

Prison, Foster Care, and the Systemic Punishment of Black Mothers

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ABSTRACT

This Article analyzes how the U.S. prison and foster care systems work together to punish black mothers in the service of preserving race, gender, and class inequality in a neoliberal age. The intersection of these systems is only one example of many forms of overpolicing that overlap and converge in the lives of poor women of color. I examine the statistical overlap between the prison and foster care populations, the simultaneous explosion of both systems in recent decades, the injuries that each system inflicts on black communities, and the way in which their intersection in the lives of black mothers helps to naturalize social inequality. I hope to elucidate how state mechanisms of surveillance and punishment function jointly to penalize the most marginalized women in our society while blaming them for their own disadvantaged positions.

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INTRODUCTION

Social scientists, legal scholars, and policymakers have noticed the intersection of foster care and prison in children's lives. Many have warned that foster care leads to prison,¹ and more recently, a literature has developed on the risk that children with incarcerated parents will end up in foster care.² The dominant framing of these systems' intersection tends either to blame incarcerated mothers for the systemic deprivations their children experience or to ignore these mothers altogether.

Foster care is more than a precursor to prison (for children), and prison is more than a precursor to foster care for children (of the incarcerated). The simultaneous buildup and operation of the prison and foster care systems rely on the punishment of black mothers, who suffer greatly from the systems' intersection. This Article analyzes how both systems work together to punish black mothers in the service of preserving U.S. race, gender, and class inequality in a neoliberal age. The intersection of prison and foster care is only one example of many forms of overpolicing that overlap and converge in the lives of poor women of color.³ I investigate this particular systemic intersection to help elucidate how state mechanisms of surveillance and punishment work to penalize the most marginalized women in our society while blaming them for their own disadvantaged positions. This systemic intersection naturalizes social inequality and obscures the need for social change.

I. TWO OVERLAPPING SYSTEMS

The prison and foster care systems are marked by glaring race, gender, and class disparities: The populations in both are disproportionately poor and African

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1. See, e.g., Richard P. Barth, *On Their Own: The Experiences of Youth After Foster Care*, 7 CHILD & ADOLESCENT SOC. WORK 419, 429–30, 432 (1990) (observing that children who have been placed in foster care are at increased risk for incarceration).
 2. See, e.g., Susan D. Phillips & Alan J. Dettlaff, *More Than Parents in Prison: The Broader Overlap Between the Criminal Justice and Child Welfare Systems*, 3 J. PUB. CHILD WELFARE 1, 5 (2009) (“In addition to the fact that these parent and family risk factors are part of a pathway that can lead to children becoming involved in the criminal justice system, the child welfare field also has an interest in these problems because of their potential to affect children’s safety, permanency, and well-being.”).
 3. INCITE! WOMEN OF COLOR AGAINST VIOLENCE, *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* (2006) (collecting writings by feminists of color addressing interpersonal violence and state violence against women of color, including domestic violence, police brutality, deportation, involuntary sterilization, and inadequate health care).

American, and both systems are particularly burdensome to poor black mothers.⁴ About one-third of women in prison are black and most were the primary caretakers of their children.⁵ About one-third of children in foster care are black, and most have been removed from black mothers who are their primary caretakers.⁶ This statistical similarity is striking, but its significance is not self-evident. Some see the disproportionate number of black mothers involved in prison and foster care as the unfortunate result of their disadvantaged living conditions.⁷ Others argue that the statistical disparities in both systems reflect the appropriate response to black mothers' antisocial conduct that puts these mothers' children and the society at risk of harm.⁸ I argue that this statistical overlap is evidence of a form of punitive governance that perpetuates social inequality.

Over the last several decades, the United States has embarked on a pervasive form of governance known as neoliberalism that transfers services from the welfare state to the private realm of family and market while promoting the free market conditions conducive to capital accumulation.⁹ At the same time that it is dismantling the social safety net, the government has intensified its coercive

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4. See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 7–10, 74–92 (2002); Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 136 (Marc Mauer & Meda Chesney-Lind eds., 2002).
 5. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, NCJ 222984, PARENTS IN PRISON AND THEIR MINOR CHILDREN 21 app. tbl.16 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf> (finding that, as of 2004, 33.3 percent of incarcerated women were black). At least 60 percent of women in prison are mothers. *Id.* at 14 app. tbl.4. As of 2004, 55.9 percent of women in federal prison had children under age eighteen. *Id.* at 2; Richie, *supra* note 4, at 141.
 6. See Barbara Needell & Richard P. Barth, *Infants Entering Foster Care Compared to Other Infants Using Birth Status Indicators*, 22 *CHILD ABUSE & NEGLECT* 1179 (1998) (reporting that 75 percent of infants in foster care were born to single mothers); Kathleen Wells & Shenyang Guo, *Reunification of Foster Children Before and After Welfare Reform*, 78 *SOC. SERVICE REV.* 74, 75 (2004) (noting that the majority of foster care children “come from families headed by poor, unmarried mothers eligible for receipt of public aid”); *The AFCARS Report: Preliminary FY 2010 Estimates as of June 2011(18)*, U.S. DEPT HEALTH & HUMAN SERVICES ADMIN. FOR CHILD. & FAMILIES (June 1, 2011), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report18.htm (finding that, in 2010, 29 percent of children in foster care were black).
 7. See Mark E. Courtney et al., *Race and Child Welfare Services: Past Research and Future Directions*, 75 *CHILD WELFARE* 99, 99 (1996).
 8. See, e.g., Elizabeth Bartholet et al., *Race and Child Welfare*, CHAPIN HALL ISSUE BRIEF, June 2011, at 2 (arguing that the high rates of placement of African American children in foster care are necessary to protect these children from the “self-destructive behavior” that characterizes “racially segregated, impoverished enclaves”).
 9. See generally DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 64–86 (2007).

interventions in poor communities of color.¹⁰ The neoliberal regime does not unidimensionally shrink government. It equally depends on the brutal containment of the nation's most disenfranchised groups.¹¹ The welfare, prison, foster care, and deportation systems have all become extremely punitive mechanisms for regulating residents of the very neighborhoods most devastated by the evisceration of public resources.¹²

Adolph Reed, Jr. and Merlin Chowkwanyun recently chastised “research precisely specifying racial disparities in the distribution of advantages, well-being and suffering” for taking on a “pro forma narrative structure” that loosely relies on progressive-sounding phrases like “institutional racism” without interrogating what concrete policies, institutions, and actors are causing them within the current neoliberal regime.¹³ This Article undertakes such an interrogation by identifying the concrete mechanisms that create the statistical overlap between the prison and foster care systems, the injuries that each system inflicts upon black communities, and the way in which prison and foster care function together to perpetuate social inequities in current U.S. society.

A. Incarcerated Mothers

A compelling body of social science research details how the astronomical escalation of imprisonment inflicts havoc on the neighborhoods from which most incarcerated individuals come and to which they return.¹⁴ As I summarized elsewhere, “Three main theories explain the social mechanisms through which

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10. See LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY 11–20 (2009).
 11. See HENRY A. GIROUX, THE TERROR OF NEOLIBERALISM: AUTHORITARIANISM AND THE ECLIPSE OF DEMOCRACY 54–80 (2004) (discussing the relationship between neoliberalism and systemic racism); WACQUANT, *supra* note 10, at 197–208 (explaining mass incarceration of African Americans as a response to the neoliberal collapse of the social safety net).
 12. See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that mass incarceration of African Americans functions like a modern day Jim Crow caste system); LISA SUN-HEE PARK, ENTITLED TO NOTHING: THE STRUGGLE FOR IMMIGRANT HEALTH CARE IN THE AGE OF WELFARE REFORM (2011) (describing how punitive immigration, health care, and welfare policies regulate immigrant women of color); WACQUANT, *supra* note 10, at 197–208; Mary V. Alfred & Dominique T. Chlup, *Neoliberalism, Illiteracy, and Poverty: Framing the Rise in Black Women's Incarceration*, 33 W. J. BLACK STUD. 240 (2009) (discussing how neoliberal policies place black women at risk of imprisonment).
 13. Adolph Reed, Jr. & Merlin Chowkwanyun, *Race, Class, Crisis: The Discourse of Racial Disparity and Its Analytical Discontents*, in SOCIALIST REGISTER 2012: THE CRISIS AND THE LEFT 149, 150, 171 n.33 (Leo Panitch, Greg Albo & Vivek Chibber eds., 2012).
 14. See, e.g., DONALD BRAMAN, DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA (2004); INVISIBLE PUNISHMENT, *supra* note 4 (collecting scholarship).

mass incarceration harms the African American communities where it is concentrated: mass imprisonment damages social networks, distorts social norms, and destroys social citizenship.”¹⁵ Sociologist Loïc Wacquant extended the theory of prisons as instruments for the management of social marginality to their particular role in racial repression in the United States.¹⁶ He situates contemporary mass incarceration in a historical lineage of “peculiar institutions” that have served to define, confine, and control African Americans—slavery (1619–1865), the Jim Crow system in the South (1865–1965), the urban ghetto in the North (1915–1968), and the expanding carceral system (1968–).¹⁷ More recently, legal scholar Michelle Alexander demonstrated that black incarceration functions like a modern-day Jim Crow caste system because it “permanently locks a huge percentage of the African American community out of the mainstream society and economy,” replicating the subjugated status of blacks that prevailed before the civil rights revolution.¹⁸ People suffer not only because the government has abandoned them but also because punitive policies make their lives more difficult. These two trends—private remedies for systemic inequality and punitive state regulation of the most disadvantaged communities—are mutually reinforcing. Mass imprisonment of blacks and Latinos allows the state to exert direct control over poorly educated, unskilled, and jobless people who have no place in the market economy because of racism.¹⁹ It also preserves a racial caste system that civil rights reforms were supposed to abolish.²⁰

While this account of the prison system’s role in maintaining racial inequality under a neoliberal regime is important, it tends to neglect incarcerated women.²¹

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15. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1281 (2004).
 16. Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC’Y 95 (2001).
 17. *Id.* at 98–103. On the parallels and relationship between the institution of slavery and the prison system, see ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 22–39 (2003).
 18. ALEXANDER, *supra* note 12, at 13. On hip hop culture’s critique of mass incarceration as an instrument of racial subordination, see PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009).
 19. See generally RUTH WILSON GILMORE, THE GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007) (linking California’s prison expansion to surpluses of labor and finance capital); WACQUANT, *supra* note 10, at 195–208.
 20. See generally JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954–1965 (1988) (describing key events of the Civil Rights Movement as ending official racial segregation and disenfranchisement).
 21. On the increasing incarceration of women, see Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, in INVISIBLE PUNISHMENT, *supra* note 4, at 79, and Richie, *supra* note 4, at 136.

Women are the fastest-growing segment of the prison population, with an 828 percent increase in the number of black women behind bars for drug offenses between 1986 and 1991.²² For most of these women, prison constitutes a culminating victimization that results from multiple forms of vulnerability and violation, including domestic violence, sexual abuse, drug addiction and other health problems, and homelessness.²³ U.S. law enforcement treats the health problem of drug addiction as a criminal offense,²⁴ and black women who lack adequate access to drug treatment²⁵ are most vulnerable to the punitive approach.²⁶ Women who depend on public assistance to care for their children are increasingly treated as criminals: Accusations of welfare fraud are brought as felony charges punished with prison sentences rather than administrative violations garnering civil penalties.²⁷ Thousands of black women in prison today—mostly for nonviolent offenses—need treatment for a substance abuse problem, support for their children, or safety from an abusive relationship instead of criminal punishment.²⁸

Much of the injury that high incarceration rates inflict on black communities results from the system's impact on black mothers.²⁹ Most incarcerated women are mothers.³⁰ Mass incarceration strains the extended networks of kin and friends that have traditionally sustained poor African American families in difficult times, thereby weakening communities' abilities to withstand economic

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22. See Martin A. Geer, *Human Rights and Wrongs in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law—A Case Study of Women in United States Prisons*, 13 HARV. HUM. RTS. J. 71, 85 n.67 (2000).
 23. See, e.g., GLAZE & MARUSCHAK, *supra* note 5, at 7; BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* (1996); REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *MOTHERS BEHIND BARS: A STATE-BY-STATE REPORT CARD AND ANALYSIS OF FEDERAL POLICIES ON CONDITIONS OF CONFINEMENT FOR PREGNANT AND PARENTING WOMEN AND THE EFFECT ON THEIR CHILDREN* 9 (2010); Alfred & Chlup, *supra* note 12, at 242–43; Geer, *supra* note 22, at 86.
 24. See NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE, *BEHIND BARS: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION* (1998) (discussing the relationship between drug addiction and the expansion of the U.S. prison population).
 25. See Amelia C. Roberts & Robert Nishimoto, *Barriers to Engaging and Retaining African-American Post-Partum Women in Drug Treatment*, 36 J. DRUG ISSUES 53 (2006).
 26. See Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 AM. U.J. GENDER & L. 1 (1995); Stephanie R. Bush-Baskette, *The War on Drugs as a War Against Black Women*, in *GIRLS, WOMEN AND CRIME: SELECTED READINGS* 175 (Meda Chesney-Lind & Lisa Pasko eds., 2d ed. 2012).
 27. See KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* 63–69 (2011).
 28. See PAULA C. JOHNSON, *INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON* 6 (2004).
 29. See Richie, *supra* note 4, at 139–42.
 30. GLAZE & MARUSCHAK, *supra* note 5, at 14 app. tbl.4.

and social hardship.³¹ This injury to social networks counterbalances the claim that removing criminal mothers benefits their children and extended family by relieving them of problems caused by the offenders' antisocial behavior.³² The type of offender has changed because of sentencing reforms that impose harsh prison terms for relatively minor drug offenses,³³ most incarcerated mothers were convicted of drug-related offenses or property crimes that involve drug use rather than violent felonies.³⁴ The increased incarceration of nonviolent mothers who are first-time offenders and who have valuable ties to their children, other family members, and neighbors, inflicts incalculable damage to communities.

Locking up black mothers transfers racial disadvantage to the next generation. According to the Sentencing Project, "In 2007 there were 1.7 million children in America with a parent in prison, more than 70% of whom were children of color." This represents an 82 percent increase since 1991.³⁵ One in fifteen black children had a parent in prison, making them nearly eight times more likely to have an incarcerated parent than white children.³⁶ Over the course of a childhood, the risk of parental imprisonment is even greater than this point-in-time estimate. By age fourteen, one in four black children born in 1990 had a parent imprisoned, compared to one in twenty-five white children.³⁷ Mass incarceration deprives thousands of children of important economic and social support from their parents, placing extra economic and emotional burdens on remaining family members.³⁸ Separation from imprisoned parents has serious psychological consequences for children, including depression, anxiety, feelings of rejection, shame, anger, guilt,

31. See Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT*, *supra* note 4, at 117, 118.

32. See John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in *CRIME & JUSTICE: PRISONS 121, 125* (Michael Tonry & Joan Petersilia eds., 1999).

33. See RITA J. SIMON & HEATHER AHN-REDDING, *THE CRIMES WOMEN COMMIT: THE PUNISHMENTS THEY RECEIVE* 72–73 (3d ed. 2005).

34. See TIMOTHY ROSS, AJAY KHASHU & MARK WAMSLEY, *VERA INST. OF JUSTICE, HARD DATA ON HARD TIMES: AN EMPIRICAL ANALYSIS OF MATERNAL INCARCERATION, FOSTER CARE, AND VISITATION* 12 (2004).

35. SARAH SCHIRMER ET AL., *SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007*, at 1 (2009) (citing GLAZE & MARUSCHAK, *supra* note 5), available at http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf; see CHRISTOPHER J. MUMOLA, *BUREAU OF JUSTICE STATISTICS, NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN* (2000).

36. SCHIRMER ET AL., *supra* note 35, at 2.

37. Christopher Wildeman, *Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage*, 46 *DEMOGRAPHY* 265, 270–71 (2009).

38. See Hagan & Dinovitzer, *supra* note 32, at 124 ("If a subsequently imprisoned parent previously contributes positively to the family, the imprisonment of that parent may result in economic deprivation and resulting strains that affect children.").

and problems in school.³⁹ Incarcerating mothers tends to upset family ties more than incarcerating fathers because inmate mothers are usually the primary caretakers of their children before entering prison.⁴⁰ While judges used to show mothers leniency, they are now more often compelled by mandatory sentencing laws to give mothers long prison terms.⁴¹ As a result, the number of children with a mother in prison more than doubled between 1991 and 2007.⁴²

Moreover, these same mothers also suffer from the incarceration of the men in their lives. Dealing with an incarcerated family member causes stress, both from worry about the inmate's well-being and from tension among relatives as they struggle to survive the ordeal.⁴³ These enormous burdens fall primarily on the shoulders of women caregivers, who customarily shore up families experiencing extreme hardship—"women struggling to manage budgets consumed by addictions; women trying to hold families together when ties are weakened by prolonged absence; women attempting to manage the shame and stigma of incarceration; and women trying to prevent children from becoming casualties of the war on drugs."⁴⁴

Research shows that, by skewing gender ratios, the mass removal of men from inner-city communities skews gender norms in ways that harm women.⁴⁵ The men and women Donald Braman interviewed in the District of Columbia described high incarceration rates as "both encouraging men to enter into relationships with multiple women, and encouraging women to enter into relationships with men who are already attached."⁴⁶ Because both men and women perceive a significant shortage of men, women have less leverage in intimate relationships

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39. See Denise Johnston, *Effects of Parental Incarceration*, in CHILDREN OF INCARCERATED PARENTS 59, 72–76 (Katherine Gabel & Denise Johnston eds., 1995); see also NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED (2005) (describing traumatic stories of children of incarcerated parents).
 40. REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CENTER, *supra* note 23, at 12–13.
 41. See KATHLEEN DALY, GENDER, CRIME, AND PUNISHMENT 9–10 (1994).
 42. GLAZE & MARUSCHAK, *supra* note 5, at 2.
 43. See Anthony E. O. King, *The Impact of Incarceration on African American Families: Implications for Practice*, in IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY 167, 170–73 (Othello Harris & R. Robin Miller eds., 2003); Richie, *supra* note 4, at 147.
 44. Richie, *supra* note 4, at 147.
 45. See Braman, *supra* note 31, at 123, 127–28; BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 163 (2006) (finding that "[i]mprisonment has also inhibited the formation of stable two-parent families in the low-income urban communities from which most of the penal population is drawn"); Johnna Christian & Shenique S. Thomas, *Examining the Intersections of Race, Gender and Mass Imprisonment*, 7 J. ETHNICITY CRIM. JUST. 69, 75 (2009) (discussing how mass incarceration of black men affects their relationships with black women).
 46. Braman, *supra* note 31, at 123.

and are therefore more vulnerable to male exploitation.⁴⁷ At the same time, some men respond to their identity as poor fathers—an identity imposed by imprisonment—by distancing themselves from their children, minimizing the father role in their sense of themselves.⁴⁸ While state and federal governments enforce welfare policies that penalize poor women of color for raising children outside of marriage,⁴⁹ they perpetuate a prison policy that discourages stable relationships, such as marriage, in these women’s communities.

Incarceration’s impact on black mothers is an important element of how mass incarceration acts as a means of political subordination. One of the most pernicious features of prison expansion is that it devastates community-based resources for contesting prison policy and other systemic forms of disenfranchisement. Unlike the black urban ghetto, which “enabled African Americans to fully develop their own social and symbolic forms and thereby accumulate the group capacities needed to escalate the fight against continued caste subordination,”⁵⁰ prisons break down social networks and norms needed for political solidarity and activism. Putting large numbers of black mothers behind bars contributes significantly to the destruction of these critical family and community ties.

B. Mothers With Children in Foster Care

If you go into dependency court in Chicago, New York, or Los Angeles without any preconceptions, you might conclude that the child welfare system is designed to monitor, regulate, and punish black mothers.⁵¹ Before the Civil Rights Movement, black children were disproportionately excluded from openly segregated child welfare services that catered mainly to white families.⁵² By 2000,

47. *See id.*

48. Brad Tripp, *Incarcerated African American Fathers: Exploring Changes in Family Relationships and the Father Identity*, in *IMPACTS OF INCARCERATION ON THE AFRICAN AMERICAN FAMILY*, *supra* note 43, at 17, 28–29.

49. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101(1), (10), 111 Stat. 2105, 2110, 2112 (“Marriage is the foundation of a successful society. . . . [P]revention of out-of-wedlock pregnancy and reduction in out-of-wedlock birth are very important Government interests. . . .”); ANNA MARIE SMITH, *WELFARE REFORM AND SEXUAL REGULATION 1–7* (2007) (discussing provisions of the Temporary Assistance to Needy Families program that promote marriage and regulate the sexuality of single mothers who receive public assistance).

50. Wacquant, *supra* note 16, at 103.

51. *See generally* ROBERTS, *supra* note 4.

52. *See* ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, *CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 72–78* (1972).

black children made up the largest group of children in foster care.⁵³ Black children are still grossly overrepresented in the U.S. child welfare system: Even though they represent only 15 percent of the nation's children, black children currently compose about 30 percent of the nation's foster care population.⁵⁴ In some cities and states, the disparity is much greater.⁵⁵ It is often forgotten that state agents forcibly remove most of these children and that the mothers are then intensely supervised by child welfare authorities as they comply with the agency requirements to be reunified with their children.⁵⁶ This state intrusion is typically viewed as necessary to protect maltreated children from parental harm. But the need for this intervention is usually linked to poverty, racial injustice, and the state's approach to caregiving, which addresses family economic deprivation with child removal rather than services and financial resources.⁵⁷

Little attention is paid to the political function of this massive removal of children from black mothers. How does U.S. child welfare policy, both historically and today, reflect and reinforce the disadvantaged political status of African American families? The racial disparity in the child welfare system reflects a political choice to investigate and blame mothers for the cause of startling rates of child poverty rather than to tackle poverty's societal roots. Child welfare philosophy became increasingly punitive as black children composed a greater and greater share of the caseloads.⁵⁸ Since the 1970s, the number of children receiving child welfare services in their homes has declined dramatically, while the foster care population has skyrocketed.⁵⁹ As the child welfare system began to serve fewer white children and more minority children, state and federal governments spent more money on out-of-home care and less on in-home services.⁶⁰

53. *The AFCARS Report: Final Estimates for FY 1998 Through FY 2002(12)*, U.S. DEP'T HEALTH & HUMAN SERVICES ADMIN. FOR CHILDREN & FAMILIES (Oct. 2006), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.htm (finding that, in the 2000 fiscal year, 39 percent of children in foster care were black, 38 percent were white, 15 percent were Hispanic, and 2 percent were Asian).

54. *The AFCARS Report: Preliminary FY 2010 Estimates as of June 2011(18)*, *supra* note 6.

55. See ROBERT B. HILL, CASEY-CSSP ALLIANCE FOR RACIAL EQUITY IN CHILD WELFARE, AN ANALYSIS OF RACIAL/ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND COUNTY LEVELS (2007).

56. See JENNIFER A. REICH, FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM 113–16 (2005).

57. ROBERTS, *supra* note 4, at 25–46; Annette R. Appell, Essay, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 578–99 (1997).

58. ROBERTS, *supra* note 4, at 15–16.

59. *Id.* at 15.

60. *Id.*

The end to the welfare safety net coincided with the passage of the Adoption and Safe Families Act⁶¹ in 1997, which emphasized adoption as the solution to the rising foster care population.⁶² Both can be seen as neoliberal measures that shifted government support for children toward reliance on private employment and adoptive parents to meet the needs of struggling families. This convergence marked the first time the federal government mandated that states protect children from abuse and neglect without a corresponding mandate to provide basic economic support to poor families.⁶³ Both the welfare and foster care systems, then, responded to a growing black female clientele by reducing services to families while intensifying their punitive functions. The main mission of child welfare departments became protecting children not from social disadvantages stemming from poverty and racial discrimination but from maltreatment inflicted by their mothers.⁶⁴

As neoliberal policies strip poor African American neighborhoods of needed services, poor and low-income black mothers tend to receive child welfare support only when they have been charged with child maltreatment.⁶⁵ An African American woman I interviewed in a black Chicago neighborhood poignantly captured this fundamental problem with U.S. child welfare philosophy:

[T]he advertisement [for the child abuse hotline], it just says abuse. If you being abused, this is the number you call, this is the only way you gonna get help. It doesn't say if I'm in need of counseling, or if . . . my children don't have shoes, if I just can't provide groceries even though I may have seven kids, but I only get a hundred something dollars food stamps. And my work check only goes to bills. I can't feed eight of us all off a hundred something dollar food stamps. . . . I don't want to lose my children, so I'm not going to call [Department of Children and Family Services] for help because I only see them take away children.⁶⁶

61. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

62. *Id.*; see Susan L. Brooks, *Permanency Through the Eyes of a Child: A Critique of the Adoption and Safe Families Act*, 19 CHILD. LEGAL RTS. J. 2 (1999).

63. See Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, 8 FUTURE CHILD. 88, 101 (1998).

64. See DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 119–58 (1994) (discussing the “transformation of child welfare into child protective services”).

65. See *id.* at 4–5 (discussing the “residual approach” to child welfare that treats state involvement as a last resort, beginning only after families are already in crisis); Sheila B. Kamerman & Alfred J. Kahn, *If CPS Is Driving Child Welfare—Where Do We Go From Here?*, PUB. WELFARE, Winter 1993, at 41 (noting that the child welfare system spends most of its resources on child protection rather than family support).

66. Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE 125, 145–46 (2008) (internal quotation marks omitted).

She and other residents I interviewed challenged the disruptive formula of child protection that makes family assistance hinge on state custody of children.⁶⁷

The turn to a punitive foster care approach is justified by stereotypes of black maternal unfitness.⁶⁸ For example, in a qualitative study of Michigan's child welfare system, the Center for the Study of Social Policy's Racial Equity Review discovered that many social workers negatively characterized African American families, mothers, and youth in particular.⁶⁹ The surveyed social workers failed to fairly assess or appreciate these clients' unique strengths and weaknesses related to the ability to care for children.⁷⁰ They frequently described African American parents in case files with terms such as "hostile," "aggressive," "angry," "loud," "incorrigible," and "cognitively delayed" without acknowledging the context or providing any justification for these labels.⁷¹ Also, the social workers often assumed that African American parents had substance abuse problems without making similar assumptions about white parents.⁷² "The belief that African American children are better off away from their families and communities was seen in explicit statements by key policymakers and service providers. It was also reflected in choices made by DHS," the report concluded.⁷³

One of these choices is for caseworkers to be more aggressive in their decision to remove black children from their homes rather than provide services to their families.⁷⁴ A study of the intersection of race, poverty, and risk in this decision concluded that the racial disparity occurred because it takes more risk of maltreatment for a white child to be placed in foster care compared to the risk for a black child.⁷⁵ This devaluation of the bonds between black children and their

67. *See id.* at 145–47.

68. *See* MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMEN IN AMERICA* 51–97 (2011) (discussing negative myths about black women); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 8–21 (1997) (describing stereotypical icons of black maternal immorality, including Jezebel, Mammy, Matriarch, Welfare Queen, and pregnant crack addict).

69. CTR. FOR THE STUDY OF SOC. POLICY, *RACE EQUITY REVIEW: FINDINGS FROM A QUALITATIVE ANALYSIS OF RACIAL DISPROPORTIONALITY AND DISPARITY FOR AFRICAN AMERICAN CHILDREN AND FAMILIES IN MICHIGAN'S CHILD WELFARE SYSTEM* (2009).

70. *Id.* at 19.

71. *Id.* at 32.

72. *Id.* at 31–32.

73. *Id.* at 17.

74. *See* ROBERTS, *supra* note 4, at 51–52.

75. *See* Stephanie L. Rivaux et al., *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 *CHILD WELFARE* 151, 165–66 (2008); *see also* Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 *CHILD. & YOUTH SERVICES REV.* 1630, 1634–36 (2011).

mothers discounts the harm inflicted on both parties when these children are removed from their homes.

The impact of the state's disruption and supervision of families is intensified when it is concentrated in inner-city neighborhoods—what I call the system's racial geography.⁷⁶ In many urban areas, most child protection cases occur in poor and low-income African American neighborhoods and most African American families live in neighborhoods with the highest rates of child welfare agency involvement.⁷⁷ Black children are at risk of growing up in a neighborhood where child protective services are heavily involved and black mothers are at risk of losing their children to the system.⁷⁸ The spatial concentration of child welfare supervision creates an environment in which state custody of children is a realistic expectation, if not the norm.⁷⁹ This degree of state supervision has damaging community-wide effects and violates the proper relationship between families and the government in a liberal democracy.⁸⁰ Like the prison system, placing large numbers of children in state custody interferes with the ability of community members to form healthy connections and to engage in collective action.⁸¹

Social scientists have yet to investigate the sociopolitical impact of the spatial concentration of child welfare supervision in poor and low-income black communities. Researchers measure the effectiveness of child welfare policies—for example, the effect of multiple foster care placements on the risk of juvenile delinquency—by aggregating the outcomes for individual children.⁸² The quantitative manipulation of individual-level data, however, misses the way the child welfare system functions in black neighborhoods where agency supervision is concentrated.

Feminist literature also pays too little attention to the political function of the foster care system. Feminist scholars have described how the nuclear family model produces a welfare state that provides stingy benefits to poor mothers—benefits that are stigmatized and encumbered by behavioral regulations.⁸³ Less

76. See Roberts, *supra* note 66; Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 24 (2005).

77. Roberts, *supra* note 66, at 127–28.

78. See *id.* at 128–29.

79. See *id.* at 131–32.

80. See generally DAVID J. HERRING, *THE PUBLIC FAMILY: EXPLORING ITS ROLE IN DEMOCRATIC SOCIETY* (2003); LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006).

81. Roberts, *supra* note 66, at 136–41.

82. Roberts, *supra* note 76, at 33.

83. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); LINDA GORDON, *PITIED BUT*

explored by feminist scholars is the role of the public child welfare system in caregiving by poor mothers. Like welfare, the child welfare system is a significant means of public support for poor children, especially poor black children.⁸⁴ The child welfare system also exacts an onerous price: It requires poor mothers to relinquish custody of their children in exchange for the state support needed to care for them.⁸⁵ Involvement in the child welfare system entails intensive supervision by child protection agencies, which often includes losing legal custody of children to the state.

Even worse, some feminist child welfare advocates not only ignore black mothers but also denigrate them. The campaign to increase adoptions, led by Harvard law professor Elizabeth Bartholet, makes devaluation of black family relationships a central component.⁸⁶ Black mothers' bonds with their children are portrayed as a barrier to adoption, and extinguishing those bonds is seen as the critical first step in the adoption process.⁸⁷ Terminating parental rights faster and abolishing race-matching policies were linked as a strategy for increasing adoptions of black children by white families.⁸⁸ Supporting this strategy is the myth that moving more black children from their families into white adoptive homes can solve the foster care problem.⁸⁹

Bartholet explicitly argues that this effort to separate black mothers from their children is feminist because the demand by the battered women's movement that the state "punish male perpetrators and liberat[e] their female victims" supports a similarly coercive approach to child abuse and neglect.⁹⁰ Feminists, however, have critiqued the political implications of both intimate violence and state violence.⁹¹

NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890–1935 (1994); GWENDOLYN MINK, WELFARE'S END (1998).

84. See ROBERTS, *supra* note 4, at 7–46 (discussing the disproportionate involvement of poor black families in the child welfare system and black children's high risk of experiencing long-term poverty); ROBERTS, *supra* note 66, at 141–43, 148 (discussing child welfare agencies' financial support for African American families).
85. See Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHICAGO-KENT L. REV. 1619 (2001).
86. See ROBERTS, *supra* note 4, at 113–16, 165–72; see also LAURA BRIGGS, SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION 115–21 (2012) (discussing the campaign by Bartholet and other liberals to increase transracial adoptions and its connection to conservative welfare reform proposals).
87. See ROBERTS, *supra* note 4, at 167–68.
88. See BRIGGS, *supra* note 86, at 116–17; ROBERTS, *supra* note 4, at 113–21, 165–72.
89. See BRIGGS, *supra* note 86, at 120–21; ROBERTS, *supra* note 4, at 163–65.
90. See ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 50–53 (1999).
91. See, e.g., INCITE! WOMEN OF COLOR AGAINST VIOLENCE, *supra* note 3 (collecting essays by feminists of color addressing the relationship between interpersonal and state violence against women of color).

Feminist analysis should situate private violence within a broader context of inequitable social structures, including male domination but also barriers created by poverty, racism, and anti-immigrant policies that trap many women in violent homes. Feminists of color especially have tied domestic violence to a continuum of social violence that, in the words of scholar-activist Angela Davis, “extends from the sweatshops through the prisons, to shelters, and into bedrooms at home.”⁹² We are cautious about participating in a regime that is eager to incarcerate huge numbers of minority men but will not allocate similar resources to programs and services that would make women less vulnerable to violence.⁹³

It makes no sense to split women into two camps for purposes of evaluating coercive state intervention—guilty women whose children are victims of maternal abuse versus innocent women who are victims of male abuse. The very same women who risk losing their children to child protective services are the ones who are hurt most by a unidimensional criminal approach to domestic violence. The most clear-cut example of this overlap is the practice of some child welfare departments of taking custody of battered women’s children on grounds that the mothers abused them by allowing them to witness violence or by allowing them to reside in a home where violence takes place.⁹⁴ The child welfare system blames and punishes battered mothers for exposing their children to violence, just as it blames and punishes mothers for other family problems caused by systemic deprivations beyond their control.⁹⁵

More fundamentally, it is the public’s mistrust of poor black mothers and its unwillingness to support them directly that underlie the emphasis on coercive state intervention to address both violence against women and child maltreatment.⁹⁶ A social welfare system that improved women’s economic status would enable

92. Angela Davis, *The Color of Violence Against Women*, COLORLINES, Oct. 10, 2000.

93. See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991); *Gender Violence and the Prison Industrial Complex: Statement by Critical Resistance and INCITE! Women of Color Against Violence*, in INCITE! WOMEN OF COLOR AGAINST VIOLENCE, *supra* note 3, at 223 (“It is critical that we develop responses to gender violence that do not depend on a sexist, racist, classist, and homophobic criminal justice system.”); Beth E. Richie, *A Black Feminist Reflection on the Antiviolence Movement*, 25 SIGNS 1133, 1136 (2000) (“For over a decade, women of color in the antiviolence movement have warned against investing too heavily in arrest, detention, and prosecution as responses to violence against women.”).

94. See *Nicholson v. Scopetta*, 344 F.3d 154, 158 (2d Cir. 2003).

95. Diane L. Redleaf, *Protecting Mothers Against Gender-Plus Bias: Part I*, CHILD. RTS. LITIG., Oct. 25, 2011.

96. See KENNETH J. NEUBECK & NOEL A. CAZENAVE, *WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA’S POOR* (2001) (examining how racist attitudes, stereotypes about black mothers, and a racialized political backlash against welfare shaped U.S. welfare policies in the 1980s and 1990s).

them to leave violent partners and to take better care of their children. It is contrary to feminist principles, which contest the political subordination of all women, to advocate for increased state separation of black mothers and their children as part of a campaign against domestic violence. Instead, feminists should be fighting for affordable housing and generous supports for struggling mothers—including formerly incarcerated mothers—as a more effective and just strategy to reduce all forms of domestic violence.⁹⁷

It is also important to recognize how the child welfare system's punishment of black mothers helps to perpetuate a neoliberal response to caregiving that relies on individual parents' private resources instead of public support for families.⁹⁸ By attributing poor black families' hardships to maternal deficits, the child welfare system hides their systemic causes, devalues black children's bonds with their families, and prescribes foster care in place of social change and services. Casting black children's need for services as the fault of abusive mothers avoids confronting racism in the child welfare system and in the broader society—while discounting the harms inflicted on children by unnecessarily separating them from their families.⁹⁹

The system's race and class geography means that most parents, especially white, middle-class, and affluent parents, sense little risk of ever being involved in it. They can afford to believe the false messages that blame poor black mothers for their children's deprivations. So there is little incentive for privileged parents to advocate alongside black mothers for more public support for caregiving for everyone. Concentrating child welfare agency involvement in poor minority neighborhoods helps to garner support for the system as it stands—a system that disserves all families. By supporting or failing to challenge punitive child removals and fast-track adoptions, women have been complicit in silencing the voices of poor black mothers with children in foster care. These voices are often inconvenient to the plans of middle-class women to adopt a child, voices that complicate a simple picture of a benevolent government saving innocent children, voices that

97. See Anne Menard, *Domestic Violence and Housing: Key Policy and Program Challenges*, 7 VIOLENCE AGAINST WOMEN 707 (2001) (advocating policies that increase all women's access to safe, affordable, and stable housing as a way to address domestic violence).

98. See PARK, *supra* note 12, at 150–53 (linking welfare policies that deny services to immigrant families of color to neoliberal politics).

99. See Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (2007) (examining the effects of foster care on long-term outcomes, including juvenile delinquency, teen motherhood, and employment, and finding that children on the margin of placement tend to have better outcomes when they remain at home); Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 461–67 (1983) (discussing foster care and psychoanalytic research showing that maintaining ties with parents promotes children's well-being and emotional security).

force us to deal with our own participation in an unjust system and that demand that we work to change it. Acknowledging the child welfare system's punishment of black mothers and its role in racial subordination reveals the need to radically transform the system from one that relies on punitive disruption of families to one that generously supports them.

II. SYSTEM INTERSECTIONALITY

So far, I have discussed how the prison and foster care systems operate in similar ways to punish black mothers, ways that are often neglected in feminist and antiracist discourse.¹⁰⁰ An intersectional perspective reveals that black women suffer the combined effects of racism and sexism and therefore have experiences that are different from those of both white women and black men. This perspective enables us to analyze how structures of privilege and disadvantage, such as gender, race, and class, interact in the lives of all people, depending on their particular identities and social positions.¹⁰¹ Furthermore, intersectionality analyzes the ways in which these structures of power inextricably connect with and shape each other to create a system of interlocking oppressions, which sociologist Patricia Hill Collins termed a "matrix of domination."¹⁰² The analysis of the roles black mothers play in both the prison and foster care systems reveals that these systems intersect with each other jointly to perpetuate unjust hierarchies of race, class, and gender. Prisons and foster care function together to discipline and control poor and low-income black women by keeping them under intense state supervision and blaming them for the hardships their families face as a result of societal inequities.

As a result of the political choice to fund punitive instead of supportive programs, criminal justice and child welfare supervision of mothers is pervasive in poor black communities.¹⁰³ The simultaneous explosion of foster care and prison populations reflects an alarming abandonment of black mothers. Instead of devoting adequate resources to support their families, the state increasingly

100. See 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, 165–66.

101. See Bonnie Thornton Dill, *Race, Class, and Gender: Prospects for an All-Inclusive Sisterhood*, 9 FEMINIST STUD. 131, 137 (1983) ("Just as the gender-class literature tends to omit race, the race-class literature gives little attention to women.").

102. PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS AND THE POLITICS OF EMPOWERMENT* 18 (2d ed. 2000).

103. See GILMORE, *supra* note 19 (examining the expansion of prisons in California during the 1980s despite a fall in crime rates and a decrease in government services to the poor).

shuffles family members into the punitive machinery of law enforcement and child protection. Child protection proceedings are more akin to criminal trials than most civil adjudications because they pit mothers accused of child maltreatment against the state and morally condemn them.¹⁰⁴ The rejection of public aid to poor families in favor of private solutions to poverty—low-wage work, marriage, and child support—mirrors the appeal to adoption to fix the public foster care system.

Stereotypes about black female criminality and irresponsibility legitimate the massive disruption that both systems inflict on black families and communities. A popular mythology promoted over centuries portrays black women as unfit to bear and raise children.¹⁰⁵ The sexually licentious Jezebel, the family-demolishing Matriarch, the devious Welfare Queen, the depraved pregnant crack addict accompanied by her equally monstrous crack baby—all paint a picture of a dangerous motherhood that must be regulated and punished.¹⁰⁶ Unmarried black women represent the ultimate irresponsible mothers—women who raises their children without the supervision of a man.¹⁰⁷ These stereotypes do not simply percolate in some disembodied white psyche. They are reinforced and recreated by foster care and prison, which leave the impression that black women are naturally prone to commit crimes and abuse their children. Stereotypes of maternal irresponsibility created and enforced by the child welfare system's disproportionate supervision of black children help to sustain mass incarceration, and stereotypes of black female criminality help to sustain foster care. As Angela Davis observes, the prison-industrial complex "relies on racialized assumptions of criminality—such as images of black welfare mothers reproducing criminal children—and on racist practices in arrest, conviction, and sentencing patterns."¹⁰⁸

The joint production of stereotypes in the child welfare and prison systems helps to explain why juvenile justice authorities send black delinquents to juvenile detention while referring white delinquents to informal alternatives for the same

104. See Appell, *supra* note 57 (discussing the moral blaming of mothers involved in the child welfare system); Amy Sinden, "Why Won't Mom Cooperate?: A Critique of Informality in Child Welfare Proceedings," 11 *YALE J.L. & FEMINISM* 339, 385 (1999) (noting that parents feel overwhelming pressure to acquiesce in child welfare agency plans).

105. See ROBERTS, *supra* note 68, at 3–21.

106. See COLLINS, *supra* note 102, at 69–96; ROBERTS, *supra* note 68, at 10–21.

107. See FINEMAN, *supra* note 83, at 101 ("[S]ingle motherhood is synonymous with deviant motherhood").

108. Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES, Sept. 10, 1998, http://colorline.com/archives/1998/09/masked_racism_reflections_on_the_prison_industrial_complex.html (emphasis added).

offenses.¹⁰⁹ Many officials think that all black children come from female-headed households that are ill equipped to handle a troubled child simply because their mothers are not married.¹¹⁰ Because they perceive black single mothers as incapable of providing adequate supervision of their children, officials believe they are justified in placing these children under state control.¹¹¹ “Inadequate family correlates with race and ethnicity. It makes sense to put delinquent kids from these circumstances in residential facilities,” a Florida juvenile court judge told researchers Donna Bishop and Charles Frazier.¹¹² “Detention decisions are decided on the basis of whether the home can control and supervise a child. So minorities don’t go home because, unfortunately, their families are less able to control the kids,” explained a prosecutor.¹¹³ Another prosecutor’s racial (and patriarchal) views were blunter: “In black families who the dad is, is unknown, while in white families—even when divorced—dad is married or something else. The choices are limited because the black family is a multigenerational non-fathered family. You can’t send the kid off to live with dad.”¹¹⁴ Thus, state officials apply the myth of black maternal irresponsibility to justify placing African American children in both juvenile detention and foster care. The fate of these children, in turn, provides further excuse to devalue their ties to their mothers.

III. A PECULIAR PUNISHMENT

This system intersectionality is evident when child welfare and prison policies make it extremely difficult for incarcerated black women to retain legal custody of their children. According to the U.S. Department of Justice, in 2004, 11 percent of mothers incarcerated in state prison reported that their children were in the care of a foster home, agency, or institution, which was five times the rate reported by fathers.¹¹⁵ A large-scale study of the prevalence of incarceration among the mothers of foster children found that more than one-third of these

109. Kenneth Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679 (2001–2002).

110. See Donna M. Bishop & Charles E. Frazier, *Race Effects in Juvenile Justice Decision-Making: Findings of a Statewide Analysis*, 86 J. CRIM. L. & CRIMINOLOGY 392, 407–08 (1996).

111. *See id.*

112. *Id.* at 409–10.

113. *Id.* at 410.

114. *Id.*

115. GLAZE & MARUSCHAK, *supra* note 5, at 5; see also Ronnie Halperin & Jennifer L. Harris, *Parental Rights of Incarcerated Mothers With Children in Foster Care: A Policy Vacuum*, 30 FEMINIST STUD. 339, 340 (2004) (noting that 11,500 children of 5000 incarcerated mothers are living with nonrelative foster parents).

mothers in New York State experienced an arrest that led to a conviction and more than one-fifth had been imprisoned.¹¹⁶ Most of the mothers studied were incarcerated after their children were placed in foster care, perhaps because losing custody of their children led to increased substance abuse or loss of needed public assistance.¹¹⁷

Prisons brutally degrade childbearing by incarcerated women in multiple ways.¹¹⁸ Women in prison receive poor reproductive health care, sometimes causing infertility, and pre- and postnatal care are especially abysmal.¹¹⁹ Justice Now, an Oakland-based organization that advocates on behalf of incarcerated women, has documented widespread sterilization inflicted on women in California prisons.¹²⁰ The devaluation of incarcerated mothers is perhaps most vividly captured by the common practice of shackling pregnant inmates.¹²¹ In many states, when incarcerated women go into labor, they are routinely shackled to the hospital bed; their legs, wrists, and abdomens are chained during the entire delivery of their babies.¹²² Immediately after delivery, their newborns are automatically placed in foster care in the vast majority of states.¹²³ Moreover, federal law governing child welfare practice encourages the termination of incarcerated mothers' parental rights, and local policies do too little to keep incarcerated mothers

116. ROSS, KHASHU & WAMSLEY, *supra* note 34, at 1.

117. *Id.* at 10, 14.

118. See REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *supra* note 23, at 9–10 (identifying the “harsh and dehumanizing” prison regulation of mothers); Human Rights Program at Justice Now, *Prisons as a Tool of Reproductive Oppression*, 5 STAN. J. C.R. & C.L. 310, 321–38 (2009); Kelly Parker, *Pregnant Women Inmates: Evaluating Their Rights and Identifying Opportunities for Improvements in Their Treatment*, 19 J. HEALTH & L. 259, 263–66 (2004–2005).

119. See REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *supra* note 23, at 16; Human Rights Program at Justice Now, *supra* note 118, at 325–29; Parker, *supra* note 118, at 267–69.

120. See Human Rights Program at Justice Now, *supra* note 118, at 321–25.

121. See Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. (forthcoming 2012) (manuscript at 32), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937872.

122. See generally AMNESTY INT'L, ABUSE OF WOMEN IN CUSTODY: SEXUAL MISCONDUCT AND SHACKLING OF PREGNANT WOMEN (2001). Only ten states (California, Colorado, Illinois, New Mexico, New York, Pennsylvania, Texas, Vermont, and Washington) and the Federal Bureau of Prisons have banned the practice, see REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *supra* note 23, at 12, 17, and most states give corrections officials discretion to determine policies regarding shackling. See Geraldine Doetzer, *Hard Labor: The Legal Implications of Shackling Female Inmates During Pregnancy and Childbirth*, 14 WM. & MARY J. WOMEN & L. 363, 366 (2008).

123. See INST. ON WOMEN & CRIMINAL JUSTICE, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 4 (2009); ANNE HEMMETT STERN, NAT'L RES. CTR. FOR FOSTER CARE & PERMANENCY PLANNING, INFORMATION PACKET: BABIES BORN TO INCARCERATED MOTHERS 2 (2004).

in contact with their children or to support their families after they are released from prison.¹²⁴

The fate of the relationship between incarcerated mothers and their children hinges partly on the fact that most of these women were the primary caretakers of their children. Incarcerated mothers are much more likely than incarcerated fathers to be living with their children when they are sent to prison.¹²⁵ Moreover, about one-third of mothers in prison were living alone with their children when they were arrested, compared to only 4 percent of incarcerated fathers.¹²⁶ In 2004, more than half of incarcerated mothers reported providing the primary financial care for their children the month before their arrest.¹²⁷ Therefore, when a mother goes to prison, the child's father often is not readily available to care for the child, increasing the chances of foster care placement.¹²⁸

Incarcerated mothers then find it difficult to retain legal custody of their children who have been placed in foster care. The state-imposed obstacles to maintaining contact with their children and to meeting other requirements imposed by child protective services often lead to a termination of parental rights.¹²⁹ As Ronnie Halperin and Jennifer L. Harris note, "To avoid having their parental rights terminated, incarcerated women, like their counterparts in the community, must participate in case planning, remain involved in their children's lives, and demonstrate their commitment and ability to reform, typically by enrolling in corrective programs as set forth in the case plan."¹³⁰ The conditions of incarceration, coupled with the policies of the prison and child welfare systems, however, make it "virtually impossible" to meet these requirements from behind bars.¹³¹ Child protection authorities often impose onerous requirements that are unrelated to the family's needs and are unnecessary to evaluate the mother's fitness to care for her child.¹³² A child welfare approach that focused more on supporting parental caregiving would benefit all families. Moreover, the difficulty that incarcerated mothers have in complying with case plans and in

124. See Halperin & Harris, *supra* note 115, at 340, 343–44; Deseriee A. Kennedy, "The Good Mother": *Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 172–90 (2012).

125. GLAZE & MARUSCHAK, *supra* note 5, at 5.

126. MUMOLA, *supra* note 35, at 4; see also GLAZE & MARUSCHAK, *supra* note 5, at 5.

127. GLAZE & MARUSCHAK, *supra* note 5, at 5.

128. See Kennedy, *supra* note 124, at 163–64.

129. Halperin & Harris, *supra* note 115, at 340–44.

130. *Id.* at 340–41.

131. *Id.* at 341.

132. See ROBERTS, *supra* note 4, at 79–82.

keeping custody of their children helps to demonstrate the social damage inflicted by mass incarceration and the need to stop imprisoning so many women.¹³³

A chief threat to reunification is the difficulty of visiting with children while in prison.¹³⁴ Child welfare agencies may construe a parent's failure to visit and communicate with his or her child as abandonment and grounds for terminating parental rights.¹³⁵ Despite—or because of—being the primary caretaker of their children before arrest, incarcerated mothers are less likely than fathers to have family visits.¹³⁶ When fathers are imprisoned, the mother usually continues as the child's primary caretaker.¹³⁷ She may maintain a relationship with the father while he is behind bars and help him keep in touch with the child. When mothers are imprisoned, children must usually leave home.¹³⁸

Most prisons are located in remote areas far away from the cities where inmates' families live.¹³⁹ A 1995 study reported that the average female inmate in federal prison was 160 miles farther from her family than the average male inmate.¹⁴⁰ The cost of traveling long distances, including bus fare or gas, hotel, and time away from work, often thwarts personal visits.¹⁴¹ Even telephone calls to prison, which are typically saddled with exorbitant fees and charges, may be too expensive for regular communication.¹⁴² Relative caregivers who fill in for incarcerated mothers receive inadequate government support, and many cannot meet the increased child care expenses or the cost of maintaining contact with incarcerated mothers without state assistance.¹⁴³ What is more, a felony conviction

133. See REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *supra* note 23, at 11–12 (discussing family-based treatment as an alternative to incarceration).

134. See Cynthia Seymour, *Children With Parents in Prison: Child Welfare Policy, Program, and Practice Issues*, 77 CHILD WELFARE 469, 473, 481 (1998).

135. See ROSS, KHASHU & WAMSLEY, *supra* note 34, at 2.

136. See REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *supra* note 23, at 13; SCHIRMER ET AL., *supra* note 35, at 5.

137. SCHIRMER ET AL., *supra* note 35, at 5.

138. REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *supra* note 23, at 12.

139. See MUMOLA, *supra* note 35, at 5; REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *supra* note 23, at 12–13; SCHIRMER ET AL., *supra* note 35, at 8.

140. John C. Coughenour, *Separate and Unequal: Women in the Federal Criminal Justice System*, 8 FED. SENT'G REP. 142, 143 (1995).

141. See REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *supra* note 23, at 13; Martha L. Raimon, *Barriers to Achieving Justice for Incarcerated Parents*, 70 FORDHAM L. REV. 421, 422–23 (2001).

142. See Olga Grinstead et al., *The Financial Costs of Maintaining Relationships With Incarcerated African American Men: A Survey of Women Prison Visitors*, 6 J. AFR.-AM. STUD. 59, 66 (2001) (finding that women in relationships with incarcerated men spent an average of eighty-five dollars per month on telephone calls).

143. See Kennedy, *supra* note 124, at 173.

often disqualifies family members from becoming legal caregivers,¹⁴⁴ making it more likely that the children will be placed in foster care with strangers who may be less willing to keep in touch with mothers behind bars.

Relatives and foster parents are further discouraged from arranging visitation by the complicated and time-consuming logistics that they must navigate. According to the Vera Institute of Justice, “Corrections officials must receive prior notification of a visit to insure the parent’s presence in the visiting room, and caseworkers need to . . . schedule transportation, and either a caseworker or other staff member must accompany foster children during these visits.”¹⁴⁵ Moreover, caseworkers often fail to communicate with incarcerated mothers altogether.¹⁴⁶ In a study of fifty-three women in New York state prisons, Adela Beckerman found that about half of the women received no written correspondence from their child’s caseworker.¹⁴⁷ As a result of all these obstacles to visitation with their children, “more than half of all mothers in prison receive no visits at all from their children.”¹⁴⁸

Incarcerated mothers risk permanently losing custody of their children because it is considered in a child’s best interests not to wait for his or her mother’s release to have a stable family life. For example, an Iowa judge terminated the rights of a mother arrested in a drug raid even though her conditional release date was less than five years from her arrest.¹⁴⁹ The judge reasoned that there was no guarantee that the mother would be granted parole and, even if she were paroled, there was no guarantee she would be ready to reunify with her child.¹⁵⁰ In an Arizona case, the appellate court affirmed termination based on the mother’s six-and-a-half-year sentence, followed by required drug treatment and one-year sobriety before she could be reunified with her children.¹⁵¹ The court noted that the mother would be able to maintain only minimal contact with her children while she was incarcerated because she failed to identify any family member who would bring

144. See CHILD WELFARE INFO. GATEWAY, CRIMINAL BACKGROUND CHECKS FOR PROSPECTIVE FOSTER AND ADOPTIVE PARENTS (2011), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/background.pdf (“States may deny approval of a foster care license or adoption application if any adult in the household has been convicted of a disqualifying crime . . .”).

145. ROSS, KHASHU & WAMSLEY, *supra* note 34, at 3.

146. See Raimon, *supra* note 141, at 422–23.

147. Adela Beckerman, *Mothers in Prison: Meeting the Prerequisite Conditions for Permanency Planning*, 39 SOC. WORK 9, 11 (1994).

148. Halperin & Harris, *supra* note 115, at 342.

149. *In re C.M.*, No. 02-0304, 2002 WL 663869, at *1–2 (Iowa Ct. App. Apr. 24, 2002).

150. *Id.*

151. *Christy C. v. Ariz. Dep’t of Econ. Sec.*, 153 P.3d 1074, 1075 (Ariz. Ct. App. 2007).

her children to visit her in prison.¹⁵² Some states relieve child welfare agencies of the requirement to provide reunification services in the case of parents who are convicted of felonies.¹⁵³ Finally, incarceration itself constitutes statutory grounds for termination of parental rights in some states.¹⁵⁴

The temporary separation of incarcerated mothers from their children by itself does not warrant termination of parental rights. If contact and communication can be maintained during a prison term, the state's goal should be to reunite mothers with their children upon release from prison. After all, the lengthy absence of parents for military duty, missions, career, or private substance abuse treatment is not considered grounds to automatically sever their legal relationship with their children.¹⁵⁵ The solution to the problem of maternal incarceration should be enforcement of the state's obligation to facilitate reunification, not permanent disruption of children's bonds with their mothers.¹⁵⁶

As noted in Part I.B, federal and state policy has shifted further away from preserving families and toward freeing children in foster care for adoption by terminating parental rights. Most notably, the Adoption and Safe Families Act of 1997 (ASFA)¹⁵⁷ implements a preference for adoption through a set of mandates and incentives to state child welfare departments.¹⁵⁸ ASFA establishes deadlines for terminating the rights of birth parents with children in foster care and offers financial incentives to states to move more children from foster care into adoptive homes.¹⁵⁹ It also weakens the chances of family preservation by encouraging agencies to make concurrent efforts to place foster children with adoptive parents while trying to reunite them with their families. Thus, federal child welfare policy places foster children on a "fast track" to adoption as a strategy

152. *Id.* at 1078, 1080.

153. *See, e.g.*, COLO. REV. STAT. § 19-3-604(1)(b)(III) (2011); CAL. WELF. & INST. CODE § 366.26(c)(1) (West Supp. 2012).

154. *See, e.g.*, IOWA CODE ANN. § 232.116(j)(2) (West 2006 & Supp. 2012) (stating that when "the parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of five or more years," there are grounds for termination of parental rights).

155. Garrison, *supra* note 99, at 478 (noting that judges maintain noncustodial parents' ties with children in private custody disputes: "In marked contrast to the child welfare system's traditional disdain for the natural parent, private family law has consistently recognized the importance of the child-parent relationship.").

156. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.), requires that states make "reasonable efforts" to prevent the removal of children from their homes and, whenever possible, to reunify children placed in foster care with their families. *Id.* § 101(a)(1), 94 Stat. at 502 (codified as amended at 42 U.S.C. § 671 (2006)).

157. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

158. *Id.*

159. Kennedy, *supra* note 124, at 175.

for curing the ills of the child welfare system, especially the enormous foster care population.¹⁶⁰ ASFA mandates that state agencies initiate termination proceedings if a child spends fifteen out of any twenty-two months in foster care.¹⁶¹ The swift federal timetable is often grounds for severing incarcerated mothers' ties to their children.¹⁶²

Even when incarcerated mothers are able to keep legal custody of their children, the post-prison collateral penalties make it difficult to maintain a relationship with their children. A host of state and federal laws impose draconian obstacles to a mother's successful reentry into her community by denying drug offenders public benefits, housing, education, and job opportunities.¹⁶³ Formerly incarcerated women are barred from many occupations held predominantly by women, such as childcare workers, certified nurse's aides, and beauticians.¹⁶⁴ States have the option of denying food stamps to applicants with a felony drug conviction.¹⁶⁵ Without a job, public assistance, or stable housing, a mother released from prison will find it extremely difficult to meet the child welfare agency's requirements for reunification with her children and therefore risks termination of her parental rights. Thus, the convergence of prison and foster care for many incarcerated mothers means losing custody of their children permanently—for many women this is the ultimate punishment that the state can inflict.¹⁶⁶

CONCLUSION

An analysis of the intersection of prison and foster care in black women's lives shows how punishing black mothers is pivotal to the joint operation of

160. See ROBERTS, *supra* note 4, at 104–13.

161. 42 U.S.C. § 675(5)(E); see Kennedy, *supra* note 124, at 175.

162. Kennedy, *supra* note 124, at 174–75.

163. See Nakima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 U. ST. THOMAS L.J. 462, 466 (2006); George Lipsitz, "In an Avalanche Every Snowflake Pleads Not Guilty": *The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746, 1774–79 (2012); Geneva Brown, *The Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women 2* (Am. Constitution Soc'y Issue Brief, 2010).

164. See AM. BAR ASS'N COMM'N ON EFFECTIVE CRIMINAL SANCTIONS & PUB. DEFENDER SERV. FOR THE DIST. OF COLUMBIA, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS 20–33 (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf>.

165. 21 U.S.C. § 862a.

166. See Phyllis Jo Baunach, *You Can't Be a Mother and Be in Prison . . . Can You? Impacts of the Mother-Child Separation*, in *THE CRIMINAL JUSTICE SYSTEM AND WOMEN* 155, 157–58 (Barbara Raffel Price & Natalie J. Sokoloff eds., 1982).

systems that work together to maintain unjust social hierarchies in the United States. Black mothers are useful to the neoliberal agenda because state regulation of their bodies, already devalued by a long history of reproductive regulation and derogatory stereotypes of maternal irresponsibility, makes excessive policing by foster care and prison seem necessary to protect children and the public from harm. In turn, this analysis suggests the need for cross-movement strategies that can address multiple forms of systemic injustice to contest the overpolicing of women of color and expose how it props up an unjust social order.¹⁶⁷

167. On using an intersectional analysis for cross-movement organizing, see Dorothy Roberts & Sujatha Jesudason, *Movement Intersectionality: The Case of Race, Gender, Disability, and Genetic Technologies*, 9 DU BOIS REV. (forthcoming 2012).