

## Bending the Bars for Mothers: How Prison Alternatives Can Build a Stronger Oregon

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| Introduction .....   | 755 |
| I. Demographics of Incarcerated Women .....                | 757 |
| II. Challenges Faced by Incarcerated Women .....           | 760 |
| A. Social and Economic Challenges .....                    | 760 |
| B. Legislative Challenges .....                            | 762 |
| 1. Oregon Law .....  | 763 |
| 2. Federal Law .....                                       | 768 |
| III. Alternatives and Solutions.....                       | 773 |
| A. Prison Nurseries and Residential Parenting Programs ... | 774 |
| B. Parent Sentencing Alternatives .....                    | 777 |
| Recommendations and Conclusion .....                       | 780 |

### INTRODUCTION

**M**ore persons are now incarcerated in the United States than in any other country in the world.<sup>1</sup> By the end of 2010, state and

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<sup>1</sup> See, e.g., Adam Liptak, *U.S. Prison Population Dwarfs that of Other Nations*, N.Y. TIMES (Apr. 23, 2008), <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html?pagewanted=all> (“The United States has, for instance, 2.3 million criminals behind bars, more than any other nation, according to data maintained by the International Center for Prison Studies at King’s College London.”); Tyjen Tsai & Paola Scommegna, *U.S. has World’s Highest Incarceration Rate*, POPULATION

federal prisoners totaled 1,612,395, most of whom were male.<sup>2</sup> Fourteen thousand of those inmates were housed in Oregon, just 1066 of whom were female.<sup>3</sup> Traditionally, women were rarely involved in the criminal justice system.<sup>4</sup> Since the 1970s, however, women have comprised the fastest growing population of criminal offenders in the United States<sup>5</sup>—a fact that is true for Oregon’s penal system as well.<sup>6</sup> Yet because women account for a mere fraction of the total U.S. inmate population, the repercussions of the incarceration of women can be difficult to ascertain. With a focus on Oregon law and policies, this Comment finds that the increased incarceration of women for nonviolent offenses has substantial economic and societal consequences that necessitate a progressive approach to prison policies and criminal sentencing.

In an effort to reduce the toll of maternal incarceration, some states have implemented progressive policies and legislative efforts to encourage continuity in mother-child relationships, such as prison nurseries and parent sentencing alternatives. Presently, Coffee Creek Correctional Facility (CCCF), Oregon’s sole women’s prison, offers a number of programs for incarcerated mothers and their children, such as parenting skills classes, support groups, and special events.<sup>7</sup> However, Oregon has yet to implement a prison nursery or an alternative sentencing program to encourage not just reunification after the mother’s release, but continuous bonding between

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REFERENCE BUREAU (Aug. 2012), <http://www.prb.org/Articles/2012/us-incarceration.aspx>.

<sup>2</sup> PAUL GUERINO ET AL., U.S. DEP’T OF JUSTICE, PRISONERS IN 2010, at 1, 2 (2011) (table showing that there were 1,499,573 male prisoners housed in state and federal prisons at the end of 2010 compared to 112,822 female prisoners), available at <http://www.bjs.gov/content/pub/pdf/p10.pdf>.

<sup>3</sup> *Id.* at 14, 16 (tables showing the total number of inmates incarcerated at state and federal prisons by jurisdiction and the total number of female inmates incarcerated at state and federal prisons by jurisdiction).

<sup>4</sup> Jessica Y. Kim, Note, *In-Prison Day Care: A Correctional Alternative for Women Offenders*, 7 CARDOZO WOMEN’S L.J. 221, 222 (2001) (discussing demographics of incarcerated women in the United States).

<sup>5</sup> Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL’Y REV. 133, 133 (1999) (discussing historical changes in sentencing women to prison in the U.S. criminal justice system).

<sup>6</sup> Hannah Hoffman, *Jail Birds: The Fastest-Growing Group of Inmates in Oregon: Women. A Look Inside Coffee Creek.*, WILLAMETTE WEEK (Jan. 18, 2012), [http://www.week.com/portland/article-18696-jail\\_birds.html?current\\_page=1](http://www.week.com/portland/article-18696-jail_birds.html?current_page=1).

<sup>7</sup> COFFEE CREEK CORR. FACILITY, PROGRAMS AND SERVICES (2012), available at [http://www.oregon.gov/doc/ops/prison/docs/pdf/cccf\\_program\\_full\\_list.pdf](http://www.oregon.gov/doc/ops/prison/docs/pdf/cccf_program_full_list.pdf).

incarcerated mothers and their minor children. Thus, this Comment examines the policies and alternatives implemented by the neighboring State of Washington in order to make a regionally appropriate recommendation for Oregon's Legislature and Department of Corrections.

Part I of this Comment provides foundational background information regarding the demographics of women incarcerated in U.S. prisons. Part II addresses the judicial and legislative challenges faced by incarcerated mothers at both the state and federal levels. Part III examines existing prison nursery and parent sentencing alternatives with a focus on those implemented by Washington State. Finally, this Comment concludes by providing a brief recommendation for Oregon's prison policies and programs.

## I

### DEMOGRAPHICS OF INCARCERATED WOMEN

Women have comprised the fastest growing population of criminal offenders in the U.S. justice system since the mid-1970s.<sup>8</sup> Today's population of incarcerated women is dramatically different from those historically sentenced. Traditionally, women took on domestic caretaker roles and therefore engaged in limited social interactions.<sup>9</sup> As a result, women infrequently encountered the criminal justice system; men committed most crimes, especially violent crimes.<sup>10</sup> Those women who were convicted of crimes typically committed such offenses as prostitution, infanticide, and illegal abortion.<sup>11</sup> Today, however, while women remain the primary caretakers in their families, the justice system has seen a shift in women's criminality and an increase in the number of women sentenced to U.S. prisons.<sup>12</sup>

The increasing number of incarcerated women in the United States represents a struggle that begins long before their involvement with the criminal justice system. For most of these women, their incarceration often "constitutes a culminating victimization that results from multiple forms of vulnerability and violation, including

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<sup>8</sup> Acocha & Raeder, *supra* note 5, at 134 (discussing historical changes in sentencing women to prison in the U.S. criminal justice system).

<sup>9</sup> Kim, *supra* note 4 (discussing demographics of incarcerated women in the United States).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 222–23.

domestic violence, sexual abuse, drug addiction and other health problems, and homelessness.”<sup>13</sup> The average woman prisoner is thirty-one years old, from an urban background, the member of a racial or ethnic minority group, and a mother.<sup>14</sup>

The number of incarcerated mothers in U.S. federal and state prisons increased 122% from 1990 to 2007.<sup>15</sup> One out of every seventeen women entering the prison system is pregnant at intake,<sup>16</sup> and an estimated seventy percent of women prisoners are mothers to two or three children.<sup>17</sup> More than half are mothers to minor children,<sup>18</sup> and most are single parents who were the primary caretakers for their children prior to incarceration.<sup>19</sup> Mothers are less likely to have committed violent crimes than non-mother prisoners; most are serving sentences for property and drug-related offenses.<sup>20</sup> Because most of these women are single parents who come from backgrounds of poverty and abuse, their offenses may be characterized as crimes of survival.<sup>21</sup>

These women and their families generally face greater challenges than their male counterparts, including histories of abuse, addiction, and socioeconomic stresses.<sup>22</sup> Undoubtedly, the incarceration of fathers presents hardships that can lead to the disintegration of their

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<sup>13</sup> Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1480 (2012).

<sup>14</sup> Kim, *supra* note 4, at 224.

<sup>15</sup> Deseriee A. Kennedy, “*The Good Mother*”: *Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 168–69 (2012) [hereinafter Kennedy, *Good Mother*].

<sup>16</sup> Purdy, KBTC DOCUMENTARIES (May 29, 2010), <http://video.kbtc.org/video/1499307098/>.

<sup>17</sup> Kennedy, *Good Mother*, *supra* note 15, at 170.

<sup>18</sup> Anne E. Jbara, *The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Programs*, 87 IND. L.J. 1825, 1827 (2012).

<sup>19</sup> Kennedy, *Good Mother*, *supra* note 15, at 170.

<sup>20</sup> *Id.* at 169–70.

<sup>21</sup> *Id.* (“Imprisoned mothers are less likely to present a danger to their children or society. Studies suggest that while some inmate parents commit violent crimes, the majority . . . were incarcerated for non-violent offenses. . . . Mothers in prison are less likely to have committed a violent crime than other prisoners and more likely to have committed drug and property crimes than non-mothers. Based on the higher rates of poverty, their status as single parents, and the high percentage of inmate women who are domestic abuse survivors, it is very likely that their crimes may be related to the stress of raising children, providing for their families, and merely surviving.” (citation omitted)).

<sup>22</sup> *Id.* at 164.

families.<sup>23</sup> However, in the majority of cases, when fathers are incarcerated, their children remain with their mothers during the period of incarceration.<sup>24</sup> In 1994, nearly ninety percent of incarcerated fathers reported that their children were living with the other parent while just twenty-five percent of incarcerated mothers reported that their children resided with the children's fathers.<sup>25</sup> In short, the children of incarcerated mothers are often left without parental guardianship.<sup>26</sup>

Mothers must therefore rely more often on nonparent family members or the state to care for their children during their incarceration.<sup>27</sup> Even when nonparent family members are able to act as guardians for the children, financial stressors often require them to rely on state assistance in order to support the children; thus, a large number of these children end up in foster care.<sup>28</sup> For the children who have no nonparent family members who are able to care for them, state care becomes an immediate reality. Approximately eleven percent of incarcerated mothers have children in the foster care system,<sup>29</sup> a system that has failed to contemplate and provide

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<sup>23</sup> Kim, *supra* note 4, at 224–25 (“Admittedly, economic and social hardships are not unique to the families of incarcerated mothers. Obviously, incarcerating fathers also inflicts economical and emotional hardships on family members. Fathers’ incarceration can lead to the disintegration of their families due to separation from their partner and estrangement from children. Aside from the emotional hardships their children must inevitably experience, the incarceration of fathers has a significant impact on the economic status of the family unit. In most cases, men draw a greater portion of the family income. Therefore, when fathers are incarcerated, the families must make do with substantially less income.” (citation omitted)).

<sup>24</sup> *Id.* at 225 (“[W]hile the incarceration of fathers may have a considerable financial impact on the children, the children’s well-being may still be guarded or cushioned against the impact by the mothers who stay behind with the children. Unfortunately, the reverse is not true when mothers are incarcerated.”).

<sup>25</sup> *Id.* at 226.

<sup>26</sup> *Id.*

<sup>27</sup> Kennedy, *Good Mother*, *supra* note 15, at 163–64; *see also* Jbara, *supra* note 18, at 1826 (“A number of scholars have investigated the societal impact of these family arrangements and have found that, while children whose fathers are incarcerated more often than not live with their mothers, children whose mothers are incarcerated typically live with a nonparent family member or become part of the foster care system.” (citation omitted)).

<sup>28</sup> Kennedy, *Good Mother*, *supra* note 15, at 173 (“Even when extended family is available to help care for these children, the family may be too stressed by economic and other factors to provide adequate care without significant state assistance. Many children . . . are placed with relatives when their mother is incarcerated. However, . . . a large percentage of these children eventually end up in state care.” (citation omitted)).

<sup>29</sup> *Id.* at 172–73.

adequately for children of incarcerated parents.<sup>30</sup> Thus, sentencing mothers to prison affects not only the offenders; its negative repercussions extend to the inmates' children, families, communities, and state foster care agencies.

## II

### CHALLENGES FACED BY INCARCERATED WOMEN

The typical woman sentenced to prison in the United States faces unique challenges due, in large part, to her socioeconomic status and state and federal legislative measures that mandate the term of her incarceration. The repercussions of such measures extend far beyond the goals of incarceration, sometimes causing disparate punitive effects for mothers that were not anticipated by the enacting legislatures. The most unsettling consequence of maternal imprisonment is the states' likely attempt to permanently terminate parental rights based on the duration of incarceration and despite a mother's nonviolent history or desire to parent.

#### *A. Social and Economic Challenges*

Incarceration creates incredible obstacles that all too often effectively revoke a mother's right and ability to parent.<sup>31</sup> Not the least of these obstacles is the physical distance that is frequently placed between incarcerated mothers and their children.<sup>32</sup> Women are typically placed in prisons located in rural areas<sup>33</sup> at distances that are farther from their homes than are male prisoners.<sup>34</sup> Most incarcerated mothers are placed more than one hundred miles from their homes,<sup>35</sup> with over two-thirds of women in federal prisons placed more than five hundred miles from their families.<sup>36</sup>

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<sup>30</sup> *Id.* at 173–74 (“The child welfare system is ill-equipped to deal with incarcerated parents and does not provide for long-term childcare needs.”).

<sup>31</sup> Kim, *supra* note 4, at 227.

<sup>32</sup> *Id.* at 227–28 (“[F]or women inmates with children, the distant location of prisons adds to the effective severance of familial ties. While most women in prison are from urban surroundings, women's prisons are most often located in rural areas. For example, there are only thirteen federal women institutions in the United States, and they are spread across the country. There are three facilities in California, two each in Arizona and Florida, and one each in Connecticut, New York City, Chicago, Kentucky, Texas, and West Virginia.” (citation omitted)).

<sup>33</sup> *Id.* at 227.

<sup>34</sup> Kennedy, *Good Mother*, *supra* note 15, at 178.

<sup>35</sup> *Id.*

<sup>36</sup> Kim, *supra* note 4, at 226.

The severance of these women from their support systems makes them more likely to recidivate; they form new support systems during their incarceration, and are therefore more likely to regard prison as the base of their existing support network.<sup>37</sup> Mothers who are serving prison sentences must rely on others to make visitations with their children possible, but the distance placed between them and their children makes visits costly and time-consuming, and thus increases the likelihood of severed family ties.<sup>38</sup> In addition, prisons often fail to offer child-friendly areas for visitations, and most do not offer areas in which parents can play with their children.<sup>39</sup> Telephone contact, too, is very expensive, and many mothers find communicating by mail difficult and ineffective, particularly when they are trying to communicate with very young children.<sup>40</sup> However, even with great distance placed between an incarcerated mother and her children, the bonds they share can remain intact during her period of incarceration.<sup>41</sup> A progressive women's prison system should do all that it can to strengthen such bonds.<sup>42</sup>

The social and economic struggles of incarcerated mothers, as compared to their male counterparts, makes clear the need for progressive policies to address these issues. Compared to incarcerated men, incarcerated women report higher rates of addiction, substance abuse, incidences of child abuse and domestic violence, and higher

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<sup>37</sup> Jbara, *supra* note 18, at 1831 (“These women are inevitably more likely to commit future crimes because of their complete separation from their support system[s], and will be more likely to return to their only existing support network: prison.” (internal quotation marks omitted)).

<sup>38</sup> Kim, *supra* note 4, at 229; *see also* Kennedy, *Good Mother*, *supra* note 15, at 178 (“[The distance placed between incarcerated mothers and their families] adds to the high cost of staying in touch by making it more expensive and time consuming to visit a female prisoner.”).

<sup>39</sup> Kennedy, *Good Mother*, *supra* note 15, at 178 (“[P]rison and jail facilities are designed with security as a primary goal and do not typically provide convenient and family-friendly visiting areas.”); *see also* Denise Johnston, *Services for Children of Incarcerated Parents*, 50 FAM. CT. REV. 91, 93 (2012) (“Like most public spaces, correctional visiting environments are not designed to meet the needs of children. The low numbers of incarcerated persons in the U.S. in the first half of the last century meant that few children visited parents in jails and prisons. There was no perceived need for child-friendly visiting rooms until prison populations began to rise in the 1960’s.” (citation omitted)).

<sup>40</sup> Kennedy, *Good Mother*, *supra* note 15, at 183.

<sup>41</sup> *Id.* at 192 (“Although incarceration presents a number of obstacles to parenting, it does not necessarily break the psychological bond between the parent and the child.”).

<sup>42</sup> Kim, *supra* note 4, at 226–27.

rates of mental health issues.<sup>43</sup> They often come from communities with inadequate resources, such as deficient housing, education, and job opportunities.<sup>44</sup> Such backgrounds, coupled with criminal convictions, generate seemingly insurmountable social stigmas affecting their ability to parent.<sup>45</sup> It is not uncommon for these women to be considered unfit to parent based on past actions.<sup>46</sup> Incarcerated mothers challenge societal views about “good mothers,” as women are often judged by their commitment and time devoted to motherhood.<sup>47</sup> As a result, the challenges faced by incarcerated mothers extend beyond social stigma. Legislative efforts and family law policies reinforce the perception that criminal convictions may be viewed as evidence of parental unfitness and the need for state intervention.<sup>48</sup>

### *B. Legislative Challenges*

Women are the fastest growing population of criminal offenders in the United States<sup>49</sup> thanks in large part to evolving gender roles, modern day feminism, and changes in criminal justice policies at both federal and state levels.<sup>50</sup> Women are now being imprisoned for

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<sup>43</sup> Kennedy, *Good Mother*, *supra* note 15, at 169; *see also* Kim, *supra* note 4, at 231–32 (“According to a study by the U.S. Department of Justice, over 75% of incarcerated women reported that they were abused as children; over 53% of the women inmates reported that they were abused by their parent or guardian, and over 22% reported that they were abused by other relatives. . . . About 32% of the incarcerated women said that the abuse had occurred before they were eighteen years old, and 24% said that they were abused since the age of eighteen.”).

<sup>44</sup> Kennedy, *Good Mother*, *supra* note 15, at 187.

<sup>45</sup> *Id.* at 171 (“Incarcerated mothers are not necessarily unfit, uncaring, neglectful or abusive. Yet the predominant approach to dealing with incarcerated mothers and their families is to treat these women as if their convictions are proof of their unsuitability as parents and evidence of the right of the state to intervene in their families.” (citation omitted)).

<sup>46</sup> Kim, *supra* note 4, at 231 (“From a moral standpoint, one may conclude that a parent who violates the moral fiber of the general society would be unable to impress a decent and honorable character onto their children. Also, because an incarcerated parent is unable to attend to [her] children’s everyday needs, incarcerated parents are often considered unfit to raise their children.”).

<sup>47</sup> Kennedy, *Good Mother*, *supra* note 15, at 182 (“Women who defy cultural norms about mothers and mothering often face criticism and some level of resistance. Incarcerated women challenge societal norms about mothering and stand counter to generally accepted views about how ‘good mothers’ conduct themselves.” (citation omitted)).

<sup>48</sup> *Id.* at 171.

<sup>49</sup> Acoca & Raeder, *supra* note 5, at 133.

<sup>50</sup> Kim, *supra* note 4, at 222–23.



offenses that previously would not have resulted in incarceration.<sup>51</sup> Specifically, harsh sentencing policies for nonviolent offenses often yield unduly long prison terms for many convicted women.<sup>52</sup> Despite an incarcerated mother's efforts and desire to parent, extended periods of incarceration may lead to the permanent termination of parental rights.<sup>53</sup> Incarcerated mothers must therefore defend against legislative efforts that propel states to pursue termination for children in foster care rather than encouraging family reunification.

### *1. Oregon Law*

Oregon case law provides certain protections for incarcerated mothers not found in other states. Even so, a parent's incarceration may be presented as a factor warranting a termination judgment.<sup>54</sup> Additionally, legislative measures approved by Oregon voters have led to an increase in the number of mothers sentenced to serve time at CCCF.<sup>55</sup> A more progressive sentencing and prison system in Oregon would reduce some of the resulting stress placed on state agencies.

Oregon's judicial inquiry as to an incarcerated mother's parental rights began with *State v. Grady*, a case in which the Oregon Supreme Court declined to terminate the parental rights of a young, incarcerated mother who had been convicted of forgery.<sup>56</sup> In *Grady*, the court grappled with the severity and permanence of a termination judgment in light of the mother's attempts and desire to parent:

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Although a comparatively larger segment of women still take on the domestic caretaker roles than men do, modern day feminism has drastically transformed the social, gender, and power structure. Women's roles have diversified, and while women still remain the default caretakers of family units, they are no longer socially restricted as they were in the past. Women have become socially, politically, and economically active members in society. These expanded social interactions have led to more frequent conflicts and crimes. As a result, modern day women commit more serious crimes more often than in the past.

*Id.* (citation omitted).

<sup>51</sup> *Id.* at 223.

<sup>52</sup> Kennedy, *Good Mother*, *supra* note 15, at 177.

<sup>53</sup> See Adoption and Safe Families Act, 42 U.S.C. § 675(5)(E) (2006) (requiring states to move for permanency where children remain in the foster care system for eighteen of twenty-two consecutive months).

<sup>54</sup> See *State ex rel. Dep't of Human Servs. v. Williams*, 130 P.3d 801, 804 (Or. Ct. App. 2006) (holding that "DHS cannot be . . . excused [from making reasonable efforts to reunify the family] based solely on a parent's incarceration, without more").

<sup>55</sup> *E.g.*, Hoffman, *supra* note 6.

<sup>56</sup> 371 P.2d 68 (Or. 1962).

We know that an incarceration does not legally effectuate a parental abandonment of a child so as to waive the necessity for a consent to a proposed adoption. Nor do we think that such an enforced separation of the parent from a child warrants an inference that the convicted parent, especially a mother of a child of tender age, has suffered any diminution of her natural maternal instincts or desires to resume the custody and care of such infant after her release. The evidence here strengthens our conviction in the righteousness of that conclusion. It shows her continuing interest and inquiry by correspondence in the welfare of her two older daughters, who at the time of the hearing were in the care of defendant's mother. It speaks of her fruitless efforts to locate through the officers of the Welfare Commission the whereabouts of the youngest child. We deem it of no little significance and a display of the depth of her maternal regard that, notwithstanding her penal situation, she elected to contest the effort to take the child away from her forever, and failing in the trial court, initiated this appeal.<sup>57</sup>

The court therefore determined that a termination judgment based solely on the mother's incarceration, without consideration for her efforts to parent from prison, would be inappropriate.<sup>58</sup>

Following *Grady*, however, Oregon case law permitted the fact of a parent's incarceration to act as a factor warranting termination. What is worse, case law then supported the proposition that incarceration effectively placed a parent outside the reach of services.<sup>59</sup> As a result, the Department of Human Services was relieved of its obligation to make "reasonable efforts . . . to prevent or eliminate the need for removal" of a child from an incarcerated parent.<sup>60</sup> As a result, termination judgments were sometimes made even where the parent had made efforts to safely parent while in prison.

For example, in *In re Moyer*, the Oregon Court of Appeals affirmed a termination judgment despite evidence that the incarcerated mother was working to ensure a better life for her children upon her release.<sup>61</sup> The court stated that its "paramount

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<sup>57</sup> *Id.* at 69 (citation omitted).

<sup>58</sup> *Id.*

<sup>59</sup> See *State ex rel. Juvenile Dep't v. Dee*, 526 P.2d 1036, 1037 (Or. Ct. App. 1974) ("[R]easonable efforts by available social agencies . . . to effect a lasting adjustment . . . in the parent cannot be attempted where the parent is not to be found, or if by his conduct he places himself in prison, beyond the reach of reasonable efforts." (emphasis added) (citation omitted) (quoting former OR. REV. STAT. § 419.523(2)(e) (1973)) (internal quotation marks omitted)).

<sup>60</sup> OR. REV. STAT. ANN. § 419B.340(1) (West 2013).

<sup>61</sup> 601 P.2d 821, 825 (Or. Ct. App. 1979).

concern [was] the welfare of the children,” and determined that the best interests of the children outweighed the mother’s right to parent.<sup>62</sup>

Over time, however, Oregon case law reformed the Department of Human Services’ statutory obligations and provided certain protections for incarcerated parents. Nearly twenty years after *Moyer*, for example, the Oregon Court of Appeals reversed a termination judgment based on the mother’s incarceration and drug addiction in *State ex rel. Children’s Services Division v. Rollins*.<sup>63</sup> The court opined that the incarcerated mother should be given the opportunity and resources necessary to serve her desire to parent:

The primary factor that has prevented mother from caring for child is her drug addiction. If that impediment is removed, the evidence persuades us that, in all other respects, mother has adequate skills to provide for the well being of child. She was described at trial as a loving parent and there was no evidence that she physically abused or neglected child.<sup>64</sup>

Later, in *State ex rel. State Office for Services to Children and Families v. Stillman*, the Oregon Supreme Court reinforced the policy that a parent’s incarceration may not be considered “criminal conduct” that presents the risk of harm on which a termination judgment is based.<sup>65</sup> Nevertheless, the court then declined to propose a policy that would eliminate parental incarceration from being a

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While in prison, the mother ha[d] completed two years of community college classes in preschool education and [was enrolled in] liberal arts classes [at the time of appeal]. . . . A prison social worker and the director of social services both testified that the mother was a model prisoner who pursued her education and counseling sessions very seriously. They testified that she possesse[d] character traits which enable change and was not likely to become a career criminal.

*Id.* at 823.

<sup>62</sup> *Id.* at 825.

<sup>63</sup> 914 P.2d 1094, 1095 (Or. Ct. App. 1996). “The trial court terminated mother’s parental rights upon finding that ‘[mother] is presently not able to meet the physical and emotional needs of her child because she finds herself incarcerated once more.’” *Id.*

<sup>64</sup> *Id.* at 1096.

<sup>65</sup> 36 P.3d 490, 496–97 (Or. 2001) (“Incarceration . . . is a possible consequence of criminal conduct, but it is not, itself, such conduct. Thus, it would be error for a court to rely on an incarceration as ‘criminal conduct’ and to base a decision to terminate parental rights specifically on the basis of [the relevant termination statute].”).

sufficient factor to terminate parental rights on its own.<sup>66</sup> Instead, that policy arrived five years later from the lower court.<sup>67</sup>

In *State ex rel. Department of Human Services v. Williams*, the Oregon Court of Appeals held “that DHS cannot be . . . excused [from making reasonable efforts toward reunifying the family] based solely on a parent’s incarceration, without more.”<sup>68</sup> The court reversed the termination judgment on this basis, finding that DHS had failed to meet its statutory obligation.<sup>69</sup> Specifically, the court found that DHS’s “involvement with father was virtually nonexistent . . . despite father’s request that DHS contact him in jail (and it appears he could not contact them while incarcerated) and despite the fact that the agency apparently was aware that father was participating in various programs offered by the jail.”<sup>70</sup> Those facts, in addition to father’s “imminent release from jail within four months of the permanency hearing,” led to the court’s reversal.<sup>71</sup>

Today, DHS continues to present parental incarceration as evidence against parents in termination proceedings.<sup>72</sup> In light of *Williams*, however, courts typically consider all conditions affecting the offender’s ability to parent safely rather than finding a parent’s incarceration alone to be dispositive.<sup>73</sup>

Nonetheless, the length of imprisonment may still be offered as evidence against a parent at a termination hearing.<sup>74</sup> Legislative measures implementing strict mandatory sentences may therefore affect the likelihood of termination judgments. Under such measures, Oregon offenders are now sentenced to lengthy terms of imprisonment for the commission of certain crimes, even if the offense would not have resulted in prison time in the past.<sup>75</sup> In the last ten years, the number of male offenders sentenced to prison in Oregon

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<sup>66</sup> *Id.* (“However, the foregoing discussion does not place incarceration, and its consequences for the children, outside the purview of the court. A parent’s imprisonment for a criminal act is, in any event, a ‘condition’ of the kind that the court is entitled to consider . . . . It cannot be disputed reasonably that any prolonged incarceration could be a condition so ‘seriously detrimental to the child’ as to warrant a finding of unfitness.”).

<sup>67</sup> *State ex rel. Dep’t of Human Servs. v. Williams*, 130 P.3d 801 (Or. Ct. App. 2006).

<sup>68</sup> *Id.* at 804.

<sup>69</sup> *Id.* at 806–07.

<sup>70</sup> *Id.* at 806.

<sup>71</sup> *Id.*

<sup>72</sup> *See, e.g., Dep’t of Human Servs. v. D.M.T.*, 243 P.3d 836, 842 (Or. Ct. App. 2010).

<sup>73</sup> *Id.* at 844.

<sup>74</sup> *See In re Moyer*, 601 P.2d 821, 824 (Or. Ct. App. 1979), *rev. den’d*, 288 Or. 633 (1980).

<sup>75</sup> *See, e.g., Hoffman, supra* note 6.

increased by twenty-eight percent; during that same time, the corresponding number of females increased by eighty-six percent.<sup>76</sup> This increase appears to be the result of ballot measures implementing mandatory minimum prison sentences for the commission of certain crimes.<sup>77</sup>

In November of 1994, Oregon voters approved Ballot Measure 11, which mandates minimum prison sentences for such violent offenses as murder, assault, and forcible rape.<sup>78</sup> With few exceptions, offenders are sentenced to serve the mandatory minimum prison terms without any possible reduction.<sup>79</sup> Although many believe Measure 11 is responsible for the increase in women inmates sentenced to serve time at CCCF, most female offenders commit property or drug related offenses not included in Measure 11.<sup>80</sup> Thus, it is the legislature's focus on nonviolent crimes that has caused women to comprise the fastest growing population in the Oregon penal system.<sup>81</sup>

Over the past fifteen years, the Oregon Legislature has passed bills implementing strict mandatory prison sentences for repeat property offenders, even under circumstances that previously would have resulted in probation rather than prison time.<sup>82</sup> As a result, CCCF has seen the number of inmates sentenced for felony property crimes double from 2000 to 2011.<sup>83</sup> Most recently, Ballot Measure 57

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Measure 11 Mandatory Minimum Sentencing*, OR. DEP'T OF CORR., [http://www.oregon.gov/DOC/RESRCH/pages/measure\\_11.aspx](http://www.oregon.gov/DOC/RESRCH/pages/measure_11.aspx) (last visited Feb. 23, 2014); *see also* OR. REV. STAT. § 137.700 (2007) (codifying Measure 11 crimes); OR. REV. STAT. § 137.707 (2007) (requiring juvenile offenders to be prosecuted as adults for the commission of Measure 11 offenses); OR. REV. STAT. § 137.712 (2007) (providing exceptions and departure considerations for Measure 11 sentences).

<sup>79</sup> *Measure 11 Mandatory Minimum Sentencing*, *supra* note 78.

<sup>80</sup> Hoffman, *supra* note 6.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* ("In 1996, the Legislature passed a bill that sent repeat property offenders to prison. Prior to 1996, repeat property offenders were typically given probation. In 1999, the Legislature passed a bill that included 'identity theft' as a property crime. Identity theft was only becoming an issue at the time, but within a few years, thanks to the growth of the Internet and availability of credit cards, it became a frequent crime. In 2001, the Legislature created a broader definition of 'repeat offenders' for property crimes, resulting in more people being sent to prison rather than placed on probation.")

<sup>83</sup> *Id.* ("Only 6.5 percent of women convicted of felony property crimes in 2000 went to prison. But in 2011, 18.6 percent of them did. (That's slightly lower than the peak of 21.7 percent in 2010.)")

broadened Oregon's definition of "property crime" and "repeat offender."<sup>84</sup> It also increased the minimum sentences imposed on offenders of such crimes as identity theft.<sup>85</sup> Corrections officials anticipate that Oregon prison populations will increase by two thousand inmates as a result of Measure 57.<sup>86</sup> The resulting economic cost of such a population increase is substantial. In fact, the population is estimated to cost six hundred million dollars over the next decade for operations and new facilities.<sup>87</sup>

Even as certain judicial protections have developed for mothers incarcerated in Oregon prisons, strict and punitive legislative measures have increased the likelihood for a woman to lose her right to parent based on the term of her incarceration. This is true despite the nature of the crime, the offender's circumstances, or her desire to parent.

## 2. Federal Law

At the federal level, political and legislative measures have created great obstacles that mandate the term and repercussions of the incarceration of women in the United States. In particular, the War on Drugs significantly impacted minority and female incarceration rates.<sup>88</sup> In the early 1970s, President Nixon waged a domestic war that served his tough-on-crime campaign rhetoric and effectively criminalized drug addiction.<sup>89</sup> In the 1980s, President Reagan advanced the war efforts, waging a "full-on federal assault on the

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<sup>84</sup> *Id.* Measure 57 was passed in November of 2008 and went into effect in January of 2012. *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Les Zaitz, *Measure 57, Oregon's Property-Crime Measure, Comes Back with Force and Controversy*, OREGONIAN (Dec. 23, 2011, 9:08 AM), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/12/oregon\\_property\\_crime\\_measure.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/12/oregon_property_crime_measure.html).

<sup>87</sup> *Id.*

<sup>88</sup> *E.g.*, Roberts, *supra* note 13, at 1481–82; Andrew D. Black, "The War on People": Reframing "The War on Drugs" by Addressing Racism Within American Drug Policy Through Restorative Justice and Community Collaboration, 46 U. LOUISVILLE L. REV. 177, 178 (2007). For background material related to the War on Drugs and its effects, see generally Ernest Drucker, *Drug Law, Mass Incarceration, and Public Health*, 91 OR. L. REV. 1097 (2013); Jeff Adachi & Tal Klement, *The War on Crumbs*, 91 OR. L. REV. 1319 (2013).

<sup>89</sup> Katrina vanden Heuvel, *Time to End the War on Drugs*, WASH. POST (Nov. 20, 2012), [http://articles.washingtonpost.com/2012-11-20/opinions/35511062\\_1\\_medical-marijuana-drug-laws-drug-war](http://articles.washingtonpost.com/2012-11-20/opinions/35511062_1_medical-marijuana-drug-laws-drug-war).

drug trade,”<sup>90</sup> and Congress passed legislation that increased prison sentences and mandated minimum sentences for drug convictions.<sup>91</sup> While the goals of mandatory minimum sentencing may have been rooted in good intentions and fairness, Congress conducted little research to determine its long-term repercussions.<sup>92</sup> The result: forty-five million arrests,<sup>93</sup> a 185% increase in female prison populations between 1980 and 1995,<sup>94</sup> and—most alarming—an 828% increase in the number of black women incarcerated for drug offenses between 1986 and 1991.<sup>95</sup>

Women of color face an additional struggle against stereotypes as mothers.<sup>96</sup> Racial stereotypes paired with the stigmas of drug use, incarceration, and poverty may impact the likelihood for these women to convince courts that they are suitable mothers.<sup>97</sup> Incarcerated black mothers are therefore at a higher risk of losing their parental rights.<sup>98</sup> Under current federal models, the permanent termination of an incarcerated mother’s parental rights is now more likely thanks to a

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<sup>90</sup> Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381, 385 (2008).

<sup>91</sup> “Congress advanced Reagan’s agenda with the passage of the Comprehensive Crime Control Act in 1984, which increased federal drug sentences, and the Anti-Drug Abuse Act of 1986, which ‘further increased federal drug penalties and instituted mandatory minimum sentences for simple possession of drugs.’” *Id.* (quoting JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 27 (2001)). *See also* Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 292 (2007) (“During the 1980s, in response to growing pressure from the public, Congress established stringent federal sentencing guidelines and mandatory minimums for the commission of certain types of crimes.” (citation omitted)).

<sup>92</sup> Levy-Pounds, *supra* note 91, at 294.

<sup>93</sup> Vanden Heuvel, *supra* note 89.

<sup>94</sup> Kim, *supra* note 4, at 222.

<sup>95</sup> Roberts, *supra* note 13, at 1480.

<sup>96</sup> “Stereotypes about race, ethnicity, and class may affect perceptions of mothering. Black mothers are often viewed as failing to live up to society’s image of the ideal mother.” Kennedy, *Good Mother*, *supra* note 15, at 185 (citation omitted).

<sup>97</sup> *Id.* at 185–86 (“The stigma associated with being convicted of a crime, spending time in prison, being a drug user, being poor, and/or being Black or Latina may affect how these women are perceived and the extent to which they are viewed as capable mothers. These mothers may find it difficult to convince first social workers and later judges that they are fit or suitable parents and often fall short of the ‘best interests’ idealism inherent in the fitness and best interests tests applied in termination cases.” (citation omitted)).

<sup>98</sup> *Id.* at 186 (“The result of devaluing motherhood by those in the margins—women of color, poor women, incarcerated women—and applying a best interests idealism to termination proceedings results in greater numbers of terminations.”).

timetable that requires states to develop permanency plans for children in state foster care systems.

The Adoption and Safe Families Act of 1997 (ASFA) implements a twenty-two month timetable in which states are encouraged to terminate parental rights and move foster children to permanent homes:

[I]n the case of a child who has been in foster care under the responsibility of the State *for 15 of the most recent 22 months* . . . the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption . . . .<sup>99</sup>

Thus, under the ASFA, children in foster care for fifteen of twenty-two consecutive months must be moved toward permanency unless—

- (i) at the option of the State, the child is being cared for by a relative;
- (ii) a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
- (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home . . . .<sup>100</sup>

When deciding whether to terminate parental rights, courts generally determine (1) whether the parent is unfit by clear and convincing evidence, and if so, (2) whether a termination judgment is in the child's best interest.<sup>101</sup> The goal of the ASFA is to reduce the length of time children remain in the foster care system by quickly moving to place children in permanent homes.<sup>102</sup> Despite the good

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<sup>99</sup> 42 U.S.C. § 675(5)(E) (2006) (emphasis added).

<sup>100</sup> *Id.*

<sup>101</sup> Kennedy, *Good Mother*, *supra* note 15, at 176.

<sup>102</sup> Emily K. Nicholson, *Racing Against the ASFA Clock: How Incarcerated Parents Lose More than Freedom*, 45 DUQ. L. REV. 83, 83 (2006) (“ASFA’s primary goal is to reduce the length of time children spend in foster care by expediting the route to permanency, preferably through adoption. In order for a child to be adopted, however, the parental rights of both the mother and father must be terminated. ASFA facilitates this process by mandating the commencement of termination proceedings after a child has been in foster care for fifteen of the most recent twenty-two months . . . .” (citation omitted)); *see also* Kennedy, *Good Mother*, *supra* note 15, at 191.



intentions of that goal, the ASFA may have unintended, disproportionate effects on incarcerated parents by terminating their parental rights where their best efforts to meet the ASFA timetable were unsuccessful.<sup>103</sup> There is often insufficient support for incarcerated parents who attempt to follow a plan for permanency under the mandated timetable,<sup>104</sup> and courts in more than twenty-five states are permitted to consider a parent's incarceration or criminal conviction when determining whether to terminate parental rights.<sup>105</sup> This approach fails to meet the needs of children of incarcerated parents; such severing of family ties increases the likelihood that these children will later become involved in the criminal justice and penal system themselves.<sup>106</sup> The permanent termination of parental rights is extreme, and it comes with repercussions that extend beyond the individual parents and children.

For incarcerated parents, parental terminations represent a gendered and political issue with serious societal consequences.<sup>107</sup> The ASFA timeline is rooted not in the reality of modern American family structures but, rather, in the traditional concept of a nuclear family.<sup>108</sup> As a result, it fails to respect and preserve ties for families that do not conform to this standard.<sup>109</sup> The problem is that "ASFA presumes the unfitness of any parent who allows a child to remain in foster care past the arbitrary deadline of fifteen months, without

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<sup>103</sup> Kennedy, *Good Mother*, *supra* note 15, at 166–67.

<sup>104</sup> *Id.* at 175.

<sup>105</sup> Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 78 (2011) [hereinafter Kennedy, *Family Ideology*]; see also Kennedy, *Good Mother*, *supra* note 15, at 177 (“[O]ne researcher reported a 250 percent increase in cases terminating parental rights due to parental incarceration.” (citation omitted)).

<sup>106</sup> Kennedy, *Family Ideology*, *supra* note 105, at 81.

<sup>107</sup> Kennedy, *Good Mother*, *supra* note 15, at 169.

<sup>108</sup> Kennedy, *Family Ideology*, *supra* note 105, at 79–80 (“Family law and policy are rooted in an ideology that privileges one familial ideal but excludes and marginalizes the many other forms that families take. . . . As societal changes occur, states struggle to define ‘family’ and continue to wrestle with what it means to be an effective parent and what settings and care are truly in a child’s best interests. The tensions that result are in part because of stubborn adherence to a belief in the supremacy of two-parent families as well as a reluctance to deal more practically with the consistent and historic diversity of family structures. These conflicts quite often result in policies that are unreflective of reality and cling to a mythology of the ‘American Family.’ Unfortunately, this leads to less-than-optimal solutions to the very real problems that face families with children. Indeed, the socio-legal responses to families with incarcerated parents demonstrate this conflict.” (citation omitted)).

<sup>109</sup> *Id.*

regard to the reason for the child's placement."<sup>110</sup> In reality, such reasons may include domestic violence and parental incarceration,<sup>111</sup> neither of which should be a dispositive factor—or, arguably, a factor at all—in determining whether to terminate a parent's fundamental right to parent. Yet, this system refuses to consider the often gendered and class-based reasons for maternal incarceration.<sup>112</sup> Instead, it punishes mothers who are unable to parent on their own, unnecessarily adding to the retributive goal of incarceration that continues to have a disparate affect on women.<sup>113</sup>

As discussed above, most incarcerated women are dealing with a host of mental health issues, trauma and histories of abuse, and drug addictions. The ASFA timetable creates a likelihood that states will terminate parental rights without providing sufficient treatment and recovery time.<sup>114</sup> An incarcerated mother's drug addiction, lack of education, and joblessness reflects more than her individual failings, yet this may be sufficient grounds for a state to terminate her parental rights, often without first providing resources or treatment.<sup>115</sup> Courts may even be skeptical of mothers who fail to get assistance prior to imprisonment, yet this skepticism effectively eliminates a second chance for offenders even after they have served out their sentences.<sup>116</sup> Such skepticism refuses incarcerated mothers the opportunity to change, thereby failing to serve the rehabilitative goal of our criminal justice system.

Many incarcerated mothers would benefit from a middle-ground approach—short of termination—that allows for future contact with their children.<sup>117</sup> Advocates differ in their arguments: some assert that

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<sup>110</sup> Nicholson, *supra* note 102, at 88.

<sup>111</sup> *Id.*

<sup>112</sup> Kennedy, *Good Mother*, *supra* note 15, at 169.

<sup>113</sup> *Id.* at 166–67 (“[The current approach to parental terminations] demonizes mothers who, unable to provide direct care on their own for a multitude of reasons, need to craft a web of support to assist them to care for their children. . . . In addition, severing legal ties between parent and child is simply one more aspect of the current retribution model of incarceration that disproportionately affects women and people of color and removes children not only from their families but from their communities.” (citation omitted)).

<sup>114</sup> *Id.* at 183–84 (describing the facts of *In re J.L.*, 924 N.E.2d 961 (Ill. 2010), to illustrate the “complicated and interrelated psychological and mental health problems that are impossible to address in the time periods prescribed by state and federal standards”).

<sup>115</sup> *Id.* at 187–89 (describing the facts of *State Dep’t of Children’s Servs. v. V.N.*, 279 S.W.3d 306 (Tenn. Ct. App. 2008), to illustrate “the disconnect between state expectations for incarcerated parents and what it is likely these parents can accomplish in the relatively short period of time allotted under the federal standards”).

<sup>116</sup> *Id.* at 179.

<sup>117</sup> *Id.* at 190.

the ASFA should ensure a balance between the children's interests and the parents' rights, while others argue that the ASFA timeline should not apply to nonviolent offenders or that incarceration should not be a factor considered in termination proceedings.<sup>118</sup> This Comment advocates for an approach that provides mothers with the resources necessary to promote safe parenting and encourages reunification for women convicted of nonviolent crimes.

The permanent severance of parental rights is an extreme, punitive repercussion for such nonviolent criminal convictions as drug and property offenses. Legislatures must address the socioeconomic challenges and inadequate resources that these women must overcome in the face of the rigid ASFA clock. Termination judgments fail to serve state agencies and prison systems in the long run. Instead, terminations promote a cycle of intergenerational crime and incarceration, and they fail to treat the underlying serious issues leading women to commit what some characterize as crimes of survival.<sup>119</sup>

### III

#### ALTERNATIVES AND SOLUTIONS

When a mother is sentenced, so too are her children. Nearly two million children have a parent who is incarcerated or otherwise involved in the criminal justice system.<sup>120</sup> Many of these children are placed in state foster care systems, yet there has not been a corresponding increase in adoptions.<sup>121</sup> In fact, foster children with an incarcerated parent are less likely to be adopted than other children.<sup>122</sup> Many of these children suffer from separation distress as well as developmental and attachment setbacks.<sup>123</sup> They are more

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<sup>118</sup> *Id.* at 191–94 (“Some advocate for greater intervention in families where there is the potential for abuse and highlight the need to prioritize a child’s right to safety and permanence over a parent’s right to the care and custody of her children. Others would prefer to blunt the harsh edge of laws and policies that result in parental terminations and look for ways to balance the needs of the children of incarcerated parents with the rights of these parents. At the far end of this view, advocates focus more on the need to support parental rights and a mother’s right to parent her children.” (citation omitted)).

<sup>119</sup> See *supra* note 21 and accompanying text (describing the underlying serious issues faced by women offenders and characterizing nonviolent offenses as “crimes of survival”).

<sup>120</sup> Kennedy, *Family Ideology*, *supra* note 105, at 81.

<sup>121</sup> *Id.* at 106.

<sup>122</sup> *Id.*

<sup>123</sup> Kim, *supra* note 4, at 229.

likely to enter a pattern of intergenerational crime,<sup>124</sup> and are seven times more likely to be incarcerated for criminal convictions.<sup>125</sup> In an effort to break the intergenerational cycle, some states have implemented alternative programs designed to preserve the mother-child relationship, such as prison nurseries and alternative sentencing programs.

In Oregon, CCCF offers a number of programs for incarcerated mothers and their children, including a parenting skills class, Girl Scouts Behind Bars and Cub Scouts programs, support groups and services through the Family Preservation Project, and special events for inmates to attend with their children.<sup>126</sup> Eligible inmates with children ages three and younger may spend two days a week with their children in a classroom setting as participants of the Early Head Start Program.<sup>127</sup> Women who give birth while incarcerated may be eligible to participate in the facility's Baby Bonding Program, which permits additional visitation time for new mothers to bond with their newborn children.<sup>128</sup> However, to date, Oregon has yet to implement a prison nursery or alternative sentencing program to encourage not only reunification after release, but continuous bonding time for mothers and their minor children. The most progressive prison policies and alternatives have been implemented by the neighboring State of Washington. This Comment advocates for Oregon to examine Washington's programs and their results in order to build stronger state agencies, families, and economies.

#### *A. Prison Nurseries and Residential Parenting Programs*

Although rare in the United States, prison nursery programs offer settings within prison facilities where incarcerated mothers are

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<sup>124</sup> Kennedy, *Good Mother*, *supra* note 15, at 186.

<sup>125</sup> Purdy, *supra* note 16.

<sup>126</sup> COFFEE CREEK CORR. FACILITY, *supra* note 7.

<sup>127</sup> Only women incarcerated at CCCF's minimum-security facility may apply to participate. Head Start Program activities

are designed to strengthen and enhance the mother-child relationship and the caregiver-mother relationship in preparation for the mother's release. Comprehensive services include education, health and nutrition for children, family support services to mothers and caregivers as the primary educator of the child, transition planning for the child upon the mother's release. Staff also provide monthly home visits to caregivers to bridge the relationship between the incarcerated parent and caregiver.

*Id.* at 4.

<sup>128</sup> *Id.*

permitted to co-reside with their newborn infants for all or part of the mother's prison sentence.<sup>129</sup> These programs typically work to develop the mother-infant relationship, promote normal infant development, and develop incarcerated mothers' parenting skills.<sup>130</sup> Additionally, such programs set up rigorous application and selection processes with strict eligibility requirements for applicants.<sup>131</sup> Generally, only women whose children were born in state custody and who have no histories of violent criminal convictions, child abuse, or child neglect are eligible to participate.<sup>132</sup>

In 1901, New York State launched the first modern prison nursery program at Bedford Hills Correctional Facility.<sup>133</sup> The Bedford Hills nursery program continues to exist today, and its policies are generally representative of other existing prison nursery programs.<sup>134</sup> The Bedford Hills nursery has the capacity to serve up to twenty-seven infants and their incarcerated mothers.<sup>135</sup> Infants remain with their mothers for twelve months, although some children may remain at the prison for longer if their mothers' release dates are within eighteen months following their births.<sup>136</sup> Participating mothers attend parenting classes and support groups, and children are offered developmentally stimulating toys as well as products donated by volunteer groups.<sup>137</sup>

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<sup>129</sup> Mary W. Bryne et al., *Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery*, 50 FAM. CT. REV. 77, 77 (2012).

<sup>130</sup> *Id.* at 79.

<sup>131</sup> See Jbara, *supra* note 18, at 1832.

<sup>132</sup> *Id.*

As of 2009, seven states [(California, Illinois, Indiana, Ohio, Nebraska, New York, South Dakota, Washington, and West Virginia)] had instituted prison nurseries for incarcerated women, and two others were working to establish such programs. The prison nurseries are comparable in that they only accept mothers who have nonviolent convictions and who do not have a history of child abuse or neglect. Additionally, the nurseries only accept women whose babies were born in state custody, so mothers who gave birth prior to incarceration are ineligible.

*Id.* (citation omitted).

<sup>133</sup> *Id.* at 1825.

<sup>134</sup> *Id.* at 1836.

<sup>135</sup> HENDRIK DEBOER, OFF. OF LEGIS. RES., PRISON NURSERY PROGRAMS IN OTHER STATES (2012), available at <http://www.cga.ct.gov/2012/rpt/2012-R-0157.htm> (summarizing prison nursery programs existing in eight states as of March 2012: Illinois, Indiana, Nebraska, New York, Ohio, South Dakota, Washington, and West Virginia).

<sup>136</sup> *Id.*

<sup>137</sup> Jbara, *supra* note 18, at 1833.

Existing prison nursery programs typically allow infants to remain with their incarcerated mothers for twelve, eighteen, or twenty-four months.<sup>138</sup> While this early opportunity to bond with their mothers is critical to child development, if children leave their mothers' care at just one year of age, that bonding time may have little to no positive effect.<sup>139</sup> In response to this issue, Washington State effected a more progressive approach. With goals to reduce the rate of recidivism and the cycle of intergenerational incarceration, the Washington Corrections Center for Women (WCCW)<sup>140</sup> instituted its residential parenting program in 1999,<sup>141</sup> which permits children to remain in the prison with their mothers for up to three years.<sup>142</sup> WCCW's program is the most comprehensive in the country; it offers doulas to help women through labor and an Early Head Start program to ensure infants' wellbeing and normal development.<sup>143</sup> Participating offenders live with their children in what is called the "J Unit" of WCCW.<sup>144</sup> Each mother and infant reside together in their own room, and all participants share a kitchenette and an outdoor play area.<sup>145</sup>

The application, screening, and selection process for WCCW's residential parenting program is rigorous.<sup>146</sup> The selection committee considers the background of the offender, and ultimately makes its decisions based on the best interest of the children.<sup>147</sup> Participants must be within thirty months of completing their sentences, and must have no prior criminal convictions.<sup>148</sup> Once accepted, participating

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<sup>138</sup> But note that South Dakota Women's Prison limits children's stays to just thirty days. DEBOER, *supra* note 135.

<sup>139</sup> Jbara, *supra* note 18, at 1834 ("If the child leaves after twelve months, and the mother stays in prison for many years, the initial bonding period was probably all for naught. Requiring the child to reconnect with a new caregiver would eliminate any developmental benefits." (citation omitted)).

<sup>140</sup> See generally *Washington Corrections Center for Women*, WASH. ST. DEP'T OF CORRECTIONS, <http://www.doc.wa.gov/facilities/prison/wccw/> (last visited Feb. 23, 2014) (providing general information about prison administration, capacity, policies, and programs).

<sup>141</sup> Purdy, *supra* note 16.

<sup>142</sup> Jbara, *supra* note 18, at 1833; see also Purdy, *supra* note 16.

<sup>143</sup> Jbara, *supra* note 18, at 1834 (explaining that Washington's correctional laws are likely responsible for its comprehensive and unique programs for incarcerated women and their children).

<sup>144</sup> Purdy, *supra* note 16.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*; see also Jbara, *supra* note 18, at 1833.

<sup>147</sup> Purdy, *supra* note 16.

<sup>148</sup> *Id.*

mothers help to maintain the facilities, pursue educational opportunities or job skills training, and attend parenting classes.<sup>149</sup>

Opponents of prison nursery programs base their arguments on the purposes for incarceration, the children's wellbeing, and the cost to taxpayers in order to support the lives of not only the incarcerated mothers, but also their children.<sup>150</sup> Proponents respond that existing programs do in fact serve the goals of incarceration, and that the long-term social and economic benefits outweigh the initial costs to implement such programs.<sup>151</sup> In fact, these programs often benefit the children and mothers in a way that may reduce the long-term cost to taxpayers. Mothers who participate in prison nursery programs have lower rates of recidivism, and state agencies are able to avoid placing children in foster care.<sup>152</sup>

### *B. Parent Sentencing Alternatives*

In the United States, parent sentencing alternatives are even rarer than prison nursery programs. Washington State again leads the country with its progressive and somewhat radical approach, thanks in large part to policies codified by state statutes.<sup>153</sup> For example, by statute, the secretary of corrections is required to

adopt policies that encourage familial contact and engagement between inmates and their children with the goal of reducing recidivism and intergenerational incarceration. Programs and policies should take into consideration the children's need to maintain contact with his or her parent and the inmate's ability to develop plans to financially support their children, assist in reunification when appropriate, and encourage the improvement of parenting skills where needed.<sup>154</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> Jbara, *supra* note 18, at 1828.

<sup>151</sup> *Id.* at 1831. Furthermore, “[s]tate governments, along with the federal government . . . have ultimately concluded that keeping families together outweighs the retributive value of incarceration. While nontraditional, this approach to imprisonment is useful for both its deterrent and rehabilitative aspects and may even create multigenerational benefits.” *Id.* at 1825.

<sup>152</sup> *Id.* at 1831, 1838–39 (discussing results of a Women’s Prison Association report documenting prison nurseries and community-based parenting programs in the United States); *see also* Bryne et al., *supra* note 129, at 77.

<sup>153</sup> The Washington Legislature has passed several laws relevant to incarcerated mothers and their children. *See, e.g.*, WASH. REV. CODE ANN. §§ 28A.300.520, 43.63A.068, 43.215.065, 72.09.495, 74.04.800 (West, Westlaw through 2013 legislation).

<sup>154</sup> § 72.09.495(2).

In 2010, the Washington Legislature created two alternatives for parents convicted of nonviolent offenses<sup>155</sup>: a judicial sentencing alternative<sup>156</sup> and a partial confinement program.<sup>157</sup> Offenders sentenced under the judicial sentencing alternative are sentenced to community custody for the term of their sentences, during which time they are permitted to continue parenting their minor children.<sup>158</sup> Even if an offender is not sentenced under the judicial sentencing alternative, under the partial confinement program he or she may become eligible to serve the final twelve months of his or her sentence in community custody as determined by the Department of Corrections.<sup>159</sup>

While in community custody, participants are required to abide by stringent conditions imposed by the court<sup>160</sup> and the Department of Corrections, which may include parenting classes; drug, alcohol, or mental health treatment; vocational training; life skills classes; or other offender change programs.<sup>161</sup> Community corrections officers closely supervise participating offenders.<sup>162</sup> For example, offenders are required to provide their community corrections officers with such information as weekly itineraries and grocery receipts.<sup>163</sup> The community corrections officers are engaged in daily contact with program participants; they become involved and invested in the offenders' lives, develop relationships with the offenders' children and other caregivers, and act as mentors to develop offenders' parenting skills.<sup>164</sup>

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<sup>155</sup> *Alternatives To Total Confinement For Some Parents Of Minor Children*, WASH. ST. DEPARTMENT OF CORRECTIONS, <http://www.doc.wa.gov/community/fosa/default.asp> (last visited Mar. 17, 2013).

<sup>156</sup> § 9.94A.655.

<sup>157</sup> § 9.94A.6551.

<sup>158</sup> § 9.94A.655.

<sup>159</sup> WASH. STATE DEP'T OF CORR., WHAT YOU NEED TO KNOW ABOUT THE FAMILY & OFFENDER SENTENCING ALTERNATIVE (2012), available at <http://www.doc.wa.gov/community/docs/FOSAbrochure05-2013.pdf>.

<sup>160</sup> For a list of conditions that may be imposed by the court, see § 9.94A.703.

<sup>161</sup> §§ 9.94A.655, 9.94A.704.

<sup>162</sup> §§ 9.94A.501, 9.94A.704.

<sup>163</sup> Susie Leavell, *A Role for Community Corrections in a Sentencing Alternative for Parents*, VERA INST. JUST. (Sept. 24, 2012), <http://www.vera.org/blog/role-community-corrections-sentencing-alternative-parents>.

<sup>164</sup> *Id.* (“CCOs provide much more than directives—they coach and mentor offenders about their interactions with their children. While a typical CCO might only meet the offender’s children if they happen to be home during a field contact, the program’s CCOs develop relationships with the children and other caregivers and learn about their family dynamics in order to better support the supervision plan. They engage in conversations



Although the program is so new that formal recidivism rates are unavailable, reports thus far indicate lower violation and recidivism rates, with only about eighteen percent of participating offenders having had their alternatives revoked.<sup>165</sup> Recidivism rates for traditional supervision are around twenty-nine percent.<sup>166</sup> Between June 2010 and January 2013, a total of 230 participants had successfully completed the program and only two had returned to prison.<sup>167</sup>

The program's goal is to ensure the children's wellbeing, but its success has resulted in cost savings benefits as well.<sup>168</sup> In the first eighteen months, the program diverted forty-four children from entering the state foster care system and an additional eight children were returned to their families from foster homes.<sup>169</sup> It costs an average of \$34,000 to supervise the alternative cases, which is \$7,000 to \$8,000 more than traditional community supervision.<sup>170</sup> However, when compared to the cost of incarceration, the savings are substantial: while the daily cost to incarcerate is ninety dollars per inmate, the daily cost to electronically monitor an alternative program participant is just seven dollars per inmate.<sup>171</sup>

In sum, Washington State has realized a number of benefits since implementing its parent sentencing alternatives in 2010. It offers a progressive alternative to the incarceration of parents whose children

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with offenders about day-to-day activities with children, gauge stress levels in families, and provide immediate feedback regarding parenting, discipline, and other skills to enhance the offender's ability to be an effective parent.”)

<sup>165</sup> Susie Leavell, *Promising Outcomes for a Parenting Sentencing Alternative*, VERA INST. JUST. (Jan. 15, 2013), <http://www.vera.org/blog/promising-outcomes-parenting-sentencing-alternative> [hereinafter Leavell, *Promising Outcomes*]. As of January 2014, the judicial sentencing alternative and partial confinement program together produced a return-to-prison rate of just 0.5%. Susie Leavell, Program Adm'r, Wash. Dep't Corr., Address at The Portia Project's Women in Prison Conference: Sentencing Alternatives: The Washington Experience (Feb. 1, 2014).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* (“Rates of recidivism—calculated as a new felony within three years after release—are around 29 percent for traditional supervision. For CPA/FOSA cases, we have seen that of the 230 offenders who have successfully completed the program, only two have returned to prison on a new felony since June 2010.”)

<sup>168</sup> Susie Leavell, *Breaking New Ground with New Laws*, VERA INST. JUST. (Aug. 17, 2012), <http://www.vera.org/blog/breaking-new-ground-new-laws> [hereinafter Leavell, *Breaking New Ground*].

<sup>169</sup> *Id.*

<sup>170</sup> Leavell, *Promising Outcomes*, *supra* note 165.

<sup>171</sup> *Id.*

may enter the foster care system or otherwise suffer developmentally or psychologically due to separation from their parents.

#### RECOMMENDATIONS AND CONCLUSION

Presently, CCCF offers a number of programs to support inmates who are parents to minor children.<sup>172</sup> However, these programs focus on strengthening mother-child relationships in preparation for reunification after the mother's release rather than on ensuring continuity in mother-child relationships. In light of the growing population of female inmates, Oregon must implement more progressive policies and programs to reduce intergenerational crime and the toll of maternal incarceration on state agencies.

Although the number of incarcerated females is a mere fraction of Oregon's total inmate population,<sup>173</sup> the repercussions are substantial. In the neighboring State of Washington, residential parenting programs and parent sentencing alternatives have been successfully implemented in an effort to curb the long-term consequences of parental incarceration.<sup>174</sup> As a result, Washington has seen enormous benefits extending beyond its primary goal to serve the children's wellbeing.<sup>175</sup> The programs' successes are also apparent as fewer children enter and remain in foster care, recidivism is reduced, and substantial costs are saved due to a reduction in prison populations and duplicative state programs.<sup>176</sup>

In light of Washington's success, Oregon should reassess the effects of its mandatory sentencing and prison policies for nonviolent offenders who are parents of minor children. While it remains true that females comprise a small portion of the total inmate population in Oregon, the recent and continuing increase in women sentenced to CCCF has substantial social and economic costs to Oregon families, communities, and state agencies not contemplated by the Oregon Legislature. These economic and societal consequences require a more progressive approach to prison policies and criminal sentencing. Moving forward, Oregon should examine the progress and success of programs implemented by the State of Washington in an effort to reform harsh sentencing practices; reduce the rates of recidivism,

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<sup>172</sup> COFFEE CREEK CORR. FACILITY, *supra* note 7.

<sup>173</sup> Guerino, *supra* note 2, at 14, 16.

<sup>174</sup> Leavell, *Breaking New Ground*, *supra* note 168.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*; Leavell, *Promising Outcomes*, *supra* note 165.

intergenerational crime, and parental termination judgments; and strengthen state agencies, economies, and communities.

