

THE ROLE OF GENDER AND RELATIONSHIP IN REFORMING THE ROCKEFELLER DRUG LAWS

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In recent years, New York's drug sentencing laws—the Rockefeller Drug Laws—have come under attack due to their failure to reduce drug use despite the growing prison population. The political and academic communities now are debating how best to reform these laws. In this Note, Eda Tinto highlights the absence of a much-needed discussion regarding the sentencing of certain women drug offenders. Qualitative studies have demonstrated that an underlying context of many women's drug crimes is their involvement in an intimate relationship with a partner who uses or sells drugs. Tinto argues that these women drug offenders are often less blameworthy than other offenders and that therefore the sentences for their crimes are often unjust. Tinto concludes that the context of an intimate relationship should be acknowledged in sentencing and proposes reforms of the Rockefeller Drug Laws.

INTRODUCTION

In 1973, New York Governor Nelson Rockefeller successfully urged the passage of the most punitive drug laws in the country.¹ The “Rockefeller Drug Laws” (the Laws) removed the discretion traditionally afforded to judges in sentencing individual offenders and forced judges to sentence drug offenders to extremely long prison terms.² While the enactment of the Laws signaled the beginning of

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¹ Marc Mauer, *Race to Incarcerate* 57 (1999); Spiros A. Tsimbinos, *Is It Time to Change the Rockefeller Drug Laws?*, 13 St. John's J. Legal Comment. 613, 613 (1999) (stating that Governor Rockefeller and Legislature enacted toughest drug laws in country in response to increased drug use); see also Thomas M. Quinn & Gerald T. McLaughlin, *The Evolution and Present Status of New York Drug Control Legislation*, 22 Buff. L. Rev. 705, 733 (1973) (stating that Rockefeller Drug Laws (the Laws) evidence “strict law enforcement attitude” regarding drug crime in New York).

² See Joint Comm. on N.Y. Drug Law Evaluation, *The Ass'n of the Bar of the City of N.Y., The Nation's Toughest Drug Law: Evaluating the New York Experience* 3 (1977) [hereinafter Joint Comm.] (stating that Laws raised penalties for sale and possession offenses); see also Corr. Ass'n of N.Y., *Rockefeller Drug Law Repeal* 1 (Feb. 2001) (on file with the *New York University Law Review*) (stating that Laws enacted long prison terms for many drug offenses); Quinn & McLaughlin, *supra* note 1, at 732 (stating that Laws require mandatory minimum prison sentences without opportunity for probation for many drug offenders).

Most of these laws were passed as part of the New York Substance Control Act revisions in 1973. See Tsimbinos, *supra* note 1, at 618 (citing 1972 N.Y. Laws 878). Among the

the widely supported national “war on drugs,” people on all sides of the debate now agree that the Laws have failed to achieve their stated goals and are in need of reform.³ The most-cited reason for reform is that the Laws have contributed to the enormous increase in the cost of prison operation, yet have failed to reduce significantly the amount of drug use in New York.⁴ Another critical reason why many advocate for the reform of the Laws is that the “war on drugs,” in the words of one scholar, “has become a war on women.”⁵ The number of women

provisions was the establishment of mandatory enhanced sentences for all drug offenders. For more on the history and components of the Rockefeller Drug Laws, see *infra* Part I.A; see also Tsimbinos, *supra* note 1, at 618.

³ A multitude of groups, including former supporters of the Laws, now speak out against them. E.g., John R. Dunne, Editorial, Paying for Failed Drug Laws, *Wash. Post*, August 12, 1999, at A27 (claiming laws have “failed to achieve their goals” in editorial by former State Senator Dunne, an original sponsor of Laws); Editorial, The General is Right, *Times Union* (Albany, N.Y.), July 4, 1999, at B4 (reporting that all “major figures” in debate, including Governor Pataki, recognize need for reform); David I. Goldstein, Editorial, Drug Laws Handcuff Our Judges, *Herald Am.* (Syracuse, N.Y.), July 11, 1999, at D3, available at 1999 WL 4692318 (calling for reform in editorial by director of New York State Association of Criminal Defense Lawyers); Lara Jakes, Catholic Church Leaders Urge Drug Law Reforms, *Times Union* (Albany, N.Y.), June 15, 1999, at B2 (discussing proreform position of Catholic Church of New York); Joseph D. McNamara, Letter to the Editor, Harsh Drug Laws’ Boomerang Effect, *Wall St. J.*, June 10, 1999, at A27 (discussing failure of Laws in letter by former deputy inspector of New York Police Department); Paul Shechtman, A Good Deal for Criminal Justice, *N.Y. L.J.*, Mar. 20, 1997, at 2 (calling Laws “draconian” in opinion piece by former Director of Criminal Justice under Governor Pataki). But see Steve Dnistrian, Letter to the Editor, Harsh Drug Laws’ Boomerang Effect, *Wall St. J.*, June 10, 1999, at A27 (editorial by Executive Vice President of Partnership for a Drug-Free America voicing support of tough drug laws like Rockefeller Drug Laws); Lara Jakes & John Caher, Draconian Drug Laws No Panacea, *Times Union* (Albany, N.Y.), May 9, 1999, at A1 (quoting chief assistant district attorney of Queens County, John M. Ryan, stating view that Laws are effective).

⁴ A 1998 MacArthur Foundation and Robert Wood Foundation study on the effectiveness of strict sentencing statutes like the Rockefeller Drug Laws found that they have very little effect on illegal drug use. Jakes & Caher, *supra* note 3, at A1 (citing study and others regarding effectiveness of treatment over prison); see also Elliot Currie, *Crime and Punishment in America* 77 (1998) (citing studies as support for claim that “putting ordinary drug offenders behind bars has very little effect on rates of drug-related crime”); Joint Comm., *supra* note 2, at 7 (reporting 1976 findings that Laws did not decrease drug use; if anything, drug use increased). The cost of total prison expenditures in New York is close to three billion dollars per year; fifteen years ago, the State spent only \$840,000 per year. David C. Leven, *Curing America’s Addiction to Prisons*, 20 *Fordham Urb. L.J.* 641, 644 (1993) (citing statistics from Correctional Association of New York).

⁵ Meda Chesney-Lind, *The Female Offender* 147 (1997) (explaining that war on drugs has contributed to large increase in number of women incarcerated nationwide). There are currently 950,000 women in criminal justice custody (in prison, jail, on parole or probation) in the United States. Corr. Ass’n of N.Y., *Women in Prison Fact Sheet* (Mar. 2000), available at http://www.corrassoc.org/women_fact.html. In 1991, one in three women in U.S. prisons was incarcerated for a drug offense, compared to one in ten women in 1979. Chesney-Lind, *supra*, at 147.

in prison in New York State for drug offenses has skyrocketed as a direct result of the Laws.⁶

Since judges no longer have discretion to tailor sentences to the context of the crime, women offenders, some of whom previously may have received lighter sentences due to particular mitigating aspects of their crimes,⁷ now face harsh mandatory sentences. While all defendants, both male and female, face this inflexibility when charged with a drug crime in New York, it is important to highlight that ignoring the individual context of the crime seems particularly harsh for one subgroup of women defendants. Qualitative studies demonstrate that the underlying reason for many women defendants' drug offenses is their involvement in an intimate relationship in which their partner uses or sells drugs.⁸ As a result, the circumstances of a woman's drug crime are often intertwined, not only with her partner's drug activities, but also with the daily aspects of her intimate relationship.

Current debates over reform are devoid of any in-depth discussion of how the Laws affect women whose drug crimes took place within the context of an intimate relationship and whether their sentences, which are given without consideration of this context, are justified.⁹ Such discussion is a much-needed component of the broader debate about reform of the Laws.¹⁰

⁶ See *infra* Part I.B for statistics.

⁷ Previous leniency may have been due to characteristics of the particular crimes (e.g., role in the offense), characteristics of the offenders (e.g., family responsibilities), or may have been due to a paternalistic or chivalrous attitude on the part of judges. See *infra* note 19.

⁸ See *infra* note 45 and accompanying text.

⁹ See Chesney-Lind, *supra* note 5, at 146 (stating that there has been "virtually no public discussion" despite large increases in number of women in prison). Most articles discussing the Rockefeller Drug Laws do not mention the impact on women at all or mention the effect on women only in the "facts" section but not in the "proposal of reform" section. See, e.g., Leven, *supra* note 4, at 654-57 (discussing prison growth nationwide and proposing reforms that do not mention women offenders); Tsimbinos, *supra* note 1, at 613 (discussing Laws and suggestions for their reform without using word "woman").

¹⁰ A discussion on how best to reform the Laws is currently ongoing in both the academic and political communities. See, e.g., Corr. Ass'n of N.Y., *Basic Principles of Drug Law Reform* (Feb. 2000) (on file with the *New York University Law Review*) (discussing current legislative proposals and suggesting reforms); John Caher, Chief Judge Announces Reforms, Judiciary to Move Ahead on Reorganizing Courts, Drug Laws, 18-B Rates, N.Y. L.J., Jan. 9, 2001, at 1 (discussing Chief Judge Judith Kaye's proposals for judicial reform); Tracy Huling, Women Drug Couriers: Sentencing Reform Needed for Prisoners of War, *Crim. Just.*, Winter 1995, at 14, 62 (discussing Rockefeller Drug Law reform as it relates to women drug couriers); Tsimbinos, *supra* note 1, at 631-34 (proposing reforms of the Laws); Legal Aid Society, *Reform the Rockefeller Drug Laws: Mandatory Sentencing and Drug Offenders in New York State*, at <http://www.legal-aid.org/rock.htm> (last visited Mar. 28, 2001) (proposing alternatives to current Laws).

This is not to suggest that some current proposals would not alleviate the harsh effects of the current Laws; some reforms could have a positive impact on these women offenders as well as benefit others who may be unfairly punished under the Laws.¹¹ However, current discussions of policy reform lack any explicit discussion of the context of some women's drug crimes—namely, that of an intimate relationship—and fail to acknowledge that recognition of this particular context might help shape more just drug policies and sentences.

This Note contributes to the general discussion of why reform of the Rockefeller Drug Laws is needed—and how to proceed with such reform—by focusing on one group of offenders: women in relationship.¹² This Note describes how 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.¹³

Part I reviews the original purposes and motivations of the Laws and presents statistical data on the Laws' effect on women. Part II examines how the existence of an intimate relationship may underlie the criminal acts for which many women are charged under the Laws. This Part also examines how women, specifically those in relationships, fare in obtaining reductions of their sentences under the Laws' provision for material assistance.¹⁴ Part III argues that an understanding of the context of women's drug crimes and their intimate relationships must shape drug policy reform. This Note concludes by offering specific reforms that strive to acknowledge more effectively—and more justly—the complexities of many women's drug crimes.

I

THE ROCKEFELLER DRUG LAWS AND THEIR EFFECTS

A. *The History of the Rockefeller Drug Laws*

During the late 1960s and early 1970s, a "get tough on crime" movement was growing throughout the country.¹⁵ In reaction to the

¹¹ For example, proposals that benefit low-level offenders, such as not determining the crime charged solely by the amount of the drug, would often benefit women offenders as well. See *infra* notes 148-57 and accompanying text for a discussion of some current reform proposals.

¹² See *infra* notes 48-49 (defining "women in relationship").

¹³ See *infra* notes 43-44 (discussing criteria of blameworthiness).

¹⁴ See *infra* note 115 (defining material assistance).

¹⁵ Norval Morris, *The Contemporary Prison: 1965-Present*, in *The Oxford History of the Prison* 227, 243 (Norval Morris & David J. Rothman eds., 1995) (discussing political pressures for increased severity in sentencing during 1960s and 1970s). This same movement continues to influence criminal justice policy today. See Christopher M. Alexander,

publicized increases in drug use nationwide, this movement argued for harsher penalties for drug crimes and less emphasis on rehabilitation and drug treatment.¹⁶ The push for strict mandatory minimum sentences, although initiated by more conservative politicians, found support among liberal organizations and politicians.¹⁷ Liberal advocates of sentencing reform believed that removing judges' discretion would help reduce race- and gender-based disparities in the length of prison terms.¹⁸ In particular, some feminists advocated for the removal of discretion in order to fight judicial paternalism and chivalry, factors often cited as explaining gender-based sentencing disparities.¹⁹ While mandatory sentencing schemes eliminated the shorter sentences women previously had received through the exercise of ju-

Crushing Equality: Gender Equal Sentencing in America, 6 Am. U. J. Gender & L. 199, 200-06 (1997) (discussing past decade's "tough" sentencing policies and motivating rationales).

¹⁶ See Joint Comm., *supra* note 2, at 3 (stating that one principal objective of Laws was to deter drug offenders by threat of "get-tough" laws); Elliott Currie, Crime and Punishment in the United States: Myths, Realities, and Possibilities, in *The Politics of Law: A Progressive Critique* 381, 381-82 (David Kairys ed., 3d ed. 1998) (noting trends toward prison labor and three-strikes-and-you're-out laws); see also Paula C. Johnson, At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing, 4 Am. U. J. Gender & L. 1, 40 (1995) (stating that New York's 1960s approach to drug treatment for low-level users was deemed "failure" by early 1970s); Tsimbinos, *supra* note 1, at 613, 622 (discussing public outcry against "scourge" of drug abuse and New York Court of Appeals's recognition of Legislature's emphasis on isolation and deterrence rather than rehabilitation); Families Against Mandatory Minimums, History of Mandatory Minimums, at <http://www.famm.org/about3.htm> (last visited Mar. 28, 2001) (noting unprecedented media attention to drugs, notably crack cocaine, in early 1980s).

¹⁷ See Alexander, *supra* note 15, at 205 (discussing both liberal and conservative support for mandatory minimum sentences); Mauer, *supra* note 1, at 47-49 (same).

¹⁸ Alexander, *supra* note 15, at 205 (stating that reforms were initiated to fight recognized gender, race, and class discrimination in sentencing). The concern about disparities based on race was grounded in the belief that defendants of color were treated more harshly than white offenders. The concern about gender-based disparities was rooted in the belief that women received *more lenient* penalties because of their gender. See *infra* notes 19-20. These concerns about racial and gender disparities in sentencing motivated sentencing reforms throughout the country in the 1970s and supported mandatory sentencing schemes at both the state and federal levels. See Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 31 (1998) (discussing critique of "illegitimate considerations" influencing judicial discretion as motivation for sentencing reform); Michael Tonry, Sentencing Matters 6-9 (1996) (discussing nationwide sentencing reform as motivated in part by evidence of racial and gender sentencing disparities).

¹⁹ Mary Coombs, Putting Women First, 93 Mich. L. Rev. 1686, 1688-89 (1995) (reviewing Kathleen Daly, *Gender, Crime, and Punishment* (1994)) (describing studies that cited unwanted chivalry as explanation for why women receive more lenient sentences than similarly situated men); Myrna S. Raeder, Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines, 20 Pepp. L. Rev. 905, 917 (1993) (highlighting focus of sentencing reform on chivalry and paternalism as reasons for gender-based disparity); cf. Chesney-Lind, *supra* note 5, at 150-51 (stating that chivalry often worked in favor of white women only).

dicial discretion, these feminists supported such schemes because they exemplified "equal treatment" of all people convicted of crimes.²⁰ In New York, politicians and community organizations, both liberal and conservative, came together to fight for sentencing reform. As a result of this bipartisan support, the state legislature passed the core of the Rockefeller Drug Laws in 1973.²¹

New York thus became the first state to enact mandatory minimum sentences for drug crimes.²² The Laws mandated imprisonment for several categories of drug offenses and increased both the number of such categories and the length of corresponding sentences.²³ For example, an A-1 felony required the mandatory sentence of fifteen to twenty-five years (minimum) to life (maximum), in addition to mandatory parole for the rest of the offender's life.²⁴ The sentence equaled the possible sanction for murder in the first degree.²⁵ Under the 1973 law, an A-1 felony was defined as the possession of two ounces of an illegal narcotic or the sale of one ounce of an illegal narcotic.²⁶ In contrast, prior to 1973, a class A felony required the possession of at least sixteen ounces of a narcotic drug.²⁷ Equally important, the mandatory sentencing scheme also removed all discretion from the judge to consider mitigating factors, such as the defendant's role in the offense, in determining an appropriate sentence.²⁸

²⁰ Kathleen Daly, *Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions About Justice*, 17 *Int'l J. Soc. L.* 1, 9 (1989) (stating that sentencing reform affirmed value of equal treatment under law).

²¹ The Laws were enacted into the 1973 Laws of New York State as Chapters 276, 277, 278, 676, and 1051. S. 6204, 1973-1974 Reg. Sess. (N.Y. 1973) (Ch. 276); S. 6205, 1973-1974 Reg. Sess. (N.Y. 1973) (Ch. 277); H.R. 7328, 1973-1974 Reg. Sess. (N.Y. 1973) (Ch. 676); H.R. 7873, 1973-1974 Reg. Sess. (N.Y. 1973) (Ch. 278); see also Joint Comm., *supra* note 2, at 3 n.1, app. at 149 tbl.A-1, app. at 150 tbl.A-2 (describing crime levels and penalties for drug offenses under New York Penal Law as of June 1977).

²² *Families Against Mandatory Minimums*, *supra* note 16. By 1983, forty other states had passed mandatory minimum sentences for drug offenses. *Id.*

²³ Tsimbinos, *supra* note 1, at 615-16.

²⁴ Joint Comm., *supra* note 2, app. at 150 tbl.A-2, 151, app. at 152-54 tbl.A-4.

²⁵ *Id.* app. at 149 tbl.A-1, app. at 150 tbl.A-2; see also Shechtman, *supra* note 3, at 2 (highlighting drug sanction under Laws as potentially being same sanction as for murder and almost twice that for rape).

²⁶ Joint Comm., *supra* note 2, app. at 152-54 tbl.A-4.

²⁷ Quinn & McLaughlin, *supra* note 1, app. at 735. The sentence was the same for an A-1 felony; however, in addition to requiring a greater amount of drugs, prior to 1973 only certain drugs would merit an A-1 felony charge. See *id.* Prior to 1973, the sale of one ounce of an illegal substance was considered a class C felony. Joint Comm., *supra* note 2, app. at 151 tbl.A-3.

²⁸ While the judge could still determine the appropriate sentence within the given range, e.g., between fifteen and twenty-five years, a judge had no discretion to go below the mandatory minimum sentence. See *supra* text accompanying note 2.

The Laws have remained largely unchanged since 1973,²⁹ and have had a significant impact both in New York and across the nation. They stand as a guiding example for other mandatory drug sentencing schemes currently in place in other states.³⁰ They also served as a model for the Federal Sentencing Guidelines, a mandatory-sentencing scheme that is widely recognized as similarly tough and inflexible.³¹

²⁹ For example, for an A-1 felony, the maximum penalty is still life imprisonment and the minimum is still fifteen years for a first-time offender. N.Y. Penal Law § 70.00 (McKinney 1998 & Supp. 2001). Some key provisions of the current versions of the Laws include N.Y. Penal Law § 70.00 (McKinney 1998 & Supp. 2001) (providing maximum and minimum sentences for felony classes A to E); N.Y. Penal Law § 60.05 (McKinney 1998) (providing for authorized disposition of sentences); N.Y. Penal Law § 65.00 (McKinney 1998) (providing for sentences of probation); N.Y. Penal Law § 220 (McKinney 1998 & Supp. 2001) (providing general regulations regarding controlled substances and various levels of criminal sale and possession offenses); N.Y. Crim. Proc. Law § 410.91 (McKinney Supp. 2001) (providing for parole supervision).

In 1977, the Marijuana Reform Act created separate laws that dealt exclusively with marijuana offenses. Tsimbinos, *supra* note 1, at 624 (citing Marijuana Reform Act, N.Y. Penal Law § 221 (McKinney 1998)). In 1979, the Legislature passed a series of amendments which, in part, increased some of the minimum amounts needed for certain drug felonies. For example, the amount needed for an A-1 felony for an unlawful sale was increased from one ounce to two ounces. *Id.* at 625. In 1992, new legislation permitted the option of treatment in certain circumstances for a first-time felon convicted of a class C, D, or E drug felony. Leven, *supra* note 4, at 648. In 1995, the Legislature overruled a previous New York Court of Appeals case, *People v. Ryan*, 626 N.E.2d 51 (N.Y. 1993), and removed the prosecutors' burden of proving knowledge of the weight of the drug involved in the offense. Tsimbinos, *supra* note 1, at 626. In the same year, the Legislature passed the New York Sentencing Reform Act, which changed some of the sentencing requirements for both predicate felons and first-time offenders. For a description of the 1995 New York Sentencing Reform Act, see Bonnie R. Cohen, New York State Sentencing Reform Act of 1995, N.Y. L.J., June 30, 1995, at 1. For a chart of current felony sentencing in New York (including drug offenses), see Bonnie R. Cohen, New York State Felony Sentencing Chart, N.Y. L.J., Mar. 11, 1996, at 1; see also Human Rights Watch, Who Goes to Prison for Drug Offenses?: A Rebuttal to the New York State District Attorneys Association, at <http://www.hrw.org/hrw/campaigns/drugs/ny-drugs.htm> (last visited Mar. 28, 2001).

³⁰ See *supra* note 22.

³¹ See Raeder, *supra* note 19, at 929 (noting increased sentences and proportion of sentence served in prison under Guidelines); cf. Stith & Cabranes, *supra* note 18, at 145-48 (discussing need for more choices for federal judges in sentencing offenders). The Federal Sentencing Guidelines were written by the U.S. Sentencing Commission, a commission formed by the Sentencing Reform Act of 1984. Tonry, *supra* note 18, at 11.

In many instances, New York sentences are harsher than the Federal Sentencing Guidelines. Huling, *supra* note 10, at 16 (stating that switch to prosecution under New York state law could trigger harsher penalties than are available under federal law); Shechtman, *supra* note 3, at 2 (comparing New York versus federal sentences and noting lesser sentences under federal law). A full examination of the Federal Sentencing Guidelines is beyond the scope of this Note, but for an excellent critique of the federal scheme, including an examination of its impact on women, see generally Raeder, *supra* note 19; Myrna S. Raeder, Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences, Crim. Just., Fall 1993, at 20.

B. Effects of the Rockefeller Drug Laws

In the past twenty-eight years, the Rockefeller Drug Laws have had a significant impact on New York's prison population.³² The prison population today is over 70,000.³³ As of March 2000, 5%, or 3508, of these prisoners are women.³⁴ Prior to the enactment of the Laws in 1973, there were approximately 12,500 prisoners in New York state prisons.³⁵ At that time, there were 400 women prisoners, approximately 3.2% of the prison population.³⁶

While the number of women prisoners today may not seem significant compared to the prison population as a whole, it is startling to examine the increase in the rate of incarceration, and the fact that the large part of this increase is due to incarceration for drug offenses. In New York, 156% more women received prison sentences in 1995 as compared to 1986; men experienced only a 49% increase during this time.³⁷ Of this increase in women prisoners, 91% was due to the imposition of prison sentences for drug offenses.³⁸ From 1986 to 1995,

³² Statistics are not available to evaluate trends over the complete time period from the passage of the Rockefeller Drug Laws in 1973 until today. Studies that gathered statistics over portions of this time period will be presented in this Part. In general, upon examination of the various statistics, one finds that the dynamics that the particular statistics demonstrate (e.g., growth of incarceration rate) remain constant since 1973. Cf. Alfred Blumstein & Allen J. Beck, Population Growth in U.S. Prisons, in Prisons 17, 19 fig.1 (Michael Tonry & Joan Petersilla eds., 1999) (showing steady increase in incarceration rates for state and federal prisoners from mid-1970s to 1997).

³³ Corr. Ass'n of N.Y., Prisoner Profile (Feb. 2001) (on file with the *New York University Law Review*).

³⁴ Corr. Ass'n of N.Y., *supra* note 5.

³⁵ Women in Prison Project, Corr. Ass'n of N.Y., Mandatory Injustice: Case Histories of Women Convicted Under New York's Rockefeller Drug Laws, at ii (Apr. 1999) (on file with the *New York University Law Review*) [hereinafter Mandatory Injustice]. This significant rise in the prison population is mainly attributable to the severe sanctioning of drug offenses, rather than a result of a significant rise in other types of crime (e.g., violent crime). In 1980, only 11% of people sent to New York state prison were drug offenders; in 1999, 44.5% of people sentenced that year were drug offenders. Corr. Ass'n of N.Y., Basic Prison & Jail Fact Sheet (Feb. 2001) (on file with the *New York University Law Review*).

³⁶ Mandatory Injustice, *supra* note 35, at ii.

³⁷ Marc Mauer et al., The Sentencing Project, Gender and Justice: Women, Drugs, and Sentencing Policy 9 (1999). The increase for women may be due in part to the presence of more women who are repeat drug offenders and thus trigger the repeat offender portions of the drug laws. *Id.* at 9-10; see also N.Y. Penal Law, § 70.06 (McKinney 1998) (Second Felony Offender Law). Overall, the majority of drug offenders do not end up in prison. Mauer et al., *supra*, at 11. Offenders are often encouraged to plea-bargain in order to avoid the harsh sentences of imprisonment mandated in the more serious felonies. *Id.* Then, if the woman commits a second drug offense (having received no drug treatment in the interim), she is sentenced as a repeat felony offender, and receives a higher sentence, due to her first guilty plea to a low-level felony. *Id.*

³⁸ Mauer et al., *supra* note 37, at 3. The high increase in the rate of women sentenced to prison is a consequence of both an increase in the number of arrests and an increase in the likelihood of being sentenced to prison once arrested for a drug offense. See *id.* at 8.

there was a 487% increase in incarceration commitments for female drug offenders; for male drug offenders, this rise was 203%.³⁹ Although an increase in the women's prison population was expected to some extent after the passage of the Laws, the rise has been so dramatic that it has caused even the Laws' supporters to question whether such an increase was merited.⁴⁰

The large increase in the rate of women's imprisonment invites the question whether it is sound policy to mandate imprisonment for certain drug crimes. More importantly, however, it also leads one to ask whether the increase in women's imprisonment in particular is correlated with the blameworthiness of women drug offenders and what we believe is the appropriate punishment for their individual crimes. If the crimes that women drug offenders commit are exactly the same as those of male drug offenders, there is no justifiable reason why we should be particularly concerned with the greater increase in the rate of women's imprisonment.⁴¹ However, acceptance of the large increase in women's incarceration is premised on the assumptions that the drug crimes women and men commit are the same, that their characteristics as offenders are the same, and that therefore men

Although there are more men in prison than women, women in prison are more likely than the men to be there because of a drug offense. *Id.* at 11. Overall, approximately thirty-three percent (over 22,000) of prisoners in New York are drug offenders. *Corr. Ass'n of N.Y., Mandatory Sentencing Laws and Drug Offenders in New York State 1* (Mar. 1999) (on file with the *New York University Law Review*); Human Rights Watch, *supra* note 29. In 1997, thirty-two percent of male prisoners in New York state prisons were incarcerated for drug offenses. Mauer et al., *supra* note 37, at 10. This figure was over sixty percent for women. *Id.*; Johnson, *supra* note 16, at 44 & n.273 (citing data from New York State Department of Correctional Services).

³⁹ Mauer et al., *supra* note 37, at 9.

⁴⁰ *Cf. id.* (stating that "[w]hile one would expect the number of women's drug convictions to have risen along with the increase in arrests over this ten-year period, in fact women's drug convictions rose at a substantially faster rate"); see also *supra* note 3 (discussing general opposition to Laws).

The increase in the number of women in prison for drug offenses makes startlingly clear the disproportionate number of low-income women of color who are sentenced for drug crimes in New York. In 2000, 91% of women in New York prisons for a drug offense were women of color; 55% were African American and 36% were Latina. *Corr. Ass'n of N.Y.*, *supra* note 5. White, non-Latina women comprised only approximately 9% of female drug offenders, compared to 17% of the general female prison population. *Id.* This significant increase in the percentage of African American women in prison in New York is echoed nationwide: "Between 1986 and 1991, the number of African American women in [all] state prisons for drug offenses increased by 828%." Keith Watters, *Law Without Justice*, Nat'l B. Ass'n Mag., Mar.-Apr. 1996, at 1, 1. The majority of women in prison can be classified as "low income." In New York prisons, 92% of women report incomes under \$10,000 prior to incarceration. *Mandatory Injustice*, *supra* note 35, at ii.

⁴¹ A concern for women's imprisonment in particular is not mutually exclusive of the general concern for whether imprisonment is an appropriate punishment for certain drug crimes that both male and female offenders commit (e.g., minor possession crimes).

and women should be treated the same by drug sentencing policies.⁴² The following Part argues that, as a matter of equity and fairness, these assumptions should be questioned. In today's society, there are legitimate differences in men's and women's drug crimes that should be examined and taken into account in sentencing.

II

CRIMINAL ACTS AND THE CONTEXT OF A RELATIONSHIP

In determining whether a certain prison sentence is merited, it is important first to examine the context of the offense. Only then is it possible to ask whether this context alters the blameworthiness⁴³ of the offender, whether the current given sentence is a just punishment, and whether this context should be taken into account in sentencing

⁴² Cf. Coombs, *supra* note 19, at 1689 (agreeing with Kathleen Daly's argument that sometimes alleged gender-based "disparities" in sentencing reflect actual differences in crimes committed); Kathleen Daly, *Gender and Sentencing: What We Know and Don't Know From Empirical Research*, 8 Fed. Sentencing Rep. 163, 165 (1995) [hereinafter *Daly, Sentencing*] (stating that difference in sentences for men and women can be explained in part by assumption that "some features of men's and women's crimes and circumstances may differ, which could be acknowledged in sentencing").

Certain characteristics of the offender, such as race and class, should never be considered when assessing blameworthiness. See Tonry, *supra* note 18, at 54 ("Every sentencing commission has included reduction or elimination of racial and gender discrimination in sentencing among its goals . . ."); Alexander, *supra* note 15, at 200 (stating that sentencing guidelines, mandatory minimum sentences, and repeat felon laws were enacted to provide harsh, uniform, and fair punishment regardless of race or class). To the extent that such biases are at work in the criminal justice system, these same factors influence the rates of men's imprisonment as well as women's. Men of color, like women of color, are disproportionately represented in New York prisons. Approximately ninety-four percent of the drug offenders in New York state prisons are African American or Latino. Corr. Ass'n of N.Y., *Drop the Rock: Repeal the Rockefeller Drug Laws* (Feb. 2001) (on file with the *New York University Law Review*). In New York, an African American male between the ages of twenty and twenty-nine is twenty-three times more likely to be in prison than a white male of the same age. Leven, *supra* note 4, at 645. Thirty-three percent of jail inmates in 1991 did not have jobs before entering jail and thirty-two percent of those who did work had annual incomes of less than \$5000. The Sentencing Project, *Facts About Prisons and Prisoners*, at <http://www.sentencingproject.org/brief/brief.htm> (Mar. 1999).

Additionally, male offenders may share with women offenders a history of victimization. Kathleen Daly, *Gender, Crime and Punishment* 83-86 (1994) [hereinafter *Daly, Gender*]. While it seems as if more women than men have a history of extreme victimization, this may be due in part to the reliance on self-reporting of victimization. *Id.* Men, due to the ideals of "masculinity," may be less likely to admit to previous victimization. *Id.* at 85. Additionally, common sites of male victimization, such as school and juvenile hall, may not be incorporated into studies that focus on victimization solely in the home. *Id.*

⁴³ This Note borrows the definition of "blameworthiness" from Kathleen Daly. "Blameworthiness" refers to linking the offender's personal characteristics and history to the offense. *Daly, Sentencing*, *supra* note 42, at 168 n.18. This definition recognizes "how a defendant's social history imposes meaning on a crime." *Id.* Thus, if the context of the crime affects our notion of an offender's blameworthiness, then this context should be taken into account in determining an appropriate sentence.

reform.⁴⁴ As this Part describes, the context of women's drug crimes is often unique in that the commission of the crime is intertwined with the woman's intimate relationship with a boyfriend or husband. This Part highlights how this context, currently unrecognized by the Laws, sheds light on the types of crimes for which women are convicted under the Laws and the appropriateness of the resulting sentences.

A. The Context of a Relationship

Many women become involved in drug activities as a result of being in a specific type of relationship; that is, being the girlfriend, wife, or live-in partner of a man involved in drug activity.⁴⁵ For many

⁴⁴ Blameworthiness, along with the harm and consequences of the crime, is a traditional criterion that judges evaluate in determining an appropriate sentence. Daly, Gender, supra note 42, at 37 (discussing views on blameworthiness and how judges assess it); see also Coombs, supra note 19, at 1698 (agreeing that judges apply, or say that they apply, notions of harm, blameworthiness, and consequences).

⁴⁵ See Kathleen Daly, Women's Pathways to Felony Court: Feminist Theories of Law-breaking and Problems of Representation, 2 S. Cal. Rev. L. & Women's Stud. 11, 14 (1992) ("A woman may continue lawbreaking as a result of relationships with men who may also be involved in crime."); Ilene H. Nagel & Barry L. Johnson, The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines, 85 J. Crim. L. & Criminology 181, 214 (1994) (stating that many female drug offenders are involved in drug conspiracies due to their relationships with male codefendants); Raeder, supra note 31, at 21 ("A number of sentenced women, particularly in drug conspiracy cases, are the wives or girlfriends of male defendants who are the fathers of their children.").

This Note makes no claims regarding the actual numbers of women who become involved in drug activities because of an intimate relationship. However, regardless of whether this is the "main" reason that underlies women's drug crimes, it is a significant enough aspect to warrant analysis. The factor arises frequently in studies of drug crimes. See, e.g., Daly, Gender, supra note 42, at 48 (studying felony women offenders in New Haven, Connecticut, and identifying category of "[d]rug-connected" women as women who "used or sold drugs in their relationships with boyfriends or family members"); Human Rights Watch, Official Data Reveal Most New York Drug Offenders are Nonviolent, at <http://www.hrw.org/hrw/press/1999/jan/ny-drug0107.htm> (Jan. 7, 1999) (reporting that their research suggests that people incarcerated for drug offenses in New York include "drug dealers' girlfriends and wives").

This is not to say that intimate relationships are the only reason why women become involved in drug crime. Another reason is financial crisis and the need for fast money. See Huling, supra note 10, at 59 (citing research in Great Britain demonstrating that most drug couriers, many of whom are female, tend to be drawn into job due to one-time opportunity to relieve economic pressures); see also Lisa Maher, Reconstructing the Female Criminal: Women and Crack Cocaine, 2 S. Cal. Rev. L. & Women's Stud. 131, 151 (1992) (highlighting economics and gender as central influences in lives of women who are street-level crack smokers).

For a general overview of women in prison and attempts to understand why women commit crimes, see generally Clarice Feinman, Women in the Criminal Justice System 19-87 (3d ed. 1994); Daly, Gender, supra note 42; Tracy Thornburg & Diane Trunk, A Collage of Voices: A Dialogue With Women in Prison, 2 S. Cal. Rev. L. & Women's Stud. 155 (1992).

women, the stories of their drug crime center on the fact that they are intimately connected with men involved in drug crime.⁴⁶ The woman's drug crime is often in support of her partner's larger drug activities.⁴⁷

In analyzing the blameworthiness of some women drug offenders, it thus becomes important to evaluate their drug crimes as crimes committed, not simply by women, but by "women in relationship."⁴⁸ The term "women in relationship" has a significantly different meaning than the standard phrasings, "women in a relationship with . . ." or "women in relationships." The latter phrases imply that the relationship is something separate from the woman and disconnected from her actions and choices as an individual, while the former emphasizes the relationship itself as influencing and shaping the personal choices a woman makes. The relationship, and the choice to be in a relationship, comprise a part of the woman's person.⁴⁹

A focus on the intimate relationship as an influence on women's decisions gives value to the act of caring for another person and views this motivation as one that may reduce criminal blameworthiness.⁵⁰

⁴⁶ See, e.g., Feinman, *supra* note 45, at 29 (presenting ex-offender's viewpoint that many women become involved in criminal activities because of their relationships with men); Mandatory Injustice, *supra* note 35 (presenting stories of several women drug offenders who were connected to male drug offenders); see also *supra* text accompanying note 45. The media empathetically has publicized this aspect of several women drug offenders' stories. The story of Kemba Smith, a woman who became involved with drugs through her boyfriend, was well publicized in general and black-focused media. See *infra* note 85 (detailing Kemba Smith's case). Nicole Richardson's case is similar and also has received a great deal of media attention. See *infra* notes 91-92 and accompanying text (detailing Nicole Richardson's case). Some judges in drug cases have argued for leniency based on the fact that the female defendant is involved with a boyfriend who is engaged in drug activities. See, e.g., *People v. Bundy*, 654 N.Y.S.2d 108, 114 (App. Div. 1997) (Ellerin, J., dissenting) (stating that "the evidence supported no inference other than that, rather than being a drug dealer herself, defendant was dating a drug dealer"); *People v. Donovan*, 454 N.Y.S.2d 118, 120 (App. Div. 1982) (Mollen, J., dissenting) (stating that defendant was dating Mr. Kjellgren, person who originally was being investigated for drug activity and who served as primary witness against defendant at trial).

⁴⁷ For examples of such cases, see *infra* text accompanying notes 73-80, 86-92, 99-107.

⁴⁸ This Note uses the phrase "women in relationship" to signify women who are in intimate relationships with men involved in drug activity. Thus, although not stated explicitly in each instance, this phrase includes a woman who is married to, has a child with, lives with, or simply dates a man involved in drug activity. While this Note focuses on heterosexual relationships due to the similar focus of the available research, the context of a relationship in a drug crime should be considered in same-sex relationships as well.

⁴⁹ Cf. Robin West, *Caring For Justice* 5 (1997) (contrasting notion of self from postmodern legal theory with notion of selfhood that "asserts either the moral importance of the self's connections with others, or the seriousness of the harms those connections sometimes occasion").

⁵⁰ This viewpoint is rooted in what is often termed "an ethic of care." An ethic of care is a vision of morality in which "moral judgment is oriented toward issues of responsibility and care" rather than a morality that emphasizes justice through individual rights. Carol

While it is true that the woman chooses to be in a particular relationship, a focus on the context of the intimate relationship recognizes the choice to maintain and support a relationship as one that has positive value.⁵¹ Such a focus also recognizes the possible harms and negative influences that are part of relationships as well.⁵² Allowing the context of an intimate relationship to affect assessments of blameworthiness reflects an understanding of both the positive and negative influences that a relationship has on individual choice. It gives value to the desire to maintain intimate relationships and at the same time does not punish women further for potential harms already suffered through "damaging relations of connection."⁵³

Examining the context of an intimate relationship helps explain the woman's decision to commit a drug crime.⁵⁴ A woman may decide

Gilligan, *In a Different Voice* 98-99 (1982). Who demonstrates an ethic of care versus an ethic of justice is not exclusively mapped onto gender lines. However, research suggests that women's judgments are often linked with issues of care and maintaining relationships. *Id.* at 69.

⁵¹ For example, if judges recognized, and valued, a woman's decision to maintain a relationship (with a boyfriend who is a drug dealer), a woman's presence in her boyfriend's home would not be viewed as a crime (as it is now due to the theory of constructive possession, see *infra* Part II.B.1) and instead would be viewed as a positive act to maintain a relationship important to the woman. Mary Coombs argues that some women defendants are disadvantaged by judicial assumptions that men are negative forces in women's lives. For some women, connections to a husband, boyfriend, or other men provide a positive force in the woman's life and may support her ability to be law abiding. Coombs, *supra* note 19, at 1709.

⁵² Stephen Schulhofer critiques an "ethic of care" approach in part because in certain contexts it can be dangerous to women to put emphasis on the continuity of relationships. Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. Pa. L. Rev. 2151, 2160 (1995). However, Robin West argues that adopting an "ethic of care" into our legal system does not mean that the dangers to women in some relationships will be ignored. Indeed, she suggests the opposite. West argues that the exclusion of women's voices from legal and political history has resulted in the failure to recognize "either the moral centrality or the potential for harm that are inherent in our connected, relational lives." West, *supra* note 49, at 7, 10 (arguing for legal and political theory to recognize both that "our connections to others are . . . central to our moral sense and potentially harmful in ways ill-heeded by the modern state"). Thus, to emphasize relations and connections to others does not ignore the possible dangers; rather, it brings the potential benefits and harms to the forefront of political and legal theory discussion.

⁵³ West, *supra* note 49, at 7.

⁵⁴ See Raeder, *supra* note 19, at 912, 977-78 (stating that fact that women offenders often get into criminal trouble due to their associations with men should be more thoroughly examined and noting that many drug cases identify women by their relationships with men).

Although beyond the scope of this Note, it is also important to question the structure of the drug economy and the effect it has on the role of women in drug crime. Lisa Maher suggests that the construction of work in the street-level drug economy is highly "raced" and "gendered," thus keeping women in subordinated roles. Lisa Maher, *Sexed Work: Gender, Race, and Resistance in a Brooklyn Drug Market* 107 (1997). According to Maher, it would be a mistake to conclude that a woman forms or maintains a relationship

to support her boyfriend's drug activities because she places the benefits of maintaining the relationship over the risks she associates with providing such help. The benefits of staying in the relationship may include the positive aspects of an intimate relationship, such as comfort and companionship. However, the calculated benefits also may include the risks of leaving. Many women may choose to become involved in drug activities because the option to leave the relationship is not a realistic one. Overwhelmingly, these relationships involve substance addiction and/or domestic violence.⁵⁵ The need to continue a drug habit⁵⁶ or the fear of physical violence are very real reasons why a girlfriend would choose not to leave her boyfriend and would choose instead to commit a drug crime.⁵⁷ Furthermore, if the boyfriend or husband is the father of her child, a woman may prefer to keep the family together rather than abandon the relationship.⁵⁸ She might agree to commit a drug crime or receive the benefits of tainted money rather than endanger her child. Many women in relationship have limited financial or familial support and therefore do not have the realistic option of leaving the relationship in order to end any involvement in the drug activity.⁵⁹ More generally, research on female criminality suggests that for women offenders the line between being

with a man involved in drug activities in order to gain the benefits of security or access into a "higher," and perhaps more stable, echelon of the street drug economy. *Id.* at 104-07, 127-29.

⁵⁵ Over seventy percent of women in New York state prisons report having had a substance abuse problem prior to entering prison. Women in Prison Project, Corr. Ass'n of N.Y., Women Prisoners and Substance Abuse (Mar. 2000) (on file with the *New York University Law Review*). In addition, eighty-five percent of women in New York state prisons report that they have been physically abused at some point in their lives. Mandatory Injustice, *supra* note 35, at ii; see also Daly, *supra* note 45, at 48 (finding in her study that incarcerated women are often victimized as adults by violent men); Thornburg & Trunk, *supra* note 45, at 163-64 (stating that most women prisoners in their study had been abused by husbands, fathers, and other family members).

⁵⁶ While male drug offenders may also have problems with substance abuse, given the gendered structure of the drug economy, men are rarely dependent on women for their drug supply. See Maher, *supra* note 54, at 107 (stating that high-level positions in drug economy and those that generate income are male-dominated). Therefore, men are rarely dependent on the relationship to continue the drug habit.

⁵⁷ See *infra* Part II.B for examples of the types of drug crimes that women in relationship commit.

⁵⁸ See Raeder, *supra* note 31, at 21 (arguing that many women "cannot remain crime free unless they are willing to break up their families"). Seventy-five percent of women in prison in New York are mothers. Corr. Ass'n of N.Y., *supra* note 5.

⁵⁹ Raeder, *supra* note 31, at 60 (stating that dependent nature of women's relationships with men involved in drug activities includes limited economic and family alternatives, thus rendering it difficult for women to remove themselves from criminal activity).

a victim and being an offender is often blurred.⁶⁰ Women offenders are often victims of crime at the same time that they choose to commit a crime.⁶¹ Links between abuse and criminality exist in the lives of many women offenders and complicate an understanding of why women commit crime. The reasons why women commit drug crimes become even further complicated when there is an intersection of victimization and criminality within a woman's intimate relationship.

The search to understand the underlying reasons why women in relationship may commit drug crimes is not intended to excuse women's actions. The above reasons are presented not to suggest that women should escape punishment for criminal acts or that women cannot make their own choices, but rather to highlight the complexities involved in women's decisions to commit drug crimes, and, ultimately, to argue that these complexities should affect their criminal sentences. For many women, recognition of the context of the intimate relationship is simply an acknowledgement that *before* the woman commits the offense, she herself is a victim of a *prior* crime.⁶² In addition, it acknowledges the fact that discrimination based on gender, race, and class also may restrict her choices.⁶³ Recognizing that there are societal influences on a woman's choice to commit a crime does not take away her "free will." Instead, it is an acknowledgement that, in many instances, her will is not completely free.⁶⁴

⁶⁰ Daly, *supra* note 45, at 47-48; see also Thornburg & Trunk, *supra* note 45, at 164 (stating their findings that women offenders are better characterized as victims themselves).

⁶¹ See Coombs, *supra* note 19, at 1706 n.73 (citing studies that made connection between abuse and women's crime).

⁶² For example, domestic violence or physical abuse. See *supra* note 55 (presenting statistics on rates of previous abuse of women offenders).

⁶³ To recognize the constraints on women's will is to "contextualize their agency within the terms of the . . . structures of patriarchy, racism and capitalism." Lisa Maher & Richard Curtis, *Women on the Edge of Crime*, in *Criminology at the Crossroads* 110, 129 (Kathleen Daly & Lisa Maher eds., 1998).

⁶⁴ As Lisa Maher states, "[d]efining social problems exclusively in terms of women's individual choices allows scant acknowledgment of the differential social, economic, cultural, and political realities that structure, and at times force, women's choices." Lisa Maher, *Criminalizing Pregnancy—The Downside of a Kinder, Gentler Nation?*, *Soc. Just.*, Fall 1990, at 111, 121. But cf. Leah Guggenheimer, Book Note, 17 *Harv. Women's L.J.* 237, 241 (1994) (reviewing *Women Prisoners: A Forgotten Population* (Beverly R. Fletcher et al. eds., 1993)) (stating that authors of book harm women by suggesting that women are dominated by men rather than being independent persons who make their own decisions).

This argument regarding the limits of women drug offenders' free will can be extended to include most offenders, as most have had some restrictions on their choices earlier in life (e.g., poverty, child abuse, racial discrimination). The argument relating to women offenders is a subset of the broader argument and is used to evaluate the blameworthiness of drug offenders who are women in relationship by highlighting their unique characteristics as well as their shared characteristics with other offenders.

Focusing on certain constraints of relationships and gender on individuals' choices may or may not affect an understanding of men's choices in similar situations. While many studies have mentioned women's connections with men as an underlying causal factor of their criminal offenses, the converse may not hold true for the men in these relationships. At least one study has found that male offenders generally are not connected to girlfriends or family members in selling or using drugs.⁶⁵ The context of the drug crimes of women in relationship, therefore, may be different than that of crimes that the men in the same relationships commit.⁶⁶ Therefore, in sentencing, judges should be free to acknowledge this significant and legitimate difference in the underlying context of men's and women's drug crimes.⁶⁷

B. Criminal Acts Under the Rockefeller Drug Laws

Currently under the Rockefeller Drug Laws, the underlying intimate relationship is not a factor that is taken into account in the charging decision or the ultimate sentencing of the woman defendant. The Laws forbid judges from considering any circumstances of the offender or the crime.⁶⁸ The primary types of criminal acts for which

⁶⁵ Daly, *Gender*, supra note 42, at 78. Daly finds in her study of felony offenders in New Haven, Connecticut that male drug offenders are less likely to work in concert with others, whereas female drug offenders work more often with a spouse or intimate partner. *Id.* at 154; see also Maher, supra note 54, at 106-07 (discussing gendered nature of drug economy and men's monopolization of income-generating positions). But cf. Maher, supra note 54, at 35 (discussing study in Brooklyn, New York, of female street drug users which found that women street drug users had personal support networks which were women-centered).

⁶⁶ There may be other features of the context of men's and women's crimes that differ. A study conducted by Kathleen Daly suggests that women offenders report higher rates of abuse, less extensive criminal histories, and more child-care responsibilities. Daly, *Gender*, supra note 42, at 84-85. However, questions to male offenders on these subjects may be asked less often and men may be less willing to share such information. *Id.* at 85.

⁶⁷ See Daly, *Sentencing*, supra note 42, at 165 (arguing that some differences in men's and women's crimes should be acknowledged in sentencing); supra text accompanying note 42.

⁶⁸ This is a general problem that, in practice, hurts many offenders and not just women in relationship. See *infra* Part III.A. However, it is still important to examine how women in relationship are particularly disadvantaged when the context of their crime is ignored in determining their crime and sentence.

Under the Laws, there is one opportunity for judges to take the context of the woman's crime into consideration. Depending on the mitigating aspects of the crime, women in relationship, along with all offenders, may be eligible for the "rare case exception." This exception is a limited opportunity for judges not to apply the mandatory sentence and to exercise their judicial discretion in prescribing a reduced sentence. In *People v. Broadie*, 332 N.E.2d 338 (N.Y. 1975), the New York Court of Appeals held that the laws surrounding the imposition of the A-1 drug felony sentence were not unconstitutional on their face. *Id.* at 341. The court, however, ended its opinion by stating that "[t]his is not to say that in some rare case on its particular facts it may not be found that the statutes have

women in relationship are convicted under the Laws can be categorized as follows: (1) actions, or *inactions*, that become crimes based on “constructive possession;”⁶⁹ (2) actions that support criminal activity; and (3) low-level criminal acts.⁷⁰ This section will examine these three categories of convictions, highlighting the significant effects that an intimate relationship may have on the woman’s criminal behavior. Such analysis provides a greater context for understanding these women’s criminal actions and evaluating the appropriateness of particular sentences for their crimes.

1. Crimes Based on “Constructive Possession”

The first category of acts under the Laws are crimes that require no affirmative action on the part of the offender. Instead, the offender is presumed to have committed a criminal offense because of her physical position in the circumstances of the crime. Although the offender may not actually have possessed a certain quantity of drugs, the criminal act of another person’s possession may be imputed onto her through the legal theory of “constructive possession.”⁷¹ Once the offender is presumed to have committed a criminal act, the underlying circumstances are not taken into account, and the seriousness of the offense is based solely on the amount of drugs involved.⁷²

The case of Leah Bundy illustrates how *inaction* can satisfy the theory of constructive possession.⁷³ Leah Bundy was dating a drug dealer.⁷⁴ Although she was aware of his illegal activities, she denied

been unconstitutionally applied.” *Id.* at 347. Scholars critique the exception as “meaningless” since it is rarely used by courts. Johnson, *supra* note 16, at 68. For a more detailed critique of the “rare case exception” and a discussion of both successful and unsuccessful uses of the exception, see *id.* at 68-71. See generally Kennard R. Strutin, *Mandatory Minimums, Life Sentences and the Eighth Amendment*, 66 N.Y. St. B.J., Nov. 1994, at 6.

⁶⁹ See *infra* note 71.

⁷⁰ These categories are ordered according to the level of criminal action required by the offender for conviction. The first category requires no action on the part of the offender; action is attributed to the offender through a legal doctrine and the physical circumstances of the offense. The last category requires a criminal act conducted by the offender herself. These categories are not based on what level of drug crime the woman is charged with under the Laws (e.g., A-1 felony, B, or C). Because the Laws base the level of crime on the amount of drugs involved, see *infra* note 97, a crime which is in the first category may be charged as a more “serious” crime and, as a result, have a longer prison sentence than a crime in the third category. See *infra* note 95 (detailing percentage of women sentenced for more serious drug offenses).

⁷¹ N.Y. Penal Law § 220.25(2) (McKinney 2000) (detailing statutory presumption of constructive possession).

⁷² See *infra* note 97.

⁷³ See *People v. Bundy*, 654 N.Y.S.2d 108 (App. Div. 1997), *aff’d*, 686 N.E.2d 496 (N.Y. 1997); *Mandatory Injustice*, *supra* note 35, at 7 (recounting story of Leah Bundy).

⁷⁴ *Mandatory Injustice*, *supra* note 35, at 7.

any involvement in her boyfriend's drug crimes.⁷⁵ The night of her arrest, the police mistakenly entered the apartment of Ms. Bundy's boyfriend while responding to a call about a shooting in another apartment.⁷⁶ Hearing the police arrive at the apartment, the boyfriend's brother, who was in the room with Ms. Bundy, threw the boyfriend's crack vials out of the window. The police on the street witnessed this action and subsequently searched the apartment, finding two handguns and various drugs.⁷⁷ Ms. Bundy was arrested and charged with criminal possession of a controlled substance.⁷⁸ The court stated that there was sufficient evidence to find that Ms. Bundy "constructively possessed all the contraband in the apartment."⁷⁹ At age twenty-one, Ms. Bundy was sentenced to fifteen years to life.⁸⁰

Leah Bundy's case demonstrates how women may serve long prison sentences based on acts they personally did not commit.⁸¹

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*; *Bundy*, 654 N.Y.S.2d at 109.

⁷⁸ *Bundy*, 654 N.Y.S.2d at 109.

⁷⁹ *Id.* at 111.

⁸⁰ *Id.* at 109. Christopher Clemente, the brother of Ms. Bundy's boyfriend, was sentenced to fifteen years to life for criminal possession of a controlled substance in the first degree along with a consecutive term of one to three years for weapon possession. *People v. Clemente*, 609 N.Y.S.2d 8, 9 (App. Div. 1994). It appears from the court's opinion that Mr. Clemente may have had previous involvement in drug activities. See *id.* at 8 (permitting prosecutor to impeach character witnesses by asking whether they heard about defendant's prior acts of drug possession). Mr. Clemente was offered a plea bargain of a one- to three-year sentence, but he refused. *Mandatory Injustice*, *supra* note 35, at 7. Because of his refusal, Ms. Bundy was not offered the same plea bargain. *Id.* Ms. Bundy was granted clemency in December 2000 by Governor Pataki. She had been in prison since 1991. John Caher, *Clemency Granted to Rockefeller Drug Inmates*, N.Y. L.J., Dec. 26, 2000, at 1.

⁸¹ Several other cases illustrate the use of the constructive possession theory. In *People v. Ortiz*, 564 N.Y.S.2d 427 (App. Div. 1991), Sol Ortiz was convicted of several drug felonies and misdemeanors and was sentenced to concurrent prison terms of seven to fourteen years. *Id.* at 428. Although Ms. Ortiz's boyfriend claimed that all the drugs and paraphernalia belonged to him, the court found that there was sufficient evidence to infer Ms. Ortiz's knowledge and control of the drugs. *Id.*

In *People v. Prather*, 672 N.Y.S.2d 562 (App. Div. 1998), the court found the evidence sufficient to establish defendant Brenda Prather's constructive possession of cocaine. *Id.* at 564. The cocaine was in a safe in her and her husband's home. *Id.* At trial, the prosecution impeached the defendant's husband when he testified that Ms. Prather was unaware of his drug-related activities. *Id.* Ms. Prather was found guilty of criminal possession and of aiding and abetting her husband's drug sales. *Id.*; see also *infra* Part II.B.2 (outlining facts relating to aiding her husband's drug sales). The appellate court held that her consecutive sentences resulting in an aggregate sentence of forty years to life were "unduly harsh and severe" and mandated that her sentences run concurrently instead. *Prather*, 672 N.Y.S.2d at 564.

In *People v. Gardner*, 559 N.Y.S.2d 63 (App. Div. 1990), Sandra Gardner was arrested while with her boyfriend in another person's apartment. *Id.* at 64. Ms. Gardner and her boyfriend were allegedly at the apartment to deal drugs. *Id.* Ms. Gardner was arrested after the police, though finding nothing on her person, found drugs in a duffel bag and a

Women in relationship are at high risk of being charged with crimes based on constructive possession because they are often present with their boyfriend in his, or their, home. Though aimed at drug activities, in such cases, the Laws punish the woman's mere presence around drugs.⁸² Given that a relationship often explains the woman's presence, the Laws, in effect, punish the woman's decision to be in the relationship.⁸³ As the dissenting judge stated in Leah Bundy's case, "the evidence supported no inference other than that, rather than being a drug dealer herself, defendant was dating a drug dealer. While this may be an inadvisable personal choice, it is not, by itself, evidence of participation in a crime."⁸⁴ By ignoring the context of an intimate relationship, the Laws effectively criminalize the very status of being a woman in relationship.

2. *Actions that Support Criminal Activity*

The second type of acts for which women are commonly imprisoned under the Rockefeller Drug Laws are those that, although not criminal in and of themselves, "become" criminal because they support ongoing criminal activity. Such actions include accompaniment to a drug sale, answering the telephone in an apartment that is the site of a drug sale, opening the door to such an apartment, or using money that is the product of previous drug activity.⁸⁵ These actions are likely

shaving kit close to where she was sitting. *Id.* The court remanded her case for a new trial because the trial court failed to convey to the jury that the constructive possession presumption was a permissible presumption, but not one that the jury was required to apply. *Id.*

⁸² The evidence that supported the government's case in *Bundy* also can be explained as evidence of the existence of an intimate relationship. Evidence upon which the Court of Appeals affirmed Ms. Bundy's conviction included her photograph in the apartment, which "suggested a connection to this obvious drug factory," and the fact that she was allowed in the apartment, because "a reasonable jury could conclude that only trusted members of the operation would be permitted to enter." *Bundy*, 686 N.E.2d at 496. These two pieces of evidence easily are viewed as evidence of being the girlfriend of the apartment's occupant rather than being a member of the drug conspiracy.

⁸³ See Raeder, *supra* note 31, at 60 (arguing that "[b]ecause of the ways in which women have been socialized to further their relationships with men, a woman's mere presence in the home is easily seen as tantamount to membership in a conspiracy"); see also Maher, *supra* note 45, at 150-51 (stating that labeling low-level crimes women commit as "volitional lawbreaking" criminalizes what, in reality, are these women's survival strategies).

⁸⁴ *Bundy*, 654 N.Y.S.2d at 114 (Ellerin, J., dissenting).

⁸⁵ For example, in *People v. Vanderpool*, 629 N.Y.S.2d 307 (App. Div. 1995), Teresa Vanderpool appealed her conviction of criminal possession of a controlled substance in the third degree. *Id.* at 308. Ms. Vanderpool was arrested when the police searched the car she was driving, a car owned by her boyfriend and codefendant, Ronald Vincent. *Id.* The search warrant for the car was based on a tip that stated that Mr. Vincent was a drug dealer and Ms. Vanderpool was actively involved in the operation. *Id.* The arrest occurred when Mr. Vincent was allegedly making a trip to purchase drugs and Ms. Vanderpool was accom-

to be extremely common for women in relationship, given that many women live with their boyfriends or have children with men involved in drug activity.

The stories of Brenda Prather and Nicole Richardson demonstrate how such acts, in the context of an intimate relationship that involves drug activities, can lead to harsh sentences. Brenda Prather was found guilty of criminal possession and criminal sale of a controlled substance.⁸⁶ Ms. Prather argued that she simply handed her husband a piece of tinfoil, believing it was for cooking.⁸⁷ When she went to hand her husband the foil, she saw another man in their home holding what she guessed to be a block of cocaine.⁸⁸ The court found sufficient evidence to establish that Ms. Prather "intentionally aided

panying him. *Id.* at 308-09. Ms. Vanderpool appealed on the legality of the search warrant but her sentence was affirmed by the court. *Id.* at 309-10.

Debbie Davis was arrested and convicted of criminal possession following a search of her apartment that she shared with her boyfriend, Thomas Ruffo. *People v. Davis*, 537 N.Y.S.2d 93, 94 (App. Div. 1989). Ms. Davis was convicted upon a plea of guilty and appealed the legality of the search warrant. *Id.* The search warrant was obtained on the basis of a tip which stated that Mr. Ruffo was a supplier of drugs and likely had drugs at the apartment where he lived. *Id.* at 94. The tip did not mention that Ms. Davis was involved in the sale of drugs. *Id.* When Mr. Ruffo was arrested on drug charges, he told the police his address where he lived with his girlfriend, Ms. Davis. *Id.* This statement then led to her arrest. *Id.*

Cynthia Vitanza and her husband were indicted for the criminal sale of a controlled substance. *People v. Vitanza*, 563 N.Y.S.2d 558 (App. Div. 1990). Ms. Vitanza alleged she was innocently at their home, the scene of the sale, and that she lacked intent for the completion of the sale. *Id.* at 560. The court, however, found her actions of handing the buyer a plastic bag to hold the cocaine as evidence that she provided "the medium for packaging it." *Id.* Thus, in the court's view, she aided and abetted the criminal sale. *Id.*

Kemba Smith, sentenced under the Federal Guidelines, is another well-publicized example of how an intimate relationship provides a greater understanding regarding a woman's commission of low-level support acts. While a college student, Ms. Smith became the girlfriend of a high-level drug dealer who proceeded to physically and emotionally abuse her. Reginald Stuart, *Justice Denied: Kemba's Nightmare Continues as Movement to Reverse Mandatory Minimums Grows*, *Emerge*, May 31, 1998, at 41, 41. Ms. Smith's charges focused on her helping her boyfriend run a drug ring. *Id.* At the age of twenty-six, she was convicted as part of a drug conspiracy, receiving a sentence of twenty-four-and-a-half years in prison with no parole. *Id.* Ms. Smith received such a sentence despite prosecutors' statements that she did not use or sell drugs or benefit from her boyfriend's drug operation. *Id.* Ms. Smith was pardoned by President Clinton in December 2000. Deb Riechmann, *Clinton Grants Pardons to 59 People*, *Associated Press*, Dec. 23, 2000, available at 2000 WL 30836209.

⁸⁶ *People v. Prather*, 672 N.Y.S.2d 562, 564 (App. Div. 1998); see also *supra* note 81 for facts related to the possession charge.

⁸⁷ See Alan Feuer, *Proposal to Ease Drug Laws Means Hope to Some in Jail*, *N.Y. Times*, Jan. 19, 2001, at B3 (reporting Ms. Prather's statements that she was barbecuing when her husband requested foil, and that he also cooked often).

⁸⁸ See *id.* (reporting Ms. Prather's statement that she knew her husband was dealing drugs but that she was not involved and did not approve).

her husband with his sales of cocaine,"⁸⁹ and sentenced her to twenty years to life.⁹⁰

Another woman, Nicole Richardson, was eighteen years old when she told a government informant on the telephone where to find her boyfriend so that the informant and he could complete a sale of LSD.⁹¹ For this telephone call, she was convicted of conspiracy to distribute LSD and received a sentence of ten years in prison.⁹²

Upon examining these types of support actions, it becomes clear that for women in relationship with drug dealers, their criminal acts and their relationships are intimately connected. For Ms. Prather, handing her husband tinfoil from their kitchen was an act that also was done during noncriminal activity in their daily life. Ignoring the context of the relationship disregards the possibility that her intent in providing tinfoil was to maintain the daily routine of their relationship, rather than to assist in drug activities. Nonetheless, the Laws do not distinguish between support acts of the relationship and support acts for drug activities, and thus implicitly equate the two. For many women, and perhaps for Ms. Richardson, the reasons why they decide to facilitate their boyfriends' drug activities are the same reasons why they stay in an unhealthy and unsafe relationship.⁹³ By ignoring the underlying context of the intimate relationship, actions such as living together, driving together, and answering the telephone, become as "serious" as actual drug transactions. Moreover, ignoring the context of the relationship, together with the harsh punishment of low-level support acts,⁹⁴ predominantly harms women rather than men, as women are more likely to play a low-level support role.⁹⁵

⁸⁹ *Prather*, 672 N.Y.S.2d at 563.

⁹⁰ Feuer, *supra* note 87, at B3.

⁹¹ David Dolinko, *Ethical Problems of Mandatory Minimum Sentences*, Tikkun, Mar.-Apr., 1998, at 27, 30; Gregg Easterbrook, *Run-on Sentencing*, New Republic, Apr. 26, 1999, at 57, 57. While Nicole Richardson was sentenced under the Federal Sentencing Guidelines, the Guidelines are very similar to the Rockefeller Drug Laws in their treatment of the charged criminal acts of women in relationship.

⁹² Dolinko, *supra* note 91, at 30. One article summed up her case by noting that "[a] foolish 18-year-old named Nicole Richardson, whose boyfriend had been dealing drugs, gets ten years for a telephone conversation in which she told a buyer where to find him." Easterbrook, *supra* note 91, at 57.

⁹³ See *supra* text accompanying notes 54-61.

⁹⁴ See *supra* text accompanying note 70 and *infra* notes 95-98 and accompanying text for discussion of how low-level acts are punished harshly under the Laws.

⁹⁵ Research suggests that women, in general, play "peripheral roles in male-dominated drug selling networks." Maher, *supra* note 54, at 87, 106-07 (additionally noting that hierarchy of labor within street drug market is based largely on gender).

Seventy percent of women prisoners in New York were convicted of nonviolent crimes. Corr. Ass'n of N.Y., *supra* note 5. Under the Rockefeller Drug Laws, in 1997, women constituted only 8.3% of those convicted of the most serious (class A-1) drug felo-

3. *Low-Level Criminal Acts*

The third category encompasses criminal acts committed by women who for the most part have a nonexistent, or a nonviolent, criminal history.⁹⁶ This category includes acts such as the delivery of an envelope containing drugs or the completion of a drug sale. The "seriousness," or level of such a criminal offense under the Laws, is determined by the amount of the drug involved; the offense with which the woman is charged is linked neither to her state of mind nor to the context of the crime.⁹⁷ A woman, therefore, will receive a sentence based on the amount of drugs in the delivery or sale without regard to her role in the larger drug activities or the motivations underlying her offense.⁹⁸

The story of Dolores Donovan illustrates how an intimate relationship can be intertwined with this category of offense.⁹⁹ Ms. Donovan was charged with criminal sale of a controlled substance in the first degree, and criminal possession of a controlled substance in the first and third degrees.¹⁰⁰ Her crime involved obtaining four ounces of cocaine to help her boyfriend complete a drug sale.¹⁰¹ Ms. Donovan was first seen entering the home of Mr. Kjellgren, her boyfriend, a man who was the subject of an investigation by the Long Island Drug Enforcement Task Force and who was known to be both a frequent user and seller of many types of drugs.¹⁰² There was no

nies. N.Y. State Div. of Criminal Justice Servs., *New York State Felony Drug Convictions by Category and Class* (Sept. 1998) (on file with the *New York University Law Review*). Sixty percent of drug offenders in prison in 1998 were convicted of the three lowest-level drug felonies (Class C, D, or E). Human Rights Watch, *supra* note 45 (based on data from New York State Division of Criminal Justice Services). Ninety-five percent of women charged as drug couriers in New York had no previous criminal involvement. Corr. Ass'n of N.Y., *supra* note 2, at 2.

⁹⁶ See *supra* note 95.

⁹⁷ A review of the various drug offenses in New York's penal law shows the absence of provisions for considering state of mind or role in the offense. See, e.g., N.Y. Penal Law § 220.06 (McKinney 2000) (defining criminal possession of controlled substance in fifth degree). The level of drug offense is determined solely by the weight of the drugs involved in the offense. See *New York Sentence Charts*, Chart VII: Controlled Substances and Marijuana Offenses (McKinney 2001) (listing drugs and amounts needed to constitute different offenses). While each offense requires "knowing" the amount of drugs in one's possession, in 1995, the Legislature made knowledge of the quantity a strict liability element. Tsimbinos, *supra* note 1, at 626; see also *supra* note 29.

⁹⁸ Unlike under the Federal Sentencing Guidelines, there is no adjustment under the Laws for a minor role in the drug offense. See *Federal Sentencing Guidelines Manual* § 3B1.2 (West 1999) (describing minor role adjustment).

⁹⁹ See *People v. Donovan*, 454 N.Y.S.2d 118 (App. Div. 1982), *aff'd*, 451 N.E.2d 492 (N.Y. 1983).

¹⁰⁰ *Donovan*, 454 N.Y.S.2d at 119.

¹⁰¹ *Id.* at 120 (Mollen, J., dissenting).

¹⁰² *Id.* at 119 (Mollen, J., dissenting).

reliable evidence, on the other hand, that Ms. Donovan had any previous involvement in drug activities.¹⁰³ As the New York Court of Appeals noted in a later case, "[the] Defendant's involvement in the transaction was in procuring the drugs, apparently without personal profit, at her boyfriend's behest."¹⁰⁴ At trial, Mr. Kjellgren was the primary witness against his girlfriend.¹⁰⁵ In exchange for his cooperation with the government, Mr. Kjellgren, the original focus of the investigation, received a sentence of lifetime probation.¹⁰⁶ For her act, Ms. Donovan was sentenced to two mandatory concurrent terms of fifteen years to life.¹⁰⁷

Ms. Donovan's story demonstrates how an intimate relationship may underlie criminal acts such as a single sale of drugs or the delivery of drugs to complete a sale.¹⁰⁸ The woman commits the drug offense,

¹⁰³ Id. at 122 (Mollen, J., dissenting). The only evidence that Ms. Donovan had experience in drug activities was uncorroborated and unsworn statements by her boyfriend, Mr. Kjellgren. Id.

¹⁰⁴ *People v. Thompson*, 633 N.E.2d 1074, 1077 (N.Y. 1994) (discussing *People v. Donovan* as presented in Justice Mollen's dissent).

¹⁰⁵ *Donovan*, 454 N.Y.S.2d at 120 (Mollen, J., dissenting).

¹⁰⁶ Id. at 121-22 (Mollen, J., dissenting). For further discussion of the cooperation aspects of this case, see *infra* text accompanying notes 140-43.

¹⁰⁷ *Donovan*, 454 N.Y.S.2d at 119.

¹⁰⁸ Other cases that exemplify this category include *People v. Tovar*, 685 N.Y.S.2d 528 (App. Div. 1999), *People v. Migliore*, 540 N.Y.S.2d 442 (App. Div. 1989), and *People v. Robinson*, 417 N.Y.S.2d 88 (App. Div. 1979).

Tina Tovar had been found guilty of two counts of the criminal sale of a controlled substance in the third degree and one count of criminal possession of a controlled substance in the third degree. *Tovar*, 685 N.Y.S.2d at 528. She received an aggregate sentence of four to twelve years. Id. Ms. Tovar appealed her sentence as unduly harsh due to her lack of criminal history, the small scale of the offense, and her remorse for the offense, which "stemmed from her involvement with a drug-dealing boyfriend." Id.

In *Migliore*, the Appellate Division reversed the trial court's discretionary sentencing of Eucharista Migliore to four years to life and resentenced her to the mandatory fifteen years to life. *Migliore*, 540 N.Y.S.2d at 443. Ms. Migliore was found guilty of criminal possession of a controlled substance in the first degree. Id. at 442. The court disagreed with the sentencing court's finding that the "defendant played merely a passive role as a courier for her husband." Id. at 443. The appellate court found the record to show that she was an active participant in the drug sale, that she had committed perjury on the stand, and that she had committed other crimes in the past. Id.

Mary Lee Robinson was convicted of the criminal sale of a controlled substance in the second degree. *Robinson*, 417 N.Y.S.2d at 88. Ms. Robinson was tried jointly with her husband, who was convicted of the same offense. Id. at 89. The husband's counsel reported that his client, Mr. Simmons, was threatened that if he did not cooperate, his wife would also be indicted. The husband did not cooperate. His wife, Ms. Robinson, was arrested approximately one month after her husband's arrest for the same incident. Id. The trial court judge said with respect to Ms. Robinson, "I feel she became involved in this case because of her husband, Mr. Simmons." Id. While her involvement in the sale was unclear, it appears from the record that she transferred the package containing drugs from her and her husband's home to the location of the eventual sale. Id. The trial court sentenced her to six years to life. Id. at 90. However, the appellate court decided that this was

not for her own financial profit, but rather as part of maintaining the emotional relationship. While it is true that the act that the woman commits is criminal, to focus solely on the act rather than the underlying circumstances can exaggerate the role the woman has in her partner's broader drug activity. As the dissenting judge in *Ms. Donovan's* case stated: "The defendant's role . . . seems to have been peripheral, since she simply made inquiries for her erstwhile boyfriend and acted as a courier for him in his attempt to obtain drugs."¹⁰⁹ Women sentenced under the Laws, like *Ms. Donovan*, are typically low-level offenders with no serious prior criminal history.¹¹⁰ Women in relationship may be drawn to commit a single drug crime, not as part of a larger drug crime network, but as part of a larger intimate relationship. While the woman's drug offense should not be completely excused because of the underlying relationship, understanding the criminal act and judging the woman's ultimate blameworthiness require an examination of the reasons why a woman would choose to commit a crime rather than leave or end the relationship.¹¹¹

C. *Providing Material Assistance Under the Laws*

Regardless of the crime with which an offender is charged, an offender can seek a shorter sentence under the "material assistance" provision of the Rockefeller Drug Laws.¹¹² "Material assistance" describes the information a criminal defendant can offer the prosecutor

a "rare case" exception as described in *Broadie* and reduced the sentence to one year to life. *Id.*; see also *supra* note 68 (discussing rare case exception).

¹⁰⁹ *Donovan*, 454 N.Y.S.2d at 122 (Mollen, J., dissenting) (arguing that defendant's sentence violated Eighth Amendment); cf. *Carmona v. Ward*, 439 U.S. 1091, 1102 (1979) (Marshall, J., dissenting from denial of cert.) ("However serious its narcotics problem, New York cannot constitutionally treat those with peripheral involvement in drug trafficking as if they were responsible for the problem in its entirety.").

¹¹⁰ See *supra* note 95 and accompanying text.

¹¹¹ See *supra* text accompanying notes 54-61. The probation report in *Dolores Donovan's* case stated that "the instant offense is out of character with the defendant's normal behavior." *Donovan*, 454 N.Y.S.2d at 122 (quoting report). Understanding the context of the relationship underlying the offense may help explain such out-of-character behavior.

¹¹² N.Y. Penal Law § 65.00(1)(b) (McKinney 1998) (defining material assistance). Research on the application of the material assistance provision of the Rockefeller Drug Laws is scarce. Some researchers, most notably Myrna Raeder, have questioned and criticized the parallel provision in the Federal Sentencing Guidelines. Raeder, *supra* note 19, at 980-84. For an excellent documentary on some of the results of reliance on assistance to the government, see generally *Frontline: Snitch* (PBS television broadcast, Jan. 12, 1999) [hereinafter *Snitch*], transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/etc/script.html>.

Since there is little research on the New York provision, this Note will discuss it using studies of the federal provision. Despite some differences in application (e.g., different judges and prosecutors), the provisions are almost identical in text and structure. Compare

in exchange for a reduction in his or her prison sentence.¹¹³ The stated purpose of the provision is to provide an incentive for low-level drug offenders to give information about high-level drug offenders.¹¹⁴ Under the Laws, the prosecutor decides if the information is of "real importance";¹¹⁵ in practice, this usually means determining whether the information will lead to the arrest of a person involved in drug activities.¹¹⁶ This is the only way a person charged with an A-1 felony can receive a reduced sentence of as little as lifetime probation.¹¹⁷

Since the material assistance provision is the sole means of receiving a reduced sentence under the Laws, whether women in relationship have the ability to qualify for such a departure is a very important determination. There is little research on how women offenders fare in obtaining a reduction due to material assistance.¹¹⁸ Research on whether women or men receive quantitatively more "substantial assistance" departures under the parallel provision in the federal system is also unclear.¹¹⁹ The critical question, however, is not who receives more departures, but the reasons for which these depar-

Federal Sentencing Guidelines Manual, *supra* note 98, § 5K1.1, with N.Y. Penal Law § 65.00(1)(b) (McKinney 1998).

¹¹³ In the Federal Sentencing Guidelines, this aid is labeled "substantial assistance." Federal Sentencing Guidelines Manual, *supra* note 98, § 5K1.1. The terms are interchangeable for the purposes of this discussion.

¹¹⁴ *People v. Lofton*, 366 N.Y.S.2d 769, 774 (N.Y. Crim. Ct. 1975) (discussing objective of New York Legislature in enacting material assistance statute).

¹¹⁵ *Id.* ("Material" is defined as being of real importance or great significance and 'assistance' is defined as help supplied or given."). The decision of whether the information offered is sufficiently helpful lies in the hands of the prosecutor rather than the judge. *Id.* at 776.

¹¹⁶ The relevant part of New York Penal Law § 65.00(1)(b) reads:

The court . . . may sentence a person to a period of probation upon conviction of a class A-II felony or a class B felony defined in article two hundred twenty if the prosecutor either orally on the record or in a writing filed with the indictment recommends that the court sentence such person to a period of probation upon the ground that such person has or is providing material assistance in the investigation, apprehension or prosecution of any person for a felony defined in article two hundred twenty or the attempt or the conspiracy to commit any such felony

N.Y. Penal Law § 65.00(1)(b) (McKinney 1998).

¹¹⁷ Huling, *supra* note 10, at 19.

¹¹⁸ In researching this Note, no studies or documentation were found on the application of the material assistance provision of the New York law.

¹¹⁹ For example, Ilene Nagel and Barry Johnson report that the data of the U.S. Sentencing Commission indicates that female drug offenders are considerably *more* likely than male drug offenders to receive substantial assistance departures. Nagel & Johnson, *supra* note 45, at 217 (analyzing data from fiscal years 1991 and 1992). In contrast, Myrna Raeder, looking at the same data, concludes that substantial assistance accounts for a larger percentage of all departures given to men than given to women. Raeder, *supra* note 19, at 980 (analyzing data from fiscal years 1991 and 1992). As Raeder notes, the difficulty in analyzing this data is the lack of information on the individual circumstances in each

tures are given. Researchers agree that women offenders often lack sufficient information to merit a departure based on substantial assistance.¹²⁰ Furthermore, research suggests that for women who do receive such departures, considerations other than the value of their information may have been the prosecutors' or judges' motivation.¹²¹ Women offenders, however, cannot rely consistently on prosecutors' sympathy or other discretionary factors that may support a material assistance motion, and subsequently, a lower sentence.¹²² It is there-

case and how the treatment of women and men who attempt to offer assistance may differ. *Id.* at 981.

¹²⁰ While Nagel and Johnson state that female drug offenders are more likely than males to receive a departure due to substantial assistance, they still give credence to Raeder's contention that women offenders often lack sufficient information to provide legally sufficient assistance. Nagel & Johnson, *supra* note 45, at 218 & n.175 (stating this proposition and citing to Raeder in corresponding footnote).

¹²¹ *Id.* at 218 (citing research of Nagel and Professor Stephen Schulhofer). Factors such as sympathy toward a woman offender or the belief that the mandatory sentence is too harsh may influence the prosecutor's decision to make a motion and the judge's decision of how great a reduction in sentence to grant. *Id.*; see also Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. Cal. L. Rev. 501, 531 (1992) (suggesting that under Federal Guidelines, substantial assistance departures may be awarded to sympathetic defendants rather than defendants who provided substantial help to prosecutors). While these discretionary factors apply to both male and female offenders, in practice they disproportionately may benefit women offenders. Nagel & Johnson, *supra* note 45, at 218 (stating that disproportionate share of substantial assistance departures given to women defendants may reflect judges' and prosecutors' greater sympathy for female offenders). Nagel and Johnson argue that their finding that women receive more substantial departures than men is evidence of continuing special treatment for women, but Kathleen Daly argues that such disparity can be seen as judges addressing, and attempting to remedy, the fact that the guidelines have "not been fashioned with women or variations in their lawbreaking in mind." Daly, *Sentencing*, *supra* note 42, at 166.

There are other considerations that apply to both male and female offenders that might cause prosecutors to ask for a substantial assistance departure. E.g., Roberto Suro, *More Informers Buy a Break on U.S. Sentence Guidelines*, *Wash. Post*, Aug. 12, 1997, at A1 (stating that whether defendant gets deduction may depend on how defendant performs as government witness at trial).

¹²² Raeder describes the current use of the substantial assistance departure by stating "the fortuity of the departure is evident." Raeder, *supra* note 19, at 983. Raeder goes on to say, "[w]e will never know whether the wife was really granted the departure as a way of ensuring the husband's participation . . . , whether she had enough information to justify a departure, or whether she simply appeared deserving enough to warrant a sentence below the mandatory minimum." *Id.* Discretion also removes any checks on prosecutors' decisions whether or not to award material assistance. See *People v. Garcia*, 558 N.Y.S.2d 63, 64 (App. Div. 1990) (holding that N.Y. Penal Law § 65.00(1)(b) "in no way commits the prosecution to taking any action to facilitate or otherwise accept defendant's offer of assistance"); see also Stuart, *supra* note 85, at 42 (discussing case of Kemba Smith and claim by her lawyers from NAACP Legal Defense Fund that government reneged on promise to make substantial assistance motion in federal court).

Although the sympathy of prosecutors and judges and their feelings about mandatory sentencing laws may lead to a more appropriate sentence for a particular woman offender, reliance on such feelings is not an appropriate policy solution. Mechanisms in the actual

fore necessary to evaluate women offenders' ability to satisfy the legal requirements of the provision.

Examination of the ability of women in relationship to offer sufficient information under the Laws highlights the problematic aspects of the material assistance provision.¹²³ It is likely that women, particularly women in relationship, will be unable to provide the requisite assistance as stated by law.¹²⁴ Because the amount of information required to obtain a reduction is both substantial and unclear, low-level offenders often do not have enough information to turn in higher players in the drug chain.¹²⁵ Given the gender-based role patterns in drug activities,¹²⁶ it is disproportionately women who will not be able to offer sufficient information.¹²⁷ For a woman in relationship, her

sentencing process should be created for the fair and appropriate sentencing of offenders statewide, rather than forcing offenders (those who happened to know sufficient information to be considered for an assistance motion in the first place) to rely on the possibility of sympathy. For a policy proposal regarding the material assistance provision, see *infra* Part III.B.1.

Additionally, the fact that prosecutors or judges may grant an "unearned" material assistance motion because of their belief that the sentence would otherwise be too harsh speaks for the need to evaluate and reform both the material assistance provision in particular and drug penalties in general. See Daly, Sentencing, *supra* note 42, at 166 (arguing that gender disparity in sentence deductions is due to legal officials redressing an unjust, male-normed sentencing scheme and suggesting more general reform based on viewing women as sentencing subjects).

¹²³ Many of the reasons why a woman may not be able to offer legally sufficient material assistance, such as threat of physical harm and lack of sufficient knowledge, also may apply to male defendants. See, e.g., *People v. Eason*, 353 N.E.2d 587, 588 (N.Y. 1976) (stating that despite fact that defendant told prosecutor all he knew about local drug crime, prosecutor is not required to deem that sufficient material assistance); Juan Gonzalez, *A Loving Dad Dies in Prison*, N.Y. Daily News, Sept. 14, 1999, at 12 (reporting that offender Jose Garcia did not take offer to provide substantial assistance to government as gang leaders threatened to hurt his family if he testified against them). This Note does not argue that these reasons are exclusive to female offenders. Rather, it highlights that these reasons why offenders cannot offer sufficient material assistance are often present in the context of women's drug crimes.

¹²⁴ See *supra* note 95 (discussing women's low-level support role in drug crimes); see also *infra* note 127 (examining women's common role as low-level offenders as related to providing assistance).

¹²⁵ Corr. Ass'n of N.Y., *supra* note 2, at 2 (stating that "[l]ess culpable persons generally do not possess information that would be useful to prosecutors"). But cf. Linda D. Maxfield & John H. Kramer, U.S. Sentencing Comm'n, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice* 12, at <http://www.ussc.gov/pdf/5kreport.pdf> (Jan. 1998) (stating that study results demonstrate that defendants' positions in drug conspiracies do not correlate with likelihood of getting substantial assistance motion).

¹²⁶ See *supra* notes 54, 56, 95 (discussing women's general roles in drug activities).

¹²⁷ Huling, *supra* note 10, at 19 (noting opinion of drug enforcement agents and prosecutors that women rarely can offer valuable assistance due to marginal roles); Raeder, *supra* note 31, at 61 (stating that women's peripheral roles in drug activities place them "at a disadvantage" in obtaining assistance departure because they often have little to offer government); Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family,*

partner more likely will be able to provide assistance to the government as he likely will be more directly connected to the drug activity.¹²⁸

It is critical to realize that, in addition to not having sufficient information, a woman in relationship may not offer material assistance because to do so would require her to "snitch"¹²⁹ on her boyfriend or husband. This aspect of providing information to the government is particularly problematic for women in relationship given certain characteristics of relationships that involve drug activities.¹³⁰ There are many reasons why a woman may choose to place greater value on the relationship rather than on her individual interest in avoiding a lengthy prison sentence. The woman may depend in part upon her partner for economic support for herself and/or their children. Additionally, the choice to snitch may not be a realistic one if she is in an abusive relationship or her partner threatens to harm her if she contacts the authorities.¹³¹ Since many female offenders do not have a supportive family environment, as evidenced by the high rates of reported physical and sexual abuse,¹³² a woman offender may rely on her partner to provide familial support and structure, something he could not do if he too were incarcerated. Finally, the traditional socialization of women impresses upon a woman the need to "stand by her man."¹³³ Images of women who are deemed "valuable"

and the Community, 5 Colum. J. Gender & L. 169, 174 (1996) (stating that women's minor roles in drug trade, dominance of men, and fear for their children make it unlikely that women will receive assistance reduction).

¹²⁸ See, e.g., *infra* notes 140-43 and accompanying text (presenting story of Dolores Donovan); see also *supra* note 127 (discussing disadvantage of women generally in obtaining assistance motions).

¹²⁹ In mainstream culture, offering assistance to prosecutors often has negative connotations. Most commonly referred to in prison culture as "snitching," providing material assistance is also referred to in the mass media as when someone "turn[s] in a few friends," helps "rat out" others, or, in the case of a large-scale drug dealer who comes forward, a "kingfish who turned state's evidence." Jakes & Caher, *supra* note 3, at A1.

¹³⁰ See *supra* text accompanying note 55 (listing comfort and companionship as positive reasons for maintaining relationship, and drug addiction and domestic abuse as negative reasons for doing so).

¹³¹ Even if the woman is not actually threatened with physical harm by an abusive partner, as a victim of possible emotional and mental abuse, she may not have the courage, self-esteem, or outside support needed to give information about him to the government and survive the possible consequences.

¹³² Forty-seven percent of the female state prison population have been victims of physical abuse, while thirty-nine percent report being victims of sexual abuse. Many have been victims of both. Mauer et al., *supra* note 37, at 1; see also *supra* text accompanying note 55.

¹³³ See, e.g., Tammy Wynette, *Stand By Your Man*, on *Stand By Your Man* (Sony/Epic 1968) (imploping listeners to "[s]tand by your man / And tell the world you love him / Keep giving all the love you can / Stand by your man"), available at <http://ckcountry.homestead.com/standbyman-ie4.html>; see also Kathryn Abrams, *Choice, Dependence, and the Reinvigoration of the Traditional Family*, 73 Ind. L.J. 517, 521 (1998) (arguing that

because they do not abandon their boyfriend during trouble continue today to be a part of the mass-media culture.¹³⁴ Therefore, while a woman in relationship personally may gain in one respect by providing assistance (a shorter prison sentence), such action may not only be an option that is unrealistic and would cause the intimate relationship to end, but also one which would lead her to lose value as a woman in the eyes of society.

Given that a woman in relationship often does not have, or does not want to give, sufficient information, her and her partner's sentencing often results in what is termed "inverted sentencing."¹³⁵ "Inverted sentencing" describes the following scenario: The more serious the defendant's drug crimes, the more information he possibly has to offer to the government, and thus he ends up with a lower sentence than someone who is a lower-level offender.¹³⁶ This result directly contra-

women have been "subject to a variety of social norms that emphasize the centrality of marriage to women's happiness and that characterize unmarried women in harsh and stigmatizing terms"); Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 Geo. L.J. 2481, 2502 (1994) (stating that alimony laws are more willing to reward women who have "attached themselves to men in very traditional ways" and are "good wives"); cf. Megan Weinstein, *The Teenage Pregnancy "Problem,"* 13 Berkeley Women's L.J. 117, 134 (1998) (arguing that Personal Responsibility and Work Opportunity Reconciliation Act of 1996 "posits marriage as both a moral and practical solution to poverty").

¹³⁴ The message that a man is a necessary component of a woman's life and that a woman should do whatever it takes to keep him in her life is omnipresent in mass media. See, e.g., Laura Doyle, *The Surrendered Wife* 19-20, 23 (2001) (arguing that women should surrender to their husbands for happier marriages); Tamala M. Edwards, *I Surrender, Dear*, Time, Jan. 22, 2001, at 71 (reporting national popularity of Doyle's *The Surrendered Wife* and book's presence on national book circuit and Amazon's Top Ten); Suzanne Fields, Editorial, *Hillary Clinton's Election A Rebuke to her Smarmy Husband*, Grand Rapids Press (Grand Rapids, MI), Nov. 12, 2000, at D3, 2000 WL 29128075 (calling Hillary Clinton "the stand-by-her man candidate"); Ruth Mathewson, *Star Attraction*, Australasian Business Intelligence: The Courier-Mail, June 23, 2000, 2000 WL 23431186 (listing celebrity women, including Hillary Clinton, who stayed with their men despite embarrassing events); Eve, *Gotta Man*, on *Let There Be Eve: Ruff Ryders' First Lady* (Interscope Records 1999) (hit hip-hop song in which woman raps: "[c]arry stories that can hurt him, still he only trustin' me / Secrets never leave my mouth, even if they torture me / Always taught to hold the ground, that's why I'll always be his queen"), available at <http://www.eve-empire.com/03.html>; French Kiss (20th Century Fox 1995) (film in which heroine falls in love with criminal and forgives him for all his crimes).

¹³⁵ Dolinko, *supra* note 91, at 30 (quoting federal appellate judge Frank Easterbrook's mention of possibility of inverted sentencing). There are some troubling results of the use of the assistance provision, in addition to inverted sentencing, which are beyond the scope of this Note. Attention has been brought to a growing underground business of selling useful information to criminal defendants. A criminal defendant can purchase information from outside informers and then use that information to attempt to get a reduction in sentence for substantial assistance. Suro, *supra* note 121, at A1 (describing booming business of trading information).

¹³⁶ Stephanie Fleischer Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 Colum. J. Gender & L. 1, 26 (1995) (stating that first-time offenders can receive

dicts the stated purpose of the assistance provision: to find and punish high-level offenders.¹³⁷ For this reason, inverted sentencing is troubling enough when it occurs between any two offenders or between people involved in the same incident. The most manifest injustices, however, occur when it is the result within the context of an intimate relationship.

In many cases, a woman in relationship is not able to provide assistance to the government while her boyfriend or husband is able to do so, thus resulting in inverted sentencing within the relationship.¹³⁸ What is even more troubling, however, is that the assistance provided by the male offender in these cases may include not only giving information on his other drug contacts, but helping in the prosecution of his wife or girlfriend as well.¹³⁹ Recall for example, the story of Dolores Donovan.¹⁴⁰ Ms. Donovan, who had no knowledge about drug dealing, was unable to provide sufficient material assistance and received a sentence of two concurrent fifteen-years-to-life sentences.¹⁴¹ Her boyfriend, on the other hand, the original focus of the law enforcement investigation, agreed to cooperate with the government in exchange for lifetime probation.¹⁴² His cooperation included testifying against Ms. Donovan at trial.¹⁴³

An examination of the ability of women in relationship to receive a material assistance departure brings to light its many troubling aspects. Women in relationship have a difficult time securing such a reduction due to their lack of sufficient information or because of the

longer sentences than "career criminals" as only these high-level drug traffickers can offer sufficient assistance).

¹³⁷ See *supra* text accompanying note 114.

¹³⁸ The case of Nicole Richardson illustrates this problem. See *supra* notes 91-92. Ms. Richardson and her boyfriend were convicted of conspiracy to distribute drugs. Dolinko, *supra* note 91, at 30. Her boyfriend received a sentence of five years as he was able to provide substantial assistance to the government. *Id.* Ms. Richardson, on the other hand, was not able to give enough information and received a sentence of ten years. *Id.*

¹³⁹ For example, Dorothy Gaines received a twenty-year sentence under the Federal Sentencing Guidelines. She was involved with a man who used and sold drugs. In exchange for a reduced sentence, he implicated her in the crime. Snitch, *supra* note 112 (discussing story of Dorothy Gaines).

Such assistance by men is not helping put more serious drug offenders behind bars; their girlfriends are rarely high-level drug offenders. Rather, the men are simply helping to secure another conviction and their own reduced sentence. See *supra* notes 95, 127; see also *infra* Part III.B.1 for proposal against "snitching down."

¹⁴⁰ See *supra* notes 99-107 and accompanying text.

¹⁴¹ *People v. Donovan*, 454 N.Y.S.2d 118, 121 (App. Div. 1982) (Mollen, J., dissenting) (noting that defendant stated she was unable to provide more cooperation as she had no further knowledge about drug dealing).

¹⁴² *Id.* at 120 (Mollen, J., dissenting). Mr. Kjellgren was originally facing a fifteen-year minimum sentence. *Id.* at 121-22 (Mollen, J., dissenting).

¹⁴³ *Id.* at 120 (Mollen, J., dissenting).

risks involved in providing such information. Additionally, the problem of inverted sentencing, given the differences in men's and women's ability to give information, becomes even more troubling when the context of an intimate relationship is highlighted.

III

REFORM OF THE ROCKEFELLER DRUG LAWS

Examining the Laws' treatment of drug offenders from the perspective of women in relationship reveals that, in application, the seemingly gender-neutral Rockefeller Drug Laws are not gender-neutral at all. Instead, sentences under the Laws are particularly unjust with respect to women in relationship and the crimes they commit. This focus on women in relationship is critical in order to propose reforms that will adequately and fairly address their lives and offenses. Moreover, a focus on how women in relationship fare in sentencing illuminates general problems in the Laws, the reform of which will result in more just treatment of male and female offenders alike.

A. General Critique of the Laws and Current Efforts for Reform

After highlighting the crimes and sentences of women in relationship, it is clear that the Laws do not allow judges to sentence offenders according to their level of blameworthiness. The Laws currently forbid judges from taking into account either the characteristics of the offender or the characteristics of the offense.¹⁴⁴ The lengthy mandatory sentences, and the fact that the amount of the drug involved is the only consideration used to determine the level of offense, force judges to sentence offenders to harsh terms of imprisonment that they personally might believe are not appropriate. These problems in the Laws, brought into focus by analyzing the treatment of women in relationship, apply to many other offenders as well. All women offenders are hurt by the Laws' refusal to look at the underlying gender roles in drug crimes.¹⁴⁵ Low-level offenders, both male and female, are harmed by the Laws' sole focus on the weight of the drug and prohibition against looking at the offender's role in the offense.¹⁴⁶

Reforms that respond to these criticisms of the Laws ultimately will help make the Laws more just for many offenders, both male and

¹⁴⁴ See *supra* text accompanying note 97.

¹⁴⁵ See *supra* text accompanying notes 95-98; cf. Raeder, *supra* note 19, at 990 (stating that mandatory sentences and prosecutors' power to plea-bargain can often disadvantage women because of their minor roles in drug conspiracies).

¹⁴⁶ See *supra* text accompanying notes 97-98.

female. But the focus on a particular impacted group—in this case, women in relationship—is a critical component of evaluating and proposing more general reforms. Without this focus on the particular groups affected, there is no assurance that the proposed reforms actually will address the injustices towards the offenders who many reform advocates believe are deserving of more just treatment. Indeed, some current proposals for reform will not address adequately the concerns raised by recognizing an intimate relationship as the context of many women's drug crimes.¹⁴⁷

Today, there are calls for reform from people on all sides of the debate.¹⁴⁸ People with various political viewpoints have proposed legislative reforms that range from relatively narrow and specific reforms to proposals for complete repeal.¹⁴⁹ Proposals for reform have come in great numbers, but reform has not been carried out as of early 2001.¹⁵⁰ Although eventually blocked in the New York state legislature due to political disagreements,¹⁵¹ Governor Pataki's proposals

¹⁴⁷ See *infra* notes 154-57 and accompanying text (discussing problems with Governor Pataki's proposal).

¹⁴⁸ See *supra* note 3 and accompanying text (presenting statements supporting reform from various groups).

¹⁴⁹ Governor Pataki (Republican) proposed one of the most publicized reform bills, S.B. 5877. Aspects of the bill included appellate review for some drug offenders and the elimination of parole for high-level drug offenders. S.B. 5877, 222d Leg. Sess. (N.Y. 1999); John McArdle & Marcia White, Senate Approves Rockefeller Drug Law Reforms, at <http://www.senate.state.ny.us> (Aug. 4, 1999) (describing Pataki's bill); see also *infra* notes 153-57. Chief Judge Judith Kaye also authored a reform proposal that is similar to Governor Pataki's. Her proposal allowed for some appellate review of serious drug felony convictions and diversion of some low-level offenders into treatment. John Caher & Lara Jakes, Reform Plans Push Chief Judge Into Debate, *Times Union* (Albany, N.Y.), May 12, 1999, at A1. Senator John DeFrancisco (Republican) has twice proposed a bill that doubles the amount of drugs required before offenders could be sentenced for the most serious drug felonies. S.B. 585, 224th Leg. Sess. (N.Y. 2001); S.B. 2992, 222d Leg. Sess. (N.Y. 1999); Yancey Roy, Drug-Law Reform Gains Steam, *Democrat and Chronicle* (Rochester, N.Y.), May 16, 1999, at 1B. Former Republican State Senator John Dunne's proposal also called for the doubling of the amount of drugs required for each level of drug offense, and allowed for more judicial discretion in sentencing and the deferral of prison time for drug treatment. Roy, *supra*, at 1B; Gary Spencer, Past Supporters Urge Drug Law Reform, *N.Y. L.J.*, May 13, 1999, at 1. Assemblyman Jeffrion Aubry (Democrat) proposed a bill that called for the repeal of the mandatory sentencing requirements of the Laws and the substitution of policies that allow more judicial discretion in sentencing. A.B. 4117, 222d Leg. Sess. (N.Y. 1999); Roy, *supra*, at 1B.

¹⁵⁰ Reform may have a better chance in 2001 than it had in earlier years. Governor Pataki appears to have made reform one of his top priorities. See John Caher, Governor Seeks Reform of Rockefeller Laws, *N.Y. L.J.*, Jan. 4, 2001, at 1 (stating that lawmakers in both parties agree that drug law reform is now top priority).

¹⁵¹ The bill was blocked in the Assembly by Democrat Assembly Speaker Sheldon Silver. Lara Jakes, Vote on Drug Law Leads to Criticism, *Times Union* (Albany, N.Y.), Aug. 5, 1999, at A1 [hereinafter Jakes, Vote] (reporting Silver's refusal to allow Assembly vote on Senate bill). Although Democrats in the Assembly stated they were in support of

have had more political acceptance than most.¹⁵²

An analysis of Governor Pataki's reform bill¹⁵³ demonstrates how, without a focus on women in relationship during the formulation of the reforms, proposals may inadequately reform the current harshness in their sentencing.¹⁵⁴ For example, the Pataki bill offers appellate review of the sentences of the most serious drug offenders and the possibility of a one-third reduction in their sentences.¹⁵⁵ In application, this reform bill would not have a sizable impact upon women in relationship because the vast majority of them are not convicted of the most serious felonies.¹⁵⁶ Moreover, even for women who are eligible for the reduction, an appeals court would be instructed, before granting such a reduction, to look at factors such as whether the offense was an isolated incident versus a pattern of activity and whether the defendant derived a benefit from the sale of drugs.¹⁵⁷ In light of these factors, women in relationship likely would not receive the reduction. Because she may live with her partner and perhaps raise a child with him, the woman's crime may be seen as part of the pattern of her partner's drug activity, and acts such as buying food and clothing may be viewed as receiving the benefits of drug money.

reform of the Laws, it appears that Silver did not want to back any reform package for fear of Democrats appearing "soft on crime" in the November 2000 election. Lara Jakes, *Silver Softens Drug Law Stance*, Times Union (Albany, N.Y.), May 27, 1999, at A1 [hereinafter Jakes, *Silver Softens*]; see also Lara Jakes, *Drug Law Debate Blocked*, Times Union (Albany, N.Y.), May 21, 1999, at A1 (discussing Silver's blocking of reforms).

¹⁵² The New York Senate passed the bill, which was sponsored by Republican Senator Dale Volker, on August 4, 1999. McArdle & White, *supra* note 149. The bill was passed in the Republican-controlled Senate by a vote of 52-4. Jakes, *Vote*, *supra* note 151, at A1.

¹⁵³ In January 2001, Governor Pataki announced new plans to reform the Rockefeller Drug Laws. See Richard Pérez-Peña, *Pataki Presents His Plan to Ease State Drug Laws*, N.Y. Times, Jan. 18, 2001, at A1. His publicized proposals include reducing the mandatory sentence for A-1 felonies to ten years to life for first-time drug offenders and offering judges some discretion to order treatment for repeat nonviolent drug offenders. See *id.* While nonviolent drug offenders would receive some benefits under these proposals, any drug offense during which the offender possessed a gun would now be treated as a violent offense. See *id.* The analysis in this Part focuses on Governor Pataki's reform bill of 1999 as an example of how policy reforms often fail to address the concerns of women in relationship. This same analysis should be done with all future proposals.

¹⁵⁴ Governor Pataki's bill will have some benefits for women in relationship. The bill provides for the option of drug treatment for some repeat nonviolent offenders with substance abuse problems. Highlights of Sentencing Reform Act of 1999 [hereinafter *Highlights*] (on file with the *New York University Law Review*).

¹⁵⁵ Jakes, *Silver Softens*, *supra* note 151, at A1. A defendant convicted of the most serious drug felony (Class A-1) can seek a reduction in sentence from a minimum of fifteen years to a minimum of ten years. *Highlights*, *supra* note 154; Caher & Jakes, *supra* note 149, at A1.

¹⁵⁶ In 1997, only 8.3% of those convicted of the most serious drug felony (A-1) were women. Moreover, only 2.1% of women convicted for drug felonies were convicted of A-1 or A-2 felonies. N.Y. State Div. of Criminal Justice Servs., *supra* note 95.

¹⁵⁷ *Highlights*, *supra* note 154.

B. *Proposals for Reform*

By ignoring the characteristics of the offense and the offender, the Laws have failed to address adequately the needs of many offenders. This failure particularly harms women in relationship because their crimes often have characteristics that affect their ultimate blameworthiness. Reform proposals formulated through the lens of women in relationship can be viewed as taking a "woman-normed" approach to sentencing.¹⁵⁸ It is an approach that considers "women as sentencing subjects"¹⁵⁹ and uses the circumstances and experiences of women's crimes as a basis for asking broader questions about fair and appropriate sentencing for all offenders, men and women.¹⁶⁰ The following reform proposals are made in this vein.¹⁶¹

1. *Reforms of the Laws*

The evaluation of the Laws' treatment of women in relationship illuminates three substantial areas for statutory reform. First, the level of offense should not be determined solely by the amount of the drug involved.¹⁶² The use of amount as the *only* determining factor in

¹⁵⁸ Coombs, *supra* note 19, at 1703-04 (using this phrase to describe her approach as replacement for traditional male-focused and allegedly gender-neutral criminology).

¹⁵⁹ Daly, *Sentencing*, *supra* note 42, at 166.

¹⁶⁰ *Id.* at 167 (arguing for investigation of circumstances of women's lives and crimes and using findings as starting point for discussion of broader questions about appropriateness of men's and women's penalties); see also Coombs, *supra* note 19, at 1706 (arguing that once certain factors that affect notions of blameworthiness in crime are observed in women offenders, these factors should be taken into account in both women's and men's lives).

The proposed policy changes are motivated in part by the need to point out the traditional centrality of the "male" perspective in the formation of policies and the lack of incorporation of the realities of women's lives. However, as part of the awareness of the exclusion of women's experiences from this "male" perspective, it is recognized that men of color and low-income men are also not included in this traditional "male" perspective. Therefore, while this Note focuses on a dialogue about women, this dialogue does not have to exclude the experiences of men. Reforms in this vein "maintain[] a focus on women's lives and on redressing harms to women, but . . . do[] not ignore those men who have been crippled by patriarchal, class, and race relations." Daly, *supra* note 20, at 15. Thus, by suggesting policy reforms that focus on the realities of women offenders' lives, these policies also strive to address the similar needs of many marginalized men.

¹⁶¹ Reform proposals emerging from an analysis of women's drug crimes are arguably gender-neutral, as opposed to gender-specific, thus achieving one of the goals of the Laws' original sponsors. Kathleen Daly defines gender-neutral policies as those "that have considered the varied ways in which sex and gender matter in the social organization of crime, in the particular contexts in which crimes emerge, in the seriousness of crime, in the culpability and blameworthiness of offenders, and in the consequences of punishment." Daly, *Sentencing*, *supra* note 42, at 166. The proposals are not gender-specific because they can be applied to both male and female offenders.

¹⁶² The amount (measured by weight) of the drug currently mandates the level of crime committed and the corresponding sentence. See *supra* note 97 and accompanying text.

the seriousness of the crime should be rejected because it ignores the various roles offenders play in drug activities.¹⁶³ For women in relationship, it often overvalues her marginal role in the crime and ignores her involvement in a relationship in which the man is the one significantly involved in drug activities.¹⁶⁴

Second, the material assistance provision should be amended to address the concerns raised by focusing on women in relationship. For example, in order to fight the result of inverted sentencing, "snitching down"¹⁶⁵ should not be allowed unless it could be shown that the sentencing of the low-level offender is more critical to fighting the drug trade than the sentencing of the high-level offender. In practice, this would mean that drug dealers who are the original focus of police investigation would not be allowed to give information on low-level drug offenders, such as their girlfriends or wives, in exchange for a reduced sentence. It also would mean that the prosecution of the low-level offender within a relationship, most often the woman, based solely on the testimony of the higher-level offender in that relationship, most often the man, would not be allowed.

Third, some judicial discretion should be reinserted into the sentencing process. Judges must have the ability, other than relying on the provision for material assistance,¹⁶⁶ to tailor sentences to the blameworthiness of the offender. They should have a mechanism for the consideration of both the characteristics of the offense and the characteristics of the offender. A return to the pre-1973 setting of full judicial discretion in the sentencing process is not likely, nor is it necessarily desirable, given the importance of some uniformity in sentences and the probability that racial and gender prejudices might reemerge. Therefore, explicit mechanisms to harness judicial discretion are necessary.

¹⁶³ If quantity of drugs were determined to be an important factor in assessing blameworthiness, it would be possible to add consideration of the amount as an aggravating factor to the sentence. This is the approach in California. Cal. Penal Code § 1170.73 (West Supp. 2001) (stating that court should consider quantity of drugs in determining whether to impose aggravated sentence).

¹⁶⁴ See *supra* note 95 (discussing women's low-level roles in drug crimes).

¹⁶⁵ This term is used to describe when an offender gives information on a lower-level offender, thus snitching on someone lower on the drug chain.

¹⁶⁶ While it is recognized that the government depends on the provision for material assistance to provide needed sources of information, given that many offenders, particularly women in relationship, cannot provide sufficient information, see *supra* Part II.C, it should not be the sole mechanism for sentence reduction. Other means of reduction, such as the mechanisms suggested in this Part, should also be available.

One option is to create limited and narrow instances when a judge can go below the mandatory sentence by a set amount.¹⁶⁷ To address the concerns of women in relationship, a downward sentence adjustment could be provided explicitly for cases in which it is probable that, but for the relationship, the offender would not have committed the crimes charged. Other possible adjustments, such as one for a minor role in the offense, would benefit women in relationship as well as other offenders judges may also find less blameworthy.

Another option for reform is to give the judge more discretion in determining the sentence but to provide guidelines that list what factors are appropriate to evaluate, and what the corresponding sentences should be. Voluntary guidelines could be adopted that suggest factors, such as the influence of an intimate relationship, that would justify a lower sentence.¹⁶⁸ Alternatively, specific lower sentencing ranges could be provided for cases in which certain mitigating factors, such as a minor role in the offense, are present.¹⁶⁹

The concerns of women in relationship would be addressed either by a fixed sentence adjustment for certain cases where the drug crime was tied to an intimate relationship, or by guidelines that instruct a judge to consider this context in determining the sentence. In applica-

¹⁶⁷ This option is exemplified by the Federal Sentencing Guidelines. While this option still does not allow a lot of judicial discretion, it would allow more tailoring of sentences than currently allowed under the Laws. Under the Guidelines, there are explicit set sentence adjustments for certain circumstances of the offense or offender (e.g., role in offense, acceptance of responsibility). Federal Sentencing Guidelines Manual, *supra* note 98, §§ 3B1.2, 3E1.1. A larger departure is possible under the Guidelines but is rarely used by judges. Judges are able to depart from the given sentencing range if they find circumstances in the case that make it unlike most other cases and render the defendant less blameworthy. *Id.* at ch. 1, pt. A(4)(b) (stating guidelines for departures outside sentencing range); see also, e.g., *United States v. Milken*, Fed. Sec. L. Rep. (CCH) ¶ 96,933, 1992 WL 196797, at *1 (S.D.N.Y. Aug. 5, 1992) (No. SS 89 CR 41 (KMW)) (mem.) (granting reduction by taking into account substantial assistance by defendant, defendant's good acts in prison, defendant's actions to work towards settlements of other related lawsuits, and illness in defendant's family). While this second type of adjustment is relatively rare, it is still a means of rendering the sentence more appropriate. Currently, under the Rockefeller Drug Laws, judges do not have the ability to reduce a sentence in either manner.

¹⁶⁸ Delaware is one of several states that have a voluntary guidelines system. See Tonry, *supra* note 18, at 27-28 (discussing sentencing system of Delaware). One caveat is that some studies show that voluntary guidelines have little effect on the sentences imposed. See *id.* at 27. Delaware may be the one exception. See *id.* at 27-28.

¹⁶⁹ This mechanism currently is used in California. California has a determinate sentencing system in which the judge has the option of sentencing an offender to one of three sentence terms for the particular crime: the base term, the aggravated term, or the mitigated term. See Cal. Penal Code § 1170 (West Supp. 2001); Cal. Ct. R. 4.405 (defining sentencing terms). Circumstances of aggravation and mitigation explicitly are listed. See Cal. Ct. R. 4.421 (listing aggravating circumstances such as vulnerable victim and abuse of position of trust); Cal. Ct. R. 4.423 (listing mitigating circumstances such as being induced by others or playing passive or minor role).

tion, these mechanisms would allow the judge to reduce the sentence below the mandatory sentence if the judge determined that the relationship played a critical role in the offender's decision to commit a drug crime, thereby reducing the blameworthiness of the offender.¹⁷⁰ Although it is difficult to define what circumstances will be sufficient for this reduction,¹⁷¹ judges traditionally have evaluated other difficult-to-determine sentencing criteria, such as the offender's acceptance of responsibility, the influence of others on the offender, and the offender's family responsibilities.¹⁷² In evaluating the context of the relationship, the judge's inquiry would include looking at the person who was the initial focus of the investigation, the role the defendant played in the actual offense, and the influence that the partner and the relationship had on the defendant and her decision to commit the crime.¹⁷³ It is therefore both possible and appropriate for judges to consider the intimate relationship, either by explicit direction to evaluate the influence of the relationship on the offender, or within a broader mandate to consider the offender's role in the offense.

2. Policy Reforms

If New York is serious about wanting to reduce both drug crime and drug usage, the legislature must explore meaningful alternatives to incarceration, including mandatory drug treatment.¹⁷⁴ Harsh pun-

¹⁷⁰ A reduction in sentence would not be automatic simply because the offender was in a relationship at the time of the offense. The judge would have to evaluate the circumstances of the crime and the individual offender to determine if the context of the relationship affected the blameworthiness of the offender.

¹⁷¹ There is a risk that paternalistic attitudes will be inserted back into the sentencing process. However, this risk is minimized by creating explicit instructions to look at the effect of the relationship on the crime rather than allowing judges to sentence a woman offender to a lower sentence simply because she is a woman. Additionally, instructions that guide the judges' evaluation of the relationship, see *infra* note 173, help ensure that judges will evaluate all offenders' crimes for the presence of such an influential relationship rather than only some women offenders. See *supra* note 19 and accompanying text (discussing paternalistic attitudes and favoring of white women).

¹⁷² Federal and state judges currently evaluate these various sentencing criteria. See, e.g., Federal Sentencing Guidelines Manual, *supra* note 98, § 3E1.1 (allowing sentence adjustment for acceptance of responsibility); Cal. Ct. R. 4.423 (allowing sentence mitigation if offender's participation was induced by others or was motivated by desire to provide necessities to family).

¹⁷³ The offender should not be forced to testify in order to get information to the judge about the relationship, as this would be in tension with her right against compelled self-incrimination. Instead, the judge should look to the probation report, the factual record, and the prosecution and defense witnesses as sources for determining the circumstances of the offense and the influence of the relationship. For example, if the primary government witness is the offender's partner, this would be an important clue that the intimate relationship may have had a significant influence on the offender.

¹⁷⁴ One option is to place more drug offenders in treatment programs as opposed to prison. Studies have shown that drug treatment is more effective in reducing drug crime

ishment of low-level offenders, particularly women in relationship, ignores the complex social problems that impact the lives of these offenders.¹⁷⁵ In fact, imprisoning the offender often compounds the problems the offender faced before committing the offense because the offender then becomes a victim of the prison system.¹⁷⁶ To address effectively the complex societal problem of drugs, we must attempt to prevent drug crime before it starts. This entails constructing meaningful ways for women to leave violent and unhealthy relationships. Programs that help fight poverty and abuse and help women achieve greater autonomy also would reduce the number of women involved in drug crime.¹⁷⁷ It also is critical that once women commit an offense and are incarcerated, they, along with other offenders, have options of drug treatment, educational programs, and counseling.¹⁷⁸ Such programs will support an independent and healthy life whether in prison or out, and whether in a relationship or not.

CONCLUSION

These reform proposals are only the first steps in the reform of the Rockefeller Drug Laws and other similar drug sentencing laws across the country.¹⁷⁹ While it is crucial that reform start immediately, it is equally critical to begin the reform process by questioning and

and less costly than imprisonment. *Corr. Ass'n of N.Y.*, *supra* note 42. In New York, Chief Judge Judith Kaye has promised to expand drug treatment courts into every county. Caher, *supra* note 10, at 1. In California, in November 2000, voters passed Proposition 36, a reform bill that mandates that first- or second-time drug users who are arrested for possession offenses are to be sent to drug treatment programs instead of being sent to prison. Charles L. Lindner, *The State: Is the Criminal Justice System Ready for Proposition 36?*, *L.A. Times*, Dec. 31, 2000, at M6.

¹⁷⁵ See *supra* notes 54-61 (detailing low-level place of women in criminal drug hierarchy, and frequency of abuse and addiction among incarcerated women).

¹⁷⁶ See Human Rights Watch, *supra* note 29 (noting effects of imprisonment on offenders' families, communities, and their own difficulties of reintegration upon release).

¹⁷⁷ See, e.g., Currie, *supra* note 4, at 81 (listing several preventative programs such as program preventing child abuse); *Corr. Ass'n of N.Y.*, *supra* note 2, at 4 (proposing program of "intensive supervision probation" that would entail job training, mandatory drug treatment, and community service). Such programs should be available both before an offender commits a crime and as an alternative to incarceration once a crime has been committed.

¹⁷⁸ See Currie, *supra* note 4, at 166-68 (discussing need, particularly for women drug offenders, for drug treatment and community reintegration programs in prison); see also Myrna S. Raeder, *Creating Correctional Alternatives for Nonviolent Women Offenders and Their Children*, 44 *St. Louis U. L.J.* 377, 378-79 (2000) (urging funding of federal community incarceration program that would serve as incarceration location for women drug offenders and their children and offer treatment and services).

¹⁷⁹ See Tonry, *supra* note 18, at 30 tbl.2.1 (summarizing state sentencing guidelines systems); Mauer et al., *supra* note 37, at 6 (discussing study of New York's, California's, and Minnesota's drug laws).

examining the theoretical and practical foundations of this reform. The Laws' failure to consider the social context of the offender's crime particularly hurts women, as the context of drug crime is often gender-linked,¹⁸⁰ both in terms of the context itself (women committing drug crimes within a relationship) and the position of women within that context (women's support role in the drug activity and relationship). Moreover, by ignoring the context of an intimate relationship, the Laws also ignore problems within the relationship and the overlapping societal subordination based on race, gender, and class.¹⁸¹ Recognition of these characteristics of the offender and the context of her crime is important because it acknowledges both that many offenders are subordinated and marginalized in society on the basis of race, gender, and class, and that these same processes occur in the context of drug crimes.¹⁸² Issues of violence, poverty, substance abuse, and discrimination underlie and contribute to people's decisions to commit drug crimes. By sentencing offenders without regard to these problems, we end up "shaming and blaming those whose needs are exposed."¹⁸³ This not only hurts the individual offenders, but also injures society's own notions of equality and just punishment.

¹⁸⁰ The term "gender-linked" is used to suggest that the various circumstances of an offender's drug crime will differ depending on the gender of the offender. These differences are not innate to gender; rather, they are a product of the role gender plays in shaping the circumstances and context of crime. See Coombs, *supra* note 19, at 1689 (supporting proposition that differences in men and women's crimes are not product of gender as such, but rather are "gendered").

¹⁸¹ See Chesney-Lind, *supra* note 5, at 4 (arguing that gender, race, and class of women offenders often place them at periphery of socioeconomic society); see also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *Stan. L. Rev.* 1241, 1246 (1993) (stating that in context of battered women of color, systems of race, gender, and class domination converge); *supra* note 40 (providing statistics regarding race and class of women offenders).

¹⁸² See Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *Yale L.J.* 1373, 1394-96 (1986) (arguing that law should focus not on gender differences but on social and economic deprivation, which is promulgated based on these differences); see also *supra* note 54.

¹⁸³ James Gilligan, *Violence: Reflections on a National Epidemic* 237 (1996).