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## Unfinished Uniformity in Systematic Sentencing: Oppressive Treatment and Disproportionate Punishment Outcomes for Black Women in Federal Prisons

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## NOTE

# Unfinished Uniformity in Systematic Sentencing: Oppressive Treatment and Disproportionate Punishment Outcomes for Black Women in Federal Prisons

Alexandria M. Foster\*

## INTRODUCTION

As a bipartisan, independent agency within the judicial branch of the United States government, the U.S. Sentencing Commission's objective is to promote uniformity in sentencing.<sup>1</sup> The Sentencing Commission's strategy is based on a variety of factors, many of which are statistical and data-driven.<sup>2</sup> While this statistical approach is beneficial, it masks two grave, substantive issues: unjust prison treatment and disproportionate punishment outcomes that weigh heavily on African American women in the U.S.

This Note seeks to accomplish several tasks. First, this Note aims to provide an overview of the mandatory minimum laws and sentencing guidelines that, in an effort to reduce sentencing disparities, have actually worsened disparities and lengthened sentences for Black women. Second, this Note illustrates how the presidential politics from the 1970s to the 1990s disproportionately treated drugs and drug offenders. Third, this Note examines unjust prison treatment of Black women in federal prisons, specifically as the treatment relates to physical and mental inaccessibility and maltreatment. Fourth, this Note analyzes how longer sentences under the guidelines have the potential to worsen the socioeconomic status of Black women. Since the enactment of new guidelines from the U.S. Sentencing Commission, Black women have been disenfranchised by a system that has failed to confront the substantive issues that are far from uniform. After addressing these problems, I provide policy recommendations to key stakeholders in hope of lessening the sentencing disparities for those in federal prisons.

## I. HISTORICAL ACCOUNT OF MANDATORY MINIMUM LAWS

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1 U.S. SENTENCING COMM'N, *About the Commission*, <http://www.ussc.gov> (last visited Nov. 30, 2016).

2 *Id.*

The Sentencing Commission's aim to foster uniformity in sentencing was implemented by contemporary mandatory minimum laws that, in retrospect, have led to sentencing disparities for minority offenders and, in particular, Black women. Before introducing how mandatory minimum laws operate today, it is first necessary to give a historical account of how mandatory minimums were first introduced by Congress. Mandatory minimum laws are "statutory provisions requiring the imposition of a sentence of at least a specified term of imprisonment when criteria set forth in the relevant statute have been met."<sup>3</sup> In lay terms, mandatory minimums require offenders to serve at least the bare minimum of a sentence imposed by law if the prohibited conduct falls within the statute. When Congress first enacted laws outlining federal offenses in the 1790 Crimes Act,<sup>4</sup> mandatory minimum penalties were imposed for severe and deadly forms of criminal conduct.<sup>5</sup> Examples of such offenses included murder, piracy, treason, and "rescue of a person convicted of a capital crime."<sup>6</sup> Throughout the Eighteenth and Nineteenth centuries, Congress continued to enact mandatory minimum penalties for serious offenses such as slave smuggling, burning military dwellings, and kidnapping freed persons in attempt to resell them into slavery.<sup>7</sup>

Although the creation of mandatory minimum laws and penalties continued to evolve and fit crimes that were prevalent during particular time periods, it was not until 1951 that Congress drastically changed the purpose and implementation of mandatory minimum laws.<sup>8</sup> According to the U.S. Sentencing Commission, Congress implemented three drastic reforms to mandatory minimum penalties. The first reform was rather simple: Congress created more mandatory minimum penalties.<sup>9</sup> The second reform—the expansion of mandatory minimum penalties to crimes that historically were not covered under such penalties<sup>10</sup>—provides an illustration of how Congress hyper-criminalized conduct that, prior to the changes in the guidelines, were not considered as dangerous and/or severe of crimes. For example, while past convictions under mandatory minimum penalties concerned crimes such as murder, piracy, and rape, today's convictions are much more likely to relate to controlled substances and firearms.<sup>11</sup> Finally, the third reform resulted in the lengthening of

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3 U.S. SENTENCING COMM'N, *Overview of Mandatory Minimum Sentencing*, [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20090710\\_StC\\_Mandatory\\_Minimum.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/submissions/20090710_StC_Mandatory_Minimum.pdf) (last visited Nov. 29, 2016).

4 U.S. SENTENCING COMM'N, *History of Mandatory Minimum Penalties and Statutory Relief Mechanisms*, in 2011 REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 7 (2011), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_02.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf) (last visited Nov. 29, 2016) [hereinafter *History*].

5 *See generally id.*

6 *Id.* at 7.

7 *Id.* at 10.

8 *Id.* at 22.

9 *Id.*

10 *Id.*

11 *Id.*

sentences served under mandatory minimum penalties; Congress began to impose longer and more severe sentences than what was required in the prior centuries.<sup>12</sup> These changes within mandatory minimum sentencing shed light on the institutional power and role of Congress as a key stakeholder in not only defining crimes but also in characterizing how the United States treats offenders in its imposition of criminal penalties. Unfortunately, the 1950s was not the last time that Congress used its power to define criminal conduct and impose longer sentences—1980s mandatory minimum legislation would prove to be detrimental to offenders, particularly to offenders of color.

## II. POLITICAL POWER AND RACIAL UNDERTONES OF THE WAR ON DRUGS

This section seeks to critique Congress for worsening racial disparities among the incarcerated through legislation that led to a disparate impact on minority groups, and in particular for Black women, whose population grew exponentially during the “War on Drugs.” The War on Drugs became common rhetoric under President Nixon’s administration in large part due to the creation of the Drug Enforcement Administration (DEA). Established in 1973, the DEA’s purpose was to eradicate all drugs by means of a global war on drugs.<sup>13</sup> While Nixon’s administration claimed the War on Drugs was rooted in the desire to destroy drugs and the drug culture that was rather visible during the 1960s, many critics argue that the war racially and economically targeted poor people of color. In fact, this argument was later supported in a 1994 interview with Nixon’s domestic policy chief, John Ehrlichman.<sup>14</sup> Ehrlichman confessed that Nixon’s 1968 presidential campaign and subsequent administration considered the “antiwar left” and “black people” to be its two enemies.<sup>15</sup> In his interview, he later went on to expose the Nixon administration for intentionally lying about the drugs and even went so far to say, “We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.”<sup>16</sup> The racially targeted rhetoric and policies of the Nixon administration were only further exacerbated by President Ronald Reagan’s anti-drug policies of the 1980s—it was during this time period when the United States would begin to see how drug legislation would ultimately lead to mass incarceration.

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12 *Id.*

13 Yassaman Saadatmand, Michael Toma & Jeremy Choquette, *The War on Drugs and Crime Rates*, 10 J. BUS. & ECON. RES. 285, 285 (2012), <http://www.cluteinstitute.com/ojs/index.php/JBER/article/view/6980/7055>.

14 See Adam Edelman, *Nixon Aide: ‘War on Drugs’ Was Tool to Target ‘Black People,’* N.Y. DAILY NEWS (Mar. 23, 2016, 8:38 AM), <http://www.nydailynews.com/news/politics/nixon-aide-war-drugs-tool-target-black-people-article-1.2573832>.

15 *Id.*

16 *Id.*

Beginning in the 1980s, the population of women in prison doubled compared to the population of men in prison.<sup>17</sup> Mandatory minimum laws, enacted by Congress in response to the racial, social, and economic construction of anti-drug policies under the Reagan administration, caused this substantial increase. Ironically, when President Reagan declared the legislative movement against the War on Drugs in 1982,<sup>18</sup> drug crimes were lower than in prior years, yet this drastically changed with the increased presence and use of crack cocaine in urban communities of color.<sup>19</sup> Mandatory minimum penalties related to drug offenses were introduced under the 1986 Anti-Drug Abuse Act; this Act rendered mandatory minimum penalties for federal drug trafficking offenses and imposed penalties that required different sentences for the same drugs in different forms.<sup>20</sup>

One of the most predominant and disputed disparities is the sentencing of crimes involving crack cocaine versus those involving powder cocaine.<sup>21</sup> Under the 1986 Act, the notorious 100-to-1 federal law imposed on crack cocaine offenses fueled racial disparities in the criminal justice system.<sup>22</sup> Because of this disparity, Black offenders convicted of crack cocaine offenses were punished far more severely than their White counterparts who were convicted of powder cocaine offenses involving 100 times the quantity.<sup>23</sup> Conviction and punishment of Black offenders who faced far more severe sentences rapidly became a growing issue; however, when the U.S. Sentencing Commission proposed changes to the law to make the treatment of powder and crack cocaine uniform,<sup>24</sup> it was met with opposition from President Clinton's administration and Congress.<sup>25</sup> President Clinton, taking the same position on the anti-drug rhetoric used by his Republican predecessors, blocked the Commission's recommendation under the argument that reducing the disparities would have a "devastating impact" on inner-city communities.<sup>26</sup> Although Clinton conceded that Congress ought to enact some adjustment, the proposed adjustment of increasing the penalty of powder cocaine<sup>27</sup> would not eliminate the disparate impact on Black drug offenders. The Clinton administration's refusal to modify the crack cocaine penalty was harshly criticized as a political strategy to keep White

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17 MARC MAUER, CATHY POTLER & RICHARD WOLF, *THE SENTENCING PROJECT, GENDER AND JUSTICE: WOMEN, DRUGS, AND SENTENCING POLICY* 1 (1999), <http://static.prisonpolicy.org/scans/sp/genderandjustice.pdf>.

18 See Saadatmand et al., *supra* note 13, at 285; Edelman, *supra* note 14.

19 MAUER ET AL., *supra* note 17, at 19.

20 *History*, *supra* note 4, at 23.

21 See Michael Tonry, *Purposes and Functions of Sentencing*, 34 *CRIME & JUST.* 1 (2006), in NORA DEMLEITNER, DOUGLAS BERMAN, MARC L. MILLER & RONALD F. WRIGHT, *SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES* 29 (3d. ed. 2013).

22 See *id.*

23 *Id.*

24 See *id.*

25 *Id.*

26 Ann Devroy, *Clinton Retains Tough Law on Crack Cocaine*, WASH. POST (Oct. 31, 1995), <https://www.washingtonpost.com/archive/politics/1995/10/31/clinton-retains-tough-law-on-crack-cocaine/0f435210-4bfd-45b5-b1ab-3f95b65a0e68/>.

27 See *id.*

constituents satisfied at the expense of imprisoning Black youth.<sup>28</sup> The anti-drug policies and attitudes under Presidents Nixon, Reagan, and Clinton encapsulate how politics has historically controlled criminal offenses and, more importantly, how politics controls who is disenfranchised by the U.S. punishment system as a whole.

The Sentencing Commission has been successful at proposing changes to the 100-to-1 law, but a disparity continues to exist under the sentencing guidelines, juxtaposing the Commission's uniformity objective. This disparity is visible in how mandatory minimums are triggered for certain offenses. For example, 280 grams or more of crack cocaine triggers a "ten-year mandatory minimum penalty with a maximum term of life imprisonment,"<sup>29</sup> whereas 500 grams of powder cocaine or twenty-eight grams of crack cocaine only warrants a "five-year mandatory minimum penalty with a maximum term of 40 years."<sup>30</sup> This disparity clearly indicates that Congress has failed to enact comprehensive uniformity, and thus minorities, particularly Black women, have faced sentencing and punishments far more severe than their White counterparts.

### III. THE EFFECT OF MANDATORY MINIMUMS ON THE SENTENCING GUIDELINES AND HOW THE COMMISSION HAS RESPONDED

Mandatory minimums posed grave consequences to the sentencing guidelines, and in fact limited the Commission's ability to promote its objective of uniformity due to structural constraints. Some critics have even argued that mandatory minimums influenced how the Commission wrote its guidelines. There are three ways in which this has occurred:

The guidelines require a government motion before the court can depart below the guideline range based on an offender's substantial assistance to authorities. The guidelines set sentences based largely on the amount of any mixture of substance containing a detectable amount of drugs, rather than the actual amount of the illegal substance. The guidelines anchor punishment for drug offenses in accordance with the trigger amounts in the statutes and scale punishment up from there.<sup>31</sup>

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28 *See id.*

29 U.S. SENTENCING COMM'N, *Mandatory Minimum Penalties for Drug Offenses*, in 2011 REPORT TO CONGRESS, 150, [http://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_08.pdf](http://www.uscc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_08.pdf) (last visited Nov. 29, 2016) [hereinafter *Mandatory Minimum Penalties*].

30 *Id.*

31 BARBARA S. VINCENT & PAUL J. HOFER, FED. JUDICIAL CTR., *THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS* 26 (1994), <https://www.fjc.gov/sites/default/files/2012/conmanmin.pdf>.

Although the Sentencing Commission has adopted some of the same methods imposed by Congress, it has also repeatedly urged Congress to change its mandatory minimum laws. According to the Commission, “The most commonly prosecuted drug offenses carrying mandatory minimum penalties are under 21 U.S.C. §§ 841 and 960.”<sup>32</sup> The first statutory provision defines the crime, and the second provision governs the criminalization of the drug-related offense. It is unlawful under § 841 for a person to knowingly or intentionally “manufacture, distribute, or dispense, or possess with intent to manufacture a controlled substance.”<sup>33</sup> Controlled substances include powder cocaine, crack cocaine, marijuana, methamphetamine, and heroin.<sup>34</sup> A person who knowingly or intentionally imports or exports a controlled substance is to be held accountable under § 960.<sup>35</sup> These laws impose incredibly severe mandatory minimum sentences for offenders, and because of the sentencing technicalities, sentences often result in a disparate impact for many Black women offenders. In an effort to mitigate the disparate results of penalties under laws such as 21 U.S.C. § 960, the Commission has made recommendations that include limiting the power of prosecutors and placing it back in the hands of judges, the stakeholders who are thought to be the most objective and impartial.<sup>36</sup>

While Congress repeatedly ignored the Commission’s urge to change many of the drug laws, it did take action to reduce disparities under mandatory minimum laws by creating the safety valve provision in 1994.<sup>37</sup> The safety valve provision can permit relief for mandatory minimum offenses,<sup>38</sup> however, it is problematic for Black women offenders because of how it is narrowly tailored. Federal judges may sentence an offender to a less severe sentence only if he or she meets all of the following requirements: (1) [T]he defendant has no prior record; (2) the defendant did not use violence or possess a weapon; (3) there was no death or serious bodily injury; (4) the defendant was not an organizer, leader, manager, or supervisor of others; and (5) the defendant provided the government all information and evidence.<sup>39</sup> The safety valve provision is inherently subjective on at least two fronts—its use is dependent on what charges the prosecutor decides to bring against the defendant<sup>40</sup> and whether the judge grants the safety valve provision even if the defendant has met all the requirements.

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32 *Mandatory Minimum Penalties*, *supra* note 29.

33 *Id.*

34 *Id.*

35 *Id.*

36 LENORA LAPIDUS, NAMITA LUTHRA & ANJULI VERMA, AM. CIVIL LIBERTIES UNION, DEBORAH SMALL, BREAK THE CHAINS (BTC) & PATRICIA ALLARD & KIRSTEN LEVINGSTON, BRENNAN CTR., CAUGHT IN THE NET: THE IMPACT ON DRUG POLICIES ON WOMEN AND FAMILIES 61 (2005), [https://www.aclu.org/sites/default/files/images/asset\\_upload\\_file431\\_23513.pdf](https://www.aclu.org/sites/default/files/images/asset_upload_file431_23513.pdf).

37 *Id.* at 39–45.

38 *Id.* at 39.

39 *Id.*

40 See Danielle Snyder, Note, *One Size Does Not Fit All: A Look at the Disproportionate Effects of Federal Mandatory Minimum Drug Sentences on Racial Minorities and How They Have Contributed to the Degradation of the Underprivileged African-American Family*, 36 *HAMLIN J. PUB. L. & POL’Y* 77, 110 (2015).

In addition to prosecutorial and judicial discretion concerns tied to the safety valve provision is the troubling reality that the provision disproportionately benefits certain offenders. According to a report by the American Civil Liberties Union (ACLU), the Sentencing Commission has conducted research showing that only twenty-five percent of “all federal drug offenders have benefitted from the provision.”<sup>41</sup> While heroin and marijuana offenders were most likely to benefit from a reduction under the safety valve provision, crack and methamphetamine offenders were the least likely to reap any sort of benefit from the provision.<sup>42</sup> The previous section highlighted drug sentencing disparities and the racially disparate impact that followed from such sentences; it is no coincidence that Black and low-income women are disparately impacted by the inability to benefit from the safety valve provision.<sup>43</sup> The ACLU further argued that the safety valve provision “has done little to minimize the pressure on a criminal justice system overburdened with people, especially women, whose principal problems are addiction and/or poverty.”<sup>44</sup> Safety valve provisions are yet another example of legislation that, in an attempt to correct a race, class, and gender disparity, have actually worsened the issue by means of prosecutorial and judicial discretion to oversee what offenses and which offenders benefit from Congress’s underwhelming effort at uniformity.

#### A. *Stripping Away Judicial Discretion*

In addition to mandatory minimums and the safety valve provision, the uniformity objective promoted by the Sentencing Commission undermines individual, communal, and social factors that, prior to the guidelines, were once taken into consideration when imposing sentences but have since then been overridden by the desire to diminish sentencing disparities. The punishment and sentencing outcome that results from eliminating the consideration of important circumstantial factors will be addressed later, but first it is necessary to understand how Congress has used its institutional power to eliminate these important circumstantial factors. Under 18 U.S.C § 3553(a), the legislature placed boundaries around what factors a judge may consider when imposing a sentence.<sup>45</sup> The text of § 3553(a) is as follows:

The court in determining the particular sentence to be imposed, shall consider—(1) the nature and circumstance of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed [including the seriousness of the offense, adequate deterrence, protection of the public, and educational and vocational training, alongside medical care and treatment]; (3) the

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41 AM. CIVIL LIBERTIES UNION ET AL., *supra* note 36, at 39.

42 *Id.*

43 *Id.*

44 *Id.*

45 18 U.S.C. § 3553(a) (2012).

kinds of sentences available; (4) the . . . sentencing range . . . ; (5) pertinent policy statement[s] issued by the Sentencing Commission . . . ; (6) the need to avoid unwarranted sentence disparities . . . ; and (7) the need to provide restitution to any victims.<sup>46</sup>

Although this list of factors on the surface could lead one to think judges have a fair amount of discretion when imposing sentences, the statute actually places constraints on judges. The Sentencing Reform Act of 1984 banned judges from considering the following factors: “race, sex, national origin, creed, religion, and socioeconomic status in sentencing decisions.”<sup>47</sup> While the argument that these factors cannot be considered to satisfy the Commission’s goal of uniformity, a compelling argument lies in the idea that these factors *must be considered* because just as offenders are not uniform (i.e., they do not all share the same characteristics), neither should their sentences be imposed under uniform considerations.

#### IV. INTERSECTIONALITIES OF BLACK WOMEN AND IMPRISONMENT

Black women offenders face unique and challenging circumstances that are worsened because of sentencing outcomes and disparities. Cyclical issues especially pertinent to Black women ought to be considered during sentencing, yet the constraints on judges to exercise proper forms of discretion make this objective difficult, if not impossible. These issues include familial obligations and carrying the financial weight as often being the sole provider or breadwinner of the home; raising children as single mothers; health issues and HIV disparities; education inequalities; and unemployment.<sup>48</sup> According to a Department of Justice Report in 1991, “Women who were most likely in prison were black, aged 25 to 34, unemployed at the time of arrest, high school graduates or holders of a GED with some college, and were never married.”<sup>49</sup> In enacting anti-drug laws, Congress has failed to carefully consider the intersectionalities of Black women and societal challenges that ought to be accounted for when imposing sentences. True uniformity is in fact limited by laws such as § 3553, which place unfair boundaries on judges who are experts trained to impose the law and impose appropriate sentences; and because of the lauded goal of uniformity, judges are no longer able to use as much discretion when sentencing marginalized and disenfranchised Black women offenders.

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46 *Id.*

47 See Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing* 4 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 661, 2013).

48 See Geneva Brown, Issue Brief, *The Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women*, Am. Const. Soc’y for L. & Pol’y 3–4 (2010), <https://www.acslaw.org/files/Brown%20issue%20brief%20-%20Intersectionality.pdf>.

49 *Id.* at 6.

The limit of judicial discretion under § 3553 is not the only sentencing policy that has led to disproportionate outcomes for Black women. Another post-guideline change is the “shift away from indeterminate sentencing.”<sup>50</sup> The shift away from indeterminate sentencing meant that many parole boards were abolished, and judges had less authority to grant early prison releases.<sup>51</sup> This policy—or change in policy—not surprisingly has had a disproportionate effect on Black women offenders, who in the enactment of the guidelines received longer and harsher sentences. According to the Bureau of Justice, at the time this shift took place, women were most likely to be convicted of a drug offense or property offense;<sup>52</sup> as alluded to in earlier sections, such laws had a disparate impact for Black women offenders, and the constraint on judicial discretion did not make this issue any easier to resolve.

### A. *The Use and Implications of Solitary Confinement as Social Control*

In moving away from the Sentencing Commission’s enactment of the guidelines to the oppressive treatment of Black women in prison, it is imperative to recognize how the technical, statistical, and data-driven support fueling the guidelines far outweighs the attention given to substantive issues of how this minority group is treated once incarcerated. This section focuses on the physical and mental health concerns Black women face before and during incarceration and how the invisibility of and inattention to these issues is part of what worsens the outcome for such offenders. One detrimental example of physical and mental maltreatment of Black women is through the use of solitary confinement. Solitary confinement, “also known as segregation, isolation, the hole, supermax, and restrictive housing—has been described as torture by the UN Special Rapporteur on torture.”<sup>53</sup> This method of incarceration is disproportionately imposed on Black women and used as a form of social control in both federal and state prisons.

Kimberle Crenshaw uses a social norm theory to argue why Black women prisoners are far more likely to be put in isolation than their White counterparts. Crenshaw’s social norm theory identifies ways in which Black women have been categorized as “other” and how the roles that Black women have played in society exclude them from the traditional notions of femininity.<sup>54</sup> One of her arguments was

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50 *Id.*

51 *See id.* at 6–7.

52 *See* Lawrence A. Greenfeld & Tracy L. Snell, U.S. Department of Justice, Bureau of Justice Statistics Special Report, Women Offenders, <https://www.bjs.gov/content/pub/pdf/wo.pdf> (last visited Apr. 20, 2018).

53 Rachel Gilmer, Crystal Peters, Mabre Stahly-Butts, Rachel Herzing & Andrea Ritchie, *A Vision for Black Lives: Policy Demands for Black Power, Freedom, & Justice, An End to All Jails, Prisons and Juvenile Detention Facilities as We Know Them and the Establishment of Policies and Programs to Address the Current Oppressive Conditions Experienced by People Who Are Imprisoned*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/wp-content/uploads/2016/07/PrisonConditions-OnePagerV2.pdf> (last visited Feb. 5, 2018).

54 *See* Kimberle 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, 154–55 (1989) (discussing social norm theory and femininity).

summarized in a paper written by Cassandra Shaylor who, in referring to Crenshaw's theory, claimed, "Black women have never been perceived to fit this description of patriarchal notions about femininity, because racism denies them access to these norms."<sup>55</sup> In response to what is often perceived to be as abnormal, or in conflict with social norms, Black women are placed in solitary confinement at rates far exceeding White women. For example, at the Valley State Prison for Women in Chowchilla, California, 61.4% of the 52% of women in solitary confinement are of color.<sup>56</sup> Of that 61.4%, over 40% are Black and 12% are Hispanic/Mexican.<sup>57</sup> The mental health effects associated with solitary confinement of Black women are profound. While there has been political traction to reduce the use of solitary confinement and even though advocates who have urged to eliminate the practice entirely, it remains a widespread issue with grave mental and physical health implications.

One issue that transcends from the use of solitary confinement is the denial of mental health treatment and therapeutic activities for prisoners who are mentally ill, who otherwise would be integrated into such activities if in the general prison population.<sup>58</sup> Another mental health implication is the rate of suicide in prisons. According to a report from *Solitary Watch*, prisoners who are put on suicide watch are "placed under the most restrictive conditions."<sup>59</sup> These conditions include the absolute denial of necessary additional therapy and mental health treatment along with the removal of personal belongings. Such personal belongings could reasonably provide comfort to those suffering from mental illnesses, but instead they are deprived of their physical and personal dignity.<sup>60</sup> Inaccessibility to mental health treatment for Black women offenders is not only confined to prisons but also exists in society generally. It is the removal of mental health treatment from prisons that worsens these conditions and limits the ability for offenders to be rehabilitated.

The Federal Bureau of Prison Statistics reported that "people with mental health conditions constitute 64% of the jail population."<sup>61</sup> These mental health conditions are in large part due to limited access for minorities and, in particular, for Blacks to seek mental health diagnoses and treatment.<sup>62</sup> Unequal health care access and provider bias are two major constraints imposed on Black women with mental illnesses. The lack of resources and access in prisons only worsens these conditions. The National Alliance on Mental Illnesses reported that "African Americans,

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55 Cassandra Shaylor, *It's Like Living in a Black Hole: Women of Color and Solitary Confinement in the Prison Industrial Complex*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 385, 394 (1998).

56 *Id.*

57 *Id.*

58 Joshua Manson, *New Report Documents Devastating Effects of Solitary Confinement on Mental Illness*, SOLITARY WATCH (Sept. 29, 2016), <http://solitarywatch.com/2016/09/09/new-report-documents-devastating-effects-of-solitary-confinement-on-mental-illness>.

59 *Id.*

60 *See id.*

61 DIGNITY AND POWER NOW, IMPACT OF DISPROPORTIONATE INCARCERATION OF AND VIOLENCE AGAINST BLACK PEOPLE WITH MENTAL HEALTH CONDITIONS IN THE WORLD'S LARGEST JAIL SYSTEM 2 (2014), [http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT\\_CERD\\_NGO\\_USA\\_17740\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_NGO_USA_17740_E.pdf).

62 *Id.* at 1.

especially women, are more likely to experience and mention physical symptoms related to health problems.”<sup>63</sup> The lack of diversity in the medical field, particularly the mental health sector, makes it difficult for those seeking treatment to have cultural understandings with their provider.<sup>64</sup> Cultural competence is a consistent issue in mental care.<sup>65</sup> Lack of competency can be attributed at least in part to the minute percentage of African American Health Provisions.<sup>66</sup> Of the total members of the American Psychological Association, African Americans represent 4% of the organization.<sup>67</sup> The aforementioned statistics are not meant to solely provide background information, but instead to highlight the cyclical nature of Black mental health and how disparities often translate and are exacerbated in the prison system.

*B. Sexual Assault, the HIV/AIDS Epidemic, and the Effect of Prison Rape on Black Women*

Lack of mental health treatment and access to rehabilitation place unfair burdens on Black women. Oppressive treatment is not limited to the use of solitary confinement but expands to patterns of physical and sexual assault by prison guards. The argument proposed in this section is that prison rape and sexual assault against Black women has the potential to worsen the HIV/AIDS epidemic and, furthermore, that the inaccessibility to treatment of the virus and the subsequent disease has a disparate impact on this prison population.

According to a study by the Center for Disease Control and Prevention, “One in thirty-two Black women will become infected with HIV.”<sup>68</sup> The CDC also reported that HIV is the leading cause of death for “Black women 25–34 years of age and the third leading cause of death for Black women 35–44 years old.”<sup>69</sup> The death rates of HIV-infected Black women within the general population is rather alarming, and access to treatment for incarcerated Black women with HIV is limited, at best. One theory behind the increased number of HIV-infected Black women is the astonishing rate of incarcerated Black men with HIV.<sup>70</sup> The National Commission on Correctional Health Care reported that of the 229,000 people in the “general public living with AIDS,” 17% had an “interaction with the correctional system.”<sup>71</sup> The aforementioned statistics should raise concerns for many reasons; the concern that legislators should

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63 *African American Mental Health*, NAT'L ALL. ON MENTAL ILLNESS, <http://www.nami.org/Find-Support/Diverse-Communities/African-Americans> (last visited Feb. 5, 2018).

64 *See id.*

65 *See id.*

66 *See id.*

67 American Psychological Association, CWS Data Tool: Demographics of the U.S. Psychology Workforce, <http://www.nami.org/Find-Support/Diverse-Communities/African-Americans> (last visited Apr. 20, 2018).

68 Gloria J. Browne-Marshall, *A Cautionary Tale: Black Women, Criminal Justice, and HIV*, 19 DUKE J. GENDER L. & POL'Y 407, 409 (2012).

69 *Id.* at 410.

70 *Id.* at 415.

71 *Id.*

be most attentive to is how prison rape and sexual assault is disproportionately contributing to the fatal health implications for Black women.

The National Black Women's Health Project reported, "Approximately 40 percent of Black women report coercive conduct of a sexual nature by age 18,"<sup>72</sup> and the National Violence Against Women Survey reported, "18.8 percent of African American women reported rape in their lifetime."<sup>73</sup> Black women as prior and future victims of sexual assault have a greater chance of being targeted in the prison system because of their disproportionate numbers in prison. The DOJ's Bureau of Justice Statistics reported allegations of "staff sexual misconduct in all but one state prison in 41 percent of local and private jails and prisons."<sup>74</sup>

Federal legislation has attempted to address the issue of prison rape and sexual assault by means of the Prison Rape Elimination Act (PREA) of 2003, which imposed a zero-tolerance policy for prison rape.<sup>75</sup> Part of the legislation included the establishment of a National Prison Rape Elimination Commission<sup>76</sup> designed to utilize a "comprehensive legal and factual study of the penological [sic], physical, mental, medical, social, and economic impacts of prison rape in the United States."<sup>77</sup> The comprehensive legislation includes items such as "general prevention planning"; "supervision and monitoring"; "staffing and juvenile facilities"; "training and education"; and "cross-gender searches and viewing."<sup>78</sup> For some, the PREA is regarded as a "human rights victory,"<sup>79</sup> yet holding prisons accountable under the PREA will have a financial cost on taxpayers, and accountability is dependent on bipartisan support and full internal and external compliance.

While the Prison Rape Elimination Act has made some strides to address sexual assault, there has not been nearly enough attention given to combating the HIV/AIDS epidemic for incarcerated Black women. There is a connection here that ought to be highlighted—the PREA has not done nearly enough to bring attention to the causes of prison rape, and, in doing so, leaves a door open for more women to be victims of this conduct and increases their likelihood of contracting HIV. AIDS-related deaths in prisons are not something to be glanced over; in 2005, twenty-seven federal inmates died because of an AIDS-related cause.<sup>80</sup> Not surprisingly, the cost of treating the virus in prisons is growing, and mass incarceration only limits the chance

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72 WOMEN OF COLOR NETWORK, *FACTS & STATS: SEXUAL VIOLENCE IN COMMUNITIES OF COLOR 2* (2006), [http://wocninc.org/docs/factsheets/fs\\_sexual-violence.pdf](http://wocninc.org/docs/factsheets/fs_sexual-violence.pdf).

73 *Id.* (citing United States Department of Justice).

74 *Id.*

75 *See* DEPT. OF JUSTICE, *NATIONAL STANDARDS TO PREVENT, DETECT, AND RESPOND TO PRISON RAPE 23* (2012), [http://ojp.gov/programs/pdfs/prea\\_final\\_rule.pdf](http://ojp.gov/programs/pdfs/prea_final_rule.pdf).

76 *Id.* at 3.

77 *Id.*

78 *Id.* at 5–6.

79 Simon McCormack, *Prison Rape Elimination Act: Landmark Legislation to End Abuse Behind Bars Turns Ten*, HUFFINGTON POST (Sept. 5, 2013, 2:54 PM), [http://www.huffingtonpost.com/2013/09/05/prison-rape-elimination-act\\_n\\_3875123.html](http://www.huffingtonpost.com/2013/09/05/prison-rape-elimination-act_n_3875123.html).

80 Laura M. Maruschak, U.S. DEP'T JUST. BUREAU JUST. STAT., *HIV IN PRISONS, 2005*, at 1 (2008), <https://www.bjs.gov/content/pub/pdf/hivp06.pdf>.

of offenders receiving adequate treatment.<sup>81</sup> Because of the failure to provide adequate educational and health resources to the incarcerated population, sentencing outcomes for Black women will remain at a standstill or even worsen over time.

### C. *The Detrimental Economic Impact of Incarceration*

Physical and mental health abuse and implications of Black women in prisons are not the only substantive issue that Congress ought to be concerned about—the economic implications of Black incarcerated women have risen exponentially since the guidelines have lengthened sentences in the process of uniformity. Policymakers have long acknowledged the employment prospects those incarcerated face once released from prison, yet employment prospects are often diminished at higher rates for Black women than for their counterparts.<sup>82</sup> “Criminal justice policies generate a number of indirect costs, or collateral consequences, for individuals with criminal records, their families, and their communities.”<sup>83</sup> The chances of Black applicants receiving jobs after being incarcerated are at a great disparity in comparison to White applicants.<sup>84</sup> The connection between employment prospects and sentence length is indisputable; the length and severity of an offender’s sentence is likely to diminish their chance of gaining employment after prison release, especially if the offender is of color and lacks the required education for the job. Because Congress constrained the factors judges may consider in imposing a sentence, such as ability to gain employment and rejoin the general citizenry as a productive member of society, Black women are further harmed by this cyclical phenomenon.

Employment prospects for formerly incarcerated Black women are potentially worsened for those women living with HIV/AIDS. Sentencing outcomes for this subcategory of Black women present challenges to the Commission’s goal of uniformity because even within the population of those who have been incarcerated, their chances of receiving and maintaining employment are constrained by unresolved and untreated health issues.<sup>85</sup> Obtaining employment post-incarceration for Black women living with HIV/AIDS can be an obstacle if they lack health insurance and are thus unable to receive treatment to be physically strong enough to carry out the requirements of a job.<sup>86</sup>

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81 See Nick Zaller, Portia Thurmond & Josia D. Rich, *Limited Spending: An Analysis of Correctional Expenditures on Antiretrovirals for HIV-Infected Prisoners*, 122 PUB. HEALTH REP. 49, 51–52 (2007) (finding expenditures are only about one-third of the estimated cost of effective antiretroviral treatment for all HIV-positive prisoners).

82 See generally THE WHITE HOUSE, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 5 (2016), [https://web.archive.org/web/20161216100217/https://www.whitehouse.gov/sites/default/files/page/files/20160423\\_cea\\_incarceration\\_criminal\\_justice.pdf](https://web.archive.org/web/20161216100217/https://www.whitehouse.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf) (explaining that the collateral consequences for individuals with criminal records generate larger disparities in employment for Black individuals).

83 *Id.*

84 See *id.* at 4–5.

85 Browne-Marshall, *supra* note 68, at 422–23.

86 See *id.*

Employment considerations for Black women offenders are not receiving the consideration warranted to address this consistent disparity. The Pew Research Center reported an unemployment rate of 4.5% for Whites and 10.3% for Blacks in 2015.<sup>87</sup> The gender disparity for unemployment between Black and White women also remains prevalent at 3.8% for White women and 9.3% for Black women.<sup>88</sup> Despite some progress, there still remains an income gap for White and Black families. Pew's report also indicated a median household income of \$71,300 for White families and \$43,300 for Black families.<sup>89</sup> In addition to unemployment and household income disparities, Black women have the highest rate of poverty among any other racial minority.<sup>90</sup> In the 2015 fiscal year, 23.1% of Black women were in poverty, as compared to 9.6% of White women, 22.7% of Native American women, 20.9% of Hispanic women, and 11.7% of Asian women.<sup>91</sup> These poverty rates weigh heavily on Black children; the National Women's Law Center reported that one in three Black children lives in poverty,<sup>92</sup> and two out of every five Black "female-headed families with children lived in poverty."<sup>93</sup>

Incarceration for Black women is indisputably damaging to their socioeconomic status. This is not to say that a criminal record does not disenfranchise offenders of other races, but rather, that Black women are more likely to face an undue economic impact post-incarceration because of their pre-existing financial status. Mandatory minimum penalties have worsened the punishment outcomes for Black women in this respect. The longer a woman is incarcerated, the longer she is unable to serve as a provider; this is a severe issue when a Black woman offender is the sole provider of a household. Moreover, lengthening sentences under mandatory minimum laws excludes Black women from the workforce and thus has made it even more difficult for them to seek and maintain employment post-incarceration.

## V. POLICY RECOMMENDATIONS TO KEY STAKEHOLDERS

There are a number of policy measures that can combat the recurring issues among the Black female prison population. The Sentencing Commission, in conjunction with Congress, ought to implement a variety of initiatives to correct many of the aforementioned disparities. One Department of Justice initiative should be focused on exclusively mental health treatment for Black women. This minority group faces unique challenges and, like any race or ethnic group, is not homogenous; because of the diversity within the Black female incarcerated population, inmates

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87 *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RES. CTR. (Jun. 27, 2016), <http://www.pewsocialtrends.org/2016/06/27/1-demographic-trends-and-economic-well-being>.

88 *Id.*

89 *Id.*

90 JASMINE TUCKER & CAITLIN LOWELL, NAT'L WOMEN'S LAW CTR., NATIONAL SNAPSHOT: POVERTY AMONG WOMEN & FAMILIES, 2015, at 1 (2016), <https://nwlc.org/resources/national-snapshot-poverty-among-women-families-2015>.

91 *Id.*

92 *Id.* at 2.

93 *Id.* at 3.

must be cared for and treated on an individual basis. Just as the Sentencing Commission aimed at promoting uniformity of sentencing under the guidelines, a uniform approach to mental health treatment will have a disproportionate impact on Black women if all who are suffering from a mental illness are treated in the same manner. Another recommendation is to implement comprehensive mental health examinations throughout the course of a prisoner's sentence. Prisoners often develop mental health diseases while incarcerated, and routine checks will allow medical officials in prisons to care for the needs of those with both existing, recurring, and new mental health diseases and conditions.

To address the issues of HIV/AIDS and prison rape, the Prison Rape Elimination Act ought to be reformed to hold prisons more accountable for failure to comply with the standards. The PREA fails to address the causes of prison rape, and instead focused on the consequences of the conduct. This is problematic because it does not provide the proper resources or guidelines to educate prison employees and inmates on the internal problem of prison rape. The Bureau of Prisons should also provide financial resources to equip offenders with the means to seek adequate treatment for HIV/AIDS. Comprehensive medical care is needed to properly address these intertwined issues and, until such care is provided, victims of both the virus and sexual misconduct will continue to be silenced by institutional barriers.

As for the economic burdens that Black women face after prison release, the Bureau of Prisons ought to implement more educational and vocational training that meets the skillsets of minority women populations and also allow them to explore career options. Career counseling and professional development in prisons would certainly require upfront costs. However, if more thorough training decreased the rates of recidivism, the economic burden would in fact be short-term and help women engage in professional activities after release. An additional solution to lessen the economic burden for Black women is to alleviate the costs of fines and fees accrued in the federal system. Prison debt weighs disproportionately on Black women, who are already more likely to be financially disadvantaged in comparison to their White counterparts. In order to provide better prison outcomes for not only Black women but also all women stakeholders must direct their resources and efforts to addressing many of the substantive issues addressed in this argument.

The policy change that would likely have the most positive impact on Black women offenders is actually rather simple: repeal mandatory minimum laws for drug offenders. Mandatory minimum laws are far too severe, too costly, and too detrimental for offenders and have proven to have a disparate impact on Black women. Not only are mandatory minimum laws unfair, but they are also contrary to the Sentencing Commission's objective of uniformity. If Congress chooses to enact groundbreaking criminal justice reform to alleviate the devastating impact of mass incarceration, it should work to repeal these outdated laws, and enact laws that are true to the Commission's work of reducing disparities and promoting uniformity in sentencing.

## CONCLUSION

Unjust prison treatment and disproportionate sentencing outcomes have proven to be detrimental to Black women offenders. The Sentencing Commission's objective of uniformity has been severely undermined by Congressional politics and policies. Such policies have moved away from the rehabilitative model of punishment, resulting in longer and far more severe sentences. Black women face unique challenges that ought to be considered when determining sentences; to mask these challenges and treat all offenders the same is to do a disservice to an already-disadvantaged prison population. In order to diminish disparities in sentencing, Congress must act in tandem with criminal justice reform stakeholders to correct what has proven to be a bipartisan issue woven with complexities. Only upon comprehensive sentencing reform can we then look towards a future where the United States Sentencing Commission's original goal of uniformity has been fulfilled.