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MOTHERS BEHIND BARS:
BREAKING THE PARADIGM OF PRISONERS

Anna Mangia

Abstract

Prison is an oppressive institution created for men, by men. While some may argue that oppression is the point of prison, this oppression is still created for and directed toward men. Because the paradigm of a prisoner is a violent male, the needs and concerns of women are often not considered. Female prisoners, therefore, experience layers of oppression: intended oppression inherent in the prison system, as well as gender-based oppression inherent in our society. Furthermore, incarcerated mothers experience a third layer of oppression due to their roles and expectations in society. “The mother” is glorified, but when a woman breaks society’s expectation of what a mother should be, it looks to punish her more severely than it otherwise would if she were not a mother. Incarcerated women break the white middle-class standards of “womanhood.”¹ Society justifies its classification of these women as unfit mothers based on their race, class, and incarcerated status.² Our society systematically decides women in prison are unworthy of being mothers and tries to deny reproductive and parental rights to those who are incarcerated.

In this paper, I explore the additional layers of oppression that incarcerated mothers experience. In Part I, I provide an overview of women in prison. In Part II, I delve into the unique concerns of incarcerated mothers, including the history of eugenics, reproductive oppression in prison, and the concerns of pregnant inmates and mothers in prison. In Part III, I examine the response to incarcerated mothers, which includes an overview of prison nurseries

¹ Priscilla A. Ocen, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239, 1254 (2012).

² *Id.*

and community-based residential parenting programs. In Part IV, I critique these responses and suggest additional solutions. Through this analysis, I argue that instead of subjecting incarcerated women to varied forms of reproductive oppression, we should allow incarcerated women to embrace the role of motherhood through various programs.

I. OVERVIEW OF WOMEN IN PRISON

Exploring a history of women in prison and the issues they face is necessary before analyzing the specific problems of incarcerated mothers. Women are the fastest-growing population within the United States prison system.³ Between 1980 and 2011, the number of incarcerated women increased 587 percent.⁴ During this time, the number of women in prison increased at a rate nearly one and a half times that of men.⁵ When including women in local jails, the overall number of incarcerated women raises to over 200,000.⁶ This number does not include women on probation or parole.⁷ The number of women involved in the criminal justice system is estimated to be over one million.⁸

This significant increase of women in the criminal justice system is in part due to mandatory sentencing laws, specifically the tough penalties these laws require for non-violent, drug-related crimes.⁹ While men are more likely to be imprisoned for violent offenses, women are more likely to be imprisoned for nonviolent crimes, typically property and drug offenses.¹⁰ Enforcement of immigration violations has also added to the increase of women in prison.¹¹

While women in the United States generally have a 1-in-56 chance of being imprisoned at some point in their lives, this statistic falls disproportionately along racial lines.¹² White

³ Jenni Vainik, Note, *The Reproductive and Parental Rights of Incarcerated Mothers*, 46 FAM. CT. REV. 670, 671 (2008).

⁴ The Sentencing Project, *Incarcerated Women 1* (rev. 2012) http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Dec2012final.pdf. [hereinafter *Incarcerated Women*].

⁵ *Id.*

⁶ *Id.*

⁷ Rachel Roth, *Obstructing Justice: Prisons as Barriers to Medical Care for Pregnant Women*, 18 UCLA WOMEN'S L.J. 79, 80 (2010).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Incarcerated Women*, *supra* note 4, at 2.

¹¹ Roth, *supra* note 7, at 80-81.

¹² *Incarcerated Women*, *supra* note 4, at 2.

women have a 1-in-118 lifetime likelihood of imprisonment.¹³ Hispanic women, at almost one and a half times the rate of white women, have a 1-in-45 lifetime likelihood of imprisonment.¹⁴ One in 19 Black women, however, will be imprisoned at some point in their lives.¹⁵ This is two and a half times the likelihood of white women. These disparities can be attributed to a number of factors: involvement in certain crimes, usually drug-related; law enforcement policies targeting neighborhoods of color; less access to substance abuse treatment; and limited opportunities for alternatives to incarceration.¹⁶

These disparities, however, were much larger in the past. In 2000, Black women were six times more likely than white women to end up in prison;¹⁷ by 2010, the rate of incarceration for black women had decreased by 35 percent.¹⁸ A decline in the incarceration of Black women and an increase in the incarceration of white and Latina women caused this shift;¹⁹ the rate of incarceration increased 38 percent for white women and 28 percent for Hispanic women.²⁰ Although the reasons behind these changing statistics are not yet clear, changes in criminal involvement, law enforcement, sentencing practices, and socioeconomics have likely attributed to the decrease in incarceration of Black women.²¹ Likewise, the increase in the incarceration of white is thought to be due to increased prosecutions of prescription drug or methamphetamine offenses, as well as low socioeconomic levels.²² The increase in the incarceration of women has naturally also resulted in an increase of the incarceration of mothers.

¹³ *Id.*

¹⁴ *Incarcerated Women*, *supra* note 4, at 2.

¹⁵ *Id.*

¹⁶ Marc Mauer, *The Changing Racial Dynamics of Women's Incarceration*, The Sentencing Project, 2013 at 10.

¹⁷ *Id.* at 16.

¹⁸ *Incarcerated Women*, *supra* note 4, at 2.

¹⁹ Mauer, *supra* note 16, at 2.

²⁰ *Incarcerated Women*, *supra* note 4, at 2.

²¹ Mauer, *supra* note 16, at 18.

²² *Id.*

In 2004, more than 350 women²³ were pregnant when they entered federal prison;²⁴ 3,800 women²⁵ were pregnant when they entered state prison.²⁶ While mothers may make up a small portion of the total number of women in prison, they constitute a significant segment of the population that has special concerns while they are incarcerated.

II. SPECIAL CONCERN: INCARCERATED MOTHERS

Between 1991 and 2007, the number of incarcerated mothers increased 122 percent.²⁷ In 2007, an estimated 65,600 incarcerated women were mothers to approximately 147,400 children.²⁸ Women in prison were 11 percent more likely than men to have minor children.²⁹ About two-thirds of these mothers lived with their children prior to their incarceration.³⁰ In 2004, the children of 45 percent of incarcerated mothers lived with their grandparents during their mothers' sentences; 23 percent lived with other relatives; 8 percent lived with friends; 11 percent were placed into foster care.³¹ Only 37 percent of children lived with their fathers while their mothers were incarcerated.³² In contrast, more than 88 percent of fathers in prison reported that at least one of their children lived with the child's mother.³³ This disparity between incarcerated mothers and fathers is one reason why women experience an extra layer of oppression associated with parenthood.

²³ Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, NCJ 210677, Prisoners in 2004 5, tbl. 6(2005). More than 350 of 12,164 total female federal prisoners.

²⁴ Laura M. Maruschak, Bureau of Justice Statistics, NCJ 221740, Medical Problems Of Prisoners 22, tbl. 10(2008). 2.9% of female federal prisoners.

²⁵ Harrison & Beck, *supra* note 23, at 5, tbl. 6. 3,800 of 92,684 total state female prisoners.

²⁶ Maruschak, *supra* note 24, at 22, tbl. 10. 4.1% of female state prisoners.

²⁷ The Sentencing Project, *Parents in Prison* 1 (2012), available at

[http://www.sentencingproject.org/doc/publications/](http://www.sentencingproject.org/doc/publications/cc_Parents%20in%20Prison_Factsheet_9.24sp.pdf)

[cc_Parents%20in%20Prison_Factsheet_9.24sp.pdf](http://www.sentencingproject.org/doc/publications/cc_Parents%20in%20Prison_Factsheet_9.24sp.pdf)

²⁸ Lauren E. Glaze & Laura M. Maruschak, Bureau of Justice Statistics, NCJ 222984, Parents in Prison and Their Minor Children 2 (2008).

²⁹ *Incarcerated Women*, *supra* note 4, at 3.

³⁰ Glaze & Maruschak, *supra* note 28, at 4.

³¹ *Id.* at 5, tbl. 8.

³² *Id.* The percentages of child caregivers sums to more than 100% because some prisoners had multiple children living with multiple caregivers.

³³ *Id.*

In 2004, an estimated 4,153 women were pregnant when they entered prison.³⁴ Twenty-three states and the District of Columbia currently restrict the use of restraints on pregnant inmates during labor and childbirth.³⁵ Over 40 states require that children born to incarcerated women be immediately separated from their mothers.³⁶ Federal prisons also generally require immediate separation.³⁷

Two federal policies exist that pose problems to parents in prison: The Adoption and Safe Families Act of 1997 (ASFA) and The Welfare Reform Act of 1996.³⁸ The ASFA allows a court to terminate parental rights if a child has been in foster care for 15 of the last 22 months.³⁹ This poses a significant problem for women in prison, because 11 percent of mothers⁴⁰ can do nothing to remove their children from foster care. If a woman has no partner or close family members to take custody of the child while she is in prison, it is very likely that she will face parental rights termination proceedings. Because this provision of the ASFA does not consider the fitness of a parent, it takes a child away from his or her mother, even if this is not in the child's best interest. This law goes directly toward the idea that mothers who do not meet society's expectations are not fit to be mothers. In 2011, more than 100,000 women were sentenced to serve more than one year in prison.⁴¹ If a mother spends any time in pretrial detention before receiving a sentence of more than one year, she will either be dangerously close to or will surpass the ASFA's 15-month requirement, and can risk losing her parental rights if her child is placed into foster care. The

³⁴ 4.1% of 92,684 female state inmates and 2.9% of 12,164 female federal inmates. Harrison & Beck, *supra* note 23, at 5, tbl. 6. Maruschak, *supra* note 24, at 22, tbl. 10.

³⁵ American Civil Liberties Union, *State Standards for Pregnancy-Related Health Care and Abortion for Women in Prison*, ACLU.COM, <https://www.aclu.org/maps/state-standards-pregnancy-related-health-care-and-abortion-women-prison-map> (last visited Nov 30, 2013) [hereinafter ACLU].

³⁶ Vainik, *supra* note 3, at 679.

³⁷ *Id.*

³⁸ *Parents in Prison*, *supra* note 24, at 3.

³⁹ *Id.*

⁴⁰ *Incarcerated Women*, *supra* note 4, at 3.

⁴¹ E. Ann Carson & William J. Sabol, Bureau of Justice Statistics, NCJ 239808, Prisoners in 2011 6, tbl. 5 (2012).

AFSA adds a further punishment to a mother's sentence if her children are in foster care, penalizing her simply because she is an incarcerated mother.

The Welfare Reform Act of 1996 permanently denies Temporary Assistance to Needy Families (TANF) and Supplemental Nutrition Assistance Program (SNAP) benefits to those who have been convicted of felony drug crimes.⁴² Because of the war on drug's racially biased policies and enforcement procedures, Black and Hispanic families are disparately impacted by this legislation.⁴³ However, states can opt-out of this ban, either fully or partially.⁴⁴ Thirteen states have completely opted-out of TANF bans; 16 states have completely opted-out of SNAP bans.⁴⁵ Twenty-five states have modified TANF bans and 25 states have modified SNAP bans,⁴⁶ depending on conviction.⁴⁷ Thirteen states still impose full TANF bans and nine states still impose full SNAP bans.⁴⁸ States that still have full or partial bans on welfare benefits or food stamps, however, pose problems for many mothers in prison.

In 1998, over 25,348 women received welfare assistance before their arrest and incarceration, for both state and federal offenses.⁴⁹ By 2002, the Welfare Reform Act bans affected at least 92,000 women and over 135,000 children.⁵⁰ By 2011, the number of women affected by full TANF bans *alone* was estimated to be 180,100.⁵¹ If this analysis had been expanded to include both full and partial TANF and SNAP bans, the number of women affected

⁴² *Parents in Prison*, *supra* note 23, at 3.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Marc Mauer & Virginia McCalmont, *The Sentencing Project, A Lifetime of Punishment: The Impact of The Felony Drug Ban on Welfare Benefits* 2, tbl. 1 (2013).

⁴⁶ *Id.*

⁴⁷ *Parents in Prison*, *supra* note 24, at 3. For example, at least one state applies the ban on welfare benefits only to those convicted of manufacturing or delivering drugs.

⁴⁸ *Mauer & McCalmont*, *supra* note 45, at 2, tbl. 1.

⁴⁹ Lawrence A. Greenfeld & Tracy L. Snell, Bureau of Justice Statistics, NCJ 175688, Women Offenders 8 (1999); Allen J. Beck & Christopher J. Mumola, Bureau of Justice Statistics, NCJ 175687, Prisoners in 1998 6, tbl. 7 (1996).

⁵⁰ Patricia Allard, *Life Sentences: Denying Welfare Benefits to Women Convicted of Drug Offenses*, *The Sentencing Project*, 2002, at 1-2.

⁵¹ *Mauer & McCalmont*, *supra* note 45, at 3, tbl. 2.

would greatly increase. Women are twice as likely as men to receive welfare benefits.⁵² Because a large portion of women in prison serve sentences for drug-related crimes, and because so many women who enter prison receive some type of welfare, this law adversely affects women more than men. Although benefits are still allocated to children if a parent has been deemed ineligible, a cutback in an already-small allocation can have a devastating effect on families.⁵³ At its essence, this law prevents women from financially caring for their children, and punishes children for their mothers' crimes.

A. History of Incarcerated Mothers

Unfortunately, the federal policies currently in existence are just the most recent in a long line of oppressive race and gender practices in the United States. Throughout the early 20th Century, the reproductive rights of women, especially women of color, were continually violated through the theory of eugenics.⁵⁴ Although the theory of eugenics was rejected by the 1940s,⁵⁵ the reproductive rights of many incarcerated women were still violated throughout history and are still violated today due to societal biases against race,⁵⁶ gender,⁵⁷ socioeconomic status,⁵⁸ and incarcerated status.⁵⁹

1. Eugenics Movement

Eugenics, the practice of “improving” humans through selective reproduction, has formed

⁵² *Id.* at 4.

⁵³ *Id.*

⁵⁴ Robin Levi, Nerissa Kunakemakorn, Azadeh Zohrabi, Elizaveta Afanasieff, & Nicole Edwards-Masuda, *Creating the “Bad Mother”: How the U.S. Approach to Pregnancy in Prisons Violates the Right to Be a Mother*, 18 UCLA WOMEN’S L.J. 1, 29, 9 (2010).

⁵⁵ Robin Levi, Nerissa Kunakemakorn, Sarah Rodriguez, Alexis Horan, Anuradha Hashemi, Alisa Welleck, Sophia Wood Henderson, & Aliya Karmali, *Prisons as a Tool of Reproductive Oppression*, 5 STAN. J. CIV. RTS & CIV. LIBERTIES 309, 316 (2009).

⁵⁶ *Id.*

⁵⁷ Levi et al, *supra* note 54, at 9.

⁵⁸ *Id.* at 10.

⁵⁹ *Prison’s as a Tool of Reproductive Oppression*, *supra* note 55, at 321.

much of the foundation of reproductive oppression in the United States.⁶⁰ The theory of negative eugenics, that people with undesirable traits should be discouraged or prevented from reproducing, has been entwined with racism throughout the country’s history.⁶¹ Through eugenics, those who society has deemed “abnormal” or somehow “unfit” to reproduce have experienced reproductive oppression through various means, from forced sterilization to the availability of birth control.⁶²

In a different, and perhaps more unpleasant, vein, eugenics was also used to advocate for the wide availability of birth control.⁶³ Margaret Sanger, a proponent of birth control and pro-choice policies, used the idea of eugenics to argue that birth control should be widely available in order to prevent reproduction of those deemed “unfit”—women with disabilities, poor women, and women of color.⁶⁴ Her advocacy shaped the purpose of birth control in that it “became a means of controlling a population rather than a means of increasing women’s reproductive autonomy.”⁶⁵ Although eugenics has largely been discredited since the 1940s,⁶⁶ the theory behind this movement has continued to resurface in other areas, including reproductive practices in prison.⁶⁷

2. Reproductive Oppression in Prison

Prison has long been a place where women have been subjected to reproductive oppression through sterilization, lack of informed consent, and inadequate reproductive healthcare.⁶⁸ In California, there have been reports of doctors taking drastic measures, such as

⁶⁰ *Id.* at 315.

⁶¹ *Id.* at 315-16.

⁶² *Id.* at 315.

⁶³ *Prison’s as a Tool of Reproductive Oppression*, *supra* note 55, at 315.

⁶⁴ *Id.*

⁶⁵ *Id.* at 316.

⁶⁶ *Prison’s as a Tool of Reproductive Oppression*, *supra* note 55, at 316.

⁶⁷ *Id.* at 320-21.

⁶⁸ *Id.* at 321.

hysterectomies and oophorectomies, in response to conditions that have less invasive alternatives.⁶⁹ Many women who undergo these procedures are not informed of possible alternative treatments,⁷⁰ and many do not receive enough information to truly consent.⁷¹ In addition, these procedures are also used on a disproportionate number of women of color.⁷² The practice of sterilizing women without proper informed consent is essentially a de facto practice of eugenics, because women, especially women of color, in prison are seen as “unfit” to mother.

Incarcerated women generally receive poor reproductive healthcare. It is often difficult to schedule gynecological appointments for Papanicolaou tests (Pap smears), either because there is no process for scheduling an appointment or because the procedure requires a co-payment, which many women in prison cannot afford.⁷³ Even when scheduling an appointment is simple and free, women may be reluctant to make an appointment out of fear that the doctors may make them feel uncomfortable.⁷⁴ Some women have even reported that prison doctors can be rough during gynecological exams, often ignoring women’s assertions that they are in pain.⁷⁵ Uncomfortable experiences like these during routine exams can have profound psychological effects that negatively influence a woman’s future decisions concerning her reproductive health.

The inadequate reproductive healthcare women receive in prison is just another layer of oppression that these female prisoners experience. While the barriers women face in attaining simple reproductive care such as Pap smears is staggering, the barriers pregnant women in prison face in attaining prenatal care are even more difficult.

⁶⁹ *Id.* at 322.

⁷⁰ *Prison’s as a Tool of Reproductive Oppression*, *supra* note 55, at 322.

⁷¹ *Id.* at 323.

⁷² *Id.* at 321.

⁷³ *Id.* at 329. A Pap smear is the most common method used to detect Cervical cancer, which is the second most common form of cancer death in the world. *Id.* at 326.

⁷⁴ *Id.* at 328.

⁷⁵ *Id.*

B. Pregnant Inmates

The average incarcerated woman is in her early thirties⁷⁶ and in her reproductive years.⁷⁷ Economically disadvantaged women and women of color are simultaneously more likely to be imprisoned and more likely to experience unintended pregnancies.⁷⁸ Consequently, they have an increased need for access to abortion services or prenatal care.⁷⁹ Many state prisons, however, lack official policies addressing prenatal care.⁸⁰ Furthermore, federal policy only requires the warden to “ensure that each pregnant inmate is provided medical, case management, and counseling services,” and requires medical staff to “arrange for the childbirth to take place at a hospital outside the institution.”⁸¹ No specifics are provided to define the few federal requirements and no guidelines are provided to hold prisons accountable to these policies, rendering them meaningless.

In reality, pregnant inmates are often unable to access medical care.⁸² When medical and prenatal care is provided, it is usually inadequate and unresponsive to the woman’s specific medical and emotional needs.⁸³ Furthermore, many prison policies and practices hinder or altogether deny opportunities for abortion, effectively forcing many women to carry their pregnancies to term.⁸⁴

1. Access to Prenatal Care

Pregnant women face several barriers when attempting to access adequate medical care. The greatest barrier is the policy-making process in prisons. Legislatures are generally not

⁷⁶ Vainik, *supra* note 3, at 676.

⁷⁷ Roth, *supra* note 7, at 81.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Vainik, *supra* note 3, at 677.

⁸¹ 28 C.F.R. § 551.22 (2007).

⁸² Vainik, *supra* note 3, at 676.

⁸³ *Id.* at 677.

⁸⁴ Roth, *supra* note 7, at 84.

involved in the policy-making process of prisons.⁸⁵ Many states allow their Departments of Correction to create these policies on their own, delegate such decisions to prison administrators, or defer to private medical companies they hire to provide services in the prison.⁸⁶ The public does not have opportunities to provide input on any of these options. This policy-making within the prison happens behind closed doors and prisons are rarely held accountable for violations of such policies.⁸⁷ Due to the clandestine nature of prison-created policies coupled with a lack of oversight, prisons and their guards have the ability to limit pregnant women’s access to medical care and therefore the power to punish incarcerated mothers more harshly simply because of their status as “mother.”

Another barrier to adequate medical care is inherent in the prison itself—confinement to certain areas.⁸⁸ Because inmates are typically not allowed to move within the prison without permission, women often have to convince guards or other personnel that their pain is significant enough to warrant a trip to the medical facilities.⁸⁹ Unfortunately, prison staff is often unprepared to deal with pregnant inmates and their medical needs.⁹⁰ Many are dismissive toward pregnant women who request medical attention and do not permit them access to the care they need.⁹¹ Some staff even ignore clear signs of miscarriage or labor, such as vaginal bleeding.⁹² Delaying necessary care to a pregnant woman can have disastrous effects on the health of both the mother and the fetus.⁹³

⁸⁵ *Id.* at 83.

⁸⁶ Roth, *supra* note 7, at 83.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 102.

⁹¹ *Id.*

⁹² Roth, *supra* note 7, at 102.

⁹³ *Id.*

If an inmate decides to carry her pregnancy to term, she then faces more obstacles within the prison system. Many women are forced to work throughout their pregnancies, sometimes undergoing strenuous manual labor or being exposed to dangerous chemicals in the course of their duties.⁹⁴ Notably, less than a fifth of states advise pregnant inmates about appropriate activity and safety levels or restrict the types of work that they are allowed to perform.⁹⁵ Prisons also do not always provide pregnant women with the food and supplements necessary for a proper prenatal diet.⁹⁶ Only 10 states require prisons to provide pregnant inmates with appropriate prenatal nutrition.⁹⁷ Finally, the relationship between physicians and pregnant women is often extremely poor, manifesting in apathetic interactions and insufficient communication of important information, such as prior medical history.⁹⁸

In addition to dealing with these barriers during pregnancy, women in prison also face complications during labor and delivery.⁹⁹ Shackling the hands and legs of woman is the gravest of these complications. Seventeen states have statutorily restricted the use of shackles during labor and childbirth; four states and the District of Columbia have restricted the use of restraints as a matter of policy.¹⁰⁰ The Federal Bureau of Prisons has also restricted the practice of using shackles on pregnant women.¹⁰¹ Twenty-seven states¹⁰² still have no specific policy addressing the use of restraints on pregnant inmates, many states leaving this practice to the discretion of each facility.

⁹⁴ Levi et al, *supra* note 54, at 30.

⁹⁵ ACLU, *supra* note 35. Data accurate as of Dec 1, 2015.

⁹⁶ Levi et al, *supra* note 54, at 32.

⁹⁷ ACLU, *supra* note 35. Only 10 states as of Dec 1, 2015.

⁹⁸ Levi et al, *supra* note 54, at 33.

⁹⁹ *Id.* at 39.

¹⁰⁰ ACLU, *supra* note 35. Data accurate as of Dec 1, 2015.

¹⁰¹ Chandra Kring Villanueva, Women's Prison Ass'n, *Mothers, Infants and Imprisonment: A National Look at Prison Nurseries and Community-Based Alternatives* 15 (2009).

¹⁰² ACLU, *supra* note 35.

Shackling punishes, degrades, and humiliates women at one of the most important moments in their lives. In many cases, women are shackled regardless of the crime they have committed or their security level.¹⁰³ Even when other security measures are in place, such as locked hospital doors or guards posted outside the delivery room, pregnant prisoners are often still shackled.¹⁰⁴ Instead of being seen as deeply vulnerable because of labor pains and the birthing process as most pregnant women are seen, female prisoners are seen as dangerous threats.¹⁰⁵ They are shackled because they are seen as unfit and unworthy women—criminals who have unwisely exercised their right to become mothers.¹⁰⁶ Because they dared to be pregnant when they committed a crime, these women are seen as somehow less than human and are, therefore, subjected to difficult and painful birthing processes.

Shackling has both physical and psychological consequences. Shackles around the feet can cause women to fall; pregnancy itself shifts a woman's center of gravity, and anything that makes walking more difficult increases her chances of falling.¹⁰⁷ Falls not only injure women, but they can also cause miscarriages or stillbirths.¹⁰⁸ Shackling can also cause problems during childbirth, especially if complications arise.¹⁰⁹ Shackles around the hands and ankles can prevent women from moving into appropriate positions for delivery.¹¹⁰ They can also cause dangerous delays if a woman needs an emergency cesarean section.¹¹¹ Some women are even shackled to their hospital beds after childbirth, while they are nursing or holding their babies.¹¹²

¹⁰³ Ocen, *supra* note 1, at 1256.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1282.

¹⁰⁶ *Id.* at 1244.

¹⁰⁷ *Id.* at 1257.

¹⁰⁸ *Id.*

¹⁰⁹ Ocen, *supra* note 1, at 1257.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

Again, these women, as well as their babies, are not deemed worthy of receiving the respect and adequate medical attention afforded to most mothers and newborns.

Shackles can also harm women psychologically by causing feelings of humiliation and degradation while wearing them. The use of shackles is oftentimes arbitrary, and can rest on assumptions and stereotypes of female prisoners, especially along racial lines.¹¹³ The picture of chains on black skin is extremely controversial and evokes images of slavery and oppression. However, instead of discarding these historic chains, the practice of shackling Black women was extended to women of all colors: “what began as a mechanism to control and demean Black women [during slavery and the post-Civil War era] has become the prevailing mechanism for the treatment of all female prisoners.”¹¹⁴ Because of this oppressive history, shackling pregnant Black women today “sends broader social messages of inferiority and deviance,” only fuelling the humiliation they feel when they are shackled during labor and childbirth.¹¹⁵

In addition to shackling, another complication is women’s lack of control during labor.¹¹⁶ In some instances, incarcerated women are not given enough information during labor to make informed decisions.¹¹⁷ Some women arrange for friends or family members to be present during childbirth, but have no control over whether these people are notified when she is transported to the hospital; consequently, many incarcerated women face delivery on their own.¹¹⁸ Many of the difficulties women face during labor and childbirth, like the absence of family, are easy and inexpensive to remedy; often only a phone call is required. The reason these simple requests are not fulfilled stems back to the women’s status as both “mothers” and “prisoners.” Because people are not expected to embody both of these terms simultaneously, guards, prison facilities,

¹¹³ *Id.* at 1258.

¹¹⁴ *Id.* at 1245.

¹¹⁵ Ocen, *supra* note 1, at 1285.

¹¹⁶ Levi et al, *supra* note 54, at 42.

¹¹⁷ *Id.* at 43.

¹¹⁸ *Id.*

and society as a whole do not deem incarcerated women fit enough to mother, nor worthy or competent enough to make decisions concerning their own bodies.

2. *Abortion*

Despite this animosity towards pregnant inmates, many prisons block access to abortions for women who seek them.¹¹⁹ Unfortunately, women in prison who choose abortion can face a number of obstacles.

Because prisons do not provide abortion services, women who choose abortion must leave the prison to access those services.¹²⁰ State prisons often require women to receive an order from a judge authorizing her to leave the site for an abortion.¹²¹ This prerequisite to abortion causes delays, sometimes significant enough to completely negate the possibility of abortion because the pregnancy has progressed too far.¹²²

In addition to the difficulties in obtaining permission for an abortion, most state prisons require women to pay for not only the services, but also the transportation costs and staff expenses as well.¹²³ These costs can be quite steep, especially because most prisons are located in rural areas, while most abortion clinics and services are offered in urban locations.¹²⁴ Some state prisons even require that a family member or friend make all the arrangements.¹²⁵ Once again, this is an example of a prison taking autonomy away from a woman because of her status as both a mother and a prisoner. Incarcerated women are not deemed worthy enough to make their own reproductive decisions.

¹¹⁹ Roth, *supra* note 7, at 83-4.

¹²⁰ *Id.* at 84.

¹²¹ *Id.* at 86.

¹²² *Id.* at 90.

¹²³ Roth, *supra* note 7 at 86.

¹²⁴ *Id.*

¹²⁵ *Id.* at 87.

Federal prison policy dictates that the prisons arrange abortions, but women are required to bear all the expenses unless the pregnancy is a result of rape or endangers the mother's life.¹²⁶ Unlike federal prisons, the Bureau of Immigration and Customs Enforcement (ICE) does not have a clear abortion policy.¹²⁷ Because refugee and migrant women commonly experience rape throughout their journeys to the United States, ICE's lack of a clear policy essentially forces immigrant women to undergo pregnancies that may be very traumatic for them.¹²⁸

Although courts in the United States have generally decided women in prison retain the right to an abortion, there is no consensus as to how this right can be exercised or what restrictions can be imposed.¹²⁹ Unfortunately, many prisons do not fully comply with court decisions regarding this right to abortion.¹³⁰ Some prisons simply continue to deny access to abortions; others impose all costs on women seeking abortions, contrary to court decisions barring prisons from burdening women with this cost.¹³¹ Even when prisons implement policies themselves, prison personnel do not fully comply.¹³² This limited compliance by guards and medical staff highlights how difficult it can be for a woman to access the medical care she needs. Instead, every woman is forced to fight for her own personal access to adequate medical care, and every woman after her has to fight the same fight.

C. Mothers in Prison

Women who are already mothers when they enter prison experience problems distinct from those experienced by expectant mothers. Although separating mother and child immediately after birth is especially traumatic, separating a mother from her children at any age

¹²⁶ *Id.* at 88-89.

¹²⁷ Roth, *supra* note 7, at 89.

¹²⁸ *Id.*

¹²⁹ *Id.* at 94.

¹³⁰ *Id.* at 103.

¹³¹ *Id.*

¹³² *Id.*

has a substantial impact on both individuals.¹³³ Separation from a parent is always traumatizing for children and can cause them to feel shame and abandonment.¹³⁴ Mothers separated from their children often experience feelings of guilt and depression.¹³⁵ Separating mother and child for a significant time is neither in the best interests of the child nor healthy for the mother's well-being.

1. Best Interests of the Child

Children with a parent in prison can feel a wide variety of emotions, including guilt, abandonment, depression, resentment, anger, loneliness, sadness, fear, and embarrassment.¹³⁶ Children with incarcerated parents can also experience emotional withdrawal and develop low self-esteem.¹³⁷ These emotions can lead to behavioral difficulties, such as increased aggression, inappropriate behavior, anti-social behavior, and early involvement in criminal activity.¹³⁸ Behavioral difficulties such as these can cause further problems, especially declines in academic performance and increases in classroom disruptions.¹³⁹ Some children with incarcerated parents even develop sleeping, eating, and attention disorders, and can suffer the stigma associated with incarceration themselves.¹⁴⁰ Generally, children with parents in prison have trouble identifying with the incarcerated parent, are preoccupied with their uncertain futures, and struggle with learning how to live without a mother.¹⁴¹

For these reasons, it is often in the best interest of the child to maintain a healthy and consistent relationship with an incarcerated mother. However, this is a difficult and complicated

¹³³ Ann 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, 1828 (2012).

¹³⁴ *Id.*

¹³⁵ *Id.* at 1829.

¹³⁶ Leda M. Pojman, *Cuffed Love: Do Prison Babies Ever Smile?*, 10 BUFF. WOMEN'S L.J. 46, 50 (2002).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 51.

task. The form and regularity of communication often depends on the age of the child, the child's current caregiver, and how far his or her home is from the prison.¹⁴²

2. *Mother's Emotional Well-Being*

Mothers in prison lose all control and authority in their children's lives. Incarcerated mothers who are able to communicate with their children generally have better mental health.¹⁴³ However, many mothers feel helpless when it comes to their relationship with their children, because they are usually at the whims of the children's new caregiver, who may or may not facilitate regular communication and visits with the mother.¹⁴⁴ This helpless feeling only exacerbates the guilt and depression an incarcerated woman feels.¹⁴⁵ A mother's separation from her child can also cause her increased stress due to a persistent concern for her children and their well-being,¹⁴⁶ coupled with the fact that she is unable to care for them. A mother's worries are not relieved when she is released from prison and reunites with her children, because her authority as a parent has been compromised due to the lack of communication and trust between her and her children.¹⁴⁷ The knowledge of this possibility puts even more stress on incarcerated mothers.

On the other hand, regular communication through letters, phone calls, and visits helps mothers feel more involved in their children's lives, thereby mitigating some of the negative effects of separation experienced by both mother and child.¹⁴⁸ Unfortunately, visits are not easy to arrange or experience. Some mothers do not want their children to see them in prison and

¹⁴² Jbara, *supra* note 133, at 1830.

¹⁴³ *Id.* at 1829.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Michael Gilad & Tal Gat, *U.S. v. Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Mothers*, 37 N.Y.U. REV. L. & SOC. CHANGE 371, 385 (2013).

¹⁴⁷ Jbara, *supra* note 133, at 1829.

¹⁴⁸ *Id.* at 1830.

often cut off communication during incarceration.¹⁴⁹ The cold environment of prisons can also intimidate and scare children, making natural familial interactions difficult.¹⁵⁰ Furthermore, prisons limit visitation hours per month, restricting the face-to-face communication a mother can have with her children. Although phone calls are an alternative, calls can only be made collect. It is not always feasible to require either the mother or her children's guardians to cover the cost of the call.¹⁵¹ Communication through letters is only effective if the child or the child's guardian is able to read and write.

While communication and relational difficulties between incarcerated mothers and their children may seem minor, taken together they constitute a large hurdle that many women must overcome in order to maintain some kind of relationship with their children. These small but significant barriers are the subtle ways that prisons oppress and punish women for being mothers in prison.

III. RESPONSE TO INCARCERATED MOTHERS

A. Prison Nurseries

There is no national policy concerning babies born to incarcerated mothers.¹⁵² Most babies are immediately separated from their mothers and are given to relatives or are placed into foster care.¹⁵³ There are at least nine states, however, that give women in prison the option of participating in prison nurseries.¹⁵⁴

¹⁴⁹ Elena Hontoria Tuerk & Ann Booker Loper, *Contact Between Incarcerated Mothers and Their Children: Assessing Parenting Stress*, 43 J. OF OFFENDER REHABILITATION 23, 28 (2006).

¹⁵⁰ *Id.* at 29.

¹⁵¹ Tuerk & Loper, *supra* note 149, at 29.

¹⁵² Villanueva, *supra* note 101, at 4.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 9. States that offer prison nurseries: California, Illinois, Indiana, Ohio, Nebraska, New York, South Dakota, Washington, and West Virginia. Rikers Island in New York is the only jail that has a prison nursery.

Prison nurseries are special, separate housing units within a prison that allow a woman to mother her newborn for a specified amount of time.¹⁵⁵ The purpose is to promote bonding between mothers and their infants.¹⁵⁶ Although prison nurseries were once very popular, all but one were shut down in the 1970s.¹⁵⁷ Rising costs, declining need, and placement alternatives were reasons behind the closures.¹⁵⁸ Some states, however, have begun to re-implement these programs over the last decade,¹⁵⁹ attempting to respond to the large increase in the female prison population. Prison nurseries are meant to foster important mother-child bonding early in the relationship because positive early bonds result in positive future outcomes for both the mother and child.¹⁶⁰

Each state that allows prison nurseries implements them differently. Washington's Residential Parenting Program, for example, allows women within 30 months of the end of their sentence to live in a nursery community with their infants.¹⁶¹ Because children are allowed to stay with their incarcerated mothers for up to three years,¹⁶² they can be enrolled in an Early Head Start pre-school program. The program fosters a community environment, requiring mothers to not only care for their own child, but also to help clean the facilities, help other mothers and children, and participate in parenting classes and caregiver training.¹⁶³

Another program, the Bedford Hills Correctional Facility, the longest-running prison nursery, allows infants to stay in the nursery with their mothers for the first year of their lives.¹⁶⁴ Although mothers can apply to extend their time in the Bedford Hills, this exception is usually

¹⁵⁵ Gilad & Gat, *supra* note 146, at 373

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Villanueva, *supra* note 101, at 8.

¹⁵⁹ Gilad & Gat, *supra* note 146, at 374.

¹⁶⁰ Villanueva, *supra* note 101 at 8.

¹⁶¹ Jbara, *supra* note 133, at 1833.

¹⁶² Villanueva, *supra* note 101, at 10.

¹⁶³ Jbara, *supra* note 133, at 1833.

¹⁶⁴ *Id.*

only granted to women who are serving the last six months of their sentence.¹⁶⁵ Bedford Hills also offers parenting classes and support groups for the mothers, as well as educationally stimulating toys for the infants.¹⁶⁶ In addition to offering a prison nursery program, Bedford Hills also offers a special child's area where mothers who cannot participate in the program can read and play games with their children in a natural setting.¹⁶⁷

As seen through these two different programs, prison nurseries implement and offer a wide array of services. Children are allowed to reside in the nurseries for an average length of 12 to 18 months.¹⁶⁸ The capacity of prison nursery programs ranges from five mother/child pairs to 29 mother/child pairs.¹⁶⁹ Despite these differences, most prison nurseries have several aspects in common. Most nurseries only accept mothers who have nonviolent criminal backgrounds and who do not have a history of child abuse or neglect.¹⁷⁰ In addition, most require women to sign waivers releasing the prison from any responsibility if their children become sick or injured.¹⁷¹

Prison nurseries, however, only accept mothers whose babies were born in state custody, excluding a large segment of mothers in the prison population.¹⁷² To correct this deficiency, some states have implemented Community-Based Residential Parenting Programs.

B. Community-Based Residential Parenting Programs

Seven states, as well as the Federal Bureau of Prisons, have instituted alternatives to prison for mothers—community-based facilities that fall somewhere in between prison and

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Villanueva, *supra* note 101, at 10.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* The Decatur Correctional Center in Illinois holds five pairs. The Bedford Hills Correctional Facility in New York hold 29 pairs.

¹⁷⁰ Jbara, *supra* note 133, at 1832.

¹⁷¹ Villanueva, *supra* note 101, at 9.

¹⁷² Jbara, *supra* note 133, at 1832.

halfway homes.¹⁷³ While these programs recognize the emotional and developmental value in allowing mothers and their children to bond, they also serve as a vehicle for mothers to learn the basics of being a parent.¹⁷⁴ This is especially important for women who may have been incarcerated soon after giving birth, because they are ineligible for prison nurseries but have not yet had an opportunity to develop a relationship with their children. These community-based alternatives, usually executed by a prison in conjunction with nonprofit organizations, aim to provide children with a stable, nurturing environment. The children are given significant attention, at least three healthy meals a day, and, most importantly, an opportunity to start their lives on the right foot.¹⁷⁵ The environment is often a home-like facility, allowing a mother and young child to share a private bedroom.¹⁷⁶

Many different stages of the criminal justice system provide women with opportunities to participate in residential parenting programs. The programs can be a requirement of probation, an alternative to prison, a transfer from a standard prison setting, or a condition of parole.¹⁷⁷ Although the mothers in residential parenting programs are usually very similar to the mothers in prison nurseries, the two programs are very different.¹⁷⁸ Residential parenting programs offer many of the same parenting and care giving classes as prison nurseries, while also providing drug treatment programs.¹⁷⁹ These programs are less restrictive than prison, allowing women to ask permission to leave the home for doctor appointments, social service appointments, or other

¹⁷³ Villanueva, *supra* note 101, at 5. These states: Alabama, California, Connecticut, Illinois, North Carolina, Massachusetts, and Vermont. The Federal Bureau of Prisons has instituted residential parenting programs in Connecticut, Florida, Illinois, Texas, and West Virginia.

¹⁷⁴ Jbara, *supra* note 133, at 1825.

¹⁷⁵ *Id.* at 1826.

¹⁷⁶ Villanueva, *supra* note 101, at 12.

¹⁷⁷ Jbara, *supra* note 133, at 1836.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

programs offered in the community.¹⁸⁰ Most significantly, community-based residential programs often allow children to stay there until they reach school age.¹⁸¹ One program even allows children to stay until they reach 18, although they impose special restrictions on boys over the age of 14.¹⁸²

These programs are ideal for fostering healthy relationships between mothers and their children. They offer women a structured environment in which to raise their children while also allowing them to retain some control over their lives and their relationships.¹⁸³ These programs go even further and help women understand and address the reasons and motivations behind their criminal activity, providing opportunities for insight and growth.¹⁸⁴ The programs aim to allow women to be self-sufficient and provide resources to give them and their children a better chance at staying out of the criminal justice system in the future.

The Federal Bureau of Prisons has implemented a similar, albeit more restrictive, program. In the mid-1980s, the federal prison system implemented Mothers and Infants Nurturing Together (MINT).¹⁸⁵ Set up as a hybrid between prison nurseries and community-based residential programs, MINT allows a woman and her newborn to live in a residential facility until the child is three months old.¹⁸⁶ However, the requirements for eligibility for MINT are rigorous: a woman must be in her last trimester, have less than five years remaining on her sentence, and be eligible for furlough.¹⁸⁷ Other factors to consider are the woman's risk level, her mental and physical health, and her behavior at her original facility prior to being granted the

¹⁸⁰ Villanueva, *supra* note 101, at 12.

¹⁸¹ Jbara, *supra*, note 133, at 1836.

¹⁸² Villanueva, *supra* note 101, at 13. This facility is Lovelady Center in Birmingham, Alabama.

¹⁸³ Jbara, *supra* note 133, at 1837.

¹⁸⁴ *Id.*

¹⁸⁵ Villanueva, *supra* note 101, at 14.

¹⁸⁶ Jbara, *supra* note 133, at 1837.

¹⁸⁷ *Id.* at 1838.

transfer.¹⁸⁸ In addition, a woman is ineligible for the program if she plans to place the child up for adoption, or if she became pregnant while on furlough.¹⁸⁹ She must also pay all of her child's expenses while living in the facility, including medical care, and she must arrange for a caregiver to take custody of the child when she returns to prison.¹⁹⁰ If a woman is able to fulfill these requirements, she is able to take advantage of pre-natal and post-natal classes, including classes covering childbirth, parenting, and coping skills.¹⁹¹ These federal facilities also offer non-parenting programs, such as drug dependency treatment, abuse counseling, financial classes, and vocational and educational classes.¹⁹² However, after three months in the program, the child is given to the arranged caregiver and the mother returns to her original facility.¹⁹³ Although not as generous as some state residential programs, MINT still offers mothers ways to learn how to parent and to practice that parenting in a safe and controlled environment.¹⁹⁴

IV. CRITIQUE OF THE EXISTING RESPONSE TO INCARCERATED MOTHERS

A. Prison Nurseries

Generally, studies have found that prison nurseries help children achieve important developmental and emotional milestones by facilitating a bond between mother and child, preventing separation, and maintaining consistency in care.¹⁹⁵ Prison nurseries have also been shown to reduce the possibility of attachment disorders.¹⁹⁶ In a study of Nebraska's prison nursery, 95 percent of women respondents reported that they felt stronger bonds with their

¹⁸⁸ Villanueva, *supra* note 101, at 14.

¹⁸⁹ *Id.*

¹⁹⁰ Jbara, *supra* note 133, at 1838.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Villanueva, *supra* note 101, at 14.

¹⁹⁴ Jbara, *supra* note 133, at 1838.

¹⁹⁵ Gilad & Gat, *supra* note 146, at 382.

¹⁹⁶ *Id.*

children because of the program.¹⁹⁷ While some studies have observed delays in cognitive and loco-motor development, these problems were never permanent and the children adjusted quickly after leaving the prison nursery.¹⁹⁸ In fact, no long-term or permanent delays have been observed in children residing in prison nurseries.¹⁹⁹ Some prison nurseries have actually found that the children in their programs are developmentally advanced, because their mothers are guided by people who have an educational understanding of how to raise children.²⁰⁰

However, there are some drawbacks to prison nurseries. Cognitive and loco-motor delays are often attributed to a lack of educational toys in prison nurseries²⁰¹ Prison nurseries are likely not good programs for mothers dealing with substance addictions or severe emotional problems, because they will be preoccupied with these problems and do not receive the appropriate support.²⁰² Community-Based residential programs are more appropriate for mothers dealing with underlying issues, because they offer many more services geared towards helping the woman as both an individual and a mother. An inherent flaw in prison nursery programs is that they are located inside correctional facilities that subject its participants to an atmosphere of constant observation, suspicion, and discipline.²⁰³ The overbearing nature of prison nurseries can inject self-consciousness into the progress that these women are trying to accomplish.

In addition, one study that assessed California prison nurseries found that children's overall healthcare was negatively impacted by residing with their mothers in the programs.²⁰⁴ Mothers reported that staff did not have adequate medical training and that their concerns about

¹⁹⁷ Villanueva, *supra* note 101, at 16.

¹⁹⁸ Gilad & Gat, *supra* note 146, at 383.

¹⁹⁹ *Id.* at 382.

²⁰⁰ *Id.*

²⁰¹ Pojman, *supra* note 136, at 66.

²⁰² Gilad & Gat, *supra* note 146, at 383-84.

²⁰³ Villanueva, *supra* note 101, at 21.

²⁰⁴ *Id.* at 18.

their children's health were not taken seriously.²⁰⁵ The study found that the California nursery program, like other prison systems in general, did not have clear policies or guidelines for women and their children to access routine medical care.²⁰⁶

Finally, because of the finite time women and infants are allowed to participate in prison nursery programs, separation of mother and children can be extremely traumatic.²⁰⁷ They have already formed bonds and developed attachments, so separation can be difficult, especially if the children are cognitively developed enough to understand the situation.²⁰⁸ The danger of traumatic separation completely negates the goal of healthy attachments underlying prison nursery programs.

In addition to these weaknesses, some opponents of prison nurseries claim that these programs essentially imprison children for their mothers' crimes, and that a prison-based environment is an inappropriate place to grow and develop.²⁰⁹ They also cite a study showing that 50% of babies raised in prison nurseries lack stranger wariness.²¹⁰ Opponents also emphasize the lack of sufficient contact with males, as well as the fact that fathers are separated from their children by prison walls.²¹¹ Finally, some opponents claim that children should not be raised behind bars because of the inherent danger that exists in prisons.²¹² However, there have been no reports of serious child harm or abuse in prison nurseries.²¹³

There are, however, also significant benefits to mothers who participate in prison nursery programs. Some studies have shown that the mere presence of a child in prison can motivate

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Gilad & Gat, *supra* note 146, at 383.

²⁰⁸ *Id.*

²⁰⁹ Pojman, *supra* note 136, at 63.

²¹⁰ *Id.* at 65.

²¹¹ *Id.*

²¹² Gilad & Gat, *supra* note 146, at 383.

²¹³ *Id.* at 384.

mothers to better themselves, while in prison and in their lives after being released.²¹⁴ In fact, the presence of children in prison softens the overall tone of the environment and has been shown to have a widespread benefit for everyone in the environment, including other prisoners and even the guards.²¹⁵ Prison nurseries have also been shown to reduce recidivism rates.²¹⁶ For example, the Nebraska recidivism rate for prison nursery participants was nine percent as compared to 33 percent for non-participants;²¹⁷ three percent as compared to 38 percent for non-participants in Ohio;²¹⁸ and 13.4 percent as compared to 25.9 percent of non-participants in New York.²¹⁹ Any program that can reduce recidivism rates to single digits should be widely heralded and followed.

Despite some flaws, prison nurseries have been shown to be an effective tool in preventing many of the harms to infants that can accompany mother-child separation.²²⁰ Even though children in prison nurseries experience occasional drawbacks due to the nature of prison nurseries, these drawbacks are still a smaller harm than that experienced by separation.²²¹ Instead of eliminating prison nurseries, prisons should focus on improving them. Prison nurseries give women an opportunity to bond with their children. These programs help break down the stigma that labels incarcerated mothers as bad parents, thus allowing for healthy families in the future. These programs help women break through that extra layer of oppression associated with motherhood because they are allowed an opportunity to be “good” mothers.

To make prison nurseries most effective, programs should adopt very lenient requirements and restrictions. The only crimes that should make a woman ineligible for these

²¹⁴ *Id.* at 387.

²¹⁵ Jbara, *supra* note 133, at 1829.

²¹⁶ Gilad & Gat, *supra* note 146, at 388.

²¹⁷ Villanueva, *supra* note 101, at 16.

²¹⁸ *Id.* at 17.

²¹⁹ *Id.*

²²⁰ Gilad & Gat, *supra* note 146, at 382.

²²¹ *Id.*

programs are ones relating to child abuse and neglect. Even in abuse and neglect cases, prisons should not institute a blanket ban but should look at a woman's individual history before deciding whether to allow her into the program. Loosening requirements allows more women to take advantage of these opportunities, and empowers them in an environment that usually breaks them down. Prison nurseries should also offer a wide variety of programs and classes for mothers to take, and they should provide the children residing there with educationally stimulating toys.

Prison nurseries should also focus on allowing children to interact with other adults, like Washington's Residential Parenting Program, where the women are expected to help each other take care of their children. Children born prior to a mother's incarceration should be allowed to visit often, and mothers should be allowed to interact with their newborn and other children at the same time to foster a healthy familial relationship. Fathers of children in nursery programs should also be given broad and frequent visitation rights, in order to promote childhood interactions with men. Finally, in order to make all of these changes effective, the administration of prison nurseries should be regulated on a national level, with the help of courts, government agencies, non-governmental organizations, and advocacy groups, to ensure mothers and children are receiving the necessary care and support. Neither the American Correctional Association nor the National Commission on Correctional Health Care have recommended standards for prison nurseries or accredited any specific program.²²² Implementing an accreditation process would be a strong first step toward regulating and overseeing prison nursery programs.

B. Community-Based Residential Parenting Programs

Community-based residential parenting programs provide the same benefits of mother-child relationships and staff support that prison nurseries provide. Compared to prison nurseries,

²²² Villanueva, *supra* note 101, at 15.

however, community-based residential parenting programs are much more well-rounded. These programs offer more services for a larger range of issues and they provide a structured environment for both the mother and the children, all while allowing mothers to retain a sense of control over their lives and their relationships with their children.²²³ This sense of control is extremely important and allows women to peel back the extra layer of oppression they experience because of their status as “mother”.

These programs are also ideal for providing a smooth way to transition from prison back into society.²²⁴ Particularly, they provide mothers and children with a secure relational and developmental foundation before they reenter the general public.²²⁵ In 2009, the Women’s Prison Association concluded that these community-based programs are a better use of state resources, because they better prepare women and children for life outside of prison.²²⁶ Finally, like prison nurseries, there has also been no record of serious child abuse or neglect occurring in these residential parenting programs.²²⁷

Despite these strengths, community-based residential parenting programs have several weaknesses. In one evaluation of an Illinois community-based residence, both participating mothers and the staff found the program to be overly restrictive and punitive.²²⁸ Prison officials visited the home often, and phone and visitor restrictions were actually harsher in the home than in the prison.²²⁹ Oppressive practices like these reinforce a residential program’s relationship to the prison and reminded women that they are still incarcerated. Overbearing practices such as

²²³ Jbara, *supra* note 133, at 1837.

²²⁴ *Id.*

²²⁵ *Id.* at 1826.

²²⁶ *Id.* at 1838.

²²⁷ Gilad & Gat, *supra* note 146, at 384.

²²⁸ Villanueva, *supra* note 101, at 19.

²²⁹ *Id.*

these negate the feelings of independence and control that residential parenting programs are meant to instill in their participants.

Like prison nurseries, some community-based residential parenting programs do not do enough to support relationships between mothers and their other children not residing in the residence.²³⁰ This tendency shows that residential parenting programs might not be focusing on the big picture of fostering healthy relationships between a mother and her children, so that when she is released she will have a healthy foundation on which to reenter society. Instead, some programs focus on mother-infant bonding at the expense of other children, depriving women from the opportunity to grow and build on every relationship she may have.

Opponents of these residential programs argue that community-based residential programs essentially reward mothers for becoming pregnant and committing crimes.²³¹ What these critics do not understand is the oppression mothers in prison experience. These programs do not reward mothers for becoming pregnant and committing crimes, they only temper the abuse and oppression experienced by incarcerated mothers. These resources are vital for mothers to maintain some semblance of control and involvement in their children's lives.

Other opponents argue that prison is in fact the best place for a mother to reside with her child, because a prison setting ensures that the mother will not partake in any dangerous activities that could potentially harm her child.²³² This perpetuates the ideal of a "good" mother and attempts to criminalize a woman simply because she does not fall into society's expectations of a mother. This view also advocates particularized punishment through motherhood, adding weight to that extra layer of oppression all mothers experience while incarcerated.

²³⁰ *Id.*

²³¹ Jbara, *supra* note 133, at 1840.

²³² Villanueva, *supra* note 101, at 23.

Some argue that these programs almost completely eliminate any punitive or deterrent effects of incarceration.²³³ One argument against this is that these programs actually *enhance* the deterrent effect of incarceration: through residential parenting programs, mothers are able to form healthy and secure bonds with their children. After going through such a program, the threat of being separated from her child once more may be enough to deter a mother from reentering the criminal justice system. The fact that community corrections programs reduce the rate of recidivism²³⁴ should be enough to show that specific deterrence works for participants of residential parenting programs.

Other opponents argue that these programs also discriminate against women who are not mothers, leaving non-mothers in their cells while participating mothers are able to live in a community residence with some independence.²³⁵ Incarcerated women still experience that additional layer of oppression associated with their gender. However, instead of subjecting mothers to a third layer of oppression by making their situations equal with non-mothers, programs and other rehabilitative solutions should be instituted within the prison itself.

Moreover, some claim that these programs might even incentivize women to commit crimes, because the community-based residences offer many parenting programs that low-income women are otherwise not able to afford.²³⁶ The fact that residential parenting programs have strict requirements and that the largest program's maximum occupancy is only 29 mother-infant pairs shows that these programs are not available to a large portion of incarcerated mothers. There is a small chance that a woman will commit a crime simply for the slight

²³³ Jbara, *supra* note 133, at 1840.

²³⁴ Villanueva, *supra* note 101, at 24.

²³⁵ Jbara, *supra* note 133, at 1840.

²³⁶ *Id.*

possibility that she may eventually be able to reside in a community-based residential parenting program.

Despite these arguments, community-based residential parenting programs have been shown to work. Like prison nurseries, they provide women with an alternative that allows them to form a real relationship with their children. Again, focus should be put toward making these programs better. They too should have more lenient requirements to enter the program.

Because community-based residential parenting programs have the same basic requirements as prison nurseries, community residences should be the preferred program for mothers involved in the criminal justice system. The Women's Prison Association advocates for more participation in community-based non-incarcerative settings than in prison nurseries.²³⁷ Residential parenting programs offer women more non-parenting related support and services, allow women to mother their children in real-world settings, and help women build a strong foundation on which to reenter society.

C. Hybrids

Both prison nurseries and community-based residential parenting programs achieve the same significant goal of fostering mothers' abilities to deal with their responsibilities, instead of preventing mothers from fulfilling them.²³⁸ Ideally, all mothers would be allowed to participate in residential parenting programs, but this is unlikely to happen due to the tough-on-crime and pro-incarceration stances that permeate our society. For this reason, prisons should take advantage of a combination of prison and residential programs. Allowing mothers to reside in prison nurseries right after childbirth promotes a healthy attachment between the mother and the

²³⁷ Villanueva, *supra* note 101, at 6.

²³⁸ Gilad & Gat, *supra* note 146, at 387.

child, and allowing women and children to reside in community-based programs as they grow older fosters healthy relationships while allowing parenting skills to continue to develop.

Because community-based programs are both more effective and more expensive, prisons should allow mothers and their children to remain in prison nurseries for up to three years, at which point they should be transferred to community-based residences. Of course, mothers should be transferred as soon as possible, but in cases of overcrowding or minimal resources, mothers should be allowed the option of remaining with their children, even if in a prison setting. By making the possibility of a community residence contingent on a mother's behavior and progress while in a prison nursery, a hybrid setting will also incentivize women to fully participate in all available programming.

Residential programs have been shown to facilitate a smooth transition out of prison. Regardless of the age of their children or whether they currently reside with them, mothers in prison should be allowed to move into a residential parenting program at least six months before the end of their sentences. Even if her children are not present in the home, a mother can greatly benefit from the support and classes that are offered, and these programs can help her not only transition back into society, but they can also help her smoothly transition back into acting as a mother for her children.

D. Eliminate Mandatory Minimum Sentences

The implementation of mandatory sentencing laws was one of the factors that lead to the severe increase in the incarceration of mothers. These laws prevent judges from considering mitigating factors when sentencing a defendant, because the length of the sentence is dependent on the charge. Mandatory minimums consider the offense, but not the offender. This approach forgoes the principle that punishment should be proportionate to the crime for the "benefits" of

uniformity and certainty.²³⁹ Uniformity and certainty in sentencing, however, have failed the criminal justice system. Mandatory minimum sentences have resulted in a legal atmosphere of over-criminalization,²⁴⁰ which in turn has resulted in prison overcrowding.²⁴¹ The lines drawn between different mandatory sentencing classes are arbitrary—one tenth of a gram of a drug can mean the difference between months in prison or a decade in prison.²⁴² The punishments inflicted by mandatory minimums are not only disproportionate to the crime committed, but are also disproportionate to the offender’s culpability.²⁴³ If a punishment does not fit the crime or the offender, then what does it fit?

Because they transfer sentencing discretion from the court to the prosecutor,²⁴⁴ mandatory minimums have also led to prosecutorial abuse.²⁴⁵ For example, some opponents of mandatory sentences claim that prosecutorial practices impose a type of “trial tax” on defendants: if a defendant chooses to forgo a plea agreement and exercise her right to a jury trial, she is “taxed” the mandatory minimum sentence that would not have been imposed had she pled guilty.²⁴⁶ This practice incentivizes a defendant to waive her basic constitutional rights, depriving her of her right to a trial by jury, to the standard of proof beyond a reasonable doubt, and to confront her accuser.

Examining mandatory minimum sentences through the lens of a mother, this policy is especially harsh. Courts are unable to take motherhood, especially single motherhood, into consideration when sentencing a female defendant. Eliminating mandatory sentencing laws, on

²³⁹ Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment no Longer Fits the Criminal*, 10 N.D. L. ETHICS & PUB POL’Y 389, 390 (1996).

²⁴⁰ Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 20 (2010).

²⁴¹ Lutjen, *supra* note 239, at 416.

²⁴² Luna & Cassell, *supra* note 240, at 15.

²⁴³ Lutjen, *supra* note 239, at 416.

²⁴⁴ *Id.*

²⁴⁵ Luna & Cassell, *supra* note 240, at 14.

²⁴⁶ *Id.*

the other hand, would allow courts to consider the whole picture of a defendant and make sentencing decisions knowing all the relevant facts. Placing sentencing discretion back into the care of the court can result in sentences that are in the best interest of both the child and the mother. The elimination of mandatory minimum sentences would do a great deal to alleviate the extra oppression women experience in the criminal justice system.

V. CONCLUSION

The best way to solve the problem of incarcerated mothers is to reduce the overall number of women going to prison. For this to happen, a significant change in this country's legal and social environment must occur. Reducing poverty rates will reduce the number of women who must resort to stealing, selling drugs, or committing other crimes in order to survive. Reducing the rate of emotional, physical, and sexual abuse will reduce the number of women who use drugs and alcohol to self-medicate. Eliminating mandatory minimum sentencing will reduce the number of women thrown into jail without any investigation into her past or her present situation. While this is the ideal, it is unfortunately far from being realized.

While working toward this ideal, current incarcerated mothers deserve relief from the extra layers of oppression they experience due to their gender and status as mother. Providing adequate treatment and healthcare, regardless of a woman's decision regarding her pregnancy, will greatly relieve the oppression incarcerated women experience due to their pregnancies. Implementing stronger prison nurseries and more community-based residential parenting programs in more locations in every state will help temper the oppression mothers experience, as well as foster healthy and secure relationships between mothers and their children. A healthy relationship with her children, supported and encouraged by the criminal justice system, will help to feminize the paradigm of a prisoner.