

REACHING BEYOND THE BARS: AN ANALYSIS OF PRISON NURSERIES

INTRODUCTION

Each night, roughly a quarter of a million children living in the United States go to sleep without either one or both of their parents to say goodnight to them.¹ These parents are not home. They are in prison. The number of children whose parents are incarcerated has increased from 21,000 in 1978 to one million in 1990.² If the numbers continue at this rate, it has been predicted that two million parents will be living in prison by the year 2000.³ For many of these children, the incarcerated parent is their primary caregiver and their absence leaves these children in foster care⁴ or alone to support themselves.⁵

In an attempt to remedy this desperate situation, a few facilities have emerged to help these children and their mothers by developing prison nurseries. Two facilities in particular have made monumental progress with their prison nursery programs: The Bedford Hills Correctional Center in Bedford, New York and the Nebraska Correctional Center for Women.⁶

This Note explores prison nurseries and whether or not prisons can be a suitable home for children. Part I examines incarcerated women and their children. In addition, this section looks at how separating the incarcerated mother from her child intermingles with incarceration theories. Part II discusses the role that the courts and the Sentencing Guidelines have played in placing women in prison and keeping them there for longer sentences. Part III focuses on the Bedford Hills Correctional Center and the Nebraska Correctional Center for Women. Part IV explains alternatives to the prison nursery system. Finally, Part V discusses the Equal Protection issues that arise when dealing with incarcerated parents. This Note concludes that prison nurseries are scarce, and it is time for the criminal justice system to consider them as a viable option to remedy many of the existing problems within the system.

¹ See Daphne Muse, *Parenting From Prison*, MOTHERING, Sept. 22, 1994, available in 1994 WL 13427294.

² See *id.*

³ See *id.*

⁴ See Donna K. Metzler, *Neglected by the System: Children of Incarcerated Mothers*, 82 ILL. B.J. 428, 430 (1994).

⁵ See Muse, *supra* note 1.

⁶ See Claudia Glenn Dowling, *Women Behind Bars*, L.I.F.F. Oct. 1997, at 77, 84, 87.

I. INCARCERATED WOMEN

The profile of a typical female offender is a woman of color in her thirties, who has at least one child.⁷ More than half of incarcerated women have been physically abused, and more than one-third have been victims of sexual abuse.⁸ Most female inmates did not finish high school and were not working at the time of their arrest.⁹ A large number of female offenders have serious drug problems, therefore, the majority are imprisoned for offenses related to drugs.¹⁰ Property offenses make up another common area of the crimes committed by women.¹¹ Most incarcerated women have been convicted at least once before, reflecting a high recidivism rate.¹²

The number of incarcerated women in the United States has increased by five hundred percent since 1980.¹³ As a result of this increase, roughly six percent of the state and federal prison population is comprised of women.¹⁴ Approximately five percent of women are pregnant when they enter prison,¹⁵ and about eighty percent of incarcerated women are mothers.¹⁶ Of that eighty percent who are mothers, seventy-five percent have children under eighteen years old who are left motherless.¹⁷

Separating the mother and child through imprisonment intermingles with incarceration theories. The four major goals of the correctional system are rehabilitation, deterrence, incapacitation, and retribution.¹⁸ If rehabilitation is the goal, it is important to teach the inmate what she did wrong, to show her how she can

⁷ See Stefanie Fleischer Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 COLUM. J. GENDER & L. 1, 1-2 (1995).

⁸ See *id.* at 2; see also Marya P. McDonald, *A Multidimensional Look at the Gender Crisis in the Correctional System*, 15 LAW & INEQ. J. 505, 516 (1997).

⁹ See Seldin, *supra* note 7, at 2.

¹⁰ See Honorable Consuelo Marshall, *Symposium: 200 Years of the Penitentiary: Criminal, Social and Economic Justice*, 34 HOW. L.J. 512, 513 (1991) (noting that more than half of the female inmates in the federal system were convicted on drug charges); see also Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 912 (1993) (stating that in 1993, 68% of federal female inmates were imprisoned for drug offenses).

¹¹ See Raeder, *supra* note 10, at 911 & n.18 (finding that female property crime percentages continue to increase and for 1992 constituted 48% of crimes committed by women).

¹² See Seldin, *supra* note 7, at 2.

¹³ See Dowling, *supra* note 6, at 77.

¹⁴ See *id.* at 79 (estimating that approximately 74,730 inmates are women).

¹⁵ See Raeder, *supra* note 10, at 945.

¹⁶ See Justin Brooks & Kimberly Bahna, "It's a Family Affair" — *The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271 (1994).

¹⁷ See Bill Hewitt et al., *Mothers Behind Bars*, PEOPLE WEEKLY, NOV. 11, 1996, at 95; see also Dowling, *supra* note 6, at 84 (estimating there are 60,000 children under 18 whose mothers are in prison).

¹⁸ See Harmelin v. Michigan, 501 U.S. 957, 999 (1991); see also SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 102-130 (6th ed. 1995).

better her life, and to provide alternatives for her other than crime.¹⁹ In order to achieve this, an inmate must be prepared to deal with the challenges that await her after prison, and rehabilitation should teach inmates how to handle these challenges.²⁰ Thus, separating an incarcerated mother from her child obstructs the goal of rehabilitation because it does not include one of the major challenges the mother will have to face upon her release — the care of her child.²¹

Deterrence is another goal that imprisonment attempts to achieve.²² Deterrence aims to prevent people from committing crimes by both experiencing and witnessing punishment.²³ Separating a mother and a child, however, cannot further deterrence when the family structure is being destroyed.²⁴ In fact, the loss of family support will actually increase the inmate's criminal behavior and force her back to the support she received in prison.²⁵ In addition, this may have a negative effect on the children of inmates because they are more likely to commit crimes.²⁶

The incapacitation theory evolved to prevent criminals from committing crimes against members of society while they were incarcerated.²⁷ It follows that if the wrongdoer is locked up, they cannot do any further harm to society, but what about the harm caused by taking the inmate out of society (i.e. taking the mother away from her child)? The only way the goal of incapacitation can be satisfied for an incarcerated mother is if she committed a crime against her family.²⁸ If a mother is separated from her child, the child is also punished, in particular, children under the age of one. During the first year, the evolution of the child's basic personality, character, and intellectual development begins.²⁹ Because a mother plays a crucial part in her child's development, if she is

¹⁹ See Brooks & Bahna, *supra* note 16, at 276.

²⁰ See *id.*

²¹ See *id.*

²² See KADISH & SCHULHOFER, *supra* note 18, at 115.

²³ See Brooks & Bahna, *supra* note 16, at 275.

²⁴ See *id.* ("Since the separation of inmates from their families increases the punitive or retributive nature of incarceration, it should further the goals of deterrence. . . . Research has shown that the disruption in family ties during incarceration actually *increases* the criminal behavior of ex-inmates.").

²⁵ See Marshall, *supra* note 10, at 514 ("It is not uncommon for her to call back to the institution to talk to someone there just to ask, 'What do I do now? I am here in this place but there is no one to help me what do I do next?'").

²⁶ See Brooks & Bahna, *supra* note 16, at 276; see also Muse, *supra* note 1.

²⁷ See KADISH & SCHULHOFER, *supra* note 18, at 126-27; see also Brooks & Bahna, *supra* note 16, at 273.

²⁸ See Brooks & Bahna, *supra* note 16, at 273-74.

²⁹ See Richard D. Palmer, *The Prisoner-Mother and Her Child*, 1 *CAR. U. L. REV.* 127, 138 (1972).

imprisoned, she cannot provide the fundamental care needed.³⁰ In addition, the incarcerated mother loses the critical support that she can get from her child and the incentive to help her change.

The final goal of the criminal justice system is retribution, which was originally implemented to punish those who did not abide by the laws.³¹ The idea behind retribution is to inflict punishment.³² Therefore, retribution can be achieved by separating the criminal from the members of her family.³³ But again, the child is the one who is punished most severely, and for a crime they did not commit. The four goals of the correctional system are not achieved in cases where mothers are separated from their children. Rehabilitation, retribution, incapacitation, and deterrence might serve the system as a whole, but it is evident that the effects of incarceration on both the mother and the child are detrimental as opposed to positive. After analyzing the goals of the correctional system and how they mesh with criminals and their familial relationships, it is questionable whether the system is working, for it is difficult to illustrate that any of the goals are actually being accomplished.

II. THE ROLE OF THE COURTS AND THE SENTENCING GUIDELINES

Before an incarcerated mother is subject to the correctional system, the length of her imprisonment is determined by her sentence. In some situations, courts have the opportunity to maintain family unity by considering family responsibilities at the time of sentencing.³⁴ Mandatory sentencing laws, however, are largely responsible for the increased number of incarcerated women and their increased prison terms.³⁵

The 1986 Anti-Drug Abuse Act³⁶ and the 1988 Omnibus Anti-Drug Abuse Act³⁷ mandate minimums of five years to life in prison without parole for drug offenses.³⁸ The sentences depend solely upon the amount of drugs involved.³⁹ Mandatory sentencing for

³⁰ See Terri L. Schupak, *Women and Children First: An Examination of the Unique Needs of Women in Prison*, 16 GOLDEN GATE U. L. REV. 455, 473 (1986).

³¹ See Kadish & Schulhofer, *supra* note 18, at 102-03.

³² See Brooks & Bahna, *supra* note 16, at 274.

³³ See *id.*

³⁴ See Jody L. King, *Avoiding Gender Bias in Downward Departures for Family Responsibilities Under the Federal Sentencing Guidelines*, 1996 ANN. SURV. AM. L. 273, 280 (1996) (noting that district courts have the authority to depart from the Guidelines in "extraordinary" family situations, although the meaning of "extraordinary" remains unclear).

³⁵ See Hewitt, *supra* note 17, at 95.

³⁶ Pub. L. No. 99-570, 100 Stat. 3207 (1986).

³⁷ Pub. L. No. 100-690, 102 Stat. 4181 (1988).

³⁸ See Seldin, *supra* note 7, at 26.

³⁹ See *id.*

drug offenses, therefore, have a large impact on incarcerated mothers and their children because they remove the judges' discretion in sentencing, and the fact that a mother is the primary caretaker may not carry any weight.⁴⁰ One in three incarcerated women is serving time for drug offenses, compared to one in five men.⁴¹

In 1984, Congress enacted the Sentencing Reform Act.⁴² The Act was developed to maintain consistency, fairness, and sufficient flexibility in sentencing.⁴³ Unlike the mandatory minimum sentencing, judges are permitted to depart from sentencing guidelines under certain circumstances.⁴⁴ The dilemma that confronts judges most often is whether to grant departures based on concerns about children or pregnancy.⁴⁵

Courts are split on whether to consider a defendant's family ties and responsibilities in determining sentences.⁴⁶ The courts have dealt with decreasing a defendant's sentence due to parental responsibilities in various ways. Some courts do not consider parenthood to be a relevant factor when sentencing a criminal.⁴⁷ Other courts think family responsibilities are occasionally relevant to sentencing, but only when dealing with probation or supervised release.⁴⁸ The majority view of the federal circuits, however, is to determine whether or not the circumstances are "extraordinary" when imposing a sentence.⁴⁹

Some examples of the diverse outcomes in the courts illustrate the complexity of this issue. In *United States v. Pokuaa*,⁵⁰ the United

⁴⁰ *See id.*

⁴¹ *See* Dowling, *supra* note 6, at 87.

⁴² Pub. L. No. 98-473, 98 Stat. 1837 (1984).

⁴³ *See* Susan E. Ellingstad, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 959-60 (1992).

⁴⁴ *See* Tracy Tyson, *Downward Departures Under the Federal Sentencing Guidelines: Are Parenthood and Pregnancy Appropriate Sentencing Considerations?*, 2 S. CAL. REV. L. & WOMEN'S STUD. 578, 581 (1993).

⁴⁵ *See* Raeder, *supra* note 10, at 936-7 ("[F]amily-based departures have declined in percentage as a reason for downward departures every year since 1989 and have fallen from the third to the fifth-most cited reason for downward departures. . . . [F]amily ties departures are requested more often by females than males.").

⁴⁶ *See* Ellingstad, *supra* note 43, at 966-69. For example, the Seventh and Ninth Circuits have strictly followed the Sentencing Guidelines regardless of the defendant's family responsibilities. *See id.* at 966-67. On the other hand, the Sixth Circuit decided that the court can consider extremely unusual family circumstances during sentencing. *See id.* at 968. The Fourth, Fifth, and Eighth Circuits are internally divided when dealing with family obligations. *See id.* at 969.

⁴⁷ *See* Tyson, *supra* note 44, at 584 (citing *United States v. Sutherland*, 890 F.2d 1042 (8th Cir. 1989)).

⁴⁸ *See id.* (citing *United States v. Thomas*, 930 F.2d 526 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 171 (1991)).

⁴⁹ *See* King, *supra* note 34, at 279.

⁵⁰ 782 F. Supp. 747 (E.D.N.Y. 1992).

States District Court for the Eastern District of New York held that, "[t]he Federal Bureau of Prisons does not allow incarcerated women to care for their children in prison facilities. . . . Since the defendant has no family members . . . to care for the child, she would be required to name the state as legal guardian of the child" ⁵¹ It was therefore likely that without a departure from the Sentencing Guidelines, the mother, who was seven months pregnant, would lose custody of her child.⁵² Thus, the Court gave the defendant a lighter sentence to prevent the potential permanent loss of custody of her child.⁵³

In another example, the Third Circuit concluded that although a defendant had five young children, it did not have the power to stray from the Guidelines and reduce her sentence.⁵⁴ The Court further held that while in extreme family circumstances departures are permissible, this situation did not fall into the "extraordinary" category.⁵⁵

"Extraordinary circumstances," has developed many inconsistent definitions among the courts.⁵⁶ The Second Circuit in *United State v. Johnson*⁵⁷ held that leaving a child motherless creates an "extraordinary circumstance."⁵⁸ The *Johnson* Court found that "[t]he United States Sentencing Guidelines do not require a judge to leave compassion and common sense at the door to the courtroom."⁵⁹ The Tenth Circuit agreed with the Second Circuit's line of reasoning when it supported a downward departure for a defendant who was the sole supporter of her two-month-old child and the partial supporter of her sixteen-year-old daughter who also had a two-month-old child.⁶⁰ Yet, other federal courts have concluded that possible separation of families is not an "extraordinary circumstance," rather a mere disturbance.⁶¹

⁵¹ *Id.* at 748

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *See* *United States v. Headley*, 923 F.2d 1079, 1082 (3d Cir. 1991).

⁵⁵ *See id.*

⁵⁶ *See* Raeder, *supra* note 10, at 939-48.

⁵⁷ 964 F.2d 124 (2d Cir. 1992)

⁵⁸ *See id.* (holding that a ten level departure from the Guidelines is allowed because the defendant had the sole responsibility to care for four young children).

⁵⁹ *Id.* at 125.

⁶⁰ *See* *United States v. Pena*, 930 F.2d 1486 (10th Cir. 1991) (holding that a five year probation term rather than the requirement under the Guidelines was permissible based partly on the fact that the defendant was the sole supporter of her two month-old child and was giving support to her 16 year-old daughter who also had a child).

⁶¹ *See* Brooks & Bahna, *supra* note 16, at 295 (citing *United States v. Daly*, 883 F.2d 313, 319 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 2622 (1990)).

Courts that refuse to depart from Sentencing Guidelines justify their conclusion by finding that "extraordinary circumstances" did not exist. For example, the Eleventh Circuit held that four small children did not create an extraordinary circumstance.⁶² Similarly, the Fourth Circuit, refused a downward departure for a mother who had to care for two young children.⁶³

The ambiguity within the Guidelines, and the differential treatment in federal court decisions, illustrate the conflict that exists among the courts in using family responsibilities to depart downward from the Sentencing Guidelines. Therefore, the sentencing system as a whole has failed to deal with the problems incarcerated women and their families face.⁶⁴ In order to solve the problems faced by a majority of the women and their families, the definition of "extraordinary family circumstances" needs to be clearly defined or abandoned all together.

III. PRISON NURSERIES

New York and Nebraska are attempting to help inmate mothers maintain close relationships with their children and break the cycle of events that occur when mothers are imprisoned. These two states are the only ones which allow babies to live with their incarcerated mothers.⁶⁵ Two facilities in particular, the Nebraska Correctional Center for Women and the Bedford Hills Facility⁶⁶ have demonstrated that prisons can also serve as a child's home.⁶⁷

The Bedford Hills Facility was the first institution to adopt a prison nursery system in 1901.⁶⁸ There, incarcerated mothers can

⁶² See *United States v. Cacho*, 951 F.2d 308 (11th Cir. 1992) (holding that four small children did not create an extraordinary circumstance and therefore a downward departure was not permissible).

⁶³ See *United States v. Brand*, 907 F.2d 31 (4th Cir.), *cert. denied*, 498 U.S. 1014 (1990) (refusing a downward departure because situation was only unfortunate, not extraordinary).

⁶⁴ See *Tyson*, *supra* note 44, at 596-600 ("The United States Supreme Court has failed to resolve the disagreement among the circuits because thus far the Court has refused to grant certiorari even though it has had several opportunities to do so.").

⁶⁵ See *Hewitt*, *supra* note 17, at 95.

⁶⁶ The Nassau and Suffolk County Jails, Taconic Prison, and Riker's Island allow babies to stay with their mother while they are awaiting sentencing. Telephone interview with Mary Riechers, RN, the Nursery Supervisor at the Bedford Hills Facility (Oct. 21, 1998) [hereinafter *Riechers Interview*].

⁶⁷ See *Hewitt*, *supra* note 17, at 95.

⁶⁸ See Paul LaRosa, *Babies Behind Bars In Three 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, available in 1992 WL 2915295. See also, *New York Prison Nurseries Aim To Stem Cycle Of Violence; Officials Disagree On Effectiveness, But Inmates Praise Program*, THE BALTIMORE SUN, Sept. 11, 1997, at 6B, available in 1997 WL 5529328 [hereinafter *New York Prison Nurseries*] ("[T]he Bedford Hills Facility is the oldest prison nursery in the nation.

keep their children until the child is 18 months old.⁶⁹ Section 611(2) of the New York Correctional Law permits a child, born to an incarcerated woman, to return to the facility with her, unless the Chief Medical Officer determines that the mother is incompetent.⁷⁰ The prison nursery can accommodate up to twenty-seven mothers and their babies.⁷¹

At the Bedford Hills Facility everything that a mother needs for her baby is given to her without charge, including diapers, strollers, baby food, formula, and health care.⁷² "The typical participant in the Bedford Hills program is a single woman in her twenties with at least one other child. She was likely convicted on a minor drug offense for which she received a sentence of less than two years."⁷³ At the Bedford Hills Facility, women who have their babies with them in prison are taught to be mothers through mandatory classes which teach them how to tend to the physical and emotional needs of their children.⁷⁴ A woman does not automatically get to keep her baby while in prison.⁷⁵ To be entitled to this privilege, a woman cannot be sentenced to more than five

the sole survivor of more than a dozen nurseries that operated at the turn of the century.").

⁶⁹ See La Rosa, *supra* note 68.

⁷⁰ The statute provides in pertinent part:

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 The officer in charge of such institution may cause a child cared for therein with its mother to be removed from the institution at any time before the child is one year of age. He shall make provision for a child removed from the institution without its mother of a child born to a woman inmate who is not returned to the institution with its mother as hereinafter provided. He may, upon proof being furnished by the father or other relatives of their ability to properly care for and maintain such child, give the child into the care and custody of such father or other relatives, who shall thereafter maintain the same at their own expense. If it shall appear that such father or other relatives are unable to properly care for and maintain such child, such officer shall place the child in the care of the commissioner of the public welfare or other officer or board exercising in relation to children the power of a commissioner of public welfare of the county from which such inmate was committed as a charge upon such county.

N.Y. CORRECT. LAW § 611(2) (McKinney 1968) (cited in Schupak, *supra* note 30, at 468).

This law which allows a baby to stay with her mother for one year can be reconciled with the Bedford Hills policy of allowing a baby to stay with her mother for up to 18 months, because the main focus is to have the mother leave prison with her baby (80-85% of mothers at Bedford Hills leave with their baby). A small number of women whose parole hearings take place after a year are allowed to keep their baby for up to 18 months. This process must be approved by officials at Bedford Hills and the mother must have displayed exemplary behavior. See Riechers Interview, *supra* note 66.

⁷¹ See LaRosa, *supra* note 68.

⁷² *Id.*

⁷³ Kathy Willens, *Imprisoned Mothers Get New Start At Parenting In Nursery*, THE DALLAS MORNING NEWS, Sept. 10, 1995, at 8A, available in 1995 WL 9058702.

⁷⁴ See LaRosa, *supra* note 68.

⁷⁵ See Willens, *supra* note 73 at 8A.

years; she must attend classes both before and after the baby is born; and she must show her desire for a second chance at life.⁷⁶ Those women who have been convicted of violent crimes, arson, or a crime involving children, are excluded from the program.⁷⁷ In addition, those women with a drug addiction must be in treatment.⁷⁸

Bedford Hills also has programs for those women whose children are older than eighteen months, to help the mother maintain a relationship with her older children.⁷⁹ During summer months, the community of Bedford Hills hosts children of incarcerated mothers for a week so that they may see their mothers every day during that period.⁸⁰ Also, one Saturday night each month during the school year, these children may stay with members of the community so they can visit their mothers.⁸¹ The Nebraska Correctional Center for Women houses approximately one hundred and eighty inmates, ranging in age from seventeen to fifty-nine.⁸² Crimes of those convicted range from shoplifting to murder.⁸³ This facility has taken innovative approaches to break down the bars that separate mothers in prison from their children.⁸⁴ One approach is to evaluate inmates who wish to participate in a program, which allows the mothers who qualify, to care for their children.⁸⁵ The program allows about six mothers to live in private rooms with cribs for their babies.⁸⁶ In addition, a mother, upon signing a contract to obey the rules in the prison nursery, is not locked down at night.⁸⁷ This allows the mother to prepare a bottle for her infant in the middle of the night if necessary. These women, however, are required to take a parenting class.⁸⁸

Incarcerated mothers are also permitted to have their older children spend the night with them, as many as five nights a month as a recompense for good behavior.⁸⁹ This kind of program gives

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See Kim S. Hirsh, *Prison Parenting/Programs Let Children Stay With Mothers Behind Bars*, *HOUS. CHRON.*, Sept. 20, 1993, at 3, available in 1993 WL 9622389.

⁷⁹ See Metzler, *supra* note 4, at 431.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See Dowling, *supra* note 6, at 84.

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See Hewitt, *supra* note 17, at 102 (those mothers who pose a threat to their children cannot participate).

⁸⁶ See *id.* at 100.

⁸⁷ See Dowling, *supra* note 6, at 87.

⁸⁸ See *id.*

⁸⁹ See *id.* at 83.

an incarcerated mother a sense of routine, as well as something to look forward to each day.⁹⁰ As the warden of the Nebraska Center comments, "Eighty percent of our inmates are mothers; 90 percent of those will care for their children when they get out. They shouldn't be strangers to their children."⁹¹

A. *Why prison nurseries*

In most institutions, when an inmate is ready to give birth, she does so at a local hospital and then is immediately separated from the newborn.⁹² The newborn is usually given to a family member, or, if none are available, the baby is placed in the foster care system.⁹³ This practice is vehemently opposed by all who know about the importance of parental bonding in a child's development.⁹⁴ Still there are others who do not believe a prison is a suitable home for a child.⁹⁵ Whether or not a child should remain with their mother in prison has been a hotly contested topic with advocates on both sides.

Some people argue that a prison is not an appropriate place for a child to live. David Botkins, a spokesman for the Virginia Department of Corrections, does not sympathize with an incarcerated mother.⁹⁶ He feels that, "[a mother] should have thought of her children before she decided to use drugs and commit robbery."⁹⁷ Even some administrators and persons who work in prison facilities adamantly feel that children do not belong in prisons.⁹⁸ They feel that such a lifestyle could have an adverse effect on kids, and mothers will likely use their children as an excuse to qualify for better programs or activities for themselves.⁹⁹

In Florida, a state that used to have prison nurseries, a corrections spokesman said, "[t]here [is] a concern about the well-being of the child. We wanted to make sure they had a proper nutritional and emotional environment as well as a safe and secure environment. A women's prison does not provide all those factors to

⁹⁰ See Hewitt, *supra* note 17, at 95.

⁹¹ *Id.*

⁹² See Marshall, *supra* note 10, at 515.

⁹³ See Schupak, *supra* note 30, at 465.

⁹⁴ See Metzler, *supra* note 4, at 430 (Separating the mother and the newborn "puts infants at risk of being moved frequently among caregivers and of suffering long-term emotional problems as the result of separation from their mothers."). See also Muse, *supra* note 1 (providing an example of those who find the bond between mother and child significant are pediatricians).

⁹⁵ See LaRosa, *supra* note 68.

⁹⁶ See Hewitt, *supra* note 17, at 100.

⁹⁷ *Id.*

⁹⁸ See Marshall, *supra* note 10, at 519.

⁹⁹ See *id.*

an optimum degree."¹⁰⁰ The superintendent of the Minnesota Correctional Facility at Shakopee, says that she "[has] a real problem with raising kids in prison. It's not a real good environment for the child."¹⁰¹

Marilyn Moses, a program director at the National Institute of Justice, agrees with the philosophy that children should not live in prisons, but feels that these attitudes are shortsighted.¹⁰² "Mothers do not deserve special treatment, but we'd better recognize that it is primarily women who care for kids before and after they are incarcerated, children have become the hidden victims."¹⁰³

Other advocates whole-heartedly believe that prison nurseries are the only rational solution. Jean Harris, a former inmate at the Bedford Hills Correctional Facility and teacher of a parenting class said, "Babies don't know they are in prison . . . They know they are with their mothers and that's where they want to be."¹⁰⁴ Superintendent Elaine Lord, of the Bedford Hills facility, has discovered that having babies in prison has brought about many changes. "Guards and inmates alike have had to break out of conventional roles and women who once paraded as 'tough guys' blossom."¹⁰⁵ Providing a psychological point of view, advocate Sister Elaine Roulet, who works at the Bedford Hills facility, says, "that the most important years of our lives is [the] first year. The babies belong with their mothers."¹⁰⁶ Eldon Vail, superintendent at McNeil Island Corrections Center, heard about the prison nursery system in New York, and went to investigate.¹⁰⁷ Vail found that "[t]he children he saw at the prison nurseries were happy, healthy, alert and developmentally advanced because their mothers were guided by people who know a lot about raising kids, a skill which hopefully transfers to the offender."¹⁰⁸ Dr. T. Berry Brazelton, a well known pediatrician said, "women in prison, many of them struggling with addiction, are in a position to gain from parent education classes and also have time to lavish attention on their infants."¹⁰⁹ In addi-

¹⁰⁰ LaRosa, *supra* note 68.

¹⁰¹ *Id.*

¹⁰² See Hewitt, *supra* note 17, at 100.

¹⁰³ See *id.*

¹⁰⁴ *Keep Babies In Prison, Say Advocates*, NEW ORLEANS TIMES-PICAYUNE, June 30, 1993, at A8, available in 1993 WL 7792095.

¹⁰⁵ *New York Prison Nurseries*, *supra* note 68, at 6B.

¹⁰⁶ Willens, *supra* note 73, at 8A.

¹⁰⁷ See Lynn Steinberg, *Program For Mothers Giving Birth In Prison Aims To Help Children, Goal Is To Halt Cycle Of Problems Leading To Crime*, SEATTLE POST-INTELLIGENCER, Sept. 9, 1993, at C1, available in 1993 WL 7690314.

¹⁰⁸ *Id.*

¹⁰⁹ Jordana Hart, *Bill Lets Mothers In Prison Keep Tots, Benefits To Parent And Child Are Cited*, THE BOSTON GLOBE, June 26 1997, at B1, available in 1997 WL 6259053.

tion, Dr. Brazelton found that mothers "need their infants for their own rehabilitation. Studies have shown that if . . . the baby [is used] as an incentive, 50 percent or more give up their addiction in favor of their baby."¹¹⁰

B. *Alternatives to prison nurseries*

Options other than prison nurseries do exist, such as placing the child with relatives, the foster care system, or adoption. Allowing children to live with their incarcerated mothers is successful for both the mother and her child.¹¹¹

Perhaps one of the easiest ways to remedy the care for a child when their mother is incarcerated, is to have the child live with their father. Nevertheless, only about twenty-five percent of children with mothers in prison live with their fathers.¹¹² Since seventy percent of the mothers in prison are single parents,¹¹³ most children are cared for by their grandparents.¹¹⁴ Yet, this alternative is not always easy to implement. The case may exist where the mother does not have any relatives who could care for the child, or that no one is willing to take responsibility for the child.¹¹⁵

Another alternative to prison nurseries is placing the child in foster care.¹¹⁶ Foster care involves the temporary shift of custody from a parent to an authorized social services agency.¹¹⁷ Foster care is a frightening issue for incarcerated mothers because it can lead to the "termination of parental rights" proceedings and adoption.¹¹⁸

Twenty-five states have "termination of parental rights" or adoptive statutes specifically for incarcerated parents, which makes the permanent loss of a child a reality.¹¹⁹ Although, a state is not

¹¹⁰ *Id.*

¹¹¹ See discussion *infra* Part III.A.

¹¹² See Dowling, *supra* note 6, at 87.

¹¹³ See Metzler, *supra* note 4, at 429.

¹¹⁴ See Dowling, *supra* note 6, at 87.

¹¹⁵ See Brooks & Bahna, *supra* note 16, at 280.

¹¹⁶ See Phillip M. Genty, *Protecting the Parental Rights of Incarcerated Mothers Whose Children Are in Foster Care: Proposed Changes to New York's Termination of Parental Rights Law*, 57 FORDHAM URB. L.J. 1, 4 (1989).

¹¹⁷ See *id.*

¹¹⁸ See Phillip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 762 (1992).

¹¹⁹ The twenty-five states are as follows: Alabama, Arizona, California, Colorado, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Wisconsin and Wyoming. Furthermore, Illinois, Indiana, Maine and Tennessee, allow parental rights to be terminated when certain crimes have been committed against children. See *id.* at 761. Whether or not a parent loses this right upon being incarcerated depends on the state. On one end

supposed to terminate a parent's right based on incarceration alone, this is not strictly followed and, in fact, some states have even demonstrated a willingness to speed up termination proceedings in those situations involving an incarcerated parent.¹²⁰

However according to the Supreme Court in *Stanley v. State of Illinois*,¹²¹ there does exist a fundamental right to be a parent to one's child:

The rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man" "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."¹²²

Furthermore, the Supreme Court held that under the Due Process Clause of the Fourteenth Amendment,¹²³ a determination of "fitness" must be made before a parent's rights are terminated.¹²⁴

The Supreme Court in *Santosky v. Kramer*¹²⁵ took its position one step further:

The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. . . . When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.¹²⁶

of the spectrum, some states have held that incarceration alone is not substantial enough for involuntary termination of parental rights. On the other hand, some state statutes automatically terminate parental rights based solely on long-term incarceration. While still other states merely consider incarceration as one aspect to be considered in determining whether or not to terminate rights. See generally Carol M. Amadio & Rosemary Mulryan, *Terminating Parental Rights of Incarcerated Parents*, 6 FEB. CHICAGO BAR ASSOCIATION '22, (1992).

¹²⁰ See Genty, *supra* note 118, at 764. See also Julie H. Jackson, *The Loss Of Parental Rights As A Consequence Of Conviction And Imprisonment: Unintended Punishment*, 6 NEW ENG. J. ON PRISON L. 61 (1979).

¹²¹ 405 U.S. 645 (1972) (finding unwed father entitled to a hearing on his fitness as a parent before he lost custody of his children).

¹²² *Id.* at 651 (citations omitted).

¹²³ The Due Process Clause of the Fourteenth amendment states: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV.

¹²⁴ See *Stanley*, 405 U.S. at 658

¹²⁵ 455 U.S. 745 (1982) (finding the Commissioner of Department of Social Services removed children from parental custody after incidents of parental neglect, and moved for termination of parental rights).

¹²⁶ *Id.* at 753-54 (citation omitted).

The Court further explained that in order to terminate a parental right, it will apply a "clear and convincing evidence standard."¹²⁷ Because the parents who would likely undergo these proceedings would usually be poor, uneducated, or members of minority groups, the Court used this heightened standard to avoid erroneous factual findings or judgments which were made based on cultural or class bias.¹²⁸ Due to the Supreme Court decisions in *Santosky* and *Stanley* the use of factors such as the parent-child relationship, and the degree to which the parent has been rehabilitated in prison, are now considered by the courts.¹²⁹

Although, depending on the state, incarceration may not be the sole reason for terminating parental rights, it is still more likely that an imprisoned parent, as opposed to the average parent, will fall within a statutory scheme leading to the termination of her rights.¹³⁰ Because, under many state statutes and an abundance of case law, physical separation is grounds for termination, it is difficult for a mother to overcome this burden since separation is likely in an incarcerated mother-child relationship.¹³¹ If the "termination of parental rights" proceedings succeeds against an incarcerated mother, the mother-child bond will be permanently severed.¹³² Therefore, the holding by the Supreme Court requiring states to show clear and convincing evidence before a parent's rights can be terminated is basically the only procedural safeguard which aims to keep the mother and child together.¹³³

¹²⁷ *Id.* at 769.

¹²⁸ *See Genty, supra* note 118, at 770.

These concerns about careless and biased fact finding apply most vividly to incarcerated parents. Because of the emotional and practical difficulty associated with these cases, such as the prolonged physical separation, the complicated feelings children may have about their parents' confinement and the need to make special arrangements for visitation at the correctional facility, a court may be tempted to write the prisoner off as a "bad" parent who has, by virtue of her criminal actions, proved herself unworthy of parenthood.

Id.

¹²⁹ *See id.* at 771.

¹³⁰ *See Seldin, supra* note 7, at 20.

¹³¹ *See id.*

¹³² *See Genty, supra* note 116, at 7.

¹³³ *See Santosky*, 455 U.S. at 769.

Generally the state does not have to provide the parent with an attorney, although in some states, such as New York (Family Court), the parent does have a right to an attorney. In some states, incarcerated parents appear in termination cases only through counsel and deposition, rather than in person. Even some states that give parents the right to appear in person often do nothing to ensure their presence, and courts may draw inferences against parents for their failure to appear.

Seldin, *supra* note 7, at 20-21.

Another way an incarcerated mother can lose custody of her child is through adoption if the child is not in foster care.¹³⁴ “[A]doption involves a state deprivation of fundamental constitutional parental rights.”¹³⁵ This scenario typically arises when the father has custody of the child and marries or remarries.¹³⁶ It is common for the new spouse to adopt the child.¹³⁷ In addition, a foster parent may wish to adopt the child currently within her custody.¹³⁸ All states have statutes outlining the procedures and circumstances of this type of adoption that can take place without the consent of one parent.¹³⁹ Furthermore, the 1981 Federal Adoption Assistance and Child Welfare Act¹⁴⁰ allows a child to be adopted by a foster parent if the child does not live with his or her mother for a year.¹⁴¹ As is the case with “termination of parental rights” proceedings, adoption will completely sever the relationship between the incarcerated mother and her child.¹⁴²

The above-mentioned alternatives to prison nurseries should also be examined in relation to the economic and social costs they bring to society. According to the warden at the Nebraska Center for Women, there is a high level of practicality in maintaining prison nurseries, since it costs \$11,000 a year for an infant to stay with its mother in prison, as opposed to \$18,000 for a child in foster care.¹⁴³

Societal effects also arise when a mother is incarcerated.¹⁴⁴ Children of inmates are more likely to commit future crimes due to a lack of familial support.¹⁴⁵ In addition, many of these children have educational and behavioral problems, and they are not given

¹³⁴ See Genty, *supra* note 118, at 762.

¹³⁵ *Id.*

¹³⁶ See *id.*

¹³⁷ See *id.*

¹³⁸ See *id.* at 761.

¹³⁹ See *id.* at 762. (“[F]or example, when the nonconsenting parent has had no contact with the child and has therefore ‘abandoned’ the child.”).

¹⁴⁰ 42 U.S.C.A. § 671 (West, 1991).

¹⁴¹ See Tyson, *supra* note 44, at 604.

Separating parents and children for long periods of time creates a severe danger that the parent will lose legal custody rights. Even if parents do not lose legal custody of their child, incarceration often leads to a complete loss of decision-making control over their children. As the loss of involvement continues, the problem worsens and family reunification becomes less probable.

Id.

¹⁴² See Genty, *supra* note 118, at 762.

¹⁴³ See Hewitt, *supra* note 17, at 102. See also Dowling, *supra* note 6, at 90.

¹⁴⁴ See Brooks & Bahna, *supra* note 16, at 284.

¹⁴⁵ See Muse, *supra* note 1 (discussing how the children of inmates themselves end up in prison because they do not have the requisite supervision, love and guidance).

the requisite attention to steer them in the right direction.¹⁴⁶ Also, families usually become dependent on the offered public assistance programs as their source of income.¹⁴⁷ As a result, society bears the costs of the public welfare system along with other social services.¹⁴⁸ Therefore, society not only sustains the cost of the mother but those members of her family affected by her imprisonment as well.¹⁴⁹

IV. EQUAL PROTECTION

If the prison nursery system is adopted, it will disproportionately affect incarcerated men that are the primary caregivers of their children. Typically, when a mother is incarcerated, the impact on the family is more severe than if the father is imprisoned.¹⁵⁰ For example, if the father is in prison, the child will typically remain with the mother, the primary caregiver.¹⁵¹ Research shows that seventy to ninety percent of incarcerated mothers are the sole caregivers for their children.¹⁵² However, treating men and women who are the primary caregivers of their children differently might violate the equal protection clause of the constitution.¹⁵³

Prison nurseries may deny incarcerated fathers the same treatment as imprisoned mothers but this different treatment begins before they even reach prison. The Sentencing Reform Act¹⁵⁴ fosters the disparity between men and women in relation to caring for their children. The Sentencing Reform Act gives judges discretion to depart downward from the sentencing guidelines when there are mitigating circumstances.¹⁵⁵ Thus, female criminals benefit disproportionately from lesser sentences as compared to male of-

¹⁴⁶ See Ellingsstad, *supra* note 43, at 980-81 ("Studies of child development have identified typical antisocial behavior that results from the disruption of stable parental relationships. This behavior includes withdrawal by young children and delinquent or criminal behavior among older children.")

¹⁴⁷ See Brooks & Bahna, *supra* note 16, at 272.

¹⁴⁸ See *id.* at 284.

¹⁴⁹ See *id.*

¹⁵⁰ See Seldin, *supra* note 7, at 17 ("First, women in prison are more likely to have been caring for children before entering prison than men. Second, while only twenty-six percent of incarcerated women's children remained with a continuous, primary caregiver, sixty-one percent of incarcerated men's children remained with their mother.")

¹⁵¹ See Brooks & Bahna, *supra* note 16, at 279.

¹⁵² See Hart, *supra* note 109, at B1.

¹⁵³ See U.S. CONST. amend. XIV.

¹⁵⁴ Pub. L. No. 98-473.

¹⁵⁵ See Ilene H. Nagel & Barry L. Johnson, *The Role Of Gender In A Structured Sentencing System: Equal Treatment, Policy Choices, And The Sentencing Of Female Offenders Under The United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 218-19 (1994).

fenders.¹⁵⁶ When women's sentences are mitigated because of their children, the criminal law seems to be rewarding them for being mothers.¹⁵⁷ This kind of treatment is unjust to men who act as primary caregivers, because women will ultimately serve less time, and thus be reunited with their children faster than men would be.¹⁵⁸

Women sentenced to serve their time in prisons equipped with nurseries, allows the mother to remain with the child, which helps to alleviate the harshness of her sentence. Plus, women in these programs enjoy special privileges.¹⁵⁹ For example, mothers are not locked down at night so they can tend to their babies, and mothers are required to take parenting classes that educate them on how to care for their child.¹⁶⁰ However, an imprisoned father would not be able to live with his baby, nor enjoy these unique privileges since the prison nurseries are for mothers only.

Therefore, because the sentencing guidelines are already being enforced and prison nurseries are not yet widespread, this inherently different treatment of similarly situated men and women should be considered before instituting prison nursery systems everywhere. These nurseries that serve women only could exacerbate the already unfair treatment between men and women when men are the primary caregivers.

Of course, the counter argument to this equal protection issue is simply that seventy to ninety percent of incarcerated mothers are the primary caregivers for their children, and thus, the ten to thirty percent of incarcerated fathers who are affected is not large enough to produce any sort of societal impact.¹⁶¹ In addition, men and women are not similarly situated in the context of prisons.¹⁶² Women have always been given inadequate and unequal services in prison as compared to men.¹⁶³ In *Klinger v. Dep't of Corrections*,¹⁶⁴

¹⁵⁶ See *id.* at 217-18 ("In fiscal year 1992, for example 44.8% of female drug offenders received downward departures for substantial assistance, compared to just 28.1% of male drug offenders. The fiscal year 1991 data reveal a similar pattern, although the gender difference is not quite as marked.")

¹⁵⁷ See *id.* at 208. See also *United States v. Berlier*, 948 F.2d 1093, 1096 (9th Cir. 1991) (finding the efforts to keep the family together did not warrant a downward departure. In this case the court's decision to not depart downward primarily centered on the fact that the father was being sentenced to prison and not the mother. Thus, the mother could continue to care for the children).

¹⁵⁸ See Nagel & Johnson, *supra* note 155, at 218.

¹⁵⁹ See Dowling, *supra* note 6, at 87.

¹⁶⁰ See *id.*; see also discussion *supra* Part III.A-B.

¹⁶¹ See Hart, *supra* note 109, at B1.

¹⁶² See McDonald, *supra* note 8, at 520.

¹⁶³ See *id.* at 545.

¹⁶⁴ 31 F.3d 727 (8th Cir. 1994), cert denied, 115 S. Ct. 1177 (1995).

the eighth circuit held that there was no violation of equal protection where female prisoners received inferior programs as compared to male prisoners because the two were not similarly situated when it came to prison programs and services. Therefore, it is possible to have separate but equal facilities for men and women.¹⁶⁵

Another argument rebutting the equal protection violation between men and women is that imprisoned men actually see their children more often than imprisoned women.¹⁶⁶ This is because the non-imprisoned spouse can bring the child to visit the incarcerated father, while an incarcerated mother usually relies on the state welfare agencies to arrange visits.¹⁶⁷ Thus, prison nurseries may help eliminate the equal protection violations that already exist, not necessarily create new ones.

Adopting a prison nursery system not only affects men who are the primary caregivers, but those incarcerated women who do not have children, and those whose children are too old for the nursery. Traditionally, there are few women prisons.¹⁶⁸ Thus, prison nurseries will most likely be integrated into an existing women's facility rather than becoming its own separate entity.¹⁶⁹ As a result, inmates in the same prison will be treated differently. While the incarcerated mothers are required to attend parenting classes,¹⁷⁰ the other women in the facility may not have the same opportunity because they do not have a baby in prison with them. In addition, some mothers at the Nebraska Correctional Facility are not locked down at night, so that they may care for their baby.¹⁷¹ Again, this unfairly benefits those women with their babies in prison and disadvantages those who do not have their child with them or do not have children at all. Because more than 80 percent of incarcerated

¹⁶⁵ See Stephen J. Schulhofer, *The Feminist Challenge In Criminal Law*, 143 U. PA. L. REV. 2151, 2205 (1995).

It makes little sense to deny women programs they do want (like courses in child rearing and prenatal care) just because such programs are not offered to or demanded by men. Inmate needs and preferences are one helpful measure of the kinds of services that should be offered . . . Preparation for jobs and the enhancement of marketable skills should be priorities. Yet effective pursuit of these goals will sometimes require different programs for the women.

Id.

¹⁶⁶ See Seldin, *supra* note 7, at 17 (finding that in 1983, 70% of prisoners are fathers, while only 19% are mothers).

¹⁶⁷ When the mother is imprisoned the child is usually in state custody. Therefore, the welfare department must bring the child to see its mother. See *id.*

¹⁶⁸ See Raeder, *supra* note 10, at 955.

¹⁶⁹ Both The Bedford Hills Facility and The Nebraska Correctional Facility house female inmates who do not have children in the prison nursery. See generally Hewitt, *supra* note 17; Willens, *supra* note 73.

¹⁷⁰ See LaRosa, *supra* note 68.

¹⁷¹ See Dowling, *supra* note 6, at 87.

women are mothers,¹⁷² the majority of female inmates will not be afforded the same treatment. Mothers that are not permitted to have their child in prison with them will not experience the same perks as those mothers that do.

However, because courts may consider "extraordinary" family circumstances when sentencing female offenders, prison nurseries may actually help equalize sentences. *United States v. Johnson*,¹⁷³ is an excellent illustration of this concept. In *Johnson*, the court departed from the sentencing guidelines due to "extraordinary family circumstances."¹⁷⁴ Johnson was a single parent who cared for her three young children and two children of Johnson's institutionalized daughter.¹⁷⁵ The court concluded that in order to prevent ruining the lives of Johnson's dependents, this departure was permissible.¹⁷⁶ Had there been the option of a prison nursery, Johnson may have been sentenced to prison with her child or children and thus would have received a sentence more akin to her co-defendant's. Therefore, the court's departure from the sentencing guidelines based on motherhood unfairly discriminates against other similarly situated female defendants, and disproportionately sentences women who do not have children. By instituting prison nurseries, these mothers can be sentenced to more time in prison without disrupting the child's life.

CONCLUSION

Children can offer humanity to an otherwise tense and hostile environment. Mothers can tend to their child's needs by having others oversee the relationship and intervene to teach them the right way to care for the child. Prison nurseries help the psyche and progress of the mother and offer a sense of stability for the child. Children should not be punished for the crimes of their mother. A criminal justice system which advocates and implements prison nurseries will ultimately ease the pain caused by incarceration for the child and better prepare the mother for life outside the prison walls.

Prison nurseries are still a relatively new concept. The criminal justice system, as a whole, needs to seriously consider where its implementation will be most beneficial and where it will not be.

¹⁷² See Brooks & Bahna, *supra* note 16, at 271.

¹⁷³ 964 F.2d 124 (2d Cir. 1992) (granting different sentences to two female co-defendants because one of the women had children).

¹⁷⁴ *Id.* at 128-29. See discussion *supra* Part II.

¹⁷⁵ See *Johnson*, 964 F.2d at 129.

¹⁷⁶ See *id.*

Prison nurseries may provide some of the answers plaguing our society and it just may be the necessary solution to keep our justice system working.

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