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THE NEW JIM AND JANE CROW INTERSECT: CHALLENGES TO DEFENDING THE PARENTAL RIGHTS OF MOTHERS DURING INCARCERATION

Carla Laroche*

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* Carla Laroche, Associate Clinical Professor and Director, Civil Rights and Racial Justice Clinic, Washington and Lee University School of Law; J.D., Columbia Law School; M.P.P., Harvard Kennedy School; B.A., Princeton University. This Piece benefitted from comments received at the Association of American Law Schools Conference on Clinical Legal Education (2021) and the American Bar Association Criminal Justice Section Academic Committee-American Academy for Justice at the Arizona State University Sandra Day O'Connor College of Law Academic Roundtable (2021). I would like to thank Maryam Ahranjani, Kathryn Banks, Valena Beety, Aliza Boom, Carliss Chatman, Philip Genty, Shalay Jackson, JD King, Alex Klein, Christina Miller, Zaneta Robinson, I. India Thusi, S. Lisa Washington, and Brian Wilson for their suggestions and comments on prior drafts; Katie Miller and Rashad Simon for their preliminary research assistance; Cassandra Lamzik for her critical research assistance; and the *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being Symposium* co-organizers Jane Spinak and Nancy Polikoff for their guidance. I would also like to thank my parents for their support. I am indebted to the people who participated in the workshops my clinic students conducted in the prison and jail facilities and the law clerks who help so many people in need of legal support while incarcerated. I am grateful to all the Columbia Journal of Race and Law editors for their editorial aid, especially Madhuri Belkale.

I. INTRODUCTION

Ms. Jones,[1] a mother incarcerated at a state prison in Florida, sought information about the state's family regulation system[2] from the Florida State University College of Law Gender and Family Justice Clinic ("Clinic").[3] She had been convicted of burglary, grand theft, and trafficking in stolen property, and she had over three months left of her one-and-a-half-year sentence.[4] The Florida Department of Children and Families ("DCF") had taken custody of Ms. Jones' child, or children, during her incarceration,[5] and she was interested in learning more about her rights and responsibilities within the system.

The Clinic students sent Ms. Jones a one-page handout and a PowerPoint presentation they had developed that included definitions of key legal terms, explained the different stages in the family regulation system, and the rights and responsibilities of parents, the DCF case worker, and the court, during these proceedings.[6] A month after sending the package, Ms. Jones sent the Clinic a note of gratitude. In the handwritten letter, she praised the Clinic's work, exclaiming:

> I must start this with a big THANK YOU for the information packet you sent to me about dependency cases an the steps of it. With that information I was able to get

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[1] Ms. Jones authorized me to share her experience in this Piece, and I am using only her last name to protect her identity. Permission to Use Volunteer/Client/Attendee Story from Ms. Jones, Workshop Attendee, to author (Aug. 5, 2020) (on file with author); Letter from Ms. Jones, Workshop Attendee, to author (Aug. 5, 2020) (on file with author).

[2] I use "family regulation system" when discussing the legal system that allows a state agency to insert itself into the parenting of children, remove children from their homes, and seek the termination of parental rights. People commonly refer to this system as the foster care, dependency, child welfare, and/or child protective services systems. *See* Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/YC6T-6CVM] (critiquing the mislabeling of the "child welfare" system and correcting it to the "family regulation" system to capture governmental agencies' monitoring of children and of the way people parent their children); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at vi–x (2002) [hereinafter ROBERTS, SHATTERED BONDS] (interrogating "what we now call child protection"); Nancy D. Polikoff & Jane M. Spinak, Symposium, *Foreword*: *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well Being*, 11 COLUM. J. RACE & L. 427, 431–33 (describing the evolving terminology activists, practitioners, and scholars have used to refer to the system that the state uses to surveil families, intervene to remove children from their homes, and terminate parental rights).

[3] From 2019 to 2021, I developed and directed the Gender and Family Justice Clinic at Florida State University College of Law. The Clinic addressed the intersection between mass incarceration on families by offering legal outreach and direct legal representation to people who were incarcerated and those who were returning from incarceration. Students in the Clinic presented monthly educational workshops in Florida jails and prisons. I founded and directed the Clinic based off the work of Professor Philip Genty at Columbia Law School.

[4] *Corrections Offender Network*, FLA. DEP'T. OF CORRS., http://www.dc.state.fl.us/offendersearch [https://perma.cc/D5R7-VWWU].

[5] In this Piece, I use incarceration and detention interchangeably to describe confinement in local, state, federal, Native American, and/or military jail or prison facilities.

[6] Because of the 2019 Novel Coronavirus (COVID-19) pandemic, students were not able to offer their legal workshops in-person. Instead, they mailed their presentation material to women in a local prison who had indicated interest in a particular family topic. In this situation, Ms. Jones, the recipient of the workshop material the students mailed, had noted she was interested in attending the dependency workshop.

> the correct forms filed in just the nic of time. Without that information they may have tried to rail road me, because I did not know what was truly happening.[7]

Ms. Jones was able to apply the legal information the students sent her to advocate for herself and her parental rights. Her letter confirmed a success for the Clinic: the students had drafted documents that nonlawyers could digest and use.

Unfortunately, Ms. Jones' letter confirmed a systemic failure: the disconnect between mothers who are incarcerated[8] and their lawyers in the family regulation system. Parents in Florida have an absolute right to counsel in all stages of the family regulation process.[9] Florida courts must appoint a lawyer to any parent who cannot afford to retain counsel,[10] and Ms. Jones would not have earned enough income while incarcerated to be ineligible for appointed counsel. The court should and would have appointed counsel to represent her. Yet, Ms. Jones did not know what was going on in her family regulation case and she felt she needed general information law students drafted to protect her parental rights. Ms. Jones' feeling of helplessness exemplifies the difficulties mothers face in attempting to navigate the family regulation system.

When mothers are incarcerated and their children are in the family regulation system, the New Jim Crow and New Jane Crow intersect to separate and destroy families.[11] In the seminal book, *The New Jim Crow*, legal scholar and law professor Michelle Alexander explains how the mass incarceration of Black people in the United States, especially through the drug war, is another form of systemic racism and state-sponsored violence, borne out of the history of slavery and Jim Crow.[12] Professor Alexander uses the term "the New Jim Crow" to explain the criminal legal system's racist history and existence.[13]

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[7] Letter from Ms. Jones, Workshop Attendee, to author (May 14, 2020) (on file with author).

[8] In recognition of the importance in using less stigmatizing language, throughout this Piece, I will use people first language when referring to people who are incarcerated and who have criminal records. As such, I will refer to "mothers who are incarcerated," instead of "incarcerated mothers" or "inmates, convicts, prisoners and felons." EDDIE ELLIS, CTR. FOR NULEADERSHIP ON URB. SOLS., AN OPEN LETTER TO OUR FRIENDS ON THE QUESTION OF LANGUAGE 3 (2007), https://static1.squarespace.com/static/58eb0522e6f2e1dfce591dee/t/596e13f48419c2e5a0e95d30/1500386295291/CNUS-language-letter-2016.pdf [https://perma.cc/JQ67-UKHZ] (open letter calling on allies to use people first language and to "refer to us as PEOPLE"); *Preferred Terms for Select Population Groups & Communities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Oct. 6, 2021), https://www.cdc.gov/healthcommunication/Preferred_Terms.html [https://perma.cc/8EE4-D3TJ] (offering non-stigmatizing terms that more closely "reflect and speak to the needs of people in the audience of focus").

[9] FLA. STAT. § 39.013(1) (2017); Fla. R. Juv. P. 8.320(a)(1).

[10] FLA. STAT. § 39.013(1) (2017); Fla. R. Juv. P. 8.320(a)(2).

[11] NEIL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED 4 (2005) (noting "[t]he dissolution of families, the harm to children—and the resultant perpetuation of the cycle of crime and incarceration from one generation to the next—may be the most profound and damaging effect of our current penal structure.").

[12] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) [hereinafter ALEXANDER, THE NEW JIM CROW].

[13] *See id*. at 248–49 (applying the analogy of mass incarceration to Jim Crow as, at the core, "race-making" systems of control).

Like mass incarceration, the family regulation system separates families and destroys parent-child relationships.[14] Although legal scholar, civil rights activist, and Reverend Pauli Murray coined the term "Jane Crow" to identify the intersectional sexism and gender discrimination she endured in the United States in the 1940s,[15] the New Jane Crow describes the way the government punishes women of color, particularly Black women, for their poverty and parenting by trapping them in the family regulation system and terminating their parental rights.[16]

Facing these dual racist and discriminatory systems creates additional and unnecessary anxiety, causes confusion, and destroys families. For example, substantial evidence shows that family visits "can reduce recidivism rates, maintain family bonds, foster reintegration into the community, break the intergenerational cycle of incarceration, and help children overcome the challenges of parental separation."[17] Yet, rather than nurture the critical mother-child bond, which is beneficial both for the affected families *and* for society at large, the current systems undermine and break these bonds.[18] Mothers who are incarcerated must navigate these legal systems to protect their own liberty and parental rights.

Undoubtedly, all parents face obstacles while navigating the family regulation system and incarceration. One in every twelve child in the United States, which amounts to more than 5.7 million children, has experienced parental incarceration at some point during their childhood.[19] Including children with parents who have been arrested, that number

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[14] *See* Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1476 (2012) [hereinafter Roberts, *Systemic Punishment*] ("The simultaneous buildup and operation of the prison and foster care systems rely on the punishment of black mothers, who suffer greatly from the systems' intersection. . . . The intersection of prison and foster care is only one example of many forms of overpolicing that overlap and converge in the lives of poor women of color.").

[15] *See* Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965); *Jane Crow & The Story of Pauli Murray*, SMITHSONIAN NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, https://nmaahc.si.edu/blog-post/jane-crow-story-pauli-murray [https://perma.cc/M4J5-R6KW].

[16] *See, e.g.*, Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html [https://perma.cc/LE92-FUKN] (citing lawyers who use "Jane Crow" to name the criminalization of the parenting of Black women in poverty).

[17] Carla Laroche et al., *Double Sentence: The Consequences Incarcerated Mothers Face and the Impact on Their Children, in* THE STATE OF CRIMINAL JUSTICE 207 (Mark E. Wojcik ed., 2016) (citations omitted).

[18] Erin Cloud et al., *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. F. 68, 85–87 (2017).

[19] Kara Gotsch, *Families and Mass Incarceration*, SENTENCING PROJECT (Apr. 24, 2018), https://www.sentencingproject.org/publications/6148 [https://perma.cc/ML54-7579] (citing the Child & Adolescent Health Measurement Initiative based out of the John Hopkins Bloomberg School of Public Health). About half of parents in prison lived with their children before their arrest or incarceration, and similar proportions of parents served as the primary source of financial support for their children. *Id*. (citing the Children's Bureau of the Department of Health and Human Services). For related data on the consequences of parental incarceration, *see* ANNIE E. CASEY FOUND., POLICY REPORT, A SHARED SENTENCE 1 (2016) [hereinafter A SHARED SENTENCE], http://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf [https://perma.cc/GTJ3-WTDN]; Dan Levin, *As More Mothers Fill Prisons, Children Suffer 'A Primal Wound'*, N.Y. TIMES (Dec. 28, 2019), https://www.nytimes.com/2019/12/28/us/prison-mothers-children.html [https://perma.cc/Q5H3-PZDR].

jumps to ten million children.[20] Over 14,000 children entered the family regulation system because of a parent's incarceration in 2009, though the U.S. Department of Health and Human Services, which collected this data, admitted that this number is an undercount.[21] This Piece focuses on mothers specifically because of their higher rates of ensnarement in the family regulation system.[22]

While mothers who are incarcerated reflect only 8% of parents who are imprisoned in federal and state prisons, the rate of imprisonment of mothers has increased at a faster rate than that of fathers, 122% versus 76%, respectively.[23] Over 217,270 women are currently incarcerated,[24] and almost one million women are under post-release supervision.[25] Nearly 80% of women in jails,[26] and almost 60% of women in state prisons,[27] are mothers of minor children. As of 2004, of the over 1.4 million children with parents who are incarcerated in state prisons, at least 11% of them with mothers in state prison are placed in the family regulation system, compared to 2% of children with fathers in state prison.[28]

Black and Indigenous and Native American women are overrepresented in detention facilities, and their children endure the consequences of these racist and sexist systems.[29] While Black women

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[20] Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, *in* 278 NAT'L INST. OF JUST. J. 11, 12 (NCJ No. 250342, 2017), https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children [https://perma.cc/6BZY-ANEV].

[21] U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-863, CHILD WELFARE: MORE INFORMATION AND COLLABORATION COULD PROMOTE TIES BETWEEN FOSTER CARE CHILDREN AND THEIR INCARCERATED PARENTS 11 (2011), https://www.gao.gov/products/gao-11-863 [https://perma.cc/A2K9-F3NC].

[22] *Cf. id.* at 7 (observing that mothers who are incarcerated are more likely than fathers who are incarcerated to be children's primary caretakers before incarceration); *id.* at 16–17 (pointing to evidence that a higher percentage of mothers than fathers have at least one child in foster care); CHILD. BUREAU, U.S. DEP'T OF HEALTH AND HUM. SERVS., CHILD WELFARE PRACTICE WITH FAMILIES AFFECTED BY PARENTAL INCARCERATION 3 (2021) [hereinafter AFFECTED BY PARENTAL INCARCERATION], https://www.childwelfare.gov/pubPDFs/parental_incarceration.pdf [https://perma.cc/R3GC-99PY] (noting that living arrangements for children of mothers who are incarcerated were more likely to include placements within the family regulation system or with nonparental family members).

[23] AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 3.

[24] Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Oct. 29, 2019), https://www.prisonpolicy.org/reports/pie2019women.html [https://perma.cc/K86G-VQ4T]. The report noted that the United States has 231,000 women and girls currently incarcerated. Of that total, 217,270 are adult women held in local jails (101,000), state prisons (99,000), federal prisons and jails (16,000), territorial prisons (500), Indian Country jails (700), and military prison (30).

[25] SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS 1 (2020), https://www.sentencingproject.org/publications/incarcerated-women-and-girls [https://perma.cc/6A4D-9APU] [hereinafter SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS] (analyzing data from the U.S. Department of Justice's Bureau of Justice Statistics).

[26] ELIZABETH SWAVOLA ET AL., VERA INST. OF JUST., OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 7 (2016), http://www.safetyandjusticechallenge.org/wp-content/uploads/2016/08/overlooked-women-in-jails-report-web.pdf [https://perma.cc/6PVX-WA9R].

[27] SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS, *supra* note 25, at 1; A SHARED SENTENCE, *supra* note 19, at 2.

[28] LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ NO. 111984, PARENTS IN PRISON AND THEIR MINOR CHILDREN 5 (2010), https://bjs.ojp.gov/content/pub/pdf/pptmc.pdf [https://perma.cc/T3TK-6CL7].

[29] *See* Kajstura, *supra* note 24 (showing sharp disparity in incarceration rates).

make up 12.9% of women in the United States, and Indigenous and Native American women make up 0.7% of women,[30] Black women and Indigenous and Native American women make up 29% and 2.5% of women who are incarcerated, respectively.[31] Additionally, research has shown that Black and Latinx children are affected disproportionately by the incarceration of their parent; one study found that Black children were 7.5 times more likely than white children to have a parent who was incarcerated and Latinx children were 2.3 times more likely to have a parent who was incarcerated than white children.[32]

Understanding the legal path from a mother's incarceration to the termination of a mother's rights requires an investigation of the challenges their legal counsel face. Mothers in detention should be able to refer to their appointed lawyer for guidance and case strategy. Family defense lawyers are supposed to offer information, advocacy, and support to mothers navigating the child welfare system;[33] mothers in detention, however, may not have access to those benefits.

In the criminal legal system, courts must appoint lawyers to people accused of a felony who cannot afford private counsel.[34] In the family regulation system, the U.S. Supreme Court has held that no federal constitutional right to counsel exists.[35] Family law scholars and advocates have expressed the importance of providing counsel to parents in the family regulation system, especially parents who are incarcerated, because of the system's complexities.[36] This Piece establishes, however, that when

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[30] *Women of Color in the United States (Quick Take)*, CATALYST (Jan. 31, 2022), https://www.catalyst.org/research/women-of-color-in-the-united-states [https://perma.cc/2JN6-9FKK]. The researchers cite "American Indian and Alaskan Native" people in their data. As legal scholar Marissa Jackson Sow has explained, "I define Indigenous peoples as those nations and communities of people who were the earliest inhabitants of the Americas. Indigenous American peoples are not a race, but rather nations of people who have been racialized. . . . recognize that a person may be Black, Latinx, and Indigenous all at once, and that mixed European ancestry is also a part of the Black and Indigenous experience. Such is the nature of race and race-ing." Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1812 (2022).

[31] Kajstura, *supra* note 24. The data cites "American Indian and Alaskan Native."

[32] Martin, *supra* note 20, at 2 (describing the studies that demonstrate the racial disparity within the family regulation system).

[33] Martin Guggenheim, *The Role of Counsel in Representing Parents*, 35 A.B.A. CHILD. L. PRAC. 17, 23 (2016) (noting the importance of parents in the family regulation system having a strong legal advocate who values the parents' opinions).

[34] Gideon v. Wainwright, 372 U.S. 335 (1963). The realities of the right to counsel in criminal cases have received increased critique. *See, e.g.*, KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE (2015) (discussing structural deficiencies in representation provided to people under the right to counsel guarantee in criminal cases); *6AC & Our Work*, SIXTH AMENDMENT CTR., https://sixthamendment.org/ [https://perma.cc/65TD-TK7F] (summarizing the Center's work of measuring the "time, ability and resources" of public defense people against "established standards of justice").

[35] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (holding no due process violation when a state does not appoint counsel when a person's physical liberty is not at stake).

[36] Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 781 (1991); JULIE KOWITZ MARGOLIES & TAMAR KRAFT-STOLAR, WOMEN IN PRISON PROJECT, CORRECTIONAL ASS'N OF N.Y., WHEN "FREE" MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND THE INCARCERATION OF WOMEN IN NEW YORK STATE 10–14 (2006), https://repositories.lib.utexas.edu/handle/2152/15159 [https://perma.cc/VM4R-RCSU].

mothers must navigate both systems, the protections appointed parents' counsel are supposed to provide are weakened, especially for mothers of color within the carceral state. Appointed lawyers cannot properly defend the due process rights of mothers who are incarcerated because of the added challenges both mothers and their lawyers face. As a result, families are destined to experience trauma, and are likely to end with the termination of parental rights.

Part I of this Piece discusses the rise in the rate of women who are incarcerated in the United States, summarizes the family regulation system's legal structure, and explains the harms that the criminal legal system and family regulation system have on mothers. Part II explains the challenges inherent in parents' counsel's representation of mothers who are both incarcerated and ensnared in the family regulation system, and examines the negative outcomes mothers who are incarcerated endure because their counsel must navigate numerous challenges. Part III offers recommendations to address these critical issues and demands a reduction in the number of mothers who are incarcerated and in the family regulation system. Ultimately, this Piece concludes by stressing the need to consider the obstacles that exist when addressing access to counsel for mothers in the family regulation system.

The challenges parents' counsel face, and their need for better resources, are not new ideas. This Piece adds to the existing literature by showing how the New Jim Crow and New Jane Crow impose too many obstacles for parents' lawyers to fulfill their promise, particularly when representing Black mothers. Serving the legal interests of parents in the family regulation system is demanding and critical work. This Piece neither advocates for the elimination of that access nor attacks parents' counsel but, rather, shines a new light on the latent defects in the state's provision of access to appointed counsel, acutely when their clients are mothers who are incarcerated. The carceral state's control does not enable parents' counsel to defend the parental rights of mothers who are incarcerated effectively.

II. THE NEW JIM CROW & THE NEW JANE CROW: BACKGROUND

While the discussion of mass incarceration in the United States has focused on men, over the past forty years, the rate of incarceration of women has increased by over 700%.[37] Comparatively, this rate is at least 50% higher than the rate of increased incarceration of men during that same period.[38] As activists have focused on the high number of men

[37] Kajstura, *supra* note 24; Nazish Dholakia, *Women's Incarceration Rates Are Skyrocketing. These Advocates Are Trying to Change That*, VERA INST. OF JUST. (May 17, 2021), https://www.vera.org/news/womens-voices/womens-incarceration-rates-are-skyrocketing [https://perma.cc/D7PT-M8RY] (citing the Sentencing Project's finding that between 1980 and 2019, the number of women who are incarcerated increased from 26,378 to 222,455); Bonnie Sultan & Mark Myrent, *Women and Girls in Corrections*, JUST. RSCH. & STAT. ASSOC. (Nov. 2020), https://www.jrsa.org/pubs/factsheets/jrsa-factsheet-women-girls-in-corrections.pdf [https://perma.cc/RZB6-HGX6] (same).

[38] *United States Still Has Highest Incarceration Rate in the World*, EQUAL JUST. INITIATIVE (Apr. 26, 2019), https://eji.org/news/united-states-still-has-highest-incarceration-rate-world/ [https://perma.cc/F4MQ-9Z6B] (citing analysis by the Sentencing Project of data released by the Bureau of Justice Statistics); Wendy Sawyer & Peter Wagner, *Mass*

ensnared in the criminal legal system,[39] principally of Black men, they have largely ignored the increasing population of women in the system.

Scholars and activists alike have ignored the gendered nature of the New Jim Crow. Although Professor Michelle Alexander has received acclaim for *The New Jim Crow*, she has admitted that she ignored gender in her analysis of the criminal legal system as an inherently oppressive institution. In 2016, for example, Professor Alexander explained:

> In my book, I stated explicitly in the introduction that I had no intention of exploring in any depth the unique experience of women. . . . I have become increasingly alarmed in recent years about the many ways in which women and girls are routinely marginalized and rendered invisible in public debates about criminal justice reform and mass incarceration—and I have been painfully aware of my own complicity.[40]

This Part discusses the ways the criminal legal system ensnares women in the system, the statutory framework mothers who are incarcerated must navigate when the state places their children into the family regulation system during their detention, and the resulting effect these interconnected legal systems have on controlling mothers, predominantly mothers of color.

A. The New Jim Crow & Gender

Over 217,000 women are currently incarcerated in federal and state prisons and jails around the country.[41] As Professor Michele Goodwin has theorized, "If Pauli Murray were alive today, she too might call this the New Jane Crow — a modern adaptation of the intersectionality to which she referred to in the 1940s to describe the unyielding, state-sanctioned

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Incarceration: The Whole Pie 2020, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/VX7F-3FP4]. Analyses have shown that the rate of incarceration of women has been up to two times the rate of incarceration of men, particularly in state prisons and local jails. Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE [hereinafter Sawyer, *The Gender Divide*] (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html [https://perma.cc/7YWH-ULN7]; U.S. COMM'N CIVIL RTS., WOMEN IN PRISON: SEEKING JUSTICE BEHIND BARS 9–14, 10 n.18 (Feb. 2020), https://www.usccr.gov/files/pubs/2020/02-26-Women-in-Prison.pdf [https://perma.cc/E62J-36NX] (agency's briefing report on the civil rights of women who are incarcerated); Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/5H9D-BG7G] (noting the gender disparity in rate of incarceration and stressing that policymakers not further the disparity when implementing criminal legal system reforms).

[39] Men make up ninety-two percent of people in jails and prisons in the United States. E. ANN CARSON, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ NO. 111984, PRISONERS IN 2019, at 3 (2020), https://bjs.ojp.gov/content/pub/pdf/p19.pdf [https://perma.cc/BS7U-CJW9].

[40] Kristi DiLallo, *Understanding the Needs of Women in the Justice System*, VERA INST. OF JUST. (Dec. 9, 2016), https://www.vera.org/blog/understanding-the-needs-of-women-in-the-justice-system [https://perma.cc/BDP5-BHNU] (quoting *Incarcerated Woman: The Experience of Women and Girls in the Era of Mass Incarceration*, UNION THEOLOGICAL SEMINARY (Oct. 18, 2016), https://utsnyc.edu/invisible-woman-the-experience-of-women-and-girls-in-the-era-of-mass-incarceration/ [https://perma.cc/2XAA-XKN3].

[41] Kajstura, *supra* note 24.

violence against Black women."[42] A review of the racial data proves that women of color represent a higher proportion of women who are incarcerated than their total population representation.[43] In 2019, for example, Black women's rate of imprisonment in state and federal facilities was 1.7 times the rate of imprisonment for white women, and Latina/Hispanic women's rate of imprisonment was 1.3 times the rate of imprisonment for white women.[44]

In comparing the types of offenses men and women are tried for and convicted of, the data indicates that women are incarcerated at a higher rate for drug and property crimes than men.[45] Scholars consider many of these convictions a result of crimes of necessity or survival crimes.[46]

Over half of the women currently incarcerated are held in jails, and 54% of those women are awaiting trial.[47] Many women who are detained are less likely to be able to afford to pay money bail, a problem resulting from and perpetuated by numerous systemic issues.[48] Importantly, women of color are affected more by lack of income than other groups; the median pre-incarceration income for Latina/Hispanic women ($11,820) and Black women ($12,735) in state prison is considerably less than that of white

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[42] Michele Goodwin, *The New Jane Crow: Women's Mass Incarceration*, JUST SECURITY (July 20, 2020), https://www.justsecurity.org/71509/the-new-jane-crow-womens-mass-incarceration [https://perma.cc/98E7-FQPB]. *See generally* VALENA BEETY, MANIFESTING JUSTICE: WRONGLY CONVICTED WOMEN RECLAIM THEIR RIGHTS (2022) (describing how people in different roles in law enforcement and the criminal legal system subjugate Black women and girls, especially members of the LGBTQ+ community).

[43] *See supra* notes 29–31 and accompanying text; *cf. Women of Color in the U.S. (Quick Take)*, *supra* note 30; William Y. Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System*, 6 WAKE FOREST J. L. & POL'Y 441, 446 (2016) ("A study of race and gender in sentencing indicated that favoritism toward White women helped explain their lower sentences, whereas bias against Black men helped explain their higher sentences. In the federal criminal justice system, the prison sentences of Black offenders are five months longer than similarly situated White offenders.") (citations omitted).

[44] CARSON, *supra* note 39, at 16.

[45] SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS, *supra* note 25, at 4 ("Twenty-six percent of women in prison have been convicted of a drug offense, compared to 13% of men in prison; 24% of incarcerated women have been convicted of a property crime, compared to 16% among incarcerated men.").

[46] *See, e.g.*, Beth E. Richie, *The Social Impact of Mass Incarceration on Women*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 138–39 (Marc Mauer & Meda Chesney-Lind eds., 2002) (positing that the incarceration of women for "nonviolent, economically motivated drug-related offenses" is "decidedly gendered . . . 'survival crimes'" committed to protect themselves against "brutal social conditions"); Deseriee A. Kennedy, *Children, Parents & The State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER, L. & JUST. 78, 89 (2011) [hereinafter Kennedy, *Children, Parents, & The State*] (presenting research showing that women commit "'survival crimes'—acts made necessary by poverty . . . . related to their status as a single mother[] and their efforts to provide for their families," such as non-violent drug offenses or "financial misdeeds"); Yvette Butler, Survival Labor (Jan. 2022) (unpublished manuscript) (on file with author) (defining survival crimes and examining the reasons people engage in survival labor).

[47] Kajstura, *supra* note 24; Sawyer, *The Gender Divide*, *supra* note 38 (sidebar on "The role of local jails").

[48] Sawyer, *The Gender Divide*, *supra* note 38 (sidebar on "The role of local jails"); Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html [https://perma.cc/6JHR-U8EC].

women ($15,480) and Black men ($17,625), Hispanic/Latino men ($19,740), and white men ($21,975) in state prison.[49]

As one report describing Texas' increased rate of the incarceration of women explains, "The combined result of this wealth disparity and Texas' money based bail system is that women like Sandra Bland — women with needs that should be addressed in other settings — are sitting in Texas jails, not because they are a threat to public safety, but because they simply cannot afford to post bail."[50] Without the funds to return to their communities while their case is pending, they sit in jail "[a]nd their incentives to take [a 'time-served' or probation plea] deal are overwhelming."[51]

Along with less wealth, women who are incarcerated have lower levels of educational attainment than women in the general public. Women who are incarcerated are more likely to have General Educational Development ("GED") certification rather than high school diplomas, particularly as their highest level of education.[52] Thirty-seven percent of women in prison do not have a high school diploma compared to only 14% of women in the general population.[53] Analyzing the data by gender and race, 42% of Black women, 52% of Hispanic women, and 29% of white women who are incarcerated did not graduate from high school, compared to 17% of Black women, 35% of Hispanic women, and 9% of white women in the general public.[54]

Further, women who are incarcerated reported a high rate of experiencing trauma both in childhood and after the age of eighteen.[55] One study found, "[A] large number of [respondents] reported having been

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[49] Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020,* PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/VX7F-3FP4].

[50] Lindsey Linder, *A Growing Population: The Surge of Women into Texas' Criminal Justice System*, TEX. CRIM. JUST. COAL. 7 (2018), https://s3.documentcloud.org/documents/4446721/TCJC-Womens-Report-Part-I.pdf [https://perma.cc/7KQ6-5UCJ]. Sandra Bland, a twenty-eight-year-old Black woman, was found dead in her cell after a traffic stop and subsequent arrest for allegedly assaulting an officer in 2015. After an autopsy, the medical examiner ruled her death a suicide. David Montgomery & Michael Wines, *Autopsy of Sandra Bland Finds Injuries Consistent with Suicide, Prosecutor Says*, N.Y. TIMES (July 23, 2015), https://www.nytimes.com/2015/07/24/us/autopsy-of-sandra-bland-finds-injuries-consistent-with-suicide-prosecutor-says.html [https://perma.cc/5UST-ZYG9].

[51] Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 715–16 (2017). *Cf.* Anjelica Hendricks, *Exposing Police Misconduct in Pre-Trial Criminal Proceedings*, 24 N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2021) (discussing the need to consider police misconduct in pre-trial, pre-plea motions and proceedings, such as bail hearings).

[52] Stephanie Ewert & Tara Wildhagen, *Educational Characteristics of Prisoners: Data from the ACS* 17–19 (U.S. Census Bureau, Working Paper No. SEHSD-WP2011-08, 2011).

[53] *Id.* at 17.

[54] *Id.* at app. tbl. 6.

[55] Zina T. McGee et al., *From the Inside: Patterns of Coping and Adjustment Among Women in Prison, in* IT'S A CRIME: WOMEN & JUSTICE 507, 515 (Roslyn Muraskin ed., 4th ed. 2007); *see also* ACLU ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 18 (2005) [hereinafter CAUGHT IN THE NET] (stating that approximately 79% of women reported physical abuse and over 60% reported experiencing sexual abuse prior to their incarceration in federal and state prisons).

physically or sexually abused before their incarceration (70%)."[56] In addition, the rate of sexual and domestic violence as a child is higher for women than men in detention.[57] Moreover, Black[58] and Native American[59] women experience higher rates of sexual and physical assaults than white women.

B. The New Jane Crow's Framework

While dealing with these traumas, women who are incarcerated face numerous other challenges, including the risk of the state terminating their parental rights.[60] As former U.S. Attorney General Loretta E. Lynch once remarked, "We know that when we incarcerate a woman we often are truly incarcerating a family, in terms of the far reaching effect on her children, her community and her entire family network."[61] Although some children are cared for through private custody arrangements during their mothers' imprisonment, many children enter the family regulation system.[62] Researchers have estimated that forty percent of children who experience out-of-home care within the family regulation system also have a history of parental incarceration.[63]

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[56] McGee et al., *supra* note 55, at 515.

[57] *Id.*; *see also* CAUGHT IN THE NET, *supra* note 55, at 18 (citing data from the Bureau of Justice Statistics).

[58] *See, e.g.*, NAT'L CTR. ON VIOLENCE AGAINST WOMEN IN THE BLACK CMTY., BLACK WOMEN AND SEXUAL ASSAULT 1 (Oct. 2018) https://ujimacommunity.org/wp-content/uploads/2018/12/Ujima-Womens-Violence-Stats-v7.4-1.pdf [https://perma.cc/89Q9-RZRU] (noting U.S. Department of Justice research indicating that one in five Black women are survivors of rape). *Cf.* ASHA DUMONTHIER ET AL., INST. FOR WOMEN'S POL'Y RSCH., THE STATUS OF BLACK WOMEN IN THE UNITED STATES 120 (July 13, 2017), https://iwpr.org/wp-content/uploads/2020/08/The-Status-of-Black-Women-6.26.17.pdf [https://perma.cc/PV52-HEBG] (confirming that Black women endure "substantially higher rates of psychological aggression than women overall"). The report also explains that Black LGBTQ individuals, especially when they are survivors of violence, face "heightened discrimination from law enforcement." *Id.* at 126.

[59] *See, e.g.*, André B. Rosay, *Violence Against American Indian and Alaska Native Women and Men*, *in* 277 NAT'L INST. JUST. J. 38, 39 (NCJ No. 249822, 2016) (reporting study findings that over 84% of American Indian and Alaska Native women have experienced sexual violence, physical violence by an intimate partner, stalking, and/or psychological aggression by an intimate partner in their lifetime). *Cf.* DuMonthier et al., *supra* note 58, at 98 (finding that Native American women have reported the highest rate of poor mental health days and the highest suicide mortality rate among women). Notably, data show that non-Native people are responsible for 96% of sexual violence that American Indian and Alaska Native women have endured. NAT'L CONG. AM. INDIANS, RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 2 (Feb. 2018), https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief__FINAL_2_1_2018.pdf [https://perma.cc/2365-UK5H].

[60] MARGOLIES & KRAFT-STOLAR, *supra* note 36, at 3, 15–18.

[61] *Attorney General Loretta E. Lynch Delivers Remarks at the White House Women and the Criminal Justice System Convening*, U.S. DEP'T OF JUST. (Mar. 30, 2016), https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-women-and-criminal-justice [https://perma.cc/T7NA-WXQB].

[62] *See* CHRISTOPHER J. MUMOLA, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., NCJ NO. 182335, INCARCERATED PARENTS AND THEIR CHILDREN 3–4 (2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf [https://perma.cc/TRK9-EQDL] (presenting data showing that mothers in both federal and state prisons were more likely than fathers to report that their children were in the family regulation system); Kennedy, *Children, Parents, & The State*, *supra* note 46, at 81 (highlighting how parents and children face the trauma of family separation and the risk of parental termination by the state).

[63] AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 4.

Mothers in the criminal legal system are more likely to have been their family's primary parental support, and as likely to have been their children's primary financial support, prior to their incarceration.[64] When fathers are incarcerated, their children continue to live with, or go to live with, their mothers.[65] When mothers are incarcerated, however, their children are significantly more likely to live with another relative or friend or enter the family regulation system.[66] These mothers are not able to activate the same sort of support from their children's other parent or other family and family friends as fathers are, which reduces their ability to ensure their children remain in private care.[67]

Even when a nonparent relative takes care of their children, they may need additional services and financial support from the state.[68] These relatives may want to keep the mothers' children together and with them, but may be hesitant to request additional involvement from the state to do so.[69] Instead of a private custody arrangement that does not involve the state, a child may be in the family regulation system, but within a nonparent relative's care, which is known as a kinship placement.[70]

A child with a mother who is incarcerated may be exposed to the family regulation system in one of four ways:

> [1.] A parental arrest coincides with child welfare system involvement, with either the arrest exposing maltreatment (more likely) or a maltreatment investigation resulting in a parental arrest (less likely).
>
> [2.] The criminal record of the parent has been found to compromise the child's safety.
>
> [3.] Relatives who are considered as placement possibilities are found to have criminal records.

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[64] *See* GLAZE & MARUSCHAK, *supra* note 28, at 5 (reporting survey results on mothers and fathers incarcerated in state prisons).

[65] MUMOLA, *supra* note 62, at 4 (observing that nearly all—over ninety percent—of fathers in both federal and state prisons reported that at least one of their children was in the care of the child's mother).

[66] *Id.*; *see also* Ronnie Halperin & Jennifer L. Harris, *Parental Rights of Incarcerated Mothers with Children in Foster Care: A Policy Vacuum*, 30 FEMINIST STUD. 339, 340 (2004) (remarking on the high number of mothers who are incarcerated who had children in nonrelative foster care places).

[67] *See* Roberts, *Systemic Punishment*, *supra* note 14, at 1480–83 (explaining the many reasons why Black mothers' incarceration leads to higher involvement in the family regulation system than Black fathers' incarceration).

[68] *See* AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 6, 15 (reporting that kinship caregivers have indicated the need for an array of financial, legal, and medical services, but may find it risky or difficult to obtain them through the family regulation system); *see also generally* Josh Gupta-Kaga, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, (2020) (arguing that informal custody arrangements that involve the state, but do not require state oversight, raise constitutional and policy concerns).

[69] AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 15.

[70] *See* CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., PLACEMENT OF CHILDREN WITH RELATIVES 1–2 (2018), https://www.childwelfare.gov/pubPDFs/placement.pdf [https://perma.cc/ZJ76-2DWB] (describing the roles and responsibilities of state agencies and family members under kinship placements).

> [4.] A child whose parent or parents are already incarcerated no longer has a safe living arrangement (e.g., a temporary caregiver has decided he or she is no longer willing or able to care for a child).[71]

Only three percent of children referred to the state for investigation occurs because of criminal allegations related to a parent's or other individual's parental child abuse or neglect of a child.[72]

When children are in the family regulation system, the state becomes the source of custody and oversight, taking over the mothers' fundamental right to parent their children.[73] Congress enacted the Adoption and Safe Families Act ("ASFA")[74] in 1997 to provide more permanency for children in the family regulation system and regulate care of children in the system. Instead, the law has led to a marked increase in the termination of parental rights.[75]

With some exceptions, ASFA requires states to seek the termination of parents' rights if children have spent fifteen out of the last twenty-two months in state custody.[76] States have enacted laws implementing ASFA's edict.[77] Some states have established shorter timeframes than those prescribed in ASFA.[78]

When children are under the state's oversight, ASFA requires the state to develop a case plan for each child and to make reasonable efforts to reunify the family.[79] The term "reasonable efforts" is broad and generally means providing "accessible, available, and culturally appropriate services that are designed to improve the capacity of families to provide safe and stable homes for their children."[80] Mothers who are incarcerated must comply with these services as listed in court-imposed case plans that the

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[71] AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 4.

[72] *Id.* at 4. Even allegations of neglect relate to a family's economic hardship, rather than "willful withholding of a child's needs." Steve Volk, *The Fight to Keep Families Together in Child Welfare*, NEXT CITY (Nov. 15, 2021), https://nextcity.org/features/view/the-fight-to-keep-families-together-in-child-welfare [https://perma.cc/6NSC-UK64].

[73] *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944).

[74] 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.).

[75] Deseriee A. Kennedy, *"The Good Mother": Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 174–76 (2012) [hereinafter Kennedy, *The Good Mother*].

[76] Adoption and Safe Families Act*, supra* note 74, at §§ 675(5)(E)(i)-(iii).

[77] *See* CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 3 (2017) [hereinafter GROUNDS FOR INVOLUNTARY TERMINATION], https://www.childwelfare.gov/pubPDFs/groundtermin.pdf [https://perma.cc/U6CA-6LDJ].

[78] *Id.* at 3. On the opposite end, several states, including Colorado, Nebraska, New Mexico, New York, Oklahoma, Vermont, and Washington, allow courts to delay the termination of parental rights when a child is in the family regulation system. Laroche et al., *supra* note 17; Julie Poehlmann et al., *Children's Contact with Their Incarcerated Parents Research Findings and Recommendations*, 65 AM. PSYCH. 575 (2010).

[79] Stephanie Sherry, Note, *When Jail Fails: Amending the ASFA to Reduce Its Negative Impact on Children of Incarcerated Parents*, 48 FAM. CT. REV. 380, 383 (2010).

[80] CHILD. BUREAU, U.S. DEP'T. OF HEALTH & HUM. SERVS. REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN, 2 (2020), https://www.childwelfare.gov/pubPDFs/reunify.pdf [https://perma.cc/68GH-MBBA].

court reviews regularly. State caseworkers should ensure mothers can access these mandated services, though only a handful of states require caseworkers to make a proactive effort.[81]

Under ASFA, if the state has proved reasonable efforts and believes reunification is not possible, the state may seek to terminate the parents' parental rights. Applying a clear and convincing standard of proof,[82] courts will balance several factors when determining whether to terminate parental rights, and will consider the best interests of the child.[83] Like reasonable efforts, "best interests" does not have a unified definition, but it includes "factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being the paramount concern."[84] Courts may authorize the termination of mothers' parental rights because they "consider [it] in a child's best interests not to wait for his or her mother's release to have a stable family life."[85]

Along with citing child abuse and neglect as grounds for termination, over half the states authorize the termination of rights when the parent must serve a long sentence and the child is placed in the state's care.[86] According to the National Conference of State Legislatures, the average sentence for parents who are incarcerated is between 80 and 100 months.[87] A 1997 report by the Bureau of Justice Statistics, within the U.S. Department of Justice, calculated that the average maximum sentence length for women in state prison is 94 months.[88] In federal prison, it is 83 months.[89] Over 72% of women in state prison and 69% of women in federal prison are serving a sentence of 36 months or more.[90] Because of these long sentences, which researchers have "attributed in part to lengthy

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[81] Arkansas, for example, includes involving parents who are incarcerated in case planning, in their reasonable efforts requirements. Ark. Ann. Code § 9-27-303. *See also* reasonable efforts requirements for New York, Soc. Serv. Law § 384-b(7)(f); and Florida, § 39.6021.

[82] Stantosky v. Kramer, 455 U.S. 745, 756 (1982) ("This court has mandated an intermediate standard of proof, clear and convincing evidence, when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money. [T]he court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty or stigma.").

[83] CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS. DETERMINING THE BEST INTEREST OF THE CHILD 2–4 (2020) [hereinafter DETERMINING BEST INTEREST], https://www.childwelfare.gov/pubPDFs/best_interest.pdf [https://perma.cc/68NT-7EZT]; Stantosky, 455 U.S. at 759–60 (describing the factors the court should consider and process the court should undertake when making its determination).

[84] DETERMINING BEST INTEREST, *supra* note 83, at 2.

[85] Roberts, *Systemic Punishment*, *supra* note 14, at 1497 (summarizing cases where courts questioned the mothers' ability to reunify with their children if released and then terminated their parental rights).

[86] GROUNDS FOR INVOLUNTARY TERMINATION, *supra* note 77. Twenty-seven states allow the termination of rights when a parent has a long-term sentence and the child must enter state custody.

[87] Steve Christian, *Children of Incarcerated Parents*, NAT'L CONF. OF ST. LEGS. 5 (2009), https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf [https://perma.cc/UMK3-2HRJ].

[88] Mumola, *supra* note 62, at tbl. 8.

[89] *Id.*

[90] *Id.*

mandatory minimum sentences for common, nonviolent offenses," mothers who are imprisoned have a hard time disputing the fifteen-out-of-twenty-two-month reunification requirement under ASFA.[91]

When considering the offenses that lead to confinement, parents who are incarcerated for reasons unrelated to their parenting are more likely to lose their parental rights than parents accused of physically or sexually assaulting their children.[92] Unfortunately, "one out of every eight incarcerated parents loses their parental rights, regardless of the seriousness of the offenses."[93] Further, courts terminate the parental rights of mothers who are incarcerated at a higher rate than those of fathers in detention.[94]

To terminate a mother's parental rights means the mother-child relationship no longer exists, at least on paper.[95] To the court and according to the law, that mother is no longer the child's parent.[96] Because of its finality and destruction of the mother-child relationship, courts, advocates, practitioners, and scholars have come to label the termination of parental rights as "the civil death penalty."[97]

This legal fiction, created by ASFA and the family regulation system, has decimated families of color.[98] In New York City in March 2021, for example, of the approximately 7,900 children the Administration for Children's Services ("ACS")[99] separated from their parents, eight-seven

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[91] AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 6; Ann Farmer, *Mothers in Prison Losing All Parental Rights*, WOMEN'S ENEWS (June 21, 2002) https://womensenews.org/2002/06/mothers-prison-losing-all-parental-rights [https://perma.cc/W7UC-C3EL] (noting that mothers face sentences higher than the ASFA timeline and describing one mother's loss of her child because of that timeline).

[92] *Id.*; Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2, 2018), https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever [https://perma.cc/9D8N-NMJ6].

[93] AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 6.

[94] Hager & Flagg, *supra* note 92.

[95] Lisa Sangoi, *"Whatever They Do, I'm Her Comfort, I'm Her Protector." How the Foster System Has Become Ground Zero for the U.S. Drug War*, MOVEMENT FOR FAM. POWER 10 (2020), https://drugpolicy.org/resource/MFPreport [https://perma.cc/J8TM-D7XB] ("The foster system holds perhaps the greatest power a state can exercise over its people: the power to forcibly take children away from parents and permanently sever parent-child relationships.").

[96] Volk, *supra* note 72.

[97] Cloud et al., *supra* note 18, at 85 n.63 (quoting court opinions that mention "civil death penalty" as another name for the termination of parental rights); *The Problem*, MOVEMENT FOR FAM. POWER, https://www.movementforfamilypower.org/new-page-2 [https://perma.cc/LMD3-B9SN] (noting that parents and families know parental termination as the civil death penalty) (last visited July 6, 2022).

[98] Recently the American Bar Association passed a policy resolution urging legal professionals to learn about and work against the "anti-Black systemic racism within the child welfare system, stemming from the history of slavery in the United States and perpetuated by over-surveillance of and under-investment in Black families in America, which is pervasive, ongoing, and a root cause of the disproportionate involvement of Black parents and children within the system." A.B.A., Resolution 606 (Aug. 2022), https://www.americanbar.org/content/dam/aba/administrative/news/2022/08/hod-resolutions/606.pdf [https://perma.cc/R85T-HUJG].

[99] ACS is the New York City agency responsible for overseeing the programming and services for parents, children, and families related to the family regulation system.

percent were Black or Latino.[100] "Black children in foster care are significantly less likely than their white counterparts to be adopted once they are 'freed.' These children have lost their parents (and often their siblings as well) without achieving the 'permanency' at which ASFA was purportedly aimed."[101] The New Jane Crow, just like the New Jim Crow, causes lasting trauma for families of color.

III. TATTERED ACCESS TO EFFECTIVE PARENTS' COUNSEL

Although the U.S. Supreme Court held in *Gideon v. Wainwright*[102] that people have a right to counsel in criminal cases through the U.S. Constitution, the Court declined to extend such a blanket right to parents in family regulation system cases.[103] In *Lassiter v. Department of Social Services*, a mother who was incarcerated, Abby Gail Lassiter, argued that the trial court erred in not appointing any counsel for her during the hearing to terminate her parental rights and that the trial court violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.[104] The U.S. Supreme Court ruled against Ms. Lassiter, holding that parents did not have a right to counsel in family regulation cases.[105]

Even though the Supreme Court has yet to require state-appointment of counsel, some states have authorized the appointment of parents' counsel in some or all family regulation cases through legislation and case law. Eligibility and timing vary by state.[106] For example, in Florida, parents who cannot afford to hire private counsel have an absolute right to appointed counsel in all stages of the family regulation proceedings.[107] By contrast, in Oklahoma, access to state-appointed counsel is more complicated. A court *may* appoint counsel if the parent is indigent in an abuse and neglect case, but it *must* appoint counsel if the state seeks to terminate parental rights.[108] In Nevada, access to counsel is at the

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[100] Michael Fitzgerald, *No Evidence of Pandemic Child Abuse Surge in New York City, But Some See Other Crises for Child Welfare System*, IMPRINT (June 15, 2021), https://imprintnews.org/top-stories/no-evidence-of-pandemic-child-abuse-surge-in-new-york-city-but-some-see-other-crises-for-child-welfare-system/55991 [https://perma.cc/DNP3-NSUY].

[101] Cloud et al., *supra* note 18, at 86–87 (internal citations omitted); AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 6 (explaining that children with parents who are incarcerated have a higher probability of becoming "legal orphans" than other children in the family regulation system).

[102] Gideon v. Wainwright, 372 U.S. 335 (1963).

[103] Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

[104] *Id.*

[105] *Id.*

[106] *See Status Map*, NAT'L COAL. FOR A CIV. RIGHT TO COUNS., http://www.civilrighttocounsel.org/map [https://perma.cc/NCT6-V4AR] (providing a state-by-state overview of state constitutional and statutory right to counsel in termination of parent rights proceedings and abuse and neglect cases).

[107] Fla. Stat. § 39.013(1) (2017); Fla. R. Juv. P. Rule 8.320(a).

[108] Okla. Stat. tit. 10A, § 1-4-306(A)(1)(a).

discretion of the court; this choice exists even when the state's goal is to terminate a parent's rights.[109]

Like criminal defense offices,[110] the organizational structure of parents' counsel offices differs across the nation.[111] There may be a centralized office that oversees all the offices in that state or each jurisdiction may have a list of attorneys who a judge may appoint to represent a parent.[112]

The low pre-arrest income of women would make them more likely to be indigent and less likely to be able to afford to retain private criminal defense counsel and private family regulation defense counsel.[113] They would need court-appointed counsel to defend their parental interests on the outside, if offered by their states at all. These lawyers must navigate unique pressures while representing these mothers. Whether the challenges are specific people, institutions, or societal narratives, they make the role of parents' counsel even more difficult than the obstacles they already face as defense lawyers in the family regulation system.[114]

This Part examines the realities parents' counsel for mothers who are incarcerated face and the outcome these challenges have for their clients' parental rights, beginning with the counsels' own biases about their clients, through the larger institutional barriers that inhibit mothers' ability to reunite with their children in facilities and upon release. While this Part does not include all the challenges parents' counsel face, it identifies many critical limitations to the attorney-client relationship and the inability to defend the parental rights of mothers who are incarcerated.[115]

A. Defense Counsel's Potential Bias, Time, & Caseload Constraints

Because of their detention, mothers who are incarcerated need their counsel to offer legal strategy and support on their family cases and situations[116] as they endure the legal, physical, mental, and emotional

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[109] Nev. Stat. § 128.100(2). Whether or not judges in Nevada have an established policy of appointing counsel automatically to eligible parents does not eliminate that they do so under their discretion.

[110] Sarah Breitenbach, *Right to an Attorney? Not Always in Some States*, PEW CHARITABLE TR. (Apr. 11, 2016), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/04/11/right-to-an-attorney-not-always-in-some-states [https://perma.cc/EN2W-4XR6].

[111] Mimi Laver & Cathy Krebs, *The Case for a Centralized Office for Legal Representation in Child Welfare Cases*, A.B.A CHILD L. PRAC. TODAY (2020), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2020/the-case-for-a-centralized-office-for-legal-representation-in-ch [https://perma.cc/A8YE-RZT7].

[112] *Id.*

[113] *See* Sawyer, *supra* note 48, at n.27 (explaining that, "[b]efore incarceration, women in prison earned 29% less than incarcerated men, and 42% less than non-incarcerated women").

[114] MARGOLIES & KRAFT-STOLAR, *supra* note 36 at 3, 15–18.

[115] This Section includes information developed through my legal practice experience representing parents in family law matters and conversations with family regulation and criminal law defense lawyers.

[116] A.B.A, STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES, 11–19 (2006), https://www.americanbar.org/

challenges to incarceration.[117] They rely on their attorneys to provide case updates and explain the law in an accessible manner.[118] The attorney-client relationship is crucial to building a strategy to defeat ASFA's restrictions and the many barriers mothers are up against. This Part delves into the challenges lawyers face because of their own bias and employment structure within the family regulation system.

Parents' counsel may have negative views of mothers with criminal records and children in the family regulation system that taint their interactions with their clients; these lawyers are not immune to metaphors and narratives that permeate U.S. laws and social norms.[119] Even though their job is to advocate on behalf of their clients, lawyers may dismiss the mothers' requests and desires out of racism, sexism, and other bias assumptions about their clients' knowledge.[120] Their clients' situations may lead these lawyers to ignore the mothers' suggestions and regard them as frivolous or unhelpful.[121] The mothers' limited access to up-to-date information about witnesses or sources of information cause parents' counsel to assume that generating ideas from their clients would be a waste of time. The marginalization of mothers who are incarcerated negates the attorney-client relationship. Mothers may view their attorneys as another part of the system seeking to destroy their families, making it harder for attorneys to build trust with their clients.[122]

ASFA imposes strict timelines, so time management and prioritization are critical aspects to parents' counsel.[123] For mothers who are incarcerated, their appointed counsel work under intense pressure, are

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content/dam/aba/administrative/child_law/aba-parent-rep-stds.pdf [https://perma.cc/TKE2-5R53] [hereinafter A.B.A. STANDARDS].

[117] *Id.* at 17–18.

[118] *Id*.

[119] For a discussion on how "longstanding bias about race, class, gender, and entitlement" influence policies, *see* Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C.J.L. & SOC. JUST. 233, 240–243 (2014). For further discussion of the narrative, *see infra* Part III.B.

[120] Although scholars have exposed the racism and misogyny inherent within the family regulation system, they have focused less attention on the bias within the lawyers who represent parents in these proceedings. *See supra* Part II.B; Roberts, *Systemic Punishment*, *supra* note 14, at 1486–88; S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097 (2022). Criminal law scholars and practitioners, however, have made similar critiques of defense lawyers in the criminal system. *See* Jeff Adachi, *Public Defenders Can Be Biased, Too, and It Hurts Their Non-White Clients*, WASH. POST (June 7, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients [https://perma.cc/Z65P-HQGN]; L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2626 (2013); Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 L. HUM. BEHAV. 413 (2011).

[121] Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 729 (2018) (summarizing work by scholars that critique public interest lawyers' privilege and elitism); E. Tammy Kim, *Lawyers as Resource Allies in Workers' Struggles for Social Change*, 13 N.Y. CITY L. REV. 213, 219 n.20 (2009) ("Social justice lawyers must be vigilant against the creep of privilege (whether based on education, class, race, gender, sexuality, or language) and the temptation to dominate the client.").

[122] *See* Margolies & Kraft-Stolar, *supra* note 36, at 30 (detailing the personal experiences of mothers who were incarcerated with their appointed counsel).

[123] A.B.A. STANDARDS, *supra* note 116, at 19–20.

underpaid, and are overworked.[124] Unfortunately, mothers' right to counsel may be restricted because states that offer appointed counsel often limit the hourly rate and the amount of lawyer's fees appointed lawyers receive.[125] Even though the American Bar Association recommended caseloads of no more than 50–100 cases per lawyer,[126] parents' counsel have reported to having 1,000 cases in some jurisdictions.[127] Because of their low pay, defense counsel must "take on high caseloads to compensate for the poor compensation."[128] Such an excessive caseload does not allow them to offer their clients the individualized attention they need.[129] Further, their caseload demands do not consider the time and challenges parents' counsel must navigate when their clients are in jails and prisons.

B. Defense Strategy

Because society does not acknowledge women who are incarcerated, especially Black women, as mothers, let alone good mothers, defense counsel must work against a family regulation system that is unforgiving of their clients' actions. Lawyers must disprove the myth that the women in detention facilities are bad mothers because (1) the state took away their children and (2) they are incarcerated.[130] The myths of Black women as inherently "criminal" and of Black mothers as "bad mothers" converge.[131] As Professor Roberts has explained:

> A popular mythology promoted over centuries portrays [B]lack women as unfit to bear and raise children. . . . Stereotypes of maternal irresponsibility created and enforced by the child welfare system's disproportionate supervision of [B]lack children help to sustain mass

[124] Myrna S. Raeder, *Special Issue: Making A Better World for Children of Incarcerated Parents*, 50 FAM. CT. REV. 23, 30 (2012) (explaining that states differ in whether and when parents who qualify as indigent receive court-appointed counsel in family regulation cases); Margolies & Kraft-Stolar, *supra* note 36, at 30 (quoting a mother who was incarcerating as stating, "The lawyers are just overworked or they don't give a damn.").

[125] *Id.*

[126] A.B.A. STANDARDS, *supra* note 116, at 32–33.

[127] Karen K. Peters, *Interim Report to Chief Judge DiFiore*, N.Y. STATE UNIFIED CT. SYSTEM COMM'N ON PARENTAL LEGAL REPRESENTATION 35 (2019), http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf [https://perma.cc/DHH8-JEGM]. One mother who was incarcerated explained, "My attorney. . . has like 500 cases and half the time he doesn't even remember. When he comes I have to really refresh his memory until he says, 'Oh, that case.' We go in there and we're not even prepared." Margolies & Kraft-Stolar, *supra* note 36, at 30.

[128] Volk, *supra* note 72 (expressing that "working harder for an individual client won't yield any more money" because of the flat fees).

[129] *Id.* at 35; A.B.A. STANDARDS, *supra* note 116, at 17–18.

[130] Although the state has the burden of proof in family regulation system proceedings, the narrative regarding parents caught in the system puts the ultimate burden on the parents and their lawyers to prove their parenting abilities. *See* Washington, *supra* note 120.

[131] Cammett, *supra* note 119, at 237 ("[T]he social construction of poor Black single mothers deemed them the agents of their own misfortune due to their unmarried status—assumed to indicate loose morals, hypersexuality, and presumed laziness—framed as reliance on public assistance rather than work.").

> incarceration, and stereotypes of [B]lack female criminality help to sustain foster care.[132]

Aside from the inability to accept Black women as good mothers, some states expressly authorize parental rights termination because of a parents' incarceration and length of sentence.[133] States can use that as a basis to consider mothers undeserving of their parental rights. Even in states that do not have a per se policy on parental incarceration, parents' counsel must address the societal image of mothers who are incarcerated as "criminals."

Mothers within the New Jim and Jane Crow may have counsel appointed in both their criminal and family law cases. Ideally, criminal defense lawyers and parents' counsel would view their clients holistically and realize the intertwined nature of their interests and goals.[134] For example, they would understand how certain plea offers from the state may negatively affect their clients' arguments in the family regulation system and vice versa.

Mothers who are incarcerated expect their defense lawyers to communicate information and case updates with them and with their other counsel.[135] The information gathered from each counsel would help them develop strong strategies and defenses against the state's allegations in both cases.[136] Logically, their collaboration would avoid duplicative meetings and requiring mothers who are incarcerated from resuscitating traumatic events. Frequently, however, criminal defense lawyers and parents' defense counsel neither communicate with each other nor consider how their shared client's decisions in one system may influence the consequences in the other system.[137]

A mother may receive a plea offer in her criminal case that may cause her to serve several years in prison. Her criminal defense lawyer may advise her whether the offer is good and the consequences to her physical freedom; if they are aware of the deal at all, her parents' counsel may advise her on what that deal may mean for her family law case strategy and the consequences for her right to parent her child. Because of the focus on the risk of the mothers losing their physical liberty, the criminal defense lawyer may view the criminal case as more important and ignore or minimize the family regulation case. As such, the parents' counsel must try

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[132] Roberts, *Systemic Punishment*, *supra* note 14, at 1492; Michael B. Mitchell & Jaya B. Davis, *Formerly Incarcerated Black Mothers Matter Too: Resisting Social Constructions of Motherhood*, 99 PRISON J. 420, 424 (2019) ("While Black motherhood has never been fully recognized, mothers with incarceration histories are shadowed in relative invisibility.").

[133] GROUNDS FOR INVOLUNTARY TERMINATION, *supra* note 77, at 2.

[134] *Underlying Causes*, STILL SHE RISES TULSA (2019), https://www.stillshe rises.org/the-issue [https://perma.cc/8EG6-ZHN7].

[135] A.B.A. STANDARDS, *supra* note 116.

[136] *Id*.

[137] Allison Durkin et al., *Incarcerated Parents & Termination of Parental Rights in Connecticut: Recommendations for Reform*, YALE L. SCH. 23 (2021), https://ctvoices.org/wp-content/uploads/2021/03/REPORT-Incarcerated-Parents-and-Termination-of-Parental-Rights-in-Connecticut.pdf [https://perma.cc/X5RY-2ALH].

to get on the criminal defense attorney's radar to receive information about the mothers' criminal case.

Even when parents' counsel wants to communicate with their client's criminal defense lawyers about relevant information and documents they receive, court orders and/or ethical obligations may limit their ability to do so. Courts may impose protective orders that ban lawyers from sharing information in reports and documents with third parties.[138] Plus, even if no court order restricts disclosing the information, lawyers may avoid informing their clients of information that may cause harm to their clients, according to applicable ethical responsibilities.[139]

Because states allow courts to end parents' rights when they have a long sentence,[140] a plea offer that may look like an excellent choice in the criminal case may be detrimental for mothers in the family regulation case. Further, in the family regulation case, the state and the court may expect mothers to take responsibility for their alleged criminal actions and admit their conduct, in compliance with state's case plans. In the criminal case, however, mothers have a right to remain silent and not incriminate themselves. To protect a mother's Fifth Amendment Right to self-incrimination, the family court judge may continue the mother's case pending resolution of the criminal case. Doing so, however, increases delays in addressing the family's needs and, thereby, increases the mother's risk of parental termination.[141]

While both the criminal defense lawyers and family defense lawyers have a responsibility to represent their clients' interests, their roles may be difficult to align.[142] This dilemma means that mothers in detention may face conflicting and hard choices between their physical liberty and their parental rights, of which her defense counsel may not be aware.[143]

While attempting to navigate the crucial dual cases that their mother-clients face, family defense counsel may have a harder time proving the relationship between their clients and their children who are under the state's control. Courts will likely seek evidence of the "quality of the parent-child relationship" when considering whether to impose the civil death penalty.[144] When defending the parental rights of mothers in facilities, defense counsel's evidence of the mother-child relationship become more difficult to prove; mothers who are incarcerated are not able to travel freely, schedule in-person visits with their children easily, or facilitate regular communication with their children that their lawyers could document for the court.

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[138] MODEL CODE OF PRO. CONDUCT r. 1.4 cmt. 7 (A.B.A. 2020).

[139] *Id.* at r. 1.4 ("In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication.").

[140] GROUNDS FOR INVOLUNTARY TERMINATION, *supra* note 77, at 3.

[141] Philip Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L. J. 1671, 1681 (2003).

[142] Kennedy, *The Good Mother*, *supra* note 75, at 198.

[143] Margolies & Kraft-Stolar, *supra* note 36, at 13.

[144] AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 6.

Facilities may not allow children to visit their mothers.[145] In fact, some jails have eliminated in-person visits for all individuals, opting for video calls instead.[146] And, even if they do offer in-person family visits, courts may not require the state to bring children to the facility. Facilitating visits may fall on state-authorized guardians and case workers; these individuals would handle making the trip, often hours long, to take the children to the jails or prisons.[147] Both the mothers and children must go through multiple metal detectors and body checks conducted by the facility staff.[148] Facilities may require family members to speak through glass partitions, never allowing parents and their children to touch. Because of these difficulties and to protect children from the trauma that occurs upon seeing their mothers in detention, some mothers may ask that children not visit them.[149] These complications lead to fewer in-person visits and less evidence of direct contact.[150]

Mothers in detention may have limited financial resources to call and send letters and emails to their children.[151] Women who are incarcerated have limited financial resources and are likely to remain in jail while awaiting trial.[152] As such, their ability to make regular calls and mail consistent correspondence to their children becomes more restricted.[153]

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[145] Kennedy, *Children, Parents, & The State*, *supra* note 46, at 82–83 (discussing the inability to support relationships between mothers and children).

[146] Mindy Fetterman, *Face-to-Face Family Visits Return to Some Jail*, PEW CHARITABLE TR. (Feb. 15, 2017), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/02/15/face-to-face-family-visits-return-to-some-jails [https://perma.cc/ZD3V-WZKH] (describing a 2015 report that found that 74% of jails with video conference communications stopped in-person visits altogether and noting that the companies that run the video communications included a contract provision requiring the jails to eliminate the in-person visits).

[147] ROBERTS, SHATTERED BONDS, *supra* note 2, at 208.

[148] Safia Fasah, *Pat-Downs But No Hugs: Why Prison Visitation Protocol Should be Changed to Help Keep Familiar Structures Intact*, 56 FAM. CT. REV. 135, 136 (2018); Carla Laroche, Public Comment, *Public Hearing on Women In Prison: Seeking Justice Behind Bars*, U.S. COMM'N ON C.R. 4–6 (Mar. 25, 2019), https://securisync.intermedia.net/us2/s/folder?public_share=6FrEhZCq5xsfVP261vt1zt0011ef58&id=Lw%3D%3D (recounting the process the author and her children went through to see each other in person while she was incarcerated and the resulting emotions associated with the visits).

[149] Margolies & Kraft-Stolar, *supra* note 36, at 28 (describing a comment by one mother that "she did not see her children because she did not want them to see her in prison").

[150] Laroche et al., *supra* note 17.

[151] Even when their children send letters, their mothers do not receive the tangible document. Instead, jails and prisons have entered contracts with private companies to scan the letters and send mothers electronic versions only. Kajstura, *supra* note 24; Victoria Law, *Captive Audience: How Companies Make Millions Charging Prisoners to Send an Email*, WIRED (Aug. 3, 2018), https://www.wired.com/story/jpay-securus-prison-email-charging-millions [https://perma.cc/G7HK-JHJR] (explaining how challenging it is for people in detention and their families to communicate because of the high fees companies charge).

[152] Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), https://www.prisonpolicy.org/reports/income.html [https://perma.cc/CMF9-AQ4M].

[153] Nazish Dholakia, *Bans on Holiday Cards and $30 Phone Calls-the Isolation of Prison*, VERA INST. OF JUST. (Dec. 21, 2021), https://www.vera.org/blog/bans-on-holiday-cards-and-30-phone-calls-the-isolation-of-prison [https://perma.cc/KN48-VJE9] (detailing prohibitions jail and prison facilities impose on communications between family members and their loved ones in the facilities).

Further, navigating the criminal legal system, the family regulation system, confinement, and separation from their children are traumatic experiences that may lead mothers to avoid discussing or interacting with their children and their lawyers.[154] What may seem like lack of interest in offering emotional support to their children and their case may be a coping mechanism for mothers who are incarcerated. Courts may assume that mothers in detention have given up on their children when learning of these mothers' actions, mothers continue to parent their children even with these financial, mental, and physical restrictions.[155] Mothers use untraditional methods, including communications through other women who had been incarcerated with them, to help parent their children.[156] As one mother explained, "You have to parent from behind the wall when you're incarcerated. . . . It doesn't really matter who takes care of your children, no one is going to love your kids like you do."[157] Counsel must find ways to confirm their clients' dedication to their children and to explain the strength of their clients' bonds to their children to the courts despite these major challenges.

Mothers who are incarcerated have little to no access to the services and treatments that the court mandates through the family case plans,[158] making it difficult for their lawyers to supply the court with evidence of their clients' participation in the programming and their immediate improvements.[159] Jails and prisons may exist in service deserts. Providers approved to conduct programming for the state may not be eligible or want to work in detention facilities. States may require the mothers to pay for the services, which they cannot afford, especially while incarcerated. For programs that courts impose on mothers often and have limited space to enroll participants, mothers who are incarcerated may have to spend time on a waitlist in the hopes of fulfilling this requirement.[160]

Parents' counsel may think services in their clients' plans are irrelevant to the issues the state identified as risks to the children in the first place.[161] Lawyers must then move to have the court remove them from

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[154] Margolies & Kraft-Stolar, *supra* note 36, at 28.

[155] Kennedy, *The Good Mother*, *supra* note 75, at 193.

[156] Anna Rawls, *When Mom Is in Prison — And When She Comes Home*, MARSHALL PROJECT (Oct. 7, 2021, 6:00 AM), https://www.themarshallproject.org/2021/10/07/when-mom-is-in-prison-and-when-she-comes-home [https://perma.cc/5Y27-Z7HX].

[157] Lindsey Van Ness, *COVID Froze Prison Visits, Spotlighting High Cost of Phone Calls*, PEW CHARITABLE TR. (Aug. 4, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/08/04/covid-froze-prison-visits-spotlighting-high-cost-of-phone-calls [https://perma.cc/PJ84-AHUC] (noting that Leslie Credle, a mother held in federal prison, and her family spent $200 a month on calls to her children).

[158] Sherry, *supra* note 79, at 385 ("Incarceration makes it difficult to complete the case plan created to help families reunify since they cannot participate in many of the services required.").

[159] A.B.A. STANDARDS, *supra* note 116.

[160] AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 10 (confirming the dearth of services for parents in prisons).

[161] Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 288 (2021) (noting scholarship describing instances where the case plan services are irrelevant to parents' needs). Cloud et al., *supra* note 18, at 83 (internal citations omitted) ("[T]here services are representative of the child welfare system's implicit bias that Black people are incapable of governing themselves, and

the plan or accept that those services are not available and would delay reunification upon a mother's release.[162]

C. Case Preparation & Communication with Mother

Knowing the varied challenges their mother-clients are up against requires parents' counsel to develop strong attorney-client relationships with their mother-clients and spend adequate and ample time communicating and strategizing with them;[163] for lawyers with mothers who are incarcerated as clients, however, that is profoundly difficult. Their clients' location and reasons for incarceration hamper their ability to put on a strong defense.[164] Mothers and their counsel cannot work efficiently together to activate their support systems, develop witness lists and prep witnesses, obtain and review evidence through the discovery process, and develop strategies to cross-examine adverse witnesses and bolster weaknesses in the case. Communicating with a mother in a jail or prison through regular forms of communication, including in person, over the phone, and through mail correspondence, requires more money and time than communicating with someone who is not incarcerated.[165] The process for scheduling and conducting a legal visit between a lawyer and their client involves advanced planning. Facilities may not allow lawyers to meet with clients unless they receive more than one to two days' notice.[166] For varied reasons, the facility may deny a lawyer's request for an in-person legal visit.[167]

If counsel has set a date and time successfully, they must drive to the facility. Because states have fewer women's prisons,[168] counsel may have to drive for hours to meet with their clients.[169] Once they arrive, they must go through security checks and wait to be escorted to a room or unit

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are a mechanism for the Court and child protective workers to impose these misguided values of the Black family.").

[162] One guide advised parents' counsel to "advise [their] client to cooperate and accept services immediately." Diana Boyd Rauber & Lisa A. Grank, *Representing Parents in Child Welfare Cases: A Basic Introduction for Attorneys,* A.B.A. 5 (2000) [https://perma.cc/CV9P-E6UA].

[163] A.B.A. STANDARDS, *supra* note 116.

[164] SHATTERED BONDS, *supra* note 2, at 208.

[165] Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL'Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html.2019 [https://perma.cc/F7BB-RDNX].

[166] 28 C.F.R. § 543.13 (2021).

[167] Nat'l Ass'n of Crim. Def. Law. & Samuelson Law, Tech. & Pub. Pol'y Clinic, *Preserving Incarcerated Persons' Attorney-Client Privilege in the 21st Century: Why the Federal Bureau of Prisons Must Stop Monitoring Confidential Legal Emails*, NAT'L ASS'N OF CRIM. DEF. LAW. 19–20 (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/12/20201210-NACDL-SamuelsonClinic-PrivilegedEmailReport.pdf [https://perma.cc/Z3ST-2BGU] [hereinafter *Preserving Attorney-Client Privilege*]; Johanna Kalb, *Protecting the Right to Counsel: Lessons from New Orleans*, BRENNAN CTR. FOR JUST. (June 14, 2018), https://www.brennancenter.org/our-work/analysis-opinion/protecting-right-counsel-lessons-new-orleans [https://perma.cc/J86K-W8ZT]; *How Criminal Justice Systems are Responding to COVID-19*, CRIME & JUST. INST. (2021), https://www.cjinstitute.org/corona [https://perma.cc/RM6M-FMNB] (noting that the COVID-19 pandemic restricted lawyers from meeting with clients).

[168] Kennedy, *Children, Parents, & The State*, *supra* note 46, at 4.

[169] Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prisons*, PRISON POL'Y INITIATIVE (Oct. 20, 2015), https://www.prisonpolicy.org/reports/prisonvisits.html [https://perma.cc/V865-VVP9].

to speak with their clients. Further, the meeting may be interrupted, canceled, or stopped for reasons beyond the lawyer's and mother's control.[170] After the meeting, the lawyer must go through metal detectors, or other security checks, before making the long drive back to their office. The legal visit may take a full day.

Legal calls, however, may not be any better. In some jurisdictions, clients must pay for their calls to their lawyer. Phone calls from mothers in facilities cost much more than calls between people outside of detention facilities.[171] Mothers who are incarcerated often cannot afford to call neither their counsel nor their children and other family members.[172] Like legal visits, lawyers must follow facility protocol to reach their client by phone. The staff will need advanced notice and they may not afford the mother enough time for the family defense counsel to obtain and relay pertinent information to their client. Further, lawyers and their clients may be concerned that the communications company may be recording the legal calls, which the state may be able to access.[173]

Counsel may also send their clients' case documents and written correspondence by mail.[174] The mail may take a long time to reach the mother in the facility and she may not have access to stamps to send return correspondence. Lawyers must be aware of and concerned for their client's confidentiality when sending emails, as well as with the other forms of communication. Under facility protocols, the mothers' email correspondence is likely not protected from staff review. In addition, depending on the facilities' layouts, staff may be able to overhear conversations describing the mother's situation and plan during legal visits and calls,[175] and, just like with legal calls, staff may share the information with opposing parties.[176]

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[170] *Preserving Attorney-Client Privilege*, *supra* note 167.

[171] *See* Matt Reynolds, *FCC Approves Plan to Make Some Phone Calls Cheaper for Inmates and Their Families*, A.B.A. J. (May 21, 2021 10:16 A.M.), https://www.abajournal.com/news/article/fcc-curbs-out-of-state-call-rates-in-prisons [https://perma.cc/XUC7-JLUX]; *See also* Eric Zorn, *Column: Phone Calls Should Be Free For Prison Inmates*, CHICAGO TRIB. (Apr. 15, 2021 4:13 P.M.), https://web.archive.org/web/20220111223846/https://www.chicagotribune.com/columns/eric-zorn/ct-column-inmate-phone-calls-charges-bobby-rush-zorn-20210415-ylqihy54tre53mx6npkzfx6tfq-story.html. "Jail phone calls are three times as expensive as calls from prison, and other forms of communication are more restricted." Wagner & Jones, *supra* note 165; Kajstura, *supra* note 24.

[172] "High call rates push incarcerated people and their families into debt, according to Politico." Sylvia A. Harvey, *Making a Phone Call from Behind Bars Shouldn't Send Your Family into Debt*, POLITICO (Sept. 29, 2020 4:30 A.M.), https://www.politico.com/news/agenda/2020/09/29/prison-telecom-costs-422774 [https://perma.cc/W83U-QJ3L]; Reynolds, *supra* note 171.

[173] Ella Fassler, *Prison Phone Companies Are Recording Attorney-Client Calls Across the US*, MOTHERBOARD (Dec. 13, 2021), https://www.vice.com/en/article/7kbbey/prison-phone-companies-are-recording-attorney-client-calls-across-the-us [https://perma.cc/C63M-G87U] (noting that a phone company recorded over 1,500 protected jail calls between legal teams and their clients in New York City).

[174] *Preserving Attorney-Client Privilege*, *supra* note 167, at 17–18.

[175] *Id.* at 19–21.

[176] Fassler, *supra* note 173 (explaining that prosecutors obtained legal call recordings between clients who were incarcerated and their legal teams).

Even if counsel sets up communication with their client, they will have to ensure they are trauma-informed and address any trauma-related events that may arise during the legal representation.[177] As described earlier, women who are incarcerated have a higher rate of childhood domestic and sexual trauma than men who are incarcerated.[178] Further, "[w]omen in jails are also more likely to suffer from mental health problems and experience serious psychological distress than either women in prisons or men in either correctional setting."[179] A mother's ability to help with legal strategy and preparation will be restricted by her location in a facility, but, also, by the status of her health. With facilities providing unacceptable medical and mental health services,[180] mothers will often not receive the treatment and support they need. Because of these health impairments, they will be less likely to provide their attorneys with the information necessary to address their legal needs.

Mothers who are incarcerated do not have freedom of movement and their lawyers will have problems when attempting to confer with them at the courthouse, ahead of and immediately after hearings.[181] To attend a hearing in person, counsel must seek court approval to require the detention facility to transport their client to court.[182] The jail or prison may be distant or logistical transportation barriers may exist; therefore, courts may deny their motion.[183]

Instead, courts may waive a mother's attendance at the hearing altogether or require her to attend remotely, whether through the phone or video.[184] Those options limit counsel's ability to confer with their client in real time.[185] Further, counsel may not be able to explain the proceeding, before and after, because of the restrictions on access to their clients who are incarcerated.[186] Defense lawyers must navigate these hearings while

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[177] *The State of Prison & Jail Communication Systems*, NAT'L ASS'N OF CRIM. DEF. LAW. (Mar. 11, 2021), https://www.nacdl.org/Map/State-of-Prison-Jail-Call-Communication-Systems [https://perma.cc/JPG4-CYHR] ("Many respondents mentioned the continuous presence of jail staff around the visiting room. Sometimes the visiting rooms were placed immediately beside the staff's booth.").

[178] *Supra* Part II.A.; *Black Women and Sexual Assault*, *supra* note 58; *Where We Stand: Racism and Rape*, NAT'L ALLIANCE TO END SEXUAL VIOLENCE, https://endsexualviolence.org/where_we_stand/racism-and-rape/ [https://perma.cc/5P5A-JRTP] (last visited July 6, 2022).

[179] Kajstura, *supra* note 24.

[180] Kamala Mallik-Kane & Christy A. Visher, *Health and Prisoner Reentry: How Physical, Mental and Substance Abuse Conditions Shape the Process of Reintegration*, URB. INST. JUST. POL'Y CTR. (Feb. 2008), https://www.urban.org/sites/default/files/publication/31491/411617-Health-and-Prisoner-Reentry.PDF [https://perma.cc/ZS8V-F4AY].

[181] Margolies & Kraft-Stolar, *supra* note 36, at 12–14 (describing the process mothers who are incarcerated must undergo to appear in court in-person).

[182] *Id.* at 12–13.

[183] *Id.* at 12.

[184] *Id.* at 12–13.

[185] Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in Court*, BRENNAN CTR. FOR JUST. (Sept. 10, 2020), https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court [https://perma.cc/4DH9-KPT2] (collecting research that indicates that remote video technology in courtrooms caused problems for attorney-client communications).

[186] Margolies & Kraft-Stolar, *supra* note 36, at 13.

their clients miss these critical proceedings and information about their family regulation case.

If mothers are able to attend remote video proceedings, lawyers will be able to call their clients to testify before the court about their parent-child relationship, but this technology may not benefit mothers who are incarcerated, as expected.[187] A 2020 report by the Brennan Center described one study that reviewed immigration proceedings conducted remotely and learned that litigants found "it difficult to understand what was happening during video proceedings, and that many perceived a video appearance as unfair and not a real "day in court."[188] Further, immigration judges viewed people less credible when they testified in a video hearing versus in-person.[189] Therefore, their mother-clients' appearance through remote technology may increase the negative views and narratives courts already have of their clients as bad mothers.[190]

The ability to interact with their clients is exceptionally difficult when family defense lawyers represent mothers who are incarcerated. Their inability to meet and correspond with their counsel limits mothers who are motivated to work with their lawyers to develop their case, suggest witnesses, and supply evidence. It also makes it difficult for client-attorney relationships to develop under these circumstances.

D. Challenges After Mothers' Release from Incarceration

ASFA expects parents to reunite with their children within twenty-two months or face the termination of their parental rights. With mothers likely being unable to afford bail and/or sentenced to lengthy terms in prison, courts may delay the return of the children to their custody until after their release. An estimated 1.8 million women and girls exit jails and at least 81,000 women reenter society from state prisons every year.[191] Almost 1 million women are under probation or parole.[192] Barriers to accessing their legal counsel do not end upon release.

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[187] Bannon & Adelstein, *supra* note 185. Because of the COVID-19 pandemic, courts have employed telephonic and video technology in court proceedings out of necessity and people have sought to make these measures permanent. *Id.* While using this technology in the courts may increase access to proceedings for some people, the report recommended caution out of concern for the negative unintended consequences associated with the technology.

[188] *Id.*

[189] *Id.* The Brennan Center report also noted that people with limited or no English proficiency had additional challenges that courts and legal advocates had to consider. *Id.* The use of translators intensified the miscommunication, confusions, and problems already inherent in the use of video technology services. *Id.* Further, because people in custody experience a disability at higher rates than the general public, remote technology may not allow mother-clients to obtain the benefit of their appearance in the court proceeding. *See Preserving Attorney-Client Privilege*, *supra* note 167, at 23.

[190] *See supra* Part III.B. (discussing the image the state and courts may have of the mothers as "bad mothers" and "criminals," without the nuanced understanding of the mothers' experiences and parenting).

[191] Wendy Sawyer, *Who's Helping the 1.9 Million Women Released from Prisons and Jails Each Year?*, PRISON POL'Y INITIATIVE (July 19, 2019), https://www.prisonpolicy.org/blog/2019/07/19/reentry [https://perma.cc/TS2Z-JUWJ]. This data does not include federal releases.

[192] SENTENCING PROJECT, *supra* note 25.

The requirements mothers returning from incarceration must follow set them up for failure.[193] Mothers may have to follow their probation or parole officers' supervision conditions; begin paying any outstanding court fines, fees, or restitution; find stable housing; seek employment or enroll in schooling; and attend substance use disorder treatment programs, among other expectations.[194] In theory, abiding by all these obligations would make it easier for their counsel to show the court that their clients are on a stable path and pose no risk to their children's safety, but the policies and laws in the United States set mothers up for failure.[195] This Part describes how the conditions imposed by both the criminal and family regulation systems that the mothers must follow once released delay parent-child reunification further and make their lawyers' advocacy harder.

Mothers may have trouble accessing reentry services the judges in both of their cases demanded.[196] Their criminal records make it harder for them to secure full-time consistent employment[197] and safe housing,[198] both of which are important to reuniting with their children.

Women with convictions face many challenges, including "substance abuse issues, problems securing childcare, and gender stereotypes," when seeking employment.[199] Women of color endure a

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[193] Sawyer & Wagner, *supra* note 38 ("The long supervision terms, numerous and burdensome requirements, and constant surveillance (especially with electronic monitoring) result in frequent 'failures,' often for minor infractions like breaking curfew or failing to pay unaffordable supervision fees."); *Words from Prison - Did You Know...?*, AM. C.L. UNION, https://www.aclu.org/other/words-prison-did-you-know [https://perma.cc/234C-JPQ8] (detailing the many gendered collateral consequences of convictions).

[194] *Id.*; MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE (3d ed. 2018); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316–17 (2012).

[195] Reuben Jonathan Mille, *How Thousands of American Laws Keep People "Imprisoned" Long After They're Released*, POLITICO (Dec. 30, 2020), https://www.politico.com/news/magazine/2020/12/30/post-prison-laws-reentry-451445 [https://perma.cc/V4X4-TX6W].

[196] Kajstura, *supra* note 24 (explaining that nearly two million women and girls reenter society after incarceration, but do not have access to post-release services); Patricia Allard, *Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses*, SENTENCING PROJECT (2002), https://www.opensocietyfoundations.org/publications/life-sentences-denying-welfare-benefits-women-convicted-drug-offenses [https://perma.cc/73AG-PQ2W] (explaining that only 25% of people in prisons and 17% of people on probation receive treatment services for substance use disorder, even though almost 75% of criminal-law-involved women used drugs pre-arrest).

[197] 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/5L3U-5VT4].

[198] "It is perhaps then no surprise that formerly incarcerated women are also more likely to be homeless than formerly incarcerated men, making reentry and compliance with probation or parole even more difficult." Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (Aug. 2018), https://www.prisonpolicy.org/reports/housing.html#raceandgender [https://perma.cc/U2MN-D95E]; Kajstura, *supra* note 24.

[199] Holly Otterbein, *Why Female Ex-Convicts May Have a Harder Time Finding Work Than Their Male Counterparts*, WHYY (Sept. 12, 2014), https://whyy.org/articles/why-female-ex-convicts-may-have-a-harder-time-finding-work-than-their-male-counterparts [https://perma.cc/KSR8-7MB7]; Sarah Callahan et al., *Reducing Economic Disparities for*

tougher job landscape than people in other demographics. In July 2018, the nonprofit research organization Prison Policy Initiative issued a report showing the average rate of unemployment for people who were formerly incarcerated was 27%; that unemployment rate, however, jumped to nearly 44% for Black women. [200] And while 87% of white men obtained full-time employment upon release, Black women ranked the lowest among racial identities—Black, Hispanic, and white—and genders—women and men—with only 67% getting full-time jobs.[201]

The education exclusion of mothers who were incarcerated makes their employment opportunities even worse and, yet again, race plays a role in this barrier. According to a 2018 report, 33% of Black women who are formerly incarcerated[202] and over "40% of formerly incarcerated Hispanic women after the age of 25 must navigate their communities with neither a high school diploma nor GED, but with the stigma of a criminal record instead."[203] This educational barrier further exacerbates the unemployment rates for women of color.[204]

Because women released from imprisonment "return to their original community upon release, and these communities are usually low income and high crime, with a lack of employment opportunities," their housing situations dictate their ability to reenter society effectively.[205] Black and Hispanic women returning from incarceration face homelessness at a higher rate than white women.[206] In fact, Black women are at greater risk of homelessness or living in a shelter than Black, Hispanic, and white men, and white women.[207] More specifically, Black women are almost "four times more likely than white men to be living in a homeless shelter."[208] Without stable housing, women may feel the pressure and necessity to "return to abusive partners or family situations" and risk recidivism.[209]

Scholars have documented these barriers to reentry well and yet the state and the court may only see noncompliance and no effort by

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Female Offenders: The Oxford House Model, 34 ALCOHOLISM TREATMENT Q. 292 (2016) (citation omitted) (noting that "individuals coming out of prison lack skills and work experience, and a depreciation of social capital, making potential employers more difficult to reach through social networks.").

[200] Couloute & Kopf, *supra* note 197.

[201] *Id*. One study found that women released from federal prison made $800–$1,800 less per quarter than men and that Black, American Indian, and Alaska Native individuals made less per quarter than any other community. E. Ann Carson et al., *Employment of Persons Released from Federal Prison in 2010*, U.S. DEP'T JUST., OFF. JUST. PROGRAMS 16 (2021), https://bjs.ojp.gov/content/pub/pdf/eprfp10.pdf [https://perma.cc/ACV5-D9F7].

[202] Lucius Couloute, *Getting Back on Course: Educational Exclusion and Attainment Among Formerly Incarcerated People*, at app. tbl. 5 PRISON POL'Y INITIATIVE (Oct. 2018), https://www.prisonpolicy.org/reports/education.html [https://perma.cc/A3FM-ZBR3].

[203] *Id.*

[204] *Id.* at app. tbl. 4.

[205] Callahan et al., *supra* note 199.

[206] Couloute, *supra* note 202.

[207] *Id*. The researcher did not have enough data to include Hispanic/Latina women in their study regarding sheltered homelessness.

[208] *Id*.

[209] Sawyer, *supra* note 191.

mothers.[210] The inaccessibility of housing and employment for women with detention histories, especially Black women, make already difficult defense strategies even more difficult. Along with these court-imposed demands, mothers must rebuild and reconnect their relationships with their children and loved ones.[211] While attempting to reengage in their children's lives, mothers may not be able to attend their children's school and extra-curricular events and volunteer during their events; schools and programs may impose a bar on allowing individuals, including parents, from participating if they have a felony conviction.[212]

Lawyers must attempt to explain to the state and the court their clients' unemployment, housing instability, potential return to unsafe environments, parent-child relationship issues, and other reentry challenges mothers may face. Nonetheless, mothers may fear that defense counsel will report to the state or the court any difficulties they may have navigating these processes and relationships and, therefore, may not share their reentry obstacles with their lawyers. And, even if mothers and their lawyers seek to establish trust and strengthen their lawyer-client relationship through in-person meetings, access to transportation may make that desire difficult, if not unattainable.[213] The consequences of the New Jim Crow and New Jane Crow defeat the attorney-client relationships once again.

As these mothers get shut out of opportunities and lawyers navigate limited legal strategies, the ASFA clock ticks toward parental termination.[214] Unfortunately, the lack of support for mothers who are incarcerated because of the challenges their counsel face results in a family regulation system that tramples on mothers' constitutional right to parent their children and ignores the best interests of the children.[215] Family defense lawyers' have difficulty proving to the court that the children's best interests are best served by placing the children back in their mothers' care.[216] Yet again, even when released, the New Jim Crow and the New

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[210] Roberts, *Systemic Punishment*, supra note 14, at 1499 (highlighting that the exclusion from social safety nets and support because of their convictions means mothers face the family regulation system's "ultimate punishment," the termination of their parental rights.).

[211] AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 16; Rawls, *supra* note 156 (describing a child's feeling of pain and resentment upon her mother's return from incarceration).

[212] Tim Pratt, *Policy Keeps Some Parents Out of Schools, Off Field Trips*, CAP. GAZETTE (Nov. 11, 2012), https://web.archive.org/web/20220112005614/https://www.capitalgazette.com/cg2-arc-3514fbff-fd51-58c6-9895-f544a38ba175-20121111-story.html.

[213] Anne Nordberg et al., *Transportation Barriers to Successful Reentry Among Returning Citizens: A Qualitative Interpretive Meta-Synthesis*, 101 PRISON J. 488, 490 (2021); Miriam Northcutt et al., *Cumulative Disadvantage and the Role of Transportation in Community Supervision*, 64 CRIM. & DELINQUENCY 1033, 1034–35 (2017) (citing Merry Morash, *Women on Probation and Parole*, NORTHEASTERN U. PRESS (2010)).

[214] AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 16.

[215] *Id.*

[216] Cloud et al., *supra* note 18, at 86–87 (internal citations omitted); Kara Gotsch, *Families and Mass Incarceration*, SENTENCING PROJECT (Apr. 2018), https://www.sentencingproject.org/publications/6148 [https://perma.cc/7QRW-FZN2] ("Studies report numerous negative outcomes for children as a consequence of parental incarceration, ranging from depression and anxiety to aggression and delinquency depending on circumstances such as the child's age and the length of a parent's incarceration."); Martin,

Jane Crow intersect to limit mothers and their counsel from contesting the civil death penalty.

E. The Carceral State's Damage

The New Jim Crow and the New Jane Crow reflect convenient terms I use to identify the different systems mothers must navigate, but I also recognize both systems are part of an all-encompassing carceral system and state. The carceral state:

> [C]enters pathology, criminalization, and punishment. The concept of carcerality captures the ways in which white supremacy shapes and organizes society "through policies and logic of control, surveillance, criminalization, and un-freedom. . . . The carceral state, and its punitive processes of criminalization and control, operate in highly discriminatory ways and have both produced and reinforced massive inequalities along lines of race, class, gender, sexuality, and other identity categories."[217]

The gendered terms should not take away from the impact both mass incarceration and family regulation have on mothers. As described throughout this Piece, in both systems, and in the carceral state more generally, Black mothers are "at the epicenter of a multi-institutional apparatus of surveillance, social control, and punitive regulation."[218] Professor S. Lisa Washington has argued that society should view these different systems as one overarching system of surveillance.[219] As such, the carceral state's continuous oversight of mothers makes it difficult for them to navigate and to live freely within the United States.[220]

The system's imposition on mothers who are incarcerated and returning from incarceration includes policies and norms that restrict movement; require participation in mandatory pre-trial and case plan services and programming, and drug tests; and mandate check-ins with caseworkers and officers, among other demands.[221] Institutions and

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supra note 20 (stressing the overwhelming findings that parental incarceration has adverse effect on children's wellbeing. In one study, researchers reported that "children of incarcerated mothers had much higher rates of incarceration — and even earlier and more frequent arrests — than children of incarcerated fathers.").

[217] Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639, 662 (2021) (quoting Gabrielle French et al., *What Is the Carceral State?*, UNIV. OF MICH. CARCERAL ST. PROJECT (May 2020), https://storymaps.arcgis.com/stories/7ab5f5c3fbca46c38f0b2496bcaa5ab0 [https://perma.cc/3BCL-GQ8A]).

[218] *Id.* at 662 (quoting Dorothy Roberts, *Digitizing the Carceral State*, 132 HARV. L. REV. 1695, 1706 (2019) (book review)).

[219] S. Lisa Washington, *Carceral Intersections of Family Regulation* (Nov. 2021) (unpublished manuscript) (on file with author).

[220] Andrea L. Dennis, *Criminal Law as Family Law*, 33 GA. ST. U. L. REV. 285, 289 (2017) ("Agents monitor whether or not supervisees are complying with obligations unrelated to their offense, such as familial and child support. To surveil and control individuals, officials gather personal family information collateral to the offense and rely on family members to report misbehavior.").

[221] *Id.* at 336–51 (emphasizing the many ways community surveillance interferes with family norms).

individuals with power within the carceral state limit who mothers may communicate with and under what conditions they may see their children.[222]

Even if a Black woman successfully exits one of these systems—release from prison, for example—no guarantee exists that that system will leave her alone—because of state supervision or re-arrest—or that she will conquer the other systems that plague her, including attempts to regain custody of her child in the family regulation system.[223] The carceral state's interconnected nature means that it pushes her child into both systems as well; these systems create a cycle of intergenerational trauma and separation.[224] The enormity of the carceral state requires mothers who are incarcerated to depend on potential guidance and advocacy from appointed counsel, when available, to defend their rights and families.[225] The carceral state, however, also makes that guidance and advocacy restricted, if not meaningless.

IV. LEGAL REPRESENTATION ENHANCEMENT

Addressing the challenges defense counsel face when their clients are mothers who are incarcerated requires a multifaceted approach because of the level of barriers the carceral state imposes. Reflecting on the support Ms. Jones, the mother discussed in this Piece's Introduction, and mothers like her across the country need, I propose three recommendations to make their counsel's defense work more effective and meaningful: (1) equip law librarians within prisons and jails with robust resources that mothers may access to work with their legal counsel to defend their parental rights; (2) increase the use of multidisciplinary legal teams to represent mothers who are incarcerated; and (3) abolish the use of the carceral state to regulate women in poverty and their families. Combined, these solutions would empower individual mothers and their counsel and decrease the mothers' entanglement within the criminal legal and family regulation systems altogether, keep families together, and avoid the trauma associated with parental termination. These suggested enhancements would aid family defense lawyers in reaching their goal of providing zealous representation to mothers who are incarcerated and ensuring the best interests of children prevail.[226]

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[222] *Id.* at 289.

[223] *Id.* at 289–90 (explaining the power others have to reincarcerate and separate parents from their families if they do not comply with court conditions).

[224] Durkin et al., *supra* note 137, at 36 n.125 ("Children of parents who experienced foster care placement or parental incarceration as children are more likely to experience the foster care placement and incarceration. . . . Additionally, our discussions with family defenders and sociologists revealed that various parents who face TPR[, or termination of parental rights,] lack kin due to their experience of TPR as a child.).

[225] *See* Genty, *supra* note 36 (explaining the myriad challenges parents who are incarcerated have when trying to use procedural rights and confirming that "[f]ar more than other parents, an incarcerated parent must depend almost completely on others for logistical assistance."). *See also* Pamela Lewis, *Behind the Glass Wall: Barriers That Incarcerated Parents Face Regarding the Care, Custody and Control of Their Children*, 19 J. AM. ACAD. MATRIM. L. 97, 98 (2004); Margolies & Kraft-Stolar, *supra* note 36.

[226] A.B.A. STANDARDS, *supra* note 116.

A. Prison & Jail Law Libraries

As Ms. Jones, the mother who wrote to the Gender and Family Justice Clinic, indicates, mothers who are incarcerated seek more understanding of the law and guidance.[227] While mothers should expect defense counsel to represent them in their family regulation case, they may also seek to learn more about the process by accessing legal resources, statutes, and caselaw through the jail or prison law library. According to *Bounds v. Smith*, facilities must allow people who are incarcerated with access to legal assistance or law libraries.[228]

Advocates like Jhody Polk, founder of the Jailhouse Lawyer's Initiative ("JLI") and a 2018 Soros Justice Advocacy Fellow,[229] have worked to bolster the training of and support to law clerks who work in prisons across the nation.[230] As JLI contends, "Nearly every person who goes to a jail or a prison comes into contact with a jailhouse lawyer or law clerk."[231] Yet, the law clerks in the prisons and jails have limited resources and support.[232]

For mothers like Ms. Jones, genuine access to law librarians and legal guidance within prisons and jails would make the law more accessible and allow them to be more proactive in their family regulation cases. As Joyce McMillan, Executive Director of JMacForFamilies,[233] noted, "It's really all about knowing your rights."[234] Ms. Jones benefitted from the Clinic students' material; it was digestible and defined her rights. Whether or not mothers have appointed attorneys, they should have the right to know the law and receive ample support to prepare for their cases adequately.

Further, meaningful access to the law and legal resources would allow mothers who are incarcerated to hold their appointed counsel

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[227] Letter from Ms. Jones, *supra* note 1 ("Im sure that you all could do worlds of good to the many parents out there, that just don't know what step to take next. I was truly blessed when I received your letter offering information. An it helped me in a MAJOR way.").

[228] Bounds v. Smith, 430 U.S. 817, 828 (1977) ("We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

[229] *Jhody Polk*, OPEN SOC'Y FOUNDS., https://www.opensocietyfoundations.org/fellows/jhody-polk [https://perma.cc/JA7L-UX3U]. JLI is a project under the Legal Empowerment Advocacy Hub ("LEAH") with support from the Bernstein Institute for Human Rights. *The Jailhouse Lawyer Initiative*, BERNSTEIN INST. FOR HUM. RTS., https://www.law.nyu.edu/centers/bernstein-institute/legal_empowerment/jailhouse_lawyers [https://perma.cc/PN4S-FMYG].

[230] Jhody D. Polk, *BEYOND BARS: The Jailhouse Lawyer Initiative*, GUILD NOTES, https://www.nlg.org/guild-notes/article/beyond-bars-the-jailhouse-lawyer-initiative [https://perma.cc/KQ4Y-QUKL].

[231] *The Jailhouse Lawyer Initiative*, *supra* note 229.

[232] Ashley Krenelka Chase, *Exploiting Prisoners: Precedent, Technology, and the Promise of Access to Justice*, 12 WAKE FOREST J. L. AND POL'Y 103 (2022).

[233] JMacForFamilies is an organization that "works to abolish the current punitive and harmful child welfare system, and create a system that truly supports families and communities." JMACFORFAMILIES, https://jmacforfamilies.org [https://perma.cc/6QCH-739Y] (last visited July 6, 2022).

[234] Joyce McMillan, Exec. Dir., JMacForFamilies, Joyce McMillan Testifies re: The Need for Family Miranda Rights 2:28 (Oct. 21, 2021), https://youtu.be/uBn1lkAv6Lc?t=148 [https://perma.cc/S4EY-6BAZ].

accountable. They would be more alert to any strategies that may conflict within their family regulation case and between that case and their criminal case. Mothers would be able to research and have ready to share with their lawyers what they have done to show to the court their relationship with their children and their efforts to parent while incarcerated. In addition, mothers would be more aware of the state's obligations and would try to hold the state more accountable in including them in the case planning and reentry services process.

Increasing access to the resources at law libraries would allow mothers more support as they contest the state's allegations against them and protect their parental rights.

B. Multidisciplinary Legal Representation

Mothers who are incarcerated have limitations, as described throughout this Piece, that make their legal counsel critical even if the mothers have meaningful access to legal resources and the law library. As mothers who are incarcerated are empowering themselves with an understanding of their rights and responsibilities under the family regulation system, parents' counsel would be in better positions to offer a trauma-informed, anti-racist, and culturally humble attorney-client relationship multidisciplinary legal representation.[235] All states should appoint lawyers to parents in family regulation cases at the first involvement of the state and the representation should be a multidisciplinary team.[236]

Lawyers research, understand, and apply the law, while their clients supply the facts and personal knowledge that form the basis for their counsel's efforts. Because of their clients' restrictions in facilities and in navigating reentry, legal teams that include social workers, peer-parent advocates, and other supportive parties would strengthen their cases.[237] Some members of the mothers' teams would navigate the barriers to communication with their clients—whether during legal visits in the facilities, by mail, or by phone—while other members move other aspects of the mothers' cases forward. The teams would be able to work on increasing communication and visits between their mother-clients and their children.

Multidisciplinary teams would allow counsel to address the bad mother myth more holistically. The legal team would be able learn their clients' history, relationship with their children, and desired needs and outcomes in the family regulation case and the criminal case. They could

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[235] Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 52–53 (2019); *Attributes of High-Quality Legal Representation for Children and Parents in Child Welfare Proceedings*, FAM. JUST. INITIATIVE 3–4 (2018).

[236] Keyna Franklin, *How Holistic Legal Representation Supports Reunification*, RISE MAG. (June 2, 2020), https://www.risemagazine.org/2020/06/how-holistic-legal-representation-supports-reunification [https://perma.cc/UR7R-2U4V] (describing the benefits of an interdisciplinary team that "includes a lawyer, parent advocate and social worker" in family regulation cases).

[237] Volk, *supra* note 72; FAM. JUST. INITIATIVE, *supra* note 235, at 5; Laver & Krebs, *supra* note 111.

spend time developing and presenting a more complex and caring image of these mothers. They could mitigate the harshness the mothers' criminal histories create and offer a more humane image of their clients' parenting.[238]

Still She Rises is "the first holistic defense office in the country dedicated exclusively to the representation of mothers in both the criminal and civil legal systems" in Tulsa, Oklahoma.[239] Several other legal service offices, including Neighborhood Defender Service,[240] Bronx Defenders,[241] Defender Association of Philadelphia,[242] Maryland Office of the Public Defender,[243] and Brooklyn Defender Services,[244] follow this multidisciplinary model. Interdisciplinary legal teams would help enact the right to counsel's role as a "fundamental safeguard to level the playing field for [individuals] and to engender a reliability in the results."[245] Engaged multidisciplinary teams have led to successful outcomes for children and parents.[246]

C. Stop Criminalizing Mothers in Poverty

To enact these recommendations would follow Professor Dorothy Roberts' call for non-reformist reforms, which are "measures that reduce the power of an oppressive system while illuminating the system's inability to solve the crises it creates."[247] By enacting these reforms, parents' counsel would be able to challenge more effectively the state's claims against mothers who are incarcerated, thereby protecting these mothers'

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[238] Kara R. Finck, *A Robust Defense: The Critical Components for a Reimagined Family Defense Practice*, 20 CUNY L. REV. F. 96 (2017), http://www.cunylawreview.org/reimagined-family-defense-finck [https://perma.cc/B4EVUA5G].

[239] STILL SHE RISES, TULSA INC., https://www.stillsherises.org [https://perma.cc/7JNP-FUCF] (last visited July 6, 2022).

[240] *Services*, NEIGHBORHOOD DEFENDER SERV., https://neighborhooddefender.org/services [https://perma.cc/95EZ-ZKR6] (last visited July 6, 2022).

[241] *About Us*, BRONX DEFENDERS, https://www.bronxdefenders.org/who-we-are [https://perma.cc/6GYR-MWXU] (last visited July 6, 2022).

[242] *Approach*, DEFENDER ASS'N. OF PHIL., https://phillydefenders.org/approach [https://perma.cc/X8MR-GHLM] (last visited July 6, 2022).

[243] *About Us*, MD. OFF. OF THE PUB. DEFENDER, https://www.opd.state.md.us/about-us [https://perma.cc/DGC3-EDVN] (last visited July 6, 2022).

[244] *Family Defense*, BROOKLYN DEFENDER SERVS., https://bds.org/our-work/family-defense [https://perma.cc/E2K5-CXN7] (last visited July 6, 2022).

[245] Kari Hong, *Gideon: Public Law Safeguard, Not a Criminal Procedural Right*, 51 U. PAC. L. REV. 741, 743 (2020) (discussing the right to counsel in criminal cases under the federal Sixth Amendment right to counsel).

[246] AFFECTED BY PARENTAL INCARCERATION, *supra* note 22, at 8 (recommending that state caseworkers support multidisciplinary teams in family regulation cases and that caseworkers attempt to add parts of these teams into their cases); Margolies & Kraft-Stolar, *supra* note 36, at 41–42 ("To avoid putting incarcerated parent defendants at an unfair disadvantage—and to decrease the possibility of unnecessary terminations—representations should be institutionalized to ensure that attorneys for parents have sufficient resources to conduct investigations, employ social workers, maintain legal support staff, and incorporate an interdisciplinary approach to their defense efforts.").

[247] Dorothy E. Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455, 807 (quoting Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolitionreform-mass-incarceration [https://perma.cc/C55S-5GEL]).

constitutional rights.[248] Their access to legal resources and to an interdisciplinary legal team would help "shrink rather than strengthen 'the state's capacity for violence' and facilitate the goal of building a society without" the family regulation systems.[249]

As legal scholar and professor Michelle Alexander explained, the criminal legal system "permanently locks a huge percentage of the African American community out of the mainstream society and economy."[250] The family regulation system, in turn, locks mothers out of parenting their children, especially Black children.[251] Because of the interlocked nature of the carceral state, the reforms proposed above address the symptoms of the problem, but they do not treat the disease itself.[252]

Access to law libraries and legal resources in jails and prisons and the appointment of interdisciplinary teams do not address the number of mothers trapped within both systems overall. While mothers would have more legal support, their attorneys' caseloads and pay may remain the same. Legal teams will continue to contend with institutional barriers because of their clients' incarceration. For example, the state will still be able to monitor legal visits, phone calls, and mails, and emails. Defense lawyers' difficulties in being able to have their mother-clients appear at court proceedings in person and to meet with them before and after would still exist.

Further, the nonreformist reforms will not eliminate the long-standing social narratives premised on racist and sexist troupes hurled upon mothers who are incarcerated.[253] As one report noted, "If incarcerated women share one salient, seemingly inescapable characteristic, regardless of race, class, age or other factors, it is their invisibility. They are, quite literally, locked away—isolated, unseen, and in minimal contact with the world outside."[254] Lawyers and their clients must defend against and address this stigma and so much more that mothers who are incarcerated face, while seeking to protect these mothers' parental rights. These reforms do not free mothers from the carceral state.

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[248] Roberts, *Systemic Punishment*, *supra* note 14, at 1498 ("The solution to the problem of maternal incarceration should be enforcement of the state's obligation to facilitate reunification, not permanent disruption of children's bonds with their mothers.").

[249] *Id*. at 465 (citing Dan Berger et al., *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolitionreform-mass-incarceration [https://perma.cc/C55S-5GEL]).

[250] THE NEW JIM CROW, *supra* note 12 at 13.

[251] Alan J. Dettlaff et al., *Racial Bias, Poverty, and the Notion of Evidence*, 99 CHILD WELFARE 61, 83 (2021) (evaluating the overwhelming evidence that documents the "racial disproportionality and disparities" for Black children in the family regulation system).

[252] Cloud et al., *supra* note 18, at 72 ("[T]he injustices of these systems are intertwined and the solutions must be as well.").

[253] Washington, *supra* note 120 (noting the need for counter-narratives, but also that attorneys' counter-narratives are based on the states' narratives).

[254] Margolies & Kraft-Stolar, *supra* note 36, at 4–6; DiLallo, *supra* note 40 (quoting Michelle Alexander's statement that recognizes how much society has ignored women and girls caught in the criminal legal system); Mitchell & Davis, *supra* note 132, at 424 (affirming that society has not recognized Black motherhood and has rendered mothers with criminal involvement invisible).

While other nonreformist reforms, like litigation and legislative modifications may exist, the best way to eliminate these legal obstacles is to stop investigating and separating people, chiefly Black mothers, in both the family regulation and criminal systems. Instead of throwing financial, time, and human resources into systems that have proven ineffective, racist, sexist, and biased and allow the repeated destruction of Black families, the state should focus on fostering stronger safety nets to end family separation altogether. "If [mothers] had health care, housing and access to good jobs and education and community, there would be less crime and less need" for the state to regulate and police them and their families.[255]

The COVID-19 pandemic proved how the family regulation system and the criminal legal system depend on trapping and punishing people in poverty, rather than supporting children.[256] At the start of the pandemic in March 2020, government officials warned of the increase in child abuse cases as schools shut down.[257] They feared that children would no longer be in the sight of the myriad of people required to report suspected child abuse, resulting in countless children allegedly suffering their abuse unprotected.[258] The District Attorney in Bronx, New York, forewarned, "There are kids behind closed doors that may be trapped with their abusers and there's no way for them to get help."[259]

These unfounded fears never came to fruition. In fact, a year after schools and social services halted, family regulation system heads like David Hansell, the Commissioner of ACS in New York City, admitted, "[I]t was just as likely that the pandemic was 'a very positive thing' for children, who were able to spend more time at home with their parents."[260] As Professor Anna Arons notes, during the shutdown, "[f]amilies stayed safely together not because of the family regulation system but because of its absence . . . . [C]ommunity members worked for and with each other, providing their neighbors food, diapers, childcare, mental health services, and redistributing government wealth."[261]

At the same time, as COVID-19 raged through jails and prisons, some administrators and policymakers realized the importance of reducing the number of people entering and incarcerated in these facilities.[262] For

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[255] Ben Kesslen, *Calls to Reform, Defund, Dismantle and Abolish the Police, Explained,* NBC NEWS (June 8, 2020) https://www.nbcnews.com/news/us-news/calls-reform-defund-dismantle-abolish-police-explained-n1227676 [https://perma.cc/WV69-JS5V].

[256] Kendra Hurley, *How the Pandemic Became an Unplanned Experiment in Abolishing the Child Welfare System*, THE NEW REPUBLIC (Aug. 18, 2021), https://newrepublic.com/article/163281/pandemic-became-unplanned-experiment-abolishing-child-welfare-system [https://perma.cc/ZT29-6W24]. *See also* Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L. F. 1 (2022) (describing how the COVID-19 pandemic resulted in less children entering the family regulation system and more families receiving support in ways that kept children safe in New York City).

[257] Hurley, *supra* note 256.

[258] *Id.*; Fitzgerald, *supra* note 100.

[259] Hurley, *supra* note 256.

[260] Fitzgerald, *supra* note 100.

[261] Arons, *supra* note 256.

[262] *The Most Significant Criminal Justice Policy Changes from the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (Nov. 24, 2021), https://www.prisonpolicy.org/

example, then-Attorney General William Barr advised the Federal Bureau of Prisons ("BOP") to reduce the prison population because of the devasting health risks COVID-19 posed.[263] The data showed that law enforcement has the ability decrease the jail and prison population by not charging people with low-level offenses[264] and technical violations.[265] These actions make communities safer.[266]

Further, as the unemployment rate increased during the COVID-19 pandemic and fearing economic collapse, federal and state governments provided financial support to families.[267] These measures included enlarged unemployment insurance funds,[268] stimulus payments,[269] and the Child Tax Credit increased monthly payments.[270] These safety net funds allowed some families to support their children and reduced the fear of unstable housing and food insecurity.[271] One study found that Black and

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virus/virusresponse.html [https://perma.cc/22V9-SD3Z] (summarizing the different methods sheriffs, jail and prison administrators, state and local officials, governors, parole boards, prosecutors, probation officers, and courts employed to reduce the number of people arrested and in jails and prisons across the nation).

[263] William Barr, *Memorandum for Director of Bureau of Prisons*: *Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, OFF. OF THE ATT'Y GEN. 1, 1 (Apr. 3, 2020), https://www.justice.gov/file/1266661/download [https://perma.cc/7UHG-E32V] (ordering BOP "to move with dispatch in using home confinement, where appropriate, to move vulnerable inmates out of these institutions").

[264] *Id*. (explaining that prosecutors in Brooklyn, New York and Philadelphia, Pennsylvania, decided not to charge people with low-level, nonviolent offenses and sought the release of people charged with non-violent offenses in March 2020).

[265] *Id*. (noting that Colorado stopped arresting people for technical parole violations temporarily in March 2020 because of the pandemic). Technical violations include "a missed appointment or unpaid fines or fees, rather than committing new offenses," but they may result in re-arrest and time in jail or prison. SWAVOLA ET AL., *supra* note 26, at 32.

[266] Jasmine Heiss et al., *The Scale of the COVID-19-Related Jail Population Decline*, VERA INST. OF JUST. 4 (2020), https://www.vera.org/downloads/publications/the-scale-of-covid-19-jail-population-decline.pdf [https://perma.cc/UX8Q-KLJ4] ("Maintaining recent reductions and further reducing jail populations will make communities safer in the coming months and years by reducing the likelihood and severity of future outbreaks of COVID-19 and enabling reinvestment of state and local dollars into community-based services and resources that support public health and public safety.").

[267] Zachary Parolin et al., *Monthly Poverty Rates Among Children After the Expansion of the Child Tax Credit,* 5 POVERTY & SOC. POL'Y BRIEF 1, 7 (2021) https://static1.squarespace.com/static/5743308460b5e922a25a6dc7/t/612014f2e6deed08adb03e18/1629492468260/Monthly-Poverty-with-CTC-July-CPSP-2021.pdf [https://perma.cc/R2MQ-74SJ].

[268] Frances Chen & Em Shrider, *Expanded Unemployment Insurance Benefits During Pandemic Lowered Poverty Rates Across All Racial Groups*, U.S. CENSUS BUREAU (Sept. 14, 2021), https://www.census.gov/library/stories/2021/09/did-unemployment-insurance-lower-official-poverty-rates-in-2020.html [https://perma.cc/F7J9-QZPP].

[269] Jason DeParle, *Vast Federal Aid Has Capped Rise in Poverty, Studies Find*, N.Y. TIMES (Sept. 14, 2020), https://www.nytimes.com/2020/06/21/us/politics/coronavirus-poverty.html [https://perma.cc/RU69-UL3M] (describing the benefits families received and highlighting how government policies excluded certain families from receiving these benefits).

[270] Parolin et al., *supra* note 267, at 7.

[271] DeParle, *supra* note 269; Stephen Roll et al., *State by State: How Are Families in the U.S. Using Their Child Tax Credit Payments?*, SOC. POL'Y INSTITUTE RES. 4 (2021), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1054&context=spi_research [https://perma.cc/Z45N-UQF6] (finding that 51% of families used the Child Tax Credit on food for their families, 36% paid essential bills, and 30% covered "clothing and other essentials for their children"); Rachel Louise Ensign, *Monthly Child-Tax-Credit Payments Cease, Ending Cushion for Family Budgets*, WALL ST. J. (Jan. 3, 2022), https://www.wsj.com/

Latino children would have the "greatest gains" if all eligible families received these funds.[272] These no strings attached payments kept an estimated six million children from poverty in July 2021.[273] Providing no-strings attached financial support helped address financial distress.[274] Yet again, the government's response to the pandemic emphasized how effective less surveillance and more support would protect children and families from harm.

With fewer mothers in the criminal legal system and family regulation system, defense counsel would be less overburdened with cases, they would not have to contend with the bad mother narrative that now engulfs their mother-clients, case strategy and communications would be more efficient, and mothers would be home with their children. The carceral state would have less control.

However, the fear of allowing mothers, expressly Black mothers, to parent overpowers the needs and best interests of the children the state claims to be protecting. Racism, sexism, and bias increase the impact of these discriminatory systems on Black mothers, in particular, and thereby, obstruct the ability of their lawyers to defend these mothers' parental rights.

V. CONCLUSION

The myth that lawyers succeed in serving parental interests effectively ignores the reality of mothers who are incarcerated. Access to legal resources and multi-disciplinary teams within family regulation system cases will help address some of the challenges identified in this Piece. That said, as activists and scholars critique the racism and discrimination inherent in both the criminal legal and family regulation systems, they must not ignore the processes that are destroying Black families, mainly, across the nation.

While states claim to be protecting children from "bad" or "dangerous" mothers, they are really reinforcing biased and harmful systems. Dorothy Roberts has reasoned, "Black mothers are useful to the neoliberal agenda because state regulation of their bodies, already devalued by a long history of reproductive regulation and derogatory stereotypes of maternal irresponsibility, makes excessive policing by foster care and prison seem necessary to protect children and the public from harm."[275] The termination of parental rights, also known as the civil death penalty, is the ultimate outcome of too many families ensnared the criminal and family regulation systems, unnecessarily.[276] We must recognize that

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articles/monthly-child-tax-credit-payments-cease-ending-cushion-for-family-budgets-11641205801 [https://perma.cc/8ZM8-BXD8] (describing the savings and benefits families received because of the Child Tax Credit).

[272] Parolin et al., *supra* note 267 at 7.

[273] *Id.*

[274] DeParle, *supra* note 269; Melody Webb, *Building a Guaranteed Income to End the "Child Welfare" System*, 12 COLUM. J. RACE & L. _ (2022) (emphasizing the financial discrimination used against Black families within the family regulation system).

[275] Roberts, *Systemic Punishment*, *supra* note 14, at 1500.

[276] *Id.* at 1498 (noting that "the lengthy absence of parents for military duty, missions, career, or private substance abuse treatment" do not automatically warrant the civil death penalty").

the United States incarcerates too many people and takes away children from too many parents, principally Black mothers who live in poverty, and increases the likelihood that these children will be trapped in the criminal and family regulation systems.[277]

To have any chance of facing the countless layers within the carceral state, women who are incarcerated and their counsel in the family regulation system must have powerful tools available. With the nonreformist reforms, mothers who are incarcerated will be equipped to protect their parental rights better, but these reforms are only the start. With the ultimate goal of abolishing the racist and sexist criminal and family regulation systems, mothers ensnared in both systems, their legal teams, and advocates across the nation will continue to work to abolish the racist and sexist criminal and family regulation systems and dismantle the carceral state.

[277] Durkin et al., *supra* note 137, at 36 n.125.