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Seham Elmalak
Pace University School of Law

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Babies Behind Bars: An Evaluation of Prison Nurseries in American Female Prisons and Their Potential Constitutional Challenges

Seham Elmalak*

I. Introduction

The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty . . . the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it.¹

The harsh reality is that most Americans have little knowledge or concern about what happens behind prison walls.² Unless a story of extreme cruelty floods the media or if a prisoner riot breaks out, prisoners' issues generally are far removed from the popular consciousness.³ This simply should not be the case. For instance, there has been an alarming increase in the female population, particularly mothers, in American prisons in the recent years, which raises several concerns that the public

* Juris Doctor, Pace University School of Law, 2015.

1. Anthony M. Kennedy, Assoc. Justice, Supreme Court of the U.S., Speech at the American Bar Association Annual Meeting (Aug. 9, 2003).

2. See Lisa Davie Levinson, *Prisoners' Rights*, 75 DENV. U. L. REV. 1055 (1998).

3. Michael Cameron Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921 (1992).

should not only acknowledge but also address.

Children are often adversely affected when their mothers are incarcerated because, as a general rule, the mother is the primary caretaker.⁴ In a 2004 study, 77% of women in state prisons and 82% of women in federal prisons indicated that they had provided the majority of their children's daily care prior to incarceration.⁵ Over half of these incarcerated women are mothers to minor children.⁶ These statistics necessitate the focus and analysis on the developmental harms linked to children of incarcerated women, along with the mental and emotional strain on a female inmate who loses her child.

One adopted solution has been the development of nursery programs in female prisons. Although the first nursery program was established more than a century ago, this is still a new and rare concept, with only nine states currently operating such programs.⁷ This note opens the prison doors and delves into the United States female prison system, primarily focusing on the positive and negative impact of nursery programs on mothers and children, along with potential constitutional claims that can be brought against these programs. Part I provides a general background about the American prison system, and briefly touches on the constitutional standards of prisoners' rights. It also discusses the history and development of female prisons and illustrates the rapid increase of female incarceration. Part II focuses on the prevalence of mothers within the female population in prisons. Part III introduces prison nursery programs and explains their history and how they operate. Part IV discusses the positive impact prison nurseries have had on both mothers and children. Part V touches on a few negative effects and the limitations of these programs. Finally, Part VI raises three potential constitutional challenges that can be raised against prison nurseries: two arguments based on the Fourteenth Amendment Equal Protection Clause and one argument based on the Fourteenth Amendment Due Process

4. See Lauren E. Glaze & Laura M. Maruschak, *Parents in Prison and Their Minor Children*, BUREAU JUST. STAT. (revised Mar. 30, 2010).

5. *Id.* at 16.

6. *Id.*

7. Robert Kravitz, *Women in Prisons*, CORRECTIONS (Apr. 5, 2010), <http://www.corrections.com/news/article/23873-women-in-prisons>.

Clause. As this note will conclude, there should be an increase in the implementation of prison nursery programs in American prisons, as the value of these programs greatly outweighs their limitations. Moreover, potential constitutional attacks on these programs should not be discouraging, as they are unlikely to prevail.

II. Background

Before focusing specifically on female incarceration and prison nurseries, it is essential to first have a general understanding of incarceration in the United States. For context purposes, it is important to be familiar with the operation of the American prison system, its history, its current standing relative to world imprisonment, the constitutional standards of prisoners' rights in this country, and this country's reliance on imprisonment as a form of punishment.

A. *Incarceration in the United States*

The most defining characteristic of the modern American prison system is its sheer enormity.⁸ The United States is officially the leader in prison population rate in the world, with a rate of 716 per 100,000.⁹ More than half of the other countries and territories around the world have rates below 150 per 100,000.¹⁰ As David Garland put it, this is an “unprecedented event in the history of the USA, and, more generally, in the history of liberal democracy.”¹¹

Today in the United States, the prison population is more than 2.2 million.¹² This is mainly because there has been an

8. Michael B. Mushlin, *Foreword Prison Reform Revisited: The Unfinished Agenda October 16-18, 2003*, 24 PACE L. REV. 395, 405 (2004).

9. Roy Walmsley, *World Prison Population List*, INT'L CENTRE FOR PRISON STUD. 1 (10th ed. Oct. 2013) [hereinafter *World Prison Population List*].

10. *Id.*

11. DAVID GARLAND, *Introduction: The Meaning of Mass Imprisonment*, in MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 1 (David Garland ed., 2001).

12. *World Prison Population List*, *supra* note 9.

unusual reliance on imprisonment in the past several decades.¹³ Professor Wayne R. Lafave writes, “[T]he broad purposes of the criminal law are . . . to make people do what society considers to be desirable and to prevent them from doing what society considers to be undesirable.”¹⁴ Because criminal law is framed in terms of imposing punishment for bad conduct, rather than granting rewards for good conduct, the emphasis is more on the prevention of the undesirable than on the encouragement of the desirable.¹⁵ If society as a whole utilizes this punishment method, the question then becomes whether people are sent to prison “as punishment, [or] for punishment.”¹⁶ In a more ideal world, society would advocate for the former, but it seems the latter more accurately depicts the current state of American prisons.

In 1871, prisoners were considered “slaves of the State” with essentially no rights.¹⁷ Rights were not to be granted to men that were “civilly dead.”¹⁸ This notion was displaced in the early to mid-1900’s by a different approach known as the “hands off doctrine.”¹⁹ Under this doctrine, courts refused to intervene; they did not adjudicate prisoners’ constitutional rights because they felt they had neither the duty nor the power to define and protect those rights.²⁰ By the 1960’s-1970’s, the courts abandoned the hands-off doctrine.²¹ In the 1974 Supreme Court decision, *Wolff v. McDonnell*, Justice White eloquently stated, “there is no iron curtain drawn between the Constitution and the prisons of this country,” declaring that the United States Constitution offers at least some protections to inmates, despite their loss of liberty.²²

13. Mushlin, *supra* note 8.

14. WAYNE R. LAFAVE, CRIMINAL LAW (5th ed. 2010).

15. *Id.*

16. *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977) (emphasis added).

17. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

18. *Id.*

19. LYNN S. BRANHAM, CASES AND MATERIALS ON THE LAW AND POLICY OF SENTENCING AND CORRECTIONS 469 (2d ed. 2013).

20. *Id.*

21. *Id.*

22. *See Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

B. *The Establishment of Prisons for Women*

The first separate institution for women in the United States was opened in 1873 in Indiana, housing between forty and sixty people.²³ By 1920, five prisons for women had opened, namely in Arkansas, California, Minnesota, Nebraska, and Pennsylvania.²⁴ Almost seven decades after the establishment of the first women's prison, there were separate women's prisons in about one-half of the states.²⁵ By the 1980's, there was a boom in the growth of women's prisons, which continued well into the 1990's.²⁶ By 1997, each of the fifty states had at least one facility for female inmates.²⁷ In total, there were 108 female-only facilities.²⁸ At the end of 2000, approximately 93,234 women were incarcerated in federal and state prisons.²⁹ By 2010, this number increased to approximately 112,822.³⁰

C. *Increase of Women in Prisons*

While admittedly, there is a strong disparity between men and women in prisons, with women making up only 8.8% of the total prison population,³¹ there is nevertheless a reason for concern because the number of women is increasing at an alarming speed.³² Between 1980 and 2011, the number of women in prison increased by an astonishing 637 percent, which is nearly 1.5 times the rate of men.³³

23. VERNETTA D. YOUNG & REBECCA REVIERE, *WOMEN BEHIND BARS: GENDER AND RACE IN US PRISONS* 43 (2006).

24. *Id.*

25. *Id.*

26. *Id.* at 44.

27. *Id.*

28. *Id.*

29. Paul Guerino et al., *Prisoners in 2010*, BUREAU JUST. STAT. BULL. (Revised Feb. 9, 2012).

30. *Id.*

31. ROY WALMSLEY, *WORLD FEMALE IMPRISONMENT LIST* (2d ed. 2012) [hereinafter *WORLD FEMALE IMPRISONMENT LIST*].

32. *INCARCERATED WOMEN FACT SHEET*, THE SENTENCING PROJECT (Sept. 2012) [hereinafter *INCARCERATED WOMEN FACT SHEET*].

33. *Id.* The female prison population is also growing around the rest of the world. According to the *World Female Imprisonment List*, created by the International Centre for Prison Studies, the total number of female prisoners

Today, more than 201,200 women and girls are held in penal institutions in the United States, either as pre-trial detainees or as individuals who have been convicted and sentenced.³⁴ This makes up a third of the 625,000 total incarcerated women in the world.³⁵ The prevalence of females within the total prison population has continued to increase in recent years.³⁶ More so than ever, this continuous and unprecedented growth is becoming an urgent concern that needs to be addressed.

III. Racial Disparities Among Female Inmates

To fully comprehend and properly address the issues, it is important to know who is being affected. Racial disparities exist generally within the prison population, but also specifically in female prisons.³⁷ The chance of a woman being sent to prison varies by race and ethnicity.³⁸ As of 2001, the lifetime likelihood of imprisonment was: 1 in 19 for black women, 1 in 45 for Hispanic women, and 1 in 118 for white women.³⁹ From 2000 to 2010, the rate of incarceration decreased by 35% for black women and increased by 28% for Hispanic women, and by 38% for white women.⁴⁰ Nevertheless, it remains more likely for a black or Hispanic women to be incarcerated than a white woman. By 2011, black women were incarcerated at nearly 2.5 times the rate of white women (129 versus 51 per 100,000), and Hispanic women were incarcerated at 1.4 times the rate of white women (71 versus 51 per 100,000).⁴¹

in the 187 countries listed, increased by more than 16% from 2006 to 2012. WORLD FEMALE IMPRISONMENT LIST, *supra* note 31. The largest increase took place in the Americas, with a 23% difference. *Id.* Experts attribute this substantial increase to tough sentencing laws and record numbers of drug offenders. Kravitz, *supra* note 7.

34. WORLD FEMALE IMPRISONMENT LIST, *supra* note 31.

35. *Id.*

36. *Id.*

37. INCARCERATED WOMEN FACT SHEET, *supra* note 32, at 2.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

IV. Inmates as Mothers

One of the most important differences between incarcerated men and women is the predominance of children in the lives of female prisoners.⁴² When asked who provided most of the daily care for their minor children, mothers and fathers in state prison responded differently. Among parents in state prison who had lived with their minor children just prior to incarceration, seventy-seven percent of mothers reported that they had provided most of the daily care for their children, while only twenty-six percent of fathers reported the same.⁴³ Similar results were found for mothers and fathers in federal prison.⁴⁴

The most significant, and probably the most obvious health concerns for women are those related to pregnancy.⁴⁵ Research has shown that there is a much greater need for more adequate nutrition and exercise for female prisoners, especially those who are pregnant.⁴⁶ The number of women giving birth in prisons has jumped significantly in the recent years.⁴⁷ Not all prison facilities are equipped or prepared to handle a growing baby population.⁴⁸ In fact, only nine states in the United States have prison nursery programs in operation or under development.⁴⁹

V. Prison Nurseries

A. *What Are Prison Nurseries?*

Prison nursery programs allow incarcerated women to keep their newborns with them in prison for a finite period of time.⁵⁰ The average maximum length of stay allowed at most facilities

42. JOYCELYN M. POLLOCK, *WOMEN, PRISON, AND CRIME* 106 (2d ed. 2001).

43. Glaze & Maruschak, *supra* note 4, at 5.

44. *Id.*

45. Kravitz, *supra* note 7.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. Women's Prison Association, *Prison Nursery Programs a Growing Trend in Women's Prisons*, CORRECTIONS (July 13, 2009) [hereinafter *Growing Trend*], <http://www.corrections.com/articles/21644-prison-nursery-programs-a-growing-trend-in-women-s-prisons>.

is between 12 to 18 months.⁵¹ Each mother and baby sleep together in individual rooms.⁵² In most correctional institutions, the program is housed in a separate wing or unit away from the general prison population.⁵³ The babies are never out in the prison's general population.⁵⁴

The number of prison nurseries is growing, but such programs are still relatively rare.⁵⁵ Although every state has seen a dramatic rise in its women's prison population over the past three decades, only nine states have prison nursery programs in operation or under development, namely California, Illinois, Indiana, Ohio, Nebraska, New York, South Dakota, Washington, and West Virginia.⁵⁶

In recent years, there has been an increase in public and government support for the establishment of prison nurseries and other programs for female prisoners and their children.⁵⁷ This support is primarily due to the 832% increase in the number of women in United States prisons since 1977.⁵⁸

B. *The First Prison Nursery Program*

The oldest prison nursery program in the United States was established in 1901 at Bedford Hills Correctional Facility for Women, a maximum-security women's prison in Bedford Hills,

51. Kelsey Kauffman, *Prison Nurseries: New Beginnings and Second Chances*, in WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM: POLICY ISSUES AND PRACTICE STRATEGIES 20-1, 20-6 (2006).

52. Natasha Haverty, *When Should Babies Stay With Their Moms in NY Prisons?*, N. COUNTRY PUB. RADIO (July 15, 2013), <http://www.northcountrypublicradio.org/news/story/22352/20130715/when-should-babies-stay-with-their-moms-in-ny-prisons>.

53. PRISON NURSERY PROGRAMS: LITERATURE REVIEW AND FACT SHEET FOR CT, CONNECTICUT GENERAL ASSEMBLY 1 (2012) [hereinafter FACT SHEET FOR CT].

54. Haverty, *supra* note 52.

55. *Growing Trend*, *supra* note 50.

56. *Id.*

57. Lorie Smith Goshin & Mary Woods Byrne, *Converging Streams of Opportunity for Prison Nursery Programs in the United States*, J. OFFENDER REHABILITATION, 271-95 (May 2009), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2768406/>.

58. Glaze & Maruschak, *supra* note 4.

New York.⁵⁹ There are several requirements that must be met by the women at Bedford in order to qualify for entrance into its nursery program.⁶⁰ The requirements for such programs vary by state.⁶¹ Eligibility criteria normally require that the crime the mother was convicted of is non-violent, and that she has no history of child abuse or violence against children.⁶² Inmates admitted to the program usually face relatively short sentences, and are due to take the role of the primary caregiver of the child upon release.⁶³

Once admitted, the babies in Bedford are allowed to remain up until their first birthday. If the mother is scheduled to be released within the next six months, she may apply for an extension, increasing the maximum length of stay to 18 months.⁶⁴

In order to stay in the program, the mothers must participate in parenting and prenatal classes and adhere to strict rules in order to stay in the program.⁶⁵ Some of the more developed programs, like the Bedford Hills Correctional Facility's nursery, also offer prenatal centers, child advocacy offices, and infant day cares that allow the mothers to attend their prison jobs and classes.⁶⁶ If the rules are violated, the child would be removed from the prison and the mother would be returned to general population.⁶⁷ While in the program, the women and their children are housed in a special section of the prison, apart from the general population.⁶⁸ However, even

59. FACT SHEET FOR CT, *supra* note 53.

60. Kisa Mlela Santiago, *Babies Behind Bars: Motherly Love or Abuse?*, HLN (June 3, 2013, 3:09 PM), <http://www.hlntv.com/article/2013/05/10/prison-nursery>.

61. WOMEN'S PRISON ASS'N, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 9 (May 2009).

62. 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, 374 (2013).

63. WOMEN'S PRISON ASS'N, *supra* note 61, at 5.

64. Santiago, *supra* note 60. Other states allow children to reside in prisons for as long as three years. *Id.*

65. *Id.*

66. Gilad & Gat, *supra* note 62, at 375.

67. Santiago, *supra* note 60.

68. *Id.*

though they live in a special unit, it is still a prison.⁶⁹ Inmates are not allowed to have contraband such as cell phones, jewelry, or makeup and are only permitted three photos a month of their baby.⁷⁰ While admittedly the mothers and their babies receive a great deal of care at the prison, the mothers are still inmates.⁷¹

C. *Positive Impact of Prison Nurseries*

Studies have shown that prison nurseries result in numerous benefits for both the mother and the child. Dr. Angela M. Tomlin, Adjunct Assistant Professor of Pediatrics at Indiana University School of Medicine, stated, "The prison nursery is an investment in the future, one mother and baby at a time."⁷² Chandra Villanueva, Policy Associate at Women's Prison Association and author of the report, *Mothers, Infants and Imprisonment: A National Look at Prison Nurseries and Community-Based Alternatives*, commented, "Prison nursery programs keep mothers and infants together during the critical first months of infant development, and research shows that these programs produce lower rates of recidivism among participating mothers."⁷³

D. *Stronger Relationship Between Mother and Child*

One major rationale for prison nurseries stems from attachment theory.⁷⁴ Attachment theory states that whether children will have a secure attachment style depends on how stable their interactions are with their main caregiver, who is

69. Ely Brown & Alexa Valiente, *Babies Born, Raised Behind Bars May Keep Mothers From Returning to Prison*, ABC NEWS (Feb. 7, 2014), <http://abcnews.go.com/US/babies-born-raised-bars-mothers-returning-prison/story?id=22413184>.

70. *Id.*

71. *Id.* Liz Hamilton, who runs the nursery program at Bedford, stated, "It is punishment. Of course you see the warm, fuzzy, the baby care, but you don't see the waking up early, getting all the chores done. They don't have their freedom, and they don't get to make all the choices they would make outside." *Id.*

72. *Growing Trend*, *supra* note 50.

73. Santiago, *supra* note 60.

74. 1 JOHN BOWLBY, ATTACHMENT: ATTACHMENT AND LOSS (1983).

usually the child's mother.⁷⁵ It is important for infants to develop a stable secure attachment early in life, as this leads to a greater likelihood of healthy development in childhood.⁷⁶ This can also strengthen the child's resiliency, which will help him later in life in dealing with obstacles.⁷⁷

Dr. Tomlin reflected on nursery programs, saying:

One of the most important things we can do for a baby is to support her to have a strong and healthy relationship with her parents. Once a baby feels safe in a relationship, everything else—from cognitive skills, to school readiness, to positive mental health later in life—grows from that foundation.⁷⁸

Longitudinal studies have shown that infants and children who have a "loving" primary caregiver and are able to develop "organized and secure" attachment to a primary caregiver are less likely to experience social and emotional maladjustments later in life.⁷⁹

On the other hand, children who fail to maintain contact or a close relationship with their mothers are more likely to suffer from developmental delays and an inability to connect with others in the future.⁸⁰ They are also at a greater risk of abusing drugs and/or alcohol, committing crimes and underachieving in school.⁸¹ Additionally, because mothers are usually the primary caregivers, prison nurseries help keep children and their

75. 2 JOHN BOWLBY, SEPARATION: ANXIETY AND ANGER (1973).

76. L. ALAN SROUFE ET AL., THE DEVELOPMENT OF THE PERSON: THE MINNESOTA STUDY OF RISK AND ADAPTATION FROM BIRTH TO ADULTHOOD (2005).

77. *Id.*

78. *Id.*

79. Diane Benoit, *Infant-Parent Attachment: Definition, Types, Antecedents, Measurement and Outcome*, PAEDIATRICS & CHILD HEALTH 541-45 (2004).

80. Anne E. Jbara, *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).

81. JULIE KOWITZ MARGOLIES, & TAMAR KRAFT-STOLAR, WHEN "FREE" MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND THE INCARCERATION OF WOMEN IN NEW YORK STATE 1, 9 (2006).

mothers together and decrease the likelihood of children entering the foster care system.⁸²

A study at Bedford Hills Prison in New York showed that prison nurseries help incarcerated mothers develop secure these attachments with their infants.⁸³ Mothers reported having stronger bonds with their children because of the program.⁸⁴ A study showed that 71% of infants who lived with their mothers in a prison nursery, did in fact develop secure attachment even though their mothers had not internalized secure attachment styles from their own childhoods.⁸⁵ This attachment leads to better developmental outcomes for the children.⁸⁶

E. *Improvement of Mental Health*

Although mental health is a general issue in American prisons, the prevalence of mental illness in prisons is much higher for women than for men.⁸⁷ Programs such as prison nurseries can improve the mental health of incarcerated mothers, which in turn can positively affect their relationships with their children.⁸⁸ It is commonly found that incarcerated mothers were the primary caregivers of their children, prior to incarceration.⁸⁹ A mother having her newborn taken away can contribute to psychological distress and a number of adverse mental health conditions, including major depression, anxiety, as well as disciplinary issues while incarcerated.⁹⁰ Parenting and nursery programs that allow mothers to care for their

82. Goshin & Byrne, *supra* note 57.

83. FACT SHEET FOR CT, *supra* note 53.

84. Joseph R. Carlson, *Prison Nursery 2000: A Five-Year Review of the Prison Nursery at the Nebraska Correctional Center for Women*, J. OF OFFENDER REHABILITATION 75–97 (2001).

85. FACT SHEET FOR CT, *supra* note 53.

86. Julia Poehlmann et al. *Children's Contact with Their Incarcerated Parents: Research Findings and Recommendations*, AM. PSYCHOLOGIST, 575-98 (2010).

87. *Women Prisoners of D.C. Dep't of Corr. v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996).

88. Johanna Bick & Mary Dozier, *Helping Foster Parents Change: The Role of Parental State of Mind*, in CLINICAL APPLICATIONS OF THE ADULT ATTACHMENT INTERVIEW 452 (H. Steele & M. Steele eds., 2008).

89. Glaze & Maruschak, *supra* note 4.

90. FACT SHEET FOR CT, *supra* note 53.

children while incarcerated, can have a positive benefit to both the mother's and the children's mental health.⁹¹

1. Improvement in Mother's Conduct

Prison nursery programs often lead to improvement of the mother's behavior throughout her time in prison. These programs improve an inmate's disciplinary conduct because her child becomes her motivation.⁹² Mothers are often required to remain in good standing at the facility in order to remain in the nursery program.⁹³ This can include maintaining clean urine tests, receiving no disciplinary infractions, etc.⁹⁴ This provides a strong incentive for mothers to follow prison rules and regulations.⁹⁵ It may even enable them to be eligible for early release programs.⁹⁶

The numbers indicate that this incentive does in fact work. For example, in the Nebraska Correctional Institution, twenty-four women went through the nursery program from 1994 through 1996.⁹⁷ Prior to entering the program, ten of the women had accumulated a total of 47 misconduct reports. However, after entering the program, these same ten women accumulated only 17 misconduct reports, resulting in a 13% reduction.⁹⁸

F. *Reduced Rate of Recidivism*

There has been a decline in recidivism rates for women who participated in prison nursery programs.⁹⁹ This helps to address the urgent need to lower recidivism rates, which have led to prison overcrowding and have been driving up correctional costs.¹⁰⁰

91. Poehlmann et al., *supra* note 86.

92. *See* Carlson, *supra* note 84.

93. *Id.*

94. *Id.*

95. *Id.*

96. FACT SHEET FOR CT, *supra* note 53.

97. Carlson, *supra* note 84.

98. *Id.*

99. *Id.*

100. *Id.*

Prison nursery programs provide the mothers with educational training in parenting and child development.¹⁰¹ As a result, mothers develop better parenting skills and form a stronger attachment with their children.¹⁰² Once released, the mothers are more likely to regain custody of their children and to maintain and continue to build their relationship with their children.¹⁰³ They are less likely to commit crimes that they know will send them back to prison and consequently separate them from their children.¹⁰⁴

According to a three-year study of the New York State Department of Correction Services in 1997, at three years post release, nursery participants had a lower recidivism rate of thirteen percent, compared to a recidivism rate of non-participating mothers of 26%.¹⁰⁵ Similarly, Washington State reported lower three-year recidivism rates for mothers who participated in their prison nursery program, specifically 15% versus 38%.¹⁰⁶ The recidivism rate for women in the Nebraska State prison nursery program, which has been active for ten years, was approximately 17% percent as compared with a recidivism rate of 50% for women who were not in the program.¹⁰⁷ It is evident that nursery programs have been successful in reducing women's rate of recidivism.

VI. Limitations of Prison Nurseries

As with many programs aimed to solve a major issue, prison nurseries are not without their limitations. This includes concerns related to security, program management, liability, child health and development, and the difficulty of eventual separation of mother and child in women with long sentences.¹⁰⁸

101. WOMEN'S PRISON ASS'N, *supra* note 61.

102. Joseph R. Carlson, Jr., *Prison Nurseries: A Pathway to Crime-Free Futures*, CORRECTIONS COMPENDIUM 17 (2009) [hereinafter *Pathway*].

103. *Id.*

104. *See id.*

105. FACT SHEET FOR CT, *supra* note 53.

106. Melissa Rowland & Alice Watts, *Washington State's Effort to the Generational Impact on Crime*, CORRECTIONS TODAY (2007).

107. *Pathway*, *supra* note 102.

108. Polly F. Radosh, *Inmate Mothers: Legislative Solutions to a Difficult Problem*, 11 J. CRIME & JUST. 61-77 (1988).

The major limitations and critiques, however, pertain to the child's best interest, the program's exclusivity, and the age limitation of the children placed in prison nurseries with their mothers.¹⁰⁹

A. *Child's Best Interest*

In most modern legal systems, the best interest of the child is a fundamental standard that guides courts and legislatures when making determinations that affect the life and well-being of children.¹¹⁰ Some critics argue that nursery programs put the mothers' needs ahead of the best interests of the children.¹¹¹ They argue that prison is not a place for children, even if it is with their own mothers, claiming that it is harmful and dangerous for children to live in the stressful and restrictive environment of a prison.¹¹² Critics are uncomfortable with the idea of young children being imprisoned for their mothers' crimes.¹¹³

While this is a fair concern, there has yet to be documentation of long-term or permanent negative effects on children who resided in prison nurseries.¹¹⁴ As of 2009, there were no incidents of serious child harm or abuse reported in prison nurseries.¹¹⁵ Nursery programs actually aim to give children a stable, nurturing environment by giving them significant attention and proper nutrition.¹¹⁶ Jean Harris, a former inmate at the Bedford 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."¹¹⁷

109. See Gilad & Gat, *supra* note 62, at 380-85.

110. *Id.* at 380.

111. Santiago, *supra* note 60.

112. *Id.*

113. Jbara, *supra* note 80, at 1825.

114. WOMEN'S PRISON ASS'N, *supra* note 61, at 20.

115. J.B. v. Superior Court, No. B216005, 2009 WL 2508221, at *7 (Cal. Ct. App. Aug. 18, 2009).

116. Jbara, *supra* note 80.

117. Nicole S. Mauskopf, *Reaching Beyond The Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN'S L.J. 101, 111 (1998) (quoting *Keep Babies in Prison, Say Advocates*, NEW ORLEANS TIMES-PICAYUNE, June 30, 1993, at A8).

Eldon Vail, superintendent at McNeil Island Corrections Center, found that the 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.”¹¹⁸

Even though these babies are, in fact, surrounded by concrete walls and barbed wire, they actually have a better opportunity to begin their lives on the right foot than those children who are separated from their mothers.¹¹⁹ Furthermore, the parenting programs serve as a transitional tool, equipping both mother and child with a sturdy foundation before releasing them into regular society.¹²⁰

B. *Exclusivity of Nurseries*

Nursery programs are limited because they generally only admit low-risk incarcerated women and thus are not available to many incarcerated women and their infants, who could benefit from these types of programs.¹²¹ Often, there is a limited amount of physical space available in prison-based nursery programs.¹²² Expansion of these nursery programs, so that these numerous benefits can be offered to more mothers and more children, can prove to be invaluable and can revolutionize the concept of female incarceration within the United States.

C. *Age Limitation*

Another limitation of prison nurseries pertains to the exclusion of older children of incarcerated mothers.¹²³ Prison nurseries provide promising placement solutions for infants born in correctional facilities, but they completely exclude other

118. *Id.* at 111 (quoting Lynn Steinberg, *Programs 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).

119. Jbara, *supra* note 80.

120. *Id.*

121. Goshin & Byrne, *supra* note 57.

122. FACT SHEET FOR CT, *supra* note 53.

123. Gilad & Gat, *supra* note 62, at 384.

minor children of incarcerated mothers.¹²⁴ It is argued that these slightly older children experience similar hardships as a result of their mothers' incarceration.¹²⁵ Some argue that the impact on these children is worse because they had already developed attachment to their mother, and might be more cognitively developed to comprehend the situation.¹²⁶

Some suggest expanding nursery programs to these older children.¹²⁷ This, however, could be more problematic, as these children become more aware of their surroundings. The confining nature of the prison environment and the idea of growing up in a prison atmosphere would become more applicable, and could prove to be detrimental for maturing children.¹²⁸ It seems fair to say that the negative impact would increase with age, but more concrete research would have to be conducted to evaluate the effect of such programs on children of varying ages in order to properly establish this.

VII. Potential Constitutional Challenges

The development of prison nurseries is still new within the United States prison system. If the population of female inmates, and specifically incarcerated mothers, continues to grow, the number of prison nurseries may potentially grow as well. If this happens, it becomes more likely that a constitutional challenge may be raised, such as Equal Protection or Due Process claims. These constitutional issues have not yet been addressed by the United States Supreme Court, but may have to be one day in the near future.

A. *Fourteenth Amendment Equal Protection Claim – Incarcerated Mothers Versus Incarcerated Fathers*

By 2007, United States prisons held approximately 744,200

124. *Id.*

125. *Id.*

126. *Id.*

127. *See id.*

128. *Id.*

fathers and 65,600 mothers.¹²⁹ Fathers in prison reported having 1,559,200 children, while mothers reported having 147,400 children.¹³⁰ Since 1991, the number of children with a mother in prison has more than doubled, increasing by 131%, while the number of children with a father in prison has grown by 77%.¹³¹ These numbers illustrate a faster rate of growth in the number of mothers held in state and federal prisons compared to the number of fathers. Nevertheless, despite the fact that the number of mothers is increasing more rapidly, the truth of the matter is that at any given moment, prisons are comprised of more fathers than mothers. Because the development of children-oriented programs, such as prison nurseries, are exclusively targeted at female prisons, this may ultimately raise a constitutional issue, specifically one raised by an incarcerated father claiming that his Fourteenth Amendment Equal Protection rights have been violated. As discussed, there are numerous benefits for both the mother and child who participate in a prison nursery program. A father who wants the same opportunity to take advantage of these benefits may argue that he is not being treated equally because prison nurseries are not available in any male prison.

The issue would be whether the development of prison nurseries exclusively in female prisons and not in any male prisons, discriminates based on sex and therefore violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.¹³² The pertinent section of the Equal Protection Clause states, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”¹³³ The Fourteenth Amendment guarantees of equal protection only apply to state or federal government action.¹³⁴ Courts have been clear and consistent when applying these protections to free people. When applying constitutional protections to inmates, however, the analysis becomes more complicated.

129. Glaze & Maruschak, *supra* note 4.

130. *Id.*

131. *Id.*

132. U.S. CONST. amend. XIV, § 1.

133. *Id.*

134. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *The Civil Rights Cases*, 109 U.S. 3 (1883).

B. *General Standard for Constitutional Claims of Inmates*

The Court in *Turner v. Safley*, a 1987 landmark case in the field of prisoners' rights, stated that "federal courts must take cognizance of valid constitutional claims of prison inmates."¹³⁵ This holding came a long way from the *Ruffin* court's view in 1871 that prisoners have no rights and are merely "slaves to the states."¹³⁶ The *Turner* Court explained that when a prison regulation impinges on an inmate's constitutional rights, the regulation would be considered valid if it is reasonably related to legitimate penological interests.¹³⁷ The Court refused to apply a strict scrutiny test because it reasoned that, "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."¹³⁸ Instead, the Court developed a four-factor test resembling a rational-basis test, to be applied when determining the reasonableness of the regulation at issue: (1) there must be a "valid rational connection" between the prison regulation and legitimate governmental interest put forward to justify it, (2) whether there are alternative means of exercising the right that remain open to prison inmates, (3) the impact accommodation of the asserted constitutional right on guards and other inmates, and on the allocation of prison resources generally, and (4) the absence of ready alternatives as evidence of the reasonableness of a prison regulation.¹³⁹ The Court noted that the existence of obvious easy alternatives may be evidence that the regulation is not reasonable, but is an "exaggerated response" to prison concerns.¹⁴⁰

Cited over 14,000 times, *Turner* continues to be a significant case and is still cited today. In 2005, however, in an opinion written by Justice O'Connor, the United States Supreme Court

135. *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citing *Procunier v. Martinez*, 416 U.S. 396, 405 (1974)).

136. *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

137. *Turner*, 482 U.S. at 89.

138. *Id.*

139. *Id.*

140. *Id.* at 90.

seemed to modify the *Turner* standard, at least when it came to an equal protection claim.¹⁴¹

C. *Equal Protection Constitutional Claims of Inmates*

The Court in *Johnson v. California* addressed an equal protection claim of an inmate, based on the Department of Corrections' use of race to assign temporary cellmates for new prisoners.¹⁴² An African-American state prison inmate brought an equal protection action against corrections officials, challenging the unwritten policy of placing new or transferred inmates with cellmates of the same race during initial evaluation.¹⁴³ The United States Supreme Court rejected the *Turner* test in this type of constitutional claim and held that the inmate's challenge is governed by a strict scrutiny standard of review, rather than a "reasonably related to legitimate penological interest" standard.¹⁴⁴ In the majority opinion, Justice O'Connor stated, "We have never applied *Turner* to racial classifications. *Turner* itself did not involve any racial classification[] [W]e have applied *Turner*'s reasonable-relationship test *only* to rights that are 'inconsistent with proper incarceration.'"¹⁴⁵ She continued to write:

The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of proper prison administration. On the contrary, compliance with the Fourteenth Amendment's ban on racial discrimination is not only consistent with proper prison administration, but also bolsters the legitimacy of the entire criminal justice system. Race discrimination is "especially pernicious in the administration of justice."¹⁴⁶

141. *Johnson v. California*, 543 U.S. 499 (2005).

142. *Id.*

143. *Id.* at 504-05.

144. *Id.* at 529.

145. *Id.* at 510 (quoting *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)).

146. *Id.* at 510-11 (quoting *Rose v. Mitchell*, 443 U.S. 545, 555 (1979)).

The Court stated that the right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*.¹⁴⁷

In his dissent, Justice Thomas argued that *Turner* had made clear that a deferential standard of review would apply to *all* inmates' constitutional challenges to prison policies.¹⁴⁸ He stated that the unitary, deferential standard for reviewing prisoners' constitutional claims, as adopted in *Turner* should apply in *Johnson* as well.¹⁴⁹ He pointed out that this standard had governed a host of other claims challenging conditions of confinement, even when restricting the rights at issue would otherwise have occasioned strict scrutiny.¹⁵⁰ He essentially argued, despite what the majority says, that *Johnson* would overrule *Turner* and that they cannot coexist.¹⁵¹

Johnson certainly complicated the analysis needed to address a constitutional claim raised by an inmate. In an equal protection claim raised by an inmate based on racial discrimination, the test was now strict scrutiny, which means that there must be a "compelling state interest" and the means are narrowly tailored. In the context of prison nurseries, the question then becomes: what standard applies in an equal protection claim raised by an inmate based on sex discrimination, rather than racial discrimination? Would *Turner* or *Johnson* apply?

D. Equal Protection Constitutional Claim Based on Sex Discrimination

The United States Supreme Court has analyzed equal protection claims based on sex discrimination, but it has not yet done so when such a claim is raised by an inmate, rather than a free person.

The Court is unlikely to apply strict scrutiny to gender-based discrimination, as this would exceed the constitutional protections granted to free people.¹⁵² Although *Johnson* seemed

147. *Id.* at 510-11.

148. *Johnson*, 543 U.S. at 530 (Thomas, J., dissenting).

149. *Id.* at 529.

150. *Id.*

151. *See id.*

152. *See* United States v. Virginia, 518 U.S. 515 (1996); Craig v. Boren,

to change the *Turner* standard at least when applied to racial discrimination cases, *Johnson* nevertheless made sense because in cases involving a free person being racially discriminated against, strict scrutiny has always been applied.¹⁵³ This harsh level of scrutiny, which requires the means to be “narrowly tailored” to a “compelling state interest,” is intended to protect suspect classes and “discrete and insular minorities.”¹⁵⁴

Laws that discriminate based on gender, however, receive a lower level of scrutiny and are instead subject to “intermediate” scrutiny.¹⁵⁵ It follows then that the court would have two methods of analysis to choose from when it comes to sex discrimination claims of inmates. The first option would be to apply the *Turner* test, since this has never been overruled. The second option would be to follow in *Johnson*’s footsteps, but to apply an intermediate scrutiny test since this involves sex-based discrimination, rather than race-based. The claim is unlikely to succeed under either test.

1. *Turner* Test

Applying the highly deferential *Turner* test, a claim made by an incarcerated father challenging the constitutionality of the placement of prison nurseries exclusively in female prisons, is unlikely to succeed.

Pertaining to the first factor of the test, there is a “valid rational connection” between the placement of prison nurseries and legitimate governmental interests of promoting child-rearing, reducing misconduct in prisons, and reducing rates of recidivism, while maintaining security and safety. Prison officials can argue that it would be impractical and would pose security risks if nursery programs were opened in male prisons. The second factor would also be met because although not as beneficial as prison nurseries, incarcerated fathers have the option of seeing their children through prison visits. Prison officials can defend the third factor by arguing that they lack the

429 U.S. 190 (1976).

153. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

154. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938).

155. *See Craig*, 429 U.S. at 190; *Virginia*, 518 U.S. at 515.

funding and resources to operate prison nurseries in male prisons. Finally, as for the fourth factor, even if there are alternative means, this factor is not definitive. The language of the *Turner* test states that the first factor “must” be met, and seems to imply that the remaining three factors should merely be considered in the analysis. Under this test, the equal protection claim will likely fail.

2. Intermediate Scrutiny Test

Applying the intermediate scrutiny test, a father’s constitutional claim may be stronger, but will still likely fail. In order for a policy to pass under intermediate scrutiny analysis, it must be “substantially related to” an “important” government interest.¹⁵⁶ The justification must be genuine and “exceedingly persuasive.”¹⁵⁷ It cannot rely on or reinforce overbroad generalizations or stereotypes.¹⁵⁸ Discrimination based on genuine differences between the sexes, however, may be justified.¹⁵⁹

In *Michael M. v. Superior Court of Sonoma County*, the court said, “[W]e have recognized that in certain narrow circumstances, men and women are *not* similarly situated; in these circumstances a gender classification based on clear differences between the sexes is not invidious, and a legislative classification realistically based upon those differences is not unconstitutional.”¹⁶⁰ Rather than delving deep into the analysis then, the threshold question would be to determine if the two groups in question are similarly situated.¹⁶¹

Here, it can be argued that the two groups, in this case incarcerated mothers and fathers, are not similarly situated, and thus the exclusivity of nursery programs cannot be found to be unconstitutional. Currently, all existing programs accommodate only infants that were born while in state custody,

156. *Virginia*, 518 U.S. at 516.

157. *Id.* at 531-33.

158. *See id.* at 549.

159. *Michael M. v. Super. Ct. of Sonoma County*, 450 U.S. 464, 478 (1981).

160. *Id.*

161. *Women Prisoners of D.C. Dep’t of Corr. v. District of Columbia*, 93 F.3d 910 (D.C. Cir. 1996).

not children born outside prison walls prior to the commencement of the mother's incarceration.¹⁶² Put simply, these programs do not accommodate mothers in general. They only accommodate pregnant women. Neither fathers nor mothers can bring in children born outside of the prison walls. It can be argued that the discrimination here, then, is based on genuine differences between the sexes, specifically the ability to become pregnant.¹⁶³

Additionally, one can argue that there are more differences that can lead a court to conclude that incarcerated mothers and fathers are not similarly situated. A number of scholars have investigated the societal impact of family arrangements and have found that, while children whose fathers are incarcerated more often than not live with their mothers, children whose mothers are incarcerated typically live with a nonparent family member or become part of the foster care system.¹⁶⁴ Moreover, the United Nations Committee for the Rights of the Child recognized children of mothers in prison as among the most vulnerable groups.¹⁶⁵ Studies have shown that children are affected by the incarceration of either parent, but they typically experience greater harm when their mother is imprisoned.¹⁶⁶ For all these reasons, a court should conclude that there is no constitutional violation because incarcerated mothers and fathers are simply not similarly situated.

E. *Fourteenth Amendment Equal Protection Claim – Mothers Versus Non-mothers*

Another potential constitutional claim against prison nurseries is another form of an equal protection claim, this time

162. WOMEN'S PRISON ASS'N, *supra* note 61.

163. *Michael M.*, 450 U.S. at 478.

164. Jessica Y. Kim, Note, *In-Prison Day Care: A Correctional Alternative for Women Offenders*, 7 CARDOZO WOMEN'S L.J. 221, 224-25 (2001).

165. Committee on the Rights of the Child, *Concluding Observations: Thailand*, ¶ 48, U.N. Doc. CRC/C/THA/CO/3-4 (Feb. 17, 2012); Committee on the Rights of the Child, *Concluding Observations: Philippines*, ¶ 53-54, U.N. Doc. CRC/C/15/Add.259 (Sept. 21, 2005).

166. Tiffany Conway & Rutledge Q. Hutson, *Parental Incarceration: How to Avoid a "Death Sentence" for Families*, 41 CLEARINGHOUSE REV. 212, 213 (2007).

brought either by a “non-mother” or by a mother who gave birth to her child prior to being incarcerated.

A non-mother could argue that despite being in prison for the same exact crime, a pregnant inmate who ultimately gives birth and then becomes part of a prison nursery program, would get special treatment and would get to reside in a relatively more home-like environment of the prison, simply because she walked into the prison pregnant.¹⁶⁷

A mother who gave birth to her child prior to being incarcerated would have a somewhat parallel, but slightly different argument. She could argue that despite being in prison for the same exact crime, a pregnant inmate would not only get special treatment but would reap the benefits of the nursery for her child, simply because she walked into the prison pregnant and had the baby inside the prison, as opposed to having the baby prior to being incarcerated.

Because these equal protection claims do not involve a suspect classification or fundamental right, if the court does not apply *Turner*, it will likely apply a rational basis test, which states that there must be a “legitimate state interest” and the means are rationally related.¹⁶⁸ Similar to the *Turner* test, the rational basis test is highly deferential. Courts will generally uphold the classification if the court can imagine a rational reason for the classification.

Under both the *Turner* and the rational basis tests, the constitutional arguments here would likely fail because the court will likely find that the prisons’ security interests would suffice.

F. *Fourteenth Amendment Due Process Claims of Nursery Children*

The final constitutional claim is one of Fourteenth Amendment Due Process, which states that the state cannot “deprive any person of life, liberty, or property, without due

167. Women facing incarceration may take advantage of these programs by purposefully becoming pregnant in order to qualify for more comfortable accommodations. Santiago, *supra* note 60.

168. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976).

process of law.”¹⁶⁹ One outspoken critic, William & Mary Law School Professor James Dwyer, was the first person to challenge the legality of prison nursery programs.¹⁷⁰ Dwyer argues that keeping infants in prisons violates their constitutional Fourteenth Amendment Due Process.¹⁷¹

The Constitution offers its protections to any “person.”¹⁷² The Constitution does not specifically define “person.”¹⁷³ In the 1973 landmark case *Roe v. Wade*, one issue was whether a fetus was a “person” within the language and meaning of the Fourteenth Amendment and whether the fetus would then be guaranteed the protections of the Amendment.¹⁷⁴ The Court held that a fetus is not a “person” under the meaning of the Constitution, and that no cases had ever made this prenatal application.¹⁷⁵ The use of the word has only been applied postnatally. In the case of prison nurseries, once the baby is born, he becomes a “person” for the purposes of the Constitution and is owed the protections of the Fourteenth Amendment.

The claim here would be that the “person” being harmed is the infant and that by placing the infant in prison with the mother, he is being deprived of his liberty interest with due process. The incarcerated mother was granted due process before being sentenced to prison. The baby, however, was not.

The argument against this claim is that the baby is not actually losing his liberty interest, because for all intents and purposes, he is not an inmate. He is not in state custody. He is not being punished. And he will not receive any disciplinary sanctions. Although it is unrealistic and not practical, he is, technically, free to leave.

VIII. Conclusion

Currently, the overwhelming majority of children born to incarcerated mothers are separated from their mothers

169. U.S. CONST. amend. XIV, § 1.

170. Santiago, *supra* note 60.

171. *Id.*

172. U.S. CONST. amend. XIV, § 1.

173. *Roe v. Wade*, 410 U.S. 113, 157 (1973).

174. *Id.*

175. *Id.*

immediately after birth and placed with relatives or into foster care.¹⁷⁶ More than half of these mothers will never receive a visit from their children during the period of incarceration.¹⁷⁷ As the female prison population continues to grow, the number of facilities such as prison nurseries for pregnant women should also increase.¹⁷⁸ State governments, along with the federal government, have weighed these issues when creating such programs, and, have ultimately concluded that keeping families together and the many benefits of prison nurseries outweigh the retributive value of incarceration and any other negative impacts of such programs.¹⁷⁹ Additionally, constitutional challenges that may arise are unlikely to succeed, and therefore, should not deter the expansion and implementation of more prison nurseries in the American prison system.

176. WOMEN'S PRISON ASS'N, *supra* note 61, at 8.

177. Conway & Hutson, *supra* note 166, at 215.

178. *See, e.g.*, Suzanne Smalley, *Bringing up Baby in the Big House*, DAILY BEAST (May 13, 2009, 8:00 PM).

179. Jbara, *supra* note 80.