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FROM THE FRYING PAN INTO THE FIRE: HOW POOR WOMEN OF COLOR AND CHILDREN ARE AFFECTED BY SENTENCING GUIDELINES AND MANDATORY MINIMUMS

Nekima Levy-Pounds

I. INTRODUCTION

Through a string of recent decisions, the U.S. Supreme Court has drawn attention to the adverse consequences that flow from the enforcement of harsh federal sentencing guidelines and mandatory minimums used to punish drug offenders. In United States v. Booker, the Court drastically altered the strictures of these guidelines by pronouncing them to be merely advisory, as opposed to presumptive, for sentencing judges. The Court’s ruling, in effect, challenged Congress to overhaul the federal sentencing guidelines and to restore judicial discretion to sentencing determinations.
Congress now has a prime opportunity to assess and repair the immense damage that has resulted from its current approach; an approach that, in addition to having a discriminatory effect on African-American women, has also been largely ineffective in addressing the drug trafficking problem in the United States.

Mandatory minimums and sentencing guidelines require excessively lengthy prison terms for convicted drug offenders. They were established in the mid-1980s as an element of the "War on Drugs" and as visible reinforcements of Congress' rhetoric with regard to getting "tough on crime." While the idea of reducing crime is appealing, this approach has virtually ignored the disparate impact of the sentencing statutes on arguably the most vulnerable members of society—poor women of color and their children.


7. See William W. Wilkins Jr. et al., Competing Sentencing Policies in a "War on Drugs" Era, 28 WAKE FOREST L. REV. 305, 315 (1993) (providing a historical overview of the Anti-Drug Abuse Act of 1986). The "War on Drugs" was a legislative response to opinion polls showing drug abuse as the number one public concern, surpassing economic problems. The backlash to this public sentiment included "[g]laring headlines, dramatic footage on nightly news programs, and regular reports in all forms of mass media chronic[ing] various battles" against drug abuse. Id. (showing the connection between Congress' enactment of the sentencing guidelines and mandatory minimums as part of the strategy to fight the War on Drugs).


When mothers are sent to prison, their children are frequently left without parents or adequate systemic safeguards. These families are left to navigate complex and

http://www.ojp.usdoj.gov/bjs/pub/pdf/wo.pdf. These statistics show that women generally faced harder economic circumstances than men prior to their incarceration: thirty percent of women, compared with eight percent of men, received welfare benefits prior to incarceration. Id. at 8. Additionally, nearly two-thirds of women in local jails and state and federal prisons are of color, and 1.3 million children nationwide have mothers who are under correctional sanction. Id. at 7-8; see also Shimica Gaskins, Note, "Women of Circumstance"—The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes, 41 AM. CRIM. L. REV. 1533, 1533-38 (2004) (discussing vulnerabilities of women who are peripherally involved in drug crimes due to socioeconomic disparities).

10. GREENFELD & SNELL, supra note 9, at 7 (showing that an estimated sixty-five percent of women in state prisons and fifty-nine percent of women in federal prisons have children under the age of eighteen).

11. See, e.g., Denise Johnston & Katherine Gabel, Incarcerated Parents, in CHILDREN OF INCARCERATED PARENTS 3, 18 (Katherine Gabel & Denise Johnston eds., 1995) ("Only one in five children of women prisoners live with their other natural parent and incarcerated mothers have a much greater proportion of their children in foster care."); Susan Phillips & Barbara Bloom, In Whose Best Interest? The Impact of Changing Public Policy on Relatives Caring for Children with Incarcerated Parents, in CHILDREN WITH PARENTS IN PRISON: CHILD WELFARE POLICY, PROGRAM, AND PRACTICE ISSUES 63, 64 (Cynthia Seymour & Creasie Finney Hairston eds., 2001) (reporting that imprisoned mothers are frequently the primary caregivers for their children before incarceration). Approximately 1.3 million children nationwide have mothers who are under correctional sanction. GREENFELD & SNELL, supra note 9, at 7. In most cases, when a woman is imprisoned, her children are displaced. AMERICAN CIVIL LIBERTIES UNION ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES, at Exec. Summary (2004), available at http://www.aclu.org/images/asset_upload_file393_23513.pdf [hereinafter CAUGHT IN THE NET].

12. Systemic safeguards for children include adequate access to social programs and community-based resources. See Denise Johnston, The Care and Placement of Prisoners' Children, in CHILDREN OF INCARCERATED PARENTS, supra note 11, at 103, 114 (reporting that most caregivers and their families are poor, with a decreased ability to access resources such as medical/dental care and dependable transportation). Access to public resources is particularly challenging for relative caregivers, and less so for nonrelative foster families. See Ellen Barry et al., Legal Issues for Prisoners with Children, in CHILDREN OF INCARCERATED PARENTS, supra note 11, at 147, 155-56 (stating that there are few essential support services available to relative caregivers, including children's counseling, family counseling, and respite care); Phillips & Bloom, supra note 11, at 67 (stating that public assistance programs, such as Temporary Assistance for Needy Families (TANF), are not designed with relative caregivers in mind, creating many obstacles for caregivers in accessing these programs).

It is important to note that there is a lack of available data surrounding children of incarcerated parents because of most states' failure to record this information. See Cynthia Seymour, Introduction, in CHILDREN WITH PARENTS
intolerant systems, such as state foster care, public education, and juvenile justice systems, with little guidance or support.\textsuperscript{13} Not only do these children face emotional and psychological trauma from parental separation,\textsuperscript{14} they are placed in systems that do not have adequate resources to fully address their dynamic and multi-faceted needs.\textsuperscript{15} These consequences are exacerbated by the fact that poor African-American women account for the fastest growing segment of those sentenced to lengthy prison terms under these guidelines.\textsuperscript{16}

\begin{quote}
\textbf{IN PRISON: CHILD WELFARE POLICY, PROGRAM, AND PRACTICE ISSUES, supra note 11, at 1, 2. Due to such information gaps, no one knows precisely how many children are impacted by incarceration, who such children reside with, or the scope of their needs. \textit{Id.} According to Seymour:}

Children whose mothers are incarcerated often experience disrupted and multiple placements. Approximately one-half of children whose mothers are incarcerated live with grandparents, one-quarter live with their fathers, and the remaining one-quarter are placed in out-of-home care or live with other relatives or friends in informal placements . . . .

Their new caregivers tend to have low incomes and lack the social supports and other resources to meet the children's complex needs. \textit{Id.} at 5.

13. \textit{See infra} Part IV (describing the systemic issues faced by children of incarcerated mothers). \textit{See generally BARBARA BLOOM \& DAVID STEINHART, WHY PUNISH THE CHILDREN?} 19-29 (1993) (reviewing survey data on characteristics of incarcerated mothers and their children); Barry et al., \textit{supra} note 12, at 148 ("[I]ncarcerated mothers are far more likely to have to deal with a social service system that is not always responsive, one that in some cases is extremely hostile to the mother in prison.").

14. \textit{See} Julie A. Norman, \textit{Children of Prisoners in Foster Care, in CHILDREN OF INCARCERATED PARENTS, supra note 11, at 124, 124 (describing the trauma experienced by children who are placed in foster care following parental arrest).}

15. \textit{See} Seymour, \textit{supra} note 11 for a discussion regarding research conducted by Smith and Elstein in 1994, when they surveyed 500 law enforcement, child welfare, and correctional officials in 100 counties. According to their findings, "[a]lthough more than half of the child protective services sample reported increased requests in recent years for help in placing children whose parents had been arrested, eighty percent acknowledged that there were no specific policies in place for responding to these requests." \textit{Id.} at 4.

Additionally, although foster care administrators acknowledged an increase in the need for foster care placement services for the children of incarcerated mothers, ninety-seven percent of the agencies reported that there were "no specific policies in place to guide their work for these children." \textit{Id.}; \textit{see also} Myrna S. Raeder, \textit{The Forgotten Offender: The Effect of Sentencing Guidelines and Mandatory Minimums on Women and Their Children, 8 FED. SENT'G REP.} 157, 158-60 (1995) [hereinafter \textit{Forgotten Offender}].

This disparate impact on children of color stems partly from the fact that African-American mothers are substantially more likely to be poor and single, factors that make them vulnerable under drug war policies. When single mothers are incarcerated, their children are often sent to live with relatives or placed in foster homes. Although placement in the foster care system may be the best alternative for care while a mother is incarcerated, there are a number of negative potential consequences that some foster children face. For example, these children risk being subjected to sexual and physical abuse at substantially higher rates than children in the general population. Due to the instability of some foster care arrangements, these children also face the possibility of being separated from siblings, constant mobility, and high rates of academic failure. In addition, as a result of the Adoption and Safe Families Act of

American women were 4.5 times more likely than white women and 2.5 times more likely than Hispanic women to serve time in prison.

17. See Rukmalie Jayakody et al., Family Support to Single and Married African American Mothers: The Provision of Financial, Emotional, and Child Care Assistance, 55 J. MARRIAGE & FAM. 261, 261 (1993) (stating that African-American children, as opposed to white and Hispanic children, are significantly more likely to live with their mothers only; stating further that high rates of poverty frequently accompany African-American single-parent families).

18. See CAUGHT IN THE NET, supra note 11, at 28, 59 (stating that poor women of color are targeted by law enforcement officials for drug-related activities; “[W]omen of color are profoundly impacted by race-biased policing practices in the context of the war on drugs.”).

19. See Johnston, supra note 12, at 109 tbl. 7.5 (showing that eighty percent of children of incarcerated mothers are placed with grandparents, other relatives, or in foster care); see also Sandra Bass et al., Children, Families and Foster Care, FUTURE OF CHILDREN, Winter 2004, at 14-15 (showing a correlation between poverty, single motherhood, and involvement in the foster care system for children of color).

20. See generally James M. Gaudin & Richard Sutphen, Foster Care vs. Extended Family Care For Children of Incarcerated Mothers, 19 J. OFFENDER REHABILITATION 129 (1993) (finding that the quality of care from foster families, when rated with the HOME Inventory, was better than from relatives for children between three and six years old; reporting also that foster care providers have more support from informal social networks).

21. National Coalition for Child Protection, Foster Care vs. Family Preservation: The Track Record on Safety, http://www.nccpr.org/newissues/1.html (last visited Apr. 3, 2007) (“[I]n group homes there was more than ten times the rate of physical abuse and more than 28 times the rate of sexual abuse as in the general population.”); see also LEROY PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 58 (1989).

1997, these children may spend their entire childhood in the care of non-parent caregivers without the possibility of parental reunification.\textsuperscript{24}

Furthermore, children in foster care who want to maintain physical contact with their incarcerated mothers are seriously challenged by federal prison relocation practices, whereby prisoners are transferred from one correctional facility to another.\textsuperscript{25} Because these children are likely to be from poor, single-parent households, they, and their caregivers, often lack the financial resources to travel long distances and follow the incarcerated parent who has been relocated.\textsuperscript{27} The lack of sustained contact between

\begin{itemize}
\item 25. See Justin Brooks & Kimberly Bahna, “It’s a Family Affair”—The Incarceration of the American Family: Confronting Legal and Social Issues, 28 U.S.F. L. REV. 271, 280-81 (1994); see also Olim v. Wakinekona, 461 U.S. 238, 247-48 (1983) (holding that re-locating an inmate more than 4,000 miles away from his homestead was within constitutional limits).
\item 26. For a discussion regarding the percentage of African-American single mothers, see Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 PEPP. L. REV. 905, 950-51 (1993) [hereinafter Gender and Sentencing] (analyzing U.S. Census data which shows that eighty-eight percent of single parents are mothers; “[A]lmost sixty-three percent of Black family groups with children are single-parent, as compared with twenty-three percent of White family groups.”).
\item 27. See Bass et al., supra note 19, at 14 (“Some evidence suggests that children of color are more likely to come from single-parent households.”); Brooks & Bahna, supra note 25, at 280 (“[I]ncarceration most commonly occurs in the lowest socioeconomic strata of our society.”); PELTON, supra note 21, at 107 (“[I]t is largely poor children who populate the foster care system.”). \end{itemize}
mothers and children only exacerbates problems of extreme emotional distress and maltreatment children may already face in the foster care system. Further, maternal incarceration may cause children to become involved in the juvenile justice system, and may eventually lead to their involvement in the adult criminal justice system.

In essence, these children of color have become America's forgotten casualties in the War on Drugs. Regardless of whether Congress believes that female offenders should be punished in a manner equivalent to their male counterparts for the commission of drug offenses, Congress should not ignore the vicarious consequences children face when their mothers are sentenced to lengthy prison terms. Congress must examine the egregious harm to children that flows from harshly punishing African-American women for peripheral involvement in drug trafficking activity, and should overhaul further the sentencing guidelines and mandatory minimums.

The purpose of this article is fourfold. First, it will provide a brief overview of the emergence of the federal sentencing guidelines and mandatory minimums as tools to fight the "War on Drugs." Second, this article will discuss how racial stereotyping of African-American women arguably contributes to their growing incarceration rate. Third, it will shed light on the systemic issues facing children of incarcerated mothers, such as generational poverty, disparate educational opportunities, and inadequate access to resources. Finally, this article will offer solutions that focus

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28. See Bass et al., supra note 19, at 6 ("[E]ven in the best situations, foster care is inherently fraught with uncertainty, instability, and impermanence."); Brooks & Bahna, supra note 25, at 281-82.

29. See infra Part IV.C (discussing the likelihood that children of incarcerated parents will become involved in the criminal justice system).

30. See infra notes 47-49. In many cases, women perform acts ranging from taking drug orders over the phone, to hiding money and drugs for a significant other who sells drugs, to living in a home used for drug-related activities. See CAUGHT IN THE NET, supra note 11, at 11; Beth E. Ritchie, The Social Impact of Mass Incarceration on Women, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 136, 138 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing the idea that women are peripherally involved in drug-related crimes as a means of survival).

31. See infra Part II.

32. See infra Part III.

33. See infra Part IV.
on redirecting wasteful government spending and providing for more community-based alternatives to incarceration for African-American women convicted of drug offenses.  

The purpose of this article is not to make excuses for the poor choices that African-American women may have made, but to attempt to explain the circumstances which may contribute to their involvement in drug offenses. An increased understanding of the unique problems faced by African-American women and their children should influence Congress to overhaul the sentencing guidelines and mandatory minimums, and to adopt a multidisciplinary approach to meet the exceptional needs of these women and their children.

II. BACKGROUND OF DRUG SENTENCING POLICY AND MANDATORY MINIMUMS

A. Origins of the U.S. Sentencing Commission and Mandatory Minimums

During the 1980s, in response to growing pressure from the public, Congress established stringent federal sentencing guidelines and mandatory minimums for the commission of certain types of crimes. The sentencing guidelines and mandatory minimums were established for at least two reasons. First, they were intended to be a rapid response to the perceived “exploding” drug problem within the United States. Congress, through the Sentencing Reform Act, hoped

34. See infra Part V.

35. In this context, the term “multidisciplinary” refers to the notion that professionals from a variety of disciplines such as law, social work, and psychology should work together by taking a team-oriented approach to assisting poor women of color and children. See Oxford English Dictionary Online, at http://o-dictionary.oed.com.sculib.scu.edu/cgi(entry/00318038?single=1&query_type=word&queryword=multidisciplinary&first=1&max_to_show=10 (last visited Apr. 4, 2007) (defining “multidisciplinary” as “[c]ombining or involving several separate academic disciplines”). By taking this approach, the professionals involved will be able to view the woman and her children holistically and provide recommendations that meet the multi-faceted needs of the client.

36. MAUER, supra note 8, at 59.

to curb these perceived problems by implementing a system that profoundly relied upon mandatory, yet arguably excessively harsh, sentences for the commission of certain types of crimes.\textsuperscript{38} Ostensibly, Congress believed that by putting statutes in place that called for convicted drug offenders to serve significantly longer prison terms, people would be deterred from using and selling drugs.\textsuperscript{39} The second reason for establishing the sentencing guidelines and mandatory minimums was to address the issues stemming from alleged imbalances in the exercise of judicial discretion.\textsuperscript{40} Complaints had previously been lodged against the judiciary because of the seemingly arbitrary and capricious way in which criminal defendants were sentenced.\textsuperscript{41} These complaints centered on the notion that

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mandatory minimum sentencing laws. *Id.* Sterling explains that "the idea behind mandatory minimum sentences was to encourage the government to prosecute high level drug offenders." *Id.*
\end{quote}


The [Sentencing Reform] Act’s legislative history clearly establishes that Congress’ "primary goal" in undertaking sentencing reform was the elimination of unwarranted sentencing disparity. Advocates of sentencing reform repeatedly emphasized the unfairness of the fact that offenders convicted of the same crime and possessing similar criminal histories, received vastly different sentences. Moreover, Congress was especially sensitive to the need to reduce disparities associated with such factors as the defendant's race, gender, and socioeconomic status. Thus, Congress instructed the Commission to “assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.”

Nagel & Johnson, *supra*, at 191.


40. See MAUER, *supra* note 8, at 136.

judges' individual biases factored into sentencing determinations. Although Congress had lofty goals in mind when it implemented mandatory minimums, little research regarding the policy was conducted in advance. As a result, Congress failed to ascertain the long-term effects of implementing mandatory minimums. At the outset, the primary targets of mandatory minimums were high-level offenders or drug "kingpins," who were invariably male and generally the principal beneficiaries of unlawful drug activity. The notion of incarcerating those

called Criminal Sentences, which called attention to sentencing disparities allegedly caused by the unlimited discretion of sentencing judges in criminal cases.

42. See id. (showing how Frankel's allegations led to shifts in sentencing reform at both federal and state levels, and ultimately led to drastically diminished discretion for sentencing judges).

43. One source describes the haste with which mandatory minimums were enacted by Congress as follows:

Since the idea [for an anti-drug bill, later known as mandatory minimums] was born in early July [1986], the law-writing committees had less than a month to develop the ideas, to write the bills to carry out those ideas, and to get comments from the relevant government agencies and the public at large.

One idea was considered for the first time by the House Judiciary Committee four days before the recess began. It had tremendous political appeal as "tough on drugs." This was the creation of mandatory minimum sentences in drug cases.


45. See Sterling, supra note 37 (stating that the idea behind mandatory minimums was to prosecute high level drug offenders); see also CAUGHT IN THE NET, supra note 11, at 38-39 ("Congress clearly expressed that its goal in tying mandatory minimum penalties to the quantity of drugs involved in trafficking offenses was to consistently and harshly punish 'major' and 'serious' traffickers.").

46. See CAUGHT IN THE NET, supra note 11, at 11 ("Those at the head of major drug operations are almost always men, while women remain at the
at the root of the United States' drug problem appealed to lawmakers who believed the availability of drugs would be considerably diminished with suppliers and transporters behind bars. Instead of achieving this result, the statutes opened the door to incarcerating a number of women for peripheral involvement in drug-related activity. Many of the women sentenced to lengthy prison terms are not the kingpins that Congress intended to punish. In fact, these women are typically the wives, girlfriends, and acquaintances of men who use drugs, or low-level dealers. Further, poor women are particularly susceptible to minor involvement in drug-related crime as a means of survival. As a testament to the abject failure of the sentencing statutes to deter drug kingpins, the U.S. Sentencing Commission reported in 1995 that only 5.5% of federal crack cocaine defendants were considered high-level offenders.

periphery, with little knowledge and even less power."); U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY tbl.8 (1995), available at http://www.ussc.gov/crack/CHAP7.HTM (showing that more than eighty percent of federal drug defendants are male).


48. See CAUGHT IN THE NET, supra note 11, at 11-12 (stating that men, who are more likely major players in the drug trade, are often able to provide information to prosecutors in exchange for shorter sentences, sometimes putting minor female players in jeopardy; “Under current drug policies, peripherally involved women . . . tend to bear the brunt of enforcement efforts and punitive approaches ostensibly aimed at more significant players.”).

49. MAUER, supra note 8, at 140 (“Women have traditionally received the benefit of consideration for having a secondary role in the commission of a crime . . . [but] these factors are now deemed largely irrelevant.”).

50. See, e.g., CAUGHT IN THE NET, supra note 11, at 35 (describing the conviction of a woman who never sold drugs, but was merely the girlfriend of a drug defendant, for conspiracy to commit a drug offense: “In too many cases, women are punished for the act of remaining with a boyfriend or husband engaged in drug activity.”). See generally Gaskins, supra note 9; Phyllis Goldfarb, Counting the Drug War's Female Casualties, 6 J. GENDER RACE & JUST. 277 (2002).

51. See CAUGHT IN THE NET, supra note 11, at 11 (“[T]he economic pressures and seemingly insurmountable challenges that low-income women face may also drive them to drug use or abuse. Women may use drugs to help them work long hours or perform multiple jobs to make ends meet . . . .”); see also Ritchie, supra note 30, at 138-39.

52. See U.S. SENTENCING COMM'N, supra note 46, at 158.
B. Blakely and Booker

The Court in *Blakely v. Washington*\(^53\) and *United States v. Booker*\(^54\) examined sentencing judges' discretion and evaluated the impact of the federal sentencing guidelines on the rights of criminal defendants.\(^55\) *Blakely* was significant in that it seemed to dismantle certain provisions within the Washington state sentencing guidelines,\(^56\) thereby restoring the rights of criminal defendants at the sentencing stage.\(^57\) In *Blakely*, the Court held that the sentencing guidelines of the state of Washington violated the right to a jury trial under the Sixth Amendment to the U.S. Constitution.\(^58\) The problem with the state sentencing guidelines, which resembled the federal sentencing guidelines, stemmed from the fact that judges had the authority to increase a defendant's sentence above the maximum guideline sentence if the court found facts outside the scope of the jury's findings, even when those facts were not proven beyond a reasonable doubt.\(^59\) *Blakely* made it clear that a sentencing judge did not have the legal authority to look beyond the scope of findings made by a jury to issue a longer sentence to a criminal defendant, even if the sentence was within the range established by statute for the crime in question.\(^60\) The *Blakely* decision raised eyebrows because of the possibility that the federal sentencing guidelines could also be deemed violations of the Sixth Amendment to the U.S. Constitution.\(^61\)

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55. See Booker, 543 U.S. 220; Blakely, 542 U.S. 296.
56. Blakely, 542 U.S. at 308-09. The Court held that "when a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, ... the judge exceeds his proper authority." Id. at 304; see also Myrna S. Raeder, American Bar Association, *A Primer on Gender-Related Issues That Affect Female Offenders*, CRIM. JUST. MAG., Spring 2005, at 12, available at http://www.abanet.org/crimjust/cjmag/20-1/home.html [hereinafter Gender-Related Issues] (stating that the impact of the Booker decision "will reverberate throughout the federal system for some time and may ultimately cause Congress to redraft the U.S. Sentencing Guidelines").
57. See Blakely, 542 U.S. at 313 ("[E]very defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters' alternative, he has no such right. That should be the end of the matter.").
58. Id. at 305.
59. Id. at 303-04.
60. Id.
61. See Douglas A. Berman, *Sentencing and Punishment: Conceptualizing*
While the Court's holding in *Blakely* appeared to limit the discretion of judges to increase sentences, *Booker* significantly broadened the scope of judicial discretion in making sentencing determinations. The *Booker* Court, while reiterating the significance of *Blakely*, held the sentencing guidelines in question to be merely advisory, as opposed to presumptive, to sentencing judges. The Court's ruling signified its disapproval of the structure of the sentencing guidelines and arguably of mandatory minimums. This was largely due to the Court's emphasis on striking the portions of the guidelines which called for mandatory sentencing terms.

Although the Court's ruling in *Booker* initially caused concern, the practical application by sentencing judges has been anti-climactic. For the most part, the judiciary has continued to adhere to the sentencing guidelines. Although the sentencing guidelines were seemingly dismantled by the Court's holding in *Booker*, mandatory minimums have generally remained unscathed.

*Booker*, 38 ARIZ. ST. L.J. 387, 406 (2006) (“In part because of *Blakely's* bold and often majestic assertions about the reach and importance of the Sixth Amendment’s jury trial right, it was expected that the Supreme Court would declare *Blakely* applicable to the federal sentencing guidelines.”).

64. *Id.* at 232 (Stevens, J.).
65. *Id.* at 245 (Breyer, J.).
66. *Id.* at 233 (Stevens, J.).
67. *Id.* at 245 (Breyer, J.).
68. Frank O. Bowman III, The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After *Booker*, 43 HOUS. L. REV. 279, 289 (2006) (stating that lawyers and courts initially struggled to interpret and apply the *Booker* decision, and that there was “an upwelling of uncertainty, hope, and concern about what the future would bring”).
69. See Lynette Clemetson, Congress is Expected to Revisit Sentencing Laws, N.Y. TIMES, Jan. 9, 2007 (“Among those eagerly awaiting signs of change are federal judges, including many conservatives appointed by Republican presidents.”); see also Bowman, supra note 68, at 319 (reporting that the nationwide effects of *Booker* have been modest, with the procedure under the prior mandatory guidelines proving surprisingly durable).
70. See Bowman, supra note 68, at 319-20 (reporting that, post-*Booker*, there was only a ten percent decline in the national rate of within-range sentences and a seven percent increase in judicial departures or variances from the guidelines).
71. *Id.* at 320 (“[T]he curious combination of a declining guideline compliance rate and a flat . . . average sentence strongly suggests that judges as
III. THE GROWING RATE OF INCARCERATED AFRICAN-AMERICAN WOMEN RESULTING FROM CURRENT DRUG SENTENCING POLICY

A. Increasing Numbers of Female Inmates

As of 1999, seventy-two percent of women serving time in federal prisons and thirty-four percent of women incarcerated in state prisons were classified as drug offenders.\(^{72}\) For women of color, the figures are even more daunting. For example, while African-Americans make up roughly thirteen percent of our nation's population,\(^ {73}\) African-American women account for thirty-five percent of the federal female prison population and forty-eight percent of state female prison populations.\(^ {74}\) In terms of overall prison growth for women, the proportion of incarcerated African-American women is outpacing the number of women incarcerated nationally.\(^ {75}\) While about thirty-three percent of women in state prisons are Caucasian, nearly sixty-seven percent are women of color.\(^ {76}\) One may attribute the disproportionate number of incarcerated women of color to a variety of factors.\(^ {77}\)

\(^{72}\) See Myrna S. Raeder, Creating Correctional Alternatives for Nonviolent Women Offenders and their Children, 44 ST. LOUIS U. L.J. 377, 379 (2000); see also GREENFELD & SNELL, supra note 9, at 6 tbl.15; Meda Chesney-Lind, Imprisoning Women: The Unintended Victims of Mass Imprisonment, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT, supra note 30, at 79, 80 (showing that the number of incarcerated women grew from 12,000 in 1980 to over 90,000 by 1999); infra Part III.C (discussing in greater detail how the statutory scheme results in lengthy sentences for low-level offenders).

\(^{73}\) GREENFELD & SNELL, supra note 9, at 2 tbl.2.

\(^{74}\) Id. at 7 tbl.16. African-American women represent over forty percent of the women in local jails and twenty-seven percent of women on probation. Id.

\(^{75}\) CAUGHT IN THE NET, supra note 11, at 1 (reporting that since 1986, the rate of incarceration for African-American women increased by 800%, whereas the incarceration rate for women of all races increased by 400%); see also GREENFELD & SNELL, supra note 9, at 11 tbl. 28 (showing that thirty-six out of every 1000 black women, compared with five percent of every 1000 white women and fifteen out of every 1000 Hispanic women can expect to be imprisoned during their lifetimes).

\(^{76}\) GREENFELD & SNELL, supra note 9, at 7 tbl.16.

\(^{77}\) Arguably, a rise in incarceration rates could coincide with a rise in crime rates or advances in law enforcement policies and procedures, making it easier to catch women who are involved in drug-related activities. Although there is merit in such suggestions, this article argues that the increase in incarceration
However, the most conspicuous reason is the implementation of unduly harsh sentencing guidelines and mandatory minimums.78

B. How Women of Color Became Prime Targets in the War on Drugs

To fully understand the devastating impact of mandatory minimums and the sentencing guidelines on women of color, it is essential to understand the political climate in which they were created. A highly traditionalist political atmosphere, coupled with an economic recession and a supposed growing U.S. drug problem, created a recipe for disaster.79 As Americans became increasingly disenchanted with the economic recession, the blame for the nation's rates for poor women of color stems largely from the "War on Drugs." See CAUGHT IN THE NET, supra note 11, at 1 (reporting that the number of women incarcerated in state facilities for drug-related offenses increased by 888% from 1986 to 1999; in 1997, thirty-nine percent of African-American women in state facilities were convicted of drug offenses); see also supra note 51 and accompanying text.

78. See CAUGHT IN THE NET, supra note 11, at 41-42 (stating that, with regard to drug-related crimes in particular, "[m]andatory minimum statutes eliminate judges' ability to consider mitigating factors that might otherwise counsel in favor of reducing sentences for low-level offenders, who make up the vast majority of women caught in the net cast by the war on drugs"; reporting also that African-American defendants are much more likely than white and Hispanic defendants to receive heightened mandatory minimum penalties). According to one source:

The interaction of drug enforcement policies and federal mandatory sentencing laws operate in a particularly pernicious way for African American women charged with drug crimes. This is true because many women convicted for drug offenses played minor roles in drug transactions for which their intimate (or former intimate) partner was a major player.

Donna Coker, Foreword: Addressing the Real World Injustice in the Criminal Justice System, 93 J. CRIM. L. & CRIMINOLOGY 827, 834 (2003). For information about the effect of mandatory minimums on women generally, see Gaskins, supra note 9, at 1533 (arguing that women who are minimally involved in drug-related activity are being unfairly sentenced to lengthy prison terms); Gender and Sentencing, supra note 26, at 922-27 (arguing that mandatory minimums play a significant role in the increasing female prisoner population).

79. See Craig Reinarman & Harry G. Levine, Crack in Context, in CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 1 (Craig Reinarman & Harry G. Levine eds., 1997) ("[T]he period from 1986 through 1992 was characterized by anti-drug extremism . . . . Drug scares typically link a scapegoated substance to a troubling subordinate group—working-class immigrants, racial or ethnic minorities, rebellious youth. The period from 1986 to 1992 was in many ways the most intense drug scare of the twentieth century.").
budgetary woes needed to be placed somewhere.\textsuperscript{80} Unfairly, the fingers pointed directly to welfare programs and African-American women as a major cause of the fiscal problems faced by Americans.\textsuperscript{81}

Propaganda disseminated to mainstream America documented exaggerated tales of “welfare queens”\textsuperscript{82} living lavishly as a result of receiving superfluous welfare benefits from the federal government.\textsuperscript{83} As a result, many women of color who legitimately relied on welfare benefits to support their families were demonized and maligned in the public eye.\textsuperscript{84} Further, a lasting stereotype developed that African-American women were poor and reliant upon public benefits because of laziness and poor choices.\textsuperscript{85} It has been difficult for

\textsuperscript{80} See id.

\textsuperscript{81} See, e.g., R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 174-77 (2000) (reviewing public assessments of the welfare system). Weaver summarizes the prevailing public opinion of welfare prior to the reforms of the late 1990s and states that “welfare, in short, was perceived as being at odds with the widely shared American belief in individualism and the work ethic.” Id. at 174. One author comments on the falsity of the stereotypical portrayal of welfare recipients as inner city African-American women:

Inner city African-American families never constituted more than twenty percent of all the people on welfare. They never even constituted a majority of African-Americans on welfare. Yet the politicized stereotype of the welfare recipient—the image that millions of Americans carried in their minds—was that of a never-married inner-city African-American woman who kept getting pregnant in order to get a bigger welfare check.


\textsuperscript{82} See Linda J. Lacey, Book Review, As American as Parenthood and Apple Pie: Neutered Mothers, Breadwinning Fathers, and Welfare Rhetoric, 82 CORNELL L. REV. 79, 79 n.2 (1994) (“A definitive profile of the ‘Welfare Queen’ has emerged from the rhetoric. She is (1) single; (2) poor; (3) a teenager; and (4) black.”).

\textsuperscript{83} See Paul Krugman, Editorial, Wag the Dog, N.Y. TIMES, Sept. 24, 2000, at D15 (describing Ronald Reagan’s constant attack against Cadillac-driving welfare queens as “mean-spirited”); Herbert Mitgang, Books of the Times; The Problem that Won’t Go Away, N.Y. TIMES, Apr. 1, 1992, at C19 (discussing Reagan’s insistence on the existence of Cadillac-driving welfare queens as a way of diverting middle-class concerns away from the plight of the underclass).

\textsuperscript{84} See WEAVER, supra note 81, at 174.

\textsuperscript{85} See Annette R. Appell, Disposable Mothers, Deployable Children, 9 MICH. J. RACE & L. 421, 457 (2004) (reviewing RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION (2003)) (“Kennedy’s description of these Black families and his solution to their problems fits a ‘conservative narrative’ of race and class that characterizes poverty as a result of individual character flaws and poor mothers as deviant, lazy, immoral, Black, and illegitimately dependent on governmental resources.”). This prevailing view may prevent serious attention
these women to escape the stigma tied to the receipt of welfare benefits, regardless of the needs of their families.  

This disparate view of poor African-American women arguably set the stage for the enactment of policy measures which had the cumulative effect of relegating these women to second- or even third-class citizenship within the United States. In the last two decades, Congress launched several punitive measures in the name of fiscal responsibility which exacerbated these problems and ensured the entrapment of African-American women and their children in a continual cycle of poverty and marginalization from mainstream society. Such measures include the denial of federal financial aid for higher education, restrictions on the receipt of welfare benefits for convicted drug offenders, and from being given to systemic issues that contribute to the underlying causes of and perpetuation of extreme poverty in the United States. See DOOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 8-19 (1997); see also Gender and Sentencing, supra note 26, at 915 (relating poverty statistics as they apply to single mothers).  

86. See WEAVER, supra note 81, at 175.  

87. See ROBERTS, supra note 85, at 110-12 (discussing the underlying role race plays in policy decisions that disparately impact African-American women); see also Earl Ofari Hutchinson, Why So Many Black Women Are Behind Bars, ALTERNET, Dec. 5, 2006, http://www.alternet.org/columnists/story/45149/ (discussing the influence of misconceptions about African-American women on policymakers; stating also that, when there is “crime fear hysteria about crime-on-the-loose women,” policymakers are “loath to ramp up funds and programs for job and skills training, drug treatment, education, childcare and health, and parenting skills”).  

88. See CAUGHT IN THE NET, supra note 11, at 56.  

89. See PATRICIA ALLARD, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 17 (2002), available at http://www.sentencingproject.org/pdfs/9088.pdf. A 1988 Amendment to the Higher Education Act was enacted to prevent convicted drug offenders from receiving federal financial aid to attend college. Higher Education Act, 20 U.S.C. § 1091(r)(1) (2000). The Act includes a denial of grants, loans, or work assistance for drug offenders on either a temporary or permanent basis. Id. § 1091(r)(1)-(2). Under the Act, an offender is permanently banned from receiving federal financial aid upon a third conviction for drug possession. Id. § 1091(r)(1). Persons who have been convicted at least twice for selling drugs are denied federal financial aid indefinitely. Id.  

prohibitions on participation in federal public housing programs.91 These punitive measures serve to perpetually punish female offenders long after they have served their extended prison sentences, often for peripheral involvement in drug-related activity.92 In effect, the children of female offenders, undoubtedly the most innocent victims in this scenario, also suffer vicariously by being denied access to much-needed benefits.93 Unfortunately, these punitive measures often fail to address the underlying issues of drug addiction, incarceration, and poverty, essentially paving the way for future generations to suffer a similar fate.94

Clause to PRWORA that provided a lifetime ban from receiving welfare benefits for women convicted of drug offenses. Id. Because many of the growing number of women incarcerated for drug offenses are poor women of color, their children have been disparately impacted by this provision. See ALLARD, supra note 89, at 13-14. To date, an estimated 123,000 children have been affected by the lifetime ban on welfare benefits as a result of their mothers' drug convictions. Id.

91. As a result of concerns regarding drug use and drug trafficking in publicly provided housing, Congress enacted The Housing Opportunity Program Extension Act of 1996. See Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9, 110 Stat. 834, 836-37 (1996) (codified as amended at 42 U.S.C. § 1437d(q)-(r) (2000)). The Act provides public housing agencies with the authority to: (a) evaluate the criminal histories of applicants or current participants in low-income housing programs; and (b) obtain records from drug treatment programs in an effort to ascertain whether an applicant is currently using illicit drugs. 42 U.S.C. §§ 1437d(s)-(t). Current participants in the federal housing programs need only be convicted of one drug offense to be permanently excluded from program participation. See id. § 1437d(l)(6). The Act allows public agencies to include lease provisions that call for the eviction of public housing tenants who engage in illicit drug activity, either on or off the premises. See id.

92. See ALLARD, supra note 89 (discussing collateral sanctions facing women convicted of drug offenses); see also Myrna S. Raeder, Remember the Family: Seven Myths About Single Parenting Departures, 13 FED. SENT'G REP. 251, 251-57 (2001) [hereinafter Remember the Family] (discussing collateral consequences faced by female drug offenders).

93. See generally Jeremy Travis, Families and Children, 69 FED. PROBATION 31, 36 (2005) ("[A]t any given time . . . 70 percent of foster children have had a parent incarcerated at one time or another during their time in foster care.").


Considerably more parents in state prison reported a history of their parents having been incarcerated in 1997 than in 1986. Only 3.1 percent of mothers incarcerated in state prisons during 1986 reported having a mother incarcerated, compared with 8.6 percent of mothers in state prisons in 1997. The same pattern exists for fathers . . . .

Id. at 468. The authors also discussed the fact that parents who were incarcerated in state prisons in 1997 had greater reports of prior physical or
1. The Crack Cocaine Conundrum

Under the Anti-Drug Abuse Act of 1986, crack cocaine users face much longer prison terms for the possession of and trafficking crack cocaine than those who use and traffic powder cocaine. Many opponents of this disparity argue that the difference in punishment with respect to possession of the two forms of cocaine is a result of a misconceived racialization of the drug. One source notes:

Although crack was the least used of all illicit drugs in the U.S., and although more whites used illicit drugs than blacks . . . , the “war on drugs” has been targeted most notoriously at the possession and sale of crack cocaine by blacks. Crack cocaine in black neighborhoods became a lightning rod for a complicated and deep-rooted set of racial, class, political, social, and moral dynamics. To the extent that the white majority in the U.S. identified both crime and drugs with the “dangerous classes”—i.e., poor urban blacks—it was easier to endorse, or at least acquiesce in, punitive penal policies that might have been rejected if members of their own families and communities were being sent to prison at comparable rates. The Anti-Drug Abuse Act prescribes a five year sentence for possession of just five grams of crack cocaine, while it takes five hundred grams of powder cocaine to trigger the same sentence. No evidence indicates that the

sexual abuse, prior criminal histories, were more often the children of incarcerated parents, and admitted to regular drug use, when compared to incarcerated parents in 1986. Id. at 473.


96. See id. at 7. Since crack is relatively inexpensive and widely sold in urban areas where minorities are most likely to live, minorities are at greater risk of arrest for crack cocaine possession than are white and higher income powder offenders. COYLE, supra note 95, at 8.


98. See COYLE, supra note 95, at 1. The American Bar Association compiled a comprehensive report on drug sentencing and mandatory minimums in this country. AM. BAR ASS’N, JUSTICE KENNEDY COMM’N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES (2004), available at
pharmacological differences in the two forms of cocaine are significant enough to account for the tremendous disparity in sentencing that currently exists.\textsuperscript{99} The United States Sentencing Commission attempted to remedy this remarkable inconsistency by recommending that Congress make the sentencing terms for crack cocaine and powder cocaine possession more consistent.\textsuperscript{100} Despite evidence supporting such revisions,\textsuperscript{101} Congress ignored the Commission’s recommendation and has failed to close the sentencing gap.\textsuperscript{102} Congress’ failure to add parity to the sentencing statutes has undoubtedly caused harm to poor African-Americans.\textsuperscript{103}

The disparities in sentencing policies exacerbated the trying circumstances of poor African-American women. After crack cocaine flooded the drug market in inner-city communities in the mid-1980s, some poor women of color became involved in using or selling the drug.\textsuperscript{104} African-

\textsuperscript{99} See Hearing on Cocaine and Sentencing Policy Before the United States Sentencing Commission (2006) (statement of Jesslyn McCurdy, Legislative Counsel, Am. Civil Liberties Union), available at http://www.ussc.gov/hearings/11_15_06/McCurdy-testimony.pdf (citing a 1996 study published by the Journal of American Medical Association (JAMA) that found that the physiological and psychoactive effects of cocaine are similar, regardless of whether it is in the form of powder or crack); see also State v. Russell, 477 N.W.2d 886, 889 (Minn. 1991) (evaluating the constitutionality of Minnesota’s crack cocaine statute, which mirrors the federal statute, and holding that there was no rational basis to justify the tremendous sentencing disparity between crack cocaine and powder cocaine). For further discussion of the differences between crack and powder cocaine, see Sentencing Project, Crack Cocaine Sentencing Policy: Unjustified and Unreasonable, at 1, at http://www.sentencingproject.org/Admin/Documents/publications/dp_cc_sentencingpolicy.pdf (last visited Mar. 28, 2007).

\textsuperscript{100} See U.S. SENTENCING COMM’N, supra note 46, at xiv.

\textsuperscript{101} See generally COYLE, supra note 95.

\textsuperscript{102} See FAMM, History Timeline, http://www.famm.org/ExploreSentencing/TheIssue/HistoryoftheIssue/HistoryTimeline/104thCongress.aspx (last visited Apr. 3, 2007) (showing that in 1997, the U.S. Sentencing Commission, the Department of Justice and the drug czar recommended that Congress minimize the crack and powder cocaine sentencing disparity, a move which was supported by President Clinton). Congress ultimately rejected these recommendations. Id.

\textsuperscript{103} See generally Gender and Sentencing, supra note 26.

\textsuperscript{104} See TANYA TELFAIR SHARPE, BEHIND THE EIGHT BALL: SEX FOR CRACK
American women came to be represented in mainstream media as the typical crack user,\textsuperscript{105} despite the fact that African-Americans constituted the minority of crack users.\textsuperscript{106} This view of crack cocaine use by poor African-American women contributed to law enforcement tactics that specifically targeted them, leading to increased arrest and incarceration rates.\textsuperscript{107}

As the government honed in on drug users and dealers, an increased number of people were caught and incarcerated for their involvement in the drug trade.\textsuperscript{108} Those prosecuted for the use or sale of crack were predominantly non-white.\textsuperscript{109} Statistics indicate that from 1992 to 1994, approximately 96.5% of all federal crack cocaine prosecutions targeted non-white individuals.\textsuperscript{110} However, these statistics were misleading because the lack of white defendants in federal court for such conduct was not indicative of a lack of white persons engaged in the conduct.\textsuperscript{111} During that same period

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\textsuperscript{105} See ROBERTS, supra note 85, at 154-58 ("The pregnant crack addict was portrayed as an irresponsible and selfish woman who put her love for crack above her love for her children. In news stories, she was often represented by a prostitute, who sometimes traded sex for crack, in violation of every conceivable quality of a good mother."); see also Alex Féthière, The Black Plague?, THE BROOKLYN RAIL, Feb. 2007, available at http://www.brooklynrail.org/2007/2/express/black-plague.

\textsuperscript{106} LEADERSHIP CONFERENCE ON CIVIL RIGHTS, JUSTICE ON TRIAL: RACIAL DISPARITIES IN CRIMINAL JUSTICE SYSTEM 13, available at http://www.civilrights.org/publications/reports/cj/cjjustice.pdf [hereinafter RACIAL DISPARITIES] ("Despite stereotypes perpetuated by the media and popular culture, government statistics show that more whites overall used crack than blacks."); Amnesty Int'l, supra note 95 (reporting that two-thirds of crack users are white or Hispanic).

\textsuperscript{107} ROBERTS, supra note 85, at 156-59, 164-94. Defendants convicted of crack cocaine possession in 1994 were 84.5% African-American. Amnesty Int'l, supra note 95.


\textsuperscript{109} RACIAL DISPARITIES, supra note 106, at 13.

\textsuperscript{110} Id.

\textsuperscript{111} Id.
of time, several hundred white individuals were prosecuted in California state courts for crack cocaine offenses.  

Despite these prosecutions on the state level, no whites were prosecuted by the United States Attorney's Office in Los Angeles County and six surrounding counties for crack-related offenses from 1988 to 1994.  

It is not clear why cases in Los Angeles involving whites were predominantly prosecuted at the state level, while cases involving African-Americans were more often prosecuted at the federal level.  

Nevertheless, this disparity is reflective of the significant consequences for defendants of color.  

Prison terms for offenders sentenced to federal prison are typically longer than prison terms handed down at the state level.  

The difference between sentencing at the federal versus the state level gives law enforcement officials a somewhat hidden power within the legal system—federal prosecutors can use their authority to prosecute African-American defendants at the federal level, with the likely outcome of significantly longer sentences.  

The ability to make such a choice illustrates that there are major flaws in the system that can cause African-American drug offenders to suffer disparately when charged with similar offenses to

112. Id.  
113. Id.  
114. Id. at 13-14.  
115. See RACIAL DISPARITIES, supra note 106, at 12. "Because of widely varying but almost universally lower state penalties for crack, the decision to prosecute in federal versus state court can often make a dramatic difference in an individual's sentence, thereby making the choice of forum perhaps the most important determinate of sentence length." U.S. SENTENCING COMM'N, supra note 46, at 10.  
116. See, e.g., RACIAL DISPARITIES, supra note 106, at 12 (citing U.S. Sentencing Commission statistics indicating that "the decision of a federal prosecutor to prosecute a suspected drug offender, rather than letting the case proceed in state court, can result in a prison term that is years longer than the sentence that would likely accompany state prosecution"). According to the Bureau of Justice Statistics, the average sentence length for a drug offense in state court was thirty-two months in 2002. See Bureau of Justice Statistics, U.S. Dep't of Justice, Criminal Sentencing Statistics, available at http://www.ojp.usdoj.gov/bjs/sent.htm (last visited Apr. 3, 2007). By comparison, the average length of imprisonment for a drug defendant in federal court was slightly more than seventy-three months in 2002. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FIGURE E: AVERAGE LENGTH OF IMPRISONMENT IN SELECTED CRIME CATEGORIES (7th ed. 2002), available at http://www.ussc.gov/ANNRPT/2002/fig-e.pdf.  
117. See RACIAL DISPARITIES, supra note 106, at 13.
white drug offenders.\textsuperscript{118}

C. Shift from Judicial Discretion to Prosecutorial Discretion

One distinctive element of the sentencing statutes that contributes to the increase in incarceration rates of poor women of color is the shift from judicial discretion to prosecutorial discretion.\textsuperscript{119} One source warned:

Mandatory minimum laws embody a dangerous combination. They provide the government with unreviewable discretion to target particular defendants or classes of defendants for harsh punishment. But they provide no opportunity for judges to exercise discretion on behalf of defendants in order to check prosecutorial discretion. In effect, they transfer the sentencing decision from impartial judges to adversarial prosecutors, many of whom lack the experience that comes from years on the bench.\textsuperscript{120}

Prosecutors are given the sole discretion to make charging decisions, such as determining which defendants meet the high threshold of providing “substantial assistance” in the investigation or prosecution of another who has committed an offense.\textsuperscript{121} The result is a prosecutor-driven

\textsuperscript{118} See id. at 13-15.

\textsuperscript{119} See id. at 21 (explaining that the switch from judicial discretion to prosecutorial discretion allowed prosecutors to grant exceptions to mandatory minimum sentences); David Bjerk, Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing, 48 J.L. \& ECON. 591, 594 (2005) (“The idea that mandatory minimum sentencing laws cause actors in the judicial system, particularly prosecutors, to change their behavior in order to mitigate the effects of these laws is not a new one. In fact, one of the main reasons Congress repealed almost all of the existing mandatory federal sentences for drug offenses in 1970 was because there was a feeling that ‘the severity of existing penalties, involving in many instances minimum mandatory sentences . . . led in many instances to reluctance on the part of the prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offenses.’”).

\textsuperscript{120} RACIAL DISPARITIES, supra note 106, at 21-22.

\textsuperscript{121} See id. at 21 (noting that under federal law, prosecutors may only grant a departure from mandatory minimums if the defendant provides “substantial assistance”); infra Part III.D (discussing “substantial assistance”). Congress, as part of the Reform Act, directed the Sentencing Commission to “assure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.” United States v. La Guardia, 902 F.2d 1010, 1012 n.2 (1st Cir. 1990)
plea bargaining regime where ninety-five percent of federal defendants plead guilty rather than risk losing at trial. This regime, however, virtually guarantees lengthy prison terms for the most vulnerable and least influential persons involved in drug operations—namely, low-level offenders and women involved with men who sell drugs.

The issue of ascertaining appropriate levels of judicial discretion in sentencing determinations is a major source of tension in the ongoing debate regarding current drug sentencing policy. Prior to the Supreme Court’s decision in Booker, judges had little de jure ability to control the

(emphasis added) (citing 28 U.S.C. § 994(n) (Supp. 1987)). "The Sentencing Commission thereupon formulated the challenged guideline: Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines." Id. (emphasis added) (citing 18 U.S.C. app. § 5K1.1).


123. See Forgotten Offender, supra note 15, at 157 (stating that sentencing guidelines have lessened the availability of parole for women and have subjected women to longer sentences than they received before the guidelines were implemented).

124. See Gaskins, supra note 9, at 1533-34; Jackson, supra note 104, at 518; supra notes 30, 48-51 and accompanying text (discussing the peripheral involvement of women in the drug trade); see also U.S. SENTENCING COMM’N, supra note 46, at 158 ("Among cocaine offenders generally, relatively few are classified as high level (9.2% and 5.5% for powder and crack, respectively.").); Paula C. Johnson, At the Intersection of Injustice: Experiences of American Women in Crime and Sentencing, 4 AM. U.J. GENDER & L. 1, 45 (1995) ("Many women find themselves incarcerated because they have been forced or tricked into carrying drugs for dealers. Often the dealers are boyfriends, spouses or other relatives that use the threat of retaliation if the women do not agree to carry large amounts of drugs.").


sentences of individual defendants.\textsuperscript{127} Congress minimized judicial discretion because of the perception that judges had too much autonomy in deciding the fate of particular defendants at the sentencing stage of criminal proceedings.\textsuperscript{128} As a result, sentencing judges were generally not allowed to depart from the mandatory minimum sentencing structure even when there were mitigating circumstances involved in the case.\textsuperscript{129} In cases where judges felt that lengthy sentences were unjust for particular defendants, they had little recourse and were forced to impose lengthy mandatory minimum prison terms.\textsuperscript{130}

In the wake of \textit{Booker},\textsuperscript{131} judges regained \textit{de jure} ability to make sentencing determinations for particular defendants, as the sentencing guidelines are now merely advisory, as opposed to presumptive.\textsuperscript{132} Although \textit{Booker}\textsuperscript{133} seemingly supports judicial autonomy, judges have generally not been

\textsuperscript{127} See Bjerk, \textit{supra} note 119, at 592 ("While mandatory minimum sentencing laws appear to significantly curtail the discretionary influence judges have over the minimum sentences they impose on convicted criminals . . . ").

\textsuperscript{128} Note, \textit{The Unconstitutionality of Determinate Sentencing in Light of the Supreme Court's "Elements" Jurisprudence}, 117 HARV. L. REV. 1236, 1249 (2004); see also Nagel & Johnson, \textit{supra} note 38, at 185-86 (stating the opinion that the sentencing system led to "unwarranted disparities in the sentencing of offenders convicted of similar offenses, and possessing similar criminal histories"); Smith & Pollack, \textit{supra} note 41, at 4.

\textsuperscript{129} \textit{BARBARA S. VINCENT & PAUL J. HOFER, THE CONSEQUENCES OF MANDATORY MINIMUM PRISON TERMS: A SUMMARY OF RECENT FINDINGS} 6 (Fed. Judicial Ctr. 1994); see also Gaskins, \textit{supra} note 9, at 1541 (showing that judges could not apply mitigating factors to reduce the sentences of less culpable defendants).

\textsuperscript{130} See generally Goldfarb, \textit{supra} note 50, at 281-89 (showing examples of cases where women who were peripherally involved in drug trafficking were sentenced by judges to lengthy terms of imprisonment). One source indicates why judges give lower-level offenders more severe sentences:

\[\text{Sentencing guidelines have resulted in great injustice by forcing judges to sentence minor offenders severely, while major offenders are treated far more leniently. This is because there is a joker in the deck. . . . [A major offender] names names and gives valuable information on his criminal enterprise. Low-level criminals cannot "cooperate" because, being at the bottom of the organization, they haven't any information to give.}\]

Smith & Pollack, \textit{supra} note 41, at 38


\textsuperscript{133} \textit{Booker}, 543 U.S. at 258.
willing to deviate from the sentencing guidelines for fear that Congress will hastily reenact sentencing guidelines that unduly limit their discretion. Judges’ unwillingness to deviate from the guidelines has resulted in prosecutors making de facto sentencing determinations outside of the courtroom. This continual reliance upon prosecutorial discretion has arguably had a deleterious effect on poor women of color who are peripherally involved in drug possession and sales.

D. Disparate Impact on Women of Color Caused by Charging Decisions Made by Prosecutors

Prior to Booker, prosecutors gained the power to determine the length of time offenders served through their ability to make charging decisions under drug conspiracy laws. Through the application of drug conspiracy laws, prosecutors are able to charge drug offenders as part of a drug-conspiracy ring, regardless of the level of involvement of

134. See Weisberg & Miller, supra note 132, at 25-28. As Weisberg and Miller note, the majority of scholars and judges acknowledge that, although misguided at times, “[t]he limits on legislative authority to define and sanction crimes are few indeed.” Id. at 6-7.

135. See Bowman, supra note 68, at 279 (noting that “judges as a class are deeply reluctant to depart very far or very often from Guidelines norms and that prosecutors as a class have many tools for increasing sentence length when that is their aim”).

136. See Johnson, supra note 124, at 45 (“Many women find themselves incarcerated because they have been forced or tricked into carrying drugs for dealers. . . . These women are victimized again by the criminal justice system by serving long sentences for drug possession.”); see also Gaskins, supra note 9, at 1535-38 (showing how conspiracy laws disparately impact women who are peripherally involved in drug-related crimes due to their relationships with men who sell drugs).

137. “Conspiracy” is defined in 18 U.S.C. § 371 as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

each individual participant. The government's decision to charge defendants under drug conspiracy laws results in more women being sentenced disproportionately to their level of involvement, despite the fact that they are often low-level, non-violent offenders. This disparity occurs because women are often only peripherally involved in drug trafficking activity, as opposed to being major contributors to an overall operation. As low-level offenders, women likely have little knowledge or control over broader drug operations, often participating in the drug trade only to the extent necessary to support their own addiction. Nevertheless, women may serve lengthy prison terms because of the way the system is structured.

The "substantial assistance" provision of the sentencing guidelines is another area that disparately impacts female offenders because of their often low-level involvement in drug trafficking activity. Women are often only peripherally involved in drug trafficking as part of a conspiracy, and thus, principal beneficiaries of the fruits of the conspiracy.

138. See Gaskins, supra note 9, at 1537-40 (providing anecdotal evidence of how prosecutors' use of conspiracy laws have worked against women who are peripherally involved in drug trafficking); see also Gender-Related Issues, supra note 56, at 4, 16.

139. See Gaskins, supra note 9, at 1533-35, 1537-40 (describing how women of circumstance are impacted by drug conspiracy laws, and that only peripheral involvement should not be held accountable to the same degree as principal male drug-dealers). "Mandatory minimums are inappropriate for women of circumstance who associate with male drug dealers [simply] because they are involved in intimate or familial relationships and gain economic support from the crime." Id. at 1542. See generally Froyd, supra note 8.

140. See supra notes 30, 48-51 and accompanying text (discussing the peripheral involvement of women in the drug trade).

141. Gender and Sentencing, supra note 26, at 984.

142. CAUGHT IN THE NET, supra note 11, at 36.

143. See Gaskins, supra note 9, at 1542. According to Gaskins:

Mandatory minimums require the courts to determine the sentences by the quantity of drugs and the size of the conspiracy, rather than the offender's role in the conspiracy. If a young woman with no prior criminal history is arrested for delivering to an undercover officer forty-eight bags of cocaine base totaling 6.854 grams, the Sentencing Guidelines imprisonment range would be anywhere from fifty-one to sixty-three months, which can be reduced by the judge. However, mandatory minimum sentencing would subject that young woman to a minimum term of five years because the weight of the drugs serves as the basis for computing the sentence.

Id. This example illustrates how charging women who are peripherally involved in drug trafficking as part of a conspiracy causes them to be held accountable as though they were principal drug dealers, and thus, principal beneficiaries of the fruits of the conspiracy.

144. See supra note 121 and accompanying text.
status in a drug ring. This provision allows prosecutors to exercise nearly unlimited discretion in permitting or refusing to allow downward departures for defendants, based upon how much “substantial assistance” was provided in the prosecution of others. Often, the allowance of downward departures occurs with little or no judicial oversight. One may describe this conundrum as “jumping from the frying pan into the fire,” as defendants are left to face their adversaries—i.e., prosecutors—and pray that plea bargains will be offered in their cases.

The substantial assistance provision unfairly affects women who are peripherally involved in drug activity. Many women do not know enough about the upper echelon of drug dealers to be able to provide relevant or substantial assistance to prosecutors. The inability to take advantage

145. See, e.g., CAUGHT IN THE NET, supra note 11, at 12.
146. “Downward departure” is defined as follows: “In the federal sentencing guidelines, a court’s imposition of a sentence more lenient than the standard guidelines propose, as when the court concludes that a criminal’s history is less serious than it appears.” BLACK’S LAW DICTIONARY 448 (8th ed. 2004); see also Froyd, supra note 8, at 1483 (providing a similar definition of downward departure).
147. CHAD THEVENOT, CRIMINAL JUSTICE POLICY FOUNDATION CRISIS OF THE ANTI-DRUG EFFORT 2 (1999), available at http://cjpf.org/drug/crises.pdf; see also Gaskins, supra note 9, at 1543-45 (describing how the substantial assistance provision is used by prosecutors in drug trafficking cases).
148. One author describes the scope of prosecutorial power and lack of judicial oversight in seeking downward departures as follows:
Typically, the government will promise to move the court for a lesser sentence if the defendant provides useful assistance, namely candid information and truthful testimony, in the prosecution of another criminal. The ultimate decision whether to move for a downward departure is left solely in the hands of the prosecutor, even where the prosecutor has entered into a formal agreement. Courts are extremely reluctant to question the decisions of prosecutors in the exercise of this discretion. Essentially, courts will compel a prosecutor to submit a downward departure motion only if the prosecutor is not acting in good faith when refusing to make the motion. This good faith legal standard forces prosecutors to abide by basic contract law principles and prevents them from acting in an unconstitutional manner, but still allows them great leeway in choosing whether to honor their agreements.
149. See, e.g., CAUGHT IN THE NET, supra note 11, at 12 (“Because [women’s] peripheral roles afford little access to information, they are often unable to give prosecutors evidence about others’ crimes and contacts—women have less currency with which to bargain their way out of harsh sentences.”).According
of the substantial assistance provision is tremendously unfair to this class of people who are given harsh sentences despite their low-level status in a drug trafficking operation.\textsuperscript{150}

Instead of achieving the purpose of capturing drug kingpins, the substantial assistance exception punishes those with only peripheral involvement. High-level offenders are able to reduce their criminal penalties because they have more information about the overall drug operation,\textsuperscript{151} while those peripherally involved are less likely to reduce criminal penalties because they are not similarly situated. This paradox constitutes a major defect in the system. Of all federal drug trafficking defendants, only eleven percent were considered to be major traffickers, according to a 1995 report.\textsuperscript{152} Instead of being punished at a level proportionate to their role in the crime, high-level dealers are able to reduce

\begin{quote}
to Gaskins:

The application of mandatory minimum sentencing makes it highly unlikely that the women who have peripheral roles in the conspiracy will be able to receive a reduction in their sentence they lack the necessary knowledge about the drug conspiracy to provide "substantial assistance" to prosecutors and thereby qualify for a lesser sentence.

Gaskins, supra note 9, at 1534.
\end{quote}


\textsuperscript{151} \textit{VINCENT & HOFER}, supra note 129, at 21; \textit{see also} \textit{CAUGHT IN THE NET}, supra note 11, at 11 n.57. \textit{See generally} Gaskins, supra note 9, at 1543-44.

Many high-level offenders are able to avoid mandatory minimum sentences by providing substantial assistance, while low-level offenders generally lack the requisite knowledge. A defendant may be eligible for a substantial assistance departure if he is able and willing to provide the government with information in an investigation. Only those with significant knowledge in drug conspiracies, however, are able to provide information that prosecutors most often deem valuable enough to substantially assist them in prosecuting others. Consequently, in a drug conspiracy, "the drug offenders who are eligible for substantial assistance downward departures are those offenders who have substantial, useful knowledge that will aid the government in the investigation or prosecution of another person who has committed an offense.

\textit{Id.} In addition, Sterling states:

High-level traffickers often get lower sentences than Congress anticipated. The top organizer is in a position, for example, to identify and testify against the people who launder money for him at a bank, corrupt police officers, airport or shipping personnel, and others. When a top organizer faces a very long mandatory or Guideline sentence, he is able to offer "substantial assistance" and get a low sentence.

Sterling, supra note 37.

\textsuperscript{152} Sterling, supra note 37.
their criminal sanctions while low-level offenders—including many women\textsuperscript{153}—must serve at least the mandatory minimum sentence.\textsuperscript{154} This loophole in the law has exacerbated the problems with the War on Drugs because it has effectively created a sense of security from criminal culpability for high-level drug offenders, while creating a parallel system that provides the inverse for low-level offenders.\textsuperscript{155}

Another alarming flaw of the substantial assistance provision is that high-level offenders typically do not need physical evidence to corroborate their stories.\textsuperscript{156} Usually, an offender is only required to testify that the other defendants sold a certain amount of drugs.\textsuperscript{157} This testimony provides sufficient proof for the prosecution to seek a mandatory minimum sentence under the guidelines.\textsuperscript{158} A major sentence reduction in exchange for often-unverified information may provide, and undoubtedly has provided, an incentive for defendants to give untruthful testimony.\textsuperscript{159}

\begin{enumerate}
\item \textsuperscript{153} See \textit{Caught in the Net}, \textit{supra} note 11, at 12.
\item \textsuperscript{154} Sterling, \textit{supra} note 37; see also Gaskins, \textit{supra} note 9, at 1533-34; Goldfarb, \textit{supra} note 50, at 281-89 (providing several examples of women who were peripherally involved in drug trafficking and sentenced to serve lengthy prison terms under mandatory minimums or the sentencing guidelines); Jackson, \textit{supra} note 104, at 518.
\item \textsuperscript{155} See \textit{Mauer}, \textit{supra} note 8, at 156-57.
\item \textsuperscript{156} Sterling, \textit{supra} note 37. Sterling states:
\begin{quote}
A drug offender while in jail awaiting trial may learn the names of other persons awaiting trial. He may learn all about substantial assistance. He may learn that he can easily make up a story that will get him out of prison fairly soon if his story provides “substantial
\end{quote}
\item \textsuperscript{157} Sterling, \textit{supra} note 37.
\item \textsuperscript{158} \textit{Id.}; see also 18 U.S.C. § 3553(e) (2000); U.S. v. La Guardia, 902 F.2d 1010, 1012 (1st Cir. 1990) (discussing the scope of the substantial assistance provision); U.S. \textit{SENTENCING GUIDELINES MANUAL} §5K1.1 (amended June 1, 2006).
\item \textsuperscript{159} United States v. Meinster, 619 F.2d 1041, 1045 (4th Cir. 1980) (“\textit{I}promises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to falsify [evidence] in that case.”). According to one source:
\begin{quote}
A drug offender while in jail awaiting trial may learn the names of other persons awaiting trial. He may learn all about substantial assistance. He may learn that he can easily make up a story that will get him out of prison fairly soon if his story provides “substantial
\end{quote}
\end{enumerate}
The basic protections that were once afforded criminal defendants have been dismantled due to the lack of transparency in the criminal justice system.\textsuperscript{160} As Congress reflects upon the best way to restructure the federal sentencing guidelines, it is not clear how much discretion judges will have under the new system. What is clear, based upon anecdotal accounts of unfairness to defendants\textsuperscript{161} and an inexcusable power imbalance enjoyed by prosecutors,\textsuperscript{162} is that it would be a travesty of justice for the system to return to its pre-\textit{Booker} status, where judicial discretion was severely limited.\textsuperscript{163}

1. \textit{Dorothy Gaines, a Case Study: How the Misguided System of Mandatory Minimums Has Failed Women}

The intersection of race, class, and gender is most pronounced in the plight of poor women of color impacted by the War on Drugs. Dorothy Gaines provides a startling case study, illustrating the point when the unanticipated consequences of the War on Drugs\textsuperscript{164} collide with the realities faced by poor women of color and their children.\textsuperscript{165}

Gaines, an African-American widow and mother of four,\textsuperscript{166} became involved with a man addicted to drugs.\textsuperscript{167} She helped her significant other, Terrell Hines, enter rehabilitation to deal with his drug abuse problem.\textsuperscript{168} Despite Gaines's help, Hines not only continued to use drugs, but also became a low-level driver for a crack distribution ring.\textsuperscript{169} Though

\begin{itemize}
  \item assistance in the prosecution of someone else as a "high level trafficker."
  \item Sterling, \textit{supra} note 37.
  \item MAUER, \textit{supra} note 8, at 138-40.
  \item See \textit{supra} Parts II.C-D.
  \item See \textit{supra} Parts II.C-D.
  \item See \textit{supra} Part II.B.
  \item See \textit{supra} Part III.B.
  \item See DorothyGaines.org, About Dorothy, http://www.dorothygaines.org/about.htm (last visited Mar. 29, 2007) [hereinafter About Dorothy].
  \item See About Dorothy, \textit{supra} note 165.
  \item Id.
  \item Id.
\end{itemize}
Gaines was not found to possess drugs, state prosecutors charged her with conspiracy to distribute drugs; the case was subsequently dismissed for lack of material evidence. Several defendants in the drug ring subsequently made a deal with prosecutors to reduce their own sentences by providing information relevant to the prosecution of others. Gaines was implicated as having delivered packages of cocaine to local street dealers. The federal government picked up the case and charged Gaines with conspiracy to sell drugs.

Gaines was subsequently offered a downward departure in exchange for providing information to federal prosecutors about the drug trafficking ring in and around Mobile, Alabama. She maintained that she was not involved with selling drugs and that she had little information to provide prosecutors. Gaines, a self-proclaimed innocent woman, refused to accept a plea agreement.

At her trial, government witnesses offered unsubstantiated testimony regarding Gaines’s involvement in drug trafficking in exchange for plea agreements. Gaines was represented by a court-appointed counsel who failed to call any character witnesses to the stand and did not conduct a thorough cross-examination of the state’s witnesses. Despite the fact that a search of her home failed to produce any drugs, weapons, money or other contraband, Gaines was found guilty at trial and sentenced to a mandatory minimum term of nearly twenty years in prison.

171. CAUGHT IN THE NET, supra note 11, at 1.
172. See id.; About Dorothy, supra note 165.
173. See Stewart, supra note 170 (reporting that Gaines’s case was moved to the U.S. District Court for the Southern District of Alabama in 1994 because a combined local and federal drug task force arrested the conspiracy suspects); About Dorothy, supra note 165.
174. See Stewart, supra note 170.
175. See id.
176. See id.
177. See id.
178. About Dorothy, supra note 165.
179. Stewart, supra note 170. By comparison, two of Gaines’s co-defendants received reduced sentences for providing substantial assistance to the government. See id. One of the state’s witnesses who testified against Gaines was a convicted felon serving time for drug and gun possession. See id. The other defendant was the ringleader of the operation, who faced a life sentence.
Since Gaines did not have adequate financial resources and familial support, her eldest daughter was forced to care for Gaines’s three minor children during her incarceration. As a federal prisoner, she was relocated to different federal correctional facilities in various parts of the country, which presumably made it difficult, if not impossible, for her to maintain physical contact with her children. Gaines’s children demonstrated emotional distress as a result of being separated from their mother. It is likely that Gaines’s incarceration will continue to have a substantial impact on her children’s behavior and emotional well-being throughout their lives.

See id. He was set to be released from prison in 2004 based upon his cooperation with the government. See id.

180. Stewart, supra note 170.

181. Interview with Dorothy Gaines, Drug War Chron., Dec. 29, 2000, available at http://stopthedrugwar.org/chronicle/166/dorothygaines.shtml. Gaines, who originally lived in Mobile, Alabama, was transported to federal correctional institutions in Danbury, Connecticut, Tallahassee, Florida and Marietta, Florida during her nearly six year period of incarceration. Id.

182. See Charlene Wear Simmons, Cal. Research Bureau, Children of Incarcerated Parents 5 (2000), available at http://www.library.ca.gov/crb/00/notes/v7n2.pdf (describing the problem of infrequent visitation or non-visititation by the children of imprisoned mothers, the primary cause of which is the distance between a child’s residence and the correctional facility, many of which are located far from major population centers). Gaines was sent to facilities that were “a long way from Mobile.” See Interview with Dorothy Gaines, supra note 181. This appears to be a system-wide problem. See Christopher J. Mumola, Bureau of Justice Statistics, U.S Dep’t of Justice, Special Report: Incarcerated Parents and Their Children 5 (2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf (reporting that sixty percent of parents in state prison and eighty-four percent of parents in federal prison reported being held over 100 miles from their children; forty-three percent of parents in federal prison were held over 500 miles from their children’s last household).

183. See Armsbury, supra note 166 (stating that her son, Phillip, began “holding things in” after his mom went to prison, that he was teased at school, and that he was under a lot of stress); Stewart, supra note 170 (reporting that Phillip threatened to kill himself if his mother had to remain in prison until 2012); Interview with Dorothy Gaines, supra note 181 (stating that Phillip stopped visiting and speaking to Gaines on the phone while she was in prison “because he couldn’t stand to have me in there anymore”; stating also that her children began to do poorly in school). For a compelling look at the obstacles Gaines’s son faced, see November Coalition, Children of War: Philip Gaines, Orphan of War in America, http://www.november.org/children/Voices-Philip.html (last visited Mar. 29, 2007).

After serving nearly six years in prison, Gaines was granted executive clemency by President Clinton in 2000.\textsuperscript{185} Her case provides anecdotal evidence of the ease with which low-income women become ensnared in the War on Drugs by virtue of their low socioeconomic status and their involvement with men who use or sell drugs.\textsuperscript{186} It also illustrates the deleterious impact children face when their mothers are imprisoned.\textsuperscript{187} Regardless of whether Congress perceived that women like Gaines would become representative of the types of drug kingpins who would face incarceration under the sentencing guidelines and mandatory minimums, such cases are becoming more common as the number of women sentenced to mandatory minimum prison terms grows substantially each year.\textsuperscript{188}

E. Lack of High-Quality Legal Representation for Indigent Female Offenders

When a poor woman of color becomes involved in the criminal justice system, intersecting issues surrounding her race and class come into play.\textsuperscript{189} A woman from a lower
socioeconomic class will almost inevitably be assigned publicly provided counsel to represent her, but "free legal assistance" comes at no small price. Most public defenders are significantly over-burdened with large caseloads, and lack the resources to provide high-quality legal representation to their clients. The inability of public defenders to provide adequate attention to the needs of their clients has several alarming effects, especially in light of the high sentencing stakes involved in drug trafficking cases. The excessively

race and class in the criminal justice system, and suggesting that sentencing policies have underlying, racially-biased assumptions).


191. Defendants in criminal matters who are considered to be indigent typically have access to what is often referred to as "free legal assistance." CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf (describing the use of publicly-financed counsel to represent indigent defendants). This assistance is usually supplied by public defenders or other publicly-provided counsel, provided that certain requirements pertaining to the type of case are met. Id.


193. See Klein, supra note 192, at 657 (citing a study by the National Legal Aid and Defender Association (NLADA) that found that "[t]he scope of representation provided for indigent defendants in many jurisdictions does not meet specific constitutional directives"); see also BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 2 (2001), available at http://www.ncjrs.org/pdffiles1/bja/185632.pdf (discussing the problems public defenders face in their legal representation of indigent criminal defendants, such as excessive workloads and limited funding for legal assistants and private investigators).

194. See HARLOW, supra note 191, at 1 ("[O]f those found guilty, higher percentages of defendants with publicly financed counsel were sentenced to incarceration.").

195. As discussed throughout this article, mandatory minimum sentences are imposed on defendants convicted of drug-related crimes, with substantial sentence enhancements for possession of a firearm, selling drugs to minors, and participation in a conspiracy. See JONATHAN P. CAULKINS ET AL., MANDATORY MINIMUM DRUG SENTENCES: THROWING AWAY THE KEY OR THE TAXPAYERS' MONEY? 9-10 (1997).
high number of drug-related cases that end in plea agreements is perhaps the most troubling consequence of utilizing publicly-provided counsel.\textsuperscript{196} Although public defenders may do the best they can, their efforts are wasted in a lose/lose situation for them and their clients.\textsuperscript{197} Because of the substantial assistance provision, public defenders may encourage their clients to accept plea agreements out of fear that prosecutors have informants waiting to testify truthfully or untruthfully against alleged co-conspirators in a drug trafficking ring.\textsuperscript{198} This may be evidenced by the fact that guilty pleas account for ninety-five percent of felony criminal convictions in state courts.\textsuperscript{199} The diminished level of discretion that judges faced prior to the holding in\textit{ Booker}, combined with sentencing judges’ continued reluctance to deviate from the guidelines, even in light of\textit{ Booker}, has caused public defenders great difficulty in trying cases in a system that is largely stacked against female offenders.\textsuperscript{200}

\begin{itemize}
\item \textsuperscript{196} See\textit{ Caught in the Net}, supra note 11, at 31 (reporting that almost ninety-six percent of federal drug cases end in pleas); see also Klein, supra note 192, at 672 (reporting that many public defenders recommend plea bargains to their clients; “[P]lea bargaining becomes a necessary technique to deal with an overwhelming caseload.” (emphasis and internal citations omitted)).
\item \textsuperscript{197} See Alexandra Natapoff, \textit{Snitching: The Institutional and Communal Consequences}, 73 U. CIN. L. REV. 645, 663 (2004) (reporting the unreliability of testimony by criminals in exchange for benefits; mentioning horror stories of fabrication and perjury by informants; stating also that such testimony raises due process issues for defendants against whom such testimony is levied).
\item \textsuperscript{199} See\textit{ Harlow}, supra note 191, at 9 tbl.19 (showing that 75.9% of female criminal defendants at the state level were represented by a public defender in 1996). By comparison, 63.3% of female offenders at the federal level were represented by a public defender. Id. Although the report did not cross-reference race and gender, one can surmise that a significant number of women who utilize the services of public defenders are African-American. The report showed that 76.6% of black criminal defendants used a public defender, while sixty-nine percent of whites used a public defender. Id. The report also showed that lower educational attainment is associated with higher use of court-appointed counsel. See id. Seventy-eight percent of criminal defendants had less than a high school diploma, while 70.2% of federal defendants had less than a high school diploma. Id. It is evident from Bureau of Justice Statistics findings that the poor and under-educated are over-represented in the criminal justice system and are significantly more likely to use a public defender. Id.; see also\textit{ William J. Stuntz, Plea Bargaining and Criminal Law’s Disappearing Shadow}, 117 HARV. L. REV. 2548 (2004).
\end{itemize}
Thus, public defenders may be less likely to encourage poor women of color to take their cases to trial.\textsuperscript{201} Even if public defenders decide to take these cases to trial,\textsuperscript{202} they may still face uncertainty regarding how juries view their clients' peripheral involvement in drug trafficking, especially given the high probability for racial bias encountered by people of color in the jury system.\textsuperscript{203}

In addition to the racial discrimination that women of color may face when tried by a jury of "non-peers," they may also suffer from inadequate access to defense counsel prior to trial.\textsuperscript{204} A recent Bureau of Justice Statistics report stated that five percent of criminal defendants at the state level never spoke to their publicly-provided counsel prior to trial.\textsuperscript{205} In addition, only thirty-seven percent of indigent defendants at the state level and fifty-four percent of indigent defendants at the federal level spoke with their publicly-provided

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\textsuperscript{201} HARLOW, supra note 191, at 8 (showing that state and federal inmates in the seventy-five largest counties that were represented by a public defender were less likely to proceed to trial in 1996); see also Bibas, supra note 122, at 2479.

Public defenders are pushed to take plea bargains (and often push their clients to accept a plea) to cut down on their case work and the burden of the courts. But [there are] many stories from prisoners who were pushed into a plea bargain even though they were innocent of charges or when going to court would have likely resulted in a lower sentence. Taking cases to trial is often the only way to fight a biased criminal injustice system. But it requires much more work on the part of the public defenders.


\textsuperscript{202} See HARLOW, supra note 191, at 8 (showing that state and federal inmates in the seventy-five largest counties that were represented by a public defender were less likely to be tried by a jury in 1996). Among criminal defendants at the state level, only seventeen percent opted for a jury trial. \textit{Id.} At the federal level, only twenty-one percent of criminal defendants were tried by a jury. \textit{Id.}

\textsuperscript{203} See Gabriel J. Chin, \textit{Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction}, 6 J. GENDER RACE & JUST. 253, 258-59 (2002). "The history of drug policy and of collateral consequences reflects an unfortunate tendency to criminalize conduct thought to have been engaged in by minority groups, and to impose special punishments on those convicted of such crimes and not others." \textit{Id.}

\textsuperscript{204} \textit{Id.}

\textsuperscript{205} HARLOW, supra note 191, at 8.
attorneys within the first week of being charged.\textsuperscript{206} In contrast, sixty percent of defendants at the state level and seventy-five percent of federal defendants spoke with their private attorneys within one week of being charged.\textsuperscript{207}

IV. SYSTEMIC ISSUES FACED BY CHILDREN OF INCARCERATED MOTHERS

By hastily enacting mandatory minimums,\textsuperscript{208} Congress failed to calculate the tremendous societal and economic costs associated with incarcerating mothers for peripheral involvement in drug trafficking. According to the U.S. Department of Justice, fifty-nine percent of women incarcerated in federal prisons are the parents of minor children, and at least fifty percent of women in federal prisons lived with their children prior to incarceration.\textsuperscript{209} The problem is widespread—it is estimated that in 1997, nearly 200,000 children under the age of eighteen had mothers who were incarcerated.\textsuperscript{210}

When mothers are incarcerated, a domino effect of harmful events occurs which weaken and may even destroy the thin fabric holding the family together.\textsuperscript{211} First, a

\begin{itemize}
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{See supra} Part II.A (discussing the insufficiency of research by Congress before implementing mandatory minimums); \textit{see also} Sterling, \textit{supra} note 37 (discussing the haste with which mandatory minimums were enacted by Congress).\textsuperscript{209}
\item \textsuperscript{209} GREENFELD \& SNELL, \textit{supra} note 9, at 7-8; \textit{see also} Myrna S. Raeder, \textit{Creating Correctional Alternatives for Nonviolent Women Offenders and Their Children}, 44 ST. LOUIS U. L.J. 377, 380 (2000) ("The vast majority of women in correctional facilities have children, many of whom are under eighteen years of age.").\textsuperscript{210}
\item \textsuperscript{210} GREENFELD \& SNELL, \textit{supra} note 9, at 8 tbl.18. \textit{See generally}, BLOOM \& STEINHART, \textit{supra} note 13, at 19-29 (reviewing survey data on the characteristics of incarcerated mothers and their children).\textsuperscript{211}
\end{itemize}

The incarceration of parents represents a major stress and challenge in the lives of children and their parents. For most families, this event is one of many stresses and challenges that they may have already confronted given the poverty and related conditions in their lives. For all families it represents a unique set of circumstances: (1) parent/child separation, which is mandated by laws and policies; (2) children reside with other family members, frequently great distances from institutions; (3) parents reside in institutions where restrictions exist on routine behavior and freedom.
mother's incarceration causes a disruption in the parent-child relationship, which most likely will result in emotional harm to the child. Second, because these families are disproportionately poor, single-parent households, it is probable that the children will be placed in the foster care system. This may result in additional emotional, psychological and physical harm to the children. Third, children may not be able to maintain contact with their incarcerated mothers due to financial barriers, transportation restrictions, and capricious inmate relocation practices. Fourth, because of emotional and psychological issues stemming from maternal separation, the children are prime candidates for involvement in the juvenile justice system.

212. TRAVIS, MCBRIDE & SOLOMON, supra note 184, at 2-4.
213. See GREENFELD & SNELL, supra note 9, at 7-8 (showing that the majority of women who are incarcerated had never been married, were mothers of young children, and faced difficult economic circumstances prior to incarceration); see also generally Gaskins, supra note 9 (describing the vulnerable socioeconomic status of women prior to drug-related involvement).
214. See Brooks & Bahna, supra note 25, at 280 (stating that when a mother is incarcerated, and there is no support from other family members, children are likely to end up in the foster care system); see also CHILD WELFARE INFO. GATEWAY, FOSTER CARE: NUMBERS AND TRENDS 1 (2005), available at http://www.childwelfare.gov/pubs/factsheets/foster.pdf (“Foster care is defined in the Code of Federal Regulations (CFR), [Title 45, Volume 4, Part 1355, Section 57] as 24-hour substitute care for children outside their own homes.” (internal citations omitted)); Smith, supra note 24. Foster care placement includes foster family placement, kinship care, and placement in group homes with other children who have been removed from their homes. See CHILD WELFARE INFO. GATEWAY, supra, at 1.
215. See Steven Fleischer, Note, Termination of Parental Rights: An Additional Sentence for Incarcerated Parents, 29 SETON HALL L. REV. 312, 324 (1998) (“If a parent is incarcerated, the bond [between parent and child] is not formed, and it generally cannot be formed with a foster family because the foster care system discourages caregivers from forming attachments to their foster children. Shifting a child from one foster family to another exacerbates this effect and can increase the possibility of a child developing a psychopathic personality.”); see also Brooks & Bahna, supra note 25, at 282 (“Inmates’ children experience feelings of loss because one of their parents, perhaps their only parent, is inaccessible and no longer participates in their life on a daily basis.”); Norman, supra note 14, at 124.
216. See CAUGHT IN THE NET, supra note 11, at 51-53 (discussing the barriers to mother-child contact during a mother’s period of incarceration); see also Brooks & Bahna, supra note 25, at 280-81, n.51; Seymour, supra note 11, at 2-3 (describing barriers to contact between incarcerated parents and children).
217. See Brooks & Bahna, supra note 25, at 281; see also Norman, supra note 14, at 124, 128-29 (describing visitation between incarcerated parents and their children).
potentially placing their communities and greater society at risk of harm.\textsuperscript{218}

After evaluating the probable string of events that follow maternal incarceration, it is evident that the practice of applying mandatory minimums in cases of low-level, non-violent drug offenders should be discontinued immediately. Since African-American women account for the fastest growing segment of those sentenced to prison for drug offenses, their children are disparately affected by these harmful events.\textsuperscript{219} Congress has largely ignored the socioeconomic status and the racial background of the children impacted by maternal incarceration. One is left to wonder whether this ignorance will continue when these same children become involved in the adult criminal justice system.

A. Emotional Harm Faced by Children of Incarcerated Mothers

When the relationship between mother and child is disrupted, a child's social, emotional and psychological growth is severely hampered.\textsuperscript{220} In fact, many children of incarcerated parents develop a form of post-traumatic stress disorder, making it extremely difficult for them to function in familial, school, and social settings.\textsuperscript{221} According to preliminary findings from an ongoing study conducted by the Vera Institute, children of incarcerated parents may suffer an extensive grieving process as a result of parental separation known as "ambiguous loss."\textsuperscript{222} The grief suffered by these

\begin{thebibliography}{99}
\bibitem{218} See Brooks & Bahna, supra note 25, at 272, 281-82, 284 (showing that children of incarcerated parents have a greater likelihood of becoming criminals, and that they experience educational and behavioral problems that may ultimately place a burden upon the rest of society); see also CAUGHT IN THE NET, supra note 11, at 50 (discussing the idea that children grieve when their mothers are incarcerated); SIMMONS, supra note 182, at 6 (discussing the likelihood that children of offenders will end up in prison themselves).
\bibitem{219} See BLOOM & STEINHART, supra note 13, at 20 tbl.2-1 (reviewing survey data on the characteristics of incarcerated mothers and their children); see also Norman, supra note 14, at 124.
\bibitem{220} Christina Jose Kampfner, Post-Traumatic Stress Reactions in Children of Imprisoned Mothers, in CHILDREN OF INCARCERATED PARENTS, supra note 11, at 89, 89.
\bibitem{221} Id. at 89, 97-98.
\bibitem{222} See generally Vera Inst. of Justice, Childhood Loss and Behavioral Difficulties at School: Overview,
children may manifest itself in unruly behavior at school and lack of attentiveness during instruction, and may escalate into exhibitions of anger or aggression.\textsuperscript{223}

At the current stage of the study, the Vera Institute has determined that most teachers, administrators, and school systems are ill-equipped to handle the growing needs of children experiencing grief from parental loss and separation.\textsuperscript{224} As a result, schools with zero-tolerance policies may discipline such children for misbehaving, rather than addressing their problems by recognizing their fragile mental and emotional states.\textsuperscript{225} Until schools recognize these problems and develop specific protocols for handling the anguish faced by children of incarcerated parents, these children may be destined to follow a pattern of transferring schools until they graduate or drop out.\textsuperscript{226} In this way, these children are prone to repeat the same cycles of poverty and incarceration of their parents.\textsuperscript{227}

\begin{flushleft}
\url{http://www.vera.org/project/project1_1.asp?section_id=5&project_id=66} (last visited Mar. 24, 2007); see also Travis, \textit{supra} note 93, at 38-39 (discussing the harmful social, economic, and mental impacts that parental separation causes in the children of incarcerated parents).

\textsuperscript{223} See Fleischer, \textit{supra} note 215, at 323-25 (discussing the negative effects of parental incarceration on children, including anger, aggression, decline in school performance, and increased risk of incarceration); see also \textit{CAUGHT IN THE NET, supra} note 11, at 50 (discussing the long term impacts of maternal incarceration on children).

\textsuperscript{224} See \textit{Vera Inst. of Justice, supra} note 222.

\textsuperscript{225} See MARCY VIBOCH, \textit{CHILDHOOD LOSS AND BEHAVIORAL PROBLEMS: LOOSENING THE LINKS} 1-3 (2005), available at \url{http://www.vera.org/publication_pdf/324_598.pdf} (describing behavioral issues in children who lost loved ones; suggesting that schools inquire whether children with behavioral problems have lost someone they love—e.g., a parent in prison—before disciplining them). As a result of its findings from a recent study on childhood loss and the connection to behavioral problems in children, the Vera Institute developed a protocol aimed at providing professionals with tools to appropriately respond to children in need. See \textit{Vera Inst. of Justice, supra} note 222.


\textsuperscript{227} See Arlene F. Lee, \textit{Children of Prisoners, Children of Promise, in LINK} 6-7 (Child Welfare League of Am., Spring 2005), available at \url{http://www.cwla.org/programs/juvenilejustice/thelink2005spring.pdf}.\end{flushleft}
B. Placement in the Foster Care System

When a poor mother faces incarceration, it is likely that there are few people or resources available to care for her children. When this occurs, placement in the foster care system may be inevitable for her children. Since so many of the newly-incarcerated are poor, single African-American women, the children of these women are funneled into the foster care system at alarming rates when their mothers are sent to prison for drug offenses.

Recent studies demonstrate that there is an indirect connection between the prevalence of drug use among female offenders and past sexual abuse, domestic violence, and extreme poverty. According to a 1998 report by Court Appointed Special Advocates (CASA), eighty-eight percent of parents reported for abuse or neglect of a child were substance abusers. Approximately fifty-one percent of these parents were reported for abuse and neglect due to poverty or economic strain, while twenty-seven percent were reported for abuse stemming from incidences of domestic

228. See id. ("Most children of incarcerated parents live in poverty before, during and after their parents' incarceration—but the period during incarceration can be particularly difficult. When women go to prison, their children may suffer financially because the mothers are often the sole support of their children. Their children are often cared for by relatives who are also poor and already overburdened. Many relative caregivers depend upon public assistance to care for the children living with them."); see also Leslie Acoca & Myrna S. Raeder, Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children, 11 STAN. L. & POL'Y REV. 133 (1999).

229. See Acoca & Raeder, supra note 228, at 136; see also Brooks & Bahna, supra note 25, at 280.

230. See GREENFELD & SNELL, supra note 9, at 7-8.


232. See Raeder, supra note 150, at 2-3 (discussing the prevalence of and correlation between past abuse, poverty and substance abuse amongst female inmates); see also BLENDING PERSPECTIVES, supra note 231.

violence.\textsuperscript{234} Statistics show that drugs, poverty, and domestic abuse were major factors in a family's involvement in the child protection system.\textsuperscript{235} Instead of directly addressing these underlying issues through intensive counseling, education and social service programs, our system has placed the blame on women by incarcerating them for drug-related involvement and sending their children to the foster care system.

1. Demographic Characteristics of Children in Foster Care

Since African-American women face poverty at a disproportionate rate and are overrepresented in the criminal justice system,\textsuperscript{236} it is not surprising that African-American children are involved in the foster care system at a disproportionate rate.\textsuperscript{237} According to the U.S. Department of Human Services, of the 542,000 children in foster care in 2001, at least thirty-eight percent were African-American, a segment that is more than double their percentage of the

\textsuperscript{234} Id.

\textsuperscript{235} See Jane C. Murphy & Margaret J. Potthast, Domestic Violence, Substance Abuse, and Child Welfare: The Legal System's Response, 3 J. HEALTH CARE L. & POL'Y 88, 91-94 (1999) (discussing the intersection of domestic violence, substance abuse, and involvement in the child welfare system); Seymour, supra note 11, at 3 (discussing the struggles with poverty, domestic abuse, etc., faced by the children of incarcerated parents and their parents); Symposium, The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predictive Power of Race, 6 N.Y. CITY L. REV. 61, 67-68 (2003); see also Acoca & Raeder, supra note 228, at 137-39 ("Among the most commonly noted characteristics of women prisoners are histories of profound physical and sexual abuse, entrenched histories of drug and alcohol dependence, and serious physical and mental health disorders.").

\textsuperscript{236} See HUMAN RIGHTS WATCH, supra note 97 (stating that, in 1997, African-American women were eight times more likely than white women to be in prison); Acoca & Raeder, supra note 228, at 137 (stating that almost two-thirds of female state prisoners are women of color and many are defined as being low-income); Larry Miller, A Growing Trend: More and More Black Women are Going to Prison, with Dire Effects on Society at Large, PHILA. TRIB., Sept. 12, 2006, available at http://www.philatribune.com/channel/thenews/091206/behindbarsP2.asp (discussing the fact that African-Americans are over-represented in the criminal justice system, largely a result of the war on drugs).

\textsuperscript{237} See CAUGHT IN THE NET, supra note 11, at 50 ("Fifty-six percent of children in foster care waiting to be adopted are African-American. African-American children are the most likely to have an incarcerated parent and are the least likely to be adopted.").
population.\textsuperscript{238} State foster care statistics show a high correlation between race and poverty among children, as African-American children are disproportionately poor and overrepresented in the foster care system in almost every state.\textsuperscript{239}

The situation in California, for example, presents a disturbing reality. In 2001, there were approximately 9,377,970 children living in California.\textsuperscript{240} Of those, at least 151,264 children were involved in the foster care system\textsuperscript{241} and 16.4% were living below the poverty line.\textsuperscript{242} While African-American children represented only 7.2% of the population of children in California,\textsuperscript{243} they represented 31.3% of children in foster care.\textsuperscript{244}

2. High Rates of Physical and Sexual Abuse Faced by Children in Foster Care

Although the foster care system provides some relief for children of incarcerated mothers, it has a number of alarming problems.\textsuperscript{245} Many children who were placed in foster care


\textsuperscript{239} See U.S. DEPT OF HEALTH & HUMAN SERVS., supra note 238. For example, in 2001, of the 1,112,966 children living in Alabama, 23.2% lived below the federal poverty line. Id. at IV-1 tbl. A. While 31.8% of the children living in Alabama were black, they represented 51.3% of the children in foster care, 63.3% of the children were white while they represented 46.7% of the children in foster care, and 2.4% of children were Latino, while they represented about one percent of the children in foster care. Id. at IV-1 tbl. A; IV-2 tbl. C. Beginning in 1998, approximately 5,500 children were involved in Alabama's foster care system annually. Id. at IV-2 tbl. C.

\textsuperscript{240} Id. at IV-33 tbl. A.

\textsuperscript{241} Id. at IV-34 tbl. C.

\textsuperscript{242} Id. at IV-33 tbl. A.

\textsuperscript{243} Id.

\textsuperscript{244} Id. at IV-34 tbl. C.

\textsuperscript{245} See generally Tom Price, Will Recent Changes Make At Risk Children Safer?, 15 CQ RESEARCHER 15 (Apr. 22, 2005), available at http://pewfostercare.org/press/files/cq042205.htm (highlighting national stories of physical and sexual abuse faced by children in the foster care system and showing cases involving foster children who were murdered by foster parents); see also Remember the Family, supra note 92, at 5 (discussing the prevalence of sexual abuse of children in foster care).
suffered physical, emotional, and sexual abuse.\textsuperscript{246} Although the U.S. Department of Health and Human Services reported 4,239 instances of abuse and neglect perpetrated by foster parents in 2001, it is probable that the actual figure is significantly higher due to potential underreporting by abused children.\textsuperscript{247}

One case illustrating the problems inherent in the foster care system occurred in Florida in 2002. A four-year-old girl, Rilya Wilson, disappeared while in the care of her foster parent.\textsuperscript{248} Rilya was in foster care because Child Protective Services removed Rilya from the care of her mother, who was homeless and addicted to crack cocaine.\textsuperscript{249} Rilya was missing for several months before her disappearance was brought to the attention of the state foster care agency responsible for her care and protection.\textsuperscript{250} Rilya's foster mother was later charged with the murder of Rilya.\textsuperscript{251}

Rilya's case exposed the vast number of weaknesses within a system which is intended to protect the rights of

\begin{itemize}
  \item \textsuperscript{246} One organization reports:
    A study of \textit{reported} abuse in Baltimore, found the rate of "substantiated" cases of sexual abuse in foster care more than four times higher than the rate in the general population. Using the same methodology, an Indiana study found three times more physical abuse and twice the rate of sexual abuse in foster homes than in the general population. In group homes there was more than ten times the rate of physical abuse and more than 28 times the rate of sexual abuse as in the general population, in part because so many children in the homes abused each other.

  \item \textsuperscript{247} \textit{See id.}; \textit{see also} U.S. Dep't of Health & Human Servs., Child Maltreatment 2001, Table 4-2 Perpetrator Relationship to Victim, 2001 (Child File), \textit{available at} http://www.acf.hhs.gov/programs/cb/pubs/cm01/table4_2.htm (last visited on Mar. 24, 2007). When residential facility staff are included, the total number jumps to 5,480 children who have experienced abuse at the hands of a non-parent caregiver. \textit{Id.}


  \item \textsuperscript{249} \textit{Id.}

  \item \textsuperscript{250} \textit{Id.}

\end{itemize}
children removed from their homes.\footnote{252} One must wonder whether Rilya would still be alive today had her biological mother been given adequate access to social services to address the underlying issues of homelessness and drug addiction that she faced.\footnote{253} Instead, the state opted to spend its resources by placing Rilya in a foster care arrangement, which turned out to be a deadly decision.

Cases like Rilya's will continue to exist as long as state foster care systems remain in their current inadequate state. According to a 2005 report issued by the Administration for Children & Families, 586 children died while in foster care in 2003.\footnote{254} The reasons listed for the causes of death include "medical conditions, accidents, and homicide."\footnote{255}

When children are removed from their homes due to their mothers' drug-related activities, there is an additional consequence. Based on the relatively high incidences of physical and sexual abuse faced by children in foster care,\footnote{256} placing a child in a foster care environment may be more detrimental than allowing the child to remain with a mother who has been peripherally involved in drug trafficking activity.\footnote{257} The numerous problems within the foster care

\footnotesize{

253. See Wilson, supra note 248 (showing that Rilya's biological mother faced homelessness and drug addiction prior to Rilya's removal from her care).


255. Id.

256. See National Coalition for Child Protection, supra note 21; see also Price, supra note 245.

257. This is not to suggest that mothers who use drugs or are tangentially involved in drug-related crime do not need intervention. To the contrary, these women need assistance in a variety of forms, such as drug treatment, job training, childcare, and counseling services—particularly if they are victims of domestic abuse or sexual assault. See Ann L. Jacobs, Give 'Em a Fighting
system should make it the last resort for children of low-level, non-violent female offenders.\textsuperscript{258} It is clear from the irreparable harm that occurs when children are placed with abusive foster parents that the system is ill-equipped to handle the hundreds of thousands of children of female drug offenders.\textsuperscript{259}

3. \textit{Diminished Parent-Child Contact Due to Indiscriminate Inmate Relocation}

Another major problem that occurs when a mother is incarcerated is her inability to remain in contact with her children. The rate of mother-child visitation fell from a healthy ninety-two percent in 1978 to less than fifty percent in 1992.\textsuperscript{260} One reason for this drop is the practice of inmate relocation carried out by federal and state prisons.\textsuperscript{261} Prison authorities do not consider the financial means of an incarcerated mother's family and may relocate the mother to

\textsuperscript{258} See generally \textit{Nina Bernstein, The Lost Children of Wilder: The Epic Struggle to Change Foster Care} xii (2001).

\textsuperscript{259} \textit{Gloria Hochman, AnnDee Hochman & Jennifer Miller, Foster Care: Voices From the Inside} 19 (2004), available at http://pewfostercare.org/research/voices/voices-complete.pdf. This report reveals that each year, twenty percent of public and forty percent of private caseworkers quit working in state foster care systems. \textit{Id.} at 19. Despite the tremendous level of responsibility that caseworkers have, their mean salary is just over $30,000. \textit{Id.} Some social workers lack adequate training. \textit{Id.} at 17-18.

\textsuperscript{260} \textit{Johnston & Gabel, supra} note 11, at 16.

\textsuperscript{261} According to Department of Justice statistics released in August 2000, eighty-three percent of inmates in state prison and ninety-two percent of inmates in federal prison lived more than 50 miles from their last place of residence. Sixty-two percent of state prison inmates and eighty-four percent of federal inmates lived more than 100 miles from their last known place of residence. \textit{Mumola, supra} note 182, at 5.
a distant prison. Thus, the children of an incarcerated mother may not be able to visit her at all during her potentially extensive period of incarceration if their family lacks sufficient financial resources. Since the average mandatory minimum sentence for drug trafficking in 2000 was thirty-five months in state prison and seventy-five months in federal prison, an incarcerated mother may expect to spend a substantial amount of time away from her children. Such prolonged periods of separation between mothers and their children can create detrimental short and long-term consequences.

C. Involvement in the Juvenile Justice System

As demonstrated above, the children of incarcerated parents face a plethora of emotional issues resulting from prolonged periods of separation and a lack of interaction with their mothers. Children also face a stigma for having a parent in prison and for being involved in the foster care system. This stigma may have substantial effects on children who are subject to peer pressure and who are trying desperately to fit into their environments.

It is highly likely that a number of children with an incarcerated parent will become involved in the juvenile justice system. For many of these children, involvement in

262. Brooks & Bahna, supra note 25, at 280-81 ("[T]here is no guarantee that the family member will continue to be housed at a particular correctional facility, because under current law inmates may be transferred to another facility for any reason.").
263. Id. at 280; see also Olim v. Wakinekona, 461 U.S. 238, 248 (1983) (holding that transferring an inmate 4,000 miles across the Pacific Ocean, from the Hawaii State Prison to Folsom State Prison in California, did not implicate a liberty interest or necessitate due process protections). These transfers have become commonplace, with no consideration given to the desires of the inmates or the plight of their families who do not have the financial resources to continue contact with them. Brooks & Bahna, supra note 25, at 280-81; see also Symposium, 200 Years of the Penitentiary: Criminal, Social and Economic Justice, 34 HOW. L.J. 512, 514-15 (1991) (describing the effects of separation upon an incarcerated mother and her children).
264. See ABA REPORT, supra note 98, at 27.
265. See Brooks & Bahna, supra note 25, at 281-82.
266. See supra Part IV.A.
268. See generally TRAVIS, MCBRIDE & SOLOMON, supra note 184, at 2.
269. See Lee, supra note 227, at 7 ("Children with a parent in prison are more likely to become involved in the system themselves.")
the juvenile justice system may be a precursor to involvement in the adult criminal justice system.270 When foster children become involved in the juvenile justice system, they are particularly vulnerable to disparate treatment by those in authority.271 A recent study exposed the unequal treatment faced by foster children involved in the juvenile justice system in New York.272 The study found that eight percent more foster children were detained in juvenile justice facilities than non-foster children.273 One possible explanation for this disparity is that foster children are less likely to have a guardian or social worker to intervene in their cases.274 Without a parent or advocate present to protect the child's interests, a judge has little or no incentive to release the child from juvenile detention.275

The cost of detaining foster children in custody is yet another cause for concern. While children are detained in correctional custody, the foster care system sometimes continues to issue payments to foster parents.276 When this occurs, tax dollars are doubly expended on each child to cover the cost of the child's detention and to compensate foster parents.277 The disparate treatment of foster children involved in the juvenile justice system is not only unfair and seemingly unjustified, but it also provides yet another

270. See id.; see also Brooks & Bahna, supra note 25, at 282 ("Children of inmates also stand a greater chance of being incarcerated later in life.").
272. Id.
273. Id. at 22-26, tbl. 3 (showing the demographic characteristics of participants in the program).
274. As one study noted:
   Project Confirm also reduced the number of foster care replacements, contributing to increased placement stability for foster youth involved in the juvenile justice system. This decrease occurred primarily among youth who were actually detained, indicating that the program affects this outcome more by getting foster care caseworkers involved in juveniles' delinquency cases early on, than by ensuring their presence in court.
   Id. at 32.
275. See id. at 10.
276. Id. at 8 ("[F]urther costs are generated when [Administration for Children's Services] continues to pay for foster care services while youth reside in detention . . . .").
277. See id.
example of misdirected government spending on the criminal justice system.\textsuperscript{278}

\textbf{D. Passage of the Adoption and Safe Families Act}

Although foster care should be used as a temporary solution to provide care and support for children of incarcerated mothers, federal legislation may make long-term involvement in the child welfare system inevitable.\textsuperscript{279} In 1997, Congress passed the Adoption and Safe Families Act\textsuperscript{280} (ASFA) to safeguard the interests of children involved in the child protection system.\textsuperscript{281} ASFA requires state agencies to terminate parental rights where: (a) a child has been in foster care for fifteen of the last twenty-two months; or (b) a court of law has determined that the parent has abandoned an infant or that the parent has committed murder or voluntary manslaughter against the other parent of the child.\textsuperscript{282} By 1999, all states passed legislation in line with ASFA.\textsuperscript{283} Some states adopted even more stringent timeframes for terminating parental rights in cases involving babies born with drugs in their system.\textsuperscript{284} In addition, if parents do not comply with the conditions required to regain custody of their children, and the state's effort to reunify the family fail within the allotted timeframe, the state has the authority to terminate parental rights.\textsuperscript{285}

\begin{flushright}
280. \textit{Id}.
281. \textit{See Substance Abuse, supra} note 24, at 75-76.
282. 42 U.S.C. § 675. The court is allowed to waive this requirement when there has been a determination that the termination of parental rights is not in the best interests of the child, or in cases where a child is placed with a relative caregiver. \textit{See Remember the Family, supra} note 92, at 2.
284. \textit{See id}.
\end{flushright}
ASFA has made family reunification extremely difficult, if not impossible, for many poor women incarcerated for drug convictions and their children. Because of the possible maximum sentence a mother incarcerated for a drug conviction might serve in prison, she may fail to meet the conditions for reunification within the requisite timeframe. As a result, her parental rights may be terminated and her children may remain in foster care long after her time in prison expires. In effect, lengthy prison terms for low-level, female drug offenders may impose an additional formidable punishment, the permanent loss of their children.

E. Collateral Consequences Faced by Female Offenders and Their Children

One of the most stupefying and ill-considered effects of current drug-sentencing policy is the simultaneous enactment of companion federal legislation in key areas of sustainability and reentry for female offenders. Among the more notable examples are legislation which ensures denial of public benefits, access to public housing programs, and a

http://www.post-gazette.com/regionstate/19991213beaverI.asp. In Santosky v. Kramer, the U.S. Supreme Court articulated the standard of proof for proceedings addressing the termination of parental rights as clear and convincing evidence. Santosky v. Kramer, 455 U.S. 745, 747-48 (1982); see also TRAVIS, McBRIDE & SOLOMON, supra note 184, at 8 ("Many states have supplemented ASFA with legislation that relieves the state of making reasonable efforts to reunify families when 'aggravated circumstances' are present.").

286. See Substance Abuse, supra note 24 (discussing the tensions between permanency planning and family preservation in light of AFSA).


288. Id.; see also Substance Abuse, supra note 24.

289. See Acoca & Raeder, supra note at 228; see also ALLARD, supra note 89.

290. See Levi & Appel, supra note 283, at 4-5 (describing section 115 of the Personal Responsibility and Work Opportunity Reconciliation Act, which permanently denies cash benefits and food stamps to individuals with felony drug convictions).

prohibition of federal financial aid for higher education to convicted drug offenders.\textsuperscript{292} Further, the children of mothers with drug offenses who have limited resources suffer when their mothers are not eligible to participate in public benefits programs.\textsuperscript{293} Since it is already difficult for convicted felons to obtain employment after facing incarceration,\textsuperscript{294} the cumulative effects of these policies leave women and their children with limited options to obtain a decent quality of life. Under such circumstances, female offenders may choose to allow their children to remain in foster care or with relatives out of fear that they will be unable to properly care for them.\textsuperscript{295} When children stay in foster care beyond their mother's incarceration, state foster care systems remain overburdened and taxpayers suffer the expense. The combination of the federal statutes mentioned above and unwritten rules that bar employment to convicted felons serve to lock African-American women and their children in a debilitating cycle of extreme poverty and crime.

Without the ability to secure meaningful employment or housing, a mother who has faced incarceration due to a drug conviction stands little chance of being able to support her children after she has served her prison sentence.\textsuperscript{296} If a


\textsuperscript{292} See Levi & Appel, \textit{supra} note 283, at 3-4 (describing the Higher Education Act, which prohibits anyone with a drug conviction from receiving federal financial assistance for post-secondary education).

\textsuperscript{293} See \textit{ALLARD}, \textit{supra} note 89, at 8; see also Levi & Appel, \textit{supra} note 283, at 1 ("Low-income persons in general, and formerly incarcerated persons in particular, are likely to require the assistance of a large number of public services.").

\textsuperscript{294} See Shawn D. Bushway, \textit{The Stigma of a Criminal History Record in the Labor Market, in Building Violence: How America's Rush to Incarcerate Creates More Violence} 142, 144 (John P. May ed., 2000); see also \textit{ABA REPORT}, \textit{supra} note 98, at 7 (stating that offenders are more likely to become recidivists if they do not have access to viable employment opportunities, and exploring the obstacles that offenders face when attempting to reenter society after facing incarceration). The report recommends training, education, access to programs that support rehabilitative efforts, and humane prison conditions. \textit{Id.}

\textsuperscript{295} See generally \textit{ALLARD}, \textit{supra} note 89 (discussing the impact of a lifetime welfare ban on mothers convicted of a state or federal felony offense and their children).

\textsuperscript{296} \textit{Id.} at 17 ("A significant number of women who come into contact with the criminal justice system have very limited employment skills and history to rely on when applying for jobs. In addition, having a criminal history
woman who has been convicted of a drug offense is ineligible for welfare, public housing benefits, and federal financial aid, and is unemployable because of the stigma associated with having a criminal record, she may return to drug involvement to survive or as a form of self-medication. Not surprisingly, her chances of returning to prison and her inability to care for her children will be substantially greater under such circumstances.\textsuperscript{297}

V. PROPOSED SOLUTIONS

If Congress is to help eradicate the continuous cycle of poverty, drug activity, and subsequent incarceration of poor African-American mothers, it must enact preventative measures that provide the possibility of upward mobility for this growing segment of the population.\textsuperscript{298} Such measures represents an additional barrier to finding employment."\textsuperscript{,} see also Cain, supra note 291, at 137-38; Levi & Appel, supra note 283, at 1; National Housing Law Project, supra note 291; Stinson, supra note 291, at 435.

\textsuperscript{297} See ABA REPORT, supra note 98, at 7 (discussing some of the obstacles that offenders face when attempting to reenter society after incarceration). The report recommends training, education, access to programs that support rehabilitative efforts and humane prison conditions. \textit{id}.

\textsuperscript{298} The insight and proposals offered by the ABA Sentencing Commission and other governmental and non-governmental entities provide practical and well-proposed solutions to some of the most harmful consequences of current drug-sentencing policy. The Resolution that was issued by the ABA and adopted by the House of Delegates in August of 2004 urged states, territories and the federal government to help equalize the inequities of the criminal justice system by doing the following:

\begin{enumerate}
  \item Repeal[ing] mandatory minimum sentence statutes;
  \item Employ[ing] sentencing systems consistent with \textit{Blakely v. Washington} [542 U.S. 296 (2004)] that guide judicial discretion to avoid unwarranted and inequitable disparities in sentencing among like offenses and offenders, but permit courts to consider the unique characteristics of offenses and offenders that may warrant an increase or decrease in a sentence;
  \item Requir[ing] a sentencing court to state on the record reasons for increasing or decreasing a presumptive sentence, and permit appellate review of any sentence so imposed;
  \item Assign[ing] responsibility for monitoring the sentencing system to an entity or agency with sufficient authority and resources to:
    \begin{enumerate}
      \item Recommend or adopt alternatives to incarceration that have proven successful in other jurisdictions; and
      \item Gather and analyze data as to criminal activity and sentencing and the financial impact of proposed legislation, and consider whether changes in sentencing practices should be recommended or adopted in light of increases or decreases in crime rates, changes in sentencing patterns, racial disparities in sentencing, correctional resources, and
    \end{enumerate}
\end{enumerate}
should include job training and placement programs, and increased access to higher education. In the long run, access to job training and higher education may result in access to better employment opportunities for African-American women and their children. In addition, it is imperative that once a woman has paid her debt to society, she should have access to financial assistance so that she may improve her own position as well as her family's. It is a troubling conundrum that convicted rapists, child molesters, and murderers may have access to federal financial aid, but convicted drug offenders do not. Based on the cost of maternal incarceration and foster care subsidies, it would be more economical to invest money in female offenders and their children before they become involved with the criminal justice system.

In recognizing the importance of offering solutions to the major problems embedded within current drug sentencing policy, the following proposals are aimed at mitigating or eliminating the harms against African-American women and their children through the federal sentencing guidelines and mandatory minimums.

availability of sentencing alternatives;
(5) Study[ing] and fund[ing] treatment alternatives to incarceration for offenders who may benefit from treatment for substance abuse and mental illness;
(6) Adopt[ing] diversion or deferred adjudication programs that, in appropriate cases, provide an offender with an opportunity to avoid a criminal conviction;
(7) Develop[ing] graduated sanctions for probation and parole violations that provide for incarceration only when a probation or parole violator has committed a new crime or poses a danger to the community.

ABA REPORT, supra note 98, at 9-10.

299. 20 U.S.C. § 1091(r) (2000); Eric Blumenson & Eva S. Nilsen, How to Construct an Underclass, or How the War on Drugs Became a War on Education, 6 J. GENDER RACE & JUST. 61, 68 (2002) ("The 1998 Drug Free Student Loans Act denies federal grants, federally-subsidized loans, and work-study funds to college students who have been convicted of any drug offense—felony or misdemeanor, sale or possession, heroin or marijuana (but not rape, robbery, or murder.")

300. See Huntington, supra note 226, at 694 (arguing that the money being funneled to the foster care system could be used on preventative measures such as social service programs providing subsidized child care to indigent families as an alternative to the involvement of child protective services).
A. **Repeal Mandatory Minimum Sentencing Laws**

Neither the unduly harsh federal sentencing guidelines nor mandatory minimums have been effective in fighting the War on Drugs.\(^{301}\) Billions of dollars have been siphoned into a system\(^{302}\) that has proven futile on many levels. The system has failed to curtail drug use in this country.\(^{303}\) It has also failed to offer adequate levels of access to drug treatment programs for poor women with children.\(^{304}\) Moreover, the goal of capturing and incarcerating drug kingpins has not been accomplished.\(^{305}\) Finally, the system has failed to achieve an

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\(^{301}\) The U.S. drug problem continues to be pervasive as the availability of drugs has remained stable since the start of the War on Drugs, and increased in some instances. See Drug Strategy Keeping Score 1998, Looking to the Future: Federal Funding for Women's Programs, http://www.drugstrategies.org/ks1998/future.html (last visited Feb. 17, 2007) ("Since 1981, the Federal government has spent more than $30 billion trying to curtail foreign drug supplies; however, drugs are cheaper and more plentiful in this country than they were a decade ago. According to the Drug Enforcement Administration, heroin now sells for less than half its 1981 street price, and heroin purity exceeds 70 percent in many cities, compared with only 7 percent in 1981. Cocaine prices have dropped by two-thirds. At the same time, consumption of heroin and cocaine has increased since 1992, while the number of 'hard-core' addicts has also risen, according to Office of National Drug Control Policy figures."); see also Michael Massing, The Elephant in the Room: Presidential Candidates are Silent on the Failure of the U.S. War on Drugs, SALON, Feb. 22, 2000, http://archive.salon.com/health/feature/2000/02/22/massing/index.html ("Despite it all, the cocaine market is glutted as always, and heroin is readily available at record high rates of purity. And, while the number of casual drug users has decreased, the number of hardcore, addicted users hasn't.").

\(^{302}\) See COMMON SENSE FOR DRUG POLICY [CSDP], REVISING THE FEDERAL DRUG CONTROL BUDGET REPORT: CHANGING METHODOLOGY TO HIDE THE COST OF THE DRUG WAR?, available at http://www.csdp.org/research/ondcpenron.pdf (showing the astronomical cost of the war on drugs).

\(^{303}\) See CAUGHT IN THE NET, supra note 11, at 1 (indicating that the "drug war" has "led to no measurable decline in illegal drug use or availability since its inception").

\(^{304}\) See CAUGHT IN THE NET, supra note 11, at 12-15 (discussing the unique drug treatment gap for women and children). Women are more likely than men to be poor, and are therefore less likely to have adequate access to health care or the resources to pay for costly drug treatment programs. Id. at 2. Women often hide their consumption of drugs, making it difficult to identify the need for treatment. Id. at 8. Women in relationships with violent partners may be prohibited from seeking treatment. Id. at 9. Further, mothers have difficulty because many residential treatment programs make no provisions for children. See id. at 2. Even when treatment programs are available, they are typically geared toward men's experiences of drug addiction, leaving women without programs tailored to their needs. Id. at 13-14.

\(^{305}\) See supra Part II.A.
equilibrium between fairness and justice for poor African-American women and their children.\textsuperscript{306}

The only way for our country to slow prison growth, restore families, and ensure the protection of communities is to repeal mandatory minimum sentences for low-level, non-violent offenders. The bottom line is that unless the underlying issue of poverty is addressed, a segment of the population will remain vulnerable to the temptation to supplement its income, or lack thereof, by selling illicit substances.\textsuperscript{307} Further, as long as poverty exists, kingpins will be able to exploit the poor by recruiting them to sell drugs for financial gain.\textsuperscript{308} Current sentencing policies expose these weaknesses within society, and exacerbate them by exploiting those who are most vulnerable and least likely and able to resist oppression. Once mandatory minimums have been repealed, the misdirected tax dollars that were used to support the War on Drugs should be used to implement preventative programs for youths and to enhance the quality of the public educational school system, particularly in urban areas where the quality of education is decidedly low.

To restore fairness and equity to the criminal justice system, judges should be given more discretion in making sentencing determinations for drug offenders. To reduce the probability of racial bias in judicial sentencing determinations, judges should receive additional training on intersecting issues of race, class, gender and the impact of white privilege on the justice system. The training should also delve into critical areas such as developing cross-cultural competency and communication for judges who need assistance in these areas.\textsuperscript{309} Although training may be costly,

\textsuperscript{306} See, e.g., \textsc{Caught in the Net}, supra note 11, at 3 (indicating that women of color unfairly affected by drug war policies; discussing further that women are generally unfairly affected by sentencing schemes and laws); see also Johnson \& Waldfögel, supra note 94, at 1 (stating that children of incarcerated parents are all, perhaps inadvertently, treated the same in the welfare system).

\textsuperscript{307} See, e.g., \textsc{Caught in the Net}, supra note 11, at 1-2 (discussing women who enter relationships with partners who use or sell drugs, or who turn to the drug trade to supplement their income to support their families).

\textsuperscript{308} See, e.g., \textsc{Caught in the Net}, supra note 11, at 1-2 (stating that women specifically turn to the drug trade in order to supplement their income “in the absence of living wage jobs and in the face of cuts to public assistance”).

\textsuperscript{309} Judges should be strongly encouraged to develop a deeper awareness of issues related to diversity and poverty. For an example of a case where a judge made statements on the record that were culturally insensitive, see Alexandra
the human cost of continuing to rely on prosecutors to negotiate plea agreements (off the record) that lead to lengthy imprisonment terms for low-level, non-violent offenders is far greater.\textsuperscript{310} Because of all that is at stake, judges should have a complete understanding of a woman's participation in a drug-related crime when making a sentencing determination. Therefore, even if race and gender do play a role in the earlier stages of a woman's case, the judge should be able to lessen this discriminatory effect by accurately assessing the situation and fairly doling out an appropriate criminal punishment.

\textbf{B. In the Alternative: Make the Punishment Fit the Crime—Reassess the Use of Downward Departures}

In the event that Congress is not willing to repeal mandatory minimum sentencing laws, it should reassess the use of downward departures.\textsuperscript{311} One point almost universally recognized by all critics of the current sentencing scheme is that it has upended a core principle of our nation's criminal justice system—that the punishment must fit the crime.\textsuperscript{312} One way to alleviate the problem of unnecessarily lengthy sentences for low-level offenders is to more precisely distinguish between high-level and low-level offenders in sentencing. It is a travesty of justice that a dealer who is significantly involved in a drug trafficking ring may escape serious punishment by providing information on those who are only peripherally involved.\textsuperscript{313}

A government study should be conducted to determine how often downward departures for substantial assistance are offered and what level of offenders benefit from such offers. The study must be dissected into categories and should cross-reference race, gender, and level of involvement.

Cox, Cracked Lenses: The Visual Exploitation of Crack Mothers, http://www.womenandprison.org/motherhood/alexandra-cox.html (last visited Apr. 3, 2007) (detailing a case involving an African-American woman who was charged with using crack cocaine while pregnant). The Honorable Frank Eppes, a South Carolina Supreme Court judge stated, "Is this a crack baby? Why wouldn't you just take a pistol and put it in your mouth and blow your head off? You wouldn't do that, would you?" \textit{Id.}

\textsuperscript{310} See supra Part.IV.
\textsuperscript{311} See supra note 146 (defining downward departures).
\textsuperscript{312} See U.S. CONST. amend. VIII.
\textsuperscript{313} See supra Part III.D (discussing the substantial assistance provision).
to obtain an accurate picture of the effects of downward departures and how recipients of such offers benefit. High-level offenders should not be able to benefit from this provision as a result of their superior knowledge of the inner workings of a drug trafficking operation in which they are involved.

C. Allow States to Retain Jurisdiction Over Low-Level and Mid-Level Federal Drug Offenders

"Subsidiarity" should be exercised when a non-violent low-level or mid-level drug offender is charged at the federal level. Instead of pursuing charges, the federal government should relinquish jurisdiction and allow the offender's state to take control of the case. Under the principle of subsidiarity, states would arguably be in the best position to provide appropriate services to drug offenders, including access to drug treatment programs, crisis management services, public benefits and oversight of familial reunification and prisoner reentry efforts. Further, if a mother faces incarceration in federal prison, she will be able to remain in her home state and have a better opportunity to remain involved with her children. While some negative consequences may flow from subsidiarity, such as the potential for misconduct by states and limited opportunities for federal oversight, states remain in a better position to evaluate and address the impact of policy decisions on local communities. However, in order for subsidiarity to work in the cases of federal female drug

314. See Robert K. Vischer, Subsidiarity as a Principle of Governance: Beyond Devolution, 35 IND. L. REV. 103, 103 (2001) ("[S]ubsidiarity holds that where families, neighborhoods, churches, or community groups can effectively address a given problem, they should. Where they cannot, municipal or state governments should intervene. Only when the lower bodies prove ineffective should the federal government become involved.").


316. See supra notes 181-182 and accompanying text.
offenders, states must be willing to work holistically for the
benefit of women and children by implementing multi-faceted
approaches to addressing their needs.

1. Increase Community-Based Alternatives to
Incarceration

Recent studies suggest there is a strong correlation
between a lack of job training or other education and
involvement in the drug trade.\(^{317}\) It would behoove us to find
remedies to these problems rather than continuing to rely on
a system that has clearly failed so many women and
children.\(^{318}\) As an alternative to incarceration, all fifty states
have implemented or are planning to implement innovative
drug court programs which allow drug offenders a second
chance.\(^{319}\) The programs give drug offenders the option to
participate in supervised probation and treatment programs
as opposed to incarceration.\(^{320}\) Drug treatment programs
should continue to be evaluated for effectiveness and should
be accompanied by multi-disciplinary approaches to helping
offenders. When such programs are successful, states will
both save money\(^{321}\) and leave more families intact.

In addition, residential drug treatment options that
include child care for mothers should be provided through
state medical benefits for those who cannot afford to pay for
such treatment. In order for a program to be effective, states
must be willing to treat drug use as a health problem and to
invest money to ensure that people receive adequate access to
treatment alternatives that are more closely tailored to meet
their needs.\(^{322}\) The federal government should fund such
programs as an alternative to sentencing low-level, non-

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317. See generally Gaskins, supra note 9 (showing that women who are
peripherally involved in drug trafficking are "women of circumstance"); Ritchie,
supra note 30, at 136, 138 (showing that poor women participate in drug
trafficking as a survival mechanism).

318. See supra Parts III-IV.


320. Id.

321. See CAULKINS ET AL., supra note 195, at 99-106 (offering solutions which
include community-based approaches to substance abuse issues, as an
alternative to over-reliance on incarceration).

322. See id.
violent drug offenders to unduly harsh and lengthy sentences; doing so could save billions of dollars which are currently being spent on the Federal Drug Control Budget. In essence, the cost of providing drug treatment is substantially lower than the costs of incarcerating female offenders and providing care for their children through the foster care system.

2. Raise the State and Federal Minimum Wage Standard

States should assist offenders involved in drug trafficking in making the transition to becoming law-abiding citizens. The government should increase the federal minimum wage from $5.15 an hour to a living wage. Sadly, despite rising inflation, the federal minimum wage standard has remained unchanged since September 1997. In fact, the value of the federal minimum wage standard has decreased by seventeen

323. See CSDP, supra note 302.
324. See CAULKINS ET AL., supra note 195; see also It's Not Mother's Day In Prison, STREETWISE, May 10-16, 2006, at 2, available at www.caseygrants.org/documents/granteesinthenews/2006/2006-05/streetwisem%200506.pdf (showing that the average annual cost of incarcerating a mother is $32,666 at Dwight Prison in Illinois; also showing that the average annual cost of maintaining a child in foster care is $25,000); JusticeWorks Cmty., A Call for Common Sense Policy in Criminal Justice, in MOTHERS IN PRISON, CHILDREN IN CRISIS: INFORMATION AND NEWS PACKET 16 (1999), available at www.barnard.columbia.edu/bcrw/archive/prison/MothersInPrison.pdf (“On the local level taxpayers in New York City are paying a particularly high price. In addition to the staggering $59,000 cost per year of incarcerating a single woman, it costs at least an additional $20,000 for each of her children to be placed in foster care.”).
326. See Jared Bernstein, Pay Workers a Living Wage, MIAMI HERALD, Aug. 6, 2001, available at http://www.epi.org/content.cfm/webfeatures_viewpoints_min_wage2001; see also Rebecca O'Donnell, The Allegheny County 'Living Wage' Debate Marches On, 21 LAW. J. 1, 1 (2001) (defining “living wage” as “a wage that would put a family of four above the poverty line and allow them to afford basic necessities,” including food, housing, transportation, clothing, personal care, health care, life insurance, a telephone and a newspaper).
327. See U.S. Dep't of Labor, supra note 325. It appears that there may be some relief on the way. On January 10, 2007, the House passed an increase to the minimum wage. The new proposed amount is $7.25 per hour. Jonathan Weisman, House Passes Increase in Minimum Wage to $7.25, WASH. POST, Jan. 11, 2007, at A06.
percent, which represents its second-lowest value since 1955.\textsuperscript{328} If the government is serious about lowering the crime rate and decreasing drug offenses, it must ensure that all Americans who want to work have an opportunity to receive fair wages for their efforts. It is ironic that as the federal prison budget continues to expand, our nation's attention to the plight of low-wage workers has decreased.

It is almost impossible for a single mother to survive on the current minimum wage even if she works full-time, year-round.\textsuperscript{329} This meager salary constitutes a little over $10,000 annually, after taxes and other deducted expenses.\textsuperscript{330} When one considers the rising costs of basic necessities such as housing, childcare, transportation, and the cost of food, a working woman and her children will likely face a financial deficit each month.

3. Eliminate Barriers to Reentry for Female Offenders

Women who have served time in prison due to their peripheral involvement in drug-related crime should not suffer perpetual punishment after their release from prison due to the collateral consequences of their convictions.\textsuperscript{331} The federal government and the states should allow these women to have access to opportunities that will reduce their chances of returning to prison. Laws disqualifying drug offenders from federal financial aid for higher education, public housing programs, and access to public benefits\textsuperscript{332} should be repealed. Instead, these women should receive a prioritized status in such programs to prevent recidivism and to ensure that they are able to support their children.

VI. Conclusion

Despite evidence of the disparate impact of our laws and policies on poor women of color and children, many members of Congress and society as a whole still believe that

\textsuperscript{329} See KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 85 (1997).
\textsuperscript{330} Id.
\textsuperscript{331} See supra Part IV.E.
\textsuperscript{332} See supra Part IV.E.
individuals who participate in drug crimes to survive deserve the excessively harsh sentences they face. Having lived in the midst of poverty and oppression in urban Los Angeles, I can bear witness to the horrific, sub-standard living conditions that poor women of color and their children encounter by virtue of circumstances arguably outside of their control. In addition to their propensity to participate in "survival" crimes to support their children, many of these women face disproportionate rates of domestic abuse and violent crimes,\textsuperscript{333} making them vulnerable, and therefore, easily susceptible to exploitation.\textsuperscript{334} Without adequate systemic safeguards in place and an increased understanding of the cycle of poverty and abuse on the part of lawmakers, many of these women end up facing extended prison terms. As Justice Kennedy proclaimed in his speech to the American Bar Association:

\begin{quote}
We have a greater responsibility. As a profession, and as a people, we should know what happens after the prisoner is taken away. To be sure, the prisoner has violated the social contract; to be sure [s]he must be punished to vindicate the law, to acknowledge the suffering of the victim, and to deter future crimes. Still, the prisoner is a person; still, . . . she is part of the family of humankind. . .
\end{quote}

Through this article, I have attempted to illustrate how mandatory minimums and the sentencing guidelines contribute to the breakdown of already fragile families and exacerbate systemic inequalities facing poor women of color and their children. It is my hope that Congress will play a greater role in examining the deleterious impact that draconian sentencing statutes have on poor women of color and their children before more lives are irreparably damaged.

\textsuperscript{333} See, e.g., CAUGHT IN THE NET, supra note 11, at 9 (discussing the relationship between violence and domestic abuse and women who use or sell drugs).
\textsuperscript{334} See Raeder, supra note 150, at 2-3.
\textsuperscript{335} ABA REPORT, supra note 98, at 2 (quoting Supreme Court Justice Anthony M. Kennedy's address to the American Bar Association on August 9, 2003).