Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy

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BEATEN BY THE SYSTEM AND DOWN FOR THE COUNT: WHY POOR WOMEN OF COLOR AND CHILDREN DON'T STAND A CHANCE AGAINST U.S. DRUG-SENTENCING POLICY

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I. INTRODUCTION

The “war on drugs” has become a war on poor women of color and their children, as African-American mothers and Latinas account for the fastest-growing segment of the female prison population. A number of factors have contributed to this phenomenon, including the impact of poverty and domestic violence on a woman’s “decision” to participate in drug-related crime, the application of seemingly gender-neutral drug conspiracy laws, and racialized drug war policies that disparately impact poor women of color suspected of crack-cocaine use. These competing drug war policies serve to diminish poor women’s ability to keep their fragile families intact and prevent serious attention from being paid to the underlying circum-


3. See generally Raeder, supra n. 1.

4. See Dorothy Roberts, Killing the Black Body: Race, Reproduction, and the Meaning of Liberty ch. 4 (Pantheon Books 1997); see also Chesney-Lind, Female Offender, supra n. 1, at 147 (discussing that the increase in the female prison population is largely due to the “war on drugs”). See also generally Mauer et al., supra n. 1; Haneefah A. Jackson, Student Author, When Love is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot be Justified by Retributive Principles, 46 Howard L.J. 517 (2003).
stances that lead to women’s involvement in drug-related activity. Such
underlying circumstances include relatively low levels of educational at­
tainment, higher rates of depression and other mental illnesses, high rates of
unemployment and underemployment, high rates of abuse, and high rates
of single motherhood prior to incarceration for poor women of color. These and other underlying circumstances contribute to women’s
participation in drug-related crime as a mechanism for survival, as well as
to some women’s propensity to use drugs as a means of self-medicating.
As drug-sentencing statutes were intentionally designed to portray gen­
der-neutrality, the law generally does not see these underlying circumstances as
being worthy of consideration by sentencing judges as mitigating factors in
drug-related cases; thus producing a disparate impact for poor women of
color involved in the criminal justice system.

5. See Gaskins, supra n. 2, at 1533.
6. See Greenfeld & Snell, supra n. 1, at 7 (showing that 37 percent of women in state prison
and 19 percent of women in federal prison had less than a high school diploma).
7. Id. (showing 23 percent of women in state prisons were receiving medication for an
emotional disorder); see also Eric Dearing, Beck Taylor & Kathleen McCartney, Implications of
Family Dynamics for Women’s Depressive Symptoms During the First 3 Years After Childbirth,
sion for low-income women).
8. See Greenfeld & Snell, supra n. 1, at 8 (showing that 37 percent of women in state
prisons had incomes of under $600 per month. Also showing that 30 percent of women, compared
with 8 percent of men, received public benefits immediately prior to incarceration).
9. Id. (showing that 57 percent of women in state prison had been abused at some point in
their lives).
10. Id. (showing that 65 percent of women in state prison and 59 percent of women in federal
prison were the mothers of young children. Forty-seven percent of women in state prison and 34
percent of women in federal prison had never married). These statistics lead me to conclude that
the relatively low rate of marriage, compared with the high rate of motherhood meant that the
majority of incarcerated women with children are single mothers.
11. Id. (showing that 48 percent of women in state prisons and 35 percent of women in federal
prisons are African-American. Additionally, 15 percent of women in state prisons and 32
percent of women in federal prisons are Latina.). I concluded that poor women of color are dispro­
portionately represented in all of the preceding categories because of their disproportionate repre­
sentation in state and federal prison populations.
12. See generally Myrna S. Raeder, A Primer on Gender-Related Issues that Affect Female
Offenders, 20 SPG Crim. Just. 4 (2005); see also Myrna S. Raeder, Remember the Family: Seven
Invisible Punishment, supra n. 1, at 138 (“[D]rug sales and other nonviolent crimes are ‘survival
cri mes’ committed by women to earn money, to feed a drug-dependant life, and to escape both
terrorizing intimate relationships and brutal social conditions.”); Brenda Miller, W. Downs & K.
Joyce, Victimization of Drug Women (March 1993) (paper presented in the Netherlands at the
Fourth International Conference on the Reduction of Drug-Related Harm); see also Gail B.
Ladwig & Marcia D. Andersen, Substance Abuse in Women: Relationship between Chemical De­
dependency of Women and Past Reports of Physical and/or Sexual Abuse, in Violence Against Wo­
men: Nursing Research, Education, and Practice Issues (Carolyn M. Sampselle ed., Hemisphere
Publg. Corp. 1992); see also generally Gaskins, supra n. 2.
13. See Mauer et al., supra n. 1; see also Myrna S. Raeder, The Forgotten Offender: The
Effect of the Sentencing Guidelines and Mandatory Minimums on Women and their Children, 8
Statutes calling for incarceration of pregnant women suspected of crack-cocaine use serve to reinforce socioeconomic and racial inequalities within the "war on drugs" and have intensified problems surrounding access to adequate prenatal care for poor women of color. Women who are found to have used crack-cocaine while pregnant risk being incarcerated for the duration of their pregnancies and having their parental rights terminated after giving birth to their children. While incarcerated, these women face dangerous collateral consequences such as being shackled before, during, and after giving birth, as well as subsequent rapid separation from their newborns.

When poor African-American and Latina mothers are incarcerated, their children are usually left parentless, due to both high rates of single motherhood and soaring parallel rates of incarceration of African-American and Latino fathers. The children of incarcerated mothers are then forced to live with aging grandparents or relatives facing financial distress, or are funneled into state foster care systems at disproportionate rates. While in foster care, these children may face sibling separation, constant mobility, physical and sexual abuse, and emotional and psychological harm stemming from both maternal separation and the trauma of having a parent in prison. Recent reports have detailed the systematic breakdown of state foster care systems and disturbing rates of physical and sexual abuse occurring in foster homes across the country, making this a potentially dangerous option for children of incarcerated mothers. The enactment of federal leg-

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14. See Roberts, supra n. 4, at ch. 4. Media hype surrounding the purported prevalence of "crack-babies" being born to poor women of color contributed to the public's misperception of the effects of crack-cocaine exposure on newborns. Prevalent public misperception also contributes to broad public support of policy initiatives that have the effect of subverting the civil liberties and civil rights of poor women who use crack-cocaine while pregnant.

15. See Lynn M. Paltrow, Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs, 8 DePaul J. Health Care L. 461 (2005).

16. See infra Section II.C.1.

17. Greenfeld & Snell, supra n. 1, at 7 (showing that black and Latino men face disproportionately high rates of incarceration due primarily to convictions for drug-related crimes).


19. See generally Bloom & Steinhardt, supra n. 10; Children of Incarcerated Parents, supra n. 18.

20. See generally Lifting the Veil, A Critical Look at the Foster Care System: How Widespread a Problem? http://liftingtheveil.org/foster04.htm (accessed Sept. 10, 2006) (showing widespread patterns of abuse and cover-ups in different state foster care systems and describing a class action lawsuit filed in the state of Arizona on behalf of foster children who were allegedly abused while in foster care). Five hundred of about four thousand foster children allegedly suffered sexual abuse while under the protection of the state in Arizona. Lawsuits filed by the Children's Rights
islation such as the Adoption and Safe Families Act of 1997 ("ASFA"), which provides states with financial incentives to hasten the process for termination of parental rights, makes it highly unlikely that incarcerated mothers and their children will be reunified, even after mothers have completed lengthy prison terms.

After mothers have served time in prison, harsh federal legislation meant to punish those convicted of drug offenses systematically prevents their successful reentry into society and denies them access to benefits that are essential to providing continuous support for their children. Such collateral consequences of drug convictions include the denial of federal financial aid, lifetime bans on public housing program participation, and denial of public benefits such as Temporary Assistance to Needy Families ("TANF") and food stamps. These misguided initiatives meant to combat the "war on drugs" serve to perpetually punish poor women long after their release from prison, and open the door to higher rates of recidivism and repeat drug offenses for these women.

This Article argues that current drug-sentencing laws and policies disparately impact poor women of color. I illustrate this disparate impact in three distinct ways. First, I show how the "war on drugs" disparately impacts women of color who are peripherally involved in drug-trafficking activity. I highlight the story of Kemba Smith, a young African-American mother who was sentenced to 24.5 years in prison for tangential involvement in drug-trafficking activity and was subsequently granted executive clemency by President Clinton in 2000. Though Kemba was from a middle-class background, her experience of navigating through the criminal Project have been brought on behalf of abused foster children against state systems in Connecticut, Kansas, Louisiana, and New Mexico, and the cities of Milwaukee, New York City, Louisville, and Kansas City. Id.

22. Although the intended purpose of the Adoption and Safe Families Act was to reduce incidences of "foster care drift," the Act has exacerbated the situation for children of color, as they are less likely to be adopted as they grow older in foster care. In circumstances where parental termination has occurred, these children may be unable to return to their mothers once their mothers are released from prison.
26. Further, these initiatives allow those who are convicted of more serious crimes such as rape, murder, and kidnapping, to continue to enjoy public offerings, assuming they have not also been convicted of violating drug-trafficking laws.
27. Interview with Kemba Smith (Mar. 31, 2006) [hereinafter Interview]. Kemba Smith and I sat down to discuss her experiences following our appearances on a panel at the University of St. Thomas School of Law Spring Symposium entitled, "Exploring Alternatives to the Incarceration Crisis."
justice system as a low-level, nonviolent mother facing incarceration clearly illustrates how our misguided "war on drugs" dismantles families and promotes female incarceration.28

Second, I show how racially-charged drug enforcement policies impact poor women of color and children. Namely, I focus on the disparate impact that occurs when drugs known to be used by poor women of color, such as crack-cocaine, become the focus of law enforcement policies that target pregnant women who use drugs.29 I also show how ASFA, along with misguided child protection policies, thwarts attempts at familial reunification and opens the door to long-term placements in the foster care system for poor children of color.30 Lastly, I describe how federal legislation such as welfare reform, lifetime bans on public housing program participation, and denial of federal financial aid to persons convicted of drug offenses serves to bolster the rate of recidivism and ensnares poor women of color and children in a perpetual cycle of crippling poverty and incarceration.31

II. CASE OF KEMBA SMITH AS A PARADIGM OF PROBLEMS WITHIN THE "WAR ON DRUGS"

In the mid-1980s, Congress initiated an unduly harsh approach to addressing the so-called "exploding" drug problem within the United States by creating a mandatory minimum sentencing scheme and federal sentencing guidelines that called for severe criminal penalties for those convicted of violating drug-trafficking laws.32 Although the purpose of the drug-sentencing statutes was to provide lengthy prison terms for drug kingpins and other high-level dealers, the laws have had a disparate impact on persons who fall far outside those categories. Thousands of low-level, nonviolent women are serving lengthy prison terms for peripheral involvement in drug-related activity under the drug-sentencing statutes.33 Kemba Smith was one of those women.

28. Interview, supra n. 27.
29. See Roberts, supra n. 4.
31. See infra, Section IV.
33. See Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (established mandatory minimum penalties for crimes involving drugs and firearms). Although mandatory minimums apply in other situations, crimes involving drugs and firearms account for over 90 percent of all mandatory minimum convictions. Most commonly applied mandatory minimums carry sentence terms ranging from 5, 10, 20 years or life imprisonment. See also Chesney-Lind, Imprisoning Women, supra
Kemba Smith’s case illustrates how young women who become involved with men who sell drugs are easy targets for prosecution and incarceration under drug-sentencing statutes, regardless of the scope of their actual level of involvement in drug-trafficking activity. Like Kemba Smith, many of these women are, at most, guilty by association as a result of their connection to men who sell drugs, and are not in fact high-level dealers. Unfortunately, the application of sentencing laws seemingly does not support this distinction. In spite of an abundance of anecdotal evidence that supports the notion that women are facing disproportionate terms of imprisonment relative to their level of involvement in drug-trafficking rings, the situation persists and will continue to get worse unless and until the law changes.

Once women are locked into the system, it is virtually impossible for them to disengage. This happens because of the built-in, though often hidden, presumptions that women who are charged with violating drug-trafficking laws are actually guilty before being proven innocent. This presumption arguably results in prosecutors’ unwillingness to drop conspiracy charges and assess each woman’s case in a holistic fashion with corresponding sentencing recommendations where appropriate. Instead, prosecutors charge women as part of drug-trafficking conspiracies where their “street-knowledge capital,” safety, and loyalty to intimate partners are viewed as bargaining chips by prosecutors in exchange for a reduction in sentence length. When women, as in the case of Kemba Smith, fall short of prosecutors’ expectations, they may face lengthy terms of imprisonment and additional collateral consequences, to boot.

A. Kemba the Kingpin and Mandatory Minimums

The case of Kemba Smith provides a distressing paradigm of the problems that exist within the war on drugs when defendants’ gender and level of culpability are disregarded by prosecutors and the judiciary in drug-related cases. When Kemba was just a 19-year-old college student, she be-

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n. 1, at 80 (showing that the number of incarcerated women grew from 12,000 in 1980 to over 90,000 by 1999).

34. See Richie, supra n. 12, at 138 (discussing the idea that women are peripherally involved in drug-related crimes as a means of survival); see also e.g. Phyllis Goldfarb, Counting the Drug War’s Female Casualties, 6 J. Gender Race & Just. 277, 284–85 (2002).

35. See e.g. Goldfarb, supra n. 34, at 284–85 (discussing examples of several women who were incarcerated for peripheral involvement in drug-trafficking activity).

36. I coined this term to explain the abundance of information that people gain while living and working in marginalized communities. “Street-knowledge capital” also encompasses having intimate knowledge of the rules of the street and the ability to capitalize from that knowledge as a means of survival. In marginalized communities, having an abundance of “street-knowledge capital” means having credibility with residents of the community, which may also guarantee safety and protection for those who use this capital wisely.
came involved with Peter Hall, a notorious drug kingpin.\textsuperscript{37} Although Kemba was aware that Hall was a drug dealer, she was both in love with him and afraid to leave him for fear of physical harm.\textsuperscript{38} Kemba’s fear of Hall was justified as she had been severely beaten by Hall on several occasions and sought medical attention more than once as a result of Hall’s abusive actions toward her.\textsuperscript{39} Fearing further abuse and out of love for Hall, Kemba became peripherally involved in Hall’s drug-trafficking activities.\textsuperscript{40} Although Kemba never sold, distributed, or manufactured drugs, she would perform tangential acts such as providing transportation for Hall or taking phone messages from cohorts on his behalf.\textsuperscript{41}

\textsuperscript{37} See e.g. Goldfarb, supra n. 34, at 284-85; Kemba Smith Found., \textit{Kemba’s Story}, http://www.kembasmithfoundation.org/foundation.html (accessed Sept. 17, 2006) [hereinafter \textit{Kemba’s Story}].

\textsuperscript{38} Interview, supra n. 27.

\textsuperscript{39} Id.

\textsuperscript{40} A highly relevant, yet often ignored, fact in determining criminal culpability in drug-trafficking cases is that many women experience high rates of sexual and physical abuse prior to their incarceration at the hands of male intimates. See generally Patricia Tjaden & Nancy Thoennes, \textit{Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women}, http://www.ncjrs.org/txtfiles/1nij/183781.txt (accessed Sept. 9, 2006); see also Marc Mauer & Meda Chesney-Lind, \textit{Introduction}, in \textit{Invisible Punishment}, supra n. 1. This sustained abuse likely had an effect on the emotional stability and autonomy of women involved in such situations. See Greenfeld & Snell, supra n. 1, at tbl. 20 (showing 44 percent of women under correctional authority reported that they were physically or sexually assaulted at some time during their lives. Further, 69 percent of women reporting an assault said that the abuse occurred before age 18). See also Miller et al., supra n. 12; Ladwig & Andersen, supra n. 12. As an attorney who has worked extensively in the area of domestic abuse, I have seen countless numbers of women who suffered physical and sexual abuse as children and subsequently connected with partners who were also abusive. See generally Tjaden & Thoennes, supra n. 40 (showing that over 50 percent of all women surveyed were abused as a child by an adult caretaker). Although domestic abuse of women is prevalent in our society and cuts across racial and socioeconomic lines, the criminal justice system strives to treat men and women equally by downplaying the impact of abuse on female offenders. See id.; see also Jimmie Briggs & Marcia D. Davis, \textit{Domestic Violence: The Brutal Truth}, in \textit{The Best of \textit{Emerge} Magazine} 391 (George E. Curry ed., Ballentine Books 2003). By failing to take into account the role of domestic abuse in determining levels of criminal culpability, the legal system causes women to suffer disparately when compared to men. One of the reasons that women face such adversity is the fact that domestic abuse is still an emerging area within the legal system. \textit{Violence Against Women Act of 1994}, Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in sections of 8, 16, 18, 28, and 42 U.S.C.). VAWA has only been in existence for a little over ten years, even though domestic abuse has been a prevalent, though hidden, problem within our society for decades. Civil remedies, such as Orders for Protection and criminal liability for domestic assaults, have only been permitted in the last twenty years or so—and with no shortage of controversy to boot. See Nina W. Tarr, \textit{Civil Orders for Protection: Freedom or Entrapment?} 11 Wash. U. J.L. & Policy 157 (2003). As a result of divergent views among prosecutors, domestic abuse proponents, lawmakers, and law enforcement agencies, there is no true consensus on the appropriate weight that evidence of past abuse should be given in criminal proceedings. Cheryl Hanna, \textit{No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions}, 109 Harv. L. Rev. 1849 (1996).

Once law enforcement officials began closing in on Hall, a pregnant and frightened Kemba reluctantly agreed to cooperate with the FBI in capturing him. Before Kemba could offer any assistance, however, Hall was murdered. Since the government no longer had Hall to prosecute, they opted to charge Kemba, who was then seven months pregnant, as part of Hall’s drug-conspiracy ring. Although the government admitted that there was no direct evidence connecting Kemba as a drug trafficker, she was charged with intent to distribute 255 kilos of crack-cocaine, which was the total amount of drugs the government believed Hall’s drug ring to have trafficked over the years.

Kemba, like most women facing drug-trafficking charges, pleaded guilty and was sentenced to a mandatory minimum term of 24.5 years in prison, without the possibility of parole. As a result of President Clinton’s decision to grant Kemba executive clemency in 2000, she was released from federal prison after serving a total of six years.

B. Prosecutors as Gatekeepers to Freedom for Defendants

1. Conspiracy Charges and the Catch-22

One of the most unsettling aspects of Kemba’s case involves the prosecution’s decision to charge Kemba as part of a drug conspiracy ring, even though her involvement in drug-trafficking was minimal at worst. Kemba, as a result of her association with Hall, was held accountable for all of the drugs that were sold by Hall and other members of the drug-trafficking ring. Even though prosecutors involved in Kemba’s case admitted that she did

42. Bad Choice of a Boyfriend, supra n. 41, at http://www.hr95.org/smith,k.htm.
43. Id.
44. Id.
45. At least some of the drugs were trafficked by Hall a full two years prior to meeting Kemba. Interview, supra n. 27.
46. Id.
47. Id. “On December 23, 2000, President Clinton commuted Smith’s sentence, and she was released after serving six years.” Kemba’s family had the means and the clout to enlist various legal and social justice organizations that lobbied against mandatory minimums and for Kemba’s freedom from incarceration. In some ways, Kemba’s experience in the criminal justice system has become a blessing in disguise. Since her release from prison, Kemba has become an advocate and spokeswoman on behalf of incarcerated women and their children. She has lectured to high school students, members of the legal profession, and civil rights advocates on issues stemming from the “war on drugs” and her involvement in the criminal justice system. She is now a first year law student at Howard University, and hopes to enter the legal profession to make changes for the better. Based upon her involvement in the criminal justice system, and for the sake of other women who remain behind bars, Kemba would like to see mandatory minimums repealed. Kemba’s presence in the legal profession is sorely needed as there are currently too few attorneys and policy-makers focused on the injustices resulting from mandatory minimums, the sentencing guidelines, and the “war on drugs.”
48. At worst, Kemba was guilty by association, largely resulting from her romantic relationship with Hall. Because Kemba made the mistake of connecting with a man who sold drugs, she was at risk of spending nearly a quarter century behind bars, even in light of her status as a young, expectant mother.
not actually manufacture, traffic, or distribute drugs, she was still sentenced as though she was the equivalent of a drug kingpin, receiving a 24.5 year sentence.\textsuperscript{49}

Unfortunately, Kemba's case is not an anomaly, as numerous other similarly-situated women are behind bars due to prosecutors' decisions to charge them as part of drug-conspiracy rings.\textsuperscript{50} This decision is no accident, as the system was specifically structured to allow prosecutors to have a great deal of discretion, while simultaneously diminishing the discretion of sentencing judges.\textsuperscript{51} Once discretion was shifted from judges to prosecutors under the sentencing laws, prosecutors in a sense, became equal to or even more powerful than judges and juries because of their roles as primary decision-makers in the early (and often most critical) stages of drug-trafficking cases.\textsuperscript{52}

When prosecutors receive a drug-trafficking case, they may charge all participants—from the girlfriend of the low-level dealer to the chief operator—as part of a drug conspiracy; they are all seen as being equally culpable in a drug-trafficking ring.\textsuperscript{53} Thus, the girlfriend of a low-level dealer might be facing the same number of years in prison as a high-level dealer or kingpin.\textsuperscript{54} The primary purpose of holding all alleged co-conspirators equally liable in a drug-trafficking ring is to force co-defendants to "snitch" on each other and cooperate with prosecutors in exchange for a sentence reduction.\textsuperscript{55} This stealth weapon placed by the legislature into prosecutors' hands arguably results in more women becoming casualties in the "war on drugs," as they are often sentenced to lengthy prison terms that are grossly disproportionate to their level of involvement in drug-related crime.\textsuperscript{56} This disparity occurs because women are often only peripherally involved in

\textsuperscript{49} See e.g. Goldfarb, supra n. 34, at 284–85; Kemba's Story, supra n. 37.

\textsuperscript{50} See Goldfarb, supra n. 34, at 284–85; see also Raeder, supra n. 1, at 977–78.


\textsuperscript{53} Raeder, supra, n. 1.

\textsuperscript{54} Id.

\textsuperscript{55} See Levy-Pounds, supra n. 52; see also 18 U.S.C. § 3553(e) (2000) and U.S. Sentencing Guidelines Manual § 5K1.1 (Westlaw as amended on June 1, 2006) [hereinafter Sentencing Guidelines], which give the sentencing court the authority to grant a downward departure upon motion of the prosecutor showing that the defendant provided substantial information and cooperation in the case. For a discussion of applicability and scope of the "substantial assistance" provision see text in U.S. v. La Guardia, 902 F.2d 1010, 1012 (1st Cir. 1990); see also Raeder, supra n. 1, at 977–78.

When prosecutors opt to charge women as part of drug-conspiracy rings, they are effectively creating a system that fails to adequately acknowledge the limits of women’s involvement in criminal drug enterprises and ultimately has the effect of punishing women for falling in love with male intimates who sell drugs.58 This is exacerbated by the fact that in most drug-trafficking cases, circumstantial evidence is the only form of evidence necessary to prove criminal involvement in a conspiracy.59 As a result, co-defendants may offer testimony against women who perform minor tasks at the direction of male intimates. Because of the conspiracy charges, activities of the entire drug ring may be imputed to these women, without regard for their actual level of criminal culpability. Conversely, high-level dealers are able to benefit most frequently from prosecutorial charging decisions because of the wealth of information they have gained about subordinates while operating drug-trafficking rings.60 Having the ability to charge co-defendants as part of a drug-conspiracy ring works marvelously for prosecutors, as 95 percent of these cases result in guilty pleas.61

2. “Substantial Assistance” and “the Girlfriend Problem”

One of the limited ways in which women may potentially escape lengthy prison terms depends on whether they are able or willing to cooperate with prosecutors by providing “substantial assistance.”62 Under the “substantial assistance” provision, women are given the choice of admitting all they know about their partners’ involvement in drug-trafficking activity in exchange for a reduction in sentence length.63 During Kemba Smith’s negotiations with federal prosecutors, she was offered a sentence length reduction in exchange for providing substantial information pertaining to Peter Hall’s drug-trafficking ring.64 Because Kemba was only peripherally involved in

57. Raeder, supra n. 1, at 984.
60. See generally Gaskins, supra n. 2.
62. See Sentencing Guidelines, supra n. 52. The “substantial assistance” provision allows prosecutors the ability to make motions for downward departures on behalf of defendants deemed to have provided substantial information to prosecutors. 18 U.S.C. § 3553(e).
63. Id.
64. Interview, supra n. 27.
Peter’s activities, she had very little information to offer prosecutors. The information that Kemba was able to offer was deemed to be unreliable by prosecutors and was not substantial enough for Kemba to receive a “substantial assistance” downward departure.

From a distance, providing information to prosecutors in exchange for a sentence reduction seems like a fair choice for women facing lengthy prison terms. However, for many poor women of color, the situation is far more complex. For one, these women are torn between their desire to remain free from incarceration and their love for their partners, who are often providers for their families and the fathers of their children. Because prosecutors fail to acknowledge or address the intense emotional connection that women may have with their male intimates, these women face a disparate impact when they fail to cooperate with prosecutors.

For those women who are faced with a choice of going to prison or becoming government informants, some opt to withhold what little information they have from prosecutors even if it means serving time in prison. Kemba Smith coined the term “the girlfriend problem,” to describe this situation. In essence, “the girlfriend problem” exists when women—even when the carrot of a reduced sentence is dangled before them by prosecutors in exchange for offering information about male intimates—choose to remain silent and loyal to their partners.

Ironically, the loyalty that many women feel to their male intimates with whom they participate in drug conspiracies is a significant reason why women do not uniformly jump at the chance of receiving a break in exchange for betraying a trust. This reality hits hardest women whose intimates deal drugs from the home . . . families can be isolated from crime committed by males in a business or public setting, but not from drug dealing at home. To be crime free, the woman in this situation must be willing to leave the male who is often the father of her children. If not, the socialization that leads her to facilitate his criminal activity by answering the phone, taking packages, or counting money

65. Id.
66. Id.
67. Raeder, supra n. 1; see also Michelle S. Jacobs, Piercing the Prison Uniform of Invisibility for Black Female Inmates, 94 J. Crim. L. & Criminology 795, 807–11 (2004) (showing that women of color face “gender entrapment” due to their perceived need to be loyal to black men and the black race in general, often stemming from external racial considerations); Girls Interrupted, Vibe Vixen (Summer 2006) (showing that African-American women may choose to remain loyal to their partners even if it means facing time in prison and discussing how hip-hop culture influences choices that African-American women make when involved with men who sell drugs) [hereinafter Girls Interrupted].
68. Girls Interrupted, supra n. 67.
69. Raeder, Remember the Family, supra n. 12, at 254.
70. Interview, supra n. 27.
71. Raeder, Remember the Family, supra n. 12, at 254.
also inhibits her from willingly disclosing his crimes to the authorities.\textsuperscript{72}

As illustrated above, many women see cooperating with authorities as the ultimate form of betrayal in a relationship. This is especially so if the male involved in drug-related activity is the woman's husband or significant other, or the father of the woman's children. She may not see her potential freedom from incarceration as being worth abandoning the principles of family life and stability, even if her view of those structures differs widely from the view of mainstream Americans.\textsuperscript{73}

A second reason that many women may fail to meet the high threshold of providing "substantial assistance" to prosecutors results from their often low-level status in drug-trafficking rings.\textsuperscript{74} Because of their low-level status, women may not have sufficient access to information regarding the sale, manufacture, or production of drugs. These women may know only what they have observed in connection with the activities of their male intimates who may hold low-level positions in drug-trafficking rings.\textsuperscript{75} Because their information may not reach the upper echelon of a drug-trafficking ring, prosecutors may not be inclined to present a downward departure motion on behalf of these women.\textsuperscript{76} As a result, women may be sentenced to serve an even longer sentence than high-level dealers who are able to provide substantial assistance based upon their intimate knowledge of drug-trafficking activity and all the key players in the drug-trafficking ring.\textsuperscript{77}

A third reason why women may fail to cooperate with prosecutors, which is significant and yet has been largely ignored in the literature, surrounds women's personal safety and the safety of their families if they "snitch" on male co-defendants. Many of the women facing incarceration on drug charges live in marginalized communities with underground rules

\textsuperscript{72} Id.

\textsuperscript{73} Id. The love and intimate connection that many of these women have with regard to their male intimates prevents their willingness to cooperate with prosecutors in such circumstances and increases the likelihood that these women will serve prison terms that are disproportionate to their level of involvement.

\textsuperscript{74} Jane L. Froyd, Student Author, Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines, 94 Nw. U. L. Rev. 1471, 1494–95 (2000). Prosecutors, due to their inordinate levels of discretion, have the sole ability to decide whether a woman has offered enough "substantial assistance." Thus, if a woman agrees to cooperate and tells everything she knows about the drug-trafficking ring, the information she provides may not be enough to please prosecutors, and she may still serve a lengthy prison term. That is precisely what happened to Kemba Smith.

\textsuperscript{75} Id.

\textsuperscript{76} Id. In instances in which a woman is involved with a high-level dealer, it is possible that she may have observed more activity and thus may have a great deal of information to provide prosecutors in exchange for a sentence reduction. However, if a woman is involved with a low-level dealer, she, like her male intimate, may have little or no substantial information to provide prosecutors.

\textsuperscript{77} Id.
prohibiting cooperation with authorities. Women who choose to sacrifice their "street-knowledge capital" in an effort to escape incarceration by cooperating with prosecutors risk the possibility of being harmed or even killed by others connected to drug-trafficking rings. Aside from placing their own lives in jeopardy by cooperating with authorities, these women may be concerned for the safety of their families. Since many of these women likely have poor family members that live in the same communities, they may choose to conceal what information they have so as not to disrupt the lives of their children and extended family members by putting them at risk of harm. In effect, the unwillingness of these women to cooperate means that their families may remain free from harm in their communities. Although the "substantial assistance" provision sounds like a fair compromise on its face, as illustrated above, women are often unable or unwilling to benefit from its promises.

3. Ineffective Attempts at Correcting Wrongs: The Safety Valve Provision

In 1994, Congress attempted to remedy the disparate impact of drug-sentencing statutes on women who were peripherally involved in drug-trafficking activity by enacting the "safety valve provision." The safety valve provision was enacted in light of the acknowledged unfairness of mandatory sentencing statutes on low-level drug dealers, who were often being sentenced more severely than high-level dealers. The safety valve provision allows judges to waive the application of a mandatory minimum sentence and propose a sentence reduction in cases where a defendant meets specific criteria set by the legislature. The five specific criteria include: 1)
no prior criminal history; 2) no violence, credible threats of violence, or the use of a firearm; 3) no death or serious bodily injury; 4) the defendant must not be a leader or organizer of the drug ring; and 5) the defendant must provide truthful information to prosecutors pertaining to the activities of the drug-trafficking ring.\footnote{85} It is often difficult for women to meet every prong established under the safety valve provision. Some women, although nonviolent, may have prior criminal histories resulting from previous drug convictions or minor property crimes. Other women, for reasons illustrated above, may not have enough information regarding the activities of the drug-trafficking ring to provide to prosecutors or may not be willing to provide such information to prosecutors. As a result of the difficulty women face in meeting every prong established under the safety valve, they do not often qualify for relief under this provision.\footnote{86} In those circumstances in which women do not qualify for relief under the safety valve provision, they are sentenced under the purportedly gender-neutral drug conspiracy laws in which their peripheral role in drug-trafficking activity may be exaggerated by prosecutors.\footnote{87} As a result, these women may serve tens of years in prison, and because of gender-neutrality in sentencing, their roles as mothers of young children are often largely ignored.

C. \textit{From Giving Birth to Serving Time}

According to Bureau of Justice Statistics, as many as five percent of incarcerated women enter state prisons while pregnant.\footnote{88} Kemba Smith is no exception. Kemba negotiated with prosecutors to allow her to give birth to her baby in a hospital close to her home in Virginia.\footnote{89} Although this sounds like a reasonable arrangement, Kemba’s experience as a new mother was horrendous. Within minutes after giving birth to a healthy baby boy, DEA agents marched into Kemba’s hospital room, insisted that Kemba be handcuffed to her hospital bed and informed her parents that they had to leave the hospital immediately.\footnote{90} Fortunately, for Kemba and her family, a staff supervisor at the hospital insisted that it was in Kemba’s best interests and the best interests of her baby for her parents to remain at the hospital.\footnote{91} Although Kemba’s parents were forced to immediately leave her hospital room, they were allowed to remain in close proximity to Kemba’s room.

\begin{thebibliography}{99}
\footnote{85}{18 U.S.C. § 3553(f) (2005).}
\footnote{86}{See Froyd, supra n. 74, at 1496–99.}
\footnote{87}{See David Bjerk, Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing, 48 J.L. & Econ. 591, 596 (2005).}
\footnote{88}{See Greenfeld, supra n. 1.}
\footnote{89}{Interview, supra n. 27.}
\footnote{90}{Id.}
\footnote{91}{Id.}
\end{thebibliography}
having secured a room at the hospital that allowed for them to visit their new grandson and arrange for his temporary care, custody, and control.\(^\text{92}\)

Shortly after Kemba gave birth to her son, she and her newborn baby were separated.\(^\text{93}\) Kemba recalls the emotional torment that she felt when her baby was ripped from her arms and she was thrown in a cold jail cell with her breasts still filled with sustenance for her baby—nourishment that she would never have the opportunity to provide.\(^\text{94}\)

1. **Shackling Pregnant Inmates During Labor**

Although the treatment experienced by Kemba seems harsh and unreasonable, such situations encountered by pregnant women who are incarcerated are not atypical and, in some situations, are far worse than what Kemba experienced. Thousands of imprisoned women are forced to give birth under the most horrific conditions—many kept in shackles during labor.\(^\text{95}\)

It is difficult to imagine the rationale for forcing women to remain in shackles immediately before, during, and after giving birth; however, this practice is explicitly allowed in at least twenty-three states as well as by the Federal Bureau of Prisons and seemingly occurs with regularity in the U.S.\(^\text{96}\)

In March of 2006, the New York Times ran an article that focused on the common practice of shackling women during labor.\(^\text{97}\) The article discussed the idea that although there have been no known escape attempts by inmates who are in labor, this practice has continued, potentially placing both women and their children at great risk of harm or even death.\(^\text{98}\) The article also featured the story of Shawanna Nelson, a prisoner who had been

\(^{92}\) Id.

\(^{93}\) Id.

\(^{94}\) Id. Kemba remembers feeling emotionally upset and overwhelmed about not having the opportunity to bond with her son for a reasonable period of time following his birth. She recalls that law enforcement officers were indifferent to her plight and viewed her as a prisoner as opposed to a proud mother who had just given birth to a precious child. Fortunately, for Kemba and her son, Kemba was able to sign legal documents granting her parents temporary custody of her son. Had Kemba not been able or willing to transfer custody, it is highly probable that he would have ended up in the foster care system as a ward of the state. Kemba, unlike many women incarcerated in federal prison, was able to have relatively frequent contact with her son and parents. She was transferred to three different prisons during her incarceration. While she was incarcerated in Connecticut, her parents and son drove to visit her at least once a month for the first few years. Once visiting Kemba monthly became too expensive, Kemba’s family visited her every other month and spoke with her frequently on the telephone. She recalls that the family phone bills were several hundred dollars per month. Kemba’s incarceration caused a tremendous economic strain on Kemba’s family.

\(^{95}\) Adam Liptak, *Prisons Often Shackle Pregnant Inmates in Labor*, N.Y. Times A16 (Mar. 2, 2006) (available at 2006 WLNR 3550814) (citing to a report by Amnesty International and showing that only two states, California and Illinois, have laws on the books which explicitly forbid the shackling of pregnant inmates).

\(^{96}\) Id.

\(^{97}\) Id.

\(^{98}\) Id.
in labor in 2003 for twelve hours and whose legs had been shackled together all through labor.\textsuperscript{99} Ms. Nelson subsequently filed suit against prison officials as a result of the lasting effects of her experience while in labor.\textsuperscript{100} Ms. Nelson, who received no anesthesia while giving birth, endured injury to her sciatic nerve and suffered sustained back pain.\textsuperscript{101} One of the most disturbing elements of this case is the fact that Ms. Nelson was incarcerated for identity fraud and writing bad checks, relatively low-level, nonviolent offenses.\textsuperscript{102} Many of the women, who face similar circumstances as Ms. Nelson, are also incarcerated for involvement in low-level, nonviolent offenses, such as peripheral involvement in drug-related offenses.\textsuperscript{103} Regardless of whether these women are guilty of participating in criminal acts, the collateral consequences they face while pregnant are indefensible and represent an added element to their sentences—the violation of their civil rights and the rights of their innocent, newborn babies.

2. Separation of Mothers from their Newborns

As Kemba’s story illustrates, it is not uncommon for women to be separated from their newborns immediately after giving birth. The separation of women from their babies may have a deleterious emotional and psychological impact on both women and their infants, as their natural period for bonding is cruelly disrupted by prison officials and law enforcement officers.\textsuperscript{104} Unfortunately, this topic has not been given as much attention as

\begin{itemize}
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id.
  \item \textsuperscript{101} Id.
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} Br. of Amici Curiae Am. Pub. Health Assn. et al., \textit{Ferguson v. City of Charleston, SC}, 532 U.S. 67 (2001) (99-936) (available at 2000 WL 33647063). "Individual Petitioners were subjected to degrading, non-medical, wholly unnecessary and even dangerous handling by the police. Various of them were shackled to their hospital beds, arrested shortly before or immediately after giving birth, often while still dressed in hospital gowns and still suffering pain and bleeding from the childbirth." Id. at 9.
  \item \textsuperscript{104} Interview, supra n. 27. Kemba recalls feeling depressed and emotionally upset after her son was removed from her care. She recalls one particular visit from her parents and son when he was just two days old. Kemba was emotionally upset because her parents arrived at the jail holding her baby, which reminded her that she would not have adequate contact with her son during her incarceration. For several months, Kemba could only see her baby through the glass due to prison rules that prohibited physical contact between prisoners and their visitors. It was not until Kemba’s son was five or six months old that she was allowed to touch him. After Kemba was released from prison, she recalls that her son would become jealous and distracted when he would see her holding other babies, primarily because Kemba did not have an opportunity to be with him when he was a baby. Until that point, Kemba had not been aware of the impact that her prolonged absence from her son’s life and her inability to bond with him as a baby had had on her son. As a result of the emotional distress they both endured, Kemba and her son sought therapy together. She believes the therapy helped to rebuild their relationship, but knows that she will never be able to share pivotal moments in the life of her son during his infancy and early childhood. \textit{Id.}; see also Sandra L. Martin, Haesook Kim, Lawrence L. Kupper, Robert E. Meyer & Melissa Hays, \textit{Is Incarceration During Pregnancy Associated with Infant Birthweight?}, 87 Am. J. Pub. Health 1526 (Sept. 1997) (** . . . [c]here is no consensus concerning the impact that incarceration has on their
needed by medical professionals and associations.\textsuperscript{105} There are conflicting reports in the literature that discuss whether there is any merit in allowing time for a mother and baby to bond after birth.\textsuperscript{106} Most of the discussion is centered on "normal" births where hospital staff separate mother and child for several hours following delivery.\textsuperscript{107} There is a dearth of discussion and research surrounding the impact of separating an incarcerated mother from her infant for a period of months, or even years.\textsuperscript{108} 

Sadly, only a small number of prisons across the country have devoted resources to allowing women to care for their children while incarcerated.\textsuperscript{109} This practice carries with it a great deal of controversy as opponents argue that prison is no place for children.\textsuperscript{110} Although that argument has merit, depending upon the conditions of the prison and access to resources, the alternatives of placement in broken foster care systems or with financially distressed relatives may be even more detrimental.\textsuperscript{111} In prison programs that cater to women and their children, the participants are at least given a place to sleep, food, and medical care—"luxuries that may not be readily available to poor women of color and children outside the walls of a prison."\textsuperscript{112}
III. DISPARATE TREATMENT FACED BY POOR WOMEN OF COLOR RESULTING FROM STEREOTYPES OF WOMEN WHO USE CRACK-COCaine

One of the most egregious effects of current drug-sentencing policy is the fact that it serves to reinforce both racial and socioeconomic inequities within the criminal justice system for women of color. Women of color face unique challenges under current drug-sentencing policy that cannot be ignored if justice is the ultimate goal. Although African-Americans constitute fewer than 13 percent of the U.S. population, African-American women comprise nearly 50 percent of state female prison populations and 35 percent of the federal prison population. The Bureau of Justice Statistics ("BJS") shows that black women were more than twice as likely as Latinas and four times as likely as white females to be in prison in 2004. Many of the women facing incarceration for peripheral involvement in drug-trafficking activity have been caught in a vicious cycle of generational poverty, inadequate access to resources, and chronic marginalization in poor, inner-city communities. According to the BJS, females facing incarceration had a relatively low level of educational attainment, were more likely to have experienced extreme poverty, and represented a greater percentage of those convicted of drug offenses. Another dismal distinction held by poor African-American women is the high rate of single motherhood.

114. See Robert A. Shearer, Identifying the Special Needs of Female Offenders, 67 Fed. Probation 46 (2003); see also Richie, supra n. 12, at 138. ("Drug sales and other nonviolent crimes are 'survival crimes' committed by women to earn money, to feed a drug dependant life, and to escape both terrifying intimate relationships and brutal social conditions.").
115. See Greenfeld & Snell, supra n. 1. African-American women represent over 40 percent of the women in our federal prisons. See also Juan F. Perea et al., Race and Races: Cases and Resources for a Diverse America (West Publg. 2000).
117. Though Kemba’s experience as a low-level, nonviolent mother caught in the "war on drugs" was incredibly egregious, there are still thousands upon thousands of incarcerated women facing similar circumstances. Kemba, however, can be distinguished from other similarly situated women in at least one significant way—Kemba was the product of a middle-class background and had a great deal of familial and community support before, during and after her incarceration.
118. Paula C. Johnson, At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing, 4 Am. U. J. Gender & L. 1, 36-41 (1995); see also Greenfeld & Snell, supra n. 1 (providing statistical information about incarcerated women).
One critical aspect of drug-sentencing policy that goes largely unrecognized, yet is connected to the cycle of poverty and abuse, is the fact that many of the women subjected to drug-sentencing statutes become involved with low-level dealers to support their own drug addictions. In essence, they are punished for being drug-users instead of receiving the necessary support and societal safeguards to help them overcome their habits. Two prime examples of the misguided way in which society treats poor women addicted to drugs are illustrated in the crack-cocaine “epidemic” of the last two decades and in the current focus on the “meth epidemic” in rural communities.

As crack-cocaine became readily available in poor communities of color during the mid-1980s, a small percentage of poor women of color began using the drug. Although there is negligible evidence supporting a pharmacological distinction between crack and powder cocaine, users of the two forms of cocaine are treated disparately by the legislature, presumably based upon users’ external characteristics and socio-economic status. Women of color who use crack-cocaine have been labeled with derogatory terms ranging from “crack-heads” to “crack-whores,” and are largely seen as being incapable of caring for their children and undeserving of entering the sanctity of motherhood. Whites who abuse substances, on the other hand, are arguably viewed as recreational drug-users who pose no real threat to society or taxpayer dollars. As a result of the disparate view of poor women of color who use crack-cocaine, mainstream Americans have generally supported the enactment of policy measures and laws that focus on punishing women for their drug addictions and dismantling poor, fragile families in the process.

A. Punishing Pregnant Women Who Use Crack-Cocaine through Public Policy Initiatives

During the late 1980s to the early 1990s, as the “war on drugs” was gaining public support and increased funding to boot, mass media outlets and law enforcement agents staged an attack on pregnant black women suspected of crack-cocaine use. Pregnant women of color who used crack-

119. See generally Raeder, Remember the Family, supra n. 12; see also generally Richie, supra n. 12.
120. It is not surprising that a percentage of poor women of color became addicted to crack-cocaine. Many of these women faced depression, mental health issues, and stress related to socio-economic conditions at higher rates than the general population. These women have also faced high rates of physical and sexual abuse and may have used drugs as a coping mechanism.
122. See Roberts, supra n. 4, at 17–21, 89–103.
123. Id. at 179.
124. Id., supra n. 4, at 19–21, and ch. 4.
125. See id. at ch. 4.
cocaine, like their older sisters before them known as "welfare queens," were denigrated and scorned for bringing so-called "crack-babies" into the world. These supposed "crack-babies" were thought to be drug-addicted babies with low levels of intelligence and low levels of emotional and mental functioning. The propaganda that was dispersed included suggestions that taxpayers would be left to foot the bill for the "remarkable" needs of these children, while their mothers would likely continue to receive government benefits resulting from additional pregnancies. This rhetoric served the purpose of swaying public opinion towards the allowance of punitive measures for pregnant women who used crack-cocaine and arguably distracted public attention from the large-scale ineffectiveness of the "war on drugs."

While just a small percentage of poor women of color used crack-cocaine as their drug of choice, the media hype surrounding pregnant women's use of the drug was exaggerated, distorted, and negatively influenced public perception. The perception of these women as being unworthy of motherhood resulted in a number of initiatives that promoted abortion, in lieu of the option of carrying a "crack-baby" to full term. In the case of Ferguson v. City of Charleston, South Carolina, hospital personnel were mandated to report to law enforcement agencies pregnant women who tested positive for crack-cocaine use during prenatal visits. The vast majority of the women reported for substance abuse were poor women of color who were seeking prenatal care in publicly funded hospitals. Because of competing public policy issues and privacy rights of the women at issue, the case was appealed to the U.S. Supreme Court. According to a brief submitted by amici curiae, who were doctors, nurses, public health officials, and substance abuse treatment professionals, the policy had a deleterious impact on the health and safety of poor pregnant women and their unborn children. The brief stated that the policy had the effect of discouraging

126. See Levy-Pounds, supra n. 52 (an analysis of "welfare queens" and public perception in the mid-1980s).
128. See Roberts, supra n. 4, at ch. 4.
129. Id. at 17-21, 186-87.
130. See Lynn Paltrow, Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs, 8 DePaul J. Health Care L. 461 (2005).
131. See Roberts, supra n. 4, at ch. 4. As a result of criminal laws enacted in the state of South Carolina to punish pregnant women addicted to crack-cocaine, a woman could receive an abortion and a criminal case against her would be dismissed or she could carry the baby to full term and risk being thrown in jail for the duration of her pregnancy.
132. 186 F.3d 469 (4th Cir. 1999); see Roberts, supra n. 4, at ch. 4.
133. Id.; see also Paltrow, supra n. 130.
134. See Roberts, supra n. 4, at ch. 4.
poor women from being candid about their drug use and beyond as well as
discouraging women from seeking prenatal care altogether. Health care
professionals were worried that, as the women being targeted by the laws
were overwhelmingly poor African-Americans, many of the health
problems affecting this group of women would be exacerbated by the lack
of ongoing prenatal care. In effect, instead of creating the potential for
healthy births for the women in question, the punitive drug measures were
having the opposite effect.

The situation in South Carolina illustrates the ways in which poor wo-
men of color have been disparately impacted as a result of the arguably
exaggerated focus on crack-cocaine use. This is evidenced by the fact that
doctors were not encouraged to identify white, middle-class pregnant wo-
men who were addicted to other types of illicit and prescription drugs, ciga-
rettes, or alcohol, even though these substances are known to cause harm to
infants. The overt emphasis on the use of crack-cocaine by poor pregnant
women of color and the misinformation that was dispersed to the public
resulted in disparate arrest and incarceration rates for these women. Al-
though poor, pregnant women of color were demonized and blamed for
their failure to stop using crack-cocaine, little attention was paid to the fact
that access to drug treatment facilities was severely limited in their commu-
nities, thereby compounding the problem and reducing preventative alterna-
tives. At one point in time, nearly all drug treatment programs refused to
treat pregnant women.

136. Id. at 18.
137. Id. at 19.
138. Id. at 12; see Roberts, supra n. 4, at 175 (showing that although black expectant mothers
and white expectant mothers tested positive for prenatal drug use at comparable rates, hospital
authorities were ten times more likely to report black mothers for drug abuse); Paltrow, supra n.
130, at 483.
139. See Roberts, supra n. 4, at 164–83.
140. See Greenfeld, supra n. 1, at 9 (nearly 56 percent of women substance abusers in state
prisons, compared to 41 percent of men, had ever been in substance abuse treatment); see gener-
ally Women in Substance Abuse Treatment: Results from the Alcohol and Drug Services Study
(ADSS) ch. 5 (Thomas M. Brady & Olivia Silber Ashley eds., Substance Abuse & Mental Health
cussing systemic barriers that plague women in need of access to drug treatment programs. Such
barriers include the relatively high cost associated with drug treatment and lack of child care
resources for mothers who need treatment. Only 13 percent of drug treatment facilities offer child-
care services and just 12 percent offer prenatal programs. The lack of drug treatment programs
with childcare availability is surprisingly low, given that women comprise about 32 percent of
U.S. drug treatment admissions).
141. See Roberts, supra n. 4, at 187–190.
B. Removal of Children of Drug-Addicted Mothers

Instead of addressing the underlying issue of the cycle of drug dependency and poverty, our society has focused on incarcerating poor women of color and removing children from their care under the guise of child protection standards focused on identifying child neglect. Most mothers who lose their children to the child protection system due to alleged neglect are extremely poor. Although drug use is considered the major factor in labeling and identifying cases of child neglect, many of the children at risk for removal meet the standard of being neglected simply by virtue of living in poverty. For example, the Federal Child Abuse Prevention and Treatment Act of 2003 ("CAPTA") lists the standards for neglect as being unable to provide access to medical care for a child and failure to provide basic necessities for a child such as food and shelter. Many poor women of color who are either working low-wage jobs without benefits or who are receiving scant welfare benefits are unable to meet the basic needs of their children. The connection between extreme poverty and quality of life for children shows that these children are less likely to do well academically, are more likely to suffer from poor nutrition, and may have severe emotional issues—partly stemming from the stress of being poor. These children are also more likely to live in unsafe or overcrowded housing and are more likely to live in homes where basic utilities have been shut off. The caregivers of these children, typically poor single mothers of color, also suffer a great deal of stress related to their inability to adequately provide

142. See id. at 193; see also Greenfeld & Snell, supra n. 1, at 8. Only about four in ten women in state prison reported that they had been employed full time prior to their arrest. By contrast, nearly six in ten male inmates had been working full time prior to arrest. About 37 percent of women and 28 percent of men had incomes of less than $600 per month prior to arrest. While fewer than 8 percent of male inmates had been receiving welfare assistance prior to arrest, nearly 30 percent of female inmates reported receiving welfare assistance at the time just before the arrest which brought them to prison. Perea et al., supra n. 115 (African-American women represent over 40 percent of the women in our federal prisons. This statistic is rather high when considering that African-Americans as a whole represent just 13 percent of the U.S. population. Forty-four percent of African-American families are headed by single mothers, compared with 13 percent of white families. The disparities are even greater when looking at the median income for an African-American household headed by a single woman, which is only 38 percent of that for an African-American married couple).


146. See Levy-Pounds, supra n. 52.

147. See Levy-Pounds, supra n. 52.

148. Id.
for their children.\textsuperscript{149} Drug use by women under such circumstances reflects symptoms of a larger societal problem related to extreme poverty and abuse, as opposed to being the major catalyst for a family’s inadequate living conditions.\textsuperscript{150}

Because of child protection workers’ general lack of understanding surrounding issues of extreme poverty faced by poor women and their children, they are more likely to view a family’s sub-par living conditions as being caused primarily by the mother’s drug use.\textsuperscript{151} As a result, child protection workers may take the necessary steps to remove children from their homes as part of a one-size-fits-all approach to perceived child neglect. The mothers of these children are then given limited time frames to seek drug treatment, notwithstanding the lack of available drug treatment options for poor women of color.\textsuperscript{152} After children are removed from the care of their mothers, the mothers have to overcome substantial hurdles in order to regain custody of their children and to prevent termination of their parental rights.\textsuperscript{153}

\textbf{C. Disparate Impact Caused by the Adoption and Safe Families Act of 1997}

Women whose children have been removed from their homes and placed in foster care, as a result of a finding of neglect based upon maternal drug use or incarceration, may suffer the permanent loss of their children due to federal legislation. The Adoption and Safe Families Act of 1997 ("ASFA")\textsuperscript{154} gives states the authority to hastily terminate parental rights under certain circumstances.\textsuperscript{155} The intended purpose of ASFA was to reduce the number of children who were lingering in foster care while waiting for parents to comply with criteria set by state foster care systems for reunification.\textsuperscript{156} Prior to the enactment of ASFA, parents would have twenty-four months or longer to fulfill the requirements that would allow their children to be returned to their homes.\textsuperscript{157} Since the enactment of

\textsuperscript{149. See generally E. Michelle Tupper, Children Lost in the Drug War: A Call for Drug Policy Reform to Address the Comprehensive Needs of Family, 12 Geo. J. Pov. L. & Policy 325 (2005).}
\textsuperscript{150. Id.}
\textsuperscript{151. Id.}
\textsuperscript{153. See Roberts, supra n. 4, at 86.}
\textsuperscript{154. 42 U.S.C. § 675; see also Erica D. Benites, In Defense of Family: An Argument for Maintaining the Parental Rights of Incarcerated Women in Texas, 3 Scholar 193, 204 (2002).}
\textsuperscript{155. Santosky v. Kramer, 455 U.S. 745, 766 (1982) (holding that the standard of proof in termination of parental rights proceedings is clear and convincing evidence).}
\textsuperscript{156. See generally Roberts, supra n. 4, at 154.}
\textsuperscript{157. Id.}
ASFA, the time frames for reunification have been dramatically decreased, causing a proverbial race against the clock for poor mothers in need of drug treatment or counseling. A mother's rights may be terminated under ASFA if her children have been in foster care for fifteen of the last twenty-two months in most states.

Although in theory ASFA sounds like a feasible solution to foster care drift, in actuality, the law has the effect of sometimes permanently severing fragile family ties between poor, drug-addicted mothers and their children. One of the worst aspects of ASFA is its large-scale failure in preventing "foster care drift." A substantial number of children whose mothers' rights have been terminated due to neglect remain in foster care; these children, who are overwhelmingly poor children of color, are least likely to be reunified with biological parents. It is possible that these children may spend the duration of their childhoods bouncing from one foster home to the next until they age out of foster care upon turning eighteen.

Part of the reason that ASFA has had such a devastating impact on poor women of color and children is the fact that the shortened time frame for compliance fails to adequately take socioeconomic factors into account that may hinder a mother's ability to obtain drug treatment in a timely manner and establish stability. In poor communities, access to high-quality drug treatment programs is severely limited, which means that a mother could be added to a long waiting list and thus may be unable to complete drug treatment before the deadline. Other socioeconomic factors such as lack of access to transportation, financial instability, and the impact of collateral sanctions that bar mothers convicted of drug offenses from receiving public access to drug treatment programs are not thoroughly considered by


159. See Farmer supra n. 152. A parent's rights may also be terminated under ASFA if a court of law determines that the parent abandoned the infant or committed murder or voluntary manslaughter against the other parent of the child.

160. See generally Richard Wexler, Take the Child and Run: Tales from the Age of ASFA, 36 New Eng. L. Rev. 129 (2001); White Stack, supra n. 158 (showing the brevity with which a state acts to terminate parental rights).

161. See U.S. Dept of Health and Human Servs., Admin. for Children & Fams., Children's Bureau, National Foster Care and Adoption Information: Data Collection Systems, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/sec11gb/national.htm (accessed Oct. 31, 2006) ("White and Hispanic children were more likely to be reunified with their families than African-American children, who were more likely to be permanently placed with a relative or be adopted.")

162. See Roberts, supra n. 152, at 77 (discussing the tensions between permanency planning and family preservation in light of ASFA); see Farmer, supra n. 152.

state agencies. Beyond the socioeconomic issues that women face in obtaining drug treatment, many of the programs are not specifically tailored to address the myriad issues that poor women of color routinely face. Some of the unique issues faced by poor women of color that contribute to their involvement in drug-related activity include childhood physical and sexual abuse, the prevalence of domestic violence, chronic marginalization and poverty, and high rates of single motherhood. As many of the current drug treatment models are focused on a confrontational style geared toward males in need of drug treatment, women in treatment may not receive effective tools for overcoming their habits. There is an abundance of anecdotal evidence showing that the system also has little tolerance for women who relapse after drug treatment.

It is not only drug-addicted women who are subject to having their parental rights terminated under ASFA; women who are serving time in prison for peripheral involvement in drug-trafficking activity face similar circumstances. If a woman has been sentenced to serve longer than fifteen months in prison, and her children are placed in foster care, she will likely also have her parental rights terminated under ASFA. In that event, there is very little, if anything, that she may do to preserve her parental rights. Thus, the children of incarcerated women who are subjected to placement in the foster care system suffer multiple forms of vicarious punishment as a result of their mothers' involvement in drug-related activity.

Although to some, long-term placement in the foster care system is ostensibly a more viable option than allowing children to remain in the care of mothers with drug-addictions, alarming reports and media attention exposing large-scale failures in state foster care systems are a cause for concern. A high proportion of children in state foster care systems have been subjected to physical abuse, sexual abuse, and even death at the hands of foster parents. For those children who are placed outside of foster homes into institutional foster settings, such as group homes, the rate of child-on-child sexual abuse is astounding. The harm that flows from displacing

164. See generally Roberts, supra n. 152.
165. See Levy-Pounds, supra n. 52; see also Roberts, supra n. 4, at 187-190 (saying, "Most drug treatment programs are based on male-oriented models, which are not geared to the needs of women."). Further, "predominately male staff and clients are often hostile to female clients and employ a confrontational style of therapy that makes many women uncomfortable." Id. at 189.
166. See Roberts, supra n. 4, at 189.
167. Id.
168. Id. at 190.
169. See generally Roberts, supra n. 4, at 156.
170. Id.
173. Id.
children from the care of their mothers and placing them in potentially more
dangerous situations should give legislatures and the courts pause about
expeditiously assuming that foster care is the most appropriate solution for
protecting children from neglect.

These children may be separated from their mothers, who have usually
been their primary caretakers, removed from their homes, and forced to live
with "strangers" through foster care placement. While in foster care, they
may be unable to maintain contact with their mothers due to financial con­
straints. In addition to the actual physical separation from their mothers,
these children will have to deal with the stigma of having an incarcerated
parent, as well as the stigma of being in foster care. Due to the emotional
and psychological distress these children face, they are more likely to fail in
school, participate in illegal activities, and use drugs and alcohol as coping
mechanisms. All of these layers of disruption may be traumatizing and
cause lasting emotional and psychological harm to these children and ulti­
mately open the door to their involvement in the juvenile and adult justice
systems.

IV. COLLATERAL SANCTIONS OF DRUG-SENTENCING POLICY THAT
DISPARATELY IMPACT POOR WOMEN OF COLOR AND CHILDREN

As if gaining access to upward mobility is not difficult enough for poor
women of color and children, misguided federal initiatives meant to facili­
tate the "war on drugs" ensure that poor women and their children will
remain in extreme poverty. These policy initiatives arguably expose
lawmakers' lack of understanding of the cycle of poverty and drug addic­
tion, as lawmakers are often wealthy, highly educated, and insulated from
systemic problems facing poor women and children. Once women with
drug convictions are released from prison, they face systematic denial of
access to public benefits such as cash grants, food stamps, and participation
in public housing programs. For single mothers struggling to provide for

174. See Justin Brooks & Kimberly Bahna, "It's A Family Affair"—The Incarceration of the
175. See generally Urban Inst. Just. Policy Ctr., Families Left Behind: The Hidden Costs of
Incarceration and Reentry (Oct. 2003) (available at www.urban.org/UploadedPDF/310882_fami­
lies_left_behind.pdf).
176. Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other
Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepp.
L. Rev. 905, 953–55 (1993); see Levy-Pounds, supra n. 52 (children may also use drugs and
alcohol as a coping mechanism).
177. See Congress.Org at http://www.congress.org/congressorg/directory/congdir.tt (showing
demographic and biographical information of various members of Congress and state officials).
178. Allard, supra n. 163, at 8; see Memo. from Natl. Hous. L. Project to Hous. Advocs.,
Eviction of Innocent Tenants Due to the Acts of Others and HUD's "One-Strike" Policy (June
ant based on drug use); Robin Levi & Judith Appel, Collateral Consequences: Denial of Basic
www.drugpolicy.org/docUploads/Postincarceration_abuses_memo.pdf); Paul Stinson, Restoring
their children, access to such benefits are critical and could mean the difference between stability and life on the streets for women and their children.\textsuperscript{179} As long as women continue to face perpetual punishment after serving time for drug convictions, they will continue to be at risk of becoming recidivists or relapsing into addiction.\textsuperscript{180}

\section*{A. Welfare Reform}

In 1996, as part of the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"),\textsuperscript{181} Congress decided to alter the rules for receipt of welfare benefits for women and children. In addition to complex changes regarding eligibility criteria and shortened time frames for receipt of benefits, Congress decided to add a penalty that they thought would aid the "war on drugs." A clause was added to PRWORA which provided a lifetime ban of welfare benefits for women convicted of drug offenses.\textsuperscript{182} Not only was the proposed provision not contested or debated in Congress, but also no other category of crime outside of drug offenses was included in the lifetime ban.\textsuperscript{183} Essentially, murderers, arsonists, and women convicted of violent crimes could continue to receive welfare benefits, as long as they had not been convicted of drug offenses.\textsuperscript{184} As the growing number of women incarcerated for drug offenses are poor women of color, their children have been disparately impacted by this provision.\textsuperscript{185} According to a national study conducted by The Sentencing Project regarding the impact of the lifetime ban of welfare benefits, as of 2002, at least 92,000 women in the twenty-three states for which data was obtained were permanently ineli-


179. Allard, supra n. 163, at 8.

180. Interview, supra 27. Once Kemba was released from prison, she continued to face a number of conditions pursuant to the terms of her executive clemency. First, although Kemba received executive clemency she still had a criminal record based upon her criminal conviction. Second, Kemba was placed on parole for at least five years. As part of her parole she was forced to submit to random monthly drug testing even though she was never accused of, nor found to be, abusing drugs. Each day, Kemba had to call a 1-800 number to find out whether she had to go in for drug testing. Third, Kemba was not allowed to travel outside of the state of Virginia without permission and advance notice of two weeks. Finally, Kemba cannot vote in elections despite being a tax-paying citizen and future lawyer. Though there is no logical connection between her purported involvement in drug-related activity and her right to vote, Kemba has been disenfranchised as a result of her criminal conviction.


183. See Allard, supra n. 163.

184. Id.

185. Id.
gible to receive welfare benefits. The study further indicates that a total of forty-two states enforce the lifetime ban either completely or partially. Some states deny either cash grants or food stamps for convicted drug offenders, while other states pose time restraints for receipt of benefits. For example, in the state of Massachusetts, those convicted of a felony drug offense are denied access to cash grants for the first year following release from prison. Other states that allow women convicted of drug offenses to receive benefits require such women to enter a drug treatment program as a condition of receipt. The states of Wisconsin and Minnesota require that women who have been convicted of drug offenses consent to random drug testing. If a woman tests positive, she loses her benefits immediately.

In terms of racial breakdown, 48 percent of the women impacted by the ban are women of color, which includes approximately 35,000 African-American women and 10,000 Latinas. In at least five states—Mississippi, Delaware, Alabama, Virginia, and Illinois—African-American women represent 54 percent to 86 percent of women impacted by the ban—figures which are grossly disproportionate to their percentages in the population.

When Congress decided to ban those convicted of drug offenses from receiving welfare benefits, the discussion lasted just two minutes, indicating Congress' failure to consider the long-term harm that flows to poor women convicted of drug offenses and to their children. While it is true that the children of women affected by the ban may continue to receive benefits, the failure to provide benefits to a poor mother exacerbates the financial strain on her family. In other words, the limited amount of benefits that a woman may receive to provide for her children will be stretched beyond capacity when she is forced to use a portion of her cash grant to meet her own needs for survival. The same may be said for a food stamps award, where a mother may be forced to ration her food stamps in order to meet her own needs for survival.

As a result, children living with a mother who is subject to the lifetime ban on benefits will have even less access to much-needed benefits and will continue to live in penury. Inadequate access to basic necessities also corre-
sponds with homelessness, hunger, and high stress levels for the women and children in these situations. Based upon the child welfare system's general definition of neglect, these fragile families are also more likely to have future involvement in the child protection system, as a woman's inability to provide for her children may be viewed as parental unfitness as opposed to a systemic issue stemming from poverty. To give an idea of the number of children affected, as of 2002, an estimated 135,000 children had mothers who were permanently banned from receipt of welfare benefits.

Arguably, the rationale behind the ban on welfare benefits stems from Congress' wish to protect American taxpayers by ensuring that welfare monies are used for legitimate purposes by recipients and not on the purchase of illegal drugs. In the eyes of the legislature, purchase or sale of illegal drugs by welfare recipients may amount to manipulation of a system purportedly built on the notion of benevolence for poor families and children. Although Congress' concerns are understandable, they deemphasize the vicious cycle of generational poverty and abuse that contribute to women's involvement in drug-related crime and ignore the disparate impact faced by families affected by the ban.

B. Denial of Federal Financial Aid for Convicted Drug Offenders

In addition to the denial of welfare benefits for women who have been convicted of drug offenses, the federal government has also put forth an initiative which limits access to higher education for those convicted of drug offenses. A 1998 Amendment to the Higher Education Act was enacted to prevent convicted drug offenders from receiving federal financial aid to attend college. The Act includes a denial of grants, loans, or work assistance for drug offenders on either a temporary or even permanent basis. Under the Act, a person is permanently banned from receiving federal financial aid for a third conviction for drug possession or a second conviction for drug-trafficking. This provision virtually guarantees that a female convicted of drug offenses, committed to getting her life back on track and furthering her education after she has paid a hefty debt to society, will fail. Without the financial means to obtain a college education, many of these women may remain in low-wage jobs for the rest of their lives.

Seemingly, one of the underlying premises behind the enactment of the ban on federal financial aid is the idea that drug dealers and users should not have open and easy access to students on college campuses. There is

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198. Allard, supra n. 163, at 9–12.
199. See id. at 11.
200. Id. at 6.
202. Id.
203. Id.
arguably an unspoken fear that those who are involved in drug-related activity will contaminate college campuses and other students in the process. While it is understandable that Congress would want to ensure drug-free college campuses, this law disparately impacts poor people convicted of drug offenses. As it stands, persons convicted of drug offenses who have personal financial resources may be able to attend college without need for federal financial aid, while those with limited financial means may not have the means to attend college. Although well-intentioned, this law does not guarantee that any fewer quantities of drugs are flowing through college campuses in the U.S.

C. Ban on Public Housing Program Participation

The third area in which the federal government has chosen to enact punitive measures that disproportionately affect drug offenders is in federal public housing programs. In response to our nation’s growing need for affordable housing for the poor, Congress enacted a federal housing program that is largely administered by state agencies.\(^{204}\) The program is comprised of a project-based public housing sector as well as programs such as the Tenant Based Housing Assistance Program, known as Section 8.\(^ {205}\) Participants in the project-based segment of the federal housing program are limited to residing in particular buildings known as “projects,” which are usually clustered in poor inner-city communities.\(^ {206}\) Participants in the Section 8 program, however, are given the opportunity to secure higher quality housing through a private landlord who accepts a voucher from the state to make up the difference between the fair market value of the rental property and the amount a tenant can afford to pay.\(^ {207}\) Participation in the federal housing program has saved many poor families from homelessness.

As a result of the growing concern regarding drug use and drug-trafficking in publicly provided housing, Congress enacted The Housing Opportunity Program Extension Act of 1996.\(^ {208}\) The purpose of the Act is to reduce the presence of drugs and drug-related activity in low-income housing units in an effort to ensure the safety and security of the residents living in these units.\(^ {209}\) The Act provides public housing agencies with the authority to a) evaluate the criminal histories of applicants or current participants in low-income housing programs; and b) to obtain records from drug treat-

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206. Id.

207. See generally Rubinstein & Mukamal, supra n. 204.

208. 42 U.S.C. § 1437d(s)-(t).

209. See generally Rubinstein & Mukamal, supra n. 204.
ment programs in an effort to ascertain whether the applicant is currently using illicit drugs.\textsuperscript{210}

Current participants in the federal housing programs need only be convicted of \textit{one} drug offense to be permanently excluded from program participation.\textsuperscript{211} The Act allows public agencies to include lease provisions that call for eviction of public housing tenants who engage in illicit drug activity either on or off the premises where the resident lives.\textsuperscript{212} Lease provisions may further include language that implies that a drug offense committed by any member of a tenant’s household or guest of the tenant may be grounds for the tenant’s eviction.\textsuperscript{213} In March of 2002, the Supreme Court issued a decision in \textit{U.S. Department of Housing and Urban Development v. Rucker},\textsuperscript{214} which approved eviction actions against public housing tenants and their entire households, irrespective of a tenant’s prior knowledge of illegal drug activity.

One of the little recognized effects of the Act, coupled with the Supreme Court’s sanctioning of restrictions placed on tenants, is the potential impact on low-income elderly tenants. As female incarceration rates continue to rise, it is inevitable that more and more children will be raised by their grandparents.\textsuperscript{215} As previously stated, there is a strong likelihood that children of incarcerated parents may be more likely to use drugs as a coping mechanism.\textsuperscript{216} Therefore, when these children are placed with their grandparents, their use of drugs may result in their grandparents being evicted from public housing programs, regardless of whether the grandparents were aware of drug-related activity. As a result of the way that the Act has been structured, in conjunction with the rising rate at which mothers are being incarcerated for drug offenses, it is possible that entire generations of poor families will be barred from much-needed low-income housing options.\textsuperscript{217}

This prohibition on drug offenders’ ability to reside in public housing threatened even to engulf victims of Hurricane Katrina, who were disproportionately poor and African-American.\textsuperscript{218} There was controversy surrounding a great number of Katrina survivors who were prevented from residing in public housing due to previous drug convictions.\textsuperscript{219} Emergency legislation was contemplated to provide a temporary suspension of the

\begin{footnotesize}
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\item \textsuperscript{210} 42 U.S.C. § 1437d(s)-(t).
\item \textsuperscript{211} See \textit{generally} Rubinstein & Mukamal, \textit{supra} n. 204.
\item \textsuperscript{212} 42 U.S.C. § 1437d(l).
\item \textsuperscript{213} See \textit{generally} Rubinstein & Mukamal, \textit{supra} n. 204.
\item \textsuperscript{214} 543 U.S. 1111 (2002).
\item \textsuperscript{215} See \textit{generally} Mader, \textit{supra} n. 18.
\item \textsuperscript{216} See infra, Section III.C.
\item \textsuperscript{217} I am hypothesizing based upon the Supreme Court's decision in \textit{Rucker}.
\item \textsuperscript{219} Beiser, \textit{supra} n. 218.
\end{itemize}
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housing prohibition so that ex-drug offenders could find emergency low-income housing in the wake of the disaster. 220

Denying women convicted of drug offenses access to much-needed benefits may limit a woman's ability to adequately provide for her children. If a woman who has been convicted of a drug offense is a) not eligible for welfare and public housing benefits; b) not eligible for federal financial aid; and c) virtually unemployable because of the stigma associated with having a criminal record, she may be tempted to participate in unsavory activities in order to make ends meet. 221 Not surprisingly, her chances of returning to prison and her inability to care for her children will be substantially greater under such circumstances. 222

V. POTENTIAL SOLUTIONS

Despite social science data and medical studies that indicate that substance abuse should be viewed as a disease that merits drug treatment, current drug policy has instead relied upon harsh punitive measures as a purported means of curbing women's involvement in drug-related activity. Unfortunately, though millions of lives have been ruined and billions of dollars have been wasted, the "war on drugs" has not moved us any closer to curbing the flow of drug-trafficking in the United States. In fact, drug-sentencing policy has created a "pink hole" that engulfs the most vulnerable members of society—poor women and children. These women and children have proven they are no match for the government; they remain easy targets for drug war policies that place blame on women for making unpopular choices without paying any real attention to providing more than band-aid solutions to the underlying problems they face.

If Congress is serious about addressing the inequities caused by drug-sentencing policies, then it must re-evaluate the levels of prosecutorial discretion that currently exist. In doing so, Congress should assemble an independent commission to study the impact of the "substantial assistance" provision on poor women of color, who are often only peripherally involved in drug-trafficking activity. The commission should investigate the frequency with which downward departures are offered to drug kingpins


222. See ABA Report, supra n. 221, at 9 (discusses some of the obstacles that offenders face when attempting to reenter society after facing incarceration. The report recommends training, education, access to programs that support rehabilitative efforts and humane prison conditions).
versus their low-level counterparts. Further, the commission should gather information surrounding women's roles in drug-trafficking, including their reasons for involvement with men who sell drugs and why they may fail to cooperate with prosecutors. Based upon the findings of the commission, Congress should be amenable to either dismantling the "substantial assistance" provision or significantly revising it to account for disparities faced by female defendants in drug-trafficking cases.

More money should be funneled into creating or expanding programs that provide sustained opportunities for poor mothers to become upwardly mobile. The programs should include sustained access to benefits as a safety net, adequate job training, generous child-care assistance, housing vouchers, and access to fair wages. The hasty time restrictions imposed under ASFA for termination of parental rights should be discarded in favor of a model that addresses each situation on a case-by-case basis. Because these families are so fragile, state agencies need to take a more holistic approach in addressing the special needs of poor women and children. Preserving families, where appropriate, should become the central goal of state agencies, as opposed to placing children on the fast track to adoption. Child protection workers, law enforcement agents, prosecutors, and the judiciary need poverty-related and cultural competency training so that they may begin to understand the myriad issues facing poor women of color and children so that they may respond appropriately to these challenges.

VI. CONCLUSION

The current drug war policies set off a chain reaction that unintentionally targets poor women who use drugs or become involved with men who sell drugs, without addressing the underlying reasons for the choices these women make. The children of these women also face a number of collateral consequences when they are displaced from their homes and sent to live with relatives or placed in foster care. We owe it to poor women and children in our society to more carefully examine the impact of drug war policies on these vulnerable families before more lives are destroyed.