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## Parental Prisoners: The Incarcerated Mother's Constitutional Right to Parent

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## COMMENTS

# PARENTAL PRISONERS: THE INCARCERATED MOTHER'S CONSTITUTIONAL RIGHT TO PARENT

EMILY HALTER\*

*The United States prison population has grown at alarming and unprecedented rates in recent decades, with certain states imprisoning more individuals than entire countries. Recently, the number of incarcerated women has climbed faster than that of men. The high rate of female incarceration has devastating effects on society, as many women are mothers and primary caregivers. Furthermore, every year, a number of mothers give birth in prison. When this happens, the mother's family and loved ones are often not permitted to be present. The mother gives birth in a room with only medical personnel and prison guards. She then generally has fewer than forty-eight hours to spend with her child before he or she is taken away. Sometimes the child is fortunate enough to live with other family members, but other times, the child is placed in the foster care system. Due to a number of restrictions and obstacles, many incarcerated women are forced to forfeit their paternal rights during incarceration.*

*While some programs exist in the United States, for the most part, there are few avenues of support for incarcerated mothers. This Comment explores the possibilities currently available to incarcerated mothers, arguing that the Fourteenth Amendment to the United States Constitution guarantees the right*

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\* B.A., Lewis & Clark College, 2014; J.D. candidate, Northwestern University Pritzker School of Law, 2018. I want to dedicate this piece to all of the currently and formerly incarcerated mothers across the country. You are beautiful, you are strong, and you are loved. I also want to thank my parents, Steve and Andrea, and my sister, Molly, for being forever supportive. Thank you to all of the members of the *Journal of Criminal Law and Criminology* for editing my piece. Thank you to Professor Kim Yuracko for providing feedback. Finally, a huge thank you to Professor Alan Mills for providing so much guidance.

*to parent and that right should be extended to incarcerated mothers.*

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#### INTRODUCTION

“My little baby, she doesn’t even know what’s coming.”<sup>1</sup> New mother, Kayla, cried on the phone to her mother and sister while shackled to the hospital bed.<sup>2</sup> Just hours before, she had given birth to a beautiful, healthy baby girl.<sup>3</sup> However, Kayla’s experience is far from the experience of most mothers in the United States. During her pregnancy, Kayla was serving a prison sentence at Logan Correctional Center in Lincoln, Illinois.<sup>4</sup> She was pregnant at the time of her arrest, and thus was required to carry her pregnancy to term from inside the prison walls.<sup>5</sup> Treated differently from the beginning, she was ordered to wear a pink jumpsuit, designating her soon-to-be mother

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<sup>1</sup> MAYA SCHENWAR, *LOCKED DOWN, LOCKED OUT* 84 (2014).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 81.

<sup>5</sup> *See generally id.*

status.<sup>6</sup> Rather than decorate a nursery and pick out baby clothes in anticipation of her daughter's arrival, Kayla was forced to fear the day she would meet her daughter and soon after say goodbye to her. Kayla knew that right after giving birth, she would return to prison alone, without her daughter.<sup>7</sup>

As her due date approached, she was taken to the hospital, and her labor was induced.<sup>8</sup> None of her family members were allowed to be present.<sup>9</sup> The only people allowed in the room with Kayla during some of the most unpleasant, yet life-changing, hours of her life were the prison guards and medical personnel.<sup>10</sup> After meeting her daughter, Angelica, Kayla had fewer than two days with her before Angelica was taken and Kayla returned to prison alone, without the child that she had carried inside her for the previous nine months.<sup>11</sup> The only communication she was permitted to have with the outside world during this time was "one call" with her mother and sister.<sup>12</sup> As she held her daughter close, savoring every precious second, she cried: "Oh my God, she is so beautiful. And I love her, I love her, I love her, and I just want to hold her forever."<sup>13</sup>

This is the true story of one woman's experience giving birth while incarcerated, which is further detailed in Maya Schenwar's *Locked Down, Locked Out: Why Prison Doesn't Work and How We Can Do It Better*.<sup>14</sup> This story, while unbelievably tragic, is not all that unique or uncommon for incarcerated women.<sup>15</sup> Mothers in both jails and prisons across the country go through similarly tragic experiences.<sup>16</sup> The vast majority of incarcerated women carry their pregnancies to term, give birth in isolation, and are then separated from their children immediately.<sup>17</sup> Often, incarcerated mothers struggle to get to know their children or maintain a positive relationship upon release.<sup>18</sup> Kayla was fortunate because her new daughter was able to live with family while she served the remainder of her sentence.<sup>19</sup> However, many mothers are not as lucky. Other incarcerated women end up at least

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<sup>6</sup> *Id.* at 81.

<sup>7</sup> *Id.* at 83.

<sup>8</sup> *Id.* at 82.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* 82–83.

<sup>11</sup> *Id.* at 83.

<sup>12</sup> *Id.* at 82–83.

<sup>13</sup> *Id.* at 84.

<sup>14</sup> *Id.* at 85.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 87.

temporarily losing their children to the foster care system, and some lose custody permanently.<sup>20</sup>

Though incarceration rates in the United States have started to decrease, there are still far too many people in prison.<sup>21</sup> As of 2016, state and federal prisons in the United States held a combined total of roughly 1.6 million people.<sup>22</sup> Women uniquely feel the effects of mass incarceration.<sup>23</sup> For a number of reasons, the number of incarcerated women has continued to increase, jumping 646% between 1980 and 2012, far quicker than the speed of male incarceration.<sup>24</sup> Women are currently the fastest growing segment of the prison population, accounting for a larger portion than ever before.<sup>25</sup> In 2014, there were a total of 215,332 women incarcerated, with 106,232 women in prisons and 109,100 in jails.<sup>26</sup>

The high rate of female incarceration is made more problematic when looking at the effect that it has on the rest of society. Almost two-thirds of incarcerated women in U.S. prisons are mothers.<sup>27</sup> Because the median age of incarcerated women is thirty-four, many of these women are new mothers

<sup>20</sup> LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUST. STAT. SPECIAL REP., PARENTS IN PRISON AND THEIR MINOR CHILDREN 5 (Aug. 2008), <https://www.bjs.gov/content/pub/pdf/pptmc.pdf>. In 2004, 10.9% of mothers in state prison had children in foster homes or other government agencies. *Id.*; Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN'S L.J. 65, 69–70 (2015).

<sup>21</sup> *See generally* Matthew Friedman, *Just Facts: The U.S. Prison Population is Down (A Little)*, BRENNAN CTR. JUST. (Oct. 29, 2015), <https://www.brennancenter.org/blog/us-prison-population-down-little>.

<sup>22</sup> Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2016*, PRISON POL'Y INITIATIVE (Mar. 14, 2016), <https://www.prisonpolicy.org/reports/pie2016.html>.

<sup>23</sup> *See generally* Sharona Coutts & Zoe Greenberg, *Women, Incarcerated*, PRISON LEGAL NEWS (June 3, 2015), <https://www.prisonlegalnews.org/news/2015/jun/3/women-incarcerated/>; Nicholas Kristof, *Mothers in Prison: "Prison got me sober, but it didn't get me anywhere."* N.Y. TIMES (Nov. 25, 2016), [http://www.nytimes.com/2016/11/25/opinion/sunday/mothers-in-prison.html?mwrsm=Facebook&\\_r=1](http://www.nytimes.com/2016/11/25/opinion/sunday/mothers-in-prison.html?mwrsm=Facebook&_r=1).

<sup>24</sup> Coutts & Greenberg, *supra* note 23.

<sup>25</sup> *Fact Sheet: Incarcerated Women and Girls*, SENT'G PROJECT 1 (Nov. 2015) <http://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf>; Valentina Zarya, *This is Why Women are the Fastest-Growing Prison Population*, FORTUNE (Dec. 10, 2015), <http://fortune.com/2015/12/10/prison-reform-women/>.

<sup>26</sup> *Fact Sheet: Incarcerated Women and Girls*, *supra* note 25, at 1. 2014 was the last time that this particular survey was conducted; therefore, it is the most recent information available. *Id.* The United States accounts for 30% of the world's incarcerated women, but only 5% of the world's female population. Aleks Kajstura & Russ Immarigeon, *States of Women's Incarceration: The Global Context*, PRISON POL'Y, <https://www.prisonpolicy.org/global/women/> (last visited: Sept. 9, 2017).

<sup>27</sup> SCHENWAR, *supra* note 1, at 85.

with young children,<sup>28</sup> and 60% of women in state prisons have children under the age of eighteen.<sup>29</sup> Once incarcerated, mothers are frequently separated from their young children for considerable amounts of time, given that the average sentence for a mother is over four years.<sup>30</sup> As a result, of the 74 million children in the United States in mid-2007, 1.7 million, or 2.3%, had a mother or father in prison.<sup>31</sup> At that time, prisons held 744,200 fathers and 65,600 mothers, with the number of mothers growing faster than the number of fathers.<sup>32</sup> According to a 2004 survey conducted by the Bureau of Justice Statistics, 16% of the children of federally incarcerated inmates and 23% of state inmates were age four or younger.<sup>33</sup> More than one-third of children would reach the age of eighteen before their parents were released from prison.<sup>34</sup> Experts believe that the number of children with incarcerated mothers is actually much higher than the recorded numbers because law-enforcement agencies are not required to gather specific information on prisoners' children, and many women fear that they will lose their children to the child welfare system if they disclose their children's existence to law enforcement.<sup>35</sup>

Estimates are that between 4% and 7% of women entering prison are pregnant, and most carry their pregnancies to term.<sup>36</sup> A small portion of these women become pregnant while in prison as a result of rape by prison guards.<sup>37</sup> Unfortunately, after giving birth, most of these women still have time left on their sentences, which separates new mothers from their infants for various periods of time.<sup>38</sup> On average, pregnant prisoners serve an additional six to twelve months after having their babies.<sup>39</sup>

After giving birth in prison, women face a host of physical and emotional problems. Perhaps the most difficult problem is being separated from

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<sup>28</sup> Coutts & Greenberg, *supra* note 23.

<sup>29</sup> Kristof, *supra* note 23.

<sup>30</sup> James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465, 467 (2014).

<sup>31</sup> GLAZE & MARUSCHAK, *supra* note 20, at 2.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.*

<sup>35</sup> Ann Farmer, *Mothers in Prison Losing All Parental Rights*, WOMEN'S ENEWS (June 21, 2001), <http://womensenews.org/2002/06/mothers-prison-losing-all-parental-rights/>.

<sup>36</sup> SCHENWAR, *supra* note 1, at 85; See Victoria Law, *Pregnant and behind bars: how the US prison system abuses mother-to-be*, GUARDIAN (Oct. 20, 2015), <https://www.theguardian.com/us-news/2015/oct/20/pregnant-women-prison-system-abuse-medical-neglect> (estimating that 3% of women in federal prisons, 4% of women in state prisons, and 5% of women in local jails are pregnant).

<sup>37</sup> Dwyer, *supra* note 30, at 467.

<sup>38</sup> SCHENWAR, *supra* note 1, at 85.

<sup>39</sup> *Id.*

their children. In most states, incarcerated women must give up their newborn babies within a few hours of delivery.<sup>40</sup> As a result, mothers are frequently denied the ability to nurse their newborns or to spend time and bond with them.<sup>41</sup> To make matters worse, these women are also frequently denied postpartum placement counseling and have a limited role in choosing who will raise their children during their incarceration.<sup>42</sup>

States take different approaches in addressing how much time an incarcerated mother may spend with her newborn.<sup>43</sup> Most states allow mothers twenty-four hours with their infants, while some allow forty-eight.<sup>44</sup> However, some states have prison nursery programs that allow mothers to stay with their babies for a longer period of time.<sup>45</sup> As an alternative to prison nursery programs, a few states also offer community-based residential parenting programs.<sup>46</sup>

If programs like these are not an option for a new mother, which is the case for a majority of incarcerated women in the United States, she has a few options.<sup>47</sup> She can put the newborn up for adoption, put the newborn into foster care, or give the newborn to relatives.<sup>48</sup> For many incarcerated mothers, there is a decent chance that the court will terminate their parental rights as a result of incarceration.<sup>49</sup> If parental rights are terminated, the mother is not legally the child's parent anymore.<sup>50</sup> She loses the right to visit or talk with the child and the right to decide how the child is raised and taken care of.<sup>51</sup> The child may also be adopted without her permission.<sup>52</sup> This harsh reality is unsettling and arguably unconstitutional. Forcing incarcerated

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<sup>40</sup> Sarah Yager, *Prison Born*, ATLANTIC (Jul./Aug. 2015), <https://www.theatlantic.com/magazine/archive/2015/07/prison-born/395297/>.

<sup>41</sup> Deborah Ahrens, *Incarcerated Childbirth and Broader "Birth Control": Autonomy, Regulation, and the State*, 80 MO. L. REV. 1, 30 (2015).

<sup>42</sup> *Id.*

<sup>43</sup> Emily Kaiser, *Pregnant in Prison: 6 Shocking Realities About Giving Birth Behind Bars*, CRIMEFEED (June 11, 2015), <http://crimefeed.com/2015/06/6-things-youll-experience-giving-birth-prison/>.

<sup>44</sup> *Id.*

<sup>45</sup> Warner, *supra* note 20, at 72.

<sup>46</sup> Anne E. Jbara, *The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Programs*, 87 IND. L.J. 1825, 1825 (2012).

<sup>47</sup> See Warner, *supra* note 20, at 67–68.

<sup>48</sup> *Id.* at 68.

<sup>49</sup> *Id.* at 69.

<sup>50</sup> Educ. for Just., *Termination of Parental Rights (TPR)*, LAWHELPMN 1 (2018), <https://www.lawhelpmn.org/files/1765CC5E-1EC9-4FC4-65EC-957272D8A04E/attachments/1F9ED560-F5C1-484D-8909-C20090BC9C37/f-10-termination-of-parental-rights.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

mothers and their children to live apart is a tragic policy, and one that separates the United States from most other countries in the world.<sup>53</sup> It is impractical and ill-advised and has life-long detrimental effects on both mother and child.

For decades, the Supreme Court has recognized the constitutionally protected right to parent under the Fourteenth Amendment.<sup>54</sup> While the Supreme Court has chipped away at the rights of prisoners in other areas, finding that many rights are forfeited at the prison doors, it has never ruled on the status of parental rights during incarceration.<sup>55</sup>

This Comment argues that incarcerated mothers have a right to parent their children under the Fourteenth Amendment, and thus, infants should be allowed to remain with their incarcerated mothers for some period of time through programs such as prison nurseries or community-based alternatives. However, even if courts do not find that such a right guarantees mothers the physical right to parent while incarcerated, legislatures should protect incarcerated women's ability to parent for policy reasons. Part I briefly discusses the few programs that currently exist to allow incarcerated mothers to remain with their infants and young children.<sup>56</sup> Part II outlines what happens to parental rights once a mother is incarcerated, considering who generally cares for the children and how difficult it is for a mother to regain parental rights once she loses them.<sup>57</sup> Part III gets to the heart of this legal issue by illustrating that the Supreme Court has, for years, read the Fourteenth Amendment to establish and protect a fundamental right to parent.<sup>58</sup> This Part ends with

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<sup>53</sup> Warner, *supra* note 20, at 66–80. Outside of the United States, only a small number of countries do not have prison nurseries, and the prison nurseries that they have allow the child to stay with the mother for much longer. *Id.* at 66. Germany's Preungesheim prison is considered to be the world's most comprehensive program for imprisoned women and their children, recognizing motherhood "as a bona fide job." *Id.* at 76. Low-security women can keep their children with them until the age of five, while high-security women can keep them until the age of three. *Id.* In Bolivia, mothers and fathers are permitted to bring their children to prison with them, as long as the children are age six and younger. *Id.* at 77. Mothers in Colombia are allowed to keep their children in prison with them until they reach the age of three. *Id.* at 78. In Mexico, there are roughly two thousand children under the age of six living with their mothers in prison. *Id.* In Kenya's Lang'ata prison, women are allowed to keep their children in prison with them until they reach four years old. *Id.* at 80.

<sup>54</sup> See generally *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>55</sup> See *Overton v. Bazzeta*, 539 U.S. 126 (2003) (chipping away at the rights of prisoners by upholding prison regulations restricting the visitation rights of inmates). The Court in *Overton* recognized that outside of the prison context, individuals have a right to maintain certain familial relationships, but freedom of association is a right "least compatible" with incarceration because the very object of imprisonment is confinement. *Id.*; see also *Gerber v. Hickman*, 291 F.3d 617, 619 (9th Cir. 2001).

<sup>56</sup> See *infra* Part I.

<sup>57</sup> See *infra* Part II.

<sup>58</sup> See *infra* Part III.



a discussion of *Turner v. Safley*,<sup>59</sup> which justifies protecting the parental rights of incarcerated mothers.<sup>60</sup> Part IV continues to apply the logic used by the Court in *Turner*<sup>61</sup> to evince that the parental rights of incarcerated mothers are protected under the Fourteenth Amendment and should be treated by courts as such.<sup>62</sup> Part V addresses the policy arguments for and against allowing incarcerated mothers to remain with their infants.<sup>63</sup> Finally, Part VI explains two particular policies that disproportionately impact incarcerated mothers and further support the protection of an incarcerated mother's right to parent.<sup>64</sup> This Comment concludes by acknowledging that while the parental rights of incarcerated mothers should be protected, it is difficult to identify the best method for protecting those rights.<sup>65</sup> Acknowledging the importance of maintaining the mother-child relationship during a mother's term of incarceration is a critical first step; however, the courts and legislatures need to take steps to repeal harmful legislation and pass beneficial legislation encouraging programs to support incarcerated mothers.

### I. WHY AND HOW WOMEN END UP INCARCERATED

Our current system operates against women, many of whom are mothers. Both custody statutes<sup>66</sup> and drug laws<sup>67</sup> act together to make matters worse for incarcerated females. The effects of these policies provide further persuasive justifications for allowing women to remain with their infants during incarceration. As this Comment will explain, the nationwide enforcement of various drug laws sends a disproportionate number of women to jail, predominantly minority women. An overwhelming number of these women need treatment rather than incarceration, and another large portion are incarcerated for the behavior of the dominant men in their lives.<sup>68</sup> Women often

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<sup>59</sup> See generally *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>60</sup> See *infra* Part III.

<sup>61</sup> See generally *Turner*, 482 U.S. at 78.

<sup>62</sup> See *infra* Section IV.

<sup>63</sup> See *infra* Section V.

<sup>64</sup> See *infra* Section VI.

<sup>65</sup> See *infra* Conclusion.

<sup>66</sup> SCHENWAR, *supra* note 1, at 86; see generally Mariely Downey, *Losing More Than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN'S L.J. 41, 47 (2000–2001)

<sup>67</sup> *Women, LGBTQIA+ People & the Drug War*, DRUG POL'Y ALL., <http://www.drugpolicy.org/issues/women-lgbtqia-drug-war> (last visited Oct. 10, 2017).

<sup>68</sup> *Id.*; *Words from Prison: Women's Incarceration and Loss of Parental Rights*, AM. C.L. UNION, <https://www.aclu.org/other/words-prison-womens-incarceration-and-loss-parental-rights> (last visited Nov. 10, 2018) [hereinafter *Words from Prison*]; Justin Glawe, *How Drug Trafficking Conspiracy Laws Put Regular People in Prison for Life*, VICE (Sept. 30, 2015) [https://www.vice.com/en\\_us/article/how-drug-trafficking-conspiracy-laws-put-regular-people-in-prison-for-life-930](https://www.vice.com/en_us/article/how-drug-trafficking-conspiracy-laws-put-regular-people-in-prison-for-life-930).

face steep sentences for even minor drug offenses.<sup>69</sup> To make matters worse, the Adoption and Safe Families Act makes it difficult for women to keep custody of their children while they are serving their sentences.<sup>70</sup> This has two implications. First, because it is often difficult for incarcerated women to maintain custody rights, they should be allowed to remain with their infants while incarcerated since the alternative is likely severing their parental rights altogether. Second, without addressing the issues with the United States' drug and child custody laws, an incarcerated mother's constitutional right to parent will never fully be protected.

Drug policies in the United States disproportionately affect women, and more specifically, mothers.<sup>71</sup> In state prisons at the end of 2013, nearly 25% of women were incarcerated for drug offenses, compared to only 15% of men.<sup>72</sup> The same discrepancy is found in federal prisons.<sup>73</sup> At the end of September 2014, 59% of women were incarcerated for drug offenses, compared to only 50% of men.<sup>74</sup> More than 75% of the women incarcerated are mothers, many of whom are the sole caregivers for their children.<sup>75</sup>

Conspiracy provisions are considered one of the "most egregious examples" of the way in which the war on drugs has negatively impacted women, contributing further to the increase in drug convictions among women.<sup>76</sup> Under these provisions, once a prosecutor can establish a "conspiracy," each participant can be held liable for the actions of every other member, regardless of whether they had any idea what was happening.<sup>77</sup> Often, women play only a very small role in drug sales but are held accountable for the entire amount of drugs attributed to the conspiracy.<sup>78</sup> As a result of conspiracy drug laws, some women end up going to prison largely because of the criminal behavior of their husbands, boyfriends, and partners.<sup>79</sup> State and federal prosecutors have a much lower burden of proof for conspiracy drug offenses than they do for proving other violent crimes, making it easier for these women to be convicted.<sup>80</sup> Furthermore, in these cases, women are frequently

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<sup>69</sup> *Id.*

<sup>70</sup> SCHENWAR, *supra* note 1, at 86; Downey, *supra* note 66, at 47.

<sup>71</sup> See generally *Fact Sheet: Women, Prison, and the Drug War*, DRUG POL'Y ALL. (Feb. 2016), [http://www.drugpolicy.org/sites/default/files/DPA\\_Fact%20Sheet\\_Women%20Prison%20and%20Drug%20War%20%28Feb.%202016%29.pdf](http://www.drugpolicy.org/sites/default/files/DPA_Fact%20Sheet_Women%20Prison%20and%20Drug%20War%20%28Feb.%202016%29.pdf).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Women, LGBTQIA+ People & the Drug War*, *supra* note 67.

<sup>76</sup> *Id.*; see e.g., *Words from Prison*, *supra* note 68.

<sup>77</sup> *Words from Prison*, *supra* note 68.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Glawe, *supra* note 68.

given harsher sentences because they have little information to trade with law enforcement, given the fact that they were not acutely aware of what was going on to begin with.<sup>81</sup> Women who refuse to testify against a partner, even if out of fear of death or injury, can often be forced to serve longer sentences than the partner who actually committed the crime.<sup>82</sup> This is made more problematic by that fact that in some instances, these convicted women were in abusive relationships with the actual drug offender that they were unable to get out of.<sup>83</sup> Thus, flaws in our drug policy and criminal justice system are sending nonviolent, capable mothers to jail, and then preventing them from raising their children. Coupling conspiracy provisions with harsh mandatory minimum sentencing laws, it is easy for women to get sent to jail, but hard for them to get out.<sup>84</sup>

The fact that many women are imprisoned not for intentional, pre-meditated criminal activity, but because they are victims of circumstance, negates the frequently made argument that they behaved poorly and thus deserve to lose their parental rights. For example, Angela was a first-generation law school graduate with a Master's degree in business.<sup>85</sup> She owned a successful luxury car dealership and was a single mother.<sup>86</sup> Wanting a father for her son, she married an accountant named Andre and eventually allowed him to take over the book-keeping for her business.<sup>87</sup> One day, Andre was arrested, and Angela was forced to scramble to post his bail.<sup>88</sup> Angela followed Andre's instructions and called a client who Andre said owed them money and wired that money into his account.<sup>89</sup> Shortly thereafter, Angela was arrested because, unbeknownst to her, the man she called was a drug distributor, and because of the conspiracy statute, Angela was implicated in the entire drug conspiracy.<sup>90</sup>

Drug addiction is also accompanied by harsher than necessary punish-

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<sup>81</sup> *Id.*

<sup>82</sup> Tessie Castillo, *How the Drug War Destroys Women's Lives: Why are women the fastest growing prison population in the US?*, ALTERNET (Feb. 12, 2015), <http://www.alternet.org/news-amp-politics/sexism-drug-war>.

<sup>83</sup> See e.g., Casey Tolan, *How a first-time drug charge became a life sentence for this mother of two* (Dec. 10, 2015), <http://fusion.net/story/243253/ramona-brant-life-sentence-drug-charge/>.

<sup>84</sup> *Women, LGBTQIA+ People & the Drug War*, *supra* note 67.

<sup>85</sup> *Words from Prison*, *supra* note 68.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

ment, negatively impacting women and mothers. States respond by incarcerating drug addicted women with little to no treatment.<sup>91</sup> Rather than giving pregnant drug addicts the help they so desperately need and deserve, these laws ensure that pregnant women are locked up.<sup>92</sup> Imprisoning these women is arguably a much worse alternative than treatment because prisons are not equipped to handle drug addiction.<sup>93</sup> Given this, most women in prison should not automatically be considered bad mothers. Perhaps if these mothers received drug treatment, rather than a prison sentence, they could be fit to parent.

## II. EXISTING PROGRAMS

### A. PRISON NURSERIES

A small number of state and federal prisons around the country operate prison nurseries and community-based residential parenting programs, which allow young children to remain with their incarcerated mothers.<sup>94</sup>

Prison nurseries permit a newborn child to stay with his or her mother in prison or jail for a certain amount of time.<sup>95</sup> As of 2010, nine states offered prison nursery programs: New York, Nebraska, South Dakota, Ohio, Washington, Illinois, Indiana, California, and West Virginia.<sup>96</sup> Of these nine, six allow newborns to remain with their incarcerated mother for up to eighteen months.<sup>97</sup> These nurseries range in size, with the maximum number of mother and infant pairs reaching only twenty-nine at New York's Bedford Hills Correctional Facility.<sup>98</sup> To qualify for these programs, the mother must be a nonviolent offender with a clean prison record with no history of child abuse, and she must have given birth while incarcerated.<sup>99</sup> Mothers who had given birth prior to incarceration, even if only a few weeks before, are ineligible to participate in prison nursery programs.<sup>100</sup> Sometimes the prison nurseries are on the prison grounds in a separate wing, while other times they

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<sup>91</sup> See Sharona Coutts & Zoe Greenberg, 'No Hope for Me': Women Stripped of Parental Rights After Minor Crimes, REWIRE (Apr. 2, 2015), <https://rewire.news/article/2015/04/02/hope-women-stripped-parental-rights-minor-crimes/>. See, e.g., *Women, LGBTQIA+ People & the Drug War*, *supra* note 67.

<sup>92</sup> Sharona Coutts & Zoe Greenberg, *supra* note 91; *Women, LGBTQIA+ People & the Drug War*, *supra* note 67.

<sup>93</sup> *Id.*

<sup>94</sup> Jbara, *supra* note 46, at 1825.

<sup>95</sup> Warner, *supra* note 20, at 66.

<sup>96</sup> *Id.* at 68.

<sup>97</sup> *Id.* at 72.

<sup>98</sup> *Id.* at 72.

<sup>99</sup> *Id.* at 72.

<sup>100</sup> Jbara, *supra* note 46, at 1832.

are off-site.<sup>101</sup> Many prison nursery programs also provide additional support to mothers, such as parenting classes, counseling, substance abuse treatment, life skills training, and education.<sup>102</sup>

More specifically, at Bedford Hills Correctional Facility, mothers can access “daily parenting classes, daycare, crisis intervention, advocacy, child placement assistance and discharge assistance,”<sup>103</sup> as well as mandated drug and anger counseling.<sup>104</sup> Children and mothers live together in unlocked rooms that are decorated and contain toys, such that the rooms more closely resemble a child’s nursery.<sup>105</sup> South Dakota, on the other hand, uses a slightly different prison nursery model.<sup>106</sup> It does not limit the number of mother-infant pairs allowed at one time, but it only allows the pairs to stay in the nursery for up to thirty days.<sup>107</sup> In order to qualify, the only requirement is that the incarcerated mother be nonviolent; however, qualifying mothers must pay \$288, which is a hindrance for many.<sup>108</sup> Mother and infant pairs live in their own rooms within the general population at the facility.<sup>109</sup> However, infants are still not allowed to be around other general population inmates.<sup>110</sup>

## B. COMMUNITY-BASED RESIDENTIAL PARENTING PROGRAMS

Community-based residential parenting programs are similar to prison nursery programs.<sup>111</sup> In a 2010 study, Massachusetts reported having these community-based alternatives.<sup>112</sup> However, the atmosphere of these programs is quite different from that of prison nurseries, and the programs themselves are meant to allow women to take control of their own lives.<sup>113</sup> Convicted women sentenced to a period of incarceration in these programs are

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<sup>101</sup> Warner, *supra* note 20, at 66.

<sup>102</sup> *Id.* at 67.

<sup>103</sup> *Id.* at 72 (quoting *Ministerial, Family and Volunteer Services*, N.Y. ST. DEP’T OF CORRECTIONS & CMTY. SUPERVISION, <http://www.doocs.ny.gov/ProgramServices/ministerial.html#fsp>) (last visited Apr. 19, 2018)).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 73.

<sup>107</sup> *Id.* at 73–74.

<sup>108</sup> *Id.* at 74.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Jbara, *supra* note 46, at 1836–37.

<sup>112</sup> See generally REBECCA PROJECT HUM. RTS. & NAT’L WOMEN’S L. CTR., *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*, NAT’L WOMEN’S L. CTR. (Oct. 2010), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/mothersbehindbars2010.pdf>

<sup>113</sup> Jbara, *supra* note 46, at 1836–37.

allowed to live in the community rather than in prison.<sup>114</sup> These community-based facilities are less restrictive than ordinary prisons and are intended to feel more like home.<sup>115</sup> Most of these programs “allow children to stay with their mothers until they reach school age,”<sup>116</sup> which is in stark contrast to prison nursery programs’ early age cut-off.<sup>117</sup> Oftentimes, a history of substance abuse is required for admittance into these programs.<sup>118</sup>

In the 1980s, the United States government established the Mothers and Infants Nurturing Together (MINT) program.<sup>119</sup> This program allows pregnant women to live in a “residential setting” from the time their child is born to the age of three months, and after three months, the inmates can apply for an extension.<sup>120</sup> This program, however, has “stringent requirements”: women must be in their last three months of pregnancy, have fewer than five years remaining on their sentences, be eligible for furlough, and pay for the child’s medical care.<sup>121</sup> Only a small number of women in federal prison participate in MINT, and access is restricted to newborns only.<sup>122</sup> In 2010, there were seven MINT sites around the country, available for only fifty-nine mother/infant pairs combined across the country.<sup>123</sup>

### III. PARENTAL RIGHTS UPON INCARCERATION

When a child is born, state law automatically gives the child’s birth mother parental rights, which the state can only remove from someone who is unwilling or unable to care for her child.<sup>124</sup> Parental rights are generally not terminated at the moment that someone is incarcerated.<sup>125</sup> However, mothers occasionally lose their parental rights during, and as a result of, incarceration.<sup>126</sup> There are three common ways for an incarcerated mother to lose her parental rights.<sup>127</sup> First, she could lose her rights if “the child is in

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<sup>114</sup> *Id.* at 1836.

<sup>115</sup> *Id.* at 1837.

<sup>116</sup> *Id.* at 1836.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1837.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1837–38.

<sup>121</sup> *Id.* at 1838.

<sup>122</sup> REBECCA PROJECT HUM. RTS. & NAT’L WOMEN’S L. CTR., *supra* note 112, at 8.

<sup>123</sup> *Id.* at 36.

<sup>124</sup> Dwyer, *supra* note 30, at 476.

<sup>125</sup> *Id.*

<sup>126</sup> Pamela Lewis, *Behind the Glass Wall: Barriers That Incarcerated Parents Face Regarding the Care, Custody and Control of Their Children*, 19 J. AM. ACAD. MATRIM. L. 97, 108 (2004).

<sup>127</sup> *Id.* at 109

the care and custody of the state and the state initiates the proceeding.”<sup>128</sup> Second, a woman could also lose her rights if the child’s father remarries and initiates proceedings so that his new wife can adopt the child.<sup>129</sup> Third, the child can end up living with another family member who initiates adoption proceedings, thereby severing her rights.<sup>130</sup>

An incarcerated mother may try to avoid giving up permanent custody of her child by temporarily signing her custody rights over to another competent adult, using the “power of attorney” privileges.<sup>131</sup> However, a study of incarcerated mothers in Illinois state prisons and the Cook County Jail from 1990 to 2000 revealed that “these [incarcerated] mothers were one-half as likely to reunify with their children in foster care than were non-incarcerated mothers whose children were in foster care.”<sup>132</sup>

According to a 2004 survey of children with mothers incarcerated in state prisons, 37% lived with their other parent, roughly 45% lived with a grandparent or set of grandparents, 23% lived with other relatives, 8% lived with friends, and 11% lived in foster homes.<sup>133</sup> Once a child ends up in the foster system, it is incredibly difficult to get him or her out.<sup>134</sup> In order to regain custody after incarceration, women must find jobs that pay well enough to support their families, attend parenting programs and substance abuse classes, if necessary, and study basic life skills.<sup>135</sup> It is difficult for many formerly incarcerated women to find jobs because they often lack a driver’s license, as well as a high school diploma or equivalent degree.<sup>136</sup> Many have issues finding a home where they can live with their children.<sup>137</sup> Felons often do not have family or friends to live with, and halfway houses

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> James Hirby, *If a Parent Goes to Jail, Can She Sign Over Custody to her Boyfriend Using Power of Attorney?*, LAW DICTIONARY, <http://thelawdictionary.org/article/if-a-parent-goes-to-jail-can-she-sign-over-custody-to-her-boyfriend-using-power-of-attorney/> (last visited Nov. 12, 2017).

<sup>132</sup> Steve Christian, *Children of Incarcerated Parents*, NAT’L CONF. ST. LEGISLATURES (Mar. 2009), at 5, <http://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf>.

<sup>133</sup> GLAZE & MARUSCHAK, *supra* note 20, at 5. According to the same survey, when children had an incarcerated father, 84.2% lived with their other parent and only around 3% ended up in foster care. *Id.*

<sup>134</sup> Angeli R. Rasbury, *Out of Jail, Mothers Struggle to Reclaim Children*, WOMEN’S E-NEWS (Sept. 17, 2006), <http://womensenews.org/2006/09/out-jail-mothers-struggle-reclaim-children/>.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

do not allow children.<sup>138</sup> For these reasons, once parental rights are terminated, it is usually final.<sup>139</sup>

#### IV. FOURTEENTH AMENDMENT RIGHT TO PARENT

This Comment argues that courts should recognize that incarcerated women have a fundamental right under the Fourteenth Amendment to parent their children. Consequently, state and federal prisons in the United States should be required to provide options to facilitate that right.

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>140</sup> It protects individuals from government interferences with their fundamental rights and liberties.<sup>141</sup> The Supreme Court has long recognized that parents have a right to control and direct the upbringing of their children under the Due Process Clause of the Fourteenth Amendment.<sup>142</sup> In *Prince v. Massachusetts*, the Supreme Court recognized parents’ fundamental right to make decisions concerning the care, custody, and control of their children.<sup>143</sup> In *Prince*, the Court weighed the interest of the parent versus the interest of society in protecting the rights of children, acknowledging that while prior precedent established a parent’s right to care for his or her child, the right to parent does not entirely nullify the state’s ability to act in the best interest of the child.<sup>144</sup> In *Quilloin v. Walcott*, the Court reaffirmed that the relationship between parent and child is constitutionally protected.<sup>145</sup> In *Quilloin*, a biological father claimed that he was entitled, as a matter of Due Process and Equal Protection, to an absolute veto over adoption proceedings of his biological child, absent a ruling that he was unfit to parent.<sup>146</sup> While ultimately prioritizing the child’s well-being over the father’s interest, the Court acknowledged the importance of constitutionally protecting the parent-child relationship.<sup>147</sup>

In *Troxel v. Granville*, the Court went even further and held that the Constitution recognizes a fundamental right to parent.<sup>148</sup> In this case, the liberty interest at issue was a mother’s care, custody, and control of her chil-

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<sup>138</sup> *Id.*

<sup>139</sup> Farmer, *supra* note 35.

<sup>140</sup> U.S. CONST. amend. XIV, § 1.

<sup>141</sup> *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>142</sup> *Id.* at 65–66.

<sup>143</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>144</sup> *Id.* at 166–69.

<sup>145</sup> *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

<sup>146</sup> *Id.* at 246–47.

<sup>147</sup> *Id.* at 255.

<sup>148</sup> *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000).



dren, which the Court acknowledged was “the oldest of the fundamental liberty interests recognized by this Court.”<sup>149</sup> The Court discussed that in light of the extensive precedent, the Due Process Clause obviously protects the fundamental rights of parents to make decisions concerning the care, custody, and control of their children.<sup>150</sup>

*Troxel* concerned a visitation petition and a Washington state statute that allowed any person to petition the court for visitation at any time as long as the visitation was in the best interest of the child.<sup>151</sup> The Washington statute did not give the desires or opinions of the parent any additional weight when deciding what was best for the child.<sup>152</sup> The Court ultimately held that the Washington statute was unconstitutional, explaining that the lower court did not find, nor did the plaintiff allege, that the defendant was an unfit parent.<sup>153</sup>

Incarcerated mothers should be able to make a claim that they have a right to parent their children because *Troxel* established a constitutionally protected right for mothers to parent their children in all instances, unless they are deemed to be unfit.<sup>154</sup> Opponents may argue that incarcerated mothers are unfit parents because they have been convicted of a crime, and therefore, *Troxel* does not give them the right to parent while incarcerated.<sup>155</sup> According to *Troxel*, however, so long as a parent adequately cares for his or her child, there is no reason for the state to inject itself.<sup>156</sup> Just because a woman is incarcerated does not mean that she has not, or cannot, adequately care for her child. Because of the structure of our criminal justice system and various drug laws, which will be discussed later in this Comment, women are often incarcerated for crimes entirely unrelated to their ability to parent.<sup>157</sup> No Supreme Court decision has ever deemed all incarcerated parents to be unfit.<sup>158</sup>

Opponents also argue that the very nature of prison itself makes incarcerated mothers unfit to parent.<sup>159</sup> Regardless of whether the mother is capable of being a good parent, the very fact that she would have to raise her child, surrounded by convicted felons, guards, threats, and perhaps violence may mean that no matter how hard an incarcerated mother tries, she will be unable

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<sup>149</sup> *Id.* at 65.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 60.

<sup>152</sup> *Id.* at 69.

<sup>153</sup> *Id.* at 68.

<sup>154</sup> *See generally id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 68.

<sup>157</sup> *See generally* Coutts & Greenberg, *supra* note 91; *see infra* Part VII.

<sup>158</sup> Based on a survey of United States Supreme Court precedent.

<sup>159</sup> Dwyer, *supra* note 30, at 485–92.

to provide a suitable environment in which to raise her child.<sup>160</sup> While this argument is valid, both prison nurseries and community-based residential programs are designed specifically to feel more like a home for infants and young children than the regular prison environment.<sup>161</sup> Furthermore, while prisons may be a less than ideal place for a child to grow up, they may often be better than an uncertain life outside prison.<sup>162</sup> Evidence suggests that because mothers are frequently the primary caregivers, the imprisonment of mothers can destroy a family in a variety of ways, making the lives of her children difficult.<sup>163</sup> Parental incarceration often creates economic strain on households, leaving children with caregivers who are not financially capable of meeting their needs.<sup>164</sup> Children of incarcerated parents are also often forced to move and change schools, which introduces massive uncertainty, posing a risk to children's healthy development.<sup>165</sup> Children who at some point had a parent incarcerated have been found to be at significantly greater risk of experiencing material hardship and familial instability, such as lower standards of living, inability to find stable housing, divorce, and "non-routine school changes."<sup>166</sup>

Furthermore, at present, most incarcerated women are in prison for non-violent crimes,<sup>167</sup> suggesting that they pose a far lesser risk, if any at all, to their children and to society at large. In fact, roughly 84% of women are incarcerated for nonviolent crimes, a majority of which are drug-related.<sup>168</sup>

Despite the extensive Supreme Court precedent recognizing parental rights and the importance of familial preservation, the Supreme Court is willing to erode the rights of prisoners by arguing that imprisonment by its very nature involves the abridgement of many rights.<sup>169</sup> In *Overton v. Bazzeta*, the plaintiff brought a suit alleging that a Michigan regulation restricting the visitors of prison inmates violated substantive due process under the Fourteenth Amendment and the First and Eighth Amendments, as applicable through the Fourteenth Amendment.<sup>170</sup> While the Constitution guarantees (and the Supreme Court recognizes) a person's freedom to associate, the Court held that the restriction did not violate the Constitution because the state had a security

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<sup>160</sup> *Id.*

<sup>161</sup> Jbara, *supra* note 46, at 1837.

<sup>162</sup> *See generally* Kristof, *supra* note 23.

<sup>163</sup> *Id.*

<sup>164</sup> Christian, *supra* note 132, at 3, 9.

<sup>165</sup> *Id.* at 3.

<sup>166</sup> *Id.*

<sup>167</sup> Coutts & Greenberg, *supra* note 23.

<sup>168</sup> *Id.*

<sup>169</sup> *Overton v. Bazzeta*, 539 U.S. 126, 131 (2003).

<sup>170</sup> *Id.* at 129–30.

interest in limiting the number of visitors that inmates had.<sup>171</sup> The Court explained that because the purpose of prison is confinement, prisoners surrender many of the liberties and privileges enjoyed by other citizens, one of those liberties being the freedom to associate.<sup>172</sup> Similarly, the Ninth Circuit noted in *Gerber v. Hickman* that “a necessary corollary to [incarceration] is the separation of the prisoner from his spouse, his loved ones, his friends, family, and children.”<sup>173</sup> Following similar logic, it is possible that the Supreme Court could extend this logic to the ability of mothers to parent while incarcerated, suggesting that they lose that right at the prison door.

That being said, this Comment argues that a mother’s fundamental right to parent should be protected even during incarceration under the precedent established in *Turner v. Safley*.<sup>174</sup> In *Turner*, the Court was asked to determine the constitutionality of two Missouri Division of Corrections regulations.<sup>175</sup> The first regulation permitted an inmate to marry only with superintendent approval, which could only be given when there was a “compelling reason[] to do so.”<sup>176</sup> The second regulation prohibited all inmate correspondence between prison facilities, unless the inmates were family members or discussing legal matters.<sup>177</sup> The Court provided a new rule for analyzing the constitutionality of regulations that restricted an inmate’s constitutional rights, deciding that if a regulation interferes with an inmate’s constitutional rights, the regulation is valid as long as it “is reasonably related to legitimate penological interests.”<sup>178</sup> The Court set out four factors to evaluate when deciding whether a regulation “reasonably related to legitimate penological interests”: (1) whether there is a “valid, rational connection” between the prison regulation and the legitimate, neutral government interest justifying it; (2) “whether there are alternative means of exercising the asserted constitutional right that remain open to inmates;” (3) “the accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;” and (4) “the absence of ready alternatives is evidence of the reasonableness of a prison regulation.”<sup>179</sup>

Ultimately, the Court upheld the restriction on correspondence, holding

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<sup>171</sup> *Id.* at 133.

<sup>172</sup> *Id.* at 131.

<sup>173</sup> 291 F.3d 617, 620 (9th Cir. 2002) (relying on the Court’s rationale in *Montayne v. Haymes*, 427 U.S. 236 (1976)).

<sup>174</sup> See generally *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>175</sup> *Id.* at 81.

<sup>176</sup> *Id.* at 82.

<sup>177</sup> *Id.* at 81.

<sup>178</sup> *Id.* at 89.

<sup>179</sup> *Id.* at 90.

that it was reasonably related to a legitimate security interest.<sup>180</sup> However, regarding the marriage restriction, the Court held that there was no reasonable relationship between the restriction and a “legitimate penological interest.”<sup>181</sup> Because the right to marry is a constitutionally protected right, it is subjected to restrictions in prison, but cannot be denied.<sup>182</sup> The Court reasoned that because inmate marriages are expressions of emotional support and public commitment, many religions recognize marriages as having spiritual significance, most inmates will eventually be released, and marital status is often a precondition to the receipt of government benefits and rights, the marital rights of prisoners are protected.<sup>183</sup>

#### V. THE LOGIC OF *TURNER* GRANTS INCARCERATED MOTHERS THE RIGHT TO PARENT

A survey of United States Supreme Court precedent confirms that *Turner*<sup>184</sup> is the most applicable case when analyzing whether incarcerated mothers should have the right to parent. *Turner* provides the best argument for why the parental rights of incarcerated women should be protected under the Fourteenth Amendment.<sup>185</sup> Applying both the *Turner* factors, as well as the policy justifications provided by the Court,<sup>186</sup> to the issue of parental rights of incarcerated mothers, the courts should protect the parental rights of incarcerated mothers under the Fourteenth Amendment. This Part will first apply the *Turner* factors to the issue at hand.<sup>187</sup> Then, it will apply and compare the policy justifications put forth in *Turner*.<sup>188</sup> Ultimately, this section concludes that under *Turner*,<sup>189</sup> incarcerated mothers should be provided the opportunity to remain with their infants during incarceration.

Using the *Turner* framework, the ultimate question is whether denying an incarcerated mother the right to remain with her newborn is “reasonably related to legitimate penological interests.”<sup>190</sup> The most persuasive “penological interest” commonly used to justify regulations or policies that deprive

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<sup>180</sup> *Id.* at 91. According to the Court, a legitimate security interest existed because mail between penal institutions could be used to communicate escape plans or arrange acts of violence. *Id.*

<sup>181</sup> *Id.* at 95.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 95–96.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 89.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> See generally *supra* Part IV.

incarcerated mothers the right to parent is that the state has a legitimate interest in protecting the child, and growing up in prison is not in a child's best interest.<sup>191</sup> Thus, this is the penological interest that will be analyzed using the *Turner* factors.

The first factor is whether there is a "valid, rational connection" between the regulation and the legitimate, neutral government interest to justify it.<sup>192</sup> A regulation will be struck down if the "logical connection is so remote as to render the policy arbitrary and irrational."<sup>193</sup> There is likely a valid, rational connection between disallowing children to remain with their incarcerated mothers and protecting the interest and well-being of the child. Prison can be dangerous, isolating, and stressful.<sup>194</sup> Thus, it makes sense for the government to be hesitant about exposing young children to prison life. It is possible that other inmates in the prison could retaliate out of jealousy that some women are allowed to remain with their children or that infants could get hurt by another inmate or their own mother.<sup>195</sup>

The government could argue that its objective in denying this right is legitimate and neutral because on its face, no one group of people is targeted. However, given the way in which children of color are disproportionately affected by denying incarcerated mothers the ability to bond with their child,<sup>196</sup> it could be argued that the objective is, in fact, not neutral. Because people of color are more likely to be imprisoned, black and Hispanic children are overrepresented among the numbers of children with incarcerated parents.<sup>197</sup> In 2007, one in fifteen black children and one in forty-two Hispanic children had a parent in prison, compared to only one in 111 white children.<sup>198</sup>

Second, there are no reliable "alternative means" for a mother to exercise her right to parent outside of being allowed to remain with her infant in some capacity through some prison program. Other methods of parenting children from within a prison are visits, telephone calls, and letters, all of which are hardly options for infants and are not viable for reasons that will be discussed in the policy section of this Comment.<sup>199</sup>

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<sup>191</sup> Dwyer, *supra* note 30, at 486–92.

<sup>192</sup> *Turner*, 482 U.S. at 89.

<sup>193</sup> *Id.* at 90.

<sup>194</sup> Dwyer, *supra* note 30, at 485, 487–88.

<sup>195</sup> *Id.* at 488–91.

<sup>196</sup> See Ahrens, *supra* note 41, at 9; *Fact Sheet: Parents in Prison*, SENT'G PROJECT 2 (Sept. 2012), available at <https://www.sentencingproject.org/publications/parents-in-prison/>; Jennifer Polish, *Children of Incarcerated Parents: What Are Their Rights?*, L. STREET MEDIA (July 8, 2015), <https://lawstreetmedia.com/issues/law-and-politics/children-incarcerated-parents-rights/>.

<sup>197</sup> *Id.*

<sup>198</sup> See generally *Fact Sheet: Parents in Prison*, *supra* note 196.

<sup>199</sup> See generally Part V.

Third, allowing incarcerated mothers to remain with their infants would not have negative impacts on guards, inmates, or prison resources. When a particular policy would have a “ripple effect” on other inmates or prison staff, courts should be “particularly deferential to the informed discretion of corrections officials.”<sup>200</sup> However, there would not be a “ripple effect” for guards because incarcerated women who are permitted to remain with their children tend to be mentally healthier,<sup>201</sup> thus likely making the job of a prison guard easier. The incarcerated mothers are likely to be more agreeable and easier for the guards and fellow inmates to get along with. Another plausible safety argument is that these incarcerated mothers, or other women in the facility, may lash out at the infants.<sup>202</sup> However, the current programs in existence restrict participation to women who have not committed violent offenses and have a clean prison record.<sup>203</sup> It is possible that other inmates will get angry and lash out at those allowed to remain with their children; however, once the right to parent while incarcerated is recognized, programs could be expanded to more than just the mothers of infants, thus benefiting many mothers in prison.<sup>204</sup> Furthermore, in most current programs, incarcerated mothers who remain with their children are separated from the general population, decreasing the risk of outbursts and violence.<sup>205</sup> As a result, the additional risks posed to infants and young children by living with their incarcerated mothers that exist<sup>206</sup> are likely minimal and outweighed by the benefits.<sup>207</sup> The state could also argue that it would be expensive, but again, these programs have the potential to save prisons money in the long run.<sup>208</sup> Finally, the lack of an alternative is not evidence of the reasonableness of the prison regulation because alternatives do exist in prisons in some states, just not a majority.<sup>209</sup>

The fourth and final factor for courts to consider is the presence or absence of ready alternatives, which goes to the weight of the reasonableness of the prison regulation.<sup>210</sup> If there is “an alternative that fully accommodates the prisoner’s rights at a *de minimis* cost to valid penological interests, a court

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<sup>200</sup> Turner v. Safley, 482 U.S. 78, 90 (1987).

<sup>201</sup> Jbara, *supra* note 46, at 1829.

<sup>202</sup> Dwyer, *supra* note 30, at 490–91.

<sup>203</sup> Warner, *supra* note 20, at 72.

<sup>204</sup> Dwyer, *supra* note 30, at 488.

<sup>205</sup> Warner, *supra* note 20, at 72–73.

<sup>206</sup> See Dwyer, *supra* note 30, at 488.

<sup>207</sup> See generally Warner, *supra* note 20, at 72–73.

<sup>208</sup> *Parent-Child Interactions within Correctional Systems*, 29 CHILD. L. PRAC. 74, 74 (2010).

<sup>209</sup> See *supra* Part II (detailing the availability of prison nursery programs).

<sup>210</sup> Turner v. Safley, 482 U.S. 78, 90 (1987).

may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.”<sup>211</sup> Here, there are “obvious, easy alternatives” to separating an incarcerated mother from her children:<sup>212</sup> prison nurseries and community-based residential parenting programs. Both of these programs, through eligibility requirements and program attributes impose a “*de minimis* burden”<sup>213</sup> on the pursuit of the legitimate objective of protecting the children. Prison nurseries currently existing in the United States have requirements, such as mandating that women who participate in prison nursery programs be non-violent offenders, which satisfy these concerns about the children’s well-being.<sup>214</sup> Furthermore, as will be discussed in more detail in Part VI, allowing young children to remain with their incarcerated mothers may be better for the well-being of the children.<sup>215</sup>

Furthermore, the Court’s policy arguments in *Turner* further justify the importance of recognizing the right of incarcerated mothers to parent their young children.<sup>216</sup> Mother-child relationships are similar to marriages in that they are also expressions of emotional support, are recognized by religions as having spiritual significance, and are frequently related to government benefits and rights.<sup>217</sup> Mother-child relationships may even be more significant because they affect custody and upbringing in general, which impact the child’s entire life. Thus, this right should be protected and not infringed upon by the state during periods of incarceration.

Opponents of prison nurseries also use the Fourteenth Amendment to argue that prison nurseries are unconstitutional.<sup>218</sup> Under Fourth and Fourteenth Amendment doctrines, the state cannot put someone in prison simply under the justification that it is improving that person’s welfare.<sup>219</sup> Prison nursery opponents argue that by recognizing the constitutional right of incarcerated women to parent, the state would be forcing infants and children to live in prison with their mothers.<sup>220</sup> However, this argument is a mischaracterization because the state would not be forcing children to live in prison. Rather, it would be recognizing a mother’s right to control the upbringing of her children and facilitating her decision about where the child should live, similar to the decisions parents make for their children all the time. If the

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<sup>211</sup> *Id.* at 91.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Warner, *supra* note 20, at 72.

<sup>215</sup> *See infra* Part VII.

<sup>216</sup> *Turner*, 482 U.S. at 95–96.

<sup>217</sup> *Id.*

<sup>218</sup> Dwyer, *supra* note 30, at 519–20.

<sup>219</sup> *Id.* at 520.

<sup>220</sup> *Id.*

mother decides that the child should leave the prison program, then the child leaves the program.

## VI. POLICY JUSTIFICATIONS

While scholars, politicians, and activists disagree about whether recognizing an incarcerated mother's right to parent is required, overwhelming evidence establishes that, as a matter of policy, allowing newborns to remain with their incarcerated mothers would benefit mothers, children, and society.<sup>221</sup> However, even among those who support allowing incarcerated mothers to parent their young children from inside prison, there is much disagreement about what methods work best to facilitate this.<sup>222</sup>

### A. WELL-BEING OF THE CHILDREN

Contact between a mother and her infant is important and provides perhaps the greatest support for allowing infants to remain with their incarcerated mothers.<sup>223</sup> Contact is most important immediately following birth because attachment bonds between mother and child are formed when the child is between the ages of six months and two years.<sup>224</sup> Studies have shown that children who fail to sufficiently bond with their mothers are more likely to have developmental problems and are less likely to be able to connect with others.<sup>225</sup> Children with incarcerated parents are more likely to engage in criminal activity, develop drug addictions, lag behind their peers academically, and suffer from behavioral issues attributed to attachment disorders.<sup>226</sup> To make matters worse, having a parent in prison can make it difficult for children to bond with whatever alternative caregivers they have.<sup>227</sup> Moreover, among infants living outside of prison, the risk of infant death is 29.6% higher for those with an incarcerated parent.<sup>228</sup>

A child's development can be limited in a number of ways by the barriers that incarceration creates between the mother and the child. Inability to breastfeed is an example of one of these limitations. Without programs like prison nurseries and community-based alternatives, barriers exist for incar-

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<sup>221</sup> See SCHENWAR, *supra* note 1, at 87 (detailing the many ways in which children growing up separated from their incarcerated mothers often struggle); Jbara, *supra* note 46, at 1827–32.

<sup>222</sup> See generally Part VI.

<sup>223</sup> Jbara, *supra* note 46, at 1827–29.

<sup>224</sup> *Id.* at 1827.

<sup>225</sup> *Id.* at 1826.

<sup>226</sup> SCHENWAR, *supra* note 1, at 87.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 88.



cerated women when it comes to breastfeeding their newborns, such as restrictions on contact.<sup>229</sup> Even if they do have the option to breastfeed their child in the hospital right after giving birth, many women choose not to because it would be “pointless” or “too painful,” as they would soon be separated from their child.<sup>230</sup> Breastfeeding is important in helping newborns bond with their mothers, and it provides numerous health benefits for the child.<sup>231</sup>

A child’s development can also often be negatively impacted by a lack of communication with his or her mother. Over half of incarcerated mothers do not see their children during their prison sentence.<sup>232</sup> Without programs allowing them to remain with their mothers, extremely young children have limited opportunities to communicate with their incarcerated mothers.<sup>233</sup> It is difficult for children to visit their mothers in prison.<sup>234</sup> Many prisons are located far away, which means that traveling for a visit requires time, money, and someone to accompany the child.<sup>235</sup> In September, 2012, 62% of parents in state prisons and 84% of parents in federal prisons were incarcerated more than 100 miles away from their last residence.<sup>236</sup> Furthermore, visiting areas in many prisons are small, cramped, and inhospitable for children, accomplishing two things: first, creating a disincentive for caregivers to bring children to visit prison, and second, ensuring that if they do visit prison, the visit is unpleasant.<sup>237</sup> Many prisons also have regulations in place that deter children or their caretakers from making contact with incarcerated parents.<sup>238</sup> For example, the telephone rates in prison are so expensive that they are often prohibitive, thus creating a financial burden for the families of the incarcerated person.<sup>239</sup> Similarly, visiting hours within jails and prisons are highly regulated.<sup>240</sup> The rules are often strictly enforced, are hard to understand, and create inconveniences, which may keep family members from visiting the

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<sup>229</sup> *Id.* at 87–88; Robin Levi et. al., *Creating the “Bad Mother”: How the U.S. Approach to Pregnancy in Prisons Violates the Right to be a Mother*, 18 UCLA WOMEN’S L.J. 1, 47 (2010).

<sup>230</sup> Levi et. al., *supra* note 229, at 47.

<sup>231</sup> *Id.* at 49; SCHENWAR, *supra* note 1, at 87–88;

<sup>232</sup> SCHENWAR, *supra* note 1, at 87.

<sup>233</sup> Jbara, *supra* note 46, at 1830.

<sup>234</sup> *Fact Sheet: Parents in Prison*, *supra* note 198, at 75; Coutts & Greenberg, *supra* note 91; *Parent-Child Interactions within Correctional Systems*, *supra* note 208, at 74; *Words from Prison*, *supra* note 68.

<sup>235</sup> *Parent-Child Interactions within Correctional Systems*, *supra* note 208, at 74.

<sup>236</sup> *Fact Sheet: Parents in Prison*, *supra* note 198.

<sup>237</sup> *See Parent-Child Interactions within Correctional Systems*, *supra* note 208, at 74.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*; *see also Words from Prison*, *supra* note 68.

<sup>240</sup> *See Parent-Child Interactions within Correctional Systems*, *supra* note 208, at 74.

prison.<sup>241</sup>

## B. BENEFITS FOR THE MOTHERS

Incarcerated women who can communicate with their children are often mentally healthier than those who are unable to maintain their parental relationships.<sup>242</sup> Studies show that up to 90% of incarcerated women are clinically depressed at some point during imprisonment, and many of these feelings may stem from poor relationships with their children.<sup>243</sup> Ensuring that a mother remains in good contact with her children reduces recidivism by making it easier for her to reenter society after completing her sentence.<sup>244</sup> If a mother falls out of touch with her child while she is serving her sentence, it will be difficult for her to build and maintain a strong relationship with that child in the future, once she is released.<sup>245</sup> After her release from prison, a formerly incarcerated mother must rebuild her relationship with her child.<sup>246</sup> These mothers are forced to start from the beginning, but without a clean slate, because frequently children hold grudges and are angry at their mothers for the time they spent locked up.<sup>247</sup>

Incarcerated mothers often lose custody of their children permanently as a result of incarceration.<sup>248</sup> Once a mother's rights are terminated, they are difficult to restore, which means that mothers who were incarcerated for even the smallest crimes can often be left without their children, no matter how much they turn their lives around.<sup>249</sup> Many formerly incarcerated mothers are unable to meet court-mandated benchmarks necessary to maintain custody because of obstacles like long distances, visitation barriers, and extended periods of separation.<sup>250</sup> The Adoption and Safe Families Act of 1997, which is discussed in-depth in Part VII, creates many problems for mothers by making it easier for mothers to lose parental rights.<sup>251</sup> Since this law was passed, incarcerated women have struggled to maintain custody of their children.<sup>252</sup> Even if mothers are lucky enough to not be impacted by the Act, restrictions on employment, housing, education, and public aid placed on

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<sup>241</sup> *Id.*

<sup>242</sup> Jbara, *supra* note 46, at 1829.

<sup>243</sup> *Id.* at 1829.

<sup>244</sup> See *Parent-Child Interactions within Correctional Systems*, *supra* note 208, at 74.

<sup>245</sup> SCHENWAR, *supra* note 1, at 85.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 86.

<sup>249</sup> Coutts & Greenberg, *supra* note 91.

<sup>250</sup> *Id.*; SCHENWAR, *supra* note 1, at 85.

<sup>251</sup> SCHENWAR, *supra* note 1, at 85.

<sup>252</sup> *Id.*

mothers released from prison hurt their ability to meet the requirements of Child Protective Services.<sup>253</sup>

### C. COMMON ARGUMENTS AGAINST PARENTAL RIGHTS FOR INCARCERATED MOTHERS

Opponents argue that incarcerated “women are not generally well functioning, psychologically healthy people.”<sup>254</sup> Prison sentences are accompanied by massive stressors for the prisoner.<sup>255</sup> Prison is isolating and overcrowded, and prisoners live in fear of violence from other inmates and the guards.<sup>256</sup> An environment with all of these stressors is likely not a good place for a child to grow up.<sup>257</sup> Likewise, women do not need the additional stress of having to care for a child while in prison.<sup>258</sup> Many women can be triggered and traumatized by things that happen inside prisons.<sup>259</sup> Trauma inside prison is endless, whether it is abuse from correctional officers, being cut-off from family, or limited access to medical care.<sup>260</sup> Female prisoners may not want to subject their new child to what they go through on a daily basis, no matter how badly they want to bond with them.<sup>261</sup>

Concerns about placing children in the stressful, often dangerous, environment of prisons are valid. The mental and physical safety of the child are the biggest and most important factors to consider when determining whether programs like prison nurseries or community-based alternatives can be viable solutions. However, if programs are well-developed, they should be able to overcome these stressors to guarantee the right to parent for incarcerated mothers.<sup>262</sup> A large source of stress for women in prison comes from concern about what is happening to their children and families, which could be alleviated by these programs.<sup>263</sup> Furthermore, existing programs have taken steps, like isolating mothers and children from the general prison population, to ensure that mothers can bond safely and normally with their children.<sup>264</sup>

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<sup>253</sup> *Id.* at 86–87.

<sup>254</sup> Dwyer, *supra* note 30, at 485.

<sup>255</sup> *Id.* at 486.

<sup>256</sup> *Id.* at 486–91.

<sup>257</sup> *Id.* at 490.

<sup>258</sup> *Id.* 485–90.

<sup>259</sup> Gail Smith, *Why Mother-Child Alternatives to Incarceration Are Vital*, JUST STRATEGIES (Nov. 14, 2014), <https://www.justicestrategies.net/coip/blog/2014/11/why-mother-child-alternatives-incarceration-are-vital>.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> See Jbara, *supra* note 46, at 1828–29.

<sup>263</sup> *Id.*

<sup>264</sup> Warner, *supra* note 20, at 74–75.

## D. CONTESTED METHODS

The methods for allowing women to parent while incarcerated are also contested. Many people oppose prison nurseries, while still supporting an incarcerated mother's right to parent. One criticism of prison nurseries is that the requirements are so strict that most incarcerated women do not qualify, leaving open and unused spots in prison nursery programs, despite the fact that many women are in need and anxious to participate.<sup>265</sup> Relatedly, because the requirements for these programs are so strict, it is questionable whether the women who manage to qualify for them likely should be in prison in the first place.<sup>266</sup> Another issue is that prison nurseries only allow children to participate up to a certain age, removing a child from his or her mother after allowing them to bond.<sup>267</sup> If a woman is nonviolent, serving a short sentence, and not a danger to her child, thus meeting the prison nursery requirements, she is also likely not a danger to society at large.<sup>268</sup> Thus, she should be parenting her children out in a community-based facility instead of the confines of a prison.<sup>269</sup> In these settings, mothers can maintain their family bonds in an a nurturing community setting.<sup>270</sup> Alternatives that keep moms and kids together while providing family-based treatment are far more effective and less costly than prison nurseries.<sup>271</sup>

From these criticisms, it is clear that the United States needs to both improve existing programs and create more of them. However, the mere fact that these programs could use improvement is not a reason to deny a whole class of people their parental rights.

## VII. ADDITIONAL BARRIER: ADOPTION AND SAFE FAMILIES ACT OF 1997

The Adoption and Safe Families Act of 1997 makes it incredibly difficult for incarcerated mothers to maintain custody of their children.<sup>272</sup> As part of the Act, foster care agencies begin termination proceedings "if a child has

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<sup>265</sup> Colleen Mastony, *Bringing up baby while doing time*, CHI. TRIB. (May 3, 2015), <http://www.chicagotribune.com/news/local/ct-decatur-prison-nursery-met-20150501-story.html>.

<sup>266</sup> *Id.*

<sup>267</sup> Ely Brown & Alexa Valiente, *Babies Born, Raised Behind Bars May Keep Mothers from Returning to Prison*, ABC NEWS (Feb. 7, 2014), <http://abcnews.go.com/US/babies-born-raised-bars-mothers-returning-prison/story?id=22413184>.

<sup>268</sup> See generally Women's Prison Ass'n, *Prison Nursery Programs a Growing Trend in Women's Prisons*, CORRECTIONS.COM (Jul. 13, 2009), <http://www.corrections.com/articles/21644-prison-nursery-programs-a-growing-trend-in-women-s-prisons> (stating that "most women in prison nursery programs present little risk to public safety").

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Mastony, *supra* note 265.

<sup>272</sup> SCHENWAR, *supra* note 1, at 86; see also Downey, *supra* note 66, at 47.

been in foster care for fifteen of the past twenty-two months.<sup>273</sup> A majority of states do not have exceptions for incarcerated mothers.<sup>274</sup> This is problematic because “91[%] of women convicted of felonies are sentenced to serve at least eighteen months.”<sup>275</sup> Furthermore, the Act provides bonuses to states that increase the number of adoptions from year to year, which incentivizes states to place the children of incarcerated mothers with foster families.<sup>276</sup>

The purposes of the Act are noble: to ensure that children do not sit in foster care for extended periods of time and to protect them from going back to unsafe homes.<sup>277</sup> However, neither incarcerated women nor their children benefit from the Act.<sup>278</sup> It hurts the potential for children to ever reunite with their incarcerated mothers, putting incarcerated mothers with only minor charges at greater risk of losing their parental rights.<sup>279</sup> Frequently, parental rights are terminated even when it is not in the best interest of the child.<sup>280</sup> This law is especially problematic given that the rate of female incarceration is rising, and a majority of the women incarcerated are mothers.<sup>281</sup> Many of these women are the sole caregivers of their children.<sup>282</sup> Often, as studies have shown, when adoptions occur mandated by this Act, children resist the placements and end up back in foster care.<sup>283</sup> This law does not seem to be working and is actually harming incarcerated women and their children. As a result, the United States likely needs a more flexible law governing the custodial rights of incarcerated parents or the existing Act requires exceptions to the timeframe rules for incarcerated mothers.<sup>284</sup>

#### CONCLUSION

Under existing Fourteenth Amendment jurisprudence, incarcerated women should be allowed to remain with their newborns and infants in one way or another. The Supreme Court’s recognition of the constitutionally protected right to parent can likely be extended to incarcerated women, subject to some limitation based on the reason for her incarceration. There have not

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<sup>273</sup> SCHENWAR, *supra* note 1, at 86.

<sup>274</sup> *Id.*

<sup>275</sup> Downey, *supra* note 66, at 47.

<sup>276</sup> *Id.* at 44.

<sup>277</sup> *Id.* at 47–48.

<sup>278</sup> *Id.* at 46–48.

<sup>279</sup> *Id.* at 45.

<sup>280</sup> *Id.* at 48.

<sup>281</sup> *Id.* at 45.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 48.

<sup>284</sup> *Id.*

been any cases deeming all incarcerated women unfit parents, nor do states have a sufficient justification for why incarcerated women should be denied this right.

While this Comment has established that children should be allowed to remain with their mothers in some capacity, the specific logistics or administration of this right remain an open question. For example, whether there ought to be an age cut-off and what sorts of programs work best are two large questions that still need to be answered. Pilot programs and additional studies would likely help policymakers answer those questions. However, one thing is certain: incarcerated mothers deserve the right to decide how to best raise and parent their children.

This analysis has also spurred criticisms of policies that disadvantage incarcerated mothers and their children, including drug and adoption laws. These policies must also be reformed or else they will continue to impede incarcerated mothers' right to parent. Drug laws in this country need to be changed so that drug addicts receive treatment rather than prison sentences, pregnant drug users receive help instead of permanent separation from their children, and women are not locked up for crimes committed by the men in their lives. Custody laws like the Adoption and Safe Families Act of 1997 ought to be struck down or deemed unconstitutional for the negative impact that they have on incarcerated mothers and their children. Extending the right to parent to incarcerated mothers to allow children to remain with their mothers is one step towards helping mothers like Kayla reunite with their children while completing their prison sentence; however, there is still much more that can and should be done.

