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Can Life in Prison be in the Best Interests of the Child?

CARMEN HAMPER*

I. INTRODUCTION

In July 2013, I attended a criminal trial in Kigali, Rwanda. I was surprised when I saw a group of women in pink uniforms with shaven heads—indications that they were detainees¹—accompanied by several infants. I asked the lawyer I was with whether the infants lived with their mothers in prison, and he replied: “Of course! Where else would they go?” He was just as shocked as I had been at the idea of children in prison when he learned that, in the United States, the children of women who are incarcerated generally go into state custody when there is no relative available or willing to care for them.² We discussed the differences in the roles of mothers and the goals of incarceration in each of our countries, and I decided to explore the practices of other countries around the world. While it shocks the conscience of most U.S. citizens, is it possible that Rwanda (and the majority of nations in the world) are acting in “the best interests of the child” when they allow infants to co-reside with their mothers in prison? Could such practices be ethical?

This paper will explore how separation, or, alternatively, prison nursery programs affect the best interests of the child, the fundamental rights of parents, and the state interests in rehabilitation and deterrence.³ Additionally, this paper will examine the history of prison nurseries in the United States, their resurgence, and the arguments for and against implementing them.⁴ This paper will draw on the examples of New York and Massachusetts in the United States, and Germany and Spain in Europe to determine the best practices.⁵ Finally, this paper will conclude with a

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1. *Rwanda Terror Trial of Victoire to Proceed*, BBC NEWS AFRICA (Sept. 5, 2011), <http://www.bbc.co.uk/news/world-africa-14789140>.

2. 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, 376, 379 (2013).

3. *See infra* Part III-IV.

4. *See infra* Part V.

5. *See infra* Part VI.

recommendation on how U.S. correctional facilities for women can implement effective prison nurseries that respect the fundamental rights of mothers, preserve the state's interest in deterrence and rehabilitation of criminals, and, above all, protect the best interests of the children involved.⁶

II. DETERMINING THE BEST INTERESTS OF THE CHILD

The United Nations ("UN") believes that "[t]he removal of children from their parents without justification is one of the gravest violations that can be perpetrated against children,"⁷ and separation should only be a "measure of last resort."⁸ The United Nations Convention on the Rights of the Child ("UNCRC"), while never ratified by the United States,⁹ still demonstrates the overwhelming consensus of the international community with respect to children's rights.¹⁰ All 194 members of the United Nations are parties to the UNCRC, with the exceptions of the United States and Somalia, giving it considerable weight in international discourse.¹¹

The UNCRC provides generally that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.*"¹² It provides specifically that a child should "not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is *necessary for the best interests of the child.*"¹³ If separation occurs, "State Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, *except if it is contrary to the child's best interests.*"¹⁴ Thus, the best interests of the child should be the primary consideration when evaluating prison nursery programs.¹⁵

Most legal systems in the world consider "the best interests of the child" ("BIC") when making decisions that affect a child's well-being and safety.¹⁶

6. See *infra* Part VIII.

7. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, GUIDELINES ON DETERMINING THE BEST INTERESTS OF THE CHILD 38 (2008).

8. BEST INTERESTS, *supra* note 7, at 39.

9. Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After Roper*, 47 B.C. L. REV. 1083, 1115 (2006).

10. United Nations Convention on the Rights of the Child, art. 3(1), *opened for signature* 20 November 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter "UNCRC"].

11. Massey, *supra* note 9, at 1115.

12. UNCRC, *supra* note 10, at art. 3 (emphasis added).

13. UNCRC, *supra* note 10, at art. 9 (emphasis added).

14. *Id.*

15. See Gilad, *supra* note 2, at 380.

16. *Id.*

In fact, every U.S. state and the District of Columbia, along with federal courts, including the U.S. Supreme Court, require BIC analysis when determining child placement or custody.¹⁷ The factors that each court considers in making a BIC determination are varied, but “courts typically focus on the promotion of the child’s well-being, ultimate safety, appropriate care, and developmental and psychological needs.”¹⁸ Family law expert, John Eekelaar, defines the BIC as “[b]asic interests, for example to physical, emotional and intellectual care; developmental interests, to enter adulthood as far as possible without disadvantage; autonomy interests, especially the freedom to choose a lifestyle of their own.”¹⁹

The U.S. Department of Health and Human Services describes the best interests of the child as “the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child.”²⁰ It says the guiding principles of BIC are:

- The importance of family integrity and preference for avoiding removal of the child from his/her home. . . ;
- The health, safety, and/or protection of the child. . . ;
- The importance of timely permanency decisions. . . ;
- The assurance that a child removed from his/her home will be given care, treatment, and guidance that will assist the child in developing into a self-sufficient adult. . .²¹

The most common factors used by U.S. courts include:

- The emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers . . . ;
- The capacity of the parents to provide a safe home and adequate food, clothing, and medical care . . . ;
- The mental and physical health needs of the child . . . ;

17. *Id.*

18. *Id.*

19. Ria Wolleswinkel, *Children of Imprisoned Parents*, in DEVELOPMENTAL AND AUTONOMY RIGHTS OF CHILDREN: EMPOWERING CHILDREN, CAREGIVERS, AND COMMUNITIES 191, 195 (Jan C.M. Willems ed., 2002).

20. U.S. DEPT. OF HEALTH AND HUMAN SERV., DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf.

21. *Id.* at 2.

- The mental and physical health of the parents . . . ;
- The presence of domestic violence in the home²²

Some states also consider: “federal and state constitutional protections;” “the importance of maintaining sibling and other close family bonds;” and “the child’s wishes,” taking into consideration his or her age and maturity.²³ The UN conceives of “best interests of the child” as the “well-being of a child . . . [as] determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child’s environment and experiences,”²⁴ balanced against “the rights and duties of his or her parents”²⁵

In determining whether life in prison is in the best interests of the child, we must balance the child’s interest in attaching to his or her mother against the child’s interest in being free from confinement and being raised in a more conventionally appropriate setting.²⁶ For the purposes of this paper, the BIC requires a consideration of: (a) the family relationships of the child, (b) the physical health and safety of the child, and (c) the emotional well-being of the child.

III. EFFECTS OF SEPARATION

A. *Effects of Separation on Children*

It has been established that “the number one social achievement of infancy” is attachment.²⁷ Attachment is the “intense infant-parent bond that children develop during their first twelve months of life.”²⁸ A “secure attachment” establishes a “secure base from which [children can] explore their surroundings.”²⁹ In order to form attachment, there must be familiarity and physical contact.³⁰ The connection must also be continuous.³¹ Attachment is vital because it creates the model for the infant’s behavior in

22. *Id.* at 3.

23. *Id.* at 4-5.

24. BEST INTERESTS, *supra* note 7, at 14.

25. UNCRC, *supra* note 10, at art. 3(2).

26. *See* Gilad, *supra* note 2, at 383.

27. Megan McMillen, Note, *I Need to Feel Your Touch: Allowing Newborns and Infants Contact Visitation With Jailed Parents*, 2012 U. ILL. L. REV. 1811, 1822 (2012) (quoting DAVID G. MYERS, *PSYCHOLOGY: SEVENTH EDITION IN MODULES 141, 147* (2004)).

28. *Id.* at 1822.

29. Joseph Murray & Lynne Murray, *Parental Incarceration, Attachment and Child Psychopathology*, 12 ATTACHMENT & HUM. DEV. 289, 292 (2010).

30. McMillen, *supra* note 28, at 1822.

31. Jessica Y. Kim, Note, *In-Prison Day Care: A Correctional Alternative for Women Offenders*, 7 CARDOZO WOMEN’S L.J. 221, 228 (2001).

future relationships.³² “As children grow, they continue to filter their experience through the models created during infancy. For this reason, the effects of positive or negative experiences occurring during infancy are powerful and long lasting, even in the face of drastic changes later in life.”³³ Attachment usually occurs (or fails to occur) by the time an infant is seven months old.³⁴ If a child has not formed attachment after two years of age, studies show that he or she likely never will.³⁵ Thus, separating a mother and an infant “who are still in the process of becoming attached . . . can lead to severe trauma and insecure attachment.”³⁶

The longer a mother and child are separated, the more damage is done.³⁷ Insecure attachments lead to myriad of problems for the children.³⁸ They are prone to fear and mistrust,³⁹ aggression,⁴⁰ unhealthy dependence,⁴¹ delinquency,⁴² poor performance in school,⁴³ mental illness,⁴⁴ sleeping disorders,⁴⁵ eating disorders,⁴⁶ sexual promiscuity,⁴⁷ drug and alcohol abuse,⁴⁸ and other criminal behavior.⁴⁹

Children of incarcerated parents not only face problems related to their lack of attachment at a young age, they also face discrimination and stigma.⁵⁰ Peers and authority figures often stigmatize children whose parents are incarcerated.⁵¹ Some family members lie about the parents’

32. Lorie Smith Goshin & Mary Woods Byrne, *Converging Streams of Opportunity for Prison Nursery Programs in the United States*, 48 J. OFFENDER REHABILITATION 271, 288 (2009).

33. *Id.*

34. Mary V. Deck, *Incarcerated Mothers and Their Infants: Separation or Legislation?*, 39 B.C. L. REV. 689, 694 (1988).

35. *Id.*

36. McMillen, *supra* note 28, at 1822.

37. Joseph R. Carlson, *Prison Nursery 2000: A Five-Year Review of the Prison Nursery at the Nebraska Correctional Center for Women*, 33 J. OFFENDER REHABILITATION 75, 77 (2001).

38. Murray, *supra* note 30, at 296.

39. McMillen, *supra* note 28, at 1825.

40. Gilad, *supra* note 2, at 381.

41. Danielle H. Dallaire, *Children with Incarcerated Mothers: Developmental Outcomes, Special Challenges and Recommendations*, 28 J. APPLIED DEVELOPMENTAL PSYCHOL. 15, 16 (2007); McMillen, *supra* note 28, at 1824 (quoting THOMAS F. OLTMANN & ROBERT E. EMERY, *ABNORMAL PSYCHOLOGY: CUSTOM EDITION FOR UNIVERSITY OF ILLINOIS* 54, 54 (2004)).

42. Goshin, *supra* note 33, at 280.

43. Barbara J. Myers et al., *Children of Incarcerated Mothers*, 8 J. CHILD & FAM. STUD. 11, 19 (1999).

44. Goshin, *supra* note 33, at 280.

45. Gilad, *supra* note 2, at 381.

46. *Id.*

47. *Id.*

48. *Id.*

49. Anne E. Jbara, Note, *The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Programs*, 87 IND. L.J. 1825, 1826 (2012).

50. Myers, *supra* note 44, at 20.

51. *Id.*

whereabouts to try to protect the children.⁵² This stigma further contributes to attachment insecurity because “[f]irst, it reduces open communication between children, caregivers, and parents Second, stigma . . . negatively affect[s] children’s representations of their incarcerated parent. [And] [t]hird, stigma . . . reduce[s] the social support that could provide caregivers with resources to respond effectively to the child.”⁵³

In addition, it has often been said that children whose parents are incarcerated are six times more likely to become incarcerated later in life.⁵⁴ For these reasons, the UN Committee for the Rights of the Child deemed children whose mothers are incarcerated “one of the most vulnerable and at risk populations.”⁵⁵

B. *Effects of Separation on Mothers*

In the last thirty years, the population of female prisoners “has increased by more than 320%.”⁵⁶ Over half of those imprisoned women have at least one minor child (under the age of eighteen).⁵⁷ Most are the sole caregivers, whose children lived with them prior to imprisonment.⁵⁸ An estimated 250,000 minor children are currently in jail or prison:⁵⁹ roughly three percent of American children.⁶⁰ Denise Johnston reported that women who request the services of the Center for Children of Incarcerated Parents in Los Angeles were primarily seeking contact with their children, parent-child visitation, and reunification;⁶¹ further proof that incarcerated mothers “overwhelmingly desire to maintain ties with their children.”⁶²

Incarcerated mothers report that separation from their children “was the most traumatic aspect of incarceration,”⁶³ and many experience separation anxiety.⁶⁴ In one study, almost seventy percent of mothers said “they felt guilty about their circumstances and worried for their child.”⁶⁵ Mothers who were the primary caregivers prior to their imprisonment “may suffer

52. Murray, *supra* note 30, at 293.

53. *Id.* at 294.

54. Myers, *supra* note 44, at 19.

55. Gilad, *supra* note 2, at 380; Dallaire, *supra* note 42, at 16.

56. Gilad, *supra* note 2, at 372.

57. M.W. Byrne et al., *Intergenerational Transmission of Attachment for Infants Raised in a Prison Nursery*, 12 ATTACHMENT AND HUM. DEV. 375, 376 (2010); Jbara, *supra* note 50, at 1826-27.

58. Kim, *supra* note 32, at 227.

59. Gilad, *supra* note 2, at 372.

60. McMillen, *supra* note 28, at 1820.

61. Denise Johnston, *Child Custody Issues of Women Prisoners: A Preliminary Report from the Chicas Project*, 75 PRISON J. 222, 232 (1995).

62. Goshin, *supra* note 33, at 275.

63. Byrne, *supra* note 58, at 376.

64. Kim, *supra* note 32, at 228.

65. Jbara, *supra* note 50, at 1830.

mentally and emotionally as a result of missing out on their children's daily lives and losing an opportunity to participate in their upbringing.⁶⁶ Many become severely depressed.⁶⁷ Conversely, women who are able to communicate with their children while imprisoned have better mental health than other prisoners.⁶⁸

IV. PARENTAL RIGHTS

A. Parental Rights in the United States

Mothers have fundamental parental rights under both state and federal law.⁶⁹ At the state level, “[t]here is no basis for denying initial legal parent status to her; in particular, there is no exclusion based on unfitness or incapacity.”⁷⁰ States rarely take parental status “as a result of parental incarceration per se because typically, in most states, child welfare agencies are not involved when a child is born to a woman already in prison.”⁷¹

The U.S. Supreme Court has also noted the fundamental importance of the family and parental rights.⁷² In *Michael H. v. Gerald D.*,⁷³ the Court held that “the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”⁷⁴ In *Troxel v. Granville*,⁷⁵ the Court held that a Washington statute that “allowed courts to overturn any parental decision that violated the visitation interests of third parties was unconstitutional because it violated the fundamental rights of the petitioner to make parental decisions about the rearing of her children.”⁷⁶ The Court has recognized that “[t]he rights to conceive and to raise one’s children [are] essential [and] basic civil rights of man.”⁷⁷ Further, the Court has held that parents have “a fundamental liberty interest in the custody and care of their children,” which the Fourteenth Amendment protects.⁷⁸ Therefore, there must be a

66. *Id.* at 1827.

67. *Id.* at 1830.

68. *Id.* at 1829-30.

69. James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465, 476 (2014); Robin Levi et al., *Creating the “Bad Mother”: How the U.S. Approach to Pregnancy in Prisons Violates the Right to be a Mother*, 18 UCLA WOMEN’S L.J. 1, 16 (2010).

70. Dwyer, *supra* note 70, at 476.

71. *Id.*

72. *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989).

73. *Id.*

74. *Id.* at 124 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1938)).

75. 530 U.S. 57 (2000).

76. Levi, *supra* note 70, at 22(citing *Troxel*, 530 U.S. at 71-72).

77. Gilad, *supra* note 2, at 385 (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); *see also* *May v. Anderson*, 345 U.S. 528, 534 (1953); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

78. Gilad, *supra* note 2, at 385.

compelling state interest before the State may interfere.⁷⁹ Such rights do “not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”⁸⁰

B. Parental Rights in the International Community

Many human rights treaties and governmental documents are very protective of the future success of the family unit.⁸¹ Article 16(3) to the UN Declaration of Human Rights (“UDHR”) provides that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁸² Further, “[m]otherhood and childhood are entitled to special care and assistance.”⁸³ The International Convention on Civil and Political Rights (“ICCPR”) also deems the family the “fundamental group unit of society and provides that the state has affirmative obligations to protect the right to family,”⁸⁴ as well as prohibits “arbitrary or unlawful interference” with his or her family.⁸⁵

The UNCRC likewise considers the family “the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children[.]”⁸⁶ As such, the family requires special protection and assistance.⁸⁷ Accordingly, every effort should be made to allow a child to “grow up in a family environment, in an atmosphere of happiness, love and understanding” to ensure “full and harmonious development of his or her personality.”⁸⁸ UN members are also required to “respect the responsibilities, rights and duties of parents.”⁸⁹ Above all else, the UNCRC requires that the BIC be considered in making determinations about parental rights.⁹⁰

It seems clear that “[i]ncarceration deprives a mother of this fundamental right[;]” a right she is owed by the United States’ own law and its international obligation.⁹¹ Separation hampers children’s development

79. Levi, *supra* note 70, at 21-22; Gilad, *supra* note 2, at 386.

80. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

81. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), at preamble (Dec. 10, 1948) [hereinafter UDHR].

82. *Id.* at art. 16(3).

83. *Id.* at art. 25(2).

84. Levi, *supra* note 70, at 64 (quoting International Covenant on Civil and Political Rights, art. 23, 6, Dec. 16, 1966, 1966 U.S.T. 521, 999 U.N.T.S. 171 [hereinafter ICCPR]).

85. ICCPR, *supra* note 85, at art. 17.

86. UNCRC, *supra* note 10, at preamble.

87. *Id.*

88. *Id.*

89. *Id.* at art. 5.

90. *Id.* at art. 3 (1).

91. Gilad, *supra* note 2, at 386.

and violates the fundamental rights of incarcerated parents.⁹² So what is the solution?

V. HISTORY OF PRISON NURSERIES IN THE UNITED STATES

A. *Prison Nurseries in the United States Generally*

Prison nurseries can further the state's interest in deterrence and rehabilitation of prisoners, while still fulfilling its obligation to serve the BIC.⁹³ Prison nurseries are arrangements within correctional facilities that allow an incarcerated mother to live with her infant as the child's primary caregiver.⁹⁴ The goals prison nurseries are:

to provide an opportunity for bonding[,] . . . facilitate the change of the inmate mother to a responsible parent, aid in the development of realistic expectations . . . provide for prenatal and infant health, and provide intervention in breaking the cycle of generational abuse and incarceration.⁹⁵

While the idea of babies in prison seems shocking, “policies allowing the incarcerated mother to live with her infant persist as the norm internationally and were a common way of dealing with this group of prisoners in the US from the beginning to the middle of the 20th Century.”⁹⁶ The federal government permitted children to stay with their mothers in the prison in Alderson, West Virginia from 1930 to 1960.⁹⁷ In the 1950s, thirteen states allowed prison nurseries.⁹⁸ By the 1960s, however, most had repealed the legislation.⁹⁹ In the 1980s, prison nurseries were seen as theoretically ideal, but prisons lacked the funding to implement them.¹⁰⁰ Prison nurseries have begun to resurge in popularity as the female prison populations grow.¹⁰¹ In 2010, the U.S. Department of Justice “issued a call for grant proposals to develop more prison nursery programs . . .”¹⁰²

92. *Id.* at 375, 389.

93. Goshin, *supra* note 33, at 271-72.

94. Goshin & Byrne, *supra* note 33, at 271; Byrne, *supra* note 58, at 377.

95. Carlson, *supra* note 38, at 84.

96. Goshin, *supra* note 33, at 272.

97. Susan C. Craig, *A Historical Review of Mother and Child Programs for Incarcerated Women*, 89 PRISON J. 35S, 43S (2009).

98. *Id.* at 44S.

99. *Id.* at 45S.

100. *Id.* at 46S.

101. *Id.*

102. Dwyer, *supra* note 70, at 471.

Nonetheless, most state statutes currently mandate that “infants be removed from their mothers immediately upon the mother’s incarceration.”¹⁰³

Most prison nurseries allow infants to stay “an average of twelve to twenty-four months[.]”¹⁰⁴ South Dakota allows the shortest stay, only thirty days, and Washington allows the longest stay, up to three years.¹⁰⁵ While in some cases incarcerated mothers share private rooms with their infants,¹⁰⁶ most prison nurseries are segregated from the general prison population.¹⁰⁷ Additionally, most prison nursery facilities are specially equipped for children and have medical and counseling staff.¹⁰⁸ Nursery programs “focus on developing the relationship between incarcerated mothers and their infants, promoting child development, and providing the mother with parenting and life skills education.”¹⁰⁹

Most programs actually require mothers to participate in General Educational Development (“GED”) courses, parenting classes, counseling, and rehabilitation programs.¹¹⁰ The nurseries in California, Indiana, New York, Ohio, South Dakota, and Washington mandate both pre-natal and post-natal parenting classes.¹¹¹ Some institutions require mothers to be in work programs, as well.¹¹² Mothers must behave and follow the institution’s rules.¹¹³

To be eligible for prison nursery programs, women generally must have been convicted for nonviolent crimes,¹¹⁴ must be serving short sentences,¹¹⁵ must not have any history of child abuse or neglect,¹¹⁶ and must be planning to become the child’s primary caregiver upon release.¹¹⁷ For the infant to be eligible for the program, it must be born while the mother is in the state’s custody.¹¹⁸ There are currently prison nursery programs in California, Idaho, Illinois, Indiana, Massachusetts, Nebraska, New York, Ohio, South Dakota, Tennessee, Texas, Washington, and West Virginia.¹¹⁹ Lorie Smith

103. Deck, *supra* note 35, at 697.

104. Gilad, *supra* note 2, at 374.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Goshin, *supra* note 33, at 277.

110. Gilad, *supra* note 2, at 375.

111. Goshin, *supra* note 33, at 273.

112. Carlson, *supra* note 38, at 84.

113. *Id.*

114. *Id.*

115. Gilad, *supra* note 2, at 374.

116. *Id.*

117. *Id.*

118. *Id.*

119. THE REBECCA PROJECT FOR HUMAN RIGHTS, *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* 20 (2010).

Goshin and Mary Woods Byrne provide an excellent summary, albeit a slightly outdated one, of the prison nursery programs in the United States in their article *Converging Streams of Opportunity for Prison Nursery Programs in the United States*.¹²⁰ A few such programs will be discussed below.

B. Massachusetts

The National Women's Law Center and the Rebecca Project for Human Rights jointly analyzed states' treatment of pregnant women and inmates' parenting responsibilities in 2010.¹²¹ In assessing prison nurseries, the researchers looked at whether the program is community based, the age at which the child must leave the program, whether the program provides therapeutic services for the mother and/or the child, and whether the program places focus on improving the mother-child relationship. Massachusetts is the only state that received a grade of A.¹²²

Massachusetts opened the Spectrum Women and Children Program in Westborough, Massachusetts in 1989.¹²³ It houses thirteen women and their children up to two years of age.¹²⁴ Rather than being an actual nursery inside a prison, it is a community-based residential parenting program.¹²⁵ It is specifically designed for women who have a history of substance abuse.¹²⁶ Additionally, the participants must not have been convicted of violent crimes or have any serious mental health issues that could threaten the child's safety.¹²⁷ Women are required to participate in "recovery groups, individual counseling, treatment planning and recreational activities."¹²⁸ Each mother's progress is evaluated once a month.¹²⁹ The team also helps the mother plan for after her release "in order to ensure continued treatment and prevent relapse following discharge from the program."¹³⁰

120. See Goshin, *supra* note 33, at 271.

121. MOTHERS BEHIND BARS, *supra* note 120, at 5.

122. Illinois Indiana, Nebraska, New York, Ohio, and Tennessee received a grade of B. California, Idaho, South Dakota, Washington, and West Virginia received a grade of C. Texas received a grade of D. *Id.* at 20.

123. WOMEN'S PRISON ASSOCIATION, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 32 (2009) [hereinafter NATIONAL LOOK].

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Residential Treatment, SPECTRUM HEALTH SYSTEMS*, <http://www.spectrumhealthsystems.org/programs/residential-treatment> (last visited May 13, 2014).

129. *Id.*

130. *Id.*

C. *Prison Nurseries in New York*

New York received a grade of B for its two prison nurseries.¹³¹ The Bedford Hills facility in New York was the first prison nursery in the United States; it has been continuously operating since 1901.¹³² Its Children's Center Nursery Program can hold up to twenty-nine children.¹³³ The facility provides all the supplies the mothers need, "including diapers, strollers, baby food, formula, and health care."¹³⁴ The Taconic Correctional Facility's nursery program was opened in 1990.¹³⁵ It can house up to fifteen children.¹³⁶

At both nurseries, children are only permitted to stay for twelve months,¹³⁷ although this time can be extended by up to six months if the mother is expected to be released in that time.¹³⁸ New York is the only state that allows women to bring children who were already born to prison with them, rather than requiring that the children be born in prison to qualify for the program.¹³⁹ Mothers can only be admitted if they pass physical and mental health screenings.¹⁴⁰ They must never have been convicted of child abuse or arson,¹⁴¹ but may be admitted on a case-by-case basis if they have been convicted of other violent crimes.¹⁴²

VI. COMPARATIVE ANALYSIS: EUROPE

A. *Prison Nurseries in Europe Generally*

In a survey of seventy nations in 2006, only four separated imprisoned mothers and their infants: Suriname, Liberia, the Bahamas, and the United States.¹⁴³ Prison nurseries are therefore the norm in most of the world, and in "some parts of Europe, Central America, and the non-Western world, children can co-reside in prisons through their preschool years."¹⁴⁴

131. MOTHERS BEHIND BARS, *supra* note 120, at 20.

132. Leda M. Pojman, *Cuffed Love: Do Prison Babies Ever Smile?*, 10 BUFF. WOMEN'S L. J. 46, 52 (2002).

133. NATIONAL LOOK, *supra* note 124, at 28.

134. Nicole S. Mauskopf, *Reaching Beyond the Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN'S L.J. 101, 108 (1998).

135. Lorie S. Goshin, *Behavior Problems and Competence in Preschoolers Who Spent Their First One to Eighteen Months in a Prison Nursery Program* 35 (2010) (Ph.D. dissertation, Columbia University) [hereinafter *Behavior Problems*].

136. *Id.*

137. *Id.*

138. Pojman, *supra* note 133, at 52.

139. *Behavior Problems*, *supra* note 136, at 35.

140. *Id.*

141. NATIONAL LOOK, *supra* note 124, at 32.

142. *Behavior Problems*, *supra* note 136, at 35.

143. Byrne, *supra* note 58, at 377.

144. *Id.*

Most prison nurseries in Europe operate similarly to those in the United States.¹⁴⁵ Michael Gilad and Tal Gat identify several key differences in their article *U.S. v. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women*.¹⁴⁶ First, only thirteen states have programs with a combined capacity of 150 mothers, in contrast to Europe, where almost every country has a formal program, and there is a combined capacity of over 400 pairs.¹⁴⁷ Second, the maximum age limit “rang[es] from six-months old in the Netherlands and Hungary to six-years old in Germany,” with the most common maximum age being three-years old.¹⁴⁸ The age limits are not as strict as in the United States, and can be stretched if it is found to be in the BIC.¹⁴⁹ Only one state in the United States allows children to stay until three-years old, and “the most common maximum age is eighteen months.”¹⁵⁰ Third, in contrast to all U.S. programs except New York, children who were not born in prison can join their mothers in prison if they are under the maximum age limit in most European countries.¹⁵¹

Two countries in Europe have particularly stood out when compared to the United States.¹⁵² Germany has been an example for creating child-centered prison programs for nearly a century.¹⁵³ Spain has recently pioneered new ways to help reintegrate women into society while preparing and enabling them to be good mothers.¹⁵⁴

B. Spain

Spain, like most other European nations, prioritizes reintegration as part of its imprisonment policies.¹⁵⁵ In 2004, the newly elected Spanish Socialist Workers’ Party promised to remove all children from prisons.¹⁵⁶ As a result, the Department of Prisons decided to end prison nurseries and instead create External Mother Units outside of the prisons.¹⁵⁷ The goal of the units is to “improve the conditions for the physical, psychological, and

145. Gilad, *supra* note 2, at 396.

146. *Id.* at 371.

147. *Id.* at 396.

148. *Id.*

149. *Id.* at 396-97.

150. Gilad, *supra* note 2, at 396.

151. *Id.* at 396-97.

152. *See infra* Part VI.B.C.

153. Gilad, *supra* note 2, at 384, 396.

154. Sophie Feintuch, Power, Perceptions, and Incarceration: An Analysis of Spain’s New External Units for Imprisoned Mothers and Children 31 (2013) (M.A. thesis, Central European University).

155. *Id.*

156. *Id.* at 29.

157. *Id.*

mental development of children in prison” and help normalize their lives.¹⁵⁸ As of 2011, there were 227 children living with their mothers in prison nurseries, the family unit, halfway houses, and the external mother units.¹⁵⁹

1. External Mother Units

Women who are pregnant or have children under the age of three may enter the program.¹⁶⁰ “[P]risoners awaiting sentences, women convicted of extremely serious crimes, and women with long sentences who tried to escape” are not eligible for the program.¹⁶¹ To participate in the units, the “women must commit to forming part of a respectful atmosphere, not use drugs, and work towards getting an education and recreating their lives.”¹⁶² They must also take part in parenting classes consisting of “courses, workshops, and lectures on comprehensive childcare, baby care, sexual health education, legal family law training, psychomotor skill development, early stimulation techniques, and birthing.”¹⁶³ Other courses are available, and in some cases, mandated, including literacy classes, education, job training, social skills classes, drug therapy, and support groups.¹⁶⁴ Additionally, “a treatment team frequently reviews each child’s case” in order “[t]o ensure that children only enter and remain in the facilities when it is in their best interest.”¹⁶⁵ If it is no longer in the child’s best interests, the team will arrange an alternative living situation for the child.¹⁶⁶

Each mother and child pairing is given an apartment consisting of a bathroom and microwave.¹⁶⁷ The facilities include a community playground and indoor playroom for the children to share.¹⁶⁸ There are no bars on the windows or electric doors.¹⁶⁹ The security is discrete so that children do not feel they are in prison.¹⁷⁰ “[G]uards lock each mother’s ‘apartment’ with a key at night and observe them during the day through surveillance cameras, alarms, and motion sensors.”¹⁷¹ The officers wear

158. *Id.* at 31.

159. Feintuch, *supra* note 155, at 35.

160. *Id.* at 34.

161. *Id.*

162. *Id.*

163. *Id.* at 32.

164. Feintuch, *supra* note 155, at 32.

165. *Id.* at 34.

166. *Id.*

167. *Id.* at 31.

168. *Id.* at 33.

169. Feintuch, *supra* note 155, at 31-32.

170. *Id.* at 32.

171. *Id.*

plainclothes, and use terms like “home” instead of “cell” or “prison” to promote a child-friendly environment.¹⁷²

The women are permitted to leave the premises to take their children for visits to the doctor, community parks, and to spend time with other family members.¹⁷³ They are also permitted to take classes or work in the community, as long as these activities do not conflict with their parenting responsibilities.¹⁷⁴ The children are further encouraged to spend weekends or vacations with other family members outside the units.¹⁷⁵ “[C]ontact visit[ation]” in the units is both available and encouraged.¹⁷⁶

While these programs are new, their administrators are very optimistic.¹⁷⁷ “Concepción Yagüe Olmos, the co-director of prison treatment and one of the unit’s creators, said the External Mother Unit is a ‘giant penitentiary step.’”¹⁷⁸ She believes these units are a compromise that helps avoid the two evils of imprisoning children and separating them from their mothers.¹⁷⁹ Rosa María Tomás Corruçhaga, the director of the External Mother Unit in Palma, says the programs are important because they encourage women to “look outward toward their community and future” instead of “dwelling on their pasts and where they have ended up.”¹⁸⁰ Overall, the units are seen “as a great improvement over prison nurseries, specifically in the freedom and community contact they afford the women and children.”¹⁸¹ They have also been described as “a pioneer initiative in Europe.”¹⁸²

2. The Family Unit

Aranjuez Prison “is the only . . . one in the world with cells for families.”¹⁸³ “All candidates have to pass a two-month observation period to prove they are prepared to live together as couples and raise a child.”¹⁸⁴ The units are specifically meant to welcome children, and are even

172. Sophie Feintuch, *New Spanish Practice Aims to Break the Cycle Among Mothers and Children*, CORRECTIONS TODAY, Dec. 2010, at 38 [hereinafter *New Spanish Practice*].

173. Feintuch, *supra* note 155, at 33.

174. *Id.* at 32.

175. *Id.* at 33.

176. *Id.*

177. *New Spanish Practice*, *supra* note 173, at 42.

178. *Id.* at 38.

179. *Id.*

180. *Id.* at 41.

181. *Id.* at 42.

182. Lorana Bartels & Antonette Gaffney, *Good Practice in Women’s Prisons: A Literature Review*, AUSTRALIAN INST. CRIMINOLOGY, TECHNICAL AND BACKGROUND PAPER No. 41, 2011, at 66.

183. Mar Roman, *Toddlers Behind Bars: Spanish Prison Offers Family Cells for Couples with Children*, USA TODAY (Feb. 7, 2007), http://usatoday30.usatoday.com/news/offbeat/2007-02-10-familyprison_x.htm.

184. *Id.*

decorated with Disney characters.¹⁸⁵ Each unit has a bed, a crib, toys, and a small bathroom.¹⁸⁶ One mother said, “[i]t’s all child-oriented. It’s clean, they give you the best milk for the child, the doctor comes twice a week and the rooms are beautiful . . . [t]he only thing that reminds me I’m in jail is the roll call three times a day.”¹⁸⁷

Despite the efforts to make it comfortable for children, both participants and prison staff lament that it is still not the ideal location for children.¹⁸⁸ The family is locked into its unit at 9:00 p.m. each night.¹⁸⁹ One mother stated, “this is not the best place to bring up a child. In some ways they are imprisoned too.”¹⁹⁰ Regardless, she feels it is preferable to separation.¹⁹¹

C. Germany

German principles regarding imprisonment are markedly different from those of the United States.¹⁹² First, Germany attempts to imprison convicts as close to their families as possible.¹⁹³ Second, and more importantly, Germany tries to “normalize” every aspect of the prison experience, including contact with family members, in order “to enable prisoners to lead a life of social responsibility without committing criminal offences.”¹⁹⁴ Germany’s unique prison nursery programs at Justizvollzugsanstalt Preungesheim (“Preungesheim”) and Justizvollzugsanstalt Frodenberg clearly manifest this foundation.¹⁹⁵

1. Preungesheim

Preungesheim is an all-women, maximum security prison.¹⁹⁶ It has been described as “[p]erhaps the most comprehensive program anywhere in the world for incarcerated mothers and their children.”¹⁹⁷ High security inmates may only have their children up to age three living with them, while

185. *Id.*

186. *Id.*

187. *Id.*

188. Roman, *supra* note 184.

189. *Id.*

190. *Id.*

191. *Id.*

192. See PRISON REFORM TRUST, INTERNATIONAL GOOD PRACTICE: ALTERNATIVES TO IMPRISONMENT FOR WOMEN OFFENDERS 48 (Sept. 2013), <http://www.prisonreformtrust.org.uk/Portals/0/Documents/international%20good%20practice%20final.pdf>.

193. *See id.*

194. INTERNATIONAL CENTRE FOR PRISON STUDIES, INTERNATIONAL PROFILE OF WOMEN’S PRISONS 42 (April 2008) (quoting QUAKER COUNCIL FOR EUROPEAN AFFAIRS WOMEN IN PRISON: A REVIEW OF THE CONDITIONS IN MEMBER STATES OF THE COUNCIL OF EUROPE (2007)).

195. See PRISON REFORM TRUST, *supra* note 3, at 48-49.

196. *Id.* at 48.

197. Kelsey Kauffman, *Mothers in Prison*, CORRECTIONS TODAY, Feb. 2001, at 64.

lower security inmates may have their children up to age five.¹⁹⁸ The mothers and children are housed in a building separate from the rest of the prison that faces the community.¹⁹⁹ During the day, there are different opportunities for the mothers and children.²⁰⁰ Some children remain with their mothers during the day.²⁰¹ Mothers who work outside the prison leave their children under the supervision of the prison's childcare staff.²⁰²

Additionally, women who are mothers to children outside the prison nursery's age limits may still interact with and care for their children.²⁰³ They are granted twenty-one days of vacation to visit with their children outside of prison.²⁰⁴ "[T]he prison recognizes motherhood as a 'bona fide job'" and allows its inmates to leave daily to care for children and the home outside of prison.²⁰⁵ Kelsey Kauffman describes how this unique work release functions:

On the radical premise that parenting and housework are as valuable labor as working in a factory or fast-food establishment, mothers who are eligible for work release can leave the prison daily to work for their own families. They must rise at 5 a.m. and take public transportation to their children's homes in time to roust them out of bed for school. Once the children are fed, clothed and out the door, mothers are responsible for housekeeping, shopping, and general household management. If they have to leave the house for more than one hour, they must call the prison for permission. When their children return from school, the mothers are responsible for their supervision, doctors' appointments, cooking, homework and all the myriad tasks that consume parents' time and energy. Once their children are tucked into bed, the mothers leave them in the care of another adult family member or caretaker and return to the prison to sleep.²⁰⁶

Women may leave the home while they are on work release, but must acquire permission to leave for more than an hour.²⁰⁷ "This programme

198. PRISON REFORM TRUST, *supra* note 193, at 48.

199. Kauffman, *supra* note 198, at 62.

200. *See id.*

201. *Id.*

202. PRISON REFORM TRUST, *supra* note 193, at 48.

203. Kauffman, *supra* 198, at 62.

204. PRISON REFORM TRUST, *supra* note 193, at 48.

205. Kauffman, *supra* note 198, at 64; *see also* PRISON REFORM TRUST, *supra* note 193, at 48.

206. Kauffman, *supra* note 198, at 64.

207. PRISON REFORM TRUST, *supra* note 193, at 48.

enables women to maintain connection with their children and retain responsibility for their welfare while they serve their sentence.”²⁰⁸

2. Frodenberg

Frodenberg is an open prison that houses women convicted of non-violent crimes, mostly theft and fraud.²⁰⁹ Women may reside there with their children under the age of six.²¹⁰ There are sixteen units,²¹¹ each with a kitchen, bathroom, bedroom, and living room.²¹² The units are meant to look like apartments or dormitories rather than prison cells,²¹³ and there are no bars on the windows, or electric fences.²¹⁴ Prison staff wear plainclothes so that “the environment [is] as normal and unthreatening as possible” for the children.²¹⁵ The “[s]taff are also there to give advice and help to women to raise their children,”²¹⁶ while “support[ing] and strengthen[ing] the mother-child relationship and reinforc[ing] the mother’s authority.”²¹⁷

“The children over the age of two go to the kindergarten while their mothers work” until the afternoon.²¹⁸ The families can watch television in the evenings.²¹⁹ The women may leave the prison for day trips and have twenty-one days of vacation.²²⁰

“[I]f a woman commits an offense, . . . she [will be sent] to a closed prison and separated . . . from her child.”²²¹ Eight participants in the last eleven years were transferred to closed prisons.²²² However, the prison has been extremely successful in protecting children, promoting family relationships, and preventing crime.²²³ Prisoners claim that their children never even notice they are in prison.²²⁴ Frodenberg boasts an extremely low ten percent recidivism rate.²²⁵ Scholars in other countries have also praised Frodenberg’s policies.²²⁶ Helen Fair conducted an international review of

208. *Id.*

209. *Id.* at 48-49.

210. *Id.* at 48.

211. *Id.*

212. INTERNATIONAL CENTRE FOR PRISON STUDIES, *supra* note 195, at 42.

213. *See id.*

214. PRISON REFORM TRUST, *supra* note 193, at 48.

215. *Id.* at 34.

216. INTERNATIONAL CENTRE FOR PRISON STUDIES, *supra* note 195, at 43.

217. PRISON REFORM TRUST, *supra* note 193, at 48.

218. INTERNATIONAL CENTRE FOR PRISON STUDIES, *supra* note 195, at 43.

219. *Id.*

220. *Id.*

221. *Id.*

222. Bartels, *supra* note 183, at 66.

223. *See* INTERNATIONAL CENTRE FOR PRISON STUDIES, *supra* note 195, at 42-43.

224. *Id.* at 42.

225. *Id.* at 43.

226. *See* Helen Fair, *International Review of Women’s Prisons*, 184 PRISON SERVICE 3, 5 (2009); *see also* Bartels, *supra* note 183, at 66.

women's prisons and found that Frodenberg was "the most child-centered system."²²⁷ Lorana Bartels of the University of Canberra and Antonette Gaffney of the Australian Institute of Criminology surveyed several countries' prisons for women to adapt best practices to Australian prisons.²²⁸ They praised Frodenberg's practices of giving each family its own flat and never undermining the women's authority as mothers by punishing them in front of their children.²²⁹

VII. OPPONENTS & PROPONENTS

A. *Arguments in Favor of Prison Nurseries*

Many proponents of prison nursery programs emphasize that "[p]rison nursery programs not only have a strong impact on the mother-child bond, but are necessary for the development of that bond, as most mothers will continue to be the primary caretaker of that child once released."²³⁰ There is empirical research that demonstrates that infants in prison nurseries are more securely attached to their mothers than the children of other incarcerated women in the same facilities.²³¹ A five-year study of children in the New York prison nursery showed that the rate of secure attachment in children in the prison nursery, roughly 60%, was comparable to the average rate of secure attachment in all children, roughly 63%, despite the fact that many of the "[mothers'] own internal attachment representation [were] categorized as insecure."²³² The study also showed a strong correlation between the length of the program and the success of attachment, suggesting that programs should permit children to remain with their mothers in prison for at least one year.²³³

Prison nurseries benefit mothers not only by securing their fundamental rights to custody and care of their children,²³⁴ but also by facilitating their rehabilitation.²³⁵ "[B]y providing the mother an opportunity to care for her child in a supervised and controlled environment [and] offering guidance and training to improve and refine parenting skills," prison nurseries "provid[e] mothers with tools to better cope with parenthood and life following release."²³⁶ Additionally, the strict criteria that are required for

227. Fair, *supra* note 227, at 5.
 228. See Bartels, *supra* note 183, at 66.
 229. *Id.*
 230. Pojman, *supra* note 133, at 61.
 231. Gilad, *supra* note 2, at 382.
 232. Byrne, *supra* note 58, at 386.
 233. *Id.* at 387-88, 390.
 234. Gilad, *supra* note 2, at 385-86.
 235. *Id.*
 236. *Id.* at 387.

women to enter prison nursery programs are “strong incentive[s] for pregnant inmates to make significant rehabilitation efforts during their pregnancy, and join educational and treatment programs in order to prove their eligibility to take part in the nursery program.”²³⁷ Mothers who struggle with addiction are 50% more likely to overcome the addiction if they participate in prison nursery programs and can see the impact of their choices on their children.²³⁸ Facilitating rehabilitation is just one way that prison nursery programs help further the state’s interests and fulfill its duty to protect the BIC.²³⁹

Prison nursery programs not only benefit mothers and children, but they also benefit society as a whole.²⁴⁰ Empirical research shows that mothers who participate in prison nursery programs have lower recidivism rates when compared to other incarcerated women in the same correctional facilities.²⁴¹ A study of the prison nurseries in New York and Washington showed that recidivism rates for participants in both programs were approximately 50% lower.²⁴² Women at the Nebraska Correctional Facility for Women who gave birth in prison before the nursery program was instituted had a 33.33% recidivism rate, while women who participated in the nursery program had only a 9% recidivism rate.²⁴³ One of the newest programs at the Ohio Reformatory for Women can boast that “only 3% of women who participate in the nursery program recidivate, in comparison to the general rate of 38%.”²⁴⁴ Anne Jbara believes the “strong[] sense of attachment to their families” that prison nurseries facilitate is the likely cause of lower recidivism.²⁴⁵ Leda M. Pojman believes this decreased recidivism is caused by “[t]he supportive environment of prison nurser[y] programs].”²⁴⁶

Prison nurseries can provide all these benefits at little to no additional cost to departments of corrections.²⁴⁷ While there are obviously expenses involved, prison nurseries are likely to be less costly than the foster care and welfare support to relatives that would otherwise be caring for the infants.²⁴⁸

237. *Id.*

238. *Id.* (quoting Jordana Hart, *Bill Lets Mothers in Prison Keep Tots, Benefits to Parent and Child Are Cited*, BOSTON GLOBE, June 26, 1997).

239. *See supra* notes 235-239 and accompanying text.

240. Gilad, *supra* note 2, at 372-73.

241. *Id.* at 388-89.

242. Goshin, *supra* note 33, at 276.

243. Carlson, *supra* note 38, at 86.

244. Gilad, *supra* note 6, at 389.

245. Jbara, *supra* note 50, at 1831.

246. Pojman, *supra* note 133, at 63; Goshin, *supra* note 33, at 276 (explaining that the rate of recidivism decreased from 26% to 13% in New York and from 38% to 15% in Washington).

247. *See* Carlson, *supra* note 38, at 80.

248. *Id.* at 87.

For example, the prison nursery in Washington “has not increased cost to the institution” because it uses “social service money received for each child to pay for baby supplies, staffing, developmental support, and health care services through partnerships with community organizations”²⁴⁹

B. Arguments against Prison Nurseries

Opponents of prison nursery programs are usually most concerned that prison is an inappropriate environment for children because it prevents them from participating in everyday activities and interacting with males.²⁵⁰ Many are concerned that children in these programs are “being imprisoned for their mothers’ crimes”²⁵¹ and that confinement in prison nurseries “deprives these children of their fundamental right to physical liberty.”²⁵²

Many states have been hesitant to implement them because of “overcrowding; healthcare and management problems (such as disciplinary actions, segregation of inmate mothers, and pre-release placement of the mother); inadequate facilities; and liability concerns.”²⁵³ Critics are also concerned that paying for children to be imprisoned would offend taxpayers.²⁵⁴

Prison officials often oppose prison nursery programs because they “do not sympathize with an incarcerated mother” whom they think should have thought about her children prior to committing a crime.²⁵⁵ Critics further argue that special treatment, such as prison nurseries, should only be given “as a reward for good behavior on the basis of conduct, rehabilitation efforts, and initiative to change and improve,” instead of on the basis of “a biographical factor.”²⁵⁶ Prison officials also fear that mothers will use their children as a tool to receive these special privileges when it is likely they do not actually care about the children’s well-being.²⁵⁷

William and Mary Professor James Dwyer is arguably the most vocal prison nursery challenger. In his forthcoming article, *Jailing Black Babies*, he contests several claims of prison nursery proponents, and goes so far as to claim that prison nurseries are unconstitutional.²⁵⁸

249. Goshin, *supra* note 33, at 279.

250. Pojman, *supra* note 133, at 65.

251. Jbara, *supra* note 50, at 1825.

252. Gilad, *supra* note 2, at 383.

253. Pojman, *supra* note 133, at 65.

254. Jbara, *supra* note 50, at 1828.

255. Pojman, *supra* note 133, at 64; Jbara, *supra* note 50, at 1844 (quoting David Botkins, a spokesman for the Virginia Department of Corrections).

256. Gilad, *supra* note 2, at 390.

257. *Id.* at 383.

258. Dwyer, *supra* note 70, at 466.

First, he says that it is unrealistic to believe that children can form secure attachment in a prison environment.²⁵⁹ He notes “prisons are typically unhappy, stressful, and dangerous places where most non-incarcerated parents would likely never bring their own children for any reason.”²⁶⁰ Additionally, he states, “the great majority [of incarcerated women] suffer from deep, serious mental healthy problems and addictions and have been involved in criminal activity for a long time,” characteristics that he believes make them unfit mothers.²⁶¹

Second, for many of the same reasons, he argues that participants are unlikely to retain custody of their children after the program, or, are at least unlikely to “consistently provid[e] a safe, stable, and suitable home for the children.”²⁶² He points out that over “a third of incarcerated women who were already mothers were not living with their children at the time of their arrest.”²⁶³ Even if children become attached in prison, he argues, they are likely to be separated once the child reaches a certain age, thus severing any healthy attachment.²⁶⁴

Third, he claims that reports of lower recidivism rates among prison nursery participants are skewed because:

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 length of their sentences.²⁶⁵

In addition to rebutting common claims about the benefits of prison nursery programs, Dwyer makes the bold assertion that they are illegal.²⁶⁶ He explains that there are “constitutional limits on the state’s power to hold people in prison or other state institutions,” which “arise from individuals’ right to liberty and bodily integrity”²⁶⁷ Because “[c]hildren of incarcerated parents do not fall into either of the articulated exceptions [committing a crime or posing a danger] . . . prison nurseries presumptively violate” their fundamental rights.²⁶⁸

259. *Id.* at 494-95.

260. *Id.* at 485.

261. *Id.*

262. *Id.* at 484.

263. Dwyer, *supra* note 70, at 486.

264. *Id.* at 496-97.

265. *Id.* at 503-04.

266. *Id.* at 518.

267. *Id.* at 519.

268. Dwyer, *supra* note 70, at 520.

VIII. PROPOSAL

While the idea of prison nurseries seems shocking, they were the norm in recent U.S. history,²⁶⁹ and continue to be the norm throughout the entire world, in both developing and highly developed countries.²⁷⁰

There is a presumption in international, federal, and state law that the government should not separate a child from his or her parent unless it violates his or her best interests.²⁷¹ In the United States, the government cannot take away parents' rights without a compelling state interest.²⁷² Mere imprisonment is never sufficient to justify taking away parents' rights.²⁷³ Further, international law promotes the family as the most appropriate environment for children to grow, and requires every effort to be made to enable parents to care for their children.²⁷⁴

Determining the BIC involves a balancing test, with the most important factors being (a) the family relationships of the child, (b) the child's physical health and safety, and (c) the child's emotional well-being.²⁷⁵ Uniting a mother and child is more beneficial to the child's family relationships than separation.²⁷⁶ Separation harms both the child and his or her mother.²⁷⁷ The child's failure to attach will severely affect his or her physical and emotional well-being, as insecure attachment leads to fear, mistrust, aggression, unhealthy dependence, delinquency, poor performance in school, mental illness, sleeping disorders, eating disorders, sexual promiscuity, drug and alcohol abuse, and other criminal behavior.²⁷⁸ Mothers suffer from mental problems brought on by guilt, separation anxiety, and trauma from separation.²⁷⁹ Allowing the mother and child to interact daily in prison nursery programs can prevent the negative effects of insecure attachment.²⁸⁰ The infant's most important development goal is attachment; therefore, prison nursery programs are much better suited to promote the child's emotional well-being, as well as securing the bond of the mother-child relationship than separation.²⁸¹

269. *See supra* Part V.A.
 270. *See supra* Part VI.A.
 271. *See supra* Parts II, IV.A-B.
 272. *See supra* Part IV.A.
 273. *See supra* Part IV.A.
 274. *See supra* Part IV.B.
 275. *See supra* Part II.
 276. *See supra* Part II.
 277. *See supra* Part III.
 278. *See supra* Part III.A.
 279. *See supra* Part III.B.
 280. *See supra* Part III.B.
 281. *See supra* Parts II, III.A.

Prison nursery programs also teach women to be better parents and citizens when they leave prison.²⁸² Dwyer's suggestion that a woman's criminal past, history of drug abuse, or other unfortunate circumstances make her an unfit mother, both in and out of prison, ignores the strong preference to place children with their families, and presumes that rehabilitation is impossible.²⁸³ The facts demonstrate that this is simply not the case, as the majority of women exit prison nursery programs with custody of their children, with substance abuse and mental issues in check, and are much less likely to recidivate than their peers.²⁸⁴ Dwyer's arguments that prison is an inappropriate environment have merit; however, it is clear from the programs in Massachusetts,²⁸⁵ Germany,²⁸⁶ and Spain²⁸⁷ that community involvement and special attention to children's comfort can overcome those obstacles.²⁸⁸ Since all the prison nursery programs discussed in this paper are voluntary, it is not really the state that is violating the children's fundamental right of liberty, but instead the children's mothers who chose to bring them into prison.²⁸⁹

Despite their critics, it is clear that prison nurseries are more beneficial than they are harmful because they protect the best interests of the child, realize the mother's fundamental parental rights, and further the state interests of deterrence and rehabilitation.²⁹⁰ Children in prison nursery programs "may ultimately have a better opportunity to begin their lives on the right foot than those children who are separated from their mothers and sent out into the world" despite their "concrete walls and barbed wire" surroundings.²⁹¹ As one of the former inmates at the Beford Hills correctional facility said, "[b]abies don't know they are in prison. . . . They know they are with their mothers and that's where they want to be."²⁹²

Therefore, prison nursery programs should be implemented in all women's correctional facilities in the United States. Programs should focus on "creating environments that support age appropriate development" rather than "simply housing the infants while their mothers serve their sentences."²⁹³ Associate Professor of Law at the University of Maastricht,

282. *See supra* Part VII.A.

283. *See supra* Part VII.B.

284. *See supra* Part VII.B.

285. *See supra* Part V.B.

286. *See supra* Part VI.B.

287. *See supra* Part VI.A.

288. *See supra* Parts V.B., VI.B-C.

289. *See supra* Part V.

290. *See supra* Parts II, III, IV.A., VII.A.

291. Jbara, *supra* note 50, at 1826.

292. Jean Harris, *Moms In Prison Should Keep Babies, Senators Told*, ORLANDO SENTINEL (June 30, 1993), <http://articles.orlandosentinel.com/keyword/jean-harris/featured/4>.

293. Goshin, *supra* note 33, at 288.

Ria Wolleswinkel, describes the measures that should be taken in implementing these programs:

Where babies and young children are held in custodial settings, their treatment should be supervised by specialists in social work and child development. The goal should be to produce a child-centered environment, free from the visible trappings of incarceration, such as uniforms and jangling keys. Arrangements should also be made to ensure that the movement and cognitive skills of babies held in prison develop normally. In particular, they should have adequate play and exercise facilities within the prison and, wherever possible, the opportunity to leave the establishment and experience ordinary life outside its walls. Facilitating child-minding by family members outside the establishment can also help to ensure that the burden of child-rearing is shared (for example by the child's father).²⁹⁴

The United States should adopt the practices of New York,²⁹⁵ and all of Europe,²⁹⁶ and allow children already born who are under the maximum age limit to enter prison with their mothers. Further, the maximum age limit should be no lower than three years, as it is in the majority of Europe.²⁹⁷ Learning from the practices of Massachusetts,²⁹⁸ Germany,²⁹⁹ and Spain,³⁰⁰ it is imperative that the women and children in these programs be housed in facilities that are similar to residences, rather than prison cells. The mothers should be permitted to learn, work, and participate in the community.³⁰¹ The children should attend school in the community, participate in frequent field trips, and be encouraged to visit with other family members.³⁰² As in Massachusetts³⁰³ and Spain,³⁰⁴ trained staff should frequently evaluate each mother-child pair's situation to determine if staying in the prison nursery is still in the BIC. If these recommendations are allowed, prison nurseries can uphold the fundamental rights of mothers, protect the BIC, and still serve the state's legitimate interests of deterrence and rehabilitation.³⁰⁵

294. Wolleswinkel, *supra* note 19, at 194.

295. *See supra* Part V.C.

296. *See supra* Part VI.A.

297. *See supra* Part VI.A.

298. *See supra* Part V.B.

299. *See supra* Part VI.C.

300. *See supra* Part VI.B.

301. *See supra* Part VI.B.1.

302. *See supra* Part VI.B.1.

303. *See supra* Part V.B.

304. *See supra* Part VI.B.

305. *See supra* Parts II, IV.A., VII.A-B.