

# INFANT INMATES: AN ANALYSIS OF INTERNATIONAL POLICY ON CHILDREN ACCOMPANYING PARENTS TO PRISON

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Mass incarceration has created a class of innocent victims, namely, children of incarcerated parents. These children are only guilty of having an incarcerated parent yet are punished through parental separation and the accompanying detrimental effects on childhood development. International steps have been taken to solve this dire problem through the United Nations Convention on the Rights of the Child and the implementation of prison nurseries. Prison nurseries provide an opportunity for children to accompany their mothers to prison for a specified time to facilitate bonding. The United States is well behind the international movement because it has not adopted the United Nations Convention on the Rights of the Child and does not have a federal policy addressing what happens to children of incarcerated parents. This note recommends that the United States follow the international movement and implement a federal policy that is in the best interest of children. To do so, this note first discusses the benefits and downfalls of three types of prison nursery systems. The note then examines the experiences of Brazil, Afghanistan, and Denmark to identify the best practice for the United States to implement. By learning from experiences of other countries, the United States will achieve the benefits of prison nursery system without the harm that children have faced in other countries. The United States must act so children are no longer punished for the crimes of their parents.

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## I. INTRODUCTION

One substantial yet historically overlooked result of incarceration is the effect it has on children.<sup>1</sup> Judges rarely consider minor children in sentencing, even though the result may be life changing for them;<sup>2</sup> children may be left to live with relatives or even end up in foster care.<sup>3</sup> In response, “efforts have escalated at the international level to create policies specifically geared towards addressing the situation of the young children of incarcerated parents.”<sup>4</sup> At the foundation of these policies is the United Nations Convention on the Rights of the Child (UNCRC), which demonstrates the overwhelming international recognition of children’s rights.<sup>5</sup> Foundationally, the UNCRC provides that the best interests of the child shall be the primary consideration in all actions concerning children taken by public or private social welfare institutions, courts, administrative authorities, or legislative bodies.<sup>6</sup> It further provides that a child should not be separated from his or her parents except when “such separation is necessary for the best interests of the

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1. Chesa Boudin, *Children of Incarcerated Parents: The Child’s Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 77 (2013), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7387&context=jclc>; see also Ria Wolleswinkel, *Children of Imprisoned Parents* 191, (last visited Feb. 1, 2017), <http://childrenofprisoners.eu/wp-content/uploads/2013/12/Wolleswinkelfulltext.pdf>.

2. Wolleswinkel, *supra* note 1, at 191.

3. Abbie Lieberman & Lara Burt, *Babies in Prison? It’s Not What You Think*, NEW AMERICA, Aug. 4, 2016, <https://www.newamerica.org/education-policy/edcentral/babies-prison/>.

4. GLOB. LEGAL RESEARCH CTR., LAWS ON CHILDREN RESIDING WITH PARENTS IN PRISON 1 (The Law Library of Congress 2014), <https://www.loc.gov/law/help/children-residing-with-parents-in-prison/children-residing-with-parents-in-prison.pdf>.

5. Carmen Hamper, *Can Life in Prison be in the Best Interests of the Child?* 41 OHIO N.U. L. REV. 201, 202 (2014). All 194 members of the United Nations, except the United States and Somalia have adopted the UNCRC. *Id.*

6. *Id.* In determining whether life in prison is in the best interests of the child, the UN takes into consideration individual factors including the child’s maturity, “the presence or absence of parents, the child’s environment and experiences, balanced against ‘the rights and duties of his or her parents.’” See *id.* at 204.

child.”<sup>7</sup> The UNCRC “create[s] a strong legal basis for a child-oriented approach to sentencing and visitation policy” in prisons.<sup>8</sup>

This idea was advanced in the United Nations General Assembly Resolution of 2010.<sup>9</sup> The Resolution recommended that country “[d]ecisions to allow children to stay with their mothers in prison . . . be based on the best interests of the children,” and if permitted, the children should “never be treated as prisoners.”<sup>10</sup> The Resolution further recommended that the prison environment “be as close as possible to that of a child outside prison.”<sup>11</sup> Finally, the Resolution outlined a process for ending a child’s time in prison with his or her incarcerated parent.<sup>12</sup> The decision of when a child is to be separated from his or her mother must be determined by an individual assessment that is in “the best interest of the child within the scope of relevant national laws.”<sup>13</sup> Further, “the removal of a child from prison shall be undertaken with sensitivity, [and] only when alternative care arrangements for the child have been identified”.<sup>14</sup> Finally, after the mother and child have been separated, mothers “shall be given the maximum possible opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised.”<sup>15</sup>

7. *Id.* at 202. In the United Nations “[t]he removal of children from their parents without justification is one of the gravest violations that can be perpetrated against children.” U.N. High Comm’r for Refugees (UNHCR), *UNHCR Guidelines on Determining the Best Interests of the Child*, 38 (2008); see also GLOB. LEGAL RESEARCH CTR., *supra* note 4, at 2–6.

8. Boudin, *supra* note 1, at 84.

9. See G.A. Res. 2010/16 (Oct. 6, 2010), <http://www.ohchr.org/Documents/ProfessionalInterest/BangkokRules.pdf>. Rules 49 through 52 of the 2010 Resolution recommend special protections for women and children in the prison nursery context. *Id.*

10. *Id.* at Rule 49.

11. *Id.* at Rule 51.

12. See *id.* at Rule 52.

13. *Id.*

14. *Id.*

15. *Id.* The two major determinants of child adjustment are the child’s opportunity to maintain contact with the incarcerated parent and the quality of the alternative caregiving arrangements. Amy Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385, 395 (2018).

With the goal of honoring the rights of children and maintaining family ties as outlined by the United Nations, ninety-seven jurisdictions around the world have implemented laws permitting minor children to reside with their incarcerated parent in prison.<sup>16</sup> The countries with such laws “impose specific age limits for a child’s admission into and length of stay in prison” and the laws are in no way uniform.<sup>17</sup> The imposed age limit usually correlates “with the degree to which the prison world deviates from the world outside.”<sup>18</sup> The more the prison environment mirrors the surrounding community, the longer the country likely allows children to remain in prison with their parent.<sup>19</sup> In addition to imposing age restrictions, most jurisdictions limit their laws in application to only incarcerated mothers because of the recognized mother-child bond; however, some jurisdictions extend the law to include fathers.<sup>20</sup> Denmark even allows incarcerated mothers and fathers to reside together in a single unit with their child.<sup>21</sup>

## II. THE PROBLEM IN THE UNITED STATES

The United States is well behind this international movement because there has been no “attempt[] to promote uniformity in solutions provided to children of incarcerated mothers . . . through federal legislation and

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16. GLOB. LEGAL RESEARCH CTR., *supra* note 4, at 1.

17. *Id.* “International law offers a range of approaches to children’s rights that may provide a basis for children to claim a relationship with incarcerated parents.” Boudin, *supra* note 1, at 83.

18. Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN’S L.J. 65, 83 (2015), [http://www.heinonline.org.proxy2.cl.msu.edu/HOL/Page?handle=hein.journals/haswo26&div=10&start\\_page=65&collection=journals&set\\_as\\_cursor=2&men\\_tab=srchresults](http://www.heinonline.org.proxy2.cl.msu.edu/HOL/Page?handle=hein.journals/haswo26&div=10&start_page=65&collection=journals&set_as_cursor=2&men_tab=srchresults).

19. *Id.*

20. *See generally* GLOB. LEGAL RESEARCH CTR., *supra* note 4, at 1–67.

21. INT’L CTR. FOR PRISON STUDIES, INTERNATIONAL PROFILE OF WOMEN’S PRISONS 34–35 (2008), [http://www.prisonstudies.org/sites/default/files/resources/downloads/womens\\_prisons\\_int\\_review\\_final\\_report\\_v2.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/womens_prisons_int_review_final_report_v2.pdf) [hereinafter INTERNATIONAL PROFILE OF WOMEN’S PRISONS].

guidelines, model codes, or otherwise.”<sup>22</sup> Further, the United States is the only country that has not adopted the UNCRC.<sup>23</sup> Nevertheless, the United States faces the same, or arguably worse, problems that the UNCRC seeks to prevent.<sup>24</sup> In the United States, one out of every fourteen children has a parent who is or has been incarcerated.<sup>25</sup> Accordingly, the United States has the highest prison population rate in the world<sup>26</sup> and has recently seen a dramatic increase in the female prison population.<sup>27</sup> Between 1980 and 2011, the number of female inmates in the United States increased by 637%.<sup>28</sup> Further, around 70% of women inmates have children under the age of eighteen.<sup>29</sup> Even more alarming, “reports suggest about ten percent of female inmates are pregnant on any given day.”<sup>30</sup> Most female inmates who give birth while incarcerated are immediately separated from their child.<sup>31</sup> Female inmates are left with

22. Michal Gilad & Tal Gat, *U.S. V. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women*, 37 N.Y.U. REV. L. & SOC. CHANGE 371, 398 (2013); see also Darren Boyle, *Raised Behind Bars: Inside America's Maximum Security Prisons Where Babies get to Stay with Their Felon Mothers While They Serve Their Jail Sentences*, DAILYMAIL.COM, May 25, 2016, <http://www.dailymail.co.uk/news/article-3608322/Born-bars-Inside-America-s-maximum-security-prisons-babies-stay-felon-mothers-serve-jail-sentences.html>.

23. Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015), <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens>.

24. *Id.* “[I]n the United States, there are more children with incarcerated parents than there are people in prison.” Boudin, *supra* note 1, at 77.

25. Christopher Zoukis, *Legacy of Mass Incarceration: Parental Incarceration Impacts One in Fourteen Children*, PRISON LEGAL NEWS, Feb. 7, 2017, <https://www.prisonlegalnews.org/news/2017/feb/7/legacy-mass-incarceration-parental-incarceration-impacts-one-fourteen-children/>.

26. Seham Elmalak, *Babies Behind Bars: An Evaluation of Prison Nurseries in American Female Prisons and Their Potential Constitutional Challenges*, 35 PACE L. REV. 1080, 1082 (2015), <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1903&context=plr>.

27. *Id.* at 1080.

28. *Id.* at 1084.

29. Warner, *supra* note 18, at 69.

30. *Id.*

31. *Id.* “[M]ost state statutes currently mandate that ‘infants be removed from their mothers immediately upon the mother’s incarceration.’” Hamper, *supra* note 5, at 210.

few options and must turn to the state or relatives to support their child.<sup>32</sup> Consequently, the United States is faced with conflicting priorities; namely, the desire for harsh retributive prison sentences and the need to keep families together and off of state-based welfare.<sup>33</sup>

The question then arises, should the United States follow the international movement and adopt a federal law allowing children to reside with their incarcerated mother in prison? Based on the number of children that incarceration effects in the United States<sup>34</sup> and the significant action taken by the rest of the world, the answer is clearly yes.<sup>35</sup> To help child victims of incarceration, the United States must first join the UNCRC or at least recognize the rights and best interests of children in this context.<sup>36</sup> After recognizing the rights of children, the United States should adopt a hybrid prison nursery system, allowing children up to eighteen months to reside with their incarcerated mother if there is no relative to care for the child outside of prison. The system, only offered to nonviolent offenders, should require each prison to have a nursery, parental education classes, and the opportunity to have autonomy in parenting decisions. The policy should mirror real life to foster a positive mother-child relationship and facilitate the eventual transition back into society. The system must also provide for a transitional period comprising of contact with the caretaker the child will be residing with upon leaving the prison to facilitate a smooth transition. Finally, if the mother is still serving her sentence after the child exceeds eighteen months old, the United States should facilitate ongoing visitation to maintain the strong mother-child relationship established through the prison nursery program. By implementing these rules, the United States will achieve the benefits of prison nursery systems without

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32. Warner, *supra* note 18, at 69–71.

33. Margaret Graham Tebo, *A Parent in Prison: States Slowly Beginning to Help Inmates' Children, and Advocates Say it's Overdue*, ABA JOURNAL, Feb. 2006, at 12, <http://www.jstor.org.proxy1.cl.msu.edu/stable/pdf/27845945.pdf?refreqid=excelsior%3A77d613feaad20c85295c2fba6dea081d>.

34. See Warner, *supra* note 18, at 69; see also Zoukis, *supra* note 25.

35. See generally GLOB. LEGAL RESEARCH CTR., *supra* note 4.

36. See generally Hamper, *supra* note 5 (discussing action taken by the United Nations and the importance of children's rights).

the harm that children have faced in other countries with different systems.

This note will justify the recommended response by first discussing the three main approaches countries have adopted: (1) complete separation of parent and child, (2) prison nurseries for the duration of the breastfeeding period, and (3) prison nurseries for the duration of a parent's sentence.<sup>37</sup> The note will then discuss the benefits and downfalls of each approach by using the United States, Brazil, Afghanistan, and Denmark as examples.<sup>38</sup> Finally, the note will explain how the benefits and downfalls of each approach lead to the conclusion that a limited prison nursery program is the best approach.<sup>39</sup> In a world where mass incarceration is hindering family relationships, it is imperative that the United States follow the international movement and adopt a solution.<sup>40</sup>

### III. THE RANGE OF INTERNATIONAL RESPONSES

Traditional incarceration removes an individual from society and places him or her in an institution with “a nearly complete severance of ties with family, friends, and community.”<sup>41</sup> The purpose of this isolation is to deter criminal conduct and punish wrongdoing.<sup>42</sup> The current international movement has moved away from this model and toward prisoner and family rights.<sup>43</sup> The movement toward allowing children to accompany their parent to prison has come with backlash: many opponents question the safety of children in prison as well as the alleged benefits of these programs.<sup>44</sup> Accordingly, some countries have decided

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37. See generally GLOB. LEGAL RESEARCH CTR., *supra* note 4 (providing an overview of each country's approach).

38. See *infra* Part III.

39. See *infra* Part III.

40. See generally GLOB. LEGAL RESEARCH CTR., *supra* note 4.

41. James G. Dwyer, *Jailing Black Babies*, 3 UTAH L. REV. 465, 469 (2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2231562](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231562).

42. *Id.*

43. *Id.*

44. See generally *id.* at 470–72 (arguing against the implementation of prison nurseries).

to maintain the traditional model of incarceration and have not adopted prison nursery laws.

A. Complete Separation of Parent and Child (United States)

Jurisdictions that follow the complete separation of parent and child model do not offer any type of in-prison program for incarcerated parents and their children.<sup>45</sup> The best example of this approach is the United States because it “remains one of only four countries that commonly separate female inmates from their newborn children.”<sup>46</sup> Since the United States does not have a national policy that allows children to reside with their parents in prison and does not have a “national policy that dictates what happens to newborn children born to incarcerated mothers,”<sup>47</sup> forty-one states separate convicted parents and their children immediately upon incarceration.<sup>48</sup> The result of this approach is that single mothers must decide between adoption, foster care, or placing the child with a family member.<sup>49</sup>

The main justifications for separating incarcerated parents and their children are to ensure the safety and quality of life for the child and to punish the incarcerated parent.<sup>50</sup> First, countries that accept this model believe that putting a baby behind bars with his or her criminal parent “could be extremely damaging [to the child] when there are alternatives such as adoption, foster care, or placing the child with extended family.”<sup>51</sup> They believe that prison is an inappropriate place for children because it prevents them from participating in normal childhood activities and could expose them to crime at a young age.<sup>52</sup> For those not incarcerated themselves, “the thought of allowing [children] to be in such

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45. Warner, *supra* note 18, at 67.

46. *Id.* at 68. The four countries are Suriname, Liberia, the Bahamas, and the United States. Hamper, *supra* note 5, at 212.

47. Warner, *supra* note 18, at 67.

48. *Id.* at 68.

49. *Id.* at 67–68.

50. *Id.* at 67.

51. *Id.*

52. Hamper, *supra* note 5, at 221.

close proximity to people who are labeled as ‘criminals’ [is] terrifying.”<sup>53</sup> Opponents of separating children from their incarcerated parents argue that the mother-child bond is so crucial for development that it justifies bringing children into the prison; however, proponents of this approach emphasize “the quality of the relationship rather than the type of relationship.”<sup>54</sup> Proponents of separation believe “it is healthier for the child to be raised in a more natural environment outside of prison walls, albeit without their mothers.”<sup>55</sup>

Second, many believe that prison nurseries are inconsistent with the purposes of incarceration: prisons are for punishment, not for raising a family.<sup>56</sup> They further argue that mothers should not be given special treatment just because they have a child.<sup>57</sup> Supporters of separation believe parents should have considered their children prior to committing a crime and that this type of system is subject to abuse if mothers receive special privileges.<sup>58</sup>

Although there are convincing reasons for the separation of parent and child approach, there are also significant downfalls.<sup>59</sup> Arguably the greatest downfalls of the separation of parent and child approach are the weakened attachment, impaired bonding, and extended separation between parent and child.<sup>60</sup> It has been established that “[t]he first few years of children’s lives are crucial to their healthy development, and much of the learning that takes place during these years depends on their

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53. Warner, *supra* note 18, at 84.

54. *Id.*

55. *Id.* at 83–84.

56. *See id.* at 67.

57. *See* Hamper, *supra* note 5, at 221.

58. *Id.*

59. Anna Mangia, *Mothers Behind Bars: Breaking the Paradigm of Prisoners*, 5 DEPAUL J. WOMEN, GENDER & L. 1, 26–27 (2015), <https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1025&context=jwgl>.

60. Julie Campbell & Joseph R. Carlson, *Correctional Administrators’ Perceptions of Prison Nurseries*, 39 CRIM. JUST. & BEHAV. 1063, 1065 (2012), [http://www.heinonline.org.proxy2.cl.msu.edu/HOL/Page?handle=hein.journals/crmjusbhv39&div=67&start\\_page=1063&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](http://www.heinonline.org.proxy2.cl.msu.edu/HOL/Page?handle=hein.journals/crmjusbhv39&div=67&start_page=1063&collection=journals&set_as_cursor=0&men_tab=srchresults).

relationships with the adults in their lives.”<sup>61</sup> Studies have shown that “[t]he separation of the infant from the mother during . . . the first 24-months of life has been proven to compound problems in the child’s development.”<sup>62</sup> In addition to developmental problems, absence during that important period will also limit the bond and relationship between the parent and child.<sup>63</sup> This can ultimately lead to a breakdown of the family unit.<sup>64</sup>

Further problems arise when a child cannot be placed in the home of family member.<sup>65</sup> The state may have no option but to turn to foster care.<sup>66</sup> “11% of those children separated from their incarcerated mothers experience[] at least two additional changes in caregivers.”<sup>67</sup> The inconsistency of care can further damage the child’s development and relationship with his or her incarcerated parent.<sup>68</sup> To combat the downfalls of separation, prison nurseries were created by various jurisdictions.<sup>69</sup>

#### B. Prison Nurseries for the Duration of the Breastfeeding Period

The second approach—the prison nursery system—is the most common international response to help young children of incarcerated parents.<sup>70</sup> “Prison nurseries allow an inmate mother to parent her newborn child within a prison or jail for a certain period of time,” usually

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61. Lieberman & Burt, *supra* note 3.

62. LAWRENCE DEAN MARSHALL, ANALYSIS OF PRISON NURSERY BENEFITS AND PROGRAM STRATEGIES: ALASKA DEPARTMENT OF CORRECTIONS OPPORTUNITY FOR REDUCTION IN RECIDIVISM AND IMPROVED BONDING BETWEEN INCARCERATED MOTHERS AND THEIR INFANTS 9 (Prison Nurseries and Maternal Attachment Org. 2011), <http://www.mpaalaska.org/wp-content/uploads/2013/03/Marshall-Capstone-.pdf>.

63. *Id.*; *But see* Hamper, *supra* note 5, at 219.

64. *See* Elmalak, *supra* note 26, at 1090.

65. Warner, *supra* note 18, at 69.

66. Campbell & Carlson, *supra* note 60, at 1064.

67. *Id.* at 1065.

68. *But see id.*

69. *See generally* GLOB. LEGAL RESEARCH CTR., *supra* note 4.

70. *See generally id.* (discussing ninety-seven jurisdictions that have laws regarding children residing in prison with an incarcerated parent).

until the child is done breastfeeding.<sup>71</sup> The age limit imposed “reflects fears that at some point children will be harmed by their unnatural surroundings.”<sup>72</sup> Although there is variation among the quality, most of the prison nursery programs are kept within a special housing at the prison.<sup>73</sup>

Generally, the main purpose of a prison nursery is to “establish bonding between mother and child.”<sup>74</sup> Bonding is defined as “the process of forming attachment.”<sup>75</sup> Since young children who are “separated from their mothers due to incarceration show disproportionately high rates of insecure attachment to their mothers,”<sup>76</sup> prison nurseries offer a solution. By participating in prison nursery programs, bonding in the first few weeks of the infant’s life will result in healthy attachment thereby reducing development problems.<sup>77</sup> A 2009 Women’s Prison Association study found that “both community-based and prison nursery programs allowed for the formation of mother-child bonds during a critical period of infant development” and reduced the risk of issues such as weakened attachment and impaired bonding.<sup>78</sup> Although critics question whether a mother and child can develop a bond while incarcerated, a 2010 study of

71. Warner, *supra* note 18, at 66.

72. *Id.* at 83 (quoting RUSS IMMARRIGEON, WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM: POLICY ISSUES AND PRACTICE STRATEGIES 20-5 (2006)).

73. Gilad & Gat, *supra* note 22, at 373.

74. Campbell & Carlson, *supra* note 60, at 1065.

75. *Id.* Attachment is defined as a “bond characterized by the unique qualities of maternal-infant or primary caregiver-infant relationships.” *Id.*

76. Lorie S. Goshin et al., *Preschool Outcomes of Children Who Lived as Infants in a Prison Nursery*, 94 THE PRISON J. 139, 140 (2014), [http://www.heinonline.org.proxy2.cl.msu.edu/HOL/Page?handle=hein.journals/prsjml94&div=11&start\\_page=139&collection=journals&set\\_as\\_cursor=0&men\\_tab=srchresults](http://www.heinonline.org.proxy2.cl.msu.edu/HOL/Page?handle=hein.journals/prsjml94&div=11&start_page=139&collection=journals&set_as_cursor=0&men_tab=srchresults). Goshin’s study found that “abrupt separation from a primary caregiver before 18 months of age has lifelong effects on a person’s ability to establish healthy relationships and interact in a positive way with the world.” Victoria Law, *Empty Cribs in Prison Nurseries*, THE INVESTIGATIVE FUND, May 13, 2018, <https://www.theinvestigativefund.org/investigation/2018/05/13/incarcerated-mothers-prison-nurseries/>.

77. Campbell & Carlson, *supra* note 60, at 1065.

78. *Id.* The first year of life is crucial to “the development of that call and response between baby and caregiver where the baby feels that, over time, that caregiver is going to be there for them.” Law, *supra* note 76.

the New York prison nursery system found that attachment and bonding can occur in a prison setting.<sup>79</sup> The 2010 study found that “71% of the babies achieved secure attachment with their own mothers . . . in a prison nursery setting.”<sup>80</sup>

“Prison nursery programs [also] provide incarcerated mothers with services designed to foster successful parenting, including prenatal, parenting, infant care, and child development education.”<sup>81</sup> The programs are designed to “improve [the mother’s] child-rearing skills in anticipation of [her] eventual release from prison.”<sup>82</sup> The facilities also work to coordinate community resources for the inmate mother during her incarceration as well as upon her release.<sup>83</sup> The overarching goal of these programs “is that at the time of release, each mother will have the tools and skills necessary to perform her role as the caregiver to her child.”<sup>84</sup> The skills learned through these programs could be why recidivism is so much lower for prison nursery participants.<sup>85</sup> A 2010 study found “a 50% lower 3-year recidivism rate among nursery program participants.”<sup>86</sup> Not only do lower recidivism rates facilitate a safer community, they also save taxpayers money because taxpayers do not have to pay to re-incarcerate former inmates.<sup>87</sup> Accordingly, reduced recidivism rates due to prison nurseries “not only benefit mothers and children, but . . . also society as a whole.”<sup>88</sup>

The research in this area is heavily focused on the short-term effects of prison nursery systems like the formation of mother-child bonds and

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79. Campbell & Carlson, *supra* note 60, at 1065.

80. *Id.*

81. *Id.* at 1066.

82. Gilad & Gat, *supra* note 22, at 375.

83. Campbell & Carlson, *supra* note 60, at 1066.

84. Gilad & Gat, *supra* note 22, at 375.

85. Campbell & Carlson, *supra* note 60, at 1066.

86. *Id.* A previous study conducted in 2002 found a similar decrease in recidivism rates for prison nursery participants: recidivism was 26 percent for mothers who were not prison nursery participants and only 13 percent for prison nursery participants. Law, *supra* note 76.

87. Campbell & Carlson, *supra* note 60, at 1066–67.

88. Hamper, *supra* note 5, at 220.

reduced recidivism rates in the time following release.<sup>89</sup> With the long-term effects still in question, a 2014 study followed infant inmates through prison and well into release.<sup>90</sup> The sample for the study included 111 preschool-aged children, forty-seven of whom spent their first one to eighteen months in a prison nursery, and sixty-four of whom were separated from their mother because of her incarceration.<sup>91</sup> The study found that prison nurseries had a positive effect on the children's development compared to those separated from their incarcerated mothers.<sup>92</sup> The study concluded that the prison nursery children had "significantly lower mean anxious/depressed and withdrawn behavior scores than children who were separated from their mothers in infancy or toddlerhood because of incarceration."<sup>93</sup> Therefore, the findings "suggest[ed] that in spite of high levels of contextual risk in the post-release environment, prison nursery co-residence may confer resilience to anxious/depressed behavior problems in the preschool period."<sup>94</sup>

Although prison nurseries have been shown to facilitate the mother-child bond, they are not flawless.<sup>95</sup> Incarcerated mothers face a unique tension: namely, the tension between their status as a mother and their status as an inmate.<sup>96</sup> Like most, inmate mothers want to be "good mothers," but it is hard to satisfy societal ideals of motherhood in a prison setting.<sup>97</sup> A study of the prison nursery system at Pacific

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89. See generally Goshin et al., *supra* note 76.

90. *Id.* at 144.

91. *Id.*

92. *Id.* at 147.

93. *Id.*

94. *Id.* at 150.

95. See generally Kate Luther & Joanna Gregson, *Restricted Motherhood: Parenting in a Prison Nursery*, 37 INT'L J. SOC. FAMILY 85, 87–88 (2011).

96. *Id.* at 85. See also Erin Ostheimer, *Baby Cribs in Prison Cells: Assessing Opinions About Prison Nursery Programs by Humanizing Incarcerated Mothers 9–10* (Mar. 2016) (unpublished honors theses, Union College) (on file online with Union Digital Works), <https://digitalworks.union.edu/theses/194> (discussing a 2009 study aimed at understanding how incarcerated women balance the "diametrically opposing roles of prisoner and mother").

97. Luther & Gregson, *supra* note 95, at 85. Luther and Gregson found that inmate mothers understood societal ideals of "good mothering" from "their socialization

Correctional Women's Center found that the biggest challenges inmate mothers faced were the restricted decision-making available and the limited "capacity for creating a sense of home" for the child.<sup>98</sup>

First, the Pacific Correctional study found that prison nurseries are not compatible with the traditional notion of motherhood with regard to decision-making because the inmate mothers "were required to parent their children in accordance with prison policy."<sup>99</sup> Traditional motherhood requires autonomous decision-making; however, prison nurseries strip inmate mothers of that autonomy and dictate matters such as selecting the child's food, deciding where the child would sleep, deciding the amount of time the child would sleep, and deciding when to take the child to the doctor.<sup>100</sup> At Pacific Correctional, the tension with regard to autonomy and decision-making was further complicated by the parenting classes required by the prison.<sup>101</sup> In the classes, inmate mothers were taught to "make decisions for their children based on their reasoned assessment of their children's needs;"<sup>102</sup> but when it came time to make a decision for their individual child's needs, prison policy dictated a general response.<sup>103</sup> Mothers in the Pacific Correctional study articulated that they "felt particularly in tune with their children's social and emotional needs" due to the emphasis on parent-child bonding, but reported that they were unable to respond in ways to further that bond.<sup>104</sup>

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experiences prior to entering prison, the parenting professionals with whom they interacted in prison . . . and the correctional staff." *Id.* at 91.

98. *Id.* at 88, 91.

99. *Id.* at 87-88, 91.

100. *Id.* at 91. Because "[a]utonomy and a sense of responsibility are necessary traits of a strong and positive mother," prison nurseries can inhibit traditional motherhood. IndiaAna Gowland, *Moms Behind Bars: Motherhood in Eshove Correctional Center 9* (2011) (unpublished thesis, School for International Training Study Abroad) (on file with the Independent Study Project Collection), [https://digitalcollections.sit.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2122&context=isp\\_collection](https://digitalcollections.sit.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2122&context=isp_collection).

101. Luther & Gregson, *supra* note 95, at 93.

102. *Id.*

103. *Id.*

104. *Id.* at 94.

Through this study, it appears that inmate mothers are faced with a confused identity.<sup>105</sup>

The second source of tension for inmate mothers was the limited capacity to “create a home and sense of family” for their child.<sup>106</sup> Women in Pacific Correctional reported that, again, what they learned in prison parenting classes contradicted what they were permitted to do in parenting their child.<sup>107</sup> For example, the mothers learned that color stimulation was important to development, but the cell walls were white and inmate mothers were barred from decorating their cells.<sup>108</sup> The mothers were concerned that the single bulletin board that was permitted on the white walls was insufficient to stimulate their child’s development.<sup>109</sup> The mothers were also banned from sleeping in the same room as their child and from eating with their child.<sup>110</sup> The mothers were equally concerned about these rules because they diminished their ability to create a sense of family.<sup>111</sup> The findings of the Pacific Correction study demonstrate that although prison nursery systems are instrumental in facilitating a mother-child bond, they create a “gap between possessing the identity of a mother and actually being able to mother one’s children.”<sup>112</sup>

### 1. Example: Study of Brazil’s Prison Nursery System

Brazil’s prison nursery system, which allows children to accompany their mothers to prison during the breastfeeding period, demonstrates

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105. *Id.* at 95.

106. *Id.*

107. *Id.* at 97.

108. *Id.* A study of the Eshowe Correctional prison nursery system in Africa found similar results: the prison mothers lacked “enrichment equipment in the mother and child unit.” GOWLAND, *supra* note 100, at 38. Currently, the program does not provide toys for the children; however, a social worker suggested the implementation of “bright paint on the walls, toys in the playroom, and special cooking facilities for baby food.” *Id.* This suggests other countries have stimulation problems in prison nurseries.

109. Luther & Gregson, *supra* note 95, at 97.

110. *Id.* at 96–98.

111. *Id.*

112. *Id.* at 99.

positive aspects of the prison nursery system; however, it also shows the tension that arises when there is lack of enforcement in the system itself.<sup>113</sup> When a single mother is convicted of a crime in Brazil, she must decide between three options for the care of her children.<sup>114</sup> First, the children can be placed with a substitute family, usually a distant relative.<sup>115</sup> Alternatively, the children can be placed in a shelter institution.<sup>116</sup> Finally, the children can accompany their mother to prison, however, only during the breastfeeding period.<sup>117</sup>

Since it is common for a mother to choose to bring her child to prison, Article 83(§2) of Brazil Law No. 7,210 requires women's penitentiaries to have a nursery where convicted women can care for their children.<sup>118</sup> The nursery also "must be equipped with qualified personnel in accordance with the guidelines adopted by educational legislation, and have opening hours that guarantee the best care for the children and their guardian."<sup>119</sup> Even though Brazilian law requires nursery accommodations, "a national survey of incarcerated women by the Ministry of Justice showed that only 19.6% of women's penal institutions in Brazil had nurseries for babies."<sup>120</sup> Nevertheless, a "study of a female penitentiary in São Paulo showed that 79% of the women were mothers and 50% had children younger than 12."<sup>121</sup> This has resulted in children staying with their mothers in prison "on an

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113. See generally Claudia Stella et al., *Mothers and Babies in A Brazilian Prison: A Study Exploring the Impact of Prison Conditions*, FORENSIC RESEARCH & CRIMINOLOGY INT'L J. 1 (2016), <http://medcraveonline.com/FRCIJ/FRCIJ-02-00052.pdf>.

114. *Id.* at 1.

115. *Id.*

116. *Id.*

117. *Id.*

118. GLOB. LEGAL RESEARCH CTR., *supra* note 4, at 15; see also *Behind Bars in Brazil*, HUMAN RIGHTS WATCH, <https://www.hrw.org/legacy/reports98/brazil/Brazil-12.htm> (last visited Sept. 21, 2018) (reiterating that the Brazilian constitution requires prisons to allow mothers to care for and nurse their babies in prison).

119. GLOB. LEGAL RESEARCH CTR., *supra* note 4, at 15.

120. Stella et al., *supra* note 113, at 1. For example, at the women's prison in Manaus, "babies can only stay with their mothers for a week because the facility is too overcrowded to permit them to remain longer." HUMAN RIGHTS WATCH, *supra* note 118.

121. Stella et al., *supra* note 113, at 2.

impromptu basis during the breastfeeding period” and even thereafter.<sup>122</sup> There is “tension between the needs of the baby and the prison’s institutional regulations.”<sup>123</sup> Brazilian Law requiring adequate prison nursery facilities looks promising on its face; however, it becomes meaningless when it is not enforced.<sup>124</sup>

From 2000 to 2014, the female prison population in Brazil jumped 567.4%.<sup>125</sup> Due to the drastic increase, a number of scholars have conducted studies on the increase in female prison population and its effect on children.<sup>126</sup> Researchers in a 2016 study systematically observed and interviewed eight Brazilian women inmates in the São Paulo prison nursery system over a six month period.<sup>127</sup> Researchers noted that although this specific prison allowed children to reside in prison with their mothers up to six months after birth, many older children were found living there without official intervention.<sup>128</sup> Again, this shows failure to enforce prison nursery rules enacted by Brazil renders them virtually meaningless.<sup>129</sup>

After observing the São Paulo prison nursery system in 2016, researchers found that the prison environment did not provide infants with adequate stimulation for development due to the strict institutional guidelines.<sup>130</sup> Mothers became solely responsible for their child’s stimulation in a place of limited freedom because the institution “did not

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122. *Id.* at 2.

123. *Id.*

124. GLOB. LEGAL RESEARCH CTR., *supra* note 4, at 15; *see also* HUMAN RIGHTS WATCH, *supra* note 118 (noting that some, but not all Brazilian prisons abide by the prison nursery requirement).

125. Ana Gabriela Mendes Braga & Bruce Angotti, *From Hyper-Maternity to Hypo-Maternity in Women’s Prisons in Brazil*, 12 INT’L J. HUM. RTS. 221, 223 (2015), <http://sur.conectas.org/en/hyper-maternity-hypo-maternity-womens-prisons-brazil/>.

126. *Id.*

127. *See generally* Stella et al., *supra* note 113.

128. *Id.* at 4. A similar situation was noted at the Women’s Penitentiary in Proto Alegre; researchers saw children ranging from babies to five years old. HUMAN RIGHTS WATCH, *supra* note 118.

129. *See* Stella et al., *supra* note 113, at 4 (noting that older children were living in prison without intervention); *see also* HUMAN RIGHTS WATCH, *supra* note 118 (noting that some, but not all Brazilian prisons abide by the prison nursery requirement).

130. *See* Stella et al., *supra* note 113, at 5.

provide a proper place for any type of play area and/or pedagogic activity for babies; nor did the prison have experts in child development on staff.<sup>131</sup> Nevertheless, the study found that the inmate mothers became creative in facilitating stimulation.<sup>132</sup> Some mothers created games with cups to facilitate crawling, for example, and others sang in an attempt to teach their child language skills.<sup>133</sup> Overall, researchers found that mothers were able to take care of their child's basic needs, but the addition of colored walls, drawings, objects, and incorporating nurseries and schools could further childhood development.<sup>134</sup> Again, this demonstrates the "tension between the needs of the baby and the prison's institutional regulations."<sup>135</sup>

Researchers in the 2016 study also noted that one of the biggest complaints they received from mother inmates was concern about nourishment.<sup>136</sup> Mothers stated that there was often not enough industrialized formula milk and other food was not ripe enough for the children to eat.<sup>137</sup> Staff in the prison responded to these complaints by saying that mothers were there to breastfeed their children and if they were not doing so, they should be in the regular part of the prison without their children.<sup>138</sup> Researchers found that the staff only saw breastfeeding as a medical requirement and not as a socio-emotional moment that facilitates the important mother-child relationship.<sup>139</sup> This was attributed to lack of training.<sup>140</sup> Accordingly, researchers suggested hiring staff with expertise in child development, nursing, and care of mothers and babies.<sup>141</sup> This expertise "could bring important and quality

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131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 2; *see also* Gowland, *supra* note 100, at 4 (noting how prison regulations can impair motherhood).

136. *See* Stella et al., *supra* note 113, at 5.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 7.

141. *Id.* Hiring expert staff could help address the problem; however, that places a significant financial burden on Brazil when it is already putting money into the

interventions in mother-baby relationships, as well as education and orientation for babies' stimulation."<sup>142</sup> Bringing in qualified staff who understand the purpose of the Brazil prison nursery system and who are willing to enforce the rules could greatly improve the system.<sup>143</sup>

Although the São Paulo prison struggles with enforcing government-imposed rules in prison nurseries, the prison importantly recognizes the need for a transitional period when a child leaves the prison.<sup>144</sup> Unfortunately, São Paulo only provides its effective transitional program for those children who will be placed with relatives after their period in prison.<sup>145</sup> The program specifies that a few months prior to separation, children start to spend weekends with the relatives they will soon be living with to facilitate an easier transition.<sup>146</sup> On the other hand, children who will not be living with relatives will be institutionalized after their period in prison.<sup>147</sup> These children do not receive a transitional period and go through the separation process without any preparation.<sup>148</sup> Research shows that even a child "faced with traumatic mother-child separation following the first half-year of life . . . can overcome and adapt to their situation better and faster if they have the chance to develop and experience a meaningful emotional bond with the mother or other caretaker before separation."<sup>149</sup> Further, research shows that "environmental adjustment is necessary for this bond to be established."<sup>150</sup> Therefore, it is essential for a child who has been with his mother for several months to have a transitional period to adapt to his

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overcrowding problem. See Lise Alves, *Brazil's Government to Invest R\$1.2 Billion in Prison System*, RIO TIMES (Dec. 29, 2016), <https://riotimesonline.com/brazil-news/rio-politics/brazils-government-to-invest-r1-2-billion-in-prison-system/>.

142. See Stella et al., *supra* note 113, at 7.

143. *Id.*

144. *Id.* at 6.

145. *Id.*

146. *Id.* This is important because one of the two major determinants of child adjustment are "the nature and quality of the alternative caregiving arrangements." See Cyphert, *supra* note 15, at 395.

147. Stella et al., *supra* note 113, at 6.

148. *Id.*

149. *Id.* at 7.

150. *Id.*

new environment.<sup>151</sup> São Paulo has implemented an effective transitional program, but must expand the program to include to all children leaving the prison, not just those who will be placed with relatives.<sup>152</sup>

A unique 2015 study conducted by Ana Gabriela Mendes Braga and Bruna Angotti in six Brazilian states focused on “the uninterrupted coexistence of mothers with their babies while they are still in prison[,] and the sudden separation from them when the official period for the children’s stay comes to an end.”<sup>153</sup> Mendes Braga and Angotti found that incarcerated mothers “praised the material support and the possibility of remaining with their children for up to one year, but they criticised [sic] the idleness and isolation during their stay in the unit, where they are subjected to strict control by staff and management.”<sup>154</sup> The incarcerated mothers were confined to the mother-child area and were not permitted to leave their children to attend religious activities or courses in the main parts of the prison.<sup>155</sup> The researchers found that this complaint was unanimous throughout all prisons in Brazil; the women felt like they had to choose between caring for their child and participating in activities in the main prison unit.<sup>156</sup> Although the mother-child areas look less like a prison, they are monitored very strictly and are “disciplined by a series of regulations that, if not followed, can lead to a notice being issued, which is followed by a judgment from the establishment’s disciplinary committee.”<sup>157</sup> One mother stated, “any little thing that happens, they say that you’re going to

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151. *See id.* It is also important for the child to maintain contact with his or her incarcerated parent. *See* Cyphert, *supra* note 15, at 395. It has been established that “maintaining contact with one’s incarcerated parent appears to be one of the most effective ways to improve a child’s emotional response to the incarceration and reduce the incidence of problematic behavior.” *Id.*

152. *See* Stella et al., *supra* note 113, at 7.

153. Mendes Braga & Angotti, *supra* note 125, at 222.

154. *Id.* at 225. Mothers have “expressed strain related to parenting in a demanding environment in which they felt basic care giving, like feeding their infant, was tightly controlled.” LORIE SMITH GOSHIN & MARY WOODS BYRNE, *CONVERGING STREAMS OF OPPORTUNITY FOR PRISON NURSERY PROGRAMS IN THE UNITED STATES 5–6* (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2768406/pdf/nihms117268.pdf>.

155. Mendes Braga & Angotti, *supra* note 125, at 227–28.

156. *Id.* at 225.

157. *Id.* at 226.

have to give up your child. We live under constant pressure.”<sup>158</sup> One researcher called this phenomenon “guard-controlled maternity.”<sup>159</sup> Although highly monitored, inmate mothers spend twenty-four hours with their child, making the inevitable separation that much more difficult for mothers.<sup>160</sup>

The researchers classified the period during which mothers live uninterrupted with the infant in prison without engaging in other activities as “hyper-maternity.”<sup>161</sup> The mother’s “removal from daily prison life generates not only isolation and feelings of solitude, but also the end of work activities, of the possibility of a remission of their sentence and of continuing with schooling.”<sup>162</sup> Researchers stated that the “repeated accounts of isolation, discipline and severance [lead them] to the conclusion that motherhood is an additional punishment for women in prison.”<sup>163</sup> Then when the period of living together ends and the child is removed, the transition from hyper to hypo maternity occurs.<sup>164</sup> This is an “immediate severance of the link, without any transition and/or adaptation period.”<sup>165</sup> The study conducted by Mendes Braga and Angotti revealed that women in Brazil prisons face an unusual paradox: namely, an “excess of maternity” in the months the child is with them in prison and then the abrupt separation and end to this strong relationship after the prescribed period.<sup>166</sup>

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158. *Id.*

159. *Id.* This again shows the lack of autonomy provided to mothers. *See generally* Gowland, *supra* note 100, at 9 (discussing how the prison environment makes difficult the ability of mothers to possess positive traits associated with motherhood).

160. *See* Mendes Braga & Angotti, *supra* note 125, at 225, 227.

161. *Id.* at 227.

162. *Id.*

163. *Id.*

164. *Id.* at 228. Since most mothers plan to resume care for their children upon release from prison, it is important to mitigate the quick switch from hyper to hypo maternity through visitation. *See generally* Goshin et al., *supra* note 76 (emphasizing that most women will resume care for their children upon release and discussing visitation).

165. Mendes Braga & Angotti, *supra* note 125, at 228. Regular visitation has been proven to help the child adapt; however, visitation could also help mitigate the mother’s feeling of loss after the abrupt separation. *See* Cyphert, *supra* note 15, at 395.

166. *See* Mendes Braga & Angotti, *supra* note 125, at 226.

Overall, the two major studies of prison nursery systems in Brazil demonstrate the tension that arises when there is lack of enforcement in the system itself, but too much intervention in motherhood.<sup>167</sup> More specifically, the São Paulo study demonstrated how Article 83(§2) of Brazil Law No. 7, 210 was not adequately enforced because children older than six months were still residing in prison with their mothers, and there were not adequate facilities to stimulate development and growth.<sup>168</sup> The São Paulo study also highlighted the importance of a transitional period, but prisons only selectively enforced the provision.<sup>169</sup> The study conducted by Mendes Braga and Angotti showed how strictly mothers were monitored in prison and how the transition from hyper to hypo maternity had negative effects on the mother's identity in prison.<sup>170</sup> The Brazil system will help guide the potential United States federal policy by fixing the system's downfalls. Namely, the United States must adequately enforce the law it implements, the United States must implement a transitional period that helps both children and mothers adapt, and the United States must implement more freedom for mothers to parent.<sup>171</sup>

## 2. Example: Prison Nurseries in the United States

Prison nurseries are not a new phenomenon in the United States; the first prison nursery was established in New York in 1902.<sup>172</sup> Nevertheless, the United States has not adopted a federal policy regarding prison nurseries.<sup>173</sup> Despite the lack of federal policy, ten states currently have active prison nurseries: New York, Nebraska, South

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167. See *supra* pp. 17–21.

168. *Id.* This law requires nurseries equipped with qualified personnel in accordance with the guidelines adopted by educational legislation until the child reaches at least six months. GLOB. LEGAL RESEARCH CTR., *supra* note 4, at 15.

169. Stella et al., *supra* note 113, at 1–2.

170. Mendes Braga & Angotti, *supra* note 125.

171. See generally Stella et al., *supra* note 113, at 1–2; Mendes Braga & Angotti, *supra* note 125.

172. See Campbell & Carlson, *supra* note 60, at 1064; see also Luther & Gregson, *supra* note 95, at 86.

173. See Gilad & Gat, *supra* note 22, at 398; see also Warner, *supra* note 18, at 67.

Dakota, Ohio, Washington, Illinois, Indiana, California, Wyoming, and West Virginia.<sup>174</sup> The length of the programs differ and usually range from thirty days to thirty months.<sup>175</sup>

The ten prison nursery programs have similar eligibility criteria: the inmate must have a tentative release date of no more than eighteen to twenty-four months after the birth of the child, the inmate cannot have a history of violence, the inmate cannot have prior convictions involving child abuse, the inmate must sign an agreement stating she will be the primary caregiver of the child upon release, and the inmate must sign a waiver releasing the facility of any liability in the event of injury.<sup>176</sup> Additionally, “the inmate must follow the institution’s rules, avoid misconduct reports, and complete specified infant care and development classes if she wishes to remain in the program.”<sup>177</sup> “A woman is . . . considered a successful participant or graduate of the program if she is able to remain in the program and leave the institution with her baby.”<sup>178</sup>

The typical United States prison nursery looks like a “dorm[] with a twin bed and crib.”<sup>179</sup> The room has a small window for guards to monitor the mother and child; however, there is also a sense of privacy that the other inmates do not receive.<sup>180</sup> Many of the rooms also have a kitchen where the mother can prepare food for her child, which facilitates autonomy for the mother.<sup>181</sup> The ten states that have implemented prison nurseries have set an example for the rest of the United States because they resolved many of the problems exemplified in the Brazilian

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174. Jessica Pishko, *The Rise of Prison Nurseries*, PAC. STANDARD (Feb. 18, 2015), <https://psmag.com/news/the-rise-of-prison-nurseries-even-a-prison-cannot-ignore-biology>.

175. *Babies Behind Bars: Nurseries for Incarcerated Mothers and Their Children*, CWLA (July 2010), <https://www.cwla.org/babies-behind-bars/> [hereinafter *Nurseries for Incarcerated Mothers and Their Children*].

176. Campbell & Carlson, *supra* note 60, at 1064.

177. *Id.*

178. *Id.*

179. Lieberman & Burt, *supra* note 3.

180. *Id.*

181. *Id.*

system.<sup>182</sup> More specifically, most states enforce their policy through eligibility criteria<sup>183</sup> while giving mothers autonomy in parenting.<sup>184</sup>

Nevertheless, the current programs in the United States still have room for improvement.<sup>185</sup> For example, in New York, “[m]any women don’t know that this resource even exists, or are discouraged from applying by prison officials”<sup>186</sup> This has resulted in a low participation rate.<sup>187</sup> In 2017, 83 pregnant women were incarcerated in New York; however, only 47 mothers were admitted to the program.<sup>188</sup> By expanding the prison nursery systems currently in place through promotion and additional funds, the United States can adopt a successful federal policy.

### C. Children in Prison with Parent for Duration of Parent’s Sentence

The third approach, where a child remains in prison with his or her mother for the duration of her sentence, can be seen in poor and underdeveloped countries, like Afghanistan.<sup>189</sup> Unfortunately, children in these poor countries have already been exposed to “community and family violence, a society traumatized by war, social chaos, and continued insecurity,” so “[h]aving to spend years in prison is just one more insult to their already battered psyches.”<sup>190</sup> Essentially the only

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182. See Pishko, *supra* note 174; see also *Nurseries for Incarcerated Mothers and Their Children*, *supra* note 175. See *contra* Mendes Braga & Angotti, *supra* note 125; Stella et al., *supra* note 113.

183. Lieberman & Burt, *supra* note 3.

184. Campbell & Carlson, *supra* note 60, at 1064.

185. See generally Law, *supra* note 76.

186. *Id.*

187. *Id.*

188. *Id.* Although only half the total number of New York’s incarcerated moms-to-be were accepted to the nursery program in 2017, it is unclear how many women actually applied and how many were actually rejected. *Id.* The low participation rate could simply be due to lack of awareness. *Id.*

189. See generally ESTHER HYNEMAN, CHILDREN OF AFGHANISTAN: THE PATH TO PEACE 98 (JENNIFER HEATH & ASHRAF ZAHEDI EDS., 2014).

190. *Id.* at 97. Since Afghanistan is so dangerous, mothers elect to bring their children to prison because it is essentially a safer environment. *Id.* at 99.

benefit of this approach is that the mother and child maintain an uninterrupted relationship; however, it is fostered in a less than ideal environment.<sup>191</sup> Although all children pay for the crimes of their incarcerated parents, “children of incarcerated mothers in Afghanistan, recently named the most dangerous country in the world for women by gender experts, may be among the most vulnerable of them all.”<sup>192</sup>

### 1. Example: Afghanistan

In Afghanistan, “there are hundreds of imprisoned Afghan children whose only crime is having a convicted mother.”<sup>193</sup> “The country’s approximately 30 women’s prisons have several hundred children living with their incarcerated mother[.]”<sup>194</sup> An incarcerated mother is permitted to keep her child in prison with her until the child turns eighteen.<sup>195</sup> Since Afghanistan is so unsettled, mothers “protect their children by keeping them in prison.”<sup>196</sup> As an alternative, a child with an imprisoned mother can be put in an orphanage, but the mother must agree to let the child be taken.<sup>197</sup> Even if the mother consents, the child can only be placed in the orphanage if the child is under five years old and the orphanage has an opening.<sup>198</sup> Given the fact that Afghanistan only has four orphanages that accept children older than 5, which are already filled to capacity, many mothers have no other option, but to bring their children with them to prison.<sup>199</sup> When asked to comment on Afghanistan

191. *See id.* at 97 (describing conditions in Afghanistan prisons as “inhuman”).

192. *Id.* at 98.

193. Rod Nordland, *11-Year-Old Has Spent her Life in Jail, a Serial Killer as a Cellmate*, N.Y. TIMES, Dec. 3, 2017, <https://www.nytimes.com/2017/12/03/world/asia/afghanistan-children-prison.html>. [hereinafter *Serial Killer as Cellmate*].

194. *Id.*

195. *Id.*

196. HYNEMAN, *supra* note 189, at 99.

197. *Serial Killer as Cellmate*, *supra* note 193.

198. Rod Nordland, *For More Than 300 Afghan Children, Many Older Than 5, Home Is Mother’s Cellblock*, N.Y. TIMES, Dec. 23, 2017, <https://www.nytimes.com/2017/12/23/world/asia/afghanistan-children-prison.html>. [hereinafter *For More Than 300 Afghan Children*].

199. *Id.*

policy, the Child Act project manager in the Ministry of Justice, Wahidullah Jahadi, stated that the imprisonment of children in Afghanistan is unavoidable.<sup>200</sup> More specifically, “[a] prison is not a place to keep kids, but sometimes we don’t have other options.”<sup>201</sup> Further worsening the problem is the stigma inevitably attached to children of incarcerated parents in Afghanistan.<sup>202</sup> Children of Afghan prisoners are often considered “embarrassments to their families” because they are “juvenile embodiments of the mother’s crime . . . even if the mother is innocent or has been sentenced to prison for a non-crime like running away from abuse.”<sup>203</sup>

Two recent New York Times articles have highlighted the practical implications of Afghanistan prison policy by focusing on the story of individual children in prison.<sup>204</sup> The first article focuses on the story of Meena, the eleven-year-old daughter of a serial killer, who has never seen life outside of a prison.<sup>205</sup> Meena is one of thirty-six other children jailed with their mothers at Nangarhar’s women’s facility.<sup>206</sup> Meena attends school in prison and has an opportunity to interact with other children.<sup>207</sup> The cells in Nangarhar’s women’s wing are arranged around a courtyard where Meena and the other children can run and play on sets of homemade swings, monkey bars, and slides.<sup>208</sup> The freedom to roam around creates the illusion that the children are living a normal and free life; however, Meena and the other children are not free because they cannot leave the facility.<sup>209</sup> Steel gates outside of the facility and coils of barbed wire that surround the enclosed walls are constant reminders of the restricted freedom.<sup>210</sup>

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200. *Id.*

201. *Id.*

202. HYNEMAN, *supra* note 189, at 99.

203. *Id.*

204. *See generally Serial Killer as Cellmate, supra* note 193; *see generally For More Than 300 Afghan Children, supra* note 198.

205. *Serial Killer as Cellmate, supra* note 193.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

Since Meena's mother is serving a life sentence and will not consent to Meena leaving, Meena will not be able to leave the prison until she turns eighteen.<sup>211</sup> When asked about her life in prison, Meena stated "[m]y whole life has passed in this prison."<sup>212</sup> "Yes, I wish I could go out. I want to leave here and live outside with my mother, but I won't leave here without her."<sup>213</sup> Amid living in the same cell as a convicted serial killer and other convicted women, Meena is described as "soft-spoken, composed, and well mannered."<sup>214</sup>

Similarly, nine-year-old Zakirullah is also living in Nangarhar Provincial prison with his incarcerated mother.<sup>215</sup> Like Meena, Zakirullah will likely spend most of his childhood in prison as a "victim of a system that allows convicts to decide the fates of their young children, who often have nowhere else to go."<sup>216</sup> What is noteworthy about Zakirullah's situation is that his mother is serving a prison sentence for "murdering Zakirullah's half-sister in their family home."<sup>217</sup> It is rather alarming that Zakirullah's mother, the person who murdered Zakirullah's half-sibling, has the authority to decide whether Zakirullah will reside in prison with her for his entire childhood.<sup>218</sup> Zakirullah's story highlights some of the negative aspects of life in prison for a child.<sup>219</sup> First, older children in Nangarhar prison suffer the most.<sup>220</sup> The prison has a one room school for the children that only offers an hour of instruction a day and only through the third grade.<sup>221</sup> This means that when Zakirullah is able to leave his mother in prison at the age of eighteen, he will only have a third grade education.<sup>222</sup> Although there are practical benefits of having a child remain with his mother, is it really worth educational suffering?

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211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *For More Than 300 Afghan Children*, *supra* note 198.

216. *Id.*

217. *Id.*

218. *Id.*

219. *See generally id.*

220. *See id.*

221. *Id.*

222. *Id.*

Further complicating Zakirullah's situation is the fact that he alternates weeks outside prison in his father's custody and inside prison with his mother.<sup>223</sup> It is worth questioning why Zakirullah cannot live with his father outside of the prison full time.<sup>224</sup> Zakirullah's education would be furthered if he lived with his father because he could attend a traditional school and not receive a limited prison education.<sup>225</sup> Additionally, Zakirullah would be free from both the physical and emotional restraint of a prison environment.<sup>226</sup> It is clear that the prison environment has already had a substantial effect on Zakirullah because "[e]ven his dreams seem bound to the cellblock."<sup>227</sup> Zakirullah recently "tugg[ed] on [a guard's] belt to get him to pay attention" and said, "I dreamed last night that someone kidnapped me, and you came and rescued me, and you fought with them and defeated them."<sup>228</sup>

A local Afghanistan psychologist described the emotional problems children like Zikullan and Meena face.<sup>229</sup> "He [explained] how vulnerable children will struggle to understand their predicament."<sup>230</sup> More specifically, "if their mothers insist that they are innocent and yet they are living in jail, this will give them a skewed understanding of morality and justice, and a lack of motivation therefore to be good citizens."<sup>231</sup> The psychologist stated that "a person in this 21<sup>st</sup> century needs to learn, experience and feel a lot of things in their first years of life so they are equipped to make the right choices and have a positive impact on society."<sup>232</sup>

Although the United States is not a poor, developing country facing systemic racism and fear, it is important to keep Afghanistan in mind

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223. *Id.*

224. *Id.*

225. *See id.*

226. *See id.*

227. *Id.*

228. *Id.*

229. Mike Healy, *Growing up Behind Bars*, AL JAZEERA (July 31, 2014, 12:46 PM), <http://www.aljazeera.com/programmes/peopleandpower/2014/07/growing-up-behind-bars-.520147301372184692.html>.

230. *Id.*

231. *Id.*

232. *Id.*

when implementing a federal policy because it highlights where the system can be abused and the potential stigma placed on children.<sup>233</sup> It is essential for the United States to set an age limit for children in prison because otherwise the negatives will outweigh all positives.<sup>234</sup>

#### D. Example: The Denmark System

Denmark's variation of a prison nursery system, which attempts to keep the full family unit together, does not fall explicitly into one of the three main categories; however, it highlights important philosophy the United States should consider in implementing its prison system.<sup>235</sup> This variation in approach can be attributed to the principle of normality uniquely embedded in Danish law.<sup>236</sup> Section four of the Danish Corrections Act provides that "the conditions of living in prison should approximate, as far as possible, those of living in freedom."<sup>237</sup> Consequently, Denmark allows couples to stay in prison units together and permits their children to reside with them until the age of three.<sup>238</sup> Although that ideology may seem unusual, Denmark has one of the lowest rates of incarceration in Europe and has "remained relatively stable for about 20 years at a time when the prison population in other countries has increased substantially."<sup>239</sup>

To make the conditions of incarceration as close to normal life as possible, Denmark often employs alternatives to high security prisons.<sup>240</sup> Alternatives are favored because the legislative purpose of prison sentences is not only to punish, but to "help the individual transition into crime-free life."<sup>241</sup> Accordingly, many Denmark inmates serve their

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233. HYNEMAN, *supra* note 189, at 98–99.

234. *Id.* at 98.

235. *See generally International Profile of Women's Prisons*, *supra* note 21.

236. *Id.* at 33.

237. *Id.*

238. *Id.* at 34.

239. *Id.* at 33.

240. *See* GLOB. LEGAL RESEARCH CTR., *supra* note 4, at 20.

241. *Id.* at 21.

sentences in “open prisons” where there is more freedom,<sup>242</sup> more contact with family members, and shorter sentences.<sup>243</sup> In open prisons, inmates have private visits once a week<sup>244</sup> and receive regular leave from prison every third weekend if their sentence is five months or more.<sup>245</sup> Maintaining parent-child contact in the child’s home or in open prisons creates a safer environment to facilitate relationships.<sup>246</sup>

Selected prisoners are also able to participate in Denmark’s Pension Engelsborg Halfway House.<sup>247</sup> This alternative is employed as a reintegration tool that allows “prisoners to reside with their entire immediate family” in an apartment type complex.<sup>248</sup> Full-time caregivers can be sentenced to serve their prison time at Engelsborg Halfway House.<sup>249</sup> The Halfway House is arguably the most suitable for children because it allows the inmate’s children, regardless of their age, to experience uninterrupted normal family life.<sup>250</sup>

242. Keramet Reiter, Lori Sexton & Jennifer Sumner, *Denmark Doesn’t Treat its Prisoners Like Prisoners-and it’s Good for Everyone*, WASHINGTON POST, Feb. 2, 2016, [https://www.washingtonpost.com/posteverything/wp/2016/02/02/denmark-doesnt-treat-its-prisoners-like-prisoners-and-its-good-for-everyone/?utm\\_term=.1eaaf596bba](https://www.washingtonpost.com/posteverything/wp/2016/02/02/denmark-doesnt-treat-its-prisoners-like-prisoners-and-its-good-for-everyone/?utm_term=.1eaaf596bba). Open prisons do not have secured parameters and inmates enjoy various benefits like wearing their own clothes and cooking their own meals. *Id.*

243. Galen Foote, *The Danish Prison System*, BERKLEY CTR. FOR RELIGION, PEACE & WORLD AFFAIRS (Nov. 30, 2012), <https://berkeleycenter.georgetown.edu/posts/the-danish-prison-system>.

244. Reiter, Sexton & Sumner, *supra* note 242. “Of the 60,000 prisoner leaves granted each year in Denmark, only 3 percent either violate the terms of their leave or fail to return to prison.” *Id.*

245. *International Profile of Women’s Prisons*, *supra* note 21, at 36. To put visitation opportunity in perspective, the average sentence imposed is six months. Foote, *supra* note 243.

246. *See* Reiter, Sexton & Sumner, *supra* note 242. Open prisons do not have barbed wire fences or secured perimeters, making the prison more child-friendly. *Id.* Further, there were only eight deaths in Danish prisons in 2013 compared to the 4,446 deaths in United States prisons that same year. *Id.*

247. Melanie Paurus, *International Report on the Conditions of Children of Incarcerated Parents: A Survey of Prison Nurseries* 38 (last visited Oct. 15, 2018), <http://cicmn.org/wp-content/uploads/2017/03/Melanie-Report-Edited.pdf>.

248. *Id.*

249. *Id.*

250. *See id.*

Even when high-security prisons are necessary, the principle of normality is still present, and children are still factored into the sentencing scheme.<sup>251</sup> Denmark enacted legislation that provides: “an inmate [regardless of gender] has the right to have [his or her] child under the age of one accompany [him or her] to prison, provided that he or she is capable of looking after that child.”<sup>252</sup> The interesting part about the law is that it allows incarcerated parents to “cohabit with a fellow incarcerated inmate if the couple had a relationship before being sentenced, and with non-sentenced spouses at the more relaxed family houses of open prisons or halfway houses.”<sup>253</sup> “If one half of [the] couple is placed in a low security prison, he or she can choose to serve his or her time in high security prison to be with his or her partner.”<sup>254</sup> If the cohabitating couple has a child, he or she can live with them until the child is three years old.<sup>255</sup> Children benefit greatly from the cohabitation provision drawn from the principle of normality because it maintains the family unit and fosters a familial environment.<sup>256</sup> Further, since sentences in Denmark are so short, the child will likely never have to be separated from his or her parents.<sup>257</sup> Given the short prison sentences and the numerous alternatives to high-security prisons, children are rarely separated from their incarcerated parent.<sup>258</sup>

The rehabilitative philosophy at the core of Danish prisons is essential for maintaining familial relationships and reintegrating criminals into

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251. *International Profile of Women's Prisons*, *supra* note 21, at 33–34. If the local authorities say an inmate is fit to look after his or her child, then it is up to the parent to decide whether to have the child in prison or not. *Id.* at 34; *see also* GLOB. RESEARCH CTR., *supra* note 4, at 20 (showing that both men and women have the right to have his or her child in prison).

252. GLOB. RESEARCH CTR., *supra* note 4, at 20.

253. *Id.*

254. *International Profile of Women's Prisons*, *supra* note 21, at 35.

255. *Id.* at 34.

256. *See id.*

257. *See* Foote, *supra* note 243. The average sentence imposed is six months and only two percent of sentences exceed two years. *Id.*

258. *See id.* In contrast, more than one third of children in the United States will reach the age of eighteen before their parent is released from prison due to the imposition of long prison sentences. Boudin, *supra* note 1, at 81.

society; however, there is also criticism that the system is “too soft” on crime.<sup>259</sup> More specifically, there is concern about the cohabitation provision because it minimizes punishment and essentially rewards criminals who have children or who are in a relationship.<sup>260</sup> Some of these concerns can be illustrated through the case of a Danish couple.<sup>261</sup> The couple committed a murder together and are serving their long sentences at the same maximum prison facility.<sup>262</sup> The couple is allowed to reside together in a prison cell with their two children.<sup>263</sup> One of the children was born prior to the couple’s crime, but their youngest child was conceived in prison.<sup>264</sup> This highlights a problem that cohabitation will likely create—namely, the conception of additional children—which places a high financial burden on the state.<sup>265</sup>

Unlike the United States, Denmark is a country with low-income disparity, low poverty, and short prison sentences.<sup>266</sup> It is unclear whether the Danish model is only workable in a country such as Denmark or if the United States could see equal success.<sup>267</sup> Nevertheless, the United States could implement aspects of the Danish system in its federal policy without issue.<sup>268</sup> For example, the United States could implement the principle of normality into its prison nursery system as well as into the transitional periods from prison nursery to society.<sup>269</sup> By creating a prison nursery system that mirrors real life, the focus shifts from punishment to rehabilitation, thereby making the transition back into regular life easier for both the mother and child.<sup>270</sup>

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259. Foote, *supra* note 243.

260. *See id.*

261. *See generally* Sarah Paddick, *Women and Children in Prisons: Accommodation Study* (Aug. 2011), <http://www.totalspacedesign.com.au/upload/Mothers-and-Babies-in-Prisons-Accommodation-Study-2010-2011.pdf>.

262. *Id.* at 114.

263. *Id.*

264. *Id.*

265. *See id.*

266. Foote, *supra* note 243.

267. *Id.*

268. *See id.*

269. *See id.*

270. *See id.*

## IV. CONCLUSION

After reviewing case studies in the United States, Brazil, Afghanistan, and Denmark, it is apparent that no country has a perfect and universal solution for children and their incarcerated parents.<sup>271</sup> Although the Danish system has seen the most success, there is question about whether the United States could feasibly implement such programs without converting its prison system from retributive to completely rehabilitative.<sup>272</sup> Realistically, the United States must first join the UNCRC or at least recognize the rights and best interests of children in the context of incarceration.<sup>273</sup> The United States should then expand the ten prison nurseries currently in place by federally standardizing the system.<sup>274</sup> To do so, the United States ought to adopt a hybrid approach employing the positive aspects of the countries examined in this note and carefully eliminating the negative aspects of the same.<sup>275</sup>

The United States should implement the principle of normality as introduced by Denmark to shift the focus of incarceration from punishment to rehabilitation for non-violent mother offenders.<sup>276</sup> As a result, the transition back into regular life would be easier for both inmate mothers and their children, thereby reducing the risk of recidivism.<sup>277</sup> Pursuant to the lessons learned from Brazil, the United States must adequately enforce the law it implements, it must implement a transitional period that helps both children and mothers adapt, and it must implement more freedom for mothers to parent.<sup>278</sup> As exemplified by the Afghanistan system, the United States must also be conscious of the potential stigma associated with prison nurseries and must set an age

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271. *See supra* Section III.

272. Foote, *supra* note 243.

273. *See generally* GLOB. RESEARCH CTR., *supra* note 4.

274. *See* Pishko, *supra* note 174.

275. *See supra* Section III.

276. Foote, *supra* note 243.

277. *See id.*

278. *See generally* Mendes Braga & Angotti, *supra* note 125.

limit for children in prison, otherwise the negatives will outweigh all positives.<sup>279</sup>

In practice, the policy would likely allow children up to eighteen months to reside with their parent in prison if there is no relative to care for the child outside of prison.<sup>280</sup> The system would require each prison to have a nursery, educational parenting classes, and the opportunity to have autonomy in parenting decisions.<sup>281</sup> The policy should be as close to real life as possible so there can be a smooth transitional period for the mother and child.<sup>282</sup> Finally, if the mother is still serving her sentence after the child exceeds eighteen months old, the United States should facilitate ongoing visitation to maintain the strong mother-child relationship established through the prison nursery program.<sup>283</sup> By implementing these rules, the United States will achieve the benefits of prison nursery systems without the harm that children have faced in other countries.<sup>284</sup>

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279. HYNEMAN, *supra* note 189, at 99.

280. *See* Warner, *supra* note 18, at 66.

281. *See, e.g.*, Lieberman & Burt, *supra* note 3; *see, e.g.*, Stella et al., *supra* note 113, at 5.

282. *See, e.g.*, Foote, *supra* note 243.

283. *See* Stella et al., *supra* note 113.

284. *See supra* Section III.

