# A POLICY PAPER ON WHAT CAN BE DONE ABOUT LOW-LEVEL, NON-VIOLENT FEMALE DRUG OFFENDERS IN KANSAS

*By Suzanne Valdez**

## I. INTRODUCTION

About a year ago, I became involved in Mentoring 4 Success, a volunteer mentor program sponsored by the Kansas Department of Corrections, which matches community volunteers with inmates to assist them in transitioning successfully to their respective communities once they are released from prison.[1] I specifically requested that I be matched with a female inmate who had children. Soon after my training, I was assigned an offender-mentee, who I will call Megan.[2] Over the past seven months that I have met with Megan at the Topeka Correctional Facility ("TCF") where she is housed, I have come to learn about her tumultuous upbringing, the crimes for which she is serving her three-year sentence, and her two young children whom she loves deeply who currently live with Megan's disabled mother until she is released. As a drug-offender, Megan is typical of at least one-third of women who are incarcerated in the Kansas prison system.[3]

Megan's involvement with drugs is due mostly to an unhealthy and abusive relationship with a male drug offender, who is the father of her two children. As Megan tells it, in her estimation, a large number of women incarcerated at TCF are mothers, and many of them have young children. Further, Megan believes that many of the women who commit drug crimes do so either because their abusive spouse or partner is himself heavily involved in the drug trade as a user, manufacturer, or distributor, or because the woman is a single mother who is

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1. ROBERTS ET AL., KAN. DEP'T OF CORR., FY 2014 ANN. REP. 3 (2014), *available at* http://www.doc.ks.gov/publications/Reports/2014/view.

2. I wrote this article with Megan's support. I have changed a few facts to protect Megan's identity, but the overall facts contained within this article closely reflect Megan's life as well as the lives of many incarcerated women in Kansas...

3. ROBERTS ET AL., *supra* note 1, at 17.

solely financially responsible for her children and has decided that selling drugs is an easy and lucrative way to support her family.[4] According to Megan, another category of women who are imprisoned are those who are addicted to drugs ("tweakers," she calls them) and alcohol, and who have committed other crimes, such as theft, burglary, and assault because of their addictions.[5]

During my regularly scheduled mentor-mentee meetings with Megan, we talk about all sorts of things. She shares openly about her life before her incarceration, and she wonders whether she can effectively transition to the outside world once she is released from prison. Of greatest concern to Megan is the well-being of her children, who were legally adopted by her mother once Megan's parental rights were terminated because of her incarceration. Megan is fortunate because her children are not in foster care, but she is worried that her children will become involved in crime someday, especially because both she and their father are currently incarcerated. Megan's children do not often visit because it is hard for her disabled mother to travel to TCF for visits. Megan is uncertain about whether she will be able to provide for her kids financially and emotionally when she is released. She is scheduled to be released from prison within the next six months, hopefully by the end of 2015. Megan is also somewhat stressed that she may reoffend and return to prison, or that she will not be able to complete all of her conditions of release. After all, as she earnestly explains, she does not think she has had enough valuable programs or services in prison to prepare her for release, and she has limited moral support from her family even though her disabled mother is raising her children. Megan knows that she must avoid both the friends that she had before prison, as well as her children's father and his family because of their negative influence, but when she talks about any of them she appears somewhat nostalgic.

I have been humbled, yet troubled, by hearing Megan's story, a story about an imprisoned low-level female drug offender that is all too common in America's criminal justice system. Often when I leave my visits with Megan, I experience serious doubts about the policy reasons for incarcerating women who are low-level drug and non-violent offenders. Slowly, over time I have been persuaded that there must be an alternative way to correct and rehabilitate women like Megan who have become involved in the criminal justice system because of drug crimes.

Megan's story has compelled me to look closely at the Kansas prison system as it relates to incarceration of women who have been convicted of non-violent drug crimes, as well as other low-level crimes, such as theft or assault, because of alcohol or drug addiction. It is concerning that women who have committed drug-defined or drug-related offenses may have done so because of contributing negative influences such as domestic violence, financial stress in

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

5. Burglary and battery crimes may be violent because there are victims. To the extent I advocate for female drug offenders in this article, it is for those women who have not committed violent crimes as part of their drug convictions.

raising a family, or drug and alcohol addiction. It is also concerning that, both in Kansas and nationwide, our corrections system does not seem to have a deterrent effect on offenders with addictions.[6] More troubling still is that universally there has been little attention to or consideration given, in any form, to the needs of and negative effects on minor children whose mothers are incarcerated. The harsh reality is that many women who are incarcerated in both state and federal prisons are non-violent, low-level drug offenders, who are either addicted users, small-time sellers, or passive participants in the drug trade. As well, an overwhelming majority of these women have young children who are left parentless because of their mother's incarceration.[7] Finally, research reveals that long-term incarceration of low-risk, non-violent offenders can produce hardened criminals who are at an increased risk for reoffending, which in turn can cause greater harm to their children and families, and society.[8]

Accountability and responsibility for one's actions are important, but while "doing time for the crime" is appropriate for most illegal conduct, when it comes to minor drug offenses, America can and should do more to address how to appropriately deter criminal conduct and meaningfully "punish" offenders for the crimes they commit. By their very nature, minor drug-defined offenses such as possession of drugs usually mean that the offender is be a drug user who may also have addiction problems and needs of treatment. Moreover, a drug-related offense, such as theft, suggests that the offender may be stealing in order support a drug habit or addiction. In either scenario, a close and expansive look at prison reform is vital to perhaps changing the way that any penal system "corrects" and rehabilitates a drug offender. Recently, studies have shown that even a few meaningful changes made to our nation's corrections systems will result in many positive and mostly cost-savings results.[9] These results include successful reintegration of released offenders with their families and their respective communities, reduction in the state's (and federal) prison population and concomitant costs, and a decrease in recidivism.[10]

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6. R. Patrick Springer, Note, *A Better Way: Rethinking SB 123 Probationary Drug Treatment in Kansas*, 62 U. Kan. L. Rev. 1365, 1366 (2014); *cf.* Douglas B. Marlowe, *Research Update on Adult Drug Courts,* NAT'L ASS'N OF DRUG COURT PROF'LS (2010), http://www.nadcp.org/sites/default/files/nadcp/Research%20Update%20on%20Adult%20Drug%20Courts%20-%20NADCP_1.pdf.

7. *See generally* PATRICIA ALLARD & JUDITH GREENE, JUSTICE STRATEGIES, CHILDREN ON THE OUTSIDE: VOICING THE PAIN AND HUMAN COSTS OF PARENTAL INCARCERATION i–iii (2011), *available at* http://www.justicestrategies.org/sites/default/files/publications/JS-COIP-1-13-11.pdf.

8. *See Statement of Principles*, RIGHT ON CRIME, http://rightoncrime.com/statement-of-principles/ (last visited Oct. 21, 2015).

9. *See generally* Bill Keller, *Prison Revolt*, NEW YORKER (June 29, 2015), http://www.newyorker.com/magazine/2015/06/29/prison-revolt; *see also* LOIS M. DAVIS ET AL., BUREAU OF JUSTICE ASSISTANCE, EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION (2013), *available at* https://www.bja.gov/Publications/RAND_Correctional-Education-Meta-Analysis.pdf; *and* DOUG MCVAY ET AL., JUSTICE POL'Y INST., TREATMENT OR INCARCERATION? (2004), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/04-01_rep_mdtreatmentorincarceration_ac-dp.pdf.

10. *See generally* DAVIS ET AL., *supra* note 9; MCVAY ET AL., *supra* note 9.

This article addresses the unique and pervasive issues associated with female drug offenders such as gender bias in the criminal justice system, domestic violence, which can be a significant factor in why women commit drug and drug-related crimes, drug and alcohol addiction, and the collateral effects that incarceration has on minor children whose mother is in prison. The Kansas corrections system can be improved in its management of low-level, non-violent female drug offenders through the use of drug courts, clemency or leniency in prison sentences, and increased financial investment in pre-release programs that focus on transitioning the drug offender to her children and family once she has completed her sentence and is released back to society.

Understandably, the current and foreseeable budget woes in Kansas may make it difficult to digest or seriously consider the ideas contained within this policy paper because change or progress of any sort usually requires substantial fiscal commitment by state government. However, not all of these ideas require additional fiscal support, but instead require a reallocation of funds and resources and certainly an open-minded approach to problem-solving. Further, as evidenced by the success of the Kansas Department of Corrections' ("KDOC") Mentoring 4 Success Program volunteer program, of which I am a part and I will highlight below, relying on and establishing more solid community partnerships can be part of the answer to address low-level and non-violent drug offenders in Kansas.

Part II discusses what the federal government and states across the country are doing regarding prison reform. Part III addresses some identifiable issues related specifically to female offenders in the criminal justice system. Part IV discusses the early vision and plans that Kansas once had for its own prison reform. Lastly, Part V discusses ideas, which if implemented, would likely reduce both the current and growing population of women prisoners, reduce recidivism, and prevent further economic and human costs to minor children whose mothers are incarcerated.

## II. FEDERAL AND STATE GOVERNMENTS ACROSS THE COUNTRY ENGAGE IN THE CHALLENGE OF PRISON REFORM

Proper attention to state corrections systems as it relates and applies to drug offenders cannot be viewed in isolation. Rather, state systems, like Kansas, should be looked at in the larger context of how American society chooses to punish and correct illegal behavior. In other words, Kansas, like most other states and the federal government, has created a corrections or penal system that is meant to sanction or correct conduct or behavior that society deems criminally punishable.[11] In the past few decades, the effect of this approach has resulted in mass incarceration in which prison overcrowding, escalating incarceration costs,

11. *See generally* ROBERTS ET AL., *supra* note 1, at 8 (in December 2013, Kansas was ranked 34th in the nation in its incarceration rate. The incarceration rate is the number of prisoners sentenced to more than 1 year per 100,000 residents).

and long-term prison sentences have had catastrophic effects, not only on government budgets, but also on familial and societal relationships.[12]

These financial and societal costs have become too great to be ignored. Thus, in recent years, there has been a strong push nationally to fix America's criminal justice system.[13] Interestingly, at the federal level, even in an era when Congress appears to be broken, lawmakers from both sides of the political aisle have come to recognize that overcrowding of the nation's prisons, and all the costs associated with it, has created the need for reform.[14] Across party lines, members of Congress have joined forces in supporting alternatives to prison, such as intensive treatment programs and supervised probation, for those who commit low-level, non-violent drug crimes, as well as changing sentencing schemes so that offenders are not incarcerated for long prison terms.[15]

To illustrate how problematic America's prison population problem is, one only has to look at simple numbers. Though the U.S. has less than five percent of the world's population, the country houses nearly 25% of the world's prison population.[16] Even more astounding is that currently there are approximately 2.2 million Americans incarcerated, which is almost four times the number of those incarcerated in the 1980s.[17] Much of the prison population increase is attributed to the 1980s drug epidemic and our country's panicked response to the "war on drugs."[18] In recent years, overcriminalization has become another contributor to prison overcrowding.[19] Overcriminalization is a term that describes how governments have unnecessarily classified victimless or harmless activities as crimes that require prison sentences.[20] The national recidivism statistics are also alarming. Nationally, more than 40% of released offenders will reoffend and return to prison within three years.[21] So while it may be mean-spirited or capricious for a prison guard to tell a soon-to-be released offender, "[S]ee you in a few months," such a common remark is not far off base.[22]

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12. *See generally* Keller, *supra* note 9.

13. *See id.*

14. *See id.* at 28; *see also Momentum Builds for Bi-Partisan Criminal Justice Reforms in Congress*, THE AM. CONSERVATIVE UNION (July 21, 2015), http://acufoundation.conservative.org/2015/07/21/momentum-builds-for-bi-partisan-criminal-justice-reforms-in-congress/.

15. *See* Keller, *surpa* note 9, at 23.

16. *See id.*; *see also* Greg Glod, *Right on Crime's Derek Cohen at Freedom Fest Discussion Overincarceration*, RIGHT ON CRIME (July 13, 2015), http://rightoncrime.com/2015/07/right-on-crimes-derek-cohen-at-freedom-fest-discussing-overincarceration/; *see also* Gilad Edelman, *The Real Answer to Mass Incarceration*, NEW YORKER (July 17, 2015), http://www.newyorker.com/news/news-desk/the-real-answer-to-mass-incarceration; *see generally* JOHN F. PFAFF, THE CAUSE OF GROWTH IN PRISON ADMISSIONS AND POPULATIONS 1 (2011), *available at* http://ssrn.com/abstract=1884674.

17. Gilad Edelman, *The Real Answer to Mass Incarceration*, NEW YORKER, (July 17, 2015), http://www.newyorker.com/news/news-desk/the-real-answer-to-mass-incarceration.

18. *Id.*

19. *See Overcriminalization*, RIGHT ON CRIME, http://www.rightoncrime.com/category/priority-issues/overcriminalization (last visited Sept. 27, 2015).

20. *Id.*

21. Keller, *supra* note 9, at 23.

22. *Id.* at 25.

Besides Congressional interest in prison reform, President Obama is pleading for changes in America's criminal justice system.[23] On July 13, 2015, the President commuted forty-six federal prisoners for non-violent drug offenses.[24] This rare act of presidential clemency was anticipated in light of the President's firm stance on addressing prison overcrowding, as well as his dissatisfaction and concern about the length, inequity, and harshness in sentences for federal drug offenses.[25] Just a day later, on July 14, 2015, the President made an impassioned speech at the NAACP Annual Conference, in which he urged Congress to reform the criminal justice system.[26] The President noted that nationally $80 billion is spent annually on prisons.[27] Moreover, he noted that prison populations have doubled in the last two decades, mostly due to incarceration of low-level drug offenders.[28]

The President's prediction that prison reform will eventually and drastically reduce nationwide spending on prisons has merit, and for financial reasons alone, his plea for reform should be seriously considered. Most taxpayers should agree that the billions of dollars that are currently being spent nationally on incarceration could be properly channeled to prison alternatives, such as more intensive treatment for drug addicted offenders, as well as other effective pre-release prison programs like job and technical training and counseling programs that will assist inmates to transition to their respective families and communities when they are released.

The need for aggressive action to reform the country's prison systems cannot be overstated. Nationwide, corrections spending is the second-fastest growing area of state budgets – following only spending associated with administering Medicaid.[29] At the state level, Kansas is not alone in its efforts to review and reform its corrections system. In 2003, Kansas was poised to be proactive in prison reform when it passed Senate Bill 123 (SB123), a law that provides for mandatory drug treatment under probationary supervision rather than incarceration, for certain drug-involved offenders.[30] In more recent years, Kansas also implemented the limited use of drug courts in some areas of the

23. Douglas A. Berman, *Turning Hope-and-Change Talk Into Clemency Action for Nonviolent Drug Offenders*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 59, 60 (2010).

24. Sherry Ricchiardi, *Shining a Spotlight on Unequal Justice*, USA TODAY, July 15, 2015, at 2A.

25. *See id.*; *see also* Keller, *supra* note 9, at 25 (describing how the sentencing disparity under federal law between crack and powder cocaine results in many more African-Americans doing longer sentences for drug offenses than Whites).

26. Edelman, *supra* note 16; *see also* Anna Merod, *Obama Makes Push for Criminal Justice Reform at NAACP Convention*, TALK RADIO NEWS SERV. (July 14, 2015), http://www.talkradio news.com/white-house/2015/07/14/obama-makes-push-for-criminal-justice-reform-at-naacp-convention.html#.Vdy3yNNVhBc.

27. Merod, *supra* note 26.

28. *Id.*

29. RIGHT ON CRIME, *supra* note 8.

30. KAN. STAT. ANN. § 21-6824 (2012).

state.[31] Both SB123 and the use of drug courts have had their challenges and limitations, which will be discussed more fully below in Part III of this article.

Besides Kansas' efforts, within the last decade, other states across the country have also answered the call to prison reform, and these states have used different strategies to reduce their respective prison populations.[32] For example, Texas, a state known to be one of toughest on crime, has become a leader through its model to reduce its prison population.[33] In 2007, then -Governor Rick Perry joined state legislators to stop a plan to add to the state's prison facilities.[34] Instead of adding more prisons, some of the funds saved on Texas's facilities expansion were funneled to treatment programs for low-level drug offenders.[35] This redirection of state funds has resulted in lower prison growth and recidivism, which allowed Texas to close three prison facilities between 2011 – 2013.[36] Other states like Ohio, Kentucky, Mississippi, Georgia, and South Carolina have embraced variations of the Texas corrections-reform model, and have made huge strides at reducing their respective prison populations by directing funds to treatment programs for offenders rather than adding to or expanding their prison facilities.[37]

In other states, like New York and California, state legislatures have reduced their respective state prison populations by changing how their state laws criminalize low-level drug offenses.[38] Over a period of about 10 years, New York has taken steps to amend its strict old mandatory drug laws enacted in the 1970s known as the Rockefeller Drug Laws.[39] Under these tough drug laws, if an offender was convicted of selling two ounces, or possessing four ounces, of a narcotic drug, the sentencing range was a minimum of 15 years in prison to a maximum life sentence. The Rockefeller Drug Laws resulted in a huge increase in drug convictions, from 11% before passage of the laws up to a high of 34%.[40] In 2009, after other progressive amendments had already been made to the substance of these drug laws, then-Governor David Patterson signed into law an amendment related to sentencing that gives courts discretion to order treatment for low-level drug offenders instead of incarceration.[41] Much of the credit for this major reform in sentencing is attributed to a statewide coalition made up of policy advocates, service providers, and treatment and medical

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31. *Courts in Kansas*, NAT'L ASS'N OF DRUG COURT PROF'LS, http://map.nadcp.org/states-courts/KS (last visited Oct. 21, 2015).

32. Keller, *supra* note 9, at 26.

33. *See generally* Keller, *supra* note 9, at 26.

34. Keller, *supra* note 9, at 26. The Texas Public Policy Foundation, a conservative think tank based in Austin has led the charge on prison reform.

35. *Id.*

36. *Id.*

37. *Id.*; *see also* Ken Blackwell, *Federal Criminal Justice Reform is Long Overdue*, WASHINGTON EXAMINER, (July 24, 2015), http://www.washingtonexaminer.com/federal-criminal-justice-reform-is-long-overdue/article/2568862.

38. *See* Keller, *supra* note 9, at 26; *see also* ALLARD & GREENE, *supra* note 7, at 39–44.

39. ALLARD & GREENE, *supra* note 7, at 40–43.

40. *Id.* at 42.

41. *Id.*

professionals.[42] Today, New York's drug laws eliminate or reduce the amount of prison sentences for many drug offenses, and allow offenders to be treated rather than incarcerated. These progressive reforms are expected to save New York state taxpayers approximately $250 million annually.[43]

In November 2014, voters in California had a significant role in changing their drug laws.[44] The people of California passed Proposition 47, a law which reduced certain minor drug, as well as property, crimes to misdemeanors.[45] The passage of Prop 47 means that fewer offenders are incarcerated, resulting in an overall reduction of the state's prison population, which had skyrocketed over the past few decades.[46]

The reforms in Texas, New York, and California show that some states are tackling the nationwide problem of prison overcrowding by using different innovative strategies and models, thereby reducing their respective prison populations and the amount of money spent on incarceration. Like these states, Kansas has put thoughtful consideration into prison reform. It has been said that Kansans do a lot with very little. The same can be said about the Kansas Department of Corrections ("KDOC") as overseer and guardian of the state's incarcerated and paroled populations. In its most recent published annual report, the KDOC revealed that as of 2014, there were a total of 9,612 adult inmates housed in the eight adult correctional facilities throughout the state.[47] Of this number, 739 were female inmates, which makes up about 8% of the state's total prison population.[48] As for recent entry into the corrections system, the Kansas Sentencing Commission reported that in 2014, 13.9% of offenders sent to prison were female.[49] With the exception of a few female inmates who are housed at Larned Mental Health Correctional Facility, all female prisoners are housed at Topeka Correctional Facility (TCF).[50] Approximately one-third of female inmates (240 inmates, 32.6%) are incarcerated because of drug offenses.[51]

Since 2009, the total inmate population in Kansas has grown by approximately 850 offenders.[52] In the KDOC's 2014 annual report, the Secretary of Corrections mentions his concern for the state's growing prison population, which will necessitate KDOC's efforts to ensure adequate "bed space" for prisoners in the future.[53] A related concern is recidivism and its effect

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42. *Id.*

43. *Id.*

44. Keller, *supra* note 9, at 26.

45. *Id.*

46. *See generally id.*

47. ROBERTS ET AL., *supra* note 1, at 5.

48. *Id.* at 5, 14.

49. KAN. SENTENCING COMM'N, ANNUAL REPORT FY 2014: ANALYSIS OF SENTENCING GUIDELINES IN KANSAS at xii (2015), *available at* http://sentencing.ks.gov/docs/default-source/publications-reports-and-presentations/fy-2014-annual-report-whole.pdf.

50. ROBERTS ET AL., *supra* note 1, at 13.

51. *Id.* at 17. It is not clear whether this number reflects only those women convicted of drug-related offenses or whether it includes all offenses related to drug activity.

52. *Id.* at 3.

53. *Id.* at 3–4.

on prison population growth. The Secretary of Corrections states that based on 2010 release data, 97% of those incarcerated will be released back into society, and "34.8% of those adult offenders released will return to prison."[54]

In Kansas, it is more expensive to incarcerate a female inmate than a male inmate. The cost to lock up a female inmate for one year is $27,639.00 (or $75.72 per day) compared to $24,176 to lock up a male inmate at Lansing Correctional Facility, which is an exclusively male prison facility.[55] In either case, it costs more annually to incarcerate one inmate in Kansas, than college tuition for one year (and room and board) for one student at any state university in Kansas.[56] With this staggering amount in mind, one has to ask whether it is worth taxpayer dollars for Kansas to imprison a low-level drug offender at this exorbitant annual cost.

## III. SOME IDENTIFIABLE ISSUES THAT ARE MOST RELATED TO FEMALE OFFENDERS

In order to begin to appreciate the ideas and recommendations for low-level, non-violent female drug offenders in Kansas as set forth in Part IV below, it is important to discuss some identifiable issues related to female offenders in the criminal justice system in general.

### *A. Gender Bias and Domestic Violence*

The issues that women face concerning gender bias and domestic violence are so interrelated in the criminal justice context that they are combined here for purposes of discussing how they relate to and affect female drug offenders. Historically and still today, one of the many disappointments of America's criminal justice system is treatment of women who are survivors of domestic violence.[57] The systemic injustices run the gamut from women who are unsuccessful at obtaining a protection order against their abuser to life-long sentences of women who have killed their intimate partners to defend themselves from further physical abuse.[58] One sociology expert has written: "Sexism in the criminal justice system dictates that women stay within their gender role expectations or face severe consequences, the same message communicated to women by their abusive mates."[59]

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54. *Id.* at 2.

55. ROBERTS ET AL., *supra* note 1, at 27.

56. *See* Keller, *supra* note 9, at 23 ("Locking up an inmate for a year can cost as much as tuition at a good college.").

57. In recent times, there has been a trend to use the term "survivor" rather than "victim" in the domestic violence context.

58. *See generally* Carol Jacobsen & Lynn D'Orio, *Defending Survivors: Case Studies of the Michigan Women's Justice & Clemency Project*, 18 U. PA. J.L. & SOC. CHANGE 1 (2015).

59. Erin Liotta, *Double Victims: Ending the Incarceration of California's Battered Women*, 26 BERKELEY J. GENDER L. & JUST. 253, 257 (2011) (quoting ELIZABETH DERMODY LEONARD, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 60 (2006)).

The abuser's need for power and control are at the core of domestic violence, which is usually manifested in the abuser's physical violence upon the victim.[60] In addition to physical violence, the abuser may also engage in other power and control behaviors such as emotional, sexual, and economic abuse, as well as tactics that involve threats, manipulation, isolation, and intimidation.[61] Sometimes, the victim's children are either abused themselves or used as pawns in the abuser's power and control scheme.[62] Women who are battered frequently find themselves in no-win situations with limited help and access to the necessities of daily life such as money, work, transportation, and the support of friends and family.[63]

Importantly, most domestic violence victims feel alienated from the world around them. They do not report incidents of abuse to police for a number of reasons including embarrassment, fear of retaliation from their batterer, protection of themselves or their children, unawareness of the true danger they face, and the belief that police or the criminal justice system will not help them.[64] Women who do not immediately report men's violence but wait to reveal it when it arises in the criminal justice context are often viewed as liars or vindictive.[65] Moreover, women are critiqued for their assertiveness, or lack thereof, and their physical appearance and demeanor. For example, if a woman is stoic and unemotional she may not be seen as a real victim. On the other hand, if she is emotional, she discredited because she is viewed as irrational.[66]

Even more troubling is the reality that plenty of our nation's laws and procedures in the criminal justice system, though gender-neutral on their face, have contributed to the disadvantage of female offenders because of how these laws and procedures are applied to them.[67] Ideally, the process of even-handed judicial decision-making should be objective and gender-neutral, but the process often fails to consider the context of women's subordinate or passive roles in crimes committed by men, and the factors of abuse and coercion that heavily impact female illegal activity, like participation in the drug trade.[68] Besides an awareness that gender bias exists in our criminal justice system, it is critical to understand that women may be compelled to commit crimes because of domestic abuse or other domineering male influences.[69] The reality is that duress and coercion of batterers, in any form, is a strong contributing factor in women's participation in criminal activity.[70]

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60. Domestic Abuse Intervention Project, *Violence Wheel,* DOMESTICVIOLENCE.ORG, http://www.domesticviolence.org/violence-wheel/ (last visited Oct. 5, 2015).

61. *Id.*; *see also* Jacobsen & D'Orio, *supra* note 58, at 25.

62. *Violence Wheel*, *supra* note 60.

63. Jacobsen & D'Orio, *supra* note 58, at 26.

64. *Id.* at 8.

65. *Id.* at 30.

66. *See generally id.*

67. *Id.* at 24; *see also* Lenox *supra* note 4, at 284-89.

68. Jacobsen & D'Orio, *supra* note 58, at 24.

69. *Id.* at 24–25.

70. *Id.* at 26.

Unfortunately, gender bias impacts the prosecutorial, defense, and judicial decisions that ultimately convict women of the crimes with which they are charged. In this way, biased treatment of female offenders in the criminal justice system often results in what is termed as "double-victimization."[71] Because of this injustice, it is necessary to acknowledge contextual victimization and to recognize that a woman's action, inaction, or reaction in any given situation may be reasonable within the context of the abuse she has endured.[72]

Of the men and women held in state prisons nationwide, approximately 20% have a history of physical or sexual abuse, though the data does not further extrapolate the percentage of women within that group.[73] Inmates who are mothers in state prisons were more likely than fathers to report past physical or sexual abuse."[74] Realistically, it is difficult to assess the number of the women who enter prison with a history of domestic violence because of the female tendency to under-report abuse due to fear or the stigma associated with it, but the numbers may be higher than reported. Further, whether the incarceration of women who have a history of domestic abuse, and also who are likely mothers, contributes to the perpetuation of the cycle of abuse in which their children are likely to follow must be considered.[75]

### *B. Incarcerated Mothers with Children*

Incarcerating a parent of a minor child has a devastating and rippling effect on not only the child, but on everyone who steps in to take on the parental role of the child once the parent is incarcerated.[76] When a child is separated from a parent because of the parent's incarceration, that child may be overcome with many different emotions, including such feelings as abandonment, depression, loneliness, grief, and rejection.[77] Moreover, common responsive behaviors of these children include acting out, difficulty in school, getting into legal trouble, and experimenting or abusing drugs or alcohol.[78] Research has revealed that "incarcerating a mother is significantly more likely to disrupt the children's lives than the incarceration of the father."[79]

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71. Erin Liotta, *Double Victims: Ending the Incarceration of California's Battered Women*, 26 BERKELEY J. GENDER L. & JUST. 253, at 254.

72. *See generally* ALLARD & GREENE, *supra* note 7.

73. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 7 (2008), *available at* http://www.bjs.gov/content/pub/pdf /pptmc.pdf. A related statistic reveals that more than 75% of domestic violence victims report that their assailant had been drinking or using illicit drugs at the time of the incident.

74. *Id.*

75. Liotta, *supra* note 59, at 259.

76. ALLARD & GREENE, *supra* note 7, at i–iii, 14–15, 25–26.

77. ALLARD & GREENE, *supra* note 7, at i-iii.

78. *See generally id.*

79. Liotta, *supra* note 59, at 259 (quoting ANNE POWELL & CLARE NOLAN, CALIFORNIA STATE PRISONERS WITH CHILDREN: FINDINGS FROM THE 1997 SURVEY OF INMATES IN STATE AND FEDERAL CORRECTIONAL FACILITIES 11–12 (2003), *available at* http://www.library.ca.gov /crb/CRBSearch.aspx).

The incarcerated parent also may grapple with various emotions too, such as inadequacy, helplessness, and isolation, especially if the parent was the primary caregiver to her child leading up to her incarceration.[80] While financial costs of incarceration are exorbitant, the human costs associated with parental incarceration can have lifelong consequences that reach beyond any tangible costs and spending predictions.[81] A comprehensive U.S. Department of Justice (DOJ) report that was published in August 2008 analyzed nationwide data gathered from 1991 through mid-year 2007 on parents as prisoners. This special report, "Parents in Prison and Their Minor Children," though somewhat dated now, provides revealing data about the incarcerated parent, as well as information about minor children who lose at least one parent to incarceration.[82]

During the time period studied by the DOJ , 52% of state prisoners and 63% of federal prisoners reported having an estimated 1.7 million minor children, which at that time accounted for 2.3% of the U.S. resident population under age 18.[83] The average incarcerated mother had 2.4 children, and the average incarcerated father had 2.0 children.[84] Incarcerated parents of minor children were most likely to be between ages 25 and 34.[85] Of the state inmates in all age categories, except age group 45–54, women were more likely than men to report being a parent.[86] Parents of minor children incarcerated in both state and federal prisons increased by 79% during the time period studied.[87]

Turning the focus to statistics related specifically to children, during the time period studied by DOJ, overall, children of incarcerated parents increased by 80% (761,000 children).[88] Children of parents in state prisons increased from 860,000 to 1.4 million and thus, saw a much larger increase than children whose parents were incarcerated in federal prisons.[89] The largest growth in the number of parents (up 40%) held in state prisons and their children (up 42%) occurred between 1991 and 1997.[90] An estimated 50% of children who had a parent in prison were 10 years old.[91] Due to long prison sentences imposed on an incarcerated parent, it is likely that more than one-third of these children will reach adulthood while their parents remain in prison.[92]

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80. *See* Thomas E. Hanlon et al, *Research on the Caretaking of Children of Incarcerated Parents: Findings and Their Service Delivery Implications*, 29 CHILD YOUTH SERV. REV. 384 (2007).

81. *See generally* ALLARD & GREEN, *supra* note 7.

82. *See generally* GLAZE & MARUSCHAK, *supra* note 73.

83. *Id.* at 1.

84. Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 82 (2011).

85. GLAZE & MARUSCHAK, *supra* note 73, at 3.

86. *Id.* at 3.

87. *Id.* at 1.

88. *Id.*

89. *Id.* at 2.

90. GLAZE & MARUSCHAK, *supra* note 73, at 3.

91. *See* Boudin, *supra* note 84, at 81.

92. *Id.*

Before arrest, more than 50% of mothers housed in state prisons reported living with at least one of their children in the month before arrest, compared to 36% of fathers.[93] About 40% of mothers held in state prisons who had minor children were living in single-parent households in the month before their arrest.[94] Of those parents incarcerated in state prisons who had lived with their minor children just prior to incarceration, mothers were almost three times more likely than fathers to report that they had provided most of the day-to-day care of their children."[95] Interestingly, both mothers and fathers in state prisons nearly equally reported that they provided the primary financial support for their children prior to incarceration.[96] After incarceration of a parent, when a father is incarcerated, 88% of children live with their mother.[97] When a mother is incarcerated, 45% of children are sent to live with their grandparents, while only 37% are sent to live with their father.[98] As many as 10% of children who have an incarcerated parent live in foster care, which is another expense funded by taxpayers when parents become incarcerated.[99] The data in the DOJ report regarding the ongoing relationship between an incarcerated parent and a minor child shows that more than 75% of state prison inmates reported that they had some contact with their children during their prison sentence.[100] Mothers were more likely than fathers to report having had any contact, such as phone calls and exchange of cards and letters with their children, though both mothers and fathers housed in state prisons were equally likely to report having had personal visits with their children.[101]

Keep in mind that the DOJ special report is about eight years old with few updates to the data that was collected. With continued prison population growth in states like Kansas, the current statistics in all the data that were revealed by the DOJ report could be much higher. Moreover, the DOJ report does not include data about parents who are jailed, or the statistics related to children who have parents in local jails. Consideration of that information would also presumably augment and inflate the statistics described in the DOJ report of offenders and children who are affected by the criminal justice system. Unfortunately, Kansas does not have detailed data on the number of incarcerated or jailed parents with minor children.

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93. GLAZE & MARUSCHAK, *supra* note 73, at 4.

94. *Id.*, *see also* Liotta, *supra* note 59, at 259 ("Nearly 80 percent of women in California prisons are mothers with two or more children, and two-thirds of women living with their children at the time of arrest were raising these children as single parents.").

95. GLAZE & MARUSCHAK, *supra* note 73, at 5.

96. *Id.*

97. *Id.*

98. *Id.*

99. GLAZE & MARUSCHAK, *supra* note 73, at 5; Liotta, *supra* note 59, at 259 ("Children with incarcerated mothers, far more so than those with incarcerated fathers, are likely to be sent to live with another relative, to live alone, or to enter into the foster care system.")

100. GLAZE & MARUSCHAK, *supra* note 73, at 6.

101. *Id.*

### C. *Alcohol Abuse and/or Drug Addiction*

Drug addiction and/or alcohol dependence wreak havoc in the lives of the addict's family, friends, and community. Most unsettling is the devastating effect that drugs and alcohol have on minor children.[102] Nationally, nearly one in four children under the age of 18 are exposed to some form of alcohol abuse or drug dependence in their family.[103] It is estimated that "more than 28 million Americans are children of alcoholics."[104] Of that number, about 11 million are minor children.[105] Research has shown that both genetic predisposition and environmental causes are factors that equally contribute to alcohol and drug addiction within families.[106] Further, children with an addicted parent are likely to develop the same addiction as their parent, and so the cycle of addiction will occur unless interventions are put in place to assist in breaking the cycle.[107]

Parental addiction, even without incarceration, can be devastating to families. When a parent is addicted, children may feel a host of emotions like anger, embarrassment, sadness, and guilt.[108] Often times, children suffer neglect at home and in some cases, the addicted parent may inflict emotional and/or physical abuse on his children.[109] There may also be huge financial hardship to the family if the addicted parent cannot function in daily life and loses a job.[110]

In extreme cases, addicts violate laws by using drugs or abusing alcohol. Those who are addicted often commit not only drug-defined offenses, which are violations of laws prohibiting possession, manufacture, and distribution of illegal drugs, but they often commit other drug-related offenses like theft, burglary, and assault either in support of or because of their addictions. For those persons with alcohol abuse problems, strict Driving Under the Influence (DUI) laws also impose harsh sentences for those convicted of felony-level offenses.[111] The range of sentences for alcohol-related offenses runs the gamut, but most state laws impose strict mandatory jail or prison sentences and expensive fines when there is a pattern of recidivism.[112]

Alcohol abuse and drug addiction as it exists nationally in the state prison population is even more startling. Roughly 70% of women in state prisons meet

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102. Sara Bellum, *Helping Children of Addicted Parents Find Help*, NAT'L INST. FOR DRUG ABUSE DRUGS & HEALTH BLOG (Feb. 16, 2012), http://teens.drugabuse.gov/blog/post/helping-children-addicted-parents-find-help.

103. *Id.*

104. *Parents That Use Drugs*, THE HILLS TREATMENT CTR. (May 21, 2015), http://thehills center.com/family/dealing-with-drug-addicted-parents/.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Parents With Addiction*, SAFE TEENS, http://www.safeteens.org/relationships/parepar-with-addictions/ (last visited Sept. 25, 2015).

109. *Id.*

110. *Id.*

111. *See* KAN. STAT. ANN. § 8-1507 (West 2015).

112. *State-by-State Dui Penalties*, FINDLAW, http://dui.findlaw.com/dui-laws-resources /state-by-state-dui-penalties.html (last visited Oct. 21, 2015).

the criteria for alcohol or substance abuse, with 37.6% being alcohol-only dependent and 62.8% being drug-only dependent.[113] Notably, of those released offenders that violate parole in Kansas, 75% have a substance abuse or mental illness issue.[114] While drug addiction and alcohol abuse touches the lives of all Americans in some way, it is particularly acute and problematic when the addiction crosses the line to illegal conduct that requires the offender to serve a prison sentence. Incarceration of an offender for drug or alcohol-related offenses comes at a high financial cost to taxpayers, as well as the immeasurable human costs to families and society as a whole.

## IV. WHAT KANSAS PLANNED FOR CORRECTIONS REFORM

Ideally, there would be adequate funding from the state, as well as other private and charitable sources, so that implementation of statewide drug courts, adequate addiction treatment, effective pre-release prison programs and services, and other interventions could be institutionalized to help drug offenders. If such resources existed, drug offenders would be in a better position to heal and succeed after being convicted of their respective crimes, and recidivism could be prevented.

Recognizing that funding in Kansas is limited in current times, recommendations about any significant systemic changes to corrections may be, at best, nothing more than aspirational in nature, especially in light of foreseeable state budgetary constraints. However, it is important to mention that about 15 years ago, the KDOC had already laid the groundwork for meaningful statewide prison reform. The KDOC vision and strategic plan for reform called for implementation of detailed offender reentry programs, and it reflected both promising and pragmatic goals that sadly did not come to fruition due to loss of both state and private funding.[115]

The KDOC's plan, called the Kansas Offender Risk Reduction & Reentry Plan (KOR3P), was documented in a comprehensive written 89-page plan published in 2006. It is still posted on the KDOC webpage.[116] The plan details the remarkable vision, mission, guiding principles, and goals for released offender success, as well as goals to improve risk reduction for recidivism.[117] Specifically, the overarching strategic vision of the plan was centered on providing "success-oriented and evidenced-based practices" focused on reduction of the prison population and revitalization of Kansas communities.[118]

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113. GLAZE & MARUSCHAK, *supra* note 73, at 19 tbl.12.

114. ROBERTS ET AL., *supra* note 1, at 19.

115. *See generally* KAN. DEP'T OF CORR., KANSAS OFFENDER RISK REDUCTION & REENTRY PLAN (2006), *available at* http://www.doc.ks.gov/reentry/goals-of-kor3p/KORP%20JEHT%20Application%2011%2014%202006%20Version.pdf [hereinafter 2006 REENTRY PLAN]; *see also* Andy Marso, *Corrections Secretary: Funding Cuts Drive Recidivism*, TOPEKA CAPITAL-J (Jan. 14, 2014), http://cjonline.com/news/2014-01-14/corrections-secretary-funding-cuts-drive-recidivism

116. 2006 REENTRY PLAN, *supra* note 115.

117. *Id.* at 2–5.

118. *Id.* at 2.

These evidenced-based practices were also intended to support programs that would assist "children of offenders" to "escape the stigma . . . of having a parent in prison" and "escape the cycle of incarceration," as well as programs to address the enormous rates of incarceration and recidivism.[119]

At the time the KOR3P was published, it indicated that the future of the Kansas corrections system was making progressive steps toward prison reform. Around 2008, however, progress in implementing effective offender reentry programs and services in the Kansas Corrections system per the KOR3P report was halted, presumably because of state budget cuts and the disappointing loss of all financial support from the JEHT Foundation.[120] JEHT was a non-profit funding organization based in New York City, which focused on "transformation of U.S. criminal justice policies and procedures" as one of its four diverse policy interests.[121] In December 2008, the JEHT Foundation abruptly announced that it would cease all funding and close its operations by mid-January 2009 due to loss of investment funds, which had been illegally diverted by Ponzi scheme investor, Bernard Maddoff.[122] Unfortunately, the KOR3P had relied heavily on JEHT funding for a large portion of the KDOC budget for offender reentry programs and services.[123]

As part of the KOR3P, the Kansas legislature established the Kansas Reentry Policy Council, whose purpose was to administer the KOR3P.[124] This multi-membered council included the Secretaries of Corrections, Social and Rehabilitative Services,[125] and Health & Environment,[126] the chair of the Kansas Parole Board,[127] as well as executives in other key state agencies.[128] This council met regularly once it was convened to follow through on implementation of the KOR3P.[129] Soon after the creation of the Council, a Task Force was created with members from within the Council. The Task Force conducted a study and a report outlining Phase I of its findings was published covering its

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119. *Id.*

120. *See generally JEHT Foundation*, WIKIPEDIA, https://en.wikipedia.org/wiki/JEHT_Foundation (last visited Oct. 23, 2015) (the acronym JEHT stands for "Justice, Equity, Human dignity & Tolerance.").

121. *Id.*

122. *Foundation to Shut Down, Says Madoff Managed Money*, ASBURY PARK PRESS (December 20, 2008), http://archive.app.com/article/20081220/NEWS/81220017/Foundation-shut-down-says-Madoff-managed-money.

123. *See* 2006 REENTRY PLAN, *supra* note 115, at 87.

124. 2006 REENTRY PLAN, *supra* note 115, at 4; *see also* KANSAS REENTRY POLICY COUNCIL (KRPC) EX OFFENDER EMPLOYMENT TASK FORCE, PHASE I: MAKING THE CONNECTION (2011), *available at* http://www.kansasworksstateboard.org/SiteCollectionDocuments/Presentations/Ex-Offender_Emplymt_TF-Phase_I-063011.pdf [hereinafter KRPC TASK FORCE].

125. This agency is now called the Department for Children & Families.

126. 2006 REENTRY PLAN, *supra* note 115, at 16.

127. Governor Sam Brownback issued Executive Reorganization Order No. 34, which abolished the Kansas Parole Board and established the Prisoner Review Board effective July 1, 2011.

128. *See* KRPC TASK FORCE, *supra* note 124, at 1.

129. 2006 REENTRY PLAN, *supra* note 115, at 16.

work from May 2009 till January 2011.[130] Though the Task Force was scheduled to begin Phase II of its work, there is no further information on whether Phase II ever got off the ground.[131]

In April 2009, as KDOC operating funds continued to dwindle, then-Secretary Roger Werholz published the "Offender Programs Evaluation," the last comprehensive report on KDOC offender programs[132] Other than this detailed evaluation and the KOR3P, which both provide detailed strategic ideas for offender reentry and reduction in recidivism, the only other published strategic plan for KDOC came for fiscal year 2010 (FY 2010).[133] The FY 2010 strategic plan is minimalist in nature, and unlike the detailed and optimistic KOR3P, it is not forward-looking or aspirational in any way. Rather, its tone is somber in that it simply recognizes that the state prison population will continue to grow, that Kansas inmates will not receive "adequate services to assist them in successfully reintegrating into society," and that released offenders will likely be re-incarcerated.[134] Importantly, the seven major goals articulated in the FY 2010 strategic plan do not focus in any way on pre-release offender programs or services.[135] Instead, the tenor of the 2010 strategic plan seems to suggest that KDOC is merely holding steady, and trying to stay afloat amid times of limited funding and continued prison population growth caused by entry of new offenders as well as recidivism.

Even though the KDOC currently is not following a strategic plan per se, it has made efforts to outline its focus and goals for each upcoming year in its published annual reports.[136] To start off its 2014 annual report, KDOC states as its Vision – "A safer Kansas through effective correctional services."[137] Some of the KDOC's current important focus points, or goals, in furtherance of its Vision include: (1) reducing recidivism; (2) identifying the driving costs of corrections; (3) developing strategies to manage the state's growing prison population; (4) promoting collaborative relationships (though it does not

130. *See* KRPC TASK FORCE, *supra* note 124.

131. Moreover, the Council does not have a website, nor does the KDOC refer to it in any recent literature or on its website.

132. *See generally* ROGER WERHOLTZ, KAN. DEP'T OF CORR., OFFENDER PROGRAMS EVALUATION (2009), *available at* http://www.doc.ks.gov/publications/CFS/evaluation/offender-programs-evaluation-volume-viii-april-2009/view.

133. *See generally* ROGER WERHOLTZ, KAN. DEP'T OF CORR., FISCAL YEAR 2010 STRATEGIC ACTION PLAN (2009), *available at* http://www.doc.ks.gov/publications/strategic /SAP%202010.pdf.

134. David Cook, *Strategic Action Plan*, KAN. DEP'T OF CORR. (Jun 21, 2013), http://www.doc.ks.gov/publications/strategic/.

135. *See generally* WERHOLTZ, *supra* note 133. There are the only two goals that appear to focus specifically on offender release. For example, Goal No. 1 states: [i]ncrease offender's abilities and motivations to practice responsible crime-free behaviors through correctional management consistent with the research driven principles of effective intervention." Goal No. 3 provides: [m]anage offenders in the community using risk reduction strategies that assist them in acquiring pro-social behaviors and ultimately achieve social integration." Absent from the language of these two goals are the specifics of how to these goals will be implemented.

136. The reporting year for KDOC, as well as all state agencies, goes from July 1 – June 30.

137. ROBERTS ET AL., *supra* note 1, at 1.

mention with whom); and (5) ensuring that prison programs are evidenced-based, with a focus on violent-offenders.[138]

There is much discussion to be had about KDOC's goals and positive efforts as they relate to its mission to provide an effective, safe, and cost-efficient corrections system for Kansas. Clearly, as shown in its various reports, the KDOC has given considerable thought and analysis about what can be done about prison reform. The ongoing lack of funding both from the state and outside sources, however, has created a financial barrier for Kansas and its corrections system to move forward in making tangible and effective reform for all offenders, especially drug offenders.

## V. IDEAS FOR WHAT SHOULD BE DONE FOR LOW-LEVEL OR NON-VIOLENT FEMALE DRUG OFFENDERS

In light of the State's proportionately large female drug offender prison population, as well as the many special considerations and factors that relate specifically to female offenders, Kansas should resolve to explore various alternative options that will lower is prison population, effectively rehabilitate its drug addicted population, and successfully integrate drug offenders back into their respective families and communities.

### *A. Executive Clemency or A Special Parole Process*

One of the most extreme ideas for Kansas to consider as a way of lowering the inmate population, thereby reducing overall incarceration costs, is the idea of early release of certain drug offenders. Low-level or non-violent female drug offenders, because of commonalities such as domestic violence, parenthood, and drug addiction, are ideal candidates for alternative methods of accountability and rehabilitation other than incarceration.

Pared down to simple numbers, release of just one female drug offender will save Kansas $27,639 per year.[139] Release of two female drug offenders means the state will save double that amount – $55,278 per year – and so on. In light of all the possible negative contributors to female criminalization, such as gender-bias and domestic violence, as well as consideration of other relevant factors such as being parents to minor children, it not only makes ethical and moral sense to release these women from prison though some form of leniency, it makes economic sense as well.[140]

Of all the possibilities to reduce the female prison population, especially with regard to imprisoned low-level or non-violent drug offenders, clemency is probably the only legal option that allows for a holistic review of the female offender's entire criminal case, including consideration of other influential aspects of her life, without constraints of legal technicalities that typically occur

138. *Id.* (emphasis added).
139. *Id.* at 27.
140. Liotta, *supra* note 59, at 260.

in the criminal justice system.[141] In other words, clemency is an extraordinary form of post-conviction relief that traditionally rests solely with the Governor, or other designated authority, without any strict accountability to other areas of government, including the criminal justice system.[142] As such, it is a unique remedy that can withstand close legal scrutiny.

The term "clemency" means "mercy" or "leniency," which has biblical roots in the Old Testament.[143] The legal definition of clemency is broad and it means the power of the governor or president "to pardon a person convicted of a criminal offense or to commute the related sentence."[144] By law, clemency includes a wide range of post-conviction remedies, including full, conditional, or partial pardons, commutation of sentences, and remissions of fines.[145] In its true sense, a pardon erases a conviction.[146] By contrast, a commutation reduces or cancels an offender's sentence after the offender has been convicted of a crime, and it usually reduces a sentence to time served.[147] Parole, on the other hand, is defined as early release of an offender, usually subject to certain conditions and the offender's supervision by the state corrections system for a certain length of time.[148]

Until President Obama's administration recently began talking seriously about granting clemency for federal low-level drug offenders in early 2015, very little attention was given to the idea of states providing leniency in drug sentences through the use of clemency power.[149] In fact, the very idea of releasing drug offenders back into society to perhaps resume their criminal drug or drug-related activity is counter-intuitive to our national psyche on the war on drugs.[150] Due to the current problem of prison overcrowding because of the incarceration of mostly low-level drug offenders, especially in female prisons, as well as the proven beneficial alternatives to incarceration like intensive treatment and close supervised probation, it is vital for states to look carefully at their prison populations and determine whether certain inmates, and their families and communities, would be better served if these inmates were released from prison.

In Kansas, clemency, through either an executive commutation of a sentence by the Governor or a special parole process described below, is the

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141. Jacobson & D'Orio, *supra* note 58, at 3.

142. *Id.* at 3–4.

143. *Clemency* , OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/clemency (last visited Oct. 23, 2015); *see also* Ronald S. Everett & Deborah Periman, *The Governor's Court of Last Resort: An Introduction to Executive Clemency in Alaska*, 28 ALASKA L. REV. 57, 58 (2011).

144. *What is Clemency?*, THE LAW DICTIONARY, http://thelawdictionary.org/clemency/ (last visited Oct. 23, 2015).

145. Everett & Periman, *supra* note 143, at 58.

146. *See id.*

147. *Id.* at 59.

148. *Parole*, THE FREE DICTIONARY, http://legal-dictionary.thefreedictionary.com/Parole (citing the *Law* definition) (last visited Oct. 5, 2015).

149. *See generally* Berman, *supra* note 23, at 60.

150. *Id.*

most appropriate post-conviction relief that should be considered for female drug offenders under certain circumstances. In Kansas, like a lot of states, only the Governor has the extraordinary power to grant executive clemency in all sentences.[151] Executive clemency is considered an extraordinary form of post-conviction relief and should not be looked upon as a substitute for parole, which is governed by law.[152] By statute, the three-member Prisoner Review Board ("PRB") established in 2011 reviews and processes all executive clemency applications and makes a recommendation to the Governor.[153] In recent years, there have been only a few recommendations for executive clemency forwarded to the Governor. For instance, in 2012, of the 28 clemency applications received by the PRB, only one application was favorably recommended to the Governor.[154] In 2013, there were 23 clemency applications, with only two forwarded to the Governor.[155] And in 2014, there were 18 applications, and none were favorably recommended to the Governor.[156]

As previously described, clemency is broadly defined. Parole is called "post-release supervision" if the offender was sentenced after July 1, 1993 under the state's sentencing guidelines.[157] The parole process in Kansas can be traced to as early as 1864, and it considers "good time credits" that the prisoner has earned while incarcerated.[158] Parole from the state's correction system has always been regarded as a privilege.[159] In today's parole process under either sentencing scheme, offenders are usually bound by certain conditions established by the PRB and supervision by the KDOC as part of their early release from prison.[160]

Over time, the Kansas paroling authority has evolved.[161] Besides processing executive clemency applications, the PRB, which serves at the pleasure of the Secretary of Corrections, has an important role in the two sentencing schemes that currently exist in Kansas.[162] The PRB establishes the

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151. Ashley Maxwell, *Clemency*, KAN. DEP'T OF CORR. (Sept. 22, 2015), https://www.doc.ks.gov/prb/clemency; *see* Jamison v. Flanner, 116 Kan. 624, 626 (1924); *see generally* Parker v. State, 247 Kan. 214 (1990).

152. Ashley Maxwell, *Process*, KAN. DEP'T OF CORR. (Jul. 06, 2015), http://www.doc.ks.gov/prb/process.

153. *Id.*

154. *Clemency*, *supra* note 151.

155. *Id.*

156. *Id.*

157. *Process*, *supra* note 152; Ashley Maxwell, *Prisoner Review Board*, KAN. DEP'T OF CORR. (Jul. 06, 2015), http://www.doc.ks.gov/prb.

158. Ashley Maxwell, *Overview*, KAN. DEP'T OF CORR. (Jul. 06, 2015), http://www.doc.ks.gov/prb/overview (describing the history of parole in Kansas); *Process*, *supra* note 152 (describing "good time credits").

159. Jamison v. Flanner, 116 Kan. 624, 626 (1924).

160. *Overview*, *supra* note 158; *see also* David, *Conditions*, KAN. DEP'T OF CORR. (June 11, 2015), http://www.doc.ks.gov/prb/conditions.

161. *Overview*, *supra* note 158.

162. *Prisoner Review Board*, *supra* note 157; *Overview*, *supra* note 158 (describing the PRB as serving at the pleasure of the secretary).

conditions of parole of eligible prisoners.[163] Under law, the PRB also has the power to revoke the parole of offenders who violate either their conditions of release or post-release supervision and the authority to discharge an offender early from supervision when appropriate.[164]

As a general matter, in Kansas, an inmate's parole from incarceration involves a detailed and sometimes convoluted process of gathering and computing information for eligibility.[165] Due to the unique characteristics and circumstances of many low-level female drug offenders, it makes sense to have a special clemency process other than the current executive clemency or parole processes in place for female inmates who qualify. The purpose of this special process would be to grant the female drug offender either early conditional or post-supervision parole, or complete discharge from her prison sentence should she be suitable for either remedy.

This proposed special clemency model follows the model from states that granted clemency to women who were convicted of murdering an abusive spouse or intimate partner in recognition of battered woman syndrome. During the 1990s, clemency for this special category of female prisoners gained momentum in such states as Ohio, Maryland, and Kentucky, where many battered women were granted early discharge from their prison sentences due to governors' recognition of their abuse.[166]

The model would consist of a procedure that allows a female inmate who petitions for clemency to give the full context of the drug or drug-related crime for which she has been sentenced, including the following: (1) the history and evidence of any domestic abuse she may have suffered, and whether the domestic abuse played a significant role in her criminalization; (2) whether she is addicted to drugs or alcohol and the extent of treatment that she has successfully completed and plans to continue if she is released; (3) whether the crimes for which she is incarcerated involved a victim, as well as the victim's position on clemency; (4) her total rehabilitation efforts and accomplishments while in prison; (5) whether she is a parent, and the extent of her role in her children's lives before she was incarcerated; (6) information about her family and other support systems in her community, including whether community partners or volunteers are willing to assist in mentoring the offender; and (7) consideration of all the facts that give full context to the female offender's involvement in committing the drug-specific or drug-related offense, including the offender's role in and motives for committing the crime.

Clemency, in some form, represents a distinct hope for justice for women who are incarcerated for drug crimes in which domestic violence, or other significant contributing factors, have played a key role in their incarceration.[167] It also allows for consideration of parenthood and the positive impact that early

163. *Id.*
164. *Id.*
165. *See Process*, *supra* note 152.
166. Liotta, *supra* note 59, at 261; *see also* Jacobsen & D'Orio, *supra* note 58, at 5–7.
167. Jacobsen & D'Orio, *supra* note 58, at 3.

release may have on children and families of female drug offenders who are released. As a matter of procedure, either the Governor would consider and grant the clemency application as a form of his executive clemency power, or the PRB could be vested by law with the authority to consider and grant early release of the female drug offender on its own without gubernatorial approval.

### *B. Institutionalized Drug Courts & Reform of Senate Bill 123*

Incarceration of drug-addicted offenders for convictions of either drug specific crimes, or for other crimes committed because of alcohol or drug addiction, has little deterrent effect.[168] In fact, drug-addicted offenders who have served either jail or prison time have the highest overall rates of recidivism.[169] In Kansas, the state's Sentencing Commission reports that in 2014, drug convictions comprised 31.3% of all convictions that resulted either in probation, jail, or prison sentences.[170] Of the criminal cases filed statewide, 4,285 of them were drug cases, 24.7% of which involved female offenders.[171] Most female drug offenders were convicted of drug possession or possession of drug paraphernalia.[172] By comparison, theft, the next highest category of criminal cases filed in Kansas comprised just 1,490 filings.[173] On a related note, of the 778 DUI cases filed in Kansas filed during 2014, female offenders were involved in 14.5% of those cases.[174]

In order to tackle what seems to be an incurable nationwide epidemic in which addicted persons commit not only drug crimes, but also other crimes because of their respective addictions, states across the country have turned to specialized courts, called "drug courts" for help.[175] This innovative alternative to the traditional criminal justice model recognizes that incarceration will not rehabilitate high-risk drug users and addicts.[176] Therefore, a different, more common sense approach, which involves extensive treatment and continuous oversight of the offender by the judge, is necessary to address criminality in order to prevent recidivism.[177]

Nationally, there are nearly 2,800 drug courts, which allow eligible drug-users or drug-addicted offenders to be sent to a specialized problem-solving court in lieu of a traditional criminal justice court.[178] Drug courts are operated

168. Springer, *supra* note 6, at 1366.

169. *Id.*

170. WILSON ET AL., KAN. SENTENCING COMM., FY 2014 ANNUAL REPORT 5 fig. 4 (2015), *available at* https://www.sentencing.ks.gov/docs/default-source/publications-reports-and-presentations/fy-2014-annual-report-whole.pdf.

171. *Id.* at 13 tbl.2.

172. *Id.* at 25.

173. *Id.* at 14 tbl.2.

174. *Id.*

175. Springer, *supra* note 6, at 1367.

176. *Id.* at 1367 fn. 12.

177. *See generally id.*

178. *About NADCP*, NAT'L ASS'N OF DRUG COURT PROF'LS, http://www.nadcp.org/learn/about-nacdcp (last visited Oct. 6, 2015).

differently than traditional criminal courts in that they combine close "judicial monitoring and effective treatment" to encourage "drug-using offenders to change their lives," hopefully without incarceration.[179] A key difference and benefit in drug court procedure is that it is not adversarial. Instead both the prosecutor and the defense attorney work together with other multi-disciplinary specialists, including corrections staff, medical personnel, and treatment counselors, to create a plan for the low-level addicted offender to be held accountable for his crime and still be rehabilitated, usually without incarceration.[180] Drug courts have the greatest impact for high-risk offenders who have poorer prognoses for success in the traditional criminal justice system.[181]

Nationwide, drug courts have been overwhelmingly successful in reducing recidivism.[182] Extensive studies of drug courts have shown significant reduction in re-arrest or reconviction rates by an average of nearly 8% to 26%.[183] Further, 78% of drug courts "were found to have significantly reduced overall crime, with the best drug courts reducing crime by as much as 35 to 40%."[184] Thus, reduction in both recidivism rates and overall crime through the use of drug courts equates to lower spending on prisons, as well as other enormous cost-savings for the state. Statistics have shown that for every "$1.00 invested in Drug Court, taxpayers save as much as $3.36 in avoided criminal justice costs alone."[185] Further, "[w]hen considering other cost offsets such as savings from reduced victimization and healthcare service utilization, studies have shown benefits range up to $27 for every $1 invested."[186]

There are currently ten Adult Drug Courts operating throughout Kansas in areas such as Kansas City, Wichita, Emporia, and Hutchinson.[187] Other than this data, there is not much public information about drug courts in Kansas or their success, except that they are administered through the state's Office of Judicial Administration. Due to little available information, it is not certain whether Kansas has reaped any of the much-publicized financial and societal benefits that has been touted nationally about drug courts. Presumably, drug courts in Kansas have been established in counties and judicial districts where there is a high concentration of drug-addicted offenders and where such courts would be beneficial and impactful to these communities. It is also unclear

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179. *Id.*

180. *See id.*

181. *See* Marlowe, *supra* note 6, at 3.

182. WILSON ET AL., *supra* note 170, at ix.

183. Marlowe, *supra* note 6, at 1.

184. *Id.* at 2.

185. *Drug Courts Work*, NAT'L ASS'N OF DRUG COURT PROF'LS, http://www.nadcp.org /learn/facts-and-figures (last visited Oct. 06, 2015).

186. *Id.*

187. *U.S. Drug Court Map*, NAT'L ASS'N OF DRUG COURT PROF'LS, http://www.nadcp.org /learn/find-drug-court (last visited Sept. 27, 2015). Nine drug courts are used in the following judicial districts: 3rd, 5th, 8th, 18th, 19th, 27th, 28th, 29th, and 31st. There is also one operated in Wichita Municipal Court.

whether the drug courts limit their jurisdiction to drug-only offenses, or whether the courts also have jurisdiction over DUI-related offenses.

The addition to the limited implementation of drug courts in Kansas, in 2003, the state changed its law on how certain drug-addicted offenders can be sentenced.[188] The law, Senate Bill 123, (SB123) works in tandem with drug courts and requires mandatory drug treatment under probationary supervision for certain drug offenders.[189] The great benefit of SB123 is that it allows courts to sentence drug-offenders to treatment and intensive probation, rather than prison.[190] But since the law has been in effect, SB123 has had some practical challenges that undermine its intent as an alternative to incarceration. For instance, it appears that SB123 lacks continuous judicial supervision of the drug offender, which is a key component of how drug courts assure successful oversight and accountability of drug-addicted offenders.[191] Second, the language of SB123 limits it applicability to a narrow class of drug offenders in that it applies only to those persons charged with drug-specific crimes.[192] In reality, drug-addicted offenders who are most in need of treatment likely commit other crimes other than drug possession, such as theft or assault, either in support of or because of their addictions. Third, SB123 has stringent admission and treatment requirements that ignore the nature of drug-addiction.[193] To illustrate this criticism, effective July 1, 2015, a cost cap on inpatient and residential treatment was reduced for SB123 offenders, creating more monetary restrictions on the funds necessary for drug treatment for offenders.[194]

The fact that Kansas has taken a positive step by implementing drug courts, which are a proven nationwide success, is commendable. If data can be gathered to show whether drug courts have been effective in the regions of Kansas where they operate, then hopefully the state can progress to an institutionalized network of drug and perhaps even DUI courts throughout the state. Moreover, SB123, a well-intentioned law that should complement the drug court procedure, needs extensive assessment to determine its efficacy. Importantly, in light of its practical limitations, without first fixing SB123, drug courts may be unable to provide the maximum benefits to drug offenders.

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188. *See* S.B. 123, 2003 Leg. Sess. (Kan. 2003), *available at* http://www.kansas.gov/government/legislative/bills/2004/123.pdf.

189. *See* KAN. SENTENCING COMM. & KAN. DEP'T OF CORR., 2003 – SENATE BILL 123 ALTERNATIVE SENTENCING FOR NON-VIOLENT DRUG POSSESSION OFFENDERS (2008), *available at* https://www.sentencing.ks.gov/docs/default-source/sb-123/sb-123---operations-manual.doc?sfvrsn=2 [hereinafter ALTERNATIVE SENTENCING].

190. *Id.* at 2-2 to 2-5.

191. Springer, *supra* note 6, at 1384–85.

192. *See e.g.*, *id.* at 1379.

193. *Id.* at 1379–82; *see also* ALTERNATIVE SENTENCING, *supra* note 189, at 2-4 to 2-5.

194. *Id.*

### C. *More Prison Programs, Including Programs That Are Gender Specific & Liberal Prison Visitation Policies For Children*

The current Kansas Secretary of Corrections, Ray Roberts, appears to be committed to offender programming and reducing recidivism. He stresses that successful programs for inmates that are aimed at "cognitive skill building, substance abuse, family issues, domestic violence, educational services and job readiness" are key to reducing recidivism.[195] A reduction in recidivism will significantly reduce the financial costs of incarceration, and it will have an overall positive and long-term impact on other tangible and non-tangible costs to taxpayers, society, as well as the offender and his family.

After facing a 50% reduction in funds for offender programming in 2009 and 2010, the KDOC was allocated approximately $8 million from the Kansas Legislature in 2013 – $5 million for offender programming and $3 million to address behavioral health issues, which include both substance abuse and mental illness.[196] The KDOC has used this allotment of funds to enhance offender programs in the state's prisons that were lacking after suffering a dramatic funding loss only a few years ago.[197]

Notwithstanding the recent additional state funding for offender programs, tapping in to and maximizing the benefits of community-based and volunteer programs such as the Mentoring 4 Success (M4S) program is tantamount to released offender success.[198] Since the start of the M4S program in 2011, there have been over 4,500 mentor matches for both male and female inmates. Early statistics gathered about the program show that released offenders matched with a mentor have an 8.7% recidivism rate compared to 20.7% of the overall population.[199] The program involves community volunteers who mentor inmates and provide many levels of support in practical areas of life as offenders near release from prison.[200] For example, a mentor may help an inmate find suitable housing or employment for when the offender is released. Importantly, the mentor provides moral support during this critical time as the offender transitions to the outside world. Not all offenders are eligible to participate in M4S but certainly low-level or non-violent drug offenders are ideal candidates to participate because of the low safety risk they pose to community volunteers who visit the prison as well as the importance of mentorship drug offenders need for post-release success.

KDOC currently offers a small number of programs for inmates that are focused on children and families.[201] At TCF, there is a family orientation class, a family transition class, and a family workshop for female inmates, as well as a

195. ROBERTS ET AL., *supra* note 1 at 2.
196. *Id.*
197. *See generally id.* at 3.
198. *Id.* at 3.
199. *Id.*
200. *Id.*
201. *See* David Cook, *Department Based Resources*, KAN. DEP'T OF CORR. (Dec. 17, 2012), http://www.doc.ks.gov/reentry/family-services/department-based-services/.

family-oriented class called "Active Parenting Now" which teaches inmates "how to develop courage, responsibility, and character in their children."[202] It is unclear whether any of these programs directly involve the offender's family so that there is at least periodic and continuous interaction between the offender and her family, which helps maintain strong family connections.

It has been said that "[w]hen moms go to prison, kids go to prison too."[203] The Kansas corrections system is in dire need of more gender-responsive incarceration policies and programs that take into account the fact that women are most often the primary caregivers of their children before they are arrested and incarcerated for their crimes.[204] During incarceration of the parent, children need the consistency of responsible and loving adults who will provide the necessary care and structure that children need, especially because incarcerated parents are absent from their children's daily lives. Also of vital importance is for children to stay connected to their incarcerated mother by having phone and mail contact, exercising frequent in-person visitation with their mothers, and participating in as many pre-release family programs or services that involve their incarcerated parents.

Missing from the offender program menu for female inmates housed at TCF are liberal visitation policies, and intensive programs and services, which involve direct participation of female inmates with their children and allow the female offender to remain in close connection with her family while she is incarcerated. According the KDOC Internal Management Policy & Procedure manual, which covers the administrative rules that apply to the state's prisons, the inmate's visitation with anyone is considered a privilege, not a right.[205] Each correctional facility, including TCF, is charged with implementing its own visitation procedures.[206] Under KDOC regulations, children of inmates are not given any special consideration for visitation privileges and are subject to the rules that apply to all visitors.[207]

Unfortunately, KDOC regulations deny any visitation to inmates' children for the first several weeks of incarceration, a time in which the inmate goes through the reception and diagnostic unit (RDU) process. During the RDU process, the inmate is assessed and evaluated in all areas including medical and mental health, and the inmate's visitor list is limited only to attorneys, clergy, and law enforcement.[208] While in the RDU phase, the female inmate may not

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202. *Id.*

203. Liotta, *supra* note 59, at 257.

204. *Id.* at 259.

205. *See* KAN. DEP'T OF CORR., INTERNAL MANAGEMENT POLICY AND PROCEDURE 10-113, at 1–2 (2013), *available at* http://www.doc.ks.gov/facilities/kdoc-policies/AdultIMPP/chapter-10/10-113/view [hereinafter IMPP].

206. *Id.*

207. *See id.* at 2. KDOC's policy requires Kansas facilities to adopt and publish their special rules for children visitors (included in the facility's entire visitation policy), but the policy makes no distinction between children of inmates and other children.

208. KAN. DEP'T OF CORR., KDOC FAMILY ORIENTATION MANUAL 2009 at 4, 11 [hereinafter FAMILY ORIENTATION]; *see also* IMPP, *supra* note 205, at 2.

be allowed to visit with her children or other family for up to several weeks.[209] This traumatic separation due to parental incarceration is stressful to all involved, especially young children whose mothers typically have been their primary caregivers until immediately after arrest or incarceration, and who may be unable to visit their mother for a long time.

According to the TCF Visitor Handbook, once the inmate is eligible to receive visitors, the inmate can apply for visitor privileges and provide the names of up to 20 persons to be put on their approved visitor list.[210] Children who are under the age of 18 must be accompanied by an adult who has legal responsibility for them.[211] Hours for visitation are limited to weekend day visits, as well as a few holidays such as Christmas and Thanksgiving.[212] During the visits, the female inmate is allowed to have physical contact with her children and visits can take place either inside the prison or on the outside grounds of the facility on a first-come first-served basis.[213]

In order to assure that children maintain a close relationship with their incarcerated mother, TCF should liberalize its visitation policy for low-level or non-violent drug offenders so that children can have meaningful in-person access to their mothers during the RDU process and at additional times beyond those currently allowed by TCF. Importantly, because of the nature of their crimes, these women typically should not pose a security risk to either their children or the prison itself. Therefore, the interests of both the female inmates and their children are best served by this accommodation.

Another progressive idea for a gender-responsive prison program in Kansas is to provide a more comprehensive child-friendly visitation program that allows children to have extended overnight visits with their mothers. The New York state prison system has such a program for female inmates and their children called the "Family Reunion Program," and similar programs exist in at least five other states.[214] The Bedford Hills Correctional Facility in New York, which hosts the model program in the country, allows minor children of female inmates to spend up to two full days inside the prison facility with their mothers in special housing that is separate from the rest of the prison population.[215] The Bedford Hills prison also has a program whereby incarcerated mothers and their newborn babies are provided special services and accommodations to allow the bonding process to occur for a certain time period.[216] These model programs, allowing for liberal visitation policies and programming for female inmates and their children, facilitates easy access and close connections between incarcerated

209. FAMILY ORIENTATION, *supra* note 208, at 3.

210. TOPEKA CORR. FACILITY, VISITOR-INFORMATION 1 (2009), *available at* http://www.doc.ks.gov/facilities/tcf/visit-1/handbook.

211. *Id.* at 2.

212. *See id.* at 1.

213. *See id.* at 1,4.

214. Boudin, *supra* note 84, at 99–100.

215. *Id.* at 100.

216. Nicole S. Mauskoph, Note, *Reaching Beyond the Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN'S L.J. 101, 107–110 (1998).

mothers and their children. The goal of these child-focused programs is to "preserve, enhance, and strengthen family ties that have been disrupted as a result of incarceration."[217]

The KDOC is in a unique position to consider at least the family reunion overnight program for older children in light of the fact that all but a few female inmates are housed at TCF. Moreover, due to the fact that drug offenders make up approximately one-third of the state's female prison population, such a program could have significant impact on the rates of recidivism, as well as reduce the amount of taxpayer money spent on other areas of the state budget that are affected by incarceration, such as social services. Thus, liberal visitation policies, and programs and services that benefit children of female inmates, should seriously be considered because they will yield positive benefits for the offender and all persons involved with the offender.

## VI. CONCLUSION

Being tough on crime and vigilant in the pursuit of justice only goes so far. Whether for fiscal, or ethical and moral reasons, prison reform in Kansas should be considered for low-level or non-violent female drug offenders especially because drug offenders comprise one-third of the state's female prison population. Acceptance that gender bias exists in how women are and have been treated by the criminal justice system and recognition that gender-specific factors such as domestic abuse, parenthood of minor children, and drug and alcohol abuse as special considerations which affect female criminalization are critical to analyzing and determining how best to address reform for women who are convicted of drug or drug-related offenses.

If the purpose of a corrections system is to deter or fix illegal behavior, then Kansas needs to sentence female drug offenders appropriately with consideration of alternatives to incarceration and length of sentence. It should consider leniency or clemency when appropriate, and it must provide more effective pre-release programs that will allow the female offender to return to society and make a better life for herself and her children without the risk of recidivism.

To the extent state financial resources or other funds are available, such monies should be spent on pre-release programs for low-level or non-violent female drug offenders, not violent offenders as Secretary of Corrections Roberts suggests in the KDOC 2014 annual report. Channeling resources to help women who are drug offenders, who have minor children, and whose addiction is addressed through effective treatment programs will provide the most benefits to these offenders and their families, as well as to the communities in Kansas where these offenders will live when they are released. Perhaps someday the KDOC will be able to follow through on and implement the many now-aspirational goals it set out to achieve only about 10 years ago, along with other gender-specific policies and programs that benefit female drug offenders.

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217. Boudin, *supra* note 84, at 100.

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