

# IT'S A MAN'S PRISON: HOW THE TRADITIONAL INCARCERATION MODEL FAILS FEMALE OFFENDERS IN KANSAS

*By Nicole Lawson\**

## I. INTRODUCTION

As of July 2014, more than 2.4 million individuals were incarcerated in the United States.<sup>1</sup> That number includes the defendants who are being held pending trial and individuals who are currently serving a judicially imposed sentence.<sup>2</sup> The number of people incarcerated in the United States is “more than the combined population of 15 states, all but three U.S. cities, and the U.S. armed forces.”<sup>3</sup> The number of people imprisoned in the United States increased eightfold between 1970 and 2010.<sup>4</sup> The dramatic rise in the prison population is often attributed to the creation and implementation of the War on Drugs.<sup>5</sup>

Mass incarceration occurs in both the federal and state correctional systems. The state of New York imprisons more individuals per capita than the country of Rwanda, a country which houses tens of thousands of individuals pending trial for their participation in the 1994 genocide.<sup>6</sup> The states of California, Illinois and Ohio all individually incarcerate more people than do the countries of Cuba and Russia.<sup>7</sup> The United States is home to only 5% of the world's population, but houses 25% of all imprisoned people in the world.<sup>8</sup> If the number of incarcerated people is combined with those under parole and probation supervision, figures show that 1 in every 31 adults in the United States is under some form of correctional control.<sup>9</sup> That translates to approximately 3.2% of the adult population in the United States.

Kansas tracks the number of incarcerated people each year. During 2013, a total of 5,205 offenders were admitted to the Kansas Department of Corrections, an increase of 212, or 4.2%, from 2012.<sup>10</sup> Almost 90% of the violent offenses and sex crimes committed in Kansas were committed by men.<sup>11</sup> The Kansas

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1. Matt Ford, *The Leader of the Unfree World*, THE ATLANTIC, July 23, 2014.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Ford, *supra* note 1.

7. *Id.*

8. NAACP, CRIMINAL JUSTICE FACT SHEET (2014), <http://www.naacp.org/pages/criminal-justice-fact-sheet>.

9. *Id.*

10. KAN. SENTENCING COMM'N, FY 2013 ANNUAL REPORT 80 (2014).

11. *Id.* at x.

Sentencing Commission predicts that by 2023, Kansas will need a total of 10,381 prison beds.<sup>12</sup> This is a total increase of 8.3% or 800 additional inmates from the actual prison population as of June 30, 2013.<sup>13</sup>

The number of women in state and federal prisons has risen dramatically since the War on Drugs began in the 1980s. In fact, the number of women in prison “has been increasing at a rate 50% higher than men since 1980.”<sup>14</sup> The majority of incarcerated women are economically deprived mothers who generally lack a support system.<sup>15</sup> Frequently, they have been unsuccessful at school and have limited occupational skills and experience, with very little job training.<sup>16</sup> Although the United States and Western Europe share comparable population demographics, the United States imprisons approximately ten times more women than Western Europe.<sup>17</sup> Nationally, women are far more likely than their male counterparts to be incarcerated for non-violent drug and property offenses, and considerably less likely than men to be incarcerated for violent crimes.<sup>18</sup>

In 2010, of all incarcerated individuals nationally, 29.6% of women were placed in prison for property crimes compared to just 18.4% of men, 25.7% of women were placed in prison for drug offenses compared to 17.2% of men, and only 35.9% of women were placed in prison for violent crimes compared to 54.4% of men.<sup>19</sup> In 2012, Kansas sentenced 674 women to prison.<sup>20</sup> In Kansas, women are housed at the Topeka Correctional Facility. In addition to committing different types of crimes, incarcerated women have different needs than incarcerated men. Incarcerated women are more likely than their male counterparts to suffer from medical problems, including mental and physical sicknesses, have substance abuse problems, and have extended histories of sexual and physical abuse.<sup>21</sup> Additionally, incarcerating women has unintended damaging effects on children. When given a grade for family-based treatment as an alternative to incarceration for women, the state of Kansas received a disappointing grade of F.<sup>22</sup> In 2013, female offenders accounted for 12.4% of

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12. *Id.* at xv.

13. *Id.*

14. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 4 (2012), [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf).

15. Jennifer Ward, *Confronting Issues in Criminal Justice: Law Enforcement and Criminal Offenders: Snapshots: Holistic Images of Female Offenders in the Criminal Justice System*, 30 FORDHAM URB. L.J. 723, 729 (2003).

16. Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL'Y REV. 133, 137 (1999).

17. *Id.* at 134.

18. THE SENTENCING PROJECT, FACT SHEET: INCARCERATED WOMEN 2 (2012), [http://www.sentencingproject.org/doc/publications/cc\\_Incarcerated\\_Women\\_Factsheet\\_Sep24sp.pdf](http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Sep24sp.pdf)

19. *Id.*

20. E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2012 at 23 (2013).

21. THE SENTENCING PROJECT, *supra* note 14.

22. THE REBECCA PROJECT FOR HUMAN RIGHTS, NAT. WOMEN'S LAW CTR., MOTHER BEHIND BARS: A STATE-BY-STATE REPORT CARD AND ANALYSIS OF FEDERAL POLICIES ON

incarcerated individuals in Kansas.<sup>23</sup> That is a significant 7.3% increase from 2012, and a staggering 20.1% increase from 2009.<sup>24</sup> In 2013, the population of women incarcerated was the highest in Kansas's recent history.<sup>25</sup>

This article discusses alternatives to the traditional incarceration model that could be implemented in Kansas for non-violent female offenders. This article focuses more specifically on those female prisoners who are also mothers, and concludes that intensive rehabilitation services and community-based alternatives that allow children to remain with their mother would better serve the non-violent female offenders of Kansas. This article begins by briefly discussing the background of alternative programs to incarceration. Second, this article addresses Senate Bill 123 and argues that, since Senate Bill 123 is not specifically tailored towards women, it is not nearly as effective as alternatives at reducing recidivism rates. Third, this article describes two specific examples of rehabilitation and community-based alternatives to traditional incarceration that have been successful in other states: the Drew House in Brooklyn, New York and Women in Recovery in Tulsa, Oklahoma. Fourth, this article discusses the cost and benefits of rehabilitation and community-based alternatives to the traditional incarceration model for non-violent female offenders in the state of Kansas. Fifth, this article touches on the legitimate concern incarcerated women face regarding who will look after their children while they are in prison, a burden most incarcerated men do not face. Sixth, this article discusses how rehabilitation and community-based alternatives to the traditional incarceration model better take into account the special circumstances that surround many female inmates including medical issues, histories of sexual and physical abuse and substance abuse. Finally, this article proposes an alternative to incarceration for non-violent women, more specifically mothers, called very generally "the program". This article discusses how the program is something Kansas could implement and touches on both the benefits to the state and the various benefits to the women the program could serve.

## II. ALTERNATIVES TO INCARCERATION, THE BACKGROUND

Alternatives to incarceration programs, commonly referred to as ATI programs, are defined as "programs or procedures that move away from the notion of imprisonment as a response to lawbreaking."<sup>26</sup> The 1980's saw an increase in prison population, generally attributed to the nation's War on Drugs.<sup>27</sup> "The current manifestation of ATI programming [alternative to

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CONDITIONS OF CONFINEMENT FOR PREGNANT AND PARENTING WOMEN AND THE EFFECT ON THEIR CHILDREN 15 (2010) <http://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>.

23. KAN. SENTENCING COMM'N, *supra* note 10, at 28.

24. *Id.* at 99.

25. *Id.*

26. Marsha Weissman, *Article: Aspiring To The Impracticable: Alternatives To Incarceration In The Era Of Mass Incarceration*, 33 N.Y.U. REV. L. & SOC. CHANGE 235, 235 (2009).

27. *Id.* at 248.

incarceration programs] began in the 1980's as a response to the emerging recognition that prison populations were growing out of control and in response to a reconsideration of the efficacy of rehabilitation.”<sup>28</sup>

Persons in alternatives to incarceration programs have been found to have comparable or lower recidivism rates than similarly situated incarcerated individuals.<sup>29</sup> In 2008, a study of New York City's alternative to incarceration programs was conducted.<sup>30</sup> The study concluded that individuals who participated in alternative to incarceration programs and probationers were markedly less likely to be rearrested than people who received jail sentences as punishment; a 41% re-arrest rate for individuals who participated in alternative to incarceration programs and a 42% re-arrest rate for probationers compared with a 53% re-arrest rate of individuals released from jail.<sup>31</sup>

### III. SENATE BILL 123

In 2003, Kansas governor Kathleen Sebelius signed into law Senate Bill 123.<sup>32</sup> Senate Bill 123 is an alternative sentencing policy for non-violent drug possession offenders.<sup>33</sup> For the target group of Senate Bill 123, a judge can sentence an individual to treatment in a certified substance abuse program in lieu of prison for an amount of time determined by the court, but not longer than 18 months.<sup>34</sup> Participants are supervised by community corrections.<sup>35</sup> The group of offenders Senate Bill 123 is designed to help, the “target group”, are individuals whose current and most serious offense is drug possession, and who have no prior history of manufacturing drugs, trafficking drugs, or distributing drugs.<sup>36</sup> The offender generally does not have prior convictions for person felonies.<sup>37</sup> However, a person felony does not always bar an individual from being sentenced under Senate Bill 123. An individual can be admitted with a conviction for a person felony if the sentencing court finds that he or she does not pose a significant threat to public safety.<sup>38</sup>

As of July 2008, a part of Senate Bill 123 has relaxed slightly and now allows for offenders with one prior possession conviction to be eligible for sentencing under Senate Bill 123.<sup>39</sup> The Kansas Sentencing Commission pays

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28. *Id.* at 237.

29. *Id.* at 243.

30. *Id.*

31. Weissman, *supra* note 26, at 243.

32. KAN. SENTENCING COMM'N, *supra* note 10, at 39.

33. KAN. SENTENCING COMM'N, 2003 SENATE BILL 123 ALTERNATIVE SENTENCING POLICY FOR NON-VIOLENT DRUG POSSESSION OFFENDERS, OPERATIONS MANUAL (2008) [hereinafter OPERATIONS MANUAL].

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. OPERATIONS MANUAL, *supra* note 33.

39. *Id.*

for treatment for these individuals.<sup>40</sup> However, the sentencing judge can determine that a participant is capable of paying for some portion or all of the substance abuse assessment and treatment.<sup>41</sup> Prior to acceptance, the offender must complete a drug abuse assessment and a standardized risk assessment.<sup>42</sup> The drug abuse assessments purpose is to measure the individual's level of substance abuse and the standardized risk assessments attempts to measure the offender's risk of committing new crimes.<sup>43</sup> The goal of Senate Bill 123 is to provide a sentencing policy that is "community-based punishment and the opportunity for treatment to non-violent offenders with drug abuse problems in order to more effectively address the revolving door of drug addicts through the state prisons, which should be reserved for serious, violent offenders."<sup>44</sup> In 2013, Kansas sentenced 1,018 people to drug treatment under Senate Bill 123.<sup>45</sup> The five counties that sentenced the most individuals under Senate Bill 123 were Sedgwick, Wyandotte, Shawnee, Johnson and Saline.<sup>46</sup> Sedgwick County imposed the most Senate Bill 123 sentences with 140, Wyandotte County followed with 93, Shawnee County had 90, Johnson County had 72 and Saline County had 67.<sup>47</sup> Only 34.6% of offenders sentenced according to Senate Bill 123 were women.<sup>48</sup>

Although Senate Bill 123 is one step towards lowering the number of Kansans sentenced to prison, including women, it does not provide either the specialized treatment that female offenders who are also mothers desperately need or specific treatments that are essential to assisting female offenders. The female participants still face the same concerns regarding the care of their children while in treatment. Additionally, the program is not tailored to the specific kinds of treatment women need, namely, treatment addressing long histories of physical and sexual abuse coupled with mental illness treatment. The program appears to be an extension of the one-size-fits-all pattern that is rampant in the traditional incarceration model, a model that was created on the idea of treating men because they are more frequently the offenders. The female offenders of Kansas and their children would benefit from a program designed to help keep families united. A program that allows for children to reside with their mother while she receives female-specific treatment is the best way to accomplish these important and lofty goals.

#### IV. PROGRAMS OTHER STATES HAVE IMPLEMENTED

In 2008, in Brownsville, a neighborhood in Brooklyn, New York, the District Attorney's office opened a small organization affectionately known as

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40. *Id.*

41. *Id.*

42. *Id.*

43. OPERATIONS MANUAL, *supra* note 33.

44. *Id.*

45. KAN. SENTENCING COMM'N, *supra* note 10, at xii.

46. OPERATIONS MANUAL, *supra* note 33.

47. *Id.*

48. *Id.*

Drew House.<sup>49</sup> Drew House is an alternative to jail for mothers.<sup>50</sup> Mothers charged with non-violent felonies are eligible to apply for Drew House and the women are considered on a case-by-case basis.<sup>51</sup> With judicial approval, women who are admitted to Drew House have their sentences delayed,<sup>52</sup> and upon successful completion of the program, have the charges dismissed.<sup>53</sup> Successful completion normally takes 12 to 24 months after entering the program.<sup>54</sup> Women who committed violent felonies are allowed to apply if the charged offense did not result in serious bodily injury and the victim has given consent.<sup>55</sup>

Instead of being separated from their young children, Drew House allows the children of participants to live in the house with their mother,<sup>56</sup> not only easing the mother's legitimate concern about who will care for her children while she is in prison, but also encouraging and promoting a stronger parent-child relationship. There is no limit on the number of minor children a woman is allowed to bring with her to Drew House.<sup>57</sup>

The program typically includes counseling, referrals for health and support services, and court monitoring by third parties.<sup>58</sup> The house has strict rules, including a curfew and visitation restrictions, substance abuse treatment, weekly drug tests, parenting classes, education and job training classes.<sup>59</sup>

Columbia University's School of Nursing conducted a study of the nine women that lived in Drew House from 2008 to 2011 and found that six had successfully completed all the requirements of the program.<sup>60</sup> Two other women were making significant progress towards completion by the end of the study.<sup>61</sup> The study also found that not a single graduate from Drew House had committed additional crimes.<sup>62</sup> One of the graduates of Drew House is Olgita, a 25-year-old single mother of three children ranging in ages from two to eight.<sup>63</sup> Olgita was arrested for possession of a weapon in front of her children when her two-year old child was only one week old, all of her children lived with Olgita's mother while she was incarcerated.<sup>64</sup> Olgita was facing a prison sentence of

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49. Joseph Berger, *Mothers Convicted of Felonies May Get Chance to Stay Out of Prison*, N.Y. TIMES, May 9, 2013, at A26.

50. *Id.*

51. *Innovator Profile: Drew House*, NAT'L RES. CTR. ON JUSTICE INVOLVED WOMEN, (2014), <http://cjinvolvedwomen.org/drew-house/>.

52. Berger, *supra* note 49.

53. *Id.*

54. NAT'L RES. CTR. ON JUSTICE INVOLVED WOMEN, *supra* note 51.

55. *Id.*

56. Berger, *supra* note 49.

57. NAT'L RES. CTR. ON JUSTICE INVOLVED WOMEN, *supra* note 51.

58. *Id.*

59. *Id.*

60. Berger, *supra* note 49.

61. NAT'L RES. CTR. ON JUSTICE INVOLVED WOMEN, *supra* note 51.

62. Joanna Molloy, *Brooklyn DA to Launch Program Allowing Female Felons to Serve Sentences at Home*, N.Y. DAILY NEWS, May 7, 2013.

63. Jessica Hartogs, *Mother to do Jail Time at Home Under New Program*, CBS NEWS, May 11, 2013.

64. *Id.*

three to five years.<sup>65</sup> That is when she was told about Drew House.<sup>66</sup> Olgita moved into Drew House on Mother's Day in 2011.<sup>67</sup> By Mother's Day 2013, Olgita had completed her mandatory sentence, but she continued to stay at Drew House while she searched for a home of her own.<sup>68</sup>

Drew House was so successful that in 2013, Brooklyn District Attorney Charles Hynes launched another program called Justice Home.<sup>69</sup> Women participating in Justice Home will serve their sentences from their own home while retaining custody of their minor children, different than the group home setting of Drew House.<sup>70</sup> At the time of Justice Home's foundation, the program had enough funding to assist 45 women.<sup>71</sup> To be eligible for the Justice Home program, a woman must be facing at least a six-month prison sentence.<sup>72</sup> Following in the footsteps of Drew House, participants in Justice Home receive intensive treatments and are monitored closely.<sup>73</sup>

Another state that has implemented alternative to incarceration programs is Oklahoma. The state of Oklahoma consistently incarcerates the highest number of female offenders in the United States.<sup>74</sup> In 2014, Oklahoma's female incarceration rate was more than double the national rate, with 142 incarcerations per 100,000 women.<sup>75</sup> (The national average in 2014 was 65 women per 100,000.<sup>76</sup>) In an attempt to help combat the problem of the growing number of incarcerated women, Tulsa's Women in Recovery program was created.<sup>77</sup>

Women in Recovery began in June 2009 and is aimed at assisting non-violent women offenders.<sup>78</sup> Women who are 18 years old or older and facing incarceration and who are not eligible for diversion and have a history of substance abuse are allowed to apply.<sup>79</sup> Mothers are given additional consideration for admission.<sup>80</sup>

The program partners with the Tulsa County Division of Court Services, Mental Health Association of Tulsa and other social services to provide recovery and substance abuse counseling, life skills training, health and wellness training,

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65. *Id.*

66. *Id.*

67. *Id.*

68. Hartogs, *supra* note 63.

69. Molloy, *supra* note 62.

70. Hartogs, *supra* note 63.

71. *Id.*

72. *Id.*

73. *Id.*

74. THE SENTENCING PROJECT, *supra* note 14, at 4.

75. *Id.*

76. *Id.*

77. April Wilkerson, *Six Graduate from the Women in Recovery Program That Was Launched in 2009*, J. REC., July 21, 2010.

78. *Id.*

79. *Women in Recovery*, GEORGE KAISER FAM. FOUND., <http://www.gkff.org/areas-of-focus/female-incarceration/women-in-recovery/> (last visited Jan. 19, 2016).

80. *Id.*

housing assistance and family counseling.<sup>81</sup> Although the women are not in a traditional prison setting or environment, the program holds women strictly accountable. Things such as house arrest, random drug tests, ankle bracelet monitoring, and court appearances are normal and re-occurring events.<sup>82</sup> To be eligible for graduation from the program, women must be substance free, have a job, participate in recovery support systems, actively pursue reunification plans with their children if they are not currently living together, and be in compliance with all court requirements.<sup>83</sup>

By November 2009, just five months after opening, Women in Recovery was already helping twenty-five women.<sup>84</sup> That number had doubled by November 2010, just a year after its creation.<sup>85</sup> By June of 2014, Women in Recovery had graduated an impressive total of 168 women.<sup>86</sup> One of those women is Brandy Carter, who proudly graduated from the Women in Recovery program on June 25, 2014, along with twenty-one other women.<sup>87</sup> Brandy was a part of Women in Recovery's twelfth graduating class.<sup>88</sup> She first experimented with marijuana when she was seven, because "my older brother thought it was cute to get us high".<sup>89</sup> By the time she was twelve years old, Brandy was an alcoholic.<sup>90</sup> Just one year later, at the impressionable age of thirteen, she was in her first abusive relationship and, by the time she was twenty-six years old, she was committing criminal acts to support her methamphetamine habit.<sup>91</sup> Brandy, a mother of four, spent time in prison, but without treatment for her addictions, she continued to commit crimes to support her drug habits, even using drugs on the day she was released from prison.<sup>92</sup> By 2011, Brandy was facing life in prison without the possibility of parole due to her status as a habitual offender.<sup>93</sup> That was when Brandy first found out about Women in Recovery.<sup>94</sup> Brandy said she "never knew where to ask for help, let alone how to ask for help."<sup>95</sup> She explains that "I was afraid of my children following in my footsteps."<sup>96</sup> In June 2014, when Brandy graduated from Women in Recovery, she said she gets "to break that cycle of addiction and abuse and be a role model for them [her four children]. . . I have coping skills, a

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81. Wilkerson, *supra* note 77.

82. *Id.*

83. Mike Averill, *Women in Recovery Celebrates its 12th Graduating Class*, TULSA WORLD, June 26, 2014.

84. Wilkerson, *supra* note 77.

85. *Id.*

86. Averill, *supra* note 83.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. Averill, *supra* note 83.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Averill, *supra* note 83.

relapse prevention plan, parenting skills. Instead of not having a mother, my kids have a mother they can look up to.”<sup>97</sup>

#### V. THE COST OF REHABILITATION AND COMMUNITY-BASED ALTERNATIVES IN COMPARISON TO THE TRADITIONAL INCARCERATION MODEL

The average annual cost to house an inmate in Kansas in 2012 was \$18,207.<sup>98</sup> The data do not separate average annual cost by gender. The average annual cost per female inmate in Kansas is currently unknown. Additionally, the data does not take into account the costs associated with placing children of incarcerated women in foster care. In April of 2014, there were 6,156 children in foster care in Kansas.<sup>99</sup> That was a 356-child increase from the prior year and an 872-child increase from April of 2012.<sup>100</sup> It is safe to assume that the increase in the number of mothers in prison has had a substantial effect on the increase of the number of children in foster care.

The Brooklyn-based program, Drew House, has saved the state of New York a significant amount of money. In New York, it costs approximately \$34,000 to send a mother and two children to Drew House for a year.<sup>101</sup> The cost to incarcerate a mother in New York and send her children to foster care averages \$129,000 a year.<sup>102</sup> Although the amount it costs to send a woman to Drew House costs more than the average annual amount Kansas spends to imprison an individual, the state of New York has a considerably higher cost of living than the state of Kansas, in addition to various other costs associated with location on the East Coast. Because the participants in Justice Home are allowed to stay at their own residence while seeking treatment, Justice Home costs approximately \$10,000 less annually per woman than Drew House.<sup>103</sup>

Comparatively, Oklahoma and Kansas have similar costs of living, which is not surprising given their geographical proximity. One woman in Tulsa’s rehabilitation and community-based alternative to incarceration, Women in Recovery, costs approximately \$15,000 per year.<sup>104</sup> To incarcerate a woman and send her children to foster care in Oklahoma, it costs approximately \$30,000 per year.<sup>105</sup>

Adopting rehabilitation and community-based alternatives to prison for non-violent female offenders would not only save the state of Kansas money, it

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97. *Id.*

98. VERA INST. OF JUSTICE, THE PRICE OF PRISONS: KANSAS (2012), <http://www.vera.org/files/price-of-prisons-kansas-fact-sheet.pdf>.

99. Dave Ranney, *Number of children in foster care hits record high*, KAN. HEALTH INST. (June 9, 2014), <http://www.khi.org/news/2014/jun/09/number-children-foster-care-climbs/>.

100. *Id.*

101. Berger, *supra* note 49.

102. *Id.*

103. Hartogs, *supra* note 63.

104. Wilkerson, *supra* note 77.

105. *Id.*

would also adequately equip the participants with skills and training that they can use after they have completed the program; knowledge that prison does not often offer. Additionally, if more children are allowed to continue to reside with their mother in community-based programs as opposed to being separated due to prison, the state of Kansas would be responsible for fewer foster children.

## VI. THE SILENT PLIGHT OF INCARCERATED WOMEN'S CHILDREN

Almost two-thirds of women in prison have at least one child.<sup>106</sup> Nationally, in 2010, approximately 1.7 million children had mothers who were incarcerated, a quarter of those children were under the age of five.<sup>107</sup> From 1991 to 2008, the number of children with a mother in prison increased by 131% in the United States.<sup>108</sup> In state prisons, 62% of women had minor children, but only 51% of their male inmates had minor children.<sup>109</sup> Of these women, 77% were the primary or sole caregiver for their children prior to their arrest.<sup>110</sup> Approximately 55% of women in prison reported living with their children in the month before their arrest compared to only 35.5% of men.<sup>111</sup> The most astonishing statistic is that when fathers go to prison, 90% of their minor children remain with their mother, however when mothers go to prison, only 25% of their children reside with their father.<sup>112</sup> Although having a father incarcerated can be extremely traumatic to a young child, children's everyday lives are disproportionately affected by losing a mother to prison. Incarcerated mothers are more likely to have children that reside with their grandparents while their mother serves her sentence than incarcerated fathers, an astounding 45%, compared to 13%.<sup>113</sup> Twenty-three percent of female inmate's children live with other family relatives compared to only 5% of male inmates.<sup>114</sup> Eleven percent of children go to foster care when their mother is imprisoned, versus a mere 2% of children who are placed in foster care when their father is sentenced to prison.<sup>115</sup> Often, women with no support system have no choice but to send their children to foster care discover that siblings are often split up and sent to live in different homes, some of which prove to be less than stable situations.<sup>116</sup>

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106. Carol E. Tracy, *Pregnant Inmates: The Most Forgotten of the Forgotten*, LEGAL INTELLIGENCER, Feb. 22, 2010.

107. *Id.*

108. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2008), <http://www.bjs.gov/content/pub/pdf/pptmc.pdf>.

109. THE SENTENCING PROJECT, *supra* note 18, at 3.

110. Tracy, *supra* note 106.

111. Sarah Wynn, *Mean Women and Misplaced Priorities: Incarcerated Women in Oklahoma*, 27 WIS. J.L. GENDER & SOC'Y 281, 284 (2012).

112. Tracy, *supra* note 106.

113. THE SENTENCING PROJECT, *supra* note 18.

114. *Id.*

115. *Id.*

116. Myrna S. Raeder, *Sentencing Guideline Law and Practice in a Post-Booker World: Rethinking Sentencing Post-Booker: Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 697 (2006).

For the unfortunate woman who cannot find a family member to care for their children while they are incarcerated, the stakes are even higher. The Adoption and Safe Families Act (ASFA) of 1997 can be an additional and difficult hurdle for these women.<sup>117</sup> The Adoption and Safe Families Act mandates that parental rights termination proceedings are to begin if a child spends fifteen or more out of twenty-two months in foster care.<sup>118</sup> The incarcerated woman facing the ASFA's parental rights termination proceedings can argue that there are compelling reasons as to why it is not in the best interest of the child to terminate parental rights; however these arguments can sometimes be an uphill battle, especially if a woman is a repeat offender.<sup>119</sup>

It can be difficult for incarcerated women to contact the appropriate parties regarding the ASFA's parental termination proceedings.<sup>120</sup> *Lassiter v. Department of Social Services*<sup>121</sup> found that states are not required to provide an attorney for any ASFA parental termination proceedings, although some states chose to appoint counsel.<sup>122</sup> However, even when an attorney is appointed for Adoption and Safe Families Act parental termination proceedings, the appointment frequently comes after the need for an incarcerated mother to contact her child and the foster care system arises.<sup>123</sup>

If the child is in the care of a relative, the Adoption and Safe Families Act does not mandate termination proceedings.<sup>124</sup> Five years after the enactment of the Adoption and Safe Families Act, reported cases regarding parental termination proceedings increased by approximately 250%.<sup>125</sup> Being incarcerated in and of itself is not a reason to justify termination of parental rights in the majority of states.<sup>126</sup> But, often reasons that are consequences of incarceration are cited as justifications for the initiation of parental termination proceedings, including things such as a child being in foster care for the majority of his or her life, the mother's failure to contact the child for six months or more, the mother being incapable of performing her parental duties, stagnated parental progress, parental abandonment, or failure to rehabilitate.<sup>127</sup>

For the incarcerated women in Kansas, this means that not only are they being punished for their wrongdoings, their children become collateral damage and innocent injured bystanders. Separating a young child from his or her mother can have disastrous consequences for the child. A study conducted in Sacramento County, California, concluded that of the children arrested in that jurisdiction who were between the ages of 9 and 12, 45% had at least one

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117. *Id.* at 700.

118. *Id.*

119. *Id.*

120. *Id.* at 701.

121. 452 U.S. 18, 33 (1981).

122. Raeder, *supra* note 116, at 701.

123. *Id.*

124. *Id.*

125. *Id.* at 700.

126. *Id.*

127. Raeder, *supra* note 116, at 700.

incarcerated parent.<sup>128</sup> Another study found a 60% rate of teenage pregnancy among the female children of incarcerated mothers and a 40% delinquency rate for the teenage male children of incarcerated mothers.<sup>129</sup> This suggests that when the children of incarcerated mothers suffer, it affects society on various levels including increases in poverty, teenage pregnancy, welfare recipients and overall criminal offenders.

As a state, Kansas should focus on strengthening the mother-child bond. A program that allowed female offenders an option to stay united with their children while receiving substance abuse treatment and rehabilitation would better serve the mothers and the children of Kansas. This would lead to more productive Kansans in the future, help to combat the unfortunate devastatingly destructive side effects of incarcerating women on children, and ultimately benefit the state financially.

## VII. THE LACK OF WOMEN-SPECIFIC TREATMENTS IN THE TRADITIONAL INCARCERATION MODEL

The traditional incarceration model is a one-size-fits-all ideal that does not take gender related differences into account. This is not particularly surprising considering the traditional incarceration model was created for the purposes of punishing men because they were, more frequently, the offenders. More specifically, incarcerated women are more likely than their male counterparts to suffer from mental and physical illnesses, be the victims of overlapping violence such as domestic, physical and sexual violence, struggle with substance abuse issues and be in need of housing assistance.

A Department of Justice study conducted in December of 2006 found that 73% of women incarcerated in state facilities suffered from some type of mental disorder.<sup>130</sup> The same study reported that in the general, not incarcerated population, only 12% of women experience some form of mental disorders.<sup>131</sup> Of incarcerated women, 12% suffer from severe psychiatric disorders.<sup>132</sup> The traditional prison model does not offer women any mental health assistance. The rare women who receive counseling or medication often exit jail without a support system, supervision or any kind of treatment plan.<sup>133</sup> This lack of structure can often cause the newly released women to fall into previous drug and alcohol habits or commit crimes to survive, which sometimes are mutually exclusive. For Kansas, this translates to the Kansas Department of Corrections being the largest provider of mental health services for the state of Kansas.<sup>134</sup>

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128. *Id.* at 699.

129. *Id.*

130. Kirk Mitchell, *Two of three women in Colorado prisons diagnosed with psychological disorders*, DENVER POST, Mar. 6, 2013, at 1A.

131. *Id.*

132. Peter M. Carlson, *Public Policy, Women, and Confinement: A Plea for Reasonableness*, 14 WM. & MARY J. WOMEN & L. 245, 251 (2008).

133. Steve Lopez, *A crime against mentally ill: Thousands are in L.A. County jail, few get treatment they need*, L.A. TIMES, July 17, 2013, at 1.

134. LORI AMMONS & SALLY FREY, KAN. DEP'T OF CORR., KANSAS DEPARTMENT OF

Between 2006 and 2013, the percentage of the prison population suffering from mental illness more than doubled, an increase of 126% in just 7 years.<sup>135</sup> Treatment plans that are aimed at addressing the root causes of substance abuse and criminal activity among women offenders should include mental health treatment and counseling. Without treatment for underlying mental illness, female offenders may be driven to return to substance abuse and criminal activity.

In addition to being more likely to suffer from mental illness, incarcerated women are more likely than their male counterparts to suffer from chronic and communicable sicknesses, 59% compared to 43%.<sup>136</sup> Approximately 80% of women in state custody suffer from substance abuse problems.<sup>137</sup> Women incarcerated in state prisons are one and one half times more likely to have a current medical or mental health related problem.<sup>138</sup> The one-size-fits-all mentality in prison health treatment is not successful for treating women. As well as being more likely to be physically ill, women prisoners may also have reproductive concerns, something male prisoners do not face.<sup>139</sup> To be effective for women, treatment plans should consider health issues specific to women including taking into account the reproductive concerns of female offenders.

A study by an Oklahoma University sociology professor revealed that more than 90% of incarcerated women in Oklahoma have been the victims of domestic violence.<sup>140</sup> Nearly 60% of state female prisoners report previous instances of physical and sexual abuse.<sup>141</sup> Female prisoners of the state are four times more likely to self-report past physical or sexual abuse than their male counterparts.<sup>142</sup> It is likely that the true number of incarcerated women who were previous victims of various types of violence is even higher because often women underreport abuse.<sup>143</sup> The traditional incarceration model does not address physical and sexual abuse or offer any treatment to combat the detrimental effects abuse can have on a woman. To better treat incarcerated women,

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CORRECTIONS SERVICES TO THE MENTALLY ILL (2013), [http://www.kansasbehavioralhealthservices.org/Document/Department\\_of\\_Corrections\\_Presentation\\_082913.pdf](http://www.kansasbehavioralhealthservices.org/Document/Department_of_Corrections_Presentation_082913.pdf).

135. *Id.*

136. THE SENTENCING PROJECT, *supra* note 18.

137. Carlson, *supra* note 132, at 248.

138. GLAZE & MARUSCHAK, *supra* note 108, at 7.

139. A discussion of pregnant inmates is beyond the scope of this article. For additional information on pregnant inmates, see International Human Rights Clinic, SHACKLING OF PREGNANT PRISONERS IN THE UNITED STATES (2014), <https://ihrcclinic.uchicago.edu/page/shackling-pregnant-prisoners-united-states>. See also AM. CIVIL. LIBERTIES UNION, STATE STANDARDS FOR PREGNANCY-RELATED HEALTH CARE AND ABORTION FOR WOMEN IN PRISON-MAP (2014), <https://www.aclu.org/maps/state-standards-pregnancy-related-health-care-and-abortion-women-prison-map>.

140. Wynn, *supra* note 111, at 287.

141. Myrna S. Raeder, *Features, A Primer On Gender-Related Issues That Affect Female Offenders*, 20 CRIM. JUST. 4, 6 (2005).

142. GLAZE & MARUSCHAK, *supra* note 108, at 7.

143. MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, FAMILY VIOLENCE STATISTICS (2005), <http://www.bjs.gov/content/pub/pdf/fvs02.pdf> (stating that approximately 60% of family violence victimizations were reported to police between 1998 and 2002).

programs must incorporate counseling and treatment options for the often long histories of abuse the female prisoners have suffered.

Interestingly, mothers in state prisons were twice as likely as their male counterparts to report homelessness in the year prior to their arrest,<sup>144</sup> suggesting female prisoners may be in need of housing assistance upon release. A treatment program that integrated housing assistance would better serve female offenders.

Additionally, most incarcerated mothers are interested in attending self-help or improvement classes and parenting classes. The Bureau of Justice Statistics reports that nationally in 2007, almost two-thirds of mothers participated in self-help or improvement classes.<sup>145</sup> About 65% of women attended self-help or improvement classes, compared to 57% of men.<sup>146</sup> However, mothers were two and a half times more likely than fathers to attend parenting or childrearing classes, 27% compared to 11%.<sup>147</sup> If given the opportunity, more women would take advantage of parenting classes. A program that allows women to stay out of jail and stay in contact with their children while attending parenting or self-help classes would best serve the interests of both the mothers and the children of Kansas.

Currently in Johnson County Kansas a Therapeutic Community program is offered by the Johnson County Department of Corrections.<sup>148</sup> The Therapeutic Community opened at the Adult Residential Center in February 1998.<sup>149</sup> The Therapeutic Community program is a 6-month drug treatment program designed for offenders with extensive drug abuse and criminal histories.<sup>150</sup> The program is licensed to serve 40 clients and has a bed capacity of 50.<sup>151</sup> The Therapeutic Community serves both male and female offenders sentenced only by the Johnson County District Court.<sup>152</sup> Although this program is beneficial to offenders in Johnson County, offenders sentenced outside Johnson County are not eligible. Additionally, Therapeutic Community can only serve a small population and serves both genders. This program fails to take into account the issues the plague female offenders specifically. Moreover, women participating in Therapeutic Community still suffer from the dilemma of who will care for their children while they are away. Finally, given the rates of domestic abuse found in female offenders, a program that allows for both genders to participate has the potential to re-victimize women who were the subject of domestic violence.

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144. GLAZE & MARUSCHAK, *supra* note 108, at 7.

145. *Id.* at 9.

146. *Id.*

147. *Id.*

148. *Therapeutic Community, Department of Corrections, JOHNSON CTY. KAN.*, <http://www.jocogov.org/dept/corrections/adult-services/therapeutic-community> (last visited Jan. 19, 2016).

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

### VIII. PROPOSED PROGRAM

Kansas should implement an alternative to incarceration program that uses both Drew House and Women in Recovery as models, ideally in Topeka. If the program is successful, additional branches could be opened in Kansas City and Wichita. The program should be aimed at assisting non-violent female offenders, with mothers given special consideration. The program should be an alternative to prison with a group home setting available to participants, but not required. Judges should have the authority to defer sentencing until the completion of the program. If a woman does not complete the program, she can have her place in the program revoked and be charged with the underlying crime, similar to the process of a diversion violation and revocation.

Women should be allowed to bring their minor children with them to live in the program's home if she chooses or if there are no other viable alternatives, such as family placement. Substance abuse treatment, counseling, parenting classes, job training and housing assistance should be mandatory. This assistance and structure gives women the chance to address the causes of their criminal behavior, which is often caused by addiction or necessity. Medical treatment for various illnesses should be readily available and easily affordable for both mother and child. To address the disproportionate number of female offenders who suffer from mental health issues, counseling should be required for women with histories of mental health problems. If a woman is found to need additional counseling or medication for her underlying mental health issues, that need can be addressed on an individual, case-by-case basis. Additionally, special attention should be given to the often long histories of sexual and physical abuse that women offenders have experienced. Counseling should include treatment for overcoming past abuses. Relapse prevention programs should be constructed on an individualized basis. For women who did not graduate high school, GED courses should be offered along with general job training classes. The women in The Program should be taught coping skills so when they are released they have adequate tools to assist them in learning to function in society again.

The average cost of incarcerating an individual in Kansas is \$18,207 annually.<sup>153</sup> As previously mentioned, Kansas does not offer information of costs per inmate by gender, although it is presumed that incarcerating women costs more than incarcerating men due to the increased costs of treating women's medical issues. Additionally, the cost of incarcerating a woman and sending her children to foster care is not a cost generally associated with imprisoning men. However, given the fact that Kansas and Oklahoma have a similar cost of living, it is a safe assumption that the amount it costs in Oklahoma to incarcerate a woman and put a child in foster care is similar to the amount it costs in Kansas to do the same. In Oklahoma, it costs \$30,000 per year to send a woman to jail and her children in foster care.<sup>154</sup> It only costs \$15,000 per year to send a woman

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153. VERA INST. OF JUSTICE, *supra* note 98.

154. Wilkerson, *supra* note 77.

to the Women in Recovery program, one of the programs that Kansas should base its program on.<sup>155</sup> Kansas could save a considerable amount of money if it implements a program similar to Drew House and Women in Recovery.

### IX. CONCLUSION

The current incarceration model does not effectively encourage female prisoners to consider the origins of her addictions or the reasons she committed the crime.<sup>156</sup> Prison does not assist the incarcerated women whatsoever in preparing for her re-entry into society.<sup>157</sup> The non-violent female prisoners of Kansas would be better served through a program that is designed to not only address the root causes of their criminal activity and addiction, but also allows them to stay united with their children and learn skills that will benefit them after completion of their treatment. A program that allows children to stay with their mother, despite her need for rehabilitation, ensures that the children are not collaterally punished for their mother's crimes, as it often seems they are, in the traditional, male-dominated incarceration model. A program tailored to fit the specific needs of women would benefit the state by saving money and reducing recidivism rates, and would benefit the women in the program by treating the underlying causes of her criminal activity. With the almost unbelievable projected increase of inmates in the next 10 years, and the increased costs associated with a dramatic increase, an alternative is desperately needed.

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155. *Id.*

156. David Rothenberg, Letter to the Editor, *A Vicious Cycle of Imprisonment*, N.Y. TIMES, June 2, 2014, at 20.

157. *Id.*

## ABOUT THE JOURNAL

The *Kansas Journal of Law & Public Policy* was conceived in 1990 as a tool for exploring how the law shapes public policy choices and how public policy choices shape the law. The *Journal* advances contemporary discourse on judicial decisions, legislation, and other legal and social issues. With its three published issues per year, the *Journal* promotes analytical and provocative articles written by students, professors, lawyers, scholars, and public officials.

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**Volume XXV**



Dear *Journal* Readers,

Welcome to the final issue of Volume XXV. This issue highlights topics from the *Journal's* 2016 Symposium: "Elections and Campaign Finance." First, I would like to give an immense thank you to the Senior Symposium Editor for Volume XXV, Cody Branham for both planning and preparing this successful Symposium. The articles that follow exhibit an overview of the topics discussed at our Symposium Friday, February 19, 2016. Legal scholars and advocates from across the country travelled to the University of Kansas School of Law and discussed current issues in national and state election. During the event, three panels explored: 1) The History and Future of Contested Elections, 2) The Conduct of Election and Protection of Voting Rights, and 3) Kansas-Specific Election Law Issues. We hope these articles spark a continued discussion.

This Issue begins with Clayton L. Barker, executive director and general counsel for the Kansas Republican Party, calling for the adoption of public policy strengthening the currently weakened state political parties, specifically pertaining state political parties and Kansas-specific reforms. The article explains that strengthening these parties would provide multiple public benefits including but not limited to: reduced political influence, higher voter turnout, better informed voters, and also better candidates for elective office.

For the second article, Dean Joseph A. Aistrup of Auburn University discusses the history and current state of Kansas elections, beginning with the politics surrounding the first term of Governor Brownback's administration, the focusing on the past and current party alignments that dominate state and federal elections in Kansas, including Governor Brownback's reelection. The conclusion of this article analyzes the key demographic characteristics, party organization elements, and patterns of presidential voting that influenced the gubernatorial election in 2014.

Next, Professor Derrick Darby reconstructs the Supreme Court's racial progress argument in *Shelby County v. Holder*, where the Supreme Court removed an obstacle to make vote more burdensome. This article also raises some concerns about ways of answering the racial progress argument that simply replace a conservative narrative about racial progress with a liberal narrative. Professor Darby concludes with brief remarks about how to safeguard the right to vote post-*Shelby County*, particularly turning to cases where vote denial rather than vote dilution is mainly at issue.

For the fourth article of the Symposium Issue, Doug Bonney surveys Kansas's historical expansion of the right to vote, and reviews the Secure and Fair Elections (SAFE) Act's requirements and its impact on Kansas's voters, ultimately arguing that the SAFE Act is bad public policy. This article concludes that the SAFE Act attempts to remedy the virtually non-existent problem of in-person voter fraud, doing so in a manner that completely disregards making voter registration easier and increasing voter turnout.

Next, Dr. Elizabeth Clarkson of Wichita State University discussed analyzing voting records, including a lawsuit she filed back in February of 2015 requesting access to voting

machine records, which was ultimately denied. This article explains why this type of audit is necessary and describes in detail the audit Dr. Clarkson would like to conduct. In conclusion, Dr. Clarkson gives recommendations regarding recently proposed legislation that would require such audits for certifying the official votes after an election.

Finally, Richard E. Levy, J. B. Smith Distinguished Professor of Constitutional Law, advances a straightforward proposition: partisan political advantage is not a legitimate purpose for election rules, requirements, or practices that burden the right to vote and argues that it is time to take the nonpartisanship principle more seriously, both as a constitutional and policy matter. This article concludes that attention to the nonpartisanship principle is a necessary and desirable step to promote the integrity of our electoral processes.

With the close of Volume XXV, I would like to thank all editors, authors, and readers, for without them, the *Journal* and its mission would cease to exist. Specially, I would like to thank Dean Mazza and our faculty advisors, Professor Elinor Schroeder and Professor Richard Levy, for their constant support. Last, and certainly not least, it has been a great pleasure working with the Board and Staff. You have been a great team to work with, and I appreciate all of your hard work this year. It has been an honor to serve you as Editor-in-Chief.

Lauren Thomas  
*Editor-in-Chief*