

# From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control



Kimberlé W. Crenshaw

## ABSTRACT

The structural and political dimensions of gender violence and mass incarceration are linked in multiple ways. The myriad causes and consequences of mass incarceration discussed herein call for increased attention to the interface between the dynamics that constitute race, gender, and class power, as well as to the way these dynamics converge and rearticulate themselves within institutional settings to manufacture social punishment and human suffering. Beyond addressing the convergences between private and public power that constitute the intersectional dimensions of social control, this Article addresses political failures within the antiracism and antiviolence movements that may contribute to the legitimacy of the contemporary punishment culture, both ideologically and materially.

## AUTHOR

Kimberlé W. Crenshaw is Professor of Law at UCLA and Columbia Law Schools.

I have benefited tremendously from the comments, suggestions, and helpful insights of Luke Charles Harris, Devon Carbado, George Lipsitz, Barbara Tomlinson, Gary Peller, Joseph Doherty, Stephanie Bush-Baskette, Monique Morris, and the participants of the African American Policy Forum's Social Justice Writers Workshop. Allen Secretov, Scott Dewey, Ezra Corral, and Stephanie Plotin provided excellent research assistance. I would also like to express my gratitude to the *UCLA Law Review* for sponsoring this symposium, to the participants who shared their work and insights, and to my colleagues in the Critical Race Studies Program who contributed to the symposium's success. Lastly, I would like to thank my faculty co-leads on this symposium, Jyoti Nanda and Priscilla Ocen, who worked tirelessly to see this important symposium come to fruition.

## TABLE OF CONTENTS

INTRODUCTION .....	1420
I. RACE, GENDER, AND MASS INCARCERATION: AUTHORIZING THE BACKDOOR CONVERSATION .....	1429
II. SHIFTING THE FRAME: ARTICULATING “DIFFERENT” NARRATIVES .....	1435
A. Hidden in Plain Sight: The Endangerment of Women and Girls .....	1435
B. No Man Is an Island: The Shared Endangerment of Women and Girls .....	1436
C. Intersectional Narratives of Overpolicing and Underprotection .....	1441
III. POLITICAL INTERSECTIONALITY: FEMINIST AND ANTIRACIST CONDITIONS OF NEOLIBERAL POSSIBILITY .....	1450
A. From the Shelter to the Jail: The Industrialization of Domestic Violence Intervention .....	1452
B. Endangerment Discourse and the Taming of Racial Justice .....	1457
C. Unlikely Allies .....	1464
CONCLUSION .....	1471

## INTRODUCTION

This symposium comes at a time in which the myriad social costs associated with the policies of mass incarceration are gaining popular attention. Although many scholars and advocates have labored for decades against what has since been termed the “prison–industrial complex,”<sup>1</sup> their critiques have only recently moved into the mainstream.<sup>2</sup> This greater attention to mass incarceration has been

- 
1. There is a voluminous literature associated with these efforts.

Representative of the insurgent contours of this literature are works by Angela Davis and Mike Davis. They prompted critical thinking about prisons beyond the typical liberal–conservative debates that foregrounded questions about the prevalence of bias, or the tensions between reform- or retribution-based justifications. Angela Davis’s description of the prison–industrial complex—drawing links between the earlier work of W.E.B. Du Bois’s assessment of the perverse incentives associated with imprisonment of Blacks during and after Reconstruction in the South and the modern prison–industrial machine—framed the skyrocketing incarceration rates in the United States as having clear historical ties to the Jim Crow era. ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* 89 (1989) (discussing W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA, 1860–1880* (Atheneum Press 1979) (1935)). Later, Mike Davis framed the “prison–industrial complex” in a widely discussed article about California’s prison system, noting that it was a “dominant force in the life of rural California and compete[d] with land developers as the chief seducer of legislators in Sacramento.” He described the prison industry as “a monster that threatens to overpower and devour its creators, and its uncontrollable growth ought to rattle a national consciousness now complacent at the thought of a permanent prison class.” Mike Davis, *Hell Factories in the Field: A Prison–Industrial Complex*, *NATION*, Feb. 20, 1995, at 229, 229.

Angela Davis foregrounded the parallels between the prison–industrial complex and the military–industrial complex, chiefly by “[t]aking into account the structural similarities and profitability of business–government linkages in the realms of military production and public punishment.” Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, *COLORLINES*, Sept. 10, 1998, [http://colorlines.com/archives/1998/09/masked\\_racism\\_reflections\\_on\\_the\\_prison\\_industrial\\_complex.html](http://colorlines.com/archives/1998/09/masked_racism_reflections_on_the_prison_industrial_complex.html).

See also PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* (2009); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* (2005); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007); *INCITE! WOMEN OF COLOR AGAINST VIOLENCE & CRITICAL RESISTANCE, STATEMENT ON GENDER VIOLENCE AND THE PRISON INDUSTRIAL COMPLEX* (2001); BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* (2012); Rose Braz et al., *Overview: Critical Resistance to the Prison Industrial Complex*, 27 *SOC. JUST.* 1 (2000); Angela Davis & Cassandra Shaylor, *Race, Gender, and the Prison Industrial Complex: California and Beyond*, 2 *MERIDIANS* 1 (2001); Ruth Wilson Gilmore, *Pierce the Future for Hope: Mothers and Prisoners in the Post-Keynesian California Landscape*, in *GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON-INDUSTRIAL COMPLEX* 231 (Julia Sudbury ed., 2005). Loïc Wacquant also writes against the expansion of incarceration, but with an explicit critique of the prison–industrial complex frame. Loïc Wacquant, *The New ‘Peculiar Institution’: On the Prison as Surrogate Ghetto*, 4 *THEORETICAL CRIMINOLOGY* 377 (2000); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 *PUNISHMENT & SOC’Y* 95 (2001).

2. A search on LexisNexis for “mass incarceration” yielded no articles in 1992, two articles by 2001, and 542 articles by 2011. Conducting a similar search for “prison industrial complex,” only eighteen

prompted by the convergence of several factors, including, for example, the high costs of confining aging populations,<sup>3</sup> state budget crises that have emptied the deep pockets that were once used to fund mass incarceration,<sup>4</sup> and legal settlements against overcrowding that have prompted a “realignment” of carceral management from state to local governments.<sup>5</sup> Perhaps the most significant development in the public discourse about mass incarceration is the long overdue attention to the racial contours of the punishment industry. Michelle Alexander’s widely discussed *The New Jim Crow* has provided a popular framing of the problem that has galvanized a critical mass of the population that may finally be willing to listen.<sup>6</sup> These factors have elevated what has long been a central concern among progressive activists and academic critics to a new level of attention within civil society more broadly.<sup>7</sup> This symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization*,

---

articles were published by 2001, with the first two of those eighteen being published in 1997, and 235 articles by 2011.

3. See generally HUMAN RIGHTS WATCH, OLD BEHIND BARS: THE AGING PRISON POPULATION IN THE UNITED STATES 72–78 (2012), available at [http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover\\_0.pdf](http://www.hrw.org/sites/default/files/reports/usprisons0112webwcover_0.pdf) (discussing the soaring costs of confinement of older inmates in the United States).
4. See John W. Ellwood & Joshua Guetzkow, *Footing the Bill: Causes and Budgetary Consequences of State Spending on Corrections*, in DO PRISONS MAKE US SAFER?: THE BENEFITS AND COSTS OF THE PRISON BOOM 207 (Steven Raphael & Michael A. Stoll eds., 2009).
5. See *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (ordering California to reduce its prison population to prevent the overcrowding that would otherwise result in below-standard medical and mental health care for prisoners). The term “realignment” refers broadly to a “reallocation of power from the state to counties. Specifically, it means shifting responsibility for punishment from prisons, which in America are state or federal operations, to jails, which are run by counties and their elected sheriffs.” See *California’s Overcrowded Prisons: The Challenges of “Realignment,”* ECONOMIST, May 19, 2012, <http://www.economist.com/node/21555611> (detailing the arguments for and against the realignment strategy).
6. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that the era of Jim Crow lives on through the concerted targeting of Black males by the criminal justice system in the United States, which ultimately functions as a contemporary system of racial control).
7. Many foundations and some local governments are taking proactive steps to address the issue. For example, the City of New York, led by Mayor Michael Bloomberg, instituted the Young Men’s Initiative (a partnership supported by foundations, public funds, and the mayor’s personal contributions) to “improv[e] outcomes for black and Latino males in the justice system by reforming” how juveniles are served in the penal system. Press Release, City of New York, Mayor Bloomberg Launches Nation’s Most Comprehensive Effort to Tackle Disparities Between Young Black and Latino Males and Their Peers (Aug. 4, 2011), <http://www.nyc.gov/html/om/html/2011b/pr282-11.html>. Yet these efforts and others like them not only marginalize females—the fastest growing group of incarcerated individuals—but also lack the constructivist and structural critique of mass incarceration, favoring instead individualist interventions that, as argued below, in some ways reinforce the underlying ideologies that support the wider system of social control and punishment. See *infra* Part III.B.

might thus be framed as the logical next step—a conversation that attends to the fastest growing population in the penal system: women and girls.<sup>8</sup>

Yet, this symposium is not a mere addendum to the growing attention to mass incarceration. Reading this symposium in such a limited way would underplay how placing women of color at the center of the discussion fundamentally challenges the existing discourse's conventional parameters. More than simply adding women of color into the mix, this symposium interrogates the terms by which women are situated both within the discourse of mass incarceration as well as within various systems that overlap and that contribute to the vulnerability of racially marginalized women. As contributors to this symposium reveal, some of the dominant frames pertaining to mass incarceration reveal little about how women are situated as objects of social control and are not analytically attentive to the dynamics that contribute to this particular population's vulnerability to incarceration. For example, although race has become a central feature in the growing understanding of mass incarceration as a contemporary manifestation of racial ordering, women are rarely if ever a focal point of this frame. And though the growth of women and girls in the

---

8. See George Lipsitz, *"In an Avalanche Every Snowflake Pleads Not Guilty": The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746, 1770 (2012) ("[T]he overall number of incarcerated women in the United States increased by 125 percent throughout the 1990s."). This increase is racially disproportionate. See Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1480 (2012) ("Women are the fastest-growing segment of the prison population, with an 828 percent increase in the number of black women behind bars for drug offenses between 1986 and 1991."); see also KIARAN HONDERICH, REAL COST OF PRISONS PROJECT, THE REAL COST OF PRISONS FOR WOMEN AND THEIR CHILDREN, BACKGROUND PAPER 2 (2003), available at [http://www.realcostofprisons.org/rcpp\\_background\\_women.pdf](http://www.realcostofprisons.org/rcpp_background_women.pdf) ("Since 1986 incarceration of all women has grown 400%, while incarceration of women of color grew 800%. This disparity in growth rates has much to do with the War on Drugs."). Kim Taylor-Thompson notes that, among juveniles, the growth of girls in the system exceeds that of boys and that the growth of African American girls far exceeds that of white girls. Kim Taylor-Thompson, *Girl Talk—Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137, 1137 (2005) (citing ABA & Nat'l Bar Ass'n, *Justice by Gender: The Lack of Appropriate Prevention, Diversion and Treatment Alternatives for Girls in the Justice System*, 9 WM. & MARY J. WOMEN & L. 73, 79 (2002)). In large part, the discourse pertaining to mass incarceration's racial-control dimensions has focused on the particular ways that African Americans have been situated both historically and currently as legitimate objects of punishment. Many of the structural and discursive dynamics pertaining to the surveillance and control of women are especially salient with respect to African American women. Of course, criminalization is not a Black problem exclusively, and nothing in this specific focus should be taken to suggest that the patterns of intersectional vulnerability discussed herein are exclusive. At the same time, acknowledging that some of the vulnerabilities discussed herein are shared either directly or by analogy with other racially marginalized women, I endeavor to signify as much with the terms "women of color" or "racially marginalized" women where appropriate. I also capitalize "Black" for reasons set forth in Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 (1988).

penal system has occasioned a critique of existing policies as male-centric,<sup>9</sup> the “gender-responsive” policies and interventions<sup>10</sup> offered in response often reflect a general inattentiveness to mass incarceration’s racial-control dimensions.<sup>11</sup> In this respect, many feminist or women-centered analyses of the current penal regime

- 
9. See, e.g., Emily J. Salisbury et al., *The Predictive Validity of a Gender-Responsive Needs Assessment: An Exploratory Study*, 55 CRIME & DELINQ. 550 (2008); Margaret A. Zahn et al., *Determining What Works for Girls in the Juvenile Justice System: A Summary of Evaluation Evidence*, 55 CRIME & DELINQ. 266 (2009); Lex Horan, *Against a Better Prison: Gender Responsiveness and the Changing Terrain of Abolition* (Apr. 2010) (unpublished B.A. Thesis, Wesleyan University), *available at* [http://wescholar.wesleyan.edu/cgi/viewcontent.cgi?article=1415&context=etd\\_hon\\_theses](http://wescholar.wesleyan.edu/cgi/viewcontent.cgi?article=1415&context=etd_hon_theses).
  10. Gender-responsive approaches not only elide race and cultural issues, but, as noted by some contributors, facilitate a hyperpolicing and surveillance of women that has negative effects on lesbian, bisexual, and transgender (LBT) women. See, e.g., Cynthia Chandler, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality* 115–16 (Jan. 28, 2012) (transcript on file with author) (“The first things [sic] we started seeing was they started changing clothing requirement, they got rid of the state issued shirts which were boxier and they wanted people to wear form fitting scoop neck shirts [so] they could look like ladies. This is a really serious problem for folks who are gender non-conforming, not cool, okay? They also started disciplining people which added time to sentences, took good time away if they got caught wearing boxers. So activists inside prison, and this is examples [sic] of two blogs which are owned by folks inside, started challenging this, basically saying ‘What, like my boxers are dangerous, or this is what gender responsiveness is showing us?’”). The harms of such gender-sensitive interventions also negatively impact girls wrapped up in the juvenile justice system. As Jody Marksamer noted, one recent study based on a survey of 2300 female-bodied persons housed in girls’ detention facilities across six jurisdictions found that upwards of 27 percent identify as lesbian, bisexual, transgender, or otherwise gender nonconforming. Yet many LBT youth who are gender conforming are rendered invisible because of stereotypes about what is appropriate femininity for girls. At the same time, “girls of color in particular that are masculine- or stud-identified or aggressive-identified are really singled out as sexual predators and hypersexual.” Jody Marksamer, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality* 160 (Jan. 28, 2012) (transcript on file with author).
  11. See, e.g., BARBARA BLOOM ET AL., NAT’L INST. OF CORR., *GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS* (2003); Emily M. Wright et al., *Predicting the Prison Misconducts of Women Offenders: The Importance of Gender-Responsive Needs*, 23 J. CONTEMP. CRIM. JUST. 310 (2007); Stephanie S. Covington & Barbara E. Bloom, *Gender-Responsive Treatment and Services in Correctional Settings*, 29 WOMEN & THERAPY 9 (2006). Critics argue that although women and girls may have different needs, gender-responsive strategies actually expand the scope of surveillance and punishment, leading one advocate to call the movement “gender responsive prison expansion.” See Chandler, *supra* note 10, at 115. Chandler argues that in California “gender responsiveness” served as a justification for interventions including sterilization abuse and continued detention of women categorized as low risk who, rather than being sent home, were slated to be housed in a new gender-responsive prison.

replicate the race-neutral framing of gender that is characteristic of the wider field of feminist criminology.<sup>12</sup>

As the symposium's researchers, advocates, and formerly incarcerated women would acknowledge, these elisions are far from new. Indeed, neither the race-based nor gender-sensitive discourses on social problems have consistently managed to create understandings that effectively serve the needs of women of color. The problem this symposium engages is an iteration of a broader set of discursive and political dynamics that leave the social vulnerabilities of marginalized women both unnamed and unnamable. Interrogating, mapping, and challenging these elisions and their consequences are perhaps the most robust themes to emerge from this symposium.

While exposing the less explored dimensions of race, gender, class, and mass incarceration is a crucial part of the project of this symposium, more is at stake than simply recognizing how the expansive reach of the punishment industry grasps particular women. More provocatively, what this inquiry may reveal is how an analysis of social control that squarely addresses the various ways that women of color are situated with respect to these dynamics might tell us something more about the conditions of possibility that make such a regime realizable.<sup>13</sup>

This symposium is an important contribution to the ongoing efforts to think critically about the intersectional features that contribute to the surveillance, punishment, and mass incarceration of women of color.<sup>14</sup> As the conversations over

---

12. For further discussion see Meghan Condon, Note, *Bruise of a Different Color: The Possibilities of Restorative Justice for Minority Victims of Domestic Violence*, 17 GEO. J. ON POVERTY L. & POL'Y 487 (2010).

13. See, e.g., Devon Carbado, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality* 10 (Jan. 27, 2012) (transcript on file with author) (“[O]ur project today in a way is to think about why these disparities exist and what we might do about them. If we center women of color in our analysis, it seems to me we are in a better position to think not only about how their lives are impacted by the criminal justice [sic] but to take on broader questions of structural reform within the criminal justice system.”). Amplifying the broadened scope of the discourse, Beth Richie adds, “The task, as I see it, is to talk about how women of color are overpoliced, and therefore find themselves in the direct path of prisons while at the same time, to talk about the other sites of surveillance and social control that surround that path to prison.” Beth Richie, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality* 11 (Jan. 27, 2012) (transcript on file with author).

14. The notion that this symposium merely adds gender to the existing discourse around race is somewhat off the mark given that a significant feature of the current debate is its race and gender specificity. One of the dominant frames within public discourse around race and mass incarceration is built around the endangerment of Black men and boys. For further discussion examining the prevalence of the Black male endangerment frame as a central feature of the current understanding of the problem, see *infra* notes 32–40. This discourse around Black men and boys is clearly intersectional—it highlights the gender, class, and race dimensions of African American males’ involvement in the

the symposium's two days demonstrated, many of the observations and problems that surfaced in the context of mass incarceration were similar to issues that had shaped earlier debates about the way that violence against women of color was politicized both within antiracism and within feminism. The sense of *déjà vu* was not a fleeting impression but a theme that surfaced in the questions, observations, and frustrations that shaped the dialogue. The intersectional concerns and frames that had been made so apparent in the context of earlier debates pertaining to gender violence helped illuminate not only the connections between violence against women and incarceration but, more broadly, the various ways that *intersectionality* could be said to be at work. In what might be framed as a co-constitutive engagement, many of the symposium's participants deployed intersectional analysis to help frame the varying relationships among race, gender, and mass incarceration, and these relationships helped illuminate certain dimensions of intersectionality.<sup>15</sup>

As explored in this brief reflection, key observations made by symposium participants reveal that there is no singular way that these dynamics might be said to be intersectional. Not only is there no one way that racially marginalized women are subject to overlapping patterns of power, but also women of color are certainly not intersectionality's only subjects when it comes to social punishment.<sup>16</sup>

---

system. The discussion here, however, seeks something more than adding women to the Black endangerment frame. Examined herein are both the systemic intersection among racism, patriarchy, and class that structures the risks associated with incarceration of women in particular, and the interplay of ideologies and social constructs that shape the critical discourses around punishment more broadly.

15. See, e.g., Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1990). *Mappings* presented typologies of intersectionality in the context of violence against women to frame disjunctures between feminism and antiracism issues that have been contested by both grassroots and academic feminists of color for decades. See, e.g., ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES (Gloria T. Hull et al. eds., 1982); BELL HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM (1981); COMBAHEE RIVER COLLECTIVE, COMBAHEE RIVER COLLECTIVE STATEMENT: BLACK FEMINIST ORGANIZATIONS IN THE SEVENTIES AND EIGHTIES (1986); THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR (Cherrie Moraga & Gloria Anzaldúa eds., 2d ed. 1983); Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42 (1988). While the discursive engagement with the typologies of intersectionality to advance these longstanding critiques has been robust, the structural, political, and representational dynamics of intersectional vulnerability have continued to multiply in ways that reflect disturbing continuities between the conditions that prevailed in the 1990s and those under investigation herein. What remains striking in the parallel is both how repetitive the dynamics are and how, at the same time, they have become newly situated in yet another set of competing discourses that underserve racially marginalized women.
16. See, e.g., Kim Shayo Buchanan, *Engendering Rape*, 59 UCLA L. REV. 1630, 1668 (2012) (discussing how male prisoners report higher rates of sexual assault by female staff members than by fellow inmates and how "[t]he notion that black male criminals—stigmatized inside and outside



Intersectional dynamics are not static, but neither are they untethered from history,<sup>17</sup> context, or social identity. As the many examples herein show, there are multiple ways in which the factors, conditions, institutions, structures, and politics contributing to mass incarceration might be said to intersect. At the same time that intersectionality transcends an exclusive focus on identity or mere categorization, the lived experiences of racially marginalized women and girls are shaped by a range of social and institutional practices that produce and sustain social categories and infuse them with social meanings. It is precisely these processes that help explain the ways in which certain girls and women are disproportionately captured and disciplined.<sup>18</sup>

Intersectionality also points to the relationships between established hierarchies that structure the relative vulnerability of subjects to the public and private

---

prison as hypermasculine rapists—might be sexually abused by law-enforcing women contravenes every intuition race and gender stereotypes have to offer”); *see also* Andrea Ritchie, Presentation at UCLA Law Review Volume 59 Symposium, Overpoliced and Underprotected: Women, Race, and Criminalization—Punishing Sexuality and Reproduction 53 (Jan. 28, 2012) (transcript on file with author) (“[D]eparture from racialized norms of appropriate gender expression is just simply read as grounds for suspicion and securing submission to gender roles. Individuals who are perceived to be transgressing racialized gender norms, consciously or subconsciously [are] framed by police as just being inherently disorderly and therefore proper subjects of suspicion surveillance and presumptions of criminality, mental instability, deceptiveness, substance abuse, promiscuity and participation in deviant sexual contact and of course predisposition to violence. All because of their perceived gender disjuncture.”).

17. Indeed, Sarah Haley took pains to remind us all of the deep historical ties to the subordination of women of color in the prison context, with specific focus on sexual abuse of female prisoners of color in the late nineteenth century and its many parallels to conditions prevailing in prisons today. Sarah Haley, Presentation at UCLA Law Review Volume 59 Symposium, Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality 58–59 (Jan. 27, 2012) (transcript on file with author) (offering historical context for issues of gender, policing, and punishment, specifically focusing on all-women prison camps, predominantly populated by Black women, in the South in the late nineteenth century, and noting that despite official silence on the prevalence of guards impregnating prisoners in camp, historical records show that one out of five women gave birth to a child “born of sexual assault”). Women, however, are not the only victims of sexual assault, nor do power relations map onto the simplistic formulations that dominate conventional thinking about race, gender, and sexual abuse in prisons, as both Kim Buchanan and Brenda Smith’s contributions reveal. *See* Buchanan, *supra* note 16, at 1668 (discussing how male prisoners report higher rates of sexual assault by female staff members than by fellow inmates, and how “[t]he notion that black male criminals—stigmatized inside and outside prison as hypermasculine rapists—might be sexually abused by law-enforcing women contravenes every intuition race and gender stereotypes have to offer.”); Brenda Smith, *Uncomfortable Places, Close Spaces: Female Correctional Workers’ Sexual Interactions with Men and Boys in Custody*, 59 UCLA L. REV. 1690 (2012) (addressing the dearth of scholarship and attention paid to female abuse of men and boys in custody and the ways that the increased power granted to female officers is mediated through race, gender, and class).
18. *See infra* notes 45–106 and accompanying text.

exercises of social power.<sup>19</sup> As framed by several of the authors here, there are many ways that surveillance and punishment are intersectionally scripted, including the ways in which race, gender, or class hierarchies structure the backdrop against which punitive policies interact.<sup>20</sup> For example, some of the issues discussed by panelists highlight what might be called structural–dynamic discrimination. These intersections are constituted by a variety of social forces that situate women of color within contexts structured by various social hierarchies and that render them disproportionately available to certain punitive policies and discretionary judgments that dynamically reproduce these hierarchies.<sup>21</sup>

Against the backdrop of these existing power relations, there is also what might be called “intersectional subordination,” outcomes produced in the interface between private institutional configurations such as the housing market<sup>22</sup> or neighborhood watches and the policing power of state actors.<sup>23</sup>

Beyond these structural and institutional intersections that contribute to the risk and consequence of punishment for women of color are discursive intersections that effectively marginalize, if not wholly erase, the significance of their vulnerability. In the context of mass incarceration, race-centered and gender-centered frames are largely silent about the hyperpresence of women of color in the system.<sup>24</sup> This Article highlights the various ways that this symposium seeks to break this silence.

---

19. See Roberts, *supra* note 8, at 1491 (“The analysis of the roles black mothers play in both the prison and foster care systems reveals that these systems intersect with each other to jointly perpetuate unjust hierarchies of race, class, and gender. Prisons and foster care function together to discipline and control poor and low-income black women by keeping them under intense state supervision and blaming them for the hardships their families face as a result of societal inequities.”); see also Priscilla A. Ocen, Presentation at UCLA Law Review Volume 59 Symposium, Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality 21 (Jan. 28, 2012) (transcript on file with author).

20. See Roberts, *supra* note 8; Lipsitz, *supra* note 8; Ocen, *supra* note 19.

21. See Roberts, *supra* note 8, at 1484–86 (discussing how the vulnerability of Black women to family court systems is predicated on their economic status, which undermines their access to resources, and their stereotypical representation as bad mothers, which justifies punishment and family separation as the preferred intervention). Added to this, of course, is patriarchy, which places primary responsibility for caretaking on women rather than men. “For example, the economic marginality of women of color poses daunting impediments to securing shelter and accumulating assets. Yet the centrality to domestic life that sexist norms impose on women leaves them with the main responsibility for raising and housing children.” Lipsitz, *supra* note 8, at 1752.

22. See generally Lipsitz, *supra* note 8 (discussing the interface between housing insecurity and incarceration).

23. Ocen, *supra* note 19, at 96–97 (discussing a lawsuit alleging a collaboration in Antioch, California, between police and homeowners to profile and exclude subsidy-dependent Black households from their midst).

24. See Carbado, *supra* note 13, at 9–10 (presenting statistics reflecting the twin intersectional problems of disproportionate vulnerability that some women of color face with respect to surveillance and incarceration, and their overall invisibility in both the academic and popular literatures on mass

Part I takes up the erasure of racially marginalized women from the central frames through which resistance and policy are mediated. It casts doubt on the likelihood that the policies and rhetorics that typify mainstream discourse about mass incarceration will productively address women of color and challenges the ideological underpinnings that corral their families and communities into the reigning regime of punishment.

Part II shifts the frame. Drawing on the articles in the symposium, it highlights the multiple ways in which racially marginalized women experience discipline and punishment. As the symposium articles make clear, social control is not only a function of the criminal justice system but a function of the welfare state and of private social ordering as well. That is to say, women of color experience punishment across a range of state apparati and formally private systems. Centering their experiences helps to reveal that the problem of mass incarceration is not simply a problem of criminal justice per se but of the disciplinary practices of the state and private social power writ large.

Part III contends that the partially visible but largely marginalized position that women of color occupy in public, academic, and political contestations of mass incarceration is reinforced by certain discursive failures that render antiracist and feminist politics vulnerable to the debilitating agendas of neoliberalism.<sup>25</sup> I suggest that this partially visible but largely marginalized representation and mobilization of women of color—what I will call their material presence and substantive absence—reproduces dynamics that have surfaced in the framing and advocacy context of discourses about and political organizing around gender violence.<sup>26</sup> Set in the context of that history, the current climate that authorizes the inhumane practices associated with surveillance and incarceration might be thought of as an intersectional project itself—one made possible by the interface of multiple intersectional failures. I conclude by sketching out some linkages between the intersectional failures within antiracism and feminism that contribute to the weakened capacity

---

incarceration and social control). As Carbado notes, the focus is not a critique of the attention given to men, but the comparative erasure of women:

I should be clear that in presenting these statistics, I do not mean to suggest that we pay nearly enough attention to the incarceration of black men. We do not. I simply mean to mark a disgraceful difference that is significant for the discussions that we'll be having for the coming days.

Carbado, *supra* note 13, at 9.

25. See discussion *infra* Part III.

26. See generally Crenshaw, *supra* note 15 (exploring how certain features of violence were distorted or underaddressed by prevailing conceptions of antiracism and feminism and how their inattentiveness to each other would inadvertently end up reinforcing the logics of race and gender power, contributing to the further marginalization of women who were subject to both).

of social justice discourses to resist the neoliberal ideologies that underwrite the expansion of social punishment and mass incarceration.

### I. RACE, GENDER, AND MASS INCARCERATION: AUTHORIZING THE BACKDOOR CONVERSATION

Over the two-day symposium, academics, advocates, formerly incarcerated women and their families, and system-involved girls participated in a rich dialogue, bringing to life the dynamics of punitive social control that are only partly reflected in the troubling statistics. Our conversation brought a sense of urgency to ongoing efforts to fashion a broader template from which to imagine the end of mass incarceration.

The constant in this, however, was a sense that the dialogue was a backdoor conversation—a sort of unauthorized biography of mass incarceration that, in the perception of others, should remain properly relegated to the sidelines. As participants acknowledged, this conversation is sometimes criticized as being diversionary or, only slightly better, understood to be an interesting subtopic without any particular implications for funding, advocacy, or organizing strategy. The sidelining of issues pertaining to women, race, and incarceration is reflected across multiple discursive spaces—both academic and political—that heighten the stakes as well as the challenges in resisting these imposed silences.

A useful starting point that illustrates the potentially transgressive space this symposium seeks to occupy begins with interrogating where and when women and girls of color enter discussions about mass incarceration. In the late summer of 2009, Priscilla Ocen, Lateefah Simon,<sup>27</sup> and I were brainstorming about ways to build a more robust conversation about African American women and girls in the context of mass incarceration. From their vantage point at the Lawyers Committee on Civil Rights in San Francisco, both Lateefah and Priscilla were struck by what they were witnessing firsthand: a combination of the dramatically visible overinvolvement of African American women and girls in a wide-ranging net of victimization and criminalization with the relative absence of any targeted attention

---

27. Simon served as Executive Director of the Lawyers' Committee for Civil Rights of the San Francisco Bay Area from 2009 to 2012. Ocen was the Thurgood Marshall Fellow at the Lawyers' Committee for Civil Rights of the San Francisco Bay Area from 2008 to 2010 and the Critical Race Studies Law Teaching Fellow at UCLA School of Law from 2010 to 2012.

to this overrepresentation in the activism both around race and around women in the criminal justice system.<sup>28</sup>

While the anecdotal picture that they both painted was sobering, the relative marginality of African American women and girls in political discourses about mass incarceration was not unprecedented. Narratives of African American women have rarely served to dramatize the draconian dimensions of the war on drugs—Kemba Smith being one of the very few exceptions.<sup>29</sup> The positive outcome in Smith's case held promise that the imprisonment of thousands of other women who were similarly entrapped might also come to light. Unfortunately, as Kemba Smith noted at the symposium, her case remains exceptional. The attention that many had hoped would be directed to countless women who languish behind bars with similar stories has yet to be realized.<sup>30</sup>

As we gathered our thoughts to lay the groundwork for this conversation, the contrast between the dominant thinking about race and social control and the space we were hoping to open up was dramatically illustrated by what was becoming "Skip-Gate," the now infamous encounter between noted Harvard academic Henry Louis Gates Jr. and James Crowley, the Cambridge police sergeant who arrested him for disorderly conduct.<sup>31</sup> The spectacle of an African American man arrested and handcuffed in his own home was framed as a teaching moment about the level of suspicion that many Blacks believe is simply an inescapable risk of doing anything "while Black."<sup>32</sup> For many critics of racial profiling, that the standoff between the

---

28. See Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502 (2012) (discussing the overrepresentation of Black women and girls under criminal supervision). I refer here to the traditional civil rights and women's rights discourses that shape the agendas of advocacy organizations, foundation portfolios, research institutions, and state and federal governments. Women of color-led organizations, activists, and critical scholars are among those who have challenged these frames, drawing attention to many of the counterproductive strategies that these dominant sensibilities have underwritten. See, e.g., INCITE! WOMEN OF COLOR AGAINST VIOLENCE & CRITICAL RESISTANCE, *supra* note 1.

29. See Reginald Stuart, *Kemba's Nightmare*, EMERGE MAG., May 1996, at 28 (describing how Smith was originally sentenced to twenty-four years in prison for being a minor figure in her abusive boyfriend's drug trafficking business). Smith was eventually granted clemency and is currently an advocate against mass incarceration. See KEMBA SMITH WITH MONIQUE W. MORRIS, POSTER CHILD: THE KEMBA SMITH STORY (2011).

30. Kemba Smith, Presentation at UCLA Law Review Volume 59 Symposium, Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality (Jan. 28, 2012).

31. For a discussion of how this event became a flashpoint in the contested politics of postracialism, see Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1334 (2011).

32. See Melissa Trujillo, *Henry Louis Gates Jr. Arrested, Police Accused of Racial Profiling*, HUFFINGTON POST (July 20, 2009, 10:26 PM), [http://www.huffingtonpost.com/2009/07/20/henry-louis-gates-jr-arre\\_n\\_241407.html](http://www.huffingtonpost.com/2009/07/20/henry-louis-gates-jr-arre_n_241407.html) (discussing how Gates's colleagues saw the actions of the police officers as

police and the acclaimed professor took place in his own home was akin to the Rodney King beating being caught on tape—proof positive of the irreducible dimension of race that enters the terrain of surveillance and social control. Their hopes that the teachable moment might create a more lasting dialogue were bolstered by President Obama’s momentary acknowledgment of the doing-anything-while-Black phenomenon,<sup>33</sup> but these expectations were quickly downshifted once the matter was reframed as an unfortunate misunderstanding that could be patched up over a couple of beers in the White House Rose Garden. Notwithstanding the fact that the president has steered clear of this issue ever since, it is fair to say that the Black community was utterly caught up in the implications of the arrest,<sup>34</sup> even as opinions about what Professor Gates did do or should have done ran the gamut from support to critique.<sup>35</sup>

One thing that was uniform, however, was the gendered assumptions about the overarching problem of racialized surveillance and social control.<sup>36</sup> Consistent

---

part of a pattern of racial profiling); *see also The Gates Case and Racial Profiling*, N.Y. TIMES BLOGS—ROOM FOR DEBATE (July 22, 2009), <http://roomfordebate.blogs.nytimes.com/2009/07/22/the-gates-case-and-racial-profiling> (providing an expert panel of opinions of the complex racial undertones that may have marked Gates’s arrest).

33. *See* Michelle McPhee & Sara Just, *Obama: Police Acted ‘Stupidly’ in Gates Case*, ABCNEWS.COM (July 22, 2012), <http://abcnews.go.com/US/story?id=8148986&page=1> (quoting President Obama as having stated, “[W]hat I think we know separate and apart from this incident is that there’s a long history in this country of African-Americans and Latinos being stopped by law enforcement disproportionately. That’s just a fact.”).
34. *See* Paul Butler, *Comment to The Gates Case and Racial Profiling*, *supra* note 32 (hoping that President Obama “seizes this as a teachable moment for white folks” and noting, “Racism still matters. It’s okay for the president to talk about that too.”); Ralph Richard Banks, *Comment to The Gates Case and Racial Profiling*, *supra* note 32 (“[I]f we are to understand not only this disturbing incident but more tragic interactions as well, we need to look beyond the question of racial profiling, [and] appreciate the myriad historical and contemporary factors that too often poison relations between African Americans and law enforcement agencies.”).
35. While some argued that Professor Gates’s impatience with the officers’ treatment was justified by the speculation that the entire episode was inflected with race, others argued that the professor’s attitude reflected a class-based license to talk back in a situation that less-privileged African Americans would rightly view as risky. *See* Crenshaw, *supra* note 31, at 1334.
36. Gates announced plans to address the issue in a documentary about Black men in America, and the overall vulnerability of Black men to profiling and other discriminatory policing practices was widely discussed. *See, e.g.*, CHARLES J. OGLETREE, JR., *THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA* (2010) (recounting the day of Gates’s arrest and arguing that it serves as a reminder that abuse of power by police and discriminatory action toward black men is still a live issue); April Walker, *Racial Profiling—Separate and Unequal Keeping the Minorities in Line—The Role of Law Enforcement in America*, 23 ST. THOMAS L. REV 576, 619 (2011) (stating that “[w]e have witnessed over and over again, that police officers are trained to protect and serve the so-called majority and keep the minorities in line” and that Gates’s experience was indicative of the issues with race that still remain, despite our advances); Krissah Thompson, *Scholar Says Arrest Will Lead Him to Explore Race in Criminal Justice*,

with the frame of Black male endangerment, both implicitly and explicitly, the dynamics of this vulnerability were widely understood to visit their primary, if not altogether exclusive, harms on African American men.<sup>37</sup> There was, of course, some intersectional awareness, primarily on the part of those who pointed to the class dimensions of being a *Harvard Professor while Black* either as evidence of the relatively undifferentiated vulnerability to racial profiling or, in the alternative, as evidence of the wide gulf between what happens to elite African Americans and what happens to the masses.<sup>38</sup> Yet aside from this caveat about class, there was virtually no recognition or acknowledgment of the fact that the disciplinary projects against the Black community as a whole included policies and ideologies that function to regulate and punish Black women as well.<sup>39</sup> In fact, despite the rarified environment in which this event took place, the Skip-Gate encounter is likelier to be included in the discourse about the surveillance and control of the masses of African American men than the discourse about their similarly situated sisters. Maleness is far more salient in constructing a vision of common, trans-class experience than any intraclass construction that includes females. Consequently, class-privileged men fit comfortably within a discourse about the criminal control of the most marginalized men of color, whereas similarly marginalized women—their mothers, sisters, wives, and daughters—stand fairly far afield.<sup>40</sup>

Although the brainstorm with Lateefah and Priscilla took place against this backdrop and was in no way prompted by the episode, Skip-Gate stood as a stark reminder of the almost reflexive way in which discourses about mass incarceration, surveillance, and punishment continued to be gendered as male. What

---

WASH. POST, July 22, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/21/AR2009072101771.html>.

37. For a critical discussion of the exclusionary dimensions of Black male endangerment discourse, see Luke Charles Harris, *My Two Mothers, America, and the Million Man March*, in *BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER* 54, 57 (Devon W. Carbado ed., 1999) (“Many Black men were raised by, or have grown up around women like my two mothers and around women whose lives, while substantially different from those of my mothers, are shaped by their class, race, gender, and sexual orientation. But, all too frequently, when Black men conceptualize a politics for our community, they marginalize the experiences and the problems of these women. Men, in a variety of problematic incarnations, are at the center of our political narratives, sometimes as an ‘endangered species,’ sometimes as the ‘rightful’ heads of our households, and sometimes as the ‘legitimate’ leaders of our community. Black women appear tangential to these political visions in ways that signify that patriarchal politics are not the exclusive prerogative of white communities.”).
38. See Raj Jayadev, *What if Henry Louis Gates Were Not an Acclaimed Professor?*, *NEW AM. MEDIA* (July 29, 2009), [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=0e04e004de044e2a27a01953c3f5a74d](http://news.newamericamedia.org/news/view_article.html?article_id=0e04e004de044e2a27a01953c3f5a74d) (discussing the different scenarios that would have played out in Gates’s arrest had he not been an acclaimed scholar, such as likely having been charged with a harsher crime).
39. See, e.g., Roberts, *supra* note 8.
40. See Harris, *supra* note 37.

we sought was a modest but provocative intervention—to draw a cohort of activists, lawyers, researchers, and formerly incarcerated women together to talk about the intersectional dimensions of social control that shape the overpolicing and underprotecting of Black women. We speculated that there were others like us who would welcome an opportunity to discuss dimensions of criminalization that remained somewhat obscured behind the prevailing frames. At the same time, however, there were legitimate anxieties about how foregrounding women and girls might be perceived no matter how private that conversation might be.

Our participants acknowledged that while they knew that women and girls warranted attention, they struggled with the disciplinary reactions of those who questioned the significance of these issues and might doubt their commitment to addressing the devastating consequences of the mass incarceration of African American males. This uneasiness reinforced the need to tread carefully as we embarked on a collective learning process to share what each set of stakeholders brought to the table. Our goal was to sort out the ways that these experiences could find traction within the practices and discourses designed to resist the Leviathan. Moving ahead under Priscilla's leadership, our learning circles on race, gender, and mass incarceration set the stage for several subsequent collaborations,<sup>41</sup> including a 2011 convening organized by Wilda White at U.C. Berkeley<sup>42</sup> and this symposium.

Unfortunately, the terrain described in these pages, while profoundly disturbing, is not entirely new. In many ways, the observations highlighted herein have been ongoing for years, which raises the question—what accounts for the minimal traction these matters receive in what remains of the feminist and antiracist agendas one might presume to be responsive to them?

On one level, the absences and collusions explored herein carry forward a knowledge-producing cycle that reproduces the very terms that we seek to interrogate. Despite their growing level of system involvement, there is widespread silence about girls and women.<sup>43</sup> The silence creates what we might call a vicious

---

41. African Am. Pol'y Forum, *Recent Learning Circles*, INTERSECTIONALITY LEARNING CIRCLES BLOG, <http://intersectionalitylearningcircles.blogspot.com/p/current-issue.html> (last visited Aug. 11, 2012).

42. Symposium, African American Girls and Young Women and the Juvenile Justice System: A Call to Action, at U.C. Berkeley School of Law (Mar. 10, 2011).

43. As Richie notes, "Indeed it is important to note that most of that work as we just saw focuses on men or at least is allegedly gender neutral which is of course why we are here." Richie, *supra* note 13, at 12; *see also* INCITE! WOMEN OF COLOR AGAINST VIOLENCE & CRITICAL RESISTANCE, *supra* note 1, at 2 ("Women prisoners and victims of police brutality have been made invisible by a focus on the war on our brothers and sons. It has failed to consider how women are affected as severely by state violence as men.").



cycle: The discursive focus on men and boys leads to research and intervention that generate increasing knowledge and public awareness about their vulnerability; yet this frame often excludes research on women and girls. This in turn reinforces the assumption that women and girls are not also suffering because the evidence is comparatively sparse. But the evidence is comparatively sparse because the frame precludes the investigation. If existing realities fall outside the frame, they cannot inform the discourse nor shape the interventions.<sup>44</sup>

While some part of the problem is, indeed, the limited way that social problems are conceptualized and researched, the challenges that surface in this symposium are not simply framing problems. They point instead to political failures in the past that are continuously reproducing marginalities that extend into the future. More broadly, the intersectional marginality of the victims of mass incarceration sometimes functions to obscure the extent to which these patterns of surveillance and detention harm multiple stakeholders, including those who do not see themselves as being implicated. Even constituencies whose own hold on public sympathy and support is precarious are potentially undermined by punitive policies and the neoliberal logics that underwrite them.

---

44. Alvin Starks explains how in the discourse about race and mass incarceration in the foundation world, little is known about the risks facing women and girls of color, and this ignorance underwrites their marginalization in programs and funding:

[F]irst we'd actually start off [with] something that's really important, and it's called the limited information about women and girls [that] becomes filled with illusion and myth. Right, so what happens: Here a good example is that there is a very popular trend of understanding why boys of color are not doing well in school. And when you ask people what's going on with the girls? People don't know. That "not knowing" turns into a "don't care."

Alvin Starks, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality* 171 (Jan. 28, 2012) (transcript on file with author). The "not caring" about women and girls turns into assumptions that they are doing well, a set of beliefs fueled by widespread failures to address the way women and girls are situated across the wider plane of social inequality. As Sparks argues,

[P]eople will talk about structural racism but they have no idea of actually how sexism is enveloped into that. Right? They will talk about immigration but still women don't matter in the immigration frame. Friends will talk about home foreclosure, right. But no one really wants to talk about guess who's losing a home. It's women, right. It's like the big secret because we purposely have degenderized this so even this topic for instance for criminal justice . . . , [people] don't even think that criminal justice issues really relate to women and girls.

*Id.* at 172.

## II. SHIFTING THE FRAME: ARTICULATING “DIFFERENT” NARRATIVES

### A. Hidden in Plain Sight: The Endangerment of Women and Girls

Over the two-day symposium, academics, advocates, formerly incarcerated women, and system-involved girls participated in a rich dialogue that highlighted—with concrete specificity—the dynamics of punitive social control. Bringing to life the lived realities of women and girls, the conversation brought a sense of urgency to efforts to fashion a broader template from which to imagine the end of mass incarceration. While the disproportionate system involvement of women and girls of color does not tell the whole story of race, gender, and social control, it is a crucial feature of mass incarceration that several participants noted. These patterns are especially pronounced with respect to African American women and girls. In California, for example, recent research reveals that while African American females constitute approximately 7.1 percent of California’s women,<sup>45</sup> they are

[m]ore than 70 percent of girls held in some northern California detention centers and more than 50 percent of girls receiving institutional commitments from these jurisdictions;

[b]etween 24 percent and 40 percent of the girls with cases that involve juvenile hall in some Southern California jurisdictions;

24 percent of new female felon admissions to state prisons;

28 percent of all women held in state prisons;

28 percent of all women on parole; and

28 percent of parole violators returned to custody.<sup>46</sup>

This research is consistent with earlier reports that indicate similar racial disparities in the criminal supervision of women and girls.<sup>47</sup>

These statistical snapshots cannot possibly tell us all we might want to know—either about Black women and girls in the context of mass incarceration or about

---

45. *American FactFinder*, U.S. CENSUS BUREAU, <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Aug. 2, 2012).

46. MONIQUE W. MORRIS, STEPHANIE BUSH-BASKETTE & KIMBERLÉ CRENSHAW, AFRICAN AM. POL’Y FORUM, *CONFINED IN CALIFORNIA: WOMEN AND GIRLS OF COLOR IN CUSTODY* 1 (2012).

47. As Lipsitz notes, “[W]omen of color are overrepresented in the sheer numbers of those snatched up by the criminal justice system. Close to two-thirds of women in prisons and jails in the United States are women of color. Women of color are eight times more likely to be incarcerated than white women.” Lipsitz, *supra* note 8, at 1766; *see also* REBECCA MANIGLIA ET AL., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *JUVENILE FEMALE OFFENDERS: A STATUS OF THE STATES REPORT* 2 (1998), *available at* <http://www.ojjdp.gov/pubs/gender/preface.html>.

other women of color who also are brought under surveillance and control in ways that both parallel and diverge from the experience of African American women. Some evidence suggests that Native women, for example, experience extraordinary rates of incarceration,<sup>48</sup> and it is also evident that immigrant and transgender women encounter a variety of intersectional vulnerabilities that stretch out into overinvolvement, and excess disciplinary supervision, and punishment.<sup>49</sup> Yet despite both the growth in female supervision and the racial contours of the populations brought under control, intersectional analysis of the factors that constitute the problem is comparatively underdeveloped in the field as a whole.<sup>50</sup>

### B. No Man Is an Island: The Shared Endangerment of Women and Girls

Existing frames that extend historical elisions and disciplinary projects associated with women and girls into contemporary practices contribute to the problem. The racial disparities that characterize the differential risks between females have little traction across the wide expanse of antiracist discourse. For example, because the extraordinarily high number of men and boys under criminal supervision is a condition that obviously reaches virtually every aspect of Black community life, consciousness of their vulnerability has come together under a rubric of endangerment. Yet the discourse of endangered Black males in some ways distorts how the racial disparities among women are understood.<sup>51</sup> A focus on the sheer numbers is important, but it alone cannot tell us much about the magnitude of racial disparity among men and women. For example, the fact that Black men are more likely to be incarcerated than any other cohort has reinforced a notion that Black men are uniquely subject to racial discrimination and control in a way that Black women are not. Yet upon closer inspection, the racial disparities

---

48. See Frank Smith, *Incarceration of Native American and Private Prisons*, LENAPE PROGRAMS, <http://lenapeprograms.info/Articles/Prison.htm> (last visited Aug. 2, 2012) (discussing how the number of imprisoned Native American women in several states is staggering and still increasing, such as in Montana, where only 6.8 percent of residents are Native, yet Natives are 29.6 percent of women prisoners).

49. “The scale of these developments can be seen most vividly in research findings from the Department of Justice. If current trends continue, 1 of every 3 African American males born today can expect to go to prison in his lifetime, as can 1 in every 6 Latino males, compared to 1 in 17 White males. For women, the overall figures are considerably lower, but the racial/ethnic disparities are similar: 1 of every 18 African American females, 1 in every 45 Hispanic females, and 1 in every 111 White females can expect to spend time in prison.” Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S (2011) (citing THOMAS BONCZAR, BUREAU OF JUSTICE STATISTICS, NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 1 (2003)).

50. See Nanda, *supra* note 28.

51. See Harris, *supra* note 37.

in incarceration between men and women across all racial groups are in fact quite similar.<sup>52</sup> This is partly because men in all these groups are more likely to be incarcerated than women.<sup>53</sup> Thus, within their respective gender groups, men and women of color face racialized risks of incarceration that are similar to their white counterparts.<sup>54</sup> In other words, the increased risk of incarceration relative to race is virtually the same for Black men and women as for whites. To the extent that the system of mass incarceration might be framed as a system of racial control, the facts that Black women are 6.9 times more likely than white women to be

52. The data show that while women are at less of a risk than men for incarceration, the odds ratios indicate that the between-race comparisons (Black–White, Black–Latino, Latino–White) are relatively consistent regardless of gender. The relative risk of incarceration for Blacks relative to other groups is the same, controlling for gender.

TABLE 1. Odds of Incarceration

	Black	Latino	White
Male	1:3	1:6	1:17
Female	1:17	1:45	1:111

TABLE 2. Proportional Odds of Incarceration by Race

	Black–White	Black–Latino	Latino–White
Male	5.7:1	2:1	2.8:1
Female	6.5:1	2.6:1	2.5:1

The data in Table 1 indicate that one out of three Black men is likely to be incarcerated at least once in his lifetime, meaning that their chance of incarceration is 33 percent. Because one out of seventeen white males will be incarcerated at some point in their lives, their chance of incarceration is 5.88 percent. This means that a Black man is approximately 5.7 times more likely to be incarcerated in his lifetime than a white man, as shown *supra* Table 2. A Black woman, on the other hand, is approximately 6.5 times more likely to be incarcerated than a white woman. Thus the Black–White racial disparity is similar for men and women. The Black–Latino and Latino–White disparities are also similar between men and women, as illustrated *supra* Table 2. See CHILDREN’S DEF. FUND, CRADLE TO PRISON PIPELINE® CAMPAIGN (2009), available at <http://www.childrensdefense.org/child-research-data-publications/data/cradle-prison-pipeline-summary-report.pdf>; see also BONCZAR, *supra* note 49, at 1, 8 (providing similar estimates, showing one in nineteen Black women being incarcerated in their lifetimes, as against one in 118 white women). I thank Joseph Doherty and Scott Dewey for assistance in calculating these odds.

53. See LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, NCJ 236319, CORRECTIONAL POPULATION IN THE UNITED STATES, 2010, at 8 tbl.3 (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf> (noting that in 2010, there are ten times as many men incarcerated as women in the United States).

54. See *supra* note 52 and accompanying text.

brought under the system and that Latinas are 2.5 times more likely than white women tell us that women are similarly caught up in a racialized enterprise.<sup>55</sup>

Of course, the sometimes-distinct ways that race may play out both between men and women and also among women is precisely what intersectionality interrogates. Both Jyoti Nanda and Francine Sherman explain one dimension of the intersection that is suggested by the increasing rates at which girls are coming under criminal supervision. Sherman points to research indicating that girls are far more likely to be detained for offenses for which boys would not be, and that girls are detained longer than boys as well.<sup>56</sup> These patterns represent a contemporary reintroduction of status offenses that apply almost exclusively to girls. Although they have been formally repealed, these gendered dimensions of juvenile supervision continue to function in part by bootstrapping trivial violations of court orders into delinquency. Yet as Nanda points out, many decisions that are made along these pathways are often discretionary and thus provide opportunities for racially biased decisionmaking to shape how girls will be managed.<sup>57</sup> This is an intersectional vulnerability that is structured both by the gendered mechanisms that bring girls into the system and by racialized decisionmaking that determines their immediate and long-term futures.<sup>58</sup>

---

55. See *supra* note 28 and accompanying text.

56. Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLAL. REV. 1586, 1617 (2012).

57. See Nanda, *supra* note 28, at 1514–21; see also Taylor-Thompson, *supra* note 8, at 1137 (“In a system built on the exercise of discretion at virtually every stage, girls of color tend to benefit the least from opportunities for diversion from or lenient treatment within the system. Prosecutors dismiss seven out of every ten cases involving white girls as opposed to three out of every ten cases for African American girls.”).

58. Juvenile detention is one of the risk factors leading to adult detention. MARY E. GILFUS, VAWNET, EXPERIENCES OF ABUSE AS A RISK FACTOR FOR INCARCERATION 3 (2002), available at [http://www.vawnet.org/Assoc\\_Files\\_VAWnet/AR\\_Incarceration.pdf](http://www.vawnet.org/Assoc_Files_VAWnet/AR_Incarceration.pdf). Discretion also plays a significant role in the processing of women, including charging decisions and, in the context of drug offenses, decisions that determine whether women will be given the option of participating in diversionary programs or punished. These decisions too may be influenced by stereotypes about the women, such that decisionmakers may not be empathetic to their need for treatment and counseling. Susan Burton explained how stunned she was when she finally was able to access treatment in Santa Monica to see how other women had been given options that were never offered to her:

[W]hen I got into recovery in Santa Monica, I saw the people in Santa Monica didn't get prison, they got court cards, I never got a court card and I'm like what's wrong with this? Everybody in South L.A. where I'm from got prison and it's not to say people in Santa Monica shouldn't have gotten the court card. But couldn't I have gotten the court card too? But when I saw this, all of this what can I do? And I came back to South L.A. and bought a little house and I began to usher women in this house.

Susan Burton, Presentation at UCLA Law Review Volume 59 Symposium, Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality 141 (Jan. 28, 2012) (transcript on file with author). After successfully

The pattern described above is not an exclusive description of intersectionality, and the relationships between a gendered backdrop against which a racial dynamic interacts can obviously be shifted.<sup>59</sup> Intersectional vulnerability might similarly be understood by reversing the structural and dynamic interface to focus on the racialized contexts that make girls vulnerable to gender-based discretion. For example, the hypersurveillance of low-income communities of color might be thought of as a race and class structure that entails particular risks for youth who are subject to curfews and other policing strategies.<sup>60</sup> Within this structural relationship between the police and communities of color, girls are subject to the discretionary decisions of gateway agents, such as police, and other agents of the state who can exercise judgment in determining whether to detain a girl or send her home. Girls may be treated differently than boys, particularly where decisionmakers perceive girls to pose threats requiring supervision when the same behavior in a boy would not. Likewise, girls may be treated differently in their initial interface with gatekeepers, reflecting differential assessments that may turn on the same racial frames that surface at later stages of juvenile adjudication.

As Kemba Smith's experience revealed, structural and dynamic interactions also help explain the tremendous increases in the incarceration of women. Numerous sources have noted that the explosive rate of women's incarceration is directly tied to the war on drugs.<sup>61</sup> This increase also has been racially disparate, as incarceration for drug-related offenses accounted for an eightfold rise in African American women and Latina supervision between 1986 and 1991.<sup>62</sup> The racial dimensions of the war, particularly the crack-powder cocaine distinctions and

---

overcoming a chemical dependency that she developed after her son was accidentally killed by a Los Angeles police officer, Burton bought several homes to house women upon reentry, and she was recently honored as a CNN Hero for her groundbreaking work.

59. For a schematic discussion of the various ways that intersectionality can be configured by the interface between background structures and power dynamics, see generally Rep. of the Expert Group on Gender and Racial Discrimination, Zagreb, Croat., Nov. 21–24, 2000 (2000), *available at* <http://www.un.org/womenwatch/daw/csw/genrac/report.htm> (prepared by Kimberlé Williams Crenshaw).
60. See, e.g., Lipsitz, *supra* note 8, at 1750–51 (“Putatively race-neutral legislation such as crack cocaine sentencing laws, augmented penalties for acts committed in designated drug zones and gang curfew areas, and mandatory sentencing statutes also work systematically to subject communities of color to degrees of surveillance and punishment that are virtually absent from neighborhoods inhabited mostly by whites.”).
61. See STEPHANIE R. BUSH-BASKETTE, *MISGUIDED JUSTICE: THE WAR ON DRUGS AND THE INCARCERATION OF BLACK WOMEN* 23 (2010).
62. See Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 85 n.67 (2000); see also Lipsitz, *supra* note 8, at 1766 (“Drug convictions account for 23 percent of incarcerated white women but for 39 percent of incarcerated Black women and 44 percent of incarcerated Latinas.”).

the draconian mandatory minimums, have been well documented.<sup>63</sup> The intersectional dimensions that contribute to the increasing rates of female incarceration reflect the interface between a racialized social policy set against the backdrop of the gendered relations between men and women. Smith's story represents precisely this kind of intersectional vulnerability. As Kemba Smith notes, although she never handled drugs nor was part of the larger enterprise that her boyfriend, Peter Hall, oversaw, conspiracy statutes rendered her fully culpable for the entire enterprise.<sup>64</sup> She was like many other wives and girlfriends: a minor player who faced enhanced penalties meted out by the mandatory minimum laws, while at the same time, she was equipped with relatively little information with which to negotiate a downward sentencing departure.<sup>65</sup> Smith's story about both the prosecutorial and judicial inattentiveness to her legitimate fear of reprisal also demonstrates the disconnect between the heightened interest in domestic violence that was, at the very time of her conviction, becoming a focal point of the Clinton era's approach to gender violence, and the underprotection provided to women whose offending was tied to violence.<sup>66</sup> Although Hall had beaten Smith severely and threatened her parent's lives, these specifically gendered dimensions of her relationship played no role in mitigating her culpability.<sup>67</sup> Smith's story represents compelling evidence of the matrix of domination that Patricia Hill Collins arti-

---

63. See David A. Sklansky, Essay, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283 (1995); see also Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing*, 94 JUDICATURE 6 (2010).

64. See Smith, *supra* note 30, at 76.

65. Smith labels this "the girlfriend problem"—the fact that "oftentimes you find the wives and the girlfriends getting more time than the actual guys that are out there selling the drugs," a fact attributable to their gendered relationships with principals. *Id.* at 81. "[O]ne of the things that you find with wives and girlfriend who are incarcerated (is) that they don't have as much information to give as . . . the actual guys, husbands that are actually out there doing the drug dealing." *Id.* at 78. Additionally, as Smith pointed out in her own case, women sometimes refuse to cooperate to protect their own lives and the lives of their families. Smith notes that she was aware that Hall had killed his best friend because he believed that he had cooperated with investigators, and he had also threatened her family. *Id.*

66. Smith recounts how the judge in her case slept through the testimony of domestic violence in her case—evidence that could have proved exculpatory. A defendant in a related case testified that he had acted under duress and was subsequently acquitted. Although the specific reason why Smith's history of violent abuse was insufficient to establish duress while another male defendant's fear was deemed legitimate, this distinction parallels the traditional ways that violence against women that would otherwise constitute felonious assault has been interpreted to be less significant in the context of an intimate relationship. *Id.* at 77. See generally BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (1996).

67. *Id.*

culates.<sup>68</sup> Here, institutional structures, gender relations, and discretionary decisionmaking all converged to erect a cage in which Kemba Smith may well have spent twenty-four years of her life.

### C. Intersectional Narratives of Overpolicing and Underprotection

Smith's story not only illuminates dimensions of mass incarceration that have underwritten the disproportionate surveillance of women of color; it also suggests that while intersectional vulnerability might reasonably be framed as "interlocking," it remains important to understand and interrogate its constituent parts. Mass incarceration also points to vulnerabilities created by the interface between systems that structure social relations and the dynamic dimensions of social control that operate within them. Within this interface, identities—understood as categories that are made salient through their relationship to social hierarchy—are not irrelevant or wholly transparent in these processes. They mark aggregations of advantage and disadvantage that are repositories of social power and vulnerability. While these identities are not static or unchanging over time, they are neither imaginary nor easily transcendable.

Priscilla Ocen brings these dimensions to the fore in her analysis of a case involving the surveillance and control of subsidy-reliant single Black mothers in Antioch, California.<sup>69</sup> As Ocen notes, single Black mothers are disproportionately low income, a socioeconomic consequence that is itself a product of the interlocking dimensions of race, class, and gender inequality.<sup>70</sup> But it is not this socioeconomic fact alone that accounts for their vulnerability to the policing strategy that Ocen so vividly recounts. It is their stereotypical representation as the incubators of Black pathology that allows them to be singled out for punitive surveillance and punishment.<sup>71</sup>

Ocen recounts the troubling story of how Black female recipients of Section 8 housing vouchers were subjected to public and private policing in predominantly white communities when economically distressed homeowners began accepting

---

68. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (2d ed. 2000); Patricia Hill Collins, *It's All in the Family: Intersections of Gender, Race, and Nation*, *HYPATIA*, Summer 1998, at 62.

69. The Black women discussed by Ocen are currently a certified class of plaintiffs in a suit against the city of Antioch that, at the time of this Article's publication, is still pending. See Order Granting Plaintiffs' Motion for Class Certification, *Williams v. City of Antioch*, No. C 08-02301, 2010 WL 3632197 (N.D. Cal. Sept. 2, 2010).

70. See Priscilla A. Ocen, *The New Racially Restrictive Covenant: Race, Welfare, and the Policing of Black Women in Subsidized Housing*, 59 *UCLA L. REV.* 1540, 1559–64 (2012).

71. See *id.* at 1562; see also Roberts, *supra* note 8, at 1492.



the vouchers, thereby opening up middle-class neighborhoods that had previously been inaccessible to single Black mothers. In response, the police department put together a special unit to meet this perceived threat.<sup>72</sup> As Ocen describes, Black women were singled out for constant monitoring and intrusive house searches by this special unit, and neighbors were invited to participate in the surveillance through flyers that the unit distributed throughout the community. In an episode that tragically captures the theme of this symposium—overpoliced and underprotected—one of the plaintiffs recounted how a police visit to intervene in a domestic assault turned into a compliance investigation and search of her home.<sup>73</sup> No investigation into the domestic violence complaint was ever pursued.

Evidence suggests that this pattern of manufacturing suspicion is widely experienced by Black women in other communities as well.<sup>74</sup> Ocen's analysis draws out a more complicated picture not only of the interface between public and private power but also of the institutional interface between subsidy programs and policing.<sup>75</sup> The multiple dimensions of this specific vulnerability are vexing and point

- 
72. Ocen, *supra* note 70, at 1544 (discussing the City of Antioch's Community Action Team [CAT]). A key feature of the CAT strategy was to gather information that might be used to terminate the women's participation in the Section 8 program. African Americans were both more likely to have cases referred to housing authorities and most likely to have their cases determined to be unfounded. See Expert Report of Barry Krisberg at 16, 19, *Williams v. City of Antioch*, No. C-08-2301 (N.D. Cal. Sept. 4, 2009), available at <http://www.impactfund.org/downloads/Antioch.B.Krisberg.ExpertReport.pdf>.
73. Ocen, *supra* note 70, at 1578. A similar disregard for potential victims of domestic violence in the context of policing suspected undocumented immigrants was reported by Sunita Patel, who observed, "[Y]ou can see, when people come into your home to investigate a violence complaint, or if they are doing a traffic stop, they then become more interested in the woman's status than they are in actually the perpetrator of the violence." Sunita Patel, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality* 104 (Jan. 27, 2012) (transcript on file with author).
74. See Ann M. Simmons, *Palmdale Settles Suit Alleging Section 8 Housing Discrimination*, L.A. TIMES, Feb. 3, 2012, <http://articles.latimes.com/2012/feb/03/local/la-me-harassment-settle-20120203> (describing a similar scenario occurring in Palmdale and Lancaster, California); Landon Cassman, *Future of Danville's Public Housing Remains Uncertain*, WILL AM 580 (June 11, 2012), <http://will.illinois.edu/news/spotstory/future-of-danvilles-public-housing-remains-uncertain> (discussing the complaint filed by four women against the city of Danville, Illinois, alleging racial discrimination in the acceptance and use of Section 8 vouchers); see also Victoria Schlesinger, *Section 8 Tenants Unwelcome*, CAL. LAW., July 2012, <http://www.callawyer.com/clstory.cfm?eid=923321> (discussing recent moves by the City of Lancaster to "crack down" on public housing tenants in the city and a suit filed by the Public Counsel Law Center of Los Angeles and the NAACP alleging race discrimination).
75. See Ocen, *supra* note 70, at 1581–82 ("The examination of the harassment of subsidy-reliant Black women also reveals the myriad ways Black women are increasingly vulnerable to sanction by the criminal justice system as a result of societal marginalization. Thus, the interaction between the welfare and criminal justice systems forcefully contributes to preserving racial stratification through exclusion.").

to the distinct way that the plaintiffs' identities as Black women authorized the surveillance they encountered.<sup>76</sup> Equally troubling is the fact that neither the police nor their white, middle-class neighbors were the only antagonists; men of color, women, and presumably other struggling families antagonized them as well. The role of identity in this intersectional story is further reinforced by the fact that not all of the women who were subsidy reliant were among those singled out and that several women who were not subsidy reliant but were targeted by the special unit were African American.<sup>77</sup> That it was African American women who prompted this response illustrates how specific identities prompt disciplinary strategies tailored to the risks that are projected on them.

This is not solely a story of intersectional vulnerability. It also reveals how convergences such as these undermine the potential to build communities of interest. The social stigma associated with surveillance constitutes an open invitation to all nonsuspect groups to erect distance between themselves and the family with the police car stationed outside its house. Once these Black mothers were singled out, their commonality with other single mothers, with other two-parent families, and with other people of color became obscured by the meaning attached to being "suspect." No doubt, among those who believed they were being protected and served were others who were also subsidy reliant but were not stigmatized as Black single mothers.

Ocen's analysis widens the lens through which the intersectional dimensions of social control are legible. As she illustrates, intersectional vulnerability to social control extends beyond the formal carceral regime.<sup>78</sup> Her analysis of the Antioch case reveals how the converging vulnerabilities that render some populations particularly amenable to control can be premised on the intersection of formal status (beneficiaries of social support services) and ascriptive identities (African American). Entrapped as such, the plaintiffs were available targets of both public (police) and private (neighborhood watch) mechanisms of surveillance and social control.

---

76. See Expert Report of Barry Krisberg, *supra* note 72, at 19 (finding that "[b]etween 2006 and 2009, African Americans represented approximately 55.8% of Section 8 households in Antioch (1,061 of 1,902), but 68.6% of CAT Section 8 referrals to the Housing Authority (94 of 137)").

77. Ocen, *supra* note 70, at 1545.

78. *Id.* at 1581–82 ("Black women are not merely experiencing the collateral consequences of overpolicing and mass incarceration; rather, the criminalization of Black communities has proliferated more broadly, as revealed by an understanding of the ideological constructs of Black women. The examination of the harassment of subsidy-reliant Black women also reveals the myriad ways Black women are increasingly vulnerable to sanction by the criminal justice system as a result of societal marginalization. Thus, the interaction between the welfare and criminal justice systems forcefully contributes to preserving racial stratification through exclusion.").

Attending to the wider patterns of social control that are facilitated by the maintenance of spatially segregated communities,<sup>79</sup> George Lipsitz addresses a set of social crimes perpetrated on poor women of color that contribute to their heightened risk of incarceration.<sup>80</sup> Highlighting the perverse relationship between the underprotection that women of color experience in the context of housing discrimination and the overpolicing they experience as a consequence of their housing insecurity, Lipsitz notes that “crimes committed against them in the form of violations of fair housing laws by landlords, real estate agents, bankers, and municipal officials go largely unprosecuted and unpunished.”<sup>81</sup> At the same time, these offenses against them create conditions that subject women of color to surveillance and expose them to increased risks of being ensnared in the criminal justice system.

In exploring the social conditions associated with housing insecurity and its robust correlation with the risk of incarceration,<sup>82</sup> Lipsitz notes that “[t]he injuries that black women and Latinas suffer at the crossroads of housing discrimination and mass criminality are intersectional: Their race, gender, and class positions all work together to create a cumulative vulnerability to the negative impacts of housing discrimination and mass criminalization.”<sup>83</sup> Building from the observation that housing insecurity is an intersectional condition itself,<sup>84</sup> Lipsitz observes, “Poverty by itself is an impediment to securing adequate shelter; race and gender discrimination adds new obstacles for women of color. Impoverished women of color have fewer housing options than white women or men of all colors and are thus subject to severe housing insecurity.”<sup>85</sup> Interrogating the contours of spatial segregation and the various mechanisms that reproduce it, Lipsitz analytically

---

79. In her discussion of Kelly Williams-Bolar, a single mother in Akron who was convicted of a felony for attempting to send her children to a wealthier school outside her school district, Tricia Rose noted the relationship between segregation and hypersurveillance. “You cannot hyperpolice constituencies who are integrated and I don’t mean that just racially, but I mean economically, sexually, politically into communities that are already protected. You simply can’t get away with it nearly as well, you have to find a way to . . . contain them to enable blind interventions . . . , and that enables the rest of this incarceration.” Tricia Rose, Presentation at UCLA Law Review Volume 59 Symposium, Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality 67 (Jan. 27, 2012) (transcript on file with author).

80. Lipsitz, *supra* note 8, at 1749.

81. *Id.*

82. *See id.* at 1753–66.

83. *Id.* at 1770.

84. *Id.* at 1751 (“Analyzing the injustices imposed on women of color by the combination of mass incarceration and housing discrimination requires thinking intersectionally about topics that are generally discussed and researched in isolation. Exploring racism as separate from sexism or examining incarceration without addressing shelter insecurity and unemployment will not do justice to the complexity of this object of study.”).

85. *Id.* at 1764.

uncovers how the economic marginality of women of color poses daunting impediments to securing shelter and accumulating assets, factors that are burdensome on their own and are also precursors to incarceration.<sup>86</sup> Beyond his analysis of how patterns of housing and spatial segregation constitute the structural features in which surveillance and control take place, Lipsitz attends as well to sexist norms embedded in gender relations that leave women with the tremendously disproportionate responsibility of raising and housing children. While these responsibilities reflect conditions shared largely across class and race, the burdens associated with primary caretaking in the context of racial segregation and economic marginalization constitute distinct economic and social costs that are not shared by men of color and all women.

These structural disadvantages are far from the only intersecting factors that shape the contours of their vulnerability. Beyond these factors are cultural representations of poor women of color as immoral and irresponsible, stereotypes that are mobilized to generate ideological justifications for their surveillance and punishment.<sup>87</sup> The intersection of these spatial, structural, and cultural factors constitute the toxic conditions by which behaviors that might otherwise be regarded as circumstantially informed are mobilized as further justification for hypersurveillance and punishment.<sup>88</sup> The economic disparities and spatial containment create scarcities that undermine their ability to provide healthy environments and quality education for their children, while judgment about their nonnormative

---

86. Richie states that “58 percent of women who are incarcerated any given day in this country were homeless at the time of their incarceration—that doesn’t mean they were well housed at other times, but they were homeless at the time of their arrest—82 percent were unemployed.” Richie, *supra* note 13, at 13.

87. Lipsitz, *supra* note 8, at 1753 (“The putatively nonnormative and allegedly criminal behavior of women of color helps fuel moral panics about crime, sexuality, and sloth that divert attention away from the cumulative vulnerabilities that women of color face as a result of systematic racial and gender discrimination in housing, employment, and education.”).

88. *Id.* Gustafson frames this social control of poor mothers as the criminalization of poverty, a process in which the state recruits private individuals to participate. “So this surveillance is not just done . . . by the state, it’s encouraging all of us, ‘Keep an eye on the poor,’ and it’s a warning to everyone, ‘Don’t break the rule and don’t go on welfare unless you want your name posted like this.’” Kaaryn Gustafson, Presentation at UCLA Law Review Volume 59 Symposium, Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality 87 (Jan. 27, 2012) (transcript on file with author). The wide invitation to society at large to participate in this surveillance is a theme that several participants noted. *See id.* (discussing bimonthly ads promising rewards to those who report individuals suspected of welfare fraud); Ocen, *supra* note 19, at 97 (discussing how neighbors in Antioch were invited to monitor subsidy-reliant households); Rose, *supra* note 79, at 69 (discussing rewards given to individuals who report out-of-district children).

family formation frames them as legitimate objects of punishment for doing what many advantage-seeking parents do every day.<sup>89</sup>

Although Lipsitz's analysis might be framed as an interplay of intersections, he shows that this intersectional complexity need not result in political surrender to an undifferentiated matrix of power. To the contrary, Lipsitz as well as Ocen show how an analysis of surveillance and punishment that interrogates the way that some matrixes are scaffolded onto others can broaden the theater in which productive intervention might unfold. For example, reading Lipsitz and Ocen together reveals that resisting the causes and consequences of mass incarceration is not solely a struggle against the war on drugs or a matter of penal policy more broadly. When framed through the prism of poor women of color, it becomes apparent how struggles against gated communities, hyperregulated public housing projects, social welfare defunding, cultural stereotypes, and narrowly construed family values are also integral to the struggle against mass incarceration.<sup>90</sup>

Dorothy Roberts's use of intersectionality also does more than reveal the converging vulnerabilities that render some populations particularly amenable to control; she also captures the interface between two expansive social systems. These systems have been historically associated with various projects of social management, usually with race, gendered, or class elements either as central features or byproducts of their operation.<sup>91</sup> Bringing these systems together as Roberts does reveals how the current crisis that we call mass incarceration or punishment comprises multiple intersections—not just of identity and power but of systemic dynamics that themselves do the work of subordination.<sup>92</sup>

Roberts brings these several elements together in her sobering account of the parallel and overlapping systems of child welfare and mass incarceration.<sup>93</sup> Her stunning narrative uncovers an intersectional infrastructure in which formal policy and discretionary decisionmaking contribute to the construction and punishment

---

89. Rose, *supra* note 79, at 66 (discussing how the stereotype of the welfare queen has morphed into a new criminal: mothers who “steal” educational opportunities from surrounding communities).

Josh Kim, taking up the presumption of the rational economic actor that figures so prominently in neoliberal analysis, offered an economic analysis of how a hypothetical woman, constrained by limited economic surroundings, prevented from pursuing more lucrative professional work by ineligibilities imposed on her because of her criminal background, would be entirely rational in choosing work in the black market. Joshua Kim, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality* 145 (Jan. 28, 2012) (transcript on file with author).

90. See Lipsitz, *supra* note 8, at 1770–74; Ocen, *supra* note 70, at 1559–64.

91. Roberts, *supra* note 8, at 1476–78.

92. *Id.* at 1483.

93. *Id.* at 1491–93.

of so-called bad Black mothers. Roberts “investigate[s] this particular systemic intersection to help elucidate how state mechanisms of surveillance and punishment work to penalize the most marginalized women in our society while blaming them for their own disadvantaged positions.”<sup>94</sup> She forcefully argues that prison and foster care are not simply parallel systems, nor are they sequential in the sense that involvement in one leads to the other. Instead, Roberts shows “how both systems work together to punish black mothers in the service of preserving U.S. race, gender, and class inequality in a neoliberal age.”<sup>95</sup>

Like Ocen and Lipsitz, Roberts’s analysis reveals that while the systems are related, and mutually constitute certain harms, they are also observable as distinct in their logics, agents, and consequences. As such, they can be understood both within their own institutional spheres and in relation to others. While acknowledging their interlocking dimensions of subordination, Roberts squarely confronts how these systems function both independently and together to regulate and punish Black women. Peeling apart the layers to reveal the unique ways in which these systems constitute social harm, she places advocacy and policymaking in better positions to take up the important task of articulating meaningful points of intervention.

In so doing, Roberts’s analysis is an important intervention against the ways that an understanding of social power as always and fully interlocking can overlook the specific dimensions and mechanisms of intersectional subordination. Beyond this methodical articulation of institutional intersectionality, her analysis also reveals how the identity of poor Black women becomes a nodal point through which harm is both delivered and rationalized. As Roberts shows, systems work in tandem to create and justify conditions that render women vulnerable and subsequently punish them for their vulnerability. Roberts’s cogent critique emphasizes the extent to which the ideological permission to punish is generated by widely

---

94. *Id.* at 1476.

95. *Id.*; *see id.* at 1499–1500 (“An analysis of the intersection of prison and foster care in black women’s lives shows how punishing black mothers is pivotal to the joint operation of systems that work together to maintain unjust social hierarchies in the United States. Black mothers are useful to the neoliberal agenda because state regulation of their bodies, already devalued by a long history of reproductive regulation and derogatory stereotypes of maternal irresponsibility, makes excessive policing by foster care and prison seem necessary to protect children and the public from harm. In turn, this analysis suggests the need for cross-movement strategies that can address multiple forms of systemic injustice to contest the overpolicing of women of color and expose how it props up an unjust social order.”). Gustafson further develops these observations, specifically within the public benefit context. Gustafson, *supra* note 88, at 88 (discussing the increase of collateral consequences associated with moving into “public benefit programs,” specifically noting that increasingly “welfare officers have become part of the criminal justice system” as a result of efforts to use welfare benefits officers to monitor women and families participating in benefit programs).

available stereotypes of Black mothers. By heaping punishment on those who have been primed to deserve it, the discourse not only “obscures the need for social change”<sup>96</sup> but also undermines solidarity and the recognition of common cause. So long as these conditions prevail, “there is little incentive for privileged parents to advocate alongside black mothers for more public support for caregiving for everyone.”<sup>97</sup>

Roberts’s analysis of the interface between child welfare and criminal justice was paralleled by Sunita Patel’s discussion of the convergence between foster care and immigration. As Patel observes, “[L]ike criminal law, immigration law is designed and created to maintain the dominant racial, class and gender hierarchy that we have. It is so much easier to immigrate lawfully if you’re from a European country and the northern border is like a sieve compared to the Mediterranean southern border.”<sup>98</sup> Patel highlighted the parallel and overlapping relationship of criminal law enforcement and immigration regulation, recounting how pursuant to the so-called Secure Communities Program thousands of undocumented immigrants have been apprehended and removed, a program that has been aggressively enforced by the Obama Administration.<sup>99</sup>

As Patel reveals, individuals who encounter the criminal justice system for even the most routine misdemeanors, or who face charges that would later be dropped, can find themselves detained and eventually deported. Against this racialized structure, the intersectional vulnerabilities that undocumented women face are in many ways similar to those that Roberts explored in the context of child welfare. For example, social expectations that are gendered, and are circumstances of economic marginality, shape the intersectional challenges faced by women defending themselves against the Department of Homeland Security’s efforts to remove them. According to Patel, “The mothers have to personify the judges’ image of a good mother in order to win: self sacrificing, humble, law abiding and English speaking. Poor migrant women and their attorneys often struggle to create a particular narrative of the woman’s life to compare with gender and rational ideas of motherhood.”<sup>100</sup> Yet in doing so, they frequently face gendered double standards in that the sacrifices they sometimes make for their children—leaving them with relatives, working long hours to send money home, saving money so that they can be reunited with their children—are perceived negatively in women

---

96. Roberts, *supra* note 8, at 1476.

97. *Id.* at 1490.

98. Patel, *supra* note 73, at 97.

99. According to Patel, the program led to 227,000 removals in 2011. *Id.* at 100.

100. *Id.*

when the same behaviors in men would be considered heroic. “Migrant men making the same decisions aren’t blamed or punished for their choices as fathers.”<sup>101</sup>

The particular challenges faced by undocumented mothers also recall Roberts’s critiques of caseworkers and some feminists who believe that poor Black children are better off being removed from their mothers. In immigration hearings, undocumented women “walk into court in an orange jumpsuit already being called bad mothers, and they face an uphill battle convincing an immigration judge that their children actually need their mother and this country.”<sup>102</sup> Those who have sympathy for the needs of the children, however, are not necessarily sympathetic to the need for their mothers to remain in the country. “There is this assumption that children are better off in the U.S.—even with a stranger, sometimes with white families—than they are in Mexico because there is [a worse] education[al] system or something else. The best interest of the child is cued towards being in the U.S.”<sup>103</sup> The interface with child protective services is similarly vexed, as Patel notes, because detained mothers are often in networks in which those whom the mother might designate as acceptable caretakers are unable to come forward because of their own status, or agencies will not accept them if they do.<sup>104</sup>

Collectively, the symposium participants painted a compelling picture of the multiple ways that women of color were situated within a variety of overlapping structures that singularly and jointly constituted the contours through which surveillance and social punishment take place. The interplay between structures and identities are key elements in understanding the ways that these women are situated within and affected by the various systems of social control. In summing up the many sites through which the overpolicing of women of color might become legible, however, Beth Richie directs collective attention beyond the criminal justice system writ large:

[W]e can also see examples of overpolicing if we step into a child welfare agency in this country or we go to a court-mandated treatment program, or an alternative high school, or special education class. We can see the concentrated disadvantage where people are vulnerable to overpolicing. If we look into most publicly funded domestic violence shelters in this country, or recruitment centers for women trapped into the military, we can see concentration of disadvantage and vulnerability

---

101. *Id.* at 98.

102. *Id.* at 99.

103. *Id.*

104. *Id.* at 106.



to overpolicing. If we can find, still, residents who live in public housing in urban areas, . . . [we would find a] concentration of poor women and women of color who are marginalized by sexuality, by legal status, by ethnicity. We'd see conservative ideology through the various kinds of public policy, sort of marking off those spaces, of intensive concentration of disadvantage . . . . [W]e'd see both the overall and sort of ways that women are policed into degrading circumstances and policed out of opportunity.<sup>105</sup>

Yet the articulation of the structural and dynamic contours of overpolicing reveals only a partial reflection of the problem because, as Richie notes, what is equally significant is what we *do not* see:

What we [don't] see are communities of color, articulating those as major concerns for racial justice movements, and we [don't] see those concerned with gender justice . . . rallying around those places . . . . Over policing for me is . . . the absence of visibility, and the absence of power, and the presence of a punitive state.<sup>106</sup>

Richie and others draw attention to the rhetorical politics of mainstream feminism and antiracism: in particular, the absences within both in that they have failed to interrogate the dynamics of surveillance and punishment of poor women of color. Attending to these absences reveals something more than mere oversights against which "inclusion" is the remedy. Instead, as argued below, these oversights might be understood as constitutive of the wider projects of social surveillance and control. Thinking more critically about the intersectional failures of feminism and antiracism reveals how the political marginality of women of color might be understood as a condition that weakened the capacity of both movements to recognize and resist the ideological foundations upon which these dynamics are grounded.

### III. POLITICAL INTERSECTIONALITY: FEMINIST AND ANTIRACIST CONDITIONS OF NEOLIBERAL POSSIBILITY

Among the most robust connections between earlier contestations around violence against women and the contemporary rhetorics surrounding mass incarceration are the discursive elisions that have characterized antiracist and feminist approaches to both of these social problems. These elisions can be thought of as interconnected structures of argumentation that do more than marginalize certain women. In their mutual inattentiveness to the intersections of patriarchy and

---

105. Richie, *supra* note 13, at 14.

106. *Id.* at 14–15.

racial power, feminist and antiracist rhetorics provide uncontested space for neoliberal ideology to gain traction not only within political culture more generally, but within the narrowed scope of social justice advocacy as well. Problems that were once debated within political discourse as the product of illegitimate social power are now less controversially seen as individual pathologies and cultural deficits. Consequentially, social problems that are disproportionately visited upon poor, racially marginalized communities have been framed in ways that prime relevant publics to accept surveillance and punishment as appropriate solutions. Social justice advocacy that posits the need for infrastructural development and social reform is increasingly superseded by market-based solutions predicated on punishment and reward.

Though the tensions between broader social justice-oriented advocacy and the more individualistic thinking that underscores neoliberal approaches are not new, what does warrant greater attention is how the contemporary discourses associated with racial inequality and violence against women reflect a certain level of retrenchment within advocacy communities themselves. Thinking about these shifts through the lens of women of color reveals how some of the intersectional failures of feminism and antiracism have devolved into rhetorics and policies that reinforce rather than resist the politics of social punishment.

As many commentators have argued, mass incarceration and its parallel and overlapping systems of surveillance and control have emerged in the face of political retreat on numerous social justice fronts.<sup>107</sup> The retrenchment politics that are now in play reflect a toxic interface between the twin dynamics of an increasingly interventionist set of punitive policies and a decreasing level of economic and political support for public institutions.<sup>108</sup> As these policies operate against a background structured by race, gender, and class hierarchies, inequalities that were once framed as forms of social injustice by feminist and antiracist advocates are increasingly

---

107. See Ocen, *supra* note 70, at 1564 (“Focusing on the work that welfare surveillance does in regulating poor Black women reveals that punitive regimes are increasingly capturing them. Indeed, incarceration rates are surging for Black women, who have become the fastest-growing prison population in the country.”); see also Roberts, *supra* note 8, at 1477 (“[T]he United States has embarked on a pervasive form of governance known as neoliberalism that transfers services from the welfare state to the private realm of family and market while promoting the free market conditions conducive to capital accumulation.”).

108. See Adalberto Aguirre, Jr. et al., *Introduction: Neoliberal Globalization, Urban Privatization, and Resistance*, 33 SOC. JUST., no. 3, 2006, at 1, 2 (distinguishing between roll-back neoliberalism, defined as “the retreat from previous governmental control of resources and state regulations, including public services, nationalized industries, and labor and social rights” and roll-out neoliberalism, including “policies and programs that seek to discipline, criminalize, and control poor and marginalized social groups”).

being represented in ways that deemphasize structural and historical causes and elevate individualistic causality along with simplistic stick-and-carrot solutions. The retrenchment that such ideological shifts help facilitate are not so much the spoils of active contestation between clearly defined political projects as they are the product of a gradual co-optation of how interventions will be framed and structured by neoliberal perspectives. Some of the discursive spaces most vulnerable to neoliberal occupation have been those where feminist and antiracist commitments have been weakened by their failures to address the intersectional dimensions of violence and social control. As a consequence, the marginalization of women and girls of color in many of these discourses is precisely where the neoliberal assault on the broader vision of social justice is particularly robust.

#### A. From the Shelter to the Jail: The Industrialization of Domestic Violence Intervention

Various observations made by symposium participants reveal how intersectional failures in responding to the underprotection of women of color are linked to the current regime of overpolicing. In the case of domestic violence, for example, the increasingly punitive approaches to a variety of social problems in the last decades of the twentieth century opened up opportunities for domestic violence advocacy to ride the tide associated with crime control and local accountability. As the “Get Tough” approach to drug dependency, poverty, juvenile delinquency, and single-family formation shifted the landscape away from legal reform to social control, domestic violence advocacy gained new traction as a criminal justice issue.<sup>109</sup> A key dimension of the Violence Against Women Act (VAWA),<sup>110</sup> for example, was its embrace of mandatory arrest policies along with federal support to encourage local police departments to process domestic assault complaints aggressively. The promise of expanding resources to support mandatory arrest policies seemed to present a win-win situation for some domestic violence advocates who understood the problem primarily in terms of the state’s underprotection

---

109. As Karen Rosenberg explains, “the Reagan administration, while drastically cutting funding for social service programs, expanded funding for criminal legal institutions. This formed part of the larger ideological project to cast social problems as criminal concerns. Thus the Reagan administration launched campaigns and concomitant policies declaring “war” on a host of social ills, from homelessness to drugs to domestic violence. In this policy environment, casting battering as a law and order issue had the best chance of winning government support.” KAREN E. ROSENBERG, FROM MODERATE CHASTISEMENT TO MANDATORY ARREST: RESPONSES TO VIOLENCE AGAINST WOMEN IN CANADA AND THE UNITED STATES 65 (2011).

110. Pub. L. No. 103-322, 108 Stat. 1796 (1994).

of women who were subject to battery.<sup>111</sup> This understanding of domestic abuse as a criminal justice issue allowed some advocates to join forces with national and local governments to receive support for certain draconian reforms.<sup>112</sup> Mandatory arrest policies and other pro-policing remedies were seen as important victories by many advocates despite the serious reservations of many women of color and other advocates.<sup>113</sup>

Other domestic violence advocates were far less sanguine about the supposed opportunities that such collaborations with law enforcement would engender for the overall movement.<sup>114</sup> For those who understood domestic violence as part of a broader system of gender subordination rather than an exclusively criminal problem, the shifts to federally supported police involvement presented a serious threat to the grassroots origins of domestic violence advocacy.<sup>115</sup> Some were particularly critical of this shifting emphasis as many warned that any strategy predicated on criminalization would likely result in higher fatalities and an increase in arrests for women of color.<sup>116</sup> But several factors seemed to pave the way toward the increasing influence of law enforcement as a primary goal of domestic violence

---

111. Radha Iyengar, *A Dangerous Shortage of Domestic Violence Services*, 28 HEALTH AFF. w1052 (2009).

112. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 294 (2005). As some critics note, the relationship between VAWA and the ongoing industrialization of social punishments was not incidental. Richie points out that "VAWA was part of a larger, more controversial Violent Crime Control and Law Enforcement Act of 1994, one of the most comprehensive, far-reaching crime bills in the history of the United States." RICHIE, *supra* note 1, at 86.

113. See generally LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* 108 (2012) (discussing the mixed reception of mandatory arrest regimes by advocates); Evan Stark, *Mandatory Arrest of Batterers: A Reply to Its Critics*, 36 AM. BEHAV. SCIENTIST 651 (1993).

114. As Richie explained, "One group remained committed to a broader analysis of the systemic causes of violence against women, arguing as strongly as ever for the need for radical social change work based on an understanding of the role that systems advocacy and coalition politics could play in that. For this group, the problem of persistent gender inequality, as a structural problem, remained at the center of the analytical paradigm that activists remained committed to. Another group coalesced around a different formation. Compelled to respond to conservative state tendencies regarding families, gender, and sexuality, they pursued a safer, less antagonistic strategy that they expected would be more acceptable to the new conservative national, legislative, and local leadership. This group distanced itself from the former activist-oriented." RICHIE, *supra* note 1, at 75; see also Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 VIOLENCE AGAINST WOMEN 38 (2005).

115. See, e.g., DONALD G. DUTTON, *The Failure of Criminal Justice Intervention Policy*, in RETHINKING DOMESTIC VIOLENCE 249 (2006).

116. See, e.g., INCITE! WOMEN OF COLOR AGAINST VIOLENCE & CRITICAL RESISTANCE, *supra* note 1; GOODMARK, *supra* note 113, at 109.

advocacy. The availability of resources associated with the get-tough turn in public policy, the ongoing debate among various camps about whether violence should be understood as a systemic embodiment of patriarchy or a matter of discriminatory protection within law enforcement,<sup>117</sup> the unresolved tensions about the importance of incorporating racial differences into gender-based advocacy, and the eclipse of the radical feminism that had grounded the shelter movement in the first place all contributed to an environment in which the marriage between domestic violence advocacy and state-oriented approaches was readily consummated.<sup>118</sup> The concerns of women of color were fairly consistently overlooked in the process.

While the alliance between domestic violence advocates and law enforcement might be readily understood as the maturation of a grassroots insurgency into a powerful national lobby, others have regarded the alliance as evidence of the shifting of the antiviolence movement into a pro-state, professionalized cohort that has depoliticized the original movement.<sup>119</sup> The alliance did work to secure a national profile for domestic violence advocacy along with funds to support mandatory arrest policies.<sup>120</sup> Yet, as many women of color predicted, mandatory arrest policies appear to have done little to protect women of color against domestic violence.<sup>121</sup> Indeed, some studies seem to suggest that the policies have inadvertently increased the risks of serious injury or death for some victims of domestic violence,

---

117. As G. Kristian Miccio described the tension,

In analyzing the Protagonist position, . . . one sees how it presumes that the state qua state is hospitable to women. This contrasts starkly with the early advocates who understood that the state was the cause of women's subordination and that male intimate violence and the system of laws that condoned such violence were emblematic of such subordination. Abolition of male intimate violence would require more than a criminal justice response; it would require a reordering of power relations in both public and private life. Arrest alone or in tandem with mandatory prosecution was not the antidote.

Miccio, *supra* note 112, at 294 (footnote omitted).

118. Pub. L. No. 103-322, 108 Stat. 1796 (1994). The section of the Violence Against Women Act (VAWA) entitled Grants to Encourage Arrest Policies, *id.* § 40231, 108 Stat. at 1932 (codified as amended at 42 U.S.C. § 3796hh (2006)), received an initial funding of \$28 million in 1996, of which funding for mandatory arrest initiatives was a large part. The funding geared toward mandatory arrests has since been suspended. NAT'L COAL. AGAINST DOMESTIC VIOLENCE, COMPARISON OF VAWA 1994, VAWA 2000 AND VAWA 2005 REAUTHORIZATION BILL (2006), available at [http://www.ncadv.org/files/VAWA\\_94\\_00\\_05.pdf](http://www.ncadv.org/files/VAWA_94_00_05.pdf); see also GARRINE P. LANEY, CONG. RESEARCH SERV., RL30871, VIOLENCE AGAINST WOMEN ACT: HISTORY AND FEDERAL FUNDING, at 8 (2003).

119. See, e.g., Elizabeth Ben-Ishai, *The Autonomy-Fostering State: "Coordinated Fragmentation" and Domestic Violence Services*, 17 J. POL. PHIL. 307 (2009).

120. See sources cited *supra* note 118.

121. Miccio, *supra* note 112.

including a heightened risk of mortality for Black women in particular.<sup>122</sup> Beyond the heightened risk of death, research suggests that women of color are more likely to be arrested themselves for behavior that may be consistent with self-defense but interpreted through the lens of stereotypes as overly aggressive.<sup>123</sup>

- 
122. See STOP ABUSIVE & VIOLENT ENV'TS, ARREST POLICIES FOR DOMESTIC VIOLENCE 4 (2010), available at <http://www.saveservices.org/downloads/Justice-Denied-DV-Arrest-Policies> (citing to a Milwaukee study that concluded that "mandatory arrest prevents 2504 acts of violence against primarily white women at the price of 5409 acts of violence against primarily black women," and to a Harvard study that concluded "intimate partner homicides increased by about 60% in states with mandatory arrest laws" (citing Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137; Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence From Mandatory and Recommended Arrest Laws* (Nat'l Bureau of Econ. Research Working Paper No. 13186, 2007), available at <http://www.nber.org/papers/w13186>) (internal quotation marks omitted)); Meda Chesney-Lind, *Criminalizing Victimization: The Unintended Consequences of Pro-arrest Policies for Girls and Women*, 2 CRIMINOLOGY & PUB. POL'Y 81, 82 (2002). The critique of the way the antiviolence movement embraced criminalization as the principle intervention against domestic violence should not be interpreted as a call for do-nothing strategies or romanticized notions of community accountability. See, e.g., INCITE! WOMEN OF COLOR AGAINST VIOLENCE & CRITICAL RESISTANCE, *supra* note 1 (critiquing the antiprison movement for failing to take violence against women seriously and calling for interventions that do not overrely on criminalization and also provide safety and accountability).
123. Michael P. Johnson & Kathleen J. Ferraro, *Research on Domestic Violence in the 1990s: Making Distinctions*, 62 J. MARRIAGE & FAMILY 948, 953-54 (2000) (citing relevant literature, broken down here by race: Native American: RONEE BACHMAN, DEATH AND VIOLENCE ON THE RESERVATION: HOMICIDE, FAMILY VIOLENCE, AND SUICIDE IN AMERICAN INDIAN POPULATIONS (1992); David G. Fairchild et al., *Prevalence of Adult Domestic Violence Among Women Seeking Routine Care in a Native American Health Care Facility*, 88 AM. J. PUB. HEALTH 1515 (1998); Diane McEachern et al., *Domestic Violence Among the Navajo: A Legacy of Colonization*, in PRESSING ISSUES OF INEQUALITY AND AMERICAN INDIAN COMMUNITIES 31 (Elizabeth Segal & Keith Kilty eds., 1998); Ilana M. Norton & Spero M. Manson, *A Silent Minority: Battered American Indian Women*, 10 J. FAMILY VIOLENCE 307 (1995); Lillian Tom-Orme, *Native American Women's Health Concerns*, in HEALTH ISSUES FOR WOMEN OF COLOR: A CULTURAL DIVERSITY PERSPECTIVE 27 (Diane L. Adams ed., 1995); Asian and Pacific Islander: YOUNG I. SONG, BATTERED WOMEN IN KOREAN IMMIGRANT FAMILIES: THE SILENT SCREAM (1996); Margaret Abraham, *Ethnicity, Gender, and Marital Violence: South Asian Women's Organizations in the United States*, 9 GENDER & SOC'Y 450 (1995); Christine K. Ho, *An Analysis of Domestic Violence in Asian American Communities: A Multicultural Approach to Counseling*, 9 WOMEN & THERAPY 129 (1990); Alice G. Yick & Pauline Agbayani-Siewert, *Perceptions of Domestic Violence in a Chinese-American Community*, 12 J. INTERPERSONAL VIOLENCE 832 (1997); Latina: Julia L. Perilla et al., *Cultural and Domestic Violence: The Ecology of Abused Latinas*, 9 VIOLENCE & VICTIMS 325 (1994); African American: RICHIE, *supra* note 66; Ruth E. Dennis et al., *Addressing Domestic Violence in the African American Community*, 6 J. HEALTH CARE POOR & UNDERSERVED 284 (1995); Clifton E. Marsh et al., *Sexual Assault and Domestic Violence in the African American Community*, 17 W.J. BLACK STUD. 149 (1993)).

The blowback from these criminal justice solutions has also ensnared girls of color.<sup>124</sup> For example, both Sherman and Nanda discuss how the increasing system involvement of girls is tied less to increases in offending and more to shifting policies such as mandatory arrest in the context of intrafamily violence.<sup>125</sup> In cases of domestic assaults, girls who have been violent at home and who may have, in an earlier era, been processed outside the juvenile justice system are now apprehended and processed through the juvenile system. Black girls appear to be disproportionately apprehended under such policies, reflecting perhaps the stereotypes that they are more likely to engage in physical confrontation.<sup>126</sup>

Advocates who were sensitive to the dual systems of private violence and public surveillance were attuned to the need to think critically about alternative means of protection that did not overinvest in approaches that put women of color at greater risk.<sup>127</sup> These intersectional sensibilities were embraced neither by legislative advocates nor by their allies, and thus domestic violence intervention became another social issue swept into the criminal justice juggernaut. Hindsight may indeed provide a clearer view of the risks associated with an overly punitive approach to domestic violence,<sup>128</sup> but it is not entirely speculative to suggest that

---

124. Sara Goodkind et al., *Are Girls Really Becoming More Delinquent? Testing the Gender Convergence Hypothesis by Race and Ethnicity, 1976–2005*, 31 CHILD. & YOUTH SERVICES REV. 885 (2009).

125. Sherman, *supra* note 56, at 1603; Nanda, *supra* note 28.

126. Chesney-Lind, *supra* note 122, at 82 (attributing the prevalence of Black women and girls arrested under mandatory arrest policies around the United States in part to the greater likelihood of Black women and girls to report domestic violence to authorities).

127. The conflict among domestic violence advocates presented yet another moment where Black feminists were locked into a two-fronted struggle. As Richie noted,

[I]t occurs to me that it may be paradoxical that in fact most of my work and most of the work of other women of color, some of who are here today . . . to end violence against women has become work about overpolicing: overpolicing of women who experience violence when in some parts of the antiviolence movement, the answer has been to call the police. So in some ways I stand in the mix still of that paradox, working primarily in low income African American communities and other communities of color for thirty years to try to say to primarily men who claim spaces of leadership . . . for racial justice to demand that attention be paid to gender inequality, while at the same time, spinning around and making sure that [the] white-dominant] antiviolence movement pays particular concerns to women of color.

Richie, *supra* note 13, at 11.

128. Funding for mandatory arrest has been suspended. Critics of the alliance point out that few if any federal dollars were ever directed to support shelter and other services for battered women. “[A] leading activist in New York City remarked that over a ten-year period approximately \$258 million has been allocated through the federal VAWA for criminal justice programs in New York City—yet not one dollar has been allocated for shelters, long-term housing, or job training. And because VAWA is the largest federal funding source and financial conduit for programmatic support, the narrow scope of its mission severely impacts distribution of resources to programs and women survivors.” Miccio, *supra* note 112, at 290 (footnote omitted).

had there been greater receptivity to the reservations that women of color were raising about mandatory arrests, domestic violence advocacy may well have been better positioned to sustain a political agenda that was more firmly rooted in social justice rather than criminal enforcement.<sup>129</sup> Had more domestic violence advocates taken up the intersectional challenges faced by women who were subject to both private violence and public control, reliance on an apparatus that was long associated with racial management might have been more carefully scrutinized. Not only might women of color have been better situated, but the entire movement might have been better positioned to address the causes and consequences of domestic abuse rather than to succumb to the more troubling logics of criminal enforcement.<sup>130</sup>

### B. Endangerment Discourse and the Taming of Racial Justice

This blowback is only one consequence of the intersectional failures from the 1990s that influences contemporary discourse about mass incarceration. A parallel and overlapping connection between the intersectional failures in the 1990s and the current discourses around mass incarceration can be found in a cluster of ideas contained within the “Black male endangerment” discourse.<sup>131</sup> Beginning in earnest with the Reagan Administration, two key dimensions of post-reformist social policy were packaged around images of criminality, crime, and pathology: the war on drugs and welfare dependency.<sup>132</sup> As President Clinton extended the

---

129. Kavitha Sreeharsha notes another tension between mainstream feminism and grassroots activism playing out in the context of trafficking that is also partly related to the collaborations between law enforcement and feminist advocacy. Kavitha Sreeharsha, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Crime, Punishment, and the Management of Racial Marginality* 166 (Jan. 28, 2012) (transcript on file with author). In the context of human trafficking, the primary focus—both in terms of media attention and resourcing—has been on sex trafficking, although far more immigrant women have been caught up in labor trafficking. *Id.* Noting that virtually all labor-trafficked women are undocumented, the consequence of “applying the criminal justice framework to labor-trafficked worker women leads to heightened immigration arrest, detention, and removal.” *Id.* The discourse’s marginalization of immigrant women “is not something we can continue to ignore.” *Id.*

130. This is not to suggest that there is always a clear strategy to resist such consequences. The risk that an insurgent movement might be co-opted always accompanies efforts to engage state power in addressing specific demands. The scope of a movement’s primary arguments will not necessarily determine how the state responds. *See* Crenshaw, *supra* note 8, at 1352–54 (arguing that in the context of antiracist struggles, civil rights advocacy was necessary to engage the state and that other rhetorics were unlikely to have generated any useful interventions). That said, in the context of domestic violence, demands around how state coercion should be deployed to force matters into the criminal justice system were far more contested within the movement itself.

131. *See, e.g.*, Harris, *supra* note 37.

132. *See* JULIA S. JORDAN-ZACHERY, *BLACK WOMEN, CULTURAL IMAGES, AND SOCIAL POLICY* 56–62 (2008) (discussing their origins in the Reagan era).



war on drugs<sup>133</sup> and campaigned to “end welfare as we know it” by shredding the economic safety net for millions of women and children, images of Black crime, drug dealing, and welfare dependency saturated the political debate.<sup>134</sup> Although both initiatives bore Black faces and contributed to the discursive shift away from social justice to social control, only the targeting of Black men was taken up as a crisis within antiracist politics.<sup>135</sup> While stereotypes of both Black men and women punctuated the growing embrace of penal approaches to drug addiction, poverty, and their many social consequences, Black politics converged around Black men as the focal point of responsibility and uplift. The shifting rhetorical stance from a more inclusive, community-centered ethos to a male-centric notion of responsibility and endangerment was captured most memorably by Minister Louis Farrakhan’s Million Man March.<sup>136</sup>

While the exclusion of women is perhaps one of the most memorable ways that the March marked its almost exclusive focus on men, deeper still was the way the March authorized a central ideological pillar that underwrote the attack on welfare, single-headed households, and Black single mothers. The thesis that Black inequality was grounded in dysfunctional family relationships had been introduced decades earlier by a controversial report that cast doubt on the possibility that structural reforms would significantly improve the lives of poor Black people. Daniel Patrick Moynihan infamously described the Black family as pathologically

- 
133. See ANDREW B. WHITFORD & JEFF YATES, PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA: CONSTRUCTING THE WAR ON DRUGS 66–69 (2009) (discussing President Clinton’s policy emphasis on drug enforcement over treatment, such as by issuing three executive orders to extend the power of the Office of National Drug Control Policy and to create the President’s Drug Policy Council); Sheila R. Zedlewski, *Welfare Reform: What Have We Learned in Fifteen Years?* 8–9 (Urban Institute Brief 24, 2012) (discussing the impact of Temporary Assistance for Needy Families (TANF), instituted as part of President Clinton’s Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, on the economic safety net of poor parents and children); see also LEGAL MOMENTUM, WELFARE REFORM AT AGE 15: A VANISHING SAFETY NET FOR WOMEN AND CHILDREN 1 (2011) (“The shredding of the safety net has had an especially harsh impact on single mother families, as at any given time between one-quarter and one-third of single mothers are jobless and potentially in need of assistance.”).
134. See, e.g., David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1293 (1995) (noting public associations of the “ghetto” drug trade targeted by the war on drugs primarily with Black men); ANGE-MARIE HANCOCK, *THE POLITICS OF DISGUST: THE PUBLIC IDENTITY OF THE WELFARE QUEEN* (2004) (arguing that much of the foundation of the welfare reform debate of the 1990s turned on stereotypes and maligned misperceptions of poor Black mothers).
135. NIKOL G. ALEXANDER-FLOYD, *GENDER, RACE, AND NATIONALISM IN CONTEMPORARY BLACK POLITICS* 68 (2007).
136. See Harris, *supra* note 37, at 58–65.

out of sorts, illustrated by the dominance of the so-called Black matriarch<sup>137</sup> and the relative absence of traditional gender relations in the family. Among other concerns, Moynihan worried about the consequences of generations of Black boys being raised by single or dominant mothers and encouraged military training to remove them from this matriarchal influence.<sup>138</sup>

The Million Man March was in many ways an extension of and response to the Moynihan critique. Unlike the March on Washington in 1963, this March sought no structural interventions, no changes in economic policy, and no specific demands with respect to legal enforcement, opportunity creation, or family support. Accountability was squarely placed on Black men whose agency or lack thereof was the focal point of critique and uplift. Although a massive retrenchment in the social support that was vital to countless women and children was being debated at the time, little effort was made to support single mothers and their families other than a promise that a man in the house was on the way. The March was so in concert with the prevailing ideology that underwrote the ongoing efforts to restructure Aid to Dependent Families that the president and other opinion leaders supported the gathering despite the widespread criticism of Minister Farrakhan.<sup>139</sup>

---

137. DANIEL PATRICK MOYNIHAN, U.S. DEP'T LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* 17–28 (1965), available at <http://www.dol.gov/oasam/programs/history/webid-meynihan.htm> (“Because the father is either not present, is unemployed, or makes such a low wage, the Negro woman goes to work. Fifty-six percent of Negro women, age 25 to 64, are in the work force, against 42 percent of white women. This dependence on the mother’s income undermines the position of the father and deprives the children of the kind of attention, particularly in school matters, which is now a standard feature of middle-class upbringing.”); *id.* at 34 (quoting Thomas Pettigrew as noting, “The Negro wife in this situation can easily become disgusted with her financially dependent husband, and her rejection of him further alienates the male from family life. Embittered by their experiences with men, many Negro mothers often act to perpetuate the mother-centered pattern by taking a greater interest in their daughters than their sons.”).

138. *Id.* at 42 (“There is another special quality about military service for Negro men: It is an utterly masculine world. Given the strains of the disorganized and matrifocal family life in which so many Negro youth come of age, the Armed Forces are a dramatic and desperately needed change: a world away from women, a world run by strong men of unquestioned authority, where discipline, if harsh, is nonetheless orderly and predictable, and where rewards, if limited, are granted on the basis of performance.”).

139. The *New York Amsterdam News* quoted President Clinton as saying of the Million Man March (“the March”):

“They were basically standing up for the dignity of family and asking African American men and fathers to be more responsible,” Clinton said. “It was totally non-violent and got a big participation and it also showed frankly, a face to a part of America that is not as sympathetic to the problems that African Americans in the cities and the poor rural areas have . . . that hey, there’s all these people and they are advocating a responsible agenda and not just asking for something, and they’re saying, ‘This is our responsibility; this is what we’re suppose to do.’ I personally thought it was quite positive.”

Thus, as the earlier social justice demands of the 1960s became rearticulated as a call for male leadership in the family and in the community, the particular risks that Black women faced as a consequence of their intersectional encounter with racialized, gendered, and class-based hierarchies bore little traction within antiracist political discourses. As dynamics such as violence, economic marginality, and vulnerability to the war on drugs continued to unfold, Black women found themselves discursively vulnerable by historical stereotype and politically vulnerable by an intracommunity investment in addressing Black male endangerment.<sup>140</sup> It is in this opportune space that legislative initiatives that extended and rationalized the web of punishment were anchored. These included, for example, welfare reform,<sup>141</sup> the Adoption and Safe Families Act (ASFA),<sup>142</sup> and draconian public housing policies,<sup>143</sup> all of which were largely conceded without the vocal community

---

Jamal E. Watson, *A Clinton Conversation, Part I: Former President Talks About Cosby's Controversial Comments and Millions More March*, N.Y. AMSTERDAM NEWS, May 5, 2005, at 1, 29, available at <http://new-york-amsterdam-news.vlex.com/vid/conversation-talks-cosby-controversial-62472075>; see also Paul Richter, *Million Man March: Clinton Calls for End to Racism: Speech: Racial Gulf Exposed by Simpson Trial Demands Individual Remedy, He Says*, L.A. TIMES, Oct. 17, 1995, [http://articles.latimes.com/1995-10-17/news/mn-57953\\_1\\_simpson-trial](http://articles.latimes.com/1995-10-17/news/mn-57953_1_simpson-trial).

Supporters of the March included Ralph Johns, reported to be the first white person to join a local NAACP chapter and the first white vice president of the NAACP. Lilly Dizon, *Million Man March: Supporters in O.C. Stage Local Rally*, L.A. TIMES, Oct. 17, 1995, [http://articles.latimes.com/1995-10-17/news/mn-57984\\_1\\_million-man-march](http://articles.latimes.com/1995-10-17/news/mn-57984_1_million-man-march).

Additionally, politicians such as Baltimore Mayor Kurt L. Schmoke, Philadelphia Mayor Edward G. Rendell, rap musicians Public Enemy and Brand Nubian, and the National Council of Negro Women supported the March. Michael A. Fletcher & Hamil A. Harris, *Million Man March' Gains Supporters*, OSCALA STAR-BANNER, Sept. 11, 1995, at 3A.

140. See Harris, *supra* note 37.

141. President Clinton vowed to “end welfare as far as we know it” throughout his campaign for the presidency and attempted to eventually fulfill this goal by signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, on August 22, 1996. See Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC, Mar. 1997, <http://www.theatlantic.com/past/docs/issues/97mar/edelman/edelman.htm>.

142. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a)(3), 111 Stat. 2115, 2118 (expediting parental termination when parents have lost contact with their children in fifteen of the preceding twenty-two months); see also Tina Reynolds, Presentation at UCLA Law Review Volume 59 Symposium, *Overpoliced and Underprotected: Women, Race, and Criminalization—Race, Gender, and Conditions of Confinement* (Jan. 28, 2012).

143. See Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (codifying the procedure for evicting residents from public housing who otherwise qualified if one of them was charged with a drug offense—commonly known as the “One Strike” law); see also Stacy L. Mallicoat, *The Incarceration of Women*, in *WOMEN AND CRIME: A TEXT/READER* 461, 471 (Stacy L. Mallicoat ed., 2012) (describing how the Welfare Reform Bill of 1996 has resulted in significant challenges to family reunification, visitation, and lifestyle improvement to individuals convicted of a drug offense). On August 12, 2009, the ACLU’s Women’s Rights Project filed suit against the Housing Authority of the City of Annapolis (HACA) challenging an HACA policy that bans approximately five hundred individuals from being on or near public housing property,

opposition such measures deserved.<sup>144</sup>

Indeed, not only have these conditions failed to muster significant attention within antiracist advocacy; very little within that discourse challenges the way that single Black motherhood remains ideologically salient as one of the key factors that contribute to the Black community's vulnerability to a host of social ills, including poverty, underachievement, violence, and incarceration.<sup>145</sup> By embracing the notion that a fundamental source of Black inequality was a family structure at odds with patriarchal norms, those Black community discourses that have been shaped around the endangered male narrative have come to regard the needs of single Black mothers with a sideways glance.<sup>146</sup> This ideology, along with the failure of antiracist discourse to significantly contest it, has contributed to making

---

effectively preventing these individuals from visiting family. Complaint, *Sharps v. Hous. Auth. of the City of Annapolis* (Md. Cir. Ct. n.d.), available at [http://www.aclu.org/files/pdfs/womensrights/sharpsvhaca\\_complaint.pdf](http://www.aclu.org/files/pdfs/womensrights/sharpsvhaca_complaint.pdf). Under the policy, individuals that were labeled a "danger" to the community were placed on the "do not enter" list for a variety of reasons, including mere involvement in minor offenses five or more years ago and, in many instances, premised upon alleged criminal conduct for which they were never charged with a crime. For more information on the case, see *Sharps v. Housing Authority of the City of Annapolis*, ACLU.ORG (Nov. 17, 2010), <http://www.aclu.org/womens-rights/sharps-v-housing-authority-city-annapolis>.

144. Traditional civil rights organizations have failed to prioritize the special challenges faced by imprisoned mothers despite the growing numbers of Black children who wind up in long-term foster care. For example, the NAACP devoted an entire convention to the crisis facing Black men and boys, yet the president's comments on mass incarceration failed to mention Black women or the devastating effects of ASFA on their families. Advocates in New York have successfully lobbied the legislature to ameliorate some of the more draconian dimensions of the law. See Deseriee A. Kennedy, *"The Good Mother": Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 195–96 (2012). The coalition that brought the plight of incarcerated mothers to light did not include traditional civil rights groups. See Abigail Kramer, *A Fight to Extend Parents' Rights*, CITY LIMITS, Feb. 25, 2010, <http://www.citylimits.org/news/articles/3895/a-fight-to-extend> (noting supporters of the bill included, inter alia, the Children's Defense Fund, Big Brothers and Big Sisters of NYC, and the Federation of Protestant Welfare Agencies; notably, the NAACP, Urban League, and other African American lobbying groups did not come out in support of the bill).
145. See Julia S. Jordan-Zachery, *Let Men Be Men: A Gendered Analysis of Black Ideological Response to Familial Policies*, in *THE EXPANDING BOUNDARIES OF BLACK POLITICS* 177, 183 (Georgia Anna Persons ed., 2007) ("Fatherhood and marriage initiatives are designed to eliminate the Black Matriarch and 'liberate' the emasculated black man by reinstating him in his rightful place. If policy can ensure the reinstatement of these men as leaders of the family, supporters argue everything will be all right in these communities."); see also DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 8 (1998) (noting that neoliberals point to failed family formation as the primary cause of poverty in the United States and ultimately demonize Black motherhood: "[I]t is believed that Black mothers transfer a deviant lifestyle to their children that dooms each succeeding generation to a life of poverty, delinquency, and despair. A persistent objective of American social policy has been to monitor and restrain this corrupting tendency of Black motherhood.").
146. Watson, *supra* note 139.

poor Black mothers the legitimate objects of punishment that Dorothy Roberts has consistently shown.<sup>147</sup>

The conditions under which Black women struggle for survival are not only marginal to Black politics. Their exclusion from prevailing discourses that address the endangerment of men supports the mistaken impression that Black women are socioeconomically secure, or alternatively, that their socioeconomic insecurity is secondary to the interests of Black men in the communities in which they live. These impressions remain, even though many of the conditions facing Black women are directly related to the particular risks of surveillance and incarceration they face. For example, domestic violence is often excluded from discussions on Black-on-Black crime even though most gender crime is intraracial.<sup>148</sup> The same intraracial solidarity that underwrites beliefs that Black men are the primary victims of racism and violence also entraps many Black women into a forced silence about their own experiences.<sup>149</sup> Black women are also marginal in antiracist critiques of the war on drugs—even though the hyperprosecution of Black communities presents particular risks for Black women given their gendered relationships to men and their various enterprises, as Kemba Smith’s story reveals.<sup>150</sup> Moreover, women’s experiences are trivialized in discourses about *economic insecurity*—even though they make less than Black men and typically, as heads of households, have to make their meager dollars stretch further.<sup>151</sup>

Black male endangerment relegates all these issues to the background even though many women—like men—face personal and economic insecurity on a daily basis. Unlike most men, however, many Black women grapple with the challenge of raising children alone on subsistence wages and struggle mightily to keep a roof over their heads.<sup>152</sup> They, along with their daughters, often navigate public spaces that are profoundly underresourced, which in turn heightens the risk of abuse and assault and lowers the likelihood of meaningful protection.<sup>153</sup> Those who become

---

147. See Roberts, *supra* note 8, at 1476, 1483–84, 1488–91.

148. “Seventy percent of women who are detained in any correctional facility in this country have experienced violence.” Richie, *supra* note 13, at 13.

149. See RICHIE, *supra* note 66, at 62.

150. See SMITH, *supra* note 29. More broadly, despite the male-centric discourses about the consequences of the war on drugs, women have suffered a greater increase in the resulting incarceration rates than men.

151. Smith, *supra* note 17; see also AM. ASS’N OF UNIV. WOMEN, THE SIMPLE TRUTH ABOUT THE GENDER PAY GAP 6–7 (2012) (additionally noting that Black women earn 91 percent of what a Black male earns and 70 percent of what a white male earns).

152. See Lipsitz, *supra* note 8, at 1752.

153. Jody Miller argues that “though violence against women is systematic throughout the United States, . . . it is particularly acute for adolescent girls in neighborhoods characterized by intense disadvantage. Young women do their best to navigate these dangerous terrains, but they encounter

caught up in the drug trade face long prison terms often for marginal involvement in drug enterprises, and are more likely to lose their children than men because of the hard-nosed provisions of the ASFA.<sup>154</sup> Those who manage to avoid parental termination face enormous challenges in reunifying their family when they are released.<sup>155</sup> Despite the risks they share with Black men, as well as other risks that are unique to them, Black women remain subject to the twin dimensions of hypervisibility and substantive erasure: They are present in the stereotypical images of Black families at risk, and they are virtually absent as a focal point of the millions of dollars strategically distributed by foundations and local governments under the promise of rescuing Black boys and saving Black families.<sup>156</sup>

---

vastly inadequate social and institutional supports. Moreover, these are structural and ecological problems.” JODY MILLER, GETTING PLAYED: AFRICAN AMERICAN GIRLS, URBAN INEQUALITY, AND GENDERED VIOLENCE 3 (2008).

154. See Reynolds, *supra* note 142, at 108 (recounting how ASFA’s policies, combined with the difficulty of female prisoners to receive visits from their children because of the long distances between the few female prisons and the community in which her family resided, resulted in the termination of her rights over one of her children). As Emily Nicholson notes, “Over sixty percent of parents in state prisons and over eighty percent of parents in federal prisons are located in facilities greater than one hundred miles from their homes.” Emily K. Nicholson, Comment, *Racing Against the ASFA Clock: How Incarcerated Parents Lose More Than Freedom*, 45 DUQ. L. REV. 83, 89 (2006) (citing CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN 1 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf>). “Mothers are particularly likely to be placed at a substantial distance from their families due to the limited number of female correctional facilities across the nation.” *Id.* (citing Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1673 (2003)). Women are additionally disadvantaged by this gender-neutral law “[b]ecause incarcerated mothers are more likely to have children in foster care than incarcerated fathers[. W]omen have become more vulnerable to ASFA’s 15/22 provision and thus more susceptible to losing their parental rights.” *Id.* at 92. Between 70 and 90 percent of incarcerated mothers are the custodial parents of their children whereas the reverse is true for men. *Id.* (citing Mariely Downey, *Losing More than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN’S L.J. 41, 45 (2001)).
155. Barriers to family reunification include laws that impose lifetime bans prohibiting those convicted of drug offenses from accessing government aid and housing support; barriers to entering professions that require licensing include, for example, nursing, hairdressing, and childcare. The intersectional dimension of race, gender, class, and status as a formerly incarcerated woman likely presents barriers that vary by race. For example, one study found that women with a criminal record are significantly more likely to receive a negative response from a potential employer than those without a criminal record. Black women were the only group more likely to receive a negative response from an employer whether or not she had a criminal record. See MONIQUE W. MORRIS ET AL., THELTON E. HENDERSON CTR. FOR SOC. JUSTICE, A HIGHER HURDLE: BARRIERS TO EMPLOYMENT FOR FORMERLY INCARCERATED WOMEN (2008).
156. Organizations focused on promoting the development of young black males include the Open Society Foundation’s Campaign for Black Male Achievement and the Knight Foundation’s Black Male Engagement Campaign. See also Kimberly Alleyne, *Foundations Help to Reshape Plight and Images of Black Males*, LA. WKLY., Jun. 4, 2012, <http://www.louisianaweekly.com/foundations-help-to-reshape-plight-and-images-of-black-males>. The federal government also supports such

### C. Unlikely Allies

Lurking behind this sacrifice of Black mothers has been a troubling rationale that permits an alliance between those who endorse an endangerment narrative and those who are in fact agents of the very policies that contribute to the social surveillance and mass incarceration of Black men. The capaciousness of this frame to include those whose policies actually contribute to the purported crisis is apparent in the actions of Mayor Michael Bloomberg in New York City. To great fanfare and media attention, Mayor Bloomberg announced a multimillion-dollar joint strategy to address the crisis of Black and Latino boys.<sup>157</sup> This initiative, predicated on averting the school-to-prison pipeline, seeks to create opportunities for better achievement in school and to develop the appropriate attachments to

---

male-centered intervention through its fatherhood initiative designed to “help[] fathers improve their economic status by providing activities, such as Work First services, job search, job training, subsidized employment, job retention, and job enhancement; and encouraging education, including career-advancing education.” *Promoting Responsible Fatherhood Home Page*, U.S. DEPT HEALTH & HUM. SERVICES, <http://fatherhood.hhs.gov> (last visited Aug. 3, 2012). A search of the Department of Health and Human Services (DHHS) website found no comparable motherhood initiatives to address the economic marginality of poor women. Although children of color are disproportionately dependent on their mothers’ income, which is, in turn, lower than their male counterparts across racial groups, the economic plight of poor women of color is all but ignored in these interventions. The alleged gender discrimination in the DHHS fatherhood initiatives drew a complaint from Legal Momentum, arguing that thirteen programs discriminated against women in a matter prohibited by the Fifth Amendment and by Title 9. *See* Legal Momentum & Nat’l Org. for Women, *Class Complaint of Sex Discrimination in Responsible Fatherhood Program in Violation of Title IX*, Submitted to United States Department of Health and Human Services (Mar. 28, 2007), *available at* <http://www.legalmomentum.org/assets/pdfs/regvicomplaint.pdf>.

157. *See* Adriane Quinlan, *Among Those It Would Help, Doubts That a Plan Can Tame Inequality in New York*, N.Y. TIMES, Aug. 4, 2011, <http://www.nytimes.com/2011/08/05/nyregion/black-and-latino-men-in-new-york-question-bloomberg-program.html>. Interestingly, the frame has been expanded to include now “Black and Brown boys,” although the rationale remains firmly fixed within the discourse of Black male crisis. Adding Latino boys to the frame highlights the fact that these initiatives are more ideologically than materially based. The crisis frame has become so wildly rehearsed that in 2007, presidential candidates John Edwards and Hillary Clinton signaled their commitment to eliminating poverty by focusing their comments on boys of color. In fact, on virtually all fronts, research suggests that young Latino men were economically better situated than their female counterparts, and Black young men were better situated than Black young women on seven out of ten comparative factors. LEGAL MOMENTUM, *YOUNG MEN ARE STILL ECONOMICALLY BETTER OFF THAN YOUNG WOMEN* 4, 6 (2008), *available at* <http://www.legalmomentum.org/assets/pdfs/youngwomenbetterthanmen.pdf> (“[A]lthough fewer are high school dropouts and more have college degrees, young women still earn less than young men. The earnings increase associated with their superior educational attainment is more than offset by the earnings decrease associated with their gender. . . . [A]t each level of educational attainment young Hispanic men earn more than young Hispanic women, and young Black men earn more than young Black women.”).

work.<sup>158</sup> At the same time, however, Mayor Bloomberg oversees the most aggressive surveillance and arrest policies in the country,<sup>159</sup> and he has campaigned against the demands to enjoin the policies on behalf of the millions of Black and Latino men who have been stopped and frisked since 2002.<sup>160</sup> Bloomberg has also vowed to stand firm against another lawsuit seeking to open up the city's disproportionately white fire department.<sup>161</sup> Of course, attachment to work requires real work opportunities, a structural feature of the status quo that Mayor Bloomberg could directly impact by cooperating with efforts to open up industries that have been largely closed to Blacks and Latinos. Yet in standing firm against these

- 
158. See DAVID BANKS & ANA OLIVEIRA, YOUNG MEN'S INITIATIVE: REPORT TO THE MAYOR FROM THE CHAIRS 10 (2011), available at [http://www.nyc.gov/html/om/pdf/2011/young\\_mens\\_initiative\\_report.pdf](http://www.nyc.gov/html/om/pdf/2011/young_mens_initiative_report.pdf) (noting that economic recovery in New York City will be incomplete without bringing jobs to Black and Latino boys and giving them a place in the workforce of tomorrow); Quinlan, *supra* note 157; Press Release, City of New York, *supra* note 7; see also Press Release, Open Soc'y Founds., Soros Pledges \$30 Million to Transform the Lives of the Most Vulnerable Black and Latino Boys (Aug. 4, 2011), <http://www.soros.org/press-releases/soros-pledges-30-million-transform-lives-nyc-s-most-vulnerable-black-and-latino-boys> (emphasizing import of targeting school-to-prison pipeline as impediment to success for Black and Latino boys).
159. See, e.g., *Floyd v. City of New York*, No. 08-1034 (S.D.N.Y. May 16, 2012) (holding that safeguarding the right to physical liberty is "quintessentially the role of the judicial branch," and that imposing an injunction on Mayor Bloomberg's stop-and-frisk policy would not be outside of the courts' power); Editorial, *Surveillance, Security and Civil Liberties*, N.Y. TIMES, Mar. 3, 2012, <http://www.nytimes.com/2012/03/04/opinion/sunday/surveillance-security-and-civil-liberties.html>; Al Baker, *Judge Grants Class-Action Status to Stop-and-Frisk Suit*, N.Y. TIMES BLOGS—CITY ROOM (May 16, 2012, 11:23 AM), <http://cityroom.blogs.nytimes.com/2012/05/16/judge-allows-class-action-status-in-stop-and-frisk-lawsuit>; see also *Stop and Frisk Practices*, NYCLU.ORG, <http://www.nyclu.org/issues/racial-justice/stop-and-frisk-practices> (last visited Aug. 12, 2012) (indicating that in 2011, NYPD stopped people 685,724 times, 88 percent of whom were not arrested or ticketed, and 87 percent of whom were Black or Latino).
160. Kate Taylor, *Stop-and-Frisk Policy 'Saves Lives,' Mayor Tells Black Congregation*, N.Y. TIMES, June 10, 2012, <http://www.nytimes.com/2012/06/11/nyregion/at-black-church-in-brooklyn-bloomberg-defends-stop-and-frisk-policy.html> (discussing Mayor Bloomberg's campaign to win support for the policy from Black churches).
161. See *United States v. City of New York*, No. 07-CV-2067 (S.D.N.Y. Oct. 4, 2011) (major reforms were ordered to be taken by the city in order to address the discriminatory practices the Fire Department of New York had employing). Mayor Bloomberg responded to the order by stating that "the judge was not elected to run the city, and you can rest assured that we'll be in court for a long time." Alan Feuer, *Monitor Must Oversee N.Y. Fire Dept. Hiring, Judge Rules*, N.Y. TIMES, Oct. 5, 2011, <http://www.nytimes.com/2011/10/06/nyregion/monitor-must-oversee-ny-fire-dept-hiring-judge-rules.html> (internal quotation marks omitted). The case has since been moved to the U.S. Second Circuit Court of Appeals on appeal by the city. See *id.*; David R. Jones, *Is the U.S. Justice Department Supporting Discrimination by the New York Fire Department?*, HUFFINGTON POST (July 9, 2012, 4:31 PM), [http://www.huffingtonpost.com/david-jones/is-the-us-justice-departm\\_b\\_1647089.html](http://www.huffingtonpost.com/david-jones/is-the-us-justice-departm_b_1647089.html).



lawsuits, Mayor Bloomberg undermines the very outcomes he promises under the rubric of “youth at risk” by reproducing the conditions that constitute the risk.<sup>162</sup>

The subtle erasure of the structural and institutional dimensions of social justice politics has been facilitated in part through the widespread adoption of the “at risk” frames.<sup>163</sup> In singling out Black boys as a uniquely vulnerable population, the frame inadvertently suggests that the structural dimensions of social life in which they and everyone else in their communities are situated are themselves relatively uncontroversial and transparent. Under this frame, the journey from underachievement to jail is preventable not through active lobbying against the carceral state and its many tributaries, but through the embrace of behavioral modifications designed to bring “at risk” individuals into compliance.

The work that such crisis narratives do to normalize retrenchment and deflect attention from the neoliberal project of underprotection and overpolicing is facilitated by intersectional failures within antiracism itself. The exclusion of women and girls from discourses pertaining to the social welfare of the community narrows the field of vision upon which the wider patterns of punishment and social control might be seen and understood.<sup>164</sup> Longstanding rhetorics that framed

162. The connection between race and neoliberalism is explored in DAVID WILSON, *CITIES AND RACE: AMERICA'S NEW BLACK GHETTO* (2007). As David Roberts and Minelle Mahtani describe, Wilson “introduces readers to a cast of characters, such as ‘Welfare Queens’, ‘welfare-hustling men’, and ‘black youth gangbangers’ that Ronald Reagan used to capitalize upon the fears of the country and direct them at the ghetto. In each of these terms, race, specifically blackness, coupled with anti-market behaviors become [sic] intertwined in the construction of the antithesis of the ideal neoliberal citizen in the black ghetto resident. In his analysis, race is mobilized to show that racialized subjectivities are essential in justifying certain impacts of neoliberalization that are experienced disproportionately within racialized communities.” David J. Roberts & Minelle Mahtani, *Neoliberalizing Race, Racing Neoliberalism: Placing “Race” in Neoliberal Discourses*, 42 *ANTIPODE* 248, 249 (2010).

163. As Janine Brodie acknowledges, neoliberalism works through numerous ideological frames, including the frame of at-risk populations:

Other strategies of subordination include: *narrowing* or downsizing and targeting social programs to specific groups that are identified as being at risk; *functionalizing* or redesigning social programs so that they primarily address the needs of neoliberal labour markets rather than personal wellbeing; and *fiscalizing* or transforming social policies that required program planning and service providers into tax credits and deductions, which purportedly allows citizens ‘choice’ in meeting their social needs.

Janine Brodie, *Reforming Social Justice in Neoliberal Times*, 1 *STUD. SOC. JUST.* 93, 101 (2007) (citing John Clarke, *Subordinating the Social? Neo-liberalism and the Remaking of Welfare Capitalism*, 21 *CULTURAL STUD.* 974 (2007)).

164. See Lipsitz, *supra* note 8, at 1751 (“Women of color play a central role in this process because punitive policies directed against impoverished people of color almost always rely on fantasies of gender normativity that locate virtue in heterosexual companionate marriage and intact male-headed nuclear families and see other forms of desire, sexuality, affiliation, and affection as causes of criminality. These fantasies function as explanations and excuses for the intersectional vulnerabilities that

men as uniquely damaged by racism have primed Black communities to endorse neoliberal accounts of social life that subtly shift the focus from historically constituted relations of power to the failures of family formation and gender conformity. As Dorothy Roberts argues:

It's not just [that] the framework doesn't work but in fact the frame that we have is not a structural frame, and one of the reasons it's not a structural frame is that it is wrapped around the identity of the black male patriarch, and as long as we frame some of the consequences in a way they need help or in the ways [that] they have not been able to step up [to] their roles and responsibilities, we are engaged [in] individualistic discourse that fails to deal with the structural reasons for some of these problems.<sup>165</sup>

These failures to address the intersectional particulars of Black women's experience have contributed to the failure to challenge the essentialized relationship between female-headed households and social dysfunction. These intersectional failures have, in turn, primed antiracist discourses to relinquish their broader social justice demands in exchange for crisis-based diversions that are integral to the "pipeline to prison." Rather than foregrounding a demand for deconstructing the pipeline itself, the crisis frame tends to regard Black (and Brown) males as the targets of reform writ large. While this targeted frame appears to embrace the many challenges that they face, the exclusions of women and girls presents male problems as *sui generis*, effectively obscuring the structural dimensions of racial power that shape the circumstances of both boys and girls, and men and women. As such, crisis discourses represent a fundamental shift away from social justice perspectives and a move toward rationalizing the basic structures of social life.<sup>166</sup> Under the crisis logics, men and boys may have to overcome disadvantages, but the source of these disadvantages rests almost entirely within the families and communities in which they exist, not within the broader societal processes that have

---

are actually created by multiple forms of raced and gendered exploitation inscribed inside the routine practices of contemporary capitalism.").

165. Dorothy Roberts, Presentation at UCLA Law Review Volume 59 Symposium, Overpoliced and Underprotected: Women, Race, and Criminalization—Establishing the Framework 40 (Jan. 27, 2012) (transcript on file with author).
166. Keita Takayama, *A Nation at Risk Crosses the Pacific: Transnational Borrowing of the U.S. Crisis Discourse in the Debate on Education Reform in Japan*, 51 COMP. EDUC. REV. 423, 427–28 (2007) (discussing the initial emergence of the crisis discourse in the United States and asserting that "[e]very crisis story line has common characteristics that legitimize a particular way of making sense of a given social condition").

historically structured these relations and that continue to underwrite social surveillance and mass incarceration.<sup>167</sup>

The turn from structural to cultural understandings of inequality leaves the endangerment of women and girls unrecognized and underresearched. More broadly, these absences have fueled unsupported assumptions that racial inequality has either bypassed women and girls or that their inequalities are wholly dependent on and collateral to the racial inequalities facing men and boys.

Similar to the disappointing contestation within feminism over mandatory arrest, the surrender to the logic of neoliberalism represented by the crisis frame has been facilitated by longstanding failures in intersectional thinking that were apparent in intracommunal discourses about violence against women.<sup>168</sup> The male-centric approaches that traditionally informed the responses to domestic violence and sexual abuse have continued to shape these and other intraracial issues within Black community discourse.<sup>169</sup> Efforts to broaden the scope of antiracism to include how Black women's lives are impacted by issues such as violence and economic marginality have frequently been reined in by an antiracist politic that prioritized Black men's vulnerability as representative of the community as a whole.

The "crisis" discourses that have replaced structural and institutional understandings of racial inequality are not only compatible with ideological justifications for surveillance and punishment; they have also facilitated an important

---

167. *Id.*

168. See Roberts, *supra* note 8, at 1488–89. As recognized by feminist and antiracist political scientists, neoliberal doctrine has had profound effects on women and persons of color. For example, as noted by David Goldberg, neoliberalism's elevation of the privatization of "property, revenue generation, utilities, services, and social support systems, . . . shifting the traditional caretaking functions of the modern state . . . [has] bifurcated experiences of social goods"—in many crucial instances along the lines of gender, race, or both. DAVID THEO GOLDBERG, THE THREAT OF RACE: REFLECTIONS ON RACIAL NEOLIBERALISM 332 (2009); see also ANNA MARIE SMITH, WELFARE REFORM AND SEXUAL REGULATION 33 n.64 (2007).

169. This is particularly notable in the context of violence and sexualized racism. See, e.g., Crenshaw, *supra* note 15, at 1256 (describing how Black women's experience of domestic violence and sexual assault is frequently suppressed out of concerns that such acknowledgment constitutes dirty laundry that will reinforce racist stereotypes of African American men). Particularly resonant here, for example, are traditional critiques of sexual violence and racism that focus almost exclusively on the disproportionate conviction of Black defendants in interracial cases. Falling far outside this focus has been Black women's experience, namely, the fact that Black women are least likely to see their assailants prosecuted and convicted. Some have gone so far as to argue that violence against Black women is justified as a disciplinary measure to keep them in check. *Id.* at 1254 (discussing controversial author Shahrzad Ali arguing that Black women have been damaged by racism's undermining of traditional male authority, and thus physical punishment is an acceptable option for men seeking to reestablish control).

shift in the grammar of racial justice.<sup>170</sup> Indicative of the marginalization of women in contemporary policy discourses is the fact that to speak about Blackness in the context of racial power is virtually coextensive with speaking about Black men. “Endangered species” has come to replace racialized communities, while the term “racism” has been nudged out by the softer sounding indictment of “lack of achievement.”<sup>171</sup> The problem of segregated and underresourced schools of the *Brown* era has been replaced by “the soft bigotry of low expectations.”<sup>172</sup> Institutions that were once the target of widespread critique and reformist energy, such as unresponsive representatives, overvigilant police, and inaccessible employment markets, have been pushed aside as benchmarks of oppression, replaced by the family not only as the site of reform but as ground zero of racial disparity. Under the crisis rationale, Black men and boys are endangered not by a society that has resisted the full demands of racial equity over the course of centuries, but by mothers and families left undisciplined by would-be husbands and absent fathers. The pathologies attributed to Black family formation in the Moynihan controversy have resurfaced in the narratives of *jail or death* for African American men.<sup>173</sup> Central to the mainstream discourses on endangerment is the home—where women rule, boys flounder, and responsibility is crushed. Efforts to address economic inequality, housing segregation, and crumbling urban infrastructures that entrap both men and women have given way to unitary efforts to resuscitate the nuclear

---

170. As Dorothy Roberts notes, the critique of the dominant frame is not to deny that there is indeed a crisis with respect to mass incarceration. Instead, “the idea is, to the extent that we do understand mass incarceration being a crisis in our community (and I think we all do), it is important that we understand it has gender dimensions, and those gender dimensions are not only not being addressed, but the failure to address them actually exacerbates those gender dimensions. So, basically, just a straightforward plea to just say [that] this is what our interest is and it should be and we need to be far more inclusive and critical [of s]ome of the frames that make it more difficult to do the work.” Roberts, *supra* note 165, at 40–41.

171. See Jaekyung Lee, *Racial and Ethnic Achievement Gap Trends: Reversing the Progress Toward Equity?*, 31 EDUC. RESEARCHER 3 (2002) (discussing the reasons that may have contributed to the widening of the achievement gap since the 1980s, but not referencing once the potential impact of declining resources and increasingly segregated education); Robert Rothman, *Closing the Achievement Gap: How Schools Are Making It Happen*, 5 J. ANNENBERG CHALLENGE, Winter 2001/02, at 1, 6 (discussing the achievement gap and the “soft bigotry of low expectations” language used by President Bush in regards to education).

172. See *supra* note 171 and accompanying text.

173. MOYNIHAN, *supra* note 137; see, e.g., Marc Mauer, *The Crisis of the Young African American Male and the Criminal Justice System*, in IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY 199 (Othello Harris & R. Robin Miller eds., 2003) (discussing the reemergence of Moynihan-esque narratives). For a searing critique of the reemergence of the Moynihan-esque thesis in public policy, see NIKOL G. ALEXANDER-FLOYD, *The Black Cultural Pathology Paradigm and George Bush's Faith-Based and Fatherhood Initiatives*, in ALEXANDER-FLOYD, *supra* note 135, at 75.

family.<sup>174</sup> This exclusive focus on the personal development of young men and boys, replete with its promise of building healthy communities, addresses the crisis of mass incarceration and social insecurity with the hope that, with a man in every household, the native sons will straighten up and fly right.<sup>175</sup>

The crisis-based focus on the family brings antiracist advocacy into the neoliberal agenda in the same way that domestic violence advocates became role players in the wider criminalization agenda that helped deradicalize antiviolence mobilization. Intersectional failures to incorporate the specific interests of women into antiracism undermined the development of a feminist articulation of antiracism and set the stage for a resurgence of agendas rooted in a defense of patriarchy. A greater degree of intersectional literacy among advocates and stakeholders would certainly have grounded a more inclusive political vision that addresses the plight of women and girls and resists the ideological frames that underwrite punitive social policies. Social justice politics that focus on equitable life chances for racially marginalized men as well as women would better equip advocates to challenge punitive logics that justify inequality on the basis of characteristics such as gender or marital status. A broader politics worthy of the legacy of social justice movements that we inherit is one that remains vigilant in the face of efforts to peel apart similarly situated members of distressed communities on the basis of greater desert or moral worth.

Healthy lives and equitable outcomes are objectives that should not be subject to trickle-down politics; nor should the heavy weight of social surveillance and incarceration be engaged primarily through ideological submission to inequitable social relations. Struggles against social control and mass incarceration should be animated by both antiracist and feminist sensibilities that ensure that peace and economic security need not be limited to those who adopt heteronormative family formations. Premised on the fundamental recognition that historical disparities exacerbated by the retraction of resources cannot be managed by the state's nightstick, feminist and antiracist advocacy should highlight and contest the logics of neoliberalism that naturalize punishment and that reserve the good life for the right kind of people.

---

174. See, e.g., Frank F. Furstenberg, *If Moynihan Had Only Known: Race, Class, and Family Change in the Late Twentieth Century*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 94 (2009) (discussing pseudo-revivalist attempts at pushing for the return to the nuclear family akin to those proffered by Moynihan).

175. See Steven L. Nock, *Marriage and Fatherhood in the Lives of African American Men*, in BLACK FATHERS IN CONTEMPORARY AMERICAN SOCIETY: STRENGTHS, WEAKNESSES, AND STRATEGIES FOR CHANGE 30 (Obie Clayton, Ronald B. Mincy & David Blankenhorn eds., 2006).

## CONCLUSION

The various gendered dimensions of racial retrenchment have continued to exact tragic consequences for racially marginalized women and their families. The articles in this symposium repeat and expand the dynamics that underscore the dramatic growth of punishment in women's lives. From their encounters within systems ranging from housing to employment, from juvenile justice to foster care, and from criminal justice to immigration, gender and class correspond with a host of vulnerabilities that fuel this explosion and that authorize some of its most debilitating consequences. As these narratives reveal, despite the dominant frames through which mass incarceration is understood and contested, the social construction of deviant publics is not exclusively gendered as male. To the contrary, the many permissions to incarcerate and punish large populations of men, women, and children are generated through broad constructions of deviance that gain traction through the representation of stigmatized women of color.<sup>176</sup>

In tracing the genealogy of a few ideological contestations within the corpus of antiracist and feminist discourse, it is evident that the dynamics that are at play in constructing the underprotection and overpolicing of women of color are far from static. Attending to the connections between earlier mobilizations against violence and the contemporary rhetoric around mass incarceration reveals that intersectional failures from an earlier era become the beachheads upon which retrenchment politics play out in the next. The retrenchment politics underwritten by neoliberal ideology are powerful, yet they are sometimes inadvertently facilitated by feminist and antiracist advocates who concede to apologetic explanations for existing inequalities or who underestimate the consequences of policies that subvert the thrust of the originating demands.

Thus, the relationship between underprotection and overpolicing is not solely a matter of state power but also the consequence of political elisions that have undermined the development of a more robust critique of social control and a more expansive vision of social justice. While the matters addressed in this symposium belie simple solutions, the efforts to attend to the paradoxes of overpolicing and underprotection are fruitfully grounded in and informed by the experiences of women of color.

The current milieu that, in George Lipsitz's words, renders large numbers of people "arrestable, incarcerable, displaceable, and deportable" rests not only on the

---

176. See generally Ron Haskins, *Movnihan Was Right: Now What?*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 281 (2009).

retraction of resources and notions of broad social responsibility.<sup>177</sup> It also is made possible by the presence of certain legitimizing beliefs, many of which pertain to the presumed dysfunction of women in need of discipline. The structural and discursive abandonment of women of color—the normalization of their socioeconomic marginality alongside the renewed fantasies of gender normativity—are key elements sustaining the beliefs that “people with problems are problems.”<sup>178</sup>

As Dorothy Roberts notes, however, until we recognize the centrality of the intersectional entrapment of racially marginalized women and girls with regard to contestations over mass incarceration and social welfare more broadly, the possibilities for building a more coherent politics that links constituencies with shared interests will remain unrealized.

---

177. Lipsitz, *supra* note 8, at 1806.

178. *Id.* at 1761.