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Oregon’s Bill of Rights for Children of Incarcerated Parents: A Step in the Right Direction

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INTRODUCTION

Like a third of all incarcerated mothers, Ricky’s mother was living alone with her children when she was arrested. Ricky was nine years old, and his brother under a year, when the police came to his house and took away his mother.

“I guess they thought someone else was in the house,” Ricky said, when I asked him how the police had come to leave him by himself. “But no one else was in the house. I was trying to ask them what

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happened and they wouldn't say. Everything went so fast. They just rushed in the house and got her and left."

After the police left with his mother, Ricky did what he could. He cooked for himself and his brother, and changed [his brother's] diapers. He burned himself trying to make toast, and got a blister on his hand, but he felt he was managing. He remembered that each day, his mother would take him and his brother out for a walk. So he kept to the family routine, pushing the baby down the sidewalk in a stroller every day for two weeks, until a neighbor took notice and called Child Protective Services.¹

There is a largely unaddressed problem in Oregon: Currently, there are more than 70,000 children in Oregon who have an incarcerated parent.² Of these 70,000 children, approximately half are age ten and under.³

Parental incarceration has been identified as an "adverse childhood experience" that can increase a child's risk of negative outcomes in his or her adult life.⁴ When the Oregon legislature recognized there were many concerning practices that overlooked these children, it attempted to rectify the problem. On June 22, 2017, Oregon Governor Kate Brown signed the Bill of Rights for Children of Incarcerated Parents ("Bill of Rights"), which became effective January 1, 2018.⁵

This Comment is organized into four parts. Part I gives an overview of the issues arising in both childhood and adulthood for these children. Part II discusses the history of the bill, focusing on the text of the original bill and the transformations to the bill during the amendment process. Additionally, this section discusses how, while the Bill of Rights sounds good in theory, it does not work as intended in the real world. Part III discusses the current best practices that Oregon should model. Finally, this Comment addresses how Oregon can implement these practices.

¹ BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, SAFEGUARDING CHILDREN OF ARRESTED PARENTS 5-6 (2014), <https://www.bja.gov/publications/iacp-safeguarding-children.pdf>.

² S.B. 241, 79th Or. Legis. Assemb. (2017) (as introduced).

³ *Id.*

⁴ BUREAU OF JUSTICE ASSISTANCE, *supra* note 1, at xi (citation omitted).

⁵ Overview of S.B. 241., 79th Or. Legis. Assemb. (2017), OR. ST. LEGIS., <https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/SB241> (last visited Oct. 13, 2018).

I

ISSUES FOR CHILDREN OF INCARCERATED PARENTS

Children whose parents are incarcerated face a myriad of issues that children whose parents are not incarcerated do not have to grapple with. Problems facing children with incarcerated parents break down into two categories: (1) problems arising during childhood and (2) problems arising during adulthood. The legislature should consider both categories when determining and implementing practices that protect the child's right to maintain a relationship with his or her parent.

A. Problems Facing Children of Incarcerated Parents

A child faces many issues arising from parental incarceration. These issues begin when his or her parent is first arrested. Approximately two-thirds of law enforcement agencies do not have a written policy instructing officers on what steps to take when the arrested individual is responsible for minor children.⁶ If the child is not present during the arrest, officers in only approximately thirteen percent of law enforcement agencies inquire about whether the arrestee has a dependent child.⁷ Even if a child is present during the arrest, officers in over half of state agencies still do not inquire about the child's care.⁸ When a child is not present, but the arrestee offers information about his or her child, officers in only thirty-nine percent of the departments will ensure the child has a responsible adult caring for them.⁹ However, if the arrestee does not offer such information, but the officer notices items (such as bottles, diapers, toys, etc.) that signal the arrestee might be responsible for a child's care, officers from only twelve percent of departments will inquire about the arrestee's parental status.¹⁰

When officers do not to ask whether an arrestee is responsible for the care of a child, a critical opportunity is missed to intervene and reduce the risk of potential harm. Many arrestees do not want to reveal their parental status to law enforcement out of fear that their child will be placed under the legal authority of the state and possibly placed in

⁶ MARCUS NIETO, CAL. RESEARCH BUREAU, IN DANGER OF FALLING THROUGH THE CRACKS: CHILDREN OF ARRESTED PARENTS 1 (2002), <http://www.f2f.ca.gov/res/pdf/InDangerofFalling.pdf>.

⁷ *Id.*

⁸ *Id.* (stating officers in forty-two percent of responding agencies will inquire about the care of a child when the child is present during an arrest of their parent).

⁹ *Id.*

¹⁰ *Id.*

foster care.¹¹ A parent who is incarcerated often fears that he or she will permanently lose his or her children to adoption, as federal policy allows a state to terminate parental rights if a child has been in foster care for fifteen of the previous twenty-two months.¹² As a result, the arrested parent often hopes that relatives or friends will care for his or her child on a voluntary basis, without child welfare services becoming involved.¹³ Such hopes are often problematic for the child's best interest because the parent occasionally places his or her child with individuals who cannot safely care for the child.¹⁴ A child is at risk to suffer severe harm when a parent places them in an unsafe home with relatives or friends, without the state's official involvement.

A child is also likely to suffer trauma when he or she learns about their parent's arrest.¹⁵ Such trauma can be reduced when the parent is able to speak with their child and assure the child that both the child and parent will be safe during this time.¹⁶ Yet despite this relatively minor safeguard, law enforcement agencies, in practice, do not allow the parent to communicate with his or her child once he or she is arrested.¹⁷

Additionally, following parental incarceration, children are likely to feel a "tremendous sense of loss."¹⁸ Parental incarceration is often difficult for children to understand and deal with, largely because their parent is still alive, so they cannot process their emotions and "move on" in the way they might if their parent had died.¹⁹ Instead, children are left in limbo, forced to carry on as though their lives have not been dramatically altered.²⁰ This feeling of loss has many effects on a child's well-being.²¹

¹¹ *Id.* at 2.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* ("Unfortunately, arrested parents do not always make good choices for their children. Children have been left in drug homes and with inappropriate neighbors and relatives.").

¹⁵ See generally BUREAU OF JUSTICE ASSISTANCE, *supra* note 1.

¹⁶ See generally *id.*

¹⁷ *Id.* at 15.

¹⁸ Melody L. Hyppolite, *Understanding Child Outcomes within a Multiple Risk Model: Examining Parental Incarceration*, SOC. SCI. 3 (Sept. 2017), <http://www.mdpi.com/2076-0760/6/3/82>.

¹⁹ *Id.*

²⁰ *Id.* (stating in addition to the sadness felt by children due to the absence of their parent from their lives, children often feel ashamed and fear rejection if their "situation" is discovered and in an attempt to avoid rejection, children of incarcerated parents will often withdraw from meaningful relationships).

²¹ *Id.*

Likely because of the trauma, loss, and stress suffered after a parent's arrest and incarceration, these children often develop antisocial behavior and mental health problems.²² One of the most prevalent mental health problems is depression.²³ Additionally, children who have an incarcerated parent are much more likely to develop sleeping and eating problems.²⁴ The prevalence of these problems varies depending on whether the mother, father, or both parents have been incarcerated.²⁵ For example, children whose fathers are incarcerated are forty-seven percent more likely to develop sleep problems than children whose fathers are not incarcerated.²⁶ Children whose mothers are incarcerated are much more likely to develop unhealthy eating behaviors.²⁷ Additionally, children with both parents incarcerated, but do not have a history of incarceration, are twice more likely to develop risky sleep and eating behaviors.²⁸

B. Problems Facing Children of Incarcerated Parents as Adults

Children with one or more incarcerated parent are likely to continue facing issues into adulthood that arise from that incarceration and forced separation during childhood.

An adult whose parent was incarcerated is more likely to engage in criminal activity than an adult whose parent was not incarcerated. "[T]he odds of a person being arrested are 1.35 times greater for a person whose father was incarcerated and 1.51 times greater for a person whose mother was incarcerated."²⁹ This correlation suggests

²² Joseph Murray et al., *Parental Involvement in the Criminal Justice System and the Development of Youth Theft, Marijuana Use, Depression, and Poor Academic Performance*, 50 CRIMINOLOGY 255, 261 (2012). These problems are less likely to be developed in children whose incarcerated parent was not the child's primary caretaker prior to incarceration, as there is less disruption.

²³ *See id.*

²⁴ *See generally* Dylan B. Jackson & Michael G. Vaughn, *Parental Incarceration and Child Sleep and Eating Behaviors*, 185 J. PEDIATRICS 211 (2017). These problems include: sleep problems, short sleep duration, salty snack consumption, sweets consumption, starch consumption, soda consumption, and fast food consumption. *Id.* at 214.

²⁵ *Id.* at 215.

²⁶ *Id.* at 214.

²⁷ *Id.* ("[A] 67% increase in the odds of salty snack consumption, a 105% increase in the odds of sweets consumption, an 80% increase in the odds of soda consumption, and a 109% increase in the odds of fast food consumption.")

²⁸ *Id.*

²⁹ Mark Gius, *The Effects of Parental Incarceration on the Criminal Activity of Adult Children*, J. FORENSIC PSYCHOL. 3 (Dec. 23, 2016), <https://www.omicsonline.org/open-access/the-effects-of-parental-incarceration-on-the-criminal-activity-of-adult-children.php?aid=83307>.

that if Oregon reduces or eliminates prison sentences for nonviolent offenses, it would reduce the number of incarcerated parents, which would reduce future crime.³⁰

Children of incarcerated parents often experience long-term psychological effects that persist through adulthood.³¹ Children often experience “cognitive delays, developmental regression or delays, and inappropriate coping strategies” in their youth, which linger into adulthood.³²

Additionally, one recent study found that parental incarceration and mental illness equally contributed to negative outcomes for children as they matured into adulthood.³³ Although it is difficult to separate parental incarceration from other risk factors when examining child outcomes, this study cannot be ignored.

Because of the potential safety and health issues arising for children who have an incarcerated parent and because parental incarceration has such a negative impact on children even after they grow into adults, Oregon must develop policies and procedures that help reduce the likelihood of traumatizing the child.

II

THE HISTORY OF THE BILL OF RIGHTS OF CHILDREN WITH INCARCERATED PARENTS

On June 22, 2017, Governor Kate Brown signed Senate Bill 241, effective January 1, 2018.³⁴ Senate Bill 241 creates what is referred to throughout this Comment as the “Bill of Rights.” The stated purpose of the bill is to protect the constitutional rights of children of incarcerated parents. As initially introduced, the bill included language stating the intent to establish a task force, ensuring the protection of children’s rights.³⁵

³⁰ *Id.* at 5.

³¹ Keva M. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD AND ADOLESCENT SOC. WORK J. 472, 478 (2006).

³² *Id.*

³³ Hyppolite, *supra* note 18, at 15 (“Parental incarceration significantly impacted the largest number of outcomes, with significance ($p < 0.05$) on three outcomes (criminal behaviors, being arrested, drug use) and the risk factor approached significance ($p < 0.10$) on two other outcomes (behavioral difficulties and alcohol use).”).

³⁴ Overview of S.B. 241, 79th Or. Legis. Assemb. (2017), OR. ST. LEGISLATURE, <https://olis.leg.state.or.us/liz/2017R1/Measures/Overview/SB241> (last visited Oct. 13, 2018).

³⁵ S.B. 241, 79th Or. Legis. Assemb. (2017) (as introduced).

The bill was spearheaded by Senator Michael Dembrow of Portland, Oregon.³⁶ Senator Dembrow stated that “a large part of what helps with [an inmate’s re-entry into normal life] is having families that are intact,” and he recognized that “[c]hildren of incarcerated parents are victims, as well, of what happens. Their needs are rarely taken into consideration by the courts, by the police.”³⁷

The bill, as introduced, contained two main sections.³⁸ The bill declared a state of emergency in Oregon because of the high number of Oregon children with an incarcerated parent and the young age of the children most affected.³⁹ It also classified parental incarceration as an “adverse childhood experience,” which predicts limited success in school and life.⁴⁰ The bill acknowledged that the United States has developed practices to protect the rights of children during parental arrest and incarceration. Accordingly, the bill stated, “Oregonians have a moral imperative to protect and nurture the children of incarcerated parents from arrest until the parents return to the family.”⁴¹ Further, the original bill described many concerns that it intended to help alleviate. Importantly, the bill enumerated the children’s rights:

It is the intent of the Legislative Assembly that each child of an incarcerated parent have certain essential rights, including but not limited to the following:

- (1) To be protected from additional trauma at the time of parental arrest.
- (2) To be informed of the arrest in an age-appropriate manner.
- (3) To be heard and respected by decision makers when decisions are made about the child.

³⁶ Amanda Waldroupe, *Children of Imprisoned Parents Get Oregon Bill of Rights*, STREET ROOTS, Sep. 22, 2017, <http://news.streetroots.org/2017/09/22/children-imprisoned-parents-get-oregon-bill-rights>.

³⁷ *Id.*

³⁸ S.B. 241. (as introduced).

³⁹ *Id.*

⁴⁰ *Id.* “Adverse childhood experiences” are commonly researched by the Center for Disease Control and Kaiser and often referred to as the “ACE study.” Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245, 250 (1998) (finding a strong correlation between the number of childhood exposures of adverse experiences, such as parental incarceration, and diseases that are leading causes of death in adults).

⁴¹ S.B. 241. (as introduced).

- (4) To be considered when decisions are made about the child's parent.
- (5) To be cared for in the absence of the child's parent in a way that prioritizes the child's physical, mental and emotional needs.
- (6) To speak with, see and touch the incarcerated parent.
- (7) To be informed about local services and programs that can provide support to the child as the child deals with the parent's incarceration.
- (8) To not be judged, labeled or blamed for the parent's incarceration.
- (9) To have a lifelong relationship with the incarcerated parent.⁴²

Although the Bill of Rights in section one enumerated constitutional rights for affected children, after the legislature failed to pass section two, the rights set forth in the bill seem to be mere suggestions rather than enforceable rights. Section two created a Task Force for Children of Incarcerated Parents, and it stated that twenty members were to be appointed to the Task Force by the Governor.⁴³ Section two also provided that appointed individuals and the Task Force shall “[r]eview the report and recommendations of the planning and advisory committee . . . and revise and update the report and recommendations.”⁴⁴ Section two also created a timeline in which the government agencies affected by the Rights of Children of Incarcerated Parents had to “establish an outreach and education plan for the criminal justice system about the needs of children of incarcerated parents and the[ir] rights,” and “create an implementation plan . . . that [i]ncludes a timeline and prioritization for implementation of the recommendations; [i]dentifies policy changes and funding needs that the implementation plan requires; and [i]dentifies educational and

⁴² *Id.* § 1.

⁴³ *Id.* § 2(2). (stating these members were to be one individual appointed from the Department of Human Services, one individual from the Department of Corrections, one individual from the Department of Education, one individual from the Oregon Health Authority, one individual from the Family Court Department, one individual who represents a public defender's office, one individual who represents a district attorney's office, one individual from the Court Appointed Special Advocate program, one individual from a nonprofit children's advocacy program, one individual from the Young Women Christian Association, one individual from a nonprofit civil rights advocacy program, one individual from an early childhood program, one individual who is a licensed mental health professional, two members of the public who were incarcerated parents at one point, two adult members of the public who were children of incarcerated parents, one member of the public who is a foster parent, one member of public who is knowledgeable about child welfare issues, and one member of public who represents a community justice department).

⁴⁴ *Id.* § 2(3)(a).

training needs to ensure success of the plan.”⁴⁵ Unfortunately, this section—which functioned as the bill’s teeth to ensure that authorities enforced the rights delineated in section one—did not survive the amendment phase.⁴⁶

Instead, the legislature, through the amendments to the bill, instructed the Department of Corrections to develop “guiding principles for policy and procedure decisions that impact incarcerated individuals with children” that are based on the Bill of Rights.⁴⁷ As addressed below, these amendments changed the purpose of the bill from creating enforceable rights for children with an incarcerated parent to creating aspirational guidelines.

As amended, there is no enforcement mechanism in place to ensure that a child with an incarcerated parent is guaranteed the rights in the bill: The bill does not delegate enforcement authority to any persons. Rather, the bill lays out the various rights and directs the Department of Corrections to establish guidelines to best protect the children’s rights.⁴⁸

The bill does not delegate authority to any agency to either (1) raise constitutional claims on behalf of children of incarcerated parents or (2) oversee the Department of Corrections to ensure their policies are actually protecting children’s rights. Without the authority to bring claims on behalf of children or oversee the Department of Corrections, the Bill of Rights is nearly impossible to implement. Therefore, it is important to focus on improving state agencies’ protocols to ensure that the bill will successfully protect the rights of children with an incarcerated parent.

Despite its shortcomings, this bill is a step in the right direction. Oregon is currently the first state to pass any legislation acknowledging children have rights when a parent becomes incarcerated.⁴⁹ Moreover, there is a strong possibility the original bill would not have passed since creating the Task Force would require the state to allocate significant resources.

⁴⁵ *Id.* §§ 2(3)(b), (c)(A)–(C).

⁴⁶ *Id.* (after Senate amendments).

⁴⁷ *Id.* (after House amendments). The bill also indicates that the Department of Corrections should develop policy and funding recommendations with partners that will adhere to those guidelines. *Id.*

⁴⁸ *Id.*

⁴⁹ Waldroupe, *supra* note 36. California attempted to pass similar legislation; however, the legislation died after committee. Status of S.C.R.-20, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=200920100SCR20 (last visited Nov. 1, 2018).

III BEST PRACTICES OREGON MAY MODEL

The following section suggests three types of agency policy changes that honor children's rights as enumerated in the bill. This first change relates to arrest protocols for individuals who are parents. The second change relates to protocols for placement of children after parental arrest. The third change relates to policies implemented by both the Department of Corrections and Department of Human Services to ensure visitation and communication between the child and the incarcerated parent.

A. Arrest Protocol

Arrest protocols are one area that can be dramatically improved to ensure that children's rights are best protected. Specifically, parental arrest protocols could help achieve various rights delineated within the Bill of Rights, such as protecting children from additional trauma at the time of parental arrest; informing children of the arrest in an age-appropriate manner; caring for children in the absence of a parent in a way that prioritizes their physical, mental, and emotional needs; informing children about local services and programs that can provide support to them as they heal; and allowing children to not be judged, labeled, or blamed for their parent's incarceration.⁵⁰

The arrest protocols should be broken down into two time periods and implemented throughout law enforcement agencies. The first time period occurs during pre-arrest planning.⁵¹ While it is not feasible for every arrest to be preplanned, a large number of arrests are.⁵² If an arrest is preplanned, there are certain things that can be done to reduce trauma to the child. Specifically, when timing of an arrest is not critical, law enforcement should consider carrying out the arrest of a parent while his or her child is in school, reducing the likelihood that the child will witness the parent's arrest.⁵³

If timing is critical, the arresting officer should at minimum make arrangements with the Department of Human Services or another similar agency to ensure an appropriate agency representative is present during the arrest to assist any child present at the time of the parent's arrest.⁵⁴ Additionally, if the arrest is not preplanned, then officers who

⁵⁰ S.B. 241, § 1 (as introduced).

⁵¹ See BUREAU OF JUSTICE ASSISTANCE, *supra* note 1, at 12.

⁵² *Id.* at 12.

⁵³ *Id.*

⁵⁴ *Id.* at 13–14.

have the ability to cite and release in lieu of arrest should when possible.⁵⁵ For certain types of crimes, an arrest is almost certain to be a book-and-release, and when that is the case, the officer should take parental status into consideration.⁵⁶ For example, an officer could issue the parent a citation in lieu of arrest and instruct the parent to “turn themselves in” to be booked and released at the police station, allowing the parent to do so while their child is at school.

The second time period occurs during the actual arrest. The San Francisco Police Department has developed a policy to establish best methods for officers in coordination with child services and first responders. These arrest protocols include having the officer inquire whether a child is present.⁵⁷ Further, when an officer makes an arrest in a home environment, the officer needs to be aware of household items, such as toys, diapers, formula, etc., which indicate that there is a child in the household.⁵⁸ After all, the parent may be responsible for that child. During the actual arrest, officers are instructed to make the arrest away from any children, as to not further traumatize them.⁵⁹ Regarding preplanned arrests, officers should consider the child’s age and execute the arrest when the child is not at home.⁶⁰ When the arrest cannot be preplanned and a child is present, officers must try to contact the nonarrested parent or another responsible adult willing to take care of the child.⁶¹ If the child is to be released to an adult, officers need to contact Child Protective Services and conduct a preliminary criminal background check to ensure the person taking responsibility for the child does not have a history of child abuse, sexual crimes, or violence against children.⁶² To ensure compliance with these provisions during the arrest, the policy instructs the reporting officer to include in the incident report, “the name and contact information of the adult with whom the children were left, any contact information of other family members the officers identified to assist FCS in case future placement is necessary, and the name and contact information of the FCS worker and school personnel contacted.”⁶³

A provision in San Francisco’s policy states:

⁵⁵ *Id.* at 13.

⁵⁶ *Id.*

⁵⁷ S.F., CAL., POLICE DEP’T, DGO7.04 (2014) (Juvenile: Children of Arrested Parents).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

If it is safe to do so, officers should allow the arrested parent to assure the children that they will be safe and provided for. If it is not safe or if . . . [this] would be non-productive, an officer . . . should explain the reason for the arrest in age-appropriate language and offer reassurances to the children that both parent and children will be cared for.⁶⁴

This is an important provision that should be replicated in Oregon's law enforcement policies. As mentioned in Part I, incarceration of a parent is an adverse childhood experience. Because the child has no control over the situation, this provision allows the arrest to progress in a way that is least likely to further traumatize the child. By allowing the parent to explain to the child that the child will be cared for, the child is more likely to feel reassured, as opposed to having a stranger assure the child that they will be cared for. Additionally, by instructing the officer to use age-appropriate language, the policy reminds the officer they are dealing with a child and to choose his or her words carefully.

San Francisco's policy also includes instructions for officers on what to do if a child is at school at the time of the parent's arrest.⁶⁵ In addition to requiring the officer to contact Family and Child Services, San Francisco's policy puts the onus on the arresting officer to alert the school resource officer, or if unavailable, the principal, of the parent's arrest.⁶⁶ Additionally, the policy instructs the officer to obtain placement information for the child prior to contacting the school and relay that information, thereby preventing children from getting on a bus and returning home to find no parent.⁶⁷

To help officers follow the policy and procedures relating to the arrest of a parent, when an officer checks the "made an arrest" box in their information system, the following questions appear:

- 1) Did an officer inquire whether the arrested person is a parent/guardian/caregiver of a child under 18 years of age? If the person is the parent/guardian/caregiver, continue with questions 2 through 7. If the person is not the parent/guardian/caregiver, you can discontinue answering the questions.
- 2) Did an officer handcuff the parent/guardian/caregiver outside the presence of the child? If not, is the reason why the parent was handcuffed in the child's presence explained in the incident report?

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

- 3) Did the parent/guardian/caregiver or an officer assure the child that he/she will be safe and provided for?
- 4) Did the parent/guardian/caregiver designate the non-arrested parent, an adult relative or other responsible adult to take responsibility of the child?
- 5) Did an officer conduct a preliminary criminal background check, including calling Family and Children Services, on the person designated to take responsibility for the child?
- 6) If the child was at school at the time of the arrest, did an officer contact the School Resource Officer or the principal of the child's school to provide the placement information?
- 7) Is the following information contained in the incident report:
 - a. Name, gender and age of the arrested parent/guardian/caregiver's child,
 - b. Name and contact information of the adult with whom the child was left,
 - c. Contact information of other family members the officers identified to assist FCS in case future placement is necessary, and
 - d. Name and contact information of the FCS worker and school personnel contacted?⁶⁸

Officers must review these questions after every arrest, which makes the officers think about their interactions with children, as well as the potential impact that the arrest of a parent will have on a child's life.

B. Placement of Children After Parental Arrest

The placement of children whose parents are arrested is often overlooked by law enforcement. When an officer does determine that the individual they are arresting is a parent with dependent children, ideally the child of the arrested parent would be placed with another parent or legal guardian.⁶⁹ However, this is not feasible in situations where the arrested parent is a single parent. Therefore, the next best option is for the arrested parent to pick the caretaker.⁷⁰ Officers often ask the parent to designate a relative or friend as temporarily

⁶⁸ S.F., CAL., POLICE DEP'T, DEPARTMENT BULLETIN 16-030 (2016), https://sanfranciscopolice.org/sites/default/files/Documents/PoliceDocuments/DepartmentBulletins/db%2016-030_0.pdf.

⁶⁹ See BUREAU OF JUSTICE ASSISTANCE, *supra* note 1, at 15.

⁷⁰ *Id.*

responsible for the children.⁷¹ Of responding law enforcement agencies, almost two-thirds said their officers will use discretion to determine whether to accept the arrested parent's caretaker preference.⁷² The agencies reported that officers follow the arrested parent's suggestion more often when the parent is arrested for a nonviolent crime.⁷³

Even when parents are able to designate someone to care for their children, agencies should, for safety reasons, ensure designated individuals are fit to care for the children.⁷⁴ Unfortunately, there are many agencies without procedures in place to ensure that the officer will verify the suitability of designated caregivers.⁷⁵ Law enforcement can establish such procedures by working closely with Child Protective Services to screen potential caregivers prior to the child's placement.⁷⁶

The best model for Oregon to follow when placing a child with a caregiver following the arrest of a parent is the San Francisco Police Department's policy.

If children are present, officers shall determine whether the non-arrested parent, an adult relative, or other responsible adult (i.e. godparent, adult neighbor) is willing to take responsibility for the children. Members shall conduct a preliminary criminal background check and contact FCS to determine if the person willing to take responsibility for the children has a history of child abuse. Any history of sexual crimes, 290 PC registration status or violence against children makes the adult ineligible to assume responsibility for the children. However, this does not apply to the non-arrested parent unless there is a court order limiting contact with the children. In any event, officers shall notify the FCS worker of the intended placement.⁷⁷

This policy allows for a collaborative effort between law enforcement and child protective services.

Additionally, Oregon could further develop the policy by adding four steps to help coordinate the efforts of law enforcement and Child

⁷¹ NIETO, *supra* note 6, at 13.

⁷² *Id.*

⁷³ *Id.* ("Officers in smaller law enforcement agencies are the most likely to grant a mother's request for her children's placement. An officer's response is conditioned by limited resources, and depends on the ability of the officer to make a judgment call in the field.").

⁷⁴ BUREAU OF JUSTICE ASSISTANCE, *supra* note 1, at 15–16.

⁷⁵ NIETO, *supra* note 6, at 13 (finding forty-four percent of responding law enforcement agencies did not have any procedures in place to check the suitability of designated individual).

⁷⁶ *Id.* at 15 (discussing relationships with CPS generally).

⁷⁷ S.F., CAL., POLICE DEP'T, *supra* note 57.

Protective Service workers.⁷⁸ The first step Oregon should adopt is to bind all law enforcement agencies in the state and Child Protective Services through a written agreement, which at a minimum must “define individual agency responsibilities and commitments; specific operational protocols; cost sharing, if necessary; shared work spaces, if required; meeting schedules and information/data exchange protocols; training responsibilities; issues related to confidentiality of information and records; and terms of agreement severability.”⁷⁹

The second step is to coordinate and schedule regular meetings between law enforcement and Child Protective Services so that information regarding a specific case or the overall effectiveness of the joint operations can be freely and regularly shared.⁸⁰

The third step Oregon should adopt is to require all law enforcement agencies to designate a liaison who will follow up with the child of the arrested individual to ensure the child’s well-being.⁸¹ Additionally, the liaison should inquire, in an age and developmentally appropriate manner, whether the child is comfortable with the placement. Because law enforcement is able and required to record an arrest or incident each time a child’s parent is arrested, whether the child is present or not, the liaison can monitor incidents on a case-by-case basis and respond with appropriate follow-up.⁸² The liaison also should be present at any meetings related to the child to ensure compliance.⁸³

The fourth and final step that Oregon should add to its policies is to provide law enforcement officers with a list of community resources and support, so the officer can share that information with the child’s caretaker.⁸⁴ By adding these steps set forth in San Francisco’s model policy, Oregon’s law enforcement officers will be prepared in the event a child’s living situation is disrupted due to parental arrest and incarceration.

C. Policies to Be Implemented by the Department of Corrections and the Department of Human Services

The Department of Corrections and the Department of Human Services can best protect the rights of children of incarcerated parents.

⁷⁸ BUREAU OF JUSTICE ASSISTANCE, *supra* note 1, at 10.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

While there is a large intersect between the two departments—especially in regard to children who have an incarcerated parent—because of the large number of procedures this Article is advocating for implementation of, it is best to discuss the agencies separately.

1. Department of Corrections

A child's adjustment to parental incarceration is greatly affected by the "quality of parent-child bonds," and experts have found "[t]he lack of a parent-child relationship can cause irreparable damage to family bonds; therefore, face-to-face contact or written communication is encouraged."⁸⁵ Accordingly, the Department of Corrections should implement various policies and procedures to ensure that the parent-child relationship prior to incarceration is maintained in a way that values the importance of that relationship.⁸⁶

Regarding the right "[t]o speak with, see and touch the incarcerated parent,"⁸⁷ the Department of Corrections should establish policies that allow for increased, in-person visitation between children and their incarcerated parent. Historically, visitation between children and their incarcerated parent was not taken into consideration at jails and prisons.⁸⁸ This means that visitation for children often takes place in uninviting areas, and children are usually required to sit across the table from their parent during visits.⁸⁹ Additionally, the visitation schedule at prisons is often inconvenient for those caring for the child. As a result, many parents may decide visitation at the prison is not in the best interest of their child.⁹⁰

Oregon prisons do not currently have a uniform policy regarding visitation between parents and their children. In a survey done on Oregon's incarcerated parent population, "57 percent of women and 48 percent of men planned to eventually be reunited with their children."⁹¹ Despite the high percentage of mothers who expected to be reunified, "50 percent had no visits, 15 percent had no phone conversations, 30

⁸⁵ Miller, *supra* note 31, at 475.

⁸⁶ *See id.* at 475–76.

⁸⁷ S.B. 241, 79th Or. Legis. Assemb., § 1(6) (2017) (as introduced).

⁸⁸ CHILDREN OF INCARCERATED PARENTS PROJECT: REPORT TO THE OREGON LEGISLATURE ON SENATE BILL 133, at 4 (2002).

⁸⁹ *Id.*

⁹⁰ *Id.* Additionally, this section discusses visitation policies that could be implemented at prisons to serve the best interests of children by maintaining the parent-child relationship. It does not address or suggest that these practices would be suitable for children whose best interests are served by ceasing contact with the incarcerated parent, whether due to issues of abuse or neglect prior to incarceration.

⁹¹ *Id.*

percent received no letters, and 8 percent had no contact at all with their children in the three months prior to the survey.”⁹² For fathers expecting to be reunified with their children, “70 percent had no visits, 40 percent had no phone conversations, 40 percent had received no letters and 20 percent had no contact at all with their children in the three months prior to the survey.”⁹³

These numbers are alarming, especially when considering the progressive efforts to reduce barriers for parents and their children to maintain their relationships that the Oregon Department of Correction has already made.⁹⁴ Several of Oregon’s prisons have programs in place that provide parenting classes to incarcerated parents.⁹⁵ The curriculum for the classes was developed in conjunction with the Oregon Social Learning Project, and the classes are part of a twelve-week program designed to teach parents about the complexities of parenting while in prison.⁹⁶

The Oregon Department of Corrections has created a highly effective program for incarcerated parents, The Family Preservation Project, which was implemented at Coffee Creek Correctional Institute, the sole women’s prison in Oregon.⁹⁷ This program was the successor to a prior program ran by the Oregon Department of Corrections, which was an “Even Start” family literacy program run at Coffee Creek from 2002–2009.⁹⁸ The Family Preservation Project began in March 2010, and its mission was to “interrupt the intergenerational cycle of criminal justice involvement, poverty, and addiction.”⁹⁹ The program followed literature regarding best practices for children of incarcerated parents and was designed to “positively rebuild and maintain the incarcerated mothers’ relationships with their children and their children’s caregivers.”¹⁰⁰

The Family Preservation Project was structured so that after acceptance into the program, women would complete a

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 5.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See generally KEVA M. MILLER, KM RESEARCH AND CONSULTING, FAMILY PRESERVATION PROJECT: COFFEE CREEK CORRECTIONAL FACILITY 2010 – 2013 EVALUATION REPORT (2014), <https://www.pdx.edu/syndication/sites/www.pdx.edu.syndication/files/Family%20Preservation%20Project-Final%20Report.pdf>.

⁹⁸ *Id.* at 1.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 2.

biopsychosocial assessment, which was used to help identify long-term and short-term goals.¹⁰¹ The women would then meet weekly to review what services were available to help them meet their goals.¹⁰² The Family Preservation Project offered opportunities designed for the children of incarcerated parents, which helped them build positive relationships with other adults.¹⁰³ More importantly, the program allowed for bimonthly visitation between the child and parent in an environment specifically designed to be child friendly.¹⁰⁴ The Family Preservation Project also created extracurricular enrichment activities for the children as well as opportunities to “receive academic support services and have access to high-quality pre-school placements.”¹⁰⁵ Additionally, because the program recognized the unique stressors associated with children of incarcerated parents, it provided children with necessary mental health service referrals.¹⁰⁶ Finally, it provided caregivers with support to help decrease some of the stressors often linked to caring for a children of incarcerated parents.¹⁰⁷

The Family Preservation Project was highly successful at maintaining the parent-child bond during incarceration.¹⁰⁸ One of the program’s main goals was to increase the mothers’ parenting skills by teaching skills using the “Parenting Inside Out” curriculum and encouraging the mothers’ use of those skills during the bimonthly visits.¹⁰⁹ The Family Preservation Project placed a high priority on maintaining the relationship and bonds between the incarcerated mother and her child.¹¹⁰ Additionally, the program successfully reduced negative mental health effects children with an incarcerated parent experience.¹¹¹

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 3.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See generally id.*

¹⁰⁹ *Id.* at 11.

¹¹⁰ *Id.* (“All program participants had a minimum of four visits with an average of 25.6 visits while in the program. . . . All participants had a minimum of 20 phone calls, with an average of 115.4 calls during their term in the program.”).

¹¹¹ *Id.* at vi. (“An assessment of children’s behavioral and emotional functioning indicated that overall, the FPP children’s average score was within normal ranges both at baseline and follow-up measurements. At both measurements, the majority of the children were assessed to be at low-risk for experiencing any diagnostic disorder, emotional disorder (i.e., anxiety, depression), behavioral disorder (i.e., aggression, delinquency), or hyperactivity or concentration disorder.”).

Unfortunately, despite The Family Preservation Project's success rate at both maintaining the child-parent bond and drastically decreasing the likelihood of recidivism in the parent, the Oregon Department of Justice cut funding for it in 2014.¹¹² While the cost of the program appears hefty at first—approximately \$300,000 a year—in viewing the Oregon Department of Corrections' budget as a whole, \$1.4 billion every two years, the program equates to only 0.04 percent of the Department's budget.¹¹³ While the Family Preservation Project was resurrected by the Young Women's Christian Association (YWCA) of Greater Portland, the program would be better served if it received stable funding from the Oregon Department of Corrections.¹¹⁴

2. Department of Human Services

The Oregon Department of Human Services could also implement better policies for children of incarcerated parents. There have been several cases regarding a parent's rights to continue having a relationship with their child after incarceration. Oregon law, following directives from federal policies, states:

[T]he Department of Human Services shall simultaneously file a petition to terminate the parental rights of a child or ward's parents and identify, recruit, process and approve a qualified family for adoption if the child or ward is in the custody of the department and:

(a) The child or ward has been in substitute care under the responsibility of the department for 15 months of the most recent 22 months.¹¹⁵

Additionally, the state will consider “[c]riminal conduct that impairs the parent's ability to provide adequate care for the child” when considering terminating parental rights.¹¹⁶

Not all criminal conduct is a basis for termination of parental rights. Currently, *State Office of Services to Children and Families (SOSCF) v. Stillman* gives the guiding principles for when incarceration may be

¹¹² Beth Slovic, *Hard Time Gets Harder: Oregon is Cutting an Effective Program to Help Mothers in Prison Stay Close to their Kids*, WILLAMETTE WEEK (Jan. 24, 2017) <http://www.wweek.com/portland/article-23658-hard-time-gets-harder.html>. (finding that none of the twenty-three women to graduate the program have returned to prison).

¹¹³ *Id.*

¹¹⁴ See generally Beth Slovic, *Will the Family Preservation Project Get a New Life?*, WILLAMETTE WEEK (Dec. 9, 2014) <http://www.wweek.com/portland/blog-33315-will-the-family-preservation-project-get-a-new-life.html>.

¹¹⁵ OR. REV. STAT. § 419B.498 (2017).

¹¹⁶ OR. REV. STAT. § 419B.504(6) (2017).

classified as “criminal conduct” such to be the basis for meeting the criteria of termination of parental rights.¹¹⁷ In *Stillman*, a father’s parental rights to his two children were terminated due to his involvement in drug-related activities and subsequent incarceration.¹¹⁸ The state’s case rested largely on the children’s need for permanency. The court found permanency would not be achieved immediately if the father maintained his parental rights because the father still had four more months left in prison and testified that after being released it would take him several months to set up his life before parenting again.¹¹⁹ However, on appeal the Oregon Supreme Court determined that while “[a] parent’s imprisonment for a criminal act is, in any event, a ‘condition’ of the kind that the court is entitled to consider under the wording of the first part of ORS 419B.504,” a parent’s incarceration is not a condition that renders them necessarily unfit for termination purposes.¹²⁰

While *Stillman* shows that incarcerated parents’ parental rights cannot be terminated solely because they are incarcerated (unless the incarceration is for a specific crime against a child), the Department of Human Services has specific policies for incarcerated parents. These policies reflect the efforts that must be made by both the incarcerated parent and the assigned case worker.

Currently, while Oregon law prohibits the Department of Human Services from ceasing reasonable efforts based solely on a parent’s incarceration,¹²¹ the definition of what constitutes reasonable efforts is malleable.¹²² Interestingly, with the creation of the Bill of Rights, it is possible for cases to be brought on behalf of a child against the

¹¹⁷ See generally 333 Or. 135, 36 P.3d 490 (2001).

¹¹⁸ *Id.* at 138, 36 P.3d at 491.

¹¹⁹ *Id.* at 142, 36 P.3d at 494.

¹²⁰ *Id.* at 147–48, 36 P.3d at 497.

¹²¹ State *ex rel.* Juvenile Dep’t v. Williams, 204 Or. App. 496, 506, 130 P.3d 801, 806 (2006) (“[O]ur examination of the text of ORS 419B.340(5)(a) convinces us that incarceration of a parent, without more, is not an aggravated circumstance that may serve as a basis for excusing DHS from making reasonable efforts toward reunifying the family.”).

¹²² D.H.S. v. C.L.H., 283 Or. App. 313, 326, 388 P.3d 1214, 1222 (2017) (“In this case, the juvenile court appears to have interpreted *S. W.* to stand for the proposition that DHS is only required to make minimal efforts with respect to an incarcerated parent so long as DHS’s failures did not prevent the parent from making sufficient progress, and any efforts on the agency’s part would not change the fact of that parent’s incarceration. We reject that interpretation of *S. W.* for several reasons. First, that interpretation misconstrues what is meant by ‘benefit’ when a court undertakes the ‘cost-benefit analysis’ that applies in these circumstances. Second, such an interpretation conflates the separate ‘reasonable efforts’ and ‘sufficient progress’ inquiries required by ORS 419B.476(2)(a). Finally, the result in *S. W.* was heavily fact-dependent and is materially distinguishable from this case.” (citation omitted)).

Department of Human Services for failing to protect their enumerated rights.

Oregon courts have recognized the unique challenges posed on the Department of Human Services in dependency cases with children of incarcerated parents. However, the courts have properly indicated that these challenges do not excuse the agency from making reasonable efforts.¹²³ The Department of Human Services could better the situations for children of incarcerated parents by creating new policies centered around the Bill of Rights.

CONCLUSION

It is the responsibility of the Oregon government to ensure the children of incarcerated parents are being protected. Oregon's Bill of Rights for Children of Incarcerated Parents is a step in the right direction: it delineates rights for the children. However, the government must do more. While the Bill of Rights is a victory for children of incarcerated parents, it is just the beginning. Oregon can, and should, implement the practices, policies, and procedures that are discussed above.

Because Oregon is the first state to pass a Bill of Rights for children, other states will be looking to Oregon when deciding how to model their systems. As such, it is important for Oregon to enact policies and procedures to ensure the state is upholding the rights of the children as laid out in the Bill of Rights.

¹²³ D.H.S. v. S.W., 267 Or. App. 277, 286, 340 P.3d 675, 680 (2014) (“Dependency cases involving incarcerated parents present unique challenges. The department’s ability to, for example, communicate with a parent, monitor a parent’s engagement in services, and facilitate visits with the child may be severely tested when a parent is incarcerated. We have made it clear, however, that the mere fact of a parent’s incarceration does not excuse DHS from making the reasonable efforts required by statute.”) (citation omitted).

