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The Missing Link: Jail and Prison Conditions in Criminal Justice Reform

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The Missing Link: Jail and Prison Conditions in Criminal Justice Reform

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INTRODUCTION

Jail and prison conditions matter because they are involuntary homes for millions of people without meaningful public oversight, transparency, or accountability. Although there are differences between jails and prisons

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under the law,[1] the conditions experienced are often similar for the person caged, whether that person is pre-trial or convicted. Current criminal justice efforts in Louisiana, consistent with national trends, have prioritized diversion and re-entry and failed to address the actual conditions of incarceration. The failure to pay attention to conditions of confinement undermines—and raises questions about—our commitment to criminal justice reform.

At any given moment in the United States, approximately 2.3 million people are behind bars, at least a quarter of whom have not been convicted of a crime.[2] Approximately 10 million children in the United States have experienced life with a parent in jail or prison.[3] The rate of incarcerated women has grown 14 times since 1970.[4] The punishment of incarceration also falls disproportionately on Black and Brown communities: "one in three [B]lack men born today can expect to be incarcerated in his lifetime, compared to one in six Latino men and one in 17 [W]hite men."[5] Louisiana leads the way, placing second in the nation—and the world— for incarceration rates in 2018, but it ranks last nationwide in all the meaningful categories: health care, infant mortality, economy, education, and infrastructure.[6]

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1. *See generally* Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018) (arguing that legal standards to evaluate use of force in pre-trial Fourteenth Amendment detainee cases should also govern use of force in convicted prisoner Eighth Amendment cases).

2. Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Mar. 14, 2018), https://www.prisonpolicy.org/reports/pie2018.html [https://perma.cc/ZSD5-XB2C].

3. BRYCE PETERSON ET AL., URBAN INST., CHILDREN OF INCARCERATED PARENTS FRAMEWORK DOCUMENT (2015), https://www.urban.org/sites/default/files/publication/53721/2000256-Children-of-Incarcerated-Parents-Framework-Document.pdf [https://perma.cc/7GYG-TS5J].

4. ELIZABETH SWAVOLA ET AL., VERA INST. OF JUST., OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM (2016), https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf [https://perma.cc/7DX 4-V4VS].

5. Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST. (May 2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/for-the-record-unjust-burden/legacy_downloads/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/2FBC-5S4V].

6. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), https://www.prisonpolicy.org/global/2018.html [https://perma.cc/KU3W-RUSN]; *Louisiana Rankings and*

Since 1986, Louisiana has ranked in the top 10 states nationwide for the highest incarceration rates. From 2005 to 2018, Louisiana ranked first in the nation and the world for holding people captive.[7] Louisiana only lost its title of "Incarceration Capital of the World" to Oklahoma following bipartisan state legislation enacted in 2017, which lowered our per capita incarceration rate. Louisiana still far outpaces the nation, incarcerating 712 people per 100,000, compared to a national average of 450 people per 100,000.[8]

The goal of this Article is simple: to connect the dots between conditions in jails and prisons and broader criminal justice reform efforts.[9] This Article highlights Louisiana conditions and reforms and also draws from other states and national data to establish broader trends. Part I discusses recent criminal justice reform efforts and how states have increasingly attempted to reduce incarceration through Justice Reinvestment Initiative (JRI) legislation and programming. Conditions in prisons and jails, however, are rarely a part of recent reform efforts. This is particularly important in Louisiana, which recently enacted sweeping JRI reforms but failed to reform prison conditions. Part II summarizes some of the key features of prison and jail conditions with particular attention to how these conditions impact both the people incarcerated and broader communities. By situating conditions inside prisons and jails within the broader criminal justice reform context, the Article demonstrates how inhumane and dangerous prison and jail conditions can

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Facts, U.S. NEWS, https://www.usnews.com/news/best-states/louisiana [https://perma.cc/XL2A-NAM4] (last visited Sept. 19, 2019).

7. Bill Quigley, *Louisiana Number One in Incarceration*, HUFFINGTON POST (May 11, 2017), http://www.huffingtonpost.com/bill-quigley/louisiana-number-one-in-i_b_9888636.html [https://perma.cc/RQ5Y-BWK6].

8. Elizabeth Compa & Adam Gelb, *Louisiana No Longer Leads Nation in Imprisonment Rate*, PEW CHARITABLE TR. (July 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/07/10/louisiana-no-longer-leads-nation-in-imprisonment-rate [https://perma.cc/5K8Z-HW6E].

9. It is also important to note—but beyond the scope of this Article—that reducing incarceration for criminal justice populations does not equal a reduction in incarceration in general. Several states have succeeded in reducing their prison or jail populations, but these states are now using those same detention facilities to hold people on behalf of the United States Immigration and Customs Enforcement. *See, e.g.*, Bryn Stole, *As Fewer Inmates Fill Louisiana Jails, Wardens Turn to Immigration Officials to Fill Bunks, Budgets*, ADVOCATE (May 9, 2019), https://www.nola.com/news/article_0b819a1f-d24b-5107-bbdd-7b29af9a3c3f.html [https://perma.cc/DC4V-NQAT] (noting that the almost 3,000 empty beds as a result of Louisiana criminal justice reform are now being used to house people who are held pending immigration matters).

detract from diversion and re-entry reforms. Part III is an initial sketch of general and specific strategies to improve prisons and jails based on the relationships between conditions and existing criminal justice reforms. This Part, a precursor to a more thorough examination in a future essay, identifies some of the challenges that may arise when conditions become a part of a broader criminal justice reform effort.

I. CRIMINAL JUSTICE REFORM CONSENSUS?

In the last few years, at both the state and national level, politicians have embraced criminal justice reform. Though the motivations may differ—economic costs, social impact, or concerns for basic human dignity and fairness—legislatures across the country are increasingly adopting laws reducing the number of people incarcerated. Important questions remain about whether this apparent consensus is durable and meaningful, or if, in fact, these reforms only further entrench punishment as our primary response to crime, instead of treatment or support.[10] Even if these reforms are sustainable, they omit a critical component by failing to address the conditions in which people are incarcerated.

Emblematic of this consensus is the JRI, which is one of the largest modern criminal justice reform efforts. Criminal justice reforms, both in Louisiana and nationwide, have focused on: (1) diverting people from the criminal system through specialty courts, renewed attention to money bail, and limited de-criminalization, and (2) reducing returns to prisons and jails through expanded re-entry services, supervision, training, and support. Although both of these strategies are essential for bending the arc more closely toward justice, given the enormous social and economic costs of incarceration, neither strategy addresses how conditions of confinement also drive our criminal justice system.

A. Justice Reinvestment Initiative and Associated Reforms

The JRI is a federally funded program that assists states and localities with developing data-driven approaches to reduce incarceration and reinvest those savings into enhancing public safety.[11] Since at least 2010,

10. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* YALE L.J.F. (2018), https://www.yalelawjournal.org/forum/the-punishment-bureaucracy [https://perma.cc/4L3T-H6HG].

11. *See, e.g.*, *Background on Improving Criminal Justice and Reducing Recidivism Through Justice Reinvestment*, BUREAU JUST. ASSISTANCE, https://www.bja.gov/Programs/jri_background.html [https://perma.cc/ZK7D-8TAW] (last visited May 7, 2019).

the JRI program has provided technical assistance for local officials to develop targeted solutions through a better understanding of the drivers of incarceration in their area. To ensure data analysis and recommendations are translated into legislative change, the JRI program requires government authorities to establish bipartisan and interbranch committees to recommend reforms.[12] Participating jurisdictions are encouraged to reinvest the correctional savings from a lower incarcerated population into initiatives that enhance public safety and reduce recidivism.[13]

At least 35 jurisdictions have participated in JRI with an estimated total savings of $1.1 billion.[14] So far, the evidence shows decreases in incarcerated populations in states including Arkansas, Hawaii, Louisiana, Missouri, and North Carolina. Some states have seen significant decreases through reducing admissions to prison for probation and parole violations. After implementing the JRI program in 2012, Missouri reduced its incarcerated population by 21.8% in 2016 through a combination of lesser sanctions and earned compliance credits for people on probation and parole.[15] North Carolina has similarly reduced its population by 20.7% and closed 11 prisons through investing in new supervision, adopting community-based treatment for people returning from prisons, and limiting sentencing for certain new offenses.[16] Other states have focused on preventing new admissions to prisons and jails by combining bail reform and diversion. Kentucky JRI legislation implemented a new pre-trial assessment tool for bail determinations and mandated lesser release options for people with low to moderate-risk scores.[17] In the first year,

12. *The Justice Reinvestment Initiative: Experiences from the States*, BUREAU JUST. ASSISTANCE 1 (July 2013), https://www.bja.gov/Publications/UI-JRI-State-Experiences.pdf [https://perma.cc/PD5F-5SP4].

13. *See, e.g.*, Jeremy Welsh-Loveman & Samantha Harvell, *Justice Reinvestment Initiative Data Snapshot: Unpacking Reinvestment*, URB. INST. 1, 3 (May 2018), https://www.urban.org/sites/default/files/publication/98361/justice_reinvestment_initiative_data_snapshot_0.pdf [https://perma.cc/FL7B-HP4H].

14. *See id.*; Samantha Harvell & Jeremy Welsh-Loveman, *Justice Reinvestment Initiative State Data Tracker*, URB. INST., http://apps.urban.org/features/justice-reinvestment/ [https://perma.cc/FFS5-LJ3E] (last updated July 2017).

15. Welsh-Loveman & Harvell, *supra* note 13.

16. *Id.*

17. Samantha Harvell et al., *Reforming Sentencing and Corrections Policy: The Experience of Justice Reinvestment Initiative States*, URB. INST. 15, https://www.urban.org/sites/default/files/publication/86691/reforming_sentencing_and_corrections_policy_3.pdf [https://perma.cc/M6XY-N78H] (last updated Mar. 2017).

Kentucky increased its "nonfinancial release rate"[18] from 50% to 60% and increased release rates more generally for people with low and moderate assessments.[19] Arkansas created Crisis Stabilization Units across the state to divert people with mental illnesses from jails, while also supporting training for law enforcement officers on mental illness.[20] Although these initial results are promising, existing research on diversion and re-entry does not yet demonstrate whether these initial gains will be sustained.[21] None of these states included jail or prison conditions in reform legislation, raising the question of whether improved conditions could contribute to even greater or more sustainable decreases in incarceration.

1. Louisiana's Justice Reinvestment Initiative

Louisiana first joined JRI in 2010, but the results were modest and reinvestment scarce. At the time, researchers found three primary drivers for Louisiana's high incarceration rate: (1) incarceration of people convicted of non-violent or non-sex offenses; (2) technical violations of parole; and (3) declining use of parole, including both declining hearing and grant rates.[22] In 2011 and 2012, the Louisiana Legislature passed a series of bills that were projected to reduce the incarcerated population by 3% between 2013 and 2024.[23] As a result, Louisiana saved approximately $17 million as of mid-fiscal year 2014, but the state only reinvested approximately $1.7 million into community-based treatment plans in 2013.[24]

By 2017, Louisiana had the highest imprisonment rate of any state in the U.S. and the highest prison admission rate of states in the region with

18. A "nonfinancial release rate" is the percentage of pre-trial releases without a financial payment or condition attached, such as bail or a bond.

19. Harvell et al., *supra* note 17.

20. *Arkansas's Justice Reinvestment Approach: Enhancing Local Mental Health Services for People in the Criminal Justice System*, COUNCIL ST. GOV'T: JUST. CTR. (May 2017), https://csgjusticecenter.org/wp-content/uploads/2017/05/Arkansas-JR-Approach_MAY2017.pdf [https://perma.cc/P2EN-VPCH].

21. *See* discussion *infra* Section I.B.

22. NANCY LAVIGNE ET AL., URBAN INST., JUSTICE REINVESTMENT INITIATIVE STATE ASSESSMENT REPORT (2014), https://www.urban.org/sites/default/files/publication/22211/412994-Justice-Reinvestment-Initiative-State-Assessment-Report.PDF [https://perma.cc/VG4G-8ZYF].

23. *Id.*

24. *Id.*

similar crime rates.[25] Forty percent of the prison population were serving sentences for drug or property crimes, and 43% of people in Department of Corrections (DOC) custody were revocations from community supervision. Of the total individuals either incarcerated or under DOC supervision from 2009 to 2015, 58% only had non-violent offenses and 17.8% only had drug offenses. All of the top 10 most common offenses for newly sentenced prison admissions were non-violent.[26]

As part of his campaign, Governor John Bel Edwards publicly committed to reducing Louisiana's incarcerated population by 14% with a focus on pre-trial diversion programs, reform sentencing for non-violent offenders, and increased use of specialty courts. The Governor's strategy relied on facilitating Louisiana's participation in the federal JRI programming. Each state or locality participating in JRI must appoint a small, bipartisan, and high-level committee that assesses current spending and trends, develops policies for adoption, and ensures that a portion of savings from the re-allocation of spending is invested into public safety programs. National experts and staff from Pew Charitable Trusts provided technical assistance to committees. Accordingly, the Governor supported legislation creating a bipartisan Louisiana Justice Reinvestment Taskforce ("The Taskforce") to make reform recommendations after a thorough assessment of Louisiana's criminal justice system.

The Taskforce, chaired by Department of Public Safety and Corrections Secretary James LeBlanc, issued its final report on March 16, 2017.[27] The report contained 21 consensus recommendations and 5 majority recommendations. The Taskforce made the following five findings:

> (1) Imprisonment: Louisiana locks people up for non-violent crimes far more than other states do.
> (2) Community Supervision: The prison population makes up just a third of Louisiana's total corrections population. The other two-thirds, over 70,000 people and growing, are supervised in the community on probation or parole.
> (3) Criminal Justice Financial Obligations: Criminal justice financial obligations should restore victims

25. *Louisiana Data Analysis Part I: Prison Trends Presentation to the Louisiana Justice Reinvestment Task Force*, PEW CHARITABLE TR. 1 (Aug. 11, 2016) (on file with author).

26. *Id.* at 20.

27. LA. JUST. REINVESTMENT TASK FORCE, REPORT AND RECOMMENDATIONS (2017), https://www.lasc.org/documents/LA_Task_Force_Report_2017_FINAL.pdf [https://perma.cc/S8SS-CGDV].

> and hold people accountable without creating barriers to success. . . . The average probationer in Louisiana has large amounts of criminal justice debt.
> (4) Budgetary Decisions: Local decision-makers lack funding incentives to use prison alternatives. . . . Programming in parish jails is not adequately funded. . . . The state has cut behavioral health resources, and large numbers of people with substance abuse and mental health needs are landing in prison. . . . Crime victim reparations funding has dwindled.
> (5) Crime Victim and Survivor Priorities: Better enforcement of victims' rights, . . . [i]ncreased transparency and accessibility for victims, . . . investment in victim services, . . . [r]educing the likelihood of re-offense and re-victimization. [28]

Based on these findings and recommendations, the legislature adopted the following JRI reforms in 2017, including:

> (1) Reduced habitual offender penalties;
> (2) Created an administrative parole process without a hearing for non-violent crimes;
> (3) Created parole eligibility for lifers sentenced in the 1970s and some juvenile lifers;
> (4) Expanded probation eligibility to first-time violent crimes and third-time non-violent crimes;
> (5) Shortened probation and parole terms and sanctions for revocation;
> (6) Eliminated several mandatory minimum sentences for drug and property crimes and reduced sentences for common weapons offenses;
> (7) Reduced sentences for drug possession and drug sales or distribution for lower amounts of controlled substances;
> (8) Tailored fines and fees to a person's ability to pay and created debt forgiveness for those who make consistent payments; and
> (9) Allowed occupational licenses and food stamps post-release.[29]

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28. *Id.*

29. *Nation's 'Most Incarcerated State' Chooses a New Path*, PEW CHARITABLE TR. (July 2017), https://www.pewtrusts.org/-/media/assets/2017/07/

The legislature also protected reinvestment of savings due to these enacted reforms. The new laws provided specific allocations for savings and designated the allocations as bona fide obligations of the state under Louisiana law.[30] Ultimately, the enacted legislation is projected to lead to a 10% reduction in the prison population by 2027, with $78 million saved and $184 million reinvested in public safety.[31]

Although the JRI in Louisiana has successfully reduced the number of people incarcerated, approximately 31,500 people remain incarcerated as of June 2019.[32] More than half are incarcerated in local jails due to lack of space in state prison facilities.[33] Approximately 51% of the Louisiana prison population is serving time for non-violent offenses.[34] The length of prison sentences for drug and property crimes has declined since the 2017 JRI reforms, as have the numbers of people under probation or parole supervision.[35] In addition, prison admissions under the "habitual offender" sentencing enhancements have significantly decreased. In the first year of implementation, Louisiana saved over $12 million—more than double the amount initially projected.[36]

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nations-most-incarcerated-state-chooses-a-new-path.pdf [https://perma.cc/3DF6-S79R].

30. *Louisiana Justice Reinvestment Reforms Practitioner's Guide*, LA. DEP'T PUB. SAFETY & CORRECTIONS 5 (July 30, 2017), https://www.lasc.org/documents/LA_Practitioners_Guide_Justice_Reinvestment_Reforms_FINAL_2017-8-1.pdf [https://perma.cc/RJ75-TKVA].

31. Julie O'Donaghue, *Louisiana Criminal Justice Reform Passed by Legislature*, TIMES–PICAYUNE (June 5, 2017), https://www.nola.com/politics/2017/06/louisiana_criminal_justice_ove.html [https://perma.cc/3235-6R4A].

32. LA. DEP'T OF PUB. SAFETY & CORRECTIONS, BRIEFING BOOK: DEMOGRAPHICS 18 (2019), https://www.doc.la.gov/media/1/Briefing Book/July 19/demographics.9.11.19.pdf [https://perma.cc/U9PC-G7JD]; *see also* Grace Toohey, *Louisiana Sees Rise in Savings, Further Drop in Prison Population From 2nd Year of Justice Reforms*, ADVOCATE (July 19, 2019), https://www.theadvocate.com/baton_rouge/news/crime_police/article_7759e8a6-aa73-11e9-ad85-470066e75115.html [https://perma.cc/M3EQ-YE2M].

33. LA. DEP'T OF PUB. SAFETY & CORRECTIONS, *supra* note 32, at 19.

34. *Id.* at 9. This percentage is a reduction from the pre-2017 prison population, which included 58% for non-violent offenses.

35. LA. DEP'T OF PUB. SAFETY & CORRECTIONS, LOUISIANA'S JUSTICE REINVESTMENT REFORMS: 2019 ANNUAL PERFORMANCE REPORT (2019), http://gov.louisiana.gov/assets/docs/CJR/2019-JRI-Performance-Annual-Report-Final.pdf [https://perma.cc/SYB9-9KF2].

36. *Id.* at 19.

B. Beyond Diversion and Re-entry

A review of the experiences of 23 states indicates that states adopted a wide variety of tools to reduce the number of people incarcerated. A few adopted additional transparency initiatives. For example, Oregon created the Oregon Knowledge Bank to collect and share information on state data, research, and programming.[37] Several states, including Mississippi, Maryland, and South Carolina, enacted significant sentencing reforms limiting mandatory minimum terms or reducing penalties for less serious offenses.[38] Maryland even made certain reforms retroactive, such that people serving mandatory minimum sentences for drug offenses may apply for a sentence reduction under the new law.[39] None of the state initiatives, however, addressed the living conditions of people incarcerated. JRI—and the growing support for reform—focuses primarily on diverting people from entering and re-entering jails and prisons to lower the number of people actually incarcerated.

1. Diversion

Diversion is a broad categorical term for pre-incarceration initiatives to steer individuals away from prisons or jails. Although diversion can include formal pre-trial diversion programs operated by a court or a district attorney, it also refers to decriminalization efforts, policing strategies, et cetera. Beginning in the 1970s, jurisdictions adopted a variety of diversion-related programs to reduce recidivism, conserve resources, and keep court dockets moving.[40] These programs are seen as voluntary alternatives to traditional criminal justice involvement[41] and can "include

37. *See generally*, OR. KNOWLEDGE BANK, https://www.oregonkb.com /about/ [https://perma.cc/4MFR-3A6K] (last visited May 7, 2018).

38. *See, e.g.*, Samantha Harvell et al., *supra* note 17.

39. *Maryland's 2016 Criminal Justice Reform*, PEW CHARITABLE TR., https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/11/marylands-2016-criminal-justice-reform [https://perma.cc/C4AU-SPH6] (last visited May 7, 2018).

40. *See, e.g.*, Erica McWhorter & David LaBahn, *Confronting the Elephants in the Courtroom Through Prosecutor Led Diversion Efforts*, 79 ALB. L. REV. 1221, 1225 (2015); Kajal Patel, *Child Prostitutes or Sexually Exploited Minors: The Deciding Debate in Determining How Best to Respond to Those Who Commit Crimes as a Result of Their Victimhood*, U. ILL. L. REV. 1545, 1573 (2017).

41. CATHERINE CAMILLA, BUREAU OF JUST. ASSISTANCE, PRETRIAL DIVERSION PROGRAMS: RESEARCH SUMMARY 3 (Oct. 25, 2010), https://www.bja .gov./publications/pretrialdiversionresearchsummary.pdf [https://perma.cc/7X7K-BK9R].

drug and alcohol treatment, psychological counseling, behavioral management sessions, vocational training, community service, and required restitution payments."[42] Successful completion of these types of programs can shorten or even eliminate actual incarceration. By limiting the number of people who are eligible to enter prisons and jails, diversion programs—particularly in the short term—can be a helpful tool in reducing overall incarceration rates.[43]

The reduction provided by diversion types of programs, however, may be short-lived. Studies have shown little research or documentation on the long-term impact of diversion programs, including whether they reduce future incidents of law enforcement involvement.[44] One study of a diversion program in a large, Midwestern city found that successfully completing the program reduced future violations, but only within short-term periods.[45] Although participants were diverted from jail in the initial encounter, participants faced difficulties in treatment and community service obligations because they lacked money, education, or supportive relationships.[46] Researchers concluded that more research is needed to determine the strength of diversion policies, not by measuring saved jail days, but by whether the policies limit future offenses, crimes, and incarceration costs.[47]

More broadly, diversion is usually aimed at crimes society considers less harmful, such as non-violent offenses—particularly low-level drug offenses—or at population groups society considers to be worthier or less blameworthy. For people who are not eligible for these programs, however, the experience of incarceration will influence their ability to build positive lives upon release.

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42. Corey R. Lepage & Jeff D. May, *The Anchorage, Alaska Municipal Pretrial Diversion Program: An Initial Assessment*, 34 ALASKA L. REV. 1, 4 (2017).

43. *But see* Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants Into Debt*, N.Y. TIMES (July 3, 2019), https://www.nytimes.com/2019/07/03/magazine/digital-jail-surveillance.html [https://perma.cc/X3YY-56J4] (noting the financial costs of electronic supervision, for example, can increase debt and result in incarceration).

44. *See, e.g.*, CAMILLA, *supra* note 41.

45. Jennifer L. Huck et al., *Jail Diversion and Recidivism: A Case Study of Municipal Court Diversion Program*, 28 CRIM. JUST. POL'Y REV. 866, 874 (2017).

46. *Id.*

47. *Id.*

2. Re-entry

The other major component of criminal justice reforms under the JRI can be categorized as programming related to re-entry.[48] Re-entry programs can include reforms to probation and parole supervision, enhanced community-based support for people returning from prison, and earlier releases from imprisonment through parole considerations. Re-entry programming can reduce the overall number of incarcerated people by decreasing the potential for recidivism and re-incarceration for new offenses.

For example, Utah's JRI approach included limiting incarceration as a penalty for violations by people on parole. Utah reduced its incarcerated population by 9% from 2015 to 2017.[49] A recent study of reforms limiting incarceration for parole violations, however, indicated that people continued to "cycle through the system."[50] Moreover, non-violent offenses—primarily drug offenses—remain a significant factor for new convictions by people on parole.

Focusing on re-entry also does not benefit different incarcerated populations equitably. Compared to incarcerated men, women in jails and prisons have fewer opportunities to participate in re-entry programming. First, Louisiana women overwhelmingly serve their state sentences in local jails—in which fewer programs exist—instead of state prisons. In Louisiana, 70% of women endure their sentences in local jails.[51] Jails historically offer fewer services and programming, since they are designed for short-term detention prior to trial.[52] Second, women may be barred from program participation because correctional officials assign them a

48. Re-entry is used here to encompass a wide range of initiatives, including expediting exit from incarceration, supportive services after incarceration, and probation and parole services.

49. *Data Trends: Utah Criminal Justice Reform*, PEW CHARITABLE TR. (May 24, 2018), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2018/05/data-trends-utah-criminal-justice-reform [https://perma.cc/GT2M -7FHS].

50. *Examining Parole Revocation Patterns*, UTAH COMMISSION CRIM. & JUV. JUST., (October 2018), https://justice.utah.gov/JRI/Documents/Examining_Parole_Revocation_Patterns.pdf [https://perma.cc/BR28-Q9DU].

51. *July 2018 Briefing Book*, LA. DEP'T PUB. SAFETY & CORRECTIONS 32 (June 30, 2018), https://www.doc.la.gov/media/1/Briefing%20Book/July%2018/2.demographics.pdf [https://perma.cc/X7YX-6YGY]. As of July 2018, 1293 women out of 1827 are housed in local instead of state facilities. *Id*.

52. *See, e.g.*, Margo Schlanger, *Differences Between Jails and Prisons*, U. MICH. (2003), https://www.law.umich.edu/facultyhome/margoschlanger/Documents/Resources/The_Difference_Between_Jails_and_Prisons%20.pdf [https://perma.cc/ 25ET-WJVW].

more restrictive custody status.[53] Experts in corrections have raised concerns that custody status determinations are not gender-informed and therefore may overestimate the disciplinary risk of incarcerated women.[54] Third, women's correctional facilities are historically under-resourced compared to men's facilities, limiting women's access to programming and treatment.[55] At the same time, national studies indicate that incarcerated women have specific needs when they are released because of prior trauma. Women in jails are overwhelmingly survivors of prior abuse: 86% have experienced sexual violence; 77% have experienced partner violence; and 60% have experienced caregiver violence.[56]

The experiences of people returning home from incarceration and numerous studies confirm re-entry programming can work. When people released from incarceration receive educational, employment, housing, and treatment assistance, they are less likely to return to prison than those who do not.[57] The studies also demonstrate, however, that the levels of

53. Rachelle Ramirez, *Reentry Considerations for Justice Involved Women*, NAT'L RESOURCE CTR. ON JUST. INVOLVED WOMEN 4, https://cjinvolvedwomen.org/wp-content/uploads/2016/07/Reentry-Considerations-for-Justice-Involved-Women-FINAL.pdf [https://perma.cc/NR2V-RUX8] (last visited Sept. 19, 2019); *see also* SWAVOLA ET AL., *supra* note 4, at 13–14. "Custody status" is a determination by prison or jail officials about the type of security required for an incarcerated person. A more "restrictive custody status" means that jail officials determined the person required a higher level of security monitoring, which may bar that person from participating in certain programming or training.

54. Phyllis Modley & Rachelle Giguere, *Re-Entry Considerations for Women Offenders*, CTR. FOR EFFECTIVE PUB. POL'Y 16 (2010), https://cepp.com/wp-content/uploads/2015/12/Reentry-Considerations-for-Women.pdf [https://perma.cc/95QZ-2FBK].

55. NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 171 (Jeremy Travis et al. eds., 2014).

56. SWAVOLA ET AL., *supra* note 4, at 11.

57. *See, e.g.*, NAT'L REENTRY RESOURCE CTR. ET AL., RE-ENTRY MATTERS: STRATEGIES AND SUCCESSES OF SECOND CHANCE ACT GRANTEES (2018), https://csgjusticecenter.org/wp-content/uploads/2018/11/Reentry-Matters-2018.pdf [https://perma.cc/FEQ4-8227]; Shawn M. Flower, *Employment and Female Offenders: An Update of the Empirical Research*, NAT'L INST. CORRECTIONS (November 2010) https://s3.amazonaws.com/static.nicic.gov/Library/024662.pdf [https://perma.cc/9C42-ZQRA]; Marie Garcia & Nancy Ritter, *Improving Access to Services for Female Offenders Returning to the Community*, 2012 NAT'L INST. JUST. J. (Issue 269) 18, https://www.ncjrs.gov/pdffiles1/nij/237725.pdf [https://perma.cc/BNJ3-BU58].

assistance provided to imprisoned women in particular do not meet their needs when they return home.[58]

Similar to diversion programs, re-entry programs do little to account for experiences in extended imprisonment. Services and support through housing or vocational training, for example, can be important tools to prevent future law enforcement involvement. Yet re-entry programs may provide too little too late, and even the best re-entry support may be unable to account for years of incarceration-produced trauma.

II. PRISON AND JAIL CONDITIONS

Prison conditions constitute the environment and treatment that convicted persons experience while serving their judicially determined sentences. Every aspect of a person's confinement—from the temperature of the facility to the availability of medical and mental health services to prison rules regarding religion, discipline, and visitation—is included within the term "prison conditions." These conditions are particularly important given the high rates of incarceration in the U.S. and the disproportionate exposure to these conditions by racial minorities.

The United States' high incarceration rate is not experienced equally. Racial minorities are more likely to be affected by conditions within the prisons. This disparity prompted scholar Loïc Wacquant to argue that the term "mass incarceration" shrouds the "hyperincarceration" of primarily poor African American men from urban areas.[59] African Americans are 5.1 times more likely to be incarcerated in state prisons than Caucasians, and Latinos are 1.4 times more likely to be incarcerated in state prisons than Caucasians.[60] This racially disproportionate rate of incarceration also affects women, with the rate for African American women at twice the incarceration rate of Caucasian women nationally.[61]

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58. *See, e.g.*, Christine H. Lindquist et al., *Prisoner Reentry Experiences of Adult Females: Characteristics, Service Receipt, and Outcomes of Participants in the SVORI Multi-Site Evaluation*, URB. INST. (2009), https://www.ncjrs.gov/pdffiles1/nij/grants/230420.pdf [https://perma.cc/42Y3-UD68].

59. Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 140 DAEDALUS 74, 78 (2010).

60. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENT'G PROJECT 3 (June 2016), http://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf [https://perma.cc/2Y33-M3LX].

61. *Fact Sheet: Incarcerated Women and Girls*, SENT'G PROJECT 2 (Nov. 2015), http://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf [https://perma.cc/WJ4L-Q8J5].

The impact of incarcerating women extends far beyond the over 200,000 women in prisons and jails—it extends to their children and to their communities in general. Nearly 80% of women in jails are mothers, and many of them are sole caregivers of minor children.[62] Five million children—7% of children nationwide—have experienced a parent's incarceration.[63] Infants of incarcerated parents have a 29.6% increased risk of early infant death than children born to non-incarcerated parents.[64] Children of incarcerated mothers are more likely to be kept back in school or drop out of school in the years immediately following their mothers' incarceration.[65] The long-term impact is also severe: children of imprisoned mothers are more likely to experience arrest, conviction, and incarceration once they reach adulthood.[66]

In Louisiana, the incarceration rate for women is significantly higher than the national average.[67] The majority of women in Louisiana are incarcerated for lower-level crimes, such as drug or property offenses.[68] One in 12 children in Louisiana have an incarcerated parent.[69] Racial minorities are also overrepresented in Louisiana prisons and jails. As of December 2018, African Americans comprise 66.9% of the total prison

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62. SWAVOLA ET AL., *supra* note 4, at 7.

63. Lindsey Cramer et al., *Parent-Child Visiting Practices in Prisons and Jails A Synthesis of Research and Practice*, URB. INSTITUTE 1 (April 2017), https://www.urban.org/sites/default/files/publication/89601/parent-child_visiting_practices_in_prisons_and_jails.pdf [https://perma.cc/2F29-GTH8].

64. Christopher Wildeman, *Imprisonment and Infant Mortality*, U. MICH. POPULATION STUD. CTR. 4 (May 2010), https://www.psc.isr.umich.edu/pubs/pdf/rr09-692.pdf [https://perma.cc/2FA6-VYPW].

65. NAT'L RESEARCH COUNCIL, *supra* note 55, at 274.

66. Lisa R. Muftic, Leana A. Bouffard and Gaylene S. Armstrong, *Impact of Maternal Incarceration on the Criminal Justice Involvement of Adult Offspring: A Research Note*, 53 J. RES. CRIM. & DELINQUENCY 98 (2016), https://www.researchgate.net/publication/281926151_Impact_of_Maternal_Incarceration_on_the_Criminal_Justice_Involvement_of_Adult_Offspring_A_Research_Note [https://perma.cc/KFB7-VRYN].

67. *Keeping Kids and Parents Together: A Healthier Approach to Sentencing in Louisiana*, HUMAN IMPACT PARTNERS (March 2018), https://humanimpact.org/wp-content/uploads/2018/02/HIP_LAcaretakers_2018.pdf [https://perma.cc/P2PW-WKNU].

68. SWAVOLA ET AL., *supra* note 4, at 7; *July 2018 Briefing Book*, *supra* note 51 (55.4% of convictions for incarcerated women consisted of drug, property, non-violent sex offenses, and miscellaneous crimes).

69. *See Keeping Kids and Parents Together*, *supra* note 67.

population but only 32.7% of the state population.[70] Accordingly, women and racial minorities are disproportionately exposed to the trauma of incarceration.

United States prisons and jails are sites that contain violence by both incarcerated people and correctional staff,[71] inhumane and unconstitutional conditions,[72] and inadequate medical and mental health services.[73] Professor Sharon Dolovich identifies several key features of current U.S. incarceration policies that can significantly impact the punishment people experience while behind bars. These features include: (1) "strict limits on visits and communication with family and friends on the outside;" (2) "limited access to meaningful work, education, or other programming;" (3) "little if any concern for the self-respect of the incarcerated;" (4) "an 'us' versus 'them' dynamic between the incarcerated and custodial staff;" and (5) "increased reliance on solitary confinement for the purpose of punishment and control."[74]

Prison and jail conditions, unlike diversion and re-entry, are also subject to more stringent constitutional protections. Diversion and re-entry programs are constitutionally discretionary, meaning that individuals do not have a "right" to participate in these programs. Thus, the current criminal justice reform efforts in Louisiana—diversion and re-entry—are only subject to the same constitutional protections as any other discretionary governmental program: basic levels of procedural due process and equal protection. Prison and jail conditions, however, are also subject to the United States Constitution's Eighth Amendment ban against cruel and unusual punishment and the Fourteenth Amendment's protection of substantive due process, respectively. This additional layer of constitutional protection for activities within the prison or jail provides an important enforcement tool unavailable in other criminal justice reform spaces.

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70. *December 2018*, LA. DEP'T PUB. SAFETY & CORRECTIONS, https://www.doc.la.gov/media/1/Briefing%20Book/Jan%202019/2.demographics.pdf [https://perma.cc/G734-FH7Y]; *Quickfacts: Louisiana*, U.S. CENSUS, https://www.census.gov/quickfacts/fact/table/LA,US/PST045218 [https://perma.cc/C7PD-XW46] (last visited Sept. 19, 2019).

71. *See, e.g.*, John J. Gibbons & Nicholas De B. Katzenbach, *Confronting Confinement*, 22 WASH. U. L. & POL'Y 385, 385 (2006) (discussing interviews, testimony, and reports of violence in prisons and jails).

72. *Id.* (discussing prolonged solitary segregation, lack of medical care, and overcrowding of inmates).

73. *See* Brown v. Plata, 56 U.S. 493, 535 (2011).

74. Sharon Dolovich, *Foreword: Incarceration American Style*, 3 HARV. L. & POL'Y REV. 237, 237–38 (2009).

A. Violence and Trauma

When people are caged in conditions of scarcity and left to fend for themselves, it is unsurprising that violence occurs. A recent article by *The New York Times* described thousands of pictures taken inside an Alabama prison:

> The contraband is scary enough: Homemade knives with grips whittled to fit particular hands. Homemade machetes. And homemade armor, with books and magazines for padding. Then there is the blood: In puddles. In toilets. Scrawled on the wall in desperate messages. Bloody scalps, bloody footprints, blood streaming down a cheek like tears. And the dead: a man kneeling like a supplicant, hands bound behind his back with white fabric strips and black laces. Another, hanging from a twisted sheet in the dark, virtually naked, illuminated by a flashlight beam. These were ugly scenes from inside an American prison, apparently taken as official documentation of violence and rule violations.[75]

There is a scarcity of reliable data and statistics on violence within prisons and jails, particularly if the violence does not result in death.[76] One study from 2005 indicates that approximately 20% of men incarcerated report that they were physically assaulted by either another incarcerated person or by staff.[77] Even where federal law requires collection of data, such as under the Prison Rape Elimination Act, reporting and investigation difficulties[78] make predicting overall incident rates difficult. What scholars and people with direct experience with incarceration do know, however, is that physical and sexual assault happens in what are supposed to be some of the most secure government-operated buildings.

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75. Shaila Dewan, *Inside America's Black Box: A Rare Look at the Violence of Incarceration*, N.Y. TIMES (Mar. 30, 2019), https://www.nytimes.com/2019/03/30/us/inside-americas-black-box.html [https://perma.cc/49ZA-BLEB].

76. *See, e.g.*, Andrea Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 463–64 (2014) (listing how various categories of data on conditions for the incarcerated are nonexistent or incomplete).

77. Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. CORRECTIONAL HEALTH CARE 58, (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2811042/ [https://perma.cc/WN7M-MKRV].

78. *See* U.S. DEP'T OF JUST., SEXUAL VICTIMIZATION REPORTED BY ADULT CORRECTIONAL AUTHORITIES, 2012–15 (July 2018), https://www.bjs.gov/content/pub/pdf/svraca1215.pdf [https://perma.cc/7DA6-QSMH].

Incarcerated women are more likely to experience sexual assault and disciplinary punishment by prison or jail staff. Of all reports on staff sexual assault against incarcerated people, three-fourths were from imprisoned women.[79] Women with prior histories of abuse—which includes 86% of incarcerated women—have a "heightened risk of sexual assault during incarceration."[80] Moreover, correctional practices and environments, such as full body searches and overcrowding, can re-victimize incarcerated women. Responses to these threats, real or perceived, may lead to disciplinary punishments for incarcerated women.[81] A recent national study concluded that prison officials punish women more often and more harshly than men in prison for low-level disciplinary violations.[82]

Even when an incarcerated person does not directly experience violence, that person will be indirectly affected by witnessing the violence. A study on victimization of incarcerated people and re-entry in Ohio found that "the vast majority indicated that they witnessed thefts (82%), physical assaults (92%), and verbal assaults (95%). Nearly 20 percent indicated they had witnessed other inmates being sexually coerced by another and 12 percent indicated they had seen a rape."[83] Studies on the impact of violence outside of jails and prisons demonstrate that repeated exposure to deaths and violence can leave a lasting physical and mental impact.[84]

As the above examples demonstrate, the punishment in prisons and jails far too often exceeds the punishment ordered by a judge for committing a crime. It would be barbaric for a judge to order a person to be sexually violated as a consequence of a crime. Is it any less barbaric if it happens incidental to lawful imprisonment? The same could be said for people denied medical and mental health care. Serving a certain amount of time in jail or prison is the intended punishment, not death or injury by neglect.

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79. NAT'L RESEARCH COUNCIL, *supra* note 55, at 225.

80. *Id.* at 171.

81. SWAVOLA ET AL., *supra* note 4, at 14.

82. Jessica Pupovac, *Investigation: In U.S. Prisons, Women Punished More Often Than Men*, NPR (October 14, 2018), https://www.npr.org/2018/10/14/657341917/investigation-in-u-s-prisons-women-punished-more-often-than-men [https://perma.cc/D824-NZGQ].

83. SHELLEY JOHNSON LISTWAN ET AL., THE PRISON EXPERIENCE AND RE-ENTRY, *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/238083.pdf [https://perma.cc/54M5-HDQ3].

84. *See, e.g.*, Richard A. Webster & Jonathan Bullington, *The Children of Central City: Science of Trauma*, NOLA (June 14, 2018), https://www.nola.com/children_of_central_city/article_965264d2-992e-11e9-b0af-cbdc34823eb2.html [https://perma.cc/K72U-9FKU].

B. Medical and Mental Health Care

Prison and jail conditions can lead to lifelong injuries and even death because incarcerated people are held hostage by the health care services the jail or prison provides. If one is incarcerated, one is not free to seek one's own private medical care. Instead, under the United States Constitution, jails and prisons are required to provide adequate medical and mental health care to all persons in their custody.[85]

Louisiana spends the least money of all 50 states on health care for incarcerated people, averaging $2,173 per person in the fiscal year of 2015.[86] In 2014, Louisiana was ranked first in the nation for per capita deaths in state prisons.[87] Additionally, Louisiana, per capita, has one of the largest populations of people serving life sentences without parole, including larger elderly populations.[88] For example, when Shannon Hurd complained of a pain in his side, he was denied treatment at the Louisiana State Penitentiary. He was ultimately diagnosed with kidney cancer, which by that time had spread to his brain, ultimately killing him in 2014.[89] Similarly, Frank Brauner walked into a Louisiana prison but left in a wheelchair paralyzed from the waist down after sustaining a back injury while working his prison-assigned job in the agricultural fields. He was abandoned in the prison's medical ward. Instead of receiving treatment,

85. *See* U.S. CONST. amend VIII; Estelle v. Gamble, 429 U.S. 97, 103 (1976) (noting that "[t]hese elementary principles establish the government's obligation to provide medical care for those whom it is punishing by incarceration").

86. *Prison Health Care Spending Varies Dramatically by State*, PEW CHARITABLE TR. (Dec. 2017), https://www.pewtrusts.org/en/research-and-analysis/articles/2017/12/15/prison-health-care-spending-varies-dramatically-by-state [https://perma.cc/74SP-TW6U] (finding that California was first in health care spending for people incarcerated, spending almost $20,000 per person.).

87. BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., MORTALITY IN STATE PRISONS, 2001–2014 (2016), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5866 [https://perma.cc/Z6F3-9VYY].

88. Julie O'Donaghue, *Louisiana Considers Giving More Old Prisoners a Chance at Parole*, TIMES–PICAYUNE (Apr. 24, 2018, 10:21 PM), https://www.nola.com/politics/2018/04/louisiana_geriatric_parole.html [https://perma.cc/6QM4-QRRV].

89. Arvind Dilawar, '*Cruel and Unusual Punishment': The Questionable State of Medical Care at Louisiana State Penitentiary*, PAC. STANDARD (Oct 19, 2018), https://psmag.com/social-justice/the-questionable-state-of-medical-care-at-louisiana-state-penitentiary [https://perma.cc/R47P-NA8W]; *see also* Second Amended Complaint, Lewis et al. v. Cain et al., 3:15-cv-00318, Rec. Doc. 71, (M.D. La. July 25, 2016).

the abandonment resulted in sores that ate his muscle tissue.[90] The failure to provide constitutionally adequate health care is not limited to state prisons.

Louisiana's jails are similar to its prisons. Whereas 80% of jails nationwide reported zero custodial deaths in 2014, jails in East Baton Rouge Parish and Orleans Parish regularly reported one or more deaths annually.[91] The mortality rate at the New Orleans jail was "four times the national average," though many of the most recent deaths were due to lack of medical and mental health treatment.[92] As of October 2019, two of the three most recent deaths in the New Orleans jail occurred during detoxification treatments under medical supervision.[93] In East Baton Rouge Parish Prison (EBRPP), 25 men—including David O'Quin—died in the jail from 2012 to 2016 due to the failure to provide adequate mental and physical health care, inadequate training for guards, and use of force.[94] David O'Quin, a diagnosed schizophrenic, was left untreated and shackled

90. Amanda Aronczyk & Katie Rose Quandt, *Angola Prison Lawsuit Poses Question: What Kind Of Medical Care Do Inmates Deserve?*, NPR (March 10, 2018), https://www.npr.org/sections/health-shots/2018/03/10/591624904/angola-prison-lawsuit-poses-question-what-kind-of-medical-care-do-inmates-deserv [https://perma.cc/5YBJ-TGJV].

91. *See, e.g.*, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., MORTALITY IN LOCAL JAILS, 2001–2014 (2016), https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5865 [https://perma.cc/RA9D-VQK3].

92. Andrea Armstrong, *The Impact of 300 Years of Jail Conditions*, DATA CTR. RES. (Mar. 2018), https://s3.amazonaws.com/gnocdc/reports/TDC-prosperity-brief-andrea-armstrong-FINAL.pdf [https://perma.cc/6JJS-556E].

93. Dennis Edwards, age 41; Kentrell Hurst, age 36. *See* Matt Sledge, *Coroner Identifies Man Who Died in New Orleans Jail Last Month*, ADVOCATE (Jan. 3, 2018, 4:34 PM), http://www.theadvocate.com/new_orleans/news/crime_police/article_54d20a78-f0d6-11e7-b69e-5b4a15cbba5a.html [https://perma.cc/K3PS-SMG5]; Maria Clark, *Woman Going Through Alcohol, Opioid Withdrawal Dies in New Orleans Jail*, Times–Picayune (May 28, 2018, 5:05 PM), http://www.nola.com/crime/index.ssf/2018/05/woman_going_through_alcohol_dr.html#incart_2box_nola_river_orleans_news [https://perma.cc/V5FC-9VC5]; Emily Lane, *Mother of 5 Who Died While Detoxing in New Orleans Jail Endured 'Difficult Times,' Family Says*, Times–Picayune (May 8, 2019, 1:21 AM), https://www.nola.com/crime/index.ssf/2018/05/inmate_death_new_orleans_detox.html [https://perma.cc/4PSQ-AKVP].

94. *See* Shanita Farris & Andrea Armstrong, *Dying in East Baton Rouge Parish Prison*, PROMISE JUST. INITIATIVE (July 2018), https://justicespromise.org/attachments/article/190/Dying%20in%20East%20Baton%20Rouge%20Parish%20Prison%20Final.pdf [https://perma.cc/7CFA-M4Z9].

for over 170 hours over 13 days.[95] Those shackles cut his ankles; the wounds subsequently became infected by his excrement; and he died on the floor.[96] Preventable deaths also occurred at the jail for Jefferson Parish. Three people committed suicide in the Jefferson Parish jail during August and September of 2017, even after jail officials allegedly knew that all three presented a risk of suicide.[97]

The conditions in prisons and jails also fail to recognize the fundamental dignity of women, often creating and exacerbating trauma in women who are held captive. Incarcerated women have distinct and unique health care needs that jails and prisons are ill-equipped to provide, including gynecological exams, mammograms, and mental health treatment for prior trauma.[98] Childbirth becomes much more dangerous in jail. In Jefferson Parish, for example, two women have given birth alone in their cells, resulting in one miscarriage.[99] On average, a woman in Louisiana serves a sentence of 6.24 years,[100] but the physical and mental effects of her imprisonment may last long after she completes her sentence. In Louisiana, 70% of women serve their sentences in a jail instead of a prison.[101] Jails are designed for short-term detention; therefore, jails often do not offer the specific and long-term services imprisoned women need.

The conditions within the jail or prison may also create additional health risks for people incarcerated. In a survey of its incarcerated members, the International Workers Organizing Committee found that rotten or spoiled food, as well as inadequate and insufficient nutrition and lengthy delays in medical treatment, ultimately endanger the health of people held in prison.[102] Infectious diseases, including hepatitis C,

95. *Id.* at 20.

96. *Id.*

97. Matt Sledge, *Lawsuit: Jefferson Parish Inmate Had Attempted Suicide Days Before Hanging Death*, ADVOCATE (Aug. 8, 2018), https://www.theadvocate.com/new_orleans/news/courts/article_b8e243ce-9b4a-11e8-b93c-979c2cb96a8c.html [https://perma.cc/GCH2-9XTQ].

98. *Position Statement: Women's Health Care in Correctional Settings*, NAT'L COMMISSION CORRECTIONAL HEALTH CARE (Oct. 19, 2014), https://www.nc chc.org/womens-health-care [https://perma.cc/D66A-FPW8].

99. Matt Sledge, *Lawsuit: Woman Forced to Give Birth Alone in Jefferson Parish Jail Cell*, ADVOCATE (Apr. 28, 2018), https://www.theadvocate.com/new_orleans/news/courts/article_b5b71fa8-49a1-11e8-8689-77ed9f1df00d.html [https://perma.cc/5YXG-NJ3N].

100. *July 2018 Briefing Book*, *supra* note 51, at 32.

101. *Id.* As of July 2018, 1293 women out of 1827 are housed in local instead of state facilities. *Id.*

102. *See, e.g.*, INCARCERATED WORKERS ORGANIZING COMMITTEE, CRUEL AND USUAL: A NATIONAL PRISONER SURVEY OF PRISON FOOD AND HEALTH CARE

tuberculosis, and HIV/AIDS, are also more prevalent in prisons.[103] Outbreaks of Methicillin-resistant *Staphylococcus aureus* (MRSA) occurred in jails and prisons in California, Georgia, Mississippi, and Texas due to barriers to medical care, lack of access to hygienic supplies, and overcrowding.[104] Applying a public health lens to incarceration, Ernest Drucker, an international expert on public health, likens conditions to "toxic exposure," which creates lifelong physical and mental disabilities for people incarcerated.[105] These disabilities then impact the families and communities of those incarcerated.[106] The failure to provide adequate health care is compounded by the isolation of some incarcerated people in "restrictive housing."

C. Solitary Confinement

Within prisons and jails, some incarcerated people are housed in "restrictive housing," a broad term that includes living separate and apart from others for administrative or disciplinary reasons. Also known as solitary confinement, restrictive housing usually involves isolation and forms of sensory deprivation. In a study of restrictive housing of five facilities, the Vera Institute of Justice notes:

> In the most-restrictive housing, people were held in their cells for at least 23 hours a day, with up to one hour of out-of-cell

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QUALITY (Apr. 2018), https://incarceratedworkers.org/sites/default/files/resource_file/iwoc_report_04-18_final.pdf [https://perma.cc/2UEK-VWTA].

103. David Cloud, *On Life Support Public Health in the Age of Mass Incarceration*, VERA INST. JUST. 6 (2014), https://storage.googleapis.com/vera-web-assets/downloads/Publications/on-life-support-public-health-in-the-age-of-mass-incarceration/legacy_downloads/on-life-support-public-health-mass-incarceration-report.pdf [https://perma.cc/2GYQ-7GC7].

104. *See* Bianca Malcolm, *The Rise of Methicillin-Resistant* Staphylococcus aureus *in U.S. Correctional Populations*, 17 J. CORRECTIONAL HEALTH CARE 254, 254–65 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3116074/ [https: //perma.cc/5MES-VKWE]; *Methicillin-Resistant Staphylococcus aureus Infections in Correctional Facilities—Georgia, California, and Texas, 2001–2003*, CENTERS FOR DISEASE CONTROL & PREVENTION (Oct. 17, 2003), https://www.cdc.gov/mmwr/preview/mmwrhtml/mm5241a4.htm [https://perma.cc/CG4L-KWGD]; Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES, 1047 (2007), https://academic.oup.com/cid/article/45/8/1047/344842 [https://perma.cc/S9VW-YGGM].

105. ERNEST DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA 113–14, 141–43 (2013).

106. *Id.*

> recreation, often held in a small caged area or a bare concrete space, sometimes with limited access to fresh air and direct sunlight. In some systems, barred indoor enclosures were used for recreation at times. Many cells were small, sparsely furnished, and lacked fresh air, and some had no windows or natural light. Opportunities for therapeutic programming or any form of productive activity were scarce.[107]

These forms of isolated housing can last months, and even years, for incarcerated people. The psychological consequences of extended solitary confinement can include "anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucination, aggression and rage, paranoia, self-mutilation, and hopelessness."[108] In a ground-breaking report, Solitary Watch published people's experiences in solitary confinement in Louisiana. Carl, currently incarcerated in Louisiana, described the psychological trauma he endured in solitary:

> These cells drive men mad. I have personally witnessed one man take his life, another tried to by running the length of the tier and smashing his head into the front bars, sadly for him he still lives, if you can really call it that... Point is the cells are killing men and they know it... These same good men including me will not be good after too much confinement, say over 2 years. Any man that's spent 5 to 10 or more years in these tiny cells should be killed, that includes me, we are no longer in any way shape or form civilized. Our morals have left us...Too much hurt, too much pain, too much confusion, we are lost, lost from God, lost from reality.[109]

The effects of solitary confinement also impact communities outside the prison or jail. Being housed in solitary confinement often means

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107. Léon Digard et al., *Rethinking Restrictive Housing Lessons from Five U.S. Jail and Prison Systems*, VERA INST. JUST. 14 (May 2018), https://storage.googleapis.com/vera-web-assets/downloads/Publications/rethinking-restrictive-housing/legacy_downloads/rethinking-restrictive-housing-report.pdf [https://perma.cc/VNA5-G46L].

108. Jennifer McNulty, *Canada's Landmark Ruling Against Solitary Confinement*, U. CAL. SANTA CRUZ (Feb. 1, 2018), https://www.universityofcalifornia.edu/news/canadas-landmark-ruling-against-solitary-confinement [https://perma.cc/YSX4-RV88].

109. SOLITARY WATCH ET AL., LOUISIANA ON LOCKDOWN 11 (June 2019), https://solitarywatch.org/wp-content/uploads/2019/06/Louisiana-on-Lockdown-Report-June-2019.pdf [https://perma.cc/RR2U-GJG7].

restricted access to visitation or telephone calls, even for incarcerated parents.[110] The traumatic effects of solitary confinement can also last long after release.[111] In addition, research indicates that people directly released from solitary confinement back into their communities committed new crimes sooner than those released from less restrictive housing.[112]

For these reasons, Canadian courts have found that "prisons within prisons"[113] violate their constitution's prohibition against cruel and unusual punishment.[114] Yet, solitary confinement is common across the U.S. According to the Arthur Liman Center for Public Interest Law at Yale Law School, which is the only source for national statistics on restrictive housing, approximately 61,000 people are held in these conditions.[115] Although restrictive housing populations are declining in recent years, prison officials have held approximately 3,500 people for over three years in solitary conditions, 2,000 of whom were held for six years or more.[116]

These isolating conditions, which can produce extreme mental trauma, are often imposed as a form of discipline. The most common rule violations resulting in disciplinary segregation are non-violent and include disobeying an order and defiance.[117] These vague "attitudinal" disciplinary

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110. *Id.* Oliver, currently incarcerated in Louisiana, described how he cannot visit with his six- and nine-year-old daughters due to being housed in solitary.

111. *Hearing on Solitary Confinement Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong. 15 (2012) (testimony of Prof. Craig Haney), https://www.judiciary.senate.gov/imo/media/doc/12-6-19HaneyTestimony.pdf [https://perma.cc/Z3FM-NJQN].

112. David Lovell et al., *Recidivism of Supermax Prisoners in Washington State*, 53 CRIME & DELINQUENCY 633 (2007).

113. Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365-66 (2018).

114. Janice Johnston, *Inmate's Months in Segregation 'Cruel and Unusual Punishment,' Judge Rules*, CBC (Dec. 18, 2018), https://www.cbc.ca/news/canada/edmonton/prystay-remand-centre-edmonton-1.4951751 [https://perma.cc/ZSG3-Y4S3].

115. THE ARTHUR LIMAN PUB. INTEREST PROGRAM & ASS'N. OF STATE CORR. ADM'RS., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 4 (2018), https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf [https://perma.cc/85LW-Y3WH].

116. *Id.* at 5.

117. David Cloud et al., *Safe Alternatives to Incarceration*, VERA INST. JUST. 22–24 (May 2019), https://storage.googleapis.com/vera-web-assets/downloads/Publications/safe-alternatives-segregation-initiative-findings-recommendations/

charges are particularly problematic in light of general evidence of implicit racial bias in decision-making.[118] This consideration may explain why people of color are overrepresented in solitary confinement.[119]

D. Social and Economic Isolation

Even when people are not in solitary confinement, they are still economically and socially isolated from relationships that ultimately could help them upon release. Social and economic isolation includes prison and jail policies that create barriers to social contact and exploit incarcerated people through forced labor and captive marketplaces. The social and economic isolation, though accomplished through different means, ultimately benefit the state by lowering the true cost of incarceration.

Some degree of isolation from free society is inherent in the United States' style of incarceration.[120] Incarceration entails depriving individuals of their personal liberty to move freely,[121] thus limiting their physical connections to their communities and families. Often, the social exclusion of people who are incarcerated is justified on the basis of retribution, incapacitation, rehabilitation, or deterrence, but none of those justifications require complete exclusion.[122] In fact, allowing and nurturing positive relationships, such as the parent–child relationship, can have a beneficial effect for both the incarcerated person and the person with whom the incarcerated person shares a relationship.[123]

Isolation, from family in particular, has a disparate impact on women and racial minorities. Children of incarcerated women are five times more

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legacy_downloads/safe-alternatives-segregation-initiative-findings-recommendations-ldps.pdf [https://perma.cc/AKE9-CLNV].

118. *See, e.g.*, Andrea C. Armstrong, *Race, Prison Discipline, and the Law*, 5 U. CAL. IRVINE L. REV. 759 (2015).

119. Juleyka Lantigua-Williams, *The Link Between Race and Solitary Confinement*, ATLANTIC (Dec. 5, 2016), https://www.theatlantic.com/politics/archive/2016/12/race-solitary-confinement/509456/ [https://perma.cc/AT4A-MLR5].

120. *See, e.g.*, Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L., 259, 268 (2011).

121. NAT'L RESEARCH COUNCIL, *supra* note 55, at 19.

122. *See* Dolovich, *supra* note 120.

123. *See* Cramer et al., *supra* note 63, at 3 (noting that incarceration is considered an "adverse childhood experience" and that positive interactions can mitigate these harmful effects); Jeremy Thomas et al., *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, URB. INST. 6 (June 2005), https://www.urban.org/sites/default/files/publication/50461/310882-Families-Left-Behind.PDF [https://perma.cc/5MAH-2CM8].

likely to end up in foster care than children of incarcerated men.[124] Accordingly, mothers, as sole caregivers of their children, are also more likely to lose their parental rights under the Adoption and Safe Family Act of 1997 (ASFA).[125] The ASFA requires child welfare agencies to initiate parental termination proceedings for any child remaining in foster care for 15 out of 22 months.[126] The overrepresentation of racial minorities within jails and prisons also means that the impact of this social and familial isolation is borne most heavily by racial minority groups.[127]

Parenting while incarcerated is difficult. Despite the well-documented benefits of maintaining family relationships,[128] Orleans and Jefferson parishes—and increasingly jails and prisons nationwide—offer only video visits instead of in-person contact or "through the glass" visits.[129] Video visitation, unlike Skype and Facetime, often cost money and may still require the family to physically travel to the jail or prison to participate. Families complain that the video visits involve audio lags, frozen screens, and other technology malfunctions.[130] For jail and prison administrators, managing video visitation requires fewer personnel and reduces the possibility of families transferring contraband to their incarcerated loved ones. Video visitation also provides a potential source of new revenue for jails and prisons. In Houston, one judge estimated that video visitation fees ($10 for a 20 minute visit) could generate millions of dollars for the county. Remote video visits at Jefferson Parish jail cost $12.99 for a

124. Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2018), https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever [https://perma.cc/8M8D-FFFU].

125. Adoption and Safe Family Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115.

126. *Id.*

127. *See* Holly Foster & John Hagan, *The Mass Incarceration of Parents in America: Issues of Race/Ethnicity, Collateral Damage to Children, and Prisoner Reentry*, 623 ANNALS AMERICAN ACAD. POL. & SOC. SCI. 179 (2009).

128. Bernadette Rabuy & Peter Wagner, *Screening Out Family Time: The For-Profit Video Visitation Industry in Prisons and Jails*, PRISON POL'Y INITIATIVE, 1–2 (January 2015), https://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf [https://perma.cc/RXN8-9YW6].

129. Ramon Antonio Vargas, *Jefferson Parish Jail Touts New Video Visitation Program, but Ban on In-Person Visits Concerns Inmate Advocates*, ADVOCATE (Sept. 27, 2017), https://www.theadvocate.com/new_orleans/news/crime_police/article_a3225930-a3d8-11e7-9d57-8f558cb46340.html [https://perma.cc/5RFA-2YD5]; Rabuy & Wagner, *supra* note 128.

130. Rabuy & Wagner, *supra* note 128, at 10.

20-minute visit.[131] Beyond video visitation, maintaining familial relationships entails high financial costs for families, including expensive transportation to geographically isolated prisons and jails and the high cost of collect phone calls.

Economically, people incarcerated in prisons and jails are a captive market. The Federal Communications Commission (FCC), after years of advocacy by impacted families, capped the price of out-of-state phone calls from prisons to $0.21 a minute.[132] A 2016 FCC order that would cap local and in-state calls from both jails and prisons, however, has been stayed by judicial order.[133] Accordingly, jails in particular continue to exact extremely high rates and fees for telephone contact.[134] Although the Louisiana Public Service Commission has capped telephone per minute rates at 25 to 30 cents, additional fees are also allowed.[135] In addition, local jails may still receive contractual commissions from telephone service providers.[136]

Jails and prisons also receive other direct and indirect revenue from people incarcerated, costs that are borne not only by people incarcerated but also by their friends and families. Similar to telephone costs, people incarcerated are often subject to higher costs for purchases from jail and prison commissaries.[137] Commissaries are the only source for incarcerated

131. *Frequently Asked Questions About Video Visitation at the Jefferson Parish Correctional Center*, JEFFERSON PARISH SHERIFF'S OFFICE, https://www.jpso.com/DocumentCenter/View/778/Online_Inmate_Vistitation_FAQs?bidId= [https://perma.cc/479D-LMEK] (last updated Sept. 21, 2017).

132. *Inmate Telephone Service*, FED. COMM. COMMISSION, https://www.fcc.gov/consumers/guides/inmate-telephone-service [https://perma.cc /FXL4-RG4X].

133. *Id.*

134. Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons and Private Phone Providers*, PRISON POL'Y INITIATIVE (February 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html [https://perma.cc/6DRV-RXX7].

135. Attachment A to General Order of April 20, 2016, LA. PUB. SERV. COMMISSION, *available at*, http://lpscstar.louisiana.gov/star/ViewFile.aspx?Id=9f07a76c-7cfe-4923-9957-21ea67244786 [https://perma.cc/7FJ6-WWTA].

136. *Families Spend Millions on Phone Calls from Louisiana Inmates*, TIMES–PICAYUNE (Jan. 11, 2017), https://www.nola.com/news/crime_police/article_257cf01d-e75f-5438-b8bc-249dedc0a87e.html [https://perma.cc/X6GD-DK7U].

137. Taylor Elizabeth Eldridge, *The Big Business of Prisoner Care Packages*, VOX (Dec. 21, 2017), https://www.vox.com/2017/12/21/16767108/prisoner-care-pack ages-big-business [https://perma.cc/X5CV-AWYL]; *but see* Stephen Raher, *The Company Store: A Deeper Look at Prison Commissaries*, PRISON POL'Y INITIATIVE (May 2018), https://www.prisonpolicy.org/reports/commissary.html [https://perma.cc/RT9L-Z635] (noting that costs can be comparable to purchases

people to purchase supplies, and they are privatized in some cases. For example, in Jefferson Parish, jail commissary sales are anticipated to generate $177,000 in net revenue for the general fund.[138] In a national survey, the Prison Policy Institute found that the majority of commissary purchases were for food and hygiene products.[139] Additionally, jails and prisons have also instituted co-pays for medical services received while incarcerated. People who are unable to pay still receive medical treatment, but the debt is added to their inmate account.[140] These medical co-pays may apply to appointments and over-the-counter treatment that medical personnel prescribe.[141] The National Commission on Correctional Health Care opposes co-pays that restrict access to health care for people incarcerated, in part because people incarcerated are disproportionately poor and have high rates of substance abuse.[142] Even when people have the ability to pay, they may forgo medical care because of the co-pay, potentially leading to more serious conditions that can spread in overcrowded environments.[143] In Louisiana, a $3.00 co-pay for medical services may not seem unreasonable, but, when considering an incarcerated person's likely earnings while working in prison, that co-pay

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in the "free world" but are nevertheless exploitative because of the low earning potential of people while incarcerated and the disparate incarceration of the poor).

138. *Jefferson Parish Sheriff's Office Operating Budgets, General Fund, and Special Revenue Funds*, JEFFERSON PARISH SHERIFF'S OFFICE (June 12, 2018), https://www.jpso.com/DocumentCenter/View/937/Current-Budget [https://perma.cc/EE9Y-R9UZ].

139. Raher, *supra* note 137.

140. *See, e.g.*, Morris v. Livingston, 739 F.3d 740 (5th Cir. 2014) (upholding Texas statute that imposed a flat $100 fee for medical services and noting service is provided even when an incarcerated person lacks sufficient funds).

141. Michelle Andrews, *Even in Prison, Health Care Often Comes with A Copay*, NPR (Sept. 30, 2018), https://www.npr.org/sections/health-shots/2015/09/30/444451967/even-in-prison-health-care-often-comes-with-a-copay [https://perma.cc/CWD5-3ZSP].

142. *Position Statement: Charging Inmates a Fee for Health Care Services*, NAT'L COMMISSION CORRECTIONAL HEALTH CARE (reaffirmed Nov. 2017), https://www.ncchc.org/charging-inmates-a-fee-for-health-care-services [https://perma.cc/4GU8-RTKR].

143. Michael Ollove, *No Escaping Medical Copayments, Even in Prison*, STATELINE (July 22, 2015), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/22/no-escaping-medical-copayments-even-in-prison [https://perma.cc/2W35-G84D].

is the equivalent of $543.75.[144] This direct and indirect revenue—borne primarily by incarcerated people and their families—masks the true cost of incarceration.

Forced prison labor further economically isolates incarcerated people by preventing them from earning financial resources to contribute to their communities while in prison or upon release. Under an exception to the Thirteenth Amendment of the United States Constitution, people sentenced for a crime may be punished through involuntary servitude.[145] Louisiana provides "incentive wages" for people forced to work while incarcerated, and state law caps compensation at $0.20 an hour for standard labor, with up to $1.00 an hour for certified tutors.[146] The standard wages, however, are much lower. People housed in "working cellblocks and maximum custody field lines" are paid a maximum of $0.02 an hour.[147] In addition, incarcerated people are required to choose between receiving credit towards time served ("good time") and incentive wages.[148] These wage policies can undermine a state's investment in re-entry programs by limiting people's ability to support themselves and their families immediately upon release.

If the JRI programs are to succeed in reducing incarceration and reinvesting those savings in programs that enhance public safety, these reforms must take prison conditions into account. People incarcerated experience unsafe conditions, violence, trauma, and solitary confinement. Additionally, these people are without meaningful access to adequate medical or mental health care, their families, or their communities, and they are economically captive to extremely low wages and monopolized businesses.

The implications of prison conditions are clearest for re-entry programs under JRI. The failure to provide mental health care, drug treatment, medical care, and skills training significantly affects the ability

144. Wendy Sawyer, *The Steep Cost of Medical Co-Pays in Prison Puts Health at Risk*, PRISON POL'Y INITIATIVE (April 19, 2017), https://www.prisonpolicy.org/blog/2017/04/19/copays/ [https://perma.cc/26JA-Y2MT].

145. *See, e.g.*, Andrea Armstrong, *Slavery Revisited: Penal Plantation Labor*, 35 SEATTLE U. L. REV. 869 (2012) (differentiating between involuntary servitude and slavery under the Thirteenth Amendment).

146. The term "incentive wages" refers to the provisions embodied in Louisiana Revised Statutes § 15:873 (2018). Additional exceptions apply if the person works for Prison Enterprises, a division of the Louisiana Department of Public Safety and Corrections. *See* PRISON ENTERPRISES, https://www.prisonenterprises.org/ [https://perma.cc/CPP2-MXYC] (last visited Sept. 19, 2019).

147. 22 La. Admin. Code Pt I, § 331(E)(2)(e) (2018).

148. *Id.* § 331(D)(2).

of an ex-prisoner to successfully re-enter general society and may contribute to high recidivism rates.[149] Even the most holistic and well-funded re-entry program would have to potentially ameliorate years of, at best, physical, mental, and social neglect before providing assistance in job training or housing. Furthermore, prison conditions implicate the potential effectiveness of diversion programs.

Prison conditions impact not just individuals incarcerated, but also the communities to which incarcerated people belong. Scholars Bruce Western and Becky Petitt have documented how incarceration exacerbates existing inequality, leading to invisible, cumulative, and intergenerational disadvantages.[150] Many people return from these prison conditions to be fathers and mothers. One in every twenty-eight children nationwide has an incarcerated parent, and prison conditions impact previously incarcerated people's ability to be healthy, supportive parents.[151] Family and community resources may be exhausted through proximity to the exploitative economics of prisons and jails.[152] Additionally, communities are exposed to public health dangers from the inadequate medical and mental health care provided in jails and prisons as hundreds of thousands of people incarcerated return home each year.[153] Furthermore, in these scarce conditions, according to a former prison administrator, prisons may also be criminogenic, meaning that they can cause additional criminal behavior.[154] Thus, prison conditions may aggravate the root causes of crime and enlarge the population at the front-end of the criminal legal system.

III. RETHINKING JAILS AND PRISONS

Prison conditions matter for effective and sustainable criminal justice reform. The conditions in which people serve their sentences during

149. Dolovich, *supra* note 74, at 245–47.

150. Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, 139 DAEDALUS 8, 12 (2010).

151. PEW CHARITABLE TRS. ET AL., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 18 (2010), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf [https://perma.cc/PDQ3-M456].

152. *See, e.g.*, Daniel Wagner, *Meet the Prison Bankers Who Profit From the Inmates*, TIME (Sept. 30, 2014), https://time.com/3446372/criminal-justice-prisoners-profit/ [https://perma.cc/JT7Y-H97S] (detailing the financial cost for families of incarcerated people).

153. David Cloud, *supra* note 103, at 15.

154. Brown v. Plata, 563 U.S. 493, 536 n.10 (2011).

incarceration can radically shape their lives, health, and economic prospects, as well as their communities. Diversion and re-entry may produce initial reductions in the number of people incarcerated, but there is no evidence showing that these programs address the disproportionate impact on—or specific needs of—women and racial minorities. Reform strategies that also encompass conditions may be more sustainable. Diversion and re-entry programs are more vulnerable to shifts in political consensus because these programs are constitutionally discretionary. Prison and jail conditions, however, are subject to constitutional oversight and may, therefore, be more immune to shifts in political opinion.

The first step is understanding the role of prisons and jails in the cycles of incarceration and poverty. Toward that goal, this Article is an intervention designed to connect the dots between broad criminal justice reform efforts and prison conditions. Prison conditions must improve simultaneously with a reduction of the number of people incarcerated.

This argument is not uncontroversial.[155] For some, prisons should be places of punishment and deprivation. Either because harsh conditions are perceived as deserved or as a deterrent to future crime, the unifying theme is that harsh conditions are central to the operation of the prison.[156] As a practical matter, though, the degree of punishment can vary widely depending on the custodial facility. Although the sentence of years may be the same, the conditions can be drastically different. In addition, this argument fails to address conditions in jails, which in Louisiana often house both convicted people and people awaiting trial, that is, people who are innocent unless proven guilty. Regardless, if society intends the harms

155. A full accounting of the nuances of these positions is beyond the scope of this article, which connects prison and jail conditions to criminal justice reform. For a deeper discussion, see MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS (2006) (discussing the historical and political aspects of a punitive turn in corrections); AMY LERMAN, THE MODERN PRISON PARADOX: POLITICS, PUNISHMENT, AND SOCIAL COMMUNITY 31–34 (2013); Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 581–87 (2006).

156. For example, Louisiana legislators enacted the following, "It is therefore the further intent of the legislature that inmates housed in any jail, prison, correctional facility, juvenile institution, temporary holding center, or detention facility ought not be afforded a standard of living above the poverty level at taxpayers' expense and therefore, the use of televisions and telephones for the convenience and entertainment of inmates should be prohibited." Act No. 113, 1994 La. Acts 990. After legislative passage, the Louisiana Law Institute struck the above paragraph from Louisiana Revised Statutes § 15:732, pursuant to the Institute's authority to strike declarations of policy and construction. LA. REV. STAT. § 15:732, Editor's and Revisor's Notes (2015).

that jail and prison conditions create, then these conditions should be a matter of public discussion. The current conditions in prisons and jails were not ordered by a judge or imposed by a democratically elected legislature or executive; instead, the conditions are the product of individual facility decisions, lack of funding, and a lack of accountability. Most importantly, prison and jail conditions were not the result of either judicial order or public deliberation. Moreover, a recent study of crime and incarceration rates in Louisiana demonstrates that caging more people does not improve public safety or decrease crime rates.[157] Harsher conditions may actually contribute to increased recidivism, according to one study of federal imprisonment.[158]

Further, historical evidence shows that lawsuits to improve prison conditions have sometimes led to more, not less, incarceration. Professor Heather Schoenfeld traces the expansion of Florida prison capacity to litigation as demonstrative of the broader perils of improving prison conditions.[159] Publicly administered jails and prisons rely on—and sometimes receive commissions from—a suite of private corporations to provide health care, transportation between facilities, food, telecommunications, and commissary, among other services. Even when private corporations are not at issue, local administrators of jails and prisons wield additional power and authority. Thus, improving prison conditions can create incentives to actually expand, instead of reduce, incarceration in the U.S.

Second, states—mindful of the above concerns—can and should uphold the human dignity of people incarcerated. In so doing, states can reinforce the current limited successes of criminal justice reforms and improve outcomes for incarcerated people and our communities. At a minimum, people should not end their judicially set sentences of incarceration worse off than when they entered. People returning from prison have paid their debts through serving their judicially ordered sentences. Although the focus of this Article has been to demonstrate the relationship between prison conditions and criminal justice reform, the research also illuminates potential general and specific strategies for future advocacy.

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157. *Louisiana Fact Sheet: What Caused the Crime Decline?*, BRENNAN CTR. JUST. (Feb. 12, 2015), https://www.brennancenter.org/analysis/louisiana-fact-sheet-what-caused-crime-decline [https://perma.cc/P653-ZWAG].

158. M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-based Approach*, 9 AM. L. & ECON. REV. 1 (2007).

159. *See* Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731 (2010).

A. General Strategies

One of the primary difficulties with connecting prison conditions to broader criminal justice reform efforts is the lack of systematic data collection by the correctional authorities themselves.[160] To the extent that data is tracked by administrators, the data usually concerns a person's criminal past and his or her behavior within the facility. The public does not, however, have aggregate information on who exactly is within the prison or jail beyond the person's race, age, and the crime he or she committed. More robust aggregate data—which would include a person's prior educational or vocational background, family characteristics, and health diagnoses—could further inform other re-entry reform efforts. Beyond aggregate characteristics of people incarcerated, I have elsewhere argued for prison and jail administrators to collect data that enhances their ability to keep incarcerated people safe, such as use of force statistics and health care usage.[161] Collecting and publicizing this data would also be consistent with the JRI's emphasis on data-driven approaches to measure reform and reinvest savings in areas that ultimately enhance public safety.

Data alone, however, does not tell the full story. No one knows the impact of prison conditions better than the people incarcerated and their families. More importantly, the experiences of people incarcerated can help dictate priorities in addressing prison conditions. In Louisiana, advocates with experiences in incarceration publicized how women in prison were denied adequate sanitary supplies. In May 2018, at the urging of formerly incarcerated women, Louisiana enacted the Dignity for Incarcerated Women's Act—which provides free hygiene and sanitary products for imprisoned women—and enacted portions of the Prisoner Rape Elimination Act's guidelines on searches of women.[162] Incarcerated women also supported the newly created Louisiana Women's Incarceration Task Force, composed of government officials and experienced community members, to conduct a "comprehensive review of

160. *See, e.g.*, Andrea Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 463–64 (2014) (listing how various categories of data on conditions for those incarcerated are nonexistent or incomplete).

161. *Id.* (listing specific data points for collection).

162. 2018 La. Act No. 392, http://www.legis.la.gov/legis/ViewDocument.aspx?d=1101161 [https://perma.cc/6VDD-WMDB]. For more about one of the organizations critical to passage of the bill, see OPERATION RESTORATION, https://or-nola.org/ [https://perma.cc/HZ74-2GLH] (last visited Sept. 19, 2019).

the state's criminal justice system as it relates to women."[163] Many of the recent criminal justice reform efforts in Louisiana—from restoring the right to vote to people on probation or parole[164] to ending non-unanimous jury convictions—[165] have demonstrated both the unique power and insight of the formerly incarcerated.

Enhanced transparency through systematic data collection and deeper engagement with people directly impacted by our jails and prisons can help build ongoing accountability. Although transparency does not equal accountability, the two concepts often operate in tandem.[166] The decentralized nature of incarceration—particularly in Louisiana where more than half of the people serving sentences are incarcerated in local jails instead of state-operated prisons[167]—makes it particularly difficult to enact conditions reform. Advocates and policymakers may want to consider broader accountability mechanisms to ensure that the reforms that are enacted become institutionalized and sustainable.[168]

Other JRI reforms point to another broad area of potential reform, which is reducing the "user-fee" approach to prisons and jails. Louisiana prison administrators estimated in 2015 that it costs approximately $55 per day to house a person at Louisiana State Penitentiary.[169] As Part II demonstrated, however, people incarcerated subsidize the operation of the facilities that hold them through co-payments, commissions, and nearly free labor in maintaining the facility. Similar to JRI efforts to reduce financial barriers to re-entry through tailoring fines and fees to a person's ability to pay or increasing diversion through streamlining pre-trial release without payment, prison conditions reform could shift from viewing

163. 2018 La. House Concurrent Resolution 27, https://legiscan.com/LA/text/HCR27/2018 [https://perma.cc/MH9Z-UAMC].

164. *See Voting Rights*, VOICE OF THE EXPERIENCED, https://www.vote-nola.org/voting-rights.html [https://perma.cc/9772-HB9Z] (last visited Sept. 19, 2019).

165. *See* UNANIMOUS JURY COALITION, https://www.unanimousjury.org/ [https://perma.cc/5MEA-EDFF] (last visited Sept. 19, 2019).

166. *See, e.g.*, Armstrong, *supra* note 160, at 458–69 (distinguishing between transparency and accountability).

167. *Demographics Briefing Book*, LA. DEP'T PUBLIC SAFETY & CORRECTIONS 19, (Dec. 31, 2018), https://www.doc.la.gov/media/1/Briefing%20Book/Jan%202019/2.demographics.pdf [https://perma.cc/563H-ZX4G].

168. For an overview of different types of accountability mechanisms, see Michele Deitch, *Independent Correctional Oversight Mechanisms Across the United States: A 50-State Inventory*, 30 PACE L. REV. 1754 (2010).

169. Julie O'Donaghue, *Amid Budget Cuts, Louisiana Keeps Prison Costs Down in Ways Other States Don't*, TIMES-PICAYUNE (Sept. 28, 2016), https://www.nola.com/news/politics/article_9116528a-0bd4-560d-8ca2-45c31fd6357a.html [https://perma.cc/49PP-RPQS].

people incarcerated as sources of revenue to a more holistic approach. Moving the economic costs to the government for communications, health care, and labor would also make the true economic burden of incarceration more apparent.

B. Specific Strategies

The conditions detailed in Part II of this Article also point toward potential specific strategies. First, reform advocates could focus on enforcement of existing state guidelines for humane and constitutional conditions. Several states, including Louisiana, have minimum standards for jail conditions, but enforcement by responsible authorities is lacking.[170] Strategies to enhance enforcement could include petitioning the responsible agency for enforcement, requesting records of prior completed audits from individual facilities, and even updating the standards themselves to include mandatory enforcement.

Second, reform advocates could focus on state and local implementation of existing federal laws. For example, federal law provides standards for preventing sexual assault and sexual harassment that could be implemented more robustly in local jails.[171] States could also apply existing federal labor laws to incarcerated people, despite court opinions holding that incarcerated people are not covered by federal labor law.[172]

Third, reform advocates could import knowledge from experts in their specific fields beyond the prison or jail walls. The American College of Obstetrics and Gynecology, for example, has specific guidance for reproductive health care for incarcerated women and adolescent females.[173] Non-governmental organizations and professional associations

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170. *See* LA. MINIMUM JAIL STANDARDS (2010), http://www.lcle.la.gov/programs/uploads/min_jail_standards_June_2010.pdf [https://perma.cc/U6E4-MYNB].

171. Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601–15609 (2003).

172. *See, e.g.*, Alexander v. Sara, Inc., 721 F.2d 149, 150 (5th Cir. 1983) (affirming the district court's opinion that an "inmate" was not covered by the Fair Labor Standards Act when working for a private employer).

173. Committee Opinion, Reproductive Health Care for Incarcerated Women and Adolescent Females, (August 2012), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Reproductive-Health-Care-for-Incarcerated-Women-and-Adolescent-Females [https://perma.cc/JW2G-B7S9].

often have specific issue area expertise and have identified best practices in a range of areas from health care to family visitation policies.[174]

These strategies—enforcement, implementation, and importation—are specific to improving prison and jail conditions, but they would also complement general strategies to improve transparency and would grow from people who have the most direct incarceration experience. This initial sketch of possibilities is only a first step to fully integrating prison and jail conditions into the broader criminal justice reform conversation.

CONCLUSION

Directly addressing prison and jail conditions is the true test of criminal justice reform. Conditions are the essential missing link between reform of diversion and re-entry programs. The experiences of people in jails and prisons can either undermine or support reform efforts. Prison conditions, unlike diversion or re-entry initiatives, force members of society to discuss how we punish each other. More than half of all Americans have had a family member incarcerated,[175] and what happens in jails and prisons ultimately affect us all. Improved conditions can help break cycles of incarceration, enhance economic and social ties post-release, build equity for disproportionately impacted groups, and ultimately help build a safer society. As such, addressing jail and prison conditions should be an essential part of any future discussions to reduce incarceration.

174. *See, e.g.*, *Standards for Health Services in Prisons*, NAT'L COMMISSION CORRECTIONAL HEALTH CARE (2018); Lindsey Cramer et al., *supra* note 123.

175. FWD.US, EVERY SECOND: THE IMPACT OF THE INCARCERATION CRISIS ON AMERICA'S FAMILIES (Dec. 2018), https://everysecond.fwd.us/downloads/EverySecond.fwd.us.pdf [https://perma.cc/32BA-QDQJ].