

INCARCERATED MOTHERS AND THEIR INFANTS: SEPARATION OR LEGISLATION?

A majority of the women currently incarcerated in United States prisons¹ are single mothers.² A significant number of these women have babies shortly before they begin serving prison sentences or are pregnant and will give birth during their incarceration.³ In most states the newborns are taken from their mothers' physical custody⁴ shortly after

¹ As used in this note, the terms "prison" and "correctional institution" include state and federal prisons as well as local jails.

² B. Smith & L. Austin, *Expectant Mothers in the Massachusetts Criminal Justice System* 2 (Oct. 1985) (available from Community Services for Women, Boston, Massachusetts) [hereinafter *Expectant Mothers in Massachusetts*]; Memorandum to Interested Parties from Ellen M. Barry 1 (Sept. 4, 1985) (Summary of the California Community Prisoner Mother-Infant Care Program) (available from Legal Services for Prisoners with Children, San Francisco, California) [hereinafter *Barry Memorandum*]; see also U.S. GEN. ACCOUNTING OFFICE, *REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL, WOMEN IN PRISON: INEQUITABLE TREATMENT REQUIRES ACTION* 3-4 (1980) [hereinafter *COMPTROLLER'S REPORT*]. This note will not discuss those circumstances where a father is willing and able to take custody of the child during the mother's incarceration.

³ One source reports that about one quarter of women in correctional institutions are pregnant or have infants. Project L.I.N.K. (Looking Into Needs of Kids), *Untitled Report* 1 (1986) (available from Project L.I.N.K., Flint, Michigan) [hereinafter *L.I.N.K. Report*]. In 1984, more than 50 pregnant women in Massachusetts were sentenced to prison. Social Justice for Women, *Expectant Mothers Residence Program Design* 2 (Dec. 1986) (available from Community Services for Women, Boston, Massachusetts) [hereinafter *Massachusetts Program Design*]. Although no recent national surveys have compiled statistics on the number of women who became pregnant shortly before or after incarceration, a 1977 American Medical Association study of seven states reported that 12.8% of the incarcerated women were pregnant. Resnick & Shaw, *Prisoners of their Sex: Health Problems of Incarcerated Women*, in 2 *PRISONER'S RIGHTS SOURCEBOOK* 331 (I. Robbins ed. 1980). This note discusses only issues relative to women who give birth while incarcerated or who have given birth shortly before their incarceration.

⁴ This note addresses a mother's right to physical custody only. Physical custody means the right to the child's companionship, whereas legal custody includes the right to make certain decisions about how the child is raised — including matters such as education, religious upbringing, and medical care. D. SAPONSEK, *MEDIATING CHILD CUSTODY DISPUTES* 107-08 (1983).

Incarceration may drastically affect a mother's right to regain physical custody of her child after she has served her sentence. This subject is beyond the scope of this note however. For a discussion of the effects of incarceration on legal child custody, see Caron, *Termination of Incarcerated Parents' Rights in Massachusetts*, 10 *CRIM. & CIV. CONFINEMENT* 147, 154-55 (1984) (in Massachusetts, the mere fact of a parent's incarceration does not give rise to a presumption of unfitness); Ash & Guyer, *Involuntary Abandonment: Infants of Imprisoned Parents*, 10 *BULL. OF THE AM. ASS'N. OF PSYCH. & LAW* 103, 103 (1982) (finding that "in many states, legal abandonment occurs when a parent is jailed . . ."); Note, *The Single Mother as Criminal Defendant: A Practitioner's Guide to the Consequences of Incarceration*, 9 *GOLDEN GATE U.L. REV.* 507, 508 (1979) ("Unlike most other prisoners, the single mother serves a double sentence, one that deprives her of her liberty, the other that deprives her of her motherhood."); Note, *The Loss of Parental Rights as a Consequence of Conviction and Imprisonment: Unintended Punishment*, 6 *NEW ENG. J. PRIS. L.* 61, 62-63 (1979) (concluding that "[a] parent's right to care for and retain control over his or her child may be irretrievably lost once a parent has been sentenced for a crime . . ."); see also Annotation, *Parent's Involuntary Confinement, or Failure to Care for Child as a Result Thereof, as Evincing Neglect, Unfitness, or the Like in a Dependency or Divestiture Proceeding*, 79 *A.L.R.* 3d 417 (1977); Annotation, *Parent's Involuntary Confinement, or Failure to Care for Child as a Result Thereof, as Permitting Adoption Without Parental Consent*, 78 *A.L.R.* 3d 712 (1977).

they are born.⁵ If a mother has any contact with her infant at all, it is limited to sporadic visitation until her release from prison.⁶ This separation may be harmful to the child's future growth and development.⁷

Most women in prison are serving sentences of fewer than two years as punishment for nonviolent "economic" crimes.⁸ Female prisoners currently constitute only 4.6 percent of the total prison population of the United States,⁹ yet the number of female prisoners has been increasing in recent years.¹⁰ Therefore, the number of infants temporarily taken from their mothers is likely to increase.¹¹

Currently, the laws of forty states fail to address whether a mother convicted of a criminal offense may retain physical custody of her infant.¹² When the mother is sentenced to a term of incarceration, the general practice in these states is to arrange to

⁵ In Massachusetts, for example, the current practice is to separate newborn infants from their mothers 48 hours after birth. Massachusetts Program Design, *supra* note 3, at 2. For purposes of this note, the terms "infant" and "child" mean persons under two years of age.

⁶ See Barry, *Children of Prisoners: Punishing the Innocent*, YOUTH LAW NEWS (Mar.-Apr. 1985) 12, 14. In a survey of 32 women with children in a Connecticut correctional institution, eight reported seeing their children once a month or more and fifteen had not seen their children at all during their incarceration, which ranged from one week to one year. W. Baker, S. Provence, C. Perkins, & A. Solnit, Task Force Report 36-37 (June 14, 1985) (available from the Connecticut Civil Liberties Foundation, Hartford, Connecticut). Twenty-six of these women planned to resume care of their children at their release. *Id.*

Most women's prisons are located far from the cities where inmates' children and families live. One common problem with visitation is the caretaker's inability to provide transportation. Barry, *supra*, at 13.

⁷ See *infra* text accompanying notes 44-57.

⁸ U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, PRISON ADMISSIONS AND RELEASES, 1983, 3, 8 (1986). In 1983, the median time women served when released after a first conviction was 15 months. The mean was 19.2 months for all offenses, including violent offenses. For all nonviolent offenses (74% of all female first releases) the median time served was less than one year. The mean was under 1 1/4 years. *Id.* at 8. In Massachusetts for example, 90% of incarcerated women serve an average of 4.7 months in prison. Massachusetts Program Design, *supra* note 3, at 3.

In 1983, 55.7% of the women admitted to prison were convicted for property offenses, primarily in the categories of larceny and forgery/fraud. These crimes include theft, petty larceny, writing worthless checks, obtaining money by false pretenses, counterfeiting, and embezzlement. Another 11.6% of the women were convicted of drug offenses and 7.2% were found guilty of public order offenses. *Id.* at 3.

⁹ U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISONERS IN 1985 1, 2 (1986). The total number of prisoners under the jurisdiction of federal and state corrections authorities at the end of 1985 was 503,601. Of these, 23,091 were women. *Id.*

¹⁰ Between 1948 and 1977 the female prison population was less than four percent of the entire prison population. From 1984 to 1985, the female prison population increased to 10.7%. *Id.*

¹¹ See *id.*

¹² Only ten state statutes currently address incarcerated mothers and their newborns. See CAL. PENAL CODE §§ 3410-3424 (West 1982); CONN. GEN. STAT. ANN. § 18-69 (1975 & Supp. 1986); FLA. STAT. ANN. § 944.24(2) (West 1985); ILL. ANN. STAT. ch. 38, para. 1003-6-2(g) (Smith-Hurd 1982); MASS. GEN. LAWS ANN. ch. 127, § 142 (West 1981); MD. ANN. CODE art. 27, § 699 (1982); N.C. GEN. STAT. § 148-47 (1983); N.C. GEN. STAT. § 15A-1353(a) (1983); N.Y. CORRECT. LAW § 611 (McKinney 1968); W. VA. CODE § 28-5-8 (1986). Three other state statutes direct that childbirth must take place outside of the correctional institution but do not address whether mothers may retain physical custody of their infants. See IND. CODE ANN. § 11-10-3-3 (Burns 1981); MINN. STAT. ANN. § 243.15 (West 1972 & Supp. 1987); PA. STAT. ANN. tit. 61 § 111 (Purdon 1964). Federal regulations specify that infants may only visit their inmate mothers. 28 C.F.R. § 551.24 (July 1, 1986 ed.).

place the infant with an alternate caretaker until the mother's release.¹³ The mother is usually given the opportunity to contribute to the decision of who will care for her child, and may recommend either a relative, friend, or spouse.¹⁴ If the mother is unable to find an acceptable caretaker, a state social service agency generally will place the child in foster care until the mother's release.¹⁵

A few states have taken legislative action,¹⁶ apparently recognizing a need to keep incarcerated mothers and their infants together, when possible. These statutes' mandates range from temporary infant care within prisons¹⁷ to sentencing alternatives for pregnant convicts.¹⁸ Only two states, however, New York and California, have developed active, working programs through which single mothers may retain physical custody of their infants while serving their sentences.¹⁹ The New York statute provides that an incarcerated mother may retain physical custody of her child for one year.²⁰ As a result of this statutory provision, the infants of some incarcerated women in New York live in a prison nursery in the same facility as their mothers.²¹

California's statute, in contrast, provides that as an alternative to incarceration, certain eligible convicted women may serve their sentences in community residences where they may live with their infants.²² Accordingly, California has developed the

¹³ Mothers and social workers must make arrangements for temporary care. Note, *On Prisoners and Parenting: Preserving the Tie That Binds*, 87 YALE L.J. 1408, 1410 (1978). In most cases, the mother will place the child with relatives. Where relatives are unavailable, the state will place the child in foster care. *Id.* at 1410-11. This practice varies little from state to state. Telephone interview with Ellen Barry, Director, Legal Services for Prisoners with Children (California) (Dec. 15, 1986); telephone interview with Gail T. Smith, Director, Chicago Legal Aid for Prisoners with Children (Jan. 9, 1987); telephone interview with Linda Romanow, Director, Looking Into Needs of Kids (Michigan) (Jan. 9, 1987). See also *Diernfield v. People*, 323 P.2d 628, 632, 137 Colo. 238, 244-45 ("A parent may make such arrangement for care of his [or her] child as circumstances may demand without order of the court by guardianship or otherwise."). See, e.g., Barry Memorandum, *supra* note 2; Complaint at 12, *West v. Manson*, No. H83-366 (D.C. Conn.) (filed 1983). See also *infra* note 111 and accompanying text.

¹⁴ See Note, *supra* note 13, at 1410. See also *infra* text accompanying note 111.

¹⁵ Note, *The Loss of Parental Rights as a Consequence of Conviction and Imprisonment: Unintended Punishment*, 6 NEW ENG. J. PRIS. L. 61, 66 (1979). In California, for example, after a mother is arrested, the department of social services arranges for foster care if the father or relative is not available. Barry Memorandum, *supra* note 2. See also *infra* note 112 and accompanying text.

¹⁶ See CAL. PENAL CODE §§ 3410-3424 (West 1982); CONN. GEN. STAT. ANN. § 18-69 (1975 & Supp. 1986); ILL. ANN. STAT. ch. 38, para. 1003-6-2(g) (Smith-Hurd 1982); MASS. GEN. LAWS ANN. ch. 127, § 142 (West 1981); MD. ANN. CODE art. 27, § 699 (1982); N.C. GEN. STAT. § 148-47 (1983); N.C. GEN. STAT. § 15A-1353(a) (1983); N.Y. CORRECT. LAW § 611 (McKinney 1968); W. VA. CODE § 28-5-8 (1986).

¹⁷ See, e.g., CONN. GEN. STAT. ANN. § 18-69a (1975 & Supp. 1986).

¹⁸ See, e.g., MD. ANN. CODE art. 27, § 699 (1982); MASS. GEN. LAWS ANN. ch. 127, § 142 (West 1981).

¹⁹ CAL. PENAL CODE §§ 3410-3424 (West 1982); N.Y. CORRECT. LAW § 611 (McKinney 1968).

²⁰ N.Y. CORRECT. LAW §§ 611-2, 611-3 (McKinney 1968). This time may be extended to eighteen months if the mother is soon to be paroled. *Id.* § 611-2.

²¹ See The Children's Center, Bedford Hills Correctional Facility, *Untitled Informational Material*, 14 [hereinafter *Facility Publication*] (available from The Children's Center, Bedford Hills, New York). R. Segal, *The Bedford Hills Correctional Facility 27-28* (1982) (available on file at the Boston College Law Review) [hereinafter *Bedford Hills*]. See *infra* notes 148-55 and accompanying text.

²² See CAL. PENAL CODE §§ 3410-3424.

Mother-Infant Care Program.²³ This program consists of three halfway houses where convicted mothers currently serve sentences while continuing to live with and care for their infants.²⁴

While working legislative alternatives to separation currently exist in only two states, numerous private organizations have taken action, independent of the legislature, to assist incarcerated mothers and their children.²⁵ Some of these organizations recently have developed proposals for community residences as an alternative to incarceration for convicted women who are pregnant or are the mothers of infants.²⁶ This note suggests that these new proposals, considered in light of the success of current programs in California and New York, demonstrate the feasibility of effective legislative action in other states. Legislation can insure that fit mothers who are convicted of nonviolent crimes and are serving short prison sentences will be allowed to care for their infants in community residence programs, or, alternatively, in prison nurseries.²⁷ Allowing convicted mothers to care for their infants in the critical early months of the infants' lives could prevent subsequent developmental harm which separation may cause.²⁸ Furthermore, properly structured residential programs and prison nurseries will preserve the state interests in the goals of the correctional system: deterrence, security, and rehabilitation.²⁹

This note begins by outlining the primary interests involved in determining whether convicted mothers may retain physical custody of their infants while they serve their sentences.³⁰ Section II first provides an overview of the historical treatment of convicted mothers,³¹ and then analyzes current legislative action and judicial decisions — primarily in New York and California — regarding the separation of infants from their incarcerated mothers.³² This section also discusses the findings and activities of private groups organized to aid convicted mothers and their children.³³ Section III proposes legislative action to insure alternatives to separation, and suggests that while both community residences and prison nurseries present acceptable alternatives, the community residence

²³ Barry Memorandum, *supra* note 2, at 3. See also *infra* notes 174–82 and accompanying text.

²⁴ Barry Memorandum, *supra* note 2, at 3.

²⁵ See *infra* notes 186–99 and accompanying text.

²⁶ See Task Force Report, *supra* note 6, at 21–24; Massachusetts Program Design, *supra* note 3, at 4. See also Report to the Illinois Citizens Assembly Council on Women 5 (Oct. 1986) [hereinafter Illinois Report].

²⁷ The characteristics and needs of prison populations vary from state to state and may therefore require appropriate program features. For example, in Massachusetts, many women are addicted to drugs upon entering prison. Therefore, the proposed program includes drug rehabilitation. Massachusetts Program Design, *supra* note 3, at 4; Expectant Mothers in Massachusetts, *supra* note 2, at 4. States with small female prisoner populations could collaborate to establish regional residences serving more than one state. See Fox, *Interstate Corrections and Penal Legislation*, 62 B.U.L. Rev. 57 (1962).

²⁸ See *infra* text accompanying notes 44–57.

²⁹ The Supreme Court listed these goals in *Pell v. Procunier*, 417 U.S. 817, 822–23 (1973), and *Procunier v. Martinez*, 416 U.S. 396, 412 (1973). For discussion of why prison nurseries and residential programs are consistent with the goals of the penal system, see *infra* text accompanying notes 228–29, 240–49, 255–57.

³⁰ See *infra* notes 36–89 and accompanying text.

³¹ See *infra* notes 85–102 and accompanying text.

³² See *infra* notes 103–85 and accompanying text.

³³ See *infra* notes 186–200 and accompanying text.

option ultimately yields the greatest benefit.³⁴ Legislatively mandated programs to prevent separation serve the interests of convicted mothers and their infants and at the same time preserve the state interests in the institutional goals of deterrence, security, and rehabilitation, as well as the state interest in safeguarding the best interests of children.³⁵ Constructive, humane alternatives to the current disregard of the problems of incarcerated women and their children are long overdue.

I. IN THE BEST INTERESTS OF THE CHILD, THE MOTHER, OR THE STATE?

The determination of whether incarcerated mothers should retain physical custody of their infants implicates three primary interests: the child's, the mother's, and the state's.³⁶ The child has an interest in normal child development, which may depend upon the child's continuous care by a single caretaker.³⁷ Because a majority of women incarcerated in the United States are single mothers,³⁸ the children of these women have a specific interest in the opportunity to bond with their mothers. The incarcerated mother's interests are also involved.³⁹ While under normal circumstances the mother, as a parent, has the right to control her child's care, this right may be suspended due to her criminal conviction.⁴⁰ Finally, the state has an interest in determining whether convicted mothers should retain physical custody of their infants while serving their sentences.⁴¹ The state's interests include maintaining the orderly operation of its criminal justice system and protecting the best interests of the child.⁴² Thus, in formulating a policy concerning imprisoned mothers and their infants, a state legislature must balance these three interests.

Children clearly have a strong interest in being free from harm, and in growing up physically and psychologically healthy.⁴³ Normal child development may require the establishment, through continuity of care by one adult caretaker, of an attachment bond which the infant maintains throughout childhood.⁴⁴ If this bond is destroyed through

³⁴ See *infra* notes 201-62 and accompanying text.

³⁵ See *infra* notes 80-83, 240-58, and accompanying text.

³⁶ See *infra* notes 37-42 and accompanying text.

³⁷ J. GOLDSTEIN, A. FREUD, A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 18-20 (1973) [hereinafter *BEST INTERESTS*] ("The child's developmental needs are best served by continuing, unconditional, and permanent relationships."); Note, *supra* note 13, at 1412 n.13 (citing J. KAGAN & E. HAVEMANN, *PSYCHOLOGY* 533-37 (1972); P. MUSSEN & M. ROSENZWEIG, *PSYCHOLOGY* 318 (1973); Ainsworth, *The Development of the Infant-Mother Attachment*, in 3 *REV. CHILD DEV. RES.* 1, 3 (1973)); see also Task Force Report, *supra* note 6, at 41-48.

³⁸ See *supra* note 2 and accompanying text.

³⁹ See *infra* notes 64-68 and accompanying text.

⁴⁰ See *infra* note 64 and accompanying text.

⁴¹ See *infra* notes 70-84 and accompanying text.

⁴² *Id.*

⁴³ See *Declaration of the Rights of the Child*, G.A. Res. 1386, 14 U.N. GAOR Supp. (No.16) at 19, U.N. Doc. A/4354 (1959). This United Nations resolution stated:

The child shall enjoy special protection, and shall be given opportunities and facilities by law and other means, to enable him [or her] to develop physically, mentally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

Id.

⁴⁴ *BEST INTERESTS*, *supra* note 37, at 18-20. See also Note, *supra* note 13, at 1412 n.13.

separation from the parent during the first two years of life, a child may successfully form a new bond with a second caretaker, but this capability diminishes as the child grows older.⁴⁵ Once the child passes beyond the point where he or she is able to form an adequate attachment bond, the child may not only experience difficulty in forming relationships, but also experience developmental retardation.⁴⁶ A child normally develops a specific attachment to an adult by the time he or she is seven months old.⁴⁷ Such attachment bonds are commonly formed through the infant's routine care by one or more adult.⁴⁸ Studies suggest that if a child does not have sufficient contact with an attachment figure between one month and twenty-five months of age, the child may lose his or her ability to form such an attachment.⁴⁹ This loss may hinder intellectual development and affect the child's ability to maintain interpersonal relationships later.⁵⁰

If the child is not yet mature enough to maintain the attachment bond during the separation,⁵¹ the child may experience acute distress followed by hostility and withdrawal.⁵² This distress may occur in infants as young as six months who are shifted from one caretaker to another.⁵³ Factors which influence the degree of harm that results from disrupting an infant's attachments include the child's ability to comprehend that the separation is temporary, whether the separation removes the child from familiar surroundings, whether a substitute figure exists with whom the child might form a new attachment, and finally, the nature of the child's relationship with the attachment figure before the separation.⁵⁴ Regardless of whether a child forms a new attachment bond, prolonged separation from the attachment figure may in itself be traumatic for the child.⁵⁵ If damage from early separation from an attachment figure is not reversed during childhood, the child may develop delinquent behavior.⁵⁶ Therefore, children

⁴⁵ BEST INTERESTS, *supra* note 37, at 40-41; J. BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT 327 (1969). Bowlby states:

As regards development of the first attachment, it is plain that during the second quarter of the first year of life infants are sensitive and ready to make a discriminated attachment. After six months of age they can still do so; but as the months pass difficulties increase. By the second year, it seems clear, these difficulties are already great; and they do not diminish.

Id. at 327.

⁴⁶ Ainsworth, *supra* note 37, at 65, 76.

⁴⁷ *Id.* at 32.

⁴⁸ *Id.* at 55. An infant may form attachment bonds with more than one person. *Id.* at 33. In most cases, however, one attachment bond will be primary. *Id.* at 81.

⁴⁹ *Id.* at 43. The inability to form attachment bonds has been shown primarily with children who have been raised in institutional settings in the early months of their lives. *Id.*

⁵⁰ *Id.* at 53.

⁵¹ *Id.* at 65.

⁵² *Id.* at 65-67.

⁵³ *Id.* at 67. This has been shown even where neither caretaker was an institutional caretaker. *Id.*

⁵⁴ *Id.* at 65.

⁵⁵ *Id.*

⁵⁶ Note, *supra* note 13, at 1415. S. GLUECK, UNRAVELLING JUVENILE DELINQUENCY 122-23 (1950). In Glueck's survey sample, over half of the delinquents surveyed suffered their first break in family life at less than five years of age. The nondelinquent sample's rate of separation at this age was less than half. *Id.* See also C. TAIT & E. HODGES, DELINQUENTS, THEIR FAMILIES, AND THE COMMUNITY 92 (1962); Barry Memorandum, *supra* note 2, at 2.

have a strong interest in being free to bond with a caretaker from whom they will not be separated early in life.⁵⁷

Although studies indicate that healthy psychological development depends upon formation of an attachment bond, no court yet has considered whether this interest is constitutionally protected.⁵⁸ In 1986, the United States Court of Appeals for the Fifth Circuit, in *Southerland v. Thigpen*, considered the related issue of a child's right to be breast-fed by her incarcerated mother and concluded that the legitimate interests of the state outweighed such a right.⁵⁹ Nevertheless, the court recognized that a child's right to personal association with a parent is not "wholly lacking" constitutional protection from government interference.⁶⁰ The court reasoned, however, that children suffer many adverse consequences when a parent is imprisoned, such as loss of the parent's earning power.⁶¹ The Fifth Circuit noted that no court has ever suggested "that the state is constitutionally obliged to modify the convicted family member's sentence to confinement or its execution in order to accommodate a spouse's or minor child's associational or relational interests vis-a-vis the convict."⁶² The court thus concluded that state interests may override a child's interest in breast-feeding.⁶³

The mother's interests are also a factor in determining whether a state should allow convicted mothers to retain physical custody of their infants. The incarcerated mother is in a unique situation. Normally, she would have control over the care of her child, under the well-settled constitutional principle that natural parents have a primary right to custody, care, and nurturance of their children.⁶⁴ While she may wish to raise her child, however, the state may prevent her from doing so because of her criminal conviction.⁶⁵ The only two courts which have addressed the issue directly have summarily concluded that the right to physical custody of a child is not compatible with incarceration.⁶⁶ In reaching this result, the Oregon Court of Appeals reasoned that "to hold

⁵⁷ Note, *Babies Behind Bars: Should Incarcerated Mothers be Allowed to Keep their Newborns with them in Prison?* 16 U. RICH. L. REV. 677, 680 (1982).

⁵⁸ Although two courts have considered bonding and continuity of care in determining a child's best interests, these interests have not been identified as a constitutional right. See *Delancy v. Booth*, 400 So. 2d 1269, 1269 (Fla. Dist. Ct. App. 1981); *Bailey v. Lombard*, 101 Misc. 2d 56, 62-64, 420 N.Y.S.2d 650, 654-55 (1979). The *Delancy* court heard testimony from a clinical psychologist that bonding is important to a child's emotional health, and that the best interests of the child would be served by placing the child in prison with its mother. *Delancy*, 400 So. 2d at 1269. The court, however, found that the child would receive greater consistency of care living with the grandmother who planned ultimately to care for the child after the mother's term in prison. *Id.* at 1270.

⁵⁹ *Southerland v. Thigpen*, 784 F.2d 713, 718 (5th Cir. 1986).

⁶⁰ *Id.* at 717.

⁶¹ *Id.* at 717-18.

⁶² *Id.*

⁶³ *Id.* at 718.

⁶⁴ This right is based on the notion of family integrity. *Santosky v. Kramer*, 455 U.S. 743, 745 (1982); *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 862-63 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); *May v. Anderson*, 345 U.S. 528, 533 (1953); *Skinner v. Oklahoma*, 316 U.S. 535, 554 (1942); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923).

⁶⁵ *Southerland v. Thigpen*, 784 F.2d 713 (5th Cir. 1986); *Pendergrass v. Toombs*, 24 Or. App. 719, 721, 546 P.2d 1103, 1103 (1976).

⁶⁶ *Southerland*, 784 F.2d at 716; *Pendergrass*, 24 Or. App. at 721, 546 P.2d at 1103.

otherwise would be to hold that no parent of an unemancipated minor child can be imprisoned for commission of a crime."⁶⁷ The Fifth Circuit, however, explained that the very concept of incarceration requires the loss of associational rights and isolation from society, logically precluding a convict's asserting a right against isolation.⁶⁸ The court further concluded that ordering infants to be housed at correctional institutions or, alternatively, suspending all mothers' prison sentences undermines the state goals of deterrence, retribution, and maintenance of security.⁶⁹

The state's interests are the predominant consideration in determining whether convicted mothers should retain custody of their infants. The primary justification for restricting an incarcerated person's rights is the state's interest in maintaining the orderly and efficient operation of its criminal justice system.⁷⁰ The United States Supreme Court has articulated three central objectives in the administration of penal institutions.⁷¹ These objectives include deterrence, rehabilitation, and internal prison security.⁷² Deterrence has twin goals: specific deterrence ensures that punishment will prevent a particular offender from repeating a criminal act; and general deterrence serves as an example to discourage others from performing similar unlawful acts.⁷³ Rehabilitation theoretically advances society's interests by reforming a criminal into a valuable citizen.⁷⁴ Prisons achieve rehabilitation through programs that remedy an inmate's educational and other deficiencies which may have led to the criminal act in the first instance.⁷⁵ The rehabilitation goal is sometimes subordinated to the state's third objective: prison security.⁷⁶ Prison security is necessary in order to maintain discipline within the prison, protect prison staff and visitors, and to prevent escape.⁷⁷ Prison administrators must insure the safety of all persons coming in contact with the prisoners, as well as the prisoners themselves.⁷⁸

While the state has a strong interest in deterring crime, rehabilitating criminals, and maintaining prison security, the state also has an obligation to protect the best interests of the child. Under the doctrine of *parens patriae*,⁷⁹ the state has the duty and power to

⁶⁷ *Id.* at 721, 546 P.2d at 1104.

⁶⁸ *Southerland*, 784 F.2d at 717.

⁶⁹ *See id.*

⁷⁰ *Pell v. Procunier*, 417 U.S. 817, 822-23 (1973); *Procunier v. Martinez*, 416 U.S. 396, 412 (1973); *see also Hudson v. Palmer*, 468 U.S. 517, 524 (1984), *aff'g*, 744 F.2d 22 (1984); *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

⁷¹ *Pell*, 417 U.S. at 822-23; *Martinez*, 416 U.S. at 412 (1973).

⁷² *Id.*

⁷³ K. DUFFEE & R. FITCH, AN INTRODUCTION TO CORRECTIONS: A POLICY AND SYSTEMS APPROACH 3 (1976).

⁷⁴ *Id.* at 77; *see also Pell*, 417 U.S. at 823.

⁷⁵ NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, THE STATUTORY FRAMEWORK OF CORRECTIONS: NATIONAL STANDARDS AND GOALS 534 (1973), *reprinted in* R. CARTER & L. WILKINS, PROBATION, PAROLE AND COMMUNITY CORRECTIONS 583, 585 (2d ed. 1976).

⁷⁶ *See DUFFEE & FITCH, supra* note 73, at 77; *Hudson v. Palmer*, 468 U.S. 517, 527 (1983).

⁷⁷ *Hudson*, 468 U.S. at 526-27; *Martinez*, 416 U.S. at 412.

⁷⁸ *Hudson*, 468 U.S. at 526-27.

⁷⁹ *Parens patriae* literally means "parent of the country" and refers traditionally to the role of the state as sovereign and guardian of persons under legal disability. The doctrine originated in the English common law where the monarch had a royal prerogative to act as guardian to persons with legal disabilities such as infants. BLACK'S LAW DICTIONARY 1002 (5th ed. 1979). *See also* Comment, *Child Custody: Best Interests of Children v. Constitutional Rights of Parents*, 81 DICK. L. REV. 733, 733-35 (1977) and cases cited therein.

act as guardian for those under legal disability.⁸⁰ The state normally will interfere with the parent/child relationship only when the relationship has broken down and the life, health, or safety of the child is endangered.⁸¹ The presumption is that "if there is still reason to believe that a positive, nurturing parent-child relationship exists, the *parens patriae* interest favors preservation, not severance of natural family bonds."⁸² Thus, as the female prison population continues to grow,⁸³ a new state interest emerges — the state must guard the welfare of the child while maintaining an efficient penal system. Properly structured state sponsored programs which allow convicted mothers to retain physical custody of their children achieve this goal. Courts have not yet identified the constitutional rights which might compel a state to discontinue the practice of separating incarcerated mothers and their infants. Some state legislatures, however, have enacted statutes which advance a state policy of keeping convicted mothers and their children together.⁸⁴

II. THE LEGISLATIVE RESPONSE

A. Historical Treatment of Incarcerated Mothers

State legislatures first promulgated statutes providing for infant care within prisons in the early part of this century.⁸⁵ Historical studies indicate that at one time, incarcerated women routinely were permitted to care for their children in the prison setting.⁸⁶ There is no accurate record, however, of the number of mothers who were allowed to keep their children with them, or how such programs operated.⁸⁷

Some of the statutes that permitted infant care within prisons later were repealed or amended to direct that infants be removed from their mothers immediately upon the mother's incarceration.⁸⁸ No available legislative documents indicate the rationale behind these changes. In Kansas, for example, the statute providing for infant care within prisons was dropped without documented explanation when that state thoroughly reworked its penal code in 1973.⁸⁹

Similarly, Virginia's permissive statute was amended.⁹⁰ The original 1918 statute allowed incarcerated mothers to retain custody of their children up to four years of

⁸⁰ Comment, *supra* note 79, at 733-35.

⁸¹ Note, *supra* note 13, at 1421.

⁸² *Santosky v. Kramer*, 455 U.S. 743, 766-67 (1982).

⁸³ See *supra* note 10 and accompanying text.

⁸⁴ See, e.g., CAL. PENAL CODE §§ 3410-3424 (West 1982); N.Y. CORRECT. LAW § 611 (McKinney 1968).

⁸⁵ See, e.g., 1918 Va. Acts 276, replaced by VA. CODE ANN. §§ 53-285 (1978); repealed by 1982 Va. Acts 636; 1915 Me. Laws 206, § 10, replaced by 1975 Me. Laws 756, § 815.

⁸⁶ See, e.g., E. FREEDMAN, *THEIR SISTERS' KEEPERS, WOMEN'S PRISON REFORM IN AMERICA, 1830-1930*, 30, 96, 152 (1981).

⁸⁷ This lack of documentation may be due to the comparatively small number of women in the corrections system. See *supra* notes 9-10. One commentator has suggested that in places where all incarcerated women were housed in one institution, there was no need for a formal statewide policy of recordkeeping. Note, *supra* note 57, at 687 n.62.

⁸⁸ See, e.g., KAN. CRIM. PROC. CODE ANN. § 76.205b, amended by 1970 Kan. Sess. Laws ch. 376, § 1, repealed by 1973 Kan. Sess. Laws ch. 339, § 3.

⁸⁹ See 1973 Kan. Sess. Laws ch. 339, § 3.

⁹⁰ 1918 Va. Acts 276 (amended 1930, 1978), repealed by 1982 Va. Acts 636.

age.⁹¹ The Virginia legislature amended this statute in 1930, giving the director of the department of corrections discretion to determine whether a child's best interests were advanced by custody with the mother in the correctional institution.⁹² From 1930 on, Virginia permitted incarcerated women to keep their children with them on a regular basis, but for decreasing periods of time.⁹³ By 1960, the department of corrections permitted infants to stay with their mothers until the infants reached two years of age.⁹⁴ The department shortened this time to three months and then to thirty days until, by 1976, incarcerated mothers were no longer allowed custody of their infants for any period of time.⁹⁵ The Superintendent of the Virginia Correctional Center for Women, empowered by the statute to determine whether infants could stay with their incarcerated mothers, explained that she disallowed women custody of their infants under the statute because she believed that early separation of mother and infant was "easier" on both parties, prison facilities were inadequate, and an infant's presence might be difficult for other inmates who had been separated from their children.⁹⁶ In 1982, in a complete revision of Virginia's prisons and corrections statute, the legislature omitted the provision which allowed the possibility that some incarcerated mothers might keep their children with them in prison.⁹⁷ The legislative history provides no explanation for this omission.⁹⁸

Similarly, state legislatures in California and Florida substantially amended statutes which had allowed incarcerated mothers to retain physical custody of their infants.⁹⁹ In both states, these amendments followed litigation brought to enforce incarcerated mothers' rights under the statutes.¹⁰⁰ While the revised Florida statute completely disallows

⁹¹ 1918 Va. Acts 276, cited in Note, *supra* note 57, at 687 n.59.

⁹² See VA. CODE ANN. § 1903a (1930), cited in Note, *supra* note 57, at 687 n.60.

⁹³ Note, *supra* note 57, at 687.

⁹⁴ *Id.* at 687.

⁹⁵ *Id.* at 688.

⁹⁶ *Id.* at 688 n.70.

⁹⁷ VA. CODE ANN. § 53-285 (1978), repealed by 1982 Va. Acts 636.

⁹⁸ The 1982 Act also omitted a provision for amending the prison sentences of pregnant inmates. VA. CODE ANN. § 53-281 (1978), repealed by 1982 Va. Acts 636.

⁹⁹ 1941 Cal. Stat. ch. 53 § 1, replaced by 1978 Cal. Stat. ch. 1054, (current version at CAL. PENAL CODE §§ 3410-3424 (West 1982)); 1957 Fla. Stat. Ann. § 944.24 (West 1981), replaced by FLA. STAT. ANN. § 944.24 (West 1985).

¹⁰⁰ From 1929 to 1978, California had laws on the books enabling women to keep their infants with them in prison. See 1929 Cal. Stat. ch. 248, § 9, cited in Note, *Women and Children First: An Examination of the Unique Needs of Women in Prison*, 16 GOLDEN GATE U.L. REV. 455, 470 n.147 (1986) [hereinafter *Women and Children First*]. In 1978, for the first time, a female prisoner brought suit to gain custody of her child under the California statute. See *Cardell v. Enomoto*, No. 701-094 (Sup. Ct. San Francisco, 1976) (Memorandum of Intended Decision), cited in Note, *supra*, at 470 n.149. The court found that the statute did not grant an incarcerated mother an absolute right to custody of her infant in prison. *Id.* at 471. The same year, the statute was repealed and replaced by a provision which authorized the creation of community residence programs for incarcerated mothers. 1978 Cal. Stat. ch. 1054. See *infra* notes 174-82 and accompanying text. The California legislature provided that this statute was subject to review in 1980. At that time the legislature made the statute less restrictive and enacted it in its present form. CAL. PENAL CODE §§ 3410-3424. The most significant change in the statute was that the original legislation provided that children under two years of age and mothers with projected sentences of two years or less would be eligible for the program, whereas the new statute expands the program to include children under six years of age and mothers six years or less from release.

From 1957 until 1981, Florida law permitted incarcerated mothers to keep their children with them in prison. See 1957 Fla. Laws ch. 121, § 22; FLA. STAT. ANN. § 944.24 (West 1985), cited in

placing an infant with the incarcerated mother,¹⁰¹ the California legislature created an alternative residential program in which convicted women may live with their children.¹⁰² Thus, although some states once routinely permitted incarcerated women to care for their children in prison, these states gradually omitted these provisions.

B. Current Status of Incarcerated Mothers and Their Infants

Most states currently do not allow incarcerated mothers to retain physical custody of their children,¹⁰³ even where the mother's crime is nonviolent and she is one of the majority of women sentenced to a short prison term.¹⁰⁴ While a great majority of state statutes are silent on the issue, some states have created alternative ways to allow convicted mothers to care for their infants.¹⁰⁵ These alternatives include prison nurseries,¹⁰⁶ sentencing modification,¹⁰⁷ and community residences.¹⁰⁸

In forty states there are no statutes which address whether a mother convicted of a criminal offense may retain physical custody of her infant.¹⁰⁹ In these states, the parents or the state itself must arrange for temporary care of the child if the father is not present.¹¹⁰ In a majority of cases, the mother places her child with relatives.¹¹¹ Where no relatives are available or where state welfare officials determine that state care is required, the state places the child in a foster home or in a state institution.¹¹²

Note, *supra*, at 466. In 1979, a female inmate brought suit to retain custody of her newborn. *Moore v. Wainwright*, no. 79-3425 (Cir. Ct.), *rev'd sub nom.* *Wainwright v. Moore*, 374 So. 2d 586 (Fla. Dist. Ct. App. 1979). Although the trial court interpreted the statute as giving sole discretion to the mother to choose to keep the child, the appellate court remanded the case to take into consideration the interests of all the parties in light of the best interests of the child. *Wainwright*, 374 So. 2d at 588. The mother was paroled before the rehearing took place. Note, *supra* note 57, at 679. The Florida Department of Corrections subsequently allowed ten mothers to have custody of their infants in prison. *Id.* In 1981, the court in *Delancy v. Booth* held that an incarcerated mother has no statutory or constitutional right to raise a child in prison. 400 So. 2d 1269, 1270 (Fla. Dist. Ct. App. 1981). The same year, the Florida legislature repealed the statute which allowed a child to remain with his or her mother in prison. The law currently provides that the mother may give birth outside the institution, and that the child will be placed outside the institution. FLA. STAT. ANN. § 944.24(2) (West 1985).

¹⁰¹ FLA. STAT. ANN. § 944.24(2).

¹⁰² CAL. PENAL CODE § 3411.

¹⁰³ See *supra* note 12 and accompanying text.

¹⁰⁴ See *supra* note 8 and accompanying text.

¹⁰⁵ CAL. PENAL CODE §§ 3410-3424 (West 1982); CONN. GEN. STAT. ANN. § 18-69 (1975 & Supp. 1986); ILL. ANN. STAT. ch. 38, para. 1003-6-2(g) (Smith-Hurd 1982); MASS. GEN. LAWS ANN. ch. 127, § 142 (West 1981); MD. ANN. CODE art. 27, § 699 (1982); N.C. GEN. STAT. § 15A-1353(a) (1983); N.Y. CORRECT. LAW § 611 (McKinney 1968).

¹⁰⁶ N.Y. CORRECT. LAW §§ 611-2, 611-3 (McKinney 1968). See also *infra* notes 120, 148-55.

¹⁰⁷ See *infra* notes 155-66.

¹⁰⁸ CAL. PENAL CODE § 3411. See also *infra* notes 167-82 and accompanying text.

¹⁰⁹ See *supra* note 12 and accompanying text.

¹¹⁰ Note, *supra* note 13, at 1410.

¹¹¹ *Id.* In one survey, 75.7% of inmates' children were placed with relatives. PRISON MATCH, PREGNANCY IN PRISON: A NEEDS ASSESSMENT OF PERINATAL OUTCOME IN THREE CALIFORNIA PENAL INSTITUTIONS 91 (1985) (available from Prison Match, Oakland, California) [hereinafter PREGNANCY IN PRISON].

¹¹² Note, *supra* note 13, at 1410-11. In the California survey, 8.6% of inmates' children were placed in foster care. PREGNANCY IN PRISON, *supra* note 111, at 91. See also *supra* note 13 and accompanying text.

Four states currently provide that under special circumstances or for a limited time period, a mother may retain physical custody of her infant while in prison.¹¹³ Only one state, New York, provides that incarcerated mothers may retain custody of their infants for up to one year.¹¹⁴ Connecticut's statute provides that children born to inmates may be maintained in a correctional institution for up to sixty days.¹¹⁵ Other statutes do not establish a specific time period.¹¹⁶ The West Virginia and North Carolina statutes direct only that a child born in a penitentiary be removed from the correctional institution as soon as possible after birth.¹¹⁷ The comparable Illinois statute gives the director of the department of corrections discretion to decide whether a child in sole custody of its mother before her incarceration or born during her incarceration may reside in a correctional institution with the mother.¹¹⁸ In recent years, however, no child is known to have remained in an Illinois prison with his or her mother.¹¹⁹

New York law, in contrast, provides that infants born while their mothers are confined in state correctional institutions, or who are nursing at the time of the mother's commitment, may live in the institution with their mothers for one year.¹²⁰ The statute also provides that the officer in charge of the institution may remove the child from the institution at any time before one year after determining that removal would be in the child's best interests.¹²¹ The child's stay is thus limited to "such period as seems desirable for the welfare of the child . . ."¹²²

Two New York court decisions illustrate that the corrections officer's power to refuse to allow an incarcerated mother to retain physical custody of her child is subject to the officer's actual determination that the separation is in the individual child's best interests.¹²³ *Apgar v. Beauter* involved a pregnant woman who was incarcerated while awaiting trial on a murder charge.¹²⁴ After she gave birth to her son in a hospital¹²⁵ the sheriff refused her permission to see or care for the infant.¹²⁶ The sheriff also refused to permit the child to return to the jail with his mother, on the grounds that it would affect prison morale and that the child's crying would disturb the other inmates.¹²⁷ The New York

¹¹³ With the exception of Illinois, these statutes provide only for children born during their mothers' commitment. CONN. GEN. STAT. ANN. § 18-69 (1975 & Supp. 1986); W. VA. CODE § 28-5-8 (1986); N.C. GEN. STAT. § 148-44 (1983); ILL. ANN. STAT. ch. 38, para. 1003-6-2(g) (Smith-Hurd 1982).

¹¹⁴ See *infra* notes 120-22 and accompanying text.

¹¹⁵ CONN. GEN. STAT. ANN. § 18-69a.

¹¹⁶ See, e.g., W. VA. CODE § 28-5-8; N.C. GEN. STAT. § 148-47.

¹¹⁷ See *supra* note 116.

¹¹⁸ ILL. ANN. STAT. ch. 38, para. 1003-6-2(g).

¹¹⁹ Telephone interview with Gail T. Smith, Project Director, Chicago Legal Aid to Incarcerated Mothers (Jan. 9, 1987).

¹²⁰ N.Y. CORRECT. LAW §§ 611-2, 611-3 (McKinney 1968). This time period may be extended to eighteen months if the mother is to be paroled shortly after the child's first birthday. *Id.* at § 611-2.

¹²¹ N.Y. CORRECT. LAW § 611-2; see also *Bailey v. Lombard*, 101 Misc.2d 60-61, 420 N.Y.S.2d 650, 653 (1979).

¹²² N.Y. CORRECT. LAW § 611-2.

¹²³ See *Bailey v. Lombard*, 101 Misc. 2d 56, 420 N.Y.S.2d 650 (1979); *Apgar v. Beauter*, 75 Misc. 2d 439, 347 N.Y.S.2d 872 (1973).

¹²⁴ *Apgar*, 75 Misc. 2d at 439-40, 347 N.Y.S.2d at 874.

¹²⁵ *Id.* at 440, 347 N.Y.S.2d at 874.

¹²⁶ *Id.*

¹²⁷ *Id.* at 442, 347 N.Y.S.2d at 876.

Court of Appeals found that because the sheriff based his decision on considerations other than the child's best interests, the jail officials failed to prove that the separation would serve the child's interests.¹²⁸ The court thus held that the petitioner had a statutory right to retain physical custody of her child while she was incarcerated, for the first year of the child's life.¹²⁹ In reaching this conclusion, the *Apgar* court stated that adequate food, clothing, shelter, care, and medical assistance were available to the child in the jail.¹³⁰ Furthermore, the court acknowledged the legislatively expressed presumption that the natural mother's care is important to the child's best interests.¹³¹

In the later case of *Bailey v. Lombard*, the New York Court of Appeals again focused on the best interests of the child, and affirmed the sheriff's decision to separate a mother and her infant daughter.¹³² In interpreting the New York statute and analyzing the best interests of the child, the *Bailey* court recognized the importance of psychological bonding for infants.¹³³ The facts showed, however, that the mother was scheduled for transfer to another institution, and therefore was likely to be separated from her infant in any event.¹³⁴ Faced with a choice between immediately placing the child in foster care or delaying the separation, the court determined that immediate placement would provide greater stability and continuity of care for the infant.¹³⁵ The court further found that the mother's inadequate past parenting behavior did not compel the conclusion that separation would be harmful to her child.¹³⁶ Thus, the court found it was not in the best interests of the child to remain with her mother in prison.¹³⁷

In *Bailey*, the sheriff also argued that prison facilities were not suited for caring for an infant, and that keeping infants in jail created security hazards.¹³⁸ The court fully rejected these arguments, maintaining that a decision based on these factors alone would be arbitrary and capricious.¹³⁹ Rather, the court ruled, the individual child's best interests must be the primary consideration.¹⁴⁰

The *Bailey* court set forth several factors the sheriff must consider in analyzing whether separation is in a child's best interests.¹⁴¹ These factors include the availability of facilities adequate to insure the child's health and safety,¹⁴² the mother's psychological health and parenting background,¹⁴³ the crime for which the mother was convicted as it

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Bailey v. Lombard*, 101 Misc. 2d at 56, 420 N.Y.S.2d at 654.

¹³³ *Id.* at 63, 420 N.Y.S.2d at 654.

¹³⁴ *Id.* at 62-65, 420 N.Y.S.2d at 654-55.

¹³⁵ *Id.* at 62-64, 420 N.Y.S.2d at 654-55.

¹³⁶ *Id.* at 64-65, 420 N.Y.S.2d at 655. The mother in question had a history of separation from her children and inadequate physical care for her children. *Id.* at 58-60, 420 N.Y.S.2d at 652. She had lost contact with two of her children for over one year, and was unaware of their location. *Id.* at 64, 420 N.Y.S.2d at 655. She also could not identify such things as her children's favorite colors, toys, or their friends' names. *Id.*

¹³⁷ *Id.* at 66, 420 N.Y.S.2d at 656.

¹³⁸ *Id.* at 65, 420 N.Y.S.2d at 656.

¹³⁹ *Id.* at 65-66, 420 N.Y.S.2d at 656.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 62, 420 N.Y.S.2d at 654.

¹⁴² *Id.*

¹⁴³ *Id.*

might reflect upon her parenting capabilities,¹⁴⁴ and the length of the mother's sentence.¹⁴⁵ The court considered the length of the mother's sentence in light of the period of time the child would be in the facility, with attention to the child's growing need for stimulation and mobility.¹⁴⁶ In general, the *Bailey* court directed the sheriff to weigh the benefits and detriments of parental care in jail against the effects of placing the child in foster care.¹⁴⁷

The New York statute permitting incarcerated mothers to keep their infants — and case law upholding its provisions — has given rise to the only prison nurseries in the United States.¹⁴⁸ The infants live in a nursery on the same floor of the prison as their mothers.¹⁴⁹ Each infant has a separate cubicle which includes a chair in which the mother can sit to hold the baby.¹⁵⁰ During the day, mothers move freely between their rooms and the nursery and playroom.¹⁵¹ At night, while the mothers are locked up, guards supervise the babies.¹⁵² If a baby cries during the night, a guard notifies the mother and takes her to her child.¹⁵³ The mothers are responsible for feeding and bathing their babies.¹⁵⁴ They are permitted to take their children outside from time to time, but they are under constant surveillance by prison officials.¹⁵⁵

Alternative sentencing is another method which some states have employed to permit convicted mothers and their children to remain together.¹⁵⁶ Statutes in North Carolina, Massachusetts, and Maryland provide alternatives to prison sentences for pregnant women convicted of crimes, including temporary deferral of sentencing, and suspension, parole or commutation of the sentence.¹⁵⁷ California, however, is the only state which provides for the establishment of alternative residences where mothers and children may live together in a secured community residence during the term of the mother's sentence.¹⁵⁸

The North Carolina statute provides that a sentencing court may defer the sentence of a pregnant woman convicted of a nonviolent crime.¹⁵⁹ The court may defer her sentence until six weeks after the birth of her child.¹⁶⁰ Under this statute, the court may

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 62-64, 420 N.Y.S.2d at 654.

¹⁴⁸ Facility Publication, *supra* note 21, at 14. New York currently has two nurseries, one at Bedford Hills and one at Riker's Island. *Id.* Prison nurseries have been successful in other countries, including West Germany, Denmark, and Yugoslavia. Bedford Hills, *supra* note 21, at 27-28.

¹⁴⁹ Facility Publication, *supra* note 21, at 14.

¹⁵⁰ Bedford Hills, *supra* note 21, at 12.

¹⁵¹ *Id.* at 53, 56.

¹⁵² *See id.* at 54.

¹⁵³ *Id.* at 54.

¹⁵⁴ *Id.* at 55.

¹⁵⁵ *Id.* at 55-56.

¹⁵⁶ *See* MD. ANN. CODE art. 27, § 699 (1982); MASS. GEN. LAWS ANN. ch. 127, § 142 (West 1981); N.C. GEN. STAT. § 15A-1353 (1983).

¹⁵⁷ MASS. GEN. LAWS ANN. ch. 127, § 142; N.C. GEN. STAT. § 15A-1353; MD. CODE ANN. art. 27, § 699.

¹⁵⁸ *See* CAL. PENAL CODE § 3411.

¹⁵⁹ *See* N.C. GEN. STAT. § 15A-1353 (1983). The woman, however, may elect to begin her sentence immediately. *Id.*

¹⁶⁰ *Id.*

impose conditions on a woman's release to insure that she serves her sentence in the future.¹⁶¹

In contrast to the North Carolina statute, the Massachusetts and Maryland statutes provide only for women who discover that they are pregnant while already serving prison sentences.¹⁶² The Massachusetts statute provides that a corrections authority may grant a pregnant inmate liberty or discharge for an indefinite period of time.¹⁶³ The Maryland statute empowers the governor, rather than a corrections authority, to decide whether an incarcerated pregnant woman's sentence should be suspended or commuted, or whether she should be paroled.¹⁶⁴ The governor's decision must be based on a recommendation by the officer of the correctional institution that the facts so require.¹⁶⁵ This power has not been exercised in recent years, however.¹⁶⁶

In California, however, incarcerated mothers and their children live together outside the prison in minimum security community residences.¹⁶⁷ In 1978, the California legislature expressly recognized that infants can suffer serious psychological damage if they are separated from their mothers during their mothers' incarceration.¹⁶⁸ Thus, the legislature enacted the statute in order "to alleviate the harm to such infants, consistent with the interest of public safety and justice."¹⁶⁹

The current California statute requires the probation department to notify all incarcerated women with probable release dates of fewer than six years about the program's existence and their possible eligibility.¹⁷⁰ Under the present law, a woman is eligible for the program if she gives birth while incarcerated, or if she is the primary caretaker of a child under six and a court has not previously declared her an unfit mother.¹⁷¹ Eligibility depends upon her parental fitness, which may be challenged by either the child's current caretaker, the department of corrections, or the local agency conducting neglect and dependency hearings.¹⁷² There is a presumption in favor of filing such a challenge if the mother has been convicted of a violent felony such as murder, kidnapping, rape, sodomy, or lewd acts, or if she has been convicted of child abuse in any proceeding.¹⁷³

¹⁶¹ *Id.*

¹⁶² See MASS. GEN. LAWS ANN. ch. 127, § 142; MD. CODE ANN. art. 27, § 699.

¹⁶³ See MASS. GEN. LAWS ANN. ch. 127, § 142. The determination of whether she will be discharged should be based on the best interests of the woman or her child. *Id.* No case has ever enumerated the factors the statute requires the court to consider.

¹⁶⁴ MD. CODE ANN. art. 27, § 699.

¹⁶⁵ *Id.*

¹⁶⁶ Telephone interview with Sandy Berenson, Director of the Prisoner Assistance Project in Maryland (Feb. 3, 1987). Ms. Berenson offered the explanation that the statute was enacted because women were originally incarcerated in the same facility as men, and would require hospital care outside the institution at childbirth and immediately after childbirth. Since the state constructed a prison facility for women with a hospital annex, no governor has exercised the power to recommend modification of an incarcerated pregnant woman's sentence.

¹⁶⁷ See CAL. PENAL CODE §§ 3410-3424. See also *infra* notes 168-82 and accompanying text.

¹⁶⁸ 1978 Cal. Stat. ch. 1054, sec. 2. This section expressly provides "[t]he Legislature finds that the separation of infants from their mothers while their mothers are in prison, can cause serious psychological damage to such infants" *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ CAL. PENAL CODE § 3415(a).

¹⁷¹ *Id.* § 3417.

¹⁷² *Id.* § 3420.

¹⁷³ *Id.*

The California statute led to the creation of the Mother-Infant Care Program¹⁷⁴ which consists of three halfway houses in California communities.¹⁷⁵ Women living in these community residences are subject to rules and regulations established by the program and the department of corrections to insure appropriate security.¹⁷⁶ The women are strictly supervised and participate in a tightly structured daily program.¹⁷⁷ Upon first entering the program, the mother may leave the facility with an authorized escort only for reasons related to bringing her child into the program.¹⁷⁸ All mothers must provide full time care for their children.¹⁷⁹ Over the course of their sentences, mothers gain greater freedom through a graduated pass system in which they progress from constant supervision to a work furlough program during which they become responsible for their child care costs. The Mother-Infant Care Program facility offers programs such as parenting classes, psychological counseling, college classes, and vocational training designed to encourage the mother-child relationship and assist the mother in her return to society.¹⁸⁰ Despite a formal charge that the California Department of Corrections initially failed to implement the program properly,¹⁸¹ the program has been a success, marked by the fact that no mother who has participated has returned to prison.¹⁸²

At present, only a small minority of states have taken steps to keep incarcerated mothers and their infants together.¹⁸³ Of states with statutes addressing this issue, only New York and California have created working programs pursuant to the statutory mandates.¹⁸⁴ The current practice in the remainder of the states is to separate infants from their incarcerated mothers as soon as possible.¹⁸⁵

While a majority of legislatures have failed to stop the practice of separating convicted mothers from their infants, private organizations are working nationwide, search-

¹⁷⁴ Barry Memorandum, *supra* note 2, at 3.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 6.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 7.

¹⁸¹ *Id.* at 4; *Rios v. McCarthy*, no. 330211 (Sup. Ct. Sacramento 1985). In 1985, a group of women who claim they were wrongfully deprived of access to the program charged the California Department of Correction and others with failure to implement the Mother-Infant Care Program in a reasonable manner. See Barry Memorandum, *supra* note 2, at 7-8. See also *Rios v. McCarthy*, no. 330211 (Sup. Ct. Sacramento 1985). The *Rios* complaint charged that while hundreds of women were potentially eligible to participate in the program, fewer than sixteen had been placed. Complaint at 8, *Rios v. McCarthy*, no. 330211. Among other things, the women complained that pregnant women were not notified of the program in a timely fashion, that information given was at times outdated or incorrect, that there was no effort to notify women prisoners of the program in any language other than English, and that on several occasions, the defendants lost or misplaced women's applications. *Id.* at 9-10. In response to the complaint, a Superior Court judge ordered that the plaintiffs' applications be processed. Temporary Restraining Order at 2, *Rios v. McCarthy*, no. 330211. Available places in the program subsequently have been filled. Telephone interview with Ellen Barry, *supra* note 13. A formal settlement conference has failed to yield a final agreement, but the serious consideration which the complaint was given may portend a successful program, as the California legislature intended. Note, *supra* note 100, at 473.

¹⁸² See Illinois Report, *supra* note 26, at 2.

¹⁸³ See *supra* notes 103-82 and accompanying text.

¹⁸⁴ *Id.*

¹⁸⁵ See *supra* notes 5, 13 and accompanying text.

ing for solutions and mobilizing for political action.¹⁸⁶ In Connecticut, a task force was formed pursuant to the terms of a settlement agreement in litigation brought by four incarcerated women and their children against the Commissioner of the Connecticut Department of Corrections and others.¹⁸⁷ After extensive investigation, the task force recommended a community program which would include only women whose security clearance qualifies them for community release.¹⁸⁸ Rather than insuring minimum security in community residences, as in the California program, the Connecticut proposal would permit eligible inmates access to community services and employment.¹⁸⁹ The task force concluded that its recommendations would serve the greatest number of inmates in Connecticut at the least cost.¹⁹⁰

In Massachusetts, a privately created task force projects establishing a community residence program in 1988.¹⁹¹ This program is designed primarily as a sentencing alternative, and will accept referrals from courts, the department of corrections, and parole authorities.¹⁹² Eligibility for the program and the form of "maternity reassignment" available would depend on the severity of criminal charges brought against a woman, her history of substance abuse, the length of her sentence, and the type of family support available to her.¹⁹³ The task force recommended that the court could stipulate that a woman's prison sentence be waived contingent on successful voluntary participation in the program during her pregnancy and at least six weeks afterward.¹⁹⁴ As with the California program, the Massachusetts model proposes surveillance of the women at all times, and the women would gain increasing freedom as they begin reintegration into the community.¹⁹⁵

The only privately established residential program currently in operation is the Mothers and Infants Together program in Fort Worth, Texas.¹⁹⁶ This program provides temporary alternative housing for incarcerated mothers and their infants.¹⁹⁷ After the child is three months old, the mother moves to a halfway house or returns to prison without her child.¹⁹⁸

The task force proposals in Massachusetts and Connecticut are based on extensive research including inmate interviews, a review of current literature on the subject, and

¹⁸⁶ See Austin, National Directory: Programs for Incarcerated Women (Mar. 20, 1986 revised Aug. 1986) (available from Community Services for Women, Boston, Massachusetts).

¹⁸⁷ Agreement of settlement at 27(IX), *West v. Manson*, no. H83-366 (D. Conn.) (settlement agreement dated June 1984).

¹⁸⁸ Task Force Report, *supra* note 6, at 2.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 24.

¹⁹¹ Telephone interview with Betsey Smith, Program Director, Incarcerated Expectant Mothers Task Force (Jan. 7, 1987). See Massachusetts Program Design, *supra* note 3, at 2.

¹⁹² Massachusetts Program Design, *supra* note 3, at 4.

¹⁹³ *Id.* at 12.

¹⁹⁴ *Id.* at 11-12.

¹⁹⁵ *Id.* at 12.

¹⁹⁶ Expectant Mothers in Massachusetts, *supra* note 2, at 20. Volunteers of America began the program, which receives funding from federal programs such as the Federal Bureau of Prisons and Aid to Dependent Children. *Id.*

¹⁹⁷ See Expectant Mothers in Massachusetts, *supra* note 2, at 20; Memorandum from Karen Schryver to Anita Arriola 2 (Jan. 28, 1986) (available from Chicago Legal Assistance for Incarcerated Mothers (CLAIM), Chicago, Illinois) (discussing alternative sentencing examples/proposals).

¹⁹⁸ See authorities cited *supra* note 197.

on-site inspection of current programs for incarcerated mothers and their children.¹⁹⁹ The work of these task forces, in addition to other programs for incarcerated mothers which are developing throughout the nation, indicates that community residence programs are both feasible and responsive to a recognized community need. The success of the California program, marked dramatically by the lack of recidivism of program participants,²⁰⁰ highlights the fact that such community programs are beneficial not only to incarcerated mothers and their children, but to society as a whole.

III. PROPOSED LEGISLATIVE ALTERNATIVES TO SEPARATION

The current practice in most states of routinely separating incarcerated mothers from their young children should not continue. Separating mothers from children unable to comprehend that the separation is temporary can have drastic effects upon the child's development. Studies have shown that children who are separated from their caretakers may suffer from depression and withdrawal. Furthermore, separation may permanently impair the child's ability to form future attachments.²⁰¹

Although prison nurseries offer one alternative to separation, the California Mother-Infant Care Program²⁰² is the most successful model for a solution to the problem of separating infants from their incarcerated mothers. Other states should follow California's lead and enact similar legislation creating community residences where mothers convicted of nonviolent crime and sentenced to short prison terms could serve out their sentences yet still retain custody of their young children. Community-based programs that permit incarcerated mothers and their infants to remain together would encourage the healthy development of young children and avoid the possible negative consequences which may result from separating children from their caretakers.²⁰³ Such programs would not unduly interfere with the legitimate state interests in punishing criminals and maintaining an effective correctional system and would also allow the state to fulfill its obligation to protect the best interests of the child.²⁰⁴

A. Current Practices of Separating Convicted Mothers from Young Children are Harmful

Bonding with at least one caretaker during the first six months of life is critical to a child's healthy emotional development.²⁰⁵ Psychological studies have demonstrated the damage which may result from a child's inability to form such a bond, and from physically separating infants from their primary caretakers after such a bond has formed.²⁰⁶ Form-

¹⁹⁹ See Massachusetts Program Design, *supra* note 3, at 2; Task Force Report, *supra* note 6, preface.

²⁰⁰ See *supra* note 182 and accompanying text.

²⁰¹ See *infra* notes 205-08 and accompanying text.

²⁰² Barry Memorandum, *supra* note 2, at 1.

²⁰³ See *infra* notes 205-09 and accompanying text.

²⁰⁴ See *infra* notes 246-57.

²⁰⁵ See *supra* notes 37-57 and accompanying text. Although the theories of bonding and continuity of care have gained wide acceptance, some scholars have criticized them. For a discussion of these criticisms, see Bush & Goldman, *The Psychological Parenting and Permanency Principles in Child Welfare: A Reappraisal and Critique*, 52(2) AMER. J. ORTHOPSYCHIAT. 223 (1982); Rutter, *Maternal Deprivation, 1972-1978: New Findings, New Concepts, New Approaches*, 50 CHILD DEVEL. 283 (1979).

²⁰⁶ See, e.g., Gaudin, *Social Work Roles and Tasks with Incarcerated Mothers*, 1984 J. CONTEMP. SOC. WORK 279. See also *supra* notes 37, 43-57 and accompanying text.

ing an attachment bond allows a child to develop skills necessary to relate to others.²⁰⁷ Prolonged separation from a primary caretaker before the child is able to understand that the separation is temporary destroys the bond and may result in distress, regression, and detachment, potentially impairing the child's ability to form future attachments.²⁰⁸ The child who is prevented from forming or maintaining an attachment bond may also manifest a greater tendency to break the law which may adversely impact not only the child, but society at large.²⁰⁹

A majority of children of incarcerated mothers currently are placed with relatives, while a significant number are placed in foster care.²¹⁰ Temporary placement of infants with relatives disrupts the continuity of care and may destroy the child's ability to bond with the parent in whose care the child will spend the remainder of his or her childhood.²¹¹ Foster placement may cause even greater harm to the child.²¹² Foster children typically are relocated several times while in foster care.²¹³ State officials often warn foster parents not to become attached to children in their care so that separation will not be as difficult when the children are reunited with their parents.²¹⁴ This may create a deficit in the continuity of human attention and nurturing which an infant requires.²¹⁵ Thus, even where the infant is placed in another home, separating an infant from his or her convicted mother may cause the infant great harm.

B. *A Rationale for Establishing Community Residence Programs to Keep Convicted Mothers and Their Infants Together*

The prevalent practice of taking an infant from its incarcerated mother and placing the infant with another caretaker until its mother may resume custody is potentially harmful to the child.²¹⁶ Legislation creating prison nurseries or community residences for nonviolent, fit mothers who, but for their prison sentences, would be the sole caretakers of their children would alleviate the potential harm to children caused by current practices.²¹⁷ A mother should be deemed nonviolent if she, like the majority of

²⁰⁷ Note, *supra* note 13, at 1413.

²⁰⁸ Ainsworth, *supra* note 37, at 55, 65-67, 76.

²⁰⁹ Note, *supra* note 13, at 1415. See also *supra* note 56 and accompanying text.

²¹⁰ See *supra* note 112 and accompanying text.

²¹¹ See *supra* notes 44-49 and accompanying text. See also Note, *supra* note 13, at 1416. Children do not have the capacity to form an unlimited number of attachment bonds. Therefore, even if a child is young enough to form a bond upon his or her mother's release, the child may be unable to do so. Note, *supra* note 13, at 1413.

²¹² See Note, *supra* note 13, at 1419-20.

²¹³ *Id.* at 1420.

²¹⁴ *Id.*

²¹⁵ *Id.* at 1421.

²¹⁶ See *supra* notes 44-57, 205-15 and accompanying text.

²¹⁷ A legislative response to the practice of separating convicted mothers and their infants is necessary in part because of judicial reluctance to further the constitutional rights of the mother and the child in these circumstances. See *supra* notes 58-63. The mother's constitutional right to the care and custody of her children may be justifiably abridged due to her incarceration, yet her infant's additional interests in freedom from developmental harm militate against disrupting the mother's care and custody. To date, no court has thoroughly discussed the child's interests where they may arguably compete with the goals of the penal system. See *supra* note 58. In *Procunier v. Martinez*, the Supreme Court ruled that certain prison restrictions may be unconstitutional if they are broader than the legitimate goals of a penal institution. 416 U.S. 396, 412-13 (1973). If it is

incarcerated women, is serving a short sentence for a property or fraud related offense.²¹⁸ Furthermore, as the California statute provides, a mother should be presumed fit for parenthood if she has not been previously adjudicated an unfit mother.²¹⁹ While prison nurseries and community residence programs both offer viable alternatives to separation, the community residence program offers greater benefits and fewer drawbacks than the prison nursery program.²²⁰ Immediate legislative action is also needed to further the work of community organizations nationwide which are attempting to respond to the needs of incarcerated mothers and children.²²¹

While it is beneficial to allow infants to form and maintain attachment bonds with their primary caretakers, this interest must be balanced against the state's competing interest in maintaining its corrections system. Each state has a strong interest in deterring criminals²²² and protecting the public,²²³ as well as in using public funds in a cost effective manner.²²⁴ Creating community residences or prison nurseries for currently incarcerated, nonviolent, fit mothers would not unduly interfere with these goals.²²⁵ Furthermore, the community residence option would promote the public interest in reducing overcrowding and facilitating successful rehabilitation of criminals.²²⁶

Prison nurseries present a second feasible alternative to separating incarcerated mothers from their infants. Prison nurseries are preferable to the community residence model for those women who may not be eligible for a low security residential program, but who are not dangerous to their children.²²⁷ Furthermore, the fact that the mothers are not physically removed from the prison environment minimizes the possible prison security and deterrence concerns which are arguably implicated in community residence models.²²⁸ Prison nurseries may also promote the state goal of rehabilitation, as inmates who maintain close family relationships while serving their sentences have had more

shown that legitimate state interests in incarcerating the mother invariably override the interest in the child's psychological well being, a constitutional argument would be precluded. To date, however, no court has directly addressed this issue. The Fifth Circuit Court of Appeals, in *Southerland v. Thigpen*, specifically declined to address the question of whether a child's interests might require allowing an incarcerated mother to have custody where the child would otherwise be in substantial or life-threatening danger. 784 F.2d 713, 718 (5th Cir. 1986). The *Southerland* court's assertion that a state's constitutional obligation to modify a prison sentence on the basis of a third person's interests "has never been suggested" leaves open the possibility of circumstances where such modification may be constitutionally required. *See id.* Therefore, while there is no strong precedent for a constitutional argument, the issue has not been decided conclusively.

²¹⁸ *See supra* note 8 and accompanying text. *See also* Barry, *supra* note 6, at 14. Ms. Barry maintains that "[s]ince a substantial number of women incarcerated in state prisons and county jails are convicted for nonviolent and status offenses, they are often low risk low security prisoners who are excellent candidates for diversion programs and other alternatives to incarceration." *Id.* *See also, e.g., supra* notes 174-82 and accompanying text.

²¹⁹ *See supra* notes 171-73 and accompanying text. As with the California program, a woman's eligibility might be subject to a new challenge of her fitness for motherhood. *Id.*

²²⁰ *See infra* notes 238-39 and accompanying text.

²²¹ *See supra* notes 186-200 and accompanying text.

²²² *See supra* note 73 and accompanying text.

²²³ *See supra* notes 76-78 and accompanying text.

²²⁴ *Southerland v. Thigpen*, 784 F.2d 713, 717 (5th Cir. 1986).

²²⁵ *See infra* text accompanying notes 228-29, 238-52.

²²⁶ *See infra* notes 253-57 and accompanying text.

²²⁷ *See* Task Force Report, *supra* note 6, at 39. Of fifteen women ineligible for placement in the proposed community program, eight would be eligible for a prison program. *Id.*

²²⁸ *See infra* notes 240-49 and accompanying text.

successful experiences after their release.²²⁹ Placing a child in prison with his or her mother may also satisfy the state's obligation to promote the best interests of the child, allowing the child the opportunity to form a strong and healthy parental bond in the early months of life.²³⁰ Even if a child is placed in a prison nursery, however, the child should be removed from the prison before the age of two.²³¹ This is approximately the age at which an established bond can be maintained through frequent contact with the parent during incarceration. At this age the child should be transferred to an environment which would better serve his or her increasing capacity for mobility and other developmental needs.²³²

Although prison nurseries provide some solutions to the problem of separating mothers and infants, they also have drawbacks which are absent in the community residence model.²³³ First, the restrictions of a prison environment, such as required periods in which the mother is locked away from the child, can debilitate a mother's feeling of control, and result in negative feelings toward the child.²³⁴ In a community residence, however, while the mother has restricted liberty, she is never locked away from her child.²³⁵ Second, the uninformed community may perceive prison nurseries as emotionally and physically unhealthy for children, and resist legislative proposals to create nurseries.²³⁶ A final disadvantage of prison nurseries is that some mothers who would otherwise elect to care for their children are unwilling to do so if the only option is a prison nursery.²³⁷

Residential programs for nonviolent inmate mothers are a favorable alternative to the prison nursery program currently in operation in New York. Community residences offer mothers much more flexibility and a greater range of services for rehabilitation²³⁸ while generating other benefits, such as cost efficiency and reducing overcrowding.²³⁹ Community residential programs also satisfy the state's need to maintain order in the criminal justice system as well as the needs of infants of incarcerated mothers. If properly administered, community residence programs should not increase the risk of harm to the public, yet they will increase the probability of the mothers' successful rehabilitation and the healthy development of their infants.

The state's legitimate interest in deterring future crime will not be undermined by programs which allow convicted mothers to serve their sentences outside the traditional prison environment. Both general and specific deterrence are legitimate goals of the

²²⁹ Fabian, *Towards the Best Interests of Women Prisoners: Is the System Working?* 6 NEW ENG. J. PRIS. L. 1, 29 (1979).

²³⁰ See *supra* notes 44-57, 205-15 and accompanying text.

²³¹ See Note, *supra* note 13, at 1424-25.

²³² *Id.* at 1425.

²³³ See *infra* notes 234-37 and accompanying text.

²³⁴ Bedford Hills, *supra* note 21, at 85, 95.

²³⁵ In the community residence model, mothers care for their children full time. Barry Memorandum, *supra* note 2, at 3.

²³⁶ Note, *supra* note 57, at 681. While this theory has not been disproved, it has been noted that none of these concerns has been realized in the history of the New York prison nursery program. *Id.*

²³⁷ See Task Force Report, *supra* note 6, at 39. Of fourteen mothers surveyed who were eligible for a community residence program, only two were not interested. Of seventeen eligible for a prison nursery program, eight were not interested. *Id.*

²³⁸ See Barry Memorandum, *supra* note 2, at 7. See also *supra* text accompanying note 180.

²³⁹ See *infra* notes 250-54 and accompanying text.

criminal justice system.²⁴⁰ Although one could argue that any punishment milder than incarceration impairs the specific deterrent effect of a criminal sentence, no actual proof exists that supports this argument.²⁴¹ Jurisdictions which use probation extensively as an alternative to incarceration have no greater incidence of recidivism than do other jurisdictions.²⁴² Even if punishment is related to deterrence, inmates usually perceive any involuntary placement under official jurisdiction, even in a community residence, as punishment in itself.²⁴³ Furthermore, studies show no relationship between the severity of punishment and the general deterrence of other potential offenders.²⁴⁴ Therefore, the argument that allowing convicted women to serve their sentences in community residences with their infants will encourage crime by repeat or new offenders is no more than speculation. In fact, no woman who has participated in the only long term residential program currently in operation has returned to prison.²⁴⁵

The state's strong interest in protecting the public from dangerous persons²⁴⁶ also will not be undermined by the proposed community residence programs. A national advisory commission has acknowledged that for most offenders, alternatives to incarceration would result in a minimal loss of protection to the public.²⁴⁷ This conclusion may apply especially to women because most states have only one correctional facility for women which houses every security level.²⁴⁸ As a result, many women who are classified as low security risks are subject to the same restrictions as higher risk inmates.²⁴⁹ It is therefore unlikely that transferring many of these women to community residences under security commensurate with their needs would pose an increased danger to the public. Furthermore, the only persons eligible for such programs would be those who are classified as nonviolent or low risk.

Properly administered community residence programs for convicted mothers may be cost effective. Contracting with private agencies to create programs to house nonviolent convicted mothers and their infants can be less expensive than incarcerating these mothers and finding alternative placement for their infants.²⁵⁰ One study has shown that a successful residential program housing mothers and their children is half as costly as incarcerating the mother in a prison.²⁵¹ In addition, the cost of providing foster housing

²⁴⁰ See *supra* note 73 and accompanying text.

²⁴¹ See NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS IN THE COMMUNITY, NATIONAL STANDARDS AND GOALS 221, *reprinted in* R. CARTER & L. WILKINS, PROBATION, PAROLE AND COMMUNITY CORRECTIONS 485, 491 [hereinafter NATIONAL STANDARDS AND GOALS].

²⁴² *Id.* at 491. Similarly, sentencing convicts to longer prison sentences has not been shown to decrease recidivism. *Id.*

²⁴³ *Id.* at 490.

²⁴⁴ NATIONAL STANDARDS AND GOALS, *supra* note 241, at 491.

²⁴⁵ See *supra* note 182 and accompanying text.

²⁴⁶ See *supra* notes 72, 76-78 and accompanying text.

²⁴⁷ NATIONAL STANDARDS AND GOALS, *supra* note 241, at 489.

²⁴⁸ See COMPTROLLER'S REPORT, *supra* note 2, at 14.

²⁴⁹ *Id.*

²⁵⁰ The current cost of incarcerating a woman in Connecticut for one year is \$25,327. Task Force Report, *supra* note 6, at 16. Existing halfway house programs in Connecticut cost \$13,000 to \$15,000 per person per year, not including the costs of child care. *Id.* at 11.

²⁵¹ Illinois Report, *supra* note 26, at 2. The Illinois report states:

At present, Illinois spends \$17,762 per year to incarcerate each woman at Dwight Correctional Center, and in addition, more than \$11 a day for each child in a foster home. In contrast, a successful residential program in Santa Clara County in which

and care for the infant will be reduced greatly because each mother is responsible for caring for her own infant.²⁵²

Creating community residences for convicted mothers and their infants also promotes other public policy goals such as reducing prison overcrowding and rehabilitating prisoners. Despite the relatively small size of the female prison population, overcrowding is a prominent problem in women's prisons in the United States.²⁵³ Removing nonviolent, low security risk mothers from prison and placing them in community residences will contribute to reducing prison overcrowding.²⁵⁴ The state's interest in rehabilitation is another significant benefit to keeping convicted mothers and their children together.²⁵⁵ As noted previously, research has shown that inmates who maintain close family relationships during the period of their incarceration have had more successful post-release experiences.²⁵⁶ Furthermore, residential communities such as the California Mother-Infant Care Program provide opportunities for a mother to build vocational and parenting skills, so that she is able to care for and support her child upon release.²⁵⁷

A community residence program may be structured to reduce the harm which separation may cause infants, and simultaneously satisfy the state's goals of maintaining an efficient criminal justice system and protecting the child's best interests. Only a primary caretaker convicted of a nonviolent offense and sentenced to a short prison term should be presumed eligible to participate in a community residence program. This insures that nondangerous women who would otherwise be their children's primary caretaker would, in most circumstances, retain physical custody of their children while serving their sentences. As with the California program, the department of corrections or other agency may overcome this presumption by showing an individual woman's unfitness for motherhood.²⁵⁸

Any mother who does not meet the initial statutory criteria should receive the opportunity for judicial review of her case in light of the best interests of her child. A judicial officer should determine the child's best interests, not an administrative agency or official affiliated with the department of corrections. These agencies and officials have an interest in the uncomplicated administration of prisons and, therefore, are unable to be impartial — especially if a child's best interests place a financial or administrative burden on their department.²⁵⁹ The legislature should delineate specific standards and

mothers provide for their own children costs one-half what it would cost to jail the mother and obviates the cost of providing placements for the children.

Id.

²⁵² *Id.*

²⁵³ For example, in 1986 the Dwight Correctional Facility had a capacity of 496 prisoners, but a recent count showed a total of 623 incarcerated women. Illinois Report, *supra* note 26, at 1. That same year the prison population at MCI-Framingham was 189% over capacity. Massachusetts Program Design, *supra* note 3, at 2. In one Connecticut facility, designed for 55 inmates, 85 were in residence on at least one occasion. Complaint at 12, West v. Manson, no. H-83-366 (D. Conn.).

²⁵⁴ See Illinois Report, *supra* note 26, at 1-2.

²⁵⁵ See *infra* notes 256-57 and accompanying text. See also *supra* notes 74-75 and accompanying text.

²⁵⁶ Fabian, *supra* note 229, at 29.

²⁵⁷ See *supra* text accompanying notes 178-80.

²⁵⁸ See CAL. PENAL CODE § 3420. Statutes should be drafted in a sex-neutral manner, so that if a father is the primary caretaker of an infant, he would be eligible for a community program. The frequency of this occurrence is undocumented, however, and is beyond the scope of this note.

²⁵⁹ For example, even though a Virginia statute empowered the director of the department of

factors for judicial consideration such as the nature of the mother's conviction, the length of her sentence, her prior parenting experience and any other appropriate considerations.²⁶⁰ These guidelines would standardize judicial decisionmaking and reduce the personal bias arguably infused in any decision of this nature.²⁶¹

Courts should consider a mother's eligibility for a community residence program at the time of sentencing. This will prevent possible delays which could lead to a child's being shifted among caretakers. As noted, such shifting may damage the child's ability to form an attachment bond. If a woman becomes pregnant in prison, or does not discover her pregnancy until after her incarceration, statutes should require prison authorities to arrange an immediate court hearing in order to determine the mother's eligibility for the program. When appropriate, the court could stipulate a prison sentence waiver contingent on successful completion of a program of rehabilitation.²⁶² Based on models currently in use, it is clear that states may structure a feasible community residence program to eliminate the harm children experience upon separation from their convicted mothers. Therefore, these programs not only promote the state interests in deterrence, security, and rehabilitation, but also protect the best interests of the child.

CONCLUSION

The prevalent practice of separating infants from their incarcerated mothers is harmful and must not continue. In a majority of cases, incarcerated mothers serve short prison terms for nonviolent crimes and pose no significant risk to the community. There is no persuasive reason why these women should not be permitted to serve their sentences while caring for their infants through cost effective alternatives to separation such as the California Mother-Infant Care program. While prison nurseries, such as the nurseries in place in New York, offer another alternative to separation, community residence

corrections with the authority to decide whether an infant's best interests would be served by remaining with his or her incarcerated mother, a blanket policy evolved preventing mothers and infants from remaining together, due largely to concerns about prison decorum. Note, *supra* note 57, at 688 n.70. See also *supra* notes 90-96 and accompanying text. The New York Court of Appeals, in *Appar v. Beuter*, expressly rejected a similar rationale when advanced by a sheriff who objected to allowing an infant to return to prison with its mother primarily because allowing it would disturb other prisoners and lower morale. 75 Misc. 2d 439, 442, 347 N.Y.S.2d 872, 976 (1973). Similarly, the court in *Bailey v. Lombard* found that the sheriff in charge could not reach a decision to separate an infant from its mother based solely on "arbitrary" factors such as unsuitability of facilities. See *Bailey v. Lombard*, 101 Misc. 2d 56, 65-66, 420 N.Y.S.2d 650, 656 (1979).

²⁶⁰ These factors may be based, for example, on the factors delineated by the court in *Bailey v. Lombard*, 101 Misc. 2d at 62, 420 N.Y.S.2d at 654. See also *supra* text accompanying notes 141-47.

²⁶¹ See Mnookin, *Child Custody Determination in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 266 (1973). Professor Mnookin states that:

[P]resent indeterminate and discretionary standards for child protection (1) give government officials too much power to second-guess decisions ordinarily left to the family; (2) leave judges free to exaggerate the risks for children remaining in parental custody and to underestimate the risks of foster-care placement; (3) allow removal under circumstances where the child might be protected within the home; and (4) fail to require that the social welfare bureaucracy and the juvenile court make adequate plans for children who are in the foster care system. Legal standards both less ambitious and more determinate than the "best interests of the child" can correct some of these deficiencies.

Id. at 277.

²⁶² See *supra* note 194 and accompanying text.

programs are a favorable alternative, allowing mothers more freedom to care for their children and to acquire rehabilitative vocational skills. In establishing residential programs for convicted mothers and their children, state legislatures not only will promote the best interests of all children of incarcerated mothers, but will also further the state interest in maintaining an effective criminal justice system. Placing nonviolent convicted mothers and their infants in residential programs is a cost efficient, constructive and humane alternative to the separation which most incarcerated mothers and their children now experience.

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