

# “In an Avalanche Every Snowflake Pleads Not Guilty”: The Collateral Consequences of Mass Incarceration and Impediments to Women’s Fair Housing Rights



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## ABSTRACT

In our society, individual acts of intentional discrimination function in concert with historically created vulnerabilities; these vulnerabilities are based on disfavored identity categories and amplify each injustice and injury. Although anyone can be a victim of housing discrimination, women of color suffer distinct collateral injuries from barriers to housing that are collective and cumulative in nature. At the intersections of race and gender, the welfare and dignity of black women and Latinas are undermined by the national failure to enforce fair housing and fair employment laws, by the concentration of poverty in neighborhoods inhabited largely by blacks and Latinos, by the criminalization of poverty, by the proliferation of punishments inside the criminal justice system, and by the expansion of the collateral consequences of arrests and criminal convictions in society at large. Produced by a plethora of public policies and private actions, these injuries entail more than denials of rights and resources to individuals. They evidence the existence and extent of a concentrated political attack on communities of color. Women play a central role in these practices because punitive policies are almost always legitimated by allegations of nonnormative behavior by poor people and people of color, allegations that occlude the actual intersectional vulnerabilities created by multiple forms of raced and gendered exploitation inscribed inside the routine practices of contemporary capitalism. This Article delineates how housing and employment discrimination combine to make black women and Latinas particularly vulnerable to surveillance, arrest, and incarceration. It shows how race and gender discrimination make reentry into society especially difficult for women ex-offenders from aggrieved communities of color. It establishes the historical causes and consequences of moral panics about the putative misbehavior of women of color, and it concludes by proposing a combination of litigation, legislation, and social mobilization to address the execrable consequences of intersectional discrimination and mass incarceration.

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## INTRODUCTION

The women of color who are locked up in jails and prisons today come largely from communities that have been locked out of economic and social opportunities. Residential segregation impedes their ability to accumulate assets that appreciate and can be passed down to subsequent generations. Employment discrimination and environmental racism work in concert with mass incarceration to augment and exacerbate the locked-in historical advantages that whites receive from the cumulative and continuing consequences of slavery and segregation.<sup>1</sup> Because of race and gender bias directed toward them, women of color have been generally unable to bargain freely over wages and working conditions. Many of them have been forced, however, to bargain over jail time. Prosecutors know that criminal cases involving impoverished defendants almost never come to trial because defendants with limited resources will almost always accept a plea bargain rather than incur the expenses and risks of a trial. As a result, prosecutors exercising broad discretionary powers make decisions about which charges to file and what penalties to request in a context that enables their own race and gender biases to come into play.<sup>2</sup> The combination of discriminatory policing, prosecuting, and sentencing practices that most people of color face makes plea bargaining a logical and affordable response to criminal charges for most defendants. The incarceration that ensues from these bargains, however, entails subsequent collateral consequences that create what amounts to a life sentence for virtually every offense.<sup>3</sup>

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1. See Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45 (2010) [hereinafter Roithmayr, *Racial Cartels*]; Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C.L. REV. 373 (2008) (especially pages 377–79). Roithmayr argues that whiteness functions as a racial cartel. She explains how the histories of restrictive covenants and redlining in housing, of employment discrimination, of voter suppression, and of impediments to asset accumulation by people of color give whites what antitrust law describes as locked-in advantages that prevent new competitors from entering the market even when the practices that made the advantage possible in the first instance are no longer deployed. Roithmayr, *Racial Cartels*, *supra*, at 77–78.
  2. See Stephen B. Bright, *The Failure to Achieve Fairness: Race and Poverty Continue to Influence Who Dies*, 11 U. PA. J. CONST. L. 23, 24 (2008); see also Angela J. Davis, *Incarceration and the Imbalance of Power*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 61, 63–70 (Marc Mauer & Meda Chesney-Lind eds., 2002); Marc Mauer, *Racial Impact Statements as a Means of Reducing Unwarranted Sentencing Disparities*, 5 OHIO ST. J. CRIM. L. 19, 26 (2007).
  3. The overwhelming majority of criminal cases do not come to trial but are resolved through plea bargains. Because the judicial system does not have the resources to handle the volume of cases created by policies like the war on drugs, these plea bargains are a necessity. They lead, however, to massive overcharging in order to induce guilty pleas. In addition, legislators have added so many

These injuries and collateral consequences of mass incarceration—which are discussed in detail in Part II—function in conjunction with housing discrimination to impose distinctly gendered and raced injuries on impoverished women of color. At the intersections of race, gender, and class, the rights, welfare, and dignity of all women of color—but especially of black women and Latinas—are violated egregiously by the national failure to enforce fair housing and fair employment laws.<sup>4</sup> Housing insecurity pushes women of color disproportionately into neighborhoods characterized by criminogenic conditions—conditions that increase their likelihood of becoming ensnared in the criminal justice system. After arrest, conviction, incarceration, and release this vicious cycle continues as women of color then confront additional impediments to securing housing during their reentry into society because of their criminal records.

Yet the 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>5</sup> Municipalities, counties, and states routinely ignore their legal obligations to affirmatively further fair housing.<sup>6</sup> Millions of individual acts of redlining, predatory lending, exclusionary zoning, real estate steering, and refusing to rent or sell to members of targeted groups leave the nation's communities thoroughly segregated.<sup>7</sup> Housing segregation, in turn, promotes the concentration of poverty in neighborhoods inhabited largely by blacks and Latinos, making members of these groups especially vulnerable to the criminalization of poverty, the proliferation of punishments inside the criminal

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collateral consequences to criminal convictions that it is impossible for any defendant to know fully what consequences a guilty plea will bring.

4. Native American and Asian American women also suffer from sexism and racism in both the criminal justice system and the housing market and consequently also experience disproportionate exposure to the criminogenic consequences of concentrated poverty. The pervasiveness and scale of hypersegregation in black and Latino/a communities are such, however, that these groups are affected more thoroughly by these dynamics and thus they are the focus of this Article. Of course, nothing in this Article should be construed to mean that any form of racial discrimination or subordination is acceptable.
5. See Shanna L. Smith & Cathy Cloud, *Welcome to the Neighborhood? The Persistence of Discrimination and Segregation*, in *THE INTEGRATION DEBATE: COMPETING FUTURES FOR AMERICAN CITIES* 9, 13–18 (Chester Hartman & Gregory D. Squires eds., 2010).
6. See, e.g., Justin D. Cummins, *Housing Matters: Why Our Communities Must Have Affordable Housing*, 28 WM. MITCHELL L. REV. 197, 205–11 (2001); see also Michael P. Seng & F. Willis Caruso, *Achieving Integration Through Private Litigation*, in *THE INTEGRATION DEBATE*, *supra* note 5, at 53, 62.
7. See Smith & Cloud, *supra* note 5, at 13–18.

justice system, and the expansion of the collateral consequences of arrests and criminal convictions for ex-offenders, their families, and their communities.<sup>8</sup>

Produced by a plethora of public policies and private actions, these injuries entail more than denials of rights and resources to individuals. They evidence the existence and extent of a concentrated political and legal attack on communities of color. During the past three decades, the political system and the law have been dominated by a continuous repudiation of the egalitarian and democratic race-based reforms of the civil rights era and by a restrictive version of antidiscrimination law designed not to redress present wrongs but to see that these wrongs do not interrupt the smooth functioning of society. In this era of repudiation, even when clear cases of injustice come to the courts, means of redress are limited to those actions that do not disturb the interests and settled expectations of whites. As Kimberlé Crenshaw argues, under this system “[t]he innocence of whites weighs more heavily than do either the past wrongs committed upon blacks or the benefits that whites derived from those wrongs.”<sup>9</sup> In addition, judicial rulings that make it more difficult for defendants to obtain competent counsel and to appeal cases,<sup>10</sup> decisions that set higher standards for claims of disparate impact in civil rights litigation,<sup>11</sup> and the continuing erosion of judicial commitment to desegregation and affirmative action provide protective cover for the power and privileges of whiteness.<sup>12</sup> 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

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8. See DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL 111–12, 192–95 (2007).

9. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in CRITICAL RACE THEORY 103, 105 (Kimberlé Crenshaw et al. eds., 1995).

10. See, e.g., *Phan v. State*, 699 S.E.2d 9 (Ga. 2010); Stephen B. Bright, *Death in Texas*, CHAMPION, July 1999, at 2. For the ways in which aggressive prosecuting of petty crimes forms part of a political attack on aggrieved communities of color, see Clyde Woods, *Les Misérables of New Orleans: Trap Economics and the Asset Stripping Blues, Part 1*, 61 AM. Q. 769 (2009). Indigent defendants have the right to be represented by counsel, but overburdened public defenders offices and lawyers conscripted by county bar associations or selected on the basis of having submitted the lowest bid rarely have the expert knowledge, investigative resources, or time needed to do their jobs adequately. As the Southern Center for Human rights declares, it is usually “better to be rich and guilty than to be poor and innocent.” *Right to Counsel*, S. CENTER FOR HUM. RTS., <http://www.schr.org/counsel> (last visited June 21, 2012); see also CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, THE REPORT OF THE NATIONAL RIGHT TO COUNSEL COMMITTEE (2009), available at <http://www.constitutionproject.org/pdf/139.pdf>.

11. See *Alexander v. Sandoval*, 532 U.S. 275 (2011).

12. See *Parents Involved in Cmty. Sch. vs. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

also work systematically to subject communities of color to degrees of surveillance and punishment that are virtually absent from neighborhoods inhabited mostly by whites.<sup>13</sup>

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 are actually created by multiple forms of raced and gendered exploitation inscribed inside the routine practices of contemporary capitalism.<sup>14</sup>

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.<sup>15</sup> In describing the many interrelated ways that housing discrimination shapes and reflects broader patterns of social stratification and subordination, National Fair Housing Alliance president and chief executive officer Shanna L. Smith often quotes Stanislaus Lec's witticism that "in an avalanche

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13. See Mauer, *supra* note 2, at 28–31.

14. See generally TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2006); THE INTEGRATION DEBATE, *supra* note 5. Attacks on the putative nonnormative behavior of women of color confuse cause and consequence. Low wages and impediments to asset accumulation impede family formation. Punitive welfare policies designed to stigmatize one-parent families compel poor women to work outside the home, which makes them vulnerable to charges of child neglect. In addition, many behaviors condemned as nonnormative are actually fully functional and rational ways of coping with poverty. See generally KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011), ELAINE BELL KAPLAN, NOT OUR KIND OF GIRL: UNRAVELING THE MYTHS OF BLACK TEENAGE MOTHERHOOD (1997); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1998).

15. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (discussing how ignoring the intersection of racism and sexism creates a distorted analysis of both); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (explaining that the failure to consider intersectional identities such as women of color causes women of color to be marginalized within discourses shaped primarily to respond to gender and discourses primarily shaped to respond to race).

every snowflake pleads not guilty.”<sup>16</sup> In our society, individual acts of intentional discrimination function in concert with historically created cumulative vulnerabilities based on disfavored identity categories—vulnerabilities that amplify and exacerbate each individual injustice and injury. Women of color are primary victims of this dynamic. 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.<sup>17</sup> The traditional perspective of civil rights law encourages us to treat the insults and injuries that women of color confront as if they were all intentional, individual, and isolated acts as different from one another as the shapes of individual snowflakes. Yet in reality, racism, sexism, classism, and criminalization are collective, cumulative, and continuous—as powerful in concert as an avalanche.

The massive increase in the number of people that have been imprisoned in the United States over the past three decades did not take place because of increases in crime. State spending on corrections tripled between 1980 and 2008, starting at a time when crime had already started to decrease because of demographic forces.<sup>18</sup> The disproportionate number of people of color in prisons and jails does not stem from disproportionate levels of criminal behavior. The incarcerated population was 70 percent white and 30 percent nonwhite in 1950 and is now 70 percent nonwhite and 30 percent white.<sup>19</sup> But there has been no change in the rates of criminality between the groups.<sup>20</sup> Instead, residential segregation combined with new forms of racially differentiated policing, charging, and sentencing accounts for the disparate impact of mass incarceration on aggrieved racialized communities and individuals.

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16. Shanna L. Smith, Keynote Address at the Fair Housing and Public Policy Conference (Apr. 5, 2008).

17. Women head 71 percent of all single-parent households and 85 percent of single-parent homeless families. INT’L WOMEN’S HUMAN RIGHTS CLINIC, CITY UNIV. OF N.Y. SCH. OF LAW, A GENDERED PERSPECTIVE ON THE RIGHT TO HOUSING IN THE UNITED STATES 16 (2009), available at <http://www.law.cuny.edu/clinics/clinicalofferings/IWHRC/research/GenderedHousingPerspective.pdf>.

18. See Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95, 97 (2001). Ruth Wilson Gilmore demonstrates that crime rates had already started to decline, largely because of demographic reasons, before political figures began their push for mass incarceration. See GILMORE, *supra* note 14, at 95. In *Locked Out*, Jeff Manza and Christopher Uggen demonstrate that crime rates were in clear decline by 1972. JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 97–100 (2008).

19. Wacquant, *supra* note 18, at 96.

20. *Id.*

Politics rather than crime fighting stand behind the mass incarceration of people of color. The civil rights and freedom movements of the mid-twentieth century won victories that increased both the numbers of rights-bearing citizens and the range of rights that the state was obligated to protect. Yet, as has been the case many times in U.S. history when political mobilizations created expanded access to rights, a revanchist counterrevolution emerged to roll back these gains by using the pretext of fighting crime to create new categories of people without rights.

The incarceration of women of color today is partially caused and powerfully complicated by the housing discrimination that concentrates the dwellings of black women and Latinas in impoverished neighborhoods that lack employment opportunities. Criminal records and histories of incarceration produce additional forms of economic and social exclusion for already-marginalized women of color. Black women and Latinas not only compose a disproportionate percentage of the total number of incarcerated women, but their criminalization and demonization as people with nonnormative gender roles contribute crucially to the concerted political attack on communities of color more broadly. 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.

Part I of this Article delineates how housing and employment discrimination combine to make black women and Latinas particularly vulnerable to surveillance, arrest, and incarceration. Part II shows how race and gender discrimination make reentry into society especially difficult for ex-offenders, and in particular women, from aggrieved communities of color. Part III delineates the ways in which reentry issues have special salience for black women and Latinas. Parts IV and V establish the historical causes and consequences of moral panics about the putative misbehavior of women of color. Parts VI and VII conclude by proposing a combination of litigation, legislation, and social mobilization to address the execrable consequences of intersectional discrimination and mass incarceration.

## I. HOUSING DISCRIMINATION AND MASS INCARCERATION

Housing discrimination limits people of color to an artificially constrained sector of the housing market, compelling them to pay higher prices for inferior

residences.<sup>21</sup> Residential segregation impedes asset accumulation.<sup>22</sup> It confines young people of color largely to schools that are underfunded because the areas in which they live lack the property tax base required to support education adequately.<sup>23</sup> Students who attend second-class schools are ill prepared to compete in the job market, a market which is already artificially limited because of discriminatory hiring practices.<sup>24</sup> Automation, capital flight, economic restructuring, and the shredding of the social safety net have led to increased polarization of wealth by class and race and to the geographic concentration of poverty.<sup>25</sup> As sociologist Douglas S. Massey argues, not only have the numbers of poor people increased over the past three decades, but the general social effects of increasing poverty are concentrated disproportionately in areas inhabited by people of color.<sup>26</sup>

Massey identifies residential segregation as the single most important factor in the concentration of poverty.<sup>27</sup> The fatal couplings of race and place deny ghetto and barrio residents access to the kinds of social networks that are crucial for spreading information about available jobs. Segregated and impoverished inner city neighborhoods are also generally physically distant from sites of employment and disconnected from affordable and efficient means of transportation to the places where jobs are plentiful.<sup>28</sup> The systematic disinvestment that

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21. See GREGORY D. SQUIRES & CHARIS E. KUBRIN, PRIVILEGED PLACES: RACE, RESIDENCE, AND THE STRUCTURE OF OPPORTUNITY 9 (2006); Chenoa Flippen, *Unequal Returns to Housing Investments? A Study of Real Housing Appreciation Among Black, White, and Hispanic Households*, 82 SOC. FORCES 1523 (2004). Flippen demonstrates that black homeowners pay higher prices than whites for homes that are worth less and appreciate more slowly. In addition, elderly black homeowners often see their property depreciate in value because of the cumulative consequences of housing segregation.
  22. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 136–37 (1995).
  23. See THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 11–12 (2004).
  24. See MERCER L. SULLIVAN, “GETTING PAID”: YOUTH CRIME AND WORK IN THE INNER CITY (1989); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003). Pager shows that ex-offenders are one-third to one-half less likely to be considered for employment than applicants without a criminal record, but that white men *with* criminal records were more likely to get callbacks than black men *without* criminal records. Sullivan shows that in addition to direct discrimination, blacks suffer from the fact that most jobs are secured through word of mouth networks from which blacks are generally excluded.
  25. See MASSEY, *supra* note 8, at 192–95.
  26. *See id.*
  27. *Id.*
  28. Urban highway, rail, and bus transportation schemes contribute to the isolation of blacks and Latinos from employment centers and civic amenities. Housing segregation and transit racism increase joblessness in minority neighborhoods. For evidence about how residential segregation shapes employment opportunities, see Stephen Raphael, *The Spatial Mismatch Hypothesis and Black Youth Joblessness: Evidence From the San Francisco Bay Area*, 43 J. URBAN ECON. 79 (1998). For evidence

comes as a consequence of segregation and concentrated poverty in areas inhabited by minorities produces many factors strongly associated with the likelihood of incarceration. These so-called criminogenic conditions include the following: high levels of unemployment and underemployment; wages that are inadequate for subsistence; aggressive and punitive policing; and the presence of underground economies fueled by spending on drugs, gambling, and prostitution.<sup>29</sup> In this way, racial and gender discrimination in housing parallels racial and gender discrimination in employment, with each axis of exclusion exacerbating and magnifying the injuries of the other.

The women of color serving time in prisons and jails today have been convicted of crimes, but they are also victims of repeated violations of the law by respectable citizens who never have to answer for their illegal actions. Individual acts of direct discrimination in employment and housing produce collective vulnerabilities that skew opportunities and life chances along axes of race and gender. Employers who refuse to hire or promote workers because of their race or gender are violating the Civil Rights Act of 1964.<sup>30</sup> Municipal officials who fail to take action to affirmatively further fair housing in their communities, real estate agents who steer home seekers of different races to different neighborhoods, and mortgage lenders and insurance agents who redline communities of color and market inferior financial products to women in those communities are violating the Fair Housing Act of 1968.<sup>31</sup> These violations of the law go largely unprosecuted and unpunished.<sup>32</sup> When civil rights laws are not enforced, whites derive unfair gains and unjust enrichments because they profit from the high prices they

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about the spatial contours of employment and educational opportunities in Los Angeles, Atlanta, and New Orleans, see HIGHWAY ROBBERY: TRANSPORTATION RACISM & NEW ROUTES TO EQUITY (Robert Bullard, Glenn S. Johnson & Angel O. Torres eds., 2004).

29. See generally KEVIN J. MUMFORD, INTERZONES: BLACK/WHITE SEX DISTRICTS IN CHICAGO AND NEW YORK IN THE EARLY TWENTIETH CENTURY (1997); NAYAN SHAH, CONTAGIOUS DIVIDES: EPIDEMICS AND RACE IN SAN FRANCISCO'S CHINATOWN (2001); Rodney Stark, *Deviant Places: A Theory of the Ecology of Crime*, 25 CRIMINOLOGY 893 (1987). Shah reveals how city officials in San Francisco used selective policing and zoning practices to concentrate sites of prostitution, gambling, and drug use in Chinese neighborhoods. SHAH, *supra*, at 23, 45–76, 105–19. These practices enabled white men to betray their marital partners and squander family resources in places inaccessible to the surveillance of white women. Moreover, even though the overwhelming majority of customers at vice establishments were white, vice itself became racialized and attributed to the nonnormative values of the Chinese themselves. Shah demonstrates that vice sites were more integrated than neighborhoods, a finding replicated in Mumford's study of prostitution and after-hours cabarets in New York. Sites established to support the illicit behavior of white heterosexual men became demonized as sites of interracial queer sociality.
30. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2 (2006).
31. Fair Housing Act § 804, 42 U.S.C. § 3604.
32. See Smith & Cloud, *supra* note 5, at 15.

can charge to home seekers of color who are forced to buy or rent in a constrained market, from the favored rates and increased equity that comes from owning property in areas graced by amenities, and from their disproportionate access to the tax breaks that subsidize home ownership. Perpetrators of discrimination very rarely receive the civil or criminal penalties that are supposed to be meted out for violations of these laws even though discrimination enacts enormous harm on individuals and on society.<sup>33</sup>

Moreover, violations of fair housing laws are crimes that create other crimes: They help produce the criminogenic conditions that put poor people of color on the path to prison. Residents of different neighborhoods created in part by steering and discriminatory segregation, for example, experience very different levels of surveillance and are administered very different kinds of justice. Part of this vulnerability stems from the criminal justice system's racially skewed practices of policing, charging, and sentencing. Prosecutors exercise enormous amounts of discretion in deciding which defendants to charge with crimes and how severe the charges will be.<sup>34</sup> No system of public accountability protects suspects from race or gender bias in these decisions unless prosecutors openly admit racist or sexist intentions.<sup>35</sup> Whites can secure precharge dismissals for the same conduct for which blacks and Latinos are charged with crimes.<sup>36</sup> Whites can be charged with simple possession of a controlled substance for carrying the same amount of drugs that produce charges of possession with intent to distribute against people of color. Crimes against victims who are white can generate more serious charges than crimes against victims who are not white.<sup>37</sup> People convicted of drug-related crimes in suburban, predominantly white neighborhoods generally receive probation and diversion into rehabilitation programs for the same conduct that leads to incarceration for the black, or other minority, residents of the inner city.<sup>38</sup> This means that white youths are placed on probation while young blacks are sent to detention facilities.<sup>39</sup>

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33. See George Lipsitz & Melvin L. Oliver, *Integration, Segregation, and the Racial Wealth Gap*, in *THE INTEGRATION DEBATE*, *supra* note 5, at 153; Smith & Cloud, *supra* note 5, at 15.

34. On prosecutorial discretion, see MICHELLE ALEXANDER, *THE NEW JIM CROW* 85–87, 112–20 (2010).

35. On lack of prosecutor accountability, see Davis, *supra* note 2, at 66.

36. On precharge dismissals, see *id.* at 63–65.

37. See ALEXANDER, *supra* note 34, at 85–75, 112–120.

38. See *id.* at 184.

39. Between 2002 and 2004, African Americans composed 16 percent of the youth population of the United States but 28 percent of juvenile arrests, 30 percent of the referrals to juvenile courts, 37 percent of the detained population, and 58 percent of young people placed in state adult prisons. NAT'L COUNCIL ON CRIME & DELINQUENCY, *AND JUSTICE FOR SOME: DIFFERENTIAL*

This double standard of law enforcement is exacerbated when people of color are also disadvantaged by extreme poverty—another outcome of housing discrimination. For example, recipients of general assistance stipends and people who are homeless receive differentially harsh treatment from the criminal justice system, especially when they are people of color. State legislatures in Florida and Georgia have mandated drug testing for welfare recipients but not for recipients of student loans, property tax abatements, or state funded construction contracts. In Florida, testing revealed that only 108 people amounting to 2.6 percent of those tested had illegal narcotics (usually marijuana) in their bodies. The state spent \$118,140 to conduct the tests, an amount \$45,780 more than would have been paid out in benefits to recipients who did not pass the test.<sup>40</sup> The testing did not reduce the number of applicants for temporary assistance to needy families. Yet political leaders in other states vowed to introduce legislation based on the Florida model. Evidently, the recreational satisfaction of policing the poor is so great that it can be deployed even in cases where it loses money for the state and fails to produce the outcomes predicted for it.<sup>41</sup> In a case that originated in responses to punitive policies directed against welfare recipients in Michigan, *Marchwinski v. Howard*,<sup>42</sup> the Sixth Circuit Court of Appeals ruled that people on welfare do not have the same rights to privacy as other citizens. In an en banc hearing the judges of the Sixth Circuit were split on the constitutionality of the drug-testing program so the district court's restraining order against the program remained in force.<sup>43</sup> Yet as in Florida, legislators' zeal to blame and shame the poor with mandatory drug testing remained undiminished.

People who are homeless are constantly victims of discriminatory law enforcement. Police surveillance and harassment of homeless people in the Skid Row section of Los Angeles (where two-thirds of the inhabitants are black in a city where blacks are less than 10 percent of the population), for example, produces thousands of citations and arrests for conduct—like jaywalking, sitting on the sidewalk, or holding an open beverage container<sup>44</sup>—that would not provoke

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TREATMENT OF YOUTH OF COLOR IN THE JUSTICE SYSTEM 3 (2007), available at [http://www.nccdglobal.org/sites/default/files/publication\\_pdf/justice-for-some.pdf](http://www.nccdglobal.org/sites/default/files/publication_pdf/justice-for-some.pdf).

40. See Lizette Alvarez, *No Savings Are Found From Welfare Drug Tests*, N.Y. TIMES, Apr. 17, 2012, <http://www.nytimes.com/2012/04/18/us/no-savings-found-in-florida-welfare-drug-tests.html>.

41. *Id.*

42. 309 F.3d 330 (6th Cir. 2002), *vacated*, 319 F.3d 258 (6th Cir. 2003).

43. *Id.* at 334–35; see GUSTAFSON, *supra* note 14, at 59–60.

44. See L.A. CMTY. ACTION NETWORK, COMMUNITY-BASED HUMAN RIGHTS ASSESSMENT: SKID ROW'S SAFER CITIES INITIATIVE 1 (2010).

police action in more affluent white areas.<sup>45</sup> These actions use the pretext of law enforcement to wage a war of attrition designed to make the everyday lives of homeless people of color so miserable that they will leave the area. They create anarchy in the lives of poor people in the name of order, similar to the harassment of immigrants promoted by laws S.B. 1070<sup>46</sup> in Arizona and H.B. 56<sup>47</sup> in Alabama.<sup>48</sup> In the ultimate consequence, they are funnels that contribute to the mass incarceration of poor people of color.

The state also specifically singles out impoverished women, and especially women of color, for draconian forms of surveillance and punishment, many of which are magnified by housing insecurity that is created by discrimination. It prosecutes them for exposing a fetus to controlled substances.<sup>49</sup> It pressures them to accept sterilization and threatens them constantly with curtailment of parental rights.<sup>50</sup> Further, some states criminalize poverty by defining the inability to provide shelter for children as neglect.<sup>51</sup> Such a finding can lead homeless parents to lose custody of their children and have the children forcefully removed from them.<sup>52</sup> Children of homeless parents also have a higher likelihood of entering foster homes. Twelve percent of homeless children end up in foster homes compared to 1 percent of children whose parents are not homeless.<sup>53</sup> This contributes to a vicious cycle because placement in the foster care system as a child

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45. ALEXANDER, *supra* note 34, at 121–22.

46. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

47. H.B. 56, 2011 Leg., 2011 Reg. Sess. (Ala. 2011).

48. See Jordan T. Camp & Christina Heatherton, *What You Need to Know About Special Order 11: An Interview With Hamid Khan*, in FREEDOM NOW! 74, 76 (Jordan T. Camp & Christina Heatherton eds., 2012).

49. Pregnant, impoverished women of color are most likely to be prosecuted for this offense. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality and the Right of Privacy*, 104 HARV. L. REV. 1419, 1432–36 (1991).

50. See INT'L WOMEN'S HUMAN RIGHTS CLINIC, CITY UNIV. OF N.Y. SCH. OF LAW, *supra* note 17, at 7.

51. See Marian Wright Edelman & Lisa Mihaly, *Homeless Families and the Housing Crisis in the United States*, 11 CHILD. & YOUTH SERVICES REV. 91, 98 (1989). See generally Dee Wilson & William Horner, *Chronic Child Neglect: Needed Developments in Theory and Practice*, 86 FAMILIES SOC'Y 471 (2005) (analyzing the causes of chronic child neglect and advocating for a better understanding of child neglect in order to develop more effective interventions).

52. See Edelman & Mihaly, *supra* note 51, at 98; cf. Irving Piliavin et al., *The Duration of Homeless Careers: An Exploratory Study*, 67 SOC. SERVICE REV. 576 (1993); Robert Rosenheck & Alan Fontana, *A Model of Homelessness Among Male Veterans of the Vietnam War Generation*, 151 AM. J. PSYCHIATRY 421 (1994). The studies by Piliavin et al. and by Rosenheck and Fontana reveal correlations between foster care and homelessness.

53. NAT'L CTR. ON FAMILY HOMELESSNESS, HOMELESS CHILDREN: AMERICA'S NEW OUTCASTS 3 (n.d.), available at <http://www.ucdenver.edu/Academics/Colleges/Architecture/Planning/discover/centers/CYE/Publications/Documents/outcasts.pdf>.

increases the likelihood of adult homelessness.<sup>54</sup> The disruptions of family and social networks produced by these policies weaken the emotional ecosystems of aggrieved communities of color and make individuals more likely to experience incarceration eventually as a result. Although foster care can be an improvement for some individuals, communities lose the shared knowledge, mutual recognition, and counseling and support networks necessary for helping members cope with poverty and deprivation. Even under the best of circumstances, foster care cannot provide young people with the levels of personal and collective stability that would follow from full employment, high wages, adequate health care, and neighborhood stability. Because placement in foster care is a predictor of adult homelessness, the system also functions to transmit deprivation from one generation to the next.

Furthermore, systematic discrimination in housing impedes its victims' access to educational and employment opportunities while increasing their exposure to health hazards and the criminogenic consequences of poverty, transience, and disorder.<sup>55</sup> Housing segregation is a key contributor to the concentration of poverty in minority communities.<sup>56</sup> Poor people who are white are rarely surrounded only by other poor people, but the overwhelming majority of impoverished blacks and Latinos live in areas of concentrated disadvantage.<sup>57</sup> In Washington D.C., for example, the percentage of poor black people living in high-poverty neighborhoods is more than twelve times higher than the percentage of nonblack poor people who dwell in areas of concentrated poverty.<sup>58</sup> This concentration of poverty often leads to adverse health consequences. Impoverished black children are

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54. See INT'L WOMEN'S HUMAN RIGHTS CLINIC, CITY UNIV. OF N.Y. SCH. OF LAW, *supra* note 17, at 40; Richard P. Barth, *On Their Own: The Experiences of Youth After Foster Care*, 7 CHILD & ADOLESCENT SOC. WORK 419, 430 (1990); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012).

55. See GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS* 8–10, 33 (rev. ed. 2006); SHAPIRO, *supra* note 23, at 155–82; SULLIVAN, *supra* note 24, at 24–25, 29–105.

56. See PAUL A. JARGOWSKY, *POVERTY AND PLACE* 139–43 (1997); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 7–13 (1993); Chester Hartman & Gregory D. Squires, *Integration Exhaustion, Race Fatigue, and the American Dream*, in *THE INTEGRATION DEBATE*, *supra* note 5, at 1. Hartman and Squires draw on studies that show that nearly a third of poor blacks lived in high poverty neighborhoods in 1990 but that only one in twenty whites lived in areas with similar levels of deprivation. *Id.* at 4.

57. See MASSEY, *supra* note 8, at 192–95; Dolores Acevedo-Garcia & Theresa L. Osypuk, *Impacts of Housing and Neighborhoods on Health: Pathways, Racial/Ethnic Disparities, and Policy Directions*, in *SEGREGATION: THE RISING COSTS FOR AMERICA* 197, 208 (James H. Carr & Nandinee K. Kutty eds., 2008).

58. Acevedo-Garcia & Osypuk, *supra* note 57, at 197.

two to three times more likely to have toxic levels of lead in their bloodstreams than poor white children.<sup>59</sup>

Segregated neighborhoods also set the stage for moral panics about the perceived lawlessness of poor people of color. Police officers who generally do not live in these neighborhoods function in them as agents of a hostile occupying force.<sup>60</sup> Police supervisors and prosecutors in the midst of moral panics about crime know that they can inflate their numbers of arrests and convictions by targeting impoverished people of color because they are less likely to be represented by private counsel and more likely to be represented by overworked and underpaid public defenders.<sup>61</sup> The resulting disproportionate representation of people of color in the criminal justice system then perversely serves as a justification for the continuation of housing discrimination. Integration of residential neighborhoods becomes viewed as a way of importing crime into previously all-white neighborhoods, when in fact crime in impoverished neighborhoods of color is a product of concentrated poverty, overcrowding, and the dearth of services and amenities. In this avalanche that preserves and protects whiteness by punishing people—especially women—of color for their housing insecurity and poverty, every snowflake gets to plead not guilty.

Claims about the alleged misbehavior of denigrated groups and both subtle and direct efforts to connect criminality to improperly mothered nonwhite people, play crucial roles in articulating and legitimating new regimes of criminalization and incarceration. Massive prison building projects and mandatory sentencing laws, for example, were fueled by race- and gender-inflected rounds of blaming and shaming that targeted the “underclass,” immigrants, welfare recipients, the homeless, inner city youth, and single mothers.<sup>62</sup> Repeated demonization of these

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59. Robert D. Bullard, *Environmental Justice for All*, in *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR* 3, 19–20 (Robert D. Bullard ed., 1994).

60. See Robert Blauner, *Internal Colonialism and Ghetto Revolt*, 16 *SOC. PROBS.* 393, 399 (1969) (arguing that policemen in communities of color operate “like an army of occupation” (citation omitted)); David W. Murphy & John L. Worrall, *Residency Requirements and Public Perceptions of the Police in Large Municipalities*, 22 *POLICING* 327 (1999).

61. See generally STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (3d ed. 2003); GILMORE, *supra* note 14; STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* (1978); Celesta A. Albonetti, *Race and the Probability of Pleading Guilty*, 6 *J. QUANTITATIVE CRIMINOLOGY* 315, 324 (1990).

62. JIMMIE L. REEVES & RICHARD CAMPBELL, *CRACKED COVERAGE: TELEVISION NEWS, THE ANTI-COCAINE CRUSADE, AND THE REAGAN LEGACY* (1994); Ruth Wilson Gilmore, *Globalization and U.S. Prison Growth: From Militant Keynesianism to Post-Keynesian Militarism*, 40 *RACE & CLASS* 171 (1999). Reeves and Campbell show how a moral panic about crack cocaine use was fueled by unsubstantiated (and ultimately untrue) claims about an epidemic of welfare mothers giving birth to drug-addicted babies. This narrative linked social boundaries to biological taboos by

putatively race-neutral but connotatively raced and gendered identities has produced a culture of punitive contempt that now justifies attacks on new classes of victims as well: religious minorities, people with nonnormative sexual identities, and more recently even teachers and public employees with pensions.<sup>63</sup> This culture of cruelty and contempt has always been directed with special venom against women of color. As Dorothy Roberts demonstrates, punishing black mothers for the poverty of their children provides this cultural and social system with its central legitimizing trope.<sup>64</sup> Anti-Latino sentiments are fueled by similarly gendered representations of the welfare dependent, excessively procreating immigrant woman.<sup>65</sup>

These gender- and race-based insults serve interests that are not exclusively racial in nature. Demonizing people with problems *as* problems also absolves capitalism and capitalists of any blame for the stagnation of real wages, the impoverishment of the public sector, the demise of social services, mass unemployment, and the enormous and ever-expanding gap between the superrich and everyone else.<sup>66</sup> Racial subordination, sexism, and economic exploitation do not take place in separate silos, but rather inside a system of racialized and gendered capitalism that uses race and racism not only to create a superexploited segment of the workforce but also to manipulate and channel the resentments of white workers away from capital and toward their competitors of color. Notions of criminality play a vital, strategic role in this unstable and often chaotic system. As anthropologist Allen Feldman explains, “[a]rrest is the political art of individualizing disorder.”<sup>67</sup>

Mass incarceration and other instruments of disciplinary subordination that are intricately linked to housing discrimination create chaos inside aggrieved communities and perpetuate their subordination. They remove parents from

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creating a fear-laden discourse about the perverse procreational powers and depraved habits of black women that diverted attention away from the impact on black communities of deindustrialization, economic restructuring, and systematic failures to enforce civil rights laws. *Id.* (arguing that moral panics are only part of the picture and that prisons provide a way for bond traders to profit from state spending without threatening the property system as social welfare expenditures might do).

63. See GEORGE LIPSITZ, *HOW RACISM TAKES PLACE* 42–43 (2011).

64. See generally Roberts, *supra* note 49.

65. LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 71 (2008). Chavez argues that race, immigration, and fertility have formed a “fearsome trinity” throughout U.S. history, but became especially important in the 1980s as a way of stoking nativist fears about Latinas. Despite dominant pro-birth and pro-child rhetorics, childbirth among Latinas was used to stigmatize them as both excessively sexual and dependent on welfare programs to aid dependent children.

66. LIPSITZ, *supra* note 55, at 247–48.

67. ALLEN FELDMAN, *FORMATIONS OF VIOLENCE: THE NARRATIVE OF THE BODY AND POLITICAL TERROR IN NORTHERN IRELAND* 109 (1991). Thanks to Daniel Olmos for calling this work to my attention.

families; send children into foster care; displace productive workers and neighbors from localities; disrupt social networks; interrupt work histories; and misallocate resources by diverting expenditures away from education, job training, housing, and health care to fund the criminal justice system. Even the costs of bail, legal defense, and telephone calls from and to incarcerated loved ones contribute to this system of subordination by transferring scarce resources to wealthier individuals and communities while adding to the burdens of being poor.<sup>68</sup> The most expensive telephone call in the United States is the collect call made from prison, its price not a product of market forces but rather of the success that telecommunications companies have securing monopolies of phone service from prison and their insistence on the more expensive collect call as the only way for inmates to speak to relatives back home. In addition, the high costs of bail, legal transcripts, and appeals cause concerned families of inmates to go into debt that disadvantages them but adds to the situational enrichments available to attorneys, lawyers, transcription companies, and people in the bail bonds business. The policies that punish largely victimless crimes of condition also collaborate in the underpolicing of laws aimed at preventing the crimes of conduct that hurt aggrieved racialized communities the most, especially hiring and housing discrimination. The concept of broken windows policing, initially articulated by James Q. Wilson, is based on the premise that zero tolerance for petty crimes will clean up slum neighborhoods and make the streets safe for their citizens. It encourages police departments to make mass arrests for petty offenses and crimes of condition in poor neighborhoods, but contains no similar incentive for arresting the predatory lenders, slum landlords, or environmental polluters responsible for not just broken windows but broken people and communities. The core assumptions behind the “broken windows” theory of policing are that the problems of ghettos and barrios come from the misbehavior of their residents, that intense surveillance and frequent arrests for minor crimes create a safe environment, and that social programs and civil rights laws are wasted efforts and unwise expenditures because they support people deemed by the theorists to be unfit for freedom.<sup>69</sup> It blames the victims of racism and discrimination while excusing and absolving their perpetrators.

Part of the cumulative vulnerabilities facing black women and Latinas stems from their location inside communities that suffer the effects of discrimination

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68. See CLEAR, *supra* note 14, at 100.

69. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC, Mar. 1982, <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/4465>.

directed against black and Latino men as well as those forms targeted more specifically to them as women of color.

Both men and women are ensnared in the processes that connect housing segregation to the concentration of poverty and the increased likelihood of incarceration that results. Discrimination in housing deprives both men and women of access to high-quality schools, jobs, and medical care.<sup>70</sup> Isolation from word-of-mouth networking with employed people makes it harder for both to learn about new job opportunities.<sup>71</sup> Increased exposure to health hazards and the criminogenic consequences of living in neighborhoods characterized by poverty, transience, and disorder makes both men and women less employable.<sup>72</sup> Males and females with unaddressed social welfare needs are more likely to end up incarcerated in the criminal justice system. Incarcerated people are twice as likely to have a serious disease and are two and a half times less likely to have finished high school.<sup>73</sup> In many cases, race, gender, class, and criminality intersect with disability. Compared to the population at large, for example, people in jails and prisons are three to four times more likely to have speech and hearing impairments, and five times more likely to be diagnosed with mental illness.<sup>74</sup> Instead of allocating funds to help people with such disabilities so that prejudice, immobility, and a refusal to make reasonable accommodations for people with disabilities do not rob society of the contributions they can make, the present political order devotes enormous resources to incarcerating people, a decision that leaves their disabilities undiagnosed and untreated. Fair housing expenditures and enforcement, on the other hand, work to integrate people with disabilities into society by mandating that dwellings be accessible and by banning discrimination against the disabled by landlords and real estate agents.

The poverty that black women and Latinas face because of their economic marginality, coupled with their domestic centrality, makes them even more vulnerable than men to the intersectional causes and consequences of housing insecurity and discrimination. Statistics show that adult women are as much as 29 percent

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70. See DENNIS R. JUDD & TODD SWANSTROM, *CITY POLITICS* 222 (1994); SQUIRES & KUBRIN, *supra* note 21, at 12–14; Scott Burris et al., *Integrating Law and Social Epidemiology*, 30 *J.L. MED. & ETHICS* 510, 514–16 (2002).

71. See SULLIVAN, *supra* note 24, at 58–105.

72. See LIPSITZ, *supra* note 55, at 11–12.

73. CLEAR, *supra* note 14, at 60.

74. *Id.*

more likely to be poor than men.<sup>75</sup> One study that examined twenty-two countries found that the United States had the highest rate of poverty for female-headed households in the sample, a rate of almost 31 percent compared with an average across all twenty-two countries of 10.5 percent.<sup>76</sup> 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. Housing insecurity, in turn, makes these women vulnerable to sexual harassment by landlords<sup>77</sup> and to battering and sexual abuse by family members.<sup>78</sup> Women who receive Section 8 vouchers, for example, are routinely subject to abusive remarks and unwelcome sexual advances by landlords and property managers. Cases adjudicated under the terms of the Fair Housing Act's<sup>79</sup> protections against sexual harassment have involved landlords touching women's breasts, using passkeys to enter apartments and assaulting residents, demanding oral sex, and exposing their genitals to tenants.<sup>80</sup> Additionally, as Susan Saegert and Helene Clark argue, scarce housing opportunities compel some women to choose between remaining in abusive situations and becoming homeless because women who hold Section 8 vouchers run the risk of being evicted from their homes if they report instances of domestic violence to the police. Not surprisingly, then, one of the leading causes of homelessness for women is gender-based violence.

Intersectionally vulnerable women are even punished by policies purportedly designed to protect them. For example, public housing agencies often punish reported acts of domestic violence by evicting the families in which the violence occurs.<sup>81</sup> Given the shortage of housing available to low- or no-income people of color, this means that women abused by partners in public housing projects have to

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75. LEGAL MOMENTUM, *READING BETWEEN THE LINES: WOMEN'S POVERTY IN THE UNITED STATES*, 2010 (2011), available at <http://www.legalmomentum.org/our-work/women-and-poverty/resources--publications/reading-between-the-lines.pdf>.

76. *Id.* at 3 (citing Stephen Pressman, *Explaining the Gender Poverty Gap in Developed and Transitional Economies* (Lux. Income Study, Working Paper No. 243, 2000), available at <http://www.lisproject.org/publications/liswps/243.pdf>).

77. See Jill Maxwell, Note, *Sexual Harassment at Home: Altering the Terms, Conditions and Privileges of Rental Housing for Section 8 Recipients*, 21 WIS. WOMEN'S L.J. 223, 224, 233 (2006).

78. See Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237, 244 (1994).

79. Fair Housing Act, 42 U.S.C. §§ 3601–3619, 3631 (2006).

80. See, e.g., *United States v. Koch*, 352 F. Supp. 2d 970, 981–83 (D. Neb. 2004); see also Maxwell, *supra* note 77, at 231–33.

81. See Tara M. Vrettos, Note, *Victimizing the Victim: Evicting Domestic Violence Victims From Public Housing Based on the Zero-Tolerance Policy*, 9 CARDOZO WOMEN'S L.J. 97 (2002).

choose between the physical dangers they face at home and the problems they would face from homelessness.<sup>82</sup> Perversely, then, women who receive Section 8 subsidies (84 percent of vouchers go to female-headed households and 56 percent to female-headed households that include children) can be evicted from their housing because of violence or sexual advances *against* them.<sup>83</sup> According to a survey conducted by the National Law Center on Homelessness and Poverty in 2007, at least 11 percent of evictions from public housing and Section 8 residences removed women from shelter because they experienced domestic violence.<sup>84</sup> Some women also get evicted from their dwellings because defending themselves against their abuser leads to arrest.<sup>85</sup>

Race-based shelter insecurity increases the likelihood that black women and Latinas will become incarcerated. The complex relationship between housing discrimination and mass incarceration is further complicated, however, by the vulnerabilities women of color experience because of their gender during and after incarceration.

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82. Susan Saegert & Heléne Clark, *Opening Doors: What a Right to Housing Means for Women*, in *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 296, 297 (Rachel G. Bratt et al. eds., 2006).

83. INT'L WOMEN'S HUMAN RIGHTS CLINIC, CITY UNIV. OF N.Y. SCH. OF LAW, *supra* note 17, at 11, 21–22; see also Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U. J. GENDER & SOC. POL'Y & L. 377 (2003); Maxwell, *supra* note 77. Lapidus argues that actions by management companies and public housing agencies to evict families where domestic violence has occurred create a new kind of discrimination against battered women. Maxwell reveals how women holding Section 8 vouchers are vulnerable to assault and abuse by landlords.

84. INT'L WOMEN'S HUMAN RIGHTS CLINIC, CITY UNIV. OF N.Y. SCH. OF LAW, *supra* note 17, at 35 (citing NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *LOST HOUSING, LOST SAFETY: SURVIVORS OF DOMESTIC VIOLENCE EXPERIENCE HOUSING DENIALS AND EVICTIONS ACROSS THE COUNTRY* (2007), available at [http://www.nlchp.org/content/pubs/NNEDV-NLCHP\\_Joint\\_Stories%20\\_February\\_20072.pdf](http://www.nlchp.org/content/pubs/NNEDV-NLCHP_Joint_Stories%20_February_20072.pdf)).

85. See Lapidus, *supra* note 83, at 385; Vrettos, *supra* note 81. Women who have filed complaints about domestic violence find that landlords consider their complaints evidence of a criminal record. A woman who reports that she has been battered can find that her report brings about eviction because it produces evidence that a resident of the dwelling has harmed another tenant. Mutual protection orders can make it appear as if women are perpetrators of violence when they are in fact its victims.

## II. COLLATERAL CONSEQUENCES OF MASS INCARCERATION FOR COMMUNITIES OF COLOR

### A. Unequal Entryways Into the Criminal Justice System for Women of Color

To begin with, and not surprisingly given the above, women of color are overrepresented in the sheer numbers of those snatched up by the criminal justice system. Close to two-thirds of women in U.S. prisons and jails are women of color.<sup>86</sup> Women of color are eight times more likely to be incarcerated than white women.<sup>87</sup>

Specific policies, like the war on drugs, take a particularly heavy toll on black women and Latinas. The disparate effect of the war on drugs on women of color is made obvious when one considers that the percentage of women prisoners convicted of drug-related offenses was only 10 percent in 1979—right before the war on drugs expanded massively—but grew to more than one-third by 1998—when the war had been raging for two decades.<sup>88</sup> In general, people of color are much more likely to be incarcerated for drug use than whites. Drug convictions account for 11 percent of incarcerated white men but for 24 percent of incarcerated black men and 26 percent of incarcerated Latino men. Women of color are hit even harder: Drug convictions account for 23 percent of incarcerated white women but for 39 percent of incarcerated black women and 44 percent of incarcerated Latinas.<sup>89</sup>

However, these disparities do not stem from disproportionate drug use in black communities. Studies consistently show comparable levels of drug use among all racial groups. The variations that do exist are slight but show that drug use among whites might actually be more prevalent than among blacks or Latinas. White high school seniors, for example, report levels of drug use 25 percent greater than the drug use reported by black high school seniors.<sup>90</sup> Similarly, white students visit emergency rooms for drug overdoses about three times as often as black students.<sup>91</sup> A study published in 2000 discovered that white students used heroin seven times

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86. Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, in *INVISIBLE PUNISHMENT*, *supra* note 2, at 136, 138.

87. CLEAR, *supra* note 14, at 63.

88. Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, in *INVISIBLE PUNISHMENT*, *supra* note 2, at 79, 88.

89. Patricia Allard, *Crime, Punishment, and Economic Violence*, in *INCITE! WOMEN OF COLOR AGAINST VIOLENCE, COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* 157, 157 (2006).

90. BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 47 (2006).

91. CLEAR, *supra* note 14, at 8; WESTERN, *supra* note 90, at 47.

more frequently than black students, used crack cocaine eight times more often than black students, and used powdered cocaine at seven times the rate of black students.<sup>92</sup> Furthermore, research also suggests that these disparities might not stem from differences in drug dealing either. The results of one national survey released in 2000, for example, found that white youths between the ages of twelve and seventeen were one-third more likely to have sold drugs than black youths of the same age.<sup>93</sup> Yet 75 percent of people nationwide imprisoned for drug offenses are blacks or Latinos.<sup>94</sup> In Los Angeles, blacks and whites use drugs at approximately the same rate, but blacks are seventeen times more likely than whites to be incarcerated for such drug use.<sup>95</sup>

As part of this racial ecology of law enforcement, women of color suffer from a disproportionate vulnerability to arrest and incarceration.<sup>96</sup> A study of gender, drugs, and criminal sentencing in New York, California, and Minnesota, for example, found that although women of color did not use or deal drugs to a greater degree than women from other groups, 86 percent of the women arrested for drug offenses were blacks or Latinas.<sup>97</sup> Similarly, over a ten-year period, nearly 90 percent of women actually convicted of drug crimes in these states were women of color.<sup>98</sup>

## B. Collective and Cumulative Vulnerability

Many black women and Latinas first encounter the criminal justice system simply because they are trying to survive unlivable circumstances. For example, girls fleeing homes to avoid physical and sexual abuse are declared delinquent. Once their survival strategy has become criminalized, their vulnerability to subsequent surveillance, discrimination, and incarceration is compounded by the fact that they now have a criminal record.<sup>99</sup> For other women of color, a record of alleged

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92. ALEXANDER, *supra* note 34, at 97 (citing NAT'L INST. ON DRUG ABUSE, NATIONAL HOUSEHOLD SURVEY ON DRUG ABUSE (2000)).

93. *Id.*

94. *Id.* at 96–97.

95. M. Belinda Tucker et al., *Imprisoning the Family: Incarceration in Black Los Angeles*, in BLACK LOS ANGELES: AMERICAN DREAMS AND RACIAL REALITIES 168, 171 (Darnell Hunt & Ana-Christina Ramón eds., 2010).

96. See MARC MAUER ET AL., SENTENCING PROJECT, GENDER AND JUSTICE: WOMEN, DRUGS, AND SENTENCING POLICY 3, 9–10, 13–14, 17, 22 (1999).

97. *Id.* at 9.

98. *Id.*

99. See Jeanne G. Kaufman & Cathy Spatz Widom, *Childhood Victimization, Running Away, and Delinquency*, 36 J. RES. CRIME & DELINQ. 347 (1999). Young women thus become doubly

misbehavior starts at school. A survey of 9,000 middle schools published in 2010, for example, found that school authorities singled out black girls for disproportionate disciplinary punishments and that black girls in middle schools received suspensions more than four times as often as white girls. The study found no evidence that black girls actually misbehaved more than white girls, but rather concluded that school authorities deemed them in need of discipline for actions that did not bring suspensions to white girls.<sup>100</sup> The public discourse that portrays Black women as angry, aggressive, and nonnormative can lead school authorities to perceive Black girls as in need of especially harsh discipline. Abuse at home and disciplinary subordination at school become compounded by the neighborhood race effects that systematically constrain the life chances and opportunities of women of color and push them into a system of mass incarceration. Large numbers of incarcerated women of color come from neighborhoods replete with criminogenic conditions such as communities with high rates of homelessness.<sup>101</sup>

Further, illegal and unprosecuted acts of discrimination in employment and the spatial isolation of minority neighborhoods from employment opportunities leave women, and particularly women of color, vulnerable to mass incarceration.<sup>102</sup> More than 60 percent of women in state prisons, for example, reported that they were not employed full time when they were arrested.<sup>103</sup> Raced and gendered barriers to white collar employment then exacerbate this vulnerability for women of color as they leave them overrepresented in low-paying jobs in bars and other entertainment outlets increasing the likelihood of their participation in prostitution or the drug trade, illegal activities into which women of color are often pushed by their circumstances but which in turn often lead to incarceration.<sup>104</sup>

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victimized by the combination of the abuse they suffer at home and by the criminal record they obtain when trying to flee from it.

100. See *Study Shows Racial Gaps in School Suspensions*, LA. WKLY., Sept. 20–26, 2010, at 10.

101. See CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* 194–200 (2005).

102. On spatial mismatch, see Sara McLafferty & Valerie Preston, *Spatial Mismatch and Labor Market Segmentation for African American and Latina Women*, 68 *ECON. GEOGRAPHY* 406 (1992), and John D. Kasarda & Kwok-fai Ting, *Joblessness and Urban Poverty in America's Central Cities: Causes and Policy Prescriptions*, 7 *HOUSING POL'Y DEBATE* 387 (1996).

103. Richie, *supra* note 86, at 138.

104. See Chesney-Lind, *supra* note 88, at 85–86. The combination of low wages and differential policing increase the lure of drug dealing and prostitution for employees in these establishments. Drug use can become a source of self-medication in response to the psychological harm enacted by engaging in prostitution. Spatial isolation from more lucrative employment also constrains the employment practices of women in poor communities. See Nancy Romero-Daza, Margaret Weeks & Merrill Singer, *"Nobody Gives a Damn if I Live or Die": Violence, Drugs, AND*

Similarly, the stagnation of real wages, rising unemployment, and devastating cuts in aid to mothers with children with no corresponding decrease in domestic responsibilities drive some black women and Latinas to crime, and crime combined with discriminatory policing drives mass incarceration. Some women drop out of school because of their need to earn wages but then become more susceptible to incarceration related to poverty. Latinas and black women in state prisons are twice as likely as white women to have failed to complete high school.<sup>105</sup> Nearly one-third of black women and Latinas were on welfare before entering prison compared to 20 percent of white women inmates.<sup>106</sup> Almost 50 percent of Latinas and black women in state prisons earned less than six hundred dollars per month before incarceration compared to 39 percent of white inmates.<sup>107</sup>

Even the economy of crime works to the detriment of women of color. Most women incarcerated for drug crimes, for example, worked at low levels of the trade.<sup>108</sup> Lack of status within the drug trade does not limit the vulnerability of women of color to prosecution, but actually works to their disadvantage in dealing with the criminal justice system. Their incomes, for example, are often too low to enable them to pay fines or offer restitution to victims.<sup>109</sup> They do not have valuable information about the drug trade, which they can give to prosecutors in return for reduced charges. Even concessions and amenities designed for men often do not help them. For example, sentences that entail home detention are nearly always desirable to men, but these sentences may force women to stay in abusive situations.<sup>110</sup> Parole conditions that prohibit drug use, moreover, do not anticipate users who turn to drugs as self-medication for the traumas that flow from abuse when therapeutic medical treatment is not available to them because they do not have health insurance.<sup>111</sup>

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*Street-Level Prostitution in Inner-City Hartford, Connecticut*, 22 *MED. ANTHROPOLOGY* 233, 253–54 (2003).

105. Allard, *supra* note 89, at 160. A special report by the Bureau of Justice Statistics in 2003 indicates that 40 percent of male state prison inmates lack a high school diploma or GED while the figure among females is 42 percent. CAROLYN WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003). By race the percentages without a high school diploma or a GED are 27 percent for whites, 44 percent for blacks, and 53 percent for Latinos. *Id.*

106. Allard, *supra* note 89, at 160.

107. *Id.*

108. Kim English, *Self-Reported Crime Rates of Women Prisoners*, 9 *J. QUANTITATIVE CRIMINOLOGY* 357, 372 (1993).

109. Chesney-Lind, *supra* note 88, at 89.

110. *Id.* at 92.

111. *See id.*

At the same time, women of color deprived of equality in securing employment, housing, and lenient treatment from the criminal justice system are extended a perverse kind of vengeful equity in sentencing. The mandatory sentences written into federal law in the Anti-Drug Abuse Act of 1986<sup>112</sup> prohibit judges from giving women lighter sentences, including measures designed to rehabilitate offenders rather than imprison them—even if they play a lesser role in a crime, are less likely to commit crimes in the future, or shoulder childcare responsibilities. In the first decade during which this law was in force, the number of women incarcerated for drug crimes rose by 888 percent.<sup>113</sup> Continuing this trend, the overall number of incarcerated women in the United States increased by 125 percent throughout the 1990s.<sup>114</sup> These changes have led to a situation in which the number of women incarcerated in U.S. jails and prisons is now ten times greater than the number of women incarcerated in all the nations of Western Europe combined.<sup>115</sup> Over a twenty-year period, the percentage of women in the incarcerated population of the United States increased sixfold: U.S. jails and prisons housed 12,000 women in 1980, and by 1999, the number was 90,000.<sup>116</sup> Every year more than three million women go to jail or prison in the United States.<sup>117</sup> Removing so many women from aggrieved and racialized communities enacts particularly severe harm on families and neighborhoods because women generally play important roles in local networks of social control and self-help.<sup>118</sup>

### C. The Intersectional Nature of the Vulnerability of Women of Color to Incarceration

The 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 that is related to, but also different from, the injuries endured by black men and Latinos. Women of color are especially vulnerable to class injuries because of their relationships to the housing market and the criminal justice system. For example, employment discrimination, the gendered segmentation of the labor market, and the grossly

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112. Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in various titles of U.S.C.).

113. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* 26 (2003).

114. Candace Kruttschnitt & Rosemary Gartner, *Women's Imprisonment*, 30 *CRIME & JUST.* 1, 2 (2003).

115. Chesney-Lind, *supra* note 88, at 81.

116. *Id.* at 80.

117. Richie, *supra* note 86, at 137.

118. CLEAR, *supra* note 14, at 10.

disproportionate gendered impacts that marriage, child rearing and even divorce have on women's work and wealth, leave women consistently earning less and owning less than men.<sup>119</sup> These lower incomes and wealth portfolios then require female-headed households to spend proportionately more of their earnings on housing than households headed by men or couples.<sup>120</sup> Not surprisingly, then, in the private housing market, women of color are the group most likely to receive subprime loans with exceedingly high interest rates, while white men are the least likely.<sup>121</sup> Part of this reality stems from problems posed by the low incomes and limited credit histories that many women have—conditions shaped historically by discrimination—but much of it also stems from the ways in which the deregulation and securitization of the home-lending industry created opportunities for enormously profitable yet predatory lending aimed at women and minorities.<sup>122</sup> Similarly, government policies that provide subsidies to homeowners—who are often white, male, and middle class—but fail to fund adequately low-income housing so dearly needed by communities, and especially women of color, are part of a pattern that sustains segregation and exposes black women and Latinas to greater risks of housing discrimination, redlining, foreclosure, eviction, serial displacement, and homelessness.<sup>123</sup>

Reductions in programs designed to assist low- and no-income people to find housing, therefore, disproportionately damage women of color. So do policies that promote the privatization of public housing because private race-, gender-, and class-based housing discrimination leaves women of color—who are reliant on public housing more than any other group—with access to an increasingly constrained

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119. Karuna Jaggar, *The Race and Gender Wealth Gap*, RACE, POVERTY & ENV'T: RACE & REGIONALISM, Fall 2008, <http://urbanhabitat.org/node/2815>.

120. See Saegert & Clark, *supra* note 82, at 296–300.

121. ALLEN J. FISHBEIN & PATRICK WOODALL, CONSUMER FED'N OF AM., WOMEN ARE PRIME TARGETS FOR SUBPRIME LENDING 4 (2006). Women, and especially women of color, are targeted by predatory lenders because unprosecuted acts of discrimination confine them to artificially constrained sectors of the lending and home buying markets. Women and men have virtually the same credit scores, yet women are 32 percent more likely to receive subprime loans. The gender disparity remains constant within every income and ethnic group, but Latinos and blacks are more likely to get subprime loans than similarly situated white borrowers. See John Leland, *Baltimore Finds Subprime Crisis Snags Women*, N.Y. TIMES, Jan. 15, 2008, <http://www.nytimes.com/2008/01/15/us/15mortgage.html>.

122. See Gary A. Dymnski, *Racial Exclusion and the Political Economy of the Subprime Crisis*, 17 HIST. MATERIALISM 149 (2009). Dymnski shows how the concentrated impact of the subprime crisis on minority borrowers helped obscure from the view of white workers the larger expropriation of working-class wealth by owners and investors enacted by securitization of the mortgage industry.

123. See generally MINDY THOMPSON FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (2004).

market.<sup>124</sup> Seventy-seven percent of households in public housing are headed by women, and 45 percent of them are headed by women with children.<sup>125</sup> Because they face an artificially constrained rental market and because historically members of their families have been denied the opportunities for asset accumulation made available to whites through federal home mortgage loan assistance, Black women are more dependent upon public housing than white women.

The resulting housing insecurity is a greater problem for women than men and a greater problem for women of color than for white women. David Shipler provides an illustrative example of the cumulative nature of class oppression in a sketch about the lives of the working poor. He writes:

A run-down apartment can exacerbate a child's asthma, which leads to a call for an ambulance, which generates a medical bill that cannot be paid, which ruins a credit record, which hikes the interest rate on an auto loan, which forces the purchase of an unreliable used car, which jeopardizes a mother's punctuality at work, which limits her promotions and earning capacity, which confines her to poor housing.<sup>126</sup>

Shipler's story demonstrates the cumulative vulnerabilities caused by poverty brilliantly and explains the unbreakable cycle they can create. Yet his example imagines a situation where class remains isolated from the oppressions of race and gender. The scenario Shipler sketches would profit from an augmented intersectional analysis that acknowledges that housing insecurity is a greater problem for women than it is for men and a greater problem for black women and Latinas than for white women.

If the parent in Shipler's illustration were black and female, the oppressions of class would be exacerbated at their intersections with race and gender in significant ways. First, black women can expect to have lives that are four years shorter than the lives of white women because of the negative impact that living in neighborhoods filled with pollution, toxic hazards, and other sources of premature death has on their health.<sup>127</sup> As they age, the cumulative health effects of residential segregation become more severe for black women. They also experience worse birth outcomes such as preterm births, low weight babies, and infant mortality as they age.<sup>128</sup> Second, it would further complicate Shipler's anecdote to realize that

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124. See Saegert & Clark, *supra* note 82, at 303.

125. INT'L WOMEN'S HUMAN RIGHTS CLINIC, CITY UNIV. OF N.Y. SCH. OF LAW, *supra* note 17, at 10.

126. DAVID K. SHIPLER, THE WORKING POOR: INVISIBLE IN AMERICA 11 (2004).

127. See Dolores Acevedo-Garcia, Theresa L. Osypuk & Nancy McArdle, *Racial/Ethnic Integration and Child Health Disparities*, in THE INTEGRATION DEBATE, *supra* note 5, at 131, 132, 134-37.

128. *Id.* at 136-37.

government policies that provide subsidies to homeowners but fail to fund low-income housing adequately are part of a gendered and raced pattern, a pattern that sustains segregation and subsidizes heteronormativity.<sup>129</sup>

The expressly discriminatory appraisal policies deployed by the Home Owners Loan Corporation starting in the 1930s gave whites preferential access to assets that form the basis for family wealth that continues to be inherited by subsequent generations in the present. Discrimination against women by mortgage lenders, employers, and social welfare system that channeled unemployment insurance, retirement benefits, home loans, and educational grants to men promoted the economic viability of the properly gendered prosperous and propertied white nuclear family. Third, the cumulative qualities of class oppression would also appear differently if Shipler's illustration noted that lower pay for women workers means that female-headed households must spend on average 30 percent of their income for shelter while male-headed households spend 25 percent, and households headed by working couples spend only 16 percent.<sup>130</sup> Lastly, it would enrich Shipler's example to note that poor housing is not the worst outcome imaginable. Poverty causes some women and their children to become homeless not just because they are poor, but also—as a function of gender-based violence<sup>131</sup>—because they are women.

These problems add up, producing an intersectional array of obstacles and impediments to a decent and dignified life for many women of color. As New Orleans activist Shana Griffin explains: "Those of us who are low-income or without income and who occupy marginal positions in society often face multiple and critical competing needs due to our lack of access to health care; safe, sanitary and adequate housing; safe reproductive health services and information; education opportunities; and financial assistance."<sup>132</sup> The intersectional injuries of class, race, and gender leave black women and Latinas with fewer resources and a greater need for social support. Yet intersectional patterns of criminalization and incarceration further compound these already intersectional injuries. They

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129. The seemingly private properly gendered and propertied prosperous white nuclear family has been subsidized and sustained by a broad range of public policies that make it more lucrative to build and inhabit large single family homes than rental properties and that give special tax treatment to the conduits of patriarchal inheritance like the capital gains tax and the inheritance tax.

130. Saegert & Clark, *supra* note 82, at 300.

131. See INT'L WOMEN'S HUMAN RIGHTS CLINIC, CITY UNIV. OF N.Y. SCH. OF LAW, *supra* note 17, at 44; Acevedo-Garcia, Osypuk & McArdle, *supra* note 127, at 132–36; Saegert & Clark, *supra* note 82, at 296–300.

132. *The Politics of Reproductive Violence: An Interview With Shana Griffin by Clyde Woods, March 12, 2009*, in *IN THE WAKE OF HURRICANE KATRINA: NEW PARADIGMS AND SOCIAL VISIONS* 157, 159 (Clyde Woods ed., 2010).

lead to regimes of disciplinary surveillance, harassment, and confinement that disrupt social support networks. Payments for bail, legal representation, and even phone calls to incarcerated loved ones impose onerous financial costs on people who cannot afford them.

Moreover, punishment does not end once female inmates of color have served their sentences. Legal penalties imposed on convicted felons impede access to shelter, employment, and education as they attempt to reenter their communities. The conditions of parole criminalize many actions that would otherwise be legal, leading to reincarceration for relatively innocent activities such as missing an appointment with a probation officer, failing to appear in court to answer charges about unpaid debts, associating with other ex-offenders or being charged with public intoxication solely on the basis of the testimony of a police officer but without a breathalyzer test. In this way, the cumulative effects of mass incarceration exacerbate the already serious obstacles to safe, sanitary, and affordable shelter faced by women of color when they try to reenter society after having served time in prison or jail.

### III. REENTRY ISSUES FOR WOMEN OF COLOR

As we have seen, women of color who are disadvantaged in securing jobs and housing because of their race and gender are also disproportionately represented in the prison population. As if that were not enough, their disadvantage is further exacerbated after their release as their criminal convictions and incarcerations then impose new obstacles to securing shelter.

Women who are ex-offenders suffer directly from these obstacles. Additionally, women of color who are *not* ex-offenders suffer from them as well because they cannot help but be affected by the injuries suffered by their friends, family members, and neighbors as a result of the cumulative and collective consequences of mass incarceration.

#### A. Guilt by Association

Many landlords, for example, refuse to rent dwellings to ex-offenders. But many others bar even those with simple arrest records even though many arrested people are innocent of any crime.<sup>133</sup> An investigation by reporters for the *Los Angeles Times*, for example, found that nearly fifteen hundred innocent people had been

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133. See David Thatcher, *The Rise of Criminal Background Screening in Rental Housing*, 33 LAW & SOC. INQUIRY 5 (2008).

incarcerated in the Los Angeles County Jail between 2006 and 2011. These inmates were wrongly arrested by police officers who worked from incomplete records, who neglected to examine fingerprint evidence, or who followed information on improperly worded warrants that led the officers to the wrong address.<sup>134</sup> For their part, landlords derive their information about the arrest records of prospective tenants from computerized databases that are notoriously inaccurate, have inadequate quality controls to distinguish individuals with the same name, inconsistently define what constitutes an arrest, and have no safeguards against simple misspellings.<sup>135</sup>

Similarly, public housing agencies can deny shelter to entire families if only a single member or guest is *suspected* of a crime, even if there has been no arrest or conviction.<sup>136</sup> The Anti-Drug Abuse Act and its subsequent amendments, for example, have led local housing agencies to bar people with misdemeanor or felony convictions from publicly supported housing of various kinds for specified periods of time.<sup>137</sup> Human Rights Watch estimates that between three and four million people are presently ineligible for public housing because of this policy.<sup>138</sup> These federal regulations that permit, and even encourage, local public housing agencies to bar residents from dwellings because of a single criminal offense thus often attach draconian collateral consequences—the loss of shelter and its many negative corollaries—to only minor crimes. In Annapolis, Maryland, for example, the public housing authority banned some five hundred people, many of whom had committed only minor crimes, from its residences. The authority kept them on the proscribed list even after they had completed their sentences and probation terms.<sup>139</sup> Even worse, in public housing projects across the nation people are barred

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134. See Robert Faturechi & Jack Leonard, *ID Errors Put Hundreds in County Jail; Wrongful Incarcerations Totaled 1,480 in the Last Five Years, a Times Inquiry Finds*, L.A. TIMES, Dec. 25, 2011, at A1.

135. See Rebecca Oyama, Note, *Do Not (Re)Enter: The Rise of Criminal Background Tenant Screenings as a Violation of the Fair Housing Act*, 15 MICH. J. RACE & L. 181, 188 (2009).

136. Allard, *supra* note 89, at 159.

137. See, e.g., Anti-Drug Abuse Act of 1988 § 5101, 42 U.S.C. § 1437d(l)(6) (2006) (requiring public housing agencies to utilize leases that “provide that any criminal activity . . . or any drug-related criminal activity on or off [the] premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy”).

138. See HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 33–34 (2004), available at <http://www.hrw.org/reports/2004/usa1104/usa1104.pdf>.

139. See Complaint, *Sharps v. Housing Auth.*, No. 02C09143799 (Md. Cir. Ct. Aug. 12, 2009), available at [http://www.aclu.org/files/pdfs/womensrights/sharpsvhaca\\_complaint.pdf](http://www.aclu.org/files/pdfs/womensrights/sharpsvhaca_complaint.pdf); *ACLU Challenges Unlawful Housing Policy That Tears Families Apart*, ACLU.ORG (Aug. 11, 2009), <http://www.aclu.org/womens-rights/aclu-challenges-unlawful-housing-policy-tears-families-apart>.

from residence even though they have never been convicted or even charged with a crime because regulations render offenses by a single family member sufficient to bar the entire group.<sup>140</sup> Similarly, rules that prevent ex-offenders from even visiting relatives in public housing projects inhibit the ability of families to assist the reentry of returning ex-offenders and disrupt and sometimes even destroy family ties.<sup>141</sup> Such zero-tolerance policies on crime in public housing might mean that a single mother who lives in public housing but has a romantic partner charged (but never prosecuted or convicted) of drug possession as a juvenile will have to raise her children alone or move out of one of the few housing units available to her.

### B. Particular Vulnerabilities of Ex-Offenders

The resulting housing insecurity is particularly damaging to ex-offenders and their families. One scholarly study found, for example, that each time an ex-offender moves after being released from prison his or her likelihood of being arrested increases by 25 percent.<sup>142</sup> Further, the loss of funds available to already-poor families caused by the costs of criminal defense, as well as the lost income and wealth suffered due to the absence of incarcerated family members, contributes to residential instability in poor neighborhoods, exacerbates family disruption, and increases the number of single-parent families and births to young adults.<sup>143</sup>

Children are not exempt from the negative influence of these disruptive dynamics: A survey of more than four thousand students in Oregon and California, for example, showed that children exposed to frequent moving while enrolled in elementary school were 20 percent more likely to be involved in violent incidents.<sup>144</sup> Residential instability and frequent moving can also leave children cut off from family members and neighbors who can drive them to school, making them dependent on unreliable local bus service. This lack of reliable transportation then often causes them to be late for class.<sup>145</sup> School authorities, however, often interpret these structural conditions as evidence of personal deficiencies in the students, which leads them to treat truancy as criminal conduct. Police officers in

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140. Allard, *supra* note 89, at 159–60.

141. See generally Lapidus, *supra* note 83 (describing the grave harms that zero-tolerance policies in public housing cause to women who are victims of domestic violence).

142. TAMMY MEREDITH ET AL., APPLIED RESEARCH SERVS., ENHANCING PAROLE DECISION-MAKING THROUGH THE AUTOMATION OF RISK ASSESSMENT 15 (2003).

143. See CLEAR, *supra* note 14, at 74, 88.

144. Deborah L. McKoy & Jeffrey M. Vincent, *Housing and Education: The Inextricable Link, in* SEGREGATION, *supra* note 57, at 125, 134.

145. ERIC MANN, PLAYBOOK FOR PROGRESSIVES: 16 QUALITIES OF THE SUCCESSFUL ORGANIZER 40–41 (2011).

Los Angeles, for example, are authorized to arrest and cite students who are truant even if they are on their way to school.<sup>146</sup> Each citation entails a summons that requires a court appearance and a \$250 fine upon conviction.<sup>147</sup> In 2009 alone, police officers arrested and cited more than fifteen thousand students, placing some in handcuffs in front of their friends on school grounds.<sup>148</sup> Parents accompanying their children to court dates for truancy offenses lost days of gainful employment at work, while the fines added to the already-strapped financial conditions of their families.<sup>149</sup> Women of color suffer from these conditions both because of their economic marginality and domestic centrality as women and because of the kinds of police surveillance and criminal prosecution they endure as people of color. Police officers in Los Angeles do not hand out truancy citations at schools attended mainly by white children. Thus, white parents rarely face the pressure to be absent from work (and maybe get fired) so they can appear in court to explain why their child did not get to school on time. The parents who miss court appointments or who cannot pay fines for truancy are considered criminals by law enforcement officials and by much of the white public, but in truth it is their poverty and not their conduct that leads them to be criminalized.

### C. The Broad Sweep of Punishment for Ex-Offenders

Raced and gendered moral panics about crime fueled by fears of out-of-control black women and Latinas have contributed to efforts by lawmakers at the state and federal level to compel judges to mete out harsh penalties for even minor offenses committed by ex-offenders. These minor offenses include possessing small amounts of controlled substances, missing an appointment with a parole officer, violating a curfew, or failing to appear in court when summoned to answer civil charges for nonpayment of debts.<sup>150</sup> These policies promote punishment rather

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146. *Id.* at 40.

147. *Id.*

148. *Id.*

149. In 2011, in response to community protests, the Los Angeles Police Department promised to stop ticketing tardy students who were clearly on their way to school and to refrain from conducting curfew "sweeps" during daylight hours without clear evidence of actual or potential criminal activity. *Id.* at 42–43.

150. See Robert Gangi, *The Rockefeller Drug Laws*, in RACIALIZING JUSTICE, DISENFRANCHISING LIVES: THE RACISM, CRIMINAL JUSTICE, AND LAW READER 49 (Manning Marable et al. eds., 2007); Victor M. Rios, *The Hypercriminalization of Black and Latino Male Youth in the Era of Mass Incarceration*, in RACIALIZING JUSTICE, DISENFRANCHISING LIVES, *supra*, at 17. For an overview of judges' responses to moral panic, see Martha A. Myers, *Symbolic Policy and the Sentencing of Drug Offenders*, 23 LAW & SOC'Y REV. 295 (1989).

than rehabilitation as the primary purpose of the penal system. But most people convicted of crimes leave prison at some point, and more than half of ex-offenders have actually served sentences for nonviolent offenses.<sup>151</sup> The successful reintegration of such people as productive members of the community would benefit all of us. Yet the punitive practices legitimized by criminalization of racialized poverty promotes demonization and marginalization of all ex-offenders, dangerous or not, violent or not, responsible or not. They all become marked as “open persons” who can be endlessly harassed and punished.<sup>152</sup>

As a result, the serious impediments to fair housing opportunities described above compose only a small part of the collateral consequences of criminal convictions that impede successful reentry. Ex-offenders not only lose some of their civil rights,<sup>153</sup> they also incur a broad range of new civil disabilities designed to punish them beyond the terms of the sentences they serve in carceral institutions. Ex-offenders return from prison to live in neighborhoods that experience aggressive surveillance and policing—where police stops based ostensibly on suspicion are frequent occurrences.<sup>154</sup> In these neighborhoods, police officers who do not find evidence of criminal conduct know that they might find evidence of technical parole violations such as missing an appointment with a probation officer or failing to take a drug test.<sup>155</sup> These violations account for a significant percentage of returns to prison by ex-offenders. The standards of proof that need to be satisfied to find a parole violation are also much lower than the standard for criminal convictions. Released to ghettos and barrios characterized by racial segregation and concentrated poverty, ex-offenders are forced to dwell in areas where they are more likely to have casual associations with other ex-offenders or to be stopped and frisked by police officers. Both of which can easily lead to a parole violation.

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151. Cynthia Golembeski & Robert Fullilove, *Criminal (In)Justice in the City and Its Associated Health Consequences*, 95 AM. J. PUB. HEALTH 1701, 1702 (2005).

152. JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 60 (1994) (quoting Carol Brooks Gardner, *Passing By: Street Remarks, Address Rights, and the Urban Female*, 50 SOC. INQUIRY 328, 332–33 (1980)).

153. See SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* 242 (5th ed. 2012).

154. See Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 813 (2007) (finding that “persons of African and Hispanic descent were stopped more frequently than whites, even after controlling for precinct variability and race-specific estimates of crime participation”); Ray Rivera, Al Baker & Janet Roberts, *A Few Blocks, 4 Years, 52,000 Police Stops*, N.Y. TIMES, July 11, 2010, <http://www.nytimes.com/2010/07/12/nyregion/12frisk.html>.

155. See PETERSILIA, *supra* note 113, at 77–92, 148–50.

The resulting disproportionate representation of people of color in the criminal justice system then serves as justification for the continuation of housing discrimination.

When government agencies reduce spending aimed at producing low- and no-income housing, when they pass ordinances making it illegal to sit, sleep, lie down, and loiter on city streets, their actions recriminalize ex-offenders by saddling them with new convictions and their collateral penalties. When landlords refuse to rent dwellings to ex-offenders, when public housing agencies are required to deny housing to anyone with even a single criminal conviction and to prevent ex-offenders from living with or even visiting their families, they create anarchy in the lives of the minorities and women of color who are so grossly overrepresented in the criminal justice system. Perversely, those individuals are already grappling with the cumulative and disproportionate vulnerabilities that come from decades and centuries of inequality, exploitation, racism, and sexism and led to their racialized and gendered mass criminalization in the first place.<sup>156</sup>

Punitive policies that increase the collateral consequences of criminal violations turn nearly every conviction into a virtual life sentence that, in addition to causing the collateral consequences identified above, often leaves ex-offenders unable to vote, hold elective office, obtain professional licenses, dwell in public housing, or receive many forms of public assistance.<sup>157</sup> Ex-offenders are vulnerable to deportation.<sup>158</sup> They may be ineligible for military service, jury duty, and educational grants.<sup>159</sup> They can be denied handgun licenses and jobs in real estate, nursing, and physical therapy.<sup>160</sup> In some states, ex-offenders are barred from public employment and cannot get licenses to be bartenders, barbers, cosmetologists, or plumbers.<sup>161</sup>

Mass incarceration and housing segregation thus create and exacerbate cumulative vulnerabilities for ex-offenders: They are an avalanche of individual snowflakes that buries people's opportunities and life chances.

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156. See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT*, *supra* note 2, at 15.

157. *Id.* at 16, 18–19, 22–24.

158. *Id.* at 18–19, 23, 25–26.

159. *Id.* at 16, 18, 26.

160. *Id.* at 22, 26.

161. *Id.*

#### IV. MORAL PANICS AND MORAL HAZARDS

##### A. The Ideology of Mass Criminalization of People of Color

The criminalization of poverty and the many different forms of contemporary disciplinary subordination are part of a comprehensive ideology that compels women of color to defend themselves against the presumption that their vulnerabilities stem from personal deficiencies. Neoliberal legal and economic policies privilege private solutions to public problems, framing people as solely responsible for their fate.<sup>162</sup> This rhetorical frame interpellates women of color as nonnormative individuals rather than as members of aggrieved communities targeted for political attack and thus individualizes structural social disorder. Discourses about individual criminality occlude the causes and consequences of the radical redistribution of wealth that has brought austerity to the masses and expanded wealth to the upper classes. Anticrime discourses serve crucial political purposes unrelated to actually fighting crime. Many of the anticrime measures adopted in the United States during the past three decades arguably produce more crime than they prevent.<sup>163</sup> This should not come as a surprise, since it was not fighting crime that motivated this society to adopt mandatory sentencing, to increase penalties for minor crimes, or to multiply the collateral consequences of every felony conviction. Instead, these measures emerged as part of a counterrevolution against the democratic and egalitarian reforms of the mid-twentieth century that made more rights available to more people—as a result of the civil rights movement.<sup>164</sup> This counterrevolution has used moral panics about crime as an ideological tool to reduce the number of rights-bearing citizens, to stigmatize members of aggrieved social groups, and to prevent workers from bargaining freely over wages and working conditions by rendering them displaceable, disposable, and deportable.

Poor and working class Latinos suffer from moral panics about poverty, racial difference, and gender normativity, but also from fear-laden discourses that blame undocumented immigrants for low wages, crime, and disease. They face the familiar patterns of arrest, charges, conviction, and incarceration that confront other communities of color but also have to deal with the uncertainties of possible undocumented status for themselves or family members as well as the racial

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162. See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2007).

163. See PETERSILIA, *supra* note 113; Golembeski & Fullilove, *supra* note 151.

164. See Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1031 (2010).

profiling legitimated in the name of policing noncitizens. Even when these policies do not lead to arrests, criminal charges, or convictions, they create chaos in the lives of poor people of color. For example, employers warned in advance about government raids on workplaces simply discharge those without appropriate papers and then rehire them after the inspection, creating fear and job insecurity in the process.<sup>165</sup> Officials patrolling the border, pressured to make large numbers of arrests by politicians responding to nativist, populist fears, encourage deportable aliens to waive their rights and forego deportation hearings. They then release the deportees on the Mexican side of the border. But the deportees' need for work drives them back into the United States, often leading to new arrests.<sup>166</sup> Similarly, police stops and searches can make going to work or shopping an ordeal for people profiled as "suspect" immigrants.

All of these policies impose a kind of calculated unpredictability and instability on the lives of undocumented workers of color and their citizen and documented relatives, friends, and coworkers. They provide another instance of producing anarchy in the name of order, imposing chaos on the everyday lives of low-wage workers of color and rendering them even less able to bargain freely over wages and working conditions, to secure housing, or simply to make any long-range plans at all. They are a consequence of what Jordan T. Camp calls the neoliberal regimes of racialized security that emerged in response to the political mobilizations and violent insurrections by aggrieved racialized groups in the 1960s and gradually led to the raced and gendered patterns of mass incarceration we see today.<sup>167</sup>

## B. The Criminalization of an American Racial Problem

As Naomi Murakawa argues, it was not that the United States had a crime problem in the 1960s that somehow became racialized, but rather, the nation had a racial problem that deliberately became criminalized.<sup>168</sup> The Omnibus Crime Control and Safe Streets Act of 1968<sup>169</sup> was the first of a series of laws that

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165. See Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419, 437 (2002).

166. See *id.* at 436–37.

167. Jordan T. Camp, *The Sound Before the Fury: A Genealogy of Neoliberal Racial and Security Regimes* (Dec. 2011) (unpublished Ph.D. dissertation, University of California, Santa Barbara) (on file with author).

168. Naomi Murakawa, *The Origins of the Carceral Crisis: Racial Order as "Law and Order" in Postwar American Politics*, in RACE AND AMERICAN POLITICAL DEVELOPMENT 234, 236 (Joseph Lowndes et al. eds., 2008).

169. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered titles of U.S.C.).

gradually increased the number of crimes for which people could be prosecuted, expanded the sentences they could receive, and enumerated new categories of limited citizenship and social membership for offenders and ex-offenders.<sup>170</sup>

That the racialized criminalization of American society emerged as the specific result of this process is made obvious when one considers that the disparity between blacks and whites in rates of imprisonment (at eight to one) far outstrips disparities in unemployment (two to one), infant mortality (two to one), and out-of-wedlock births (three to one).<sup>171</sup> Politically inspired policing targets inner-city ghettos and barrios for drug offenses that routinely take place in suburban neighborhoods, on college campuses, and in country clubs as well.<sup>172</sup> Inhabitants of inner cities can also be incarcerated more easily than other offenders once targeted, since they are more likely to be represented by overburdened public defenders and more likely to accept plea bargains. Consequently, police officers routinely detain blacks and Latinos more often than whites, and this racial disparity in the criminal justice system continues throughout the conviction and incarceration process.

Take the example of New York City. People of color make up slightly more than half of the population of New York City, but in 2011, 84 percent of police stops were of blacks and Latinos.<sup>173</sup> Only 12 percent of these stops led to an arrest or a summons; contraband was discovered in only 2 percent of the stops.<sup>174</sup> In the period between 2005 and 2008 only 34 percent of the whites in New York stopped by police officers were also frisked, but officers frisked 50 percent of the blacks and Latinos that they detained.<sup>175</sup> Similar disparities affect the Latino population across the country. Latino youth are 16 percent more likely to be judged delinquent than whites, 28 percent more likely to be detained, 41 percent more likely to receive out-of-home placement, and 40 percent more likely than

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170. See GILMORE, *supra* note 14, at 219; Wacquant, *supra* note 18, at 119–20.

171. MASSEY, *supra* note 8, at 99. For a further discussion of the civil rights movement as a cause of the racialized criminalization, see *infra* Part V.A.

172. ALEXANDER, *supra* note 34, at 121–22.

173. CTR. FOR CONSTITUTIONAL RIGHTS, 2011 NYPD STOP AND FRISK STATISTICS (2011), available at [http://ccrjustice.org/files/CCR\\_Stop\\_Frisk\\_Factsheet-2011.pdf](http://ccrjustice.org/files/CCR_Stop_Frisk_Factsheet-2011.pdf); see also ATTORNEY GEN., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL, at vii (1999), available at [http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil\\_rights/stp\\_frisk.pdf](http://www.oag.state.ny.us/sites/default/files/pdfs/bureaus/civil_rights/stp_frisk.pdf).

174. CTR. FOR CONSTITUTIONAL RIGHTS, *supra* note 173.

175. CTR. FOR CONSTITUTIONAL RIGHTS, RACIAL DISPARITY IN NYPD STOPS-AND-FRISKS: PRELIMINARY REPORT ON UF-250 DATA FROM 2005 THROUGH JUNE 2008, at 4 (2009), available at [http://ccrjustice.org/files/CCR\\_NYPD\\_Stop\\_and\\_Frisk\\_Report.pdf](http://ccrjustice.org/files/CCR_NYPD_Stop_and_Frisk_Report.pdf); see also LOIC WACQUANT, PRISONS OF POVERTY 24–25 (expanded ed. 2009).

white youth to be sent to adult prisons.<sup>176</sup> Anti-immigrant legislation and police practices created a situation in which by 2007 Latinos made up 40 percent of newly sentenced offenders in federal prisons and one-third of all federal inmates—nearly half of them sentenced in federal court for immigration violations.<sup>177</sup> State prison populations are also now two-thirds black and Latino.<sup>178</sup> Black women and Latinas endure injustices on their own, but they also suffer from the neighborhood race effects and collateral consequences of the mass incarceration of black and Latino men. White women are disadvantaged as individuals by the incarceration of their male partners and family members, but they do not experience the devastating disempowerment of whole communities because they do not have to contend with the degrees of mass incarceration that black women and Latinas confront routinely, especially given the role of felon and ex-felon disenfranchisement in minority vote suppression and dilution. In 14 states, felony conviction records keep more than 1 in 10 African Americans from voting. In 5 of those states, 20 percent of the potential African American electorate is disqualified from exercising the franchise. Nationally 1 in 7 African Americans are disenfranchised by felony convictions and in 5 states more than 20 percent of blacks cannot vote because of their criminal records.<sup>179</sup>

These anticrime policies and politics that developed in response to the civil rights movement do not do much to reduce crime, but they do protect some of the purely racial privileges of whiteness by relegating large numbers of nonwhites to second-class status. In addition, they also serve other purposes. The criminalization of poverty has been combined with the stigmatization of social welfare policies as entitlements funneled to unworthy people of color and both have become central weapons in the longstanding counterrevolution against the New Deal welfare state.<sup>180</sup> More recently, they have also functioned to advance neoliberal policies aimed at the privatization of state assets and resources and the fiscalization of social services.

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176. NEELUM ARYA ET AL., *AMERICA'S INVISIBLE CHILDREN: LATINO YOUTH AND THE FAILURE OF JUSTICE* 6 (2009).

177. Solomon Moore, *Study Shows Sharp Rise in Latino Federal Convicts*, N.Y. TIMES, Feb. 18, 2009, <http://www.nytimes.com/2009/02/19/us/19immig.html>; Mark Hugo Lopez & Michael Light, *A Rising Share: Hispanics and Federal Crime*, PEW HISPANIC CENTER (Feb. 18, 2009), <http://www.pewhispanic.org/2009/02/18/a-rising-share-hispanics-and-federal-crime>.

178. Lopez & Light, *supra* note 177; see also MANZA & UGGEN, *supra* note 18, at 245–46; Alina Ball, Comment, *An Imperative Redefinition of "Community": Incorporating Reentry Lawyers to Increase the Efficacy of Community Economic Development Initiatives*, 55 UCLA L. REV. 1883, 1887 n.16 (2008).

179. MANZA & UGGEN, *supra* note 18, at 79–80.

180. See Haney López, *supra* note 164, at 1034.

### C. The Mechanics of the Criminalization of Race

Moral panics about the allegedly nonnormative culture of the poor make it possible to frame poor people as more in need of sermons than social programs and to justify spending state funds on incarceration rather than, for example, education. The demonization and criminalization of communities of color, furthermore, enables cruelty to disguise itself as compassion. Cuts in social spending, for example, are justified as efforts to reduce dependency and improve the moral fiber of poor people.<sup>181</sup>

These goals are achieved through the following process: First, the language of law breaking that is central to moral panics about crime attributes poverty to the moral failings of individuals. Ronald Reagan used the empirically suspect but affectively powerful image of the “welfare queen” to portray hard-working and law-abiding Americans as victims of lawbreaking and lazy criminals receiving lavish welfare benefits instead of working.<sup>182</sup> In this discourse, programs designed to promote equal opportunity can then become portrayed as wasteful subsidies to unworthy recipients. Initially, these policies of reducing social support systems are often purported to protect standards of living that the white working and middle classes obtained initially through the New Deal “social wage”—composed of support for full employment and full production, high wages, aid to education, housing subsidies, and old age, unemployment, and disability insurance—by reducing the number of people to be helped through the elimination of benefits for welfare recipients, drug users, single mothers, noncitizens, or ex-offenders. Yet the very policies sold to the public as a way of saving the social wage of the middle class also stigmatize the social wage itself, by decrying government aid as the special entitlement of lazy and unworthy people. It then becomes easier to expand the class of the unworthy to more groups through the cost-cutting measures favored by balanced-budget conservatives and neoliberals alike: to the young, the poor, and the sick; to public transit riders and college students, to government workers with pensions, including teachers and fire fighters, to the New Deal constituency itself that in its zeal to cut off aid to the poor hurts itself. Policies legitimized by a white racial imaginary then become used against the material interests of most whites.

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181. The budget plan authored by Paul Ryan and supported by the Republican majority in the U.S. House of Representatives is an example. See Rosalind S. Helderman & Lori Montgomery, *GOP Budget Plan Cuts Deeply Into Domestic Programs, Reshaped Medicare, Medicaid*, WASH. POST, Mar. 20, 2012.

182. See JOE SOSS, RICHARD C. FORDING & SANFORD F. SCHRAM, *DISCIPLINING THE POOR: NEOLIBERAL PATERNALISM AND THE PERSISTENT POWER OF RACE* 33 (2011).

Many of the people that then often end up hurt the most by these policies are the very working class whites who supported them passionately because they had become convinced that social welfare expenditures are entitlements doled out to unworthy blacks and Latinos.

Opponents of civil rights laws, antipoverty programs, and aid to education mobilized white opposition against social support programs and policies as manifestations of an illegitimate black state helping special interests rather than the legitimate white state that administered programs that primarily benefited whites such as social security, Medicare, and the home mortgage tax deduction. As Ian Haney Lopez argues, in the closing decades of the twentieth century “[t]he right promoted its antistatism as, in large part, opposition to the black state.”<sup>183</sup>

Antistatism promises taxpayers the benefits of small government, yet the concurrent regimes of surveillance, policing, and incarceration also pushed by advocates of antistatism do not cut state spending; they merely shift it. Just as tax reduction schemes in practice entail reducing the income, property, and capital gains taxes paid largely by the wealthier (and generally white) sectors of the population and shifting the burden to the payroll taxes, sales taxes, and user fees imposed disproportionately on poorer taxpayers (more often people of color), the antistatist whiteness produced by antistatism does not cut state spending but transfers it away from support for housing, health care, education, and transportation and toward surveillance, incarceration and privatization.<sup>184</sup>

These policies of surveillance and mass incarceration impose new burdens on aggrieved communities of color while producing new opportunities for private profits in the wake of the social crises they create. In the process, white working-class fears of racialized crime are exploited by entities able to profit materially from moral panics about such crime. Investors and owners in the private prison industry, correctional workers unions, and financial institutions trading in public bonds benefit directly from mass incarceration policies. Developers of gated and walled communities and private security firms profit from public anxieties about crime; indeed, the nation now employs more private security guards

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183. Haney López, *supra* note 164, at 1036.

184. See generally SIDNEY PLOTKIN & WILLIAM E. SCHEUERMAN, PRIVATE INTERESTS, PUBLIC SPENDING: BALANCED-BUDGET CONSERVATISM AND THE FISCAL CRISIS (1994). Plotkin and Scheurman show that policies justified as tax cuts are really tax shifts, helping investors and owners at the expense of workers and consumers. Their book reveals how tax cuts are designed to produce fiscal crises for states, which then justify additional cuts in services and promote the transfer of public assets into private hands. But spending on policing, surveillance, and incarceration continues to increase.

than police officers.<sup>185</sup> And increased penalties for undocumented immigration produce the bodies needed to fill private prisons, promote demands for new surveillance equipment, and supply the system with a steady stream of racialized criminal scapegoats to be blamed for the decline in real wages and the curtailing of social services that characterize contemporary capitalism.

#### D. Moral Hazard

The economic and philosophical principle of moral hazard looms large in the discourses used to legitimate these policies. Advocates of antistatist whiteness argue, for example, that poor people take undue risks because they have so little to lose, and that the costs of their actions have to be borne by the people whose wealth gives them a greater stake in society. Both the 2012 budget authored by Paul Ryan and supported by the Republican majority in the U.S. House of Representatives and the refusal of the Obama administration to impose a moratorium on mortgage foreclosures in 2012 proceeded from a commitment to the notion of moral hazard.<sup>186</sup> They then promote reductions in the social safety net, mass incarceration, and privatization as ways of forcing the poor to behave better by increasing the risks of not doing so. Yet the same advocates of anti-statism do not seem to apply similar principles of accountability to the financiers and mortgage brokers whose greed nearly destroyed the economy in the first decade of the twentieth century, to the large corporations insulated from the consequences of market losses by tax subsidies and government bailouts, to the corporations, banks, and investors able to reduce their risks through subsidies like tax increment financing, or even to the homeowners who build assets that appreciate in value and can be passed down across generations through market-distorting subsidies (in the form of home mortgage interest deductions and property tax deductions) and then complain about their tax burdens while in fact benefitting from a regressive tax system that makes the poor pay disproportionate percentages of their incomes in sales taxes, payroll taxes, and user fees.

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185. See Amy Goldstein, *More Security Firms Getting Police Powers: Some See Benefits to Public Safety, but Others Are Wary*, S.F. CHRON., Jan. 7, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/01/07/MNGVENCASV1.DTL>.

186. Shaila Dewan, *Moral Hazard: A Tempest Tossed Idea*, N.Y. TIMES, Feb. 25, 2012, <http://www.nytimes.com/2012/02/26/business/moral-hazard-as-the-flip-side-of-self-reliance.html>; Helderman & Montgomery, *supra* note 181. For a critique of the moral hazard theory, see Malcolm Gladwell, *The Moral-Hazard Myth*, NEW YORKER, Aug. 29, 2005, [http://www.newyorker.com/archive/2005/08/29/050829fa\\_fact](http://www.newyorker.com/archive/2005/08/29/050829fa_fact).

The mortgage foreclosure crisis exemplifies how the principle of moral hazard works in practice. Bankers, brokers, and investors were saved from the consequences of their own actions by government loans, but mortgage holders facing foreclosure (even those foreclosed fraudulently) were denied meaningful assistance on the grounds that such aid would constitute a moral hazard and send a misleading signal that debts do not need to be paid. Yet the principle of moral hazard could support opposite conclusions. If the best behavior comes from people with a stake in society, the best policy would be to raise wages and increase opportunities for asset accumulation. Similarly, if disastrous consequences ought to teach important moral lessons, there can be no justification for bailing out the banks or for timid enforcement of fair housing laws. The moral hazard that genuinely threatens this society does not stem from overly generous treatment of the poor. Rather, it stems from the abandonment of moral principles that has ensued from the raced, gendered, and classed consequences of policies provoked by decades of similar types of moral panics.

## V. THE PATTERNS OF THE PAST AND THE PROBLEMS OF THE PRESENT

### A. The Reemergence of a Familiar Problem

The same Congress that passed the Fair Housing Act of 1968<sup>187</sup> also enacted the Omnibus Crime Control and Safe Streets Act of 1968.<sup>188</sup> At the very moment when civil rights legislation meaningfully expanded the number of people who had access to societal opportunities, therefore, anticrime legislation worked to narrow the numbers of rights-bearing individuals. Adopting some of the language, and much of the social vision, used initially against the civil rights movement by Southern segregationists—but quickly embraced as well by non-Southerners including Everett Dirksen, Barry Goldwater, and Ronald Reagan—anticrime crusaders attempted to replace concerns for civil rights with concerns for states' rights, property rights, and victims' rights.<sup>189</sup> These campaigns addressed white anxieties about the ways in which civil rights laws threatened to diminish their overrepresentation in politics and raised the specter of new limits on the unfair gains and unjust enrichments that centuries of segre-

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187. 42 U.S.C. §§ 3601–3619, 3631 (2006).

188. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90–351, 82 Stat. 197 (codified as amended in various titles of U.S.C.).

189. See LIPSITZ, *supra* note 55, at 24–47; Haney López, *supra* note 164, at 1032–34.

gation and slavery had secured for whites.<sup>190</sup> Both major political parties embraced law-and-order rhetoric at a time when crime was actually decreasing as part of an elite and popular reaction among whites against the democratic and egalitarian gains of the civil rights era.<sup>191</sup> The resulting law-and-order policies increased sentences for minor offenses, promoted punishment rather than rehabilitation as the primary purpose of the penal system, and shredded the social safety net by cutting expenditures on education, housing, and health in order to increase spending on the policing practices and prisons that were identified above as the main sources of disproportionate vulnerability for communities, and women, of color.<sup>192</sup>

This eclipse of civil rights victories by repressive anticrime policies in 1968 followed a well-established pattern in U.S. history. Whenever the percentage of the population with access to rights has been meaningfully expanded, moral panics about crime and nonnormative behavior have emerged and have fueled the implementation of mechanisms for reducing the number of people with rights again.

## B. Abolition Democracy

The violent mass struggle that produced Abolition Democracy, civil rights laws, and the Thirteenth, Fourteenth, and Fifteenth Amendments during and immediately after the Civil War, for example, gave the nation the first real democracy it had ever known.<sup>193</sup> Very quickly, however, the enemies of that democracy passed new laws against loitering and vagrancy and used the convict lease system, mob violence, and lynching to implement Jim Crow segregation and sharecropping as systems that replicated the social relations of slavery even after formal emancipation.<sup>194</sup> Furthermore, a series of U.S. Supreme Court decisions, including the *Slaughterhouse Cases*,<sup>195</sup> *United States v. Cruikshank*,<sup>196</sup> and the *Civil Rights Cases*,<sup>197</sup> subverted the intent of Abolition Democracy by confining the application of the

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190. See generally THOMAS EDSALL & MARY EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS (1992). The Edsalls demonstrate the white working class embrace of moral panics about a raced underclass but do not recognize the ways in which even liberal policies dating back to the New Deal subsidized whiteness. See also JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 3–32 (1996).

191. LIPSITZ, *supra* note 63, at 43–50.

192. See GILMORE, *supra* note 14, at 89–127.

193. See generally W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA (Atheneum 1992) (1935).

194. See Haney López, *supra* note 164, at 1041–45.

195. 83 U.S. 36 (1873).

196. 92 U.S. 542 (1876).

197. 109 U.S. 3 (1883).

Reconstruction amendments to specific overt actions by state and local governments, thereby giving private parties a clear signal that the government would implicitly support them in practicing discrimination and even in launching vigilante violence against blacks.<sup>198</sup> Civil rights laws and constitutional amendments, which were intended to fight racial subordination by identifying and eliminating the vestiges of a slave system that was unwilling to die, perversely became interpreted as prohibitions against state acknowledgment of the pervasive power of white supremacy and insulated that supremacy against government intervention.

These reactionary measures depended on an ideological ruse that remains popular today: Whites opposed to obeying laws that expand the rights-bearing citizenry—in this case the Civil Rights Act of 1866<sup>199</sup> and the Thirteenth, Fourteenth, and Fifteenth Amendments—presented their own lawlessness as a defense against black criminality and as a reasonable response to the irrational preferences they claimed these laws gave to blacks they deemed unfit for freedom.<sup>200</sup> In doing so, they used the power that law inscribes in everyday life for their own purposes to create a captive workforce on plantations and in prisons through mass arrests and incarceration. For example in Alabama, blacks accounted for only 2 percent of the prison population in 1850. By 1870, however, 74 percent of the state's prison inmates were black.<sup>201</sup> Workers who travelled in search of employment were routinely arrested for vagrancy.<sup>202</sup> Those who stayed in one place but did not contract their labor out to whites were regularly arrested for loitering.<sup>203</sup> As Ruth Wilson Gilmore observes, under this system there were only two things that could get blacks arrested in the postbellum South: moving or standing still.<sup>204</sup> Once arrested, prisoners were then contracted out to do hard labor for whites, reinstating

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198. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 530–31 (Perennial Classics 2002) (1988); john a. powell, *Dreaming of a Self Beyond Whiteness and Isolation*, 18 WASH. U. J.L. & POL'Y 13, 22 (2005).

199. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1982, 1987–1988, 1991–1992 (2006)).

200. President Andrew Johnson, for example, vetoed the Civil Rights Act of 1866 on the ground that it safeguarded rights for blacks that went beyond what had been provided for whites. Johnson did not note, of course, that only blacks had been slaves or that the Black Codes passed after emancipation aimed to suppress the freedom and economic and political power of blacks. See DU BOIS, *supra* note 193, at 282–83.

201. Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 268 (2007) (citing MANZA & UGGEN, *supra* note 18, at 57).

202. See GILMORE, *supra* note 14, at 12.

203. See *id.*

204. *Id.*

slavery-type relationships for all intents and purposes.<sup>205</sup> Mass incarceration in the postbellum era betrayed the promises of Reconstruction. The formal expansion of rights and people with rights enacted through the Thirteenth, Fourteenth, and Fifteenth Amendments and the Civil Rights Act of 1866 led to a backlash and radical restrictions of rights rooted in claims of black inferiority and unfitness for freedom.

### C. The Labor Insurgencies of the 1930s

The labor insurgencies of the 1930s also initially led to an expansion of the rights-bearing citizenry through campaigns that won broad support for new forms of social welfare including old age pensions, federal housing programs, and government protection of collective bargaining. Even as new laws were being written and new programs were being implemented, however, reactionary forces worked assiduously to narrow the impact of these reforms and to reserve their benefits mainly for whites. New Deal reforms like the Wagner Act,<sup>206</sup> the Social Security Act,<sup>207</sup> and the National Housing Act<sup>208</sup> were crafted narrowly to limit those entitled to their benefits largely to whites. For example, farm workers and domestics—composing large portions of the minority population—were not given access to social security and the labor protections of the Wagner Act.<sup>209</sup> Furthermore, the expressly racist home appraisal categories institutionalized by the National Housing Act deprived minority populations of housing assets. These measures also identified only male workers as worthy of employment and relief while relegating women exclusively to their domestic responsibilities of raising children. These policies, therefore, also provide a prime example of the particularly serious and intersectional vulnerabilities of women of color. In addition, moral panics about the alleged idleness and sloth of unemployed workers justified repressive state actions against them.<sup>210</sup> Workers wandering the countryside in desperate searches for

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205. *See generally* DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICA FROM THE CIVIL WAR TO WORLD WAR II* (2008).

206. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006).

207. Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

208. National Housing Act, ch. 847, 48 Stat. 1246 (1934) (codified as amended in scattered sections of 12 U.S.C.).

209. QUADAGNO, *supra* note 190, at 20.

210. *See* JAMES N. GREGORY, *AMERICAN EXODUS: THE DUST BOWL MIGRATION AND OKIE CULTURE IN CALIFORNIA* 38–41 (1991); MICHELE MITCHELL, *RIGHTEOUS PROPAGATION: AFRICAN AMERICANS AND THE POLITICS OF RACIAL DESTINY AFTER RECONSTRUCTION* 161–62 (2004); QUADAGNO, *supra* note 190, at 3–32.

employment were ridiculed as tramps and hobos, as irresponsible and lazy social deviants unwilling to work.<sup>211</sup>

#### D. *Brown* and the Subversion of Its Intention

Similarly, the democratic intentions of *Brown v. Board of Education*<sup>212</sup> and the fair hiring and fair housing provisions of the 1960s civil rights laws provoked reactionary restrictions on democratic opportunities justified by moral panics about the nonnormativity of people of color. Whites again justified their own lawbreaking, such as in refusing to desegregate public schools, as a reasoned and reasonable response to the specter of nonwhite lawlessness.

For example, state officials in Louisiana viewed *Brown* as more than a ruling about segregated schools. They saw it as a wedge that might open the door to black political power in the future.<sup>213</sup> Louisiana state officials claimed that segregated schools were necessary to protect white children—and especially innocent white girls—from immoral, depraved, and diseased black children.<sup>214</sup> The *Brown* decision, however, had expressly rejected that claim in its footnote eleven, noting that the alleged deficiencies attributed to black children came from poverty, ill health, lack of education, and other aspects of their victimization by Southern white oppression.<sup>215</sup> Thus, the Court ruled that Southern school boards could not use the injuries created by segregation as an excuse for continuing it. Yet the idea of protecting whites from unfit blacks unwisely given freedom by a government now presumed to be dominated by black interests proved productive in protecting white advantages, notwithstanding *Brown*'s admonishment.

In response to *Brown*, the all-white Louisiana legislature passed laws designed to produce new evidence of black immorality. It passed laws, for example, designed to inflate the statistics recording common law marriages and children born

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211. For a discussion of how incarceration helped shape the racial common sense of the nation during the 1930s, see ETHAN BLUE, *DOING TIME IN THE DEPRESSION: EVERYDAY LIFE IN TEXAS AND CALIFORNIA PRISONS* (2012). During the Great Depression, mass unemployment, indebtedness, migrants seeking employment, and men deserting families led to new regimes of policing and incarceration dramatized in signature works of expressive culture from that decade including the films John Ford's *THE GRAPES OF WRATH* (20th Century Fox 1940), and Mervyn Leroy's *I AM A FUGITIVE FROM A CHAIN GANG* (Warner Bros. Pictures 1932), and novels like TOM KROMER, *WAITING FOR NOTHING* (1935).

212. 347 U.S. 483 (1954).

213. See Anders Walker, Note, *Legislating Virtue: How Segregationists Disguised Racial Discrimination as Moral Reform Following Brown v. Board of Education*, 47 DUKE L.J. 399, 418 (1997).

214. *Id.*

215. See *Brown*, 347 U.S. at 494 & n.11; see also Walker, *supra* note 213, at 403.

out of wedlock among blacks by making it harder to get valid marriage licenses.<sup>216</sup> The new statutes forced couples wanting to wed to provide copies of original birth certificates and to produce health certifications signed by physicians within the previous ten days.<sup>217</sup> These were onerous and impractical demands to make of a population that was largely unable to afford medical care, was unwelcome in segregated hospitals and clinics, had low levels of literacy, and had to move frequently to find work. One law proclaimed that marriage licenses could be issued only on weekdays between eight in the morning and noon; hours when working people were at their jobs.<sup>218</sup> The laws had exceptions, however, that advantaged whites. Couples wishing to wed could secure licenses by visiting the homes of registrars outside the hours of eight to noon stipulated in the law.<sup>219</sup> This provision created special preferences and opportunities for whites. They could visit the homes of county officials (who were all white because of segregationist voter suppression), but such visits would have been considered inappropriate by blacks.<sup>220</sup> Other laws outlawed common law marriages, limited the number of people authorized to perform marriage ceremonies, demanded legal proof that previous marriages had been dissolved, and required official documents affirming that applicants were free of venereal disease.<sup>221</sup> Still other statutes insisted that all newborn babies had to have certificates within five days of their birth that indicated whether they had been born out of wedlock.<sup>222</sup>

The behavior of poor people, black and white, did not change because of these laws, but increased surveillance of blacks and exemptions from the letter of the law extended to whites produced the appearance of a wave of nonnormative behavior by blacks. Armed with the statistics that their policies produced, Southern states then began to use “bad moral character” as a reason to deny black citizens the right to vote and as an excuse for their resistance to school desegregation.<sup>223</sup> They also

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216. See Walker, *supra* note 213, at 410.

217. *Id.*

218. *Id.* at 411.

219. *Id.*

220. *Id.*

221. *Id.* at 410–13.

222. *Id.* at 416.

223. The Mississippi and Louisiana legislatures enacted laws that justified removing children from welfare rolls if they lived in “morally unsuitable” homes which the states described as a home in which a child was born out of wedlock, in which parents were not married, or if a woman gave birth after receiving aid to dependent children assistance for a previous child. Louisiana denied the right to vote to men who fathered children out of wedlock. See KENNETH J. NEUBECK & NOEL A. CAZENAIVE, WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA’S POOR 71–72 (2001). In Mississippi a citizen could object to another citizen’s right to vote by alleging “bad moral character,” a statute that served as a pretext for suppressing black votes. Arkansas Governor Orville

acted resolutely to remove indigent blacks from the welfare rolls on the ground that their behavior did not merit public support.<sup>224</sup> Louisiana Governor Jimmie Davis, for example, deprived more than twenty thousand needy black children of welfare payments due to them on the ground that the mothers of these children were “a bunch of professional prostitutes.”<sup>225</sup>

Such blaming and shaming of blacks proved to be an effective means for white supremacists to preserve their racial privileges without referring directly to race and to disguise discrimination as family protection and moral uplift. But these policies produced in the neo-Confederate quarters of the Mississippi Delta did not merely reflect a backward and reactionary racial order outside of the national mainstream. The political power that white Southerners derived from suppressing black participation in electoral politics and a bipartisan consensus in the North and West on behalf of the settled interests and expectations of whites soon made Southern policies the basis for national laws, and the formula developed by Southern segregationists—to reduce the rights and the numbers of rights-bearing citizens—quickly came to dominate the politics of both political parties.<sup>226</sup> Anticipating the colorblind racism that would prevail in the courts around the country by the 1970s by achieving racist ends without admitting racist intent, these white supremacists turned the antiracist victories of the civil rights movement into a defeat for that movement by declaring that blacks were unfit for freedom and replaced the race-based and race-bound policies crafted in concert by private individuals and the state with putatively race-blind reforms that criminalized bad conduct and bad character.<sup>227</sup>

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Faubus in 1957 defied federal court orders to desegregate local schools and contended that when President Eisenhower sent federal troops to Little Rock to enforce the law that white schoolgirls were under physical and psychological attack. Local whites argued that desegregation meant that white girls would have to shower with black girls after gym classes, that using the same bathrooms that black girls used would expose the white girls to venereal diseases, and that integration would mean that white parents would soon be confronted with black grandchildren. See Phoebe Godfrey, *Bayonets, Brainwashing, and Bathtubs: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock's Central High*, 42 ARK. HIST. Q. 42 (2003).

224. Walker, *supra* note 213, at 420–21.

225. NEUBECK & CAZENAIVE, *supra* note 223, at 72 (internal quotation marks omitted).

226. See generally CLYDE WOODS, *DEVELOPMENT ARRESTED: THE BLUES AND PLANTATION POWER IN THE MISSISSIPPI DELTA* (1998), which shows how the welfare policies of the Mississippi plantation bloc eventually became the template for federal policies including the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, that sharply curtailed access to welfare.

227. *Id.* at 63.

### E. The Crucible of 1968

The pairing of the Fair Housing Act<sup>228</sup> with the Omnibus Crime Control and Safe Streets<sup>229</sup> Act in 1968 carried over these practices in a new context. Congress bitterly resisted a fair housing bill when President Lyndon B. Johnson's administration first proposed one in 1966.<sup>230</sup> The House and Senate approved the 1968 Crime Control Act in the midst of the violent insurrections in cities across the nation that followed the assassination of Martin Luther King, Jr. The law contained provisions that did more to punish the victims of white racism than to heed their cries for justice. Even the fair housing bill that was eventually passed and signed by the president included an antiriot provision authored by South Carolina's segregationist stalwart Strom Thurmond designed to blame the riots on black militants.<sup>231</sup> The provision made it a federal crime to cross interstate lines to give speeches that lead to subsequent violence even though no proof existed that the urban insurrections of the era were caused by fiery speeches rather than decades of misery and subordination.<sup>232</sup> Moreover, the parts of the bill that actually addressed fair housing were intentionally designed to be unenforceable.<sup>233</sup> Senate minority leader Everett Dirksen of Illinois insisted on stripping the bill of all of its viable enforcement mechanisms as the price of bipartisan support.<sup>234</sup>

Although persistent citizen action at the local level has made the Fair Housing Act more effective than its structure would suggest, it was not so much a law designed to end housing discrimination once and for all as much as an effort to outlaw some of the most visible manifestations of it. As with many other civil rights laws, its focus on individual intentional acts of discrimination and the lack

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228. Fair Housing Act, 42 U.S.C. §§ 3601–3619, 3631 (2006).

229. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered titles of U.S.C.).

230. See QUADAGNO, *supra* note 190, at 99–100. White House aide Joseph Califano disclosed that proposing the fair housing law provoked some of the most vicious hate mail that President Johnson had ever received.

231. Civil Rights Act of 1968 § 104, Pub. L. No. 90-284, 82 Stat. 73, 75 (codified as amended at 18 U.S.C. § 2101).

232. *Id.*

233. See Smith & Cloud, *supra* note 5, at 10. The Act contained no meaningful enforcement measures, no cease and desists provisions, limits on damages, and barriers against the Department of Housing and Urban Development initiating its own investigations. A large part of the bill left the filing of complaints up to private citizens acting with limited resources (and no subpoena powers) who had to make their claims quickly. Moreover, the bill was heavily weighted away from punishment of violators and toward “conference, conciliation, and persuasion” between the aggrieved and those discriminating against them.

234. *Id.*

of meaningful enforcement mechanisms make the fair housing law what Scott Burris aptly describes as “a white-oriented system that regulates discrimination” rather than prevents it.<sup>235</sup>

Yet while the civil rights laws of 1968 were structured to be weak, the anticrime laws of that year were written to have maximum effect. Four decades later, we see evidence all around us of what these policies have produced. As Markus Dubber argues, state authorities today deploy laws making it a crime to possess a controlled substance in the same way and to the same effect that authorities in the nineteenth century used vagrancy laws: as a legal mechanism to control and subordinate racial minorities.<sup>236</sup> The United States now has one of the highest incarceration rates in the world, somewhere between five to ten times greater than other industrialized nations.<sup>237</sup> Blacks and Latinos account for nearly three-fifths of that prison population.<sup>238</sup> The United States houses one twentieth of the world's population but one quarter of the global incarcerated population.<sup>239</sup>

#### F. Mass Incarceration as a Mask That Hides Structural Social Problems

Mass incarceration not only exacerbates the crises caused by social conditions in communities of color, but it also hides many of the structural weaknesses of the economy that otherwise might be addressed. We do not see how severe some of our economic problems are because mass incarceration hides them from public view. For example, unemployment is always much greater than official statistics reveal because prison and jail inmates are not included in these numbers.<sup>240</sup> Imprisoning marginally employable black and Latino/a workers depresses the measured rate of unemployment, making it seem as if the economy is doing better than it is. Government statistics that show relative increases in black wages in the 1980s and 1990s are also misleading because of the realities of incarceration. These increases do not stem from increased opportunity or increasing black wages compared to white wages but rather from the fact that many of the people earning the lowest wages wind up in jails and prisons.<sup>241</sup> Thus, problems in the economy

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235. Burris et al., *supra* note 70, at 517.

236. See Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 908 (2001).

237. CLEAR, *supra* note 14, at 5.

238. Marc Mauer, *Two-Tiered Justice: Race, Class, and Crime Policy*, in THE INTEGRATION DEBATE, *supra* note 5, at 169, 170.

239. Haney López, *supra* note 164, at 1029.

240. See BECKY PETIT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS (2012).

241. MASSEY, *supra* note 8, at 100–01.

at large are hidden from view because mass incarceration makes the labor pool look smaller and better off than it actually is. In addition, mass incarceration depresses the economy, reducing earning power and depressing economic growth. According to one estimate, the immediate and collateral costs of mass incarceration produce an estimated loss in lifetime income for the present generation of offenders alone that measures close to twelve billion dollars.<sup>242</sup> Moreover, mass incarceration often increases rather than decreases crime because it undermines marital stability and child rearing, debilitates the physical and mental health of inmates, interrupts their work histories, and subverts acquisition of employable skills.<sup>243</sup>

## VI. LITIGATION AND LEGISLATION

Some of the injustices routinely perpetrated on individuals by the criminal justice system could be lessened by individual rights-based responses. Advocates are currently engaged in a number of social justice campaigns designed to help people mitigate the negative consequences of having interacted with that system: Reentry lawyers and ex-offender advocates have mobilized to “[b]an the [b]ox” that requires applicants for jobs and housing to indicate if they have criminal convictions, especially in cases when those convictions are not relevant to the employment or housing situations they seek.<sup>244</sup> “Think Before You Plea” educational programs attempt to make defendants and attorneys more aware of the collateral consequences of plea bargains—although, as has been described, there are so many of those that it is difficult for any defense lawyer or defendant to know exactly what future rights and opportunities would be lost because of a criminal conviction.<sup>245</sup> Initiatives focused on restorative justice promote positive victim-offender mediations, group conferencing, and peacemaking circles as mechanisms for responding to the ripple effects of crime through processes grounded

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242. See Mark L. Joseph, *Understanding the Economic Costs of Incarceration for African American Males*, in *SOCIAL WORK WITH AFRICAN AMERICAN MALES: HEALTH, MENTAL HEALTH, AND SOCIAL POLICY* 316 (Waldo E. Johnson, Jr. ed., 2010) (estimating the lifetime earnings loss of the average inmate at \$136,000).

243. PETERSILIA, *supra* note 113, at 112–16, 223–30.

244. Gene C. Johnson, *'Ban the Box' Movement Gains Steam*, *NEW AM. MEDIA* (Aug. 15, 2006), [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=99ce5ed2c12c489351589891334e720f](http://news.newamericamedia.org/news/view_article.html?article_id=99ce5ed2c12c489351589891334e720f); ABA Criminal Justice Section, *Think Before You Plea: Juvenile Collateral Consequences in the United States*, *BEFOREYOUPEA.COM*, <http://www.beforeyouplea.com> (last visited June 22, 2012).

245. See generally Davis, *supra* note 2 (analyzing the imbalance of power between prosecutors and defendants in the plea bargaining process and the threat it poses to the fair administration of justice).

in reconciliation, mutual recognition, and rehumanization rather than harsh punishment in carceral institutions.<sup>246</sup>

### A. Legislation as a Response

There are also legislative avenues for positive change. Reforming parole practices, increasing standards of proof required for technical parole violations, and helping ex-offenders secure pardons, expunged convictions, and expunged criminal records would all lessen the collateral consequences of incarceration. Municipal fair banking ordinances can require evidence of socially responsible and non-discriminatory lending practices as a precondition for the deposit of city funds in banks. Fair housing laws would be stronger and more enforceable if they were amended to give judges the power to issue cease-and-desist orders and to impose stricter penalties. Insurance redlining could be restrained by a law requiring the property insurance industry to make public its practices in minority communities through release of the kinds of data that the Home Mortgage Disclosure Act<sup>247</sup> secures from housing lenders. Repealing the Gramm-Leach-Bliley Act of 1999<sup>248</sup> and the Commodity Futures Modernization Act of 2000<sup>249</sup> would ban many of the disastrous practices that produced the home mortgage foreclosure crisis. A constitutional amendment overturning the Supreme Court decisions in *San Antonio Independent School District v. Rodriguez*<sup>250</sup> and *Milliken v. Bradley*<sup>251</sup> would go a long way toward integrating schools and democratizing educational opportunities.

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246. See generally MARK UMBREIT & MARILYN PETERSON ARMOUR, RESTORATIVE JUSTICE DIALOGUE: AN ESSENTIAL GUIDE FOR RESEARCH AND PRACTICE (2010).

247. Home Mortgage Disclosure Act of 1975, 12 U.S.C. §§ 2801–2810 (2006).

248. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 & 15 U.S.C.).

249. Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763 (codified as amended in various titles of U.S.C.).

250. 411 U.S. 1 (1973). This case involved a complaint by Mexican American parents from San Antonio that their children received inferior educations in underfunded and poorly equipped schools. By a 5–4 vote the Supreme Court held that the parents had not proved that the inferiority of their children's education came from racial bias, that it could have stemmed from class inequalities for which there is no constitutional remedy. In addition, the Court held that while the state of Texas is obligated to provide all students with an education, the state is not obligated to provide an education of equal quality for all students.

251. 433 U.S. 267 (1977). This case involved a complaint by black and white parents that school segregation in Detroit robbed all students of important educational and social experiences. The District Court ordered implementation of a cross-district desegregation plan that the Supreme Court ruled violated the principle of local control. As Jamin Raskin argues, this decision gave “aggressive judicial impetus and imprimatur to the processes of white flight.” See JAMIN B. RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VERSUS THE AMERICAN PEOPLE 160–61 (2003).

## B. Litigation as a Response

But litigation is also needed to resist the attack on women of color because unprosecuted acts of intentional and individual discrimination remain pervasive. Structural lawsuits seeking damages and prospective relief can play an important role in addressing the collective injuries produced by patterns of housing and hiring discrimination.<sup>252</sup> The more than four million cases of unprosecuted race-based housing discrimination that take place each year impose enormous costs on blacks and Latinos.<sup>253</sup> Furthermore, the economic damage routinely done to communities of color through discriminatory practices by private individuals, public zoning boards, public housing authorities, and the real estate, banking, and insurance industries, as described in Parts I and II, has been exacerbated immeasurably in recent years by the economic collapse provoked by predatory lending and the securitization of home loans. Black individuals and families lost between \$72 billion and \$93 billion in wealth because of loan foreclosures and lost equity between 2000 and 2008.<sup>254</sup> Losses have not been confined to the mortgage holders themselves, as each foreclosure has a spillover effect on the equity of neighboring houses and municipal tax bases. A study conducted for the Center for Responsible Lending, for example, estimates that the 2.2 million homes foreclosed between 2000 and 2008 led to a \$202 billion decline in overall taxable house values.<sup>255</sup>

Women of color have been exposed to the negative consequences of the economic crisis to a significant degree. Women make up 46.7 percent of black borrowers purchasing homes, while Latinas compose 31.4 percent of Latino borrowers purchasing homes.<sup>256</sup> Yet black women are five times more likely than white men to receive subprime loans—the loans that were the catalyst of the recent crisis—and black women and Latinas are more likely to receive subprime loans than any other race-gender combination.<sup>257</sup> These disparities are not necessarily due to creditworthiness, as women frequently have higher credit scores than men and large numbers of borrowers who received subprime loans actually qualified for

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252. See Seng & Caruso, *supra* note 6, at 55–58.

253. See Smith & Cloud, *supra* note 5, at 15.

254. AMAAD RIVERA ET AL., UNITED FOR A FAIR ECON., FORECLOSED: STATE OF THE DREAM 2008, at 1, 17 (2008).

255. CTR. FOR RESPONSIBLE LENDING, SUBPRIME SPILLOVER: FORECLOSURES COST NEIGHBORS \$202 BILLION; 40.6 MILLION HOMES LOSE \$5,000 ON AVERAGE 1–4 (2008), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/subprime-spillover.pdf>.

256. FISHBEIN & WOODALL, *supra* note 121, at 7.

257. INT'L WOMEN'S HUMAN RIGHTS CLINIC, CITY UNIV. OF N.Y. SCH. OF LAW, *supra* note 17, at 26.

prime loans.<sup>258</sup> Instead it was race- and gender-based discrimination that made women of color particularly vulnerable to the negative consequences of the crisis.<sup>259</sup>

Fair housing advocates and activists have begun to contest these conditions in productive and creative ways. These include the City of Baltimore's successful lawsuit charging Wells Fargo with predatory lending and other policies in violation of the Fair Housing Act;<sup>260</sup> the successful action brought by the Anti-Discrimination Center charging Westchester County, New York with failing to fulfill its obligations to affirmatively further fair housing;<sup>261</sup> and the \$9 million award secured by residents of the Coal Run neighborhood in Zanesville, Ohio as a result of litigation charging city and county officials with denying their neighborhood water and sewer connections because of its racial makeup.<sup>262</sup> These cases augur well for future action in the courts because they create a more favorable legal basis for litigators to argue from. Campaigns at the municipal level in Grand Rapids and Seattle, and at the state level in New York and Wisconsin, in addition, have enjoyed some success in making ex-offenders convicted of nonviolent and nonsexual crimes members of a protected class under the Fair Housing Act.<sup>263</sup> Their success will enable litigators to pursue productive avenues for advancing the interests and rights of women of color in the future.

Furthermore, Craig Haney, who serves as an expert witness in death penalty sentencing cases, has been able to argue successfully to judges and juries that minority neighborhoods contain risk factors, neighborhood disadvantages, and criminogenic conditions that should serve as mitigating factors in considering an individual's culpability for criminal actions in capital cases.<sup>264</sup> These arguments

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258. *Id.*

259. *See, e.g.,* Leland, *supra* note 121. Lending companies in Baltimore engaged in reverse redlining, concentrating deceptive and predatory loans in black neighborhoods. In a deposition, one loan officer remembered his colleagues referring to blacks as "mud people" and calling subprime loans "ghetto loans." *See* Ben Popken, *Affidavits on How Wells Fargo Gave "Ghetto Loans" to "Mud People,"* CONSUMERIST (June 8, 2009, 5:53 PM), <http://consumerist.com/2009/06/affidavits-on-how-wells-fargo-gave-ghetto-loans-to-mud-people.html>.

260. *Mayor of Balt. v. Wells Fargo Bank, N.A.*, 631 F. Supp. 2d 702 (D. Md. 2009); *see also* Yan Q. Mui, *Wells Fargo, Justice Department Settle Discrimination Case for \$175 Million*, WASH. POST, July 12, 2012, [http://www.washingtonpost.com/business/economy/wells-fargo-justice-department-settle-discrimination-case-for-175-million/2012/07/12/gJQAX66ZgW\\_story.html](http://www.washingtonpost.com/business/economy/wells-fargo-justice-department-settle-discrimination-case-for-175-million/2012/07/12/gJQAX66ZgW_story.html).

261. *United States ex rel. Anti-Discrimination Ctr. of Metro N.Y. v. Westchester Cnty.*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007).

262. *Kennedy v. City of Zanesville*, 505 F. Supp. 2d 456 (S.D. Ohio 2008); *see also* LIPSITZ, *supra* note 55, at 106–09, 253.

263. Eric Kestin & Brenda Anibarro, Presentation at the John Marshall Law School Fair Housing Conference: Ex-Offenders, A New Protected Class: Mobilizing for Action (Aug. 27, 2011).

264. *See* HANEY, *supra* note 101, at 3–25.

could be raised outside of the special circumstances of capital crimes to argue that the high levels of health hazards existing in communities of color combined with the defunding of the social safety net create conditions that increase violence and crime. They could then be used to show that effective crime reduction could actually come from improving health conditions, strengthening neighborhood networks, and sponsoring programs aimed at promoting home ownership, asset building, and broader and fairer access to affordable rental dwellings rather than from punishment and mass incarceration. In this context, it would help if administrative agencies such as the Office of the Comptroller of the Currency and the Federal Reserve Board were given the authority to bring disparate impact cases against mortgage lenders. The Department of Justice generally does not pursue fair housing cases (which fall outside its primary responsibilities) but in recent years it has taken some innovative steps relevant to fair housing by settling discriminatory lending cases in St. Louis, Detroit, Baltimore, and Memphis<sup>265</sup> with agreements that compelled banks to issue home improvement loans in neighborhoods suffering from high rates of foreclosure and to assist victims of predatory lending to repair their credit records.<sup>266</sup> These efforts should continue.

Yet problems caused by structural racism and sexism cannot be addressed adequately solely by legislation or litigation. The tort model of individual injury that dominates civil rights law is part of the problem. It encourages us to view the many different and discrete acts that produce racial and gendered stratification and subordination as isolated and aberrant instances of intentional individual discrimination.<sup>267</sup> This model largely fails to address and redress the dimensions of discrimination that are structural and systematic—that create collective, cumulative, and continuing injuries.<sup>268</sup> Redressing these injuries requires coordinated campaigns that expose how individual problems function as nodes in a linked and integrated network.<sup>269</sup>

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265. See *supra* note 260 and accompanying text.

266. See Charlene Crowell, *Equal Credit Elusive for Minorities, Says Assistant Attorney General*, LA WKLY., Nov. 21–27, 2011, at 13; see also *Agreed Order, United States v. Midwest BankCentre* (E.D. Mo. n.d.), available at <http://www.stopfraud.gov/news/midwest-agreed-order.pdf> (last visited June 23, 2012); Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement With Citizens Republic Bancorp Inc. and Citizens Bank Regarding Alleged Lending Discrimination in Detroit (May 5, 2011), <http://www.justice.gov/opa/pr/2011/May/11-crt-576.html>.

267. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57 (1978).

268. See OLIVER & SHAPIRO, *supra* note 22; Lipsitz & Oliver, *supra* note 33. The concepts of collective and cumulative injury have advanced over the years and have gained particular momentum because of the foreclosure crisis, which demonstrates how entire communities are damaged by discrimination against individuals.

269. Kimberlé Crenshaw explains, for example, that the field of Critical Race Theory emerged out of a shared recognition by students at Harvard Law School that there was a distinction between civil

## VII. POLITICAL CHALLENGES, POLITICAL RESPONSES

How can people be protected against the avalanche of cumulative vulnerability created at the intersection of gender, race, and mass incarceration? What are some of the responses social justice advocates should employ to improve the condition of society's most vulnerable members, and especially women of color?

### A. A Concentrated Political Attack

Entrenched forms of systemic structural segregation and racialized and gendered discrimination of the types outlined above create cumulative vulnerabilities that guarantee that nearly *any* public policy, even a purportedly neutral one, will have a negative, disparate impact on women of color.<sup>270</sup> Yet the criminalization of poverty and homelessness, the war on drugs, immigration restrictions, and the heteropatriarchal model of family protection inscribed in policies aimed at the poor amount to more than policies with disparate impacts.<sup>271</sup> They constitute a fundamentally political attack on the rights of poor women of color. They are part of a neoliberal program that exploits difference to produce disciplinary policing and subordination in all realms of social life.<sup>272</sup>

Mass incarceration is enabled by apparatuses that include mandatory sentencing, differential policing, increases in the collateral consequences of criminal convictions, and repressive enforcement of "quality-of-life crimes" that target people's condition rather than their conduct.<sup>273</sup> The surveillance and disciplining of

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rights law and an analysis of how law actually functions to constitute the racial order that civil rights law regulates. Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1271 (2011).

270. The flood waters in New Orleans in 2005 that rose in the aftermath of Hurricane Katrina did damage in nearly every part of the city. But the lower Ninth Ward suffered the greatest damage because water flows to the low places. More than a century of housing discrimination, racial zoning, lending bias, and differential policing led to the concentration of impoverished black people without access to private transportation in the neighborhood. Just as water literally flowed to the low places in New Orleans in 2005, it figuratively flows to the low places in many other realms of activity. The home mortgage interest and property tax deductions in the tax code enrich whites by making the fruits of past (and now illegal) discrimination more valuable in the present. Increases in sales and payroll taxes harm blacks disproportionately because they are more dependent on wage income and inherit less property than whites. Because water flows to the low places, the patterns of the past impede progress in the present. In the Ninth Ward, even gravity worked against racial justice.

271. See generally LISA DUGGAN, *TWILIGHT OF EQUALITY: NEOLIBERALISM, CULTURAL POLITICS AND THE ATTACK ON DEMOCRACY* (2004).

272. See generally HARVEY, *supra* note 162.

273. See generally FREEDOM NOW!, *supra* note 48. This collection includes testimony by homeless people and analyses by academics and activists that reveal how a massive concentration of police

ex-offenders, people on public assistance, residents of public housing, the homeless, and immigrants prevent any kind of long-range planning because they make large numbers of people immediately arrestable, incarcerable, or deportable whether they have committed crimes or not. In the case of Latinas, understanding the extent of this attack, as well as the intersection of criminality and race, requires special recognition of the intersection of criminality and immigration. The numbers of aliens deported from the United States because of criminal convictions numbered 7,338 in 1989 but by 1998 rose to 56,011.<sup>274</sup> These numbers coupled with nativist rhetoric promote public perceptions that connect Latino identity with illegality and justify forms of racial profiling against all Latinos, even those who are citizens. This connection between Latino identity and illegality serves multiple political purposes. While it rarely leads to their expulsion or exclusion from the U.S. economy, it routinely guarantees their subordinate inclusion and availability for exploitation as farmworkers, domestics, gardeners, garment workers, and nannies.<sup>275</sup> Latinas suffer the effects of these policies whether or not they are citizens and whether or not they are individually targeted for arrest or deportation. The portrayal of Mexicans as “illegals” serves white supremacy as a device for the racialization and subordination of all Latinos, no matter their citizenship status.<sup>276</sup> In the wake of the new security regimes implemented after the terrorist attacks of September 11, 2001, moral panics about undocumented immigrants have been used as a justification for increasing state surveillance in general, even (and especially) by people who often indicate contradictorily that they are advocates of small government.<sup>277</sup>

Part of this political attack manifests itself though vast government efforts at surveillance and control of, but little government support for, communities of color. The pervasiveness of child welfare supervision officials in black neighborhoods, the higher likelihood of poor people losing children to state custody, the pervasive use of gang injunctions to enable police to make stops and arrests for behavior in black and Latino neighborhoods that would be legal in suburbs, the channeling of black and Latino youth offenders to detention facilities, and the disproportionate number of disciplinary suspensions meted out in schools to black and Latino/a students give

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officers in the Skid Row section of Los Angeles harass homeless residents in an effort to drive them out of the area and recover the land for redevelopment.

274. Travis, *supra* note 156, at 23.

275. See De Genova, *supra* note 165, at 429. For an overview of the subordination of Latino immigrants in American society, see JONATHAN XAVIER INDA, TARGETING IMMIGRANTS: GOVERNMENT, TECHNOLOGY, AND ETHICS (2006), and PIERRETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE (2001).

276. See De Genova, *supra* note 165, at 433.

277. See Ali Behdad, *INS and Outs: Producing Delinquency at the Border*, 23 AZTLÁN 103, 106 (1998).

young people of color an early and enduring lesson that the state exists to harass and control them. As Avery Gordon notes about this combination of big and intrusive government to police the poor and ever-increasingly defunded, small government when it comes to meeting the needs for jobs, housing, education, and health care that are particularly salient for women of color: "When the State abandons you, it never lets you out of its sight."<sup>278</sup>

### B. Using the Past to Better Respond to Political Attacks of the Present

Such a vast political attack requires a political response. Perhaps the most important intervention in addressing the problems that communities, and especially women, of color face in securing fair housing and fending off the negative collateral consequences associated with a lack of housing, including mass incarceration, would be to remind our constituencies and ourselves that the most important crime wave confronting our nation comes from the more than four million violations of the Fair Housing Act<sup>279</sup> that take place every year; from pervasive mortgage redlining and predatory lending that strip millions of dollars of assets from communities of color every year; from the mortgage foreclosures forged from the opportunities for plunder promoted by the securitization and deregulation of the mortgage industry; and from the accumulation of wealth for some made possible by dispossession of others through the privatization of public housing, the criminalization of homelessness, and public subsidies for private redevelopment projects.<sup>280</sup>

Priscilla Ocen argues that the racial surveillance and harassment directed toward impoverished black women seeking to move into predominately white communities with Section 8 vouchers violates the Fourteenth Amendment.<sup>281</sup> Ocen argues that these practices constitute a contemporary reincarnation of the racially restrictive covenants outlawed by the 1968 Fair Housing Act.<sup>282</sup> Even though there

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278. Avery F. Gordon, *A World Map*, in *AN ATLAS OF RADICAL CARTOGRAPHY* 139, 143 (Lize Mogel & Alexis Bhagat eds., 2007).

279. Fair Housing Act, 42 U.S.C. §§ 3601–3619, 3631 (2006).

280. Smith & Cloud, *supra* note 5, at 11.

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

282. *Id.* at 1568. It is commonly argued that the 1948 decision in *Shelley v. Kraemer*, 334 U.S. 1 (1948), outlawed racially restrictive covenants, but that ruling only banned states from enforcing them. Property owners were still free to enter into such restrictive covenants and local authorities could still register deeds that included them. The Federal Housing Administration actually continued to recommend and even require restrictive covenants as a precondition for securing a federally supported loan long after *Shelley*. MASSEY & DENTON, *supra* note 56, at 188. Only the Fair Housing Act of 1968 made racially restrictive covenants completely illegal. See 42 U.S.C. § 3604(c); 24 C.F.R. § 100.75 (2011).

are no written deed restrictions in these cases, police surveillance and harassment practically designate as “off limits” dwellings that the voucher holders are fully qualified to inhabit legally.<sup>283</sup> Ocen’s argument resonates with Justice William O. Douglas’s concurring opinion in the 1968 case of *Jones v. Alfred H. Mayer Co.*<sup>284</sup> Douglas viewed the private housing discrimination perpetrated against the Joneses, an interracial couple seeking to buy a home in the previously all-white suburban development of Paddock Hills in St. Louis, as evidence of the existence of a badge of slavery unwilling to die, thus rendering such discrimination illegal under the Civil Rights Act of 1866 and the Thirteenth Amendment.<sup>285</sup>

In that case, Douglas argued that Congress had outlawed private discrimination in housing with the Civil Rights Act of 1866.<sup>286</sup> Although it stood virtually unenforced for more than a century, that Act addressed the intent of the Thirteenth and Fourteenth Amendments to eliminate all of the residual badges and emblems of slavery.<sup>287</sup> The 1866 Act guaranteed all citizens the same right as whites to inherit, purchase, lease, sell, hold, and convey real and personal property.<sup>288</sup> Two months before Congress passed the Fair Housing Act of 1968, Douglas’s concurring opinion noted that the refusal to sell a home to a mixed race couple in *Jones* constituted part of a pattern of practices by whites over an entire century that had their origins in the white racial supremacy at the center of the slave system.<sup>289</sup> Whites had restricted voting rights,<sup>290</sup> excluded blacks from jury service,<sup>291</sup> segregated education,<sup>292</sup> housing,<sup>293</sup> transportation,<sup>294</sup> and public accommodations,<sup>295</sup>

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283. Ocen, *supra* note 281, at 1568–81.

284. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

285. See Mira Tanna, *Jones v. Mayer Revisited*, 57 CLEV. ST. L. REV. 269, 273 (2009).

286. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1982, 1987–1988, 1991–1992).

287. Tanna, *supra* note 285, at 273–74. The 1866 Act had been used in only one previous federal court case about private discrimination. In 1903, a federal judge in Arkansas found that whites conspiring to prevent a black man from leasing a farm violated the Act. *United States v. Morris*, 125 F. 322 (E.D. Ark. 1903).

288. See 42 U.S.C. § 1982 (2006).

289. *Jones*, 392 U.S. at 445–49 (Douglas, J., concurring).

290. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 8–60 (2004).

291. See *id.* at 41–43.

292. See, e.g., JOHN HOPE FRANKLIN, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 290 (2000).

293. See, e.g., JUDD & SWANSTROM, *supra* note 70, at 198.

294. See, e.g., MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1956–1961*, at 71–76 (1996).

295. See, e.g., A. K. Sandoval-Strausz, *Travelers, Strangers and Jim Crow: Law, Public Accommodations, and Civil Rights in America*, 23 LAW & HIST. REV. 53 (2005).

and banned intermarriage.<sup>296</sup> Douglas deemed all of these actions evidence of slavery unwilling to die. The arguments advanced by Ocen and Douglas illustrate how the coupling of contemporary housing discrimination with mass incarceration functions as the modern-day equivalent for women of color of the betrayal of emancipation and Reconstruction in the nineteenth century. These practices should remind us of the intent and effect of the key measure that was used to support the slave system in the Constitution: the Three-Fifths Clause.<sup>297</sup> Before the adoption of the Thirteenth Amendment, whites who lived in regions populated by slave owners received increased voting power because slaves were counted as part of the represented population even though, of course, they could not vote. Similarly, today, the rural communities in which many prisons are located secure more than the direct benefits of the construction costs, employment opportunities, and tax revenues that accompany prison building.<sup>298</sup> They also profit from the Census Bureau's policy of counting inmates as residents of the municipalities where they are incarcerated.<sup>299</sup> This means that the low-income ghettos and barrios that many inmates leave when they go to prison lose state and federal aid tied to population numbers. They are deprived, for example, of funds allocated for job training, schools, Medicaid, and community development programs. At the same time, the mostly white rural communities that host prisons receive augmented funding, using the demographic power of people locked up in their districts to pursue policies inimical to the interests of the inmates and the communities from which they come.<sup>300</sup> Felon and ex-felon disenfranchisement and other voter suppression strategies like voter identification laws that have a predictably racialized impact complete the picture, limiting the number of people who can exercise rights and effectively abrogating the rights themselves for people in the targeted populations.<sup>301</sup>

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296. See, e.g., PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* (2009).

297. U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of years, and excluding Indians not taxed, three-fifths of all other persons.").

298. Ruth Wilson Gilmore, *Forgotten Places and the Seeds of Grassroots Planning*, in *ENGAGING CONTRADICTIONS: THEORY, POLITICS, AND METHODS OF ACTIVIST SCHOLARSHIP* 31, 44-45 (Charles R. Hale ed., 2008).

299. See PRISONERS OF THE CENSUS, <http://www.prisonersofthecensus.org> (last visited June 23, 2012).

300. *Id.*

301. See generally RACIALIZING JUSTICE, DISENFRANCHISING LIVES, *supra* note 150 (demonstrating the intersections of incarceration, unemployment, and disenfranchisement).

This ability to effect racist ends without having to admit racist intent functions as a modern day Grandfather Clause, another emblem of slavery unwilling to die. In the Jim Crow era, registrars in Southern states denied the franchise to potential black voters through clauses in laws passed by state legislators that stated that only citizens whose grandfathers had been voters could exercise the franchise themselves. The clauses did not deny blacks the right to vote outright because that would have been in clear violation of the Fifteenth Amendment. Yet the grandfather clause (which remained in force through the early years of the twentieth century) worked effectively to prevent blacks from voting by placing them in a category of citizens whose freedom could be restricted for reasons not overtly or expressly connected to race. No blacks in the South could overcome the obstacles of these provisions because their slave parents and grandparents were not considered to be citizens, voters, or even humans in the regime of slavery.<sup>302</sup> White voters whose grandparents had not been voters were not held to the provisions of the Grandfather Clause by registrars who understood correctly the racist intent of the clause and acted accordingly. Poor whites secured the franchise based on the privileges available to them because of their race.

Today, as has been described above, the collateral consequences of criminal convictions, the concentrated poverty in segregated black and Latino neighborhoods, the criminalization of such poverty, and the relentless surveillance, policing, and prosecution of what are essentially crimes of condition rather than crimes of conduct also function in concert to create a new category of people of color whose rights can be restricted or disposed of completely without having to acknowledge any racist intent. Such policies produce a direct political attack on impoverished women of color as a group, since they are often hit hardest by these policies, as described above. At the same time, they function as part of a more general practice of reducing the ranks of rights-bearing citizens in order to privilege the propertied over the property-less and to augment the power of properly gendered, propertied and prosperous white subjects by creating new classes of arrestable, incarcerable, disposable, displaceable, and deportable people.<sup>303</sup> This political attack needs political redress in addition to the legislation- and litigation-based approaches just discussed.

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302. See KLARMAN, *supra* note 290, at 31, 34, 52–55.

303. See De Genova, *supra* note 165; Woods, *supra* note 10.

### C. What We Can Do

The Fair Housing Act of 1968 declared that creating integrated communities was the highest priority of the federal government.<sup>304</sup> The Wagner-Taft-Ellender Act of 1949 promised a decent home and living environment to every American.<sup>305</sup> The Civil Rights Act of 1866 pledged that all persons would have the same freedom to enter into contracts and business transactions as white citizens.<sup>306</sup> The Fourteenth Amendment announced that all people would be entitled to the equal protection of the law.<sup>307</sup> A series of Court rulings held that the Thirteenth Amendment declared an end to the influence of the badges and emblems of slavery.<sup>308</sup> These promises have all been broken.

We do not need new and better *promises*. No one will do for us what we need to do for ourselves. Things will not get better unless we make them better. New and better *policies*, however, can come from coordinated collective actions, from a collective political response. Litigation and legislation needs to be accompanied by political mobilization. The Los Angeles Community Action Network has mounted

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304. 42 U.S.C. § 3601 (2006) ("It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States."); see John P. Relman, Glenn Schlactus & Shalini Goel, *Creating and Protecting Prointegration Programs Under the Fair Housing Act*, in *THE INTEGRATION DEBATE*, *supra* note 5, at 39.

305. Housing Act of 1949, ch. 338, 63 Stat. 413 (codified as amended in scattered sections of 12 & 42 U.S.C.); see *id.* § 2 (codified as amended at 42 U.S.C. § 5351) ("The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.")

306. Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 ("[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.")

307. U.S. CONST. amend. XIV, § 1.

308. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.")

important campaigns proclaiming housing as a human right.<sup>309</sup> The New Orleans Women's Health and Justice Initiative involves impoverished women of color in significant struggles for affordable safe and sanitary housing, reproductive rights, and health care.<sup>310</sup> Just as feminist mobilizations inside and outside legal circles succeeded in transforming the legal status of rape and battering from private matters considered external to the purview of the courts into public issues popularly understood as matters of collective responsibility and justice,<sup>311</sup> the confluence of mass incarceration, housing discrimination, and the criminalization of poverty can be exposed as a raced and gendered injury that can be remedied and repaired. Connecting the fight for fair housing to mass incarceration and the criminalization of poverty will require dedication to popular education, agitation, mobilization, litigation, and legislation.

### CONCLUSION

A growing recognition of the costs and consequences of mass criminalization and incarceration has helped spark the start of campaigns to challenge mandatory sentencing laws, to find alternatives to incarceration, and to establish programs that promote the reentry of ex-offenders into community life. The emphasis on citizen enforcement inscribed in four decades of fair housing law and the waves of foreclosures caused by the deregulation and securitization of the home mortgage industry have led to ever more creative and more ambitious strategies of litigation and legislation promoting fair housing. But we have not yet reached a point where fair housing is seen as a vital part of the solution to the problems posed by mass incarceration or where actions against mass incarceration routinely inform the work of fair housing advocates. Just as the problems confronting women of color cannot be solved by separating their gender from their race, the linked issues of fair housing and prison reform (or abolition) cannot be addressed effectively in isolation from one another. No one can do everything in this struggle, but everyone can do something. In isolation, individual snowflakes do not amount to much, but when they amass they can have the force of an avalanche. Such an avalanche does not only form when creating cumulative problems and burdens. It can also

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309. See generally *FREEDOM NOW!*, *supra* note 48. This volume enacts in discursive space the coalition it envisions in physical place through contributions by artists, academics, and activists who come from different strata of society but are united in their support for homeless people's right to the city.

310. See *The Politics of Reproductive Violence: An Interview With Shana Griffin by Clyde Woods, March 12, 2009*, *supra* note 132, at 157.

311. Crenshaw, *supra* note 15.

generate an overwhelming force for creating new affinities, associations, and alliances to address and redress problems that affect us all.