

NEUTRALIZING THE GENDERED COLLATERAL CONSEQUENCES OF THE WAR ON DRUGS

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As a result of the War on Drugs, women are disproportionately impacted by the civil sanctions resulting from felony drug convictions. While legislation imposing collateral consequences of felony drug convictions does not explicitly discriminate against women, these laws reflect sex-based institutional biases and are thereby unequal in effect. While some statutes permit a disparate impact theory of sex discrimination, there exists no statutory protection for women in the context of collateral consequences. And because the Equal Protection Clause of the Fourteenth Amendment does not adequately protect against gender-neutral legislation that adversely affects women, raising a constitutional claim is not a viable alternative to statutory protection. In response, this Note sets forth two separate—constitutionally sound—proposals for legislative reform. First, I suggest that in light of historic sex discrimination, a remedial sex-based exemption from penalties imposed by collateral consequences is in order. In recognition of the Court's distaste for sex-based legislation, however, I alternatively recommend that Congress exempt from collateral penalties ex-offenders who serve as the primary caretakers of their children.

INTRODUCTION

In the mid-1980s, at the height of the War on Drugs, Elaine Bartlett was twenty-six years old with four children under the age of eleven, “working off the books as a hairdresser in Harlem.”¹ In exchange for \$2500—which she planned to use to furnish her apartment and provide Thanksgiving dinner for extended family—Ms. Bartlett agreed to take four ounces of cocaine by train from New York City to Albany.² Within hours, Ms. Bartlett was under arrest for selling cocaine.³ With no prior criminal history,⁴ Ms. Bartlett was sentenced to twenty years to life in a maximum-security prison.⁵

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¹ Sara Rimer, *At Last, the Windows Have No Bars*, N.Y. TIMES, Apr. 29, 2004, at F1, F10 (reporting on Elaine Bartlett).

² *Id.*

³ JENNIFER GONNERMAN, *LIFE ON THE OUTSIDE: THE PRISON ODYSSEY OF ELAINE BARTLETT* 31 (2004) (quoting *Couple Held in Cocaine Sale*, TIMES UNION (Albany), Nov. 9, 1983, at B4).

⁴ Rimer, *supra* note 1, at F10.

⁵ GONNERMAN, *supra* note 3, at 82.

In 2000, having served sixteen years behind bars as a first-time drug offender, Ms. Bartlett won clemency and was released from state prison.⁶ Paroled to her family's housing project apartment, Ms. Bartlett resided—illegally—with twelve relatives, including her children.⁷

Ms. Bartlett's victimization by the War on Drugs is not unique. Between 1986 and 1995, drug offenses accounted for 91% of the increase in the number of women sentenced to prison in New York, 55% in California, and 26% in Minnesota.⁸ The majority of women in federal prisons were neither violent nor repeat offenders.⁹ While there was a 487% increase in the incarceration of female drug offenders during this time, incarceration rates rose only 203% for male drug offenders between 1986 and 1995.¹⁰ In 1999, state and federal prisons housed an estimated 53,600 mothers of minor children, leaving roughly 126,100 children with incarcerated mothers.¹¹

As a result of the War on Drugs, women have been disproportionately affected by the civil sanctions resulting from felony drug convictions. These sanctions signify additional penalties resulting from an arrest, prosecution, or conviction, which are independent of the criminal sentence imposed. While legislation compelling collateral consequences for felony drug convictions does not explicitly discriminate against women, these laws reflect sex-based institutional biases and are thereby unequal in effect. The question thus becomes: How do we ensure true gender equality in the context of collateral sanctions for drug offenses?

While some statutes permit a disparate impact theory of sex discrimination,¹² there exists no statutory protection for women in the

⁶ *Id.* at 174.

⁷ See *id.* at 232–33 (noting that Bartlett's drug conviction precluded her from residing legally in public housing).

⁸ MARC MAUER ET AL., GENDER AND JUSTICE: WOMEN, DRUGS, AND SENTENCING POLICY 3 (1999), available at http://www.sentencingproject.org/doc/publications/dp_gender_andjustice.pdf.

⁹ See Leslie Acocha & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 134 (1999) (describing general characteristics of female prisoners).

¹⁰ Eda Katharine Tinto, Note, *The Role of Gender and Relationship in Reforming the Rockefeller Drug Laws*, 76 N.Y.U. L. REV. 906, 913–14 (2001).

¹¹ CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 2 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf>.

¹² The Supreme Court first articulated the disparate impact theory in the context of employment law in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Title VII “proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. . . . [G]ood intent or absence of discriminatory intent does not redeem [biased] employment procedures” *Id.* at 431–32.

context of collateral consequences. Because the Equal Protection Clause of the Fourteenth Amendment does not adequately protect against facially gender-neutral legislation that adversely affects women, raising a constitutional claim is not a viable alternative to statutory protection.¹³ Therefore, I argue that amending collateral consequences legislation to reflect gender differences will best ensure that male and female ex-drug offenders are equally situated upon reentry to society from prison.

This Note sets forth two separate—constitutionally sound—proposals for legislative reform. First, I suggest that in light of historic sex discrimination, a remedial sex-based exemption from civil penalties is an appropriate way to combat the unequal collateral consequences that result from felony drug convictions. In recognition of the Court's distaste for sex-based legislation,¹⁴ however, I alternatively recommend that Congress exempt from collateral penalties ex-offenders who serve as the primary caretakers of their children. While much has been written about the race and gender implications of the War on Drugs sentencing policy,¹⁵ no previous work has considered gender-based legislative reform as a possible cure for the disparate impact on women of the collateral consequences of felony drug convictions.¹⁶

In Part I, I discuss the history of the War on Drugs and mandatory minimum sentencing regimes, illustrating their combined effects on female drug offenders and those who are the parents of minor children.¹⁷ Part II outlines the implications of felony drug con-

¹³ See *infra* Part III (rejecting litigation strategy based on Equal Protection Clause as futile response to collateral-consequences legislation).

¹⁴ See *infra* Part III.A (discussing intermediate scrutiny standard of review for sex-specific laws).

¹⁵ See generally, e.g., Lanette P. Dalley, *Imprisoned Mothers and Their Children: Their Often Conflicting Legal Rights*, 22 *HAMLIN J. PUB. L. & POL'Y* 1 (2000) (discussing Montana study of female prison population); Kathleen Daly & Michael Tonry, *Gender, Race, and Sentencing*, 22 *CRIME & JUST.* 201 (1997) (comparing differing impacts of race and gender on criminal justice system); 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 (2006) (arguing War on Drugs disparately impacts children and poor women of color); Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 *J. CRIM. L. & CRIMINOLOGY* 181 (1994) (analyzing impact of federal sentencing reform on female offenders); 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 (1993) (arguing that federal sentencing guidelines ignore factors critical to female offenders).

¹⁶ For the purposes of this Note, I have limited my discussion of collateral consequences to those affecting public assistance, housing, and foster care.

¹⁷ For a detailed discussion, see specifically *infra* notes 45–62 and accompanying text.

victions for public assistance, foster care, and housing, which I argue disparately impact female ex-offenders.

In Part III, I lay the foundation for my legislative reform proposals outlined in Part IV. Part III reveals that while litigating the gendered implications of collateral consequences under the Equal Protection Clause would likely be unfruitful, the Fourteenth Amendment remains salient to the extent that it frames legislative reform efforts. Because courts rarely address subtle, institutional sex discrimination—such as that implicated by collateral consequences legislation—legislators must take the reins to address implicit inequality. Working within the confines of current equal protection jurisprudence, Part IV puts forth two separate proposals for legislative reform to address effectively the gendered disparate impact of collateral consequences for felony drug convictions.

Before discussing collateral consequences, I begin by exploring the social construction of the War on Drugs, determinate sentencing practices, and their disparate impact on women and primary caretakers of minor children.

I

THE WAR ON DRUGS

In 1971, President Nixon officially declared a “war on drugs,” identifying illegal drug use as “public enemy number one.”¹⁸ Over the past forty years, the War on Drugs has caused momentous transformations in crime policy, magnifying racial disparities in incarceration¹⁹ and amplifying the prison population.²⁰ With the Obama administra-

¹⁸ PBS, *Thirty Years of America's Drug War: A Chronology*, <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/cron> (last visited Feb. 7, 2011).

¹⁹ Under the Anti-Drug Abuse Act, possession of 500 grams of powder cocaine warranted the same five-year sentence as possession of five grams of crack cocaine. 21 U.S.C. § 841(B) (2006). In 2004, the U.S. Sentencing Commission concluded that “[t]his one sentencing rule contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination.” 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 132 (2004), available at http://www.ussc.gov/15_year/15_year_study_full.pdf. In 2010, President Obama signed legislation that reduces the sentencing disparity from 100-to-1 to 18-to-1; now, a person convicted of crack cocaine possession gets the same mandatory prison term as someone with 18 times more powder cocaine. Peter Baker, *Obama Signs Law Narrowing Cocaine Sentencing Disparities*, N.Y. TIMES (Aug. 3, 2010, 12:55 PM), <http://thecaucus.blogs.nytimes.com/2010/08/03/obama-signs-law-narrowing-cocaine-sentencing-disparities>.

²⁰ See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 20–21 (2007); see also HUMAN RIGHTS WATCH, COUNTRY SUMMARY: UNITED STATES 2 (2010), available at http://www.hrw.org/sites/default/files/related_material/unitedstates.pdf (“The United States continues to have both the largest incarcer-

tion comes hope for scaling down the War on Drugs, though the collateral consequences remain for those who are presently incarcerated. The current director of the White House Office of Drug Control Policy, Gil Kerlikowske, has chastised the phrase “War on Drugs” as eliciting an inaccurate representation of the War on Drugs as a war on individuals.²¹ But for millions, this characterization is in fact an accurate depiction of the War on Drugs.

A. *Waging War Against Women*

Female incarceration rates have skyrocketed since the inception of the War on Drugs.²² In order to “mak[e] individuals accountable for their actions,” officials increased funding for street-level drug enforcement,²³ resulting in a dramatic rise in the female inmate population.²⁴ Between 1986 and 1996, women’s incarceration in state prisons for drug offenses rose 888%; during the same time, incarceration rates for males convicted of drug offenses rose only 522%.²⁵ The gendered effects of the War on Drugs persist: In 2003, 29% of women in state prisons were incarcerated for drug offenses, compared to only 19% of male inmates.²⁶

ated population and the highest incarceration rate in the world.”); HUMAN RIGHTS WATCH, *BACKGROUND: INCARCERATED AMERICA* (2003), available at <http://www.hrw.org/legacy/backgrounder/usa/incarceration/us042903.pdf> (“Perhaps the single greatest force behind the growth of the prison population has been the national war on drugs.” (internal quotation marks omitted)).

²¹ Gary Fields, *White House Czar Calls for End to ‘War on Drugs,’* WALL ST. J., May 14, 2009, at A3.

²² In 1979, roughly 1 in 10 incarcerated women was serving a sentence for a drug conviction; in 1999, this figure was approximately 1 in 3. Dana Sussman, *Bound by Injustice: Challenging the Use of Shackles on Incarcerated Pregnant Women*, 15 *CARDOZO J.L. & GENDER* 477, 484, 486 (2009).

²³ See OFFICE OF NAT’L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY 18, 20–24 (1989) (recommending increased funding for street level enforcement). The fiscal budget for drug control resources in 1989 indicates that treatment accounted for just 10% of the overall budget, while “Other Law Enforcement” amounted to nearly 50%. *Id.* at 113.

²⁴ Between 1980 and 2009, the number of females incarcerated in state or federal prisons rose from 12,300 to 114,979. HEATHER C. WEST, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 4 tbl.1 (2010); Shimica Gaskins, Note, “Women of Circumstance”—*The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 *AM. CRIM. L. REV.* 1533, 1533 (2004).

²⁵ MAUER ET AL., *supra* note 8, at 5 tbl.1.

²⁶ THE SENTENCING PROJECT, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM: BRIEFING SHEETS* (2007), www.sentencingproject.org/doc/publications/womenincj_total.pdf.

While female criminality has long been attributed to the intersection of poverty and drugs,²⁷ recent data indicate that drugs play a more critical role than previously recognized.²⁸ Most female inmates were convicted of nonviolent and/or economically motivated drug offenses, leading scholars to conclude that such illegal behavior is “decidedly gendered.”²⁹ Academics agree that selling drugs is a “survival crime[]” that women commit to earn money, support an addiction, or escape domestic violence and horrific social conditions.³⁰ This, coupled with purportedly gender-blind mandatory minimum sentencing practices³¹ has made the War on Drugs the greatest single factor contributing to the rapid increase of female inmates.³²

When President Nixon first declared a national War on Drugs,³³ the policy focused on treatment rather than incarceration.³⁴ Despite

²⁷ See Alida V. Merlo, *Female Criminality in the 1990s*, in *WOMEN, LAW, & SOCIAL CONTROL* 119, 126 (Alida V. Merlo & Jocelyn M. Pollock eds., 1995) (recognizing long-held view that drugs and poverty are “major factors” causing women to commit crimes).

²⁸ Stephanie R. Bush-Baskette, *The War on Drugs: A War Against Women?*, in *HARSH PUNISHMENT: INTERNATIONAL EXPERIENCES OF WOMEN’S IMPRISONMENT* 211, 211 (Sandy Cook & Susanne Davies eds., 1999) (noting statistics that “have led some feminist criminologists to posit that [the] war on drugs has actually been a war on women”). Because of mandatory minimum sentencing and the ongoing War on Drugs, women have become the fastest growing population in the prison system. Mariely Downey, *Losing More Than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 *BUFF. WOMEN’S L.J.* 41, 44–45 (2001).

²⁹ Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 136, 138 (Marc Maurer & Meda Chesney-Lind eds., 2002).

³⁰ *Id.* at 138.

³¹ See *infra* notes 40–47 and accompanying text (discussing gender-blind sentencing guidelines).

³² See Acoca & Raeder, *supra* note 9, at 133 (noting that, before War on Drugs, “women [were] an aberration in the criminal justice system”); Gaskins, *supra* note 24, at 1533 (arguing that War on Drugs and mandatory minimum sentencing together account for dramatic increase in female prison population); 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.”). While women’s incarceration in state prisons for drug offenses rose 888% from 1986 to 1996, female confinement rates increased only 129% for offenses unrelated to drugs. *THE SENTENCING PROJECT*, *supra* note 26, at 4.

³³ The Nixon Administration created the Drug Enforcement Agency, which is “endowed with extraordinary powers to gather intelligence, to conduct wiretaps and warrantless searches, and to freeze the assets and confiscate the property of suspected traffickers.” Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen’s Race: Medical Marijuana in the New Century*, 27 *QUINNIPIAC L. REV.* 673, 687–88 (2009).

³⁴ See *Excerpts from President’s Message on Drug Abuse Control*, *N.Y. TIMES*, June 18, 1971, at 22.

its initial success,³⁵ the Nixon era marks the only time in the history of the War on Drugs in which more funding went toward treatment than law enforcement.³⁶ Notwithstanding declining rates of illegal drug use, the Reagan administration launched a public relations campaign that cultivated widespread support for the War on Drugs.³⁷ Nancy Reagan's "Just Say No" campaign represented a shift toward classifying drug use as a morally wrong choice rather than the manifestation of a disease.³⁸ In response, Congress passed and funded drug enforcement initiatives lest legislators risk being considered "soft" on the issue.³⁹

In an effort to curtail judicial sentencing discretion, Congress passed the Sentencing Reform Act of 1984,⁴⁰ which established the U.S. Sentencing Commission to promulgate binding sentencing guidelines.⁴¹ Throughout the 1980s, Congress adopted mandatory-minimum sentencing regimes, signifying its rejection of rehabilitation-based sentencing in favor of incapacitation and retribution-based sentencing.⁴² As a result of draconian sentencing practices in both state⁴³ and fed-

³⁵ Nixon's methadone treatment program cut recidivism rates for enrollees and reduced overall crime rates. Eric Blumenson, *Recovering from Drugs and the Drug War: An Achievable Public Health Alternative*, 6 J. GENDER RACE & JUST. 225, 231 (2002).

³⁶ PBS, *supra* note 18; Dana Adams Schmidt, *President Orders Wider Drug Fight; Asks \$155-Million*, N.Y. TIMES, June 18, 1971, at 1, 22 ("Of the new funds requested by the President, \$105 million is to be used solely for treatment and rehabilitation of addicts.")

³⁷ Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the 'War on Drugs' Was a 'War on Blacks'*, 6 J. GENDER RACE & JUST. 381, 389 (2002) (noting that National Institute on Drug Abuse surveys in 1982 indicated substantial decline in illegal drug use).

³⁸ See Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 799 (2004) ("With the emphasis on law enforcement, antidrug publicity, and new international interdiction programs, treatment received little consistent support from Washington.")

³⁹ See Nunn, *supra* note 37, at 389-90 ("[W]idespread public support [of Reagan's anti-drug proposals] explains the political value of the War on Drugs.")

⁴⁰ Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. § 3553 (2006)).

⁴¹ Nagel & Johnson, *supra* note 15, at 191. In *United States v. Booker*, 543 U.S. 220, 245 (2005), the Court held that sentencing guidelines are advisory, rather than determinate. Regardless, absent "exceptional circumstances," judges continue sentencing defendants within the guideline range to avoid congressional scrutiny of judicial decisions. Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353, 361 (2010); see also King, *supra* note 32, at 8-9 (noting that, post-*Booker*, "courts [have been] operating . . . as they did pre-*Booker*"). Indeed, "[d]iscretionary mandatories . . . are largely used as bargaining chips for plea negotiation." Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 213 (1993).

⁴² Nagel & Johnson, *supra* note 15, at 192. Two years after Reagan signed the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified at 21 U.S.C. § 801 (2006)), Congress passed the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified at 21 U.S.C. § 1501 (2006)).

⁴³ See UNIV. OF ILL. AT CHI. HEALTH RESEARCH & POLICY CTRS., ILLICIT DRUG POLICIES: SELECTED LAWS FROM THE 50 STATES 8 (Jan. 2002), available at <http://www.>

eral law, nonviolent drug offenders serve sentences similar to those convicted of murder and kidnapping and spend more time incarcerated than those convicted of rape, manslaughter, and assault.⁴⁴

Because judges under these sentencing regimes could not account for a particular offender's characteristics—including her level of involvement in the crime—or the fact that many women commit drug-related crimes at the behest of their abusers,⁴⁵ the purportedly “gender-neutral” sentencing was in practice detrimental to first-time, female offenders.⁴⁶ As Myrna Raeder has suggested, “[sentencing] guidelines cannot be truly gender neutral if they do not recognize the gender-based realities of criminal activity and child rearing.”⁴⁷

Historically, women's unique biological ability to reproduce has cultivated concrete social distinctions between the sexes, which have been fortified by law. In 1872, the Supreme Court in *Bradwell v. Illinois* wrote of the “natural” role of women, determining that the “timidity and delicacy” of females disqualified women from occupations outside of the home.⁴⁸ The Court stated, “[T]he domestic sphere . . . properly belongs to the domain and functions of womanhood.”⁴⁹ In the same vein, until recently, family courts decided child custody matters based on the presumption that the mother is the natural caretaker of her child.⁵⁰ Regardless of whether they earn wages

impacteen.org/generalarea_PDFs/IDTchartbook032103.pdf (“The vast majority of states use . . . [sentencing statutes that] specify a minimum and/or maximum fine and jail sentence associated with each drug and each offense.”). Individual states also developed mandatory-minimum sentences targeting drug offenses. See Alfred Blumstein & Allen J. Beck, *Reentry as a Transient State Between Liberty and Recombination*, in PRISONER REENTRY AND CRIME IN AMERICA 50, 53–54 (Jeremy Travis & Christy Visher eds., 2005).

⁴⁴ SUSAN C. BOYD, FROM WITCHES TO CRACK MOMS: WOMEN, DRUG LAW, AND POLICY 222–23 (2004).

⁴⁵ MARY WELEK ATWELL, EQUAL PROTECTION OF THE LAW? GENDER AND JUSTICE IN THE UNITED STATES 109 (2002).

⁴⁶ See Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. GENDER RACE & JUST. 277, 285, 291–93 (2002) (discussing gendered effect of patriarchal drug economy).

⁴⁷ Myrna S. Raeder, *Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences: “Gender Neutral” Sentencing Wreaks Havoc in the Lives of Women Offenders and Their Children*, 8 CRIM. JUST. 20, 21 (1993).

⁴⁸ 83 U.S. 130, 141 (1872) (holding that refusal to admit women to practice law does not violate Constitution).

⁴⁹ *Id.*

⁵⁰ See, e.g., *J.B. v. A.B.*, 242 S.E.2d 248, 253 (W. Va. 1978) (“From a strictly biological perspective, children . . . are accustomed to the warmth, softness, and physical affection of the female parent.”). *But cf.* *Stanton v. Stanton*, 421 U.S. 7, 14–15 (1975) (“No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.”). Despite the burgeoning recalibration of gender roles at the time of *J.B. v. A.B.*, the court held that “the primary responsibility for the maintenance of the house and the care and upbringing of minor children in this society still rests with the woman.” *J.B.*, 242 S.E.2d at 252; see also *infra* notes 212–14 and accompa-

outside of the home, women today continue to be pigeonholed into adopting family caretaking responsibilities.⁵¹

The 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.⁵² Women's roles in drug deals generally consist of answering the phone, opening the door, bringing contraband to sellers, or acting as couriers for men.⁵³ Yet sentencing does not reflect the supporting role women play to their male lead counterparts in the drug trade.⁵⁴ Perversely, it is a woman's subsidiary role in the drug trade that seals the coffin on her extensive sentence. The primary mechanism for sentencing flexibility lies not in the hands of judges, but rather with prosecutors who may strike deals with knowledgeable defendants to obtain information that may be used to prosecute other offenders.⁵⁵ Those playing a secondary role, like most women,⁵⁶ are not privy to such information, which renders providing "substantial assistance"⁵⁷ to the government in return for a

nying text (noting that mothers, as presumptive caretakers, were automatically granted custody over their children in divorce proceedings).

⁵¹ Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 378–79 (2001).

⁵² Meda Chesney-Lind, *Imprisoning Women: The Unintended Victims of Mass Imprisonment*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT*, *supra* note 29, at 79, 88–89 (arguing that sentencing guidelines and mandatory minimums "distinctly disadvantage women" and noting that "women tend to be working at the lowest levels of the drug hierarchy"); Goldfarb, *supra* note 46, at 291–92 ("[W]omen do not hold income-generating positions in the drug trade.").

⁵³ Raeder, *supra* note 15, at 977–78.

⁵⁴ See Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, in *GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS* 3, 9 (Barbara E. Bloom ed., 2003) (arguing that gender-neutral sentencing laws fail to recognize distinction between major and ancillary players in drug organizations).

⁵⁵ See, e.g., *United States v. Brigham*, 977 F.2d 317, 318 (7th Cir. 1992) ("Mandatory minimum penalties . . . create a prospect of inverted sentencing. The more serious the defendant's crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he has to offer to a prosecutor."); see also Gaskins, *supra* note 24, at 1544 ("[D]efendants most knowledgeable are best placed to negotiate sentences while those who play minor roles with little knowledge or responsibility end up with far more severe sentences.").

⁵⁶ For example, in 1994, Kemba Smith, who had no prior criminal record, pled guilty to conspiracy to distribute crack cocaine because her boyfriend at the time, unbeknownst to Kemba, was the leader in a \$4 million crack cocaine ring and one of the FBI's Fifteen Most Wanted. In 1989, Serena Nunn, with no prior criminal record and a minor role in her boyfriend's drug ring, was sentenced to more than fifteen years in prison. *The Sentencing Project Featured Stories—Women*, SENT'G PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=135> (last visited Feb. 7, 2011). For case studies detailing the effects of the War on Drugs on twelve different women, see Goldfarb, *supra* note 46, at 281–91.

⁵⁷ See, e.g., Tinto, *supra* note 10, at 929–36 ("[W]omen offenders often lack sufficient information to merit a [downward sentencing] departure based on substantial assistance

reduced sentence nearly impossible for this class of offenders.⁵⁸ Consequently, non-violent, drug-related offenses account for the largest source of the total growth of female inmates.⁵⁹

The statistics are exceedingly bleak for indigent women of color.⁶⁰ The vast majority of women sentenced to prison for drug offenses in New York are women of color who reported annual incomes of less than \$10,000 prior to their incarceration.⁶¹ Because poor women of color are under greater government supervision—by public hospitals, welfare agencies, and probation officers—their drug use is more likely to be detected and reported.⁶²

Indeed, “pregnant women reported to child welfare agencies and law enforcement are more likely to be Black and poor” despite the fact that they are less likely than their white counterparts to use illicit drugs during their pregnancies.⁶³ Although use of cocaine, alcohol, or tobacco during pregnancy endangers the fetus,⁶⁴ pregnant women using illegal drugs risk losing custody of their newborns, while those using alcohol and tobacco do not.⁶⁵ With the birth of so-called “crack

[to the government].”). For a more in-depth discussion concerning the effect of the substantial assistance provision on women, 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, 310–14 (2007).

⁵⁸ See BOYD, *supra* note 44, at 219–20 (noting that poor women are especially likely to be subject to harsh sentences for drug crimes due to their inability to provide information to prosecutors). The unintended gender inequities generated by the War on Drugs’s “gender-neutral” sentencing scheme merit comprehensive discussion but are beyond the scope of this Note. For a more in-depth discussion on this topic, see generally Raeder, *supra* note 47.

⁵⁹ Beth E. Richie, *Challenges Incarcerated Women Face as They Return to Their Communities: Findings from Life History Interviews*, 47 CRIME & DELINQ. 368, 369 (2001).

⁶⁰ For an extensive discussion on the intersection of race, class, gender, and the War on Drugs, see generally Antoinette Greenaway, Note, *When Neutral Policies Aren’t So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African-American Women*, 17 NAT’L BLACK L.J. 247 (2004).

⁶¹ Goldfarb, *supra* note 46, at 293.

⁶² Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 387–88 (2008).

⁶³ Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1741–43 (2008).

⁶⁴ Susan Okie, *The Epidemic That Wasn’t*, N.Y. TIMES, Jan. 27, 2009, at D1. Research shows alcohol is more dangerous to the fetus than any other substance a pregnant woman may ingest. Kate Bagley & Alida V. Merlo, *Regulating and Controlling Women’s Bodies*, in WOMEN, LAW, & SOCIAL CONTROL, *supra* note 27, at 64, 70. Further, a pregnant woman’s tobacco use and second-hand smoke exposure correlate with low birth weight and Sudden Infant Death Syndrome. *Id.*

⁶⁵ While South Carolina is the only state that currently criminalizes a pregnant woman’s use of illicit drugs, other states capitalize on child abuse and neglect laws to remove newborn babies from their mothers. Bagley & Merlo, *supra* note 64, at 66.

babies,”⁶⁶ public hospitals serving poor communities play a critical role in the disproportionate impact of the War on Drugs on indigent women of color.⁶⁷

B. Primary Caretakers in Prison

A 2000 Bureau of Justice Statistics report illuminates the starkly gendered reality of both the War on Drugs and child caretaking responsibilities in the context of prison inmates.⁶⁸ Incarcerated mothers serving time for drug offenses are overrepresented in the general prison population. Of five categories of offenses, “drug offenses” comprised the greatest percentage of crimes for which mothers were incarcerated in both state and federal prisons.⁶⁹ While most fathers in federal prison also were serving time for drug offenses, “violent offenses” comprised the greatest percentage of crimes for

⁶⁶ The use of crack cocaine by pregnant women has long given rise to significant public outcry and corresponding responses from law enforcement. By 1992, more than 160 women in 24 states were arrested for delivering drugs to their newborns through the umbilical cord while pregnant. Tamar Lewin, *Mother Cleared of Passing Drug to Babies*, N.Y. TIMES, July 24, 1992, at B7. Notably, “[the] reaction to the mothers [of so-called crack babies was] completely guided not by the toxicity, but by the social meaning” of crack cocaine, Okie, *supra* note 64, which was commonly linked to women’s “sexual degradation.” E.g., Jane Gross, *A New, Purified Form of Cocaine Causes Alarm as Abuse Increases*, N.Y. TIMES, Nov. 29, 1985, at A1, B6. In 2004, a cohort of doctors, scientists, and psychologists protested use of the term “crack baby” as it “lack[s] scientific validity”: There is no scientific evidence of a “crack baby” syndrome or condition. Bagley & Merlo, *supra* note 64, at 68.

⁶⁷ The War on Drugs precipitated pregnant women’s prosecution for exposing their fetuses to crack cocaine. See Okie, *supra* note 64. Some public hospitals created policies specifically designed to detect and prosecute pregnant cocaine users. In *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the Court considered a South Carolina public hospital policy to involuntarily drug test female patients receiving prenatal treatment, ultimately determining that the policy violated the Fourth Amendment. Because such drug testing policies occurred more in public hospitals that serve low-income communities of color, a disproportionate number of women of color were charged with drug offenses. Tiffany Scott, Note, *Repercussions of the “Crack Baby” Epidemic: Why a Message of Care Rather than Punishment Is Needed for Pregnant Drug-Users*, 19 NAT’L BLACK L.J. 203, 209–10 (2005). Due to its impact on women and communities of color, the War on Drugs soon became known as the War on Crack. See, e.g., Timothy Egan, *War on Crack Retreats, Still Taking Prisoners*, N.Y. TIMES, Feb. 28, 1999, at 1.

⁶⁸ MUMOLA, *supra* note 11, at 4 (comparing numbers of mothers versus fathers that were primary caretakers of children prior to incarceration).

⁶⁹ *Id.* at 6 tbl.7 (noting that 35.1% of mothers in state and 73.9% of mothers in federal prison were serving time for drug offenses). Categories of offenses include violent offenses, property offenses, drug offenses, public order offenses, and other or unspecified offenses. Violent offenses include: homicide, sexual assault, robbery, assault, and “other violent.” *Id.* Property offenses include: burglary, larceny, motor vehicle theft, fraud, stolen property, and “other property.” *Id.* Drug offenses include: possession, trafficking, and “other drug.” *Id.* Public order offenses include weapons and “other public-order.” *Id.*

which incarcerated fathers served sentences in state prison.⁷⁰ Roughly equal numbers of male and female inmates reported having minor children;⁷¹ however, mothers in both state and federal prison were more than three times as likely to have been the only parent living with their children in the month preceding their arrest.⁷² Accordingly, “[t]he lives of children of single mothers who are incarcerated are significantly disrupted, while the children of imprisoned fathers overwhelmingly continue to reside with their mothers.”⁷³

Prior to the facially gender-neutral sentencing guidelines introduced at the height of the War on Drugs,⁷⁴ mothers’ prison sentences reflected an effort to encourage family reunification.⁷⁵ Today, however, family ties are not generally used to depart downward from the guidelines in state and federal cases,⁷⁶ resulting in an increased percentage of incarcerated mothers.⁷⁷ In 1990, the Fourth Circuit Court of Appeals in *United States v. Brand* held that a defendant’s family responsibilities as sole custodial parent of two minor children did not warrant a downward departure from federal sentencing guidelines, regardless of the fact that the defendant’s incarceration would result in her children’s placement in non-kinship care.⁷⁸ Lamenting these

⁷⁰ *Id.* (noting 66.7% of fathers in federal prison were serving time for drug offenses as opposed to only 23% in state prison, where 45.4% of inmate fathers were serving time for violent offenses).

⁷¹ *Id.* at 2 tbl.1 (finding approximately 65% of female and 55% of male state prisoners, and 59% of female and 63% of male federal prisoners, reported having minor children).

⁷² *Id.* at 4 (finding 46% of state and 51% of federal inmates who are mothers, and 15% of state and 14% of federal inmates who are fathers, reported living with their children in month prior to arrest). Prior to incarceration, nearly one-third of mothers in prison lived alone with their children compared to only 4% of incarcerated fathers. *Id.*

⁷³ Raeder, *supra* note 47, at 20.

⁷⁴ See *supra* notes 40–47 and accompanying text (discussing “gender-neutral” sentencing guidelines). For a general discussion of the effects of parental incarceration on children, see Julie Poehlmann, *Children of Incarcerated Mothers and Fathers*, 24 *Wis. J.L. GENDER & Soc’y* 331 (2009).

⁷⁵ Christopher Uggen et al., *Work and Family Perspectives on Reentry*, in *PRISONER REENTRY AND CRIME IN AMERICA*, *supra* note 43, at 209, 222 (noting that sentencing guidelines disparately impact offenders who are primary caretakers of children). Prior to the guidelines, judges often sentenced mothers to probation rather than prison, particularly in cases where suitable relatives were unavailable to care for the children. *Id.*

⁷⁶ See 28 U.S.C. § 994(e) (2006) (noting that “family ties and responsibilities” should not be considered in determining defendant’s sentence); see also *State v. Crawford*, 908 P.2d 638, 640 (Kan. Ct. App. 1995) (noting that sentencing leniency may not be based solely on defendant’s status as parent of minor children); *State v. Sherwood*, 341 N.W.2d 574, 577 (Minn. Ct. App. 1983) (same); *State v. Hodges*, 855 P.2d 291, 293 (Wash. Ct. App. 1993) (holding that fact that defendant who sold drugs to feed family, lived on public assistance, and was needed by her children, did not justify downward departure).

⁷⁷ Uggen et al., *supra* note 75, at 222.

⁷⁸ 907 F.2d 31, 33 (4th Cir. 1990) (asserting that “[a] sole, custodial parent is not a rarity in today’s society” and therefore does not merit downward departure). *But see United States v. Johnson*, 964 F.2d 124, 129 (2d Cir. 1992) (noting that sentencing single parent to

federal sentencing guidelines in a separate case, Judge Weinstein stated, “[r]emoving the mother in such a matriarchal setting destroys the children’s main source of stability and guidance and enhances the possibility of their engaging in destructive behavior.”⁷⁹

Reflecting the implications of sentencing guidelines coupled with gendered caretaking norms, responses to questions about their children’s current caregiving arrangements varied markedly between mothers and fathers in both state and federal prison.⁸⁰ Nearly all incarcerated fathers reported that at least one of their minor children resides in the care of the child’s mother.⁸¹ The reverse is true for children of incarcerated mothers: Nearly 80% of mothers in state prison identified the child’s relatives—not the child’s father—as the current caretaker.⁸² Mothers in state prison were five times more likely than incarcerated fathers to report that their children were in a foster home or under the control of a child welfare agency as a result of their incarceration.⁸³

The implications for children of their parents’ incarceration represent just one collateral consequence of felony drug convictions. In the following Part, I further explore the gendered implications of the collateral consequences of drug convictions.

prison “wreak[s] extraordinary destruction on dependents who rely solely on [their single mother] for their upbringing”); *United States v. Pena*, 930 F.2d 1486, 1494–95 (10th Cir. 1991) (upholding downward departure decision for single mother responsible for raising two infants).

⁷⁹ *United States v. Concepcion*, 795 F. Supp. 1262, 1282 (E.D.N.Y. 1992) (noting that “almost all” male relatives in female defendants’ families “have renounced any connection with or obligation to the children”).

⁸⁰ JEREMY TRAVIS ET AL., *THE URBAN INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY* 38 (2001), available at http://www.urban.org/pdfs/from_prison_to_home.pdf.

⁸¹ See MUMOLA, *supra* note 11, at 4 (“Ninety percent of the fathers in State prison reported that at least one of their children was in the care of the child’s mother . . . [They also reported] that they had a minor child in the care of either grandparents (13%) or other relatives (5%) . . .”).

⁸² TRAVIS ET AL., *supra* note 80, at 38 (finding 53% of mothers in state prison reported child’s grandparent as caretaker and 26% reported other relatives). In federal prison, 31% of mothers reported their child’s father as the current caretaker, with 45% in the care of grandparents and 34% with other relatives. MUMOLA, *supra* note 11, at 4. Because an incarcerated parent’s children may not all reside with the same caretaker, the percentages may not total 100%.

⁸³ *Id.* at 38. During the time their mother is in prison, children often move at least once and live with at least two different caretakers. CORR. ASS’N OF N.Y., *IMPRISONMENT AND FAMILIES FACT SHEET* (Apr. 2009), available at http://prisonpolicy.org/scans/Families_Fact_Sheet_2009_FINAL.pdf; cf. Levy-Pounds, *supra* note 41, at 366–68 (“When [female drug offenders] are prosecuted, their children become doubly vulnerable, as their mothers may have been the last line of defense in protecting their children from spending their childhoods in the foster care system.”). For a more in-depth discussion of foster care, see *infra* Part II.B.

II

RETURNING FROM PRISON: COLLATERAL CONSEQUENCES

Coming home from prison is about learning to control your temper without using your fists. It's about finding a place to sleep. It's about remembering how to feed yourself. It's about accumulating a wardrobe. . . . It's about finding a way, legal or illegal, to make money. It's about trying to earn respect from the children you abandoned.⁸⁴

Retribution does not draw to a close with court-prescribed punishment; the conclusion of a prison sentence often signifies the end of direct consequences and the start of a potentially lifelong struggle for equality. Criminal convictions carry with them a variety of indirect collateral consequences—legally classified as civil rather than criminal sanctions—about which the court is not required to inform the offender.⁸⁵ Justified on punitive or deterrent grounds, collateral consequences affect the reentry process for many different types of offenders, including murderers, rapists, kidnappers, and sex offenders.⁸⁶ Yet, because many collateral consequences specifically target drug offenses, drug felons and misdemeanants suffer more severe post-prison sanctions than do any other class of offenders, with the exception of sex offenders.⁸⁷

Both male and female ex-drug offenders encounter challenges to successful reentry, such as deportation and barriers to employment, licensing, voting, business, and student loans.⁸⁸ The gendered nature of family caretaking and economic instability, however, complicates the reintegration process for many women.⁸⁹

⁸⁴ GONNERMAN, *supra* note 3, at 10.

⁸⁵ Nora V. Demleitner, "Collateral Damage": No Re-entry for Drug Offenders, 47 VILL. L. REV. 1027, 1032 (2002). Such consequences may attach automatically to conviction or may be controlled by a governmental agency operating beyond the direct authority of a given judge. Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 608 (2006) (discussing general lack of knowledge about collateral consequences by defense attorneys, prosecutors, and judges).

⁸⁶ Demleitner, *supra* note 85, at 1032–33.

⁸⁷ *Id.* at 1033–34.

⁸⁸ See generally U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION (2000), available at www.justice.gov/pardon/collateral_consequences.pdf (enumerating and discussing collateral consequences imposed by federal law upon conviction of felony offense). For a discussion of the myriad collateral sanctions imposed on drug offenders, see generally Demleitner, *supra* note 85.

⁸⁹ While I recognize that many of the collateral sanctions imposed on drug offenders have the potential to disparately impact women, I have, for the purposes of this Note, limited my discussion of collateral consequences to their impact on public assistance, foster care, and housing.

A. Public Assistance

The ability to access public benefits disproportionately affects women, children, people of color, and single parents.⁹⁰ Women's greater reliance on public assistance cannot be divorced from their role in our patriarchal society.⁹¹

In the early twentieth century, the Supreme Court discouraged women from joining the workforce, stating, "[t]hat woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious."⁹² More than one hundred years later, vestiges of this seemingly antiquated patriarchal system remain;⁹³ women's association with childcare persists despite women's contemporary move to the workforce.⁹⁴ The gendered structure of society⁹⁵—including women's historic exclusion from well-paying jobs and the lack of adequate daycare—preserves the model of women as primary caretakers of children and men as breadwinners.⁹⁶ In her book *Unbending Gender*, Joan Williams attributes this gendered work-family paradigm to the centuries-old system

⁹⁰ ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) EIGHTH ANNUAL REPORT TO CONGRESS ch. X (2009), available at <http://www.acf.hhs.gov/programs/ofa/data-reports/annualreport8/chapter10/chap10.htm>. In 2009, 38.5% of single-mother families lived in poverty. Press Release, Nat'l Women's Law Ctr., NWLC Analysis of New Census Data Shows Substantial Increase in Women's Poverty, Decline in Health Insurance Coverage, No Improvement in Wage Gap (Sept. 16, 2010), available at <http://www.nwlc.org/press-release/nwlc-analysis-new-census-data-shows-substantial-increase-womens-poverty-decline-health>.

⁹¹ Factors such as caregiving, parenthood, and gender discrimination have led to a society in which women experience poverty at higher rates than men. JOEL F. HANDLER & YEHESEKEL HASENFELD, *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* 39–40 (2007) (discussing factors causing higher poverty rate for women).

⁹² *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (upholding state protective labor legislation limiting hours employers could require women to work).

⁹³ See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 16–22 (1993) (discussing how historic and current labor systems disadvantage women, particularly women of color).

⁹⁴ See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 27 (2000). Although women with young children today are twice as likely to be employed than they were thirty years ago, women continue to constitute a very small percentage of managers and officials. EEOC Notice 915.002, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (2009), available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

⁹⁵ See Victoria Shannon, *Equal Rights for Women? Survey Finds: Yes, But . . .*, INT'L HERALD TRIB., July 1, 2010, at 1 (“In [the United States], women seem stymied by a lack of real progress . . .”).

⁹⁶ CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 137 (2005); see also WILLIAMS, *supra* note 94, at 24.

of domesticity that has demarcated work and family life by means that justify, sustain, and reproduce gender norms.⁹⁷

This gendered work-family disparity is reproduced in the prison population and affects public assistance. Reports from parent inmates in state prisons indicate that in the month before their arrest, twice as many mothers as fathers were unemployed.⁹⁸ While incarcerated mothers were less likely than fathers in state prison to receive wages in the month prior to arrest, they were more than three times as likely to receive public assistance.⁹⁹

Prison reinforces these gender norms. While incarcerated, female inmates typically have less access to educational, vocational, and treatment programs than do their male counterparts.¹⁰⁰ When they do receive such services, the vocational training is typically gender-specific, “women’s work,”¹⁰¹ despite the fact that most states prohibit ex-offenders with felony convictions from obtaining occupational or professional licenses in fields where women are typically over-represented.¹⁰² In effect, this renders meaningless any training women receive in prison. 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.

Contemporary welfare reform—while purportedly aiming to assist “needy” families to ensure that “children may be cared for in

⁹⁷ WILLIAMS, *supra* note 94, at 1.

⁹⁸ MUMOLA, *supra* note 11, at 9.

⁹⁹ *Id.* at 10.

¹⁰⁰ Barbara Owen, *Differences with a Distinction: Women Offenders and Criminal Justice Practice*, in GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS, *supra* note 54, at 25, 35–36; see also Acoca & Raeder, *supra* note 9, at 138 (“[I]nadequate educational and vocational options for incarcerated women fail to give them the practical tools they will need to survive crime-free once they are released.”).

¹⁰¹ SHERYL J. GRANA, WOMEN AND (IN)JUSTICE: THE CRIMINAL AND CIVIL EFFECTS OF THE COMMON LAW ON WOMEN’S LIVES 171 (2002) (noting that “women’s work” includes cosmetology, cooking, and clerical work) (internal quotation marks omitted). Women’s work also has historical underpinnings: In 1905, women represented only 20% of the paid workforce, 60% of whom were employed either as domestics in private households or home-based workers providing lodging, laundering, or sewing services. SUPREME COURT DECISIONS AND WOMEN’S RIGHTS: MILESTONES TO EQUALITY 16 (Clare Cushman ed., 2001).

¹⁰² See PATRICIA ALLARD, THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 17–18 (2002), http://www.sentencingproject.org/doc/publications/women_lifesentences.pdf (referring to fields such as childcare, social work, nursing, dentistry, health, and accounting). The twenty leading occupations for women in 2008 include: secretaries and administrative assistants, receptionists, nurses, teachers, childcare workers, cooks, and home health aids. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, 20 LEADING OCCUPATIONS OF EMPLOYED WOMEN: ANNUAL AVERAGES 1 (2008), <http://www.dol.gov/wb/factsheets/20lead2008.pdf>.

their own homes or in the homes of relatives”¹⁰³—has shifted away from providing childcare subsidies¹⁰⁴ toward encouraging recipients to join the paid workforce.¹⁰⁵ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA)¹⁰⁶ replaced Aid to Families with Dependent Children (AFDC) with Temporary Assistance for Needy Families (TANF), a federal block grant program that imposes on welfare recipients time limits and mandatory work requirements.¹⁰⁷

Work requirements under PRWORA mandate that poor women—who remain the primary beneficiaries of public assistance¹⁰⁸—leave their homes and children in search of low-wage employment. Despite the fact that the construction of the labor force revolves around an ideal worker who takes little or no time off for child caretaking,¹⁰⁹ public assistance recipients must limit their work commitments to accommodate their childcare responsibilities.¹¹⁰ To account for the gap between the legislation’s purpose and its directives, the Act incentivizes patriarchy by “encourag[ing] the formation

¹⁰³ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 601(a)(1) (2006).

¹⁰⁴ The birth of welfare in the United States contributed to the creation of a separate sphere of child caretaking, to which women were traditionally relegated. To relieve impoverished mothers who had been abandoned or widowed by their husbands, state programs established “mothers’ pensions,” which effectively subsidized childrearing and promoted traditional norms of motherhood in the absence of men. Jill Duerr Berrick, *From Mother’s Duty to Personal Responsibility: The Evolution of AFDC*, 7 HASTINGS WOMEN’S L.J. 257, 258–60 (1996).

¹⁰⁵ In 2010, despite increased federal support for subsidized childcare, most states have been unable to keep pace with rising demand, leading some to slash childcare subsidy programs altogether. Peter S. Goodman, *Cuts to Child Care Subsidy Thwart More Job Seekers*, N.Y. TIMES, May 24, 2010, at A1. Without this subsidy, many parents are unable to work. *Id.* One such parent captured the essence of this vicious cycle, stating, “I can’t work without child care, and I can’t afford child care without work.” *Id.* (internal quotation marks omitted).

¹⁰⁶ 42 U.S.C. § 601.

¹⁰⁷ *Id.* § 607; ALLARD, *supra* note 102, at 1.

¹⁰⁸ See generally NAT’L WOMEN’S LAW CTR., *Poverty Among Women and Families, 2000–2008: Recession Deepens Poverty*, Sept. 2009, <http://www.nwlc.org/sites/default/files/pdfs/WomenPoverty2000-2008.pdf> (noting that women and children continue to be disproportionately impacted by poverty despite increase in male poverty rate). Those experiencing the highest poverty rates include: female-headed families with children; women over 65 years old who live alone; and black, Latino, and Native-American women and children. *Id.* at 1.

¹⁰⁹ WILLIAMS, *supra* note 94, at 1.

¹¹⁰ See Roberts, *supra* note 93, at 17 (“Although most mothers now engage in wage labor, they must limit their work commitments to accommodate their child-care duties.”). PRWORA recognizes that 89% of children receiving AFDC benefits do not live with their father. 42 U.S.C. § 601 (2006).

and maintenance of two-parent families.”¹¹¹ Operating under the guise of “individual responsibility,”¹¹² the Act implicitly acknowledges that employment outside of the home precludes caretakers from performing as ideal workers, effectively reinforcing traditional gender norms.¹¹³ In essence, this Act provides women with a problematic choice between leaving home to find work—an option limited by childcare responsibilities—or marrying a male breadwinner and staying home with the children.¹¹⁴

Despite evidence of the disproportionate impact that the War on Drugs has exerted on women, PRWORA established a lifetime ban on cash assistance and food stamps for individuals with felony drug convictions.¹¹⁵ Currently, there is no good cause or hardship exemption for parents who resume caretaking responsibilities for their children upon reentry. While individual states may opt out of this provision or limit the period of disqualification,¹¹⁶ as of 2002, 42 states either fully or partially enforce the ban, and “an estimated 92,000 women are affected by the ban in the 23 states for which” data were available.¹¹⁷ Legislators have justified denying public benefits to drug

¹¹¹ See 42 U.S.C. § 601 (“Marriage is an essential institution of a successful society which promotes the interests of children.”). At least one feminist scholar argues that “marriage reinforces patriarchy by labeling families outside the husband-wife structure as deviant and unhealthy and by encouraging women to become dependent on men.” Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform’s Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1652 (2005).

¹¹² Judith E. Koons, *Motherhood, Marriage and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy*, 19 WIS. WOMEN’S L.J. 1, 10 n.48 (2004) (quoting Robert Kuttner, *Ron Brown’s Party Line*, N.Y. TIMES MAG., Dec. 3, 1989, at 126).

¹¹³ See WILLIAMS, *supra* note 94, at 1 (discussing domesticity as centuries-old entrenched gendered system that traditionally relegates women to caretaker role). Despite the common perception of gender equality, women in the United States continue to do 80% of the childcare and 66% of the housework. *Id.* at 2.

¹¹⁴ See Goodman, *supra* note 105 (discussing recent state cuts to childcare subsidies and noting that “low-income families are being denied resources required to enable them to work”).

¹¹⁵ Controlled Substances Act, 21 U.S.C. § 862a (2006). An individual convicted under federal or state law of any felony that has as an element the possession, use, or distribution of a controlled substance shall not be eligible for (1) assistance under any State program funded under part A of Title IV of the Social Security Act, or (2) benefits under the food stamp program (as defined in section 3(h) of the Food Stamp Act of 1977) or any State program carried out under the Food Stamp Act of 1977. *Id.* Under section 115 of the Controlled Substances Act, individuals with felony drug convictions remain eligible for the following federal benefits: emergency medical services under Title XIX of the Social Security Act; short-term, noncash, in-kind emergency disaster relief; public health assistance for immunizations; prenatal care; job training programs; and drug treatment programs. *Id.*

¹¹⁶ *Id.* § 862a(d)(1).

¹¹⁷ ALLARD, *supra* note 102, at 1 (documenting first national analysis of impact of lifetime welfare ban on women and their children).

offenders as a measure of “user accountability,”¹¹⁸ ignoring the original intent of the War on Drugs: treatment.¹¹⁹ The felony drug provision of PRWORA, section 115, was introduced and ratified by Congress with bipartisan support following very brief debate.¹²⁰ Senator Phil Gramm, the provision’s sponsor, remarked that in order to seriously enforce our nation’s drug laws, those who violate such laws should not be entitled to public assistance.¹²¹ State governments that have adopted section 115 adhere to a similar philosophy.¹²² Wholly absent from congressional debate was talk of including violent or other crimes as disqualifying offenses.¹²³ Consequently, while this provision disqualifies from public assistance an individual with a conviction for possession or sale of a small quantity of drugs, the eligibility of an individual convicted of murder remains intact.¹²⁴ While the rationale for section 115 of PRWORA is tenuous at best,¹²⁵ the Seventh Circuit recently held that, because it is “rationally related to legitimate government interests in deterring drug use and reducing welfare fraud,” the legislation is constitutional.¹²⁶

Transitional income is critical upon reentry: Within one year of release, only 40% of female ex-offenders are able to find gainful employment in the regular labor market.¹²⁷ The lifetime loss of benefits “makes it almost impossible for many former female prisoners to attain self-sufficiency, provide for their families, and return to the

¹¹⁸ Demleitner, *supra* note 85, at 1033.

¹¹⁹ See *supra* notes 33–36 and accompanying text (noting that treatment was initial aim of War on Drugs).

¹²⁰ ALLARD, *supra* note 102, at 1.

¹²¹ *Id.*

¹²² Cynthia Godsoe, *The Ban on Welfare for Felony Drug Offenders: Giving a New Meaning to “Life Sentence,”* 13 BERKELEY WOMEN’S L.J. 257, 258 (1998). The bill’s legislative sponsor in California, Democratic State Senator Adam Schiff, stated, “[I]f we’re going to [spend] welfare dollars on those with drug convictions, that means less money [for] those who are probably . . . better [positioned to] plac[e] into jobs.” *Id.* at 258–59 (internal quotation marks omitted).

¹²³ ALLARD, *supra* note 102, at 1.

¹²⁴ *Id.*

¹²⁵ 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.”).

¹²⁶ *Turner*, 207 F.3d at 431.

¹²⁷ THE SENTENCING PROJECT, *supra* note 26. Women’s unemployment may be explained not only by their lack of significant work history and skills, but also by the social stigma related to their substance abuse and criminal records. PATRICIA O’BRIEN, SAFER FOUNDATION, COUNCIL OF ADVISORS TO REDUCE RECIDIVISM THROUGH EMPLOYMENT (C.A.R.R.E.), REDUCING BARRIERS TO EMPLOYMENT FOR WOMEN EX-OFFENDERS: MAPPING THE ROAD TO REINTEGRATION 5 (2002), <http://www.saferfoundation.org/docs/womenspolicy.pdf>.

community as contributing members of society.”¹²⁸ The felony drug provision of PRWORA disparately impacts female ex-offenders, who experience greater difficulty securing employment than do their male counterparts.

The impact of section 115 is also more acute for ex-offenders who serve as the primary caretaker of their children. By reducing the household welfare allocation by the ex-offender’s share of the total benefits, the loss of benefits inevitably strains household resources,¹²⁹ frustrating a parent’s ability to resume caretaking responsibilities upon reentry,¹³⁰ an element particularly critical to ex-offender parents of children in foster care.

B. Foster Care

For incarcerated parents of minor children, the foster care system plays an integral role in family reunification upon reentry. Families caring for inmates’ children often expect paroled women to take immediate custody of their children upon release, yet formerly incarcerated parents of children placed in foster care find it difficult to demonstrate their ability to adequately provide for their children.¹³¹ The majority of incarcerated mothers resume childcare responsibility without the financial or emotional support of the children’s fathers.¹³²

Because roughly 10% of mothers incarcerated for drug offenses have a child in foster care—as opposed to fewer than 2% of fathers¹³³—the foster care system plays a critical role in family reunification upon a mother’s reentry. Deplorably, the logistics of incarceration, the dearth of government support, and federal law governing foster care make it extremely difficult for primary caretakers to reclaim their children from foster care upon reentry.

In 1997, Congress passed the Adoption and Safe Families Act (ASFA), shifting focus from keeping children safely in their homes to the broader “best interests” of the child.¹³⁴ ASFA mandates that,

¹²⁸ Amy Fettig, *Women Prisoners Altering the Cycle of Abuse*, 36 HUM. RTS. 2, 5 (2009).

¹²⁹ ALLARD, *supra* note 102, at 8–9.

¹³⁰ Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL’Y & L. 176, 215 (2004).

¹³¹ Owen, *supra* note 100, at 37.

¹³² *Id.*

¹³³ See *supra* notes 80–83 and accompanying text (discussing limited childcare role of incarcerated fathers compared to incarcerated mothers).

¹³⁴ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. § 1305 (2006)). On the other hand, Martin Guggenheim, a leading advocate in the family preservation movement, argues that “we do best by the majority of children by keeping them with their parents, even when we have reason to be concerned about a parent’s adequacy of caregiving.” Interview by PBS’s *Frontline* with Martin Guggenheim,

within twelve months of placing a child in foster care, the court must hold a hearing to determine the child's permanency plan.¹³⁵ Though ASFA aims to shorten children's stay in foster care, the legislation threatens parental rights by mandating that states automatically pursue termination of parental rights (TPR) proceedings if a child has been in foster care for 15 of the most recent 22 months.¹³⁶

Given that parent inmates average more than 45 months in both state and federal prison,¹³⁷ those with children in foster care risk losing their children upon release.¹³⁸ Indeed, about 25 states include incarceration as grounds for terminating parental rights.¹³⁹ A recent Vera Institute study found that termination of parental rights was granted in 81.5% of cases involving parents incarcerated for drug-

Professor, New York University School of Law, available at <http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/guggenheim.html> (transcript) (last visited Feb. 7, 2011).

¹³⁵ 42 U.S.C. § 675(5)(C) (2006). The permanency plan includes whether and when the child will be returned to the parent, referred for legal guardianship, or placed for adoption—at which point the state files for termination of parental rights.

¹³⁶ *Id.* § 675(5)(E). States have reacted differently to the enactment of ASFA. See generally Maryann Zavez, *ASFA at 15/22 Months for Incarcerated Parents*, 34 VT. B.J. 49 (2008) (discussing Child Welfare League of America report on effect of ASFA on termination of incarcerated parents' rights). Seventeen states modified their TPR statutes, some with specific concern about how ASFA would affect incarcerated parents. *Id.* at 49. Colorado, for instance, added an exception to the TPR filing timeline if a child remains in foster care due to circumstances beyond parents' control, such as "incarceration of the parent for a reasonable period of time." COLO. REV. STAT. § 19-3-604(2)(k)(IV) (2010). A few states, including Nebraska and New Mexico, expressly preclude incarceration as the sole basis for bringing a TPR petition at the point when a child has been in foster care for 15 of the most recent 22 months. Zavez, *supra*, at 49.

¹³⁷ See MUMOLA, *supra* note 11, at 6 tbl.8 (noting average estimated total time inmates who are mothers will serve on current sentence is 49 months in state and 66 months in federal prison).

¹³⁸ In 1989, nationwide data on terminations of parental rights in black families revealed that incarcerated parents account for 12–18% of all TPRs. Katherine Gabel & Denise Johnston, *Incarcerated Parents*, in CHILDREN OF INCARCERATED PARENTS 15 (Katherine Gabel & Denise Johnston eds., 1995).

¹³⁹ JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 128 (2005). In *Kenosha County Department of Human Services v. Jodie W.*, 708 N.W.2d 692 (Wis. 2005), an ex-offender and mother had been the sole caretaker of her son for the first two years of his life, prior to her incarceration in 2002. The child's father never assumed responsibility for his son. See *In re Max G.W.*, 716 N.W.2d 845, 848–49 (Wis. 2006). The lower court terminated the mother's parental rights, finding her to be unfit because of her inability to find suitable housing for her son—a direct consequence of her incarceration. *Id.* at 851–52. Although the incarcerated mother had arranged for the child's grandmother to care for her child while she was imprisoned, the grandmother later informed social services that she could not care for the child. *Id.* at 849. In reversing, the Supreme Court of Wisconsin held that a parent's incarceration may not be the sole basis for termination of parental rights. *Id.* at 861.

related offenses.¹⁴⁰ Since the enactment of ASFA, another study estimates a 250% increase in the number of cases terminating parental rights involving parental incarceration, from 260 to 909 cases.¹⁴¹ Research also suggests single parents of children in foster care face the greatest resistance to reunification.¹⁴²

The Center for Children of Incarcerated Parents¹⁴³ determined that women are disproportionately affected by the involuntary termination of parental rights. Of the female offenders whose children participate in the Center's programs, 25% had lost their parental rights.¹⁴⁴ Contact between a mother and her child is among the most significant predictors of family reunification following incarceration.¹⁴⁵ Yet, because there are far fewer prisons for women than men, women are sent further away from their communities and therefore receive fewer visits from their children and families.¹⁴⁶

C. Housing

Women are generally more susceptible to housing instability than are men. Women are more likely than men to be victims of subprime mortgage lending practices and are more likely to receive higher-cost mortgages.¹⁴⁷ Women—particularly low-income black women, often single mothers—are evicted at greater rates than their male counter-

¹⁴⁰ Arlene F. Lee et al., *The Impact of the Adoption and Safe Families Act on Children of Incarcerated Parents*, in *INTERRUPTED LIFE: EXPERIENCES OF INCARCERATED WOMEN IN THE UNITED STATES* 77, 81 (Rickie Solinger et al. eds., 2010).

¹⁴¹ Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 *FORDHAM URB. L.J.* 1671, 1678 (2003). In contrast, before ASFA, between 1992 and 1996, the number of TPR cases involving incarcerated parents rose only 30%. *Id.*

¹⁴² R. Anna Hayward & Diane DePanfilis, *Foster Children with an Incarcerated Parent: Predictors of Reunification*, 29 *CHILD. & YOUTH SERVICES REV.* 1320, 1330 (2007).

¹⁴³ The Center was founded to increase documentation on and demonstrate model services for children with incarcerated parents. *CTR. FOR CHILD. INCARCERATED PARENTS, The CCIP Story*, http://e-ccip.org/about_us.html (last visited Feb. 7, 2011).

¹⁴⁴ ROSLYN MURASKIN, *IT'S A CRIME: WOMEN AND JUSTICE* 180 (3d ed. 2003); Gabel & Johnston, *supra* note 138 (citing DENISE JOHNSTON, *CHILDREN OF OFFENDERS* (Pacific Oaks Center for Children of Incarcerated Parents, 1992)). In 1992, the Children of Offenders Study studied 58 children of criminal offenders. These children received school-based therapeutic services. *CTR. FOR CHILD. INCARCERATED PARENTS, CCIP Client Publications*, <http://www.e-ccip.org/publication.html> (last visited Feb. 7, 2011).

¹⁴⁵ Hayward & DePanfilis, *supra* note 142, at 1325.

¹⁴⁶ ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* 55 (2008); TRAVIS ET AL., *supra* note 80, at 13 (noting that mother inmates are on average 160 miles farther away from their children than are incarcerated fathers).

¹⁴⁷ ALLEN J. FISHBEIN & PATRICK WOODALL, *WOMEN ARE PRIME TARGETS FOR SUBPRIME LENDING: WOMEN ARE DISPROPORTIONATELY REPRESENTED IN HIGH-COST MORTGAGE MARKET* 3 (2006), available at <http://www.consumerfed.org/elements/www.consumerfed.org/file/housing/WomenPrimeTargetsStudy120606.pdf>.

parts, resulting in damage to their social ties, children's schooling, and credit ratings.¹⁴⁸ One explanation for this disturbing trend is the fact that single mothers need, though frequently cannot afford, larger, more expensive housing than single men.¹⁴⁹

Gendered housing instability in the general population is reproduced in the inmate population. Mothers in state prison were twice as likely as fathers to report having been homeless in the year before their incarceration.¹⁵⁰ As such, women are more likely to require government assistance with housing.¹⁵¹

After the Anti-Drug Abuse Act of 1988 declared that "drug dealers are increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants,"¹⁵² the Housing Opportunity Program Extension Act of 1996 mandated that public housing authorities (PHAs) implement policies to deny public housing to individuals engaged in proscribed criminal behavior.¹⁵³ The legislation authorized PHAs, including Section 8 housing providers, to perform criminal background checks on adult applicants and to terminate the leases of public housing tenants and their families for the criminal behavior of a household member, guest, or "other person under the tenant's control."¹⁵⁴

Congress also provided PHAs greater latitude to evict tenants by expanding the definition of "criminal activity" to include "any drug-related activity."¹⁵⁵ The Department of Housing and Urban

¹⁴⁸ See Erik Eckholm, *A Sight All Too Familiar in Poor Neighborhoods*, N.Y. TIMES, Feb. 19, 2010, at A14 (reporting findings of not-yet published research on gender patterns in Milwaukee inner-city rentals).

¹⁴⁹ *Id.*

¹⁵⁰ MUMOLA, *supra* note 11, at 9.

¹⁵¹ In 2000, women headed 79% of households in public housing nationally. HUD USER DATA SETS, *A Picture of Subsidized Households*, 2000, <http://www.huduser.org/picture2000/index.html> (last visited Feb. 7, 2011) (follow "Click Here to Start a Query" hyperlink; then select "U.S. total"; then select "Total for all HUD programs"; and then select "pct_female_head").

¹⁵² 42 U.S.C. § 11901(3) (2006).

¹⁵³ 42 U.S.C. § 1437d(1)(6) (2006). The term "public housing" includes both project-based public housing and programs such as the Section 8 Tenant Based Housing Assistance Program, § 1437a, which pays private landlords the difference between the contract price of a unit and affordable rent for a tenant with limited income. 24 C.F.R. § 880.501(d)(1) (2009).

¹⁵⁴ 42 U.S.C. § 1437d(1)(6). The Act allows PHAs the authority to access (1) criminal records of the applicant or current tenant and (2) records from drug treatment facilities where that information is solely related to whether the applicant is currently engaging in the illegal use of a controlled substance. *Id.* § 1437d(s)-(t).

¹⁵⁵ 42 U.S.C. § 1437d(1)(6) ("Each public housing agency shall utilize leases which . . . provide that . . . any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy."). Public housing

Development (HUD) issued “One Strike” eviction guidelines for PHAs, incentivizing housing authorities to adopt strict standards in an effort to bar from public housing those who had engaged in criminal behavior.¹⁵⁶ In the six months prior to the policy, 9835 people were denied admission to PHAs because of their criminal or drug-related activities.¹⁵⁷ Six months after the policy’s implementation, nearly twice as many individuals were denied public housing on the same grounds.¹⁵⁸

These regulations affect not only those with criminal records, but also law-abiding residents. In 1997, Pearlie Rucker, a 63-year-old woman residing in public housing with her mentally disabled daughter, two grandchildren, and a great-grandchild, was evicted from her home of thirteen years.¹⁵⁹ Why? Three blocks away from the apartment, Ms. Rucker’s daughter—named on the lease—was found with cocaine.¹⁶⁰ In an 8-0 decision with Justice Breyer abstaining, the Supreme Court held that the 1988 Anti-Drug Abuse Act authorizes local PHAs to terminate a tenant’s lease when a member of the household or a guest has engaged in drug-related activity.¹⁶¹ The housing authority may evict a tenant regardless of whether she knew or should have known about the drug-related activity.¹⁶²

That women are unemployed and without housing at greater rates than men demonstrates the need to ensure that this already vulnerable population retains access to government support. Yet our laws foreclose to many women valuable resources necessary for successful reentry following a felony drug conviction. Because the law disadvantages female ex-offenders as a class, one ought to consider whether the Fourteenth Amendment adequately protects these women. The following Part reveals the limitations of the Equal Protection Clause as a tool to combat the gendered disparate impact of collateral consequences.

authorities may now evict tenants for drug-related criminal activity occurring “on or off [the] premises,” rather than on or near the premises. *Id.*

¹⁵⁶ TRAVIS, *supra* note 139, at 232. For an in-depth discussion of the “One Strike” provision, see Jason Dzubow, *Fear-Free Public Housing?: An Evaluation of HUD’s “One Strike and You’re Out” Housing Policy*, 6 TEMP. POL. & CIV. RTS. L. REV. 55 (1996).

¹⁵⁷ TRAVIS, *supra* note 139, at 232.

¹⁵⁸ *Id.* In 1997, the “One Strike” ban affected 43% of those denied public housing. *Id.*

¹⁵⁹ Melissa A. Cohen, *Vindicating the Matriarch: A Fair Housing Act Challenge to Federal No-Fault Evictions from Public Housing*, 16 MICH. J. GENDER & L. 299, 300 (2009).

¹⁶⁰ Dep’t of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 128 (2002).

¹⁶¹ *Id.* at 130.

¹⁶² *Id.* at 130, 136.

III

UNEQUAL PROTECTION FOR FEMALE EX-OFFENDERS UPON REENTRY

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.¹⁶³ To remedy this inequity, one may envision an equal protection challenge to legislation imposing collateral sanctions on the grounds that the application of these seemingly neutral statutes adversely affects women. But while the Equal Protection Clause has invalidated explicitly discriminatory legislation, courts continue to grapple with implicit discrimination in the law.

In this Part, I briefly outline the two types of discriminatory legislation jurists often distinguish in the context of sex discrimination: (1) facially neutral statutes that exert a disparate, adverse impact on women; and (2) facially discriminatory statutes that distinguish between the sexes on the face of the legislation. Analyzing equal protection doctrine leads me to reject a litigation-based strategy for sex equality in the reentry context and lays the foundation for my two proposals for legislative reform, set out in Part IV.

A. *Facial Distinctions in Statutes*

U.S. history is rife with sex-based laws and policies,¹⁶⁴ resulting in centuries of institutional discrimination. A 1971 case, *Reed v. Reed*, signifies the first time in history that the Court applied a standard of review less deferential than mere rationality for a sex discrimination

¹⁶³ Women in the general population represent nearly 80% of all single-parent families with minor children. Bureau of the Census, U.S. DEP'T OF COMMERCE, LIVING ARRANGEMENTS OF CHILDREN: 2004, at 5 (2008), available at www.census.gov/prod/2008pubs/p70-114.pdf; see also *supra* notes 49–51 and accompanying text (discussing women's historical family caretaking role).

¹⁶⁴ See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 62–63 (1961) (holding that because women were “still regarded as the center of home and family life,” states could relieve women of jury duty for their “special responsibilities”), *overruled by* *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding law prohibiting women from being employed as bartenders unless their husbands or fathers owned establishment), *overruled by* *Craig v. Boren*, 429 U.S. 190 (1976); 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.”).

claim.¹⁶⁵ It also represents the first time the Court struck down a law discriminating on the basis of sex as a violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁶⁶ Five years later, the Court clarified the intermediate standard of review for explicitly sex-based legislation, which continues to apply today: To withstand constitutional scrutiny, laws facially distinguishing between the sexes “must serve important governmental objectives and must be substantially related to achievement of those objectives.”¹⁶⁷

While the Court does not uphold facial distinctions in the law that are based on traditional gender stereotypes,¹⁶⁸ to the extent that such stereotypes reflect and reinforce the subordination of women, the Court tolerates gender-based legislation intended to remedy the effects of historic sex discrimination.¹⁶⁹ The Supreme Court supports categorization by sex in an effort “to compensate women ‘for particular economic disabilities [they have] suffered,’ [and] to ‘promot[e] equal employment opportunity’ But such classifications may not be used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women.”¹⁷⁰

B. *Facially Neutral Statutes*

Because facially neutral statutes are less likely to elicit sex discrimination claims, the Court typically prefers such statutes above legislation that explicitly distinguishes between the sexes. But when a facially neutral statute exerts a disparate, adverse impact on a pro-

¹⁶⁵ See 404 U.S. 71, 76 (1971) (examining whether underlying objective was consistent with Equal Protection Clause of Fourteenth Amendment).

¹⁶⁶ *Id.* at 73 (holding unconstitutional Idaho code stating that among “several persons claiming and equally entitled . . . to administer [decedent’s will], males must be preferred to females” (internal quotation marks omitted)).

¹⁶⁷ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁶⁸ See, e.g., *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981) (holding unconstitutional statute giving husband, as “head and master” of jointly owned property with wife, right to dispose of property without spouse’s consent); *Orr v. Orr*, 440 U.S. 268, 271 (1979) (holding unconstitutional statutory scheme authorizing obligation of alimony upon husbands but not upon wives); *Califano v. Goldfarb*, 430 U.S. 199, 201–02 (1977) (holding unconstitutional Social Security provision under which widows were entitled to survivor’s benefits based on deceased husband’s coverage regardless of dependency but widower entitled to benefits only if he received at least half of his support from his deceased wife); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637–39 (1975) (holding Social Security Act provisions restricting survivor’s rights to female widows to be unconstitutional gender distinctions).

¹⁶⁹ Heather Nelson, “*Fatal in Fact?*”: *An Examination of the Viability of Affirmative Action for Women in the Post-Adarand Era*, 21 WOMEN’S RTS. L. REP. 151, 156 (2000).

¹⁷⁰ *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (citations omitted) (quoting *Califano*, 430 U.S. at 320); see also *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 280 (1987) (holding that Pregnancy Discrimination Act does not prohibit employment practices that favor pregnant women).

tected class, the constitutionality of the law hinges on whether it was intended to be discriminatory despite its facial neutrality.¹⁷¹ To determine legislative intent to discriminate,¹⁷² the Court considers whether the statute was passed “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”¹⁷³ If discriminatory intent exists, the statute will draw the same level of scrutiny as it would if it were facially discriminatory: intermediate scrutiny in the sex discrimination context.¹⁷⁴ Otherwise, it will draw only rational basis review, under which statutes almost always pass constitutional muster.¹⁷⁵

Courts rarely find legislative intent to discriminate. In practice, the Supreme Court typically rejects disparate impact claims based on facially gender-neutral statutes brought under the Equal Protection Clause, effectively shielding such legislation from equal protection challenges.¹⁷⁶

Therefore, despite the disparate impact on women, efforts to litigate discriminatory collateral consequences under the Fourteenth Amendment would likely prove futile, as collateral consequences legislation is facially neutral and does not evince discriminatory intent.¹⁷⁷ The Equal Protection Clause remains significant, however, because its interpretation guides future efforts to reform legislation that disparately impacts a protected class.

Working within the confines of contemporary equal protection jurisprudence, I next submit two separate proposals for legislative reform—one sex-specific, the other gender-neutral—in an effort to

¹⁷¹ See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that absent proof of invidious intent, facially neutral legislation does not violate Equal Protection Clause simply because it disparately impacts minorities).

¹⁷² The Court has named evidentiary places to look for discriminatory intent, noting that disparate impact on a protected class is probative but not dispositive of discriminatory intent. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

¹⁷³ *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (noting that although severe underrepresentation of women veterans directly resulted from Armed Services’ longstanding exclusionary practices, legislation favoring veterans is valid absent showing “gender-based discriminatory purpose”).

¹⁷⁴ See *supra* note 167 and accompanying text (noting that intermediate scrutiny standard applies to sex-based legislation).

¹⁷⁵ See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955) (“[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”).

¹⁷⁶ Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111, 1141 (1997). *But cf.* *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding admissions program was narrowly tailored to serve its compelling interest in diversity and did not violate Equal Protection Clause).

¹⁷⁷ See *supra* Part II (discussing collateral consequences of felony drug convictions).

ensure female ex-offenders receive greater substantive equality with their male counterparts upon reentry.

IV LEGISLATIVE REFORM

To the extent that historic, sex-based economic inequality adversely affects female ex-offenders, legislators should consider gender-anchored exemptions from the economic penalties stemming from felony drug convictions. To neutralize the disparate impact collateral consequences laws exert on women, I first propose amending current collateral sanctions to create a sex-specific exemption for female ex-offenders.

A. Statutory Exemptions for Female Ex-Offenders: A Proposal

At first glance, it may seem counterintuitive to demand sex-specific legislation in an effort to promote gender equality. But the Court has acknowledged that in limited circumstances, such bold measures are appropriate. Compensatory sex-based legislation may be upheld if the gender disparity the law seeks to cure is attributable to past discrimination against women or to women's current disadvantage.¹⁷⁸ According to Justice Ginsburg, promoting women's advancement and equal participation in society, politics, and the economy is an "exceedingly persuasive justification," for sex-based legislation.¹⁷⁹

Women's marginalization in today's society stems from centuries of lawful sex discrimination. Because courts have long viewed sex-based action as a rational reflection of distinctions between males and

¹⁷⁸ The Fourteenth Amendment bars only "invidious discrimination" or classifications that are "patently arbitrary [and] utterly lacking in rational justification." *Gruenwald v. Gardner*, 390 F.2d 591, 592 (2d Cir. 1968) (citing *Flemming v. Nestor*, 363 U.S. 603, 611 (1960)) (holding fact that women are treated more favorably than men in computing social security benefits does not constitute invidious discrimination and does not violate Due Process or Equal Protection Clauses). According a historically subordinated group favorable treatment does not necessarily violate the Equal Protection Clause. *See Nguyen v. INS*, 533 U.S. 53, 64 (2001) ("Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction."); Nelson, *supra* note 169, at 156 ("Laws [that] treat women differently from men are not necessarily illegitimate if the differential treatment can be justified by reference to past discrimination and current disadvantage."). *But see* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) ("[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.").

¹⁷⁹ *United States v. Virginia*, 518 U.S. 515, 531 (1996); *see id.* at 533–34 ("Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' to advance full development of the talent and capacities of our Nation's people." (alterations in original) (internal citations omitted)).

females,¹⁸⁰ the law has fortified gendered norms.¹⁸¹ To the extent that social norms limit women's options, the economic implications of gendered caretaking have disadvantaged all women.¹⁸² Some contend women's overrepresentation as caretakers is a function of choice;¹⁸³ such arguments, however, neglect the fact that choice is constrained by entrenched social ideologies.¹⁸⁴ The mere reproductive capacity of a woman and its potential effect on productivity, regardless of whether she chooses to have children, continues to make her less marketable—and therefore an unequal participant—in the workforce.¹⁸⁵

¹⁸⁰ See *supra* notes 164–66 and accompanying text (noting that until 1971, sex-based legislation received only rational basis review).

¹⁸¹ See *supra* notes 48–50 and accompanying text (discussing historical underpinnings of gender roles); see also *Frontiero v. Richardson*, 411 U.S. 677, 684–86 (1973) (acknowledging that paternalism is “firmly rooted in our national consciousness” and, thus, “women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena”).

¹⁸² See MacKinnon, *supra* note 96, at 136 (discussing childrearing, often considered women's “biological destiny,” as source of gender inequality and women's subordination).

¹⁸³ In a 2005 *New York Times* article documenting the trend of women abandoning their careers to raise families, one Yale University undergraduate student with plans to become an attorney remarked, “My mother's always told me you can't be the best career woman and the best mother at the same time You always have to choose one over the other.” Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005 at A1 (internal quotations omitted).

¹⁸⁴ See Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13, 21–22 (2000) (explaining that personal choice is constrained by social conditions including ideologies, history, and tradition); see also Williams, *supra* note 94, at 37 (arguing that mothers' marginalization reflects discrimination instead of merely choice). Women who leave the workplace as a result of maternal bias or because of their husbands' expectations are not voluntarily “opting out” of work; rather, they are pushed out because of sex discrimination. JOAN C. WILLIAMS ET AL., UNIV. OF CAL., HASTINGS COLL. OF LAW, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT: THE UNTOLD STORY OF WHY WOMEN LEAVE THE WORKFORCE 49 (2006), available at www.uchastings.edu/site_files/WLL/OptOutPushedOut.pdf. When women today who work full-time rely upon others to serve the primary caretaking role, their childcare providers are typically women—whether hired or family—and the work is unpaid or low paying. M. M. Slaughter, *The Legal Construction of “Mother,”* in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 73, 81 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

¹⁸⁵ “Historically, denial or curtailment of women's employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.” *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (internal citation omitted). Further, current studies reveal that motherhood accounts for the increasing wage gap between the sexes. Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 77 (2003) (describing phenomenon of “maternal wall” as hindrance to women's workplace achievement).

While legislation exists to address this type of sex discrimination,¹⁸⁶ without proactive measures, socially entrenched gender roles ensure the continuation of implicit inequality.

The Court has responded by upholding certain legislative efforts to protect women's rights—particularly in the economic context—through differential sex-based treatment.¹⁸⁷ In consideration of ongoing economic inequality between men and women, lawmakers should amend legislation authorizing the adverse economic impact of felony drug convictions to reflect the gender of the ex-offender. Specifically, female ex-offenders should be exempt from both section 115 of PRWORA and the “One Strike” housing initiative that would otherwise severely limit their ability to support themselves upon reentry. In crafting this legislation, lawmakers must be cognizant of constitutional constraints:

Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the ‘proper place’ of women and their need for special protection. . . . Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored.¹⁸⁸

Like the women the Court has sought to protect in the past,¹⁸⁹ female ex-offenders attempting to rebuild their lives upon reentry are generally worse equipped than their male counterparts to handle greater obstacles.¹⁹⁰ A 2005 report by the National Institute of Justice recognized that “women have different needs than men, specifically

¹⁸⁶ See, e.g., 42 U.S.C. § 2000e-2 (2006) (outlawing employment discrimination on basis of sex).

¹⁸⁷ See, e.g., *Califano v. Webster*, 430 U.S. 313, 314–16 (1977) (per curiam) (upholding provision of Social Security Act that resulted in greater monthly old-age benefits for retired women workers to compensate women for past economic discrimination); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (upholding regulation requiring honorable discharge of Navy men who were twice passed over for promotion, while allowing their female counterparts at least thirteen years of service without promotion before such discharge); *Kahn v. Shevin*, 416 U.S. 351, 353 n.4 (1974) (noting that in 1970, while 70% of working men earned over \$7000, 73.9% of working women earned less than \$7000). In 1972, two years before *Kahn* was decided, the median income for women working full-time was only 57.9% of men's median income. *Id.* at 353 n.5. The Court determined that, “[w]hether from overt discrimination or from the socialization process of a male-dominated culture,” a widow seeking employment will encounter greater obstacles than a widower, as she will likely have fewer skills to offer. *Id.* at 353–54.

¹⁸⁸ *Orr v. Orr*, 440 U.S. 268, 283 (1979) (citations omitted). Indeed, Justice Scalia's dissent in *United States v. Virginia*, 518 U.S. 515, 596 (1996), cautioned that, “for sex-based classifications, [the Court's] redefinition of intermediate scrutiny . . . makes it indistinguishable from strict scrutiny.”

¹⁸⁹ See *supra* note 187 (listing cases in which Court upheld efforts to protect women's rights).

¹⁹⁰ O'BRIEN, *supra* note 127, at 6.

greater social, emotional, and physical challenges that affect their rehabilitation and reentry into society.”¹⁹¹

Nearly forty years after the Court ruled in favor of benefits to widows that were not extended to widowers,¹⁹² the gender wage gap persists: The Bureau of Labor Statistics reported that, in 2008, women’s median weekly salary was about 80% that of men’s.¹⁹³ In addition, female ex-offenders tend to have fewer skills and less work experience than their male counterparts.¹⁹⁴ In 2002, 66% of men in jail were earning wages pre-incarceration, compared to only 25% of women.¹⁹⁵ Education plays a significant role in one’s ability to secure a job, yet nearly half of women in state prison have not graduated from high school or earned a GED, adversely affecting employment prospects upon release.¹⁹⁶ As discussed above, female ex-offenders are further hampered by the dearth of vocational and educational training programs in women’s prison facilities.¹⁹⁷

Importantly, female drug offenders struggle with substance abuse and dependency at a far greater rate than their male counterparts.¹⁹⁸ Women’s greater reliance on the drug trade as a mechanism to combat economic marginalization and physical and emotional abuse necessitates effective rehabilitation programs for women upon reentry.¹⁹⁹ One avenue of successful reentry for women depends on recognition that women have different treatment needs than men;²⁰⁰ yet TANF now denies ex-felony drug offenders the benefits that have traditionally covered the cost of treatment.²⁰¹ Further, since states often screen

¹⁹¹ NAT’L INST. OF JUSTICE, DEPT. OF JUSTICE, 2005 ANNUAL REPORT 26, available at www.ncjrs.gov/pdffiles1/nij/213267.pdf.

¹⁹² *Kahn*, 416 U.S. at 355 (upholding Florida state law providing valuable property tax exemption for widows, but not widowers).

¹⁹³ See Catherine Rampell, *Women Earn Less Than Men, Especially at the Top*, N.Y. TIMES ECONOMIX BLOG (Nov. 16, 2009, 5:25 PM) <http://economix.blogs.nytimes.com/2009/11/16/the-gender-pay-gap-persists-especially-for-the-rich/> (noting that gender gap is related to fact that women and men tend to do different jobs).

¹⁹⁴ O’BRIEN, *supra* note 127, at 6.

¹⁹⁵ DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES, 2002, at 9 (2004), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pji02.pdf>.

¹⁹⁶ O’BRIEN, *supra* note 127, at 20.

¹⁹⁷ See *supra* notes 100–02 and accompanying text (noting that ex-felons are typically foreclosed from jobs requiring skills taught in female prison vocational training programs).

¹⁹⁸ See Chesney-Lind, *supra* note 52, at 92 (noting stronger nexus between substance abuse and women’s crimes than substance abuse and men’s crimes).

¹⁹⁹ See *id.* (discussing need for gender distinctions in rehabilitation and drug treatment programs).

²⁰⁰ NAT’L INST. OF JUSTICE, *supra* note 191, at 27.

²⁰¹ See Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT, *supra* note 29, at 37, 42 (noting TANF ban denies women benefit of room, board, and institutional pathways into treatment).

TANF recipients for substance abuse issues, the welfare ban also functions to foreclose this avenue to treatment.²⁰² Without treatment and stable housing, female ex-offenders are unlikely to achieve successful reentry into society.²⁰³

Accessing public assistance and securing adequate housing are crucial elements of successful reentry for low-income women. Yet section 115 of PRWORA precludes the majority of women with criminal records from access to such assistance.²⁰⁴ Consequently, it is more difficult for women ex-offenders to remain sober and retain employment than it is for their male counterparts.²⁰⁵

My sex-specific proposal, while drastic, represents a step toward gender equality in its recognition of current implicit sex discrimination. Although my ultimate aim is legislative reform that affects all women, I concede that sex-specific legislation will not easily withstand a constitutional challenge: The Court regularly strikes down gender-conscious legislation in favor of facially neutral laws devoid of explicit bias.²⁰⁶ Preferring legislation that does not distinguish between the sexes on its face, the Court disregards the reality that institutional sexism renders purportedly “neutral” legislation male-centric. The Court reasons that because the pertinent distinction in facially neutral statutes is not between males and females, but rather discrete non-suspect classes comprised of both women and men, the Equal Protection Clause is not implicated.²⁰⁷ While I fundamentally believe

²⁰² *Id.*

²⁰³ *Id.* at 43.

²⁰⁴ See *supra* notes 115–30 and accompanying text (discussing felony drug provision of PRWORA).

²⁰⁵ O'BRIEN, *supra* note 127, at 9.

²⁰⁶ See *Nguyen v. INS*, 533 U.S. 53, 78 (2001) (O'Connor, J., dissenting) (“[T]he availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification.”); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980) (invalidating sex-based classification where sex-neutral alternative achieves same goals); *supra* note 168 and accompanying text (listing cases).

²⁰⁷ In *Personnel Administrator v. Feeney*, the Court upheld a facially neutral statute that implicitly disadvantaged women by privileging veterans (98% of whom were men) for state civil service jobs. 442 U.S. 256, 274–75, 281 (1979); see *id.* at 284 (Marshall, J., dissenting) (noting this point). Until the years immediately preceding the *Feeney* decision, married women or women with dependent children were ineligible for service in the Armed Forces; similarly situated men were not. *Id.* at 283 n.1 (Marshall, J., dissenting). The Court reasoned that since men comprised significant numbers of nonveterans, and male and female nonveterans were equally disadvantaged, the statutory distinction between veterans and nonveterans was not a pretext for sex discrimination. *Id.* at 275 (majority opinion). Similarly, the Court in *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974), held that the exclusion of pregnancy-related disabilities from a state-administered disability insurance plan did not constitute sex-based discrimination in violation of the Equal Protection Clause. Because the program categorized potential recipients by pregnancy status—distinguishing between pregnant persons and non-pregnant persons rather than between men and women—the

that sex-specific legislation is necessary to combat historic sex discrimination, in the following subsection I propose a second, more Court-friendly, gender-neutral approach to legislative reform.

B. Primary Caretakers Versus Non-Primary Caretakers Framework: A Gender-Neutral Approach

Given the social ramifications of felony drug convictions, ex-offenders who resume primary caretaking responsibility of their minor children upon reentry—regardless of the offender’s gender—merit distinct treatment concerning the collateral consequences of drug offenses.

Recently, the Court demonstrated its support of gender-neutral legislation that forestalls potentially discriminatory practices. In *Nevada Department of Human Resources v. Hibbs*, the Court upheld the Family and Medical Leave Act of 1993 (FMLA), which affords unpaid medical leave for both male and female employees.²⁰⁸ In crafting the gender-neutral family-care leave provision of the Act, Congress acknowledged that societal expectations often leave women to assume primary responsibility for family caretaking, thereby disadvantaging women in the workforce. Rather than structure the legislation to reflect this gendered reality, however, Congress cautioned that employment standards distinguishing between the sexes might encourage employers to discriminate against employees.²⁰⁹ As such, the FMLA is intended to guarantee that employers do not implicitly reinforce domestic stereotypes by denying or discouraging men from taking leave.²¹⁰ Here, we see a rare instance of Congress—and the Court by upholding Congress’s remedy—recognizing and attempting to ameliorate “subtle discrimination that may be difficult to detect on a case-by-case basis.”²¹¹

Court reasoned it did not qualify as sex discrimination. *Id.* at 496 n.20 (“The fiscal and actuarial benefits of the program . . . accrue to members of both sexes.”).

²⁰⁸ 538 U.S. 721 (2003). The FMLA, 29 U.S.C. §§ 2601–54 (2006), entitles eligible employees—both male and female—to take up to twelve weeks of unpaid leave annually for the birth of a child or a “serious health condition” in an employee’s spouse, child, or parent, among other reasons. *Id.* § 2612(a)(1)(C).

²⁰⁹ *Id.* § 2601(a)(5)–(6). By ensuring the option to take unpaid leave for family medical emergencies was available to both male and female employees on a “gender-neutral basis,” Congress intended to “minimize[] the potential for employment discrimination on the basis of sex” “in a manner . . . consistent with the Equal Protection Clause of the Fourteenth Amendment.” § 2601(b).

²¹⁰ *Hibbs*, 538 U.S. at 736. Assumptions that women will engage in family caretaking responsibilities entrench gender-based discrimination by fostering employers’ stereotypical views about women’s commitment to work and their value as employees. *See id.* at 730–31 (noting widening gender gap in eligibility for parental leave despite overall increase in such eligibility).

²¹¹ *Id.* at 736.

Awarding differential treatment based on one's primary caretaking status has also proven successful in family court. Originally, mothers—as the presumptive caretakers—were automatically granted custody over their children in divorce proceedings.²¹² In an effort to reduce gender stereotyping, however, courts began to reject the maternal presumption in favor of the primary caretaker standard established by *Garska v. McCoy* in 1981: Absent a showing of an unfit parent, the parent who had been assuming primary childcare responsibilities is granted custody over the child.²¹³ Unlike the maternal presumption, the primary caretaker standard does not grant custody over a child based exclusively on her parent's gender, but rather presumes the child's best interest is to remain with the primary caretaker.²¹⁴

The underlying rationale of this model may be applied to the context of prisoner reentry. In order to meet PRWORA's purpose of having children "cared for in their own homes or in the homes of relatives,"²¹⁵ primary caretaker ex-offenders must have access to public assistance and adequate housing. Without stable housing, it is impossible for ex-offender parents to reunify with their children upon reentry.²¹⁶ Absent a repeal of the offending legislation, civil statutes imposing further penalties on ex-felony drug offenders should be amended to employ gender-neutral language exempting primary caretakers from section 115 of PRWORA and the "One Strike" housing initiative.

²¹² See, e.g., *J.B. v. A.B.*, 242 S.E.2d 248, 253 (W. Va. 1978) (reaffirming, in divorce proceeding presumption, that mother is natural caretaker of children).

²¹³ 278 S.E.2d 357, 362–63 (W. Va. 1981) (employing sex-neutral primary caretaker standard for custody determinations based on best interests of child). The primary caretaker rule is significant in determining a child's best interest. See Katharine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project*, 36 FAM. L.Q. 11, 17–24 (2002) (discussing American Law Institute's "Principles of the Law of Family Dissolution"). The "best-interests" standard arguably has its own gender bias concerns, favoring mothers based on traditional stereotypes and penalizing them for failure to conform to gender role expectations. See generally Susan Beth Jacobs, *The Hidden Gender Bias Behind the "Best Interests of the Child" Standard in Custody Decisions*, 13 GA. ST. U. L. REV. 845 (1997) (arguing that best-interests standard results in harmful consequences of gender bias).

²¹⁴ In practice, however, some argue the primary caretaker standard operates under a guise of sex-neutrality by disadvantaging women with inferior earning capacity, effectively reinforcing enduring social biases against working mothers. See Rena K. Uviller, *Father's Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 108–09 (1978) (arguing that primary caretaker standard is premature given existing gender norms).

²¹⁵ 42 U.S.C. § 601(a) (2006).

²¹⁶ See Rubinstein & Mukamal, *supra* note 201, at 48 (noting increased difficulty of family reunification caused by public housing ban and laws requiring states to terminate parental rights absent regular parental contact with children).

Critics of this approach, however, may argue that distinguishing between primary caretakers and non-primary caretakers merely reinforces the troubling stereotype of women as caretakers, effectively undermining the women's equality movement. Scholars contend that the seemingly race- and gender-neutral rhetoric employed in today's society actually functions to reinforce rather than eradicate inequality.²¹⁷

To the extent that the primary caretaker distinction capitalizes on the effects of institutional sexism to benefit women, its implementation as a gender-neutral category to avoid sex-based classifications is, in some sense, a fallacy. Gender-neutral laws (idealistically) assume that differences between the sexes are irrelevant to government policy. In truth, such laws disregard the reality that patriarchy continues to permeate social institutions.²¹⁸ Domestic gender roles are no longer a formal part of law, but rather a subtle reflection of the sex discrimination women have battled for centuries.²¹⁹ To the extent that ostensibly gender-neutral laws reflect male dominance, these laws are not in fact neutral, but rather male-oriented.²²⁰

Changes in the manner of discrimination in the United States—from explicit to implicit—necessitate a shift toward remedial gender-based legislation.²²¹ Yet *Personnel Administrator v. Feeney*²²² presents a nearly insurmountable constitutional hurdle to sex-based laws,

²¹⁷ See, e.g., Siegel, *supra* note 176, at 1145–46 (“Today, government rarely classifies by race or gender, but it conducts a ‘war on drugs,’ regulates education and residential zoning, responds to ‘sexual assault’ and ‘domestic violence,’ and makes policy concerning ‘child care,’ ‘family leave,’ ‘child support,’ and the ‘welfare’ of ‘single-headed households’ in ways that often perpetuate, or aggravate, historic patterns of race and gender inequality.”).

²¹⁸ Because the breadwinner role is culturally linked with masculinity, men have implicit permission to pursue wage labor. WILLIAMS *supra* note 94, at 210; see also *Frontiero v. Richardson*, 411 U.S. 677, 681–82 (1973) (noting that District Court decided Congress could “reasonably have concluded that, since the husband in our society is generally the ‘bread-winner’ in the family—and the wife typically the ‘dependent’ partner—it would be more economical to require married female members claiming husbands to prove actual dependency than to extend the presumption of dependency to such members’” (quoting *Frontiero v. Laird*, 341 F. Supp. 201, 207 (M.D. Ala. 1972))). While feminists have challenged the relegation of women to the home, men’s obligation and entitlement to work outside the home has yet to be genuinely questioned. WILLIAMS, *supra* note 94, at 210.

²¹⁹ See WILLIAMS, *supra* note 94, at 209. Research demonstrates that early infant and childhood experiences foster a “gendered life” for women. DOROTHY MCBRIDE-STETSON, *WOMEN’S RIGHTS IN THE USA: POLICY DEBATES AND GENDER ROLES* 50 (3d ed. 2004). For most women, the capacity to become a mother forms the foundation of the discrimination and inequality they experience. Insofar as gender-neutral legislation neglects social constructions of gender, formal equality reinforces social hierarchies. *Id.* at 52–53.

²²⁰ See *Acoca & Raeder, supra* note 9, at 135; *Covington & Bloom, supra* note 54, at 3, 5–7 (noting that equalization approach applies male standard).

²²¹ See Siegel, *supra* note 176, at 1113 (“[S]tatus-enforcing state action evolves in form as it is contested.”).

²²² See *supra* note 207 (discussing case).

making most sex-specific legislative proposals unlikely to pass constitutional muster under the Court's equal protection analysis. Until society becomes truly egalitarian and men assume primary caretaking responsibilities at rates comparable to women, my primary caretaker proposal is the most palatable way to advance sex equality in the prisoner reentry context while maintaining an air of gender neutrality necessary to garner the Court's approval.

CONCLUSION

As overt prejudice becomes socially objectionable, it has been replaced by invisible institutional bias. In the absence of "smoking gun" evidence, it is nearly impossible to prove that intentional discrimination underpins an otherwise gender-neutral statute.²²³ Yet, insofar as a purportedly nondiscriminatory law disparately impacts women as a historically subordinated class, it is inherently—if not intentionally—discriminatory, and thus not presumptively neutral.²²⁴

When inadvertent effects result in the same discriminatory impact as purposeful discrimination, they must be addressed; however, current equal protection doctrine neglects to confront these concerns adequately.²²⁵ Until equal protection doctrine (or the legislature) catches up with society, however, the primary caretaker standard—despite its flaws—is likely the most effective measure to ensure women are not disparately impacted by the collateral consequences of felony drug convictions. To achieve true equality, laws must reflect the reality of our male-centric society. To be successful, legal reforms must work within the confines of current equal protection doctrine to address the multifaceted nature of the female ex-offender population.

As the Obama administration reconsiders the War on Drugs, it must focus not only on sentencing schemes and policing strategies, but must also consider the effects of the past War on Drugs on currently incarcerated individuals. The administration must make every effort to address the complex issues facing currently incarcerated women, and in particular mothers, upon reentry.

²²³ K.G. Jan Pillai, *Neutrality of the Equal Protection Clause*, 27 HASTINGS CONST. L.Q. 89, 97 (1999).

²²⁴ See *id.* at 101 (discussing effect of facially neutral law in *Feeney*).

²²⁵ The Equal Protection Clause should respond not only to intentional discriminatory policies and practices, but also to those that unintentionally reinforce gender subordination in our society. See Jordan Steiker, *American Icon: Does it Matter What the Court Said in Brown?*, 81 TEX. L. REV. 305, 317 (2002) ("[A]ny distinctions among groups that tend to subordinate are inconsistent with a commitment to equality." (emphasis omitted)).