

12-19-2017

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Recommended Citation

Correa, Catalina P. (2017) "The Foundations of Modern Criminal Law and Gender Inequality," *Seattle Journal for Social Justice*: Vol. 16 : Iss. 1 , Article 9.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol16/iss1/9>

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The Foundations of Modern Criminal Law and Gender Inequality

Catalina Perez Correa*

ABSTRACT

Modern penal theory, like prevalent western theories of law, adopts a determined model of autonomy, one in which people are separable from social and family contexts. Taken to the criminal law context, this model proposes people can be defined without taking into account the social context. The use of prisons thus presupposes that individuals can be removed from their communities and families to be reeducated, readapted, treated or—in the retributive approach—simply punished. This notion of autonomy, however, hides from sight the group of people who not only maintain family ties with the men and women in prison, but who also, in contexts such as the Latin American one, take on the responsibility of supporting the prisoners economically. As this paper shows, this group is not heterogeneous or plural but defined by gender and primarily constituted of the mothers, daughters, wives and sisters of the people who are imprisoned. The data presented in this paper shows that this group of women is marginalized, impoverished and abused by a criminal justice system that not only omits to recognize the serious costs that the system imposes on them, but also omits to acknowledge their existence. This paper argues that this lack of recognition is possible because it is premised on a penal model that assumes a certain idea of autonomy, one which enables

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societies to erroneously affirm that prison sentences are individual sentences.

I. INTRODUCTION

In spite of the darkness and the cold temperatures, the outer door of the prison is buzzing. It is only five a.m. but already a long line of visitors waits for the main gate to open. Merchants selling cigarettes, freshly squeezed orange juice or phone cards walk up and down the line offering their products. A man pushes a yellow tricycle with two metal buckets from which steam escapes. “Tamales, Atole”¹ he shouts, while slowly moving his cart down the line. On the opposite sidewalk, the pink and red plastic canvases are periodically illuminated by the passing by cars. The stalls underneath offer all types of products: beige clothing for the inmates, black shoes, big bags (of the kind that are allowed into the prison), water bottles, rice, beans, oil, laundry detergent, soap, plastic containers, books, toys, brooms. A few stalls rent clothing for visits who are sent back for wearing forbidden color clothing or forbidden types of shoes with buckles or laces. Above all the sounds, a woman’s voice can be overheard: “Tickets, do you have tickets? I have tickets.” Not everyone will be able to get in. Tickets are supposed to be distributed for free, on a first come, first serve basis, yet here they are sold to latecomers.

One characteristic of the group of people patiently waiting outside the prison walls is immediately apparent: the majority are women. Some carry babies, who seem oblivious of the chaos that surrounds them. Others hold older children by the hand. Most women carry heavy bags with food or water for their inmates and most have weary faces. Those who have been here before know it will still be a few hours before they see their brothers, husbands, fathers, sons. New visitors will likely be turned back.

¹ A typical Mexican food and beverage made from corn.

Modern penal theory, like prevalent Western theories of law, adopts a determined model of autonomy: an atomistic model in which people are separable from social and family contexts.² This model proposes people can be self-defined without taking into account their social context.³ Under this model, prison sentences, the preferred form of criminal punishment in most western countries, are understood as a way in which individuals are removed from their communities and families to be reeducated, readapted, treated or—in the retributive approach—simply punished.⁴ Family or social contexts are not relevant. People are individually responsible for their choices and must be individually condemned, treated, or punished.⁵ This concept of individuality and autonomy, however, hides from sight the group of people who not only maintain family ties with the men and women in prison, but who also, in contexts such as the Latin American one, take on the responsibility of supporting the prisoners economically. As this paper shows, this group is not heterogeneous or plural but defined by gender and primarily constituted of the mothers, daughters, wives and sisters of the people who are imprisoned. This paper provides data that demonstrates the extent to which this group of women is marginalized, impoverished, and abused by a criminal justice system that not only fails to recognize the serious costs that it imposes on them, but also to acknowledge their

² As Jennifer Nedelsky points out: “The now familiar critique by feminists and communitarians is that liberalism takes atomistic individuals as the basic units of political and legal theory and thus fails to recognize the inherently social nature of human beings.” Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 *YALE J. L. & FEMINISM* 7, 8 (1989).

³ In her first work about autonomy, Jennifer Nedelsky points to the fact that people are not self-made but come into being in a social context that is constitutive of us. In other words, we are not self-determined but rather made through interaction with others. However, the liberal model of autonomy hides the importance of social life, without which there would be no formation of the self. *Id.* at 8–10. This is the reason why the liberal concept of autonomy, is inadequate in her view, because it fails to acknowledge the importance of our social nature.

⁴ See generally JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 3 (2011).

⁵ See generally NEDELSKY, *supra* note 2.

existence. This lack of recognition is possible because it is based on a penal model that presupposes a certain idea of autonomy, one which enables societies to affirm—erroneously—that prison sentences are individual sentences.

The data presented here shows that the use of prisons, especially in the Latin American penitentiary context where the state frequently fails to meet its obligation to provide the minimum goods necessary to meet prisoners' basic needs, resembles ancient criminal law which punished families and/or communities for individual crimes. As this paper demonstrates, the effects of criminal law today—with its reliance on prison sanctions—extend to the family of the person who receives punishment; have a deep, negative impact on people whom the law recognizes as innocent; and often have permanent costs for the prisoners' families.

This paper is divided into two parts. The first explores how the value system on which modern criminal law is based results marginalizes and makes invisible the thousands of women who maintain the system. This implies documenting the costs implicit in the State's use of prison sentences. The second part uses descriptive data to show some of the socio-demographic traits of these women and the economic, social and health costs that the use of prison sentences implies for this group in particular.

II. THE CRIMINAL JUSTICE MODEL AND GENDER INEQUALITY

Various studies have questioned whether there is such a thing as neutral, equitable criminal law; one that affects all people equally, regardless of their different social conditions. From the decision about which behaviors to punish to the decision about which punishments to impose, criminal law translates into unequal treatment and creates disparities in society.⁶ Some

⁶ Catalina Pérez Correa, *El Sistema Penal Como Mecanismo de Discriminación y Exclusión*, UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO, INSTITUTO DE INVESTIGACIONES JURÍDICAS (2014), <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3541/8.pdf> (In this paper I propose thinking of the criminal justice system as a process composed of three sub-processes: 1)

authors show that the criminal justice system often tries and punishes economically and socially excluded groups.⁷ Others show how the use of prisons, the punishment preferred by today's criminal justice systems, not only affects those who are in prison, but also contributes to the impoverishment of families and communities that are already marginalized.⁸ This led to a view of the criminal process⁹ and prison as complex social institutions with a variety of criminal justice and social functions, ranging from the expression of punitive feelings and desire for social control to retribution and the exclusion of certain individuals or social groups.¹⁰

From a gender standpoint, the use of criminal law results in strong disparities. The criminal justice system not only punishes women who come from marginalized and vulnerable sectors of society, but also reflects women's secondary role in society and is often used to communicate a certain expected social role.¹¹ Some studies show that men and women

the decision regarding what behaviors to criminalize (who is an offender), 2) the decision regarding what crimes to prosecute (who is to be prosecuted), and 3) the decision regarding what punishment (and what intensity of punishment) to impose.)

⁷ See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 197 (2001); LIBARDO JOSÉ ARAIZA & MANUEL ITURRALDE, *LOS MUROS DE LA INFAMIA: PRISIONES EN COLOMBIA Y EN AMÉRICA LATINA* at 7, 8, 11 (2011); Correa, *supra* note 6, at 145; Jeffrey Fagan & Tracy L. Meares, *Punishment, Deterrence, & Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173 (2008); Alice Goffman, *On the Run: Wanted Men in a Philadelphia Ghetto*, 74 AM. SOC. REV. 339 (2009); Gabriel Bouzat, *Inequality, Crime, & Security in Argentina*, SELA (SEMINARIO EN LATINOAMÉRICA DE TEORÍA CONSTITUCIONAL Y POLÍTICA) PAPERS (2010), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1090&context=yls_sela.

⁸ See, e.g., ERNEST DRUCKER, *A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* (2011); MARC MAUER & MEDA CHESNEY-LIND, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (2002).

⁹ Criminal process often begins with a formal criminal charge and ends with acquittal or conviction of a defendant during the sentencing phase.

¹⁰ DAVID GARLAND, *CRIMEN Y CASTIGO EN LA MODERNIDAD TARDÍA* 194 (2007).

¹¹ See, e.g., CAROL HEDDERMAN & LORAINÉ GELSTHORPE, *UNDERSTANDING THE SENTENCING OF WOMEN* (1997)

receive differentiated treatment during criminal proceedings and are sentenced differently for similar crimes.¹² In a pioneering study on the topic, for example, Elena Azaola showed that in Mexico's Federal District, the murder of a relative was punished with an average of six more years in prison when committed by a woman than by a man.¹³

Others, especially in Latin America, show that the conditions of punishment tend to be worse for women than for men.¹⁴ The National Human Rights Commission of Mexico, for example, noted that prisons for women in that country have fewer services than those for men.¹⁵ This is because facilities for female prisoners are often adaptations of some part of the men's facilities, rather than being specifically designed for women.¹⁶ Because of this, they often lack their own independent facilities.¹⁷ It is common, for example, for women's prisons, unlike men's, to lack outdoor

¹² See, e.g., ELENA AZAOLA GARRIDO & CRISTINA JOSÉ YACAMÁN, *LAS MUJERES OLVIDADAS: UN ESTUDIO SOBRE LA SITUACIÓN ACTUAL DE LAS CÁRCELES DE MUJERES EN LA REPÚBLICA MEXICANA* (1996); CAROL HEDDERMAN & LORAINÉ GELSTHORPE, *UNDERSTANDING THE SENTENCING OF WOMEN* (1997); Mauer & Chesney-Lind, *supra* note 8 at 84–6, 88–9; David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001); S. Fernando Rodriguez, Theodore R. Curry, & Gang Lee, *Gender Differences in Criminal Sentencing: Do Effects Vary Across Violent, Property, and Drug Offenses?*, 87 SOC. SCI. Q. 318 (2006); Correa, *supra* note 2, at 145.

¹³ ELENA A. GARRIDO, *EL DELITO DE SER MUJER* (1997).

¹⁴ See, e.g., Garrido & Yacamán, *supra* note 12; MARIA NOEL RODRIGUEZ, *MUJERES MADRES EN PRISION EN AMERICA CENTRAL* (2005); COMISIÓN NACIONAL DE DERECHOS HUMANOS, *DIAGNÓSTICO NACIONAL DE SUPERVISIÓN PENITENCIARIA 2013* (2014) [hereinafter *Comisión 2013*]; *Diagnóstico Nacional de Supervisión Penitenciaria*, COMISIÓN NACIONAL DE DERECHOS HUMANOS, (2015), http://www.cndh.org.mx/sites/all/doc/sistemas/DNSP/DNSP_2015.pdf [hereinafter *Comisión 2015*]; Marcela Briseño López, *Garantizando los Derechos Humanos de las Mujeres en Reclusión*, INSTITUTO NACIONAL DE LAS MUJERES (2006), http://cedoc.inmujeres.gob.mx/documentos_download/100793.pdf.

¹⁵ *Comisión 2015*, *supra* note 14, at 5.

¹⁶ GARRIDO & YACAMÁN, *supra* note 12, at 179.

¹⁷ GARRIDO & YACAMÁN, *supra* note 12, at 179.

patios, recreation areas, workshops or their own health facilities.¹⁸ Because they lack their own infrastructure, when female inmates need medical assistance, they are attended by staff from the men's prisons in the men's facilities.¹⁹ This means there are no gynecological health services for women inmates or special services for pregnant women.²⁰ Women in prison, who have their children with them, often share their beds in overcrowded cells designed for adults.²¹ Alternatively, they are simply denied the possibility of being with their children because of a lack of family areas in prisons.²² From a gender perspective, we see that the criminal justice system reflects the social structure that puts women in a secondary, marginal place, and serves as a tool for censure and social control of women in general, and women from certain social sectors in particular.

In this paper, I seek to make visible one of the less studied ways in which criminal law excludes and marginalizes a significant number of women. These are the women who visit the men and women in prison and maintain family and social bonds with them (crucial for helping later re-inclusion into society): the mothers, daughters, wives and sisters of people who are in prison. In a context like that of Latin America, where the State tends not to provide the basic goods required for survival in prison, this group also provides economic support for the men and women imprisoned by the State, and for their children and other dependents. Despite the fact that these women bear a significant part of the cost of prison use, they are not recognized as a target of criminal policy, and they are rarely taken into consideration when criminal justice or prison policies are designed. This lack of recognition, I contend, is the result not only of deficient or corrupt

¹⁸ Victoria Adato Green, *La situación actual de las mujeres en reclusión* in LA SITUACION ACTUAL DEL SISTEMA PENAL EN MEXICO, 335 (Sergio García R. & Olga I. de González Mariscal eds., 2011) at 89, 103.

¹⁹ COMISIÓN DE DERECHOS HUMANOS, DIAGNÓSTICO DEL DISTRITO FEDERAL, INFORME ANUAL 2014 (2015), at 79-80.

²⁰ GARRIDO & YACAMÁN, *supra* note 12, at 180.

²¹ Comisión 2015, *supra* note 19, at 102.

²² RODRIGUEZ, *supra* note 12, at 29-30.

institutions, but also of a criminal law model that endorses a certain conception of autonomy that results in the idea that prison sentences can be individual punishments.

A. Freedom, Autonomy, and Criminal Responsibility

Western societies place a high value on freedom and on a very particular understanding of autonomy. People, in these societies, are perceived as autonomous from one another, defined by individuality but without reference to their social environment.²³ In this model, social relations are not understood as a constitutive aspect of personality (or autonomy) and are therefore not taken into account.²⁴ This way of understanding autonomy underestimates the importance that social relations has in the construction of autonomy. As noted by Nedelsky, autonomy cannot be constructed from the abstract, nor from individuality, but from the relations that we have throughout our lives, with our parents, teachers, friends, neighbors, employees and employers, etc.²⁵ These relationships are what make autonomy and individuality possible.

Modern criminal law and its use of prisons as punishment presupposes, as other areas of modern law, an individualistic idea of autonomy. Thus, in many ways, it not only denies the existence of personal relations but assumes these can be severed or reconstructed by will. The effect is a negation of the effects criminal punishment has on others, making it impossible to take these effects into account. For example, according to prevalent discourse, punishment through prisons is said to have two types of costs: the direct or main cost, and the indirect, collateral, or secondary costs.²⁶ The main cost of imprisonment is the loss of freedom. The

²³ See generally NEDELSKY, *supra* note 2, at 3.

²⁴ See generally NEDELSKY, *supra* note 2, at 8.

²⁵ See generally NEDELSKY, *supra* note 2, at 3.

²⁶ See, e.g., A. Mitchell Polinsky & Steven Shavell, *The Optimal Use of Fines and Imprisonment*, 24 J. PUB. ECON. 880 (1984) (analyzing the optimal use of imprisonment in terms of achieving deterrence, where imprisonment is analyzed as the loss of liberty);

secondary (or collateral) costs are separation from the family and community, loss of a job (legitimate income), loss of prospects for obtaining work in the future, and stigmatization (or loss of prestige) because of being punished.²⁷ In other words, prevalent discourse places the greatest value on loss of freedom and a secondary value on the other effects caused by imprisonment: whether it be loss of health, reputation or future income.²⁸ Under this model, collateral costs may include the effects that imprisonment has on the family²⁹ or community, but these are rarely studied and much less taken into account when formulating public policy.

The lack of recognition of these costs as primary ones, not only implies that imprisonment continues to be the preferred choice of criminal punishment but also means that legislation fails to take into account the offenders' family context in determining a sentence.³⁰ U.S. legislation, for

Ross L. Matsueda et al., *Detering Delinquents: A Rational Choice Model of Theft and Violence*, 71 AM. SOC. REV. 95 (2006) (describing and analyzing Rational Choice theories that use risk of imprisonment as a main deterrent); Jeffrey Fagan & Alex R. Piquero, *Rational Choice and Developmental Influences on Recidivism Among Adolescent Felony Offenders*, 4 J. EMPIRICAL LEGAL STUD. 715, 729 (2007) (explaining that one of the variables used by the authors is the cost of punishment, described as "deprivation of liberty associated with correctional punishment").

²⁷ Peter Y. Sussman, *Media on Prisons: Censorship and Stereotypes*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 258 (Marc Maurer & Meda Chesney-Lind eds., 2002); Tracey L. Meares, Neal Katyal, & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1183–85 (2004).

²⁸ See generally NEDELSKY, *supra* note 2.

²⁹ The term family is used in this paper to refer to any relationship resembling a family arrangement, whether or not it is recognized by the legal system.

³⁰ In Mexico, for example, even when some articles of criminal legislation indicate that the judge must consider "the social and economic conditions" of the defendant, these are only relevant as a function of the danger that the offender represents to society and are never used for consideration of the "secondary" effects of the sentence. See Código Penal Federal) [CPF], art. 52, 70, 72. Neither a person's obligation to provide food—a basic economic standard—nor the existence of other dependents enters into the decision about who should be punished with imprisonment or for how long. See Federal Criminal Code (Código Penal Federal) (CPF) Art. 52, 70, 72 (stating the factors that judges can take into account when deciding length of prison sentences). OFFICIAL DIARY OF THE FEDERATION (Diario Oficial de la Federación, Mexico) (Sept. 17, 1931). See also WEEKLY GAZETTE OF THE FEDERAL JUDICIAL POWER (Semanao Judicial de la Federación y su Gaceta) 100 (Mar. 2008) (stating that Federal District legislation allows

example, openly oppose such considerations.³¹ In more conservative societies, like Latin America's, this also means the failure to recognize the women who support prisoners and the children of prisoners.³² As this paper shows, the use of prison sentences results in great costs for thousands of women. The irony is that by ignoring the importance of these caregiving values—between people in prison and the women who support them—the model violates one of its fundamental principles; that only the person responsible for a crime should be punished.³³ In this sense, instead of communicating disapproval to the offender, as various criminal theorists would propose,³⁴ the state communicates disregard for a large group of people who are characterized precisely by their caring for others.³⁵

the court to take into account investigative reports about the defendant's personality, although this is not mandatory, and failure to do so does not invalidate the sentence, but does not mention personal conditions or family responsibilities).

³¹ In one of the few cases in which these issues are discussed, a U.S. district court judge sentenced Mary Lou Thomas to probation instead of the six years in prison that the prosecutor recommended. Mary Lou was the main source of support for and caretaker of two minors with mental disabilities, as well as the guardian of her 4-year-old grandson. The seventh circuit court reversed the judge's decision, arguing that family responsibilities, regardless of their difficulties, did not justify straying from the norm—the Federal Sentencing Guidelines—that required a prison sentence. See Mary Coombs, *Putting Women First*, 93 MICH. L. REV. 1686, 1686–87 (1995).

³² This is the reason why feminists have criticized the atomistic model of autonomy. See NEDELSKY, *supra* note 2, at 8.

³³ See generally R.A. DUFF, *ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW* (2007).

³⁴ See e.g., R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* at 27, 80–82 (2001) (offering a theory of punishment based on communication instead of deterrence or retribution); Andrew Von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 24 (1983); see Richard W. Burgh, *Do the Guilty Deserve Punishment?*, 79 J. PHIL. 193 (1982) (discussing the difficulty in setting appropriate punishment).

³⁵ See Von Hirsch, *supra* note 31, at 24 (stating that criminal punishment implies doing harm to another as retribution for an offense committed: "Punishment consists of doing something painful or unpleasant to someone, because purportedly he committed a wrong, under circumstances and in a manner that convey society's disapproval of his actions. Treating the action as *wrongdoing*, Richard Wasserstrom has pointed out, is central to the concept of punishment.") In this view, an important function of punishment is communicating disapproval to the offender. The harshness of the punishment must

From an instrumental view³⁶ of punishment, also, the policy undermines one of its principal objectives. The harm done to families undermines the supposed purpose of the punishment, whether reeducation and, or reinsertion into society. As the paper shows, one of the effects of imprisonment is the impoverishment of the family and the resulting inability to take care of the prisoners when released.

The extent of this paper does not allow for exploration of what the woman's role should be in caring for others, whether a partner, child or other relatives. It does not analyze the many factors that explain why women take on the caregiving task inside and outside the home, or the multiple models of "family" that exist—single-parent families, families with parents of the same sex, families with parents who are separated, etc. The statements made here are based on factual evidence: most prisoners are men, and it is women who, for various reasons, assume the economic, health and personal costs of their incarceration.³⁷ By ignoring this disparity, the State, through its criminal law system, punishes and makes invisible millions of women whom it marginalizes, impoverishes and punishes without cause and without even acknowledging that it is doing so.

The following section uses descriptive data to show the costs that use of prison sentences has on many women, and demonstrates how the criminal justice system—which, in practice, is reduced to the use of prisons—impoverishes and harms a large group of women from social sectors that are already disadvantaged.

communicate the degree of the community's disapproval and must therefore be proportionate to the wrong that was done).

³⁶ An instrumental view of punishment is one that understands punishment as a means to reduce crime. Duff refers to this justification of punishment as consequentialism. See DUFF, *supra* note 34 at 3-7.

³⁷ According to the National Institute of Statistics, only 5% of Mexico's inmates are women. See *Encuesta Nacional de Población Privada de la Libertad (ENPOL)*, INEGI 9 (2016), <http://www.beta.inegi.org.mx/proyectos/encotras/enpol/2016/>.

III. INVISIBLE WOMEN

This section presents the main findings of the study, “Invisible women: the real costs of prison” carried out in Mexico in 2014 with support from the Inter-American Development Bank (IDB).³⁸ For the study, a survey was conducted in seven local prisons (Centros Readaptación Social) in Mexico City and five in the state of Morelos, in Mexico.³⁹ The survey consists of 1,213 interviews, conducted between 22 May and 21 June 2014.⁴⁰ The participants were 992 women and 221 men over age 18.⁴¹ All participants were anonymous volunteers selected randomly from among visitors leaving the centers after their visits.⁴² The sample is representative of the two states, but not of the prisons.⁴³

As mentioned above, the use of prison sanctions creates costs that are extended to the families and communities of offenders punished, especially affecting the women who, take responsibility for caring for those who are in prison. I propose that by considering them secondary or collateral, criminal justice and penitentiary discourse denies or minimizes the serious (negative) impact of the current criminal model on women.

³⁸ See Catalina Pérez Correa, *Las Mujeres Invisibles los Costos de la Prisión y los Efectos Indirectos en las Mujeres*, INTER-AM. DEV. BANK 47 (Sept. 2015), https://publications.iadb.org/bitstream/handle/11319/7235/ICS_DP_Las%20mujeres_invisibles.pdf?sequence=1&isAllowed=y. (The survey was conducted in state centers in the Federal District and the state of Morelos. Mexico has 416 penitentiary centers; 15 are under jurisdiction of the federal government, 11 under the Federal District, 299 under state governments and 91 under municipal governments. Altogether, the country has capacity to house 196,742 people, although it currently houses 257,807 people, 80.7 percent of them in centers under local jurisdiction.)

³⁹ *Id.*

⁴⁰ *Id.* at 23.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

A. Sociodemographic Characteristics of Visitors

In 2013, Mexico City received a total of 3,293,597 visitors; 2,944,969 were adults and 348,628 were minors. Of the adult visitors, 75.3 percent (2,211,409) were women.⁴⁴ The state of Morelos received a total of 175,859 visitors in 2013, of whom 79 percent (139,082) were women.⁴⁵

Table 1. Visitors to penitentiary centers in México City and Morelos, by sex (2013)

State	Men	Women	Children	Total
Mexico City	733,560	2,211,409	348,628	3,293,597
Morelos	36,777	139,082	N/D	175,859
Both	770,337	2,350,491	348,628	3,469,456
(%)	22.2	67.7	10.0	100.0

Sources: Government of the State of Morelos, public information request no. 00088914, and Government of Mexico City, request no. 0101000045214.

Of the people surveyed, 81.8 percent were women and 18.2 percent were men; the percentage of women in the sample was slightly greater than that registered by officials.⁴⁶ Most of the people surveyed (91.8 percent) have children.⁴⁷ Unlike the prisoners, who tend to be concentrated between ages

⁴⁴ *Id.* at 19.

⁴⁵ *Id.*

⁴⁶ *Id.* at 25.

⁴⁷ *Id.* at 31.

31 and 40,⁴⁸ the largest age group of visitors to the centers was 51 and over.⁴⁹ Of those surveyed, 39.5 percent were in the group ages 51 and over, and 27.7 percent were between ages 41 and 50.⁵⁰

The survey data show that visitors to the center come from disadvantaged social sectors. On average, they have less formal education than the population in their states (the average schooling is lower, there is a smaller percentage of people with a middle school or higher education, and a larger percentage of people with no formal schooling than the average for their respective states), and there is a higher percentage of working women than is reported nationwide.⁵¹ Of those surveyed, 11.4 percent receive less than one minimum wage per day (equivalent to \$4.50 USD per day), and nearly 50 percent receive 800 Mexican pesos or less per week (equivalent to \$52 USD or less per week).⁵²

Of the women surveyed in the DF, 69.7 percent said they worked, while in Morelos, that figure was 67.2 percent.⁵³ According to the National Institute of Statistics and Geography (*Instituto Nacional de Estadística Geografía e Informática*, INEGI), 37.4 percent of women nationwide participate in remunerated labor.⁵⁴ This means the percentage of working women who visit penitentiaries is nearly twice the national average rate of women who work in the country. As discussed below, this is because they

⁴⁸ Catalina Pérez Correa & Elena Azaola, *Resultados de la Primera Encuesta Realizada a Población Interna en Centros Federales de Readaptación Social*, CENTRO DE INVESTIGACIÓN Y DOCENCIA ECONÓMICAS 7 (2012), https://publiceconomics.files.wordpress.com/2013/01/encuesta_internos_cefereso_2012.pdf.

⁴⁹ Pérez Correa, *supra* note 38, at 31.

⁵⁰ Pérez Correa, *supra* note 38, at 31.

⁵¹ Pérez Correa, *supra* note 38, at 31.

⁵² Pérez Correa, *supra* note 38, at 33.

⁵³ Pérez Correa, *supra* note 38, at 33.

⁵⁴ *Cuadro Resumen: Indicaciones Sociales*, INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA, OCUPACIÓN Y EMPLEO (July 7, 2017), <http://www3.inegi.org.mx/sistemas/temas/default.aspx?s=est&c=25433&t=1>

must work to support their relatives in prison, as well as the prisoners' children.

One relevant figure is that the main form of employment reported by the women visitors is domestic labor (see Table 2), while the men are self-employed or private employees. When asked, "What kind of work do you do?" 23.5 percent of those surveyed answered that they were private employees, while 23 percent said they were domestic workers, 18.6 percent were merchants, 15 percent were self-employed, seven percent were employed by the government, and 5.2 percent were laborers.⁵⁵ Breaking down the answers by the interviewee's sex, however, we find that 29 percent of the women are domestic workers and 21 percent are merchants, while 27.7 percent of the men are self-employed and 11 percent drive taxis or other vehicles.⁵⁶ INEGI states that domestic workers make up 4.7 percent of the actively employed population, and 90.2 percent of domestic workers nationwide are women.⁵⁷ In other words, among the people who visit the centers, there is a much larger percentage of people who perform a work that characterized by informality, low pay and precarious conditions.⁵⁸ This, as shown below, is a direct effect of the use of criminal law in general and the use of prison in particular, as well as by the ways in which prisons are operated in Mexico.

⁵⁵ Pérez Correa, *supra* note 38, at 32.

⁵⁶ Pérez Correa, *supra* note 38, at 32.

⁵⁷ *Encuesta Nacional de Ocupación y Empleo, Población de 15 Años y más de Edad*, INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA (2017), <http://www.beta.inegi.org.mx/proyectos/enchogares/regulares/enoe/>.

⁵⁸ See *Household Workers: The Informality We Choose Not to See*, NEXOS (Apr. 5, 2011), <http://redaccion.nexos.com.mx/?p=1115>

Table 2. Work by type, place and sex

Type of work	Mexico City (%)	Morelos (%)	Total (%)	Women (%)	Men (%)
Domestic worker	23.1	22.9	23	29.2	0.5
Merchant	18.1	19.3	18.6	21.1	9.6
Private employee	26.1	19.9	23.5	23.1	25
Government employee	8.2	5.4	7.0	7.0	6.9
Factory worker	5.8	4.4	5.2	4.6	7.4
Driver of taxi or other vehicle	2.4	2.5	2.4	0.0	11.2
Professional	1.4	2.2	1.7	1.5	2.7
Small farmer	0	2.2	0.9	0.3	3.2
Self-employed	12.7	18.0	15	11.5	27.7
Other	2.0	2.9	2.5	1.4	5.8
Don't know/no response	0.2	0.3	0.2	0.3	0
Total	100	100	100	100	100

Source: Catalina Pérez Correa, *Las mujeres invisibles. Los Costos de la prision y los efectos indirectos en las mujeres* (2015) at 36

Most of the people who visit the centers are going to visit their sons or daughters. According to the data, 48.3 percent of respondents said they were visiting their child/son, 21 percent a husband or partner, and 14 percent a brother or sister; the rest were visiting a mother/father, uncle, nephew, neighbor, friend or other.⁵⁹ Because of the methodology of survey,

⁵⁹ Pérez Correa, *supra* note 38, at 36.

it is impossible to know if there are differences between the visits made by women and men.⁶⁰

The data also shows that the frequency of the visits is higher when the person is in pretrial detention than when he/she has been sentenced. 64.5 percent of people who were visiting a relative who had already been sentenced said they visited once a week.⁶¹ For those visiting a person on pretrial detention this percent was 72.6.⁶² Also, while 16 percent of people who were visiting a family who had already been sentenced said they visited more once a week, 20.3 percent of those with a relative on pretrial detention said the same thing.⁶³ This data is very relevant when thinking about the costs of pretrial detention.

IV. COSTS OF PRISON

Prisons imply costs not only for the national budget and institutions, but also for people. In discourse, as noted above, these costs tend to be divided into direct (loss of freedom) and indirect (those stemming from the loss of freedom). Indirect costs, in turn, can be divided into individual and non-individual costs. While individual costs refer to costs imposed on the person detained or imprisoned (such as limits to the right to free association, information or family; social stigmatization, which affects possibilities for getting a job or access to other opportunities in the future; impacts on health; loss of a job if the person had one, etc.), non-individual costs refer to those imposed on the prisoner's relatives and friends. We could further classify the indirect, non-individual costs of imprisonment into three types: economic, social, and health.

Economic costs refer to any expense or monetary loss that a person suffers as a consequence of having a relative/friend in prison. Social costs

⁶⁰ Pérez Correa, *supra* note 38, at 36.

⁶¹ Pérez Correa, *supra* note 38, at 38.

⁶² Pérez Correa, *supra* note 38, at 38.

⁶³ Pérez Correa, *supra* note 38, at 38.

are non-economic costs to the family that result from the incarceration of one of its members. Examples of social costs are: stigmatization, the emotional effect on children of having a father or mother in prison, and the ways in which people's daily lives change because a family member is in prison. As the study data show, the incarceration of a family member becomes a matter of extreme importance in the family's life, as it affects work, family relationships (with children, for example) and social relationships (such as the relationship with neighbors). Health costs refer to the direct impact on a person's health as a result of the imprisonment of a family member.

The rest of this section presents a brief summary of the indirect, non-individual costs—economic, social and health—that result from the use of prisons, based on data from the study, *Invisible Women* (2014).

A. Economic Costs

The principal economic costs borne by prisoners' families result from directly providing basic items (goods) to the prisoner, from informal payments to guards or other prisoners, from the cost of transportation to and from the prison (plus the time dedicated to the visit), from legal costs related to hiring lawyers, and from supporting the children of prisoners. Regarding economic costs, the study showed little difference between the answers of the men and the women surveyed. Thus, the responses about economic costs are not broken down by the sex of respondents in the section on economic costs.

1. Goods

Local prisons in Mexico⁶⁴, as others in Latin America, frequently fail to comply with the obligation to provide prisoners with the basic goods they need to live in prison, such as: food, water, clothing, blankets, shoes,

⁶⁴ Prisons may be local, federal or municipal, depending on jurisdiction.

medication, personal hygiene or cleaning products, etc.⁶⁵ As a result, one of the main economic costs of imprisonment for the prisoners' families is the cost of items they take every time they visit the center.⁶⁶ According to the survey data, 94 percent of the people said they had brought items to their relative/friend in prison on the day of the survey.⁶⁷ Among the items most often taken into the prisons are basic products or money to buy the products they need.⁶⁸ When asked, respondents said they had, that day, brought food (96.7 percent), money (62.7 percent), personal hygiene products (49 percent), water (nearly 50 percent reported bringing this), cleaning products (29.9 percent), candy (22.4 percent), telephone cards (20 percent) and clothing (18 percent).⁶⁹

2. Informal Fees

"They have a salary but they want to live off us. They extort us. The entire family has to work to pay them."

(Woman interviewed, referring to prison guards)⁷⁰

As in other countries in Latin America, prisons in Mexico are characterized by the corruption of their authorities.⁷¹ The survey found a widespread practice of guards or inmates asking for payment for almost

⁶⁵ Pérez Correa, *supra* note 38, at 40.

⁶⁶ Pérez Correa, *supra* note 38, at 40.

⁶⁷ Pérez Correa, *supra* note 38, at 40.

⁶⁸ Pérez Correa, *supra* note 38, at 42.

⁶⁹ Pérez Correa, *supra* note 38, at 42.

⁷⁰ Field notes from the following research: LAS MUJERES INVISIBLES: LOS COSTOS DE LA PRISIÓN Y LOS EFECTOS INDIRECTOS EN LAS MUJERES (available with the author).

⁷¹ Elena Azaola & Marcelo Bergman, *Delincuencia, Marginalidad, y Desempeño Institucional, Tercera Encuesta a Población en Reclusión*, CENTRO DE INVESTIGACIÓN Y DOCENCIA ECONÓMICAS 61 (2009); *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS & ORGANIZATION OF AMERICAN STATES 1 (2011), <https://www.oas.org/en/iachr/pdl/docs/pdf/PPL2011eng.pdf>.

anything, from entering the center to having a place to sit down during the visit. In what seems to be an extreme case of the extraction of rents by guards, one of the women interviewed told us that because she was pregnant, she was charged a double fee to enter the prison: “They told me that as of the sixth month, I had to pay double because it counted as a person.”⁷² Another said she preferred not to pay for a place at a table, but to pay for an alternative arrangement: “Instead of paying for the table, they rent buckets to sit on for five pesos each, or a blanket for \$25 pesos. The table costs between \$20 and \$70 pesos.”⁷³

From the interview results, it is possible to distinguish two types of informal fees guards charge prison visitors. The first type are directly related to the family member’s visit to a prisoner. The second type are fees asked of the family so that the relative may obtain benefits or services related to the prisoner’s life. Examples of the first type include: having to pay for a table and chairs so as to sit down during the visit; being allowed to enter the prison while wearing clothing of the wrong color,⁷⁴ having someone tell the prisoner that a visitor is waiting, or being included on the list of authorized visitors. Examples of the second type include: payments for the prisoner to have a bed to sleep in, protection against being beaten by other inmates or punished by authorities, assurance of being transferred (or not being transferred) to other areas of the center (for example, to an area that is more dangerous or a punishment area).

⁷² Pérez Correa, *supra* note 38, at 47.

⁷³ Pérez Correa, *supra* note 38, at 47.

⁷⁴ *Id.* The centers have rules about the color of clothing that visitors must wear. The women interviewed said that guards use their own discretion to decide if the tone of the color is correct. As a result, sometimes a piece of blue clothing is considered too dark or light and is therefore not permitted. In those cases, visitors can pay the informal fee to enter with the wrong color or drop out of line and rent a piece of clothing (with the right color) in one of the kiosks outside the center and pay someone to hold their item of clothing. Both rental of the clothing and storage have a cost of between \$10 and \$20 MXN (between \$0.60 USD and \$1.20 USD). More experienced visitors therefore choose to wear bright reds or oranges.).

While informal fees of the first type (related to the visit) tend to range from \$5 to \$50 MXN⁷⁵ (each) and must be paid at each visit, the latter exceed \$2500 MXN⁷⁶ and are paid once, monthly or occasionally.

Food is the most common item guards ask entry fees for; 27.5 percent of the people interviewed said they had been asked for money to bring food into the prison on the day of the survey.⁷⁷ It is possible, however, that our warning to the authorities about our presence may have decreased requests for payment for entry of items on the day of the survey. When we asked, “On this visit or any previous visits to this center, have you ever been asked for money to bring items or goods into the prison center?” the percentage of people who reported being asked for payment to take an item into the prison rose to 41.5%.⁷⁸

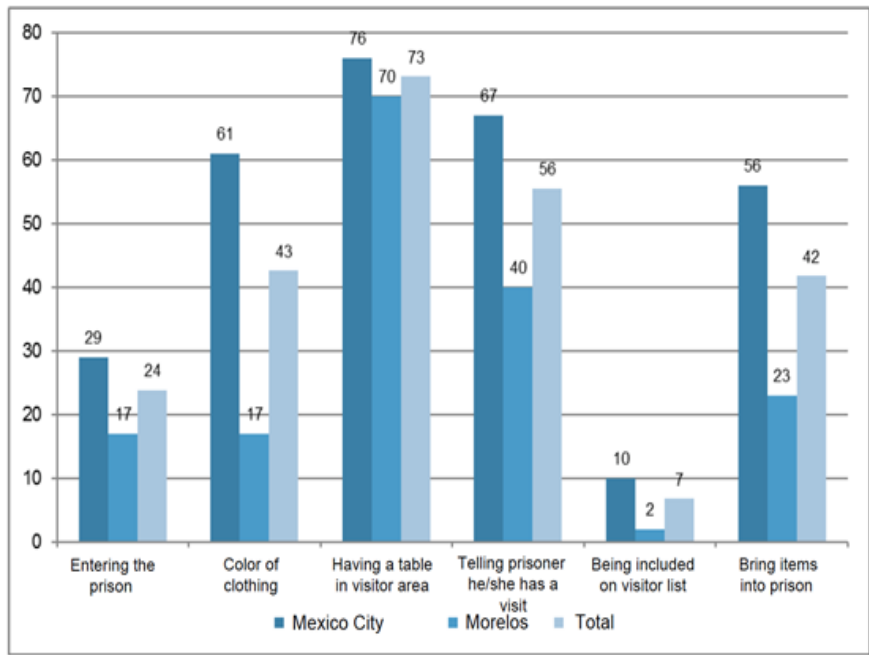
⁷⁵ Between \$0.30 USD and \$3.20 USD.

⁷⁶ Approximately \$161 USD.

⁷⁷ In the case of México City (previously Federal District), we found higher percentages of requests for money in exchange for being allowed to take items into the prison; for example, 42.7 percent of the women interviewed there said they had been asked for money in exchange for being allowed to take food into the prison, while in Morelos the figure was seven percent. While 2.3 percent of the people interviewed in Morelos said they had been asked for money in exchange for being allowed to take clothing into the prison, that figure was 11.4 percent in the Federal District. Pérez Correa, *supra* note 38, at 48.

⁷⁸ Pérez Correa, *supra* note 38, at 44.

Graph 1. On this visit or a previous visit to this center, were you asked for money for ...?⁷⁹ (%)⁸⁰



Source: Catalina Pérez Correa, *Las mujeres invisibles. Los Costos de la prision y los efectos indirectos en las mujeres* (2015)

The second type of fee, which prisoners must pay—to guards and/or other prisoners—while living in these prisons are not requested directly of the families but because the prisoners lack funds of their own, they are usually paid by the family. As mentioned before, these payments include fees for a prisoner to have a bed in the cell,⁸¹ fees for protection against

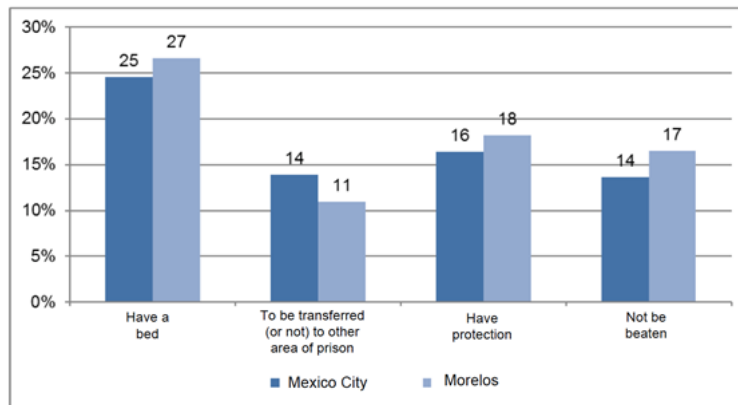
⁷⁹ Non-responses and responses of “don’t know” were eliminated. Pérez Correa, *supra* note 38, at 52.

⁸⁰ Pérez Correa, *supra* note 38, at 52.

⁸¹ Due to overcrowding, some prisoners are forced to sleep on the floor. *Id.* at 49, 145.

beatings by other prisoners or punishment by authorities, and fees for being transferred (or not) to other parts of the center, as shown in graph 2. According to some of the women interviewed, these payments are made less frequently than payments directly related to the visit (which must be made at each visit) and can even be paid in installments via bank deposits.⁸² During the interviews, several interviewees showed receipts for deposits to bank accounts supposedly to prevent the prisoner visited from being beaten.

Graph 2. On this visit or a previous visit to this Center, were you asked for money so that your inmate would...?⁸³ (%)⁸⁴



Source: Catalina Pérez Correa, *Las mujeres invisibles. Los Costos de la prision y los efectos indirectos en las mujeres* (2015) at 53.

One pending question, raised by the analysis of the amounts put down in informal fees, is how the families pay these “fees,” considering the low

⁸² Field notes from the research: LAS MUJERES INVISIBLES: LOS COSTOS DE LA PRISIÓN Y LOS EFECTOS INDIRECTOS EN LAS MUJERES (available with author).

⁸³ Non-responses and responses of “don’t know” were not included in the data underlying this chart.

⁸⁴ Pérez Correa, *supra* note 38, at 48.

incomes they report.⁸⁵ One hypothesis is that the informants exaggerate the amounts of the fees. Another possibility is that these fees are also covered by other family members. The latter assumption implies, as proposed in this paper, that prison sentences affect a wide network of the prisoners' families and communities. This means that a vast number of people are affected by what is often seen as illegitimate use of State force.

3. Transportation

The cost of transportation varies depending on the location of the prison. In the study, transportation to the centers in Morelos were more expensive than in Mexico City.⁸⁶ That is not surprising, because several of the centers in Morelos are in rural or semi-rural areas, away from urban centers, and do not have public transportation. Seventy-five percent of the people in the DF said they spend up to \$50 pesos (equivalent to \$3.20 USD) to reach the centers, while 53 percent of the people in Morelos spend that amount.⁸⁷ Meanwhile, while 19 percent of people in the DF spend between \$51 and \$200 MXN (between \$3.20 USD and \$13 USD), 38.5 percent of the people in Morelos spend that amount on transportation to the centers.⁸⁸ These figures must be doubled, because they do not include the cost of returning home from the center.⁸⁹

Most people (68.4 percent of those surveyed) said it took between one and three hours to travel to the center.⁹⁰ This time must be doubled to include the return home after the visit; therefore, the vast majority of the

⁸⁵ 11.4 percent of those surveyed receive less than one minimum wage per day (equivalent to \$4.50 USD a day) and nearly 50 percent receive \$800 Mexican pesos or less per week (equivalent to about \$52 USD or less per week). Pérez Corea, *supra* note 38, at 9.

⁸⁶ Pérez Corea, *supra* note 38, at 55.

⁸⁷ Pérez Corea, *supra* note 38, at 55.

⁸⁸ Pérez Corea, *supra* note 38, at 55.

⁸⁹ Pérez Corea, *supra* note 38, at 55.

⁹⁰ Pérez Corea, *supra* note 38, at 56.

people spend between two and six hours traveling to and from the prison for a visit.

The cost of transportation to and from the prisons must be considered when analyzing the construction of new prisons. Recently Mexico built several new federal prisons in remote places such as the Maria Islands, Oaxaca or Nayarit. Not only do these prisons impose a higher cost on the families of prisoners, they also increase recidivism.⁹¹

4. Cost per Visit and Monthly Cost

Each visitor interviewed was asked, “What is the total amount that you calculate you spent to make the visit today, including transportation, food and any expense incurred for the visit?”⁹² Slightly less than half of the respondents said they spent between \$251 and \$500 MXN (between \$16 and \$32 USD).⁹³ Considering that 11.4 percent of those surveyed said they receive less than one minimum wage per day (equivalent to \$4.50 USD per day) and nearly 50 percent earn \$800 Mexican pesos or less a week (equivalent to \$52 USD or less per week), each visit represents a considerable transportation expense for the visitor.⁹⁴

When asked, “How much do you calculate that you spend each month to visit, provide economic assistance, purchase telephone cards or any other expense to help your friend/relative imprisoned in this center?” 31 percent responded that they spend between \$1001 and \$2,000 MXN (\$64.50 and \$129 USD), 21 percent said they spend between \$501 and \$1,000 MXN (\$32 and \$64.50 USD) and 27 percent said they spend between \$2,001 and \$5,000 MXN (\$129 and \$322.50 USD).⁹⁵

⁹¹ Francesco Drago, Roberto Galbiati & Pietro Vertova, *Prison Conditions and Recidivism*, 13 AM. L. & ECON. REV. 103 (2011).

⁹² Pérez Correa, *supra* note 38, at 58.

⁹³ Pérez Correa, *supra* note 38, at 58.

⁹⁴ Pérez Correa, *supra* note 38, at 59.

⁹⁵ Pérez Correa, *supra* note 38, at 60.

As noted above, the percentage of economically active women in the studied group is nearly twice as high, compared to women in the country in general. The main type of work reported by the women visiting the prison centers (in 29 percent of the cases) was domestic labor.⁹⁶ Women who have a relative in prison are forced to work to pay the costs of the visits, to support the family member in prison and to pay the illegal fees requested by guards and by other prisoners. Because of their low level of formal schooling and due to the fact that their schedule must allow flexibility to visit the prison, they are forced into a work that is unregulated, low paid and usually done in precarious conditions.⁹⁷ Prison, as an institution, therefore contributes to the impoverishment and marginalization of a group that was already in a precarious and disadvantaged situation and whose members are mothers, wives, daughters and/or sisters of the people who the state has imprisoned.

5. Legal Costs

When we asked about the families' expenses for legal procedures and lawyer fees, the study found that 27.3 of the people in Mexico City and 20.3 percent in Morelos had spent nothing, because they relied on the services of a public defender.⁹⁸ However, the other people interviewed reported extremely high legal fees, ranging from \$5,000 to \$300,000 MXN (\$322 to \$19,354 USD). These costs were considered necessary since the family member's freedom was at stake.⁹⁹ The study shows that legal costs sometimes leads to the economic ruin of the family or the person(s) who take economic responsibility for the person in prison.¹⁰⁰ As discussed

⁹⁶ See *supra* table 2, page 15.

⁹⁷ Consejo Nacional para Prevenir la Discriminación, *Documento Informativo sobre Trabajadoras del hogar 2015*, (Mar. 30, 2015).
http://www.conapred.org.mx/index.php?contenido=documento&id=300&id_opcion=473&op=501.

⁹⁸ Pérez Correa, *supra* note 38 at 57.

⁹⁹ Pérez Correa, *supra* note 38 at 58.

¹⁰⁰ Pérez Correa, *supra* note 38 at 57–58.

below, in analyzing the social costs of the use of prisons, the data shows that some family members sold their accumulated assets—cars and even houses—to cover the economic costs of legal proceedings.¹⁰¹ Some people also reported going into debt, either through loans from relatives or by mortgaging their homes.¹⁰²

Besides the cost of legal services, there is a serious problem of the quality of the legal services. The women interviewed generally expressed deep frustration with their lawyers' dishonesty and lack of responsiveness. They hired these lawyers thinking that they would win the cases against their sons, husbands, daughters, etc. but often found they simply disappeared with their money.¹⁰³ As one woman said, "I had to sell my house to scrape together \$300,000 (MXN) for the lawyer, who in the end did nothing."¹⁰⁴ Another woman said, "I sold my house to give [the lawyer] the money, and he stole it all. Now I live in a room with my husband, daughter-in-law and grandsons, and the other children."¹⁰⁵ This case alone shows the effects of impoverishment and marginalization resulting not only from the use of prisons, but also from deficiencies in the criminal justice system in general, which provides little oversight of lawyers' work.¹⁰⁶

6. Prisoners' Children

The effects of a person's imprisonment on his or her children could mainly be classified as social costs. However, these effects also include a significant economic dimension because incarceration of a mother and/or father often implies the loss of that person's income for the family¹⁰⁷ and

¹⁰¹ Pérez Correa, *supra* note 38 at 58.

¹⁰² Pérez Correa, *supra* note 38 at 58.

¹⁰³ Pérez Correa, *supra* note 38 at 57.

¹⁰⁴ Pérez Correa, *supra* note 38 at 57.

¹⁰⁵ Pérez Correa, *supra* note 38 at 57.

¹⁰⁶ *Out of Control: Torture and Other Ill-Treatment in Mexico*, AMNESTY INT'L 3, 34 (2014) <https://www.amnesty.org/en/documents/AMR41/020/2014/en/>.

¹⁰⁷ In a survey conducted in Mexico City and the state of Morelos, 97.3 percent of prisoners said they had done some sort of work during the month before their arrest. This

the need for the rest of the family (especially the partner) to replace that income. Incarceration also implies that someone must care for the children's needs. The data from this study only provides information about prisoners who receive visitors (and not all prisoners), so it is impossible to know if the rest of the prison population behaves the same way.¹⁰⁸ However, the data suggests that when the father is imprisoned, the mother becomes the main provider for the children; in contrast, when the mother is imprisoned, the maternal grandparents become the main providers for minors. This data coincide with other studies of the prison population in Mexico.¹⁰⁹

When asked, "Does your relative/friend have children?" 69.3 percent of the visitors interviewed said yes.¹¹⁰ As shown in graph 3, when asked with whom the children under age 17 lived before and after the person's arrest, the data showed that while most of the children of the prisoners being visited (63.6 percent) lived with both parents before the arrest (24 percent lived only with the mother), after the arrest a similar percentage (67.1 percent) lived with the mother.¹¹¹ Also noteworthy is the percentage of cases of children under age seventeen who, after the arrest of their parents, went to live with maternal or paternal grandparents: 3.6 percent of those interviewed said the children under age seventeen lived with their maternal grandparents before the arrest and 1.8 percent said they lived with their

means that, for prisoners' families, the incarceration almost always implies a significant economic loss. *See Azaola & Bergman, supra* note 69.

¹⁰⁸ *See generally* Pérez Correa, *supra* note 38.

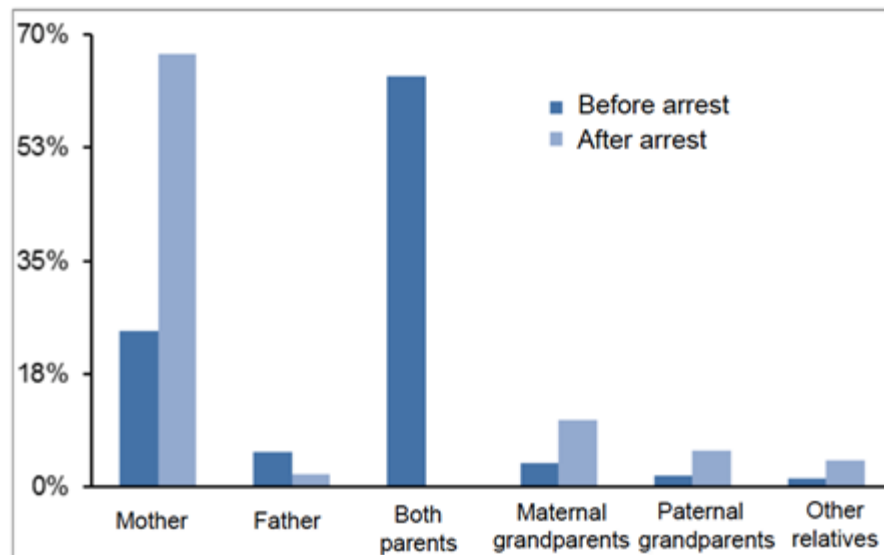
¹⁰⁹ According to the First Survey in Federal Prisons, 58 percent of men said their children under age 15 were in the mother's care, but only 22 percent of the women said their children's father had taken charge of them. In the case of women, 41 percent said they had left their children in the care of grandparents or other relatives, while for men, that occurs in only 5 percent of cases. Pérez Correa, *supra* note 38; *see also* Azaola & Bergman, *supra* note 69.

¹¹⁰ Meanwhile, 14.5 percent responded that their relative/friend had no children under age 17. Of those with children, 60.6 percent said they had one or two children, while 32.5 percent said they had three or four children and 6.5 percent said their relative/friend had five or more children. Pérez Correa, *supra* note 38.

¹¹¹ Pérez Correa, *supra* note 38, at 62.

paternal grandparents.¹¹² After the arrest, 10.3 percent went to live with their maternal grandparents and 5.6 percent with their paternal grandparents.¹¹³ In other words, imprisonment moves children from two-parent households to households headed by women (either the mother or the maternal grandmother).

Graph 3. With whom do children under age 17 live before and after the arrest?¹¹⁴



Source: Catalina Pérez Correa, *Las mujeres invisibles. Los Costos de la prision y los efectos indirectos en las mujeres* (2015) at 65

¹¹² Pérez Correa, *supra* note 38, at 62.

¹¹³ Pérez Correa, *supra* note 38, at 62.

¹¹⁴ Pérez Correa, *supra* note 38, at 63.

When asked who supported the prisoner's minor children before the arrest, the data showed that, in the cases studied, the father was the main economic support before the arrest (81.2 percent of the cases), but after the arrest, the mother became the person with the main economic responsibility (in 64.3 percent of the cases).¹¹⁵ Once again, grandparents take on a significant amount of childcare when the mother is arrested; 3.6 percent of prisoners' children under the age of seventeen visited were supported by their grandparents before the arrest, but 23.9 percent were supported by grandparents after the arrest.¹¹⁶

The survey data also show that the use of prisons is not short term, but has a prolonged time frame (long sentences).¹¹⁷ This implies that the economic costs created by incarceration must be covered for long periods of time, which eventually impoverishes the family.¹¹⁸ It should also be noted that imprisonment has a negative impact on family finances even after incarceration ends. Wildeman and Western, for example, note that men who are released from prison are 14 percent less likely to contribute economically to households with small children.¹¹⁹ Those who do contribute provide an average of \$1,400 USD less per year than those who were not imprisoned.¹²⁰ One study of people released from prison in Brazil shows that in the province of de Brasília, ex convicts' wages are up to 39 percent lower than those of people who have not been incarcerated.¹²¹ By further reducing economic and educational possibilities for families that were already disadvantaged, imprisonment creates a vicious circle that

¹¹⁵ Pérez Correa, *supra* note 38, at 64.

¹¹⁶ Pérez Correa, *supra* note 38, at 64.

¹¹⁷ See generally Pérez Correa, *supra* note 38, at 64.

¹¹⁸ Or the person who takes responsibility for the prisoner.

¹¹⁹ Christopher Wildeman & Bruce Western, *Incarceration in Fragile Families*, 20 FUTURE CHILD. 157, 166 (2010).

¹²⁰ *Id.*

¹²¹ Adolfo Sachsida & Mario Jorge C. de Mendonça, *Ex-Convicts Face Multiple Labor Market Punishments: Estimates of Peer-Group and Stigma Effects Using Equations of Returns to Schooling*, 7 REVISTA ECONOMIA 503, 505 (2007).

exacerbates use of the criminal justice system and increases the likelihood of other social problems, such as problem substance abuse, violence, and conflict with the law.¹²²

B. Social Costs

Social costs, as noted above, refer to the non-economic costs borne by the family due to incarceration. For example, one social cost which is frequently reported is the stigmatization of children because their father or mother is in prison.¹²³ Social costs are the various ways in which imprisonment affects prisoners' families, both psychologically and in daily life. I identified two types of social costs that can be seen through the data: first, those related to the person who visits the center and their experiences, and second, those related to the children of the prisoners visited. This paper discusses only the costs related to the person who visits the center because the main interest of the study was to understand the costs of incarceration imposed on this group of people. In the survey, however, it was possible to see that because of the incarceration of the father or mother, the minors (prisoners' children) suffer serious social costs such as dropping out of school or having problems with their studies, substance abuse, problems with authorities, discrimination, and being forced into work.¹²⁴

As this section shows, for a large number of people, the incarceration of a relative or friend becomes the most important part of their lives and implies significant changes in daily life. One woman interviewed said that "the family members don't have our own lives."¹²⁵ The social changes in daily life reported included: isolation from friends and family, having to find a job or take on an additional job and leave children in the care of other

¹²² Wildeman & Western, *supra* note 116 at 169.

¹²³ See MAUER & CHESNEY-LIND, *supra* note 8, at 8, 117–36.

¹²⁴ See generally Pérez Correa, *supra* note 38. For reasons of space the information about children is not presented in this paper.

¹²⁵ Pérez Correa, *supra* note 38, at 66.

people, and/or losing a job or no longer working.¹²⁶ Whereas men and women tend to bear similar economic costs, there are visible discrepancies between the two with respect to social costs.¹²⁷

When asked, “Has having a family member in prison meant you ...”: 41.5 percent of those surveyed said they stopped working or lost their job, 5.5 percent stopped studying, 51.6 percent stopped seeing friends, 40.6 percent stopped seeing neighbors, 50.4 percent had to get a job or take an additional job to the one they already had, and for 18.4 percent, it meant moving to a different home.¹²⁸ Another effect of a family member’s incarceration is that the people who take charge of supporting a prisoner often are unable to care for their own children. For 29.4 percent of those surveyed, a relative’s arrest meant not being able to take their children/grandchildren to school, and for 39.2 percent, it has meant not being able to take care of them.¹²⁹ It is interesting to note, as the graph shows, that there are differences between the responses of men and women who were interviewed, showing that a family member’s incarceration affects men and women differently.¹³⁰

¹²⁶ Pérez Correa, *supra* note 38, at 66.

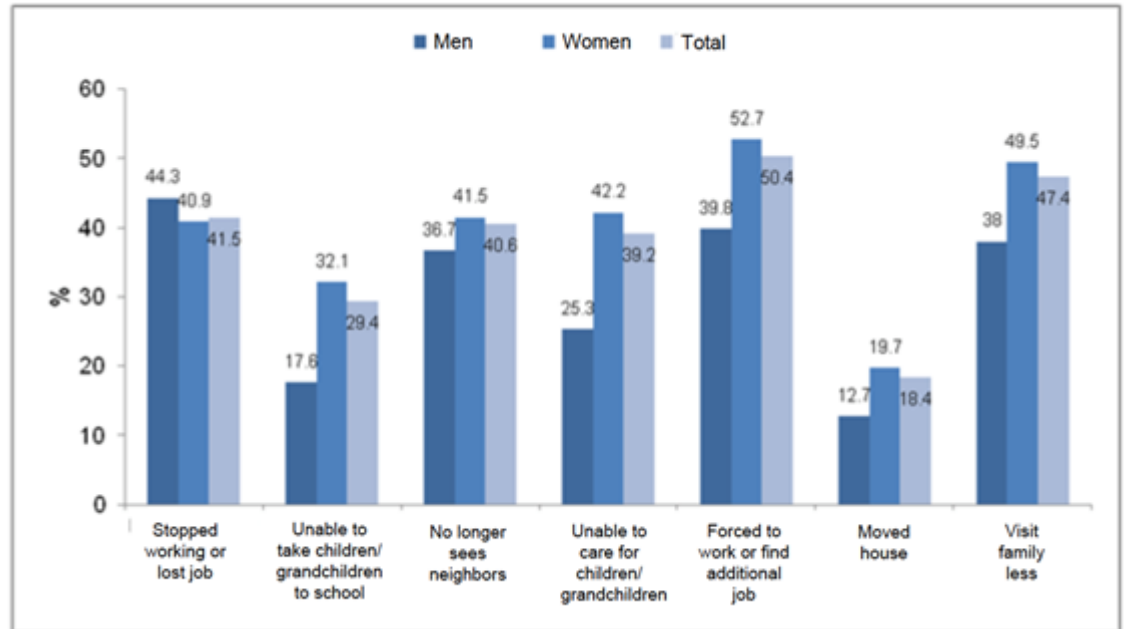
¹²⁷ Pérez Correa, *supra* note 38, at 66–69.

¹²⁸ Pérez Correa, *supra* note 38, at 68.

¹²⁹ Pérez Correa, *supra* note 38, at 69.

¹³⁰ Pérez Correa, *supra* note 38, at 69.

Graph 4.¹³¹ Responses to: Has having a family member in prison meant you... (only “yes” answers).¹³²



Source: Catalina Pérez Correa, *Las mujeres invisibles. Los Costos de la prision y los efectos indirectos en las mujeres* (2015) at 70.

When asked about the problems the person has had because of a family member’s incarceration, 63.3 percent reported problems with health, 34.2 percent reported problems at work, and 30 percent reported problems with children.¹³³ In addition, 27 percent reported having problems with their

¹³¹ Pérez Correa, *supra* note 38, at 68.

¹³² The figure shows only the responses in which there are differences by gender. Dk/nr answers are eliminated.

¹³³ Pérez Correa, *supra* note 38, at 68.

family, 20.9 percent said they had problems with their partner, 15.7 percent with their neighbors, and 11.2 percent with their children's school.¹³⁴

Table 3. Since your family member was imprisoned, have you had problems with your...?¹³⁵

	Mexico City (%)	Morelos (%)	Total (%)	Women (%)	Men (%)
Work	36	31.8	34.2	33.8	31.2
Children	35.9	22.1	30	32.3	19.9
Neighbors	13.3	18.8	15.7	15.4	16.7
Children's school	13.8	7.80%	11.2	11.7	9
Health	68.9	56.6	63.6	67.9	44.3
Partner/spouse	24.2	16.5	20.9	21.7	17.6
Family	30.3	22.7	27	28	22.6

Source: Catalina Pérez Correa, *Las mujeres invisibles. Los Costos de la prision y los efectos indirectos en las mujeres* (2015) at 71.

Through this question, it is also possible to see men and women responded differently. Although 32.3 percent of women reported having had problems with their children because of the family member's detention, only 19.9 percent of men reported this.¹³⁶ In addition, 21.7 percent of the

¹³⁴ In all cases, more problems related to imprisonment were reported in Mexico City than in Morelos. Pérez Correa, *supra* note 38, at 68.

¹³⁵ Pérez Correa, *supra* note 38, at 69.

¹³⁶ Pérez Correa, *supra* note 38, at 69.

women said they had problems with their partner and 28 percent said they had problems with their family as a result of the detention, while the percentage of men reporting such problems was 17.6 and 22.6, respectively.¹³⁷ Finally, although 67.9 percent of the women reported health problems due to detention, 44.3 percent of men reported having had such problems.¹³⁸

The differences by sex show that men and women experience the imprisonment of a family member differently and are affected differently. It is not just that more women are affected; it is also the way in which they are affected. On one hand, the childcare that most of these women perform is seriously affected.¹³⁹ On the other, the data shows that these women's emotional relationships are also affected, to a greater degree than those of men.¹⁴⁰ This means that these women become more isolated precisely when they need more family and community support.

The data show that incarceration has negative impacts on the couple's lives, as well as the lives of children and the family. Incarceration of the partner, son, daughter, brother, sister, father or mother often implies distancing oneself from friends and relatives, being forced to get a job or take on an additional job in order to cover prison expenses, leaving children in the care of other people, and/or losing one's job or quitting.¹⁴¹ In other words, incarceration means the distancing of families from their communities, friends and relatives, because people must spend time going to and coming from the prison and/or working to support the prisoner and pay the economic costs that implies. As Wilderman and Western explain, some women conceal the fact that their partners are in prison.¹⁴² This silence also contributes to isolation and separation from family circles. As

¹³⁷ Pérez Correa, *supra* note 38, at 69.

¹³⁸ Pérez Correa, *supra* note 38, at 69.

¹³⁹ Pérez Correa, *supra* note 38, at 81.

¹⁴⁰ Pérez Correa, *supra* note 38, at 81.

¹⁴¹ Pérez Correa, *supra* note 38, at 82.

¹⁴² Wilderman & Western, *supra* note 119 at 166.

the data shows, 51 percent of those interviewed said that having a family member in prison meant not seeing friends, 40 percent said it meant no longer seeing neighbors, and 47 percent stopped seeing their family.¹⁴³ In terms of crime prevention, this results in fewer informal social controls (on which criminal law depends) and greater risk conditions for crime.¹⁴⁴

C. Health Costs

Health costs refer to the direct impact on one's health due to having a family member in prison. Worldwide, prisons are linked to a higher prevalence, in the general population, of certain illnesses such as HIV/AIDS, tuberculosis, hepatitis C, and other diseases transmitted by blood and sexual contact.¹⁴⁵ This is explained by certain risk factors related to prison life, such as overcrowding, high prevalence of unprotected sexual encounters, use of injected drugs, lack or deficiency of health-care services, lack of water, and lack of hygiene in general.¹⁴⁶ Health risks to prisoners in the centers are shared by their families, especially their sexual partners.¹⁴⁷ In addition, the process of the detention and imprisonment of a relative and visits to the centers, as described here, cause fear and anguish for family members. These stress factors are linked to certain stress-related health problems, such as gastritis, colitis, high blood pressure, etc.¹⁴⁸

As noted in the preceding section, 63.6 percent of the people surveyed said they have had health problems because of their family member's detention.¹⁴⁹ In addition, 27.8 percent of those surveyed said the children of

¹⁴³ Pérez Correa, *supra* note 38, at 67.

¹⁴⁴ Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating The Study of Punishment*, 56 STAN. L. REV. 1171 (2014).

¹⁴⁵ ILANUD & OACDH, DIAGNOSTICO SOBRE LAS CONDICIONES DE LAS MUJERES EN PRISIÓN EN LOS PAÍSES DE AMÉRICA CENTRAL, CON ÉNFASIS EN LA SITUACIÓN DE LAS MUJERES MADRES Y SUS HIJOS E HIJAS MENORES DE EDAD, 75-85 (2005).

¹⁴⁶ Pérez Correa *supra* note 6, at 21, 22.

¹⁴⁷ Megan Comfort, *Punishment Beyond the Legal Offender*, 3 ANNUAL REV. L. & SOC. SCI. 271, 282 (2007).

¹⁴⁸ Pérez Correa *supra* note 6.

¹⁴⁹ Pérez Correa *supra* note 6 at 76.

the prisoner they were visiting have had health problems resulting from the incarceration.¹⁵⁰ When asked about the type of health problem they have had, 58.9 said they have had psychological problems, anxiety or depression; 37 percent reported problems with high or low blood pressure; 18.8 percent reported diabetes or high blood sugar; 15.8 percent reported colitis/gastritis, 4.8 percent have had respiratory infections; 2.3 percent have had skin problems; and 23.3 percent had “other” types of problems.¹⁵¹ Among “others,” respondents mentioned alcoholism, stress, weight loss, kidney problems, back problems from carrying heavy items, facial paralysis, etc.¹⁵²

There are differences in the responses of men and women regarding health problems. In the case of women, 74.5 percent in Mexico City and 58.6 percent in Morelos have had health problems because of their relative’s incarceration, while in the case of men, this figure is 40.5 percent and 48.6 percent respectively.¹⁵³ Once more, these differences show the use of prison affects men and women differently. More women report health and social costs.

V. CONCLUSION

One of the key postulates of modern western criminal law is criminal sanctions should be individual. Only the person responsible for an illicit act should suffer the legal consequences of having committed it. As Tamayo y Salmoran writes, except for cases such as medieval law, which established penalties to the third or fourth generation of the offender’s family, or some infractions of international law, which establishes sanctions for the State which often go beyond the generation that violated international law, only the person responsible for an offense should be punished.¹⁵⁴ In other words,

¹⁵⁰ Pérez Correa *supra* note 6 at 76.

¹⁵¹ Pérez Correa *supra* note 6 at 77.

¹⁵² Pérez Correa *supra* note 6 at 77.

¹⁵³ Pérez Correa *supra* note 6 at 77.

¹⁵⁴ ROLANDO TAMAYO Y SALMORÁN, ELEMENTOS PARA UNA TEORÍA GENERAL DEL DERECHO 97 (2nd ed., 2001).

while early law accepted that the punishment applied to the family or community, modern criminal law is based on the principle that criminal punishments are individual and based exclusively on the offense committed.¹⁵⁵

This paper questions the possibility of a criminal law capable of only sanctioning the person responsible for an illicit act. The data described in this paper demonstrates that, especially in the Latin American prison context, where the State often fails to meet its obligation to provide the minimum goods necessary to guarantee the basic needs of the person it has incarcerated, criminal law fails to only affect the offender. The data also further shows that, the effects of criminal law extend to the family, having a severe, negative impact on those whom the law recognizes as innocent. This is because even when prison conditions are ideal, family members must pay for transportation to the prisons, legal proceedings, child support and, must suffer the social and health costs of imprisonment.

As this paper has shown, for prisoners' families, the incarceration of a family member results in significant economic losses, including the loss of income from the person who is imprisoned and sometimes the impoverishment of the family. It also results in social costs—such as distancing from family and friends—that place these families at an even greater social disadvantage. Analysis of the costs that penitentiary policy has for the prisoners' families shows both the numerous indirect costs to the and the fact that these costs are not distributed equitably between men and women. Women bear a disproportionate share of the indirect costs of the use of prison. The prevailing criminal justice model, which understands people as individuals whose social relationships are not a fundamental part of the self, contributes to making this group of women invisible. This paper shows that the legal system wrongly assumes that a certain idea of autonomy guides everyday life. However, data from prisons in Mexico City

¹⁵⁵ Richard W. Burgh, *Do the Guilty Deserve Punishment?*, 79 J. PHIL. 193, 195 (1982).

and Morelos show that this is not true for a significant number of women who take on the task of caring for men and women in prison. By ignoring this, the state negatively affects thousands of women, marginalizing them, impoverishing them, and harming them through criminal law. Criminal policy and the prevalent concept of autonomy contributes to a gender violence that is rarely acknowledged or documented.

Modern criminal law has been practically reduced to punishment through prisons. Data from the study however, shows that prisons violate a basic principle of law: that only offenders should be punished. The study shows that even in ideal conditions, the use of prisons will punish the innocent. Also, it shows that prisons disproportionately affect innocent women. The question remains as to the possibility of having a criminal justice system that does not punish the innocent and what that system would look like.