



Children of Incarcerated Caregivers

Considering the Well-being of Defendants' Children Pretrial

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Abstract

This report examines the pretrial period, the effects of pretrial parental detainment on a person's children, and alternatives to pretrial detainment for caregivers in the United States and select countries.² Existing research thoroughly investigates the impacts of incarceration on both those incarcerated and their families. However, less attention has been paid to the pretrial period specifically. Additionally, across the globe, policies that address children's best interests during the pretrial period appear to be lacking. Without mechanisms for considering the well-being of children when making decisions about their parent's pretrial freedom, children and the harm they experience are invisible. Further, courts and policymakers are left ill-equipped to mitigate the impacts of parental incarceration on children. This report identifies a handful of global programs and policies that seek to reduce parent-child separation during the pretrial stage; some explicitly consider the best interests of the child, some don't. These include programs that divert caregivers from prison entirely, judges' use of family impact statements to decide pretrial placement, community-based alternatives to pretrial detainment, and prison nurseries for those who are imprisoned pretrial. Children of Incarcerated Caregivers encourages further research on these and other options, as well as greater attention and consideration of the best interests of a child when their parent awaits trial.

I. Introduction

The pretrial stage of the criminal legal system includes the time after a person is arrested or charged and prior to a resolution of their case. The length of time, processes, and sequence of events during this stage vary from country to country, jurisdiction to jurisdiction, and case by case. Some countries, by default, incarcerate people through the entirety of the legal proceedings against them. Others, like the United States, rely on courts to decide whether a person can remain in the community before a legal determination is made about their guilt or innocence, as well as the conditions of release.

¹ Carley Mossbrook Addy edited and contributed to this report. Anya Lindberg also contributed.

² The research in this report comes from primary and secondary sources, as well as several interviews with practitioners, advocates, and researchers in the fields of law, children's rights and criminal justice.

Studies indicate that pretrial detention, also known as remand or preventative detention, has been steadily rising in the last decade, both in the United States and globally.⁴ Yet its impact on defendants' children is under-researched and insufficiently understood. Additionally, mechanisms to mitigate harm to kids and prioritize their best interests are sparse and typically underutilized. "Detention prior to trial can have devastating effects on families," writes Children of Prisoners Europe.⁵

Definitions of the "best interest of a child" vary slightly. Generally, it means that, when a decision is being made that may affect a child, positive and negative consequences for the child should be a primary consideration. The United Nations Committee on the Rights of the Children describes the concept as "a right, a principle and a rule of procedure."³

Existing research thoroughly examines the harmful impacts of imprisonment on families and children of incarcerated people, especially those incarcerated in prisons. Less attention has been drawn specifically to the pretrial detention of a parent, and little consideration is given to the best interests of their children during this time. "We do not know much about the effects of the earlier stages of parental criminal justice involvement," writes Urban Institute.⁶ Other researchers concur. "The largest pool of people with incarceration experience is among the least studied," wrote Sara Wakefield and Chase Montagnet, referring to people in local jails, most of whom are being held pretrial.⁷

There may be a number of reasons why this period is under-researched. Each detention facility is typically run differently by different administrators, so it can be difficult to access people pretrial, said Dr. Rebecca Shlafer, associate professor in general pediatrics and adolescent health.⁸ She said the majority of research has focused on detention post-sentencing since there is a clearer timeline, allowing researchers time to establish relationships, protocols, and processes for collecting data.

However, there is some acknowledgement and growing evidence that this uncertain time—during which a person may be detained and separated from their children abruptly and

³ Committee on the Rights of the Child, General Comment No. 14: Article 3 (Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration), 62nd Sess, adopted 2013, UN Doc CRC/C/GC/14, 3, online: https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf.

⁴ Global Prison Trends 2021 (Thailand Institute of Justice and Penal Reform International, 2021), 16, <https://cdn.penalreform.org/wp-content/uploads/2021/05/Global-prison-trends-2021.pdf>.

⁵ Noah Boden, Keeping Children in Mind Toolkit (Children of Prisoners Europe, 2019), 31, <https://childrenofprisoners.eu/wp-content/uploads/2022/04/Keeping-children-in-mind-toolkit.pdf>.

⁶ Bryce Peterson et al., Children of Incarcerated Parents Framework Document: Promising Practices, Challenges, and Recommendations for the Field (Urban Institute, June 2025): 1, <https://www.urban.org/sites/default/files/publication/53721/2000256-Children-of-Incarcerated-Parents-Framework-Document.pdf>.

⁷ Sara Wakefield and Chase Montagnet, "Parental Criminal Justice Involvement," Handbook on Children with Incarcerated Parents: Research, Policy and Practice (2019): 27, https://doi.org/10.1007/978-3-030-16707-3_3.

⁸ Dr. Rebecca Shlafer (Associate Professor in General Pediatrics and Adolescent Health, University of Minnesota Department of Pediatrics), email message to author, January 27, 2025.

indefinitely—has a range of harmful effects. “The period of initial incarceration and the period immediately following release are particularly stressful times for children and families,” according to Urban Institute.⁹

Certain international laws, like the UN Convention on the Rights of the Child (UNCRC) and the Bangkok Rules, seek to prevent, or at least mitigate, harmful outcomes. But not all countries have adopted such laws, including the U.S.—the only country to not ratify the UNCRC.¹⁰ Many countries that have ratified the UNCRC lack implementation and policies that address the best interests of children. However, there are some promising programs and policies around the globe that consider a person’s caregiving responsibilities and/or provide alternatives to parental separation during the pretrial stage. Many have shortfalls, are selective, or have not been thoroughly implemented. Still, they provide important examples to learn from. Further research and thoughtful examination of these and other proposed solutions are needed to properly uphold children’s rights, both domestically and globally, during the pretrial period.

II. Pretrial Period in the U.S.

The rise in incarceration rates in the United States over the past 25 years is a direct result of increases in pretrial detention.¹¹ Over 1.9 million people in the United States are incarcerated, and over 500,000 of those incarcerated are unconvicted.¹² Jails, which are city or county-run facilities, are primarily used for pretrial detention.¹³ Around 80 percent of those held in jail have not been convicted and are presumed innocent.¹⁴

The women’s incarceration rate has grown at twice the rate of men’s in recent decades.¹⁵ More than 60 percent of incarcerated women have not been convicted and are awaiting trial.¹⁶ Most are detained in jails.¹⁷ Most women in jails are mothers and primary caretakers of their children.¹⁸ They are also more likely to be single parents and to have been living with their children prior to imprisonment.¹⁹

⁹ Peterson et al., Children of Incarcerated Parents Framework Document: 3.

¹⁰ “Frequently Asked Questions on the Convention on the Rights of the Child,” UNICEF, accessed November 17, 2023, <https://www.unicef.org/child-rights-convention/frequently-asked-questions>.

¹¹ Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2024,” Prison Policy Initiative, March 14, 2024, <https://www.prisonpolicy.org/reports/pie2024.html>.

¹² Sawyer and Wagner, “Mass Incarceration: The Whole Pie 2024.”

¹³ Sawyer and Wagner, “Mass Incarceration: The Whole Pie 2024.”

¹⁴ Sawyer and Wagner, “Mass Incarceration: The Whole Pie 2024.”

¹⁵ Aleks Kajstura and Wendy Sawyer, “Women’s Mass Imprisonment: The Whole Pie 2024,” Prison Policy Initiative, March 5, 2024, <https://www.prisonpolicy.org/reports/pie2024women.html>.

¹⁶ Kajstura and Sawyer, “Women’s Mass Imprisonment: The Whole Pie 2024.”

¹⁷ Kajstura and Sawyer, “Women’s Mass Imprisonment: The Whole Pie 2024.”

¹⁸ Kajstura and Sawyer, “Women’s Mass Imprisonment: The Whole Pie 2024.”

¹⁹ Kajstura and Sawyer, “Women’s Mass Imprisonment: The Whole Pie 2024.”

As the number of Americans held in pretrial detention has grown, so has the number of children consequently impacted. Estimates suggest around 5 million children have had a parent in jail or prison at some point in their life.²⁰ However, most courts have no legal framework for considering children's best interests during the pretrial period.

A. The Process

When someone is charged with a crime, they will typically appear in court, and if they plead not guilty, a judge will decide whether the defendant will be diverted to a program, detained in jail pretrial, or released with or without conditions.²¹

Judges consider a range of factors, including the severity and nature of the charges, the defendant's due process rights, their appearance in court, and concerns for public safety.²² "The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive," asserts the American Bar Association.²³

Defendants who are jailed pretrial may be separated from their children for a few days to several months—the average stay is about 26 days.²⁴ Many people who are incarcerated pretrial ultimately plead guilty, sometimes due to unsafe and unsanitary conditions in jails or separation from their kids. "[Our subjects] worried that being held pre-trial would have a negative impact on employment and family responsibilities, and so chose to plead," wrote one research team.²⁵

B. Bail and Reform²⁶

At the federal level and in many U.S. states, one of the conditions judges may impose for release is the payment of bail. Monetary bail, often referred to as cash bail, is a financial arrangement designed to ensure that a defendant charged with a crime appears in court.²⁷ If the defendant is not released on personal recognizance, the court may set a cash amount that must be

²⁰ A Shared Sentence: The Devastating Toll of Parental Incarceration on Kids, Families and Communities (The Annie E. Casey Foundation, April 2016), <https://assets.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf>.

²¹ "Pretrial Release," Criminal Justice Section Standards, American Bar Association, https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk/.

²² "Pretrial Release," Pretrial Justice Center for Courts, <https://www.ncsc.org/pjcc/topics/release-decisions>.

²³ American Bar Association, "Pretrial Release."

²⁴ Sandra Susan Smith, "The Difference a Day Makes: How Spending One Day in Jail Can Have Devastating Consequences," Harvard Kennedy School Malcolm Wiener Center for Social Policy, <https://www.hks.harvard.edu/centers/wiener/programs/criminaljustice/projects/pretrial-detention#full-project-description>.

²⁵ Amy E. Lerman, Ariel Lewis Green and Patricio Dominguez, "Pleading for Justice: Bullpen Therapy, Pretrial Detention, and Plea Bargains in American Courts," abstract, *Crime & Delinquency* 68, no. 2 (2021), <https://doi.org/10.1177/0011128721999339>.

²⁶ Anya Lindberg authored the following section.

²⁷ "What is Cash Bail?" The Bail Project, <https://bailproject.org/bail/>.

paid for pretrial release.²⁸ The cash amount may be determined by factors such as the defendant's flight risk (likelihood they fail to appear in court), nature of the alleged crime, potential danger the defendant poses to others, and community safety.²⁹ If the defendant is released on bail and returns as required, the money is refunded. If they fail to appear, the court keeps the money.³⁰ Thus, cash bail is intended to financially incentivize defendants to return to court when released pretrial.³¹

However, the use of monetary bail results in a system where pretrial release is dependent on a defendant's ability to pay. Bail amounts are often set at thousands of dollars, which is unaffordable for a significant proportion of the U.S. population, especially for those with limited financial resources.³² As a result, defendants from economically disadvantaged communities are more likely to be detained before trial: 60 percent of pretrial detainees are jailed because they couldn't afford bail.³³ Parents, in particular, are more likely to be held in pretrial detention because they can not afford bail, and this burden falls disproportionately on women.³⁴ Sixty-six percent of mothers are unable to afford bail.³⁵ Their incarceration can lead to separation from their children, disruption of their families, and the possible termination of their parental rights.³⁶ These defendants also face increased negative consequences such as housing and employment insecurity, loss of child custody, and higher likelihood of conviction.³⁷ These risks are financially and emotionally destabilizing to the entire family.

²⁸ Muhammad B. Sardar, "Give Me Liberty or Give Me...Alternatives?: Ending Cash Bail and Its Impact on Pretrial Incarceration," *Brooklyn Law Review* 84, no. 4 (2019), <https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=2217&context=blr>.

²⁹ "How Courts Work," American Bar Association, https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail/. Many state bail statutes provide that money bail can be based on public safety considerations, while several courts in "right to bail" states (i.e., states with constitutions having a right to pretrial release) have recognized that money bail cannot be used to detain a defendant for public safety purposes. *See* *State v. Pray*, 346 A.2d 227, 229 (Vt. 1975); *Ex parte Harris*, 733 S.W.2d 712, 714 (Tex. App. 1987); *Harp v. Hinkley*, 410 So. 2d 619 (Fla. Dist. Ct. App. 1982). *Contra* *State v. Anderson*, 127 A.3d 100 (Conn. 2015). *See also* *United States v. Salerno*, 481 U.S. 739, 762–67 (1987) (Marshall, J., dissenting) (describing the scope of a constitutional right to pretrial release that he would have recognized in the federal constitution).

³⁰ Steven D. Schwinn, "The Bail Bond System and Rule of Law," American Bar Association, January 27, 2022, https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-21/issue-3/the-bail-bond-system-and-rule-of-law/.

³¹ Schwinn, "The Bail Bond System."

³² "Bail Reform," Vera Institute, <https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/bail-reform>.

³³ U.S. Commission on Civil Rights, "U.S. Commission on Civil Rights Releases Report: The Civil Rights Implications of Cash Bail," news release, January 20, 2022, <https://www.usccr.gov/news/2022/us-commission-civil-rights-releases-report-civil-rights-implications-cash-bail>.

³⁴ Kajstura and Sawyer, "Women's Mass Imprisonment: The Whole Pie 2024."

³⁵ Wendy Sawyer, "How Does Unaffordable Money Bail Affect Families?," Prison Policy Initiative, August 15, 2018, <https://www.prisonpolicy.org/blog/2018/08/15/pretrial/>.

³⁶ Jennifer Warner, "Infants in Orange: An International Model-Based Approach Prison Nurseries," *Hastings Women's Law Journal* 26, no. 1 (2015): 70, <https://repository.uclawsf.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1159&context=hwlj>.

³⁷ Sawyer and Wagner, "Mass Incarceration: The Whole Pie 2024."; U.S. Commission on Civil Rights, "The Civil Rights Implications of Cash Bail."; Vera Institute, "Bail Reform."

Because the consequences of pretrial detention are severe, in many states, families who cannot afford bail often turn to private bail bond agencies in an effort to secure the release of their loved ones. Bail bondsmen act as sureties, and charge defendants a percentage of the actual bail amount (usually around 10 percent) in exchange for paying the full bail amount to the court.³⁸ Such arrangements require a contract and co-signer who bears financial and legal liabilities for the defendant's appearance in court.³⁹ Cosigners are overwhelmingly female caregivers in the defendant's family (usually mothers, grandmothers, or partners of the defendants), and face the fees and legal burdens associated with private bonds in addition to their caregiving obligations.⁴⁰ Oftentimes, this leads to families depleting their already limited financial resources and risking the loss of homes and vehicles, which are often used as collateral.⁴¹ Whether secured through private bonds or community resources, the financial strain and negative consequences of cash bail extend to families of defendants, severely impacting their ability to support themselves and their loved ones.

The negative impacts of cash bail have attracted significant attention in recent years, causing many U.S. states and cities to consider, approve and, in some cases, implement reforms to their own bail systems. Some jurisdictions have nearly or completely eliminated cash bail for all or certain offenses. In its absence, they have established processes for deciding someone's freedom, including risk assessment tools. Early outcomes indicate that, across jurisdictions, most defendants appear for their court dates, and crime and recidivism rates have not significantly changed as reform opponents speculated.⁴² Despite this, some places have rolled back reforms. It's important to note that eliminating cash bail doesn't mean that people won't be held pretrial – they just won't be held because they can't afford bail. Even if cash bail is eliminated, it is likely that some people who are now detained because they cannot afford bail might otherwise be detained on detention orders based on flight or public safety risks.

Illinois recently became the first state to entirely eliminate cash bail and established a process in which prosecutors petition judges to detain someone pending trial.⁴³ It also invested money

³⁸ "Bondsman," Cornell Law School Legal Information Institute, <https://www.law.cornell.edu/wex/bondsman>.

³⁹ Joshua Page, Victoria Piehowski and Joe Soss, "A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation," *The Russell Sage Foundation Journal of the Social Sciences* 5, no. 1 (2019): 157, <https://doi.org/10.7758/RSF.2019.5.1.07>.

⁴⁰ Page et al., "A Debt of Care," 153.

⁴¹ Alex Kornya et al., "Crimsumerism: Combating Consumer Abuses in the Criminal Legal System," *Harvard Civil Rights-Civil Liberties Law Review*, 54 no. 1 (2019): 138, <https://ssrn.com/abstract=3354644>.

⁴² Illinois Network for Pretrial Justice, "Get the Facts.," Terry-Ann Craigie and Ames Grawert, "Bail Reform and Public Safety," Brennan Center for Justice, August 15, 2024, <https://www.brennancenter.org/our-work/research-reports/bail-reform-and-public-safety>; Sarah Staudt, "Releasing People Pretrial Doesn't Harm Public Safety," Prison Policy Initiative, July 6, 2023, <https://www.prisonpolicy.org/blog/2023/07/06/bail-reform/>.

⁴³ "Pretrial Provisions of SAFE-T Act Took Effect This Week," *The Civic Federation*, September 22, 2023, <https://www.civicfed.org/node/4154>.

in community organizations to provide supportive social services like drug treatment and child care for court appearances.⁴⁴

New York, in 2019, limited the use of money bail for most misdemeanor and low-level felony offenses.⁴⁵ Yet recent changes have rolled back the reforms by carving out additional exceptions.

In 2017, New Jersey eliminated cash bail for most offenses and uses pretrial risk assessments to help judges make release decisions. These assessments have been scrutinized.⁴⁶

Washington DC eliminated virtually all money bail in 1992. Most accused people are released immediately after arrest.⁴⁷

III. Pretrial Period Around the Globe

Many experts and organizations consider the overuse of pretrial detention a human rights abuse, as it violates the principle of the presumption of innocence.⁴⁸ The presumption of innocence is “universal.”⁴⁹ However, the acceptance of this principle does not prevent nations from detaining individuals before they are found guilty of a crime and doing so at an unnecessarily high volume.⁵⁰

It is estimated that almost three million people throughout the world are being held as pre-trial/remand prisoners.⁵¹ This estimate includes anyone who is “deprived of liberty following a judicial or other legal process but have not been definitively sentenced by a court for the

⁴⁴ Maurice West, “Your Turn: Pretrial Success Act will Help Continue Progress in Illinois,” Opinion, *Rockford Register Star*, June 21, 2024, https://www.rstar.com/story/opinion/columns/2024/06/21/your-turn-pretrial-success-act-will-help-continue-progress-in-illinois/74152664007/?utm_campaign=snd-autopilot.

⁴⁵ Brianna Seid, “The Facts on Bail Reform in New York: How Pretrial Detention and Release Works Now,” *Brennan Center for Justice*, March 13, 2024, <https://www.brennancenter.org/our-work/research-reports/facts-bail-reform-new-york-how-pretrial-detention-and-release-works-now>.

⁴⁶ Dillon Reisman, “How New Jersey Used an Algorithm to Drastically Reduce its Jail Population – and Why it Might Not be The Right Tool for the Job,” *ACLU New Jersey*, August 30, 2022, <https://www.aclu-nj.org/en/news/how-new-jersey-used-algorithm-drastically-reduce-its-jail-population-and-why-it-might-not-be>.

⁴⁷ “Get the Facts,” Illinois Network for Pretrial Justice, <https://pretrialfairness.org/get-the-facts/>.

⁴⁸ Martin Schönteich, *Presumption of Guilt: The Global Overuse of Pretrial Detention* (Open Society Justice Initiative, 2014): 1–6, <https://www.justiceinitiative.org/uploads/de4c18f8-ccc1-4eba-9374-e5c850a07efd/presumption-guilt-09032014.pdf>.

⁴⁹ Schönteich, *Presumption of Guilt*, 1–6.

⁵⁰ Schönteich, *Presumption of Guilt*, 1–6.

⁵¹ Walmsley, *World Pre-trial Remand Imprisonment List*, 2.

offence(s).”⁵² The number of persons in pretrial detention has risen 30 percent since 2000.⁵³ This growth in remand detention has impacted women too.

Expectedly, pretrial detention procedures vary widely across the globe. Unlike the U.S. and Canada,⁵⁴ where defendants have a right to a speedy trial, in many other nations, time limits for completing certain legal proceedings are ignored or absent entirely. Even laws that set detention deadlines or contain language aimed at decreasing the number of pretrial detainees may fail to prevent corruption or systemic abuses, like arbitrary arrests or the pressure to pay bribes.⁵⁵

Remand prisoners make up more than 40 percent of the prison population in almost half the countries in Africa and southern Asia.⁵⁶ In the Americas, Asia and Oceania, the rise in the number of pre-trial/remand prisoners is much greater than the rise in the general prison population.⁵⁷ In England and Wales, nearly half of women entering custody do so on remand.⁵⁸

The detention period in Madagascar ranges from several days to years, and the court system is riddled with problems.⁵⁹ In the Dominican Republic, researchers found that respondents' median length of time in pretrial detention is one year—in excess of the three months prescribed in law.⁶⁰ In Pakistan, criminal trials were not subjected to time limits until 2011; however, in 2017, the United Nations expressed concerns that individuals were still held in pretrial detention for excessively long periods.⁶¹

⁵² Walmsley, World Pre-trial Remand Imprisonment List, 1.

⁵³ Global Prison Trends 2021, Thailand Institute of Justice and Penal Reform International, 16.

⁵⁴ Canadian Charter of Rights and Freedoms, s 11, Part B,
<https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/cdl/check/art11b.html>.

⁵⁵ Pretrial Detention and Corruption (Open Society Justice Initiative),
<https://www.justiceinitiative.org/uploads/20d3bbad-5deb-46cd-8548-312371e3eb49/Factsheet%20PTD%20Corruption%20202142013.pdf>.

⁵⁶ Roy Walmsley, *World Pre-trial Remand Imprisonment List* (World Prison Brief/Institute for Crime & Justice Policy Research), 2,
https://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_list_4th_edn_final.pdf.

⁵⁷ Walmsley, World Pre-trial/Remand Imprisonment List, 2.

⁵⁸ Sarah Beresford, *What About Me? The Impact on Children When Mothers Are Involved in the Criminal Justice System* (Prison Reform Trust and Families Outside, 2018): 28,
<https://prisonreformtrust.org.uk/wp-content/uploads/2018/02/what-about-me.pdf>.

⁵⁹ *Madagascar 2023 Human Rights Report* (United States Department of State, 2023): 9,
<https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/madagascar/>.

⁶⁰ Jennifer Peirce, “Overuse of Pretrial Detention in Tension with Judicial and Prison Reforms in the Dominican Republic,” *Latin American Law Review*, no. 05 (2020): 58, <https://doi.org/10.29263/lar05.2020.03>.

⁶¹ Tauqeer Hussain, “Pre-Trial Detention and Its Compensation in International and Pakistani Law,” *Policy Perspectives* 15, no. 3 (2018): 51, 58, <https://doi.org/10.13169/polipers.15.3.0047>.

A. International Law

The United Nations Convention on the Rights of the Child is one of the most widely ratified agreements pertaining to the subject (although, notably, the US has failed to ratify the Convention).⁶² Among its many provisions, it asserts a child's right to have their "best interests" taken into consideration in all actions affecting them, including decisions to detain their parents.⁶³ The Bangkok Rules, also established by the United Nations, assert that women shouldn't be separated from their families without "due consideration being given to their background and family ties."⁶⁴ Instead, alternatives should be implemented "where possible and appropriate," including during the pretrial period.⁶⁵ Comparatively, the African Charter on the Rights and Welfare of the Child affirms children's rights in Africa and governs all members of the African Union. It specifically recognizes children's right to have their best interest considered in all actions concerning them, including in judicial or administrative proceedings.⁶⁶

In addition to treaties that govern multiple signatories, individual countries possess their own laws and covenants related to the general consideration of the child's best interest. However not all are implemented fully.

In Kenya, "a child's best interests are of paramount importance in every matter concerning the child."⁶⁷ Cambodian judges are required to consider the personal circumstances of a suspect before ordering pre-trial detention, including if the person is pregnant or has young children.⁶⁸ Yet researchers found excessive use of pretrial detention of mothers. South Africa's Constitutional Court ruled that the best interests of the child must be taken into account when sentencing a primary carer of minor children, including pretrial measures.⁶⁹ It's not limited to young children or mothers or parents. However, the ruling is limited to single, primary caregivers.

⁶² "Frequently Asked Questions on the Convention on the Rights of the Child," UNICEF, accessed November 17, 2023, <https://www.unicef.org/child-rights-convention/frequently-asked-questions>.

⁶³ Convention on the Rights of the Child Art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3.; CRC, General Comment No. 14: Article 3, Para. 1 (Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration), 2013, https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf.

⁶⁴ G.A. Res. 65/229, Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) (Dec. 21, 2010), https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf.

⁶⁵ G.A. Res. 65/229, The Bangkok Rules.

⁶⁶ African Charter on the Rights and Welfare of the Child, Nov. 29, 1999, 1520 U.N.T.S. 217, https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf.

⁶⁷ Constitution art. 53 (2010) (Kenya).

⁶⁸ Billy Gorter, "Women in Cambodian Prisons: The Challenges of Caring for Their Children," Penal Reform International, Nov. 4, 2019, <https://www.penalreform.org/blog/women-in-cambodian-prisons-the-challenges-of-caring/>.

⁶⁹ Rachel Brett, Best Interests of the Child when Sentencing a Parent: Some Reflections on International and Regional Standards and Practices (Children of Prisons Europe, May 2018), 4–6 https://childrenofprisoners.eu/wp-content/uploads/2020/06/Brett_best_interests_sentencing.pdf.

In Italy, a Memorandum of Understanding between the Ministry of Justice, the National Ombudsman for Childhood and Adolescence, and Bambinisenasbarre (an NGO) asks judicial authorities to consider the rights and requirements of minor children when deciding pretrial measures and give priority to alternatives to pretrial detention.⁷⁰ Italy also has specific laws relating to women offenders who have children, designed to avoid pre-trial custody or imprisonment.

A. Impacts on Children

There is reason to believe that pretrial detainment negatively impacts children; however this period is understudied and thus its impacts are not well understood.⁷¹ Most research about the impact of parental incarceration does not distinguish the pretrial phase from incarceration after sentencing.⁷²

Incarceration—which can have the effect of separating parent and child—generally has significant negative consequences on the children of defendants.⁷³ Like all parental loss or separation, children may experience feelings of abandonment, grief, and fear when separated from a parent for a length of time.⁷⁴ Children of incarcerated parents may experience increased anxiety, shame, and confusion.⁷⁵ Because pretrial incarceration can extend for an unknown period of time, this can create a “pervasive feeling of uncertainty and disorientation.”⁷⁶

Parental incarceration is considered an Adverse Childhood Experience (ACE), which is associated with significant negative consequences on children’s mental, physical, and social development across a lifetime.⁷⁷ These impacts can manifest in difficulties paying attention in school, aggressive and risk-taking behavior, increased risk of substance abuse, and future

⁷⁰ Brett, Best Interests of the Child, 6–7.

⁷¹ Shlafer, message.

⁷² Impacts of Pre-trial Detention Procedures on Children with Parents in Conflict with the Law (Children of Prisoners Europe), https://childrenofprisoners.eu/wp-content/uploads/2022/01/Impacts-of-pre-trial-detention-procedures-on-children-with-parents-in-conflict-with-the-law_COPE.pdf.

⁷³ Keva M. Miller, “The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions,” *Children and Adolescent Social Work Journal* 23, no. 4 (August 2006), <https://doi.org/10.1007/s10560-006-0065-6>; Kristin Turney and Rebecca Goodsell, “Parental Incarceration and Children’s Wellbeing,” *The Future of Children* 28, no.1, (Spring 2018), <https://www.jstor.org/stable/26641551>; Anne Bentley Waddoups et al., “Developmental Effects of Parent-Child Separation,” *Annual Review of Developmental Psychology* 1 (2019), <https://doi.org/10.1146/annurev-devpsych-121318-085142>.

⁷⁴ Miller, “The Impact of Parental Incarceration on Children.”

⁷⁵ Impacts of Pre-trial Detention Procedures (Children of Prisoners Europe), 7.

⁷⁶ Impacts of Pre-trial Detention Procedures (Children of Prisoners Europe), 7.

⁷⁷ “Adverse Childhood Experiences,” CDC Vital Signs, Center for Disease Control and Prevention, updated August 23, 2021, <https://www.cdc.gov/vitalsigns/aces/index.html>.

criminal behavior.⁷⁸ ACEs are also linked to chronic health issues including increased risk of clinical depression and anxiety, asthma, cancer, heart disease, and diabetes.⁷⁹

When a parent is detained, including pretrial, the child's daily routine may be disrupted including school routine, caregiving schedules, and meals.⁸² Children may have to move to live with another parent, grandparent, or relative, or enter the foster care system when their parent is in jail.⁸³

Some countries also have arrest policies that consider children. Lithuania prohibits the arrest of pregnant women and caregivers of children under three.⁸⁰ In the Netherlands, police are required to conduct a 'Child Check' before the arrest of a parent. Officers must also ask questions to determine whether a detained person has children and care arrangements have been made for them.⁸¹

There is limited research specifically on the impact of pretrial incarceration on children. One study from the UK found that remand and short custodial sentences, specifically, can have "devastating effects" on children, including insecurity, bedwetting, nightmares, and bullying.⁸⁴ Care arrangements were mostly informal, and, in some cases, older children looked after younger siblings. Additionally, children whose parents are detained pretrial may experience the stigma of their parent's imprisonment despite no decision of their guilt.⁸⁵

IV. Pretrial Policies and Programs for Parents

Numerous countries have policies and programs that seek to reduce parent-child separation caused by pretrial incarceration. Some that consider the best interest of the defendants' children, though not all. These include diversion programs that steer caregivers into some sort of treatment or community programming. Others allow non-custodial placements in lieu of pretrial detention like electronic home monitoring and community housing. This is not an exhaustive list, and further examination is needed to determine their equity and effectiveness.

⁷⁸ "Adverse Childhood Experiences," Center for Disease Control and Prevention.

⁷⁹ "Adverse Childhood Experiences," Center for Disease Control and Prevention.

⁸⁰ Boden, *Keeping Children in Mind Toolkit*, 47.

⁸¹ Boden, *Keeping Children in Mind Toolkit*, 47.

⁸² Impacts of Pre-trial Detention Procedures (Children of Prisoners Europe), 7.

⁸³ Deborah Gibbs et al., *Parental Incarceration and Children in Nonparental Care* (RTI International, December 2016): 2,

<https://aspe.hhs.gov/sites/default/files/private/pdf/258536/ParentalIncarcerationChildrenNonparentalCare.pdf.pdf>; Wendy Sawyer, "How Does Unaffordable Money Bail Affect Families?," Prison Policy Initiative, August 15, 2018, <https://www.prisonpolicy.org/blog/2018/08/15/pretrial/>.

⁸⁴ Beresford, *What About Me?*, 28.

⁸⁵ Impacts of Pre-trial Detention Procedures (Children of Prisoners Europe), 9.

A. Impact Assessments & Statements

In some jurisdictions, judges may specifically consider information about defendants' children and caregiving responsibilities when making pretrial release or detainment decisions, as well as during sentencing. This information may come in the form of a child or family impact (or responsibility) statement submitted to the court. "Family impact statements help ensure courts, judges, prosecutors, public defenders, and probation officers are making informed decisions on the basis of the needs of the defendant's children and by the potential effect on them if their parent were to be incarcerated," Urban Institute writes.⁸⁶ Judges can also utilize bench cards—informative guides and/or sample questions about specific topics, like parenting responsibilities—at defendants' court appearances.⁸⁷

Judges typically are not required to consider child or family impact at the pretrial stage; it is at their discretion. Advocacy and education is needed to inform sentencers of its importance. We speculate that other barriers to the use of impact statements may include parents' desire to leave their children out of the judicial process entirely.

In addition to abolishing cash bail, Illinois recently implemented the Children's Best Interest Act.⁸⁸ It required judges to consider new mitigating factors in pretrial detention and sentencing decisions – a defendant's pregnancy and/or, if they're a parent, the impact of their absence on their child's well-being. Under the new law, they also have the right to introduce a Family Impact Statement. It reads: "Unless the court finds that the parent poses a significant risk to the community that outweighs the risk of harm from the parent's removal from the family, the court shall impose a sentence in accordance with subsection (b) that allows the parent to continue to care for the child or children."⁸⁹ In November 2023, the Children's Best Interest Project (CBIP), which championed the bill, celebrated helping four mothers win pretrial release "who otherwise would have been stuck in jail for years until their cases were decided."⁹⁰ CBIP educates Cook County judges and public defenders about the law and offers free workshops to teach people how to write effective family impact statements.

In the UK, Prison Reform Trust developed a Child Impact Assessment in 2022 to "encourage children to voice their feelings, concerns and views in relation to having a parent in conflict

⁸⁶ Lindsey Cramer et al., Toolkit for Developing Family Impact Statements: Children of Incarcerated Parents Project (Urban Institute, June 2015), <https://www.urban.org/sites/default/files/publication/53651/2000253-Toolkit-for-Developing-Family-Impact-Statements.pdf>.

⁸⁷ Erica King, Keilah Joyner, Alison Shames, et al., Judicial Bench Card to Center Gender and Racial Equity (Center for Effective Public Policy, April 2024), <https://cepp.com/wp-content/uploads/2024/04/CEPP-Participatory-Pretrial-Judicial-Bench-Card.pdf>.

⁸⁸ 2019 Ill. Legis. Serv. P.A. 101-471 (West). See also 730 Ill. Comp. Stat. 5/5-5-3.1 (2019).

⁸⁹ 730 Ill. Comp. Stat. 5/5-5-3.1 (2019).

⁹⁰ Children's Best Interest Project, "We're sharing some good news...", Facebook, July 2, 2024, <https://www.facebook.com/share/iUQY6tmaJPpKjPo9/>.

with the law.”⁹¹ The tool includes a set of questions in child-friendly language, and is intended to be administered by a trusted adult known to the child, like a teacher, coach, or social worker.⁹² The child’s needs, as indicated by the child, should be taken into consideration throughout all stages of their parent’s involvement with the criminal legal system, including the pretrial stage. Prison Reform Trust encourages judges to seek out information about defendants’ caregiving responsibilities and to request a Child Impact Assessment for any children affected. It provides instructions for piloting and evaluating the assessments too; importantly, Prison Reform Trust emphasizes that this assessment is not a statutory procedure, so it must not be compulsory for the child.⁹³ It is also not a means for the courts to gather evidence for contact or custody decisions. “It can be a useful framework to understand a child’s views, and may provide helpful information, but it should not be used for assessing a mother’s competency or to remove a child from her care.”⁹⁴

B. Community-Based Housing Programs

Some caregivers may be offered placement in community housing programs as a condition of pretrial release or as a diversion program. These programs permit women to live in approved facilities outside of traditional prisons.⁹⁵ Few allow children to reside with their parent. The programs are typically run by nonprofit organizations and provide rehabilitative services, like drug and alcohol treatment, as well as parenting classes.

Living outside of prison allows women to have greater control over their daily lives and parenting, and begins the process to establish stable housing. Housing instability is both a cause and effect of incarceration—homelessness is often criminalized and criminalization can lead to homelessness.⁹⁶ In the US, someone in jail is between 7.5 and 11.3 times more likely to have been unhoused than someone with no history of jail incarceration.⁹⁷ Services offered through residential programs, like drug treatment and mental health care, also give caregivers opportunities to address their other needs.

⁹¹ “Child Impact Assessments for Children with a Primary Carer in the Criminal Justice System,” Children of Prisoners Europe, accessed Nov. 21, 2024, <https://childrenofprisoners.eu/database/child-impact-assessments/>.

⁹² “Child Impact Assessments,” Children of Prisoners Europe.

⁹³ “‘This is Me’: A Child Impact Assessment Toolkit,” Prison Reform Trust, accessed Nov. 21, 2024, <https://prisonreformtrust.org.uk/child-impact-assessment-toolkit>.

⁹⁴ “This is Me,” Prison Reform Trust.

⁹⁵ Anne E. Jbara, “The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Programs,” *Indiana Law Journal* 87 (2012): 4, <https://www.repository.law.indiana.edu/ilj/vol87/iss4/10>.

⁹⁶ Kareem Butler, “Criminalizing Despair: The Intersections of Pretrial Incarceration and Housing Insecurity,” *Chicago Appleseed Center for Fair Courts*, April 28, 2023, <https://www.chicagoappleseed.org/2023/04/28/criminalizing-despair-the-intersections-of-pretrial-incarceration-and-housing-insecurity/>.

⁹⁷ Kareem Butler, “Criminalizing Despair.”

Community housing programs are limited and often have strict eligibility requirements, leaving many caregivers unable to participate. Some only allow women with low-level offenses, and some only allow mothers of young children.

In Oklahoma County, Oklahoma, the nonprofit ReMerge operates a pretrial diversion program for high-risk, high-needs mothers who've been charged with non-violent felonies.⁹⁸ The provides comprehensive support, including mental and physical health care, education and employment help, parenting development, and housing with ReMerge partners. However, children do not reside with their mothers—separation still occurs. Interested women can request a diversion screening, which considers risk of recidivism, any substance abuse needs and barriers to treatment, and their childcare responsibilities.⁹⁹ The district attorney approves or denies requests, and participation typically lasts two years. If someone successfully completes the program, they are eligible to have the charges against them dismissed and they are reunited with their child and connected to safe, stable housing. Since 2011, 181 women, who have 455 minor children, have completed the program.¹⁰⁰

Residential women's centres are another alternative—albeit limited—in the United Kingdom. These facilities may house women who are serving a community sentence and those on remand. Few allow children to live with their caretaker. Residential women's centres provide a range of services, which may include drug and alcohol treatment and parenting programs. Centers are typically run by nonprofits, but the government plans to pilot a few in the coming years.¹⁰¹ It broke ground on the first 12-bed centre in 2022.¹⁰² The centre will be run by the Probation Service, and about 50 women with community sentences will reside there annually for 12 weeks at a time. There are a handful of nonprofit residential centers currently operating, including One Small Thing's Hope Street hub.¹⁰³ Built in 2022, Hope Street hub offers temporary apartments, programming and therapy for women and their children, diverting those who are in contact with the criminal legal system from prison.¹⁰⁴ Up to 24 women can reside there. Women with short custodial sentences, on remand, completing community service or released to homelessness may live there.

⁹⁸ "ReMerge," ReMerge, <https://www.remergeok.org/>.

⁹⁹ Sullyari Bautista, *Community-Based Solutions for Alternatives to Parental Incarceration* (Children of Incarcerated Caregivers, 2023), 2, <https://cicmn.org/wp-content/uploads/2023/09/Community-Based-Solutions-for-Alternatives-to-Parental-Incarceration-FINAL-9-18-23.pdf>.

¹⁰⁰ Sullyari Bautista, *Community-Based Solutions for Alternatives to Parental Incarceration*, 3.

¹⁰¹ "Residential Women's Centres," HM Prison and Probation Service, accessed November 25, 2024, <https://www.gov.uk/guidance/residential-womens-centres>.

¹⁰² Ministry of Justice, "Location of First Ground-breaking Residential Women's Centre Revealed," news release, May 20, 2022, <https://www.gov.uk/government/news/location-of-first-ground-breaking-residential-women-s-centre-revealed>.

¹⁰³ "Hope Street," One Small Thing, <https://onesmallthing.org.uk/hopestreet>.

¹⁰⁴ Hope Street Brochure (One Small Thing), <https://onesmallthing.org.uk/s/HopeStreetBrochure-Updateopen23compressed.pdf>.

C. Electronic Home Monitoring

Opponents of pretrial detainment often look to house arrest and electronic home monitoring (EHM) as a preferred alternative. House arrest is a court order to remain in a place of residence, with limited ability to leave. This is usually monitored via electronic home monitoring or regular check-ins with law enforcement.¹⁰⁵ Supporters argue it reasonably assures the person is not a flight risk and shows up to court. Its use may also allow parents or caregivers to remain with their children without subjecting them to detainment. However research on its effectiveness is lacking.¹⁰⁶ Researchers, scholars and impacted people have detailed its many problems. Some describe it not as an alternative to incarceration, but an “alternative form” of incarceration.¹⁰⁷

Some say EHM acts as another mode of confinement and surveillance outside traditional carceral settings.¹⁰⁸ It poses significant limitations on an individual’s physical freedom, although that individual has not been convicted of any crime. EHM can also be logistically burdensome for the individual, as it requires them to have secured stable housing and a landline phone connection.¹⁰⁹ Some jurisdictions impose the cost of EHM on the defendant too, creating another financial burden.¹¹⁰ House arrest may also be mandated without clearly delineated regulations on what individuals can and cannot do.¹¹¹ Minor violations of house arrest and EHM can land the person in jail.¹¹²

While house arrest may seem less punitive than formal pretrial incarceration, this can be counterproductive if it restricts a parent’s ability to care for their child. At least one U.S. state (Alaska) bars people on EHM from being a primary caregiver to children.¹¹³ Others place rules on other house members or prohibit guests. EHM can also restrict an individual’s ability to work or care for their children.¹¹⁴ Parents may be unable to take their children to school or attend doctor appointments and extracurriculars.¹¹⁵

¹⁰⁵ *Home Confinement and Electronic Monitoring* (Office of Juvenile Justice and Delinquency Prevention, 2014), https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/home_confinement_and_electronic_monitoring.pdf.

¹⁰⁶ Emmett Sanders, “Not an Alternative: The Myths, Harms and Expansion of Pretrial Monitoring,” *Prison Policy Initiative*, October 30, 2023, https://www.prisonpolicy.org/blog/2023/10/30/electronic_monitoring/; Kate Weisburd, “Punitive Surveillance,” *Virginia Law Review* 108, no. 147 (2022): 170, <https://ssrn.com/abstract=3808657>.

¹⁰⁷ James Kilgore, “Let’s Fight for Freedom from Electronic Monitoring and E-Carceration,” *Truthout*, September 4, 2019, <https://truthout.org/articles/lets-fight-for-freedom-from-electronic-monitors-and-e-carceration/>.

¹⁰⁸ Weisburd, “Punitive Surveillance,” 159.

¹⁰⁹ Gabriela Kirk, “The Limits of Expectations and the Minimization of Collateral Consequences: The Experience of Electronic Home Monitoring,” *Social Problems* 68, no. 3 (2020): 642–57, <https://doi.org/10.1093/socpro/spaa021>.

¹¹⁰ Weisburd, “Punitive Surveillance,” 162; Hernandez D. Stroud and Taylor King, “How Electronic Monitoring Incentivizes Prolonged Punishment,” *Brennan Center for Justice*, July 26, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/how-electronic-monitoring-incentivizes-prolonged-punishment>.

¹¹¹ Weisburd, “Punitive Surveillance,” 166; Corina Giacomello and Teresa Garcia Castro, *Imprisoned at Home: Women Under House Arrest in Latin America* (Washington Office on Latin America, July 2020), 11. <https://www.wola.org/wp-content/uploads/2020/07/Imprisoned-at-Home.pdf>.

¹¹² Sanders, “Not an Alternative.”; Stroud and King, “Prolonged Punishment.”

¹¹³ Weisburd, “Punitive Surveillance,” 166.

¹¹⁴ Weisburd, “Punitive Surveillance,” 166.

¹¹⁵ Castro and Giacomello, *Women Under House Arrest in Latin America*, 11.

Throughout Latin America, house arrest is utilized to different degrees in place of pretrial detention. In Argentina, home arrest has become an increasingly popular alternative for pregnant women and mothers.¹¹⁶ It was enacted in 2008 as an alternative to custodial sentences to address prison overcrowding and to avoid violating children's rights by subjecting them to the harsh environments in prisons.¹¹⁷ However, it presents many challenges for mothers and their families, and it is not implemented equally. Migrant mothers and those of low socioeconomic status face significant barriers to accessing and living under home arrest.

In Brazil, legislation passed in 2018 mandated house arrest rather than pretrial detention for mothers of children under the age of 12.¹¹⁸ Despite this policy, 2019 data from the Justice Ministry's National Prison Department (DEPEN) indicated that thousands of women were still held pretrial despite qualifying for house arrest.¹¹⁹

In Colombia, house arrest is only granted if the person accused is a female head of household with a child who is a minor or has a disability.¹²⁰ This is further limited in the Dominican Republic and Mexico, where house arrest can only be utilized for individuals who are nursing.¹²¹

D. Prison Nursery Programs

Prison nurseries, referred to in some jurisdictions as mother-baby units or creches, are arrangements in which incarcerated women co-reside with their children in custody.¹²² These programs or policies allow children to live in jail or prison up to a certain age, typically for the first few years of their life.¹²³ They can be found in nearly every country in the world. Some allow cohabitation for women who are detained pretrial.

¹¹⁶ Anya Lindberg, *2024 Argentina Prison Nursery Country Report* (Children of Incarcerated Caregivers, 2024), <https://cicmn.org/wp-content/uploads/2024/11/2024-Argentina-Prison-Nursery-Country-Report.pdf>.

¹¹⁷ Lindberg, *2024 Argentina Prison Nursery Country Report*.

¹¹⁸ Brazil Federal Senate, "Law No. 13,769 of December 19, 2018," <https://legis.senado.leg.br/norma/30753434/publicacao/30753796>; Castro and Giacomello, *Women Under House Arrest in Latin America*, 10.

¹¹⁹ "Brazil: Mothers at Risk of Illegal Detention," *Human Rights Watch*, May 10, 2019, <https://www.hrw.org/news/2019/05/10/brazil-mothers-risk-illegal-detention>.

¹²⁰ Castro and Giacomello, *Women Under House Arrest in Latin America*, 8.

¹²¹ Castro and Giacomello, *Women Under House Arrest in Latin America*, 9.

¹²² Mary W. Byrne, Lorie Goshin, and Barbara Blanchard-Lewis, "Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery," *Family Court Review* 50, no. 1 (2012): 77-90. doi: 10.1111/j.1744-1617.2011.01430.x.

¹²³ Marie Claire Van Hout et al., "Children Living in Prison with a Primary Caregiver: A Global Mapping of Age Restrictions and Duration of Stay," *Health Policy* 7, vol. 7 issue 11 (2023), [https://doi.org/10.1016/S2352-4642\(23\)00190-6](https://doi.org/10.1016/S2352-4642(23)00190-6).

Nurseries prevent separation between mother and child, promote mother-baby attachment,¹²⁴ and allow for breastfeeding.¹²⁵ Some facilities have designated, well-maintained facilities for mothers and children.¹²⁶ However, many prisons and jails around the globe have poor conditions that make for an unsafe environment for children.¹²⁷ The existence of a prison nursery does not guarantee that it will be suitable for the development or well-being of the children who reside there.¹²⁸ Additionally, many nursery programs are underutilized.¹²⁹ It appears many criminal courts and prison facilities lack processes for considering the best interest of the child in placement decisions.¹³⁰

In the US, most people held pretrial are detained in local jails,¹³¹ where programs like nurseries may not exist. New York City’s Rikers Island jail opened its 25-bed nursery in 1985 at the Rose M. Singer Center, the jail’s facility for women.¹³² It still operates today. In British Columbia, Canada, jailed mothers have the right to care for their newborns.¹³³ BC’s Alouette Correctional Centre for Women (ACCW) operates the country’s only provincial prison nursery, available to mothers who give birth in custody and those with young children.¹³⁴ Many women who are imprisoned here are on remand.¹³⁵ The best interests of a child and other children living in the unit are the main considerations in decisions about participation.¹³⁶

¹²⁴ Seham Elmalak, “Babies Behind Bars: An Evaluation of Prison Nurseries in American Female Prisons and Their Potential Constitutional Challenges,” *Pace Law Review* 35, no. 3 (2015): 1089, <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1903&context=plr>.

¹²⁵ Women’s Community Justice Association, “Issue Brief: Pregnancy and Birthing In Jails and Prisons,” February 21, 2022, https://www.womenscja.org/issue_brief_pregnancy_and_birthing_in_jails_and_prisons.

¹²⁶ Melanie Paurus, *International Report on the Conditions of Children of Incarcerated Parents: A Survey of Prison Nurseries* (Children of Incarcerated Caregivers, 2017), <https://cicmn.org/wp-content/uploads/2017/03/Melanie-Report-Edited.pdf>.

¹²⁷ “Prison Conditions,” Penal Reform International, accessed November 17, 2024, <https://www.penalreform.org/issues/prison-conditions/issue/>.

¹²⁸ “Prison Conditions,” Penal Reform International.

¹²⁹ Carley Mossbrook Addy, *2024 Canada Prison Nursery Country Report* (Children of Incarcerated Caregivers, 2024), https://cicmn.org/wp-content/uploads/2024/06/2024-Canada-Country-Report- FINAL_.docx.pdf; Victoria Law, “Mothers are Incarcerated at Record Rates, Yet Prison-Nursery Beds Go Empty,” *Jezebel*, May 13, 2018, <https://www.jezebel.com/mothers-are-incarcerated-at-record-rates-yet-prison-nu-1825829952>.

¹³⁰ Paurus, *Conditions of Children of Incarcerated Parents*.

¹³¹ Wendy Sawyer and Peter Wagner, *Mass Incarceration: The Whole Pie 2024* (Prison Policy Initiative, March 2024), <https://www.prisonpolicy.org/reports/pie2024.html>.

¹³² “Facilities Overview,” New York City Correction, accessed November 17, 2024, <https://www.nyc.gov/site/doc/about/facilities.page>.

¹³³ *Inglis v. British Columbia* (Minister of Public Safety), 2013 BCSC 2309 (Can. B.C. S.C.), <https://canlii.ca/t/g2d20>.

¹³⁴ *Mother-Child Program in British Columbia Provincial Prisons* (West Coast Prison Justice Society, 2018), 3, <https://prisonjustice.org/wp-content/uploads/2019/01/Provincial-Mother-child-2018.pdf>.

¹³⁵ “Pre-Trial Custody,” British Columbia, updated June 8, 2021, <https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bcs-criminal-justice-system/if-you-are-accused-of-a-crime/pre-trial-custody>.

¹³⁶ *Mother Child Program in British Columbia*, West Coast Prison Justice Society, 2.

India allows both children of those on remand and those who are sentenced to reside in prisons until six years of age.¹³⁷ However most women's prisons have not been adapted to meet the needs of the mothers and the children they house.¹³⁸ In England, a prisoner with a child under 18 months can apply to bring their children to prison with them, including pretrial.¹³⁹ A 2021 report found inconsistencies within England's mother-baby unit application process, which included a lack of support for women during the process and scrutinization of the application determinations.¹⁴⁰ At one federal facility in Australia, the Living with Mums (LWM) Program is offered to pregnant women entering custody, and to all women—both those sentenced and in pretrial—in prison custody, who are the parent of an infant or preschool aged child/children prior to incarceration.¹⁴¹ Children can still until they are school age. In Cambodia, where pretrial detention is used pervasively, children can stay with their mothers during this period (typically up to the age of three), usually at the discretion of a prison director.¹⁴²

E. Other Efforts

There are a number of organizations domestically and around the globe that provide advocacy, legal aid and programming to women and gender-diverse people during the pretrial period. Though they don't specifically focus on parents and their children, some of their clients are caregivers.

The Legal Aid Society's Pretrial Women's Initiative works to secure the release of women who are detained pretrial in New York City and connect them to alternatives like a treatment or housing program.¹⁴³ Its lawyer-social worker pair provide legal advocacy and support to access a range of social services, including mental health care, substance abuse services, housing, and employment resources.¹⁴⁴ Many of their clients are caregivers, though few are primary caregivers to young children. Staff Attorney Sasha Fisher makes bail applications for women who are held in detention pretrial, providing a legal argument and their plan for participation in

¹³⁷ Stuti Shah (Doctoral Candidate, Columbia Law School), in interview with the author(s), February 29, 2024.

¹³⁸ Stuti Shah, 2024 India Prison Nursery Report (Children of Incarcerated Caregivers, 2024), <https://cicmn.org/wp-content/uploads/2024/05/India-Report-Finalized-Version.docx.pdf>.

¹³⁹ "Pregnancy and Childcare in Prison," Prison Life, GOV.UK, <https://www.gov.uk/life-in-prison/pregnancy-and-childcare-in-prison#>.

¹⁴⁰ Isabelle Trowler, *Applications to Mother and Baby Units in Prison: How Decisions Are Made and the Role of Social Work* (Department for Education, November 24, 2022), https://assets.publishing.service.gov.uk/media/637e1e2ed3bf7f153c5175fc/Applications_to_mother_and_baby_units_in_prison_-_how_decisions_are_made_and_the_role_of_social_work.pdf.

¹⁴¹ "Pregnancy and Childcare in Prison," Victoria State Government Corrections, Prisons & Parole, accessed January 28, 2025, <https://www.corrections.vic.gov.au/being-in-prison/pregnancy-and-childcare-in-prison>.

¹⁴² Gorter, "Women in Cambodian Prisons."

¹⁴³ Sasha Fisher (staff attorney, Legal Aid Society) and Sarah D'Ambrosio (social worker and mitigation specialist, Legal Aid Society), in interview with author, September 2023.

¹⁴⁴ Fisher and D'Ambrosio, interview.

an alternative program.¹⁴⁵ She includes information about someone's caregiver status. "At every point in the process you want everyone to know they're caregiving for a child or family member," said Sarah D'Ambrosio, LAS social worker and mitigation specialist.¹⁴⁶

V. Conclusion

Pretrial detention is only one stage of incarceration, yet it has profound implications for those detained and their children. Non-governmental organizations, advocates, and lawmakers are increasingly focusing on this stage in the United States and globally. However, noticeable gaps persist. Children of defendants are overlooked in academic literature and courtrooms. More needs to be done to address kids' "systematic invisibility."¹⁴⁷ As criminal legal proceedings and lawmaking processes around the globe vary widely, it is difficult to propose universally feasible and effective recommendations. We encourage further consideration of the following:

- **Judges should consider the impact on children when making pretrial decisions about their parents.** Courts can utilize family impact statements to make well-informed decisions about a parent's release or detention.¹⁴⁸ Probation officers can also ask questions about parenting responsibilities in their pretrial investigation. Additionally, more resources are needed to educate lawyers, prosecutors and judges about these resources.
- **Alternatives to pretrial detention should be evaluated and expanded. When it is in the best interests of the child, non-custodial options should be prioritized for parents of young children.**
- **More research that specifically examines the impact of the pretrial period on caregivers and their children is needed to better understand and meet their needs.**
- **The United States should adopt the United Nations Convention on the Rights of the Child.** Although the U.S. has signed the convention, which typically signals the nation's intention for ratification, it has yet to formally ratify the treaty. It would signal a significant value shift in terms of children's rights recognition and serve as a step forward in the paradigm of carceral reform.

¹⁴⁵ Fisher and D'Ambrosio, interview.

¹⁴⁶ Fisher and D'Ambrosio, interview.

¹⁴⁷ Else Marie Knudsen, "The Systemic Invisibility of Children of Prisoners," in *Prisons, Punishment, and the Family: Towards a New Sociology of Punishment*, eds. Rachel Condry and Peter Scharff Smith (Oxford University Press, 2018).

¹⁴⁸ Cramer et al., *Toolkit for Developing Family Impact Statements*.