

## Executive Summary

Recent estimates show that almost 10 million children in the United States, 1 out of every 28, have experienced parental incarceration.<sup>1</sup> These children face the collateral damage that results when the parents and caregivers in their lives become embroiled in the criminal justice system. In the United States the best interests of the child are rarely considered when sentencing parents involved in the criminal justice system. This is especially problematic because the United States has the highest rate of incarceration in the world, with 2.2 million people behind bars currently.<sup>2</sup> This mass incarceration has devastating consequences on communities, individuals, and especially children.

The purpose of this report is to describe studies on the impact of parental incarceration, to present viable alternatives to traditional incarceration of primary caregivers, and to present the purpose and plan of CIC. The full report is organized into six sections; each is summarized below.

The first section (section I) presents information on the scale of incarceration—both in the United States as a whole and in Minnesota, focusing on how these rates have changed over time. These statistics provide the context in which CIC was created.

The second section (section II) of the report details the consequences that massive incarceration in the United States has had on communities, individuals, and the children of those who are punished. Current research demonstrates that parental incarceration leads to economic instability, mental health and behavioral problems, infant mortality, childhood homelessness, childhood inequality, and especially racial inequality for the children of incarcerated parents.<sup>3</sup> Maternal incarceration may have even more deleterious consequences on children than paternal incarceration—and the increasing incarceration of women in recent decades has amplified this problem dramatically.

The next section of the report (section III) discusses existing theoretical and legal frameworks that can be used to ameliorate the impact of caregiver incarceration on children. Internationally, the United Nations Committee on the Rights of the Child created a policy framework of procedural and substantive protections for such children.<sup>4</sup> The framework can be applied at the time a caregiver is sentenced to ensure that children's best interests are considered. Although the U.S. is not a party to the CRC, and therefore has no direct legal obligations under the treaty, the policy framework the Committee has recommended is instructive.

Additionally, section III of the report draws attention to the fact that best-interest-of-the-child determinations are already an integral part of the U.S. legal system. Currently, statutes of all 50 states, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, and the District of Columbia, as well as the National Indian Child Welfare Act, require consideration of the best interests of the child in proceedings on custody, placement, and termination of parental rights.<sup>5</sup> There is not a single United States jurisdiction that does not already make best-interest determinations in its courts in the family law context. Determinative factors vary by jurisdiction, though generally courts make best-interest decisions by weighing elements relative to the child's circumstances, the parent's perceived capacity to parent, and the ultimate safety and wellbeing of the child.<sup>6</sup> (These statutes are detailed further in the body of the report in section III B.) Because evaluating the best interests of the child is an integral part of the family court system in the U.S., similar evaluations could be made, without excessive complication, by sentencing courts.

Section IV of the report discusses innovations and best practices for more thoughtful sentencing of primary caregivers. Alternative practices include: prison nurseries; community-based detention, such as house arrest and commitment to residences where convicted parents can live with children; and improved visitation centers and extended visitation programs. A description of some existing programs and research on their impact on children can also be found in this section of the document.

The final section (section V) of the report details recommendations for future initiatives. The primary recommendation posed by CIC is that sentencing guidelines be amended to provide authority and guidance for courts to **consider the best interests of the child when sentencing their primary caregiver**. One goal of considering the child's needs during sentencing is to reduce caregiver incarceration when appropriate. But equally important is having numerous alternatives available when parental incarceration is unavoidable. Initiatives supported by CIC include community-based alternatives to prison, improvement in the quality of visits for children of prisoners, and the consideration of prison nurseries. CIC also advocates for more research and oversight of alternative sentencing, visitation, and prison nursery programs; there is a particularly pressing need for longitudinal research to examine long-term impacts of these programs. An action plan that specifies how to achieve these goals is outlined in section V (D).

## Introduction

Recent estimates show that almost 10 million children in the United States have experienced parental incarceration.<sup>7</sup> These children face the collateral damage that results when the parents and caregivers in their lives become embroiled in the criminal justice system. The problems these children face are very real. Fortunately, there are viable alternatives that can improve outcomes for children, their caregivers, and society, some of which can be implemented relatively easily.

This report is a project on behalf of the Minneapolis-based organization Children of Incarcerated Caregivers (CIC). CIC commissioned an interdisciplinary team of graduate students and recent graduates from the University of Minnesota to research the prevalence and effects of caregiver incarceration on children and determine concrete steps to address this problem at the state and national level. This report offers a brief analysis of the primary academic literature and existing legal frameworks relevant to the issue and presents CIC's preliminary recommendations for how to best improve circumstances for children whose primary caregivers face incarceration.

The first section of the report provides a historical context for the effects of incarceration on children and demonstrates how mass incarceration in the U.S. has led to a staggering number of children who will lose a parent or other primary caregiver to the prison system. The second section provides a review of social science research, showing that forced separation of children from their caregivers due to incarceration leads to dramatic detrimental effects on the child, the caregiver, and the community. The second section also provides an overview of current legislation, which drives parental separation as a result of incarceration. This report uses the term "primary caregiver," except when citing specific studies or programs focused only on mothers. While in realistic, practical terms the primary caregiver will most often be the child's mother, it is important to acknowledge that childrearing can just as meaningfully be undertaken by a father or non-parent caregiver.

The third section of the report contains an analysis of the legal framework addressing the issue, both domestically and internationally. This report posits that in order to best serve families and their communities, each child's circumstances must be evaluated on a case-by-case basis and that the best interests of the child should be considered at the time a caregiver is sentenced in the criminal justice system. The legal research in this field relies in part on the United Nations Convention on the Rights of the Child (CRC) and the recommendations of the Committee overseeing that treaty. The Committee has given substantial attention to the issue of children of incarcerated caregivers, and this report will discuss how some of the Committee's recommendations may be integrated into a practical legal framework protecting the best interests of the child in a domestic context.

The fourth section of the report presents a variety of alternatives to the conventional U.S. model of forced separation due to parental incarceration, and discusses studies demonstrating positive outcomes that occur when the caregiver-child bond is fostered, rather than severed, after sentencing. Evidence is presented in support of successful programs, such as alternatives to incarceration for mothers of young children, which have been shown to reduce recidivism and improve outcomes for both mothers and children. This section also discusses prison nurseries and mother-baby units, defined as any program that incarcerates a non-criminal minor child with a parent, which exist in a variety of forms throughout the world with varied outcomes.

The fourth section offers recommendations for future action to benefit the children of incarcerated caregivers. Recommendations are: (1) the best interests of the child should be considered in sentencing; (2) a variety of programming alternatives should be implemented in accordance with best practices specific to local resources; and (3) support for additional research and evaluation of programs and alternatives should be prioritized. Finally, the report concludes with the proposal that CIC take a leading role in helping to create a "Minnesota Model" that addresses the

specific challenges faced by children whose caregivers are sentenced as a result of criminal prosecution in this state.

## I. Context

The United States has the highest rate of incarceration in the world, with an adult incarceration rate of .92%. This means that almost 1% of adults in the country are in prison or jail at this moment. The rate of incarceration in the U.S. is both historically and internationally unprecedented. There are currently 2.2 million people imprisoned in the United States, which is one quarter of the world's entire prison population, even though the US only holds one fifth of the world's population.<sup>12</sup> At this point, most scholars agree that the rate of incarceration in the U.S. is not tied to crime rates,

but instead results from changes in laws and policies which began in the 1970s, including the war on drugs, three-strikes laws, and the elimination of parole.<sup>13</sup>

Though the

While Minnesota has one of the lowest rates of incarceration in the United States, second only to Maine,<sup>8</sup> this does not imply the punitive era did not impact the level of punishment in Minnesota. Between 1978 and 2013 the rate of incarceration in Minnesota went from about 50 per 100,000 residents to 189 per 100,000 residents.<sup>9</sup> Also, although the rate of incarceration of women is substantially lower than that of men, it has increased dramatically over time. In 1994 the rate of incarcerated women was 10 per 100,000 adult residents and by 2013 it had more than doubled to the rate of 26 per 100,000.<sup>10</sup> A recent Minnesota survey found that in terms of prisoners who report being parents and living with their children prior to incarceration, Minnesota has a rate substantially higher than the national rate. This study found that the percentage of incarcerated women who were living with their children prior to their arrest was 66%, compared to the national rate of 55%, and that the percentage of incarcerated men living with their children prior to arrest was 56%, compared to the national rate of 51%.<sup>11</sup>

number of people imprisoned in the United States is itself an issue for concern, the detrimental consequences of mass incarceration extend far beyond incarcerated individuals to a population often forgotten: children. Most people in prison are parents. According to the Pew Center Charitable Trusts 54% of prisoners are parents of minor children.<sup>14</sup> There are almost 3 million children in the United States who currently have an incarcerated parent, and about 10 million or more children have experienced parental incarceration during their lifetime.<sup>15</sup> These numbers mean that 1 in 28 children

in the U.S. have an incarcerated parent. By contrast, 25 years earlier, the number was 1 in 125.<sup>16</sup> One-fourth of children of incarcerated parents are four years of age or younger.<sup>17</sup>

Fifty-one percent of men incarcerated in state prisons reported having minor children compared to 62% of women. According to the Women's Prison Association, 64% of the 65,000 women incarcerated in 2007 who were parents of minor children were also the primary caregivers of those children prior to incarceration. When women become incarcerated their children are often displaced, ending up in foster care, grandparents' homes, or other placements. One alternative to separation is prison nurseries, in which children can live with a parent within in a prison setting, but only a small number of children in the U.S. are placed in these programs.<sup>18</sup>

Although men are disproportionately impacted by the criminal justice system and have far greater rates of incarceration than their female counterparts, this trend has been shifting. Between 1980 and 2010 the incarceration rate for women increased 1.5 times faster than that of men—646% compared to 419%.<sup>19</sup> This trend in incarceration has clearly displaced children and caused separation from primary caregivers at greater rates than at any time in U.S. history.

## **II. Why This Matters**

Research demonstrates that incarceration has a detrimental impact on those who are incarcerated, the communities from which they come, and their families—in particular, children of incarcerated parents. Prominent criminologist Dr. Todd Clear offers a compelling overview of the impact incarceration has had on entire communities—particularly certain black urban communities with high levels of poverty such as Brooklyn, New York or inner city Philadelphia.<sup>20</sup> As Clear points out, men in these communities often cycle in and out of prison leaving behind entire communities where the majority of families have experienced the incarceration of at least one male. Dr. Clear further notes that the impact of incarceration extends beyond individuals and their families and leads to limited social networks and social capital, and less informal social control, counterintuitively

increasing the crime incarceration is thought to prevent. Such community-level consequences have a dramatic impact on the children born and raised in these communities.<sup>21</sup>

Incarceration also has detrimental consequences at the individual level. Research has shown, for instance, that experiencing incarceration reduces one's lifetime earnings,<sup>22</sup> and has a serious negative impact on a number of health outcomes.<sup>23</sup> More broadly, research has documented a number of collateral consequences that occur from a criminal record, including barriers to finding employment, housing discrimination, and barriers to higher education.<sup>24</sup> All of these negative consequences adults face are likely to directly impact the children they care for. As a result, a new line of research has begun to examine the range of negative consequences that parental incarceration has on children.

In a recent comprehensive overview of the deleterious impact of incarceration on children, Wakefield and Wildeman point to a number of the consequences that children of incarcerated parents disproportionately face. These include economic instability, mental health and behavioral problems, infant mortality, childhood homelessness, childhood inequality, and especially racial inequality.<sup>25</sup> While Wakefield and Wildeman's research is broadly focused on children who have experienced parental incarceration, other research has focused more directly on the impact of maternal incarceration and how it differs from the impact of paternal incarceration. This line of research suggests that maternal incarceration may be even more detrimental to children than paternal incarceration. For instance, Tasca, Rodriguez, and Zatz found that both paternal and maternal incarceration contributed to residential instability that leads to arrest and re-arrest of children, but that maternal incarceration was directly related to re-arrest.<sup>26</sup> Similarly, in an overview of the impact of parental incarceration on children, Wildeman and Western point out that maternal incarceration is a much stronger predictor of foster care placement for children than paternal incarceration.<sup>27</sup> Research conducted by Dallaire found that maternal incarceration increased the risk

of intergenerational incarceration at a rate 2.5 times greater than paternal incarceration.<sup>28</sup> Relatedly, Murray and Murray found that maternal incarceration—more so than paternal incarceration—causes disruption for children, which may lead to a greater risk for psychopathology and insecure attachment for those children later in life.<sup>29</sup> Focusing solely on maternal incarceration, Huebner and Gustafson’s study demonstrated that maternal incarceration impacted their children’s subsequent criminal behavior, increasing the probability of future crime.<sup>30</sup> And Poehlmann found that children who experienced maternal incarceration scored substantially lower on cognitive test scores than the average child.<sup>31</sup> On average, mothers have sentences five years shorter than those of fathers.<sup>32</sup> Relatively short sentences make it more likely for parents to re-enter their children’s lives upon release.

Attachment theory is useful in determining the best interests of the child. The fundamental premise of the theory acknowledges that a child’s sense of security is rooted in relationships with familiar caregivers and the security established is necessary for confidence, productive autonomy, cognitive, and social skills.<sup>33</sup> Attachment theorists indicate that separating during infancy can have negative effects on whether a child forms healthy relationships throughout life.<sup>34</sup> Furthermore, studies have found that incarcerated mothers may experience a variety of threats to their wellbeing due to separation from their children. Ultimately, these threats may have a secondary effect on the children, such as when the mother’s stress leads to aggression directed toward the child.<sup>35</sup> Attachment theory also suggests that caregivers transmit to their children local norms, parental and social behavior.<sup>36</sup>

In 2010, Murray and colleagues found that maternal incarceration may put children at an increased risk of becoming offenders.<sup>37</sup> Mothers who had been incarcerated were 2.5 times more likely than fathers to report that their own adult children were incarcerated. For this reason,



mitigating the effects of incarceration on children may be essential to lessening crime rates in future generations.

On top of the negative consequences punishment has at the community, individual, and familial level, the cost of incarceration is exorbitant. Calculations by Henrichson and Delaney estimate that prisons cost taxpayers \$5.4 billion annually, an average of \$31,307 per prisoner per year.<sup>38</sup> Similarly, the annual costs of keeping children in foster care are astronomical, estimated at \$40,000 per child.<sup>39</sup> Incarcerating caretakers and sending their children to the child welfare system costs billions of dollars that could be saved with the implementation of community alternatives. The exorbitant costs of incarceration have led to recent bipartisan support of sentencing reform.<sup>40</sup>

In addition to the social and financial costs, the family unit itself is endangered by incarceration, with termination of parental rights as another potential collateral consequence of incarceration.<sup>41</sup> Lack of non-custodial sentencing alternatives, particularly in conjunction with unavailability of prison nurseries or similar programs, can lead directly to termination of parents' rights to raise their children.<sup>42</sup> More than half of U.S. states consider incarceration as a factor in termination proceedings, independent from a showing that the criminal act for which the parent was sentenced was actually detrimental to the child.<sup>43</sup>

The issue of termination is exacerbated by the Federal Adoption and Safe Families Act (ASFA), which requires states to proceed with termination hearings if a child has been in foster care for 15 of the last 22 months.<sup>44</sup> States are also granted monetary incentives under ASFA if the average time between removal of children from their homes and adoption by another family is less than 24 months in the state.<sup>45</sup> This legislation greatly increases the risk that incarcerated caregivers with children in foster care will lose their parental rights. In the first five years after the passage of ASFA, termination of parental rights of incarcerated parents increased by 250%.<sup>46</sup>

These results may have occurred in part because ASFA was not enacted to address the unique situation that arises when the justice system has created caregiver absence through incarceration. Rather, the purpose of the legislation was to protect children from being returned to abusive homes or living permanently in foster care when it was not possible for them to safely return to their families.<sup>47</sup> The blanket application of the law to all children in foster care without consideration of the caregiver's involuntary incarceration, ability and desire to parent, and consideration of the child's best interests fails to account for the factual circumstances of children who have been placed in foster care because of caregiver incarceration.

Further, federal courts frequently did not consider the effects of caregiver incarceration at sentencing and state courts have been varied in their approach. The Federal Sentencing Guidelines Manual, which states that "family ties and responsibilities are not ordinarily relevant in determining whether a [sentencing] departure may be warranted"<sup>48</sup> was broadly interpreted by many federal courts as a prohibition against considering family separation in sentencing, even where disintegration of the family would likely result.<sup>49</sup> Some federal circuits were more willing to make downward departures from guideline sentences where caregiver incarceration would cause severe hardship to the family.<sup>50</sup> In the wake of three Supreme Court decisions that found mandatory sentencing unconstitutional, limited judicial discretion in upward departures in sentencing, and held that deviation from guidelines need not be based on "extraordinary" circumstances, there does not appear to be a clear consensus on the way federal courts are applying the federal sentencing guidelines to consideration of familial ties and impacts on children.<sup>51</sup> The effects of these decisions are currently being borne out at the state level as well, with many states now redrafting sentencing laws.<sup>52</sup>

### **III. Existing Theoretical and Legal Frameworks**

#### **A. International Framework**

Over the last several years, there has been substantial development of law and policy in the international arena aimed at promoting the interests of children of incarcerated caregivers.<sup>53</sup> This development has taken place primarily within the United Nations Committee on the Rights of the Child. Through discussion with NGOs and State parties to the Convention on the Rights of the Child, the Committee and civil society organizations with which it works have created a policy framework of procedural and substantive protections for children of incarcerated caregivers.<sup>54</sup> The framework can be applied at all phases of a caregiver's contact with the criminal justice system in order to ensure that children's best interests are protected. Although the U.S. is not a party to the CRC, and therefore has no direct legal obligations under the treaty, the policy framework the Committee has recommended is instructive.

The Committee has recommended that when caregivers come into conflict with the criminal law, the best interests of children they care for should be considered during sentencing.<sup>55</sup> Best-interests assessments are specific to each child within the particular context, and the assessment should be made through a procedure that ensures legal guarantees.<sup>56</sup>

The Committee has also stated that in caregiver sentencing, a balancing test should be undertaken that considers and weighs all relevant factors to determine how a potential sentence impacts the child's interests. This may include weighing the child's interest in forming secure attachments, the child's interest in growing up in an environment that is maximally conducive to his or her health and development, safety of the child, and any factors that arise given the particular situation. Such a determination should be made in relation to the sentences available to the court in the specific case.<sup>57</sup>

The Committee has recommended that in every case where a caregiver is sentenced, a multidisciplinary team trained in child psychology, childhood development, and other relevant fields should be involved in assessing how sentencing will impact the best interests of children.<sup>58</sup> Those involved with sentencing the parent should also receive training on best-interest evaluations.<sup>59</sup> This could include those directly involved at sentencing, such as lawyers and judges, as well as legislators responsible for drafting sentencing laws.<sup>60</sup> In every case where a child's best interests are formally assessed, including during sentencing of a caregiver, the child should have legal representation.<sup>61</sup>

Both custodial and non-custodial sentencing alternatives should be available to the sentencing court.<sup>62</sup> Whether custodial detention or a non-custodial alternative is found appropriate, the decision should be made with full consideration of the best interests of the child.<sup>63</sup>

### **1. Custodial Sentencing**

Where prison nurseries and similar programs exist, the Committee on the Rights of the Child has recommended that due consideration be given to whether the best interests of the child would be served by allowing the child to live with the incarcerated caregiver in prison.<sup>64</sup> Consideration should be given to the importance of caregiver-child contact in early development and the overall conditions of incarceration, and must always be made on an individual basis.<sup>65</sup> The decision to allow a child to live with an incarcerated caregiver should be subject to judicial review.<sup>66</sup> Where institutions that allow children to be incarcerated with their caregivers do exist, the institutions must provide adequate health and education facilities for children.<sup>67</sup>

Other custodial alternatives should also be established to mitigate the potential damage inflicted on children when caregivers are sentenced. The Quaker United Nations Office, an NGO that worked closely with the Committee on the Rights of the Child in developing the policy framework for children of incarcerated caregivers, has identified other custodial measures that do not lead to the same issues of early childhood separation.<sup>68</sup> Such measures include: delaying

imposition of a sentence until infants and young children reach a certain age; semi-custodial sentencing, where a parent is only imprisoned for a part of the term of incarceration; and alternative family incarceration centers, where parents live with children in a supervised facility apart from the prison itself.<sup>69</sup>

When a caregiver is imprisoned under any custodial sentence, children who do not accompany the parent into custody must be able to visit the incarcerated parent, as long as it is in the child's best interests.<sup>70</sup> Such visits should take place in a child-friendly environment or, if possible, outside the correctional facility.<sup>71</sup> Further, caregivers should be imprisoned in a facility as close as possible to the child.<sup>72</sup> If visitation is substantially burdensome or prohibitive due to costs, the state or federal government that has ordered imprisonment should facilitate or subsidize travel.<sup>73</sup>

## **2. Non-custodial sentencing**

The Committee has also recommended that non-custodial measures should be imposed on caregivers whenever possible.<sup>74</sup> Such measures could include supervised or unsupervised probation, fines and compensation, house arrest and electronic monitoring, suspended sentences, community service, drug and alcohol rehabilitation, and restorative justice practices.<sup>75</sup>

## **3. Ongoing Assessment**

Because best-interest determinations as recommended by the Committee are fact-specific to each individual child in the child's particular context, they are subject to change and should therefore be reviewable.<sup>76</sup> Any number of factors, such as the transfer of a caregiver from one facility to another, changed circumstances of a child's living situation when the child has not accompanied the caregiver into prison, the child reaching a particular age or stage of development, caregiver success in custodial or non-custodial programming, further criminal activity by the caregiver, or drug or alcohol relapse could all potentially lead to a change in the best-interests evaluation. For this reason, best-interest determinations should be subject to review and modification.

## **B. National Framework**

Although most jurisdictions do not consider the best interests of the child when sentencing a caregiver, best-interest determinations by courts are already an integral part of the U.S. justice system. Currently, statutes of all 50 states, American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, the U.S. Virgin Islands, the District of Columbia and the National Indian Child Welfare Act require consideration of the best interests of the child in proceedings on custody, placement and termination of parental rights.<sup>77</sup> There is not a single United States jurisdiction that does not already make best-interests determinations in its courts in the family law context. Determinative factors vary by jurisdiction, though generally courts make best-interests decisions by weighing elements relative to the child's circumstances, the caregiver's perceived capacity to parent, and the ultimate safety and wellbeing of the child.<sup>78</sup>

Twenty-one states and the District of Colombia have statutory factors for the court to consider in making best-interests determinations. The Child Welfare Information Gateway, an informational service of the Children's Bureau of the U.S. Department of Health and Human Services, has identified common factors that appear in many best-interest statutes. They are:

- 1) The emotional ties and relationships between the child and the parents, siblings, family and household members, and other caregivers;
- 2) The capacity of the parent to provide a safe home and adequate food, clothing and medical care;
- 3) The mental and physical health needs of the child;
- 4) The mental and physical health needs of the parents;
- 5) The presence of domestic violence in the home.<sup>79</sup>

Some state statutes contain broad language and do not require consideration of any particular factors, while others provided a more comprehensive list. For example, Minnesota's best-interests statute for child custody determinations contains twelve specific factors that must be considered in a best-interest determination, and the list is non-exhaustive.<sup>80</sup>

Due to the pervasiveness of best-interests statutes in the United States, courts are competent to make best interests determinations and do in fact make such determinations regularly. Best-interest determinations are often made with input from state social services or child welfare agencies. Currently a fully functioning framework to determine the best interests of the child, with the assistance of trained professionals, already exists in every U.S. jurisdiction. These determinations are simply not part of the equation when sentencing a child's parent or primary caregiver for a violation of criminal law in most jurisdictions, though they could easily be implemented in criminal sentencing proceedings.

#### **IV. Innovations and Best Practices**

In cases where children leave the public to join their incarcerated caregiver, eligibility requirements first and foremost should emphasize that placement be in the best interests of the child. Although the best-interests analysis does not take the offender's gender into account, changes to the current incarceration model are likely to have a greater impact on women due to a higher likelihood of the mother being the child's caregiver. The measures recommended in this report reflect what has been implemented domestically and abroad to remedy the impact of incarceration on minor children.

##### **A. Prison Nurseries**

When addressing the best interests of the child in the context of eligibility for a prison nursery program, courts typically focus on the promotion of the child's wellbeing, safety, appropriate care, and developmental and psychological needs.<sup>81</sup> In the United States prison nursery programs are designed for non-violent prisoners without a history of child abuse who will give birth while incarcerated but will be released within two years or less after birth.<sup>82</sup> Common goals of these programs are to (1) teach incarcerated mothers parenting skills and allow them opportunities to practice parenting in a supportive environment; (2) teach mothers and children coping skills; (3)

prevent negative consequences such as depression and recidivism mothers might experience as a result of being away from their children; and (4) allow children to motivate mothers to succeed in their rehabilitation.<sup>83</sup>

Twelve states have prison nurseries. Of the states that provide the alternative, only two allow children to stay past two years of age.<sup>84</sup> Only three programs offer therapeutic services for both mother and child.<sup>85</sup> The federal prison system has the Mother and Infant Nurturing Together (MINT) program. MINT is only available for women who enter prison while pregnant and who will have custody of their children after release. The maximum stay for a child in the MINT program is typically limited to 90 days.

Prison nurseries support mother-child bonding and, in turn, may prevent negative effects of incarceration on both mother and child. However, further research is needed to determine whether prison nurseries may also adversely affect children. In a study examining the long-term outcomes of children who spent their first eighteen months in a U.S. prison nursery, Goshin and colleagues found that children who lived in a prison nursery had significantly lower mean anxious/depressed and withdrawn behavior scores than children who were separated from their mothers due to incarceration.<sup>86</sup> Furthermore, these programs have been reported to facilitate bonding between mother and child, prevent separation, and maintain consistency in care. The supportive environment of prison nurseries helps reduce recidivism rates and provides motivation for prisoners to complete rehabilitation programs.<sup>87</sup> In most states where prison nurseries have been implemented for caregivers with children recidivism rates have been reduced by a range of ten to twenty-two percent.<sup>88</sup> Additionally, no long-term or permanent negative effects on children who resided in prison nursery programs have been documented. As of 2009, there have been no incidents of serious child harm or abuse reported in prison nurseries or community-based mother-child correctional programs in the United States.<sup>89</sup>



## B. Community-Based Sentencing Alternatives

Community-based alternatives may be the best option when it is in the best interests of the child to remain with the caregiver. Unlike prison nurseries, family-based treatment programs can allow caregivers to be with all of their children. These community-based programs provide services including therapy, parenting classes, and substance-abuse treatment that benefit the child and caregiver.<sup>90</sup> As a sentencing alternative, family-based treatment programs demonstrate successful outcomes for children's health and stability, family reunification, reduced rates of recidivism, and sustained parental sobriety.<sup>91</sup> In 2003, the Center for Substance Abuse Treatment evaluated the effectiveness of family residential treatment programs and found that at six months post-treatment, 60% of mothers remained sober, criminal arrest declined by 43%, 44% percent of children returned from foster care, employment rose from 7% to 37% percent post-treatment, and enrollment in educational and vocational training increased from 2% to 19% post-treatment. Alternative family-based treatment programs are less costly than incarceration and achieve better outcomes than maternal incarceration and a child's placement in foster care.<sup>92</sup> Despite this reality, only thirty-four states offer family-based treatment programs as a sentencing alternative.<sup>93</sup>

Drew House, located in New York, is an example of one such community-based alternative. Participants in the program live in supportive, non-secure housing and may take up to three minor children to live with them. Participants are monitored during their stay and receive family and substance abuse counseling. Consideration for eligibility for the program is not automatically foreclosed for those who have violent and felony offenses.

Notably, community-based sentencing alternatives may be more cost effective than incarceration. A caregiver raising a child outside of prison under intensive supervision can cost tens of thousands of dollars less than incarcerating the caregiver and providing foster care for the child. One source reported that the former alternative would cost approximately \$10,000 to \$34,000 annually. On the other hand, the costs of incarceration plus foster care amount to \$129,000.00 per

year.<sup>94</sup> By avoiding foster care and lowering recidivism rates, there is a potential short-term and long-term budgetary benefit for governments.

### **C. Consideration of the Best Interests of the Child at Sentencing**

Among U.S. jurisdictions, only a handful of states consider family impacts at sentencing. Washington State has adopted “parenting sentencing alternative” laws.<sup>95</sup> Under this legislation, which was enacted in 2010, courts may sentence a parent to twelve months of community custody and impose conditions such as parenting classes, chemical dependency treatment, mental health treatment, vocational training, offender change programs, and life skills classes.<sup>96</sup> Eligibility for the program is dependent upon the parent’s criminal history and prior involvement with the child welfare department.<sup>97</sup> Parents who are not sentenced under the sentencing alternative statute may nonetheless serve the final twelve months of a custodial sentence in partial confinement under house arrest as part of the parenting program if it is determined to be in the best interests of the child.<sup>98</sup>

Similarly, California has an alternative sentencing program for mothers with an established history of chemical dependency.<sup>99</sup> The program offers chemical dependency treatment and parenting classes, and children accompany their mothers into the live-in program. Women who have been sentenced for particular crimes are not eligible.<sup>100</sup> In determining whether a convicted mother may be sent to the program with her child, courts must also determine whether participation is in the best interests of the child.<sup>101</sup>

Internationally, children’s best interests are taken into account in sentencing in a variety of ways. Most notably, the Constitutional Court of South Africa has established that when a single primary caregiver is sentenced, South African courts must give consideration to the best interests of the child.<sup>102</sup> If imprisonment of the caregiver will be detrimental to the child, courts must consider a

non-custodial sentence unless the offense was so serious that it would be entirely inappropriate.<sup>103</sup> The best interests are then weighed against the court's interests in imposing punishment.<sup>104</sup>

In making the determination, South African courts must make a five-part inquiry, which requires the court to establish: whether the person on trial is the primary caregiver; the effect of a custodial sentence on children for whom the defendant is caring; whether it is necessary to ensure the children are adequately cared for if the primary caregiver is given a custodial sentence; if the sentence will clearly be non-custodial, what sentence is appropriate bearing in mind the best interests of the child; if there are a range of sentences, the court must consider the best interests of the child as paramount when determining which to impose.<sup>105</sup>

#### **D. Visitation**

Visitation for children of incarcerated caregivers is another important component of family preservation. While visitation is not as desirable as keeping mothers with their children, harm to the child may be mitigated through visitation. For children, visiting and communicating with their parent can decrease the feelings of loss caused by separation, help dissolve fears or fantasies about prison by seeing it first hand, and encourage discussion of current circumstances, thereby addressing issues that may lead to shame or fear.<sup>106</sup> The quality of the caregiver-child contact during visitation is likely to be very important in influencing the reactions of both the parent and child. In a study by Landreth and Lobaugh, an increase in children's self esteem was shown following a 10-week intervention in which the children could physically interact with their incarcerated fathers in a child-friendly environment.<sup>107</sup>

Extended visitation is another alternative that has been adopted in the United States. A Midwestern women's prison, which was not identified in the relevant report, has started a Mother-Child Visitation Program that allows forty prisoners to visit their children on a monthly basis for extended hours inside a child friendly environment in a renovated classroom with child-appropriate

furniture and materials.<sup>108</sup> Research indicates that mothers reported more contact with their children including through visits, phone, and by mail as a result of their participation in the program.<sup>109</sup> Although some participants were concerned about rebuilding their relationships after release, many identified the importance of on-site visits as an opportunity to bond with their children. As a result of physical contact and face-to-face interaction, mothers and their children are afforded an opportunity for nurturing and emotionally satisfying contact.<sup>110</sup>

Shakopee Women's Prison in Minnesota currently has an extended visitation program. The visitation program at Shakopee allows for extended visitation hours, greater physical contact between mothers and their children, and child-appropriate activities that enhance mother-child bonding.

Studies have shown that prisoners who maintain close family relationships while serving their sentences have had more successful experiences after their release.<sup>111</sup> For the incarcerated parent, in-prison parenting programs and other visitation interventions are shown to correlate with lower rates of recidivism, increased self-esteem, and more parental involvement with their children following release.<sup>112</sup> By allowing the presence of children and maintaining and fostering the caregiver-child relationship, visitation programs permitting caregivers to parent behind bars promote the universal goal of rehabilitation.

Overall, effective alternatives promote therapeutic jurisprudence principles. Potential outcomes of these alternatives include positive rehabilitation outcomes for the mother, improved mental and social wellbeing for children as well as reduced risk for children to become offenders, less crowding of prisons and court dockets, cost efficiency, and arguably, lower crime rates. Developing the mother-child relationship has shown considerable rehabilitative effects and positive developmental outcomes for children. As more alternatives arise for fathers to parent while

incarcerated, future research may draw similar conclusions. Without intervention it is likely the extreme negative impact of caregiver incarceration on children and society will persist in the future.

## **V. Recommendations**

As shown, when the primary caregiver of a minor dependent child is convicted of a crime, society is faced with the complicated task of balancing how to address the criminal act committed by the adult while also protecting the needs and interests of the child whose life and welfare is dependent on that adult. The most salient conclusion of this report is that there is no one-size-fits-all solution. What follows is a framework for how best to address this balance, taking into consideration the extensive work undertaken by the Committee on the Rights of the Child, and recommendations for best practices based on domestic and international experience.

### **A. Considering the Best Interests of Children In Sentencing Primary Caregivers**

This is a multifaceted recommendation. The simplest goal of considering the child's needs in making sentencing decisions is to reduce caregiver incarceration. When appropriate, and especially for minor non-violent crimes, alternatives to incarceration and reduced sentences should be considered in order to minimize the disruption to the child's life. And when possible, caregivers who pose minimal ongoing risk to the community should be given the opportunity to serve their sentence in the home or an alternative setting while continuing to care for their child. This may take the form of electronic home monitoring or other intensive-supervision programs.

When a caregiver faces a term of incarceration, the potential arrangements for the child's care should be an explicit consideration in determining the length and location of the caregiver's sentence. There should be a trained person or team to assist with assessing alternatives and presenting those alternatives to the sentencing court. Ideally, a trained child advocate, would be responsible for presenting an impact statement on the child's best interests prior to sentencing. Judges should receive training on how to consider the best interests of the child at sentencing, and

should be informed about each family's circumstances and the most appropriate available alternatives. Defense attorneys should be trained to raise the issue of the child's best interests during the sentencing process where there is no conflict between the child's best interests and the client's wishes. Further, defense attorneys should be trained to inform their clients of collateral consequences, including the potential for termination of parental rights, during plea negotiations.

While "best interests" is a broad and widely interpretable concept, every U.S. jurisdiction already has a means of determining the best interests of the child in the family law context. CIC recommends utilizing existing statutes and case law within that context to develop a best-interests analysis applicable to criminal sentencing.

Ideally, there should be a wide variety of programming available, both in the prison system and in the community, so that the child advocate and the sentencing judge have an arsenal of options to consider when deciding what best serves the child. But even if there are few relevant programs available, advocates could play a vital role in the courtroom by ensuring that courts are informed of how each sentencing option would affect all of the minor children involved in the case.

Finally, CIC recommends ongoing assessment of the best interests of the child. Circumstances change, and different programming is appropriate at different times. A toddler may age out of a prison nursery, or an older child may become newly eligible for a homework help visitation program. Even after a sentence is imposed, trained individuals should continue to monitor the child's situation and update recommendations. These individuals should make ongoing reports to the presiding judge, who should then have the discretion to alter the living situation if necessary. As with the initial determination, a procedure for reviewing changing conditions already exists U.S. jurisdictions in the family law context.

## **B. Programming Alternatives & Best Practices**

What follows is a list of alternative programs CIC recommends for implementation where possible. This is not an exhaustive list and additional research will inform future recommendations. Furthermore, no one program, no matter how well conceived or effective, would be appropriate for every child. CIC thus wishes to promote the expansion of options so that an advocate can identify programs suited to the individualized needs of any given child, and then recommend sentencing options that will serve the child's best interest.

- **Visitation:** Every effort should be made to incarcerate caregivers within a reasonable driving distance from their children. Family visitation rooms should be present in every prison, designed with age appropriate decor and activities. In order to minimize trauma, visiting children should be subjected to as little invasive screening and security as possible within the necessary constraints of maintaining institutional security. Transportation assistance should be provided whenever possible to ensure that children are able to visit regularly.
- **Extended Visitation:** In some circumstances it can be beneficial for a child to be allowed to stay in prison with their incarcerated caregiver overnight, for a weekend, or even for extended visits over holidays. This type of program is most appropriate for school-aged children, allowing them to attend a normal day school and maintain strong ties to their community, while also building and strengthening the bonds of attachment with their caregiver and reducing the harms of separation.
- **Community-Based Residential Family Treatment Centers:** Community-based residential alternatives offer an opportunity for caregivers to serve a sentence in a monitored facility without being separated from minor children. This alternative allows a caregiver to live with multiple children and is significantly less costly than incarcerating

the caregiver and sending children to foster care. Further, this option has the potential to cause the least disruption in the lives of children and offers caregivers the chance to learn valuable parenting skills while serving their sentences.

- **Prison Nurseries:** Sometimes it is in the best interests of the child is to stay with their incarcerated caregiver, living in the prison. This alternative is most common for infants and babies, and especially for nursing mothers or following prison births. Many current programs consider 18 months of age or younger to be an appropriate age limit. However, CIC does not recommend any specific age limit for prison nursery programs. Instead, each case should be assessed on an individual basis, taking into account the resources available within the particular prison nursery, to determine how long the child would continue to benefit from remaining in that setting.

### **C. Ongoing Research & Oversight:**

Much of the research on outcomes of alternative sentencing and prison nursery programs is in its infancy. This is an ongoing problem with no easy solution, and there are many opportunities for innovation and further research. Most notably, this report has presented the outcomes of a wide variety of programs as they have been observed so far, but there have been no longitudinal studies of the long-term effects of caregiver incarceration on children, or the long-term outcomes of any particular program designed to address those effects. CIC recommends that localities support ongoing innovation of new programs, and recognize the need for ongoing research into the effectiveness of these programs.

### **D. A Job For CIC: A Two-Year Action Plan:**

The United States is unique both in the scale of its incarcerated population and in that it is one of the only places where the child of an incarcerated person is very rarely brought into prison



with a caregiver. In order to address this unique need, most of CIC's immediate objectives focus on this domestic context. Given CIC's geographic location in the Twin Cities, its close ties to the University of Minnesota, and the window of opportunity currently present in Minnesota's political climate, the first recommendation is that CIC help create a "Minnesota Model."

Over the next two years, CIC will help to identify and implement best practices to address the needs of children whose caregivers are convicted of a crime in Minnesota. Working with local partners, CIC will work to modify sentencing guidelines, to establish new protocols for assessing and presenting the best interests of the child to judges prior to criminal sentencing of caregivers, and to support the development of new programs to provide more options to address the needs of this vulnerable population. Looking ahead, CIC will seek research partners who can evaluate the effectiveness of the Minnesota Model, and work with other states and international partners to share the best parts of that model in other jurisdictions.

Below is a detailed list of concrete objectives that CIC can choose to pursue over the next two years:

- **Sentencing Guidelines:** CIC board members should work with political contacts to advocate for adjusting the state sentencing guidelines. Trial judges should be granted explicit authority to consider the best interests of the child, where appropriate, in sentencing.
- **Child Advocates:** CIC can work with other organizations and state and local institutions to establish an appropriate mechanism to determine the best interests of each child and to provide sentencing judges with information about the best interests of each child . CIC can also assist by providing advocates and defense attorneys with current data on alternative sentencing practices and outcomes.
- **Improve Current Programs and Practices:** The fastest and easiest way to improve the system is to address minor shortcomings and implement the easy fixes within the current

status quo. CIC can use University of Minnesota students to do a survey of local programs and institutions currently serving the needs of this community. CIC can help inform defense lawyers and advocates about existing programs that might serve the best interests of the child.

- **Implement New Prison Programs:** CIC can work with the Minnesota Department of Corrections to raise awareness of potential programs for state prisons. This collaboration could include assessing the need for transportation assistance for child visitation, as well as assessing the viability of a prison nursery or community-based residential alternatives in Minnesota.
- **Raise Awareness of Community Based Programs:** CIC can reach out to other local NGOs and work with them to address the needs of children outside the prison system. CIC can raise awareness and provide data to support the establishment of new community-based programs.
- **Data Collection and Ongoing Research:** CIC can work with partners at the University of Minnesota to conduct further research into the effectiveness of alternative sentencing programs and conduct ongoing evaluations of the outcomes of the Minnesota Model.
- **International Collaboration:** CIC can reach out to partners in other countries, compare practices, and learn from the successes and pitfalls of a wide variety of programs.
- **Raise Awareness of Minimum Requirements For Facilities (Domestic and International):** CIC can work with U.S. and international partners to consider minimum needs for prison nurseries and alternative community-based residential facilities , both in the U.S. and internationally.
- **Training Criminal Defense Lawyers:** CIC can create training materials and programs, such as continuing legal education courses, to better equip practicing criminal defense

lawyers to deal with the potential collateral consequences of parental incarceration. Such trainings can focus on ensuring that lawyers have all information necessary on the potential for termination of parental rights when advising clients, and providing data and statistics on the harms of caregiver incarceration to support sentencing arguments.

### **Conclusion**

The children of incarcerated caregivers are suffering due to the inadequacies of the criminal justice system. The government has a legitimate interest in protecting their needs. The recommendations presented here are not intended to constitute comprehensive criminal justice reform, and they are not intended to provide special treatment to criminal offenders who also happen to be parents. But the relationship between a child and a primary caregiver is unique, and the difficulties that arise when that relationship is interrupted by incarceration must be addressed. It should be standard practice to tailor every offender's treatment to their individual needs: e.g. addicts get substance abuse treatment; high school dropouts take GED classes; and parents get parenting support. This should not be seen as an undeserved reward, but rather as a logical response to an unmet need. The goal of the recommendations here is to simultaneously improve concrete outcomes for convicted offenders who are raising children, and reduce the negative impacts on their children, families, and broader communities. It is CIC's hope that the implementation of these recommendations can result in a bipartisan effort to reduce the negative effects of crime on the children, families, and communities of offenders.

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<sup>1</sup> Peterson, B., Fontaine, J., Kurs, E., & Cramer, L. (2015). Children of Incarcerated Parents Framework Document.

<sup>2</sup> Hellerstedt, W. L. (2015). Adult Incarceration in the United States. *Healthy Generations, Winter*.

<sup>3</sup> Wakefield, S., & Wildeman, C. (2013). *Children of the prison boom: Mass incarceration and the future of American inequality*. Oxford University Press.

<sup>4</sup> The Committee and many international civil society organizations use the term "primary caregiver" instead of parent. The term is broader because it can encompass those besides legal and biological parents who care for

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children. It is also more specific because not all parents are primary caregivers for their children. Because most of the U.S. research deals with effects of parental incarceration, the term “parent” has been retained for this section.

<sup>5</sup> Child Welfare Information Gateway, Determining the Best Interests of the Child, Summary of State Laws (2012), available at: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx>.

<https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/resources/>.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> Peterson, B., Fontaine, J., Kurs, E., & Cramer, L. (2015). Children of Incarcerated Parents Framework Document.

<sup>8</sup> Carson, E. A. (2014). Prisoners in 2013. *Bureau of Justice Statistics, September*, NCJ 247282.

<sup>9</sup> Wagner, P. (2014, May 1). Minnesota incarceration rate, 1978 to 2012. Retrieved July 26, 2015, from

<http://www.prisonpolicy.org/graphs/incrates/MN.html>; Carson, E. A. (2014). Prisoners in 2013. *Bureau of Justice Statistics, September*, NCJ 247282.

<sup>10</sup> Allen, B. J. and Gilliard, D. K. (1996). Prisoners in 1994. *Bureau of Justice Statistics*, NCJ 161559; Carson, E. A. (2014). Prisoners in 2013. *Bureau of Justice Statistics, September*, NCJ 247282.

<sup>11</sup> Shalfer-Nealy, R. (*forthcoming*)

<sup>12</sup> Hellerstedt, W. L. (2015). Adult Incarceration in the United States. *Healthy Generations, Winter*.

<sup>13</sup> Clear, T. R. (2007). *Imprisoning communities: How Mass Incarceration Makes Disadvantaged Neighborhoods worse*. Oxford University Press, USA.

<sup>14</sup> Pew Charitable Trusts (2010). *Collateral costs: Incarceration's effect on economic mobility*. Children are defined as those under the age of 18.

<sup>15</sup> *Id.*

<sup>16</sup> Peterson, B., Fontaine, J., Kurs, E., & Cramer, L. (2015). Children of Incarcerated Parents Framework Document.

<sup>17</sup> Glaze, L. E., & Maruschak, L. M. (2008). *Parents in prison and their minor children*. Washington, DC: US Department of Justice, Office of Justice Programs.

<sup>18</sup> Women's Prison Association. (2009). Mothers, infants, and imprisonment: A national look at prison nurseries and community-based alternatives. *New York: Author*. Retrieved from <http://www.wpaonline.org/pdf/Mothers%20Infants%20and%20Imprisonment,202009>.

<sup>19</sup> [http://www.sentencingproject.org/doc/publications/cc\\_incarcerated\\_women\\_factsheet\\_sep24sp.pdf](http://www.sentencingproject.org/doc/publications/cc_incarcerated_women_factsheet_sep24sp.pdf).

<sup>20</sup> *Id.* note 9, *supra*.

<sup>21</sup> *Id.*

<sup>22</sup> Western, B. (2002). The impact of incarceration on wage mobility and inequality. *American Sociological Review*, 526-546.

<sup>23</sup> Massoglia, M., & Pridemore, W. A. (2015). Incarceration and Health. *Annual Review of Sociology*, 41(1).

<sup>24</sup> Uggem, C. and Stewart, R., (*forthcoming*). *Minnesota Law Review*.

<sup>25</sup> Wakefield, S., & Wildeman, C. (2013). *Children of the prison boom: Mass incarceration and the future of American inequality*. Oxford University Press.

<sup>26</sup> Tasca, M., Rodriguez, N., & Zatz, M. S. (2011). Family and residential instability in the context of paternal and maternal incarceration. *Criminal justice and behavior*, 38(3), 231-247.

<sup>27</sup> Wildeman, C. & Western, B., (2010). Incarceration in fragile families. *The Future of Children*, 20(2), 157-177.

<sup>28</sup> Dallaire, D. H. (2007). Incarcerated mothers and fathers: A comparison of risks for children and families. *Family relations*, 56(5), 440-453.

<sup>29</sup> Murray, J., & Murray, L. (2010). Parental incarceration, attachment and child psychopathology. *Attachment & human development*, 12(4), 289-309.

<sup>30</sup> Huebner, B. M., & Gustafson, R. (2007). The effect of maternal incarceration on adult offspring involvement in the criminal justice system. *Journal of Criminal Justice*, 35(3), 283-296.

<sup>31</sup> Poehlmann, J. (2005). Children's family environments and intellectual outcomes during maternal incarceration. *Journal of Marriage and Family*, 67(5), 1275-1285.

<sup>32</sup> Sabol, W. J., & Minton, T. D. (2008). Jail prisoners at midyear 2007. *Bureau of Justice Statistics, US Department of Justice. NCJ, 221945*.

<sup>33</sup> Bowlby, J., & Ainsworth, M. (2013). The origins of attachment theory. *Attachment Theory: Social, Developmental, and Clinical Perspectives*, 45.

<sup>34</sup> *Id.* at 76.

<sup>35</sup> *Id.* at 70.

<sup>36</sup> Makariev, D. W., & Shaver, P. R. (2010). Attachment, parental incarceration and possibilities for intervention: An overview. *Attachment & human development*, 12(4), 311-331.

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- <sup>37</sup> Murray, J., & Murray, L. (2010). Parental incarceration, attachment and child psychopathology. *Attachment & human development*, 12(4), 289-309.
- <sup>38</sup> Henrichson, C., & Delaney, R. (2012). The price of prisons: What incarceration costs taxpayers. *Federal Sentencing Reporter*, 25(1), 68-80.
- <sup>39</sup> Facts on Foster Care in America. (2006, May 30). Retrieved July 27, 2015, from <http://abcnews.go.com/Primetime/FosterCare/story?id=2017991>
- <sup>40</sup> Bade, R. (2015, July 15). Criminal justice reform gains bipartisan momentum. Retrieved July 31, 2015, from <http://www.politico.com/story/2015/07/criminal-justice-reform-gains-bipartisan-momentum-120125.html>.
- <sup>41</sup> Kennedy, A., *Children, Parents & the State: The Construction of A New Family Ideology*, 26 Berkeley J. Gender L. & Just. 78 (2011).
- <sup>42</sup> See *J. D. v. Superior Court*, 2008 Cal. App. Unpub. LEXIS 2669 (Cal. App. 6th Dist. 2008)(upholding juvenile court's termination of rights where incarcerated mother was unable to gain access to nursery program and the child was thus deemed to have been left without provision for support); but see *J.B. v. Superior Court*, 2009 Cal. App. Unpub. LEXIS 6695 (Cal. App. 2d Dist. 2009)(holding that because mother was enrolled and participating in FFP, protective services should not have removed her child); see also Eitenmiller, K. *Bending the Bars for Mothers: How Prison Alternatives Can Build A Stronger Oregon*, 92 Or. L. Rev. 755, 763-768 (2014).
- <sup>43</sup> *Id.* note 41, *supra*, at 98. Kennedy breaks statutory parental termination schemes into two conceptual categories, what she calls "clearly bad parent" and "impliedly bad parent" termination statutes. Those statutes allowing the court to take the fact of incarceration itself into account during termination proceedings fall into the latter category and exist in most states.
- <sup>44</sup> See Adoption and Safe Families Act (ASFA), 42 U.S.C. § 675(5)(E) (2006) (requiring states to move for permanency when a child is in foster care for 15 of 22 months).
- <sup>45</sup> ASFA, 42 U.S.C.A. § 673b (d)(1)(3).
- <sup>46</sup> Genty, P. *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 20 Fordham Urb. L. J. 1671, 1678 (2003).
- <sup>47</sup> H.R. REP. 105-77, 7-8, 1997 U.S.C.C.A.N. 2739, 2740; see also Congressional Research Service, Child Welfare: Implementation of the Adoption and Safe Families Act (P.L. 105-89) p. 2, (2004) (discussing the legislative history and intent of ASFA and noting that it was meant to correct prior legislation, which had been interpreted to require family reunification even where children's health or safety was in jeopardy, and to expedite adoption for children who cannot safely return home).
- <sup>48</sup> Federal Sentencing Guidelines Manual § 5H1.6.
- <sup>49</sup> See *U.S. v. Sweeting*, 213 F.3d 95, 102 (3d Cir. 2000)(finding downward departure was not warranted where the mother, who was the sole caretaker of five children, was sentenced for a drug offense requiring 63-78 months of imprisonment); *U.S. v. Gentile*, 473 F.3d 888 (8th Cir. 2007) *cert. granted, judgment vacated*, 552 U.S. 1089, 128 S. Ct. 866, 169 L. Ed. 2d 714 (2008) *and cert. granted, judgment vacated*, 552 U.S. 1089, 128 S. Ct. 868, 169 L. Ed. 2d 715 (2008) (finding downward departure inappropriate based on harm to the family); *U.S. v. Gaskill*, 991 F.2d 82, 85 (3d Cir. 1993); *U.S. v. Daly* 883 F.2d 313, 319 (4th Cir. 1989); *U.S. v. Dyce*, 91 F.3d 1462, 1466 (D.C. Cir. 1996).
- <sup>50</sup> *U.S. v. Johnson*, 964, F.2d 124 (2d Cir. 1992); *U.S. v. Aguirre*, 214 F.3d 1122, 1127 (9th Cir. 2000).
- <sup>51</sup> See Abramowicz, S., *Rethinking Parental Incarceration*, 82 U. Colo. L. Rev. 793, 828-29 (2011) (discussing the effects of *U.S. v. Booker*, 543 U.S. 220 (2005) and *Blakely v. Washington*, 542 U.S. 296 (2004) on federal deviation from guidelines in sentencing parents); *Gall v. U.S.*, 552 U.S. 38 (2007)(holding that "[i]n reviewing the reasonableness of a sentence outside the [Federal Sentencing] Guidelines range, appellate courts may...take the degree of variance into account and consider the extent of a deviation from the Guidelines" and rejecting "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range" and "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.").
- <sup>52</sup> *Id.* at 834.
- <sup>53</sup> See Committee on the Rights of the Child, Report and Recommendations of the Day of General Discussion on "Children of Incarcerated Parents" (2011) *retrieved from*: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx>; see also Committee on the Rights of the Child, General Comment No. 14 on the Right of the Child to Have His or Her Best Interests Taken as Primary Consideration, U.N. Doc. CRC/C/GC 14 (2013); United Nations Quaker Office, "Collateral Convicts: Children of Incarcerated Parents" (2011).

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<sup>54</sup> The Committee and many international civil society organizations use the term “primary caregiver” instead of parent. The term is broader because it can encompass those besides legal and biological parents who care for children. It is also more specific because not all parents are primary caregivers for their children.

<sup>55</sup> *Id.* note 53, *supra*, Report and Recommendations at ¶¶ 30, 33, 37; General Comment at ¶ 69.

<sup>56</sup> *Id.* note 53, *supra*, General Comment at ¶ 46.

<sup>57</sup> *See Id.* note 53, *supra*, Report and Recommendations at ¶ 37 (laying out a specific balancing test where accompanying the parent into prison is an available option at sentencing).

<sup>58</sup> *Id.* note 53, *supra*, General Comment at ¶¶ 47, 94.

<sup>59</sup> *Id.* at ¶ 15(f).

<sup>60</sup> *Id.* at ¶ 32; *see also Id.* note 53, *supra*, Report and Recommendations at ¶ 47.

<sup>61</sup> *Id.* note 53, *supra*, General Comment at ¶ 96.

<sup>62</sup> *Id.* at ¶ 69; *Id.* note 53, *supra*, Report and Recommendations at ¶ 30.

<sup>63</sup> *Id.* note 53, *supra*, Report and Recommendations at ¶ 30.

<sup>64</sup> *Id.* at ¶¶ 33, 37.

<sup>65</sup> *Id.*

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

<sup>67</sup> *Id.* ¶ at 34; note 53, *supra*, UN Quakers at 21-26.

<sup>68</sup> *Id.* at 15, 22

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* note 53, *supra*, Report and Recommendations at ¶¶ 35, 38.

<sup>71</sup> *Id.* ¶ 39.

<sup>72</sup> *Id.* ¶ 40; *see also* Committee on the Rights of the Child, Concluding Observation, Switzerland, U.N. Doc. CRC/C/CHE/CO/2-4 ¶ 53 (Feb. 26, 2015).

<sup>73</sup> *Id.* note 53, *supra*, Report and Recommendations at ¶ 40.

<sup>74</sup> *Id.* at ¶ 30; *Id.* note 51, *supra*, General Comments at ¶ 69.

<sup>75</sup> *Id.* note 13, *supra*, UN Quakers at 15; *see also* Quaker United Nations Office, “Children of (Alleged) Offenders: Revised Draft Framework for Decision-Making” (2012).

<sup>76</sup> *See Id.* note 53, *supra*, General Comment at ¶ 11, (recognizing that “best interests of the child is a dynamic concept that encompasses various issues which are continuously evolving” and that the best interests concept “should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs.”).

<sup>77</sup> Child Welfare Information Gateway, Determining the Best Interests of the Child, Summary of State Laws (2012), available at: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2011.aspx>.

<https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/resources/>.

<sup>78</sup> *Id.* at 2.

<sup>79</sup> *Id.* at 3.

<sup>80</sup> Minn. Stat. Ann. § 518.17 (2015) states requires the court to consider and evaluate all relevant factors, including:

- (1) a child's physical, emotional, cultural, spiritual, and other needs, and the effect of the proposed arrangements on the child's needs and development;
- (2) any special medical, mental health, or educational needs that the child may have that may require special parenting arrangements or access to recommended services;
- (3) the reasonable preference of the child, if the court deems the child to be of sufficient ability, age, and maturity to express an independent, reliable preference;
- (4) whether domestic abuse, as defined in section 518B.01, has occurred in the parents' or either parent's household or relationship; the nature and context of the domestic abuse; and the implications of the domestic abuse for parenting and for the child's safety, well-being, and developmental needs;
- (5) any physical, mental, or chemical health issue of a parent that affects the child's safety or developmental needs;
- (6) the history and nature of each parent's participation in providing care for the child;
- (7) the willingness and ability of each parent to provide ongoing care for the child; to meet the child's ongoing developmental, emotional, spiritual, and cultural needs; and to maintain consistency and follow through with parenting time;
- (8) the effect on the child's well-being and development of changes to home, school, and community;
- (9) the effect of the proposed arrangements on the ongoing relationships between the child and each parent, siblings, and other significant persons in the child's life;

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(10) the benefit to the child in maximizing parenting time with both parents and the detriment to the child in limiting parenting time with either parent;

(11) except in cases in which domestic abuse as described in clause (4) has occurred, the disposition of each parent to support the child's relationship with the other parent and to encourage and permit frequent and continuing contact between the child and the other parent; and

(12) the willingness and ability of parents to cooperate in the rearing of their child; to maximize sharing information and minimize exposure of the child to parental conflict; and to utilize methods for resolving disputes regarding any major decision concerning the life of the child.

<sup>81</sup> Gilad, M., & Gat, T. (2013). US v. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women. *NYU Rev. L. & Soc. Change*, 37, 371.

<sup>82</sup> Carlson, J. R. (1998). Evaluating the effectiveness of a live-in nursery within a women's prison. *Journal of Offender Rehabilitation*, 27(1-2), 73-85.

<sup>83</sup> *Id.* at 87,

<sup>84</sup> <http://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>

<sup>85</sup> <http://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>

<sup>86</sup> Goshin, L. S., Byrne, M. W., & Blanchard-Lewis, B. (2014). Preschool outcomes of children who lived as infants in a prison nursery. *The Prison Journal*, 0032885514524692.

<sup>87</sup> Pojman, L. M. (2001). Cuffed love: Do prison babies ever smile. *Buff. Women's LJ*, 10, 46.

<sup>88</sup> Carlson, J. R. (2001). Prison nursery 2000: A five-year review of the prison nursery at the Nebraska Correctional Center for Women. *Journal of Offender Rehabilitation*, 33(3), 75-97.

<sup>89</sup> *Id.* at 88.

<sup>90</sup> *Id.* at 91.

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

<sup>92</sup> *Id.* at 91.

<sup>93</sup> *Id.* at 91.

<sup>94</sup> <http://www.cbsnews.com/news/mothers-to-do-jail-time-at-home-under-new-program/>

<sup>95</sup> See Wash. Rev. Code Ann. § 9.94A.655 (2010); Wash. Rev. Code Ann. § 9.94A.6551 (2010).

<sup>96</sup> *Id.* § 9.94A.655 (2010).

<sup>97</sup> *Id.* Violent crimes, sex offenses, and removability from the country all act as a bar to eligibility.

<sup>98</sup> *Id.* note 95, *supra* § 9.94A.6551 (2010).

<sup>99</sup> Cal. Pen. Code § 1174.4 (2011).

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

<sup>101</sup> *Id.*

<sup>102</sup> S v. M, Constitutional Court of South Africa, CCT 53/06 ¶ 36 (2007); MS v. S, Constitutional Court of South Africa, CCT63/10 (2011).

<sup>103</sup> *Id.* S v. M.

<sup>104</sup> *Id.* note 102, *supra*, MS v. S at ¶ 45.

<sup>105</sup> *Id.* note 102, *supra*, S v. M.

<sup>106</sup> Sanders, E., & Dunifon, R. (2011). Children of Incarcerated Parents.

<sup>107</sup> Landreth, G. L., & Lobaugh, A. F. (1998). Filial therapy with incarcerated fathers: Effects on parental acceptance of child, parental stress, and child adjustment. *Journal of Counseling & Development*, 76(2), 157-165.

<sup>108</sup> Snyder, Z. K., Carlo, T. A., & Mullins, M. M. C. (2002). Parenting from prison: An examination of a children's visitation program at a women's correctional facility. *Marriage & Family Review*, 32(3-4), 33-61.

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

<sup>110</sup> *Id.* at 92.

<sup>111</sup> *Id.* at 88.

<sup>112</sup> *Id.* at 91.