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## Roll Back "Prison Nation"

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### ROLL BACK “PRISON NATION”<sup>1</sup>

*By Donna Coker*<sup>2</sup>

The Violence Against Women Act (VAWA) represents an unprecedented federal focus on violence against women, both in terms of money allocated and in terms of changes in federal law. VAWA dollars have increased services for victims including civil legal representation, shelters, and youth prevention programs. The substantive law changes in VAWA include relief for some immigrant victims, expanded tribal court jurisdiction over certain instances of gender violence that occur on Native American land, and the provision that protection orders in one state are enforceable in another state. While VAWA has made these important positive changes in civil law and remedies, the most significant changes and the most significant dollars have been in the area of law enforcement. More than 50% of the current VAWA allocation is directed to training and support of police and prosecutors.

VAWA was part of the 1994 Violent Crime Control and Law Enforcement Bill (“Crime Bill”) of the Clinton administration. This legislation did much to ratchet up what Beth Richie refers to as the U.S. “prison nation” and what Marie Gottschalk refers to as the “carceral state.”<sup>3</sup> The Crime Bill allocated nearly \$10 billion for new prison construction,

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<sup>1</sup> BETH E. RICHIE, *ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA’S PRISON NATION* 11 (New York University Press 2012).

<sup>2</sup> Professor of Law University of Miami School of Law. I owe a special debt of gratitude to Ahjane Macquoid whose research, thoughtful analysis, and general good cheer are a reminder of what is possible. I am also grateful for the careful research completed by Ravika Rameshwar, Nicole Downing, and Carlos Espinosa. I am grateful for the friendship and comradeship of the group who, together with CUNY Law Review, conceived of this endeavor: Julie Goldscheid, Carrie Bettinger-Lopez, Ann Cammett, Leigh Goodmark, Adele Morrison, and Deborah Weissman.

<sup>3</sup> MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 1 (Cambridge University Press 2006).

expanded the death penalty, added mandatory life sentences for federal offenders with three violent priors, required states to maintain sex offender registries or risk losing federal money, and made admissible prior sex abuse offenses of a defendant in both criminal and civil cases involving charges of sex abuse.<sup>4</sup>

#### POLICIES THAT CREATE HYPER-INCARCERATION

The Crime Bill represented a significant leap in the already steep trajectory of the ever-increasing growth of the criminal justice system, with hyper-incarceration the consequence. The term “hyper-incarceration” highlights that the tremendous growth in incarceration is concentrated in particular geographic locations (low-income neighborhoods of color) and has concentrated effects felt disproportionately by African Americans.<sup>5</sup> As a result, African Americans represent nearly 40% of male prisoners and 25% of female prisoners, though they make up only 13% of the U.S. population.<sup>6</sup>

U.S. prison populations increased six-fold since the 1970s and the U.S. leads the world in the number of people incarcerated.<sup>7</sup> The overall growth in the number of people who are incarcerated or otherwise under the control of the criminal justice system is the result of the intersection of a series of government policy decisions: (1) drug crime policies that focused surveillance and control in urban communities of color; (2) mandatory minimums and “three-strikes” legislation that dramatically increased the years served for convictions; (3) expansive drug conspiracy charging that resulted in lengthy terms of incarceration for minor players, including a number of women in abusive relationships. Well-documented racial bias informs decision-making throughout the criminal law system.<sup>8</sup>

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<sup>4</sup> *Id.* at 152.

<sup>5</sup> Frank Rudy Cooper, *Hyper-Incarceration as a Multidimensional Attack: Replying to Angela Harris Through the Wire*, 37 WASH. U. J.L. & POL’Y 67, 68-69 (2011); see generally Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (New Press 2012).

<sup>6</sup> Paul Guerino, Paige M. Harrison & William J. Sabol, *Prisoners in 2012*, BJS Bull. NCJ 236096 (Office of Justice Programs, U.S. Dep’t of Justice) Dec. 2011, at 26 tbl.12, available at <http://www.bjs.gov/content/pub/pdf/p10.pdf>.

<sup>7</sup> Marie Gottschalk, *The Past, Present, and Future of Mass Incarceration in the United States*, 10 CRIMINOLOGY & PUB. POL’Y 483, 483 (2011); Roy Walmsley, *Tenth Edition, WORLD PRISON POPULATION LIST* (Int’l Ctr. For Prison Studies), Nov. 2013, at 1, available at [http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl\\_10.pdf](http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf).

<sup>8</sup> Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 827, 839 (2003), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi>

Much of the attention to hyper-incarceration has focused on the impact on African-American men, but the negative impact—both direct and indirect—on Latinas and African American women has been every bit as significant. The biggest growth in incarceration rates has been among women, with the biggest impact on African American women.<sup>9</sup>

#### THE RACE/CLASS GEOGRAPHY OF HYPER-INCARCERATION

“Because poor black men and women tend to live in racially and economically segregated neighborhoods, these neighborhoods feel the brunt [of hyper-incarceration].”<sup>10</sup> The negative effects of hyper-incarceration go beyond the effects on those who are arrested and jailed. Families and entire communities suffer as a result of hyper-incarceration. Families of an incarcerated individual bear a significant financial burden, including court costs and fees, high phone calling rates required to speak to the person imprisoned, and travel expenses to see a loved one in prison. Most of those who are locked up are parents. Their absence shifts to others (single parents, grandparents) the very significant financial and social costs related to rearing children. Incarceration disrupts the social networks that are critical to the survival of poor families, particularly poor families of color who experience concentrated disadvantages that are the result of race discrimination in housing, employment, and education.

Concentrated incarceration weakens social controls in a neighborhood and threatens social ties: “The mass movement of adults between the neighborhood and prison impedes the ability of families and other socializing groups, such as churches, social clubs, and neighborhood associations, to enforce informal social norms.”<sup>11</sup> Hyper-incarceration diminishes the economic prospects of entire communities. Most of those who are incarcerated were earning legal wages at the time of their arrest, but the likelihood of finding gainful employment post-incarceration is greatly reduced. Further, the collateral consequences of conviction hamstring an ex-felon’s ability to be self-supporting: they find themselves ineligible for public housing, federal student loans, and a number of occupations. When

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?article=7132&context=jclc.

<sup>9</sup> *Id.* at 833-834; Kimberlé Crenshaw’s review of incarceration data finds little difference in the ratio of black-to-white within gender groups: black men are 5.7 times more likely to be incarcerated than are white men and black women are 6.5 times more likely to be incarcerated than are white women. Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1437 n.52, tbl.2 (2012).

<sup>10</sup> Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1275-1276 (2004).

<sup>11</sup> *Id.* at 1285.

ex-felons return home, “[t]he impact on employment extends to the entire neighborhood as the concentration of ex-inmates in an area diminishes legitimate job prospects for everyone . . .”<sup>12</sup>

#### HYPER-INCARCERATION INCREASES THE RISK OF GENDER VIOLENCE

Activists and scholars have long documented the impact of race-based hyper-incarceration and surveillance on the likelihood that African American women victims of domestic violence will seek assistance from the police, and on the likelihood that the police will provide that assistance, if called. Hyper-surveillance creates and reinforces a dangerous police-state from which poor women of color and other subordinated women are more likely to be objects of control, rather than beneficiaries of state protection.

But what may be less obvious is that the diminishment of community resources, networks, and social control that is the result of hyper-incarceration creates the very social conditions that are linked to increased rates of domestic violence. A growing body of empirical research finds neighborhood effects on the rates of domestic violence. Neighborhoods that are multiply oppressed—that suffer what sociologists refer to as “concentrated disadvantage”—have significantly higher rates of domestic violence than do other neighborhoods.<sup>13</sup> These higher rates represent more than a compositional effect—meaning, that even when you compare households with similar incomes, the results still point to a separate effect of living in a multiply oppressed neighborhood.

How much difference does living in a multiply oppressed neighborhood make? Michael Benson and Greer Fox’s study of male-on-female domestic violence in heterosexual couples found that rates were twice as high in these neighborhoods,<sup>14</sup> while research by Rebecca Miles-Doan and Susan Kelly found median rates nine times higher in areas of concentrated poverty.<sup>15</sup>

What is more, research demonstrates that strong social ties act to protect

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<sup>12</sup> Coker, *supra* note 8, at 840.

<sup>13</sup> See, e.g., Gillian M. Pinchevsky & Emily M. Wright, *The Impact of Neighborhoods on Intimate Partner Violence and Victimization*, 13 TRAUMA VIOLENCE ABUSE 112, 124 (2012). As Deborah Weissman forcefully describes, this research underscores the need to refocus domestic violence policy to address its structural causes, rather than continue to presume that the abuser is a rational economic actor for whom classical deterrence models will be effective. See generally, Deborah Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL’Y 221 (2013).

<sup>14</sup> Michael Benson & Greer L. Fox, *Concentrated Disadvantage, Economic Distress, and Violence Against Women in Intimate Relationship*, NCJ 199709 (2004) at II-3-5, available at <https://www.ncjrs.gov/pdffiles1/nij/199709.pdf>.

<sup>15</sup> Rebecca Miles-Doan & Susan Kelly, *Geographic Concentration of Violence Between Intimate Partners*, 112 PUB. HEALTH REPORTS 135, 135 (1997).

women from domestic violence.<sup>16</sup> Thus, the way in which hyper-incarceration destroys social ties may have special significance for its impact on rates of domestic violence.

#### ROLL BACK – OR WHAT FEDERAL LEGISLATION WE SHOULD SUPPORT

As INCITE! and other community-based women-of-color led organizations have argued for some time, hyper-incarceration is deeply connected to gender violence.<sup>17</sup> We must call out the hypocrisy of governments—local, state, and federal—that purport a commitment to ending gender violence and yet continue policies of hyper-incarceration.

One opportunity to make this connection is to support the Smarter Sentencing Act of 2014.<sup>18</sup> This legislation would direct federal courts to disregard statutory minimum sentence requirements for defendants who have less significant criminal histories, allow courts to lower sentences for those convicted of crack cocaine charges prior to changes that made penalties for crack possession and sale commensurate with penalties for powder cocaine, and reduces mandatory minimums for drug charges. Unfortunately, the Act was amended in committee to include new mandatory minimum sentences for sex crimes, domestic violence, and terrorism. Talk about one step forward and two steps back!

The National Task Force to End Sexual and Domestic Violence (“Task Force”) and the National Network to End Domestic Violence supported the original bill and opposed the new amendments.<sup>19</sup> In their letter supporting the original bill, the Task Force noted that mandatory minimum sentencing laws “adversely affect victims” and “have an adverse impact on communities of color.”<sup>20</sup>

We can stand with INCITE!, the Task Force, and NNEDV to oppose hyper-incarceration. One step in that direction is to urge Congress to pass the Smarter Sentencing Act and to do so without the mandatory minimum amendment.

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<sup>16</sup> Emily M. Wright & Michael L. Benson, *Immigration and Intimate Partner Violence: Exploring the Immigrant Paradox*, 57 SOCIAL PROBLEMS 480, 483 (2010).

<sup>17</sup> See *Women of Color & Prisons*, INCITE! (Dec. 12, 2014), <http://www.incite-national.org/>.

<sup>18</sup> Smarter Sentencing Act of 2014, S.1410, 113th Cong. (2014), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s1410rs/pdf/BILLS-113s1410rs.pdf>.

<sup>19</sup> Letter from Nat’l Task Force to End Sexual and Domestic Violence Against Women, to Senators Leahy, Durbin, and Lee, in support of the Smarter Sentencing Act (Dec. 11, 2013), available at <http://famm.org/wp-content/uploads/2013/07/NTF-SSA-letter.pdf>.

<sup>20</sup> *Id.*