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GENDER AND INCARCERATION—FAMILY RELATIONSHIPS AND
THE RIGHT TO BE A PARENT

*Carol Strickman**

INTRODUCTION

Many prison features raise gender issues. This article examines three California programs that concern prisoners' relationships with their children and other family members. California's mother-infant programs were created as innovative alternatives to traditional prison, where pregnant women and mothers of young children could live in community-based housing with their children up to age six. The Alternative Custody Program was designed for women prisoners and for parent-caregivers of minor children to be released early from prison to reside in a community facility or at home. For prisoners in traditional prison, the regular visiting program provides an important avenue to maintain family ties.

The information in this article was gathered during the course of my experience over the last eight years as a staff attorney at Legal Services for Prisoners with Children (LSPC). Founded in 1978, LSPC began as one of the first organizations in the United States to promote the rights of incarcerated parents and their children through litigation, legislative advocacy, and policy change. We began with a focus on civil legal issues affecting parents in prison, including dependency, foster care, termination of parental rights, alternatives to incarceration, medical care, and immigration. We continue to be a policy advocacy organization, with a continuing priority in the area of prisoners and their families. We have been directly involved in the programs discussed here.

Overall, we have observed that these laudable programs are often undermined by the dominant prison culture that emphasizes security and punishment over family relationships.

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I. MOTHER-INFANT PROGRAMS

What happens to the newborn babies of incarcerated women who want to mother their children? The best plan is to release the new mother back to the community with her baby. When that is not possible, generally due to the seriousness of pending charges or an unchangeable jail or prison sentence, alternative “prison-like” housing may be an option to allow the mother and baby to live together. I am unaware of any such programs in California *county jails*. However, the state prison system has a mother-infant program. The first Mother-Infant Care facility was started reluctantly by the state corrections department¹ in 1980. It eventually grew to house over 100 women at a time in seven separate facilities. In 2012, it was radically cut back to only one facility.

A. *Creation of the Programs*

Pursuant to legislation enacted in 1978,² the California Prisoner-Mother Program (CPMP) opened its doors in 1980. The law required CDC to establish a housing option for women where they could live with their babies or young children. Generally, eligible women had to have shorter, less serious sentences and be pregnant or have a child or children less than twenty-six months old (later raised to six years by legislative amendment).³

From the beginning, there were serious problems with access to the programs. It was very difficult for any incarcerated woman to apply or be accepted. Five years after the program started, fewer than fifteen women were participating. Many women only heard about the program through other prisoners. Some had to wait over two years to be notified of their application status. “Delays were often the result of applications being lost or incorrectly processed.”⁴

1. At that time, the corrections department was called the California Department of Corrections (CDC). In 2005, its name was changed to the California Department of Corrections and Rehabilitation (CDCR). Both abbreviations are used in this article.

2. CAL. PENAL CODE §§ 3410–24 (West 2017).

3. CAL. PENAL CODE § 3416(a) (West 2017).

4. KAREN SHAIN, CAROL STRICKMAN & ROBIN REDERFORD, LEGAL SERVS. FOR PRISONERS WITH CHILD., CALIFORNIA’S MOTHER-INFANT PRISON PROGRAMS: AN INVESTIGATION 4 (2010), http://www.prisonerswithchildren.org/pubs/cmp_report.pdf.

Finally, in 1985, after five years of administrative advocacy, LSPC sued CDC to reform and expand this program. As LSPC's former director described, "At th[at] time . . . , there was barely one functional program, and they were about to close their doors because the DOC refused to give them more than two or three women at a time."⁵ That case, *Rios v. Rowland*,⁶ was settled favorably to plaintiffs in 1990. It required the prisons to inform women about the program within one week of their entry into prison, to provide meaningful assistance to women in applying and in appealing denials, to revamp the appeals process, to accept applications from pregnant women before delivery, and to train staff in correct procedures for placement.⁷ After the settlement, there were seven functional programs.⁸

In order to further address the serious problem that pregnant women were not being allowed to apply for the program until after their babies were born, LSPC staff worked to change this policy in the legislature, as well as the courts. Later, rules were implemented establishing that (1) pregnant women could be placed directly into the program before delivery; (2) women convicted of manslaughter could be considered if they committed the crime in response to a physically abusive male partner; and (3) the CDC could consider mitigating circumstances to approve an otherwise ineligible applicant.⁹

The Family Foundations Program (FFP) opened in 1999 pursuant to 1994 legislation.¹⁰ This program differed from the CPMP in several significant ways. The most important was that a woman was sentenced to FFP by her judge and was transported there directly from county jail, rather than being transported to state prison first. Second, FFP was specifically a drug treatment

5. Silja J.A. Talvi, *What We Do to Women in Prison: An Interview with Longtime Prison Rights Activist and Lawyer Ellen Barry*, SOJOURNER: THE WOMEN'S F., May 1999, at 16.

6. *Rios v. Rowland*, No. 333240 (Super. Ct. of Cal. 1990) (on file with author).

7. Settlement Agreement, *Rios v. Rowland*, No. 333240 (Super. Ct. of Cal. 1990) (on file with author).

8. See Talvi, *supra* note 5, at 16.

9. CAL. DEP'T OF CORR. AND REHAB., COMMUNITY PRISONER MOTHER PROGRAM (CPMP) ELIGIBILITY CRITERIA (2012), http://www.cdcr.ca.gov/Adult_Operations/FOPS/docs/COMMUNITY%20PRISONER%20MOTHER%20PROGRAM%20CRITERIA%202012.pdf [<https://perma.cc/JK4D-QDTS>].

10. CAL. PENAL CODE § 1174 (West 2017).

program. Third, unlike the CPMP, the mother did not serve her full sentence in the program. Rather, she served one year in the program and then was paroled to one year of aftercare. Thus, in this program, she could serve more or less than her original sentence.¹¹ Fourth, the FFP facilities were larger and less community-based than several of the CPMP facilities.

B. *Benefits and Problems with the Programs*

In 2009, I was part of an LSPC team that visited all six of the current mother-infant programs. We toured the facilities and met with the women housed there. Each was managed by outside contractors, with CDCR oversight. Each was different, and they all had plusses and minuses. Some were situated in remote rural locations where the women rarely left the facilities; others were located in cities and the women could get passes to leave for specific purposes. Location also affected the availability of volunteers. The three CPMP facilities were in older buildings—one so decrepit we were not allowed to tour it—and another had dorm housing. The three Family Foundations programs were housed in new buildings with private rooms and communal space. All were under-enrolled, even though California's prison population had soared.¹²

They all had good on-site and off-site childcare services, some managed by Project Head Start, and the women worked in the childcare area. However, the facilities were not otherwise child-friendly. For example, the schedules were regimented. Also, children lost privileges when their mothers were disciplined. Programming (counseling, groups, job training, etc.) for the moms varied. However, it was probably more enriched than regular prison programming. The moms all seemed to have job assignments plus classes or group sessions or both.

We observed that the Family Foundation Program served primarily white mothers, while the CPMP mothers were primarily

11. However, if she had any disciplinary problems or violated her release conditions, she could be "rolled up" and sent to state prison, and her child would be sent to live elsewhere.

12. CAL. DEP'T OF CORRS. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT JUNE 30, 2009 (2009), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad0906.pdf [<https://perma.cc/DHB7-DDWZ>]. In June, 2009, CDCR's female population was about 11,000. *Id.*

women of color. We learned that the three Family Foundation programs received greater funding than the three CPMP programs. This racial and funding disparity was of grave concern to us. The Oakland CPMP program closed in 2010, apparently because its funding from CDCR was inadequate.

Despite the many problems and flaws with these programs, every mother expressed gratitude for being there. The alternative would have been separation from their babies and young children for years; for some, it would have meant the termination of their parental rights.

C. *Medical Care for the Children*

In January 2007 LSPC heard from the mother of a prisoner that children living in FFP-San Diego were in danger there. We followed up by visiting the mother of a five-year-old girl who had complained of serious headaches and nausea for over six weeks. When the little girl finally saw a doctor, it was discovered that she had a malignant brain tumor. She spent the next six months in intensive treatment.

Soon after that, we met Denisha Lawson, another mother in that facility who had difficulty getting her ailing daughter seen by a doctor. After two weeks, her daughter Esperanza was rushed to a hospital in near-cardiac arrest.¹³ This incident led to a lawsuit, which resulted in a landmark decision that private contractors in this program owe a duty to provide medical care to the infants and children in their care. The court further held that CDCR and its on-site staff may be found liable for negligence in failing to provide such care.¹⁴ It is distressing that CDCR and the non-profit had argued otherwise.

D. *Issuance of Our Report*

In 2010, we issued our report, entitled *California's Mother-Infant Prison Programs: An Investigation*.¹⁵ Our twenty-three-page report is probably the most extensive report ever written on these programs. The Director of the Female Offender Programs and

13. Solomon Moore, *California Investigates a Mother-and-Child Prison Center*, N.Y. TIMES (July 6, 2007), <http://www.nytimes.com/2007/07/06/us/06women.html> [<https://perma.cc/G574-GPEA>].

14. *Lawson v. Superior Court*, 103 Cal. Rptr. 3d 834, 855–56 (2010).

15. SHAIN, STRICKMAN & REDERFORD, *supra* note 4.

Services (FOPS) office told us that she was very proud of the program and that our report was like “calling [her] baby ugly.”¹⁶ Nevertheless, in early 2011, she arranged a major gathering of CDCR and program staff in Sacramento for us to present and discuss our recommendations with them. We never learned whether CDCR implemented any of our recommendations.

One of our recommendations was to expand eligibility for the programs by allowing women with more serious convictions to be accepted. In 2012, the legislature expanded eligibility for the CPMP to permit women convicted of robbery or burglary to be accepted on a “case-by-case basis.”¹⁷ Unfortunately, CDCR had already decided to shut down these programs, as described below.

E. *Mass Incarceration, Realignment, and the Closure of the Programs*

When the first CPMP opened in 1980, there were fewer than 25,000 California state prisoners, about 1,300 of whom were women.¹⁸ California had twelve prisons at that point.¹⁹ Over the next two decades, California’s prison population swelled. At the end of 1999, there were more than 160,000 California state prisoners, over 11,000 of whom were women.²⁰ Mass incarceration led to a massive prison-building boom: between 1980 and 2005, California constructed and opened an additional twenty-one prisons.²¹ California’s prison population peaked in 2006, with over 172,000 prisoners, of whom over 11,700 were women. Of these, 139

16. Interview with Debra Dexter Herndon, Associate Director, Female Offender Programs, Services and Contract Beds, in Sacramento, CA (January, 2011).

17. CAL. PENAL CODE § 3417(b)(1)(C) (West 2017).

18. CAL. YOUTH & ADULT CORRS. AGENCY, CALIFORNIA PRISONERS 1980: SUMMARY STATISTICS OF FELON PRISONERS AND PAROLEES 7 (1980), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/CalPris/CALPRISd1980.pdf [<https://perma.cc/AZ9K-UGR6>].

19. CAL. DEP’T OF CORRS. & REHAB., CALIFORNIA’S CORRECTIONAL FACILITIES 2 (2007), <http://web.archive.org/web/20071214123130/http://www.cdcr.ca.gov/Visitors/docs/20071015-WEBmapbooklet.pdf> [<https://perma.cc/PHU6-X2K3>].

20. CAL., DEP’T OF CORR., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT DEC. 31, 1999 (2000), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad9912.pdf [<https://perma.cc/K2XN-T38F>].

21. CAL. DEP’T OF CORRS. & REHAB., *supra* note 19, at 3–4.

were housed in the mother-infant programs.²²

Still, the prison population was almost double the design capacity of those buildings. In 2006, plaintiffs in two long-standing class action lawsuits, challenging physical and mental health care, filed parallel motions to convene a three-judge panel to consider issuing a population reduction order.²³ At a joint trial, plaintiffs successfully proved that crowding was the primary reason why CDCR was incapable of providing constitutionally adequate care.²⁴ In 2009, the special three-judge panel issued an order requiring CDCR to reduce its population to 137.5% of design capacity.²⁵ The United States Supreme Court affirmed this ruling in May 2011.²⁶

In anticipation of that ruling, in 2011, Governor Jerry Brown successfully pushed his realignment plan through the legislature, as a budget bill.²⁷ Under that legislation, people convicted of less serious offenses would serve their sentences in county jails, as would most people who were found in violation of their parole. This legislation has indeed resulted in a reduction of prison population. However, it has also meant the death knell for the mother-infant programs. CDCR closed the Family Foundations Programs entirely because it determined that women who would be eligible for those programs would no longer be sentenced to prison under realignment. With the expected decline in the number of incarcerated women generally, it anticipated the need for only one CPMP,²⁸ leaving open only the Pomona program.

CDCR's initial approach to shuttering these programs was to call the moms together, program by program, for a group

22. CAL., DEP'T OF CORR. & REHAB., MONTHLY REPORT OF POPULATION AS OF MIDNIGHT JUNE 30, 2006 (2006), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/TPOP1A/TPOP1Ad0606.pdf [<https://perma.cc/XL3L-GSHY>].

23. Order Granting Plaintiffs' Motion to Convene Three-Judge Court, *Plata v. Schwarzenegger*, 922 F. Supp. 2d 882, 912–16 (E.D. Cal. 2009) (No. 3:01-cv-01351-THE).

24. *Plata v. Schwarzenegger*, 922 F. Supp. 2d 882, 951 (E.D. Cal. 2009).

25. *Id.* at 1003.

26. *Brown v. Plata*, 563 U.S. 493, 545 (2011).

27. A.B. 109, 2011–12 Assemb., Reg. Sess. (Cal. 2011).

28. CAL. DEP'T OF CORR. & REHAB., THE FUTURE OF CALIFORNIA CORRECTIONS: A BLUEPRINT TO SAVE BILLIONS OF DOLLARS, END FEDERAL COURT OVERSIGHT, AND IMPROVE THE PRISON SYSTEM 26–27 (2012), <http://www.cdcr.ca.gov/2012plan/docs/plan/complete.pdf> [<https://perma.cc/YL8U-UDUA>] [hereinafter THE FUTURE OF CALIFORNIA CORRECTIONS].

announcement from Sacramento by speakerphone that their facility was to be closed in a month. Children were to be turned over to a relative or someone in the community; the moms were to be sent to prison. These announcements resulted in widespread panic and distress among the moms and program administrators alike. LSPC reached out to supportive legislators to help mount a campaign to slow down this transition, for the benefit of the children and everyone else involved. CDCR ultimately agreed, and closed one program at a time. Any mothers who had not completed their prison term were transferred to one of the remaining programs with their children. At the end of this process, we advocated on behalf of two individual moms who had specific fact patterns that CDCR thought were problematic (but weren't).²⁹ Ultimately, neither they nor any other mother were forcibly separated from their children due to the abrupt closure of these programs.

F. *Current Status of Mother-Infant Programs*

On November 9, 2016, there were twenty-one mothers in the prisoner mother program, out of 5,865 women incarcerated in state custody.³⁰ A few years ago, the California Institution for Women in Chino (one of the state's two major women's prisons) invested substantial sums in constructing a prison nursery—a facility on the grounds of CIW where women could live with their newborns. It was announced with great fanfare, but never opened. On a recent visit to CIW, we learned that it had not opened because CDCR did not want to be responsible for the care of the babies. Perhaps the *Lawson* decision was a factor. There may be new interest in opening it.

29. One woman's transfer to the last remaining facility was denied because her alleged victim lived in that county (LA). However, she had recently been residing in a different LA mother-infant facility with no problems. The other woman's transfer was denied because her original police report could not be located.

30. THE FUTURE OF CALIFORNIA CORRECTIONS, *supra* note 28; CAL. DEP'T OF CORRS. & REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT NOVEMBER 9, 2016 (Nov. 9, 2016), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad161109.pdf [https://perma.cc/BB3X-76DL]. See generally THE FUTURE OF CALIFORNIA CORRECTIONS, *supra* note 28.

II. ALTERNATIVE CUSTODY PROGRAM

A. *The Enactment of the Alternative Custody Program*

California's Alternate Custody Program (ACP) was enacted in 2010 with the passage of Senate Bill 1266.³¹ Its purpose was to provide an early release from prison for certain prisoners: low-risk women generally and caregiving mothers and fathers of minor children. They could be released to their home or to a residential facility and be subject to curfews and other conditions.³² Regulations drafted by CDCR provided that prisoners could be released up to two years before their release date.³³

The bill's author, Senator Carol Liu, was primarily motivated to help incarcerated women. Reportedly, she was advised that limiting this program to women would make it vulnerable to an equal protection challenge.³⁴ Thus, the bill was drafted to include low-risk fathers who had been primary caregivers. The law was also promoted as a way to reduce prison population in light of the crowding issue. LSPC had worked with Senator Liu on the initial drafting of the bill. However, as the terms and conditions became more and more onerous to prisoners, we withdrew our support and took a neutral position.

B. *Limiting the Program to Women*

A few months after the law was signed by the governor, CDCR announced that it would begin implementation of the program in September 2011 by offering it initially only to qualifying *female* prisoners.³⁵ A few months later, in June 2012, the Governor signed into law an amendment, which limited the ACP statute to females only. The amendment was buried in a 127-page budget

31. S.B. 1266, 2009–10 S., Reg. Sess. (Cal. 2010).

32. CAL. PENAL CODE § 1170.05 (West 2017).

33. CAL. CODE REGS. tit. 15, § 3078.2(b) (2017).

34. See S. COMM. ON PUB. SAFETY, DEPARTMENT OF CORRECTIONS AND REHABILITATION: "ALTERNATIVE CUSTODY" FOR FEMALE INMATES AND INMATES WHO WERE PRIMARY CAREGIVERS OF DEPENDENT CHILDREN, SB 1266, S. 2009–10, Reg. Sess., at 15–16 (Cal. 2010).

35. Emilie A. Whitehurst, *Shaping California's Prisons: How the Alternative Custody Program, Designed to Remedy the State's Eighth Amendment Violations in the Prison System, Encroaches on Equal Protection*, 21 WM. & MARY BILL RTS. J., 303, 319 (2012).

bill.³⁶ This was a stealth move that our office only learned about years later.

C. *Problems with the Implementation of the ACP*

Similar to its implementation of the prisoner-mother program, CDCR added multiple criteria for eligibility not mandated by the legislature. For example, CDCR initially required that a woman have her own health insurance. This was a deal-breaker for many women, because few women prisoners were covered on a husband's employment-related medical insurance. CDCR mandated that there be a certain number of bedrooms in the home, depending on how many people lived there, and it would reject residences where a co-inhabitant legally possessed a firearm. CDCR threatened to issue disciplinary write-ups to women who applied for the program but were not eligible.

Also similar, the approval process was so byzantine that very few women were being released—far fewer than the numbers that had initially been predicted.³⁷ A woman I spoke with stated, “If they don't like you, your documents will get lost,” and generally stated, “They just don't care.” Women were being released from prison at their regularly scheduled date while their applications were pending. An application could take “up to six months” for processing.³⁸

Further, there were early reports that women's applications were being denied at the initial screening level due to clerical errors. Some women stopped taking their prescribed medications for fear that it would disqualify them from participation in the program.³⁹

In the first three years of the program (from September 2011 through August 2014), a total of 420 women “participated,” with

36. S.B. 1021, 2011–12 S., Reg. Sess., at 47 (Cal. 2012).

37. CDCR estimated that 500 women would be released through the program between September 2011 and June 2012. Email from Debra Dexter Herndon, Assoc. Dir., Female Offender Programs Servs. and Contract Beds (Nov. 8, 2011) (on file with author). Reportedly, only around 40 women were released by that date. CDCR had not even reached the 500 mark by June 2015. ASSEMB. COMM. ON PUB. SAFETY, SB 219, 2015–16 S., Reg. Sess., at 4 (Cal. June 29, 2015).

38. Defendants' Opposition to Plaintiff's Motion to Enforce at 5, *Sassman v. Brown*, 99 F. Supp. 3d 1223 (E.D. Cal. 2015) (No. 14-CV-01679-MCE-KJN).

39. Public Comment Letter from Justice Now to CDCR Regulation and Policy Management Branch (December 13, 2011) (on file with author).

eighty-four in the program in August 2014. Notably, there were 516 pending applications at that time.⁴⁰ As of October 2014, 422 had participated, an increase of two participants in two months.⁴¹ In January 2015, only sixty-nine were presently in the program,⁴² a drop of fifteen from five months earlier.⁴³ As of June 2015, only 460 women had been approved to participate in the program to date, out of 7,200 applications.⁴⁴ This is an approval rate of about 6%.

D. *The Lawsuit*

In July 2014, LSPC and a private prisoner rights law firm (Rosen, Bien, Galvan & Grunfeld) filed a federal 42 U.S.C. § 1983 civil rights action against Governor Jerry Brown and CDCR Secretary Jeffrey Beard, alleging a violation of equal protection for sex discrimination against men in the rules and implementation of the ACP. We argued that (1) men were categorically excluded from participation in the program; (2) a “heightened intermediate level of scrutiny” was the proper test to evaluate the constitutionality of the program; (3) male prisoners who meet the twenty-two eligibility criteria are “similarly situated” to the women who meet them; (4) the exclusion of these men defeats the legislative purposes of the program (to promote family reunification, reduce recidivism and reduce crowding); and (5) there was no evidence to justify exclusion of men from the program.⁴⁵ CDCR estimated that over 3,000 currently incarcerated men were potentially eligible for participation.⁴⁶

The state responded that the program was a proper gender-responsive strategy to address the “specific needs and unique

40. Defendants’ Opposition to Plaintiff’s Motion for a Preliminary Injunction at 6, *Sassman*, 99 F. Supp. 3d 1223 (No. 14-CV-01679-MCE-KJN).

41. Defendants’ Notice of Motion and Motion for Summary Judgment at 8, *Sassman*, 99 F. Supp. 3d 1223 (No. 14-CV-01679-MCE-KJN).

42. *Id.*

43. Defendants’ Opposition to Plaintiff’s Motion for a Preliminary Injunction *supra* note 40.

44. ASSEMB. COMM. ON PUB. SAFETY, S.B. 219, 2015–16 S., Reg. Sess., at 4 (Cal. June 29, 2015).

45. Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Summary Judgment at 7–20, *Sassman*, 99 F. Supp. 3d 1223 (No. 2:14-CV-01679-MCE-KJN).

46. *Id.* at 6.

characteristics of female inmates.”⁴⁷ Among other authorities, it cited the *Woods v. Horton*⁴⁸ case, which upheld the constitutionality of California’s mother-infant programs.⁴⁹ It based its argument on general data about differences between male and female prisoners, such as women having fewer convictions for violence, women being more likely to be survivors of physical and sexual abuse, and the numerically greater impact on children of maternal incarceration.⁵⁰

We did not dispute that these differences existed in prisons generally. Instead, we pointed out the logical fallacy of using these gender stereotypes, when the narrow program under scrutiny had eligibility criteria that were *unrelated* to the generalizations the state cited. For example, even if a higher proportion of men than women are incarcerated for crimes of violence, it is discriminatory to exclude men with non-violent convictions. Second, we noted that the program, as designed and implemented, did not require that any female have any of the gender-stereotyped qualities that the state alleged the program was designed to address. For example, a female could be eligible for the program even if she had no minor children, had not been physically or sexually abused, etc. Third, the program, as designed and implemented, did not always provide services to address those specific rehabilitative needs. The bottom line was that, after the fact, the state tried to justify providing a benefit for prisoners of only one sex based on the concept of a gender-responsive strategy when the program did not have the features of a gender-responsive strategy.⁵¹

E. *The Victory*

In September 2015, in a well-written and heartfelt thirty-five-page opinion, the trial court granted summary judgment in our

47. Defendants’ Opposition to Plaintiff’s Motion for a Preliminary Injunction, *supra* note 40, at 1.

48. 783 Cal. Rptr. 3d 332 (Cal. Ct. App. 4th 2008).

49. Defendants’ Opposition to Plaintiff’s Motion for a Preliminary Injunction, *supra* note 40, at 1; *see Woods v. Horton*, 83 Cal. Rptr. 3d 332 (Cal. Ct. App. 4th 2008).

50. *See generally* Defendant’s Notice of Motion and Motion for Summary Judgment, *supra* note 41.

51. Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment at 1–12, *Sassman*, 99 F. Supp. 3d 1223 (No. 14-CV-01679-MCE-KJN).

favor.⁵² Judge Morrison C. England Jr., found that the program violated the Equal Protection Clause of the U.S. Constitution, and ordered CDCR to open the program up to men. He disputed CDCR's framing that the case is about prison programming; rather, he stated that the case is "about freedom from incarceration."⁵³ In persuasive prose, he asserted that the state cannot look at generalizations about men to justify the exclusion of the subset of men who would be eligible. In personal terms, he criticized the use of gender stereotypes in sentencing decisions and found "no principled reason why the State should be allowed to employ these stereotypes when evaluating offenders for release."⁵⁴ He observed, "Nothing before the court is so compelling that it can justify keeping fathers but not mothers from their children."⁵⁵ He also stated that it was counter-productive to favor one group of children (the children of mothers) over the other (the children of fathers).⁵⁶

F. *New Legislation to Increase Participation*

While the lawsuit was pending, the legislature enacted Senate Bill 219, which made several reforms to the Alternative Custody Program. It set deadlines for various steps in the application process, required that a notice of denial provide reasons, and authorized re-applications. It required CDCR to assist applicants to obtain health insurance and clarified that the state retains responsibility for the participants' medical, dental, and mental health needs. Finally, it provided that CDCR may not exclude an applicant from the ACP due to an existing psychiatric or medical condition that requires ongoing care.⁵⁷

52. *Sassman v. Brown*, 99 F. Supp. 3d 1223 (E.D. Cal. 2015).

53. *Id.* at 1233.

54. *Id.* at 1247.

55. *Id.* at 1246.

56. *Id.* at 1247. That the rights of prisoners' children should be taken into account in decision-making about their parents' incarceration is not a new idea. See also *M v. State Centre for Child Law* 2007 CCT 53/06 [2007] ZACC 18 (CC) at 8 para. 13 (S. Afr.), <http://www.saflii.org/za/cases/ZACC/2007/18.pdf> [https://perma.cc/2W2V-WT3Q]. See KATHLEEN MARSHALL, SCOT'S COMM'R FOR CHILDREN AND YOUNG PEOPLE, NOT SEEN. NOT HEARD. NOT GUILTY. THE RIGHTS AND STATUS OF THE CHILDREN OF PRISONERS IN SCOTLAND 5 (2008).

57. S.B. 219, 2015–16 S., Reg. Sess. (Cal 2015).

G. *The Results*

CDCR has now revised its ACP program to include men, which it describes as an expansion.⁵⁸ As of mid-October 2016, there were only eighty-six people in “alternative custody”—forty-four men and forty-two women:⁵⁹ about the same number (eighty-four) who had been in the program in August 2014—except earlier, all had been women.⁶⁰ However, as of March 22, 2017, there were 167 participants. That upward trend is promising.⁶¹

Sadly, CDCR has shortened the length of time that a prisoner can be in the program, from two years to one.⁶² How many women, if any, were in the program for longer than a year is unknown to this writer. Nevertheless, the program benefits were reduced in the wake of the court ruling. Finally, how many participants have been released to their homes, as opposed to residential facilities, is unknown.

III. VISITING ISSUES

A. *Legal Context: The Right to Visit with One’s Children*

Parents have important legal rights regarding their children. Constitutionally, these rights are grounded in their fundamental liberty interest in the care, custody, and control of their children. Further, the state interest generally favors preservation of natural

58. CAL. DEP’T OF CORRS. & REHAB., AN UPDATE TO THE FUTURE OF CALIFORNIA CORRECTIONS 49 (2016), <http://www.cdcr.ca.gov/Blueprint-Update-2016/An-Update-to-the-Future-of-California-Corrections-January-2016.pdf> [<https://perma.cc/B3YF-Q9Z4>].

59. Telephone Interview with CDCR Associate Warden (Oct. 5, 2016).

60. Defendant’s Opposition to Plaintiff’s Motion for a Preliminary Injunction, *supra* note 40, at 6.

61. Apparently, the number of female participants in ACP was reduced during the course of the lawsuit. This development was revealed in early 2016, when CDCR started producing public monthly population reports for the ACP program. They show (as of the end of each month): February 2016—40 participants; March 2016—30; April 2016—37; May 2016—39; June 2016—40; July 2016—47; August 2016—67; September 2016—81; October 2016—89. *Monthly Total Population Report Archive*, CAL. DEP’T OF CORRS. & REHAB., http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Monthly/Monthly_Tpop1a_Archive.html [<https://perma.cc/8XNE-MCCM>].

62. CAL. CODE REGS. tit. 15, § 3078.2(b) (2017).

family bonds.⁶³ The Supreme Court held that the parent's protected interest "does not evaporate simply because [the parents] have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."⁶⁴ As one California court explained: "The relationship between parent and child is so basic to the human equation as to be considered a fundamental right, and that relationship should be recognized and protected by all of society, no less jailers."⁶⁵

The incarceration of parents creates a significant challenge to their ability to retain and exercise these rights. As a practical matter, in-person visits between parents and their children are a key means to maintain family life. Interference with visiting can lead to many forms of harm.

B. *Loss of Parental Rights*

In California courts, it is often stated that "[t]here is no 'Go to jail, lose your child' rule in California."⁶⁶ In reality, incarceration often leads to the legal termination of parental rights, and sometimes to the loss of all contact with the child. This is particularly true where the child has been declared a dependent of the juvenile dependency court. Under federal law, a parent may have only a matter of months to reunify with the child before the court makes a permanent plan—which can be adoption.⁶⁷ The ability to maintain visits, either as part of reunification services or to establish and strengthen the parent-child bond, is "make or break" for some families.

C. *Emotional Harm*

Loss of contact is emotionally detrimental to children and

63. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (upholding right of parents to rear their children over a statute allowing a court to grant visitation for a third party).

64. *Santosky*, 455 U.S. at 753.

65. *In re Smith*, 169 Cal. Rptr. 564, 570 (Cal. Ct. App. 1980) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Van Atta v. Scott*, 27 Cal. 3d 424, 436 (1980)).

66. *Maggie S. v. Superior Court*, 163 Cal. Rptr. 3d 337, 345 (Cal. Ct. App. 2013) (citation omitted).

67. Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (1997); *see CALIFORNIA JUVENILE DEPENDENCY PRACTICE* § 6.1 (2016).

parents. This is an area that was, historically, not well-studied, as children of incarcerated parents have been an invisible population; however, the research is growing. There is enough data to conclude that the separation from one's biological parents can be emotionally damaging. It has been found to be the psychological equivalence of the death of a parent.⁶⁸ The separation itself is a trauma, which can result in depression, anger, confusion, self-blame, and so on. This separation can lead to permanent loss of one's parents, with additional emotional impact. We all have an innate emotional need to understand who we are and where we come from. Adopted children often go on a search for their biological parents, even when they are bonded with and well-cared-for by their adoptive parents.

In the San Francisco Bay Area, LSPC staff helped form the San Francisco Children of Incarcerated Parents Partnership (SFCIPP). SFCIPP has produced an aspirational Bill of Rights for Children of Incarcerated Parents.⁶⁹ One such right is, "I have the right to speak with, see and touch my parent."⁷⁰ Later, LSPC drafted a "Bill of Rights for Incarcerated Parents" that articulates a parallel right: "I must have regular visits with my child whenever possible."⁷¹

D. *Consequences to Others*

Family visiting generally has been recognized as one of the two most significant factors in whether or not a person released from prison will be able to successfully reintegrate into the community. Successful reentry benefits the former prisoner, the family, and

68. NANCY G. LA VIGNE ET AL., URBAN INST. JUSTICE POLICY CTR., BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS 7–10 (2008), <http://www.f2f.ca.gov/res/pdf/BrokenBonds.pdf> [<https://perma.cc/2A8X-6K3Z>].

69. *A Bill of Rights*, S.F. CHILD. INCARCERATED PARENTS PARTNERSHIP <http://www.sfcipp.org/> [<https://perma.cc/R23K-C7NJ>].

70. *Id.* In 2009, the California State Senate issued a resolution encouraging the distribution of this Bill of Rights and its use as a framework to determine procedures when making decisions about services for these children. S. Con. Res. 20, 2009–10 S., Reg. Sess. (Cal. 2009).

71. LEGAL SERVS. FOR PRISONERS WITH CHILDREN, BILL OF RIGHTS FOR INCARCERATED PARENTS, <http://www.prisonerswithchildren.org/wp-content/uploads/2012/05/Incarcerated-Parents-Brochure-22.pdf> [<https://perma.cc/64FU-WLAM>].

public safety in general.⁷² Further, by providing positive experiences and a sense of hopefulness for prisoners, family visits help to relieve the stress of prison life. In one study, a correlation was noted between visits and reduced rules violations. This positive impact on individual prisoners creates a positive cumulative impact on the prison itself.⁷³ Considering how beneficial family visiting is, it is remarkable how many barriers have been erected to keep families out.

E. *Barriers to Visits: Clearance Documents*

It is a fact of life that prison visitors must get a security clearance. How that process is administered can be problematic. Visitors are asked to report their arrests and convictions; however, people sometimes innocently omit something. As a result, they are rejected for the *omission itself* (and not for the underlying incident), the assumption being that the visitor is being dishonest. Considering that the prison is going to independently review the visitor's criminal history records, the requirement that the visitor report everything on it is objectively unnecessary. This requirement creates an excuse to exclude people for their reporting omissions—a “gotcha” approach, which is wholly inappropriate to the beneficial nature of the visiting program. Other visiting denials are for similarly minor reasons, such as outstanding warrants for traffic fees or for a discrepancy between the address a person submits to the prison and the address on the driver's license.⁷⁴

Bringing in children for visits increases the opportunity for exclusion. The adult needs to have documentation (court order or power of attorney) proving his or her own legal custody of the child. Alternatively, the adult must bring a notarized document from the custodial person giving the adult permission to bring the child to the prison for a visit *and* proof (court order or power of attorney) that the custodial person has legal custody of the child.

72. MINN. DEP'T OF CORR., THE EFFECTS OF PRISON VISITATION ON OFFENDER RECIDIVISM 29 (Nov. 2011).

73. Chelsea Boudin, Trevor Stutz & Aaron Littman, *Prison Visitation: A Fifty State Survey*, 24 PRISON LEGAL NEWS 5, 1 (May 2013), <https://www.prisonlegalnews.org/news/2013/may/15/prison-visitation-a-fifty-state-survey/> [<https://perma.cc/8K8F-ZC4U>].

74. CAL. CODE REGS. tit. 15, § 3172(e) (2017).

F. *Barriers to Visits: Distance*

California is geographically large, with its population concentrated in Southern California. However, prisons are scattered throughout the state. Families in the Los Angeles area have to drive for fourteen hours one way to reach Pelican Bay State Prison in the far north. While there is a written preference to house prisoners near their families, it is often overridden by numerous other factors. Currently, more than half of the people incarcerated in California state prisons are more than 100 miles from their communities.⁷⁵

Exacerbating the problem, California currently has about 4,700 male prisoners living in prisons in Arizona and Mississippi.⁷⁶ The out-of-state placement regulations for involuntary transfers do not foreclose the transfer of fathers of minor children.⁷⁷ While the prison in Eloy, Arizona, is closer to Southern California than many California prisons are, it is quite far from Northern California families. Placement in Mississippi, of course, is a virtual banishment for California prisoners.

People from impoverished communities are disproportionately incarcerated in state prisons. Their families have often lost an income-earner. Then, the families incur additional costs, such as costs for basic necessities for their loved ones inside. Long trips to the prison require motel rooms, gas, and car maintenance. Even if a family can get to the prison's town by public transportation, there is often limited or no public transport to the prison itself.

G. *Barriers to Visits: Numbers of Slots*

For prisons where there is a lot of demand for visits, some families cannot get a slot in advance. Some families travel to

75. Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prisons*, PRISON POL'Y INITIATIVE (Oct. 20, 2015), <http://www.prisonpolicy.org/reports/prisonvisits.html> [https://perma.cc/669M-ZJ9M].

76. CAL. DEP'T OF CORR. & REHAB., WEEKLY REPORT OF POPULATION AS OF MIDNIGHT NOVEMBER 9, 2016 (2016), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/WeeklyWed/TPOP1A/TPOP1Ad161109.pdf [https://perma.cc/JY3K-T6W4].

77. CAL. CODE REGS. tit. 15, § 3379(a)(9)(H) (2017). However, involuntary out-of-state transfer of California prisoners will apparently be unauthorized effective January 1, 2017, due to recent population reductions. See CAL. PENAL CODE § 11191 (West 2016).

prisons for “drop-in” visits, wait for hours, and are then turned away. The visits of other families are cut short so more people can visit that day. As one father described:

I was in a visit for only one hour when they terminated our visit. My daughters were very upset. People have been bringing up this issue for years now—that’s what I was told. But the sergeant says, “Well there just isn’t enough space.” Why not open up the patio or make more room at visiting so that we can see our families every week for eight hours? One hour a week is not enough time to have a good and healthy relationship with your teenage kids. CDCR is supposed to be helping us keep our families, but in reality all they are doing is making things harder and harder to have a meaningful relationship with our kids. I don’t sit here complaining about being in prison. I committed a crime and I have to pay for my mistake. But my daughters should still be allowed to see their father every week for a reasonable amount of time, not sit there and be worried that our visit is going to be terminated every time they see the sergeant come in. That is what is happening now. That’s a stress that they do not need.⁷⁸

Over the years, CDCR has reduced the available days and hours for visits, even as its prison population soared. Visits were not only on weekends, but were also during the week; and the number of holidays where visits could occur has now been reduced to four: the Fourth of July, Thanksgiving Day, Christmas Day, and New Year’s Day.⁷⁹ This forced scarcity creates competition within the prison and has the potential to pit families against each other while they compete for limited space.

H. *Barriers at the Gate*

Many visitors are turned away based on their attire. First-time visitors, in particular, often run into this roadblock. Many colors of clothing are forbidden, including blue denim. Women wearing clothing that is considered “too tight” or “too short” are excluded.⁸⁰ Female visitors are often forced to turn around for male guards to

78. Letter from California state prisoner to Carol Strickman (June 2016) (on file with author) [hereinafter Letter].

79. CAL. CODE REGS. tit. 15, § 3172.2 (2017).

80. CAL. DEP’T OF CORRS. & REHAB., VISITING A FRIEND OR LOVED ONE IN PRISON 6, <http://www.cdcr.ca.gov/visitors/docs/inmatevisitingguidelines.pdf> [<https://perma.cc/FJS4-NUUS>].

determine if they are dressed modestly enough. Paradoxically, baggy or loose clothing may also be forbidden. A source of great humiliation and embarrassment are rules about women's bras.⁸¹ Further, the rules are inconsistently enforced from prison to prison, and even week to week at the same prison. A skirt that was not too short at one prison is too short at another. A blouse that was allowed one week is cause for exclusion the next week. Fortunately, in California, an organization called "Friends Outside," located on or near prison grounds, can lend out approved clothing to visitors. However, this clothing exchange causes delays and can shorten visiting time.

Metal detectors are routinely used. Visitors with metal implants may be excluded if they do not bring a doctor's note. In the interest of intercepting drugs from entering the prisons, California employs ion scans and searches by drug-sniffing dogs to screen visitors at certain prisons. The ion-scan devices are notoriously unreliable and can wrongly detect narcotics on someone's hands or glasses.⁸² This results in more intrusive searches, loss of contact visits (non-contact visits are discussed below), or visits at all. Repeated positive readings of contraband can result in a person's visits being terminated for a year, or even indefinitely.

These searches and other barriers are justified as necessary to prevent contraband from entering prisons. However, no research has found that family visitors bring in the majority of contraband, while research has repeatedly found that visiting increases the morale, safety, and security of the prison as well as reducing recidivism.⁸³ It is also notable that correctional officers are rarely searched.

I. *Barriers During Visits*

Visitors are allowed to hug or kiss their loved ones briefly, but only at the beginning and end of each visit. Other than that, they may only hold hands. Trivial violations, such as feet touching under a table, can result in reprimands and even write-ups.

81. Underwires and metal clasps can set off metal detectors. Women are required to remove the underwire and/or are told to wear a sports bra.

82. Karen Hogsten, *Drug Interdiction Test Pilot in a Prison Environment*, SECURITY TECH. (1998).

83. See Boudin, *supra* note 73.

According to the CDCR regulations, “[a]n inmate may hold his or her minor children.”⁸⁴ However, the practice may be otherwise, as described recently by one prisoner:

I was in the visit with my wife and daughters. They were tired because they had been up since 4:30 am. I told my wife to let one daughter sit by me so that I could hug her and she could rest her head on my shoulder, so she did. And my daughter, who is fourteen years old, snuggled up to me and I put my arm around her. I was told right away by one of the officers working visiting that I could not hug my daughter during visiting. How is that fair for us who have missed out of so much contact time with our kids? . . . Just because it’s a policy does not mean it’s right.⁸⁵

Prisoners may face other consequences for behavior during visits. One prisoner was given a write-up for putting his arm around his fiancée on visiting day. This write-up was the basis for a parole denial.⁸⁶ In another incident, a prisoner’s cell front was painted yellow and he was required to wear a yellow jumpsuit (both signifying indecent exposure or sexual impropriety), apparently for developing an erection under his clothing during a non-contact visit with his fiancée. His fiancée lost visiting privileges for a year for allegedly engaging in “lewd or dissolute conduct,” a misdemeanor.⁸⁷ These penalties were an exaggerated reaction to the couple’s fairly innocuous behavior, for which they had never previously been warned.

J. *Non-Contact Visits*

Non-contact visits are visits that occur entirely behind glass. The prisoner and visitor are seated opposite each other with a glass or Plexiglas window between them, and they speak to each other over a phone. They may be seated in a row of other people, or they may be alone in a closet-sized space. No physical touching is

84. CAL. CODE REGS. tit. 15, § 3175(f) (2017).

85. Letter, *supra* note 78.

86. Sam Levin, *Trapped*, PRISON LEGAL NEWS (Feb. 8, 2017), <https://www.prisonlegalnews.org/news/2017/feb/8/trapped/> [<https://perma.cc/YN9X-RL2L>].

87. Letter from prisoner’s fiancée to Warden Lewis (February 3, 2012); Email from prisoner’s fiancée to author (February 6, 2012); Letter from prisoner to author (February 20, 2012); Letter from prisoner’s fiancée to a CDCR Director (March 19, 2012); Letter from Warden to prisoner’s fiancée (April 10, 2012).

possible, the sound quality may be poor, and the conversation may be recorded. It is an entirely inferior way of having a visit, particularly for children. In California, prisoners in solitary confinement (in units called the “Security Housing Unit” and “Administrative Segregation”) all have non-contact visits.⁸⁸ The unsatisfactory nature of non-contact visits discourages families from visiting, thereby aggravating the already devastating impact of solitary confinement on prisoners.⁸⁹

In addition, some prisoners in general population are required to have some or all of their visits with minors “behind glass,” generally for reasons related to their underlying convictions.⁹⁰ While the justification for these restrictions is purported to be the protection of children, in too many instances, these restrictions harm children, rather than benefit them. In one unpublished appellate court matter, a thirty-one-year-old prisoner had several successful visits with his minor cousins for years. Then, due to a regulations change, he was denied contact visits with them.⁹¹ The regulation provides that a prisoner convicted of the murder of a minor shall not have contact visits with minors unless approved by the Institutional Classification Committee.⁹² In this case, the prisoner was sixteen years old when he killed another sixteen-year-old male. This minor-on-minor crime did not represent a propensity on his part to harm minors. That conviction was entirely unrelated to his ability, fifteen years later, a courteous and proper visitor with his minor cousins was non-existent.⁹³

While prison officials have discretion to enact regulations that limit a prisoner’s right pursuant to legitimate penological interests, a regulation should be invalidated if it is “arbitrary, or excessive or

88. CAL. CODE REGS. tit. 15, § 3343(f) (2017).

89. See LEGAL SERVS. FOR PRISONERS WITH CHILDREN, A CAGE WITHIN A CAGE: A REPORT ON INDETERMINATE SECURITY HOUSING UNIT (SHU) CONFINEMENT AND CONDITIONS 10–12 (June 2012), <http://www.prisonerswithchildren.org/wp-content/uploads/2013/01/Cage-Within-A-Cage.pdf> [<https://perma.cc/SJ24-E3V6>].

90. CAL. CODE REGS. tit. 15, § 3173.1 (2017).

91. See generally *Ramazzini v. Cate*, No. F063203 (Cal. Ct. App. 2012); Legal Services for Prisoners with Children as Amicus Curiae supporting Petitioner, *Ramazzini v. Cate*, No. F063203 (Cal. Ct. App. 2012).

92. CAL. CODE REGS. tit. 15, § 3173.1(d) (2017).

93. See generally *Ramazzini*, No. F063203.

an exaggerated response” to that interest.⁹⁴ It was arbitrary and irrational to apply this regulation to this prisoner.

K. *County Issues, Aggravated by Realignment*

As described above, in 2011, California enacted the Governor’s realignment plan, under which people newly convicted of less serious felonies would serve their sentences in the county jails. Over time, this has successfully reduced California’s bloated prison population, but it has led to an increase in jail populations. On the one hand, many prisoners are serving their sentences closer to home, making visiting more accessible. On the other hand, the county jails do not currently have the physical ability to provide contact visits—all visits are behind glass.⁹⁵ Additionally, counties, by regulation and practice, provide less visiting time per week than the state prison system offers.⁹⁶

It gets worse. Video visitation is being cued up to replace in-person non-contact visits. As dissatisfying as non-contact visits are, video visitation is even worse. Video visitation is, effectively, poor-quality video calls between jail prisoners and their loved ones. The video calls may be made from a person’s home computer, but there are connection fees and per-minute fees of a dollar or more. The calls may be staticky, or break in and out, leaving the family member paying steeply for a poor quality call that was shorter than was paid for. In some cases, a family member has to travel to the jail, only to sit in front of a screen to talk to her loved one, who is sitting in front of another screen in a nearby room.⁹⁷

Video visitation is a positive development only for those family members who are unable to travel to their loved one’s jail.

94. *In re Smith*, 169 Cal. Rptr. 564, 569 (Cal. Ct. App. 1980); see also *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

95. An exception is a special program in the San Francisco jails called “One Family,” in which incarcerated parents can have contact visits with their minor children, along with other helpful services. *One Family: Who We Are*, COMMUNITY WORKS, <http://communityworkswest.org/program/one-family/?subpage=who-we-are> [<https://perma.cc/6NED-2WBT>].

96. Regulations for county jails set a minimum standard of only one hour of visiting per prisoner per week. CAL. CODE REGS. tit. 15, § 1062(a) (2017).

97. See generally BERNADETTE RABUY & PETER WAGNER, SCREENING OUT FAMILY TIME: THE FOR-PROFIT VIDEO VISITATION INDUSTRY IN PRISONS AND JAILS, PRISON POLICY INITIATIVE (Jan. 2015), https://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf [<https://perma.cc/N3DT-7P8S>].

It should only supplement in-person visiting, not replace it. However, several counties in California have already installed video visitation *in lieu of* in-person visits. In 2016, the California legislature passed Senate Bill 1157 (co-sponsored by LSPC), which would have required that all county jails provide a minimum of in-person visiting hours each week.⁹⁸ Governor Brown's veto of SB 1157 was gravely disappointing.

Related to visiting are phone calls. In California, the cost of phone calls between *state* prisoners and their loved ones, while expensive, is not astronomical. In contrast, the fees charged by many counties for people incarcerated in county jails to speak to their loved ones by phone are excessive. Litigation against counties and service providers is underway.⁹⁹

L. *Ending on a Positive Note*

Since the end of 2012, and as a result of the historic hunger strikes of 2011 and 2013, California has released more than 2,500 prisoners from solitary confinement to general population. Some of those prisoners had been in solitary for ten, twenty, and even thirty years.¹⁰⁰ Many prisoners who have not been able to touch their loved ones for years have recently been getting contact visits. Those loved ones include their children and grandchildren.

Recently, CDCR announced that it was reinstating overnight visits for prisoners with life sentences, including those with life-

98. S. COMM. ON PUB. SAFETY, SB 1157, S. 2015–16, Reg. Sess. (Cal. 2016).

99. See, e.g., Class Action Complaint, *Banks v. County of San Mateo*, No. 16-cv-04455-YGR (N.D. Cal. 2017); *Salazar v. County of Los Angeles*, No. BC635599 (Cal. Super. Ct. 2016); Complaint, *Crane v. CoreCivic*, No. 17-cv-2031 (D. Kan. 2017).

100. Victoria Law, *Two Years After Hunger Strike, California Settlement May Release 2,000 Prisoners From Solitary*, TRUTHOUT (Sept. 2, 2015), <http://www.truth-out.org/news/item/32612-two-years-after-hunger-strike-california-settlement-may-release-2000-prisoners-from-solitary> [https://perma.cc/M963-3A7E]. About 1,100 prisoners were released into general population (GP) between 2013 and 2015. Paige St. John, *California Agrees to Move Thousands of Inmates Out of Solitary Confinement*, L.A. TIMES (Sept. 1, 2015), <http://www.latimes.com/local/lanow/la-me-ln-california-will-move-thousands-of-inmates-out-of-solitary-20150901-story.html> [https://perma.cc/MYY8-Y3LC]. Over 1,400 were released to “GP or GP-type housing in the first year following the settlement.” Letter from Sandra Alfaro, Assoc. Dir., High Sec. Mission, Div. of Adult Insts. to Hon. Nandor J. Vadas, U.S. Magistrate Judge, N. Dist. Cal. (November 10, 2016) (on file with author) (regarding *Ashker v. Governor*, No. C09-05796 CW).

without-parole sentences.¹⁰¹ Sometimes termed “conjugal visits,” these overnight visits may include several family members, including children. Lifers had enjoyed this benefit for many years; it was taken away in 1996.¹⁰² Around thirty percent of California state prisoners are serving life sentences.¹⁰³ This development is happy news for many people.

Finally, in recent years, a dedicated group of activist family members has emerged.¹⁰⁴ They are advocating in tandem with their loved ones inside, who have breathed new life into the prisoner human rights movement. A cornerstone of that movement is an agreement to end hostilities between various groups so that prisoners may come together to advocate for their common rights, which include visiting issues.

CONCLUSION

“I have the right to a lifelong relationship with my parent.”¹⁰⁵ This is the most basic right of all, yet it is thwarted by parental incarceration. Incarcerated mothers and fathers are important to their children. Their bond should be honored.

However, prisons and jails are designed to punish people by removing them from their families and communities, restraining them in small spaces, and depriving them of ordinary freedoms, pleasures, and self-determination. Nurturing family bonds runs counter to the dominant philosophy and practice of incarceration.

101. Memorandum from CDCR Sec. Scott Kernan to CDCR staff, *Revision to the Family Visiting (Overnight) Offender Eligibility* (Feb. 17, 2017) (on file with author).

102. Willie Wisely, *California Slashes Family Visits*, PRISON LEGAL NEWS, <https://www.prisonlegalnews.org/news/1997/apr/15/california-slashes-family-visits/> [<https://perma.cc/WX24-DQXF>].

103. CAL. DEP'T OF CORRS. & REHAB., PRISON CENSUS DATA AS OF DECEMBER 31, 2013 at Table 10 (May 21, 2014), http://www.cdcr.ca.gov/Reports_Research/Offender_Information_Services_Branch/Annual/Census/CENSUSd1312.pdf [<https://perma.cc/2PH7-ZGW8>].

104. See, e.g., CFASC, SOLITARY WATCH, <http://solitarywatch.com/cfasc/> [<https://perma.cc/ND8A-34A9>]; Home, FAMILY UNITY NETWORK, <http://familyunitynetwork.org/> [<https://perma.cc/R3P6-A9XS>]; PRISONER HUNGER STRIKE SOLIDARITY, <http://prisonerhungerstrikesolidarity.wordpress.com/> [<https://perma.cc/BKT7-NKSV>].

105. S.F. CHILDREN OF INCARCERATED PARENTS P'SHIP, CHILDREN OF INCARCERATED PARENTS: A BILL OF RIGHTS, http://media.wix.com/ugd/73a5ec_83e372f34c154ffb99d9725a95ec1918.pdf [<https://perma.cc/NEN8-SK3Z>].

Nor are these custodial institutions motivated to release people to community-based facilities. It should therefore come as no surprise that family-friendly programs mandated by the legislature fare so poorly in the implementation phase.

Prisoners are treated badly as a matter of course. So are their families and children, even though families hold the key to successful reentry and public safety. It doesn't have to be this way.