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# JAILING BLACK BABIES

James G. Dwyer\*

## I. INTRODUCTION

In reaction to the tremendous increase in incarceration of poor and minority-race adults, perceiving that such adults suffer from losing not only liberty but also family ties, and citing the damage that children suffer from parental incarceration, advocates for prisoners have promoted programs to increase inmates' contact with their children. When convinced that such programs reduce criminal recidivism, legislators and prison officials have approved and funded such programs. As described in Part I, children-in-prison programs, which predominantly involve children of minority race, range widely in the degree to which they make prison a part of children's lives. At the extreme, there is a fast-growing phenomenon of states placing newborn children into prisons to live for months or years with their incarcerated mothers, mostly in separate units termed "prison nurseries."

Prison nurseries have not come at the urging of advocates for children, and they have proceeded without research support for any hope of positive child welfare outcomes.<sup>1</sup> As explained in Part II, there is still no evidence that increased contact with incarcerated parents is on balance good for children, whereas there is much reason to believe that bringing children into prisons is detrimental for them and that this is especially true for minority-race children. Indeed, there is also no evidence that the programs serve the aim of reducing recidivism. That advocates for prison inmates are inclined to support placement of babies in adult prisons, without empirical basis for believing it is good for the children and without seriously considering the obvious alternative of adoption, betrays their willingness to use children in an instrumental way to ameliorate the suffering of disadvantaged adults.

Further evidence of this instrumental attitude toward predominantly minority-race babies is the complete absence of consideration about whether prison nurseries transgress legal limits on states' power to put people in prison. Yet, there certainly are limits, ones of tremendous importance to adults. The fact that some persons are dependent and not self-determining cannot possibly mean they have no

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\* © 2014 James G. Dwyer. Arthur B. Hanson Professor of Law, William & Mary School of Law. This Article reflects an extraordinary amount of research, much of it quite challenging. It would not have been possible without the exceptional work of librarian Paul Hellyer and research assistants Kaitlin Gratton, Elizabeth Herron, Claire de Jong, Kylie Madsen, Rebecca Pensak, Thomas O'Connor, and Lily Saffer.

<sup>1</sup> See CHANDRA KRING VILLANUEVA, WOMEN'S PRISON ASS'N, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 15 (2009) ("Though the number of prison nursery and community-based residential parenting programs has increased steadily over the last ten years, little research has been conducted on the impact of these programs.").

right against confinement with adult criminals in state penal institutions. Indeed, there would likely be widespread public outrage if any state began putting mentally disabled or senile adults in prisons with incarcerated relatives in the hope that this would reduce recidivism and provide some benefits to those incompetent adults.

Part III of this Article therefore presents the first analysis ever of how constitutional and statutory rules governing incarceration and civil commitment should apply to programs under which the state places children in prisons. It concludes that existing programs patently violate children's Fourteenth Amendment substantive and procedural due process rights. If such imprisonment were ever constitutionally permissible, it could only be after an individualized determination by a competent state authority, based on 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 rather than in any available non-incarceration alternative placement, including adoption. No existing prison nursery program satisfies this test. In addition, prison nurseries violate statutory prohibitions on housing minors with incarcerated adults—laws enacted with juvenile delinquents in mind but whose language and underlying premises extend to all children. Thus, prison nurseries clearly contravene constitutional rights of and statutory protections for children, and states should discontinue them immediately.

## II. THE CHILDREN-IN-PRISON PHENOMENON

United States prisons currently hold nearly 1.6 million people.<sup>2</sup> Women constitute approximately 7% of those inmates, with more than 110,000.<sup>3</sup> Their numbers have increased dramatically in recent decades, as has occurred also in many other countries.<sup>4</sup> Women are most commonly imprisoned for violent

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<sup>2</sup> E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2011, at 1 (2012), *available at* [www.bjs.gov/content/pub/pdf/p11.pdf](http://www.bjs.gov/content/pub/pdf/p11.pdf); *see also* E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2012, at 1 (2013), *available at* [www.bjs.gov/content/pub/pdf/p12tar9112.pdf](http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf) (detailing the trends in the prisoner population for 2012).

<sup>3</sup> CARSON & SABOL, *supra* note 2, at 2.

<sup>4</sup> REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *MOTHERS BEHIND BARS: A STATE-BY-STATE REPORT CARD AND ANALYSIS OF FEDERAL POLICIES ON CONDITIONS OF CONFINEMENT FOR PREGNANT AND PARENTING WOMEN AND THE EFFECT ON THEIR CHILDREN 9–10* (2010) [hereinafter REPORT CARD] (stating a fourfold increase over three decades). In California, the number increased from 1,232 in 1979 to 11,416 in 2007. *See* Angela Wolf et al., *The Incarceration of Women in California*, 43 U.S.F. L. REV. 139, 140 (2008). These trends are not unique to the United States; Europe has also seen an escalation in the female prison population. *See* WORLD HEALTH ORG., *WOMEN'S HEALTH IN PRISON: CORRECTING GENDER INEQUITY IN PRISON HEALTH 12* (2009), *available at* [http://www.unodc.org/documents/commissions/CND-Session51/Declaration\\_Kyiv\\_Women\\_60s\\_health\\_in\\_Prison.pdf](http://www.unodc.org/documents/commissions/CND-Session51/Declaration_Kyiv_Women_60s_health_in_Prison.pdf).

offenses including murder, assault, and robbery (34%); property crimes such as burglary, larceny, and fraud (30%); and drug offenses, predominantly trafficking (27%).<sup>5</sup> The great majority have prior criminal charges when arrested for the crime that triggers incarceration.<sup>6</sup> The average prison sentence of a convict who is a mother is over four years.<sup>7</sup>

Most female criminals leave children behind in their communities when they enter prison,<sup>8</sup> though more than a third of these mothers were not living with their children prior to arrest.<sup>9</sup> Furthermore, instead of or in addition to leaving children behind, at least 5% of female convicts are pregnant when they enter prison,<sup>10</sup> and an unknown number of other women become pregnant while in prison from voluntary or involuntary sex with guards.<sup>11</sup> As a result, roughly two thousand babies are born to prison inmates in the U.S. each year.<sup>12</sup>

Most children with a parent in prison are of minority race.<sup>13</sup> Whereas the general U.S. population is approximately 64% white, 16% Hispanic, and 13%

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<sup>5</sup> See PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2010, at 7, 28, 30 (2011); LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 22 (2008). It is a frequently asserted myth that the "War on Drugs" is the cause of mass incarceration in the United States, but in fact the primary explanation for the great swelling of the prison population before 1990 is an explosion of violent crime. See John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1087–89 (2013).

<sup>6</sup> See, e.g., JULIE KOWITZ MARGOLIES & TAMAR KRAFT-STOLAR, WOMEN IN PRISON PROJECT, WHEN "FREE" MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND THE INCARCERATION OF WOMEN IN NEW YORK STATE 5 (2006). See also *infra* note 101.

<sup>7</sup> See CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, "SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN" 6–7 (2000) (providing statistics about prison sentences for mothers in federal and state prison).

<sup>8</sup> GLAZE & MARUSCHAK, *supra* note 5, at 2; Susan M. George, *Incarcerated Mothers and Their Children: A Decade Long Overview*, in WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM: POLICY ISSUES AND PRACTICE STRATEGIES 18-1, 18-4 (Russ Immarigeon ed., 2006) [hereinafter WOMEN AND GIRLS] (noting that most incarcerated mothers gave birth to four or more children).

<sup>9</sup> See MARGOLIES & KRAFT-STOLAR, *supra* note 6, at 3; GLAZE & MARUSCHAK, *supra* note 5, at 4.

<sup>10</sup> LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, MEDICAL PROBLEMS OF JAIL INMATES 1 (2006); Drika Weller Makariev & Phillip R. Shaver, *Attachment, Parental Incarceration and Possibilities for Intervention: An Overview*, 12 ATTACHMENT & HUM. DEV. 311, 312 (2010).

<sup>11</sup> See *infra* notes 120–122 and accompanying text (discussing sexual abuse of female inmates by guards).

<sup>12</sup> Jenni Vainik, *The Reproductive and Parental Rights of Incarcerated Mothers*, 46 FAM. CT. REV. 670, 676 (2008).

<sup>13</sup> SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991–2007, at 1 (2009), available at <http://www.sentencingproj>

black,<sup>14</sup> half of the children with a parent in prison are black, only one-fourth are white, and most of the rest are Hispanic.<sup>15</sup> Black and Hispanic children are respectively 7.5 and 2.5 times more likely to have a parent in prison than white children. One-third of children whose mothers are in prison live primarily with their fathers, while most of the rest are left in the care of a grandmother or other relative.<sup>16</sup> For roughly one-tenth of imprisoned mothers, their children are in foster care,<sup>17</sup> but nearly all of those children were already in foster care prior to the mother's conviction.<sup>18</sup> Contrary to the claims of some advocates for women prisoners,<sup>19</sup> it is rare for a child to go into foster care because a parent enters

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ect.org/doc/publications/publications/inc\_incarceratedparents.pdf (reporting that over 70% of the 1.7 million children in America with a parent in prison in 2007 were "children of color").

<sup>14</sup> See KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 4 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

<sup>15</sup> See SCHIRMER ET AL., *supra* note 13, at 7 (showing black children were 51% in 1997 and 45% in 2007 of all children with a parent in prison). In 2010, the female prison population was approximately 46% white, 25% black, and 18% Hispanic. See GUERINO ET AL., *supra* note 5, at 26. This suggests minority-race inmates have a higher average number of children.

<sup>16</sup> SCHIRMER ET AL., *supra* note 13, at 5.

<sup>17</sup> See GLAZE & MARUSCHAK, *supra* note 5, at 5; SCHIRMER ET AL., *supra* note 13, at 5.

<sup>18</sup> See Deseriee A. Kennedy, "The Good Mother": Mothering, Feminism, and Incarceration, 18 WM. & MARY J. WOMEN & L. 161, 173 (2012) (noting a study of incarcerated women in Illinois which found that the majority "had a child in state care prior to the woman's imprisonment"); Marilyn C. Moses, *Correlating Incarcerated Mothers, Foster Care, and Mother-Child Reunification*, CORRS. TODAY Oct. 2006, at 98, 98 (finding "a child's foster care status is rarely a direct result of a mother's imprisonment").

<sup>19</sup> See, e.g., *An Act Establishing a Child Nursery Facility at the Connecticut Correctional Institution, Niantic: Hearing on H.B. 6642 Before the Judiciary Comm.* (Conn. 2013) [hereinafter *Alexander's Testimony*] (testimony of Amanda Alexander, member of Women, Incarceration, and Family Law Project at Yale Law School, asserting that "[i]ncarcerated mothers are at particularly high risk of having their children placed in foster care, as most are primary caretakers of the children before arrest"); Michal Gilad & Tal Gat, *U.S. v. Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women*, 37 N.Y.U. REV. L. & SOC. CHANGE 371, 376 (2013) ("[I]t is reported that many incarcerated mothers with children in foster care are unable to meet court-mandated family reunification requirements for contact and visitation with their children, and consequently lose their parental rights."); Alexandria Gutierrez, *Sufferings Peculiarly Their Own: The Thirteenth Amendment, in Defense of Incarcerated Women's Reproductive Rights*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 117, 164 & n.354 (2013) (advocating women's reproductive rights in the prison context under the Thirteenth Amendment and asserting that children are taken away to foster care); Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1494 (2012)

prison; even with children born before their mother's incarceration, this occurs in less than 2% of cases.<sup>20</sup> It is even rarer for babies born to inmates to be placed immediately for adoption, as that occurs only if the mother chooses to relinquish the child for adoption.<sup>21</sup>

#### A. Range of Program Types

Traditionally, incarceration entailed a nearly complete severance of ties with family, friends, and community. Indeed, loss of gratifying intimate relationships is part of the suffering that makes imprisonment a deterrent to criminal activity. However, motivated principally by a belief that they can reduce recidivism following convicts' release, legislators and prison administrators have in recent years adopted new programs to increase communication and contact between inmates and their families—in particular, their offspring.<sup>22</sup>

Some such programs involve simply more communication between parents and children. A number of men's prisons, for example, have introduced parenting programs that encourage fathers to write letters to their children or record themselves reading books.<sup>23</sup> A small number of male prisons go beyond normal visitation procedures to facilitate greater personal contact with children by allowing more private and extended visits or furloughs (i.e., brief returns of the inmates to the community).<sup>24</sup>

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(asserting that “[i]mmediately after delivery, their newborns are automatically placed in foster care in the vast majority of states”).

<sup>20</sup> See, e.g., TIMOTHY ROSS ET AL., VERA INST. OF JUSTICE, *HARD DATA ON HARD TIMES: AN EMPIRICAL ANALYSIS OF MATERNAL INCARCERATION, FOSTER CARE, AND VISITATION* 9–10 (2004) (finding that 85% of the children of incarcerated women in New York who are in foster care were in foster care before the mother's arrest that led to incarceration), available at [http://www.prisonpolicy.org/scans/vera/245\\_461.pdf](http://www.prisonpolicy.org/scans/vera/245_461.pdf). Cf. *infra* notes 62–66 and accompanying text (outlining the legal barriers to state involvement and the substantial likelihood that other family will care for the children).

<sup>21</sup> See *infra* notes 62–71 and accompanying text.

<sup>22</sup> See Dave Ghose, *Nursery Program Aids Jailed Moms in Four States*, STATELINE (Sept. 24, 2002), <http://www.pewstates.org/projects/stateline/headlines/nursery-program-aids-jailed-moms-in-four-states-85899392756>.

<sup>23</sup> See, e.g., Rachel D. Costa, *Now I Lay Me Down to Sleep: A Look at Overnight Visitation Rights Available to Incarcerated Mothers*, 29 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 67, 92–93 (2003) (describing the D.C. Family Literacy Project, a family education program for inmates as part of two-step process leading to visits with children); ‘Promising Practices’: *Program Helps NM Inmates Be Active Part of Family*, DEMING HEADLIGHT (Nov. 5, 2009, 12:00 AM), [http://www.demingheadlight.com/ci\\_13715604](http://www.demingheadlight.com/ci_13715604) (describing the Strengthening Families Initiative Incarcerated Fathers Program, which provides parenting education classes requiring inmates to create books and cards for their children).

<sup>24</sup> See, e.g., Costa, *supra* note 23, at 88–89 (describing the park-like area of a Louisiana penitentiary where fathers can have a picnic and playtime with their children);

More dramatic new programs have proliferated in women's prisons. Most female prisons now have special areas and longer hours for mother-child visits.<sup>25</sup> Many have parenting programs for female inmates that entail young children spending several hours a week in supervised group play sessions with their mothers.<sup>26</sup> Some allow furloughs so mothers can spend time with their children in a more natural, community setting.<sup>27</sup> And some are going further and having children stay overnight in prisons. For example, the Tennessee Prison for Women allows inmates to have children under six stay with them for one weekend per month.<sup>28</sup>

### B. Prison Nurseries

The most extreme effort to connect incarcerated women with their children is a fast-growing trend to create prison nurseries, units within prisons where infants live full-time with their mothers. New York State has operated one at Bedford Hills, a maximum-security prison forty miles north of New York City, for over a century. In the mid-twentieth century, a dozen or so other states allowed incarcerated mothers to keep their children in prison with them, but they discontinued the practice in the 1970s, a time of increased consciousness regarding children's rights, citing concerns about children's safety and well-being.<sup>29</sup>

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Brian Handwerk, *Mothers Behind Bars: What Happens to the Children?*, NAT'L GEOGRAPHIC NEWS, [http://news.nationalgeographic.com/news/2003/06/0613\\_030613\\_prisonkids.html](http://news.nationalgeographic.com/news/2003/06/0613_030613_prisonkids.html) (last updated Jan. 30, 2004) (describing weekend afternoon programs in Louisiana women's prisons).

<sup>25</sup> Joycelyn M. Pollack, *A National Survey of Parenting Programs in Women's Prisons in the U.S.*, in *WOMEN AND GIRLS*, *supra* note 8, at 19-6.

<sup>26</sup> See, e.g., REPORT CARD, *supra* note 4, at 21 (describing Oregon's Coffee Creek Correctional Facility Parenting Inside Out program); Costa, *supra* note 23, at 89-91, 93-94 (describing family time and model parenting programs in North Carolina, Kansas, and New York).

<sup>27</sup> Pollack, *supra* note 25, at 19-6 to 19-7.

<sup>28</sup> See Jennifer L. Fiorica, Note, *How the Constitution Can Preserve the Strength of Existing Familial Bonds and Foster New Relationships Between Female Inmates and Their Children*, 29 *WOMEN'S RTS. L. REP.* 49, 53 (2007) (describing overnight visitation programs in women's prisons in New York, Delaware, and South Dakota); Erin Quinn, *Women's Prison Works to Make Inmates Better Mothers*, GANNETT NEWS SERV., Nov. 1, 2010.

<sup>29</sup> See 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*, L.A. TIMES, May 12, 1992, [http://articles.latimes.com/1992-05-12/news/vw-1747\\_1\\_baby-food](http://articles.latimes.com/1992-05-12/news/vw-1747_1_baby-food); see also Leda M. Pojman, *Cuffed Love: Do Prison Babies Ever Smile?*, 10 *BUFF. WOMEN'S L. J.* 46, 55 (2001-2002). Pojman notes that a survey in 1981 showed widely divergent views among prison administrators about the advisability of having children live in prisons. *Id.* at 56.

In recent years, however, the idea of babies living in prison has quietly taken on new life, as seven states—Illinois, Indiana, Ohio, Nebraska, South Dakota, Washington, and West Virginia—have joined New York in operating prison nurseries, in at least one case with federal funding.<sup>30</sup> Another state, Wyoming, is in the process of creating one.<sup>31</sup> In some states, prison officials have discretion to place children in prison with birth mothers even in the absence of a special nursery unit.<sup>32</sup> The numbers of states, programs, and children living in adult prisons are likely to increase rapidly. The U.S. Department of Justice issued a call for grant proposals to develop more prison nursery programs in 2010,<sup>33</sup> advocates advance prison nursery legislative proposals in additional states each year,<sup>34</sup> and a recent report exclaimed that “unprecedented bi-partisan support currently exists for

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<sup>30</sup> VILLANUEVA, *supra* note 1, at 27–33; Ken Kusmer, *Nursery Programs Allow Imprisoned Moms, Newborns to Bond*, SEATTLE TIMES (May 11, 2008), [http://seattletimes.com/html/nationworld/2004405371\\_apbabiesbehindbars.html](http://seattletimes.com/html/nationworld/2004405371_apbabiesbehindbars.html) (stating that Indiana launched its program of imprisoning babies with a grant from the federal Department of Health and Human Services). Several states also or instead offer “community treatment programs” under which a more select group of women with young children leave prison and live in a more homelike setting while still under state supervision. *See, e.g.*, CAL. PENAL CODE § 3411 (West 2011) (establishing a community treatment program for women inmates with children under six years old); *Rehabilitation Programs Division: Baby and Mother Bonding Initiative (BAMBI)*, TEX. DEP’T OF CRIM. JUSTICE, [http://www.tdcj.state.tx.us/divisions/rpd/rpd\\_bambi.html](http://www.tdcj.state.tx.us/divisions/rpd/rpd_bambi.html) (last visited Mar. 30, 2014) (describing Texas’s rehabilitation program, BAMBI, that allows offender mothers and their infants to bond in a residential facility); *see also* KAREN SHAIN ET AL., CALIFORNIA’S MOTHER-INFANT PRISON PROGRAMS: AN INVESTIGATION I (2010) (describing six small, community-based facilities for mother-child coresidence). *But see id.* (concluding that “[t]he programs are not sufficiently ‘child friendly’, with the children’s needs not met”); *id.* at 19 (noting that some mothers thought the facilities dangerous for their children). These community-based programs call for a somewhat different analysis outside this Article’s scope.

<sup>31</sup> Sara Hossaini, *Plans Underway for New Prison Nursery in Lusk*, WYO. PUB. MEDIA (Mar. 19, 2012, 5:43 PM), <http://wyomingpublicmedia.org/post/plans-underway-new-prison-nursery-lusk>.

<sup>32</sup> *See, e.g.*, 730 ILL. COMP. STAT. § 5/3-6-2(g) (2012) (authorizing prison officials to keep children in prison up to age six); MD. CODE ANN., CORR. SERVS., § 9-601(f) (LexisNexis 2008) (no age limit); N.Y. CORRECT. LAW § 611 (McKinney 2003 & Supp. 2014) (providing prison officials discretion to keep a child in prison with the mother until the child reaches age one, except in extenuating circumstances under which the child may remain until 18-months old).

<sup>33</sup> U.S. DEP’T OF JUSTICE, FAMILY-BASED PRISONER SUBSTANCE ABUSE TREATMENT PROGRAM, FY 2010 COMPETITIVE GRANT ANNOUNCEMENT 1 (2010).

<sup>34</sup> Connecticut is now poised to join the list of states that place babies in prison. *See* H.B. 5569, Gen. Assemb., Feb. Sess. (Conn. 2014). In 2011 and 2012, some Massachusetts legislators proffered a bill relating to incarcerated women that included this provision: “Every effort shall be made to keep infants of twelve months or less born to incarcerated mothers with their mothers.” H.B. 2234, 187th Gen. Assemb. (Mass. 2011).

rehabilitative services for inmates, especially those, like prison nursery programs, that decrease recidivism.”<sup>35</sup>

A child’s life in prison can extend to up to three years of age in Washington State and up to eighteen months in most of the other states.<sup>36</sup> Most programs ostensibly limit participation to mothers whose expected release date is before the child will reach the maximum age,<sup>37</sup> who have no history of convictions for violent crime or criminal child maltreatment, and who have no recent misbehavior reports.<sup>38</sup> However, some states do not impose such limitations.<sup>39</sup> Moreover, the focus on criminal convictions for child abuse in the rules of most prison nursery programs<sup>40</sup> means the great majority of women who have previously committed child maltreatment can still have their babies placed in prison with them. Criminal prosecution for child maltreatment committed by mothers is rare—a substantial percentage of maltreatment incidents are never reported; in most reported instances, child protection services (CPS) is unable to substantiate the maltreatment, CPS refers only about 15% of substantiated maltreatment other than sexual abuse (which is almost never the kind of maltreatment mothers commit) for criminal investigation; and only a fraction of cases referred for criminal

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<sup>35</sup> Lorie Smith Goshin & Mary Woods Byrne, *Converging Streams of Opportunity for Prison Nursery Programs in the United States*, 48 J. OFFENDER REHABILITATION 271, 276 (2009).

<sup>36</sup> VILLANUEVA, *supra* note 1, at 10. Nebraska prison officials have discretion to authorize a stay longer than eighteen months. *Id.* at 28.

<sup>37</sup> *See, e.g.*, OHIO ADMIN. CODE 5120-9-57 (2005) (stating that a mother’s sentence must be eighteen months or less).

<sup>38</sup> *See* Tiffany Walden, *A Years-Long Struggle for Prison Moms*, CITY LIMITS (May 23, 2011), <http://www.citylimits.org/news/articles/4334/a-years-long-struggle-for-prison-moms#.Uu2QpmRDujI>.

<sup>39</sup> *See, e.g.*, N.Y. CORRECT. LAW § 611 (McKinney 2003 & Supp. 2014) (entitling women to enter the nursery without limitation based on length of sentence); Jessica L. Borelli et al., *Attachment Organization in a Sample of Incarcerated Mothers: Distribution of Classifications and Associations with Substance Abuse History, Depressive Symptoms, Perceptions of Parenting Competency and Social Support*, 12 ATTACHMENT & HUM. DEV. 355, 360 (2010) (noting that among mothers in New York prison nurseries included in a study, “sentences ranged from two months to 10 years”); Mary Woods Byrne et al., *Intergenerational Transmission of Attachment for Infants Raised in a Prison Nursery*, 12 ATTACHMENT & HUM. DEV. 375, 380 (2010) (noting that some mothers in New York prison nurseries have felony convictions for assault, robbery, and/or burglary). Illinois has no categorical limitations; a committee makes a subjective eligibility determination based on numerous factors, including length of sentence and behavioral history. *See* 20 ILL. ADMIN. CODE tit. 20, § 475.25 (2013).

<sup>40</sup> *See, e.g.*, OHIO ADMIN. CODE 5120-9-57 (2005) (requiring that an inmate “has never been convicted of a violent crime or any type of child abuse, or child endangerment”). Nebraska’s program manual suggests civil child abuse adjudications can also disqualify a woman. NEB. CORR. CTR. FOR WOMEN, NEB. DEP’T OF CORR. SERVS., OPERATIONAL MEMORANDUM, NURSERY PROGRAM 3 (2012).

investigation result in a conviction.<sup>41</sup> In addition, states that have rules excluding women based on their history or length of sentence might not implement them very carefully. For example, an Ohio report found that a significant percentage of the children living in prison were mistakenly put there even though their mothers had histories of violent crime or overly long sentences.<sup>42</sup>

Bedford Hills is the only maximum-security prison for women in New York State, so it houses the most serious female criminals.<sup>43</sup> Its nursery unit can house twenty-nine mother-baby dyads at a time.<sup>44</sup> While in the program, women attend parenting classes and substance abuse programs and receive counseling on preparing for life after release.<sup>45</sup> When mothers are receiving these services or performing prison jobs, other inmates come in from the general population to provide day care.<sup>46</sup> The most recent report of the nursery residents' demographics notes that over 60% of the babies who have begun their lives in Bedford Hills

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<sup>41</sup> See Ted Cross, Children & Family Research Ctr., U. of Ill. at Urbana-Champaign, *The Criminal Justice Response to Child Abuse: Lessons Learned and Future Directions for Research and Practice*, [http://cfr.illinois.edu/pubs/pt\\_20120701\\_TheCriminalJusticeResponseToChildAbuseLessonsLearnedAndFutureDirectionsForResearchAndPractice.pdf](http://cfr.illinois.edu/pubs/pt_20120701_TheCriminalJusticeResponseToChildAbuseLessonsLearnedAndFutureDirectionsForResearchAndPractice.pdf) (last visited Mar. 30, 2014) (presenting national statistics on CPS referrals to law enforcement for different types of maltreatment, the percentage of referrals that result in prosecution, and the percentage of prosecutions that result in conviction); see also 55 PA. CODE § 3490.92 (2008) (requiring that child protection workers refer cases to prosecutors only if they are cases of child abuse (not neglect) involving homicide, sexual abuse or exploitation, or serious bodily injury); *Statistics on Perpetrators of Child Sexual Abuse*, NAT'L CTR. FOR VICTIMS OF CRIME, available at <http://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse/statistics-on-perpetrators-of-csa> (last visited Mar. 30, 2014) (noting that only a small percentage of sexual abuse perpetrators are female, including females who abuse children other than their own); *Investigating Child Abuse and Crimes Against Children in Pennsylvania*, PROTECT OUR CHILDREN COMM., <http://www.protectpachildren.org/files/child-protection-report-investigations-may-2012.pdf> (last visited Mar. 30, 2014) (quoting child protection officials as saying, "In the vast majority of suspected physical abuse cases, we are prohibited from contacting law enforcement.").

<sup>42</sup> See TINA L. MAWHORR, OHIO DEP'T REHAB. & CORR., *EVALUATION OF THE ACHIEVING BABY CARE SUCCESS NURSERY PROGRAM 7* (2006) (finding that three out of seventy women were in the nursery despite not meeting the eligibility criteria).

<sup>43</sup> See *Facility Listing*, N.Y. DEP'T OF CORRS. & CMTY. SUPERVISION, <http://www.doccs.ny.gov/faclist.html> (last visited Mar. 30, 2014).

<sup>44</sup> See Byrne et al., *supra* note 39, at 378–79.

<sup>45</sup> See Walden, *supra* note 38 ("Mothers must attend substance abuse programs and take pre- and post-natal classes, addressing any addictions that put them in prison while learning how to improve their parenting skills simultaneously.").

<sup>46</sup> See Gilad and Gat, *supra* note 19, at 375; Leslie Flowers, *Prison Babies*, NURSE.COM (Nov. 17, 2008), [http://news.nurse.com/article/20081117/NY02/111170078#.Uuf\\_5HkQFO0](http://news.nurse.com/article/20081117/NY02/111170078#.Uuf_5HkQFO0) (describing the vocational programs inmates attend); ILL. ADMIN. CODE tit. 20, § 475.20(f)(2) (2013).

prison were black and over a quarter were Hispanic, whereas only one tenth were white.<sup>47</sup>

New York law creates a presumption that every woman who delivers a baby while incarcerated may, if she chooses,<sup>48</sup> keep the baby with her in prison:

A child so born may be returned with its mother 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 . . . . A child may remain in the correctional institution with its mother for such period as seems desirable for the welfare of such child, but not after it is one year of age, provided, however, if the mother . . . 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.<sup>49</sup>

The same New York law allows a woman who is nursing a baby under one year of age at the time she enters prison to bring the baby with her.<sup>50</sup> The law applies to “any institution” where a woman is confined, not just to prisons where there is a special nursery unit.<sup>51</sup>

New York law does not limit participation to women whose sentence will end before the baby must leave the prison, nor does it automatically exclude women with histories of violence or child maltreatment.<sup>52</sup> Moreover, despite the law’s

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<sup>47</sup> See Joseph R. Carlson Jr., *Prison Nurseries: A Pathway to Crime-Free Futures*, 34 CORRECTIONS COMPENDIUM 17, 18 (2009) (studying the racial demographics of the mothers and finding that “the female inmates in New York’s programs had the following demographics: . . . 61 percent were black, 26 percent were Hispanic and 11 percent were white”).

<sup>48</sup> See *Apgar v. Beauter*, 347 N.Y.S.2d 872, 874 (1973) (“[T]he discretion to bring the child into the institution rests with the inmate mother. . . .”); Mary W. Byrne et al., *The Drew House Story: Collaborating on Alternatives for Incarcerated Women and Their Children*, 28 CRIM. JUST. 25, 26 (2013) (“New York is unique among the seven states that currently have nursery facilities in that all incarcerated pregnant women have not only the option but the legislatively protected entitlement (N.Y. CORRECT. LAW § 611) to use the prison nursery program unless they are judged unfit for motherhood.”).

<sup>49</sup> N.Y. CORRECT. LAW § 611 (McKinney 2003 & Supp. 2014).

<sup>50</sup> *Id.* § 611(3).

<sup>51</sup> *Id.* § 611(1).

<sup>52</sup> See Byrne et al., *supra* note 48, at 26 (“New York has not established the same strict eligibility limitations as have other states with prison nursery programs, and participants are more likely to have a broader range of crimes and sentence lengths than elsewhere.”); Kelsey Kauffman, *Prison Nurseries: New Beginnings and Second Chances*, in *WOMEN AND GIRLS*, *supra* note 8, at 20-1, 20-4 (stating that officials have placed in Bedford Hills babies whose birth mothers had long sentences for violent crimes); Natasha Haverty, *When Should Babies Stay with Their Moms in NY Prisons?*, N. COUNTRY PUB.

reference to children's welfare, there is no legal requirement in New York that an authority competent to make such a judgment conduct a best-interests assessment and conclude that imprisonment is the best available alternative for a child, before the state puts that child in prison, nor that any qualified persons conduct an ongoing review of the infants' well-being.<sup>53</sup> Prison administrators conduct the screening.<sup>54</sup> Thus, regardless of what the circumstances would be for the child, any prison warden can order transfer of a baby from a birthing facility to the prison to live with the birth mother for a year or more, if the mother so requests. Even a petition for custody from the baby's legal father appears to be insufficient to block prison officials from sending his child to live in prison.<sup>55</sup>

Illinois's program is typical of the new wave of prison nursery experiments. It has one nursery, in its Decatur Correctional Center for women.<sup>56</sup> Prison officials screen inmate applicants to decide which babies will live in the nursery. In Illinois this is done by subjective assessment taking into account numerous vague criteria such as length of sentence and nature of criminal history, rather than by applying categorical limitations.<sup>57</sup> The nursery is in a segregated unit, where each mother has her own room adjoined to a central area decorated and furnished much like a

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RADIO (July 15, 2013), <http://www.northcountrypublicradio.org/news/story/22352/20130715/when-should-babies-stay-with-their-moms-in-ny-prisons> (discussing a baby living in Bedford Hills prison with a mother serving a fifteen-year sentence for first-degree manslaughter).

<sup>53</sup> See Kauffman, *supra* note 52, at 20-1, 20-3 to -4 (stating that the admission restrictions of the Ohio Reformatory for Women, which exclude violent offenders and women with previous charges of child endangerment, are not automatically applied to inmate mothers in New York).

<sup>54</sup> See Haverty, *supra* note 52 (stating that the deputy superintendent of programs decides which inmates are admitted to the nursery program).

<sup>55</sup> See *Apgar v. Beauter*, 347 N.Y.S.2d 872, 875 (N.Y. Sup. Ct. 1973) (overturning a decision to exclude a child, stating that "even the father does not have the power under this statute to countermand the decision of an inmate mother to keep her child"). In contrast, Illinois regulations require permission of the father, if he is known and available, for a baby to live in prison. See ILL. ADMIN. CODE tit. 20 § 475.20(f)(5) (2013).

<sup>56</sup> VILLANUEVA, *supra* note 1, at 27.

<sup>57</sup> See ILL. ADMIN. CODE tit. 20, § 475.25(b) (2013) (listing the following criteria: "1) Sentence, including factors such as the nature and class of the offense, length of sentence, and sentencing orders. 2) History of violence, abuse, criminal neglect, sexual offenses, or crimes against children. 3) Outstanding warrants or detainers. 4) Court order prohibiting contact with children. 5) Department of Children and Family Services involvement, including, but not limited to, present or past investigations or cases regarding the offender and her children. 6) Affiliation with organized crime activities or narcotics trafficking. 7) Mandatory supervised release date. 8) Grade, security designation, and escape risk. 9) Disciplinary history. 10) Psychological evaluation. 11) Medical or dental health. 12) Known enemies or documented offenders from whom the offender is to be kept separate.").

day care facility.<sup>58</sup> In addition to having superior living arrangements, participants are relieved from work for weeks after giving birth.<sup>59</sup> But then they must resume normal prison life, going to work and attending classes, and they must arrange for other prisoners to care for their children during that time.<sup>60</sup> 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.<sup>61</sup>

### C. Background Legal Rules for Parentage and Custody

To understand how young children end up living in prisons requires familiarity with certain background legal rules for parentage and handling of prison births. State laws confer legal parent status on every child's birth mother.<sup>62</sup> There is no basis for denying initial legal parent status to her; in particular, there is no exclusion based on unfitness or incapacity. The state can remove legal parent status from someone unwilling or unable to care for an offspring under laws authorizing termination of parental rights (TPR). That almost never happens, however, as a result of parental incarceration *per se*<sup>63</sup> because typically, in most states, child welfare agencies are not involved when a child is born to a woman already in prison.<sup>64</sup> Instead, absent a nursery program, the baby's father or, more commonly, some other family member designated by the mother simply takes the baby from the prison or birthing facility.<sup>65</sup> The baby then lives in temporary kin care, subject to reclamation by the mother upon her release.<sup>66</sup>

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<sup>58</sup> See Huey Freeman, *Illinois Prison Program Guides New Mothers*, PANTAGRAPH.COM (Apr. 12, 2010, 7:47 AM), [http://www.pantagraph.com/news/state-and-regional/illinois/article\\_ab1d5106-4631-11df-97d4-001cc4c002e0.html](http://www.pantagraph.com/news/state-and-regional/illinois/article_ab1d5106-4631-11df-97d4-001cc4c002e0.html).

<sup>59</sup> *Id.*

<sup>60</sup> ILL. ADMIN. CODE tit. 20, § 475.20(f)(2) (2013).

<sup>61</sup> *Id.* at § 475.35; see also NEB. DEP'T OF CORR. SERVS., *supra* note 40, at 5 (“Involuntary expulsion from the program may result from . . . [d]isregard for rules established in the Nursery Program/Unit or staff directives.”).

<sup>62</sup> See, e.g., 750 ILCS 45/4(1); Ohio R.C. § 3111.02.

<sup>63</sup> See James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 445–46, 447, 452–60, 463–64 (2008).

<sup>64</sup> Cf. LEGAL SERVS. FOR PRISONERS WITH CHILDREN, WHAT TO PLAN FOR WHEN YOU ARE PREGNANT AT THE CALIFORNIA INSTITUTION FOR WOMEN 12 (2013), available at <http://www.prisonerswithchildren.org/wp-content/uploads/2013/03/CIW-pregnancy-manual-v.-3-6-13.pdf> (instructing pregnant inmates that CPS will become involved after the birth only if no family member shows up at the hospital to take the baby or if the hospital happens to know the mother is already under CPS investigation or supervision and contacts CPS); Moses, *supra* note 18, at 1 (reporting that children are rarely placed in foster care as a result of maternal incarceration).

<sup>65</sup> See, e.g., 28 C.F.R. § 551.24(b) (2012) (“Child placement is the inmate's responsibility.”); VA. CODE ANN. § 37.2-714 (2011 & Supp. 2013) (“The child shall be

Only in the rare instance that no family member wishes to take the baby does CPS assume custody,<sup>67</sup> and then the child lives in a foster home until the mother leaves prison or until CPS orchestrates a TPR and adoption.<sup>68</sup> Federal law requires that CPS initiate a TPR proceeding if a child has been in nonrelative foster care for fifteen of the past twenty-two months (the “15/22 rule”), so the rare newborn who goes into foster care because of maternal incarceration is likely to remain in that impermanent status for at least a couple of years (fifteen months plus time for the TPR and adoption processes to run) if the birth mother has a long sentence.<sup>69</sup> Several states authorize TPR as to a child in state custody based solely on incarceration for a particular length of time, including at least two of the states currently operating prison nurseries.<sup>70</sup> But that can only occur after CPS takes

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removed from the state facility . . . and shall be delivered to his father or other member of his family.”); REPORT CARD, *supra* note 44, at 12 (noting that in one-fourth of cases, the father assumes custody).

<sup>66</sup> See, e.g., *In re M.B.*, Nos. 11CA010060, 11CA010062, 2012 WL 5899320, ¶3 (Ohio Ct. App. 9th Dist. Nov. 26, 2012) (“[A]fter Mother’s release from prison, she regained legal custody of S.Z.”); *Compton v. Eckman*, No. 11 MA 94, 2012 WL 1116931, ¶¶51–52 (Ohio App. 7th Dist. Mar. 30, 2012) (ordering transfer of custody from father to mother after latter’s release from prison, despite mother’s extensive history of drug abuse).

<sup>67</sup> See *supra* note 20.

<sup>68</sup> See, e.g., VA. CODE ANN. § 37.2-714 (“If he is unable to effect the child’s removal [to a family member] . . . the director of the state facility shall cause the filing of a petition in the juvenile and domestic relations district court . . . requesting adjudication of the care and custody of the child . . .”).

<sup>69</sup> See *Dwyer*, *supra* note 63, at 435–61 (describing federal law and agency resistance to its application). Ohio goes further and requires a petition for TPR after twelve months of foster care within a twenty-two month period. See OHIO REV. CODE ANN. § 2151.413 (LexisNexis 2011).

<sup>70</sup> See, e.g., FLA. STAT. ANN. § 39.806(1)(d)(1) (West 2012 & Supp. 2013) (terminating parental rights when a parent is incarcerated in a state or federal correctional institution for a period that is expected to be a “substantial portion of the period of time before the child will attain the age of 18 years”); 750 ILL. COMP. STAT. ANN. 50/1(D)(r) (2009 & West Supp. 2013) (authorizing TPR based on a prison sentence of over two years if the child is in state custody, but only if “prior to incarceration the parent had little or no contact with the child or provided little or no support for the child.”); OHIO REV. CODE ANN. § 2151.414(E)(12) (West 2005) (authorizing TPR if the parent is incarcerated and “will not be available to care for the child for at least eighteen months”); *id.* § 2151.414(E)(5), (13) (authorizing TPR based on incarceration if the imprisonment is the result of conviction for “an offense committed against the child or a sibling of the child” or if “[t]he parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.”); S.D. CODIFIED LAWS § 26-8A-26.1(4) (2004 & Supp. 2013) (authorizing TPR as to a parent who “[i]s incarcerated and is unavailable to care for the child during a significant period of the child’s minority, considering the child’s age and the child’s need for care by an adult”). A court would probably say this does not include a woman who just gave birth to the child in question. Wyoming’s TPR statute includes a provision relating to incarceration that suggests something more is required, but

custody and only if CPS is motivated to move quickly for termination, which it generally is not.<sup>71</sup>

Thus, the prevailing default rule and practice with newborns whose mothers are in prison has not been a child-welfare-agency or court determination of what is the best long-term family placement for them, but rather state empowerment of incarcerated mothers to choose who will take possession of the children. One might expect, given that these mothers typically want to be able to collect the child as soon as they leave prison, that they will choose someone who does *not* wish to be a permanent caretaker for the child. A large literature has documented the adverse outcomes for children in this situation, most of whom are left in poor and dangerous communities, passed from one overburdened custodian to another and living under the cloud of having a “real” parent who is an incarcerated criminal.<sup>72</sup> These children are at very high risk for mental health problems, substance abuse, unintended pregnancy, dropping out of school, gang involvement, chronic unemployment, and incarceration as adults.<sup>73</sup> The intergenerational cycle is clear.<sup>74</sup>

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it is unclear what. WYO. STAT. ANN. § 14-2-309(a)(iv) (2013) (authorizing TPR when “[t]he parent is incarcerated due to the conviction of a felony and a showing that the parent is unfit to have the custody and control of the child”).

<sup>71</sup> See Dwyer, *supra* note 63, at 452–57.

<sup>72</sup> See *infra* note 73. Some developmental experts believe, however, that the main cause of the problems these children manifest is actually the life they had with their mothers before the mothers went to prison. See, e.g., Joseph Murray & Lynne Murray, *Parental Incarceration, Attachment and Child Psychopathology*, 12 ATTACHMENT & HUM. DEV. 289, 303 (2010) (“Given the extreme disadvantage that many children experience before parental incarceration, it seems unlikely that parental incarceration is the main cause of psychopathology in this population.”).

<sup>73</sup> See e.g., PRISONERS ONCE REMOVED, *supra* note 72, at 1–2 (“[F]amilies impacted by incarceration are already typically at high risk along several dimensions. . . . The incarceration of a family member may further exacerbate an environment already characterized by ongoing poverty, stress, or trauma.”); JANE A. SIEGEL, *DISRUPTED CHILDHOODS: CHILDREN OF WOMEN IN PRISON* 5–8 (2011) (describing the challenges and consequences faced by children with parents who are incarcerated); Murray & Murray, *supra* note 72, at 303 (“Parental incarceration is a strong predictor of certain symptoms of child psychopathology.”). See also generally NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* (2005) (proposing that reform of our criminal justice system be viewed through the eyes of children whose families are disrupted by incarceration); DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* (2004) (discussing how criminal sanctions shape the lives of criminal offenders’ children); *CHILDREN OF INCARCERATED PARENTS: A HANDBOOK FOR RESEARCHERS AND PRACTITIONERS* (J. Mark Eddy & Julie Poehlmann eds., 2010) (summarizing “current research on children whose parents are incarcerated and discuss[ing] the implications of those findings for policy and intervention”); *CHILDREN OF INCARCERATED PARENTS: THEORETICAL, DEVELOPMENTAL, AND CLINICAL ISSUES* (Yvette R. Harris et al. eds., 2010) (providing “psychologists, educators, students, researchers, and policy makers who work with . . . or pursue research on children of incarcerated parents, as

Evidence from developmental studies suggests the psycho-emotional root of the problems is the children's failure to form secure attachments to a permanent caregiver, resulting from the chaotic life they had with their mothers before their mothers' arrests and/or from "unstable caregiving situations during the mothers' incarceration."<sup>75</sup>

To the extent support for children-in-prison programs has rested on any child welfare motivation, that support has been a reaction to this tragic reality produced by the default regime. But the option of placing children in confinement with their mothers is the only alternative that receives attention. No laws direct prison officials to encourage mothers to consider relinquishing a baby for adoption, let alone trigger CPS or court consideration of adoption for the baby, and there is no evidence that any prison officials or social workers on their own initiative urge pregnant inmates to consider adoption. They would likely incur recrimination from women's advocacy organizations if they did so.

In any event, prison nursery programs will likely foreclose the possibility of adoption. Women facing a year or more of incarceration who are offered the opportunity to move to a nicer unit and live with the baby they just delivered are exceedingly unlikely to decline that opportunity. Moreover, if any female convicts do contemplate acting altruistically by choosing adoption, to give their babies the best chance for a happy and fulfilling life, the tremendous push that self-appointed advocates for women prisoners are now making for children-in-prison programs suggests that these women would be under tremendous pressure to hold on to their offspring. They would be pushed to insist on occupying the role of legal mother—despite any concerns they have about subjecting their babies to the prison environment and later to the dangers of the communities they came from, despite the personal struggles that led to their incarceration and that will continue to pose severe challenges for them after release, and despite the ready availability of good adoptive homes.<sup>76</sup>

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well as the frontline responders who provide immediate assistance to these children" with a "comprehensive source").

<sup>74</sup> See Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 301–02 (2007) (stating that increased rate of imprisonment has "ensured the entrapment of African-American women and their children in a continual cycle of poverty and marginalization from mainstream society" and that "punitive measures often fail to address the underlying issues of drug addiction, incarceration, and poverty, essentially paving the way for future generations to suffer a similar fate"). Pfaff, *supra* note 5, at 1107 ("incarceration can be a self-sustaining 'epidemic'").

<sup>75</sup> Murray & Murray, *supra* note 72, at 292–97, 303.

<sup>76</sup> See JO JONES, ADOPTION EXPERIENCES OF WOMEN AND MEN AND DEMAND FOR CHILDREN TO ADOPT BY WOMEN 18–44 YEARS OF AGE IN THE UNITED STATES, 2002, at 12, 22, 25 tbl.7 (VITAL AND HEALTH STATISTICS Ser. 23, Nov. 27, 2008) (showing 900,000 women currently seeking to adopt, most of them married, including 228,000 black women and 195,000 Hispanic women); *id.* at 16, 33 tbl.15 (showing that over half of these women express indifference about the race of the child, only one-fifth of white women seeking to

### III. IDEALS AND REALITIES OF CHILDREN-IN-PRISON PROGRAMS

The extraordinary push in recent years to increase children's presence in prisons has not come from child welfare organizations. Rather, the force behind these programs has been individuals and organizations that advocate for prisoners, women, the poor, or racial minorities in general.<sup>77</sup> These advocates generally ignore evidence showing that bringing children into prison is contrary to the children's welfare, ignore or dismiss the option of adoption, and make unsupported claims about the positive impacts of these alternative programs.<sup>78</sup>

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adopt express a preference for a white child, half express a preference for a child less than two-years old, and 89% would accept a child with a mild disability); *id.* at 16 (“[I]n 2002 . . . the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted had become virtually nonexistent.”); Jeff Katz, *Adoption's Numbers Mystery*, WASH. POST, Nov. 8, 2008, at A17 (“a government agency has found that there are far more women seeking to adopt children than there are children awaiting adoption.”).

<sup>77</sup> See, e.g., Goshin & Byrne, *supra* note 35, at 275 (“Feminist criminologists have led the call for increased gender-responsiveness in correctional facilities. . . . Prison nursery programs and community-based co-residence facilities are the primary intervention strategies currently implemented specifically for women under criminal justice supervision and their infant children.”).

<sup>78</sup> See, e.g., Noelle E. Fearn & Kelly Parker, *Washington State's Residential Parenting Program: An Integrated Public Health, Education, and Social Service Resource for Pregnant Inmates and Prison Mothers*, 2 CAL. J. HEALTH PROMOTION 34, 44 (2004) (promoting prison nurseries because of “the lack of sufficient placement alternatives” for the children of the incarcerated women. “The alternative to care from their mothers—such as placement with grandparents (53%), other relatives (26%), or foster care (10%)—can come at a great expense to these children and their wellbeing.”); Michal Gilad & Tal Gat, *U.S. v. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women*, 37 N.Y.U. REV. L. & SOC. CHANGE 371, 383 (2013) (dismissing the option of adoption by suggesting adoptive homes are not available to newborns who are black, but citing in support a publication discussing adoptions of older children out of the foster care system); Goshin & Byrne, *supra* note 35, at 286–88 (devoting over two pages to the topic: “Policy Alternatives to Prison Nurseries,” but never mentioning adoption); Kennedy, *supra* note 18, at 197–200 (opposing TPR of incarcerated mothers); Nicole S. Mauskopf, *Reaching Beyond the Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN'S L.J. 101, 112–15 (dismissing adoption as alternative by citing parents' constitutional rights); Myrna S. Raeder, *Special Issue: Making a Better World for Children of Incarcerated Parents*, 50 FAM. CT. REV. 23, 27 (2012) (dismissing adoption with the suggestion that children of all ages are difficult to place and psychologically bonded to extended family); Vainik, *supra* note 12, at 683 (considering placement with relatives and foster care as the only alternatives to housing children in prison with their mothers); Allison Ford, *Bonding Behind Bars: Do Prison Nurseries Help or Hinder Parenting?*, DIVINE CAROLINE, <http://www.divinecaroline.com/life-etc/culture-causes/bonding-behind-bars-do-prison-nurseries-help-or-hinder-parenting> (last visited Apr. 2, 2014) (“[G]rowing up on lockdown isn't the ideal situation for any child. But since the alternative is that kids

### A. *The Ideals*

The primary motivation for state actors to accede to advocates' requests for more programs that bring children into prisons has been the law-and-order and fiscal aims of preventing criminals from reoffending after they are released from prison.<sup>79</sup> Most private advocates for children-in-prison programs primarily manifest sympathy for prison inmates,<sup>80</sup> though they also typically assert that the programs reduce recidivism.<sup>81</sup> Legal scholarship on the topic is almost entirely

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often bounce between foster families or the homes of distant relatives . . . living in a stable prison environment with their mothers make it a far preferable scenario.”). *See also infra* notes 185–191 and 199–253 and accompanying text (discussing unsupported claims regarding the effect of programs on recidivism and children’s attachment).

<sup>79</sup> *See, e.g.*, S.B. 491, 1998 Reg. Sess. (Cal. 1998); REPORT CARD, *supra* note 4, at 12, 13, 30; Byrne et al., *supra* note 39, at 377–78 (“Recidivism, one aspect of maternal rehabilitation, has been the most commonly used measure of prison nursery program success. Relationship factors have received no empirical attention until the present study.”); Carlson, *supra* note 47, at 17 (“[M]ost [prison nursery programs] have the hope of reducing the inmate mother’s risk of recidivism . . . .”); Goshin & Byrne, *supra* note 35, at 273 (“[L]awmakers are providing bi-partisan support for services to incarcerated and recently released populations, particularly those programs designed to decrease recidivism.”); Fiorica, *supra* note 28, at 58 (“Strong family ties can help with rehabilitation if those bonds remain intact.”); Freeman, *supra* note 58 (“Prison officials are constantly frustrated by a revolving door, the seemingly endless supply of inmates returning shortly after they are released.”); Vainik, *supra* note 12, at 683; Erin Jordan, *Prison Nurseries Cut Female Inmates’ Risk of Reoffending*, GAZETTE (Cedar Rapids) (Jan. 31, 2011, 7:52 AM), <http://thegazette.com/2011/01/31/prison-nurseries-cut-female-inmates-risk-of-reoffending/> (“Prison nurseries are gaining ground because of evidence they reduce recidivism, which saves the cost of housing repeat offenders.”).

<sup>80</sup> *See* Fearn & Parker, *supra* note 78, at 45 (noting pregnant inmates’ fear of their children being placed in foster care and urging expansion of baby-in-prison programs because “[p]rison nurseries may well serve those women for whom, for whatever reason, incarceration is an appropriate punishment.”); Vicki Haddock, *Babies Behind Bars: With California Inmates Expected to Give Birth to More than 300 Babies This Year, Officials Are Preparing to Open the State’s First Prison Nursery*, SFGATE.COM, May 14, 2006, <http://www.sfgate.com/opinion/article/BABIES-BEHIND-BARS-With-California-inmates-2497061.php>; *see also* Vainik, *supra* note 12, at 682–83 (suggesting three policies that will further “humane treatment of incarcerated women,” including prison nurseries).

<sup>81</sup> *See, e.g.*, *Alexander’s Testimony*, *supra* note 19; SARAH DIAMOND & JASMINE ORWISH-GROSS, DIAMOND RESEARCH CONSULTING LLC, PRISON NURSERY PROGRAMS: POLICY BRIEF FOR CT 1 (2012), *available at* <http://www.diamondresearchconsulting.com/174-2/> (citing “the urgent need to lower recidivism rates” in encouraging Connecticut legislators to approve a prison nursery bill); REPORT CARD, *supra* note 4, at 12, 13, 30; Carlson, *supra* note 47, at 17–18; Gilad & Gat, *supra* note 78, at 388 (“There is strong empirical evidence to support the claim that PNPs can lower rates of recidivism.”); Vainik, *supra* note 12, at 682–83; Wolf et al., *supra* note 4, at 164; VILLANUEVA *supra* note 1, at 16–17; Haverty, *supra* note 52 (“[P]articipating in prison nurseries lowers recidivism rates dramatically . . . .”); Press Release, Women’s Prison Ass’n, New Report: Prison Nursery

feminist writing, sympathetic to any policies promising to alleviate the perceived suffering of incarcerated women.<sup>82</sup> This is part of a broader scholarly concern for incarcerated women, reflected in a large literature characterizing them as victims of economic injustice and male oppression. This concern also underlies, and calls for, substantial changes in criminal sentencing, improved societal support for single mothers and victims of domestic violence, and comprehensive programs to help incarcerated mothers chart a new course in life.<sup>83</sup> Though that concern is commendable and that characterization quite plausible, sympathy for the women appears to blind advocates to the reality of the babies' needs and the potential conflict of interests between mothers and their children. Many who advocate bringing children into prisons blithely assert that it will benefit the children by enabling them to form a secure attachment to their birth mother—a crucial aspect of healthy child development that I discuss below.<sup>84</sup> This might be important to some because they care about children and to others because of the well-known phenomenon of children following their parents' criminal path, the “cradle to prison pipeline.”<sup>85</sup> But the programs have arisen without any empirical support for

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Programs a Growing Trend in Women's Prisons (July 13, 2009) (on file with Utah Law Review) (quoting a policy associate at the Women's Prison Association as saying “the research shows that these programs produce lower rates of recidivism among participating mothers”).

<sup>82</sup> See e.g., Kennedy, *supra* note 18, at 166 (characterizing separation of convicted mothers from their children as a “call to action for feminists interested in dismantling stereotypes about women, mothering, race, and poverty”); Vainik, *supra* note 12, at 680–81, 683 (arguing, based on women's rights, for more programs in which children live with convicted mothers and other reforms that benefit incarcerated mothers).

<sup>83</sup> See generally, e.g., BARBARA BLOOM ET AL., NAT'L INST. OF CORR., GENDER-RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS (2003); INTERRUPTED LIFE: EXPERIENCES OF INCARCERATED WOMEN IN THE UNITED STATES (Rickie Solinger et al. eds., 2010) [hereinafter INTERRUPTED LIFE]; JODY RAPHAEL, FREEING TAMMY: WOMEN, DRUGS, AND INCARCERATION (2007); PAULA C. JOHNSON, INNER LIVES: VOICES OF AFRICAN AMERICAN WOMEN IN PRISON (2003); MADONNA R. MAIDMENT, DOING TIME ON THE OUTSIDE: DECONSTRUCTING THE BENEVOLENT COMMUNITY (2006); Sally Day, *Mothers in Prison: How the Adoption and Safe Families Act of 1997 Threatens Parental Rights*, 20 WIS. WOMEN'S L.J. 217 (2005); Marie A. Failing, *Lessons Unlearned: Women Offenders, the Ethics of Care, and the Promise of Restorative Justice*, 33 FORDHAM URB. L.J. 487 (2006); George, *supra* note 8; see also Levy-Pounds, *supra* note 74, at 301–02; Tiffany Scott, *Repercussions of the “Crack Baby” Epidemic: Why a Message of Care Rather than Punishment is Needed for Pregnant Drug-Users*, 19 NAT'L BLACK L.J. 203, 216 (2006).

<sup>84</sup> See, e.g., REPORT CARD, *supra* note 4, at 30.

<sup>85</sup> See Susan Phillips, *Mother-Child Programs: Connecting Child Welfare and Corrections Agencies*, in WOMEN AND GIRLS, *supra* note 8, at 22-2 (“Another reason for the growing interest in programs of this nature is their potential for preventing children whose mothers are incarcerated from following in their mothers' footsteps.”).

this assertion regarding children's welfare,<sup>86</sup> which makes it appear disingenuous, or, at best, as wishful thinking. As discussed below, the first study of attachment outcomes for prison nursery babies in the U.S. was published in 2010, even though the Bedford Hills prison nursery has existed for over a century.<sup>87</sup> The only studies of child welfare impact available to the seven states that created prison nurseries in the fifteen years before 2010, therefore, would have been a 1980s study of child development in United Kingdom prison nurseries—which found “progressive developmental decline in motor and cognitive scores . . . for all nursery infants after admission to the unit”<sup>88</sup>—and two observational studies of the Bedford Hills program in the early 1990s that found physical and cognitive developmental delays in a large percentage of the children.<sup>89</sup> Moreover, this unsupported child welfare speculation typically operates against a background assumption that the only alternative for a child is the current default regime of “bouncing around” among relatives or spending childhood in foster care.<sup>90</sup> But that is clearly false, given that the number of Americans wishing to adopt an infant far exceeds the number of infants currently available for adoption,<sup>91</sup> as well as the fact that children adopted soon after birth have developmental outcomes as good as or better than the general population and far better than children raised in the types of homes and communities from which most incarcerated women come.<sup>92</sup> Adoption could also

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<sup>86</sup> Cf. Goshin & Byrne, *supra* note 35, at 276 (“Data regarding child-specific outcomes . . . have rarely been collected.”); *id.* at 277 (“Research assessing US outcomes other than recidivism is nascent.”); Pojman, *supra* note 29, at 61 (“[R]esearch specifically measuring the long-term impact of nurseries on children is virtually non-existent . . .”).

<sup>87</sup> See Byrne et al., *supra* note 39, at 377–78, 386; Flowers, *supra* note 46 (“Prior to Byrne’s research, no one had formally studied the impact of the prison nursery on an infant’s development.”).

<sup>88</sup> Goshin & Byrne, *supra* note 35, at 277.

<sup>89</sup> See Pojman, *supra* note 29, at 65–66. These reports do not appear to be available anymore, which might mean the American Medical Association withdrew them, perhaps because of flaws, but they were available to policy makers at least as recently as 2001. *Id.* at 51 n.41.

<sup>90</sup> See, e.g., Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 868–74 (2011) (considering several ways to avoid separating parents from children, but not adoption); Bill Hewitt & Margaret Nelson, *Mothers Behind Bars*, PEOPLE, Nov. 11, 1996, at 95 (reporting an interview with a Nebraska prison warden who stated that prison nurseries are less expensive than placing a child in foster care); Vainik, *supra* note 12, at 683–84 (stating that although putting babies in prison “might not be the optimal scenario,” it is better than placing children in foster care or with relatives).

<sup>91</sup> See Dwyer, *supra* note 63, at 428–35 (“children are readily adoptable immediately after birth, but their chances for adoption diminish steadily from that point on . . .”).

<sup>92</sup> See SHARON VANDIVERE ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS 7 (2009) (stating that most children privately adopted were under one month of age at time of placement); *id.* at 21–35 (providing comparative statistics for all children in the United States versus privately adopted children with respect to physical health, social

allow a child to begin life with two parents in a loving, mutually supportive relationship with each other, rather than with a single parent.<sup>93</sup> Encouraging these women to relinquish their babies for adoption, or terminating their rights involuntarily and immediately to clear the way for adoption,<sup>94</sup> would, as shown further below, give these babies a far better chance at a good upbringing with permanent, stable, capable caregivers. But prison nursery advocates never consider these possibilities.

In any case, the ideal depicted by advocates for prison nurseries, and the expectation of legislators and prison officials who approve them, is this: The state will place newborns into prison with the birth mothers. As a consequence of this close and supervised contact, the children will form a secure attachment to their mothers. The children will then leave the prison with their mothers. The mothers will thereafter refrain from criminal conduct (including substance abuse) and will remain the custodians of the children throughout their minority, consistently providing safe, stable, and suitable home for the children.

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and emotional well-being, and relationship with parents); *id* at 46 (showing 41% of private adoptions were by relatives, which likely skews well-being statistics downward for this group of children); Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV. 1323, 1326 (2012) (noting that “the adoptive parent maltreatment rate is lower than the norm for the general population”); Dwyer, *supra* note 63, at 434 (noting the predominance of substance abuse, mental illness, and criminal records among parents whose children suffer maltreatment and developmental problems); Jacqueline Y. Portello, *The Mother-Infant Attachment Process in Adoptive Families*, 27 CANADIAN J. COUNSELING 177, 178–79 (1993) (summarizing studies finding no difference in attachment results as between children raised by biological parents and children placed with adoptive parents in the first six months of life).

<sup>93</sup> On the traditional preference adoption agencies give to married applicants and the child welfare benefits of two-parent households, see generally Lynn D. Wardle, *Preference for Marital Couple Adoption—Constitutional and Policy Reflections*, 5 J. L. & FAM. STUD. 345 (2003); *Who Can Adopt?*, NOLO, <http://www.nolo.com/legal-encyclopedia/who-can-a-dopt-child-30291.html> (last visited Apr. 2, 2010) (“Agencies often ‘reserve’ healthy infants and younger children for two-parent families”).

<sup>94</sup> In some states, statutory amendment might be necessary to accomplish an immediate TPR based on incarceration per se. In others, it is already possible. *See, e.g.*, Ohio Rev. Code Ann. § 2151.414(E)(12)–(13) (authorizing TPR based on a prison sentence of greater than eighteen months or on repeated incarceration); S.D. Codified Laws § 26-8A-26.1 (authorizing TPR based on a finding that a parent is “incarcerated and is unavailable to care for the child during a significant period of the child’s minority, considering the child’s age and the child’s need for care by an adult”). In addition, in every state other circumstances in the lives of incarcerated women can serve as a legal basis for immediate TPR, such as a prior TPR as to another child. *See* Dwyer, *supra* note 63, at 438.

### B. *The Realities*

Without knowing much about the programs or studies on the effects of bringing children into prisons, one might suppose there are good and bad aspects for children. While in prison, they get more time with their biological mothers, and the parents might be more attentive than they would be at home. On the other hand, prisons are typically unhappy, stressful, and dangerous places where most nonincarcerated parents would likely never bring their own children for any reason.

#### 1. *Mothers' Incapacity*

As to the positive dimension of children being with their birth mothers rather than in the care of someone who is not in prison, one must bear in mind that incarcerated women are generally not well functioning, psychologically healthy people who happen to land in prison one day because of aberrational misconduct.<sup>95</sup> To the contrary, the great majority of these women suffer from deep, serious mental health problems and addictions and have been involved in criminal activity for a long time.<sup>96</sup> Most had very poor upbringings themselves—a large portion having suffered from physical or sexual abuse as children—and never developed a secure attachment to their own parents.<sup>97</sup> Dysfunction typically runs through the

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<sup>95</sup> The frequent claim that a large portion of the prison population consists of people who committed minor drug offenses is false. See Shima Baradaran, *Race, Prediction, and Discretion*, 81 GEO. WASH. L. REV. 157, 175 (2013) (“[G]iven the consensual nature of drug crimes, they are underreported and police choose to apprehend only about 10% of drug users.”); Pfaff, *supra* note 5, at 1096 (“Relatively few drug arrests result in incarceration . . .”).

<sup>96</sup> See Byrne et al., *supra* note 39, at 379 (finding a history of substance abuse in most women in the New York prison nursery programs); Jude Cassidy et al., *Enhancing Attachment Security in the Infants of Women in a Jail-Diversion Program*, 12 ATTACHMENT & HUM. DEV. 333, 334 (2010) (noting “65 to 94% of pregnant inmates report histories of substance abuse” and “the majority of pregnant inmates report depressive symptomatology at levels indicative of clinical depression”); Lili Garfinkel, *Female Offenders and Disabilities*, in WOMEN AND GIRLS, *supra* note 8, at 39-1, 39-3 (“[T]he typical female offender had been hospitalized at least once for a psychiatric episode (usually a suicide attempt), had been violent in a school setting, and had a diagnosis of ODD (oppositional-defiant disorder). Because of girls’ histories of abuse and violence it is likely that they also have abuse-related disorders such as PTSD.”); Diane S. Yough & Liette C. Dennis, *The Complex Needs of Mentally Ill Women in County Jails*, in WOMEN AND GIRLS, *supra* note 8, at 42-1, 42-2 to 42-3 (noting that the “vast majority . . . had previously been in psychiatric and/or alcohol or drug treatment” and “[t]wo-thirds . . . had received psychiatric medication in the past”).

<sup>97</sup> See REPORT CARD, *supra* note 4, at 9 (“Rather than being treated for trauma, depression, addiction, and the other indelible injuries of violence, these mothers have been displaced into the criminal justice system.”); Byrne et al., *supra* note 39, at 386 (“[M]any

families of incarcerated women; for example, most of these women have parents or siblings who have been incarcerated,<sup>98</sup> and nearly half had parents who abused alcohol or drugs.<sup>99</sup> Many grew up in foster care.<sup>100</sup> When sentenced to prison, two-thirds had prior convictions,<sup>101</sup> and most were abusing drugs.<sup>102</sup> Furthermore, victims of domestic violence comprise a large percentage of female inmates,<sup>103</sup> and one-third of incarcerated women have been raped before entering prison.<sup>104</sup> One inmate, in the documentary film *Mothers of Bedford Hills*, stated, “[W]e’re all sick and broken when we enter these gates, or we wouldn’t be here.”<sup>105</sup> Having sympathy for and desire to improve life for these women is entirely understandable and commendable. Unfortunately, this sickness and brokenness prevents adequate parenting<sup>106</sup>—in fact, more than a third of incarcerated women who were already mothers were not living with their children at the time of their arrest.<sup>107</sup>

Imprisonment temporarily removes these women from the home environment that produced their dysfunctions, and it mostly curtails their substance abuse. It

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of the women in our sample did have mental health needs including depressive symptomatology.”); *id.* at 381–82 (finding that among thirty maternal research subjects only one-third had attached securely to their own parents in childhood); Cassidy et al., *supra* note 96, at 334 (reporting that 60% of pregnant inmates “experienced family violence during childhood” and “24% reported experiencing sexual abuse before adulthood”); Failing, *supra* note 83, at 501 (noting “highly disproportionate incidence of childhood physical, sexual, and emotional abuse that is found among female offenders”); Makariev & Shaver, *supra* note 11, at 312, 318; Malika Saada Saar, *Mothers Behind Bars in the United States: A Human Rights Issue*, HUFFINGTON POST (Nov. 10, 2010), [http://www.huffingtonpost.com/malika-saada-saar/a-report-card-on-mothers-\\_b\\_774338.html](http://www.huffingtonpost.com/malika-saada-saar/a-report-card-on-mothers-_b_774338.html) (“The shared narrative arc of incarcerated women and mothers behind bars is that of repeated experiences of brutal sexual and physical victimization, generally begun during girlhood.”).

<sup>98</sup> GLAZE & MARUSCHAK, *supra* note 5, at 7.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 22; Murray & Murray, *supra* note 70, at 300 (noting that 46% had a prior or current conviction for a violent offense).

<sup>102</sup> *Id.*

<sup>103</sup> Failing, *supra* note 83, at 493–94 (“[W]omen’s . . . relationships with men in their lives, profoundly affects the behavior that lands them in the criminal justice system. Covington has described how dysfunction in women offenders’ relationship leads to drug abuse and other crime.”); Michelle S. Jacobs, *Piercing the Prison Uniform of Invisibility for Black Female Inmates*, 94 J. CRIM. L. & CRIMINOLOGY 795, 804–11 (2004).

<sup>104</sup> See Alysia Santo, *Raped Behind Bars: New York Prisons Have A Problem: A Fox Guarding the Henhouse*, TIMESUNION.COM, (Sept. 9, 2013, 9:39 AM), <http://www.timesunion.com/local/article/Raped-behind-bars-4795883.php>.

<sup>105</sup> MOTHERS OF BEDFORD HILLS (Covey Productions Apr. 2011).

<sup>106</sup> See Byrne et al., *supra* note 47, at 27 (“[I]mprisoned pregnant women are, not unexpectedly, poor candidates for bonding and attachment with their infants.”); Cassidy et al., *supra* note 96, at 334 (“The multiple psychosocial problems presented by pregnant inmates have been well-established as risk factors for poor parenting.”).

<sup>107</sup> *Id.* at 30.

does not, however, cure them of deep-seated problems nor alter the environment to which they are likely to return after release.<sup>108</sup> To the contrary, “[w]omen go to prison often with an already severe complex of problems, which, without adequate treatment, the harsh conditions of prison tend to exacerbate.”<sup>109</sup> Imprisonment adds stressors of its own that intensify psychopathologies.<sup>110</sup> Human rights organizations complain that prison life today remains “harsh and dehumanizing for all who are confined.”<sup>111</sup> The physical environment in prisons is generally stifling, harsh, unstimulating, and foreboding.<sup>112</sup> The social environment is rife with hostility, fear, and depression.<sup>113</sup> The prison setting denies women autonomy and

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<sup>108</sup> See BLOOM ET AL., *supra* note 83, at 21 (“Most correctional interventions do not address the effects of early physical, sexual, and emotional abuse and the resulting trauma.”); Gina McGalliard, *Record Numbers of Incarcerated Mothers Bad News for Women, Children, and Communities*, TRUTHOUT (Jan. 27, 2012, 3:45 PM), <http://truth-out.org/news/item/5871-record-numbers-of-incarcerated...rs-bad-news-for-women-children-communities?tmpl=component&print=1> (quoting the Executive Director of the Women’s Prison Association, Georgia Lerner, who said that “going to prison fails to address the underlying factors that led to incarceration in the first place”). Many advocates for incarcerated women bemoan the lack of adequate medical care, mental health treatment, counseling, and drug rehabilitation. See, e.g., REPORT CARD, *supra* note 4; Vainik, *supra* note 12, at 676–77.

<sup>109</sup> Wolf et al., *supra* note 4, at 142; *id.* at 145 (“Women come into prison with a lifetime of unmet needs in health care, education, and vocational training. The experience of incarceration exacerbates these issues in potentially dangerous ways . . . .”); Baradon et al., *New Beginnings—An Experience-Based Programme Addressing the Attachment Relationship Between Mothers and their Babies in Prisons*, 34 J. CHILD PSYCHOTHERAPY 240, 242 (2008) (“We assume that many troubling aspects of the mothers’ histories are activated by the prison environment, thereby creating major problems for the establishment of caregiving bonds.”).

<sup>110</sup> See John J. Gibbs, *Symptoms of Psychopathology Among Jail Prisoners: The Effects of Exposure to the Jail Environment*, 14 CRIM. JUST. & BEHAV. 288, 307 (1987) (suggesting “going to jail can substantially increase the severity of some symptoms of psychopathy”); Ruthanne DeWolfe & Alan S. DeWolfe, *Impact of Prison Conditions on the Mental Health of Inmates*, 4 S. ILL. U. L.J. 497, 533 (1979) (discussing the negative effects maximum security prison systems have on the psychological health of inmates and proposing solutions to this problem).

<sup>111</sup> See Saar, *supra* note 97.

<sup>112</sup> See, e.g., *Bailey v. Lombard*, 420 N.Y.S.2d 650, 654 (Sup. Ct. Monroe Cnty. 1979) (stating as a factor in assessing the child’s welfare interests “the effect that institutionalization would have on the child after the first few months, considering the constriction on movement and the sterility of environment”); *id.* at 656 (characterizing the prison as “an unsuitable environment” for a child).

<sup>113</sup> See Christina Jose-Kampfner, *Coming to Terms with Existential Death: An Analysis of Women’s Adaptation to Life in Prison*, 17 SOC. JUST. 110, 115–19 (1990) (discussing the emotional experiences of women serving long prison sentences and comparing those experiences to the terminally ill); La Rosa, *supra* note 29, at 2–3

privacy, as they are constantly under the authoritarian control of prison guards and surrounded by people who also committed crimes and have deep-seated psychological problems.<sup>114</sup> Inmate-on-inmate sexual violence is actually four times higher in female prisons than in male prisons.<sup>115</sup>

Living in a nursery unit is certainly more comfortable for inmates, but it is still life in a prison (in fact, the women typically spend much of their day outside the nursery unit amidst the general population<sup>116</sup>), and it can entail different stressors. For example, other prisoners are likely to resent women who receive special treatment because of their children, and prison nurseries entail the additional tension arising from babies' uncontrolled noise, especially during the night.<sup>117</sup> Many incarcerated women, both those in nursery units and those in normal units, describe prison life as socially and emotionally isolating, entailing complete severance of ties with family and friends and conditions not conducive to forming positive new ties, which compounds their struggles with depression, guilt,

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(discussing various arguments for why incarcerated mothers should not be allowed to raise their newborn children in prison).

<sup>114</sup> See, e.g., Amy Littlefield, *Mothers Behind Bars: The Prison Birth Project Helps Women in Prison with Pregnancy, Delivery and Parenting*, VALLEY ADVOCATE (June 24, 2010) (relating inmate's description of "[t]he structure of life in the jail—the strip searches, the uniformed guards, the heavily controlled schedule, the medications used to sedate her—made [the inmate] feel stripped of her right to be an emotional person. 'It's really humiliating having to face the guards that watch you strip every day . . . You don't have that personal, private thing anymore. . . . You have nothing. You are a number . . . . You have no right to feel, no emotions, no opinions, you have nothing. You do and say what you're told to do. That's it.'").

<sup>115</sup> See ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011–2012, at 17–18 (2013).

<sup>116</sup> See Fiorica, *supra* note 28, at 58; see also *supra* note 60 and accompanying text.

<sup>117</sup> See, e.g., *Bailey v. Lombard*, 420 N.Y.S.2d 650, 656 (Sup. Ct. Monroe Cnty. 1979) (noting Sheriff's concern that the effect of babies' presence on other inmates could create a "security hazard"); *Apgar v. Beauter*, 347 N.Y.S.2d at 876 (Sup. Ct. Tioga Cnty, 1973) ("The Sheriff . . . complains that the jail morale will be lowered in that others so confined are not allowed to have their families in jail and that the child's crying will disturb the other prisoners."); La Rosa, *supra* note 29 (stating that a constant source of tension in nursery units comes from babies crying during the night).

and sense of loss.<sup>118</sup> Many are preoccupied with thoughts of children and men left behind.<sup>119</sup>

Prison guards use their power over female inmates to inflict psychological and sexual abuse.<sup>120</sup> Rape of incarcerated females is a widespread problem in many states.<sup>121</sup> Reporting rape or any other abuse typically results in the accuser's being put in solitary confinement. That potential punishment, along with difficulty of proof, officials' lack of sympathy for criminals, and a code of secrecy, give guards near impunity.<sup>122</sup> A prison guard is not likely to become kind and nurturing just because an inmate has a baby with her.<sup>123</sup>

A study of New York's two prison nurseries found "crowded conditions and negative interactions with corrections officers and nursery staff. Mothers expressed strain related to parenting in a demanding environment in which they felt basic

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<sup>118</sup> See Jose-Kampfner, *supra* note 113, at 118–19; Quinn, *supra* note 28, at 2 ("As she struggles to mourn for her daughter in an atmosphere where she has no true friends among the other inmates, she believes she is not worthy of being a parent."); see also Lorie S. Goshin & Mary W. Byrne, *Predictors of Post-Release Research Retention and Subsequent Reenrollment for Women Recruited While Incarcerated*, 35 RES. IN NURSING & HEALTH 94, 95 (2012) ("Social networks, frayed prior to criminal justice contact, can be further damaged by incarceration.").

<sup>119</sup> See, e.g., Paul Vallely, *Mothers & Prison: Babies Behind Bars*, INDEPENDENT (U.K.) (Sept. 17, 2012), available at <http://www.independent.co.uk/news/uk/home-news/mothers--prison-babies-behind-bars-8143296.html>.

<sup>120</sup> See BLOOM ET AL., *supra* note 83, at 25–26; Santo, *supra* note 104, at 1 (describing pervasive problem of inmate abuse in New York State's women's prisons); *Critical Statistics: California Women's Prisons*, CAL. COALITION FOR WOMAN PRISONERS, [http://www.womenprisoners.org/resources/critical\\_statistics.html](http://www.womenprisoners.org/resources/critical_statistics.html) (last visited Apr. 4, 2014) ("It is in this powerless environment that some prisoners have endured sexual assault from guards."); *id.* (reporting that "71% of women in California prisons report experiencing continual physical abuse by guards or other prisoners"; "[p]ersistent privacy violations are a fact of life for women in California prisons"; "male guards observe female inmates at all times—while taking showers, dressing, going to the bathroom and being strip searched"; and prisoners endure "degrading and sexually explicit language and frequent harassment from guards" and risk retaliation from the guards if they report any such abuse).

<sup>121</sup> See Santo, *supra* note 104 (reporting the pervasive problem of sexual abuse in New York women's prisons); Kelsey Meany, *Former Inmates Claim Texas Prison Ran 'Rape Camp'*, DAILY BEAST (June 20, 2013, 4:45 AM), <http://www.thedailybeast.com/witw/articles/2013/06/19/former-inmates-claim-texas-prison-ran-rape-camp.html>.

<sup>122</sup> See Meany, *supra* note 121; Alysia Santo, *Hidden World of Official Silence*, TIMES UNION (Sept. 9, 2013, 9:40 AM), <http://www.timesunion.com/local/article/Hidden-world-of-official-silence-4795871.php>.

<sup>123</sup> Cf. REPORT CARD, *supra* note 4, at 13 ("Reports from mothers with children in prison nurseries indicate that their babies' close proximity allows prison staff to coerce and manipulate a mother by threatening to deny her access to her baby."); Vainik, *supra* note 12, at 681 (expressing concern about women's powerlessness with prison guards and officials).

care giving, like feeding their infant, was tightly controlled.”<sup>124</sup> In fact, guards 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.<sup>125</sup> 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.<sup>126</sup>

## 2. *Unhealthy Environment*

The same conditions that exacerbate inmates’ psychological and personality problems are also likely to affect children adversely, both directly—by exposing them to the same hostile and stifling atmosphere—and indirectly—by disturbing their caregivers. In most nursery programs, babies come into contact not just with other mother-child pairs but also with inmates who do not have a child with them in prison, either because these other inmates serve as day care workers or because the babies live in a unit that contains inmates who do not have children with them.<sup>127</sup> Such contact with other inmates increases risk of harm and disease.<sup>128</sup> In some prisons, inmates have access to drugs,<sup>129</sup> and women in the nursery who know or suspect the guards are going to have them ejected are likely to act in a

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<sup>124</sup> Goshin & Byrne, *supra* note 35, at 278 (citing Katherine Gabel & Kathryn Girard, *Long-Term Care Nurseries in Prison: A Descriptive Study*, in CHILDREN OF INCARCERATED PARENTS 237, 253 (Katherine Gabel & Denise Johnston eds., 1995); R. Barry Ruback & Timothy S. Carr, *Crowding in a Woman’s Prison: Attitudinal and Behavioral Effects*, 14 J. APPLIED SOC. PSYCHOL. 57, 57–59 (1984) (discussing the adverse impact of crowded conditions, lack of privacy, and lack of control).

<sup>125</sup> See MAWHORR, *supra* note 43, at 7 (reporting study showing 15% of mothers in Ohio’s prison nursery were ejected for rule infraction or inattention to their babies); SHAIN ET AL., *supra* note 30, at 17 (discussing mothers’ fear of retaliation by guards for anything that displeases them, causing some to forego asking for medical attention for their sick or injured children); see also Baradon et al., *supra* note 109, at 242 (“[T]he officer-prisoner relationship may easily trigger a negative transference underpinned by unresolved conflicts within their own child-parent relationship.”).

<sup>126</sup> Tracy Murphy, *Mom: Having Son in Prison Was Scary, Beautiful*, HLN VIDEOS, <http://www.hlntv.com/video/2013/06/03/babies-behind-bars> (last visited Apr. 4, 2014).

<sup>127</sup> See Kauffman, *supra* note 52, at 20-5 (noting that different prisons have different conceptions of the role of the nursery in the wider prison community and that children are exposed to other “program mothers and the inmate caregivers”).

<sup>128</sup> See Goshin & Byrne, *supra* note 118, at 94 (noting a “higher prevalence of . . . mental illness, substance use disorders, hepatitis, HIV/AIDS, and other sexually transmitted infections” among incarcerated women).

<sup>129</sup> See, e.g., Laura Stone, *Women Behind Bars: A Baby’s Home Behind the Barbed Wire*, CALGARY HERALD (May 25, 2012) <http://www.calgaryherald.com/news/alberta/Women+Behind+Bars+baby+home+behind+barbed+wire/5540938/story.html> (citing prison employees’ position that “drugs proliferate” in the prison and “violence is on the rise”).

volatile manner and could become very violent.<sup>130</sup> The physical atmosphere is also unhealthy, as evidenced by elevated rates of respiratory problems among inmates.<sup>131</sup> Tellingly, many prison nursery programs require mothers to sign waivers absolving the prison of responsibility for harm to or medical problems with their babies.<sup>132</sup>

Anyone who has ever entered a federal or state prison in the United States must be aware that the environment is dramatically different from that outside, and that difference principally explains the age limits in prison nursery programs, because administrators fear it would be detrimental to a child to be aware of his or her surroundings in prison.<sup>133</sup> But children are affected by their physical and social environments even before they have conscious conceptual awareness or understanding of them, regardless of whether they will remember the experience. Infant brains process information from their environments intensely, and experiences even in the earliest days of life can psychologically affect a child throughout life.<sup>134</sup> Although prison officials endeavor to make nursery units more pleasant, they are still units in a prison—populated by prison inmates, controlled by prison guards, subject to the strict prison regimentation, and very limited in both space and variety of experiences. A team of child development experts summarized concerns about children’s well-beings in prison nurseries:

Prison is by definition a very constraining institution. . . .

. . . Living space is reduced and children often share small cells with their mothers. This spatial shrinking is in contradiction with a child’s needs to move, to discover his environment and to be surrounded by a rich and diversified milieu.

Prison also imposes strict temporal constraints. Activities take place in rigid and regulated sequences. . . . While regularity is a good thing for a child, it goes too far in prison . . . .

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<sup>130</sup> See, e.g., *id.* (describing an incident in a Canadian prison in which a woman, after learning her child had been removed because the woman refused a drug test, took a guard hostage).

<sup>131</sup> See Goshin & Byrne, *supra* note 118, at 94 (noting that inmates suffer a higher rate of asthma compared to nonincarcerated persons).

<sup>132</sup> See VILLANUEVA, *supra* note 1, at 9.

<sup>133</sup> *Id.*; Valley, *supra* note 119 (noting that Britain generally does not permit mothers to keep their children in prison mother-baby units after they reach eighteen months because “[a]fter that, child development experts say, the harmful effects of being in an institution start to outweigh the benefits of being with their mother”).

<sup>134</sup> See Douglas F. Goldsmith et al., *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, JUV. & FAM. CT. J. 1, 8 (2004). (“Infants are capable of recalling experiences from the first days of life. . . . The memories are largely perceptual and are encoded through touch and sound. . . . [E]ven years following an event, though inaccessible to consciousness, the memory may still influence the child’s behavior and physiological responses.”).

Social deprivation is evident . . . . Cut off from the outside world, human exchanges are limited to the same people, prisoners and guards, most of whom are women. The hierarchical prison structure also imposes restrictions. Prisoners are at the bottom of the ladder and stay there. Personal autonomy is discouraged and various controls discourage responsible behavior. A mother is generally not allowed to freely care for her child. . . . [S]he is dependent on prison personnel who monitor her continuously. . . . [S]urveillance per se generates stress and anxiety.

. . . .  
 . . . Living conditions in prison, where stress levels are high both in the milieu as well as in the mother's subjective world, diminish her protective capacities and her ability to set aside the vicissitudes of her personal life, her mood variations, her anxieties, etc. . . . [T]his constitutes a serious risk factor for the child.

. . . Neither [mother nor child] can escape the other's frustrations and mood swings, perhaps contributing to . . . simultaneous apathy and nervousness.

. . . .  
 . . . [M]other-child proximity in prison . . . acts as a brake in the child's autonomization process.

. . . .  
 . . . Indeed, constraints imposed on their relationship limits the possibility of separation and the emergence of symbolic representation which is one of the basic instruments of cognitive development.<sup>135</sup>

In addition, infants confined to a prison unit for months and even years are deprived of a wide array of experiences that ordinarily stimulate cognitive, emotional, and physical development in children.<sup>136</sup> A mother who left Bedford Hills with her seventeen-month-old daughter described how the girl "freaked out" at seeing blowing leaves and was "petrified of cars," never having experienced either before.<sup>137</sup> In addition, the only males that infants in prison nurseries observe are prison guards, who treat the female inmates in an authoritarian and often abusive manner.<sup>138</sup>

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<sup>135</sup> Philip D. Jaffé et al., *Children Imprisoned with their Mothers: Psychological Implications*, in *ADVANCES IN PSYCHOLOGY AND LAW: INTERNATIONAL CONTRIBUTIONS* 402–04 (Santiago Redondo et al. eds., 1997).

<sup>136</sup> See Flowers, *supra* note 46, at 2 (noting the results of study of prison nursery children in which "[s]ocial and emotional screening in toddlerhood showed high scores for potential problems"); Vallely, *supra* note 119 (describing "[a] sterile life" for infants inside a prison).

<sup>137</sup> Tracy Murphy, *Mom: Having my Daughter in Prison Motivated Me*, HLN (June 4, 2013), <http://www.hlntv.com/video/2013/06/04/prison-moms-babies>.

<sup>138</sup> See Santo, *supra* note 104; Kelly Virella, *Male Guards, Female Inmates and Sexual Abuse in NYS Prisons*, CITY LIMITS (May 3, 2011), <http://www.citylimits.org/news/>

The concern is not limited to residential programs. Just visiting a parent in prison can be upsetting for children because of the prison's ominous environment, hostile guards and inmates, harsh procedures, and radical disempowerment of the parent.<sup>139</sup> A recent study found "visitation during a mother's incarceration predicted *less* child attachment security."<sup>140</sup> Many custodians of children in the community, whose mothers are in prison, object to visits because they believe, often based on past experience, that entering the prison environment will traumatize the children.<sup>141</sup> Many courts, also citing concern about the psychological impact visiting a prison may have on children, have refused to issue orders sought after by prisoners that would require a child's caretaker to bring the child to prison for visitation.<sup>142</sup> Many prison officials likewise express this worry.<sup>143</sup> Even many mothers in visitation or nursery programs themselves voice the view that prison is no place for children and their worries about the impact that the prison environment might have.<sup>144</sup> One mother, whose son spent some weekends with her in a Tennessee prison, stated that "she hopes his 2-year-old brain isn't capable of remembering his formative years in prison."<sup>145</sup>

Few advocates for placing children in prisons acknowledge, let alone address the implications of, the potential harms to children from entering such a tense, stressful, antagonistic, demoralizing, and stifling environment.<sup>146</sup> Some aim to

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articles/4325/male-guards-female-inmates-and-sexual-abuse-in-nys-prisons#.UnkXe-KzL-5.

<sup>139</sup> See Murray & Murray, *supra* note 72, at 294–95; Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 216 (2004).

<sup>140</sup> See Makariev & Shaver, *supra* note 11, at 320 (emphasis in original).

<sup>141</sup> See Costa, *supra* note 23, at 83–85; Vainik, *supra* note 12, at 679.

<sup>142</sup> See Solangel Maldonado, *Recidivism and Paternal Engagement*, 40 FAM. L.Q. 191, 201–05 (2006); see also Standard Pa. Practice § 126:1078 (2012) (indicating there is a "presumption that visitation with an incarcerated parent is not in the best interests of the child").

<sup>143</sup> See Mauskopf, *supra* note 78, at 110–11; Vainik, *supra* note 12, at 683 ("[P]rison administrators adamantly feel that children do not belong in prisons . . ."); Clare Dyer, *Prisons Consider More Baby Units*, GUARDIAN (Aug. 29, 2000, 10:02 PM), <http://www.theguardian.com/uk/2000/aug/30/prisonsandprobation.society> (quoting a representative of the Prison Reform Trust in the U.K. as saying, "In trying to do the right thing the prison service is in danger of making things worse. Prison is not a place for children.").

<sup>144</sup> See, e.g., Handwerk, *supra* note 24 (incarcerated mothers state "prison is no place for kids"); La Rosa, *supra* note 29 (noting that "inmates complain of the peeling paint, roaches, and bad plumbing"); Walden, *supra* note 38 (noting that some incarcerated mothers and critics say "prison is not an appropriate environment for children and that living in prison may have harmful effects on the child later in life").

<sup>145</sup> Quinn, *supra* note 28.

<sup>146</sup> The few advocates for incarcerated women who do acknowledge the harms do so in support of transferring inmates to community-based facilities to be with their children. E.g., Abramowicz, *supra* note 90, at 872–73 (discussing community-based facilities as a

bolster their position by cagily asserting that adverse effects on children have not been shown<sup>147</sup> while failing to mention that there has been almost no effort among child development researchers to study the effects on children.<sup>148</sup> Some rely on an assertion that the prison environment is better than the neighborhoods the mothers came from.<sup>149</sup> Although this is likely true in some respects (e.g., less violence and drug abuse in prison), they overlook the reality that women exiting prison almost always return to wherever they came from, and these advocates studiously avoid the topic of adoption, a far more attractive option for newborns than either the default regime or prison.

### 3. *Improbability of Attachment*

A crucial empirical claim many advocates assert is that, despite any adversities in the prison environment, a child will form a secure attachment with the mother that will constitute a basis for a healthy and permanent mother-child relationship.<sup>150</sup> Yet there is no evidence that visitation programs accomplish this,<sup>151</sup> and what little evidence there is of outcomes for former prison nursery babies suggests that only a small percentage meet this expectation. As explained below, available evidence suggests children-in-prison programs are actually more likely to undermine attachment and produce even worse outcomes than the default regime. By this measure, prison nurseries are a failure for the vast majority of children and a reckless gamble for all.

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“place for mothers . . . to live with their children and avoid the separation and trauma that the mother’s incarceration in a prison facility would inflict on the child”); Pollack, *supra* note 25, at 19-7 (noting that furloughs avoid subjecting children “to the negative and frightening elements of a prison visit”); REPORT CARD, *supra* note 4, at 30 (stating that a community-based nursery is “far better situated to serve the unique physical and emotional needs of a mother and her child” than is a prison nursery).

<sup>147</sup> See, e.g., *Alexander’s Testimony*, *supra* note 19; *An Act Establishing a Child Nursery Facility at the Connecticut Correctional Institution, Niantic: Hearing on H.B. 6642 Before the Judiciary Comm.* (Conn. 2013) (testimony of Civic Trust Public Lobbying Co. in support of Conn. H.B. No 6642).

<sup>148</sup> See Goshin & Byrne, *supra* note 35, at 276–77 (“Data regarding child-specific outcomes after participation in a nursery program are also critical endpoints but have rarely been collected. . . . Research assessing US outcomes other than recidivism is nascent.”).

<sup>149</sup> See, e.g., Suzanne Smalley, *Should Female Inmates Raise Their Babies in Prison*, NEWSWEEK (May 13, 2009, 8:00 PM), <http://www.newsweek.com/should-female-inmates-raise-their-babies-prison-80247> (“A prison may not seem like the best place to raise infants. But researchers are finding that it’s better than the alternative.”).

<sup>150</sup> See VILLANUEVA, *supra* note 1, at 22 (“[P]romoting maternal attachment is a primary argument for the creation of prison nurseries.”); Kusmer, *supra* note 30; Pojman, *supra* note 29, at 60 (“Mother-child bonding and attachment are at the crux of the prison nursery debate.”).

<sup>151</sup> See Mary W. Byrne et al., *Maternal Separations During the Reentry Years for 100 Infants Raised in a Prison Nursery*, 50 FAM. CT. REV. 77, 78 (2012).

Attachment is a child's psychological identification with and emotional connection to a permanent caregiver. Secure attachment is the foundation for healthy child development and appropriate social and emotional functioning later in life.<sup>152</sup> Children who fail to form a secure attachment "tend to see the world as threatening and unpredictable"<sup>153</sup> and consequently "have difficulties with anxiety, anger, aggression, depression, and mental disorganization."<sup>154</sup> These psychological effects in turn lead to deficiencies in physical health and development, "cognitive problems, speech and language delays, sensory integration difficulties and . . . social and behavioral abnormalities."<sup>155</sup> Attachment failure "retards socioemotional development and produces emotional withdrawal, indiscriminate socializing, lack of impulse control, failure to internalize moral norms, and psychiatric disorders such as depression, anxiety, hyperactivity, and disruptive behavior."<sup>156</sup> Adults who failed to form a secure attachment as children have great difficulty with intimate relationships, social interactions, and control of impulses and emotions; thus, they are at high risk for psychopathology and sociopathology, as well as criminal behavior likely to lead them to prison.<sup>157</sup> In short, attachment failure is the root cause of the intergenerational cycle of dysfunction and criminality.

For many reasons, putting babies in prison with incarcerated birth mothers is not a sensible strategy for promoting healthy attachment. First, as explained above, prison is far from a nurturing environment, and mothers "who are anxious or preoccupied with their own difficulties tend to be inconsistently responsive, causing the children in their care to develop an insecure pattern of attachment."<sup>158</sup> Second, incarcerated women's long-standing psychological and emotional problems pose an obstacle to their ability to give babies the kind of attention and interactions the babies need.<sup>159</sup> Third, there are the crucial matters of timing and continuity, which are given far too little attention in the literature and policy discussions about prison nurseries. The critical time period for attachment begins

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<sup>152</sup> Makariev & Shaver, *supra* note 11, at 314.

<sup>153</sup> *Id.* at 315.

<sup>154</sup> *Id.*

<sup>155</sup> Charles H. Zeanah et al., *Designing Research to Study the Effects of Institutionalization on Brain and Behavioral Development: The Bucharest Early Intervention Project*, 15 DEV. & PSYCHOPATHOLOGY 885, 886 (2003) (citations omitted).

<sup>156</sup> Dwyer, *supra* note 63, at 422 n.74 (citing developmental literature documenting these effects).

<sup>157</sup> See Makariev & Shaver, *supra* note 11, at 317–18.

<sup>158</sup> *Id.* at 315.

<sup>159</sup> See Carla Candelori & Maria Dal Dosso, *An Experience of Infant Observation in a Prison*, 10 INFANT OBSERVATION 59, 59 (2007); Makariev & Shaver, *supra* note 11, at 316–19 ("Caregivers who are unaware of or uncomfortable with their own emotions . . . encourage their children to suppress needs and feelings and develop . . . compulsive self-reliance and . . . avoidance. . . . Disorganized attachment is predictable from a caregiver's unresolved, incoherent feelings about his or her own losses or traumas . . .").

after a child reaches the developmental stage of animate-object permanence, which is typically at around five months, and it continues roughly to age twenty-four months.<sup>160</sup> Before that time period, children need consistent nurturing and positive stimulation, but it is not essential that the nurturing come from the person(s) who will ultimately be the attachment figure(s).<sup>161</sup> Thus, placement of newborns immediately in prison cannot be justified as necessary to a child's attachment.<sup>162</sup> More important, once the process of forming an attachment to the expected permanent caregiver commences, it takes substantial time to complete, and it is crucial that the infant receive continuous nurturance from that caregiver throughout this period.<sup>163</sup> Thus, significant separations are threatening to the attachment process and likely psychologically damaging.<sup>164</sup>

The realities of incarceration are simply not compatible with this requirement of stability and continuity. For a woman whose release is scheduled six to eighteen months after the child's birth, the attachment process might have begun but not proceeded far when the mother is thrust back into the community and all its challenges. The enormous stress of reentry, discussed further below, can interfere with the attachment process even if a mother and child remain together. The reality is that separation is very common because many mothers resume substance abuse, reenter prison, commit child maltreatment, or simply become unwilling or unable to retain custody of their children.<sup>165</sup> For women whose release dates are beyond

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<sup>160</sup> Jaffé et al., *supra* note 135, at 404; Daniel S. Schechter & Erica Willheim, *Disturbances of Attachment and Parental Psychopathology in Early Childhood*, 18 *CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM.*, 665, 666 (2009) ("The emergence of stranger wariness and separation protest, beginning at approximately 7 to 9 months of age and consolidating by the end of the first year of life, signals the establishment of the attachment system with its discrimination of, and preference for, the primary attachment figure.").

<sup>161</sup> See VIVIEN PRIOR & DANYA GLASER, *UNDERSTANDING ATTACHMENT AND ATTACHMENT DISORDERS: THEORY, EVIDENCE AND PRACTICE* 19–20 (2006); Thompson et al., *Group Report: Early Social Attachment and Its Consequences*, in *ATTACHMENT AND BONDING: A NEW SYNTHESIS* 349, 363 (C. Sue Carter et al. eds., 2006).

<sup>162</sup> This is borne out also by studies showing that children placed in adoptive homes anytime in the first six months have attachment outcomes as good as children who grow up with biological parents. See Portello, *supra* note 92, at 178–79.

<sup>163</sup> See Goldsmith et al., *supra* note 134, at 9 (describing the risk that separation from an established caregiver will cause a child to experience a "serious emotional crisis, creating at best an adjustment disorder and at worst the development of reactive attachment disorder," even when the child is returning to a former caregiver and attachment figure); Makariev & Shaver, *supra* note 11, at 317.

<sup>164</sup> See Byrne et al., *supra* note 151, at 87.

<sup>165</sup> See *infra* notes 241–252 and accompanying text; see also AM. MED. ASS'N, 1997 INTERIM MEETING OF THE AMERICAN MEDICAL ASSOCIATION REPORTS OF THE COUNSEL ON SCIENTIFIC AFFAIRS 4, available at <http://www.ama-assn.org/resources/doc/csaph/csai-97.pdf> (recommending against creation of more prison nurseries because "it has not been prove[n] that the skills provided to these mothers and the bonds created between the mother

the dates their babies will “age out” of the program, as occurs with some frequency in New York,<sup>166</sup> the attachment process will necessarily be disrupted because the babies must separate from the mothers. A child typically then goes to live with relatives, likely having little or no contact with the mother thereafter for as long as she remains in prison.<sup>167</sup> When the mother does emerge, and if she then assumes custody despite all the challenges facing her, this causes another potentially damaging dislocation in the child’s life.<sup>168</sup> In addition, prison officials expeditiously eject from nurseries mothers who violate prison rules, and in those cases also the attachment process is disrupted.<sup>169</sup>

The literature on prison nurseries generally overlooks the crucial fact that separation from a caregiver after the attachment process is underway or completed is psychologically traumatic and developmentally damaging for a child, whose understanding of, comfort with, and trust in the world has been made to depend on that one person.<sup>170</sup> Even if positive things happen between mother and child while a mother is in the intensely controlled environment in the prison, it is vital to know what is likely to happen after mother and child exit prison. Policy makers need to

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and infant are maintained after they leave the facility”); *Mental Stress: Unique Solutions for Unique Populations*, TEX. MED. OBSERVER, <http://txmorgv.com/news/mental-stress-unique-solutions-for-unique-populations/> (last visited Apr. 5, 2014) (describing results of research on the parenting of former prison nursery mothers, finding that “the majority used psychological aggression and minor physical assault against their children, and mothers who had faced significant depression were more likely to utilize physical assault”).

<sup>166</sup> See Byrne et al., *supra* note 151, at 83–84.

<sup>167</sup> See GLAZE & MARUSCHAK, *supra* note 5, at 6, 18 (reporting that only about half of mothers in state prisons had weekly communication with their children, that over half of incarcerated mothers never had a visit from their children, and only one-fifth had a visit monthly or more frequently); Makariev & Shaver, *supra* note 11, at 320 (listing some reasons why children do not visit parents in prison); Roberts, *supra* note 19, at 1496–97.

<sup>168</sup> Makariev & Shaver, *supra* note 11, at 320.

<sup>169</sup> See MAWHORR, *supra* note 42, at 7 (reporting study showing 15% of mothers in Ohio’s prison nursery were ejected for rule infraction or inattention to their babies); Deborah Jiang Stein, *Babies Behind Bars Nurseries for Incarcerated Mothers and Their Children*, CHILDREN’S VOICE (July/Aug. 2010), <http://www.cwla.org/voice/JA10babies.html> (noting that prison policies are generally quite harsh, requiring the removal of a baby from the prison if a mother commits any rule infraction, including just a verbal altercation with another inmate).

<sup>170</sup> See *Nicholson v. Williams*, 203 F. Supp. 2d 153, 198–200 (E.D.N.Y. 2002) (citing expert testimony on the effect of parent-child removal); Byrne et al., *supra* note 39, at 389–90 (noting that “attachment depends on contextual stability in the early years of life . . . [C]onsideration needs to be given to potential threats created by separations . . . [and] [d]evelopment of an attachment relationship is a long and fragile process . . .”); Byrne et al., *supra* note 151, at 80 (“Separations threaten the evolving neurobiological attachment system.”); Murray & Murray, *supra* note 72, at 295; Pollack, *supra* note 25, at 19–4 (summarizing studies and research on the effects of attachment disruption); Stein, *supra* note 169 (recounting struggles of a woman who, as a child, spent her first year in prison and thereafter was consigned to foster care).

ask this crucial question: Are women who get sentenced to state prison generally individuals whom children can depend on—both while they serve their time *and* after they leave prison—to always be there for the children and provide them with good care. If the answer is negative, the state should be looking for healthier, more reliable, and better-functioning parents for these children.

#### 4. *Barriers to Reentry*

Advocates for prison nurseries generally avoid discussing what mothers and infants face when the mothers complete their sentence. Yet in other contexts, advocates for incarcerated women regularly emphasize the formidable challenges these women face upon reentry.<sup>171</sup> Those challenges largely explain the very high rate at which mothers separate from prison babies after release. One commentator warns of potential difficulties:

[M]ost inmate-mothers have low literacy, limited education, limited work experience, and past alcohol, drug, or mental health problems. These limitations, in addition to their criminal records, severely curtail post-release employment opportunities for mothers who have been incarcerated.

In addition . . . these women are likely to have court-ordered demands on their time. If past alcohol, drug, or mental health problems are a matter of record . . . when a mother is released, she must be referred for treatment ordered by the court, as well as aftercare ordered as a condition of her release to community supervision. There are often waiting lists for such programs and often delays in referrals from her caseworker as well. In addition . . . the mother must attend court hearings relevant to [any child neglect, abandonment, or abuse proceedings]. These hearings are often adjourned multiple times.

If a mother must attend multiple court hearings, substance abuse programs, and other requirements of both the Department of Corrections and the Bureau of Child Welfare, along with reestablishing periods of visitation with her children, it is doubtful she will keep her employment for long. . . . However, without such employment she cannot hope to provide a home for her children . . . .<sup>172</sup>

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<sup>171</sup> See, e.g., BLOOM ET AL., *supra* note 83, at 16, 21.

<sup>172</sup> Day, *supra* note 83, at 236–37; see also Carlson, *supra* note 47, at 22 (noting that hoped-for “aftercare programs to help women and their babies transition smoothly from the prison to the community” have not materialized “due to a lack of funding”); Stephanie S. Covington, *Challenges Facing Women Released From Prison*, in *WOMEN AND GIRLS*, *supra* note 8, at 44-1, 44-2 (proposing that planning for incarcerated women’s reentry into the community should begin as soon as a woman begins serving her prison sentence rather than thirty to sixty days before release, which often provides inadequate resources for the

Many ex-inmates also must deal with substantial resentment from family members, especially those who took on the burden of caring for older children while their mothers were in prison.<sup>173</sup> Most ex-inmates have little contact with any family or friends outside of prison during their sentence, so they lack a support network when they return to the community.<sup>174</sup>

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 . . . .”<sup>175</sup> Such “social exclusions . . . quite effectively relegate ex-offenders to the margins of legitimate society,”<sup>176</sup> where they are likely to return to the dysfunctions of the past. Federal law requires states to exclude from welfare benefits and food stamp programs individuals who have been convicted of a felony involving possession, use, or distribution of drugs.<sup>177</sup> This leaves many without means to house, feed, and clothe themselves, let alone take care of children and search for work.<sup>178</sup> Living with relatives is not an option for those whose relatives are poor and therefore unable to add another member to the household, or for those with relatives in public housing who could be evicted if an ex-convict lives with them.<sup>179</sup> Some job training and educational loan programs exclude ex-convicts, yet most mothers have neither a high school diploma nor job skills when they enter prison, and, in any event, these women need employment immediately just to survive and cannot devote time to such programs.<sup>180</sup> Additionally, returning to the community after even just one year in prison is

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women upon release from prison); Pfaff, *supra* note 5, at 1107–08 (discussing the “collateral costs” of incarceration).

<sup>173</sup> See, e.g., Jacobs, *supra* note 103, at 811; Mawhorr, *supra* note 42, at 26; Quinn, *supra* note 28 (noting that one woman’s “mother is raising her 2- and 3-year old sons, but is so angry at her for getting in trouble that she had her phone blocked from receiving calls from her daughter”).

<sup>174</sup> See BLOOM ET AL., *supra* note 83, at 16; Goshin & Byrne, *supra* note 118, at 95; Creasie Finney Hairston & James Rollin, *Prisoner Reentry: Social Capital and Family Connections*, in WOMEN AND GIRLS, *supra* note 8, at 4-1, 4-3–4-5.

<sup>175</sup> Abramowicz, *supra* note 90, at 813; see also McGalliard, *supra* note 108; Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 586–87 (2006) (citing ineligibility for welfare benefits, educational grants, public housing, and certain types of jobs and licenses as collateral consequences of criminal convictions); Ross, *supra* note 139, at 215 (describing laws denying public assistance and public housing to persons with drug-related convictions).

<sup>176</sup> Pinard & Thompson, *supra* note 175, at 590.

<sup>177</sup> See 21 U.S.C. § 862 (2012).

<sup>178</sup> See Patricia Allard, *Unintended Victims of the Lifetime Welfare Ban for Drug Offenders*, in WOMEN AND GIRLS, *supra* note 8, at 16-1, 16-8 to -17.

<sup>179</sup> *Id.* at 16-9 to -17.

<sup>180</sup> *Id.* at 16-11 to -14; see also Maureen Norton-Hawk, *Forgotten Victims: The Children of Incarcerated Mothers*, in WOMEN AND GIRLS, *supra* note 8, at 21-1, 21-2.

typically quite disorienting, given the dramatic difference in structure, norms, and demands relative to prison life.<sup>181</sup>

Thus, released inmates' lives are typically characterized by lack of lawful employment, instability in housing, lack of child care, efforts to recover older children from foster care or the custody of family members, little support from extended family and the state, struggles with environmental factors that led to the prior criminal activity and substance abuse, difficulty reestablishing relationships and overcoming the resentment of their children and other family members, serial cohabitation with men who are not the children's father and could pose a danger to the children, risk of partner abuse, additional unintended pregnancies, and depression and other mental health problems.<sup>182</sup> In the midst of all these severe challenges, these women must act as single parents to all their children, some of whom are likely troubled and extremely needy.<sup>183</sup> It is simply unrealistic to expect them adequately to care for an infant upon release from prison.<sup>184</sup>

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<sup>181</sup> See Margaret Oot Hayes, *Mothering After Imprisonment*, in INTERRUPTED LIFE, *supra* note 83, at 388–91 (discussing the many “obstacles” most women encounter after being released from prison); Jose-Kampfner, *supra* note 113, at 123 (“Prison creates dependent women who have difficulty adapting to the outside.”).

<sup>182</sup> See Covington, *supra* note 172, at 44–42 (“[M]any women find themselves either homeless or in environments that do not support sober living.”); Goshin & Byrne, *supra* note 118, at 95 (“Reentry is further complicated for women who resume childcare responsibilities soon after release.”); Jacobs, *supra* note 103, at 811–14 (noting the economic challenges facing women released from prison); Shirley A. Hill, *Why Won't African Americans Get (and Stay) Married? Why Should They?*, in MARRIAGE AND FAMILY: PERSPECTIVES AND COMPLEXITIES 345, 356 (H. Elizabeth Peters et al. eds., 2009) (“The courtship practices of young African American men who lack decent jobs or respect in mainstream society are often characterized by deceit, violence, and a general disrespect for women.”); *id.* at 358 (noting “the diminishing support single mothers are receiving from the state and their extended families”); Jose-Kampfner, *supra* note 113, at 122–24 (“The re-adaptation to the world is complex. Prisoners have to re-establish relationships with their children and family, which are very difficult to just pick up after years of being away . . . . [R]esuming a relationship after a long period of time needs support and intensive therapy.”); Leslie Margolin, *Child Abuse by Mothers' Boyfriends: Why the Overrepresentation?*, 16 CHILD ABUSE & NEGLECT 541, 548 (1992) (“[A]lthough mothers' boyfriends perform comparatively little child care, they are responsible for more child abuse than any other nonparental caregivers.”); Aruna Radhakrishna et al., *Are Father Surrogates a Risk Factor for Child Maltreatment?*, 6 CHILD MALTREATMENT 281, 286 (2001) (finding the presence in the home of a man who is not a child's biological father to be a predictor of child maltreatment); Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 262–66 (2001) (discussing the especially high risk of physical and sexual abuse for daughters of single mothers); Wolf et al., *supra* note 4, at 144–45 (noting high recidivism rates among women released from prison).

<sup>183</sup> Some scholars have noted that the “collateral consequences” of incarceration might impact women more severely than men, precisely because they are generally expected to bear responsibility for children upon release. See, e.g., Marne L. Lenox,

Most female convicts come from areas of deep poverty and pervasive crime, areas without readily accessible support and rehabilitation services or employment opportunities.<sup>185</sup> The vast majority reacted to this environment in the past by abusing drugs and alcohol and repeatedly committing crimes.<sup>186</sup> For most, the children they had before going to prison suffered maltreatment in their care.<sup>187</sup> It should not be surprising, then, that rates of child neglect, abuse, and abandonment; resumption of substance abuse; and return to prison are quite high among ex-inmate mothers.<sup>188</sup> These are predominantly women who have long dealt with adversity and pain by self-medicating with drugs, and life after prison contains even greater adversities than existed before.<sup>189</sup> Neither the prisons nor the

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*Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 293–99 (2011).

<sup>184</sup> See Goshin & Byrne, *supra* note 118, at 95 (“The search for the necessities of survival often dominates the immediate post-release period . . . . This struggle may worsen instead of improve over time as . . . women are overwhelmed with life events and family obligations.” (citations omitted)); Roberts, *supra* note 19, at 1499 (“[P]ost-prison collateral penalties make it difficult to maintain a relationship with their children. A host of state and federal laws impose draconian obstacles to a mother’s successful reentry . . . .”).

<sup>185</sup> See Allard, *supra* note 178, at 16–13 to –14 (recognizing a lack of drug treatment programs in low-income communities); Jacobs, *supra* note 103, at 799 (stating that one cost of high incarceration rates for black women is “a continued break down of already fragile family and community structures”); *id.* at 803 (observing “poverty and lack of community-based resources and criminality” in neighborhoods from which most incarcerated women come); *id.* at 811 (noting higher prearrest poverty rates among female inmates than male); Ross, *supra* note 139, at 211–12 (describing survey of state governments that found the vast majority reported insufficient drug treatment programs); *id.* at 214 (“[E]ffective treatment programs for women involved with the criminal justice system are virtually non-existent.”); Scott, *supra* note 83, at 216.

<sup>186</sup> See Norton-Hawk, *supra* note 180, at 21–2 (“Drug use is endemic within this population. Almost all the women have tried a variety of both legal and illegal addictive drugs . . . .”); *id.* at 21–2 to 21–3 (noting the median number of incarcerations for women studied was three).

<sup>187</sup> See *id.* at 21–3.

<sup>188</sup> See BRAMAN, *supra* note 73, at 54–57 (describing the high rate of return to drugs among recently released convicts); Covington, *supra* note 172, at 44–2 (“Without strong support in the community to help them navigate the multiple systems and agencies, many offenders fall back into a life of substance abuse and criminal activity.”); Failing, *supra* note 83, at 500 (“[W]omen offenders frequently take out the rage that they have suppressed from their own childhood experiences on their children, or neglect or abandon their children as they descend into the hopeless vortex of drugs and crime.”); Ross, *supra* note 139, at 212 (citing evidence that drug abusers tend to experience repeated relapses even when receiving treatment); Wolf et al., *supra* note 4, at 145 (noting a 39% rate of return to prison for women in California within three years of release).

<sup>189</sup> See Walden, *supra* note 38 (discussing mothers who had their babies in prison nursery and resumed substance abuse after release); see also Saar, *supra* note 97 (noting that women are often victims of violence before “self-medicating” with illegal drugs); Wolf

community provide the treatment these women need to avoid replicating past patterns.<sup>190</sup> For most, their own family members have little hope of their doing so.<sup>191</sup>

Indeed, even inmates and former inmates express a sense of fatalism about life after release from prison. One former prison-nursery mother explained, “The funny thing about addiction 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.”<sup>192</sup> Another, 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. . . . The babies aren’t going to get us clean . . . . I have six kids and that didn’t cure me.”<sup>193</sup>

Advocates for women in prison nevertheless commonly assert that programs unifying them with their children greatly reduce recidivism rates, thus lessening the chance of later separation.<sup>194</sup> This pitch is crucial to winning the support of

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et al., *supra* note 4, at 143 (“Compared to men, women are less likely to use drugs for pleasure. Instead, women use drugs to ‘self-medicate’ depression or stress, to numb themselves from the emotional pain of abuse, or as a means to escape from conditions of poverty that create emotional stress.”); *id.* at 144–45 (“Fifty-one percent of the women committed to California prisons in 2004 were parolees returned to custody. . . . In 1998, more than half the women returned to prison for parole violations returned for drug offenses.”).

<sup>190</sup> See Wolf et al., *supra* note 4, at 145; see also McGalliard, *supra* note 108 (“Prisons, as opposed to being places where people can be rehabilitated in the hope of establishing law-abiding lives and becoming productive members of society, are typically warehouses to store people until their time has been served. Furthermore, in these cash-strapped times, budget cuts often mean slashing what few services exist, such as educational, drug treatment or mental health programs.”); BRAMAN, *supra* note 73, at 56–57 (discussing the lack of effective drug treatment in and out of prison); Makariev & Shaver, *supra* note 11, at 325 (explaining a lack of attachment-related assistance for incarcerated parents); Pinard & Thompson, *supra* note 175, at 590.

<sup>191</sup> See JESSICA MEYERSON ET AL., VOLUNTEERS OF AM., CHILDHOOD DISRUPTED: UNDERSTANDING THE FEATURES AND EFFECTS OF MATERNAL INCARCERATION 16 (2010), available at <http://www.vo.org/Childhood-Disrupted-Report> (reporting a survey result that 81% of nonparent primary caregivers for children of incarcerated parents expect to remain the caregiver after the parent’s release); *id.* at 23 (conveying nonparent caregivers’ distrust of incarcerated parents); *id.* at 24 (noting that many nonparent caregivers relinquish physical custody to a mother upon release “contingent upon her ability to ‘get her life in order’”).

<sup>192</sup> Walden, *supra* note 38.

<sup>193</sup> Haddock, *supra* note 80, at E1 (internal quotation marks omitted).

<sup>194</sup> DIAMOND & ORWISH-GROSS, *supra* note 81, at 2 (“There is considerable research evidence to show that Prison Nursery Programs reduce recidivism rates for incarcerated mothers that are released.”); Fearn & Parker, *supra* note 78, at 40; Ford, *supra* note 78 (“[A] powerful benefit is that women participating in such programs have far lower recidivism rates.”); Gilad & Gat, *supra* note 19, at 387–89, 391; Haverty, *supra* note 52

legislators and prison officials. But there is actually no evidentiary support for the claim, and the foregoing discussion gives reason for skepticism. No studies purport to show reduced recidivism as a result of visitation programs, and those that advocates tout as showing nursery programs cause a reduction in reoffense rate in fact do no such thing. Many advocates cite a report from the Nebraska Correctional Center for Women, which states that in the four years before initiation of a prison nursery, one-third of women who delivered a baby while incarcerated returned to prison within three years because of a new crime, whereas in the first five years of the nursery program, only 9% of nursery graduates had returned after release.<sup>195</sup> Some cite similar statistics in two other states (26% vs. 13% in New York and 39% vs. 17% in Washington) as supposed proof that prison nurseries cause a reduction in recidivism.<sup>196</sup>

But that is a misuse of data that anyone with minimal social science sophistication would recognize. These studies clearly suffer from a selection-bias problem; in layman's terms, they compare apples and oranges. Nursery participants are a special subset of all women who give birth while incarcerated. The states in which these studies were conducted all impose some form of screening that excludes candidates who are especially unpromising because of their history, taking into account the seriousness of their crimes, as reflected in the

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(asserting that participating in prison nursery programs cuts a woman's chances of reoffending in half); Erin Jordan, *Prison Nurseries Cut Female Inmates' Risk of Reoffending*, GAZETTE (Jan. 31, 2011, 7:52 AM), <http://thegazette.com/2011/01/31/prison-nurseries-cut-female-inmates-risk-of-reoffending/> (quoting Joseph Carlson, author of the report on Nebraska's prison nursery, as saying that "[the program] reduces recidivism").

<sup>195</sup> See, e.g., Gilad & Gat, *supra* note 19, at 388; Goshin & Byrne, *supra* note 35, at 276; Vainik, *supra* note 12, at 683. A more recent report on recidivism in Nebraska, by the same researcher, Carlson, *supra* note 47, which will also likely be widely cited with the false claim that it proves prison nurseries reduce recidivism, claims that the prenursery recidivism rate was actually 50%, for the same four-year period studied in the earlier report. *Id.* at 21–22. It also found a higher recidivism rate—17%—than in the earlier study for women who completed the prison nursery program. *Id.* For both groups, the sample was rather small, and the researcher failed to indicate whether the rate difference was statistically significant. *Id.* at 22 (showing a sample of thirty mothers for the prenursery period and sixty-five prison nursery mothers for the ten-year period studied). In addition, it appears the researcher did not look at a set time period following reentry for all released inmates, such as three years postrelease, but rather looked for any recidivism up to the year 2007 for members of the two groups. This means the study looked at recidivism within seventeen years for some women and recidivism within three years for others, which obviously undermines the comparison. This study also suffers from the selection bias problems discussed below, though the author of the report did not acknowledge this.

<sup>196</sup> See, e.g., Carlson, *supra* note 47, at 18, 22 (providing recidivism statistics for nine states that allow incarcerated mothers to keep their babies).

length of their sentences.<sup>197</sup> As noted above, most programs categorically exclude women with longer sentences, histories of violence, or past child maltreatment convictions. Moreover, the prison nursery group in these studies does not include the substantial percentage of mothers who begin the 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 in the nonnursery group, thus further stacking the deck in favor of finding a positive outcome with nursery mothers relative to other inmates.<sup>198</sup>

At most, these comparative recidivism figures support a conclusion that the women who enter *and complete* a prison nursery program as currently operated are at a lower risk of returning to prison than are other inmates. But this might be so entirely because those women have characteristics that would have translated into a low reoffense rate even if there were no nursery program. These figures in no way show that imprisoning babies with female criminals heals those inmates or changes their dispositions. Indeed, the cited statistics are consistent with a hypothesis that nursery programs *increase* recidivism for that special population. The programs could have this effect if having babies with them distracts women from rehabilitative work they need to do, prevents them from advancing educationally, undermines the deterrent impact of incarceration,<sup>199</sup> or imposes a responsibility on them that upon leaving prison becomes a source of great additional stress for them. We simply do not know what the recidivism rate would be for those women who qualify for and persist through the nursery programs in the absence of those programs, so claims that the programs have been shown to reduce recidivism are indefensible and irresponsible.

That the programs attempt to screen out higher-risk inmates counts in their favor from a child-centered perspective. But the primary reason legislators and prison officials support these programs—namely, the promise that they will *cause* a reduction in recidivism—remains entirely speculative. Some prison directors themselves express strong skepticism. An Ohio Department of Rehabilitation and Correction assessment of the state’s prison nursery concluded, after describing the poor service delivery in the program, the limited time the women were in the program, the fact that the great majority of them already had children when they entered prison, and the severe difficulties they faced upon exit, that “program developers should not expect that this ‘programming’ will have any impact on the likelihood that these women will recidivate.”<sup>200</sup>

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<sup>197</sup> See, e.g., *id.* at 21 (stating that thirty women were denied entry into the prison nursery in Nebraska during the study period, nearly half as many as were studied); Mawhorr, *supra* note 42, at 6 (showing that 80% of pregnant inmates were excluded).

<sup>198</sup> See Carlson, *supra* note 47, at 21 (noting that during the ten-year period studied in Nebraska, “65 women successfully completed the nursery program . . . [and] [t]hirty-eight other women entered the program but did not complete it”).

<sup>199</sup> See, e.g., Kusmer, *supra* note 30 (quoting an inmate as saying, about being with her son in a prison nursery, “When he’s with me, I really don’t feel like I’m incarcerated”).

<sup>200</sup> Mawhorr, *supra* note 42, at 27.

Moreover, as explained above, returning to prison is only one reason why mothers separate from children. Another is reverting to substance abuse. Resuming or forming relationships with men who do not want the children around or pose a danger to the children is another likely cause. Published research confirms a very high rate of ultimate mother-child separation suffered by prison babies.<sup>201</sup> Further, remaining in maternal custody does not necessarily mean living in a safe and nurturing environment. The rate of documented maltreatment is high among parents with criminal histories, and there is much developmental deprivation that never leads to an agency or court finding of maltreatment.<sup>202</sup>

##### 5. *Prison as Origin and Identity for Black Children*

Finally, advocates for prison nurseries and extended visitation also ignore other potential negative effects on children. They fail to consider the normalization of the prison environment for these children, who are already at heightened risk of calling a prison their home when they are adults, and the stigmatizing effect of forever having to call a prison “my first home” or “where I am from.” Yet that concern is apparent to many other people. For example, in refusing to order that a child go to a prison for visitation with a father, a trial court judge in Oregon stated the following:

[W]hat would be the impact on this child of growing up being exposed to that situation, and being reminded through life that this is his origin? I think it almost goes without saying that it would be devastating to the child. I don't think there's any way that we can say it would be in his best interest, but I think it can be almost automatically said that it would be horrendously against this child's best interest to grow up with that.<sup>203</sup>

There is at least anecdotal direct support for the judge's concern about normalization and stigma. One woman who began life in a federal prison wrote about her life thereafter:

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<sup>201</sup> See Byrne et al., *supra* note 151, at 83 (finding that three years after reentry only 44% of mothers who participated in New York's nursery program had custody of their children); Goshin & Byrne, *supra* note 35, at 278 (noting a study finding that among women exiting Nebraska's prison nursery, “only 57% retained custody of their children post release”).

<sup>202</sup> See Failing, *supra* note 83, at 500; Raeder, *supra* note 78, at 25 (“[O]ne third of national maltreatment complaints regarding children in in-home settings were made against caregivers who had been previously arrested.”).

<sup>203</sup> *Harris v. Burns*, 904 P.2d 648, 649 (Or. Ct. App. 1995) (upholding order of paternity and denial of visitation).

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.

. . . Inmates are an outcast class, by design cast out of society, so without the right support, it's natural for a child born inside to end up feeling outcast as well.<sup>204</sup>

Ample indirect support comes from the well-documented phenomenon of children who grow up in the community suffering from feeling stigmatized if they have a parent in prison.<sup>205</sup> And it is plausible to suppose that the internalization of a prison identity and the shame that prison babies later experience increases with the more time they spend in prison, as this would make their parents' incarceration more prominent in their minds and in their sense of self.

Of particular importance to the cause of race equality, these concerns about normalization and internalization must be especially pronounced with children of color, who constitute the majority of children whose mothers are incarcerated. Some women's advocates cite the disproportionate percentage of female inmates who are of minority race, as illustrating the social injustice at the root of the growing prison population.<sup>206</sup> What those advocates fail to recognize is that any adverse effects on children from tying them permanently to incarcerated parents and making them live in prison during early formative years are going to fall disproportionately on children of minority race. We ought to exercise much greater caution; we ought to think through the consequences much more thoroughly—taking into account the complex realities of prison life, children's developmental needs and lived experience, as well as the tremendous obstacles to successful reentry—before we put black babies in prison, where they might develop an image of themselves as persons who belong behind bars.

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<sup>204</sup> Stein, *supra* note 169.

<sup>205</sup> See BRAMAN, *supra* note 73, at 60–61 (describing a young girl's difficulty with friends and in school because of her father's incarceration); Murray & Murray, *supra* note 72, at 294 (“Incarceration is highly stigmatizing, and this stigma appears to be ‘sticky,’ spreading and adhering to family members, including the children of prisoners. In some cases, this stigma can lead to peer hostility and rejection.”).

<sup>206</sup> See, e.g., BLOOM ET AL., *supra* note 83, at 2 (“While they constitute only 13 percent of women in the United States, nearly 50 percent of women in prison are African American. Black women are eight times more likely than white women to be incarcerated.”); Jacobs, *supra* note 103, at 798 (remarking on “the overwhelming presence of women of color, particularly black women, in prisons”); Kennedy, *supra* note 18, at 166–67, 169; Levy-Pounds, *supra* note 74, at 298; Vainik, *supra* note 12, at 674, 680 (arguing that current incarceration of black women should be viewed in light of a history in which “racist and misogynist attitudes permeated American society”).

C. *Advocacy and the Abuse of Social Science Research*

The preceding section demonstrates that there are substantial reasons to believe the ideal motivating creation of prison nurseries—namely, that newborn children will securely attach to their birth mothers, will remain with their mothers for the remainder of their childhood, and will live a healthy and happy life—is actually highly unlikely to be realized for children placed in prison nurseries. Instead, most seem destined for attachment failure, separation from their mothers, maltreatment, and long-term mental health problems. Recently published research on New York’s prison nurseries substantiates these reasons for fear of bad outcomes for prison babies. I devote a subsection to that research because it provides an object lesson in how advocates can misuse social science and how readily policy makers and legislators can be duped if there is no pushback from another constituency, which is especially likely with policy choices harmful to children.

A group at the Columbia University School of Nursing, led by Dr. Mary Byrne, conducted a study of one hundred children who entered the prison nurseries at maximum-security Bedford Hills and neighboring medium-security Taconic Correctional Facility during a three-year period. Byrne’s group at Columbia has for many years been providing clinical services to the incarcerated mothers in these programs.<sup>207</sup> Although the expectation of objectivity in social science research is ordinarily incompatible with studying the benefits of a program in which researchers have a vested interest<sup>208</sup>—in particular, an interest in demonstrating

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<sup>207</sup> See Byrne, et al., *supra* note 39, at 379 (“[This] intervention consisted of weekly visits by a Nurse Practitioner . . . incorporating anticipatory guidance regarding infant development, responsive parenting, maternal life goals, and maternal coping with reentry issues using . . . interactive communication responsive to mothers’ expressed concerns” as well as feedback to the mothers on their interactions with their children.); *id.* at 387 (“[O]ur NP interventionists provided individualized visits and follow-up contacts with tailored content focusing on specific moments of maternal-infant behavior, fostering each mother’s sensitivity to infant development, and encouraging reflective narration about the child as a unique person.”); see also *id.* at 388 (conceding that her research could not distinguish any positive effects of her team’s therapeutic intervention from effects of the prison nursery per se).

<sup>208</sup> See Karen A. Jordan, *Financial Conflicts of Interest in Human Subjects Research: Proposals for a More Effective Regulatory Scheme*, 60 WASH. & LEE L. REV. 15, 36 (2003). Indeed, when the study involves human subjects, and in particular child subjects who are incapable of giving consent and for whom the researchers’ conclusions could have life-altering consequences, this self-interest of the researchers raises grave ethical concerns. See *id.*; see also 45 CFR § 46.111(b) (requiring additional protection for the rights and welfare of human subjects who are children or other nonautonomous persons). Relying on consent from the children’s mothers only exacerbates the concern in this context because the mothers also have a conflict of interests with the children, standing to benefit personally from a positive report about the program; Doriane Lambelet Coleman, *The Legal Ethics of Pediatric Research*, 57 DUKE L.J. 517, 517–18 (2007) (noting that

success in order to secure continued financial and institutional support for the program<sup>209</sup>—the Columbia study is widely cited in support of prison nurseries.<sup>210</sup>

In a first round of study, Byrne's team looked for indications that, upon reaching one year of age, babies who had been or still were in the prison were forming attachments with their mothers. The mothers had many of the characteristics noted above for the female inmate population generally, such as high rates of substance abuse, prior criminal histories, and having left older offspring behind when entering prison.<sup>211</sup>

Although the research began with one hundred babies, the team reported results for only thirty.<sup>212</sup> The team's research report mostly avoids discussing the

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“parental consent is central to the research community's claims about child protection” in use of children as research subjects).

<sup>209</sup> See Patricia C. Kuszler, *Curing Conflicts of Interest in Clinical Research: Impossible Dreams and Harsh Realities*, 8 WIDENER L. SYMP. J. 115, 141 (2001) (“The FDA has had regulations in place since 1998 requiring investigators to have no financial interests in the product and technologies they are testing.”). Columbia University had an institutional conflict of interest given that it benefits from grant money supporting clinical experiences for its students, like the School of Nursing's program at Bedford Hills, so any approval it gave for this human subject research would be suspect. See Mark Barnes & Patrik S. Florencio, *Financial Conflicts of Interest in Human Subjects Research: The Problem of Institutional Conflicts*, 30 J.L. MED. & ETHICS 390, 393–94 (2002) (stating that there is an “assumption that institutional conflicts can influence researchers and institutional decision makers, including IRB members, IRB staff, and others employed by the institution. . . . The risk is that their professional judgment may be affected by institutional pressure to achieve a research end point that is favorable to the institution's reputation or financial interests.”). The investigators did employ “blind coders” for the attachment assessments. Films of mother-child interactions were given to outside assessors without informing them of the research setting or hypotheses. See Byrne, et al., *supra* note 39, at 381. That gives some reason for viewing the attachment observations themselves, as opposed to the report based on them, as unbiased. However, one way a conflict of interests manifests is with “improper data manipulation.” See Barnes & Florencio, *supra*, at 394. Moreover, one might want to know, whether the coders could figure out from the films or from the fact of being contacted by the Columbia team that the mothers and infants were in a therapeutic prison program operated by that team. The coding entails subjective judgments from observations of infants' behavior.

<sup>210</sup> See, e.g., Susan Conova, *Do Babies Belong in Prison?*, NURSING RES. (Columbia U. Med. Ctr., New York, N.Y.), Feb./Mar. 2006, <http://www.cumc.columbia.edu/nursing/pdf/InVivoByrne.pdf> (“The project will have a big impact on the future of these nurseries. . . . When Dr. Byrne's study ends next year, other prison systems will have enough information on child development to make decision about opening their own nurseries.”).

<sup>211</sup> See Borelli et al., *supra* note 39, at 356 (“Prison nursery residents have histories that are similar to women in the general prison population.”); *id.* at 360 (noting that 48% of the mothers “had between one and eight previous children”); Byrne et al., *supra* note 151, at 81–82.

<sup>212</sup> Byrne et al., *supra* note 39, at 379.

fate of the other seventy children. Figuring out what happened to them requires piecing together bits of information scattered throughout the team's publications.

The team conducted attachment assessments for an additional twelve children (forty-two altogether)<sup>213</sup> yet nowhere reported what they found with those other twelve. The explanations given for excluding those twelve suggest the results were poor.<sup>214</sup> Among the remaining fifty-eight infants, at least twenty-two experienced disruption of their relationship with their mothers while they were still in prison, because of disciplinary action or the mother's choices, presumably before their first birthday (when the attachment assessment would have been done).<sup>215</sup> Those twenty-two children who experienced disruption include fourteen whom prison authorities ejected from the nursery unit, causing an immediate and possibly traumatic separation of infant from mother.<sup>216</sup> The twenty-two also include three who separated from their mothers because the mothers decided after a while in the program that they did not want to continue and returned to the general prison population, and another five mothers who elected to transfer to a "boot camp drug treatment."<sup>217</sup> Presumably, these twenty-two babies were abruptly transferred to

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<sup>213</sup> *Id.*

<sup>214</sup> The ostensible reasons for excluding them were (1) that for some there was no corresponding assessment of the mother's own attachment status vis-à-vis her parents, and the team wanted to compare each baby's attachment status with that of his or her mother, and (2) that the child was no longer with the mother at the time of assessment. *Id.* at 379, 388. But neither of those explanations suffices as justification for concealing the results for this significant number of children for whom attachment was assessed, especially given the broad claims Byrne ultimately made about positive outcomes for children from spending time in the prisons. *See infra* notes 232, 258–265 and accompanying text. Further, both reasons raise suspicion that the success rate was poor for those children; whatever gives rise to a mother not completing an assessment herself could be problematic for attachment, and being separated from the mother obviously presents a problem for becoming attached to her. The Author asked Byrne by email what the secure attachment rate was for these twelve, but she declined to respond.

<sup>215</sup> *See* Byrne et al., *supra* note 39, at 379 (noting that of one hundred dyads, forty-two were given assessments, leaving fifty-eight unassessed); Byrne et al., *supra* note 151, at 83–84, 86 (noting that three mothers were separated by maternal request, five mothers were separated due to the mother's choice to transfer to boot camp drug treatment options, and the New York Department of Corrections and Community Supervision ("DOCCS") separated fourteen mothers for disciplinary reasons). It is actually unclear whether all of these twenty-two were among the fifty-eight who never had an attachment assessment; the twelve assessments on which the team did not report included some children who had separated from their mothers. *Compare* Byrne et al., *supra* note 39, at 379 (noting that of one hundred dyads, forty-two were given assessments, leaving fifty-eight unassessed), *with* Byrne et al., *supra* note 151, at 83–84 (noting that a total of twenty-two mothers were separated because of disciplinary action or the mother's choices, but not whether they had been assessed).

<sup>216</sup> Byrne et al., *supra* note 151, at 84, 86.

<sup>217</sup> *Id.* at 83–84. A study of Ohio's prison nursery similarly showed that nearly 20% of women who entered the nursery were either ejected or chose to exit from it before their

someone in the outside community, likely someone with whom they had little or no prior contact and for whom care of the infant was a substantial burden.<sup>218</sup>

For these twenty-two children who were suddenly separated from their birth mothers, it seems reasonable to suppose that the rate of secure attachment to the birth mother was near zero.<sup>219</sup> In addition, one baby died after contracting a respiratory infection in the prison.<sup>220</sup> Thus, the team actually knew or could readily infer the attachment outcomes for as many as sixty-five infants (forty-two for whom attachment was assessed plus twenty-three who separated from the birth mother before the first birthday) on their first birthday, but nevertheless reported and drew policy conclusions on the basis of results for only thirty infants.<sup>221</sup> For the additional thirty-five, the rate of secure attachment to birth mother was likely close to zero.

The fate of the remaining infants (those not assessed but not removed from the program while the mother was still incarcerated) is difficult to discern from the study reports. Some (the researchers do not reveal how many) left with their mothers before their first birthday but were separated from the mothers soon thereafter, and for them the rate of secure attachment to birth mother was likely also zero or close to zero, because of that separation.<sup>222</sup> Five mothers were deported at the end of their prison sentences, and it appears that only two of their babies left the country with them at that time, so three of these mothers separated from their children, possibly permanently.<sup>223</sup> An additional undisclosed number of infants could not be assessed because they had not yet progressed to the stage of physical development at which it is possible to do an attachment assessment.<sup>224</sup>

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release dates, causing their babies to experience a disruption. See MAWHORR, *supra* note 42, at 7.

<sup>218</sup> Byrne et al., *supra* note 151, at 85–86; *see also* Goshin & Byrne, *supra* note 118, at 97 (“Kinship caregivers . . . faced similar struggles to research participation . . . most notably poverty, housing instability, and personal histories of criminal justice involvement, mental illness, and/or substance abuse.”).

<sup>219</sup> *See* Byrne et al., *supra* note 151, at 86 (only a few of the twenty-two ever reunited with their birth mothers after their releases from prison).

<sup>220</sup> *Id.* at 83. The infant’s mother sued the prison for providing inadequate medical care to her son. Robin Hindery, *Mothering Behind Bars: Prison Nurseries Have Noble Goals but Mixed Results*, YOUTH MATTERS (May 2004), [http://web.jrn.columbia.edu/studentnetwork/youthmatters/2004/just\\_2\\_hindery.asp](http://web.jrn.columbia.edu/studentnetwork/youthmatters/2004/just_2_hindery.asp).

<sup>221</sup> Byrne et al., *supra* note 39, at 379.

<sup>222</sup> Byrne et al., *supra* note 151, at 83; *see also* Byrne et al., *supra* note 39, at 379, 389. Even among those infants who *were* still with their mother in the community on their first birthday, and for whom Byrne’s team did report attachment results, most did not form a secure attachment to the mother. *See* Byrne et al., *supra* note 39, at 379, 382 (reporting that only six out of fourteen infants in this subcategory showed signs of secure attachment).

<sup>223</sup> Byrne et al., *supra* note 151, at 84.

<sup>224</sup> Email from Mary Woods Byrne, Professor, Columbia University, Dir., Ctr. for Children and Families, to author (Feb. 27, 2012) (on file with Author) (stating that independent mobility is a developmental prerequisite for conducting the Strange Situation

The team did not reveal the number of children for which that was true, nor did they discuss whether the slower rate of physical development in these children might itself suggest something negative about the babies' well-beings, such as deficient maternal nurturing or adverse impacts of the prison environment. For an additional, unspecified number of infants who exited the prison with their mothers before reaching age one, the team lost contact with the mothers or the mothers lived too far away from the lab where the team was conducting the attachment assessments.<sup>225</sup> The team received reports that some of these mothers had separated from their children or were again engaged in criminal activity that could lead them back to prison.<sup>226</sup>

Thus, perhaps the most interesting part of the Bedford Hills story, and the most revealing of the true odds of a good outcome for a baby the state places in prison, is the fate of the seventy children whom the team chose not to discuss in their report on attachment. As stated above, what policy makers should want to know is the answer to this: What is the likelihood, for any given newborn child of an incarcerated woman, that if the state puts that baby into prison he or she will form a secure attachment to the mother *and* will not suffer separation from the mother thereafter (and will not be harmed by the experience of living in prison)? Both failing to form a secure attachment in the first place and experiencing a disruption or destruction of the attachment relationship after it forms or begins to form are seriously detrimental to a child and likely to put the child on a downward trajectory in life.<sup>227</sup>

Among the thirty children on whom the team chose to focus for attachment purposes, they observed indications of attachment forming in eighteen babies, so they did document that attachment might be achievable in a prison environment.<sup>228</sup> Attachment "might be" achievable because the one-year point is early in the attachment stage of development, which is "fragile," lengthy, and dependent on "contextual stability in the early years of life."<sup>229</sup> Subsequent adverse experiences, to which these children are highly vulnerable, could easily derail the attachment process.<sup>230</sup> In fact, some of those eighteen were separated from their mothers

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Procedure ("SSP"), so infants that had not reached that level of development were excluded).

<sup>225</sup> Byrne et al., *supra* note 151, at 83–85.

<sup>226</sup> *Id.* at 82 (noting that the researchers received reports of "longer term separation patterns" among these women); Goshin & Byrne, *supra* note 118, at 97, 98, 102 (reporting researchers' belief that some mothers avoided contact because they were again involved in criminal activity).

<sup>227</sup> See *supra* notes 164–165 and accompanying text.

<sup>228</sup> Byrne et al., *supra* note 39, at 382, 384 (noting that there were indications of secure attachment for 60% of the thirty children, totaling eighteen).

<sup>229</sup> *Id.* at 389–90.

<sup>230</sup> See Inge Bretherton, *Parental Incarceration: The Challenges for Attachment Researchers*, 12 ATTACHMENT & HUMAN DEV. 417, 421 (2010) ("One might conclude [from Byrne's study] that the year-long in-prison intervention experience interrupted the

immediately after the assessment, because of New York's one-year timeline for a baby's stay in prison.<sup>231</sup>

Despite these reasons for hesitation, and despite the omission of seventy out of the original one hundred children, Byrne concluded, based on the eighteen-out-of-thirty finding, that her study “demonstrates that children raised in a prison nursery program exhibit measurable rates of secure attachment consistent with or exceeding population norms.”<sup>232</sup> In other words, she claimed that prison babies on the whole do just as well in terms of attachment rate as babies who do not live in prisons, a claim that my deconstruction of the study above shows to be false. Byrne did add several caveats—namely, that thirty is a small sample,<sup>233</sup> that testing conditions were constraining,<sup>234</sup> that the attachment process might not continue to go well after the team's support services ended<sup>235</sup> or when children returned to the mother's community of origin with its “multitude of environmental risks,”<sup>236</sup> that the high risk of mother-child separations was cause for serious concern,<sup>237</sup> and that the attachments observed might not have occurred without the research team's therapeutic involvement with the mothers.<sup>238</sup> But advocates for prison nurseries predictably have ignored these cautionary notes and have routinely made sweeping statements to the effect that this study proves prison nurseries are good for children.<sup>239</sup> State commissions appointed to assess the policy desirability of prison

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cycle of intergenerational transmission for many babies with AAI-insecure [Adult Attachment Interview-insecure] mothers but (given the small sample involved) I have reservations about making such claims before confirmatory follow-up results from this longitudinal study become available.”); Murray & Murray, *supra* note 72, at 292 (“Importantly, there is evidence that attachment quality can change over time in response to changes in the caregiving environment, with, for example, secure children later becoming insecure in response to new family adversities.”).

<sup>231</sup> See *supra* notes 166–168.

<sup>232</sup> Goshin & Byrne, *supra* note 35, at 280.

<sup>233</sup> Byrne et al., *supra* note 39, at 388.

<sup>234</sup> *Id.* at 388–89.

<sup>235</sup> *Id.* at 389.

<sup>236</sup> *Id.* at 390.

<sup>237</sup> *Id.* at 389.

<sup>238</sup> *Id.* at 387–88; see also Bretherton, *supra* note 230, at 422 (hypothesizing “that the weekly one-on-one interactions with the nurse practitioner who functioned as a therapeutic secure base may have been the most efficacious aspect of the Bedford Hills intervention”).

<sup>239</sup> See, e.g., DIAMOND & ORWISH-GROSS, *supra* note 81, at 4 (claiming that Byrne's study showed that “71% of infants who lived with their mothers in a prison nursery, developed secure attachment”); Sarah Abramowicz, *A Family Law Perspective on Parental Incarceration*, 50 FAM. CT. REV. 228, 234–35 (2012) (stating that Byrne's study demonstrates “healthier infant development, in addition to reducing recidivism on the part of mothers”); Carlson, *supra* note 47, at 17 (citing the Columbia research and asserting, “This data is strong evidence that nursery program[s] promote bonding”); Press Release, Women's Prison Ass'n, *supra* note 81, available at <http://www.corrections.com/articles/21644-prison-nursery-programs-a-growing-trend-in-women-s-prisons> (claiming that Byrne's

nurseries repeat these claims that falsely suggest the programs are a success for all or nearly all babies in them, and legislators do not question these assertions because no opposing constituency prods them to do so.<sup>240</sup>

Yet Byrne's research actually supports a very negative conclusion. Adding to the calculations of attachment rate the twenty-two babies<sup>241</sup> who separated from their mothers while in prison before age one (fourteen because prison officials ejected the mother, eight because the mothers chose to exit), who undoubtedly did not form a secure attachment to their birth mothers, changes the rate of secure attachment to 35% (eighteen out of fifty-two), which is similar to the poor rates of secure attachment for infants in the community whose mothers are incarcerated.<sup>242</sup> Taking into account also that some of those eighteen who showed signs of secure attachment suffered separation from their mothers immediately after the assessment,<sup>243</sup> that many more infants left prison with their mothers but separated soon thereafter, and that the results were likely poor for the twelve additional babies who were assessed but excluded from the calculations, the rate of secure attachment among the one hundred babies originally enrolled in the study must actually be well below even the very poor rate for children who remain in the community while their mothers are in prison. And *that* is what policy makers should want to know.

Moreover, even for the small percentage of prison babies who do develop secure attachments to their mothers, the long-term prospects would be poor. The enormous challenges facing the mothers on reentry create a high likelihood of maltreatment and disruption of the attachment relationship.<sup>244</sup> Follow-up research

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research "indicates that these programs benefit mothers and children"); Kusmer, *supra* note 30 ("[S]tudies show the children benefit from the contact, said Mary Byrne . . . . The babies born to mothers in prisons generally are better off staying there with them, she said. The outcomes are promising . . . .").

<sup>240</sup> See, e.g., CONN. DEP'T OF CORR., PRISON NURSERY FEASIBILITY REPORT 3–4, 27 (2013) (concluding that prison nurseries foster the early child bonding that results in positive future outcomes for both mother and child, and not mentioning any opposition to these programs.).

<sup>241</sup> Byrne et al., *supra* note 151, at 83–84.

<sup>242</sup> Byrne et al., *supra* note 39, at 376–77; Murray & Murray, *supra* note 72, at 292.

<sup>243</sup> Ten of the children who were still in the nursery upon reaching age one had to exit the prison on their first birthdays while the mothers remained, but it is not clear what overlap there is between those ten and the eighteen with secure attachment indicators. Byrne et al., *supra* note 151, at 83; see also Byrne et al., *supra* note 39, at 379–85 (noting that the average stay in prison for those mothers whose babies "aged out" of the program at one year of age was 36.3 months, meaning mothers remained in prison on average two years after their babies left); *id.* at 389 ("Typical celebrations of the first birthday in this study setting are poignant when followed by infant-mother separation . . . .").

<sup>244</sup> See Failing, *supra* note 83, at 500 ("[W]omen offenders frequently take out the rage that they have suppressed from their own childhood experiences on their children, or neglect or abandon their children as they descend into the hopeless vortex of drugs and

that Byrne's team conducted confirms the danger of developmentally damaging disruption.<sup>245</sup> In addition to continuing to provide services to the study participants after release, the team recorded the participants' statuses one year after reentry and again two years later. The team found at three years after reentry that only twenty-four of the original one hundred children had remained continuously in the care of their mothers<sup>246</sup> and that most of the children were not in their mother's custody at that point.<sup>247</sup>

What explains this high rate of separation? In addition to the twenty-two children who were separated from their mothers while in prison because of disciplinary action or the mothers' choice, as well as the ten who were separated immediately upon turning one because their mothers had more than six months left to serve, many others experienced separation from their mothers even though they left prison at the same time as their mothers. Some separations were temporary, but even those can be traumatic and disrupt a child's psycho-emotional development.<sup>248</sup> Others were prolonged and possibly permanent. At least eighteen mothers returned to prison because of criminal recidivism,<sup>249</sup> and an unspecified number had drug relapses after release.<sup>250</sup> Moreover, even among the forty-four women who were primary caretakers of their children at three years after reentry,<sup>251</sup> undoubtedly some subsequently separated from the children—the team learned that some of them were involved in criminal activity, substance abuse, or other parole violations.<sup>252</sup>

Even among the 24% of children who remained continuously with their mothers through the three-year mark after reentry, the rate of secure attachment was likely around half.<sup>253</sup> Thus, judging from this one longitudinal study of one

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crime."); Roberts, *supra* note 19, at 1499 ("[T]he post-prison collateral penalties make it difficult [for released mothers] to maintain a relationship with their children.").

<sup>245</sup> Byrne et al., *supra* note 151, at 87.

<sup>246</sup> Of these twenty-four children, eight were separated from their mothers for periods of time. Byrne et al., *supra* note 151, at 83.

<sup>247</sup> *Id.*; see also Goshin & Byrne, *supra* note 118, at 102 (indicating worse results would have been likely without the post-release nurse visits).

<sup>248</sup> See Goldsmith et al., *supra* note 134, at 6 ("[A]ny separation, particularly if long and abrupt, will evoke strong and painful emotional reactions.").

<sup>249</sup> Byrne et al., *supra* note 151, at 83.

<sup>250</sup> *Id.* at 84.

<sup>251</sup> *Id.* at 83.

<sup>252</sup> See Goshin & Byrne, *supra* note 118, at 102. Byrne did not include these women in her reports of recidivism or of return to prison. See *id.*

<sup>253</sup> The team did not conduct attachment assessments in the follow-up studies nor report what overlap there was between the attachment assessments at the one-year mark and the twenty-four children who remained continuously with their mothers, so one can only make a reasonable estimate based on other information. These twenty-four children would not have included the ten who were still with their mothers and in prison on their first birthdays but who then had to leave the prison while their mothers stayed behind. It might include the other six children who were still in prison on their first birthdays, and for

hundred prison babies, conducted by a team that had attitudinal and institutional motivations to find positive results, the percentage of mother-child relationships that fulfill the ideal envisioned by prison nursery proponents (secure attachment and continuous maternal care thereafter) appears to be 10 to 15%. The conclusion Byrne's research actually, objectively yields, then, is this: it is *possible* for the prison nursery ideal to be realized, but it is *very unlikely*, and for the great majority of babies whom states are putting in prisons, the ultimate outcome will entail attachment failure or disruption; separation from the mothers; and, consequently, later lives marred by the same dysfunctions their mothers had.

It is difficult to understand why the high rate of separation is not the main story the research team tells and why it does not lead Byrne and her team to advise against continuation of this experiment with children's lives unless and until states figure out how to prevent separations. Byrne herself writes,

The overwhelming conclusion of existing research in psychology, psychiatry, and child development is that abrupt separation from a primary caregiver before 18 months of age has lifelong effects on a person's ability to establish healthy relationships and interact in a positive way with the world. . . . Children who are separated from their primary caregivers during this period learn that they cannot depend on others to care for them and that the world is an unpredictable and frightening place. It is well established that frightening experiences early in life can lead to disorganization even in an established attachment. Neurochemical studies show that disruptions to the attachment process affect the growth and development of the brain, as well as social functioning, aggressiveness, reaction to stress, and risk for substance abuse during adulthood.<sup>254</sup>

Byrne's published reports of her research could give readers the impression that she approached her studies as an advocate for women prisoners and prison nurseries rather than as a disinterested social scientist.<sup>255</sup> Despite her acknow-

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them we might reasonably assume four were securely attached. The remaining eighteen children who continuously lived with their mothers from birth to three years after reentry most likely left with their mothers before reaching age one. Among the fourteen children in that category for whom the team reported results, only six showed signs of secure attachment, a rate of 43%. Extrapolating from the fourteen to the eighteen, 43% of 18 is 7.7, so let us assume eight children. Eight and four make twelve, or half of the twenty-four. Without more complete disclosure from the research team, it is not possible to confirm the accuracy of this estimate.

<sup>254</sup> Byrne et al., *supra* note 151, at 86–87 (citations omitted).

<sup>255</sup> By "advocate for," I do not mean occupy a role designated for advocacy, but rather simply someone who advocates for. It is worth noting, though, that one of Byrne's official roles has been supervisor of the clinical program at Columbia University School of Nursing

ledgement that the recidivism studies are “specious,”<sup>256</sup> she frequently suggests to readers that policy makers should support prison nurseries because they reduce recidivism.<sup>257</sup> And despite her own numerous cautions about interpreting the attachment results that she chose to report, Byrne frequently makes sweepingly positive assertions about the research in a way that appears designed to convince readers of the desirability of putting babies in prison: “Evidence that secure attachment actually does occur in US prison nursery settings provides a strong argument for their effectiveness” and “these programs are effective for the women and child participants and are reasonably efficient, but provide access to a small number of those in need. Limited access is a constraint to the potential widespread effectiveness of this policy solution.”<sup>258</sup> A reasonable reader could conclude from these assertions that all or nearly all children in prison nurseries realize “positive developmental outcomes” and do so because of the prison nurseries,<sup>259</sup> yet that is patently false.<sup>260</sup>

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through which her students provide services to the inmate mothers. *See* Melanie A. Farmer, *Behind Bars: Supporting Mothers in Prison*, COLUMBIA U. REC., Nov. 23, 2009, at 4.

<sup>256</sup> Goshin & Byrne, *supra* note 35, at 276.

<sup>257</sup> *See id.* at 276 (“Decreased recidivism after release from a nursery program is currently the positive outcome with the most empirical support . . . . Decreased maternal recidivism is an undoubtedly positive outcome for children as well as their mothers.”); *see also id.* at 289 (“The evidence linking prison nursery participation to large reductions in recidivism makes them politically viable.”).

<sup>258</sup> *Id.* at 288; *see also* Byrne et al., *supra* note 151, at 79 (stating that the team’s research results “provide evidence of positive infant, toddler, and post-release preschool outcomes” for “children who resided in a U.S. prison nursery”); Goshin & Byrne, *supra* note 35, at 287 (“Contact between incarcerated parents and their children is important.”); *id.* at 280 (arguing that prison nurseries are economically efficient for the state); *id.* at 289 (“The current conservative approach of admitting only low risk mothers may be unrealistic if departments wish to reach more women and children . . . . Prison nursery programs are a creative, gender-responsive strategy with the potential to positively affect both incarcerated women and their infant children.”); *id.* at 290 (“[P]rison nurseries are a preferred intervention for policy makers wishing to provide a cohabitation intervention for the incarcerated mothers with infant children under their jurisdiction . . . . Positive developmental outcomes for infants who co-resided with their mothers in a US prison nursery have only recently been documented and provide renewed incentive for co-residence while ameliorating one of the most common concerns.”); Goshin & Byrne, *supra* note 118, at 95 (“Parenting interventions that allow women to co-reside with their young children . . . further extend the potential benefits to the next generation.”). I focus here on Byrne’s own publications. She is sometimes quoted in news stories speaking in even stronger advocacy terms, but these might be misquotes. *See, e.g.,* Conova, *supra* note 210 (“To answer the real question ‘do the babies belong in the prison with their mothers?’—the answer, so far, seems to be yes.”).

<sup>259</sup> Goshin & Byrne, *supra* note 35, at 290. Byrne also makes misleading statements about the law governing the prison program, falsely suggesting that courts have ordered prison officials not to place a child in prison unless and until they conclude that doing so is in that particular child’s best interests. *See* Byrne et al., *supra* note 151, at 81 (“[T]he ‘best

A more objective conclusion from this one study that has been done on the child welfare impact of prison nurseries in the United States is this: imprisoning babies with their mothers is a reckless gamble that harms the great majority of them by tethering the children psycho-emotionally to women who are not capable of giving a baby the nurturing needed for secure attachment or serving as consistent long-term caregivers. For the great majority of children, the programs are a failure likely to cause lifelong adverse consequences. What is most disheartening from a child welfare perspective is how advocates downplay or simply ignore this reality, determined to continue the practice for the sake of the adults whose suffering appears to be their primary concern.

#### IV. LEGAL LIMITATIONS ON THE PLACEMENT OF CHILDREN IN PRISON

Part II showed that prison is not a healthy environment for children; it is highly unlikely children will attach to their incarcerated mothers even when forced to live with them in prison; if attachment with an incarcerated mother does occur, there is great risk it will be disrupted; and immediately placing babies born to

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interest of the child' standard applied to community custody cases must also be used to determine whether a pregnant inmate could keep her child . . . [C]orrectional authorities are duty-bound to apply [the best interest] standard when making decisions.”). In fact, the court decisions she cited to support these assertions (1) were local court decisions governing only counties that do not include Bedford Hills, and (2) simply held that incarcerated *mothers* can challenge an *exclusion* of their child from the program on the grounds that prison officials failed to consider whether placement in the prison might be consistent with the child's welfare. *See* *Bailey v. Lombard*, 420 N.Y.S.2d 650 (N.Y. Sup. Ct. 1979) (holding that a sheriff did not abuse his discretion in declining, based on his assessment of the child's welfare, a mother's request to have her baby placed in county jail with her); *Apgar v. Beauter*, 347 N.Y.S.2d 872 (N.Y. Sup. Ct. 1973) (holding that a sheriff improperly denied a jailed mother's request to place her baby in jail with her because he did not have sufficient reason to believe this would be contrary to the child's welfare).

<sup>260</sup> At other times, Byrne writes in somewhat more measured terms of attachment *rates*, but she still claims too much. She asserts that “this study provides the first evidence that mothers in a prison nursery setting can raise infants who are securely attached to them at rates comparable to healthy community children.” Byrne et al., *supra* note 39, at 375; *see also* Byrne et al., *supra* note 151, at 80 (characterizing the attachment success as “striking”). She claims that her research “demonstrates that children raised in a prison nursery program exhibit measurable rates of secure attachment consistent with or exceeding population norms.” Goshin & Byrne, *supra* note 35, at 280. And she states that her study showed babies of “imprisoned pregnant women” achieved attachment “at very high levels.” Byrne et al., *supra* note 48, at 27. Her findings do not support even these assertions because they pertain only to a carefully culled subset of mothers and infants and only at an early point in the attachment stage of development. To assert that the rate of secure attachment with “mothers in a prison nursery,” with “imprisoned pregnant women,” or for “children raised in a prison nursery” ultimately is that reflected in that subset at that point in time is grossly misleading at best.

inmates for adoption gives them a far better chance for a healthy and fulfilling life. Prison nurseries are therefore patently unjustifiable on child welfare grounds. Are they also unlawful?

Remarkably, no one has asked this question before now. Scholars concerned about incarceration of parents routinely argue in favor of greater substantive and procedural protection for those parents as a matter of constitutional entitlement,<sup>261</sup> but they have nothing to say about what rights the Constitution might confer on children in connection with the state's placing them in prisons.

This Part considers both constitutional and statutory limitations on placement of children in prisons. For this first-ever analysis of the question, it affords helpful simplicity to confine consideration to the extreme case of prison nurseries. This Part examines the legality of this practice from two perspectives—first viewing it as a state decision to place babies in prison and second as a state decision to authorize incarcerated parents to place their children into prison.

Regardless of how one views the situation, for children to spend any amount of time in prison, there must be some state action that plays a causal role. At some point, some state officials—whether prison wardens, department of corrections officials, social service agency employees, legislators, or governors—must decide that it will happen and, accordingly, either transfer a child in state custody to a prison or confer on parents or other adults the legal power to bring children into prisons and keep or leave them there. Such government decision making must be subject to legal limits even if some private party also plays a role. Clearly, if the state said that children of inmates *must* live in the prison with them, we would recognize a potential constitutional violation. Likewise, if a state decided to put abandoned children into prisons to live with unrelated inmates at the request of those inmates and in the hope that this would reduce recidivism, it would certainly be subject to legal challenge. And if legislatures authorized placement of mentally disabled adults in prisons to live with incarcerated relatives who so request, advocates for disabled persons would undoubtedly challenge its legality.

#### A. *May the State Place Infants in Prison?*

State placement of infants in prison can be viewed as analogous to a state decision to remove a free person from the community and sentence him to a prison term or civilly commit him to a secure psychiatric facility. This is so regardless of how much nicer a nursery unit is than the rest of the prison; if an entire prison were just like the nicest existing prison nursery, in terms of accommodations and decorations, only without babies, no one would deny that it is still a prison.<sup>262</sup> And

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<sup>261</sup> See, e.g., Caitlin Mitchell, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 *YALE J. L. & FEMINISM* 175, 193 (2012) (“Understanding family integrity as a substantive due process right is important because it suggests that a high standard should be used when evaluating federal and state law that terminates parental rights.”).

<sup>262</sup> Cf. *In re Gault*, 387 U.S. 1, 27 (1967) (“It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an

there are, of course, constitutional limits on the state's power to hold people in prison or other state institutions. These limits arise from individuals' right to liberty and bodily integrity, and they have substantive and procedural aspects. After describing general constitutional limits and rights, this section considers whether these apply in the case of nonautonomous persons and, if so, whether the unique situation of parental incarceration warrants creating a special exception to normal constitutional rules. Lastly, it addresses the implications of federal and state statutes that prohibit housing minors in adult prisons.

### *1. General Substantive and Procedural Constitutional Limits*

As a general matter, the state may not order individuals into detention facilities unless it has either (a) charged them with a crime and determined on an individualized basis that they pose a flight risk or a danger to the community that can only be addressed by detention,<sup>263</sup> or (b) found in an adversary hearing that they for some other reason pose a danger to themselves or others that makes detention necessary.<sup>264</sup> “In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”<sup>265</sup> It is, in fact, “the most elemental of liberty interests—the interest in being free from physical detention by

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Industrial School. The fact of the matter is that, however euphemistic the title, a ‘receiving home’ or an ‘industrial school’ for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes ‘a building with whitewashed walls, regimented routine and institutional hours’ . . . peopled by guards, custodians, state employees, and ‘delinquents’ confined with him for anything from waywardness to rape and homicide.” (citations omitted)).

<sup>263</sup> See, e.g., *United States v. Montalvo-Murillo*, 495 U.S. 711, 720 (1990) (holding that a pretrial detainee may be confined to ensure his presence at trial or in “recognition [of] the danger [such] a person may pose to others if released” (quoting S. REP. NO. 98-225, at 3)); *United States v. Salerno*, 481 U.S. 739, 751 (1987) (holding the Bail Reform Act of 1984 constitutional because it “authorizes the detention prior to trial of arrestees charged with serious felonies who are found *after an adversary hearing* to pose a threat to the safety of individuals or to the community *which no condition of release can dispel*” (emphasis added)).

<sup>264</sup> See *Addington v. Texas*, 441 U.S. 418, 426–27 (1979) (holding “that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence”); see also *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (holding violative of due process a state statute authorizing detention of a person acquitted due to insanity, because under it such person was not “entitled to an adversary hearing at which the State must prove by clear and convincing evidence that he is demonstrably dangerous to the community”); *Jackson v. Indiana*, 406 U.S. 715, 731–39 (1972) (holding indefinite detention of persons found incompetent to stand trial unconstitutional absent finding of dangerousness. “Without a finding of dangerousness, one committed thereunder can be held only for a ‘reasonable period of time’ necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future.”).

<sup>265</sup> *Salerno*, 481 U.S. at 755.

one's own government."<sup>266</sup> Incarceration is "the most common and one of the most feared instruments of state oppression and state indifference."<sup>267</sup>

Under the existing Fourth Amendment search and seizure doctrine and the Fourteenth Amendment substantive due process doctrine, an aim of simply improving someone's welfare is patently insufficient to justify infringing liberty by putting that person in prison, as is an aim of trying to influence the behavior of other private parties.<sup>268</sup> Many people now living in free society might be better off if the state put them in prison for a while, but the state may not do so for that reason alone. Even the aim of protecting individuals from harm by other persons is insufficient justification for the state to seize persons and place them in prison. Thus, the state may not arrest and imprison victims of domestic violence to protect them from further abuse.<sup>269</sup> Presumably, it would not be constitutionally permissible for the state to react to reports of pervasive abuse in nursing homes by ordering that elderly persons be housed in prisons instead, even though the state might better supervise their treatment there.

Children of incarcerated parents do not fall into either of the articulated exceptions to the general constitutional prohibitions against state confinement of persons in correctional facilities. They have committed no crime, and they do not pose a danger to themselves or others. Thus, prison nurseries presumptively violate those substantive prohibitions.

The state is also subject to substantive constitutional limitations when it initiates a civil commitment action against mentally ill or mentally disabled persons; "[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."<sup>270</sup> The Supreme Court has established that mere deficiency of reason is not sufficient cause for committing a person to an institution.<sup>271</sup> Even when a mental deficit is clear, "there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."<sup>272</sup> Thus, it is clearly insufficient under civil commitment doctrine that a person might be better off if institutionalized:

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<sup>266</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004).

<sup>267</sup> *Foucha*, 504 U.S. at 90 (Kennedy, J., dissenting).

<sup>268</sup> I do not consider Eighth Amendment doctrine because it applies only following a criminal conviction. *Ingraham v. Wright*, 430 U.S. 651, 64 (1977) ("An examination of the history of the Amendment and decisions of this Court construing the proscription against cruel and usual punishment confirms that it was designed to protect those convicted of crimes."). Further, as a descriptive matter, placement of babies in prison nurseries cannot fairly be characterized as punishment.

<sup>269</sup> My research assistants searched in vain for reported instances of this occurring.

<sup>270</sup> *Addington v. Texas*, 441 U.S. 418, 425 (1979).

<sup>271</sup> *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("'[M]ental illness' alone cannot justify a state's locking a person up against his will and keeping him indefinitely in simple custodial confinement.").

<sup>272</sup> *Id.*

[T]o commit an individual to a mental institution in a civil proceeding, the State is required by the Due Process Clause to prove by clear and convincing evidence . . . that the person sought to be committed is mentally ill *and* that he *requires* hospitalization for his own welfare *and* the protection of others.<sup>273</sup>

Indeed, even if a mentally ill person has committed a crime but is found not guilty by reason of insanity, the state may confine him only so long as he poses a danger to others.<sup>274</sup> That justification cannot plausibly be invoked to support state placement of infants in prison. Thus, even if civil commitment doctrine applied rather than doctrine relating to incarceration, prison nurseries presumptively violate children's substantive constitutional rights.

In addition to substantive limitations on state placement of persons in detention facilities or psychiatric hospitals, there are constitutionally mandated procedural requirements. These are no minor detail; they are crucial for ensuring that state actors do not run roughshod over individuals' rights, especially those of vulnerable individuals who cannot complain, and that state decision making that impacts persons' basic welfare is rational and objective as well as respectful of rights.<sup>275</sup> First, such state action requires "clear and unquestionable authority of law."<sup>276</sup> Prison officials in Indiana, Nebraska, and Washington are violating this mandate by placing babies in prisons despite the absence of any statute authorizing the practice. Second, the state action may occur only after a procedurally regular, individualized adjudication of its appropriateness.<sup>277</sup> Ordinarily the state places someone in prison for a definite term, such as eighteen months or three years, only after finding that person committed a crime; to do so, the state must conduct an

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<sup>273</sup> *Foucha v. Louisiana*, 504 U.S. 71, 75–76 (1992) (emphasis added).

<sup>274</sup> *Id.* at 76–77; *see also O'Connor*, 422 U.S. at 575–76 (holding that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends").

<sup>275</sup> *Cf. In re Gault*, 387 U.S. 1, 20–21 (1967) ("Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. As Mr. Justice Frankfurter has said: 'The history of American freedom is, in no small measure, the history of procedure.' But in addition, the procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what 'scientific method' is to science.'").

<sup>276</sup> *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

<sup>277</sup> *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (recognizing that "the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty").

individualized hearing, in which the person in question has independent legal representation, and satisfy the high evidentiary burden of proof beyond a reasonable doubt.<sup>278</sup> Civil commitment similarly requires an individualized determination of necessity, based on clear and convincing evidence.<sup>279</sup> Yet in none of the existing nursery programs does any competent authority, prior to ordering a child's imprisonment, decide the best choice for a child with an incarcerated mother—among all alternatives available—through individualized determination, let alone through finding by clear and convincing evidence or proof beyond a reasonable doubt that a particular child needs to be in prison to avoid imminent danger of substantial harm. Moreover, whereas a mother might be able to appeal a decision excluding her from the nursery,<sup>280</sup> there is no mechanism for appealing on behalf of the child a decision to put him or her in prison; a prison warden's decision to put a baby in prison is unreviewable. States are placing children in prison for months or years without any formal and transparent process and without independent representation for the children—an obvious violation of children's right to procedural due process.<sup>281</sup> That this processless incarceration is happening primarily to minority-race children makes it especially troubling.<sup>282</sup>

## 2. *Do Infants Have "Liberty" Interests?*

Doctrine establishing rights against confinement has developed in contexts involving persons capable of experiencing confinement as a deprivation, and the Supreme Court has predicated these rights largely on the individual interest in liberty. A pertinent question is whether infants have the capacity for that experience or have a sufficient liberty interest such that it is fitting to extend the doctrine to them.

The Supreme Court has typically spoken in general terms of all persons having constitutionally protected interests in liberty, rather than in more limited terms of just autonomous persons having such an interest. For example, in *Terry v.*

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<sup>278</sup> See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 671–72 n.40 (1977) (“[T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law.”).

<sup>279</sup> *Foucha*, 504 U.S. at 75–76, 81.

<sup>280</sup> See *Haverty*, *supra* note 52, at 3 (reporting a statement by a prison official at Bedford Hills that there is an appeals process for the mothers).

<sup>281</sup> In some programs, there might be a committee that reviews each application that any woman submits, but the committee does not include a child welfare expert and is not addressed by an independent advocate for the child whose fate is being decided. See, e.g., NEB. DEP'T OF CORR. SERVS., *supra* note 40, at 3 (naming as decision makers the prison warden and a committee consisting of the assistant warden, a mental health staff person, a parenting program coordinator, and the substance abuse unit supervisor).

<sup>282</sup> Cf. *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (observing that “an unchecked system of detention carries the potential to become a means for oppression”).

*Ohio*,<sup>283</sup> the Court pronounced, “No right is held more sacred, or is more carefully guarded, by the common law, than the right of *every individual* to the possession and control of his own person, free from all restraint or interference of others.”<sup>284</sup> In *Hamdi v. Rumsfeld*,<sup>285</sup> the Court reaffirmed “the fundamental nature of *a citizen’s* right to be free from involuntary confinement by his own government.”<sup>286</sup> In fact, the Court has explicitly extended substantive and procedural due process rights to children.<sup>287</sup>

However, the Court has also stated on occasion that it views minors’ liberty interests as weaker than those of adults, simply because children must always be in someone’s custody and are never fully in control of their own lives and persons anyway. In *Schall v. Martin*,<sup>288</sup> for example, the Court upheld a statute authorizing preadjudication detention of juveniles charged with delinquency, reasoning that although a “juvenile’s countervailing interest in freedom from institutional restraints, even for the brief time involved here, is undoubtedly substantial as well . . . that interest must be qualified by the recognition that juveniles, unlike adults, are always in some form of custody. Children, by definition, are not assumed to have the capacity to take care of themselves.”<sup>289</sup> Whatever truth this assertion has as to teenagers, it is even more true of infants; they are appropriately always in someone’s custody.

But as this passage suggests, the Court has not stated that any minors have *no* constitutionally protected liberty interests at all; though more limited, minors’ liberty interests are still “substantial.” Indeed, some Supreme Court Justices have taken the position that minors have liberty interests equal to those of adults, interests the state must justify infringing even when it places minors in a homelike setting. Concurring in *Reno v. Flores*,<sup>290</sup> which upheld a federal immigration policy of holding unaccompanied alien children in state custody pending deportation if no parent was available to assume custody, Justices O’Connor and Souter wrote the following:

“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental

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<sup>283</sup> 392 U.S. 1 (1968).

<sup>284</sup> *Id.* at 9 (emphasis added) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

<sup>285</sup> 542 U.S. 507 (2004).

<sup>286</sup> *Id.* at 531 (emphasis added).

<sup>287</sup> *See, e.g., Parham v. J.R.*, 442 U.S. 584, 601–02 (1979) (holding that “a child has a protectible interest not only in being free of unnecessary bodily restraints but also in not being labeled erroneously”); *In re Winship*, 397 U.S. 358, 367–68 (1970) (holding that there is a right to an evidentiary standard of proof beyond reasonable doubt in delinquency proceedings).

<sup>288</sup> 467 U.S. 253 (1984).

<sup>289</sup> *Id.* at 265 (citation omitted).

<sup>290</sup> 507 U.S. 292 (1993).

action.” “Freedom from bodily restraint” means more than freedom from handcuffs, straitjackets, or detention cells. A person’s core liberty interests are also implicated when she is confined in a prison, a mental hospital, or some other form of custodial institution, even if the conditions of confinement are liberal. This is clear beyond cavil, at least where adults are concerned. . . .

Children, too, have a core liberty interest in remaining free from institutional confinement. In this respect, a child’s constitutional “[f]reedom from bodily restraint” is no narrower than an adult’s. Beginning with *In re Gault*, 387 U.S. 1 (1967), we consistently have rejected the assertion that “a child, unlike an adult, has a right not to liberty but to custody.” . . .

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. . . Institutionalization is a decisive and unusual event. “The consequences of an erroneous commitment decision are more tragic where children are involved. [C]hildhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives.”<sup>291</sup>

Moreover, as an empirical matter, infants are unquestionably affected physically and psychologically by their environment and have interests threatened by imprisonment that are properly viewed as liberty interests. Recall the description of prison presented by child development experts, quoted in Part II, which emphasized the “spatial shrinking,” “strict temporal constraints,” “[s]ocial deprivation,” “surveillance,” and inhibition of “the child’s autonomization process.”<sup>292</sup> Babies undoubtedly experience prison differently than do adults or teenagers, but they likely also experience it as a confining and oppressive environment and are adversely affected by the authoritarian control, severely limited space shared with many people, regimentation, pervasive tension, and deprivation of innumerable ordinary experiences, including contact with men and most of the natural world.<sup>293</sup> In fact, babies might incur greater harm from time in prison than do adults or teenagers, because infancy is a time of intense brain development, physical growth, and vulnerability.<sup>294</sup> The psychological, physical,

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<sup>291</sup> *Id.* at 315–18 (O’Connor, J. and Souter, J., concurring) (citations omitted) (internal quotation marks omitted).

<sup>292</sup> Jaffé et al., *supra* note 135, at 402–04.

<sup>293</sup> See Hindery, *supra* note 220 (relating a former prison mother’s ambivalence about her son’s stay with her in New York’s program, citing the regimentation, spread of infectious diseases, and lack of normal infant experiences).

<sup>294</sup> See Evelyn Wotherspoon et al., *Neglected Infants in Family Court*, 48 FAM. CT. REV. 505, 506 (2010).

social, and developmental interests babies have that are thwarted in a unique way by imprisonment are fairly characterized as liberty interests.<sup>295</sup>

Even if infants' liberty interests are deemed weaker than those of adults, there is reason to be just as protective of them—namely, that infants are unable to object to unwarranted incursions. It is too easy for adults to use children instrumentally to serve adults' interests—in particular, when the child's legal parents have interests contrary to those of the child. The primary motivation prison officials have had for instituting prison nursery programs is one that might also lead them to institute pets-in-prison programs—that is, the supposition that it has some positive rehabilitative effect on the prisoners, which might in turn benefit prison operators and the rest of society by reducing recidivism and therefore the prison population.<sup>296</sup> The primary motivation of prisoners' advocates, the initiating force behind these programs, is to alleviate prisoners' suffering, just as a pets-in-prison program might do. It is essential, if children and their liberty interests are to receive respect and protection, that courts review these programs rigorously and demand, at a minimum, before the state places any child in an adult prison, an individualized finding based on at least clear and convincing evidence that imprisonment is necessary to avoid danger of substantial harm to that child, taking into account all available alternatives to imprisonment.

A state, therefore, could not plausibly defend placement of babies in prison against constitutional challenges by asserting that babies have no interest in liberty—no interest in not being confined to a state correction facility. The relevant question is what state justification could suffice for infringing that liberty by placing a child in prison. The Supreme Court has held that some justifications that might not pertain or suffice with competent adults do so with minors—in particular, paternalistic efforts to protect minors' welfare. The *Schall* Court cited the state's authority to protect dependent and vulnerable persons as adequate justification for brief pretrial detention, stating that “if parental control falters, the State must play its part as *parens patriae*. In this respect, the juvenile's liberty interests may, in appropriate circumstances, be subordinated to the State's '*parens patriae* interest in preserving and promoting the welfare of the child.’”<sup>297</sup> Certainly the state and private parties are justified in constraining the freedom of very young children in some ways just to promote their welfare, and they need not always demonstrate that this is necessary or the least restrictive means of benefiting the child.

Nevertheless, with prison nurseries, long-term imprisonment is at issue—not a temporary detention pending a hearing, not residential placement in a home environment as with foster care or kin guardianship, and not compulsory school

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<sup>295</sup> Cf. *Mendez v. Rutherford*, 655 F. Supp. 115, 120 (N.D. Ill. 1986) (holding that a complaint on behalf of a three-year-old child stated a cognizable substantive due process claim for damages against a police department for trauma from watching officers beat her father).

<sup>296</sup> See *supra* notes 79, 194 and accompanying text.

<sup>297</sup> *Schall v. Martin*, 467 U.S. 253, 264–65 (1984) (citations omitted).

attendance. The *Schall* Court emphasized that in the context of detention, even in a facility housing only minors, not just any paternalistic justification will do; the justification must be proportionate to the severe deprivation that confinement in a prison-like facility for any period of time constitutes for anyone.<sup>298</sup> The justification the government relied on was not that the juvenile might simply derive benefits from pretrial detention, such as by receiving counseling, but that temporary detention was *necessary* to prevent him from engaging in more criminal activity and thereby subjecting others and himself to danger of violence.<sup>299</sup> There was a danger-to-self-and-others rationale and a necessity, as well as alleged criminal conduct, consistent with doctrine on pretrial detention of adults.

Thus, any *parens patriae* justification for prison nurseries must be especially compelling. It must be far more than would be required to place a child in foster care, which is typically an imminent risk to a child's physical health or safety that is avoidable only by placing the child in state custody.<sup>300</sup> And presumably it must be more than would be required to place a juvenile under house arrest, which is proof that the juvenile has committed a crime and poses a danger to the community.<sup>301</sup> It is not enough that a child might benefit in some ways. Prison is different. It is different for a teenager, and it is different for an infant. In any case, as explained in Part II, states simply do not have evidence of any benefits; in fact, the weight of evidence points to a conclusion that prison nurseries are more harmful than beneficial to children, even relative to the status quo, and a far worse alternative than placement for adoption.<sup>302</sup>

### 3. Does the Parent-Child Context Warrant a Special Exception?

Prison nursery programs differ from the pretrial detention at issue in *Schall* and from the custodial retention of alien minors in *Reno* in that, with prison nurseries, a legal parent is waiting for the babies in the facility in which the state is placing the child. Incarceration of the child thus has the effect of uniting the child with a legal parent rather than separating the two; that is the whole purpose. How does this affect the analysis?

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<sup>298</sup> *Id.* at 269.

<sup>299</sup> *See id.* at 265–66.

<sup>300</sup> *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-129(B)(1) (West 2003) (stating that removal is necessary to ensure a child's safety when the child is in immediate danger); N.Y. FAM. CT. ACT § 1028(b) (McKinney 2009 & Supp. 2013) (outlining what a court should consider when determining whether it is necessary to temporarily remove a child to avoid an imminent risk to the child's life or health); VA CODE ANN. § 16.1-251(A)–(C) (2010 & Supp. 2013) (detailing emergency removal procedures where a child is “taken into immediate custody and placed in shelter care pursuant to an emergency removal order”).

<sup>301</sup> *See, e.g., In re M.E.B.*, 569 S.E.2d 683, 686 (N.C. Ct. App. 2002) (stating that house arrest is an appropriate disposition only when a juvenile has committed a relatively serious crime).

<sup>302</sup> *See supra* Part II.

The presence of a competing constitutional right sometimes alters constitutional analysis.<sup>303</sup> Incarcerated parents, however, have no competing constitutional right to bring their children into prison.<sup>304</sup> If they did, prisoners, male and female, would deluge courts across the United States with litigation, demanding that their children of all ages be incarcerated to live with them. It has long gone without question that being sentenced to prison for committing a crime entails losing one's right to physical custody of children.<sup>305</sup>

The significance of the birth mother's presence in the prison could therefore only be a factor in applying the test articulated above. Advocates for prison nurseries might contend that children *are* in imminent danger of substantial harm precisely by virtue of separation from their mothers. They would prefer that incarcerated mothers be transferred to a more homelike setting in the community, but unless the state does that, they might argue, incarcerating babies is the only way to protect the babies' fundamental well-being.

Given the strong constitutional presumption in favor of liberty and nonincarceration, the burden of proof falls squarely on advocates for prison nurseries to make this case. Making the case would entail demonstrating that (1) children of incarcerated birth mothers incur harm when they do not live in prison with the birth mothers; (2) living in prison with their mothers would avert harm; and (3) living in prison is the only way to avert harm.

To demonstrate the first of these, advocates can and do point to the very poor outcomes for most children who live in the community while their mothers are in prison, much attributable to failure to form a secure attachment with any permanent parent figure. Pointing to statistics for a large population cannot suffice, however, to justify incarcerating the entire population. The state may not institutionalize everyone diagnosed with schizophrenia, for example, based on studies showing high self-harm rates for this population. Some children born to

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<sup>303</sup> See, e.g., *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 203 (1989) (justifying CPS's failure to remove an abused child by explaining that "had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection").

<sup>304</sup> See, e.g., *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003) (upholding restrictions on prison visitation with children; applying highly deferential rational basis review; and stating, "The very object of imprisonment is confinement. Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner. An inmate does not retain rights inconsistent with proper incarceration. . . . And, as our cases have established, freedom of association is among the rights least compatible with incarceration."); *Delancy v. Booth*, 400 So. 2d 1268, 1270 (Fla. Dist. Ct. App. 1981) (upholding exclusion of inmate mother from prison nursery program and stating, "The appellant has no constitutional or statutory right to raise the child in prison. Lawful incarceration limits many privileges and rights, a 'retraction justified by the considerations underlying our penal system.'").

<sup>305</sup> *Overton*, 539 U.S. at 131.

incarcerated women have good lives without ever living in prison,<sup>306</sup> and for some who have poor outcomes, it is not because of the mother's incarceration. There is variability in this population as to what the alternative to maternal custody is, at what time of life and for how long separation occurs, what caused the birth mother to be in prison, and other factors. Children's procedural due process right requires an individualized assessment.

To demonstrate the second point, that imprisonment averts harm, advocates would need to establish that prison babies generally have better outcomes—that prison nurseries are effective in avoiding the harm supposed to befall this population of children in the community. As explained in Part II, they cannot show this. In fact, starting life in prison appears to be even worse for these children—because of the nature of prison life, because they experience the trauma of separating from their birth mothers after beginning the attachment process with them, because they end up in the same bad situations in the community after separating from their mothers, and because they will always view prison as their home of origin.

To demonstrate the third proposition, that imprisonment is the only way to avert harm, advocates would need to satisfy a sort of “least restrictive environment” test, as the state must do when it places a juvenile charged with delinquency in a secure facility, civilly commits a mentally ill person, confers guardianship powers with respect to an elderly adult with diminished capacity, or makes school placement decisions for children with disabilities.<sup>307</sup> They would need to show not only that imprisonment with a birth mother is better for a baby than living in temporary care in the community, but also that no reasonably available alternative to incarceration would be at least as effective as incarceration in avoiding the supposed harm to the children. And this they clearly cannot do. The state could easily place children born to incarcerated women in good, permanent homes where the children would be quite likely to have very good lives, far better than the prisons and their birth mothers can provide, by immediately placing them with adoptive parents.

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<sup>306</sup> See *Delancy*, 400 So. 2d at 1270 (upholding the exclusion of a child based on finding that placement with his grandmother would be better for him under a later-repealed Florida prison nursery statute, which required an individualized determination that placement of a child in prison was in his or her best interests).

<sup>307</sup> See *Cruz v. Collazo*, 84 F.R.D. 307, 313 (D.P.R. 1979) (stating that the federal Juvenile Justice and Delinquency Prevention Act of 1974 “embraces the principle of the least restrictive alternative” for juvenile dispositions); Valerie L. Corzine et al., *Colorado Medicaid Home and Community-Based Services and Least Restrictive Environment*, 39 COL. LAW. 35 (2010) (discussing the least restrictive environment test in the context of guardianship and civil commitment proceedings); Theresa M. DeMonte, Comment, *Finding the Least Restrictive Environment for Preschoolers Under the IDEA: An Analysis and Proposed Framework*, 85 WASH. L. REV. 157, 158 (2010) (discussing the Individuals with Disabilities Education Act and how it entitles children with disabilities “to individualized educations in the least restrictive environment”).

There is no warrant, therefore, for creating a new exception to constitutional limitations on the state's power to incarcerate or civilly commit persons, one that would save prison nurseries from the otherwise ineluctable conclusion that they violate children's constitutional rights to liberty and due process. That a child's biological parent is in prison is not a good reason from a child welfare perspective, let alone a compelling justification, for making the child live in prison too.

#### 4. *Statutory Limitations*

It was once common for states to place juveniles charged with crimes in the same prisons that housed adults charged or convicted of crimes.<sup>308</sup> Based on a perception that this was harmful for juveniles, because the harsh atmosphere of adult prison was antithetical to the state's rehabilitative aims for juvenile detention and because adult inmates pose a danger to vulnerable youths, a national consensus emerged decades ago that (1) juveniles should be spared as much as possible from any detention in state institutions, and (2) when juveniles must be placed in a state facility, it must be entirely separate from facilities for adults, and the juveniles should have no contact with adult criminals.<sup>309</sup> This consensus ultimately produced the Juvenile Justice and Delinquency Prevention Act of 1974 (the "Act").<sup>310</sup> The Act imposes on states, as a condition for receiving federal money aimed at preventing delinquent youths from becoming lifelong criminals, a "deinstitutionalization mandate."

Under the Act, minors who have not broken any law but are "dependent, neglected, or abused," as well as those who have committed only "status offenses"—that is, violations of legal prohibitions applicable only to minors, such as curfew violations or truancy—"shall not be placed in secure detention facilities or secure correctional facilities."<sup>311</sup> Juveniles who have committed crimes may be placed in a detention facility, but they may not be confined in any facility housing adult inmates or otherwise have any contact with adult inmates.<sup>312</sup> The Act repeatedly expresses congressional intent that minors should never have any contact with incarcerated adults,<sup>313</sup> and it makes no distinction between male and female adult inmates.

Consistent with the federal Act, states, including all those in which prison nurseries currently exist, have enacted laws and regulations to effectuate this deinstitutionalization mandate.<sup>314</sup> Many echoed the conclusions regarding youth

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<sup>308</sup> Douglas E. Abrams, *Lessons from Juvenile Justice History in the United States*, 4 J. INST. JUST. INT'L STUD. 7, 8–9 (2004).

<sup>309</sup> *Id.* at 10–13.

<sup>310</sup> 42 U.S.C. §§ 5601–5792a (2012).

<sup>311</sup> 42 U.S.C. § 5633(a)(11)(B) (2006).

<sup>312</sup> *Id.* § 5633(12).

<sup>313</sup> *Id.* § 5633(12)(A), (13)(A), (13)(B)(i)(I).

<sup>314</sup> *See, e.g.*, 20 ILL. COMP. STAT. 505 / 17a-5 (2012); IND. CODE § 31-37-4-4 (2012); NEB. REV. STAT. ANN. §§ 43-3503, 43-2404.02 (LexisNexis 2011); N.Y. EXEC. LAW § 4.80

well-being that underlie the federal law. Nebraska, for example, announced legislative findings that “the incarceration of juveniles in adult jails, lockups, and correctional facilities is contrary to the best interests and well-being of juveniles and frequently inconsistent with state and federal law requiring intervention by the least restrictive method.”<sup>315</sup>

Prison nurseries straightforwardly contravene the Act’s prohibition on placement of children who have violated no law in secure facilities. They also violate the provision mandating that no juvenile be “detained or confined” in any adult prison or have any contact with adult inmates.<sup>316</sup> Congress did not have prison nurseries in mind when it passed the Act, but the plain meaning of the Act’s language makes it applicable to all children and thus to prison nurseries; it proscribes any state action by which children who have committed no crime are “placed in secure detention facilities or secure correctional facilities” or are “detained or confined in any jail.”<sup>317</sup> Moreover, prison nurseries present the same dangers to which the federal law was a reaction; babies in prison routinely interact with numerous adult criminals and therefore are at risk of physical or verbal attack and of being influenced in a way that makes them more likely to become criminals later in life.

### *B. May the State Empower Parents to Place Children in Prisons?*

In defense of prison nurseries, states might argue that they themselves do not place children in prisons but rather merely permit parents to place their children in prison. The Supreme Court and lower courts have held in some contexts, discussed

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(McKinney 2010); 2001 Bill Text NY S.B. 4904 (2001); OHIO REV. CODE ANN. §§ 5119.66, 5139.11(K)(2)(g) (amended 2011); S.D. Codified Laws §§ 26-11A-1, 26-11A-6 (2014); WASH. REV. CODE ANN. § 13.04.037 (West 2012); W. VA. CODE §§ 15-9-1 to -5 (2013); *see also* Conn. Gen. Stat. § 46b-121h.

<sup>315</sup> NEB. REV. STAT. § 43-2403 (LexisNexis 2011).

<sup>316</sup> 42 U.S.C. § 5633(12).

<sup>317</sup> 42 U.S.C. § 5633(a)(11)(A)–(B), (a)(13). The Act does not define “juvenile.” Dictionaries define the noun as “a young person,” “a child,” and “a person who is not yet old enough to be legally considered an adult.” *See e.g.*, *Juvenile*, FREE DICTIONARY, <http://www.thefreedictionary.com/juvenile> (last visited Apr. 6, 2014); *Juvenile*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/juvenile> (last visited Apr. 6, 2014); *Juvenile*, OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/definition/english/juvenile> (last visited Apr. 6, 2014). The Act defines “jail” in a way that would include prisons. *See* 42 U.S.C. § 5603(22) (2006). Because prison nurseries were not the target of the Act, the federal oversight agency might not take action against them. But most courts that have decided the question have concluded that the Act creates a private right of action. *See* CIVIL ACTIONS AGAINST STATE & LOCAL GOVERNMENT: ITS DIVISIONS, AGENCIES, AND OFFICERS § 7:23, *Juvenile Justice Act* (Jon L. Craig ed., 2d 1996); Horn by Parks v. Madison Cnty. Fiscal Court, 22 F.3d 653, 658 (6th Cir.), *cert. denied*, 513 U.S. 873 (1994) (mem.). Thus, a representative for an incarcerated baby, such as a biological father, could bring a 42 U.S.C. § 1983 claim against a state operating a prison nursery.

below, that it does not violate children's constitutional rights for a state to empower their parents to seek their commitment to a secure facility. In nearly every case, the facility in question has been one for treatment of mental illness or disability. Obviously, with both prison nurseries and civil commitment of minors, state action plays a determinative role; the state must create or accredit the facility, confer the power on a parent, approve the parent's choice, and transport the child to the facility. But in the civil commitment context, courts have found that the constitutionally protected authority of parents shapes the analysis of what rights the minors have.

The leading case is *Parham v. J.R.*,<sup>318</sup> in which children committed to a psychiatric hospital at their parents' requests claimed a constitutional right to greater protection against such commitment.<sup>319</sup> The Supreme Court did not decide in *Parham* nor in any other case what substantive test must be met to confine a minor in such a facility at the request of a parent; the Court has been called on only to assess the procedures involved.<sup>320</sup> But the Court in *Parham* did affirm that children, like adults, have a constitutionally protected liberty interest against confinement,<sup>321</sup> and it suggested that the confinement must be necessary to serve the medical needs of the minor.<sup>322</sup> Significantly, the Court assumed that children's interest in not being institutionalized is subverted not only by the physical restraint that confinement entails but also by any stigmatization that results from psychiatric institutionalization.<sup>323</sup> Three Justices who partially dissented expressed the impact on children's protected interests more vividly:

Commitment to a mental institution necessarily entails a "massive curtailment of liberty" and inevitably affects "fundamental rights." Persons incarcerated in mental hospitals are not only deprived of their physical liberty, they are also deprived of friends, family, and community. Institutionalized mental patients must live in unnatural surroundings under the continuous and detailed control of strangers. They are subject to intrusive treatment which, especially if unwarranted,

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<sup>318</sup> 442 U.S. 584 (1979).

<sup>319</sup> *Id.* at 588.

<sup>320</sup> *Id.* at 587.

<sup>321</sup> *Id.* at 600 ("It is not disputed that a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment and that the state's involvement in the commitment decision constitutes state action under the Fourteenth Amendment.").

<sup>322</sup> *See, e.g., id.* at 608 (stating that "the decision should represent an independent judgment of what the child requires"); *id.* at 617 (directing remand to determine "whether every child in the appellee's class received an adequate, independent diagnosis of his emotional condition and need for confinement"); *id.* at 618 (finding "no evidence that the State, acting as guardian, attempted to admit any child for reasons unrelated to the child's need for treatment").

<sup>323</sup> *See id.* at 601.

may violate their right to bodily integrity. . . . Furthermore, as the Court recognizes, persons confined in mental institutions are stigmatized as sick and abnormal during confinement and, in some cases, even after release.

Because of these considerations, our cases have made clear that commitment to a mental hospital “is a deprivation of liberty which the State cannot accomplish without due process of law.”

. . . .  
Indeed, it may well be argued that children are entitled to more protection than are adults. The consequences of an erroneous commitment decision are more tragic where children are involved. . . . [C]hildhood is a particularly vulnerable time of life and children erroneously institutionalized during their formative years may bear the scars for the rest of their lives.<sup>324</sup>

All of these warnings about the threat to children’s welfare also apply to prison nurseries.

The *Parham* Court held that commitment pursuant to the Georgia law at issue did not violate minors’ Fourteenth Amendment procedural due process rights, because the hospitals’ procedures for admission were sufficient to guard against parents’ illicit motivations or mistaken judgments, and it held that formal adversary hearings are not constitutionally mandatory.<sup>325</sup> Crucially, the hospitals’ procedures ensured admission only after individualized review, independent of parents, by professionals with specialized training to determine the needs of each child, yielding a conclusion of medical necessity.<sup>326</sup> Also important to the Court’s analysis was an assumption that some deference to the average parent is appropriate, as parents generally are inclined and able to do what is best for their children and because adversary hearings would deter some parents from getting needed help for their child.<sup>327</sup> But the Court affirmed that there must nevertheless be an independent, professional assessment of the child’s needs.<sup>328</sup>

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<sup>324</sup> *Id.* at 626–28 (Brennan, J., concurring in part and dissenting in part) (citations omitted).

<sup>325</sup> *Id.* at 612–13.

<sup>326</sup> *Id.* at 606–07, 614–16; *see also* Sec’y of Pub. Welfare v. Institutionalized Juveniles, 442 U.S. 640, 649–50 (1979) (upholding Pennsylvania’s procedures for committing minors to psychiatric hospitals) (“We are satisfied that these procedures comport with the due process requirements set out earlier. No child is admitted without at least one and often more psychiatric examinations by an independent team of mental health professionals whose sole concern under the statute is whether the child needs and can benefit from institutional care.”).

<sup>327</sup> *Parham*, 442 U.S. at 602–04.

<sup>328</sup> *Id.* at 604 (“[T]he child’s rights and the nature of the commitment decision are such that parents cannot always have absolute and unreviewable discretion to decide whether to have a child institutionalized.”); *see also* Colon v. Collazo, 729 F.2d 32, 35 (1st

Such an assessment is absent from decisions to place babies in prison programs. In addition, procedural protections for children whose parents want to have them placed in prison should be much greater, because the *Parham* Court's crucial assumptions about parents' ability and altruistic motivation cannot be made in this context, and because prison is a worse place to put children. Mothers in prison are not average parents but, rather, are a special subset whose severe deficiencies in ability to regulate their own lives belie any assumption about their ability to do what is best for a dependent child. Moreover, unless and until the state decides that a child will be placed in the mother's custody in prison, she does not possess the decision-making rights of legal custody for which normal parents in the community receive constitutional protection. Mothers in prison are also much more likely than the average parent to act for selfish reasons in deciding whether their child will be confined; incarcerated women can vastly improve their own personal situation practically and psychologically by moving from the general population to a nursery and having their babies imprisoned with them. Whereas one might assume a parent would petition to have a child placed in a psychiatric hospital only against inclination and after intense internal struggle, for a troubled woman in jail who just gave birth it seems safe to assume that her selfish reasons for wanting to keep the baby with her would easily overwhelm any thoughts she might have that the child would be better off living in the community with a relative or being adopted. Relatedly, the *Parham* Court's fear of deterring a parent from requesting needed help is simply inapplicable in this context.<sup>329</sup>

Thus, even if one views the situation as one in which the state merely approves a parental request for institutionalization, rather than itself deciding to place a child in prison, the *Parham* decision and its rationale do not support a test for placement of children in adult prisons that is less rigorous than that dictated by the incarceration and adult civil commitment doctrines analyzed above. Arguably the test should be more stringent, or placement of children in prison should be categorically impermissible, as the Juvenile Justice and Delinquency Prevention Act suggests it should be.<sup>330</sup> In any event, all existing nursery programs fail even the test for civil commitment, and they must therefore be terminated.

In sum, regardless of how they are conceptualized, all extant prison nursery programs in the United States violate the substantive and procedural constitutional rights of children and contravene the command of federal legislation prohibiting housing of minors in adult prisons. Any legal challenge to them by a representative for an imprisoned baby should result in immediate closure. Less clear is how a legal challenge could arise. In a state like New York, where it appears a father's consent is irrelevant,<sup>331</sup> a disgruntled father might serve as such a representative.

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Cir. 1984) (upholding commitment that occurred only after extensive investigation of minors' family and personal background and that was subject to periodic review by social workers, psychologists, and supporting staff).

<sup>329</sup> See *Parham*, 442 U.S. at 610.

<sup>330</sup> 42 U.S.C. §§ 5601–5792a (2012).

<sup>331</sup> See *supra* note 55 and accompanying text.

Otherwise, a concerned adult or organization would need to convince a court to confer representational status.<sup>332</sup>

### V. CHILDREN AS MEANS TO OTHERS' ENDS

Advocacy for children-in-prison programs comes from liberal supporters of incarcerated women. Conservatives jump on board when duped into believing that such programs reduce crime and therefore taxpayer expense of operating prisons. For both groups, support for bringing children into adult prisons comes without empirical support for claims that this is good for children and despite numerous reasons for believing it bad for children. It comes without rigorous examination of what little empirical study has been done of effects on children. It comes without consideration of whether children have legal rights precluding the states from putting them in prison. It comes with no mention of the alternative of adoption. And it comes with little dissent. The conclusion is inescapable that in this context, for nearly all who take an interest in incarcerated women, the welfare of children is subordinate to the aim of improving these women's lives or otherwise serving interests other than those of children.

Consider one example in the legal academy. Professor Desirée Kennedy has perhaps written more about this issue than any other law professor. Her depiction of incarcerated mothers reads like an indictment of them as parents. She writes,

Incarcerated women are more likely to be . . . young, poor, less educated and largely unskilled. Mothers in prison are often dealing with addiction and report higher rates of substance abuse than incarcerated men. Incarcerated women are also more likely than imprisoned fathers to be struggling with mental health issues. Women in prison report significantly higher incidences of child abuse and domestic violence as compared to men. Typically, the available services are insufficient to meet the needs of these populations. . . .

. . . [I]t is very likely that their crimes may be related to the stress of raising children, providing for their families, and merely surviving. . . .

. . . .

. . . These families may be trapped in a cycle of poverty, addiction, child and domestic abuse, and mental illness . . . .

. . . .

. . . [M]any incarcerated women [are] dealing with a number of complicated and interrelated psychological and mental health problems that are impossible to address in the time periods prescribed by state and

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<sup>332</sup> On the legal rules for acquiring representative status for a child, see James G. Dwyer, *The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors*, 74 N.C. L. REV. 1321, 1466–74 (1996).

federal standards. Incarcerated women engage in high levels of drug and alcohol use and frequently have histories of mental illness and abuse. . . .

. . . .

. . . Children of incarcerated mothers . . . . may be more easily pulled into a pattern of “intergenerational” crime and are more likely to engage in illegal activity. . . .

. . . In fact, many come from communities that lack adequate housing, schools, jobs, and drug and alcohol treatment centers. The result is that these women may find it difficult to provide for basic needs and get the assistance they need to cope with the stresses of living at the margins of society . . . .

. . . .

. . . Women from impoverished communities may have an even more difficult and stressful role in mothering their children . . . . Many of these women come from communities which present greater challenges to mothering and caring for their children than many other mothers. For example, . . . “[w]omen [in Harlem] spend an extraordinary amount of time escorting children, limiting their movement, and trying . . . to keep them away from the violence.” . . .

. . . .

. . . Mothers who are incarcerated may be faced with trying to find housing and care for their children, may have drug and alcohol problems, or may have a host of other social and economic problems . . . .<sup>333</sup>

A rational, child-centered response to this depiction would be that the state should find other parents for any newborn child of these women, taking into account that a newborn has no established relationship with the mother, is readily adoptable, and needs a healthy, stable, nurturing permanent caregiver in place within six months. Yet Kennedy concludes from the severe difficulties and dysfunctions of these women that the state should be *more* protective of their role as parents. She argues against termination of parental rights and in favor of more prison nurseries from a “critical race feminist” perspective,<sup>334</sup> arguing that TPR “should be viewed as a gendered and political act with community-wide ramifications”<sup>335</sup> and should be opposed because it “not only removes children from their communities but disempowers the mother whose only source of potential power or status may be as a mother, and disempowers communities by removing their youth.”<sup>336</sup> In this view, the child functions largely like a therapy

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<sup>333</sup> Kennedy, *supra* note 18, at 169–200 (citations omitted).

<sup>334</sup> *Id.* at 166.

<sup>335</sup> *Id.* at 167.

<sup>336</sup> *Id.* at 197; *see also* Roberts, *supra* note 19, at 1499–50 (characterizing TPR as punishment of mothers) (“An analysis of the intersection of prison and foster care in black women’s lives shows how punishing black mothers is pivotal to the joint operation of systems that work together to maintain unjust social hierarchies in the United States.”);

dog—something the state could give to a deeply unhealthy person to try to help her heal—not a person with rights of his own. The child also functions like a welfare benefit, a resource given to the poor in an effort to make their lives more tolerable.<sup>337</sup>

Many other law review articles follow the same line of reasoning—in particular, articles complaining about application of Adoption and Safe Families Act’s 15/22 rule (requiring CPS to petition for TPR if a child has been in non-relative foster care for fifteen of the past twenty-two months) to incarcerated women whose children live outside prison. The authors maintain that this timeline is too short, that incarcerated mothers cannot be ready to take custody of their children within that time period, because they are in prison and face severe challenges after release.<sup>338</sup> But whereas a rational child-centered response to this reality might be that the state should terminate parental rights immediately, rather than waiting twenty-two months, so that the children can achieve permanency with good caregivers sooner rather than later or never, these authors instead argue that incarceration should be treated as a reason for waiving the deadline, giving incarcerated mothers much more time!<sup>339</sup> They hardly address the consequences of that for the children; it is at most a superficial afterthought. For example, some rest on the point that after twenty-two months in foster care, a child is hard to place for adoption.<sup>340</sup> This is true, but it again begs the question why the state does not terminate rights twenty-two months earlier.<sup>341</sup> If the state knows when a woman

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Vainik, *supra* note 12, at 676 (detailing severe problems in women’s lives before they entered prison, but treating this only as reason for sympathy).

<sup>337</sup> See Denise Johnston, *Intervention, in CHILDREN OF INCARCERATED PARENTS*, *supra* note 124, at 199, 206–09 (arguing that it is unfair to minority-race women to deny those with child maltreatment histories the opportunity to have their babies enter prison to be with them).

<sup>338</sup> See, e.g., Day, *supra* note 83, at 236–38; Roberts, *supra* note 19, at 1495–99; Ross, *supra* note 139, at 217 (“[I]t is hard to imagine how a parent newly released from prison, without an apartment or a job, whose kin were not available to care for the boy when the parent was sentenced, will be able to handle the stresses of parenting a demanding child while seeking to adjust to life after prison.”).

<sup>339</sup> See, e.g., ANNE HEMMETT STERN, *BABIES BORN TO INCARCERATED MOTHERS* 9 (2004); MARGOLIES & KRAFT-STOLAR, *supra* note 6, at x–xii; Day, *supra* note 83, at 242; Roberts, *supra* note 19, at 1498–99; Ross, *supra* note 139, at 226–28.

<sup>340</sup> See, e.g., Ross, *supra* note 139, at 224.

<sup>341</sup> It also overlooks the fact that if there is no better alternative permanency plan for a child, TPR will not occur. The 15/22 rule only requires a petition, not an order, for TPR. The petition requirement contains broad exceptions based on a best-interests showing—taking into account prospects for adoption—or on a child residing with relatives. In addition, courts are always precluded from ordering TPR unless they find it would be in the child’s best interests, all things considered, including potential for adoption. As a legal matter, there is no such thing as a TPR that is bad for a child. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, 2118 § 103(a)(3) (1997); S.C. CODE ANN. § 20-7-1572 (2013) (“The family court may order the termination of parental

enters prison that she cannot parent her child for the next year or longer, because she will be in prison, and if it knows she will require indefinite additional time after prison to establish a stable and healthy life before she can assume custody, why does it not sever the legal tie at the time the woman enters prison, at least as to any infant children, so a court can quickly create an alternative permanency plan, such as adoption, that will enable the child to form an attachment to reliable permanent caregivers? To advocates for incarcerated women, it seems that possibility is unthinkable.

If they gave serious attention to the well-being of children, scholars who bemoan the elevated rate of maternal incarceration would at least acknowledge that the best policy for a newborn might be different from the best policy for a ten-year-old. They would at least recognize as a pertinent question whether a policy truly designed to do what is best for children should draw a distinction between children who were in foster care even before their mothers went to prison, because their mothers abused or neglected them, and children who were in their mother's custody until she entered prison. But they contemplate no such distinctions. Their position is categorical and unbending: the state must preserve female prisoners' parental status no matter what. Insofar as they have succeeded in advancing their position, advocates for female convicts have caused children to start life in a prison and then suffer rupture of whatever relationship they establish there with their birth mothers, and they have caused children to linger endlessly in foster care, never achieving family permanence. Their position is thus causing black children to become deeply troubled black teens who, deep in their psyche, view prison as their home. Remarkably, no one has studied the long-term outcomes for these former prison babies.

A thought experiment should make even clearer the adult-centered focus of advocates for children-in-prison programs and their inclination to protect adults first and worry about children later or not at all. Suppose Washington revised its laws so that three years was no longer just the maximum stay in prison nurseries but also the minimum. In other words, suppose it became a condition for participation that pregnant inmates agree, regardless of how much time remains on their sentences, to remain in prison until their child's third birthday, so that the attachment process can fully run its course under close supervision. Additionally, mothers must agree to spend another two years subsequently in a halfway facility, with substantial restrictions on and close monitoring of their movements and activities, including their socializing, and with compulsory job training and mental health services. The state's aim would be to ensure that mothers who choose to deny their children the opportunity for adoption by healthy, well-functioning,

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rights upon a finding of one or more of the following grounds *and a finding that termination is in the best interest of the child . . .*" (emphasis added); H.G. v. Indiana Dep't. of Child Servs., 959 N.E.2d 272, 275, 294 (Ind. App. 2011) (overturning TPR as to incarcerated parents because the state had not shown it would be in the child's best interests, despite the foster parents' desire to adopt the child).

nonincarcerated people in good communities remain with the child and stay drug-free in a safe environment at least until the child reaches school age. Thus, a woman scheduled for release from prison one year after giving birth would have to agree to an additional four years of confinement and supervision if she wants to keep her baby.

Prison nursery advocates assert that the prison environment is not so bad for children and is in any case better than the neighborhoods the mothers came from.<sup>342</sup> None object that Washington's three years is too long for children to live in prison. Even proponents of the nurseries concede the high risk of separation and attachment disruption upon reentry.<sup>343</sup> So what response would they have to this hypothetical new policy? Would they endorse it as a promising strategy for improving outcomes for children, one that lowers the alarming rate of separation? Would they be receptive to an argument that this policy is also good for the mothers, as it makes it more likely they will stay on a positive path in life? That is unimaginable. Undoubtedly, they would reject the policy outright simply because it is coercive and an additional incursion on women's liberty, and they would struggle to find some reason why it is actually not better for the children.

What explains this implicit lexical prioritizing of adults' interests over children's welfare? Liberal advocates for incarcerated women would undoubtedly in many other contexts strongly support programs that are clearly aimed solely at improving child welfare, even at the cost of an increased tax burden, such as subsidized child care, Head Start, and free school lunches. But those are contexts in which there is no conflict of interests between children and parents. In the context of parental incarceration, in contrast, there clearly is a potential conflict of interests, because the adults at issue are predominantly among the most dysfunctional people in our society, the least able to care for a child. And they are in a place, adult prison, that has generated national legislation commanding that children never be housed in it. This context clearly raises the question of whether the children should even be in a legal relationship with the adults, a negative answer to which would likely cause suffering to the adults. The conflict of interests between adults and children is plain. Yet the strong inclination of liberals in particular is to deny that any conflict exists, develop a policy position that protects the adults' interests, and then endeavor mightily to explain why that position does not sacrifice the welfare of the children.

In this respect, advocacy for prison nurseries epitomizes a broader phenomenon among scholars, advocates for historically subordinate groups, and people in general—namely, to view the relationship between biological parents and children as unlike almost any other good in adults' lives, including adults' relationships with other adults. They view the relationship as unique in two ways—first, as normatively different, insofar as it is something many believe adults are entitled to even in circumstances when they are entitled to almost

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<sup>342</sup> See *supra* notes 78, 85–86, 91, 149 and accompanying text.

<sup>343</sup> See, e.g., Byrne et al., *supra* note 39, at 387.

nothing else, especially if the adults are viewed as victims of social injustice;<sup>344</sup> and second, as empirically different, insofar as children are viewed relative to their biological parents as something other than distinct persons, as if they are a part of biological mothers' very self, or objects of ownership rights.<sup>345</sup> These untenable views explain why immediate placement of babies born to prison inmates in adoptive homes is never an option considered in the law, policy, and social science literature relating to female criminals, even though that option would provide nearly all of these babies with vastly better life prospects.

In addition to denying that any conflict of interests exists between incarcerated women and their children, advocates for children-in-prison programs might point out that these women would not be incarcerated in the first place if the legal response to their problems were less punitive, if the communities from which the women came offered more opportunities for healthy and productive lives, if better treatment for addiction were available to these women, if the state did more to prevent domestic violence, and in general if life were more fair. All that counterfactual speculation might be true, but it is morally and legally irrelevant to what the state ought to do with a child whose mother is incarcerated in this far-from-perfect world that actually exists. It is fallacious to reason that if something would not happen in a better world then it should not happen in the actual world. Adults are entitled to make choices about their relationships based on real-world circumstances—for example, ending an intimate relationship with a woman because she goes into prison. Children are entitled to have the state make the best decision for them about their family relationships, based on real-world circumstances and the options available to them, including adoption.<sup>346</sup>

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<sup>344</sup> See ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 7 (1999) (discussing “blood bias” that causes state actors and others to attribute to biological parents rights to possession of their children even when it is harmful to them); Stone, *supra* note 129 (commenting that “[s]o strong is the conviction that mothers have an inherent right to parent”). Some former prison inmates in Canada were bold enough to file suit against the province of British Columbia arguing that cancellation of a prison nursery program there in 2008, because of perceived dangers to the children from inmate fighting and drug use, violated the fundamental right of mothers to have their children with them. See *id.*; Vivian Luk, *Supreme Court hears case for Mother-Baby Program*, *GLOBE & MAIL*, May 28, 2013, at S.1.

<sup>345</sup> This view of parenthood is not as archaic as one might imagine. See Bailey v. Lombard, 420 N.Y.S.2d 650, 653–54 (N.Y. Sup. Ct. 1979) (“Cases in New York State, culminating in *Bennett v. Jeffreys* . . . have shown that a child is no longer considered as a chattel . . .” (citation omitted)).

<sup>346</sup> See generally JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* (2006) (analyzing what rights children should possess in connection with state decision making about their personal relationships).

## VI. RECOMMENDATION

To make clear what alternative legal regime this Article recommends, the following preliminary sketch is offered, limited here to the case of a newborn child:

First, state laws should direct that when an incarcerated woman gives birth, prison officials must notify the local child protection agency, and that agency must conduct an assessment of the child's situation and develop a permanency plan recommendation for the child based on that assessment. That assessment would take into account the mother's history (including past parenting and pattern of intimate relationships); the mother's current mental and physical health (including substance abuse); the time remaining on the mother's sentence; the prospects for the mother's successful reentry (taking into account family support, employability, plans for residence, rehabilitative progress, and need to assume custody of older children); and other possible permanent caregivers (including the child's father, extended family members willing to adopt, and unrelated persons interested in adopting).

Second, state laws should direct the child protection agency to initiate a juvenile court proceeding, and the court should order the permanency plan that is most consistent with the baby's long-term best interests, taking into account several factors: the agency's assessment and recommendation, the psychological benefit children gain when raised by their biological parents or at least by biologically-related persons, any evidence that the mother or other interested parties might present to the court, and potential adoptive placements. The mother should have legal representation, but so too should the child.

Third, putting babies in prison should never be an option. If the mother is expected to leave prison within six or seven months, and if the court-selected permanency plan is for her to raise the child, the baby should be placed with a CPS-approved temporary caregiver until the mother leaves prison. If the mother has significantly more than seven months remaining to serve, and if there is no community-based residential program to which the mother can move, then presumably the permanency plan should not be for the birth mother to occupy the role of primary caregiver.

Lastly, under any scenario involving placement of the child with an alternative parent figure, the decision whether that entails TPR as to the mother should depend on the identity of the alternative parent figure (e.g., family member vs. stranger) and other considerations. The best outcome for a particular child born to a prison inmate might be for an aunt to adopt the child, so that the child's primary attachment figure has role security and the law can ensure that the birth mother and child have the opportunity to form a relationship with each other at some point.

The foregoing is obviously not comprehensive, addressing every possible permutation and detail. The most important points include the following: (1) state actors whose normal function includes making assessments about and choices for children's welfare (i.e., CPS and juvenile courts, not prison officials) should be

making such assessments and choices for babies born to incarcerated women; (2) the state should never choose to put a baby in prison; and (3) the state should immediately find an alternative permanent primary caregiver for any newborn child whose mother will be in prison for a substantial portion of the attachment period or for other reasons is not the best choice for the role of long-term primary caregiver (despite the child-welfare presumption in favor of her as a biological parent).

## VII. CONCLUSION

Children-in-prison programs reflect a commendable sympathy for the lifelong disadvantage and deprivation that most prison inmates have suffered and a wish to transform their lives. But acting primarily on the basis of that sympathy and wish, rather than focusing realistically on what is truly best for children, is a moral and policy mistake. Available evidence suggests that the extreme form of connecting incarcerated birth parents with their offspring, prison nurseries, harms the great majority of those children, especially when the impact is compared to the life the children might have had if adopted immediately after birth. Advocacy for this practice depends on a pretense that there is no conflict of interests between incarcerated women and their newborn offspring and on misuse of empirical studies. It is ultimately grounded in a normative commitment to giving lexical priority to the welfare or happiness of those women. State actors need to recognize that advocates for incarcerated women are not reliable sources of information about the child welfare impacts of any policy, and they need to seek that information elsewhere and make children's welfare the determinative criterion of their decisions. But this is likely to occur only when true advocates for children begin to take an interest in this quietly proliferating practice of putting children in prison.