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## CREATING CORRECTIONAL ALTERNATIVES FOR NONVIOLENT WOMEN OFFENDERS AND THEIR CHILDREN

MYRNA S. RAEDER\*

In 1999, the explosion of the female correctional population finally began to attract significant public attention. A national news magazine published an investigative report about intergenerational crime committed by the daughters of female offenders.<sup>1</sup> *Nightline* broadcast a series of programs that profiled female offenders, many of whom were incarcerated for nonviolent drug-related offenses and many of whom had children. In December 1999, the Bureau of Justice Statistics issued a Special Report entitled *Women Offenders*<sup>2</sup> that was distributed at the first National Symposium on Women Offenders. That Conference, sponsored by the Office of Justice Programs of the Department of Justice brought together correctional officials, probation and parole officers, sheriffs, service providers, prosecutors, defense counsel, judges, legislators and academics from numerous jurisdictions to share ideas and to form action plans to address the myriad issues concerning women offenders. Both Assistant Attorney General Laurie Robinson, head of the Office of Justice Programs and Attorney General Janet Reno, shared their thoughts with the group and listened to suggestions identified by many of the assembled state and local teams.

One of the key recurring themes addressed at the Symposium and in the media is how to deal with children, particularly when the incarcerated female is a single mother. In 1994, Congress addressed this same problem when it enacted the Family Unity Demonstration Project.<sup>3</sup> Its response was to authorize residential facilities to be built that could accommodate nonviolent offenders and their children. Unfortunately, that statute has never been implemented, and its funding schedule only extends to the year 2000. Therefore, at the request of the Criminal Justice Section of the American Bar Association, the ABA House of Delegates approved a resolution on February 5, 2000 urging the funding and immediate reauthorization of this legislation in

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\* Immediate past chair of the Criminal Justice Section. Professor Raeder gratefully acknowledges the assistance of Mary Shilton

1. Toni Locy, *Like Mother, Like Daughter*, U.S. NEWS & WORLD REPORT, Oct. 4, 1999. Ms. Locy was also a luncheon speaker at the National Symposium on Women Offenders.

2. Lawrence A. Greenfield & Tracy L. Snell, *Women Offenders*, Bureau of Justice Statistics (NCJ 175688, Dec. 199).

3. 42 U.S.C. § 13881.

order to better serve offenders, their children, and the public. What follows is ABA Resolution 102A which now embodies ABA policy, and the Report that supported its adoption.

AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION  
RECOMMENDATION<sup>4</sup>

RESOLVED, That the American Bar Association urges the immediate funding and reauthorization of the Title XVI - Family Unity Demonstration Project, passed as part of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 13881, et. seq.

REPORT<sup>5</sup>

This report is submitted in support of the Resolution urging the reauthorization and funding of the Family Unity Demonstration Project. In 1994, Congress enacted the Family Unity Demonstration Project (the "Project"), whose stated purpose is to evaluate the effectiveness of community correctional facilities in helping to:

- (1) alleviate the harm to children and primary caretaker parents caused by separation due to the incarceration of the parents;
- (2) reduce recidivism rates of prisoners by encouraging strong and supportive family relationships; and
- (3) explore the cost effectiveness of community correctional facilities.<sup>6</sup>

The Project was specifically designed to house eligible offenders and their children under seven years of age in residential facilities that were not within the confines of a jail or prison and which would provide a safe, stable, environment for children.<sup>7</sup> Eligible parents included nonviolent offenders facing or sentenced to a term of not more than seven years, who had acted as a primary caretaker of the child prior to incarceration or had just given birth and were willing to assume a primary caretaking role.<sup>8</sup> Parents guilty of neglect or

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5. The report relies heavily on the following three sources: A.B.A. SEC. CRIMINAL JUSTICE L. REP. 104B (1996), submitted by the Criminal Justice Section in August 1996 in support of its resolution to support initiatives fostering family ties with prisoners; Leslie Acoca and Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Women Offenders and Their Children*, 11 STAN. L. REV. (forthcoming, 1999); and Myrna S. Raeder, *Gender and Sentencing: Single Mothers, Battered Women and Other Sex-Based Anomalies in the Gender Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905 (1993). Report submitted by Bruce M. Lyons, Chairperson of the Criminal Justice Section. Please note that the footnotes contained herein have been renumbered and expanded from those in the original report

6. 42 U.S.C. § 13881 (1994).

7. 42 U.S.C. § 13882 (1994).

8. *Id.*

convicted of crimes against their children are explicitly excluded.<sup>9</sup> The residential facilities would provide programs to improve the stability of the parent child relationship, as well as alcoholism and drug addiction treatment, and services to help inmates obtain adequate housing, suitable education and employment and child care upon their release.<sup>10</sup> The law authorized appropriations on a yearly basis from 1996 through 2000, totaling nearly \$20 million,<sup>11</sup> to benefit both state and federal prisoners. Unfortunately, despite the dire need for this project, Congress has appropriated NO funding for this Act since the time of its inception. The funding schedule included in the Act is now nearing its end without any likelihood that Congress will live up to its commitment to incarcerated parents and their children. Yet, the paucity of such residential facilities, particularly at the federal level, is a national embarrassment in light of the burgeoning ranks of incarcerated nonviolent female drug offenders.

The past twenty-five years have witnessed an explosion in the female inmate population. Women prisoners used to be an aberration in the criminal justice system. Approximately two-thirds of all women sentenced in federal court were given probation, and women comprised less than 5% of all prisoners. That was before the war on drugs, with its focus on mandatory minimums. The most recent statistics show that 72% of women incarcerated in the federal system are drug offenders.<sup>12</sup> Minority women are particularly hard hit. For example, the number of Hispanic female inmates increased 71% from 1990 to 1996.<sup>13</sup> This effect has even been noted in official publications. One report commented that “[a]s a consequence of the dramatic growth in the number of drug offenders, an increasing percentage of Federal prisoners are black or Hispanic.”<sup>14</sup> Compared with their number in the general population, African American and Hispanic women are disproportionately represented in the segment of women who are incarcerated.<sup>15</sup>

The dramatic increase in the number of incarcerated women, both in absolute terms and as a percentage of the overall prison and jail populations, highlights the need for attention to problems faced by children when their parents are detained. By the end of 1997, women were 15% of those being

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9. *Id.*

10. *Id.*

11. 42 U.S.C. § 13883 (1994).

12. Lawrence A. Greenfield and Tracy L. Snell, *Women Offenders*, Bureau of Justice Statistics (NCJ 175688, Dec. 1999).

13. See Darrell K. Gilliard & Allen Beck, *Prisoners in 1997*, Bureau of Justice Statistics, table 12 (NCJ 170014, Aug. 1998).

14. *Id.* at 13.

15. See AMNESTY INT’L REP., *Not Part of My Sentence Violations of the Human Rights of Women in Custody* Sec. III(1) (Mar. 1999).

sentenced in federal court,<sup>16</sup> and at the end of 1998 were 7.5% of federal inmates.<sup>17</sup> By mid year 1998, there were more than 80,000 female prisoners, nearly 9,000 of whom were in federal custody,<sup>18</sup> as well as approximately 64,000 women who were jail inmates.<sup>19</sup> The vast majority of women in correctional facilities have children, many of whom are under eighteen years of age. It has been estimated that some 200,000 children under age eighteen have mothers who are incarcerated.<sup>20</sup> Needless incarceration of single mothers and primary caretakers punish children as much if not more than their mothers.<sup>21</sup>

In federal court, sentencing options for mothers with children are particularly bleak. Policy statement 5H1.6 of the Sentencing Guidelines explicitly mandates that "family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."<sup>22</sup> However, 88% of single parents are mothers.<sup>23</sup> Not surprisingly, most of the single parenting departure cases involve females.<sup>24</sup> When fathers are incarcerated, their wives or former wives overwhelmingly care for their children.<sup>25</sup> In contrast, when mothers are incarcerated, surveys find that fathers seldom have custody of the children. In *United States v. Concepcion*,<sup>26</sup> Judge Weinstein recognized that "[r]emoving the mother in such a matriarchal setting destroys the children's main source of stability and guidance and enhances the possibility of their engaging in destructive behavior." Ironically, the Guidelines' attempt to legislate gender equality in sentencing has backfired against the very women who are the best candidates for alternative sentencing. In other words, female offenders who bear sole responsibility for the care of their children fare no better than individuals who have openly scorned any responsibility for acknowledging their children, caring for them, or financially contributing to their support.

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16. U.S. SENTENCING COMMISSION ANN. REP. 35 (1997).

17. *Federal Bureau of Prisons Quick Facts* (updated Dec. 31, 1998) <<http://www.bop.gov>>.

18. Darrell K. Gilliard, *Prison and Jail Inmates at Midyear 1998*, Bureau of Justice Statistics Bulletin, tables 3 & 4, at 4 (Mar. 1999).

19. *Id.* at 6.

20. AMNESTY INT'L REP., *supra* note 12, at III.

21. *See generally* BARBARA BLOOM & DAVID STEINHART, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, *WHY PUNISH THE CHILDREN?* (1993) (reviewing survey data on the characteristics of incarcerated mothers and their children); KATHERINE GABEL & DENISE JOHNSTON, EDS., *CHILDREN OF INCARCERATED PARENTS* (1995).

22. *See United States v. Concepcion*, 795 F. Supp. 1262, 1282 (E.D.N.Y. 1991).

23. Bureau of the Census, *Marital Status and Living Arrangements* at 11 (Mar. 1992).

24. *See generally* Alan Ellis & Samuel A. Shummon, *Let Judges Be Judges! Post-Koon Downward Departures, Part VII: Family Ties and Responsibilities*, 14-Sum CRIMINAL JUSTICE (1999).

25. Lawrence A. Greenfield & Stephanie Minor-Harper, *Women In Prison*, Bureau of Justice Statistics Special Report 6 (NCJ 145321, Mar. 1991).

26. 795 F. Supp. 1262, 1282 (E.D.N.Y. 1992).

The public appears to have forgotten the societal costs that such incarceration imposes: costs borne most heavily by the dependent children of nonviolent women offenders. While termination of parental rights has always been a concern of incarcerated mothers, the Adoption and Safe Families Act of 1997 ("ASFA") is likely to further disrupt attempts at family unity after release by shortening the timing for termination of parental rights for children in foster care.<sup>27</sup> Indeed, the implementation of ASFA has the potential of depriving virtually all mothers who are incarcerated for more than fifteen months of any children who are not in the care of relatives. Even without the threat of termination, women offenders often serve their sentences in institutions further from home than male inmates, because of the smaller number of female facilities. Thus, visiting can be problematic, even if the institution is sensitive to promoting parental bonding. The creation of additional community correctional facilities for nonviolent mothers would ensure the maintenance of strong family ties and keep children from being placed outside their home.

Moreover, it is currently acknowledged that women in prison "have some needs that are quite different from men's, resulting in part from women's disproportionate victimization from sexual or physical abuse and . . . are more likely than men to have become addicted to drugs, to have mental illnesses, and to have been unemployed before incarceration,"<sup>28</sup> in addition to their responsibilities for children. Some commentators believe that current correctional practices that are not gender specific can be harmful to women and their families.<sup>29</sup> Lack of female-specific programs is well documented.<sup>30</sup> The Family Unity Demonstration Project would help alleviate the shortage of programs aimed at drug and substance abuse for female offenders, while offering a stable environment for their children.

In general, the implementation of the Family Unity Demonstration Project would have constituted a positive step towards bettering the lives of parents whose crimes did not warrant imprisonment that separates them from their children. In Canada, it has been estimated that over half of all females in prison could be successfully reintegrated through safe release and gender-specific community-based services.<sup>31</sup> Innovative community programs for female

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27. Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. §§ 620-79 (1991)).

28. Merry Morash, Timothy S. Bynum, and Barbara A. Koons, *Women Offenders: Programming Needs and Promising Approaches* 1, National Institute Of Justice Research in Brief (Aug. 1998).

29. See K. Kendall, *Creating Real Choices: A Program Evaluation of Therapeutic Services at the Prison for Women*, 6 LONG TERM OFFENDERS 1-4 (No. 4, 1997).

30. See generally Merry Morash, *Findings from the National Study of Innovations and Promising Programs for Women Offenders*, National Institute of Justice Research Project (1996).

31. L. Motiuk & Kelley Blanchette, *Assessing Female Offenders: What Works*, International Community Corrections Association (1998).

offenders do exist in the United States, but usually have scant resources regardless of how effective they are.<sup>32</sup> A number of factors have been identified as inhibiting the use of alternative sanctions, including “unavailability of alternatives, lack of money or other resources and community resistance.”<sup>33</sup> Federal funding would help provide necessary resources. Unlike the Congressional failure to appropriate funding, California fully funded its Pregnant and Parenting Women’s Alternative Sentencing Program Act.<sup>34</sup> Even so, planning and building a community corrections facility took five years, with the first facility opening in 1999. Further delay of federal funding will continue to deprive state and federal female offenders of residential alternatives well into the millennium.

While the federal Act was prompted by the plight of women offenders, it does not exclude males who fit its criteria. Concerns regarding the exposure of a child to a prison environment are eliminated because the Act specifically provides for residential facilities in the community and not within the confines of a jail or prison. It is time to urge Congress to abide by its legislative commitment to the Family Unity Act Demonstration Project. Given the timing of the appropriation schedule, this would require reauthorization of the Act as well as its funding.

The ABA has already enacted policy-supporting initiatives that preserve and promote family accessibility to detention facilities. In 1996, the following Criminal Justice Section Resolution was approved by the ABA House of Delegates:

RESOLVED, that the American Bar Association supports initiatives that seek to preserve and promote healthy relationships between children and their parents in correctional custody. Such initiatives would consider family accessibility to the facility in making assignment of inmates; would assist parents in correctional custody in developing parenting skills; would allow extended contact visitation by such parents and children; and would support the emotional well-being of the children.

The Report accompanying that resolution noted that it was “premised on the proposition that it is important both for the rehabilitation of the parent and to the emotional well-being of the child that the parent-child relationship continue while the parent is in correctional custody. . . . The preservation and promotion of the parent-child relationship, the continuity of contact between parent and child, and the enhancement of parenting skills are all essential to

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32. See, e.g., James Austin, Barbara Bloom and Trish Donahue, *Female Offenders in the Community: An Analysis of Innovative Strategies and Programs*, National Council on Crime and Delinquency (1992); AMERICAN CORRECTIONAL ASSOCIATION, *MATERNAL TIES: A SELECTION OF PROGRAMS FOR FEMALE OFFENDERS* (Cynthia Blinn ed., 1997).

33. Morash, *supra* note 30, at 6.

34. CAL. PENAL CODE §§ 1174 – 1174.9 (1994).

both the maintenance of the relationship and the successful reunification upon the parent's release."<sup>35</sup>

This sentiment also directly supports the rationale for Congress' enacting the Family Unity Demonstration Project. ABA policy has long opposed mandatory minimum prison sentences for drug offenders, supported the diversion of eligible defendants to alternate dispositions, and the development and implementation of sanctions in lieu of prison and jail terms for nonviolent offenders. Chapter 23 of the ABA Standards for Criminal Justice, which addresses "The Legal Status of Prisoners," provides that correctional facilities should assure that "it is possible for women prisoners to keep their young children with them for a reasonable time, preferably on extended furlough or in an appropriate community facility."<sup>36</sup> The resolution is also consistent with the ABA-approved Model Adult Community Corrections Act.<sup>37</sup> In August 1999, the ABA recommended the establishment of a national commission to reevaluate sentencing and correctional practices. The current resolution builds on existing ABA policy to specifically endorse the funding of community correctional facilities for parents and their children who would be eligible under the terms of the Family Unity Demonstration Project Act. It is time to urge Congress to return to its good intentions and desist its shortsighted failure to fund the Act.

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35. A.B.A. SEC. CRIMINAL JUSTICE L. REP. 104B (1996).

36. A.B.A. STANDARDS FOR CRIMINAL JUSTICE § 23-5.7(b) (1980).

37. A.B.A. MODEL ADULT COMMUNITY CORRECTIONS ACT § II-A (1992).



