

Notes

EXCUSING “WOMEN OF CIRCUMSTANCE”: REDEFINING CONSPIRACY LAW TO HOLD CULPABLE OFFENDERS ACCOUNTABLE

*Amanda E. Smallhorn**

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There are a lot of women who are in prison because of their association with a man. We may not necessarily be involved with the crime, but knowing about it is what makes us guilty. . . . People should know that with conspiracy law, you don't have to know anything to be brought in with those charges. You could be in a car with someone, you could stop by someone's house, you could even make a phone call to someone. So don't pass judgment on those who have been sentenced to serve prison time because of this law. Research it. Understand it fully. We're not all guilty to the degree that we should be sentenced so seriously in the courts.¹

Twenty-five year-old Ramona Brant met Donald Barber in 1989, soon after relocating from New York to North Carolina.² When she moved in with him, she knew he dealt drugs, but had no idea he ran an interstate drug ring.³ One month into their relationship, Barber began violently beating Ramona when he was angry, a pattern that continued for years.⁴ On the various occasions when Ramona left or tried to leave, Barber threatened to harm her or her loved ones and promised to change, so she returned.⁵ Ramona and Barber had two sons together; once while

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¹ Ramona Brant, *Life After Prison: Ramona Brant*, MEDIUM (May 5, 2016), <https://medium.com/the-white-house/life-after-prison-ramona-brant-83212d36ea86#.qdecnclubg>.

² See Casey Tolan, *How a First-Time Drug Charge Became a Life Sentence for this Mother of Two*, SPLINTER NEWS (Dec. 10, 2015, 11:18 AM), <https://splinternews.com/how-a-first-time-drug-charge-became-a-life-sentence-for-1793853465>.

³ *Id.*

⁴ *Id.* For example, in January 1990, while pregnant with their first son, Dwight, Barber allegedly smacked Ramona in the face and she left him. *Id.* In October 1990, while ten weeks pregnant with their second son, DaJon, Barber allegedly hit Ramona in the head with a telephone receiver so hard that she had to get stitches. Tolan, *supra* note 2; see also Transcript of Re-sentencing of Ramona Brant at 131, United States v. Brant, No. 3:93CR124-09 (W.D.N.C. July 15, 1998) [hereinafter Transcript of Re-sentencing] (on file with author) (“Q. Did you have to—did you have any injuries as a result of that assault? A. Yes, I did. I had an open wound on my forehead. It took 16 stitches to close.”).

⁵ See Tolan, *supra* note 2; see also *RIP: Ramona Brant received clemency on 12/18/15, set FREE on 2/2/2016 and tragically passed 2/25/18*, CANDOCLEMENCY,

she was trying to call for help from a gas station payphone, Barber punched Ramona so hard that she miscarried their third child.⁶

In May 1993, the police pulled over one of Barber’s associates, Christopher Durante, for speeding, and found two guns and 21 grams of crack cocaine in his car.⁷ Durante implicated Barber as his source for the drugs, which led to Barber’s arrest several months later.⁸ The eventual charges alleged that Barber and his drug ring conspirators were responsible for 183 kilograms of powder and 97 kilograms of crack cocaine.⁹

The government did not indict Ramona as a conspirator until June 1994.¹⁰ When the police questioned Ramona, she said that Barber made her carry a gun¹¹ and physically forced her to accompany him when he traveled to Florida or New York to pick up cocaine or to meet clients.¹² She admitted making phone calls and delivering messages for Barber, but insisted that she did not personally direct his drug trade.¹³ Barber forced her to be present at drug deals to manipulate her, saying that if she “was present during some of the activities, she couldn’t rat on him, she didn’t have any power anymore over him with regard to that.”¹⁴

Unfortunately for Ramona, her minimal involvement was no defense to the charges: conspiracy law says that “[a] member of a conspiracy is liable for all the foreseeable acts of co-conspirators in furtherance of the agreement. . . . If the defendant is in for a penny, [s]he

<http://www.candoclemency.com/ramona-brant/> (last visited Mar. 31, 2018) [hereinafter *Ramona*, CANDOCLEMENCY] (“I even left him and moved back to New York after he struck me. He got help, begged, traveled to see me almost every weekend and promised my family he would never hit me again. I returned to live with him in Charlotte and regret that decision, as it cost me my life.”).

⁶ Tolan, *supra* note 2.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Transcript of Sentencing of Ramona Brant at 21, United States v. Brant, No. 3:93CR124–9 (W.D.N.C. Oct. 12, 13, 1994) [hereinafter Transcript of Sentencing] (on file with author).

¹¹ Transcript of Re-sentencing, *supra* note 4, at 151 (“[Barber] would hand me a gun and say, here, carry this. . . . There were times that he would give me the gun and when I’d give it back, he said, stupid, you didn’t even take the safety off. What’s a safety?”).

¹² *Id.* at 149, 179 (“There were times [Barber] would call me and tell me, pack a bag, we are going on a trip. . . . Plenty of times I went with him on trips, and by the time I reached my destination I would have black eyes or bruises.”).

¹³ *Id.* at 185, 187 (“[Barber] had the money. He controlled anything and everything that happened. If you check to see, I had no bank account, I had no car, I had no money, I had no credit cards.”).

¹⁴ *Id.* at 36.

is in for a pound.”¹⁵ The Supreme Court held in *Pinkerton v. United States* that conspiracy liability makes all criminal conduct admissible against, and attributable to, each member of a conspiracy, regardless of whether the individual had actual knowledge of the entire conspiracy.¹⁶ Under federal law, Ramona was legally responsible for the entirety of the drugs sold by *any member of the conspiracy, anywhere, anytime, whether she helped with, or even knew of, the sales or not*. She could be charged with the very same crimes as Barber, the actual leader and mastermind of the drug ring.¹⁷

The War on Drugs¹⁸ and Congress’s subsequent creation of mandatory minimum sentences triggered by the type and quantity of drugs charged¹⁹ make it nearly impossible for a federal drug conspirator

¹⁵ Wesley M. Oliver, *Limiting Criminal Law’s “In for a Penny, In for a Pound” Doctrine*, 103 GEO. L.J. ONLINE 8, 8–9 (2013) (footnote omitted).

¹⁶ *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).

In virtually every jurisdiction in the United States, a conspirator can be held responsible for crimes committed by her co-conspirators as long as such crimes were in furtherance of the agreement and were reasonably foreseeable. The crimes themselves do not have to have been agreed upon, intended or even discussed. Liability is based upon a simple negligence standard, reasonable foreseeability. This rule of liability was established by the Supreme Court in 1946 in *Pinkerton v. United States*, and is applied in an enormous number of prosecutions. . . . [“]The *Pinkerton* doctrine permits the government to hold a defendant criminally responsible for all reasonably foreseeable acts of co-conspirators regardless of actual knowledge, intent, or participation. Thus, if the government cannot prove a defendant’s guilt or various substantive charges, it need only convince the jury of the defendant’s guilt of conspiracy to secure convictions on the otherwise unsupported substantive charges.[”]

Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back From an Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL RTS. J. 1, 6–7 (1992) (footnotes omitted) (quoting Letter from Jeffrey Weiner, President of the National Association of Criminal Defense Lawyers, to Paul Marcus (Feb. 1, 1991) (on file with Paul Marcus)).

¹⁷ See Shana Knizhnik, *Failed Snitches and Sentencing Stitches: Substantial Assistance and the Cooperator’s Dilemma*, 90 N.Y.U. L. REV. 1722, 1733 (2015) (“As long as an enterprise as a whole is responsible for the statutorily requisite quantity of drugs, each individual defendant can be held liable at sentencing for that entire amount.”).

¹⁸ Holly Jeanine Boux and Courtenay W. Daum, *Stuck Between a Rock and a Meth Cooking Husband: What Breaking Bad’s Skyler White Teaches Us About How the War on Drugs and Public Antipathy Constrain Women of Circumstance’s Choices*, 45 N.M. L. REV. 567, 573 (2015) (“[A] growing body of research suggests that the legal system utilizes expansive criminal liability and draconian sentencing laws, including mandatory prison or mandatory minimum sentences, to pressure and/or prosecute women in the War on Drugs.”).

¹⁹ See U.S. SENTENCING COMM’N, AN OVERVIEW OF MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11 (2017), <https://www.uscc.gov/research/research-reports/2017-overview-mandatory-minimum-penalties-federal-criminal-justice-system> (depicting the two-tiered triggering thresholds used for determining mandatory minimums for common controlled substances under 21 U.S.C. § 841).

like Ramona to receive less than the mandatory minimum sentence.²⁰ In mandatory minimum drug cases, sentences can range from a low of five years to a high of lifetime imprisonment.²¹ There are two ways to avoid the mandatory minimum for drug conspiracy.²² One way is to provide the government with “substantial assistance,” which it can subsequently use in cases against other conspiracy members,²³ essentially creating a “rat race” between conspirators to see who can give the government the most useful information first.²⁴ The other way is to meet a statutory safety valve’s strict requirements, which rewards low-level drug-trafficking offenders who have no prior criminal history, but only if they also have no aggravating factors, such as the use of a firearm during the offense.²⁵ In a case like this one, with a high quantity of drugs and various aggravating factors, including the use of a firearm, Ramona’s role as a conspirator meant that she was facing a potential life sentence, unless she could successfully “snitch” on Barber.

Sure enough, the government offered Ramona a plea deal in exchange for information on Barber,²⁶ and agreed to reserve her the right

²⁰ See Boux & Daum, *supra* note 18, at 581 (“Federal law specifies that individuals conspiring to sell drugs shall be subject to mandatory *minimum* sentencing policies, not just mandatory prison time. . . . While mandatory minimum sentencing laws apply to an array of criminal offenses, drug offenders have comprised the greatest portion of those sentenced under these guidelines.”) (footnote omitted).

²¹ See 21 U.S.C. § 841(b) (2012).

²² U.S. SENTENCING COMM’N, *supra* note 19, at 18 (“Under the current system, a sentencing court can impose a sentence below an otherwise applicable statutory mandatory minimum penalty if: (1) the prosecution files a motion based on the defendant’s ‘substantial assistance’ to authorities in the investigation or prosecution of another person; or (2) in certain drug trafficking cases, the defendant qualifies for the statutory ‘safety valve’ contained in 18 U.S.C. § 3553(f).”) (footnote omitted).

²³ Phyllis Goldfarb, *Counting the Drug War’s Female Casualties*, 6 J. GENDER RACE & JUST. 277, 294 (2002) (“The primary mechanism for sentencing flexibility in the current scheme derives from substantial assistance motions filed by the prosecution. If a prosecutor certifies that a defendant has provided important information to law enforcement that can be used in cases against other offenders, then the defendant may receive a significant reduction in sentence, perhaps salvaging years of freedom. Yet this is precisely the sort of benefit that is available to those who have major involvement in the drug trade and unavailable to those who have peripheral involvement.”) (footnote omitted).

²⁴ Knizhnik, *supra* note 17, at 1741 (“In crimes involving multiple defendants, it is in each defendant’s interest to cooperate as quickly as possible, since ‘[t]he longer a defendant waits to cooperate, the less likely he is to have information that is still useful to the government.’ This results in a ‘race to the station house’ among co-conspirators, each wanting to provide the most beneficial (new) information.”) (alteration in original) (footnote omitted).

²⁵ See 18 U.S.C. § 3553(f) (2012).

²⁶ *United States v. Brant*, No. 94–5813, No. 95–5128, 1997 U.S. App. LEXIS 9876, at *7 (4th Cir. May 5, 1997).

to allocute on the basis of duress or coercion at sentencing.²⁷ Ramona signed the plea agreement on August 11, 1994,²⁸ despite having very little useful information to offer,²⁹ because she was advised that the plea would result in probation and she could remain home with her infant children.³⁰ But she refused to plead guilty at her September 11, 1994, hearing³¹ after she was told that the plea would result in jail time.³² She decided that going to trial and asserting a duress defense to her minimal involvement was a better option.³³

At trial, however, several of Barber's associates, including Durante, testified that Ramona was extensively involved in Barber's drug trade.³⁴

²⁷ Transcript of Re-sentencing, *supra* note 4, at 215.

²⁸ *Brant*, 1997 U.S. App. LEXIS 9876, at *7.

²⁹ Telephone Interview with Ramona Brant (Feb. 28, 2017). See also Transcript of Re-sentencing, *supra* note 4, at 186, stating:

A. . . . And when [Mr. Tadeo] got finished with the interview, he told me—he turned to my attorney and he said, she knows less than Durante and Chris did, she really wasn't no help, and he knew I was no help. But because you have a job to do, y' all came down and indicted me anyway.

³⁰ Telephone Interview with Ramona Brant (Feb. 28, 2017). See also Transcript of Re-sentencing, *supra* note 4, at 167–68 stating:

Q. And why did you not—why did you withdraw your guilty plea?

A. I had been listening to [Barber]. He was insisting on going to trial. And when I spoke to Mr. Tadeo, he said that he would guarantee me straight probation, I believe three years straight probation with no jail time. When I got in there that day, he told me that I was going to have to do jail time.

³¹ *Brant*, 1997 U.S. App. LEXIS 9876, at *7.

³² Telephone Interview with Ramona Brant (Feb. 28, 2017); Transcript of Re-sentencing, *supra* note 4, 168.

³³ Telephone Interview with Ramona Brant (Feb. 28, 2017). See *infra* Part IV(A)(2) for more discussion of the current duress defense.

³⁴ During their testimony, Barber's associates revealed the following:

Q. Have you ever been to the residence of Donald Ray Barber and received the powder from Ms. Brant at that time?

A. Yes, I have.

Q. How many times would you estimate?

A. Probably three times.

. . . .

Q. And state who led the New York connection, was it Donald Ray Barber or Ramona Brant?

A. It was Ramona Brant.

Q. And how do you know that?

A. Because not only did she tell me, I know that she is originally from New York, the New York area.

. . . .

Q. What kind of gun did [Ramona] have?

A. It looked like an uzi.

. . . .

Q. What did she ask you?

Despite her shock at this testimony, Ramona was confident that proof of Barber’s constant physical abuse toward her would support an affirmative defense to her alleged involvement.³⁵ But Ramona’s public defender never presented the numerous police reports that documented the abuse she suffered, nor did he ask Ramona’s family members to testify about their knowledge of the abusive relationship.³⁶ After a two-day trial, the jury found Ramona guilty of conspiracy to possess with intent to distribute a quantity of cocaine and cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 846.³⁷

At the sentencing hearing, the judge barred Ramona’s lawyer from introducing the police reports about her abuse or admitting an expert to testify about Battered Women’s Syndrome to support a duress departure.³⁸ With no other grounds for a departure, Ramona faced a

A. She asked if when you first cooked the first ounce up or why didn’t you just cook a little of it up and when it lost, then just bring it back then?

Transcript of Trial of Ramona Brant at 45, 53–54, 152–53, *United States v. Barber*, No. 3:93CR124–MU (W.D.N.C. Oct. 12, 13, 1994) [hereinafter Transcript of Trial] (on file with author). *See also* Tolan, *supra* note 2 (“Police said [Barber and Ramona] had introduced cocaine to Charlotte and sold \$37 million worth of the drug in the last five years, based on the records they recovered. (Officers never found any drugs on Barber or [Ramona], however.)”); *Brant*, 1997 U.S. App. LEXIS 9876, at *11–12 (finding that hearsay testimony from a co-conspirator alleging that Ramona, while inside her home, held an Uzi and scolded the co-conspirator for cooking an entire batch of cocaine without test cooking a small quantity first was sufficient to show that Ramona was the link to a drug supplier in New York); *but see* Telephone Interview with Ramona Brant (Feb. 28, 2017) (“I didn’t even know what an ‘uzi’ was! They were lying about that interaction, it never happened. They also held me responsible for all of the drugs for the entire length of the conspiracy, but I didn’t know Barber before 1989.”); Transcript of Re-sentencing, *supra* note 4, at 182 (“The things that was going on, I really did not honestly have knowledge of, what was this, what was that. And an Uzi, my God, I don’t even know what kind of guns that [Barber] had in the home.”).

³⁵ Tolan, *supra* note 2.

³⁶ *See* Transcript of Trial, *supra* note 34, at 225–31 (covering the extent of the testimony given by Anna Brant, Ramona’s mother, which does not mention her knowledge of the abusive relationship); Tolan, *supra* note 2; *Brant*, 1997 U.S. App. LEXIS 9876, at *12 (“Brant presented no evidence of duress or abuse, and her lawyer elicited no testimony from any of the witnesses on cross-examination that they saw evidence of abuse.”).

³⁷ Transcript of Sentencing, *supra* note 10, at 51.

³⁸ *Id.* at 3 (“And for the record, let me say that your request for the witnesses to speak to the coercion battered wife syndrome phase of the case was denied by the Court because that defense was not raised at the trial stage.”); *see also* Tolan, *supra* note 2; *Brant*, 1997 U.S. App. LEXIS 9876, at *12–13.

Before sentencing Brant filed a motion requesting the issuance of subpoenas to witnesses whom Brant says would have helped establish duress and coercion for sentencing purposes. Brant also submitted medical records and police reports to support the claim at sentencing. U.S.S.G. § 5K2.12 allows a court to decrease the sentence below the applicable guideline range if the defendant committed the offense because of serious coercion, blackmail or duress, even if the circumstances

maximum sentence of life in prison without the possibility of parole for her first time, nonviolent drug conviction.³⁹ The statute and sentencing guidelines mandated how many years Ramona should receive based on the quantity of drugs in the charge and other aggravating factors, not based on her individual culpability.⁴⁰ The trial judge stated that he “hope[d] that the Government can find some basis for filing a motion for sentence for you to serve that’s less than what the guidelines mandated, because . . . it would be counterproductive for society to keep you in prison for the rest of your life”⁴¹ Unfortunately, the government did not make a motion and Ramona received an LWOP sentence.⁴² When she appealed, the appellate court ruled that evidence of the abuse should have been taken into account at sentencing, and remanded for re-sentencing.⁴³

do not amount to a complete legal defense.

Id. But because Brant did not present a defense of coercion or duress at trial, the court held that it would be inappropriate to allow her to present evidence of the defense at her sentencing hearing. *Id.*

³⁹ Transcript of Sentencing, *supra* note 10, at 51; *see also* Tolan, *supra* note 2. A sentence of life without parole is referred to as “LWOP.” The term LWOP will be used hereinafter.

⁴⁰ *See* Sarah Glazer, *Women in Prison: Should they be treated differently from men?*, 27 CQ RESEARCHER 193, 200 (Mar. 3, 2017) <http://library.cqpress.com/cqresearcher/getpdf.php?id=cqresre2017030300>.

[J]udges have more discretion today after the Supreme Court in 2005 held that the sentencing guidelines were “advisory” and thus not binding on judges. As a result, some of the harshest sentences mandated by the guidelines, such as Brant’s life sentence, would not occur today if the judge considered it inappropriate.

Id. Prior to *United States v. Booker*, 543 U.S. 220 (2005), district courts were mandated to apply the guidelines in every situation; post-*Booker*, the guidelines became advisory. Further discussion about the guidelines will take place *infra* Part IV.

⁴¹ Transcript of Sentencing, *supra* note 10, at 53–54.

⁴² *See id.* at 46 (“The Court: All right. Mrs. Shappert [Assistant U.S. Attorney], do you care to speak to the Court? Ms. Shappert: No, sir.”); *see also* Tolan, *supra* note 2. The prosecutor said Barber and Ramona sold 183 kilograms of powder and 97 kilograms of crack cocaine. *Id.* In addition to the mandatory sentence length based on drug quantity, Ramona also received sentence enhancements for carrying guns and for allegedly leading a drug organization. *Id.* The combination of all the charges resulted in a mandatory LWOP sentence. The police never actually found drugs on Ramona during the course of their investigation and all accusations against her were hearsay statements from third parties, who received significantly less prison time than Ramona. *Id.* For example, Christopher Durante, the government’s main witness against Ramona, received just an eight-year sentence for his involvement in the conspiracy. *See* Transcript of Re-Sentencing, *supra* note 4, at 197.

⁴³ Tolan, *supra* note 2; *see also* Brant, 1997 U.S. App. LEXIS 9876, at *13–14.

“In determining the sentence to impose within the guidelines range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law.” This principle is particularly

Hopeful for justice, Ramona returned to court and presented the evidence of her abuse and an expert testified about Battered Women’s Syndrome,⁴⁴ but the judge felt the evidence did not satisfy the standard for a duress departure.⁴⁵ The judge again stated, “I thought the sentence that I originally imposed on you was entirely too harsh, but it was mandated by the sentencing guidelines.”⁴⁶ The judge then “confirm[ed] the sentence as it exists, even though I absolutely am shocked at the severity of the sentence. And I wish right now that the government would make a motion that would permit me to downward depart from it.”⁴⁷ The government did not make a motion, so Ramona was sent back to prison for life.⁴⁸

Over the last thirty years, the female inmate population in the United States has grown by over 800 percent, with the majority of female inmates convicted for low-level, nonviolent drug or property offenses.⁴⁹ According to Families Against Mandatory Minimums (“FAMM”), about fifty-six percent of women are in jail due to the drug war or over property crimes, which carry mandatory minimum sentences

appropriate in the case of duress that does not qualify as a complete legal defense. In such a case, the defendant might make the decision to forego asserting duress at trial to avoid admitting the commission of a criminal act. Section 5K2.12 of the sentencing guidelines does not punish such a decision because it allows departure even if the evidence is insufficient to establish a complete defense.

Id. (citation omitted).

⁴⁴ Transcript of Re-Sentencing, *supra* note 4, at 9–49. Ramona presented an expert to testify about the abuse she endured. The expert stated, for example:

[A]t the point where she had made an effort to escape that relationship and in essence was met with the reality that she couldn’t protect her mother from Mr. Barbour’s [sic] threats to kill her, and therefore, she essentially in my view was in pretty much of a catch 22, she was in a situation where although she personally could flee, she couldn’t protect her mother against the threats from him, she went back to him.

Id. at 32; *see also* Tolan, *supra* note 2.

⁴⁵ Transcript of Re-Sentencing, *supra* note 4, at 219–20.

⁴⁶ *Id.* at 219.

⁴⁷ *Id.* at 221.

⁴⁸ Tolan, *supra* note 2. On December 18, 2015, President Barack Obama granted clemency to 94 federal inmates, including Ramona Brant. Ramona served twenty-one years before she was officially released from prison on February 2, 2016. *See id.* Most women in Ramona’s situation are not so lucky. Ramona’s clemency resulted from the work of Amy Povah and other activists, who assist prisoners with executive clemency petitions and raising awareness about unfair sentencing practices. *See Ramona*, CANDO CLEMENCY, *supra* note 5.

⁴⁹ *See* Clarice Palmer, *America’s Female Prison Population Has Grown 800% and Nobody Is Talking About It*, ANTIMEDIA (June 30, 2016), <http://theantimedia.org/female-prison-population-800-percent/>.

with no ability for the judge to consider mitigating circumstances.⁵⁰ Sociological studies indicate that men represent the vast majority of upper-level drug traffickers,⁵¹ which drug conspiracy laws were intended to target, but national news and prisoners' rights advocacy agencies have highlighted the widespread phenomenon of harsh sentencing of unintended targets: wives and girlfriends who had minimal involvement in the underlying crime.⁵²

The inequity in sentencing outcomes for women like Ramona Brant demonstrates how the law "presumes that males and females are equally situated in the drug economy" and therefore equally deserving of punishment.⁵³ Mandatory sentencing reforms resulting from the 1980s War on Drugs made sentencing gender-neutral, but also switched the power of discretion in sentencing from judges to prosecutors.⁵⁴ While facially neutral, these reforms resulted in the imposition of harsh sentences for conspiracy on women like Ramona, who were merely "dating, trusting, acquiescing, or submitting to the dominance of a boyfriend or husband who engages in the drug trade. . . ."⁵⁵

⁵⁰ *Id.*

⁵¹ See, e.g., Frederick Desroches, *Research on Upper Level Drug Trafficking: A Review*, 37 J. DRUG ISSUES 827, 840 (2007); see also Goldfarb, *supra* note 23, at 291 ("By and large, women do not hold income-generating positions in the drug trade. We know the words 'druglords' and 'kingpins', not 'drugladies' and 'queenpins.'") (footnotes omitted).

⁵² See Valentina Zarya, *This is Why Women Are the Fastest-Growing Prison Population*, FORTUNE (Dec. 10, 2015), <http://fortune.com/2015/12/10/prison-reform-women/>; *Women Behind Bars*, N.Y. TIMES (Nov. 30, 2015), <https://nyti.ms/2kD7yeq>; Michelle Mark, *Obama is Approving Hardly Any Clemency Requests from the Fastest-Growing Group in Prison*, BUS. INSIDER (Sep. 15, 2016), <http://www.businessinsider.com/obama-not-granting-many-women-clemency-2016-9>; Britni de la Cretaz, *Obama's Clemency Program Has Failed Incarcerated Women*, ESTABLISHMENT (Jan. 18, 2017) <https://theestablishment.co/obamas-clemency-program-has-failed-incarcerated-women-f4391a4a944#g7655oqz5>; Victoria Law, *Women Imprisoned Under the Drug War Speak Out Against Sessions' New Policy*, TRUTHOUT (May 16, 2017), <http://www.truth-out.org/news/item/40594-women-imprisoned-under-the-drug-war-speak-out-against-sessions-new-policy>.

⁵³ Boux & Daum, *supra* note 18, at 584.

⁵⁴ Kathleen Daly, *Gender and Sentencing: What We Know and Don't Know From Empirical Research*, 8 FED. SENT'G REP. 163, 165 (1995); Myrna S. Raeder, *Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences*, 8 CRIM. JUST. 20, 21 (1993). Raeder's research on gender-neutrality in sentencing laws highlights how the attempt to even the playing field just brought in the female players without adjusting the rules:

Even though *all* defendants receive longer sentences under the guidelines than previously, women's sentences have increased more than those of men because formerly they received probation and/or shorter sentences more often than did men. . . . The result of gender neutrality was simply to add women to the mix without evaluating whether this was fair.

Id. at 23.

⁵⁵ Haneefah A. Jackson, Note, *When Love is a Crime: Why the Drug Prosecutions and*

But the inequity in sentencing is not just gendered, it is also raced and classed—the female population in prison is “disproportionately people of color, overwhelmingly poor and low-income, survivors of violence and trauma, and have high rates of physical and mental illness and substance use.”⁵⁶ Wives and girlfriends of drug dealers are often involved in drug activities solely because their partner uses or sells drugs,⁵⁷ but “tend to have less extensive criminal histories than their male counterparts.”⁵⁸ Scholars refer to this less culpable subset of women as “women in relationship”⁵⁹ or “women of circumstance.”⁶⁰

Punishments of Female Non-Conspirators Cannot Be Justified By Retributive Principles, 46 HOW. L.J. 517, 521 (2003); see also Transcript of Re-sentencing, *supra* note 4, at 218. Ramona testified:

Certainly a life sentence I don’t believe that’s fair or can justify my role as far as being what I thought was Donald Barbour’s [sic] mate. That’s what it started out to be, a relationship. I never thought that it would turn into a conspiracy charge. I never knew that Donald Barbour [sic] was indulging in some type of drug enterprise.

Id. at 218.

⁵⁶ ELIZABETH SWAVOLA ET AL., OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 7 (2016).

⁵⁷ Eda Katharine Tinto, *The Role of Gender and Relationship in Reforming the Rockefeller Drug Laws*, 76 N.Y.U. L. REV. 906, 908 (2001). One of Daly’s studies looked at felony offenders in New Haven, Connecticut, and found “that men and women who were accused and convicted of statutorily similar crimes did not commit crimes of similar seriousness.” Daly, *supra* note 54, at 165. Daly’s analysis of presentence reports for these individuals showed that more often for the women, there were “‘blurred boundaries’ between victimization and criminalization,” which “rendered some women’s crimes less blameworthy.” *Id.* Daly defines “blameworthy” as linking the defendant’s social history and prior record to the offense to see how a defendant’s social history imposes meaning on a crime. *Id.* at 165 n.18. This blameworthiness should be taken into account to determine appropriate sentencing.

⁵⁸ SWAVOLA ET AL., *supra* note 56, at 7.

⁵⁹ Tinto, *supra* note 57, at 909. Tinto uses the term “women in relationship” to explain that “a woman’s intimate relationship is often interconnected with the drug offense she commits and demonstrates how, under the Laws, the failure to consider this underlying context results in a criminal charge and sentence that are likely to be unjust.” *Id.*

⁶⁰ Shimica Gaskins, “*Women of Circumstance*”—*The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533 (2004). Gaskins describes “women of circumstance” as

the wives, mothers, sisters, daughters, girlfriends, and nieces, who become involved in crime because of their financial dependence on, fear of, or romantic attachment to a male drug trafficker. These “women of circumstance” find themselves incarcerated and subject to draconian sentences because the men in their lives persuade, force, or trick them into carrying drugs.

Id. at 1533; see also Boux & Daum, *supra* note 18, at 583. A situation where a woman may find herself being a “woman of circumstance” is when she “lives with a male drug operative [and] may be charged with possession and sentenced to a mandatory jail sentence if there are drugs in their shared residence.” *Id.* A “woman of circumstance”

None of these scholars claim that every woman involved in drug activities is a woman of circumstance. They do agree, however, that it is often difficult to tease out the main reason why women participate in drug crimes with their husbands or boyfriends, making it a challenge to determine if a particular woman is a less culpable woman of circumstance.⁶¹ Coercion and duress get women of circumstance involved in drug conspiracies,⁶² but our current non-intersectional legal doctrines offer limited means for these minimally involved women to raise a defense to get out of the mandatory minimum sentences that entail.

This Note aims to discuss the harsh mandatory federal sentences⁶³ imposed on peripherally involved wives and girlfriends of drug dealers, like Ramona Brant, and better ways to hold these less culpable offenders accountable. Part I of this Note explores the history of two “women-only” excuses and the impact they have had on current views of criminal culpability of women in the United States. Part II describes who some of the women of circumstance are and how these women find themselves uniquely involved in the criminal justice system because of drug conspiracy laws. Part III demonstrates how an intersectional analysis of “women-only” excuses is necessary to ensure that women of circumstance have equal access to justice when charged under drug conspiracy laws. Part IV proposes changes to conspiracy law in general and ways of sentencing women of circumstance specifically to better serve the purposes of deterrence and retribution. Part IV(A) proposes substantive changes by (1) legally excusing women of circumstance from conspiracy charges and (2) adjusting the standard to meet a duress defense. Part IV(B) proposes ways to move out of the federal mandatory

may also be “a woman who drives a male intimate in her vehicle . . . if he is delivering drugs.” *Id.* This Note will use Gaskins’ term “women of circumstance” when referring to the wives and girlfriends of drug dealers hereinafter.

⁶¹ See Tinto, *supra* note 57, at 916 n.45.

⁶² Boux & Daum, *supra* note 18, at 568–69.

Combined with the tactics employed by police and prosecutors in the War on Drugs, these women are forced to try and reconcile a long list of conflicting concerns. They must balance (1) how the legal system uses them as scapegoats and pawns, (2) their intimate relationships with dangerous drug operatives, (3) the physical, financial and emotional wellbeing of their children and families, and (4) societal expectations about “good” women and female subservience. The combined effect of these intersecting forces has led to the entrapment, marginalization and incarceration of tens of thousands of women of circumstance.

Id. (footnote omitted).

⁶³ See Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 837 (2017).

minimum sentencing regime by (1) recalculating drug quantities under the current definition of conspiracy, (2) changing the elements to meet a safety valve, and (3) creating a “cooperation under duress” departure. Ultimately, our goal should be to hold the culpable offenders accountable—women of circumstance do not rise to the level of culpability warranting LWOP or other mandatory minimum sentences.

I. THE IMPACT OF “WOMEN-ONLY” EXCUSES ON CRIMINAL CULPABILITY OF WOMEN

Women’s rights in America have come a long way, especially in establishing autonomy between husband and wife. With increased autonomy came the corresponding recognition of independent culpability: if a wife had legal independence then she no longer needed an excuse if her husband forced her to participate in criminal conduct.⁶⁴ The logic makes sense when looking at the general population of women. But it does not make sense when looking at the subpopulation of women of circumstance who, despite having legal independence, are still coerced, battered, or manipulated into criminal conduct by their husbands or boyfriends. The “women-only” excuses of coercion by husband and Battered Women’s Syndrome show the tension between embracing legal autonomy for the majority of women and the need for “women-only” excuses to address the reality of coercion for marginalized women of circumstance.

A. *Coercion by Husband*

Historically, under the doctrine of coverture, a single woman’s property came under control of her husband upon marriage⁶⁵ and women themselves became the legal property of their husbands.⁶⁶ The common law fiction of legal unity between a husband and wife made it so that a wife was merely the servant of her husband and acted only by his will.⁶⁷

⁶⁴ See Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 32–33 (1994).

⁶⁵ See, e.g., Sandra R. Zagier Zayac & Robert A. Zayac, Jr., *Georgia’s Married Women’s Property Act: An Effective Challenge to Coverture*, 15 TEX. J. WOMEN & L. 81, 82 (2005).

⁶⁶ Coughlin, *supra* note 64, at 36 (“Upon marriage the woman’s personal property was vested absolutely in her husband, any earnings she might secure in the future were his, his interest in her real property ‘were almost as extensive’ as his rights in her personality, and divorce was difficult, costly, and, in many cases, impossible, to secure.”) (footnotes omitted).

⁶⁷ See *Commonwealth v. Santiago*, 340 A.2d 440, 445 (Pa. 1975); see also Note, *The Effect of Marriage on the Rules of the Criminal Law*, 61 COLUM. L. REV. 73, 85 (1961) [hereinafter *Effect of Marriage*] (“The doctrine is of ancient derivation, and was apparently

The rebuttable presumption of “coercion by husband”⁶⁸ fit into the doctrine of coverture because, if a wife committed a crime in the presence of her husband, it was reasonable to assume that he had forced her and she was an unwilling, coerced participant in the crime.⁶⁹ As legal head-of-household, the husband was always in control of everything under his roof,⁷⁰ so the presumption was valid even if he was not actually present or within the home when his wife committed the crime.⁷¹ There were reasonable limits on the presumption, so that a wife could not rely on it if, for example, she had participated in a homicide.⁷²

Individual states started phasing out their reliance on coverture rules in the 1830s, and a wave of married women’s property reforms swept the country over the next half century, eliminating the old doctrine of coverture.⁷³ The presumption of coercion by husband to excuse women’s criminal conduct fell out of legal favor starting in the 1930s⁷⁴ coinciding with women’s suffrage,⁷⁵ and completely disappeared from

based on an appreciation of the legal and practical power of the husband to impose his will on his wife and of the resulting necessity to protect the wife from criminal liability when she lacked independent criminal intent.”) (footnote omitted).

⁶⁸ The name of the “coercion by husband” defense itself carves out unmarried heterosexual women from its scope, and an entirely different Note would be warranted to explain the legal reasons behind this choice of language and the respective implications for girlfriends in general, and homosexual wives/girlfriends specifically. While this divergence clearly informs the discussion around the historical treatment of women in the American legal system, it is beyond the scope of the analysis presented in this Note.

⁶⁹ *Effect of Marriage*, *supra* note 67, at 85; 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2514 (Chadbourn rev. 1981); *see also* Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1274–75 n.115 (2000) (describing various cases from the 1870s and 1880s which presumed coercion by husband and acquittal of wife, unless rebutted); Coughlin, *supra* note 64, at 28–29 n.139 (listing various texts that point to the origin of the “coercion by husband” defense, some going as far back as 712 A.D.).

⁷⁰ *Effect of Marriage*, *supra* note 67, at 88.

⁷¹ *Id.* at 87; *see, e.g.*, *State v. Noell*, 72 S.E. 590, 591 (N.C. 1911) (“[I]t is not necessary to show that the act was done literally in sight of the husband, but it is sufficient to raise the presumption it was done near enough to her husband to be under his immediate control or influence.”).

⁷² Coughlin, *supra* note 64, at 40 (“[T]he presumption of coercion generally was not available in cases of homicide, presumably on the ground that even a woman could be expected to perceive for herself that killing another person was unlawful.”).

⁷³ *See* Richard H. Chused, *Late Nineteenth Century Married Women’s Property Law: Reception of the Early Married Women’s Property Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIST. 3, 3 (1985).

⁷⁴ *See, e.g.*, *State v. Renslow*, 230 N.W. 316, 318 (Iowa 1930) (stating that the presumption of coercion by husband could not have operation at common law in murder cases “under [the] present condition of society”).

⁷⁵ *Effect of Marriage*, *supra* note 67, at 92–93. “The emancipation of the married woman has been accompanied by a decrease in the amount of evidence necessary to rebut the

American case law by the 1970s.⁷⁶ Colorful opinions authored during this period of change denounced the law’s former presumption that a wife needed a legal excuse to get out from under her husband’s control and society’s acquiescence of such legal treatment.⁷⁷

Although perceived as a win for women’s autonomy and equality, the dismissal of the presumption has arguably made it harder for women of circumstance to claim that their involvement in a drug crime was indeed a result of their husbands’ coercion. This is evidenced in *Commonwealth v. Santiago*.⁷⁸ In this case, Sheila Santiago looked out the window when she heard police officers knocking on her door to serve a search warrant on her husband.⁷⁹ Sheila called out to her husband, he also looked out the window, and when neither of them came down to open the front door, the officers forcibly entered.⁸⁰ The officers allegedly saw Sheila attempting to throw a bundle of heroin out of an open window.⁸¹

At trial, Sheila was not permitted to use the coercion by husband defense to excuse her conduct.⁸² The court determined that the view of wives as subordinate to husbands was akin to the “Middle Ages” and the excuse was no longer available.⁸³ The court found that the officers’ testimony accusing Sheila of throwing heroin out of the window, combined with Sheila being the first to respond to the officers’ knock on

presumption, probably because of the judicial conclusion that women are now less likely to be under their husband’s control.” *Id.* at 90 (footnote omitted).

⁷⁶ Coughlin, *supra* note 64, at 20.

⁷⁷ See, for example, *United States v. Dege*, 364 U.S. 51, 54–55 (1960), holding:

For this Court now to act on Hawkins’s formulation of the medieval view that husband and wife “are esteemed but as one Person in Law, and are presumed to have but one Will” would indeed be “blind imitation of the past.” It would require us to disregard the vast changes in the status of woman—the extension of her rights and correlative duties—whereby a wife’s legal submission to her husband has been wholly wiped out, not only in the English-speaking world generally but emphatically so in this country. . . . Suffice it to say that we cannot infuse into the conspiracy statute a fictitious attribution to Congress of regard for the medieval notion of woman’s submissiveness to the benevolent coercive powers of a husband in order to relieve her of her obligation of obedience to an unqualifiedly expressed Act of Congress by regarding her as a person whose legal personality is merged in that of her husband making the two one.

⁷⁸ *Commonwealth v. Santiago*, 340 A.2d 440 (Pa. 1975).

⁷⁹ *Id.* at 442; see also George L. Blum, Annotation, *Defense of necessity, duress, or coercion in prosecution for violation of state narcotics laws*, 1 A.L.R.5th 938, § 5[b] (1992).

⁸⁰ *Santiago*, 340 A.2d at 442.

⁸¹ *Id.*

⁸² *Id.* at 445.

⁸³ *Id.*

the door, were sufficient circumstances to show that she acted on her own volition.⁸⁴ Since no evidence was presented to demonstrate that a third party inspired Sheila's acts, the court ruled that "hiding behind the marital bond" of coercion was not in service of policy and would only permit unjustifiable avoidance of punishment.⁸⁵ No subsequent American cases have attempted to make the standalone coercion by husband argument to excuse a wife's criminal conduct.

B. *Battered Women's Syndrome*

Legal scholars have theorized that when the coercion by husband excuse disappeared from the American legal system in the 1970s, it was replaced by another patriarchal excuse⁸⁶ which continued to demean women in much the same way as the former—Battered Women's Syndrome ("BWS").⁸⁷ Dr. Lenore Walker is credited with stating the theory that a battered woman's actions may be reasonable, and therefore excusable, due to her psychological state.⁸⁸ BWS is not a standalone defense, but is often asserted to explain a claim of self-defense if a battered woman kills her abusive partner rather than leaving him.⁸⁹ Since the traditional doctrine of self-defense (and all criminal laws and their corresponding defenses) is based on the experience of men as the norm,⁹⁰ BWS was created to show that a battered woman's experience of self-defense, which deviates from the traditional norm, is still a justified and reasonable response.⁹¹

Lawyers then began to use BWS to explain a claim of duress if a battered woman "commit[ted] crimes against someone other than their

⁸⁴ *Santiago*, 340 A.2d at 446.

⁸⁵ *Id.*

⁸⁶ See Rebecca D. Cornia, *Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women*, 8 UCLA WOMEN'S L.J. 99, 105–07 (1997).

⁸⁷ Coughlin, *supra* note 64, at 29, 48–49; see also Cornia, *supra* note 86, at 105 ("The premise behind the Marital Coercion Doctrine, that women were incapable of rational consideration, was historically used in a larger context to deprive women of many of the rights we take for granted today.").

⁸⁸ See Cornia, *supra* note 86, at 101–02.

⁸⁹ *Id.* at 101.

⁹⁰ See Raeder, *supra* note 54, at 21 (noting that gender neutral criminal law policies "shoehorn" women into a policy originally contoured to males).

⁹¹ *Id.* at 57 ("[T]he court may reduce the sentence if the victim's wrongful conduct contributed significantly to provoking the defendant's behavior."); see also Cornia, *supra* note 86, at 101–02.

abusers.”⁹² In comparing evidence to support a self-defense theory of BWS with evidence to support a duress theory of BWS, evidence of past abuse and the impact it has on the battered woman “relates directly to the reasonableness of the defendant’s choice between being beaten and committing the criminal activity.”⁹³ Courts have recognized that battered women can be coerced into “deal[ing], carry[ing], or purchas[ing] drugs” and that this coercion supports a duress defense.⁹⁴

Ramona Brant’s lawyer raised a BWS excuse at her resentencing hearing. Ramona’s expert, Dr. Dutton, testified that the abuse Ramona suffered was “pretty severely violent,” “involve[d] weapons,” and resulted in “actual physical injury.”⁹⁵ She further testified that Ramona used a range of strategies including compliance with Barber’s commands, physically resisting, and actually leaving him, but that those strategies only worked in the short term.⁹⁶ Dr. Dutton highlighted that Ramona’s attempt to leave Barber in August of 1991 resulted in Barber physically attacking Ramona’s brother and threatening to kill her mother.⁹⁷ Dr. Dutton also testified that “[a]s to the drugs . . . he would then simply involve her, so that essentially, if she knew information, had information, was present during some of the activities, she couldn’t rat on him . . . [by] report[ing] him to the police.”⁹⁸ The judge found that “there were a lot of threats” but concluded that “it in no way impacted the forming of or carrying out of the conspiracy” and that “it is impossible for me to make the factual findings that would justify a downward departure.”⁹⁹

Despite the potential benefit of the BWS excuse for women of circumstance like Ramona, critics say the benefits are outweighed by the harms of disempowering women in the eye of the law. BWS “defines the woman as a collection of mental symptoms, motivational deficits, and behavioral abnormalities; indeed, the fundamental premise of the defense is that women lack the psychological capacity to choose lawful means to extricate themselves from abusive mates.”¹⁰⁰ Critics argue that

⁹² Cornia, *supra* note 86, at 107.

⁹³ Beth I. Z. Boland, *Battered Women Who Act Under Duress*, 28 NEW ENG. L. REV. 603, 627 (1994).

⁹⁴ Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN’S L. J. 217, 311 (2003).

⁹⁵ Transcript of Resentencing, *supra* note 4, at 22.

⁹⁶ *Id.* at 23–24.

⁹⁷ *Id.* at 35–36.

⁹⁸ *Id.* at 36–37.

⁹⁹ Transcript of Resentencing, *supra* note 4, at 219–20.

¹⁰⁰ Coughlin, *supra* note 64, at 7.

BWS adheres to the same principles of servitude and obedience that undergirded the earlier excuse of coercion by husband: after identifying the conduct as unreasonable, BWS excuses the woman “if she can prove that she was a passive, obedient wife whose choices were determined, not by her own exercise of will, but by the superior will of her husband.”¹⁰¹

Critics also worry that the strategic choice to use a BWS excuse at trial could cause collateral damage. The term “battered women’s exceptionalism” describes the “attempt to treat battered women as special legal persons requiring consideration denied to others. . . .”¹⁰² The negative impact of this exceptionalism is that battered women, because they allegedly could not prevent the battering from happening or chose not to leave their batterer, are deemed less qualified to take care of their own children and dependents.¹⁰³ Even though lawyers will argue that the inferiority implied by asserting the defense is “a small sacrifice to impugn a client’s reputation in order to save her from a sentence of life in prison or the death penalty,”¹⁰⁴ these greater implications may outweigh the “small sacrifice” if she risks losing her children.¹⁰⁵

Consequences of the BWS label can go beyond the risk of losing custody of children. Other real consequences include being perceived “as suffering from a permanent condition which causes [a woman] to be untruthful (on the witness stand), . . . dangerous (to children or other vulnerable persons in [her] care), unreliable (in protecting the interests of legal clients), and beyond hope of rehabilitation.”¹⁰⁶ So while the BWS excuse is still raised in court today, many feminist scholars

¹⁰¹ *Id.* at 50.

Dressed up as a duress claim, the battered woman syndrome defense resembles almost perfectly the marital coercion doctrine. In both cases, the demanding “duress” standard, which the criminal law insists that responsible actors must satisfy, is adjusted downward to accommodate women’s predisposition for obedience to men. Indeed, the new defense is, if anything, more misogynist than its predecessor. By proving that women suffer from special psychological deficits that make them incapable of resisting illegal pressures exerted by men, it explicitly locates the source of women’s subjugation, not within legal or cultural convention, but within women themselves.

Id. at 57.

¹⁰² Peter Margulies, *Battered Bargaining: Domestic Violence and Plea Negotiation in the Criminal Justice System*, 11 S. CAL. REV. L. & WOMEN’S STUD. 153, 182–83 (2001).

¹⁰³ Cornia, *supra* note 86, at 122.

¹⁰⁴ *Id.* at 106.

¹⁰⁵ *See id.* at 116–17 (providing an example of when a BWS defense led to a woman losing her parental rights).

¹⁰⁶ *Id.* at 122.

consider it demeaning, demoralizing, and an affront to women’s autonomy. As evidenced by Ramona’s case, even if a woman of circumstance suffers from BWS, it is still incredibly difficult to use evidence of BWS to meet the high standard for a duress defense to conspiracy.

II. WHO THE WOMEN OF CIRCUMSTANCE ARE AND WHY THEY SHOULD BE EXCUSED

While the policy argument against “women-only” excuses—to prevent guilty women from unjustifiably avoiding punishment—is a valid one, more information is necessary to determine if a violation exists in every situation. It is true that some women of circumstance participate in drug dealing for their own benefit and may therefore deserve prison time for their culpable actions.¹⁰⁷ It is not the aim of this Note to deny the logic behind holding culpable offenders accountable.

But what about the women who are truly coerced and questionably culpable? Was Sheila Santiago a willing participant in her husband’s heroin operation, or did her husband bring heroin into their jointly-owned home despite her protests against it?¹⁰⁸ Why would Sheila’s attempt to throw drugs out of the window automatically implicate her as a culpable participant in her husband’s drug operation, rather than being seen as a kneejerk reaction to the police forcibly entering her home? Was Ramona really a culpable member of the drug conspiracy if she was forced to be present at drug deals by her abusive boyfriend who attacked and threatened to harm her and her family if she left him? If Sheila or Ramona, or the countless other women in similar circumstances, had reported their husband’s or boyfriend’s drug activities before the police came with a warrant, would they have been worse off than if they had just kept their mouths shut?¹⁰⁹ Should these real life factors matter when determining the severity of punishment for women of circumstance under drug conspiracy laws?¹¹⁰

¹⁰⁷ Elizabeth M. Vasily, *Women, Gangs, and Law Enforcement in America: A Critical Race and Feminist Analysis*, 7 GEO. J. L. & MOD. CRITICAL RACE PERSP. 319, 341 (2015).

¹⁰⁸ For an overview of how the criminal justice system “protects women who obey the violent men in their lives but . . . does not protect women who challenge those men,” see Cornia, *supra* note 86, at 110–11.

¹⁰⁹ In fact, Ramona said that Barber threatened to take away her children if she told the police that he was the one abusing her. See Transcript of Re-sentencing, *supra* note 4, at 31–32 (“And he said, I guess you are going to have to get some help. He said, you better not tell, you better not tell I did it, if you tell I did it, you won’t see Dwight again.”).

¹¹⁰ See Jackson, *supra* note 55, at 518.

By ignoring the context of the domestic relationship during sentencing, the legal system ignores the possibility that a particular woman of circumstance had limited options and was only acting out of fear for her own safety, or the safety of her family. Often times, a woman of circumstance has drug and alcohol addiction problems of her own, has endured physical and sexual abuse, and is dependent upon her abuser, but her overarching need to keep the family together above all else outweighs her own safety concerns.¹¹¹ Most are “desperate, unsuspecting or coerced women who often have no prior criminal history.”¹¹² Cooperation with the authorities is seen as “the ultimate form of betrayal in a relationship,” so some women risk incarceration rather than disrupting the cohesiveness of the family unit.¹¹³ “The girlfriend problem” describes the dilemma of choosing between a reduced sentence in exchange for offering information or remaining silent and getting the maximum sentence.¹¹⁴ The dilemma is exacerbated when drugs are being dealt from within the home because the woman of circumstance must be willing to physically leave her own home, her romantic partner, and the father of her children in order to be risk-free.¹¹⁵

The following three stories further illustrate how the current legal system fails to excuse, or even acknowledge, the role that coercion and duress play when determining culpability and appropriate punishment of

¹¹¹ Boux & Daum, *supra* note 18, at 589. Ramona’s BWS expert testified that:

I think that another very strong motivator, especially after the attempt [Ramona] made to leave in August of ‘91 was simply fear, that she had learned that in spite of a quite, I think, valiant effort to leave this man and to leave this state and to escape, that she was unable to do that in a way that she could assure the safety not only of herself, but of her mother and her family. In fact, her brother was the victim of Mr. Barbour [sic] and/or his cohorts, and her mother was quite severely threatened, that is, threatened to be killed. And so I think once that happened and once he found her and came back, she came back, the option of leaving, the option of just trying that again, she knew what would happen, she knew what had already happened. She didn’t have to guess, gee, what would happen if I tried to leave. She knew; it happened before. And so I think fear was a particularly powerful motivator about why she didn’t just leave after August of ‘91.

Transcript of Re-sentencing, *supra* note 4, at 35–36.

¹¹² Gaskins, *supra* note 60, at 1535; see generally Julian Abele Cook, Jr., *Gender and Sentencing: Family Responsibility and Dependent Relationship Factors*, 8 FED. SENT’G REP. 145 (1995).

¹¹³ Boux & Daum, *supra* note 18, at 604. This betrayal is especially poignant when the male is involved in drug-related activity and the woman’s choice to stay might not match up with what mainstream society sees as a normal decision. *Id.*

¹¹⁴ Nekima Levy-Pounds, *Beaten by the System and Down for the Count: Why Poor Women of Color and Children Don’t Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 U. ST. THOMAS L. J. 462, 473 (2006).

¹¹⁵ *Id.*

women of circumstance involved in drug conspiracies.

A. *Kemba Smith*

Twenty-four year-old Kemba Smith was seven months pregnant when she was sentenced to serve twenty-four and one-half years in prison for participating in her drug kingpin boyfriend’s activities.¹¹⁶ Before his death, Peter Hall recruited mostly female students, like Kemba, from Hampton University, to serve as drug couriers in his drug ring.¹¹⁷ During their relationship, Hall violently abused Kemba to the point where she feared for her life.¹¹⁸ Kemba had no prior criminal record¹¹⁹ and never handled the drugs that Hall ran through his interstate business, but she was found fully culpable for his entire drug enterprise after he was murdered.¹²⁰

At sentencing, Kemba’s lawyers presented evidence that Kemba suffered from BWS to support a duress defense.¹²¹ They called lay witnesses who went to college with Kemba, introduced medical and other documents showing the violent abuse Kemba suffered, and had expert witnesses testify on her behalf.¹²² But the trial court rejected Kemba’s duress defense, saying that it “could not accept such a defense when [Kemba] had dated Hall for such a long time and had witnessed Hall’s violent nature. In the Court’s view, [Kemba] understood and appreciated the criminality of Hall’s actions”¹²³ and was therefore fully

¹¹⁶ *Stories: Kemba Smith*, SENTENCING PROJECT, <http://www.sentencingproject.org/stories/kemba-smith/> (last visited Apr. 3, 2018).

¹¹⁷ *United States v. Smith*, 113 F. Supp. 2d 879, 884 (E.D. Va. 1999).

¹¹⁸ *See Margulies, supra* note 102, at 175–76; Gaskins, *supra* note 60, at 1534 (stating that Kemba was fearful of Hall, “who eventually killed his best friend for informing on him”).

¹¹⁹ Gaskins, *supra* note 60, at 1534.

¹²⁰ Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1440 (2012).

¹²¹ *See Smith*, 113 F. Supp. 2d at 895.

¹²² *Id.* (“All the witnesses concurred that Smith’s relationship with Hall was marked by episodes of brutal rage. According to the witnesses’ testimony, Hall slapped, beat, or choked Smith on many instances, and he would often yell and scream at her.”).

¹²³ *Id.* at 896. *But see* *United States v. Smith*, 966 F. Supp. 408, 410 (E.D. Va. 1997). The district court judge who dismissed Kemba’s motion to vacate her sentence did so begrudgingly, again showing the struggle between the desires of the legislature and the lack of discretion in the judiciary for mandatory drug sentencing schemes.

The undersigned occasionally thinks that particular applications of law are unfair. For example, the sentences routinely imposed for drug offenses are excessively stiff; the penalties for crack cocaine involvement are staggeringly exorbitant. For example, applying the Sentencing Guidelines in this case generated

culpable for her behavior.¹²⁴

B. *Danielle Metz*

Danielle Metz was the wife of an abusive cocaine dealer and mother of two children; she had no job skills other than cutting hair, no bank account in her name, no Social Security number, and no independent source of income.¹²⁵ Her husband moved her and the children across the country away from Danielle's family, and he forced Danielle to transport money and drugs across state lines, which she did fewer than five times.¹²⁶ When Danielle could not take any more of the mental and physical abuse, she moved her children back across the country to be with her family.¹²⁷ Two months later, Danielle was arrested and indicted for participating in her husband's drug conspiracy.¹²⁸ At twenty-six years-old, Danielle was sentenced to serve three LWOP sentences plus twenty years for her first time, nonviolent drug conviction.¹²⁹

C. *Teresa Griffin*

Teresa Griffin was twenty-one years-old and pregnant when her abusive boyfriend forced her to quit her job, withdraw from college, and follow him to a new state.¹³⁰ When Teresa tried to leave, her boyfriend

a range of 262 to 327 months for a woman who had no prior criminal history, who had arguable extenuating circumstances mitigating the severity of her conduct, and who had never actually handled drugs. The undersigned cannot say with resounding conviction that this result mandated by law is fair. But when a result is required by the law, the law as established by Congress must be applied faithfully.

Id.

¹²⁴ See *Stories: Kemba Smith*, *supra* note 116. Kemba's parents raised her infant son for the six and one-half years that she served until she was granted clemency in 2000. *Id.* Kemba now shares her traumatic story and experience with the criminal justice system to advocate for reform in sentencing. See *About Kemba*, KEMBA SMITH, <http://www.kembasmith.com/bio/> (last visited Feb. 17, 2018).

¹²⁵ AM. CIV. LIBERTIES UNION FOUND, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 44–45 (2013) [hereinafter LIVING DEATH].

¹²⁶ *Id.* at 45.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ LIVING DEATH, *supra* note 125, at 45. Danielle was granted clemency on August 30, 2016, after serving twenty-three years. See *Danielle Metz—Serving Life—Received Clemency on 8/30/2016*, CANDOCLEMENCY, <http://www.candoclemency.com/danielle-metz/> (last visited Apr. 3, 2018).

¹³⁰ LIVING DEATH, *supra* note 125, at 52.

hit her and threatened to not only kill her, but also take her children from a previous relationship out of the country.¹³¹ After their baby was born, he forced Teresa to buy him a car, rent him an apartment, and work for him as a drug mule, transporting drugs by bus so that he could fly to the final destination to deal the drugs himself.¹³² She tried to leave again, and he again threatened to take her children out of the country.¹³³ Teresa was seven months pregnant with her second child by her boyfriend when she was apprehended by police and arrested.¹³⁴ Teresa was convicted of conspiracy, among other charges, and was sentenced to serve LWOP in addition to two concurrent 280-month sentences and a 60-month sentence for her first time, nonviolent drug conviction.¹³⁵

Women like Ramona, Kemba, Danielle, and Teresa should be excused from the mandatory minimums tied to drug conspiracy laws because they are the unintended targets of the laws. Congress’s Anti-Drug Abuse Act of 1986 aimed to punish kingpin drug dealers by tying mandatory minimum sentences to drug type and quantity.¹³⁶ The enactment of the Anti-Drug Abuse Act of 1988 then added “conspiracy to commit a drug offense” to the list of crimes subject to a mandatory minimum to hold conspirators to the same level of punishment as kingpin dealers, regardless of individual culpability.¹³⁷ The American Civil Liberties Union has said that this addition “pulled many girlfriends and wives of drug dealers into the justice system” because “every participant in a conspiracy can be held liable for the crime of every other participant.”¹³⁸ It is therefore not surprising that “non-violent, drug-related offenses account for the largest source of the total growth of female inmates” incarcerated in both federal and state prisons.¹³⁹

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ LIVING DEATH, *supra* note 125, at 52–53.

¹³⁵ *Id.* at 53. Teresa was granted clemency on June 3, 2016, after serving twenty-six years. See Teresa Mechell Griffin Received Clemency on June 3, *Serving Life Sentence*, CANDOCLEMENCY, <http://www.candoclemency.com/teresa-mechell-griffin/> (last visited Apr. 3, 2018).

¹³⁶ See Jane L. Froyd, *Safety Valve Failure: Low-Level Drug Offenders and the Federal Sentencing Guidelines*, 94 NW. U. L. REV. 1471, 1486 (2000); Glazer *supra* note 40, at 199.

¹³⁷ Froyd, *supra* note 136, at 1487–88.

¹³⁸ Glazer, *supra* note 40, at 204.

¹³⁹ Marne L. Lenox, Note, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 289 (2011).

III. AN INTERSECTIONAL ANALYSIS OF “WOMEN-ONLY” EXCUSES IS NECESSARY¹⁴⁰

So why have “women-only” excuses gone by the wayside? It would seem that a “women-only” excuse would perfectly address the unique situations that many women of circumstance find themselves in and allow them to have a fighting chance when trying to raise an affirmative defense against male-defined conspiracy law. As illustrated by the stories of Ramona, Kemba, Danielle, and Teresa, the typical woman of circumstance has no prior criminal record before meeting her drug-dealing boyfriend.¹⁴¹ She then gets pregnant, endures violent abuse, and becomes financially dependent upon her abuser, locking her into the role of a conspirator with no easy way out.¹⁴² Surely a “women-only” excuse is appropriate to allow this small subset of less culpable women to escape from the draconian mandatory minimum sentences for drug crimes.

But it is the very fact that women of circumstance are a small subset of (primarily) poor women of color that creates the problem.¹⁴³ Often women of circumstance are members of a group (racial, ethnic, immigrant, religious) that has been systemically abused, coerced, and overly incarcerated throughout American history for one reason or another.¹⁴⁴ Most of the predominate drivers of the feminist movement

¹⁴⁰ As a white, middle-class woman, I acknowledge that my understanding of intersectionality is limited by what I can read and study, as opposed to lived experience, and I am mindful of disclaimers from black feminists like Hillary Potter about not tokenizing intersectionality or using it to promote colorblind legal analyses. See HILLARY POTTER, *INTERSECTIONALITY AND CRIMINOLOGY: DISRUPTING AND REVOLUTIONIZING STUDIES OF CRIME* 40–81 (2015) (describing the evolution of feminism and birth of intersectionality). My purpose in bringing up intersectionality is to combat the belief that all women would reject a “women-only” excuse, because this ignores the voices of women of color, or poor women, who are often women of circumstance.

¹⁴¹ See Gaskins, *supra* note 40, at 1535.

¹⁴² See *id.* at 1533; see also *infra* Part IV(A)(1).

¹⁴³ See Boux & Daum, *supra* note 18, at 573–74 n.17 for data demonstrating that women, especially women of color, are uniquely caught up in the War on Drugs and the policies that resulted in ways that white women are not.

¹⁴⁴ See, for example, Brenda V. Smith, *Uncomfortable Places, Close Spaces: Female Correctional Workers’ Sexual Interactions With Men and Boys in Custody*, 59 UCLA L. REV. 1690, 1701 (2012), for an illustrative picture of this concept as it relates specifically to black women.

As early as the late nineteenth century, black women were more likely to be arrested and imprisoned than white women because they were perceived as less feminine, less worthy, and less salvageable than white women. New York, which led the nation in early penal reform for both male and female inmates, has long had

for women’s equality are members of the white majority; therefore, “women-only” excuses are usually viewed through the lens of an independent, middle-class, white woman, which does not represent the experience of all women.¹⁴⁵ Consequently, if an excuse jeopardizes the autonomy of women (like coercion by husband) or implies inferiority between women and men (like BWS), then the feminist majority will almost certainly oppose it. The voice of the many drowns out the voice of the few.

This idea of a universal woman as representative of all women’s experience “that can be described independent of other facets of experience like race, class, and sexual orientation” is called “gender essentialism.”¹⁴⁶ In looking at the exclusion of homeless women from the group of women that is traditionally welcomed by the philosophy of battered women’s shelters, Lisa R. Green refers to the following definition of “essentialism” and its impact on homeless battered women seeking shelter:

Essentialism refers to the “tendency in dominant Western feminist thought to posit an essential ‘womanness’ that all women have and share in common despite the racial, class, religious, ethnic, and cultural differences among us.” This tendency toward homogeneity results in a feminist movement that is often meaningless for women whose experiences differ from the paradigmatic woman at the center of the philosophy. The phenomenon of essentialism is

disproportionate numbers of black women in its correctional institutions, including the Auburn Prison for Women, established in 1893, and the Bedford Hills Reformatory for juveniles, established in 1901. Although blacks never composed more than 5 percent of the population of the state during the relevant time period, Auburn’s records from 1893 to 1933 show a total of 1674 inmates, of which 536 were black women. Relying on eugenic theories of criminality, black women were cast as sexually loose and aggressive in their behavior, and unfeminine and animal-like in their appearance. These misperceptions made African American women exceptionally vulnerable to arrest for prostitution, vagrancy, and disorderly conduct. Of course, these misperceptions did not consider black women’s vulnerability to abuse because of their past histories as slaves and descendants of slaves, nor their independence and physical strength as a direct result of having had to make their own paths in the world.

Id. (footnotes omitted).

¹⁴⁵ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990). Unfortunately, feminist legal theory often claims to speak for all women, but really speaks on behalf of the majority who are “white, straight, and socioeconomically privileged.” *Id.*; see also Buel, *supra* note 94, at 237 (“Women of color are often silenced by the discourse centered on white females. This results in the omission of their unique experiences and perspectives from traditional feminist jurisprudence and certainly from other analytical legal constructs.”).

¹⁴⁶ See Harris, *supra* note 145, at 588.

demonstrated when battered women's shelters do not accept homeless women because these women do not conform to the prototypical battered woman whom the institution is designed to accommodate.

Although homeless women do maintain intimate relationships and are subject to abuse by their husbands, boyfriends, and lovers, the staff at battered women's shelters discount the issue of male violence when it is directed at women in the lowest socio-economic class in our country.¹⁴⁷

Green's analysis of the essentialism problem for homeless battered women can be transposed almost word-for-word to describe the problem faced by marginalized women of circumstance under the mandatory federal sentencing regime for peripheral involvement in drug crimes. The goal of seeking homogeneity in sentencing between (white) women and (white) men resulted in a feminist movement that was arguably meaningless for non-white or poor white women, whose experiences differed dramatically from the middle-class white women at the center of the philosophy.¹⁴⁸ When the federal sentencing guidelines promote equal treatment toward both men and women regardless of gender,¹⁴⁹ they ignore the reality that many women of circumstance do not conform to the prototypical criminal woman whom the institution is designed to punish. Finally, although women of circumstance can share evidence of the abuse and coercion they suffered, the law ignores the evidence unless it meets the exact statutory definition for a duress defense.¹⁵⁰ The standard is incredibly difficult to meet, and because a mandatory minimum sentence is tied to the charged drug quantity and type, the only way out is if the prosecutor changed the charge to a crime without a mandatory minimum, giving the discretion back to the judge.¹⁵¹ Thus, the experiences of women of circumstance are discounted in these situations, possibly because they, like homeless battered women, are in

¹⁴⁷ Lisa R. Green, *Homeless and Battered: Women Abandoned by a Feminist Institution*, 1 *UCLA WOMEN'S L.J.* 169, 170 (1991) (footnote omitted).

¹⁴⁸ *Id.* at 170.

¹⁴⁹ See, for example, U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.10 (2016), <https://www.usc.gov/sites/default/files/pdf/guidelines-manual/2016/GLMFull.pdf> [hereinafter U.S.S.G.], entitled *Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status (Policy Statement)*, with the following explanation: "These factors are not relevant in the determination of a sentence." The Introductory Commentary to Part H, which defines specific offender characteristics, highlights that "the [Sentencing Reform] Act directs the Commission to ensure that the guidelines and policy statements 'are entirely neutral' as to five characteristics—race, sex, national origin, creed, and socioeconomic status." *Id.* § 5H, at 473.

¹⁵⁰ See Cook, *supra* note 112, at 146–47.

¹⁵¹ See William W. Berry III, *The Mandate of Miller*, 51 *AM. CRIM. L. REV.* 327, 332 (2014).

the class with the lowest priority of rights in our country.¹⁵²

According to Kimberlé Crenshaw, feminism needs to be intersectional and “account for multiple grounds of identity when considering how the social world is constructed.”¹⁵³ Without applying an intersectional lens to an analysis of the mandatory sentencing of women peripherally involved in drug crimes, the very identity of women of circumstance is arguably erased.¹⁵⁴ A common misconception about embracing intersectionality in the feminist movement is that it encourages division and exclusion, but this harkens back to the original problem of the one-size-fits-all feminism that centered around middle-class, white women.¹⁵⁵ Focusing “only on the common ground between women is *erasing* rather than *inclusive*. . . . One-size-fits-all feminism is to intersectional feminism what #AllLivesMatter is to #BlackLivesMatter. The former’s attempt at inclusiveness can actually erase the latter’s acknowledgment of a unique issue that disproportionately affects a specific group of people.”¹⁵⁶

Ramona, Kemba, Danielle, and Teresa were considerably lucky; they all received executive clemency that recognized their punishment did not fit the crime. The executive branch should not have to overstep the judiciary in granting justice to women of circumstance, but without changes to mandatory minimum drug sentencing laws, there really is no other choice. This means that the only legal recourse for a woman of circumstance is to go through the criminal justice system, lose custody of her children, and give up her freedom for an unknown number of years while hoping for a convincing clemency petition and a president sympathetic to her situation.

The legislature can make changes to divert this specific subset of

¹⁵² Lenox, *supra* note 139, at 285.

While female criminality has long been attributed to the intersection of poverty and drugs, recent data indicate that drugs play a more critical role than previously recognized. Most female inmates were convicted of nonviolent and/or economically motivated drug offenses, leading scholars to conclude that such illegal behavior is “decidedly gendered.” 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.

Id. (footnotes omitted).

¹⁵³ Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991).

¹⁵⁴ See Jarune Uwujaren & Jamie Utt, *Why Our Feminism Must Be Intersectional (And 3 Ways to Practice It)*, EVERYDAY FEMINISM (Jan. 11, 2015), <http://everydayfeminism.com/2015/01/why-our-feminism-must-be-intersectional/>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

women out of the criminal justice system; saving precious judicial resources and precious lives. The process of change must start by recognizing that our system of laws is patriarchal; therefore, every woman facing the legal system is already at a disadvantage in trying to match up to the normative man. But proposing a normative woman standard does not go far enough, because there is no such thing as a universal woman; issues such as race and class also contribute to the varying types of “normative” women. So what can we do to ensure that marginalized women of circumstance have equal access to justice and a law that recognizes their unique situations?

IV. POTENTIAL INTERSECTIONAL SOLUTIONS TO EXCUSE WOMEN OF CIRCUMSTANCE

Significant intersectional work is needed to combat the unintended gendered, raced, and classed consequences of the legal response to the War on Drugs. Women of circumstance are just one of the many casualties of this war, but little attention is paid to their unique status as low-level, first time offenders with unequal bargaining power as compared to their male counterparts. Federal conspiracy law is deliberately broad and all-encompassing, making it easy to get involved in a conspiracy and much more difficult to get out. Additionally, despite being violently coerced into participation, women of circumstance find themselves facing mandatory minimum sentences because they have no useful information to offer the government. Furthermore, once charged and tried as a conspirator, individual culpability arguments are moot because each conspirator is responsible for all drugs charged to the conspiracy. The following proposed solutions take this reality into consideration and formulate ways to increase the ability for women of circumstance to advocate for fair treatment under the law, while allowing the criminal justice system to hold the culpable drug offenders accountable for their actions.

A. *Proposed Substantive Changes to Criminal Law*

The most drastic and cure-all solution to the unfair sentencing of women of circumstance is to change substantive conspiracy law. When domestic partners are charged as co-conspirators in a larger conspiracy involving third parties, the jury should be required to find that the woman of circumstance was actively initiating and encouraging the criminal scheme as a conspirator and not merely aiding and abetting

under coercion from her husband or boyfriend. If the jury does not make this finding, then the woman of circumstance should be excused from the penalties of the overall conspiracy. Sentencing women for their actual culpability in a conspiracy serves legitimate purposes of deterrence and retribution. Sentencing women of circumstance to strict mandatory minimum sentences when they lack culpability, however, serves no legitimate purpose because it unfairly equates being trapped in an abusive or controlling relationship with voluntary acquiescence in a conspiracy.

In the alternative, Congress should alter the definition of the affirmative defense of duress at trial. The current standard, requiring an imminent threat to kill or cause grievous bodily injury,¹⁵⁷ discounts the harm of ongoing physical threats or an imminent threat of non-physical injury that creates the same fear as a physical threat. Furthermore, this practice rewards abusers whose chosen method of power and control is verbal or emotional rather than physical, allowing abusers to manipulate women of circumstance in ways that are ineligible to meet the defense. The law should not remove a woman’s access to a deserved duress defense based on the uncontrollable actions of her abuser.

1. Legally Excusing Women of Circumstance From Conspiracy Charges

Common law defines the specific intent crime of general criminal conspiracy as an agreement between two or more persons formed for the purpose of committing a crime.¹⁵⁸ To convict for a drug conspiracy, “the Government must prove the following beyond a reasonable doubt: (1) the existence of an agreement between two or more individuals to distribute [the substance]; (2) the defendant’s knowledge of the agreement; and (3) [the defendant’s] voluntary participation in the conspiracy.”¹⁵⁹ There is no requirement to prove an overt act in furtherance of the conspiracy.¹⁶⁰ Once labeled a conspirator, federal courts follow *Pinkerton v. United States*, and hold that conspirators are liable for all the “reasonably foreseeable” substantive crimes committed

¹⁵⁷ See *United States v. Willis*, 38 F.3d 170, 175 (5th Cir. 1994).

¹⁵⁸ See, e.g., *Pinkerton v. United States*, 328 U.S. 640, 647 (1946); *United States v. Childress*, 58 F.3d 693, 707 (D.C. Cir. 1995).

¹⁵⁹ *United States v. Kiekow*, 872 F.3d 236, 245 (5th Cir. 2017) (quoting *United States v. Olguin*, 643 F.3d 384, 393 (5th Cir. 2011)).

¹⁶⁰ *United States v. Dumes*, 313 F.3d 372, 382 (7th Cir. 2002).

by their co-conspirators in furtherance of the agreement.¹⁶¹ The Anti-Drug Abuse Act of 1988 codified this premise specifically for drug conspiracies, stating that drug conspirators could receive mandatory minimum sentences for the full amount of drugs charged in the conspiracy, regardless of their individual culpability.¹⁶²

A conspiracy charge carries a very low burden of proof. Under 21 U.S.C. § 846, “[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”¹⁶³ Under 21 U.S.C. § 841, a person will receive the same punishment as the principal actor if they conspired either “(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.”¹⁶⁴ The government does not have to meet a tangible evidence standard to charge an individual for conspiracy—just being a party to the conspiracy is enough to receive the punishment equal to that of the person who “knowingly or intentionally” manufactured, possessed, or distributed the drugs.¹⁶⁵ There is also no requirement that the government prove the conspirator knew the quantity or type of drugs involved in the conspiracy, nor is there an occasion for the alleged conspirator to challenge the assertion at trial.¹⁶⁶

Scholarship on conspiracy law repeats two main justifications for punishing conspirators equal to the primary offender. The first is that conspiracy is an inchoate crime, allowing law enforcement to intervene and apprehend individuals before they can complete the entire planned bad act.¹⁶⁷ The second is that conspiracies in general present more of a danger to society as an “independent societal ill,”¹⁶⁸ because group

¹⁶¹ See *Pinkerton*, 328 U.S. at 647–48.

¹⁶² See Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 FLA. ST. U. L. REV. 935, 941 (2001).

¹⁶³ 21 U.S.C. § 846 (2012).

¹⁶⁴ 21 U.S.C. § 841(a)(1) (2012).

¹⁶⁵ See, e.g., *United States v. Dixon*, 547 F.2d 1079, 1081 (9th Cir. 1976) (noting that neither failed narcotic transaction nor failure to recover bag containing heroin precluded conspiracy conviction).

¹⁶⁶ Dan Honold, Note, *Quantity, Role, and Culpability in the Federal Sentencing Guidelines*, 51 HARV. J. ON LEGIS. 389, 403–04 (2014).

¹⁶⁷ See, e.g., R. Michael Cassidy & Gregory I. Massing, *The Model Penal Code’s Wrong Turn: Renunciation as a Defense to Criminal Conspiracy*, 64 FLA. L. REV. 353, 357 (2012).

¹⁶⁸ Barton D. Day, Note, *The Withdrawal Defense to Criminal Conspiracy: An Unconstitutional Allocation of the Burden of Proof*, 51 GEO. WASH. L. REV. 420, 422 (1983).

actors are more likely to succeed in their bad acts than an individual actor.¹⁶⁹ But critics of conspiracy law argue that holding individual conspirators accountable for the “reasonably foreseeable” actions of others creates a “‘culpability gap’—a gap between the greater level of moral culpability contemplated by Congress and the lesser level manifested in the action of the offender.”¹⁷⁰

This culpability gap is prevalent among women of circumstance caught in their domestic partner’s drug conspiracy. The legitimate purposes for charging all conspirators equally are irrelevant when applied to a woman of circumstance because even if she knew about the conspiracy agreement and participated in some way, the voluntariness of her actions is questionable. For example, it is hard to argue that Ramona voluntarily became part of Barber’s drug conspiracy when, after moving in with him and after he started beating her, she found out he was a large-scale drug dealer. Even if Ramona had left soon after, she could still conceivably be charged as a conspirator for doing something as small as answering the phone on Barber’s behalf or using the money from his drug sales to buy food for her children while they lived together. Unlike the other co-conspirators who did not live with Barber or have a romantic relationship with him, Ramona was stuck. Barber was not only the father of her two children and her sole financial supporter, but also physically abused her and attacked her family when she tried to leave him. He routinely dragged Ramona to drug deals against her will so that she could not turn him in without implicating herself. There is nothing voluntary or intentional about why Ramona stayed in the house or complied when forced to accompany Barber on drug deals—she was trapped by fear, dependence, and love.

An example of a current defense to conspiracy that precludes most women of circumstance is the doctrine of withdrawal. Withdrawal protects an actor from being liable for a coconspirator’s subsequent actions or statements when the actor affirmatively terminates his membership in the conspiracy.¹⁷¹ For the defense to be valid, the actor must cease participating in activities and also either give notice of abandonment to coconspirators or report the conspiracy to the authorities.¹⁷² The withdrawal starts the clock on the statute of limitations as to previous actions, removes liability for subsequent

¹⁶⁹ Cassidy & Massing, *supra* note 167, at 357.

¹⁷⁰ Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 136 (2009).

¹⁷¹ Day, *supra* note 168, at 422.

¹⁷² Cassidy & Massing, *supra* note 167, at 373.

offenses that active conspirators commit, and keeps later declarations from being admissible against the actor who withdraws.¹⁷³

Membership in the conspiracy for the entirety of the crime is a rebuttable presumption in which only affirmative proof of a defendant's withdrawal can overcome it.¹⁷⁴ Yet it is unlikely that a woman of circumstance will even be able to accomplish the first requirement of ceasing to participate in the activity if her husband or boyfriend is using her home to carry out the drug business. As previously mentioned, the overwhelming majority of women of circumstance rely upon their domestic partner financially, so cutting ties and leaving the home is not a valid option if she wishes to keep a roof over her head. Therefore, even if she were to announce her abandonment to the group or inform the authorities of the activities, she would still be liable as a conspirator for not ceasing to participate.

When domestic partners are charged as co-conspirators in a larger conspiracy involving third parties, the jury should be required to find that the less-involved domestic partner was actively initiating and encouraging the criminal scheme, not just acquiescing in isolated acts of aiding and abetting under the influence of the more-involved domestic partner.¹⁷⁵ This does not preclude a woman of circumstance from liability for her personally commissioning other crimes, but would excuse the actions of a truly innocent woman of circumstance who merely shared a home with a drug dealing husband or boyfriend, but took no part in the drug business. It would give a peripherally involved woman like Ramona the opportunity to raise a legal defense against allegations that she was actively initiating and encouraging the conspiracy—often asserted by desperate co-conspirators under pressure to appease the government to earn their own sentence reductions.¹⁷⁶

¹⁷³ Day, *supra* note 168, at 422–23.

¹⁷⁴ *Id.* at 424–25.

¹⁷⁵ Current jury instructions ask juries to do the exact opposite. For example, the Eleventh Circuit's pattern jury instructions for conspiracy under 21 U.S.C. § 846 state: "If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan—and willfully joined in the plan on at least one occasion—that's sufficient for you to find the Defendant guilty." ELEVENTH CIRCUIT JUDICIAL COUNCIL, ELEVENTH CIRCUIT PATTERN JURY INSTRUCTIONS (CRIMINAL) 2016, at O100 (2016), <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructions2016Rev.pdf>.

¹⁷⁶ See Telephone Interview with Amy Povah (Mar. 28, 2017). The following analogy shows how convoluted the conspiracy charge can be and how the low burden of proof works in the government's favor (a version of this story was presented in Amy's trial):

Suppose the government made picnics illegal. A car shows up at a local park. Albert gets out and has a platter of chicken, Billy has a blanket, Charlie has a

Creating space for a woman of circumstance to challenge the voluntariness of her involvement in the conspiracy addresses the prejudicial stereotype that the wife or girlfriend of a drug dealer is always complicit and fully culpable in her partner’s crimes.

Excusing a woman of circumstance from the mandatory minimums tied to conspiracy means that the government can only try her for the actual crimes she is alleged to have committed rather than saddling her with the punishments of the entire conspiracy. Spending a lifetime in prison as punishment for being in an abusive relationship serves no legitimate purpose; the streets are no safer with a nonviolent, peripherally involved woman of circumstance behind bars.¹⁷⁷ Requiring a higher burden of proof for a crime currently known as “[the] darling of the modern prosecutor’s nursery”¹⁷⁸ would be a drastic change in the law and would upset the traditional method of relying upon co-conspirator hearsay testimony to establish conspiracy convictions. But as shown in the next section, the current legal defense of duress does not sufficiently allow women of circumstance to defend themselves against the intangible evidence of hearsay testimony in the high-stakes sentencing regime that ignores their peripheral involvement.

pitcher of kool-aid, and David has a volleyball net. Just by looking at them one would think they have just engaged in an illegal act—a conspiracy to have a picnic. In fact, Albert, Billy, and Charlie were conspiring to have a picnic, but David just got a ride from them to the park and had no intention to take part in the picnic. David should have reported the picnic right away (as should every wife or girlfriend whose partner deals drugs) but he did not. As a result, when all four of them are arrested, Albert, Billy, and Charlie are each happy to make a deal (because they are truly guilty), but in order to get a sentence reduction they must incriminate someone else. David refuses to make a deal because he is truly innocent and does not know anything that would be helpful to the prosecution to earn him a sentence reduction. Albert, Billy, and Charlie all testify against David in exchange for a two-year sentence but David gets the mandatory minimum of ten years because he has no evidence to refute the hearsay testimony against him.

¹⁷⁷ In addition to not keeping the streets any safer, the over-incarceration of women of circumstance negatively impacts their children because, like Ramona’s children, they now have no mother or father to take care of them. For more information on the specific impact on children, see, for example, Chieko M. Clarke, Comment, *Maternal Justice Restored: Redressing the Ramifications of Mandatory Sentencing Minimums on Women and Their Children*, 50 *HOW. L.J.* 263, 266 (2006), noting the correlation between incarcerated mothers and the increased likelihood that their children will abuse drugs or alcohol, become homeless, or exhibit suicidal behaviors.

¹⁷⁸ *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). Judge Learned Hand’s famous quote about conspiracy charges has been heavily referenced since he penned it in 1925, showing that the prosecutor today is just as “modern” as the prosecutor of Judge Learned Hand’s time. See, e.g., Marcus, *supra* note 16, at 1.

2. Adjusting the Standard to Meet a Duress Defense

The affirmative defense of duress as currently written is insufficient to excuse women of circumstance who are coerced into participation in a drug conspiracy. The existing standard to meet a duress defense should be adjusted so that a woman of circumstance is allowed to provide evidence of her individual experience of duress to obtain an acquittal, or at least a reduced sentence.¹⁷⁹ The defense as currently written states:

the defendant must show that: (1) she acted under an immediate threat of serious bodily injury; (2) she had a well-grounded belief that the threat would be carried out; and (3) she had no reasonable opportunity to avoid violating the law and the threatened harm.¹⁸⁰

Kemba Smith's case is a textbook example of how difficult the current duress standard is to meet for a woman of circumstance who experienced violent physical abuse. Despite ample evidence from both expert and lay witnesses testifying to the extent of the violent and deadly abuse Kemba suffered at the hands of her boyfriend, the court denied her duress defense, reasoning that Kemba's "generalized fear of serious bodily harm if she did not commit certain offenses"¹⁸¹ was insufficient to meet the high standard. According to the court, it was just as easy for Kemba to "discontinue[] her criminal activity and avoid[] the feared injury"¹⁸² as it was for her to remain in the abusive relationship and be subject to the conspiracy statute. This is the classic case of victim-blaming and discounting the non-normative experiences of women of circumstance in favor of the essential woman standard: a reasonable woman would have left if the abuse was so bad, so a woman who stayed must be intentionally participating in the criminal activity.

If evidence of a "generalized fear of serious bodily harm" is insufficient to meet the current duress standard, then most women of circumstance will never succeed on duress claims. Although physical abuse is prevalent, non-deadly threats of force—such as mental and emotional intimidation, withholding financial support, or threatening to kidnap children or call child protective services—are even more

¹⁷⁹ Arguably, courts have refused to lower the standard, and precedent shows that a high standard is favored in duress claims. While tradition is important, the law is ever-changing and it may be time to re-evaluate the reasoning behind the firm stance against leniency.

¹⁸⁰ *United States v. Smith*, 113 F. Supp. 2d 879, 909 (E.D. Va. 1999) (citing *United States v. King*, 879 F.2d 137, 138–39 (4th Cir. 1989)).

¹⁸¹ *Id.* at 909.

¹⁸² *Id.*

frequent, and are equally valid reasons why women of circumstance do not leave and are coerced into participation.

A woman of circumstance should be allowed to raise a duress defense if she can demonstrate that, for example, she would have lost her home, her job, or custody of her children because of her dependence upon the principal drug dealer. These facts should create a presumption against a finding of voluntary agreement or intent to conspire, excusing women of circumstance from the punishment under conspiracy law. Allowing her to raise this defense gives her more power in the initial plea bargaining process and puts the discretion back into the hands of the trier of fact, especially if, as is usually the case, her knowledge of the conspiracy is too limited to qualify for a prosecutorial substantial assistance departure.¹⁸³ If the duress defense is granted, it would keep a woman of circumstance from being charged with the full quantity of drugs involved in the conspiracy that she had nothing to do with and ensure that a mandatory minimum sentence, if warranted, reflects her actual participation in the crime.

It is important to highlight and immediately dismiss a potential criticism from feminists who strongly oppose the BWS theory of duress. Adjusting the standard to meet a duress defense is not singling out women as the inferior sex or implying that women are incapable of separating from abusive partners. Unlike the BWS theory of duress, an adjusted standard for the duress defense that allows proof of non-physical threats does not define a woman as a collection of mental symptoms; it merely recognizes the multiple layers of harm involved in the particular relationship. This is not an attempt to create a “women of circumstance exceptionalism” with negative implications; it is taking an existing defense, which does not carry a lifelong label of shame and stigma, and applying it to circumstances in which poverty and marginalization create and magnify different kinds of threats.

There are some drawbacks to proposing an adjusted standard for the duress defense. Realistically, the act of determining which women qualify for the lower standard of a duress defense will necessarily leave some deserving women, or other afflicted household members, out of consideration. The opposite is also possible; that undeserving women will qualify for the adjusted standard and receive reduced sentences when they were actually culpable. These concerns are worth investigating further to determine how many people might realistically

¹⁸³ See *infra* Part IV(B)(3).

fall into these categories and the likelihood that they would attempt to assert the duress defense if it was adjusted as proposed.¹⁸⁴

If conspiracy law is not redefined to excuse women of circumstance from the charge, the duress defense should at least be adjusted to provide an opportunity for women to present evidence of any kind of abuse they endured, to help mitigate the resulting sentence.

B. Proposed Changes to Federal Mandatory Minimum Sentencing Practices

Mandatory minimum sentences were the answer to society's question of how to clean up the streets from rampant drug crime. The impact of a mandatory minimum is that, unless a defendant meets very specific exceptions, they will never receive less than the statutorily defined minimum term of years. These narrow exceptions keep women of circumstance who had little or no involvement in the drug conspiracy itself from getting below the mandatory minimum.

The focus of this section is finding ways to get out from under the mandatory minimum sentencing regime so that judges are able to use their discretion in sentencing. One way is to recalculate the drug quantities imputed to women of circumstance so that they do not rise to the level that triggers the mandatory minimum. Another way is to create a new safety valve provision for low-level offenders that is easier to meet than the current provision, which in principle avoids triggering the mandatory minimum. Finally, creating a "cooperation under duress" departure, which can be raised by the defendant rather than the government, puts bargaining power back into the hands of the woman of circumstance and allows her to present evidence of her willingness to cooperate for mitigation purposes.

1. Recalculating Drug Quantities Under the Current Definition of Conspiracy

The quantity-driven rather than culpability-driven sentencing scheme for drug offenses is illustrated by the way that the statutes and sentencing guidelines pinpoint levels of punishment based on drug

¹⁸⁴ See, e.g., Neil P. Cohen et al., *The Prevalence and Use of Criminal Defenses: A Preliminary Study*, 60 TENN. L. REV. 957, 965 (1993) (reporting prevalence of defenses, including duress, in criminal trials in Tennessee from questionnaires sent to judges, prosecutors, and defense lawyers, and finding that the duress defense was seldom used).

quantity, regardless of actual knowledge.¹⁸⁵ To demonstrate the problem with using overall drug conspiracy quantity to derive sentences, this section explores the levels of punishment for Ramona Brant’s conviction as a first-time, nonviolent narcotics offender charged under 21 U.S.C. § 841(b)(1)(A) with 183 kilograms of powder cocaine.¹⁸⁶ Despite the fact that police found no drugs on Ramona during the investigation, she was held responsible for the full amount charged under the law of conspiracy, and was sentenced as such.

The quantity of a particular drug triggers a specific mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). For example, a first-time conviction for anyone who knowingly or intentionally manufactures, distributes, dispenses, or possesses

5 kilograms or more of a mixture or substance containing a detectable amount of . . . cocaine . . . [results in] a term of imprisonment which may not be less than 10 years or more than life . . . [and requires] supervised release of at least five years in addition to such term of imprisonment . . . [and] the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph.¹⁸⁷

Under the statute and my hypothetical drug amount of 183 kilograms of powder cocaine, Ramona’s mandatory minimum sentence is ten years with at least five years of supervised release and no probation. Therefore, under the statute, the only way to get a sentence lower than ten years is if the entire amount of cocaine found in the conspiracy was less than 5 kilograms.

But the same drug quantity can result in a different sentence under the sentencing guidelines. The statute of conviction, here 21 U.S.C. § 841(b)(1)(A), directs a judge to make an assessment under U.S.S.G. § 2D1.1 as to offense type and the base offense level.¹⁸⁸ Ramona, as a first-time offender, would have a criminal history category level of one and a base offense level of at least 36, because she was charged with having “at least 150 KG but less than 450 KG of Cocaine.”¹⁸⁹ Ignoring

¹⁸⁵ See 21 U.S.C. § 841(b)(1)(A) (2012); U.S.S.G. § 2D1.1.

¹⁸⁶ The charge in Ramona’s actual case was for 183 kilograms of powder cocaine and 97 kilograms of crack cocaine, with enhancements for use of a firearm and being a leader in the organization. See *supra* note 42. For ease of explanation, I am only using the charge of 183 kilograms of powder cocaine in this example.

¹⁸⁷ See 21 U.S.C. § 841(b)(1)(A).

¹⁸⁸ See Froyd, *supra* note 136, at 1480.

¹⁸⁹ U.S.S.G. § 2D1.1. Just for reference, the trial court found Ramona’s base offense level to be 38.

the aggravating factors found in the actual case, the base offense level of 36 corresponds to a term of 188–235 months on the sentencing table, or roughly 15 to 20 years.¹⁹⁰ While this is higher than the statutory minimum, Ramona might have qualified for some mitigating factors, such as the four level “minimal participant” reduction in § 3B1.2(a) and the corresponding two level reduction for § 2D1.1(b)(16), bringing her overall offense level in this hypothetical scenario down to 30 and a range of 97 to 121 months, or roughly 8 to 10 years.¹⁹¹

The current mandatory minimum statutes prevent a judge from sentencing someone like Ramona below the ten-year mandatory minimum, despite the fact that the sentencing guidelines might allow for a lower sentence.¹⁹² If Congress is unwilling to amend the definition of conspiracy to allow for women of circumstance to raise a defense against voluntary participation, then it should amend the drug calculations tied to mandatory minimums. The trier of fact should have discretion to determine the quantity of drugs that an individual was actually responsible for, rather than allowing the government to impute the full amount of drugs in the conspiracy to each conspirator, and being forced to abide by the corresponding mandatory minimums. The trial judge in Ramona’s case practically begged the government to make a motion for him to downward depart on Ramona’s sentence, because he did not feel she deserved life in prison for what the evidence alleged she had done.¹⁹³ If a judge states on the record that he or she disagrees with the sentence being imposed because the punishment does not fit the crime, this statement should not continue to go unaddressed.¹⁹⁴

¹⁹⁰ See *id.* ch. 5, pt. A, Sentencing Table. During the sentencing phase of a trial, the judge refers to the guidelines that were in effect at the time of sentencing. For ease of explanation, I am using the most current edition of the guidelines.

¹⁹¹ See *id.*

¹⁹² See U.S.S.G. § 5G1.1(c), stating that “the sentence may be imposed at any point within the applicable guideline range, provided that the sentence—(1) is not greater than the statutorily authorized maximum sentence, and (2) is not less than any statutorily required minimum sentence.”

¹⁹³ See Transcript of Re-sentencing, *supra* note 4, at 221.

¹⁹⁴ Judges across the country have voiced their disagreement and have actually stepped down from the bench in their outrage over mandatory minimum sentences and the havoc it wreaks on the lives of nonviolent drug offenders. See, e.g., *Another Federal Judge is Speaking Out Against Mandatory Minimum Sentences*, MEDIUM (Apr. 19, 2017), <https://medium.com/@civilrightsorg/another-federal-judge-is-speaking-out-against-mandatory-minimum-sentence-s-e30301ad2211>.

2. Changing the Elements to Meet a Safety Valve

The current safety valve provision under 18 U.S.C. § 3553(f) provides an exception to mandatory minimum sentences specifically for drug charges regardless of drug quantity.¹⁹⁵ Because it is not a departure, it does not require a government motion, and it therefore places the burden into the hands of the defendant to present evidence of their eligibility¹⁹⁶ and allows judges to “impose a sentence without regard to the statutory mandatory minimum penalty for the covered offenses.”¹⁹⁷ But the scope of the current safety valve is too narrow to allow women of circumstance the benefit of its coverage. The safety valve language reads:

(f) Limitation on Applicability of Statutory Minimums in Certain Cases. . . . [T]he court shall impose a sentence pursuant to guidelines . . . without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act [21 U.S.C. § 848]; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.¹⁹⁸

¹⁹⁵ The safety valve applies to the offenses “under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963).” 18 U.S.C. § 3553(f) (2012).

¹⁹⁶ See Froyd, *supra* note 136, at 1497.

¹⁹⁷ U.S. SENTENCING COMM’N, *supra* note 19, at 19.

¹⁹⁸ 18 U.S.C. § 3553(f).

Ramona is a perfect example of someone who should have qualified for the safety valve. Ramona was a first-time offender, and therefore “[did] not have more than 1 criminal history point” on her record.¹⁹⁹ Ramona’s involvement in the conspiracy “did not result in death or serious bodily injury to any person.”²⁰⁰ Most importantly, for someone so peripherally involved as Ramona “the fact that [she] ha[d] no relevant or useful other information to provide . . . shall not preclude a determination by the court that [she] has complied with this requirement.”²⁰¹

What made Ramona ineligible, however, were the government’s allegations that she “possess[ed] a firearm . . . in connection with the offense” and that she was “an organizer, leader, manager, or supervisor of others in the offense.”²⁰² These allegations were founded on the hearsay testimony of co-conspirators who themselves received substantial assistance departures from the government in exchange for testifying against Ramona and her boyfriend.²⁰³ But for allegations that one of the guns found in the house belonged to Ramona and that she directed the drug sales from New York, making her an organizer, Ramona would have qualified for the safety valve exception as currently written.²⁰⁴

The safety valve exception as exists now is unworkable. Factors (1), (3), and (5) could remain as currently written because they clearly support a finding that the individual charged is a low-level, nonviolent, first time offender. They are objective in nature and cannot be manipulated by the government: (1) the individual either does or does not have more than one criminal history point; (3) the crime either did or did not result in death or serious bodily injury; and (5) the individual either spoke or did not speak to the government before the sentencing hearing. Factors (2) and (4) are problematic because they are subjective in nature and can be proven solely through hearsay testimony, but they are also important indicators of violence and levels of culpability. For example, a bright-line rule like the one in (2) ensures that any possession of a gun or inducing another participant to possess a gun in connection to the offense disqualifies the individual from the safety valve. Problematically, there is no room for explanation in a case like

¹⁹⁹ See *id.* § 3553(f)(1).

²⁰⁰ *Id.* § 3553(f)(3).

²⁰¹ *Id.* § 3553(f)(5).

²⁰² 18 U.S.C. § 3553(f)(2), (4).

²⁰³ See, e.g., Transcript of Trial, *supra* note 34, at 82–83.

²⁰⁴ See *id.* at 45, 53–54, 152–53.

Ramona’s where her abuser forced her to carry a gun, which is very different from a conspirator who willingly obtains a gun to facilitate drug activities. This element can also be satisfied if any member of the conspiracy possessed a firearm, under *Pinkerton* vicarious liability. As currently written, the law does not distinguish, for example, between the less culpable Ramona, who was forced to carry a gun, but was not arrested with a gun in her possession, and the fully culpable Durante, who was arrested with both guns and drugs in his car. Nor could it, and still be called a safety valve rather than a floodgate.

To avoid the difficulty of the current safety valve provision, one proposal calls for using the sentencing guidelines regime if a defendant falls within a statutory definition of a low-level drug offender.²⁰⁵ The proposal identifies a non-exhaustive list of factors that a court may consider when determining whether a defendant is a low-level participant.²⁰⁶ If a judge finds that the defendant met a sufficient number of factors, the safety valve provision would apply, and the judge would sentence under the guidelines rather than following the mandatory minimum.²⁰⁷ The judge would still take factors like use of a firearm or cooperation with the government into consideration as an aggravating or mitigating adjustment, but not until after the mandatory minimums were off the table.²⁰⁸ This “solves the problem of sentence disparity between high-level and low-level offenders and remedies the disparate impact felt

²⁰⁵ Froyd, *supra* note 136, at 1500.

²⁰⁶ See *id.* at 1501, enumerating the following factors:

- (1) The Defendant received a small, flat fee payment for a drug delivery (rather than a percentage of the profits after the drugs were sold);
- (2) The Defendant only delivered drugs one way, and did not deliver the money in return;
- (3) The Defendant received a pre-packaged bag;
- (4) The Defendant delivered to an individual not previously known to the Defendant;
- (5) The Defendant did not sell or negotiate the terms of the sale of the drugs;
- (6) The Defendant had no ownership of any portion of the drugs;
- (7) The Defendant did not finance any aspect of the criminal activity;
- (8) The Defendant lacked knowledge as to the type, quantity, or value of the drugs the Defendant was carrying;
- (9) The Defendant lacked knowledge or understanding of the scope and structure of the conspiracy;
- (10) The Defendant lacked knowledge regarding the activities of others involved in the conspiracy;
- (11) The Defendant did not supervise others; or
- (12) The Defendant was closely supervised by the supplier or distributor.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1505.

by women drug offenders.”²⁰⁹

3. Creating a “Cooperation Under Duress” Departure

The United States Attorney’s Manual permits federal prosecutors to offer a substantial assistance recommendation on behalf of a defendant who “has provided substantial assistance in the investigation or prosecution of others, or has otherwise provided substantial assistance to the government.”²¹⁰ The process is codified and states, “[u]pon *motion of the Government*, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who has committed an offense.”²¹¹ Per the sentencing guidelines, only “upon *motion of the government* stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.”²¹² This option gives the prosecutor “a power, not a duty, to file a motion when a defendant has substantially assisted.”²¹³

There is no definition for “substantial assistance” and therefore prosecutors are free to make a determination of what qualifies as “substantial” on a case-by-case basis.²¹⁴ The guidelines state,

²⁰⁹ Froyd, *supra* note 136, at 1507.

²¹⁰ OFFICES OF THE UNITED STATES ATTORNEYS, U.S. ATTORNEY’S MANUAL 9–27.730 (1997), <https://www.justice.gov/usam/united-states-attorneys-manual>.

²¹¹ 18 U.S.C. § 3553(e) (2012) (emphasis added).

²¹² U.S.S.G. § 5K1.1 (emphasis added). The court may consider the appropriate reduction based on the following facts:

- (1) the court’s evaluation of the significance and usefulness of the defendant’s assistance, taking into consideration the government’s evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant’s assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant’s assistance.

Id.

²¹³ *Wade v. United States*, 504 U.S. 181, 185 (1992).

²¹⁴ See Cassia Spohn & Robert Fornango, *U.S. Attorneys and Substantial Assistance Departures: Testing for Interprosecutor Disparity*, 47 CRIMINOLOGY 813, 836 (2009).

As one judge interviewed for the project stated: U.S. Attorneys don’t agree on the definition of substantial assistance. Some define it as anything that helps them solve the case or leads to charges against new individuals or strengthens the case against previously indicted defendants. Some will not make the motion unless the defendant actually testified before the grand jury. For others, truthful debriefing is

“[s]ubstantial weight should be given to the government’s evaluation of the extent of the defendant’s assistance, particularly where the extent and value of the assistance are difficult to ascertain.”²¹⁵ Unsurprisingly, this means that many low-level offenders are not offered a substantial assistance recommendation because they do not know enough useful information.²¹⁶ Although Congress’s intention in creating mandatory minimums was to punish drug kingpins, ironically, those who are most deeply involved in the crime are the ones who have a greater chance of receiving the most lenient sentences because of how helpful they can be to the prosecution of others.²¹⁷

When looking at the barriers a woman of circumstance must face, it seems cruel that she is unable to qualify for a substantial assistance recommendation—the only recommendation that a prosecutor can make on her behalf at sentencing—because her information is either nonexistent or not useful enough to implicate other participants.²¹⁸ Rather than simply having no impact on the sentencing process, the current system actually punishes wives and girlfriends for not being good enough “snitches,”²¹⁹ while rewarding husbands and boyfriends for being deeply entrenched in crime.²²⁰ Although men and women involved in drug conspiracies are equally subjected to mandatory minimums, the results are gendered with women receiving disproportionately lengthy sentences for their limited roles.²²¹

One dramatic solution to this problem would be to eliminate the

all that is required. And here is where you get huge inconsistencies in outcome.

Id.

²¹⁵ U.S.S.G. § 5K1.1 cmt. 3.

²¹⁶ Froyd, *supra* note 136, at 1493.

²¹⁷ *Id.*

²¹⁸ Raeder, *supra* note 54, at 21; Jackson, *supra* note 55, at 518 n.5 (“Women who associate with male drug dealers find themselves in uniquely difficult situations when faced with the rigidity of the sentencing guidelines because their low-level or nonexistent roles in the alleged conspiracies often render them unable to provide prosecutors with the substantial assistance required for sentence level reductions.”).

²¹⁹ Levy-Pounds, *supra* note 114, at 471–72.

The primary purpose of holding all alleged co-conspirators equally liable in a drug-trafficking ring is to force co-defendants to “snitch” on each other and cooperate with prosecutors in exchange for a sentence reduction. This stealth weapon placed by the legislature into prosecutors’ hands arguably results in more women becoming casualties in the “war on drugs,” as they are often sentenced to lengthy prison terms that are grossly disproportionate to their level of involvement in a drug-related crime.

Id. (footnotes omitted).

²²⁰ Glazer, *supra* note 40, at 199.

²²¹ Lenox, *supra* note 139, at 288–89; Froyd, *supra* note 136, at 1495.

substantial assistance departure altogether. Data shows that prosecutors are inconsistent in their application of the departure,²²² and a strict reading of Congress's intention to remove disparities in sentencing would indicate that substantial assistance departures go against that objective. If high-level offenders are receiving unfairly low sentences, then the scale may weigh in favor of eliminating the departure altogether, rather than continuing to leave it up to prosecutorial discretion.

A more tempered solution might be to create a "cooperation under duress" carve-out to the substantial assistance departure requirements. Currently, women of circumstance are penalized for not having useful information about other actors, even if they are willing to admit their own guilt. Rather than relying on the prosecutor to make a recommendation at sentencing (for assistance that these women are likely unable to provide), women of circumstance should be allowed to move on their own behalf to receive a sentence below the mandatory minimum by showing they wanted to cooperate, but lacked any useful information due to duress.²²³ It would give the judge discretion to hear evidence in support of the motion without relying upon the prosecutor to make the first move. The level of departure would not be as significant as a substantial assistance departure, but it would recognize the effort and not penalize a woman of circumstance for having the misfortune of knowing too little information to be of use. Importantly, the standard of "cooperation under duress" would be left undefined "just as the government's standard for 'substantial assistance' is not defined."²²⁴ This open definition levels the playing field so that the judge is the one

²²² See generally Spohn & Fornango, *supra* note 214 (analyzing research on jurisdictional variations in the use of substantial assistance departures, and the corresponding likelihood that a person will receive that departure, to determine that such departures are affected by race, ethnicity, and gender).

²²³ See, e.g., Knizhnik, *supra* note 17, at 1727. Knizhnik's suggested "good faith cooperation" departure would be as follows:

Notwithstanding any other provision of law, the court shall have the authority, upon motion from the defendant, to depart from the Guidelines or impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's good faith cooperation with the Government, if the defendant:

(a) qualifies for a decrease under Section 3E1.1(a) for acceptance of responsibility, and

(b) demonstrates having engaged in cooperation with the Government in good faith, in order to provide assistance in the investigation or prosecution of a person who has committed an offense.

Id. at 1755.

²²⁴ *Id.* at 1757.

deeming the sufficiency of the evidence, rather than the prosecutor.

V. CONCLUSION

It has now been thirty years since the mandatory sentencing guidelines were put into practice. It is high time for our legislature to take a serious look at the gendered and racialized results of these sentencing laws, especially in the drug conspiracy context, and ask why women of circumstance are being locked up at a greater rate than their male counterparts. What began as a well-intentioned legislative goal of making sentencing for drug crimes more equal by being gender-neutral, has resulted in a disproportionate number of women of circumstance being subjected to harsh sentences designed to deter and punish the most culpable leaders and organizers of drug conspiracies. It is hard to believe that this was the outcome Congress envisioned.

To be fair, it does not make sense to go back in time and revive the old, outdated “women-only” legal excuses that protected married women who acted at the will of their husbands. Arguably, it may even be time to discard the BWS theory of duress and self-defense because of its own pitfalls in painting women as inferior creatures who cannot make rational decisions and stigmatizing them as having a mental illness. But the proposed solutions for women of circumstance in this Note cannot be equated to the misogynistic doctrines of the past. These solutions are only necessary because of the havoc that mandatory minimums have created when unintended targets are caught in the expansive web of drug conspiracy laws. Changes, either to substantive law or to the mandatory minimums themselves, can ensure fair sentencing by holding the culpable offenders accountable for their actions.