

# THE EFFECTS OF THE WAR ON DRUGS ON BLACK WOMEN: FROM EARLY LEGISLATION TO INCARCERATION

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*“Once the public has been convinced that culture and choices, not structures or policies, are to blame for bad outcomes, solutions coalesce around individual punishments rather than systemic change. Let’s lock up the bad guys instead of changing the bad laws. The prison population exploded and the effects of that explosion were not gender-neutral. The war on drugs was especially pernicious for black women.”<sup>1</sup>*

## I. INTRODUCTION

Those wielding the power to enact and enforce laws and guidelines control not only the process, but also the impacts on the community at-large. Legislation surrounding the War on Drugs has increased the number of Black

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1. Melissa Harris-Perry, *The Rest of the Story: Black Women and the War on Drugs*, THE UNDEFEATED (Sept. 15, 2016), <https://theundefeated.com/features/the-rest-of-story-black-women-and-the-her-story-of-the-war-on-drugs-jay-z-melissa-harris-perry-nyt/>.

female offenders and has moved these women from traditional homes to national prisons.<sup>3</sup> Understanding the root of what has become a national epidemic is the only means of rectifying this wrong. This understanding will hopefully lead to policy changes and more efficient legislation.

“The prison industrial complex is a cornerstone of the conservative neo-policies emerging in the age of globalization since the early 1970s, which has increased the disenfranchisement of marginalized Black and Latino/a communities and is responsible, in large part, for the circumstances facing Black women when involved with the prison system today.”<sup>4</sup> The prison industrial complex (hereinafter “PIC”) is not a location, but an abstract concept that defines imprisonment as the cure for most societal ills.<sup>5</sup> PIC is grounded in the interests of the government and industry to protect the public welfare and promote economic growth.<sup>6</sup> Regarding statutory regulations that deal with the use and distribution of narcotics, Black women have been given the keys to open the door to their new rooms in local, state, and federal penitentiaries.<sup>7</sup> Since the official proclamation of a national War on Drugs, Black women have been sentenced to confinement at alarming rates.<sup>8</sup> As part of the analysis of factors contributing to this rise, a balanced approach examining the presumed neutrality of the regulatory sentencing structure versus the biased results is required. Critical Race Theory (hereinafter “CRT”) and Critical Race Feminism (hereinafter “CRF”) provide a vivid context to further examine this notion. The mass incarceration of Black women is racially motivated and is rooted in the discriminatory nature of the laws enacted in this country.<sup>9</sup> This Article will examine the intersection between those in power and those who experience oppression because of that power.

Critical Race Theory evolved in the 1980s after the Supreme Court

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3. See generally Stephanie Bush-Baskette, *MISGUIDED JUSTICE: THE WAR ON DRUGS AND THE INCARCERATION OF BLACK WOMEN* (2010).

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

5. See *History*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/history/> (last visited Feb. 5, 2018) (stating that PIC is a term used to illustrate “the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social, and political problems”).

6. *Id.*

7. See discussion *infra* Section II.

8. See Harris-Perry, *supra* note 2 (finding that the rate of imprisonment for Black women is almost twice as high as the rate of imprisonment for white women).

9. See generally Bush-Baskette, *supra* note 3.

dismantled the positive gains made by the Civil Rights Movement.<sup>10</sup> CRT suggests that laws are neutral on the surface, but not in application.<sup>11</sup> CRT also examines the possibility of transforming the relationship between law and racial power, and more broadly, pursues a project of achieving racial emancipation and anti-subordination.<sup>12</sup> In short, CRT provides a broader focus on the conditions of racial inequality.<sup>13</sup>

CRF grew from the cross section of CRT and critical legal studies.<sup>14</sup> CRF is a unique theory in that its foundation is based on the stories of men and women who are not legal scholars.<sup>15</sup> This transformative theory accounts for the many dimensions that make-up Black women and acknowledges the importance of storytelling.<sup>16</sup> CRF also attempts to comprehend the intersection between gender, race, class, and other facets of societal labels within the context of oppression.<sup>17</sup> The theory gives a voice to women of color that is often lost in various forms of writing.<sup>18</sup>

This Article will outline how the War on Drugs has made Black women bear the label of criminal at an astoundingly disproportionate rate. Part II

10. See Darren Lenard Hutchinson, *Critical Race Histories: In and Out*, 53 AM. U. L. REV. 1187 *passim* (2004).

11. See generally Dolores Delgado Bernal, *Critical Race Theory, Latino Critical Theory, and Critical Raced-Gendered Epistemologies: Recognizing Students of Color as Holders and Creators of Knowledge*, 8 QUAL. INQ. 105, 105-126 (2002) (finding that when looking through a lens of cultural context, one can begin to recognize the racialized effects of laws).

12. See *id.* at 107-08; see also Molly A. Schiffer, *Women of Color and Crime: A Critical Race Theory Perspective to Address Disparate Prosecution*, 56 ARIZ. L. REV. 1203, 1207 (2014) (recognizing that key principles of CRT include the idea that “racism is a societal norm”, that the white dominated society does not address racism and thus it becomes difficult to address, that “color-blind remedies only appear obvious and blatant in instances of race discrimination”, and that white dominance “is in the interest of all whites” and thus nobody is interested in changing the system).

13. See Schiffer, *supra* note 12.

14. See Theodora Regina Berry, *Engaged Pedagogy and Critical Race Feminism*, 24 EDUC. FOUND. 19, 23 (2010).

15. See *id.* at 24.

16. See *id.*

17. See *id.* at 25; see also Begum Verjee, *Critical Race Feminism: A Transformative Vision for Service-Learning Engagement*, 51 J. COMMUNITY ENGAGEMENT & SPONSORSHIP 57, 57 (2012).

18. Adrien Katherine Wing, *Critical Race Feminism and International Human Rights*, 28 U. MIAMI INTER-AM. L. REV. 337, 341 (1997) (highlighting that CRF puts women of color at the forefront of writing, instead of in the background, thereby expanding CRT).

explains the history of narcotic legislation in the United States from the beginning of the twentieth century. In Part III, the US Sentencing Commission and its regulatory impact is discussed. Part IV examines the use of prosecutorial discretion and its use as a tool of oppression. Part V outlines the role of each U.S. President, from Nixon to Trump, in developing the application of the sentencing guidelines. Part VI scrutinizes how mass incarceration has not only affected the Black woman, but society as a whole. The future of sentencing reform is discussed in Part VII. Part VIII identifies the next face of crime based on statistical data and misapplication of the law. In the conclusion, Part IX, Black women are encouraged to arm themselves with information as a means of protection and activism.

## II. EARLY LEGISLATION OF THE WAR ON DRUGS

The United States has had a “drug problem” since long before it became a hot topic in the White House.<sup>19</sup> The Harrison Narcotics Act of 1914 changed how this country handled narcotics and paved the way for the stricter standards that followed.<sup>20</sup> Originally used to generate funding, the Act required all distributors of drugs to apply for a tax stamp.<sup>21</sup> Consequently, the Narcotics Act curbed sales stemming from addiction as opposed to those related to medical necessity.<sup>22</sup>

In the 1930s, the newly created Federal Bureau of Narcotics (hereinafter “FBN”), under the leadership of Harry Anslinger, launched a campaign to eradicate drugs from American’s daily lives.<sup>23</sup> Anslinger used deceit and innuendo to manipulate the general public by building on pre-existing fears towards minorities and associating marijuana use with “lower-class Mexican Americans and African Americans”.<sup>24</sup> This illicit linkage spread the notion that marijuana usage was dangerous for the white, middle-class American.<sup>25</sup>

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19. See Federal Food and Drugs Act of 1906, 21 U.S.C. § 8 (1906) (repealed 1938) (requiring that all physicians properly label medications because of increased addiction to psychotropic drugs); see also ELAINE B. SHARP, *THE DILEMMA OF DRUG POLICY IN THE UNITED STATES* (Janet Frick ed., 1994); STEVEN WISOTSKY, *BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY* (1990).

20. See *Webb v. United States*, 249 U.S. 96, 96 (1919); see also David Jakubiec et al., *The War on Drugs*, ROCH. INST. TECH. (2009), <http://scholarworks.rit.edu/cgi/viewcontent.cgi?article=2664&context=article>.

21. See Jakubiec et al., *supra* note 20 at 3.

22. See *id.*

23. See *id.*

24. See *id.*

25. See *id.*

As a result, Congress enacted the Marijuana Tax Act of 1937.<sup>26</sup> This Act increased the price of marijuana and made it nearly impossible to purchase legally.<sup>27</sup>

President Richard Nixon formally declared a “War on Drugs” during his 1971 special address to Congress.<sup>28</sup> Forty-six years later, there have been numerous legislative attempts to win this war.<sup>29</sup> The Anti-Drug Abuse Acts of 1986 and 1988 are two such pieces of legislation; however, the ripple effect caused by these statutes lead to the incarceration of Black women at disproportionate rates in comparison to other demographic groups, including white men and women.<sup>30</sup>

A facet of the 1986 Anti-Drug Act (hereinafter “ADA I”) focused on punishment rather than treatment for street level offenders that were arrested with crack cocaine in their possession.<sup>31</sup> ADA I formally established mandatory minimums, a method that our judicial system still uses today.<sup>32</sup> The premise behind this sentencing practice was to toughen punishments for drug trafficking and importation.<sup>33</sup> However, the amount of drugs that can prompt an elevated sentence are often much lower than the amount of drugs that a high-level trafficker would be “pushing.”<sup>34</sup> ADA I also introduced the disparate 100:1 ratio that differentiated between crack and powder cocaine.<sup>35</sup> Mandatory minimum sentencing emerged as the quintessential example of the war on crime conjoined to race, and especially targeted Blacks.<sup>36</sup>

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26. *See id.*

27. *See id.*

28. *See Richard Nixon: Special Message to the Congress on Drug Abuse Prevention and Control*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=3048> (last visited Sept. 14, 2017).

29. *See* Bush-Baskette, *supra* note 3, at 27.

30. *See id.* at 30.

31. *See id.* at 44.

32. *See id.* at 45.

33. *See id.*

34. *See* Eric E. Sterling, *Drug Laws and Snitching: A Primer*, PBS: FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/> (last visited Sept. 14, 2017).

35. *See id.*

36. *See id.*; Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L. J. 2 *passim* (2013); *see also* Llewelyn Engel, Blog, *Mandatory Sentencing Leads to Racial Disparities*, GEO. L. J. MOD. CRITICAL RACE PERSP. (Nov. 15, 2013), <https://georgetownlawmcrp.wordpress.com/2013/11/15/mandatory-sentencing-leads-to-racial-disparities/>.

The 1988 Anti-Drug Act (hereinafter “ADA II”) raised the base levels for crack cocaine.<sup>37</sup> The Act mandated that the simple possession of crack cocaine now required jail time and would be categorized as a felony.<sup>38</sup> Under ADA II, there were three instances that warranted a mandatory sentence of at least five years: a first time offender in possession of five grams of cocaine, an offender with one prior conviction for the “simple possession of crack cocaine” facing a new conviction for possession of greater than three grams of crack cocaine, or an offender with two prior convictions for possession of crack cocaine.<sup>39</sup> Additionally, ADA II required people who may attempt, or conspire to attempt, to distribute a drug to be given a sentence equivalent to those that participate in the full criminal conduct.<sup>40</sup> While mandatory sentencing was thought to discourage people from selling crack cocaine, in its effect, it ended up facilitating more bias in an already discriminatory system.<sup>41</sup>

### III. FEDERAL SENTENCING REGULATIONS AND THE SHIFT OF POWER FROM JUDGES TO PROSECUTORS

In assessing the means used to sentence Black female offenders, it is important to review established statutory restrictions and the people who have the authority to enforce these guidelines. Prior to 1984, the authority to punish federal defendants fell to the judges that sat in the various circuit and district courts and there was no standardized means of dispensing sentences.<sup>42</sup> Congress enacted the Sentencing Reform Act of 1984.<sup>43</sup> This Act called for the creation of the United States Sentencing Commission (hereinafter “USSC”).<sup>44</sup>

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37. See Ben Fabens-Lassen, *A Cracked Remedy: The Anti-Drug Abuse Act of 1986 and Retroactive Application of the Fair Sentencing Act of 2010*, 87 TEMP. L. REV. 645, 651 (2015).

38. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 2775, 102 Stat. 4181 (1988).

39. *Id.* (stating that simple possession of cocaine is equivalent to the possession of five grams of crack cocaine).

40. *Id.*

41. See Harris-Perry, *supra* note 2.

42. See Celesta Albonetti, *Sentencing Under the Federal Sentencing Guidelines: Effects of Defendant Characteristics, Guilty Pleas and Departures on Sentence Outcomes for Drug Offenses, 1991-1992*, 31 L. & SOC’Y REV. 789, 789 (1997).

43. See *id.*

44. See *About*, U.S. SENT’G COMM’N, <http://www.ussc.gov/about-page> (last visited June 15, 2017) (summarizing that the goal of the U. S. Sentencing Commission is to act as an advisor to the federal courts, Congress, and the Office of the President by

The USSC adopted its first set of guidelines in 1987, abolishing the sentencing differences between defendants that had been convicted of similar crimes.<sup>45</sup> The new guidelines essentially transferred the sentencing power from judges to prosecutors.<sup>46</sup> Prosecutors were now able to circumvent the guidelines with the charges they filed, plea negotiations, and motions for sentence departures.<sup>47</sup> Although not the USSC's intention, the sentencing disparities widened because the sentence advantage associated with a negotiated plea or departure (e.g. acceptance of responsibility or substantial assistance) varied based on the influence of legally irrelevant defendant characteristics, such as ethnicity.<sup>48</sup>

In recent years, there have been several cases challenging the constitutionality and impact of sentencing guidelines.<sup>49</sup> One of these cases, *United States v. Booker*, set a new standard of how sentencing guidelines are to be used.<sup>50</sup> *Booker* addressed two distinct issues: (1) whether imposing an enhanced sentence under the U.S. Sentencing Guidelines, based on a judicial determination, violates the Sixth Amendment, and if it does, (2) whether Sentencing Guidelines are unconstitutional.<sup>51</sup> The Supreme Court stated that "the Sixth Amendment right to a jury trial requires that, other than a prior conviction, only facts admitted by a defendant or proved beyond a reasonable doubt to a jury may be used to calculate a sentence whether the defendant has pleaded guilty or been convicted at trial."<sup>52</sup> This decision limited judicial sentencing discretion of sentencing to facts that are either explicitly stated or

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establishing sentencing policies and practices).

45. See U.S. Sentencing Commission, 28 U.S.C. § 991(b)(1)(B) (1993).

46. See Keith A. Wilmot & Cassia Spohn, *Prosecutorial Discretion and Real-Offense Sentencing: An Analysis of Relevant Conduct under the Federal Sentencing Guidelines*, 15 CRIM. JUST. POL'Y REV. 324, 325 (2004).

47. See Albonetti, *supra* note 42 (citing to Albonetti's 1997 remarks on the Federal Sentencing Guidelines).

48. Terrance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 159 (1987).

49. See *Mistretta v. United States*, 488 U.S. 361, 361 (1989) (holding that the Sentencing Commission is a constitutional delegation of power to the Executive Branch); see also *Blakely v. Washington*, 542 U.S. 296, 296 (2004) (deciding on whether the Sixth Amendment right to a jury trial applied to the federal sentencing guidelines).

50. See generally *United States v. Booker*, 543 U.S. 220 (2005) (resolving the same issue found in *Blakely*).

51. *Id.* at 221-23.

52. *Id.* at 244.

adjudicated to be true.<sup>53</sup> The opinion of the Justices also rendered the federal sentencing guidelines as essentially advisory.<sup>54</sup>

#### IV. PROSECUTORIAL DISCRETION AND ITS DISPROPORTIONATE IMPACT ON BLACK WOMEN

Prosecutors often hold more power than judges because they set the tone for the charges sought and the correlated sentencing. The efforts used to control the influence exerted by actors of the criminal justice system are usually one-sided at best. Under the “hydraulic displacement” of discretion model, determinant sentencing practices limit judicial discretion, but do not directly regulate prosecutorial discretion.<sup>55</sup> Further, this particular model “undermines the goals of sentencing neutrality and uniformity through greater differentiation in the type of person who receives the plea concessions” by measuring the person’s social profile.<sup>56</sup> Under this model, the prosecutor controls every aspect of the offender’s initial processing.<sup>57</sup>

The social profiles of Black female offenders vary from person to person (e.g. geographic location and socioeconomic status).<sup>58</sup> Some Black female offenders come from broken homes, while other black female offenders are college educated.<sup>59</sup> “Notwithstanding blatant bias, Black women also [battle] a general presumption of their guilt, owing to commonly held notions of their low character and lack of morality, as well as to the popularity of racialized caricatures depicting their purported fiendish, criminal ways.”<sup>60</sup> There is a presumption of guilt even when there is no supporting evidence.<sup>61</sup> In the case of Dorothy Gaines, federal prosecutors pursued charges against

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53. *Id.*

54. See U.S. SENT’G COMM’N, SELECTED SUPREME COURT CASES ON SENTENCING ISSUES 31 (2014), [http://www.uscc.gov/sites/default/files/pdf/amendment-process/Supreme\\_Court\\_Cases.pdf](http://www.uscc.gov/sites/default/files/pdf/amendment-process/Supreme_Court_Cases.pdf).

55. See Miethe, *supra* note 48, at 157.

56. *Id.* at 160.

57. See Albonetti, *supra* note 43.

58. See generally *President Commutes Sarasota Woman’s Life Sentence*, CAN-DO CLEMENCY, <http://www.candoclemency.com/cheryl-howard/> (last visited June 16, 2017); see also *Dorothy Gaines*, THE SENT’G PROJECT, <http://www.sentencingproject.org/stories/dorothy-gaines/> (last visited, June 15, 2017) [hereinafter, *Dorothy Gaines*].

59. *Dorothy Gaines*, *supra* note 58.

60. Kali Nicole Gross, *African American Women, Mass Incarceration and the Politics of Protection*, 102 J. AM. HIST. 25, 28 (2015).

61. See *Dorothy Gaines*, *supra* note 58.



her even though their state counterparts had dropped their own.<sup>62</sup> Local police in Mobile, Alabama raided the home that she shared with her three children looking for drugs in August 1993.<sup>63</sup> Although she maintained that she had no knowledge that her then boyfriend, Terrel Hines, was dealing crack cocaine, she was under suspicion because of her affiliation with him.<sup>64</sup> Federal prosecutors moved forward with their case against her and the court sentenced her to 19 years and seven months for conspiracy to sell drugs.<sup>65</sup> Although she claimed her innocence throughout the entire adjudication process, this single mother with a clean criminal record was still convicted because of her romantic partner's dealings.<sup>66</sup> In 2000, President Bill Clinton commuted her sentence.<sup>67</sup>

Sadly, Dorothy did not learn about racism from her southern upbringing, but from the American criminal justice system. In an interview, Dorothy stated the following: "We teach racism in those systems. I wasn't taught prejudice as a youth, didn't notice it in Putnam, [Alabama], but after seeing the sentencing disparities, I began to see it for the first time."<sup>68</sup> When viewed through the lenses of CRF, the world judged Dorothy as a Black person, a woman, and a mother rather than objectively taking stock of the underlying facts.<sup>69</sup>

*A. Downward Departures of Sentencing through Subjective Standards that Negatively Impact Black Women*

The sentencing guidelines allow prosecutors to depart from recommended sentences.<sup>70</sup> A downward departure indicates that a defendant may receive a sentence below the statutory minimum.<sup>71</sup> Two methods that are often used in drug offense cases are voluntary disclosure and cooperation. Voluntary

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62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.*

68. Chuck Armsbury, *Dorothy Gaines: Guilt by Association*, THE NOV. COAL. (1998), <http://www.november.org/thewall/cases/gaines-d/gaines-d.html>.

69. *See* Schiffer, *supra* note 12, at 1207.

70. *See* U.S. SENT'G COMM'N, GUIDELINES MANUAL, § 5K1-5K2.2(a) (2004), <https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2004/manual/gl2004.pdf>.

71. *See* United States v. Li, 206 F.3d 78, 89 (1st Cir. 2008) (stating that the statutory minimum is the starting point of downward departures).

disclosure permits a downward departure when a person has voluntarily disclosed information and has accepted responsibility for the offense prior to offense discovery.<sup>72</sup> In other words, the discovery of the defendant's illegal conduct cannot be imminent when the defendant discloses information about the offense if the defendant wants to get a downward departure because of voluntary disclosure.

Cooperation requires that the defendant provide "substantial assistance" to the authorities in the investigation or prosecution of another person.<sup>73</sup> This approach is subjective because the defendant must convince the prosecuting attorney that he or she has provided substantial assistance.<sup>74</sup> Further, the prosecutor has discretion to decide whether or not to offer a cooperation option.<sup>75</sup> If the court decides to go below the mandatory minimum sentence, only causes related to the substantial assistance provided by the offender are considered.<sup>76</sup>

Family ties and responsibility are factors that are often overlooked in sentencing.<sup>77</sup> Moreover, how these details are considered is extremely subjective.<sup>78</sup> In society, women traditionally take on greater roles within the familial structure, and this role often dictates the type of offense a woman commits and the woman's rate of recidivism.<sup>79</sup> For example, a mother with limited income may steal diapers from a local grocery store because she does not have enough money to cover food and other basic living expenses. It is not uncommon for Black women to serve as the head of their household, with their male counterparts absent due to incarceration.<sup>80</sup> Allowing factors,

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72. See U.S. SENT'G COMM'N, GUIDELINES MANUAL, § 5K2.16.

73. See *id.* at § 5K1.1.

74. See *id.*

75. See *id.*

76. See Sterling, *supra* note 34.

77. See Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 *Yale J.L. & FEMINISM* 291, 291 n.1 (2002); see also U.S. SENT'G COMM'N, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES (2003), <http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/departures/2003-10-rtc-downward-departures/depart rpt03.pdf> (noting that Congress advised against considering family ties, responsibilities, education or vocational skills as determinant sentencing factors, merely to "guard against the inappropriate use of incarceration for those defendants who lack education, employment and stabilizing ties").

78. See Gertner, *supra* note 77, at 295.

79. See *id.* at 293.

80. See *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/criminal-justice-fact-sheet/> (last visited June 15, 2017) (reporting that one in six black men had been incarcerated as of 2001, and if current trends continue, one in three black males

such as family ties and responsibilities, to be considered subjectively during sentencing may impact the frequency with which prosecutors and judicial officers seek and impose prison time versus reduced sentences.

*United States v. Pereira* established a standard of “irreplaceable” care and thereby forced the offender to prove how vital her role was to her family.<sup>81</sup> Because the level of responsibility should be “extraordinary,” women traditionally benefit from this form of downward departure more than men.<sup>82</sup> Women serve as the primary caretakers in most instances and by default are viewed as bearing the brunt of the domestic load. However, this assumption does not extend to Black women, despite how commonly they assume the head-of-household role, and this places them at a significant deficit during sentencing.<sup>83</sup> Although statistics clearly show that the majority of Black households are led by single mothers<sup>84</sup>, overarching legal practices prevent these mothers from being viewed as anything other than common criminals, especially when it comes to the War on Drugs. Consequently, stereotypes of Black women being “unfit mothers” only serve to reinforce the gender and racial bias present in the criminal justice system.<sup>85</sup>

#### B. Ability to Increase Oppression Through Inapplicable Safety Valve Provisions and Prosecutorial Enhancement

The ability of a prosecutor to lengthen the sentence given to an offender has long since been abused and used against Black females. Prosecutorial enhancements allow prosecutors to increase the length of sentences beyond the base level.<sup>86</sup> Factors that are considered when assigning enhancements are: (1) the base level offense, (2) the criminal history of the defendant, and

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born today can expect to spend time in prison during his lifetime).

81. *United States v. Pereira*, 272 F.3d 76, 76 (1st Cir. 2001).

82. See Gertner, *supra* note 77, at 298.

83. See Amy S. Farrell, Dissertation, *The Effect of Gender and Family Status on Downward Departures in Federal Criminal Sentences*, NAT’L CRIM. JUST. REV. SER. 1, 18 (Apr. 21, 2003), <https://www.ncjrs.gov/pdffiles1/nij/grants/199684.pdf> (finding that Black women are disproportionately targeted for prenatal substance abuse investigations due to the stereotype that Black women are “unfit” mothers).

84. JONATHAN VESPA, JAMIE M. LEWIS & ROSE M. KREIDER, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2012, (August 2013), <https://www.census.gov/prod/2013pubs/p20-570.pdf>.

85. Breea C. Willingham, *Black Women’s Prison Narratives and the Intersection of Race, Gender and Sexuality in U.S. Prisons*, 23 CRITICAL SURV. 55, 55-66 (2011).

86. See *id.* at 2; see also H.R. REP. NO. 103-460, at 4 (1994).

(3) the zones based on the sentencing table.<sup>87</sup> Enhancements also apply in situations where the offense includes the abuse of a position of trust or use of a special skill, use of a minor to commit a crime, or use of body armor in drug trafficking crimes or crimes of violence.<sup>88</sup>

Although there were provisions created to place restrictions on sentencing, Black female offenders regrettably did not benefit from these measures. During the infancy of the sentencing guidelines, there were many first time low-level and nonviolent drug offenders receiving the mandatory sentence.<sup>89</sup> Unfortunately, this resulted in sentences that did not fit the crime because many of the overlooked the offender's history.<sup>90</sup> To remedy this situation, the Sentencing Commission added a "safety valve provision", which takes an offender's prior criminal history into account when deciding sentences. Once the other sentencing criteria are satisfied, the safety valve provision is applied as a means of mitigating the severity of the sentencing guidelines.<sup>91</sup>

A person qualifies for a safety valve if:

- (1) [S]he does not have more than one criminal history point;
- (2) [S]he did not use violence or possess a dangerous weapon or induce another person to do so;
- (3) The offense did not result in death or bodily injury;
- (4) [S]he was not the organizer, leader, manager or supervisor; and
- (5) Before sentencing, [s]he has truthfully provided to the government all of the information and evidence [s]he had concerning the offense or offenses that were part of the same course of conduct or common scheme or plan.<sup>92</sup>

Safety valve provisions were purported to decrease the impact of allotted punishments, but Black women only saw negative effects. A defendant's previous criminal record is the basis for the system of criminal history point

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87. See Willingham, *supra*, note 85, at 3.

88. See *id.*

89. See 18 U.S.C. § 3553(f) (1994); see also U.S. SENT'G. GUIDELINES MANUAL § 5C1.2 (1994).

90. See 18 U.S.C. § 3553(f) (1994); see also U.S. SENT'G. GUIDELINES MANUAL § 5C1.2 (1994).

91. See *Safety Valves in a Nutshell*, FAM. AGAINST MANDATORY MIN. (July 17, 2012), <http://famm.org/wp-content/uploads/2013/08/FS-Safety-valves-in-a-nutshell-6.27.pdf> (last visited June 16, 2017) (noting that mandatory minimums apply to the offense no matter the circumstances, and each year, about one quarter of federal drug offenders receive the benefit of the safety valve).

92. See *id.* (noting that 80,000 federal drug offenders have received the safety valve since 1995, and as a result, have saved the government \$28,000 per prisoner every year).

qualification.<sup>93</sup> For every prior conviction, including juvenile convictions, of at least 60 days or an offense committed during periods of incarceration, probation, parole, supervised release, or prison escape, a defendant is assigned two or more points.<sup>94</sup> Only one point is given for all other state and/or prior convictions, outside of specific exceptions.<sup>95</sup> The mandatory nature of such sentencing systems and the forced requisites make it impossible for certain persons to receive intended benefits.<sup>96</sup> As a result, similar to the prior bad acts application found in the rules of criminal procedure, safety valve provisions are in effect a weapon of prejudice and bias, and thus, a form of adjudicated racial profiling that occurs because of blatant characterization.<sup>97</sup>

*C. To Plea or Not to Plea: The Negative Impact of Plea Bargaining on Black Women*

Plea bargains have the greatest impact on cases related to drug crimes. In fact, 97% of drug convictions were concluded through plea bargains in 2012.<sup>98</sup> When negotiating plea bargains with drug offenders, prosecutors must take into account various factors, including the type of plea agreement; whether the agreement is binding; and whether, and how, the agreement may

93. See *Federal Mandatory Minimum Sentences: The Safety Valve and Substantial Assistance Exceptions*, CONG. RES. SERV. 1, 3 (Aug. 25, 2015), [https://www.everysrsreport.com/files/20150825\\_R41326\\_1ad9269b65cd54cd7fd1e804fecce050a0a591a0.pdf](https://www.everysrsreport.com/files/20150825_R41326_1ad9269b65cd54cd7fd1e804fecce050a0a591a0.pdf).

94. See *id.*

95. See *id.*; see e.g., *United States v. Brooks*, 722 F.3d 1102, 1108 (8th Cir. 2013) (holding that the calculation also includes any sentence imposed for any conduct that was not a part of the initial offense); see generally U.S. SENT'G GUIDELINES MANUAL §§ 4A1.1(c), 4A1.2 (2004), <https://www.uscc.gov/sites/default/files/pdf/guidelines-manual/2004/manual/gl2004.pdf>.

96. See *Safety Valves*, *supra* note 91.

97. See *Racial Profiling*, AM. C.L. UNION, <https://www.aclu.org/issues/racial-justice/race-and-criminal-justice/racial-profiling> (last visited Sept. 2, 2017) (remarking that racial profiling is patently illegal and violates the U.S. Constitution's core promises of equal protection under the law); Mikah K. Thompson, *Blackness as Character Evidence*, 20 MICH. J. RACE & L. 321, 326 (2015); see also Nina Totenberg, *U.S. Supreme Court Decides 3 Cases Involving Race*, NAT'L PUB. RADIO (May 23, 2016, 8:17 PM), <http://www.npr.org/sections/thetwo-way/2016/05/23/479240531/u-s-supreme-court-decides-three-cases-involving-race>.

98. See Jamie Fellner, *An Offer You Can't Refuse: How Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUM. RTS. WATCH (Dec. 5, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead>.

limit the consideration of the defendant's conduct or other certain germane conduct.<sup>99</sup> The prosecutor may also include penalties, such as jail time and/or fines, in the plea bargain, and these plea bargains often have a negative effect on drug offenders.<sup>100</sup>

In fact, plea bargains have such a large effect on drug offenders that the Human Rights Watch was prompted to conduct a study in 2013 that reviewed how plea bargains affected federal drug offenders.<sup>101</sup> The study found that plea bargaining, used as a measure for resolving federal drug cases, raised significant human rights concerns.<sup>102</sup> Specifically, the study found that since prosecutors can charge or threaten to charge offenses that carry high sentences, they use plea bargaining as an instrument to force defendants to plead guilty and punish defendants who choose to go to trial.<sup>103</sup> As a result, defendants who choose to go to trial get sentences that average eleven years longer than the sentences given to defendants who plead guilty.<sup>104</sup>

This point is illustrated in the case of LaShonda Hall, a Black woman convicted of a drug offense in Tennessee.<sup>105</sup> Ms. Hall was initially charged with conspiracy to distribute powder cocaine and crack cocaine; a charge that carried a ten-year sentence.<sup>106</sup> However, when she refused to take a plea bargain, the prosecutors filed an intervening indictment, which increased the drug counts and added two weapons counts.<sup>107</sup> Ms. Hall still chose to go to trial and was ultimately convicted and sentenced to 548 months (45.6 years) in prison.<sup>108</sup> However, in February 2013, Ms. Hall and two other co-defendants attempted to fight back by appealing the case.<sup>109</sup> The appeal alleged prosecutorial misconduct and stated that the duplicitous charges in the altered indictment denied them a fair trial by allowing them to

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99. See Sterling, *supra* note 34.

100. See FED. R. CRIM. P. 11(e)(6).

101. See Fellner, *supra* note 98.

102. See *id.*

103. See *id.*

104. See Carrie Johnson, *Report: Threat of Mandatory Minimums Used to Coerce Guilty Pleas*, NAT'L PUB. RADIO: THE TWO WAY, <http://www.npr.org/sections/thetwo-way/2013/12/05/248893775/report-threat-of-mandatory-minimums-used-to-coerce-guilty-pleas> (last updated Dec. 5, 2013, 9:30 AM).

105. See *United States v. Briddy*, No. 3:07-CR-51, 2007 U.S. Dist. LEXIS 47150, at \*1-2 (E.D. Tenn. June 28, 2007).

106. See *United States v. Martin*, 516 Fed. App'x 433, 437 (6th Cir. 2013).

107. See *id.* at 439.

108. See *id.*

109. See *id.*

be convicted twice for the same offense, *i.e.* double jeopardy.<sup>110</sup> Nevertheless, the judges upheld the defendants' convictions and Ms. Hall remains imprisoned.<sup>111</sup>

Ms. Hall is just one example of the many Black women that continue to be mistreated by the criminal justice system in America due to systemic racial bias and unfettered prosecutorial discretion. Ms. Hall was not seen as a person but more as a means to an end. When the prosecutor decided to enhance the charges against her to include a higher penalty, they infringed on her constitutional rights and denied her a fair and just process, and yet again, another Black women became a casualty at the hands of the greatest weapon of the War on Drugs – the criminal justice system.

#### V. THE EXECUTIVE BRANCH'S IMPACT ON THE WAR ON DRUGS AND SENTENCING DISPARITIES (1991 TO 2017)

Presidents have far more influence over drug policy than most Americans believe. The President's agendas and goals are often reflected in the political climate. President George H.W. Bush (1988-1992) followed precedent set by Ronald Reagan by signing ADA II into law.<sup>112</sup> The aforementioned statute created the Office of National Drug Control Policy (hereinafter "ONDCP"), which runs the federal government's anti-drug programs.<sup>113</sup> Then President Bush also appointed the first Drug Czar, William Bennett, who sought to make drug use "socially unacceptable."<sup>114</sup>

However, as the presidency passes from one person to another, the policies also change. Although running on a platform that touted drug treatment over incarceration during his campaign, Bill Clinton failed to keep his promise and instead appeared to escalate the War on Drugs.<sup>115</sup> President Clinton signed the North American Free Trade Agreement (hereinafter "NAFTA") on December 8, 1993.<sup>116</sup> While the intent was to increase the amount of trade between the United States and Mexico, NAFTA also made it more

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110. *See id.* at 444-45 (noting that under double jeopardy, a person cannot be charged for the same offense twice).

111. *See id.* at 439.

112. *See Timeline: America's War on Drugs*, NAT'L PUB. RADIO (Apr. 2, 2007, 5:56 PM), <http://www.npr.org/templates/story/story.php?storyId=9252490>.

113. *See id.*

114. *See id.*

115. *See id.*

116. *See NAFTA Signed into Law*, HIST. CHANNEL: THIS DAY IN HIST., <http://www.history.com/this-day-in-history/nafta-signed-into-law> (last visited Dec. 14, 2017).

difficult for customs officers to find narcotics that were being moved across the border.<sup>117</sup>

Moreover, in 1995 during President Clinton's presidency, the United States Sentencing Commission acknowledged the racial disparity created by the sentencing guidelines.<sup>118</sup> As a result, the commission recommended that the sentencing discrepancy between crack cocaine and powder cocaine be eliminated.<sup>119</sup> Yet, for the first time since its creation, Congress rejected the recommendation of the USSC and thereby continued to feed the racial biases present in federal sentencing.<sup>120</sup>

The George W. Bush administration made very little progress.<sup>121</sup> In fact, under his regime there was a drastic increase in the use of domestic drug law enforcement.<sup>122</sup> During his presidency there were close to 40,000 paramilitary-style Special Weapons and Tactic (hereinafter "SWAT") raids conducted annually for primarily non-violent drug offenses, which often were misdemeanors.<sup>123</sup> These SWAT raids caused many to fear for their lives in their own homes.<sup>124</sup> The Illicit Drug Anti-Proliferation Act, passed in the same time frame as the SWAT raids, addressed the increased use and trafficking of ecstasy, predatory drugs<sup>125</sup>, and methamphetamines.<sup>126</sup>

In contrast, President Barack Obama's administration caused controversy during his two terms in office because of his approach to sentencing reform. On December 8, 2010, he signed the Fair Sentencing Act of 2010, which reduced the sentencing disparity between crack and powder cocaine from

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117. See *Timeline*, *supra* note 112.

118. See *id.*

119. See *id.*

120. See *id.*

121. See *id.*

122. See Radley Balko, *Overkill: The Rise of Paramilitary Police Raids in America*, CATO INST. (July 17, 2006), <https://www.cato.org/publications/white-paper/overkill-rise-paramilitary-police-raids-america>.

123. See *id.*

124. See *id.* (recognizing that SWAT teams cause more harm than just death or injury).

125. Errol J. Chavez, Special Agent in Charge, Drug Enforcement Administration Phoenix Division, Closing Speech at the 2003 Third Annual Arizona Drug Court Conference (Apr. 30, 2003), <https://www.dea.gov/pr/speeches-testimony/2003/s043003p.html> (noting that predatory drugs are often used in crimes of sexual assault and violence, and the most common forms of predatory drugs include Rohypnol, GHB, and Ketamine).

126. See *Timeline*, *supra* note 112.



100:1 to 18:10.<sup>127</sup> Critics of President Obama said he merely “dipped his toe” into the pool of sentencing reform because the act only applied to new cases and was not retroactive.<sup>128</sup> However, the measure was an improvement since the former sentencing guidelines subjected tens of thousands of Black offenders to lengthy prison terms for crack cocaine convictions while giving more lenient sentences to those caught with powder cocaine.<sup>129</sup> Conversely, the former sentencing guidelines increased the race disparity in prisons because people who are convicted for offenses involving powder cocaine are more likely to be white.<sup>130</sup>

Moreover, December 15, 2013, marked the day that former offenders were recognized as victims of the federal criminal justice system. On this day, President Obama commuted the sentence of eight inmates who had served at least 15 years for crack cocaine crimes, and pardoned 13 others.<sup>131</sup> Obama wrote, in regards to his decision to release these individuals: “because of disparity in the law that is now considered unjust, they remain in prison, separated from their families and their communities, at the cost of millions of taxpayer dollars each year.”<sup>132</sup> At the end of his last term, President Obama had commuted the sentences of 1,715 prisoners, which is more than any other U.S. President on record.<sup>133</sup> Several of these commuted sentences belonged to people who had fallen victim to the harsh penalties of the War on Drugs.<sup>134</sup>

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127. *Fair Sentencing Act*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/feature/fair-sentencing-act?redirect=fair-sentencing-act> (last visited June 16, 2017).

128. See Liz Halloran, *How Long is Too Long? Congress Revisits Mandatory Sentences*, IT’S ALL POL. (Jan. 9, 2014, 11:42 AM), <http://www.npr.org/sections/itsallpolitics/2014/01/08/260797831/how-long-is-too-long-congress-revisits-mandatory-sentences>.

129. See *id.*

130. See *id.*

131. See Nedra Pickler, *Obama Commutes Sentences for 8 Drug Convictions*, SAN DIEGO TRIB. (Dec. 19, 2013), <http://www.sandiegouniontribune.com/sdut-obama-commutes-sentences-for-8-drug-convictions-2013dec19-story.html>.

132. See *id.*

133. See *Clemency Statistics*, DEP’T. OF JUST., <https://www.justice.gov/pardon/clemency-statistics> (last visited June 16, 2017); see also John Gramlich & Kristen Bialik, *Obama Used Clemency Power More Often than Any President Since Truman*, PEW RES. CTR. (Jan. 20, 2017), <http://www.pewresearch.org/fact-tank/2017/01/20/obama-used-more-clemency-power/>.

134. See Ed Pilkington & Laurence Mathieu-Léger, *Gift of Freedom: How Obama’s Clemency Drive Tackled Aftermath of ‘War on Drugs’*, THE GUARDIAN (Jan. 12, 2017, 6:00 PM), <https://www.theguardian.com/us-news/2017/jan/12/obama-clemency-pardons-commutations-war-on-drugs> (noting that most of the 1,324 individuals with

In contrast, since taking office President Donald Trump has widened the racial divide in this country and has exposed the prejudice that was thought to be gone ages ago.<sup>135</sup> His appointment of Jeff Sessions as the Attorney General marks the resurrection of the War on Drugs.<sup>136</sup> This draws a comparison to the days when President Richard Nixon used fear and political hysteria to polarize the country.<sup>137</sup> Although opioid usage has increased, the current administration is seeking to focus on what is referred to as “gateway drugs”.<sup>138</sup> Gateway drugs, such as marijuana, are seen as the first step down a path of addiction towards much harsher drugs, such as heroin and cocaine.<sup>139</sup> Attorney General Sessions also recently ordered federal prosecutors not to follow the Smart on Crime Initiative commenced during the Obama administration.<sup>140</sup> Sessions’ order will “incarcerate more people engaged in the lower levels of the drug trade, and exacerbate racial and ethnic

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sentences commuted were serving harsh prison sentences for non-violent, small drug offenses).

135. See Sophia A. Nelson, *How Trump Can Bridge the Racial Divide*, CNN (Feb. 22, 2017, 9:01 PM), <http://www.cnn.com/2017/02/22/opinions/trump-bridge-racial-divide-nelson/index.html>.

136. See Sari Horwitz, *How Jeff Sessions Wants to Bring Back the War on Drugs*, WASH. POST (Apr. 8, 2017), [https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3\\_story.html?utm\\_term=.d61193582d37](https://www.washingtonpost.com/world/national-security/how-jeff-sessions-wants-to-bring-back-the-war-on-drugs/2017/04/08/414ce6be-132b-11e7-ada0-1489b735b3a3_story.html?utm_term=.d61193582d37).

137. See Krish Lingala, *Trump’s Opioid Plan and the Bones of the War on Drugs*, PAC. STANDARD (Apr. 3, 2017), <https://psmag.com/news/trumps-opioid-plan-and-the-bones-of-the-war-on-drugs>.

138. *Id.*

139. See generally *Is Marijuana a Gateway Drug?*, NAT’L INST. ON DRUG ABUSE, <https://www.drugabuse.gov/publications/research-reports/marijuana/marijuana-gateway-drug> (last updated Apr. 2017).

140. See Kara Gotsch & Marc Mauer, *Jeff Sessions Decision to Re-up in the Drug War Won’t Work*, THE HILL (May 14, 2017, 1:00 PM), <http://thehill.com/blogs/pundits-blog/crime/333333-jeff-sessions-decision-to-re-up-in-the-drug-war-wont-work> (finding that the Smart on Crime policy led to prosecutors focusing on more serious cases instead of using mandatory minimums for non-violent crimes); see also *The Attorney General’s Smart on Crime Initiative*, U.S. DEP’T JUST. (Mar. 9, 2017), <https://www.justice.gov/archives/ag/attorney-generals-smart-crime-initiative> (stating that the Justice Department developed five goals during a review of the criminal justice system, including “to ensure finite resources are devoted to the most important law enforcement priorities; to promote fairer enforcement of the laws and alleviate disparate impacts of the criminal justice system, to ensure just punishments for low-level, nonviolent convictions; to bolster prevention and reentry efforts to deter crime and reduce recidivism and to strengthen protections for vulnerable populations.”).

disparities in the federal criminal justice system.”<sup>141</sup> The revolving doors of the White House bring new leadership and new policies with each administration. The personal agendas of the members of the Executive Branch have time and again established a stagnant cycle that has kept the country’s drug crisis from being fully alleviated, and thus, has continued to push the Black female offender to the wayside.

## VI. THE FUTURE OF SENTENCING REFORM

Some thirty-three years after the sentencing guidelines were first adopted, Congress is beginning to question their effectiveness.<sup>142</sup> More specifically, Congress is questioning whether the correct offenders are being punished.<sup>143</sup> Even former Attorney General Eric Holder made strides to control the power of his prosecutors.<sup>144</sup> In fact, Holder instructed his federal prosecutors not to pursue mandatory minimum sentences for certain low-level, nonviolent drug offenders.<sup>145</sup> However, like most federal directives, there was no clear direction provided.<sup>146</sup>

New sentencing regulations were finally proposed in 2013, making it a major year for sentencing reform. There were four bills that may have had an immense bearing on sentencing reform. The Smarter Sentencing Bill of 2013 promised to cut by half the five, ten, and twenty year minimums required for first- and second-time drug-sale offenses.<sup>147</sup> The Justice Safety Valve Act of 2013 hoped to return some of the sentencing power back to the judges by allowing them to impose sentences below the minimum guidelines.<sup>148</sup> The Recidivism, Reduction, and Public Safety Act

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141. Gotsch & Mauer, *supra* note 140; *see also* Pete Williams, *Attorney General Sessions Orders Tougher Drug Crime Prosecutions*, NBC NEWS (May 12, 2017, 8:18 PM), <http://www.nbcnews.com/news/us-news/attorney-general-sessions-orders-tougher-drug-crime-prosecutions-n758111>.

142. *See* Halloran, *supra* note 128.

143. *See id.*

144. *See id.*

145. *See* Dan Merica & Evan Perez, *Eric Holder Seeks to Cut Mandatory Minimum Drug Sentences*, CNN (Aug. 12, 2013, 7:03 PM), <http://www.cnn.com/2013/08/12/politics/holder-mandatory-minimums/>.

146. *See id.* (asking federal prosecutors to develop new guidelines and strategies).

147. *See Durbin and Lee Introduce Smarter Sentencing Act*, DICK DURBIN U.S. SEN. ILL. (Aug. 1, 2013), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-and-lee-introduce-smarter-sentencing-act>; *see also* Halloran, *supra* note 128.

148. *See Justice Safety Valve Act*, S. 619, 113th Cong. (2013); *see also* Halloran, *supra* note 128.

(hereinafter “RRPSA”) of 2013 is a bill that focused on the reentry of offenders.<sup>148</sup> The RRPSA also allowed inmates to shorten their prison sentences by participating in reentry programs.<sup>149</sup> Lastly, the Federal Prison Reform Act of 2013 sought to give low-risk prisoners the opportunity to serve up to half of their sentences in home confinement or a halfway house.<sup>150</sup>

The Sentencing Reform Act of 2015 is the latest proposed legislation aimed at changing federal sentencing guidelines.<sup>151</sup> The Act will likely reduce many of the mandatory minimum drug and gun sentences, and may even be retroactive. Further, the Fair Sentencing Act of 2010 will be retroactive and the federal “safety valve” exception will be expanded regarding drug mandatory minimums.<sup>152</sup> Perhaps the most important part of the bill is that it will allow many prisoners to earn time credits for completing rehabilitative programs.<sup>153</sup> However, it is too early to determine what impact the Trump administration will have on the various communities impacted by the War on Drugs.<sup>154</sup>

## VII. CONCLUSION

Not surprisingly, there are several prosecutors who believe the race to reform the sentencing guidelines should be a marathon, and not a sprint. However, this way of thinking leads to society believing that it is acceptable to continue imprisoning non-violent criminals for long periods of time instead of focusing on fixing the laws that put them behind bars in the first

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148. See *Senators Introduce Bipartisan Prison Reform Bill*, SHELDON WHITEHOUSE U.S. SEN. R.I. (Nov. 15, 2013), <https://www.whitehouse.senate.gov/news/release/senators-introduce-bipartisan-prison-reform-bill>; see also Halloran, *supra* note 132.

149. See Halloran, *supra* note 128.

150. See *Cornyn Introduces Federal Prison Reform Based on the Texas Model*, JOHN CORYN U.S. SEN. TEX. (Dec. 9, 2013), [http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord\\_id=0750fd6f-6a79-473b-8af0-d495d283db39](http://www.cornyn.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=0750fd6f-6a79-473b-8af0-d495d283db39); see also Halloran, *supra* note 128.

151. See *Statement on Bipartisan Sentencing Reform Legislation*, U.S. SENT’G COMM’N (Nov. 18, 2015), [www.ussc.gov/about/news/prss-release/november-18-2015](http://www.ussc.gov/about/news/prss-release/november-18-2015).

152. Kara Gotsch, “*After*” the War on Drugs: *The Fair Sentencing Act the Unfinished Drug Policy Reform Agenda*, AM. CONST. SOC’Y FOR L. & POL’Y (Dec. 2011), [https://www.acslaw.org/sites/default/files/Gotsch\\_-\\_After\\_the\\_War\\_on\\_Drugs\\_0.pdf](https://www.acslaw.org/sites/default/files/Gotsch_-_After_the_War_on_Drugs_0.pdf).

153. See *id.*

154. See Gotsch, *supra* note 153 (finding that Session’s recent revocation of the Smart on Crime Initiative from of the Obama Era will likely increase the racial divide within the criminal justice system).

place.<sup>155</sup> Scott Burns, Executive Director of the National District Attorneys Association, feels the reasons behind Congress' efforts to reform the federal justice system are purely financial.<sup>156</sup> He stated, "[t]hey refuse to fund the construction of more prisons".<sup>157</sup> Building more prisons lends to the notion that there is no faith in a system designed to rehabilitate, and this feeling of despair is transferred to the mindset of Black female offenders. During the height of the War on Drugs, the media portrayed Black women participating in these offenses as persons who engaged in behavior that could destroy the delicate fabric of the American culture and the economic well-being of taxpayers, who would eventually be responsible for the care and treatment of their crack-addicted offspring.<sup>158</sup>

The way laws are currently written leave no room for resources, healing, or advancement for the Black female offenders. Instead, the laws encourage an endless cycle of recidivism and little chance of improvement for Black female offenders' socioeconomic status. She, the Black female offender, needs to be aware of her rights and feel empowered enough to stand up for them. Her voice has been silenced for far too long. Even when facing release, the reentry and reintegration programs are limited and relegate her to roles in service industries. Having to check "yes" next to the box on the job application that asks if you have a criminal record reinforces the negative stigma. Simply being able to expunge their records would enable the Black female offender to wear the label of mother and provide for family and no longer be viewed as an ex-con.

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155. See Harris-Perry, *supra* note 2 (stating that this outlook causes the public to believe drug sentences are due to a person's "culture and choices, not structures or policies").

156. See Halloran, *supra* note 128.

157. See *id.*

158. See generally Bush-Baskette, *supra* note 3 (highlighting the role of the media and politics in the War on Drugs).