
The Female Incarceration Effect
By: Aubrey Eyrolles, UNT Dallas College of Law

Abstract

Female incarceration is on the rise in the state of Texas. This presents problems not only for the women who are incarcerated, but also for their children, their families, and their communities. While the mass incarceration of men continues to be a hot topic for criminal justice reformers, there is typically less of a focus on studying the unique effects that female incarceration has on our society. This effect cannot be discounted and it deserves just as robust a discussion as the mass incarceration of men.

The following discussion focuses on the problems created by the increase in female prisoners, the laws that have disproportionately caused this increase in female prisoners, and the ways we can solve this problem in the state of Texas.

The Problem

The United States as a whole is seeing an increase in the number of incarcerated women, but as of 2016, Texas had the 9th highest rate of female incarceration in the country at 92 women per 100,000.¹ Between 1980 and 2016, female incarceration increased by 908% in Texas.² By comparison, male incarceration in Texas grew by 396% during that same period of time.³

81% of the women in jail or prison in Texas are mothers.⁴ Since women, on average, are the main caretakers of children, the imprisonment of mothers creates unique challenges for their children. It destabilizes the children and creates long-lasting issues for them. In some situations, children are left to fend for themselves when their mothers are in prison because the justice system does not have designated individuals to check in on them.⁵ Other children end up in foster care while their mothers are in prison because they do not have other family members that can take care of them. Unfortunately, foster children are 200-300% more likely than non-foster children to be arrested as adults.⁶ This domino effect created by mothers going to prison is detrimental to the mother, the child, the family members who are unable to care for the abandoned children, and society.

The astronomical increase in female incarceration over the past three decades deserves a serious conversation. While the inclination of some may be to dismiss the above statistics as representative of modern women being convicted of more serious crimes than in the past, it is important to note that increased incarceration rates exist in both prisons and jails in Texas. Since 2011, the number of women

¹ The Sentencing Project. *Incarcerated Women and Girls, 1980-2016* (2018), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>.

² Texas Criminal Justice Coalition. *A Growing Population: The Surge of Women into Texas' Criminal Justice System* (2018), <https://www.texascjc.org/womens-justice>.

³ *Id.*

⁴ *Id.*

⁵ Cary Aspinwall. *Overlooked*, https://interactives.dallasnews.com/2017/overlooked/#_ga=2.137598576.1771645489.1550849552-381849290.1550849552.

⁶ Matthew J. Lindquist & Torsten Santavirta. *Does placing Children in foster care increase their adult criminality?* (2014), <https://www.sciencedirect.com/science/article/pii/S0927537114001146?via%3Dihub>.

sitting in jail awaiting trial has risen by 48%.⁷ The women in jails are not there because they were convicted of a serious crime. They are in jail because they cannot afford to pay bail. As such, the increase in women being incarcerated cannot entirely be attributed to women acting worse now than they did three decades ago. The actual causes for the increase in female incarceration are a variety of factors such as poverty, untreated mental illness, lack of education, and psychological trauma.⁸ These women are in desperate situations that oftentimes cause them to turn to drugs or non-violent crime in order to support their families.

Many of these issues can be solved by devoting more resources to ensuring that women do not fall through the cracks and turn to crime in order to solve their problems. As discussed above, this criminal behavior is detrimental to children. However, it is also detrimental to society because we lose women to prison who could be rehabilitated and given the chance to remain a productive member of society.

Given how detrimental female incarceration is in the state of Texas, this is not a problem that Texas can afford to ignore. Luckily for Texas, there are relatively simple solutions to this problem. However, before this discussion turns to solutions, we must first discuss the laws and the systemic issues that lead to higher incarceration rates for women.

The Laws

Texas women are incarcerated due to a variety of offenses. While one specific law is not responsible for all the women who end up in jail or prison, we can point to one specific category: non-violent crimes. A non-violent offense is one that does not involve a weapon or a physical injury to another human. Of the women incarcerated in Texas, 64% of them committed an offense that is considered non-violent.⁹

Some criminal justice reformers advocate for the abolition of jail time for crimes that do not involve violence. These offenses—like drug charges, theft, and fraud—are crimes that typically deserve some type of punishment, but many believe they are not the types of crimes that warrant jail time. As such, many reformers advocate for non-prison alternatives, such as fines or access to rehabilitation programs. While changing the laws to reflect these new sentencing guidelines would be one way to fix the problem, this is often not something the legislature is focused on in Texas, especially since their sessions run for four months every two years.

Oftentimes, a better solution for criminal justice reformers is to work on the systemic issue that plagues incarcerated women, which is that prosecutors recommend jail sentences at a much higher rate than they recommend non-prison punishments that keep a woman out of prison and with her family. These District Attorneys have wide latitude in determining what charges and sentencing they hand down to female offenders, yet many of them continue to use prison in a way that is oftentimes abusive.

In order to fix the problems caused by the laws and the criminal justice system, there are a variety of solutions that can be implemented. This discussion now turns to a few of those solutions.

⁷ Texas Criminal Justice Coalition. *A Growing Population: The Surge of Women into Texas' Criminal Justice System* (2018), <https://www.texascjc.org/womens-justice>.

⁸ *Id.*

⁹ *Id.*

The Solutions

Female incarceration should not continue to be an epidemic in Texas. It is not an insurmountable, confusing problem where the solutions are not evident or they are not easy to implement. It is quite the opposite. The solutions to this problem already exist and have been executed in cities and states around the country. The tried-and-true nature of these solutions gives credence to the solutions because we know that they already work in practice, not just in theoretical conversations. Since these solutions already exist, the only thing left to do is implement them throughout Texas.

The following three solutions would lead to fewer women being incarcerated in Texas: (1) reforming the bail system, (2) reforming the ways that prosecutors handle non-violent female offenders, and (3) utilizing diversion programs where appropriate. As mentioned above, all three solutions have been instituted to varying degrees across the United States. These solutions are not groundbreaking, but one key part of fixing this problem is making sure that we do not overlook simple solutions that are already working in other cities and states.

Bail Reform

Bail reform is a prevalent topic of conversation in Texas at the moment. Federal judges in both Houston and Dallas recently ruled that both cities are using unconstitutional bail practices to victimize indigent arrestees.^{10,11} In many cities in Texas, not just Houston and Dallas, the inability to afford bail has been a big reason why many women end up in jail until they get their plea agreements or have their trials. The time these women spend in jail is time spent away from children, family, and jobs. This oftentimes leads to women losing their jobs and temporarily losing the ability to support their families.

Rather than utilizing traditional bail for women, there are less onerous versions of the cash bail system that exist and that are being tested in other cities. New York, for example, tested partially secured or unsecured bonds that require a small upfront payment or no upfront payment at all.¹² So far, this system has largely worked and has proven that pre-trial individuals will show up in court even when they do not put up a high dollar amount for bail. In Philadelphia, District Attorney Larry Krasner saw the same result when he stopped seeking cash bail for a variety of non-violent offenses. In 2018, without cash bail for 61% of Philadelphia's offenses, the city saw a higher court-appearance rate for defendants than it had seen in a decade.¹³

With proof that a less onerous bail still results in offenders showing up for court, and sometimes even increases the number of offenders who appear in court, it is getting harder to justify large bail amounts, especially for violations of the law that are non-violent in nature. Houston and Dallas are already

¹⁰ Gabrielle Banks. *Harris County bail system unconstitutional, federal judge rules*, <https://www.chron.com/news/houston-texas/houston/article/Harris-County-bail-system-unconstitutional-11108210.php>.

¹¹ Jolie McCullough. *Federal judge rules against Dallas County bail practices*, https://www.texastribune.org/2018/09/20/dallas-bail-system-judge-order/?_ga=2.8538866.690969267.1551368691-1764390285.1551368691.

¹² Insha Rahman. *Against the Odds: Experimenting with Alternative Forms of Bail in New York City's Criminal Courts* (2017), https://storage.googleapis.com/vera-web-assets/downloads/Publications/against-the-odds-bail-reform-new-york-city-criminal-courts/legacy_downloads/Against_the_Odds_Bail_report_FINAL3.pdf.

¹³ Samantha Melamed. *Philly DA Larry Krasner stopped seeking bail for low-level crimes. Here's what happened next*, https://www.philly.com/news/philly-district-attorney-larry-krasner-money-bail-criminal-justice-reform-incarceration-20190219.html?_vz=medium%3Dsharebar&fbclid=IwAR0TGU-dyK0Cyd1ODlZZUby1FTD8s96Z4s-7pgAsfEJWzMWdm-M25Aip_E.

working on ways to make bail less impactful to indigent arrestees, but the entirety of Texas needs to jump on board and start exploring alternatives to the traditional cash bail system. When Texas does this, it will be an immediate and impactful way to reduce the incarceration rate of Texas females.

Prosecutorial Reform

Prosecutorial reform is a hot topic and is picking up steam with District Attorneys across the United States. Prosecutorial reform focuses on the root cause of crimes and focuses on making sure that District Attorneys are not wielding their power to throw people into prison too loosely. Rather than prosecute everybody to the fullest extent of the law, the goal is to make sure that the people going to prison are the ones who committed violent crimes, the ones who need jail time to deter future crime, or the ones who likely could not succeed in diversion programs (as discussed in further detail in the next section).

To reduce the rate of female incarceration in Texas, we need to convince District Attorneys to only incarcerate women who committed violent crimes or would not succeed in rehabilitation and/or diversion programs. With many Texas women receiving prison sentences for low-level drug offenses, such as the possession of marijuana, the prison system is becoming overloaded with people who would be better off receiving drug treatment. Putting women in prison for low-level drug offenses is also not consistent with what we strive for in society, which is keeping families together and helping people who struggle with drug addiction. Prison advocates claim that prison can solve this issue, but in most cases, it ends up exacerbating the issue.

Several District Attorney offices across the United States have decided to stop prosecuting certain low-level, non-violent crimes. In many of these offices, low-level drug crimes are typically the first offense that they decide not to prosecute. For example, Larry Krasner in Philadelphia and John Creuzot in Dallas have both informed their prosecutors that they do not want to prosecute low-quantity marijuana offenses. This commitment by certain prosecutors marks a departure from the past treatment of drug offenders. However, if Texas wants to reduce the number of women who are incarcerated, the cities will need to work to reduce the number of non-violent women who are sentenced to prison and taken away from their children.

Diversion Programs

One of the focuses of criminal justice reform is on fixing the underlying causes of incarceration. The ultimate goal is to reduce female incarceration by identifying and solving the issues that are causing women to end up in prison. Diversion programs can accomplish this goal. These programs recognize that rehabilitation usually leads to lower rates of recidivism than imprisonment.¹⁴

Experts estimate that 98% of the women who end up in the justice system have some sort of trauma in their history.¹⁵ In these situations, the women who end up incarcerated do not have access to resources that can help them resolve traumas and find healthy coping mechanisms. These women are oftentimes prime candidates for diversion programs that can help them deal with their addictions while allowing them to stay out of prison and raise their children.

¹⁴ Center for Health and Justice. *A National Survey of Criminal Justice Diversion Programs and Initiatives* (2013), http://www2.centerforhealthandjustice.org/sites/www2.centerforhealthandjustice.org/files/publications/CHJ%20Diversio%20Report_web.pdf

¹⁵ Texas Criminal Justice Coalition. *A Growing Population: The Surge of Women into Texas' Criminal Justice System* (2018), <https://www.texasjc.org/womens-justice>.

To bring these diversion programs to fruition, courts would pair women with social workers who are responsible for assessing what services they need, whether those be drug rehabilitation, counseling, or other similar services. Once the social worker identifies the need, the women would be placed in those programs under strict guidance by the court. Participating in these programs would be a condition of remaining out of prison, and the privilege to participate in these programs would be revoked in situations where the women were not following the rules.

In 1998, John Creuzot, now the District Attorney for Dallas, started a specialty court for drug offenses that allowed first-time offenders to go through a court-monitored rehabilitation program instead of going to prison. The program is still operational and has achieved a 68% reduction in recidivism.¹⁶ Many former participants have thrived outside of prison and in their communities. If more cities in Texas were willing to institute these types of diversion programs, more women could be helped and more families could stay together. This clearly benefits families and communities.

Conclusion

Female incarceration in Texas is an epidemic that we must work to solve. We can immediately begin to reduce the number of women who sit in jail and prison if we initiate bail reform on a larger scale, elect and hire prosecutors who seek out non-prison options when practicable, and increase the use of diversion programs for women. These relatively simple changes will benefit women, children, and society as a whole.

¹⁶ The Creuzot Law Firm website. *About John Creuzot*. Accessed on February 26, 2019. <http://creuzotlawfirm.com/about/>.

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