

## The High Cost of Incarceration: A Call for Gender-Responsive Criminal Justice Reforms for Women and Their Children

DONA PLAYTON<sup>†</sup>

### INTRODUCTION\*

[W]omen’s crime is different from men’s crime. Women commit different crimes than men, generally nonviolent crimes. Their life circumstances are different from the life circumstances of men as are the factors that motivate them to break the law. Family ties play a more significant role in women’s offenses, in the likelihood that they will recidivate, and in their chances of rehabilitation. Because family obligations fall disproportionately on women in this society, their imprisonment has a disproportionate impact on the children in their care.<sup>1</sup>

Today, women are the fastest-growing segment of the United States prison population.<sup>2</sup> An often-overlooked consequence of the skyrocketing rate of incarcerated women is its impact on the children they leave behind. The number of children with a parent in prison is 2.7 million,<sup>3</sup> or roughly one in every twenty children in the United States. This number equates to at least one child in every classroom with a parent in prison or jail.<sup>4</sup> Thousands more children are affected when considering parental experiences of arrest, probation, and parole. Though there are parallels between women’s and men’s incarceration, there are many additional hardships that incarcerated

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<sup>†</sup> Dona Playton is an Associate Professor at the University of Wyoming College of Law and a Municipal Court Judge. She is also the director of the law school’s Family and Child Legal Advocacy Clinic. She wishes to thank Jeremy Meerkreebs and Jaelyn Waara for their grit and assistance with research for this article.

\* “Gender” in this article refers to a “cisgender” person whose sense of personal identity and gender corresponds with their birth sex. The author recognizes that there are a variety of gender identities in our society including non-binary, genderqueer, and transgender identities. Additional research relating to the experiences of non-cisgender primary caretakers of children in the criminal justice system is beyond the scope of this article but should be undertaken in future research and articles.

<sup>1</sup> Nancy Gertner, *Women and Sentencing*, 57 AM. CRIM. L. REV. 1401, 1402 (2020) (quoting Nancy Gertner, *Women Offenders and the Sentencing Guidelines*, 14 YALE J.L. & FEMINISM 291, 293 (2002)).

<sup>2</sup> See *Facts About the Over-Incarceration of Women in the United States*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/facts-about-over-incarceration-women-united-states> (last visited Mar. 1, 2021).

<sup>3</sup> Lindsey Cramer et al., *Parent-Child Visiting Practices in Prisons and Jails*, URB. INST. (2017), [https://www.urban.org/sites/default/files/publication/89601/parent-child\\_visiting\\_practices\\_in\\_prisons\\_and\\_jails\\_0.pdf](https://www.urban.org/sites/default/files/publication/89601/parent-child_visiting_practices_in_prisons_and_jails_0.pdf).

<sup>4</sup> Bryan L. Sykes & Becky Pettit, *Measuring the Exposure of Parents and Children to Incarceration*, in HANDBOOK ON CHILDREN WITH INCARCERATED PARENTS 11–23 (J. Mark Eddy & Julie Poehlmann-Tynan eds., 2019) (about 3.5% of U.S. children under age 18—or one child in every classroom of about 29 students—had a parent behind bars in 2015, mainly their fathers.).

mothers and their children face.<sup>5</sup> This Article explores those hardships and proposes reforms that will mitigate the damages and prevent future harm.

Part I of this Article begins by looking at the current level of mass incarceration<sup>6</sup> in the United States in tandem with the economic and social costs of the number of incarcerated individuals. Many efforts are underway to reduce the prison population and control the collateral consequences of existing policies. The need for evidence-based solutions that account for gender differences is critical to the national conversations on reforms.

Part II explains the need for gender-informed policy and reforms. As the number of women incarcerated continues to rise, so do efforts to explain the reasons and measure the consequences. Since the early 1980s, the casualty of incarcerating women from the war on drugs has become evident. As the rate of incarcerated women has climbed sharply, so has the number of children separated from their primary caregivers. While most of the research focusing on incarcerated parents continues to be on fathers, incarcerated mothers are more likely to have been their children's primary caretakers.<sup>7</sup> The resulting research thus fails to account for the disparate impacts on children when their mothers are incarcerated.<sup>8</sup> Though statistics demonstrate that women of color are disproportionately overrepresented in the criminal justice system,<sup>9</sup> this Article focuses on the intersections of incarcerated women's shared experiences as mothers and primary caretakers of dependent children.<sup>10</sup>

Unfortunately, there is a lack of comprehensive data distinguishing between maternal and paternal incarceration and the impacts on children; therefore, many of the sources cited throughout will appear outdated but, more likely, are the most recent data available for the various premises discussed.<sup>11</sup> There are profound consequences of disregarding gender in

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<sup>5</sup> See LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON & THEIR MINOR CHILDREN (2010) (demonstrating the most recent Bureau of Justice Statistics report that compares incarcerated parents of minor children by gender); see also Hayli Millar & Yvon Dandurand, *The Best Interests of the Child and the Sentencing of Offenders with Parental Responsibilities*, 29 CRIM. L.F. 227, 235–36 (2018).

<sup>6</sup> Discussion and analysis on incarceration in the United States generally focuses on state prisons, federal prisons, and local jails.

<sup>7</sup> GLAZE & MARUSCHAK, *supra* note 5, at 5 (mothers in state and federal prisons were almost three times more likely than fathers to report they had provided most of the daily care for their children).

<sup>8</sup> Dawn K. Cecil, et al., *Female inmates, family caregivers, and young children's adjustment: A research agenda and implications for corrections programming*, 36 J. CRIM. JUST. 513, 513 (2008); see also Dan Levin, *As More Mothers Fill Prisons, Children Suffer 'A Primal Wound'*, N.Y. TIMES (Dec. 28, 2019) ("The toll it takes on children is often far more severe when the inmate is their mother. More than 60 percent of women in state prisons, and nearly 80 percent of those in jail, have minor children, and most are their primary caretaker."), <https://www.nytimes.com/2019/12/28/us/prison-mothers-children.html>.

<sup>9</sup> See *Incarcerated Women and Girls*, THE SENT'G PROJECT 2 (Nov. 24, 2020) (citing PRISONERS SERIES, WASH., DC: BUREAU OF JUST. STAT.), <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf>.

<sup>10</sup> Keva M. Miller, et seq., *Variations in the Life Histories of Incarcerated Parents by Race and Ethnicity: Implications for Service Provision*, 87 SMITH COLL. STUD. SOC. WORK 59, 69–70 (2017); see also GLAZE & MARUSCHAK, *supra* note 5, at 5.

<sup>11</sup> See Lauren G. Beatty & Tracy L. Snell, *Profile of Prison Inmates, 2016*, BUREAU OF JUST. STAT. 19 (2021), <https://bjs.ojp.gov/content/pub/pdf/ppi16.pdf> (this report refers to a survey of prison inmates

policy discussions and implementation, including skyrocketing rates of incarcerated women and irreparable harm to millions of children.

Part III points out significant differences in risk factors for children with mothers who were their primary caretakers prior to incarceration, including financial insecurity, interruptions in caregiving during the parent's incarceration, adverse childhood experiences, and loss of contact with parents in prison.<sup>12</sup> The trauma and harm children experience from parental incarceration are often more severe and disruptive when their mothers are incarcerated.<sup>13</sup> A gender-informed understanding of the consequences for incarcerated mothers and their dependent children is critical to accounting for and explaining the reforms necessary to mitigate the harm.

Section IV is perhaps the best example of how incarceration sets mothers up to have parental rights to their children permanently terminated. While the stated purpose of the 1997 Adoption and Safe Families Act (ASFA) was to prevent children from languishing in foster care by making them eligible for adoption,<sup>14</sup> the result for incarcerated parents, especially those with sentences over fifteen months, is often the termination of their parental rights.<sup>15</sup> Without the resources and services necessary to maintain contact and a relationship with children, termination of parental rights constitutes an often-overlooked enhanced penalty for incarcerated mothers.<sup>16</sup>

Part V provides a brief history of sentencing policies in federal and state courts and notes the disproportionate impacts on women and children. As a result of efforts to eliminate discrimination, judicial discretion in sentencing decisions was significantly restricted. The focus of criminal sentencing shifted from a rehabilitative model to one of law and order. As a result, criminal justice policies and efforts fail to anticipate predictable and disparate impacts on women when implemented. Today, the United States holds the highest rate of incarcerated women in the world.<sup>17</sup> Despite the numbers, there is no corresponding increase in women's criminality; instead,

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from 2016 that does not differentiate between mothers, fathers, and stepparents.); *see also* GLAZE & MARUSCHAK, *supra* note 5, at 5.

<sup>12</sup> Julie Poehlmann, *Children of Incarcerated Mothers and Fathers*, 24 WIS. J.L. GENDER & SOC'Y 331, 332–33 (2009) (citing Danielle H. Dallaire, *Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families*, 56 FAM. REL. 440, 444, 448–49 (2007)).

<sup>13</sup> *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. 348, 350 (2007).

<sup>14</sup> Adoption and Safe Families Act of 1997, 42 U.S.C. 1305, Pub. L. 105-89, 111 Stat. 2115 (1997) (the stated purpose of the Adoption and Safe Families Act of 1997 signed into law on November 19, 1997, was to “promote the adoption of children in foster care.”).

<sup>15</sup> Viki Klee, *Information Packet: ASFA*, NAT'L RESOURCE CTR. FOR FOSTER CARE & PERMANENCY PLANNING 2, 6 (2002).

<sup>16</sup> KRISTEN S. WALLACE, *THE ADOPTION AND SAFE FAMILIES ACT: BARRIER TO REUNIFICATION BETWEEN CHILDREN & INCARCERATED MOTHERS 2* (Lyn Ariyakulkan ed., 2012).

<sup>17</sup> Aleks Kajstura, *States of Women's Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (2018), <https://www.prisonpolicy.org/global/women/2018.html> (indicating that while only 4% of the world's female population lives in the United States, the United States accounts for over 30% of the world's incarcerated women); *see also* Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, in GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 1 (Barbara E. Bloom ed., Carolina Academic Press 2003).

the rise in women in prisons and jails is directly related to underlying criminal justice policies.<sup>18</sup> Unfortunately, shifting the focus of sentencing systems to the collateral costs of criminal sentences on women and children has been an uphill battle. If the criminal justice system focuses on men, sentencing policies will continue to have disproportional impacts on women and their children.<sup>19</sup>

Before 1970, the sentencing system in the United States focused on tailoring each sentence to the specific circumstances and needs of the offender, with rehabilitation being the primary aim of punishment.<sup>20</sup> The “war on drugs” and “tough on crime” initiatives of the 1970s and 1980s spurred the movement away from consideration of individual needs and toward harsher sentences with specific timeframes. The result is the patchwork of sentencing policies in the United States today. Several scholarly articles advocate for the overhaul of current federal and state sentencing policies that would then be improved or replaced by the requirement to consider family responsibilities at sentencing.<sup>21</sup> Unfortunately, there has been little progress in the past fifty years toward widespread policy changes that help incarcerated mothers and their children. This Article highlights efforts to allow and encourage judges to resume consideration of the impact and collateral consequences on the mother, her children, and her community as part of sentencing. Since most women are incarcerated in state prisons and jails,<sup>22</sup> this Article highlights innovative state and local reforms and programs that consider family responsibilities and alternatives to incarceration at sentencing.

Part VI of this Article sets forth many of the benefits of and barriers to accessible prison visitation. The evidence confirms that policies that encourage parent-child contact offer many benefits and can be implemented without jeopardizing prison safety or security.<sup>23</sup> For instance, several studies conclude that increased prison visitation opportunities can improve inmate behavior by reducing disruptive and violent conduct in institutional

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<sup>18</sup> *Id.*

<sup>19</sup> Barbara Bloom et al., *Gender-Responsive Strategies: Research, Practice, and Guiding Principles for Women Offenders*, U.S. DEPT. OF JUST., NAT’L INST. FOR CORR. 1, 4–8 (2003), [https://www.prisonpolicy.org/scans/NIC\\_018017.pdf](https://www.prisonpolicy.org/scans/NIC_018017.pdf); see also Michal Gilad & Tal Gat, *U.S. v. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women*, 36 N.Y.U. REV. L. & SOC. CHANGE 371, 380 (2013).

<sup>20</sup> Michael Tonry, *Sentencing in America, 1975-2025*, 42 CRIME & JUST. 141, 141–42 (2013).

<sup>21</sup> See Emma DeCourcy, *The Injustice of Formal Gender Equality in Sentencing*, 47 FORDHAM URB. L.J. 395 (2020); Lauren Feig, *Breaking the Cycle: A Family Focused Approach to Criminal Sentencing in Illinois*, UNIV. CHI. (2015); Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 NW. J. L. & SOC. POL’Y. 24 (2013); Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 700 (2006); 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. 3 (1993).

<sup>22</sup> *Incarcerated Women and Girls*, *supra* note 9, at 1.

<sup>23</sup> BRYCE PETERSON ET AL., MODEL PRACTICES FOR PARENTS IN PRISONS AND JAILS: REDUCING BARRIERS TO FAMILY CONNECTIONS, BUREAU OF JUSTICE ASSISTANCE & THE NATIONAL INSTITUTE OF CORRECTIONS 1 (2019), <https://s3.amazonaws.com/static.nicic.gov/Library/033094.pdf>.

settings.<sup>24</sup> There is also evidence suggesting offenders are less likely to reoffend after release when familial bonds are maintained during incarceration.<sup>25</sup> Thus, a comprehensive approach would recognize that accessible prison visitation is beneficial for corrections staff, incarcerated parents, and children.

In Part VII, this Article explains the limitations of court challenges to prison visitation policies. The overall benefits of prison visitation outweigh the costs.<sup>26</sup> Yet, recognition of the benefits of prison visitation by prison administrators is crucial to overcoming the status quo of restrictive visitation policies and procedures. Courts give considerable deference to prison officials and their decisions, even those that may infringe on inmates' constitutional rights, so long as they are "reasonably related to legitimate penological interests."<sup>27</sup> The 2003 United States Supreme Court decision in *Overton v. Bazzetta*<sup>28</sup> demonstrates the difficulty of challenging prison visitation policies on constitutional grounds. The interests espoused by correctional institutions will almost always override any infringement on an incarcerated parent's rights or those of their children.

Part VIII offers solutions for improving meaningful access to visitation for children other than challenging prison policies in court. Tangible changes to reduce barriers will only happen when prison officials and others within the correctional system make the necessary programmatic and policy decisions to improve parent-child communications and contact.<sup>29</sup> In 2019, the Bureau of Justice Assistance (BJA) and the National Institute of Corrections (NIC) collaborated with the Urban Institute and Community Works West to roll out a set of model practices to facilitate parent-child communication and contact during parental incarceration. This Article highlights some of the model practices that are available for correctional facilities to implement. It also provides examples of states and facilities that have employed innovative programs to facilitate prison visitation.

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<sup>24</sup> See Joshua C. Cochran, *The Ties That Bind or the Ties That Break: Examining the Relationship Between Visitation and Prisoner Misconduct*, 40 J. CRIM. JUST. 433 (2012); Kristie R. Blevins et al., *A General Strain Theory of Prison Violence and Misconduct: An Integrated Model of Inmate Behavior*, 26 J. CONTEMP. CRIM. JUST. 148, 151–52 (2010); Chesa Boudin et al., *Prison Visitation Policies: A Fifty-State Survey*, 32 YALE L. & POL'Y REV. 149, 152 (2013) (citing GARY C. MOHR, AN OVERVIEW OF RESEARCH FINDINGS IN THE VISITATION, OFFENDER BEHAVIOR CONNECTION, OH. DEP'T OF REHAB & CORR. (2012)).

<sup>25</sup> See Meghan M. Mitchell, et al., *The Effect of Prison Visitation on Reentry Success: A Meta-Analysis*, 47 J. CRIM. JUST. 74 (2016); Karen De Claire & Louise Dixon, *The Effects of Prison Visits from Family Members 74 on Prisoners' Well-Being, Prison Rule Breaking, and Recidivism: A Review of Research since 1991*, 18 TRAUMA VIOLENCE ABUSE 185 (2017); Daniel P. Mears et al., *Prison Visitation and Recidivism*, 29 JUST. Q. 888, 888, 893–94 (2012).

<sup>26</sup> Mitchell, et al., *supra* note 25, at 81.

<sup>27</sup> *Turner v. Safley*, 482 U.S. 78, 84–85 (1987) (internal quotation marks omitted) (recognizing the level of expertise needed to run a prison).

<sup>28</sup> *Overton v. Bazzetta*, 539 U.S. 126 (2003).

<sup>29</sup> PETERSON ET AL., *supra* note 23, at 4.

## I. THE HIGH COST OF INCARCERATION IN THE UNITED STATES

Although an incarceration-based punishment system has existed in the United States for over two centuries, mass incarceration is a relatively recent phenomenon.<sup>30</sup> Imprisoning people convicted of crimes has become the default response in this country, with 70% of convictions resulting in confinement.<sup>31</sup> There are approximately 2.3 million people in prisons and jails in the United States;<sup>32</sup> federal, state, and local governments supervise another 4.5 million adults on parole or probation.<sup>33</sup> These numbers translate to about one in one hundred American adults behind bars, and about one in thirty-three American adults under some form of correctional control.<sup>34</sup> Today, the United States maintains the highest rates of incarceration in the world.<sup>35</sup> The number of women incarcerated in the United States has grown at a rate twice that of men's incarceration.<sup>36</sup>

The ideological underpinnings of incarceration have historically relied on an empirical perspective that measures the benefits of imprisonment by the amount of crime prevented.<sup>37</sup> The reality, however, is that neither the crime rate nor criminal deterrence decreased in correlation with the skyrocketing rates of incarceration in the United States.<sup>38</sup> Instead, the high incarceration rates have been considerably costly, particularly on state governments who bear the bulk of the fiscal burden.<sup>39</sup> According to the Center on Budget and Policy Priorities, corrections spending is the third-largest spending category for most states, behind education and health care.<sup>40</sup> The annual economic burden on the United States is also substantial. The United States spends more than \$80 billion each year for the nearly 2.3

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<sup>30</sup> See Melissa S. Kearney et al., *Ten Economic Facts about Crime and Incarceration in the United States*, THE HAMILTON PROJECT (May 1, 2014), [https://www.hamiltonproject.org/assets/legacy/files/downloads\\_and\\_links/v8\\_THP\\_10CrimeFacts.pdf](https://www.hamiltonproject.org/assets/legacy/files/downloads_and_links/v8_THP_10CrimeFacts.pdf).

<sup>31</sup> Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (2018), <https://www.prisonpolicy.org/global/2018.html>.

<sup>32</sup> Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

<sup>33</sup> DANIELLE KAEBLE, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS PROBATION AND PAROLE IN THE UNITED STATES, 2016 1 (2018) ("An estimated one in fifty-five adults in the United States were under community supervision at year-end 2016. Persons on probation accounted for the majority (81%) of adults under community supervision.").

<sup>34</sup> *One in 100: Behind Bars in America 2008*, THE PEW CHARITABLE TRS. (2008), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2008/one20in20100pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2008/one20in20100pdf).

<sup>35</sup> The United States has the highest prison population rate in the world at 707 per 100,000 of the national population. See NATIONAL RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 13, 33, 68 (Jeremy Travis et al. eds., 2014) [hereinafter GROWTH OF INCARCERATION IN THE U.S.].

<sup>36</sup> Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE, (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html>.

<sup>37</sup> See Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71 (2019).

<sup>38</sup> GROWTH OF INCARCERATION IN THE U.S., *supra* note 35, at 9.

<sup>39</sup> Kearney et al., *supra* note 30, at 12.

<sup>40</sup> Michael Mitchell & Michael Leachman, *Changing Priorities: State Criminal Justice Reforms and Investments in Education*, CTR. ON BUDGET POL'Y PRIORITIES 1 (Oct. 28, 2014), <https://www.cbpp.org/research/changing-priorities-state-criminal-justice-reforms-and-investments-in-education>.

million people incarcerated.<sup>41</sup> According to the Institute for Advancing Justice Research and Innovation, if essential social costs to incarcerated persons, families, children, and communities are considered, the cost of incarceration in the United States is closer to \$1.2 trillion per year.<sup>42</sup>

## II. THE NEED FOR GENDER INFORMED CRIMINAL JUSTICE POLICIES AND REFORMS

Recognition of the enormous costs of incarceration has triggered national discussion around criminal justice reforms to reduce the number of people incarcerated and scale back the collateral consequences of a conviction.<sup>43</sup> To make real progress, efforts to reform the criminal justice system in the United States must address the underlying forces that shaped the current policies. Such efforts must also analyze the actual costs, including humanitarian and social costs, perpetuated by underlying policies. For example, trends in women’s incarceration can be directly traced to longer sentences, including mandatory minimum sentences for nonviolent drug offenses, and sentencing systems that eliminate or reduce judicial discretion.<sup>44</sup> Policies resulting from the war on drugs are possibly the best example of a failure to account for foreseeable consequences:

[n]o issue has had more impact on the criminal justice system in the past three decades than national drug policy. The “war on drugs,” officially declared in the early 1980s, has been a primary contributor to the enormous growth of the prison system in the United States during the last quarter-century and has affected all aspects of the criminal justice system and, consequently, American society.<sup>45</sup>

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<sup>41</sup> Kearney et al., *supra* note 30, at 2; *see also* Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL’Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>; *Cf.* Neil Schoenherr, *Cost of Incarceration in the U.S. More Than \$1 Trillion*, THE SOURCE, WASH. UNIV. ST. LOUIS (Sept. 7, 2016), <https://source.wustl.edu/2016/09/cost-incarceration-u-s-1-trillion/> (referring to Michael McLaughlin, et al., *The Economic Burden of Incarceration in the U.S.* 2–4 (Concordance Inst. for Advancing Soc. Just., Working Paper No. CI072016 July 2016), <https://joinnia.com/wp-content/uploads/2017/02/The-Economic-Burden-of-Incarceration-in-the-US-2016.pdf> (“The \$80 billion spent annually on corrections is frequently cited as the cost of incarceration, but this figure considerably underestimates the true cost by ignoring important social costs.”)).

<sup>42</sup> *See* Schoenherr, *supra* note 41.

<sup>43</sup> Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2019*, THE SENT’G PROJECT 1–4 (Jan. 17, 2020), <https://www.sentencingproject.org/wp-content/uploads/2020/01/Top-Trends-in-State-Criminal-Justice-Reform-2019.pdf>.

<sup>44</sup> *See* Wendy Sawyer, *The Gender Divide: Tracking Women’s State Prison Growth*, PRISON POL’Y INITIATIVE 6–7 (Jan. 9, 2018), [https://www.prisonpolicy.org/reports/women\\_overtime.html](https://www.prisonpolicy.org/reports/women_overtime.html).

<sup>45</sup> Marc Mauer & Ryan S. King, *A 25-Year Quagmire: The War on Drugs and Its Impact on American Society*, THE SENT’G PROJECT 1 (2007), <https://www.sentencingproject.org/wp-content/uploads/2016/01/A-25-Year-Quagmire-The-War-On-Drugs-and-Its-Impact-on-American-Society.pdf>.

Incarcerated women of all races and ethnicities are also more likely than their male counterparts to report having minor children.<sup>46</sup> Thus, Women and children have been hit particularly hard by criminal justice policies emphasizing increased mandatory penalties for low-level drug offenses.<sup>47</sup> Before 1980, women were less than 5% of all prisoners.<sup>48</sup> Now, females account for approximately one of every fourteen prisoners in the United States.<sup>49</sup> Since the inception of the war on drugs, the number of women incarcerated in the United States has increased by over 700%.<sup>50</sup> While the dramatic rise of female offenders entering the corrections system has enhanced scholarly research on the causes and consequences of the increases, the disparate impacts of policies and reforms continue today.

Women are considerably more likely to be in prison for a drug conviction than men.<sup>51</sup> According to the Drug Policy Alliance, more than 61% of women in federal prison are there for nonviolent drug offenses.<sup>52</sup> Consequently, women of color have been disproportionately impacted by harsh drug policies. Drug use occurs at similar rates across racial and ethnic groups, but racialized women are far more likely to be criminalized for drug law violations than white women.<sup>53</sup> The systemic criminal justice reforms necessary to tackle mass incarceration require an acceptance of the realities of inherent race and gender disparities.

Women in state prisons are also more likely than men to be incarcerated for a drug or property offense. For example, 26% of women compared to 13% of men in prison have been convicted of a drug offense.<sup>54</sup> Almost 25% of incarcerated women have been convicted of a property crime, compared to 16% among incarcerated men.<sup>55</sup> At the end of 2018, more female offenders were serving time in state prisons for drug (26%) or property (24%) offenses than males (13% drugs, 16% property).<sup>56</sup>

Over the decades, women have remained far less likely to be convicted of violent offenses than men and continue to be less threatening to the safety of the community.<sup>57</sup> Instead, the offenses women commit are often motivated by socioeconomic factors. Furthermore, “[m]any of the violent crimes committed by women are against a spouse, ex-spouse, or partner, and

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<sup>46</sup> *Id.* at 13.

<sup>47</sup> *Id.*

<sup>48</sup> Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL’Y REV. 133, 133 (1999) (citing Elizabeth F. Moulds, *Chivalry and Paternalism: Disparities of Treatment in the Criminal Justice System*, in WOMEN IN THE CRIMINAL JUSTICE SYSTEM 277, 286–87 (Susan Datesman & Frank Scarpitti eds., 1980)).

<sup>49</sup> Sawyer, *supra* note 44.

<sup>50</sup> *Incarcerated Women and Girls*, *supra* note 9, at 1.

<sup>51</sup> *Women, Prison, and the Drug War*, THE DRUG POL’Y ALL. (2018), [https://drugpolicy.org/sites/default/files/women-and-the-drug-war\\_0.pdf](https://drugpolicy.org/sites/default/files/women-and-the-drug-war_0.pdf).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Incarcerated Women and Girls*, *supra* note 9, at 4.

<sup>55</sup> *Id.*

<sup>56</sup> E. Ann Carson, *Prisoners in 2019*, U.S. DEP’T OF JUST., BUREAU OF JUST. STATS. 1, 20 (2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf>.

<sup>57</sup> *Incarcerated Women and Girls*, *supra* note 9, at 4; *see also* Bloom et al., *supra* note 19, at 1.



the women committing such crimes are likely to report having been physically and/or sexually abused, often by the person they assaulted.”<sup>58</sup>

Most female offenders also report previous victimization, mental illness, and substance abuse.<sup>59</sup> Domestic violence is the most reported type of abuse reported by female prisoners.<sup>60</sup> It should be no surprise that women are also more likely to enter prison with mental health problems or to develop them while incarcerated.<sup>61</sup>

Nevertheless, even as the number of incarcerated women has increased, research exploring crime and incarceration still focuses on male offenders.<sup>62</sup> Consequently, criminal justice policies and interventions continue to disregard the differences between male and female offenders. Therefore, these policies do not sufficiently reflect an understanding of the realities of women’s lives.<sup>63</sup> Though there is continuing debate about the discriminatory aspects of treating women differently from men in the criminal justice realm, that debate has created a model of justice that purports to treat all offenders the same regardless of gender.<sup>64</sup> This model has resulted in the implementation of criminal justice policies that fail to anticipate disparate impacts on female offenders and lead to collateral consequences associated with their incarceration.<sup>65</sup>

The spike in the number of incarcerated women does not correspond with the rate or seriousness of their crimes.<sup>66</sup> Instead, the rate of women in prisons and jails appears to result from shifts in political and public policy trends based on male criminality, relegating female offenders and their children as collateral damage within the United States criminal justice system.<sup>67</sup> Many of the underlying causes for the spike in the number of women incarcerated resulted from policies surrounding the war on drugs. Other contributing factors include:

[T]he shift in legal and academic realms toward a view of lawbreaking as individual pathology, ignoring the structural

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<sup>58</sup> Covington & Bloom, *supra* note 17, at 1.

<sup>59</sup> Emily M. Wright et al., *Gender-Responsive Lessons Learned and Policy Implications for Women in Prison: A Review*, 39 CRIM. JUST. & BEHAV. 1612, 1613 (2012).

<sup>60</sup> *Id.* at 1616.

<sup>61</sup> *Principles of Drug Abuse Treatment for Criminal Justice Populations*, NAT’L INST. OF HEALTH, U.S. DEP’T OF HEALTH & HUM. SERVS., NAT’L INST. OF DRUG ABUSE 28 (2014), [https://www.drugabuse.gov/sites/default/files/txcriminaljustice\\_0.pdf](https://www.drugabuse.gov/sites/default/files/txcriminaljustice_0.pdf) (“Incarcerated women in treatment are significantly more likely than incarcerated men to have severe substance abuse histories, co-occurring mental disorders, and high rates of past treatment for both; they also tend to have more physical health problems. . . . Approximately 50[%] of female offenders are likely to have histories of physical or sexual abuse, and women are more likely than men to be victims of domestic violence.”).

<sup>62</sup> Covington & Bloom, *supra* note 17, at 2–3.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 4.

<sup>65</sup> *Id.* at 2–3, 7.

<sup>66</sup> *Id.* at 1.

<sup>67</sup> See Stephanie S. Covington, *A Woman’s Journey Home: Challenges for Female Offenders and Their Children*, U.S. DEP’T OF HEALTH & HUM. SERVS., THE URB. INST. (Jan. 30, 2002), [https://www.aspe.hhs.gov/sites/default/files/migrated\\_legacy\\_files//42361/Covington.pdf?\\_ga=2.87608600.1629971122.1642899818-1567356651.1642899818](https://www.aspe.hhs.gov/sites/default/files/migrated_legacy_files//42361/Covington.pdf?_ga=2.87608600.1629971122.1642899818-1567356651.1642899818).

and social causes of crime; government policies that prescribe simplistic, punitive enforcement responses to complex social problems; federal and state mandatory sentencing laws; and the public's fear of crime even though crime in the United States has been declining for nearly a decade.<sup>68</sup>

Today, there is a foundation for reform that can be realized only through the implementation of gender-informed policies that consider the realities of women's lives. Unfortunately, increasing research on the collateral costs of long prison sentences for mothers and their children has had a negligible impact on reform policies. Even the FIRST STEP Act,<sup>69</sup> claimed by many as the most significant reform legislation to our criminal justice system in decades,<sup>70</sup> contains only two provisions specific to women. The first mandates that "healthcare products" like tampons and sanitary napkins be provided free of charge.<sup>71</sup> The other provision prohibits officials from using restraints on pregnant inmates and those in postpartum recovery.<sup>72</sup> Additionally, the FIRST STEP Act affects federal prisoners only; however, more women are held in local jails than state prisons.<sup>73</sup>

Without considering gender, policymakers cannot begin to comprehend the full impact of existing policies on women involved in the criminal justice system. Only when gender differences and the inequitable implications on women are addressed will there be a recognition of the collateral consequences for women's lives, circumstances, and experiences in incarceration.

### III. SIGNIFICANT RISK FACTORS: MOTHERS AS PRIMARY CARETAKERS AND THEIR DEPENDENT CHILDREN

While the overall picture of incarcerated women is less than complete, motherhood is an overwhelming common denominator requiring more research focusing on incarcerated women's unique experiences as mothers,<sup>74</sup> including their roles as primary caretakers of dependent children.<sup>75</sup> Today, almost two-thirds of incarcerated women in state prisons<sup>76</sup> and 80% of those

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<sup>68</sup> Covington & Bloom, *supra* note 17, at 1–2.

<sup>69</sup> This Act was passed in 2018 to limit mandatory minimums for non-violent drug offenses, to retroactively reduce sentences under the 100 to 1 crack cocaine disparity and expand rehabilitation in federal prisons. First Step Act of 2018, 18 U.S.C. § 4042 (2018).

<sup>70</sup> *Senate Passes Landmark Criminal Justice Reform*, COMM. JUDICIARY (Dec. 18, 2018), <https://www.judiciary.senate.gov/press/rep/releases/senate-passes-landmark-criminal-justice-reform>.

<sup>71</sup> First Step Act, *supra* note 69.

<sup>72</sup> *Id.*

<sup>73</sup> See Kajstura, *supra* note 36.

<sup>74</sup> Katarzyna Celinska & Jane A. Siegel, *Mothers in Trouble: Coping with Actual or Pending Separation from Children Due to Incarceration*, 90 PRISON J. 447, 448 (2010).

<sup>75</sup> Acoca & Raeder, *supra* note 48 (citing MAYA SCHENWAR, LOCKED DOWN, LOCKED OUT 84–85 (2014)).

<sup>76</sup> Emily Halter, *Parental Prisoners: The Incarcerated Mother's Constitutional Right to Parent*, 108 J. CRIM. L. & CRIMINOLOGY 539, 542 (2018); see also Wendy Sawyer, *Bailing Moms Out for Mother's*

in jails are mothers,<sup>77</sup> and most of them are primary caretakers of dependent children.<sup>78</sup> Thus, more research on incarcerated women's unique experiences as mothers, including their roles as primary caretakers of dependent children, is required.

Consequently, the surge in women's incarceration rates means the number of children impacted by the mass incarceration of the last several decades has reached unprecedented numbers. The war on drugs has seen the number of children with a mother in prison spike by 100% and those with incarcerated fathers increase by more than 75%.<sup>79</sup> "Recent estimates show that 2.7 million [United States] children have a parent who is incarcerated, and more than 5 million children—7[%] of all [United States]children—have had a parent in prison or jail at some point."<sup>80</sup> While one in twenty-eight children have an incarcerated parent,<sup>81</sup> if exposure to the criminal justice process beyond incarceration is considered, including arrest, probation, and parole, the estimate of affected children rises to ten million.<sup>82</sup> Making matters worse, the actual number and demographic details of children affected are unknown because this information is not systematically collected by correctional facilities, child welfare agencies, or schools.<sup>83</sup> Even today, no evidence indicates any coordinated effort by law enforcement or sentencing judges at any time in the criminal justice process to inquire whether an offender has children. Furthermore, despite the number of children impacted, most of the research thus far examining incarceration and parenting focuses on fathers without differentiating between paternal versus maternal incarceration.<sup>84</sup>

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Day, PRISON POL'Y INITIATIVE (May 8, 2017), <https://www.prisonpolicy.org/blog/2017/05/08/mothers-day/> (stating that 80% of women in jails are mothers).

<sup>77</sup> Elizabeth Swavola et al., *Overlooked: Women and Jails in an Era of Reform*, VERA INST. OF JUST. 1, 7 (2016), <https://www.safetyandjusticechallenge.org/wp-content/uploads/2016/08/overlooked-women-in-jails-report-web.pdf> (citing SUSAN W. MCCAMPBELL, THE GENDER-RESPONSIVE STRATEGIES PROJECT: JAIL APPLICATIONS, NAT'L INST. CORR. 4 (2005)).

<sup>78</sup> Sawyer, *supra* note 76.

<sup>79</sup> Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT'L INST. JUST. 1, 2 (2017), <https://www.ojp.gov/pdffiles1/nij/250349.pdf>.

<sup>80</sup> Cramer et al., *supra* note 3, at 6 (citing David Murphy & P. Mae Cooper, *Parents Behind Bars: What Happens to their Children?*, CHILD TRENDS (2015), [https://www.academia.edu/31374279/Parents\\_Behind\\_Bars\\_What\\_Happens\\_to\\_Their\\_Children](https://www.academia.edu/31374279/Parents_Behind_Bars_What_Happens_to_Their_Children))).

<sup>81</sup> *Collateral Costs: Incarceration's Effect on Economic Mobility*, THE PEW CHARITABLE TRS. 4, 21 (2010), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2010/collateralcostspdf.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/collateralcostspdf.pdf).

<sup>82</sup> Myrna S. Raeder, *Making a Better World for Children of Incarcerated Parents*, 50 FAM. CT. REV. 23, 23 (2012).

<sup>83</sup> Julie Pohlmann et al., *Children's Contact with Their Incarcerated Parents, Research Findings and Recommendations*, 65 AM. PSYCH. 575, 575 (2010); *see also* Charlene Wear Simmons, *Children of Incarcerated Parents*, 7 CAL. RES. BUREAU 1, 2 (2000), <https://files.eric.ed.gov/fulltext/ED444750.pdf> (summarizing what is known about children of incarcerated parents in California in 2000 and providing example of a systemic failure to coordinate data collection of children with an incarcerated parent existing today).

<sup>84</sup> Kristen Turney & Christopher Wildeman, *Maternal Incarceration and Child Wellbeing: Detrimental for Some? Heterogeneous Effects of Maternal Incarceration on Child Wellbeing*, 14 CRIMINOLOGY & PUB. POL. 125, 127 (2015); *see also* Cramer et al., *supra* note 3, at 6.

The increasing number of children with an incarcerated parent represents one of the most significant collateral consequences of incarcerating women in the United States.<sup>85</sup> Where a child lives and who cares for the child when a parent is incarcerated often dictates the extent of the collateral damage children will endure throughout their lifetimes. Understanding how the outcomes and risk factors can vary depending on the incarcerated parent is imperative to framing policies to mitigate the damage. While most children suffer when either parent is incarcerated, the collateral effects are often dramatically different for children when their mother, not their father, is imprisoned.<sup>86</sup> A significant reason for the disparate impact is because a higher percentage of female offenders than male offenders are the primary caretakers of their young children.<sup>87</sup>

Furthermore, between 70 and 90% of incarcerated women are single parents. Thus, not only are they the primary caretakers, but they are often the only caretakers.<sup>88</sup> As a result, children with an incarcerated mother have an increased risk of being placed in foster care or moved from caretaker to caretaker.<sup>89</sup> Notably, 88% of fathers in state prisons reported the other parent as their child's caregiver, compared to only 37% of mothers.<sup>90</sup> When mothers are incarcerated, 68% of children live with a grandparent or other relative instead of their fathers.<sup>91</sup> According to one study, over 40% of children with an incarcerated mother live with their grandmothers.<sup>92</sup>

Since most women sent to prison face financial insecurity, relatives caring for their children must take on the additional burdens of raising children with little or no financial assistance from the incarcerated parent.<sup>93</sup> The economic strain in children's households is worse for families with other dependents or grandparents with limited income.<sup>94</sup> The financial hardships caused by parental incarceration are related to the increased risks to children of multiple moves, school changes, childhood poverty, and contact with the child welfare system.<sup>95</sup> In addition, when a child loses a

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<sup>85</sup> See, e.g., NELL BERNSTEIN, *ALL ALONE IN THE WORLD, CHILDREN OF THE INCARCERATED* (2005).

<sup>86</sup> Poehlmann, *supra* note 12, at 331.

<sup>87</sup> GLAZE & MARUSCHAK, *supra* note 5, at 5.

<sup>88</sup> Gilad & Gat, *supra* note 19, at 372; see also Jordana Hart, *Bill Lets Mothers in Prison Keep Tots: Benefits to Parent and Child Are Cited*, BOSTON GLOBE, June 26, 1997, at B1.

<sup>89</sup> Poehlmann, *supra* note 12, at 332–33 (citing Rebecca J. Shlafer & Julie Poehlmann, *Attachment and Caregiving Relationships in Families Affected by Parental Incarceration*, 12 ATTACHMENT & HUM. DEV. 395 (2010)).

<sup>90</sup> Steve Christian, *Children of Incarcerated Parents*, NAT'L CONF. OF STATE LEGISLATURES 1, 4 (2009), <https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf>.

<sup>91</sup> *Id.*

<sup>92</sup> GLAZE & MARUSCHAK, *supra* note 5, at 5.

<sup>93</sup> Creasie Finney Hairston, *Children with Parents in Prison: Child Welfare Matters*, in CW360: A COMPREHENSIVE LOOK AT A PREVALENT CHILD WELFARE ISSUE 4, 4 (2008), <https://casw.umn.edu/wp-content/uploads/2013/12/CW360.pdf>.

<sup>94</sup> Keva M. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD & ADOLESCENT SOC. WORK J. 472, 475 (2006) (describing the emotional, financial, and social struggle many family members face in addition to caretaking responsibilities as a result of having a family member incarcerated).

<sup>95</sup> Christian, *supra* note 90, at 3.

primary caregiver, their sense of security and continuity of care are often significantly disrupted, making them vulnerable to other risk factors.

The Centers for Disease Control and Prevention have established that children with an incarcerated parent experience disruptions that qualify as adverse childhood experiences (ACE).<sup>96</sup> An ACE is defined as “a traumatic experience that serves as a pathway for social, emotional, and cognitive neurodevelopmental impairments.”<sup>97</sup> There is also evidence that children with an incarcerated parent are exposed to almost five times as many ACEs as children without incarcerated parents, including experiences preceding parental incarceration.<sup>98</sup>

It is helpful to understand the concept of attachment theory when considering the link between parental incarceration and childhood trauma. Attachment theory emphasizes the significance of disruptions in parent-child relationships, including the connection between parental incarceration and negative outcomes for children.<sup>99</sup> When an attachment figure is removed from a child’s life, the child’s vulnerability to later adversity increases.<sup>100</sup> Additionally, when children are separated from a primary caregiver at critical stages of development, they are prevented from forming healthy bonds, a particularly devastating consequence for children with incarcerated mothers.<sup>101</sup>

Consequently, a significant factor important for predicting harm is the child’s age at the time of the parental separation.<sup>102</sup> One study found that “22% of children with a parent in state prison and 16% of children with parents in federal prison were four years of age or younger.”<sup>103</sup> Children in this age group are in the process of forming primary attachments, making them particularly vulnerable to the effects of parental separation.<sup>104</sup>

The available evidence demonstrates that for children whose primary caretaker parent is incarcerated, the disruption and trauma caused by separation can lead to depression, anxiety, and developmental delays.<sup>105</sup> Studies also confirm people exposed to severe early childhood stress can have an earlier onset of psychological disorders that are more difficult to

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<sup>96</sup> See *Preventing Adverse Childhood Experiences*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/violenceprevention/aces/fastfact.html> (last visited May 15, 2021).

<sup>97</sup> Joyce A. Arditti, *Child Trauma Within the Context of Parental Incarceration: A Family Process Perspective*, 4 J. FAM. THEORY & REV. 181, 181 (2012) (explaining that having a parent incarcerated can cause levels of stress and trauma similar to children who experience abuse, domestic violence, and divorce).

<sup>98</sup> Kristin Turney, *Adverse Childhood Experiences Among Children of Incarcerated Parents*, 89 CHILD & YOUTH SERV. REV. 218, 218 (2018).

<sup>99</sup> Arditti, *supra* note 97, at 183.

<sup>100</sup> *Id.* at 184.

<sup>101</sup> Dallaire, *supra* note 12, at 15.

<sup>102</sup> Poehlmann, *supra* note 12, at 576.

<sup>103</sup> *Id.* (citing GLAZE & MARUSCHAK, *supra* note 5, at 3).

<sup>104</sup> Poehlmann, *supra* note 12, at 576.

<sup>105</sup> Martin, *supra* note 79, at 3.

treat in adulthood.<sup>106</sup> For example, “adverse childhood experiences account for about 45% of the population-attributable risk for childhood-onset psychiatric disorders.”<sup>107</sup>

Removing a child from an emotional environment required for their development is one of the most profound traumas a child can experience.<sup>108</sup> Parents act as a buffer between their children and psychological stress and adversity.<sup>109</sup> When parents are removed from children’s lives, they cannot act as that buffer and cannot protect their children from the psychological harm that the separation will cause them later in their lives.<sup>110</sup>

While the empirical data is incomplete, there is some evidence of an intergenerational cycle of incarceration for children who have had a parent incarcerated.<sup>111</sup> This risk of involvement in the criminal justice system may be even higher for children of incarcerated mothers.<sup>112</sup> Adolescents are often more vulnerable to peer pressure and are more likely to engage in deviant conduct without parental intervention.<sup>113</sup> Children exposed to more adverse childhood experiences, such as parental abuse, neglect, addiction, and parental incarceration, are also disproportionately susceptible to criminal behavior as adolescents and adults.<sup>114</sup>

Too many traumatic experiences can even lead to a recognized phenomenon known as Reactive Attachment Disorder (RAD), a trauma- and stressor-related condition of early childhood caused by social neglect and maltreatment.<sup>115</sup> RAD results in difficulty forming emotional attachments and an inability to be comforted or feel secure.<sup>116</sup> Children with RAD are “more likely than their neuro-typical peers to engage in high-risk sexual

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<sup>106</sup> Martin H. Teicher & Jacqueline A. Samson, *Childhood Maltreatment and Psychopathology: A Case for Ecophenotypic Variants as Clinically and Neurobiologically Distinct Subtypes*, 170 AM. J. PSYCHIATRY 1114, 1114 (2013).

<sup>107</sup> Martin H. Teicher, *Childhood Trauma and the Enduring Consequences of Forcibly Separating Children from Parents at the United States Border*, 16 BIOMED CENT. MED. 146, 147 (2018), <https://bmmedicine.biomedcentral.com/articles/10.1186/s12916-018-1147-y>.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Christian, *supra* note 90 (citing CREASIE FINNEY HAIRSTON, FOCUS ON CHILDREN WITH INCARCERATED PARENTS: AN OVERVIEW OF THE RESEARCH LITERATURE 1, 4–5 (2007), [https://repositories.lib.utexas.edu/bitstream/handle/2152/15158/aecasey\\_children\\_incparents.pdf?sequence=2](https://repositories.lib.utexas.edu/bitstream/handle/2152/15158/aecasey_children_incparents.pdf?sequence=2)).

<sup>112</sup> Albert M. Kopak & Dorothy Smith-Ruiz, *Criminal Justice Involvement, Drug Use, and Depression Among African American Children of Incarcerated Parents*, 6 RACE & JUST. 89, 92–93 (2016); *see also* Dallaire, *supra* note 12, at 449 (finding one study concluding that mothers were two and a half times more likely than fathers to report that their own adult children were incarcerated and that generally the risk of poor outcomes intensified with maternal incarceration).

<sup>113</sup> Hanlon et al., *supra* note 13, at 350.

<sup>114</sup> *Id.* at 349–50.

<sup>115</sup> E.g., *Reactive Attachment Disorder*, TRAUMA DISSOCIATION, (quoting 6B44 *Reactive Attachment Disorder*, ICD-11 FOR MORTALITY & MORBIDITY STATS. (2021)), <http://www.traumadissociation.com/rad> (last visited May 16, 2021).

<sup>116</sup> *Id.*

behavior, substance abuse, involvement with the legal system, and experience incarceration.”<sup>117</sup>

Many of the impacts of parental incarceration on children are often related to the problems leading to the parent’s involvement with the criminal justice system.<sup>118</sup> The trauma of having a parent incarcerated often intensifies the problems that already exist for children.<sup>119</sup> Since women involved in the criminal justice system have a higher likelihood of family instability, usually resulting from addiction and mental health problems,<sup>120</sup> their children face certain increased risks. Their children’s risks include increased financial insecurity, social stigma, caregiving changes during incarceration, and limited contact with their parents in prison.<sup>121</sup> Assessing the effects on children with an incarcerated parent may require distinguishing between the risk factors present before the parents’ incarceration and afterward.<sup>122</sup>

There are limited studies distinguishing the impacts on children facing separation because of parental incarceration and other risk factors the children face. For example, it is difficult to disentangle the research to distinguish the effects of parental incarceration from substance abuse, child abuse, domestic violence, and mental illness that may have existed long before a parent is incarcerated.<sup>123</sup> In addition, research that tries to assess parenting skills before and after incarceration is also challenging. Nevertheless, there is general acceptance that children experience a high level of disruption when their mother is incarcerated.<sup>124</sup>

#### IV. TERMINATION OF PARENTAL RIGHTS: THE ULTIMATE PUNISHMENT

Since incarceration is not a discrete event but “a dynamic process that unfolds over time,”<sup>125</sup> the long-term impacts on children whose mother is incarcerated differ depending on various factors.<sup>126</sup> Moreover, not all risk factors for children with an incarcerated parent are the same. Policy

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<sup>117</sup> Elizabeth E. Ellis et al., *Reactive Attachment Disorder*, STATPEARLS, <https://www.ncbi.nlm.nih.gov/books/NBK537155/> (last visited May 16, 2021).

<sup>118</sup> Susan D. Phillips et al., *Differences Among Children Whose Mothers Have Been in Contact with the Criminal Justice System*, 17 *WOMEN & CRIM. JUST.* 43, 45 (2006).

<sup>119</sup> John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 *CRIME & JUST.* 121, 123 (1999).

<sup>120</sup> *Id.*

<sup>121</sup> Poehlmann, *supra* note 12, at 332 (citing Dallaire, *supra* note 12, at 444, 448–49).

<sup>122</sup> See Hanlon et al., *supra* note 13, at 349.

<sup>123</sup> *Id.* at 349–50.

<sup>124</sup> See generally Hanlon et al., *supra* note 13 (focusing on the impact of incarceration on urban African American children and on the incarceration of mothers “because children are less likely to be cared for by their fathers during their incarceration”) (citing CHRISTOPHER J. MUMOLA, U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN I (2000)).

<sup>125</sup> Ross D. Parke & K. Alison Clarke-Stewart, *From Prison to Home: Effects of Parental Incarceration on Young Children*, NAT’L POL’Y CONF. 1, 3 (2001) (working paper prepared for the “From Prison to Home” Conference Jan. 30–31, 2002), <https://aspe.hhs.gov/system/files/pdf/74981/parke%26stewart.pdf>.

<sup>126</sup> *Id.*

solutions must “take into account the child’s unique needs, the child’s relationship with the incarcerated parent, and alternative support systems.”<sup>127</sup> There is general agreement in the literature that because mothers are more likely to be the sole caregivers, a child’s continuity of care and sense of security are more dramatically disrupted by a mother’s incarceration than a father’s.<sup>128</sup> One reason is fathers, unlike mothers, typically have a spouse or partner providing childcare during their incarceration.<sup>129</sup>

Children are more likely to be placed into foster care when their mother rather than their father is incarcerated.<sup>130</sup> Though the data is incomplete, reports to the Bureau of Justice Statistics by parents in state prisons found incarcerated mothers were five times more likely than fathers to report their children were in foster care.<sup>131</sup> A more recent Department of Health and Human Services report from 2016 estimated that 20,939 American children are placed in foster care when a parent is incarcerated.<sup>132</sup>

Mothers and fathers who have a child placed in foster care because they are incarcerated — but who have not been accused of child abuse, neglect, endangerment, or even drug or alcohol use — are more likely to have their parental rights terminated than those who physically or sexually assault their kids, according to a Marshall Project analysis of approximately 3 million child-welfare cases nationally.<sup>133</sup>

As a result, because female prisoners are more likely than male inmates to have their children placed in foster care, they are also more likely to have their parental rights terminated.<sup>134</sup>

Incarcerated parents and their children are impacted by several child welfare laws, including timeline requirements outlined in the Adoption and

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<sup>127</sup> Martin, *supra* note 79.

<sup>128</sup> See Hanlon et al., *supra* note 13, at 350 (citing ALLEN J. BECK, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 1999 1 (2000)).

<sup>129</sup> *Id.*

<sup>130</sup> Poehlmann, *supra* note 12, at 332.

<sup>131</sup> Christian, *supra* note 90, at 4; accord WOMEN’S PRISON ASS’N, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY BASED ALTERNATIVES, INST. ON WOM. & CRIM. JUST. 1 (2009) (stating 2% of the children of incarcerated fathers and 10% of the children of incarcerated mothers are in foster care), [https://www.prisonlegalnews.org/media/publications/womens\\_prison\\_assoc\\_report\\_on\\_prison\\_nurserie\\_s\\_and\\_community\\_alternatives\\_2009.pdf](https://www.prisonlegalnews.org/media/publications/womens_prison_assoc_report_on_prison_nurserie_s_and_community_alternatives_2009.pdf).

<sup>132</sup> U.S. DEP’T OF HEALTH & HUM. SERV., THE ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT, NO. 24, (Oct. 20, 2017), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport24.pdf>.

<sup>133</sup> Eli Hager & Anna Flagg, *How Incarcerated Parents are Losing Their Children Forever*, THE MARSHALL PROJECT (Dec. 2, 2018), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever>.

<sup>134</sup> *Id.*



Safe Families Act of 1997 (ASFA).<sup>135</sup> When children are in foster care, ASFA requires an expeditious permanency plan for the child's placement, which involves filing petitions to terminate parental rights to children living in out-of-home care for fifteen of the last twenty-two months.<sup>136</sup> Termination of parental rights means a parent loses any rights to visitation or decision-making authority while in prison and after release. The involuntary termination of parental rights is such a devastating and final consequence for a parent and child that some people declare it is tantamount to a civil death penalty.<sup>137</sup>

Given the strict timelines for initiating termination of parental rights proceedings, incarcerated parents lose their parental rights at a disproportionate rate.<sup>138</sup> According to the Bureau of Justice Statistics, state prisoners serving time for drug offenses, including trafficking and possession, served an average of twenty-two months.<sup>139</sup> As a result, incarcerated parents with children in foster care face the real possibility of having their rights terminated.<sup>140</sup>

Though ASFA is a federal provision requiring filing for termination of parental rights in certain cases, state laws dictate additional conditions or grounds for termination of parental rights.<sup>141</sup>

These conditions include length of confinement relative to the child's age; failure to make provision for the child's care; the quality of the parent-child relationship and the effect of incarceration thereon; pre-incarceration contact with and support of the child; repeated incarceration; failure to cooperate with the child welfare agency's efforts to help with case planning and visitation; and the nature of the crime for which the parent is incarcerated.<sup>142</sup>

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<sup>135</sup> E.g., WALLACE, *supra* note 16.

<sup>136</sup> MARTHA L. RAIMON ET AL., *Sometimes Good Intentions Yield Bad Results: ASFA's Effect on Incarcerated Parents and Their Children*, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 121, 123 (2009) (under the timelines of ASFA, termination proceedings are mandated unless the child is in the care of a relative, reasonable efforts to reunify the family have not been provided, or there is a compelling reason why it is not in the best interest of the child to terminate the parental relationship).

<sup>137</sup> *Drury v. Lang*, 776 P.2d 843, 845 (Nev. 1989) ("Because termination of a parent's rights to her child is tantamount to imposition of a civil death penalty, we have previously declared that 'the degree and duration of parental fault or incapacity necessary to establish jurisdictional grounds for termination is greater than that required for other forms of judicial intervention.'").

<sup>138</sup> RAIMON ET AL., *supra* note 136.

<sup>139</sup> KAEBLE, *supra* note 33 (the average time served by state prisoners released in 2016, from initial admission to initial release, was 2.6 years, and the median time served was 1.3 years. State prisoners serving time for drug offenses, including trafficking and possession, served an average of twenty-two months and a median time of fourteen months before their initial release).

<sup>140</sup> Christian, *supra* note 90, at 5–6.

<sup>141</sup> *Id.* at 6.

<sup>142</sup> *Id.* at 6; see also Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 700 (2006).

The parents of children placed in foster care are required to navigate the child welfare system in a way that indicates they are making active efforts toward family reunification.<sup>143</sup> Maintaining contact, preferably face-to-face visitation, with a child in foster care can be critical for a court to decide whether to grant a termination decree for incarcerated parents.<sup>144</sup> In addition, dependency proceedings often require a parent's meaningful participation in the case plan. One of the many barriers to visitation for incarcerated parents is the inability or refusal of the child's caretaker to transport the child to the correctional facility for visitation.<sup>145</sup> The obstacles to visitation are even worse when children are in foster care because parents rely on caseworkers for approval and arranging visitations. Most caseworkers, however, have high caseloads and may be less inclined to pursue the prospect of the reunification of a child with a parent who is incarcerated.<sup>146</sup> It is also critical that an attorney representing the incarcerated parent maintain contact with the parent and ensure that prison officials cooperate to allow the parent an opportunity to review the state's evidence and be available for termination proceedings.

For parents to avoid having their rights terminated, they must have the opportunity to participate in the dependency proceedings actively. Participation requires informing parents of the status of the proceedings, ensuring they understand the requirements of a case plan, and having the ability to meet their obligations for reunification.<sup>147</sup> Unfortunately, few caseworkers maintain necessary communication about the proceedings with the incarcerated parent.<sup>148</sup> Additionally, many incarcerated parents cannot receive the reunification services required, including substance abuse treatment or mental health interventions while incarcerated.<sup>149</sup>

In the BJS study, more than half of parents in state prison (55[%] of fathers and 74[%] of mothers) reported a mental health problem and more than two-thirds (67[%] of fathers and 70[%] of mothers) reported substance dependence or abuse. Only [four] in [ten] of these parents, however, reported receiving treatment for substance abuse since admission, and only one-third received treatment for mental health problems.<sup>150</sup>

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<sup>143</sup> See CHILD WELFARE INFORMATION GATEWAY, *Reunifying Families*, U.S. DEP'T OF HEALTH & HUM. SERVS. ADMIN. FOR CHILD. & FAM., CHILDS. BUREAU, <https://www.childwelfare.gov/topics/permanency/reunification/> (last visited May 24, 2021).

<sup>144</sup> Christian, *supra* note 90, at 6.

<sup>145</sup> *Id.* at 5.

<sup>146</sup> *Id.* at 6.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* (referring to GLAZE & MARUSCHAK., *supra* note 5, at 8, 19).

The impacts of legally terminating the relationship between a parent and a child can have life-long consequences for both, including severe anxiety, depression, and PTSD.<sup>151</sup> Many incarcerated parents are unaware of the risk of having their rights terminated or do not understand how to avoid it. Even if they know the risks, the obstacles to meeting their obligations, including attending hearings and complying with case plan requirements, can be impossible to overcome.<sup>152</sup> Addressing these concerns will require incarcerated parents to access competent attorneys who understand the child welfare system and how it interfaces with the correctional system.<sup>153</sup> It is also necessary to have improved coordination between law enforcement, child welfare agencies, and the courts.<sup>154</sup> Even when parental rights are not at risk of being terminated, maintaining a strong parent-child bond can play a significant role in a child's ability to overcome challenges and increase their chances for a successful life.<sup>155</sup> It is also generally understood that children with a strong support system under any circumstances are more likely to develop resilience despite the risks.<sup>156</sup>

#### V. CONSIDERATION OF FAMILIAL RESPONSIBILITIES AND IMPACTS AT SENTENCING

Many incarcerated parents intend to reunify with their families and children; however, the barriers to successfully doing so are steep.<sup>157</sup> Prison policies oriented towards family reunification must consider the parent-child relationship from sentencing to post-release.<sup>158</sup> Doing so necessarily requires consideration of a person's familial responsibilities throughout the criminal legal proceedings, including at the time of sentencing.

##### A. Brief History of Federal and State Sentencing

A brief history of federal and state sentencing sheds light on potential challenges against and possibilities for reforms, including facilitating meaningful consideration of offending mothers and responsibility for their children. Historically, the dominant purposes of punishment were deterrence, incapacitation, and rehabilitation.<sup>159</sup> In support of these goals,

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<sup>151</sup> See Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation is Deep, Long-Lasting*, NOVA NEXT (June 20, 2018), <https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/>.

<sup>152</sup> Christian, *supra* note 90, at 11.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> See Rebecca Shlafer et al., *Children with Incarcerated Parents, Considering Children's Outcomes in the Context of Family Experiences*, UNIV. OF MINN. CHILD., YOUTH & FAM. CONSORTIUM 1, 7 (2013).

<sup>156</sup> See Julie Poehlmann & J. Mark Eddy, *Introduction and Conceptual Framework*, 78 SOC'Y. RSCH. CHILD DEV. 1 (2013).

<sup>157</sup> Hairston, *supra* note 93, at 4.

<sup>158</sup> PETERSON ET AL., *supra* note 23, at 71.

<sup>159</sup> Richard S. Frase, *Why Have U.S. State and Federal Jurisdictions Enacted Sentencing Guidelines?*, SENT'G GUIDELINES RES. CTR. (Mar. 25, 2015), <https://sentencing.umn.edu/content/why-have-us-state-and-federal-jurisdictions-enacted-sentencing-guidelines>.

judges and parole boards had broad discretion to consider various factors and characteristics of each offender, including the nature of the crime and potential for rehabilitation.<sup>160</sup> “Since women were, in accordance with the norms and psychological teachings of the era, deemed fit subjects for rehabilitation, it followed that the duration of their incarceration should reflect the time needed to rehabilitate rather than the time needed to punish.”<sup>161</sup>

Before 1970, every American state and the federal system operated under an indeterminate sentencing system premised on rehabilitation through tailoring sentences in each case to the offender’s circumstances and needs.<sup>162</sup> This level of discretion often resulted in highly individualized or “indeterminate” and inevitably disparate sentences.<sup>163</sup> Additionally, studies available then demonstrated that broad discretion failed to deter crime and was, instead, leading to troubling disparities, including racial inequality.<sup>164</sup> These findings led to a widespread attack on indeterminate sentencing in several states and a bi-partisan consensus that discretion in sentencing and prison release decisions should be substantially reduced.<sup>165</sup>

Between the 1920s and 1970s, the rate of incarceration remained stable.<sup>166</sup> In 1971, however, President Nixon’s declaration of the “war on drugs” started a long-term climb in prison rates with mandatory sentences of incarceration, reduced access to parole, and pressure to expand the capacity of prison populations by constructing new facilities.<sup>167</sup> By 1980, President Reagan’s “tough on crime” campaign<sup>168</sup> eventually led to the Sentencing Reform Act of 1984 (SRA) and Federal Sentencing Guidelines (Guidelines) that followed, in which initiatives sought to make sentences harsher and more uniform.<sup>169</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> Marianne Popiel, *Sentencing Women: Equal Protection in the Context of Discretionary Decisionmaking*, 6 WOMEN’S RTS. L. REP. 85, 85 (1979); see also Carolyn Engel Temin, *Discriminatory Sentencing of Women Offenders: The Argument for ERA in a Nutshell*, 11 AM. CRIM. L. REV. 355, 358 (1973).

<sup>162</sup> Tonry, *supra* note 20.

<sup>163</sup> Frase, *supra* note 159.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (citing RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 1–4 (Alfred Blumstein et al. eds., 1983); Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 223–24 (Michael Tonry & Richard S. Frase, eds., 2001)).

<sup>166</sup> GROWTH OF INCARCERATION IN THE U.S., *supra* note 32, at 1.

<sup>167</sup> Aldina Mesic, *Women and the War on Drugs*, PUB. HEALTH POST (May 16, 2017), <https://www.publichealthpost.org/research/women-and-the-war-on-drugs>.

<sup>168</sup> Ryan S. King, *A Change of Course: Developments in State Sentencing Policy and Their Implications for the Federal System*, 22 FED. SENT’G REP. 48, 48 (2009).

<sup>169</sup> See Emily W. Andersen, *Not Ordinarily Relevant: Bringing Family Responsibilities to the Federal Sentencing Table*, 56 B.C. L. REV. 1501, 1501 (2015) (for an excellent discussion of the history of courts’ consideration of family ties and responsibilities to determine a sentence. This Note advocates that Rule 32 of the Federal Rules of Criminal Procedure should be amended to require that a family impact assessment be incorporated in presentence investigation reports to provide courts with information about a defendant’s family ties and responsibilities); Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 (Supp. IV

Indeterminate sentences with a primary goal of rehabilitation gave way to determinate sentences characterized by fixed sentence lengths.<sup>170</sup> The Guidelines were mandatory, and absent “extraordinary” circumstances, there could be no substantial deviations.<sup>171</sup> As a result of the SRA and the Guidelines, family ties and responsibilities were no longer relevant in determining whether a sentence should be outside the applicable guideline range.<sup>172</sup> After years of federal courts operating under the Guidelines, the often devastating effects of disregarding family ties and responsibilities came to light in various court challenges and national headlines.<sup>173</sup>

In the landmark 2005 case, *United States v. Booker*,<sup>174</sup> the United States Supreme Court held that judges had leeway to “tailor” sentences by considering each defendant’s history and characteristics, thus making the Guidelines advisory instead of mandatory.<sup>175</sup> Many believed this decision reversed course by opening the door to considering factors that previously were “not ordinarily relevant” in sentencing, such as an offender’s family ties and responsibilities.<sup>176</sup> *Booker* seemed to offer judges a method for balancing holding offenders uniformly accountable while avoiding blindly compounding the severity of a sentence with its impacts on parents and their dependent children.

Even after *Booker*, many courts remained reluctant to depart from the Guidelines.<sup>177</sup> Though other seminal cases followed *Booker* that, theoretically, offered courts a way around the Guidelines to consider a defendant’s familial circumstances in sentencing,<sup>178</sup> court consideration of

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1986), & 28 U.S.C. §§ 991–998 (Supp. IV. 1986)); U.S. SENT’G COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL (1988).

<sup>170</sup> Tonry, *supra* note 20, at 142.

<sup>171</sup> See *Gall v. United States*, 446 F.3d 884 (2006), *rev’d*, 552 U.S. 38 (2007), *and cert. granted*, 551 U.S. 1113 (2007).

<sup>172</sup> Patricia M. Wald, “What About the Kids?”: Parenting Issues in Sentencing, 8 FED. SENT’G REP. 137, 137 (1995).

<sup>173</sup> See Andersen, *supra* note 169, at 1502 (citing several national newspaper articles on the effects of parental incarceration on children, including Emily Badger, *The Meteoric, Costly and Unprecedented Rise of Incarceration in America*, WASH. POST (Apr. 30, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america> (discussing the results of the National Research Council report); Eduardo Porter, *In the U.S., Punishment Comes Before the Crimes*, N.Y. TIMES (Apr. 29, 2014), <http://nyti.ms/1hPCKlu> (discussing incarceration in the United States generally and the 2014 National Research Council report); *When a Parent Goes to Prison, a Child Also Pays a Price*, NAT’L PUB. RADIO (June 8, 2014, 6:22 PM), <http://www.npr.org/2014/06/08/320071553/when-a-parent-goes-to-prison-a-child-also-pays-a-price> (discussing the National Research Council report and the effects of parental incarceration on children)).

<sup>174</sup> 543 U.S. 220.

<sup>175</sup> *Id.* at 222.

<sup>176</sup> Jennifer A. Segal, *Family Ties and Federal Sentencing: A Critique of the Literature*, 13 FED. SENT’G REP. 258, 258 (2001).

<sup>177</sup> See Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385, 402–03 (2018) (this article provides an excellent discussion of the shifts in federal case law holdings on judicial discretion when considering departures from the Federal Sentencing Guidelines).

<sup>178</sup> See *Gall v. United States*, 552 U.S. 38, 49 (2007) (describing the Guidelines as the starting point in sentencing); *Rita v. United States*, 551 U.S. 338, 351 (2007) (stating that the Guidelines are the first consideration in sentencing, but each party can still argue for departures); *Kimbrough v. United States*,

family ties and responsibilities for sentencing remain wholly inconsistent. As more research confirms the often-devastating impacts on children when a parent, particularly a primary caretaker parent, is incarcerated, more judges may be willing to consider the potential “collateral damage” on children for sentencing purposes.<sup>179</sup> For now, there is little evidence that the advisory nature of the federal and state guidelines has increased courts’ willingness to consider “family ties” when sentencing parents.<sup>180</sup>

### *B. State Sentencing Policies and Guidelines*

Although each state has a unique sentencing system, many are modeled on the federal guidelines, which encourage sentencing defendants with comparable criminal histories and offenses to similar sentences.<sup>181</sup> Some states approach sentencing by assigning a wide sentencing range to crimes, while other states provide fixed sentence lengths.<sup>182</sup> Many state sentencing statutes also allow courts to consider certain mitigating factors, including family financial and emotional needs when deciding whether to depart downward from the presumptive sentencing range.<sup>183</sup> Other states have found that the impact of an offender’s sentence on their children is not a proper consideration for a downward departure or alternative sentence.<sup>184</sup> It is clear that addressing parenting responsibilities at sentencing and implementing policies that mitigate the collateral damage of incarcerating primary caretakers will require more than a reliance on judicial discretion in individual cases. Transformative changes are necessary and require a gender-informed approach that considers unique risk factors for incarcerated women and their children.

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552 U.S. 85, 109–10 (2007) (limiting circumstances when a judge can reject the Guidelines’ policies and suggests closer appellate review may be appropriate when courts do so).

<sup>179</sup> See Eck, *supra* note 53.

<sup>180</sup> Millar & Dandurand, *supra* note 5, at 261.

<sup>181</sup> Neal B. Kauder & Brian J. Ostrom, *State Sentencing Guidelines, Profiles and Continuum*, NAT’L CTR. ST. CTS. 1, 3 (2008).

<sup>182</sup> See Alison Lawrence, *Making Sense of Sentencing: State Systems and Policies* 1, NAT’L CONF. OF STATE LEGISLATURES (2015).

<sup>183</sup> Marjorie A. Shields, Annotation, *Downward Departure Under State Sentencing Guidelines Based on Extraordinary Family Circumstances*, 106 A.L.R.5th § 377 (2003); see *State v. Gebeck*, 635 N.W.2d 385 (Minn. Ct. App. 2001) (the court held that the trial court’s downward dispositional departure when sentencing a driver convicted of criminal vehicular homicide was justified, where the driver was a single mother of two minor children, as well as the fact that the driver was amenable to treatment and a ten-year sentence of probation provided greater leverage to assure the driver’s success in rehabilitation).

<sup>184</sup> *Gebeck*, 635 N.W.2d 385; see also *State v. Bray*, 738 So. 2d 962 (Fla. Dist. Ct. App. 1999) (the court held that the fact that the defendant had to support and provide shelter for his minor daughter over whom he had custody and that the defendant’s crimes were not violent were not valid reasons supporting the court’s downward departure sentence in a prosecution of motor vehicle violations. The court stated, while it was not unsympathetic to the trial judge’s concern that incarcerating the defendant could place the burden of caring for the child on the taxpayers of the state, such a consideration could not be employed in determining whether one defendant will be incarcerated while another will be given a non-incarcerative sentence. The court thus concluded that the downward departure sentence must be set aside).

### C. The Need for Gender-Informed Sentencing Considerations

To effectuate strategic reforms, the realities of offenders' lives, such as gender, racial, and socioeconomic disparities, must be included in designing and implementing sentencing reforms and policies. A significant challenge for women facing incarceration today is that, in the past fifty years, little progress has been made toward effecting widespread changes in the sentencing policies that primarily impact caretakers and their children.<sup>185</sup> Even though reform advocates have been calling for changes in the current laws and regulations to allow for more judicial and prosecutorial discretion for decades, there are renewed calls for policymakers and courts to consider consequences of sentencing policies on women offenders and their children.<sup>186</sup> Since incarcerated women are more likely than incarcerated men to be the sole or primary caregivers for their dependent children, the dramatic increase in incarcerated women has proven devastating for their children.<sup>187</sup> As the number continues to rise, the impacts of separation on mothers are also becoming more evident.<sup>188</sup>

A primary outcome of incarceration is reducing access to the outside world; it follows then that separation of mother and child achieves the most punitive aspect of this goal.<sup>189</sup> The consequences of lengthy prison sentences, including financial hardships and damaged relationships with their children, often follow mothers long after release. Few studies in corrections and criminal justice focus on women's experiences as mothers.<sup>190</sup> Nevertheless, available research confirms that most incarcerated mothers report separation from their children as the most damaging consequence they suffer.<sup>191</sup> As more women are entangled in a criminal justice system designed for men, sentencing policies will continue to have disparate impacts on women, especially those with children.<sup>192</sup> None of this is to say that men and their children are not impacted when fathers are incarcerated; instead, it is to urge a gender-responsive understanding of the realities of incarcerated women's lives and to apply policies and considerations accordingly.

Family-focused approaches to sentencing will enact a shift in prison policy and expand the range of policy solutions available to reduce prison populations, support rehabilitation efforts, and decrease recidivism.<sup>193</sup>

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<sup>185</sup> Emma DeCourcy, *The Injustice of Formal Gender Equality in Sentencing*, 47 *FORDHAM URB. L.J.* 395, 398, 423 (2020).

<sup>186</sup> *Id.* at 417.

<sup>187</sup> Millar & Dandurand, *supra* note 5, at 235–36.

<sup>188</sup> See Amy Dworsky et al., *Addressing the Needs of Incarcerated Mothers and Their Children in Illinois*, *CHAPIN HALL U. CHI. & U. CHI. SCH. SOC. SERV. ADMIN.* 1, 24–25 (2020).

<sup>189</sup> See generally Lorna Collier, *Incarceration Nation*, *AM. PSYCH. ASSOC.* (2014), <https://www.apa.org/monitor/2014/10/incarceration>.

<sup>190</sup> Celinska & Siegel, *supra* note 74.

<sup>191</sup> *Id.* at 449.

<sup>192</sup> Bloom et al., *supra* note 19; see also Gilad & Gat, *supra* note 19, at 380.

<sup>193</sup> See Todd R. Clear & Dennis Schrantz, *Strategies for Reducing Prison Populations*, 91 *PRISON J.* 138S (2011).

Trends in criminal justice reform offer insights and possibilities for sentencing alternatives, including more reforms that address the adverse effects of incarceration on children.<sup>194</sup> Before courts can be expected to consistently inquire about dependent children and consider their best interests when their parent is sentenced to prison, safe and effective alternatives to prison must exist.<sup>195</sup>

Fortunately, more reforms are starting to focus on women's unique risks and needs, including reducing nonviolent admissions to prison and adopting evidence-based reentry practices.<sup>196</sup> In addition, more states are considering differences in women's offending patterns and offenses, including that they are more likely to be incarcerated farther from their children with fewer opportunities for visitation than their male counterparts.<sup>197</sup> Other states provide gender-responsive alternatives to incarceration for women with children, including suspended and conditional sentences served in the community.<sup>198</sup>

#### *D. Primary Caretaker Sentencing Reforms*

In 2010, Washington State passed the Parenting Sentencing Alternative for nonviolent inmates with minor children, which provides two different types of sentencing alternatives.<sup>199</sup> The first program is the Family and Offender Sentencing Alternative (FOSA), which allows judges to waive a sentence and impose twelve months of community supervision so that eligible nonviolent offenders<sup>200</sup> can continue to parent their child in the community under intensive supervision.<sup>201</sup> For those who qualify, this program is one tool to potentially lessen the damage that occurs when a parent is incarcerated by affording the incarcerated parent and their children the ability to maintain a family bond.

Another program in Washington State, the Community Parenting Alternative (CPA), allows qualified offenders who have physical or legal custody of a minor child to serve up to the last twelve months of their prison

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<sup>194</sup> See *Children of Incarcerated Parents*, FED. INTERAGENCY REENTRY COUNCIL (2014), [https://nrccfi.camden.rutgers.edu/files/SnapShot\\_Children\\_Incarcerated\\_Parents.pdf](https://nrccfi.camden.rutgers.edu/files/SnapShot_Children_Incarcerated_Parents.pdf).

<sup>195</sup> Millar & Dandurand, *supra* note 5, at 268 n.162.

<sup>196</sup> Clear & Schrantz, *supra* note 193, at 150S.

<sup>197</sup> Millar & Dandurand, *supra* note 5, at 235.

<sup>198</sup> *Parent Sentencing Alternative (PSA)*, DEP'T OF CORR., WASH. STATE, <https://www.doc.wa.gov/corrections/justice/sentencing/parenting-alternative.htm> (last visited May 24, 2021); *Community Parenting Alternative (CPA)*, DEP'T OF CORR., WASH. STATE, <https://doc.wa.gov/corrections/justice/sentencing/community-parenting.htm> (last visited May 24, 2021) [hereinafter *CPA*].

<sup>199</sup> Substitute S.B. 6639, 61st Leg., Reg. Sess., (Wash. 2010), <http://lawfilesexternal.wa.gov/biennium/2009-10/Pdf/Bills/Senate%20Passed%20Legislature/6639-S.PL.pdf>.

<sup>200</sup> *CPA*, *supra* note 198 (stating that eligible offenders include: (i) A parent with physical custody of a minor child; (ii) An expectant parent; (iii) A legal guardian of a minor child; or (iv) A biological parent, adoptive parent, custodian, or stepparent with a proven, established, ongoing, and substantial relationship with a minor child that existed at the time of the offense).

<sup>201</sup> WASH. REV. CODE § 9.94A.655 (2020).



sentence in their community under electronic monitoring.<sup>202</sup> “Early evidence from Washington State suggests that family-centered sentencing reform is an effective recidivism reduction tool, with only two out of a total of two hundred and thirty FOSA/CPA participants returning to prison between June 2010 and January 2013.”<sup>203</sup>

In 2018, Massachusetts passed a primary caretaker statute that allows judges to consider the defendant’s status as a “primary caretaker of a dependent child” before imposing a sentence.<sup>204</sup> Massachusetts’ law places the burden on the defendant to request the court’s consideration of primary caretaker status within ten days after the entry of the judgment.<sup>205</sup> Once the motion and any supporting affidavits are presented to the court, the judge must make written findings concerning the defendant’s status as a primary caretaker of a dependent child and consider alternatives to incarceration.<sup>206</sup>

In 2019, Tennessee passed legislation giving nonviolent offenders who are primary caregivers of children a community-based alternative to incarceration. This major criminal sentencing reform directs judges to consider “[a]vailable community-based alternatives to confinement and the benefits that imposing such alternatives may provide to the community . . . when the offense is non-violent and the defendant is the primary caregiver of a dependent child.”<sup>207</sup> In Tennessee, before the passage of their primary caretaker sentencing reforms in 2019, proponents estimated that 3,733 parents in state prisons and county jails would have been eligible for the alternatives at the time of their sentencing.<sup>208</sup>

Community-based sentencing alternatives for primary caretakers will expand the options for parents and their children. Additionally, states stand to save millions of dollars each year by offering alternatives to incarceration for primary caretakers. For example, in Louisiana, advocates for similar sentencing alternatives predict the state can save over \$18 million annually in incarceration costs alone.<sup>209</sup> Community-based sentencing alternatives are far more cost-effective than incarceration. These programs also help families become more self-sufficient by keeping parents connected to their local workforce.<sup>210</sup>

Community-based alternative sentencing programs offer treatment, education, and social services that often are not available in a prison or jail

<sup>202</sup> WASH. REV. CODE § 9.94A.6551 (2020).

<sup>203</sup> Lauren Feig, *Breaking the Cycle: A Family Focused Approach to Criminal Sentencing in Illinois*, U. CHI. ADVOCS. F. 13, 18 (2015).

<sup>204</sup> MASS. GEN. LAWS ch. 279 § 6B (2018).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> TENN. CODE ANN. § 40-35-103(7) (West 2019).

<sup>208</sup> Kim Gilhuly & Lee Taylor-Penn, *Keeping Kids and Parents Together: A Healthier Approach to Sentencing in Tennessee*, HUM. IMPACT PARTNERS, at i (2018), [https://humanimpact.org/wp-content/uploads/2018/02/HIP\\_PrimaryCare-TN-Report.pdf](https://humanimpact.org/wp-content/uploads/2018/02/HIP_PrimaryCare-TN-Report.pdf).

<sup>209</sup> *Community-Based Sentencing for Primary Caretakers Improves Health Outcomes*, HUM. IMPACT PARTNERS (2017), [https://humanimpact.org/wp-content/uploads/2017/12/HIP\\_FactSheet\\_LouisianaPrimaryCaretakers\\_11-16-17.pdf](https://humanimpact.org/wp-content/uploads/2017/12/HIP_FactSheet_LouisianaPrimaryCaretakers_11-16-17.pdf).

<sup>210</sup> *Id.*

setting.<sup>211</sup> Programs, including drug and alcohol treatment, behavioral health interventions, therapeutic counseling, and vocational and educational resources, allow for rehabilitation, accountability, and strengthening of parent-child relationships.<sup>212</sup> In addition, community-based sentencing alternatives offer children and parents trauma-informed interventions that increase parental attachments leading to healthier child development outcomes.<sup>213</sup> The benefits of providing alternatives to incarceration for qualifying primary caretakers and their children far outweigh the costs of establishing such programs.

## VI. BENEFITS AND BARRIERS OF PARENT-CHILD PRISON VISITATION

While the benefits of visitation for children and their incarcerated parents are highly dependent on each family's dynamics and each facility's visitation accommodations,<sup>214</sup> for most, visitation from family and friends provide long-lasting benefits.<sup>215</sup> Unfortunately, according to the Prison Policy Initiative, less than a third of those incarcerated in state prisons receive a visit from a family or friend in a typical month.<sup>216</sup> For incarcerated mothers and their children, visitation can be a lifeline.

When considering the importance of familial ties between children and their incarcerated mothers, the most direct way to maintain a relationship with family or friends is through visits; however, many correctional facilities' policies and procedures for visitation are expensive, complicated, or overly restrictive.<sup>217</sup> Often, policies that are needlessly difficult or degrading reflect societal and institutional beliefs that "incarcerated individuals, including parents, do not deserve privileges."<sup>218</sup> In addition, just the social stigma of entering the facility and the process of waiting and going through security can be frustrating and confusing for children and their caretakers.<sup>219</sup>

Parental incarceration may also lead to fear, uncertainty,  
anxiety, frustration, and confusion among children as they  
navigate correctional institutions and policies when trying

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 1–2.

<sup>213</sup> *Id.* at 9.

<sup>214</sup> Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 85 (2011).

<sup>215</sup> See generally Melinda Tasca et al., *Moving Visitation Research Forward: The Arizona Prison Visitation Project*, 17 CRIMINOLOGY, CRIM. JUST. L & SOC'Y 55, 56–57 (2016) ("While the majority of research suggests that visitation is positive for inmates, some studies show that under certain circumstances, visitation can have adverse effects.")

<sup>216</sup> Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prison*, PRISON POL'Y INITIATIVE (Oct. 20, 2015), <https://www.prisonpolicy.org/reports/prisonvisits.html>.

<sup>217</sup> *Id.*

<sup>218</sup> See generally Parke & Clarke-Stewart, *supra* note 125, at 8–9.

<sup>219</sup> Eric Martin, *The Changing Nature of Correctional Visitation: Can Video Visitation Provide the Same Benefits as In-Person Visits?*, CORR. TODAY 22, 23 (2016), <https://www.ojp.gov/pdffiles1/nij/250197.pdf>.

to communicate or visit their parents. For example, phone calls with parents in prison and jail are often expensive; correctional facilities' visiting guidelines can be difficult to understand or follow; children may be living far from where their parents are incarcerated; and search procedures and encounters with uniformed officers during correctional visits can be daunting and emotionally draining.<sup>220</sup>

The more burdensome the process to visit in-person, the less likely family members are to travel long distances to see their loved ones.<sup>221</sup> For example, some states, including Arkansas and Kentucky, require prospective visitors to provide their social security numbers before visiting.<sup>222</sup> Other states, like Arizona, require visitors to undergo and pay for background checks before being allowed to visit.<sup>223</sup> In addition, some rules are inherently subjective such as Washington State's ban on "excessive emotion," leaving families' visiting experience to the whims of individual officers.<sup>224</sup> Other barriers include lack of privacy, the physical layout of the visitation room, child-unfriendly facilities, and other conditions that deter family members and caregivers from visiting.<sup>225</sup> As more information and research becomes available, policymakers are being urged to reconsider the reality of the prison experience on families.<sup>226</sup>

#### A. Distance as a Barrier to Prison Visitation

Incarcerated mothers face challenges that decrease visitation with their children.<sup>227</sup> One challenge is that mothers are more likely to take children to visit an incarcerated father.<sup>228</sup> Another challenge is that there are fewer

<sup>220</sup> PETERSON ET AL., *supra* note 23, at 1.

<sup>221</sup> SANETA DEVUONO-POWELL ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 11 (2015), <https://perma.cc/9Q4J-WS6F> (concluding that incarceration adversely affects inmates' and their families' health, finances, and relationships); *id.* at 11 (concluding that the growth rates of state correctional budgets have outpaced those of education, transportation, and public assistance); *see also* THE PEW CENTER ON THE STATES, ONE IN 31: THE LONG REACH OF AMERICAN CORRECTIONS 16 (2009), [https://www.pewtrusts.org/~media/assets/2009/03/02/pspp\\_1in31\\_report\\_final\\_web\\_32609.pdf](https://www.pewtrusts.org/~media/assets/2009/03/02/pspp_1in31_report_final_web_32609.pdf) (stating incarceration is also expensive for taxpayers); *see also* TRACEY KYCKELHAHN, U.S. DEP'T OF JUST., LOCAL GOVERNMENT CORRECTIONS EXPENDITURES, FY 2005-2011 3 (2013), <https://www.bjs.gov/content/pub/pdf/lgcefy0511.pdf> (finding that correctional facilities cost local communities over twenty-two billion dollars in 2011).

<sup>222</sup> Rabuy & Kopf, *supra* note 216.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> Parke & Clarke-Stewart, *supra* note 125, at 8.

<sup>226</sup> Rabuy & Kopf, *supra* note 216.

<sup>227</sup> *See* Elena Hontoria Tuerk & Ann Booker Loper, *Contact Between Incarcerated Mothers and Their Children: Assessing Parenting Stress*, 43 J. OFFENDER REHAB. 23 (2006) (the result of these difficulties is that 54% of mothers in state prisons and 42% of mothers in Federal prison never receive visits from their children.).

<sup>228</sup> Martin, *supra* note 219, at 23 (citing Melinda Tasca, "It's Not All Cupcakes and Lollipops": An Investigation of Predictors and Effects of Prison Visitation for Children During Maternal and Parental Incarceration 5 (2014) (Ph.D. dissertation, Arizona State University) (<https://www.ojp.gov/pdffiles1/nij/grants/248650.pdf>)).

correctional facilities for women, so incarcerated mothers are at an increased risk of being located farther from their children.<sup>229</sup> The farther away from home a person is locked up, the fewer visits they receive.<sup>230</sup> Distance from their children and lack of transportation are the most frequent reasons given for so few visits.<sup>231</sup> Caregivers, including grandmothers, are less likely to have the resources necessary to endure a long trip to take children to visit an incarcerated mother.<sup>232</sup>

A prison's distance from the offender's family can be a significant barrier to visitation.<sup>233</sup> Many of the prisons built in recent decades are in rural areas, contributing to transportation challenges for children and their caretakers.<sup>234</sup> "Incarcerated people often serve their sentences far from home in places unreachable by public transport. In-person visits can place a substantial burden on the visitor, who may have to miss work, pay for childcare, and cover the costs of travel."<sup>235</sup> Inmates serving their sentences more than fifty miles from their city of residence are much less likely to receive phone calls or be visited by children, family, or friends.<sup>236</sup> A National Council on Crime and Delinquency report confirms that 60% of incarcerated mothers are incarcerated more than one hundred miles from their children, making visitation geographically and financially prohibitive.<sup>237</sup>

### B. Remote Video Visitation

Most agree there are benefits of video visitation in prisons and jails.<sup>238</sup> Research demonstrates that prison visitation is vital to the success of

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<sup>229</sup> Parke & Clarke-Stewart, *supra* note 125, at 8 (citing to Mark S. Kaplan & Jennifer E. Sasser, *Women Behind Bars: Trends and Policy Issues*, 23 J. SOCIO. & SOC. WELFARE 43, 49 (1996)); see also Johanna Christian, *Riding the Bus: Barriers to Prison Visitation and Family Management Strategies*, 21 J. CONTEMP. CRIM. JUST. 31 (2005).

<sup>230</sup> Kelly Bedard & Eric Helland, *The Location of Women's Prisons and the Deterrence Effect of "Harder" Time*, 24 INT'L REV. L. & ECON. 147, 152 (2004) (focusing on the punitiveness of reduced visitation as a result of being incarcerated far away from home).

<sup>231</sup> *Id.* (referring to the 1994 Bureau of Justice Statistics report that 52% of women with children receive no visits from their children and that the cost of traveling to distant prisons is the most stated reason for the lack of contact).

<sup>232</sup> Martin, *supra* note 219, at 23.

<sup>233</sup> HAIRSTON, *supra* note 111, at 4–5.

<sup>234</sup> *Id.*

<sup>235</sup> LÉON DIGARD ET AL., A NEW ROLE FOR TECHNOLOGY? IMPLEMENTING VIDEO VISITATION IN PRISON, VERA INST. OF JUST. 2 (2016), [https://www.vera.org/downloads/publications/video-visitation-in-prison\\_02.pdf](https://www.vera.org/downloads/publications/video-visitation-in-prison_02.pdf).

<sup>236</sup> Bedard & Helland, *supra* note 230, at 153 ("For example, 47% of women whose city of residence is less than 50 miles of the prison see their children at least once a month compared to only 24% of women whose city of residence is fifty miles or more from the prison.").

<sup>237</sup> *Id.* at 152.

<sup>238</sup> See BERNADETTE RABUY & PETER WANGER, SCREENING OUT FAMILY TIME: THE FOR-PROFIT VIDEO VISITATION INDUSTRY IN PRISONS AND JAILS, PRISON POL'Y INITIATIVE 2 (2015), [https://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime\\_January2015.pdf](https://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf) (stating the benefits of video visitation, including addressing the challenges of long distances to most prisons and jails; not as restrictive as in-person visitation, especially for children, the elderly, and for people with disabilities; allows children to visit from familiar setting; eliminates physically moving incarcerated people from cells to visitation rooms; and that it is not possible to transmit contraband via computer screen).

incarcerated people through improving conduct, reducing the risk of reoffending, and promoting positive parent-child relationships.<sup>239</sup> Video visitation can decrease the burden and costs of caregivers to bring children to prison facilities long distances from their homes. Additionally, video visitation may be a viable option for some children who respond negatively to in-person visitation with a parent in a prison setting.<sup>240</sup>

Of concern, however, is that the implementation of video visitation in prisons and jails is far from uniform across the states. Some states limit the availability and accessibility to certain categories of incarcerated people.<sup>241</sup> For instance, they restrict access to video visitation for those held in segregation as a form of discipline.<sup>242</sup> Other states limit the availability to specific locations, to parents whose children cannot visit the facility, or to those who have not received in-person visits for more than a year.<sup>243</sup>

Video visitation costs can still be financially out of reach for many incarcerated people and their visitors.<sup>244</sup> In-person visitation is usually free for the inmate,<sup>245</sup> while video visitation can be costly and plagued with technological glitches, making the experience frustrating.<sup>246</sup> Costs of implementing a video visitation system can vary depending on whether the facility owns and operates its system, or whether a contracted vendor installs and maintains the video visitation system. Even with some contracted services, the facility can use the service to generate income by charging a commission.

The average user fee for video visits was [forty-one] cents per minute, with the highest fee reported by the Alabama DOC at [sixty] cents per minute. The DOCs in Georgia, Indiana, and Oregon reported the lowest user fees—[thirty-three] cents per minute. Many jurisdictions require users to pay for a minimum number of minutes; in Pennsylvania, for example, visits last 55 minutes and cost \$20 (36 cents per minute).<sup>247</sup>

When a correctional facility does not provide video visitation services free of charge, it passes the costs on to the users.<sup>248</sup> Prisons must carefully

<sup>239</sup> Mitchell et al., *supra* note 25; Boudin et al., *supra* note 24; Cochran, *supra* note 24.

<sup>240</sup> Tasca, *supra* note 228, at 146.

<sup>241</sup> DIGARD ET AL., *supra* note 235, at 6.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 8.

<sup>244</sup> *Id.* at 14.

<sup>245</sup> See RABUY & WAGNER, *supra* note 238, at 11 (noting that 74% of jails that adopt video visitation then eliminate in-person visitation).

<sup>246</sup> *Id.* at 10 (noting that in-person visitation is traditionally free); but see, e.g., Erica Goode, *Inmate Visits Now Carry Added Cost in Arizona*, N.Y. TIMES, Sept. 5, 2011, at A10 (reporting that the Arizona Department of Corrections charges visitors a one-time twenty-five-dollar fee for a background check).

<sup>247</sup> DIGARD ET AL., *supra* note 235, at 13.

<sup>248</sup> DEVUONO-POWEL ET AL., *supra* note 221, at 11 (concluding that incarceration adversely affects inmates' and their families' health, finances, and relationships).

consider the cost to family users of these services and consider subsidizing and controlling these costs.<sup>249</sup> The costs of video visitation for the prison or jail can be minimal when a state's department of corrections uses a contracted provider that bundles video visitation with other services.<sup>250</sup> Prisons can partner with remote locations to support telecommunications from around the state for those who cannot access required technology or high-speed internet from home.<sup>251</sup> As a supplement to sometimes costly and time-consuming in-person visits, remote visits can encourage and reinforce gains made by those in-person visits.<sup>252</sup>

A study funded by the National Institute of Justice examined the availability of video visitation and its impact on incarcerated persons' family contact and prison behavior in the Washington State Department of Corrections (WADOC).<sup>253</sup> The study found that video visitation allows incarcerated persons additional opportunities for visits with their loved ones and complements in-person visits.<sup>254</sup> It also confirmed that receiving visitation, including video visitation, can help by "reducing . . . behavioral infractions, [and] decreasing the risk of [an incarcerated person] reoffending after release."<sup>255</sup>

In Washington State's Department of Corrections program, which is considered a model for implementing a video visitation program at minimal cost, the cost-prohibitive nature of video visitation was still apparent.

While this user fee is low compared to travel costs and other expenses associated with in-person visits, it was reportedly still prohibitively high for many of the incarcerated people surveyed in WADOC facilities— nearly half of all the incarcerated people surveyed (47[%]) said that the cost of video visitation prevented them from using the service or from using it more often.<sup>256</sup>

"With the advent of inexpensive . . . video technology, like Skype and FaceTime," many more departments of correction have begun to explore video visitation as a way to increase opportunities for visitation in prisons and jails.<sup>257</sup> There are reasons to be cautious about implementing video

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<sup>249</sup> See Nicole Lewis & Beatrix Lockwood, *The Hidden Cost of Incarceration*, THE MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), <https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration>.

<sup>250</sup> DIGARD ET AL., *supra* note 235, at 11 (explaining that even when a DOC contracts with an external vendor to bring communications systems including video visitation into a prison, the agency can charge a commission for these services).

<sup>251</sup> *Id.* at 18.

<sup>252</sup> *See id.* at 10.

<sup>253</sup> *Id.* at 6.

<sup>254</sup> *Id.* at 10.

<sup>255</sup> *Id.* at 4.

<sup>256</sup> *Id.* at 14.

<sup>257</sup> *Id.* at 4.

visitation in correctional settings.<sup>258</sup> Video visitation has the potential to jeopardize in-person visitation when instituted as a replacement instead of an additional form of prison visitation.<sup>259</sup> While complementing in-person visitation with video visitation may save correctional institutions money and increase opportunities for incarcerated parents to visit their children, it may not be an adequate, long-term substitution for in-person visitation between prisoners and their families.<sup>260</sup> The fact is, visiting over a video screen is not the same as seeing someone in person.<sup>261</sup> Physical, face-to-face visits with loved ones influence an incarcerated person's behavior and provide superior psychological benefits compared to video visitation.<sup>262</sup> Despite the benefits of in-person visitation, there is a growing trend of replacing in-person visitation with video visitation,<sup>263</sup> especially today, in reaction to the public health crisis that resulted from the COVID-19 pandemic.

### C. Impacts of COVID-19 on Prison Visitation Policies

The COVID-19 pandemic required many correctional facilities to terminate in-person visits to slow the spread of the virus, prompting increased pleas for telephone and video calls.<sup>264</sup> It is apparent now that the isolating measures taken in response to the pandemic will inevitably affect temporary and even permanent visitation policies throughout the American prison system. As virtually all correctional facilities were required to eliminate in-person visitation for containment purposes, demand increased for access to virtual visitation for prisoners, particularly parents.<sup>265</sup> Concerns about the widespread adoption of virtual visitation in place of in-person visitation remain essential. Some prisons and the Federal Bureau of Prisons waived virtual visitation fees during the coronavirus pandemic, but there are no assurances the waivers will continue.<sup>266</sup> Regardless, there is no doubt that

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<sup>258</sup> PETERSON ET AL., *supra* note 23, at 52 (video visits “have the potential to exacerbate the stress and frustration children and families experience during visits because children cannot touch or see how their parent is doing in person.”).

<sup>259</sup> Alexandre Bou-Rhodes, *Straight to Video: America's Inmates Deprived of a Lifeline Through Video-Only Visits*, 60 B.C. L. REV. 1243, 1244 (2019).

<sup>260</sup> PETERSON ET AL., *supra* note 23, at 53; *see also* RABUY & WAGNER, *supra* note 238, at 2–3.

<sup>261</sup> *Id.* (explaining that video visitation is even less intimate than visiting through a glass, which families already find less preferable than contact visits).

<sup>262</sup> *See, e.g.*, SUSAN PINKER, *THE VILLAGE EFFECT: HOW FACE-TO-FACE CONTACT CAN MAKE US HEALTHIER, HAPPIER, AND SMARTER* 9 (2014) (noting the critical importance in-person communication and that it affects thought and trust processes).

<sup>263</sup> RABUY & WAGNER, *supra* note 238, at 11 (noting that 74% of jails that adopt video visitation then eliminate in-person visitation).

<sup>264</sup> Bernadette Rabuy & Wanda Bertram, *Jails and Prisons Are Suspending Visits to Slow COVID-19. Here's What Advocates Can Do to Help People Inside*, PRISON POL'Y INITIATIVE (Mar. 17, 2020), <https://www.prisonpolicy.org/blog/2020/03/17/covid19-visits/>.

<sup>265</sup> *We Must Urgently Do More to Address COVID-19 Behind Bars and Avoid Mass Infection and Death: Guidance for Attorney General Barr, Governors, Sheriffs, and Corrections Administrators*, VERA INST. OF JUST. (May 12, 2020), <https://www.vera.org/downloads/publications/coronavirus-guidance-crisis-behind-bars.pdf>.

<sup>266</sup> *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (May 18, 2021), <https://www.prisonpolicy.org/virus/virusresponse.html>.

video visitation in prisons and jails will continue to prevail for the foreseeable future.<sup>267</sup>

While correctional facilities have increasingly been exploring ways to improve the accessibility and efficacy of family-centered visitation, there was no way to anticipate the impact and unexpected consequences of the COVID-19 pandemic for incarcerated individuals or their families. The pandemic has changed the landscape of institutional administration in ways inconsistent across the states, and changes are anticipated to evolve in the indefinite future. Correctional responses to the unfolding pandemic are challenging to predict. There is a patchwork of fifty different state correctional authorities plus the Federal Bureau of Prisons, which makes family visitation uneven across the United States and has made pandemic responses similarly inconsistent. Now more than ever, there needs to be a renewed focus on improving access between incarcerated parents and their children.

#### *D. Benefits of Visitation on Custodial Behavior of Incarcerated Parents*

The implications and benefits of visitation reach beyond the individual prisoner or her children. Studies that focus on the pains of incarceration, including loss of unlimited access to family and friends, have found the stressors and anxiety related to not having contact with loved ones during incarceration often lead to disruptive behaviors.<sup>268</sup> Available research confirms that incarcerated mothers who do not receive visits from their minor children are more likely to engage in serious and often violent misconduct.<sup>269</sup> Other studies confirm that visitations improve prisoner behavior and increase prison safety.<sup>270</sup>

Less disruptive behavior of inmates benefits internal security in correctional facilities.<sup>271</sup> Incarcerated parents who receive frequent visits by their children are less likely to break a prison rule than those visited less frequently.<sup>272</sup> Correctional staff and administrators are increasingly aware of the benefits of inmate visitation and how it improves behaviors while incarcerated.<sup>273</sup> Correlating visitation with prison security is a significant development, especially since institutional security is frequently cited as a

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<sup>267</sup> See DIGARD ET AL., *supra* note 235, at 19.

<sup>268</sup> See Blevins et al., *supra* note 24, at 151–52.

<sup>269</sup> Mari B. Pierce et al., *Assessing the Impact of Visitation on Inmate Misconduct Within a County Jail*, 31 SEC. J. 1, 5 (2018) (“As this study assessed a particular population of inmates, mothers of minor children, and a specific type of visit, visits by minor children, the findings may be unique.”).

<sup>270</sup> Boudin et al., *supra* note 24, at 152.

<sup>271</sup> See 34 U.S.C. § 60501(b)(6) (stating that inmates who remain connected to loved ones while incarcerated are less likely to have “negative incidents”) (originally enacted as 42 U.S.C. § 17501); Sonja E. Siennick et al., *Here and Gone: Anticipation and Separation Effects of Prison Visits on Inmate Infractions*, 50 J. RSCH. CRIME & DELINQ. 417, 435 (2013) (finding that in the weeks leading up to an in-person visit the probability of an inmate committing a facility infraction decreased).

<sup>272</sup> See Bou-Rhodes, *supra* note 259, at 1270.

<sup>273</sup> Pierce et al., *supra* note 269, at 4.



reason to limit visitations.<sup>274</sup> The administrators of correctional facilities are vital to facilitate improvements that preserve family connections during incarceration. As more research confirms the benefits of improved visitation policies that support legitimate penological interests, the more likely it is that prison administrators can implement transformative reforms and policies.<sup>275</sup>

### E. Reducing Recidivism

Despite increased numbers of incarcerated women, courts continue to pay “little attention to the cyclical nature of incarceration among women and how it often” destabilizes families further.<sup>276</sup> While recent reforms have reduced the total number of people in state prisons, almost all the decreases have been among men.<sup>277</sup> Failure to consider essential differences between female and male involvement with the criminal justice system, including women generally having lower recidivism rates,<sup>278</sup> disproportionately contributes to the collateral costs of mass incarceration. Fortunately, efforts to reduce recidivism have received increased attention due to inadequate prison capacity and overcrowding.<sup>279</sup> The increased interest in promoting success after prison release requires policymakers to consider ways to make prison visitation more accessible.

Since nearly 95% of those sentenced to prison are eventually released,<sup>280</sup> more research is needed to study ways to decrease recidivism and increase successful reintegration for ex-prisoners back into their communities and their families.<sup>281</sup> Several theoretical efforts support the beneficial effects of visitation, not only during incarceration but also post-

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<sup>274</sup> George L. Blum, Annotation, *Right of Jailed or Imprisoned Parent to Visit from Minor Child*, 6 A.L.R.6th 483 (2005) (setting forth cases that disallowed visits between an incarcerated parent and their minor child by courts holding that any possible constitutional infringement on the inmate's rights were outweighed by legitimate penological interests, or rejecting the prisoner's argument that restrictions on child visitation violated the right of association guaranteed by the First Amendment or that such restrictions were a violation of due process and equal protection); see also *Overton v. Bazzetta*, 539 U.S. 126 (2003).

<sup>275</sup> See Martin, *supra* note 219, at 22.

<sup>276</sup> Christina Scotti, *Generating Trauma: How the United States Violates the Human Rights of Incarcerated Mothers and Their Children*, 23 CUNY L. REV. 38, 63 (2020); see generally Kajstura, *supra* note 36.

<sup>277</sup> Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), [https://www.prisonpolicy.org/reports/women\\_overtime.html#statelevel](https://www.prisonpolicy.org/reports/women_overtime.html#statelevel); see also *Incarcerated Women and Girls*, THE SENT'G PROJECT (Nov. 24, 2020) (“The female incarcerated population stand over seven times higher than in 1980.”).

<sup>278</sup> Margareth Etienne, *Sentencing Women: Reassessing the Claims of Disparity*, 14 J. GENDER, RACE & JUST. 73, 82 (2010).

<sup>279</sup> See generally First Step Act of 2018, 18 U.S.C. § 1 (passing in Congress in 2018, with former President Trump signing. The First Step Act (FSA) of 2018 is a bipartisan criminal justice bill that reforms sentencing laws to reduce recidivism, decrease the federal inmate population and maintain public safety).

<sup>280</sup> Timothy Hughes & Doris James Wilson, *Reentry Trends in the United States: Inmates Returning to the Community After Serving Time in Prison*, BUREAU OF JUST. STAT. (Apr. 14, 2004), <https://www.bjs.ojp.gov/content/pub/pdf/reentry.pdf>.

<sup>281</sup> See generally E. Rely Vilciã, *The Influence of Inmate Visitation on the Decision to Grant Parole: An Exploratory Study*, 43 J. CRIM. JUST. 498 (2015).

release.<sup>282</sup> A variety of studies confirm that increased contact between inmates and their families is an important way for inmates to maintain or rebuild relationships that can improve the likelihood of success once released.<sup>283</sup>

By maintaining social bonds during incarceration, offenders are less likely to engage in criminal activity and more likely to rely on family and friends for support, including employment, financial assistance, and housing once released.<sup>284</sup> Former inmates often turn to their spouses, parents, siblings, grandparents, and other family members for assistance when transitioning back into the community.<sup>285</sup> Visitation with family members, including children, while incarcerated is pivotal to successful reintegration after release.<sup>286</sup> For example, a Minnesota prison study found that maintaining family support and relationships while incarcerated can decrease recidivism and increase public safety upon release.<sup>287</sup>

Tracking over 16,000 prisoners released from Minnesota prisons between 2003 and 2007, the study showed that, when controlling for numerous other factors, prisoners who received visits were thirteen percent less likely to be reconvicted of a felony after release and twenty-five percent less likely to have their probation or parole revoked.<sup>288</sup>

Another researcher found that inmates who receive visitation experience an estimated reduction of recidivism of around 3.5% per visit.<sup>289</sup> Many corrections officials understand the positive role of maintaining familial contact for those going through the reentry process upon release; however, they do not often know how to help people in prison maintain the

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<sup>282</sup> Mears et al., *supra* note 25, at 888, 893–94.

<sup>283</sup> Tasca et al., *supra* note 215, at 55–56 (citing JOYCE A. ARDITTI, PARENTAL INCARCERATION AND THE FAMILY: PSYCHOLOGICAL AND SOCIAL EFFECTS OF IMPRISONMENT ON CHILDREN, PARENTS, AND CAREGIVERS (2012)); see also Jeremy Travis & Michelle Waul, *Prisoners Once Removed: The Children and Families*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 1, 10 (Jeremy Travis & Michelle Waul eds., 2003); William D. Bales & Daniel P. Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45 J. RSCH. CRIME & DELINQ. 287, 304–05 (2008); Jeremy Travis, 69 FED. PROBATION 31, 31–32 (2005); Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAM. L.Q. 191, 191–92 (2006) (analyzing the development of parenting skills in prison).

<sup>284</sup> Mark T. Berg & Beth M. Huebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382 (2011).

<sup>285</sup> Mike Bobbitt & Marta Nelson, *The Front Line: Building Programs that Recognize Families' Role in Reentry*, VERA INST. OF JUST. (2004), [https://www.prisonpolicy.org/scans/vera/249\\_476.pdf](https://www.prisonpolicy.org/scans/vera/249_476.pdf).

<sup>286</sup> Tasseli McKay et al., *If Family Matters: Supporting Family Relationships During Incarceration and Reentry*, 15 CRIMINOLOGY & PUB. POL'Y 529 (2016).

<sup>287</sup> *The Effects of Prison Visitation on Offender Recidivism*, MINN. DEP'T OF CORR. (2011), [https://mn.gov/doc/assets/11-11MNPisonVisitationStudy\\_tcm1089-272781.pdf](https://mn.gov/doc/assets/11-11MNPisonVisitationStudy_tcm1089-272781.pdf).

<sup>288</sup> Boudin et al., *supra* note 24, at 152.

<sup>289</sup> Bales & Mears, *supra* note 283, at 304–05.

necessary connections.<sup>290</sup> When offenders no longer return to prison for probation or parole violations, the economic costs of incarceration are lowered and, importantly, so are the costs to familial relationships.

## VII. LIMITATIONS OF COURT CHALLENGES TO PRISON VISITATION POLICIES

As a result of the historical lack of gender-informed correctional policies, the different needs of female and male offenders and their ability to maintain contact with their children still are not considered in most prison visitation policies. Despite the benefits, prison visitation is often severely restricted by correctional facilities, and courts have been reluctant to intervene.<sup>291</sup> For decades courts have given considerable deference to correction officials' decisions, policies, and procedures purporting to ensure the security and order of the institution.<sup>292</sup> The broad scope of penological interests claimed to be protected by restrictive visitation policies include "interests that relate to the treatment (including punishment, deterrence, rehabilitation, etc.) of persons convicted of crimes."<sup>293</sup>

While there is no federal law or case declaring inmates have a right to visitation, visitation policies exist in almost all correctional facilities today.<sup>294</sup> As prison sentences have increased, so too have offenders' challenges against barriers to familial visitation and access to social support networks. A key challenge to such policies occurred in 2003 when the United States Supreme Court decided *Overton v. Bazzetta*.<sup>295</sup>

The case involved controversial visitation bans implemented by Michigan prison officials in 1995 to address drug smuggling and disciplinary problems.<sup>296</sup> The policies included a ban on visitation by minor nieces and nephews and children for whom the inmate's parental rights had been terminated, including those children adopted by family or friends.<sup>297</sup>

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<sup>290</sup> Alex Friedmann, *Lowering Recidivism Through Family Communication*, PRISON LEGAL NEWS 24 (Apr. 15, 2014), <https://www.prisonlegalnews.org/news/2014/apr/15/lowering-recidivism-through-family-communication/>.

<sup>291</sup> Bou-Rhodes, *supra* note 259, at 1243.

<sup>292</sup> See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979) ("Prison administrators therefore should be accorded wide-ranging deference on the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. . . . 'Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated the response to these considerations, courts should ordinarily defer to their expert judgment in such matters.' . . . Prison administrators may be 'experts' only by Act of Congress or of a state legislature." (Marshall, Stevens, and Brennan, JJ., dissenting)); see also *Turner v. Safley*, 482 U.S. 78, 85 (1987) (recognizing the level of expertise needed to run a prison).

<sup>293</sup> *Bull v. City & Cnty. of S.F.*, 595 F.3d 964, 996 (9th Cir. 2010) (quoting *Benjamin v. Fraser*, 264 F.3d 175, 187 n.10 (2d Cir. 2001)).

<sup>294</sup> See generally Boudin et al., *supra* note 24.

<sup>295</sup> *Overton v. Bazzetta*, 539 U.S. 126 (2003).

<sup>296</sup> *Id.* at 129. Christie Thompson, *When Prisons Cut Off Visits — Indefinitely*, THE MARSHALL PROJECT (Apr. 9, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/04/09/when-prisons-cut-off-visits-indefinitely>.

<sup>297</sup> *Id.* at 126.

The plaintiffs were a group of incarcerated women who asserted the Michigan Department of Corrections policies restricting visitation violated their rights to “intimate association” and the consequences for violations constituted “cruel and unusual punishment.”<sup>298</sup> To support their claims, the plaintiffs introduced as a key witness a psychiatrist, Dr. Terry Kupers, who was an expert on prison conditions, including the opportunity to maintain family ties.<sup>299</sup> Dr. Terry Kupers testified about a 1972 study that connected reduced recidivism and familial contact during incarceration:

The central finding of this research is the strong and consistent positive relationship that exists between parole success and maintaining strong family ties while in prison. Only [fifty] percent of the “no contact” inmates completed their first year on parole without being arrested, while [seventy] percent of those with three visitors were “arrest free” during this period. In addition, the “loners” were [6] times more likely to wind up back in prison during the first year (12[%] returned compared to 2[%] for those with [3] or more visitors). For all Base Expectancy levels, we found that those who maintained closer ties performed more satisfactorily on parole.<sup>300</sup>

The state court and the Sixth Circuit Court of Appeals ruled in favor of the women.<sup>301</sup> The Michigan Department of Corrections appealed to the United States Supreme Court, bringing public attention to the issue of prison visitation.<sup>302</sup> Before the Supreme Court heard the case, the department changed the policy to allow young siblings to visit, but both the substance abuse law and the ban on other relatives under eighteen remained.<sup>303</sup> Applying a four-factor test from *Turner v. Safley*,<sup>304</sup> all nine justices sided

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<sup>298</sup> *Id.* at 136–37, 141.

<sup>299</sup> Christie Thompson, *When Prisons Cut Off Visits — Indefinitely*, THE MARSHALL PROJECT (Jan. 23, 2022, 6:00 AM), <https://www.themarshallproject.org/2019/04/09/when-prisons-cut-off-visits-indefinitely>.

<sup>300</sup> Friedmann, *supra* note 295 (citing to NORMAN HOLT & DONALD MILLER, EXPLORATIONS IN INTIMATE-FAMILY RELATIONSHIPS 1 (Cal. Dep’t of Corr. ed., 1972)).

<sup>301</sup> Thompson, *supra* note 299; *see also* Bazzetta v. McGinnis, 148 F.Supp.2d 813 (E.D. Mich. 2001); Bazzetta v. McGinnis, 286 F.3d 311 (6th Cir. 2002).

<sup>302</sup> Thompson, *supra* note 299.

<sup>303</sup> *Id.*

<sup>304</sup> *Turner v. Safley*, 482 U.S. 78, 89–90 (1986) (declaring four factors relevant in deciding whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge, including: (1) whether regulation has valid, rational connection to legitimate governmental interest; (2) whether alternative means are open to inmates to exercise the asserted right; (3) what impact an accommodation of right would have on guards, inmates and prison resources; and (4) whether there are ready alternatives to the regulation. *Turner* involved challenges to the Missouri Department of Corrections policies on inmate marriage and correspondence between inmates. Writing for the majority, Justice Sandra Day O’Connor declared “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” On the claims, the Court upheld the correspondence regulation and struck down marriage ban, recognizing prison administrators should be given deference in the management of their institutions.).

with the prison officials finding the prison regulations protected legitimate penological interests and therefore could withstand a constitutional challenge.<sup>305</sup> The result was a seminal case upholding the restrictions on prisoner visitation, including visitation between the inmates and their children.<sup>306</sup>

Though prison staff claimed that visiting children created disturbances, not one documented incident occurred.<sup>307</sup> Conversely, studies have found that “[t]he presence of children makes prisons easier, not harder, to manage, and that lawsuits have not been a problem.”<sup>308</sup> There is also no support for the defendant’s proposition that child visitors would become “too comfortable” with prison life and less deterred from criminal acts.<sup>309</sup> Instead, studies show many children separated from an incarcerated parent suffer considerable psychological harm and may have a higher likelihood of criminality.<sup>310</sup> The Court in *Overton* “assumed the truthfulness of the prison officials’ concerns about visitation by minors despite empirical evidence to the contrary.”<sup>311</sup>

The Court also sided with prison officials finding that more inmates implies more visitors, and those visitors require supervision and control by an already overburdened prison system.<sup>312</sup> The *Overton* court uses safety precautions as a shield to ignore the negative impacts of restricting visitation between parents and their children.<sup>313</sup> Doing so obscures the positive impacts of visitation for inmates, their children, communities, and the correctional institutions. The Court’s decision declaring the regulations bear a rational relation to legitimate penological interests, permits restrictive visitation policies to be sustained regardless of whether respondents have a constitutional right of association that has survived incarceration.<sup>314</sup> It has been over twenty-five years since Michigan adopted the controversial visitation policy, and families are still fighting it today. *Overton*’s overall

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<sup>305</sup> Thompson, *supra* note 299.

<sup>306</sup> *Overton v. Bazzetta*, 539 U.S. 126, 127 (2003) (examining prison regulations that include the exclusion of certain family, including minor nieces and nephews and children, as to whom parental rights had been terminated, and other regulations which (1) prohibit inmates from visiting with former inmates, (2) require children to be accompanied by a family member or legal guardian during visitation, and (3) subject inmates with two substance-abuse violations to a ban of at least two years on future visitation).

<sup>307</sup> James Robertson, *The Rehnquist Court and the “Turnerization” of Prisoner’s Rights*, 10 N.Y.C. L. REV. 97, 121 (2006); *Overton*, 539 U.S. at 127.

<sup>308</sup> *Overton*, 539 U.S. at 135; *see also* Kelsey Kauffman, *Mothers in Prison*, 63 CORR. TODAY 62, 65 (2001).

<sup>309</sup> Robertson, *supra* note 307, at 121.

<sup>310</sup> *Id.* at 120–21; *see also* BARBARA BLOOM, *Children of Prisoners*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 298 (Marilyn D. McShane & Frank P. Williams III eds., 1996) (stating imprisoned mothers also benefit from visits with their children); Mary Martin, *Connected Mothers: A Follow-Up Study of Incarcerated Women and Their Children*, 8 WOMEN & CRIM. JUST. 1, 18–19 (1997) (finding a strong relationship between post-prison success and imprisoned mothers who frequently visited with their children while incarcerated in the Minnesota Correctional Facility at Shakopee).

<sup>311</sup> Robertson, *supra* note 307, at 133 (citing *Overton*, 539 U.S. at 126).

<sup>312</sup> *Overton*, 539 U.S. at 126–27.

<sup>313</sup> *See id.* at 135.

<sup>314</sup> *Id.* at 132 (stating that the Supreme Court would “accord substantial deference to the professional judgment of prison administrators”).

effect has been to establish the constitutionality of restricting the right of association for inmates. As acknowledged by the Court in *Overton*, “freedom of association is among the rights least compatible with incarceration.”<sup>315</sup>

#### VIII. FAMILY-FOCUSED VISITATION POLICIES: REDUCING BARRIERS

For incarcerated parents and their families, challenging prison policies through litigation is rarely successful.<sup>316</sup> Since *Overton*, courts frequently cite the ruling to uphold a range of prison visitation policies over prisoners’ rights to visitation with their children.<sup>317</sup> As demonstrated, even when there is an understanding of the benefits of supporting parent-children’s relationships during incarceration, implementing comprehensive reforms can be difficult. One reason is that visitation policies and resources vary in each correctional facility.<sup>318</sup> Another reason is that increasing access and facilitating appropriate and beneficial contact in a prison setting requires buy-in from the administrators and staff of each facility. While more research confirms the importance of visitation practices in correctional settings,<sup>319</sup> many professionals and some family members continue to question the appropriateness and potential effects on children having contact with an incarcerated parent.<sup>320</sup> It may take time to collect data on the results, but since *Overton*, several states have successfully enacted legislation that encourages and increases the accessibility of prison visitation.<sup>321</sup>

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<sup>315</sup> *Id.* at 131.

<sup>316</sup> Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 163 (2015).

<sup>317</sup> See *In re Gossett*, 435 P.3d 314, 320 (Wash. Ct. App. 2019) (holding state and federal constitutions’ due process clauses did not create a protected liberty interest in prison visitation between prison inmate and his minor children; an inmate did not have a liberty interest under federal due process clause in the denial of contact visits by a spouse, relatives, children, and friends, and state due process clause was presumptively coextensive with the federal due process clause); *Brown v. Divelbliss*, 963 N.Y.S.2d 791, 793 (N.Y. App. Div. 2013) (finding insufficient the opposition of mother and attorney for child, when unsupported by any evidence that visitation would be detrimental to child, as determinative to support Family Court’s denial of incarcerated father’s petition for visitation with child); *Wirsching v. Colorado*, 360 F.3d 1191, 1193 (10th Cir. 2004) (holding that prison officials did not violate a convicted sex offender’s rights of familial association nor his due process rights by refusing to allow visits between his child and himself due to his refusal to comply with the requirements of his treatment program, where the protection of the children and the furthering of rehabilitation of convicted sex offenders were legitimate governmental interests justifying the policy, and where prison officials allowed the offender to contact his child by letter and telephone); *Nouri v. Cnty. of Oakland*, 615 F. App’x 291, 297–300 (6th Cir. 2015) (declaring County did not violate high security inmate’s rights under First, Eighth, or Fourteenth Amendment when it denied him visitation rights with his minor children, as restriction on visits to high security inmates had rational relation to legitimate penological interest of maintaining internal security and protecting minor visitors, inmate had alternate means of communicating with children, and impact on jail staff and prison resources was obviously disruptive to inmate security).

<sup>318</sup> Boudin et al., *supra* note 24, at 157–66.

<sup>319</sup> Branden A. McLeod & Janaé Bonsu, *The Benefits and Challenges of Visitation Practices in Correctional Settings: Will Video Visitation Assist Incarcerated Fathers and Their Children?*, 93 CHILD. YOUTH SERVS. REV. 30, 30–35 (2018).

<sup>320</sup> See generally Poehlmann et al., *supra* note 83, at 576.

<sup>321</sup> Thompson, *supra* note 295 (asserting that even in Michigan, corrections officials have allowed, under certain conditions, inmates to apply to have visits reinstated).

### A. Child-Focused Considerations

The daunting needs of children of prisoners often go unrecognized. In 2003, the San Francisco Children of Incarcerated Parents Partnership adopted and published the Children of Incarcerated Parents Bill of Rights (Children’s Bill of Rights) to ensure that every child with an incarcerated parent is guaranteed certain rights.<sup>322</sup> The Children’s Bill of Rights was later considered a model for the United Nations Human Rights Council Resolution on the Rights of the Child.<sup>323</sup> According to the Children’s Bill of Rights, children with an incarcerated parent are entitled to know the truth about their parent, be well cared for during their parent’s absence, and maintain relationships with their incarcerated parents.<sup>324</sup> Children also have the right to speak to and touch their incarcerated parents during visitations.<sup>325</sup>

The Children’s Bill of Rights focuses on the needs of the children of incarcerated parents by calling on the relevant agencies and institutions to consider the needs of children when their parents are incarcerated.<sup>326</sup> “There is no requirement that the various institutions charged with dealing with those accused of breaking the law—police, courts, jails and prisons, probation departments— inquire about the children’s existence, much less concern themselves with the children’s care.”<sup>327</sup> Implementation of consistent and systemic data collection by police, courts, prison administrators, schools, and child welfare agencies is necessary to identify children with an incarcerated parent.<sup>328</sup> Only then can children be acknowledged, and their needs considered. Hawaii is one state taking the lead on understanding the costs to children when parents are incarcerated. In 2015, to improve data collection in Hawaii, the state passed legislation requiring the Department of Public Safety to collect data relating to the number of parents in the state correctional system who have children under eighteen to provide services to incarcerated parents and their children.<sup>329</sup> Once the children’s circumstances are known, their needs, including safe caregivers, housing, food, clothing, and medical care can be addressed.

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<sup>322</sup> S.F. CHILD, INCARCERATED PARENTS P’SHIP, *Children of Incarcerated Parents: A Bill of Rights* (rev. 2005), [http://sfoonline.barnard.edu/children/SFCIPP\\_Bill\\_of\\_Rights.pdf](http://sfoonline.barnard.edu/children/SFCIPP_Bill_of_Rights.pdf); see also G.A. Res. 19/L.31 (Mar. 20, 2012) (mirroring “The Bill of Rights for Children of Incarcerated Parents”) [hereinafter Children’s Bill of Rights].

<sup>323</sup> G.A. Res. 66/141 (Apr. 4, 2012).

<sup>324</sup> Children’s Bill of Rights, *supra* note 322, at 1 (referencing rights one through eight).

<sup>325</sup> *Id.* at 12 (referencing right 5).

<sup>326</sup> *Id.* (“There is no requirement that the various institutions charged with dealing with those accused of breaking the law—police, courts, jails and prisons, probation departments— inquire about the children’s existence, much less concern themselves with the children’s care.”).

<sup>327</sup> *Id.*

<sup>328</sup> Poehlmann et al., *supra* note 83, 575; see also Simmons, *supra* note 81, at 3 (summarizing what is known about the children of incarcerated parents in California).

<sup>329</sup> HAW. REV. STAT. ANN. § 353-35 (West 2015).

### B. Family-Focused Placement Considerations

There are many benefits of family-focused visitation in correctional settings for inmates, their family and friends, and others associated with the environment in the correctional facilities, including staff and administrators. Implementing policies necessary to maintain a parent-child relationship during incarceration requires family-focused placement or proximity considerations. “Hawaii, for example, enacted legislation in 2007 that, among other things, requires the director of public safety to establish policies that place parent inmates in facilities consistent with public safety and inmate security, based on the best interest of the family rather than on economic or administrative factors.”<sup>330</sup>

In 2010, New Jersey adopted the Strengthening Women and Families Act, which requires the Department of Corrections Commissioner to make every effort to assign incarcerated women to the prisons closest to their families.<sup>331</sup> Florida followed suit in 2015 by directing correction officials to consider the proximity of the correction facility to an incarcerated person’s family when making placements.<sup>332</sup> More recently, in December 2020, New York passed proximity legislation that directs the State Department of Corrections and Community Supervision to place incarcerated parents in the facility closest to their minor children per their designated security level and program and health needs.<sup>333</sup> It took family members and advocates over nine years to pass this legislation in New York, citing that many of the state’s fifty-two prisons were not accessible by public transportation and are hundreds of miles away from where families live.<sup>334</sup>

While some states have taken the initiative to pass proximity legislation to ensure that parents are sent to detention facilities closer to their children’s homes, more needs to happen to facilitate the maintenance of familial relationships between incarcerated mothers and their children.<sup>335</sup> Disrupting the status quo of inaccessible and restrictive prison visitation requires supporting correctional administrators with detailed practices and tools that

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<sup>330</sup> Christian, *supra* note 90, at 8 (citing Haw. Spec. Sess. Law 932 (2007)).

<sup>331</sup> N.J. REV. STAT. § 30:4-8.6 (2009).

<sup>332</sup> FLA. STAT. § 944.171(4) (2009), *amended by* FLA. STAT. § 34.191(5) (2014).

<sup>333</sup> N.Y. MCKINNEY’S CORR. L. § 72-c (McKinney 2021) (repealed 2006).

<sup>334</sup> Velmanette Montgomery, *Governor Cuomo Signs Proximity Legislation into Law Bringing Parents and Children Closer Together*, THE N.Y. STATE SENATE (Dec. 25, 2020), <https://www.nysenate.gov/newsroom/press-releases/velmanette-montgomery/governor-cuomo-signs-proximity-legislation-law>.

<sup>335</sup> *See, e.g.*, Women and Families Strengthening Act, 328 N.J. STAT ANN. § 30:4-8.6 (2009) (leading to N.J. REV. STAT. § 30:4-8.6 (2009), which required that the Department of Corrections Commissioner make every effort to assign incarcerated women to a prison in close proximity to their families); FLA. STAT. § 944.171(4) (2014) (stating that, as much as possible, the department should consider the proximity of a prison to an incarcerated person’s family when making placements). In New York, similar legislation has been put forward in light of COVID-19 and its disparate impacts on people of color. *See* Paul Frangipane, *Senate Passes Montgomery’s Bill to Localize Incarceration for Families*, OSBORNE (Aug. 6, 2020), <https://www.osborneny.org/stay-informed/senate-passes-montgomerys-bill-to-localize-incarceration-for-families>.



can be implemented to remove barriers to parent-child contact and communication.

### C. Model Practices for Parents in Prison

In 2019, a research report entitled *Model Practices for Parents in Prisons and Jails, Reducing Barriers to Family Connections (Model Practices)*, acknowledged the importance of parent-child visitation in correctional facilities.<sup>336</sup> The Model Practices includes several evidence-based model practices to facilitate parent-child communication and contact during parental incarceration that do not compromise a facility's safety or security.<sup>337</sup> The report lays out ten chapters, each with recommended practices for state and federal correctional facilities to consider when developing policies to improve family-centered visitations.<sup>338</sup> The model practices "outlines a group of practices, describes their importance, and lists tips and resources that may help with their implementation."<sup>339</sup> The administrators of each facility can choose which practices to implement to improve support and increase the preservation of parent-child relationships during a parent's incarceration.<sup>340</sup> The report also considers the many difficulties children encounter when attempting to communicate and maintain contact with their incarcerated parents.<sup>341</sup> The researchers gathered multi-disciplinary perspectives on the institutional barriers to parent-child visitation in the prison setting to offer a comprehensive guide for correctional administrators to improve access to and outcomes of children's communications with their incarcerated parents.<sup>342</sup>

The Model Practices present findings in support of earlier research that suggests a division between academic research and correctional programming and practices.<sup>343</sup> The report stresses the importance of family visitation and its relationship to the prison's security goals by offering administrators and staff the tools necessary to effectively address and mitigate the collateral damage on children when their parents are incarcerated.<sup>344</sup> The report also has helpful resources for training correctional employees on the scope of parental incarceration, including the harmful effects on children, and the potential for positive effects on prison discipline, safety, and outcomes at reentry.<sup>345</sup> Finally, the Model Practices

<sup>336</sup> PETERSON ET AL., *supra* note 23, at 1 (this project was funded with a grant by the National Institute of Corrections and the Bureau of Justice Assistance).

<sup>337</sup> *Id.* at 1, 57–61.

<sup>338</sup> PETERSON ET AL., *supra* note 23.

<sup>339</sup> *Id.* at 5 (covering model practices for Partnership Building, Training and Core Competencies, Intake and Assessment, Family Notification and Information Provision, Classes and Groups, Visitor Lobbies, Visiting, Parent-Child Communication, Caregiver Support, and Family-Focused Reentry).

<sup>340</sup> *Id.* at 2.

<sup>341</sup> *Id.* at 1.

<sup>342</sup> *Id.* at 4.

<sup>343</sup> Julie Campbell & Joseph R. Carlson, *Correctional Administrators' Perceptions of Prison Nurseries*, 39 CRIM. JUST. & BEHAV. 1063, 1072 (2012).

<sup>344</sup> PETERSON ET AL., *supra* note 23, at 3.

<sup>345</sup> *Id.* at 4.

stress the importance of partnerships between prison programs and community organizations, institutions, and other government agencies to increase resources that support family relationships.<sup>346</sup>

Institutional support and staff buy-in are essential for facilitating family relationships through incarceration. For in-person visitation to occur, even in the friendliest institutional environment with the most well-appointed facilities, the child must be brought to the facility. The question of *which* children visit their parents is often a question of who the caregiver is.<sup>347</sup> Since caregivers can be non-incarcerated parents, grandparents, other family members, friends, and even foster parents, the barriers caregivers face are also diverse.<sup>348</sup> Most frequently, the caregiver will be a grandmother, especially in cases where the incarcerated parent is the child's mother.<sup>349</sup> These caregivers inevitably make significant financial and emotional investments in the relationship between child and parent. Accordingly, it also benefits corrections reformers to invest in supporting these caregivers, whose participation in the system and the accessibility is a predicate to visitation in the first place.<sup>350</sup>

Since most caregivers bringing children to visits may be traveling a long way to see the incarcerated parent, the visitation policies and procedures must be transparent and easily understood.<sup>351</sup> The investment necessary to facilitate visitations often comes with substantial costs, including transportation, food, and time.<sup>352</sup> There is a significant risk of investing these resources into traveling to the parent's facility only to discover that, for example, the facility is in lockdown, the parent has been transferred, or the parent's visitation privileges have been temporarily revoked.<sup>353</sup> Frustrating for caregivers and scary for children, failures to inform families of status changes can create a chilling effect on visits.<sup>354</sup> For this reason, prisons must ensure clear and timely lines of communication with caregivers and family, both outgoing and incoming.<sup>355</sup> Outgoing communications can take the form of allowing incarcerated parents the opportunity to call family and give updates as their status changes, or at minimum, calls, texts, or emails from administration informing the families of status changes.<sup>356</sup> Facilities must also be prepared to respond to incoming

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<sup>346</sup> *Id.* at 3–4 (examples given include forging a partnership with local churches, which can provide carpools to and from the facility on visitation days, or local libraries and bookstores donating books to prisons for parents to record themselves reading for their children. Universities can provide interns and volunteers to help coordinate programs. Local schools can facilitate video communications, even extending parent-teacher conferencing into the walls of the prison).

<sup>347</sup> *Id.* at 64.

<sup>348</sup> *Id.*

<sup>349</sup> See GLAZE & MARUSCHAK, *supra* note 5, at 5.

<sup>350</sup> See PETERSON ET AL., *supra* note 23, at 64.

<sup>351</sup> See Rabuy & Kopf, *supra* note 215 (determining that over 50% of survey respondents are incarcerated between 101 and 500 miles from the place they lived prior to incarceration).

<sup>352</sup> PETERSON ET AL., *supra* note 23, at 66.

<sup>353</sup> *Id.* at 28.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

communications from family, perhaps through a centralized hotline, to allow prospective visitors to verify the incarcerated parent's status and whether she can currently receive visitors.<sup>357</sup>

Beyond individualized information related to specific incarcerated people, prisons must be careful to communicate the general policies related to visitation. Statewide and local rules can change without clear and advance notice to interested visitors. For this reason, it is essential to post them in a manner accessible to the public.<sup>358</sup> When policies and rules are available, it increases the likelihood visitors can comply and have successful, productive visitations with their incarcerated family; when policies are not readily accessible or changed without notice, visitation is likely to be difficult or impossible.<sup>359</sup>

The Model Practices also provide tools and ideas for addressing the accessibility of prison facilities to use trauma-informed practices that promote visitation and enhance safety and security in women's correctional facilities.<sup>360</sup> Having addressed the human resources which support visitation and the outreach to those most responsible for facilitating it, correctional administration must naturally also address the setting where visits occur. Changing the facilities available to caretakers and visiting children at the outset of their visit can improve their experience, help meet their basic needs, and fundamentally set the tone of visits.<sup>361</sup>

Encouraging family relationships through prison visitation begins at the reception area. Facilities should consider designs for reception areas that prison architects may not typically consider, including the need for bathrooms large enough to accommodate children and their caretakers, with changing tables.<sup>362</sup> Also, prisons should consider designing their lobbies to reduce the anxiety and fear children might feel when waiting in lobby areas for visits.<sup>363</sup> Visitors often spend a significant amount of time waiting for visitations to begin—sometimes as long as an hour.<sup>364</sup> The lobby acts as a transitional space between the outside world and the visitation room, and it often “looks and feels like an extension of the correctional institution, . . . uninviting, constrained, noisy, and crowded.”<sup>365</sup> Here, children are often first subjected to prison security procedures: metal detectors, drug-sniffing dogs, and invasive searches.<sup>366</sup> It should be a priority for prisons to reduce the traumatic character of waiting to see the parent by making visitor lobbies as child-friendly as possible. The Model Practices have suggestions for

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<sup>357</sup> *Id.*

<sup>358</sup> Boudin et al., *supra* note 24, at 160.

<sup>359</sup> *Id.* at 149.

<sup>360</sup> PETERSON ET AL., *supra* note 23, at 19.

<sup>361</sup> *Id.* at 50.

<sup>362</sup> *Id.* at 41.

<sup>363</sup> *Id.* at 39.

<sup>364</sup> Joyce A. Arditti et al., *Saturday Morning at the Jail: Implications of Incarceration for Families and Children*, 52 FAM. REL. 195, 197 (2003).

<sup>365</sup> PETERSON ET AL., *supra* note 23, at 39.

<sup>366</sup> *Id.*

improving visitor lobbies, including adding brightly colored décor, toys, books, or games.<sup>367</sup> Given the possibility of long waiting times, which may occur after even longer travel times, some prisons also provide healthy, affordable food options for young visitors.<sup>368</sup> The Model Practices also recommend painting family visitation rooms in soft or bright colors with child-appropriate, soft furnishing.<sup>369</sup> Children may be more comfortable and visitation more interactive when “props” like games, play tables, art supplies, and books for various ages are available.<sup>370</sup>

The experiences leading up to the visitation can set the tone for the main event. Prisons can be stressful, alienating places for both children and caretakers.<sup>371</sup> Not all children respond positively to visiting a parent in prison. Several studies indicate that many children experience “fear, anger, anxiety, crying, depression, emotional outbursts.”<sup>372</sup> Others, however, have more positive experiences and are excited and well-behaved during the visits.<sup>373</sup> According to the data, family dynamics and the “daunting prison atmosphere” are two factors that significantly impact how children respond to prison visitation.<sup>374</sup> Correctional administrators and staff may not control the existing family dynamics between a parent and a child; however, there is evidence that improving the atmosphere where prison visitations take place influences the positive aspects for children visiting a parent in prison.<sup>375</sup> Modifying facilities to be more friendly for children can encourage meaningful, productive contact between children and their parents.<sup>376</sup>

Proponents of in-person visitation urge, wherever appropriate, parent-child prison visits should involve contact.<sup>377</sup> Contact visits allow physical interaction that can reduce a child’s anxiety and enable the child to see that their parent is safe and healthy.<sup>378</sup> The argument is that “contact visits conducted in supportive, safe, and child-friendly environments are likely the best option to help most families mitigate the harmful effects of parental incarceration” and children’s feelings of abandonment and anxiety.<sup>379</sup> Where in-person contact visitation is impracticable or inappropriate, reducing trauma and anxiety in non-contact visits is essential.<sup>380</sup> Even if through a plexiglass partition, children get the opportunity to see their parents, even though it can be confusing to understand why they do not get

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<sup>367</sup> *Id.*

<sup>368</sup> See FLA. STAT. § 944.8031(2)(c) (2020) (for provision requiring that Florida prisons provide “[f]ood services with food choices which are nutritious and acceptable for children and youth visitors.”).

<sup>369</sup> PETERSON ET AL., *supra* note 23, at 50.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> Eric Martin & Doris Wells, *Dissecting the Issue of Child Prison Visitation*, CORRIS TODAY 20, 20 (2015), <https://www.ojp.gov/pdffiles1/nij/249457.pdf> (last visited Sept. 22, 2021).

<sup>373</sup> See, e.g., Tasca et al., *supra* note 214, at 57.

<sup>374</sup> Martin & Wells, *supra* note 372, at 21.

<sup>375</sup> Tasca et al., *supra* note 215, at 57.

<sup>376</sup> PETERSON ET AL., *supra* note 23, at 50.

<sup>377</sup> *Id.*

<sup>378</sup> Cramer et al., *supra* note 3, at 3.

<sup>379</sup> *Id.*

<sup>380</sup> PETERSON ET AL., *supra* note 23, at 52.

to touch their parents.<sup>381</sup> The Model Practices offer several other solutions, all of which can improve outcomes and reduce mass incarceration's human and social costs.

#### CONCLUSION

The rates of mass incarceration in the United States and the resulting collateral costs are no longer sustainable. Moreover, treating female offenders equally to male offenders ignores the realities in women's lives and, consequently, those of their dependent children. Undoing the devastation caused by the failed policies of the last fifty years requires immediate implementation of gender-informed interventions and changes to criminal justice policies and reforms that consider the costs, including from the child's perspective.<sup>382</sup>

Understanding the significance of female offenders and their life experiences is vital to implementing effective criminal justice reforms. Marginalizing differences between male and female offenders by favoring gender-neutral approaches to criminal justice reforms have resulted in far more damage than good. Without serious and systematic gender-informed research, the collateral consequences and disparate impacts on female offenders as primary caretakers and their dependent children will remain neglected and unaddressed considerations in the policy framework surrounding the national conversation on criminal justice reform.

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<sup>381</sup> *Id.*; see also MEGAN COMFORT, DEVELOPMENTS AND NEXT STEPS IN THEORIZING THE SECONDARY PRISONIZATION OF FAMILIES 76 (2019) (“In San Francisco, advocacy organizations in partnership with criminal justice system actors developed a Bill of Rights for children of incarcerated parents, which includes the right ‘to be well cared for in my parent’s absence’ and ‘to speak with, see, and touch my parent’”) (citing CHILDREN’S BILL OF RIGHTS, *supra* note 322).

<sup>382</sup> See generally Poehlmann et al., *supra* note 83.