

Child Separation from Incarcerated Mothers

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Abstract

This paper seeks to address the broad issue of whether newborn children should be with their incarcerated mothers. Pursuant to the New Haven Method, it is separated into five parts. Part I explains both the problems associated with separating a child from his or her incarcerated mother, and the problems associated with children residing in prison nurseries. Part II highlights the claims of interested parties in relation to the issue of whether children should remain with their mothers in prison nurseries. Part III familiarizes the reader with the history and law related to prison nurseries. Part IV forms projections in reference to previous historical and legal trends related to prison nurseries. Finally, Part V appraises current policy in light of the New Haven Method, offers alternative policy measures, and recommends policy that best comports with the highest public order of human dignity.

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Introduction

This paper seeks to address the broad issue of whether newborn children should be with their incarcerated mothers. Although this paper will contribute to a larger body of important work examining children's interactions with incarceration and detention, it is important to note certain flaws in the data presented.

There is a plethora of research on children of incarcerated mothers and the risk factors these children face in development. Such research consists of longitudinal studies of children with established relationships with their mothers before or during the mother's incarceration. Without prison nurseries, the children discussed in this paper would have no such relationship with their incarcerated mothers. This research will be used analogously, as it provides insight into the development of children whose intended primary caregiver is incarcerated. There are additional problems with research into prison nursery programs, since data on the program's benefits is often provided by, and through the perspective of, the incarcerated mother. The studies focus on participating children are located in New York at a particular prison nursery, whose program is subject to repeated scrutiny by healthcare professionals over the past several decades. Additionally, in observing the claims between interested parties, most public policy is focused on the *parent*, as an incarcerated person, rather than the *child*.

As a means of discouraging my own biases and the biases of others towards controversial public policy interests, I want to make it clear this paper focuses on the *children* of incarcerated mothers, rather than on the incarcerated mothers themselves. I find it important to establish my position: any policy affecting a child should be one which supports the child of an incarcerated mother's welfare and wellbeing.

Pursuant to the New Haven Method, this paper is separated into five parts. Part I explains both the problems associated with separating a child from his or her incarcerated mother, and the problems associated with children residing in prison nurseries. Part II highlights the claims of interested parties in relation to the issue of whether children should remain with their mothers in prison nurseries. Part III familiarizes the reader with the history and law related to prison nurseries. Part IV forms projections in reference to previous historical and legal trends related to prison nurseries. Finally, Part V appraises current policy in light of the New Haven Method, offers alternative policy measures, and recommends policy that best comports with the highest public order of human dignity.

I. Delimitation of the Problem

In this section, I intend to first *delimitate the problems* as they arise both when children are separated from their mothers, and when children are united and cohabitating with their mothers in these prison nursery programs.

A. General Problems with Prison Nurseries

Prisons in the United States serve a largely punitive role; prisons are meant to punish the prisoner, in this case the mother, for her crimes, through limiting her liberties.¹ To begin this delimitation, it is important to note the demographics of children affected by parental incarceration, and by proxy, children affected by prison nurseries.

Around 80% of incarcerated women report to be mothers.² Of the women incarcerated, approximately 50% are black, about 25% are white, and the remaining population is Hispanic or Latina.³ There is evidence suggesting the women entering prison nurseries are overwhelmingly women of color.⁴ By consequence, the children affected by a woman's incarceration are predominantly children of color. These incarcerated mothers also by-and-large report being single mothers, acting as single-

¹ See *Module 7: Punishment—Retribution, Rehabilitation, and Deterrence*, VICE, CRIME, AND AM. LAW, (Dec. 10, 2018), <https://web.uncg.edu/dcl/courses/viceCrime> (describing rehabilitative theory as punishment which shapes future behavior of the criminal in order to reform the person in a manner where the individual is motivated to no longer commit crime).

² See Elizabeth Swavola, Kristin Riley & Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform*, VERA INST. OF JUST., 12 (2016), <https://www.vera.org/downloads/publications/overlooked-women-and-jails-report-updated.pdf> (“[M]ost women in jails are mothers—79 percent have young children and approximately five percent are pregnant when they are incarcerated.”); see also *Children and Families of the Incarcerated Fact Sheet*, NAT’L RES. CTR. ON CHILDREN & FAMILIES OF THE INCARCERATED, RUTGERS U.-CAMDEN, 1 (2014) <https://nrccfi.camden.rutgers.edu/files/nrccfi-fact-sheet-2014.pdf> (“64-84 Percent of mothers had at least one minor child living with them before incarceration”), Victoria Law, *Empty Cribs in Prison Nurseries*, TYPE INVESTIGATIONS (May 12, 2018), <http://www.typeinvestigations.org/investigation/2018/05/13/incarcerated-mothers-prison-nurseries/> (“Between three and five percent of women are pregnant when they first enter jail or prison.”).

³ James Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465, 68 (2014); see also *id.* at 468 (“Black and Hispanic children are respectively 7.5 and 2.5 times more likely to have a parent in prison than white children.”).

⁴ *Id.* at 473-74 (“The most recent report of the nursery residents’ demographics notes that [in 2009] over 60% of the babies who have begun their lives in Bedford Hills Prison were black and over a quarter were Hispanic, whereas only one tenth were white.”). (internal footnotes omitted).

earners, and providing most, if not all, parental care to their children.⁵ Children with incarcerated parents likely live in neighborhoods that are not supportive and secure for families.⁶ Lastly, incarcerated mothers tend to have low levels of economic attainment prior to incarceration.⁷

Given the demographics of most mothers entering prison, their incarceration will disrupt and affect both the family unit (particularly the children), and the family's available resources. With an existing "Cradle-to-Prison" pipeline identified, government entities should do what it can not only to rehabilitate the mother, but also to reduce the harm the child of incarcerated mothers may experience in order to break this intergenerational cycle and aid the child in maintaining positive wellbeing.⁸

To this end, some prisons have programs which serve rehabilitative functions to help the inmate-mother during and after prison. One such program is commonly referred to as a "prison nursery." A prison nursery is a program where a pregnant inmate can care for her child during incarceration after her child is born until a fixed time where either her child exceeds the maximum age to be in the program, or both mother and child leave the prison.⁹ This length of time varies from facility to facility.¹⁰

⁵ Julie Poehlmann, *Children of Incarcerated Mothers and Fathers*, 24 WIS. J.L. GENDER & SOC'Y 331, 33 (Fall 2009) (reporting 52% of mothers reported living as single parents before being incarcerated); *see also*, Steve Christian, *Children of Incarcerated Parents*, NAT'L CONFERENCE OF STATE LEGISLATURES, 2-3 (March 2009), <https://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf>.

⁶ The Annie E. Casey Found., *A Shared Sentence of the Devastating Toll of Parental Incarceration on Kids, Families and Communities*, 2 (April 18, 2006), <https://www.aecf.org/resources/a-shared-sentence/> ("[P]arents [of incarcerated children] are more likely to report feeling unsafe in their communities and less likely to feel they have people on whom they can rely for help with their children."); *see also* Swavola et. al, *supra* note 2, at 12 ("[m]ost often, they are single mothers.").

⁷ The Annie E. Casey Found., *supra* note 6, at 3 (noting a fraction of mothers prior to incarceration use federal assistance programs).

⁸ Dwyer, *supra* note 3, at 85 (identifying the concern of Cradle-to-Prison pipelines). *See generally* Marian Wright Edelman, *The Cradle to Prison Pipeline: An American Health Crisis*, PREVENTING CHRONIC DISEASE, 4(3), 43. available at: http://www.cdc.gov/PCD/issues/2007/jul/07_0038.htm (2007) (explaining "Cradle-to-Prison Pipeline" as a sociological concept explaining the tendency of children of incarcerated parents to follow in their footsteps).

⁹ Depending on the jurisdiction and the sentencing requirements for a mother, sometimes the mother and child may complete the program together, whereupon the mother is either up for parole or has completed her time in prison. Unfortunately, such a program only caters towards newborns.

¹⁰ Hendrik DeBoer, *Prison Nursery Programs in Other States*, OLR RESEARCH REPORT, 2-4 tbl.1 (Mar. 30, 2012) <https://www.cga.ct.gov/2012/rpt/pdf/2012-R-0157.pdf> (describing

There are currently nine different state prison nursery programs in the United States.¹¹ The U.S. Bureau of Prisons also has prison nursery programs.¹² Although the make-up of the prison nursery programs varies from jurisdiction to jurisdiction, there are certain similarities between programs. First, a mother must apply and be accepted in order to join the program.¹³ Second, the entity controlling the program vets the mother for security and legal concerns.¹⁴ Third, the mother and baby move to some form of private housing: either a private cell, or a separate wing away from the general prison population.¹⁵ Fourth, the mother has certain education or training requirements she must complete either prior to or during the program with baby (i.e. parenting classes).¹⁶ Other trends are that children over thirty months are ineligible for prison nursery programs, and such programs do not exist for incarcerated fathers.¹⁷ Lastly, these programs do not typically exist in jails.¹⁸

Another set of problems with prison nurseries are the institutional

8 prison nursery programs open in 2012, and their eligibility requirements, location and name of program, and the bed capacity, its manner of staffing, and length of stay).

¹¹ The following 8 states have at least one prison nursery within the state's prison system: California, Illinois, Indiana, Nebraska, New York, Ohio, Texas, Washington. The Federal Bureau of Prisons also has a program.

¹² US Bureau of Prisons (BOP) provides the child with the ability to bond with the mother, but they do so outside of prison, in a minimum-security halfway house. After some time, the child leaves to stay with someone else, and the mother goes back under BOP custody.

¹³ DeBoer, *supra* note 10, at 2-4 tbl. 1.; Matthew Clarke, *Benefits of Allowing Prisoners to Raise Babies Born in Prison*, 27 PRISON LEGAL NEWS 34 (2016), available at <https://www.prisonlegalnews.org/news/issue/27/6/> (explaining women convicted of a violent crime, arson, or crime with a child victim are ineligible for the program).

¹⁴ See Clarke, *supra* note 13, at 34 (“[T]he prisoners who participate in the program are carefully selected and do not include anyone convicted of a violent crime, arson, or a crime with a child victim.”).

¹⁵ See Victoria Law, *Empty Cribs in Prison Nurseries*, TYPE INVESTIGATIONS (May 13, 2018),

<http://www.typeinvestigations.org/investigation/2018/05/13/incarcerated-mothers-prison-nurseries/> (“For the first four months, two mothers and their newborns live together in one room. After that, the mother is able to move to a single room with a twin bed, crib, and metal storage cabinet.”).

¹⁶ See Clarke, *supra* note 13, at 36; see also Lori Smith Goshin & Mary Woods Byrne, *Converging Streams of Opportunity for Prison Nursery Programs in the United States*, 48 JOURNAL OF OFFENDER REHABILITATION 271, 275 (May 2009) (“[M]others participating in nursery programs in Indiana, New York, Ohio, South Dakota, and Washington State are mandated to participate in parenting education in order to remain in the program.”) (internal citations omitted).

¹⁷ See Swavola et. al., *supra* note 2.

¹⁸ *Id.*

barriers which limit a mother's ability to enter a prison nursery program with her child. Prisons use risk-factor systems to measure concerns, such as likelihood to cause harm, when considering whether inmates will be accepted to certain programs, prison nurseries included.¹⁹ These risk assessment systems are often *static*, meaning inmates are measured once during a particular period of time, and their risk assessment is determined based on that measurement only.²⁰ Such measurement systems are also typically made through sampling male offenders.²¹ Using risk factors commonly found with male offenders ignores gender-specific variants in behavior, and reduces women's potential ability to utilize certain resources, such as prison nurseries.²²

Risk factors aside, determinations about who enters into prison nursery programs may vary by institution. This variance in acceptance may also depend on the discretion of a prison supervisor.²³ Prisons are typically organized under a state's Department of Corrections; therefore, decisions such as who is accepted into the prison nursery program are considered administrative decisions underneath that state agency.²⁴

The case of Cassidy Green, a former inmate at Bedford Correctional Institute in New York, and former prison nursery mother, illustrates how the administrative process can prevent incarcerated mothers from accessing this resource. Cassidy's initial application was reviewed by the prison's deputy superintendent.²⁵ After her first denial, she appealed to the facility's superintendent, who denied her appeal within twenty-four hours of receiving her letter.²⁶ Shortly thereafter, less than forty-eight hours after her initial denial, she was transferred out of the facility to another prison without a prison nursery.²⁷ She believed her transfer to the other prison was the result of efforts by the prison administrators to prevent future appeals by

¹⁹ Swavola et. al. *supra* note 2, at 13.

²⁰ *Id.*

²¹ Swavola et. al. *supra* note 2, at 30. *See also*, Swavola et. al. *supra* note 2, at 13 (explaining the accuracy of the outcome prediction measures is primarily based on men).

²² *Id.* at 13 (“Assessing women with a gender-neutral or male-focused assessment tool—often using current charges and criminal history as determining factors—ignores research showing that women, even those deemed high-risk, generally pose less risk than men.”) (internal footnote omitted).

²³ *See* Law, *supra* note 15 (recalling how Bedford's nursery program's acceptance rate declined after the retirement of Elaine Lord, the prison's former superintendent).

²⁴ *Id.* (discussing New York's Article 78, allowing pregnant inmates to appeal an agency's administrative decision to a judge).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

pregnant inmates.²⁸ Luckily for her, Cassidy discovered she could appeal the prison's administrative decision to a state court judge.²⁹ However, this is not the norm; many pregnant inmates do not know about the option to appeal to a court judge.³⁰ Because parents are not informed of the appeals process beyond the prison system, they risk losing custody of their children, and their children could become subjected to all the potential risks facing children separated from their incarcerated mothers.³¹

This may explain why, despite a growing population of pregnant inmates, a steadily increasing number of pregnant inmates applying for entry, and a consistent availability of beds, most prison nursery facilities in the country do not achieve capacity.³² In fact, despite the increasing number of pregnant inmates, several prison nurseries were either shut down or never opened due to a lack of or a decline in admissions.³³

B. Problems Children Face when Separated from Their Imprisoned Mother

Children of incarcerated mothers are found to experience more risk factors, such as parental substance abuse, mental illness, poverty, and changes in caregiving, than either children of incarcerated fathers or children without incarcerated parents.³⁴ The presence of these risk factors may be because most incarcerated mothers are single mothers, and primary caregivers to their children prior to incarceration.³⁵ Overall, children of incarcerated mothers, when separated, lack attachment, consistency of care, financial stability in their caregiver's home, and contact with their incarcerated mother. As a consequence of their mothers' incarceration,

²⁸ *Id.* (mentioning numerous prisoners who suspected Bedford Hills transfers inmates that were denied entry to the prison nursery program to other prisons to remove the chance of issue).

²⁹ *Id.*

³⁰ *Id.*

³¹ *See id.*

³² *See id.* ("In 2015, the Correctional Association of New York, a nonprofit prison monitoring agency, charged that 'Bedford's administration seems to be denying more and more women acceptance to the nursery.'").

³³ *Id.*

³⁴ Poehlmann, *supra* note 5 ("Depending on the gender of the incarcerated parent, children may experience different sets of risk factors and outcomes. These risk factors include parental substance abuse and mental illness, poverty, social stigma, changes in caregiving during the parent's incarceration, and limited contact with parents in prison. Several findings suggest that children with incarcerated mothers may experience more risk factors than children of incarcerated fathers."). (internal citations omitted).

³⁵ *See* Christian, *supra* note 5, at 3.

children also experience various long-term health and behavioral issues.

1. Children's Attachment and Development

Approximately 2,000 children are born to incarcerated women each year and are separated from their mothers soon thereafter.³⁶ Since most children do not participate in prison nurseries, the average child will spend no more than four days with their inmate-mother in the hospital before the mother must return to prison without the child.³⁷ As a result, children who are separated from their parents do not develop secure attachments to their caretakers within the first-year of life.³⁸ The consequences of such separation are expansive, and can result in diminished social, emotional, and intellectual growth later in life.³⁹

Researchers in a 2014 study at Columbia School of Nursing compared 47 preschool-age children who originally participated in a prison nursery program, with 64 preschool-age children from a national dataset of children separated from their incarcerated mothers.⁴⁰ They found that children who participated in prison nurseries experienced far better mental health outcomes than those children who were separated from their mothers

³⁶ Clarke, *supra* note 13, at 34. (“About 2,000 prisoners give birth in U.S. prisons each year, and the vast majority are separated from their babies soon after delivery.”).

³⁷ Swavola et. al. *supra* note 2, at 17 (“[T]he majority of women who give birth while in custody are allowed between 24 and 48 hours with their newborns before handing them off to a chosen caregiver, foster care agency, or adoptive parents.”). (internal footnotes omitted); *see also* Victoria Law, *supra* note 2 (“[T]hose in other states, as well as the women who are denied [entry to prison nursery programs], are only permitted to spend two days with their newborns, four if they have C-sections.”).

³⁸ Dwyer, *supra* note 3, at 95 (“Attachment is a child’s psychological identification with an emotional connection to a permanent caregiver.”); *see* Leda M. Pojman, *Cuffed Love: Do Prison Babies Ever Smile?*, 10 BUFF. WOMEN’S L.J. 46, 61 (2001/2002) (citing James Boudoris, Ph.D., parents in prison: addressing the needs of families (Alice Fins ed., Am. Correctional Ass’n 1996) (“Prison Nursery programs...are necessary for the development of that [mother-child] bond, as most mothers will continue to be the primary caretaker of that child once released.”); *see also id.* at 61-62 (noting the mother-child bond before four years old can still affect the child’s development).

³⁹ OFF. OF CHILD DEV., U. OF PITTSBURGH, *Children of Parents in Jail or Prison: Issues Related to Maintaining Contact*, 6 (Jan. 2011); *see also* Pojman, *supra* note 38, at 61 (“During the first year of life the foundations for emotional, social, and intellectual qualities are formed.”). *But see* Dwyer *supra* note 3, at 95 (explaining the vast consequences that are associated with an unstable attachment to caregiver early-on in life).

⁴⁰ Lorie S. Goshin et al., *Preschool Outcomes of Children Who Lived as Infants in a Prison Nursery*, 94 THE PRISON J. 139, 139 (2014).

during their early developmental stages.⁴¹ In fact, the separated children experienced “significantly worse” ratings for anxiety and depression, even after controlling for other risk factors in the separated child’s caregiving environment.⁴² Moreover, the longer children spent in prison nurseries, the more secure the children’s emotional attachments became, even when accounting for the mother’s level of attachment.⁴³ However, despite recommendations from medical professionals to the contrary, children continue to be separated from their mothers early in their attachment phase.⁴⁴

2. Children’s Behavior

According to researchers, “[h]aving a parent incarcerated is a stressful, traumatic experience of the same magnitude as abuse, domestic violence and divorce, with a potentially lasting negative impact on the child’s well-being.”⁴⁵ A child’s stressful and traumatic separation from his

⁴¹ *Id.* See also Goshin & Byrne, *supra* note 16, at 274 (“Infants co-residing 12 months in the nursery comprised a larger proportion of secure attachment than reported for low-risk community sample and infants released early in infancy and tested following the first birthday.”).

⁴² Goshin et. al., *supra* note 40, at 139 (controlling for additional factors in child outcome, such as socio-economic status). Rosalyn D Lee, Xiangming Fang & Feijun Luo, *The Impact of Parental Incarceration on The Physical and Mental Health of Young Adults*, 131 PEDIATRICS 4 (April 2013) (“[I]ndividuals who reported mother incarceration only were highest on 2 condition (depression and anxiety).”).

⁴³ See Goshin & Byrne, *supra* note 16, at 274 (describing the mothers as lacking autonomy and having unresolved trauma, making them unlikely to transmit secure attachment); see OFFICE OF CHILD DEVELOPMENT, *supra* note 39, at 7 (“Among the benefits reported in an evaluation of the program was the finding that infants who lived with their mothers in the prison nursery program for at least one year were more likely to have secure attachments than infants who were discharged from the nursery prior to one year.”); see also *id.* (explaining the “research team’s weekly Nurse Practitioner” intervened in the nursery’s required parenting classes to help improve child’s attachment to mother during the study).

⁴⁴ Swavola et. al. *supra* note 2, at 17 (“[T]he American College of Obstetricians and Gynecologists (ACOG) and the American Public Health Association strongly recommend that jails allow women time to connect with their infants after delivery by having longer postpartum hospital stays, diversion programs, and in-custody nursery programs.”). (internal footnote omitted).

⁴⁵ The Annie E. Casey Found., *A Shared Sentence the Devastating Toll of Parental Incarceration on Kids, Families and Communities*, 3 n.34 (2006). This behavioral response by the child is proffered by researchers as the result of disrupted bonding between mother and child. See Pojman, *supra* note 38. *Id.* at 62 (“Disorganized attachment relationship during infancy is the strongest predictor of excessive hostile behaviors towards peers in preschool.”) citing Am. Med. Ass’n, Council on Scientific Affairs, Bonding Programs for Women Prisoners and Their Newborn Children, Report 3 (I-97),

or her incarcerated mother impacts the child's internalized and externalized behaviors. Internalized behaviors are inward-affecting problems, like depression and anxiety; externalizing behaviors are outward-affecting problems, such as aggression and bullying.⁴⁶ A study published by the National Institute of Health reported children separated from their incarcerated mothers experienced more severe internalized and externalized behavioral issues when accounting for general environmental risks (like low educational attainment and poverty).⁴⁷ More specifically, the study found that when a child is separated from his or her mother, the child is exposed to greater risks specific to the mother's incarceration, such as both anxiety and depression symptoms and displaying distress in more externalizing ways.⁴⁸ Another study conducted by researchers in the Division of Violence Prevention of the National Center for Injury Prevention and Control, and Centers for Disease Control and Prevention, found similar results when studying over 14,000 adolescents over several years, measuring their mental health risks against parental incarceration. The adolescents who reported having incarcerated mothers also had a higher risk for depression and anxiety.⁴⁹ Fortunately, for the children of incarcerated mothers, researchers have also concluded, "continuous, stable caregiving and responsive home environments may have protective effects on children [from negative emotional behaviors]," defined as "preventing or minimizing the negative effects of risk factors."⁵⁰

<http://www.amaassn.org/ama/pub/article/2036-2529.html> (last updated Apr. 11, 2001) (site page no longer exists).

⁴⁶ NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES, 271 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

⁴⁷ Danielle H. Dallaire et. al., *Children's Experiences of Maternal Incarceration-Specific Risks: Predictions to Psychological Maladaptation*, 44(1) J. OF CLINICAL CHILD & ADOLESCENT PSYCHOL.: THE OFFICIAL J. FOR THE SOCIETY OF CLINICAL CHILD AND ADOLESCENT PSYCHOL. 109, 109-22, (2015); see also Poehlmann, *supra* note 5, at 335 (finding correlations between maternal incarceration and a separated child's antisocial internalizing behavior even when controlling for other risk factors).

⁴⁸ Dallaire et. al., *supra* note 47, at 109-22.

⁴⁹ Rosalyn D. Lee et. al., *The Impact of Parental Incarceration on The Physical and Mental Health of Young Adults*, 131 PEDIATRICS 4 (April 2013) ("[I]ndividuals who reported mother incarceration only were highest on 2 conditions (depression and anxiety)."). Dallaire et. al., *supra* note 47, at 109-22.

⁵⁰ Poehlmann, *supra* note 5, at 337.

3. Caregiver's Diminished or Insecure Financial Support

In addition to affecting their mental health, children and their caregivers also experience financial problems as a result of separating the child from his or her incarcerated mother. When a child's mother is in prison, especially if she is a single, working mother, this experience "increases the risk of children living in poverty or experiencing household instability independent of these other problems [i.e., inadequate education, parental substance abuse, and mental health problems]."⁵¹ When a mother goes to state prison, researchers found over 60% of children live with their grandparents or some other family member, 37% live with their fathers, and 10.9% enter foster care.⁵² One study suggested, of the incarcerated mothers acting as primary financial providers for their children, about 20% also received government assistance (e.g. welfare assistance, or social security benefits).⁵³

Once the mother goes to prison, the new caregiver steps in, often without suitable support to care for the child.⁵⁴ Existing support can be impaired if the family already relies upon public assistance programs.⁵⁵ Caregivers may either increasingly rely on such public programs, or, because such programs are not designed with distant relative caregivers in mind, the caregivers may not qualify for additional assistance to meet the needs of the child.⁵⁶

As one survey found, 65% of families with incarcerated family members could not meet basic financial needs.⁵⁷ Even worse, distant family members, such as grandparents, may be reluctant to seek out necessary services, such as forms of public assistance, for fear of losing the child to

⁵¹ NAT'L RES. CTR. ON CHILDREN & FAMILIES OF THE INCARCERATED, RUTGERS U.-CAMDEN, *supra* note 2 (internal footnotes omitted).

⁵² Poehlmann, *supra* note 5, at 332.

⁵³ Christian, *supra* note 5, at 3 ("[Of the 52% of mothers that provided primary financial support to their minor children before imprisonment], more than one-third received government payments such as welfare or Social Security benefits.").

⁵⁴ The Annie E. Casey Found., *supra* note 6, at 3.

⁵⁵ *Id.* ("Families who already relied on public programs, such as the Supplemental Nutritional Assistance Program and Temporary Assistance for Needy Families, become increasingly dependent on them.") (internal citations omitted).

⁵⁶ *Id.* ("Families who already relied on public programs, such as the Supplemental Nutritional Assistance Program and Temporary Assistance for Needy Families, become increasingly dependent on them.") (internal citations omitted). *See also*, NAT'L RES. CTR. ON CHILDREN & FAMILIES OF THE INCARCERATED, RUTGERS U.-CAMDEN, *supra* note 2, at 3 ("Public assistance programs, including TANF were not designed with relative caregivers [sic] in mind.") (internal citation omitted).

⁵⁷ The Annie E. Casey Found., *supra* note 6, at 3.

foster care.⁵⁸ The cost of supporting the child, paying court-related fees, and maintaining contact between the family and an incarcerated parent leaves approximately thirty percent of struggling families in debt.⁵⁹

4. Insecure Care

A family member's lack of financial resources to support a child during the period of incarceration can result in inconsistent or unstable care. In a study of 60 children born to mothers incarcerated in state prison, 24 children changed caregivers at least once following their mother's incarceration, and 18 children changed caregivers at least four times.⁶⁰ As a result of these challenges, one of the most significant problems children of incarcerated mothers will experience as a result of separation is inconsistent or instable care from his or her alternate caregiver.⁶¹ As a majority of incarcerated women are both single mothers and primary caregivers to their children,⁶² separated children most often go to grandparents,

⁵⁸ NAT'L RES. CTR. ON CHILDREN & FAMILIES OF THE INCARCERATED, RUTGERS U.-CAMDEN, *supra* note 2, at 3.

⁵⁹ The Annie E. Casey Found., *supra* note 6, at 3 ("A recent survey found that 65 percent of families with a member in prison or jail could not meet basic needs. Thousands of dollars in court-related fines and fees, along with costly visits to maintain contact, landed nearly one-third in debt.") (internal citations omitted).

⁶⁰ Poehlmann, *supra* note 5, at 333.

⁶¹ *Alternate caregiver*, meaning the agency or person primarily caring for the child while the mother is subject to incarceration. See The Annie E. Casey Found., *supra* note 6, at 3 ("[C]hildren of incarcerated parents move more frequently than their peers.") (internal citations omitted). *But see* Christian, *supra* note 5, at 3 ("[C]hildren who live in *stable* households with nurturing caregivers during their parents' incarceration are likely to fare better than children who experience family instability as a result of parent's confinement.") (emphasis added) (internal footnotes omitted).

⁶² Christian, *supra* note 5, at 3 ("[S]eventy-seven percent of mothers in state prison who lived with their children just prior to incarceration provided most of the children's daily care."). *Id.* ("[52% of now incarcerated mothers] provided primary financial support to their minor children before imprisonment."); see Poehlmann *supra* note 5, at 33 ("52% of mothers reported living as single parents before being incarcerated."); see also Christian, *supra* note 5, at 2-3 ("[I]ncarcerated mothers are more likely than incarcerated fathers to have lived with their children before incarceration. [... 55% of female inmates in state prison, and 73% of inmates in federal prison reported living with their children in the month before their arrests.]); see also NAT'L RES. COUNCIL OF THE NAT'L ACADEMIES, *supra* note 46, at 261 (explaining incarcerated mothers are more likely than incarcerated fathers to have come from single-parent households, 42 percent versus 17 percent in state prisons, and 52 percent versus 19 percent in federal prisons respectively). *Id.* at 274 ("[N]early two-thirds of mothers in state prisons were living with their child(ren) prior to their incarceration, many in single-parent households.") (internal citations omitted). Swavola et al., *supra* note 2, at 7 ("[N]early 80 percent of women in jails are mother, but unlike

or to their father, or end up in foster care.⁶³

If a child enters foster care during the mother's incarceration, the child may still experience instability in changing caregivers. Once out of prison, a mother may experience additional problems in regaining custody of her child who had been placed in foster care during her incarceration.⁶⁴ The most drastic consequence is minor children may never be able to return to their mother's custody because her parental rights were terminated.

The termination of parental rights of incarcerated people is of national concern since, in 1997, Congress enacted the Adoption and Safe Families Act. The act required states to begin the process of terminating parental rights when children were either abandoned or remained in foster care for 15 months of the recent 22 months.⁶⁵ There are certain exceptions warranting state discretion in terminating parental rights; for example, if the state sees the child is being cared for by a relative, then the state may delay terminating the incarcerated mother's parental rights.⁶⁶ Although the Act only requires a state file the petition to terminate parental rights, and the final decision is largely dependent on additional state requirements, there is some evidence suggesting there has been an increase in the number of children permanently removed from parental custody as the result of the Act.⁶⁷ In the alternative, if the mother's parental rights are not terminated and the child is in foster care, the child may be separated from his or her mother for longer than the mother's period of incarceration because the mother may need to satisfy state requirements in order to regain custody.⁶⁸

incarcerated men, they are, by and large, single parents, solely responsible for their young children") (internal citations omitted).

⁶³ See generally NAT'L RES. CTR. ON CHILDREN & FAMILIES OF THE INCARCERATED, RUTGERS U.-CAMDEN, *supra* note 2, at 1 (demonstrating the statistics of children and where their care comes from when their parent is incarcerated).

⁶⁴ See *id.* at 2 ("Incarcerated parents lose their parental rights at a disproportionate rate due to the Adoption and Safe Families Act (ASFA).").

⁶⁵ Christian, *supra* note 5, at 5.

⁶⁶ *Id.*

⁶⁷ *Id.* at 5-6 ("Some evidence suggests that the number of termination of parental rights cases that involved incarcerated parents increased following enactment of AFSA... [but because it is the state that ultimately sets the legal conditions for termination of parental rights, justification varies from state-to state] [while incarceration is a factor in many states, for termination of parental rights, it is thankfully not a per se condition for parental rights termination].").

⁶⁸ See Swavola et al., *supra* note 2, at 12 ("[W]ithout the financial means to support their families for the length of their detention and upon their release, these women are very likely to be separated from their children, especially those who are in foster care, for longer than necessary.").

5. Varying Contact with Incarcerated Mother

If a mother seeks to regain custody of her child after incarceration, courts will often consider several factors, one of which is whether the mother maintained consistent or positive contact with the child while the child was in foster care.⁶⁹ Unfortunately, separation of incarcerated mothers from their children often results in poor or diminished contact. Studies analyzing correlations between mother-child contact and sociological risks children encounter have found mixed results; however, a child's outcome in the study may be affected by the quality of contact between mother and child.⁷⁰ Fostering a continued and fulfilling relationship between a child and incarcerated mother is difficult when the two are separated. Different problems may arise depending upon who is caring for the child during the mother's incarceration.

When the child is in foster care, case-workers must coordinate visits for the child to see the incarcerated mother.⁷¹ As a result, children in foster care are least likely to visit their incarcerated parents due in part to the number of children case workers manage, and the difficulty of coordinating such visits to the prison.⁷²

In general, caregivers struggle to foster relationships between the incarcerated mother, and her children they now care for.⁷³ Contact between an incarcerated mother and child is often achieved through letters, or phone calls; such contact is difficult when the child is younger and unable to see his or her mother.⁷⁴ In one study, about half of mothers reported at least weekly contact with their children.⁷⁵ This same study discussed the likelihood of children ever visiting the incarcerated mother, with few incarcerated mothers reporting *regular* personal visits from any of their children and more than half of mothers reporting their children had never

⁶⁹ Christian, *supra* note 5, at 6.

⁷⁰ OFF. OF CHILD DEV., U. OF PITTSBURGH, *supra* note 39 (explaining the sociological impact of parent and children relationships generally).

⁷¹ Christian, *supra* note 5, at 6.

⁷² *Id.*

⁷³ NAT'L RES. CTR. ON CHILD. & FAM. OF THE INCARCERATED, RUTGERS U.-CAMDEN, *supra* note 2.

⁷⁴ Poehlmann, *supra* note 5 (explaining difficulty that comes with consistent contact through phone calls, when phone calls are subject to surcharges in most prisons); *see also* OVERLOOK at 18 [70-21] (explaining difficulty that comes with consistent contact through phone calls, when phone calls are subject to surcharges in most prisons).

⁷⁵ Christian, *supra* note 5, at 4 (including mediums such as exchanging letters, having phone calls, and visits).

visited the prison.⁷⁶

Lack of visits can be due to the nature of prisons. Factors include: their locations, their conditions, as well as the resources the child's alternate caregiver has to accommodate this trip to visit the incarcerated mother. According to data reported by the Bureau of Justice Statistics and collected by Rutgers University, a majority of parents incarcerated in either state or federal prisons are held over 100 miles away from where they last lived and 43% of federal inmates are held even farther, over 500 miles away from where they last lived.⁷⁷ Most facilities are also inaccessible by public transportation.⁷⁸ Even if the caregiver has the means to transport the child to see his or her parent, the caretaker and child may still be unable to visit the mother because visiting hours for prisons may interfere with the work week or school schedule.⁷⁹

Another factor is a caregiver's hesitance to bring a child to visit his or her mother because the caregiver believes prison is frightening or uncomfortable for young children, both due to attitudes and behaviors of prison staff and the physical setting of the prison itself.⁸⁰ Visits can include long waits; body frisks; rude treatment; and hot, dirty and crowded visiting rooms with no activities for children.⁸¹ When a child finally sees his or her mother, depending upon a facility's policy, there may be thick acrylic glass separating the child from his or her parent and he or she may only be able to show affection during opening and closing salutations of the visit.⁸²

6. Academic Issues

Children separated from their incarcerated parents also experience issues in school. In general, studies suggest children of incarcerated mothers

⁷⁶ *Regular* can be defined as more than once a month. See Christian, *supra* note 5, at 4 (“Relatively few inmates reported regular personal visits from at least one of their children.”); (“14.6 percent of mothers reported personal visits from a child at least once a month.”); see NAT’L RES. CTR. ON CHILD. & FAM. OF THE INCARCERATED, RUTGERS U.-CAMDEN, *supra* note 2, at 4 (“58 percent of mothers had no personal visits from any of their children.”) (internal footnotes omitted).

⁷⁷ NAT’L RES. CTR. ON CHILDREN & FAMILIES OF THE INCARCERATED, RUTGERS U.-CAMDEN, *supra* note 2, at 2.

⁷⁸ *Id.* at 4.

⁷⁹ Swavola et al., *supra* note 2, at 18 n. 70-71.

⁸⁰ *Cf. id.* at 18 (stating that the jail environment and structure of visits diminishes the quality of contact between the mother and child).

⁸¹ Christian, *supra* note 5, at 4

⁸² See Swavola et al., *supra* note 2 (“During visits, the jail environment and the strictures on visits—typically through a glass partition—diminish the quality of contact.”).

are susceptible to a wide range of academic issues including: poorer academic performance, declining externalized behavior in the classroom, increased chance of suspension, and increased chance of delinquency.⁸³ One study conducted by Virginia Commonwealth University's Department of Psychology suggests children will likely suffer with grade retention in the years immediately following the mother's incarceration.⁸⁴ In their adolescent years, immediately following separation from their mothers, children are more likely to drop out of school entirely.⁸⁵

C. Problems Children Face when United with Their Imprisoned Mother

There are also certain disadvantages to consider when children are united with their mothers during the mother's prison sentence. A child is meant to be cared for in a secure and stable environment with ample resources. They require a supportive caregiver to provide this healthy environment. Even accounting for the benefits prison nurseries can provide, a child in a prison nursery program can be affected by any of the subsequent problems.

1. Children's Attachment and Development, Reexamined

As previously mentioned, a child creates a strong bond with his or her caregiver within his or her first few months of life.⁸⁶ A child can feel the effects of separation from his or her parent years later.⁸⁷ This attachment becomes an integral part of the child's social, emotional and intellectual functioning later on in development.⁸⁸ Regrettably, incarcerated mothers and their children do not always positively bond in these programs.⁸⁹ Researchers suggest the *quality* of resources and facilities available at the

⁸³ NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES, 274 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

⁸⁴ *Id.* (demonstrating the negative effects of mother's incarceration on her child's grade retention the years immediately following her incarceration). (referencing B.J. Myers, T.M. Smarsh, K. Amlund-Hagan, and S. Kennon, *Children of Incarcerated Mothers*).

⁸⁵ *Id.* See also The Annie E. Casey Found., *supra* note 6 ("Kids of incarcerated mothers, in particular, are at greater risk of dropping out of school.") (citations omitted).

⁸⁶ Pojman, *supra* note 38, at 61.

⁸⁷ See Dwyer, *supra* note 3, at 496 (explaining how attachment of child to caregiver, once it begins, is long and is crucial to the child's wellbeing).

⁸⁸ OFF. OF CHILD DEV., U. OF PITTSBURGH, *supra* note 39; see also Pojman, *supra* note 38, at 61.

⁸⁹ See generally Dwyer, *supra* note 3, at 494.

prison facility will determine the effectiveness of the attachment.⁹⁰ For example, a 2001 study of Bedford Hills Prison suggested children may not perform well in a prison nursery based on its design.⁹¹ Specifically, this study found the children in the prison nursery program did not have stranger anxiety and insecure attachment to their mothers.⁹² This same study also evaluated the developmental effects the environment had on the children, and found they were one standard deviation lower than the average child's development.⁹³ Another study published by the American Medical Association Council on Scientific Affairs, discovered "short-term detrimental [development] effects" in children who lived in the prison nursery for over four months; "[a]s soon as the infants were placed in a non-prison environment, deficits disappeared."⁹⁴ This same study found,

⁹⁰ See also Goshin & Bryne, *supra* note 41, at 274 (advising prisons to continue the program, but to improve the environment to make it more stimulating for the child); Dwyer, *supra* note 3, at 471 (explaining Illinois and New York's statutory language gives all prison officials the discretion to place children in prison with the mother, without a separate nursery); *id.* ("The [New York] law applies to 'any institution' where a woman is confined, not just to prisons where there is a special nursery unit.") (internal footnotes omitted).

⁹¹ Pojman, *supra* note 38, at 65 (citing Am. Med. Ass'n, council on scientific affairs, bonding programs for women prisoners and their newborn children, report 3 (I-97), available at <http://www.ama-assn.org/ama/pub/article/2036-2529.html> (last updated Apr. 11, 2001)).

⁹² *Contra* Pojman, *supra* note 38, at 65. See also OFFICE OF CHILD DEVELOPMENT, UNIVERSITY OF PITTSBURGH, http://www.ocd.pitt.edu/sites/default/files/Parent_Guides/FosterParents/Stranger%20Anxiety%20Foster%20Parent%20Guide.pdf ("Stranger anxiety is said to occur when infants or children feel uncomfortable or frightened when approached by someone they do not know. Stranger anxiety occurs even though the child is with a trusted caregiver and in a safe environment.").

⁹³ Pojman, *supra* note 38, at 65.

⁹⁴ See *id.* ("[Prison nurseries] were unable to promote the extended use of skills necessary for the developmental growth of a child. The Infant's inability to build on their basic skill set was attributed to the constrains in the design of the prison nurseries."). *But see* Lorie Smith Goshin & Mary Woods Byrne, *Converging Streams of Opportunity for Prison Nursery Programs in the United States*, 48(4) *Journal of Offender Rehabilitation* 271, 274 (May 2009) ("[I]nfants also reached developmental goals as measured by the Bayley Scales of Infant Development every three months during the prison stay and continued to do so post release as measured directly by the Bayley Scales or through care-giver report on the Ages and Stages Questionnaire."). The Bayley Scales is a developmental test administered to children up until toddler age, that determines the child's language comprehension, motor skills, and cognitive function. *But see* M. W. Byrne, L. S. Goshin & S. S. Joestl, *Intergenerational Transmission of Attachment for Infants Raised in a Prison Nursery*, 12(4) *Attachment & Human Development* 375 (July 2010)

("[M]others in a prison nursery setting can raise infants who are securely attached to them at rates comparable to healthy community children, even when mother's own internal attached representation has been categorized as insecure.").

unsurprisingly, a facility's restriction of a child's movement for several hours a day may diminish locomotive functioning and limited funding for stimulating childhood toys may reduce a child's rate of development.⁹⁵

Childcare advocates have suggested studies of prison nurseries into the early 2000s, which conclude children in prison nursery programs develop productively, are too overstated.⁹⁶ These advocates provide that studies with positive conclusions, for example, may not include the manner and method the researcher tested, so the findings might be duplicated.⁹⁷ A prison nursery study conducted at Bedford Hills, also cited earlier, actually had the researching party's Nurse Practitioner intervene during the comparative study of attachment in both the incarcerated mothers and children, positively affecting the children's attachment outcome.⁹⁸ Even if such studies are not suggestive, children who enter and remain in prison nurseries for most of their infancy will still remain deprived of stimulating, cognitive experiences as a result of remaining in a confined space for so long.⁹⁹

⁹⁵ See Pojman, *supra* note 38, at 66 ("A child's cognitive ability to respond, including problem solving and developmental skills, is partially developed through interaction with educational toys, where were missing at the nursery. Spending long amounts of awake time in psychically confined space contributed to lack of locomotor development."); see Goshin & Byrne, *supra* note 41, at 274 (describing Dillner's 1992 study of British children as being strapped into a chair for hours, severely restricting the children's movement); see also, *id.* at 274 (describing Catan's findings that children in prison nurseries had a decline in motor function, as a result of "[p]oor unit design, staffing and protocols" in the two United Kingdom prison nurseries).

⁹⁶ Dwyer, *supra* note 3, at 504 ("[T]he prison nursery group in these studies does not include the substantial percentage of mothers who begin the prison nursery program but then drop out, either by choice or because of disciplinary action; the studies do not count them in the nursery group but rather the nonnursery [sic] group.").

⁹⁷ See Goshin & Byrne, *supra* note 16, at 274 ("[A] national study of prison nursery programs. . . revealed 'no negative effects on the locked correctional environment on infants' The methodology, including sampling, enrollment, data collection, measures, and statistical analyses, used to reach these conclusions was not described, nor were results provided.").

⁹⁸ See Goshin & Byrne, *supra* note 41, at 271 n.45.

⁹⁹ Dwyer, *supra* note 3, at 492 (citing Leslie Flowers, *Prison Babies*, NURSE.COM) (Nov. 17, 2008), http://www.news.nurse.com/article/20081117/NY02/111170078#.Uuf_5HkQFO0 (site unavailable) (describing life inside of prison nurseries as too "sterile" to challenge an infant as it develops).

2. Children's Health

In addition to children's attachment and development issues, there are also concerns for the physical health of the child entering a prison nursery. Even with a pediatrician available, these children are infants, subject to whatever prison environment they are accepted into.¹⁰⁰ They interact with their mother, prison staff (maybe guards), and other inmates; such interactions will affect the child.¹⁰¹ Contact with so many additional people can result in easier transmission of illness or other harms which could compromise the health of an infant.¹⁰² Additionally, anecdotal evidence suggests incarcerated mothers may be less inclined to report health problems or injuries to their children, out of fear of their removal from the program.¹⁰³

3. Inflexible Prison Policy

Prison policy may also create challenges for those raising children while incarcerated. Inside of prison, both mothers and children are subject to the rules and routines of the prison nursery program.¹⁰⁴ Some rules, unfortunately, sound more trivial than practical; for example, a mother cannot lay with her child on the bed.¹⁰⁵ This can result in conflicts in parenting between the mother and program staff in raising the child.¹⁰⁶

¹⁰⁰ See Clarke, *supra* note 13, at 34 (introducing the Bedford Hills pediatrician, Dr. Janet Stockheim who visits the facility every-other week to perform check-ups on the children).

¹⁰¹ See Dwyer, *supra* note 3, at 490 (noting some nurseries have inmates acting as daycare employees; and some facilities lack a nursery altogether, keeping the children with the mother in the same facilities).

¹⁰² See *id.*

¹⁰³ See Dwyer, *supra* note 3, at 490 (citing Tracy Murphy, *Mom: Having Son in Prison Was Scary, Beautiful*, HLN VIDEOS, <http://www.hlnv.com/video/2013/06/03/babies-behind-bars> (last visited Apr. 4, 2014)) ("A woman at Bedford Hills confessed to concealing her son's broken kneecap for some time because she knew reporting his fall out of a crib would result in his removal from the prison.").

¹⁰⁴ Dwyer, *supra* note 3, at 475-76 (describing how prisons will deny women their autonomy by nature of being in prison and under authoritarian control of staff or guards). See also *id.* at 490 ("[G]uards have especially great power over the women in prison nurseries, because any report of misconduct or harm to a baby could get a mother immediately ejected from the program and separated from her baby.").

¹⁰⁵ Law, *supra* note 2 ("Mothers are not allowed to lie on the bed with their babies; if they are breastfeeding or holding their babies, they must sit upright with their feet firmly planted on the floor. Lying on the bed with their baby is grounds for removal—and means the baby is immediately sent out of prison.").

¹⁰⁶ Goshin & Byrne, *supra* note 16, at 275-76 ("Mothers expressed strain related to parenting in a demanding environment in which they felt basic care giving, like feeding their infant, was tightly controlled.").

Failure to follow the rules may result in ejection from the program.¹⁰⁷

4. Insecure Care Resulting from Removal from the Nursery

While it is understood inmates may be accepted into prison nursery programs to care for their children, such decision may be unilaterally revoked by the prison under certain circumstances.¹⁰⁸ As a result of inflexible program rules and the prison's ability to immediately remove the child and his or her mother from the program after a violation, insecure attachment and instable care still remain a concern inside prison nursery programs. In the event a mother fails to follow such rules, the mother and child to be removed from the program and resulting in separation, the child's bonding and attachment would be cut short, leaving the child insecure and unattached to his or her new relative or non-relative caregiver.¹⁰⁹ Disorganized attachment to his or her mother after removal from the program can have lasting effects on a child's outcome.¹¹⁰ A prison's interests can also affect one's ability to enter or remain in the program. Budget cuts or low admission rates can result in termination of the program.¹¹¹

¹⁰⁷ Deborah Jiang Stein, *Babies Behind Bars: Nurseries for Incarcerated Mothers and Their Children*, 19 CHILDREN'S VOICE 4 (2010) ("For a mother in the nursery program at WCCW, the stakes are high for compliance. Within hours of any infraction, her child is removed. That's cause enough to think twice about a fight or a verbal encounter, or throwing water or food. That's all it takes to be thrown out of the program."); see also Dwyer, *supra* note 3, at 476 ("Mothers are subject to eviction from the program if they violate any disciplinary rule, program policy, or staff command, which results in the baby's immediate and permanent removal from the prison and thus the baby's separation from the mother.") (internal footnotes omitted). See generally Swavola, et. al., *supra* note 2 (providing that incarcerated mothers who are not accepted into prison nursery programs surrender their children between 24 to 48 hours after birth).

¹⁰⁸ See generally N.Y. Correct. L. § 611 (2016) (demonstrating the conditions to enter the program, and the manner a mother and child may be removed from the program).

¹⁰⁹ See Stein, *supra* note 107 ("I believe that my year in prison as an infant contributed to my current sense of security. But it took decades to return to this feeling. The uprooting journey after prison, into foster care, and eventually to my final adoption around age 3 or 4 has taken years to settle in me. I was a girl, a teen, and a woman on edge for all of my life until recently. I found it next to impossible to reconcile my roots, for I've never met a peer with a story quite like mine.").

¹¹⁰ Pojman, *supra* note 38, at 62 ("Disorganized attachment relationship during infancy is the strongest predictor of excessive hostile behaviors towards peers in preschool.") (internal footnote omitted).

¹¹¹ Law, *supra* note 2 (showing that budget cuts and low amounts of pregnant mothers can shut down the program).

5. Mother's Inability to Regain Custody

In some programs, incarcerated mothers will graduate out of prison with their newborn; in others, the child will graduate out of the program without his or her mother.¹¹² In the event the child is placed in state custody, released mothers must satisfy the state's conditions to regain custody. These conditions may include acquiring employment, stable housing, child care, or other similar conditions.¹¹³ Incarcerated mothers will still have difficulty regaining custody after release because generally, released inmates experience difficulty satisfying these requirements.¹¹⁴ Even worse, newly released mothers are often single mothers and therefore meet these challenges alone.¹¹⁵

6. Mother's Recidivism – Reoffending & Substance Abuse

Prison nurseries are hailed for reducing recidivism in incarcerated mothers under the presumption mothers develop a bond with their child and feel obligated to parent their child during and after entrance into the program.¹¹⁶ In fact, numerous studies report a significant decrease in recidivism among incarcerated mothers who participated in a prison nursery program.¹¹⁷ However, if a released mother regains custody of her children,

¹¹² See Dwyer, *supra* note 3, at 472 (“Most programs ostensibly limit participation to mothers whose expected release date is before the child will reach the maximum age [to age-out of the nursery program].”) (e.g., Ohio). Of course, some do not have such requirements to participate (e.g. New York); see also Pojman, *supra* note 38, at 52 (“Most mothers and infants leave [Bedford Hills facility] together; however, women serving lengthy sentences may apply to keep their babies with them for the first year, even though they have little chance of ever being their children’s primary caretaker again.”) (internal citations omitted).

¹¹³ See generally NAT’L RES. CTR. ON CHILDREN & FAMILIES OF THE INCARCERATED, RUTGERS U.-CAMDEN *supra* note 2.

¹¹⁴ See Dwyer, *supra* note 3, at 499 (“Mothers released from prison also have criminal histories likely to ‘make it more difficult . . . to obtain a job, live in subsidized housing, obtain an education, and obtain welfare benefits’”) (internal footnotes omitted); see also Goshin & Byrne, *supra* note 16, at 276 (citing a 2001 Nebraska study that showed 43% of the 43 mothers surveyed did not retain custody of their child post-release).

¹¹⁵ Dwyer, *supra* note 3, at 500 (“Thus, released inmates’ lives are typically characterized by lack of lawful employment, instability in housing, [and] lack of child care In the midst of all these severe challenges these women must act as single parents to . . . their children.”).

¹¹⁶ See generally Clarke, *supra* note 13. See also Goshin & Byrne, *supra* note 16, at 271-288.

¹¹⁷ See Clarke, *supra* note 13 (explaining that 33% of women separated from their child reoffend, while only 10% of those who were allowed to raise their child reoffend. There are also positive results that the support programs alleviate the stress of both mom and

there is still a chance—however slim—the mother may recidivate, leaving her children without their mother.¹¹⁸

In the aforementioned section, the statistical likelihood of children having emotional and academic issues arise from studies of older children already bonded to their mothers who either currently reside in prison, or who have a history of incarceration.¹¹⁹ This data may be analogized to children who bond with their mothers and, after regaining custody and care of the child, the mother reenters the prison system when the child is older. Substance abuse is common amongst incarcerated people; unfortunately, incarcerated pregnant women are no exception.¹²⁰ Recidivism or repeat substance abuse in maternal substance abusers may be high, as suggested in part by prisoner’s anecdotes, as well as the number of maternity programs for substance abuse education.¹²¹

child); *see also* Goshin & Byrne, *supra* note 16, at 274 (“One-third of women who delivered while incarcerated in the Nebraska Correctional Center for Women in the four years before the inauguration of their nursery returned to the facility for a new crime within three years of release, whereas only 9% of nursery participants in the first five years of their program recidivate.”) (internal citations omitted). *See also id.* (explaining that New York and Washington State’s recidivism rates saw a 50% decrease in women who had participated in the nursery when compared to women released from the general prison population).

¹¹⁸ *See* Stein, *supra* note 107 (“Critics of prison nurseries, however, argue that statistics indicate many offenders reoffend and that keeping a baby in prison just delays the inevitable trauma of separation.”).

¹¹⁹ *See* The Annie E. Casey Found., *supra* note 6, at 3 (discussing a behavioral study using older, bonded children).

¹²⁰ *See* DIFFERENCES at 8 (“[M]ore than half of the youth who had parents with an incarceration history also had parents (probably the same parent) who had a history of substance abuse”); *see also* Poehlmann, *supra* note 5, at 331, 33 ([O]ut of 167 mothers incarcerated in a methadone maintenance program, 57% reported using drugs during pregnancy.”).

¹²¹ *See* Dwyer *supra* note 3, at 502 (“The funny thing about is it doesn’t matter how much you love your child. It doesn’t matter how much you want to do good . . . The addiction has this force that if you don’t address what the issues are surrounding the addiction, you’re always going to go back to it.”); *see also id.* at 502 (“Another [inmate], who had entered prison pregnant three times, said that after each time she was paroled, she ‘did what I normally did on the outside because that’s what addicts do. We’re selfish. . . [sic] The babies aren’t going to get us clean . . . I have six kids and that didn’t cure me.’”) (internal citation omitted); *see also* Paul La Rosa, *Babies Behind Bars: In 3 New York prisons, inmates who give birth may keep their babies with them. Dr. Spock endorsed the idea, but critics are queasy* [sic], LOS ANGELES TIMES (May 12, 1992), http://articles.latimes.com/1992-05-12/news/vw-1747_1_baby-food (“My son is my objective,” says Taylor, a former cocaine abuser, “but I can’t say I’ll never get high again.”).

II. Claimants and Conflicting Claims

A. *Children of Incarcerated Mothers*

Children involved in prison nursery programs are young enough to enjoy living with their mother as opposed to someone else. Evidence provides children in prison nurseries are well-attached to their mothers and do not feel insecure when in new situations or with strangers; they present better than separated children and more similarly to children who do not have incarcerated parents.¹²² Several articles describe children playing, laughing, and being in daycare with smaller children.¹²³ Mothers in prison nursery programs also have state resources available to pay for formula, diapers for the child, and prison resources to learn how to feed and change the child.¹²⁴ Based on evidence provided above, children who were a part of prison nurseries would rather be a part of prison nursery Programs than separated from their mothers.

B. *Incarcerated Mothers*

Incarcerated mothers, too, have similar claims. Because of the nature of prison nurseries, a pregnant mother must first apply to the program and be accepted in order to care for her child in prison; it can therefore be inferred all women entering prison nursery programs applied to these programs because they want to raise their children in prison while they remain incarcerated.¹²⁵ Moreover, the program offers mothers more than an opportunity to bond with their children;¹²⁶ mothers who complete the prison nursery program have decreased recidivism rates, are less likely to use

¹²² See Goshin & Byrne *supra* note 16, at 271.

¹²³ See Lynn Hulsey, *Mom Feels Blessed to Have Child with Her in Prison*, DAYTON DAILY NEWS (May 15, 2017), <https://www.daytondailynews.com/news/crime--law/mom-feels-blessed-have-child-with-her-prison/QkK1qBcOsiZkIVue427LjI/>.

¹²⁴ See DEP'T OF CORRECTIONS – WASH. STATE, *Residential Parenting Program: Teaching Parenting, Infant-child Bonding to Incarcerated Mothers*, (May 2017), <https://www.doc.wa.gov/docs/publications/fact-sheets/400-FS003.pdf> (explaining Washington prison nursery mothers are eligible for WIC).

¹²⁵ See DeBoer, *supra* note 10, at Table 1 (explaining the requirements various institutions require for participation in prison nursery programs).

¹²⁶ See Goshin & Byrne, *supra* note 16, at 274 (“Mothers . . . reported that the advantages to cohabitation included: improved bonding with their infants, developing parenting skills, infant services and supplies, better conditions of confinement, drug education and treatment, help from others and self- respect. Reported disadvantages included: crowded conditions and negative [sic] interaction with corrections officers and nursery staff.”).

drugs, and are less likely to have a conduct violation while in prison.¹²⁷

C. Alternate Caregivers

Alternate caregivers for children with incarcerated mothers aim to do whatever suits the needs of the child, and these needs of the child may differ.¹²⁸ An alternate caregiver's claim may also depend upon the caregiver's relationship to the child. Because prisons likely observe conflicts in parental custody and time-sharing before allowing a child to remain with his or her mother, it can be assumed family members often advocate for the child to remain with his or her mother. When the child is separated and remains in a relative's care, family members most often care for the child as a means of providing stability for the child, and to keep the child out of foster care, thereby reducing the potential risk the mothers' parental rights would be terminated.¹²⁹ In contrast, non-familial caregivers, such as foster parents or social workers, may believe it is in the child's best interest to live with a foster parent away from prison, with a person who has the emotional and financial means to support a child with an incarcerated parent.

D. Prison Facilities

Due to the limited number of prison nurseries in incarceration facilities, a majority of state Departments of Corrections and their corresponding prisons do not want children to be with their incarcerated mothers.¹³⁰ Observing the facilities with prison nurseries, and considering how women must be accepted into the prison nursery program, it can also be presumed these agencies believe only certain qualifying women should

¹²⁷ See Chhaya Nene, *The Controversial, Emerging Notion of Prison Nurseries*, THE CHRONICAL OF SOCIAL CHANGE: CHILDREN AND YOUTH, FRONT AND CENTER (Mar. 28, 2013) <https://chronicleofsocialchange.org/featured/the-controversial-emerging-notion-of-prison-nurseries/2362>.

¹²⁸ See Sherry Green, *Your [sic] Are Not Alone*, BUILDING FAMILIES TOGETHER (Aug. 15, 2018) <https://buildingfamilies.together.org/help-for-children> (Aug. 15, 2018) ("Kids who were in a loving two-parent family before incarceration, may now feel grief for the parent who is missing out on day to day life."); see also Sherry Green, *Your [sic] Are Not Alone*, BUILDING FAMILIES TOGETHER (Aug. 15, 2018) <https://buildingfamilies.together.org/help-for-children> ("Children who were being mistreated by the now incarcerated parent, may feel some relief at their changed situation."). Although some children may feel relief from a mother being incarcerated, most children with incarcerated mothers report emotions and behaviors closely associated with losing their support system.

¹²⁹ See Poehlmann, *supra* note 5, at 33.

¹³⁰ See DeBoer, *supra* note 10, at Table 1.

be with their children in incarceration.¹³¹ Finally, facility personnel appear to feel ambivalent about the benefits of the program, citing issues with liability and discipline among other concerns.¹³²

E. Healthcare Professionals

Contrary to the majority viewpoint of prison facilities nationwide, healthcare professionals have encouraged and recommended the use of prison nursery programs, citing their helpfulness to both the mother and child. Healthcare experts have by-and-large encouraged policies which allow children to remain with their incarcerated mothers for the purposes of forming superior and more secure attachments than those experienced by children separated from their birth mothers.¹³³ Both the American College of Obstetricians and Gynecologists (ACOG) and the American Public Health Association went a step further to encourage jails to open nursery programs.¹³⁴ The Columbia College of Nursing has consistently studied the Bedford prison nursery program in New York, and based on these studies' consistently positive results, the College likely supports uniting incarcerated women with their children.¹³⁵ The resident pediatrician at Bedford Hills Facility in New York, Dr. Janet Stockheim, also supports prison nurseries.¹³⁶

F. Child's Rights Advocate

In contrast to the majority claim of the medical community, Professor James Dwyer of William & Mary School of Law, a staunch advocate for children's rights whose work focuses on family, children's, and adoption law, opposes prison nursery programs. In his paper, "Jailing Black Babies," Dwyer describes several legal and sociological points, ultimately concluding not only do children not belong in prison nurseries,

¹³¹ Goshin & Byrne, *supra* note 16, at 274.

¹³² *Id.* ("Descriptive reports of limited interviews in two states suggest that mothers participating in nursery programs in the US feel positively about them while corrections personnel are ambivalent . . . Staff perceptions varied, with the superintendent, psychologist, and nursery manager reporting positive perceptions, and the nurse and corrections officers reporting mixed perceptions.").

¹³³ See Swavola et al., *supra* note 2, at 17; Clarke, *supra* note 13, at 34.

¹³⁴ Swavola et al., *supra* note 2, at 17.

¹³⁵ Clarke, *supra* note 13 (introducing the Bedford Hills pediatrician, Dr. Janet Stockheim who visits the facility every-other week to perform check-ups on the children).

¹³⁶ *Id.* ("[T]hese babies aren't aware [of [sic] the prison environment] They are very well bonded to the mothers.").

they also should not remain with relative caregivers.¹³⁷ Rather, children born to pregnant incarcerated women should be put up for adoption.¹³⁸ In his writing, he explains what he perceives to be certain foundational flaws with prison nurseries. Dwyer argues prison nurseries were created due to unfounded claims that a child is better off with his or her mother in incarceration rather than outside of prison with either familial care-takers or in the custody of the state.¹³⁹ Dwyer argues there is no evidence, beyond certain attachment studies, suggesting children benefit more from prison nurseries than separation.¹⁴⁰ He also argues against confining children in prisons while their mothers are incarcerated, arguing it is a violation of the child's Fourteenth Amendment right to due process because not all states require a hearing where the claimant must meet a high burden to confine a child without a hearing.¹⁴¹ Dwyer also argues incarcerated women experience stressors and trauma while in prison, making them unsatisfactory caretakers, both in the short and long term.¹⁴²

G. Civil Society

Civil society also has conflicting opinions regarding prison nurseries. In 2010, democrats from the House of Representatives introduced a bill meant to authorize a trial development of a federal prison nursery program.¹⁴³ This would seem to indicate the public favors more rehabilitative rather than punitive systems of criminal reform. In 2018, a national prison strike in 17 states involving various facilities allied citizens who advocated for improved conditions in prisons, including access to

¹³⁷ Dwyer, *supra* note 3.

¹³⁸ *Id.*

¹³⁹ *Id.* at 480.

¹⁴⁰ *Id.* at 483 (“[A]n attachment study in New York has shown that more than half of children were eventually separated from their mothers, many during prison.”).

¹⁴¹ *Id.* at 465 (“If such imprisonment is ever constitutionally permissible, it can only be after an individualized determination by clear and convincing evidence that it is necessary, in order to avoid substantial harm to a particular child, for the state to place that child in prison with his or her biological mother rather than in any available non-incarceration alternative placement, including adoption. No existing prison nursery program satisfies this test.”).

¹⁴² *Id.* at 485 (“The experience of entering prison is symptomatic of deep and serious problems that most [mothers] have, reflected in recidivism and substance abuse and mental health problems and dysfunctional relationships with men . . .”).

¹⁴³ SIMARRA Act, 115 Bill Tracking H.R. 3410 (explaining the bill, called the Stop Infant Mortality And Recidivism Reduction Act of 2017, although introduced, died in 115th Congress before the subcommittee reported the bill to the House floor).

rehabilitative programs and sentencing reform.¹⁴⁴ Because the public does not generally support incarcerating children, it seems likely the public will support prison nurseries as a way to support the well-being of both mother and child.¹⁴⁵ Critics of prison nursery programs may argue prison is an unsuitable place for children to live, regardless of the program's alternative living arrangements.¹⁴⁶ These critics believe women are placed in prison to be punished and by placing children into prison nurseries, children will also experience the consequences of their mother's crime.¹⁴⁷

III. Past Trends in Decisions and Conditioning Factors

The debate about whether to allow incarcerated mothers to care for their children while in prison is not a new one. Programs allowing women to care for their children during incarceration have existed for several centuries in the United States.¹⁴⁸ However, the construction and deconstruction of these programs has come in waves. This trend can be attributed to conditioning factors, such as society's view of women as primary caregivers of children, and society's vacillation between more punitive or more rehabilitative incarceration theories.¹⁴⁹

A. Pre-1900s

Early prisons functioned under a theory of reformation where an incarcerated individual was made to think about his or her punishment in order to rehabilitate.¹⁵⁰ On both an international and national level, women were considered both a wife and mother and were thought to play an indispensable role in caring for young children.¹⁵¹ As a result, these

¹⁴⁴ See INCARCERATED WORKERS ORGANIZING COMMITTEE, Prison Strike 2018 (Oct 15, 2018) <https://incarceratedworkers.org/campaigns/prison-strike-2018>; see also, German Lopez, *America's Prisoners are Going on Strike in at Least 17 States*, Vox (Aug. 22, 2018) <https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018>.

¹⁴⁵ See Pojman, *supra* note 38, at 61.

¹⁴⁶ *Id.* at 64.

¹⁴⁷ *Id.* at 63.

¹⁴⁸ See *id.* at 46.

¹⁴⁹ See generally Vice, Crime, and American Law, *supra* note 1 (describing rehabilitative theory as punishment which shapes future behavior of the criminal in order to reform the person in a manner where the individual is motivated to no longer commit crime).

¹⁵⁰ NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES, *supra* note 46, at 321; see also, Susan C. Craig, *A Historical Review of Mother and Child Programs for Incarcerated Women*, 89 THE PRISON JOURNAL 35S, 40S (Mar. 2009).

¹⁵¹ Pojman, *supra* note 38 at 51 (referencing JoAnn B. Morton & Deborah M. Williams, *Mother/Child Bonding*, Corrections Today, Dec. 1998) (explaining how both the American

incarcerated women were made to bond with their children while in prison in order to foster their relationship with their children.¹⁵² Horrific prison conditions and the high mortality rate of women and their children led to many facilities closings, and society turned its focus to improving prison conditions for its inmates.¹⁵³

B. 1900s-1920s — Reformation Theory

Continuing under the theory of reformation, the early twentieth century brought improved conditions and a surge of prison nursery programs, all catering to the mother-child relationship.¹⁵⁴ In 1901, New York opened what would become the nation's longest-running prison nursery at Bedford Hills.¹⁵⁵ The original New York legislation authorizing the nursery can still be found under New York's Correction Law Statute § 611(2):

A child so born *may* be returned with its mothers to the correctional institution in which the mother is confined *unless* the chief medical officer of the correctional institution shall certify that the mother is physically unfit to care for the child, in which case the statement of the said medical officer shall be final. A child may remain in the correctional institution with its mother for such period as seems desirable for the welfare of

colonies as well as England engaged in incarcerating mother with child); *see also*, Goshin & Byrne *supra* note 16, at 271 (“The early history of US prison nurseries and [currently] accepted international perspective are often forgotten in recent publications and media coverage, where co-residence is portrayed as a new and radical phenomenon.”) (internal citations omitted).

¹⁵² Pojman, *supra* note 38, at 51 (“The women’s traditional role as a mother and wife was considered important to her reformation. Consequently, early programs began to emphasis [sic] the bonding between young children and their mothers.”) (internal quotations omitted); *see also*, *supra* (outlining how a Farmingham Massachusetts facility allowed female inmates to maintain custody of their children until the age of 18 months for a century, from 1858 until 1958).

¹⁵³ Pojman, *supra* note 38, at 51; *see also* Craig, *supra* note 149, at 40S (“[I]n a notorious case, Rachel Welch died in childbirth in New York’s Auburn Prison on January 12, 1826, after becoming pregnant while in solitary confinement [and being severely flogged].”).

¹⁵⁴ NAT’L RESEARCH COUNCIL OF THE NAT’L ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES, *supra* note 46 (“Early in the twentieth century, the goal of rehabilitation of offenders was central to mainstream thinking Incarceration was widely seen as an opportunity to address the needs and remedy the defects of the criminal offender.”) (internal citations omitted); *see also* Craig, *supra* note 149, at 42S (explaining how evidence of children in early prisons exists, despite children being more likely found in reformatories).

¹⁵⁵ Pojman, *supra* note 38, at 52.

such child, but not after it is one year of age, however, if the mother is in a state reformatory and is to be paroled shortly after the child becomes one year of age, such child may remain at the state reformatory until its mother is paroled, but in no case after the child is eighteen months old.¹⁵⁶

States such as Kansas and Virginia soon followed, allowing incarcerated mothers to remain with their children for a period of several years.¹⁵⁷ Soon after, California and Illinois also enacted legislation allowing for children to cohabitate with their incarcerated mothers.¹⁵⁸

C. 1920s to 1960s

Although some prison nursery programs were affected by the Great Depression, these programs continued to grow over the following decades.¹⁵⁹ During the 1930s, for example, one federal prison allowed children to cohabitate with their incarcerated mothers.¹⁶⁰ By the 1950's, the United States had 13 prison nursery programs.¹⁶¹ This number did not include areas where there were no official programs, but mothers would

¹⁵⁶ *Id.* at 52-53; *see also*, N.Y. Correct. L. § 611(2) (2016).

¹⁵⁷ *See* Pojman, *supra* note 38, at 53 (explaining how Kansas mothers could maintain custody of her children while she was in prison until the child is two years old); *see also*, Children of Inmates at Farm K.S.A. § 76-2506 (1917 & Supp. 1923) (repealed 1973). In 1918, Virginia enacted a statute that presumed children could stay with their incarcerated mother until four years old. Pojman, *supra* note 38, at 53. It wasn't until 1930 that Virginia amended its statute to authorize the Department of Corrections to determine whether the child *should* be with his or her mother. *Supra* at 53. In 1943 lasting until the 1970s, incarcerated women were still able to keep their children until they were two years old. Pojman *supra* note 38, at 53.

¹⁵⁸ *See* Pojman, *supra* note 38, at 53 (stating California Statute, § 4301 provided for incarcerated mothers keep their children until age two); *see also*, *supra* note 38, at 54 (allowing the mothers in the Dwight Correctional Center of Illinois to keep their children until age one).

¹⁵⁹ Craig, *supra* note 149, at 42S (“[M]any other [prison nursery] programs were closing down because of Depression-era funding problems.”).

¹⁶⁰ *Id.* at 43S (describing the prisoners as also assisting in the war effort in 1946, while maintaining their children in prison).

¹⁶¹ Pojman, *supra* note 38, at 54 (“There were 13 prison nurseries throughout the United States [in the 1950s].”);

see also Susan C. Craig, *A Historical Review of Mother and Child Programs for Incarcerated Women*, 89 THE PRISON J. 35S, 44S (Mar. 2009) (reporting thirteen states had statutory provisions allowing for infants to remain in institutions with their mothers for a maximum of two years: California, Connecticut, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, New Jersey, New York, North Carolina, Virginia, and West Virginia).

cohabituate with their children.¹⁶²

D. 1970s — Punitive Theory

In the 1970s, the United States moved away from its view of incarceration as a period of reflection meant to reform prisoners and instead viewed prisons as a punitive mechanism aimed to deter people from committing crimes.¹⁶³ Much legislation authorizing prison nurseries was repealed during this decade.¹⁶⁴ Other legislation was challenged and resulted in revisiting public policy surrounding the programs.¹⁶⁵ For

¹⁶² See Pojman, *supra* note 38, at 54-55 (describing mothers in Broward Correctional Institute in Florida and the Florida Correctional Institute where they could cohabituate with their babies until 18 months of age); see also, Fla. Stat. § 994.24 (1977) (“[I]f any woman received by or committed to said institution shall give birth to a child while an inmate of said institution, such child may be retained in the said institution until it reaches the age of 18 months.”).

¹⁶³ See NAT’L RES. COUNCIL OF THE NAT’L ACADEMIES, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES, *supra* note 46; see also, *supra* at 322 (“Proponents of legislative proposals to make sentencing laws more punitive invoked theories of deterrence and incapacitation.”). But see Dwyer, *supra* note 3, at 70 (citing to Paul La Rosa, *Babies Behind Bars: [sic] In 3 New York Prisons, Inmates Who Give Birth May Birth May Keep Their Babies with Them. Dr. Spock Endorsed the Idea, but Critics are Queasy.* [sic], LOS ANGELES TIMES (May 12, 1992) http://articles.latimes.com/1992-05-12/news/vw-1747_1_baby-food) (“[i]n the mid-twentieth century, a dozen or so other states [other states meaning not NY’s Bedford] allowed incarcerated mothers to keep their children in prison with them, but they discontinued the practice in the 1970’s, a time of increased consciousness regarding children’s rights, citing concerns about children’s safety and well-being.”). See also, Paul La Rosa, *Babies Behind Bars: [sic] In 3 New York Prisons, Inmates Who Give Birth May Birth May Keep Their Babies With Them. Dr. Spock Endorsed the Idea, But Critics are Queasy.* [sic], LOS ANGELES TIMES (May 12, 1992) http://articles.latimes.com/1992-05-12/news/vw-1747_1_baby-food (“The reasons [for eliminating prison nurseries] vary from society’s desire to be more punitive, to a twisted backlash of the women’s movement, which caused judges to treat women as harshly as men. ‘We are developing a more and more inhumane system of punishment,’ says Ellen Barry, director of the San Francisco-based Legal Services for Prisoners with Children. ‘Taking infants from their mothers reflects the correctional system’s attitude. It should be shocking, but it’s not.’”).

¹⁶⁴ Goshin & Byrne *supra* note 16 (“[S]ecurity, nursery program management, liability, the potential adverse effects of the prison on child health and development, and the difficulty of eventual separation of mother and child in women with long sentences was cited as the primary reasons for program closure.”); see also Pojman, *supra* note 38 (explaining Kansas’ 1974 decision to repeal its legislative statute § 76-2506; and, Virginia discontinued its policy in 1976). *Id.* at 54 (“In 1973, a new statute (Ch. 38-1003-6-3) was passed [in Illinois] permitting the Department of Corrections discretionary authority to oversee the births of infants at the facility. As a result, infants were not returned to Dwight upon birth.”) (internal citations omitted).

¹⁶⁵ See generally Pojman, *supra* note 38.

example, *Apgar v. Beauter*, a New York case, reinforced the legislative intent of New York's 1900s statute § 611(2). *Apgar* held an officer does not have the unchecked power to prevent a mother from keeping her child with her in prison and it is the mother's prerogative to determine whether the child should remain with her in prison; pending the institution's medical examiner's finding the mother is physically able to care for the child, and it is in the child's welfare to remain with the mother.¹⁶⁶ *Apgar* was noteworthy in other ways; the case justified the mother's custody, even separating the child from the father filing a petition of custody, under the common law Tender Years Doctrine.¹⁶⁷ Additionally, the case provided, "incarceration in a jail or correctional institution per se does not constitute such unfitness or exceptional circumstances so as to require that a newborn infant be taken from its mother."¹⁶⁸ Most often, it is assumed without note a mother entering prison foregoes her right to maintain custody of her child; whereas in this case, the court strictly interpreted the statute and provided in its dicta women may maintain custody of their newborns in criminal institutions and courts must find other reasons to justify removing the child from the custody of the mother.

Two years after *Apgar*, Florida altered its placement policy, placing newborn infants of incarcerated mothers into foster care rather than allowing them to cohabitate with their mothers in either Broward or Florida Correctional Institutions.¹⁶⁹ Four years later, a pregnant inmate filed a motion to enjoin the state from depriving her of custody of her newborn child the under Florida Statute § 944.24(2) (1977), which provided:

If any woman received by or committed to said institute shall give birth to a child while an inmate of said institution, such child may be retained in the said institution until it reaches the age of 18 months, at which time the Department of Offender Rehabilitation may arrange for its care elsewhere; and provided further, at its discretion, in exceptional cases, the department

¹⁶⁶ *Apgar v. Beauter*, 347 N.Y.S.2d 872, 875-76 (N.Y. Sup. Ct. 1973).

¹⁶⁷ The tender years doctrine is a common law principle which observed custody cases of young children. Under the Tender Years Doctrine, the mother was assumed to receive custody of the child. Now most states have stepped away from the presumption children are meant to be with their mother and use a "best interests of the child" standard to determine custody. See 3 N.Y. CIV. PRAC.: MATRIM. ACTIONS § 40.03 (2019).

¹⁶⁸ *Apgar v. Beauter*, *supra* note 166.

¹⁶⁹ *Pojman*, *supra* note 38, at 55; see also *Wainwright v. Moore*, 374 So. 2d 586 (Fla. Dist. Ct. App. 1979).

may retain such child for a longer period of time.¹⁷⁰

The Court in *Wainwright v. Moore* reversed the trial court's holding, and found the statute does not give the mother the exclusive right to determine whether the incarcerated mother would maintain custody of her child while incarcerated.¹⁷¹ It reasoned the trial court erred in failing to consider the Best Interest of the Child measure used in resolving all questions of custody, in this case.¹⁷²

The court also addressed Florida's 1975 policy change when it held the statute did not give the Florida Department of Corrections the exclusive authority to place the child.¹⁷³ Later the same year, the Florida legislature amended the statute, giving the courts the sole authority to determine whether a child could remain in institutions with his or her mother.¹⁷⁴ However, due to the trend against keeping children with their incarcerated mothers, by the end of the decade only the Bedford Hills prison nursery remained.¹⁷⁵

E. 1980s

The public remained ambivalent about prison nurseries during the early 1980s.¹⁷⁶ States responded by repealing legislation authorizing prison

¹⁷⁰ *Wainwright v. Moore*, 374 So. 2d 586, 87 (Fla. Dist. Ct. App. 1979); *see also*, Fla. Stat. § 944.24(2) (1977).

¹⁷¹ *Id.* at 588.

¹⁷² *Id.* at 587-88 (holding that the trial court erred in its decision in letting the mother have sole discretion to keep her child in prison with her).

¹⁷³ *See id.* at 587 (finding the Department of Offender Rehabilitation did not have sole discretion in placing the child of an incarcerated mother).

¹⁷⁴ Pojman, *supra* note 38, at 55.

¹⁷⁵ *Id.* at 56; *see also id.* at 52 (“[T]he success of Bedford is in a large part due to the dedication of Sister Elaine Roulet who [worked] at Bedford for over 30 years.”). *See generally*, Elaine Roulet, NATIONAL WOMEN’S HALL OF FAME, <https://www.womenofthehall.org/inductee/elaine-roulet/> (explaining Sister Elaine Roulet’s work at Bedford Hills and how she founded the Bedford Children’s Center, providing mother and child with resources).

¹⁷⁶ *See* Goshin & Byrne, *supra* note 16, at 271 (“[P]rison nurseries were lauded as the theoretical solution to the problem of incarcerating women with infants but were deemed unrealistically cumbersome for already overburdened US prison systems.”) (internal citations omitted). *But see* Pojman, *supra* note 38, at 56 (“[In 1981, administrators] at four federal institutions and 44 state institutions for women were surveyed on the subjects of prison nurseries and whether children should live in the institution. The results indicated 25% strongly agreed children *should never* be allowed to stay overnight in prison with their psychological mothers, whereas 31% strongly agreed children *should* be allowed to visit with their psychological mothers overnight. Twenty-five percent also agreed that prisons

nurseries, and shutting down their programs, as happened in Florida.¹⁷⁷ Other states opted for community-based facilities, or another prison-nursery alternative.¹⁷⁸ Other states, such as New York and California, bucked the trend and opened more prison nurseries.¹⁷⁹ On an international scale, most countries appear to favor keeping children with their incarcerated mothers. The Alliance of Non-Governmental Organizations on Crime Prevention and Criminal Justice surveyed seventy nations in 1987, and found the United States, Suriname, Liberia, and the Bahamas, were the only countries routinely separating imprisoned mothers from their infants.¹⁸⁰

F. 1990s and 2000s

Various news articles and state cases, as well as national and international reports from the 1990s and 2000s demonstrate prison nurseries, and states' attitudes towards placing children with incarcerated mothers, grew in popularity during that period. Several states developed prison nurseries, including New York, Nebraska, Ohio, and Washington.¹⁸¹ California enacted legislation providing mothers with the opportunity for alternative sentencing in a residential facility.¹⁸² Other states, such as Kansas and Illinois, developed programs which provided for more

should not have prison nurseries and 31% agreed prisons *should* have.”) (emphasis in original) (internal citations omitted).

¹⁷⁷ See Pojman *supra* note 38, 55 (“[A] correctional spokesman in Florida reflects on this decision: ‘[t]here [is] a concern about the well-being of the child. We wanted to make sure they had proper nutritional and emotional environment [sic] as well as a safe and secure environment. A woman’s prison does not provide all those factors to an optimum degree.’”) (internal citations omitted).

¹⁷⁸ See Pojman, *supra* note 38, at 56 (listing California, Massachusetts, New York, North Carolina, and Washington as states with community-based nursery facilities); *see also*, Pojman, *supra* note 38, at 51 (describing the purpose of the Neil J. Houston House as a facility for pregnant women to live and remain with her child for up to a year).

¹⁷⁹ Pojman, *supra* note 38, at 53-54; *see* Pojman, *supra* note 38, at 56-57 (supporting the fact that there were three facilities, one prison (Bedford) and one jail, available for pregnant inmates to bond with their children). *See also*, CAL. PEN. CODE, §§ 3410-24 (1980) (requiring the Department of Corrections to implement a community treatment program for qualifying inmate mothers and children).

¹⁸⁰ Goshin & Byrne, *supra* note 16, at 271 (citing Kelsey Kauffman, *Prison Nurseries: New Beginnings and Second Chances*, 3 WOMEN AND GIRLS CRIM. JUST. SYS. 20-1 (2006)).

¹⁸¹ See Pojman, *supra* note 38, at 57-59 (naming New York’s Taconic Correctional Institute, Nebraska’s Correctional Center for Women, Washington’s Correctional Center for Women in Gig Harbor, and Ohio’s Reformatory for Women as the new prison nurseries added before 2002).

¹⁸² Pojman, *supra* note 38, at 54 (describing the Pregnant and Parenting Women’s Alternative Sentencing Program Act).

meaningful contact through visitation, rather than cohabitation, for mother and child.¹⁸³ Missouri conducted a study to offer recommendations on whether prison nurseries or alternatives were viable options in meeting Missouri's goals for recidivism.¹⁸⁴ And Delaware, South Dakota, and West Virginia all offered legislation to create prison nursery programs.¹⁸⁵ By the end of the early 2000s, twenty-three states had some form of parent-child facility interaction.¹⁸⁶ By the end of 2008, as it remains today, there were nine prison nursery programs in the United States operated by California, Illinois, Indiana, Nebraska, New York, Ohio, Texas, Washington, and the Federal Bureau of Prisons.¹⁸⁷

IV. Projection of Future Decisions in Light of Changed and Changing Conditioning Factors

A. General, Nation-Wide Trends

In the past several years, there were several changes in environmental conditioning factors which will affect future policy decisions on whether children should remain with their incarcerated mothers in prison nursery programs.

Currently, the United States residents hold roughly 5% of the world's populations, yet the United States' prisons hold about 25% of the

¹⁸³ Pojman, *supra* note 38, at 53-54 (describing the two-day retreat opportunity mothers have at the Topeka Correctional Facility; and the Dwight Correctional Center's visitation center and weekend camping opportunity).

¹⁸⁴ See MO. REV. STAT. §§ 210.875-210.879 (2000) (outlining the Missouri's Children's Services Commission study on incarcerated parents and their children); see also Keely R. Black, *Report to the Children's Services Commission*, 9-12 (2003) https://visionforchildren.org/wp-content/uploads/2014/03/Rpt_ChildrensServComm_2003.pdf (recommending the state enhance visitation and contact between incarcerated mothers and children, using a holistic approach to connect non-governmental organizational services to incarcerated women and their families, and use sentencing alternatives).

¹⁸⁵ See Pojman, *supra* note 38 ("[Despite Delaware's unsuccessful legislation] advocates such as Janet Leban, Executive Director of the Delaware Center for Justice, still advocate today for a mother-baby program, stating: 'The Delaware Center for Justice believes this state needs to act to... [sic] and secure a better future for children and our communities.'"); see also Goshin & Byrne, *supra* note 16, at 271-72.

¹⁸⁶ See Pojman, *supra* note 38, at 58; see also Goshin & Woods Byrne, *supra* note 16, at 272-273.

¹⁸⁷ See Goshin & Byrne, *supra* note 16, at 273 (listing California, Illinois, Indiana, Nebraska, New York, Ohio, Texas, Washington as States having prison nursery programs as of 2008); see also Dwyer, *supra* note 3, at 471.

world's inmates.¹⁸⁸ This system predominantly incarcerates racial minorities, such as African Americans, and low-income people.¹⁸⁹ These demographics, as previously mentioned, reflect the demographics of inmates seeking entry into prison nursery programs.¹⁹⁰ This number of inmates (and their children) seeking admission to, or eligible to participate in prison nursery programs will likely increase. As this number increases, the need to address and reduce this rising population of inmates will increase as well.

In 2018, inmates at several institutions in states including Florida and South Carolina participated in nation-wide protests to gain improved prison conditions by refusing to purchase commissary, going on hunger strikes, and refusing to work.¹⁹¹ Among the reasons for protest, representatives called for more meaningful and rehabilitative programming.¹⁹² Because the number of inmates is likely to continue growing, inmates are likely to continue mobilizing for programming which promotes their rehabilitation, and inmates may begin to focus their activist energies on additional, women-focused issues such as prison nurseries.¹⁹³

In addition, the national view of punitive theory of incarceration is becoming a minority view, and the national view of rehabilitative theory is

¹⁸⁸ Eli Lehrer, *Responsible Prison Reform*, NAT'L AFF (2013), <https://www.nationalaffairs.com/publications/detail/responsible-prison-reform>. See Etienne Benson, *Rehabilitate or Punish?* 34 AM. PSYCHOL. ASS'N 46, 47 (2003) (“[A]nother four to five million people [in the United States] are on probation or parole.”).

¹⁸⁹ *Id.* (“African-Americans comprise about 13% of the population, [yet] they make up nearly 40% of this country’s inmates.”). See also Dwyer, *supra* note 3, at 467-468, 501.

¹⁹⁰ See e.g., Dwyer, *supra* note 3, at 467-68 (noting that many young mothers in prison are women of color).

¹⁹¹ Dalvin Brown, *Nationwide Strike by Prisoners Set to End Sunday after Weeks of Protests*, USA TODAY (Sept. 8, 2018), <https://www.usatoday.com/story/news/2018/09/08/prison-strike-state-state-looks-protestsbehind-bars/1225268002/>; see also Mitch Smith, *Prison Strike Organizers Aim to Improve Conditions and Pay*, THE NEW YORK TIMES (Aug. 26, 2018), <https://www.nytimes.com/2018/08/26/us/national-prison-strike-2018.html>.

¹⁹² See German Lopez, *America’s Prisoners are Going on Strike in at Least 17 States*, VOX (Aug. 22, 2018), <https://www.vox.com/2018/8/17/17664048/national-prison-strike-2018> (providing the press release for the national prison strike which states, “State prisons must be funded specifically to offer more rehabilitation services”); see also Audie Cornish, *U.S. Inmates Plan Nationwide Prison Strike To Protest Labor Conditions*, NATIONAL PUBLIC RADIO (Aug. 21, 2018), <https://www.npr.org/2018/08/21/640630606/u-s-inmates-plan-nationwide-prison-strike-to-protest-labor-conditions>.

¹⁹³ Women’s issues with mass incarceration are already discussed on a national scale, such as issues related to the shackling of non-violent pregnant women in transport or delivery; or, inaccessibility to feminine hygiene products.

becoming the majority view.¹⁹⁴ Experts such as psychologists and sociologists are trying to refocus prison policy to rehabilitation theory through published studies.¹⁹⁵ Additionally, the aforementioned grassroots groups are trying to refocus prison policy on rehabilitation through strikes and protests.¹⁹⁶

Based on the growing national prison population, the growing mobilization of prisoners within this population, and the national view of the punitive theory of justice, the country will see a movement towards further rehabilitative programs, both out of necessity and option, so as to reduce the number of people in prison and satisfy those currently in prison. As it stands, progress toward more prison nurseries is slow, but will likely increase within the next several decades on a national scale.

B. Department and Bureau Specific Trends

In states where the Department of Corrections still operates on a punitive theory of incarceration, and where facilities have either few rehabilitative programs or few programs committed to women or mothers, prison nurseries will likely be slow to develop. However, States and the Bureau of Prisons have repeatedly funded studies or programs committed to the improvement of relationships between mother and child because it is commonly understood children are harmed by maternal incarceration.¹⁹⁷ If a state has not approved legislation authorizing prison nurseries, it may have approved legislation authorizing extended visiting hours, retreats for mother and child, or alternative sentencing programs (so mother goes to a non-punitive facility instead of a prison).¹⁹⁸

Despite the number of alternative programs meant to improve mother-child interactions, prison nurseries will remain a part of many state jurisdictions, such as New York and Washington, which have immersive programs committed to the health and wellbeing of the child and improvement of the mother's parenting skills for the period of several years.¹⁹⁹ Because several states eventually removed prison nurseries due to funding, and some legislation was passed without regard to whether funding was available, state departments should consider the amount of funding

¹⁹⁴ See Vice, Crime, and American Law, *supra* note 1.

¹⁹⁵ See, e.g., Craig Haney, *Mental health issues in long-term solitary and "supermax" confinement*, 49 CRIME & DELINQUENCY 124 (2003).

¹⁹⁶ Cornish, *supra* note 193.

¹⁹⁷ See Pojman, *supra* note 38, at 56-66.

¹⁹⁸ See *id.* at 53, 58.

¹⁹⁹ See generally Elain Roulet, *supra* note 174.

needed for the construction and maintenance of a prison nursery before authorizing one, or it could fail due for lack of funding.

Based on the legislative history of states such as New York and Florida, the statutes authorizing prison nurseries will be affected by, and challenged in reference to the fundamental rights of the incarcerated mother (and potentially free spouse), and the state's proceedings for issues of custody.²⁰⁰ If legislation or the corresponding courts fail to consider these issues in applying the statute, then prison nurseries will fail due to legal conflicts.

V. Appraisals, Alternatives and Recommendations of Solutions in Common Interest

A. Appraisal of Prison Nurseries

The rule of law set forth in establishing prison nurseries falls reflects the desire to preserve human dignity, especially when prioritizing the needs and wants of children of incarcerated mothers. Public order of human dignity is meant to maximize *every* person's access to processes which shape and share valuable aspects of the human experience: affection, enlightenment, power, rectitude, respect, skills, wealth, and wellbeing. The establishment of more prison nurseries supports this goal in several ways.

First, current prison nursery programs have the resources to promote the child's positive wellbeing. Children in prison nurseries have access to consistent day care education, healthcare, diapers, formula, and other necessities.²⁰¹ Due to the nature of the programs, children are not just observed by mother, but by other prison staff as well. The better the quality of the prison services, the more beneficial the effect on the child's emotional, physical, and cognitive development.²⁰² In comparison to the child remaining outside the prison with family with limited means, or receiving inconsistent care from caretakers, a child in a prison nursery will receive care more certain to meet the child's needs.

Second, a child inside of a prison nursery program will receive far more affection than one outside of a prison nursery program without consistent and stable care. As previously stated, bonding between mother and child in the months following the child's birth is integral to

²⁰⁰ See Goshin & Byrne, *supra* note 16.

²⁰¹ See Smith & Woods, *supra* note 199, at 275.

²⁰² See Dwyer, *supra* note 3; see also Clarke, *supra* note 13 (describing children raised in prison as having a strong bond with their mothers and receiving excellent care).

development. Prison nurseries allow for the child to remain close to his or her mother and for both of them to bond. Some programs also provide for the child to, visit outside of the prison with other family.

Prison nursery programs undoubtedly give the child of an incarcerated mother the opportunity to learn and grow with his or her mother in the manner which will assist him or her emotionally, cognitively, and academically, among other benefits. Such programs have improved dramatically over each decade to give the child the best care a facility and its resources may provide. However, to this day, most states do not afford the option of a prison nursery, or other cohabitation program outside of the prison, to incarcerated women and their children. In those states where the mother and child are part of a community-based alternative program or alternative-sentencing program, the rule of law in those states seems sufficient to support children's affection and well-being. With other policies, like increasing visitation while keeping the child separated from the incarcerated mother, the child may still suffer in areas of well-being and affection because they are not under their mother's consistent care. Of the current standards of law, policies enacting prison nurseries and allowing an incarcerated mother and her child to remain together while the mother is in prison currently provide the best option for children in light of shared societal values.

B. *Alternatives to Current Prison Nursery System*

There are several entities observing prison nurseries and community-based alternatives to determine which policy is the best option for incarcerated mothers and their children. A report from the Women's Prison Association (WPA) observed prison nursery programs, and community-based alternative programs, and concluded women of nearly-identical backgrounds are considered eligible to use these different programs.²⁰³ The WPA concluded its analysis by endorsing community-based alternative programs for peripartum or postpartum mothers.²⁰⁴ Some states thought of other more creative alternatives to prison nursery programs, such as placing detained or incarcerated mothers in facilities closest to their children in order to increase the likelihood of maintaining contact.²⁰⁵ Other states provide policies which allow children to gain meaningful contact in other ways (for example, the mother and child may go on a weekend-long retreat, or the mother and child may spend time in a

²⁰³ Stein, *supra* note 107.

²⁰⁴ *Id.*

²⁰⁵ See Christian, *supra* note 5, at 8-9.

community setting).²⁰⁶

C. Recommendations of Solutions in Common Interest

Because rehabilitative programs will often prioritize the health and well-being of the inmate, decisions of policy which reference children of incarcerated mothers should instead be made in deference to the child's needs. In viewing the effects of these policies from the perspective of the affected children, the principle concern is with the child's ability to keep and maintain affection and positive wellbeing. This is best accomplished through using the New Haven theory of law to address policy concerns.

First, I recommend the entities creating prison nursery programs scrutinize whether the programs should exist. If mothers qualify for these rehabilitative programs because they are in prison for non-violent crimes, and are low-risk to public safety, then entities should consider removing these women from incarceration. As an alternative to incarceration, I recommend these mothers and children be placed in programs that provide the mother with skills to rehabilitate and keep children out of prison.

Second, in the event the entity finds the mothers cannot leave prison, I recommend the children of incarcerated mothers cohabit with their mothers in prison nursery programs during the child's early life so the child can improve his or her cognitive and intellectual development without straining either the outside family unit, the mother, or the child. The mother should be eligible to enter the program regardless of whether she will graduate from the program at the same time as her child so more mothers are afforded the opportunity to enter with their children.

Lastly, if incarcerated mothers risk their parental rights being terminated, then both parent and caregiver need to be provided the necessary resources in order for mothers to regain custody.

In any scenario, the prison should either partner with a non-governmental organization or create a prison program, which caters to long-term family planning for the child and mother after the child graduates from the program. That way, the mother will leave prison with resources to assist with childcare, the child-centered steady and dependable care consistent with the mother's wishes, and both mother and child are firmly attached to each-other when they reunite.

²⁰⁶ Clarke, *supra* note 13, at 34; see Christian, *supra* note 5, at 11; see also Dwyer, *supra* note 3, at 470.