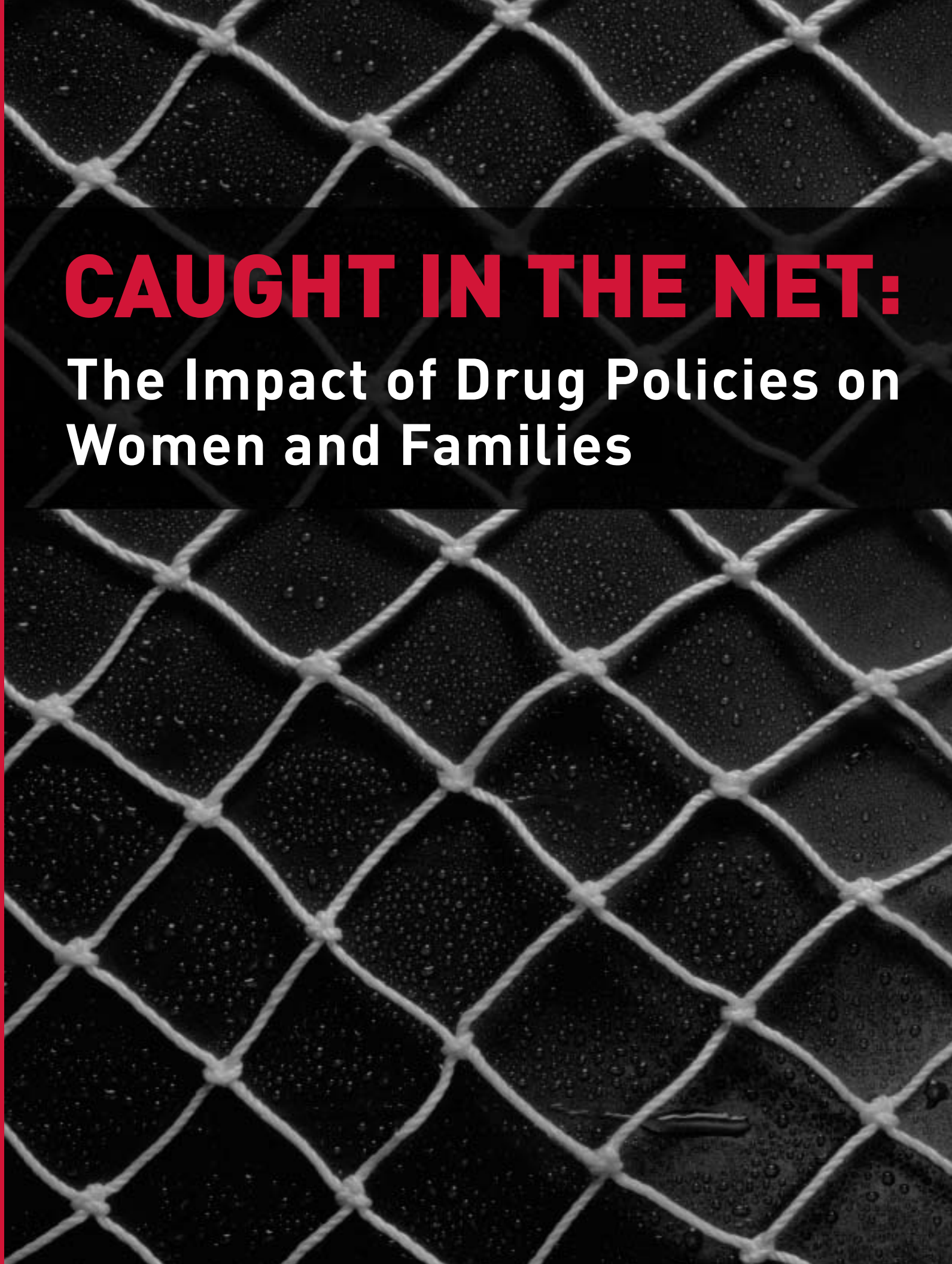

CAUGHT IN THE NET:

The Impact of Drug Policies on Women and Families

AUTHORS & ACKNOWLEDGMENTS

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Executive Summary

Who ever heard of a female drug lord? As the terms "kingpin" and "drug lord" denote, men are almost always at the head of major drug operations, and yet the rate of imprisonment of women for drug crimes has far outpaced that of men. Families and children suffer – but why? Either we have turned a blind eye or we simply misunderstand women's experiences with drugs. This report begins a new dialogue and insists on answers to questions about women and drugs, and the laws and policies that should be in place.

Federal and state drug laws and policies over the past twenty years have had specific, devastating, and disparate effects on women, and particularly on women of color and low-income women. These effects require further study and careful consideration as state and federal decision-makers evaluate existing and prospective drug laws and policies.

Reliance on the criminal justice system to reduce the use, abuse, and sale of illegal drugs has had little effect on the supply and demand for these drugs in the United States. It has, however, led to skyrocketing rates of incarceration of women.

- Nationally, there are now more than **eight times** as many women incarcerated in state and federal prisons and local jails as there were in 1980, increasing from 12,300 in 1980 to 182,271 by 2002.
- Between 1986 and 1999, the number of women incarcerated in state facilities for drug-related offenses increased by **888%**, surpassing the rate of growth in the number of men imprisoned for similar crimes.
- When all forms of correctional supervision – probation, parole, jail, and state and federal prison – are considered, more than **one million women** are now behind bars or under the control of the criminal justice system.

Women of color use drugs at a rate equal to or lower than white women, yet are far more likely to be affected by current drug laws and policies:

- In 1997, 44% of Hispanic women and 39% of African American women incarcerated in state prison were convicted of drug offenses, compared to 23% of white women, and 26% and 24% of Hispanic and African American men, respectively.

These racially disparate effects are the result, in significant part, of racially targeted law enforcement practices, prosecutorial decisions, and sentencing policies. Selective testing of pregnant women of color for drug use as well as heightened surveillance of poor mothers of color in the context of policing child abuse and neglect exacerbate these racial disparities.

The underlying circumstances contributing to the dramatic increase in women's incarceration for drug offenses, including patterns of women's drug use, barriers to women seeking and obtaining treatment, lack of effective and appropriate treatment for women, the nature of women's involvement in the drug trade, and patterns of prosecution and sentencing of women for drug offenses, have yet to be thoroughly examined and addressed by researchers or policy makers. Available research in these areas indicates a strong connection between women's experiences of violence and economic and social pressures, and women's drug use or involvement in the drug trade. Existing data also indicate that women, and particularly mothers and survivors of abuse, are less able to access or benefit from current drug treatment models. In the absence of viable drug treatment options, women's drug use and addiction are more likely to be treated as criminal justice issues than as the health problems they truly are. Addressing women's drug use and addiction through incarceration, rather than treatment, contributes to the escalating costs associated with current drug laws and policies.

Executive Summary

- In 1997, incarceration cost approximately $26,000 per woman per year. When the often-necessary expense of placing the children of incarcerated mothers in foster care is considered, the cost more than doubles.
- In comparison, the cost of drug treatment ranged between $1,800 for regular outpatient services and $6,800 for long-term residential services per client per year.

Even when they have minimal or no involvement in the drug trade, women are increasingly caught in the ever-widening net cast by current drug laws through provisions such as conspiracy, accomplice liability, and constructive possession, which expand criminal liability to reach partners, relatives, and bystanders. Sentencing laws fail to consider the many reasons – including domestic violence, economic dependence, or dependent immigration status – that may compel women to remain silent or not report a partner or family member's drug activity to authorities. Moreover, existing sentencing policies, particularly mandatory minimum sentencing laws, often subject women to equal or harsher sentences than those imposed upon the principals in the drug trade, who are ostensibly the target of those policies.

Women's incarceration for drug offenses fails not only to address the issues that likely contributed to their involvement with drugs, it often exacerbates them.

- Sexual and physical violence against women at the hands of correctional officers is widespread in United States prisons. The abuse women experience behind prison walls has devastating consequences, particularly for those who are survivors of violence, suffer from depression, or are working to overcome addiction.
- Incarcerated women's physical and mental health is routinely put at risk by ill-conceived security policies, as well as delays in providing emergency and routine healthcare.
- Incarcerated mothers face emotional trauma due to separation from their children and frequently suffer from depression, loneliness, and despair. Infliction of such trauma on women with substance abuse problems is particularly problematic because these conditions often trigger the urge to use drugs.

Communities targeted by current drug laws and policies lose mothers, caregivers, and breadwinners as a result of women's incarceration, leading to serious effects on the well-being of children and families.

- In most cases, when a woman is imprisoned, her child is displaced. Children are three times more likely to live with the other parent when their father, rather than mother, is incarcerated.
- Ten percent of children with mothers incarcerated in state prison are in foster homes or agencies, and 79% live with a grandparent or relative.
- Women's incarceration can result in emotional and financial hardship for their families. Family members often take custodial responsibility for the children of incarcerated mothers because the alternative may be the permanent loss of custody. The loss of incarcerated women's income, combined with the emotional impact on children from losing their mothers, results in increased stress on family and community members.
- An estimated 28 million women (approximately 26% of women 18 years or older living in the United States) provide support and care to chronically ill, disabled, or aged family members or friends. While there is no documentation of the number of women who were caregivers prior to their incarceration, the removal of incarcerated women from their communities clearly has a significant impact on all community members.

The ACLU, Break the Chains, and the Brennan Center for Justice advocate for fair drug laws and policies that adequately take into account the needs of women and their families, and address the root causes of women's involvement with illegal drugs.

Almost 50 years ago, acclaimed jazz artist Billie Holiday collapsed in her apartment and was rushed to Metropolitan Hospital in New York, where she was diagnosed with cardiac failure and serious liver disease, both the result of a long history of drug and alcohol abuse. As she lay fighting for her life, police raided her hospital room and arrested her on her deathbed for possession of heroin. Billie Holiday died in police custody, another victim of the relentless "war on drugs," the moniker used to describe the laws, policies and practices that prohibit and harshly punish the use, possession, and sale of drugs deemed illegal or controlled. This "drug war" costs a great deal to wage – approximately $50 billion annually[1] – and has led to no measurable decline in illegal drug use or availability since its inception.[2] In 1959, as today, drug addiction was treated as a crime. Addicts could not obtain treatment and were subjected to police harassment, arrest, and incarceration. These punitive attitudes toward drug use and abuse have intensified over the last half-century, leading to a drastic increase in the number of women caught in the net of the war on drugs.

Between 1986 and 1999, the number of women incarcerated in state facilities for drug-related offenses increased by 888%, far outpacing the rate of growth in the number of men imprisoned for similar conduct.[3] In 1998, a quarter of a million women were arrested for drug offenses. By 2003, 58% of all women in federal prison were convicted of drug offenses, compared to 48% of men.[4] Women of color, and particularly African American and Latina[i] women, have been disproportionately impacted by this trend – African American women's incarceration rates for all crimes, largely driven by drug convictions, have increased by 800% since 1986, compared to an increase of 400% for women of all races.[5] In 1997, 44% of Hispanic women and 39% of African American women incarcerated in state prison were convicted of drug offenses, compared to 23% of white women, and 24% and 26% of African American and Hispanic men, respectively.[6]

Dorothy Gaines, a 42-year-old widow with three children, entered the national spotlight in 2000 when the President granted her clemency from a 19½ year prison sentence imposed upon her conviction for conspiracy to deliver crack cocaine. Dorothy's journey to that moment began with a relationship with a partner who was addicted to crack cocaine. With her encouragement, he entered treatment, remaining in a program for almost 8 months. Unfortunately, once he left treatment, Dorothy's boyfriend relapsed and continued using crack. When federal agents raided Dorothy's home, where she lived with her partner, officers found no drugs or weapons on the premises. Yet both were arrested and charged with conspiracy to deliver cocaine based on her boyfriend's alleged involvement in a large-scale drug operation as a driver. Charges against Dorothy were initially dismissed, but several defendants in the conspiracy made a deal with the prosecutor to reduce their own sentences by providing information to assist in the prosecution of others. They alleged that Dorothy had delivered small packages of cocaine to local street sellers. On the basis of their testimony Dorothy was charged and convicted of conspiracy to distribute the total quantity of drugs involved in the drug operation, and served six years in prison before she was granted clemency.[7]

Moreover, the war on drugs now reaches beyond those using or addicted to drugs, targeting individuals unwittingly, unknowingly, or peripherally involved in drug related activity. This widening of the net has had the effect of capturing more women, particularly women in relationships (some of which are abusive) with partners or family members who use or sell drugs, as well as women who turn to the drug trade to supplement their income in order to support their families in the absence of living wage jobs and in

[i] In this report, we intentionally use the terms 'Hispanic' and 'Latina' interchangeably according to colloquial use. Most of the statistics available and presented in this report do not distinguish between 'Hispanic' and 'Latina' unless otherwise noted.

the face of cuts to public assistance. Current examples of women serving multi-decade sentences for simple drug possession – often based on the mere presence of drugs in their home or their minimal involvement in drug-related crimes – abound. Two such women, Dorothy Gaines and Kemba Smith, came into the national spotlight in 2000, when President Clinton granted them clemency from long mandatory minimum sentences that many saw as unjustly harsh given their non-violent, minimal, and uninformed involvement conduct. Thousands more continue to languish behind bars, the victims of ill-conceived policies and ineffective practices that fail to consider individual circumstances in determining how to address involvement with illicit drugs.

In 1999, Kemba Smith found herself sitting in a cell in the Danbury Correctional Facility for women, spending yet another year away from her family and five-year-old son, born in prison during her first year of incarceration. The only child of professional parents in a suburb of Richmond, Virginia, Kemba lived a sheltered life. When she was a sophomore in college, she met a well-known young man on campus. His self-confidence, nice clothes and fancy cars led young Kemba to believe that she had found a "knight in shining armor," and she became romantically involved with him. Unfortunately, this man was also a cocaine dealer. As time passed, he exerted more and more control over her, becoming both physically and verbally abusive. Under threat of physical harm to herself and her family, Kemba began to carry money and weapons for him. In 1994, after he was killed by rival dealers Kemba was indicted as a member of his drug trafficking operation because of her failure to cooperate with law enforcement. Although Kemba had no prior criminal record, is a survivor of domestic violence, and was pregnant at the time of her conviction, she was sentenced to 24½ years. Kemba received clemency from President Clinton in 2000, after serving six years in prison.[8]

The war on drugs is having a specific, dramatic, and devastating impact on women that requires further study and attention when evaluating the success of drug policies. It is also clear that certain segments of women are more harshly impacted by the war on drugs than others – for instance, African American and Latina women make up a disproportionate number of women arrested, charged, convicted, and incarcerated for drug-related offenses.

Less clear are the underlying circumstances contributing to the skyrocketing rate of incarceration of women for drug offenses, including patterns of women's drug use, involvement in the drug trade, and prosecution and sentencing for drug offenses. Women begin and continue to use drugs in different ways and for different reasons than men, requiring different forms of prevention and intervention. Often, women's drug use is triggered by violence – either past or current – in their lives requiring special attention to the systemic issue of violence against women when both addressing individual cases and formulating broader drug policies.

Treatment options, where available, are generally modeled on men's experiences of drug use and addiction, leaving women without programs tailored to their needs. Women, who earn less on average and have a 50% higher rate of poverty than men,[9] are less likely to have adequate health insurance or the resources to pay for costly drug treatment programs. Women who are mothers find treatment difficult to access because many residential treatment programs make no provisions for children. Pregnant or parenting women are penalized for the alleged risk to their fetuses or children posed by their drug use or addiction, rather than being given the support necessary to appropriately address their situation. In the absence of viable drug treatment options, women's drug use and addiction are more likely to be treated as criminal justice issues than as the health problems they truly are.

Once in the criminal justice sphere, women are unfairly affected by sentencing schemes and laws enacted as part of the escalation of the war on drugs. Whether they are using drugs, involved in the illegal drug trade of their own volition, or coerced into it by an abusive partner or family member, women tend to play minimal, peripheral, or unsuspecting roles in the drug trade. Yet under current laws, women are frequently subjected to harsh mandatory minimum prison terms, regardless of the level or circumstances of their involvement in the underlying drug offense.

The effects of increasing punishment for drug-related offenses on women themselves, as well as their children, families, and communities are often hidden. Sexual violence at the hands of correctional officers as well as the severe inadequacy of medical care are but two of the conditions faced by women on the inside. A mother's prolonged incarceration often leads to the destruction of relationships with her family, financial hardship to the caretakers of children left behind, and, all too often, placement of children in an already overburdened and problematic foster care system, which can result in termination of her parental rights. Elders are left without caregivers, and communities without workers.

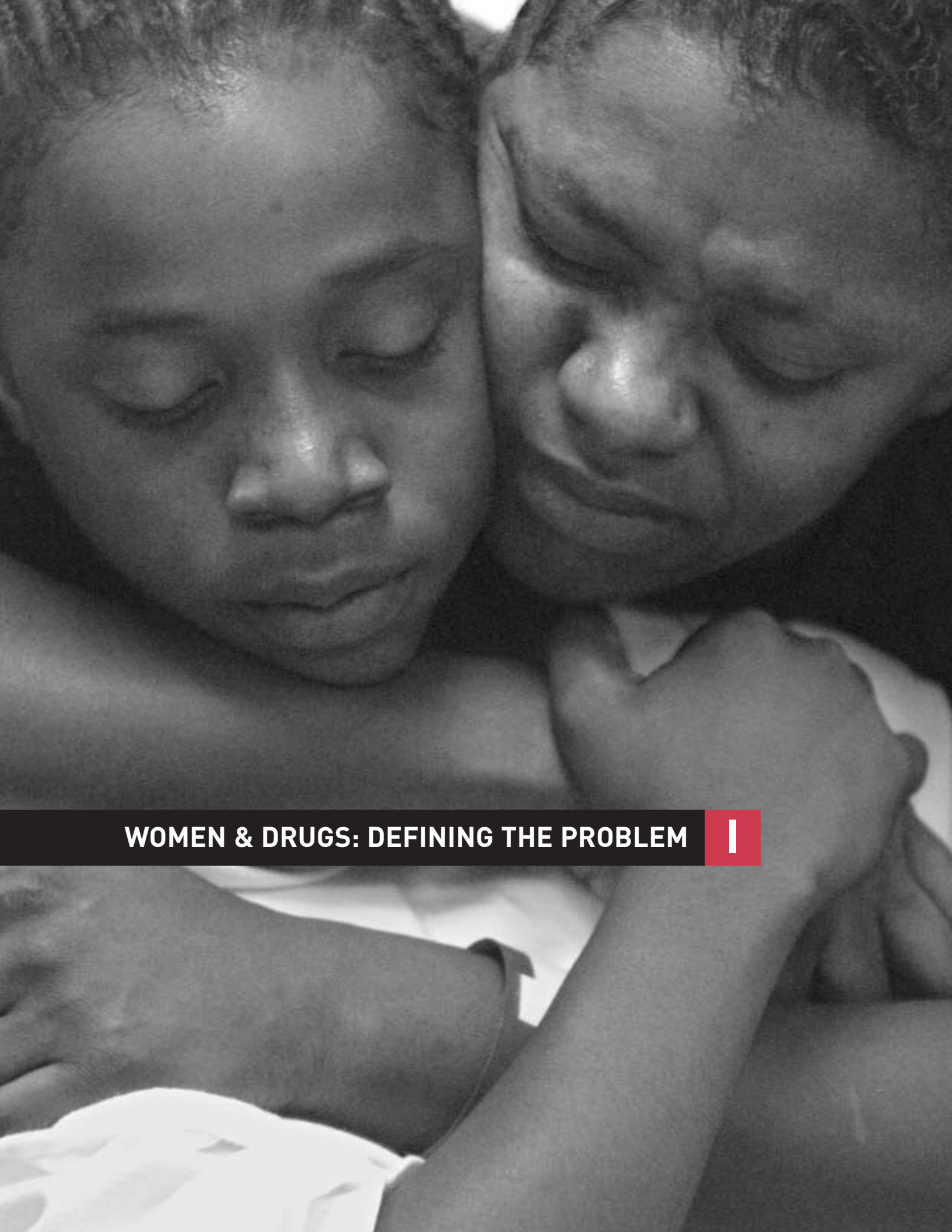
This report compiles and analyzes existing research with respect to these and other specific impacts of current drug policies on women. The material summarized illustrates the myriad ways in which current drug laws and sentencing schemes have not only failed to achieve what they purportedly aim to do – promote public safety, reduce drug use, stem the growth of the illegal drug market, and deter repeat offenses – but also exacerbated the root causes of addiction and drug-related crime. The report also demonstrates the complete failure of current drug policies to address the experiences and circumstances of women.

The report is divided into five main sections. The first section offers an overview of the current state of affairs, summarizing patterns of women's drug use and involvement in the drug trade, and providing quantitative information about the population of women currently incarcerated for drug offenses. The second section provides historical context for drug laws that illustrates how, beginning with women's first point of contact with the criminal justice system during police encounters, women of color are, and historically have been, unfairly affected by drug war policies. The third section explains how modern drug laws have expanded liability provisions and toughened sentencing schemes to the detriment of women. The fourth section highlights the qualitative impact of current drug laws on women and their families, examining the ways in which children are impacted by a mother's incarceration, and how reform of the child welfare system in the late 1990s has affected incarcerated mothers and their families. The final section of the report offers comprehensive recommendations aimed at reducing the war on drugs' disproportionate effects on low-income women and women of color and their children, and suggests policy directions that would begin to reduce women's incarceration and mitigate its negative effects.

“When one is incarcerated with 1,200 other inmates, it is hard to be selfish … So many of the women here … will never have the joy and well-being that you and I experience. Many of them have been here for years – devoid of care, devoid of love, devoid of family.

I beseech you all to think about these women – to encourage the American people to ask for reforms, both in sentencing guidelines, in length of incarceration for nonviolent first-time offenders, and for those involved in drug-taking. They would be much better served in a true rehabilitation center than in prison where there is no real help, no real programs to rehabilitate, no programs to educate, no way to be prepared for life ‘out there’ where each person will ultimately find herself, many with no skills and no preparation for living.”

– Martha Stewart, 2004[10]



WOMEN & DRUGS: DEFINING THE PROBLEM I

To understand how and why women are being incarcerated at unprecedented rates in the war on drugs, it is important to examine their unique relationship to controlled substances in terms of use, addiction, and involvement in the drug trade, as well as the lack of treatment options available to them. Meaningful and effective responses to women's involvement with drugs will be hard to come by until we fully understand the scope and nature of women's experiences.

PATTERNS OF WOMEN'S DRUG INVOLVEMENT

According to the National Institute on Drug Abuse (NIDA), in 2004 more than 9 million women used illegal drugs, and almost 4 million women took prescription medication without authorization.[11] Almost half of all women between the ages of 15 and 44 have used illegal drugs at least once in their lifetimes. Of these, more than 6 million have used marijuana and nearly 2 million have used cocaine within the past year.[12]

NIDA notes that men and women are "equally likely to become addicted to or dependent on cocaine, heroin, hallucinogens, tobacco, and inhalants."[13] However, women are more likely than men to become addicted to or dependent on sedatives and drugs designed to treat anxiety or sleeplessness, and less likely than men to abuse alcohol and marijuana.[14] Additionally, women are more likely to abuse prescription drugs, accounting for close to 60% of prescription drug related emergency room visits.[15] These differences influence women's initial contact with and consequent treatment within the criminal justice system.

A National Institutes of Health (NIH) survey indicates that white women (33%) are more likely to report using drugs illegally at least once in their lifetimes than black women (26%) or Latinas (20%).[16] All three groups of women are equally likely to report having used illegal drugs in the past month.[17]

Nevertheless, as discussed in greater detail in Section II, substantial racial disparities exist in women's arrest, prosecution, and incarceration for drug-related offenses.

Significant differences do, however, exist in the types of drugs used by women of different racial groups. White women are most likely to report using marijuana at some point in their lifetimes, and, along with Latinas, are more likely than black women to use hallucinogens and inhalants.[18] Although white women are more likely than both black women and Latinas to have tried cocaine at least once in their lifetimes, black women "are more likely to be recent and frequent users of crack cocaine."[19]

Beyond these initial statistics, relatively little quantitative information is currently available at the national level regarding women's involvement with drugs, particularly where marginalized populations are concerned. The remainder of this section summarizes existing research on women's primary modes of consumption of drugs, the causes of drug addiction unique to women, and women's roles in criminal drug activity, as well as the inadequacy of drug treatment services for women. Further, it identifies areas in which additional research on the experiences and needs of women is necessary to promote more informed, effective drug policies.

WOMEN'S DRUG CONSUMPTION

Women's modes of drug consumption differ from those of men in at least two important ways. First, as a general rule, women appear less likely to consume drugs in invasive ways, such as intranasally or intravenously. This difference is particularly significant with respect to use of cocaine, where the number of women admitted to treatment for the smokable form of cocaine – crack – increased in the mid-1980s as this version of the drug became more widely available.[20] Use of powder cocaine, which is generally consumed intranasally, is less aggressively

policed and carries lesser penalties. Conversely, crack cocaine – which can be smoked and is therefore more likely to be used by women – has been the subject of more concerted law enforcement efforts and harsher penalties.[21] As a result, women, and particularly black women, are disproportionately harmed by current drug policies.[22]

Second, research indicates that the stigma associated with drug use is more keenly felt by women, particularly parenting or pregnant women, rendering them more likely to conceal their drug use to avoid public disapproval.[23] This pattern appears to result at least in part from society's framing of women's drug use as more deviant and inconsistent with accepted gender roles than drug use by men.[24] This is likely even more true for low-income and poor women, who are more often under surveillance by government authorities due to participation in social programs or receipt of public assistance, and therefore risk losing their benefits or even their children if their drug use is discovered. The same can be said for immigrant women, who may fear deportation if their drug use comes to light.

The manner in which women use drugs has profound implications under current drug policies. Their solitary and often hidden consumption of illicit substances makes it more difficult to identify their need for treatment, and the stigma associated with women's drug use renders them reluctant to seek treatment on their own. Over-reliance on excessively punitive measures, such as incarceration, deportation, and permanent termination of parental rights, to control women's drug use, rather than on more rehabilitative methods, inhibits many women from taking steps to overcome their addictions. This leads to greater harm to women, as well as their children, families, and communities, than if women's addiction were addressed through a more health-centered and rehabilitative approach.

CAUSES OF DRUG USE AND ADDICTION AMONG WOMEN

"You get high because you're suffering, because you have a lot of problems, because you are in pain, because things aren't going the way you wish they would and you have no way out. Drugs don't really make it any better, but for the moment, it does."

-Woman who formerly abused drugs[ii]

Women use drugs for reasons as complex and varied as women themselves. Existing research indicates that, across the board, women's drug use is more likely to be triggered by negative experiences and stress, and motivated by anxiety and depression, than by a desire to experiment or to conform to social expectations.[25] In other words, women tend to use drugs to simply make it through the day. The risk of drug use by women is therefore heightened by experiences such as sexual harassment, emotional, physical, and sexual abuse, poverty, racial bias, and mental illness.[26]

Factors such as a woman's race, socioeconomic status, sexual orientation, and immigration status, among others, can contribute to the degree to which she faces individual and systemic challenges that place her at risk of drug abuse. These factors also impact her ability to obtain appropriate healthcare, treatment, therapy, and social support to address addiction. For instance, the National Association of Lesbian and Gay Addiction Professionals reports that lesbian, bisexual, and transgender women report higher rates of substance abuse, and that their reasons for drug use are connected in part to stress caused by homophobic discrimination and internalized homophobia.[27] Social attitudes toward women can also contribute more directly to women's drug use. For instance, the National Center on Addiction and Substance Abuse reports that some women use cocaine, which, like nicotine and other "legal" drugs, is an appetite suppressant, to control their weight.[28]

[ii] Kathryn A. Sowards & Marsha Weissman, Surviving; Connecting; Feeling: Psychosocial dimensions of Recovery from Drug Dependence Among Women in the Criminal Justice System 10 (Justice Strategies, Working Paper, (Feb. 2005)

While it is difficult to establish a causal relationship between any one condition and an individual's drug use or addiction, the following sections discuss the factors that appear to be most relevant to women's drug use and addiction.

Violence and Coercive Relationships

"I remember my mother always telling me that you had to stick to a marriage no matter what. . . . I tried for fifteen years, I stayed with this man. It was like hell. And I became addicted to drugs because he was on drugs so often that I had to keep up with him. I was really afraid of him."

-Woman who formerly abused drugs[iii]

The prevalence of emotional, physical, and sexual violence against women in our society is a significant contributing factor to women's use of illegal drugs. Researchers consistently have found high levels of past and current physical and emotional abuse in the lives of women drug abusers.[29] Many have suggested a direct relationship, if not absolutely causal, between violence experienced by women and problematic drug use.[30] For instance, the 1989 National Women's Study found a correlation between the number of violent assaults a woman sustains in her lifetime and the severity of her drug or alcohol dependency.[31]

Similarly, a study of methadone maintenance programs found that 51% of women who sought to overcome heroin addiction reported some form of past or present violence in their lives.[32] Psychological trauma from repeated violent episodes drove women to start or continue using heroin to "escape" the abuse or to "self-medicate"[33] for depression or physical injuries caused by the abuse.

Forty percent of women who experienced abuse reported surviving multiple abuse patterns, such as a combination of child abuse, rape, and domestic violence. Women's sense of self-worth, importance, competence, and control was eroded by each violent and abusive experience, thus increasing barriers to treatment.[34] The effects of past violence, if not sufficiently addressed in counseling and therapy, can continue to haunt women and undermine treatment and recovery. Current violent relationships can have the same effect. Researchers noted that some violent partners may directly prohibit women from seeking or continuing drug treatment.

For some women, the link between violence and drug use is even more direct. In some cases, abusive partners coerce women into using illegal substances as part of the pattern of violence, in an effort to render women more dependent on them and exert greater control in the relationship.[35] According to sociologist Beth Richie, women who are battered by their drug abusing partners report that their partners abuse them less when they themselves begin using drugs.[36]

In many violent relationships, a woman's economic status, immigration status, or sexual orientation may further limit her choice to use or sell drugs when an abusive partner directs her to do so. Lack of self-sufficiency resulting from unemployment may hinder a woman's ability to leave a violent relationship. An immigrant woman may be reluctant to seek assistance from the government in leaving a violent relationship for fear of being deported, particularly if she is undocumented. Social service agencies may be ill-equipped to assist a non-English speaker. Support services for lesbian, bisexual, or transgender survivors of domestic violence are few and far between, further isolating this already marginalized group. Under such circumstances, a woman may, understandably, determine that complying with her partner's demands to use or sell drugs is the only option available to her.

[iii] Kathryn A. Sowards & Marsha Weissman, Surviving; Connecting; Feeling: Psychosocial dimensions of Recovery from Drug Dependence Among Women in the Criminal Justice System 10 (Justice Strategies, Working Paper, (Feb. 2005)

Untreated Mental Illness

Mental illness, and particularly depression, anxiety, and Post-Traumatic Stress Disorder (PTSD), also appear to contribute to women's use of illicit and controlled substances. At least half of the women in drug treatment will be diagnosed with a mental disorder such as depression.[37] For many, depressive symptoms predate the use of drugs and are often related to post-traumatic stress resulting from violence in their lives.[38]

For women of color, discrimination also contributes to depression – NIH reports that "[r]acial discrimination probably '...exacerbates the mental health-damaging effects of poverty status among blacks...Even if poverty in America is reduced, as long as economic, social, and political inequalities persist, the health of black Americans is likely to remain impaired."[39] NIH also reports that "[t]he stress of constantly struggling to make ends meet also translates directly into the finding that blacks living below the poverty level, many of whom work, have the highest rate of depression for any racial/ethnic group."[40] According to NIH, the greatest frequency of depression is found among black women ages 18 to 24 years.

NIH also points out that, "the major legacy of the forced relocation of American Indians throughout the United States has been to place them in communities in which they confront racism and hostility from their non-Native neighbors..." and that this reality has had a devastating impact on the physical and mental well-being of Native American/Alaska Native women.[41] Native American women and their families often live in severe poverty – 50% of the households they head are below the poverty line.[42] Native American/Alaska Native communities are also plagued by inadequate housing – in many cases with no indoor plumbing, severe electrical problems, and prolonged dysfunctional heating systems during the winter – unemployment, and toxic surroundings.[43] The National Household Survey on Drug Abuse found that Native Americans were more likely than any other ethnic or racial group to have used illegal drugs in the past month.[44]

War and forced relocation may also contribute to PTSD, and consequent drug use, among women. For instance, among Southeast Asian communities, Cambodians are viewed as the social group "most traumatized by turmoil of their home country and immigration to the United States, and as a result have the highest levels of psychological stress of all Southeast Asians."[45] NIH points out that Hmong women who immigrate to the United States "have been found to be particularly susceptible to developing substance abuse problems in the wake of their resettlement...Opium use to cure physiological and psychological problems also has been reported."[46] A common practice in the United States at the turn of the century, opium use is discussed in Section II of this report. NIH further reports that members of Hmong communities will often self-medicate using substances deemed illegal in the United States, reflecting "their distrust of Western medicine."[47]

Economic Pressures and Coping Mechanisms

In the hit TV show "Desperate Housewives," the character Lynette, a suburban stay-at-home mother of four children, used Ritalin without a prescription so she could stay up all night sewing costumes for a school play. Introduced to the drug by another mother who confessed "that's how she gets through the day," Lynette initially refused, joking, "No thank you, I just smoked crack a little while ago and so I better not mix." When faced with the challenging project, she raided a Ritalin bottle prescribed for her two sons.[48] Although middle and upper class women have long been known to cope with social pressures through use and abuse of pre-

scription drugs, the economic pressures and seemingly insurmountable challenges that low-income women face may also drive them to drug use or abuse.[49] Women may use drugs to help them work long hours or perform multiple jobs to make ends meet, or to help them survive poor workplace conditions and sexual harassment on the job.

Economic pressures also force many women to remain in abusive living situations, which can in turn lead to drug use, as discussed above. In many cases, a combination of all of these factors – everyday demands, violence, mental illness, and economic pressures – play a role in a woman's involvement with drugs. Until these factors that negatively affect women are confronted and addressed as society-wide problems, there is no doubt that women's drug use and abuse will persist as they struggle to manage and numb the resulting trauma and pain. Similarly, until universal, appropriate, and targeted mental healthcare is available to all, women will turn to whatever escape is available to them to relieve their pain.

WOMEN'S INVOLVEMENT IN THE DRUG TRADE

Women tend to be "very small cogs in a very large system, not the organizers or backers of illegal drug empires."

-Amnesty International, *Rights for All*[50]

Elaine Bartlett is a mother of four and grandmother of three. She was having difficulty making ends meet, so she agreed, just once, to carry one four-ounce package of cocaine from New York City to Albany in an effort to make some money to support her family. She was sentenced to 20 years. After Bartlett spent 16 years in prison, New York Governor George Pataki granted her clemency.[51] In some cases, economic realities may lead not to drug use, but to involvement in the drug trade as a means of supplementing income in the face of unemployment, low-wage and unstable jobs, lack of affordable housing, and cuts to social programs such as childcare, social assistance, and healthcare. Women generally do not play central roles in the drug trade, serving instead primarily as small scale carriers, sellers, couriers, or drivers, as Elaine did.[52] In many cases, their roles are limited to answering telephones or living in a home used for drug-related activities.[53] Those at the head of major drug operations are almost always men, while most women remain at the periphery, with little knowledge and even less power.[54]

Chrissy Taylor was incarcerated at the age of 19 based on her marginal involvement in her boyfriend's scheme to manufacture methamphetamine. Her boyfriend asked her to go to a store in Mobile, Alabama, to pick up a shipment of chemicals. Based on his assurance that the mere purchase and possession of the chemicals was legal, she went to the store and bought them. As it happened, agents from the Drug Enforcement Administration were working with the chemical store in a reverse-sting operation. The agents sold Chrissy the chemicals and then arrested both her and her boyfriend, not for possession or purchase of the chemicals – neither of which was in and of itself illegal – but for possession with intent to manufacture methamphetamine.[55]

A 1997 review of over 60,000 federal drug cases by the *Minneapolis Star Tribune* found that men were more likely than women to offer evidence to prosecutors in exchange for shorter sentences, even if the information placed others, including the women in their lives, in jeopardy.[56] The study concluded that women, as minor players in the trade, not only lacked information useful to prosecutors, but also often erroneously believed that they could not be found guilty or be subject to long sentences based on uninformed, inconsequential, or coerced activity.[57] Moreover, what limited information women may have about a drug operation might implicate their partner, a family member, or

a community member necessary to their long term survival, rendering them understandably reluctant to provide information.

Dawn Beverlin was sentenced to a five-year mandatory minimum sentence for conspiracy to distribute methamphetamine. She began using drugs when she was 16, was smoking or snorting methamphetamine on a daily basis by the age of 20, and began selling drugs to support her habit. To ensure that she had a sufficient supply for her own use, she would purchase methamphetamine from her boyfriend, use some herself, and sell the remainder to support her own habit.

When Dawn and her boyfriend were caught, charged, and convicted of drug offenses, her boyfriend received a sentence of probation because he had knowledge of the larger operation and assisted the government in making cases against others involved in it. Because her involvement in the drug conspiracy was limited to isolated, small-scale sales to support her own drug habit, Dawn was not able to provide the government with any information to assist in the prosecution of others, and therefore was subject to the five-year mandatory minimum sentence.[58]

Under current drug policies, peripherally involved women and other low-level participants tend to bear the brunt of enforcement efforts and punitive approaches ostensibly aimed at more significant players. In many cases, they face charges and sentences of the same severity as their male counterparts, despite lesser involvement in the underlying offense. Indeed, the marginal roles women play in drug-dealing operations actually make them more vulnerable to long prison terms for drug crimes. Because their 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. Conversely, those with information, almost always men, are more likely to have greater involvement in the drug trade and may be in a better position to reduce their own sentences if they choose to do so.

INADEQUATE TREATMENT OPTIONS FOR WOMEN

"You know, I was so exhausted living my life the way I'd been living. When I got arrested the third time I was just praying and saying God please just help me, help me find some help. You know? Just help me, I just can't do this anymore, I can't live in the street anymore, I can't use anymore drugs, but I don't want to stop. And then people from the [treatment] program came into the jail. I said, this is it, this is my out."

-Woman who formerly abused drugs[IV]

Women, who make up 30% of individuals with drug addictions, are largely unable to access effective and appropriately designed drug treatment. Moreover, women tend to come into treatment at a much later point in their addiction than men, frequently as a result of a crisis such as severe illness, domestic assault, the threat of losing their children, or conflict with the law. As a result, they have often developed chronic, deteriorating conditions by the time they reach out for help.

Unfortunately, for many women and men the help they need is simply not there. The U.S. Substance Abuse and Mental Health Services Administration (SAMHSA) estimates that the drug treatment gap – the number of individuals who need drug treatment services for whom no services are available – is 3.9 million people.[59] This gap appears to be even greater for women with children. In 2003, the National Survey of Substance Abuse Treatment Services reported that women made up less than a third of all treatment admissions nationwide[60] and that only 8% of all available programs offered childcare.[61]

[IV] Kathryn A. Sowards & Marsha Weissman, Surviving; Connecting; Feeling: Psychosocial dimensions of Recovery from Drug Dependence Among Women in the Criminal Justice System 6 (Justice Strategies, Working Paper, (Feb. 2005)

Women of color, and particularly Latina women, appear to face even greater barriers to accessing treatment than whites. SAMHSA reports that an individual's race is one of the main factors in determining whether an individual will be admitted to treatment outside the context of the criminal justice system: whites represented almost 62% of treatment admissions nationwide, while African Americans represented only 24% and Latinos less than 13%.[62] Latina women appear to face particular barriers to treatment – according to the Drug and Alcohol Services Information System, "Hispanic admissions [for substance abuse treatment] were 77 percent male and 23 percent female compared with 69 percent male and 31 percent female among non-Hispanic admissions." According to NIH, racial disparities in access – or lack thereof – to healthcare services, such as drug treatment, is in part based on disparities in health insurance coverage. NIH reports that "[t]hirteen percent of white women were uninsured, compared to 23 percent of black, 25 percent of Asian, and 42 percent of Hispanic women."[63]

Even when women are able to access drug treatment, existing treatment options – usually premised on and geared toward male habits and behaviors – are not always appropriate or effective for women.

Obstacles to Treatment for Women

There are significant obstacles to women's participation in current drug treatment models. The absence of childcare or family centered treatment presents a particularly difficult barrier to women, who are more often than men the primary caretakers of young children. Many residential treatment programs require stays from one month to a year, making participation in such programs unrealistic for many women with children and/or other obligations, such as eldercare responsibilities.[64] Poor and low-income women, who may be under the surveillance of government agencies, are particularly apprehensive about seeking residential treatment. First, many would be forced to leave their children in the care of relatives or friends. Second, obtaining treatment requires them to disclose their drug use. Doing either, they understandably fear, may be viewed by child welfare authorities as evidence of maternal unfitness or abandonment. Additionally, women who work long hours, where schedules are unpredictable and long absences from work can easily result in job loss, find accessing treatment services even more challenging. Other forms of drug treatment, including outpatient services, intensive day programs, or nightly self-help group meetings, are also less accessible to women, and particularly poor women, because childcare is rarely provided.

Lack of Treatment Targeted to Women's Needs

Even when women are able to overcome logistical obstacles to obtaining treatment, the type of treatment available may be inappropriate for a number of reasons, and therefore ineffective. As an initial matter, given that women's drug abuse is often linked to the trauma of past or current emotional, physical and/or sexual abuse, the style of traditional addiction treatment programs, designed with male experiences in mind, can have disastrous consequences when applied to women.[65] Researchers report that women are often disturbed by the confrontational approach of group treatment, and when they challenge these methods, women are labeled as "noncompliant" or resistant to treatment.[66]

Women in coeducational treatment sometimes feel demeaned by not only the style of treatment, but also their male counterparts and facilitators. Women who have participated in such programs have reported sexual harassment, abusive conduct – such as being called prostitutes – and negative comments about their bodies by both participants and facilitators. In some cases, women

who are survivors of abuse have been placed in treatment with abusers. Such conduct recalls or replicates the abuse that may have led women to drug use and abuse in the first place, thereby not only harming them, but also increasing the chance of relapse and decreasing the effectiveness of the treatment.[67] Such was the case for Imani Walker, Sacred Authority Director at the Rebecca Project for Human Rights, who emphasizes "the importance of feeling safe in group" during her own recovery phase. Imani reports that she and several other women left one drug treatment program after a man in the recovery group privately disclosed that he was abusing his sister's daughter. Imani and a few women then asked the treatment program supervisor to ask the man to leave the group because of the negative impact his comments were having on their recovery efforts. When they returned for the next treatment session, however, the man was still there. Several women left as a result, including Imani, who later relapsed.[68] Imani was able to return to treatment despite this experience and continues in recovery today. However, she does not know if the other women who left the treatment program because of the abuser's presence have been able to do the same.

Twelve-step models and other commonly used drug treatment methods also emphasize disclosure and personal responsibility, and therefore may be less effective for more marginalized groups of women. Immigrant women or lesbians, bisexual or transgender women, for instance, may be reluctant to disclose their immigration status, sexual orientation, or other personal details for fear of deportation or discrimination, and may be deemed "resistant to treatment" as a result. For women of many cultures, the means of communication or degree of disclosure required by traditional drug treatment programs, as well as their overall approach to healing and recovery, is simply inappropriate. For instance, NIH reports that the failure of addiction treatment programs to incorporate healing elements from Native American cultures, such as the medicine wheel, into their service offerings creates an additional barrier for Native American women seeking care.[69]

In addition to failing to meet women's needs, in many cases, treatment programs, and particularly residential treatment programs, affirmatively discriminate against women. For instance, women in such programs may be subject to curfews not imposed on men. Women identified by staff as lesbian, bisexual, or transgender may be prohibited from being alone with or displaying affection toward other women, whereas similar surveillance is not imposed on heterosexual women or men.

Treatment for Pregnant Women

Public health professionals view pregnancy as a unique opportunity for healthcare providers to engage hard-to-reach women drug users and encourage them to access a range of services – from prenatal care to drug abuse treatment. As long as women fear retaliation by law enforcement, there is limited opportunity for pregnant women seek help for their addictions prior to giving birth. Moreover, given that the vast majority of fetal injuries and deaths resulting from chemical dependence on the part of the mother are connected to alcohol abuse,[70] laws criminalizing illegal drug use during pregnancy are ineffective and glaringly misplaced. The American Medical Association, the American Academy of Pediatrics, the American Public Health Association, the American Nurses Association, the American Society on Addiction Medicine, and the March of Dimes argue that the intense shame women already feel about their addiction, when coupled with the likelihood of arrest and prosecution should their drug use be discovered, creates significant disincentives for pregnant women to seek out and complete treatment programs.[71]

No group of drug users is more stigmatized than pregnant or parenting women. At no

time was this clearer than in the 1980s, when the popular media demonized pregnant women using crack cocaine and predicted that their newborns – called "crack babies" – were destined for tormented lives of addiction and stunted development. More than 20 years have passed since "crack baby" hysteria swept the country, yet pregnant women have seen little if any expansion of drug treatment services available to them. The stigmatized newborns of the eighties have since grown up, and many of them have spoken out about the misplaced stereotypes they have had to conquer.[72] The same type of popular hysteria, similarly unaccompanied by genuine efforts to provide adequate and readily available drug treatment services for pregnant women, is currently on the rise with respect to pregnant women's use of methamphetamine.

Most recently, as a result of the so-called war on drugs and promotion of "fetal rights," women's reproductive rights have been attacked through the criminal prosecution of pregnant women who use drugs. An estimated 200 women in more than 30 states have been prosecuted on charges of "drug delivery," "drug possession," or "fetal/child abuse" based on evidence of drug use during pregnancy.[73] Healthcare providers have been reported to engage in surveillance of pregnant women through regular drug testing during prenatal visits and prior to delivery, focusing primarily on women who rely on publicly funded healthcare and notifying law enforcement if a drug test comes back positive.

Perceptions, attitudes, and responses to drug use by pregnant women are affected by race. NIDA estimates that the number of white women who use drugs during pregnancy is much higher than the number of African American or Hispanic women who do so.[74] Yet women of color are increasingly the focus of drug tests, arrests, prosecution, and incarceration for drug use during pregnancy. One well-known example involved a public hospital in Charleston, South Carolina, serving a predominantly black population, that selectively drug tested pregnant women whom staff deemed "likely" to have a drug abuse problem and reported positive tests to the police, who then arrested the women – sometimes within minutes of giving birth – and took them into custody. Twenty-nine of the 30 women prosecuted under this policy were black. In a landmark decision in 2001, the United States Supreme Court ruled in *Ferguson v. City of Charleston* that South Carolina's policy of drug testing women without their consent and reporting the results to local prosecutors was unconstitutional.[75]

Considerable work remains to be done in identifying and addressing the causes, contexts, and consequences of women's drug use, as well as in developing enough accessible drug treatment services tailored to women's experiences. Rather than focus on these areas, however, the government has instead pursued a much different path, one that criminalizes women's drug use and leads to dramatic increases in the number of women behind bars.

SKYROCKETING INCARCERATION RATES FOR WOMEN

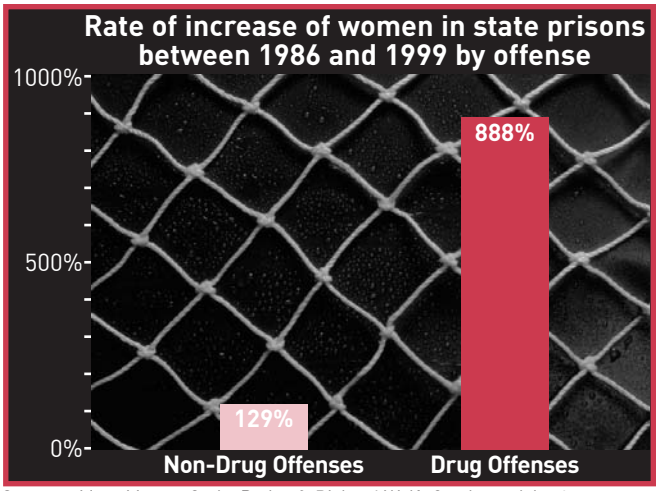
The United States has the highest incarceration rate in the world.[76] The number of people behind bars recently surpassed the 2 million mark,[77] at an estimated annual public cost of nearly $24 billion to incarcerate those charged with non-violent offenses.[78] Although the vast majority of those currently incarcerated are men, in recent years the number of women in prison has more than doubled, growing at a much faster rate than men. According SAMHSA's 2003 annual National Household Survey on Drug Abuse Population Estimates, nearly twice as many men (8.1%) reported using drugs as women (4.5%), yet women are being incarcerated on drug charges at a rate outpacing that of men.[79] Women are now six times more likely to spend time in prison than they were in 1974.[80] There are now more than eight times as many women incarcerated in state and federal prisons and local jails as there were in 1980, increasing in number from 12,300 in 1980 to 182,271 by 2002.[81] Additionally, there were 933,100 women on probation (23% of all adults on probation) and 96,900 on parole (13% of all adults released on parole supervision).[82]

When all forms of correctional supervision – probation, parole, jail, and state and federal prison – are considered, more than one million women are now under the supervision of the criminal justice system in the United States.

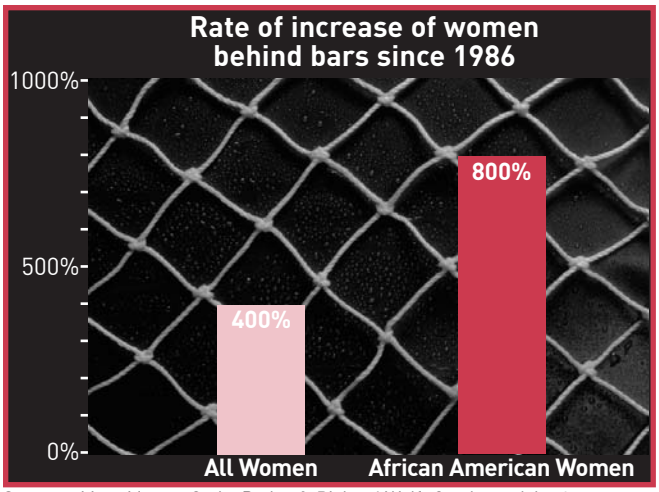
More women than ever before are being incarcerated for drug crimes, and are serving longer prison sentences as well. Drug offenses are one of the leading causes of criminal convictions and incarceration among women, far outpacing convictions for violent crimes and public order offenses. According to the federal Bureau of Justice Statistics (BJS), 40% of criminal convictions leading to incarceration of women in 2000 were for drug crimes, 34% were for other non-violent crimes such as burglary, larceny, and fraud, while only 18% were for violent crimes and 7% were for public order offenses, such as drunk driving, liquor law violations, and vagrancy.[83]

Women in prison: The numbers

- **129%:** the rate of increase between 1986 and 1999 in the number of women in state prison for *non-drug offenses*[84]
- **888%:** the rate of increase, between 1986 and 1999 in the number of women in state prison for *drug offenses alone*[85]
- **400%:** the rate of increase since 1986 in the number of women behind bars (state and federal jail and prison)[86]
- **800%:** the rate of increase since 1986 of *African American* women behind bars (state and federal jail and prison)[87]
- Drug offenses accounted for half (49%) of the rise in the number of women incarcerated in state prison from 1986 to 1996, compared to one-third (32%) of the increase for men.[88]
- By 1999 drug offenses accounted for 72% of the female population in federal prison; 34% in state prison; 24% in local jail; and 27% on probation.[89]



Sources: Marc Mauer, Cathy Potler & Richard Wolf, *Gender and Justice, Women, Drugs and Sentencing Policy*, The Sentencing Project (Nov. 1999); Susan Boyd, From Witches to Crack Moms: Women, Drug Law, and Policy 208-09 (2004).



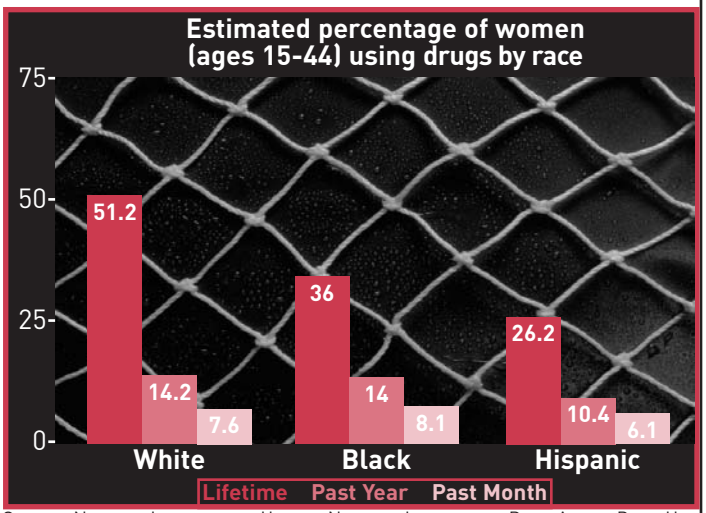
Sources: Marc Mauer, Cathy Potler & Richard Wolf, *Gender and Justice, Women, Drugs and Sentencing Policy*, The Sentencing Project (Nov. 1999); Susan Boyd, From Witches to Crack Moms: Women, Drug Law, and Policy 208-09 (2004).

RACIAL DISPARITIES

Women of color generally are incarcerated at disproportionately higher rates than white women. For example, the rate of incarceration for African American women for all offenses – many of which are drug-related – has increased by 800% since 1986, compared to an increase of 400% for women of all races.[90] These disparities are inconsistent with rates of drug use across racial and gender lines. Women of all races use drugs at approximately the same rate, but women of color are arrested and imprisoned at much higher rates. NIDA reported in 2003 that 51.2% of white women reported drug use in their lifetimes, compared to 36% of black women and 26% of Hispanic women. When asked whether they had used drugs within the past year, 14.2% of white women, 14% of black women, and 10.4% of Hispanic women responded affirmatively. Additionally, 7.6% of white women, 8.1% of black women, and 6.1% of Hispanic women reported drug use in the past month.[91]

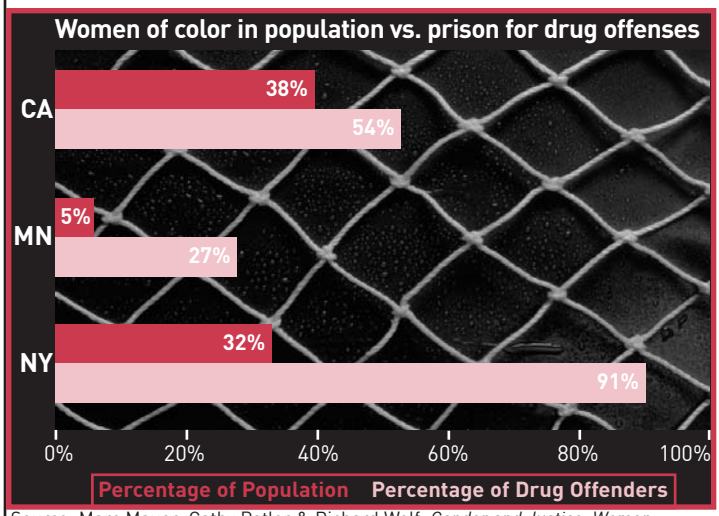
Because the Native American population is quite small and concentrated in particular regions of the country, national statistics fail to capture rates of drug use and disproportionate incarceration for drug offenses for Native American women. However, Professor Luana Ross's state-specific research on the impacts of the criminal justice system on Native American communities offers a glimpse of the manner in which the war on drugs has impacted Native women. "Although Native Americans in Montana comprise only about 6 percent of the total state population, Native men account for approximately 20 percent of the total male prisoner population, and Native women constitute approximately 25 percent of the total female prisoner population."[92] According to Professor Ross, "[a] partial explanation for the increase in the female prison population is their incarceration for drug offenses."[93] Moreover, Professor Ross explains that, "Native women face overwhelming odds at every stage of the criminal justice system...extralegal factors, such as race and gender, influence not only incarceration rates but treatment of prisoners while incarcerated. Racism and sexism clearly affect the treatment of women and people of color when they encounter the criminal justice system in Montana."[94]

Racial disparities are not limited to prosecution and conviction for drug offenses, but extend to the forms of punishment imposed. Women of color, particularly African American and Latina women, also make up a disproportionate share of those women sentenced to prison versus community supervision for drug offenses. While nearly two-thirds of women under probation supervision are white, nearly two-thirds of those con-



Source: National Institutes of Health, National Institute on Drug Abuse, Drug Use Among Racial/Ethnic Minorities, (revised 2003).

fined in jails and prisons are women of color.[96] Racial disparities in arrest, conviction, and sentencing are explored in greater detail in Section II of the report.



Source: Marc Mauer, Cathy Potler & Richard Wolf, *Gender and Justice, Women, Drugs and Sentencing Policy*, The Sentencing Project (Nov. 1999).

Racial disparities in convictions for drug offenses at the state level

- In New York, women of color comprise 91% of the prison sentences for women convicted of drug crimes, compared to 32% of the state population.
- In Minnesota, women of color comprise 27% of the prison sentences for women convicted of drug crimes, compared to 5% of the state population.
- In California, women of color comprise 54% of the prison sentences for women convicted of drug crimes, compared to 38% of the state population.[95]

PROFILE OF WOMEN BEHIND BARS

As a general rule, women wind up behind bars for activities they undertake to feed themselves and their families, supplement incomes, sustain a drug addiction, or escape violent situations and relationships. Examination of the behavior of women serving time for offenses other than the sale or possession of drugs reveals that drug use and addiction often play a significant role even in non-drug offenses. Forty percent of women in state prisons and 19% of women in federal prison reported committing the offense for which they are currently incarcerated while under the influence of drugs.[97]

Not surprisingly, the women's prison population consists of the most vulnerable and marginalized. The majority of women in prison are between the ages of 25 and 44, are mothers, and have, at most, graduated from high school.[98] More than 37% of women in prison earned less than $600 per month prior to their incarceration, and nearly 30% received public assistance.[99] According to BJS, more than half (55%) of incarcerated women report physical and/or sexual abuse in their childhoods and immediate past.[100] Seventy-nine percent of women in federal and state prison reported past physical abuse, and over 60% reported past sexual abuse.[101] As noted in Section I, numerous studies indicate a significant correlation between trauma related to physical and/or sexual abuse and subsequent drug and/or alcohol addiction in women.[102] Given the established link between substance abuse and physical and sexual abuse, the war on drugs' primary targets and casualties are women already suffering under extreme socioeconomic and psychological stress.

Studies also indicate that a significant number of women in prison suffer from mental illness coupled with addiction – commonly referred to as a "dual diagnosis" – and may have been "self-medicating"[103] with illegal drugs prior to their imprisonment. Among women jail detainees identified with severe mental disorders, 72% also suffer from substance abuse disorders. Conversely, less than 15% of women detainees identified as substance abusers suffer from severe mental disorders. Thus, the use of illegal drugs may be an entry-point into prison for women whose principal problem is actually a severe mental illness. Because prescription medicines to treat severe mental illnesses are often unavailable to low-income populations,

poor women may choose to self-medicate with more affordable, but illegal, drugs – a choice women with access to adequate healthcare and insurance generally do not face.

As explored further in Section IV, women's incarceration can exacerbate the trauma of physical, psychological, and sexual abuse, as well as mental anguish experienced prior to incarceration. The frequently deficient healthcare services incarcerated women receive can have serious health consequences and, notwithstanding the Prison Rape Elimination Act of 2003, women continue to suffer serious abuse at the hands of prison staff.

Kimberley McDowell was abandoned by her mother when she was an infant and left with her father, an alcoholic. After being passed around to various family members, Kimberley and her sister ended up living with a destitute aunt. Kimberley dropped out of school in the ninth grade, gave birth to her first child at age 14, and to her second at age 16. In order to support her children, she enrolled in the Job Corps program, earned her G.E.D., and obtained factory and retail jobs. She later married and gave birth to two more children.

One of Kimberley's friends had a relative who was arrested for crack cocaine distribution. In exchange for a shorter sentence, he testified that Kimberley and 18 others were part of a drug conspiracy. Though she admits "knowing [and] seeing" what her friends were doing, Kimberley denies that she actively participated in the conspiracy and maintains that she never helped prepare or distribute crack cocaine. Kimberly accepted a plea bargain not realizing that she would be held accountable for the sale of 80 grams of crack, the amount attributed to the entire conspiracy. She was sentenced to 10½ years in prison for conspiracy to distribute crack cocaine.

Kimberley, whose husband is incarcerated for an unrelated offense, could find no family member to care for her children when she went to prison, so they are currently living with a friend. Kimberley sends them the 23 cents per hour she earns from her prison job.[104]

COSTS OF INCARCERATING WOMEN

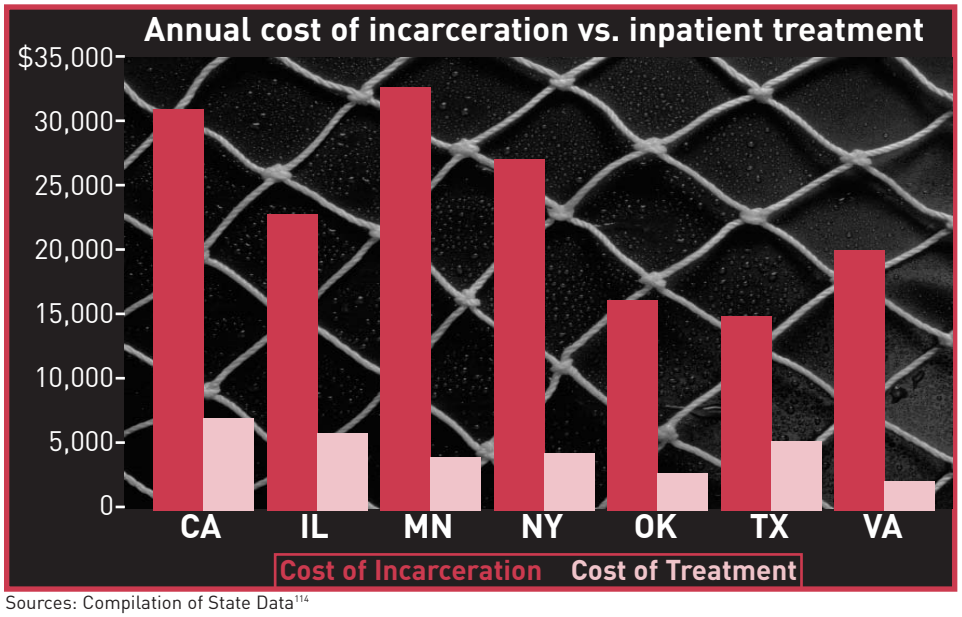
Studies of the fiscal impacts of women's incarceration reveal that taxpayers shoulder an enormous cost for the war on drugs. For instance, the Federal Bureau of Prisons reported in 1997 that incarcerating women cost $25,900 per woman per year.[105] The University of Chicago Irving B. Harris Graduate School of Public Policy Studies, in a more recent study conducted in 2000, found that the public pays an estimated $25,000 annually to house a woman in prison and $25,000 annually for each child of an incarcerated mother placed in foster care.[106] Therefore, it costs the state over $50,000 a year for each family that enters both the prison and child welfare systems.[107] In comparison, in 2000 drug treatment costs ranged between $1,800 for regular outpatient services and $6,800 for long-term residential services per client per year.[108] When the costs of incarcerating women and placing their children in foster care are considered together, it costs the state more than seven times as much to imprison a woman than to provide her treatment services.[109]

Even adjusting for inflation, the 1997 finding of the Department of Health's National Treatment Evaluation Study that "treatment appears to be cost effective, particularly when compared to incarceration," continues to hold true, and particularly for women.[110]

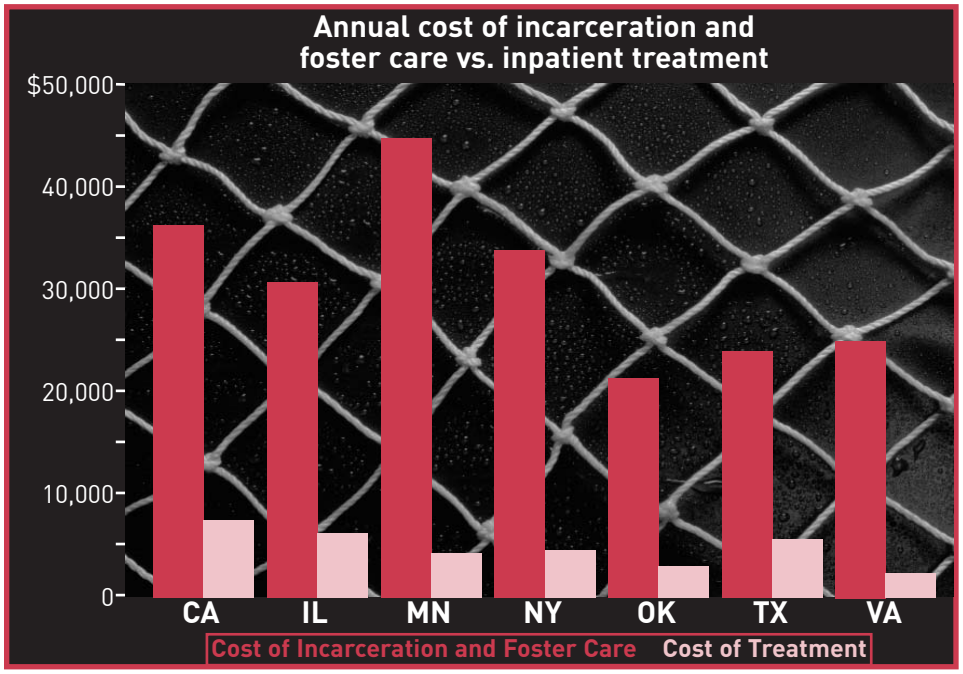
Additionally, a study conducted by the RAND Corporation concluded that treatment is many times more effective in reducing the social costs of drugs than law enforcement-based approaches.[111] The study further found that for every dollar allocated to drug treat-

ment, taxpayers save $7.46 in social costs. This and other research suggest that current approaches to drug use, abuse, and involvement do not reflect the most efficient or appropriate use of public funds to control crime and keep communities safe.

Recognizing that incarceration is expensive and does little to deter or rehabilitate non-violent drug offenders, in 2000, California voters passed Proposition 36, "The Substance Abuse and Crime Prevention Act," allocating $120 million per year to the redirection of first-time, non-violent drug offenders into drug treatment instead of prison. The results of this initiative have been promising. Over 50,000 drug-offending individuals have participated in treatment programs, the majority of whom are doing so for the first time in their lives.[112] The estimated savings in incarceration costs are projected at $1.5 billion over five and a half years.[113]



Sources: Compilation of State Data[114]



Sources: Compilation of State Data[115]


Alton,
I miss
so much

ORIGINS OF THE DRUG WAR

A century ago, opiates and cocaine were freely available and used both medicinally and recreationally by people throughout the United States. Scores of patented medicines, elixirs and liquid concoctions contained substantial amounts of opium or cocaine – including potions used to treat conditions particular to women.[116] Opiate dependence peaked in the United States near the turn of the century, when the number of addicts was estimated at close to 250,000 in a population of 76 million – representing a drug addiction rate far higher than that of today's society.[117] The prevailing attitude was that drug addiction was a health problem, best treated by physicians and pharmacists; not coincidentally, the typical drug addict in the early 20th century was a middle-aged, middle to upper class white woman living in a rural community.[118]

Public attitudes about drug use began to change as perceptions about drug users shifted. Even though white Americans consumed their own fair share of opium in liquid, powder, or pill form in concoctions such as laudanum and other widely available tonics and elixirs, societal prejudice against opiates grew with the arrival of large numbers of Chinese in the United States, whose custom of smoking opium was perceived as strange and foreign. In 1875 San Francisco passed the nation's first drug law, banning only the smoking of opium in opium dens, the form of opium use most commonly associated with the Chinese. The motivations underlying the birth of the nation's drug policy are clear: in 1902, the Committee on the Acquirement of the Drug Habit of the American Pharmaceutical Association declared: "If the 'Chinaman' cannot get along without his 'dope,' we can get along without him." The first state drug prohibition law was passed in 1909, when California outlawed the importation of smoked opium. In 1910, Dr. Hamilton Wright, considered by some to be the progenitor of anti-narcotics laws in the United States, reported that contractors were giving cocaine to their black employees in an effort to get more work out of them.[119] A few years later, stories began to proliferate about "cocaine-crazed Negroes" in the South running dangerously amuck. One article in the *New York Times* went so far as to state that cocaine made blacks shoot better, and would "increase, rather than interfere with good marksmanship." Another reported that some southern police departments had switched to .38 caliber revolvers, believing that cocaine made blacks impervious to smaller .32 caliber bullets.[120] Evoking highly racially and gender-charged imagery, an article in *Literary Digest*, a popular magazine of the era, claimed that, "most of the attacks upon white women of the South are the direct result of the cocaine-crazed Negro brain."[121] The impact of these and other racialized representations of drug users were profound – indeed, when Coca-Cola removed cocaine from their popular soft drink, they did so not only out of concern for their customers' health, but also to appease their southern market, which "feared blacks getting cocaine in any form."[122] It has been suggested that the proliferation of media stories linking cocaine with violence by African Americans was motivated in part by a desire to persuade southern members of Congress to support the proposed Harrison Narcotics Act,[123] which greatly expanded the federal government's regulatory powers with respect to illegal drugs, ostensibly to fight crime.[124] The sensationalism, gross distortion, and appeal to racism inherent in these media stories may have been necessary to garner support for these new laws, given that very little crime was actually being committed by drug users.[125]

As use of marijuana became popular on the American jazz scene in the 1920s and 30s, blacks and whites increasingly began socializing as equals and smoking the drug together. The anti-marijuana propaganda of the time cited this breach of racial barriers as exemplifying the social degradation

caused by marijuana. For instance, officials in New Orleans attributed many of the region's crimes to marijuana, which they claimed was also a dangerous sexual stimulant. Harry Anslinger, head of the newly formed federal narcotics division, warned political and community leaders about blacks and whites dancing together in "tea-houses," using racial prejudice to sell prohibition.[126] The first federal law targeting marijuana possession and use, the Marijuana Tax Act of 1937, was enacted during the Great Depression, and its proponents once again used racist rhetoric as their chief selling point. It was said that Mexican immigrants, who were vying with out-of-work white Americans for the few agricultural jobs available, engaged in marijuana-induced violence against these whites. The American Coalition, an anti-immigrant group, claimed:

> *"Marihuana, perhaps now the most insidious of our narcotics, is a direct by-product of unrestricted Mexican immigration. ... Mexican peddlers have been caught distributing sample marihuana cigarettes to school children. Bills for our quota against Mexico have been blocked mysteriously in every Congress since the 1924 Quota Act. Our nation has more than enough laborers."*[127]

In the early 1960s, college students and "hippies" once again popularized marijuana. At the same time, a growing youth movement questioned the value of the Vietnam War, the sanity of United States foreign policy, and governmental authority in general. This period coincided with growing urban unrest among African Americans impatient with the slow pace of progress in implementation of civil rights gains and angered by a slew of political assassinations of progressive leaders. President Richard Nixon responded by declaring a new "war on crime" targeting, and effectively criminalizing, his most vocal critics – urban minorities and student dissidents. Student dissidents were regularly maligned as draft-dodgers, hedonistic drug users, and unpatriotic opponents of United States foreign policy, while youth of color were portrayed as purveyors of violence, traffickers of drugs, and an overall danger to society. Meanwhile, white suburban women's increasing use of prescription drugs – memorialized in the Rolling Stones' famous song "Mother's Little Helper" – much like white women's use and abuse of opium at the turn of the century, escaped drug law enforcement efforts. Although both white students and youth of color were demonized for their drug use, police surveillance was focused on communities of color, immigrants, the unemployed, the undereducated, and the homeless, who continue to be the principal targets of law enforcement efforts to fight the war on drugs.

For a brief period in the early 1970s, as large numbers of American soldiers were returning from the Vietnam War with severe heroin dependencies, addiction was once again framed as an illness, and the drug policy agenda took a largely medical-rehabilitative tack, focusing primarily on reducing addiction rather than on incarcerating drug users.[128] In 1970, Congress even overhauled the federal drug laws, repealing the mandatory minimum sentences for drug offenses that had been established in the early 1950s.[129] In so doing, legislators expressed a general concern that "increasingly longer sentences that had been legislated in the past had not shown the expected overall reduction in drug law violations,"[130] and instead had hampered the "process of rehabilitation of offenders" and infringed "on the judicial function by not allowing the judge to use his discretion in individual cases."[131]

By the mid-1980s the pendulum of drug policy had swung again, as Congress began to question whether rehabilitation was the system's appropriate objective and whether parole boards could appropriately identify individuals ready for release. At the same time, a vocal group of critics concluded that

to effectively control drugs, courts must levy sentences that were more certain and sufficiently punitive. Others criticized the discretion of judges to tailor sentences to the facts of the individual case as the source of disparities – including racial and gender based disparities – in sentences imposed on similarly situated defendants. In response to these and other criticisms of the federal judiciary, Congress enacted the Sentencing Reform Act of 1984, abolishing the existing parole system and replacing it with a determinate method of sentencing that would base all federally imposed sentences on mandatory guidelines to be promulgated by the newly created United States Sentencing Commission. The same year, Congress enacted a number of statutes imposing mandatory minimum sentences for drug and weapons offenses.

During the same period of time, a new type of cocaine was emerging in cities throughout the country – a solid substance known as crack cocaine that could be smoked, producing an immediate and powerful high. Typically sold in small amounts known as "rocks," each representing a single dose, crack was cheap, easy to produce, and highly lucrative. Its advent spawned a dramatic increase in the number of street-level dealers and significantly expanded the market of drug users.[132] Responding to growing concern over the increasing drug trade, First Lady Nancy Reagan urged all Americans, and especially middle-class youth, to "Just Say No" to drugs. As Congress passed new laws that escalated the war on drugs, state legislators followed suit. At both the federal and state levels, lawmakers adopted expansive definitions of "drug related activities" and harsh sentences aimed at keeping individuals with any connection to drugs "off the streets" and behind bars for longer periods of time. Once again, these new laws would be enforced most vigorously in communities of color.

By 1986, drug war hysteria had reached an unprecedented height. The media played a key role in creating a national sense of urgency surrounding drugs generally, and crack cocaine specifically. Whether the media was simply reporting on a perceived national crisis or creating it is open to debate. What is clear, however, is that the media could not get enough of the crack story.

In the months leading up to the 1986 Congressional elections, more than 1,000 stories appeared on crack cocaine in the national press, including five cover stories each in *Time* and *Newsweek*. NBC news ran 400 separate reports on crack cocaine (15 hours of airtime). *Time* called crack cocaine the "Issue of the Year" (September 22, 1986). *Newsweek* called crack the biggest news story since Vietnam and Watergate (June 16, 1986). CBS news aired a documentary entitled "*48 Hours on Crack Street*."[133] The media reported that crack produced a powerful high, rampant sexuality, and an all-but-impossible-to-break addiction in its users. Almost all of these stories focused on crack cocaine use in inner-city communities by blacks and Hispanics.

An example of media hype over crack cocaine with disastrous results was the coverage following the death of Len Bias in June 1986. A national celebrity, Bias died of cocaine intoxication the day after he was drafted into the NBA. The method of cocaine ingestion that killed him was unknown at the time of his death. Nevertheless, newspapers across the country ran stories quoting Dr. Dennis Smyth, Maryland's Assistant Medical Examiner, who stated that Bias probably died of "free-basing" cocaine, although other medical examiners reached different conclusions.[134] In July 1986 alone, there were 74 evening news segments about crack cocaine, many fueled by the belief that Bias died of a crack overdose.[135] A year later, during the trial of the man accused of supplying Bias with the cocaine, another University of Maryland basketball player testified that he,

Bias, and two others had actually snorted powder cocaine over a four-hour period prior to Bias's death. His testimony received limited media coverage.[136]

A few weeks after Bias's death, on July 15, 1986, the United States Senate's Permanent Subcommittee on Investigations held a hearing on crack cocaine. During the debate, Bias's case was cited 11 times in connection with crack.[137] Congress, based largely on media coverage of his death, singled out crack cocaine for much harsher penalties than powder cocaine when it enacted the first federal cocaine possession and distribution laws.[138] Crack cocaine use and trafficking remains subject to penalties 100 times more severe than those for powder cocaine: a person convicted of attempting to sell five grams of crack cocaine can be sentenced to five years in prison, whereas it takes 500 grams of powder cocaine to trigger the same mandatory sentence. Moreover, despite studies repeatedly demonstrating that blacks use crack cocaine at only slightly higher rates than whites, black crack users are much more likely to be sentenced under these harsh laws.[139]

Another example of media excess that fueled the escalation of the drug war was the media coverage of "crack babies." This coverage was largely sparked by a study conducted by Dr. Ira Chasnoff and published in the *New England Journal of Medicine,* which suggested that prenatal cocaine exposure could have a devastating effect on infants. What the media failed to mention was that only twenty-three cocaine-using women participated in the study, and that Dr. Chasnoff himself warned in his report that more research was needed.[140] Instead, anecdotal stories proliferated – after CBS ran a story featuring a social worker who claimed that an eighteen-month-old crack-exposed baby in her care would grow up to have "an IQ of perhaps fifty" and be "barely able to dress herself," images of the crack epidemic's "tiniest victims" – scrawny, trembling infants – flooded television screens. Charles Krauthammer, a columnist for the *Washington Post*, wrote that crack babies were doomed to "a life of certain suffering, of probable deviance, of permanent inferiority."[141] As Mariah Blake, assistant editor of the *Columbia Journalism Review* put it, "[t]he public braced for the day when this 'biological underclass' would cripple our schools, fill our jails, and drain our social programs. But the day never came. Crack babies, it turns out, were a media myth, not a medical reality."[142] The media frenzy over "crack babies" only further fueled the war on drugs, punitive political agendas, and the racialized and gendered images of the drug users who were to be the primary targets.[143]

"I don't know if I was born with drugs in my body or not. But my mom used drugs while she was pregnant with me. So it wasn't long before kids at school were calling me a "crack baby"... From that day on, just about all the kids in fourth grade began calling me "slow," "dirty" and "crack baby." I started to believe those things about myself and I constantly imagined what the kids were saying to each other about me. I felt stupid and worthless... But I didn't quit. And it wasn't long before I was in the top classes in the school. Now, 10 years later, that kid who was called a crack baby is in college... I am not done yet. I have a lot more things to accomplish in my life, and I am not letting no one or no label hold me back from achieving anything... Those two words almost cost me an education. It's crazy how powerful two words can be. I won by not letting them hold me back."[144]

–Antwaun Garcia, *They Called Me a "Crack Baby,"* REPRESENT MAGAZINE (March/April 2004.)

By 2000, 85% of individuals convicted of federal *crack* cocaine offenses were black, 9% were Latino, and less than 6% were white. Those convicted of federal *powder* cocaine offenses were 30.5% black, 51% Latino, and

18% white.[145] In effect, the media and cultural bias that demonized crack as the most dangerous of all illegal drugs and associated it with poor people of color became codified in law and enforcement practices.

Drug laws as they evolved over the 20th century have been ineffective in stemming the supply and availability of illegal drugs. They have, however, been quite effective at criminalizing and incarcerating disproportionately large numbers of people of color. State and federal prisons are filled with low-level, nonviolent drug offenders who are serving long sentences at ever increasing costs to taxpayers. Moreover, expansion of criminal liability for drug offenses has succeeded only in capturing an unprecedented number of small-time users and dealers, often along with innocent family and community members, and has left kingpins and higher-level traffickers largely untouched. The following section of this report describes in greater detail the drug laws and enforcement policies put in place as part of the war on drugs in the mid-1980s and their consequences for women.

RACIAL PROFILING IN DRUG LAW ENFORCEMENT

Racial profiling is a term used to describe law enforcement agents' consideration of a person's race as a factor, or indeed the sole factor, when determining whom to stop, search, or detain based on suspicion of involvement in criminal activity.[146] In other words, when engaging in racial profiling, law enforcement officers act based on presumptions that individuals of certain races are more likely than others to be using or selling drugs, rather than on objective evidence justifying further investigation.

While racial profiling has always existed to some extent in the United States,[147] the practice has been the subject of considerable public attention in the context of the war on drugs. Racial profiling in drug law enforcement encompasses both increased police presence and aggressive policing in geographic areas with higher percentages of residents of color, as well as intensified policing and monitoring of people of color wherever they are: on highways, in neighborhoods, in airports, and even in hospitals.

Although research and discourse surrounding racial profiling in the context of the war on drugs has, with a few exceptions, focused on men of color, women of color have not escaped its effects. As noted in Section I of this report, women of color are arrested for drug related offenses at far higher rates than white women, despite lower or equal rates of drug use. Racial disparities in arrests, convictions, and incarceration of women of color are clearly connected to the considerable discretion exercised by law enforcement agents when deciding whom to stop, search, and arrest. This discretion permits them to act, in whole or in part, based on a presumption that women of color are more likely to be either using or carrying drugs. Whether the subject is more "conventional" forms of racial profiling – such as traffic, street or border stops and searches

based solely or primarily on an individual's race – or gender-specific forms of racial profiling, which receive less attention but are equally problematic – such as selective testing of pregnant women of color for drug use or race-based surveillance of mothers of color in the context of policing child abuse and neglect, women of color are profoundly impacted by race-biased policing practices in the context of the war on drugs.[148]

This section offers evidence that there is no legitimate nexus between the well-documented use of race in the war on drugs and curtailment of drug activity, and examines how race-based policing practices harm women of color and their families.

DECIDING WHOM TO STOP, SEARCH, AND ARREST

Dr. Mae Jemison, the first black woman astronaut to go into space, was stopped by a Texas police officer in February 1996 who subsequently cuffed her, pushed her face down into the pavement, and forced her to remove her shoes and walk barefoot from the patrol car to the police station. Also in 1996, Sandra Antor, a nursing student and Sunday school teacher, was pulled over by a South Carolina state trooper as she was driving down Interstate 95 on her way home to Florida, ripped from her car, shoved to the ground on a busy highway, and beaten before being taken into custody. The officer later cited the possibility that Sandra may have been transporting drugs as justification for his actions. Unfortunately, these instances of violent traffic stops were far from isolated: Amnesty International's 1998 report, *Rights for All*, suggested a pattern and practice of stopping and assaulting African American women motorists among the all-male, all-white police force in Riverdale, a Chicago suburb that saw a dramatic increase in the number of black residents in the mid-1990s.

At times, stereotypes of women of color as drug users and couriers have had deadly consequences. For instance, Frankie Perkins, a black mother of three on her way home in Chicago one evening in 1997, was crossing an empty lot when she was stopped and subsequently choked by police officers who later claimed that they had seen her swallowing drugs and were trying to get her to spit them up. Witnesses maintain that the officers simply strangled her to death. Autopsy photos revealed bruises on her face and rib cage, and show her eyes swollen shut. The hospital listed the cause of death as strangulation. In a similar incident in southern Seattle, Theresa Henderson was choked by police who claimed that she tried to swallow a small amount of cocaine.[149] Also in 1997, Danette Daniels, a pregnant black woman arrested by New Jersey police officers for allegedly dealing drugs, was shot to death by the officers as she sat in a police squad car.[150] Witnesses deny that Danette was involved in any drug transaction at the time of her death.[151] In all three of these cases, women lost their lives as a result of police encounters precipitated by an unsubstantiated race-based presumption that they were carrying or selling drugs.

Police wage the war on drugs primarily on sidewalks, highways, airport terminals, and in other public places, seeking to identify and arrest individual drug users and interdict drug traffic. The primary techniques used to enforce the drug laws are surveillance, "random" stops, and the use of informants. As noted below, numerous studies demonstrate that law enforcement officers improperly use race as a proxy for criminal propensity. A woman's first point of contact with the net cast by the war on drugs is often the result of a law enforcement officer's discretionary – and racially informed – decision regarding whom to stop and search.

A report by the General Accounting Office (GAO), published in 2000, concluded that United States customs agents at the nation's airports disproportionately singled out women of color for strip searches aimed at discovering concealed contraband, including

drugs.[152] Black women appeared to be most often subject to a presumption that they were acting as drug "mules" or couriers and carrying drugs concealed on or in their person; consequently, they were the group most often strip-searched by customs agents. According to the GAO, among United States citizens, black women were nine times more likely than white women to be x-rayed after being frisked or patted down. However, black women were less than half as likely to be found carrying contraband as white women. Furthermore, the racial profiling documented by the GAO at the nation's borders was not limited to black women – Asian American and Hispanic women were strip-searched three times more often than men of the same race, and were 20% less likely than white women to be caught with contraband.

The GAO study, as well as subsequent litigation,[153] reveals that women of color – be they African American, African, Latina, or from the Caribbean – are frequently stereotyped by law enforcement agents as couriers in the international drug trade, and as such are disproportionately targeted for strip searches as part of border interdiction activities, even though they are less likely than white women to actually be transporting drugs. Although law enforcement interactions with women of color beyond the customs context have received considerably less attention, such stereotypes extend beyond the border. Women of color also report frequent, and often abusive, strip searches by local and state law enforcement officers in search of drugs. Danni Tyson is one such woman, arrested on a subway train on her way to pick up her daughter from swim practice, and subsequently strip-searched at a Manhattan police station. During the search, she was asked to lift up her breasts to show that she was not hiding drugs, and subjected to racialized ridicule.[154] In some cases, women report that such searches take place in full view of officers not necessary to the search, other detainees, or both. "Visual body cavity searches" – in which women are required to squat and allow visual inspection of their vaginal and anal areas for concealed drugs – are yet another weapon in the war on drugs aimed at women who are the subject of stops and searches based on racial profiling.[155]

Racial profiling of women of color in the context of the war on drugs also takes on more gender-specific, less visible forms.[156] As discussed in greater detail in Section I, law enforcement also engages in racial profiling of pregnant and mothering women by arresting disproportionate rates of women of color for drug use during pregnancy. Similarly, portrayal of women of color as poor mothers who are more likely to be using and selling drugs in the home leads to racially disproportionate arrests of women of color for child abuse and neglect.[157]

South Carolina offers a stark example of the extent to which law enforcement officials racially profile and arrest pregnant women believed to be drug users. Police there worked with the Medical University of South Carolina to devise a drug-testing program for pregnant women at a public hospital serving a poor, African American community, a program the medical director of the neonatal intensive-care unit at the hospital called "thinly veiled discrimination against . . . poor black women."[158] One doctor at the hospital expressed concern that the policy made healthcare providers an arm of the law and that the hospital was applying the policy only to a selected population of poor black women[159] even though, she felt, many more women, not simply those targeted by the policy, would test positive if screened for drugs. The hospital's general counsel, in a letter to the state attorney general, said "[t]he other weakness in this program is that the main prosecutions have been against black indigent mothers. . . ."[160]

In 2001 the U.S. Supreme Court, in *Ferguson v. City of Charleston*,[161] found South Carolina's practice of testing the urine of pregnant women for cocaine violated a patient's

Fourth Amendment right to be free from search without a warrant. A decade before the Supreme Court ruled in *Ferguson*, the practice of drug-testing and criminally prosecuting pregnant women of color was well underway. According to a 1990 summary of pending criminal prosecutions against pregnant women in Florida, of 52 defendants, 35 were African American, 14 were white, two were Latina and one was Native American.[162]

As Professor Dorothy Roberts noted a decade before *Ferguson*, "[t]he prosecution of drug-addicted mothers cannot be explained as simply an issue of gender inequality. Poor black women have been selected for punishment as a result of an inseparable combination of their gender, race, and economic status."[163] Black women are five times more likely to live in poverty, five times more likely to be on welfare, and three times more likely to be unemployed than are white women. As Professor Roberts explains: "Because poor women are under greater government supervision – through their associations with public hospitals, welfare agencies, and probation officers – their drug use is more likely to be detected and reported."[164]

This is not, however, because poor black women are using drugs more than others. A study reported in *The New England Journal of Medicine* showed that the prevalence of drug use among pregnant women in public health clinics and in private obstetrical offices in Pinellas County, Florida, was quite similar regardless of race or class. Despite similar rates of drug use among pregnant women, black women were ten times more likely than whites to be reported to public health authorities for substance abuse during pregnancy.[165]

The war on drugs prompts not only individual instances of racial profiling, but also profiling of entire communities. Although the use and sale of drugs takes place in a wide range of locations – from penthouses and boardrooms to fraternity houses and university campuses to suburban basements and bathrooms – police focus their efforts in the war on drugs almost exclusively on "open air" or street drug markets in communities of color. Although it could be argued that it is more effective to target open air markets, where many drug users and sellers can be found with less effort or need for intrusion into private spaces, disparities exist even with respect to which open air markets are targeted.

A study conducted by researchers from the John F. Kennedy School of Government at Harvard University revealed that the Seattle police department tended to focus their drug law enforcement efforts on open air markets featuring more black drug sellers rather than on predominantly white open air markets.[166] There was also a disproportionate focus on making arrests for sales of crack cocaine, rather than other commonly used street drugs, such as heroin, methamphetamine, and MDMA (also known as Ecstasy), which tend to be used more frequently by whites. Moreover, even though the study revealed a significant level of white involvement in the crack cocaine market, because police associated blacks with crack cocaine, they were predisposed to focus on arresting blacks to the exclusion of whites engaged in the same behavior. One major recommendation of the study is that the Seattle Police Department devote considerable resources to examining the role that race has played in police training, deployment, and law enforcement priorities.

As currently analyzed and published, racial profiling statistics tend to compare the experiences of men of color with those of white men, or of people of color with those of whites. Further quantitative study is needed concerning racial profiling of women of color. Existing research shows that women of all races use illegal drugs at roughly the same rate, yet women of color are disproportionately arrested for drug crimes, and that the

widespread use of race as a basis for more frequent and more intrusive police stops and searches of women of color in the context of the war on drugs is all too common.

PROSECUTORIAL DISCRETION IN CHARGING AND PLEA BARGAINING

Noelle Bush, daughter of Florida Governor Jeb Bush and niece to President George W. Bush, was arrested on January 29, 2002, at a drugstore for attempting to obtain Xanax with a fraudulent prescription. A month later she entered an Orlando drug treatment facility on court order. That summer a judge sentenced Noelle Bush to ten days in a Florida jail after police found her with two grams of crack cocaine in the rehabilitation center. The judge refused to compel the rehabilitation center employees to testify against Noelle Bush and stressed that the contempt sentence was lenient: "[t]his situation could have been much worse than what it is. You could have very easily been charged with a new felony offense... [a]nd if you were charged with that, you would have automatically been put out of drug court and you'd be facing two felony charges." The incident was the second time Noelle Bush had been sent to jail for violating the terms of her rehabilitation program. Earlier, staff members at the rehabilitation facility accused her of taking prescription pills from a nurse's office, which led to a three-day jail sentence. Nonetheless, upon completion of the drug program, Noelle Bush's fraudulent prescription charges were dropped.[167]

When the relatively innocuous outcome of Noelle Bush's case is considered alongside the outcomes of so many other women accused of committing similar or lesser drug offenses, including those whose stories are recounted throughout this report, it becomes clear that prosecutors are among the most powerful players in the war on drugs – determining who gets charged, what that charge will be, and the terms of any plea offer.

Under current drug law enforcement and mandatory sentencing policies, substantial discretion lies in the hands of police and prosecutors. Indeed, almost 96% of federal cases end in pleas based on deals negotiated and entered by prosecutors behind closed doors, out of public view.[168] In this era of mandatory sentencing, the prosecutor's discretionary charging and plea decisions essentially dictate a woman's sentence.

Significant racial disparities in the population of women incarcerated for drug-related offenses demonstrate that women of color are faring far worse than their white counterparts. According to the Department of Justice "[f]emale incarceration rates at every age, reveal ... racial and ethnic disparities. Black females (with an incarceration rate of 191 per 100,000) were more than twice as likely as Hispanic females (80 per 100,000) and 5 times more likely than white females (35 per 100,000) to be in prison on December 31, 2002. These differences among white, black, and Hispanic females were consistent across all age groups."[169] The lifetime chances of going to prison among black women (5.6%) were nearly as high as for white males, while Hispanic women (2.2%) and white women (0.9%) had much lower chances of going to prison.[170]

Examinations of how prosecutors exercise discretion in cases involving substance abusing, low-income women of color support the Justice Department's conclusions. Prosecutorial decisions based on gender, race, and class have been identified by several sources, particularly in the context of prosecution of women for prenatal substance abuse.[171] Based on the data available, it appears that the statement of the National Criminal Justice Commission applies with equal force to women of color – "[a]ll else being equal, whites did better than African Americans and Hispanics at getting charges dropped, getting cases dismissed, avoiding harsher punishment, avoiding extra charges, and having their criminal records wiped clean."[172]

While further research and action is clearly necessary in this area, ultimately the veil shielding prosecutorial discretion is difficult to pierce. Prosecutors are seldom required to justify their discretionary decisions – such as charge selection or plea terms – either orally or in writing.[173] Though the law jealously guards the privacy of the prosecutorial decision making process, in the face of gross racial disparities, the system must devise a way to document and understand this discretionary process.

TODAY'S DRUG LAWS: WIDENING THE NET III

GUILT BY ASSOCIATION

Current drug laws punish not just those who sell drugs, but also a wide range of people who help or merely associate with those who sell drugs. The length of a sentence usually depends on the quantity of drugs a person possesses or distributes. Where more than one person is charged with a drug crime, sentences often reflect the total amount of drugs possessed or sold by everyone in the operation.

As a result, even when they have minimal or no involvement whatsoever in the drug trade, women are increasingly captured in the ever-widening net cast by the war on drugs, and subjected to the same or, in some cases, harsher sentences than the principals in the drug trade at whom the sentencing statutes are aimed. In too many cases, women are punished for the act of remaining with a boyfriend or husband engaged in drug activity. There are four types of expanded liability that, in the context of drug law enforcement, have contributed to the recent explosion in women's drug conviction and incarceration rates: conspiracy provisions, accomplice liability, constructive possession doctrines, and asset forfeiture laws.

CONSPIRACY PROVISIONS

In 1988, Congress added conspiracy to commit a drug offense to the list of crimes for which a federal mandatory minimum sentence would be imposed. This change expanded the application of mandatory minimum penalties for substantive offenses to those convicted of conspiracy to commit these substantive offenses. Once a "**conspiracy**" is established, every participant in the conspiracy can be held liable for the actions of every other member, even absent any knowledge of the actions or existence of others.[174] For instance, if a woman tells an undercover federal agent where to buy LSD, and the agent then buys some from a person who possessed five grams of the drug, the woman may be held liable as a "conspirator" for the entire five grams possessed by the seller, and is subject to the same mandatory minimum sentence as the person who actually sold the drugs.

In 1993 Sally Smith was sentenced to life without parole in Michigan after being convicted of "conspiracy with intent to deliver over 650 grams of cocaine." Her conviction was based on two phone calls she made to collect money for her boyfriend, and two receipts she signed for a cash exchange. It made no difference that Sally was brutally beaten and verbally abused by her boyfriend during their 17-year relationship, and that he had threatened to kill her and one of her family members if she left him. At trial, the judge refused to admit evidence of any abuse prior to the period of the conspiracy, deeming it too remote in time to impact her behavior. He also disallowed the testimony of an expert witness who would have testified that Sally's long history of abuse made her incapable of exercising free will.[175]

Women are particularly vulnerable to prosecution and incarceration based on their associations rather than their conduct. The experience of Sandra Lavonne Rucker is illustrative. At the time of her arrest, Sandra was in a relationship with a man who ran a drug operation and allegedly brought a weapon into Sandra's apartment. Although the testimony of a codefendant established that Sandra was not a principal organizer of the drug operation, and Sandra herself provided credible testimony that she had never sold drugs and was nothing more than the man's girlfriend, she was nevertheless convicted of involvement in the drug conspiracy. Under provisions requiring that each member of a conspiracy be held liable for the entire amount of drugs involved in an operation – in this case 50 grams or more of cocaine – Sandra received a sentence of life imprisonment.[176]

As noted in Section I, even where women are admittedly active in the drug trade, they are often minimally and peripherally involved, participating in the drug trade only to the extent required to support their own addiction, and therefore have little knowledge of or control over any broader drug operations. Other women are coerced by abuse or economic circumstance to participate in the drug trade, or to live or associate with someone who does. And, in cases such as Sandra's, women may have no involvement whatsoever beyond mere association with an intimate partner or family member engaged in illegal activity. Nevertheless, under conspiracy provisions, all of these women are subject to the same harsh sentences as the "kingpins" current drug laws were designed to punish.

ACCOMPLICE LIABILITY

Accomplice liability is another means by which current drug policies impose criminal liability on women who have minimal or no involvement in drug-related crimes. An "**accomplice**" is a person who intentionally assists another person in the planning or commission of a crime by either providing physical or psychological aid, or by failing to act when there is a legal duty to do so. Acts found by courts to give rise to accomplice liability for others' drug-related activity include renting a car for interstate travel, allowing an intimate partner to keep their belongings at one's home, and taking phone messages for another person.

By virtue of economic structures forcing women into low-wage jobs, their roles as primary caretakers of children and relatives, and their relationships with intimate partners, women are likely to live with and share household tasks with others. Indeed, they may have no choice but to do so, regardless of whether they are aware of that person's involvement in drug-related activity. As with conspiracy laws, in practice, accomplice liability statutes do not clearly differentiate between *having knowledge* of another's illegal purpose when providing some form of assistance and *having the intent to aid* in that illegal purpose. As a result, commonplace actions, such as taking a message, renting a car for a partner or family member, or purchasing household supplies that may be construed as materials for manufacturing drugs, can expose women to harsh penalties under accomplice liability laws, leading to unjust and disproportionate punishment.

In Brenda Prather's case, the act triggering liability was handing a piece of aluminum foil to her husband. Brenda Prather was sentenced to 40 years to life imprisonment upon conviction of criminal sale of a controlled substance. Brenda was charged with this offense after her husband sold drugs to an undercover New York State police investigator on two occasions. The charge was based in part on the fact that Brenda handed her husband a roll of foil from their kitchen that he subsequently used in drug-related activity. Although her husband testified that Brenda was unaware of the drug transactions for which she was charged, the state imputed knowledge of the drug transactions to her.[177]

CONSTRUCTIVE POSSESSION

The theory of "**constructive possession**" – which requires no affirmative act on the part of an individual in order for criminal liability to attach – is yet another tool employed to the detriment of women charged with drug offenses. Under this theory, possession of contraband is presumed based on proximity to it as well as degree of control over the area in which the contraband is found. As discussed in the contexts of conspiracy and accomplice liability, women are particularly vulnerable to being charged with possession of contraband placed in their home by a family member or partner.

Such was the case for Leah Bundy, who was

dating a man involved with drugs.[178] Although she was aware of his drug activities, Leah denied any involvement in his crimes. Leah was arrested when the police mistakenly entered her boyfriend's apartment in response to a call about an incident in a neighboring apartment. When they searched the apartment, police found two handguns and several types of drugs. Leah was arrested, charged, and convicted of criminal possession of a controlled substance, criminal possession of a weapon, and criminal use of drug paraphernalia, all under the theory of constructive possession, through which her possession of these items was presumed by her presence in her boyfriend's apartment. At age 21, Leah was sentenced to 15 years to life.

ASSET FORFEITURE LAWS

Legislation adopted as part of the war on drugs increases not only the risk that women will be charged and convicted of drug offenses based on their family and intimate relationships, but also the likelihood that they will lose their homes and other hard earned assets. Since 1970, the federal drug laws have allowed the government to seize property used in or obtained by means of drug crimes and to keep the proceeds of such seizures, creating a powerful incentive for cash-strapped local and state law enforcement agencies. When the government takes ownership of this seized property, it is called "**forfeiture**." Property can be seized under forfeiture laws even when the property owner is not herself accused of drug trafficking, and there is no allegation that the owner had knowledge the property was being used for drug trafficking. Indeed, some courts have found forfeiture to be warranted even when the owner of the property took steps to prevent the property from being used in illegal activities, but the steps taken were deemed insufficient.

In so doing, courts have penalized women, notwithstanding their lack of any involvement in criminal activity, for their failure to meet unreasonable, and in some cases unattainable, standards of control in their relationships with those close to them.[179] For instance, in one Oklahoma case[180] the court ruled that a single mother could not claim to be an "innocent owner"[181] of property used to pursue drug-related activity, and thus exempt her house from seizure under asset forfeiture laws, even though she had attempted to deter her son from growing marijuana on the premises by using weed killer on his marijuana plants, destroying any marijuana seeds she found, and telling her son she would evict him if he did not stop the illegal activity. The court found that, despite her attempts to curb her son's activities, because she failed to "thoroughly investigate the property," alert the police, or evict her son from the home, she had not taken all reasonable steps to prevent her son from engaging in drug-related activity. It authorized seizure of her property. In a similar case, another court held forfeiture of parents' property appropriate, finding as a matter of law that the parents consented to their children's drug-related activity because they failed to search the premises for drugs or evict their children from their home, notwithstanding the fact that, in the face of fear of retaliation by "drug lords," the parents notified police of their own children's drug use and urged their children to enter rehabilitation.[182] In both cases, women lost their property based on their children's presence in their home and their decision to try to help their children overcome a drug problem.

In other cases, courts have presumed knowledge of and consent to the presence of drugs on the property based on the intimate "nature and circumstances of the marital relationship," creating an almost insurmountable burden of proving lack of knowledge of drugs on a premises shared with a spouse.[183] Lack of consent to use of marital property for illicit purposes also appears to be virtually impossible to prove in asset for-

feiture cases, even in circumstances involving the most obvious duress. For instance, in one recent case, despite evidence that a woman's husband regularly beat her, had beaten his previous wife to death, and owned several guns, a federal court of appeals concluded that a wife's "generalized fear of persecution from her husband ... does not allow her to escape the consequences, (in this case forfeiture), for her consent to his illegal acts."[184] In another, the court disregarded evidence of domestic violence, focusing instead on whether the abused spouse's ultimatum to remove marijuana from marital property within 24 hours was sufficient to shield her from forfeiture of the family home.[185]

Such approaches fail to take into consideration the reasons why a woman may remain silent or fall short of a court's standard for assertiveness in the face of a partner or family member's drug-related activity. Ignored are factors like domestic violence, economic dependence, disability that makes one reliant on others to provide support or medical care, and immigration status linked to marriage. Women are also penalized for supporting spouses and family members seeking help for drug addictions, instead of turning them over to the criminal justice system. Finally, these approaches fail to account for or address the harm to women whose homes, businesses, and vehicles are pulled out from under them without compensation through asset forfeiture statutes.

MANDATORY MINIMUMS AND THE FEDERAL SENTENCING GUIDELINES

"These mandatory minimum sentences are perhaps a good example of the law of unintended consequences. There is a respectable body of opinion which believes that these mandatory minimums impose unduly harsh punishment for first-time offenders – particularly for 'mules' who played only a minor role in a drug distribution scheme. Be that as it may, the mandatory minimums have also led to an inordinate increase in the federal prison population and will require huge expenditures to build new prison space. . . .

Mandatory minimums . . . are frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.' Just as frequently they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole. Indeed, it seems to me that one of the best arguments against any more mandatory minimums, and perhaps against some of those that we already have, is that they frustrate the careful calibration of sentences, from one end of the spectrum to the other, which the sentencing guidelines were intended to accomplish."[186]

-Chief Justice William H. Rehnquist, U.S. Supreme Court

Mandatory Minimum Sentences:
As detailed in Section II, federal and state legislatures are increasingly enacting "mandatory minimum" statutes as part of the arsenal of the war on drugs. A "**mandatory minimum**" is a minimum prison sentence, set by statute, which must be imposed when a person is convicted of a particular crime. Mandatory minimum statutes governing drug crimes impose sentences based almost exclusively on the amount of drugs involved in the crime charged, regardless of the defendant's level of culpability in the offense. Congress clearly expressed that its goal in

tying mandatory minimum penalties to the quantities of drugs involved in trafficking offenses was to consistently and harshly punish "major" and "serious" traffickers.[187] However, the amounts triggering a mandatory minimum sentence are often much smaller than those a high-level trafficker would be selling. For example, federal law imposes a mandatory sentence of five years in prison for selling as little as five grams, or a few tablespoons, of crack cocaine.

As early as 1991, the U.S. Sentencing Commission criticized mandatory minimum sentences. The commission found that all defense lawyers and nearly half of all prosecutors queried had serious problems with mandatory minimum sentences. Most judges pronounced them "manifestly unjust."[188] The 1991 U.S. Sentencing Commission report particularly criticized the transfer of power in courts from judges, who are supposed to be impartial,to prosecutors, who are not. In response to these criticisms, in 1994 Congress enacted a "safety valve" provision permitting relief from mandatory minimums for a narrowly-defined category of non-violent, first-time drug offenders.[189]

The "**safety valve**" law allows federal judges to impose less than mandatory minimum drug sentences if the defendant meets all of the following requirements:

(1) the defendant has no prior record;

(2) the defendant did not use violence or possess a weapon;

(3) there was no death or serious bodily injury;

(4) the defendant was not an organizer, leader, manager, or supervisor of others; and

(5) the defendant truthfully provided the government all information and evidence.

The "safety valve" provision grants federal judges the discretion not to impose mandatory minimum sentences only in those instances where the defendants meet the strict criteria outlined above and the judge thinks that a lesser sentence is warranted. The "safety valve" law should be an effective measure judges can use to reduce excessive and unjust sentences for women who are peripherally involved in drug activity. There remain, however, significant differences in judicial interpretation with respect to when defendants have met the requirements of the "safety valve" provisions.

According to the U.S. Sentencing Commission, since its enactment, only 25% of all federal drug offenders have benefited from the "safety valve" provision. Persons convicted of heroin and marijuana violations were most likely to receive a reduction under the "safety valve" provision; those convicted for crack and methamphetamine offenses were the least likely to receive the "safety valve" reduction.[190] Recall, as discussed in Section I, that men and white women are most likely to be heroin and marijuana users, while women of color and low income women have been stereotyped as crack and methamphetamine users, suggesting that application of the safety valve provision, like other aspects of our nation's drug laws, has had disparate effects based on gender and race. At best, the safety valve provision works to minimize the harm caused by ineffective and unjust sentencing policies, but in reality the law has done little to minimize the pressure on a criminal justice system overburdened with people, especially women, whose principal problems are addiction and/or poverty.

The Federal Sentencing Guidelines:
Statutes imposing mandatory minimum sentences for drug offenses are sometimes confused with the Federal Sentencing Guidelines. However, it is important to understand the distinction and the interac-

tions between the two sentencing schemes. **The Federal Sentencing Guidelines (Guidelines)** are a set of rules drafted by the U.S. Sentencing Commission that provide specific sentence ranges for every federal crime, including drug-related offenses, by creating a grid or table that generates a sentencing range based on a number of different elements of the offense. As discussed in greater detail below, the U.S. Supreme Court has recently ruled that the once-mandatory Guidelines are now advisory, raising fundamental questions about the extent to which federal judges will follow them. As indicated in Section II, the purpose of the Guidelines was to foster certainty and fairness while achieving just punishment, deterrence, incapacitation, and rehabilitation through sentencing.[191] With respect to drug offenses, they are based in large part on the federal mandatory minimum statutes in existence at the time they were developed.[192] Where current statutory mandatory minimum sentences require greater penalties than those called for by the Guidelines, the mandatory minimum prevails. In other words, if the Guidelines specify a sentence in the five- to six-year range for an offense, but the statutory mandatory minimum sentence for the offense in question is 10 years, the court must impose a sentence of 10 years or more.

Defendants can seek and obtain "**downward departures**" from the sentencing range provided by the Guidelines. Downward departures are distinct from the "safety valve" provision, which relates to mandatory minimum statutes, in that they allow judges to sentence defendants outside the Guideline range under very specific and limited circumstances. For instance, a defendant could receive a sentence lower than the Guideline range if the judge determined there were *unusual and meaningful mitigating circumstances* not taken into account by the drafters of the Guidelines.

Under the Guidelines as traditionally applied, a woman's circumstances – including her past or current experiences of violence or economic status – motivations, role in the offense or the drug trade as a whole, physical or mental health, pregnancy, or family responsibilities rarely played a role in judges' sentencing decisions.[193] In some cases where judges granted downward departures based on some or all of these factors upon review, appellate courts overturned the decisions.[194] For instance, the U.S. Court of Appeals for the Seventh Circuit reversed a departure based on family ties in a case where the defendant was a single mother and caregiver for her two mentally disabled adult children and one young grandchild, finding nothing in the Guidelines that would enable it to take these compelling circumstances into consideration at sentencing.[195] Not surprisingly, in 2002, family ties and responsibilities were cited in only 3.7% of cases granting downward departures.[196] Women's minor roles in drug-related offenses received even less consideration at sentencing – downward departures for "mule role in the offense" accounted for only 0.5% of all downward departures in 2002.[197]

Under the Federal Sentencing Guidelines, downward departures for coercion and duress are rarely granted – in 2002, the relevant guideline was cited in only 0.6% of cases where downward departures were granted.[198] Coercion and duress reductions were granted more frequently in cases involving white women than in those involving women of color.[199] Evidence of domestic violence, including death threats to women, their children, and their families, and of the long-term harms caused by violence in women's lives, was routinely rejected as a basis for downward departures.[200] A few courts, however, fully and fairly considered such evidence and adjusted their sentencing decisions accordingly, demonstrating that courts can avoid further penalizing women who have already been subjected to violence in their homes and in their communities.[201]

At the state level, criminal justice systems use both sentencing guidelines and mandatory minimum statutes, and tend to enact policies that mirror the structure and severity of sentencing at the federal level. Michigan, once a state with some of the most severe mandatory minimum sentences, only recently amended its notorious "650-lifer" law that mandated life in prison for anyone convicted of possessing – either directly or as part of a conspiracy – 650 grams or more (less than the weight of a loaf of bread) of cocaine. JeDonna Young, one of the first individuals convicted under the Michigan law, served 21 years in prison for simply being with her boyfriend in a car where drugs were found, although she denied knowing they were there. Former Michigan Governor William G. Milliken has said that had he foreseen that the law would have been applied to minor players such as JeDonna Young, he would have never signed the bill into law.[202]

WOMEN'S EXPERIENCES UNDER MANDATORTY MINIMUM SENTENCING SCHEMES

Mandatory 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. Under such federal statutes, prosecutors are the sole – and unaccountable – gatekeepers to one of the few avenues to escape a mandatory minimum sentence: a plea bargain requiring a defendant to provide "substantial assistance" to the government in the prosecution of others.

Harsh Sentences

One consequence of mandatory minimum sentences is that low-level drug offenders receive the statutorily required sentence, while many mid- and high-level drug offenders, ostensibly the main targets of the legislation, avoid long mandatory sentences by entering into plea deals with the prosecution and obtaining shorter sentences in exchange for "**substantial assistance**,"[203] meaning providing information that will enable the prosecutor to identify and prosecute others. The substantial assistance mechanism benefits mid- and high-level drug defendants because they are the individuals most intimately acquainted and centrally involved with drug operations, and can provide the government with the most useful and complete information about other participants. Unlike mid- and high-level drug offenders, lower level drug offenders – such as drug couriers, who transport drugs from one location to another – generally have little information to offer and therefore cannot obtain reductions in their sentences by providing substantial assistance.

As indicated in Section II, based on their peripheral, minimal, or unknowing role in drug activity, women rarely have information to provide prosecutors, and, when they do, may elect not to do so, perhaps in the interest of their family. As a result, women are often subject to harsher sentences under mandatory minimum statutes than men, who are generally more active and powerful participants in the drug trade.

Pressures to Plead Guilty

Another important aspect of mandatory minimum drug statutes is that they give prosecutors an effective weapon with which to extract pleas from vulnerable defendants. Through the number and nature of the charges they bring, prosecutors can single-handedly determine the potential sentence faced by drug defendants. Often defendants will plead guilty to a lesser charge, even if they did not commit the offense, with the promise of a reduced sentence and the assurance of avoiding the possibility of a much longer sentence if convicted at trial. Mothers and other primary caregivers, detained in jail while their children or others

who depend on them are left unattended or in precarious temporary arrangements, are particularly vulnerable to the pressures to obtain a speedy resolution of their cases by entering a plea, and so frequently have greater incentive to plead guilty to a lesser offense in an effort to guarantee that they stay out of prison or reduce their prospective sentence.

This was certainly the case for many of the women implicated in the now infamous Tulia, Texas, drug sting case. Several of the women and men charged with drug sales pled guilty, despite their innocence, after watching other defendants go to trial and receive sentences as high as 99 years.[204] The Tulia defendants were later pardoned by Texas Governor Rick Perry, while the agent whose testimony was the basis of their convictions has since been convicted of perjury.[205]

Racial Disparities

For a host of reasons, federal mandatory minimum drug sentencing laws impact certain communities of color more than others. For instance, as an initial matter, because all crimes committed on federally recognized tribal lands are subject to the provisions and sentencing mandates of federal, rather than state, criminal laws, Native Americans are more often subject to the harsher federal penalties.

Moreover, a recent report to Congress by the U.S. Sentencing Commission highlighted an alarming and growing racial disparity in prosecutions:

> *Commission data show two demographic trends with respect to the application of mandatory minimum sentences that may raise some concerns. First, since 1993, the percent of mandatory minimum cases in which the defendant is white has decreased from 30 percent to approximately 23 percent, while the percent of such cases in which the defendant is Hispanic has increased from approximately 33 percent to almost 39 percent. Thus, during this period, Hispanics subject to mandatory minimums displaced white defendants on almost a one-to-one basis.*
>
> *.....[B]lacks are much more likely than white or Hispanic defendants to receive heightened mandatory minimum penalties, and the difference in the likelihood increases as the penalty increases. In 1998 black defendants comprised only 30 percent of cases subject to a five year mandatory minimum. However, they comprise over 40 percent of cases subject to a ten year mandatory minimum, over 60 percent of cases subject to a 20 year mandatory minimum, and almost 80 percent of cases subject to a mandatory life term.*

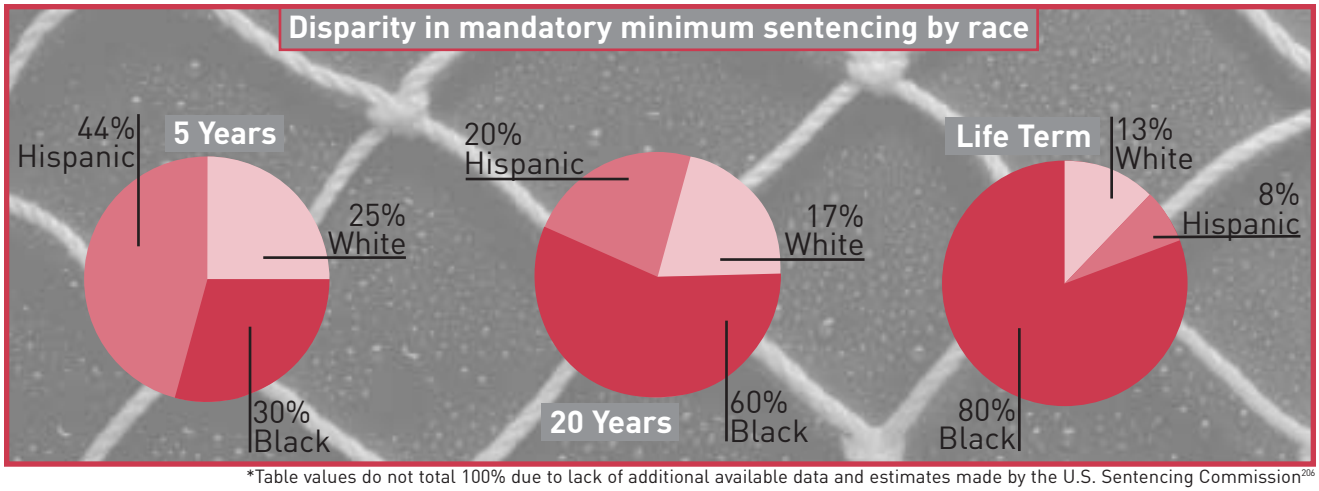


*Table values do not total 100% due to lack of additional available data and estimates made by the U.S. Sentencing Commission[206]

Conversely, whites and Hispanics are less likely to receive heightened mandatory minimum penalties as the mandatory term increases. Hispanic defendants comprise approximately 44 percent of cases subject to a five year mandatory minimum, 20 percent of cases subject to a 20 year mandatory minimum, and approximately 8 percent of cases subject to a mandatory life term. Similarly, white defendants comprise approximately 25 percent of cases subject to a five year mandatory minimum, approximately 17 percent of cases subject to a 20 year mandatory minimum, and approximately 13 percent of cases subject to a mandatory life term.[207]

THE SUPREME COURT WEIGHS IN: THE DEBATE OVER SENTENCING POLICY

Several cases recently decided by the U.S. Supreme Court have generated considerable uncertainty with respect to existing approaches to sentencing. This creates an opportunity for a considered debate about the future of federal and state sentencing policies. This debate should address the limitations of mandatory sentences and fully integrate the experiences of women, and particularly women of color, as outlined in this report and the referenced research.

Until these recent Supreme Court decisions, the Federal Sentencing Guidelines, as discussed above, required judges to impose longer sentences based on additional findings relating to drug quantity and other circumstances of the crime. Judges, rather than juries, made these additional factual findings during sentencing proceedings held after the jury returned a guilty verdict. The U.S. Supreme Court, however, ruled in *Apprendi v. New Jersey* and *Blakely v. Washington*[208] that under the Sixth Amendment right to a jury trial, any facts that are relied upon to impose an increased sentence in a state court must be found beyond a reasonable doubt by the jury. Then in *United States v. Booker* and *United States v. Fanfan*[209] the Supreme Court applied these rules to the Federal Sentencing Guidelines. The Court held that the Guidelines violated the Sixth Amendment in requiring judges to increase defendants' sentences based upon facts (like drug quantity) determined by the judges during sentencing proceedings, rather than by juries during the trial. The Court struck down the provision that makes the Guidelines mandatory, and ruled that sentencing courts are not bound by them, but rather must consider the Guidelines together with "other sentencing goals, the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, the need to provide restitution to victims ... and must impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence [and] protect the public. . . ."[210]

By rendering the Guidelines advisory rather than mandatory, the Supreme Court opened the door for defense counsel to present, and courts to consider, a host of information about individual defendants, the offense, larger societal issues, and the official opinions of the U.S. Sentencing Commission,[211] as well as for courts to impose sentences well below the range set forth by the Guidelines, including a sentence of probation or community confinement. Since *Booker*, dozens of lower courts have already ruled that the Guidelines are but one relevant factor to consider when fashioning an appropriate sentence.[212] Conversely, at least one court has recently ruled that the Guidelines after *Booker* are still "nearly dispositive."[213]

THE BASIS FOR CONGRESSIONAL ACTION

"Ours, of course, is not the last word: The ball now lies in Congress' court."

–Justice Stephen Breyer[V]

It is unclear at this point what effect the decisions in *Booker* and *Fanfan* will have on charging practices related to drug offenses. It is also unclear what action, if any, Congress will take in response to the decisions. However, a unique window of opportunity now exists to reevaluate current approaches to drug use, abuse, sales, and trafficking, as courts decide how to apply the Federal Sentencing Guidelines in an "advisory fashion," and Congress considers whether to maintain them or toss them out altogether.

The day after the Supreme Court announced its decisions in *Booker* and *Fanfan,* 50 organizations concerned with criminal justice and sentencing policy sent a letter to the ranking members of the House and Senate Judiciary Committees, urging that Congress consider the following two key points when contemplating any legislative action in this arena:[214]

1. In order to create a sensible, long-term sentencing policy, Congress should avoid the temptation to create a 'quick fix.' There is no real quick fix, and seeking to make an end run around the important issues could have unintended negative consequences. Any proposals providing for longer sentences while retaining current restrictions on the exercise of judicial discretion to mitigate punishment should be rejected.

2. In order to have punishments that fit the crimes committed, Congress must carefully evaluate the past 20 years of sentencing policies and their broader implications. Mandatory minimum sentences should be reconsidered in this process.

Clearly, the disparities that both the Federal Sentencing Guidelines and mandatory minimums originally aimed to negate still exist. Racial profiling and racial disparities in prosecution, charging, and sentencing persist. Imposition of full liability for the drug-related offenses of others, without consideration of individual intent or circumstances, through conspiracy provisions, accomplice liability, constructive possession, and asset forfeiture laws, along with inflexible sentencing schemes, result in devastating and disproportionate harm to women, particularly poor women and women of color, and their families.

While it remains to be seen what action Congress will take with respect to federal sentencing policy, it is clear that the experiences of women discussed in this report have not informed sentencing policies to date.

Congress must consider and evaluate carefully the evidence of the impacts of past approaches, some of which are outlined in this report, before it acts.

[V] *United States. v. Booker*, 125 S. Ct. 738, 768 (2005).

The ravaging effects of our nation's drug policies do not end when a woman is sentenced to prison. Incarceration itself damages women and their families, changing their lives forever.

This section of the report provides a brief overview of how ill-informed drug policies hurt women, their children and family members, and their communities. Incarcerated women experience physical, emotional, and psychological trauma in prison that haunts them throughout their lives. In recent years, an increasing number of studies and reports have also highlighted how a mother's incarceration affects the emotional and psychological well-being of her children, who are often placed in the care of friends or family – possibly leading to financial and emotional hardship on family members – or end up in an overburdened child welfare system. Less well documented, but no less significant, are the impacts of women's incarceration on family and community members dependent on them for support and care.

IMPACT ON WOMEN

Far from offering rehabilitative services, prisons envelop women in an atmosphere of violence and abuse that fails to address their psychological, physical, or socioeconomic needs – the very factors that contribute to their involvement with drugs. Instead, the prison experience exacerbates these concerns, inflicting further damage. Incarceration hurts women in many ways. This section concentrates on two particularly important ways in which the prison experience has lasting consequences for women involved in drugs – physical and sexual abuse in prison and denial of appropriate healthcare services.

ABUSE IN PRISON

"That was not part of my sentence, to ... perform oral sex with the officers."

-New York prisoner Tanya Ross[vi]

In the early 1990's the nation's leading international human rights groups documented a range of widespread physical, psychological, emotional, and sexual abuse experienced by women in prisons in the United States.[216] These reports documented widespread custodial abuse of incarcerated women, perpetrated by guards and other prison personnel, including rape, other forms of sexual assault, and verbal and emotional abuse.

Amnesty International's 1999 report, *"Not Part of My Sentence" -Violations of the Human Rights of Women In Custody,* indicates that male staff, under the guise of correctional supervision, frequently watch women as they shower, use the bathroom, and dress and undress in their cells.[217] Women also reported sexual extortion – correctional officers demanding sexual favors in exchange for necessities as basic as a bar of soap. Incarcerated women told human rights monitors that they were reluctant to file grievances, fearing that prison officials would not believe them and that staff would retaliate. Indeed, a Human Rights Watch report, *Nowhere to Hide: Retaliation Against Women in Michigan State Prisons,* found that incarcerated women in Michigan who filed complaints alleging abuse were later threatened and harassed by staff.[218] According to a report by the group Stop Prison Rape, those women who spoke out in an Ohio prison were routinely sent to solitary confinement, a "kind of isolation [that] can be devastating in the aftermath of abuse," further traumatizing women and emboldening their attackers.[219]

Abuse within prison walls has severe consequences, especially for women who have experienced violence in the past and those who suffer from mental illness, like depres-

[VI] *November 1998 Interview on Dateline NBC television, November 1, 1998, National Broadcasting Co Ltd.*[215]

sion, or are recovering from addiction. Women abused in prison are likely to have long-term psychological scars, including Post Traumatic Stress Disorder (PTSD), Rape Trauma Syndrome, and ongoing fear, nightmares, and flashbacks, contributing to self-hatred, substance abuse, anxiety, depression, and suicide.[220] Although there appears to be no research directly linking prison abuse to women's recidivism rates, research does indicate drug use relapse is "significantly higher among women with PTSD."[221] Moreover, as discussed in Section I, women who experience abuse in prison, like other survivors of violence, may face additional barriers during the recovery process. Women in prison who are sexually assaulted are exposed to sexually transmitted diseases, such as HIV, hepatitis A and B, syphilis, and gonorrhea. They also face the possibility of pregnancy, for which they will likely receive little or no prenatal care.

"I was raped on March 20, 1997 at the Central California Women's Facility (CCWF) in Chowchilla, CA. I was assigned to the electrician's shop... I worked for a man, who was my boss. ...He was standing by an open door that led into a catwalk between the gym and the library. As I stepped in, he stepped in closed the door and bolted it. He flipped the light switch off, it was pitch black in there. He pushed me down on to a mattress and proceeded to pull down my pants and panties. We are required as prison inmates to wear state issue clothing to our assigned jobs which are elastic waist bands, so he had no problem getting them down. The catwalk was about 4 ft. wide, open wall beams (2x4's). He bit my forearm in three different places, I had bruises on my legs and back where I fought him and tried to turn over, as I was face down. Anyway, I ended up hysterical.

. . . I never got to talk to any police officers . . . . They found the mattress, they found that the lock had been changed on the catwalk and that [my boss] had the only key to it. . . . They never let me talk to anyone, no police, no detectives – nothing. . . . I'm telling the truth. Please help me."[222]

–Johanna, California

Although the Prison Rape Elimination Act fails to address many critical problems related to sexual assault in prisons, it may eventually assist in reducing custodial misconduct. The law calls for the gathering of national statistics about the problem of prisoner rape; the development of guidelines for states about how to address prisoner rape; the creation of a review panel to hold annual hearings; and the provision of grants to states to combat the problem.[223]

In implementing the Act's directive and following its spirit, prison officials throughout the country should systematically document and effectively address the abuse of women by prison staff and other personnel.

PHYSICAL AND MENTAL HEALTH

Our nation's prisons provide notoriously poor healthcare for incarcerated men and women alike. Women, however, are more likely than men to report a medical problem during their stay in prison.[224]

Reports of poor medical treatment for women in prison abound. Incarcerated women frequently experience delays and interruption in the receipt of medication for problems as serious as heart conditions, depression, sickle cell anemia, and asthma.[225] In some cases, women must obtain permission from non-medical staff, namely guards, to see medical professionals, which itself delays their care.[226]

Ineffective medical treatment is in part due to a lack of medical staff in prisons.[227] In 1999, the Special Rapporteur for the United Nations Commission on Human Rights reported that, "of the $21,000 per prisoner per year spent in California, approximately $11,000 (or 52 per cent) is for security measures, approximately $3,125 (or 14 per cent)

for health care and only some $900 (or 4.5 per cent) for education and training."[228] This distribution of prison resources can have painful, debilitating, and, in some cases, fatal, results, as it did for an incarcerated woman in Virginia, who, the United Nations found, had bled to death because no medical staff was available to treat her.[229]

Turning to mental health, as discussed in Section I of this report, many women who come into contact with the criminal justice system through enforcement of drug laws suffer from some form of mental illness, and are often labeled with a "dual diagnosis" of drug addiction and depression, PTSD, anxiety disorder, schizophrenia, or other conditions. While mental illness may be a significant contributing factor to women's drug use, and therefore women's high incarceration rates, research indicates that women's mental health needs usually are not addressed in prison "because prisons and jails are commonly able to treat only the most serious disorders and cannot afford the counseling services that would benefit many women."[230] In some cases, psychotropic drugs are inappropriately used to sedate incarcerated women who are suffering from mental illnesses for which such medication is not appropriate.[231]
Incarcerated mothers experience significant emotional trauma when separated from their children, contributing to depression, loneliness, and despair. For some women, separation from their children is worse than serving time in a prison.[232] Among women with substance abuse problems, these feelings are particularly acute and may feed a desire to use drugs to escape the pain – the very cycle that may have led them to prison in the first place.

"I want to tell other mothers that I know the pain they're feeling; the awfulness that comes because we don't know where our children are, the anxiety that comes around certain dates like birthdays knowing we can't call to say 'I love you.' I know the loss of joy in those days, because they're not things to celebrate without our children. I know, because we're all facing the same problem of not being able to see our children due to the fact that we're convicted and it is more painful to not see our children, or have the chance to talk to them then the sentence we have to serve."

–An excerpt from: *Locked Up-Locked Down: A Mother's Love for Her Child*, California Coalition for Women Prisoners.

IMPACT ON CHILDREN WITH INCARCERATED MOTHERS

THOSE AFFECTED

Today, approximately 2.4 million children have an incarcerated parent – an increase of roughly 1.5 million children since 1991.[233] More than 65% of women incarcerated in state prison report having a minor child, compared to 55% of their male counterparts.[234] According to the Bureau of Justice Statistics, "the number of minor children with an imprisoned father rose 58 percent from 1991 through 1999, compared to a 98 percent increase during the same period in the number of minors with an imprisoned mother."[235] African American children were nine times more likely to have a parent incarcerated than white children, and Latino children were three times as likely as non-Latino white children to have an incarcerated parent.[236] These figures do not reflect other groups of children who may not be biologically related to an incarcerated parent, but are dependent on their care, including minor siblings, nieces and nephews, and friends' children.

Incarcerated parents are overwhelmingly male – 93% of parents in prison are men. However, the impact of women's incarceration on families is particularly severe. Women in prison have an average of two children, and the overwhelming majority of these women lived with their children prior to their incarceration.[237] In most cases, when a woman is imprisoned, her child is displaced.[238] According to the Bureau of Justice Statistics, nine in 10 fathers in state prison reported that their children lived with the other parent. In comparison, only about one in four (28%) of mothers in prison said their child's father was the current caregiver, demonstrating that when mothers are incarcerated, children are more likely to go into kinship care or foster care.

DAMAGE DONE TO CHILDREN

In the context of the war on drugs, children become separated from their mothers for many reasons, including a mother's incarceration or inability to care for her child as a result of addiction. In some cases, a mother's entry into a residential treatment programs may also result in separation, based either on the wholesale exclusion of children from adult-only programs, or age limits imposed in programs that allow children. Although each child will react uniquely to extended separation from his or her mother, researchers report that when a mother and child are separated due to incarceration, the child often grieves as if the mother has died, experiencing a grief that is unique to children with incarcerated parents.[239] Indeed, the lengthy sentences commonly imposed for drug offenses frequently last for the duration of a son's or daughter's childhood. The emotional toll of children's separation from their mothers is significant and is likely to have a long-term impact. These children experience fear, anxiety, grief, and sadness, all of which may lead to withdrawal, or verbal or physical aggression.[240]

> "When I was four-years-old, my mother started doing drugs. She started going to prison when I was seven-years-old. That's when we first got taken from her. Her friends took me to Social Services, dropped me off, and left me there. I have been in about 18 different group homes since then, and three or four foster homes. I don't care how bad whatever we were going through, I still wanted to be with my mom. One foster home I was in, I called the lady there my grandmother, cause she always took care of me by making sure I got in touch with my mom. Even if she was calling collect, she could call there. My grandmother knew that mattered in my life. The other places, they just didn't care."
>
> –Antonio, 23, Excerpt from: San Francisco Partnership for Incarcerated Parents "Children of Incarcerated Parents: A Bill of Rights"

Many children with incarcerated mothers face the threat of removal from their immediate family and placement in a state child welfare system for the term of their parents' incarceration. Ten percent of children whose mothers are incarcerated in state prisons currently live in foster homes or agencies.[241] Arguably, one of the most tragic consequences of the war on drugs is the relegation of children to the child welfare system, where they are at increased risk of becoming victims of sexual or physical abuse or neglect.[242]

Race plays a major role in determining whether a child enters into the child welfare system as a result of a mother's incarceration, as well as how long the child stays there. In 1999, 7.0% of African American children and 2.6% of Hispanic children had an incarcerated parent, compared to 0.8% of white children.[243] 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.[244] Children from families receiving public assistance prior to parental conviction are one-and-a-half times more likely to enter the child welfare system following a parent's incarceration.[245] It is clear, therefore, that the

race, class, and gender of incarcerated parents significantly affect the risk of their children entering the child welfare system, as well as the likelihood that they will be adopted.

BARRIERS TO PARENT-CHILD RELATIONSHIPS AND INTERACTION

Incarceration drastically alters a mother's day-to-day interactions with her child and, indeed, transforms their entire relationship. Visitation, telephone, and other communication become essential to maintaining familial relationships. Unfortunately, physical distance and the nature of correctional facilities make mother-child visits difficult, while exorbitant long-distance charges levied by telephone companies further limit the ability of mothers to be a part of their children's lives.

Source: Bureau of Justice Statistics, Incarcerated Parents and the Children 1997

Conditions That Make Visiting Hard or Impossible

Most incarcerated parents never receive visits from their children. In 1997 over half of incarcerated mothers never received a personal visit, and fewer than 10% received a visit at least once a week.[246]

Visiting is hard on children for two reasons. First, most women's prisons are located in remote rural areas, many miles away from the neighborhoods where women lived before going to prison, and where their children still live.[247] Over 60% of parents in state prisons are held at least 100 miles away from their last place of residence.[248] Child welfare workers, who generally carry extremely large caseloads, family members, and foster parents may have neither the time nor the money to take children lengthy distances to visit their incarcerated mothers.

Source: Bureau of Justice Statistics, Incarcerated Parents and the Children 1997

Second, caretakers of children with incarcerated parents, whether foster parents, social workers, relatives, or family friends, may be hesitant to expose children to the prison visiting experience. To gain entry into prisons, visitors of all ages must walk through metal detectors, and submit to pat down searches and searches of their bags. Despite posted visiting hours, after making a long journey to a prison children and those accompanying them may be forced to wait hours before actually seeing their loved one. There is the chance that prison officials will prevent visitors from seeing their loved one at all. Once visitors and incarcerated family members do come together, their interaction itself will be regulated. The Department of Corrections in California, for example, prevents children older than seven-years from sitting on the laps of their parents, and limits the time of a kiss and/or embrace to no longer than five seconds.[249]

Conditions That Make Telephone Contact Difficult

Mother-child contact is further limited by exorbitant, commission-driven phone rates, made possible by exclusive deals between

prison administrators and long distance providers. State prisons and phone companies reap millions of dollars from these agreements. California, for example, receives commissions of more than $35 million each year from phone companies.[250] These monopolistic provider arrangements and collect-call policies produce high prices and poor service, and offer no choice of service provider. These conditions have led to collect-call arrangements in prison that are prohibitively expensive. Not only is the recipient of the call charged a collect-call rate that is much higher than the standard phone rates, that person must often pay an additional connection fee assessed on each prison call. Many families and foster parents, already financially stretched, cannot carry the additional burden of costly prison collect-calls.

"I would just imagine the chance to say, Peter, how was school today, did you do your homework, what's your favorite subject, do you like sports and if you do, what kind? Peter, do you have any best friends? What are their names? Peter, are you eating your favorite food (spaghetti) still? Are you eating good? Peter, my beloved son, how are you adjusting to your new family? Your new life? Do you know that Mommy never stopped loving you, and I have your name engraved in me to remind me of you everyday.

I have no contact with my son. If I had contact with him, I'd want to say that I'm terribly sorry for the poor choice I made. I pray to God everyday, that he is happy."

—An excerpt from: *Locked Up-Locked Down: A Mother's Love for Her Child*, California Coalition for Women Prisoners

When an incarcerated mother cannot maintain phone contact with her family members she suffers, they suffer, and society suffers as well. Studies show that "telephone usage and other contacts with family contribute to prisoner morale, better staff-prisoner interactions, and more connection to the community, which in turn has made [incarcerated people] less likely to return to prison."[251]

Lack of In-Prison Mother-Child Programs

As some facilities have demonstrated, prisons can mitigate the damage caused by familial separation, and even help women in prison strengthen their parenting skills. Some prison officials are making efforts to make prison-visiting rooms more child-friendly.[252] The visiting room at Bedford Hills Correctional Facility – the largest women's prison in New York – for example, "has a child-friendly, stimulating environment with a portion of the visiting room dedicated to a carpeted and cheerfully painted 'children's center.' The children's center has games, toys, blocks, paper and pens, pillows, books–everything useful for normal mother-child interaction."[253] And some prisons actually offer incarcerated mothers family reunification programs that include family advocacy counseling, parenting self-help and skills training, mother-child over-night visits, daycare, and storybook initiatives through which mothers read to their child via video conferencing. Unfortunately, these programs are rare, and even those that are available can assist only a limited number of women and their children annually.[254] A 2003 study conducted by the California Department of Corrections found that of the 11,000 women in California prisons, 8,250 were mothers. However, the four Community Prisoner Mother Programs and two Family Foundation Programs funded by the state serve a maximum of 166 mothers annually.[255]

In response to "perceived inadequacies of in prison visitation programs," over a decade ago the Girl Scouts established the "Girl Scouts Behind Bars" program "to keep mothers and daughters connected and to enhance parenting skills [by] involv[ing] mothers in their daughters' lives through a unique partnership between a youth services

organization and State and local corrections departments."[256] One corrections official who has seen the program in action observed "[i]t's very healing for [these] kids to have the kind of loving relationship that other kids have with their mothers. . . . And it restores something really precious to the women; it gives them a chance to fulfill their most important role in life. When people are doing well emotionally, when they feel hope, feel encouraged, they can do much better in here."[257] Yet its reach is limited – as of 2003, only 500 girls nationwide participated in the program.[258]

In the last decade, interest in understanding and meeting the needs of children with incarcerated parents has increased dramatically, yet the number of family unification programs has not. Development and expansion of alternatives to incarceration that enable mothers convicted of drug offenses to remain in the community and continue to care for their children must keep pace with the nation's new interest in this vulnerable population.

IMPACT ON FAMILY MEMBERS

In addition to caring for their own children, women are often caregivers for other dependent family members and friends, including non-biological children. An estimated 28 million women (approximately 26% of women 18 years or older living in the United States)[259] provide support and care to chronically ill, disabled, or aged family members or friends.[260] While there is no documentation of the number of incarcerated women who were caregivers prior to their incarceration, a reasonable estimate places the number of women who provided care to dependent adults prior to their admission to prison at over 24,000 nationwide.[261]

Increasingly, our society relies on family units and friends to care for the chronically ill, disabled, or aged.[262] More research, then, is needed to expand our understanding of the scope of women's care-giving responsibilities prior to their incarceration, the effect that a woman's incarceration has on that care-giving role, and the fiscal impact of losing care-giving women to prison.

A woman may have cared for grandparents and relatives prior to incarceration. She may turn to this same group to give care to her children while she is locked up. Nationally, one in 12 children (8%) lives in a household headed by a grandparent or other relative. Children of incarcerated mothers are 10 times more likely than children in the general population to be cared for by relatives (53%) or grandparents (26%).[263] While there is no published information on the demographics of family members caring for children with incarcerated parents, given what we know about the system's disproportionately harsh impact on families of color, those families are likely the ones most overburdened with additional custodial responsibilities. The disparate incarceration of women of color may help explain this key finding by the American Association of Retired Persons

(AARP) in a 2003 report designed to learn more about grandparents of color caring for grandchildren: "[w]hile the largest numbers of children living in grandparents' homes are Caucasian, there are higher percentages of children within certain racial/ethnic groups, including African Americans (13.2%) and Hispanics (7.8%). The fastest growing segment of children living in grandparent-headed homes is Hispanic."[264]

As families take on the extra financial burden of raising a child whose parent is incarcerated, they are not able to access the funding and services to help them do so – resources that foster care parents routinely obtain. One study by the Children's Research Institute of California found that slightly more than half of the relatives caring for children with incarcerated parents received the same levels of government subsidies as non-relative foster-parents.[265] This disparity in accessing assistance may be explained in part by the lack of information about services that prompted AARP to undertake its study, and generally plagues caregivers of color, especially American Indians/Alaska Natives and Latinos/Latinas.[266] Language, cultural, and geographic barriers may also hinder access to services. In addition to the financial strain of raising an additional child, family members may also face a host of behavioral issues triggered in children by a parent's incarceration. They must provide food, clothing, shelter, and intensive emotional support for their grandchildren, nieces, nephews, or siblings, even as they themselves deal with the loss of someone, possibly their own child, to prison.

AARP has taken the lead in raising awareness of the difficulties grandparent caregivers, especially grandparents of color, encounter in raising their children's children. The organization recommends launching major national, state, and local outreach campaigns to educate grandparent caregivers about existing services available to them, with a particular emphasis on outreach targeting communities of color and those with custodial responsibility for children whose parents are in prison. While AARP has produced a fact sheet about the unique needs of grandparents caring for children with incarcerated parents,[267] more research in this area is sorely needed, including collection of data about these grandparents, their needs and concerns, the impact of incarceration on other family members, and how incarceration changes family structures and impacts other individuals in a family.

CHILD WELFARE SYSTEM: CURRENT PRACTICE AND POLICY

As our nation's drug policies land a growing number of mothers in prison, increasingly, a separate set of child welfare policies determine the fate of their children. In general child welfare systems are not prepared to meet the needs of this growing population of children effectively.

A 1997 survey of state child welfare agencies conducted by the Child Welfare League of America (CWLA) found that while certain state and local agencies have started to focus on the population of children with incarcerated parents, only six of 38 responding child welfare agencies have enacted policies or developed programs specifically addressing their needs.[268] Twelve states reported programs aimed at assisting parents with pre-release planning, while only four states provided support groups for children and their caregivers. Only one state offered counseling services for children of incarcerated parents, and only one state reported working with prison social workers to provide coordinated services for children and their parents.[269] Only two of the responding 38 states claimed to provide their staff with specific training to address the needs of children of incarcerated parents, and only one had developed a formal training curriculum.[270]

ADOPTION AND SAFE FAMILIES ACT (ASFA)

Mothers convicted and incarcerated for drug offenses serve double sentences: one imposed by the court and another imposed by child welfare agencies. A law known as the Adoption and Safe Families Act (ASFA) of 1997[271] can lead to the permanent loss of an incarcerated woman's children – a sentence that lasts a lifetime.

Child welfare was primarily a state and local matter until the 1980s, when the federal government began exerting influence by attaching conditions on funding for state and child welfare activities. Concerned about the number of children in foster care, in 1980 Congress passed the Adoption Assistance and Child Welfare Act, intended in part to promote family preservation. Despite the passage of this legislation, foster care rates soared during that decade. Some observers attribute this trend to the effects of crack, while others attribute it to the combination of de-funding of social programs in the 1980s and funding incentives promoting out-of-family placements. ASFA was intended to reduce long-term stays in foster care by facilitating quick termination of parental rights and speedy adoption, emphasizing "permanency" over family reunification. This represented a sea change in child welfare policy, which had previously emphasized family reunification as the most appropriate means of serving the best interests of the child.

Under ASFA, states are required to initiate the termination of parental rights (TPR) proceedings when a child has been placed in foster care for 15 out of the last 22 months. A Government Accounting Office (GAO) report concluded that the combination of the Act's 15-month foster care time limit and the median prison sentence for women (60 months) leaves the parental rights of thousands of mothers in jeopardy.[272] Because 72% of all women in federal prisons are incarcerated for non-violent drug offenses, the expansive use of mandatory minimum sentences for these offenses seriously impacts the likelihood of termination of parental rights and contributes significantly to the rising number of children in the child welfare system.

Under ASFA, there are several circumstances under which states are not required

[VII] Post-conviction penalties are often referred to as collateral consequences. However, the term collateral consequences inadequately reflects the additional punishment imposed by law.

to file a petition for TPR. The most significant of these exists where relatives are caring for children. Because 79% of the children of incarcerated mothers live with a grandparent or other relative,[273] this provision is particularly significant in this context. However under other ASFA provisions, some family members may be found "unfit" to be foster or adoptive parents due to any past criminal conviction, including minor offenses, such as resisting arrest, or drug-related offenses as much as five to ten years old. A disproportionate number of people of color are arrested and convicted of such offenses, decreasing the likelihood of kinship care for children of color whose parent is incarcerated.

Even if a woman's sentence is shorter than 15 months, ASFA sets forth a virtually impossible timeline for reunification. Some mothers may be able to reunite with their children immediately after they finish their sentences because family members have cared for their children during incarceration. Yet many others are losing their children because of the time required to meet preconditions to regaining custody of their children, such as attending drug treatment and securing housing and employment. As ASFA was passed with little, if any, consideration of its impact on incarcerated mothers, more research is needed to fully understand how it affects the parental rights of incarcerated mothers.

In addition to the risk of losing their children as a result of a drug conviction, other types of punishment follow women, sometimes for life, far beyond prison walls. Since the mid-1990s, post-conviction penalties[VII] – such as denial of public assistance and permanent loss of federal financial aid for post-secondary education, housing, employment, and franchise – have increasingly been imposed in addition to a woman's court-mandated sentence for a drug-related offense. Although critically important to women's successful reintegration, a discussion of the impacts of post-conviction penalties is beyond the scope of this report. However, it is important to note that few reports specifically examining post-conviction penalties have addressed their particular impacts on women. Future research should document the number and demographics of women and men affected by post-conviction penalties, as well as the distinct ways in which these penalties affect them.

CONCLUSION & FINAL RECOMMENDATIONS

CONCLUSION & FINAL RECOMMENDATIONS

Our nation's sweeping and punitive drug policies devastate women, their children, and their families. Current approaches do not address underlying problems that lead women to use, abuse, or sell drugs, or to remain in relationships with others involved with drugs. Nor do they reduce the harm drugs inflict upon people's lives. Instead, law enforcement officials arrest and prosecute women – usually poor, often women of color – for drug-related activities that can and should be dealt with outside the confines of our punitive criminal system. With little, if any, room to consider the facts and circumstances driving a woman's involvement in drugs, the nation's current, counterproductive criminal law-based drug policy demeans the humanity of those dispensing and receiving this so-called justice.

Rather than treating drug dependent women for their addictions we lock them up in prisons, where anxiety, depression, and separation from family only drive their need to mute the blaring pain with drugs.

Rather than providing opportunities to break away from coercive or abusive relationships, we hold women accountable not only for failing to turn in their partners to the police, but also for their partners' criminal behavior – conduct over which women have little, if any, control and about which they may be completely unaware.

Rather than easing the emotional, psychological, and even financial trauma inflicted when children lose their mothers to prison and are left in the hands of family members, friends, or child welfare agencies, the system simply ignores it.

And rather than permitting women to complete their sentences and move on with their lives after a drug conviction, we allow the conviction to serve as a scarlet letter that bars them from a range of services and opportunities, and even leads to the permanent loss of their children.

As a nation, we can reverse course. We can begin addressing drug use and drug activity, particularly minor or petty drug activities, outside the criminal justice system. We can seek to root out causes – like addiction, mental illness, or poverty – instead of locking up women, and removing them from their families and communities. Criminal sanctions should never be the first stop in addressing drug issues. Rather they should be an approach of last resort, if we use them at all. The people of California, for example, moved in that direction when they voted in 2000 to send those convicted of first-time, non-violent drug offenses to treatment, instead of prison. As a nation, we can also value families in practice, even when a mother is locked up. A handful of programs illustrate that parenting from behind bars, and preserving mother-child relationships during a woman's prison stay, are possible and valuable.

Federal policy-makers, poised to reconsider federal sentencing policies, as well as state officials, who are primarily responsible for crafting and enforcing drug policies and criminal justice policies, must not ignore what we now know about the effects of punitive drug measures on women and families. Drug convictions have caused the number of women behind bars to explode, leaving in the rubble displaced children and overburdened families.

Looking to the future, these goals and recommendations should guide policymakers as they decide how to treat and effectively serve women who use, abuse, or sell drugs, or who are linked to others that do so:

Recommendations

View drug involvement as a symptom of a larger social problem, or set of problems, that must be rooted out and solved.

- Invest public dollars in treatment and services to address the underlying causes of involvement with drugs in a community setting, not a prison setting;
- Provide women involved in coercive or abusive relationships services and support needed to gain financial and personal independence;
- Offer vocational and skills training to women that leads to jobs for women lacking employment opportunities;
- Make child care available to ensure women with children have a realistic chance of participating in self-improvement programs;
- Divert women out of the criminal justice system and into the appropriate treatment system as early as possible.

Treat women drug users as patients, not prisoners.

- Understand and treat underlying causes of a woman's involvement with drugs – like substance addiction, mental illness, and trauma caused by abuse;
- Conduct appropriate screening of women charged with drug offenses to identify health issues such as substance addiction, mental illness, and trauma;
- Design treatment programs with a woman's unique needs in mind;
- Make treatment programs accessible to women with children by enabling them to participate in the program while still caring for their children;
- Recognize that relapse is a natural step on the road to recovery, not an occurrence that should lead to a punitive response.

Develop a clear understanding of women in the criminal justice system that will inform and improve policymaking.

- Regularly collect and track data on women in the criminal justice system – at the state and federal levels – that will inform policymaking, such as: numbers and growth trends; activities underlying specific charges; commonly charged offenses; physical and mental health status; income levels; race; sexual orientation; age; parental status; immigration status; and place of residence;
- Brief state and federal policymakers on trends relating to women and the criminal justice system;
- Assess proposed legislation and policy changes relating to criminal justice and drug policy to determine their impact on women and their families;
- Educate those involved in the criminal justice and drug treatment arenas about the unique needs and characteristics of women and mothers in the criminal justice system.

Recommendations

Hold women accountable for their actions, not the actions of others.

- Enact sentencing policies that reflect an understanding of women's levels of culpability and control with respect to drug crimes;
- Repeal laws that hold women responsible for their association with people involved in drug activities, rather than for their own conduct, and punish them for activities of drug operations whose scale or very existence may be unknown to them;
- Restore judicial discretion to take into account factors such as an individual's role in or knowledge of the offense in fashioning a sentence.

Preserve families despite incarceration.

- Allow incarcerated mothers to visit with their children, and maintain or establish critical family ties, with minimal inconvenience and in an appropriate setting;
- Tailor child welfare practices to ensure that women in prison have a fair chance to demonstrate their ability to parent their children;
- Open lines of communication between prison and child welfare officials to increase the likelihood that incarcerated mothers will have an opportunity to parent from behind bars and when they return home;
- Increase financial and emotional support for family members, like grandparents and aunts, and friends who care for children while their parents are incarcerated;
- Document the impact of women's incarceration on others for whom they care and leave behind – e.g. the chronically ill, disabled or aged adults – and the unique needs of this population;
- Assess proposed child welfare provisions with an eye toward their impact on incarcerated mothers and mothers with criminal convictions.

❖ END ❖

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[33] The terms "self-medicate" or "self-medication" refer to the idea that addiction to alcohol and other drugs results from their use for relief from ill feelings resulting from an underlying disorder or condition. For example, "[c]ocaine is thought to help overcome fatigue and alleviate depression in some depressed individuals (Freud, 1884; Schnoll, Daghestani, & Hansen, 1984; Khantzian, 1975), increase feelings of self esteem, assertiveness, and frustration tolerance (Weider & Kaplan, 1969), overcome boredom and emptiness (Wurmser, 1974), and alleviate impulsive/ hyperactive states in attention-deficit disordered individuals (Weiss, & Mirin, 1986; Zweben & Smith, 1989, and others). Cyclical mood disorders (manic depressive illness, cyclothymic disorders) have been shown to be more common in cocaine abusers than opiate addicts (20 % vs. 1%), suggesting such persons may preferentially select stimulants over other illicit substances (Gawin & Ellinwood, Jr., 1988). Cocaine is a CNS stimulant with pharmacological properties similar to the stimulant medications Ritalin®, Cylert®, and Dexedrine® that are commonly used to treat attention-deficit hyperactivity disorder. Thus, it is thought that individuals with untreated ADHD may be using cocaine to 'self medicate' these disease symptoms (Hallowell &

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123 The Harrison Narcotics Act of 1914, Pub. L. No. 223, 63rd Cong. approved Dec 17, 1914. The Harrison Narcotics Act was passed in 1914. It required those who dispensed "narcotics" to register with the Bureau of Internal Revenue (predecessor to the IRS), pay a tax, and keep records of the drugs they dispensed. The Act gave physicians the right to prescribe narcotics to patients, but the courts interpreted this to mean that physicians could prescribe narcotics to patients in the course of normal treatment, but not for the treatment of addiction.

124 In 1912 the first international Opium Convention meets at The Hague, and recommends various measures for the international control of the trade in opium. Subsequent Opium Conventions are held in 1913 and 1914.

125 In 1914 the U.S. Congress adopted the Harrison Narcotic Act, the first federal law to impose registration and record keeping requirements on the production and sale of opiates and cocaine. The Harrison Act was the implementation of the Hague Convention of 1912, which

called upon signatories to enact domestic legislation controlling narcotics supplies and distribution.

126 "Colored students at the Univ. of Minn. partying with female students (white), smoking (marijuana) and getting their sympathy with stories of racial persecution. Result pregnancy. Two Negroes took a girl fourteen years old and kept her for two days under the influence of marihuana [sic]. Upon recovery she was found to be suffering from syphilis" James A Inciardi, The War on Drugs: Heroin, Cocaine, Crime, and Public Policy. (Mayfield Publishing Company 1986).

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138 Because there was little debate on the amendments establishing the mandatory minimum crack cocaine possession penalties, statements on the floor of the House and Senate by proponents provide the clearest indication of congressional intent. It should also be noted that the Department of Justice opposed the amendments. In debating the amendments, three reasons were given by proponents for singling out possession of crack cocaine for severe penalties. 134 Cong. Rec. S 17,301 (Oct. 21, 1988).

First, it was argued that the supply of "cocaine" was greater than ever.. See e.g., 134 Cong. Rec. H 7,704 (Sept. 16, 1988) (statement of Rep. Hunter) ("There is so much crack that we . . . are creating users because the supply is so prevalent."). Second, it was argued that crack cocaine "causes greater physical, emotional, and psychological damage than any other commonly abused drug." Id. Finally, repeating the concern expressed during consideration of the 1986 Act, it was argued that "crack [cocaine] has been linked to violent crime." Id. Of particular note was the connection between the crack cocaine trade and gang activity. See, e.g., 134 Cong. Rec. H 2,701 (Aug. 10, 1988) (statement of Rep. Miller). A strong emphasis was placed on the possession penalties as a means of aiding the enforcement community's efforts against crack cocaine traffickers by setting up a presumption that possession of five grams of crack cocaine meant the possessor was a trafficker. It was thought that possession of as little as five grams of crack cocaine was an indicator of distribution rather than personal use. Letter from Senator Jesse A. Helms to William Wilkins, Jr., Chairman, United States Sentencing Commission (May 15, 1989) (on file with the United States Sentencing Commission).

139 Office of the Director, National Institutes of Health, *supra* note 16, at 75. (States that 2.7% of black women were estimated to have used crack cocaine in their lifetimes, versus 1.2% of white women); U.S. Sentencing Commission, 2000 Datafile; Federal Cocaine Offenses: An Analysis of Crack and Powder Penalties, U.S. Department of Justice, 19 March 2002. *available at* http://www.usdoj.gov/olp/cocaine.pdf (Shows that blacks comprise 85% of federal crack cocaine convictions).

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179 Allison A. Cornelius, *Civil Forfeiture Under 21 U.S.C. S 888(A)(7): The Problem of the Innocent Owner Spouse*, 39 Vill. L. Rev. 1351, 1362 (1994)

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181 An "innocent owner" defense is an argument defendants in civil asset forfeiture cases can make that they were unaware of the criminal activity happening regarding their assets. Section 881(a)(7) of title 21 U.S.C., dealing with the forfeiture of real estate for violations of the drug laws, has an 'innocent owner defense' governing forfeiture of conveyances for drug violations: "[N]o prop-

erty shall be forfeited ... to the extent of an interest of an owner, by reasons of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."

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187 The House Judiciary Subcommittee on Crime defined major and serious traffickers as follows: major traffickers: "the manufacturers or the heads of organizations who are responsible for creating and delivering very large quantities (ten-year minimum);" serious traffickers: "the managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack cocaine into vials . . . and doing so in substantial street quantities (five-year minimum)." United States Sentencing Commission, Report on Cocaine and Federal Sentencing Policy (Feb. 1995)

188 Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System United States Sentencing Commission (August 1991)

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190 "In particular, for each of the past three years, the safety valve has applied in over 40 percent of the cases otherwise subject to a five year mandatory minimum, and to about 30 percent of those otherwise subject to a ten year mandatory minimum." Statement of John R. Steer, Member and Vice Chair of the United States Sentencing Commission Before the House Governmental Reform Subcommittee on Criminal Justice, Drug Policy and Human Resources May 11, 2000. *available at* http://www.ussc.gov/hearings/steer51100tes.htm

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192 In setting the sentencing range for drug offenses, the Sentencing Commission began by adopting the five- and ten-year mandatory minimum sentences set out in the 1986 Anti-Drug Abuse Act, and the quantities associated with these mandatory minimum sentences, as reference points. Using the above two reference points, the offense guidelines were expanded proportionately in two-level increments, upward and downward, to address trafficking in larger and smaller quantities of crack and powder cocaine. The 100-to-1 quantity ratio was maintained throughout the offense levels. United States Sentencing Commission, Report on Cocaine and Federal Sentencing Policy (Feb. 1995).

193 Christopher Alexander, *Crushing Equality: Gender Equal Sentencing in America*, 6 Am. U. J. Gender & Law 199 (1997); *see, e.g.*, United States v. Pozzy, 902 F.2d 133, 139 (1990); Symposium: *Gender Issues and the Criminal Law: The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. Crim. L. & Criminology 198 (1995).

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211 Importantly, the U.S. Sentencing Commission has published Commission opinions stating that courts should look for alternatives to incarceration for a variety of crimes, and attacking the crack-powder sentencing disparity in federal law. Whereas prior to Booker courts could not give weight to these statements by the Commission, courts can now use these opinions as a basis for refusing to sentence drug defendants, particularly crack defendants, within the Guidelines range. The Commission's views have authoritative weight on their own and can be plugged into one or more of the seven sentencing factors of 3553(a).

212 See e.g. *U.S. v. Hughes*, No. 03-4172 (4th Cir. January 24, 2005) "In the wake of *Booker*, therefore, the discretion of a sentencing court is no longer bound by the range prescribed by the guidelines. Consistent with the remedial scheme set forth in *Booker*, a district court shall first calculate (after making the appropriate findings of fact) the range prescribed by the guidelines. Then, the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in § 3553(a) before imposing the sentence. The Booker Court concluded that this remedial scheme should apply not only to those defendants, like Booker, whose sentences had been imposed in violation of the Sixth Amendment, but also to those defendants, like *Fanfan*, who had been sentenced under the mandatory regime without suffering a constitutional violation. See also *U.S. v. Ranum*, 04-CR-31, (E.D. Wisc. Jan. 14. 2005) interpreting Booker the court said: The directives of Booker and § 3553(a) make clear that courts may no longer uncritically apply the guidelines and, as one court suggested, "only depart . . . in unusual cases for clearly identified and persuasive reasons." *United States v. Wilson*, Case No. 2:03-CR-0082, 2005 WL 78552, at *1 (D. Utah Jan. 13, 2005). The approach espoused in *Wilson* is inconsistent with the holdings of the merits majority in *Booker*, rejecting mandatory guideline sentences based on judicial fact-finding, and the remedial majority in *Booker*, directing courts to consider all of the § 3353(a) factors, many of which the guidelines either reject or ignore.

213 *See U.S. v. Barkley*, 04-CR-119-H (N.D. Oklahoma, Jan. 24, 2005) in which the Court found as follows: (i) under *Booker*, the Sixth Amendment rights set forth in Blakely apply to the Guidelines; (ii) pursuant to the discretion granted in Booker, courts may constitutionally apply the Guidelines if the manner of application fully protects the Sixth Amendment rights articulated in *Blakely*; (iii) law, policy, and common sense dictate that this Court should exercise its discretion by strictly applying in all cases the Guidelines, modified to satisfy *Blakely*. (emphasis added).

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BREAK THE CHAINS
Communities of Color and the War on Drugs

Break the Chains: Communities of Color and the War on Drugs (BTC) aims to help build a national movement within communities of color against punitive drug policies, with the ultimate goal of enacting alternative policies that promote racial justice, public health and human rights.

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