

NOTES

Serving Time for Falling in Love: How the War on Drugs Operates to the Detriment of Women of Circumstance in Poor Urban Communities of Color

MARYLYN HARRELL*

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I. INTRODUCTION

When she was twenty-six, Danielle Metz received three life sentences plus twenty years for a cocaine conspiracy in which her husband was the alleged ringleader. Danielle, a mother of two, was a first-time nonviolent offender. Investigators utilized different tactics to persuade her to cooperate. First, they assured her that their focus was her husband. Then, they threatened her parental rights. Still, Danielle would not cooperate. After a year, the government procured witnesses to testify against her. Some of these witnesses were serving sentences of thirty years and after testifying against Danielle, received sentence reductions or were set free. In a statement to the press, Danielle acknowledged “completing various tasks at my husband [sic] request including collection [sic] drug money. While I my [sic] actions should not have gone unpunished I feel that my sentence was unfair. If anything, my most serious offense was trying to salvage a failing marriage.”¹

The emergence of the War on Drugs introduced a new type of criminal defendant – the woman of circumstance. Women of circumstance, the majority of whom are women of color, are the wives, girlfriends, mothers, daughters, and sisters of men involved in the drug trade who remain in the relationship and become inadvertently involved in crime due to financial reliance, blatant fear, or emotional attachment.² Thousands of these women are imprisoned, leaving tangible effects in communities of color.³ There are a number of competing influences that transform an autonomous and free-thinking woman into a woman of circumstance. The combination of financial instability, domestic violence, and devotion to a loved one involved in the drug trade may land a woman of circumstance in a precarious position – defending herself in court against felony drug conspiracy charges. These charges arise because a man whom a woman of circumstance loves is involved in an illegal narcotics enterprise.

Often, criminal charges against women of circumstance stem from any number of benign actions: she answered the phone in their shared apartment; she let him borrow her car to run errands; she used money that he earned from selling drugs at the grocery store to buy food for their children. These acts seem innocent, and they are. Often women of circumstance have no idea that their loved ones are involved in the drug trade. Even if they are aware, this does not mean they were complicit in the scheme or that they acted in furtherance of its goals.⁴

1. STEPHANIE BUSH-BASKETTE, MISGUIDED JUSTICE: THE WAR ON DRUGS AND THE INCARCERATION OF BLACK WOMEN 23 (2010).

2. See Shimica Gaskins, “Women of Circumstance” – The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes, 41 AM. CRIM. L. REV. 1533, 1533 (2004).

3. See, e.g., Nekima Levy-Pounds, *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*, 3 U. ST. THOMAS L.J. 462, 473, 475 (2006); Gaskins, *supra* note 2, at 1550-51; Holly Jeanine Boux & Courtenay W. Daum, *Stuck Between a Rock and a Meth Cooking Husband: What Breaking Bad’s Skyler White Teaches Us About How the War on Drugs and Public Antipathy Constrain Women of Circumstance’s Choices*, 45 N.M. L. REV. 567, 573-74 n.17 (2015) (containing data illustrating that women of color are distinctively impacted by the War on Drugs in a way that white women are not).

4. See Phyllis Goldfarb, *Counting the Drug War’s Female Casualties*, 6 J. GENDER, RACE & JUST. 277, 291 (2002). (“Undoubtedly, some women are co-equal participants in drug dealing with their partners. Others

Now this woman is standing before a judge, facing a mandatory minimum sentence.⁵ She may end up with a longer sentence relative to others participating in the drug trade because they have information to offer to prosecutors.⁶ Because they offered such information to the government, their sentences are reduced. The woman of circumstance has no information to offer.⁷ The judge sees the woman before him, hears her story, and understands that she is just a mother trying to take care of her kids, a young girlfriend who thought she was in love, or a wife who didn't leave because she was afraid of what her husband might do.⁸ The judge's hands are tied due to federal mandatory minimum sentencing guidelines.⁹ Now her children are left without parents to care for them. The degree she was pursuing is left unfinished.¹⁰ Her life has been entirely derailed. Is this justice?

Due to the War on Drugs, thousands of women are in prison right now serving lengthy sentences for minimal involvement¹¹ in the drug trade under laws designed to impose the same lengthy sentences on drug kingpins and people at the highest tiers of the drug trade.¹² In both state and federal prisons, "non-violent, drug-related offenses account for the largest source of the total growth of female inmates."¹³ Women of circumstance are guilty by their association with drug-dealing intimates (who themselves are not the kingpins that the law was intended to punish).¹⁴ The application of gender-neutral sentencing laws and the restriction on judicial discretion in sentencing explains why so many women have found themselves behind bars.

may act of their own accord and on their own behalf, operating as independent agents in the drug trade. Nonetheless, focusing on women whose partners are involved in the drug trade is a defensible choice, not only because it comprises one substantial subset of those who are serving drug sentences grossly disproportionate to their conduct. Such a focus is also defensible, because it is mindful of the criminological literature, both statistical and ethnographic, that reveals markedly different patterns of male and female involvement in drug crimes.").

5. Under the Anti-Drug Abuse Act of 1988, "conspiracy to commit a drug offense" is subject to a mandatory minimum sentence. Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1475 (2000).

6. See *infra* Part III.D.

7. See *infra* Part III.C.1.

8. See *infra* Part III.C.1.

9. See *infra* Part III.B.

10. See *infra* Part III.B.

11. Often women are prosecuted for passive or coerced involvement in the drug trade, such as answering the phone or running an errand for a loved one, or running an errand for a loved one, which could result in evidence that the woman was a knowing participant of the drug conspiracy. See, e.g., *infra* Part III.B; Goldfarb, *supra* note 4, at 292-93 ("[A] sentencing structure which treats offenders as fully responsible for a quantity of drugs to which they have a minimal connection can be fairly said to have pronounced effects on women as a group, even if its impact is not felt exclusively by women.").

12. See Levy-Pounds, *supra* note 3, at 467 ("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.").

13. See Marne L. Lenox, Note, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 289 (2011); see also Ryan S. King, *Moving Toward a Gender-Appropriate Response in the Criminal Justice System*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 7 (2007) ("The 'war on drugs' has been the most significant explanatory factor for the growth witnessed in the female prison population.").

14. See Nekima Levy-Pounds, *From The Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 295 (2007).

This Note will argue that the United States' gender-neutral drug sentencing policy, which does not allow judicial discretion, has created a new class of criminal defendant in communities of color – the woman of circumstance. In Part II, this Note will describe who these women are and analyze how they find themselves trapped in the criminal justice system due to the War on Drugs. Part III will address how conspiracy laws and mandatory minimum sentencing guidelines act to the detriment of women of circumstance. Finally, Part IV will provide an overview of how patriarchal norms in the War on Drugs facilitated the emergence of the woman of circumstance.

II. WHAT IS A “WOMAN OF CIRCUMSTANCE”?

A. *Background on the War on Drugs*

The War on Drugs was a monumental failure. It contributed to a surge in the prison population, perpetuated violence, and deprived people with addictions from getting the treatment they so desperately needed.¹⁵ Not only did the War on Drugs fail—it was built upon a lie. In 1971, former President Nixon declared drugs “public enemy number one,” while increasing the federal government’s role in punishing drug abusers.¹⁶ However, this “war” was nothing more than a cynical political tactic, as revealed decades later by Nixon’s domestic policy chief, John Ehrlichman:

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I’m saying? . . . We knew we couldn’t make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did.¹⁷

While the intense fight against drug use subsided in the Jimmy Carter Administration,¹⁸ the battle increased forcefully in 1982 when former President Reagan declared a far more punitive “War on Drugs,” now with a strict “zero tolerance” policy.¹⁹ Reagan’s War on Drugs caused incarceration rates to skyrocket, even

15. See, e.g., THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 3 (2018), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/2KRX-4MRW>] (“Since [the war on drug’s] official beginning in the 1980s, the number of Americans incarcerated for drug offenses has skyrocketed from 40,900 in 1980 to 450,345 in 2016.”); Gaskins, *supra* note 2, at 1537 (“Take for example Lisa Hanna, who sold drugs with her husband to sustain her addiction. Years after she had left her husband, had been treated for her addiction and had passed the Indiana Bar exam, she was prosecuted for conspiracy to commit drug crimes.”).

16. *Thirty Years of America’s Drug War: A Chronology*, PBS, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron> [<https://perma.cc/JMB4-A7R7>].

17. *The United States War on Drugs*, STAN. UNIV., https://web.stanford.edu/class/e297c/poverty_prejudice/paradox/htele.html [<https://perma.cc/X8H3-BJDH>].

18. See *id.*

19. See J. Mitchell Miller & Lance H. Selva, *Drug Enforcement’s Double-Edged Sword: An Assessment of Asset Forfeiture Programs*, 11 JUST. Q. 313, 313-14 (1994) (“This publicly supported crusade against drug

after the end of his administration. The war undoubtedly waged on in the background even when the War on Drugs was not the focal point of subsequent presidential administrations' political rhetoric.²⁰ It is important to keep in mind that much of the reason for the intense increase in attention on the War on Drugs over years stems from two causes: media portrayal and politicians using the end of the war as a convenient legislative platform. According to one commentator, the "[l]ack of job opportunities, rampant and increasing discrimination against women and minorities, lack of affordable housing, health and child care, and *resulting hopelessness and despair* are the real problems that are being ignored by the commanders-in-chief in the war against drugs."²¹

Women of circumstance, primarily women of color, are directly impacted by the ramifications of the deceptive policies behind the War on Drugs.²² During the 1980s and 1990s, the incarceration rates of black women for drug offenses increased more than any other demographic group.²³ According to feminist scholar Angela Davis, "it is not just a series of bad choices that land black women in prison but a deadly combination of reduced possibilities and extensive police targeting or public monitoring."²⁴ Women of circumstance find themselves in jail because they are in an intimate relationship with a drug dealer.

B. *The Woman of Circumstance*

*"The raced and gendered framing of the War on Drugs has made black women simultaneously hyper-visible and invisible. They have been made hyper-visible in terms of the images and symbols used to frame the issue. While being used in the story telling of the war on drugs, black women's voices have been rendered invisible . . . Linking images of drug abuse, promiscuity, and out-of-wedlock births, the war on drugs constructs black women as unconscionable criminals in need of incarceration."*²⁵

Women of circumstance occupy a unique role in the War on Drugs. A woman of circumstance is essentially someone who is found guilty by her association (familial or romantic) with a male loved one who is active in the drug trade.²⁶ According to research, women of circumstance must delicately balance "(1) how the legal system uses them as scapegoats and pawns, (2) their intimate relationships with dangerous drug operatives, (3) the physical, financial, and emotional wellbeing of their children and families, and (4) societal expectations about 'good' women and female

abuse and narcotics trafficking was supposed to succeed where the supply reduction-oriented policies of the 1970s has failed.")

20. See, e.g., Craig Horowitz, *The No-Win War*, N.Y. MAG., Feb. 5, 1996, at 22-33.

21. Bernida Reagan, *The War on Drugs: A War Against Women*, 6 BERKELEY WOMEN'S L.J. 203, 206 (1991) (emphasis added).

22. See, e.g., Lenox, *supra* note 13 at 282; Goldfarb, *supra* note 4, at 292-93.

23. BUSH-BASKETTE, *supra* note 1, at 2. (Incarceration rates for black women on drug-related offenses grew by 828 percent.)

24. Angela Y. Davis, *Women in Prison*, ESSENCE, Sept. 2000, at 150.

25. Julia S. Jordan-Zachery, *A Declaration of War: An Analysis of How the Invisibility of Black Women Makes Them Targets of the War on Drugs*, 29 J. WOMEN, POL. & POL'Y 231, 234-35 (2008).

26. See Boux & Daum, *supra* note 3, at 568.

subservience.²⁷ Standing at the intersection of these competing influences makes women of circumstance convenient targets and victims of the War on Drugs.

There is no better example of a woman of circumstance than Kemba Smith. Kemba Smith, a nineteen-year-old African American college student, fell in love with Peter Hall.²⁸ Kemba eventually learned that Peter was a drug dealer. Blighted by both love and fear, she remained in the relationship.²⁹ On numerous occasions, Kemba sought medical attention for injuries sustained from Peter's beatings.³⁰ She feared him, and rightfully so. Therefore, when he asked that she do something for him, she was hesitant to say no. Kemba was never actively involved in Peter's drug trade.³¹ She did not manufacture or sell drugs on his behalf, but she did drive him places and take messages for him left by his associates in the drug trade.³²

When the FBI began assembling its case against Peter, Kemba was seven months pregnant.³³ Her love for her unborn child outweighed her fear of Peter, so she agreed to assist the FBI.³⁴ However, before she could offer any information to the FBI, Peter was killed. The FBI turned its attention to prosecuting Kemba under conspiracy laws as a member of Peter's drug enterprise.³⁵ The conspiracy laws under which she was charged required only circumstantial evidence. As such, all acts taken in furtherance of the conspiracy were imputed to her even though the prosecution conceded that they had no direct evidence of her involvement.³⁶ The government charged Kemba with intent to distribute 255 kilograms of cocaine – the entire estimated quantity of drugs Hall and his associates allegedly sold over the entire duration of his drug ring.³⁷ This included the sale of drugs that occurred two years before she even met Peter.³⁸ Seeing no other options, and with the threat of an even longer sentence, Kemba pled guilty.³⁹ Under mandatory minimum sentencing policy, she was sentenced to 24.5 years in prison—the same amount of time given to those in the highest ranks of the drug ring.⁴⁰

Kemba's story is typical of women of circumstance. Unlike most women of circumstance, Kemba was granted executive clemency after already serving six years in prison.⁴¹ Kemba is lucky, but many women of circumstance are not as fortunate.

27. *Id.*

28. See Levy-Pounds, *supra* note 3, at 468.

29. See, e.g., Gaskins, *supra* note 2, at 1534 (Kemba was afraid of Hall, "who eventually killed his best friend for informing on him"); Levy-Pounds, *supra* note 3, at 469.

30. See Levy-Pounds, *supra* note 3, at 469.

31. See Gaskins, *supra* note 2, at 1537.

32. See Levy-Pounds, *supra* note 3, at 469.

33. *Id.* at 470.

34. *Id.*

35. *Id.*

36. Gaskins, *supra* note 2, at 1534; see also Gaskins, *supra* note 2, at 1537.

37. Levy-Pounds, *supra* note 3, at 470.

38. *Id.* at 470 n. 45.

39. *Id.*

40. *Id.* at 470.

41. Gaskins, *supra* note 2, at 1534.

Consider the case of Melquidia Cruz. After falling on hard times, she began dating Jaime who, unbeknownst to her, dealt cocaine out of her apartment.⁴² Jaime was the subject of an investigation and was targeted by a confidential informant who called him at Melquidia's apartment.⁴³ Eventually, the police searched the home, found drugs, and charged Melquidia with felony drug charges, despite the fact that she was never accused of selling drugs.⁴⁴ Her participation was limited to answering a couple of phone calls from the informant.⁴⁵ Melquidia was sentenced to ten years in prison, leaving her three young children without their mother.⁴⁶

III. CONSPIRACY LAWS AND MANDATORY MINIMUM SENTENCING: THE DASTARDLY DUO KEEPING WOMEN OF CIRCUMSTANCE BEHIND BARS

A. Conspiracy Laws

Conspiracy is one of the most frequently charged offenses in federal court.⁴⁷ Wrapped around the finger of a male drug dealer, a woman of circumstance finds herself paying the ultimate price for her romantic and/or financial connection to a loved one. These men are their boyfriends, their husbands, and the father of their children. Under harsh conspiracy laws, women of circumstance are faced with a choice: exit their "involvement" in the drug trade by giving up their partners and causing family turmoil, or wind up in prison.⁴⁸

A seminal Supreme Court case, *Pinkerton v. United States*, allows women of circumstance who played only marginal roles to be charged with the same offense as the leader of a conspiracy.⁴⁹ Under the *Pinkerton* rule, any reasonably foreseeable acts of a co-conspirator may be imputed upon all other members of the conspiracy under a theory of vicarious liability.⁵⁰ Women of circumstance are often unwittingly caught up in drug trafficking due to societal expectations of what it means to be a loyal mother, girlfriend, or wife. According to Raeder, "because of the ways that women have been socialized to further their relationship with men, a woman's mere presence

42. *Mandatory Sentencing Was Once America's Law-and-Order Panacea. Here's Why It's Not Working*, FAMILIES AGAINST MANDATORY MINIMUMS 11, <https://www.prisonpolicy.org/scans/famm/Primer.pdf> [<https://perma.cc/HJ33-7JS5>].

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Haneefah A. Jackson, Note, *When Love Is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot Be Justified by Retributive Principles*, 46 HOW. L.J. 517, 527 (2003).

48. *Id.* at 540 ("Studies indicate that the majority of women involved in narcotics conspiracy cases are not individuals who have sought out and affirmatively agreed to participate in drug offenses. Rather, they are usually intimately involved with principal male dealers, and their links to the so-called conspiracies are, rather than being actual links to criminal activity, based mostly on their ties to their intimate partners.")

49. See *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) ("[W]e fail to see why the same or other acts in furtherance of the conspiracy are . . . not attributable to the others for the purpose of holding them responsible for the substantive offense.")

50. See Carrie Casey & Lisa Marino, *Federal Criminal Conspiracy*, 40 AM. CRIM. L. REV. 577, 589 (2003).

in the home may be seen as tantamount to membership in a conspiracy.”⁵¹ Women of circumstance, who may have no prior criminal history and no substantive involvement in the drug trade, are not given any leniency by conspiracy laws, “even though their culpability is undoubtedly less than that of co-conspirators not faced with such gender and familial constraints.”⁵²

A woman’s presence in the home where drug trade-related business occurs is enough to show complicity with the criminal acts, even though she may not know the details of the trade or any of the participants. The Anti-Drug Abuse Act of 1988 mandated that, regardless of one’s role, everyone convicted in a narcotics trafficking conspiracy receive the same sentence as the substantive offense.⁵³ To successfully convict someone on drug conspiracy charges, “the government must prove the following beyond a reasonable doubt: (1) the existence of an agreement between two or more individuals to distribute [the substance]; (2) the defendant’s knowledge of the agreement; and (3) [the defendant’s] voluntary participation in the conspiracy.”⁵⁴

Charging a defendant under conspiracy laws is a convenient course of action for prosecutors because “circumstantial evidence alone is a sufficient basis for a conspiracy conviction.”⁵⁵ The prosecution’s burden of proof is lowered because they need only demonstrate “the essential nature of the plan and [the conspirator’s] connection with it.”⁵⁶ Small acts like answering the door after someone knocks or answering the house phone could provide the government with circumstantial evidence that the woman is an integral part of the conspiracy.⁵⁷ For women of color especially, who do not have the racial and class privileges of many white women, the lack of financial and familial options makes it overwhelmingly difficult to detach from the drug trafficking enterprise.⁵⁸

A return to individualized sentencing would prevent women who play truly minuscule roles in the drug trade from serving draconian sentences and would be a better means to serve the ends of justice. Women are effectively punished for falling in love with someone who sells drugs. Conspiracy laws are gender-neutral and fail to suitably consider the limits of a woman’s role in her partner’s drug enterprise;⁵⁹ this is exactly what happened to Kemba Smith.

51. See Myrna S. Raeder, “Gender Neutral” Sentencing Wreaks Havoc in the Lives of Women Offenders and Their Children, 8 CRIM. JUST. 20, 21 (1993).

52. *Id.*

53. 21 U.S.C. § 1501 (2006). See also BUSH-BASKETTE, *supra* note 1, at 39; Shana Knizhnik, *Failed Snitches and Sentencing Stitches: Substantial Assistance and the Cooperator’s Dilemma*, 90 N.Y.U. L. REV. 1722, 1733 (2015) (“As long as an enterprise as a whole is responsible for the statutorily requisite quantity of drugs, each individual defendant can be held liable at sentencing for that entire amount.”).

54. United States v. Kiekow, 872 F.3d 236, 245 (5th Cir. 2017) (quoting United States v. Olguin, 643 F.3d 384, 393 (5th Cir. 2011)).

55. See Carrie Casey & Lisa Marino, *Federal Criminal Conspiracy*, 40 AM. CRIM. L. REV. 577, 580 (2003).

56. *Id.* at 479.

57. See, e.g., FAMILIES AGAINST MANDATORY MINIMUMS, *supra* note 42; Levy-Pounds, *supra* note 3 at 472-73; Gaskins, *supra* note 2 at 1548.

58. See generally Boux & Daum, *supra* note 3.

59. See Raeder, *supra* note 51, at 21 (“[Sentencing] guidelines cannot be truly gender-neutral if they do not recognize the gender-based realities of criminal activity and child rearing.”).

B. Mandatory Minimums

The ramifications of mandatory minimums on the black community in the United States is well-documented.⁶⁰ Mandatory minimum sentencing policies in particular are responsible for the disparate impact of the War on Drugs on women of circumstance.⁶¹ Two main features of mandatory minimum sentencing support the proposition that women of circumstance are a unique category of criminal defendants that deserves further study. First, mandatory minimum sentencing policies make the length of the sentence contingent upon the quantity of drugs involved rather than the defendant's role in the conspiracy.⁶² Second, the stringent guidelines in mandatory minimum sentencing policy discourage judicial discretion in considering a defendant's familial obligations or prior criminal history.⁶³

Mandatory minimum sentences are determined by the quantity and type of drugs, as well as the sophistication of the conspiracy—but not the nature of the defendant's role in the conspiracy.⁶⁴ The emphasis on quantity means that a woman of circumstance can receive an extremely long sentence due to her boyfriend's participation in a large and sophisticated drug ring. For some narcotics-related offenses, mandatory minimums forbid a judge from considering the individual characteristics of a defendant such as her community ties, familial background, employment, and other extenuating circumstances.⁶⁵ As previously discussed, a woman of circumstance's "role" in a drug conspiracy is often as attenuated as letting her boyfriend use the phone in her home, permitting him to borrow her car, or using money he earned from dealing drugs at the grocery store to buy food for their children. Such actions are not done "in furtherance" of any conspiracy. These women are simply trying to navigate their own lives in spite being in a relationship with a drug dealer. This is precisely why

60. See generally U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 113-35 (2004), https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/15-year-study/15_year_study_full.pdf [<https://perma.cc/N7S4-74Q7>] [hereinafter *Fifteen Years of Guidelines Sentencing*] (analyzing the racially disparate effects of the Sentencing Guidelines and identifying the sentencing rules that create the most significant adverse impacts on African Americans); see also Written Submission of the American Civil Liberties Union on Racial Disparities in Sentencing, Hearing on Reports of Racism in the Justice System of the United States Submitted to the Inter-American Commission on Human Rights (153rd Session, Oct. 27, 2014), https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf [<https://perma.cc/NHR9-WWR4>] (commenting that a 100-to-1 disparity between amounts of crack and powder cocaine will trigger certain mandatory minimum sentences because the majority of people arrested for crack offenses are black).

61. Gaskins, *supra* note 2, at 1540 ("National mandatory sentencing policies disparately affect women who tend to play marginal roles in drug trafficking crimes by tying sanctions to the quantity of drugs involved in the transaction and limiting judicial discretion in considering prior criminal history and family responsibilities.").

62. See *Fifteen Years of Guidelines Sentencing*, *supra* note 60, at 50 ("Drug quantity has been called a particularly poor proxy for the culpability of low-level offenders, who may have contact with significant amounts of drugs, but who do not share in the profits or decision-making.").

63. Gaskins, *supra* note 2, at 1541.

64. *Id.* at 1542.

65. *Id.* at 1539.

sentencing should be individualized and based on the defendant's actual involvement in the enterprise.

Federal mandatory minimum policies intended to reform judicial sentencing discretion towards a more equitable outcome.⁶⁶ The articulated goal of creating these policies was to eradicate sentencing disparities caused by a judge's unconscious bias in response to a defendant's gender, race, or class.⁶⁷ Rooted in formal equality, the Sentencing Reform Act of 1984 is a set of gender-neutral guiding principles for deciding the fates of those convicted of drug offenses.⁶⁸ Congress passed the Act to end judicial paternalism, the phenomenon of male judges showing leniency to female offenders because of the judges' paternalistic notions to "protect" women and children.⁶⁹ Under very limited circumstances, a judge may use her discretion and impose a sentence above or below the Act's suggestion; however, these instances are few and far between.⁷⁰ According to some legal theorists, "the absence of judicial paternalism results in harsher sentences for women because familial obligations and other factors are no longer taken into account."⁷¹

Justices Breyer and Kennedy have also spoken out against the unmerciful regime.⁷² In a 1998 speech, Justice Breyer argued that Congress should abolish mandatory minimum sentencing guidelines and that "greater judicial discretion is appropriate" because the guidelines have not advanced the intended goal of increased fairness in sentencing.⁷³ In 2015, during congressional testimony to the House Appropriations Committee, Justice Breyer reiterated his position against mandatory minimums: "I've said publicly many times that I think [mandatory minimums are] a terrible idea. And I've given reasons."⁷⁴ He then urged Congress to prioritize reforming this aspect of the criminal justice system.⁷⁵ Justice Kennedy also denounced the use of mandatory minimums, arguing, "it's not so

66. Froyd, *supra* note 5, at 1475.

67. *Id.*

68. *Id.* at 1540.

69. See Kathleen Daly, *Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing*, 3 GENDER & SOC'Y 9 (1989). See also *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.").

70. BUSH-BASKETTE, *supra* note 1, at 74 (noting only one percent of women convicted of drug-related offenses with a mandatory minimum of ten years, received a sentence lower than the ten-year sentencing guideline suggestion).

71. Gaskins, *supra* note 2, at 1540.

72. See Assoc. Justice Anthony M. Kennedy, Address at the American Bar Association Annual Meeting in San Francisco (Aug. 2003), <http://www.november.org/stayinfo/breaking/Kennedyspeech.html> [https://perma.cc/NYF5-JB3H].

73. Linda Greenhouse, *Guidelines on Sentencing Are Flawed, Justice Says*, N.Y. TIMES (Nov. 21, 1998), <https://www.nytimes.com/1998/11/21/us/guidelines-on-sentencing-are-flawed-justice-says.html> [https://perma.cc/VP9H-ZBVE].

74. Supreme Court Fiscal Year 2016 Budget: Hearing Before the H. Appropriations Subcomm. on Fin. Servs. & Gen. Gov't, 114 Cong. 52 (2015) (statement of Justice Stephen Breyer).

75. *Id.*

much the sentencing guidelines, it's the mandatory minimums. That's the problem."⁷⁶

Because extenuating circumstances are not considered to be a relevant factor during sentencing, mandatory minimums are overly harsh and do not further the ideals of justice, nor do they promote deterrence.⁷⁷ “[R]eceiving a mandatory sentence for trusting, acquiescing, submitting to, [or being economically dependent upon] the dominance of a boyfriend or husband involved in the drug trade is grossly disproportionate to the crime committed.”⁷⁸ To some in the law enforcement community, women of circumstance are nothing more than expendable pawns used to capture the men who play a more substantial role in the drug conspiracy.

C. How Can a Woman of Circumstance Evade a Mandatory Minimum Sentence?

There are two potential avenues by which a woman of circumstance may evade a mandatory minimum sentence.⁷⁹ First, a woman of circumstance may provide substantial assistance to the government by providing information regarding other people involved in the drug conspiracy.⁸⁰ Second, she may use a safety valve designed by Congress to exempt non-violent, low-level offenders from receiving an overly harsh mandatory minimum sentence if a woman meets a set of criteria.⁸¹ The aforementioned methods of reducing a mandatory minimum sentence are often unavailable to women of circumstance precisely because of their low participation in drug conspiracies, resulting in their serving the entirety of their lengthy sentences.

1. Women of Circumstance Often Cannot Receive a Downward Departure for Substantial Assistance

A woman of circumstance can evade receiving a mandatory minimum sentence by cooperating in the investigation and providing law enforcement with “substantial

76. Brad Wright, *Justice Kennedy Criticizes Mandatory Minimum Sentences*, CNN (Apr. 9, 2003), <http://www.cnn.com/2003/LAW/04/09/kennedy.congress/> [<https://perma.cc/N73B-6XZZ>].

77. Gaskins, *supra* note 2, at 1542-43 (Extenuating circumstances range from the fact that that defendant knew nothing about, or played only a peripheral role in the conspiracy. “Mandatory minimums require the courts to determine the sentences by the quantity of drugs and the size of the conspiracy, rather than the offender’s role in the conspiracy.”).

78. Jackson, *supra* note 47, at 521.

79. See U.S. SENTENCING COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 18 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170711_Mand-Min.pdf [<https://perma.cc/A5LU-RW4P>] (“Under the current system, a sentencing court can impose a sentence below an otherwise applicable statutory mandatory minimum penalty if: (1) the prosecution files a motion based on the defendant’s ‘substantial assistance’ to authorities in the investigation or prosecution of another person; or (2) in certain drug trafficking cases, the defendant qualifies for the statutory ‘safety valve’ contained in 18 U.S.C. § 3553(f).”) (footnote omitted).

80. See, e.g., Gaskins, *supra* note 2, at 1543; Goldfarb, *supra* note 4, at 294 (“The primary mechanism for sentencing flexibility in the current scheme derives from substantial assistance motions filed by the prosecution. If a prosecutor certifies that a defendant has provided important information to law enforcement that can be used in cases against other offenders, then the defendant may receive a significant reduction in sentence, perhaps salvaging years of freedom. Yet this is precisely the sort of benefit that is available to those who have major involvement in the drug trade and unavailable to those who have peripheral involvement.”) (footnote omitted).

81. See 18 U.S.C. § 3553(f) (2012). See also Gaskins, *supra* note 2, at 1546.

assistance.”⁸² In other words, they can snitch on other participants in the drug trade in the attempt to avoid a mandatory minimum sentence.⁸³ Women of circumstance are often unaware of other participants in the scheme and thus are unable to offer information to prosecutors without committing perjury.

As a result, only high-level participants with a detailed knowledge of the intricacies of the drug enterprise can take advantage of the substantial assistance escape hatch – an occurrence known as the “cooperation paradox.”⁸⁴ A “downward departure” is a reduction in one’s sentence as a result of their providing substantial information to prosecutors. As Froyd states, “[d]rug offenders who are eligible for substantial assistance downward departures are those offenders who have substantial, useful knowledge that will aid the government in the investigation or prosecution of another person who has committed an offense.”⁸⁵

The presence of patriarchal norms prevents women from being at the top levels of drug cartels and contributing useful information to prosecutors—ensuring that they receive longer sentences than people more involved in the drug economy.⁸⁶ In fact, according to the U.S. Sentencing Commission in 1995, a mere 5.5 percent of those accused of crack-cocaine offenses were considered to be “high-level” operatives.⁸⁷ Congress is not meeting its stated goal of deterring drug kingpins.

Professor Stephen Schulhofer elaborated on the consequences of the cooperation paradox, explaining that

[T]he inflexibility of mandatories means that all participants tend to face the same high sentence, regardless of their limited role in the offense or any mitigating personal circumstances. The “big fish” and the “minnows” wind up in the same sentencing boat. Enter the statutory escape hatch, with sentence concessions that tend to increase with the knowledge and responsibility of the offender. The big fish get the big breaks, while the minnows are left to face severe and sometimes draconian penalties.⁸⁸

In her ancillary role, a woman of circumstance is ill-equipped to provide prosecutors with the type of substantial assistance that would help her avoid a mandatory minimum sentence.

Even if a woman of circumstance can offer information, the information must be deemed “significant knowledge” according to the subjective judgment of the

82. See 18 U.S.C. § 3553(e) (2012).

83. *Id.* at 1539.

84. Gaskins, *supra* note 2, at 1544.

85. Froyd, *supra* note 5, at 1483.

86. See, e.g., Lenox, *supra* note 13, at 288 (“[t]he highly patriarchal organization of society at large is reflected in the drug economy: The majority of women serving time for drug offenses played an ancillary role in the drug trade”); Goldfarb, *supra* note 4, at 291 (“By and large, women do not hold income-generating positions in the drug trade. We know the words ‘druglords’ and ‘kingpins’, not ‘drugladies’ and ‘queenpins.’”) (footnotes omitted); Boux & Daum, *supra* note 3, at 583-84 (The problem with this legislated “equality” is that it presumes that males and females are equally situated in the drug economy.”).

87. Nekima Levy-Pounds, *supra* note 14, at 295.

88. Stephen J. Schulhofer, *Rethinking the Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 211-13 (1993).

prosecutor. For example, Kemba Smith did not receive a downward departure for the information that she offered to prosecutors because it was regarded unsubstantial and unreliable.⁸⁹ If a woman of circumstance can provide information regarding a drug-dealing boyfriend, husband, or son, she may do so at the risk of violent retaliation at the hands of the man who put her in that circumstance.⁹⁰ Women of circumstance are therefore left with few meaningful choices.

The most glaring pitfall of the substantial assistance provision is that filing a motion to reduce the sentence is entirely discretionary.⁹¹ The sentencing guidelines give prosecutors discretionary authority on whether to file a motion for a sentence reduction on behalf of a woman of circumstance who gave the government useful information.⁹² This means that even if a woman of circumstance divulged all information known to her, and that information resulted in the conviction of a high-level participant in a drug conspiracy, the prosecution may still decline to present her cooperation to the judge.⁹³ Even when prosecutors decide to file a motion for a departure from the sentencing guidelines based on substantial assistance, studies show that this decision is impacted by the defendant's gender, race, and ethnicity.⁹⁴ The prosecution should have an affirmative duty to file a motion on behalf of the women who have given details that has assisted the government in thwarting a criminal enterprise.⁹⁵

2. Women of Circumstance Often Cannot Meet the Requirements of the Statutory Safety Valve

In 1994, Congress implemented the "safety valve provision" as a deliberate response to growing concerns about low-level offenders trapped in the War on Drugs, often for being in the wrong place at the wrong time.⁹⁶ Unlike the substantial assistance provision, the safety valve does not require the prosecutor to file a motion, and is therefore not subject to the prosecution's discretion.⁹⁷ Rather, if the defendant

89. See Levy-Pounds, *supra* note 3, at 473.

90. *Id.* at 474-75 ("Many of the women facing incarceration on drug charges live in marginalized communities with underground rules 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.") (footnotes omitted).

91. Gaskins, *supra* note 2, at 1545.

92. See *Wade v. United States*, 504 U.S. 181, 185 (1992) (holding that prosecutors are allowed discretion in deciding whether to file a substantial-assistance motion.). See also OFFICES OF THE U.S. ATTORNEYS, U.S. ATTORNEY'S MANUAL 9-27.730 (1997), <https://www.justice.gov/archives/usam/archives/usam-9-27000-principles-federal-prosecution#9-27.730> [<https://perma.cc/LKF8-JJQL>].

93. *Id.*

94. See generally Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 CRIMINOLOGY 813 (2009) (Studies show that "jurisdictional variations are evident in the use of substance assistance departures . . . and that the likelihood of receiving the departure is affected by legally irrelevant offender characteristics, which include race, ethnicity, and gender.").

95. See Ross Galin, Note, *Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements*, 68 FORDHAM L. REV. 1245, 1284 (2000).

96. Gaskins, *supra* note 2, at 1546.

97. See Froyd, *supra* note 5, at 1497.

meets five criteria, the safety valve mandates that the judge abandon the mandatory minimum sentencing guidelines and reduce the sentence:⁹⁸

[The] defendant must (1) not have more than one criminal history point, as determined under the sentencing guidelines; (2) not have possessed a firearm in connection with the offense; (3) not have participated in an offense that resulted in death or serious bodily injury to any person; (4) not be a leader, organizer, or supervisor of others in the offense; and (5) truthfully provide to the government all information the defendant has concerning the offense or offenses that were part of the same course of conduct no later than the time of the sentencing hearing.⁹⁹

Women of circumstance incontrovertibly meet the fourth element of the safety valve, as they are inherently not a “leader, organizer, or supervisor of others” in the offense.¹⁰⁰ However, the other four elements present hurdles to a woman of circumstance securing her freedom. Women of circumstance often have no prior criminal histories, and therefore may meet the first element. However, a study revealed that women with no criminal pasts were still convicted of low-level offenses at a rate higher than men with no criminal pasts, despite meeting this requirement.¹⁰¹

Women of circumstance also have difficulties meeting the second and third prongs. This may be explained by the ruling in *Pinkerton*, which imputes the acts of one member of a conspiracy on all other members.¹⁰² Therefore, if any member of the drug conspiracy possessed a firearm, killed, or severely injured another person in furtherance of the conspiracy, a woman of circumstance would fail to meet the second and third elements. Consequently, a woman of circumstance would be ineligible for evading a mandatory minimum under the statutory safety valve. Revealing information as required by the fifth element of the safety valve may be a serious threat to the woman’s (and children’s) life and safety, due to a woman of circumstance’s precarious and often dangerous relationship with a male drug operative. Even if a woman of circumstance can offer information to prosecutors and meets all other elements, she may decline to provide any information out of sheer fear of retaliation.

The drug trade is typically a large and sophisticated operation. Congress’s intent was noble in passing § 80001 of the Violent Crime Control and Law Enforcement of 1994.¹⁰³ In practice, however, this “safety valve” does little to keep women of circumstance safe from bearing the brunt of the actions of their male counterparts. Because women of circumstance are, by definition, not highly involved in the drug trade, providing substantial assistance may be an impossible task. The result is that women of circumstance are hoarded into America’s prisons in droves, though they

98. *Id.* at 1496.

99. 18 U.S.C. § 3553(f). *See also* Gaskins, *supra* note 2, at 1546.

100. Gaskins, *supra* note 2, at 1546.

101. U.S. DEP’T OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES 8 (1994).

102. *See* *Pinkerton v. United States*, 328 U.S. 640, 646-48 (1946) (holding that conspirators are liable for all the “reasonably foreseeable” substantive crimes committed by their co-conspirators in furtherance of the agreement.).

103. Pub. L. No. 103-322, § 80001, 108 Stat. 1796, 1985.

do not deserve to be imprisoned for doing nothing more than loving or fearing a man involved in the drug trade. They wait out their days behind bars, serving a sentence imposed on them by a chart rather than consideration of their actual involvement in the crime. This is not justice; this is despotism.

D. Conspiracy Laws and Mandatory Minimums at Work: A Case Example

Mandatory minimums obligate a judge to set a sentence based on the quantity of drugs and the sophistication of the conspiracy rather than the accused's role in the operation. As a result, a woman of circumstance with no prior criminal history and little to no actual involvement in the drug trade can end up with a sentence that far outweighs the sentence imposed on key players in the conspiracy. Tammi Bloom provides a poignant illustration of how a woman of circumstance's life can be turned upside down by virtually no fault of her own.

Tammi, a licensed nurse practitioner and mother of two, was convicted of conspiracy to distribute cocaine and possession of a large quantity of cocaine.¹⁰⁴ Ronald, Tammi's husband of fifteen years, dealt cocaine from an apartment he shared with his mistress.¹⁰⁵ The apartment was in Ocala, Florida, while Tammi resided with her children in Miami.¹⁰⁶ She contends that she had no idea about either the mistress or the drug dealing.¹⁰⁷ After Ronald and his mistress were arrested in Ocala, the police conducted a search of Tammi's home in Miami where they found cocaine, cocaine base, records involving the sale of drugs, and weapons.¹⁰⁸ Tammi contended that the location of the drugs were purposefully hidden from her in a septic tank in the backyard.¹⁰⁹ Nonetheless, Tammi was charged with being a member of the conspiracy and sale and constructive possession of the drugs was imputed on to her with the same weight as those directly involved in acquisition and distribution.¹¹⁰

Charges of constructive possession are commonly levied against women of circumstance who are presupposed to have committed an actual criminal violation due to her relationship with someone who has.¹¹¹ Factors that have the effect of increasing one's sentence length, such as the quantity of drugs or the presence of a firearm, are imputed onto the woman, regardless of her participation or knowledge of the action.¹¹² Tammi was charged with a sentence longer than anyone else involved in

104. Gaskins, *supra* note 2, at 1539.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Gaskins, *supra* note 2, at 1539.

110. *Id.*

111. See Lenora Lapidus et al., AM. CIV. LIBERTIES UNION, CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND CHILDREN, iii (2004), https://www.aclu.org/files/images/asset_upload_file431_23513.pdf [<https://perma.cc/AY75-LH4K>] ("Even when they have minimal or no involvement in the drug trade, women are increasingly caught in the ever-widening net cast by current drug laws through provisions such as conspiracy, accomplice liability, and constructive possession, which expand criminal liability to reach partners, relatives, and bystanders.")

112. Gaskins, *supra* note 2, at 1546.

the drug enterprise.¹¹³ The disparity in Tammi's sentence compared to those of others in the conspiracy may be explained by the large quantity of drugs and the presence of firearms found during the search, coupled with the fact that Tammi was largely unaware of the drug enterprise, and therefore unable to offer substantial assistance to prosecutors.¹¹⁴ Her husband received a 17.5-year sentence, his mistress received a 6.5-year sentence, and another co-conspirator in Ocala received a 14-year sentence.¹¹⁵ Tammi received a sentence six months shy of twenty years.¹¹⁶ Such disparities illustrate that current conspiracy laws and mandatory minimum sentences are not the appropriate way to fight the War on Drugs.

E. The Implications of the War on Drugs on Women of Circumstance Post-Conviction

After a non-drug abusing woman of circumstance is released from prison, she still feels the implications of her conviction. In addition to absurd mandatory minimums and harsh conspiracy laws, Congress enacted burdensome measures that ensure women of circumstance remain disadvantaged post-conviction. As well as facing marginalization in society, former drug offenders are ineligible for federal financial aid for education,¹¹⁷ may be restricted from living in federal public housing,¹¹⁸ and face limitations in welfare benefits.¹¹⁹ On top of these challenges, society's gendered presumptions compound reintegration into society with familial expectations for women.

While in prison, women have less access than men to the educational and vocational programs that would aid in their reintegration upon release.¹²⁰ In the occupations where women are typically overrepresented, numerous states prevent those with felony convictions from obtaining the professional licenses to do work in conformity with the law.¹²¹ If a formerly imprisoned woman is able to find employment, it is usually a low-paying job that leaves her in need of additional financial assistance.¹²²

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) instituted a "lifetime ban on cash assistance and food stamps for individuals with felony drug convictions."¹²³ Framed as a provision to maintain

113. *Id.*

114. *Id.* at 1539, 1542.

115. *Id.* at 1542.

116. *Id.*

117. 20 U.S.C. § 1091(r)(1) (2000) (denying convicted drug offenders the ability to receive federal financial aid for higher education).

118. 42 U.S.C. §§ 1437d(s)-(t) (2000) (giving public housing agencies the authority to require access to criminal records and obtain information from drug abuse facilities).

119. 21 U.S.C. § 862a (2000) (amending the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), adding a provision that bans women convicted of drug offenses from receiving welfare benefits.).

120. Lenox, *supra* note 13, at 295.

121. *Id.* (occupations such as nursing, childcare, dentistry, social work, accounting).

122. *Id.* ("Women's heightened reliance on public assistance prior to incarceration coupled with the lack of adequate job training in prison makes it likely that female ex-offenders will remain dependent on social welfare upon reentry into society.")

123. *Id.* at 297.

accountability, the Act specifically targets drug offenders, while the same type of assistance is still available for those convicted of murder—evidencing the absurdity of the law.¹²⁴ This lifetime ban on assistance “makes it almost impossible for many former female members to attain self-sufficiency, provide for their families, and return to the community as contributing members of society.”¹²⁵

Securing housing post-release is a particularly arduous challenge for women of circumstance. Federal housing regulations authorize landlords to evict a tenant on mere suspicion of drug use. In *Dep’t of Hous. & Urban Dev. v. Rucker*, the Supreme Court ruled that under the Anti-Drug Abuse Act of 1988, Public Housing Authorities have the right to evict a tenant and terminate her lease when a resident or guest engages in drug activity, irrespective of whether she knew about the activity.¹²⁶ If a woman of circumstance finds a way to secure housing for herself post-release, the possibility of losing said housing always looms and may come to fruition due to no fault of her own.

These obstacles exacerbate the likelihood of recidivism, as those who cannot overcome them may return to the lifestyle that initially led them to jail. For example, a woman of circumstance incarcerated for being “complicit” in her intimate’s drug enterprise, may find herself again relying on money linked to drugs. If she is unable to receive federal funds for higher education or housing, she may not be able to successfully navigate society post-release.¹²⁷ The United States should focus on ensuring successful reentry into society by breaking down these unnecessary barriers.

IV. HOW SOCIETAL NORMS OF PATRIARCHY PRESENT IN THE WAR ON DRUGS SEND WOMEN OF CIRCUMSTANCE TO PRISON

A female intimate of a male drug operative makes decisions restricted by her counterpart’s actions. Her decisions are “limited and reactionary—as opposed to independent or proactive.”¹²⁸ Women of circumstance are truly in a lose-lose situation. If she reports her partner’s drug involvement, she runs the weighty risk of disrupting the family unit by sending him, and potentially herself, to jail—even in circumstances of limited involvement. If she decides not to report, she may implicate herself in the crime due to her “complicity” with the scheme. The criminal justice system falsely assumes that women of circumstance have the free will to make choices for themselves.

124. *Id.* at 298; Reply Brief of Appellants at 2-4, *Turner v. Glickman*, 207 F.3d 419 (7th Cir. 2000) (No. 99-1923) (“[T]here is certainly no reason to believe that murderers are more honest than drug felons and are therefore less likely to commit food stamp fraud.”).

125. Lenox, *supra* note 13, at 298-99 (quoting Amy Fettig, *Women Prisoners Altering the Cycle of Abuse*, 36 HUM. RTS. 2, 5 (2009)).

126. *Dep’t of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125, 130 (2002).

127. See, e.g., Lenox, *supra* note 13, at 282, 304; Goldfarb, *supra* note 4, at 304 (“While male ex-offenders continue to suffer the consequences of their convictions long after exiting prison, these collateral sanctions uniquely impact females, who are not only unemployed and without housing at greater rates than men, but are more often relied upon as the primary caretakers of their children.”).

128. Boux & Daum, *supra* note 3, at 574.

Many women of circumstance are reluctant to provide prosecutors with information, even when they know it would greatly help their own situation. Known as “the girlfriend problem,” prosecutors offer a woman of circumstance a reduced sentence for giving them information, yet she still declines to help out of loyalty to her loved one.¹²⁹

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 also inhibits her from willingly disclosing his crimes to the authorities.¹³⁰

For many reasons which require consideration by prosecutors and sentencing judges, a woman of circumstance may be more willing to go to prison than to betray her loved one. Even if she considers saving herself, the repercussions and potential isolation she may face from her community influence her decision-making process.¹³¹ Even though not all women of circumstance are necessarily blameless, their ancillary role in a male counterpart’s drug enterprise consists of such minor actions—opening the apartment door, answering the telephone, or driving her loved-one somewhere—that it is absurd to contend that they deserve to be imprisoned for longer than high-level participants in the drug trade. The lack of empathy towards women of circumstance in the War on Drugs is precisely why the United States should show leniency to the intimates of male drug operatives.

V. CONCLUSION

The War on Drugs has caused irreparable harm to women of circumstance who are serving extensive prison sentences often for doing nothing more than supporting or loving with the wrong man. The War on Drugs intended to punish the drug kingpins responsible for supervising large and sophisticated illegal narcotics operations. The result has been the imprisonment of countless women with no consideration of their ancillary roles.

The United States should reconsider the War on Drugs in its entirety, but there are some measures that would considerably lessen the damage that the War on Drugs has on women of circumstance. Congress should reconsider federal conspiracy laws and mandatory minimum sentencing guidelines in light of the evidence that these policies are ill-suited to advancing the means of justice, particularly when it comes to women of circumstance. Under *Pinkerton’s* vicarious liability, a woman of

129. Levy-Pounds, *supra* note 3, at 473.

130. Myrna S. Raeder, *Remember the Family: Seven Myths About Single Parenting Departures*, 13 FED. SENT’G REP. 254 (2001).

131. See, e.g., *infra* Part III.B; Part III.C.1; Levy-Pounds, *supra* note 3 at 474-75.

circumstance is responsible for all actions taken in furtherance of a drug conspiracy regardless of whether or not she even knew this particular action was occurring.¹³² For a woman of circumstance to be considered a member of a conspiracy, prosecutors should be required to show that the accused plays an integral role in furthering the conspiracy rather than a mere connection to the conspiracy through a loved one. Changing this standard would result in far fewer women finding themselves caught up in the criminal justice system due to the actions of a loved one, and would mitigate the disruption that their absence leaves on their families.

In addition, Congress should allow more judicial discretion in sentencing under the mandatory minimum guidelines. Because patriarchal norms are present in the drug trade, women are not ordinarily at the top ranks of a narcotics enterprise and therefore, are often unable to offer substantial assistance to prosecutors. This should be taken into account and leniency should be shown to women of circumstance who are unable to offer knowledge. Lastly, Congress should remove the barriers to reentry into society for formerly incarcerated women of circumstance who are seeking housing, education, and financial assistance to rebuild their lives. Specifically, the lifetime ban on public assistance for felony drug offenders should be eliminated to reduce the disparate impact that this provision has on women of circumstance. Landlords should be required to meet a standard higher than mere suspicion of drug activity before evicting a tenant.

The War on Drugs has stifled the progress of an entire class of American citizens. The American justice system has failed women of circumstance. This failure is systemic and until the United States rethinks the “War on Drugs,” women of circumstance will continue to suffer disproportionately. In reconsidering the War on Drugs, legislators and law enforcement need to ponder both policing strategies and sentencing structures that land women of circumstance in prison, as well as the barriers that hamper these women’s reintegration to society.

132. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).