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STUDENT SCHOLARSHIP

GENDER AND CRIMINALITY

Kolleen Duley*

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I. INTRODUCTION

The study of gender and criminality in the United States has undergone considerable changes since the origins of the critical prison studies movement. Research on criminalized women, in particular, crosses many professional, disciplinary, epistemological, and methodological fields. Therefore, studies on gender and criminality resist any one methodological structure. Despite its complexity, it is imperative to trace literature on gender and criminality in order to progress efforts to advocate for women

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prisoners, gender non-conforming prisoners, and others subjected to criminalization related to gender oppression.

The literature on gender and criminality spans many disciplines and incorporates many simultaneous developments occurring within each discipline. To trace the study of gender and crime, one might start from the rather detached measures articulated in male-dominated research arenas and end with paradigms put forth by feminist criminologists. Yet one would be remiss to consider only gender identity in studying women prisoners. Gender is just one vector of oppression operating in prisons; many activist scholars also recognize prisons as means of racialized social control and state-sanctioned violence. Thus, to adequately study gender and criminality, one must examine work from scholars and activists of multiple disciplines, including feminists, sociologists, historians, and prison abolitionists alike. Chronicling this course, thus, necessitates a bit of jumping around.

It is often difficult to even ascertain a specific point in history from which to begin the analysis of gender in prisons. There have been many forms of imprisonment prior to the establishment of women's penitentiaries as we know them today. For instance, women were imprisoned and suffered gender discrimination in earlier prison systems such as those on American reservations and those during the periods of slavery. Although some researchers do begin their analysis with the birth of the women's penitentiary, this literature review, in an effort to be more comprehensive, includes analysis of earlier forms of incarnation.

Rather than presenting this literature as a mosaic of unconnected histories, I hope to "liberate women prisoners from the criminologists," as called for by Julia Sudbury, in her influential anthology on women's prisons. In turn, I aim to rearticulate the history of gender and criminality from multiple and often conflicting perspectives.¹ I have attempted to contextualize the scholarly literature with its relevant histories. The first section details: 1) studies that articulate and critique the first women's prison and subsequent reform movements and 2) research in gender and criminality. The latter section looks at: 3) studies of police violence against women, sex workers, queers, gender non-conforming and transpeople; 4) studies of gender essentialism in

1. Julia Sudbury, *Introduction: Feminist Critiques, Transnational Landscapes, Abolitionist Visions*, in *GLOBAL LOCKDOWN: RACE, GENDER AND THE PRISON-INDUSTRIAL COMPLEX* xi, xix (2005).

policing and the deployment of neoliberal feminism post-9/11; and 5) research on the interplay between global capitalism, globalization, and imprisonment.

II. WOMEN'S PRISON REFORM MOVEMENT: SCHOLARLY REVIEWS

Organized efforts to address women's criminality began during the early nineteenth century. The ideologies set forth in this period continue to influence literature about gender and criminality.²

Scholar Estelle Freedman's canonical work cataloguing the history of women's prison reform details three different eras: (1) early forms of women's punishment; 2) the growth in understandings of uniquely gendered criminality and efforts to aid "fallen women" by creating women's prisons; and (3) the professionalized women's reform movement and strategies for gender-specific punishment. Both Freedman and scholar Angela Davis present and challenge the theoretical and public discourse surrounding these eras.³

Prior to the organization of formal women's prison and efforts to reform it, women who transgressed gender norms, social mores, or plantation rules were punished by private parties rather than by formal state sanctioned incarceration; women were punished in the home, by the church or by a slave master and/or his agents.⁴ As a starting point, it is important to note that efforts to alleviate the suffering of incarcerated women during the nineteenth century were on behalf of white women. As Angela Davis reminds us, early attention to the plight of women prisoners was paralleled by the atrocious sexualized punishment of Black women under the system of African American slavery.⁵ As slaves, they "were directly and often brutally disciplined for conduct considered perfectly normal in context of freedom."⁶ The gendered nature of punishment for slave women included

2. E.g., ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 74 (2003) [hereinafter DAVIS, *ARE PRISONS OBSOLETE?*] (discussing the "difference" approach discussed in this paper).

3. See generally *id.*; ESTELLE B. FREEDMAN, *THEIR SISTERS KEEPERS* (1981).

4. FREEDMAN, *supra* note 3, at 10.

5. DAVIS, *ARE PRISONS OBSOLETE?*, *supra* note 2, at 69.

6. *Id.* at 67.

forced reproduction through rape and penalties reserved for pregnant women who did not meet work quotas.⁷

Colonialism, white supremacy, slavery, patriarchy, and economic exploitation were coeval with the rise of the women's prison movement.⁸ During this time period, ongoing punishment practices against Native American women continued. Punishment in their communities also included rape and sexual mutilation.⁹

The punishment for the few and mostly white women charged with committing public order crimes included penance and possibly jail time. Freedman suggests that the use of incarceration was limited because women were seen as having few political and economic liberties to be revoked.¹⁰ Unlike men, who most often committed crimes against people and property, most women's crimes were considered crimes against public order.¹¹ Women were sent to jail for crimes against sexuality-based norms and moral codes, most often petty theft, street crimes, and prostitution.¹² During this period, women served their time – often in cruel conditions and often in men's prisons where they were subject to sexual abuse – and then returned to society.¹³

The first efforts of formal incarceration were aimed at saving women designated as irredeemable and outside the sphere of acceptable womanhood.¹⁴ Whereas before, women who committed "crimes against chastity" might have repented, served their punishment, and then returned to society, the nineteenth century capitalist codes of stricter morality suggested that women's sexual desire and "impurity" had the power to "unleash the social disintegration which sexuality symbolized."¹⁵ Victorian era codes

7. *Id.* at 68. For example, Davis cites the slave narrative of Moses Grandy, who describes a form of whipping. *Id.* Davis describes it as "an especially brutal form of whipping. . . in which the woman was required to lie on the ground with her stomach positioned in a hole, the purpose of which was to safeguard the fetus [conceived as future slave labor]". *Id.*

8. See generally SHERENE RAZACK, *What Is to Be Gained by Looking White People in the Eye? Race in Sexual Violence Cases*, in *LOOKING WHITE PEOPLE IN THE EYE: GENDER, RACE, AND CULTURE IN COURTROOMS AND CLASSROOMS* 56 (1998).

9. ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* 11, 23 (2005).

10. FREEDMAN, *supra* note 3, at 10.

11. *Id.* at 11.

12. *Id.*

13. DAVIS, *ARE PRISONS OBSOLETE?*, *supra* note 2, at 69.

14. See FREEDMAN, *supra* note 3, at 17.

15. *Id.* at 20-21.

of morality created new categories of crime that disproportionately affected women.¹⁶ New crimes against chastity and/or decency arose and applied exclusively to women.¹⁷ Crimes for lewd and lascivious carriage, fornication and adultery, for example, were applied to more women than men.¹⁸ Men in prison, conversely, were seen as having violated social coders and could redeem their rights and liberties through “self reflection, religious study, and work.”¹⁹ Because women were not seen as having such rights, they were ineligible for redemption.²⁰ These new trends and understandings of female criminalization signaled a significant departure from the idea that women could repent and be redeemed. Rather, the new moral standards led to a category of permanent female criminals. Freedman summarizes the shift: “No longer the perpetrator of a single immoral act, those who crossed the boundary of chastity gained a lifetime identity as a ‘fallen woman’.”²¹

Throughout the nineteenth century, the mostly white and middle class liberal Protestant, Quaker, and Unitarian women prisoner reformers challenged the fallen woman’s hopeless depravity and “substituted an indictment of society and particularly of men for causing her fall.”²² Rather than challenging the notion of the fallen woman, they simply suggested that she could be saved.²³

The second stage of reform established separate women’s prisons with women police matrons, based on the idea that women were best served by “same sex counsel.”²⁴ With “feminine influence to bear, fallen women could be redeemed and made into true women.”²⁵ Woman’s superior “moral force” alone qualified her for this previously male-dominated profession.²⁶ A female custodial staff would “minimize the sexual temptations, which [reformers] believed were often at the root of female criminality.”²⁷ Reformers established “homes” with “softening influ-

16. *Id.* at 14.

17. *Id.*

18. *Id.*

19. Davis, *Are Prisons Obsolete?*, *supra* note 2, at 69-70.

20. *Id.* at 70.

21. Freedman, *supra* note 3, at 14.

22. *Id.* at 45.

23. Davis, *Are Prisons Obsolete?*, *supra* note 2, at 70.

24. Freedman, *supra* note 3, at 58.

25. *Id.* at 45.

26. *Id.* at 61-63.

27. Davis, *Are Prisons Obsolete?*, *supra* note 2, at 70.

ences" like "flowers, farm animals, music and visits to the infant nursery" where "feminine employments such as sewing, laundry, cleaning and habits of neatness and industry" replaced the banned habits of "profanity, tobacco, alcohol and coarse behavior."²⁸

Freedman suggests two failures of domestication prison models; first, reformers' insistence on woman's innate sexual difference and superior morality "limited their power and stifled the inmates they sought to aid."²⁹ Second, she argues that the reforms were actualized in accordance with the more punitive penal ideals of the time, based on control rather than camaraderie.³⁰ On the other hand, Davis' critique suggests that efforts to save criminalized women through forced domestication failed because, in effect, they steered poor women (and especially poor Black women) into "free world" jobs in domestic service.³¹ Instead of becoming skilled stay-at-home wives and mothers, many women prisoners, upon release, became maids, cooks, and washwoman for more affluent women.³² Thus, women's patriarchal role in performing household duties, though differentially applied to white women and women of color, was left unchallenged. Instead, women's domestic role in the family was taken as natural.³³

Women's prison reform movements of the twenty-first century confront prisons that function to incapacitate, rather than rehabilitate. These new movements in the third era have put forth conservative, liberal reformist, and radical abolitionist critiques of prisons. Davis suggests that in contrast to prior efforts, recent reform efforts situate women's equality with men as the basis for reform.³⁴ She argues that the modern "separate-but-

28. Freedman, *supra* note 3, at 54-55.

29. *Id.* at 2.

30. Because of poor planning, inadequate resources, and lack of space, the plan for a "cottage style" prison was actualized as a "bastille-like structure" where the goals of reformers soon came to match the penal interests of the period, with few exceptions. *Id.* at 70-72. Many of the women prison administrators of this period gained control and legitimacy because their goals matched those of their male counterparts who utilized punishment as the mainstay of prison programming. *Id.* at 72. Rather than the sisterhood paradigm that structured the early reformers, many of these administrators spoke about the need to control women prisoners, which came into fruition through the more consistent use of corporeal punishment, solitary confinement, and merit-based behavioral programs. *Id.* at 97-100.

31. DAVIS, ARE PRISONS OBSOLETE?, *supra* note 2, at 70.

32. *Id.* at 70.

33. *Id.* at 71.

34. *Id.* at 74.

equal" approach has led to more repressive prisons as articulated by *The Warden Wore Pink*, a warden's "feminist" approach to prisons.³⁵

Research on recent efforts to address the needs of women prisoners by creating gender-responsive prisons illuminates such problems. "Gender-responsive" policy proposals put forth in California, for example, are ostensibly aimed at creating an environment in women's prisons "based on safety, respect, and dignity."³⁶ But it fails to do so because policy framers base their theories on inadequately static and uniform psychological theories of female moral development. They believe that woman's strengths include "her ability to care, empathize, use her intuition, and build relationships."³⁷ In developing theories that cater to those characteristics, they failed to account for the varied experiences and actual strengths of many women, especially those of women of color. Not only are these theories used to support the seemingly contradictory idea that prisons can be changed into a "women-specific therapeutic environment" but that all women would be healed by one-dimensional and universalizing theories of "moral development."³⁸ In this sense, they hope that women will work to attain proper [white] womanhood, which is remarkably similar to earlier efforts to "domesticate" women prisoners. Scholar Laurie Shaffner suggests that such reform efforts "reify simplistic and antiquated norms of white femininity in order to 'tame' unruly criminalized women [read women of color]."³⁹

Other activists fight for reforms to get health care in women's prisons, discharge elderly prisoners through compassionate release petitions, and stop human rights violations such as sexual abuse. Prison abolitionists like those in the social justice organization, Critical Resistance [to end the prison industrial

35. *Id.*

36. Barbara Bloom, Barbara Owen, Stephanie Covington & Myrna Raeder, U.S. Dep't of Justice, Nat'l Inst. of Corrections, *Gender Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders* xvi (2002), available at <http://static.nicic.gov/Library/018017.pdf>.

37. Stephanie Covington & Barbara Bloom, *Gender Responsive Treatment and Services in Correctional Settings*, in *INSIDE AND OUT: WOMEN PRISON AND THERAPY* 9, 20 (Elaine Leeder ed., 2006).

38. *Id.*

39. Laurie Schaffner, *Beyond Gender-Specific Intervention: Theory-Driven Praxis*, *WOMEN AND PRISON: A SITE FOR RESISTANCE* (May 2008), http://womenandprison.org/prison-industrial-complex/view/beyond_gender-specific_intervention_theory-driven_praxis/.

complex], work to “build communities not prisons” and work only for reform that starts to dismantle the prison system itself; they see the prison as inherently repressive, having especially racialized and gendered forms of punishment, and incapable of reform. Relying on French theorist Michel Foucault, other prison abolitionists suggest that reforms have always accompanied prisons and that they have only led to more and more prisons – not an end to the social and economic problems that place people on the path to criminality.⁴⁰ As Foucault argues, “[F]rom the outset, the prison was caught up in a series of accompanying mechanisms, whose purpose was apparently to correct it, but which seem to form part of its very functioning, so closely have they been bound up with its existence through its long history.”⁴¹ Rather than decrease crime rates, prison reforms have only decreased our ability to imagine more sustainable measures to address it outside the context of incapacitation and imprisonment. Prison abolitionists argue, prison reforms have strengthened the system’s ability to continue repressive and discriminatory practices against the most marginalized people in our communities.⁴² This movement, which is detailed in the last two sections, is comprised of activists and intellectuals, both organic and academic.⁴³

40. See generally Smith, *supra* note 9; Angela Y. Davis, *Abolition Democracy: Beyond Prisons, Torture and Empire* (2005); Beth E. Richie, *Compelled to Crime: the gender entrapment of battered black women* (1996); *Global Lockdown: Race, Gender and the Prison-Industrial Complex* (Julia Sudbury ed., 2005); Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (2007).

41. Michel Foucault, *Discipline and Punish: The Birth of the Prison* 234 (1979).

42. See generally Davis, *Are Prisons Obsolete?*, *supra* note 2.

43. See Sudbury, *supra* note 1 at xi (explaining the distinction between organic and academic intellectuals). See also Angela Y. Davis, *Race and Criminalization Black Americans in the Punishment Industry*, in *The Angela Davis Reader* (Joy James ed., 1998) [hereinafter Davis, *Race and Criminalization*] (evidencing the prison abolitionist stance taken by activists in the aforementioned movements in the 1960’s and 1970’s). The language of “building communities not prisons” is articulated by the contemporary national prison abolitionist organization, *Critical Resistance*. See www.criticalresistance.org. Davis describes “late twentieth century ‘abolitionism,’ with its nineteenth century resonances,” as leading to the “recontextualization of the practice of imprisonment.” She suggests that “A radical strategy to abolish jails and prisons as the normal way of dealing with social problems of late capitalism is not a strategy for abstract abolitionism. It is designed to force a rethinking of the increasingly repressive role of the state during this era of late capitalism and to carve out a space for resistance.” Davis, *Race and Criminalization*, at 72.

III. EARLY LITERATURE ON GENDER AND CRIMINALITY

Women researchers of the Progressive Era (1900-1920) contributed to a shift in studies of crime from biology to sociology.⁴⁴ For example, female sociologist Francis Kellor proposed social explanations for crime and rejected the nativist biological explanations for criminality such as those made famous by Lombroso.⁴⁵ Both these explanations were based on individual behavior rather than systemic injustice and, in some ways, spurred the next dangerous shift in the scientific investigations of criminality: eugenics.⁴⁶ It wasn't until later in the nineteenth century that multifactor explanations for crime took precedence, and poverty, lack of education, and menial work were seen as contributing to crime.⁴⁷ Since it was thought that prisons could not change these causes, feminist researchers recommended extra-institutional efforts to change society and thus prevent incarceration. They also sought to improve women's institutions through diversified programming and education.⁴⁸

Rather than conducting research to explain criminality, the major studies on gender and crime of the nineteen-sixties and nineteen-seventies focused on the life inside.⁴⁹ As presented by sociologist Barbara Owen, each major study presents women in accordance with dominant representations and expectations of racialized "traditional" sexuality- and family-based gender roles

44. See Freedman, *supra* note 3, at 110 (suggesting that this literature was put forth by a different set of reformers – college-educated women trained in law, social work, medicine who rejected the essentialist position that women were morally superior).

45. See generally Cesare Lombroso & Guglielmo Ferrero, *The female offender* (1895).

46. FREEDMAN, *supra* note 3, at 116 (explaining that the propensity for criminality was added to the list of other hereditary diseases, like mental deficiency, feeble-mindedness, and physical disability that subjected marginalized individuals to sterilization, institutionalization, and segregation from society). Freedman does not address the way in which race and racism and government supported projects for white racial purity also informs the Eugenics movement.

47. BARBARA OWEN, *IN THE MIX: STRUGGLE AND SURVIVAL IN A WOMEN'S PRISON* 15, 50 (1998). Owen does not cite structural racism as being seen as related.

48. FREEDMAN, *supra* note 3, at 126 (suggesting that that the successes of early efforts towards extra-institutional changes undermined efforts to change the prison because they helped to create "last resort" institutions). The idea was that delinquency would be prevented before incarceration, through changes in judicial sentencing policies and legislation and that those who slipped through the network would be rehabilitation inside. *Id.* at 126-130.

49. OWEN, *supra* note 47, *passim*.

of that time.⁵⁰ Generally, these studies discuss prisoner social structures based on the "pseudo-family structure and homosexual relations" that reflect the "family roles and street life" women lived before imprisonment.⁵¹ Female sociologists of the last quarter of the twentieth century also studied the way in which gender oppression affected women's experiences in the criminal justice system, reflecting the burgeoning second wave of the women's movement. In general, they introduced themes into the gender and criminality literature like "partial justice," detailing the way in which women prisoners received unequal treatment compared to male prisoners and "double deviancy" where women were seen as breaking both gender roles and criminal laws.⁵²

During this same period, literature in feminist criminology began to gain prominence as well.⁵³ Feminist Criminal Law scholar Ngaire Naffine identifies three different approaches. She calls the first "feminist empiricism."⁵⁴ These criminologists ques-

50. *Id.* It is my presumption that by this she means, heterosexual, white, and nuclear family based roles.

Owen suggests that the first studies were conducted by Ward and Kassebaum (1965), Giallombardo (1966), and Hefferman (1972). *Id.* at 4. She suggests that early sociological and criminological studies on women and prison were largely done by male researchers (white males) in response to the dearth of research on women prisoners in sociology and criminology, though there were. *Id.* at 3-6. Owen suggests that the "first" sociological (I suppose versus criminological because there were clearly studies of studies of crime before this) studies concerned men, how men "do time" including studies on prisoner social systems, the "inmate code," race relations, history of forms of these social interactions. *Id.* Largely, they all painted a picture of prison culture as violent and predatory. *Id.*

51. *See id.* at 4.

52. *See id.*

53. NGAIRE NAFFINE, *FEMINISM AND CRIMINOLOGY* (1996). Naffine cites other departures from traditional criminology coeval with feminist empiricist literature. Some of these gestures include those who sought to take male theories of crime and simply apply them to women. *Id.* at 32-35. Another widely rebutted and largely dismissed position was the "women's liberation theory." *Id.* The theory stated that an outcome of women's liberation was that women would seize the opportunity for parity with men in every gesture, including their right to "do crime." FREDA ADLER, *SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL* (1975). Others contend that women are primarily law abiding because they have been trained, by their mothers, to "reproduce conformity" FRANCES HEIDENSOHN, *WOMEN AND CRIME* (1985). Feminist Empiricists also created a large body of literature regarding "women as victims of crime" in order to contest the belief that rape, for example, is committed by strangers rather than by family members and friends. NAFFINE, at 33; *See also* ELIZABETH A. STANKO, *INTIMATE INTRUSIONS: WOMEN'S EXPERIENCE OF MALE VIOLENCE* (1985); CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1989); SANDRA WALKLATE, *VICTIMOLOGY: THE VICTIM AND THE CRIMINAL JUSTICE PROCESS* (1989); R. EMERSON DOBASH & RUSSELL P. DOBASH, *WOMEN, VIOLENCE, & SOCIAL CHANGE* (1989).

54. NAFFINE, *supra* note 53, at 29.

tioned the objectivity of criminological research that purported to be generally applicable, yet omitted women and sought to extend the rigors of the scientific methods to include them.⁵⁵ A second strand of feminist criminologists identified the problems of criminology with the pitfalls of positivist scientific research. For example, they questioned the Kantian notion of objectivity and neutrality.⁵⁶ This shift included many feminist standpoint theorists who believed that “who does the inquiring matters and who is doing the knowing affects what is known” and that the “epistemological site of the woman ‘from below’ provides better insights into her condition.”⁵⁷

Critics of standpoint theory – the idea that justice efforts ought to start from the standpoint of those marginalized in society in order to gain the most holistic perspective of social problems– question the essential unitary notion of womanhood put forth by its proponents.⁵⁸ For example, some suggest that the theory erases difference and privileges white women, while purporting to speak for all women. This reflects the critique that feminists originally launched against [male-dominated] criminology.⁵⁹ In some cases, this skepticism provoked larger discussions on the constitution and stability of identity itself and its relation to power and knowledge.⁶⁰

Using Michel Foucault’s philosophy, a third strand of feminist criminologists suggest that the very categories of identity upon which standpoint theory relies are unstable, constructed through social and political knowledge-making practices, and

55. *Id.* They relied on the Kantian method, which suggests that the social position of the researcher does not matter to research; if the scientific method is followed, results will be duplicated. In other words, if women were simply included in existing scientific study, the rigors of the scientific method would prevail.

56. *Id.* at 39-40.

57. *Id.* at 29, 47. Although they adopted the standpoint of the offender by doing participatory research because the “best knowledge comes from [research by] those who [are] directly involved”, the research presented women as seen through the eyes of men or as drudges of domesticity. Also, Naffine notes, this research failed to interrogate the role that masculinity plays in the lives of boys and men in their study. *Id.* at 39-40. Also, Naffine notes that the [male criminologist] “new deviancy theorists” also started to reject the idea of an impartial scientific inquirer, and “actively take part in the life of the offender,” gender was still largely absent from their analysis.

58. NAFFINE *supra* note 53, at 58 (citing ELIZABETH SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1990) and CAROL SMART, *WOMEN, CRIME AND CRIMINOLOGY: A FEMINIST CRITIQUE* (1978)).

59. *Id.*

60. *Id.*

carry different meanings across different contexts.⁶¹ Because power, identity, and knowledge are conceptual frameworks already in place and because power relations already define individuals and how they see the world, one cannot turn to any subject for an untainted pre-social, pre-conceptual truth.⁶² Others have followed the philosophy of French post-structuralist Jacques Derrida, most famously known for "deconstruction" theories, who suggests that as we acquire language, we acquire our sense of the world and language supplies the frame through which we view the world.⁶³ The reason that feminist standpoint theorists cannot speak as "women", Naffine surmises, is because "women" is a category that they did not invent.⁶⁴

During the same era, writers from movements aimed at fighting racism and state political repression critiqued the way in which race, class, and sexuality relate to imprisonment. The poignancy of their writings suggests that unique perspectives and understandings are produced based on a theorist's relationship towards systems of power and domination. Angela Davis, for example, has borne the burden of incarceration stemming from her political activism.⁶⁵ From her prison cell, Davis developed an analysis linking slavery and criminalization by challenging the dearth of writing about women in slave communities.⁶⁶ Inside, Davis wrote about women prisoner's conditions of confinement and how the prison and the criminal justice system functioned as tools of repression – a repression using strategies similar to those employed during slavery.⁶⁷

61. *Id.*

62. *Id.* at 72-3.

63. See JACQUES DERRIDA, *OF GRAMMATOLOGY* (GAYATRI CHAKRAVORTY SPIVAK, TRANS., 1997).

64. NAFFINE, *supra* note 53, at 82. She suggests deconstruction, where a dominant term (like white) is unearthed as always being set up in opposition to its corollary subjugated meaning (Black), results in a violent opposition, where the latter is always repressed. *Id.* at 83- 85. Deconstruction is considered a tactic for change because language can be changed; its meaning is not fixed, and change is already happening. *Id.* The problem, however, is that it must be accompanied by theoretical and empirical theory because otherwise it is just textual investigation, always reactive, not active.

65. See JOY JAMES, *RESISTING STATE VIOLENCE: RADICALISM, GENDER, AND RACE IN U.S. CULTURE* (1996); See also ANGELA DAVIS, *AN AUTOBIOGRAPHY* (1974).

66. *THE ANGELA Y. DAVIS READER* 14 (Joy James ed., 1998).

67. *Id.* James suggests that Davis was one of the first Black women to write in the genre of Black protest literature.

Decades later, along with other writers, Davis revisited these themes in calling for prison abolition and in challenging the reliance on Foucault in critical prison studies.⁶⁸ Indeed, scholars have put forth compelling gender-based critiques of Foucault, but they rarely contest his silence on the impact of race, colonialism, and slavery. James, for example, suggests that although *Discipline and Punish* is considered to be the “master narrative to critique contemporary state policing. . . [it]. . . vanishes historical and contemporary racialized terror, punishments, and control in the United States; therefore, it distorts and obscures violence in America in general.”⁶⁹ She suggests that because he fails to mention the violence committed against indigenous peoples in Africa and the Americas in writing about the “disappearance of torture as a public spectacle of violence,” Foucault positions the western state as a nonpractitioner of torture.⁷⁰ His ability to “erase specificity of the body and violence while centering discourse on them. . . elides racist violence against black, brown, and red bodies.”⁷¹

Like James, Davis contends that Foucault’s erasure of race and racism indicates a form of epistemic violence.⁷² She suggests that, although it may be interesting to examine how the European model affects prisons in the United States, an examination of slavery would help to better understand how the European model of penology – indeed built to reform the system of corporal punishment – could come to “incorporate, sustain, and transform structures and ideologies of racism.”⁷³ Unlike Foucauldian, feminist, sociological, and criminological literature, Davis’s work examines the foundationally racist underpinnings of the criminal justice system. According to Davis, incarceration was not created for the moral re-education of whites, but for the management of the labor and bodies of recently freed slaves – in accordance with the “formal construction of prisoners as human beings who deserved to be subject to slavery.”⁷⁴

68. See DAVIS, ARE PRISONS OBSOLETE?, *supra* note 2; JAMES, *supra* note 65, at 24-25 (1996).

69. JAMES, *supra* note 65, at 24-5.

70. *Id.*

71. *Id.* at 25.

72. Angela Y. Davis, *Racialized Punishment and Prison Abolition*, in THE ANGELA Y. DAVIS READER 97 (Joy James ed., 1998) [hereinafter Davis, *Racialized Punishment*].

73. *Id.*

74. *Id.* at 100. Furthermore, Davis suggests that treatment of racism as “contingent element” of European prison abolition research stems from the absence of race

The final decade of the twentieth century saw a dramatic rise in the amount of literature surrounding women in prison. In part, this scholarship resulted from the exponential rise (a staggering 3,000 percent increase) in the number of women in prison.⁷⁵ The increased criminalization of women – primarily Black and Latina women – may be due to increased penalties for low level drug offenders in the U.S. War on Drugs.⁷⁶ Others suggest that it is because of the global prison boom, which became an “economic motor during the downsizing, layoffs, and corporate relocations of the 1980’s and 1990’s.”⁷⁷ The first set of literature, hereafter referred to as the “liberal” literature continues to be brought forth by (mostly white) women researchers. Those writings focus on the gendered nature of criminalization and imprisonment and on themes that resonate with second wave liberal feminism. The theoretical backing of much of the literature posits economic marginalization as the primary cause of women’s incarceration.⁷⁸ Barbara Owen, in line with her prolific contemporaries, Barbara Bloom, Stephanie Covington, Karlene Faith, and Meda Chesney-Lind, suggests that “female criminality is based on the need for marginalized women to survive under conditions not of their own making.”⁷⁹ Their literature consistently presents the demographics of women prisoners – proportionally still true today, though in higher absolute numbers – as those who are more likely to be poor, women of color, mothers, and survivors of abuse that occurred before the age 18. These women are incarcerated for crimes related to drugs, petty theft, and, less often,

in theories of punishment. *Id.* at 102. Davis suggests that the abolitionist discourse emanating from the Netherlands and Denmark actively denied the importance of race until more people of color immigrated into these countries. *Id.* She suggests that their use of Foucault to demonstrate that reform perpetuates the prison would be more compelling if the role of race and racism in the production and maintenance of the prison are put forth. *Id.*

75. Sudbury, *supra* note 1, at xiv.

76. Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 84, 87-91 (Marc Mauer & Meda Chesney-Lind eds., 2002).

77. Sudbury, *supra* note 1, at xvii. In regards to the increase in the number of women in prison, Sudbury reports, “Beginning in 1973, an explosion in the number of women in prisons and jails in the United States has contributed to one of the largest building booms in world history. Whereas in 1970 there were 5,600 incarcerated women, by June 2001, 161,200 women were held in U.S. prisons and jails, representing a staggering 2,800 percent increase.” *Id.* at xiv.

78. See, e.g., Bloom et al., *supra* note 36; KARLENE FAITH, *UNRULY WOMEN: THE POLITICS OF CONFINEMENT AND RESISTANCE* (1993); and Meda Chesney-Lind, *supra* note 76.

79. Bloom et al., *supra* note 36, at 9.

violent crime. These crimes are often connected to the women's histories of abuse.⁸⁰

The focus on the personal and psychological causes of women's imprisonment and a reflection of the feminist commitment to qualitative and "hands-on" research tends to individualize imprisonment and risks "replicating the criminal justice system's discourse of personal responsibility."⁸¹ Here, women's personal histories are mined for the "root" causes of aberrant behavior. Microanalyses that focus on "familial dysfunction, childhood abuse, drug addiction, and alcoholism" are important, but also tend to obfuscate the political and economic interests in using prisons as a "catch all" solution to social problems.⁸² In other words, they tend to obscure the "social disorder signified by mass incarceration."⁸³ In this literature, individual circumstances do not narrate macroeconomic processes and geopolitics.⁸⁴ It is not so much that this early literature fails to mention the way in which various forms of oppression relate to incarceration (hardly possible when most cite Bureau of Justice Statistics in their introductions, which clearly show that poor women of color are disproportionately represented in prison) but, rather, most do not consider the ways in which systemic and structural racism, global capitalism, and homophobia – indeed intersectional subordination – converge in the path to prison. In the liberal literature, vectors of oppression beyond sexism might be mentioned in the first paragraph as an example of the "compounding problem," yet, rarely, if ever, are they addressed in their complexity.⁸⁵ Rather than deploying structural analysis, issues like racism, for

80. *Id.* at 11.

81. Sudbury, *supra* note 1, at xvi.

82. *Id.* at xv-xvi

83. *Id.* at xv-xvii. Regarding those who benefit from the use of prisons: "Scholars and Activists have documented the emergence of a range of players in both the public and private sectors who participate in and benefit from the shift to a 'tough on crime' culture. Although they differ in the emphasis given to political or economic forces, these researches have a common commitment to revealing the diverse interests involved in promoting the 'new penology' a shift from rehabilitation to and reform to incapacitation and mass warehousing of surplus populations. Examinations of politicians eager to present their opponents as 'soft on crime,' media outlets seeking headlining grabbing stories eh war of the ratings, and private corporations that build and operate prisons and detention centers for profit have shown that the global prison boom is the outcome of public policy and private greed." *Id.* at xvi. Of course many others benefit, including corrections guards/their unions, elite whites whose families are disproportionately represented in the prison system, etc. *Id.*

84. *Id.*

85. See, e.g., Bloom et al., *supra* note 36, at 62.

example, are presented simply as forms of individual prejudice in the same way that many dominant discourses represent race.⁸⁶ Attempts at including such analysis, like the work of Karlene Faith, do so with a primarily gendered lens, focusing on the important-but-insufficient histories of criminalization like witchcraft.⁸⁷ Thus, the very real impact of criminalization and resultant incarceration on those most harshly targeted remains unexamined.⁸⁸ In fact, much of this literature does not delve much into why or who goes to prison at all; much of feminist liberal criminological literature, like its androcentric predecessor, discusses – indeed dramatizes – what life is like inside.⁸⁹ They detail, often with a voyeuristic eye, how women prisoners organize themselves, how they shape their identity, how they relate to other women inside, and more.⁹⁰ Importantly, many expose human rights violations, like the high risk of sexual assault by corrections staff, the deadly health care, and the pittance pay for mandatory work.⁹¹ In other words, they study how women do time and what time does to them, but lack sufficient systematic analyses.

Researchers in the early stages of the mass incarceration explosion like Dorothy Roberts, Beth Richie, Luana Ross, Angela Davis, and Ruth Gilmore made attempts to narrate the way in which structural inequalities, like racism, homosexuality, and the lasting legacies of slavery, colonialism, and sexual violence inform the gendered nature of the mass incarceration of marginalized peoples. This literature deserves more attention than it has received thus far in the sociological, criminal, and mainstream liberal feminist literature. Roberts, for instance, suggests that Black pregnant women addicted to drugs are given disproportionately harsh sentences for using drugs during pregnancy.⁹² In

86. Davis, *Race and Criminalization*, *supra* note 43, at 61.

87. FAITH, *supra* note 78 (1993) (drawing historical attention to crimes like witchcraft, prostitution, violence, adultery, infanticide and property crimes as a way of historicizing contemporary crimes like prostitution, theft and fraud, drugs and violence crimes, but her analysis remains primarily on their gendered and class based nature). Unlike some of the liberal literature, Faith includes an interesting section on media representations of women's criminality. Though susceptible to my previous criticisms, her analysis of sexuality is of note.

88. Davis, *Race and Criminalization*, *supra* note 43, at 63.

89. For a poignant example, see Bloom et al., *supra* note 36.

90. *Id.*

91. See *supra* note 78.

92. See Dorothy Roberts, *Crime, Race and Reproduction*, 67 TUL. L. REV. 1945, 1952 (1993) [hereinafter Roberts, *Crime, Race, and Reproduction*]; DOROTHY

her work, she suggests that they are thus punished because of their poverty, race, and subsequent reliance on state-monitored health care.⁹³ Regardless of similar or equal levels of illicit drug use during pregnancy, African American women are ten times more likely than white women to be reported to child welfare agencies for prenatal drug use.⁹⁴ Using central tenets of critical race theory which suggests that “[r]ace is used to determine who the criminals are, what conduct constitutes a crime and which crimes society treats more seriously,” Roberts examines the way in which ideology, representation, and law produce multivalent understandings of gender, race, drug use, and criminality.⁹⁵ Her work examines the way that public consciousness and state discourses have been shaped by demonizing racialized and gendered representations of both “crack babies” and “crack moms” in the media, and in turn, how punitive legal actions reflect these messages and perpetuate racialized and gendered notions of criminality.⁹⁶ Such intersections in the complexity of women’s incarceration are examined throughout this literature.

Beth Richie augments the literature with her interviews of battered African-American women and white women and non-battered African American women imprisoned at the Cook County Jail in Chicago. Her work is pivotal to scholarship about gender and criminality because it shows how women commit crimes as a result of violence they have experienced in their lives, because of the threat of violence, and because of other forms of coercion by male counterparts.⁹⁷ Broadly, she explains the way in which gender, race/ethnicity and violence against women “intersect to create a subtle, yet profoundly effective system of organizing women’s behavior into patterns that leave women vulnerable to private and public subordination, to violence in their intimate relationships and, in turn, to participate in illegal activities.”⁹⁸

E. ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

93. See Roberts, *Crime, Race, and Reproduction*, *supra* note 92, at 1953.

94. *Id.*; see also Daniel R. Neuspiel, *Racism and Perinatal Addiction*, 6 ETHNICITY & DISEASE 47, 48 (1996); Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use during Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1204 (1990).

95. Roberts, *Crime, Race and Reproduction*, *supra* note 92, at 1945.

96. *Id.* at 1957-58.

97. RICHIE, *supra* note 40, at 15.

98. *Id.* at 4.

Her analysis challenges sociological, criminological, feminist economic analyses of crime by offering the theory of "gender entrapment" to better understand the particular obstacles that criminalized battered African American women face.⁹⁹ The theory elucidates the "socially constructed process whereby African American women who are vulnerable to men's violence in their intimate relationships are penalized for behaviors they engage in even when the behaviors are logical extensions of their racialized gender identity, their culturally expected gender roles and the violence in their intimate relationships."¹⁰⁰ It is not to say that white women or non-battered black women are not affected by violence and racism, but that the particular experiences of battered Black women tear at the seemingly continuous fabric of experiences presented by the liberal women in prison literature by introducing important levels of complexity.

Luana Ross similarly enhances the literature by suggesting that the incarceration of Native women is a result of colonization. They are the most disproportionately incarcerated group in the United States, yet almost entirely absent from the liberal literature.¹⁰¹ She argues that the history of colonization, including brutal sexual violence, near extermination, and continued denial of sovereignty informs the experiences of Native women at all levels of the criminal justice system.¹⁰²

Ross amends the literature on women in prison by expressing the ways in which genocide, early criminalization of culture, and confinement in forts, boarding schools, orphanages, prisons and jails are tied to native criminalization today.¹⁰³ Ross's work takes a fierce approach to the study of gender in the criminal justice system by interweaving the profound way in which neocolonialism and racism affect reservation, non-reservation, and landless criminalized native women at the Women's Correctional Center in Montana.¹⁰⁴

Ross outlines the historical social construction of criminality. In an effort to justify the theft of land later legally allotted to whites, early colonial law and practice aimed to "civilize" "law-

99. *Id.* at 4-5.

100. *Id.* at 4.

101. See generally LUANA ROSS, *INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY* (1998).

102. *Id.* at 4-6.

103. ROSS, *supra* note 101.

104. *Id.*

less, backward, and savage” American Indian people by forcing them into assimilation and criminalizing their “everyday behaviors.”¹⁰⁵

Furthermore, by using demographic data of women incarcerated in Montana from 1878-1990’s, she details how Native women’s experiences of violence and poverty, as well as their reactions to it, lead them into criminalization.¹⁰⁶ In the latter half of her book, she describes the way race, gender, class, sexuality, religion, motherhood, and reservation status dictate women’s experiences inside prison and their relationships to each other, to staff and with prison programming and educational opportunities.¹⁰⁷

Her discussion of the ways in which imprisoned Native mothers face unique difficulties in maintaining access to their children shifts sharply from the liberal literature.¹⁰⁸ While the latter literature is sure to mention that nearly eighty-percent of women in prison are mothers, it rarely describes the way motherhood is differently experienced inside.¹⁰⁹ For example, it rarely examines the intrusion of the welfare system or the weakening of family networks due to the mass incarceration of Black communities, on incarcerated Black mothers and how this makes maintaining access to their children a qualitatively different fight.

IV. LAW ENFORCEMENT VIOLENCE

Women’s experiences with state-sanctioned law enforcement violence are also *grossly* under-theorized.¹¹⁰ They are virtually absent in the liberal literature on women in prison, the anti-

105. *Id.* at 16.

106. *Id.* at 108-51.

107. *Id.*

108. *Id.* at 178-91

109. *Id.*

110. Scholar Anannya Bhattacharjee describes law enforcement violence as the abuse of authority and “violations of civil, constitutional, and human rights [and people press for accountability of] local and state police agencies; prison systems at the local, state and federal levels; the United States Border Patrol and interior enforcement agents of the Immigration and Nationalization Service (INS).” Anannya Bhattacharjee, *Private Fists and Public Force: Race, Gender, and Criminalization*, in *POLICING THE NATIONAL BODY* 1, 1 (Jael Silliman & Anannya Bhattacharjee eds., 2002). Bhattacharjee also suggests that part of the urgency in redefining remedies to violence is because the apparatuses of law enforcement in the US have “expanded dramatically, becoming more punitive, highly integrated, heavily funded, and technologically sophisticated.” *Id.* Testament to this is the fact that the INS has now been subsumed under Homeland Security and renamed ‘Immigration and Customs Enforcement.’

olence movement and the literature on police brutality. Part of this deficiency, suggests Andrea Ritchie, is because law enforcement violence against women is seen as a deviation from the police brutality norm.¹¹¹ Whereas police violence against men is the direct focus of police brutality literature, such violence against women is seen as a tangential issue. The focus of the impact on women only relates to their positions as “mothers, partners, and children of men of color targeted by systemic state violence and the criminal legal system.”¹¹² Ritchie argues that women should be seen as direct “targets of law enforcement violence and agents of resistance in our own right.”¹¹³

Ritchie also describes how transpeople, African American women, Latina women, working class people, lesbians and sex workers are often assumed to be hyper-masculine, aggressive, unfeminine and undeserving of protection. According to Ritchie, these characterizations lead to sexual harassment, brutal physical violence, sexual assault, rape, and even murder by state officials¹¹⁴ For example, lesbians are seen as intruding on male territory, undermining male privilege and “taking what is not theirs to take” by having sexual relationships with other women.¹¹⁵ Ritchie describes how one police officer forced his way into the apartment of an African American lesbian at gunpoint.¹¹⁶ After raping her, the police officer told her that he was “teaching her a lesson” because the world needed “one less dyke.”¹¹⁷ Similarly, transwomen of color, Ritchie notes, are called ‘fags,’ ‘bitches,’ ‘sluts,’ ‘whores,’ and ‘prostitutes’ when they are seen on the street and, like sexworkers, they are arbitrarily arrested and detained.¹¹⁸

When sex workers are detained, they report endemic extortion of sexual favors by police officers in exchange for lenience or to avoid routine police violence against them, as well as fre-

111. Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, in *COLOR OF VIOLENCE: THE INCITE ANTHOLOGY* 138, 139 (Incite! Women of Color Against Violence ed., 2006)

112. *Id.* at 140.

113. *Id.* at 140. It is not to say that enforcement is not discriminatory towards men of color, that women suffer more than men, or that more women suffer than men, as Bhattarchjee argues, but the invisibility of women in discussion of law enforcement violence must be addressed. RITCHIE, *supra* note 40, at 95.

114. Ritchie, *supra* note 111, at 138-156.

115. *Id.* at 144.

116. *Id.* at 149.

117. *Id.*

118. *Id.* at 144, 146.

quent rapes and sexual assaults.”¹¹⁹ Scholar Annanya Bhattacharjee corroborates Ritche’s theories. Bhattacharjee cites journalist Jeremy Hay who suggests that statements made by police like, “[b]low me and I wont take you in” seem “predicated on the assumption that prostitutes don’t care who they have sex with and they the would do anything to avoid arrest.”¹²⁰ This type of critical literature highlights many brutal accounts of law enforcement violence against those whose stories are left untold by mainstream scholarly and activist literature – and most of these narratives are documented not by the police, but by young women of color abolitionist collectives.¹²¹

V. GENDER ESSENTIALISM AND FEMALE POLICING

Gender and criminality scholars disagree about the libratory possibilities of women workers in the criminal justice system and in positions of state power. Would women be less susceptible to abusing authority? The logic behind the early feminist attempts to create women-run prisons and later attempts to replace male prison guards with women in the move to create “gender responsive” prisons suggests that female law enforcement officials will be less abusive than males.¹²² With the increased awareness to women as torturers post-9/11, these arguments have gained more scholarly attention.¹²³ It is argued that switching the sex of law enforcement agents neither challenges the institutional sexism of the state, nor does it effectively address the needs of multiple marginalized people who are subject to violence.¹²⁴ The inher-

119. *Id.* at 149.

120. Bhattacharjee, *supra* note 110, at 42.

121. See, e.g., CARA, COMMUNITIES AGAINST RAPE AND ABUSE, www.cara-seattle.org (last visited Oct. 19, 2011). The work they do also includes working towards non-harmful responses to violence that do not rely on police.

122. In fact, international law explicitly prohibits males from attending women prisoners; Rule 53 of the United Nations *Standard Minimum Rules for the Treatment of Prisoners* states, “female prisoners should be attended and supervised only by woman officers.” HUMAN RIGHTS WATCH, *ALL TOO FAMILIAR: SEXUAL ABUSE OF WOMEN IN US STATE PRISONS* (1997) available at <http://www2.ohchr.org/english/law/treatmentprisoners.htm>.

123. See Zillah Eisenstein, *Sexual Decoys: Gender, Race, and War in Imperial Democracy* (2007); Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (2007); Susan Faludi, *Terror Dream: Myth and Misogyny in an Insecure America* (2008); Tara McKlevy, *One of the Guys: Women as Aggressors and Tortures* (2007); Tara McKlevy, *Monsterring: Inside America’s Policy of Secret Interrogations and Torture in the Terror War* (2007).

124. Kolleen Duley, *Building Oppositional Consciousness and [Breaking down] the Gender Responsive Prison*, in *Shifting Positionalities: The Local and Interna-*

ently abusive nature of the jailer-jailed dynamic remains unchanged.

Similarly, in regard to women torturers at Abu Ghraib prison, Zillah Eisenstein argues that the very presence of women military officers "allures us into thinking that this is what democracy looks like. . .creating confusion by [having women participate in sexual humiliation] that women are usually victim to" and that such switching leaves masculinized and racialized gender dynamics in place.¹²⁵ In other words, "masculinist depravity as political discourse and practice" can be adopted by either women or men."¹²⁶ Eisenstein presents a theory of "sexual decoys" to explain this phenomenon. She posits that sexual fluidity (or understandings of sex/gender as social constructs) and racial diversity are manipulated by the state to serve imperialist ends.¹²⁷ Both women's rights and racial diversity rhetoric and the bodies of women and people of color "in drag" are positioned to provide an illusion of feminism and multiculturalism in empire building projects – at the expense of radical social justice.¹²⁸ Methods for change through law, for instance, are especially fragile post-9/11.¹²⁹ Because women commit torture in this increasingly militarized politic, "Abu Ghraib looks like feminism; females are pre-

tional Geo-Politics of Surveillance and Policing (Maria Amelia Viteri & Aaron Tobler eds., 2009)

125. Eisenstein, *supra* note 123, at 37.

126. *Id.* at 38.

127. *Id.* at 41.

128. *Id.* at 2 (providing many examples of the ways in which human rights and women rights discourse are used by neoliberal feminists to "mystify and rationalize the misogynist and racialized aspects of global capitalism"). Bush's "cowgirls" are females who represent militarized masculinity who support empire building, including the call to invade Afghanistan in the name of saving Muslim women (she lists, for instance, Laura Bush and Condoleezza Rice). *Id.* at 40. Another example includes the neoliberal feminists on the National Advisory Council on VAWA who have called for VAWA's demise and who have investments in private right wing groups who opposed VAWA. *Id.* at 121-22.

129. Daily practices of racial profiling and racism both inside and outside prison take on forms less seen in the gender and criminality literature. Eisenstein suggests that in a post-9/11 security state, legal rights have decreased and security trumps all. She implies that possibilities for legal protection have diminished yet contends that law is "never sufficient [and] always necessary to redress discrimination and injustice." *Id.* at 71. For example, she suggests that calls for prisoners' rights seems as "liberal excesses protecting the guilty rather than the innocent." *Id.* at 69. Eisenstein argues that because civil rights language focuses on equality and similarity and because the language of diversity has been co-opted by the state and private corporations, the possibilities for recognizing difference are limited. *Id.* at 68-71. On the contrary, Puar challenges Eisenstein in suggesting the increased securitization evident post 9/11 was very much present before, albeit in different, perhaps less con-

sent to cover misogyny of empire building while actually building it.”¹³⁰

The early questions regarding the libratory possibilities of hiring women as prison matrons, warden and officers remain salient. The idea that female guards would act less coercively than male guards towards other imprisoned women (or men for that matter) is a contested proposition. Scholar Jasbir Puar suggests that it is a mistake to exceptionalize women torturers.¹³¹ Her work challenges the idea that there is something inherent in women that would make their behavior less suspect under the power laden dynamics of the prison. “The pleasure and power derived from these positions and actions cannot be written off as some kind of false consciousness or duping by the military.”¹³² Neither can it be explained through Eisenstein’s “white female decoys,” argues Puar. Women can be subjects of violence but they can also be agents of it, whether it is produced on their behalf or perpetuated directly by them.”¹³³ Puar borrows from Veena Das to explain violence as a form of sociality. She wrote that the “economy of violence produces a circulatory system whereby no woman is strictly an insider or outsider.”¹³⁴

Puar criticizes liberal feminist writings on the problem of tortured prisoners for (re)centering American feminism as the ultimate victim of torture rather than focusing on the various atrocities at Abu Ghraib.¹³⁵ In other words, rather than using feminism as a discursive tool to better understand or contextualize women’s torture, feminists instead only mourned the fall of the trenchant male/female dichotomy where women are perceived to be more vulnerable to violence and morally superior to men. For example, feminist Zillah Eisenstein lamented, “we are the fanatics, the extremists. . . . how could there be so many females involved in the atrocities”¹³⁶ Similarly, Barbara Ehrenreich “secretly hoped that the presence of women in the

spicuous forms. Jasbir Puar, Lecture at the UCLA Center for the Study on Women at The Color of LGBT series (Oct. 22, 2008).

130. EISENSTEIN, *supra* note 123, at 41. Of course equal participation in military is also not a sign of progress because, argues Eisenstein, women go into the military out of necessity brought forth through globalization and consequent restructuring of labor market. *Id.*

131. PAUR, *supra* note 123, at 90.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 89.

136. *Id.* (quoting EISENSTEIN, *supra* note 123, at 34).

military would make it more respectful to other cultures, more peacekeeping. . .”¹³⁷ In Puar’s critique, she asks:

“Why is this kind of affective response to the failures of Euro-American feminism, feminism neither able to theorize gender and violence nor able to account for racism within its ranks, appropriate to vent at this particular moment – especially when it works to center the (white) Euro-American feminism as victim, her feminisms having fallen apart?”¹³⁸

VI. GLOBALIZATION AND IMPRISONMENT

Early in critical feminist of color engagements with liberal literature, Angela Davis and Ruth Gilmore describe the relationship between racialized and gendered imprisonment and the growth of global capitalism.¹³⁹ Davis suggests that as global capital moves across borders in search of the cheapest labor, legitimized through NAFTA and GATT, corporations close in the US and “leave entire communities in shambles, consigning huge numbers of people to joblessness, leaving them prey to the drug trade, destroying the economic base of these communities, thus affecting the education system, social welfare – and turning the people who live in those communities into perfect candidates for prison.”¹⁴⁰

Early in the critical prison studies analyses of capitalism, both Davis and Gilmore rebuked a theory that held prominence in prison scholar circles over the next ten years: that prisons are economic stimulus for the small white rural towns where they were built.¹⁴¹ Gilmore’s early research suggests that the fiscal benefits to prison towns were impossible to find and her later

137. *Id.* (quoting Barbara Ehrenreich, Opinion, *Prison Abuse: Feminism’s Assumptions Upended*, L.A. TIMES, May 16, 2004, at M1).

138. *Id.* Puar also describes a “death of a parallel yearning” put forth by homonational gay men. For them, the idea that female soldiers could do that was disorienting for gay men “who view them as natural allies.” *Id.* at 89-90. Puar suggests that the “[Nostalgic] mourning the loss of the liberal feminist subject” suggests an “emotive convergence of white liberal feminists and white gay men unwittingly reorganiz[ing] the Abu Ghraib tragedy around their desires.” *Id.* at 90.

139. See generally Davis, *Race and Criminalization*, *supra* note 43; Ruth Wilson Gilmore, Globalisation and U.S. Prison Growth: From Military Keynesianism to Post-Keynesian Militarism, 40 RACE AND CLASS, no. 2-3 (October 1998-March 1999).

140. Davis, *Race and Criminalization*, *supra* note 43, at 67.

141. See *id.* at 67. “At the same time, [fleeing corporations] create an economic demand for prisons, which stimulates the economy, providing jobs in the correctional industry for people who often come from the very populations that are criminalized by this process. It is a horrifying and self-producing cycle.” *Id.*

research suggests that, in fact, prisons were not even being built in rural white communities, but were rather increasingly being built in rural communities of color.¹⁴² Rather, Gilmore asserts prisons are an “[ineffective] geographical solution to socio-economic problem.”¹⁴³ Additionally, Davis suggests that, as opposed to being an economic stimulus for rural white communities, prisons instead serve as profit-generating sites for large private corporations.¹⁴⁴ Hundreds of billions of state dollars are being used to fund these corporate contracts required to build, maintain, and service prisons. Scholars titled this the “Prison Industrial Complex.”¹⁴⁵

Scholar Julia Oparah¹⁴⁶ urges feminists of color to put their trenchant intersectional theorizing of the prison toward a transnational analysis of how “punishment regimes are shaped by global capitalism, dominant and subordinate patriarchies, and neocolonial racialized ideologies.”¹⁴⁷ She asks to look beyond the impact of capitalism in the U.S. to an examination of the “cross-border flows of goods, people, capital and cultures” in the global South (and back).¹⁴⁸ For example, her anthology urges scholars to consider how neoliberal globalization drives the mass migration of poor women and men of the global south, who upon migration, are met with anti-immigrant sentiment, racial profiling, and incarceration while awaiting deportation.¹⁴⁹

Kemala Kempadoo has similar views. She argues that sex trafficking should be viewed “as both a discourse and practice that emerges from the intersections of state, capitalist, patriarchal, and racialized relations of power with the operation of women’s agency and desire to shape their own lives and strategies

142. See Gilmore, *supra* note 139.

143. Gilmore, *supra* note 139, at 174. Similarly, Davis cites Gina Dent to suggest that California prisons were born, in part, as a response to excess capital, land, and labor, the state buys devalued agricultural land from big landowners and promises economic return. DAVIS, ARE PRISONS OBSOLETE?, *supra* note 2, at 17; Gina Dent, *Stranger Inside and Out: Black Subjectivity the Women-in-Prison Film*, in BLACK CULTURAL TRAFFIC: CROSSROADS IN BLACK PERFORMANCE AND BLACK POPULAR CULTURE, (Harry Elam & Kennel Jackson eds., 2003).

144. Davis, *Race and Criminalization*, *supra* note 43, at 67.

145. See *id.* at 66; Gilmore, *supra* note 139; VIJAY PRASHAD, KEEPING UP WITH THE DOW JONES: DEBT, PRISON, WORKFARE (2003); TARA HERIVEL & PAUL WRIGHT, PRISON NATION THE WAREHOUSING OF AMERICA’S POOR (2003).

146. Julia Oparah previously published under her maiden name, Julia Sudbury.

147. Sudbury, *supra* note 1, at xiii.

148. *Id.*

149. *Id.*

for survival and livelihood.”¹⁵⁰ She argues that discourses on trafficking that seek to control migrant labor – through U.S. legislation and U.N. frameworks – are linked to both the criminalization of migrant women from the global South and “greater policing and control of their mobility, bodies, and sexuality.”¹⁵¹ Because of the state’s anti-immigration sentiment, many migrant women – defined as “traffic victims” whether they are or not – are detained, arrested, or deported and face unique vulnerability to law enforcement violence because they are not citizens.¹⁵²

Further deepening the cycle, men from the global South are criminalized as agents assisting in the transportation of workers, while the corporations who employ undocumented labor and the militaries, businessmen and elites who are the consumers of sexual labor remain out of sight.¹⁵³ Similarly, literature in this genre elaborates on how U.S. policing practices are constantly reshaping themselves according to new terms of neoliberal globalization. For instance, Cristina Jose Kampfner suggests that the punitive drugs policies put forth in the U.S. War on Drugs have been pushed onto Mexico.¹⁵⁴ As in the U.S., the resulting punitive polices in Mexico, are disproportionately felt by poor women who either peddle drugs or who are addicted to them and are subject to long mandatory minimum sentencing.¹⁵⁵

150. Kamala Kempadoo, *Victims and Agents of Crime: The New Crusade Against Trafficking*, in *GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON-INDUSTRIAL COMPLEX* 35, 36 (Julia Sudbury ed., 2005).

151. *Id.* at 35.

152. *Id.* at 42 (suggesting that there is strong evidence that immigrant women experience high levels of abuse, sexual assault, and brutalization at the border). Andrea Smith corroborates, citing to the American Friends Service Committee who documented 346 reports of gender violence between 1993-1995 on the US-Mexico border. SMITH, *supra* note 9, at 29. Also, border patrol agents, because of their positions within the law, rarely are held accountable. For example, one woman from Nogales, Arizona, had to sue the US government for them to investigate a man, Larry Selders, who had raped her repeatedly and taken her to an isolated place and threatened her not to say anything to anyone. Also, the government guarded information about Selder’s prior acts of violence. It took three years of legal battles, reports Smith, to uncover at least three other victims. Further, Smith reports that over 44 percent of those searched at the border are Black or Latino though together they only represent 24 percent of population. *Id.*

153. Kempadoo, *supra* note 150, at 43.

154. Cristina Jose Kampfner, *Las Mujeres Olvidadas: Women in Mexican Prisons*, in *GLOBAL LOCKDOWN: RACE, GENDER AND THE PRISON-INDUSTRIAL COMPLEX* 127-136 (Julia Sudbury ed., Dereka Rushbrook trans. 2005).

155. *Id.* at 131.

VII. CONCLUSION

In conclusion, scholars suggest that rigidifying nation-state boundaries and neoliberal forms of feminism through disparate ethnographic study of carceral regimes or sociological surveys of how women “do time” is not sufficient.¹⁵⁶ Rather, a careful tracing of the continuities and ruptures associated with imprisonment in an era of globalization and empire building would allow researchers to avail themselves of “political and cultural synergies and economic shifts that occur at a supranational level.”¹⁵⁷

For example, in 2001, in an effort to relieve a bloated prison system of over one million prisoners, the Russian Duma released all women prisoners who were pregnant, disabled, over fifty, or single mothers.¹⁵⁸ Meanwhile, organizers in Oakland were trying to (re)appropriate and wrestle the issue of prison overcrowding from prison expansion bills in order to test drive a compassionate release bill – a model decarceration plan that ought to be replicated with other prisoners in the future.¹⁵⁹ How might learning from Russian organizers have helped streamline the process and make it successful? Putting forth narratives of singularly-gendered imprisonment or a “global sisterhood” where women are victims and agents is not enough. Scholars suggest that *cautiously* comparing and contrasting the different ways in which ideologies about race, gender, sexuality, gender identity, and class are put forth to legitimize punitive incarceration mechanisms will reveal continuities and enable possibilities for resistance.¹⁶⁰

156. See, e.g., Sudbury, *supra* note 1, at xii-xiii.

157. *Id.* at xviii.

158. *Id.* at xiv.

159. JUSTICE NOW, <http://www.jnow.org> (last visited Nov. 2, 2011).

160. Sudbury, *supra* note 1, at xvii.