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The Modern Day Scarlet Letter

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THE MODERN DAY SCARLET LETTER

Ifeoma Ajunwa*

The stigma gone, Hester heaved a long, deep sigh, in which the burden of shame and anguish departed from her spirit. O exquisite relief! She had not known the weight, until she felt the freedom!¹

American society has come to presuppose the efficacy of the collateral legal consequences of criminal conviction. But little attention has been paid to their effects on the reintegration efforts of the formerly incarcerated and, in particular, formerly incarcerated women. An 1848 case, Sutton v. McIlhany, affirmed collateral legal consequences as constituting an important part of criminal punishment. More recent cases, such as Turner v. Glickman, in which a class of people convicted of drug crimes were subsequently denied food stamps and other government benefits, have upheld the constitutionality of imposing these legal penalties on an individual even after she has served her prison sentence.

This Article argues that the collateral legal consequences of criminal conviction represent a “modern day scarlet letter” that lingers with the formerly incarcerated woman for life and that serves to circumscribe those individuals’ economic and social opportunities. Calling upon critical legal theory and empirical social science research, this Article argues that the collateral legal consequences of conviction exact a disproportionate cost on formerly incarcerated women. Expanding upon the understanding of Professor Kimberlé Crenshaw’s critical legal theory of “intersectionality,” this Article discusses the predominant intersectional identities that formerly incarcerated women embody and examines how these identities compound the impact of collateral legal consequences. This Article finds that Black women are most negatively impacted by the collateral legal consequences of incarceration. Relying on Professor Martha Fineman’s concepts, this Article argues that the state has a “positive obligation” to abrogate

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1. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 167 (Barnes & Noble Classics 2003) (1850).

collateral legal consequences that disproportionately negatively impact women and to mandate gender-sensitive policies for federally subsidized reentry organizations. This Article proposes a model of reentry that is cognizant of the increased vulnerability of formerly incarcerated women and that is better designed to accommodate the exigencies that are intrinsic to their intersectional identities.

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INTRODUCTION

Mass incarceration² is one of the most significant social problems in America. Although men represent the majority of the incarcerated

2. Studies show that nearly one in three Americans have been arrested by age twenty-three and that on any given day, there are 1 in 100 adults behind bars. See Amy L. Solomon, *In Search of a Job: Criminal Records As Barriers to Employment*, NAT'L INST. OF JUSTICE (June 15, 2012), <http://www.nij.gov/journals/270/criminal-records.htm>. Some scholars argue that the term “hyperincarceration” is a more appropriate descriptor for the high rates of imprisonment in the United States as those rates are highest in certain populations—Black and Latino males—rather than throughout the mass population of the United States. See, e.g., Loïc Wacquant, *Forum*, in RACE, INCARCERATION, AND AMERICAN VALUES 57, 59 (2008) (arguing for the use of “hyper-incarceration” rather than “mass incarceration”); see also Frank Rudy Cooper, *Hyper-Incarceration As a Multidimensional Attack: Replying to Angela Harris Through the Wire*, 37 WASH. U. J.L. & POL'Y 67 (2011) (arguing that hyperincarceration is a multidimensional attack on Blacks and Latinos). Although

population, women comprise the fastest growing segment of the incarcerated in the United States—to illustrate, from 1995 to 2008, the female prison population increased by 203 percent.³ As of 2003, nearly one million women were in some way “under the control of the criminal justice system,” including 72,671 women who were in prison, 167,000 in jail, and 800,000 on parole and probation.⁴ Almost half of those women were African American.⁵

While there are myriad legal issues⁶ associated with mass incarceration, this Article constrains its focus to the impact of the collateral legal consequences of conviction,⁷ particularly as they affect formerly

“hyperincarceration” might have been a more accurate description in the early 1990s when the War on Drugs (and its harsh sentencing policies) most targeted crack cocaine, this is no longer the case. Given the decline of crack cocaine, a drug associated with Black and Latino populations and the rise in the use and sale of heroin and methamphetamines associated more with white populations, the War on Drugs now impacts all U.S. communities and has indeed led to the mass incarceration of many individuals. *See, e.g.,* Combat Methamphetamine Epidemic Act of 2005 (CMEA), Pub. L. No. 109-177, 120 Stat. 256 (2006); *see also* Zusha Elinson, *Heroin Makes a Comeback: This Time, Small Towns Are Increasingly Beset by Addiction, Drug-Related Crimes*, WALL ST. J. (Aug. 8, 2013), <http://online.wsj.com/article/SB10001424127887323997004578640531575133750.html> (detailing the rise of heroin addiction in rural areas and the accompanying rise in crime).

3. *See* DARRELL GILLIARD & ALLEN BECK, BUREAU OF JUSTICE STATISTICS, NCJ-161132, PRISON AND JAIL INMATES, 1995 (1996), *available at* <http://www.bjs.gov/content/pub/pdf/PJI95.PDF>; WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 228417, PRISONERS IN 2008 (2009), *available at* <http://www.bjs.gov/content/pub/pdf/p08.pdf>.

4. Natalie J. Sokoloff, *The Impact of the Prison Industrial Complex on African American Women*, 5 SOULS 31, 32 (2003).

5. *Id.*

6. *See, e.g.,* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1275, 1278 (2004) (detailing the pernicious effects of the War on Drugs on African American communities); Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 343 (2006) (documenting how mass incarceration has disrupted the administration of the criminal justice system); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 178–220 (2010) (arguing that mass incarceration resembles the Jim Crow laws because of its disproportionate impact on Black and Latino males in the United States); Ifeoma Ajunwa, “Bad Barrels”: *An Organizational-Based Analysis of the Human Rights Abuses at Abu Ghraib Prison*, 17 U. PA. J.L. & SOC. CHANGE 75, 76–77 (2014) (demonstrating that human rights abuses on par with the infamous incidents at the American military Abu Ghraib prison also routinely occur within American domestic prisons, most notably in the Los Angeles jail system); Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 349 (2013) (asserting that “criminal justice debt can serve as an insurmountable obstacle to the resumption of voting rights and broader participation in society”); Nekima 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, 494 (2006) (arguing that poor women of color and their children are adversely impacted by current drug sentencing policies because such policies are designed to relegate women of color and their children into a perpetual “pink hole,” which “engulfs the most vulnerable members of society”).

7. Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1705 (2003) (“The collateral consequences of a criminal conviction linger long after the sentence imposed by the court has been served.”).

incarcerated women. This Article argues, with the support of empirical evidence, that formerly incarcerated women are disproportionately impacted by the collateral legal consequences of criminal conviction because of their intersectional identities.⁸ This Article does not overlook the fact that formerly incarcerated men are also negatively affected by the collateral legal consequences of conviction. In fact, much of the social science research on the impact of collateral legal consequences has focused exclusively on men, as is evidenced by the landmark work of Harvard sociologist Devah Pager.⁹ The work of sociologists Bruce Western and Becky Pettit also has exclusively focused on male populations.¹⁰ In contrast, the struggles of formerly incarcerated women to reintegrate into society after imprisonment have remained relatively understudied.

This Article does not affirm that the collateral legal consequences of conviction should apply only to men and not women; the paramount thesis is that the government ought to consider how, because of the genres of intersectional identities that predominate among the population of formerly incarcerated women, these women are disproportionately impacted by the punitive policies that the collateral legal consequences of conviction represent.

Furthermore, while this Article acknowledges that Black¹¹ women are the most negatively impacted by collateral legal consequences, the decision to not focus exclusively on the plight of Black women is one based on the long recognized reality in critical legal theory studies that coalition building is necessary to engender positive social change and avoid marginalization.¹² Thus, by framing the issue in a multiracial manner, I allow other groups to

8. See Marne L. Lenox, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280 (2011) (finding that women are unjustly impacted by the collateral legal consequences of criminal conviction but not presenting empirical evidence in the form of interviews of the women).

9. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 959 (2003) (finding that Black male job applicants with criminal records were the least likely to get a callback interview). Pager also found that Black applicants *without* a criminal record received fewer callbacks than white applicants with a criminal record. *Id.* at 958; see also Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617 (discussing the legal implications of the author's audit study of employment prospects for formerly incarcerated men).

10. See Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 2010 DAEDALUS 8 (noting the cycle of inequality created by the intergenerational incarceration of Black and Latino males, especially those in their twenties with low education credentials).

11. Following the tradition in critical race theory whose founders have noted that "Blacks, like Asians [and] Latinos . . . constitute a specific cultural group and, as such, require denotation as a proper noun," I capitalize "Black" as a racial descriptor in the United States. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988). However, I also use the term "African American" interchangeably with the term "Black." This use is based on the realities of U.S. law enforcement wherein people of African ancestry with dark skin are racially profiled, with no consideration for cultural background.

12. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 64 (2012) ("[F]raming issues in terms of black and white discourages other racial minorities from engaging in coalition politics."); see also Anthony V. Alfieri & Angela Onwuachi-Willig, *Next-Generation Civil Rights Lawyers: Race and Representation in the Age of Identity Performance*, 122 YALE L.J. 1484, 1520–30 (2013).

come to recognize how their interests align with those of Black women who are most disproportionately impacted by the policies.¹³

With the same aim of reaching all audiences, this Article employs ethnographic data and interviews of formerly incarcerated women from an academic study¹⁴ to illustrate some of the hurdles that formerly incarcerated women face as a result of the intersection of their gender, criminal record, and other identities. The purpose of such empirical social science data is twofold. First, the interviews provide a nonfiction narrative. Narratives have become an integral part of critical legal studies scholarship,¹⁵ particularly as a means to focus the reader's attention on legal inequalities that had hitherto gone unrecognized.¹⁶ However, the presence of narratives in legal scholarship has been criticized.¹⁷

In this Article, the empirically derived narratives, obtained through rigorous social science protocols, address the criticism that the use of narratives in critical race scholarship can distort the truth. The intent behind the inclusion of such narrative is not to reify "objectivity." As a social science discipline, sociology recognizes that even at the collection stage, the researcher inevitably influences the results of her research, even if by her mere presence.¹⁸

13. Alfieri & Onwuachi-Willig, *supra* note 12, at 1519 (arguing for a redefinition of what civil rights law practice means in the present day and that the new civil rights "extend beyond race, embracing rights movements on issues such as sex, sexuality, disability and immigration").

14. Under the auspices of the sociology doctoral program of Columbia University, I conducted an ethnography of a reentry organization in Ohio, where I interviewed formerly incarcerated men and women who make use of the organization. This study was approved by the Human Research Internal Review Board of Columbia University as research protocol IRB-AAAK9867. To ensure anonymity, the respondents are assigned a numerical identifier. This is in no way meant to minimize the humanity of the women who graciously shared their lived experiences with me.

15. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (6th ed. 2008).

16. See, e.g., Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2440 (1989) ("Stories humanize us. They emphasize our differences in ways that can ultimately bring us closer together. They allow us to see how the world looks from behind someone else's spectacles. They challenge us to wipe off our own lenses and ask, 'Could I have been overlooking something all along?'); see also Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971, 972 (1991) ("They may be a bridge to those who share a similar vision, or a means of inciting change among those who do not."); Charles Lawrence III, *Listening for Stories in All the Right Places: Narrative and Racial Formation Theory*, 46 LAW & SOC'Y REV. 247, 251 (2012) ("Stories express depth and complexity, and allow for ambiguity and multiple interpretations. They inspire feelings of commonality, connectedness, and empathy among tellers, listeners, and the subjects of our stories.").

17. DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 39 (1997) ("[S]tories can distort legal debate, particularly if those stories are atypical, inaccurate, or incomplete.").

18. In sociological ethnographic work, researchers are expected to think about how their identity and experiences could influence their research. See Anne-Marie Ambert et al., *Understanding and Evaluating Qualitative Research*, 57 J. MARRIAGE & FAM. 879, 879-93 (1995). Also, researchers are expected to acknowledge their biases and to realize that it is impossible not to bring in any subjectivities to the research process. *Id.*; see also Richard

Second, beyond merely reassuring the critics, the inclusion of nonfiction narratives derived from empirical qualitative social science research serves to fulfill an important imperative of critical legal theory scholarship—it amplifies the voices of the marginalized. As one critical legal theory founder, Professor Mari Matsuda, has observed, “[l]ooking to the bottom—adopting the perspective of those who have seen and felt [the injustices or inequalities that one is studying] can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.”¹⁹

To start to grasp the devastating effects of the collateral legal consequences of conviction on women, consider this hypothetical scenario that combines the typical experiences of many incarcerated women: Julie is a single mother who is addicted to crystal methamphetamines.²⁰ She initially started taking the drug because she found that it gave her the extra energy to work long hours as a waitress to provide for herself and her son. She subsequently became romantically involved with her drug dealer, Michael, who would supply her with the drug for free. One Sunday evening, the DEA raids Julie’s apartment on an anonymous tip that her boyfriend, who the DEA knows to be a drug dealer, is using the apartment as a lab. The DEA does not find Michael but while searching Julie, they discover a small amount of the drug. They offer Julie immunity in exchange for her cooperation in a sting operation to arrest Michael. She refuses and, as a result, she is charged with possession of a controlled substance and endangering the life of a minor (because she admitted to using the drug in the home she shares with her two-year-old son). She pleads guilty and when she is sentenced, the judge tells her that he is disgusted that a mother would choose to use drugs and orders the maximum sentence possible.²¹ She is sent to prison for twenty-six months. After serving fifteen months of her sentence, she learns that her son, who entered the foster system the day she was arrested, is now eligible for adoption pursuant to the Adoption and Safe Families Act of 1997²² (ASFA). Once she is released from prison, she must deal with the emotional blow of

Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 670 (1993) (“Majoritarians tell stories . . . but with the conviction that they are not stories at all, but the truth.”). The counter stories told by critical race theorists are necessary because the “destruction of contingent, comforting myths is often a necessary prelude to constructing a better, fairer world.” *Id.* at 671.

19. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

20. Forty-five percent of individuals who entered methamphetamine treatment in 2003 were women. Female methamphetamine users are more likely than male users to be single parents who live alone with their children. CATHLEEN OTERO ET AL., NAT’L CTR. ON SUBSTANCE ABUSE & CHILD WELFARE, METHAMPHETAMINE ADDICTION, TREATMENT, AND OUTCOMES: IMPLICATIONS FOR CHILD WELFARE WORKERS (2006), available at <http://www.ncsacw.samhsa.gov/files/Meth%20and%20Child%20Safety.pdf>.

21. See ANGELA J. HATTERY & EARL SMITH, PRISONER REENTRY AND SOCIAL CAPITAL: THE LONG ROAD TO REINTEGRATION 66–67 (2010) (noting that women receive more severe sentences than men for drug offenses).

22. Pub. L. No. 105-89, 111 Stat. 2115 (allowing children who are in foster care for fifteen months out of a twenty-two-month period to be placed for adoption).

having lost all parental rights to her son who has been adopted, while maintaining the focus to continue drug addiction treatment and find permanent housing. She also finds that although she completed her general education degree (GED) while incarcerated, due to her status as a felon, she is now ineligible to work as a nurse, a career path she was contemplating before her incarceration. She is also now unable to work for her former employer because he has an application form that requires applicants to confess whether they have been convicted of a felony. She is despondent about her future and unable to contemplate where and how she will live after her stay at the short-term women's shelter since her drug conviction makes her vulnerable to denials of both private and public housing, and because her conviction makes her ineligible for food stamps. She restarts a relationship with Michael in order to avoid becoming homeless and before long she starts using drugs again.

Unfortunately, Julie's story is not unique. This Article details how many formerly incarcerated women find themselves inordinately burdened with legal penalties they continue to face even after they have served their prison sentences. Part I of this Article provides a brief overview of the origin and rationale behind collateral legal consequences and argues that they have stigmatizing and exclusionary effects similar to those of the "scarlet letter" described in Nathaniel Hawthorne's novel depicting punishment in colonial America.²³ Part II of this Article explicates Professor Kimberlé Crenshaw's legal concept of "intersectionality" and discusses the various predominant intersectional identities that formerly incarcerated women embody, including their status as (1) women, (2) primary caregivers, (3) victims of domestic violence and sexual abuse, and (4) racial minorities. Part III of this Article illuminates how these intersectional identities compound the impact of collateral legal consequences with a focus on four key arenas in which these collateral legal consequences come into play: (1) government aid, (2) employment, (3) education, and (4) family ties. Part IV argues that formerly incarcerated women are particularly "vulnerable subjects" and that, following Martha Fineman's theory of the "responsive state," the government has an affirmative obligation both to abrogate laws that serve to impede women's reintegration into society and to enact new laws and policies that would facilitate women's reentry. Finally, Part V of this article urges a rethinking of the existing model of reentry organizations (many of which are federally subsidized) fails to take into account the intersectional identities of formerly incarcerated women and is therefore inadequate in effectuating their reentry into society.

I propose a model of reentry that is cognizant of the differing needs of formerly incarcerated women, arising from their intersecting identities. Such a model would be better designed to accommodate the exigencies that are intrinsic to the identities. I conclude that it serves the interests of society for formerly incarcerated women to be enabled to reintegrate

23. See HAWTHORNE, *supra* note 1.

successfully. Thus, the government should carefully consider whether its current policies are serving to make society safer by ensuring that all members have a chance at upward mobility; or whether the opposite result is achieved.

I. COLLATERAL CONSEQUENCES AS THE MODERN DAY SCARLET LETTER

Because of their stigmatizing effects, the collateral legal consequences of criminal conviction have come to represent a modern day scarlet letter for formerly incarcerated women.²⁴ A collateral legal consequence of criminal conviction is defined as: “a [legal] penalty, disability, or disadvantage, however denominated, imposed on an individual as a result of the individual’s conviction of an offense . . . whether or not the penalty, disability, or disadvantage is included in . . . the sentence.”²⁵ The collateral legal consequences of criminal conviction also have been referred to as:

punishment that is accomplished through the diminution of the rights and privileges of citizenship and legal residency in the United States . . . [t]hrough judicial interpretation, legislative fiat, and legal classification, these forms of punishment have been defined as “civil” rather than criminal in nature, as “disabilities” rather than punishments, as the “collateral consequences” of criminal convictions rather than the direct results.²⁶

With some variation across the different states, collateral legal consequences of criminal conviction include: restrictions on employment and occupational licenses, denials of public and private housing, ineligibility for public benefits, blocked access to legal immigration, limited access to federal educational grants and both federal and private loans, and potential loss of parental rights.²⁷ As statutes that determine collateral legal

24. See Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”*: Restoring Socioeconomic Rights for Ex-Offenders, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 527 (2006) (asserting that “virtually every felony conviction carries with it a life sentence” because of the effects of the collateral legal consequences that continue to punish and stigmatize the individual long after their prison sentence has been completed); Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. POVERTY L. & POL’Y 313, 319 (2006) (“Collateral sanctions, particularly against people with drug convictions, affect poor people almost exclusively . . . sanctions themselves deprive formerly incarcerated people of opportunities to lift themselves out of poverty.”); Loïc Wacquant, *The New ‘Peculiar Institution’: On the Prison As Surrogate Ghetto*, 4 THEORETICAL CRIM. 377, 384 (2000) (describing social discrimination, incarceration, and the preceding collateral consequences as a “closed circuit” of perpetual marginality).

25. See UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT §§ 2(1)–(2) (2010), available at http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf.

26. See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15–16 (Marc Mauer & Meda Chesney-Lind eds., 2002).

27. See *Collateral Consequences*, SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=143> (last visited Apr. 23, 2015).

consequences differ from state to state,²⁸ this Article will focus on federally sanctioned collateral consequences such as the ones that apply to federal public housing, employment, federal loans for education, and the ASFA.²⁹ Prior to the discussion of how the stigmatization effects of collateral legal consequences represent a modern day scarlet letter for formerly incarcerated women, it is important to understand the historical roots, as well as the accepted criminological theories that undergird this practice.

A. *The Rationale for Shaming As a Recidivism Reduction Tool*

The roots of collateral legal consequences lie both in American puritanical history and in the more recent theories regarding the reintegration of formerly incarcerated people. Consider Nathaniel Hawthorne's novel, *The Scarlet Letter*,³⁰ based on historical records of colonial America. A young presumed widow, Hester Prynne, is punished for her crime of adultery by being forced to wear a scarlet letter "A" at all times; an act designed to shame her.³¹ This shaming does not serve to reintegrate her into society; rather she is shunned by her fellow villagers and is forced to live on the margins of their town.³² Prynne manages to eke out a meager living for herself and her illegitimate daughter, Pearl, but she must soon steel herself to fight the overtures of the villagers to remove her daughter because of Prynne's perceived pernicious influence.³³

The shaming of individuals convicted of a crime, like in *The Scarlet Letter*, is a practice that persists in modern day America. The criminologist John Braithwaite put forth a theory of reintegration in his book, *Crime, Shame and Reintegration*,³⁴ that now serves as a template for punishment in America.³⁵ Borrowing from sociological theories like labeling and control,

28. In 2003, the American Bar Association (ABA) established a new chapter of its Criminal Justice Standards that called on each U.S. jurisdiction to collect and analyze the collateral legal consequences in its laws and regulations. See ABA STANDARDS FOR COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-2.1 (2003). The ABA standards made a distinction between two types of collateral consequences: (1) "collateral sanctions," defined as penalties imposed automatically upon conviction; and (2) "discretionary disqualifications" defined as penalties that are authorized but not required to be imposed. *Id.* § 19-1.1. Although this Article chooses not to make this distinction, because an individual may be subject to either type of consequence without notice or process, this distinction is present in a uniform law adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL), and also section 510 of the Court Security Act, both of which also call for a comprehensive study of collateral legal consequences. See ABA, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS 9 (2009).

29. For a comprehensive overview of federal statutes that impose collateral legal consequences upon conviction, see *Federal Statutes Imposing Collateral Consequences upon Conviction*, DEP'T OF JUSTICE, http://www.justice.gov/pardon/collateral_consequences.pdf (last visited Apr. 23, 2015).

30. HAWTHORNE, *supra* note 1.

31. *Id.* at 46.

32. *Id.* at 68.

33. *Id.* at 90-97.

34. JOHN BRAITHEWAITE, *CRIME, SHAME AND REINTEGRATION* 1-5 (1989).

35. In North America, the growth of restorative justice in which reintegrative shaming is practiced has been facilitated by NGOs dedicated to this approach to justice. See Daniel W.

Braithwaite asserts that high rates of violent crime within a society indicate the society's failure to adequately shame the perpetrators of crime.³⁶ According to Braithwaite, making individuals feel guilty for crimes they have committed deters them from committing further crime.³⁷ His proposal harkens back to a traditional view of crime as an opportunity to reinforce societal norms.

The theory that shaming could be redemptive seems to run counter to human experience—shaming is, by its nature, isolating and alienating. Hawthorne's story of the condemned woman who never regains her place in society is archetypal of stigmatization arising from crime. *The Scarlet Letter* illustrates that continued shaming and societal reintegration are mutually exclusive.

Braithwaite's theory of reintegration is, however, not entirely devoid of merit. At the core of Braithwaite's theory is the belief that ties to family and community deter crime because would-be criminals, in anticipating that their tight-knit family or community would have an adverse reaction to their criminal action, would choose to forgo the criminal act.³⁸ The question is whether shaming is the best way to enforce this loyalty to family and community, and ultimately, whether shaming is the best way to reduce recidivism. Other scholars have criticized Braithwaite's theories regarding crime and recidivism for failing to adequately take into account environmental factors such as structural inequality³⁹ and systemic injustice.⁴⁰ A fundamental assumption of Braithwaite's theory is that lack of shame causes crime, but as sociologists and social psychologists have argued, crime can be a rational act driven by societal factors.⁴¹ For example, an individual that is shut out from societally accepted methods of earning money because of lack of opportunities for social mobility or

Van Ness, *North America*, in HANDBOOK OF RESTORATIVE JUSTICE 512 (Gerry Johnstone & Daniel W. Van Ness eds., 2007).

36. BRAITHEWAITE, *supra* note 34, at 105.

37. *Id.* at 75. This is similar to Émile Durkheim's view of crime, now viewed as a major influence on the later developed sociological theory of "control." Durkheim argued that stronger social control among individuals of the Catholic faith was what resulted in their lower rates of suicide in comparison to those of the Protestant faith. ÉMILE DURKHEIM, ON SUICIDE 156, 163 (Robin Buss trans., 1897).

38. BRAITHEWAITE, *supra* note 34, at 56–57.

39. See Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 678 (1997); see also Gabrielle Maxwell & Allison Morris, *The Role of Shame, Guilt, and Remorse in Restorative Justice Processes for Young People*, in RESTORATIVE JUSTICE: THEORETICAL FOUNDATIONS 267 (Elmar G.M. Weitekamp & Hans-Jürgen Kerner eds., 2002).

40. See Bonnie Price Lofton, *Does Restorative Justice Challenge Systematic Injustices?*, in CRITICAL ISSUES IN RESTORATIVE JUSTICE 381 (Howard Zehr & Barb Toews eds., 2004).

41. See CARL HART, HIGH PRICE: A NEUROSCIENTIST'S JOURNAL OF SELF-DISCOVERY THAT CHALLENGES EVERYTHING YOU KNOW ABOUT DRUGS AND SOCIETY 266–75 (2013) (demonstrating through clinical studies with drug addicts conducted at Columbia University that the use of illicit drugs is a rational choice driven by societal factors).

discrimination may feel compelled to resort to criminal activities to attain the same standard of living that she views others enjoying.⁴²

More recently, the criminologists Dina R. Rose and Todd R. Clear have found in their research that robust ties to the community—that include supportive networks—provide a deterrence to crime.⁴³ Rose and Clear also discovered that the act of “shaming” the perpetrators of crime with long prison sentences tended to destroy the very networks and ties to community that would deter future crime, thus resulting in high recidivism rates.⁴⁴ Similarly, rather than serving to reintegrate formerly incarcerated women, modern “shaming” of those individuals by the assignation of collateral legal consequences, many of which endure for life, operate to drive those individuals to the margins of society.

A study of prisoner reentry⁴⁵ discovered that people who are incarcerated at a young age have a high likelihood of returning to prison in their adult years. Furthermore, the study tied this high recidivism rate to the persisting stigma of incarceration.⁴⁶ Many formerly incarcerated individuals find themselves limited in their ability to enter professional fields or to obtain the funding for higher education, which is one way that collateral legal consequences can restrict social mobility and foster social marginalization.⁴⁷ Despite evidence of the ineffectiveness of shaming as a method of reducing recidivism, collateral legal consequences that negatively discriminate against formerly incarcerated individuals continue to enjoy legal support.⁴⁸

B. *The Collateral Damage of the War on Drugs*

Although statutes imposing collateral legal consequences have long been a part of the history of American punishment⁴⁹ and have withstood several legal challenges,⁵⁰ many more of those statutes have been enacted since the

42. See, e.g., SUDHIR VENKATESH, *GANG LEADER FOR A DAY: A ROGUE SOCIOLOGIST TAKES TO THE STREETS* 27–35 (2008) (noting that gang leaders who engage in criminal activities like drug dealing believe that they have been shut out of socially accepted structures for earning a high income).

43. See Dina R. Rose & Todd R. Clear, *Incarceration, Social Capital, and Crime: Implications for Social Disorganization Theory*, 36 *CRIMINOLOGY* 441 (1998) (asserting a social disorganization theory in which mass incarceration weakens community ties and diminishes the social and cultural capital within a community thereby leading to less informal social control and more crime).

44. See *id.* at 491.

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

46. *Id.* at 224.

47. *Id.*

48. See, e.g., *Sutton v. McIlhany*, 1 Ohio Dec. Reprint 235, 236 (Ct. Com. Pl. 1848) (acknowledging the importance of collateral consequences as part of criminal conviction); see also *Turner v. Glickman*, 207 F.3d 419, 430–31 (7th Cir. 2000) (upholding the constitutionality of collateral consequences).

49. See, e.g., *Sutton*, 1 Ohio Dec. Reprint at 236.

50. See *Turner*, 207 F.3d at 423, 426–27, 431; see also *People v. Boespflug*, 107 P.3d 1118, 1121 (Colo. App. 2004) (dismissing defendant’s argument that “he should be allowed to withdraw his pleas because the court did not advise him that he would lose his right to

beginning of the War on Drugs in the 1980s,⁵¹ and their effects have been exacerbated by harsher charges and longer sentences.⁵²

New developments in the laws against drug possession and sale are important factors driving the increase of incarcerated women and the rise in new collateral legal consequences. These developments include longer mandatory minimum sentences for drug offenses⁵³ and harsher and longer lasting collateral legal consequences, such as the legalized lifetime exclusion of felons from certain professional jobs⁵⁴ and the denial of federal loans for education.⁵⁵

vote while he was imprisoned"); *Henry v. State*, No. 207, 2003 Del. LEXIS 507, at *1, *6 (Del. Oct. 7, 2003) (rejecting defendant's request to withdraw a nolo contendere plea based on counsel's failure to "inform him of the possible revocation of his Mortgage Loan Broker License"); *Slater v. State*, 880 So. 2d 802, 803 (Fla. Dist. Ct. App. 2004) (rejecting defendant's claim that "the trial judge should have set aside his pleas of no contest because the sentencing court and his attorney failed to advise him that as a result of a plea, his parental rights would be terminated"); *State v. Wilkinson*, No. 20365, 2005 WL 182920, at *1 (Ohio Ct. App. Jan. 28, 2005) (denying defendant's motion to withdraw his guilty pleas because he was not informed that his pleas could "preclude him from any future employment at any facility that provides care to older adults," and could also "jeopardize his nursing license"); *Gonzalez v. State*, 83 P.3d 921, 923-25 (Or. Ct. App. 2004) (involving a successful ineffective assistance of counsel claim stemming from counsel's failure to adequately warn of collateral deportation consequences); *Commonwealth v. Duffey*, 639 A.2d 1174, 1175 (Pa. 1994) (rebuffing defendant's claim that his plea was invalid because he was not told that his license would be suspended); *Ames v. Johnson*, No. CL04-413, 2005 WL 820305, at *3 (Va. Cir. Ct. Mar. 28, 2005) (concluding that trial counsel's failure to warn of civil commitment collateral consequence did not violate defendant's right to effective assistance of counsel); *State v. Merten*, 668 N.W.2d 750, 753-55 (Wis. Ct. App. 2003) (refusing defendant's request to withdraw a plea due to trial court's failure to warn of resulting denial of Medicare and Medicaid benefits).

51. See Archer & Williams, *supra* note 24, at 530 (noting that the disproportionate impact of collateral consequences on drug offenders "creat[e] an absurd result: ex-offenders convicted of rape or murder are nonetheless eligible for a number of rights denied to drug offenders"); see also Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 461 (2010) (noting that "collateral consequences have increased in number, scope, and severity since the 1980s").

52. See Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1976 (abolishing federal parole).

53. See *id.* (creating a sentencing disparity of 100 to 1 for crack versus powder cocaine, which has been shown to disproportionately impact racial minorities and the poor); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (instituting mandatory minimum sentences for drug crimes on the mere basis of the quantity of drugs recovered). *But see* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (reducing the crack versus powder cocaine sentencing disparity to 18 to 1). In August of 2013, Attorney General Eric Holder, announced that the Department of Justice will help certain drug offenders, who have no ties to large-scale organizations, gangs, or cartels, avoid harsh mandatory minimum sentences. See Ryan J. Reilly, *DOJ to Nix Mandatory Minimum Sentences in Some Pending Drug Cases: Eric Holder*, HUFFINGTON POST (Sept. 19, 2013), http://www.huffingtonpost.com/2013/09/19/mandatory-minimum-sentences-doj-eric-holder_n_3956409.html.

54. Federal law automatically excludes felons from serving or continuing to serve as a law enforcement officer, without exception. See 5 U.S.C. § 7371 (2012). Persons wishing to serve as airport security screeners or who need access to secure areas of an airport must not have been convicted of a wide variety of felonies during the previous ten years. See 49 U.S.C. § 44936(b)(1)(B) (2012). Similar restrictions exist for persons whose employment requires a Transportation Worker Identification Credential. See 46 U.S.C. § 70105 (2012). Merchant mariners also must not have been convicted of certain enumerated offenses,

Women are especially affected by the collateral legal consequences stemming from a drug conviction, as incarcerated women are more likely to be convicted of a drug offense than their male counterparts.⁵⁶ In fact, convictions for nonviolent drug felonies and property offenses account for nearly 80 percent of the female inmate population.⁵⁷ Gender disparities in sentencing for drug crimes also play a factor in how women experience the collateral legal consequences of conviction. Studies have shown that women convicted of a drug offense receive harsher sentences than similarly situated men.⁵⁸ These statistics are significant because of the developments in the drug laws that impose harsh collateral legal consequences on individuals convicted of drug felonies.⁵⁹ Thus, a significant percentage of formerly incarcerated women, because they have been convicted of a drug crime, face government-imposed restrictions on affordable housing and welfare,⁶⁰ employment,⁶¹ and the pursuit of higher education.⁶² Collateral legal consequences represent a herculean hurdle that formerly incarcerated women must surmount in their bid to reintegrate into society. Next, I detail how the intersectional identities of women exacerbate this particularly difficult task.

II. INTERSECTIONALITY AND COMPOUND IDENTITIES

The laws that allow for collateral legal consequences are facially neutral; that is, they make no notice of gender. However, it should not be overlooked that the intersectional identities of formerly incarcerated women serve to intensify the negative impact of those consequences. Legal activists and scholars have long recognized circumstances in which a law of general applicability is nonetheless shown to have a discriminatory effect or

including federal “dangerous drug laws.” *See id.* §§ 7703–7704. Airman certificates can be revoked for certain convictions, particularly those involving drugs. *See* 14 C.F.R. § 61.15 (2014).

55. *See Students with Criminal Convictions Have Limited Eligibility for Federal Student Aid*, FED. STUDENT AID, <https://studentaid.ed.gov/eligibility/criminal-convictions> (last visited Apr. 23, 2015).

56. Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 84 (Marc Mauer & Meda Chesney-Lind eds., 2002).

57. Women in Prison Project, *Women in Prison Fact Sheet*, CORR. ASS’N OF N.Y. (2006), http://www.prisonpolicy.org/scans/Fact_Sheets_2002.pdf.

58. *Id.*

59. Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 259 (2002) (observing that “drug offenses are subjected to more and harsher collateral consequences than any other category of crime”).

60. Travis, *supra* note 26, at 15–16.

61. MARGARET COLGATE LOVE & SUSAN M. KUZMA, U.S. DEP’T OF JUSTICE, OFFICE OF THE PARDON ATTORNEY, *CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY* 6–10 (1996); PETERSILIA, *supra* note 45, at 19–20.

62. PATRICIA ALLARD, THE SENTENCING PROJECT, *LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES* 17 (2002), *available at* http://www.sentencingproject.org/doc/publications/women_lifesentences.pdf.

indeed is revealed to purposefully target a subset of the population that share a disadvantaged identity.⁶³

An early canonical case in which a facially neutral law was found to be discriminatory in effect is that of *Yick Wo v. Hopkins*.⁶⁴ In that case, the Court struck down a San Francisco ordinance that sought to curtail the operation of laundries in wooden buildings. The ordinance disproportionately affected people of Chinese descent as 95 percent of the city's 320 laundries were operated in wooden buildings and Chinese immigrants owned two-thirds of those wooden laundry buildings.⁶⁵ Of course, the reach of *Yick Wo* was limited. Even after *Yick Wo*, the Court in *Plessy v. Ferguson*⁶⁶ upheld laws that discriminated against African Americans by asserting a "separate but equal"⁶⁷ standard that allowed for legal segregation until it was overturned by the *Brown v. Board of Education*⁶⁸ decision in 1954. Both cases involved instances when racial animus or the intent to discriminate on racial grounds could be shown. The plaintiff who alleges no discriminatory intent, but rather "disparate impact"⁶⁹ and/or disproportionate impact based on grounds other than race,⁷⁰ faces a much more arduous path to effectuating redress.⁷¹

Intersectionality as a feminist sociological theory was first highlighted by Deborah King, who referred to a "double jeopardy" arising from a woman question and a race problem.⁷² Kimberlé Crenshaw⁷³ and Patricia Hill

63. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

64. 118 U.S. 356 (1886).

65. *Id.* at 358–59.

66. 163 U.S. 537 (1896).

67. *Id.* at 552 (Harlan, J., dissenting).

68. 347 U.S. 483 (1954).

69. See *McClesky v. Kemp*, 481 U.S. 279, 291–92 (1987) (holding that racially discriminatory impact of death penalty as shown by comprehensive study is not enough to overturn verdict without a showing of a racially discriminatory purpose); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–70 (1977) (establishing the disparate impact test wherein the challenging party bears the burden of demonstrating that the law in question: (1) affects a protected class in greater proportion, and (2) was created with the intent or purpose to discriminate against the protected class); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (finding that laws that have a racially discriminatory impact but which do not have a racially discriminatory purpose are not unconstitutional).

70. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273–74 (1979) (holding that a gender-neutral law with an exclusionary impact on women is not unconstitutional absent a showing of discriminatory purpose). *But see Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (establishing that pursuant to Title VII, an employer must provide a business necessity justification for the use of a test that has a disparate impact on a protected class). In 1991, Congress amended Title VII to codify the "disparate impact test" established by *Griggs*. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

71. See *Ricci v. DeStefano*, 557 U.S. 557, 594–95 (2009) (Scalia, J., concurring) (implying Title VII's disparate impact provision is unconstitutional); *id.* at 609 (Ginsburg, J., dissenting) (raising the issue of whether the holding in *Ricci* has effectively overruled *Griggs*); see also *infra* Part III (offering a brief discussion of how the disproportionate gendered effects of collateral legal consequences might be challenged on the equal protection doctrine).

72. See generally Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 SIGNS 42, 42 (1988).

73. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

Collins⁷⁴ then articulated the legal realities of intersectionality. Crenshaw popularized the legal concept in an attempt to contextualize the double and intersecting discrimination that Black women endure as a result of their dual identities as women and as racial minorities.⁷⁵ However, the concept has evolved into a methodology employed in both critical legal studies⁷⁶ and empirical social science research to aid the examination of how social and cultural categories such as gender, race, class, disability, and other facets of identity interact on multiple and often simultaneous levels, to contribute to systematic social inequality.⁷⁷ Even in the matter of legal redress, the negative effect of intersectionality is documented by a study showing that legal plaintiffs who bring discrimination claims are disadvantaged when they reveal their intersectional identities.⁷⁸

74. Patricia Hill Collins, *Gender, Black Feminism, and Black Political Economy*, 568 ANNALS AM. ACAD. POL. & SOC. SCI. 41 (2000); Patricia Hill Collins, *Learning from the Outsider Within: The Sociological Significance of Black Feminist Thought*, 33 SOC. PROBS. S14 (1986); Patricia Hill Collins, *The Tie That Binds: Race, Gender and US Violence*, 21 ETHNIC & RACIAL STUD. 917 (1998).

75. Crenshaw, *supra* note 73, at 1242–43 (explaining that women of color are at the intersection of race and gender oppression); *see also* Kimberlé Williams Crenshaw, *Panel Presentation on Cultural Battery, Speaker: Kimberlé Williams Crenshaw*, 25 U. TOL. L. REV. 891, 892 (1995) (“Intersectionality generally functions as a metaphor for capturing the different dimensions of race and gender as they converge in the lives of women of color.”).

76. *See* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1775 (2003) (asserting that intersectionality “conveys at least the following two ideas: (1) that our identities are intersectional—that is, raced, gendered, sexually oriented, etc.—and (2) that our vulnerability to discrimination is a function of our specific intersectional identities”); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 860–74 (2006) (applying intersectionality theory to heterosexual Black men); Emily M.S. Houh, *Toward Praxis*, 39 U.C. DAVIS L. REV. 905, 924–38 (2006) (operationalizing anti-essentialism and intersectionality in a sexual harassment hypothetical); Gowri Ramachandran, *Intersectionality As “Catch-22”: Why Identity Performance Demands Are Neither Harmless nor Reasonable*, 69 ALB. L. REV. 299, 301 (2005) (discussing the double bind of “intersectionals,” defined as “persons who are members of more than one ‘low-status’ category, such as women of color, queer persons of color, or indigent women”); Catherine Smith, *Queer As Black Folk?*, 2007 WIS. L. REV. 379, 381 n.4 (“The experiences for black heterosexual women in interracial relationships are also different than those of black lesbians and black men in interracial relationships.”).

77. For a pioneering example of how the concept of intersectionality has been employed in legal research to illuminate overlooked disadvantaged identities, *see generally* Angela Onwuachi-Willig & Jacob Willig-Onwuachi, *A House Divided: The Invisibility of the Multiracial Family*, 44 HARV. C.R.-C.L. L. REV. 231 (2009) (calling for housing discrimination statutes to explicitly recognize “interraciality” as a protected category because “interraciality” (as in the case of an interracial couple or multiracial family) is a disadvantaged identity that renders an individual particularly vulnerable to housing discrimination). *See also* Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS 1771 (2005) (noting that intersectionality has introduced new methodological issues).

78. *See* Rachel Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 LAW & SOC’Y REV. 991, 991 (2011) (finding that both intersectional demographic characteristics and legal claims are associated with dramatically reduced odds of plaintiff victory).

A. *The Intersectionality of Criminality and Gender*

Formerly incarcerated women embody various intersectional identities, but the most predominant of these identities is that of a woman who has been convicted of a crime. Criminal women suffer from the double vulnerability of discrimination that comes from being both “criminal” and “female,” meaning that they experience negative differential treatment as a result of the convergence of gender bias and the stigma of having been in prison.⁷⁹ As a result of the stigma surrounding femininity and crime, there are fewer reentry resources for formerly incarcerated women. One groundbreaking study has identified seven major unmet needs of formerly incarcerated women:

- (1) treatment for substance abuse;
- (2) health care for serious medical problems;
- (3) treatment for serious mental health issues;
- (4) protection from abusive environments, and treatment for past, violent trauma;
- (5) educational and employment services;
- (6) safe and affordable housing; and
- (7) services to address family reunification needs.⁸⁰

Further, the study found three broad social and institutional contexts within which reentry barriers exist for women. These contexts include: (1) the combined impact of the competing demands of the barriers to reentry—for example, a female parolee is expected to find employment as soon as possible even while she is trying to reconcile with her children; (2) the ill-equipped and deteriorating communities to which women return, and; (3) the additional gender, racial, and economic challenges specific to women of color.⁸¹

B. *The Unequal Demands of Parenthood*

In addition to the stigma of female criminality, formerly incarcerated women are more greatly impacted by the demands of parenthood. First, formerly incarcerated women must contend with undeniably distinct biological and social demands, particularly in regards to pregnancy, childbirth, and parenting.⁸² Second, women are more likely to be the primary caregivers of their minor children. Approximately 75 to 80 percent

79. See Coramae Richey Mann, *Minority and Female: A Criminal Justice Double Bind*, in *AFRICAN AMERICAN CLASSICS IN CRIMINOLOGY AND CRIMINAL JUSTICE* 261 (Shaun Gabbidon et al. eds., 2002).

80. Beth E. Richie, *Challenges Incarcerated Women Face As They Return to Their Communities: Findings from Life History Interviews*, 47 *CRIME & DELINQ.* 368, 371–79 (2001).

81. *Id.* at 380–83.

82. SANDRA ENOS, *MOTHERING FROM THE INSIDE: PARENTING IN A WOMEN’S PRISON* (2001); Barbara Bloom et al., *Women Offenders and the Gendered Effects of Public Policy*, 21 *REV. POL’Y RES.* 31, 32–33 (2004).

of incarcerated women are mothers of minor children, with the incarcerated woman having an average of 2.11 children under the age of eighteen.⁸³ Further, the majority of incarcerated mothers, approximately 64 percent, lived with their minor children immediately prior to incarceration.⁸⁴ As a result of these differences, there are disparities in outcomes for children when a mother is incarcerated versus when a father is sent to prison. About 10 percent of the children of incarcerated women are placed in foster care⁸⁵ which is in stark contrast to the 2 percent of the children of incarcerated men who end up in foster care.⁸⁶ Thus, formerly incarcerated women are more likely to face the added challenge of losing legal custody of their children.

One formerly incarcerated woman I interviewed articulates a situation that many formerly incarcerated women must confront upon release: the loss of their children. “Well, the many of the women maybe have lost their children Often times jail is a reason why they lose their children. They may not have someone to go to take of them, so they are put into the foster care system.”⁸⁷

C. *Victims of Domestic Violence and Sexual Abuse*

Studies have shown that most incarcerated women, about 78 percent, were victims of abuse.⁸⁸ Several studies have suggested a link between abuse and involvement in the criminal justice system,⁸⁹ and in some cases, women are incarcerated because they were convicted of killing their abusive domestic partners.⁹⁰ Other illicit behavior can derive from the abuse, including drug and alcohol use as a coping mechanism, or crimes such as property and financial crimes related to a desperate bid to escape the abusive partner.⁹¹

The intersectional identity of domestic violence victim is particularly significant for formerly incarcerated women given that legal scholars have found that the criminal justice system does not respond adequately to

83. See HATTERY & SMITH, *supra* note 21, at 67; see also LAWRENCE A. GREENFIELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, NCJ 175688, WOMEN OFFENDERS 8 (1999), available at <http://www.bjs.gov/content/pub/pdf/wo.pdf>.

84. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN (2000), available at <http://www.bjs.gov/content/pub/pdf/iptc.pdf>.

85. *Id.* at 1.

86. *Id.*

87. Interview with Female Respondent 130612_001 (June 12, 2013).

88. Kayleen A. Islam-Zwart & Peter W. Vik, *Female Adjustment to Incarceration As Influenced by Sexual Assault History*, 31 CRIM. JUST. & BEHAV. 521, 522 (2004).

89. See, e.g., HATTERY & SMITH, *supra* note 21, at 47, 67; COAL. FOR WOMEN PRISONERS, COALITION FOR WOMEN PRISONERS’ 2006 PROPOSALS FOR REFORM (2006), available at http://www.correctionalassociation.org/wp-content/uploads/2012/05/Proposals_for_Reform_06_Brochure.pdf.

90. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 9–11 (1989); COAL. FOR WOMEN PRISONERS, *supra* note 89.

91. HATTERY & SMITH, *supra* note 21, at 67; COAL. FOR WOMEN PRISONERS, *supra* note 89.

female victims of domestic violence.⁹² Thus, some formerly incarcerated women who confront a lack of housing opportunities⁹³ upon their release from prison may have no recourse but to return to their abusers, leading to their recurrent victimization.

Formerly incarcerated women are also more likely than men to have been victims of sexual abuse.⁹⁴ Forty-four percent of female offenders report having been either sexually or physically assaulted and 69 percent report that the abuse took place before they were eighteen.⁹⁵

One formerly incarcerated woman I spoke with recounted her sexual abuse:

My mother was a workaholic. She didn't have time for me. She had the people that were renting the house that she owned babysit me and it was a messed up environment. Alcoholic environment. You know, I believe I was sexually abused in that house, I was so young. It was like kinda I could remember up to a certain point and then it was like and nothing. And when I'm older now and I can look back and try to put the pieces, it all kinda makes sense. Can't prove it, but I'm pretty sure.⁹⁶

D. Racial Minorities

In addition to the intersection of the stigma of incarceration and sexism, women of color have the added stigma of accompanying negative stereotypes⁹⁷ and are subject to the racial biases that have been found to permeate the legal system.⁹⁸ Black women are three times more likely to be incarcerated than white women and twice as likely as Hispanic women.⁹⁹

These racial discrepancies persist after incarceration. For example, Black children of incarcerated mothers are more likely to be in foster care than their counterparts, making regaining custody of their children much harder for formerly incarcerated Black women.¹⁰⁰ Some legal scholars have identified an intersectionality centered around race, gender, and reentry and have made the argument that African American women, because of their

92. See, e.g., Kimberly D. Bailey, *Lost in Translation: Domestic Violence, "The Personal Is Political," and the Criminal Justice System*, 100 J. CRIM. L. & CRIMINOLOGY 1255 (2010) (arguing that the criminal justice system is ineffective for addressing domestic violence as it fails to account for the social, political, and economic factors involved in such cases).

93. The housing limitations that formerly incarcerated women face are discussed *infra* Part III.A.

94. See generally LESLIE ACOCA & KELLY DEDEL, NAT'L COUNCIL ON CRIME & DELINQ., NO PLACE TO HIDE: UNDERSTANDING AND MEETING THE NEEDS OF GIRLS IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM (1998), available at http://www.nccdglobal.org/sites/default/files/publication_pdf/no-place-to-hide.pdf.

95. GREENFIELD & SNELL, *supra* note 83, at 8.

96. Interview with Female Respondent 130410 (Apr. 10, 2013).

97. See Jyoti Nanda, *Blind Discretion: Girls of Color & Delinquency in the Juvenile Justice System*, 59 UCLA L. REV. 1502, 1520–21 (2012).

98. Mann, *supra* note 79.

99. See U.S.: *World's Leading Jailer, New Numbers Show*, HUM. RTS. WATCH (Dec. 11, 2008), <http://www.hrw.org/news/2008/12/10/us-world-s-leading-jailer-new-numbers-show>.

100. See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 210–11 (2002).

gender and race, are the most disproportionately impacted by the collateral legal consequences of criminal conviction.¹⁰¹

III. FOUR KEY ARENAS OF LEGAL DISCRIMINATION

The arenas of legal discrimination I chose to focus on were derived both from my literature review of prior reentry studies and from my interviews with the formerly incarcerated women. Contrary to the stereotype of disadvantaged subjects who are oblivious to their marginalized social positions, many of these women were socially and politically aware. One formerly incarcerated woman astutely summarized the disadvantages women in her situation face:

So you know, I know the money goes and follows where the greatest need is and somebody has said that it's men. But women are the caretakers of the kids, women when they are released are less likely to be employed than men because our demographics show that most are [or] have been in poverty. Don't have a high school degree, have had numerous issues and barriers—whether that be culturally, socially, economically—have mental health, historically have a familial history or culture of poverty and that cycle of abuse, neglect, mental health issues, substance abuse issues . . . where you often don't see, that doesn't happen as many times with men.¹⁰²

A. Government Aid: Food and Housing

Ironically, the human comforts that a formerly incarcerated woman needs most, like food and housing, may be out of reach once she is released from prison. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996¹⁰³ (PRWORA) denies government aid, including federally subsidized housing and food stamps, to individuals convicted of drug offenses. While states may opt out of the provisions of the Act, currently, there are more states that comply with the ban than there are those that do not.¹⁰⁴ This denial of housing has been shown to lead to crime.¹⁰⁵

One formerly incarcerated woman I interviewed described how the lack of housing played a role in her reincarceration. The need for housing left

101. See, e.g., Geneva Brown, *The Wind Cries Mary—The Intersectionality of Race, Gender, and Reentry: Challenges for African American Women*, 24 ST. JOHN'S J. LEGAL COMMENT. 625 (2010); see also HATTERY & SMITH, *supra* note 21, at 68–69.

102. Interview with Female Respondent 130612_001 (June 12, 2013).

103. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

104. See MARC MAUER & VIRGINIA MCCALMONT, THE SENTENCING PROJECT, A LIFETIME OF PUNISHMENT: THE IMPACT OF THE FELONY DRUG BAN ON WELFARE BENEFITS 2 (2013), available at http://sentencingproject.org/doc/publications/cc_A%20Lifetime%20of%20Punishment.pdf.

105. See George Lipsitz, "In an Avalanche Every Snowflake Pleads Not Guilty": *Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746, 1754–56 (2012).

her with no choice but to seek refuge in an environment she knew was criminogenic¹⁰⁶ and which facilitated her relapse as a recovering addict.

The first time it happened . . . I had to go move back with Pops and a whole really drug-fulfilled environment, active addiction household. Yeah that was just all crazy. It was just relapse then straight. Relapse, straight. Was in the treatment, went to transitional housing right over here across the street. Relapsed. Boom, straight back.¹⁰⁷

Clearly, the fact that this woman endured such Sisyphean efforts to stay sober demonstrates a willingness to rejoin society as a productive member. However, as she describes, her lack of housing, and the consequence of being forced to inhabit a household where drug use was pervasive, were factors that thwarted this woman's will to reclaim her sobriety and stay out of legal trouble, no matter how many times she tried.

B. Employment

The fact that formerly incarcerated women are less likely to have been employed prior to their period of incarceration has significant implications for reentry.¹⁰⁸ Forty percent of women offenders were employed prior to their incarceration compared to 60 percent of their male counterparts.¹⁰⁹ This can be a challenge to successful reentry as other studies have demonstrated that employment serves to reduce recidivism among the formerly incarcerated.¹¹⁰ Furthermore, levels of compensation, a variable dependent on level of education, also influences reentry outcomes, as those making higher wages are less likely to recidivate.¹¹¹ In addition to lowering recidivism rates, employment helps the formerly incarcerated reintegrate into society, as they are now able to financially support themselves and their families.¹¹² Recent studies have explored the link

106. "Criminogenic" is an adjective which denotes "producing or leading to crime or criminality." See *Criminogenic*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 537 (1986).

107. Interview with Female Respondent 130410 (Apr. 10, 2013).

108. See ACOCA & DEDEL, *supra* note 94, at 121.

109. GREENFIELD & SNELL, *supra* note 83, at 8.

110. See Robert J. Sampson & John L. Laub, *A Life-Course Theory of Cumulative Disadvantage and the Stability of Delinquency*, in 7 *ADVANCES IN CRIMINOLOGICAL THEORY* 1 (Terence P. Thornberry ed., 1997); Christopher Uggen, *Work As a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 67 *AM. SOC. REV.* 529, 529–30 (2000); see also MILES D. HARER, FED. BUREAU OF PRISONS, OFFICE OF RESEARCH & EVALUATION, *RECIDIVISM OF FEDERAL PRISONERS RELEASED IN 1987*, at 4–5 (1994), available at http://www.bop.gov/resources/research_projects/published_reports/recidivism/orepreprecid87.pdf.

111. See CHRISTY VISHER ET AL., URBAN INST. JUSTICE POLICY CTR., *EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASEES IN THREE STATES* 8 (2008), available at http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf.

112. DIANA BRAZZELL ET AL., URBAN INST. JUSTICE POLICY CTR., *FROM THE CLASSROOM TO THE COMMUNITY: EXPLORING THE ROLE OF EDUCATION DURING INCARCERATION AND REENTRY* 17 (2009), available at http://www.urban.org/UploadedPDF/411963_classroom_community.pdf.

between incarceration and employment rates, finding that spending time in prison disadvantages released criminal offenders.¹¹³

Formerly incarcerated women are even more impacted by unemployment for various reasons. For one, most formerly incarcerated women cannot fall back on many of the unskilled or semiskilled jobs that their male counterparts can. Many other trade jobs or vocational jobs, such as being an electrician or welding require an apprenticeship and are socially closed off to women.¹¹⁴ Additionally, most “pink-collar” jobs that attract women such as nursing or teaching are subject to professional licenses and background checks that weigh negatively against people who have been convicted of a crime.¹¹⁵

One woman I interviewed assessed the barriers stacked against her chances of finding employment:

Well, jobs is pretty hard nowadays. I was just talking to somebody about McDonald’s, and they go through, send you through an extensive background. And just to work there. And I worked at McDonald’s years ago and it wasn’t nothing like it is now. . . . But I mean they have to know that there’s a lot of people that do go to prison and come out and that doesn’t mean that they’re a waste to society. I mean. People still have to make a living. I still have to pay bills. I still want to see my kid. I have to have a job to do that.¹¹⁶

C. Education

In relation to employment, many scholars have found that education is important for the successful reentry of the formerly incarcerated.¹¹⁷ Formerly incarcerated women discover, however, it is more difficult to

113. Becky Petit & Christopher Lyons, *Status and the Stigma of Incarceration: The Labor-Market Effects of Incarceration, by Race, Class, and Criminal Involvement*, in BARRIERS TO RE-ENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POSTINDUSTRIAL AMERICA 203, 223 (Shawn Bushway et al. eds., 2007).

114. See Vickie Elmer, *Report: Women Still Face Barriers in Construction Trades*, WASH. POST (June 11, 2014), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/06/11/report-women-still-face-barriers-in-construction-trades/> (noting that women still face barriers in entering construction trades).

115. See Elvis Michael, *Can Certified Nursing Assistants with Felony Convictions Get Jobs?*, HOUS. CHRON., <http://work.chron.com/can-certified-nursing-assistants-felony-convictions-jobs-26491.html> (last visited Apr. 23, 2015) (explaining that a required background check would most likely disqualify an individual from becoming certified and registered in most states if he or she has a felony conviction). In the state of Minnesota, a background check is required for persons offered employment by a K–12 school, including teachers and athletic and academic extracurricular activity coaches. See MINN. STAT. § 123B.03 (2009).

116. Interview with Female Respondent 130710 (July 10, 2013).

117. See generally STEPHEN J. STEURER & LINDA G. SMITH, EDUCATION REDUCES CRIME: THREE-STATE RECIDIVISM STUDY EXECUTIVE SUMMARY (2003); Bruce Western, *The Penal System and the Labor Market*, in BARRIERS TO RE-ENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POSTINDUSTRIAL AMERICA 335 (Shawn Bushway et al. eds., 2007); Robert J. Sampson & W. Byron Groves, *Community Structure and Crime: Testing Social-Disorganization Theory*, 94 AM. J. SOC. 744 (1989); Gerald G. Gaes, *The Impact of Prison Education on Post Release Outcomes*, URBAN INST. JUSTICE POL’Y CENTER (2008), <http://www.urban.org/projects/reentry-roundtable/upload/Gaes.pdf>.

obtain higher education, after prison. The federal government makes eligibility for student grants—including the Pell Grant which is for students from low-income backgrounds—and student loans contingent on the absence of a criminal record.¹¹⁸ Beginning in 1994, prisoners were declared ineligible for college Pell Grants, thus creating a nearly insurmountable financial hurdle for the formerly incarcerated individuals who would like to continue their education while in prison.¹¹⁹

Although men bear a higher risk of incarceration, women are disproportionately impacted by the lack of educational programs in prison. While correctional institutions have increased the number of general education programs available to prisoners since the 1970s, as of 1996 only 52 percent of correctional facilities for women offered post-secondary education.¹²⁰ Avenues for financing higher education have become even restricted for the formerly incarcerated woman since the enactment of the 1998 amendment to the Higher Education Act.¹²¹ Under this Act, individuals with drug convictions are prohibited from receiving federal financial aid to enroll in a post-secondary institution.¹²² During the 2000–2001 school year, more than 43,000 college students were affected by the amendment.¹²³

Lack of access to education is a concern given that education has been shown to result in increased employment and reduced recidivism.¹²⁴ Education may be helpful in mitigating the stigma of incarceration that “marks” an individual as unfit for work¹²⁵—as credentials and diplomas certify the formerly incarcerated individual’s hard work and ability for success.¹²⁶

Higher education also has been theorized as an important key to the reintegration of formerly incarcerated people as it provides greater access to social networks and social and cultural capital, intangibles which criminologists argue should help reduce recidivism.¹²⁷ There is, however, a paucity of effective programs that enable formerly incarcerated women to obtain higher education.¹²⁸

One woman I interviewed spoke about her dissatisfaction with a prior reentry program that did not allow her to continue her education:

118. Richard Tewksbury et al., *Opportunities Lost: The Consequences of Eliminating Pell Grant Eligibility for Correctional Education Students*, 31 J. OFFENDER REHABILITATION 43, 44 (2000).

119. ALLARD, *supra* note 62, at 15.

120. Karen F. Lahm, *Equal or Equitable: An Exploration of Education and Vocational Program Availability for Male and Female Offenders*, 64 FED. PROBATION 39, 41 (2000).

121. Pub. L. No. 105-244, 112 Stat. 1581 (codified as amended in scattered sections of 20 U.S.C.); ALLARD, *supra* note 62, at 17.

122. ALLARD, *supra* note 62, at 17.

123. *Id.* at 17.

124. See Gaes, *supra* note 117, at 3–4.

125. See Western, *supra* note 117, at 335.

126. See ALLARD, *supra* note 62, at 17.

127. See Rose & Clear, *supra* note 44; Sampson & Groves, *supra* note 117.

128. See Gaes, *supra* note 117.

Their concentration was on that you do their program which meant that since it was faith based that we spent a lot of time at church. And not only that, they didn't allow you to leave the building unless they agreed to why you were leaving the building. So again, I felt like I was back in prison. I told them that I had a need that I wanted to fulfill that was school. That I wanted to continue my education because I was very excited to have my GED. And you were not allowed to go to school or have a job in that shelter.¹²⁹

D. Family Ties

The loss of parental ties is another issue that negatively impacts the reintegration of formerly incarcerated women. In 1997, the federal government enacted the Adoption and Safe Families Act with the stated goal of facilitating domestic adoptions.¹³⁰ However, in practice, the ASFA has become a government-mandated push for the adoption of children who have been in foster care for fifteen months out of a twenty-two month period,¹³¹ thus negatively impacting incarcerated parents. Adoption rates have nearly doubled since the enactment of the ASFA.¹³² Since its enactment in 1997, the annual number of children leaving foster care for adoption has risen from roughly 30,000 to more than 50,000.¹³³ The annual number of adoptions from foster care climbed from less than 30,000 in the mid-1990s, to a peak of some 57,000 in fiscal year 2009.¹³⁴ Since then the number has remained at, or above, roughly 50,000.¹³⁵ While this might be good news for children who would otherwise age out of the foster care system without ever having the security net and emotional stability afforded by a permanent family, this also means that fewer children are being reunited with their biological families.

The adoption of many of these children is not really the best result given that said adoption is based on the length of an imposed prison sentence, rather than a true judgment of the suitability of the incarcerated parent to raise a child. Furthermore, because women are more likely to be the principal guardians of minor children, many more formerly incarcerated women than men find themselves as parents with no parental rights to their biological children.¹³⁶ As the average prison sentence exceeds twenty-two

129. Interview with Female Respondent 130710 (July 10, 2013).

130. See Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act (ASFA)*, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 8 (2009), available at http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf.

131. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

132. EMILIE STOLTZFUS, CHILD WELFARE: STRUCTURE AND FUNDING OF THE ADOPTION INCENTIVES PROGRAM ALONG WITH REAUTHORIZATION ISSUES 3 (2013), available at <http://www.fas.org/sgp/crs/misc/R43025.pdf>.

133. *Id.*

134. *Id.*

135. *Id.*

136. See MUMOLA, *supra* note 84, at 1 (nothing that about 64 percent of women in state prison reported that they had been primary caregivers of children compared to about 43 percent of men).

months, incarcerated parents dependent on the foster care system to care for their children risk losing custody.¹³⁷ Therefore, loss of parental rights is of particular concern to mothers in prison, who are five times as likely as men to report having children placed in a foster home.¹³⁸ One formerly incarcerated woman shared her thoughts with me regarding the other formerly incarcerated women she knew who had lost their children: “Oh some of them are really depressed, angry, just so much because they’ve lost their children forever. Their children have been adopted out through the system which makes it so they never will ever get their children back. Some of them won’t even know where their children are living.”¹³⁹

IV. THE DUTY OF THE RESPONSIVE STATE

The state has a duty to ensure that all members of its population enjoy the equal opportunity to strive for upward social mobility and that starts by redressing the inequalities it has created because of overlooked intersectional social identities. I argue that the state’s “carceral burden”¹⁴⁰ goes beyond an individual’s tenure as a ward of the state while in prison. I propose that the state’s carceral burden extends to when the former inmate is released and necessitates that the state affirmatively ensure that the individual is free to reintegrate back into society, without legally imposed fetters that would continue to hinder the individual’s economic and social progress.

As my empirical research has shown, formerly incarcerated women represent particularly “vulnerable subjects” because of the manner in which their intersectional identities work to exacerbate the effects of the collateral legal consequences of criminal conviction.¹⁴¹ Thus, the state has an affirmative obligation, first, to reconsider the collateral legal consequences that serve to anchor formerly incarcerated women to a marginalized status, and second, to enact new laws and policies that would enable their social mobility.

A. *Removing the Scarlet Letter*

To remove the scarlet letter from formerly incarcerated women, the government should ensure that institutional policies, particularly when it comes to housing, employment, and education, are not being used to “mark” and sort those individuals for negative discrimination.¹⁴² For

137. SARAH SCHIRMER, ASHLEY NELLIS & MARC MAUER, THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007, at 9 (2009), available at http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf.

138. *Id.*

139. Interview with Female Respondent 130710 (July 10, 2013).

140. See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 891–92 (2009) (identifying the state obligation as the “carceral burden,” which is “an ongoing affirmative obligation to meet the basic human needs of the people exiled in this way”).

141. See *supra* Part III.

142. *EEOC Enforcement Guidance*, EEOC (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

example, the EEOC has instituted guidelines for the use of “conviction questions” on job application forms, essentially limiting their use to when it is a matter of “business necessity.”¹⁴³ Similarly, advocates in several states have followed suit, instituting “Ban-the-Box” initiatives that call for conviction questions to be removed from all initial application forms.¹⁴⁴ The National Employment Law Project reports that in 2013 and 2014 alone, eight states passed ban-the-box legislation.¹⁴⁵ I argue for a federal law or congressional act that effectively bans the use of conviction questions on applications in all states. The federal government should not stand by and watch piecemeal social reform, when it has the power to bring about nationwide reform on its own.

In addition to eliminating conviction questions from initial employment applications, federal funding should be reinstated, both federal loans and the Pell Grant, for low-income students regardless of past criminal background. As discussed above, lack of higher education—and the resulting limited social mobility—is a factor leading to crime, thus it does not serve the purpose of recidivism reduction for ex-offenders to be denied the means of attaining higher education. Similarly, the ban-the-box initiative should be extended to college applications; meaning that conviction questions should be eliminated from college applications.¹⁴⁶ As college education has now become the baseline for education and as its achievement has become a prerequisite for social mobility, the government owes a duty to ensure that all its citizens, including the formerly incarcerated, enjoy equal access to higher education.

As discussed earlier in this Article, the achievement of higher education is particularly important for the formerly incarcerated woman as it serves to combat the stigma of incarceration that might otherwise render her unemployable. Higher education also serves as a credential of job readiness and the necessary skills. As it stands, however, former prisoners will have to confront the harsh truth that, according to the *Chronicle of Higher Education*, over 60 percent of colleges consider an applicant’s criminal history when making admission decisions.¹⁴⁷ To make matters worse, most of those schools have no formal protocols in place to determine how criminal backgrounds should factor into the admission decision—thus creating a situation that is ripe for the covert discrimination of protected classes.¹⁴⁸

143. *See id.*

144. *See* Pam Fessler, *How Banning One Question Could Help Ex-Offenders Land a Job*, NPR (July 14, 2014, 3:28 AM), <http://www.npr.org/2014/07/14/330731820/how-banning-one-question-could-help-ex-offenders-land-a-job>.

145. NAT’L EMP’T LAW PROJECT, BAN THE BOX (2015).

146. This does not prevent colleges from using the sex offender registry to ensure the safety of their students living in on-campus dorms.

147. Sara Lipka, *Experts Debate Fairness of Criminal-Background Checks on Students*, CHRON. OF HIGHER EDUC. (June 30, 2010), <http://chronicle.com/article/Experts-Debate-Fairness-of/66107>.

148. *See id.*

As the statistics show that many formerly incarcerated women lack higher education,¹⁴⁹ allowing criminal backgrounds to factor into the admission decision creates an unnecessary hurdle for the formerly incarcerated woman on her path to social inclusion and upward mobility. Undoubtedly, the conviction question on the college application has a chilling effect on formerly incarcerated women who otherwise would be eager to continue their education after imprisonment.

In addition to removing impediments to education and employment, the government should also consider the psychological havoc that barriers to family reunification wreak on the formerly incarcerated woman's state of mind and motivation to reintegrate into society. It is undoubtedly a psychological blow for a woman to understand that based on the length of her sentence alone, rather than her suitability for parenting, she is now eligible to lose all parental rights to her children. Rather, allowing women the opportunity to regain custody of their children based on their good behavior in prison and other demonstrated fitness such as pursuit of higher education and employment will serve as motivation for these women to turn away from a life of crime, buoyed in the knowledge that reunification with their children awaits them.

B. Enabling Reintegration

Besides eliminating institutional policies that hinder the economic progress of formerly incarcerated women, the government also holds a positive obligation to enact policies that would enable and facilitate their reintegration into society. The first of those policies is to emphasize higher education in all prison systems, making it possible for women to earn higher education degrees while they are incarcerated. It is unfair that, for women, the continuation of their education comes to rest on fickle fortune determining where they are incarcerated rather than on their personal ability and initiative.

V. MANDATING A BETTER MODEL OF REENTRY

Beyond merely eliminating collateral legal consequences that serve as stumbling blocks for the formerly incarcerated, the government has a duty to take on an active role in creating a model of reentry that facilitates the reintegration of formerly incarcerated women into society.

A. Gender-Neutral Policies Ignore the Needs of Women

Historically, there always have been more men in prison than women.¹⁵⁰ Thus, it is not surprising that the model of reentry espoused by reentry

149. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), available at www.bjs.gov/content/pub/pdf/ecp.pdf.

150. Male inmates had an incarceration rate fourteen times higher than females. See E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, NCJ 239808, PRISONERS IN 2011, at 2 (2012), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4559>.

organizations is a “gender neutral” one that fails to take into account the differing needs of formerly incarcerated women. However, women now represent the fastest growing population in prison¹⁵¹ and this also will have an impact on the population of those who identify as formerly incarcerated.

B. Regulations for a More Inclusive Model

The Second Chance Act¹⁵² enacted in 2008 was designed to facilitate the societal reentry of formerly incarcerated individuals. It is the first type of legislation to confer federal grants to government agencies and nonprofit organizations that are engaged in providing support strategies for the formerly incarcerated and services designed to reduce recidivism.¹⁵³ The availability of this funding source has resulted in a proliferation of nonprofit organizations with the mission statement of aiding formerly incarcerated people in their quest to reintegrate into society, vying to receive grant money.¹⁵⁴ Most of these organizations derive their financial support from a combination of grants made available through the Second Chance Act and contributions from private donors.¹⁵⁵

The statistics indicate that the Second Chance Act has contributed to reduced recidivism,¹⁵⁶ and there is a strong argument that it should be reauthorized.¹⁵⁷ However, I argue that the implementation of the Act should be modified to include more gender-specific guidelines and standards¹⁵⁸ placed on the public and private organizations that receive the grant.

151. The number of female prisoners rose at a faster rate (4.8 percent) than the number of male prisoners (2.7 percent). The percent increase in female prisoners was almost twice that of male prisoners. WILLIAM J. SABOL, TODD D. MINTON & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, NCJ 217675, PRISON AND JAIL INMATES AT MIDYEAR 2006. (2007) (rev. 2008), available at <http://www.bjs.gov/content/pub/pdf/pjim06.pdf>.

152. Pub. L. No. 110-199, 122 Stat. 657 (2008).

153. See *Second Chance Act Prisoner Reentry Initiative*, CATALOG OF FED. DOMESTIC ASSISTANCE, <https://www.cfda.gov/index?s=program&mode=form&tab=core&id=0f0083d29a6d817d18734debda07293a> (last visited Apr. 23, 2015).

154. LYNNE HANEY, OFFENDING WOMEN: POWER PUNISHMENT AND THE REGULATION OF DESIRE 101-03 (2010).

155. Since 2009, nearly 600 Second Chance Act grant awards have been made to government agencies and non-profit organizations from forty-nine states for reentry programs serving adults and juveniles. See THE SECOND CHANCE ACT: JUVENILE REENTRY (2014), available at http://csgjusticecenter.org/wp-content/uploads/2014/08/SCA_Juvenile_Reentry.pdf.

156. States like Ohio, Texas, Kansas, and Michigan, which have embraced the Second Chance Act, have seen dramatic decreases in recidivism. See Rob Portman & J.C. Watts, *Reauthorize Second Chance Act: Rob Portman and J.C. Watts*, CLEVELAND PLAIN DEALER (Apr. 29, 2013, 3:00 AM), http://www.cleveland.com/opinion/index.ssf/2013/04/reauthorize_second_chance_act.html.

157. See *id.*

158. For the 2015 eligibility guidelines and standards for Second Chance Act grant funding, see U.S. DEP'T OF JUSTICE, SECOND CHANCE ACT TWO-PHASE ADULT REENTRY DEMONSTRATION PROGRAM: PLANNING AND IMPLEMENTATION FY 2015 COMPETITIVE GRANT ANNOUNCEMENT (2015), available at <https://www.bja.gov/Funding/15SCAReentryDemoSol.pdf>.

The federal government, through the Second Chance Act, has an opportunity to develop a better model of reentry which takes into account the intersectional identities of formerly incarcerated women and ensures that they are not subjected to a “gender neutral” model that favors formerly incarcerated men.

As noted earlier in this Article, formerly incarcerated women face distinct reentry struggles from their male counterparts because of their intersectional identities as women convicted of a crime, as primary caregivers of minor children, as victims of domestic violence and sexual abuse, and as racial minorities.¹⁵⁹ Thus, through the Second Chance Act, the government should ensure that the programs it funds are cognizant of these identities. Any program seeking funding should be required to prove that (1) it has in place programming specific to women’s mental and physical needs; (2) in-house childcare services or a system for women to obtain reliable and secure childcare services; and (3) counseling for domestic violence and sexual abuse.

CONCLUSION

The collateral legal consequences of criminal conviction disproportionately impact women primarily because they cumulatively serve as a modern day scarlet letter that attaches to formerly incarcerated women for life and which renders the women’s attempts to reintegrate into society Sisyphean. Beyond merely creating or recreating collateral consequences that might impact men and women equally, it behooves the government to reconsider whether collateral legal consequences serve to reduce recidivism, which is perhaps the most important goal of punishment.

It is also the government’s duty to provide greater oversight over the funding it provides for reentry programs to ensure that the model of practice for such programs takes into account the intersectional identities of formerly incarcerated women and their particular needs. It is without argument that society as a whole benefits from the successful reintegration of formerly incarcerated women. Thus, a responsive government should not actively or passively promote practices that would stymie that very process.

159. *See supra* Part III.