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Promoting Self-Sufficiency? How HRA's Exclusion of Incarceration from the Definition of "Temporary Absence" Contradicts Statutory Mandates and Hurts New York Families

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**PROMOTING SELF-SUFFICIENCY? HOW HRA’S
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Matthew P. Main[†]

ABSTRACT

The New York City Human Resources Administration has implemented a policy that has a punitive and disproportionate impact on poor families of color. The policy departs from the legislative mandate to support New York’s neediest and most at risk by arbitrarily excluding incarceration from the definition of “temporary absence,” as it applies to the Cash Assistance program. Aside from the discriminatory impact on poor children and families, the policy decision comes at a higher cost to New York taxpayers in the midst of a financial crisis. This Comment evaluates the legal flaws in the policy, the persons it targets, the families it affects, and how it must be remedied in order to truly promote self-sufficiency and survival for New Yorkers in need.

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[†] J.D., 2011, City University of New York School of Law. The author would like to give appreciative acknowledgement to Leslie Boutin, Juan Cartagena, Paul Keefe, Michelle Light, Diane Wenzler, and Barbara Zerzan for their assistance in producing data, initially conceptualizing the problem, and developing research on the issue during my summer internship at the Community Service Society. McGregor Smyth of Bronx Defenders and Susan Antos of Empire Justice Center also offered thoughtful critique and insight to improve the piece. Finally, the author would like to extend a special thanks to Professor Ruthann Robson for her guidance and encouragement and to Professor Andrea McArdle for her additional suggestions and relentless optimism.

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INTRODUCTION

The New York City Human Resources Administration (“HRA”) has a policy that could hurt thousands of New York’s most vulnerable children and families. More troubling is that during the biggest financial crisis in decades, HRA has chosen a path that will actually increase costs to the City and add to the burden on New York taxpayers.¹ Perhaps even more surprising is that the policy has been adopted despite its patent departure from HRA’s own stated mission² and in contravention to the agency’s statutory mandate.³ The policy affects recipients of Cash Assistance from HRA—a population comprised of New York’s poorest and neediest families

¹ See discussion *infra* Part III.

² The HRA website states that its mission is to “provide[] temporary help to individuals and families with social service and economic needs to assist them in reaching self-sufficiency.” *About HRA/DDS*, N.Y.C. HUMAN RES. ADMIN., DEP’T OF SOC. SERVS., http://www.nyc.gov/html/hra/html/about/about_hra_dss.shtml (last visited Nov. 15, 2010); see also CITY OF N.Y. OFFICE OF THE COMPTROLLER, FOLLOW-UP AUDIT REPORT ON THE DEVELOPMENT AND IMPLEMENTATION OF THE PAPERLESS OFFICE SYSTEM BY THE HUMAN RESOURCES ADMINISTRATION (2010) (“HRA’s mission is to enhance the quality of life for all City residents by providing temporary assistance to eligible individuals and families to help them lead independent and productive lives.”).

³ According to the enabling legislation, the statutory duty of social services officials is to “provide adequately for those unable to maintain themselves” and to “restore such persons to a condition of self-support or self-care.” N.Y. SOC. SERV. LAW § 131(1) (McKinney 2003).

and, notably, one comprised primarily of poor women and children of color.⁴

The purpose of this Comment is to provide an overview of HRA's Cash Assistance program and the devastating practical effects that HRA's decision to adopt a discriminatory, arbitrary, and contradictory definition of "temporary absence" will have on at-risk children and families. The first section will outline and explain the connection between Cash Assistance and the temporary absence policy. The discussion will continue in the second section to discuss the populations—families, children, and incarcerated persons—who are affected by the HRA policy. The third section of the Comment will use relevant data to contextualize the discussion and to provide a concrete illustration of the disproportionate impact the policy will potentially have on poor people of color. By means of analogy to other programs and other jurisdictions, the fourth section will demonstrate the ease and feasibility of adopting a more just and efficacious policy. The final section will offer a remedy—that incarceration be included within the definition of temporary

⁴ The author notes that the phrase "people of color" is used throughout the course of this Comment in a manner that is concededly overbroad. While some statistics relied on refer to "blacks and Latinos" or "African Americans and Hispanics" or even more generally "people of color," the author has made the conscious decision to generalize these statistics in some places throughout the article by adopting the phrase "people of color." The word choice is deliberate and is intended to acknowledge the plight of all persons who identify themselves as members of minority populations whether in race, nationality, ethnicity, or religion. The author's choice of language is not in any way intended to minimize the particular struggles of any of these diverse groups of oppressed people. As of January 2010, females represented 83% of Family Assistance recipients, 46% of Safety Net recipients and 87% of Temporary Assistance to Needy Families ("TANF") recipients who have been converted to Safety Net Assistance. Blacks and Hispanics represent 92% of Family Assistance recipients, 80% of Safety Net recipients, and 95% of TANF recipients who have been converted to Safety Net Assistance. N.Y.C. Human Res. Admin., Dep't of Soc. Servs., *HRA Facts Quarterly Supplement January 2010* (2010), http://www.nyc.gov/html/hra/downloads/pdf/hrafacts_2010_01.pdf [hereinafter *HRA Facts Quarterly*]. Historically, national data have shown that single-mother families are those most in need of TANF and food stamps. For a discussion of the history of race, gender, and public assistance and the evolution of the welfare system as a "tool of law enforcement," see Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 648–61 (2009). Gustafson also discusses the punitive system of welfare that has developed along with the "reform."

A vast regulatory and punitive system developed under welfare reform. The welfare policies the states instituted after welfare devolution included a broad range of punitive approaches to the poor designed not only to punish poor adults who failed to transition from welfare to work, but also to punish entire families where the head of the household failed to live up to governing standards of morality.

Id. at 666.

absence—as the necessary solution to ensure that HRA’s stated goal “to promote the maximum level of self-sufficiency” is truly being realized.⁵

I. CASH ASSISTANCE AND TEMPORARY ABSENCE: WHAT THEY ARE AND HOW THEY WORK

The safety net provided by social welfare programs exists because the American people demanded it.⁶ Franklin Delano Roosevelt, in explaining to Congress the objectives of the programs created under the New Deal, made clear that such programs are a matter-of-fact entitlement created by the U.S. Constitution. “If, as our Constitution tells us, our Federal Government was established among other things ‘to promote the general welfare,’ it is our plain duty to provide for that security upon which welfare depends.”⁷ Welfare programs developed to ensure that a civilized society will promote and protect human dignity for everyone by providing a basic foundation that permits people to be self-sufficient.⁸ In New York City and around the State, especially during such challenging economic times, many families rely on programs such as Cash Assistance (“CA”),⁹ Medical Assistance¹⁰ and Food Stamps¹¹ in order

⁵ See *Family Independence Administration*, N.Y.C. HUMAN RES. ADMIN., DEP’T OF SOC. SERVS., <http://www.nyc.gov/html/hra/html/programs/fia.shtml> (last visited Nov. 17, 2010); N.Y. SOC. SERVS. LAW § 131(1) (McKinney 2003); see also *About TANF*, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, OFFICE OF FAM. ASSISTANCE, <http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (last updated Nov. 20, 2008) (stating that the mission of the federal TANF program is “to help needy families achieve self-sufficiency”).

⁶ FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR* 451 (Vintage Books 1993).

⁷ Franklin D. Roosevelt, President of the United States, Message to Congress on the Objectives and Accomplishments of the Administration (June 8, 1934). See U.S. CONST. pmbl.

⁸ See TAMMY DRAUT, *NEW OPPORTUNITIES? PUBLIC OPINION ON POVERTY, INCOME INEQUALITY AND PUBLIC POLICY: 1996–2001*, 6–8 (Demos: A Network for Ideas and Action) (2001) (explaining the common public opinion that people are entitled to be economically self-sufficient and that it is the responsibility of the government to ensure that basic human needs are met).

⁹ The Cash Assistance program provides low-income families with temporary benefits including shelter assistance, energy assistance, and cash grants to help them survive the difficult economic situation they are experiencing. *Temporary Cash Assistance*, N.Y.C. HUMAN RES. ADMIN., DEP’T OF SOC. SERVS. <http://www.nyc.gov/html/hra/html/directory/cash.shtml> (last visited Nov. 17, 2010). Cash Assistance is funded by the federal Temporary Assistance for Needy Families program for up to 60 months; see Social Security Act, 42 U.S.C. §§ 601–619 (2006). Upon expiration of the 60-month period, the funds are provided under the New York State Safety Net program. See N.Y. SOC. SERV. LAW §§ 158–159 (McKinney 2003).

¹⁰ N.Y.C. Human Res. Admin., Medical Assistance Program, http://www.nyc.gov/html/hra/html/programs/medical_assistance_program.shtml (explaining the medi-

to meet their basic survival needs. HRA's temporary absence policy is one key example of how the government is failing to meet the constitutionally mandated duty to promote the general welfare. As of January 2010, there were over 155,000 families (355,454 individuals) receiving Cash Assistance—which provides funds to help pay rent, fuel, and utility expenses—from the Department of Social Services of the Human Resources Administration for the City of New York.¹² Consistent with statutory and regulatory mandate, the HRA website proclaims that one of the primary goals of programs that provide CA funds is to provide economic stability for families so that they can work “to promote the maximum level of self-sufficiency.”¹³ Unfortunately, it is precisely this economic stability that is threatened by HRA's current policy regarding treatment of temporarily incarcerated individuals. In reality, as will be shown, the policy is structured to function in a manner that directly contravenes the stated goal of maximizing self-sufficiency.¹⁴

Families receiving CA, by definition, already struggle to meet their daily needs of food and shelter as they walk the difficult path to self-sufficiency.¹⁵ If a member of the household is incarcerated, even for a brief period, the entire family is destabilized and faces significant risks of job loss and eviction.¹⁶ In fact, when a household member is incarcerated, families are two times more likely to move to another residence or shelter during the month that the incarceration occurs.¹⁷ For these families, it is critical that certain forms of CA remain available to stabilize them during this crisis and, particularly, to “retain housing and maintain the home.”¹⁸

cal services that are made available to low-income New Yorkers under the Medical Assistance Program).

¹¹ N.Y.C. Human Res. Admin., Food Stamps & Food Programs, <http://www.nyc.gov/html/hra/html/directory/food.shtml> (explaining the process for low-income New Yorkers to obtain assistance to “increase their ability to purchase food”).

¹² N.Y.C. Human Res. Admin., Office of Data Reporting and Analysis, *HRA Facts: January 2010* (2010), http://www.nyc.gov/html/hra/downloads/pdf/hrafacts_2010_01.pdf.

¹³ N.Y.C. Human Res. Admin., *supra* note 5; *see* N.Y. SOC. SERV. LAW § 131(1) (McKinney 2003); *see also* U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 5.

¹⁴ *See* N.Y.C. Human Res. Admin., *supra* note 5.

¹⁵ *See supra* note 9 and accompanying text.

¹⁶ *See* discussion *infra* Part II.A.

¹⁷ Zaire D. Flores, Jeffrey Lin, John Markovic & Nancy Smith, *Understanding Family Homelessness in New York City* 29 (2005), http://www.nyc.gov/html/dhs/downloads/pdf/vera_Study.pdf.

¹⁸ Under the policy directives issued by HRA, “An allowance for household expenses for up to 180 days [is permissible] if essential to retain housing and maintain the home.” (Policy Directive No. 08-16-ELI, N.Y.C. HUMAN RES. ADMIN. (Apr. 16, 2008) [hereinafter PD No. 08-16-ELI]; Policy Directive No. 02-35-ELI, N.Y.C. HUMAN

HRA's temporary absence policy was created to provide exactly this type of security and continuity of family stability.¹⁹

A. *"Temporary Absence" and the Exclusion of Incarceration*

In order to further advance this objective of stability, the New York State Office of Temporary and Disability Assistance ("OTDA") promulgated regulations that promote the uninterrupted provision of Cash Assistance by not penalizing recipients for "temporary absences" during the period in which they are receiving benefits.²⁰ This so-called "temporary absence" policy permits families to continue receiving Cash Assistance to pay rent and utilities when a household member is found to be temporarily absent "because of illness or other good cause."²¹ According to the final rule, codified at § 349.4 of the Official Compilation of the Rules and Regulations of the State of New York ("NYCRR"), a temporary absence is "*any* absence . . . during which the applicant or recipient (i) does not leave the United States; (ii) does not evidence intent to establish residence elsewhere; and (iii) complies with [§ 349.4] and other provisions of [Title 18 of the NYCRR]."²² The temporarily-absent household member is simply budgeted into the calculation of CA benefits as if he were physically present in the household during

RES. ADMIN. (Aug. 30, 2002) [hereinafter PD No. 02-35-ELI]. Even when persons are absent from the household because they are temporarily housed in a residential treatment center, they are included under the temporary absence policy. PD No. 08-16-ELI. Likewise, when children are temporarily removed from the household and placed in foster care, the temporary absence policy provides the family with "continued shelter and fuel allowance." *Id.* In *Matter of Chrystol B.*, the court explained why it was so important for HRA to provide continued cash assistance even though a child was temporarily absent from the household. It said that

[a] primary responsibility of the Commissioner is "to preserve and stabilize family life wherever possibility [sic]." Obviously, the reduction of the shelter allowance not only negates the supportive services provided by the Department of Social Services but may very likely lead to the break-up of the family household.

In re Chrystol B., 429 N.Y.S.2d 358, 361 (N.Y. Fam. Ct. 1980).

¹⁹ See N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4 (2007). According to the legislative history, as per the notice of adoption of the rule, the purpose of establishing a broad definition of "temporary absence" was "[t]o make it easier for social services districts to determine [that] public assistance recipients, who are temporarily absent from the district of residence, continue to be eligible for assistance." 27 N.Y. Reg. 18 (Mar. 23, 2005); accord N.Y. SOC. SERV. LAW § 131(3) (McKinney's 2003) (stating that a purpose of providing social services is to "maintain and strengthen family life").

²⁰ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4.

²¹ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a)(2)(i).

²² N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a) (emphasis added); see also PD No. 02-35-ELI; PD No. 08-16-ELI, *supra* note 18 ("Temporarily absent individuals are budgeted as if they are physically in the household and are eligible for the basic allowance plus energy, shelter, fuel, and any other additional allowances.").

the period of absence, and the family's budget is not disrupted.²³

However, a recent HRA policy directive created significant—and improper—limits on the broad definition outlined by the state regulation.²⁴ The directive expressly excludes incarceration from the definition and thereby prevents those who are temporarily incarcerated from continuing to receive CA due to their “temporary absence.”²⁵ As a result, families must confront the reality of a reduction or revocation of benefits when a household member is detained or imprisoned, even if for a brief period of time.²⁶ The exclusion of incarceration under this policy directive remains the practice at HRA despite clear statutory and regulatory language as well as pertinent case law that consistently recognize incarceration as “good cause” to justify absences.²⁷

This policy fails to consider the factual reality that most periods of incarceration are very brief.²⁸ In 2008, for example, the median stay for all inmates at New York City's jail at Rikers Island was just 7.74 days.²⁹ The exclusion of persons who fall into this narrow exception crafted by HRA does not serve the broader purpose underlying the temporary absence policy as it applies to CA and other social programs at HRA.³⁰ In light of the documented brevity of most periods of incarceration, the exclusion does nothing more than punish those who are at the highest risk of arrest and least able to make bail—regardless of whether such persons are ever found guilty of a crime.³¹

²³ PD No. 08-16-ELI, *supra* note 18.

²⁴ See N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a).

²⁵ *Id.*

²⁶ See *id.* (“Individuals incarcerated more than two weeks are not eligible to receive cash assistance.”).

²⁷ See N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a); *infra* Part I.C.

²⁸ For a more complete analysis of typical incarceration periods and other circumstances surrounding arrest and incarceration in New York see discussion *infra* Part III.A.

²⁹ N.Y.C. Indep. Budget Office, *City Spending Rises on Programs to Help Inmates Leaving Jail 2* (2009), <http://www.ibo.nyc.ny.us/iboreports/dischargeplanning060309.pdf>.

³⁰ See N.Y.C. HUMAN RES. ADMIN., *supra* note 5; N.Y. SOC. SERV. LAW § 131(1) (McKinney 2003); see also U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 5.

³¹ See discussion *infra* Part III.B. See also Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 29–30 (2008) (discussing the cycle of poverty and the multitude of factors that weigh into a defendant's decision to plead guilty, especially the inability to post bail):

[T]he dysfunctional families, the segregated housing communities, inadequate foster care, poor schools, lack of jobs, inadequate family courts, drug dependencies, mental problems, cruel imprisonments, exclusion from voting, repeated crime, and early death. Peer pressures to fail from within the deprived, segregated community are especially hard

To promote family stability and cohesiveness—and to comply with the statutory mandate of § 131 of the New York Social Services Law to provide assistance to needy New Yorkers³²—HRA and OTDA established the temporary absence policy to allow for Cash Assistance benefits to continue even if a recipient is temporarily absent “because of illness or other good cause.”³³ The policy creates a standard of flexibility in the continued disbursement of Cash Assistance when a household member is unable to attend the required meetings, work assignments, or recertification appointments due to his or her temporary absence.³⁴ Fundamentally, the temporary absence policy provides security and support to ensure that temporary circumstances do not derail essential stability.³⁵ Without the protection of such a policy, a single household member’s reduction in benefits could have detrimental effects on the entire family.³⁶

Benefit reductions due to this restrictive interpretation di-

to overcome. These are the cases we see repeatedly when we sentence. To help break this chain of events, the Bronx Defenders has recently instituted a program which provides indigent persons arrested for non-violent crimes with bail money. This program hopes to combat the phenomenon of those who cannot afford to post bail pleading guilty to “crimes they did not commit in the greater interest of leaving Rikers Island, often to tend their children.”

Id. (internal citation omitted).

³² See N.Y. SOC. SERV. LAW § 131. Section 131 of the New York Social Services Law provides that it is the “duty of social services officials . . . to provide adequately for those unable to maintain themselves” in an effort to restore such persons to a “condition of self-support or self-care.” § 131(1). The statute further provides that social services officials are charged to help those who are discharged from “mental hygiene institutions in their transition to a condition of self-support and self-care in the community.” § 131(2). The mandate of such services under the statute is that they be provided in order to “maintain and strengthen family life.” § 131(3).

³³ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a)(2)(i) (2007).

³⁴ The HRA temporary absence policy permits CA recipients to temporarily miss work training programs and appointments that are otherwise required for the continued receipt of CA benefits. See N.Y. SOC. SERV. LAW § 131(7)(b) (2011) (explaining that persons who are employable but who willfully refuse or fail to report for or cooperate in a work training program will be ineligible for Cash Assistance).

³⁵ See, e.g., *In re Chrystol B.*, 429 N.Y.S.2d 358, 361 (N.Y. Fam. Ct. 1980) (stating that it is “a primary responsibility” of the Department of Social Services to “preserve and stabilize family life whenever possibility [sic]”).

³⁶ See *id.* (“Obviously, the reduction of the shelter allowance not only negates the supportive services provided by the Department of Social Services but may very likely lead to the break-up of the family household.”); New York State Office of Temporary and Disability Assistance, *Temporary Assistance Source Book* 31 (2010) [hereinafter *Temporary Assistance Source Book*], <http://otda.ny.gov/main/programs/temporary-assistance/TASB.pdf> (“Local districts must delete individuals who move out of the assistance household as soon as possible after discovering the change in household composition.”).

rectly contradict the purpose of social services programs to achieve the “maximum level of self-sufficiency” and leave families vulnerable to abrupt situations of crisis and insecurity.³⁷ It is a fundamental tenet to statutory interpretation that “remedial statutes”—like those underlying HRA’s mandate to provide social services to needy New Yorkers—“are to be liberally construed so as to spread their beneficial result as widely as possible.”³⁸ HRA’s construction of temporary absence flies in the face of this widely accepted tenet by actually restricting the scope of those who will be benefited under the temporary absence policy.³⁹ It therefore follows that, consistent with the underlying objectives of stability and family cohesiveness, the definition of “temporary absence” should be interpreted to include reasonably brief periods of incarceration as contemplated by the state regulation.⁴⁰

B. Cash Assistance: The Process and Consequences of Ineligibility

The total amount of Cash Assistance that is distributed to eligible persons in need is based on the aggregate of three sub-categories: Basic CA Allowance,⁴¹ Home Energy Allowance,⁴² and

³⁷ See *Family Independence Administration*, N.Y.C. HUMAN RES. ADMIN., DEP’T OF SOCIAL SERVS., <http://www.nyc.gov/html/hra/html/programs/fia.shtml>; N.Y. SOC. SERV. LAW § 131(1); see also 42 U.S.C. § 601(a) (2006) (stating that the purpose of TANF is to “(1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives; (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage; (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and (4) encourage the formation and maintenance of two-parent families”); U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 5.

³⁸ *Mlodozienec v. Worthington Corp.*, 189 N.Y.S. 468, 471 (App. Div. 1959), *aff’d* 168 N.E.2d 834 (N.Y. 1960), *cert. denied*, 364 U.S. 628 (1961); see N.Y. STAT. LAW § 321 (McKinney 2007).

³⁹ *Cf. People v. Figuera*, 894 N.Y.S.2d 724, 739 (N.Y. Sup. Ct. 2010) (reasoning that where the plain language of a remedial statute makes explicit exclusions, there is “a strong inference that no further exclusions were intended . . . [and the statute] must be liberally construed”).

⁴⁰ See N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a) (2007) (outlining the basic requirements that must be satisfied for an absence to be considered a “temporary absence” without restricting that definition either expressly or impliedly with respect to absence due to temporary incarceration).

⁴¹ N.Y. COMP. CODES R. & REGS. tit. 18, § 352.2(d); DON FRIEDMAN, CASH ASSISTANCE (Leslie Boutin ed., Center for Benefits and Services) (2008), http://www.cssny.org/userimages/downloads/PublicAssistance_.pdf; see also CMTY. SERV. SOC’Y, *Benefit Tools*, http://www.cssny.org/userimages/downloads/Needs%20Based_04_09.pdf.

⁴² N.Y. COMP. CODES R. & REGS. tit. 18, § 352.5(d); see also FRIEDMAN, *supra* note 41; CMTY. SERV. SOC’Y, *supra* note 41.

Maximum Shelter Allowance.⁴³ Grant amounts are calculated and disbursed to recipients according to the number of persons in the household.⁴⁴

In New York, both state regulations and the Temporary Assistance Source Book⁴⁵ indicate that in order for an individual to be included in the budget, he or she must be residing in the dwelling unit.⁴⁶ However, for the purposes of Cash Assistance, the regulations provide that a CA household may also include “persons who are temporarily absent from such household, such as children or minors attending school away from home, whose full needs are not otherwise met.”⁴⁷ Specifically, the New York State regulations clearly establish that a person shall be considered “temporarily absent” and, thus, remain entitled to his or her benefits, as long as he or she “(i) does not leave the United States; (ii) does not evidence intent to establish residence elsewhere; and (iii) complies with [§ 349.4] and other provisions of [Title 18 of the NYCRR].”⁴⁸

Under this temporary absence standard, the grant of Cash Assistance may be continued as long as the participant is “reasonably expected” to return to the home and the abovementioned conditions are met.⁴⁹ The policy includes an inherent safeguard that if an absence extends beyond six months, the absent person is required to submit affirmative evidence of his or her continuing intention to return to the home and that he or she is prevented from returning because of “illness or other good cause.”⁵⁰ The absent recipient must also continue to be financially eligible for the grant in the same or different amount and have continuing contact with the Agency or another social services agency located outside the

⁴³ N.Y. COMP. CODES R. & REGS. tit. 18, § 352.3(a); *see also* FRIEDMAN, *supra* note 41; CMTY. SERV. SOC'Y, *supra* note 41.

⁴⁴ N.Y. SOC. SERV. LAW § 131-a(2)(a) (McKinney 2003).

⁴⁵ The Temporary Assistance Source Book is a comprehensive guide to social services law, regulations, directives, and informational letters published by the Office of Temporary and Disability Assistance and is designed to be a source of authoritative information for staff providing Temporary Assistance services. Temporary Assistance Source Book, *supra* note 36, at 1-1.

⁴⁶ N.Y. COMP. CODES R. & REGS. tit. 18, § 352.30(a) (2007); Temporary Assistance Source Book, *supra* note 36, at 576.

⁴⁷ N.Y. COMP. CODES R. & REGS. tit. 18, § 352.30(a); Temporary Assistance Source Book, *supra* note 36, at 576.

⁴⁸ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a) (emphasis added); *see also* PD No. 02-35-ELI; PD No. 08-16-ELI, *supra* note 18 (“Temporarily absent individuals are budgeted as if they are physically in the household and are eligible for the basic allowance plus energy, shelter, fuel and any other additional allowances.”).

⁴⁹ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a); *see* PD No. 02-35-ELI and PD No. 08-16-ELI, *supra* note 18.

⁵⁰ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a)(2)(i).

state.⁵¹

Even under certain exceptional circumstances, the temporary absence of the recipient may still allow for the continuance of Shelter and Home Energy Allowances to help pay rent and utility bills. Examples of such special circumstances include situations where the temporary absence is due to residential treatment for substance abuse; where a child is removed from CA and placed in foster care with a plan for the child to eventually return to the home; or where an individual is in a medical facility and reasonably expected to return to the household.⁵²

Under any of these circumstances, allowance for household expenses can be made for up to 180 days if “essential to retain the housing and maintain the home.”⁵³ As a means of oversight, such payments are controlled and cannot continue for more than 45 days unless a caseworker has reviewed the recipient’s status and it is expected that he or she will not remain in the facility for more than 180 days.⁵⁴ Based on these guidelines, the statutory language, and the abovementioned illustrative situations, there is no indication that the objectives of Cash Assistance are furthered by excluding incarceration from the definition of “temporary absence.” In fact, the same type of oversight could be applied in situations where a recipient of CA has been temporarily incarcerated. Given that very short periods of incarceration are the overwhelming norm, such a practice would be completely consistent with the exceptions made for persons receiving treatment for substance abuse or who are temporarily absent due to medical or mental health reasons.⁵⁵

Under the current practice, however, if a family member is temporarily unable to complete work requirements due to a brief period of incarceration, HRA is permitted to sanction the household, have its case closed, or have the absence construed as a “change in household composition,” which would allow HRA to rebudget the amount of funds that the entire *household* is entitled to.⁵⁶

As a practical matter, this means that an inability to comply with program mandates due to absence can result in the household’s monthly allowance being reduced to account for one less

⁵¹ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a)(2)(ii), (iii).

⁵² PD No. 08-16-ELI, *supra* note 18.

⁵³ PD No. 02-35-ELI and PD No. 08-16-ELI, *supra* note 18.

⁵⁴ *Id.*

⁵⁵ See PD No. 08-16-ELI, *supra* note 18.

⁵⁶ Temporary Assistance Source Book, *supra* note 36.

person in the home.⁵⁷ For families living under the constraints of already very tight budgets, such a reduction only increases the difficulty of making food, rent, fuel, and utility payments. Unfortunately, due to their indigence alone, families in these situations may face more drastic consequences like eviction, homelessness, or even further disruption of the family unit if children are subsequently placed in foster care.⁵⁸ When a household member's absence is not recognized within the interpretation of "temporary absence," the burden caused by the reduction of CA benefits must inevitably be borne by the family.

C. An Arbitrary Change of Policy

Until recently, it could be inferred that there was no logical reason to believe that incarceration would be excluded from the temporary absence policy.⁵⁹ In response to the New York State regulation governing the allocation of Cash Assistance, HRA Policy Directive No. 02-35-ELI ("PD No. 02-35-ELI"), dated August 30, 2002, was issued to clarify the meaning of "temporarily absent."⁶⁰ PD No. 02-35 made it clear that the definition of "temporary absence" includes circumstances where a Cash Assistance recipient is absent "due to illness or *other reasons*."⁶¹ Notably, the policy directive made no mention of incarceration.⁶²

This interpretation of the controlling state regulations changed significantly, however, on April 16, 2008, when HRA Policy Directive No. 08-16-ELI ("PD No. 08-16-ELI") revised PD No. 02-35-ELI. The language in this new directive was altered to state that "[a]n individual currently in receipt of Cash Assistance (CA) who is temporarily absent from the household due to illness or other *good cause* and intends to return to the household, is entitled to a continued CA grant."⁶³ This revised directive narrowed the

⁵⁷ *Id.*

⁵⁸ See discussion *infra* Part II.B.

⁵⁹ Neither the enabling statute, § 131 of the New York Social Service Law nor the governing state regulation, § 349.4 of the NYCRR, nor even the first policy directive issued by HRA suggests that incarceration would be excluded from the definition of temporary absence. See N.Y. SOC. SERV. LAW § 131 (McKinney 2003); N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a) (2007); PD No. 02-35-ELI *supra* note 18.

⁶⁰ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4.

⁶¹ PD No. 02-35-ELI, *supra* note 18 (emphasis added).

⁶² See *id.*

⁶³ PD No. 08-16-ELI, *supra* note 18 (emphasis added). In pertinent part, the directive states:

An individual currently in receipt of Cash Assistance (CA) who is temporarily absent from the household due to illness or other good

scope of the definition of “temporary absence” by modifying its language from “illness or other reasons” to “illness or other good cause.”⁶⁴ Most significant, and in contradiction with the broad OTDA definition, the directive mandated that anyone who is absent for more than two weeks due to incarceration be deemed ineligible for Cash Assistance.⁶⁵

Despite the undisputed temporary nature of most periods of incarceration,⁶⁶ the fact that temporarily incarcerated individuals do not generally intend to establish residence anywhere other than their residence prior to their incarceration,⁶⁷ and that most temporarily incarcerated individuals have yet to be convicted of any crime,⁶⁸ HRA has improperly interpreted “temporary absence” to exclude incarceration.⁶⁹ Furthermore, HRA has taken a novel approach, which excludes incarceration from the definition of “good cause.”⁷⁰

cause and intends to return to the household, is entitled to a continued CA grant.

This policy does not apply to individuals who are temporarily absent due to incarceration. Individuals incarcerated more than two weeks are not eligible to receive cash assistance.

Id.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ The New York City Department of Correction reports that the average stay for all detainees at New York City’s jail at Rikers Island is 50.3 days and that 92% of all admissions are released within 180 days. City of N.Y. Dep’t of Correction, DOC Statistics, http://www.nyc.gov/html/doc/html/stats/doc_stats.shtml (last visited November 15, 2010). The median stay of all inmates at Rikers Island in 2008 was just 7.74 days. N.Y.C. Indep. Budget Office, *supra* note 29.

⁶⁷ It is particularly noteworthy that the language defining temporary absence in PD No. 08-16-ELI departs from the language codified in § 349.4(a) of the NYCRR. Compare N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a) (2007) with PD No. 08-16-ELI, *supra* note 18. The policy directive alters the second requirement to satisfy temporary absence. In § 349.4(a) the regulation states that the person claiming temporary absence must “not evidence intent to establish residence elsewhere.” N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a) (2007). However, in PD No. 08-16-ELI, HRA modified the language, requiring that the person “[e]stablish[] the intent to return to the household.” PD No. 08-16-ELI, *supra* note 18 (emphasis added). The language in § 349.4(a) implies that a person’s previous residence remains his continued residence as long as he evinces no intent to establish residence elsewhere. In contrast, the language of PD No. 08-16-ELI departs from the regulatory language and imposes an additional burden on the person who is temporarily absent to affirmatively demonstrate an intent to return to that previous residence.

⁶⁸ Jennifer R. Wynn, *Can Zero Tolerance Last?*, in ZERO TOLERANCE 120 (Tanya Erzen & Andrea McArdle eds., 2001) (“Two-thirds of Rikers detainees are people who have been arrested for a crime but not yet convicted. They are in jail mainly because they cannot make bail.”).

⁶⁹ PD No. 08-16-ELI, *supra* note 18.

⁷⁰ Cf., e.g., *In re Appeal of C.M.*, F.H. No. 4286162Z (Office of Temp. and Disability Assistance Feb. 23, 2005) (fair hearing) (holding that incarceration constitutes good

Since many of a person's needs—temporary shelter and three meals daily—are met while in prison or jail, HRA contends that there is no apparent basis for the incarcerated person to be considered temporarily absent in a manner that would permit continued disbursements of Cash Assistance.⁷¹ This rationale, however, ignores the demonstrated impact on families that results from excluding incarcerated individuals from the temporary absence policy and also abandons the needs of that person upon his or her imminent and intended return to the household.⁷² This exclusion can result in a loss of crucial financial assistance that is relied on by the families of incarcerated individuals. Due to the precarious nature of the financial situations experienced by many Cash Assistance families and the important need for stability to promote self-sufficiency, incarceration should be evaluated by HRA no differently than any other temporary absence situation.

D. Including Incarceration in the Definition of "Temporary Absence" Would Impose No Additional Costs or Burdens on HRA

If, as required by the state regulation, the circumstances surrounding incarceration were evaluated in a manner similar to other temporary absence situations, no changes to current HRA processes for determining the continued disbursement of CA funds would be required.⁷³ HRA would continue to supervise dis-

cause); *In re Appeal of [Appellant]*, F.H. No. 3307248R (Office of Temp. and Disability Assistance Mar. 29, 2000) (fair hearing) (holding that incarceration constitutes good cause).

⁷¹ Memorandum from Bill Faulkner, N.Y.C. Human Res. Admin., to James Whelan, Deputy Comm'r, N.Y.C. Human Res. Admin. (June 16, 2003); see S. REP. NO. 96-987 (1980), reprinted in 1980 U.S.C.C.A.N. 4787, 4794-95 (justifying the termination of benefits to incarcerated persons on the grounds that the expenses for shelter, food, clothing and medical care are provided by prison officials); cf. *Zipkin v. Heckler*, 790 F.2d 16, 19 (2d Cir. 1986) (holding that § 402(x) of the Social Security Act, which suspends Social Security benefits to persons incarcerated *as felons*, "rationally reflects the policy that prisoners' Social Security retirement benefit payments be suspended since their substantial economic needs are already met").

⁷² See discussion *infra* Part II.

⁷³ The legislative history does not suggest that incarceration was intended to be excluded from the definition of temporary absence. See 26 N.Y. Reg. 15 (Apr. 28, 2004). Thus, it should be presumed to have been contemplated because a person who is incarcerated can satisfy the requirements of § 349.4(a) of the NYCRR. See N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a) (2007). The legislative history evinces a clear expectation that the temporary absence policy would lessen, rather than increase, the burden on social services agencies. 26 N.Y. Reg. 15 (Apr. 28, 2004). In the notice of proposed rulemaking, OTDA stated that it expected the temporary absence policy to reduce errors and "save money on administrative costs" by reducing the time required of social services workers to make assistance determinations and the confusion that resulted from making such determinations. *Id.* Furthermore, it noted that

bursement while ensuring that the Cash Assistance and “temporary absence” eligibility criteria continue to be met.⁷⁴ It is true that the temporarily absent recipient may have to be excused from appointments and work assignments during this interim period, but such exceptions fall squarely within established “good cause” definitions and are made routinely by HRA to account for other circumstances faced by recipients.⁷⁵

For example, as of April 18, 2010, of the 175,597 persons receiving CA, 88,050 were excused from work assignments and continued to receive benefits.⁷⁶ These data indicate that over 50% of recipients are already receiving temporary waivers of their work assignments.⁷⁷ Where this is the reality of the current practice, a policy that extends a similar waiver to individuals for brief periods of incarceration would be neither inconsistent nor illogical. Families rely on the stability promoted by such waivers, and the interest of those families must outweigh any concern generated by an already routine practice that temporarily excuses work assignments for those who are temporarily unable to comply.⁷⁸

According to HRA’s current interpretation of the regulations governing Cash Assistance, incarcerated individuals are not entitled to any benefits under the definition of “temporary absence.”⁷⁹ This means that when a family member is temporarily incarcerated, not only are Food Stamps reduced, but Cash Assistance—necessary for rent and utilities—is as well. Although the City and the State have informally suggested that individuals may be incarcerated for up to 30 days without affecting the continuance of their

“[n]o new professional services” would be required to comply with the new rule and that the “proposed regulations will not result in any compliance costs for social services districts but should result in unspecified savings” *Id.*

⁷⁴ Cf. PD No. 02-35-ELI and PD No. 08-16-ELI, *supra* note 18 (explaining that continued disbursement of CA is permissible for up to 180 days as long as the absence is temporary and the person intends to return to the household).

⁷⁵ See N.Y. SOC. SERV. LAW § 131(7)(b) (McKinney 2003) (explaining that persons who are employable but who *willfully* refuse or fail to report for or cooperate in a work training program will be ineligible for Cash Assistance); N.Y.C. HUMAN RES. ADMIN., CA – APRIL 18, 2010 – WEEKLY REPORT, REPORT NO. WJS02. For the most recent statistics, <http://www.nyc.gov/html/hra/downloads/pdf/citywide.pdf> (indicating that over 50% of those receiving Cash Assistance as of April 2010 were excused from mandatory work assignments and continued to receive benefits).

⁷⁶ N.Y.C. HUMAN RES. ADMIN., *supra* note 75, at lines 3, 15.

⁷⁷ *Id.*

⁷⁸ Accord N.Y. SOC. SERV. LAW § 131(1) (McKinney 2007) (stating that it is the duty of social services officials to “provide adequately for those unable to maintain themselves” and to “restore such persons to a condition of self-support or self-care”).

⁷⁹ PD No. 08-16-ELI, *supra* note 18.

benefits,⁸⁰ there remains a requirement that families immediately notify HRA upon any change in household composition,⁸¹ which, under the current interpretation, would include a temporarily incarcerated person.⁸² Such a requirement is particularly problematic because, for many families, a situation where a member of the household is temporarily incarcerated is not interpreted as a “change” in household composition, but rather as a family crisis.⁸³

Recipients do have a right to a fair hearing⁸⁴ where they can “challenge [the correctness of] certain determinations or actions”⁸⁵ of HRA and where it is the burden of HRA to establish that any discontinuance or reduction was correct.⁸⁶ However, failure to make such a challenge can result in an abrupt reduction in benefits because once HRA has been informed that a member of the household has been incarcerated, it need only provide “timely notice” of the proposed reduction of benefits.⁸⁷ The “timely notice” standard requires that HRA inform families of their proposed action a mere 10 days prior to the effective date of any reduction or

⁸⁰ E-mail from James Whelan, Deputy Comm’r, N.Y.C. Human Res. Admin., to Michelle Light (Sep. 9, 2008, 16:05:53 EST) (on file with author).

⁸¹ Temporary Assistance Source Book, *supra* note 36, at 415; N.Y. State, *What You Should Know About Your Rights and Responsibilities (When Applying for or Receiving Benefits)* 22 (Feb. 2007), <http://www.otda.state.ny.us/main/programs/applications/4148A.pdf>. See also N.Y. COMP. CODES R. & REGS. tit. 18, § 387.17(e)(1)(ii) (2007).

⁸² PD No. 08-16-ELI, *supra* note 18.

⁸³ See discussion *infra* Part II.A, B; Jeremy Travis, Elizabeth Cincotta McBride & Amy L. Solomon, *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, 3, 9 THE URBAN INST. (2005), http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf (discussing child support and a multitude of complications that interfere with family cohesiveness when a family member is incarcerated). The burdens faced by families of incarcerated persons are not limited to the loss of CA benefits. Families must also accept the loss of any other income contributions made by the person who is incarcerated. See Marc Mauer, *Invisible Punishment: Block Housing, Education, Voting*, FOCUS MAGAZINE 3, 4 (2003), http://www.sentencingproject.org/doc/publications/cc_mauer-focus.pdf. Furthermore, the incarceration of a household member imposes the additional financial burden on the family to bear expenses related to the incarceration, such as inflated communication costs imposed by phone companies and correctional facilities. *Id.* at 4. See McGregor Smyth, *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42, 46 (2009) (“Individuals and families begin to suffer collateral consequences from the moment of arrest—missed days of work, the loss of a job or home after the reporting of an arrest to a licensing agency or public housing authority, the removal of one’s children.”).

⁸⁴ N.Y. COMP. CODES R. & REGS. tit. 18, § 358-2.12 (2007); see also N.Y. STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, <http://www.otda.state.ny.us/oah/> (explaining that a fair hearing gives persons a right to have their case heard before an Administrative Law Judge and how one can obtain such a hearing).

⁸⁵ N.Y. COMP. CODES R. & REGS. tit. 18, § 358-3.1(a).

⁸⁶ N.Y. COMP. CODES R. & REGS. tit. 18, § 358-5.9(a).

⁸⁷ N.Y. COMP. CODES R. & REGS. tit. 18, § 358-3.3(a)(3).

discontinuance of benefits.⁸⁸ This means that families may be advised just 10 days prior to the date on which their CA funds—funds they rely on to meet rent, fuel and utility payment obligations—will be reduced.

Furthermore, where a fair hearing is not requested within 10 days of the notice date, recipients must reapply and wait a 45-day period before they are able to be reenrolled in Cash Assistance.⁸⁹ For families with such fragile budgets, these kinds of abrupt changes that carry such far-reaching consequences can be detrimental to the continued maintenance of family stability.⁹⁰ Finally, it must not be forgotten that this entire fair hearing process itself carries a financial burden on HRA and the City.⁹¹ That expense surely exceeds the \$59 to \$72 per month that HRA “saves” when one person is removed from the household calculation for CA.⁹² In light of the stated HRA and OTDA objective of family stability and maximized self-sufficiency, it follows that HRA’s policy—which ef-

⁸⁸ N.Y. COMP. CODES R. & REGS. tit. 18, § 358-3.3(d)(1)(iv).

⁸⁹ See, e.g., *In re Appeal of C.H.*, F.H. No. 2996554H (Office of Temp. and Disability Assistance Oct. 18, 1998) (fair hearing).

⁹⁰ See Patricia Allard, *Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses* 9, 11 (2002), http://www.sentencingproject.org/doc/publications/women_lifetimesentences.pdf (explaining how families must often forego basic necessities to maintain safe housing when a reduction in cash assistance limits the family’s disposable income).

⁹¹ See, e.g., Editorial, *How to Make the Welfare System Better*, N.Y. TIMES, Nov. 22, 1990, at A26 (discussing the high costs and disadvantages associated with the fair hearing process at HRA).

If a recipient fails to comply with H.R.A.’s requirements, his or her life-sustaining benefits may be terminated. A recipient can challenge a termination through a fair hearing. New York State holds fair hearings at nearly five times the national rate, with more than 60,000 a year in this city, 90 percent of the state total. This means caseworkers save time and energy by telling a dissatisfied recipient to request a fair hearing.

By increasing caseworker morale and training, and by developing systems to limit erroneous case closings, we believe that fair hearings, and the high costs associated with them, can be reduced.

Providing benefits to those who are financially eligible—not punitive enforcement of ill-considered technical rules—must remain a top priority of H.R.A.

Id.

⁹² N.Y. COMP. CODES R. & REGS. tit. 18, § 352.2(d) (2007). This range of values is obtained by subtracting the allowance amount mandated by the regulation as per the table that appears therein. For example, the table states that a household of five is entitled to \$379, while the amount corresponding to a household of four is \$307. *Id.* Subtracting \$307 from \$379 yields a difference of \$72, which, according to the table, is the most that HRA would “lose” per month by reducing the household composition by one person. *Id.* See also COMM’Y SERV. SOC’Y, *supra* note 41 (providing a more simplistic table to illustrate the breakdown of benefits available according to household composition).

fectively contradicts those very goals—must be reevaluated in the interest of the families it was designed to protect.

II. NEW YORK'S TEMPORARY ABSENCE POLICY: WHY IT MATTERS AND WHOM IT AFFECTS

The population of incarcerated individuals and their families is of particular concern in the context of the temporary absence policy for Cash Assistance. The gap in services that is created by the exclusion of temporary incarceration warrants special consideration due to the implications that such a revocation of benefits has on dependent family members.

A. *The Burden on Dependent Families*

Under the current policy, if one member of a household is incarcerated, HRA is authorized to reduce CA benefits notwithstanding the reliance on those funds by other members of the family.⁹³ For instance, when one member of a household of three is incarcerated, albeit temporarily, HRA's policy erroneously categorizes that household as a household of two, rather than three, persons. The practical result of such a categorization is that HRA then grants Cash Assistance—Basic CA Allowance,⁹⁴ Home Energy Allowance,⁹⁵ and Maximum Shelter Allowance⁹⁶—as well as any Food Stamps for a two-person household instead of three.⁹⁷ At first glance, such an assessment may appear to make sense. For example, a reduction in the Basic CA Allowance or in the provision of Food Stamps is understandable.⁹⁸ If one less household member is present, there is one less person to feed. Logically, there would be a corresponding reduction in the household's total cost for *food*.⁹⁹

⁹³ See PD No. 08-16-ELI, *supra* note 18. Accord N.Y. COMP. CODES R. & REGS. tit. 18, § 387.14(a)(5)(iii)(f) (2007).

⁹⁴ N.Y. SOC. SERV. LAW § 131-a(2) (McKinney 2003); N.Y. COMP. CODES R. & REGS. tit. 18, § 352.2; see also COMM'Y SERV. SOC'Y *supra* note 41.

⁹⁵ N.Y. COMP. CODES R. & REGS. tit. 18, § 352.5; see also COMM'Y SERV. SOC'Y, *supra* note 41.

⁹⁶ N.Y. COMP. CODES R. & REGS. tit. 18, § 352.3; see also COMM'Y SERV. SOC'Y, *supra* note 41.

⁹⁷ N.Y. SOC. SERV. LAW § 131-a (McKinney 2003).

⁹⁸ Food stamps are governed by a separate statute and are unrelated to whether a person is eligible for Cash Assistance. See N.Y. COMP. CODES R. & REGS. tit. 18, § 387.14(a)(5)(iii)(f).

⁹⁹ For the sake of argument, it is presumed that allocation of food stamps per family member is proportionate to the cost of food necessary to provide adequate nutrition for each person included in the food stamps calculation. There is ample criticism to suggest that this is *not* the case. For one such critique, see, e.g., Editorial, *Why the Hungry Refuse Help*, N.Y. TIMES, Sept. 13, 2007, at A22 ("As many as 1.3 million

However, the same cannot be held true for the Home Energy and Shelter Allowance portions of Cash Assistance, resources that are relied on collectively by the *entire family* irrespective of the number present.

The cost of rent that a family pays, for instance, does not fluctuate when a member of the household is not present for some or all of the month. Likewise, the amount of gas that a family needs to heat the home is not reduced when there is one less person residing in the dwelling.¹⁰⁰ Electricity for lights and appliances is at most nominally affected if there is one person less who is present each day in the home.¹⁰¹ In fact, each of these costs—rent, gas, electricity—are essentially pre-established and paid regularly according to an average annual cycle for bill payment.¹⁰² Even home telephone lines have monthly flat rates that are paid uniformly, irrespective of the precise amounts of time that the phone is used for local calls each month.¹⁰³

When a family member is temporarily incarcerated and the Cash Assistance that the *family* receives is reduced, that family suffers.¹⁰⁴ The amount of money that a family loses in the Shelter Allowance component of the Cash Assistance allocation under such circumstances ranges from \$22 to \$117 per month, depending on the size of the family.¹⁰⁵ For the Home Energy component, the loss to the family ranges from just \$12.50 to \$15 per month.¹⁰⁶ These amounts are undoubtedly small in terms of the City's budget but crucially important to the maintenance of stability for families surviving in the most precarious of financial situations.¹⁰⁷

New Yorkers, about one-quarter of them children, do not have enough to eat. These are precisely the people, many from working families, whom federal food stamps are supposed to help.”).

¹⁰⁰ In fact, consumers may have the same fixed bill all year long. *See, e.g.*, CON EDISON, <http://www.coned.com/customercentral/levelpayment.asp> (explaining the “Level Payment” plan, which “spreads [consumers’] payments evenly throughout the year”) (last visited Dec. 21, 2011).

¹⁰¹ W. KEITH BRYANT & CATHLEEN D. ZICK, *THE ECONOMIC ORGANIZATION OF THE HOUSEHOLD* 79 (2006) (“[O]n average, the addition of one individual to the household raises electricity demand by 8 percent.”).

¹⁰² *Id.*

¹⁰³ *See, e.g.*, VERIZON, <http://www22.verizon.com/Residential/HomePhone> (offering a monthly flat-rate home phone plan) (last visited Dec. 21, 2011).

¹⁰⁴ *See* Mauer, *supra* note 83.

¹⁰⁵ N.Y. COMP. CODES R. & REGS. tit. 18, § 352.3(a); N.Y. SOC. SERV. LAW § 131-a(2) (establishing that the standard of monthly need depends on the size of the household); *see also* CMTY. SERV. SOC'Y, *supra* note 41.

¹⁰⁶ N.Y. SOC. SERV. LAW § 131.3(3-d) (McKinney 2003).

¹⁰⁷ *See, e.g.*, Jennifer Mascia, *A Woman's Desire to Work Is Thwarted by a Body that Strains to Keep Up*, N.Y. TIMES, Jan. 3, 2010, at A19 (recounting the precarious situation of a

While the individual who is incarcerated may have most of his or her needs met by the correctional facility, the families left behind have no such support.¹⁰⁸ Neither rent nor utilities reduce themselves proportionately when one tenant is temporarily absent due to incarceration.¹⁰⁹ Therefore, though the family's food and personal expenses budget would understandably decrease with one less person to include, the cost of other basic necessities remains the same regardless of whether the temporarily incarcerated individual is present in the household or not.

Even if the family is not immediately evicted, it is the logical reality that when an already delicate budget is further strained by the reduction of Cash Assistance benefits, forced sacrifices are imposed on families.¹¹⁰ Under such precarious economic conditions, families may be forced to forego food, fuel, or medication in order to retain their housing.¹¹¹ In some cases this reduced budget may even drive the family into homelessness because of an inability to pay rent.¹¹² Such consequences, aside from the obvious harm experienced by families, also lead to an inevitable increase in the cost to the City to provide emergency services.

B. *The Children*

Entire families bear the burdens of a CA recipient's incarceration under the current policy.¹¹³ Families are twice as likely to move to another residence or shelter when a member of the house-

disabled woman on the brink of homelessness and where food stamp allocations are insufficient).

¹⁰⁸ See *Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses*, THE SENTENCING PROJECT (2006), <http://www.sentencingproject.org/doc/publications/9088smy.pdf> ("The loss of welfare benefits adversely affects the ability of women, especially women of color, to become self-sufficient, provide for their children, and be active participants in their communities.").

¹⁰⁹ See Allard, *supra* note 90, at 11 (explaining the difficulty of finding and securing safe, affordable housing when reduced cash assistance limits the family income available for rent).

¹¹⁰ *Id.* at 9 ("Due to the limited income at their disposal, low-income and poor families often have to forego some of life's basic necessities—such as rent, medical and dental services, food, appliances, and utilities.").

¹¹¹ *Id.*

¹¹² See *id.* at 9–11; see also Flores et al., *supra* note 17 (stating that families are two times more likely to move to another residence or shelter when a family member is incarcerated).

¹¹³ See, e.g., Allard, *supra* note 90, at 8–9 (explaining that even though a mother who is deemed ineligible for welfare benefits does not affect the eligibility of dependent children, the "loss of benefits will nonetheless put a severe strain on household resources and on [the mother's] ability to support and care for her children").

hold is incarcerated.¹¹⁴ When a family loses housing due to a reduction in Cash Assistance, the City then has to manage the family's crisis situation and absorb the corresponding financial, administrative, and social costs.¹¹⁵ Whereas the family would otherwise be able to retain a safe and stable home environment, homelessness introduces the associated stress and insecurity created by potential job loss, the need to procure safe shelter, poor attendance and performance of children at school, vulnerability to crime as well as any number of additional circumstantial factors.¹¹⁶

Aside from the financial burdens that are certainly augmented when a family member is incarcerated,¹¹⁷ the child whose parent is jailed, even if temporarily, is more likely to experience psychological trauma and behavioral problems than his counterpart.¹¹⁸ Children who witness the arrest of a parent report nightmares and flashbacks¹¹⁹ and are more likely to have problems with peer relationships, to show signs of aggression, and to perform poorly in school.¹²⁰ Similarly, children experiencing homelessness have high rates of anxiety, depression and behavioral problems.¹²¹ It is also true that families in homeless situations are more likely to be separated and the children are more likely to be placed in foster care.¹²²

Regardless of whether the family is left immediately homeless, the precariousness of the situation may still result in the State inter-

¹¹⁴ Flores et al., *supra* note 17.

¹¹⁵ *Has the Rise in Homelessness Prevention Spending Decreased the Shelter Population?*, INSIDE THE BUDGET NEWS FAX (N.Y.C. Independent Budget Office), Aug. 7, 2008, 2–4; N.Y.C. INDEP. BUDGET OFFICE, INSIDE THE BUDGET 2–4 (Aug. 7, 2008) (reporting that the total spending on the New York City shelter system was \$651.3 million in 2007 and that one-time cash assistance has risen from \$76.6 million in 2004 to \$114.3 million in 2007); see also Amie Vaccaro, *Common Ground: Cutting the Costs of Homelessness*, TRIPLEPUNDIT.COM (May 3, 2010), <http://www.triplepundit.com/2010/05/common-ground-homelessness/>; Common Ground, *Annual Report 2007 17* (2008), <http://www.commonground.org/wp-content/uploads/2008/04/CGAnnualReport07.pdf> (reporting that the cost of a shelter bed is \$64 per night while cost for a night in a city jail cell is \$167).

¹¹⁶ See Nat'l Alliance to End Homelessness, *Promising Strategies to End Family Homelessness* 6 (2006), <http://www.hoopsforthehomeless.org/docs/hoopspaperfinal.pdf>.

¹¹⁷ See Travis et al., *supra* note 83, at 5.

¹¹⁸ See ROSS D. PARKE & K. ALISON CLARKE-STEWART, EFFECTS OF PARENTAL INCARCERATION ON YOUNG CHILDREN, 3–6 U.S. Dep't of Health and Human Servs. & The Urban Inst. (2001).

¹¹⁹ *Id.* at 4.

¹²⁰ *Id.* at 6.

¹²¹ Nat'l Alliance to End Homelessness, *supra* note 116.

¹²² *Id.*

vening to place children in foster care.¹²³ For example, a family crisis caused by the temporary absence of a parent in a single-parent household may be surmountable where CA disbursements are continued in order for a temporary caregiver to be able to use the funds to maintain stability in the children's lives.¹²⁴ When CA funds are terminated, however, such an option may be unavailable and may require removing the children from the home to placement in foster care.¹²⁵ Whether the issue is homelessness, foster care, or purely the stress and disruption of a volatile family situation, children and families suffer.¹²⁶

Statistics indicate that based on numbers alone, the societal benefits of family stability are abundantly clear. Aside from the pain, stress, and crisis that result when families are separated by the State, the costs of both foster care and of family homelessness are undeniably high. It is estimated that the cost of placing two children in foster care is approximately \$34,000 per year.¹²⁷ The annual cost to taxpayers to provide an emergency shelter bed to a person experiencing homelessness is estimated to be \$8,067 more than the cost of a Section 8 housing voucher, which averages about \$6,805 per year.¹²⁸ According to Common Ground, an organiza-

¹²³ See N.Y. FAM. CT. ACT § 1055 (West, Westlaw through 2009, ch. 1–14, 16–43 and 50–59).

¹²⁴ See, e.g., Barbara Vobejda & Judith Havemann, *Child-Only Cases Rise on Welfare Rolls; Parents Ineligible or Absent; A Policy Debate Is Reborn*, WASH. POST., Jan. 2, 1999, at A1 (discussing the reliance on family members to care for dependent children when parents are absent and how some states have begun programs that pay relatives to care for children); see also, e.g., Joy Rothke, *Justice for Criminals; Help for Women on the Wrong Side of the Law*, CHI. TRIB., Feb. 7, 1999, at 3 (discussing the difficulties of keeping families intact when a parent is incarcerated and how it is estimated that “grandmothers or other female relatives raise 60–65 percent of the children of incarcerated women [] [while] 30–35 percent end up in foster care”).

¹²⁵ See NAN P. ROMAN & PHYLLIS WOLFE, NAT'L ALLIANCE TO END HOMELESSNESS, WEB OF FAILURE: THE RELATIONSHIP BETWEEN FOSTER CARE AND HOMELESSNESS 29 (1995) (noting that of 112 respondents who lived in foster care, one-fifth were placed because of the incarceration of a parent); *Homeless Youth*, NCH FACT SHEET #13, (Nat'l Coalition for the Homeless), Aug. 2008, at 1–2 (explaining that “[s]ome youth may become homeless when their families suffer financial crises resulting from lack of affordable housing, limited employment opportunities, insufficient wages, no medical insurance, or inadequate welfare benefits . . . [and are separated from their families] by shelter, transitional housing, or child welfare policies.”).

¹²⁶ See Allard, *supra* note 90, at 13 (discussing the adverse effects—such as poor school performance, behavioral and mental health problems, drug use, teen pregnancy, and delinquency—that stressful family environments have on children).

¹²⁷ Nat'l Alliance to End Homelessness, *supra* note 116, at 23.

¹²⁸ *Id.* The New York City Housing Authority provides needy families with vouchers that pay part of the rent for eligible families by means of the Section 8 Housing Assistance program. N.Y.C. Housing Auth., *Guide To Section 8 Housing Assistance Program 1* (2008), <http://www.nyc.gov/html/nycha/downloads/pdf/070213N.pdf>; see also U.S.

tion in New York dedicated to the eradication of homelessness, “the cost to society of letting someone be homeless” can reach as high as \$41,000 per year.¹²⁹ This means that every time the State prevents a family from becoming homeless, the burden on the families involved—as well as that absorbed by taxpayers—is reduced. Cash Assistance and its pertaining temporary absence policy were designed in recognition of this reality.¹³⁰ Nonetheless, HRA’s improper refusal to include incarceration within the scope of eligible temporary absence situations has undermined the intended benefits of this explicit public policy objective.¹³¹ In addition, HRA’s policy weakens the statutory mandate that requires social service providers to provide assistance to and promote the unity of needy families.¹³²

C. *A Search for Support After Incarceration*

Aside from maintaining a secure household for the family, cash allowances for shelter, utilities, and fuel also help to ensure that the temporarily incarcerated individual has a safe and stable home to return to.¹³³ Often, people returning from short jail terms come to rely on public housing as their only means to avoid homelessness.¹³⁴ It is only logical, therefore, that the very same continuing needs assessment that is contemplated for other temporarily absent persons seeking assistance from HRA—including the need to maintain a home, secure employment, and support a family—applies equally to people who are temporarily incarcerated and

Housing Act of 1937, 42 U.S.C.A § 1437f(o) (West, Westlaw through P.L. 111-35 (excluding P.L. 111-31)).

¹²⁹ Vaccaro, *supra* note 115.

¹³⁰ See N.Y. SOC. SERV. LAW § 131-a (McKinney 2003); 26 N.Y. Reg. 15 (Apr. 28, 2004).

¹³¹ See 26 N.Y. Reg. 15 (Apr. 28, 2004) (stating that the temporary absence policy would reduce confusion, reduce administrative labor, and reduce costs for social services providers).

¹³² See N.Y. SOC. SERV. LAW § 131-a; 26 N.Y. Reg. 15 (Apr. 28, 2004) (“[S]ocial services officials *must*, in accordance with the regulations of [OTDA], provide public assistance to needy persons who are eligible therefore.” (emphasis added)); see also, e.g., *In re Chrystol B.*, 429 N.Y.S.2d 358, 361 (N.Y. Fam. Ct. 1980) (stating that it is the public policy to “preserve and reunite the family unit whenever possible”).

¹³³ James Austin, John Irwin & Patricia Hardyman, *Exploring the Needs and Risks of the Returning Prisoner Population* 8 URBAN INSTITUTE (2001), http://www.urban.org/uploadedpdf/410626_ReturningPrisonerPopulation.pdf (noting that residential instability and unemployment are closely related to crime rates and violence in persons returning from a period of incarceration).

¹³⁴ Caterina Gouvis Roman and Jeremy Travis, *Where Will I Sleep Tomorrow? Housing, Homelessness, and the Returning Prisoner*, 17 HOUSING POLICY DEBATE 389, 397 (2006).

who will soon return to their families.¹³⁵

Before moving on to analyze the myriad risks faced by those who return from periods of incarceration, it must be reiterated that the exclusion of incarceration from the definition of temporary absence applies regardless of whether the person is actually found guilty of a crime.¹³⁶ Moreover, it must not be forgotten that the majority of individuals who experience incarceration—whether they are actually sentenced or not—are released in less than two weeks.¹³⁷ Nevertheless, at least statistically, the sole fact that a person is incarcerated heightens that individual's risk of future encounters with the criminal justice system.¹³⁸ Absent a safe place to return with their families—a possibility amplified by HRA's current policy—persons returning from jail are more likely to utilize delinquent means to satisfy basic needs.¹³⁹

Rates of recidivism for formerly incarcerated individuals are already high.¹⁴⁰ However, these rates increase further when the individual is rendered homeless upon release from prison or jail because individuals experiencing homelessness or family crisis are more likely to be involved in criminal activity.¹⁴¹ This propensity is exacerbated still more because persons experiencing homelessness are more likely to be stigmatized as deviant or anti-social and,

¹³⁵ The needs assessment for all individuals and families is based on a case-by-case evaluation according to the particular needs at issue. See 26 N.Y. Reg. 15 (Apr. 28, 2004) ("Payments to public assistance recipients who are temporarily absent from the public assistance household are limited to the standard of need."); N.Y. Soc. SERV. LAW § 131-a(2) (establishing that the standard of monthly need depends on the size of the family); see also Nat'l District Attorneys Ass'n, *Policy Positions on Prisoner Reentry Issues* 2 (2005), http://www.ndaa.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf ("[People] reenter our communities in need of housing, medical and mental health treatment, employment, counseling and a variety of other services. Communities are often overwhelmed by these increased demands and, due to budget constraints, unable to provide minimum services to [people returning from jail or prison].").

¹³⁶ See PD No. 08-16-ELI, *supra* note 18.

¹³⁷ N.Y.C. Indep. Budget Office, *supra* note 29.

¹³⁸ A U.S. Department of Justice study showed that of nearly 300,000 prisoners discharged in 15 states, 67.5% were rearrested within three years of their release. PATRICK A. LANAN & DAVID J. LEVIN, *RECIDIVISM OF PRISONERS RELEASED IN 1994*, 1 (U.S. Dep't of Justice Bureau of Justice Statistics) (June 2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf>.

¹³⁹ Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59(2) *PSYCHIATRIC SERVS.* 170, 170–76 (Feb. 2008) (indicating the correlation between homelessness and involvement in criminal activity), <http://psychservices.psychiatryonline.org/cgi/reprint/59/2/170>; see also Roman & Travis, *supra* note 134, at 395.

¹⁴⁰ See LANAN & LEVIN, *supra* note 138.

¹⁴¹ Greenberg & Rosenheck, *supra* note 139; see also Roman & Travis, *supra* note 134, at 395.

therefore, more likely to resort to illegal activities as a means of survival.¹⁴²

In New York, approximately 40% of persons released to their communities return to jail within one year.¹⁴³ The abovementioned tendency of those experiencing homelessness to be involved in criminal activity is particularly relevant in the present context because recidivism rates are generally highest during the first weeks and months following the person's release.¹⁴⁴ Similarly, people who are released and do not have stable housing are more likely to return to prison than those who have a fixed housing arrangement.¹⁴⁵ It follows that when an individual has lost his or her housing during a period of incarceration—a plausible occurrence under the current interpretation of “temporary absence”—he or she may be more likely to commit another crime and to be reincarcerated.¹⁴⁶

Conversely, by inference, if a formerly incarcerated individual is able to return to a safe home, he or she may be less vulnerable and less likely to commit a crime during the crucial weeks and months following release.¹⁴⁷ Aside from the sociological consequences of criminal behavior by repeat offenders, recidivism carries with it a high economic cost for society as well. In fact, in monetary terms—based on a calculation of victimization, processing, and corrections costs in a Massachusetts study—it is estimated that the average expected cost for society to process a recidivating person is \$49,123.¹⁴⁸

¹⁴² DENNIS P. CULHANE & STEPHEN METRAUX, HOMELESS SHELTER USE AND REINCARCERATION FOLLOWING PRISON RELEASE: ASSESSING THE RISK 3 (Univ. of Pennsylvania 2002), http://povertyandhomelessness.wikispaces.com/file/view/dennis_culhane_prison_paper.pdf.

¹⁴³ N.Y.C. INDEP. BUDGET OFFICE, *supra* note 29.

¹⁴⁴ Amy L. Solomon et al., *Life After Lockup*, URBAN INST. 43 (2008), http://www.urban.org/UploadedPDF/411660_life_after_lockup.pdf.

¹⁴⁵ *Id.* at 19.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ This calculation is based on a statistical analysis of the average victimization, processing, and corrections costs in each of four categories of offenses: violent, property, drug, and public order. Processing costs are based on estimates in the costs of investigation, arrest, prosecution, court-related costs, as well as the average costs of labor for time spent by professionals working on the case. Though the true costs of victimization concededly cannot be determined, the study based such costs on economic literature that included medical expenses resulting from injury, productivity losses, and intangible costs associated with pain and suffering. The corrections cost is based on a mean sentence of 263 days across offenses and uses an average cost of \$78/day as reported by Hampden County, MA, where this unique and extensive study was carried out. Thus, the figure cited, \$49,123, represents the average total cost of

A policy that, in practice, makes it more difficult for families experiencing difficult financial situations to remain intact, that creates instability for vulnerable children, and that makes the re-entry process more difficult to overcome does not benefit New York families. Nor does such a policy further the objectives of the United States Congress in establishing Temporary Assistance for Needy Families (“TANF”) and the parallel objective of the New York State legislature in creating New York State Safety Net—programs that collectively fund Cash Assistance in New York.¹⁴⁹ The underlying goals of self-sufficiency and family cohesiveness remain unchanged when a household member is temporarily incarcerated.¹⁵⁰

A policy that departs from those goals undeniably results in a higher cost to taxpayers.¹⁵¹ The consequences of failing to efficaciously pursue these objectives, and the resultant disruption of family stability, manifest as economic and social problems that the City and State are forced to confront and resolve. In the face of such a reality, the benefits and real cost-savings of maintaining cohesive families by including incarceration within the scope of the temporary absence definition clearly outweigh the abovementioned costs that must otherwise be incurred by the City and State. It is with all of these considerations in mind that the temporary absence policy must include incarceration under the same standards that would be applied to any other situation that causes the temporary absence of the recipient.

III. STATISTICS, FACTS, AND NUMBERS: WHAT THE DATA SHOWS

A. *Incarceration Periods Are Generally Brief*

The majority of individuals who are incarcerated are detained for short periods of time. On a national level, according to the Urban Institute, jails have contact with as many people in three weeks

victimization, processing, and corrections for an offense irrespective of which “type of offense” is committed. John Roman & Aaron Chalfin, *Does It Pay to Invest in Reentry Programs for Jail Inmates?* 18 (2006), http://www.urban.org/projects/reentry-roundtable/upload/roman_chalfin.pdf.

¹⁴⁹ See *Family Independence Admin.*, N.Y.C. HUMAN RES. ADMIN., DEP’T OF SOCIAL SERVS., <http://www.nyc.gov/html/hra/html/programs/fia.shtml>; N.Y. SOC. SERV. LAW § 131(1) (McKinney 2003); 42 U.S.C. § 601(a) (2006) (stating that one of the four purposes of TANF is family cohesiveness by “encourag[ing] the formation and maintenance of two-parent families”); *About TANF*, Admin. for Children and Families, Office of Family Assistance, U.S. DEP’T OF HEALTH AND HUMAN SERVS., <http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (stating as the mission of the federal TANF program is “to help needy families achieve self-sufficiency”).

¹⁵⁰ See Travis et al., *supra* note 83.

¹⁵¹ See discussion *supra* Part II.B–C.

as prisons do over the course of an entire year.¹⁵² More than 80% of individuals incarcerated in jail are there for less than one month.¹⁵³ Only 13% are estimated to stay longer than two months, 7% longer than four months, and just 4% longer than six months.¹⁵⁴ According to the New York City Department of Correction, in 2008 the average daily jail population was 13,850 and there were a total of 107,516 admissions to correctional facilities.¹⁵⁵ The average length of stay for city-sentenced persons was 34.3 days while that for all detainees at Rikers Island was 49.4 days.¹⁵⁶ However, the median length of stay for all persons incarcerated in New York City in 2008 was just 7.74 days while that for those who served time after sentencing was an even shorter 7.70 days.¹⁵⁷

Statistics show that the inmate population at Rikers Island is an inherently temporary population. Of all admissions during 2007, 28% were released within 3 days, 47% within 7 days, 58% within 15 days, 70% within 30 days, 80% within 60 days, 85% within 90 days, and 92% within 180 days.¹⁵⁸ Over two-thirds of the population is released within one month while a noteworthy 92% of the individuals whose benefits would be revoked due to their incarceration under the current policy actually fall within the six-month threshold period that is deemed permissible for other “good causes” to excuse a “temporary absence.”¹⁵⁹

Situations where persons remain incarcerated but not convicted of any crimes illustrate perhaps the strongest case for including incarceration within the definition of “temporary absence.”¹⁶⁰ Such circumstances arise when a recipient has been arrested and

¹⁵² Solomon et al., *supra* note 144, at xv.

¹⁵³ *See id.* at 5–6.

¹⁵⁴ *Id.*

¹⁵⁵ City of N.Y. Dep’t of Corr., *supra* note 66.

¹⁵⁶ *Id.*

¹⁵⁷ N.Y.C. INDEP. BUDGET OFFICE, *supra* note 29.

¹⁵⁸ Martin F. Horn, Comm’r of N.Y.C. Dep’t of Corr. & Prob., PowerPoint presentation given at the Mayors’ Summit on Reentry & Employment (Feb. 28, 2008) (handout on file with author).

¹⁵⁹ *Id.*; N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a)(2) (2007).

¹⁶⁰ The case presented by this class of individuals who have not been convicted of a crime is also strengthened in light of the limitations enumerated in § 131(12) and § 131(14) of the New York Social Services Law. Subsection 12 of the statute withholds public assistance to those who have been convicted in federal or state court for making a fraudulent statement or representation in order to obtain public assistance, medical assistance, or food stamps. N.Y. SOC. SERV. LAW § 131(12) (McKinney 2003). Subsection 14 prohibits those who are “fleeing to avoid prosecution or custody or conviction” or those who have violated a condition of their parole. § 131(14)(a)(i), (ii). Those who are merely incarcerated, without more, would not fall within these statutory restrictions.

remains detained in jail—due to an inability to post bail—while awaiting trial or pre-trial motions.¹⁶¹ In essence, many such inmates remain confined simply because of their indigence alone.¹⁶²

In fact, the *majority* of those detained at Rikers Island have not yet been convicted of any crime.¹⁶³ At any given time approximately 80% of detainees at the Rikers Island jail have been neither convicted nor sentenced, but nonetheless can have the CA benefits that their families rely on cut under the current policy.¹⁶⁴ With that in mind, it is important to remember that our criminal justice system is grounded by a fundamental concept that presumes each accused individual to be innocent until proven guilty.¹⁶⁵ HRA's policy does not adhere to that fundamental tenet. Not only can those who have not been convicted of any crime be punished, but the policy goes a step further by effectively punishing innocent family members by forcing them to bear the burdens imposed on them by the hasty punitive measures that the erroneous interpretation demands. Under HRA's current policy, the presumption of innocence is simply ignored despite the drastic consequences that such a premature condemnation has for families.

Given that such a large percentage of people in jail remain confined prior to any judicial determination of guilt—and in recognition of the documented brevity of the average stay—there is much evidence to support the contention that such absences fall squarely within the definition of “temporary.”

People in jail generally intend to return to their homes,¹⁶⁶ are

¹⁶¹ See Wynn, *supra* note 68. At least one court has recognized the inherent discrimination in forcing arrestees to choose between payment of a fine or incarceration. In a California case, holding that incarceration did constitute “good cause” for employment absence, the court said that “[c]ompulsion to serve a sentence which is imposed only in lieu of the primary penalty, a fine, which cannot be paid because of the indigence of the defendant constitutes invidious discrimination in violation of the equal protection clause of the Fourteenth Amendment.” *Kaylor v. Dep’t of Human Res.*, 108 Cal. Rptr. 267, 269 (Cal. Ct. App. 1974).

¹⁶² See JENNIFER WYNN, *INSIDE RIKERS: STORIES FROM THE WORLD’S LARGEST PENAL COLONY* 6 (2001) (“They are detained because they cannot afford bail. Illustrating their poverty, one-quarter of Rikers inmates face bails of \$500 or less. ‘Unlike white, employed, middle-class persons, who are perceived as being reputable and thus are generally released on their own recognizance or are able to make bail . . . [those perceived as] disreputable persons are detained.’”).

¹⁶³ See Wynn, *supra* note 68.

¹⁶⁴ Trymaine Lee, *To Help Rikers, City Wants More Prisoners in Brooklyn*, N.Y. TIMES, Apr. 3, 2007, at B3.

¹⁶⁵ *Coffin v. United States*, 156 U.S. 432, 456–60 (1895) (illustrating that the presumption of innocence is deeply rooted in the foundation of American criminal law).

¹⁶⁶ It should be noted that some states simply presume that an incarcerated person intends to return to the place where he was residing before he was incarcerated. For

“prevented from doing so because of good cause”¹⁶⁷ and “do[] not evidence intent to establish residence elsewhere.”¹⁶⁸ It is of notable importance that, in New York, according to the Court of Appeals, “a patient or inmate of an institution does not gain or lose a residence or domicile, but retains the domicile he had when he entered the institution.”¹⁶⁹ Even the New York State Constitution provides that a person’s legal residence should not be altered while she is incarcerated.¹⁷⁰ As HRA continues to improperly limit the

example, in Maine—which along with Vermont is one of only two states that permits voting for incarcerated persons—an incarcerated person is permitted to elect as his residence any jurisdiction where he resided prior to being incarcerated. ME. REV. STAT. ANN. tit. 21-A, § 112(14) (West, Westlaw through ch. 651 of the 2009 1st Reg. Sess. of the 124th Legis.); VT. STAT. ANN. tit. 17, § 2122(a) (West, Westlaw through No. 82 of Adjourned Sess. of 2009-2010 sess.) (“A person shall not gain or lose a residence solely by reason of presence or absence . . . while confined in a prison or correctional institution.”); CAL. ELEC. CODE § 2025 (West, Westlaw through 2009 Reg. Sess. laws) (“A person does not gain or lose a domicile solely by reason of his or her presence or absence from a place . . . while kept in an almshouse, asylum or prison.”); cf. Jack Maskell, *Congressional Candidacy, Incarceration, and the Constitution’s Inhabitancy Qualification* 11 (2002), http://lugar.senate.gov/services/pdf_crs/congress/Congressional_Candidacy_Incarceration_and_the_Constitutions_Inhabitancy_Qualification.pdf (discussing the inhabitancy requirement to seek office in the House of Representatives):

However, absence from the State—particularly involuntary absence, such as if one had been injured and hospitalized out of State, or had been involuntarily removed from the State to another State, would not appear, in itself, to be the *only* consideration or even the determinant factor in judging “inhabitancy” in that State from which elected. The involuntary nature of the relocation to another State would, in fact, significantly militate against a finding that such person intended to abandon his inhabitancy and residency in the first State.

Id. Of paramount importance is that a person does not generally *intend* to establish residence in prison or jail. Even in New York, under § 349.4 of the NYCRR, it is presumptively inferable that a person’s residence prior to incarceration remains that person’s residence while he is incarcerated. N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a) (stating, *inter alia*, that a person’s absence is considered a “temporary absence” as long as he “does not evidence intent to establish residence elsewhere”). It was PD No. 08-16-ELI that shifted the burden to the person who is temporarily absent and changed that presumption. PD No. 08-16-ELI, *supra* note 18 (changing the intent element by requiring a person who is absent to “establish[] the intent to *return* to the household” (emphasis added)).

¹⁶⁷ See N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a)(2).

¹⁶⁸ See N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a)(ii). Notably, in the context of medical assistance, for which the same temporary absence statute governs, even when a person left the country for six months and where facts were uncertain about whether she intended to return to New York, it was held that there was insufficient evidence to demonstrate that the trip was “anything other than a temporary visit.” *Hutchings v. Brezenoff*, 467 N.Y.S.2d 382, 385 (App. Div. 1983).

¹⁶⁹ *Corr v. Westchester Cnty. Dep’t of Soc. Servs.*, 305 N.E.2d 485, 485 (N.Y. 1973).

¹⁷⁰ N.Y. CONST. art. II, § 4 (“[N]o person shall be deemed to have gained or lost a residence, by reason of his presence or absence . . . while confined to any public prison.”).

state regulation, both the individuals and their families are adversely affected when a household member is temporarily incarcerated.¹⁷¹ This remains true even in cases where the person is acquitted of the crime charged or when those charges are subsequently dropped.¹⁷²

Since the overwhelming majority of persons incarcerated at Rikers Island fall precisely within the guidelines of what constitutes a “temporary absence,” the regulations should be interpreted accordingly.¹⁷³ Such a regulatory construction is the appropriate and necessary way for HRA to facilitate stability in the lives of at-risk individuals as well as their dependent families.

B. A Disproportionate Risk for Poor People of Color

The influence of race, class, and gender on arrest and incarceration cannot be ignored. People of color are disproportionately affected by this country’s increase in incarceration rates.¹⁷⁴ Data from the U.S. Bureau of Justice Statistics illustrate that in 2000 nearly ten percent of young black men were incarcerated, compared to slightly more than one percent of whites in the same age cohort.¹⁷⁵ A study by the Sentencing Project, a national organization that promotes prison reform and alternatives to incarceration,¹⁷⁶ found that “a black boy born in 2001 stood a 32 percent chance of being imprisoned at some point in his life, compared to

¹⁷¹ See discussion *supra* Part II.

¹⁷² See PD No. 08-16-ELI, *supra* note 18. Although PD No. 08-16-ELI does not address the issues of acquittal or the dropping of charges, the policy directive does not contemplate the possibility of either of these outcomes. Because the policy directive reduces benefits based on incarceration and not conviction, it is at least plausible that benefits will be denied even when the person is released without ever being convicted of a crime. See Wynn, *supra* note 68.

¹⁷³ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a); PD No. 08-16-ELI, *supra* note 18.

¹⁷⁴ See MARC MAUER, *THE RACE TO INCARCERATE* 139 (1999) (“African Americans, therefore, have a seven times greater chance of being incarcerated than do whites.”); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 AM. SOC. REV. 151, 152–53 (2004) (discussing data that suggest that “blacks are punitively policed, prosecuted, and sentenced”). Pettit and Western also provide a detailed analysis, using data from 1974 to 1999, to demonstrate that the incarceration rate of black males is approximately ten times that of white males. *Id.* at 156–58; William J. Sabol, Heather C. West & Matthew Cooper, *Bureau of Justice Statistics, Prisoners in 2008* 8, tbl.8 (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf> (demonstrating an average annual increase of 2.5% in the U.S. prison and jail population).

¹⁷⁵ Sabol, West & Cooper, *supra* note 174, at 2 (stating that “[b]lack males were incarcerated at a rate six and a half times higher than white males” in 2008).

¹⁷⁶ *About Us*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=2> (last visited December 12, 2010).

a 17 percent chance for a Hispanic boy and a 6 percent chance for a white boy.¹⁷⁷ Data also suggest that the higher incarceration rates of people of color are accounted for substantially by the higher rates of arrest that are experienced by those populations.¹⁷⁸

Discussing misdemeanor policing in New York City, Professor Babe Howell surmises that “it seems reasonable to assume that the hundreds of thousands of arrests made during the past six years under an aggressive misdemeanor policing strategy have had a disproportionate impact on communities of color in New York City.”¹⁷⁹ Such an assertion is only supported further by earlier data, which demonstrate that people of color are significantly more likely to receive jail sentences for property offenses and misdemeanors than are their white counterparts.¹⁸⁰ The data simply make clear that minorities in New York City are more likely to have encounters with law enforcement. Thus, it is axiomatic that the temporary absence policy—whose very function is triggered by contact with the criminal justice system—has a disproportionate effect on minorities and should not be permitted as a means to refuse necessary benefits to families.

People of color are more likely to be stopped by police while

¹⁷⁷ MAUER, *supra* note 174, at 137.

¹⁷⁸ *Id.* at 160 (noting that while African Americans constitute 13 percent of the U.S. population, they accounted for 32 percent of arrests for drug possession in 2000); see Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. COLO. L. REV. 743, 746, 759 (1993) (noting the results of a previous study, in 1979, indicated that “eighty percent of the disproportionality in prison was explained just by the differential involvement in arrest,” and concluding that after a 1991 study the ratio of arrest rates of blacks to whites ranges “between five and ten to one”); Robert D. Crutchfield, George S. Bridges & Susan R. Pritchard, *Analytical and Aggregation Biases in Analyses of Imprisonment: Reconciling Discrepancies in Studies of Racial Disparity*, 31 J. RES. CRIM. & DELINQ. 166, 179 (1994) (discussing how disproportionate rates of incarceration are explained by disproportionate arrest rates of African Americans); see also, *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, 111th Cong. 3 (Oct. 29, 2009) (testimony of Marc Mauer, Executive Director of The Sentencing Project) (“[W]hile greater involvement in some crimes is related to higher rates of incarceration for African Americans, the weight of the evidence to date suggests that a significant proportion of the disparities we currently observe is not a function of disproportionate criminal behavior.”).

¹⁷⁹ Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 291 (2009) (citing data showing that approximately 86% of persons arrested for misdemeanors in New York City are nonwhite).

¹⁸⁰ James F. Nelson, *N.Y. State Division of Criminal Justice Services, Disparities in Processing Felony Arrests in New York State, 1990–1992* viii–xii (1995); see MAUER, *supra* note 174, at 153 (discussing how among persons with no prior record of being arrested for a felony, whites are more likely than blacks or Hispanics to have the charges reduced to misdemeanors or infractions).

driving¹⁸¹ and are more likely to be stopped under “stop-and-frisk” policies of the New York City Police Department.¹⁸² In 2009, of 575,000 New Yorkers who were stopped by the police, only 53,000 were white.¹⁸³ The New York Times reported that “Blacks and Latinos were nine times as likely as whites to be stopped by the police in New York City in 2009, but, once stopped, were no more likely to be arrested.”¹⁸⁴ The statistics, however, are no better for those who are actually arrested.

According to one study completed in 2003, black males are 2.3 times and Hispanic males 1.3 times more likely to be arrested for misdemeanor marijuana crimes in Manhattan than their white counterparts.¹⁸⁵ Similarly, black males were found to be 2.66 times more likely and Hispanic males 1.85 times more likely than white males to be detained following an arrest but before they are arraigned.¹⁸⁶ The study emphasized that the heightened likelihood of arrest and detention has a “substantial and disproportionate impact on black and Hispanic communities.”¹⁸⁷ Where blacks make up 23% and Hispanics just 25% of the population but account for 84% of arrests in New York City, policymakers, in crafting a given policy, must consider how such disparities could have a similar disparate impact on these same marginalized communities of color.¹⁸⁸

¹⁸¹ MAUER, *supra* note 174, at 141–42 (“Although African Americans and Hispanics represented only five percent of drivers on the country’s highways [in the late 1980s], more than 70 percent of all drivers stopped were either African American or Hispanic . . . and represented 80 percent of the cars that were searched following a stop.”).

¹⁸² Expert Report of Jeffrey Fagan at 4, *Floyd v. City of New York*, 08 Civ. 01034 (SAS) (S.D.N.Y. filed Apr. 16, 2008), http://ccrjustice.org/files/Expert_Report_JeffreyFagan.pdf; Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the NYPD’s Stop-And-Frisk Policy in the Context of Claims of Racial Bias*, 19 *COLOMBIA PUBLIC LAW RESEARCH PAPER* NO. 05-95, 10 (June 16, 2006), <http://www.stat.columbia.edu/~gelman/research/unpublished/frisk7.pdf> (discussing the data showing that blacks and Hispanics are “stopped” more often than whites by police); *see also* DAVID COLE, *NO EQUAL JUSTICE* 43–45 (The New Press 1999) (discussing how “stop-and-frisk” policies have been held constitutional based on the “reasonable suspicion that police officers have to stop people in “high-crime areas,” which tend to be low-income and heavily populated by blacks and Hispanics).

¹⁸³ Al Baker, *City Minorities More Likely to Be Frisked*, *N.Y. TIMES*, May 13, 2010, at A1.

¹⁸⁴ *Id.*

¹⁸⁵ Andrew Golub, Bruce D. Johnson & Eloise Dunlap, *The Race/Ethnicity Disparity in Misdemeanor Marijuana Arrests in New York City*, 6(1) *CRIMINOLOGY & PUBLIC POLICY* 131, 145–47 (2007) (presenting data to illustrate the disproportionate rates of arrests and detention of individuals based on race), *available at* <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=2561263&blobtype=pdf>.

¹⁸⁶ *Id.* at 147, 148 tbl.2.

¹⁸⁷ *Id.* at 155.

¹⁸⁸ *Id.* at 145–46. At the state level, the situation is only worse. According to yet another study, blacks represent only 17.4% of the population in New York State but

Although it is difficult to ascertain data that demonstrate arrest and incarceration rate distributions by class or income level, the intersection between race and class is an instructive guidepost. As stated by Marc Mauer, founder and executive director of The Sentencing Project, “when we speak about race and the criminal justice system, we are often in fact also talking about class.”¹⁸⁹ Because of the ongoing presence of housing segregation, communities of color are more likely to be isolated from centers of employment and more likely to contain pockets of extreme poverty.¹⁹⁰ According to a 1997 survey conducted by the Justice Department, “68 percent of prisoners had not completed high school, 53 percent earned less than \$1,000 in the month prior to their incarceration, and nearly one half were either unemployed or working only part-time prior to their arrest.”¹⁹¹ Not surprisingly, individuals with limited resources face still more obstacles when trying to navigate the criminal justice system.¹⁹² Aside from the inability to make bail, low-income defendants are often plagued by an inability to afford adequate legal defense to advocate on their behalf.¹⁹³

These statistics make it clear that “willful acts” are not the sole indicator to explain the likelihood that a given person will be arrested and detained. In a society where males, especially males of color, are more likely to be arrested and incarcerated while women are more likely to be forced to bear burdens at home, the effect that the temporary absence policy has on families cannot be evaluated without careful consideration of the influence of race, class and gender.¹⁹⁴ The affected populations are disproportionately scourged by poverty and unjustifiably targeted by a broken crimi-

account for 51.4 % of drug arrests. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL’Y REV. 257, 286 (2009).

¹⁸⁹ MAUER, *supra* note 174, at 177.

¹⁹⁰ *Id.* at 184.

¹⁹¹ *Id.* at 178.

¹⁹² *See, e.g.,* Smyth, *supra* note 83, at 43. (“More than 80 percent of those charged with crimes are too poor to afford an attorney.”).

¹⁹³ *Racial Disparities in the Criminal Justice System: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security*, *supra* note 178, at 4–5 (discussing the disadvantages faced by low-income people including inadequate financial resources, treatment, and legal representation throughout the guilt and sentencing phases of the criminal justice process).

¹⁹⁴ MAUER, *supra* note 174, at 202 (“[A]s of 2003, nearly 8 percent, or one in thirteen, of all black males were incarcerated in a prison or jail on any given day.”); *see* THE SENTENCING PROJECT, *supra* note 108 (explaining the adverse effects of losing welfare benefits and the burdens often shouldered by women and children); *see also* discussion *supra* Part II.A, B.

nal justice system. Policymakers, like those charged with the drafting and enforcement of the temporary absence policy, must remain attuned to the causes and effects of such disparities in order to remain faithful to the statutory mandate to provide for the neediest and most at-risk populations of New York.¹⁹⁵

Not only are poor people of color more likely to be arrested, they are, not surprisingly, more likely to be in need of programs like food stamps and CA.¹⁹⁶ It follows that they are less likely to be able to post bail. Ultimately, the practical effect of disproportionate arrest rates for males on the street coupled with the disproportionate representation of poor families of women and children left at home demonstrates that HRA's temporary absence policy strikes at the heart of New York's most vulnerable populations.

IV. OTHER PROGRAMS AND OTHER JURISDICTIONS

A. *Following the Lead of Other Programs*

Other public benefit programs have been willing to acknowledge the need to address this uniquely vulnerable population and take into consideration the impact on dependent families. For example, Medicaid policy was recently changed to allow individuals who are incarcerated to suspend, rather than close, their Medicaid status and then reactivate it upon release.¹⁹⁷ Generally, in other situations, where the legislature has intended to exclude incarcerated persons from eligibility, it has said so explicitly. For instance, the Social Services Law and its pertaining regulations provide that if the Agency has "reliable information" that the recipient has been "admitted or committed to an institution or prison," he or she becomes ineligible for benefits as a member of the household.¹⁹⁸ Similarly, both federal and state Food Stamps regulations exclude residents of institutions that provide more than half of their meals.¹⁹⁹ Here, however neither the statute nor the state regulation addresses or even suggests that there was an intention to exclude incarceration from the broadly constructed definition of tempo-

¹⁹⁵ 26 N.Y. Reg. 14 (Apr. 28, 2004) ("[S]ocial services officials *must*, in accordance with the regulations of [OTDA], provide public assistance to needy persons who are eligible therefore." (emphasis added)).

¹⁹⁶ See HRA Facts Quarterly, *supra* note 4.

¹⁹⁷ Administrative Directive No. 08 OHIP/ADM-3, State of N.Y. Dep't of Health (Apr. 21, 2008).

¹⁹⁸ N.Y. COMP. CODES R. & REGS. tit. 18, § 358-3.3(d)(1)(iv) (2007); tit. 18, § 387.14(a)(5)(iii)(f) [Food Stamps]; see also 7 C.F.R. § 273.1(b)(7)(vi) (West, Westlaw through June 12, 2009) [Food Stamps only].

¹⁹⁹ 7 C.F.R. 273.1(b)(7)(vi); tit. 18, § 387.14(a)(5)(iii)(f).

rary absence.²⁰⁰

With this in mind, Federal Social Security Administration regulations governing the provision of benefits are particularly instructive. Section 404.468 of the Code of Federal Regulations stipulates that no monthly benefits will be paid to individuals who are “confined in jail, prison, or another kind of penal institution or correctional facility for conviction of a felony.”²⁰¹ However, the regulation clarifies that the exemption from receiving benefits “applies only to the prisoner; benefit payments to any other person who is entitled on the basis of the prisoner’s wages and self-employment income are payable as though the prisoner were receiving benefits.”²⁰² Likewise, where families rely on CA benefits for rent and utilities, it is consistent and reasonable that such funds similarly be “payable as though the prisoner were receiving benefits” in order to support families and further the stated objectives of Cash Assistance to help New York’s needy families.²⁰³ It should be further noted that, consistent with § 402(x) of the Social Security Act, the termination of benefits to incarcerated persons applies only to those who have actually been *convicted* of a felony, a limitation that has not been followed by HRA as regards temporary absence.²⁰⁴

Further guidance regarding the manner in which incarceration should be interpreted within the context of public benefits can be seen in the language of fair hearing decisions issued by OTDA. For instance, it has been held that “each case of this kind must be evaluated on a case by case basis” in order for recipients to be provided an “ongoing grant of [Cash] Assistance benefits in accordance with [their] verified degree of need.”²⁰⁵ Although some fair hearing decisions have maintained that Cash Assistance, Medi-

²⁰⁰ See N.Y. SOC. SERV. LAW § 131 (McKinney 2003); N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a).

²⁰¹ 20 C.F.R. § 404.468 (West, Westlaw through June 12, 2009).

²⁰² *Id.*; cf. *Zipkin v. Heckler*, 790 F.2d 16, 19 n.2 (2d Cir. 1986) (noting that the court’s decision to uphold the termination of retirement benefits to an incarcerated person should not be construed to affect the benefits of dependents of incarcerated persons).

²⁰³ See N.Y.C. HUMAN RES. ADMIN., *supra* note 37; see also 42 U.S.C. § 601(a) (2006); U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 5. Cf. H.R. REP. NO. 98-47 (1983) (Conf. Rep.), reprinted in 1983 U.S.C.C.A.N. 404, 448 (explaining that with respect to social security benefits, the congressional intent of an amendment “would eliminate all benefits to felons during their period of incarceration . . . Benefits of dependents and survivors of incarcerated felons would not be affected.”).

²⁰⁴ 42 U.S.C. § 402(x) (2006). Compare PD No. 08-16-ELI, *supra* note 18 (authorizing the termination of cash assistance when a recipient is incarcerated regardless whether such person has yet been convicted of any crime).

²⁰⁵ *In re Appeal of B.J.*, F.H. No. 2037464H, at 3 (Office of Temp. and Disability Assistance Oct. 12, 1993) (fair hearing).

cal Assistance, and Food Stamps may be discontinued upon incarceration, it has been established that those benefits must be restored without a new application if incarceration lasts 30 days or less and the individual remains in need.²⁰⁶

HRA's exclusion of incarceration from the definition of temporary absence is also inconsistent with judicial interpretation of "good cause." Notably, incarceration has been held sufficient to establish "good cause" for failure to appear at fair hearings concerning the provision of Cash Assistance in New York.²⁰⁷ Decisions in fair hearings have held that "good cause" includes "circumstances beyond the individual's control, such as but not limited to, illness of the member, illness of another household member . . . a household emergency, or the lack of adequate child care"²⁰⁸

Where a recipient claims "good cause," he or she is responsible for notifying the Agency to support that claim, and the Agency must then review the information provided to determine whether the evidence substantiates such a finding.²⁰⁹ In *Appeal of Anonymous*, the administrative law judge ("ALJ") found that the appellant's incarceration constituted "good cause" for absence because it was an "unrelated event" and, therefore, did not justify revocation of Cash Assistance benefits.²¹⁰ Similarly, where an appellant failed to attend a scheduled fair hearing because he was incarcerated and did not receive the letter advising him of the hearing, the ALJ in *Appeal of CM* excused the absence from a fair hearing because it was held that the incarceration was sufficient to satisfy the "good cause" standard.²¹¹

Consistent with statutory and regulatory mandates, courts have held that before Cash Assistance benefits can be terminated for failure to comply with a work requirement, the non-compliance must be found to be willful.²¹² Though incarceration may arguably

²⁰⁶ *In re Appeal of C.H.*, F.H. No. 2996554H, at 4 (Office of Temp. and Disability Assistance Oct. 18, 1998) (fair hearing).

²⁰⁷ *In re Appeal of C.M.*, F.H. No. 4286162Z, at 9 (Office of Temp. and Disability Assistance Feb. 23, 2005) (fair hearing); *In re Appeal of [Appellant]*, F.H. No. 3307248R, at 11–12 (Office of Temp. and Disability Assistance Mar. 29, 2000) (fair hearing).

²⁰⁸ *In re Appeal of Anonymous*, F.H. No. 3563886Y, at 3 (Office of Temp. and Disability Assistance July 18, 2001) (fair hearing).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 4.

²¹¹ *In re Appeal of C.M.*, F.H. No. 4286162Z, at 9.

²¹² N.Y. SOC. SERV. LAW § 131 (McKinney 2003); N.Y. COMP. CODES R. & REGS. tit. 18, § 351.22(e) (2007); *see, e.g.*, *McKillen v. Perales*, 519 N.Y.S.2d 59, 60 (App. Div. 1987) (holding that the failure of Social Services to show that the appellant's failure to comply with work rules was willful rendered the termination of public assistance

result as a consequence of willful acts, such acts are generally “unrelated events” and therefore, as such, cannot be said to constitute willful non-compliance with requirements that are directly related to participation in the Cash Assistance program.²¹³ Nevertheless, this Comment’s previous discussion of race, class, and gender demonstrates poignantly that the circumstances leading to arrest and incarceration entail much more than the deliberate acts of an individual. The scope of what constitutes “good cause” must also take such considerations into account.

B. Other Jurisdictions

Other states have been explicit in their inclusion of incarceration within the definition of “temporary absence.” For example, in Nebraska, incarceration is “good cause” for failing to report changes in income within ten days.²¹⁴ Nebraska regulations also include incarceration in the definition of “temporary absence” by allowing an incarcerated parent, caretaker, or guardian to continue to be the payee for up to three months for allowances that ultimately benefit a dependent child.²¹⁵ In Oklahoma, the regulations governing household composition for income consideration expressly include incarceration as an example of “temporary absence.”²¹⁶

In Maine²¹⁷ and Illinois,²¹⁸ incarceration is considered “good cause” for failure to comply with the requirements necessary to participate in the TANF program—such as attendance at mandatory meetings. Similarly, incarceration is considered *per se* “good cause” to justify failures to comply with participation requirements or absences in Alaska,²¹⁹ Arizona,²²⁰ and Maryland.²²¹ Under the Wisconsin Administrative Code, incarceration has been

benefits improper); *Allen v. Blum*, 447 N.E. 2d 68, 68 (N.Y. 1983) (reiterating that willfulness is an element of ineligibility for public assistance, thus, termination of benefits for failure to report to work obligations is permissible only if such failure to report was willful).

²¹³ *In re Appeal of Anonymous*, F.H. No. 3563886Y, at 4.

²¹⁴ 468 NEB. ADMIN. CODE § 015.02B (West, Westlaw through Mar. 31, 2009).

²¹⁵ *Id.* § 006.01D1.

²¹⁶ OKLA. ADMIN. CODE § 340:40-7-6(c)(B) (West, Westlaw through May 1, 2009).

²¹⁷ 10-144 ME. Code R. § CH. 607(4) (West, Westlaw through Feb. 2009).

²¹⁸ ILL. ADMIN. CODE tit. 89, § 112.80(a)(2) (West, Westlaw through Feb. 2009).

²¹⁹ ALASKA ADMIN. CODE tit. 7, § 45.261(a)(6) (West, Westlaw through Apr. Reg. 189).

²²⁰ ARIZ. ADMIN. CODE § R6-12-1306(B)(3) (West, Westlaw through Sept. 30, 2008); *see also* *John C. v. Sargeant ex rel. County of Maricopa*, 90 P.3d 781, 784–85 (Ariz. Ct. App. 2004) (holding that incarceration can constitute good cause for failure to appear at a hearing to determine the termination of parental rights); *State v. Bail Bonds*

held to satisfy “good cause” in the context of a failure to appear at a fair hearing.²²²

Incarceration has also been held as “good cause” for purposes of other judicial and administrative proceedings in jurisdictions throughout the United States. For example, in California, although incarceration does not constitute *per se* “good cause” in the context of California Unemployment Insurance (“CUI”), a recipient of CUI is entitled to have the determination of good cause reheard in cases where that determination is made prior to any conviction of the crime that led to the incarceration.²²³ Likewise, in Florida, it was held that an employee’s 26-day absence from his employment due to incarceration was sufficient to satisfy the “good cause” standard.²²⁴ Courts in Indiana,²²⁵ Louisiana,²²⁶ and Nevada²²⁷ have similarly each recognized incarceration as “good cause” for employment absence.

Even in cases where incarceration has been held not to constitute good cause, courts have intimated that an exception would exist under circumstances where the detention was found to be unlawful or where the charges against the detainee were subsequently dropped. For example, in a recent case in Minnesota, the court said that incarceration “may provide good cause” depending on the circumstances of the case.²²⁸ Pennsylvania, too, has adhered to a case-by-case analysis to determine whether a person’s incarcera-

USA, 224 P.3d 210, 214 (Ariz. Ct. App. 2010) (holding that the defendant’s continued detention by the Customs Enforcement Agency constitutes good cause).

²²¹ MD. CODE REGS. 07.03.16.08(D)(8) (West, Westlaw through June 5, 2009).

²²² *Matousek v. Sears Roebuck & Co.*, ERD Case No. CR200302571 (Aug. 20, 2004) (“Obviously, the complainant’s inability to attend the hearing given his involuntary confinement would satisfy this good cause standard.”); *see* WIS. ADMIN. CODE DWD § 218.18(4) (West, Westlaw through Apr. 15, 2010).

²²³ *See* CAL. UNEMP. INS. CODE § 1256.1(b) (West, Westlaw through 2009) (providing specifically that “good cause” for employment absence may be satisfied where the individual is not convicted of the offense).

²²⁴ *Parker v. Dep’t of Labor & Emp’t Sec.*, 440 So. 2d 438, 439 (Fla. Dist. Ct. App. 1983); *see* FLA. STAT. § 443.101(1)(a) (West, Westlaw through 2010).

²²⁵ *Holmes v. Review Bd. of Indiana Emp’t Sec. Div.*, 451 N.E.2d 83, 88 (Ind. Ct. App. 1983) (holding that pre-trial incarceration constitutes “good cause” for employment absence and, therefore, unemployment benefits cannot be denied on such grounds); *see* IND. CODE § 22-4-15-1(d)(3) (current as of 2010).

²²⁶ *Schoennagel v. Louisiana Office of Emp’t Sec.*, 413 So. 2d 652, 654–55 (La. 1982) (holding that by being incarcerated the employee did not “voluntarily” leave his employment and, therefore, had good cause for his absence and could not be disqualified from receiving benefits).

²²⁷ *State, Emp’t Sec. Dep’t v. Evans*, 901 P.2d 156, 156–57 (Nev. 1995) (explaining that where an employee could not afford to post bail, her “absence [from work] was neither deliberate nor voluntary”).

²²⁸ *See* *Petracek v. Univ. of Minnesota*, 780 N.W.2d 927, 930 (Minn. Ct. App. 2010).

tion can constitute good cause.²²⁹

The practice at the New York City Human Resources Administration departs from each of the various systems in place in other states around the country. HRA has decided to implement its discriminatory policy notwithstanding the heightened financial burden it imposes on a tight City budget and on everyday New Yorkers struggling through the current financial crisis. Furthermore, the exclusion of incarceration from the temporary absence policy has been imposed despite readily available data from the City of New York Department of Correction and HRA's own reports that those who will be affected are New York most susceptible populations of poor individuals and families of color.²³⁰

Based on the often transient and temporary nature of incarceration periods that nonetheless render Cash Assistance recipients at risk of benefit termination under the current policy, and consistent with findings in other jurisdictions, incarceration should be considered "good cause" that falls within the definition of "temporary absence" under § 349.4 of the NYCRR.

V. A REMEDY TO PROMOTE SECURITY AND SELF-SUFFICIENCY

The remedy for this disconnect between the temporary absence policy as it is written in the state regulations and the resultant effects of its improper application by HRA in practice is neither complex nor controversial. Simply put, incarceration should be treated no differently than any other type of circumstance that falls within the scope of "temporary absence." Rather than create a special standard for how incarceration should be interpreted within the context of Cash Assistance, HRA should use the same criteria as those used to make temporary absence determinations for other situations. As previously stated, under the general temporary absence standard, the grant of Cash Assistance may be continued as long as the participant is "reasonably expected"²³¹ to return to the home based on evidence that he or she "(i) does not leave the United States; (ii) does not evidence intent to establish residence elsewhere; and (iii) complies with [§ 349.4] and other provisions of [Title 18 of the NYCRR]."²³²

²²⁹ Thomas v. Unemployment Compensation Bd. of Review, 543 A.2d 600, 602 (Pa. 1988) (restating a previous holding that while incarceration is not *per se* "good cause," it may constitute good cause where constitutional rights are implicated).

²³⁰ See City of N.Y. Dep't of Corr., *supra* note 66; HRA FACTS QUARTERLY, *supra* note 4.

²³¹ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a) (2007).

²³² *Id.*

By restoring the definition of temporary absence to include incarceration, families will be able to retain the funds necessary for mandatory monthly household expenses, such as rent, that would otherwise be reduced when the household's Cash Assistance entitlement is rebudgeted to include one less person.²³³ As previously mentioned, other situations of temporary absences by the recipient allow for the continued disbursement of payments for up to 180 days, contingent on a review by a caseworker after 45 days to determine that the absence is indeed temporary and that the individual intends to return to the household.²³⁴ Likewise, standards for the continuance of benefits despite a temporary absence have remained flexible when the recipient is able to show "good cause"²³⁵ or when it is "essential to retain housing and maintain the home."²³⁶

It was also noted above that incarceration establishes "good cause" for non-compliance with many agency requirements such as the requirement to work.²³⁷ HRA already demonstrates a willingness to remain flexible in light of exceptional circumstances, as evidenced by the current practice that allows over 50% of recipients to continue receiving CA for circumstances like residential treatment for substance abuse, a child's placement in foster care, or admission to a medical facility, among others.²³⁸ It would be no less feasible to apply such waiver practices to individuals who are temporarily incarcerated. Since any continuance of Cash Assistance can be managed and monitored for cases involving incarceration just as it is for other "good causes" of temporary absence, there is no compelling justification for evaluating temporary incarceration differently than other temporary absences.

There are structural controls in place to regulate the disbursement of Cash Assistance and to ensure that only eligible individuals and families are receiving assistance.²³⁹ For other temporary absence cases, payments cannot continue for more than 45 days unless a caseworker has reviewed the Cash Assistance recipient's status and it is expected that he or she will not remain in the facility for more than 180 days.²⁴⁰ This permits HRA and OTDA to al-

²³³ See Temporary Assistance Source Book, *supra* note 36.

²³⁴ *Id.*

²³⁵ See *id.* at 206.

²³⁶ PD No. 02-35-ELI and PD No. 08-16-ELI, *supra* note 18.

²³⁷ N.Y.C. HUMAN RES. ADMIN., *supra* note 75, at lines 3, 15.

²³⁸ *Id.*

²³⁹ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a)(2)(i), (ii), (iii) (2007).

²⁴⁰ *Id.*

low for CA to continue for up to six months if it is “essential to retain housing and maintain the home” while keeping the objective of family stability at the forefront of the policy.²⁴¹ To further control and sustain structure in the system, when the recipient is absent for more than six months, HRA and OTDA have required the recipient to submit affirmative evidence of his or her continued intent to return to the home and that he or she is prevented from returning because of “illness or other good cause.”²⁴² Given these standards to maintain the integrity of the program, and ongoing assurance that the requisite conditions that establish a temporary absence are met, there need not be concern that the inclusion of incarceration in the definition of “temporary absence” would lead to fraudulent or unnecessary disbursement of CA funds. Thus, it follows that—consistent with goals of social and economic stability—incarceration should be evaluated in the same manner as all other temporary absence claims.

CONCLUSION

The creation of an improper limitation on the continuance of Cash Assistance to individuals who have been temporarily incarcerated is in conflict with an unambiguous state regulation and the purpose of public benefit policies “to achieve the maximum level of self-sufficiency.”²⁴³ Such a limitation has resulted in the unintended consequences of decreased stability for families, homelessness, and increased costs for both the City and State. Evaluating situations where a member of a household is incarcerated in the same way that other “temporary absence” situations are evaluated promotes a system that is reliable, stable, effective and true to its objectives. Where stability, family cohesiveness and self-sufficiency are the desired results of Cash Assistance, there is no defensible justification for excluding incarceration—an exclusion that ultimately prevents families from achieving either. Such an exclusion is even less justified in light of considerable and continuous data that demonstrate the disproportionate rates of arrest and detention faced by poor people of color in New York.²⁴⁴ Since it would be in the best interests of families and consistent with the intent of HRA, OTDA, the New York State and United States legislatures as

²⁴¹ See PD No. 08-16-ELI, *supra* note 18; N.Y.C. HUMAN RES. ADMIN., *supra* note 5.

²⁴² N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a)(2)(i).

²⁴³ N.Y.C. Human Res. Admin., *supra* note 5; see N.Y. SOC. SERV. LAW § 131(1) (McKinney 2003); see also U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 5.

²⁴⁴ See *supra* Part III.B.

well as with the abovementioned statistical and public policy support, incarceration should be evaluated no differently than any other temporary absence situation.

The regulation establishes that “temporary absence” is satisfied by “*any* absence . . . during which the person (i) does not leave the United States; (ii) does not evidence intent to establish residence elsewhere; and (iii) complies with [§ 349.4] and other provisions of [Title 18 of the NYCRR].”²⁴⁵ Nothing more is required to demonstrate that a period of incarceration can fall squarely within this regulatory mandate. Notwithstanding the clear regulatory mandate, the need to reconsider the current restrictive application of the temporary absence policy is further supported by ample social and public policy justifications.²⁴⁶ Therefore, to the extent that individuals in situations of temporary incarceration meet the required statutory and regulatory criteria for their absences to be considered “temporary,” incarceration should be interpreted to be within the scope of the definition of “temporary absence” as mandated by the New York State legislature.²⁴⁷

²⁴⁵ N.Y. COMP. CODES R. & REGS. tit. 18, § 349.4(a) (emphasis added); *see also* PD No. 02-35-ELI; PD No. 08-16-ELI, *supra* note 18 (“Temporarily absent individuals are budgeted as if they are physically in the household and are eligible for the basic allowance plus energy, shelter, fuel and any other additional allowances.”).

²⁴⁶ *See* discussion *supra* Part I, II.

²⁴⁷ N.Y. COMP. CODES R. & REGS. tit. 18 § 349.4(a); *contra* PD No. 08-16-ELI, *supra* note 18.