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The Costs of Separation: Incarcerated Mothers and the Socioeconomic Benefits of Community-Based Alternatives for Nonviolent Offenders

I. INTRODUCTION

While being detained in a California county jail, expectant mother Veronica Martinez felt her water break and knew that her baby would be coming soon. Though she was due in court the next day for a preliminary hearing, Veronica was instead handcuffed in the back of a metal bus and taken to the local county hospital for an emergency C-section. After enduring a painful and traumatic delivery in the presence of male police officers, Veronica was shackled to the bed at her ankle, able to leave the room only for bathroom breaks if handcuffed. Her only company, aside from the occasional checkup by a doctor or nurse, was the male guard sitting at her door 24/7 and her newborn child. Three days after the delivery, a nurse informed Veronica that it was “time to go.” Veronica took a few minutes to say goodbye to her daughter, handed the child to a nurse, and returned to the jail to await her sentence. Upon her return, Veronica spent the next few years in prison, seeing her child only once every few months.¹

Nearly a decade earlier, and on the opposite side of the country, Lori Lynn Adams received a call from a family court attorney, informing her that her three toddlers, temporarily under county supervision, were being placed for adoption. Before incarceration, Lori had been living in poverty with her children in the aftermath of Hurricane Floyd. Displaced from her home, working a low-paying job, and on the verge of desperation, Lori filed a fraudulent disaster-relief claim and began writing bad checks. After being discovered, she was convicted and sentenced to two, year-long prison sentences. Though Lori had never been charged with child abuse, neglect, or endangerment, at a hearing that took place nearly three hundred miles away—one that Lori was not allowed to attend—Lori’s parental rights were irrevocably terminated, and she was not permitted to see her children again.²

1. Nancy Mullane, *Birth and Motherhood in Prison: An Interview with Veronica Martinez at Folsom Women’s Prison*, LIFE OF THE LAW (May 9, 2014), <https://www.lifeofthelaw.org/2014/05/imprisoned-birth-and-motherhood-an-interview-with-veronica-martinez-folsom-facility-for-women-prison/>.

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

Like Veronica, many incarcerated women in the U.S. today will deliver their child while in prison or jail, and most will be separated from their child within the first forty-eight hours after delivery.³ And like Lori, many incarcerated women ultimately have their parental rights terminated during incarceration. Thus, these stories represent one of the greatest fears of every incarcerated mother—the separation from her children, potentially on a permanent basis.

While studies continually show that a majority of incarcerated mothers play a significant, if not primary, role in the life of their child prior to incarceration, the current system of incarceration calls for prolonged periods of separation between mother and child and high rates of parental rights terminations, both of which negatively impact the mother, child, and society. And these negative outcomes are costly. In general, the economic cost of incarceration in the United States continues to grow each year, with federal and state prisons spending \$81 billion dollars annually just to operate prisons, jails, parole, and probation.⁴ For individual families, incarceration can take an extreme financial toll, particularly through court fees, loss of primary income, phone calls, and visitation costs.⁵ The social costs are high as well, with one survey reporting that about half of all family members of an incarcerated loved one experienced PTSD, depression, anxiety, nightmares, and hopelessness.⁶ For incarcerated mothers, particularly those who have committed nonviolent offenses, these costs are not justified.⁷ Additionally, these high costs could be substantially mitigated through community-based alternatives to incarceration that adequately take into account the unique circumstances of incarcerated mothers and their children and provide better long-term outcomes at a fraction of the price.

3. ELIZABETH SWAVOLA ET AL., VERA INSTITUTE OF JUSTICE, OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM (2016), <https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf>.

4. TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2012 - PRELIMINARY (2012), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5239>.

5. See SANETA DE VUONO-POWELL ET AL., ELLA BAKER CENTER FOR HUMAN RIGHTS, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES (2015), <https://nicic.gov/who-pays-true-cost-incarceration-families>.

6. *Id.* at 9.

7. While most incarcerated women are in prison or jail for non-violent drug or property-related crimes, this paper does recognize that some women are incarcerated for extreme neglect and abuse of their children. As will be discussed below, the alternatives to incarceration proposed here do not generally apply to those individuals.

II. WHAT ARE THE COSTS OF INCARCERATION?

In order to understand why these high economic and social costs of incarceration are not justified for incarcerated mothers, one must understand the history and current demographics of incarcerated women. Between 1980 and 2016, the number of incarcerated women increased by more than 700%, rising from a total of 26,378 in 1980 to 213,722 in 2016.⁸ This dramatic increase in incarceration stems not from a major increase in crime, but instead from a combination of factors, including the “War on Drugs,” mandatory minimum sentencing laws, and decreased access to mental health resources.⁹ Due in large part to these factors, the majority of incarcerated women are imprisoned for non-violent drug or property-related crimes.¹⁰ For example, as of 2017, a quarter of women in state prisons and nearly 60% of women in federal prisons were incarcerated for drug offenses.¹¹ Notably, in federal prisons, less than five percent of women were serving time for violent crimes.¹²

In a nationwide survey of prisoners and jail inmates, the Department of Justice reported that 65.7% of female prisoners and 67.9% of jailed female inmates had a history of mental health problems.¹³ Additionally, one in three women in the criminal justice system meet the criteria for current PTSD, while one in two women meet the criteria for chronic, lifetime PTSD.¹⁴ Along with mental health issues, one study found that more than 57% of women in state prisons and more than 47% of women in jails had

8. THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS (2018), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>. See E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2016 (2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6187>.

9. THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS (2019), <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf>; Stephanie S. Covington & Barbara E. Bloom, *Gendered Justice: Women in the Criminal Justice System*, in BARBARA E. BLOOM, GENDERED JUSTICE: ADDRESSING FEMALE OFFENDERS 1, 5 (classifying the war on drugs as “The War on Women”); Robin Levi et al., *Creating the “Bad Mother”*: How the U.S. Approach to Pregnancy in Prisons Violates the Right to Be A Mother, 18 UCLA WOMEN’S L.J. 1, 6 (2010); Barbara A. Hotelling, *Perinatal Needs of Pregnant, Incarcerated Women*, 17 J. PERINATAL EDUC. 37 (2008).

10. Levi et al., *supra* note 9.

11. JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf>.

12. *Id.*

13. JENNIFER BRONSON & MARCUS BERZOFKY, BUREAU OF JUSTICE STATISTICS, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12 (2017), <https://www.bjs.gov/content/pub/pdf/imhprpj1112.pdf>.

14. NATIONAL RESOURCE CENTER ON JUSTICE INVOLVED WOMEN, FACT SHEET ON JUSTICE INVOLVED WOMEN IN 2016 (2016), <https://cjinvolwedwomen.org/wp-content/uploads/2016/06/Fact-Sheet.pdf>.

been physically or sexually abused prior to incarceration.¹⁵ Other studies have reported even higher figures of abuse among incarcerated women, with rates as high as 94%.¹⁶ Because mental health issues and abuse-related trauma are so prevalent, the ability to form healthy and empowering relationships while incarcerated is often limited.¹⁷

Unfortunately, even if convicted on other grounds, substance abuse is a large concern among incarcerated women. One recent study reported that 60% of women met the criteria for drug dependence or abuse in the year prior to their incarceration.¹⁸ Another recent multi-site study among women in jails revealed that 82% of women met lifetime criteria for drug or alcohol abuse or dependence.¹⁹ In comparison to men, incarcerated women are almost twice as likely to have concurring substance abuse disorders and mental illnesses.²⁰ Additionally, almost all incarcerated women have a lower monthly income than incarcerated men, with most reporting an income of less than \$600 per month prior to arrest.²¹ While 60% of men are employed full time prior to incarceration, only 40% of women have full-time employment prior to incarceration.²² Because incarcerated women face higher rates of poverty than incarcerated men, many cannot afford the steep price of bail—potentially an entire year’s worth of income.²³ Therefore, nearly half of the incarcerated female population is disproportionately detained in local jails, yet approximately 60% of these women have yet to be convicted of a crime.²⁴

This dramatic increase in incarceration for nonviolent offenses disproportionately impacts women of color and their families.²⁵ For example, while substance abuse and selling occur at similar rates among racial and ethnic groups, Black and Latina women are far more likely to be criminalized for drug violations than White women and are far more likely to be

15. CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS (1999), <https://www.bjs.gov/content/pub/pdf/parip.pdf>.

16. Angela Browne et al., *Prevalence and Severity of Lifetime Physical and Sexual Victimization Among Incarcerated Women*, 22 INT’L J.L. & PSYCHIATRY 3, 3–4 (1999); see also Ashley Blackburn et al., *Sexual assault in Prison and Beyond: Toward an Understanding of Lifetime Sexual Assault Among Incarcerated Women*, 88 PRISON J. 351, 372 (2008); Sarah Cook et al., *Self-reports of Traumatic Events in a Random Sample of Incarcerated Women*, 16 WOMEN & CRIM. JUST. 107 (July 2005).

17. NATIONAL RESOURCE CENTER ON JUSTICE INVOLVED WOMEN, *supra* note 14, at 3.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. ALEKS KAJSTURA, PRISON POLICY INITIATIVE, WOMEN’S MASS INCARCERATION: THE WHOLE PIE 2019 (2019), <https://www.prisonpolicy.org/reports/pie2019women.html>.

24. *Id.*

25. THE SENTENCING PROJECT, *supra* note 8.

reported to child welfare services for drug use than White women.²⁶ As of 2019, “the imprisonment rate for [Black] women (83 per 100,000) was over 1.7 times the rate of imprisonment for [W]hite women (48 per 100,000),” and Latina women “were imprisoned at 1.3 times the rate of [W]hite women.”²⁷ Black women also made up nearly 44% of all incarcerated females, compared to 36% of White women,²⁸ despite the fact that White women make up 60.8% of the U.S. female population while Black women make up only 13.7%.²⁹

While this ever-increasing rate of incarceration among women for non-violent offenses has significant social costs to society as a whole, its costs are particularly egregious for incarcerated mothers and their children. From 1991 to 2007—the most recently available data—there was a 122% increase in the number of incarcerated mothers.³⁰ Currently, approximately 80% of incarcerated women have children, and more than 60% of women have at least one child under the age of eighteen.³¹ Moreover, approximately 3% of women in federal prisons and 4% of women in state prisons are pregnant when they are admitted to prison.³² This mass incarceration of women with minor children has major collateral costs to society that have generally been overlooked or under-addressed. The majority of incarcerated mothers—64 to 84%—live with their children prior to incarceration, and studies show that incarcerated women are significantly more likely to be the primary caregiver of their children.³³ Because of this, incarcerated mothers are more likely than incarcerated fathers to have children living with relatives or in the foster care system than with the other parent.³⁴

26. THE DRUG POLICY ALLIANCE, WOMEN, PRISON, AND THE DRUG WAR (2018), https://drugpolicy.org/sites/default/files/women-and-the-drug-war_0.pdf.

27. THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS (2019).

28. ELIZABETH SWAVOLA ET AL., VERA INSTITUTE OF JUSTICE, OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM (2016), <https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf>.

29. CATALYST, WOMEN OF COLOR IN THE UNITED STATES: QUICK TAKE (Mar. 19, 2019), <https://www.catalyst.org/research/women-of-color-in-the-united-states/>. Notably, however, the rate of incarceration for Black women has been steadily decreasing over the past few years, while the rate for White women has been increasing. THE SENTENCING PROJECT, *supra* note 27.

30. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN (2008), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=823>.

31. THE SENTENCING PROJECT, *supra* note 8.

32. LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, MEDICAL PROBLEMS OF PRISONERS, (2008), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=1097>.

33. KRISTA MURPHY, SECURE ATTACHMENT WITHOUT BARS: ALTERNATIVES TO INCARCERATION AND CLINICAL INTERVENTIONS TO TREAT THE MOTHER-INFANT RELATIONSHIP 9 (2018), https://sophia.stkate.edu/msw_papers/836/.

34. *Id.*

However, incarcerated women are significantly less likely than men to see their children while incarcerated; over half of all incarcerated women never receive a visit from their children while incarcerated, and fewer than 10% receive visits at least once a week.³⁵ Two factors contribute significantly to this lack of visitation.³⁶ First, many prison facilities are located in rural areas far away from where their children live, making regular visits difficult or impossible. For state prisons, over 84% of women are held in facilities over 100 miles or more from where they or their children live.³⁷ Second, caretakers of children are often hesitant to bring a child into a prison facility environment, where they must walk through metal detectors, wait for long periods of time, and remain closely monitored throughout the entire interaction.³⁸ Aside from physical contact, incarcerated mothers also have difficulty maintaining a relationship with their children through telephone or email because of the incredibly expensive rates to call or email.³⁹ Thus, while many incarcerated mothers and their children have a strong desire to remain in contact, many families cannot afford the cost.⁴⁰

For incarcerated mothers, separation and the threat of termination of parental rights are two of the most damaging aspects of incarceration. According to one psychologist, the pain of separation is “analogous to those resulting from other forms of loss, such as death or divorce.”⁴¹ Most women facing the emotional trauma of separation suffer from increased depression and loneliness on top of already present mental health issues. Separation is particularly harmful for women who are suffering from substance abuse, because these conditions often trigger an urge to use drugs.⁴² Yet, most incarceration facilities lack adequate treatment options for women with mental health issues or substance abuse problems, which in turn increases the rate of recidivism and continued separation or termination of parental rights.⁴³

The higher rates of substance abuse, domestic violence, and childhood and domestic abuse among the female incarcerated population also make

35. LENORA LAPIDUS ET AL., BRENNAN CENTER FOR JUSTICE, *CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES* (2005).

36. *Id.*

37. THE DRUG POLICY ALLIANCE, *supra* note 26.

38. *Id.*

39. Deseriee A. Kennedy, “*The Good Mother*”: *Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 178 (2012).

40. *Id.*

41. *Id.* at 193.

42. *Id.*

43. *Id.*

it more difficult for incarcerated mothers to comply with federal and state standards for retaining parental rights.⁴⁴ Prior to incarceration, many incarcerated women reside in low-income communities that lack adequate housing, educational opportunities, employment, and substance abuse treatment centers, meaning that they lack the resources necessary to satisfy judges and child welfare agencies in parental rights termination proceedings.⁴⁵ This difficulty is only compounded upon incarceration. Both federal and state laws now address the distinct needs of incarcerated parents who are working to retain parental rights, including the barriers that incarcerated parents face to many of the statutory or court-mandated reunification requirements.⁴⁶ Yet in many states, termination proceedings are allowed to proceed without the presence of the parent whose rights are at issue and without a guaranteed right to counsel.⁴⁷

While incarceration alone is rarely sufficient to warrant termination of parental rights, it is a factor that courts can consider to determine whether a person is “unfit” to parent her child.⁴⁸ Thus, courts are not precluded from considering how incarceration factors into parenting of a child.⁴⁹ In reality, this means that in cases where the mother is serving a longer sentence and is unable to make temporary arrangements for the care of her child, it is likely that her parental rights will be severed if the state chooses to bring proceedings against her.⁵⁰ One mitigating factor to termination is how much regular contact the mother has with her child while incarcerated.⁵¹ However, as discussed above, the geographic limitations to physical visitation and the significant cost of emails and phone calls from prison or jail prevent regular contact between mother and child, thus inhibiting the mother’s ability to actively parent from prison.⁵² While the law grants substantial discretion to trial courts in making the decision whether to terminate a mother’s rights, it is clear that a mother’s incarceration can play a significant role in the court’s determination.⁵³ While termination of

44. *Id.* at 184.

45. *Id.* at 165.

46. *Id.* at 184.

47. *Id.* at 199.

48. *See, e.g., In re Sego*, 513 P.2d 831, 833 (Wash. 1973).

49. *See, e.g., In re Hannah S.*, 133 A.3d 590, 593 (Me. 2016).

50. *Id.*

51. 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 16:6 (5th ed. 2020).

52. *Id.* Regardless of the significant costs of communication for incarcerated women and their families, some state courts have held that incarceration does not justify a parent’s lack of communication with a child. *In re Omarian R.*, No. H14CP06008614A, 2008 Conn. Super Ct. LEXIS 1427, at *10-12 (Conn. Super. Ct. June 2, 2008) (“incarceration is no excuse for a parent failing to communicate and keep contact with her child.”).

53. MUSHLIN, *supra* note 51.

parental rights is difficult for the incarcerated mother, it might be argued that termination is in the best interest of the child. However, as will be discussed further below, this is often not the case. Instead, reunification should most often be the goal, because it leads to better outcomes for the child as well as the mother.

Along with the high costs to mothers, the social costs and consequences of separation through incarceration on children and family members cannot be overstated. As Veronica's case in the introduction revealed, mothers who give birth while incarcerated are usually separated from their child within twenty-four to forty-eight hours after birth.⁵⁴ This separation has serious negative consequences on both the mother and the newborn child. For the mother, this separation can trigger extreme psychological trauma and heightens the risk of severe post-partum depression.⁵⁵ This is especially true in cases where the mother is isolated from the general population upon return from the hospital.⁵⁶ Moreover, separation from a child upon birth has also been shown to increase rates of criminal recidivism.⁵⁷ For infants, the first few hours after birth are crucial to healthy psychological development.⁵⁸ Studies show that separation often leads to "multifaceted, severe emotional and behavioral problems in later life including low self-esteem, less successful peer relationships, and difficulty coping with life stressors."⁵⁹

Along with its effects on newborns, parental incarceration "is a strong risk factor for a number of adverse outcomes, including antisocial and violent behavior, mental health problems, school dropout, and unemployment" for older children.⁶⁰ Incarceration also increases the risk of poverty and child homelessness.⁶¹ This particularly affects Black children, who are 65% more likely than White children to experience homelessness due to a parent's incarceration.⁶² Levels of post-traumatic stress are also significantly higher in children of incarcerated parents.⁶³ Additionally, parental

54. SWAVOLA ET AL., *supra* note 28, at 17.

55. Jennifer G. Clarke & Rachel E. Simon, *Shackling and Separation: Motherhood in Prison*, 15 *AMA J. ETHICS* 779 (2013).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. L. Hines & M. Martinez, *Missouri Programs for Children of Incarcerated Parents*, MISSOURI KIDS COUNT (2016), <https://mokidscount.org/wp-content/uploads/2016/06/missouri-programs-for-children-of-incarcerated-parents.pdf>.

61. Saneta deVuono-Powell et al., *supra* note 5, at 33.

62. *Id.*

63. Anna Morgan-Mullane, *Trauma Focused Cognitive Behavioral Therapy with Children of Incarcerated Parents*, 46 *CLINICAL SOC. WORK J.* 200, 202 (2018).

incarceration leads to increased levels of aggression in young children.⁶⁴ Some studies find that the worst outcomes are reported in children whose parents are incarcerated while the children are teenagers.⁶⁵ Unfortunately, while incarceration of either parent can have negative consequences for children, studies show that children of incarcerated mothers are more adversely affected than children of incarcerated fathers and are at greater risk of being imprisoned themselves.⁶⁶

Along with behavioral costs to society, children of incarcerated women are significantly more likely to end up in the foster care system.⁶⁷ According to the Bureau of Justice Statistics, nine out of ten children of incarcerated fathers live with the other parent during incarceration, while only about one in four children of incarcerated mothers live with the other parent.⁶⁸ In state systems, 10% of children in the foster care system have mothers who are incarcerated.⁶⁹ Unfortunately, women of color are most at risk of having their children placed in foster care and having their parental rights severed; studies consistently show that children of color are placed in the foster system at disproportionate rates.⁷⁰ However, while children of incarcerated mothers are statistically more likely to end up in the foster care system during their lifetime, they are statistically less likely to be adopted into a permanent home.⁷¹ Indeed, children of incarcerated parents are four times less likely than other foster care children to be adopted and instead linger in foster care until they age out of the system.⁷² But regardless of whether a child is placed in foster care or lives with another relative during incarceration, the separation of child and mother for long periods of time can inhibit a child's ability for healthy childhood development by limiting stability and proper parental attachment, with consequences that last into adulthood.⁷³

Incarcerating mothers also has high collateral costs on the communities in which they live. Productivity in a community is directly impacted when a woman, as a breadwinner and/or caregiver to other members of

64. *Id.* at 201.

65. Laurel Davis & Rebecca J. Shlafer, *Mental Health of Adolescents with Currently and Formerly Incarcerated Parents*, 54 *J. Adolescence* 120, 121 (2017).

66. LEILA MORSY AND RICHARD ROTHSTEIN, *MASS INCARCERATION AND CHILDREN'S OUTCOMES* 12 (2016).

67. *Id.* at 14.

68. CHRISTOPHER J. MUMOLA, *INCARCERATED PARENTS AND THEIR CHILDREN* 1 (2000).

69. *Id.* at 4.

70. Lapidus, *supra* note 35, at 50.

71. *Id.*

72. Kennedy, *supra* note 39, at 165 n.27.

73. Committee on Early Childhood, Adoption and Dependent Care, *Developmental Issues for Young Children in Foster Care* 106 *PEDIATRICS* 1145 (2000).

society, is placed behind bars. This loss of income continues not only during incarceration but also upon release, since occupational and educational prospects are significantly limited by a criminal record.⁷⁴ However, upon incarceration, these communities lose not only mothers, but also many of their youth as well through the foster care system that tends to place children in different communities where they might “do better.”⁷⁵ Moreover, most incarceration facilities lack rehabilitative programs, which consequently lead to higher rates of recidivism and contribute to intergenerational cycles of poverty.⁷⁶

III. COMMUNITY-BASED ALTERNATIVES AS A COST-EFFICIENT AND SOCIALLY DESIRABLE SOLUTION

The goals of incarceration must be clear in order to understand the social and economic benefits of community-based alternatives. An economically efficient criminal justice system maximizes safety and minimizes crime at the lowest possible cost.⁷⁷ Achieving these goals necessarily requires low rates of recidivism among offenders. Thus, incarceration must be rehabilitative in nature to decrease levels of re-arrest. However, as of 2018, the Bureau of Justice Statistics reported a 76.8% rate of recidivism among female offenders within the first nine years after release from prison.⁷⁸ Within the first year alone, the recidivism rate was 35.1%.⁷⁹ Moreover, in the context of incarcerated women, current sentencing laws, which are based on male characteristics and male crimes, often fail to take into account many of the socioeconomic factors that lead to women’s incarceration, including the rate of nonviolent offenses.⁸⁰ By failing to account for the unique characteristics of female offenders, the two main goals of incarceration—safety and reduced crime—are not being met at the lowest efficient cost.

74. Lapidus, *supra* note 35.

75. Kennedy, *supra* note 39, at 196.

76. Joan Petersilia, *Beyond the Prison Bubble*, NAT’L INST. JUST. J., October 2011, at 26.

77. EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 34 (2016).

78. MARIEL ALPER ET AL., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) 6 (2018).

79. *Id.*

80. Even in situations where a woman has been convicted of a violent crime, it is most often committed in the context of sexual or physical abuse against a spouse or significant other. Suzanne C. Swan et al., *A Review of Research on Women’s Use of Violence with Male Intimate Partners*, 23 VIOLENCE & VICTIMS 301 (2008).

In the context of safety, female inmates with children generally pose less of a flight risk than males.⁸¹ Moreover, even more than incarcerated males, most incarcerated females are nonviolent offenders. Thus, the safety concerns to society of incarcerating women with minor children are relatively low in comparison to their male counterparts. Yet sentencing laws fail to reflect these considerations.

However, community-based alternatives to incarceration—programs that provide education and employment opportunities, individual and family counseling, family housing, and mental health or substance abuse treatment as an alternative to imprisonment—offer a more cost-efficient solution without impacting safety concerns among the community. Research indicates that communities that divert funding from incarceration to other social institutions such as a community-based alternative treatment program see public safety improve over the long term.⁸² Thus, while incarceration might meet the goal of providing safety to the community, it is done only at a significant and unnecessary cost.

The second main goal, crime reduction, also is not efficiently met for incarcerated mothers. Both incarceration and threat of incarceration on mothers have marginal benefits that do not outweigh their costs. Moreover, as discussed above, the rate of recidivism for incarcerated mothers and the likelihood of criminal behavior in their children mitigates any substantial reduction in crime that comes through incarceration. However, community-based alternatives to incarceration report much lower rates of recidivism and a net positive effect on both mothers and children. Thus, incarcerating mothers not only fails to meet the goal of reduced crime but also does so at costs that significantly outweigh any benefits that incarceration could potentially provide.

Because women tend to be the primary caretaker of their children prior to incarceration, the collateral damage of removing these women from their families and communities is significant and costly. As of 2018, incarceration costs on average \$33,274 per woman per year, or \$91 per day.⁸³ However, this figure accounts only for the cost of staffing and maintaining a prison and for providing prison services.⁸⁴ When accounting for collateral costs, such as the placement of children in the foster care system,

81. Kajstura, *supra* note 23.

82. JUSTICE POLICY INSTITUTE, PRUNING PRISONS: HOW CUTTING CORRECTIONS CAN SAVE MONEY AND PROTECT PUBLIC SAFETY 2 (2009).

83. *Prison Spending in 2015*, VERA, <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending>. (last visited Jul. 28, 2021), Costs per state ranged from \$14,780 to \$69,355, with eight states reporting a cost per inmate over \$50,000.

84. *Id.*

the figure is much higher, and by some estimates twice as expensive.⁸⁵ However, many of the additional costs to women, their families, and society, such as the economic impact on a family from loss of income or the high rates of recidivism from incarceration, are not reflected in the general cost of incarceration. In contrast to incarceration, successful community-based alternative treatment programs are significantly cheaper, with costs as low as \$3 per day.⁸⁶ Particularly in facilities that deal with substance abuse treatment, research indicates that community-based alternative programs for substance abuse save on average \$20,000 per inmate.⁸⁷ Additionally, these programs incorporate educational and occupational courses into treatment to prepare mothers to be productive members of society upon release.⁸⁸ In doing so, these programs result in significantly lower rates of recidivism and better long-term results.⁸⁹

But along with their purely economic benefits, community-based alternative programs provide many positive social benefits that incarceration cannot offer. Community-based alternative programs allow pregnant women and mothers of minor children the opportunity to serve out court-imposed sentences in the community in which they live while simultaneously providing substance abuse treatment and parenting support.⁹⁰ Additionally, children in most programs are allowed to stay with their mother during the course of treatment and spouses are allowed regular visitation.⁹¹ Community-based alternatives prevent long-term mother-child separation while allowing mothers to address the social or economic issues that contributed to their involvement in the criminal justice system in the first place. In doing so, these programs keep children out of foster care and provide them with stability and consistency that can lead to positive developmental outcomes. Consistently, these programs have been shown to

85. WELLESLEY CENTERS FOR WOMEN, *infra* note 87.

86. Vallery Brown, *Oklahoma Program Offers Women a Second Chance*, THE OKLAHOMAN (Feb 27, 2011), <https://www.oklahoman.com/article/3544345/oklahoma-program-offers-women-a-second-chance> (describing the ReMerge Program in Oklahoma).

87. JUSTICE POLICY INSTITUTE, *supra* note 82, at 1; *see also* WELLESLEY CENTERS FOR WOMEN, ALTERNATIVES TO INCARCERATION (ATI): PROMISING PRACTICES IN MASSACHUSETTS (2012), <https://www.wcwoonline.org/pdf/Fact%20sheet%204.pdf> (discussing the economic benefits of alternatives to incarceration).

88. WELLESLEY CENTERS FOR WOMEN, *supra* note 87.

89. *Id.*; Josh Dulaney, *ReMerge Program for Women Looking Forward to New OKC Home*, THE OKLAHOMAN (Oct 17, 2018), <https://www.oklahoman.com/article/5611932/remerge-program-for-women-looking-forward-to-new-okc-home> (describing a community-based alternative program with a 5% recidivism rate).

90. *See* WELLESLEY CENTERS FOR WOMEN, *supra* note 87.

91. *See* Dulaney, *supra* note 89.

protect public safety while reducing rates of recidivism in ways that are significantly cheaper than incarceration.⁹²

Although community-based alternative treatment programs are not currently the norm, several states and counties have led the way in implementing these programs, some more successfully than others. One early program, the Mother-Infant Care program in California, allowed for women with young infants to live with them in halfway houses as they completed their sentences.⁹³ While this program emphasized keeping mothers with their children, many of the infants in the program were reported to have serious medical neglect due to the environment of the facilities in which the women lived.⁹⁴ Moreover, the program did not focus on family reunification and/or providing adequate tools for re-entry into society.⁹⁵ Ultimately, this early program was unsuccessful, but through its failure, it paved the way for better alternative treatments in the future.

To date, one of the most successful programs has been the ReMerge program in Oklahoma County.⁹⁶ As the state with the highest number of incarcerated women, in 2011 Oklahoma created ReMerge to provide alternatives for incarcerated mothers and their families.⁹⁷ This program, which lasts either one or two years, provides housing, transportation, medical and behavioral health care, domestic violence intervention and counseling, education training and job placement, parenting and family services, legal services, and life skills.⁹⁸ Candidates are selected for the program by Oklahoma County judges, district attorneys, or public defenders, and priority selection is given to women who are pregnant, have a child under five years old, have multiple children, or have charges originating in Oklahoma County.⁹⁹ Monitored by the Oklahoma Department of Corrections, both participants and their family members are provided with any substance abuse or mental health treatment and therapy necessary.¹⁰⁰

92. In providing for community-based alternatives to incarceration for mothers, the United States would join many nations in providing creative solutions as an alternative to incarceration. For example, women in Germany have had mothering approved as a legitimate work-release assignment. Prisons in India are obligated to provide nurseries and day care to children of inmates, and these facilities are sometimes open to the community at large. In Kyrgyzstan, women with children under fourteen years old commonly have their sentence suspended if it is their first offense. See INSTITUTE ON WOMEN & CRIMINAL JUSTICE, *MOTHERS, INFANTS, AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES* 35–37 (2009) for more information.

93. Levi et al., *supra* note 9, at 59-60.

94. *Id.* at 61.

95. *Id.* at 59-62.

96. REMERGE, <https://www.remergeok.org/> (last visited Jul. 28, 2021).

97. *About Us*, REMERGE, <https://www.remergeok.org/about-us> (last visited Jul. 28, 2021).

98. *Id.*

99. *Id.*

100. *Id.*

The program also partners with corporations such as Google to provide training during treatment and employment upon completion.¹⁰¹ Since 2010, ReMerge has graduated 143 participants of the program and has impacted 356 children.¹⁰² In addition to completely changing the trajectory of these women's lives, the program has also saved the State of Oklahoma \$32 million dollars.¹⁰³ Nearly 70% of the women who enter the program have graduated, and the recidivism rate among graduates is only 5%.¹⁰⁴

After the success of ReMerge, many other states began implementing similar programs. For example, in 2015 the Oregon legislature implemented a Family Sentencing Alternative Pilot Program.¹⁰⁵ To be eligible for the program, the prisoner must be convicted of a non-violent crime with a sentence of more than one year and must be the "parent or legal guardian of a minor child and [have] had physical custody of the child at the time of the offense."¹⁰⁶ Although the program is still relatively new, data already show that the average time children of participants in the program spent in foster care was lower than the state-wide average.¹⁰⁷ Other successes include "increased client patience with their children, increased engagement and motivation to be successful while on supervision, and increased enthusiasm about the future."¹⁰⁸ Additionally, the Community Corrections Director of Washington County, Oregon, reported \$770,000 in savings from foster care avoidance costs alone.¹⁰⁹ Other states, such as Massachusetts and Washington, have reported success with similar community-based programs.¹¹⁰

Following the trial and error of states who have begun implementing these programs, it is clear that successful programs meet the following criteria.¹¹¹ First, to meet the safety goals of incarceration, the community-

101. *Id.*

102. *Id.*

103. *Id.*

104. Delaney, *supra* note 89.

105. H.R. 3503, 78th Leg., Regular Sess. (Or. 2015).

106. *Id.*

107. OREGON DEPARTMENT OF HUMAN SERVICES, FAMILY SENTENCING ALTERNATIVE PILOT PROGRAM: REPORT TO THE SENATE AND HOUSE COMMITTEES ON JUDICIARY 5 (2019).

108. *Id.*

109. Community Corrections Department, *Washington County Family Sentencing Alternative Pilot Program*, WASHINGTON COUNTY OREGON (May 17, 2018), <https://www.co.washington.or.us/CAO/washington-county-family-alternative-sentencing-pilot-program.cfm#:~:text=>.

110. *Id.*; WELLESLEY CENTERS FOR WOMEN, *supra* note 87.

111. Many proponents of prison reform for women have proposed prison nurseries as an alternative to separation for children under two years old. *See* Levi, et al., *supra* note 9 at 59. However, the prison environment has been shown to have a negative impact on the growth and psychological development of infants and toddlers and on their overall physical health. *Id.* Moreover, many of these facilities have been reported to have unsafe conditions that open the door to abuse by corrections officials.

based alternative program must accept women who have been charged with and/or convicted of a non-violent offense¹¹² and who will continue to be the primary caretaker of their children upon release. Second, while in the program, these women must be given access to educational and vocational services as well as substance abuse or mental health treatment if necessary. Third, these programs should include staff members who are certified in early child development to ensure that the facilities are run according to widely accepted child health standards and guidelines.¹¹³ Fourth, these programs must emphasize the importance of family relationships and place no limits on the age or number of children in the program. In focusing on family relationships, support should be given to spouses and older children as well as young children in dealing with substance abuse or mental health issues.¹¹⁴ Finally, these programs must not be located inside a correctional facility but instead must provide supervision, housing, and social services to the mother within her own community. Facility settings should be home-like, with the mother and child(ren) sharing a small living space or bedroom.

In late 2018, President Trump signed a bipartisan criminal justice reform bill called the First Step Act with the goal of reducing recidivism rates among U.S. prisons.¹¹⁵ As part of this reform, the bill reauthorizes and expands the Second Chance Act of 2008 to provide grants for state and local programs to treat substance abuse and mental health issues.¹¹⁶ Under these two acts, community-based alternative treatment programs for incarcerated women and their children are eligible for funding.¹¹⁷ Thus, like Oregon, Washington, and Massachusetts, other states can begin

Id. Thus, rather than placing children in prison with the incarcerated mother, the most effective and cost-efficient way to rehabilitate mothers into society and prevent separation is still to provide for community-based alternatives to incarceration that allow mothers to remain with their children in safe and nurturing environments. Prison nurseries, while better than outright separation for mothers, have too high of a social cost on the children of incarcerated mothers.

112. Allowing for community-based alternatives addresses the reality that a significant portion of incarcerated mothers are housed in local jails and have not yet been convicted of any crime. There is a strong argument to be made that these women should not face any sort of detention before conviction. See Alex Traub, *How Does Bail Work, and Why Do People Want to Get Rid of It?*, N.Y. TIMES, (Jan. 11, 2019), <https://www.nytimes.com/2019/01/11/nyregion/how-does-bail-work-and-why-do-people-want-to-get-rid-of-it.html>. However, even if release is not allowed, community-based alternatives to jail are still in the best interest of the mother and child and make the most fiscal sense.

113. INSTITUTE ON WOMEN & CRIMINAL JUSTICE, *supra* note 92, at 25.

114. See, for example, Remerge's successful implementation of this policy. REMERGE, *supra* note 96.

115. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

116. *Second Chance Act Family-Based Substance Use Treatment Program*, THE NATIONAL REENTRY RESOURCE CENTER, <https://nationalreentryresourcecenter.org/second-chance-act-family-based-substance-use-treatment-program> (last visited March 24, 2020).

117. *Id.*

implementing cost-effective, successful, community-based treatment programs for incarcerated mothers as alternatives to incarceration, and they can do so with funding and aid from the federal government.¹¹⁸

IV. CONCLUSION

As the number of incarcerated mothers continues to grow every year for nonviolent drug or property-related crimes, thousands of families and communities suffer the high costs of incarceration. Incarcerated mothers, who are likely to be the primary caretakers of their children prior to incarceration, often suffer from untreated mental health or substance abuse problems, which are exacerbated by prolonged periods of separation from their children. But along with increasing the risk of recidivism for the mother and aggravating existing mental health or substance abuse issues, family separation and incarceration do not necessarily lead to better outcomes for the child. Indeed, children of incarcerated mothers also suffer, with many experiencing PTSD, mental health problems, and increased aggression. Often, this incarceration and separation leads to the termination of the mother's parental rights, and the child is likely to end up in the foster care system for long periods of time.

These costs are not justified. While the current system of incarcerating women with minor children does not efficiently meet the goals of incarceration in either safety or crime reduction, community-based alternatives to incarceration meet these goals at a fraction of the social and economic cost of prison.¹¹⁹ Importantly, community-based alternatives can look beyond any failing of the individual mother to consider the community and environment in which the mother resided prior to conviction. In doing so, community-based alternatives can address the lack of education and job opportunities, the unavailability of substance abuse treatment facilities, and the cycles of poverty, intergenerational crime, and abuse within the mother's community to reduce rates of recidivism in ways that incarceration and separation cannot.

In the communities that have implemented these programs, millions of dollars have been saved. But more importantly, the lives of hundreds of women and children have been completely changed for the better. Through these programs, recidivism rates and drug dependency within the community decrease. At the same time, educational and occupational opportunities increase, making these women more productive in their families and communities. Finally, the parenting classes and treatment options for

118. *Id.*

119. See INSTITUTE ON WOMEN & CRIMINAL JUSTICE, *supra* note 92.

every member of the family provide for permanent family reunification and healthy family interactions, which in turn can break the cycles of poverty and intergenerational crime that often plague communities.

The cost of incarcerating mothers is one that our country can no longer afford. Fortunately, community-based alternative programs—programs that would have given Veronica Martinez and Lori Lynn Adams a chance to know their children—provide greater long-term outcomes at a fraction of the price. Many states are already beginning to implement their own programs, and the federal government has provided its endorsement through the First Step Act. Because of the benefits, state and local governments everywhere should do what they can to provide this alternative to incarceration to every eligible mother in the criminal justice system.

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