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Generating Trauma: How the United States Violates the Human Rights of Incarcerated Mothers and Their Children

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GENERATING TRAUMA: HOW THE UNITED STATES VIOLATES THE HUMAN RIGHTS OF INCARCERATED MOTHERS AND THEIR CHILDREN

Christina Scotti[†]

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INTRODUCTION

“You must live life with the full knowledge that your actions will remain. We are creatures of consequence.”¹

The United States has long championed the value of family, but its actions reflect a much different reality in which U.S. policies disregard incarcerated mothers’ rights as parents, their children’s rights to continue to have meaningful contact with their primary caregiver, and the overall worth of the mother-child relationship.² Today, the number of women in prison is unprecedented, with data confirming an estimated 750% increase in women in prisons and jails over nearly four decades.³ The majority of these women are mothers, most of whom were also the primary caregivers of their child or children prior to incarceration.⁴ Yet the country that has historically proclaimed itself as one centered on the integrity of the family fails to adequately take this fact into account, despite the historical role women have played in raising children.⁵ Similarly, the United States also overlooks both the internationally recognized human

¹ ZADIE SMITH, *WHITE TEETH* 102 (2000).

² See, e.g., THE SENTENCING PROJECT, *INCARCERATED WOMEN AND GIRLS 1* (2019), <https://perma.cc/JW2G-Q5BG>; Natalie Angier, *The Changing American Family*, N.Y. TIMES (Nov. 25, 2013), <https://perma.cc/JV8G-GXD8>; *Facts About the Over-Incarceration of Women in the United States*, ACLU, <https://perma.cc/3VRH-5SHL>. This article’s focus on the ways in which the United States violates the human rights of incarcerated mothers and their children is in no way meant to sublimate or minimize the egregious violations that occur against other incarcerated women, transgender incarcerated people, or incarcerated men in the U.S. correctional system; nor is it an attempt to suggest that the human rights of incarcerated mothers are any more deserving to be recognized. It is also salient to emphasize that while the article directs its attention to incarcerated mothers in particular, the majority of whom overwhelmingly served as primary caregivers of their children prior to incarceration, the human rights of transgender incarcerated people who served as primary caregivers and incarcerated fathers who had served as primary caregivers and the rights of their children are equally being violated.

³ THE SENTENCING PROJECT, *supra* note 2, at 1.

⁴ LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 3, 5 (2008), <https://perma.cc/3KCD-2S2H>; ALEKS KAJSTURA, PRISON POLICY INITIATIVE, *WOMEN’S MASS INCARCERATION: THE WHOLE PIE 2019* (2019), <https://perma.cc/M7CF-K9R6>; ELIZABETH SWAVOLA ET AL., VERA INST. OF JUSTICE, *OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 7* (2016), <https://perma.cc/MK8P-ARTP>; ACLU, *STILL WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES 5* (2019), <https://perma.cc/Q5JF-Q7LS>. Estimates from the most recent Bureau of Justice Statistics (“BJS”) report on parents in prison indicate that while eighty-eight percent of children with incarcerated fathers in state prison reside with their mothers, only thirty-seven percent of children reside with their fathers if their mother is incarcerated. (It is more likely that the child would reside with a grandparent.) GLAZE & MARUSCHAK, *supra*, at 5.

⁵ Sarah Stillman, *America’s Other Family-Separation Crisis*, NEW YORKER (Oct. 29, 2018), <https://perma.cc/N3ZC-24NM>; Angier, *supra* note 2.

rights standards that are in place to protect these principles and the neuroscience research that reveals the pernicious effects of such a separation.⁶ This behavior by the United States has led to deep and bitter reverberations that extend far beyond the direct human rights violations.⁷

While a leader in the creation of the United Nations and the drafting of the Universal Declaration of Human Rights (UDHR), the United States' commitment to these common standards and principles has proved egregiously incongruous from the beginning, which W.E.B. Du Bois pointed out in a ninety-six-page petition to the newly established United Nations in 1947.⁸ Nevertheless, instead of acknowledging its own pervasive human rights violations, the United States has subverted its respon-

⁶ Louis Henkin, *The Age of Rights*, in HUMAN RIGHTS 3, 3-4 (2008); Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the United States*, 3 N.Y. CITY L. REV. 59, 60-61 (1998); see generally BESSEL A. VAN DER KOLK, *THE BODY KEEPS THE SCORE: BRAIN, MIND AND BODY IN THE HEALING OF TRAUMA*, 51-124 (2015).

⁷ VAN DER KOLK, *supra* note 6, at 119-20; Olga Khazan, *Inherited Trauma Shapes Your Health*, ATLANTIC (Oct. 16, 2018), <https://perma.cc/JX4Q-6QDD>; see generally Bessel A. van der Kolk, *The Compulsion to Repeat the Trauma*, 12 PSYCHIATRIC CLINICS N. AM. 389 (1989). "The truth about our childhood is stored up in our bodies, and lives in the depths of our souls. Our intellect can be deceived, our feelings can be numbed and manipulated, our perceptions can be shamed and confused, or our bodies tricked with medication. But our soul never forgets. And because we are one, one whole soul in one body, some day, our body will present its bill." Kathy Brous, *The Greatest Study Never Told*, ATTACHMENT DISORDER HEALING BLOG (Oct. 2, 2013) (quoting Alice Miller), <https://perma.cc/2H3F-AXKZ>.

⁸ HENKIN ET AL., HUMAN RIGHTS 274-275 (1999); see G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]. The Universal Declaration of Human Rights, created in the wake of the Holocaust and burgeoning tensions between the capitalist world and the Soviet Union, is generally agreed to be the foundation on which international human rights law rests. It was built on a theory that certain indispensable rights should not be in the hands of sovereign States alone because of their fundamental nature. However, during the time of the signing of the UDHR, which proclaims in Article 1 that "all human beings are born free and equal in dignity and rights," human rights violations continued to be pervasive in the United States, including the segregation and disenfranchisement laws known as Jim Crow. These laws represented a "formal, codified system of racial apartheid," which had dominated the American South since the 1890s. *Jim Crow Laws*, PBS: AM. EXPERIENCE, <https://perma.cc/9D28-ASY8>. On October 23, 1947, the year prior to the UDHR's creation, W.E.B. Du Bois and the NAACP submitted a ninety-six-page petition to the newly established United Nations demanding accountability for the human rights violations occurring against black people in the United States entitled "An Appeal to the World." The UN replied to the petition citing a lack of authority in domestic matters. W.E. BURGHARDT DU BOIS, NAACP, AN APPEAL TO THE WORLD 1-14 (Oct. 23, 1947), <https://perma.cc/D5DJ-7H9V>; Jamil Dakwar, *W.E.B. Du Bois's Historic U.N. Petition Continues to Inspire Human Rights Advocacy*, ACLU: HUM. RTS. PROGRAM BLOG (Oct. 25, 2017), <https://perma.cc/3NJ7-PV93>; JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 521-719, 778 (2018); see generally CAROL ANDERSON, *EYES OFF THE PRIZE: THE UNITED NATIONS AND THE AFRICAN AMERICAN STRUGGLE FOR HUMAN RIGHTS, 1944-1955*, at 101-09 (2003).

sibilities to the international community by generating a false and dangerous narrative that not only is the U.S. Constitution alone an effective and just guarantor of human rights but that the most flagrant human rights violations occur abroad.⁹

Furthermore, given the formalities often associated with law and the non-binding nature of much of human rights law, implementation can sometimes seem abstract or fragile.¹⁰ This is especially true in the United States, which has constructed a uniquely American distinction by requiring that all international human rights treaties signed and ratified by the United States also have corresponding domestic legislation in place before there can be a basis for a legal claim in a U.S. courtroom.¹¹ Still, the absence of domestic enforcement mechanisms does not negate human rights as legal norms.¹² Instead, the substance and potential of these human rights exist not only in the power of the collective but in sources of international legal obligations, in addition to domestic case law and human rights decisions from other international courts and tribunals.¹³

The principle that each person has a claim to an “irreducible core of integrity and dignity,”¹⁴ is not novel in the United States, at least in theory: it can be traced back, well before the UDHR, to documents such as the American Declaration of Independence, which holds “these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights.”¹⁵

Today, there is a profound necessity to call attention to the United States’ lack of commitment to indispensable rights that are fundamental

⁹ Copelon, *supra* note 6, at 63, 69.

¹⁰ *Id.* at 78-79; Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 372 (1990). Aside from a brief period in the 1970s, the U.S. human rights policy has been an “unqualified rejection of economic, social and cultural ‘rights’ as rights,” which means an unqualified rejection of two-thirds of the UDHR. Noam Chomsky, *Human Rights in the New Millennium*, Lecture at the London School of Economics and Political Science (Oct. 29, 2009), <https://perma.cc/SX3R-85RT>.

¹¹ Louis Henkin, *International Human Rights and Rights in the United States*, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 25, 53-55 (Theodor Meron ed., 1984).

¹² *Id.* at 53-55.

¹³ Louis Henkin, *Human Rights: Ideology and Aspiration, Reality and Prospect*, in REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT 3, 12-13, 18-21 (Samantha Power & Graham Allison eds., 2000); Alan Boyle, *Soft Law in International Law-Making*, in INTERNATIONAL LAW 120-22 (Malcolm D. Evans ed., 4th ed. 2014); *see* Convention on the Rights of the Child, arts. II, III, VII, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; *see also* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *see also* International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹⁴ LOUIS HENKIN, *THE AGE OF RIGHTS* 193 (1990).

¹⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. amends. I-X.

in nature and that belong to all human beings. This is seen vividly in the ways mothers and children are unduly harmed without attentive consideration of their rights and how these violations often have ramifications that echo far beyond the cries of children being separated from their primary caregiver and the person on whom they have relied most.¹⁶

Part I briefly examines the influx of women into U.S. prisons and jails and how the U.S. correctional system, designed primarily for men, does not reflect the specific needs of women or adequately address their circumstances, including recognizing their role as mothers.¹⁷ This male standard of incarceration creates additional punitive implications for incarcerated mothers and has long-lasting effects on their children, including a far greater likelihood that they will be involved in the correctional system themselves.¹⁸

Part II further explores the ways in which this separation from a primary caregiver can have irreversible impacts, illustrated by breakthrough findings in neuroscience that demonstrate how trauma can greatly alter a child's brain development and can lead to devastating long-term health outcomes.¹⁹ Despite the serious ramifications associated with the severing of these critical relationships, the behavior by the United States continues.

Part III looks at the ways in which federal and state government practices harm incarcerated mothers: they range from the routine treatment of incarcerated pregnant women pre- and post-birth, to the Bureau of Prisons not following its own visitation policies, to the rare use of “downward

¹⁶ See JOYCE A. ARDITTI, PARENTAL INCARCERATION AND THE FAMILY: PSYCHOLOGICAL AND SOCIAL EFFECTS OF IMPRISONMENT ON CHILDREN, PARENTS, AND CAREGIVERS 62-66 (2012); John Bowlby et al., *The Effects of Mother-Child Separation: A Follow-Up Study*, 29 PSYCHOL. & PSYCHOTHERAPY 211, 211 (1956); Jamie Ducharme, ‘What This Amounts to is Child Abuse.’ *Psychologists Warn Against Separating Kids from Their Parents*, TIME (June 19, 2018), <https://perma.cc/DB92-T55W>; HUMAN RIGHTS WATCH & ACLU, “YOU MISS SO MUCH WHEN YOU’RE GONE”: THE LASTING HARM OF JAILING MOTHERS BEFORE TRIAL IN OKLAHOMA 30-31 (2018), <https://perma.cc/6384-8VJY>.

¹⁷ *Developments in the Law—Alternative Sanctions for Female Offenders*, 111 HARV. L. REV. 1921, 1922 (1998).

¹⁸ Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 NAT’L INST. JUST. J., Mar. 2017, at 1-3, <https://perma.cc/2FFH-Q6KT>; HUMAN RIGHTS WATCH & ACLU, *supra* note 16, at 34. Ignoring the basic needs of children with incarcerated mothers has, unsurprisingly, made little sense from a criminal justice perspective; one statistic indicates that children of incarcerated parents are, on average, six times more likely to become incarcerated themselves. Martin, *supra*, at 1-2.

¹⁹ Ducharme, *supra* note 16; Press Release, Colleen Kraft, President, American Academy of Pediatrics, AAP Statement Opposing the Border Security and Immigration Reform Act (June 15, 2018), <https://perma.cc/6623-VSXT>. More than 8.3 million children have a parent under correctional supervision, 1.5 million children have a parent in prison, and more than one in five of these children is under five years old. *Facts About the Over-Incarceration of Women in the United States*, *supra* note 2.

departures” under Federal Sentencing Guidelines, to legislation that can terminate a mother’s parental rights.

Part IV introduces international human rights law and the obligations and duties that the United States has assumed under international law, which is not currently reflected in domestic measures or legislation. This includes provisions in the International Covenant on Civil and Political Rights, which the United States has both signed and ratified, and provisions in the Convention on the Rights of the Child, which has been signed by all 193 member countries of the United Nations, including the United States, and ratified by all members but the United States.²⁰ The article then considers recent U.S. legislation and initiatives and the impacts, if any, on the rights of incarcerated mothers and their children; it also puts forward a set of rules developed by the United Nations that recognize the ways in which the world’s prison systems design incarceration specifically for men, with harmful outcomes for incarcerated women, including incarcerated mothers and their children.²¹

There is a critical need to align existing domestic law with international laws and standards and the United States’ own articulated policy goals. The United States puts mothers and their children at risk of irreparable harm. By applying human rights principles and employing well-supported discoveries in trauma research, the United States could begin to alleviate the avoidable anguish that is being imposed on the children of incarcerated mothers and on the mothers themselves.²²

I. AN OVERVIEW: INCARCERATION IN THE UNITED STATES

“Pity the nation oh pity the people, who allow their rights to erode, and their freedoms to be washed away.”²³

²⁰ CRC, *supra* note 13; ICCPR, *supra* note 13; UDHR, *supra* note 8; THE REBECCA PROJECT FOR HUMAN RIGHTS & THE NAT’L WOMEN’S LAW CTR., *MOTHERS BEHIND BARS* 46 n.134 (2010), <https://perma.cc/HG3Z-PBER>.

²¹ G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Dec. 21, 2010) [hereinafter *Bangkok Rules*].

²² PENAL REFORM INT’L, *UN Bangkok Rules on Women Offenders and Prisoners* 4 (2013), <https://perma.cc/47K3-U2CE>; PENAL REFORM INT’L & QUAKER UNITED NATIONS OFFICE, *BRIEFING ON THE UN RULES FOR THE TREATMENT OF WOMEN PRISONERS AND NON-CUSTODIAL MEASURES FOR WOMEN OFFENDERS (‘BANGKOK RULES’)* 4 (2011), <https://perma.cc/C2KS-KQBR>.

²³ LAWRENCE FERLINGHETTI, *Pity the Nation*, in *FERLINGHETTI’S GREATEST POEMS* (Nancy Peters ed., 2017).

Today, the United States is the world's leader in incarceration with 2.2 million people—most of whom face economic insecurity—in the nation's prisons and jails.²⁴ The rate of growth in incarcerated women is likewise unmatched, yet the group itself makes up a small proportion of the overall prison system. This has resulted in a male standard of incarceration,²⁵ with incarcerated men accounting for approximately ninety-three percent of the total federal prison population.²⁶ This approach does not reflect an understanding that women commit different crimes than men, most of which are non-violent offenses, for different reasons, and that current incarceration policies do not have the same impact on them.²⁷ Such inadequate attention to women's gender-specific characteristics, circumstances, and needs has resulted in violations of their human rights and the rights of their children, and a disregard for international law.²⁸

A. *The Surge of Female Incarceration in the United States and How It Differs from Male Incarceration*

“Prisons thus perform a feat of magic . . . But prisons do not disappear problems, they disappear human beings.”²⁹

²⁴ *Criminal Justice Facts*, THE SENTENCING PROJECT, <https://perma.cc/TG4Q-JYNX>; see BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, PRISONS OF POVERTY: UNCOVERING THE PRE-INCARCERATION INCOMES OF THE IMPRISONED (2015), <https://perma.cc/CS4A-Z9ZF>.

²⁵ *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1922 (citing MEDA CHESNEY-LIND & JOYCELYN M. POLLOCK, WOMEN'S PRISONS: EQUALITY WITH A VENGEANCE, IN WOMEN, LAW, AND SOCIAL CONTROL 155, 167 (Alida V. Merlo & Joycelyn M. Pollock eds., 1995)).

²⁶ *Inmate Gender*, FEDERAL BUREAU OF PRISONS, <https://perma.cc/V4A8-N89R>.

²⁷ BARBARA BLOOM ET AL., NAT'L INST. OF CORRECTIONS, GENDER RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, & GUIDING PRINCIPLES FOR FEMALE OFFENDERS 4-8 (2003); *Facts About the Over-Incarceration of Women in the United States*, *supra* note 2. It is noteworthy that information cited here from a United States-sponsored report written *seventeen years ago* explicitly acknowledges the differing situations women and men face while incarcerated and recommends a gender-responsive approach. See generally BLOOM ET AL., *supra*, at 4-8.

²⁸ Brenda J. van den Bergh et al., *Imprisonment and Women's Health: Concerns About Gender Sensitivity, Human Rights and Public Health*, 89 BULL. WORLD HEALTH ORG. 689, 691 (2011); Valentina Zayra, *This Is Why Women Are the Fastest-Growing Prison Population*, FORTUNE (Dec. 10, 2015), <http://fortune.com/2015/12/10/prison-reform-women/>; *Criminal Justice Facts*, *supra* note 24.

²⁹ Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sep. 10, 1998), <https://perma.cc/PQ4G-MJ9Z>.

The United States has only four percent of the world's female population but accounts for roughly thirty percent of incarcerated women globally.³⁰ Women continue to be the fastest-growing segment within the country's prison population.³¹ Since 1980, the number of women in prison has increased by more than 750%, about twice the rate of men.³² The latest data show that, as of 2019, there are 231,000 women incarcerated in total in the United States and over a million under correctional supervision.³³ More than sixty percent of women in state prison and eighty percent of women in jails are mothers with at least one child under the age of eighteen.³⁴

Much of the increase in arrests and incarceration of women is due to the United States' renewed focus on the War on Drugs in the 1980s when, with help from Congress, President Ronald Reagan began the federal government's full-on assault on the drug trade.³⁵ Legislation like the Anti-Drug Abuse Act of 1986, which, among other things, created mandatory minimum sentencing for simple drug possession, has had calamitous effects on women.³⁶ These statutes eliminated judges' ability to consider mitigating factors for these low-level crimes, beginning an explosion in women's incarceration.³⁷ Aside from these drug-related offenses, women are most likely to be involved in property offenses such as burglary or fraud, all of which are generally deemed to be non-violent.³⁸ In fact, out of the 231,000 women currently incarcerated, only 43,700 have been convicted of a violent crime.³⁹

³⁰ ALEKS KAJSTURA, PRISON POLICY INITIATIVE, STATES OF WOMEN'S INCARCERATION: THE GLOBAL CONTEXT 2018 (2018), <https://perma.cc/YP8K-UA2F>.

³¹ *Facts About the Over-Incarceration of Women in the United States*, *supra* note 2.

³² THE SENTENCING PROJECT, *supra* note 2.

³³ KAJSTURA, *supra* note 4. As of 2019, there are over one million women on probation and parole in the United States. *Id.*; *see also* THE SENTENCING PROJECT, *supra* note 2.

³⁴ KAJSTURA, *supra* note 4; WENDY SAWYER, PRISON POLICY INITIATIVE, THE GENDER DIVIDE: TRACKING WOMEN'S STATE PRISON GROWTH (2018), <https://perma.cc/A7TG-KPQ7>.

³⁵ ACLU ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 24-26 (2005), <https://perma.cc/8D8Z-EGRU>.

³⁶ *Id.* at 40 n.192; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

³⁷ *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1922; ACLU ET AL., *supra* note 35, at 38-40. One caveat to these drug laws that has had disastrous effects on women is that often, based on their peripheral or unknowing role in drug activity, they rarely have information to provide to prosecutors; as a result, women can be subject to harsher sentences under mandatory minimum sentences than men, who are generally more active and powerful participants in the drug trade. *See Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1922; David Dagan, *Women Aren't Always Sentenced by the Book*, FIVETHIRTYEIGHT (Mar. 30, 2018), <https://perma.cc/A7G6-JNQY>.

³⁸ KAJSTURA, *supra* note 4.

³⁹ *Id.*

Instead, many of the offenses that women commit can be characterized as crimes of survival motivated often, if not always, by socioeconomic factors.⁴⁰ Data demonstrate that women in prison are overwhelmingly poor, with most living well below the poverty line.⁴¹ Sixty percent of incarcerated women were not employed full-time when they were arrested and nearly one-third have received government assistance prior to arrest.⁴² Moreover, close to half of women in state prisons have not completed high school, and a third of women in state prisons or jails reported being physically or sexually abused before the age of eighteen.⁴³

The rate of imprisonment for black women is nearly twice the rate of incarceration for white women, and Hispanic women are incarcerated at 1.3 times the rate of white women.⁴⁴ In total, data show that incarcerated women are: 53% White; 29% Black; 14% Hispanic; 2.5% American Indian and Alaskan Native; 0.9% Asian; and 0.4% Native Hawaiian and Pacific Islander.⁴⁵ Incarceration disproportionately affects black women, who represent thirty percent of all incarcerated women in the United States but only an estimated thirteen percent of the total female population.⁴⁶

Research comparing the experiences of incarcerated women with those of incarcerated men illustrates some of the critical distinctions between the two groups. Women's economic situations, for example, are worse than those of their male counterparts, which can make it even more difficult for women to afford cash bail.⁴⁷ An astounding sixty percent of women in jail have not yet been convicted of a crime but are involuntarily

⁴⁰ *Id.*; ALEKS KAJSTURA, PRISON POLICY INITIATIVE, WOMEN'S MASS INCARCERATION: THE WHOLE PIE 2017 (2017), <https://perma.cc/Z2BH-6HYR>; *see also* Gregg Barak, *Introduction: A Comparative Perspective on Crime and Crime Control*, in CRIME AND CRIME CONTROL: A GLOBAL VIEW, at xvi (Gregg Barak ed., 2000) (crimes of survival include offenses such as property crimes, drug sales, or prostitution); Gina Fedock, *Number of Women in Jails and Prisons Soars*, U. CHI. SCH. OF SOC. SERV. ADMIN. MAG., Spring 2018, at 2, <https://perma.cc/3D5P-RFX8>.

⁴¹ THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM 4 (2007), <https://perma.cc/CE47-MZUV>; *see also* MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF WOMEN'S INCARCERATION 9 (2013), <https://perma.cc/KU3K-G7JY>; Phillip Alston, United Nations Special Rapporteur on Extreme Poverty and Human Rights, Statement on Visit to the USA (Dec. 15, 2017), <https://perma.cc/BH3U-EWJJ>. The number of children living in extreme poverty in single-mother households went from fewer than 100,000 in 1995 to 704,000 in 2012. Alston, *supra*, para. 36.

⁴² THE SENTENCING PROJECT, *supra* note 41, at 3.

⁴³ *Id.* at 3; CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, PRIOR ABUSE REPORTED BY INMATES AND PROBATIONERS 1 (1999), <https://perma.cc/NJA5-X9E7>.

⁴⁴ THE SENTENCING PROJECT, *supra* note 2, at 1.

⁴⁵ KAJSTURA, *supra* note 4.

⁴⁶ *Facts About the Over-Incarceration of Women in the United States*, *supra* note 2.

⁴⁷ RABUY & KOPF, *supra* note 24.

held in pretrial detention.⁴⁸ Women who cannot make bail have an annual median income of \$11,071, and among those women, black women have a median annual income of \$9,083; a typical bail amount is \$10,000, more than a full year's income for many women.⁴⁹ Unsurprisingly, research finds that formerly incarcerated women are more likely to be homeless than formerly incarcerated men, which then makes reentry and compliance with probation or parole even more challenging.⁵⁰

Reports also show that women can experience traumatizing events like sexual victimization at much higher rates than men: between 2009 and 2011, women represented approximately thirteen percent of people held in local jails but sixty-seven percent of victims of sexual victimization by staff.⁵¹

Women are less likely than men to be incarcerated for a violent offense.⁵² As mentioned, most offenses women commit are non-violent and as a result, the Federal Bureau of Prisons (BOP) classifies nearly all incarcerated females as minimum or low security.⁵³ BOP data also find that, while the majority of women in federal prison are incarcerated for drug offenses, women are most often accessories to a male partner's broader criminal activity rather than being the instigators of a crime.⁵⁴

Incarcerated women report past physical or sexual abuse at higher rates than their male counterparts.⁵⁵ In state prisons, 57.6% of women reported past abuse, compared with 16.1% of men; in federal prisons, 39.9% of women reported past abuse, compared with 7.2% of men; and in jails, 47.6% of women reported past abuse, compared with 12.9% of men.⁵⁶ Understanding the impact of those traumas is particularly critical, especially in a prison setting where common practices such as searches and restraints often only serve to re-traumatize victims.⁵⁷

⁴⁸ KAJSTURA, *supra* note 4. Jails have become "massive warehouses primarily for those too poor to post even low amounts of bail," with a nearly five-fold increase in the number of people in U.S. jails in the last four decades. *See* SWAVOLA ET AL., *supra* note 4, at 6.

⁴⁹ BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, DETAINING THE POOR: HOW MONEY BAIL PERPETUATES AN ENDLESS CYCLE OF POVERTY AND JAIL TIME 2 (2016), <https://perma.cc/JP9C-YDLK>.

⁵⁰ KAJSTURA, *supra* note 4.

⁵¹ *See* SWAVOLA ET AL., *supra* note 4, at 14.

⁵² MAUER, *supra* note 41, at 1.

⁵³ OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT OF ITS FEMALE INMATE POPULATION 2 n.5 (2018), <https://perma.cc/ZB7K-K29V>.

⁵⁴ *Id.* at 2.

⁵⁵ ACLU, WORSE THAN SECOND-CLASS: SOLITARY CONFINEMENT OF WOMEN IN THE UNITED STATES 3 (2014), <https://perma.cc/C2AK-UYGE>.

⁵⁶ *Id.* at 14 n.10 (citing HARLOW, *supra* note 43, at 1).

⁵⁷ BARBARA E. BLOOM, CALIFORNIANS FOR SAFETY AND JUSTICE, MEETING THE NEEDS OF WOMEN IN CALIFORNIA'S COUNTY JUSTICE SYSTEMS 9 (2015), <https://perma.cc/BY27-Z3HN>.

Mental health disorders, including depression, bipolar disorder, and post-traumatic stress disorder, are also more likely among incarcerated women.⁵⁸ Among those incarcerated, major depressive disorder is the most widespread, followed by bipolar disorder and post-traumatic stress disorder.⁵⁹

These findings lead to a more holistic understanding of the experiences of women, including how they often have different underlying reasons for being involved in the correctional system and how the nature of most of their offenses is also distinct.⁶⁰ Still, while research has affirmed that there should be distinctions in the treatment of women, there has not been an adequate response by the United States to change the male standard that dominates U.S. correctional institutions.⁶¹ It comes as no surprise that this has proven to be exceedingly detrimental to incarcerated mothers, who again make up the majority of women in prison. Data show that almost forty-two percent of mothers live alone with their children prior to their imprisonment,⁶² and subsequently, are five times more likely than incarcerated fathers to have their children placed in state custody because there is no one else to care for them.⁶³ The irrevocable harm that results cannot be overstated,⁶⁴ which makes it crucial to respond with action to these gender-specific realities.⁶⁵

B. Severing Ties: The Additional Punishments U.S. Mothers Face Behind Bars

“When we lose that sense of the possible, we lose it fast.”⁶⁶

⁵⁸ BLOOM ET AL., *supra* note 27, at 7; JENNIFER BRONSON & MARCUS BERZOFKY, U.S. DEP’T OF JUSTICE, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12, at 4 (2017), <https://perma.cc/T9MR-PXKE>.

⁵⁹ BRONSON & BERZOFKY, *supra* note 58, at 14; DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP’T OF JUSTICE, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), <https://perma.cc/ZRA7-Q9L6>.

⁶⁰ Joseph Shapiro & Jessica Pupovac, *In Prison, Discipline Comes Down Hardest on Women*, NPR (Oct. 15, 2018), <https://perma.cc/DF52-YQ2U>.

⁶¹ *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1922, 1929; van den Bergh et al., *supra* note 28, at 690-91.

⁶² Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1495-96 (2012); *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1922; see GLAZE & MARUSCHAK, *supra* note 4, at 4.

⁶³ See Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2, 2018), <https://perma.cc/GF4C-CPW9>.

⁶⁴ *Id.*; PENAL REFORM INT’L., WORKBOOK ON WOMEN IN DETENTION: PUTTING THE UN BANGKOK RULES ON WOMEN PRISONERS INTO PRACTICE 129 (2017), <https://perma.cc/Q8Q2-LV2X>.

⁶⁵ Ducharme, *supra* note 16. See generally VAN DER KOLK, *supra* note 6, at 138-160.

⁶⁶ JOAN DIDION, BLUE NIGHTS 183 (2011).

The physical distance between incarcerated mothers and children is often cited as one of the most significant barriers to sustaining a meaningful relationship.⁶⁷ Most women's prisons are located in rural areas, far from the cities where the majority of incarcerated women previously lived, making the ability to adequately maintain relationships with their children difficult.⁶⁸ It can also be an expensive burden, with costs of visitation and communication driving some families of incarcerated people into debt.⁶⁹ Moreover, since there are far fewer women's prisons, the locations tend to be much farther from family than where men's prisons are located, with research indicating that an incarcerated woman's federal prison is approximately 160 miles farther from family than the average incarcerated man's federal prison.⁷⁰ In total, there are twenty-six federal correctional facilities spread out over fourteen states that are either female only or mixed-gender.⁷¹ This means that women in federal prison are scattered across the United States, which often results in an inability to have critical face-to-face interactions with their children.⁷²

Incarcerated mothers also have less of a support system than incarcerated fathers, which exacerbates the implications of their imprisonment, including their children's possible displacement.⁷³ While the overwhelming majority of children with fathers in prison live with their mothers, the same is not true when mothers are in prison.⁷⁴ Although the father's incarceration often puts an economic strain on the family, it is less likely to take as much of an emotional toll on the child since the mother continues as the primary caregiver, which helps to cushion the overall negative impact.⁷⁵ Only approximately twenty-eight percent of incarcerated mothers report that their child's father is the current caregiver.⁷⁶ That number is in

⁶⁷ See THE REBECCA PROJECT FOR HUMAN RIGHTS & THE NAT'L WOMEN'S LAW CTR., *supra* note 20, at 12-13.

⁶⁸ BERNADETTE RABUY & DANIEL KOPF, PRISON POLICY INITIATIVE, SEPARATION BY BARS AND MILES: VISITATION IN STATE PRISONS (2015), <https://perma.cc/V53R-E8Z7>.

⁶⁹ *Id.* In state prisons, approximately forty-two percent of the time, it is the child's grandmother who assumes caregiving responsibilities and would therefore likely be the one to bear the costs associated with visitation and communication. See GLAZE & MARUSCHAK, *supra* note 4, at 5.

⁷⁰ Roberts, *supra* note 62, at 1496.

⁷¹ *Female Locations*, FEDERAL BUREAU OF PRISONS, <https://perma.cc/LX93-DG6G>.

⁷² *Id.*; GLAZE & MARUSCHAK, *supra* note 4, at 6; VAN DER KOLK, *supra* note 6, at 64.

⁷³ ACLU ET AL., *supra* note 35, at 50; see Stephanie Bush-Baskette, *The War on Drugs and the Incarceration of Mothers*, 30 J. DRUG ISSUES 919 (2000). Mothers in state prison are more likely than incarcerated fathers to report having had a family member who had been incarcerated prior to their own imprisonment. See GLAZE & MARUSCHAK, *supra* note 4, at 7.

⁷⁴ GLAZE & MARUSCHAK, *supra* note 4, at 5; ACLU ET AL., *supra* note 35, at 50.

⁷⁵ Deseriee A. Kennedy, "The Good Mother": *Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 163-64 (2012).

⁷⁶ ACLU ET AL., *supra* note 35, at 50.

marked contrast with the finding that about ninety percent of fathers incarcerated in state prison report that their children live with their mother.⁷⁷ Thus, the children of incarcerated mothers have a far greater likelihood of entering foster care as a result of their mother's imprisonment.⁷⁸

The lack of support produces an additional difficulty that plagues incarcerated mothers: a higher rate of recidivism.⁷⁹ Due to a weak foundation of assistance, mothers often form new support systems while incarcerated, which more acutely ties them to prison as a base of support and, as a result, increases their likelihood of returning.⁸⁰ Similar to federal prisons, the number of face-to-face meetings between mothers in state prisons and their children is low: only 14.6% of incarcerated mothers report seeing their children at least once a month and an estimated 58% of mothers have not seen any of their children while incarcerated.⁸¹

Although visitation is necessary to sustain the vital connection and correlates with a reduction in recidivism, there are often no policies or programs in place that encourage visits.⁸² Instead, most facilities fail to offer even basic child-friendly visitation areas or programs, which can profoundly affect the relationship if and when the child is able to visit.⁸³

The environment in prisons and jails can be frightening and traumatic for children as a result of the behavior of the staff, the physical

⁷⁷ *Id.*

⁷⁸ GLAZE & MARUSCHAK, *supra* note 4, at 5.

⁷⁹ *Id.* at 15; see SWAVOLA ET AL., *supra* note 4, at 17.

⁸⁰ See Jessica Y. Kim, *In-Prison Day Care: A Correctional Alternative for Women Offenders*, 7 CARDOZO WOMEN'S L.J. 221, 234 (2001).

⁸¹ GLAZE & MARUSCHAK, *supra* note 4, at 18. Overall, mothers are more likely than fathers to report having any contact with their children. Studies attribute this difference to mothers' more common role as primary caregivers. LINDSEY CRAMER ET AL., URBAN INST., PARENT-CHILD VISITING PRACTICES IN PRISONS AND JAILS 22 (2017), <https://perma.cc/EK87-242Y>; see GLAZE & MARUSCHAK, *supra* note 4, at 6.

⁸² STEVE CHRISTIAN, NAT'L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS 4-5 (2009), <https://perma.cc/SGY4-LXE4>; Megan Thompson, *For Incarcerated Mothers, Parenting Is a Day-to-Day Struggle*, PBS NEWSHOUR (May 13, 2018), <https://perma.cc/M8MU-XFSA>; see HUMAN RIGHTS WATCH & ACLU, *supra* note 16, at 49-51.

⁸³ Kennedy, *supra* note 75, at 178. When an incarcerated mother is fortunate enough to have family step in to care for her child, research suggests that two-thirds of those caregivers struggle with poverty and often have difficulty arranging visits. Furthermore, many facilities require that children be accompanied by a legal guardian; if a child is in the care of grandparents, other extended family, or family friends, they may be unable to visit. A child who is in state care may not have a caseworker or foster parent who supports visits to the mother. CRAMER ET AL., *supra* note 81, at 20; see NANCY G. LA VIGNE ET AL., URBAN INST., BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS 4-6 (2008), <https://perma.cc/UK3D-ZZX2>. Child-friendly visiting areas are discussed in Part IV as a recommendation in UN guidelines.

setting, or both.⁸⁴ Long waiting times, limited visitation hours, body frisks, and abrupt treatment are some factors that discourage in-person meetings between incarcerated mothers and their children.⁸⁵ Prison visits where children are not allowed to touch their parents and can sometimes only see them through a glass partition can gravely diminish the quality of contact.⁸⁶

The high cost of telephone calls further inhibits mothers from effectively keeping in touch with their children and also often adds an economic burden to an incarcerated mother's family member if one has been able to assume the care of the child.⁸⁷ In fact, many families must choose between paying for food and rent or staying in touch with the incarcerated parent.⁸⁸ While this is profoundly troubling, it is far from surprising.⁸⁹ Phillip Alston, United Nations Special Rapporteur on extreme poverty and human rights, notes in a report on the United States that, in many instances, "the criminal justice system is effectively a system for keeping the poor in poverty while generating revenue to fund not only the justice system but diverse other programs."⁹⁰

Both the United States' actions, such as allowing prisons to charge incarcerated primary caregivers unreasonable fees to speak with their

⁸⁴ CHRISTIAN, *supra* note 82, at 4-5; SWAVOLA ET AL., *supra* note 4, at 18.

⁸⁵ CHRISTIAN, *supra* note 82, at 4-5.

⁸⁶ SWAVOLA ET AL., *supra* note 4, at 18; Thompson, *supra* note 82.

⁸⁷ Komala Ramachandra, *Extortionate Phone Fees Cut Off US Prisoners*, HUMAN RIGHTS WATCH (June 16, 2017), <https://perma.cc/5HA5-SHJ8>; PETER WAGNER & ALEXI JONES, PRISON POLICY INITIATIVE, STATE OF PHONE JUSTICE: LOCAL JAILS, STATE PRISONS AND PRIVATE PHONE PROVIDERS (2019), <https://perma.cc/5VGX-9NR3>. In 2018, a fifteen-minute in-state call from a jail in Arkansas was \$24.82; in Michigan, it was as much as \$22.56; and in California, the cost could be as high as \$17.80. WAGNER & JONES, *supra*.

⁸⁸ Ramachandra, *supra* note 87.

⁸⁹ *Id.* While video visitation is often discussed as a potential solution to maintaining better contact, there is a disturbing trend in jails throughout the United States that use this technology: approximately seventy-four percent of jails banned in-person visits when they implemented video visitation. Moreover, the cost can be up to an estimated \$15 for twenty minutes and it does not necessarily benefit the child in the same ways that in-person visitation could in a child-friendly atmosphere. Thus far, no state prison has banned in-person visitations. See BERNADETTE RABUY & PETER WAGNER, PRISON POLICY INITIATIVE, SCREENING OUT FAMILY TIME: THE FOR-PROFIT VIDEO VISITATION INDUSTRY IN PRISONS AND JAILS (2015), <https://perma.cc/8QJ4-ML66>; see also LEAH SAKALA, PRISON POLICY INITIATIVE, RETURN TO SENDER: POSTCARD-ONLY MAIL POLICIES IN JAIL (2013), <https://perma.cc/2DZP-5GEU>; see also Peter Wagner & Alexi Jones, *The Biggest Priorities for Prison and Jail Phone Justice in 40 States*, PRISON POLICY INITIATIVE (Sept. 11, 2019), <https://perma.cc/TJ9F-647Z>.

⁹⁰ Alston, *supra* note 41, para. 33; Laura Pitter, *US Should Address Concerns Raised in UN Poverty Report*, HUMAN RIGHTS WATCH (July 17, 2018), <https://perma.cc/2PYU-VHUQ>.

children, and its inactions, such as not creating child-friendly visitation facilities, have shattering results that generate and exacerbate trauma.⁹¹

II. ALTERING THE BRAIN: THE DEEPLY EMBEDDED TOXIC STRESS IN CHILDREN

“We know that family separation causes irreparable harm to children. This type of highly stressful experience can disrupt the building of children’s brain architecture. Prolonged exposure to serious stress—known as toxic stress—can lead to lifelong health consequences.”⁹²

During a mother’s incarceration, the breakdown of the mother-child relationship is largely driven by harmful U.S. policies, which have been sustained despite plentiful research showing the detrimental physical and psychological effects caused by such a separation, especially for the child, whose brain is at a critical stage in its development.⁹³ Putting the child in such an untenable situation often produces toxic stress, which adversely affects a child’s brain and is correlated with an increased risk of developing chronic health conditions.⁹⁴ Leading trauma expert Dr. Bessel van der Kolk stresses the simplicity of the child’s basic need: a caregiver with

⁹¹ Davis, *supra* note 29; RABUY & WAGNER, *supra* note 89; see *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1943.

⁹² Kraft, *supra* note 19. Toxic stress response can occur when the child experiences strong or prolonged adversity without adequate adult support. See *Toxic Stress*, HARVARD UNIV. CTR. ON THE DEVELOPING CHILD, <https://perma.cc/X2M3-NQHV>; Ducharme, *supra* note 16.

⁹³ VAN DER KOLK, *supra* note 6, at 111-24, 150-51; Ducharme, *supra* note 16. “The relationships children have with their caregivers play critical roles in regulating stress hormone production in the early years of life.” *Excessive Stress Disrupts the Architecture of the Developing Brain* 4 (Nat’l Scientific Council on the Developing Child, Working Paper No. 3, 2014), <https://perma.cc/Z5MP-AY2R>.

⁹⁴ Félice Lê-Scherban et al., *Intergenerational Associations of Parent Adverse Childhood Experiences and Child Health Outcomes*, 141 *PEDIATRICS*, no. 6, 2018, at 1-2; Ducharme, *supra* note 16; Nadine Burke Harris, *How Childhood Trauma Affects Health Across a Lifetime*, TED TALKS (Sept. 2014), https://www.ted.com/talks/nadine_burke_harris_how_childhood_trauma_affects_health_across_a_lifetime. “[Infants] are extremely responsive to the emotions and reactivity and the social interactions that they get from the world around them.” UMass Boston, *Still Face Experiment: Dr. Edward Tronick*, YOUTUBE (Nov. 30, 2009), <https://www.youtube.com/watch?v=apzXGEbZht0>. Research has shown that experiencing trauma in infancy has an enduring biological impact on the brain. The stage at which trauma begins has considerable effects on mental functioning; the earlier the trauma, the worse it often becomes for a person since the brain matures in the context of the environment. See *id.*; see also Allan N. Schore, *Attachment Trauma and the Developing Right Brain: Origins of Pathological Dissociation*, in *DISSOCIATION AND THE DISSOCIATIVE DISORDERS: DSM-V AND BEYOND* 107, 109-11 (Paul F. Dell & John A. O’Neil eds., 2009); see also Echo, *Changing the Paradigm 2015 Developmental Trauma Panel: Dr. Bessel van der Kolk*, YOUTUBE (Nov. 12, 2015), <https://www.youtube.com/watch?v=-pCbbOWKB2I>.

whom to feel safe.⁹⁵ “Depriving [children] of their caregivers,” he says, “has effects on the brain as profound as starving them.”⁹⁶

Incarcerated mothers also suffer from the disruption; they also frequently already carry unresolved trauma when a separation occurs.⁹⁷ Symptoms such as helplessness, depression, terror, disconnection, and shame often accompany this trapped state of existence, which prohibits the traumatized person from engaging as fully in life as a non-traumatized person.⁹⁸

As Judith Herman explains in *Trauma and Recovery*, the core experience of trauma lies in disempowerment and disconnection from others, and it is only in the context of relationships that recovery can take place.⁹⁹ As discussed in Part I, the circumstances imposed on mothers in prison often intensify feelings of disempowerment and disconnection. Yet the United States continues to ignore the root causes of their incarceration, thereby creating an environment where the real problems remain unaddressed, the already existing trauma of the mother is made worse, and additional toxic stress is created for the child, all of which only serves to wreak havoc on future generations.¹⁰⁰

⁹⁵ Echo, *supra* note 94, at 6:00-7:22. Van der Kolk stresses that when a person lives with an abnormal level of unaddressed trauma, the world that the person lives in is unsafe and unpredictable, which manifests not only in the psychology of a person but also in their body, and “no amount of insight will silence it.” See VAN DER KOLK, *supra* note 6, at 64.

⁹⁶ Ducharme, *supra* note 16; see VAN DER KOLK, *supra* note 6, at 64.

⁹⁷ GLAZE & MARUSCHAK, *supra* note 4, at 7; see Michelle Sleed et al., *New Beginnings for Mothers and Babies in Prison: A Cluster Randomized Controlled Trial*, 15 ATTACHMENT & HUM. DEV. 349, 349-50 (2013).

⁹⁸ Gabor Maté, *Foreword* to PETER A. LEVINE, IN AN UNSPOKEN VOICE, at xi-xiii (2010); see JUDITH HERMAN, TRAUMA AND RECOVERY 51 (rev. ed. 2015). Levine defines a traumatic event as an occurrence that causes a long-term dysregulation in the nervous system. This can vary from person to person, depending largely on “their ability to handle various kinds of challenging situations due to different genetic makeup, early environmental challenges, and specific trauma and attachment histories.” Peter Payne et al., *Somatic Experiencing: Using Interoception and Proprioception as Core Elements of Trauma Therapy*, FRONTIERS IN PSYCHOL., Feb. 4, 2015, at 1, 5.

⁹⁹ HERMAN, *supra* note 98, at 51.

¹⁰⁰ Pioneering research on the connection between the body and mind has helped uncover effective somatic (body-based) approaches to treating trauma. VAN DER KOLK, *supra* note 6, at 21; see generally SEBERN F. FISHER, NEUROFEEDBACK IN THE TREATMENT OF DEVELOPMENTAL TRAUMA (2014); HERMAN, *supra* note 98; LEVINE, *supra* note 98; PAT OGDEN ET AL., TRAUMA AND THE BODY (2008); STEPHEN W. PORGES, THE POLYVAGAL THEORY (2011).

A. *Unspoken Trouble: Childhood Development, Parental Attachment, and the Strange Situation*

“As long as we feel safely held in the hearts and minds of the people who love us, we will climb mountains and cross deserts But if we feel abandoned, worthless, or invisible, nothing seems to matter.”¹⁰¹

Data confirm that early separation from a primary caregiver has a significant biological effect on a person’s overall capacity to function because a “child and parent’s biology are inextricably linked” and thus, when separated, the child’s development suffers irrevocable harm.¹⁰² Forcibly separating children from their mothers constitutes an adverse childhood experience, which is defined as a psychosocial stressor and trauma experienced by children that has a significant impact on later health and well-being.¹⁰³ These traumatic experiences are linked with disrupted neurodevelopment, creating disturbances in the regulation of the body and resulting in social, emotional, and cognitive impairment.¹⁰⁴

Children often do not comprehend what is occurring when their caregiver is taken away and their primary attachment bond is disrupted. Frequently filled with intense emotion and a lack of understanding, the trauma of the separation is then stored in the body.¹⁰⁵ This severing of the child’s earliest and closest relationship, which had been helping to build the child’s map of the world, often shatters the child’s most intimate sense of self.¹⁰⁶ The identity of the child is supposed to be formed and sustained through minute-to-minute exchanges with a caregiver, and significant interruption can cause toxic stress.¹⁰⁷ Furthermore, the child’s most fundamental sense of trust is broken, which continues to pervade the child’s sense of self and the child’s relationships with others into adulthood.¹⁰⁸

¹⁰¹ VAN DER KOLK, *supra* note 6, at 350.

¹⁰² Ducharme, *supra* note 16.

¹⁰³ Lê-Scherban et al., *supra* note 94, at 2; see Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults*, 14 AM. J. PREVENTIVE MED. 245, 248 (1998).

¹⁰⁴ Felitti et al., *supra* note 103, at 251-56; Lê-Scherban, *supra* note 94, at 5-7; see generally VAN DER KOLK, *supra* note 6.

¹⁰⁵ Julie Poehlmann, *Representation of Attachment Relationships in Children of Incarcerated Mothers*, 76 CHILD DEV. 679, 687-88 (2005); see generally VAN DER KOLK, *supra* note 6; ARDITTI, *supra* note 16, *passim*.

¹⁰⁶ VAN DER KOLK, *supra* note 6, at 64; Kraft, *supra* note 19; *Toxic Stress*, *supra* note 92.

¹⁰⁷ Kraft, *supra* note 19; *Toxic Stress*, *supra* note 92; Payne et al., *supra* note 98, at 5.

¹⁰⁸ HERMAN, *supra* note 98, at 51; see VAN DER KOLK, *supra* note 6, at 111-13.

Attachment adversity and childhood trauma are often intertwined.¹⁰⁹ Developmental psychoanalyst John Bowlby has defined attachment as a lasting psychological connectedness between human beings and concluded that attachment is the secure base from which a child moves out into the world.¹¹⁰ Yet when the primary attachment relationship is disrupted, developmental changes in the child can occur, which is associated with a rise in attachment behaviors.¹¹¹ Separating children from their caregivers does not take away their longing to attach; this deeply felt need is not a choice.¹¹² Children have a biological instinct to do this and will thus develop a coping style based on their attempt to get at least some of their basic needs met.¹¹³

Studies by Bowlby and psychologist Mary Ainsworth demonstrate the crucial role that secure bases play in normal social and biologic development.¹¹⁴ Ainsworth conducted pivotal research in an effort to understand how attachment and attunement with a primary caregiver affected a child. Based on thousands of hours of observation, Ainsworth created a research tool called the Strange Situation,¹¹⁵ which examines how an infant reacts to a temporary separation from the mother—and the results were clear: while a child with a secure attachment does show distress when the mother leaves, when the mother returns and after a short check-in for reassurance, the child is happy and resumes play, exhibiting confident and exploratory behavior. However, the picture is more complex and distressing for children with an insecure attachment pattern.¹¹⁶ In this scenario, during the mother's absence, the child's exploration immediately becomes depressed and heightened attachment behaviors are activated, such as crying and confusion.¹¹⁷ Yet when the mother returns, the child does not quickly settle down. Instead, insecurely attached infants often

¹⁰⁹ JOHN BOWLBY, ATTACHMENT AND LOSS 9-10 (2d ed. 1982); VAN DER KOLK, *supra* note 6, at 115; Christin M. Ogle et al., *The Relation Between Insecure Attachment and Posttraumatic Stress: Early Life Versus Adulthood Traumas*, 7 PSYCHOL. TRAUMA 324, 329-30 (2015).

¹¹⁰ BOWLBY, *supra* note 109, at 332; VAN DER KOLK, *supra* note 6, at 113-14. Bowlby suggests that a child initially forms one primary attachment and that the attachment figure acts as a secure base for exploring the world. If an attachment has not developed between infancy and early childhood or if it has been disrupted, the child will likely develop an insecure attachment style.

¹¹¹ BOWLBY, *supra* note 109, at xii.

¹¹² VAN DER KOLK, *supra* note 6, at 112-17.

¹¹³ *Id.* at 115. Traumatized children will organize their lives as if the trauma is still going on, with every new encounter or event contaminated by the past. *See id.* at 53.

¹¹⁴ van der Kolk, *supra* note 7, at 394.

¹¹⁵ *Id.* at 117-19; Mary D. Salter Ainsworth & Silvia M. Bell, *Attachment, Exploration, and Separation: Illustrated by the Behavior of One-Year-Olds in a Strange Situation*, 41 CHILD DEV. 49 (1970).

¹¹⁶ *Id.*; VAN DER KOLK, *supra* note 6, at 117-18.

¹¹⁷ Ainsworth & Bell, *supra* note 115, at 49.

react to the anxiety of the separation in the aftermath by either heightening their desire to maintain contact or exhibiting resistance to contact and comforting from their mothers.¹¹⁸ Both behaviors result from an often chronic and inconsistent response to some of the child's most basic biological needs.¹¹⁹ Children who are separated from their mothers, due to an event such as incarceration, are unable to see and speak to their primary caregivers frequently and thus may be at risk of developing such an attachment style.¹²⁰

B. *Incarcerated Mothers and Unaddressed Trauma*

Mothers also habitually face similar emotional trauma related to separation from their children, experiencing high levels of anxiety, depression, and the potential for post-traumatic stress disorder (PTSD).¹²¹ However, the majority of these mothers, frequently caught at the crossroads of racial, gender, and economic oppression,¹²² often exhibit traumatic symptoms even before they are separated from their children, a likely factor underlying the circumstances that led to their incarceration in the first place.¹²³ Such unaddressed issues can run a person's life, with their energy "focused on suppressing inner chaos, at the expense of spontaneous involvement in their life."¹²⁴ Mothers' incarceration and physical separation from their children only serves to be all the more destructive.¹²⁵

Fragmentation of parental bonds has been shown to be more keenly felt by mothers who were the primary caregivers prior to incarceration

¹¹⁸ *Id.* at 61-63.

¹¹⁹ *Id.*; VAN DER KOLK, *supra* note 6, at 119; van der Kolk, *supra* note 7, at 396; see Mary D. Ainsworth, *Patterns of Attachment Behavior Shown by the Infant in Interaction with His Mother*, 10 MERRILL-PALMER Q. BEHAV. DEV. 51, 51-58 (1964).

¹²⁰ Ainsworth & Bell, *supra* note 115, at 61-63; see Ainsworth, *supra* note 119, at 56-58; see also PsychAlive, *Dr. Dan Siegel - On Disorganized Attachment*, YOUTUBE (Mar. 3, 2011), https://www.youtube.com/watch?v=iGDqJYEi_Ks.

¹²¹ Kennedy, *supra* note 75, at 192-93; Ducharme, *supra* note 16.

¹²² See, e.g., Kimberlé Crenshaw on Intersectionality, *More than Two Decades Later*, COLUMBIA LAW SCHOOL (June 8, 2017), <https://perma.cc/H3XU-LXQB>. The concept of intersectionality is a "lens through which you can see where power comes and collides, where it interlocks and intersects" and is a crucial framework to employ when considering the experiences of many incarcerated mothers. *Id.*

¹²³ See ARDITTI, *supra* note 16, at 55. An incarcerated mother likely also suffers from an insecure attachment pattern. Unresolved trauma may contribute to the intergenerational transmission of insecure attachment. Udita Iyengar et al., *Unresolved Trauma in Mothers: Intergenerational Effects and the Role of Reorganization*, 5 FRONTIERS IN PSYCHOL. 1, 1 (2014).

¹²⁴ VAN DER KOLK, *supra* note 6, at 53.

¹²⁵ LEVINE, *supra* note 98, at 108. "Face-to-face, soul-to-soul contact is a buffer against the raging seas of inner turmoil. It is what helps you calm any emotional turbulence [F]acial recognition meet[s] people's deepest emotional needs and motivate[s] many behaviors, both conscious and unconscious." *Id.*

than by incarcerated fathers who were not.¹²⁶ Yet that pain only becomes more profound since the children of incarcerated mothers have a higher likelihood of ending up in the custody of child protective services, which then makes mothers more susceptible to the permanent loss of parental rights.¹²⁷

Moreover, when incarcerated mothers are released and still retain parental rights, they face abounding challenges that are unlike any confronted by those who do not bear the primary responsibility of parenting.¹²⁸ Obtaining and sustaining legal employment and meeting any treatment needs¹²⁹ are challenging on their own; coupled with caregiving responsibilities and the stigma that women endure when leaving prison, this set of challenges is often an unrealistic burden to shoulder.¹³⁰

C. *Predicting the Future: ACEs, Intergenerational Effects, and Devastating Long-Term Health Outcomes*

In *The Body Keeps the Score*, Dr. van der Kolk asserts that trauma is a much larger public health issue than people recognize, as most are unwilling to talk about it frankly and are more comfortable marginalizing its effects.¹³¹ Often children caught in this chaos must dismiss powerful and anguished experiences in order to move on, which can result in “serious problems, including ‘chronic distrust of other people, inhibition of curiosity [and] distrust of their own senses.’”¹³² These traumatic experiences, which cause lasting psychobiologic changes that reduce the capacity to

¹²⁶ ARDITTI, *supra* note 16, at 68.

¹²⁷ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. ch. 7); Kennedy, *supra* note 75, at 163-66.

¹²⁸ ARDITTI, *supra* note 16, at 65.

¹²⁹ See generally BRONSON & BERZOFKY, *supra* note 58; JAMES & GLAZE, *supra* note 59, at 5.

¹³⁰ ARDITTI, *supra* note 16, at 65; Marilyn Brown & Barbara Bloom, *Reentry and Renegotiating Motherhood: Maternal Identity and Success on Parole*, 55 CRIME & DELINQ. 313, 320-21, 327-28 (2009); see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 95 (2010). According to a report from the White House, job applicants with a criminal record are fifty percent less likely to receive interview requests or job offers. Press Release, Office of the Press Secretary, the White House, CEA Report: Economic Perspectives on Incarceration and the Criminal Justice System (Apr. 23, 2016), <https://perma.cc/3DY7-J48S>.

¹³¹ See generally VAN DER KOLK, *supra* note 6, at 349-58.

¹³² *Id.* at 141.

cope with subsequent social disruption, are also tied to negative intergenerational effects since they often “disturb parenting processes and create similar vulnerability into the next generation.”¹³³

This exposure to toxic stress on developing brains of children can inhibit their prefrontal cortex, which is necessary for executive functioning and impulse control, and on MRI scans, there are often measurable differences in the amygdala, which is often described as the brain’s fear response center.¹³⁴ California Surgeon General Nadine Burke Harris explains that, while this stress response system is critical to survival, when it is activated repeatedly and continuously, it goes from being adaptive and lifesaving to maladaptive and health damaging, causing the body to remain in a hyper-alert state.¹³⁵ These lifetime implications of unaddressed childhood trauma are so far-reaching that research shows they not only physically change a child’s biology but also result in devastating health outcomes.¹³⁶ There are dramatic links between adverse childhood experiences—which include parental separation, incarceration and parental mental illness—and risky behavior, psychological issues, serious illness, and other causes of death.¹³⁷ The pivotal Adverse Childhood Experiences (“ACE”) Study first published these startling results, concluding that people with four or more ACEs are significantly more likely to develop serious illnesses, including heart disease and cancer, and those with six or more ACEs die twenty years earlier on average.¹³⁸ Moreover, the potential intergenerational effects of ACEs are supported by research revealing an “increased risk of adverse health outcomes among children of parents who experienced chronic trauma.”¹³⁹

¹³³ van der Kolk, *supra* note 7, at 408; *see* Felitti et al., *supra* note 103, at 245; Lê-Scherban et al., *supra* note 94, at 5-7; *see also* Rachel Yehuda & Amy Lehrner, *Intergenerational Transmission of Trauma Effects: Putative Role of Epigenetic Mechanisms*, 17 *WORLD PSYCHIATRY* 243 (2018).

¹³⁴ Burke Harris, *supra* note 94 at 6:43-9:22; *see* Felitti et al., *supra* note 103, at 249-56.

¹³⁵ Burke Harris, *supra* note 94 at 6:43-9:22.

¹³⁶ *Id.*; *see* Felitti et al., *supra* note 103, at 249-56.

¹³⁷ *See generally* Burke Harris, *supra* note 94; *see* Felitti et al., *supra* note 103, at 249-56.

¹³⁸ Felitti et al., *supra* note 103, at 249-56; Mark A. Bellis et al., *Adverse Childhood Experiences and Associations with Health-Harming Behaviours in Young Adults: Surveys in Eight Eastern European Countries*, 92 *BULL. WORLD HEALTH ORG.* 641 (2014); *see also* PUB. HEALTH MGMT. CORP., *FINDINGS FROM THE PHILADELPHIA URBAN ACE STUDY* 24 (2013).

¹³⁹ Lê-Scherban et al., *supra* note 94, at 1-2.

III. THE TORMENT OF SEPARATION: HOW THE UNITED STATES KEEPS INCARCERATED MOTHERS AND THEIR DEPENDENT CHILDREN APART AND ITS SHATTERING CONSEQUENCES

“[I]n America all too few blows are struck into flesh. We kill the spirit here, we are experts at that.”¹⁴⁰

From the Bureau of Prisons disregarding its own visitation policies to the passage of legislation that vastly increases the likelihood incarcerated mothers will have their parental rights terminated, the conduct by the United States has generated catastrophic results for incarcerated mothers and their children.¹⁴¹ This is not only flagrantly inconsistent with international norms, discussed in Part IV, but is also incongruous with the purported goals of the U.S. correctional system.¹⁴²

A. *The Experiences and Treatment of Incarcerated Pregnant Women in the United States*

The failure to consider the ways in which female offenders’ life circumstances differ from those of male offenders imposes hardship that can begin, in the case of incarcerated mothers, before they even give birth.¹⁴³ The starkest example is the practice of shackling incarcerated pregnant women during labor, which the American Medical Association has described as “a barbaric practice that needlessly inflicts excruciating pain

¹⁴⁰ NORMAN MAILER, *THE PRESIDENTIAL PAPERS* 69 (Bantam Books 1964) (1963).

¹⁴¹ Adoption and Safe Families Act of 1997, Pub L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. ch. 7); FED. BUREAU OF PRISONS, NO. 5267.09, VISITING REGULATIONS 1 (2015), <https://perma.cc/HE27-YAXJ>; Hager & Flagg, *supra* note 63; Antoinette Greenaway, *When Neutral Policies Aren’t So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African-American Women*, 17 NAT’L BLACK L. J. 247, 249 (2004).

¹⁴² See generally PENAL REFORM INT’L, *supra* note 22; *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1929. While this article focuses on the United States’ international obligations to protect human rights, there is also a strong argument that separating incarcerated mothers from their children and creating circumstances whereby they can no longer play a meaningful role in their children’s lives violates parents’ constitutional right to family integrity. See Emily Halter, *Parental Prisoners: The Incarcerated Mother’s Constitutional Right to Parent*, 108 J. CRIM. L. & CRIMINOLOGY 539 (2018).

¹⁴³ ACLU ET AL., *supra* note 35, at 47-54. The violations of rights for many of these women may also have occurred prior to prison: many poor, pregnant women who are on government assistance have their privacy invaded through a series of highly intrusive and punitive methods and are then ultimately criminalized. Women in general are often targeted in ways inextricably related to race, class, and gender. Alston, *supra* note 41, paras. 36-37, 39; see KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 1-6 (2017); see also Emma S. Ketteringham et al., *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the “Womb-to-Foster-Care Pipeline,”* 20 CUNY L. REV. 77, 96-97 (2016); see generally AMNESTY INTERNATIONAL, *CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA* (2017).

and humiliation.”¹⁴⁴ Although international human rights law prohibits shackling and many argue that the practice also violates the U.S. Constitution, the United States is one of the few countries that uses restraints on pregnant incarcerated women, who represent an estimated four percent of all women admitted to prison.¹⁴⁵

While many states have guidelines against shackling in most instances, as of 2020, only twenty-two states and the District of Columbia have laws restricting the shackling of pregnant women in prisons and jails.¹⁴⁶ Utah, Nebraska, Kansas, Indiana, and South Carolina have not implemented any law or policy to restrict shackling while in labor.¹⁴⁷ North Carolina recently enacted a policy against shackling after intense pressure from advocacy groups.¹⁴⁸ Nevertheless, the state’s guidelines continue to allow incarcerated pregnant women to be handcuffed while being transported to the hospital for delivery.¹⁴⁹ There are also reports of correctional officers not adhering to guidelines, including an account of a woman in New York being shackled while in labor in 2018, despite the fact that the state passed a law in 2015 barring the use of restraints on women during delivery.¹⁵⁰

¹⁴⁴ AM. MED. ASS’N, AN “ACT TO PROHIBIT THE SHACKLING OF PREGNANT PRISONERS” MODEL STATE LEGISLATION 1 (2015); Editorial, *Handcuffed While Pregnant*, N.Y. TIMES (Sept. 23, 2015), <https://perma.cc/7KKJ-DUFB>; see also COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS, HEALTH CARE FOR PREGNANT AND POSTPARTUM INCARCERATED WOMEN AND ADOLESCENT FEMALES 1 (2011) (reaffirmed 2019); see generally Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CAL. L. REV. 1239 (2012).

¹⁴⁵ Dana L. Sichel, *Giving Birth in Shackles: A Constitutional and Human Rights Violation*, 16 AM. U. J. GENDER SOC. POL’Y & L. 223, 223-24, 247-51 (2008); Carolyn Sufrin et al., *Pregnancy Outcomes in US Prisons, 2016-2017*, 109 AM. J. PUB. HEALTH 799, 801 (2019); see UNIV. OF CHI. LAW SCH. ET. AL., THE SHACKLING OF INCARCERATED PREGNANT WOMEN: A HUMAN RIGHTS VIOLATION COMMITTED REGULARLY IN THE UNITED STATES (2013), <https://perma.cc/K85T-TNHH>.

¹⁴⁶ Chris DiNardo, *Pregnancy in Confinement, Anti-Shackling Laws and the “Extraordinary Circumstances” Loophole*, 25 DUKE J. GENDER L. & POL’Y 271, 279 n.60 (2018).

¹⁴⁷ Lilian Min, *These Are the States That Still Allow Female Inmates to Be Shackled During Childbirth*, THE CUT (Mar. 28, 2018), <https://perma.cc/T6ZW-EMBC>. Georgia recently enacted a law prohibiting the shackling of incarcerated pregnant women. See Sarah McCammon, *Pregnant, Locked Up, and Alone*, NPR (June 16, 2019, 5:00 AM), <https://perma.cc/8BWE-ZQMX>.

¹⁴⁸ Press Release, Sistersong, Advocates Demand an End to Shackling of People in Labor (Feb. 5, 2018), <https://perma.cc/E56M-JBJM>.

¹⁴⁹ Min, *supra* note 147.

¹⁵⁰ Complaint & Jury Demand at 1-2, *Doe v. City of New York*, No. 18 Civ. 11414 (S.D.N.Y. Dec. 6, 2018); Ashley Southall & Benjamin Weiser, *Police Forced Bronx Woman to Give Birth While Handcuffed, Lawsuit Says*, N.Y. TIMES (Dec. 6, 2018), <https://perma.cc/P6YD-4NTR>; see Audrey Quinn, Opinion, *In Labor, in Chains*, N.Y. TIMES (July 26, 2014), <https://perma.cc/8BCK-EVEQ>. In July 2019, the New York City government

The practice of shackling pregnant women has also been publicly criticized by the American College of Obstetricians and Gynecologists in an extensive Committee Opinion, which not only calls the practice de-meaning but notes that shackled pregnancies are often high-risk because of a lack of adequate prenatal care.¹⁵¹ Physical restraints interfere with health care providers' ability to treat patients safely, and shackling pregnant women is exceptionally dangerous; the risks range from an increase in blood clots to causing serious delays when there is hemorrhaging or an irregular fetal heartbeat, both of which require emergency intervention, including cesarean delivery.¹⁵²

As the issue of shackling pregnant women continues to garner more public outcry, there has been some change. In December 2018, the First Step Act was signed into law, formally banning federal prison officials from shackling women during the period of pregnancy, labor, and post-partum recovery, defined as approximately twelve weeks after delivery.¹⁵³ However, the provision allows correctional officers to use restraints on a pregnant woman if they believe that doing so is necessary to prevent immediate and serious risk of harm to the woman herself or to others.¹⁵⁴ While the Department of Justice did have a policy in place as of 2014 that prohibited the shackling of pregnant women, it is significant that this violative practice gained enough attention to propel federal legislation.¹⁵⁵ Still, while the newly created law remains pertinent to the estimated 16,000 incarcerated women in federal prison, it does not affect the estimated 200,000 women in state prisons and local jails.¹⁵⁶

In addition to shackling, the Committee Opinion also stresses the importance of allowing the newborn to remain with the mother to facilitate bonding; most federal prisons, state prisons, and jails separate the mother

agreed to pay the woman \$610,000 to settle her claim that her treatment by correctional officers was inhumane and violated state law, but the city denied wrongdoing. Still, the case prompted the New York Police Department to revise its Patrol Guide procedures for handling pregnant women. Ashley Southall, *She Was Forced to Give Birth in Handcuffs. Now Her Case Is Changing Police Rules.*, N.Y. TIMES (July 3, 2019), <https://perma.cc/4EJK-4Q5B>.

¹⁵¹ COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, *supra* note 144, at 1.

¹⁵² *Id.* at 3-4. The Committee Opinion emphasizes that shackling pregnant women creates danger not only during labor and childbirth but throughout pregnancy, with the practice increasing the risk of falling and also preventing the pregnant woman from being able to break a fall. The Opinion also stresses the need for improvements to prenatal care. *See id.*

¹⁵³ First Step Act of 2018, Pub L. No. 115-391, § 301, 132 Stat. 5194, 5217-20. This new federal law is discussed in more detail in Part IV.

¹⁵⁴ *Id.*

¹⁵⁵ FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT: ESCORTED TRIPS 12 (2014), <https://perma.cc/BGJ9-MNEV>.

¹⁵⁶ KAJSTURA, *supra* note 4. No current state law bans the use of shackles outright; rather, at their most restrictive, the anti-shackling laws still allow for "extraordinary circumstances" to exist, which permits the use of restraints. *See* DiNardo, *supra* note 146, at 280.

from her infant within twenty-four to seventy-two hours after delivery.¹⁵⁷ However, in certain instances, new mothers who have committed non-violent offenses may be allowed to remain with their infants in prison nursery programs, giving them an opportunity to develop secure bonds.¹⁵⁸ Thirteen states currently have programs that allow mothers to stay with their infants in a separate section of the prison for a finite amount of time, typically ranging from twelve to eighteen months, while participating in prenatal and parenting classes.¹⁵⁹ In order to be admitted into a nursery program, incarcerated pregnant women typically must be serving shorter sentences and be the primary caregiver to the child upon release.¹⁶⁰ While the benefits of these nursery programs are extensive, including a stronger relationship between mother and child and reduced rates of recidivism, prison nurseries are currently only available to a small fraction of pregnant incarcerated women.¹⁶¹

B. Mothers with Nowhere to Turn: Rarely Used Sentencing Alternatives and Prison Conditions That Ignore the Federal Bureau of Prisons Policies

Despite growing national concern, the U.S. federal government continues to give little attention to the cyclical nature of incarceration among women and how it often only serves to further destabilize families.¹⁶²

¹⁵⁷ Elizabeth Chuck, *Prison Nurseries Give Incarcerated Mothers a Chance to Raise Their Babies – Behind Bars*, NBC NEWS (Aug. 4, 2018), <https://perma.cc/U58X-PCHG>; COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, *supra* note 144, at 2.

¹⁵⁸ Sarah Yager, *Prison Born*, ATLANTIC (July/Aug. 2015), <https://perma.cc/P348-CGY Y>; Megan Thompson & Mori Rothman, *In One Indiana Prison, a Program Allows Incarcerated Moms to Raise Their Newborns*, PBS NEWS HOUR (May 12, 2018), <https://perma.cc/32FM-FGMT>; see generally Kimberly Howard et al., *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, 13 ATTACHMENT & HUM. DEV. 5 (2011). For more on parental attachment, see JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT (1988).

¹⁵⁹ Yager, *supra* note 158; CHANDRA KRING VILLANUEVA ET AL., WOMEN'S PRISONERS ASS'N, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 6 (2009), <https://perma.cc/ERG8-K9QM>; THE REBECCA PROJECT FOR HUMAN RIGHTS & THE NAT'L WOMEN'S LAW CTR., *supra* note 20, at 7.

¹⁶⁰ See Naomi Schaefer Riley, *On Prison Nurseries*, NATIONAL AFFAIRS (Spring 2019). There have also been reports of applicants being rejected because of overly stringent standards. See Victoria Law, *Empty Cribs in Prison Nurseries*, TYPE INVESTIGATIONS (May 13, 2018), <https://perma.cc/3BU2-L244>.

¹⁶¹ Thompson & Rothman, *supra* note 158; Yager, *supra* note 158.

¹⁶² KAJSTURA, *supra* note 4; Stillman, *supra* note 5.

However, there are tools already in place that could readily change the environment, although they are not often utilized.¹⁶³

Under the Federal Sentencing Guidelines, the U.S. Sentencing Commission (USSC) established that, in very limited circumstances, judges are allowed to sentence people outside of the applicable guideline range; these lesser sentences are referred to as “downward departures.”¹⁶⁴ Yet situations where incarcerated mothers have primary caregiving responsibilities have been routinely rejected as deserving of such sentences despite the detrimental repercussions of parental incarceration.¹⁶⁵ In fact, these effects are so commonly known that the USSC has been encouraged to do its own review of the impact of parental incarceration, although there is no indication that this has meaningfully taken place.¹⁶⁶

In an internal USSC report, more than half of both district and circuit court judges indicated that they “would like to see more emphasis at sentencing placed on . . . the offender’s family ties and responsibilities.”¹⁶⁷ Results of a 2014 government survey likewise showed the dismay of United States district judges, a majority of whom agreed that the USSC should significantly revise its guidelines to provide more alternatives to incarceration.¹⁶⁸

While these judges do have some discretion, the BOP ultimately determines where a person convicted of an offense will be designated.¹⁶⁹ This means that even in a case where a federal district court judge requests that an incarcerated mother be assigned to the prison closest to her child, the BOP does not need to comply with the judge’s request once the mother is in custody.¹⁷⁰ This is enormously problematic, especially given the BOP’s record of failing to strengthen familial ties in other ways, such as in the case of visitation, where the BOP routinely does not provide child-

¹⁶³ See, e.g., OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM’N, DEPARTURES AND VARIANCES 5 (2018), <https://perma.cc/334Z-48T7>; *Determining the Sentence*, U.S. SENTENCING COMMISSION (Nov. 1, 2018), <https://perma.cc/GEB9-A3US>.

¹⁶⁴ See generally OFFICE OF GEN. COUNSEL, *supra* note 163.

¹⁶⁵ ACLU ET AL., *supra* note 35, at 40; Fedock, *supra* note 40.

¹⁶⁶ Memorandum from Pat Nolan et al. to U.S. Sentencing Comm’n, *Alleviating the Impact of Parental Incarceration on Children Through Sentencing Reform* (July 9, 2017), <https://perma.cc/N46W-NJF6>.

¹⁶⁷ LINDA DRAZGA MAXFIELD, U.S. SENTENCING COMM’N, SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES 6 (2003), <https://perma.cc/PU8F-KGFX>.

¹⁶⁸ U.S. SENTENCING COMM’N, RESULTS OF 2014 SURVEY OF UNITED STATES DISTRICT JUDGES: MODIFICATION AND REVOCATION OF PROBATION AND SUPERVISED RELEASE 6, 21 (2015), <https://perma.cc/FXH6-28JG>. Fifty-nine percent of the judges who filled out the survey said they believed that the Federal Sentencing Guidelines should be amended to allow for more alternatives to incarceration. *Id.* at 6.

¹⁶⁹ *Custody and Care Designations*, FED. BUREAU OF PRISONS, <https://perma.cc/D7S4-YR8K>.

¹⁷⁰ *Id.*

friendly areas in women's prisons and in some instances allows visitation only two days a week.¹⁷¹ Such restrictions ignore its own visitation regulations, which state that the BOP "encourages visiting by family . . . to maintain the morale of the inmate and to develop closer relationships between the inmate and family members or others in the community."¹⁷²

In September 2018, the U.S. Justice Department's Office of the Inspector General issued a report that criticized the BOP, concluding that it "has not been strategic in its management of female inmates."¹⁷³

C. *Permanent Separation: The Alarming and Unjust Consequences of the Adoption and Safe Families Act on Incarcerated Mothers*

"I have had two visits since I signed the adoption papers five years ago. I have spoken to my son only five times on the phone. His family put a block on the phone so it couldn't accept collect calls. I offered to pay for calls, but his adoptive mother wouldn't allow me to do so."¹⁷⁴

The Adoption and Safe Families Act of 1997 ("ASFA") is a federal law that claims to promote the adoption of children who are in foster care, citing health and safety as paramount and encouraging permanent living arrangements for children in foster care as soon as possible.¹⁷⁵ While seemingly benign on its face, ASFA has produced disproportionate and crippling consequences for incarcerated mothers, who—despite their best efforts to meet the ASFA requirements within the prescribed timetable—are at a considerably higher risk than incarcerated fathers of having their parental rights indefinitely terminated.¹⁷⁶ A parent's incarceration can be considered as a factor in determining whether a termination judgment is in the child's best interest,¹⁷⁷ and since 2006, nearly 5,000 incarcerated parents have had their parental rights terminated expressly because of

¹⁷¹ For visiting regulations at each of the BOP's listed facilities, see *Our Locations*, FED. BUREAU OF PRISONS, <https://perma.cc/9QRD-P25L>.

¹⁷² FED. BUREAU OF PRISONS, NO. 5267.09, VISITING REGULATIONS 1 (2015), <https://perma.cc/HE27-YAXJ>. The BOP continues to make meaningful visitation between mothers and their children difficult, if not impossible, despite the breadth of research showing contact reduces recidivism and mitigates trauma. See CRAMER ET AL., *supra* note 81, at 7-9; LA VIGNE ET AL., *supra* note 83, at 10; RABUY & KOPF, *supra* note 68.

¹⁷³ OFFICE OF THE INSPECTOR GEN., *supra* note 53, at i.

¹⁷⁴ Deborah McCabe, *Signing Away My Son*, RISE MAG. (May 19, 2016), <https://perma.cc/R8WJ-WPPV>.

¹⁷⁵ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, 111 Stat. 2115, 2115 (codified as amended at 42 U.S.C. § 671 (2018)); Roberts, *supra* note 62, at 1495, 1498-99; ACLU ET AL., *supra* note 35, at 55-56.

¹⁷⁶ Kennedy, *supra* note 75, at 175-78; Roberts, *supra* note 62, at 1493-96; GLAZE & MARUSCHAK, *supra* note 4, at 54 tbl. 8; ACLU ET AL., *supra* note 35, at 55-56.

¹⁷⁷ Kennedy, *supra* note 75, at 191-93.

their imprisonment.¹⁷⁸ Proponents of ASFA and short deadlines for terminating parental rights contend that doing so is in a child's best interest and that the child's need for permanence is primary.¹⁷⁹ This assertion is problematic considering that many of the children affected do not necessarily find permanent homes and the number of children in foster care continues to rise.¹⁸⁰ Furthermore, as examined in closer detail in Part II, since separation from a mother can have serious short- and long-term impacts on a child, it is often contrary to a child's best interests—and yet, in many instances, these hazardous effects are not properly weighed as part of the best interests analysis within U.S. domestic law.¹⁸¹ It is also salient to add that none of ASFA's provisions focus on supporting and reuniting families, with one critic of ASFA pointing out that “instead of actually responding to the struggles of poor families . . . we've decided that it's simpler to take their children away.”¹⁸²

Despite these damaging consequences, the federal government continues its forceful steps to incentivize states to support ASFA.¹⁸³ For example, in order to receive certain federal funds, a state is required under ASFA to apply plans that include filing or joining a petition to terminate parental rights, subject to a few exceptions, when a child has been in foster care for fifteen of the most recent twenty-two months, though there is nothing to ensure that the child moves from foster care to an adoptive home once rights are terminated.¹⁸⁴ As previously discussed, the majority of children with fathers in prison have their mother to care for them, which protects them from becoming wards of the state. However, when mothers are incarcerated, children are more likely to go into foster care if

¹⁷⁸ Hager & Flagg, *supra* note 63.

¹⁷⁹ *Id.*

¹⁸⁰ CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, THE ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) REPORT: PRELIMINARY FY 2017 ESTIMATES AS OF AUGUST 10, 2018, at 1 (2018), <https://perma.cc/VS2B-KREF>; Kennedy, *supra* note 75, at 186.

¹⁸¹ See Kennedy, *supra* note 75, at 186-87; Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. ch. 7). The “best interests of the child” standard and the effects of ASFA are further discussed in relationship to international human rights law in Part IV.

¹⁸² Hager & Flagg, *supra* note 63; ACLU ET AL., *supra* note 35, at 50-51.

¹⁸³ Hager & Flagg, *supra* note 63; see Adoption and Safe Families Act of 1997 § 201.

¹⁸⁴ During the fifteen-month timeline, the state can concurrently “identify, recruit, process, and approve a qualified family for an adoption.” See Adoption and Safe Families Act of 1997 § 103(a)(3). The three exceptions are: (1) the child is under a relative's care; (2) a state agency finds a “compelling reason” that terminating parental rights is not in the child's best interest; and (3) the state has failed to make “reasonable efforts” to reunite the child with their parents. *Id.*; see also Hager & Flagg, *supra* note 63.

the father or a family member is unavailable to take custody, which happens frequently.¹⁸⁵

It is significant that these children only enter foster care because of parental incarceration, rather than a separate finding of abuse or neglect, which makes ASFA acutely harmful to incarcerated mothers.¹⁸⁶ The USSC's own report bolsters this finding: the average median prison sentence for women convicted under a federal statute carrying a mandatory minimum sentence, which includes drug offenses, is sixty months; with ASFA's fifteen-month foster care time limit, this leaves incarcerated mothers in jeopardy of losing their parental rights and their children permanently.¹⁸⁷

Despite the fact that most incarcerated mothers have been convicted of offenses that are non-violent in nature, monetary bonuses for states that facilitate these adoptions continue. The federal government has given an estimated \$639 million in rewards through the "adoption incentive payments" provision of ASFA since 1998.¹⁸⁸ Moreover, ASFA discourages foster parents from supporting the child's relationship with his or her birth family.¹⁸⁹

¹⁸⁵ GLAZE & MARUSCHAK, *supra* note 4, at 54 tbl. 8.

¹⁸⁶ ACLU ET AL., *supra* note 35, at 55. Parents with child-welfare cases who are not incarcerated can stave off termination of parental rights by doing things that are next to impossible from confinement, such as "spending time with their children regularly, showing up for court hearings, taking parenting classes, being employed, having stable housing, and paying child support to reimburse the government for the costs of foster care." See Hager & Flagg, *supra* note 63. Some states have enacted laws to allow for increased flexibility in the ASFA analysis in cases of parental incarceration. See Alison Walsh, *States, Help Families Stay Together by Correcting a Consequence of the Adoption and Safe Families Act*, PRISON POL'Y INITIATIVE (May 24, 2016), <https://perma.cc/M9FS-GJTP>.

¹⁸⁷ U.S. SENTENCING COMM'N, QUICK FACTS: WOMEN IN THE FEDERAL OFFENDER POPULATION 2 (2013), <https://perma.cc/STC5-5Z92>. One study shows that children are twice as likely to die of abuse in foster care than in the general population. See Ketteringham et al., *supra* note 143, at 98.

¹⁸⁸ Adoption and Safe Families Act of 1997 § 201; Hager & Flagg, *supra* note 63. Other countries outside of the United States provide alternatives to having a child separated from the mother to ensure adequate bonding between the mother and child. See Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN'S L. J. 65, 75-82 (2015).

¹⁸⁹ MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS? 209 (2007).

D. *The Purported Goals of the U.S. Correctional System and How They Are Not Met*

The additional punitive implications for incarcerated mothers do not effectively serve the claimed goals of the U.S. correctional system, including rehabilitation and deterrence.¹⁹⁰ Rehabilitation, aimed at creating positive outcomes by encouraging and supporting people who are incarcerated with treatment services, is not only the logical approach but research shows that it reduces recidivism.¹⁹¹ However, there are very few programs focused on the specific concerns of incarcerated women, including understanding the impact of separation on incarcerated mothers and their children.¹⁹²

In separating mothers from children, the U.S. also fails to reach its intended goal of deterrence. Instead, its incarceration model results in an increased likelihood of recidivism and intergenerational incarceration in the aftermath of the separation of mother and child.¹⁹³ Moreover, not only do women experience a higher rate of recidivism and a higher risk that their children will be imprisoned, but more than seventy percent of those incarcerated are themselves the children of incarcerated people, illustrating the ineffectiveness of the prison system.¹⁹⁴ Still, while the current treatment of incarcerated mothers is in most instances wholly counterproductive to the deterrence rationale, there has been no meaningful response by the U.S. government to enact change.¹⁹⁵

This is despite the fact that the effects of separating mothers from their children have economic consequences that extend beyond their families. According to a White House report, an estimated \$80 billion is spent annually on federal, state, and local correctional institutions, and the estimated cost to taxpayers is an average of \$31,000 per incarcerated person.¹⁹⁶ In New York, taxpayers pay the most in the country, estimated at

¹⁹⁰ *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1938. The four purported goals of the U.S. correctional institution are rehabilitation, deterrence, incapacitation, and retribution. *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*; BLOOM ET AL., *supra* note 27, at 29.

¹⁹³ *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1922, 1929-31; Martin, *supra* note 18, at 2.

¹⁹⁴ Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Last Century and Some Thoughts About the Next*, 70 U. CHICAGO L. REV. 1, 9-10 (2003); Martin, *supra* note 18, at 2; *Developments in the Law—Alternative Sanctions for Female Offenders*, *supra* note 17, at 1935.

¹⁹⁵ One study suggests that children of incarcerated parents are, on average, six times more likely to become incarcerated themselves. See Martin, *supra* note 18, at 2.

¹⁹⁶ CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS 9 (2012), <https://perma.cc/CEK9-EYNR>; EXEC. OFFICE OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 43 (2016),

nearly \$70,000 per incarcerated person.¹⁹⁷ Yet rather than achieving correctional goals, the current approach to incarcerating mothers only adds to the population of the U.S. correctional system.

IV. HUMAN RIGHTS: THE LEGAL RIGHTS OF MOTHERS AND THE LEGAL RIGHTS OF THEIR CHILDREN

“Human rights are rights; they are not merely aspirations, or assertions of the good. To call them rights is not to assert, merely, that the benefits indicated are desirable or necessary; or merely, that it is ‘right’ that the individual shall enjoy these goods . . . To call them ‘rights’ implies that they are claims ‘as of right,’ not by appeal to grace, or charity, or brotherhood, or love: they need not be earned or deserved.”¹⁹⁸

The suffering that incarcerated mothers and their children endure in the United States—including damage to and wholesale destruction of their families—is not only distressing but an unmistakable violation of international legal norms. The fundamental nature of family is protected by the International Covenant on Civil and Political Rights (ICCPR), which the United States is obligated to follow after ratifying the treaty in 1992.¹⁹⁹ The United States’ actions also conflict with rights described within the Convention on the Rights of the Child (CRC).²⁰⁰ While the United States is the only country not to have ratified this international treaty on children, it did become a signatory in 1995, which, according to the Vienna Convention on the Law of Treaties (Vienna Convention), therefore obligates the United States to not take any actions that are incompatible with the object and purpose of the CRC.²⁰¹

<https://perma.cc/3FME-EQ6K>; Carimah Townes, *The True Cost of Mass Incarceration Exceeds \$1 Trillion*, THINKPROGRESS (Sept. 12, 2016), <https://perma.cc/DM6U-FVZN>.

¹⁹⁷ CHRIS MAI & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, *THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010-2015*, at 8 (2015), <https://perma.cc/4DR5-TYXD>.

¹⁹⁸ HENKIN, *supra* note 14, at 3.

¹⁹⁹ ICCPR, *supra* note 13.

²⁰⁰ CRC, *supra* note 13.

²⁰¹ *Id.*; Vienna Convention, *supra* note 13. The Vienna Convention governs the interpretation of all international treaties. Many of its provisions are considered customary international law and thus binding on the United States. The United States signed the Vienna Convention in 1970 but has yet to ratify it. *Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION, <https://perma.cc/8Z8G-SUN3>. *The Core International Human Rights Instruments and Their Monitoring Bodies*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, <https://perma.cc/KA4X-U3XH>. There are nine core international human rights treaties. See *UN Human Rights Treaties*, HUMANRIGHTS.CH, <https://perma.cc/GP26-EXWX>.

A. *International Law, Human Rights Law, and U.S. Courts*

The foundation of international human rights law was first articulated and recognized by the United Nations and its member countries in the Universal Declaration of Human Rights in 1948.²⁰² At its core, this body of law recognizes certain irreducible rights based in the fundamental human dignity that each person inherently possesses and legally obligates countries to uphold these rights through treaty law, customary international law, and other types of human rights mechanisms.²⁰³

Much of international law, which consists mostly of rules and principles that deal with the conduct of countries and international organizations, is most often derived from either customary practice or international agreements.²⁰⁴ Human rights law, a type of international law, has developed much in the same way, with customary law and international treaties serving as its backbone.²⁰⁵

The general understanding throughout the world is that once a country becomes a party to a treaty, it consents to be bound by that treaty, assuming the legal rights and obligations contained in it.²⁰⁶ However, as mentioned earlier, unlike countries that directly incorporate international law into their domestic law, the United States has declared all of the core human rights treaties it has ratified to be “non-self-executing,” which means that these agreements are not regarded as judicially enforceable law unless the United States implements corresponding domestic legislation to give the treaties effect.²⁰⁷ Still, it is critical to underscore that Article 18 of the Vienna Convention expressly requires a State to refrain from any acts that would defeat the object and purpose of any treaty it has signed.²⁰⁸

²⁰² See LYNN HUNT, *INVENTING HUMAN RIGHTS* 203-05 (2007); UDHR, *supra* note 8.

²⁰³ UDHR, *supra* note 8; see Alston, *supra* note 41, paras. 8-9.

²⁰⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (AM. LAW INST. 1987); STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., RL32528, *INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW* 2 (2018), <https://perma.cc/2GCG-SM8M>.

²⁰⁵ *The Foundation of International Human Rights Law*, UNITED NATIONS, <https://perma.cc/67RM-X7MR>; see Alston, *supra* note 41, paras. 8-9.

²⁰⁶ *The Foundation of International Human Rights Law*, *supra* note 205.

²⁰⁷ See Carlos Vazquez, *The Distinction Between Self-Executing and Non-Self-Executing Treaties in International Law*, UNIV. OF OXFORD FACULTY OF LAW (May 10, 2018), <https://perma.cc/3KVB-7DQE>. Henkin contends that it is evident that “[t]he Framers intended that a treaty should become law *ipso facto*, when the treaty is made; [and that] it should not require legislative implementation to convert it into United States law.” Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 346 (1995).

²⁰⁸ Vienna Convention, *supra* note 13.

International law scholar Louis Henkin believes that the approach by the United States toward human rights treaties is contrary to “the language, and spirit, and history of the Constitution”²⁰⁹ and highly problematic as a matter of law, given that Article VI of the Constitution states, in part, that “[treaties] should be supreme Law of the Land.”²¹⁰ Moreover, he argues that, whether a treaty is self-executing or not, it is nonetheless legally binding on the United States, pointing out that while a treaty may not rule the judiciary branch, there is no evidence that it does not govern the executive or legislative branches.²¹¹ Instead, he says that “it is [the executive and legislative branches’] obligation to do what is necessary to make [the treaty] a rule for the courts . . . if making it a rule for the courts is a necessary or proper means for the United States to carry out its obligation.”²¹²

The commanding and influential legal weight that international human rights carry is evident, even despite the judicial barriers established by the United States.²¹³ As Judge Rosalyn Higgins observes, the passing of binding law is not the only way in which law develops, since “legal consequences can also flow from acts which are not, in the formal sense, ‘binding.’”²¹⁴ In addition, the widespread acceptance of this type of law, often referred to as soft or non-binding law, “tend[s] to legitimize conduct and make the legality of opposing positions harder to sustain.”²¹⁵ Other human rights instruments such as guidelines and declarations adopted at the international level also bear weight, as do regional human rights systems already in place.²¹⁶

²⁰⁹ HENKIN ET AL., *supra* note 8, at 781.

²¹⁰ U.S. CONST. art. VI.

²¹¹ HENKIN ET AL., *supra* note 8, at 781-82.

²¹² *Id.*; see Henkin, *supra* note 207, at 343-46, 343 n.11.

²¹³ Boyle, *supra* note 13, at 120 (citing ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 24 (1995)); Henkin, *supra* note 207, at 343 n.11. Advocates have used the U.S. court system to interpret domestic laws to protect the universal and fundamental rights embodied in international human rights law. See, e.g., *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003).

²¹⁴ ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 24 (1995); Vienna Convention, *supra* note 13. Customary international law can be established by showing: (1) general and consistent State practice, and (2) the State following this practice out of a sense of legal obligation, which is referred to as *opinio juris*. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. vs U.S.)*, Judgment, 1986 I.C.J. 14, ¶¶ 183-86 (June 27).

²¹⁵ Boyle, *supra* note 13, at 121.

²¹⁶ *International Human Rights Law*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, <https://perma.cc/RN6S-YW3N>. There are also regional human rights systems in place to help ensure that agreed-upon human rights standards are implemented. These systems include the Inter-American Court of Human Rights (IACrHR) and its counterpart, the Inter-American Commission on Human Rights (IACHR), which together provide the regional

Arguably the most vital of the UN human rights instruments is the Universal Declaration of Human Rights, with many of its provisions considered to be customary international law.²¹⁷ Within the UDHR, Articles 12 and 16(3) explicitly indicate that the right to family is integral, stating that “[n]o one shall be subjected to arbitrary interference with . . . family,” and that family is “the natural and fundamental group unit of society and is entitled to protection by society and the State.”²¹⁸ In the continuing evolution of international human rights law, core human rights treaties, including the ICCPR and the CRC, and the UN Committee bodies charged with aiding in their implementation, have helped give nuance to the broader international norms first articulated in the UDHR’s formidable list of rights.²¹⁹

As a domestic matter, the basic premise of parents’ right to care, custody, and control of children without state interference is firmly entrenched in U.S. constitutional law as a fundamental liberty guaranteed by the Fourteenth Amendment and supported by extensive Supreme Court precedent from the 1920s to the present day.²²⁰ The rights of children are less explicit in judicial decisions, though countless cases reference the internationally recognized “best interests of the child” principle set forth in the CRC, with one such case expressly acknowledging the harm of family separation.²²¹

U.S. courts have also referenced the CRC despite it not yet being ratified: the Supreme Court looked to international practice to abolish the juvenile death penalty, explicitly stating that “every country in the world [had] ratified [the CRC] save for the United States and Somalia,” and other district court cases demonstrate how the treaty is persuasive authority in U.S. courts.²²² This idea of looking beyond the shores of the United

human rights system for the Americas. In certain instances, this can provide an alternate forum for human rights cases when domestic laws fail. An example of this is the pivotal IACHR case, *Jessica Gonzales v. United States*. See Jessica Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011).

²¹⁷ Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 290-91 (1996).

²¹⁸ UDHR, *supra* note 8, arts. 12, 16(3).

²¹⁹ Hannum, *supra* note 217, at 290-91.

²²⁰ Barbara Bennett Woodhouse, *The Family Supportive Nature of the U.N. Convention on the Rights of the Child*, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 37 (Jonathan Todres et al. eds., 2006); see *Troxel v. Granville*, 530 U.S. 57 (2000); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

²²¹ *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378 (2004).

²²² *Roper v. Simmons*, 543 U.S. 551, 576 (2005); see *Nicholson v. Williams*, 203 F. Supp. 2d 153, 234-35 (E.D.N.Y. 2002); *Beharry v. Reno*, 183 F. Supp. 2d 584, 601 (E.D.N.Y. 2002) (stating that, due to its vast acceptance “to the extent that it acts to codify longstanding, widely-

States for judicial guidance, while not uncommon, is more critical than ever, according to Justice Stephen Breyer, who wrote of the urgency in which the United States needs to use law as a tool “to build a civilized, humane, and just society,” and that it must “construct such a society—a society of laws—together.”²²³

B. *Applying International Human Rights Law*

1. ICCPR: The Fundamental Right to Family

The International Covenant on Civil and Political Rights is a U.S.-ratified treaty with significant legal implications for parents’ and children’s rights that relate to the protection of the family unit, which is among the most fundamental and basic of rights.²²⁴ Adopted by the UN General Assembly in 1966 and ratified by the United States on June 8, 1992, the ICCPR obligates the United States to respect and ensure all the rights of individuals “within its territory and subject to its jurisdiction” and to provide specific remedies in case of any violations; this grants the ICCPR the full force of treaty law as described earlier by Henkin.²²⁵

Certain articles of the ICCPR are almost identical to the UDHR, such as Article 17(1), which states that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence.”²²⁶ The UN Human Rights Committee, the expert body established

accepted principles of law, the CRC should be read as customary international law”), *rev’d on other grounds sub nom. Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003). Somalia has since ratified the CRC. *UN Committee Hails Somalia’s Ratification of Convention on the Rights of the Child*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS (Oct. 2, 2015), <https://perma.cc/QW7F-7Q7X>.

²²³ Stephen Breyer, *America’s Courts Can’t Ignore the World*, ATLANTIC (Oct. 2018), <https://perma.cc/28M7-W5B8>. Other U.S. Supreme Court Justices recognize this view, including Justice Ruth Bader Ginsburg and Justice Sandra Day O’Connor, who, citing the *Charming Betsy* doctrine, said that for more than two hundred years the Supreme Court has held that acts of Congress should “be construed to be consistent with international law, absent clear expression to the contrary.” Sandra Day O’Connor, *Keynote Address at the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002); see Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES (Apr. 11, 2009), <https://perma.cc/FE5H-DMLF>. Other Justices ardently reject this notion, opposing citations to international law in constitutional cases. *Roper*, 543 U.S. at 624. In the 2005 dissent, Justice Antonin Scalia, joined by then Chief Justice William Rehnquist and Justice Clarence Thomas, wrote that “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.”

²²⁴ ICCPR, *supra* note 13, arts. 17, 23-24.

²²⁵ *Id.* art. 2; see HENKIN ET AL., *supra* note 8, at 781-82.

²²⁶ ICCPR, *supra* note 13, art. 17(1). This right is also articulated in the CRC. See CRC, *supra* note 13, art. 16.

to monitor implementation of the ICCPR, maintains that “arbitrary interference” can include interference provided for by law and that the concept of arbitrariness is “intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant.”²²⁷ Prohibiting incarcerated people from communicating with family, whether overtly or more subtly by creating circumstances whereby the person cannot freely communicate, falls under the ICCPR’s definition of arbitrary interference and thus violates the treaty. In its commentary, the Human Rights Committee has been unequivocal that incarceration in and of itself does not allow the State to keep an incarcerated person from their family arbitrarily, stating that “prisoners should be allowed under necessary supervision to communicate with their family . . . at regular intervals, by correspondence as well as by receiving visits.”²²⁸

While Article 17 is a negative right meant to forbid the State from interfering arbitrarily with a person’s right to family, Article 23(1) of the ICCPR creates a positive right to protection, restating Article 16 of the UDHR that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”²²⁹ The Human Rights Committee expressly acknowledges that, within the scope of the rights discussed in Article 23, States are obligated to provide protection to single parents and their children by actively taking actions to safeguard them; single-parent families include many incarcerated mothers and their children.²³⁰ The Committee asserts that the State must adopt all legislative, administrative, and other measures necessary in order to ensure the protection provided for by Article 23.²³¹ It also maintains that Article 23

²²⁷ UN Human Rights Comm., CCPR General Comment No. 16: Article 17, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation, ¶ 4, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Apr. 8, 1988) [hereinafter CCPR General Comment No. 16]. Human rights treaty bodies publish authoritative interpretations of the legal nature of certain provisions in the form of “general comments” or “general recommendations.” See *Human Rights Treaty Bodies – General Comments*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, <https://perma.cc/WVP8-DETX>.

²²⁸ Miguel Angel Estrella v. Uruguay, Comm. No. 74/1980, U.N. Doc. CCPR/C/OP/2, ¶ 9.2 (Mar. 29, 1983). The Human Rights Committee states that when interferences do abide by ICCPR standards and are not deemed to be arbitrary, there must be relevant legislation that specifies the precise circumstances in which interference will be permitted. See CCPR General Comment No. 16, *supra* note 227, ¶¶ 1, 8.

²²⁹ ICCPR, *supra* note 13, ¶ 23.

²³⁰ Alston, *supra* note 41, para. 36.

²³¹ U.N. Human Rights Comm., CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, ¶ 2, 3, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Jul. 27, 1990) [hereinafter CCPR General Comment No. 19].

bars any discriminatory treatment pertaining to visiting rights or the loss of parental rights.²³²

Article 24 of the ICCPR specifically addresses “the protection of the rights of the child, as such or as a member of a family.”²³³ The Committee indicates that the State and society are responsible for guaranteeing children this special protection but adds that the duty is nevertheless primarily incumbent on the family itself, particularly the child’s parents.²³⁴

Yet while the United States is charged with prohibiting interference between family members in Article 17; establishing protection of the family in Article 23; and guaranteeing the right to increased protections for children by the State and by their parents in Article 24, incarcerated mothers and their children continue to endure a harsh and different reality. Children of incarcerated mothers are not afforded the special protections required by their minor status, which creates punitive circumstances for them; nor are these children able to be protected by their primary caregivers, who are often unable to maintain meaningful contact because of the circumstances imposed on them.²³⁵ By not adequately considering the role or responsibilities of mothers, often as single parents, the United States violates incarcerated mothers’ rights—keeping them from fulfilling parental responsibilities, inflicting more pain, and leaving them more powerless.²³⁶

2. CRC: Children of Incarcerated Mothers and Their Right to Be Nurtured

Approximately 2.7 million children under the age of eighteen currently have an incarcerated parent in the United States.²³⁷ As laid out, the United States is failing these children; it is also failing to follow international human rights law, despite knowing how damaging the effects of parental imprisonment are on children and their developing brains.²³⁸ This conduct persists despite treaties like the Convention on the Rights of the Child, which is the most widely and rapidly ratified human rights

²³² *Id.* ¶ 9.

²³³ ICCPR, *supra* note 13, ¶ 24(1); CCPR General Comment No. 19, *supra* note 231, ¶ 1.

²³⁴ U.N. Human Rights Comm., CCPR General Comment No. 17: Article 24 (Rights of the Child), ¶ 6, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (Apr. 7, 1989) [hereinafter CCPR General Comment No. 17].

²³⁵ Adoption and Safe Families Act of 1997, Pub L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. ch. 7).

²³⁶ ICCPR, *supra* note 13, ¶¶ 23, 24; CCPR General Comment No. 17, *supra* note 234, ¶¶ 1, 3.

²³⁷ Victoria Law, *Double Punishment: After Prison, Moms Face Legal Battles to Reunite with Kids*, TRUTHOUT (Feb. 26, 2017), <https://perma.cc/N8BW-X9Q2>.

²³⁸ Law, *supra* note 237; Ducharme, *supra* note 16.

treaty in history and which sets out the individual rights of children worldwide.²³⁹

As previously mentioned, the CRC has been signed by all 193 UN members, including the United States, which did so on February 16, 1995, and has been ratified by all members except for the United States.²⁴⁰ Regardless of it not yet ratifying such a critical and symbolic international treaty, the United States is required to fulfill its duty as a signatory of the Convention and refrain in good faith from acts that would defeat the object and purpose of the treaty.²⁴¹

In its Preamble, the CRC grants heightened protections for children, stating that “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”²⁴² It explicitly recognizes a child’s right to know and be cared for by parents; to not unduly be separated from parents; to benefit from a parent’s guidance; and to have the child’s best interests always be primarily considered by governments, private entities, courts of law, and administrative authorities whenever the decision could substantially impact the child.²⁴³ The Convention also observes that the parents’ right to raise their children is mirrored by the children’s right to be raised and nurtured by their parents, stating that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment.”²⁴⁴

a. The Best Interests of the Child

The best interests of the child standard, one of the most foundational principles of the CRC, is meant to help interpret and implement all of the

²³⁹ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19-25 (Jonathan Bennett ed., Early Modern Texts 2017) (1689) (ebook); *25th Anniversary of the Convention on the Rights of the Child*, HUMAN RIGHTS WATCH (Nov. 17, 2014), <https://perma.cc/LU7J-M3CX>.

²⁴⁰ *US: Ratify Children’s Treaty*, HUMAN RIGHTS WATCH (Nov. 18, 2009), <https://perma.cc/9HY9-CSFS>; *UN Convention on the Rights of the Child (CRC)*, FAWCO, <https://perma.cc/L2C3-FE34>; The rights laid out in Articles 5, 7, 8, 9 and 16 of the CRC are particularly relevant to children of incarcerated mothers. See CRC, *supra* note 13, ¶¶ 5, 7-9, 16.

²⁴¹ Vienna Convention, *supra* note 13, ¶ 18. *Vienna Convention on the Law of Treaties*, *supra* note 201. The United States has ratified the two Optional Protocols to the CRC. See *11.b Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, UNITED NATIONS TREATY COLLECTION, <https://perma.cc/LLS4-RVFE>; *11.c Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, UNITED NATIONS TREATY COLLECTION, <https://perma.cc/532M-TFBS>.

²⁴² CRC, *supra* note 13, at Preamble.

²⁴³ *Id.* at Preamble, arts. 3, 5, 7, 9.

²⁴⁴ *Id.* arts. 2, 7, 9. As philosopher John Locke acknowledged in 1690: “[C]hildren are not born in this full state of equality, though they are born to it.” LOCKE, *supra* note 239, at 19.

child's rights set out in the treaty.²⁴⁵ Article 3 states that, "in all actions concerning children . . . the best interests of the child shall be a primary consideration."²⁴⁶ This concept, which is referenced throughout the CRC, is a standard with deep historical roots in U.S. law.²⁴⁷ Today, every state in the United States has legislation requiring courts to consider the best interests of the child in custody disputes and in termination proceedings, including those initiated under ASFA.²⁴⁸

The best interests of the child standard is intended to ensure the child's holistic development by "embracing the child's physical, mental, spiritual, moral, psychological and social development."²⁴⁹ While the Committee on the Rights of the Child states that application is not necessary in every situation in which a child is indirectly involved, it underscores that, in any action taken by the State that will have "a major impact on a child or children," a comprehensive process of determining the best interests of the child is critical and the child's interests must be taken into primary consideration.²⁵⁰ Close scrutiny of the individual characteristics and circumstances of every child helps determine the best interests. Factors can include age and experience, as well as the context in which the child or children find themselves, such as whether the child lives with the parent or parents, the quality of the relationships between the child and caregivers, and the safety of the environment.²⁵¹

²⁴⁵ U.N. Comm. on the Rights of the Child, CRC General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para. 6), ¶¶ 44-45, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003).

²⁴⁶ CRC, *supra* note 13, art. 3.

²⁴⁷ Revised Codes of the Territory of Dakota § 127 (1877); Elisabeth A. Mason, *The Best Interests of the Child*, in THE UN CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 123-24 (Jonathan Todres et al. eds., 2006).

²⁴⁸ While there is no standard definition of "best interests of the child" in U.S. law, determinations are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent. In determining the best interests of the child, a U.S. court "must balance that risk [of serious harm] against the harm removal might bring, and it must determine factually which course is in the child's best interests." *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378 (2004); Mason, *supra* note 247, at 123; SUBCOMM. ON BEST INTERESTS OF THE INTERAGENCY WORKING GRP. ON UNACCOMPANIED AND SEPARATED CHILDREN, FRAMEWORK FOR CONSIDERING THE BEST INTERESTS OF UNACCOMPANIED CHILDREN 12 (2016), <https://perma.cc/BEB7-WZQ6>.

²⁴⁹ U.N. Comm. on the Rights of the Child, General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1), ¶ 4 n.2, U.N. Doc. CRC/C/GC/14 (May 29, 2013) [hereinafter General Comment No. 14, Right of the Child].

²⁵⁰ *Id.* ¶ 20. The UN Committee on the Rights of the Child is the expert body that monitors implementation of the CRC.

²⁵¹ *Id.* ¶¶ 48-49.

The Committee states that this standard applies to children affected by situations where their parents are in conflict with the law.²⁵² It also highlights that children have greater needs than adults in their physical, psychological, and educational development.²⁵³ Any best interests of the child analysis must therefore examine the inherently destructive nature of separating children from their primary caregivers and prohibiting children from maintaining meaningful contact.²⁵⁴

Yet, as illustrated by the effects of the Adoption and Safe Families Act, this type of qualitative best interests analysis does not always occur in the United States.²⁵⁵ As discussed in Part III, there are several dangers inherent in ASFA's approach toward incarcerated parents, including the assumption that all children put up for adoption because of its strict timetable for terminating parental rights will then be placed in what advocates of ASFA envision will be a more nurturing home.²⁵⁶ However, many children are not adopted, with studies showing that once placed in foster care, they have a fifty percent chance of remaining in such circumstances for three years or longer.²⁵⁷ In addition, state care has risks such as multiple placement changes, which hurt children's ability to form attachments or maintain connection to school, community, friends, siblings, and extended family, and carries considerable threat of homelessness and incarceration after leaving foster care.²⁵⁸ Yet while none of these results can be construed to be in the best interests of the child, they are not being adequately weighed when many incarcerated mothers' rights are terminated.²⁵⁹ This is acutely discriminatory toward incarcerated mothers, who

²⁵² *Id.* ¶ 28.

²⁵³ U.N. Comm. on the Rights of the Child, General Comment No. 10 (2007): Children's Rights in Juvenile Justice, ¶ 10, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007).

²⁵⁴ See Hager & Flagg, *supra* note 63. An estimated seventy-seven percent of mothers in state prison lived with their children just prior to incarceration and provided most of the children's daily care, compared with twenty-six percent of fathers in state prison. CHRISTIAN, *supra* note 82, at 3.

²⁵⁵ Hager & Flagg, *supra* note 63.

²⁵⁶ *Id.*

²⁵⁷ Kennedy, *supra* note 75, at 165 n.27; see generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-270T, FOSTER CHILDREN: HHS GUIDANCE COULD HELP STATES IMPROVE OVERSIGHT OF PSYCHOTROPIC PRESCRIPTION 3, 7 (2011); Patrick J. Fowler et al., *Pathways to and from Homelessness and Associated Psychosocial Outcomes Among Adolescents Leaving the Foster Care System*, 99 AM. J. PUB. HEALTH 1453, 1457 (2009); Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 59 (2006).

²⁵⁸ See generally U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 257, at 7, 11; Fowler et al., *supra* note 257, at 1456-57; Lawrence et al., *supra* note 257, at 59.

²⁵⁹ U.S. courts must balance the risk of serious harm against the harm of parental termination. See *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378 (2004); see also Hager & Flagg, *supra* note 63. "The just thing to do as a society would be to better support these families with affordable housing, food assistance, drug treatment and childcare, including in prisons." *Id.*

again are five times more likely than incarcerated fathers to have their child placed in foster care.²⁶⁰

Undoubtedly, creating a system that automatically threatens parental rights because the mother is imprisoned, regardless of individual circumstances, is discriminatory and unjust.²⁶¹ This behavior by the United States also ignores the more nuanced and individualized critical assessment that the Committee on the Rights of the Child emphasizes is essential in order to thoroughly determine the best interests of the child, as the CRC requires.²⁶² Yet while the particular situation of an incarcerated mother and her child defy quick analysis and instead call for a more individualized and nuanced approach, the destructive conduct of the United States continues.²⁶³ The alarming rhetoric around ASFA, which claims that severing a relationship with an incarcerated parent can often best serve the child's interests,²⁶⁴ devalues the parent-child bond and irresponsibly disregards international human rights standards; the fact that it is mostly directed at poor women, a disproportionate number of whom are black, does not seem accidental.²⁶⁵

Furthermore, since the vital mother-child relationship is not valued, prison environments are not designed to accommodate visiting children and are thus often so hostile that allowing children to go there would not be in their best interests.²⁶⁶ The more logical and humane approach, which would align with international human rights principles set out in the CRC and the ICCPR, would be for the United States to demand that all prisons and jails meet a minimum standard such that visitation conditions are clean and child-friendly, with an area designated for families to interact without any physical barriers.²⁶⁷

²⁶⁰ GLAZE & MARUSCHAK, *supra* note 4, at 5.

²⁶¹ *See generally* Kennedy, *supra* note 75.

²⁶² CRC, *supra* note 13, art. 3.

²⁶³ Hager & Flagg, *supra* note 63.

²⁶⁴ One well-known ASFA proponent states that “while some parents turn their lives around when they leave prison, their children should not have to wait for a family.” *Id.*; Kennedy, *supra* note 75, at 181-83.

²⁶⁵ *See generally* Kennedy, *supra* note 75; *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS passim* (2010); Kathryn Joyce, *The Crime of Parenting While Poor*, NEW REPUBLIC (Feb. 25, 2019), <https://perma.cc/NH67-QADQ>.

²⁶⁶ ACLU ET AL., *supra* note 35, at 50-53, 59.

²⁶⁷ Bangkok Rules, *supra* note 21. Other measures that would support maintaining meaningful connection between mother and child include extending the length of visits when families confront difficulties due to the distances involved or a lack of resources or transport; providing overnight accommodation for families traveling a long way, free of charge; and increasing the telephone calls if the child is unable to visit due to the long distance. (These examples are also discussed later in this section.) Bangkok Rules, *supra* note 21, rs. 26, 28.

It is also valuable to mention that incarcerated mothers' role as primary caregivers does not suggest that those who have committed a crime should not face any penalties or that maintaining a relationship is always in the best interests of the child. Rather, the best interests should be determined holistically on a case-by-case basis.²⁶⁸

b. The Right to Parental Care

The CRC does not differentiate between the rights of children of incarcerated parents and the rights of all other children, with the principle of non-discrimination fundamentally rooted in the treaty. Article 2(1) provides that a child has the right to be free from discrimination "irrespective of [a] parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status," and Article 2(2) obligates States to ensure that no child is discriminated against on the basis of the actions of their parents.²⁶⁹

Many of the CRC provisions are relevant to circumstances often faced by children of incarcerated mothers and, unsurprisingly, these provisions illustrate how intertwined the rights of the child are with the child's right to family. Article 7, an example of that interconnectedness, protects "as far as possible the [child's] right to know and be cared for by his or her parents."²⁷⁰ The child's right to parental care is further articulated in a General Comment by the Committee, which emphasizes that "young children are best understood as social actors whose survival, well-being and development are dependent on and built around close relationships"²⁷¹ and that, unless it is not in the interests of the child, family is the best environment since "[they] are especially vulnerable to adverse consequences of separations because of their physical dependence on and emotional attachment to their parents."²⁷² The CRC also recommends that States adopt programs and policies that strengthen the family, suggesting that countries are responsible for ensuring conditions that allow children to exercise their rights and parents to meet their obligations.²⁷³

²⁶⁸ General Comment No. 14, Right of the Child, *supra* note 249, ¶¶ 32-34, 46-50.

²⁶⁹ CRC, *supra* note 13, art. 2(1)-(2).

²⁷⁰ *Id.* art. 7.

²⁷¹ U.N. Comm. on the Rights of the Child, General Comment No. 7 (2005): Implementing Child Rights in Early Childhood, ¶ 8, U.N. Doc. CRC/C/GC/7/Rev.1 (Sept. 20, 2006).

²⁷² *Id.* ¶ 18.

²⁷³ CRC, *supra* note 13, arts. 5, 8(1), 16, 18; *see also* U.N. Comm. on the Rights of the Child, General Comment No. 7 (2005) ¶ 15; U.N. Comm. on the Rights of the Child; Consideration of Reports Submitted by States Parties under Article 44 of the Convention, ¶ 33(b), U.N. Doc. CRC/C/15/Add.196 (Mar. 17, 2003).

Article 9 most explicitly addresses the children of incarcerated mothers, asserting that “a child shall not be separated from his or her parents against their will” unless it would be contrary to the child’s best interests.²⁷⁴ Because of this recognized right, the UN Guidelines for the Alternative Care of Children, which set out best practices using the CRC’s principles, says that when sentencing primary caregivers, non-custodial sentences should be issued whenever possible, on a case-by-case basis; it also instructs States to provide specific protective measures when handling circumstances involving the separation of a child from their parent, noting that “removal of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration.”²⁷⁵ Moreover, when there is a separation, Article 9(3) obligates States to respect the child’s rights “to maintain personal relations and direct contact” with the separated parent on a regular basis.²⁷⁶

Yet despite the CRC’s persuasive authority, meaningful and individualized consideration of the rights of children with incarcerated parents is frequently ignored in the United States. Among the examples of this are the bleak visiting conditions in U.S. prisons and jails that inhibit positive interactions between mother and child, thus inhibiting the child’s right to parental care. The Committee has stated that child-friendly prisons are critical and urges that “due consideration and good faith efforts . . . be made in providing a [prison] visit context that [is] respectful to children’s dignity, right to privacy and which is child-friendly and conducive to positive child-parent interaction for children of different ages.”²⁷⁷

c. The Parents’ Right to Fulfill Their Responsibilities

The inverse of children’s right to parental care is the parents’ right to fulfill their responsibilities to their children.²⁷⁸ Several provisions within the CRC provide for such rights. Article 5 references parental

²⁷⁴ CRC, *supra* note 13, art. 9.

²⁷⁵ G.A. Res. 64/142, Guidelines for the Alternative Care of Children, ¶ 14, 48, 69 (Feb. 24, 2010) [hereinafter Guidelines for the Alternative Care of Children]. “Presumptive responsibility, unless shown to be otherwise, is with the child’s parents or principal caregivers.” *Id.*

²⁷⁶ Comm. on the Rights of the Child, Report and Recommendations of the Day of General Discussion on “Children of Incarcerated Parents,” ¶ 35 (Sept. 30, 2011).

²⁷⁷ *Id.* ¶ 24.

²⁷⁸ KOFI. A. ANNAN, UNITED NATIONS, WE THE CHILDREN: MEETING THE PROMISES OF THE WORLD SUMMIT FOR CHILDREN 72 (2001), <https://perma.cc/3BRH-ZEA4>. “The primary responsibility for promoting children’s development and well-being [lies with the parents].” U.N. Comm. on the Rights of the Child, *supra* 271 ¶¶ 18.

child-rearing responsibilities, obligating States to respect the right to exercise parental duties.²⁷⁹ Articles 18 and 27 of the CRC similarly affirm the importance of the responsibility that parents have in the upbringing of their children.²⁸⁰ Article 18(1) provides that States shall use their best efforts to ensure parents “have the primary responsibility for the upbringing and development of the child.”²⁸¹ Article 18(2) and Article 27(3) require that States must take appropriate measures to assist parents with these child-rearing responsibilities, including through material assistance and support programs.²⁸²

The CRC illuminates the striking contrast between what a government fully aligned with international standards on child rights owes its citizens—including actively supporting positive conditions for successful parent-child relationships—and what the United States imposes on incarcerated mothers and their children.

3. *M v. State*: A Valuable Judgment in South Africa

Jurisprudence from other countries illustrates how implementing international principles can substantially alter outcomes. In a groundbreaking ruling in 2007, the Constitutional Court of South Africa expressly considered the defendant’s children at sentencing, applying both the CRC and the African Charter on the Rights and Welfare of the Child (ACRWC) in the determination.²⁸³

In the case, *M v. State*, a mother who served as the primary caregiver of her three children had been convicted of a series of non-violent fraud offenses and was facing imprisonment.²⁸⁴ Instead of focusing on whether the mother should receive a custodial sentence, the Court instead concentrated on the children’s rights, applying a comprehensive analysis of the best interests of the child standard that carefully considered the damaging

²⁷⁹ CRC, *supra* note 13, art. 5. This right is aligned with the U.S. Constitution, as discussed in *Stanley v. Illinois*, which states that absent a showing of “powerful countervailing interest,” parents have the right to maintain contact with their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

²⁸⁰ CRC, *supra* note 13, arts. 18, 27.

²⁸¹ *Id.* art. 18(1).

²⁸² *Id.* arts. 18(2), 27(3).

²⁸³ See African Charter on the Rights and Welfare of the Child, arts. 19, 30, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49 [hereinafter Children’s Charter]; see generally *M v. State* 2008 (3) SA 232 (CC) (S. Afr.); African Comm. of Experts on the Rights and Welfare of the Child, African Union, General Comment No. 1 (Article 30 of the African Charter on the Rights and Welfare of the Child) on “Children of Incarcerated and Imprisoned Parents and Primary Caregivers,” ¶¶ 6-9, ACERWC/GC/01 (2013) [hereinafter ACERWC General Comment No. 1].

²⁸⁴ *M v. State* 2008 (3) SA 232 (CC) at 2 para. 2 (S. Afr.).

nature of separation.²⁸⁵ Ultimately, the court held that incarceration would have a negative impact on the mother's children and sentenced her to a period of correctional supervision, which included community service and repayment to victims.²⁸⁶

Former South Africa Constitutional Court Justice Albie Sachs, one of the judges who decided the case, remarked later that he was pleased with the outcome, which emphasized the critical necessity to look at the child as a person with a distinctive personality whose rights should be, at minimum, a primary consideration during sentencing.²⁸⁷ Justice Sachs stressed that “[children] cannot be treated as a mere extension of [their] parents,” and that the right to parental care, articulated in Article 7 of the CRC and Article 19 of the ACRWC, is often not given enough weight.²⁸⁸ He expounded on how the rights of the child are commonly viewed either as physical or nutritional, but that the right to nurturing “[and] to have somebody in the home, somebody close to them”²⁸⁹ is also crucial when applying the best interests standard.²⁹⁰ Thus, Justice Sachs stated, when circumstances permit, non-custodial sentences must be an essential consideration.²⁹¹

C. *The United States' Inadequate Efforts to Implement Human Rights Principles*

“The essential humanity of man can be protected and preserved only where the government must answer—not just to the wealthy, not just to those of a particular religion, not just to those of a particular race, but to all the people.”²⁹²

²⁸⁵ *Id.* at 15-16 para. 25; see ACERWC General Comment No. 1, *supra* note 283, ¶¶ 22-24.

²⁸⁶ *M v. State* 2008 (3) SA 232 (CC) at 41-48 paras. 66-77 (S. Afr.).

²⁸⁷ *Id.* at para. 18; see generally Strathclyde Center for Law, Crime and Justice, *Doing Children Justice: What is the Impact of Imprisonment on Dependent Children?*, YOUTUBE (Mar. 15, 2014), <https://www.youtube.com/watch?v=DwwjcPoSrFI>. Justice Sachs was part of a panel discussion at Strathclyde Centre for Law, Crime and Justice.

²⁸⁸ Strathclyde Center for Law, Crime and Justice, *supra* note 287; see Children's Charter, *supra* note 283, art. 19; CRC, *supra* note 13, art. 7.

²⁸⁹ Strathclyde Center for Law, Crime and Justice, *supra* note 287, at 34:10-34:40.

²⁹⁰ *M v. State* 2008 (3) SA 232 (CC) (S. Afr.) at 18, para. 36; see generally Strathclyde Center for Law, Crime and Justice, *supra* note 287.

²⁹¹ Strathclyde Center for Law, Crime and Justice, *supra* note 287.

²⁹² Robert F. Kennedy, Day of Affirmation Address at the University of Cape Town (June 6, 1966), <https://perma.cc/CU2N-QYPP>.

1. The Federal Dignity Act: Why Congress Still Has Not Passed It into Law and How It Is Sparking State Action

There have been some legislative efforts in the United States to develop gender-responsive policies aligned with international human rights principles, including the well-publicized Dignity for Incarcerated Women Act (Dignity Act). First introduced in 2017, the Dignity Act recognizes both the ways in which incarcerated women are overlooked in the U.S. correctional system and their inherent right to human dignity; its implications could greatly affect incarcerated mothers and their children.²⁹³ Among its provisions, the Dignity Act would allow incarcerated women who are pregnant or primary caregivers to be eligible for non-custodial sentencing, including residential substance abuse programs.²⁹⁴ It would also provide for more substantial visitation hours for family, including children; allow for physical contact during visits; introduce a pilot program for overnight visits by children of incarcerated mothers; ban federal prisons from charging for telephone calls; and require the Bureau of Prisons to implement video conferencing technology free of charge.²⁹⁵

Despite these integral and much-needed reforms, Congress has yet to pass the Dignity Act.²⁹⁶ Nevertheless, there continues to be support for the bill, which was reintroduced in April 2019.²⁹⁷ Moreover, the Dignity Act has spurred state action: as of February 2020, eleven states have passed legislation modeled after it and three other states have legislation in progress.²⁹⁸

Most recently, New Jersey's Dignity for Incarcerated Primary Caretaker Parents Act, which has provisions modeled after the federal legislation and explicitly focuses on the unique challenges of incarcerated primary caregivers, was signed into law.²⁹⁹ Crucially, it creates one of the

²⁹³ Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. (2017); Christina Cauterucci, *Inside the Legislative Fight for the Rights of Incarcerated Women*, SLATE (Jul. 19, 2017), <https://perma.cc/6X5U-SAQV>.

²⁹⁴ S. 1524 § 2. The bill states that the BOP may not block a primary caregiver or pregnant person from residential substance abuse treatment for failing to disclose that they have a substance abuse problem. *Id.*

²⁹⁵ *Id.* §§ 2-3.

²⁹⁶ Dignity for Incarcerated Women Act of 2019, S. 992, 116th Cong. (2019); Dignity for Incarcerated Women Act of 2019, H.R. 2034, 116th Cong. (2019); Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. (2017).

²⁹⁷ *Id.*; Rachel Frazin, *Warren, Booker Reintroduce Dignity for Incarcerated Women Act*, HILL (Apr. 3, 2019) <https://perma.cc/NC64-HEUG>.

²⁹⁸ For an interactive map of states that have adopted such legislation, see *Dignity for Incarcerated Women*, DREAM CORPS (2019), <https://perma.cc/2FD9-M5AC>.

²⁹⁹ Dignity for Incarcerated Primary Caretaker Parents Act, Assemb. B. 3979, 219th Leg., Reg. Sess. (N.J. 2019). The Dignity for Incarcerated Primary Caretaker Parents Act was signed

“strongest corrections oversight structures in the country by strengthening the Office of the Corrections Ombudsperson, an independent office that reports directly to the governor.”³⁰⁰ Among its provisions: contact visits must be available at least six days a week, including weekends, for at least three hours at a time, with no limit on the number of children who can visit; parenting classes must be offered; and special care must be provided for those who have experienced trauma.³⁰¹ As mentioned, the law will substantially increase the scope and powers of the existing Office of the Corrections Ombudsperson, which can conduct inspections of prison facilities, including unannounced visits.³⁰²

2. The First Step Act and Its Minor Step for Incarcerated Mothers and Their Children

While it is evident that some states have begun to respond to the plight of incarcerated mothers, the federal government has not been as proactive in recognizing the ways in which they are being adversely affected by its incarceration policies. Still, while having only a minimal impact on incarcerated mothers and their children’s lives, there has been some modest movement due to bipartisan legislation: in December 2018, the First Step Act, perceived by many to be significant criminal justice reform, was signed into law and, on its merits, does provide some meaningful and hard-fought first steps in federal sentencing reform.³⁰³ One provision that directly applies to incarcerated mothers codifies the BOP’s guidelines requiring incarcerated people in federal prisons to be placed within 500 driving miles from their families or homes.³⁰⁴ Another bars

into law on January 9, 2020. Press Release, Office of Governor Phil Murphy, Governor Murphy Signs Dignity for Incarcerated Primary Caretaker Parents Act (Jan. 9, 2020), <https://perma.cc/TER7-A85L>; Press Release, ACLU, NJ Governor Signs Law Establishing Historic Oversight of Prisons and Helping Incarcerated Parents Maintain Bonds (Jan. 9, 2020), <https://perma.cc/RD3Q-RM4S>; see Colleen O’Dea, *Making Life a Little Easier for Women – or Any Parent – Serving Time in Prison*, N.J. SPOTLIGHT (Apr. 24, 2018), <https://perma.cc/YM5B-PLS3>.

³⁰⁰ ACLU, *supra* note 299; see N.J. Assemb. B. 3979.

³⁰¹ N.J. Assemb. B. 3979.

³⁰² *Id.* “The office will identify systemic issues and ensure compliance with laws and policies governing the treatment of prisoners. The ombudsperson will receive and investigate complaints concerning incarceration from a wide variety of sources: incarcerated people, their families, government agencies, advocates, and anyone with knowledge of what happens inside.” ACLU, *supra* note 299.

³⁰³ Charlotte Resing, *How the FIRST STEP Act Moves Criminal Justice Reform Forward*, ACLU (Dec. 3, 2018), <https://perma.cc/QC5Q-BHRU>; Jasmine L. Tyler, *Why the FIRST STEP Act Shouldn’t Be the Last*, HUMAN RIGHTS WATCH (Dec. 20, 2018), <https://perma.cc/WUZ4-MS5H>.

³⁰⁴ First Step Act of 2018, Pub. L. No. 115-391, § 601, 132 Stat. 5194, 5237; *Custody and Care Designations*, *supra* note 169.

the shackling of pregnant women, a ban that was previously a federal policy but often disregarded.³⁰⁵ More generally, the law also helps improve living conditions for the estimated 16,000 incarcerated women in federal prison by providing basic feminine hygiene items, once exorbitantly priced in prison commissaries, at no charge.³⁰⁶

There have also been reports of unintended consequences, including the pending “risk and needs assessment” tool that will be used to determine which incarcerated people are eligible for rehabilitative programs and early release; however, some believe that it could further harm the most marginalized individuals in prison.³⁰⁷ Another provision within the law could allot millions of dollars to private companies that run post-prison reentry programs, which the American Civil Liberties Union highlighted as a cause for concern before the passage of the First Step Act, stating that it could “result in the further privatization of what should be public functions and would allow private entities to unduly profit from incarceration.”³⁰⁸

³⁰⁵ First Step Act of 2018, Pub L. No. 115-391, § 301, 132 Stat. 5194, 5217-20.

³⁰⁶ *Id.* § 611. Soon after the 2017 Dignity Act was introduced, the BOP issued a policy mandating prisons to give out free sanitary products; the First Step Act codifies this into federal law. See FED. BUREAU OF PRISONS, RSD/FOB 001-2017, PROVISION OF FEMININE HYGIENE PRODUCTS (2017), <https://perma.cc/UBH3-EHQZ>.

³⁰⁷ Jamil Smith, *Criminal Justice Legislation Means Nothing Without Follow-Through*, ROLLING STONE (Mar. 21, 2019), <https://perma.cc/HW2E-H6BP>; Kanya Bennett, *The First Step Act Was Exactly That, a First Step. What Comes Next?*, ACLU (Oct. 25, 2019), <https://perma.cc/K6HH-V9VV>; Bryan Furst, *Trump’s Budget Requests Nothing for the FIRST STEP Act*, BRENNAN CTR. FOR JUSTICE (Mar. 21, 2019), <https://perma.cc/2GM5-DGQK>. In October 2019, Andrea James of the National Council for Incarcerated and Formerly Incarcerated Women and Girls testified before the U.S. Senate, stating that she was “skeptical that this system can be implemented in a way that fully respects the individual circumstances and background of each incarcerated person,” particularly women. Bennett, *supra*.

³⁰⁸ ACLU & The Leadership Conference, Letter to Majority and Minority Leaders of the U.S. Senate Regarding S. 756, at 4 (Dec. 17, 2018), <https://perma.cc/7B5X-63JN>; Liliana Segura, *The First Step Act Could Be a Big Gift to CoreCivic and the Private Prison Industry*, INTERCEPT (Dec. 22, 2018), <https://perma.cc/9V3U-XHZ9>. The *Tampa Bay Times* has reported that the bill authorizes “a \$375 million expansion of post-prison services for inmates transitioning back into society,” which would benefit private prison companies such as CoreCivic (formerly Corrections Corporation of America). See Steve Contorno, *Why is a Florida For-Profit Prison Company Backing Bipartisan Criminal Justice Reform?*, *Tampa Bay Times* (Dec. 10, 2018), <https://perma.cc/RE9H-H5D3>. The market for reentry facilities and electronic monitoring is burgeoning. This has troubling implications. See AM. FRIENDS SERV. COMM. ET AL., TREATMENT INDUSTRIAL COMPLEX: HOW FOR-PROFIT PRISON CORPORATIONS ARE UNDERMINING EFFORTS TO TREAT AND REHABILITATE PRISONERS FOR CORPORATE GAIN 8-9 (2014), <https://perma.cc/6LJB-RQ4W>.

D. *The United Nations' Bangkok Rules: Concrete Guidelines That Recognize the Role of the Mother and the Gravity of the Parent-Child Bond*

Despite the efforts sparked by blatant international human rights violations and rising national concern, both the U.S. federal government and many states continue to give little attention to implementing a gender-sensitive approach that holistically considers each person's circumstances, including the role many women play as primary caregivers.³⁰⁹ Specific guidelines for such an approach can be seen in the rules developed by the United Nations, which recognize the ways in which the world's prison systems design incarceration specifically for men, with harmful outcomes for incarcerated women, including incarcerated mothers and their children.³¹⁰ In accordance with international human rights law, the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders were adopted by the UN General Assembly in 2010 to address the particular needs of women in correctional systems and propose alternatives to imprisonment.³¹¹ The Rules are also the first international instrument to specifically consider the needs of children with incarcerated mothers.³¹²

These guidelines, commonly referred to as “the Bangkok Rules” in recognition of the city where they were drafted, outline a human-rights-based approach that acknowledges the different characteristics and experiences of women,³¹³ including consideration of the fact that they are often convicted of non-violent crimes closely linked with poverty.³¹⁴

³⁰⁹ Though most incarcerated women are in state facilities, federal legislation has historically been seen as an example to states, which is another reason it is so critical that the federal government passes the Dignity for Incarcerated Women Act. See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 703 (2016); see also Dignity for Incarcerated Women Act of 2019, S. 992, 116th Cong. (2019); Dignity for Incarcerated Women Act of 2019, H.R. 2034, 116th Cong. (2019).

³¹⁰ Bangkok Rules, *supra* note 21.

³¹¹ *Id.*; PENAL REFORM INT'L, *supra* note 22, at 4. In addition to the CRC, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has also heavily influenced the Bangkok Rules. G.A. Res. 34/180, Convention on the Elimination of All Forms of Discrimination Against Women (Dec. 18, 1979).

³¹² Bangkok Rules, *supra* note 21; *Laws on Children Residing with Parents in Prison*, LIBRARY OF CONG., <https://perma.cc/R4ZJ-738L> (last updated June 9, 2015).

³¹³ *Id.*; PENAL REFORM INT'L, *supra* note 22, at 4-5.

³¹⁴ UNITED NATIONS OFFICE ON DRUGS & CRIME, COMMENTARY TO THE UNITED NATIONS RULES FOR THE TREATMENT OF WOMEN PRISONERS AND NON-CUSTODIAL MEASURES FOR WOMEN OFFENDERS (THE BANGKOK RULES) 40, 45 (2011); PENAL REFORM INT'L & THAI INST. OF JUSTICE, GUIDANCE DOCUMENT ON THE UNITED NATIONS RULES ON THE TREATMENT OF WOMEN PRISONERS AND NON-CUSTODIAL MEASURES FOR WOMEN OFFENDERS (THE BANGKOK RULES) 14 (2013), <https://perma.cc/UC3G-TH8N>.

This gender-responsive approach, unanimously voted for by all UN Member States, consists of seventy rules that are meant to guide policy-makers, legislators, sentencing authorities, and prison staff, and to encourage countries to implement such guidelines in an effort to combat the discrimination incarcerated women face in prison.³¹⁵

The Bangkok Rules emphasize in Rule 64, as well as in Rules 2, 57, and 58, that non-custodial sentences should be employed whenever possible.³¹⁶ The Rules assert that a considerable number of incarcerated women, many of whom are mothers with dependent children, do not pose “a risk to society.”³¹⁷ Therefore, the Rules contend, non-custodial alternatives often make more logical sense, especially when considering both the gravity of the offense and the best interests of the child standard articulated in Article 3 of the CRC.³¹⁸ The Official Commentary on the Bangkok Rules points out that by keeping mothers out of prison when incarceration is not necessary, children may be saved from “the enduring adverse effects of their mothers’ imprisonment, including their possible institutionalization and own future incarceration.”³¹⁹ It also notes that prisons inherently are not designed for women with minor children or pregnant women.³²⁰

Another relevant guideline, discussed in Rule 26, emphasizes that in custodial sentences, contact with children should be encouraged and facilitated by all reasonable means.³²¹ This rule focuses on the particular importance of maintaining familial connections and encourages flexibility in applying visitation rules to “safeguard against the harmful impact of separation.”³²² This is in accordance with Rule 4, which taking into account caregiving responsibilities, requires that incarcerated mothers serve their sentences as close to their children as possible.³²³

³¹⁵ See Bangkok Rules, *supra* note 21; PENAL REFORM INT’L, *supra* note 22, at 3. By voting in favor of the Bangkok Rules, UN member countries agreed to adhere to its guidelines. See PENAL REFORM INT’L, *supra* note 22, at 4. Although mainly concerned with the needs of women, some of the rules address issues applicable to both incarcerated men and women, including those related to parental responsibilities. See Bangkok Rules, *supra* note 21, annex ¶ 12.

³¹⁶ Bangkok Rules, *supra* note 21, rs. 2(2), 57-58, 64.

³¹⁷ UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 43.

³¹⁸ Bangkok Rules, *supra* note 21, rs. 2(2), 57-58.

³¹⁹ UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 43.

³²⁰ *Id.* at 46-47.

³²¹ Bangkok Rules, *supra* note 21, r. 26.

³²² UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 35.

³²³ Bangkok Rules, *supra* note 21, r. 4; UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 25.

A third guideline stresses that visits involving children must be conducted in an environment that promotes dignity.³²⁴ Rule 28 explicitly considers the emotional need for physical contact by both incarcerated mothers and their children, and requires a child-friendly environment.³²⁵ Creating a comfortable atmosphere where there is an emphasis on quality visitation is also cited as a way to reduce the toxic stress that, as discussed in Part II, children often suffer in these circumstances.³²⁶ Rule 43 provides that prison staff should, when possible, facilitate visitation through measures that include extending the length of visits when families confront difficulties in travel due to distance, resources or lack of transport; offering overnight accommodations for families traveling a long way, free of charge; and increasing the frequency of telephone calls women are allowed if their families are unable to travel due to the far distance.³²⁷ Rule 21 maintains that during searches, prison staff should demonstrate professionalism and sensitivity, preserving children's respect and dignity.³²⁸ The Official Commentary on the Bangkok Rules discusses the importance of this rule, describing how incarcerated mothers can often become so distressed at seeing their children handled without appropriate care that they may decide to forgo future visits in an effort to avoid putting their children through "the humiliating and potentially damaging experience of such practices."³²⁹

In addition to these recommendations, the Bangkok Rules also provide vital guidelines that support mothers: they include the need for programs that address the underlying causes of an offense; parenting skills; employment training; and access to individualized, gender-specific, and trauma-informed healthcare, such as treatment programs for substance addiction.³³⁰

³²⁴ Bangkok Rules, *supra* note 21, r. 28; UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 33-34, 36.

³²⁵ Bangkok Rules, *supra* note 21, r. 28. The Official Commentary stresses that "conditions of visits are of utmost importance, so that visits are experienced as a positive experience, rather than discouraging further contact." UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 36.

³²⁶ UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 39-40; *see* discussion *supra* Part II.

³²⁷ UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 39-40.

³²⁸ *Id.* at 33-34; Bangkok Rules, *supra* note 21, r. 21.

³²⁹ UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 33.

³³⁰ Bangkok Rules, *supra* note 21, rs. 12, 15, 63; UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 29-30, 30-31, 46.

By helping incarcerated mothers, the United States helps their children; in many instances, no additional resources would be needed to implement these international guidelines in the U.S. correctional system—only a change of consciousness.³³¹

CONCLUSION: A CALL FOR THE UNITED STATES TO ADOPT AN APPROACH
ROOTED IN HUMAN RIGHTS LAW

“Every life is a piece of art, put together with all means available.”³³²

There are a number of steps that the United States can take to address the human rights violations inherent in the way that U.S. correctional facilities incarcerate mothers and subsequently separate them from their children. Many of these proposed changes have been proven to reduce recidivism rates and save taxpayers money, in addition to better aligning the United States with international human rights laws and principles.³³³ While the following suggestions are by no means exhaustive, they pull from recent research and proposals aimed at tackling this immense issue.

³³¹ See PENAL REFORM INT’L & THAI. INST. OF JUSTICE, *supra* note 314, *passim*.

³³² VAN DER KOLK, *supra* note 6, at 112 (quoting the French psychologist Pierre Janet). In 1889, Janet published *L’Automatisme Psychologique*, which dealt with how the mind processes traumatic experiences. In his crucial work, Janet asserted that failing fully to confront overwhelming experiences can lead to dissociation of the traumatic memories and their return as fragmentary reliving of the trauma, including through both behavioral reenactments and somatic states. Traumas, Janet said, “produce their disintegrating effects in proportion to their intensity, duration and repetition.” See Bessel A. van der Kolk & Onno van der Hart, *Pierre Janet and the Breakdown of Adaption in Psychological Trauma*, 146 *Am. J. Psychiatry* 1530, 1535-37 (1990); see generally PIERRE JANET, *L’AUTOMATISME PSYCHOLOGIQUE* (1889).

³³³ SANETA DE VUONO-POWELL ET AL., ELLA BAKER CTR. FOR HUMAN RIGHTS, WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 10 (2015). Research indicates that incarceration costs approximately \$29,000 per person, per year. When the often necessary expense of placing the children of incarcerated mothers in foster care is considered, the costs more than double. In comparison, the cost of drug treatment ranges between \$1,800 for regular outpatient services and \$6,800 for long-term residential services per client, per year. The United Nations Office on Drugs and Crime (“UNODC”) has also noted that investments in rehabilitation programs are one of the best and most cost-effective ways of preventing recidivism, with significant benefits not only to the individual but to society more broadly. Aimee Picchi, *The High Price of Incarceration in America*, CBS NEWS (MAY 8, 2014), <https://perma.cc/QMW7-FJWU>; ACLU ET AL., *supra* note 35, at 9; *Rehabilitation and Social Reintegration of Prisoners*, UNITED NATIONS OFFICE ON DRUGS & CRIME, <https://perma.cc/ZHE8-6QK9>; see also Caitlin Curley, *The Simpler, Cheaper Alternative to Incarcerating Drug Users*, GENFKD (Mar. 18, 2016), <https://perma.cc/TC6F-DX99>; Caitlin Curley, *Reclassifying Minor Crimes: An Easy Solution or Dangerous Mistake?*, GENFKD (Feb. 2, 2016), <https://perma.cc/2N2V-79MQ>.

A. *Recommendations*

- Employ a Holistic Framework Within the U.S. Correctional System

In order to combat the cyclical nature of incarceration, there must be a greater recognition of the issues that often underlie imprisonment. Women specifically are frequently caught at the crossroads of racial, gender, and economic oppression, factors that are intertwined with the majority of the offenses that they commit.³³⁴ Failure to adequately address these underlying issues has devastating consequences for incarcerated mothers and their children, including the termination of parental rights.³³⁵

- Focus on Non-Custodial Alternatives to Imprisonment

The United States must aim to increase non-custodial measures for convicted mothers and other primary caregivers, especially those whose crimes are non-violent.³³⁶ As discussed in the Bangkok Rules, focusing on non-custodial sentences for mothers of dependent children often is not only a more effective response but also is imperative to minimize the harmful and long-term effects of parental incarceration on children.³³⁷

³³⁴ KAJSTURA, *supra* note 4; *see generally* ALEXANDER, *supra* note 130; Samuel Moyn, *Human Rights Are Not Enough*, NATION (Mar. 16, 2018), <https://perma.cc/B6DR-8ZMH>; Elise Gould, Senior Economist, Econ. Policy Inst., Testimony before the U.S. House of Representatives Ways and Means Committee: Decades of Rising Economic Inequality in the U.S. (Mar. 27, 2019), <https://perma.cc/3488-HMYU>; Kimberlé Crenshaw on *Intersectionality, More than Two Decades Later*, *supra* note 122; UN Faults US on Racism, HUMAN RIGHTS WATCH (Mar. 6, 2008), <https://perma.cc/F79S-VNVX>; Alston, *supra* note 41. As necessary background in which to effectively argue for human rights, there must be an acknowledgment of the need for economic and social rights in the United States. While this has not been adequately recognized by U.S. policies, these human rights are articulated in the UDHR, including Article 25, which states that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” It also states that “motherhood and childhood are entitled to special care and assistance.” *See* UDHR, *supra* note 8, art. 25(1). As Nelson Mandela eloquently stated: “[O]vercoming poverty is not a gesture of charity. It is an act of justice. It is the protection of a fundamental human right, the right to dignity and a decent life.” Nelson Mandela, Address for the “Make Poverty History” Campaign (Feb. 3, 2005), <https://perma.cc/3E5A-D7J7>.

³³⁵ Hager & Flag, *supra* note 63; Stillman, *supra* note 5; TOMRIS ATABAY, UNITED NATIONS OFFICE ON DRUGS & CRIME, HANDBOOK FOR PRISON MANAGERS AND POLICYMAKERS ON WOMEN AND IMPRISONMENT 7 (2008), <https://perma.cc/4YW-M-AWPV>.

³³⁶ Stillman, *supra* note 5.

³³⁷ As discussed in Part IV, the Official Commentary on Rules 57 and 58 of the Bangkok Rules notes that “a considerable proportion of women offenders do not necessarily pose a risk to society and their imprisonment may not help, but hinder their social reintegration.” UNITED NATIONS OFFICE ON DRUGS & CRIME, *supra* note 314, at 43. “The majority of these women do not need to be in prison at all. Most [women] are charged with minor and non-violent offences.” ATABAY, *supra* note 335, at 4. *See generally* PENAL REFORM INT’L, *supra* note 22.

This suggestion aligns with principles articulated in the Convention on the Rights of the Child, the International Convention on Civil and Political Rights, and the Universal Declaration of Human Rights. It is also reflected in a report by the UN Committee on the Rights of the Child on Children of Incarcerated Parents:

The Committee emphasises that in sentencing parent(s) and primary caregivers, noncustodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase. Alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren).³³⁸

Alternative penalties for sentencing authorities are referred to in the Bangkok Rules.³³⁹ These UN-recommended measures include: (1) verbal sanctions, such as admonition, reprimand, and warning; (2) restitution to the victim or a compensation order; (3) a suspended or deferred sentence; (4) probation and judicial supervision; (5) a community service order; (6) referral to an attendance center; (7) house arrest; or (8) any other mode of non-institutional treatment.³⁴⁰

There is an ever-increasing recognition across the United States that non-custodial alternatives are essential to genuinely helping people change their lives in ways that prisons most certainly do not.³⁴¹ What is needed now is for that recognition to be put into practice on a broad scale.

³³⁸ Comm. on the Rights of the Child, *supra* note 276, ¶ 30.

³³⁹ Bangkok Rules, *supra* note 21, annex, r. 58 “Taking into account the provisions of Rule 2.3 of the Tokyo Rules, women offenders shall not be separated from their families and communities without due consideration being given to their backgrounds and family ties.” *Id.*

³⁴⁰ G.A. Res. 45/110, U.N. Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), ¶ 8(2) (Dec. 14, 1990). The Tokyo Rules also list economic sanctions and monetary penalties as alternatives to incarceration, but for mothers who are already facing extreme economic hardships, this would not be effective since it would only add to their already heavy burden. *Id.*

³⁴¹ Meredith Derby Berg, *Massachusetts Mobilizes to Treat Addicted Moms*, MARSHALL PROJECT (Jan. 19, 2016), <https://perma.cc/M2X6-SL62>. The average four-to-six month stay at Edwina Martin House, a residential recovery home in Brockton, Massachusetts, which receives significant state funding, costs between \$12,000 and \$18,000. Comparatively, according to correction department data, the women’s prison in Framingham, Massachusetts, the oldest women’s prison in the United States, costs \$60,000 per person, per year. *Id.*; *see also* REMERGE, <https://perma.cc/7X9T-Y5B7>. ReMerge is a comprehensive female diversion program based in Oklahoma, which has the highest female incarceration rate in the United States. *Id.*

- Designate Child-Friendly Areas in All Federal and State Prisons for Children to Visit in Environments That Promote Dignity

In most circumstances, contact between mother and child should be encouraged and facilitated by all reasonable means. Correctional officers should respect the child's right to parental care and should also promote visitation and demonstrate sensitivity in all interactions with children.³⁴² Visits must be conducted in a child-friendly atmosphere that embraces a child's right to develop and flourish, and a child's inherent right to dignity.³⁴³ Indiana Women's Prison in Indianapolis is one such example of a prison that has made efforts to accommodate visiting children.³⁴⁴

- Ban Expensive Telephone Calls and Be Wary of Video Alternatives to Face-to-Face Meetings

Prisons must stop charging mothers inordinately high prices to call their children.³⁴⁵ This not only inhibits mothers from effectively keeping in touch with their children but adds to the already heavy economic burden they face.³⁴⁶ Moreover, while video visitation is often discussed as a potential solution to maintaining better contact, there is a disturbing trend in jails throughout the United States that use this technology: approximately seventy-four percent have banned in-person visits after implementing video visitation.³⁴⁷ Research shows that early childhood experiences become prototypes for later connections with others and that a person's "most intimate sense of self is created in our minute-to-minute exchanges with our caregivers."³⁴⁸ Thus, while video technology is certainly adjunctive, it is not a substitution for in-person meetings.³⁴⁹

³⁴² This suggestion is aligned with Bangkok Rules 4, 12, 26, 28, and 43. *See* Bangkok Rules, *supra* note 21; CRC, *supra* note 13, at 7.

³⁴³ Bangkok Rules, *supra* note 21, rs. 12, 28, 43; *see generally* CRC, *supra* note 13; ICCPR, *supra* note 13, at Preamble; UDHR, *supra* note 8, at Preamble.

³⁴⁴ Indiana Women's Prison designates a large playroom, along with play equipment, books, toys, and a place for mothers to prepare snacks for visiting children. Thompson, *supra* note 82.

³⁴⁵ Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. (2017); Dignity for Incarcerated Women Act of 2019, S. 992, 116th Cong. (2019).

³⁴⁶ Ramachandra, *supra* note 87; WAGNER & JONES, *supra* note 87; *see discussion supra* Part I.

³⁴⁷ RABUY & WAGNER, *supra* note 89; *see* Ramachandra, *supra* note 87; WAGNER & JONES, *supra* note 87; *see generally* SAKALA, *supra* note 89.

³⁴⁸ *See* VAN DER KOLK, *supra* note 6, at 109.

³⁴⁹ For an example of a positive adjunctive use of video technology, *see* Elaine Quijano, *Imprisoned Mothers Read to Their Children Through Storybook Project*, CBS NEWS (Feb. 11, 2016), <https://perma.cc/NXG5-PC6C>.

- Implement Better Checks on the Bureau of Prisons to Ensure that It Follows Its Own Policies and Modify Federal Sentencing Guidelines

The Bureau of Prisons cannot maintain its current level of discretion without better oversight of its behavior, especially when it is not adhering to its own policies, a fact recently underlined by the Justice Department's criticism of the BOP's "management of female inmates."³⁵⁰

While its visitation regulations state that the BOP "encourages visiting by family . . . to maintain the morale of the inmate and to develop closer relationships between the inmate and family members," this is not adequately taking place; similarly, it does not seem that best efforts are being made to place those who are incarcerated as close to home as possible, as is described in the BOP's designation guidelines.³⁵¹ So, while the First Step Act did recently codify BOP policies to require that people incarcerated in federal prisons be placed within 500 driving miles from their families or homes, it is not clear whether this is being followed—what is apparent is that the Bureau of Prisons should not have the sole authority in determining prison designations, especially for incarcerated mothers.³⁵²

Judges should be empowered to better determine prison placements and be encouraged and incentivized to use the downward departure measures available to them.³⁵³ There is also an urgent need for the United States Sentencing Commission to amend the Federal Sentencing Guidelines to allow judges more alternatives to incarceration.³⁵⁴

- Align Domestic Correctional Practices with International Human Rights Principles

Employing internationally recognized standards in the U.S. correctional system, including the foundational principle of human dignity, is critical. The vast benefits of subscribing to a human-rights-based approach can be seen in programs like T.R.U.E. and W.O.R.T.H., which are both aimed at reimagining incarceration and which have both received

³⁵⁰ OFFICE OF THE INSPECTOR GEN., *supra* note 53, at i.

³⁵¹ FED. BUREAU OF PRISONS, *supra* note 172, at 1; WENDY SAWYER, PRISON POLICY INITIATIVE, THE GENDER DIVIDE: TRACKING WOMEN'S PRISON GROWTH (2018), <https://perma.cc/AZE3-7W2Q>; *Custody and Care Designations*, *supra* note 169.

³⁵² First Step Act of 2018, Pub. L. No. 115-391, § 601, 132 Stat. 5194, 5237; FED. BUREAU OF PRISONS, *supra* note 172; *Custody and Care Designations*, *supra* note 169.

³⁵³ U.S. SENTENCING COMM'N, *supra* note 168, at 6. As mentioned previously, downward departures are limited allowances to sentence outside of the federal guideline range. *See generally* OFFICE OF GEN. COUNSEL, *supra* note 163.

³⁵⁴ U.S. SENTENCING COMM'N, *supra* note 168, at 6.

overwhelmingly positive feedback.³⁵⁵ Based on a model pioneered in Germany, where the main objective of prison is rehabilitation, the Connecticut Department of Correction first established the T.R.U.E. program in early 2017. Focused on young adults aged fifteen to twenty-five, T.R.U.E., which stands for Truthfulness, Respectfulness, Understanding, and Elevating, is a “therapeutic unit for young men that focuses on developing their sense of self, autonomy, and responsibility, and keeps a clear focus on preparing for life after prison.”³⁵⁶ It also prioritizes personal relationships, taking proactive steps to involve the families of those in the program in order to help build and sustain fundamental connections.³⁵⁷ After the initial success of T.R.U.E., the program was expanded to a women’s prison in Connecticut. Women Overcoming Recidivism Through Hard Work, or W.O.R.T.H., began in June 2018 at the York Correctional Institution.³⁵⁸ While these efforts are still in their beginnings, they are good examples of how the U.S. prison system can be improved—and the success of countries like Germany, whose recidivism rate is about half that of the United States, shows that a different approach may yield far better results.

According to research, there is a remarkable level of agreement between Americans that the U.S. correctional system needs reform, with a staggering ninety-one percent of people who believe that there are problems with the current system that need to be fixed.³⁵⁹ Given that recognition, it is urgent that the United States better utilize international human

³⁵⁵ See Maurice Chammah, Opinion, *To Help Young Women in Prison, Try Dignity*, N.Y. TIMES (Oct. 9, 2018) [hereinafter Chammah, *Try Dignity*], <https://perma.cc/AR8C-ACS6>; Maurice Chammah, *The Connecticut Experiment*, MARSHALL PROJECT (May 8, 2018, 5:00 AM), <https://perma.cc/S8HM-DDLE>; Bill Whitaker, *German-Style Program at a Maximum Security Prison Emphasizes Rehab for Inmates*, 60 MINUTES (Mar. 31, 2019), <https://perma.cc/RB94-Q4JK>; RUTH DELANEY ET AL., VERA INST. OF JUSTICE, REIMAGINING PRISON 77-89 (2018), <https://perma.cc/5942-JLNS>.

³⁵⁶ DELANEY ET AL., *supra* note 355, at 83.

³⁵⁷ *Id.* at 84-85.

³⁵⁸ *Id.* at 88; Chammah, *Try Dignity*, *supra* note 355.

³⁵⁹ Press Release, ACLU, 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds (Nov. 16, 2017), <https://perma.cc/V9GL-EDCR>. The research poll also found that 71% agree that incarceration is often counterproductive to public safety since long prison sentences increase the likelihood that the person “will commit another crime when they get out because prison doesn’t do a good job of rehabilitating problems like drug addiction and mental illness.” Other key findings include: 71% of Americans say that it is important to reduce the prison population in America (including 87% of Democrats, 67% of Independents, and 57% of Republicans); 68% would be more likely to vote for an elected official if the candidate supports reducing the prison population and using the savings to reinvest in drug treatment and mental health programs; 72% would be more likely to vote for an elected official who supports eliminating mandatory minimum laws; 84% believe that people with mental health disabilities belong in mental health programs instead of prison; and the majority of

rights standards in its correctional practices.³⁶⁰ One concrete move toward this would be for the federal government to pass the Dignity for Incarcerated Women Act and concurrently for states to implement similar legislation.³⁶¹

- Start Adequately Treating Trauma and Stop Disregarding the Science Surrounding It

The United States must begin effectively treating traumatic stress, not just the symptoms people exhibit from trying to cope with underlying trauma, which often lead to incarceration, but the origins of those symptoms.³⁶² An approach that incorporates trauma-based research and guidelines is integral to all interactions with incarcerated mothers and their children.³⁶³ Guiding principles should include creating safety, empowerment, trustworthiness, and predictability, which are often absent in the original trauma and in subsequent prison settings.³⁶⁴

Americans recognize racial bias in the correctional system, with only one in three believing that black people are treated fairly. *Id.*

³⁶⁰ Noted scholar Noam Chomsky argues that international human rights principles are continually undermined by multinational organizations and other large corporations interested not in genuine human rights but in turning a profit. These institutions, Chomsky emphasizes, have incredible power over governments, including the U.S. government. NOAM CHOMSKY, *WORLD ORDERS OLD AND NEW* 163, 183 (1996 ed.); *see generally* NOAM CHOMSKY, *PROFIT OVER PEOPLE: NEOLIBERALISM AND GLOBAL ORDER* (1999).

³⁶¹ Dignity for Incarcerated Women Act of 2019, S. 992, 116th Cong. (2019); Dignity for Incarcerated Women Act of 2019, H.R. 2034, 116th Cong. (2019).

³⁶² Van der Kolk warns that as long as “[we] live in denial and treat only trauma while ignoring its origins, we are bound to fail.” VAN DER KOLK, *supra* note 6, at 348; *Toxic Stress*, *supra* note 92. Incorporating the groundbreaking work of trauma experts like Bessel van der Kolk, Judith Herman, Peter Levine, and Stephen Porges is critical; using body-oriented approaches, often referred to as somatic therapies, in addition to more traditional treatments can be advantageous. “For real change to take place, the body needs to learn that the danger has passed and to live in the reality of the present.” VAN DER KOLK, *supra* note 6, at 21; *see generally* SEBERN F. FISHER, *NEUROFEEDBACK IN THE TREATMENT OF DEVELOPMENTAL TRAUMA* (2014); HERMAN, *supra* note 98; LEVINE, *supra* note 98; PAT OGDEN ET AL., *TRAUMA AND THE BODY* (2008); STEPHEN W. PORGES, *THE POLYVAGAL THEORY* (2011).

³⁶³ *See* HERMAN, *supra* note 98; Stephanie S. Covington, *Women and Addiction: A Trauma-Informed Approach*, 40 *J. PSYCHOACTIVE DRUGS* 377 (2008).

³⁶⁴ “Safety: The number one component in trauma-informed care is providing safety. Unless someone feels safe, all bets are off. They will not hear your well-reasoned words, nor be able to perceive your good intentions because the higher brain will be offline. They will be in survival mode. Choice: Giving options is one way of restoring choice, which was taken away along with control during the trauma. Collaboration: Trauma-informed care is about moving from a ‘power over’ to a ‘power with’ paradigm. Our higher brains are wired for cooperation and collaboration. It is the opposite of the domination and oppression inherent in relational trauma. Empowerment: Empowerment increases the degree of autonomy and self-determination. The mistake many well-meaning people make is to advocate so actively on behalf of the person so the person never develops skills to advocate and find safety for themselves. Trustworthiness: Trauma often involves betrayal by an adult who is supposed to love and protect

Simultaneously, the United States must recognize its role in creating and perpetuating toxic stress, which can ultimately lead to a “stunted existence.”³⁶⁵ By continuing to separate children from their primary caregivers, thus altering their brain development and capacity, and failing to adequately address the deep-rooted trauma that is often present in incarcerated mothers, the United States is helping to devastate these families far into future generations.³⁶⁶

As discussed in Part II, the core experience of trauma lies in disempowerment and disconnection from others, and it is only in the context of relationships that recovery can genuinely take place.³⁶⁷ That means the United States must stop carelessly breaking connections critical for both mother and child.

Approaching the treatment of trauma holistically should include adopting simple initiatives, such as the development of a therapeutic yoga program across all state and federal prisons. Numerous studies illustrate yoga’s effectiveness in helping people to become calmer and get in touch with their often-disassociated bodies; the combination of mindful movement and breathing exercises has been shown to decrease stress and clear the mind.³⁶⁸

By relying on interpersonal rhythms and visceral awareness, yoga helps people to shift out of fight, flight, or freeze responses; reorganize

you. Being trustworthy is one way to heal this wound. Predictability: Trauma is often unpredictable and leaves the person in an agony of suspense waiting for the next bad thing to happen. We can avoid this by creating predictable environments and schedules, as well as helping the person anticipate transitions.” Am. Acad. of Pediatrics, *AAP Trauma and Resilience ECHO Training* (on file with author); see generally Roger D. Fallot & Maxine Harris, *Trauma-Informed Services: A Self-Assessment and Planning Protocol*, COMMUNITY CONNECTIONS (Mar. 2006), <https://perma.cc/Q5XX-QW4X>.

³⁶⁵ See VAN DER KOLK, *supra* note 6, at 27; Felitti et al., *supra* note 103, at 251-56; Burke Harris, *supra* note 94.

³⁶⁶ Van der Kolk discusses various methods for treating trauma, including neurofeedback, which has been shown to help regulate brain activity, as well as yoga, which can help activate the brain’s natural neuroplasticity through movement. See VAN DER KOLK, *supra* note 6, at 265-78, 298-310.

³⁶⁷ HERMAN, *supra* note 98, at 51. Van der Kolk identifies interoception as a catalyst for a person’s transformation, writing, “Agency starts with what scientists call interoception, our awareness of our subtle sensory, body-based feelings: the greater that awareness, the greater our potential to control our lives. Knowing *what* we feel is the first step to knowing *why* we feel that way. If we are aware of the constant changes in our inner and outer environment, we can mobilize to manage them.” Yoga has been known to cultivate interoception. VAN DER KOLK, *supra* note 6, at 97-98 (emphasis in original).

³⁶⁸ See B.K.S. IYENGAR, *YOGA: THE PATH TO HOLISTIC HEALTH* 33, 36 (2014); Bessel van der Kolk et al., *Yoga as an Adjunctive Treatment for Posttraumatic Stress Disorder: A Randomized Controlled Trial*, 75 J. CLINICAL PSYCHIATRY 559 (2014); see also Anis Sfindla et al., *Yoga Practice Reduces the Psychological Distress Levels of Prison Inmates*, FRONTIERS IN PSYCHIATRY, Sept. 3, 2018.

their perception of danger; and increase their ability to manage relationships—all of which would benefit incarcerated mothers in regaining a sense of agency, efficacy, and control, which is critical in combating trauma.³⁶⁹

B. Summation: There Is No Substitute for Action

“Some things you must never stop refusing to bear.”³⁷⁰

It has been said that the greatest source of our suffering are the lies that we tell ourselves; that people can never get better without knowing what they know and feeling what they feel.³⁷¹ This truth is no different for the United States, whose own identity continues to erode in the face of its unacknowledged and destructive actions.

It is difficult to appreciate how truly insidious the situation is for incarcerated mothers and their children, or how much additional hardship they endure beyond the actual sentences. This is because the scope of people affected, most especially children, is so wide, the deep-seated ways in which these primary caregivers and their children are kept apart are so numerous, and the threats of the potential dissolution of their families are so grievous.³⁷² Yet while it takes the peeling back of many layers to capture the full picture, what becomes clear is that U.S. prison policies are not addressing the needs of incarcerated mothers; that traumatic stress, while maybe invisible to the eye, is alive inside the many mothers and children affected; that domestic courts often perpetuate the very wrongs they proclaim to be against; and that international human rights laws and

³⁶⁹ VAN DER KOLK, *supra* note 6, at 88, 95-96, 274; see DAVID EMERSON & ELIZABETH HOPPER, *OVERCOMING TRAUMA THROUGH YOGA* 55-56 (2011) (discussing interpersonal rhythms in yoga). Yoga as a way to cope with traumatic stress would likewise be beneficial to the children of incarcerated parents, who are frequently treated with drugs. Medicaid, the government health program for the poor, spends more on antipsychotics than any other class of drugs. See Lucette Lagnado, *US Probes Use of Antipsychotic Drugs on Children*, WALL STREET JOURNAL (Aug. 11, 2013), <https://perma.cc/N3YK-HC6T>. “Because drugs have become so profitable, major medical journals rarely publish studies on non-drug treatments of mental health problems.” VAN DER KOLK, *supra* note 6, at 38. “Immobilization is at the root of most traumas.” *Id.* at 84.

³⁷⁰ WILLIAM FAULKNER, *INTRUDER IN THE DUST* 200-01 (Second Vintage International 2011) (1948); see Strathclyde Center for Law, Crime and Justice, *supra* note 287, at 26:49-26:57 (“Isn’t it about time, in matters like this, that we insist that the rights of the child be raised?” (quoting Justice Sachs)). “You live through that little piece of time that is yours, but that piece of time is not only your life, it is the summing-up of all the other lives that are simultaneous with yours What you are is an expression of history.” VAN DER KOLK, *supra* note 6, at 22 (quoting ROBERT PENN WARREN, *BAND OF ANGELS* 34 (LSU Press 1994) (1955)).

³⁷¹ VAN DER KOLK, *supra* note 6, at 127.

³⁷² See Dan Levin, *As More Mothers Fill Prisons, Children Suffer ‘a Primal Wound,’* N.Y. TIMES (Dec. 28, 2019), <https://perma.cc/Z5MB-WXVZ>.

standards, meant to protect mothers and children, are being obstinately disregarded.³⁷³

By needlessly separating children from their mothers and by failing to devise meaningful rehabilitative and holistic approaches to treat these issues, the United States not only violates human rights law but continues quietly to tear apart its own fabric.³⁷⁴ It is evident that, in times like today, the exceedingly influential court of the people needs to be more effectively mobilized to fight against what so many know and feel is wrong.³⁷⁵ In order to do this, Americans must put aside some of their differences to stand up for the human rights of these vulnerable children and the primary caregivers on whom they rely.³⁷⁶ This change is ultimately up to the people.³⁷⁷ When people come together as a community greater than themselves, they step into power.

“Power concedes nothing without a demand. It never did and it never will. Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them.”³⁷⁸

³⁷³ UDHR, *supra* note 8; THE SENTENCING PROJECT, *supra* note 2; Martin, *supra* note 18, at 1-3; *see generally* HUMAN RIGHTS WATCH & ACLU, *supra* note 16.

³⁷⁴ *See generally* PENAL REFORM INT’L, *supra* note 22. “It is scarcely worthwhile to attempt remembering how many times the sun has looked down on the slaughter of the innocents It is so simple a fact and one that is so hard, apparently, to grasp: *Whoever debases others is debasing himself*. That is not a mystical statement but a most realistic one.” JAMES BALDWIN, *THE FIRE NEXT TIME* 83 (Vintage Books 1993) (1963) (emphasis in original).

³⁷⁵ *See* ACLU, *supra* note 359.

³⁷⁶ “I note the obvious differences between each sort and type, but we are more alike, my friends, than we are unlike.” MAYA ANGELOU, *Human Family*, in *THE COMPLETE COLLECTED POEMS OF MAYA ANGELOU* 225 (1994).

³⁷⁷ “We have two choices: to abandon hope and help ensure that the worst will happen; or to make use of the opportunities that exist and perhaps contribute to a better world. It is not a very difficult choice. There are, of course, sacrifices; time and energy are finite. But there are also the rewards of participating in struggles for peace and justice and the common good.” Noam Chomsky with Scott Casleton, *Choosing Hope*, BOSTON REV. (June 4, 2019), <https://perma.cc/68WL-BU27>.

³⁷⁸ Frederick Douglass, Address on West India Emancipation (Aug. 3, 1857), <https://perma.cc/AQ77-8ERC>.