

Broken Families From Behind Bars: Analyzing the Impact of the 1984  
Comprehensive Crime Control act and the 1997 Adoption and Safe  
Families Act on Incarcerated Women and Families

by

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A THESIS

Presented to the Department of Political Science  
and the Robert D. Clark Honors College  
in partial fulfillment of the requirements for the degree of  
Bachelor of Arts

June 2024

## **An Abstract of the Thesis of**

Josselyn Studer for the degree of Bachelor of Arts  
in the Department of Political Science to be taken June 2024

Title: Broken Families from Behind Bars: Analyzing the Impact of the 1984 Comprehensive Crime Control Act and 1997 Adoption and Safe Families Act on Incarcerated Women and Families (1984-2008)

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This thesis explores the intersections of mass incarceration, punitive sentencing policies, child welfare policies, and their profound ramifications on familial structures, particularly concerning incarcerated mothers and their parental rights. It begins by contextualizing the escalation of female imprisonment, stemming from the War on Drugs and the enforcement of mandatory minimum sentences, which culminated in the Sentencing Reform Act housed within the 1984 Comprehensive Crime Control Act (CCCA). As the incarceration rates of women continue to escalate, it becomes ever more imperative to acknowledge the broader societal implications of the disproportionate imprisonment of this demographic. Given that a significant majority of women incarcerated in US jails and prisons are mothers and primary caregivers to children, this study explores the repercussions of mass female incarceration on the policies of the US child welfare system, as governed by the 1997 Adoption and Family Safety Act (AFSA). At the heart of the discussion lies the paradoxical outcome of ostensibly child-focused policies like the 1997 Adoption and Safe Families Act (ASFA), designed to ensure the well-being of children by expediting permanency in foster care through measures such as the 15/22 provision. This provision dictates that parental rights termination (PRT) proceedings must commence if a child spends 15 out of the last 22 months in foster care, often leading to the involuntary termination of

parental rights. This stringent timeline is exacerbated by Oregon's adoption of ASFA via SB 689, also known as the "Best Interest of the Child Act," which expedites Oregonians' parental rights termination (PRT) process. The imposition of mandatory minimum sentencing laws under the Comprehensive Crime Control Act (CCCA) often leads to incarcerated mothers receiving unduly long prison sentences. With the average prison term exceeding 15 months, many mothers are subject to automatic initiation of Parental Rights Termination (PRT) proceedings mandated by ASFA's 15/22 provision, irrespective of their wishes to retain custody of their children. By exploring the interplay of mandatory minimum sentencing laws, heightened female incarceration rates, and expedited parental rights termination procedures, this study offers a more nuanced understanding of the profound impact of criminal justice policies on incarcerated women and their families.

## Acknowledgments

I want to extend my most sincere gratitude for the invaluable guidance and support Professor Berk has extended to me throughout the preliminary stages of my thesis development. His unwavering commitment to supporting my thesis, as exhibited by his patience and flexibility, knows no bounds, and I am grateful for his mentorship.

I appreciate Professor Catalina de Onís' persistent belief in my capabilities and potential. Her words of encouragement and insightful guidance in delineating the scope of my paper infused me with the faith and courage necessary to approach this research with the confidence required to do justice to the chosen topic.

I would also like to thank Professor Jane Cramer and Professor Anita Chari for taking the time out of their busy schedules to serve on my thesis committee. I appreciate the difference they make in the University of Oregon and the lives of students like myself. Thank you for your investment in my research and scholarly development.

Finally, I would like to acknowledge my loving family and friends. Their emotional, financial, and intellectual investment in me, not only as a scholar but as a human, grants me the stamina to persevere as a first-generation college student.

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## Introduction

In the wake of massive political demonstrations consuming American media headlines in recent years, grassroots activist campaigns like the Black Lives Matter movement and the American Civil Liberties Union have reinvigorated serious conversations between policy-makers and citizens regarding the state of the nation's criminal justice system. Central to this discourse is a critical examination of the nation's criminal justice system, probing deeply into how federal and state legislative policies, alongside case law, directly influence the incarceration rates of vulnerable communities. Indeed, while this discussion is far from new, research investigating contemporary manifestations of prison reform policy coming out of the 1980s reveals troubling patterns, particularly for women and especially for women of color. According to the Bureau of Justice Statistics, as of December 31, 2022, the United States had the world's largest prison population, with over 1.2 million individuals behind bars (Carson, 2022, p. 6). Approximately 7% of these incarcerated individuals were women (Carson, 2022, p. 6). Furthermore, despite constituting a notably smaller segment of the U.S. populace, statistics regarding state and federal female demographics in the United States indicate striking disproportionality in the representation of minority women within the incarcerated population. Specifically, 17% are Black, 19% are Hispanic, 2.5% are American Indian or Alaska Native, 0.7% are Asian, and 13% are categorized as belonging to other racial or ethnic groups (Kajstura & Sawyer, 2024, para. 16).

Although the proportion of women in the U.S. prison population may seem relatively low when compared to their male counterparts, the statistics for female imprisonment become alarming when viewed in the context of previous decades. The female prison population saw a substantial increase, surging nearly eightfold between 1980 and 2001, growing from 12,300 to

93,031 women incarcerated in state and federal prisons (Covington & Bloom, 2003, p.1). These numbers have only compounded in recent years. Between 1980 and 2021, the number of incarcerated women in the United States soared by almost eight hundred percent, increasing from 26,378 to 222,455 (Monazzam & Budd, 2023, para. 4). Notably, the majority of these convictions were related to nonviolent property crimes and drug offenses. In 1998, the most significant contributor to the rising number of women prisoners was drug-related offenses, accounting for a 36% increase (Monazzam & Budd, 2023, para. 4).

This increase in imprisonment, however, does not correlate with an increase in women's criminality, as most of these accounts are non-violent and attributed directly to the Nixon and Reagan Administration's War on Drugs. Despite its inception in the 1970s, it was not until the Reagan Administration of the 1980s that dramatic policy changes, such as the 1984 Comprehensive Crime Control Act (CCCA), allowed the full effects of the War on Drugs to come to fruition. As the United States transitioned away from an intermediate sentencing system, where judges had virtually unrestricted discretion in determining the nature and severity of a convicted defendant's punishment, the Sentencing Reform Act, a component of the CCCA, sought to combat the perceived "special treatment" of female offenders. The advent of mandatory guidelines and statutory minimums prevented judges from considering "mitigating circumstances" such as family responsibilities, experiences of domestic abuse, and other external factors that uniquely affected female offenders, which were previously considered in sentencing decisions. As a result, rigid and uniform sentencing requirements forced judges to issue inequitable, longer prison terms that overlooked the distinctive "mitigating circumstances" specific to female defendants. Mandatory minimum sentencing laws emerged as the primary driver of gender disparity in sentencing. Although these laws were applicable across a range of



criminal offenses, their impact was particularly pronounced in cases related to drug offenses. The War on Drugs and its policy mechanisms for enforcing punishment-orientated sentencing procedures, like the Sentencing Reform Act and its parent CCA, resulted in harsh sentencing procedures that disproportionately affected women, resulting in higher incarceration rates, longer sentences, and nonpermissive parole grants for women compared to their male counterparts.

As the number of women incarcerated continues to rise, it becomes increasingly crucial to recognize the broader societal ramifications of increasingly imprisoning this demographic. This is especially pertinent when considering the traditional association of female gender roles with childcare responsibilities. Mothers make up nearly 58% of female prison populations and 80% of female jail populations (Sawyer & Bertram, 2022, para. 1). Considering the majority of these mothers serve as primary caregivers or single parents, those without the option to entrust temporary custody to another parental guardian or family member while in jail or prison see their children placed within the child welfare system (When "Free" Means Losing Your Mother, 2006, p. xi). Consequently, it is imperative to examine federal and state child welfare policies when assessing the consequences of mass incarceration among women. Yet, it is concerning that this area remains largely unexplored in academic research.

To comprehensively understand the impact of the War on Drug policies on maternal incarceration, it is essential to examine the implications of the 1997 Adoption and Safe Families Act (ASFA). Born out of a desire to decrease the number of children "languishing" in the foster care system and promote national adoption efforts, the ASFA introduced a policy stipulating the termination of parental rights if a child spent 15 out of the last 22 months in foster care or group homes. While ostensibly noble in prioritizing the welfare of children over their biological parents, this policy overlooked the unique circumstances faced by incarcerated parents,

particularly mothers. Compared to their male counterparts, women often experience longer periods of incarceration, possess lower incomes that exacerbate challenges in affording bail money, and frequently shoulder the role of sole caregiver for their children. Consequently, these factors compel incarcerated mothers to place their children into the welfare system at a higher rate than imprisoned fathers. The 15/22 provision failed to adequately consider the complexities of parental incarceration, disproportionately affecting maternal caregivers and their children.

Ostensibly designed to expedite the termination of parental rights for individuals deemed unfit or incapable of providing a secure environment, this act inadvertently unveiled a grim reality for women trapped in the complex interplay of poverty, addiction, and incarceration. Among these women stands Sonya, a poignant embodiment of systemic failure and societal neglect.

Sonya's narrative unfolds against a backdrop of socioeconomic disenfranchisement, wherein she, as the sole provider for her three children and granddaughter, grapples with the harsh realities of daily survival. Faced with the unyielding pressures of financial destitution, Sonya resorts to petty theft to secure essentials like diapers and clothing for her family. Yet, her actions, born out of sheer necessity, propel her into a relentless cycle of incarceration and judicial entanglement.

Compounding Sonya's plight is her battle with substance dependency, a pervasive issue often exacerbated by the absence of adequate support systems. Rather than receiving the requisite assistance for rehabilitation and addressing the underlying causes of her addiction, Sonya finds herself ensnared within the punitive confines of the criminal justice system. Each encounter with incarceration begets a mounting burden of fines and court fees, perpetuating a

cycle of impoverishment and legal entanglement from which escape seems increasingly elusive. Bail determinations, bereft of considerations regarding familial ties or financial capabilities, render her incarcerated pending trial, distanced from her children and familial responsibilities. Faced with the prospect of protracted separation from her loved ones, Sonya, like many women in similar circumstances, confronts the agonizing choice between prolonged incarceration and expedient release through guilty pleas, regardless of their veracity or the strength of the prosecution's case.

For many women like Sonya who find themselves incarcerated, the anguish of separation from their children is compounded by the grim reality that they are often the sole caregivers for their families. In the absence of adequate support systems or alternative caregiving arrangements, these women are coerced into relinquishing custody of their children to the state foster care system while they serve their sentences. Tragically, the duration of their incarceration frequently exceeds the arbitrary time constraints imposed by the ASFA, resulting in the termination of their parental rights. In this cruel paradox, the very system ostensibly designed to safeguard the interests of children becomes complicit in perpetuating the systematic dismantling of familial bonds, leaving mothers like Sonya grappling with the enduring trauma of losing not only their freedom but also their fundamental rights as parents.

Furthermore, as states began to adopt their child welfare legislation modeled after the 1997 ASFA, certain states elected to expedite terminating parental rights (TPRs), including Oregon, as evidenced by Senate Bill 689. Consequently, these mothers in custody are now confronted with the imminent threat of losing custody of their children at an accelerated rate. Adding to the complexity, legal precedents from Oregon's case law established stringent criteria for determining TPRs, frequently relying on the mere fact of convictions and the duration of

sentences as adequate grounds for termination, regardless of the mother's expressed desire or ability to retain custody of her child. This legal framework compounds the challenges faced by incarcerated mothers as they endeavor to maintain familial bonds amidst the convoluted dynamics of the criminal justice system.

This study endeavors to contribute to a nuanced comprehension of mass incarceration, particularly its ramifications for women and the ensuing familial implications arising from reforms in the criminal justice system. By scrutinizing the compounded effects of two distinct yet intersecting policies — the gender-disproportionate repercussions of War on Drugs initiatives, resulting in lengthier sentences for women, and the Adoption and Safe Families Act (ASFA), which expedites parental rights termination and incentivizes adoptions — this research seeks to unravel the unintended consequences stemming from their confluence. Central to this examination is the poignant narrative of families torn asunder, with mothers forcibly separated from their children.

In delving into the intersectionality of factors such as the disproportionate representation of women in carceral institutions and the expedited process of parental rights termination, this study fills a crucial void in the ongoing discussions surrounding mass incarceration. In doing so, this analysis aims to provide valuable insights that can effectively guide reform efforts in understanding and mitigating the impact of criminal justice policies on incarcerated women and their families.

## Literature Review

### A. The War on Drugs as a War on Women

#### I. *The Nexus of Counterculture, Political Strategy, and the War on Drugs*

"America's public enemy number one in the United States is drug abuse" (American Presidency Project, 1971). These words harken back to a 1971 press conference held by President Richard Nixon, yet their sentiment permeates the "get tough" anti-drug policy employed to this day. Nixon's purported heroic campaign against drug abuse was not propelled by an earnest commitment to mitigating addiction or safeguarding public health. Instead, it was strategically motivated by a desire to vilify voter demographics mobilizing against his Republican base, whose influence grew amidst the fervent backdrop of the countercultural social movement in the 1960s (Cummings & Ramirez, 2022, p. 461). These revolutionary cohorts included the Baby Boomer youth, second-wave feminists, anti-Vietnam War protesters, "hippies," civil rights activists, and the Black Power movement.

Forged in the crucible of post-World War II economic prosperity, the countercultural youth from predominantly white middle-class families underwent a profound disillusionment with mainstream American cultural norms, confronting the prevailing ideals of consumerism, suburbanization, and conformity. Discourses from second-wave feminists, exemplified by Betty Friedan's 1963 work *The Feminine Mystique*, offer a quintessential example of political dialogue during the 1960s and 1970s by addressing the experiences of white middle-class Americans who felt marginalized within a society underscored by materialism (Gair, 2007, pp. 23-24). Friedan's critique of the suburban housewife ideal challenged conventional gender roles and domestic expectations mandated in the 1950s "Golden Age of Capitalism," resonating deeply with her predominantly white, privileged, yet disillusioned audience.

Furthermore, as Amy Hayes (2022) posits, "radical leftists who were anti-war socialism supporters with anarchist-like points of view," undecieved by the anti-communist propaganda of the Red Scare era, found common ground in opposition to the Vietnam War, which emerged as a central pillar of the counterculture movement (paras. 9-12). Protesters against the Vietnam War vehemently spoke out against American military involvement in Southeast Asia under the pretext of containing communist ideology. As an estimated 58,220 soldiers died on foreign soil, the counterculture movement mobilized into what is widely regarded as the largest political protest in U.S. history (National Archives, 2016, para. 2) & (New York Times, 2011, para. 1). On November 15, 1969, approximately half a million "predominantly youthful" individuals participated in a "mass gathering of the moderate and radical Left, [...] including old-style liberals; Communists, pacifists, and elements of the violent New Left" (New York Times, 2011, para. 4). The Vietnam Moratorium Committee posed a significant threat to the Nixon administration by effectively mobilizing a broad spectrum of American society against its foreign policy, thereby undermining the administration's ability to maintain public support for its stance on the Vietnam War. From burning draft cards to igniting American flags, the anti-Vietnam War movement strategically defaced United States emblems to underscore their profound dissent against governmental policies and military interventions, a tactic that struck fear and repugnance into the hearts of conservatives and the Nixon administration alike (*United States v. O'Brien*, 1968). This grassroots movement challenged the legitimacy of Nixon's war strategy. It highlighted the growing discontent and dissent within the populace, ultimately eroding the administration's political capital and credibility on the domestic and international fronts.

In the mid-1960s, the San Francisco Bay Area experienced a significant surge in young Americans embracing the burgeoning hippie movement, a phenomenon primarily driven by the widespread consumption of lysergic acid diethylamide (LSD), commonly known as "acid," and the emergence of "Acid Rock" music. This demographic cohort, many of whom identified as spiritual seekers, held a belief in the transformative potential of psychedelic substances for "transcendence" and societal change (Gair, 2007, pp. 176-177). Some hippies went so far as to assert that if policymakers engage in hallucinogenic or marijuana substances, "their world view would change and the wars would end" (Gair, 2007, p. 135). This trend coincided with a complex and ambiguous relationship between hippies and politics during the era. While some hippies rejected conventional political engagement and embraced a dropout lifestyle as a form of alternative political statement, the movement encompassed a diverse range of adherents. This includes hedonists, those lacking coherent ideology, and individuals disillusioned with politics altogether (Rorabaugh, 2015, p. 133).

In his book *The American Counterculture*, Christian Gair illuminates the convergence of the hippie image and the anti-Vietnam War protester image into a singular stereotype systematically vilified by conservative segments of American society. This coalescence effectively constructed a clear enemy, allowing for the generalized application of a negative image onto multiple groups. The portrayal of counterculture lifestyles as diametrically opposed to working-class American ideals, centered around patriotism and self-improvement, underscores the depth of societal divisions during this period (Gair, 2007, pp. 126-128). Drawing from Frank Kusch's examination of the Chicago police's perspective on the 1968 Democratic Convention, Gair highlights how these law enforcement officers, representative of urban working-class communities, viewed the hippie movement and anti-war activism as antithetical to their hard

work and tradition ethos (Gair, 2007, p. 127). Within the popular stereotype, individuals with long hair were indiscriminately branded as drug-taking "commie" subversives whose anti-war stance symbolized un-American sentiments. Moreover, their perceived idleness and disdain for financial stability further reinforced their depiction as incompatible with the core values of "real Americans" (Gair, 2007, p. 127). This portrayal perpetuated the narrative of hardworking citizens who contributed to nation-building through diligent labor and civic responsibility, juxtaposed against the perceived frivolity and lack of moral fiber attributed to countercultural groups. Through this lens, Gair elucidates how the amalgamation of disparate cultural movements into a singular stereotype polarized society, fostering an environment where divergent ideologies were demonized and marginalized (Gair, 2007, pp. 126-127).

Conservative policymakers and citizens alike grew increasingly concerned about the implications of drug usage within the context of national security. Michael Massing explains in *The Fix* that there was a widespread perception amongst white Republicans that the mass consumption of drugs such as LSD and marijuana, particularly among the hippie and minoritized communities, was not only a threat to traditional societal values but also a potential source of funding for criminal organizations involved in drug trafficking (Massing, 1998, 158-161). The Nixon administration, in particular, viewed the rising drug culture as a significant challenge to law and order, with fears mounting that the profits from the drug trade could be used to finance criminal activities and subversive political agendas.

In their 2022 article "The Racist Roots of the War on Drugs and the Myth of Equal Protection for People of Color," André Cummings and Steven Ramirez delve into the deeply ingrained racial biases that underpinned the Nixon administration's War on Drugs. They argue that Nixon and his political allies strategically weaponized drug policy as a means of targeting



and neutralizing political adversaries, particularly black Americans and youth activists of the counterculture movement. This strategy was epitomized by Nixon's close advisor, John Ehrlichman, in an infamous 1994 admission that the administration deliberately associated certain demographic groups with specific drugs to vilify and criminalize them in the public eye:

The Nixon campaign in 1968 and the Nixon White House after that had two enemies: the antiwar left and black people. You understand what I'm saying? We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news. Did we know we were lying about the drugs? Of course we did (p. 461).

This deliberate manipulation of racial prejudices served to entrench systemic inequalities further and perpetuate racial stereotypes within society. The surge in incarceration rates within the United States is emblematic of an intricate and insidious form of racism that lurks beneath a veneer of race-neutral "colorblind" rhetoric. As Alexander (2011) observes, the "War on Drugs, cloaked in race-neutral language, offered whites opposed to racial reform a unique opportunity to express their hostility toward blacks and black progress, without being exposed to the charge of racism" (p. 69). This phenomenon finds its roots in the Southern Strategy, where key advisers like H.R. Haldeman recounted that President Nixon deliberately pursued a racial strategy, recognizing that framing the issue as about African Americans allowed for a subtle yet racially biased approach. Conservatives in the late 1960s and 70s claimed that African Americans were responsible for their difficulties, attributing issues like unemployment, drug use, and crime to

their culture. The 1965 Moynihan Report typifies this conservative view, linking poverty and criminality to a supposed "black subculture" and the "tangle of pathology" it exhibited.

Cummings and Ramirez affirm that the War on Drugs was intricately linked with Nixon's broader political agenda, particularly his Southern Strategy, which aimed to appeal to white voters in the South by exploiting fears of black empowerment and capitalizing on hostility toward the civil rights movement. By aligning rural white Americans against black and brown communities politically, Nixon sought to solidify support for the Republican Party among working-class whites. Ultimately, Cummings and Ramirez argue that Nixon's War on Drugs not only exacerbated racial disparities within the criminal justice system but also served as a tool to suppress the political power of marginalized groups, particularly black Americans, thus perpetuating systemic racism in American society.

The Southern Strategy emerged as a linchpin forging a unified conservative front against the countercultural movement. By framing these groups as existential threats to traditional American values and national security, conservatives consolidated support among white Americans by positioning themselves as champions of law, order, and societal stability. This concerted effort targeted Baby Boomer youth, second-wave feminists, anti-Vietnam War protesters, "hippies," civil rights activists, and the Black Power movement, portraying them as threats to the American social fabric and national security due to their perceived unpatriotic, drug-using tendencies. The subsequent institutionalization of the War on Drugs during Nixon's tenure laid the groundwork for subsequent conservative campaigns, notably Reagan's, to capitalize on this narrative.

## *II. Racist Underpinnings of the Reagan Revolution Against Drugs*

Despite its inception in the 1970s, it was not until the Reagan Administration of the 1980s that dramatic policy changes, such as the Comprehensive Crime Control Act of 1984, allowed the full effects of the War on Drugs to come to fruition. The ascent of the "conservative revolution" in the Republican party between the 1960s and the 1980 election gave rise to the "war on drugs" as the centerpiece of Ronald Reagan's campaign. As the rise of technology, deindustrialization, and globalization struck urban black economies with particular harshness, Reagan's administration rapidly expanded federal law enforcement agencies. While never explicitly racist in rhetoric, Alexander (2011) that Reagan employed race-neutral language to channel white frustration, particularly appealing to poor and working-class whites. This coded language allowed for plausible deniability, fostering the racial dimension of his appeals while eluding direct accusations of racism.

Concurrently, the crack epidemic ravaged marginalized black communities, prompting a sensationalized response from the media (Alexander, 2010). Alexander argues that media coverage further entrenched racial stereotypes, portraying black women as "welfare queens" and black men as "predators" within a criminal subculture. Against this backdrop, the Reagan administration intensified the War on Drugs in response to the crack cocaine crisis, revealing underlying racial motivations behind escalating incarceration rates (Alexander, 2010). The Anti-Drug Abuse Acts of 1986, as highlighted by Alexander, extended mandatory minimum sentences for drug offenses, exacerbating sentencing disparities between crack and powder cocaine offenses.

**Mandatory minimum sentences for first time drug offenders:**

Type of drug	Five Year Sentence Without Parole	Ten Year Sentence Without Parole
LSD	1 gram	10 grams
Marijuana	100 plants/100 kilos	1000 plants/1000 kilos
Crack cocaine	5 grams	50 grams
Powder cocaine	500 grams	5 kilos
Heroin	100 grams	1 kilo
Methamphetamine	10 grams	100 grams
PCP	10 grams	100 grams

Figure 1: Mandatory minimum sentences for first time drug offenders (Sterling, 1999)

Mandatory minimum sentences represent a legal framework wherein predetermined minimum prison terms are mandated for specific criminal offenses, regardless of individual circumstances or mitigating factors. These sentencing laws require judges to impose a minimum sentence upon conviction, usually lasting five to ten years, limiting judicial discretion. Mandatory minimum sentences aimed to ensure consistency and uniformity in sentencing and deter individuals from committing certain offenses by imposing harsh penalties. Despite minimal distinctions between the substances, punishment for crack cocaine, predominantly found in impoverished black communities, was disproportionately severe compared to powder cocaine, which was more prevalent among wealthier white-collar populations. By 1991, the Sentencing

Project documented a surge in incarceration rates, with one-fourth of young black men ensnared within the criminal justice system.

*III. Reagan at the Reins: The 1984 Comprehensive Crime Control Act, Sentencing Reform Act, and Gendered Sentencing Disparities*

In response to the prevailing racist political rhetoric of drug usage and the push to adopt a tough-on-crime punitive approach, the Reagan administration introduced the 1984 Comprehensive Crime Control Act as a prominent legislative measure targeting the War on Drugs. At its core, the act introduced the Sentencing Reform Act, a pivotal component that significantly reshaped the federal sentencing framework. With purported aims to enhance consistency and equity, this act sought to establish federal sentencing guidelines, ostensibly standardizing sentencing practices and mitigating disparities. However, a contentious aspect of this reform was the introduction of mandatory minimum sentences for drug offenses. Specifically targeting drug trafficking and associated crimes, this provision was deeply entrenched within the broader War on Drugs initiative, drawing considerable scrutiny and debate regarding its effectiveness and implications within the criminal justice system.

As the United States transitioned away from an intermediate sentencing system in which judges assigned prison sentences upon their discretion, the 1984 Sentencing Reform Act sought to combat the lenient, unfair discretion of the former with a later method that, as Emma DeCourcy (2020) states in her Fordham Urban Law article "The Injustice of Formal Gender Equality in Sentencing" "[changed the] perceived purpose of criminal punishment [...] away from rehabilitation toward deterrence, and the focus of sentencing "away from the personal characteristics of the offender to the circumstances of the offense" (p. 404). This effectively

ended the perceived "special treatment of women offenders," such as judicial consideration for "mitigating circumstances" like family obligations, domestic abuse, and other external factors impacting women offenders, resulting in longer prison terms for women than before.

The imposition of mandatory sentencing laws was the most important means by which gender disparity in sentences can be attributed. While they applied to various criminal offenses, they were most prominent in drug-related offenses. DeCourcy (2020) states that "Mandatory minimum sentencing statutes present a clear example of a gender-neutral sentencing policy that results in sentencing outcomes for women that are disproportionate to the harm caused by their conduct" (p. 410). Indeed, DeCourcy (2020) affirms that the amalgamation of mandatory minimum statutes and inflexible Sentencing Guidelines regime "[resulted] in lengthy incarceration of such women whose actual role in drug cases is often quite limited" (p. 409). Indeed, many women who found themselves incarcerated for drug offenses were drawn into criminal activity through pre-existing relationships with male drug traffickers, whether familial or romantic, upon whom they may have been financially dependent or felt coerced. These women, described by DeCourcy (2020) as "women of circumstance," typically played peripheral roles in the illegal drug trade. However, upon arrest, they were frequently charged with conspiracy (p. 409).

Under federal conspiracy laws, a woman's mere presence in a household where drug-related activities occur could be construed as evidence of complicity in the conspiracy. Consequently, actions as innocuous as allowing drugs into the home or answering the door were used to establish the woman's knowledge and involvement in the conspiracy (DeCourcy, 2020, pp. 409-410). During sentencing, mandatory minimum statutes pertaining to drug conspiracies restricted judges from considering factors such as the individual's level of participation in the

conspiracy. As a result, women categorized as "women of circumstance" often received sentences that did not reflect their minor roles but held them accountable as if they were principal conspirators.

Despite claiming that "sex is not relevant in the determination of a sentence," the Sentencing Reform Act's facade of gender-neutral sentencing laws created a platform of inequitable sentencing procedures that, in practice, disproportionately impacted women by disregarding the nuances of their involvement and assigning sentences that did not align with the actual harm caused by their actions.

In addition to these legislative policies, policing strategies like the "broken window" theory contributed to the high rates of female incarceration. This theory, popularized by James Q. Wilson's renowned 1975 book *Thinking About Crime*, suggested that addressing minor offenses could effectively prevent more serious crimes. However, despite empirical evidence showing that women primarily possessed low-level offenses, they were subjected to equally harsh punishments as their more severe offender counterparts (Sawyer, 2018, paras. 8-18). The "broken window" surmise, which aimed to prevent first-time offenders from escalating to more severe acts, engendered an atmosphere of law and order but disproportionately affected women (Sawyer, 2018, paras. 8-18).

During the era of the War on Drugs, women were increasingly targeted by the police. Between 1995 and 1996, women arrested for drug-related offenses increased by 95%, while male drug-related arrests increased by only 55% (Kajstura & Sawyer, 2023). The War on Drugs and its policy mechanisms for enforcing punishment-orientated sentencing procedures, such as the Sentencing Reform Act, mandatory sentencing laws, the Reagan Administration Crime Control Act, and the "broken window" policy, resulted in harsh sentencing procedures that

disproportionately affected women (Kajstura & Sawyer, 2023). These policies led to higher incarceration rates, longer sentences, and nonpermissive parole grants for women compared to their male counterparts (Kajstura & Sawyer, 2023).

## **B. War on Child Welfare**

### *I. The 1980 Adoption Assistance and Child Welfare Act*

The Adoption and Safe Families Act of 1997 (ASFA) marked a significant shift in federal legislation addressing issues within the child welfare system. In her Wisconsin Women's Law Journal article, Sally Day contextualizes the ASFA within the broader historical trajectory of child welfare policies, notably referencing the Adoption Assistance and Child Welfare Act of 1980 as a precursor. She argues that the 1980 act encouraged states to prioritize family preservation through preventive programs, countering the burgeoning foster care system's reliance on lengthy placements and termination of parental rights (Day, 2005, p. 221).

Day underscores the socio-economic milieu of the 1980s and 1990s, characterized by escalating poverty rates, cocaine epidemics, and welfare reforms, attributing these phenomena as catalysts for the surge in children entering foster care (Day, 2005, p. 221). Similarly, Arlene F. Lee, Philip Genty, and Mimi Laver (2010) contextualize the historical backdrop of child welfare, noting a decline in out-of-home care in the late 1970s and early 1980s, succeeded by a resurgence attributed to societal stressors such as HIV/AIDS, drug addiction, and violence (p. 78). As Day contends, this surge catalyzed a crucial transition among federal policymakers in 1980, redirecting their focus toward prioritizing family preservation through preventive and reunification programs as a viable alternative to prolonged foster care placements, termination of parental rights, and adoption (Day, 2005, pp. 220-221).



## *II. The 1997 Adoption and Safe Families Act*

The 1997 Adoption and Safe Families Act, sponsored by Representative Dave Camp (R-MI) and endorsed by then-First Lady Hillary Clinton, alongside bipartisan support, emerged as a response to the perceived shortcomings of the prevailing child welfare framework. Advocates of the act contended that the protracted and cumbersome process of family reunification, coupled with judicial delays in adjudicating adoption and Termination of Parental Rights (TPR) proceedings, led to prolonged stays for children within the foster care system. To rectify these inefficiencies, the act aimed to amend the vague language of its predecessor, the 1980 Child Welfare Act, particularly regarding the "reasonable effort" clause governing the reunification process. Furthermore, proponents sought to realign the focus away from the biological parents' welfare and towards prioritizing the best interests of the children. Central to the act's objectives was the desire to incentivize adoption and decrease the number of children lingering within the foster care system, thus promoting timely permanency solutions and ensuring a more expedient pathway to stable family environments for vulnerable youth. Through these initiatives, the 1997 Adoption and Safe Families Act sought to streamline the child welfare process, enhance permanency outcomes, and prioritize the welfare of children above all else.

"The Good Mother: Mothering, Feminism, and Incarceration," authored by Deseriee A. Kennedy (2012), critically examines the implications of the Adoption and Safe Families Act of 1997 (ASFA) on incarcerated mothers and their parental rights. Kennedy (2012) argues that while ASFA aimed to prioritize permanency and stability for children in foster care, its rigid timelines and criteria placed undue pressure on state agencies to expedite the termination of parental rights (TPR), particularly for incarcerated women (p. 175). ASFA mandates permanency hearings within twelve months of a child's removal from the home, with further requirements

stipulating that children in foster care for fifteen of the last twenty-two months must move towards permanency, often through TPR petitions filed by state agencies (Kennedy, 2012, pp. 175-177).

Kennedy (2012) highlights the ambiguity surrounding the definition of "reasonable efforts" for family reunification, which is "left up to the states and individual state agencies to define" (p. 175). Despite the ASFA's legal mandates requiring states to make reasonable efforts to reunite families and maintain family ties, the interpretation and implementation of these efforts vary, leaving many families, particularly those affected by parental incarceration, without sufficient support. The Oregon statute delineates the "permanency plan" as a documented strategy to secure enduring and secure guardianship arrangements for a child placed into the foster care system. These plans are formulated to evaluate the sustainability of parent-child relationships over time. Permanency options may encompass adoption, guardianship, or a planned permanent living arrangement (PPLA). Kennedy contends that the support provided to incarcerated parents in adhering to permanency plans is often inadequate, exacerbating their difficulties in maintaining parental rights. She argues that the current approach to permanency planning under the Adoption and Safe Families Act (ASFA) fails to account for the realities of lengthy prison sentences and disregards the pre-existing bonds between incarcerated parents and children, thus effectively penalizing parents for their crimes through the termination of parental rights (Kennedy, 2012, p. 175).

Moreover, Kennedy scrutinizes the intersection of federal and state laws, which she argues has led to a significant increase in TPR for incarcerated mothers. She notes that many states permit courts to consider incarceration as a factor in determining parental fitness, leading to disparities in how fitness is assessed and parental rights terminated, such as in Oregon

(Kennedy, 2012, p. 176). Kennedy highlights the lack of consistency among states regarding aspects such as the nature and length of incarceration, communication efforts by the parent, and the best interests of the child (Kennedy, 2012, p. 176). She contends that the vague standards used in parental termination proceedings rely heavily on judicial discretion, further complicating the plight of incarcerated mothers seeking to retain their parental rights (Kennedy, 2012, p. 176).

## **C. Oregon's Legislative Framework and Judicial Precedents on Parental Rights**

### **Termination for Incarcerated Parents**

#### *I. Addressing Foster Care Drift: Oregon's Response with SB 689 "Best Interest of the Child Act"*

Following the enactment of ASFA, Oregon's policymakers undertook a deliberate initiative during the 1999 legislative session to address state laws and procedures that perpetuated extended stays in the foster care system. Their goal was to align state statutes with evolving national standards in child welfare (McComb, 2004, p. 2). In her 2004 "Background Brief on Adoption" for the Oregon State Legislative Committee Services, Jan McComb elucidates that Senate Bill 689, commonly referred to as the "Best Interests of the Child" Act, was constructed amidst mounting concerns regarding the expedience of the placement and adoption processes for children deemed at risk of abuse or neglect, who find themselves removed from their homes by the state's Children, Adults, and Families Department (CAF) and subsequently placed in foster care for their protection (McComb, 2004, p. 1).

Oregon's lawmakers and private adoption agencies harbored deep concerns regarding a troubling "foster care drift" trend within the state's Department of Human Services (McKenzie, p. 1). This drift occurs when a child is forcibly separated from their biological family for an

extended duration without a definitive plan for either reunification or the establishment of an alternative permanent home. The ramifications of such prolonged uncertainty are profound, exerting significant physical and psychological tolls on the minors ensnared within the system. In her article reviewing S.B 689 for the Judicial Department of Oregon, Leola McKenzie, the Division Director of Oregon Judicial Department Juvenile and Family Court Programs Division, starkly outlines these repercussions, which include the "development of attachment and emotional disorders, increased likelihood of school dropout, engagement in delinquent behaviors, susceptibility to teenage pregnancy, substance abuse, homelessness, and, distressingly, perpetuation of the cycle of child abuse and neglect into their future parenting endeavors" (McKenzie, p. 1).

Although Jan McComb and McKenzie contextualize SB 689 within the imperative of preventing child abuse and neglect, they both underscore a significant aspect of the Best Interests of the Child Act aimed at preventing children from languishing in the foster care system. McComb (2004) asserts, "The Act contained a number of provisions, all with the goal of moving children from foster care to an adoptive home more quickly" (p. 2). This expeditious movement was facilitated through various provisions, including swifter terminations of parental rights in cases where parents failed to implement court-ordered necessary changes aimed at creating a suitable environment for the child's well-being, a reduction in the time taken by the state to find adoptive homes, and an increase in the number of families trained and certified to become adoptive families (McComb, 2004, p. 2). While the literature on SB 689 is scarce, both McComb and McKenzie's analyses emphasize the accelerated timelines for terminating parental rights as a fundamental aspect of the legislation. It is intriguing to note that neither McComb nor McKenzie delved into the potential repercussions of expediting the termination of parental rights beyond

cases of neglect or abuse crisis within the foster care system, reflecting a notable oversight in the examination of the bill's broader implications on incarcerated parents.

## *II. Oregon Case Law on the Termination of Parental Rights*

In her paper "Bending the Bars for Mothers: How Prison Alternatives Can Build a Stronger Oregon," Katherine L. Eitenmiller provides a comprehensive examination of the legal dynamics surrounding the rights of incarcerated mothers and their children in Oregon. Eitenmiller's analysis is grounded in the evolution of Oregon's case law for delegating terminating parental rights dictated by *State v. Grady* (1962), *In re Moyer* (1979), and *State ex rel. Department of Human Services v. Williams* (2004), each of which has left an indelible mark on the jurisprudential landscape regarding parental rights within the context of incarceration.

*State v. Grady* represents a pivotal juncture in Oregon's legal history, wherein the Oregon Supreme Court grappled with the complexities of parental incarceration and its implications for familial relationships. In this landmark case, the Oregon Supreme Court declined to terminate the parental rights of a young, incarcerated mother convicted of forgery, emphasizing the enduring maternal instincts and desires of the mother to parent her child despite her imprisonment (Eitenmiller, 2014, pp. 763-764). Eitenmiller underscores that the court's decision reflects a departure from traditional legal norms, as it acknowledges that incarceration alone does not constitute parental abandonment or diminish the natural maternal instincts of the mother (Eitenmiller, 2014, pp. 763-764).

However, the subsequent evolution of Oregon case law, as evidenced in cases like *In re Moyer*, introduced a more nuanced approach to considering parental incarceration in termination proceedings in Oregon. Eitenmiller's analysis of *In re Moyer* delves into the repercussions of case law permitting parental incarceration as a factor warranting termination, subsequently

relieving the Department of Human Services of its obligation to "reasonable efforts [...] to prevent or eliminate the need for removal" to incarcerated parents (OR. REV. STAT. ANN. § 419B.340(1) (West 2013). This legal framework, Eitenmiller posits, underscores a prioritization of the welfare of children over parental rights, where even evidence of the incarcerated mother's efforts to ensure a better life for her children upon release did not sway the court's decision (Eitenmiller, 2014, pp. 764-765). The court's determination reflects a prevailing concern for the welfare of the children at the expense of recognizing the incarcerated parent's continued efforts to maintain familial bonds and provide for their children's well-being from within the confines of prison.

In the case of *State ex rel. Department of Human Services v. Williams*, the Oregon Court of Appeals established a crucial precedent by ruling that the Department of Human Services (DHS) cannot justify neglecting its duty to pursue family reunification solely based on a parent's incarceration. This decision marked a significant departure from past practices, as the court reversed the termination judgment, highlighting DHS's failure to fulfill its statutory obligation and engage adequately with the incarcerated parent (Eitenmiller, 2014, p. 766).

However, despite this legal precedent, Eitenmiller notes that DHS continues to use parental incarceration as evidence against parents in termination proceedings, highlighting persistent challenges in achieving equitable outcomes for incarcerated individuals within the legal system (Eitenmiller, 2014, p. 766). Furthermore, the length of a parent's imprisonment is still admissible as evidence against them at termination hearings, indicating the ongoing complexities surrounding parental incarceration and its implications for termination proceedings (Eitenmiller, 2014, p. 766).

Eitenmiller emphasizes that Oregon's stringent legislative measures, which enforce mandatory minimum sentences, significantly threaten the likelihood of termination judgments. These measures often lead to individuals receiving extended prison sentences for offenses that previously might not have warranted incarceration, thereby jeopardizing their ability to maintain familial bonds while entangled in the legal system (Eitenmiller, 2014, pp. 765-767). This issue is particularly pertinent for women, as Eitenmiller points out, citing a substantial increase in female offenders sentenced to prison between 2004 and 2014, alongside a notable rise in male offenders. She attributes this surge to the implementation of ballot measures advocating for mandatory minimum sentences for specific crimes, underscoring the profound impact of legislative policies on family dynamics and the criminal justice system's operations (Eitenmiller, 2014, pp. 765-767).

## Methodology

Within discourse addressing the nationwide trends regarding the termination of parental rights among incarcerated women, it is imperative to avoid overarching generalizations about the impact of federal policies without considering the nuanced interplay of state-level regulations. This complexity is particularly evident when evaluating the repercussions of the 1997 Adoption and Safe Families Act (ASFA) on the mass incarceration of mothers and subsequent termination of parental rights, as it interfaces with distinct state policies, yielding varied outcomes across different jurisdictions. To comprehensively grasp the confluence of state and federal policies and their resultant effects at the state level, this research endeavors to assess the ramifications of the ASFA specifically for incarcerated and recently released mothers in Oregon.

This state-focused approach is crucial, given that certain states have implemented expedited procedures for parental rights termination, exemplified by Oregon's SB 689, known as the "Best Interest of Child Act." Drawing upon qualitative data from independent research studies, such as the 2008 Bureau of Justice Statistics special report on "Parents in Prison and Their Minor Children," the 2009 National Conference of State Legislatures report on "Children of Incarcerated Parents," and the 2016 "Report on Incarcerated Parents in Oregon" published by the Oregon Commission for Women, this research aims to elucidate nationwide and Oregon-specific trends, encompassing trends in parental incarceration rates, the proportion of mothers within Oregon's correctional facilities, average prison sentence durations for maternal offenders, prevalent convictions among incarcerated mothers, predominant custodial arrangements for children of incarcerated parents, and the percentage of such children in the foster care system. These data trends measure pre and post-enactment of the 1997 ASFA. Data will be pulled



between 1991 and 2008 to garner a nearly decade year before and after the impact of PRTs and foster care placements.

Furthermore, a meticulous qualitative examination of pertinent statutes, such as Oregon Revised Statute (ORS) 419B.498 on Termination of Parental Rights and ORS 419B.504 on Termination Upon Finding of Unfitness, will unveil the obstacles encountered by recently released mothers in meeting the criteria for retaining custody of their children post-incarceration. This analysis will probe how ORS provisions establish criminal behavior, irrespective of conviction type or sentence length, as grounds for parental rights termination based on "unfitness" and how such statutes, in conjunction with Oregon case law precedents like *State v. Grady* and *State ex rel. Department of Human Services v. Williams* facilitated the termination of parental rights for Oregonian mothers based on prior incarceration statuses.

Lastly, a qualitative analysis of the Adoption and Safe Families Act (ASFA) will be undertaken to delineate its impact, including the expansion of subsidies and incentivization for adoption agencies and the discernment of quantitative data illustrating the disproportionate rise in parental rights terminations vis-à-vis adoption rates after the implementation of ASFA, thereby engendering the phenomenon of "legal orphans."

A mixed-methods approach will be employed for the analytical techniques to address the multifaceted nature of the research questions. Quantitative analysis will involve statistical examinations of relevant datasets, such as incarceration rates and custody arrangements, to identify patterns and correlations. Descriptive statistical methods will quantify relationships and trends within the data by summarizing and delineating the key characteristics of a dataset, encompassing its central tendencies, variability, and distribution across gender, parental, criminal status, and racial and ethnic identities. Qualitative analysis will involve a close reading of the

Oregon Revised Statute, focusing on understanding the nuances, historical context, and diverse perspectives surrounding the impact of the legal frameworks on incarcerated mothers and their families.

### A. Analyzing Trends Among Mothers-in-Custody: National and Oregon Perspectives

#### I. Parental Incarceration is On the Rise

The Bureau of Justice Statistics Special Report on "Parents in Prison and Their Minor Children" sheds light on a significant societal phenomenon: the escalating prevalence of incarcerated parents in the United States spanning from 1991 to midyear 2007 (Glaze & Maruschak, 2010, p. 1). This period witnessed a staggering surge in the parent population detained in state and federal prisons, with a remarkable 79% increase totaling 357,300 individuals (Glaze & Maruschak, 2010, p. 1). Concurrently, the number of children affected by parental incarceration soared by 80%, reaching an alarming 761,000. These statistics transcend mere numerical analysis; they signify a profound societal shift with wide-ranging implications (Glaze & Maruschak, 2010, p. 1).

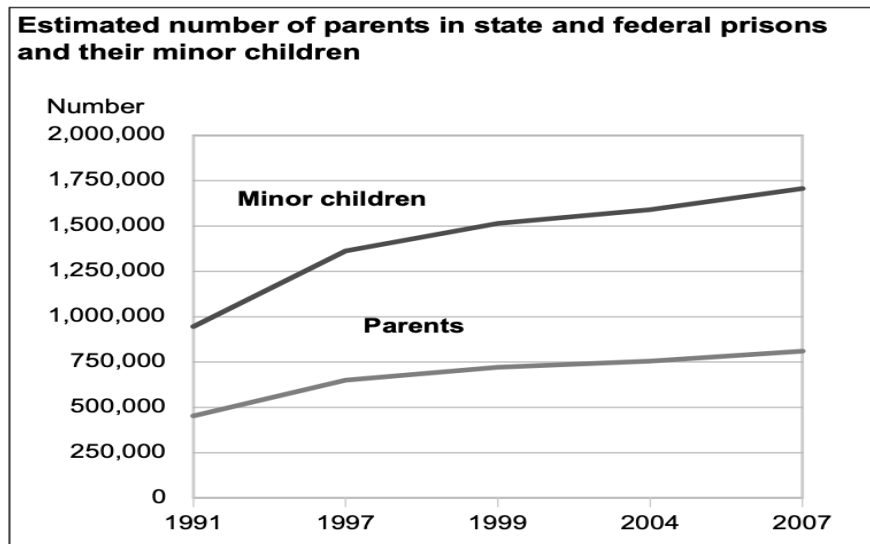


Figure 2: Estimated number of parents in state and federal prisons and their minor children (Glaze & Maruschak, 2010, p. 1)

Of particular note is the rapid growth observed between 1991 and 1997, during which both the number of incarcerated parents and their affected children surged by 44%. This period represents a critical juncture characterized by an escalation in parental incarceration rates and the subsequent ramifications for children. It is interesting to note that in 1997, within the cohort of incarcerated women, drug-related offenses emerged as the predominant catalyst behind the surge in the inmate populace. Notably, these infractions constituted 45% of the aggregate rise in the female inmate demographic during that temporal span (Gilliard & Dr. Beck, 1998, p.1).

Moreover, while the data also indicates continued growth in the number of affected parents and children, albeit at a slower pace from 1997 to midyear 2007, it is imperative to recognize that this does not alleviate the pressing need for systemic reforms. Instead, it underscores the necessity for urgent action to address the underlying factors driving the phenomenon of parental incarceration. A review conducted by the Child Welfare League of America in 2005 brings attention to the rise in cases of Termination of Parental Rights (TPR) from 1997 to 2002 (Lee, Genty, & Laver, 2005, p. 81). Significant findings from the review reveal that parental rights were terminated in 92.9% of instances where the mother was incarcerated, 91.4% when the father was imprisoned, and in 100% of cases when both parents were incarcerated (Lee, Genty, & Laver, 2005, p. 81).

**Estimated number of parents in state and federal prisons and their minor children, by inmate's gender, race, and Hispanic origin, 2004 and 2007**

	Male				Female			
	Total <sup>a</sup>	White <sup>b</sup>	Black <sup>b</sup>	Hispanic	Total <sup>a</sup>	White <sup>b</sup>	Black <sup>b</sup>	Hispanic
<b>State inmates</b>								
Number of parents								
2007	627,800	197,800	262,400	127,600	58,200	29,000	16,100	8,800
2004 <sup>c</sup>	592,300	189,800	279,500	113,100	51,800	23,300	19,000	8,200
Number of children								
2007	1,296,500	373,400	577,900	263,500	131,000	60,000	39,600	22,900
2004 <sup>c</sup>	1,223,700	358,000	611,600	233,000	116,600	47,900	45,700	21,000
<b>Federal inmates</b>								
Number of parents								
2007	116,400	25,900	57,000	32,500	7,400	2,700	2,200	2,300
2004 <sup>c</sup>	104,200	20,900	49,300	31,000	6,600	2,000	2,100	2,200
Number of children								
2007	262,700	45,100	144,800	71,200	16,400	5,600	5,100	5,200
2004 <sup>c</sup>	235,200	36,300	125,400	67,800	14,600	4,200	4,900	4,900

Note: See *Methodology* for estimation methods.

<sup>a</sup>Includes other races. Other races include American Indians, Alaska Natives, Asians, Native Hawaiians, other Pacific Islanders, and persons identifying two or more races.

<sup>b</sup>Excludes persons of Hispanic or Latino origin.

<sup>c</sup>Numbers were estimated based on the June 30, 2004 custody population in state (1,241,034) and federal (176,156) prisons.

Figure 3: Estimated number of parents in state and federal prisons and their minor children, by inmate's gender, race, and Hispanic origin, 2004 and 2007 (Glaze & Maruschak, 2010, p. 13)

Researchers found that among the estimated 74 million children in the U.S. population under the age of 18 as of July 1, 2007, approximately 2.3% had a parent incarcerated, as indicated in Figure 3 (Glaze & Maruschak, 2010, p. 2). Notably, disparities based on race were evident, with Black children significantly more likely, at 6.7%, to have a parent in prison compared to their White counterparts, at 0.9% (Glaze & Maruschak, 2010, p. 2). Similarly, Hispanic children exhibited a higher likelihood, at 2.4%, compared to White children (Glaze & Maruschak, 2010, p. 2).

Reflecting broader incarceration trends, the majority of parents in the nation's prisons in midyear 2007 were male, mirroring the demographic distribution in the general prison population. Specifically, Black fathers were overrepresented, comprising more than 40%, followed by White and Hispanic fathers. Consequently, an estimated 1,559,200 children had a father incarcerated, with a significant proportion being children of Black fathers (Glaze & Maruschak, 2010, p. 2).

Turning to maternal incarceration, White women constituted the most significant percentage, followed by Black and Hispanic women. This racial disparity among incarcerated mothers mirrored the racial distribution of children with a mother in prison, with approximately 45% having a White mother, 30% having a Black mother, and 19% having a Hispanic mother (Glaze & Maruschak, 2010, p. 2).

When contextualized within the historical backdrop of the "War on Drugs" and the implementation of punitive policies driven by Nixon and Reagan's political rhetoric, these statistics unveil a troubling narrative of racialized criminalization and incarceration. As later sections will elucidate, the majority of convictions held by mothers are nonviolent, drug-related offenses. When one considers how the mandatory minimum sentencing statutes and broken-window policing tactics from the War on Drugs specifically targeted people of color, particularly Black people, and resulted in unprecedented, unequal sentence lengths for women, these trends in racial and ethnic composition of parents are revealing of contemporary manifestations of these policies. Indeed, the data not only highlights the overrepresentation of Black individuals within the prison system but also underscores the disproportionate impact of mass incarceration on families of color.

The stark contrast in parental incarceration rates between Black, White, and Hispanic populations underscores systemic biases in law enforcement practices and sentencing outcomes. Black children, for instance, are significantly more likely to have a parent in prison compared to their White counterparts, with rates disproportionately higher among Hispanic children as well. This disparity suggests a pattern of racial targeting in policing and judicial decision-making, wherein individuals from marginalized communities, especially Black and Hispanic individuals, are more likely to be arrested, convicted, and incarcerated for similar offenses compared to their White counterparts.

Moreover, the racial composition of incarcerated parents further highlights the impact of systemic biases on incarceration demographics. Over 40% of fathers in state or federal prisons are Black, while nearly half of incarcerated mothers are White. This imbalance suggests a pattern of racial disproportionality in the criminal justice system, where Black individuals are overrepresented among incarcerated fathers, while White individuals are overrepresented among imprisoned mothers.

By examining the trends in the gender, racial, and ethnic composition of incarcerated parents, we unearth the enduring effects of these policies on contemporary society. Indeed, the data not only underscores the overrepresentation of Black individuals within the prison system but also reveals the profound and disproportionate toll that mass incarceration exacts on families of color.

## *II. The Proportion of Mothers in Federal and Oregon Correctional Facilities*

The Bureau of Justice Statistics Special Report additionally paints a comprehensive picture of the gender dynamics within the prison system, shedding light on the distinct

experiences of incarcerated mothers compared to fathers. The glaring contrast in population figures between fathers and mothers within correctional facilities, with 744,200 fathers and 65,600 mothers incarcerated at midyear 2007, highlights the stark gender disparity prevalent in the criminal justice system (Glaze & Maruschak, 2010, p. 2). Despite the lower count of incarcerated mothers, the impact of their imprisonment on children is profound. Mothers in prison reported 147,400 children, while fathers reported 1,559,200 children (Glaze & Maruschak, 2010, p. 2). Although more children experience the absence of a paternal figure due to the criminal justice system, the significant increase in the number of female prisoners since 1990, surpassing the rise in male prisoners, resulted in nearly doubling the number of children with incarcerated mothers since 1991 (Mumula, 2000, p.2). Meanwhile, the number of children with incarcerated fathers increased by 58% during the same period (Mumula, 2000, p.2).

Researchers concluded that between 1991 and midyear 2007, there was a notable escalation in the number of children with at least one parent incarcerated. Specifically, the count of children with a mother in prison more than doubled, marking a significant 131% increase (Glaze & Maruschak, 2010, p. 2). Likewise, the number of children with a father behind bars also rose, though at a slower rate, with a 77% growth (Glaze & Maruschak, 2010, p. 2). Moreover, the analysis revealed a distinct gender disparity in the rate of parental incarceration. Maternal imprisonment exhibited a faster growth trajectory compared to paternal incarceration during the same period. The rate of increase in the number of mothers held in state and federal prisons soared by 122%, while the corresponding growth for fathers was 76% (Glaze & Maruschak, 2010, p. 2).

Additionally, the overwhelming majority of incarcerated women are mothers, with an estimated 70% of female prisoners being mothers of two or three children (Kennedy, 2012, p.

170). This statistic underscores the reality that maternal incarceration not only affects the individual incarcerated but also has far-reaching consequences for their dependent children, who often lose their primary caregiver and face disruptions in family structure and stability. Recognizing this reality is crucial for developing effective policies and interventions aimed at addressing the unique needs of incarcerated mothers and their children, with a focus on promoting family reunification, mitigating the intergenerational cycle of incarceration, and fostering supportive environments for children affected by parental imprisonment.

### *III. Average Sentencing Length of Parents Contrasted with ASFA and SB 689 PRT Timelines*

The duration of sentences served by incarcerated parents presents a significant challenge in the context of parental rights and the adoption process, both at the national level under the Adoption and Safe Families Act (ASFA) and at the state level in Oregon, particularly in light of Senate Bill 689 (SB 689). Christian (2009) underscores that the typical sentence for an incarcerated parent ranges from 80 to 100 months, placing most imprisoned parents of children in foster care at risk of losing their parental rights. This prolonged period of incarceration increases the likelihood of parental rights termination, as extended separation from their children may hinder reunification efforts and adherence to ASFA timelines. Although ASFA does not explicitly mandate termination of parental rights for incarcerated parents, the provision requiring termination, if reunification is delayed beyond 15 months, could apply in cases where parental incarceration prolongs the process, even if the parent is actively engaging in services to facilitate reunification (Christian, 2009).

In Oregon, Senate Bill 689 introduces additional complexities by expediting the parental rights termination (PRT) process and imposing stricter deadlines for mothers. This legislative initiative accelerates the legal procedures for terminating parental rights, potentially creating



even narrower windows of opportunity for incarcerated parents to fulfill reunification requirements. Consequently, the intersection of lengthy sentences for incarcerated parents and expedited TPR processes under SB 689 in Oregon intensifies the risk of parental rights termination for incarcerated individuals, effectively exacerbating the challenges faced by families affected by incarceration.

#### *IV. On Average, Mothers Are Not Convicted of Violent Crimes Across National and State Jurisdictions*

Distinct patterns emerge nationally in the relationship between offender categories and parental status. According to Glaze and Maruschak (2010), drug and public-order offenders in state and federal prisons display higher rates of parenthood compared to violent offenders. Among male state prisoners, the data reveals that public-order and drug offenders are more likely to report having children than those convicted of violent and property offenses, with 60% and 59%, respectively, compared to 47% for violent and 48% for property offenders (p. 4). A similar trend is observed among women held in state prison, where those convicted of drug, property, and public-order offenses exhibit higher rates of motherhood compared to those convicted of violent offenses (Glaze & Maruschak, 2010, p. 2). Specifically, the data shows that 63% of drug offenders, 65% of property offenders, and 65% of public-order offenders report being mothers, while only 57% of violent offenders report the same (Glaze & Maruschak, 2010, p. 2). The 2009 National Conference of State Legislatures report on “Children of Incarcerated Parents” affirms this data, revealing that “from 1986 to 1996, the number of women incarcerated in state facilities for drug offenses increased by 888%, compared to a rise of 129% for non-drug offenses” (Christian, 2009, p. 8).

<b>Percent of state and federal inmates who were parents of minor children, by current offense and gender, 2004</b>						
Current offense	Parents in state prison			Parents in federal prison		
	Total	Male	Female	Total	Male	Female
<b>All inmates</b>	51.9%	51.2%	61.7%	62.9%	63.4%	55.9%
<b>Violent</b>	47.5%	47.1%	57.3%	49.9%	49.8%	52.4%
Homicide <sup>a</sup>	40.3	39.9	46.6	51.6	51.7	^
Sexual assault <sup>b</sup>	45.4	45.3	61.9	30.7	30.1	^
Robbery	47.0	46.5	59.6	49.5	49.5	49.2
Assault	56.9	56.5	64.2	56.2	56.5	^
<b>Property</b>	49.9%	48.2%	64.7%	53.8%	53.5%	55.5%
Burglary	44.4	43.8	61.4	29.0	^	^
Larceny	49.9	47.8	61.8	40.9	^	^
Motor vehicle theft	52.0	51.2	67.6	43.8	^	^
Fraud	60.2	56.8	68.1	58.7	59.2	56.5
<b>Drug</b>	59.6%	59.3%	62.5%	67.6%	68.7%	54.5%
Possession	56.9	55.9	64.3	63.0	64.5	^
Trafficking	61.3	61.3	61.7	67.9	68.9	55.9
<b>Public-order</b>	59.9%	59.6%	65.0%	62.4%	62.3%	64.7%
Weapons	64.9	64.9	66.4	63.8	63.8	65.6
DWI	52.9	52.6	59.3	38.7	^	^

Note: See appendix table 17 for estimated total counts.  
<sup>a</sup>Estimate not reported. Sample size too small (10 or fewer) to provide reliable data.  
<sup>a</sup>Includes murder and manslaughter.  
<sup>b</sup>Includes rape and other sexual assault.

Figure 4: Percent of state and federal inmates who were parents of minor children, by current offense and gender, 2004 (Glaze & Maruschak, 2010, p. 15)

Among male federal prisoners, those convicted of drug offenses (69%) were more inclined to report having children compared to those convicted of property (54%) and violent (50%) offenses, as detailed in Figure 4. Similarly, public-order offenders (62%) were more likely than violent offenders to report having children. Conversely, for women incarcerated in federal prisons, the likelihood of being a mother showed little variation based on the nature of the

offense. This observation hints at potential disparities in demographic characteristics or offense profiles between female inmates in federal and state prisons.

<b>Current offense of inmate parents in State or Federal prison, by gender, 1997</b>						
Current offense	Percent of inmate parents, 1997					
	Total	State		Federal		
		Male	Female	Total	Male	Female
<b>Violent offenses</b>	43.9%	45.4%	26.0%	11.9%	12.3%	6.5%
Homicide <sup>a</sup>	10.9	11.1	8.6	1.2	1.2	1.3
Sexual assault <sup>b</sup>	8.3	8.8	1.7	0.7	0.8	0.1
Robbery	13.2	13.8	6.4	7.8	8.1	3.4
Assault	9.7	9.9	7.2	1.3	1.3	1.3
Other violent	1.8	1.8	2.1	0.9	0.9	0.4
<b>Property offenses</b>	21.6%	21.1%	28.3%	5.3%	4.9%	10.3%
Burglary	10.2	10.6	5.4	0.3	0.3	0.1
Larceny	4.6	4.3	8.5	0.4	0.4	0.3
Motor vehicle theft	1.5	1.6	1.2	0.2	0.3	0.0
Fraud	2.8	2.1	11.3	3.7	3.3	8.9
Stolen property	1.6	1.7	1.3	0.4	0.4	0.6
Other property	0.9	0.9	0.6	0.3	0.3	0.3
<b>Drug offenses</b>	23.9%	23.0%	35.1%	67.2%	66.7%	73.9%
Possession	10.1	9.7	14.8	12.9	13.1	9.7
Trafficking	13.1	12.7	19.0	48.9	48.0	61.0
Other drug	0.7	0.6	1.3	5.4	5.6	3.2
<b>Public-order offenses</b>	10.3%	10.3%	10.4%	14.6%	15.1%	7.9%
Weapons	2.7	2.8	0.9	6.9	7.3	1.1
Other public-order	7.6	7.5	9.5	7.8	7.9	6.7
<b>Other/unspecified</b>	0.2%	0.2%	0.3%	1.0%	0.9%	1.5%

<sup>a</sup>Includes murder and manslaughter.  
<sup>b</sup>Includes rape and other sexual assaults.

Figure 5: Current offense of inmate parents in State or Federal prison, by gender, 1997

(Mumalo, 2000, p. 6)

However, the Bureau of Justice Statistics Special Report found in 2000 that “the current offenses of mothers and fathers in Federal prison were more similar than those of State inmates.

Two-thirds of fathers and three-quarters of mothers in Federal prison were convicted of drug

offenses. The percentage of violent offenders among both fathers (12%) and mothers (6%) was much lower than in State prison, while 5% of fathers and 10% of mothers were property offenders (Mumola, 2000, p. 6). This dataset is instrumental in contextualizing the composition of federal prison populations in 1997 when the Adoption and Safe Families Act (ASFA) was signed into law. The report indicates that there were notable similarities in the current offenses of both mothers and fathers incarcerated in federal prisons, particularly in comparison to state inmates.

Key findings reveal that the majority of both fathers and mothers in federal prison were convicted of drug offenses, with approximately two-thirds of fathers and three-quarters of mothers falling under this category. This underscores the prevalence of drug-related convictions within the federal prison system during that period. Additionally, the proportion of violent offenders among both fathers and mothers in federal prison was substantially lower than that observed in state prisons, with only 12% of fathers and 6% of mothers convicted of violent offenses. This suggests a distinct focus on non-violent crimes within the federal system.

Furthermore, in Oregon, a unique pattern emerges among incarcerated mothers in terms of their criminal convictions compared to non-mothers, as outlined by Kennedy (2012). These mothers are less likely to have committed violent crimes but demonstrate a higher propensity for drug and property offenses (Kennedy, 2012, p. 170). This disparity may be attributed to socioeconomic inequality, the challenges of single parenthood, and experiences of domestic abuse among incarcerated mothers. The higher prevalence of poverty and the complexities associated with single parenting may contribute to the involvement of these mothers in drug and property offenses, which may serve as coping mechanisms for financial hardship and familial responsibilities.

The absence of a violent crime conviction holds significant implications for a mother's prospects of regaining custody of her children upon release from prison or jail. Kennedy concluded, "Imprisoned mothers are less likely to present a danger to their children or society" (Kennedy, 2012, p. 169). This absence suggests a lower perceived risk to the safety and well-being of her children, which can positively influence her chances of reunification. Family courts and child welfare agencies prioritize the child's best interests, often ensuring a stable and secure environment. Thus, a mother without violent convictions may be viewed more favorably as capable of providing such an environment.

Moreover, the lack of violent convictions may signal a higher likelihood of successful rehabilitation and reintegration. Courts and social service agencies may perceive these mothers as posing less risk to themselves, their children, and the community. Consequently, they may be more willing to provide the necessary support and resources for reunification, including rehabilitation programs, counseling services, and parenting classes.

#### *V. Trends in Temporary Custodial Arrangements for Children of Incarcerated Mothers vs Fathers*

The custodial arrangements for children of incarcerated parents illuminate significant disparities between mothers and fathers. The data from the Oregon Department of Corrections in 2000 unveils a striking contrast in custodial outcomes upon parental arrest. When mothers are incarcerated, only 36% of their children reside with their fathers, while the majority are placed with relatives (54%) or in foster care (15%) (Foxen, 2016, p. 16). Conversely, when fathers are arrested, a substantial 81% of their children remain with their mothers, with a smaller proportion in the care of relatives (14%) or foster care (5%) (Foxen, 2016, p. 16). This discrepancy

underscores the greater responsibility typically placed on mothers to maintain caregiving roles, even amidst the challenges of incarceration, compared to fathers.

Furthermore, the custodial arrangements during the period of parental incarceration reveal additional complexities. A study conducted in 1994 highlights that nearly 90% of incarcerated fathers reported their children were living with the other parent. In contrast, only a quarter of incarcerated mothers reported a similar arrangement (Eitenmiller, 2014, pp. 159-160). As a consequence, children of incarcerated mothers often find themselves without parental guardianship, necessitating reliance on non-parent family members or state support systems. However, financial strain frequently forces non-parent family members to seek state assistance, placing many children in foster care (Eitenmiller, 2014, pp. 159-160). Approximately 11% of children with incarcerated mothers enter the foster care system, highlighting systemic shortcomings in adequately addressing the needs of these vulnerable populations.

The disproportionate burden of childcare borne by mothers, coupled with fewer safety nets compared to fathers, creates unique challenges for maternal caregivers in the context of the Adoption and Safe Families Act (ASFA) and SB 689. These legislative measures have a disproportionate impact on incarcerated mothers compared to fathers due to their heightened likelihood of placing their children in foster care. Under ASFA and SB 689, parental rights termination (PRT) requirements may be exempt if the child can remain with a relative while the parent is incarcerated. However, as data indicates, mothers are more inclined to place their children in foster care than fathers, often due to financial strain and lack of familial support networks. Consequently, these requirements disproportionately affect incarcerated mothers, as they face greater barriers in meeting the exemption criteria compared to fathers.

*VI. Children of Incarcerated Parents Make Up A Significant Portion of the Foster Care Population*

Despite only 3% of incarcerated parents reporting having a child in foster care, a striking 41% of children in foster care in Oregon have an incarcerated parent, according to Pathfinders of Oregon (Foxen, 2016, pp. 15-16). This disparity underscores the profound disruption and instability experienced by children with incarcerated parents, as they are disproportionately represented in the foster care system.

Furthermore, the overrepresentation of children of color, particularly Native American and African American children, in Oregon's foster care system highlights systemic inequities within the child welfare system (Foxen, 2016, p. 16). This overrepresentation may be attributed to the disproportionate representation of people of color, particularly African American individuals, within Oregon's prison population, leading to a ripple effect within the child welfare system.

**B. Analysis of Oregon Revised Statute for PRT for Incarcerated and Formerly Incarcerated Parents on the Grounds of Custody and Fitness**

*I. ORS 419B.504 Termination Upon Finding of Unfitness*

ORS 419B.504 outlines the grounds for terminating parental rights in Oregon. The Oregon Revised Statutes (ORS) are the codified laws of Oregon. These statutes encompass a wide range of legal provisions, including laws enacted by the Oregon Legislative Assembly, regulations promulgated by state agencies, and ordinances passed by local governments within the state. The ORS serves as the primary legal resource for understanding and interpreting the laws governing various aspects of life in Oregon, covering topics such as criminal law, family

law, and more. ORS 419B.504 outlines the grounds for terminating parental rights in Oregon. The court can terminate parental rights if it finds the parent or parents unfit due to conduct or conditions seriously detrimental to the child or ward. This section is critical in safeguarding the well-being of children in cases where parental care poses a significant risk. However, the language and vague criteria used in ORS 419B.504 can be predatory for parents within the carceral system or recently released individuals attempting to regain custody of their children. ORS 419B.500 dictates:

The rights of the parent or parents may be terminated as provided in ORS 419B.500 (Termination of parental rights generally), if the court finds that the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child or ward and integration of the child or ward into the home of the parent or parents, is improbable within a reasonable time due to conduct or conditions not likely to change. In determining such conduct and conditions:

**(1)** The court shall consider but is not limited to the following:

- (a)** Conduct toward any child of an abusive, cruel or sexual nature.
- (b)** Addictive or habitual use of intoxicating liquors, cannabis or controlled substances to the extent that parental ability has been substantially impaired.
- (c)** Physical neglect of the child or ward.
- (d)** Lack of effort of the parent to adjust the circumstances of the parent, conduct, or conditions to make it possible for the child or ward to safely return home within a reasonable time or failure of the parent to effect a lasting adjustment after reasonable efforts by



available social agencies for such extended duration of time that it appears reasonable that no lasting adjustment can be effected.

**(e)** Criminal conduct that impairs the parent's ability to provide adequate care for the child or ward.

**(f)** A mental health condition of the parent of such nature and duration as to render the parent incapable of providing proper care for the child or ward for extended periods of time.

One of the most concerning aspects of ORS 419B.504 is the inclusion of "criminal conduct" as a factor that can impair a parent's ability to provide adequate care for the child or ward. This provision is particularly problematic considering the lack of specificity regarding the types of criminal conduct that could trigger termination of parental rights. This provision disproportionately affects women offenders, particularly those convicted of nonviolent offenses, given that the majority of mothers in state and national prisons were not found guilty of violent crimes. The law does not differentiate between the nature of the offense but instead applies the same punitive standard uniformly to all individuals charged with a crime. Consequently, women who have been convicted of nonviolent offenses face equivalent punitive consequences as those convicted of violent crimes. This lack of distinction between violent and nonviolent offenses results in a disproportionate impact on women, as they are more likely to be charged with nonviolent offenses compared to men. Therefore, the provision perpetuates an inequitable system that fails to consider the complexities of individual cases and unfairly penalizes women for nonviolent offenses. The ambiguity surrounding what constitutes impairing criminal conduct leaves room for subjective interpretation by the courts, potentially resulting in unjust termination of parental rights.

Furthermore, the section does not explicitly address the impact of parental incarceration on termination proceedings. Recent case law, such as state *ex rel. Department of Human Services v. Williams* has clarified that incarceration alone cannot serve as a basis for excusing the Department of Human Services (DHS) from making reasonable efforts toward family reunification; parental incarceration continues to be presented as evidence against parents in termination proceedings. The length of a parent's imprisonment stay can also be used against them in termination hearings. Despite courts being advised to consider all conditions affecting the offender's ability to parent safely rather than solely focusing on incarceration, parental imprisonment remains a significant factor in termination decisions (Foxen, 2016, p. 18).

ORS 419B.504 presents significant challenges for parents within the carceral system or those recently released who are attempting to regain custody of their children. The vague language regarding criminal conduct and the continued consideration of parental incarceration in termination proceedings highlight the need for more explicit guidelines and protections to ensure fair treatment and parental rights preservation within the legal system.

## *II. Post-Carceral Challenges for Maintaining Custody*

The challenges faced by mothers seeking to regain or maintain custody of their children post-incarceration are multifaceted and daunting. Oregon Revised Statute (ORS) 419B.498 outlines the conditions under which the Department of Human Services (DHS) is mandated to file a petition to terminate parental rights, including instances where a child has spent 15 out of the most recent 22 months in substitute care under the department's responsibility. This statutory provision underscores the urgency with which reunification efforts must be pursued, placing significant pressure on mothers to swiftly address any issues impeding their ability to regain custody of their children. ORS 419B.498 Termination of Parental Rights states:

- A. “Except as provided in subsection (2) of this section, the 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:
  - 1. The child or ward has been in substitute care under the department’s responsibility for 15 months of the most recent 22 months;”
  
- B. The department shall file a petition to terminate the parental rights of a parent in the circumstances described in subsection (1) of this section unless:
  - 1. (a) The child or ward is being cared for by a relative and that placement is intended to be permanent;
  - 2. (b) There is a compelling reason, which is documented in the case plan, for determining that filing such a petition would not be in the best interests of the child or ward. Such compelling reasons include, but are not limited to:
    - a) (A) The parent is successfully participating in services that will make it possible for the child or ward to safely return home within a reasonable time as provided in ORS 419B.476 (Conduct of hearing)(5)(c);

However, for formerly incarcerated Oregonian mothers, these efforts are hindered by a myriad of challenges. Limited job opportunities exacerbate their difficulties, with many women facing significant barriers to securing stable employment due to their criminal records and societal stigmas associated with past incarceration. Moreover, the demands of court-ordered obligations further compound their struggles. Upon release, mothers with histories of substance

abuse or mental health issues are often mandated to participate in court-ordered treatment programs, which may have lengthy waiting lists, delaying their access to necessary support services. Additionally, they must attend numerous court hearings related to their child's case, including those about the Child in Need of Protection or Services (CHIPS) and Termination of Parental Rights (TPR) (Day, 2005, pp. 236-238). These hearings frequently experience delays and require the mother's mandatory attendance to avoid adverse legal consequences.

Court congestion and lengthy travel times exacerbate the logistical challenges of attending court hearings, further straining the mother's time and resources. Juggling multiple court appearances, treatment programs, and other obligations from the Department of Corrections and the Bureau of Child Welfare leaves little room for securing and maintaining steady employment (Day, 2005, pp. 236-238). Furthermore, the types of employment available often offer minimal flexibility in scheduling, making it difficult to accommodate the time demands of their legal and treatment obligations.

Delays in referrals from caseworkers further impede progress, prolonging the mother's journey toward reunification (Day, 2005, pp. 236-238). Without stable employment, mothers struggle to provide a suitable home for their children, thereby risking the termination of their parental rights. The cumulative effect of these challenges presents formidable barriers for incarcerated mothers seeking to reintegrate into society and reunite with their children, highlighting the urgent need for comprehensive support services and policy reforms to address the systemic inequalities faced by this vulnerable population.

## **C. ASFA & the Phenomena of “ Legal Orphans”**

### *I. Financial Incentives for Adoption Overshadow Reunification Efforts*

Financial provisions for adoption present a complex dynamic within state agencies, potentially influencing their pursuit of adoption efforts over reunification efforts. While the Adoption and Safe Families Act (ASFA) does promote some reunification efforts, it offers substantial financial incentives for states to prioritize adoption as a permanency option for children in foster care. States receive a financial "bonus" for each adoption above the base number, amounting to \$4000 per adoption and an additional \$2000 for "special needs" adoptions. Moreover, a later amendment provides an extra \$4000 incentive for adopting older children (Day, 2005, p. 222). These financial incentives are powerful motivators for state agencies to expedite adoption processes and prioritize permanency through adoption, especially considering the financial savings accrued when children are removed from foster care rolls. Removing children from court monitoring and the cessation of services needed for reunification further contribute to the financial advantages associated with adoption (Day, 2005, p. 222).

In contrast, no equivalent financial incentives are allocated to states for reunifying families or placing children in relative placements as an alternative to adoption (Day, 2005, p. 222). This discrepancy in financial support between adoption and reunification efforts creates a lopsided incentive structure within state agencies, potentially steering their focus toward adoption as a preferred permanency option. The economic benefits associated with adoption may lead to a bias in decision-making processes, where adoption is prioritized over reunification, despite the latter being a central goal of child welfare policies.

The imbalance in financial incentives underscores broader systemic issues within the child welfare system, raising concerns about equity, fairness, and the best interests of the child. While adoption may offer stability and permanency for some children, prioritizing it at the expense of reunification may overlook the importance of preserving family relationships and addressing the underlying issues that led to removal in the first place. Efforts to reform child welfare policies should consider rebalancing financial incentives to ensure that reunification efforts receive equitable support and consideration within state agencies, ultimately prioritizing the holistic well-being of children and families involved in the child welfare system.

## *II. PRT Outpacing Adoption Placements, the Phenomena of “Legal Orphans”*

The data regarding the outpacing of Parental Rights Terminations (PRTs) with adoption placements, leading to the creation of legal orphans, underscores the unintended consequences of the Adoption and Safe Families Act (ASFA). While ASFA aimed to expedite adoptions and promote permanency for children in foster care, it inadvertently left a significant number of children without parental ties but also not adopted. Following the enactment of ASFA, adoptions of foster children surged, reaching a peak of 52,546 in 2002, with an average annual increase of 54% (White Stack, 2005, para. 6). However, there was a simultaneous yearly average increase of 82% in the number of terminations of parental rights (White Stack, 2005, para. 7). Consequently, in each of the six years following the act's implementation, a substantial number of children experienced the termination of their parents' rights without subsequent adoption. For instance, in 1997, the parents of 37,000 children lost their rights, while the number increased to 67,000 in successive years (White Stack, 2005, para. 9-10). Moreover, the number of children left legal orphans, despite parental termination, also rose significantly, reaching a high of 24,219 in 1999 (White Stack, 2005, para. 6-9). This phenomenon highlights the disconnection between PRTs

and adoption placements, leading to the creation of legal orphans: children who are not adopted despite the termination of parental rights.

Furthermore, research indicates that the termination of parental rights does not guarantee adoption, with each year spent in foster care after termination reducing the likelihood of adoption by 80% (Taylor Adams, 2010, pp. 325-326). The difficulty in quantifying the number of legal orphans further exacerbates the issue. Estimates vary widely, with one source suggesting between 40,000 and 80,000 children nationwide who had been freed for adoption but not yet adopted in 1999 (Taylor Adams, 2010, p. 326). The U.S. Department of Health and Human Services estimated that in 2006 129,000 children were waiting to be adopted, including those whose parental rights had been terminated but had not been adopted. However, this figure excludes children aged sixteen and older with a permanency goal of emancipation, indicating that the actual number of legal orphans may be higher than reported (Taylor Adams, 2010, p. 326). Overall, these data underscore the challenges and complexities inherent in the intersection of PRTs, adoption placements, and the creation of legal orphans within the child welfare system, calling for a critical reevaluation of policies and practices to ensure the well-being and permanency of children in foster care.

## Conclusion

Curtailing the relentless, swift current that pulls increasing numbers of mothers away from their families and into the criminal justice system requires the United States to pinpoint the upstream federal and state legislative policies and case law engendering this surge. Positioned within the broader context of the War on Drugs, a concerted effort was made to diminish the political influence of dissenting ideological and racial factions, notably the Baby Boomer youth, second-wave feminists, anti-Vietnam War protesters, "hippies," civil rights activists, and members of the Black Power movement, emerging from the countercultural milieu. The Southern Strategy, baked into the Nixon Administration's political agendas, painted these groups as existential threats to conventional American norms and national security imperatives. Drug usage became synonymous with subversion and un-Americanism, prompting the introduction of federal measures such as the 1984 Comprehensive Crime Control Act.

Introducing the Sentencing Reform Act as its centerpiece, this legislative overhaul aimed to standardize sentencing practices for greater consistency and fairness. However, the Act's embrace of stringent Sentencing Guidelines and mandatory minimum statutes for drug offenses ushered in a new era of punitive justice, shifting the focus from rehabilitation to deterrence and from individual circumstances to offense severity. This shift disproportionately impacted women, particularly those tangentially involved in drug-related activities. Labeled as "women of circumstance," these individuals found themselves ensnared in conspiracy charges, their minor roles leading to sentences that belied the true extent of their culpability. The Act's purported gender neutrality obscured a harsh reality: women were receiving disproportionately severe punishments, a trend exacerbated by policing strategies like the "broken window" theory, which indiscriminately targeted low-level offenders. As statistics reveal a stark rise in female drug-



related arrests during this period, it becomes evident that the War on Drugs, with its punitive legislative arsenal and aggressive policing tactics, exacted a heavy toll on women, perpetuating disparities in sentencing and incarceration rates.

The analysis from the Bureau of Justice Statistics Special Report underscores the distinct experiences of incarcerated mothers and fathers and highlights the profound impact of maternal incarceration on dependent children. The substantial increase in parental incarceration rates observed between 1991 and 2007, alongside the clear gender and racial disparities among incarcerated parents, highlights the pervasive impact of systemic biases within the criminal justice system. The overrepresentation of Black fathers and a higher proportion of White mothers in the prison population signify a pattern of racial disproportionality, particularly among Black and Hispanic communities.

The analysis from the Bureau of Justice Statistics Special Report reveals significant gender disparities within the prison system, emphasizing distinct experiences between incarcerated mothers and fathers. Despite the lower count of incarcerated mothers, their imprisonment profoundly impacts children, with a notable increase in the number of children with incarcerated mothers since 1991. This surge surpasses the rise in children with incarcerated fathers. The rate of maternal imprisonment exhibited a faster growth trajectory compared to paternal incarceration during the same period. Additionally, the majority of incarcerated women are mothers, highlighting the profound consequences of maternal incarceration on dependent children, including disruptions in family structure and stability.

Parental status among incarcerated individuals reveals consistent trends across national and state jurisdictions. Nationally, drug and public-order offenders consistently report higher

rates of parenthood compared to those convicted of violent crimes. This pattern holds true among both male and female prisoners, indicating a consistent trend across gender lines. Moreover, federal prison populations demonstrate a distinct focus on nonviolent offenses, particularly drug-related convictions, with a significantly lower proportion of violent offenders compared to state prisons. In Oregon, incarcerated mothers are less likely to have committed violent crimes but show a higher propensity for drug and property offenses, which may be attributed to socioeconomic factors and the challenges of single parenthood. The lack of violent convictions among incarcerated mothers theoretically carries significant implications for their potential to regain custody of their children upon release. This absence suggests a reduced perceived risk to their children's safety and well-being, potentially improving their prospects for successful rehabilitation and reunification.

As incarceration rates soared, the repercussions reverberated through families, fracturing structures and destabilizing children's lives. Children of incarcerated parents represent a significant proportion of the foster care population, despite incarcerated parents reporting a lower percentage of their children in foster care. This disparity underscores the pronounced instability experienced by these children, who are overrepresented in the foster care system. Moreover, the disproportionate presence of children of color, especially Native American and African American children, within Oregon's foster care system points to systemic inequities within the child welfare system, potentially linked to the overrepresentation of people of color, particularly African Americans, within the state's prison population. The Adoption and Safe Families Act of 1997 heralded a profound transformation in federal child welfare legislation, aiming to accelerate the attainment of stable permanency for children in foster care. The ASFA sought to rectify perceived deficiencies in family reunification processes while placing paramount emphasis on

the welfare of children. However, scholars contend that ASFA's rigid timelines and stringent permanency criteria place undue pressure on state agencies to hasten the termination of parental rights, particularly impacting incarcerated women. Furthermore, the inconsistent interpretation and application of ASFA across states compound the challenges confronted by incarcerated parents, resulting in disparities in TPR proceedings.

The duration of sentences served by incarcerated parents poses a significant challenge to parental rights and the adoption process, both nationally under the Adoption and Safe Families Act and at the state level in Oregon under Senate Bill 689. With average sentences ranging from 80 to 100 months, the ASFA's 15/22 rule, stipulating the termination of parental rights for children staying in the foster care system for 15 out of the last 22 months, failed to consider or accommodate these prolonged incarcerations. This oversight increased the likelihood of parental rights termination for incarcerated parents, even if the parent is actively engaged in reunification efforts. SB 689 in Oregon further complicates matters by expediting the parental rights termination process, narrowing opportunities for incarcerated parents to fulfill reunification requirements. This intersection of lengthy sentences and expedited TPR processes intensifies the risk of parental rights termination, exacerbating challenges faced by families affected by incarceration.

Moreover, trends in temporary custodial arrangements for children of incarcerated parents reveal stark differences between mothers and fathers. When mothers are incarcerated, a majority of their children are placed with relatives or in foster care, indicating the challenges mothers face in maintaining caregiving roles during incarceration. In contrast, the majority of children of incarcerated fathers remain with their mothers, highlighting the disproportionate burden of childcare typically placed on mothers. Additionally, incarcerated mothers are less

likely to have their children living with the other parent compared to fathers, leading to greater reliance on non-parent family members or state support systems. However, financial strain often forces these family members to seek state assistance, resulting in a significant proportion of children entering the foster care system. These disparities underscore the unique challenges faced by maternal caregivers and the disproportionate impact of legislative measures such as the Adoption and Safe Families Act and SB 689 on incarcerated mothers, particularly regarding parental rights termination requirements.

Oregon Revised Statute (ORS) 419B.504 delineates the grounds for terminating parental rights in Oregon, emphasizing the court's authority to intervene if a parent's conduct or conditions pose a risk to the child's well-being. However, the vague criteria and inclusion of "criminal conduct" as a factor impairing parental care, without specificity on the types of offenses, disproportionately affect women offenders, who are frequently convicted of nonviolent crimes. This lack of clarity perpetuates inequalities within the legal system, particularly for the majority of Oregonian mothers convicted of nonviolent offenses, as it fails to distinguish between violent and nonviolent acts. Moreover, ORS 419B.504 overlooks the unique challenges faced by incarcerated parents in termination proceedings, with parental incarceration often used against them. The ongoing consideration of parental imprisonment in termination decisions underscores the necessity for more explicit guidelines and protections to ensure equitable treatment and preservation of parental rights within the legal framework.

If a mother is fortunate enough to be released from prison before the 15/22 rule triggers a parental rights termination, the post-carceral challenges for mothers seeking to regain custody of their children after incarceration are complex and formidable, making sustained reunification nearly impossible. ORS 419B.498 outlines strict conditions under which the Department of

Human Services (DHS) must file a petition to terminate parental rights, placing immense pressure on mothers to address any impediments to reunification swiftly. However, formerly incarcerated mothers encounter numerous obstacles, including limited job opportunities due to criminal records and societal stigma, as well as court-ordered obligations that demand their time and resources. Lengthy court processes, treatment program waitlists, and logistical challenges further hinder progress, prolonging the journey toward reunification and increasing the risk of parental rights termination.

Examining financial incentives within the child welfare system, particularly in the context of adoption and reunification efforts, revealed a significant disparity in support that influences decision-making processes within state agencies. While the Adoption and Safe Families Act nominally encouraged both adoption and reunification, the substantial financial incentives allocated for adoption placements created a pronounced bias towards adoption as the preferred permanency option. This bias, driven by financial motivations, undermined the emphasis on reunification, a fundamental goal of child welfare policies to preserve family relationships and address underlying issues.

Moreover, the unintended consequences of ASFA become evident in the phenomenon of "legal orphans," where children experience the termination of parental rights without subsequent adoption, leaving them in a state of limbo within the foster care system. The escalation of Parental Rights Terminations (PRTs) without corresponding adoption placements highlights the disconnection between policy objectives and outcomes, resulting in a growing population of children without permanent family ties. The difficulty quantifying the extent of legal orphanhood underscores the systemic challenges in effectively addressing this issue.

In the convergence of these policies, it becomes painfully evident that the bonds between incarcerated mothers and their children are being broken from behind the bars of both our nation and our states. These findings underscore the need for a critical reevaluation of child welfare policies and practices to rebalance incentives, prioritize reunification efforts, and ensure the well-being and permanency of children in foster care. Efforts to address the complexities of legal orphanhood must consider the holistic needs of children and families, aiming to achieve equitable and sustainable solutions within the child welfare system.

## Postscript

In echoing E. P. Thompson's reflection in *Whigs and Hunters*, I, too, find myself perched on a precarious ledge, witnessing the systematic destruction and erosion of hundreds of thousands of families. As I sit amidst a clutter of research materials, grappling with the complexities of our prison population and child welfare system, I am acutely aware of the profound implications of our collective inaction.

Thompson's introspection resonates deeply as I confront the stark reality of entrenched structural inequities. Despite decades of discourse and data, essential truths remain obscured, overshadowed by systemic neglect and societal apathy. Yet, amid this disheartening landscape, I am compelled to advocate for meaningful change.

Indeed, the core issue lies not in the intent behind child protective laws but rather in their implementation and the broader societal support structures. It is undeniable that safeguarding vulnerable children is a noble endeavor rooted in principles of compassion and justice. However, the detrimental consequences arise from the systemic failure to provide adequate assistance to mothers before, during, and after their incarceration.

Therefore, I am resolute in my conviction that preserving existing child protective laws is a necessary step. However, it must be accompanied by a concerted effort to bolster social services, ensuring that mothers receive the support and resources needed to navigate the complexities of parenthood amidst adversity. By investing in comprehensive interventions that address the root causes of familial instability, we can foster resilience and cohesion within these vulnerable communities.

While I am confident in my diagnosis of the problem, I acknowledge the inherent complexity of devising solutions. Thus, I offer these reflections not as definitive answers but rather as a call to action- a call to collectively envision and implement policies that uphold the dignity and well-being of all individuals, regardless of their circumstances.

In the face of daunting challenges, we must embrace Thompson's spirit of introspection and resilience, recognizing that true progress requires both humility and resolve. Only through sustained advocacy and collaboration can we realize a future where families are empowered to thrive, and every child is afforded the opportunity to flourish.



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