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## Mass Parental Incarceration and Sentencing Reform in Minnesota

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## MASS PARENTAL INCARCERATION AND SENTENCING REFORM IN MINNESOTA

Caitlin Curry, Veronica Horowitz, Julie Matonich, & Kristin Stock<sup>†</sup>

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<sup>†</sup> This article is authored by Children of Incarcerated Caregivers board members and interns. We are grateful for the feedback provided by the Honorable Mark Wernick and Peter Thompson.

Children of Incarcerated Caregivers is a nonprofit organization dedicated to researching the impact of parental incarceration and ways to minimize harm to children, advocating for laws and policies that promote the best interests of affected children, and partnering with community organizations to provide resources for families impacted by incarceration. Additional information can be found at <https://cicmn.org/>.

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I. INTRODUCTION

The devastating consequences of parental incarceration are well established and widely recognized on international, national, and local levels. The increasing awareness of how mass parental incarceration harms children, their families, and society as a whole has led to recommendations for and the adoption of sentencing reforms. One holistic approach is to provide courts with both the authority to assess the impact of parental incarceration on children and families, and the ability to consider that information in determining an appropriate and proportionate sentence.

International governing bodies have stated that children have the right to have their best interests considered by courts when their parents or primary caregivers are sentenced in a criminal proceeding.<sup>1</sup> Since 2009, following the United States Supreme Court’s decision in *United States v. Booker*,<sup>2</sup> United States federal courts have been able to more freely consider impact on the family as a sentencing factor. In state courts, Washington, Oregon, Arkansas, and New York have adopted legal mechanisms for courts to consider the interests of children when a parent is facing incarceration.<sup>3</sup> At the municipal level, San Francisco and New York City have incorporated the use of family impact statements into the presentencing investigation process.<sup>4</sup>

Under existing laws and guidelines, Minnesota courts can consider the impact parental incarceration would have on children or other family members in determining whether family support makes the defendant particularly amenable to probation and, thus, eligible for a sentence of probation in lieu of prison. The studies cited in this article confirm the

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1. G.A. Res. 44/25, art. 3, Convention on the Rights of the Child (Nov. 20, 1989).

2. 543 U.S. 220 (2005).

3. Creating Alternatives to Total Confinement for Nonviolent Offenders with Minor Children, S.B. 6639, 61st Leg., 2010 Reg. Sess. (Wash. 2009); Relating to Offenders with Minor Children, 2015 Or. Laws 830. An Arkansas-based organization, the Arkansas Voices for Children submits Family Impact Statements for many of their clients. See DEE ANN NEWELL, A GUIDE TO FAMILY MATTERS, ARKANSAS VOICES FOR THE CHILDREN LEFT BEHIND (2011), <http://www.arkansasvoices.org/a-guide-to-family-matters.html> [<https://perma.cc/YYU7-JJXT>]. “New York State has embedded the concept [of family impact statements] throughout the pre-sentence investigation training.” LINDSAY CRAMER ET AL., TOOLKIT FOR DEVELOPING FAMILY IMPACT STATEMENTS, URBAN INSTITUTE 4 (June 2015), <https://www.urban.org/sites/default/files/publication/53651/2000253-Toolkit-for-Developing-Family-Impact-Statements.pdf> [<https://perma.cc/SE45-CM6J>].

4. See CRAMER ET AL., *supra* note 3.

intergenerational and societal harm that parental incarceration sows and demonstrate why judges, including those in Minnesota, should—when sentencing parents and other caregivers—utilize their authority to issue non-custodial sentences whenever such a sentence is consistent with public safety interests. This article explores the current impact of parental incarceration on children and communities,<sup>5</sup> discusses the international, federal, and state laws and recommendations pertaining to sentencing caregivers,<sup>6</sup> and encourages Minnesota to adopt policies that allow for the consideration of a child’s interests at sentencing.<sup>7</sup>

## II. PARENTAL INCARCERATION HAS REACHED A CRISIS LEVEL IN THE UNITED STATES

Parental incarceration can and should be seen as a human rights issue. The mass incarceration of parents in the United States has created a human rights disaster for children. The number of children with a parent in prison or jail has increased fivefold since 1980.<sup>8</sup> By 2012, nearly 2.6 million children (or one in twenty-five minors) in the United States experienced parental incarceration.<sup>9</sup> And at least five million children—about one in fourteen—had a parent in prison or jail at some point in their lives.<sup>10</sup> As outlined below, parental incarceration is connected to a multitude of harmful impacts for children, including increased mental and physical health problems, infant mortality, child protection involvement, homelessness, and financial insecurity. Moreover, these collateral consequences are not limited to children with incarcerated parents but also have negative implications for their caregivers, local communities, and American society more broadly.

## II. CONSEQUENCES TO THE CHILD

Studies demonstrate that incarceration of a parent or primary caregiver is likely to cause devastating consequences for a child. Parental incarceration is on the list of Adverse Childhood Experiences (ACEs), which, along with

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5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part IV.

8. Bryan L. Sykes & Becky Pettit, *Mass Incarceration, Family Complexity, and the Reproduction of Childhood Disadvantage*, 654 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 135 (2014).

9. *Id.* at 127.

10. David Murphey & P. Mae Cooper, *Parents Behind Bars: What Happens to Their Children?*, CHILD TRENDS 3 (2015), [http://www.courts.ca.gov/documents/BTB\\_23\\_4K\\_6.pdf](http://www.courts.ca.gov/documents/BTB_23_4K_6.pdf) [<https://perma.cc/MK9S-2BUY>].

experiences including physical abuse, sexual abuse, and intimate partner violence, are known to affect well-being into adulthood.<sup>11</sup>

The collateral consequences of parental incarceration on families and children are well documented, with several studies demonstrating that parental incarceration negatively impacts a child's well-being in several areas, including mental health, behavioral issues, physical health, cognition, educational success, and material hardship.<sup>12</sup> Research has documented that these deleterious impacts may extend into adolescence and young adulthood, and may include an increased risk of arrest among young adult males who have had a father incarcerated.<sup>13</sup>

Children who have experienced parental incarceration are at an increased risk of many negative mental health outcomes, including depression, posttraumatic stress disorder, anxiety,<sup>14</sup> internalizing symptoms, self-injury, suicidal ideation, and suicide attempts.<sup>15</sup> Moreover, a recent study found that the experience of the incarceration of a household member in childhood increases the odds of a suicide attempt later in life by 50%.<sup>16</sup> The consequences

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11. *Adverse Childhood Experiences*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES. ADMIN., U.S. DEP'T HEALTH & HUM. SERVICES., <https://www.samhsa.gov/capt/practicing-effective-prevention/prevention-behavioral-health/adverse-childhood-experiences> [<https://perma.cc/TW3A-6AM6>]. This list is maintained by the United States Department of Health and Human Services.

12. SARA WAKEFIELD & CHRISTOPHER WILDEMAN, *CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY* (Oxford Univ. Press 2014); Anna R. Haskins, *Beyond Boys' Bad Behavior: Paternal Incarceration and Cognitive Development in Middle Childhood*, 95 SOC. FORCES 861, 861-92 (2016), <https://academic.oup.com/sf/article/95/2/861/2452933#85011740> [<https://perma.cc/7EMR-2DMT>]; Christopher Wildeman & Kristin Turney, *Positive, Negative, or Null? The Effects of Maternal Incarceration on Children's Behavioral Problems*, 51 DEMOGRAPHY 1041, 1041-68 (2014).

13. Michael E. Roettger & Raymond R. Swisher, *Associations of Fathers' History of Incarceration with Sons' Delinquency and Arrest Among Black, White, and Hispanic Males in the United States*, 49 CRIMINOLOGY 1109, 1110 (2011), <https://pdfs.semanticscholar.org/6984/ae359f229d16305f75c1d4d1dcfd65ebdbaf.pdf> [<https://perma.cc/P5X9-NGDG>].

14. Rosalyn D. Lee, Xiangming Fang & Feijun Luo, *The Impact of Parental Incarceration on the Physical and Mental Health of Young Adults*, 131 PEDIATRICS 1188, 1191 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3608482/pdf/peds.2012-0627.pdf> [<https://perma.cc/Z73J-DYCR>].

15. Laurel Davis & Rebecca J. Shlafer, *Mental Health of Adolescents with Currently and Formerly Incarcerated Parents*, 54 J. OF ADOLESCENCE 120, 120-34 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5549675/> [<https://perma.cc/G2CU-56XB>].

16. Melissa T. Merrick et al., *Unpacking the Impact of Adverse Childhood Experiences on Adult Mental Health*, 69 CHILD ABUSE & NEGLECT 10, 10-19 (2017),

of experiencing parental incarceration as a child are long lasting. For instance, one study found that up to age thirty-two, parental incarceration is associated with an increased risk of antisocial-delinquent outcomes.<sup>17</sup> Other scholarship finds that experiencing parental incarceration increases the risk of internalizing and antisocial problems for children up to the age of forty-eight.<sup>18</sup>

Studies investigating the specific consequences of paternal incarceration yield similar findings. Children who experienced their father's incarceration have increased attention problems relative to children who experienced other forms of father absenteeism, suggesting that paternal incarceration may create a unique form of disadvantage.<sup>19</sup> However, these deleterious consequences may not apply to all cases of paternal incarceration. One recent study found that children who experience paternal incarceration have higher levels of behavioral problems and school punishments (e.g. suspension), but this association was limited to children who lived with their father prior to his incarceration.<sup>20</sup> A nuanced analysis uncovered that paternal incarceration is associated with a significant increase in physical aggression for boys, with a few caveats. These findings do not hold for boys whose fathers were incarcerated for a crime of violence or for being abusive to the boys' mothers prior to prison.<sup>21</sup> Relatedly, experiencing maternal incarceration is associated with increases in a multitude of childhood behavioral problems, including aggressiveness; anxiety; depression; rule breaking, as reported by caregivers; inattention; assertion problems; oppositional problems; and cooperation problems, as reported by teachers.<sup>22</sup>

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<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6007802/> [https://perma.cc/GMC2-JQM6].

17. Joseph Murray & David P. Farrington, *Parental Imprisonment: Effects on Boys' Antisocial Behaviour and Delinquency Through the Life-Course*, 46 J. CHILD PSYCHOL. & PSYCHIATRY 1269, 1269-78 (2005).

18. Joseph Murray & David P. Farrington, *Parental Imprisonment: Long-Lasting Effects on Boys' Internalizing Problems Through the Life Course*, 20 DEV. & PSYCHOPATHOLOGY 273, 273-90 (2008), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.509.7915&rep=rep1&type=pdf> [https://perma.cc/NW9S-AAA6].

19. Amanda Geller et al., *Beyond Absenteeism: Father Incarceration and Child Development*, 49 DEMOGRAPHY 49, 65-66 (2012).

20. Wade C. Jacobsen, *The Intergenerational Stability of Punishment: Paternal Incarceration and Suspension or Expulsion in Elementary School*, J. OF RES. IN CRIME AND DELINQ. (2019).

21. Christopher Wildeman, *Paternal Incarceration and Children's Physically Aggressive Behaviors: Evidence from the Fragile Families and Child Wellbeing Study*, 89 SOC. FORCES 285, 285-309 (2010).

22. See Wildeman & Turney, *supra* note 12.

Regarding negative physical health outcomes, a recent incarceration of either a mother or a father is associated with a nearly 50% increase in early infant mortality.<sup>23</sup> Parental incarceration is also correlated with high cholesterol, asthma, migraines, HIV/AIDS, and poor health.<sup>24</sup> Experiencing paternal incarceration as a child has been found to increase the odds of both asthma and migraines in young adults.<sup>25</sup> Some studies suggest that the impact of parental incarceration may be more detrimental to the physical health of young girls and women than for males. Women who have experienced parental incarceration have higher subsequent Body Mass Indexes than women who have not shared this experience, but this finding does not hold for men.<sup>26</sup> While not specific to parental incarceration, a recent study found that experiencing the incarceration of a family member had a profound impact on the health of women; the experience of family incarceration increases women's odds of reporting poor or fair health by 200% and their odds of obesity by 44%.<sup>27</sup> Further, the odds of a heart attack or stroke are about 2.5 times greater for women with a currently incarcerated family member than for women without.<sup>28</sup> For men, however, experiencing the incarceration of a family member did not increase their odds of any of these negative health outcomes.<sup>29</sup>

Other studies point to the negative impact of parental incarceration on educational readiness and attainment. Boys who have experienced paternal incarceration by age five have worse non-cognitive skills such as the abilities to concentrate and emotionally self-regulate when they enter school, leading to an increased likelihood of placement in special education classes by age nine.<sup>30</sup> Children who have experienced parental incarceration have decreased educational attainment in emerging adulthood, with significantly lower GPAs,

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23. Christopher Wildeman, *Imprisonment and Infant Mortality*, 59 SOC. PROBS. 228, 228-57 (2012).

24. See Lee, Fang & Luo, *supra* note 14.

25. Holly Ventura Miller & J.C. Barnes, *The Association Between Parental Incarceration and Health, Education, and Economic Outcomes in Young Adulthood*, 40 AM. J. CRIM. JUST. 765, 765-84 (2015).

26. Michael E. Roettger & Jason D. Boardman, *Parental Incarceration and Gender-Based Risks for Increased Body Mass Index: Evidence from the National Longitudinal Study of Adolescent Health in the United States*, 175 J. EPIDEMIOLOGY 636, 636-44 (2012).

27. Hedwig Lee et al., *A Heavy Burden: The Cardiovascular Health Consequences of Having a Family Member Incarcerated*, 104 AM. J. PUB. HEALTH 421, 421-27 (2014).

28. *Id.*

29. *Id.*

30. Anna R. Haskins, *Unintended Consequences: Effects of Paternal Incarceration on Child School Readiness and Later Special Education Placement*, 1 SOC. SCI. 141 (2014).

lower levels of education achieved, lower levels of college completion,<sup>31</sup> and greater unhappiness in school than their counterparts who have not shared this adverse experience.<sup>32</sup> Experiencing a father's incarceration as a child reduces the odds of graduating from college as a young adult by 46%, and decreases self-reported satisfaction with one's own educational attainment as well.<sup>33</sup>

Parental incarceration also exacerbates economic hardships for children through an array of distinct but interlocking mechanisms. Parents who were incarcerated during the first ten years of their children's life have less education, work fewer hours, have lower incomes, receive more government assistance, and have lower socioeconomic statuses than parents without this history. Thus, children who have experienced parental incarceration have less family social advantages than their peers.<sup>34</sup> Parental incarceration exacerbates economic and material hardship for children through a combination of factors, including a reduction in fathers' economic contributions and other family strains,<sup>35</sup> and maternal instrumental support (in the case of a mother's recent incarceration).<sup>36</sup> Thus, research has found children who experience parental incarceration are at an increased risk of experiencing homelessness as children<sup>37</sup> (though some research finds the risk of childhood homelessness

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31. Holly Foster & John Hagan, *The Mass Incarceration of Parents in America: Issues of Race/Ethnicity, Collateral Damage to Children, and Prisoner Reentry*, 623 ANNALS 179, 179-94 (2009); John Hagan & Holly Foster, *Intergenerational Educational Effects of Mass Imprisonment in America*, 85 SOC. EDUC. 259, 259-86 (2012).

32. Marcus Shaw, *The Reproduction of Social Disadvantage Through Educational Demobilization: A Critical Analysis of Parental Incarceration*, CRITICAL CRIMINOLOGY 1-16 (2019).

33. See Miller & Barnes, *supra* note 25.

34. Jean M. Kjellstrand & J. Mark Eddy, *Parental Incarceration During Childhood, Family Context, and Youth Problem Behavior Across Adolescence*, 50 J. OFFENDER REHABILITATION 18, 18-36 (2011).

35. Ofira Schwartz-Soicher, Amanda Geller & Irwin Garfinkel, *The Effect of Paternal Incarceration on Material Hardship*, 85 SOC. SERV. REV. 447, 447-73 (2011). Parental incarceration also leads to increased material hardship for children. Kristin Turney, *The Consequences of Paternal Incarceration for Maternal Neglect and Harsh Parenting*, 92 SOC. FORCES 1607, 1607-36 (2014).

36. Kristin Turney, Jason Schnittker & Christopher Wildeman, *Those They Leave Behind: Paternal Incarceration and Maternal Instrumental Support*, 74 J. MARRIAGE & FAMILY 1149, 1149-65 (2012).

37. See WAKEFIELD & WILDEMAN, *supra* note 12.

follows only paternal, rather than maternal, incarceration)<sup>38</sup> and in their transition into adulthood.<sup>39</sup>

Homelessness is not the only mechanism by which parental incarceration leads to childhood displacement. Parental incarceration—especially maternal incarceration—also puts children at risk of being placed into foster care. Almost 90% of incarcerated fathers reported their child’s mother as the current caregiver for their minor children while they were imprisoned, with only about 2% reporting that their children were placed in foster care. This does not hold true for imprisoned mothers, however. Only 37% of mothers report the child’s father as the primary caregiver while they are imprisoned, and 11% of mothers in prison report their children being placed in foster care.<sup>40</sup> In fact, the sharp rise in female incarceration has had a profound impact on what has been termed the “foster care crisis” at a national level. For every 100 women imprisoned, the rate of foster-care caseloads increased by 6%, while for every 100 men incarcerated the foster-care caseload rate increased by 1%. The growth of women’s incarceration rate specifically accounted for 31.1% of the growth in foster-care caseloads in the United States from 1985 to 2000.<sup>41</sup>

Yet perhaps the most consequential impact that parental incarceration has on children is that it puts them at an increased risk of subsequent delinquency, criminality, and criminal justice system contact themselves. For instance, one study found that children who experienced parental incarceration before age ten exhibited higher levels of problem behaviors than their peers, with these differences increasing over time. By tenth grade, children who had experienced parental incarceration were significantly more likely to have engaged in serious delinquency.<sup>42</sup> Children who experienced the incarceration of a father are at an increased risk of delinquent behavior in adolescence and young adulthood and an increased risk of arrest by age twenty-five.<sup>43</sup> They are also more likely to report using illegal drugs during their

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38. Christopher Wildeman, *Parental Incarceration: Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, 651 ANNALS 74, 74–96 (2014).

39. Holly Foster & John Hagan, *Incarceration and Intergenerational Social Exclusion*, 54 SOC. PROBS. 399, 399–433 (2007).

40. LAUREN E. GLAZE & LAURA M. MARUSCHAK, PARENTS IN PRISON AND THEIR MINOR CHILDREN, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS 5 (2008), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf> [<https://perma.cc/5PUV-HL3F>].

41. Christopher A. Swann & Michell Sheran Sylvester, *The Foster Care Crisis: What Caused Caseloads to Grow*, 43 DEMOGRAPHY 309, 309–35 (2006).

42. Jean M. Kjellstrand & J. Mark Eddy, *Parental Incarceration During Childhood, Family Context, and Youth Problem Behavior Across Adolescence*, 50 J. OFFENDER REHABILITATION, 18, 18–36 (2011).

43. Roettger & Swisher, *supra* note 13, at 1110.

transition from adolescence into adulthood.<sup>44</sup> Those who experienced the incarceration of a mother are also at risk of justice system involvement. A longitudinal study found that for adults, the experience of maternal incarceration as a child increased their odds of being placed on adult probation by 400% and increased their odds of having a criminal conviction by nearly 300%.<sup>45</sup> This suggests maternal incarceration has serious long-term intergenerational consequences. Similarly, a recent survey of incarcerated parents revealed that mothers in prison were 2.5 times more likely than fathers in prison to report that their adult children were incarcerated.<sup>46</sup> Moreover, when children who experience parental incarceration are imprisoned, they fare worse in prison. These “second-generation prisoners” adjust worse to their incarceration, reporting more prison violence, anger, and rule violations than other prisoners.<sup>47</sup> The wide-reaching consequences of parental incarceration also decrease political participation and promote distrust in the government for the children and families affected.<sup>48</sup>

### III. CONSEQUENCES FOR CAREGIVERS

While a wealth of research has investigated the harmful impacts of parental incarceration on children, we know far less about the experiences of caregivers of children who have one or more incarcerated parents.<sup>49</sup> Scholars often attribute this dearth of research to a lack of data collection on the social relationships of prisoners by correctional institutions. Likewise, most nationally representative surveys do not ask respondents about experiences

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44. Michael Roettger et al., *Paternal Incarceration and Trajectories of Marijuana and Other Illegal Drug Use From Adolescence Into Young Adulthood: Evidence From Longitudinal Panels of Males and Females in the United States*, 106 *ADDICTION* 121, 121–32 (2011).

45. Beth M. Huebner & Regan Gustafson, *The Effect of Maternal Incarceration on Adult Offspring Involvement in the Criminal Justice System*, 35 *J. CRIM. JUST.* 283, 283–96 (2007).

46. Danielle H. Dallaire, *Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families*, 56 *FAMILY REL.* 440, 440–53 (2007).

47. Caitlin M. Novero, Ann Booker Loper & Janet I. Warren, *Second-Generation Prisoners: Adjustment Patterns for Inmates with a History of Parental Incarceration*, 38 *CRIM. JUST. & BEHAVIOR* 761, 761–78 (2011).

48. Hedwig Lee, Lauren C. Porter & Megan Comfort, *Consequences of Family Member Incarceration: Impacts on Civic Participation and Perceptions of the Legitimacy and Fairness of Government*, 651 *ANN. AM. ACAD. POL. SOC. SCI.* 44, 44–73 (2014).

49. Wing Hong Chui, *Association Between Caregiver Stress and Behavioral Problems in the Children of Incarcerated Fathers in Hong Kong*, 20 *MATERNAL CHILD HEALTH J.* 2074, 2074–83 (2016).

with incarceration of friends or family members.<sup>50</sup> Of the few statistics available, approximately 50% of incarcerated men consider themselves to be in committed heterosexual relationships that they intend to return to once they are released.<sup>51</sup> Moreover, one nationally representative survey indicates that 7% of the over 4,000 female respondents reported having a male partner who had been incarcerated.<sup>52</sup> Recent estimates suggest that 45% of Americans have had an immediate family member incarcerated.<sup>53</sup> The estimates also indicate that this experience is particularly heightened for African Americans, with 63% having had an immediate family member incarcerated at some point in their lives.<sup>54</sup>

While these statistics highlight the sheer scale of families impacted by incarceration, we still know far less about the experiences of those individuals who assume caregiver roles once a parent is incarcerated. Studies thus far indicate that caregivers of children with an incarcerated parent face significant challenges. These challenges include, but are not limited to, financial strain, psychological and physical health complications, and increased difficulty in caring for children.<sup>55</sup> These effects may be more pronounced among caregivers who are grandparents, as many elderly caregivers already experience financial and health problems that may be compounded by taking care of one or more

50. See Lee, Porter & Comfort, *supra* note 48; see also Christopher Wildeman, Kristin Turney & Youngmin Yi, *Tough on Crime, Tough on Families? Criminal Justice and Family Life in America*, 665 ANNALS 80 (2016).

51. Olga Grinstead Reznick et al., *Collaborative Research to Prevent HIV Among Male Prison Inmates and Their Female Partners*, 26 HEALTH EDUC. & BEHAVIOR 225, 225-38 (1999).

52. See Lee, Porter & Comfort, *supra* note 48.

53. Peter K. Enns et al., *What Percentage of Americans Have Ever Had a Family Member Incarcerated?: Evidence from the Family History of Incarceration Survey (FamHIS)*, 5 SOCIUS 1, 1 (2019).

54. Olga Grinstead Reznick et al., *Collaborative Research to Prevent HIV Among Male Prison Inmates and Their Female Partners*, 26 HEALTH EDUC. & BEHAVIOR 225, 225-38 (1999).

55. JOYCE A. ARDITTI, PARENTAL INCARCERATION AND THE FAMILY: PSYCHOLOGICAL AND SOCIAL EFFECTS OF IMPRISONMENT ON CHILDREN, PARENTS, AND CAREGIVERS (N.Y. Univ. Press 2013); Susan Phillips & Barbara Bloom, *In Whose Best Interest? The Impact of Changing Public Policy on Relatives Caring for Children with Incarcerated Parents*, 77 CHILD WELFARE 531, 531-41 (1998); Alyssa G. Robillard et al., *An Exploratory Study Examining Risk Communication Among Adolescent Children, Their Incarcerated Mothers, and Their Caregivers*, 27 J. HEALTH CARE FOR POOR & UNDERSERVED 101 *passim* (2016); Jillian J. Turanovic, Nancy Rodriguez & Travis C. Pratt, *The Collateral Consequences of Incarceration Revisited: A Qualitative Analysis of the Effects on Caregivers of Children of Incarcerated Parents*, 50 CRIMINOLOGY 913, 913-59 (2012). See Chui, *supra* note 49.

children.<sup>56</sup> Caregiver experiences are also consequential for the children who experience parental incarceration. Psychological stress experienced by a caregiver has an indirect impact on the psychological well-being of children. When caregivers experience depression, whether moderate or severe, behavioral problems in children following parental incarceration are exacerbated.<sup>57</sup>

Experiencing the incarceration of a loved one may also result in increased shame, stigma, and social isolation among the friends and family members of the incarcerated person.<sup>58</sup> Families and caregivers of children impacted by parental incarceration often report feeling hopeless and disempowered.<sup>59</sup> Likewise, family or friends may not disclose that they have an incarcerated loved one when interacting with employers, teachers, and social service providers due to the stigma associated with incarceration. However, there is extreme variability in how caregivers are affected by parental incarceration. This variability depends, at least in part, on previous parental involvement, interpersonal relationship quality between the caregiver and the incarcerated parent, and the social support system during incarceration.<sup>60</sup>

In her powerful ethnography of the romantic partners of male prisoners at San Quentin Prison in California, Megan Comfort highlights how many of these women become “quasi-inmates” themselves as they try to maintain close contact with their boyfriends or husbands. Comfort finds that these women—most of whom are impoverished mothers—often plan their work, childcare, mealtimes, and even wardrobes to fit with prison visitation schedules and rules so that they can sustain a connection with their partners. Many also described the exorbitant costs associated with maintaining contact, including fees for care packages and phone calls, travel expenses, and time lost at work for in-person visits. These costs further amplified the economic precarity that many women faced, and the women often expressed complicated feelings about the prison and its impacts on their romantic relationships and personal lives. Comfort

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56. See Phillips & Bloom, *supra* note 54; see also Julie Poehlmann, Danielle Dallaire, Ann Booker Loper, and Leslie D. Shear, *Children's Contact with Their Incarcerated Parents: Research Findings and Recommendations*, 65 AM. PSYCHOLOGIST 575, 575–598 (2010).

57. See Chui, *supra* note 49.

58. DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004); Kerry M. Green et al., *Impact of Adult Sons' Incarceration on African American Mothers' Psychological Distress*, 68 J. MARRIAGE & FAMILY 430, 430–41 (2006).

59. See Braman, *supra* note 58; see also MEGAN COMFORT, *DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON* (2008).

60. See Turanovic, Rodriguez & Pratt, *supra* note 55.

concludes that, due to the conditions of poverty and lack of a social safety net in the United States, prisons have become an enduring social institution in the lives of women and families with an incarcerated loved one.<sup>61</sup>

The absence of social services and financial resources not only impacts caregivers but also complicates their ability to provide children in their care with adequate support, particularly during a prolonged period of parental incarceration. These difficulties are exacerbated by laws and policies that prevent caregivers from applying for and receiving social assistance due to the incarceration of a family member.<sup>62</sup> Thus, although scholars are beginning to understand the experiences of caregivers, further research is needed to explore how they navigate the challenging process of caring for a child with an incarcerated parent. Future research must continue to investigate the experiences of children of incarcerated parents and their caregivers, and also uncover the various layers of families and family life, including experiences of families and children with multiple incarcerated loved ones that may be affected by mass incarceration.

#### V. PARENTAL INCARCERATION EXACERBATES RACIAL AND CLASS DISPARITIES

Racial and class disparities in incarceration rates continue to persist in the United States, concentrating the damaging impacts of parental incarceration among low-income African-American families and children.<sup>63</sup> Estimates indicate that one in nine African-American children (11.4%), one in twenty-eight Hispanic children (3.5%), and one in fifty-seven white children (1.8%) in the United States have an incarcerated parent.<sup>64</sup> Moreover, while one in twenty-five white children born in 1990 are at risk of experiencing parental

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61. See COMFORT, *supra* note 59.

62. See ARDITTI, *supra* note 55.

63. Holly Foster & John Hagan, *Punishment Regimes and the Multilevel Effects of Parental Incarceration: Intergenerational, Intersectional, and Interinstitutional Models of Social Inequality and Systemic Exclusion*, 41 ANN. REV. SOC. 135, 135–58 (2015); John Hagan & Holly Foster, *Intergenerational Educational Effects of Mass Imprisonment in America*, 85 SOC. EDUC. 259, 259–86 (2012); Joseph Murray, Rolf Loeber & Dustin Pardini, *Parental Involvement in the Criminal Justice System and the Development of Youth Theft, Marijuana Use, Depression, and Poor Academic Performance*, 50 CRIMINOLOGY 255 (2012).

64. THE PEW CHARITABLE TRUSTS: PEW CENTER ON THE STATES, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 4 (2010), [https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pes\\_assets/2010/collateralcosts1pdf.pdf](https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf) [<https://perma.cc/DSF6-APXC>].

imprisonment, the rate for black children born in 1990 is one in four.<sup>65</sup> These disparities are even more apparent among children of parents with limited educational attainment. Nearly half of African-American children born in 1990 to parents who dropped out of high school had a parent incarcerated by the early 2000s.<sup>66</sup>

The racial and class disparities in parental incarceration may also exacerbate inequality for a wide range of childhood outcomes. In their book *Children of the Prison Boom*, Sara Wakefield and Chris Wildeman find that paternal incarceration has shaped black-white disparities in child behavioral and mental health, homelessness, and infant mortality.<sup>67</sup> The most pronounced racial impacts of mass incarceration are on childhood homelessness.<sup>68</sup> They estimate that for children born in 1990, mass incarceration is associated with a 65% increase in the black-white gap in child homelessness. The effects of the prison boom are much smaller for total behavioral problems. However, the impacts on black-white gap in infant mortality, internalizing, externalizing, and physical aggression were large, but less so than for experiencing homelessness. For example, had the imprisonment rate remained where it was in 1973, the black-white gap in infant mortality rate would be 18.3% lower. Their findings also indicate that for each outcome, the effects on black-white disparities in childhood inequality were much greater than disparate effects of the prison boom on adults documented in previous research.<sup>69</sup>

These disparate impacts may also extend to children's educational success. Recent estimates indicate that disparities in paternal incarceration also contribute to racial inequality in the educational achievement and cognitive skills of their children. So much so that if white Americans were incarcerated at the same rate as African Americans, it is estimated that the black-white

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65. Christopher Wildeman, Anna R. Haskins & Christopher Muller, *Implications of Mass Imprisonment for Inequality Among American Children*, in *THE PUNITIVE TURN: NEW APPROACHES TO RACE AND INCARCERATION* 177, 181 tbl.3 (Deborah E. McDowell et al. eds., 2013).

66. Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 *ANNALS* 221, 237 tbl.3 (2009).

67. WAKEFIELD & WILDEMAN, *supra* note 12.

68. *Id.*

69. For example, Bruce Western's research demonstrates the impact of mass incarceration on black-white disparities in lifetime earnings. BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006).

achievement gaps at age nine in reading, math, and attention skills would decrease by a range of 7% to 14%.<sup>70</sup>

This national picture masks the regional variation in parental incarceration trends. In their estimates of risks of parental incarceration by region, Muller and Wildeman find that in no region do whites have a greater risk of experiencing imprisonment than African Americans or Latinos.<sup>71</sup> Nonetheless, the cumulative risk of parental incarceration is highest for African-American children in Midwestern states, while Latino children have the highest risks in the West and Northeast. Their findings highlight that while the national picture of disparities in parental incarceration is quite bleak, this racial and ethnic concentration of parental incarceration is markedly increased in certain regions of the United States. As such, researchers and policymakers must consider how racial and ethnic disparities in parental incarceration may have differential impacts on opportunity gaps in education, health, and other areas for youth and young adults, depending on the state and region.

In Minnesota, racial and ethnic disparities in experiences of parental incarceration are especially pronounced. Data from the 2013 Minnesota Student Survey indicate that youth of color report increased rates of parental incarceration when compared to white and Asian youth.<sup>72</sup> Specifically, African and African-American youth are four times more likely, American-Indian youth 3.5 times more likely, and Hispanic or Latino youth 2.5 times more likely to have a currently incarcerated parent than white or Asian youth.<sup>73</sup> Minnesota is also home to some of the worst racial and ethnic inequities in poverty rates, home ownership, educational achievement, degree attainment, and health.<sup>74</sup> However, we know very little about how racial disparities in parental incarceration may directly or indirectly impact opportunity gaps for youth of color in the state.

Thus, research so far demonstrates that parental incarceration contributes to many deleterious impacts for children and families, and that

70. Anna R. Haskins, *Beyond Boys' Bad Behavior: Paternal Incarceration and Cognitive Development in Middle Childhood*, 95 SOC. FORCES 861, 883 (2016).

71. Christopher Wildeman & Christopher Muller, *Mass Imprisonment and Inequality in Health and Family Life*, 8 ANN. REV. L. & SOC. SCI. 11 (2012).

72. REBECCA J. SHLAFAER & JULIE K. ATELLA, WHO HAS AN INCARCERATED PARENT IN MINNESOTA? MINNESOTA'S STRENGTHENING FAMILIES AFFECTED BY INCARCERATION COLLABORATIVE INFOGRAPHIC (2015), <https://www.wilder.org/sites/default/files/imports/who-has-an-incarcerated-parent-in-Minnesota.pdf> [<https://perma.cc/AY5Z-KZBZ>].

73. *Id.*

74. See *Disparities Overview*, MINN. COMPASS, <https://www.mncompass.org/disparities/overview> [<https://perma.cc/5Y37-52MF>].

parental incarceration may serve as a mechanism for racial and ethnic inequality. Moving forward, more data collection and research is needed to examine the intergenerational impacts of mass incarceration and how this is connected with racial, ethnic, and class inequality for a wide range of youth and family outcomes. Policymakers across the United States, and especially in states like Minnesota, must consider the broader societal impacts of placing so many parents in prison, and how this affects their children, families, and entire communities.

#### VI. THE ECONOMIC COSTS OF PARENTAL INCARCERATION EXTEND BEYOND THE COSTS ASSOCIATED WITH IMPRISONMENT

On top of the detrimental impact on children and the societal consequences, there are incredible economic costs of incarcerating parents—that is, the initial cost of incarcerating a parent, the potential additional cost of reincarcerating a parent due to recidivism, and the potential cost of subsequently incarcerating a child. These expenses also include the cost of foster care placement, as well as the additional burden of increased healthcare spending due to the negative health consequences for children, parents, and families.

The United States incarcerates a greater portion of its citizens than any other country.<sup>75</sup> This holds true despite the fact that incarceration rates have been declining slowly since 2008.<sup>76</sup> Funded by taxpayers, the fiscal cost of maintaining such a sizeable prison population is exorbitant. A 2012 Vera Institute report estimates the cost of prisons in forty states at \$39 billion. Corrections budgets only account for \$33.5 billion of this total, but additional costs such as health care and insurance for state employees, hospital and health care for the prison population, and capital costs are also funded by taxes.<sup>77</sup> While Minnesota has a relatively low rate of incarceration when compared with the rest of the United States—ranked forty-eighth—the annual cost of incarceration to taxpayers is \$395.3 million.<sup>78</sup> This total includes the Minnesota Department of Corrections Budget of \$365.5 million and additional costs in

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75. JOHN SCHMITT, KRIS WARNER & SARIKA GUPTA, CENTER FOR ECONOMIC AND POLICY RESEARCH, *THE HIGH BUDGETARY COST OF INCARCERATION* 1 (2010).

76. See Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html> [<https://perma.cc/382V-WG4G>].

77. CHRISTIAN HENRICHSON & RUTH DELANEY, CENTER ON SENTENCING AND CORRECTIONS, *THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS* 25, 68 (2012), <https://shmy.org/uploads/Price-of-Prisons.pdf> [<https://perma.cc/AVC9-JDUD>].

78. See *id.* at 8.

underfunded pensions and retiree healthcare, capital costs, and administrative costs.<sup>79</sup> The annual cost for each Minnesota prisoner is \$41,364.<sup>80</sup> Further, some evidence suggests that prisons themselves are criminogenic.<sup>81</sup> Thus, if a parent sentenced to prison is reincarcerated post-release, taxpayers will bear the additional burden of funding this reincarceration.

Foster care is also costly. State and federal expenditures for foster care in the United States in a single fiscal year cost \$3.3 billion in maintenance payments and \$4.3 billion in administrative costs.<sup>82</sup> The annual cost for each foster child is about \$25,782.<sup>83</sup> In 2016, Minnesota's expenditures on foster care were \$86 million.<sup>84</sup> The average annual cost of foster care per child in Minnesota is \$13,050, plus an estimated \$2420 for each placement made by the child's caseworker, \$5050 per case to the case aid, and \$1910 in costs related to licensing foster families.<sup>85</sup> If a child is placed in a facility instead of foster care the annual cost is significantly greater—\$38,420 per child.<sup>86</sup>

Finally, incarcerating parents may increase taxpayer and government spending on healthcare through two primary mechanisms: the detrimental health consequences of incarceration on parents' health and the increasing risk of mental and physical health problems of which children are at risk. Research concludes that incarceration has a strong impact on negative health outcomes for formerly incarcerated persons, regardless of incarceration length, including both physical and mental health consequences.<sup>87</sup> Given these consequences to

79. *Id.*

80. *See State-by-State Data*, SENTENCING PROJECT (2016), <https://www.sentencingproject.org/the-facts/#rankings?dataset-option=SIR> [<https://perma.cc/2FD2-7TQJ>].

81. Francis T. Cullen, Cheryl Lero Johnson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 55S (2011); *see generally Criminogenic*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Tending to cause crime or criminality.").

82. Nicholas Zill, *Better Prospects, Lower Cost: The Case for Increasing Foster Care Adoption*, 35 ADOPTION ADVOCATE 3 (2011).

83. *Id.*

84. MINN. DEP'T OF MGMT. & BUDGET, CHILD WELFARE: INVENTORY AND BENEFIT-COST ANALYSIS 16 (Apr. 2018), <https://mn.gov/nmb-stat/results-first/child-welfare-report.pdf> [<https://perma.cc/U6Q2-Q9D7>].

85. *Id.* at 29.

86. *Id.*

87. Dora M. Dumont et al., *Public Health and the Epidemic of Incarceration*, 33 ANN. REV. PUB. HEALTH 325, 325–39 (2012); Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 L. & SOC'Y REV. 275, 275–306 (2008); Michael Massoglia & William Alex Pridmore, *Incarceration and Health*, 41 ANN. REV. OF SOC. 291, 291–310 (2015); Jason Schmittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115, 115–30 (2007).

former prisoners and, as detailed above, the increased risk that their children will experience an array of negative mental and physical health outcomes, parental incarceration is likely to increase healthcare spending. Highlighting these health consequences, as well as those experienced by other family and community members due to mass incarceration, some scholars argue that mass incarceration should be considered an epidemic and treated as a pressing public health concern.<sup>88</sup>

## VII. THE BENEFITS OF COMMUNITY-BASED ALTERNATIVES

A recent study examining the financial savings of community supervision found that three types of community supervision had high financial benefits with a very high degree of certainty.<sup>89</sup> Intensive supervision programs—a form of community corrections that involves a greater frequency of contact between the probation officer and probationer than standard probation—with both surveillance and treatment had a total financial benefit of \$14,079.<sup>90</sup> Risk-need responsiveness supervision—probation centered around the probationer’s criminogenic needs and risks as determined by individualized assessments—had benefits totaling \$11,274, and the benefits of swift, certain, fair, supervision—probation that includes intensive monitoring as well as fast, modest, and clearly predetermined punishments for all violations—were \$8,258 per prisoner.<sup>91</sup> Finally, as noted earlier, scholarship has highlighted the intergenerational cycle of incarceration of which children of incarcerated parents are at risk. The cost of subsequently incarcerating these children is another important financial cost to consider.

In addition to financial benefits, community-based alternatives have several other advantages over incarcerating the caregivers of minor children. The use of alternatives promotes attachment between children and mothers,<sup>92</sup>

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88. Christopher Wildeman & Emily A. Wang, *Mass Incarceration, Public Health, and Widening Inequality in the USA*, 389 LANCET, 1464-74 (2017); see also Dumont, *supra* note 87.

89. Elizabeth K. Drake, *The Monetary Benefits and Costs of Community Supervision*, 34 J. CONTEMP. CRIM. JUST. 47, 47-68 (2018).

90. *Id.* at 55.

91. *Id.*

92. Pauline K. Brennan, *An Intermediate Sanction That Fosters the Mother-Child Bond: A Process Evaluation of Summit House*, 18 WOMEN & CRIM. JUST. 47, 47-80 (2008); Jude Cassidy et al., *Enhancing Attachment Security in the Infants of Women in a Jail-Diversion Program*, 12 ATTACHMENT & HUM. DEV. 333, 333-53 (2010); Sheryl Pimlott Kubiak, Natalie Kasiborski & Emily Schmittle, *Assessing Long-Term Outcomes of an Intervention Designed for Pregnant Incarcerated Women*, 20 RES. ON SOC. WORK PRAC. 528, 528-35 (2010).

leads to reunification between children and mothers,<sup>93</sup> and improves maternal sensitivity.<sup>94</sup> Some research suggests that alternative sentencing, such as drug treatment in place of incarceration, reduces the likelihood of recidivism.<sup>95</sup> Further, in an overview of the extant research on the impact of treating parental substance abuse on children, Susan Phillips, James Gleeson, and Melissa Waites-Garrett concluded that there is evidence that treating substance-using, pregnant mothers improves the birth outcomes of children.<sup>96</sup> Another study comparing the outcomes of children whose mothers had recently been released from prison with children whose mothers were recently released from a community-based alternative found alternative sentencing has many benefits for children.<sup>97</sup> The children whose mothers participated in the community-based alternative had fewer externalizing behavior problems, fewer total behavior problems, more parental trust, less parental alienation, and better communication with their parents.<sup>98</sup>

#### VIII. GLOBAL RECOGNITION AND INTERNATIONAL SOLUTIONS

Due to its devastating effects, parental incarceration has been recognized as a matter of human rights globally. The United Nations has taken strides to recognize and reduce the impact of parental incarceration. In its Resolution 63/241 of December 24, 2008, the General Assembly of the United Nations

93. Sara Lichtenwalter, Maria L. Garase & David B. Barker, *Evaluation of the House of Healing: An Alternative to Female Incarceration*, 37 J. SOC. & SOC. WELFARE 75, 75-94 (2010).

94. See Jude Cassidy et al., *Enhancing Attachment Security in the Infants of Women in a Jail-Diversion Program*, 12 ATTACHMENT & HUM. DEV. 333, 333-53 (2010).

95. See, e.g., Jeremy D. Jewell et al., *The Long Term Effectiveness of Drug Treatment Court on Reducing Recidivism and Predictors of Voluntary Withdrawal*, 15 INT'L J. MENTAL HEALTH & ADDICTION 28, 28-39 (2017); Jeff Latimer, Kelly Morton-Bourgon & Jo-Anne Chretien, *A Meta-Analytic Examination of Drug Treatment Courts: Do They Reduce Recidivism?*, RES. & STAT. DIVISION, DEP'T JUST., CAN., 1-24 (2006), <http://herzog-evans.com/wp-content/uploads/2014/10/A-meta-analytic-examination-of-DTC-Latimer-et-al.pdf> [<https://perma.cc/BS43-9NRX>]; Douglas Young, Reginald Fluellen & Steven Belenko, *Criminal Recidivism in Three Models of Mandatory Drug Treatment*, 27 J. SUBSTANCE ABUSE TREATMENT 313, 313-23 (2004); see also Lichtenwalter, Garase & Barker, *supra* note 93.

96. Susan D. Phillips, James P. Gleeson & Melissa Waites-Garrett, *Substance-Abusing Parents in the Criminal Justice System: Does Substance Abuse Treatment Improve Their Children's Outcomes?*, 48 J. OFFENDER REHABILITATION 120, 120-38 (2009).

97. Lindsay Fry-Geier & Chan M. Hellman, *School-Aged Children of Incarcerated Parents: The Effects of Alternative Criminal Sentencing*, 10 CHILD INDICATORS RES. 859, 859-79 (2017).

98. *Id.*

empowered member States to recognize the impact of parental detention and imprisonment on children and, in particular, recommended that member States resort to non-custodial sanctions “when sentencing or deciding on pretrial measures for a child’s sole or primary caretaker, subject to the need to protect the public and the child, and bearing in mind the gravity of the offence.”<sup>99</sup> On December 18, 2013, Resolution 68/147 was issued by the General Assembly.<sup>100</sup> The resolution includes recommendations pertaining to treatment of children of incarcerated parents. Specifically, it encourages member States to recognize the impact of parental incarceration on the child, prioritize non-custodial sentences when possible, and develop good practices to support the mental and physical needs of children with detained parents.<sup>101</sup>

The United Nations has also weaved its concern for children’s human rights into its rules addressing female imprisonment. The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (“the Bangkok Rules”) were adopted by the General Assembly in 2010 and provide additional guidance to courts when sentencing female caregivers.<sup>102</sup> Although the Bangkok Rules are not binding, they strongly encourage member States to consider alternatives to detention when a caregiver is facing imprisonment and only contemplate detention “when the offense is serious or violent.”<sup>103</sup> The Bangkok Rules request member States to record and analyze sentencing data on female offenders and promote legislation that includes alternatives to detention for primary or sole caregivers.<sup>104</sup> Specifically, the Bangkok Rules request member States inquire into and consider family ties and backgrounds prior to a sentencing decision for women convicted of crimes.<sup>105</sup>

In the Convention on the Rights of the Child, the United Nations recognizes a child’s right to grow up in the custody of his or her parent.<sup>106</sup> This international human rights treaty has been adopted by 196 member States,

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99. G.A. Res. 63/241, at 12 (Dec. 24, 2008), [http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_63\\_241.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_63_241.pdf) [<https://perma.cc/HFS7-SMMZ>].

100. G.A. Res. 68/147 (Dec. 18, 2013).

101. *Id.* ¶ 57.

102. G.A. Res. 65/229, 4 ¶ 9, 8 ¶ 2, 9 ¶ 4 (Dec. 21, 2010).

103. *Id.* at 4 ¶ 9.

104. *Id.* at 4 ¶¶ 5, 6, 10; 5 ¶ 2, 6 ¶ 5.

105. *Id.* at 18.

106. See G.A. Res. 44/25, Art. 18 § 1, U.N. Convention on the Rights of the Child (Nov. 20, 1989).

making it the most widely ratified United Nations treaty.<sup>107</sup> The treaty articulates a child's human rights along with standards for treatment of children and the family unit. It encourages member States to implement the standards within their respective jurisdictions and monitor conformity of existing and future legislation that may conflict with the Convention.<sup>108</sup>

The United Nations continues to keep the well-being of children on the forefront of its work through the Committee on the Rights of the Child ("CRC").<sup>109</sup> The CRC is made up of eighteen independent experts that encourage and track the implementation of the Convention on the Rights of the Child by ratifying parties.<sup>110</sup> The CRC reviews reports submitted by State parties, fields alleged violations of the Convention on the Rights of the Child, meets three times a year to conduct business, releases general comments, and hosts annual days of general discussion to raise awareness and develop recommendations for action in support of children's human rights.<sup>111</sup>

On September 30, 2011, the CRC held a Day of Discussion on Children of Incarcerated Parents.<sup>112</sup> The CRC's Days of Discussion are intended "to foster a deeper understanding of the contents and implications of the Convention as they relate to specific articles or topics."<sup>113</sup> The CRC "aimed to provide policy and practical guidance to States and other relevant actors on the respect, promotion and fulfillment of the rights of children" of incarcerated parents.<sup>114</sup> Taking into account the discussion at the Day of General

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107. The United States is the only United Nations member state to not ratify the Convention. However, the unprecedented and universal support by the 196 State parties demonstrates a global commitment to recognizing children's rights. *See Day of General Discussion: "Protecting and Empowering Children as Human Rights Defenders" 28 September 2018-10:00 a.m. to 6:00 p.m., Room XVII, Palais de Nations, Geneva, U.N. HUM. RTS., OFF. HIGH COMMISSIONER, COMMITTEE ON RTS. CHILD*, <https://www.ohchr.org/EN/HRBodies/CRC/Pages/Discussion2018.aspx> [<https://perma.cc/9DMB-PW6F>].

108. *See* G.A. Res. 44/25, U.N. Convention on the Rights of the Child (Nov. 20, 1989).

109. *Monitoring Children's Rights*, U.N. HUM. RTS., OFF. HIGH COMMISSIONER, COMMITTEE ON RTS. CHILD, <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> [<https://perma.cc/5ZH6-LC8H>].

110. *Id.*

111. *Id.*

112. *Id.*

113. COMM. ON THE RIGHTS OF THE CHILD, REPORT AND RECOMMENDATIONS OF THE DAY OF GENERAL DISCUSSION ON "CHILDREN OF INCARCERATED PARENTS" ¶ 1 (2011), <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf> [<https://perma.cc/JES5-6QHT>].

114. *Id.*

Discussion, the CRC issued several recommendations. One recommendation called upon member States to consider the well-being of the child at the time of sentencing a parent:

The Committee emphasizes that in sentencing parent(s) and primary caregivers, non-custodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren).<sup>115</sup>

Since 2011, the concern over children with incarcerated parents has appeared in other work completed by the CRC. For example, the CRC's General Comment No. 14 (2013) issued by the CRC interprets article three, paragraph one, of the Convention, which states that the best interest of the child should be a "primary consideration" in a variety of public and private institutions, including "courts of law."<sup>116</sup> The General Comment interprets "courts of law" as referring to "all judicial proceedings . . . and all relevant procedures concerning children, without restriction," and states that the "best interests" principle applies to children "affected by the situation of their parents in conflict with the law."<sup>117</sup>

The United Nations is not the only political body to take action on the issue of children of incarcerated caregivers. In 2018, the Council of Europe<sup>118</sup> issued recommendations asking member States to acknowledge the impact of parental incarceration on children and adopt legislation that allows the best interest of the child to be a sentencing consideration.<sup>119</sup> The recommendations stated, "particularly when the person is a child's primary care[giver],

115. *Id.* at ¶ 30.

116. Comm. on the Rights of Children, General Comment No. 14, ¶¶ 1, 25 (2013), <https://www.refworld.org/docid/51a84b5e4.html> [<https://perma.cc/7ZHP-5UYL>].

117. *Id.* at ¶¶ 27-28.

118. The Council of Europe is a human rights organization dedicated to protecting and monitoring human rights within its forty-seven European member states. *See Overview*, COUNCIL EUROPE, <https://www.coe.int/en/web/yerevan/the-coe/about-coe/overview> [<https://perma.cc/2DJQ-XPM9>]. The council monitors implementation of recommendations through reports, and hosts conventions to increase awareness and promote conversation about human rights topics. *See Values*, COUNCIL EUROPE, <https://www.coe.int/en/web/yerevan/the-coe/values> [<https://perma.cc/N6HC-69ZY>].

119. *See* COMM. OF MINISTERS, COUNCIL OF EUROPE, EXPLANATORY MEMORANDUM TO RECOMMENDATION CM/REC(2018)5 CONCERNING CHILDREN WITH IMPRISONED PARENTS 8 (2018), <https://rm.coe.int/explanatory-memorandum-to-cm-recommendation-2018-5-eng/16807b3439> [<https://perma.cc/WF3R-YGXR>].

alternatives to custody should be the preferred solution.”<sup>120</sup> The Council drew its focus on the voice and views of the child from article twelve of the United Nations Convention on the Rights of the Child.<sup>121</sup>

Individual countries are also concerned about a child’s interests at the sentencing of a caregiver. In 2007, South Africa’s Constitutional Court considered a case in which a single mother of three was sentenced to four years in prison for fraud and theft convictions.<sup>122</sup> The court interpreted its constitutional provision “[a] child’s best interests are of paramount importance in every matter concerning the child”<sup>123</sup> to include consideration the child’s best interests during the pretrial and sentencing decisions of a single primary caregiver. This expansive interpretation led to the court’s holding that a sentencing court must ensure “the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices.”<sup>124</sup> The court further defined a primary caregiver as “the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly.”<sup>125</sup> Applying this new standard, the court determined that the lower courts did not adequately consider the impact of the mother’s incarceration on her three boys.<sup>126</sup>

In summary, countries and international governing bodies are adopting or mirroring the recommendations offered by the United Nations for sentencing caregivers of children. There is a consistent international standard that sentencing bodies should inquire into a convicted person’s status as a caregiver and subsequently weigh the impact of a caregiver’s custodial sentence on the child. Underlying this standard is the belief that children have a human right to be heard in matters that affect them and have their best interests weighed in any decision that separates them from their primary caregiver.<sup>127</sup>

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120. *Id.*

121. *Id.*

122. *M v. The State* 2008 (3) SA 232 (CC) at ¶ 2 (S. Afr.).

123. S. AFR. CONST., 1996, § 28(2). This provision is based upon commitments made under the Convention on the Rights of the Child. *See M v. The State*, (3) SA 232 (CC) at ¶ 16. The court stated that “section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child.” *Id.*

124. *M v. The State* 2008 (3) SA 232 (CC) at ¶ 33.

125. *Id.* at ¶ 28.

126. *Id.* at ¶ 48.

127. G.A. Res. 44/25, Arts. 9, 12, U.N. Convention on the Rights of the Child (Nov. 20, 1989).

IX. IN RECOGNITION OF THE PROFOUND IMPLICATIONS OF PARENTAL  
INCARCERATION IN THE UNITED STATES, SOME STATE AND  
MUNICIPAL LEADERS HAVE PROMOTED A CHANGE IN SENTENCING  
PRACTICES

Addressing parental incarceration requires considering alternatives to current sentencing practices, such as amending state law to include consideration of a child’s best interests or utilizing family impact statements. In 2009, the National Conference of State Legislatures (NCSL) suggested possible policy interventions to improve the lives of children of incarcerated parents.<sup>128</sup> When addressing the sentencing phase of the incarceration process, the NCSL suggested that states could ensure that children’s interests are considered during sentencing by amending state law to require sentencing judges to consider the effect of a parent’s incarceration on children. For example, the NCSL noted that Oklahoma requires judges to ask a convicted individual whether he or she is a “single custodial parent” and, if so, to inquire about childcare arrangements.<sup>129</sup> In addition to Oklahoma, both North Dakota and Massachusetts passed legislation that allows parental status into consideration at sentencing. One of the factors to be considered at sentencing in North Dakota is whether “[t]he imprisonment of the defendant would entail undue hardship to himself or his dependents.”<sup>130</sup> Massachusetts passed legislation in April 2018 that allows a defendant to motion the sentencing court to consider their parental status and primary caretaker duties when determining a sentence, if incarceration is not required by law.<sup>131</sup> The court can issue written findings about the defendant’s caregiving status and detail the availability of incarceration alternatives.<sup>132</sup>

The NCSL also suggested that states should consider adding family impact statements to presentencing investigation reports along with recommendations for the “least detrimental alternative” sentence and suggested services to support children during a parent’s custodial sentence.<sup>133</sup> The NCSL noted that Arkansas and Tennessee were utilizing family impact

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128. See STEVE CHRISTIAN, NAT’L CONF. STATE LEGIS., CHILDREN OF INCARCERATED PARENTS 7 (2009), <https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf> [<https://perma.cc/Q62S-MMF8>].

129. *Id.* at 8.

130. N.D. CENT. CODE ANN. § 12.1-32-04 (West 1973).

131. 2018 Mass. Legis. Serv. ch. 69, § 207 (West) (to be codified at MASS. GEN. LAWS ch. 279, § 6B(b)).

132. *Id.*

133. *Id.*

statements to a limited extent and Texas was developing ways to implement these statements in sentencing.<sup>134</sup>

The addition of family impact statements in presentence reports, or providing one to the judge at the time of sentencing, has been utilized in the states listed above along with New York and California. New York has included the concept of family impact in presentence investigation training.<sup>135</sup> Probation officers are expected to inquire about the defendant's family background, relationships, parenting responsibilities, and the effect of incarceration on his or her family and children during the presentence investigation.<sup>136</sup> Hawaii passed legislation that allows parental status to be taken into consideration when determining the location where a parent will be incarcerated.<sup>137</sup>

Furthermore, the cities of New York and San Francisco have added sections on family impact to their presentence investigation reports. San Francisco is believed to be the first jurisdiction in the United States to use family impact statements at the time of sentencing.<sup>138</sup> Since 2009, presentence investigation reports have included a family impact statement addressing the impact of the recommended sentencing on the individual's family.<sup>139</sup> In describing the process, San Francisco's Chief of Adult Probation noted, "[F]amily impact statements give probation, the district attorney and the public defender a more comprehensive view of the individual being sentenced."<sup>140</sup> New York City has also implemented the use of family impact statements into presentence investigations to encourage judges and other court officials to consider the needs and the challenges that family members would face as a result of sentencing decisions.<sup>141</sup>

Other states have developed sentencing alternatives and diversionary programs for caregivers. Washington, Oregon, and California passed legislation to strengthen families and communities and, as a result, reduce long-term incarceration expenses. In 2010, Washington implemented the Parenting Sentencing Alternative (PSA) program, which has decreased

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134. *Id.*

135. *See* Cramer et al., *supra* note 3, at 3.

136. *Id.* at 5.

137. S.B. 2305, 29th Leg, 2018 (Haw. 2018).

138. Margaret Dizerega, *San Francisco's Family-Focused Probation: A Conversation with Chief Adult Probation Officer Wendy Still*, 24 FED. SENT'G REP. 54 (2011).

139. *Id.* at 55.

140. *Id.*

141. CRAMER ET AL., *supra* note 3, at 2-3.

recidivism and improved children's well-being.<sup>142</sup> The PSA program provides two types of sentencing alternatives for parents convicted of nonviolent crimes who have minor children. The Family and Offender Sentencing Alternative (FOSA) provides for a sentence in the community as an alternative to prison. The Community Parenting Alternative (CPA) allows eligible incarcerated parents to serve the last twelve months of their sentence in the community under electronic monitoring and intensive supervision. In 2015, Oregon passed HB 3503 to create the Family Sentencing Alternative Pilot Program (FSAPP), which emulates Washington's PSA court-based alternative.<sup>143</sup> While the Oregon Criminal Justice Commission considers it too early to draw conclusions from the program, the supervising probation officers in the program have expressed satisfaction with the positive changes in their clients.<sup>144</sup> A California law allows all inmates to apply to the Alternative Custody Program which transitions them from their custodial sentences and out-of-custody programs with the goal of reuniting caregivers with their children.<sup>145</sup> Those serving time for violent felonies are not eligible to participate.<sup>146</sup>

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142. Creating Alternatives to Total Confinement for Nonviolent Offenders with Minor Children, S.S.B. 6639, H. Comm. AMD (Wash. 2010); CHYLA M. AGUIAR, RESEARCH IN BRIEF: PRELIMINARY FELONY RECIDIVISM OUTCOMES OF THE COMMUNITY PARENTING ALTERNATIVE 4 (2015), [https://s3.wp.wsu.edu/uploads/sites/436/2014/11/2015-06-03\\_Preliminary-Felony-Recidivism-Outcomes-of-the-Community-Parenting-Alternative.pdf](https://s3.wp.wsu.edu/uploads/sites/436/2014/11/2015-06-03_Preliminary-Felony-Recidivism-Outcomes-of-the-Community-Parenting-Alternative.pdf) [https://perma.cc/L27Z-KSS2].

143. An Act Relating to Offenders with Minor Children, H.B. 3505, 78th Leg. Assembl., 2015 Reg. Sess. (Or. 2015).

144. OR. DEP'T OF CORRECTIONS, FAMILY SENTENCING ALTERNATIVE PILOT PROGRAM: REPORT TO THE SENATE AND HOUSE COMMITTEES (2019), <https://www.oregon.gov/cjc/CJC%20Document%20Library/FSAPPJointReport2019.pdf> [https://perma.cc/TZ43-ELX7].

145. See CAL. CODE REGS. tit. 15, § 3078.4 (2016); see also CAL. PENAL CODE § 667.5(c) (West 2019) (listing the twenty-three different categories of "violent felonies" as understood in CAL. CODE REGS. tit. 15, § 3078.4 (2016)).

146. CAL. CODE REGS. tit. 15, § 3078.3(a)(1) (2016).

Although lacking formal legislation, organizations in Illinois,<sup>147</sup> Connecticut,<sup>148</sup> Kentucky,<sup>149</sup> Louisiana,<sup>150</sup> and Colorado<sup>151</sup> are calling for legislative changes to allow parental status to be considered at sentencing or the use of family impact statements.

X. MANY FEDERAL COURTS HAVE BEGUN CONSIDERING FAMILIAL TIES AND CIRCUMSTANCES AT THE TIME OF SENTENCING IN LIGHT OF *BOOKER*

The Federal Sentencing Reform Act of 1984 (“SRA”) was passed to create sentencing guidelines centered around three purposes: honesty, uniformity, and proportionality.<sup>152</sup> The SRA required the sentencing guidelines to prohibit the use of “race, sex, national origin, creed, and socioeconomic status” in departure decisions in order to maintain neutrality and ensure uniformity.<sup>153</sup> The SRA emphasized that the guidelines should note that five characteristics, “education; vocational skills; employment record; family ties and responsibilities; and community ties” are “generally inappropriate” to consider in a sentencing decision.<sup>154</sup> The above factors could not justify a departure absent extraordinary circumstances.<sup>155</sup> Two examples include a downward departure from prison to probation when it benefitted the

147. Lauren Feig, *Breaking the Cycle: A Family-Focused Approach to Criminal Sentencing in Illinois*, U. CHI. ADVOCATES’ FORUM, <http://ssa.uchicago.edu/breaking-cycle-family-focused-approach-criminal-sentencing-illinois> [<https://perma.cc/6A6V-Q7KD>].

148. CONN. VOICES FOR CHILDREN, 2019 LEGISLATIVE PRIORITIES, <http://www.ctvoices.org/sites/default/files/full-images/Policy%20Agenda%20-%204%20page%20booklet%202019.pdf> [<https://perma.cc/8FUL-UWLW>].

149. THE SPECIAL PROJECT, PARENTAL INCARCERATION, CHILDREN’S HEALTH, AND AN OPPORTUNITY TO SHIFT THE FUTURE (2016), [https://louisvilleky.gov/sites/default/files/health\\_and\\_wellness/che/parental\\_incarceration\\_childrens\\_health.pdf](https://louisvilleky.gov/sites/default/files/health_and_wellness/che/parental_incarceration_childrens_health.pdf) [<https://perma.cc/7G24-7G8>]. Kentucky refers to these statements as family responsibility statements to eliminate confusion with victim impact statements. *Id.*

150. *Keeping Kids and Parents Together: A Healthier Approach to Sentencing in MA, TN, and LA*, HUMAN IMPACT PARTNERS (Mar. 2018), <https://humanimpact.org/hipprojects/primary-caretakers/> [<https://perma.cc/Y5B4-CJN3>].

151. *A Family Affair*, COLO. JUST. REP. (Colo. Crim. Just. Reform Coalition, Denver, Colo.), Winter 2014, at 3, <http://t.cjrc.org/pdf/Winter2014.pdf> [<https://perma.cc/5W9E-G9WC>] (“We need to push for family impact statements to be introduced prior to sentencing so that the needs of the children and families are taken into account.”).

152. U.S. SENTENCING COMM’N, GUIDELINES MANUAL 2–3 (2018).

153. *Id.* at 7.

154. *Id.* at 458–59.

155. U.S.S.G. § 5H1.6.

offender's disabled young son,<sup>156</sup> and a downward departure when a seven-year-old child would have become a ward of the state if her mother—her sole caregiver—went to prison.<sup>157</sup>

In *United States v. Booker*, the United States Supreme Court held that the federal sentencing guidelines must be advisory rather than mandatory in order to be consistent with the Sixth Amendment.<sup>158</sup> In the year before *Booker*, 72.2% of federal sentences fell within the sentencing guidelines; however, only 62.2% of federal sentences fell within the guidelines in the year after *Booker*.<sup>159</sup> The United States Sentencing Commission cited an increase in judicial discretion to explain the increased departures.<sup>160</sup> As of 2017, family ties were the third most cited reason for a departure.<sup>161</sup> The impact of *Booker* on the ability of sentencing courts to consider familiar ties is unsettled, as courts have responded to this decision in two distinct ways.

Many courts have interpreted *Booker* to allow family circumstances to be considered at sentencing because of an increase in judicial discretion. Courts have continued to consider family ties under the authority of 18 U.S.C. § 3553(a)(1), which states that sentencing judges may consider “the history and characteristics of the defendant” and disregarded section 5H1.6 of the guidelines, which requires exceptional circumstances, as no longer binding.<sup>162</sup> In contrast, a few courts have continued to abide by section 5H1.6, which only permits consideration of family ties in exceptional circumstances, and have

156. *United States v. Lehmann*, 513 F.3d 805, 808–09 (8th Cir. 2008).

157. *United States v. King*, 201 F. Supp. 3d 167, 170–71 (D.D.C. 2016).

158. 543 U.S. 220, 245 (2005).

159. U.S. DEP'T. OF JUST., FACT SHEET: THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING 2 (Mar. 15, 2006), [https://www.justice.gov/archive/opa/docs/United\\_States\\_v\\_Booker\\_Fact\\_Sheet.pdf](https://www.justice.gov/archive/opa/docs/United_States_v_Booker_Fact_Sheet.pdf) [<https://perma.cc/V4JK-BM74>].

160. *Id.* at 2.

161. U.S. SENTENCING COMM'N, REASONS GIVEN BY SENTENCING COURTS FOR DOWNWARD DEPARTURES FROM THE GUIDELINE RANGE: FISCAL YEAR 2017, (2017), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/Table25.pdf> [<https://perma.cc/HNR6-VRTH>].

162. 18 U.S.C. § 3553(a)(1); *see* *United States v. Menyweather*, 447 F.3d 625 (9th Cir. 2006), *overruled on other grounds by* *Kimbrough v. United States*, 552 U.S. 85 (2007); *see also* *U.S. v. Aitoro*, 446 F.3d 246, 258 (1st Cir. 2006) (observing that under the Guidelines, consideration of family ties is discouraged). However, the *Aitoro* court stated “[a]fter *Booker*, however, the fact ‘[t]hat a factor is discouraged or forbidden under the guidelines does not automatically make it irrelevant when a court is weighing the statutory factors apart from the guidelines.’” *Id.* (quoting *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006)).

rejected the above approach.<sup>163</sup> These differing viewpoints have been characterized as “guidelines allegiance versus judicial discretion.”<sup>164</sup> There has not been any direction or clarification provided to bring uniformity, and courts continue to apply these two very different interpretations.

#### XI. MINNESOTA SHOULD TAKE ACTION TO ADDRESS THE IMPACTS OF PARENTAL INCARCERATION

Under Minnesota Sentencing Guidelines, the courts may only consider family support as a factor in evaluating whether the defendant is particularly amenable to probation. Minnesota Sentencing Guidelines commentary and case law provide guidance to the court when making these determinations.

The Minnesota State Legislature created the Minnesota Sentencing Guidelines Commission (“Commission”) in 1978. The Commission was tasked with researching current sentencing and parole release practices in Minnesota state courts. The Commission released the first guidelines in 1980, making Minnesota the first state to implement a sentencing guideline framework.<sup>165</sup>

Minnesota Sentencing Guidelines section II.D.2 bars race, sex, employment status, educational attainment, living arrangements, length of residence, and marital status from consideration when a dispositional or durational departure from a presumptive sentence is contemplated.<sup>166</sup> This provision has remained unchanged since the original 1980 guidelines.<sup>167</sup>

It was important to the Commission to exclude these economic and social factors because it found they correlated with race and income level.<sup>168</sup> The Commission aimed to remove a defendant’s race or income level from a sentencing decision in an effort to increase neutrality and decided this required the exclusion of the listed variables.<sup>169</sup> In its 1980 report to the legislature, the

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163. See *United States v. Lackard*, 549 F. App’x, 193, 195-96 (4th Cir. 2013) (upholding the denial of a downward departure because the defendant’s caretaking duties and financial support was not irreplaceable).

164. Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385, 404 (2018).

165. See MINN. SENTENCING GUIDELINES COMM’N, REPORT TO THE LEGISLATURE 5 (Jan. 15, 2016).

166. MINN. SENTENCING GUIDELINES § II.D.2. (1980).

167. Compare MINN. SENTENCING GUIDELINES § II.D.2. (1980), with MINN. SENTENCING GUIDELINES § II.D.2. (2018).

168. MINN. SENTENCING GUIDELINES COMM’N, PRELIMINARY ANALYSIS OF SENTENCING AND RELEASING DATA 5 (Oct. 1979); MINN. SENTENCING GUIDELINES, Comment § II.D.101 (1981).

169. *Id.*

Commission noted that educational attainment, community stability, marital status, and drug and alcohol use were not being contemplated during sentencing decisions; however, employment status was a consideration.<sup>170</sup> Thus, the Commission decided neutrality could be accomplished by excluding all of the factors identified above since exclusion would not “creat[e] a substantial disruption of current sentencing practices”<sup>171</sup> and permitting the factors may introduce “a systemic racial and economic bias.”<sup>172</sup>

Numerous Minnesota appellate court opinions from 1981 to 1989 affirmed sentencing judges’ tendency to use social and economic factors to support amenability to probation as a departure justification. For example, in *State v. King*,<sup>173</sup> the Minnesota Supreme Court stated “[w]hile it is true that social and financial factors may not be directly considered as reasons for departure, occasionally they bear indirectly on a determination such as whether a defendant is particularly suitable to treatment in a probationary setting.”<sup>174</sup> In *King*, the defendant was a father who provided financial support to his family.<sup>175</sup> Instead of executing his sentence and serving a year-and-one-day prison sentence, he requested a probationary sentence, which included up to ten years of supervision in order to continue to “pay the bills” and “keep his family together.”<sup>176</sup> The court found that these factors greatly motivated the defendant and concluded he was particularly amenable to probation.<sup>177</sup>

In *State v. Malinski*,<sup>178</sup> the court considered the defendant’s employment, stable home life, and that he was expecting a child when finding that the defendant was amenable to probation.<sup>179</sup> The state argued that the sentencing judge incorrectly considered “human factors” that should not inform a departure decision when the sentencing judge noted that Malinski had a job and that his fiancée would be giving birth to their child shortly as reasons for departing from the guidelines.<sup>180</sup> The Minnesota Court of Appeals affirmed the sentencing judge’s decision and reasoning. Similarly, the judges in *State v.*

170. MINN. SENTENCING GUIDELINES COMM’N, REPORT TO THE LEGISLATURE 5 (Jan. 1, 1980).

171. *Id.*

172. *Id.*

173. 337 N.W.2d 674, 675–76 (Minn. 1983).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 675–76; *see also* *State v. Heywood*, 338 N.W.2d 243, 243 (Minn. 1983). *But see* *State v. Sherwood*, 341 N.W.2d 574, 578 (Minn. 1983).

178. 353 N.W.2d 207 (Minn. Ct. App. 1984).

179. *Id.* at 209–10.

180. *Id.* at 210.

*Sherwood*<sup>181</sup> acknowledged that the defendant's status as mother and caregiver was a relevant factor in weighing her amenability to probation, but found her nine prior convictions weighed against her amenability to probation.<sup>182</sup> More recently, in *State v. Soto*,<sup>183</sup> the Minnesota Supreme Court found that the lower court erred in concluding that Soto's parental status was a social factor that cannot be considered in an amenability decision. To the contrary, the *Soto* court said that a defendant's parental responsibilities can be considered in determining whether the defendant is particularly amenable to probation.<sup>184</sup>

In 1989, the Commission recommended changes to the guidelines to address judges' use of excluded factors in the amenability to probation decision.<sup>185</sup> The change required judges to provide a justification when citing "amenability to probation" as a reason for departure that did not reference social or economic factors. The commentary acknowledged that social and economic factors may be closely related to a finding of amenability, but the factors could not be the foundation for the decision.<sup>186</sup>

In 2015, "amenability to probation" was added to the list of mitigating factors, and it remains a mitigating factor today. This change did not appear to affect sentencing practices, but rather codified the already common practice of citing amenability to probation as a departure reason. The addition was made by the Commission and did not require legislative approval. Judges are allowed to consider economic and social variables in the analysis. For example, the judge can consider "the defendant's age, prior record, remorse, cooperation, attitude before the court, and social support."<sup>187</sup> The commentary states that the reasoning could be "closely related" to the excluded "social status" factors, but the court must show the departure was "not based on any of the excluded factors."<sup>188</sup>

Minnesota courts may, therefore, consider whether the defendant is particularly amenable to probation because of family ties. When courts are considering this issue, presentencing reports should include a family impact

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181. 341 N.W.2d 574 (Minn. Ct. App. 1983).

182. *Id.* at 577-78.

183. 855 N.W.2d 303 (Minn. 2014).

184. *Id.* at 312.

185. MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON THREE SPECIAL ISSUES 18 (Feb. 1989), [https://mn.gov/sentencing-guidelines/assets/MN%20Sentencing%20Guidelines%20Commission%20Report%20to%20the%20Legislature%20on%20Three%20Special%20Issues%20February%201989\\_tcm30-81505.pdf](https://mn.gov/sentencing-guidelines/assets/MN%20Sentencing%20Guidelines%20Commission%20Report%20to%20the%20Legislature%20on%20Three%20Special%20Issues%20February%201989_tcm30-81505.pdf) [<https://perma.cc/5QJU-EKNE>].

186. *Id.* at 18.

187. *Id.*

188. *Id.*

statement that addresses the impact on the minor child and other family members that would result if the defendant is sentenced to a term of imprisonment. This information would make children's needs more visible to judges making sentencing decisions and considering alternatives, so that the well-being of children is considered when a primary caregiver faces imprisonment.

## XII. CONCLUSION

Parental incarceration has been declared a human rights issue by the United Nations and should be considered as such by every government. Being deprived of a parent will often be as devastating as deprivation of other fundamental needs, leading to emotional and physical harm, and impacting access to financial resources, health care, and education. The consequences of parental incarceration are intergenerational and interconnected, and can influence a child's life well into adulthood. Moreover, these collateral consequences extend well beyond the children and caregivers affected, but impact the social and economic well-being of their communities and society as a whole. Mass parental incarceration exacerbates racial and class inequalities including disparities in child mental health and risk of homelessness, necessitating that policy makers and other community leaders make concerted efforts to redress mass incarceration's concentrated impact on the lives and livelihoods of children who already face extreme disadvantages.

Minnesota needs to join international bodies and United States cities and states to take action to reduce the devastating impact of parental imprisonment. Not every defendant will be particularly amenable to probation. However, whenever the defendant may be particularly amenable to probation, Minnesota courts should use their authority to take the needs of minor children into account and impose sentences that do not unnecessarily cause harm to children and the community. Adding family impact statements to presentence reports would give judges more insight into a defendant's caretaking responsibilities and allow judges to make an informed decision. Beyond making changes to current sentencing policies and practices, we urge policymakers, legal professionals, and community organizations to expand laws, services, and support to meet the needs of children affected by a parent or caregiver's involvement in the criminal justice system. Parental incarceration is taking its toll on the next generation and our communities, and Minnesota must take part in reducing these devastating effects.

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