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## **A Free Start: Community-based Organizations as an Antidote to the Mass Incarceration of Women Pretrial**

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## A Free Start: Community-Based Organizations as an Antidote to the Mass Incarceration of Women Pretrial

*Amber Baylor\**

In 1973, the feminist newsmagazine *Off Our Backs* featured a segment on women in jail awaiting trial in Washington, D.C.<sup>1</sup> Many of the women faced minor charges, such as soliciting prostitution, but remained in detention because they could not afford to pay even very low amounts of monetary bail. The magazine interviewed Myrna Raeder, then a fellow at Georgetown, and other attorneys involved in a class action suit against D.C. corrections, who argued that low-income women were unjustly subjected to the punitive effects of pretrial detention, in violation of their due process rights. Raeder reported to the newsmagazine, “as a practical matter, many bondsmen refuse to write bonds for small amounts which yield only a limited fee.”<sup>2</sup>

Forty years later, advocates are still pushing courts to consider alternatives to setting bail, which effectively leaves poor women in detention pretrial. During the last few years, a number of reports have been published to encourage the use of alternatives to pretrial incarceration, particularly to address the needs of the rising number of women in the system.<sup>3</sup> This comment illustrates how collaborations with community-

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1. Pam Kalishman, *DC Detention*, OFF OUR BACKS, Feb. 28, 1973, at 5.

2. *Id.* Myrna Raeder, who passed away in 2013, was a fierce advocate for women in the criminal justice system. Her work as an attorney, law professor, and advocate challenged sentencing guidelines, health care in incarceration, the treatment of pregnant women in the system, and loss of parenting rights. See *Myrna Sharon Raeder: Obituary*, NYTIMES.COM (Nov. 21, 2013), <http://www.legacy.com/obituaries/nytimes/obituary.aspx?pid=168123430>.

3. See, e.g., Tamar Kraft-Stolar, Elizabeth Brundige, Sital Kalantry, & Jocelyn Getgen Kestenbaum, *From Protection to Punishment: Post-Conviction Barriers to Justice for Domestic Violence Survivor-Defendants in New York State*, AVON GLOBAL CENTER FOR WOMEN AND JUSTICE AT CORNELL LAW SCHOOL & THE WOMEN IN PRISON PROJECT OF THE CORRECTIONAL ASSOCIATION OF NEW YORK 26-27 (2011), <http://www.lawschool.cornell.edu/womenandjustice/upload/From-Protection-to-Punishment-Report.pdf> (international standards for treatment of women prisoners recognize need for alternatives to incarceration).

based programs can potentially reduce the mass incarceration of women in jails across the country. First, I consider the consequences of defaulting to pretrial detention in women's jails. Second, I argue that community-based pretrial support for people who would otherwise be in detention is one of the most effective paths towards reducing mass incarceration. Finally, I examine how to close gaps in the provision of social services in order to facilitate effective long-term improvements in women's lives. As local jurisdictions trend toward exploring pretrial services for women, we must consider how the lessons of local community-based alternatives can minimize detention for all.

### I. WHY DOES BAIL MEAN JAIL?

"If it bleeds, it leads," criminal defense attorneys remind each other in court. A commonly held belief amongst attorneys is that judges do not release people pending trial because they fear the released person will be involved in a subsequent crime. When a noteworthy crime is committed, newspapers lead with the story, including the name of the soft-hearted judge who released the perpetrator.<sup>4</sup> Rarely does the public take note of judges that release people and provide supportive services that help them succeed. The American Bar Association guidelines on bail state "the law favors the release of defendants pending adjudication of charges. Deprivation of liberty is harsh and oppressive."<sup>5</sup> Why are so many women relegated to jail before standing trial? Despite American Bar Association recommendations, many judges find the risk in pretrial release outweighs the presumption towards release.<sup>6</sup>

During the 2011 National Symposium on Pretrial Justice, United States Attorney General Eric Holder identified significant problems with pretrial detention in the United States, including the impact on indigent defendants who are often unable to pay low amounts of bail, and are incarcerated

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that address histories of violence); *Bail Fail: Why the U.S. Should End the Practice of Using Money for Bail*, JUST. POL'Y INST. 3 (Sept. 2012), available at <http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf> [hereinafter *Bail Fail*]; *When Less is More: How a Larger Women's Jail in Baltimore will Reduce Public Safety and Diminish Resources for Positive Social Investments*, JUSTICE POLICY INSTITUTE (2011), available at [http://www.justicepolicy.org/images/upload/11-01\\_REP\\_WhenMoreisLess\\_MD-AC.pdf](http://www.justicepolicy.org/images/upload/11-01_REP_WhenMoreisLess_MD-AC.pdf) (encouraging use of pretrial supervision, among other options, as an alternative to building a new city prison for women).

4. See Reuven Blau & Rocco Parascandola, *Bloomberg Rips Judge Who Freed Alleged Cop Killer*, N.Y. DAILY NEWS, Dec. 14, 2011, <http://www.nydailynews.com/new-york/mayor-rips-judge-freed-accused-killer-article-1.991758>.

5. ABA PRETRIAL RELEASE STANDARD 10.1-1, available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pretrialrelease\\_blk.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk.html) (last visited July 2, 2014).

6. The Bail Reform Act of 1984 directs courts to default to release unless risk of return or safety factors weigh in favor of bail or detention. 18 U.S.C. § 3142(b) (1984); *Bail Fail*, *supra* note 3 (judges rely on money bail to address risk factors, even when studies show money bail does not alleviate risk).

while waiting for their cases to be heard.<sup>7</sup> As Myrna Raeder vocalized in 1973, courts' reliance on bail has a disparate impact on indigent women in the system.<sup>8</sup> Over two-thirds of women arrested are charged with a nonviolent crime and courts often set low amounts of bail in misdemeanors and less serious cases.<sup>9</sup> Many people from low-income communities can neither pay low bail, nor can they find a bonds company that will think it worth their while to post bond. From 1980 to 2010, the number of women arrested and in jail increased 646 percent.<sup>10</sup>

Paternalism at the bail determination stage also keeps women, particularly younger women and girls, incarcerated as their cases move through the system. A recent study by the Coalition for Juvenile Justice showed that girls were often kept in detention facilities as a way of ensuring that they stay connected to social services the court deems important.<sup>11</sup> Courts misuse pretrial detention to protect women from themselves. Jail is imagined as a quick fix alternative to safe housing, vocational training, or therapy.<sup>12</sup>

During my career as a public defense attorney, I often witnessed the subtle injustices of pretrial detention. In one case, I represented an eighteen-year-old high school student accused of helping her boyfriend steal a backpack. At the time of the alleged theft, the young woman was blocks away from the scene. Despite having no criminal record and weak evidence against her, a cautious judge set bail at \$5,000—an amount her family could not meet. During my first visit to her in jail, we spoke across a battered protective glass window and reviewed her immediate options. I recommended that she plead not guilty at her next court date and fight the charges, though she would likely remain in on bail. As an alternative, we could attempt to strike a deal with the prosecutor to have her released.

She was an honor roll student who spoke with a careful cadence and appeared calm considering her bewildering situation. In the middle of our conversation, her voice broke, and she began to cry. The night before—her

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7. Att'y Gen., Eric Holder, Speaks at National Symposium on Pretrial Justice (June 1, 2011) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110601.html>).

8. Kalishman, *supra* note 1, at 5.

9. THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM 4 (2007), available at [http://www.sentencingproject.org/doc/publications/womenincj\\_total.pdf](http://www.sentencingproject.org/doc/publications/womenincj_total.pdf).

10. THE SENTENCING PROJECT, INCARCERATED WOMEN FACTSHEET 1 (Sept. 2012), available at [http://www.sentencingproject.org/doc/publications/cc\\_Incarcerated\\_Women\\_Factsheet\\_Sep24sp.pdf](http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Sep24sp.pdf).

11. Coalition for Juvenile Justice, *Girls, Status Offenses and a Need for a Less Punitive and More Empowering Approach*, EMERGING ISSUES POLICY SERIES 6-7 (Fall 2013) available at <http://www.juvjustice.org/sites/default/files/resource-files/SOS%20Project%20-%20Girls,%20Status%20Offenses%20and%20the%20Need%20for%20a%20Less%20Punitive%20and%20More%20Empowering%20Approach.pdf>.

12. Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOCIAL JUSTICE 212, 212 (2000) (describing the prison as a “surrogate solution to social problems associated with poverty and racism”).

first night in jail—there was an undisclosed security breach in the women's facility. The guards required everyone in the unit to strip. They proceeded to thoroughly search the detainees everywhere. Like the other women around her, the high school student stood naked until an unknown female officer inspected her body.

It is hard to forget this young woman whose mother could not afford bail, shaking quietly in the booth. The ability to collect a few thousand dollars separated our realities more definitively than any protective glass window. She was lucky, though. The young woman had a dogged aunt who later rallied relatives to pay bail. Six months later, all charges were dropped.

## II. CONSEQUENCES OF PRETRIAL DETENTION

Recent reports recognize what advocates have known for some time: indigent women in the system watch as their income, home, health and family networks unravel because they cannot pay bail.<sup>13</sup> Regardless of how their cases resolve—dismissal, conviction, or acquittal—women will have to scramble post-detention to reconstitute these support systems.

### A. IMPACT ON INCOME AND HOUSING

Incarceration can immediately affect a family's income stream. Work is the primary source of income for forty-four percent of women entering the justice system.<sup>14</sup> Once a woman is detained during pretrial, the effect of being in jail can be disastrous in maintaining an existing job. Women entering the system typically are not well paid: fifty-one percent made under 600 dollars a month before incarceration.<sup>15</sup> Low-income jobs have significantly fewer benefits than middle-class positions, including lack of leave time.<sup>16</sup> In these positions, an employee is often in danger of being terminated when they call in sick, let alone take time off for an indefinite period while in jail.<sup>17</sup> Without leave or job security, many women may

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13. *See generally*, BARBARA BLOOM & BARBARA OWEN, WOMEN'S COMMUNITY JUSTICE REFORM BLUEPRINT, (April 2013), *available at* <http://sfgov.org/adultprobation/sites/sfgov.org/adultprobation/files/Women%27s%20Community%20Justice%20Reform%20Blueprint.pdf> (recommending pretrial alternatives to incarceration for women with children).

14. JEREMY TRAVIS, ELIZABETH CINCOTTA MCBRIDE, & AMY L. SOLOMON, URB. INST. JUST. POL'Y CENTER, FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 5 (2005), *available at* [http://www.urban.org/UploadedPDF/310882\\_families\\_left\\_behind.pdf](http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf).

15. *Id.*

16. BUREAU OF LABOR STATISTICS U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS IN THE UNITED STATES 1 (July 2014), *available at* <http://www.bls.gov/news.release/pdf/ebs2.pdf> (only 24% of part-time workers in private industry have paid sick leave). *See also* REBECCA MAY & MARGUERITE ROULET, CTR. FOR FAMILY POLICY AND PRACTICE, A LOOK AT ARRESTS OF LOW-INCOME FATHERS FOR CHILD SUPPORT NONPAYMENT 18, 42 (Jan. 2005) *available at* <http://www.cpr-mn.org/Documents/noncompliance.pdf> (describing arrest as putting jobs of low-income men at risk).

17. "Twenty-three percent of adults say they've been threatened with termination or fired

lose their jobs from absences when detained pretrial.

Women, including those with some form of employment, may also rely on subsidies from the government in order to provide food and welfare for their families.<sup>18</sup> In New York, for example, if a person in detention misses monthly reporting requirements with benefit providers, or reports over a month in jail, her public assistance benefits are suspended.<sup>19</sup> If she remains in detention for over a year, the benefits are terminated.<sup>20</sup>

Pretrial detention potentially jeopardizes the most anchoring element in these women's lives: their homes.<sup>21</sup> Under Housing and Urban Development guidelines for subsidized housing, a resident's home may be taken if she is incarcerated for a period of over six months.<sup>22</sup> Depending on the jurisdiction, the local housing authority may consider incarceration a permanent absence.<sup>23</sup>

The problem with pretrial detention is not just that women are cut off from their networks of survival. Women are more likely to return to the system when they are denied such basic needs, including women who are subsequently absolved of charges. Loss of income or housing increases the likelihood that a woman will be involved in the criminal justice system in the future.

#### B. PARENTING RIGHTS AT RISK

Over forty percent of people in women's state detention facilities are the primary caretakers or sole providers for their children.<sup>24</sup> In cases where children are taken by child welfare services because of the criminal case, reunification with children is dependent upon the parent's participation in classes and supervised visits, all options that are delayed for parents in detention. Some states permanently take custody of children who have not been with their parents for over eighteen months.<sup>25</sup> Any detention will extend a parent's time away from the child. If a woman is released, with or

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for time off when they or a family member were sick." JANE FARRELL & JOANNA VENATOR, CTR. FOR AM. PROGRESS, FACT SHEET PAID SICK DAYS 2 (2012) *available at* [http://cdn.americanprogress.org/wp-content/uploads/issues/2012/08/pdf/paidsickdays\\_factsheet.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2012/08/pdf/paidsickdays_factsheet.pdf).

18. *Women in the Criminal Justice System*, *supra* note 9, at 9.

19. THE BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE 77-78 (August 2014) *available at* [http://www.reentry.net/ny/library/folder.128172-Manuals\\_and\\_Overviews\\_of\\_Reentry\\_and\\_Collateral\\_Consequences](http://www.reentry.net/ny/library/folder.128172-Manuals_and_Overviews_of_Reentry_and_Collateral_Consequences).

20. *Id.*

21. *Id.* at 53 (citing JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 120-23 (2003)).

22. 24 C.F.R. § 982.312(a) ("the family may not be absent from the unit for a period of more than 180 consecutive calendar days in any circumstance, or for any reason").

23. 24 C.F.R. § 982.312(e)(1) ("the PHA may establish policies on absences because of vacation, hospitalization or imprisonment").

24. MYRNA RAEDER, NAT'L INST. OF CORRECTIONS, PREGNANCY- AND CHILD-RELATED LEGAL AND POLICY ISSUES CONCERNING JUSTICE-INVOLVED WOMEN 34 (2013), *available at* <https://s3.amazonaws.com/static.nicic.gov/Library/027701.pdf>.

25. *Id.* at 33.

without a conviction, and her children are in state custody, she enters a time-sensitive race to prevent the permanent loss of her children.

### C. HEALTH RAMIFICATIONS OF DETENTION

Detention in a jail directly impacts health. Jails are not innocuous holding facilities: they are often less regulated than prisons, with insubstantial and bare-boned medical facilities.<sup>26</sup> Before any decision about guilt in their cases, women, presumed innocent, may face the lasting health implications of pretrial detention. Restricted access to reproductive health, for instance, can affect women's rights to terminate early pregnancies, access gynecologists, attain prenatal healthcare, labor in a safe environment, and attain postnatal care.<sup>27</sup>

Women also report emotional traumatization from pretrial incarceration. Seventy-three percent of people in women's prisons were identified as having symptoms of mental illnesses.<sup>28</sup> Anxieties caused by confinement, separation from support networks, a pending criminal case, and living conditions in jail can aggravate existing emotional illnesses.<sup>29</sup> In imposing pretrial incarceration, courts exacerbate the very factors that contribute to instability and involvement in the system.

### III. LONG-TERM BENEFITS OF PRETRIAL CONNECTION TO SOCIAL SERVICE PROGRAMS

A first step in minimizing the over-incarceration of women at the pretrial stages involves consideration of existing bail statutes and judicial practices. Institutionalizing a bail determination process that defaults to unsupervised release, rather than bail, should be a precursor to thinking about alternatives to detention. Individuals may be wrongfully charged with a crime. Many women are arrested as a result of prejudice, careless policing, false allegation, or disproportionate targeting of their community

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26. See Laura Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1301 (2012).

27. See Julia Preston, *Settlement for Shackled Pregnant Woman*, N.Y. TIMES (Oct. 18, 2013), [http://www.nytimes.com/2013/10/18/us/settlement-for-a-shackled-pregnant-woman.html?\\_r=0](http://www.nytimes.com/2013/10/18/us/settlement-for-a-shackled-pregnant-woman.html?_r=0); See also *Doe v. Arpaio*, 150 P.3d 1258 (2007) (finding facility's prohibition on transporting women detainees for abortion services a fourteenth amendment violation); *Mothers Behind Bars: A state-by-state report card and analysis of federal policies on conditions of confinement for pregnant and parenting women and the effect on their children*, NAT'L WOMEN'S LAW CTR. 28, 34 (2010) available at <http://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf> (describing poor prenatal care in women's prisons); Corey G. Johnson, *Prison Doctor Blamed for Excessive Sterilizations*, SF GATE, Feb. 15, 2014, available at <http://www.sfgate.com/news/article/Prison-doctor-blamed-for-excessive-sterilizations-5238882.php>.

28. INCARCERATED WOMEN FACTSHEET, *supra* note 10, at 3.

29. See Holly M. Harner & Suzanne Riley, *Impact of Incarceration on Women's Mental Health: Responses From Women in a Maximum-Security Prison*, 23 QUALITATIVE HEALTH RESEARCH 26, 39 (2012).

by authorities.<sup>30</sup> Not every woman arrested requires specialized pretrial support. Mandating pretrial programming presumes the appropriateness of state services monitoring people before they have been found guilty.<sup>31</sup>

Community-based programs can address the needs of women who would otherwise have monetary bail set and be held pretrial. In many places, community organizations for women impacted by the criminal justice system exist. The community-based organizations and programs are often utilized as *post-conviction* alternatives to incarceration, but are not yet embraced by courts as pretrial alternatives to detention.<sup>32</sup> If courts engage community-based organizations and services at the pretrial stage, these groups could serve as a support for women as their cases move through the court system *and* after the criminal case is resolved.<sup>33</sup>

A. PRETRIAL PROGRAMMING MAY CREATE MOST OPTIMAL OUTCOMES FOR WOMEN POST-ADJUDICATION.

Defaulting to release in criminal cases has immediate benefits for the entire system. If sixty percent of people in the criminal justice system are awaiting trial, reform in bail determinations may certainly reduce the overall number of people in the system at any one time.<sup>34</sup> Proponents of pretrial reform concerned with the state's bottom line have pointed out potential cost savings in releasing more people pretrial.<sup>35</sup> Where pretrial detention has been reduced, the rate of appearance in court, without re-arrest, is high.<sup>36</sup>

Freedom while a case is pending also has post-adjudication implications. People who are released pretrial are sentenced to jail less often than similarly situated incarcerated people awaiting trial.<sup>37</sup> Sentences of people who are incarcerated are often longer than their freed equals.<sup>38</sup> Courts' adoption of supportive programming from community-based

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30. See generally Andrea J. Ritchie, *Law Enforcement Violence Against Women of Color*, THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY (2006).

31. Advocates of court-recommended services must be cognizant that forms of social service "assistance" are more likely to be imposed upon low-income women of color. See GWENDOLYN MINK, *The Lady and the Tramp: Gender, Race, and the Origins of the American Welfare State*, in WOMEN, THE STATE, AND WELFARE 92 (Linda Gordon ed., 1990).

32. Bloom & Owen, *supra* note 13, at 30.

33. Bloom & Owen, *supra* note 13, at 29.

34. *Bail Fail*, *supra* note 3, at 3.

35. WOMEN IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 9, at 9.

36. *D.C. Pretrial Service Agency: Lessons from Five Decades of Innovation and Growth*, PRETRIAL JUST. INST. 2 (2010), available at <http://www.pretrial.org/download/pji-reports/Case%20Study-%20DC%20Pretrial%20Services%20-%20PJI%202009.pdf> (eighty-eight percent of people released without monetary bail return to all court appearances).

37. Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, THE LAURA AND JOHN ARNOLD FOUNDATION 3 (2013), available at [http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF\\_Report\\_state-sentencing\\_FNL.pdf](http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF_Report_state-sentencing_FNL.pdf).

38. *Id.*



organizations has the ability to increase the amount of people who are released during pretrial. Intensive services in the community improve life options, as reflected in lower incidences of reinvolverment with the criminal justice system. While the number of women in pretrial detention can be affected through other methods, community-based support available to women during the pretrial stage can help many to maintain stability and prevent future detention upon resolution of their cases.

Through a woman's involvement in pretrial services, courts and attorneys have more information to make informed decisions about the course of cases. Seeing women connect to services can provide a stronger basis for negotiation with prosecutors and the court.<sup>39</sup> A woman who has attained greater stability while released pretrial can make much more compelling arguments against incarceration in her case.<sup>40</sup> When given the space to articulate their life history and experiences, women may end up assisting their attorneys in finding an affirmative defense to charges, providing a basis for the court to consider diversion to treatment courts, or convincing the prosecution to reduce or dismiss charges.

#### IV. IMPROVING PRETRIAL SERVICE PROGRAMS

Jurisdictions that use pretrial supportive programming can release more people who would not otherwise be able to post bond. In order to reap the potential benefits of pretrial alternatives, collaborations with community-based organizations must prioritize the agency of women in the system and honoring women's determinations about the appropriate path for their future. If advocates can steer courts toward meaningful and effective engagement with community-based organizations for women, they can make a more convincing call for alternatives to mass incarceration.

##### A. INVESTIGATING GAPS IN SERVICES FOR WOMEN IN THE SYSTEM

In recent years, many jurisdictions have responded to the surge of women in prison by attempting to create "gender-responsive" systems. Anti-prison activists and feminist scholars point out that this type of gender-specific justice project encodes an essentialist view of gender.<sup>41</sup> The efforts also continue to rely on prisons, as most gender-responsive plans have supported the idea of "woman-centered" prison reform.<sup>42</sup>

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39. Alan Rosenthal, Marsha Weismann, & Elaine Wolf, *Unlocking the Potential of Reentry Through Restorative Justice*, in *PATHWAYS FOR OFFENDER REENTRY: AN ACA READER* 229-30 (Russ Immarigeon & Larry M. Fehr eds., 2004), available at [http://www.communityalternatives.org/pdf/Pathways\\_Rosenthal\\_Chapter.pdf](http://www.communityalternatives.org/pdf/Pathways_Rosenthal_Chapter.pdf) (incorporates benefits of pretrial programming in re-entry planning model).

40. *Id.*

41. Cassandra Shaylor, *Neither Gentle Nor Kind: the Perils of Gender Responsive Justice*, in *THE VIOLENCE OF INCARCERATION* 145, 152 (P. Scranton & J. McCullough eds., 2009).

42. *Id.* at 150.

There is no typical life track based on gender identity. Yet the increased attention to women in the system has sparked a deeper examination amongst policy makers about alternatives to detention, spurred in part by stereotypical notions about women's needs. All people facing charges benefit when courts shift away from traditional interaction with community-based programming and consider the idiosyncratic goals, histories, sustenance needs, and self-expression of individuals awaiting trial.

1. Individual-led provision of services is most effective

Women presented with the option of non-detention pretrial supervision may have little input on the terms of pretrial release programs. For an incarcerated woman, the desire to be out of detention and in the world is tremendous. A woman may feel so compelled to accept any non-detention offer such that she will not risk holding out on the chance she will be offered a program that meets her individual needs. Surveys of women in the system consistently note that pretrial programming can become systematized in a way that misses the mark.<sup>43</sup> They may disregard or fail to collaborate with accessible service providers in the woman's community.<sup>44</sup> Programs may spend inadequate time tailoring support to individual needs of women.<sup>45</sup> Pretrial programming can also easily become punitive when women are not able to direct provision of service. The holistic ethos of support is undermined when services are provided under threat of re-incarceration.

In Connecticut, the state has constructed a "gender-responsive plan" for criminal justice agencies.<sup>46</sup> The plan includes a model based on nine core practices.<sup>47</sup> Instead of being based on "risk factors," the nine-point system includes a needs-assessment identifying the woman's strengths and ways she can utilize her strengths to attain her goals.<sup>48</sup> One critical component of the system is collaboration, so that the woman decides which services will assist her and her family.<sup>49</sup> Through the program reforms, the state identified a ten percent drop in women returning to the system within a

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43. NAT'L RESOURCE CENTER ON JUST. INVOLVED WOMEN, INNOVATIONS IN GENDER-INFORMED PRETRIAL PRACTICE FOR WOMEN: SCREENING AND REFERRAL NETWORKS IN HAMILTON COUNTY, OHIO (Aug. 20, 2012), *available at* <http://cjinvolvedwomen.org/sites/all/documents/NAPSA%20Final%20ppt.pdf>.

44. VERA INST. OF JUST., MAKING THE TRANSITION: RETHINKING JAIL TRANSITION IN LOS ANGELES COUNTY, 18, 24 (2013), *available at* <http://www.vera.org/sites/default/files/resources/downloads/making-the-transition-summary-report.pdf>.

45. *Id.* at 24.

46. BART MILLSON, DAVID ROBINSON, & MARILYN VAN DIETEN, NAT'L INST. OF CORRECTIONS, WOMEN OFFENDER CASE MANAGEMENT MODEL: THE CONNECTICUT PROJECT 2 (2010), *available at* <http://www.cjinvolvedwomen.org/sites/all/documents/Women%20Offender%20Case%20Management%20Model.pdf>.

47. *Id.* at 7.

48. *Id.* at 18.

49. *Id.* at 8.

year, which the state regarded as a marker of success.<sup>50</sup>

2. Courts must be prepared to understand complex intersections for treatment.

Where the court utilizes service instead of incarceration, this supervision, like all aspects of the system, has traditionally been based on the projection of an archetypical male defendant (which is not to say that this paradigm is accurate for men in the system).<sup>51</sup> Court programs often have not advanced to meet our evolving understanding of the connections between trauma, treatment, and unlawful activity.

Reports indicate that a majority of incarcerated women have histories of trauma and abuse.<sup>52</sup> In her study of narratives of women in jail at Riker's in the 1990s, sociologist Beth Ritchie found that many of the women interviewed had experienced intimate violence.<sup>53</sup> The resulting emotional or mental illness from violence was the link between a history of trauma and involvement in the system.<sup>54</sup> In their personal stories, women often reported reliance on illegal substances as medication for emotional or mental illness instigated by abuse.<sup>55</sup> Substance abuse programs used by courts must necessarily deeply engage in the intersections of trauma from violence and mental illness in order to assist people.

3. Experts can educate judges making bail determinations

In Hamilton County, Ohio, interviews of women brought to light the role of trauma and access to mental health support in interaction with the system.<sup>56</sup> One way of lowering pretrial detention of women in Hamilton County was creating a better pipeline to services and employing counseling experts that can knowledgeably explain available services to judges.<sup>57</sup>

One program with success in using expert advocates in court is New York City's STEPs to End Family Violence Alternatives to Incarceration (ATI) program.<sup>58</sup> STEPs to End Family Violence is a program of Edwin

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50. MILLSON, ET. AL., *supra* note 46, at 40.

51. See ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES* 63 (2008) (describing the structure of treatment programs as based on male subjects); see, e.g., Raeder, *supra* note 24, and U.S. DEPARTMENT OF JUSTICE, *PREGNANCY- AND CHILD-RELATED LEGAL AND POLICY ISSUES CONCERNING JUSTICE-INVOLVED WOMEN* 6 (2013), available at <https://s3.amazonaws.com/static.nicic.gov/Library/027701.pdf> (discussing abuses in "a correctional culture that still tends to focus on male prisoners").

52. "In 2004, 62 percent of women in state prison reported a history of prior physical or sexual abuse." *Women in America: Indicators of Social and Economic Well-Being*, U.S. DEPARTMENT OF COMMERCE, ECONOMICS, AND STATISTICS ADMINISTRATION 5 (March 2011), available at <http://www.esa.doc.gov/sites/default/files/reports/documents/womeninamerica.pdf>.

53. BETH E. RICHIE, *COMPELLED TO CRIME: THE GENDER ENTRAPMENT OF BATTERED BLACK WOMEN* 5 (1996).

54. *Id.*

55. *Id.* at 124-25, 150.

56. *Innovations in Gender-Informed Pretrial Practice*, *supra* note 43.

57. *Id.*

58. *STEPS to End Family Violence*, EDWIN GOULD SERVICES FOR CHILDREN AND

Gould Services for Children and Families, and provides therapeutic services as an alternative to incarceration for women who have experienced domestic violence.<sup>59</sup> As experts in the effects of trauma, particularly in cases of women charged with violence, they are able to speak convincingly to judges about the importance of treatment outside of jail and specialized services they are able to provide.<sup>60</sup>

#### 4. Material Support is a Necessary component of Pretrial Programming

I relapsed because I could not afford transportation to meetings. I was too embarrassed to say that I could not come up with bus fare.<sup>61</sup>

Rarely is emphasis placed on the impact of material support in changing the course for women in the criminal justice system. Courts have the tools to consider pretrial support for “remediable” problems like addiction, and not larger-scale implications of poverty. Even programs that address recognizable problems like addiction may or may not provide additional housing and income support for participants. Addressing material need and helping to stabilize women pretrial can provide greater opportunity for people dependent on unlawful activity and demonstrate to prosecutors and courts that incarceration is unnecessary.

Evaluations of programs have affirmed the ways in which attention to the material demands of women’s lives affects success in pretrial programs.<sup>62</sup> For instance, pretrial services that require women to participate in programming often fail to provide childcare.<sup>63</sup> A low-income parent who is the primary caretaker of her child may not have access to regular childcare and therefore, faces the additional stress of finding someone to care for children when she attends programming. An unsuccessful search for care may result in poor attendance and “failure” in the program, prompting judges to return the woman to jail.

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FAMILIES, <http://www.egscf.org/services/steps> (last visited July 2, 2014). See, Kraft-Stolar, et al., *supra* note 3, at 25.

59. *Alternatives to Incarceration*, EDWIN GOULD SERVICES FOR CHILDREN AND FAMILIES, <http://www.egscf.org/services/steps/alternatives-to-incarceration/> (last visited Sept. 21, 2014).

60. Kraft-Stolar, et al., *supra* note 3, at 15.

61. COAL. FOR WOMEN PRISONERS, CORR. ASS’N OF N.Y., *MY SISTER’S KEEPER: A BOOK FOR WOMEN RETURNING HOME FROM PRISON OR JAIL* 13 (2008).

62. See, e.g., Bloom & Owen, *supra* note 13, at 22 (listing housing, transportation, and child care as components associated with better outcomes).

63. See Lynn Paltrow, *Punishing Women for Their Behavior During Pregnancy: An Approach that Undermines the Health of Women and Children*, ADVOCATES FOR PREGNANT WOMEN 472 (2006), available at [http://advocatesforpregnantwomen.org/file/Punishing%20Women%20During%20Pregnancy\\_Paltrow.pdf](http://advocatesforpregnantwomen.org/file/Punishing%20Women%20During%20Pregnancy_Paltrow.pdf); see also Paltrow, *Perspective of a Reproductive Rights Attorney*, THE FUTURE OF CHILDREN 86 (1991), available at [http://futureofchildren.org/futureofchildren/publications/docs/01\\_01\\_07.pdf](http://futureofchildren.org/futureofchildren/publications/docs/01_01_07.pdf).

## B. PRETRIAL SERVICES SUPPORT COMES IN NONTRADITIONAL FORMS

An alternative means of providing services is to put people in a position to challenge systemic obstacles. Some community-based service organizations have facilitated the formation of alliances of people in the system to affect policy, making women more powerful agents of change. For instance, many women who have been in the system identify difficulty in attaining regular employment as a factor driving them into the system. Some women lacked work experience or vocational training.<sup>64</sup> However, many women also have difficulties finding employment due to discrimination. Some women have had to counter discrimination against criminal records while others faced employers who were uncomfortable with LGBTQ applicants or gender nonconforming employees.<sup>65</sup>

Advocates that participated in San Francisco's Women's Community Justice Reform planning meetings asked politicians and corrections officials to consider nontraditional alternatives to incarceration, such as fostering entrepreneurship, higher education, and arts-based advocacy.<sup>66</sup> One service provider referenced in the plans, Community Works West, provides case management, housing, food and clothing, and focuses on advocacy through artistic expression to raise awareness about issues affecting people who have been in the criminal justice system.<sup>67</sup> Their participants in the Women Rising program educate people about obstacles women face in the system and inspire movement towards positive policy change within the larger community.<sup>68</sup>

## V. CONCLUSION

Envisioning better alternatives to incarceration for women in the pretrial system helps lay a path for a justice system that does not rely on jails. An examination of the experiences of women in the system has opened up new realms of discussion about the harm of pretrial detention on health, families, and support systems provide fodder for arguments against incarceration. Community-based, individual-directed services can be

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64. Bloom & Owen, *supra* note 13, at 18.

65. Ann Cammett, *Queer Lockdown: Coming to Terms with the Ongoing Criminalization of LGBTQ Communities*, SCHOLAR AND FEMINIST ONLINE 13 (2009), available at <http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1626&context=facpub>.

66. Bloom & Owen, *supra* note 13, at 3, 13-14 (listing Community Works West as a participant). The plan included prison reform recommendations, which as Cassandra Shaylor notes are counter to divestment aims of many advocates. Shaylor, *supra* note 41, at 151 (the prison system "can be reformed only to the extent that such reforms support its continued existence").

67. *Women Rising/Rising Voices*, COMMUNITYWORKSWEST.ORG, <http://www.communityworkswest.org/index.php/women-risingrising-voices> (last visited July 2, 2014).

68. *Behind the Scenes of Rising Voices*, COMMUNITYWORKSWEST.ORG, <http://www.communityworkswest.org/index.php/women-risingrising-voices/4-programs/programs/61-rvblog> (last visited July 2, 2014).

employed as an alternative to pretrial detention. Effective provision of these community-based services results in fewer people relegated to prison as a resolution in their criminal case, or returning to jail later in life. If courts really begin to default to release or nonmonetary conditions of release, this shift in use of detention has implications beyond addressing the impact of detention on due process. Courts' acceptance of community alternatives to pretrial detention presupposes the potential of free women to stabilize their own lives if given access to resources. Advocates that assist courts in envisioning this possibility, and acknowledging the detriments of the holding cell, provide a critical, pragmatic basis for the movement against mass incarceration.

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