

U.S. V. MY MOMMY:  
EVALUATION OF PRISON NURSERIES AS A SOLUTION  
FOR CHILDREN OF INCARCERATED WOMEN

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ABSTRACT

*In the United States alone, more than 250,000 children are separated from their mothers due to incarceration. This number has been steadily growing over the last two decades. Such separation has substantial detrimental effects on the child, the mother, and, inevitably, the general public. Prison Nursery Programs that provide an opportunity for children to accompany their mothers to prison for the duration of her sentence is one possible, albeit controversial, solution for this dire problem. This article provides a comprehensive analysis of the efficacy of Prison Nursery Programs in providing an adequate solution for children of incarcerated mothers. It examines the ability of these programs to advance the rights and interests of the child, the mother, the state, and the general public. The experience of European countries with Prison Nursery Programs is also presented and analyzed to identify how lessons learned from this cumulative experience can help improve practices in the United States.*

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## I.

## INTRODUCTION

To most, a prison environment is perceived as grim, dark, confining, and scary. Not without reason: individuals are sent to prison as a harsh and, arguably, deterring form of punishment.<sup>1</sup> Based on this common and relatively accurate perception, can we argue that the best interest of a child is to be kept in prison? Is it possible that an environment that is detrimental for most human beings can be considered, under some circumstances, an auspicious placement for a tender and vulnerable child?

Since the mid-1980's the population of women in U.S. state and federal prisons has increased by more than 320%.<sup>2</sup> Two-thirds of incarcerated women have minor children,<sup>3</sup> and as many as seventy to ninety percent of incarcerated mothers are the sole caregivers for their children.<sup>4</sup> It was estimated that more than 250,000 minor children across the United States have a mother in jail or prison.<sup>5</sup> Where do all these invisible victims of crime go when deprived of their primary or sole caregiver?

In thirteen U.S. states, Prison Nursery Programs ("PNPs") have been established in correctional facilities, providing an opportunity for children born to incarcerated mothers to remain in prison until a certain age.<sup>6</sup> Participation in PNPs allows children to avoid separation from their mother. We argue that, paradoxically, PNPs can offer a beneficial and constructive solution for children of incarcerated mothers, and prevent further victimization of the child by the mother's criminal behavior. Furthermore, we will demonstrate that not only is the child advantaged by participation in the program, but the mother, the state,

1. A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1 (1999) (explaining the deterrent effect of prisons); J. L. Miller & Andy B. Anderson, *Updating the Deterrence Doctrine*, 77 J. CRIM. L. & CRIMINOLOGY 418 (1986).

2. The Bureau of Justice Statistics reported the population of female state and federal prisoners as 26,610 at the end of 1986; the corresponding report released at the end of 2010 lists the population of female prisoners as 122,822. BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 1986 (1987); BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 2010 (2011).

3. BARBARA BLOOM, BARBARA OWEN & STEPHANIE COVINGTON, NAT'L INST. OF CORR., GENDER RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS 7 (2003).

4. Jordana Hart, *Bill Lets Mothers in Prison Keep Tots; Benefits to Parent and Child Are Cited*, BOSTON GLOBE, June 26, 1997, at B1.

5. BLOOM, OWEN & COVINGTON, *supra* note 3, at 7.

6. United States Correctional facilities with PNPs have varying policies with regard to the age at which children born in prison must leave their mothers, ranging from 30 days at the South Dakota Women's Prison to a maximum of three years at the Washington Correctional Center for Women. CHANDRA KRING VILLANUEVA, WOMEN'S PRISON ASSOCIATION, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 10 (2009).

and society as a whole also gain considerable benefits.

The form, nature, terms, and characteristics of PNPs are described in Section II. Section III elaborates on the common alternatives available to children of incarcerated mothers in the absence of PNPs. Section IV discusses the best interests of the child and the ability of PNPs to meet this overriding standard. Section V outlines the advantages of participation in PNPs to the incarcerated mothers. Section VI explains how PNPs can also further state and public interests. In section VII, the development of PNPs across Europe is discussed and compared to the situation in the United States. Conclusions follow.

## II.

### WHAT ARE PRISON NURSERIES?

Prison nurseries have been defined as programs that “allow a mother to parent her infant for a finite period of time within a special housing unit at the prison.”<sup>7</sup> The stated purpose of PNPs is “to facilitate bonding between mothers and their children.”<sup>8</sup> Historically, prison nurseries were common, and women often cared for their minor children in correctional facilities during the period of their incarceration.<sup>9</sup> However, by the 1970’s, for various reasons,<sup>10</sup> nearly all PNPs had been closed and statutes allowing for child care within prisons were repealed.<sup>11</sup> The only continuously operated PNP is that of Bedford Hills Correctional Facility in the state of New York, which opened in 1901 and still

7. *Id.* at 4. The Women’s Prison Association report notes that individual facilities determine the manner in which mothers and children are housed. *Id.* at 10. See also Deborah Jiang Stein, *Babies Behind Bars: Nurseries for Incarcerated Mothers and Their Children*, CHILDREN’S VOICE, July–Aug. 2010, at 10, 11 (“Prison nursery programs allow a mother to parent her infant for a finite period of time, anywhere from 30 days to 30 months, depending on the facility. . . . Some nurseries are on-site within the prison complex, either as a wing or unit of the prison separated from the general population.”).

8. VILLANUEVA, *supra* note 6, at 9.

9. Mary V. Deck, *Incarcerated Mothers and Their Infants: Separation or Legislation?*, 29 B.C. L. REV. 689, 697 (1988); Lucia Zedner, *Wayward Sisters: The Prison for Women*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 329, 343 (Norval Morris & David J. Rothman eds., 1995).

10. Lawmakers and correctional facility officials provided various rationales for the closure of prison nurseries in the mid-1970s. See Deck, *supra* note 9, at 698 (citing the inadequacy of prison facilities, a preference for “easier” early separation of mothers and babies, and concerns that the presence of infants might be difficult for other inmates who had been separated from their children); Lorie Smith Goshin & Mary Woods Byrne, *Converging Streams of Opportunity for Prison Nursery Programs in the United States*, 48 J. OFFENDER REHAB. 271, 273 (2009) (citing as primary reasons for program closure: “[c]oncerns related to security, nursery program management, liability, the potential adverse effects of the prison on child health and development, and the difficulty of eventual separation of mother and child in women with long sentences”).

11. Deck, *supra* note 9, at 697–99 (describing the narrowing and/or ultimate repeal of prison nursery statutes in Kansas, Virginia, California, and Florida); Goshin & Byrne, *supra* note 10, at 273 (noting that by the mid-1970s, many states had repealed their legislation supportive of prison nurseries).

exists today as the largest PNP in the U.S.<sup>12</sup> During the past decade, however, PNP's have begun to reemerge as a growing trend, linked with the rising population of female prisoners.<sup>13</sup> Still, programs are relatively scarce, and as of October 2010, only thirteen states provide for PNP's of varying capacities.<sup>14</sup>

Modern PNP's vary considerably between states and facilities; nevertheless, many similarities exist. Most often, the nurseries are housed in a distinct wing within the prison facility, where the inmates and their infants reside separately from the general prison population.<sup>15</sup> In many cases, the mothers live in private rooms with cribs for their babies.<sup>16</sup> The maximum allowable duration of a child's stay at a prison ranges from thirty days (South Dakota) to three years (Washington), with an average of twelve to twenty-four months at the majority of facilities.<sup>17</sup>

All currently existing programs accommodate only infants that were born in state custody, while children born outside prison walls prior to the commencement of the mother's incarceration are excluded.<sup>18</sup> Eligibility criteria for the inmate mothers normally require that the crime they were convicted of was non-violent, and that they have no history of child abuse or violence against children of any form. Inmates admitted to the program usually face relatively short sentences, and are due to take the role of the primary caregiver of the child upon release.<sup>19</sup> Some programs require the mothers to sign waivers releasing the

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12. See VILLANUEVA, *supra* note 6, app. I at 28 (stating that the Bedford Hills Correctional Facility's PNP has a capacity of 29 mother-infant pairs); *id.* at 9 (noting that the Bedford Hills PNP, created in 1901, is the exception to the rule that PNP's in the United States were generally developed in the mid-1990s or later). See also REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *MOTHERS BEHIND BARS: A STATE-BY-STATE REPORT CARD AND ANALYSIS OF FEDERAL POLICIES ON CONDITIONS OF CONFINEMENT FOR PREGNANT AND PARENTING WOMEN AND THE EFFECT ON THEIR CHILDREN* 31 (2010) (noting that the Bedford Hills Correctional Facility "includes the longest standing continuous prison nursery in the country[, which] has served as a model for many other prison nursery programs").

13. VILLANUEVA, *supra* note 6, at 9.

14. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 20 (showing that the states reporting availability of prison nursery programs are California, Idaho, Illinois, Indiana, Massachusetts, Nebraska, New York, Ohio, South Dakota, Tennessee, Texas, Washington, and West Virginia).

15. VILLANUEVA, *supra* note 6, at 10.

16. See, e.g., *id.* at 11 (describing housing available to women participating in the Residential Parenting Program at the Washington Correctional Center for Women in Gig Harbor, Washington); Nicole S. Mauskopf, *Reaching Beyond The Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN'S L.J. 101, 109 (1998) (describing housing available to PNP participants at the Nebraska Correctional Center for Women); Debbie Denning, *Moms and Babies—First Anniversary*, ASS'N OF PROGRAMS FOR FEMALE OFFENDERS NEWSLETTER (Jan. 2009), available at [http://www.apfonews.org/page\\_three.htm](http://www.apfonews.org/page_three.htm) (describing housing available to PNP participants at the Decatur Correctional Center in Illinois).

17. VILLANUEVA, *supra* note 6, at 10.

18. *Id.* at 9.

19. *Id.* at 5. For specific terms and conditions of the PNP at the Bedford Hills Correctional Facility in New York, see Mauskopf, *supra* note 16, at 108–09.

prison facility from any responsibility if their children become sick or injured.<sup>20</sup>

For the duration of their stay in the nursery, the new mothers participate in educational, training, and treatment programs, and the care of the children is closely supervised. The inmates are obligated to participate in child development and parental skills classes, to improve their child-rearing skills in anticipation of their eventual release from prison.<sup>21</sup> Some programs require mothers who do not hold a high-school diploma to attend GED courses.<sup>22</sup> In some cases, substance abuse treatment is mandatory for inmates suffering from addictions.<sup>23</sup> Some of the more developed programs, like the Bedford Hills Correctional Facility's nursery, also offer prenatal centers, child advocacy offices, and infant day cares that allow the mothers to attend their prison jobs and classes. The programs enable the new mothers to participate in support groups, receive guidance and information about breastfeeding, and learn about infant growth and development.<sup>24</sup> Other programs provide therapeutic services for the child, such as Early HeadStart, assessment for developmental delays, therapeutic play, and intensive counseling.<sup>25</sup> In some facilities, services are also provided to support the inmate's physical, mental, and emotional needs.<sup>26</sup>

PNPs aim to keep mothers and children together during a crucial period of child development.<sup>27</sup> The programs provide incarcerated mothers an opportunity to give birth, nurse, and experience the beginning of their babies' lives while bonding with their children in ways that are not possible through visitations.<sup>28</sup> The program also prepares inmates for their obligations and responsibilities as mothers upon release. The goal 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>29</sup>

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20. VILLANUEVA, *supra* note 6, at 9.

21. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 30. *See also* VILLANUEVA, *supra* note 6, at 10 ("All of the prison-based programs provide educational programming in child development and parenting skills.").

22. *See* VILLANUEVA, *supra* note 6, at 10 (describing such a policy in place at the Nebraska Correctional Center for Women).

23. *See* Mauskopf, *supra* note 16, at 109 (describing such a policy in place at the Bedford Hills Correctional Facility).

24. VILLANUEVA, *supra* note 6, at 10.

25. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 30 (noting that programs may provide an assessment for developmental delays, therapeutic play, and intensive counseling); VILLANUEVA, *supra* note 6, at 10 (noting that the Washington Correctional Center for Women, which allows children to stay with their mothers for up to 36 months, offers Early HeadStart to all children residing there). *See* REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 20, for a chart evaluating states' provision of therapeutic services.

26. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 31.

27. *Id.* at 13.

28. *Id.* at 30.

29. *Id.*

### III. WHAT ARE THE ALTERNATIVES?

In order to evaluate the strengths and weaknesses of PNPs as a placement option for children of incarcerated mothers, the existing alternatives should be explored. Currently, the United States has no uniform national policy that dictates what happens to the children of women under correctional supervision. PNPs are only one infrequently used option. The overwhelming majority of children born to incarcerated mothers are separated from their mothers immediately after birth and placed with relatives or into foster care.<sup>30</sup> More than half of these mothers will never receive a visit from their children during the period of incarceration.<sup>31</sup>

Although ninety percent of children whose fathers are incarcerated live with their mothers, only twenty-five percent of children of incarcerated mothers are cared for by their fathers.<sup>32</sup> A large percentage of the children of incarcerated mothers are placed with relatives or friends, with grandparents as the most likely caregivers.<sup>33</sup> Around ten percent of these children are placed in foster families, agencies, or group homes after their mother begins her incarceration.<sup>34</sup> Children placed in foster care may face the prospect of having their mother's parental rights terminated. As a result, any contact between these children and their biological mothers could be permanently severed.<sup>35</sup>

There is no published statistical data documenting the number of female inmates who lose their parental rights during their period of incarceration. Yet, it is reported that many incarcerated mothers with children in foster care are unable to meet court-mandated family reunification requirements for contact and visitation with their children, and consequently lose their parental rights.<sup>36</sup> Many courts treat any sentence beyond two years as a determinative predictor for

30. VILLANUEVA, *supra* note 6, at 8.

31. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 13; Tiffany Conway & Rutledge Q. Hutson, *Parental Incarceration: How to Avoid a "Death Sentence" for Families*, 41 CLEARINGHOUSE REV. 212, 215 (2007).

32. BLOOM, OWEN & COVINGTON, *supra* note 3, at 7.

33. *Id.* See also Conway & Hutson, *supra* note 31, at 212 (citing a 2000 Bureau of Justice Statistics study that showed nearly 80% of children with incarcerated mothers live with a grandparent (53%) or another relative (26%)).

34. Conway & Hutson, *supra* note 31, at 212 (citing a 2000 Bureau of Justice Statistics study that showed 10% of children of incarcerated mothers living in foster homes). See also SUSAN SHARP & EMILY PAIN, OKLA. COMM'N OF CHILDREN & YOUTH, *STUDY OF INCARCERATED MOTHERS & THEIR CHILDREN* 8 (2010) (discussing placement of the children of incarcerated women in Oklahoma).

35. Conway & Hutson, *supra* note 31, at 212.

36. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 13. See also Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 348-49 (2005) (discussing courts' application of the Adoption and Safe Families Act and noting that "[r]eunification efforts may not be required if the incarceration creates a situation of abandonment, which ASFA includes as an aggravating circumstance" and that "[c]ourts treat incarceration as a circumstance created by the parents").

termination of parental rights.<sup>37</sup>

This problem is further aggravated by existing federal and state laws related to child welfare matters. In 1997, the Federal Adoption and Safe Families Act (ASFA)<sup>38</sup> was enacted, and was adopted by many state legislatures in one form or another.<sup>39</sup> The defined objective of ASFA is “[t]o promote the adoption of children in foster care.”<sup>40</sup> The well-intentioned Act attempts to assure that children do not linger in the system unnecessarily and that children who are removed from their homes find permanent families as quickly as possible. It does so by promoting enhanced permanency planning.<sup>41</sup> 42 U.S.C. § 675(5)(C)(i) requires that a permanency hearing be held within twelve months of the child’s entry into foster care. In the hearing, a permanency plan is determined and a decision is made as to whether the child should be reunified with her parents or freed for adoption.<sup>42</sup> Even more significantly, excluding enumerated exceptions,<sup>43</sup> 42 U.S.C. § 675(5)(E) mandates that the State shall file a petition to terminate the parental rights of the child’s parents in order to allow her

37. See, e.g., *United States v. Dyce*, 975 F.-Supp. 17, 22 (D.D.C. 1997) (noting that the defendant, a single mother, could lose custody of her children if sentenced to the recommended five years in prison, and deeming the likely outcome—the placement of the defendant’s children in foster care—to constitute “extraordinary family circumstances” warranting a downward departure from sentencing guidelines); *United States v. Arize*, 792 F. Supp. 920, 921 (E.D.N.Y 1992) (noting that the defendant would likely lose custody of her child if she were imprisoned for more than two years); *United States v. Pokuaa*, 782 F. Supp. 747, 748 (E.D.N.Y 1992) (noting that for a defendant without family or community resources, whose infant would therefore be removed to state custody almost immediately after being born, imprisonment for more than a year after giving birth would likely cause her to lose custody of her child).

38. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

39. See UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT ON STATES’ EARLY EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT 2 (1999), available at <http://www.gao.gov/assets/230/228529.pdf> (stating that by July 1999, all states had laws that mirrored the federal legislation or were more stringent than federal law). ASFA applies in situations where children are removed from the care of their parents by child welfare agencies due to abuse, neglect, or lack of proper parental care and control. As discussed in this article, not all children of incarcerated mothers end up in state care. However, state care is often the end result, especially if the mother is the primary caretaker and no relatives are able to provide care for the child without state assistance. Because child welfare involvement is frequent, this article discusses how the situation of incarcerated mothers is impacted by ASFA and how PNPs could play a positive role that is consistent with the objectives of ASFA. To that end, the article will consider whether PNPs could, in fact, result in an avoidance of child welfare involvement by keeping the mother and child together.

40. This objective is set out in the subtitle of the statute. See Adoption and Safe Families Act of 1997.

41. Conway & Hutson, *supra* note 31, at 214 (noting that under ASFA, “[s]tates must develop a permanency plan and conduct a permanency hearing within twelve months of a foster care placement”).

42. Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5)(C)(i).

43. One of the exceptions is kinship placement; i.e., this provision will not significantly affect children who are placed with relatives during the period of the mother’s incarceration. However, even for children whose families can care for them, termination petitions can be filed under different provisions.

placement for adoption if the child has spent fifteen of the most recent twenty-two months in foster care.<sup>44</sup> Thus, these ASFA provisions have significant impact on children who were placed in foster care as a result of the incarceration of their mothers for more than twelve months.

Generally, ASFA requires that states make reasonable efforts to reunite children with their biological parents.<sup>45</sup> However, the statute clarifies “that providing ‘reasonable efforts’ does not mean that families must always be preserved and reunified.”<sup>46</sup> ASFA allows courts to conduct a case-by-case review and determine, when appropriate, that reasonable efforts are not required due to the existence of aggravated circumstances.<sup>47</sup> ASFA offers an inconclusive list of possible aggravated circumstances that can be adopted in legislation and considered by courts.<sup>48</sup> However, states have the discretion to augment the list and introduce additional items.<sup>49</sup> While a finding of aggravated circumstances may justify a waiver of the reasonable efforts requirement, the court has the discretion to still order reasonable efforts to be made despite such a finding.

Despite statements from some courts that incarceration by itself is insufficient to justify terminating parental rights,<sup>50</sup> states have developed different approaches on this issue that indicate otherwise. Some state legislatures have added “incarceration” as an “aggravated circumstance” that relieves the state from its obligation to make reasonable efforts to reunify families under ASFA.<sup>51</sup> Several state courts have demonstrated a willingness to expedite termination proceedings in cases involving an incarcerated parent.<sup>52</sup> Almost half the states have enacted specific “termination of parental rights” provisions designed for cases of incarcerated parents.<sup>53</sup> In several other states, courts are

44. 42 U.S.C. § 675(5)(E).

45. See *id.* §§ 671(a)(15)(B)(i), 675(5). See also Conway & Hutson, *supra* note 31, at 213 (noting that federal law requires that states make “reasonable efforts” to keep children safe without removing them from their home. If doing so is not possible, the state generally must make “reasonable efforts” to reunify the child with the child’s family in a timely manner).

46. Conway & Hutson, *supra* note 31, at 213

47. 42 U.S.C. § 671(a)(15)(A).

48. *Id.* § 671(a)(15)(A)–(D).

49. Conway & Hutson, *supra* note 31, at 213.

50. Phillip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 764 (1992). See, e.g., *In re B.W.*, 498 So. 2d 946 (Fla. Dist. Ct. App 1985); *Murphy v. Vanderver*, 349 N.E.2d 202 (Ind. Ct. App. 1976); *In re Daniel C.*, 480 A.2d 766 (Me. 1984); *In re Staat*, 178 N.W.2d 709 (Minn. 1970); *In re J.D.*, 512 So. 2d 684 (Miss. 1987); *In re Doe*, 657 P.2d 134 (N.M. Ct. App. 1982); *In re Sego*, 513 P.2d 831 (Wash. 1973).

51. ARLENE F. LEE, PHILIP M. GENTY & MIMI LAVER, CHILD WELFARE LEAGUE OF AMERICA, *THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT ON CHILDREN OF INCARCERATED PARENTS* 17–18 (2005), available at [www.fcnetwork.org/Resource%20Center/cop\\_pubimpact.pdf](http://www.fcnetwork.org/Resource%20Center/cop_pubimpact.pdf) (noting that as of 2005, Alaska, Kentucky, North Dakota, and South Dakota have adopted statutes that excuse reasonable reunification efforts if the parent is incarcerated).

52. Genty, *supra* note 50, at 764; Mauskopf, *supra* note 16, at 112–13.

53. As of 1998, there are 25 states with such specialized statutes: Alabama, Arizona, California, Colorado, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana,



instructed to treat incarceration as merely one factor to be considered in termination proceedings.<sup>54</sup> On the opposite side of the spectrum, a few states have concluded that incarceration may be a “compelling reason for determining that filing a petition to terminate parental rights is not in the child’s best interest.”<sup>55</sup>

Community-based programs for mothers convicted of crimes have also been developed in several states. These programs are a non-institutional alternative to incarceration. Instead of being sentenced to serve time in a prison, women who meet certain criteria are sent to a supervised residential facility in the community. In many of these programs, mothers are allowed to keep their children, whether infants or older minors, for the duration of their sentence.<sup>56</sup> Many studies have found these programs to be a more favorable alternative than PNPs.<sup>57</sup> However, since the vast majority of women are incarcerated and serve prison sentences, this article will focus only on a solution for children of incarcerated mothers. Thus, alternative sentencing options are beyond the scope of this article.

Current federal and state child welfare law, which often results in the separation of an incarcerated parent and her child, has significant implications for mothers’ parental rights as well as the future of their children. When a child does not have relatives capable and willing to serve as caregivers for the duration of the mother’s sentence, permanent separation is virtually inevitable.<sup>58</sup> The lack of more desirable options can lead to prolonged stays in the foster care system.<sup>59</sup> This range of undesirable possibilities underscores the importance of offering PNPs as a viable alternative in appropriate cases to prevent separation during the mother’s incarceration, and to provide tools for the mother and child to maintain a familial structure upon release.

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Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Wisconsin, and Wyoming. Furthermore, Illinois, Indiana, Maine, and Tennessee allow parental rights to be terminated when certain crimes have been committed against children. Mauskopf, *supra* note 16, at 112; Carol M. Amadio & Rosemary Mulryan, *Terminating Parental Rights of Incarcerated Parents*, CHI. B. ASS’N REC., Feb. 1992, at 22.

54. Amadio & Mulryan, *supra* note 53, at 22.

55. Conway & Hutson, *supra* note 31, at 214 (noting that Colorado added a provision that the general requirement to file a petition to terminate parental rights after a child has been in foster care for fifteen months does not apply when the parent is incarcerated for a “reasonable period of time,” and that Nebraska and New Mexico prohibit the termination of parental rights solely on the basis of the parent’s incarceration).

56. VILLANUEVA, *supra* note 6, at 12.

57. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN’S LAW CENTER, *supra* note 12, at 30.

58. *United States v. Pokuaa*, 782 F.Supp. 747 (E.D.N.Y. 1992).

59. The average stay in the foster care system for a child with an incarcerated mother is 3.9 years. TIMOTHY ROSS, AJAY KHASHU & MARK WAMSLEY, VERA INSTITUTE OF JUSTICE, *HARD DATA ON HARD TIMES: AN EMPIRICAL ANALYSIS OF MATERNAL INCARCERATION, FOSTER CARE, AND VISITATION 9* (2004), available at <http://www.vera.org/download?file=123/Hard%2Bdata.pdf>.

#### IV. THE BEST INTERESTS OF THE CHILD

The best interest of the child is a fundamental standard in most modern legal systems. It guides courts, legislatures, and decision-makers when making a variety of determinations that affect the life and well-being of children. The special status of children in our society renders their best interests the primary consideration in the evaluation of PNPs. Although insufficient empirical data currently exists regarding the exact impact of PNPs on children, this section will assess some of the positive and negative effects that PNPs have on children of incarcerated mothers. It will also explore whether PNPs serve the best interests of children and the objectives of the ASFA.

All U.S. states and the District of Columbia have statutory provisions requiring the consideration of the best interests of the child when decisions involving the child's custody, placement, or other critical life issues are made.<sup>60</sup> The standard is also commonly used by courts, including the U.S. Supreme Court, when determining guidelines for a child's placement.<sup>61</sup> Although there is not a uniform definition of the term, courts typically focus on the promotion of the child's well-being, ultimate safety, appropriate care, and developmental and psychological needs.<sup>62</sup> Though additional research is needed, existing studies indicate that participation in PNPs has the potential to promote the fundamental elements of the child's best interests.

Children are affected by the incarceration of either parent, but they typically experience greater harm when their mother is imprisoned.<sup>63</sup> The United Nations Committee for the Rights of the Child recognized children of mothers in prison as among the most vulnerable groups.<sup>64</sup> Continuity of the mother-child relationship is essential for a child's normal development during different life stages.<sup>65</sup> Separating the mother and the newborn puts the infant "at risk of being moved frequently among caregivers and of suffering long-term emotional problems as the result of separation."<sup>66</sup> Maternal incarceration leaves the child

60. CHILD WELFARE INFORMATION GATEWAY, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, DETERMINING THE BEST INTERESTS OF THE CHILD: SUMMARY OF STATE LAWS 1 (2010), available at: [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm)

61. *Parham v. J.R.*, 442 U.S. 584 (1979).

62. CHILD WELFARE INFORMATION GATEWAY, *supra* note 60 (providing an outline of the components of the "best interests of the child" definition in different U.S. jurisdictions); Kim H. McGavin, *Child Custody and Visitation in Maryland: In the Best Interests of the Child*, 26 U. BALT. L.F. 3 (1995).

63. Conway & Hutson, *supra* note 31, at 213.

64. CRC, Concluding Observations: Thailand, ¶ 48, U.N. Doc. CRC/C/THA/CO/3-4 (Feb. 17, 2012); CRC, Concluding Observations: Philippines, ¶ 53-54, U.N. Doc. CRC/C/15/Add.259 (Sept. 21, 2005).

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

66. Donna K. Metzler, *Neglected by the System: Children of Incarcerated Mothers*, 82 ILL. B.J. 428, 430 (1994).

behind, without recognition of a child's fundamental need for her mother, and increases the vulnerability and fragility of the child.<sup>67</sup> The extent to which maternal incarceration affects each child varies, but negative effects and trauma are frequently documented.<sup>68</sup>

Researchers, as well as courts, agree that early mother-child bonding during infancy is a critical developmental factor.<sup>69</sup> Deborah Jiang Stein, who spent the first year of her life with her mother in a prison facility before being sent to foster care, testifies that her year in prison as an infant, bonding with her mother, contributed to her current sense of security.<sup>70</sup> Marie-Celeste Condon, a specialist in infant mental health and development at the University of Washington School of Social Work who conducted extensive research at the nursery in the Washington Corrections Center for Women, also supports this notion. She argues that during their early months, babies develop a sense of security and trust in their surroundings, which is enhanced by mother-infant bonding.<sup>71</sup>

Empirical evidence shows that the separation of an infant from her mother during the first year drastically impairs her ability to sympathize or show concern for others.<sup>72</sup> Additional common symptoms of maternal separation are attachment disorders; aggression and anger; developmental and behavioral problems; sleeping, eating, or attention disorders; delays in educational development and achievement; excessive hostile behaviors toward peers; problems with social adaptation; greater likelihood to develop addiction to drugs or alcohol or engage in criminal activity; and manifestation of sexually promiscuous behavior.<sup>73</sup> Courts have also recognized these harms caused by maternal separation due to incarceration, stating that:

Children who have stable, predictable care “can overcome great adversity,” . . . . Conversely, adults who grow up in temporary

67. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 13, 30; Kim, *supra* note 65, at 228.

68. Cynthia Seymour, *Introduction*, in CHILDREN WITH PARENTS IN PRISON: CHILD WELFARE POLICY, PROGRAM, AND PRACTICE ISSUES (Cynthia Seymour and Creasie Finney Hairston eds., 1998) (noting that the extent to which parental incarceration will affect the child is unique to each child, hinging on numerous extraneous variables, including: the age at which the parent-child separation occurs; length of separation; stability of the family; disruptiveness of the incarceration; the child's familiarity with the new caregiver or placement; strength of the child-parent relationship; result and number of previous separation experiences; nature of the parent's crime; length of parent's separation; the availability of community or family support; and degree of stigma associated with incarceration).

69. *Wainwright v. Moore*, 374 So. 2d 586 (Fla. Dist. Ct. App. 1979); Deck, *supra* note 9, at 694; Mauskopf, *supra* note 16, at 111–12; Beth Azar, *The Bond Between Mother and Child*, APA MONITOR, Sept. 1995 (finding that infants who bond securely with their mothers become more self-reliant and have higher self-esteem as toddlers).

70. Stein, *supra* note 7, at 10.

71. *Id.*

72. John J. Sheridan, *Inmates May be Parents, Too*, CORRECTIONS TODAY, Aug. 1996, at 100.

73. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 13; Kim, *supra* note 65, at 228; Leda M. Pojman, *Cuffed Love: Do Prison Babies Ever Smile?*, 10 BUFF. WOMEN'S L. J. 46, 62 (2002).

homes often suffer . . . . The majority hold low-skilled jobs; up to 50% spend some time on public assistance. Drug use is common. Nearly one third of males commit crimes as adults. Among the homeless, as many as 39% spent years in foster care as kids.<sup>74</sup>

The Federal ASFA aims to promote two principal goals: (1) permanency and consistency in care and (2) the well-being and safety of the child.<sup>75</sup> Studies and professional reports point towards the potential of PNPs to further both. PNPs have been reported to facilitate bonding between mother and child, prevent separation, and maintain consistency in care, which can alleviate some of the noted harms. In particular, PNPs can help children fulfill important developmental and emotional milestones.<sup>76</sup> Some empirical studies show that placement in PNPs reduces the rates of attachment disorders and of other developmental difficulties caused by early separation.<sup>77</sup> The Council on Scientific Affairs' report on "Bonding Programs for Women Prisoners and Their Newborn Children" suggests that "there was a strong, healthy attachment between mothers and their infants in prison nurseries versus those infants who are immediately separated from their mothers and placed with caregivers after birth."<sup>78</sup>

Direct reports also indicate positive outcomes. Jean Harris, a former inmate at the Bedford Hills Correctional Facility and teacher of a parenting class said, "[b]abies don't know they are in prison . . . . They know they are with their mothers and that's where they want to be."<sup>79</sup> Eldon Vail, superintendent at McNeil Island Corrections Center, found that "[t]he children he saw at the prison nurseries were happy, healthy, alert and developmentally advanced because their mothers were guided by people who know a lot about raising kids, a skill which hopefully transfers to the offender."<sup>80</sup> So far, no long-term or permanent negative effects on children who resided in PNPs have been documented.<sup>81</sup> In fact, data compiled in 2000 demonstrates that "infants and children are far safer in mother-child correctional settings than they are in most low income communities or in foster care."<sup>82</sup> Hence, providing the child and mother with the opportunity to participate in PNPs can fulfill ASFA's objectives because it both

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74. Bean, *supra* note 36, at 337. See also *In re Lilley*, 719 A.2d 327, 335 (Pa. Super. Ct. 1998).

75. Bean, *supra* note 36, at 326.

76. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 30.

77. *Id.*

78. VILLANUEVA, *supra* note 6, at 20–21.

79. Mauskopf, *supra* note 16, at 111–12.

80. *Id.*

81. VILLANUEVA, *supra* note 6, at 5.

82. *J.B. v. Superior Court*, No. B216005, 2009 WL 2508221, at \*19–20 (Cal. Ct. App. Aug. 18, 2009).

prevents separation and promotes the child's health and safety, as will be further discussed in Section VI.

Despite the documented benefits of PNPs, not everyone agrees that prison is an appropriate environment for children. It is argued that "prison is not a normal environment, children missed the opportunity for everyday activities and lacked contact with males."<sup>83</sup> Others contend that PNP placement deprives these children of their fundamental right to physical liberty.<sup>84</sup> Some prison administrators believe that the prison lifestyle could have an adverse effect on kids, and that mothers are likely to use their children as an excuse to qualify for better programs or activities for themselves.<sup>85</sup> For instance, the Florida corrections spokesman expressed concern that prisons cannot provide children with the optimal environment to meet their basic nutritional and emotional needs.<sup>86</sup> While some developmental and motor-skills delays were observed by researchers,<sup>87</sup> they were not permanent and disappeared immediately after the child left the PNP and integrated back into society with her mother.<sup>88</sup>

Others claim that although PNPs can potentially benefit the child, because some mothers will lose custody later despite their participation in the program, separation would be less traumatic if it was made before the mother and child became attached.<sup>89</sup> In accordance with ASFA's emphasis on prompt permanency,<sup>90</sup> separation at an earlier age could allow the state to begin early permanency planning as soon as possible, resulting in increased chances for successful adoption of the child. However, with particularly low adoptions rates for children of color,<sup>91</sup> who are also disproportionately affected by parental incarceration,<sup>92</sup> it is extremely difficult to guarantee successful adoption or any kind of favorable permanent placement, even for a newborn.

Although separation of a child from her mother can have adverse effects, allowing a child to stay with her mother during incarceration is not always in her best interest. ASFA made child safety a paramount goal.<sup>93</sup> Mothers who are occupied with addictions and emotional problems cannot always provide the

83. Pojman, *supra* note 73.

84. QUAKER COUNCIL FOR EUROPEAN AFFAIRS, *WOMEN IN PRISON: A REVIEW OF THE CONDITIONS IN MEMBER STATES OF THE COUNCIL OF EUROPE* 48 (2007).

85. Honorable Consuelo Marshall, *Symposium: 200 Years of the Penitentiary: Criminal, Social and Economic Justice*, 34 *HOW. L.J.* 512, 519 (1991).

86. Mauskopf, *supra* note 16, at 110–11.

87. VILLANUEVA, *supra* note 6, at 20–1.

88. *Id.*

89. Pojman, *supra* note 73, at 65.

90. Bean, *supra* note 36, at 326.

91. EVAN B. DONALDSON ADOPTION INSTITUTE, *FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE* 5 (2008), available at <http://www.adoptioninstitute.org/publications/MEPApaper20080527.pdf>

92. Joseph Murray and David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 *CRIME & JUST.* 133, 183 (2008).

93. Bean, *supra* note 36, at 334.

safety, support, love, care, and attention vital for the child's healthy development. Media reports, as well as court decisions, document horrific harms parents have inflicted on their children intentionally or negligently.<sup>94</sup> These harms can outweigh the presumptive benefit of the parent-child relationship.<sup>95</sup> According to ASFA, child safety is prioritized even if that goal is achieved at the cost of parent-child separation and the eventual termination of rights.

As of 2009, there "have been no incidents of serious child harm or abuse" reported in prison nurseries or community-based mother-child correctional programs.<sup>96</sup> The close professional supervision and guidance at PNPs can prevent harm to the child, and meet the ASFA health and safety requirements. Nevertheless, monitoring is not always possible after the mother and child depart from the facility. Therefore, case-by-case examination of the mother's fitness and the quality of care she provides for the child is necessary, both prior to admission to the program and before her release, to ensure compliance with the ASFA standard and minimize impairment to the health and safety of the child after departure from the program.

Another concern with PNPs pertains to the exclusion of older children of incarcerated mothers. PNPs might provide promising placement solutions for infants born in correctional facilities, but they completely exclude other minor children of incarcerated mothers. These young children endure similar hardships as a result of their mothers' incarceration. Separation can be even more traumatic for existing children, since they have already developed attachment to their mother, and might be more cognitively developed to comprehend the situation.<sup>97</sup> In countries like Canada, Germany, and France arrangements are made to accommodate older children and enable them to accompany their mother to prison. Such expansion of PNPs could provide an invaluable solution for young children with no possibility for kinship placement. Nevertheless, the same concerns regarding the confining nature of the prison environment apply. PNPs might be even more restricting and detrimental for maturing children. Additional research is vital to evaluate the effect of PNPs on children of varying ages, perhaps by examining the experiences of children in other countries.

It is evident that PNPs have great potential to effectively promote the best interests of children of incarcerated mothers and comply with ASFA's statutory standards and objectives, particularly in light of the likely alternatives listed in Section III. Yet, the long- and short-term effects of placement of a child in a

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94. *DeShaney v. Winnebago Cnty Dep't of Soc. Servs.*, 489 U.S. 189 (1989); *Bennett v. City of Philadelphia*, 499 F.3d 281 (3d Cir. 2007); *In re J.W.*, 578 A.2d 952, 958 (Pa. Super. Ct. 1990). See also Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J. L. & POL'Y 63, 65-66 (1999).

95. Bean, *supra* note 36, at 327.

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

97. Denise Johnston, *Effects of Parental Incarceration*, in CHILDREN OF INCARCERATED PARENTS 59-88 (Katherine Gabel & Denise Johnston eds., 1995).

prison environment require further study. Such research can also enable the development of effective methods to minimize detrimental effects of PNPs. Because the capacity of each program is relatively small, the formulation of multi-site research projects should be considered to allow the accumulation of a critical mass of data, and the generation of more accurate and substantial results.

## V. THE MOTHERS

Inmates themselves can greatly benefit from participation in PNPs. It is estimated that eighty-five percent of incarcerated mothers in the United States are involuntarily separated from their child as a result of the incarceration,<sup>98</sup> although they are fit to fulfill their parental obligations and strive to continue parenting their children. Most of these women are non-violent, first-time offenders.<sup>99</sup> Like their children, mothers also endure adverse physical and emotional effects due to the separation. The most common conditions are depression, separation anxiety, and an incessant concern for their children.<sup>100</sup> Participation in PNPs allows incarcerated mothers who meet the program's criteria to avoid separation and take advantage of treatment, training, and educational courses provided to encourage self-growth and rehabilitation.

Courts have repeatedly asserted that parents possess a fundamental liberty interest in the custody and care of their children, which is protected by the Fourteenth Amendment of the United States Constitution. According to the United States Supreme Court, "[t]he rights to conceive and to raise one's children have been deemed "essential," "basic civil rights of man," and "[r]ights far more precious . . . than property rights."<sup>101</sup> The Court stated, furthermore, that "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."<sup>102</sup> The Supreme Court later elevated this parental right further, holding that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because

98. Genty, *supra* note 50, at 764.

99. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 9.

100. JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT & DOROTHY BURLINGHAM, *BEYOND THE BEST INTERESTS OF THE CHILD* 57 (1973).

101. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). *See also* *May v. Anderson*, 345 U.S. 528, 534 (1953) (recognizing a mother's right to custody of her children as a personal right entitled to protection); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (recognizing the fundamental rights of marriage and procreation); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing the right to establish a home and bring up children and the right of parents to control their child's education as protected by the Fourteenth Amendment).

102. *Stanley*, 405 U.S. at 651 (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). *See also Meyer*, 262 U.S. at 400 (holding it to be the natural duty of a parent to control the education of their child).

they have not been model parents or have lost temporary custody of their child to the State.”<sup>103</sup> Incarceration deprives a mother of this fundamental right. As discussed above, in many cases the deprivation of parental rights often extends beyond the period of incarceration. The distance, lack of adequate public transportation, and considerable cost of travel, present significant barriers to visitation and the development of a continuous and meaningful relationship between mothers and their children.<sup>104</sup> Women’s prisons are often located in rural areas, far from the cities where the majority of incarcerated women live, making visitation even more difficult and costly.<sup>105</sup> Only forty-two percent of mothers in prison reported weekly contact with their children through in-person visits, video communications, telephone, mail, or e-mail. More than half reported that they had never experienced an in-person visit with their child.<sup>106</sup> When contact does occur, it tends to be infrequent, unpredictable, and of poor quality.<sup>107</sup> This prolonged lack of contact increases the risk of irrevocable interference with the exercise of an incarcerated mother’s parental rights.<sup>108</sup>

The magnitude of the parental right to the custody, care, and nurture of her child requires a compelling state interest in order to justify its infringement.<sup>109</sup> The state’s interest in punishing violations of the criminal law and protecting public safety arguably provide such a justification. Moreover, some courts have interpreted ASFA as tipping the balance from protecting the rights of parents towards protecting children.<sup>110</sup> Other courts, however, have shown a willingness to depart downwards from the sentencing guidelines in order to minimize the infringement of a mother’s right to raise her children and reduce the harm to her children as a result of the separation.<sup>111</sup> PNPs allow the state to avoid infringement of the incarcerated mother’s right to parent her child while fulfilling the state’s interest in retribution, incapacitation, and public safety.

Additionally, some see the deprivation of parental rights as serving as a supplemental punishment, beyond the incarceration itself. Perhaps the right to parenthood is so fundamental that its denial in addition to the deprivation of

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

104. Kim, *supra* note 65, at 228.

105. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN’S LAW CENTER, *supra* note 12, at 12–13.

106. Conway & Hutson, *supra* note 31, at 215.

107. *Id.*

108. *United States v. Ekwunoh*, 813 F. Supp. 168, 180 (E.D.N.Y. 1993) (citing *United States v. Pokuaa*, 782 F. Supp. 747, 748 (E.D.N.Y. 1992)).

109. Conway & Hutson, *supra* note 31, at 213.

110. N.J. Div. of Youth & Family Servs. v. A.R.G., 824 A.2d 213, 233 (N.J. Super. Ct. App. Div. 2003). See also *In re Rasheta D.*, No. 98-08-07-TN, 2000 WL 1693157, at \*20 (Del. Fam. Ct. March 2, 2000) (stressing that a child’s health and safety must be of paramount concern in all child-welfare decisions, as explicitly stated by ASFA).

111. *United States v. Pokuaa*, 782 F. Supp. 747, 748 (E.D.N.Y. 1992); *United States v. Concepcion*, 795 F. Supp. 1262, 1291 (E.D.N.Y. 1992); *United States v. Arize*, 792 F. Supp. 920, 921 (E.D.N.Y. 1992).



physical liberty inherent in incarceration makes the punishment excessive. The language used by at least one court during a sentencing decision supports a view of the potential termination of parental rights as an aggravating component of the imparted sentence.<sup>112</sup> PNPs provide a possibility for the court to impart appropriate sentences, without the additional denial of all parental rights.

One of the recognized purposes of punishment is rehabilitation. Some scholars posit that:

In order to achieve the goal of rehabilitation, inmates must be prepared to deal with the challenges of post-prison life. The rehabilitation process should foster inmates' abilities to deal with the responsibilities, not prevent them from fulfilling these responsibilities. . . . To be rehabilitated, inmates must . . . be transformed into individuals who have the necessary skills and emotional stability to face up to their responsibilities as citizens, parents and spouses.<sup>113</sup>

Because statistical data show that the vast majority of incarcerated women are parents to minor children, and will resume the role of primary caregiver upon release, preparing them to assume and successfully fulfill this role should be a major part of the rehabilitation process. PNPs can facilitate the process by providing the mother an opportunity to care for her child in a supervised and controlled environment, offering guidance and training to improve and refine parenting skills, and providing mothers with tools to better cope with parenthood and life following release.<sup>114</sup> Furthermore, admission to PNPs requires that inmates meet relatively strict criteria. They serve as a strong incentive for pregnant inmates to make significant rehabilitation efforts during their pregnancy, and join educational and treatment programs in order to prove their eligibility to take part in the nursery program.<sup>115</sup>

Studies also show that "inmates who maintain close family relationships while serving their sentences have had more successful experiences after their release."<sup>116</sup> The mere presence of a child has been shown to motivate mothers to better themselves, both in prison and in their lives beyond it.<sup>117</sup> Dr. T. Berry Brazelton, a well-known pediatrician, found that mothers "need their infants for their own rehabilitation. Studies have shown that if . . . the baby [is used] as an incentive, 50 percent or more give up their addiction in favor of their baby."<sup>118</sup>

112. *Ekwunoh*, 813 F. Supp. at 180.

113. Justin Brooks & Kimberly Bahna, "It's a Family Affair"—*The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 276–77 (1994).

114. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 30.

115. *See, e.g., Babies Behind Bars* (TLC television broadcast Feb. 24, 2011); Denning, *supra* note 16.

116. Deck, *supra* note 9, at 709.

117. Denning, *supra* note 16.

118. Jordana Hart, *Bill Lets Mothers in Prison Keep Tots, Benefits to Parent and Child Are*

Hence, by effectively using the presence of the infant, and maintaining and fostering the bond between the mother and her child, PNPs may promote the state's goal of rehabilitation.

Data shows that many female inmates have suffered trauma and abuse in their past. Approximately one-half are reported to be victims of sexual and/or physical abuse.<sup>119</sup> "In the absence of access to mental health services, many of these vulnerable mothers turned to self-medicating with illegal substances. Rather than being treated for trauma, depression, addiction, and the other indelible injuries of violence, these mothers have been displaced into the criminal justice system."<sup>120</sup> PNPs, which tend to provide treatment and support services for the mother, as well as the child, aid the healing process, and increase the ability of the inmate to conduct a more productive life, free of addictions and criminal behavior, upon release. There is also hope that treating a mother's trauma will prevent the cycle of victimization from affecting the upbringing of her children.<sup>121</sup>

There is strong empirical evidence to support the claim that PNPs can lower rates of recidivism.<sup>122</sup> Strong familial ties and close relationships with offspring during incarceration are recognized as factors that reduce the risk of reoffending.<sup>123</sup> A study of the Nebraska PNP revealed that "[p]ositive outcomes for mothers were seen in both behavioral conduct during incarceration and in recidivism rates."<sup>124</sup> For example, a 13% reduction in misconduct reports among PNP participants has been observed. Although the majority of incarcerated women are serving sentences for drug related offences, none of the PNP mothers who participated in the Nebraska study ever tested positive for drug use.<sup>125</sup>

The data on recidivism is also promising. In Nebraska, the recidivism rate<sup>126</sup> of mothers who went through the PNP was 9%, in comparison to 33% for women who gave birth in custody and were immediately separated from their

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*Cited*, BOSTON GLOBE, June 26, 1997.

119. J.B. v. Superior Court, No. B216005, 2009 WL 2508221 (Cal. Ct. App. Aug. 18, 2009) (noting that 50% of women prisoners report a history of sexual or physical abuse); Pojman, *supra* note 73, at 47 (noting that more than 30% of incarcerated women had been sexually abused, and more than 50% had been physically abused prior to incarceration). *See also* Kim, *supra* note 65, at 231–32 (2001) (showing that according to a study conducted by the U.S. Department of Justice, over 75% of incarcerated women reported that they were abused as children; over 53% of the women inmates reported that they were abused by their parent or guardian, and over 22% reported that they were abused by other relatives).

120. REBECCA PROJECT FOR HUMAN RIGHTS & NATIONAL WOMEN'S LAW CENTER, *supra* note 12, at 9.

121. J.B. v. Superior Court, No. B216005, 2009 WL 2508221 at \*14 (Cal. Ct. App. Aug. 18, 2009).

122. VILLANUEVA, *supra* note 6, at 5.

123. *Id.* at 9.

124. *Id.* at 16.

125. *Id.*

126. *Id.*

child.<sup>127</sup> Additionally, a study of recidivism in Ohio showed that only 3% of women who participate in the nursery program recidivate, in comparison to the general rate of 38%.<sup>128</sup> Data regarding mothers released from PNPs in New York indicated a 13.4% recidivism rate, compared to 25.9% of all women under the New York Department of Corrections. Parole violations were the primary reason for nursery program participants to be re-incarcerated.<sup>129</sup>

Nevertheless, the effect of the PNP on incarcerated mothers is not unambiguously positive. The Nebraska study revealed that twenty-seven percent of the program's participants did not retain custody of their children for various reasons.<sup>130</sup> Of the forty-three mothers who were admitted to the Nebraska nursery program, "seven women were involuntarily removed . . . and six women voluntarily sent their infants home."<sup>131</sup> Similar findings were also documented on a sample study conducted in New York.<sup>132</sup>

Some critics of PNPs have expressed the opinion that by breaking the law, the mother has demonstrated that she is unable and unwilling to be an adequate parent, and therefore should not have the privilege of parenting.<sup>133</sup> One author asserts that "[f]rom a moral standpoint, one may conclude that a parent who violates the moral fiber of the general society would be unable to impress a decent and honorable character onto their children."<sup>134</sup> While this argument may have some political currency, it is not consistent with current legal standards. For example, in *Santosky v. Kramer*, the United States Supreme Court made clear that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents."<sup>135</sup> Since crimes are committed with different motives and under a variety of circumstances, the mother's fitness to fulfill a parenting role is a factual issue that should be determined according to statutory guidelines. The right to parenthood is a fundamental constitutional right, and therefore disregarding these procedures could amount to a violation of the constitutional due process standards of the Fifth and Fourteenth Amendments.

Furthermore, it is a factual reality that despite a criminal conviction, the majority of incarcerated mothers will care for their children when they are released. As the warden of the Nebraska Center commented, "[t]hey shouldn't be

127. *Id.* at 16 (the statistics are not entirely accurate, since at the time the study was conducted some women had not been released for a full three years).

128. *Id.* at 17.

129. *Id.* at 18.

130. *Id.* at 17.

131. *Id.* at 16.

132. *Id.* at 17.

133. *Id.* at 9. See also Mannix Porterfield, *West Virginia's Prison Nursery Program Receives Worldwide Attention*, REGISTER-HERALD (March 16, 2007), <http://www.register-herald.com/local/x519077933/W-Va-s-prison-nursery-program-receives-worldwide-attention>

134. Kim, *supra* note 65, at 231.

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

strangers to their children.”<sup>136</sup> With frequent visitations and contact a rare possibility, PNPs are virtually the only current alternative that can prevent estrangement while maintaining the traditional correctional structure.

Still, other opponents of PNPs assert that incarcerated mothers have brought the negative outcome of separation on themselves by committing crimes. Since separation from family and children is a predictable by-product of incarceration, the mother should bear this foreseeable consequence of her actions. Courts interpreting ASFA’s requirement for the state to make reasonable efforts for reunification may also view incarceration as a less compelling, self-imposed condition.<sup>137</sup> In fact, these critics believe that the separation itself can have a beneficial impact on the mother’s parenting. For some mothers, the additional impact of the separation helps heighten their understanding of their own behavior and its effects on their children, “[e]specially for mothers who had been involved in drugs or alcohol for prolonged periods, incarceration provides them with a chance to step back and take stock of the experiences their children have endured.”<sup>138</sup>

These are valid arguments with regard to the accountability of the mother as a rationally acting adult. However, the drawback is that not only the mother, but also the child bears the consequences of the separation. As demonstrated above in Section IV, the incarceration of the mother and separation from the child exposes the child to a multitude of negative effects and can result in profound long-term harms. It can also be in contradiction to ASFA’s demand to assure the health and safety of the child. Considering the predominance of the ‘best interests of the child’ and ‘health and safety’ standards, these should be paramount to the discussion of the validity of PNPs.

Critics of PNPs also complain that participation in the program constitutes special treatment that should not be given simply based on the mother’s status as a primary caregiver of her child. They believe that special privileges should be furnished as a reward for good behavior on the basis of conduct, rehabilitation efforts, and initiative to change and improve, rather than based on a biographical factor. It was also documented that the special privileges provided to PNP participants create resentment and animosity among inmates.<sup>139</sup> On the other hand, some maintain that preferential treatment on the basis of special needs is not a new phenomenon unique to the situation of incarcerated mothers. Inmates with mental disabilities, minor inmates, and elderly inmates are recognized as having inherent qualities that justify different treatment than that given to average inmates. Motherhood should be recognized in a similar manner; the special privileges embodied in PNPs address the special needs of this particular

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136. Bill Hewitt, *Mothers Behind Bars*, PEOPLE WEEKLY, Nov. 11, 1996, at 95.

137. *In re Doe*, 60 P.3d 285, 295 (Haw. 2002). See also Bean, *supra* note 36, at 350 (parenthetical needed).

138. JAMES BOUDOURIS, PARENTS IN PRISON: ADDRESSING THE NEEDS OF FAMILIES 2 (1996).

139. Pojman, *supra* note 73, at 65.

group.<sup>140</sup>

Although not without controversy and criticism, the collected data and information suggest that PNPs may yield an array of benefits for the incarcerated mother regarding her rehabilitation, recovery, and self-growth. The next section will outline how these seemingly personal gains can translate into broader benefits to society and the general public.

## VI. THE STATE

The state is another player with high stakes that should not be ignored in this discussion. The benefits and burdens that the implementation of PNPs will place on the state and society as a whole will greatly affect its feasibility. It is widely agreed that the success of these programs is highly dependent on the resources invested in them.<sup>141</sup> Without evidence of a broader positive impact beyond the individual participants, investment of meaningful funds is difficult to justify.

The low recidivism rate of PNP participants, described in the previous sections, serves the state's interest in preventing crime and protecting the public from criminal behavior. The fast-growing number of female prisoners and the overcrowding of facilities have been recognized as a serious public concern.<sup>142</sup> The reduction in the crime rate of women offenders is a significant outcome that can aid the ongoing state and federal efforts to reduce prison populations. Moreover, the effect on a child of her mother's incarceration, their subsequent separation, and her placement in foster care increases the likelihood that the child will be involved in future criminal activity due to a lack of familial support and guidance.<sup>143</sup> Preventing separation and fostering the bond between the mother and the child has the potential to reduce risk for future criminal behavior. Thus, extending the implementation of PNPs can aid the state administration in promoting its function of reducing crime rates while enhancing the public's sense of safety and security.

Fiscal interests can also be advanced through implementation and expansion of PNPs. The average annual cost of keeping a child in foster care in the U.S. is \$40,000.<sup>144</sup> In comparison, it costs approximately \$11,000 per year for an infant

140. Kim, *supra* note 65, at 235.

141. VILLANUEVA, *supra* note 6, at 5.

142. BLOOM, OWEN & COVINGTON, *supra* note 3, at 7.

143. Mauskopf, *supra* note 16, at 115. *See also* Brooks & Bahna, *supra* note 113, at 281–82 (explaining that children of inmates stand a greater chance of committing crimes and being incarcerated later in life, and that this is a result of the emotional reaction to parental incarceration—which often involves extreme anger, loss, and embarrassment—combined with the lack of support for these children and their families).

144. Lawrence Adams, *A Voice for the Previous Voiceless*, FCAA: FOSTER CARE ALUMNI OF AMERICA (Aug. 11, 2006), [http://www.associatedcontent.com/article/50411/fcaa\\_foster\\_care\\_alumni\\_of\\_america.html](http://www.associatedcontent.com/article/50411/fcaa_foster_care_alumni_of_america.html).

to stay with her mother in prison, depending on the range of services offered.<sup>145</sup> While a child placed in a prison nursery will depart upon the conclusion of her mother's sentence, the child's stay in foster care may extend far beyond that, especially when the mother's parental rights are terminated. Also, "keeping incarcerated mothers and their babies together can work preemptively against future psychosocial problems for the child and their associated burdens on the state," which can mitigate the future fiscal costs of the problems.<sup>146</sup> Lastly, with an average annual cost of \$23,876 for the incarceration of a single inmate, prevention of future imprisonment by reducing recidivism rates can also save the state substantial funds that could be diverted to more constructive causes.<sup>147</sup> Thus, by avoiding foster care and lowering recidivism rates, there is a potential for both short-term and long-term budgetary benefits to the state—an invaluable advantage in light of the ongoing fiscal crisis.<sup>148</sup> Furthermore, the general public can also be a beneficiary, as the freed funds can be channeled towards other goals, including education, welfare, healthcare, and improvement of quality of life.

The ASFA places the responsibility on the state to make "reasonable efforts" to prevent separation or reunify the mother and child, if such efforts do not compromise the health and safety of the child.<sup>149</sup> The state has a strong interest in meeting this burden; receipt of federal funds for states' child welfare systems is tethered to such compliance. It can be argued that providing children of incarcerated mothers with the possibility to join PNPs is necessary to meet ASFA's "reasonable effort" requirement, given that, in many cases, PNPs are the sole instrument to prevent permanent separation. As demonstrated above, PNPs have high success rates in preventing short- and long-term maternal separation. At a minimum, there is no evidence that PNPs pose a significant risk of harm to the health and safety of the child, while there are indications of positive effects in this regard. During the stay in the program, the mother and child receive services that facilitate consistency of care by the biological mother, similar to those normally provided by state agencies under ASFA's "reasonable efforts" provision, and the cost to the state is usually lower than the alternatives. Based on these factors, it appears that PNPs meet all the ASFA criteria as effective "reasonable efforts" to prevent maternal separation.

ASFA does not explicitly define the "reasonable efforts" requirement.<sup>150</sup> Thus, it is up to state legislatures and courts to pour content into the term and

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145. Mauskopf, *supra* note 16, at 115.

146. Denning, *supra* note 16, at 3.

147. JENNIFER WARREN, PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008, at 11 (2008), available at <http://www.pewstates.org/research/reports/one-in-100-85899374411>.

148. THE REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *supra* note 12, at 13.

149. 42 U.S.C. § 671(a)(15)(A) (2006).

150. Bean, *supra* note 36, at 329.

provide guidance. States have interpreted the term differently. It is therefore difficult to make a general determination whether the existing legal environment compels the states to make PNPs available as part of the “reasonable efforts” requirement. The limited present availability of PNPs strongly suggests that states have not interpreted the term in this manner. Some state legislatures confine the “reasonable efforts” requirement to providing “available services,” and thus do not mandate the states to develop any new services, such as PNPs.<sup>151</sup> A few states use more inclusive language, which is more conducive to a broader interpretation that might enable a successful assertion of the argument that PNPs should be made available under the “reasonable efforts” requirement.<sup>152</sup> Strict budgetary constraints are, of course, a significant barrier for the judiciary to obligate the executive to establish PNPs in order to meet the ASFA conditions.<sup>153</sup>

Federal courts have interpreted ASFA’s intention to “limit the reasonable efforts social service agencies must undertake to reunite families.”<sup>154</sup> A further limiting factor is the courts’ view of incarceration as a circumstance created by the parent, which mitigates the responsibility of the state to provide services under the “reasonable efforts” requirement.<sup>155</sup> In those cases where the parent is incarcerated, “courts are also increasingly likely to hold that efforts aimed at safely reuniting children with the parent would be futile,” and therefore deem any reasonable efforts unnecessary.<sup>156</sup> As a result, many courts conclude that it is “not reasonable to expect [the agency] to provide services beyond what [is] available within the corrections system.”<sup>157</sup> Hence, when a PNP program is available and the mother meets the admission criteria, an argument can be made that the “reasonable efforts” requirement compels the state to allow the mother and child to join the program.<sup>158</sup> However, when a PNP does not exist, the

151. *Id.*

152. *Id.* at 329–30. *See, e.g.,* COLO. REV. STAT. ANN. § 19-1-103(89) (West 2002); S.D. CODIFIED LAWS § 26-8A-21 (1999).

153. Bean, *supra* note 36, at 333.

154. *In re D.M.H.*, 736 A.2d 1261, 1273 (N.J. 1999).

155. *In re J.K.*, No. 03-1413, 2003 WL 22346526, at \*2 (Iowa Ct. App. Oct. 15, 2003) (noting that the parents’ incarceration is due to their own actions and therefore they cannot fault the State for being unable to provide services to facilitate reunification). *See also In re M.L.*, No. 01-1337, 2002 WL 535381, at \*1 (Iowa Ct. App. Apr. 10, 2002) (explaining that the father’s “inability to partake of reunification efforts due to incarceration is of his own making not the fault” of the state); *In re M.T.*, 613 N.W.2d 690, 692 (Iowa Ct. App. 2000) (recognizing a parent “cannot fault [the state] for being unable to provide him additional services when his own actions prevented him from taking advantage of them”).

156. Bean, *supra* note 36, at 350.

157. *In re Doe*, 60 P.3d 285, 295 (Haw. 2002). *See also* Bean, *supra* note 36, at 350 n.222 (outlining the difficulties faced by incarcerated parents attempting to receive the services required for reunification).

158. This is also supported by pre-ASFA court decisions analyzing the “reasonable efforts” standard with regard to PNPs. *See, e.g.,* *Wainwright v. Moore*, 374 So. 2d 586 (Fla. Dist. Ct. App. 1979).

demand to establish such a program in order to meet the requirement would most likely be unsuccessful at the present time.

In addition, the state also has an obligation to protect the child's best interests and guard the general interest in the child's well-being under the doctrine of *parens patriae*.<sup>159</sup> The doctrine puts a duty on the state and grants it the power to act as guardian of the child to protect her best interests and prevent harm. "The state normally will interfere with the parent/child relationship only when the relationship has broken down and the life, health, or safety of the child is endangered."<sup>160</sup> The presumption is that if "there is still reason to believe that a positive, nurturing parent-child relationship exists, the *Parens Patriae* interest favors preservation, not severance of natural family bonds."<sup>161</sup> Although ASFA emphasizes the safety of the child, reunification is still the preferred goal. Moreover, ASFA must be consistent with Supreme Court jurisprudence on parent's rights. Well-designed PNPs provide the state with a platform to pursue its *parens patriae* obligation by improving the welfare of the child and preventing unnecessary separation of the child from the mother.<sup>162</sup>

One criticism voiced from the state's point of view is the controversy surrounding the placement of tender children in harsh prison settings without a profound understanding of the outcomes and long-term effects such placement has on them. Moreover, distribution and prioritization of limited available funds is also an issue for debate. It can be argued that funds should be invested in support for underprivileged mothers and additional programs for teen-mothers and pregnant youth, rather than on inmates who violated society's rules. Another possible argument is that the number of participants in these programs is much too small to produce any meaningful impact on society. However, only further empirical research and comprehensive analytical studies can provide sufficient information to better evaluate the costs and benefits of PNPs for children and society.

Without a doubt, large scale implementation of PNPs will not be without controversy. Nevertheless, PNPs have the potential to serve diverse interests. Public safety, criminal deterrence, rehabilitation, financial efficiency, and *parens patriae* obligations can be fulfilled simultaneously with minimal compromise through the proper implementation of PNPs.

## VII.

### COMPARATIVE CASE STUDY: EUROPE

Over the past decade, European states have exhibited very similar trends in the area of female incarceration to those experienced in the United States. In

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159. Deck, *supra* note 9, at 697.

160. *Id.* See also *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (explaining that the state has the power to limit parental authority when it concerns child welfare).

161. *Santosky v. Kramer*, 455 U.S. 745, 766-67 (1982).

162. Deck, *supra* note 9, at 696-97.



2009, the Parliamentary Assembly of the European Council officially acknowledged that the “number of women in prison in Europe is growing.”<sup>163</sup> For example, according to the World Health Organization’s 2009 report, the number of incarcerated women has increased by more than 200% in the past 10 years in England and Wales.<sup>164</sup> It is estimated that there are over 100,000 female prisoners in European prisons on any given day.<sup>165</sup>

As in the United States, the majority of these incarcerated women are mothers to minor children. Due to a lack of consistent recording of statistical information, the accurate portion of incarcerated women in Europe who are mothers and the number of children affected by maternal incarceration is not fully known.<sup>166</sup> Some estimate that there are as many as 700,000 children across Europe affected by parental incarceration,<sup>167</sup> and approximately 10,000 European children under the age of two are separated from their mothers by incarceration.<sup>168</sup> European studies have observed that separation due to incarceration results in problems for mother and child, comparable in extent and nature to those identified by studies conducted in the United States.<sup>169</sup>

Although, in 2006, the European Court of Human Rights refrained from mandating that member states provide the possibility for incarcerated mothers to keep their children in prison settings,<sup>170</sup> currently all European states, except

163. EUR. PARL. ASS., *Resolution on Women in Prison*, 13<sup>th</sup> Sess., Doc. No. 11619 (2009), available at <http://www.assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta09/ERES1663.htm>.

164. WORLD HEALTH ORG., *WOMEN’S HEALTH IN PRISON: CORRECTING GENDER INEQUITY IN PRISON HEALTH 11* (2009), available at [http://www.euro.who.int/\\_data/assets/pdf\\_file/0004/76513/E92347.pdf](http://www.euro.who.int/_data/assets/pdf_file/0004/76513/E92347.pdf).

165. *Id.*

166. DANISH INSTITUTE FOR HUMAN RIGHTS, *CHILDREN OF IMPRISONED PARENTS 8* (Peter Scharff-Smith & Lucy Gampell eds., 2011), available at <http://menneskeret.dk/files/pdf/Full%20report%20Children%20of%20Imprisoned%20parents.pdf>. Several studies have been conducted to estimate this number. According to these studies, it is estimated that in the Russian Federation, 63.5% to 80% of convicted women are mothers. *Compare* TOMRIS ATABAY, UNITED NATIONS OFFICE ON DRUGS AND CRIME, *HANDBOOK FOR PRISON MANAGERS AND POLICYMAKERS ON WOMEN AND IMPRISONMENT 18* (2008), with QUAKER COUNCIL FOR EUROPEAN AFFAIRS, *supra* note 84. One study conducted in nine European countries indicated that the percentage of female prisoners who are mothers to minor children ranges from 57.7% in Denmark to 81.9% in Greece. QUAKER COUNCIL FOR EUROPEAN AFFAIRS, *supra* note 84, at 68. In the United Kingdom, 66% of women prisoners are mothers, 55% have at least one child under sixteen years of age, and the percentage of women that are single parents increases from 34% before prison to 60% after incarceration. ATABAY, *supra*, at 18; QUAKER COUNCIL FOR EUROPEAN AFFAIRS, *supra* note 84.

167. LIZ AYRE, KATE PHILBRICK & MARIELLE REISS, *CHILDREN OF IMPRISONED PARENTS: EUROPEAN PERSPECTIVES ON GOOD PRACTICE 7* (2006); JEAN TOMKIN, QUAKER UNITED NATIONS OFFICE, *ORPHANS OF JUSTICE: IN SEARCH OF THE BEST INTERESTS OF THE CHILD WHEN A PARENT IS IMPRISONED: A LEGAL ANALYSIS 36* (Aug. 2009), available at <http://www.quono.org/geneva/pdf/humanrights/women-in-prison/Orphans-of-Justice200908-English.pdf>.

168. ATABAY, *supra* note 166, at 18.

169. QUAKER COUNCIL FOR EUROPEAN AFFAIRS, *supra* note 84; DANISH INSTITUTE FOR HUMAN RIGHTS, *supra* note 166; TOMKIN, *supra* note 168; AYRE, PHILBRICK & REISS, *supra* note 167; ATABAY, *supra* note 166.

170. *Kleuver v. Norway*, 14 HUM. RTS. CASE DIG. 385 (2002).

Norway and Malta, provide such an arrangement, either in formal PNPs or in other institutional settings.<sup>171</sup> There are several European countries in which there are no established PNPs, but babies are still permitted to accompany their mothers to prison, and are housed in special cells that are usually more spacious and accommodating of their needs.<sup>172</sup>

PNPs in European countries are, for the most part, similar in design to programs in the United States. The quality of services and facilities also vary substantially between countries and institutions. For instance, in the United States, participating mothers and children are usually housed in separate, specially designed units. Additional services for mother and child are also provided to various degrees. Nevertheless, there are several significant differences between practices in the United States and Europe that are particularly noteworthy.

Capacities of PNPs are much larger in Europe than in the United States. While, in the United States, PNPs are available in only thirteen states, with a total capacity of approximately 150 mother-baby pairs, PNPs are available in virtually all European countries, with a total capacity of over 400 mother-baby pairs.<sup>173</sup> In fact, in most European countries, more than one PNP is available, which allows the incarcerated mothers to be housed in relative proximity to their families whenever possible.<sup>174</sup> This is despite the fact that the number of female prisoners in the United States is slightly higher than the number in all European countries combined. This enhanced capacity reduces the chance that children will be forcibly separated from their mother in contradiction to the child's best interests.

Another apparent difference between PNPs in Europe and the United States is the allowable ages of admitted children. There is substantial variation among European countries in the maximum age for a child to stay with her mother in prison, ranging from six-months old in the Netherlands and Hungary to six-years old in Germany.<sup>175</sup> The most common maximum age is three-years old. This is substantially different than in the United States, where only the State of Washington allows children to stay in PNPs until they are three-years old, and the most common maximum age is eighteen months.<sup>176</sup> Moreover, in contrast to the United States, admission to PNPs in most European countries is not limited

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171. QUAKER COUNCIL FOR EUROPEAN AFFAIRS, *supra* note 84, at 48–52.

172. *See id.* (examples for countries without PNPs, that still allow mothers to keep their babies in prison are Armenia, Cyprus, Denmark, Iceland, Ireland, Luxemburg, and Sweden).

173. *Id.* at 48–53.

174. *Id.* at 47.

175. Section 80 of the German Prison Act provides that children are permitted to accompany their mother to prison up to the age of compulsory school attendance. Nevertheless, in practice, the most common age of stay is three years. Strafvollzugsgesetz [Prison Act], Mar. 16, 1976, BGBL. I at 581, 2088, last amended by Gesetz [G], June 11, 2008, BGBL. I. at 1010 (Ger.); QUAKER COUNCIL FOR EUROPEAN AFFAIRS, *supra* note 84, at 48–53.

176. VILLANUEVA, *supra* note 6, at 10.

to babies born in prison, but extends to older children for at least some of the period of the mother's incarceration.<sup>177</sup> In many of the countries in Europe, the maximum age is not a strict limitation, and designated policies or statutory provisions enable children to stay with their mothers in prison until a later age under special circumstances.<sup>178</sup> In the U.K. and Denmark, for example, if a child reaches the maximum permitted age just before the end of a woman's sentence, or if a longer stay is in the child's best interest, the child is permitted to remain in prison with the mother.<sup>179</sup> Similarly, although the maximum age in the Czech Republic is three-years old, a child will be permitted to stay with his mother until the age of five in exceptional cases.<sup>180</sup> This flexibility, aimed to promote the best interests of the child, is rarely permitted in the United States.

The most significant difference is in the legal and normative frameworks that govern the institutional development of PNPs. When reviewing the relevant national, regional, and applicable international provisions, it becomes apparent that the issue of children of incarcerated mothers receives significantly more attention and consideration in Europe than it does in the United States. This is despite the relative similarity in the nature and magnitude of the problem in the two regions.

The Convention on the Rights of the Child<sup>181</sup> is an international multilateral treaty to which all European countries are a party. In fact, the only two countries in the world that have refrained from ratifying this convention are Somalia and the United States.<sup>182</sup> The convention states that as long as it is reasonably possible, children should be granted the right to be cared for by their parents,<sup>183</sup> and shall not be separated from their parents against their will unless necessary for the best interests of the child.<sup>184</sup> However, it is recognized that detention and imprisonment may sometimes mandate separation of children from their parents. Additionally, states are required to provide appropriate assistance to parents in the performance of their child-rearing responsibilities.<sup>185</sup> PNPs can be considered as such assistance. Obligations under this convention may tilt the balance towards preventing separation of mother and child by enabling access to PNPs, when such actions are consistent with the best interests of the child.

European organs have developed specific instruments dealing with PNPs

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177. QUAKER COUNCIL FOR EUROPEAN AFFAIRS, *supra* note 84, at 16.

178. *Id.* at 48.

179. *Id.* at 69.

180. *Id.* at 49.

181. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989).

182. *Status of the Convention on the Rights of the Child*, UNITED NATIONS TREATY COLLECTION, [http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-11&chapter=4&lang=en](http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en) (last visited Jan. 17, 2013).

183. *Id.* art. 7.

184. *Id.* art. 9.

185. *Id.* art. 18(2).

and the issues of children who accompany their mothers to prison. These provisions are attempts to promote uniformity in widely available state practices, to raise awareness, and to address other complex issues on a regional level. In contrast, there are no such attempts to promote uniformity in solutions provided to children of incarcerated mothers in the United States, through federal legislation and guidelines, model codes, or otherwise. In 2000, the Parliamentary Assembly of the Council of Europe issued its first set of recommendations on the issue of mothers and babies in prison.<sup>186</sup> The recommendations were also confirmed by the Ministers' Deputies' European Committee on Crime Problems in 2001.<sup>187</sup> These acknowledgements recognize the need to raise "awareness of criminal justice professionals as to the difficulties mothers with young children have to face within the framework of the criminal justice process."<sup>188</sup> While the assembly notes that prison is not an optimal environment for young children, and that alternative sentencing options for convicted mothers should be sought whenever possible, it also recognizes the advantages of PNPs in preventing separation between mother and child.<sup>189</sup>

The European Committee on Crime Problems' opinion provided several instructions to its member states. It states that penitentiary staff members entrusted with the supervision of mothers with young children should be specially chosen and trained. Appropriate support, including social work and child development specialists, must also be provided to children who live with their mothers in prison.<sup>190</sup> The committee also places a duty on prison management and providers of other complimentary services, "to do everything possible to ensure the normal health, growth, social, emotional and intellectual development of the child and to support the mother in an appropriate way."<sup>191</sup> In order to reinforce maternal bonding, it is recommended that crèches, day nurseries, and kindergartens be provided for children staying in prison.<sup>192</sup> Lastly, the committee recognizes the importance of visits by family members, and fathers particularly, to children in PNPs "in that they help them to develop normal inter-personal relationships with the outside world." Thus, "[f]amily

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186. EUR. PARL. ASS., *Reply of the Comm. of Ministers on Parliamentary Assembly 1469 (2000)*, 740th Mtng. (2001), <http://www.coe.int/document-library/default.asp?urlwcd=https://wcd.coe.int/ViewDoc.jsp?id=185207>.

187. EUR. PARL. ASS., *Report of the European Comm. on Crime Problems*, 737th Mtng. (2001), [https://wcd.coe.int/ViewDoc.jsp?Ref=CM%282001%2915&Language=lanEnglish&Site=COE&ShowBanner=no&Target=\\_self&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864](https://wcd.coe.int/ViewDoc.jsp?Ref=CM%282001%2915&Language=lanEnglish&Site=COE&ShowBanner=no&Target=_self&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864) [hereinafter *Report on Crime Problems*].

188. *Id.* app. III.

189. *Id.*

190. EUR. PARL. ASS. *Recommendation Rec(2006)2 of the Comm. of Ministers on the European Prison Rules*, 572nd Mtng. (2006), art. 36.2, <https://wcd.coe.int/ViewDoc.jsp?id=955747>.

191. *Report on Crime Problems*, *supra* note 191, at app. III, ¶10.

192. EUR. PARL. ASS., *Recommendation No. R (98) 7(2) of the Comm. of Ministers to member states concerning the Ethical and Organizational Aspects of Health Care in Prison*, 627th Mtng. (1998), app. (III)(G)(70), <https://wcd.coe.int/ViewDoc.jsp?id=475927&Site=CM>.

visits to prisoners should command high priority for resources and in daily routines,” and the frequency and duration of visits should be extended.<sup>193</sup>

A second resolution on this issue by the Parliamentary Assembly was issued in 2009.<sup>194</sup> The resolution embraces the 2000 documents, and establishes a new set of recommendations. The assembly expressed concern that despite the rise in female imprisonment, correctional facilities and programs continued to fail to address the specific needs of women. This is similar to the existing situation in the United States today. The resolution states that it is imperative to ensure the flexibility of prison facilities.<sup>195</sup> It recommends that PNP children will be given “access to crèches outside the prison, offering them opportunities for socialization with other children and alleviating the detrimental social effects of imprisonment on their personal development.”<sup>196</sup> Such daycare programs also enable the mothers to work and participate in various programs. Hygiene and health care programs should be provided and tailored to special needs of pregnant women, breast-feeding mothers, and post-natal mothers.<sup>197</sup> Moreover, it should be ensured that, “where babies and young children in prison with their mother have to be separated from her, this is done gradually, so that the process is as painless and non-threatening as possible.”<sup>198</sup>

The Council of Europe Committee of Ministers also issued the European Prison Rules,<sup>199</sup> which address, among other issues, matters related to children accompanying their mothers in prison. This is not a legally binding document, but is meant to guide member states when devising legislation, policies, and practices related to prison and corrections issues. Rule 36.1 emphasizes that an infant’s stay in prison should be determined by the child’s best interest.<sup>200</sup> When the stay of the child is allowed, “special accommodation shall be set aside to protect the welfare” of the child.<sup>201</sup>

The Quaker Council of European Affairs (QCEA), a non-governmental organization, issued a proposal for revisions and additions that could further improve the existing European Prison Rules.<sup>202</sup> The matter of PNPs was also addressed in this document. The new recommendations have two layers, one addresses the rights and interests of the imprisoned mother, and the second deals with those of the child.

193. *Report on Crime Problems*, *supra* note 191, at app. III, ¶12.

194. EUR. PARL. ASS., *Resolution on Women in Prison*, 13th Sess., Doc. No. 11619 (2009), <http://www.assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta09/ERES1663.htm>.

195. *Id.* § 9.1, § 9.3.

196. *Id.* § 9.5.

197. *Id.* § 10.1.

198. *Id.* § 9.4.

199. EUR. PARL. ASS., *Recommendation of the Comm. of Ministers on European Prison Rules*, 116th Sess. 952, Recommendation Rec(2006)2, § 36.1–36.3.

200. *Id.* § 36.1.

201. *Id.* § 36.3.

202. CHARLOTTE WETTON, QUAKER COUNCIL FOR EUROPEAN AFFAIRS, *THE EUROPEAN PRISON RULES: A GENDER CRITIQUE* (2006).

The document recognizes the special needs of pregnant and breastfeeding women. It proposes that more flexibility be allowed in the prison's regime for these women in order to meet their needs. For example, it offers that educational programs should also be provided to mothers caring for their children in prison if the inmate desires.<sup>203</sup> Additionally, juvenile mothers are recognized as a high priority group that should receive additional support.<sup>204</sup> The PNP application process was also identified as problematic. It was recommended that applications be designed in a simplified form, and help be provided to the applicants, when needed, in order to assure the accessibility of PNPs.<sup>205</sup>

The QCEA revision proposal also specifies that penal sentences should "not have a punitive effect on the family of the prisoner and shall take into account the rights of the child according to international treaties."<sup>206</sup> While at the moment the European Prison Rules only allow mothers with infants to take advantage of PNPs, the proposal emphasizes that the rules should explicitly apply to other minor children.<sup>207</sup> In order to minimize any potential detrimental effect of a PNP stay on children, it is recommended that "children or infants residing with their mother in prison shall be entitled to home visits" with their family on the outside to enable interaction and bonding.<sup>208</sup> It was also advised that the child have the option of receiving mail (including photographs and audio tapes) independently of their mother to facilitate regular contacts with the outside.<sup>209</sup>

These European efforts to address and regulate the accommodation of children in prison facilities is commendable, and is significantly more thorough than the minimal attention devoted to this issue in the United States. Additionally, the QCEA proposal has the potential to improve state practices, enhance uniformity, raise awareness for this substantial issue and its complexities, and assure that children experiencing maternal incarceration are provided with solutions that promote their best interests, including participation in PNPs. Nevertheless, there is still room for improvement. The majority of the instruments discussed above are merely declaratory, and are not binding for member states. Thus, no enforcement mechanisms are set up to ensure compliance. This results in variation in the quality of the PNPs and in the degree of conformity with the regional standards.

Furthermore, the exclusive focus of these initiatives is on the rights and interests of children. However, providing a more comprehensive perspective, which demonstrates the benefits to other entities—such as the states and the

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203. *Id.* at 20.

204. *Id.* at 26.

205. *Id.* at 27.

206. *Id.* at 40.

207. *Id.* at 27.

208. *Id.* at 28.

209. *Id.*

public—may enhance the power of these instruments to generate voluntary compliance by member states.

The relevant authorities in the United States have an opportunity to learn from the accumulated European experience with PNPs. This will of course require careful analysis and adaptation to the unique characteristics of the American correctional system and criminal justice practices. Nevertheless, the marked parallels in the nature and extent of the problem of children with incarcerated mothers in the two regions could make such inferences extremely valuable.

## VIII.

### POLICY RECOMMENDATIONS

Based on the extensive research that was conducted during the production of this article, and considering the multitude of benefits the administration of PNPs can potentially generate, several recommendations can be offered.

The current trend of PNPs' reemergence should be encouraged and accelerated, with a goal of enabling access to nursery programs in every state. Shared facilities in adjacent states can be instituted in the intermediary period, until all states establish independent programs. The possibility of providing federal funding to facilitate this process and incentivize states to develop PNPs, as part of the national effort to reduce the overflowing prison population, should be considered. Moreover, attempts should be made on a national level by courts, government agencies, NGOs, and advocacy groups in the field to regulate the administration of PNPs across states. The development of guidelines, regulations, and informative resources can facilitate the standardization process, promoting uniform program quality and methods of operation and optimizing the positive outcomes that can be yielded.

Efforts should be made to expand existing, as well as emerging, PNPs by increasing admission capacity and incorporating children born prior to incarceration, who meet the program's age-limit, especially when no alternative caregiver is available. Furthermore, the quality and quantity of services provided to mother and child in PNPs should be improved in order to aid rehabilitation, better the mother's parenting and independent living skills, and ensure the healthy development of the child. This will enable the utilization of PNP participation to incentivize positive behavior and motivate rehabilitation among incarcerated mothers.

Research examining the effect of PNPs on children of different age groups should be funded and encouraged. The findings will help adjust program design to address children's needs and ensure that the best interest of the child is served. Methodical research will also uncover any potential harm or risks to children included in PNPs, to address the concerns that have been raised by some PNP opponents. Lastly, such research will allow exploration of the possibility of extending the child's duration of stay at the program and of raising the existing

age limits.

Pursuing a comprehensive cost-benefit analysis for PNPs would help uncover all budgetary aspects of the program and enhance financial efficiency. Relying on this analysis, reasonable efforts should be made to maximize the investment in PNPs, to improve capacity, as well as the quantity and quality of services, to optimize the programs' impact within the available budget.

In order to improve long-term results, follow-up services and monitoring with a focus on parenting and childcare should be developed to assure the well-being of the child and assist the mother in the transition to independent living with the child upon release. This can be incorporated as part of the parole and probation framework, and mandated as a condition for PNP admission in appropriate cases.

The implementation of these recommendations can help establish PNPs as a viable and effective solution for children of incarcerated mothers. Furthermore, it will also enable states to capitalize on PNPs as a tool to advance the best interests of children, the rehabilitation of incarcerated mothers, and society's safety and well-being.

## IX.

### CONCLUSION

The number of women convicted of criminal offenses and sentenced to prolonged prison sentences continues to rise rapidly. The majority of these women are mothers of minor children, and the children's primary or sole caregivers. Many of these women give birth while incarcerated. Their infants and children are invisible and often forgotten victims of crime. Unfortunately, they are also frequently re-victimized by the system, which does not recognize their special needs and punishes them for their mother's wrongdoing. Some effective solutions are necessary to address the needs of these children.

Unless there is a candid willingness to reduce incarceration rates or develop alternative sentencing solutions, the implementation and expansion of PNPs should be seriously considered. As illustrated in this article, these programs serve a broad spectrum of interests and needs. Critics should overcome the controversial image of a young child confined behind bars. Instead, they should pursue extensive empirical studies that evaluate the true effect of PNPs on these children and devise strategies to improve these programs and eliminate factors that compromise the well-being of children. Of course, this solution should always be evaluated against the alternatives, though sadly they are not promising.

Some states have begun to recognize the advantages of PNPs, which is reflected in the reemergence of PNPs across the United States. If this trend continues, more infants, mothers, and communities will be able to enjoy the positive outcomes generated by Prison Nursery Programs.