

EXPANDING THE DEFINITION OF DIGNITY: THE CASE FOR BROAD CRIMINAL JUSTICE REFORM THAT ACCOUNTS FOR GENDER DISPARITIES

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I. INTRODUCTION

This Article examines the national “Dignity” movement, which seeks to address the unique needs of women impacted by the criminal justice system, and urges reformers to continue expanding the definition of “Dignity” reform to include issues that disproportionately impact women—those driving women into incarceration at higher rates and those keeping them in the system longer. Part II looks at the historical rise of incarceration in the United States. Part III examines how the rise of mass incarceration has impacted women. Part IV looks at legislative successes aimed at providing dignity for incarcerated women at the federal and state levels, and it takes a particularly focused look at what role Texas has played in mass incarceration and “Dignity” reform. Part V suggests five additional areas of reform that should be considered in future legislative efforts. Finally, the Article concludes by suggesting that future reform efforts should build upon the successes of the “Dignity” movement to broaden gains and enable the greatest possible reduction in women’s incarceration.

II. A BRIEF HISTORY OF MASS INCARCERATION

America incarcerates more of its citizens than any other nation in the world.¹ In 1972, the jail and prison populations totaled less than 200,000 people.² Today, more than 2.2 million people are incarcerated,³ and nearly seven million people are under “correctional control,” including probation and parole supervision.⁴ With only 5% of the world’s population, the United

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¹ Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/?noredirect=on>.

² BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS 1925–81 (1982), <https://www.bjs.gov/content/pub/pdf/p2581.pdf>.

³ *United States Still Has Highest Incarceration Rate in the World*, EQUAL JUST. INITIATIVE (Apr. 26, 2019), <https://eji.org/news/united-states-still-has-highest-incarceration-rate-world>.

⁴ Danielle Kaebler, *Probation and Parole in the United States, 2016*, BUREAU JUST. STAT. (Apr. 26,

States is responsible for nearly 25% of its prisoners.⁵ This is largely a policymaking problem with significant ramifications: “Changes in law and policy, not changes in crime rates, explain most of this increase. The results are overcrowding in prisons and fiscal burdens on states, despite increasing evidence that large-scale incarceration is not an effective means of achieving public safety.”⁶

The War on Drugs, initiated in the 1980s, is an example of policymaking with severe consequences. The number of people incarcerated in America for a drug offense skyrocketed from 40,900 in 1980 to 452,964 in 2017; as a result, “there are more people behind bars for a drug offense than the number of people who were in prison or jail for any crime in 1980.”⁷ The War on Drugs was followed by other “tough on crime” campaigns during the 1990s, leading to the expansion of mandatory minimum sentencing, the explosion of life without parole sentences, and the growth of private prisons operated by for-profit corporations.⁸

The unprecedented rise in incarceration did not impact all communities equally. Racial bias in sentencing and socioeconomic inequality contribute to racial disparities in the criminal justice system. Despite making up only 37% of the United States’ total population, people of color account for 67% of the prison population.⁹

Over time, the American criminal justice system began forgoing prioritization of the most dangerous or habitually offending individuals. This is where the theory that higher incarceration leads to less crime falls apart.¹⁰ In February 2015, the Brennan Center for Justice published a rigorous empirical analysis of the various causes of America’s decline in crime.¹¹ The following is an excerpt from the Foreword to that report written by economist Joseph E. Stiglitz¹²:

2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6188>.

⁵ Ye Hee Lee, *supra* note 1.

⁶ *Criminal Justice Facts*, SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> (last visited May 30, 2020).

⁷ *Id.*

⁸ *Criminal Justice Reform*, EQUAL JUST. INITIATIVE, <https://eji.org/criminal-justice-reform/> (last visited May 30, 2020).

⁹ *Criminal Justice Facts*, *supra* note 6.

¹⁰ Inimai M. Chettiar, *The Many Causes of America’s Decline in Crime*, ATLANTIC (Feb. 11, 2015), <https://www.theatlantic.com/politics/archive/2015/02/the-many-causes-of-americas-decline-in-crime/385364/>.

¹¹ OLIVER ROEDER ET AL., WHAT CAUSED THE CRIME DECLINE? (2015), https://www.brennancenter.org/sites/default/files/analysis/Crime_rate_report_web.pdf.

¹² See JOSEPH E. STIGLITZ, <http://www.josephstiglitz.com/> (last visited May 30, 2020) to learn more about Joseph Stiglitz.

The authors conclude that incarceration had relatively little to do with crime decline. They find that the dramatic increases in incarceration have had a limited, diminishing effect on crime. And they have quantified those minimal benefits. At today's high incarceration rates, continuing to incarcerate more people has almost no effect of reducing crime.

These findings raise questions as to whether the toll — fiscal, economic, and societal — of mass incarceration is worthwhile in the face of these negligible crime control benefits. . . .

The United States has limited resources. We must foster opportunity and work to bridge inequality, not fund policies that destroy human potential today and handicap the next generation. The toll of mass incarceration on our social and economic future is unsustainable.

. . . Instead, the country should shift priorities away from policies proven to be ineffective and focus our energies on truly beneficial initiatives that both reduce crime and reduce mass incarceration. The evidence presented here tells us that these are compatible goals.¹³

Professor Stiglitz rightly acknowledges that the United States' addiction to incarceration is associated with great fiscal and human costs—to individuals, families, communities, and the country. According to the Bureau of Justice Statistics, the cost of mass incarceration in America is \$81 billion per year.¹⁴ However, this figure fails to include the costs of policing, court costs, and costs paid by families to support their incarcerated loved ones. A 2017 report from the Prison Policy Initiative estimates the real fiscal costs of mass incarceration to be \$182 billion per year.¹⁵

But now, after nearly four decades of continuous growth, prison populations in America have begun to stabilize.¹⁶ Evolving views on criminal justice have led to more evidence-based, common-sense approaches to public safety, resulting in pragmatic policy changes. One of the most observable examples of such a shift at the state level can be found in Texas. Historically, Texas has been viewed as staunchly “tough on crime”¹⁷—but in 2007, when

¹³ ROEDER ET AL., *supra* note 11, at 1–2.

¹⁴ Tracey Kyckelhahn, *Justice Expenditure and Employment Extracts, 2011- Preliminary*, BUREAU OF JUST. STAT. (July 1, 2014), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5050>.

¹⁵ Peter Wagner & Bernadette Rabuy, *Following the Money of Mass Incarceration*, PRISON POL'Y INITIATIVE (Jan. 25, 2017), <https://www.prisonpolicy.org/reports/money.html>.

¹⁶ David Firestone, *U.S. Figures Show Prison Population Is Now Stabilizing*, N.Y. TIMES (June 9, 2001), <https://www.nytimes.com/2001/06/09/us/us-figures-show-prison-population-is-now-stabilizing.html>.

¹⁷ See generally ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE

Texas was faced with a projected prison population increase of 17,000 individuals over five years, policymakers chose to invest in alternatives to incarceration.¹⁸ More specifically, rather than allocating \$2.5 billion to the construction and operation of new prisons, the legislature invested a fraction of the amount—approximately \$241 million—in probation, parole, and treatment beds.¹⁹ Since then, Texas has closed a record eight prisons,²⁰ crime rates have fallen significantly,²¹ and Texas taxpayers have seen billions of dollars in savings.²²

Similar shifts have occurred across the country. Changes in policy at both state and federal levels have successfully decreased incarceration with no adverse impacts on public safety.²³ In fact, crime rates have declined.²⁴ Between 2007 and 2017, thirty-four states reduced both crime and incarceration in tandem, clearly demonstrating that reductions in mass incarceration do not compromise public safety.²⁵

III. MASS INCARCERATION IS A WOMEN'S ISSUE

Mass incarceration is both a racial and economic issue, but it is also a women's issue. The number of women in the United States prison system has grown by over 700% since 1980.²⁶ This is significantly higher than the growth rate of the overall prison population, which has risen by approximately 500%.²⁷

(2010).

¹⁸ See *Adult & Juvenile Justice System Reforms in Texas*, TEX. CRIM. JUST. COALITION, <https://www.texascjc.org/adult-juvenile-justice-system-reforms-texas> (last visited May 30, 2020).

¹⁹ *Id.*

²⁰ Brandi Grissom, *With Crime, Incarceration Rates Falling, Texas Closes Record Number of Prisons*, DALL. MORNING NEWS (July 5, 2017, 1:41 PM), <https://www.dallasnews.com/news/texas-legislature/2017/07/05/crime-incarceration-rates-falling-texas-closes-record-number-lock-ups>.

²¹ *Texas Crime Rates 1960–2018*, DISASTER CTR., <http://www.disastercenter.com/crime/txcrime.htm> (last visited May 30, 2020).

²² Mark Holden & Brooke Rollins, *Commentary: Texas Saved \$3B Closing Prisons. Why Rehabilitation Works*, AUSTIN AMERICAN-STATESMAN (Feb. 9, 2018, 12:01 AM), <https://www.statesman.com/news/20180209/commentary-texas-saved-3b-closing-prisons-why-rehabilitation-works>.

²³ *Criminal Justice Facts*, *supra* note 6.

²⁴ *Id.*

²⁵ Cameron Kimble & Ames Grawert, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*, BRENNAN CTR. FOR JUST. (Aug. 6, 2019), <https://www.brennancenter.org/blog/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem>.

²⁶ *Fact Sheet: Incarcerated Women and Girls*, SENTENCING PROJECT, <https://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf> (last updated June 2019).

²⁷ *Fact Sheet: Trends in U.S. Corrections*, SENTENCING PROJECT, <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> (last updated June 2019).

The significant differences between justice system-involved women and men point to the need for gender-based programs and services to address women's underlying causes of criminality. Women are more likely than men to commit property and drug offenses, and less likely than men to commit violent offenses.²⁸ When women do commit violent offenses, it is often in self-defense, rather than in a calculated manner.²⁹ Women in the criminal justice system are far more likely to have been sexually abused as children³⁰ and adults³¹ than men. Per a survey by the Texas Criminal Justice Coalition of over 430 incarcerated women in Texas, more than half reported experiencing some kind of physical or sexual trauma prior to their incarceration.³² Some studies have found that between 77% and 98% of justice system-involved women have trauma histories.³³ For some women, this victimization can continue during their incarceration,³⁴ where women can experience physical and sexual assaults. Along with, and perhaps as a result of, significant trauma histories, justice system-involved women also report high rates of mental health problems, substance abuse, and poverty.³⁵ Despite all this, the institutions of criminal justice largely ignore the context of these women's lives and the reality of their needs.³⁶

A multitude of factors have contributed to the growing rate of female incarceration: poverty, tough-on-crime prosecution of drug crimes, overly broad conspiracy and accomplice laws (which are more likely to sweep up

²⁸ LINDSEY LINDER, AN UNSUPPORTED POPULATION: THE TREATMENT OF WOMEN IN TEXAS' CRIMINAL JUSTICE SYSTEM 4 (2018), <https://www.texascjc.org/system/files/publications/TCJC%20Womens%20Report%20Part%202.pdf> [hereinafter AN UNSUPPORTED POPULATION].

²⁹ NAT'L RES. CTR. ON JUSTICE INVOLVED WOMEN, FACT SHEET ON JUSTICE INVOLVED WOMEN IN 2016, at 2 (2016), <https://cjinvolvedwomen.org/wp-content/uploads/2016/06/Fact-Sheet.pdf>.

³⁰ *Child Sexual Abuse Statistics*, NAT'L CTR. FOR VICTIMS CRIME, <https://victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics> (last visited May 30, 2020).

³¹ NAT'L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media_packet_statistics-about-sexual-violence_0.pdf.

³² *Findings from Survey of Incarcerated Women*, TEX. CRIM. JUST. COALITION, <https://www.texascjc.org/findings-survey-incarcerated-women> (last visited May 30, 2020).

³³ Shannon M. Lynch et al., *Looking Beneath the Surface: The Nature of Incarcerated Women's Experiences of Interpersonal Violence, Treatment Needs, and Mental Health*, 7 FEMINIST CRIMINOLOGY 381, 382 (2012).

³⁴ See *Findings from Survey of Incarcerated Women*, *supra* note 32.

³⁵ See Barbara E. Bloom & Stephanie S. Covington, *Addressing the Mental Health Needs of Women Offenders*, in WOMEN'S MENTAL HEALTH ISSUES ACROSS THE CRIMINAL JUSTICE SYSTEM (Rosemary Gido & Lanette Dalley eds., 2008), available at <https://www.stephaniecovington.com/assets/files/FinalAddressingtheMentalHealthNeeds.pdf>.

³⁶ See Elise Barlow, *Understanding Women in Prison: A Review of Gender Specific Needs and Risk Assessments and Their Policy and Research Implications* (2014) (B.A. honors thesis, Portland State University), available at <https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1046&context=honorsthesis>.

women), lack of treatment for substance use and mental illness, lack of education, racial disproportionality in justice system practices, and psychological and physical trauma.³⁷ These factors are devastating to women and those in their lives. Although women comprise a small, albeit growing, portion of the prison population, their incarceration creates profound ripple effects in their families and within their communities. Across the United States, 2.6 million children have a parent in prison or jail,³⁸ and incarcerated women are more likely to be the primary caretakers of their children than incarcerated fathers.³⁹

The growth of incarcerated women has been largely obscured by overly broad discussions of the total prison population. Because women have historically made up a narrow portion of the overall incarcerated population, their needs have been largely disregarded in criminal justice reform conversations. While recent reforms over the past decade have reduced the overall number of people incarcerated in state prisons, the vast majority of this decrease has been seen in the male population.⁴⁰ In some states, the number of women in prison has actually increased enough to counteract reductions in the men's population; for instance, women's prison populations grew while men's prison populations have decreased in Alabama, Idaho, Indiana, Iowa, Michigan, Texas, Washington, and Wisconsin.⁴¹ In these eight states, ignoring women's needs worked against local efforts to reduce incarceration.

Texas has contributed greatly to the surge in incarcerated women, with one of the top ten highest female incarceration rates in the country.⁴²

³⁷ See Inimai M. Chettiar, *The Hidden Bearers of Mass Incarceration: Women*, BRENNAN CTR. FOR JUST. (July 18, 2017), <https://www.brennancenter.org/our-work/analysis-opinion/hidden-bearers-mass-incarceration-women>; Susan F. Sharp & Susan T. Marcus-Mendoza, *It's a Family Affair: Incarcerated Women and Their Families*, WOMEN & CRIM. JUST., Sept. 2008, at 21, 23–24; Stephen J. Tripodi and Carrie Pettus-Davis, *Histories of Childhood Victimization and Subsequent Mental Health Problems, Substance Use, and Sexual Victimization for a Sample of Incarcerated Women in the US*, INT'L J. L. & PSYCHIATRY, Jan.–Feb. 2013, at 30, 32; Janet I. Warren et al., *Psychiatric Symptoms, History of Victimization, and Violent Behavior Among Incarcerated Female Felons*, INT'L J. L. & PSYCHIATRY, Mar.–Apr. 2002, at 129, 130–34.

³⁸ Nicholas Kristof, Opinion, *Mothers in Prison*, N.Y. TIMES, (Nov. 25, 2018), <https://www.nytimes.com/2016/11/25/opinion/sunday/mothers-in-prison.html>.

³⁹ See ANNIE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES, AND COMMUNITIES 2 (2016), <http://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf> (“Children with incarcerated mothers are more likely than those with incarcerated fathers to end up living with grandparents or family friends or in foster care — and, as a result, tend to experience greater disruption and instability.”).

⁴⁰ Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), https://www.prisonpolicy.org/reports/women_overtime.html.

⁴¹ See *id.*

⁴² *Fact Sheet: Incarcerated Women and Girls*, *supra* note 26.

Regarding growth over time, female incarceration in the Texas Department of Criminal Justice (TDCJ, the state's corrections system) increased 908% from 1980–2016, compared to an increase in the male population of 396%.⁴³ In other words, female incarceration in Texas increased at more than twice the rate of male incarceration over the past 40 years.

A more recent spike in system-involved women has occurred as Texas has lowered its overall population in TDCJ, and Texas now incarcerates more women by sheer number than any other state.⁴⁴ From 2009–2018, Texas reduced its prison population by 10,179 men while backfilling its prisons with 122 women.⁴⁵ As of August 2018, women incarcerated in TDCJ numbered 12,076, representing 8.3% of the incarcerated population, up from 7.7% in 2009.⁴⁶ Additionally, the number of women serving 10 years or more in Texas increased over 50% from 2005 to 2014,⁴⁷ sustaining population increases. Ultimately, the number of women incarcerated in TDCJ in 2018 was only slightly less than the total number of women in both state and federal prisons across the country in 1980.⁴⁸ Racial disparities are perpetuated among this population; while Black women make up approximately 6.5% of the overall Texas population,⁴⁹ Black women comprise 24% of the incarcerated female population.⁵⁰

The rise in female incarceration is not exclusive to prisons. In Texas, the number of women in jails awaiting trial—totaling around 6,300—has grown 48% since 2011, compared to an increase of 11% for men over that time period.⁵¹ However, the number of female arrests in Texas has decreased 20% since 2011, suggesting the growth of women in Texas jails is not the result

⁴³ AN UNSUPPORTED POPULATION, *supra* note 28, at 3.

⁴⁴ Telephone Interview with Aleks Kajstura, Prison Policy Initiative (Sept. 5, 2017) (referring to all incarcerated women, including immigrant detainees, based on 2010 U.S. Census Bureau data).

⁴⁵ TEXAS DEPARTMENT OF CRIMINAL JUSTICE, FY 2018 STATISTICAL REPORT 1 (2018), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2018.pdf [hereinafter FY 2018 STATISTICAL REPORT]; TEXAS DEPARTMENT OF CRIMINAL JUSTICE, FY 2009 STATISTICAL REPORT 1 (2009), https://www.tdcj.texas.gov/documents/Statistical_Report_FY2009.pdf.

⁴⁶ AN UNSUPPORTED POPULATION, *supra* note 28, at 3.

⁴⁷ LEIGH COURTNEY ET AL., URBAN INSTITUTE, A MATTER OF TIME: THE CAUSES AND CONSEQUENCES OF RISING TIME SERVED IN AMERICA'S PRISONS (2017), https://apps.urban.org/features/long-prison-terms/a_matter_of_time_print_version.pdf.

⁴⁸ BARLOW, *supra* note 36.

⁴⁹ TEXAS DEMOGRAPHIC CENTER, TEXAS POPULATION TRENDS, CHARACTERISTICS, AND PROJECTIONS OF TEXAS CHILDREN (2019), https://demographics.texas.gov/Resources/Presentations/OSD/2019/2019_01_16_NALEORoundtableontheYoungestTexans.pdf.

⁵⁰ FY 2018 STATISTICAL REPORT, *supra* note 45, at 8.

⁵¹ Cary Aspinwall, *More Women Are Jailed in Texas, Even Though Arrests Have Dropped. Why?*, DALL. MORNING NEWS (Dec. 3, 2017), <https://www.dallasnews.com/news/2017/12/03/more-women-are-jailed-in-texas-even-though-arrests-have-dropped-why/>.

of rising crime.⁵² This emphasizes just how significantly women's needs are failing to be met in the community.

IV. LEGISLATION AIMED AT PROVIDING DIGNITY FOR INCARCERATED WOMEN

A. The Federal Dignity for Incarcerated Women Act

In 2017, United States Senators Cory Booker (D-NJ), Elizabeth Warren (D-MA), Dick Durbin (D-IL), and Kamala Harris (D-CA) introduced the "Dignity Act."⁵³ The Dignity Act proposed banning the use of shackling or solitary confinement of pregnant women, expanding trauma-informed care, eliminating fees for phone calls, ensuring access to an adequate amount of free feminine hygiene products, enabling more contact between women and their families, and more.⁵⁴ Senators Booker and Warren unveiled the legislation during a press conference, joined by Andrea James, Founder and Executive Director of the National Council for Incarcerated and Formerly Incarcerated Women and Girls (the Council) and a formerly incarcerated woman herself, and Jessica Jackson, National Director for the prison reform organization #cut50.⁵⁵

Many organizations—including the Council, the Justice Action Network, #cut50, and the American Conservative Union—have been instrumental in building national momentum around women's justice efforts. To advocate for the Dignity Act, #cut50 launched the "Dignity Campaign," partnering with formerly incarcerated women and celebrities such as Alicia Keys, Oprah Winfrey, Ava DuVernay, and Common to share the story of women's incarceration.⁵⁶

Three of the provisions outlined in the Dignity Act—banning the shackling of pregnant women, requiring people who are incarcerated to be placed within 500 miles of their families, and providing feminine hygiene products to incarcerated women free of charge—were included in the federal

⁵² *Id.*

⁵³ See Dignity for Incarcerated Women Act of 2017, S. 1524, 115th Cong. (2017).

⁵⁴ *Id.*

⁵⁵ See *Dignity for Incarcerated Women*, DREAM CORPS #CUT50, <https://www.cut50.org/our-programs/cut50/campaigns/dignity-for-incarcerated-women/> (last visited May 30, 2020); Caroline Webb, *New Florida Law Provides Incarcerated Women with Hygiene Products, Protection from Sexual Victimization*, FIRST COAST NEWS, <https://www.firstcoastnews.com/article/news/politics/new-florida-law-provides-incarcerated-women-with-hygiene-products-protection-from-sexual-victimization/77-a5524be6-3631-4abd-a62d-5cc6cc0531eb> (last updated July 1, 2019, 6:37 PM).

⁵⁶ See *Dignity for Incarcerated Women*, *supra* note 55.

First Step Act, which was signed into law in December 2018.⁵⁷ In April 2019, Senators Booker and Warren, along with United States Representatives Pramila Jayapal (D-WA-7) and Karen Bass (D-CA-37), reintroduced the Dignity for Incarcerated Women Act and called for Congress to pass the remaining provisions,⁵⁸ though they have not yet become law.

However, since the Dignity for Incarcerated Women Act was first introduced in 2017, at least eleven states have passed—and another four states have introduced—legislation to address some of the needs of incarcerated women.⁵⁹

B. State-by-State Dignity Reforms: A Timeline

Spring 2018 through mid-2019 saw a spate of state-level dignity bills pass into law.

On April 10, 2018, Kentucky became the first state in the nation to pass a dignity law.⁶⁰ Senate Bill 133 banned the shackling of pregnant women, improved feminine health and hygiene services, and expanded treatment for women struggling with addiction.⁶¹

Two weeks later, on April 24, 2018, Maryland Governor Larry Hogan signed into law Senate Bill 598, ensuring all women incarcerated in Maryland have access to an adequate supply of feminine hygiene products at no cost.⁶²

Then, on May 10, 2018, Oklahoma Governor Mary Fallin signed into law House Bill 3393.⁶³ It required all jails and prisons in Oklahoma to use the least restrictive restraints necessary for pregnant women in custody, and it prohibited the use of restraints on women in labor, during delivery, or during post-partum recovery.⁶⁴

Four days later, on May 14, 2018, Connecticut Governor Dannel Malloy signed into law Senate Bill 13, limiting the use of restraints on and expanding care for incarcerated pregnant women, ensuring incarcerated women have access to an adequate amount of feminine hygiene products at no cost,

⁵⁷ Press Release, Booker, Warren, Jayapal, Bass Reintroduce Dignity for Incarcerated Women Act (April 2, 2019), https://www.booker.senate.gov/?p=press_release&id=910.

⁵⁸ *Id.*

⁵⁹ *Dignity for Incarcerated Women*, *supra* note 55.

⁶⁰ *Id.*

⁶¹ *Kentucky Becomes First State to Pass "Dignity" Law for Incarcerated Women*, JUST. ACTION NETWORK (April 10, 2018), <https://www.justiceactionnetwork.org/news/kentucky-becomes-first-state-to-pass-dignity-law-for-incarcerated-women>.

⁶² S.B. 598, 2018 Reg. Sess. (Md. 2018).

⁶³ *Bill Information for HB 3393*, OKLA. ST. LEG., <http://www.oklegislature.gov/BillInfo.aspx?Bill=hb3393&Session=1800>.

⁶⁴ H.B. 3393, 2nd Sess. of the 56th Leg. (Okla. 2018).

expanding visitation policies for incarcerated parents of minor children.⁶⁵ Senate Bill 13 also prevented non-medical staff from entering areas where incarcerated individuals of the opposite gender may be undressed, and utilizing gender-responsive approaches to recognize the unique risks and needs of incarcerated women.⁶⁶

Less than a week later, on May 20, 2018, Louisiana Governor John Bell Edwards signed into law Senate Bill 558.⁶⁷ It provided “for increased access to health care products for incarcerated women,” and it restricted male staff from conducting certain searches and entering certain “areas where incarcerated women may be undressed.”⁶⁸

On August 20, 2018, California Governor Jerry Brown signed into law Assembly Bill 2550, prohibiting male guards from conducting pat-down searches of incarcerated women, as well as prohibiting male guards from entering areas where women may be undressed.⁶⁹

The following year, on May 7, 2019, Georgia Governor Brian Kemp signed into law House Bill 345, limiting strip searches, vaginal examinations, and the use of solitary confinement or restraints on certain incarcerated women who are pregnant, in labor, or in post-partum recovery.⁷⁰

Two weeks later, on May 21, 2019, Tennessee Governor Bill Lee signed into law House Bill 129, requiring certain hygiene and health care products be made available to all incarcerated women at no charge in an appropriate quantity.⁷¹

On June 7, 2019, Florida Governor Ron DeSantis signed into law House Bill 49, expanding incarcerated women’s access to certain health care and hygiene products, preventing male guards from entering areas where incarcerated women might be undressed, and preventing male guards from conducting certain searches on incarcerated women.⁷²

⁶⁵ *Substitute for S.B. No. 13, Session Year 2018*, CONN. GEN. ASS., https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=13&which_year=2018 (last visited May 30, 2020); S.B. 13, 2018 Feb. Sess. (Conn. 2018).

⁶⁶ *Id.*

⁶⁷ S.B. 558, 2018 Reg. Sess. (La. 2018).

⁶⁸ *Dignity for Incarcerated Women*, *supra* note 55.

⁶⁹ A.B. 2550, 2017–2018 Reg. Sess. (Cal. 2018).

⁷⁰ H.B. 345, 2019–2020 Reg. Sess. (Ga. 2019).

⁷¹ SB 0075, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0075> (last visited May 30, 2020).

⁷² See FLA. STAT. ANN. § 944.242 (LEXIS through leg. enacted through May 20, 2020); *Governor Ron DeSantis Signs 38 Bills*, FLGOV.COM (June 7, 2019), <https://www.flgov.com/2019/06/07/governor-ron-desantis-signs-38-bills/>.

C. Building Momentum in Texas: Identifying Areas of Reform

The most recent state to advance dignity legislation is Texas,⁷³ but advocates in the state had been building momentum around women's justice for years. In 2014, the Texas Criminal Justice Coalition sent surveys to 1,600 women incarcerated in the TDCJ; more than 430 women completed the survey, providing extensive and detailed information about themselves and their experiences prior to and during incarceration. While preliminary findings were provided to legislators and the public, the Texas Criminal Justice Coalition released a comprehensive two-part report series in 2018 that offered more insight from the system-involved women who shared their experiences.⁷⁴ In addition to an analysis of the survey data, these reports included information obtained from TDCJ, from formerly incarcerated women, and from people directly serving incarcerated or formerly incarcerated women.⁷⁵

Two predominant themes developed in the Texas Criminal Justice Coalition's research. First, as discussed above, the number of women in Texas' criminal justice system had been rapidly increasing for decades.⁷⁶ Second, Texas was failing to adequately support these women and treat them with dignity—especially problematic given the tremendous challenges that incarcerated women face.

1. Pre-Incarceration Challenges

The most common pre-incarceration themes show that life for many incarcerated women included poverty, domestic violence, and sexual assault. 65% of responding women had not graduated from high school or obtained a GED, with 35% completing less than twelfth grade before entering TDCJ, and 11% completing only eighth or lower grade levels.⁷⁷ Fifty-two percent of women reported that their total household income, before taxes, immediately before entering TDCJ was less than \$10,000 per year; 80% reported it was less than \$30,000 per year.⁷⁸ When asked if they were ever forced to

⁷³ Christopher Connelly, *Texas Lawmakers Move to Meet Women's Needs in Prisons*, KERA NEWS (May 24, 2019), <https://www.keranews.org/post/texas-lawmakers-move-meet-womens-needs-prisons>.

⁷⁴ AN UNSUPPORTED POPULATION, *supra* note 28, at 1; LINDSEY LINDER, TEX. CRIMINAL JUSTICE COAL., A GROWING POPULATION: THE SURGE OF WOMEN INTO TEXAS' CRIMINAL JUSTICE SYSTEM 1 (2018), <https://www.texascjc.org/system/files/publications/TCJC%20Womens%20Report%20Part%201.pdf> [hereinafter A GROWING POPULATION].

⁷⁵ A GROWING POPULATION, *supra* note 74, at 12.

⁷⁶ *Id.* at 4.

⁷⁷ *Id.* at 12.

⁷⁸ *Id.* at 13.

exchange sex for money, food, or basic needs before entering TDCJ, more than 25% of women responded that they had.⁷⁹ Fifty-eight percent of women reported being sexually abused or assaulted as a child; 47% reported being sexually abused or assaulted as an adult before entering TDCJ.⁸⁰ When asked if they believed the crime they were charged with or convicted of was related to any abuse or violence they had experienced, 48% of women responded in the affirmative.⁸¹ Eighty-two percent reported that they had experienced domestic violence or dating abuse (either physical, emotional, or sexual harm by a husband, boyfriend, girlfriend, or romantic partner).⁸² Forty-eight percent reported that they, as a child, had witnessed their mother being abused by her romantic partner.⁸³ When asked if anyone had ever forced them to use drugs, 20% of women reported that their spouse or romantic partner had done so. Fifty-five percent reported that they had been diagnosed with a mental illness; the most common diagnoses for these women were depression (69%), bipolar disorder (48%), anxiety disorder (37%), and Post-Traumatic Stress Disorder (32%).⁸⁴

Nearly all of the state-level dignity reforms have fallen into four categories, intended to address already incarcerated women: (1) care for incarcerated women who are pregnant, (2) improving family unity for incarcerated women who are mothers to minor children, (3) improving incarcerated women's access to an adequate quantity and quality of feminine hygiene products and other health care services, and (4) expanding trauma-informed care for incarcerated women, such as limiting pat-down and body-cavity searches and restricting male guards' access to places where women may be undressed. Texas data, including the Texas Criminal Justice Coalition's survey data, also bear out the need to address these issues.

2. Pregnancy and Motherhood

Visitation was one of the hardest parts of my mom's incarceration. I always had to find someone to take me to see her. Even then, I could only see her on a screen. There was no face-to-face visitation. I remember looking at this fuzzy screen and crying. My mom was trying to console me, but she couldn't even wipe the tears from my eyes. The visits themselves were

⁷⁹ *Id.* at 18.

⁸⁰ *Id.* at 15-16.

⁸¹ *Id.* at 18.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 13 (notably, women could choose multiple diagnoses if more than one diagnosis applied to them).

traumatizing.⁸⁵

Across the United States, 2.6 million children have a parent in prison or jail.⁸⁶ In Texas, more than 10,000 women in TDCJ (81% of incarcerated women) are mothers.⁸⁷ Despite the benefits of parent-child interaction,⁸⁸ incarcerated women are likely to be isolated from their children due to limitations on visitation, costly prison phone fees, and great distances (often hundreds of miles) between children and the prison units.⁸⁹

Children are better able to thrive when their mother remains in their lives; otherwise, losing a parent to incarceration can result in serious mental, physical, and emotional health issues. Nevertheless, incarcerated women have reported their newborns being taken from them soon after birth. According to TDCJ, mothers typically have visitation with their newborn for “somewhat less than 2 weeks,” but this varies according to disciplinary history, offense type, and custody level.⁹⁰ This separation of a woman and her child can be deeply traumatizing, especially during the six weeks immediately following birth when the mother is particularly vulnerable to post-partum depression.⁹¹ “Some mothers are only able to see their children through a glass partition.”⁹² Mothers who are eligible for contact visitation may still find it difficult to engage in meaningful play and bonding with their children, as the visits are limited to sitting inside at a table alongside other incarcerated individuals and visitors.⁹³

Efforts to expand prohibitions on the unnecessary restraint of pregnant women have also been vitally important. Shackling women who are pregnant, in labor, or in post-partum recovery is known to be medically unsafe:

Restraining pregnant prisoners at any time increases their potential for physical harm from an accidental trip or fall. This also poses a risk of serious harm to the woman’s fetus, including the potential for miscarriage. During labor, delivery and post-partum recovery, shackling can interfere with

⁸⁵ AN UNSUPPORTED POPULATION, *supra* note 28, at 15 (quoting Destiny, the child of an incarcerated mother).

⁸⁶ Kristof, *supra* note 38.

⁸⁷ AN UNSUPPORTED POPULATION, *supra* note 28, at 4.

⁸⁸ N. Cicuto Ferreira Rocha et al., *Impact of Mother-Child Interaction on Development During the First Year of Life: A Systematic Review*, DEVELOPMENTAL MED. & CHILD NEUROLOGY, Oct. 2015, at 40, 40.

⁸⁹ See Chettiar, *supra* note 37.

⁹⁰ AN UNSUPPORTED POPULATION, *supra* note 28, at 14.

⁹¹ *Id.* at 14.

⁹² *Id.* at 15.

⁹³ *Contact Visits: What You Need to Know*, TEX. DEPT. OF CRIM. J., https://www.tdcj.texas.gov/visitation/video_contact_visits.html (last visited May 30, 2020).

appropriate medical care and be detrimental to the health of the mother and her newborn child.⁹⁴

Additionally, according to national studies, incarcerated pregnant women are more likely to have complicated and higher-risk pregnancies than women in the general population, resulting in higher numbers of stillbirths, miscarriages, and ectopic pregnancies.⁹⁵

3. Women's Health Care

I had a fibroid on my uterus, so I had a lot of bleeding. But, the pads are so cheap and they don't absorb well. I would go through three of them a night and still bleed through my clothes onto my sheets. It was so embarrassing and shameful, I would get up early and wash myself, my clothes, and my sheets, even though this was against the rules. I would get in trouble, but I couldn't just stay with my clothes and sheets like that. It made me feel less than a human being, let alone a woman. Even though we are in prison, we are still women.⁹⁶

Another critical component of dignity reform has been ensuring incarcerated women are provided feminine hygiene and other health care products in a quantity and quality that is sufficient to meet their needs. The Texas Criminal Justice Coalition's survey of incarcerated women found that 54% of women in Texas prisons did not always have access to basic hygiene items when needed.⁹⁷ Many women specified that they were provided an insufficient number of tampons and pads, and that facilities lacked toilet tissue.⁹⁸ Many women also noted that, while these items may be available for purchase through the commissary, the women could not afford to purchase them, and sharing them with others ran the risk of a disciplinary infraction for "trafficking and trading."⁹⁹ Without enough of these products, women are forced to suffer leaks through their clothes and sheets. For women who are already struggling with their self-esteem, allowing them to soil themselves

⁹⁴ *The Shackling of Pregnant Women & Girls in U.S. Prisons, Jails & Youth Detention Centers*, ACLU 1, <https://www.aclu.org/other/aclu-briefing-paper-shackling-pregnant-women-girls-us-prisons-jails-youth-detention-centers> (last visited May 30, 2020).

⁹⁵ See Rebecca Shlafer and Laurel Davis, *Pregnant, in Prison and Facing Health Risks: Prenatal Care for Incarcerated Women*, CONVERSATION (Feb. 19, 2016), <https://theconversation.com/pregnant-in-prison-and-facing-health-risks-prenatal-care-for-incarcerated-women-45034>.

⁹⁶ AN UNSUPPORTED POPULATION, *supra* note 28, at 12 (quoting Evelyn, incarcerated for two and a half years).

⁹⁷ *Id.* at 10.

⁹⁸ *Id.*

⁹⁹ *Id.*

with blood is an unacceptable consequence of the criminal justice system's failure to prioritize their health care needs.

4. Trauma

Every story [in prison] seems the same, just a different person. Drug convictions and prostitution, women with extensive trauma histories, women who don't value themselves or their bodies because of things that happened to them and messed with their self-esteem.¹⁰⁰

Dignity reform has also focused on implementing more trauma-informed practices within correctional institutions. Studies show that justice system-involved women are far more likely to report being physically or sexually abused than their male counterparts.¹⁰¹ In addition to abuse histories during childhood being more prevalent among women,¹⁰² the risk of abuse for women continues throughout adolescence and adulthood (whereas the abuse risk for males drops after childhood).¹⁰³ Not only do these women have higher rates of victimization than incarcerated males, but they also have more extensive victimization histories.¹⁰⁴ Research has shown that women who are sexually abused as children are more likely to be victims of domestic violence as adults.¹⁰⁵ This finding was mirrored in the Texas Criminal Justice Coalition's survey findings; as noted above, 58% of responding women had been sexually abused or assaulted as a child, and 82% had experienced domestic violence or dating abuse.¹⁰⁶ The rate of prior victimization among incarcerated women is so high that Senator Cory Booker has called it the "survivor of sexual trauma to prison pipeline."¹⁰⁷

All four of these predominant dignity categories address unacceptable deficiencies in the treatment of incarcerated women and their families, and

¹⁰⁰ *Id.* at 23 (quoting Angelica, in and out of prison for 17 years).

¹⁰¹ DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF J. STATISTICS, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

¹⁰² *Id.* at 10.

¹⁰³ *See, e.g.*, SHANNON M. LYNCH ET AL., BUREAU OF J. ASSISTANCE, WOMEN'S PATHWAYS TO JAIL: THE ROLES & INTERSECTIONS OF SERIOUS MENTAL ILLNESS AND TRAUMA 385, 395 (2012), https://www.bja.gov/Publications/Women_Pathways_to_Jail.pdf; Lynch et al., *supra* note 33, at 388.

¹⁰⁴ Kayleen A. Islam-Zwart & Peter W. Vik, *Female Adjustment to Incarceration as Influenced by Sexual Assault History*, 31 CRIM. JUST. AND BEHAV. 521, 526 (2004).

¹⁰⁵ Bonnie L. Green et al., *Trauma Exposure, Mental Health Functioning, and Program Needs of Women in Jail*, 51 CRIME AND DELINQUENCY 133, 134 (2005).

¹⁰⁶ A GROWING POPULATION, *supra* note 74, at 9–10.

¹⁰⁷ Christina Cauterucci, *Inside the Legislative Fight for the Rights of Incarcerated Women*, SLATE (Jan. 19, 2017), <https://slate.com/human-interest/2017/07/kamala-harris-and-cory-booker-push-new-legislation-for-the-rights-of-incarcerated-women.html>.

every new dignity law that has passed across the country will inevitably improve conditions of confinement for incarcerated women, making it easier for them to connect with their loved ones and build self-esteem.

D. Passing Dignity Reform in Texas

Between May 23rd and June 14th, 2019, Texas Governor Greg Abbott signed into law eight bills that address many of the needs of Texas' system-involved women.¹⁰⁸ Four of these bills fell into one of the four traditional categories of dignity legislation for incarcerated women.

1. House Bill 650

This comprehensive bill requires TDCJ to implement the following provisions intended to improve outcomes for incarcerated women:

- Trauma history screenings at intake to determine if women have significant histories of trauma, and referral to medical or mental health care professionals for treatment;
- Training for correctional officers who interact with pregnant women in the areas of medical and mental health care;
- Education for pregnant women around prenatal care and hygiene, the effects of fetal exposure to drugs and alcohol, medical and mental health care issues affecting children, and parenting;
- Nutritional support for pregnant women;
- Limits on invasive body-cavity searches of pregnant women;
- Restrictions on the shackling of pregnant women;
- Restrictions on the solitary confinement of pregnant women and those who gave birth in the previous thirty days;
- Seventy-two-hour post-delivery care where infants can remain with the mother, who can receive nutritional or hygiene products necessary to care for the infant, including diapers, which are cost-free for indigent women;
- A requirement that searches of rooms where women are not fully clothed must be conducted by a female correctional officer; and
- Expanded access to free feminine hygiene products.¹⁰⁹

House Bill 650 separately requires TDCJ to study and report on the effects that current visitation policies have on the relationship between incarcerated

¹⁰⁸ *2019 Bills That Are Still Moving or Have Become Law*, TEX. CRIM. JUST. COALITION (May 27, 2019), <https://texascjc.org/blog/2019-bills-are-still-moving-or-have-become-law>.

¹⁰⁹ H.B. 650, 86th Reg. Sess. (Tex. 2019).

individuals and their children, and accordingly consider changing internal policies to strengthen these relationships.¹¹⁰

2. House Bill 812

This bill considers the effects of high medical care fees on people in TDCJ, which can dissuade them from seeking medical care and, in turn, increase preventable health risks, the spread of infectious disease, and the use of emergency care.¹¹¹ House Bill 812 will allow incarcerated individuals to pay \$13.55 per medical visit rather than a \$100 annual health services fee, and the fee amount is capped at \$100 per fiscal year.¹¹² Predominantly due to histories of trauma, abuse, and substance use disorder, incarcerated women tend to experience higher incidences of serious medical conditions.¹¹³ Combined with their disproportionately high levels of poverty,¹¹⁴ incarcerated women are more likely to need—and less likely to be able to afford—these medical services. Financially accessible medical care, along with the free feminine hygiene products provided via House Bill 650, will significantly improve women’s health during incarceration.

3. House Bill 1651

This bill contemplates care for the high number of women who experience pregnancy while incarcerated in Texas.¹¹⁵ This county-level reform requires the Texas Commission on Jail Standards (TCJS, which provides county jail oversight) to ensure that each county jail’s health services plan addresses obstetrical and gynecological care, and has mechanisms in place to identify pregnant women in labor to provide appropriate care, including rapid transport to a hospital.¹¹⁶ Additionally, this bill requires TCJS to adopt procedures related to the use of restraints of pregnant women or those who have recently given birth.¹¹⁷ Specifically,

¹¹⁰ *Summaries of Selected Legislation Passed by the 86th Legislature, Regular Session*, TEX. DEP’T CRIM. JUST., https://www.tdcj.texas.gov/news/summaries_of_select_legislature_passed_by_86th.html (last visited May 30, 2020).

¹¹¹ H.B. 812, 86th Reg. Sess. (Tex. 2019).

¹¹² *Id.*

¹¹³ See Carolyn Sufrin et al., *Reproductive Justice, Health Disparities and Incarcerated Women in the United States*, 47 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 213, 213 (2015).

¹¹⁴ LAWRENCE A. GREENFELD & TRACEY L. SNELL, U.S. DEP’T OF JUSTICE, WOMEN OFFENDERS 8 (2000), <https://www.bjs.gov/content/pub/pdf/wo.pdf>.

¹¹⁵ H.B. 1651, 86th Reg. Sess. (Tex. 2019).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

restraints must be prohibited during pregnancy and at least twelve weeks after delivery unless determined necessary for health or safety purposes; if so determined, the least restrictive restraints must be used, and they must be removed at the request of health care professionals.¹¹⁸ This bill separately requires each county jail to submit an annual report on the jail's use of restraints during the preceding year on pregnant women or those who gave birth in the past twelve weeks.¹¹⁹

4. House Bill 2169

This bill implements another county-level reform, requiring TCJS to *establish minimum standards* for the *quantity and quality of feminine hygiene products* provided to incarcerated women.¹²⁰ This will require the provision of tampons in regular and large sizes and menstrual pads with wings in regular and large sizes.¹²¹ Each county jail will also be required, when submitting its existing monthly jail population report to TCJS, to include the number of women confined in that county jail, which will better inform decision-making around women's services.¹²²

5. House Bill 3227

This new Texas bill will address the confinement of women,¹²³ but it falls outside "traditional" dignity categories and focuses on programs that prepare women for a safe, stable reentry to the community.

This bill responds to the lack of programming for women in Texas' state corrections system, as compared to programming for men. Incarcerated women in Texas have access to an Associate degree plan and certifications in two occupations: office administration and culinary arts/hospitality management.¹²⁴ In contrast, men have access to an Associate, Associate of Applied Science, Bachelor's, or Master's degree plan, as well as certifications in twenty-one occupations.¹²⁵ Additionally, women have access to twenty-one technical education courses, while men have access to forty-

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ H.B. 2169, 86th Reg. Sess. (Tex. 2019).

¹²¹ *Id.*

¹²² *Id.*

¹²³ H.B. 3227, 86th Reg. Sess. (Tex. 2019).

¹²⁴ Dalyah Jones, *Women Incarcerated in Texas Have Fewer Opportunities Than Men, Report Finds*, KUT 90.5 (Apr. 24, 2018), <https://www.kut.org/post/women-incarcerated-texas-have-fewer-opportunities-men-report-finds>.

¹²⁵ *Id.*

eight courses.¹²⁶ House Bill 3227 requires TDCJ to implement policies that increase incarcerated women's access to educational, vocational, substance use treatment, rehabilitation, life skills training, and prerelease programs.¹²⁷ TDCJ must publish annual reports describing changes made to internal policies during the preceding year to further such programming requirements, as well as list the programs available to incarcerated women during that year.¹²⁸ Separately, TDCJ must increase the availability of certified peer support services to individuals incarcerated in its facilities, and it must allow for previously convicted and incarcerated individuals to be able to serve in trained peer support roles.¹²⁹ TDCJ must also encourage and help currently incarcerated individuals take part in peer specialist training, focusing on those who have been involved with programs and services related to substance abuse or behavioral health.¹³⁰

Finally, three new Texas bills are focused on helping women avoid incarceration through community-based supervision or services. The Texas Criminal Justice Coalition's survey data and all other data relating to the experiences of incarcerated women—both prior to and during incarceration—should expand policymakers' views about what constitutes dignity reform, with a goal of reversing the growing trend of women's incarceration and effectively redirecting women away from the criminal justice system. These bills are a step in that direction:

6. House Bill 1374

This bill addresses the unique needs of pregnant women and mothers entering Texas' justice system.¹³¹ The correction system's probation arm will be given the option to award a grant to probation departments to develop and operate a pretrial intervention program for defendants who are either pregnant at the time of placement into the program, or who are the primary caretaker of a child under the age of eighteen.¹³² This will hold women accountable but keep them out of incarceration so they can remain with their families.

¹²⁶ AN UNSUPPORTED POPULATION, *supra* note 28, at 18.

¹²⁷ H.B. 3227, 86th Reg. Sess. (Tex. 2019).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ H.B. 1374, 86th Reg. Sess. (Tex. 2019).

¹³² *Id.*

7. House Bill 405

This bill designates June as Neonatal Abstinence Syndrome Awareness Month in Texas.¹³³ The goal of this designation is to increase awareness of the dangers of opioid and substance abuse during pregnancy, as well as the availability of existing resources for mothers-to-be and new mothers who struggle with substance abuse disorder.¹³⁴ Improving information about health care services and recovery support services can help women address and manage substance use issues and avoid incarceration.

8. Senate Bill 436

This bill will address maternal and newborn health care for women who struggle with opioid use disorder, including by improving screening procedures to identify and care for such women, ensuring health care providers refer such women to appropriate treatment, improving care given to pregnant women with opioid use disorder and newborns with neonatal abstinence syndrome, increasing access to medication-assisted treatment, and reducing opioid drugs prescribed before, during, and following delivery to prevent opioid use disorder.¹³⁵ State entities will also promote and facilitate the use of maternal health informational materials by health care providers, including tools and procedures related to best practices that improve obstetrical care for women with opioid use disorder.¹³⁶

V. EXPANDING THE DEFINITION OF “DIGNITY”

While the four historically predominant categories of dignity reform—care for incarcerated women who are pregnant, improving family unity for incarcerated women who are mothers to minor children, improving incarcerated women’s access to an adequate quantity and quality of feminine hygiene products and other health care services, and expanding trauma-informed care for incarcerated women—are critically important, this framework should only be the beginning of how states seek to ensure dignity for incarcerated women and those at risk of entering the justice system.

Below are five additional areas of reform that will help improve outcomes for women.

¹³³ H.B. 405, 86th Reg. Sess. (Tex. 2019).

¹³⁴ *Id.*

¹³⁵ S.B. 436, 86th Reg. Sess. (Tex. 2019).

¹³⁶ *Id.*

A. Bail Reform & the Consequences of Poverty

I see the deeply rooted connections between crime and poverty and am baffled by the way we choose to punish people instead of working to fix the actual problems that drive crime and poverty.¹³⁷

Bail is a prominent example of an issue that disproportionately impacts women in the justice system. Fifty-two percent of women surveyed in Texas prisons reported that their total household income, before taxes, immediately before entering prison was less than \$10,000 per year¹³⁸—making poverty itself a women’s justice issue that leaves women more vulnerable in the justice system. Many bail systems do not take into account a person’s indigency and, as such, they force people who otherwise pose no threat to the public to remain incarcerated until trial; riskier but wealthier defendants can buy their way out of jail and receive limited oversight.¹³⁹ Such resource-based bail systems are particularly problematic for women, inside and outside Texas. Nationally, a higher percentage of women than men reported incomes of less than \$600 per month prior to their incarceration,¹⁴⁰ with two-thirds of such women earning minimum wage in entry-level positions.¹⁴¹

For Black and Hispanic women, struggles relating to poverty are even more likely because they face the greatest wealth disadvantage.¹⁴² According to a national study, around half of all single Black and Hispanic women have a zero or negative net worth, and the average household median wealth for all single Black women was \$100, compared to \$41,500 for single white women.¹⁴³ The combined result of this wealth disparity and existing money-based bail systems is that women like Sandra Bland¹⁴⁴—women with needs

¹³⁷ *Hear from Her: System Impacted Women Speak Series*, TEX. CRIM. JUST. COALITION, <https://www.texasjc.org/sites/default/files/Hear%20From%20Lauren%20Johnson.pdf> (quoting Lauren Johnson, who was formerly incarcerated in Texas).

¹³⁸ AN UNSUPPORTED POPULATION, *supra* note 28, at 6–7.

¹³⁹ Nathan Fennell and Meridith Prescott, *Risk, Not Resources: Improving the Pretrial Release Process in Texas*, LBJ SCH. PUB. AFF., U. TEX. AUSTIN (June 2016), <https://lbj.utexas.edu/sites/default/files/file/Risk,%20Not%20Resources%20Improving%20the%20Pretrial%20Release%20Process%20in%20Texas--FINAL.pdf>.

¹⁴⁰ GREENFELD, *supra* note 114, at 8.

¹⁴¹ Barbara Owen & Barbara Bloom, *Profiling Women Prisoners: Findings from National Surveys and a California Sample*, 75 PRISON J. 165, 170 (1995).

¹⁴² MARIKO LIN CHANG ET AL., INSIGHT CTR. FOR COMMUNITY ECON. DEVELOPMENT, *LIFTING AS WE CLIMB: WOMEN OF COLOR, WEALTH, AND AMERICA’S FUTURE 2* (2010), <http://www.insightcced.org/uploads/CRWG/LiftingAsWeClimb-WomenWealth-Report-InsightCenter-Spring2010.pdf> (“Twenty-nine percent of white women heads of households with children live in poverty, compared to 43 percent of African-American women and 46 percent of Latina women.”).

¹⁴³ *Id.* at 3.

¹⁴⁴ In July 2015, Sandra Bland was arrested in Texas “after a traffic stop for failing to use a turn signal

that should be addressed in other settings—are sitting in jails, not because they are a threat to public safety, but because they simply cannot afford to post bail. As stated in the *Houston Chronicle* shortly after Ms. Bland’s death, she would probably still be alive today if the bail system was fair.¹⁴⁵ Because women are less likely to be able to afford a monetary bail—the average cost of which is around \$10,000—women and mothers languish in jail on low-level and misdemeanor offenses.¹⁴⁶ The cost of this unnecessary incarceration to women, children, families, and communities is devastating, as women often lose their jobs, housing, or even custody of their children.¹⁴⁷

Additionally, gender wealth disparities mean women are less likely to be able to afford a private attorney who could assist them during the bail and larger pretrial process.¹⁴⁸ Only 24% of women responding to the Texas Criminal Justice Coalition’s survey reported being released on bail or bond before their trial, while the remaining 76% reported being held in jail until their trial.¹⁴⁹ The vast majority (73%) of women reported being represented by a court-appointed attorney.¹⁵⁰ Such attorneys are often incredibly overworked, and the American Bar Association has observed, “[p]ublic defenders are having to carry ‘outlandish, excessive workloads’ that make ‘a mockery of the constitutional right to counsel.’”¹⁵¹ As of 2007, the Bureau of Justice Statistics estimated that 73% of local public defenders exceeded the maximum recommended caseload,¹⁵² and more recent studies in Louisiana¹⁵³

escalated into a physical confrontation with a white state trooper.” Leah Binkovitz, *Bail Reform Urged After Sandra Bland’s Death*, HOUS. CHRON. (August 19, 2015), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Bail-reform-urged-after-Sandra-Bland-s-death-6454085.php>. After failing to make bail, she was found dead in her cell, allegedly having hung herself. *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Myesha Braden and Phylcia H. Hill, *Women More Likely to Be Unable to Afford Bail*, BALT. SUN, (May 13, 2018, 6:00 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-op-0514-women-bail-20180509-story.html>.

¹⁴⁷ Arisha Hatch, *How Black Women Are Leading the Way on Bail Reform*, ESSENCE (Sept. 26, 2017), <https://www.essence.com/news/black-women-leading-criminal-justice-bail-reform/>.

¹⁴⁸ Bernadette Rabury and Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL’Y INITIATIVE (May 10, 2016), <https://www.prisonpolicy.org/reports/incomejails.html>.

¹⁴⁹ A GROWING POPULATION, *supra* note 74, at 18.

¹⁵⁰ *Id.*

¹⁵¹ Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> (quoting the American Bar Association).

¹⁵² DONALD J. FAROLE, JR. & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 1 (2010), <https://www.bjs.gov/content/pub/pdf/clpdo07.pdf>.

¹⁵³ POSTLETHWAITE & NETTERVILLE, & AM. BAR ASS’N, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_1

and Missouri¹⁵⁴ mirror the Bureau's findings. Such excessive caseloads can result in exorbitant trial delays, and people being unnecessarily detained pretrial.¹⁵⁵

For low-risk individuals, being detained pretrial for even three days can have drastic consequences, including an increased likelihood of committing new crimes as a result of the stress that incarceration places on employment, housing, and family connections.¹⁵⁶ This is an especially significant consideration for advocates seeking bail reform in Texas: As of September 1, 2019, pretrial detainees—numbering more than 44,000—made up 63% of Texas' county jail population, with 5,480 people charged with a misdemeanor.¹⁵⁷ It is critical to take steps to reduce the potential for additional, higher-level crimes among these individuals. Already, at an average cost of \$60.53 per person per day,¹⁵⁸ Texas' misdemeanor population costs taxpayers approximately \$331,700 per day—over \$121 million per year.¹⁵⁹ Recidivism only brings greater costs to taxpayers and further harms families. Also of importance in bail reform conversations is the risk that poor individuals who are detained pretrial may be so desperate to be released that they plead guilty—even when they are factually innocent. In 2015, Harris County, Texas, exonerated 42 people who had originally pled guilty to drug possession, only for later lab results to prove them factually innocent.¹⁶⁰ Still, the guilty plea can have a detrimental, lifelong impact.

With the number of women detained in county jails awaiting trial having grown nearly 50% between 2011 and 2017¹⁶¹—and with roughly 60% of

ouisiana_project_report.pdf.

¹⁵⁴ RUDING BROWN & AM. BAR ASS'N, *THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS* (2014), https://www.aclu.org/sites/default/files/field_document/Ex007-The-Missouri-Project-2014-Public-Defender-Study.pdf.

¹⁵⁵ CONSTITUTION PROJECT, *JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 100-01* (2009), <http://constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

¹⁵⁶ See *3DaysCount for State-Level Change*, PRETRIAL JUST. INST., <https://www.pretrial.org/what-we-do/plan-and-implement/3dayscount-for-state-level-change/> (last visited Feb. 29, 2020).

¹⁵⁷ *Texas County Jail Population*, TEX. COMM'N ON JAIL STANDARDS (Sept. 1, 2019), <https://www.tcjs.state.tx.us/docs/POPSUMCurrent.pdf>.

¹⁵⁸ *Immigration Detainer Report*, TEX. COMM'N ON JAIL STANDARDS (Sept. 20, 2019), <https://www.tcjs.state.tx.us/docs/ImmigrationDetainerReportCurrent.pdf>.

¹⁵⁹ *Id.*

¹⁶⁰ Meagan Flynn, *Harris County Leads Country in Exonerations. Again*, HOUS. PRESS (Feb. 3, 2016, 12:05 PM), <https://www.houstonpress.com/news/harris-county-leads-country-in-exonerations-again-8125943>.

¹⁶¹ Laura Rice & Jill Ament, *Violent Crime Is Down in Texas, But the Number of Women in Jail Is on the Rise*, TEX. STANDARD (Dec. 6, 2017, 10:42 AM), https://www.texasstandard.org/stories/violent-crime-is-down-in-texas-but-the-number-of-women-in-jail-is-on-the-rise/?_ga=2.61682348.1278819523.1566340685-1997389268.1565810745.

women in jails nationwide having not been convicted of a crime¹⁶²—eliminating cash bail and expanding the use of pretrial interventions (including encouraging judges to consider a defendant’s primary caretaker status) should be priorities for anyone seeking justice for women in the criminal justice system.

B. Drug Reform & the Disproportionate Impact of Current Policies

I had a severe cocaine addiction for 15 years. Instead of offering some type of drug treatment, I was put on probation without services and then revoked. I cycled through the system because I had a drug problem and my root issues weren’t being addressed. Today, I am a nurse at a drug rehab center. God saved me out of that world, and then brought me back to help others.¹⁶³

The War on Drugs has especially impacted women. Women are more likely than men to be treated with prescription pain medication, such as opioids, at higher doses and for longer periods than men.¹⁶⁴ As a result, women have become dependent on opioids at nearly twice the rate as men.¹⁶⁵ Separately, many women have extensive trauma histories and may self-medicate through illegal drug use.

“Furthermore, although designed to target members of illicit drug organizations, conspiracy and accomplice laws are some of the most egregious examples of the drug war’s harsh treatment of women.”¹⁶⁶ Indeed, “[a]ctivities such as living where drugs are sold, being present during a drug sale, or counting money are considered part of a drug trafficking conspiracy, and are therefore eligible for harsh mandatory minimums.”¹⁶⁷ But in reality, women’s choices are constrained as a result of familial and/or financial circumstances. According to a recent study, “Women will often remain in relationships with men involved with drugs because of the fear of assault, unequal power dynamic, relationship dependency, and a commitment to

¹⁶² Aleks Kajstura, *Women’s Mass Incarceration: The Whole Pie 2018*, PRISON POL’Y INITIATIVE (Nov. 12, 2018), <https://www.prisonpolicy.org/reports/pie2018women.html>.

¹⁶³ A GROWING POPULATION, *supra* note 74, at 6 (quoting Evelyn, incarcerated for two and a half years).

¹⁶⁴ Heather Boyd, *Why the Opioid Epidemic Affects More Women Than Men*, SOC’Y FOR WOMEN’S HEALTH RES. (Aug. 25, 2016), <http://www.healthywomen.org/content/article/why-opioid-epidemic-affects-more-women-men>.

¹⁶⁵ *Id.*

¹⁶⁶ A GROWING POPULATION, *supra* note 74, at 23 (citing Lenora M. Lapidus, *The War on Drugs = A War on Women and Families*, AM. C.L. UNION (2011), <https://www.aclu.org/blog/smart-justice/sentencing-reform/war-drugs-war-women-and-families>).

¹⁶⁷ Aldina Mesic, *Women and the War on Drugs*, PUB. HEALTH POST (May 16, 2017), <https://www.publichealthpost.org/research/women-and-the-war-on-drugs/>.

keeping the family together, even if it puts her at a heightened risk of prosecution and incarceration.”¹⁶⁸ More than 61% of all women incarcerated in federal prison are there for nonviolent drug offenses.¹⁶⁹ In Texas, nearly 3,600 women are incarcerated for nonviolent drug offenses, and their average sentence length is nine years¹⁷⁰—which comes with the price tag of \$202,455 per woman.¹⁷¹

Substance use disorder is inherently a public health issue that should be addressed in the community, not through costly and unnecessary incarceration. However, many of the current alternatives to incarceration are also failing women. Per a 2018 survey by the Texas Criminal Justice Coalition of women in Woodman State Jail, the majority (55%) had initially been placed on community supervision (i.e., probation) but were unable to meet the conditions and had been revoked to jail.¹⁷² Women responding to the survey were revoked on probation at two and a half times the rate of their male counterparts.¹⁷³ The women specifically cited challenges relating to costly probation fees (71% of women responded that probation simply costs too much);¹⁷⁴ again, given women’s struggles with poverty, this is unsurprising. Women respondents also noted that extraneous conditions made compliance too challenging, especially while also caring for children.¹⁷⁵ The following is an excerpt from the resulting report:

Probation requires frequent meetings with probation officers, participation in treatment programming and classes, completion of community service hours, and frequent unscheduled drug screens. To navigate these requirements, people need transportation, an understanding employer, and reliable child care. People also need ongoing treatment and peer support to achieve and maintain recovery from mental illness and substance use disorder. The requirements of probation are a challenge for anyone, much less someone who faces the obstacles above. It is not surprising, then, that the most frequent comments made by our interviewees about probation

¹⁶⁸ *Id.*

¹⁶⁹ *Women and the Drug War*, THE DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/issues/women-drug-war> (last visited Feb. 29, 2020).

¹⁷⁰ A GROWING POPULATION, *supra* note 74, at 23.

¹⁷¹ *Id.*; see also LEGIS. BUDGET BD., CRIMINAL AND JUVENILE JUSTICE UNIFORM COST REPORT (2017), https://www.lbb.state.tx.us/Documents/Publications/Policy_Report/3137_UniformCosts_2017.pdf.

¹⁷² DOUG SMITH, TEX. CRIMINAL JUSTICE COALITION, A FAILURE IN THE FOURTH DEGREE: REFORMING THE STATE JAIL FELONY SYSTEM IN TEXAS 7 (2018), <https://texascjc.org/system/files/publications/A%20Failure%20in%20the%20Fourth%20Degree%20Report.pdf>.

¹⁷³ *Id.* at 7.

¹⁷⁴ *Id.* at 9.

¹⁷⁵ *Id.*

were that “probation sets you up for failure,” and “doing time is just easier.”¹⁷⁶

With treatment and support, substance use disorder is manageable and recovery is possible.

Unfortunately, across the U.S., the vast majority of people with a drug use disorder receive no treatment.¹⁷⁷ Similarly, in Texas, help for a substance use disorder can be hard to find: “People who are low income and struggling with substance use disorder must wait more than two weeks for intensive residential treatment, four weeks for outpatient treatment, and almost five weeks for Medication-Assisted Treatment.”¹⁷⁸ People in need of co-occurring substance abuse and psychiatric treatment must wait almost four weeks for specialized services.¹⁷⁹

To reduce the number of women backfilling prisons and jails as male populations decrease,¹⁸⁰ it is critical to ensure that women have the tools to safely manage addiction issues and live productive lives in the community. This requires investments in community-based treatment services, which will reduce waitlists, expand access to programming, and, if properly integrated with community supervision, can improve probation outcomes. It also means lowering penalties for minor drug offenses so more women can take drug-related educational courses or engage in community service rather than be incarcerated.

C. Education Reform & the Importance of Targeting Women

We must [stop] funding a system that doesn’t do much beyond warehousing people and further adding to the problems they face. We could invest that money into education and services that would get at the actual root of the problems that people turn to crime to solve.¹⁸¹

¹⁷⁶ *Id.* at 10.

¹⁷⁷ *10 Percent of U.S. Adults Have Drug Use Disorder at Some Point in Their Lives*, NAT’L INST. HEALTH (Nov. 18, 2015), <https://www.nih.gov/news-events/news-releases/10-percent-us-adults-have-drug-use-disorder-some-point-their-lives>.

¹⁷⁸ SMITH, *supra* note 172, at 14.

¹⁷⁹ *See*, Mary Ann Priester et al., *Treatment Access Barriers and Disparities Among Individuals with Co-Occurring Mental Health and Substance Use Disorders: An Integrative Literature Review*, 61 J. SUBSTANCE ABUSE TREATMENT 47, 55 (2016).

¹⁸⁰ *See* Wendy Sawyer, *The Gender Divide: Tracking Women’s State Prison Growth*, PRISON POL’Y INITIATIVE (2018), https://www.prisonpolicy.org/reports/women_overtime.html (“Across the country, we find a disturbing gender disparity in recent prison population trends. While recent reforms have reduced the total number of people in state prisons since 2009, almost all of the decrease has been among men.”).

¹⁸¹ Email Interview with Lauren Johnson (Aug. 21, 2017). Lauren was incarcerated for three years.

The earning potential of system-impacted women is stifled by low education levels, as 44% of incarcerated women across the United States have not graduated from high school or obtained a GED.¹⁸² As mentioned above,¹⁸³ in the Texas Criminal Justice Coalition's survey of incarcerated women, 65% of responding women had not graduated from high school or obtained a GED, with 35% completing less than twelfth grade before entering TDCJ and 11% completing only eighth or lower grade levels.¹⁸⁴ Problematically, women in TDCJ have also had access to drastically fewer educational and vocational opportunities than their male counterparts.¹⁸⁵

Studies reinforce that low education levels are linked to higher rates of arrest and incarceration.¹⁸⁶ As such, efforts to improve educational attainment for women, both during their incarceration and as a prevention tool, are crucial to reducing the number of women who enter—or re-enter—the justice system. The Texas Legislature took an important step with House Bill 3227, intended to increase educational programming for incarcerated women,¹⁸⁷ additional states should follow suit, where needed. However, targeting educational attainment campaigns towards women before they become involved in the system would be significantly more effective from a fiscal and human standpoint.

D. The Need for Strategies to Address Racial Disparities

No Lady

Prison didn't improve me none.

There was ten of us girls in the county jail
five white, five black awaitin' trial for sellin shit.

The white girls, they all on probation.

Us black girls, we all go to Dwight. Me, three months gone.

An I ask myself sittin on them concrete benches in the county.

How come? How come me an my sisters goin to jail

See Hear from Her: System Impacted Women Speak Series, *supra* note 137.

¹⁸² CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf>.

¹⁸³ *Supra* Part III.C.1.

¹⁸⁴ AN UNSUPPORTED POPULATION, *supra* note 28, at 6.

¹⁸⁵ *Id.* at 21.

¹⁸⁶ *Crime Rates Linked to Educational Attainment, 2013 Alliance Report Finds*, ALLIANCE FOR EXCELLENT EDUC. (Sept. 12, 2013), <https://all4ed.org/press/%20crime-rates-linked-to-educational-attainment-%20new-alliance-report-finds/>.

¹⁸⁷ *Justice for Women Campaign Update: Texas Prison Program Focuses on Trauma and Education Needs of Incarcerated Women*, TEX. CRIM. JUST. COALITION (Sept. 25, 2019), <https://www.texasjc.org/blog/justice-women-campaign-update-texas-prison-program-focuses-trauma-and-education-needs>.

An the white girls goin back to college?¹⁸⁸

It is impossible to discuss criminal justice without discussing the vast racial disparity that permeates each decision point in the criminal justice system. Decisions made at one stage contribute to increasing disparities at subsequent stages. For example, if bail practices result in minorities being detained before trial at greater rates than similarly situated white defendants, they will also be disadvantaged at trial and sentencing by having reduced access to defense counsel, community resources, and treatment options.

In addition to suffering from grave wealth disparities,¹⁸⁹ Black women are especially more likely than women of other races to go to prison during their lifetime.¹⁹⁰ According to the Bureau of Justice Statistics, if current incarceration rates continue, 1 in 18 Black women will be incarcerated during her lifetime. This is greater than the rate for Latinas—1 in 45 women—and far greater than the rate for white women—1 in 111.¹⁹¹ The ripple effects of racial disparities in the justice system ultimately impact children of color; Black children are over six times more likely to have experienced parental incarceration than white children, and one in four Black children born in 1990 had a parent in prison or jail by the time the child was fourteen.¹⁹² Children who have one or both parents incarcerated are more likely to be placed in foster care or experience homelessness,¹⁹³ and parental incarceration is now formally recognized as an adverse childhood experience (ACE).¹⁹⁴ ACEs are tied to depression, chronic diseases, certain cancers, and an array of other mental health disorders,¹⁹⁵ outcomes are significantly increased for the

¹⁸⁸ *Poem of the Day: No Lady* by Anonymous, PRISON CULTURE (Mar. 12, 2014), <https://www.usprisonculture.com/blog/2014/03/12/poem-of-the-day-no-lady-by-anonymous/> (reprinted from the CHICAGO SEED (1981)). Although originally attributed to an anonymous author, a December 14, 2019 update to the *Prison Culture* blog attributed the poem to CarolJean Kier. *Id.*

¹⁸⁹ CHANG ET AL., *supra* note 142.

¹⁹⁰ THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 6 (2003) <https://www.bjs.gov/content/pub/pdf/piusp01.pdf>.

¹⁹¹ *Id.* at 5.

¹⁹² Sarah D. Sparks, *Parents' Incarceration Takes Toll on Children*, *Studies Say*, EDUC. WEEK (Feb. 24, 2015), <https://www.edweek.org/ew/articles/2015/02/25/parents-incarceration-takes-toll-on-children-studies.html>.

¹⁹³ Rachel Anspach, *What It's Like to Grow up with a Parent Behind Bars*, TEEN VOGUE (October 13, 2017), <https://www.teenvogue.com/story/what-its-like-to-have-an-incarcerated-parent>.

¹⁹⁴ TANYA KRUPAT ET AL., A CALL TO ACTION: SAFEGUARDING NEW YORK'S CHILDREN OF INCARCERATED PARENTS 12 (2011), <http://www.osborneny.org/services/strengthening-communities/new-york-initiative-for-children-of-incarcerated-parents/a-call-to-action/>.

¹⁹⁵ CENTER FOR HEALTH CARE STRATEGIES, FACT SHEET: UNDERSTANDING THE EFFECTS OF TRAUMA ON HEALTH (2017), <https://www.chcs.org/media/Fact-Sheet-Understanding-Effects-of-Trauma.pdf>.

children of incarcerated individuals and include attachment disorders, substance use disorders, and severe lags in academic performance.¹⁹⁶

Because of the stark over-representation of Black women in the criminal justice system, and because of the ripple effects on Black children, racial justice is intricately tied to women's justice. States should work towards reducing racial disparities at every stage of the criminal justice system. This requires improved data collection and analysis to assess the degree to which racial disparities are evident at each stage. All agencies, departments, and courts with relevant information and the capability to develop reporting mechanisms should be directed to track traffic citation, arrest, charging, sentencing, and revocation patterns by jurisdiction and race. It is critically important that such data be easily accessible to the public, and in a timely manner. States could also work to establish their own Racial Disparities Commission to help track and analyze data, provide reports and policy recommendations, and serve as experts to policymakers, agency personnel, advocates, and others seeking information about strategies for reducing racial disparities among system-involved populations.

E. The Need to Consider Victims' Rights

Many of these women have been victims of serious crimes themselves—they've been physically or sexually assaulted, or they've experienced domestic violence or stalking. Unfortunately, these victims often turn to illegal actions to cope, from drugs to self-medicate or petty theft to provide income—all actions that lead to our justice system.¹⁹⁷

With high rates of sexual abuse, physical abuse, and domestic violence among incarcerated women, prior to and during their incarceration, victims' rights is—like poverty—a women's justice issue. Nevertheless, seven states outright bar people with criminal records from receiving victims' compensation,¹⁹⁸ and incarcerated victims are generally ineligible to receive victims' services.¹⁹⁹ The federal Victims of Crime Act (VOCA) was expanded in 2016 to include an exception to the bar on services for victims

¹⁹⁶ See Anspach, *supra* note 193.

¹⁹⁷ Mary Fallin, *Gov. Mary Fallin: Working to Get Smarter on Crime*, OKLAHOMAN (July 19, 2017, 12:00 AM), <https://oklahoman.com/article/5556706/gov-mary-fallin-working-to-get-smarter-on-crime>.

¹⁹⁸ Alysia Santo, *States Have Money to Help Victims of Crime, but Seven Ban Aid for People with Criminal Records*, MARSHALL PROJECT (Sept. 13, 2018, 7:00 AM), <https://www.themarshallproject.org/2018/09/13/the-victims-who-don-t-count>.

¹⁹⁹ See *Eligibility for Crime Victims' Compensation Program*, TEX. ATT'Y GEN., <https://www.texasattorneygeneral.gov/crime-victims/crime-victims-compensation-program/eligibility-crime-victims-compensation-program> (last visited Mar. 14, 2020).

who are incarcerated: Rape crisis centers can now use VOCA assistance funds to serve incarcerated victims.²⁰⁰ However, this exception is limited and covers only a fraction of the victims who could benefit from these services and supports.

Also problematic, survivors can be arrested and convicted of crimes that are directly tied to their victimization. The National Survivor Network (NSN) conducted a survey of 130 survivors of human trafficking and found that 91% had a criminal record as a result of being trafficked.²⁰¹ Forty percent of victims reported being arrested nine or more times as a result of their abuser's force, and 42% were arrested as minors.²⁰² Having a criminal record drastically impacts the lives of survivors: 73% of respondents to NSN's survey reported that they lost or were unable to obtain employment, and 58% reported that they could not find safe and affordable housing because of their criminal record.²⁰³

Clemency and parole reform for survivors who are incarcerated or who are struggling under the weight of criminal record as a result of their victimization are crucial to reducing the number of women incarcerated in the United States. For instance, states could expand survivors' access to relief from their convictions by establishing expert panels to review cases for evidence of self-defense, duress, or coercion, and make appropriate recommendations for clemency.

Poverty (and the impact that poverty has on pretrial detention and legal representation), the disparate impact of drug enforcement policies, educational and racial disparities, and victims' rights are only a few areas where women are being uniquely impacted. There are likely many more, and reformers searching for the greatest reductions in women's incarceration should consider what additional obstacles women face prior to and during incarceration that might benefit from the attention of the Dignity movement.

VI. CONCLUSION

For too long, women's unique needs have gone unaddressed and unaccounted for in the criminal justice system, leading to surges in the

²⁰⁰ *New VOCA Assistance Rule Means More Services, More Funds for Victims*, DEP'T OF JUST. ARCHIVES (Dec. 31, 2016), <https://www.justice.gov/archives/opa/blog/new-voca-assistance-rule-means-more-services-more-funds-victims>.

²⁰¹ NAT'L SURVIVOR NETWORK, NATIONAL SURVIVOR NETWORK MEMBERS SURVEY: IMPACT OF CRIMINAL ARREST AND DETENTION ON SURVIVORS OF HUMAN TRAFFICKING (2016), <https://nationalsurvivornetwork.org/wp-content/uploads/2017/12/VacateSurveyFinal.pdf>.

²⁰² *Id.*

²⁰³ *Id.*

population of incarcerated women at nearly twice the rate of men. We know that “women often become involved with the justice system as a result of efforts to cope with life challenges such as poverty, unemployment, and significant physical or behavioral health struggles, including those related to past histories of trauma, mental illness, or substance use.”²⁰⁴ We owe it to the women who become entangled in the justice system—and their families—to advocate for and implement policies and practices that address their distinct challenges.

But reformers must also look beyond the challenges that are largely specific to women’s experiences and address the issues that disproportionately impact women—those driving women into incarceration at higher rates, and those keeping them in the system longer. Without considering the impact of poverty, of unjust drug enforcement, of educational and racial disparities, and of the consequences of victimization, efforts to fight for women’s justice will address only part of the problem. By expanding the definition of “dignity” for women, reformers can have a more significant impact in addressing women’s unique needs while incarcerated, in preparing women to live successfully in their communities, and—most importantly—in reducing the number of women under correctional control.

²⁰⁴ ELIZABETH SWAVOLA ET AL., *OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM* 9 (2016), <http://www.safetyandjusticechallenge.org/wp-content/uploads/2016/08/overlooked-women-in-jails-report-web.pdf>.

