



Advancing Justice in Massachusetts: The Impact and Evolution of Primary Caretakers Legislation

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Background

The mission of Families for Justice as Healing (FJAH) and The National Council for Incarcerated and Formerly Incarcerated Women and Girls (The National Council) is to end the incarceration of women and girls.¹ ² The organizations are led by incarcerated and formerly incarcerated women and women who have been directly impacted by incarceration.³ FJAH and The National Council organized to pass the Primary Caretakers Statute ([Section 6B of Chapter 279](#)) as part of the 2018 Criminal Justice Reform Act in Massachusetts of the state's criminal code.⁴ The statute allows primary caretakers of dependent children who are convicted of a transgression to file a motion with the court requesting a community-based sentence (*i.e.*, probation).⁵

The Primary Caretakers Bill (“Primary Caretakers”) was drafted by Families for Justice as Healing; Andrea James, founder of The National Council; and fellow formerly incarcerated mothers.⁶ The campaign to pass the bill was led by formerly incarcerated mothers and daughters of incarcerated parents.⁷ Directly impacted women and girls shared their stories about the devastating and lasting impact of family separation caused by incarceration and their vision of alternative solutions that would enable families to heal and advance their lives.

It took two sessions to pass Primary Caretakers in 2018. Directly impacted women provided legislators with insight into the trauma caused by family separation and cultivated a statewide support network for the bill, including nurses, teachers, public health professionals, parents, faith congregations, and civil rights and community organizations.⁸ Showing Up for Racial Justice Boston, an organization that engages white people in racial justice work,

¹ *Families for Justice as Healing* (last visited April 19, 2024), <https://www.justiceashealing.org/>.

² *National Council for Incarcerated and Formerly Incarcerated Women and Girls* (last visited April 18, 2024), <https://www.nationalcouncil.us/>.

³ *Id.*

⁴ Interview with Shira Diner, Lecturer and Clinical Instructor, Boston University School of Law (Feb. 20, 2024) (hereinafter “Interview #1”).

⁵ Mass. Gen. Laws ch. 279, § 6b (2018).

⁶ Victoria Law, *When a Parent Is Taken Away, It's Like a Death”: Two States Consider Bills to Keep Parents Out of Jail*, Truthout (April 10, 2017), <https://truthout.org/articles/when-a-parent-is-taken-away-it-s-like-a-death-ma-and-tn-consider-bills-to-keep-parents-out-of-jail/>.

⁷ *Id.*

⁸ Interview #1, *supra* note 4.



partnered with FJAH to table at events and distributed holiday cards to constituents with a message about keeping families together to uplift the legislation.

FJAH and The National Council also partnered with Human Impact Partners, an organization that transforms public health to center around equity and social justice, to create [a landmark report](#) on the subject of parental incarceration that centers the voices of mothers and children.⁹ Public health research corroborates the firsthand experiences of individuals directly affected by parental incarceration, demonstrating that it leads to long-lasting harm, trauma, and economic devastation and has a disproportionate impact on families of color.¹⁰

A profound moment in the journey to pass the bill was during a 2017 Judiciary Committee hearing, when formerly incarcerated women and daughters of incarcerated parents waited more than eight hours to testify and spoke truth to power about the urgent need to pass Primary Caretakers.¹¹ Community organizations adopted an effective strategy to advocate for this legislation, emphasizing the adverse consequences experienced by the defendant's *child* rather than solely focusing on the defendant themselves. A key mechanism for achieving this goal involved the testimony of several formerly incarcerated women and daughters of incarcerated parents before the state legislature.¹² Ayana Aubourg, an advocate of the 2018 legislation and an individual who was a child of a formerly incarcerated parent, shared the following:

There's no reason why babies, youth, young people should be visiting their parents in jail and subject to these dehumanizing practices. We bring these traumas back into our communities. Instead of subjecting people to prisons, our society should give people the healing and support that they need — I think that's key. When a parent is taken away from you, it's like a death. It really hurts.¹³

The collaborative efforts of FJAH, The National Council, and their partners resulted in significant strides towards ending the incarceration of primary caretakers through the passage of the 2018 Primary Caretakers statute in Massachusetts. Through education, advocacy, and strategic partnerships, these organizations have effectively highlighted the urgent need for reform in the criminal justice system. The effectiveness of utilizing poignant testimonies during legislative hearings underscores the importance of centering the voices of directly impacted individuals in policy discussions surrounding incarceration and its repercussions.

⁹ Celia Harris & Kim Gilhuly, *Keeping Kids and Parents Together: A Healthier Approach to Sentencing in Massachusetts*, Human Impact Partners (September 2017), https://humanimpact.org/wp-content/uploads/2018/10/KeepingMAKidsParentsTogetherHealthier_2017.09.pdf.

¹⁰ *Id.*

¹¹ Interview #1, *supra* note 4.

¹² Interview #1, *supra* note 4.

¹³ Law, *supra* note 6.



Setbacks of the 2018 Primary Caretakers Bill

Shira Diner, a public defender and criminal law clinical professor at Boston University School of Law, played a pivotal role in assisting with an educational campaign alongside FJAH. She disseminated information about the Primary Caretaker statute to attorneys across Massachusetts. The educational campaign focused on roughly five specific counties within the state (*e.g.*, Boston, Brockton, and Springfield), where she conducted training sessions aimed at familiarizing attorneys with the new legislation and outlined the legal requirements for defendants seeking its benefits.¹⁴ These sessions involved comprehensive presentations explaining the requirements for a defendant and their attorney to substantiate the impact of parental incarceration on the defendant's child through affidavits presented to the judge.¹⁵ The training sessions also included the participation of several individuals who shared personal accounts of the challenges faced growing up with incarcerated parents, highlighting the adverse social, economic, and emotional repercussions of familial separation due to incarceration.¹⁶ As part of the educational efforts, informative materials were also distributed to Massachusetts attorneys, including practice advisories and sample motions, to equip them with the necessary tools to effectively advocate for their clients under the provisions of the 2018 Primary Caretakers statute.¹⁷

Despite these efforts, Diner explained that the statute was “incredibly underutilized” in Massachusetts.¹⁸ One reason why the legislation is underutilized is because if the defense attorney does not raise the statute to the judge, the court may not recognize the defendant as a primary caretaker under the law.¹⁹ The statute's underutilization can also be attributed to the substantial demands on defense lawyers. The dynamic nature of legal standards presents a challenge for public defenders, as they must continuously acquaint themselves with the intricate details accompanying each update in criminal law.²⁰ Nonetheless, if a lawyer is aware of the statute and appropriately brings it to a court's attention, a judge is willing to follow the appropriate procedure and provide alternatives to incarceration for a defendant deemed to be a primary caretaker.

¹⁴ Interview #1, *supra* note 4.

¹⁵ Interview #1, *supra* note 4.

¹⁶ Interview #1, *supra* note 4.

¹⁷ Interview #1, *supra* note 4.

¹⁸ Interview #1, *supra* note 4.

¹⁹ Interview #1, *supra* note 4.

²⁰ Interview #1, *supra* note 4.



Additionally, under the current law, a “primary caretaker” is narrowly defined as “a parent with whom a child has a primary residence.”²¹ This excludes many parents who have an active and essential role in their child’s daily life, and it also leaves out family members who are responsible for the care of aging, sick, or disabled relatives. In light of the setbacks encountered with the 2018 Primary Caretakers statute, there is a clear imperative for legislative reform to address the underutilization and limitations of the existing statute, ensuring equitable access to alternative sentencing options for primary caretakers entangled in the criminal justice system.

Addressing Limitations and Expanding Protection with New Legislation, The Primary Caretakers Diversion Bill (S.1049)

A new bill, S.1049, also known as the [Primary Caretakers Diversion Bill](#), would create a path to pre-trial diversion instead of conviction and incarceration for pregnant people and primary caretakers of children and sick or aging family members.²² Noncustodial parents would be eligible to benefit from S.1049.²³ However, advocates note that courts may try to limit the definition of a noncustodial parent if implemented and seek to ensure this would be widely applied.²⁴ Operationally, a primary caretaker who is being prosecuted would file a motion with the court requesting pretrial diversion, which can include programs, services, restorative justice activities, employment, and/or community service that would benefit that person’s life and the community.²⁵ If the person completes the pretrial diversion program, their case will be dismissed.²⁶ Whereas the 2018 bill only required a judge to *consider* the impact incarceration of the primary caretaker would have on a child, the new legislation would establish a rebuttable presumption that the court should accept a person’s diversion plan unless the presiding district attorney can demonstrate that there is a public safety concern with clear and convincing evidence.²⁷ There is also no exclusion for certain offenses written into the proposed legislation.²⁸ Second, participation in pretrial diversion would not require an admission of guilt.²⁹ Thus, if the defendant does not complete the program, they will still be presumed innocent until proven guilty. And lastly, the proposed legislation would expand the definition of a “primary caretaker”

²¹ S. 1049 Mass. Gen. Laws ch. 279, § 6b (2018).

²² *Id.*

²³ Interview with Austin Frizzel, Strategic Learning Coordinator, National Council for Incarcerated and Formerly Incarcerated Women and Girls, and Louellyn Lambros, Policy Director, National Council for Incarcerated and Formerly Incarcerated Women and Girls (Feb. 23, 2024) (hereinafter “Interview #2”).

²⁴ Interview #2, *supra* note 23.

²⁵ Interview #2, *supra* note 23.

²⁶ Interview #2, *supra* note 23.

²⁷ Interview #2, *supra* note 23.

²⁸ Interview #2, *supra* note 23.

²⁹ Interview #2, *supra* note 23.



to reflect the reality of more families' lives and allow more people who are entangled in the criminal legal system to access alternatives to incarceration to keep their families together.³⁰

Austin Frizzell, the strategic learning and evaluation coordinator at The National Council, underscored the significance of not only educating attorneys about the advantages of the Primary Caretakers legislation but also extending outreach efforts to judges and defendants themselves. Frizzell explained the importance of partnering with community organizations, like those using the participatory defense model, to assist in educating people outside of the legal system about the protections afforded to them if this new legislation becomes a reality.³¹ Frizzell hopes the broadened efforts to educate and outreach to the community encourages increased usage of the legislation if it passes.³² Unlike the 2018 Primary Caretaker legislation that took a small part in a comprehensive criminal justice reform package, this new legislation stands on its own. Nonetheless, Frizzell and Louellyn Lambros, policy director for the National Council, are confident that it has the potential to become law. Specifically, Frizzell and Lambros explained the importance of S.1049 not requiring funding for community-based programs.³³ Frizzell elaborated that this particular legislation may be easier to move through the legislative process without fiscal implications. Rather, S.1049 integrates preexisting community-based programs (*e.g.*, restorative justice activities, employment, community service) by allowing the defendant to participate in a selected program to dismiss their underlying case.³⁴ In all, the proposed Primary Caretakers Diversion Bill (S.1049) offers a comprehensive approach to addressing the limitations in the current legislation while expanding protections for primary caretakers, aiming to provide a viable alternative to incarceration and promote family unity within the criminal justice system.

Conclusion

The collaborative efforts of FJAH, The National Council for Incarcerated and Formerly Incarcerated Women and Girls, and their allies have resulted in significant strides towards addressing the issue of family incarceration. The passage of the 2018 Primary Caretakers statute in Massachusetts marked a crucial victory in recognizing the importance of maintaining familial bonds during times of legal proceedings. However, despite educational campaigns and training sessions aimed at increasing awareness and utilization of the statute, its implementation has fallen short of its potential impact. Challenges such as the narrow definition of a "primary caretaker" and the ever-evolving nature of the law have hindered its effectiveness in practice.

³⁰ Interview #2, *supra* note 23.

³¹ Interview #2, *supra* note 23.

³² Interview #2, *supra* note 23.

³³ Interview #2, *supra* note 23.

³⁴ Interview #2, *supra* note 23.



Children of Incarcerated Caregivers

Nevertheless, the introduction of the Primary Caretakers Diversion Bill (S.1049) represents a promising step to expand access to pre-trial diversion programs for pregnant individuals and primary caretakers facing conviction and sentencing. By establishing a presumption in favor of diversion and broadening the definition of primary caretakers, this proposed legislation addresses key limitations of the existing statute and aims to provide alternative pathways instead of incarceration to keep families together. Moving forward, it is imperative to continue advocating for policies that prioritize the well-being of families affected by incarceration and to ensure that legal frameworks are responsive to the diverse needs of communities impacted by the criminal justice system. Through continued collaboration, education, and advocacy, advocates of the proposed legislation are committed to work towards a more just and compassionate approach to address the intersecting challenges of incarceration and family separation.