

Ending the Incarceration of Women and Girls

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ABSTRACT. This Essay encourages a shift in public awareness towards support for ending incarceration of women and girls; towards a deeper exploration of prison abolition, and of the possibilities besides reliance on prisons; and towards the view that incarceration is not an acceptable form of addressing harm that only needs reform, but rather is a continuation of policies rooted in racism that have been used as tools of oppression and control with little relation to meaningful public safety measures. Drawing on the author's experience as a formerly incarcerated mother and advocate, the Essay challenges the reader to consider whether incarceration generally—and incarceration of women and girls specifically—is a fundamentally misguided response to violence and poverty that we must retire.

INTRODUCTION

During my incarceration, when I wasn't working my prison job teaching General Education Development (GED) classes or jogging five miles a day to maintain my sanity, I spent my time in the prison library writing letters to President Obama and Members of Congress. In those letters, I described what I witnessed as a woman incarcerated in a prison filled with other women, mostly mothers who had been separated from their children and were serving protracted and unjust sentences.

The federal prison in Danbury, Connecticut where I was incarcerated had two components. The midlevel security prison was called a federal correctional institution, or FCI, and the lowest security designation was known as the federal prison camp. I lived in the camp. It sat on a hill overlooking the higher-security FCI, which sat behind an enormous, imposing prison wall.

The women at the camp drove prison vehicles, provided manual labor for the prison at a pay rate starting at twelve cents per hour,¹ worked for the Federal Prison Industries (known as UNICOR),² and at times even trained new officers in the jobs in which they had gained expertise. Officials trusted the women to keep the prison community functioning, but they did not trust them to serve their sentences in their own community.

As I witnessed life in prison, I found it increasingly difficult to comprehend why these women – both the women with me in the camp, and those confined in the federal correctional institution behind the wall – were forced to live away from their families. In their own communities, they could have worked to address the issues that landed them on a prison bunk, while receiving and giving the help they and their children needed. Besides keeping their families intact, allowing these women to remain in their communities would have enabled them to focus more on healing themselves and any others they had harmed. This would have allowed for the more personally transformative experience that is necessary if minimizing harm and violence is the goal of the criminal system.

In this Essay, I relate my experience as an incarcerated mother and as a friend, colleague, and advocate of countless others. I then explain why these collective experiences have persuaded me that we must put an end to the incarceration of women and girls.

I. TO BE A MOTHER INCARCERATED

My own experience as a mother incarcerated opened my eyes to the pain the criminal legal system inflicts on children and families. I remember the difficult moment when I told my twelve-year-old daughter that I was leaving home to go to prison. I waited until the night before I was expected to voluntarily surrender myself. In this respect, I was lucky; not everyone is allowed to self-surrender. Most of the women incarcerated with me were swept up in a drug arrest and held in custody until their sentencing and transport to the prison where they would serve their sentence. Many had not seen their children since they struggled to catch a glimpse of them through the rear window of a police vehicle, watching as their children were also taken away by strangers.

1. See also *U.S. Prisoners' Strike Is a Reminder How Common Inmate Labor Is*, CBS NEWS (Sept. 3, 2018, 5:51 AM), <https://www.cbsnews.com/news/u-s-prisoners-strike-is-reminder-how-commonplace-inmate-labor-is> [<https://perma.cc/R7NP-XT79>] (noting that inmates work for rates as low as twelve cents per hour, and in some places are not paid at all).

2. UNICOR is a wholly-owned government corporation. *FPI General Overview: Frequently Asked Questions*, UNICOR, https://www.unicor.gov/FAQ_General.aspx [<https://perma.cc/5C32-72LA>].

The night before I was to surrender, I went into my daughter's bedroom and sat next to her on her bed. I told her that I had gotten into trouble in my law practice, and that I had to go away for a while. She asked what I meant by "go away." Beginning to cry, she asked, "Mom, do you have to go to prison?"

I had always tried to protect my children from painful experiences. That's why it took me so long to have this conversation with her. As much as I tried to hide the truth, she had understood all along that something was going on. And she knew it was something bad. Maybe it was the rushed closing of my law office; or my harried attempts to get my infant son to stop breastfeeding; or the immense heaviness hanging in the air from the day I realized I would be unable to reverse the mistakes I had made and for too long had been too afraid to seek help with.

Before I was convicted of mortgage fraud, I was a criminal-defense and real-estate-conveyance attorney. On December 7, 2009, the U.S. District Court of Massachusetts sentenced me to serve a twenty-four-month prison sentence. At the time of my sentencing, my husband and I had young adult children, a daughter who was twelve years old, and a son who was five months old.

When my case started, I was pregnant with my son. The Assistant U.S. Attorney assigned to my case was also expecting. By the time of my sentencing, another prosecutor had replaced her because she was on maternity leave. This irony was painful for me. I understood that she was a prosecutor, and I, a woman convicted of a crime; but that did not change my feeling of desperation to find a way to remain home with my infant. Weeks before my self-surrender, I bought my son a stuffed animal, Billy, and slept with it in the hopes that my scent would comfort him after I was gone. The criminal legal system threatens even one's identity as a mother.

Because of my children, and because of my socioeconomic privilege as a lawyer with far-reaching familial and professional support, the judge sentenced me to the prison closest to our home in Roxbury, Massachusetts. Even so, it was a state away—in Danbury, Connecticut. During my entire time at Danbury, my husband brought our two youngest children to visit me every visiting day. He drove them three hours in each direction, getting up at four in the morning to get them ready, make the baby bottles, and pack the Pampers, extra clothing, and Billy, the stuffed animal I left with my son. He bundled them into the car, even during snow and ice storms, and made the early morning drive to Danbury hoping to get there before count time so they would not have to wait to be allowed to visit me.

The first time they came to visit me was the hardest. When the officer announced that the visit was over, it was unbearable. It was almost impossible for us to let go of each other as he told them to leave and told me to line up against the wall to be strip-searched. For my mother, a psychology professor who studies

families of the African diaspora, visiting me was a challenge – not only because she had to come to a federal prison to see her daughter, but also because her pain was compounded by witnessing the other mothers and their children interact in the visiting room.

I saw my son walk for the first time in the prison visiting room. I often recall the visit when he wobbled over to the door leading to the outside and motioned with his tiny hand, saying, “Come, Mommy.” But during these visits, my infant son didn’t really know who I was. I was less his mother, and more like the “mommy lady.”

I wouldn’t return home until six days after my son’s second birthday.

Still, I was fortunate. I was incarcerated with women who spent decades separated from their children – women like Michelle West, who is serving life with no parole for a drug case. At ten years old, her daughter Miquelle “knew something was wrong when her mother didn’t pick her up from school.”³ That was over twenty-five years ago. Miquelle, now an adult, is unrelenting in her fight to free her mother. She asks each new President to commute her mom’s life sentence.⁴

II. JAILING BLACK WOMEN IN THE ERA OF MASS INCARCERATION

Michelle West and her daughter are not alone. Incarceration of women has increased dramatically in recent decades, growing at twice the pace of men’s incarceration.⁵ I served time in a federal prison, but the vast majority of incarcerated women throughout the country are in county jails or state prisons.⁶ Four in five of these women are mothers.⁷ These trends present special difficulties to

3. Casey Tolan, *How a Woman Who’s Served 23 Years in Prison Raised Her Daughter from Behind Bars*, SPLINTER (Aug. 15, 2016, 12:07 PM), <https://splinternews.com/how-a-woman-who-s-served-23-years-in-prison-raised-her-1793861175> [<https://perma.cc/7BWN-FTZR>].

4. *Id.* (documenting Miquelle West’s advocacy under the Obama Administration, including a trip to the White House); Miquelle West, *Clemency for Michelle West Serving Life Without Parole*, CHANGE.ORG, <https://www.change.org/p/775onald-trump-clemency-for-michelle-west-serving-life-without-parole> [<https://perma.cc/U9WK-RGTR>] (presenting a petition to President Trump signed by 47,587 people as of November 10, 2018). For profiles of mothers serving long-term drug sentences who sought clemency during the Obama Administration, including Michelle West, see Victoria Law, *Mothers Serving Long-Term Drug Sentences Call for Clemency*, TRUTHOUT (Sept. 11, 2015), <https://truthout.org/articles/mothers-serving-long-term-drug-sentences-call-for-clemency> [<https://perma.cc/VTE7-XU9V>].

5. Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2018*, PRISON POL’Y INITIATIVE (Nov. 13, 2018), <https://www.prisonpolicy.org/reports/pic2018women.html> [<https://perma.cc/7A5P-297F>].

6. *Id.*

7. *Id.*

children and communities: in jails, contact with family is restricted especially severely, and many jails are replacing in-person visits with video visitation.⁸

The criminal system targets poor people and people of color. African Americans are 13% of the U.S. population, but make up 40% of people incarcerated in the United States.⁹ As of 2016, there were 161,957 people serving life sentences in the United States—one of every nine people in prison.¹⁰ An additional 44,311 people, or one in seven incarcerated individuals, are serving what essentially amount to life sentences, since they are for fifty years or more.¹¹ About half of this population is black.¹² One out of every five black prisoners in the United States is serving a sentence of fifty years or more.¹³

Our culture and history of racism, classism, and discriminatory application of criminal justice policy has not passed over women. Since before the nation's founding, African American women have been a target. Throughout our history, Black women were viewed as property, not as human beings, starting with American slavery. The abolition of slavery—except as punishment for a crime¹⁴—ushered in the shift from slave labor to convict labor, including arrests of Black women to provide domestic servitude and childcare labor to white women's households.¹⁵ During this period, Black women throughout the South were arrested for prostitution, vagrancy, and other crimes of poverty, as well as for simply existing, and they were incarcerated in prison labor camps. There, they were forced to perform hard labor, working side-by-side with men on chain gangs; they were expected to maintain the care of the camp, prepare the meals, and mend the clothing;¹⁶ and all the while, they were subjected to beatings¹⁷ and rape.¹⁸ There were instances of white women being sentenced to convict lease

8. *Id.*

9. Danyelle Solomon, *Time to Fix Our Failing Criminal Justice System*, REAL CLEAR POL. (Oct. 19, 2016), https://www.realclearpolicy.com/articles/2016/10/20/time_to_reform_our_failing_criminal-justice_system.html [https://perma.cc/TBQ3-5YNJ].

10. *Still Life: America's Increasing Use of Life and Long-Term Sentences* 5, SENT'G PROJECT (2017), <https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf> [https://perma.cc/68B4-3G3W].

11. *Id.*

12. *Id.*

13. *Id.*

14. U.S. CONST. amend. XIII, § 1.

15. SARAH HALEY, *NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY* 180 (2016).

16. *Id.* at 71.

17. *See, e.g., id.* at 66.

18. *Id.* at 104-06.

camps, but these cases were rare.¹⁹ When they did occur, they caused such public outrage about white women living among Black women and performing the same hard labor that their sentences were often vacated, or other arrangements were made for them.²⁰

One can draw a continuous line between the historical mistreatment of Black women – and the evolution from slavery, to domestic servitude, to mass incarceration – and the present-day conditions of confinement affecting all incarcerated women. The barbaric and brutal practice of shackling pregnant women and girls during labor, reminiscent of slavery, is a routine and widespread practice.²¹ It is a testament to the persistence of society's disregard for the Black woman.

So, too, can it be argued that the accepted practice of separating mothers from children in our criminal legal system derives from historic racist practices. The common thread is the dehumanization of the Black woman.²² In this way, the sentencing policies that separate mothers from children are inextricably linked to the brutal disregard for Black people sold as property and the separation of Black families during slavery. Mothers are often incarcerated for choices

19. *Id.* at 79-82, 158.

20. *Id.* at 75, 84-86, 100-04.

21. Amanda Glenn, *Shackling Women During Labor: A Closer Look at the Inhumane Practice Still Occurring in Our Prisons*, 29 HASTINGS WOMEN'S L.J. 199, 207 (2018) (noting that shackling prisoners during labor is legal in the majority of states). Under the First Step Act, Congress banned shackling of pregnant women in federal prison facilities. Lauren Kuhlik, *Congress Just Took a Big Step Toward Ending the Shackling of Pregnant Prisoners*, ACLU (Dec. 20, 2018), <https://www.aclu.org/blog/prisoners-rights/women-prison/congress-just-took-big-step-toward-ending-shackling-pregnant> [<https://perma.cc/TX9U-GLJG>]. The practice remains legal in most states, however. See Rachel D. Cohen & Ailsa Chang, *Federal Legislation Seeks Ban on Shackling of Pregnant Inmates* (Dec. 5, 2018), <https://www.npr.org/sections/health-shots/2018/12/05/673757680/federal-legislation-seeks-ban-on-shackling-of-pregnant-inmates> [<https://perma.cc/H3V7-QKDD>].

22. Of course, the dehumanization is not limited to family separation, but instead pervades the experience of being incarcerated and processed as a criminal defendant. Consider the temporary fame of Judge Amber Wolf of Louisville, Kentucky. She looked up at the defendant in front of her bench and realized the Black woman had been brought to court from the county jail wearing no pants. She had been incarcerated for failing to complete a diversion program for a prior shoplifting charge, and although she had been held for three days before appearing before the judge, authorities still had not issued her a jail jumpsuit. As she stood in her underwear in front of the bench, she told the judge many more women were at the jail without clothing or access to feminine hygiene products. Judge Wolf's reaction went viral online for showing the degree of compassion any person should when faced with this situation. Unfortunately, the deplorable jail conditions themselves have yet to receive the same attention. See Doug Criss, *This Kentucky Judge Is a Viral Video Star and She Finds It 'Mind-Boggling'*, CNN (Aug. 12, 2016, 1:27 PM), <https://www.cnn.com/2016/08/12/us/judge-amber-wolf-profile-trnd/index.html> [<https://perma.cc/746X-D59F>].

made as a result of being cash-poor and without support. This would not seem like a sensible or humane policy, if only the full humanity of the people it affected were accepted.²³

I have been told countless stories, either during my tenure as a criminal defense attorney or while laying on my prison bunk, about times women in the depth of their addiction were beaten, trafficked, humiliated, and left for dead. It's disturbing how common the story is of women forced by drug detectives and street cops to perform oral sex on them, or the story of women being urinated upon after men forced themselves on them. The ever-present sights and sounds of law enforcement vehicles that speed in and out of streets in neighborhoods like mine, stopping and frisking in ongoing violation of the Fourth Amendment,²⁴ betrays a bitter irony to those of us who know that their presence, alleged to keep us safer, is an overwhelmingly ineffective response to violence, addiction, mental illness, and poverty.

While incarcerated, I often asked myself what kind of country would separate mothers from their children in this manner. I thought about those who implement these policies, and wondered how judges could carry them out despite knowing the devastation they cause when they sentence a mother to a lengthy mandatory minimum sentence. I understand that the role of the judge is to interpret the law. But at what point should those of us who know better radicalize the power and professional privilege we have for the purpose of correcting grave injustices?²⁵

In recent years, there has been a significant increase in the incarceration rate of white women.²⁶ This uptick, in a country steeped in racism and inequity,

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23. The discriminatory “war on drugs” represents another example. Years of neglect for the illness of addiction in communities of color, especially women, and the use of jails and prisons as the response, is a striking contrast to the current public health response to an opioid crisis sweeping the country and affecting millions of white middle class families struggling to cope with opioid and heroin addicted teens and adult children. See Kristina Peterson & Stephanie Armour, *Opioid vs. Crack: Congress Reconsiders Its Approach to Drug Epidemic*, WALL ST. J. (May 5, 2018), <https://www.wsj.com/articles/opioid-v-crack-congress-reconsiders-its-approach-to-drug-epidemic-1525518000> [<https://perma.cc/5K7L-F87W>]. The response now is a public health approach to treatment, not prison, scrubbing clean the stigma and caricature of the heroin-shooting, crack-smoking, junkie woman not worthy of that same response. The crack epidemic was brief, yet the policies to address it were disastrous and remain the prevailing response in communities of color for drug use generally, including marijuana.
 24. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).
 25. See Recent Case, *United States v. Hungerford*, 465 F.3d 1113 (9th Cir. 2006), 120 HARV. L. REV. 1988 (2007).
 26. Keith Humphreys, *White Women Are Going to Prison at a Higher Rate than Ever Before*, WASH. POST: WONKBLOG (Jan. 24, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/01/24/white-women-are-going-to-prison-at-a-higher-rate-than-ever-before> [<http://perma.cc/J8Z4-9Z8D>].

reminds me of the words of James Baldwin in his letter to the incarcerated Angela Davis:

Only a handful of the millions of people in this vast place are aware that the fate intended for you, Sister Angela, and for George Jackson, and for the numberless prisoners in our concentration camps – for that is what they are – is a fate which is about to engulf them, too. White lives, for the forces which rule in this country, are no more sacred than black ones For, if they take you in the morning, they will be coming for us that night.²⁷

Overall, the number of women in state prisons in the United States has increased at a rate fifty percent higher than men since 1978.²⁸ There are about 219,000 women incarcerated in the United States,²⁹ making it the largest jailer of women in the world.³⁰ The unchecked prosecutorial use of conspiracy laws has ensnared countless women and mothers into years of incarceration and separation from their children regardless of their peripheral involvement in criminal activity, often coerced through intimate partner violence. For example, my friend Ramona Brant was sentenced to serve life in prison for a first-time federal drug conspiracy conviction. Her husband’s repeated threats to kill her if she left him were not considered as a mitigating circumstance when she was sentenced. From prison, Brant did what she could for her children. She worked a commissary job, sending the money she made to them to pay for their haircuts. And at the beginning of each school year, she reached out to her sons’ teachers to ask them to consider the situation her kids were in.³¹ “[I] just wanted [the teachers] to understand I’m absent . . . physically, but I’m there if you allow me to be there My arms would ache from not being able to pick them up and hold them.”³² Ramona served twenty-one years in prison before President Obama commuted

27. James Baldwin, *An Open Letter to My Sister, Miss Angela Davis*, N.Y. REV. BOOKS (Jan. 7, 1971), <https://www.nybooks.com/articles/1971/01/07/an-open-letter-to-my-sister-miss-angela-davis> [https://perma.cc/UPH7-MKVZ].

28. Wendy Sawyer, *The Gender Divide: Tracking Women’s State Prison Growth*, PRISON POL’Y INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html [https://perma.cc/SG7X-ZR3D].

29. See Kajstura, *supra* note 5.

30. Aleks Kajstura, *States of Women’s Incarceration: The Global Context 2018*, PRISON POL’Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/women/2018.html> [https://perma.cc/P48Z-UY3M].

31. *Narratives: The Personal Costs of Long-Term Incarceration*, URBAN INST. (July 2017), <https://apps.urban.org/features/long-prison-terms/narratives.html> [https://perma.cc/GZ2B-ZYS9].

32. *Id.*

her life sentence.³³ Two years after being released and reunited with her sons, now adults, Ramona died unexpectedly in her sleep. She had spent every day since her release working to bring an end to incarceration of women and girls.

III. FAMILY SEPARATION AND INCARCERATION AT THE BORDER

The American people have recently experienced a consciousness-raising moment about the harm of family separation. On May 7, 2018, U.S. Attorney General Jeff Sessions announced a “zero-tolerance” policy, stating that the United States will criminally prosecute every unauthorized crossing of the Mexico border.³⁴ The implementation of this policy would involve the separation of migrant adults from children, effectively breaking up many families. In a speech defending the policy, Sessions said, “If you’re smuggling a child, then we’re going to prosecute you, and that child will be separated from you, probably, as required by law. If you don’t want your child separated, then don’t bring them across the border illegally. It’s not our fault that somebody does that.”³⁵

I watched his speech on the evening news and thought about his use of the term “smuggling” in reference to parents crossing the U.S. border with children whom they were unwilling to leave behind in the conditions they were fleeing. It was incredible to me that Sessions viewed their actions not as a desperate attempt for a better life, but as criminal actions that justified splitting their families apart.

Stories and pictures of crying babies and children taken from their parents dominated morning and evening news programs. The reaction from Americans was swift and demanding: end the practice of separating minor children from their parents at the border. Activists organized rallies across the country, and people came out to protest by the hundreds of thousands.³⁶ Public outcry

33. *Id.*

34. *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, U.S. DEP’T JUSTICE, (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry> [<https://perma.cc/3JBH-FBS7>].

35. Sari Horwitz & Maria Sacchetti, *Sessions Vows to Prosecute All Illegal Border Crossers and Separate Children from Their Parents*, WASH. POST (May 7, 2018), https://www.washingtonpost.com/world/national-security/sessions-says-justice-dept-will-prosecute-every-person-who-crosses-border-unlawfully/2018/05/07/e1312b7e-5216-11e8-9c91-7dab596e8252_story.html [<https://perma.cc/SU9N-74PP>].

36. Erica Chenoweth & Jeremy Pressman, *Millions of Protesters Turned Out in June – More Than in Any Month Since Trump’s Inauguration*, WASH. POST: MONKEY CAGE (Aug. 31, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/31/millions-of-protesters-turned-out-in-june-more-than-in-any-month-since-trumps-inauguration/> [<https://perma.cc/9RBG-ECZ4>] (reporting that 1,081 protests over the family-separation policy took place

condemned the practice as “inhumane”³⁷ and “cruel.”³⁸ People held signs demanding that the Administration “stop the inhumanity of separating families.”³⁹ On June 20, 2018, as a result of the public outrage, President Trump signed an executive order aimed at stopping family separation at the Mexico border.⁴⁰

Having been an incarcerated mother, I understood the pain of these mothers hoping to be reunited with children. Yet I also wondered why there are not protests on behalf of the women separated from their children every day due to our carceral policies. Reading the accounts of the mothers and children who had been separated at the boarder reminded me of the countless times in prison when I saw women crumple to the floor, inconsolable and desperate for a chance to see and hold their children, to look them in the eyes, and to tell them they love them.

The muffled cry at three o’clock in the morning of a mother lying on a prison bunk, desperate to get home to her children, is a sound difficult to forget. How to describe and quantify the suffocating anxiety felt by incarcerated mothers, forced to live in a place where, as one mother I was incarcerated with told me, you do not even have the right to struggle? How to transpose into words the screams of a mother trapped behind prison walls receiving the news that her child has disappeared, or been trafficked, harmed, or killed while struggling to survive in the absence of her mother?

How do we harness the lived experiences of incarcerated mothers and their children, in addition to all the research and statistics, to challenge and transform carceral policy to an approach that addresses the underlying causes of the poverty, violence, illness, and inequity that overwhelmingly land mothers on prison bunks? In this struggle, we must learn from the courage of incarcerated women and girls – and from their ability to carry on against great odds.

in June 2018 alone, with between 433,943 and 505,852 people protesting on June 30 – Families Belong Together mobilization day).

37. See, e.g., Azad Essa, *Americans Protest Against ‘Inhumane’ Family Separation Policy*, AL JAZEERA (June 1, 2018), <https://www.aljazeera.com/news/2018/06/americans-protest-inhumane-family-separation-policy-180601194614069.html> [<https://perma.cc/TRT8-PHXF>].
38. See, e.g., Erica Grieder, *Family Separations are Cruel and Gratuitous*, HOUST. CHRON. (June 21, 2018), <https://www.houstonchronicle.com/news/columnists/grieder/article/Family-separations-are-cruel-and-gratuitous-13012044.php> [<https://perma.cc/YJF6-9DF8>].
39. Chantal Da Silva, *Mass Protests Planned in 30 Cities over ‘Inhumane’ Separation of Families at Border*, NEWSWEEK (June 1, 2018, 8:45 AM), <https://www.newsweek.com/mass-protests-over-inhumane-separation-families-border-planned-30-cities-953112> [<https://perma.cc/X6XN-3BZB>].
40. Michael D. Shear et al., *Trump Retreats on Separating Families, but Thousands May Remain Apart*, N.Y. TIMES (June 20, 2018), <https://www.nytimes.com/2018/06/20/us/politics/trump-immigration-children-executive-order.html> [<https://perma.cc/H63P-TC9G>].

IV. INCARCERATION: A MISGUIDED RESPONSE TO VIOLENCE AND POVERTY

One common justification for incarceration is that the public must be protected from society's most dangerous. The problem with this sweeping assertion is that it suggests that the only way to protect the public from dangerous people is to lock them in a prison and rely upon this as the way to stop further harm. But hurt people hurt people. Relying upon incarceration as the response to violent acts is not an effective way to increase the well-being of the public, because it harms rather than heals the people we subject to it, while not addressing why they harm. This is not the most effective way to achieve accountability and atonement. Changes in sentencing and carceral policies over the past forty years led to the increase in U.S. incarceration rates with a focus on improving public safety and reducing crime, yet there is no uniformity regarding the effects of these policies on crime rates.⁴¹ A review by the Brennan Center for Justice estimated that increased incarceration explained six percent of the decline in property crime in the 1990s, explained below one percent of the decline in property crime in the 2000s, and *had no effect at all* on the violent crime rate in the 1990s or 2000s.⁴²

In my opinion, these findings are not surprising. The theory of deterrence assumes that individuals rationally weigh the benefits of crime against the costs of punishment. But life experience does not support this theory. Relying on incarceration to improve public safety and reduce crime is deeply flawed, and the alternatives that could replace it have been for the most part ignored, underutilized, and untested. Instead, crime prevention relying on the use of incarceration as deterrence is the overwhelming norm, despite being based on a rationale that is unrealistic.

Meanwhile, arguments for incarceration that center on the incapacitation of people viewed as dangerous do not take into consideration that much violence is situational and the result of previous and unaddressed violence, illness, trauma, hatred, and political ideology. Reliance on incarceration does not automatically lead to a safer society, because it does not address the ongoing social, political, and economic reasons at the root of violent acts.

Of course, I do not intend to impose any particular reaction on someone suffering. It is not for any of us to decide for a person who has lost a loved one to violence or personally experienced trauma what their response should be.

41. See generally NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (2014).

42. Oliver Roeder et al., *What Caused the Crime Decline?*, BRENNAN CENTER FOR JUST. 23 (2015), https://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf [<https://perma.cc/F8WR-NZRE>].

Violence is often lethal, and it is always painful, damaging, and debilitating. But violence is also a complex phenomenon,⁴³ and we too often fail to examine its underlying causes when we rely on incarceration. This failure to understand the true causes of violence is especially difficult to accept when the whole point of prison is said to be the eradication of violence and harm.

Each day I spent in prison, the facade that incarceration was necessary for a peaceful and safe public – or indeed, that it contributed to public safety in any effective way – eroded more and more. I learned that the conventional view that confinement in prison is necessary for public safety by way of incapacitating the dangerous is misguided. Prison itself does not cure but more often exacerbates violence. People do not cease being human beings because they are sent to live in a prison. Their responses to trauma do not cease in a prison environment, and they do not cease once the person is released from the prison. Incarceration itself is an act of violence and therefore does not address harm in effective evolutionary ways. Continuing to exact violence won't end it.

It is now well known that U.S. criminal justice policies have driven an unprecedented rise in incarceration rates, unmatched anywhere else in the world. Our country has twenty-five percent of the world's incarcerated individuals, despite having less than five percent of the world's population.⁴⁴ But despite the broad consensus that there is a need for criminal justice reform – reform that includes reducing the prison population,⁴⁵ ending mandatory minimum

43. Gareth Cook, *History and the Decline of Human Violence*, SCI. AM. (Oct. 4, 2011), <https://www.scientificamerican.com/article/history-and-the-decline-of-human-violence> [<https://perma.cc/SE4D-A2GK>] (“[N]euroscience has given us the crucial starting point in understanding violence, namely that it is not a single thing.”).

44. *A Roadmap for Criminal Justice Reform: Executive and Legislative Recommendations from the Justice Roundtable Working Groups*, JUST. ROUNDTABLE 3 (Jan. 2017), <https://justiceroundtable.org/wp-content/uploads/2017/05/Roadmap-for-Criminal-Justice-Reform.pdf> [<https://perma.cc/9B3X-7AL4>].

45. *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <https://www.aclu.org/news/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/4CS5-5FPU>].

sentences,⁴⁶ developing better responses to mental illness and addiction,⁴⁷ and ending incarceration caused by money bail⁴⁸—these policies remain alive and well.

Children are uniquely harmed. Incarceration of parents contributes significantly to the number of children entering the child welfare system, exacerbating tragic trends. There are about 438,000 children in foster care in the United States at any given time,⁴⁹ and sixty percent of child sex trafficking victims have been in the child welfare system.⁵⁰ The passage of the federal Adoption and Safe Families Act in 1997 required states to automatically file a petition to terminate parental rights once a child has been in foster care for fifteen of the most recent twenty-two months. This only makes it harder for incarcerated parents to maintain their legal rights to their children.⁵¹

The cost of incarceration for individuals, their families, and their communities is often financially crippling and emotionally overwhelming.⁵² Yet the

46. *Id.*

47. *Id.*; accord *United Toward Justice: Urban and Rural Communities Share Concerns About Incarceration, Fairness of the Justice System, and Public Spending Priorities*, VERA INST. JUST. (Apr. 19, 2018), <https://www.vera.org/blog/united-toward-justice-urban-and-rural-communities-share-concerns-about-incarceration-fairness-of-the-justice-system-and-public-spending-priorities> [<https://perma.cc/8WCG-L47M>] (“They need a new treatment center, not a jail. This is a poor place; there’s a drug problem like all these poor places across the country. We don’t need a new jail.”).

48. *Survey on American Money Bail System: Americans Recognize Inequities in Pretrial Justice System and Support Reforms to Current System*, CHARLES KOCH INST. (July 13, 2018, 4:59 PM), <https://www.charleskochinstitute.org/blog/pretrial-justice-bail-reform-poll> [<https://perma.cc/82KF-23ZV>] (“Fifty-seven percent of Americans favor ending the practice of jailing people who cannot afford money bail before trial . . . except in extreme cases.”).

49. *Foster Care*, CHILD. RTS. (2018), <https://www.childrensrights.org/newsroom/fact-sheets/foster-care> [<https://perma.cc/83YF-5QCU>].

50. *Sex Trafficking: Sex and Human Trafficking in the U.S. Disproportionately Affects Foster Youth*, NAT’L FOSTER YOUTH INST., <https://www.nfyi.org/issues/sex-trafficking> [<https://perma.cc/R2VA-4ATL>].

51. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified, in relevant part, at 42 U.S.C. § 675).

52. See, e.g., Gina Clayton et al., *Executive Summary, Because She’s Powerful: The Political Isolation and Resistance of Women with Incarcerated Loved Ones*, ESSIE JUST. GROUP (2018), <https://www.becauseshespowerful.org/executive-summary/> [<https://perma.cc/B4AR-BWYC>] (describing a 2,281-women survey concluding that “incarceration of a loved one is a burgeoning women’s health crisis;” that “as linchpins of communities, women take on extraordinary financial burden[s];” that “women are isolated;” and that, “[p]erhaps most importantly,” “women know what needs to change”); Saneta deVuono-powell et al., *Who Pays? The True Cost of Incarceration to Families*, ELLA BAKER CTR. HUM. RTS. (Sept. 2015), <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> [<https://perma.cc/4CQP-QG6M>].

activity that leads to incarceration is itself typically caused by a lack of resources. The communities most directly affected by forty years of mass incarceration have also suffered from the decline of well-paying jobs throughout the country. Despite a currently strong labor market, wages for most U.S. workers haven't risen in decades.⁵³ For formerly incarcerated people, the unemployment rate is worse than it was for all workers in the Great Depression.⁵⁴

The women I was in prison with were, for the most part, from these communities. Before their incarceration, they struggled to find living-wage employment, accessible and affordable housing, health insurance, mental health care and substance use treatment, GED and vocational training, college education, or well-funded public schools for their children.

Women continue to be unable to access these resources once they are incarcerated. A recent report by the Department of Justice's Office of the Inspector General found that there were several areas of inadequate and poor management of the needs of incarcerated women.⁵⁵ These included a lack of trauma-informed programming—despite research showing that physical and emotional trauma affects as many as ninety percent of incarcerated women.⁵⁶ The report found that access to even basic gender-specific needs such as feminine hygiene products was inadequate.⁵⁷ The use of incarceration has become a common solution to the symptoms of poverty. Ironically, the political priority of shrinking government appears to apply only to investment in basic human needs within cash-poor communities, not to the billions of dollars spent on incarcerating people or feeding other forms of carceral supervision.

The closer one looks at the carceral system, the less real its purported benefits appear.

53. Drew DeSilver, *For Most U.S. Workers, Real Wages Have Barely Budged in Decades*, PEW RES. CTR. (Aug. 7, 2018), <http://www.pewresearch.org/fact-tank/2018/08/07/for-most-us-workers-real-wages-have-barely-budged-for-decades> [<https://perma.cc/SZzZ-G783>].

54. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/BT7G-TRVJ>].

55. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T JUSTICE, REVIEW OF THE FEDERAL BUREAU OF PRISONS' MANAGEMENT OF ITS FEMALE INMATE POPULATION (Sept. 2018), <https://oig.justice.gov/reports/2018/e1805.pdf> [<https://perma.cc/P49V-6C6L>].

56. *Id.* at i (noting that “[r]esearch also recommends that female inmates undergo trauma treatment early during incarceration to enhance their ability to benefit from all institutional programming,” and explaining that the office “found that BOP may not be able to provide its trauma treatment program to all eligible female inmates until late in their incarceration, [if] ever, because it has assigned only one staff member at each institution to offer this program.”).

57. *Id.* at ii.

V. THE NEED FOR ABOLITION

At the National Council for Incarcerated and Formerly Incarcerated Women and Girls, where I now serve as Executive Director, our work with directly affected women spans across the United States and much of the world. We have participated in convenings in Mexico, Brazil, Argentina, the Caribbean, and at the United Nations. Whether in Chicago, the Bronx, Roxbury, Appalachia, or lower Alabama, the stories of American women who have experienced incarceration mirror those from Mexico City, Canada, or the favelas of São Paulo. Everywhere, women tell stories of persistent struggle with being cash-poor. These women are mothers navigating chronic food and housing scarcity. Their stories involve racism, unfair labor practices, over-criminalization, addiction, and a drug war that for decades has targeted their communities, creating continuous social and economic disruption. All too often, it is this disruption that led to their incarceration. Most disturbing are their stories of both witnessing and suffering physical trauma and sexual violence, often starting in childhood. In the United States, three-quarters of women in prison “have histories of severe physical abuse by an intimate partner during adulthood, and 82% suffered serious physical or sexual abuse as children.”⁵⁸

This is why we work from a prison abolition framework to end the incarceration of women and girls. We know that a prison will never be the place for a woman or girl to effectively heal and advance her life. We know that investing in prisons and carceral policies such as risk assessment tools, surveillance, electronic monitoring, and the privatization of programming for the criminalized—all of which essentially expand brick-and-mortar incarceration to the incarceration of people in their homes and communities through privately owned digital tools—is not the answer.⁵⁹ These policies detract from investment in community-led solutions that will more effectively address violence, harm, illness, and poverty. And we know that although incarcerated and formerly incarcerated women have been written off as either victims or criminals,⁶⁰ they are

58. *Survivors of Abuse and Incarceration*, CORRECTIONAL ASS'N N.Y., <https://www.correctionalassociation.org/issue/domestic-violence> [<https://perma.cc/J2PJ-YGEA>].

59. See Michelle Alexander, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html> [<https://perma.cc/YZ9Q-S964>]; James Kilgore, *Electronic Monitoring Is Not the Answer: Critical Reflections on a Flawed Alternative*, URBANA-CHAMPAIGN INDEP. MEDIA CTR. (Oct. 2015), <https://centerformediajustice.org/wp-content/uploads/2015/10/EM-Report-Kilgore-final-draft-10-4-15.pdf> [<https://perma.cc/X5RP-ADW7>].

60. Kathy Boudin, *The Resilience of the Written Off: Women in Prison as Women of Change*, 29 WOMEN'S RTS. L. REP. 15, 16 (2007).

courageous, resilient and brilliant, and steadily rising in leadership as agents of change.

In the aftermath of the onslaught of mass incarceration and the resulting prison boom – from 1990 to 2005, on average, a new prison opened in the United States every ten days⁶¹ – there has been a shift in public opinion in support of alternatives to incarceration.⁶² Spearheaded by the formerly incarcerated and others directly affected by carceral policies, there have been efforts to redefine what constitutes “crime” versus symptoms requiring public health solutions, and a renewed push for community-led solutions that are defining prison abolitionism.⁶³ As Nathan Robinson has pointed out, “[s]ince low-crime societies are possible *already*, even when they are constituted entirely of perfectly ordinary human beings, it does not actually seem especially naïve to believe that both crime and prisons can essentially be eliminated.”⁶⁴ The goal of prison reform is to change America’s prisons so that our communities are safer and our justice system fairer.⁶⁵ But if prison reform can be achieved, so too can prison abolition. That abolition must be based on a new system, one that comes from within the communities most directly affected.⁶⁶ As Angela Davis explains, “[t]he call for prison abolition urges us to imagine and strive for a very different social landscape.”⁶⁷

At the National Council for Incarcerated and formerly Incarcerated Women and Girls, we have tried to answer this call by creating an initiative called “Reimagining Communities.” It is our collective contribution to changing decades of mass incarceration and law enforcement led policies. Our approach is to shift the focus to community-led approaches designed by directly affected

61. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 260 (2014).

62. See *supra* notes 45-48 and accompanying text.

63. These efforts have included programs by National Participatory Defense Network, Families for Justice as Healing, the National Bail Fund Network, Survived and Punished, Transformative Justice, A New Way of Life, Brookview House, the National Council for Incarcerated and Formerly Incarcerated Women and Girls, JustLeadership, various women’s circles, safe use sites, and numerous jail and prison closure campaigns, to name a few.

64. Nathan J. Robinson, *Can Prison Abolition Ever Be Pragmatic?*, CURRENT AFF. (Aug. 3, 2017), <https://www.currentaffairs.org/2017/08/can-prison-abolition-ever-be-pragmatic> [https://perma.cc/6Y76-NWRN]. For instance, some American cities already have very low crime rates. See *100 Safest Cities in America 2018*, SAFEWISE, <https://www.safewise.com/safest-cities-america> [https://perma.cc/7W8G-7VTE].

65. *President Donald J. Trump Calls on Congress to Pass the FIRST STEP Act*, WHITE HOUSE (Nov. 14, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-calls-congress-pass-first-step-act> [https://perma.cc/F969-6E7C].

66. For organizations and initiatives already working on these efforts, see *supra* note 63.

67. Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212, 215 (2000).

women and girls and implemented within our neighborhoods, with advocacy for robust foundation investment in these projects and campaigns. By focusing on reimagining our communities, we hope to create local change that moves us closer to our goal of ending incarceration of women and girls and ultimately making the current system obsolete.

CONCLUSION: HOW FAR WE HAVE LEFT TO GO

I lived in the federal prison in Danbury for eighteen months out of my twenty-four-month sentence. Federal parole was eradicated under the Sentencing Reform Act of 1984, which also limited credit for good behavior so as to require all prisoners to serve at least eighty-five percent of their sentences behind bars.⁶⁸ Upon release from the prison, I briefly went to a halfway house. I then served the balance of my sentence in home confinement. After completing home confinement, I started what I refer to as my second sentence: federal supervised release, prescribed by the federal sentencing guidelines for anyone sentenced to more than a year in prison.⁶⁹ Mine lasted three years. My experience pales in comparison with that of most of the other women with whom I was incarcerated. I had to figure out how to navigate a twenty-four-month sentence, but I was with women going on their twentieth year living in a prison. The lengths of their sentences ended any notion I may have had of carceral policymaking being effective or intelligent.

From the moment I walked into prison, I felt that there was something wrong with this system of incarcerating women, of separating mothers from their children and warehousing them far from their communities. By the time I left, I was convinced of it. Today, women, children, and men are still entering jails, detention centers, and state and federal prisons to begin sentences that will provide no true benefit, will defeat any potential for far-reaching societal transformation, and will exact a price that far exceeds the costs of community-based alternatives. For every individual who may benefit from a period of incarceration, thousands more spiral deeper into poverty and despair.⁷⁰

68. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987; see also *Issue Brief: Prison Time Surges for Federal Inmates*, PEW CHARITABLE TR. (Nov. 18, 2015), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates> [<https://perma.cc/S4SK-KBYY>] (describing the consequences of these policy changes in terms of incarceration rates and their fiscal cost).

69. U.S. SENTENCING GUIDELINES MANUAL § 5D1.1(a)(2) (U.S. SENTENCING COMM'N 2018).

70. See Caitlin Curley, *Mass Incarceration: How the US Prison System Creates a Cycle of Poverty*, GENFKD (Apr. 5, 2016, 4:15 PM), <http://www.genfkd.org/mass-incarceration-cycle-poverty> [<https://perma.cc/5695-HDFA>].

Women’s prisons make plain the ineffectiveness of our present carceral policies. In no place is it more evident that the U.S. system of incarceration is not in line with what a just or meaningful solution would be. And yet the incarcerated women I have met continue to hold out hope and work for change. They are resilient, self-reflective, and courageous. I’ve never experienced as much laughter, or as many tears of both pain and joy, as I did while in prison. Hearing the stories of the women exploited due to their vulnerabilities, I realized their struggle to survive often brought them in conflict of the law, and law enforcement, hiding behind darkened windows of militarized police SUVs, equipped with guns and digital tools for matching faces with outstanding warrants, then sought them out for things like failure to appear in court for stealing a coat or food, or for possessing illegal substances.

I started this journey to end the incarceration of women and girls in 2010 because of my experience as an incarcerated woman. My work still focuses on incarceration. But as I worked to uncover the reasons why prisons are used to address the societal problems that cause women and girls to end up there, speaking about prisons seemed less relevant than working to address the underlying issues of racism and the devalued objectification of women. My work became directed more toward how to change the social forces that put women there in prison the first place.

And still the answer in 2019 by Congress to the racist, harmful, and discriminatory criminal legal system, was to offer up a prison reform bill known as the First Step Act.⁷¹ Heralded as the most important piece of criminal justice reform legislation in a generation, the bill—now signed into law—keeps the system trained on the most vulnerable among us and sends the message that there is no need to fix the system itself. The bill creates programming for the incarcerated, providing earned-time credits that allow them to be released earlier if they successfully complete programming, but it carves out exclusions barring the participation of those with convictions in categories comprised of primarily Black and Brown people.⁷²

Most disappointing is that, based on the year of listening sessions in communities across the country that my organization engaged in, most of what was

71. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

72. The law also excludes noncitizens who have been ordered deported. *Id.* § 101 (excluding people convicted of any among several immigration or drug crimes and excluding noncitizens subject to a final order of removal); see *Vote “No” on The FIRST STEP Act*, LEADERSHIP CONF. ON CIV. & HUM. RTS. (May 8, 2018), https://civilrights.org/resource/vote-no-first-step-act/#_edn4 [<https://perma.cc/CBF4-R83T>] (noting that “immigration and drug offenses account for 53.3 percent of the total federal prison population” and that “these exclusions could also have a disparate impact on racial minorities, since the majority of those held in federal prison for immigration and drug offenses are people of color”).

in the bill is not what those directly affected requested for meaningful criminal justice reform. Unlike what was enacted in the First Step Act, none of the recommendations we received during our year of listening focused on increasing the use of risk-assessment tools⁷³ and electronic monitoring.⁷⁴ In our community conversations, these policies were considered as part of the current carceral system needing change.

The recommendations we heard focused on community-led solutions for addressing harm, closing and repurposing jails and prisons, family reunification, reducing reliance on law enforcement, including parole and probation, using a transformative justice framework for addressing violence, and building community bail funds and bail outs, safe-use sites including medication assistance and treatment for drug addiction, participatory defense, court-watching programs, women's circles, and other community-led initiatives.

Despite the emerging consensus that this country must find a way to break its addiction to incarceration, much work remains to educate the public on the need for community-led alternatives to jails and prisons. We will continue advocating for policies and initiatives such as these, because, unlike the incarceration of women and girls, they reduce harm and violence rather than inflicting and exacerbating it. The passage of the First Step Act reminds us that it is an uphill battle. But having experienced the harm of incarceration myself, I know there is no other option than to keep fighting against it.

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73. See Stephanie Lacambra et al., *Recidivism Risk Assessments Won't Fix the Criminal Justice System*, ELECTRONIC FRONTIER FOUND. (Dec. 21, 2018), <https://www.eff.org/deeplinks/2018/12/recidivism-risk-assessments-wont-fix-criminal-justice-system> [https://perma.cc/279C-VJ7K].

74. Liliana Segura, *The First Step Act Could Be a Big Gift to CoreCivic and the Private Prison Industry*, INTERCEPT (Dec. 22, 2018, 9:20 AM), <https://theintercept.com/2018/12/22/first-step-act-corecivic-private-prisons> [https://perma.cc/9343-RZYZ].