

COMMENTS

BABIES BEHIND BARS: HOW PRISON NURSERIES PROTECT THE CONSTITUTIONAL RIGHT TO BE A PARENT IN WISCONSIN

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To My Children:

Nothing hurts me more right now than being away from you.

*I can handle the consequences of jail, fines, community service, rehab,
everything but the hurt I put you through by being away
Depriving you hurts more than any punishment sentenced to me.
I can only pray that you will learn from my bad choices
and not go through the same mistakes*

*Please know that it is you that motivates me to do right now and plan for
the future.*

The consequences of being away again is too great to re-offend.

*Love, Mom*¹

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1. Sue Stauffacher, *Poetry of Women Prisoners*, 5 (2013), <http://suestauffacher.com/wp-content/uploads/2013/01/Poetry-Of-Women-Prisoners.pdf> [<https://perma.cc/GMV9-A5QV>].

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INTRODUCTION

The Wisconsin Department of Corrections should create and support more alternatives to incarceration for women including prison nurseries and community-based family living, in order to preserve the constitutional right to be a parent.² These types of programs would decrease the childhood trauma caused by parental incarceration, which can lead to better outcomes in child development, encourage community integration, and lower recidivism rates.³

When a mother is incarcerated, a child is five times more likely to end up in foster care than when a father is incarcerated.⁴ It is difficult to foster continuing relationships between children and their parents in prison because of the cost associated with an in-person visit.⁵ Most prisons are not accessible by any form of public transportation, which sometimes means that a child will not be able to visit their parent.⁶ Evidence suggests that fostering the bond between parent and child positively impacts the parent by “reducing prison misconduct and recidivism” but can also “positively affect a child’s well-being and improve the chances that the families will remain intact when a former inmate reenters the community.”⁷ Preserving this bond is highly important and begs the question of why more alternatives to incarceration do not exist, particularly in Wisconsin.

In the United States, there is no national policy that dictates what happens to newborn children born to incarcerated mothers.⁸ This comment will address the constitutional right to be a parent guaranteed through the Fourteenth

2. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

3. Chandra Villaneuva, *Mothers, Infants, and Imprisonment: A National Look at Prison Nurseries and Community-Based Alternatives*, WOMEN’S PRISON ASSOCIATION, 1, 5-6, (May 2009), http://www.wpaonline.org/wpaassets/Mothers_Infants_and_Imprisonment_2009.pdf [<https://perma.cc/X62D-3EZZ>].

4. Eli Hager & Anna Flagg, *How Incarcerated Parents End Up Losing Their Children Forever*, THE MARSHALL PROJECT (Dec. 2, 2018), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> [<https://perma.cc/AMD8-RADH>].

5. Jaime Joyce, *Let’s Make It Easier for Kids to Visit Their Incarcerated Parents*, THE MARSHALL PROJECT (May 10, 2019), <https://www.themarshallproject.org/2019/05/10/let-s-make-it-easier-for-kids-to-visit-incarcerated-parents> [<https://perma.cc/93TH-R3QV>].

6. *Id.*

7. *Id.*

8. Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN’S L.J. 65, 67 (2015).

Amendment.⁹ Further, this comment specifically assesses this right as it relates to incarcerated women in Wisconsin. Part I of this comment will discuss the constitutional right to be a parent as it pertains to incarcerated women in the United States. Part II will discuss the effect of the Adoption and Safe Families Act (ASFA) on families experiencing parental incarceration. Part III outlines the alternative programs available in the other states as well as internationally, including prison nurseries and community-based alternatives. Part IV assesses how the four factors determined by the Supreme Court in *Turner v. Safley* can be applied to Wisconsin in order to uphold the constitutionality of a prison nursery program.¹⁰ Finally Part V points out criticisms on prison nurseries and community-based prison nurseries, concluding that the benefits to pregnant women and their children outweigh the cost.

I. CONSTITUTIONAL RIGHT TO PARENT

A. United States Supreme Court Precedent

The Fourteenth Amendment provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”¹¹ The Due Process Clause also includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.”¹² Parents have a liberty interest in the care, custody, and control of their children.¹³ The United States Supreme Court has recognized the constitutionally protected right to parent under the Fourteenth Amendment.¹⁴ Despite this, the U.S. Supreme Court has yet to rule on the status of parental rights during incarceration.

In *Stanley v. Illinois*, the Court recognized a parent’s fundamental right to make decisions regarding the care and custody of his or her child.¹⁵ The Court concluded that a state may not terminate this right without an individualized

9. *See* *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

10. *Turner v. Safley*, 482 U.S. 78, 89-90 (1987).

11. U.S. CONST. amend. XIV.

12. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

13. *See* *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923). Where the Court held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” *Id.* Then again in *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) the Court held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.” Further, in *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children.

14. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

15. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). *See also*, *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (holding that the history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (holding that on numerous occasions, the Court has recognized that the relationship between parent and child is constitutionally protected).

determination that a parent is unfit.¹⁶ Additionally, a finding of unfitness is a crucial part in the decision to terminate parental rights.¹⁷ In *Santosky v. Kramer*, the United States Supreme Court set the standard for proving “unfitness” as “clear and convincing.”¹⁸ The Court also held that the state court must determine whether severing the parent-child relationship is in the child’s best interest.¹⁹

There are several grounds for terminating parental rights. The most common statutory grounds for determining parental unfitness include: severe or chronic abuse or neglect, sexual abuse, abuse or neglect of other children in the household, abandonment of the child, long-term mental illness or deficiency of the parent(s), long-term alcohol-or drug-induced incapacity of the parent(s), failure to support or maintain contact with the child, and involuntary termination of the rights to another child.²⁰ In thirty states and Puerto Rico, a parent’s rights can be terminated if he or she has been convicted of committing sexual abuse or another sexual offense.²¹ In fourteen states and Puerto Rico, a parent’s rights can be terminated upon conviction for child sexual exploitation.²² A conviction for human trafficking or sex trafficking of a minor can result in the termination of a parent’s rights in six states.²³ In twenty-one states, a father’s parental rights can be terminated when he commits rape or sexual assault of the child’s mother and the child was conceived as a result.²⁴ In twenty-seven states, a conviction for any felony that results in long-term incarceration and requires the child to enter foster care because of a lack of alternatives may also constitute grounds for termination of parental rights.²⁵ While state laws require that proceedings for termination of parental rights be initiated when statutory grounds are met, thirty-four states plus the District of Columbia and the U.S. Virgin Islands provide for exceptions under some circumstances: the child has been placed under the care of a relative, the state agency has documented in the case plan a compelling reason to believe that terminating the parent’s rights is not in the best interests of the child, or the State agency has not provided the parent with the services required by the service plan to facilitate safe reunification.²⁶ With rising levels of incarceration, the United States Supreme Court must address incarceration as grounds for termination of parental rights.

16. *Stanley*, 405 U.S. at 653.

17. *Id.* at 649.

18. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (explaining that “clear and convincing” is a standard that falls between “beyond a reasonable doubt” and “more likely than not” meaning it is lower than the burden to find a defendant guilty, but it is higher than the standard for a police officer to make an arrest, for example).

19. *Id.*

20. *Grounds for Involuntary Termination of Parental Rights*, CHILD WELFARE INFORMATION GATEWAY 1 (2017) <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf> [<https://perma.cc/VKK7-QAK8>].

21. *Id.* at 2. Wisconsin is among these states.

22. *Id.*

23. *Id.* Wisconsin is among these states.

24. *Id.* Wisconsin is among these states.

25. *Id.*

26. *Id.* at 3.

B. Wisconsin Termination of Parental Rights Proceedings

Termination of parental rights interferes with a fundamental liberty interest; therefore, the government must establish that a parent is unfit before terminating his or her parental rights.²⁷ Turning to Wisconsin specifically, Wis. Stat. § 48.415(1)-(10) establishes 11 grounds for termination of parental rights. Under § 48.415(2)(a), grounds for termination of parental rights exist when a child is in continuing need of protection or services, if the following are established: (1) the child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders; (2) the agency responsible for the care of the child and the family or of the unborn child and expectant mother has made a reasonable effort to provide the services ordered by the court; or (3) the child has been outside the home for a cumulative total period of six months or longer pursuant to such orders not including time spent outside the home as an unborn child; and that the parent has failed to meet the conditions established for the safe return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions within the 12-month period following the fact-finding hearing under § 48.424.²⁸ The parent challenging the termination of right must have a “substantial relationship” with his or her child to have fundamental liberty interest in protecting the child, and that interest is protected by the substantive due process clause of the Fourteenth Amendment.²⁹

Termination of parental rights proceedings involves two phases. In the first phase, the court determines whether the grounds exist to terminate a parent’s rights to his or her child.³⁰ If the court or jury find grounds to terminate the parent’s rights, the court shall find the parent unfit.³¹ Then the court proceeds to the second phase and determines whether it is in the child’s best interest to terminate parental rights.³² The court may only terminate parental rights after all alternatives have been explored and it determines that termination is in the best interest of the child.³³ The court considers of the following: (1) “the likelihood of the child’s adoption after termination,”³⁴ (2) “the age and health of the child,

27. *Id.*

28. *Kenosha Dep’t of Human Servs. v. Jodie W. (In re Max G.W.)*, 2006 WI 93, ¶ 42, 293 Wis. 2d 530, 716 N.W.2d 485.

29. *Id.* ¶ 50. The Wisconsin State Supreme Court analyzes whether there is a substantial parental relationship based on the totality of the circumstances to look at the parent’s conduct for the entirety of the child’s life up to that point. *Id.* For example, the court considers whether or not the parent took an interest in the child’s well-being at any point in time.

30. *See Sheboygan County D.H.H.S. v. Julie A.B. (In re Termination of Parental Rights to Prestin T.B.)*, 2002 WI 95, ¶ 24, 255 Wis. 2d 170, 648 N.W.2d 402 (citing WIS. STAT. § 48.424(1) (2017-18)).

31. *Id.* ¶ 26 (citing WIS. STAT. § 48.424(4) (2017-18)).

32. *Id.* ¶ 22. (“A parent’s desire for a right to the companionship, care, custody, and management of his or her children is an important interest that ‘undeniably warrants deference and, absent a powerful countervailing interest, protection.’”) (quoting *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

33. *A.B. v. P.B.*, 151 Wis. 2d 312, 322, 444 N.W.2d 415 (Wis. Ct. App. 1989).

34. WIS. STAT. § 48.426(3)(a) (2017-18).

both at the time of the disposition and, if applicable, at the time the child was removed from the home;³⁵ (3) “whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships;”³⁶ (4) “the wishes of the child;”³⁷ (5) “the duration of separation of the parent from the child;”³⁸ (6) “whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child’s current placement, the likelihood of future placements and the result of prior placements.”³⁹ At this point, the court may either dismiss the petition “if it finds the evidence does not warrant the termination of parental right” or “enter an order terminating the parental rights of one or both parents.”⁴⁰ The Wisconsin statute has laid out the grounds for termination, but the Wisconsin State Supreme Court has interpreted the statute in a way to protect the rights of incarcerated parents.

In Wisconsin, incarceration does not indicate a presumption of parental unfitness. The Wisconsin Supreme Court notes that parental incarceration is relevant, but termination cannot be based on that factor alone.⁴¹ In *Kenosha Department of Human Services v. Jodie W.*, a mother was incarcerated for 15-22 months, which allowed the State to bring a termination of parental rights (TPR) action against her.⁴² At the fact-finding hearing, the court established conditions Jodie was required to meet in order for Max to be returned. The conditions were: (1) obtain, maintain and manage a suitable residence; (2) cooperate with the Division of Children and Family Services; (3) maintain regular contact with Max; (4) actively participate in services; (5) provide for the financial needs of Max; (6) participate in a counseling program specifically designed to address issues of domestic violence; and (7) successfully complete any conditions of probation.⁴³ The Kenosha County Department of Human Services filed a petition to terminate Jodie’s rights.⁴⁴ The basis of their petition was that: (1) [t]he Department made a reasonable effort to provide the services ordered by the court; (2) Jodie failed to meet the conditions for the safe return of Max to her home, specifically noting that Jodie remained incarcerated and therefore had not obtained a suitable residence; and (3) there was a substantial likelihood that Jodie would not meet these court-ordered conditions for safe

35. *Id.* § 48.426(3)(b).

36. *Id.* § 48.426(3)(c).

37. *Id.* § 48.426(3)(d).

38. *Id.* § 48.426(3)(e).

39. *Id.* § 48.426(3)(f).

40. WIS. STAT. § 48.427(2)-(3).

41. *Kenosha Dep’t of Human Servs. v. Jodie W. (In re Max G.W.)*, 2006 WI 93, ¶ 49, 293 Wis. 2d 530, 716 N.W.2d 485. *But see* *Waukesha County DH & HS v. Angela M.I. (In re Termination of Parental Rights to Malaika B.)*, 2007 WI App 230, ¶ 16, 306 Wis. 2d 128, 740 N.W.2d 903 (unpublished) (the defendant in this case “failed to show that her incarceration was the sole reason she did not meet all of the conditions for return”).

42. *Kenosha Dep’t of Human Servs. v. Jodie W. (In re Max G.W.)*, 2006 WI 93, ¶ 42, 293 Wis. 2d 530, 716 N.W.2d 485.

43. *Id.* ¶ 7.

44. *Id.* ¶ 8.

return within the next twelve months, again noting that Jodie remained incarcerated.⁴⁵ One of the factors that the court considers is the length of time that the parent is not providing for the child.⁴⁶ A mother who is incarcerated would be unable to retain custody of her child under this requirement.⁴⁷ The circuit court found that the grounds for termination had been established and that Jodie W. was unfit.⁴⁸

In this case, the circuit court erred when finding Jodie W. unfit solely based on her inability to retain custody of her child as a result of the length of her incarceration.⁴⁹ The circuit court did not consider any other relevant facts and circumstances particular to the parent.⁵⁰ The Wisconsin Supreme Court held that, since Jodie made comments and notations on her plea form indicating that she did not fully understand the ramifications of her no contest plea at the grounds phase of the TPR proceedings, she had not “knowingly, intelligently, and voluntarily” entered her plea.⁵¹ Therefore, she did not waive her right to challenge whether grounds existed to support a TPR.⁵²

The Wisconsin Supreme Court relied on *Stanley v. Illinois*, which guided the analyses in protecting parental due process rights.⁵³ In *Stanley*, the United States Supreme Court held that the termination of a parent’s rights must be based on an individualized determination of parental unfitness.⁵⁴ The Court reasoned that this individualized interpretation is essential to protecting a parent’s due process rights because retaining custody of his or her child is fundamental.⁵⁵ Ultimately, the Wisconsin Supreme Court found that “a parent’s failure to fulfill a condition of return due to his or her incarceration, by itself, is not a constitutional ground for finding a parent unfit.”⁵⁶ A petition based on continuing need of protection and services “requires the court to evaluate the particular facts and circumstances relevant to the parent and child involved in the proceeding.”⁵⁷ The court held that a parent’s incarceration is relevant to TPR proceedings, but relying on incarceration alone is not sufficient and does not constitute the individualized determination of parental unfitness required by *Stanley*:

...in cases where a parent is incarcerated and the only ground for parental termination is that the child continues to be in need of protection or services solely because of the parent’s incarceration, Wis. Stat. § 48.415(2) requires that

45. *Id.*

46. *Id.* ¶ 46.

47. *Id.* ¶ 47.

48. *Id.*

49. *Id.* ¶ 3.

50. *Id.* ¶ 50.

51. *Id.* ¶¶ 35-38.

52. *Id.* ¶ 38.

53. *Id.* ¶ 40.

54. *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).

55. *Id.* at 650-52.

56. *Kenosha Dep’t of Human Servs. v. Jodie W. (In re Max G.W.)*, 2006 WI 93, ¶ 49, 293 Wis. 2d 530, 716 N.W.2d 485.

57. *In re Max G.W.*, 2006 WI, ¶ 50 (citing WIS. STAT. § 48.415(2) (2017-18)).

the court-ordered conditions of return are tailored to the particular needs of the parent and child. A contrary interpretation would render the statute unconstitutional.⁵⁸

When considering TPRs of incarcerated parents, courts must consider other factors beyond incarceration, including the parent's relationship with the child before and during the parent's incarceration, the length of the parent's sentence and anticipated time in prison, the parent's cooperation with the county's child welfare agency as well as the Department of Corrections, and what result would serve the best interest of the child.⁵⁹

An important consideration when determining the "best interest of the child" is who that child primarily resided with prior initiating a TPR proceeding. Many incarcerated women are mothers and were the sole caretakers for their children prior to incarceration.⁶⁰ When mothers are removed from the home, there is a traumatic effect on the children.⁶¹ Protecting parental rights of incarcerated women is crucial to decrease childhood trauma and preserve the maternal bond because the number of mothers sentenced to incarceration continues to increase.

C. Considerations for Incarcerated Women

Incarceration in the United States has steadily increased over the years.⁶² Every year, 626,000 people walk out of prison, but people go to jail 10.6 million times per year.⁶³ This illustrates the massive net of the criminal justice system that captures a wide range of individuals who require newer programs and progressive policies.⁶⁴ Incarcerated women make up an increasing amount of the prison and jail population, demonstrating the need for defined policies to address their unique concerns.⁶⁵ Between 1980 and 2017, the number of incarcerated women increased by more than 700%, rising from a total of 26,378 in 1980 to

58. *Id.* ¶ 51.

59. *Id.* ¶ 50.

60. Julie Smyth, *Dual Punishment: Incarcerated Mothers and Their Children*, 3 COLUM. SOC. WORK REV. 33, 34 (2012).

61. *Id.* at 35.

62. *Fact Sheet: Trends in U.S. Corrections*, THE SENT'G PROJECT 2 (June 2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/QH62-TBKL>].

63. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<https://perma.cc/Z7YE-WBQN>].

64. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Mar. 14, 2018), <https://www.prisonpolicy.org/reports/pie2018.html> [<https://perma.cc/U6XF-5W97>].

65. Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Nov. 13, 2018), <https://www.prisonpolicy.org/reports/pie2018women.html> [<https://perma.cc/5WZ9-5VXN>].

225,060 in 2017.⁶⁶ The rate at which women are incarcerated varies greatly from state to state.⁶⁷ At the national level, 63 out of every 100,000 women were in prison in 2017.⁶⁸ Women in state prisons are more likely than men to be incarcerated for a drug or property offense; according to the Sentencing Project, 25% of women are in prison for a drug offense, and 26% of women are in prison for a property offense.⁶⁹ According to a study conducted by the ACLU, a large number of women who are incarcerated are not even convicted: more than a quarter of women who are behind bars have not yet had a trial.⁷⁰

Although there has been an effort to reduce mass incarceration overall, women are largely forgotten.⁷¹ There is a large gender disparity in recent prison population trends—the female prison population grew 834% over nearly 40 years, which is more than double the pace of the growth among men.⁷² There are some glaring differences between incarcerated men and women. Most incarcerated women experience violence prior to their first incarceration.⁷³ The types of violence include repeated experiences of brutal sexual and physical victimization, which women deal with by self-medicating with illegal substances.⁷⁴ More than two-thirds of incarcerated women report a history of mental health problems.⁷⁵ Most incarcerated women experienced sexual trauma before their imprisonment.⁷⁶

66. *Incarcerated Women and Girls 1980-2017*, THE SENT'G PROJECT 1 (June 2019), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/> [https://perma.cc/LDV3-G47B].

67. *Id.* at 4.

68. *Id.*

69. *Id.*

70. Aleks Kajstura, *Incarceration: The Whole Pie 2017*, ACLU CAMPAIGN FOR SMART JUSTICE 1, 3 (Oct. 19, 2017), https://www.aclu.org/sites/default/files/field_document/womenprisonreport_final.pdf [https://perma.cc/A3W6-EL9K]. According to the study, 60% of women in jail have not been convicted of a crime and are awaiting trial. *Id.* This makes it difficult to maintain contact with their families, which is problematic when 80% of women in jails are mothers and most of them are the primary caretakers of their children. *Id.*

71. *Id.* at 2-3.

72. Wendy Sawyer, *The Gender Divide: Tracking Women's State Prison Growth*, PRISON POL'Y INITIATIVE (Jan. 9, 2018), www.prisonpolicy.org/reports/women_overtime.html [https://perma.cc/YBN9-N5CW].

73. *Mothers Behind Bars*, NATIONAL WOMEN'S LAW CENTER 9 (2010), www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf [https://perma.cc/B35Y-DVNV].

74. *Id.* at 9.

75. Manuel Villa, *The Mental Health Crisis Facing Women in Prison*, THE MARSHALL PROJECT (June 22, 2017), <https://www.themarshallproject.org/2017/06/22/the-mental-health-crisis-facing-women-in-prison> [https://perma.cc/TB4M-L9QE]. In a survey conducted from 2011-2012 of over 100 jails and prisons, 66% of women reported having a history of mental disorder.

76. The Rebecca Project for Human Rights, *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*, NATIONAL WOMEN'S LAW CENTER (Oct. 2010),

Specifically in Wisconsin, the prison population over the last 40 years has increased almost 700% which can be attributed to changes in the sentencing law.⁷⁷ According to the Sentencing Project, Wisconsin incarcerates 53 out of every 100,000 women.⁷⁸ The Truth in Sentencing legislation eliminated parole and increased the penalties for offenses by at least 50%, and in some instances by more than 100%.⁷⁹ For example, the maximum sentence for a Class B felony increased from 40 years to 60 years, with 40 years of possible confinement.⁸⁰ The maximum penalty for the lowest classification of felonies more than doubled from two years to five years.⁸¹

Despite the increasing number of pregnant women and mothers entering the criminal justice system, the majority of states lack prison nurseries.⁸² Regarding motherhood and prison, one in twenty-five women entering prison or jail is pregnant.⁸³ About 2,000 infants are born to incarcerated mothers each year.⁸⁴ According to the Equal Justice Initiative, more than 60% of women in state prisons have a child under the age of 18; this is problematic because women are more likely to be the primary caretakers of their children.⁸⁵ New mothers that give birth while incarcerated have few choices if a prison nursery is unavailable or if they are unqualified to participate: put the newborn up for adoption, into foster care, or give to relatives until they are released.⁸⁶ As previously mentioned, all of these options increase the risk of facing a termination of parental rights action.⁸⁷

In Wisconsin, there are only a few statutory guidelines for pregnant women in the Wisconsin Prison System. Those guidelines deal with preference for

<https://www.nwlc.org/sites/default/files/pdfs/mothersbehindbars2010.pdf>
[<https://perma.cc/ZV3T-SLWX>].

77. Mary Prosser & Shannon Toole, *How Did We Get Here? Wisconsin's Mass and Disparate Incarceration*, 91 WISCONSIN LAWYER (April 2018), <https://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=91&Issue=4&ArticleID=26275> [<https://perma.cc/NXA4-YDG7>].

78. *Incarcerated Women and Girls 1980-2017*, *supra* note 65, at 1-6.

79. Act of June 15, 1998, 1997 Wis. Sess. Laws. 283 §§ 322-327, 419 (codified at WIS. STAT. 939.50(3) and 973.01(1) (2017-18)).

80. *Id.* §§ 322, 419.

81. *Id.* § 326.

82. Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN'S L.J. 65, 68-69 (2015).

83. Analisa Johnson, *The Benefits of Prison Nursery Programs: Spreading Awareness to Correctional Administrators Through Informative Conferences and Nursery Program Site Visit*, 9 WR 70, 72 (2016-17). <http://www.bu.edu/writingprogram/files/2017/08/Issue-9.pdf> [<https://perma.cc/66HV-54N5>].

84. *Id.*

85. *Incarceration of Women is Growing Twice as Fast as that of Men*, EQUAL JUSTICE INITIATIVE (May 11, 2018), <https://eji.org/news/female-incarceration-growing-twice-as-fast-as-male-incarceration> [<https://perma.cc/VYF8-QNC8>]. See also Anne E. Jbara, Note, *The Price They Pay: Protecting the Mother-Child Relationship Through the Use of Prison Nurseries and Residential Parenting Programs*, 87 IND. L.J. 1825, 1826 (2012). Less than one in five males are the primary caretaker for their children.

86. *Id.*

87. *Grounds for Involuntary Termination of Parental Rights*, *supra* note 20, at 2.

Alcohol or Drug Abuse Treatment and screening for pregnancy during the initial screening.⁸⁸ In addition to statutory guidelines, the Department of Corrections (DOC) released a ten-year development plan for the Wisconsin Prison System in 2009.⁸⁹ The official mission statement of the Wisconsin Women's Correctional System (WWCS) "is to provide female inmates safe and secure confinement in an environment that is gender responsive and utilizes gender specific strategies to assist in successful inmate transition and return to their families and communities."⁹⁰ One of the included principles is, "[d]evelop procedures, practices and programs that are relational to children, family and significant others and the community."⁹¹ While the Department of Corrections has begun to recognize the shifting needs of incarcerated women, the legislature is several steps behind.

For example, in 2017, a woman filed suit with the State of Wisconsin challenging the constitutionality of a 20-year law that led to her jail time.⁹² This law permitted the detention of a pregnant person with a "habitual lack of self-control" in the use of alcohol or drugs "to a severe degree" that poses a "substantial risk" that the infant will be "seriously affected or endangered" at birth.⁹³ In *Loertscher v. Anderson*, the court struck down this law noting that it violated due process because the law was unconstitutionally vague.⁹⁴ Although the law made some headway recognizing the importance of pregnant women's rights, the legislature's attempt to codify a policy initiative for pregnant women in Wisconsin failed. Senate Bill 393 proposed an end to the shackling of females during childbirth and to provide appropriate educational materials and resources related to pregnancy, childbirth, breastfeeding, and parenting to pregnant people and people who had given birth in the past six weeks.⁹⁵ Unfortunately, the bill did not pass during the 2017-2018 session.

88. See WIS. STAT. § 51.46 (2017-18) (which grants priority placement for pregnant women for private treatment for alcohol or other drug abuse); WIS. ADMIN. CODE DOC § 350.15(12) (2017-18) (which outlines pregnancy management as a health care screening concern for jails).

89. DIVISION OF STATE FACILITIES, DEPARTMENT OF CORRECTIONS TEN-YEAR CORRECTIONAL FACILITY SYSTEM DEVELOPMENT PLAN (2009).

90. *Id.* at Section 8-1.

91. *Id.*

92. *Loertscher v. Anderson*, No. 14-cv-870-jdp, 2016 WL 3166599, at *1 (W.D. Wis. June 6, 2016); See WIS. STAT. § 48.193 (2017-18) (preempted by *Id.*).

93. WIS. STAT. § 48.193(1)(c) (2017-18) (preempted by *Loertscher*, 2016 WL 3166599).

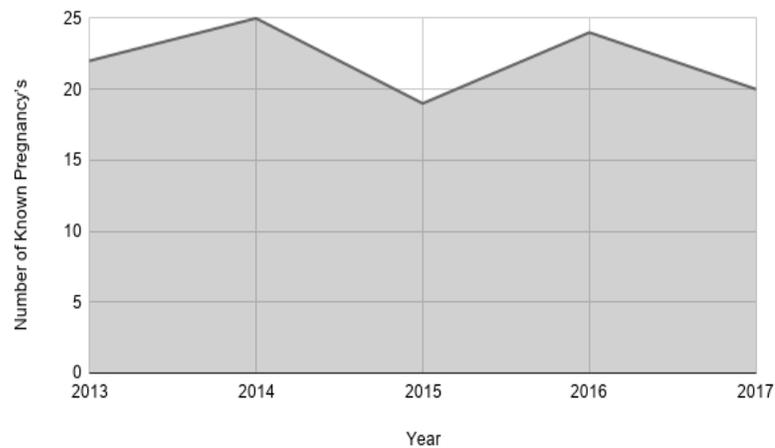
94. *Loertscher*, 2016 WL 3166599, at *1, *9.

95. Press Release, State Representative Lisa Subeck, Office of Representatives, Bill to Limit Shackling of Incarcerated Women during Labor and Childbirth Passes Senate Committee on Judiciary and Public Safety (Oct. 24, 2017), <http://legis.wisconsin.gov/assembly/78/subeck/news/press-releases/bill-to-limit-shackling-of-incarcerated-women-during-labor-and-childbirth-passes-senate-committee-on-judiciary-and-public-safety/> [<https://perma.cc/PRF4-VA7W>]. Other states have considered passing legislation to prevent shackling of women. See Associated Press, *Shackling pregnant inmates is still a practice in many states*, CBS NEWS, (Mar. 13, 2019, 10:11 AM), <https://www.cbsnews.com/news/shackling-pregnant-inmates-is-still-a-practice-in-many-states/> [<https://perma.cc/H7RT-DPEB>].

Despite the increasing number of incarcerated women in Wisconsin, no new facilities have been created since 1921 when Taycheedah Correctional Center, then named the Industrial Home for Women at Taycheedah, was built.⁹⁶ There are three women's facilities in Wisconsin: Taycheedah Correctional Institution, Robert E. Ellsworth Correctional Center, and the Milwaukee Women's Correctional Center.⁹⁷ The Wisconsin Department of Corrections collects data on its incarcerated populations. In order to see a clear picture of the women incarcerated in Wisconsin, a data inquiry revealed the number of known pregnancies during incarceration as well as the number of female inmates reporting dependents.⁹⁸

Figure 1:⁹⁹

Number of Known Pregnancy's vs. Year



96. *Department History*, STATE OF WIS. DEP'T OF CORR. (last visited Sept. 27, 2019), <https://doc.wi.gov/Pages/AboutDOC/DepartmentHistory.aspx> [https://perma.cc/W3U3-M5P7].

97. *Wisconsin Women's Correctional System*, STATE OF WIS. DEP'T OF CORR. (last visited Oct. 15, 2019), <https://doc.wi.gov/Pages/OffenderInformation/AdultInstitutions/WisconsinWomensCorrectionalSystem.aspx> [https://perma.cc/3F9Y-SRRY].

98. E-mail from Olivia Butler, MIPA, Wis. Dep't. Corr., to Sophia Dolan, J.D. Candidate, Univ. of Wis. Law Sch. (Oct. 26, 2018, 12:37 CST) (on file with author).

99. *Id.*

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Figure 1 depicts the number of known pregnancies from 2013-2017. The highest number is 25 pregnancies in 2014, and the lowest is 19 pregnancies in 2015.¹⁰⁰

Figure 2:¹⁰¹

Number of Female Inmates Reporting Dependents vs. Year

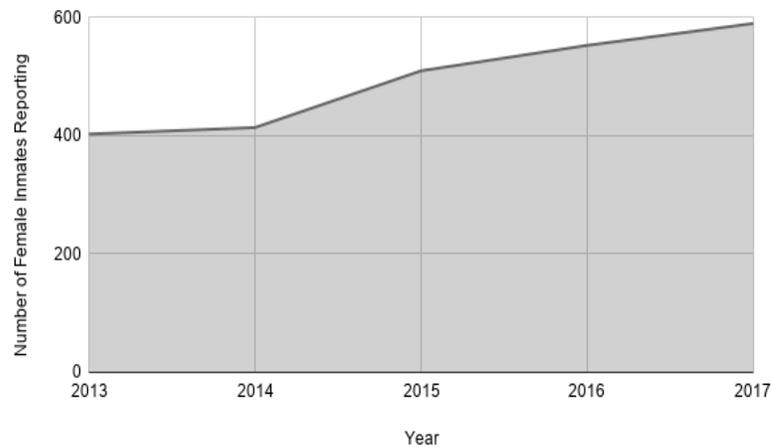


Figure 2 depicts the number of incarcerated women reporting dependents from 2013- 2017.¹⁰² This number does not include the number of women in jail reporting dependents. 80% of women in jail report having dependents.¹⁰³ The number of women reporting dependents continues to rise, increasing by 187 women, or 46% in five years.¹⁰⁴ The largest increase occurred between 2014-2015, where there was a 23% increase in the number of women reporting dependents.¹⁰⁵

100. *Id.* These numbers only reflect the number of pregnant women entering prison, not including jail.

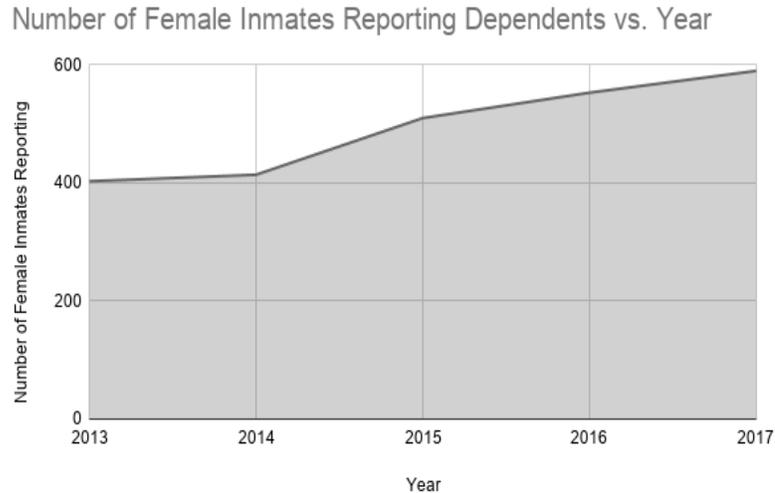
101. *Id.*

102. *Id.* See also Jamiles Lartey, *Women in Jails are the Fastest Growing Incarcerated Population*, THE GUARDIAN (Aug. 17, 2016, 12:08 PM), <https://www.theguardian.com/us-news/2016/aug/17/women-incarceration-rates-growth-study> [<https://perma.cc/K8LM-FEBB>] (“About 80% of the women in jails have dependent children . . .”).

103. Lartey, *supra* note 101.

104. Butler, *supra* note 98. This percentage is calculated by $(590-403)/403$.

105. Butler, *supra* note 98.

Figure 3¹⁰⁶

Next, Figure 3 compares the amount of known pregnancies to the number of women reporting dependents.¹⁰⁷ The above numbers can be compared to the average daily population of the three female correctional institutions in Wisconsin. The DOC Institution Fact Sheets for Taycheedah Correctional Institution states that the daily population is 870, Robert E. Ellsworth Correctional Center has 447 inmates, and the Milwaukee Women's Correctional Center has 101 inmates.¹⁰⁸ Taking the number of female inmates reporting dependents over the total population of the Wisconsin Women's Correctional System (WWCS) means that about 42% of incarcerated women were mothers in 2017.¹⁰⁹ The data is self-reported, so women may not have disclosed having a child, therefore the number could actually be higher.¹¹⁰

106. Butler, *supra* note 98.

107. Butler, *supra* note 98.

108. *Milwaukee Women's Correctional Center Fact Sheet*, WIS. DEP'T OF CORR. (June 30, 2017), <https://doc.wi.gov/DataResearch/ArchivedReports/FactSheets/0218MWCCInstitutionalFactSheet.pdf> [<https://perma.cc/32UB-U9RV>]; *Robert E. Ellsworth Correctional Institution Fact Sheet*, WIS. DEP'T OF CORR. (June 30, 2017), <https://doc.wi.gov/DataResearch/ArchivedReports/FactSheets/0218REECCInstitutionalFactSheet.pdf> [<https://perma.cc/WD6W-KK5U>]; *Taycheedah Correctional Institution*, WIS. DEP'T OF CORR. (June 30, 2017), <https://doc.wi.gov/DataResearch/ArchivedReports/FactSheets/0218TCIInstitutionalFactSheet.pdf> [<https://perma.cc/DU66-NHF8>].

109. See Butler, *supra* note 98.

110. See Butler, *supra* note 98.

II. THE ADOPTION AND SAFE FAMILIES ACT (ASFA)

A. Termination of Parental Rights (TPR) Actions

Nationally, there are more than 2.7 million children in the United States that have an incarcerated parent.¹¹¹ “Incarcerated parents lose their parental rights at a disproportional rate due to the Adoption and Safe Families Act (ASFA) which set[s] strict timelines for initiating Termination of Parental Rights [(TPR) actions].”¹¹² The ASFA amended the 1980 Child Welfare Act and shifted “the emphasis of the nation’s child welfare policy from family reunification to adoption as the primary method to achieve permanent homes for the thousands of children in foster care.”¹¹³ A TPR petition is filed in a few different situations: (1) if a child has been in the custody of the state for “fifteen of the most recent twenty-two months; (2) a court has determined that the child is an abandoned infant under state law; (3) the parent has been convicted of murder or voluntary manslaughter of another child of the parent, or of felony assault that has resulted in serious bodily injury to the child or another child of the parent.”¹¹⁴

In Wisconsin, the ASFA creates an incentive for a mother “to voluntarily relinquish her rights to an older sibling [in order] to increase her odds of retaining rights to a newborn.”¹¹⁵ Relinquishing rights is better than involuntary termination because the court considers that when determining parental fitness.¹¹⁶ This creates an issue for incarcerated mothers in Wisconsin. For example, if the length of the mother’s sentence is what caused the state to file a TPR on children already in the system, the mother’s parental rights to her children may be at risk.¹¹⁷ On the other hand, “if a mother fights to retain her rights and loses, any child that enters the system in the three years following this involuntary termination” is subject to Wis. Stat. § 48.415(10) which names prior involuntary termination of parental rights “one of the grounds in which parental rights can be outright terminated.”¹¹⁸

“The prevailing case law in Wisconsin... holds that grounds for unfitness can be supported with the evidence that a mother committed a crime and was incarcerated based on the theory that “she has not accepted responsibility for the care and protection of her children.”¹¹⁹ The United States Supreme Court has not addressed whether the United States Constitution “allows the use of a prior criminal conviction

111. Nat’l Res. Ctr. on Children and Families of the Incarcerated, *Children and Families of the Incarcerated Fact Sheet*, RUTGERS UNIV. CAMDEN (2014), <https://nrccfi.camden.rutgers.edu/files/nrccfi-fact-sheet-2014.pdf> [<https://perma.cc/VU83-BNMP>].

112. *Id.*

113. Sally Day, *Mothers in Prison: How the Adoption and Safe Families Act of 1997 Threatens Parental Rights*, 20 WIS. WOMEN’S L.J. 217, 217 (2005).

114. *Id.* at 222. See WIS. STAT. § 48.417(1)(a) (2017-18).

115. Day, *supra* note 113, at 234.

116. Day, *supra* note 113, at 234.

117. Day, *supra* note 113, at 234.

118. Day, *supra* note 113, at 234-35 (citing WIS. STAT. § 48.415(10) (2017-18)).

119. Day, *supra* note 113, at 240; See *In re Teyon D.*, 2002 WI App 318, ¶¶ 21-22, 259 Wis. 2d 429, 555 N.W.2d 752).

to prove present unfitness under the Wisconsin Standard.”¹²⁰ According to the DOC, as many as twenty-five women were pregnant at the time of their admission to Taycheedah Correctional Institution.¹²¹ The DOC Development plan also notes that, “[t]hey require additional support and medical services during their incarceration to ensure the safe delivery and eventual placement of their child.”¹²² This suggests that the mindset of the WWCS is not to preserve the bond between the mother and child, but rather to encourage child placement within the community.

Incarcerated mothers face a myriad of roadblocks when trying to re-enter their children’s lives. In order for incarcerated women to regain custody following release, they must find jobs that pay well enough to support their families, attend parenting program and substance abuse classes, if necessary, “and study basic life skills.”¹²³ Many incarcerated women do not have a high school diploma or an equivalent degree.¹²⁴ Unfortunately for many women in this situation, regaining custody of their children is impossible.

i. The Bond Between a Mother and Child is Crucial for Decreasing the Potential Negative Effects of Incarceration.

Overall, children with incarcerated parents fare worse in many different categories than their peers without incarcerated parents. The former United States Attorney General Loretta Lynch stated that, “[p]ut simply, we know that when we incarcerate a woman we often are truly incarcerating a family, in terms of the far-reaching effect on her children, her community, and her entire family network.”¹²⁵ For example, “incarceration of a family member is associated with a 64% decline in household assets, magnifying the poverty and race gap” in the United States.¹²⁶ Additionally, “parental incarceration is recognized as an ‘adverse childhood experience’” and “is distinguished from other adverse childhood experiences by the unique combination of trauma, shame, and stigma.”¹²⁷ The U.S. Department of Health and Human Services has shown that children who have an incarcerated parent face “increased risk of developing mental-health conditions, including anxiety and

120. Day, *supra* note 113, at 241.

121. Butler, *supra* note 98.

122. *Department of Corrections Ten-Year Correctional Facility Plan*, WIS. DEP’T OF CORR., 8-A-5 (2009) https://doa.wi.gov/DFDM_Documents/State-Building-Program/DOC-Dev-Plan.pdf [<https://perma.cc/2NP7-QZ8X>].

123. Angeli R. Rasbury, *Out of Jail, Mothers Struggle to Reclaim Children*, WOMEN’S ENEWS (Sept. 17, 2006), <https://womensenews.org/2006/09/out-jail-mothers-struggle-reclaim-children/> [<https://perma.cc/HEM7-M3TG>].

124. *Id.*

125. Sarah Stillman, *America’s Other Family-Separation Crisis*, NEW YORKER (Oct. 29, 2018), <https://www.newyorker.com/magazine/2018/11/05/americas-other-family-separation-crisis> [<https://perma.cc/MLU5-7YPZ>].

126. Nicholas Kristof, Opinion, *Mothers in Prison*, N.Y. TIMES (Nov. 25, 2016), <https://www.nytimes.com/2016/11/25/opinion/sunday/mothers-in-prison.html> [<https://perma.cc/P4HY-BEKD>].

127. National Resource Center on Children and Families of the Incarcerated, *supra* note 111.

depression.”¹²⁸ “In adulthood, they have higher rates of asthma, migraines, high cholesterol, and HIV/AIDS, and are more likely to use illicit or prescription drugs.”¹²⁹

The strongest support for allowing infants to remain with their incarcerated mothers is the value of contact between a mother and an infant.¹³⁰ Contact is most important following birth because attachment bonds between mother and child are formed “when the child is between the ages of six months and two years.”¹³¹ Studies show that children who fail to sufficiently bond with their mothers are more likely to have developmental problems and are less likely to connect with others.¹³² As noted earlier, there are several negative impacts of parental incarceration. “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.”¹³³ A child may face developmental barriers due to maternal incarceration, such as the inability to breastfeed.¹³⁴ Without implementation of prison nurseries or community-based prison nurseries, a woman loses the opportunity to breastfeed her child.¹³⁵

Additionally, lack of communication can impact a child’s development.¹³⁶ It is incredibly difficult for children to visit their incarcerated mothers.¹³⁷ Prisons are often located far away, and children are unable to travel alone, therefore requiring an adult to accompany them.¹³⁸ Also, prison environments are not conducive to family visits.¹³⁹ Fully implementing prison nurseries and more community-based alternatives would preserve the bond between a mother and their child. Programs like

128. Stillman, *supra* note 125.

129. Stillman, *supra* note 125.

130. See 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, 1827-29 (2012).

131. *Id.* at 1827.

132. *Id.* at 1826.

133. Emily Halter, Comment, *Parental Prisoners: The Incarcerated Mother’s Constitutional Right to Parent*, 108 J. CRIM. L. & CRIMINOLOGY 455, 561 (2018).

134. *Id.*

135. Robin Levi et. al., Creating the “Bad Mother”: How the U.S. Approach to Pregnancy Violates the Right to be a Mother, 18 UCLA Women’s L.J. 1, 47 (2010).

136. Emily Halter, Comment, *Parental Prisoners: The Incarcerated Mother’s Constitutional Right to Parent*, 108 J. CRIM. L. & CRIMINOLOGY 455, 562 (2018).

137. *Id.*

138. In Madison, there is a program through Madison Area Urban Ministry Called “Reading Connections” which brings children to Taycheedah Correctional Institution and Waupun Correctional Institution (a male facility). This program is able to cover children in Dane County impacted by parental incarceration, but if the program could reach less populated areas, more children could have the positive experience. See Madison Area Urban Ministry, *Family, Mentoring, Reading*, <https://emum.org/what-we-do/family-mentoring-reading/> [<https://perma.cc/8X48-S3D5>] (last visited Oct. 27, 2019).

139. KIM GILHULY & LEE TAYLOR-PENN, KEEPING KIDS AND PARENTS TOGETHER: A HEALTHIER APPROACH TO SENTENCING IN TENNESSEE, at ii (2018), https://humanimpact.org/wp-content/uploads/2018/02/HIP_PrimaryCare-TN-Report.pdf [<https://perma.cc/HQB4-TQ8L>].

these have innumerable benefits for children and their mothers as well as positively impacting the community by preparing women to be released into the community.

Moreover, a parent going to prison produces very different outcomes depending on whether it is the father or mother going to prison. When a mother goes to prison, between 17-28% of children live with their fathers; when a father goes to prison 90% of children remain with their mothers.¹⁴⁰ This data demonstrates the crucial role that a mother plays in a child's life and the relative certainty that even if a child's father is not around, his or her mother will be. A solution to the problem of separating families through incarceration is the implementation of alternative programs that preserve the bond between mother and child. Two types of programs aid with this goal: prison nurseries and community-based prison nurseries.

III. ALTERNATIVE PROGRAMS

A. Prison Nurseries

A prison nursery is a program that allows a child born to an incarcerated woman to remain in the care of his or her mother for a finite amount of time within a correctional facility.¹⁴¹ There are requirements that must be met in order to participate. For example, typically only mothers who are convicted of non-violent crimes and who do not have a history of child abuse or neglect are allowed to participate in these types of programs.¹⁴² There are eleven states that allow women who are pregnant at the time of sentencing to keep their infants with them inside a correctional facility immediately after the baby's birth.¹⁴³ The length of time for the program varies between the different facilities. For example, Montana and New York have nurseries on-site, whereas Massachusetts, Nebraska, Ohio, and Washington state have special housing so that a child can reside with the mother for up to at least eighteen months.¹⁴⁴

The longest standing continuous prison nursery in the United States is located at Bedford Hills in New York.¹⁴⁵ In 1930, Governor Franklin Delano Roosevelt signed a bill into law that allowed women in New York prisons and reformatories to keep their babies with them for 12-18 months following birth.¹⁴⁶ To be eligible for the program, the mother must be physically fit to care for her child and her participation must be in the best interest of the child; if she has other children, her relationship with them is taken into account.¹⁴⁷ Additionally, admission depends on

140. *Id.* at 5.

141. Villanueva, *supra* note 3.

142. *Id.* at 9.

143. John Caniglia, *Growing Up Behind Bars: How 11 States Handle Prison Nurseries*, CLEVELAND.COM (Mar. 4, 2018), https://www.cleveland.com/metro/index.ssf/2018/03/growing_up_behind_bars_how_sta.html [<https://perma.cc/FH2P-J9BH>]; California, Delaware, Illinois, Indiana, Nebraska, New York, Ohio, South Dakota, Texas, Washington, and West Virginia.

144. Day, *supra* note 113, at 232.

145. The Rebecca Project for Human Rights, *supra* note 76, at 31.

146. *Id.*

147. Villaneuva, *supra* note 3, at 28.

the woman's participation in the prison's rehabilitative programs, the length of her sentence, and the likelihood that the mother-child bond can be sustained after the baby leaves the nursery.¹⁴⁸ A 1997 study by the New York Department of Correctional Services found that nursery participants at Bedford Hills had a lower recidivism rate compared to nonparticipants.¹⁴⁹

Nebraska's Prison Nursery Program is the second oldest prison nursery currently open and houses fifteen mother and infant pairs for up to eighteen months after birth.¹⁵⁰ The prison nursery is part of a larger parenting program that includes parenting classes, overnight on-grounds child visits, and extended day visits.¹⁵¹ Pregnant women must meet strict eligibility requirements that usually involve screening each case prior to placement in the nursery.¹⁵² Many women are incarcerated for drug-related crimes, so participants are subject to randomized urine testing and are removed if they test positive.¹⁵³ In addition to the prison nursery program, the facility allows children from one to six years old to spend up to five nights per month with mothers in a separate family living unit.¹⁵⁴ This program resulted in a 33.2% decrease in recidivism for program participants compared to a nonparticipating pregnant inmate during a ten-year period.¹⁵⁵

Another example is South Dakota's Prison Nursery Program which opened in 1998.¹⁵⁶ It is unique compared to other programs in the United States because it allows an unlimited number of mother and infant pairs to stay together for only up to thirty days.¹⁵⁷ The one requirement to participate in the program is that the mother must be non-violent.¹⁵⁸ Regardless of an inmate's total sentence, any pregnant inmate can pay \$288 to keep their baby with them for the initial thirty days after birth.¹⁵⁹

B. Community-Based Prison Nurseries

Community-based prison nurseries are programs where a child is allowed to reside with his or her mother in a community-based residence where the mother is

148. *Id.*

149. Warner, *supra* note 8 at 72-73. "For the first year after release, 5 percent of program participants were returned compared to 8 percent of all female inmates released. After the second year, the recidivism rate was 7 percent compared with 19 percent, and on the third year it was 13 percent compares with 26 percent."

150. *Id.* at 73.

151. *Id.*

152. *Id.* Some eligibility requirements include "having a tentative release date of no more than eighteen months after birth, no history of violence or child abuse, planning to be the primary caregiver of the child upon release, completing a GED if needed, and even refraining from smoking."

153. *Id.* "Over the past ten years, no participants have tested positive for drugs."

154. *Id.*

155. *Id.*

156. *Id.* at 73-74.

157. *Id.*

158. *Id.* at 74.

159. *Id.* Many inmates do not have the funds to pay themselves, nor family to help with the funds. A local church group assists to make sure inmates can participate.

serving her sentence.¹⁶⁰ Programs like these can be traced back to the 1980's when the United States government established the Mothers and Infants Nurturing Together (MINT) program.¹⁶¹ 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 women can apply for an extension.¹⁶² An example of this is located in California. The California program allows incarcerated women to spend as many as six years caring for their child in a twenty-four-bed facility.¹⁶³ Another example is a program in Delaware, where women who enter the program are placed on probation rather than being sentenced to prison.¹⁶⁴ Most community-based nurseries allow children to stay with their mothers for much longer than prison nurseries.¹⁶⁵

Prison nurseries and community-based prison nurseries, if implemented throughout the women's facilities in Wisconsin, would preserve the bond between a mother and her child. These types of programs are created through an implementation process articulated by the Supreme Court of the United States.¹⁶⁶

IV. *TURNER V. SAFELY* APPLICATION

A. *Federal case law*

The precedential opinion on the implementation of certain programs is *Turner v. Safley*.¹⁶⁷ The Court set out four factors to evaluate when deciding whether a regulation is "reasonably related to legitimate penological interests."¹⁶⁸ The four factors are: 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 "effect that 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."¹⁶⁹ To deprive incarcerated mothers of their right to remain with their newborn child, the government's actions must be

160. Halter, *supra* note 133, at 550-51

161. *Id.* at 551.

162. Jbara, *supra* note 85, at 1837-38. In Wisconsin, a similar program exists through ARC Community Services Maternal and Infant Program. All the women in that program have an AODA assessment and are pregnant at the time of their admission. They remain in the residential setting for 6 months and are then released back into the community on probation. See *ARC Maternal and Infant Program*, ARC COMMUNITY SERVICES, INC., <https://arccommserve.com/maternal-and-infant-program.php> [https://perma.cc/9PJX-A5EP] (last visited Oct. 20, 2019).

163. Caniglia, *supra* note 143.

164. *Id.* In the event that the women break the rules of their community supervision, they are sent to prison to complete their sentence.

165. Villaneuva, *supra* note 3, at 4.

166. See *Turner v. Safley*, 482 U.S. 78 (1987).

167. *Id.*

168. *Id.* at 89-91.

169. *Id.*

“reasonably related to legitimate penological interests.”¹⁷⁰ Some common justifications the government uses to deprive incarcerated mothers of their right to parent are: it is not in the child’s best interest to grow up in prison, and the State has a legitimate interest in “protecting the child.”¹⁷¹ Therefore, the protection of the child is the penological interest that will be analyzed using the *Turner* factors.¹⁷²

The first factor is whether there is a “valid, rational connection” between the prison regulation and the legitimate, neutral government interest justifying it.¹⁷³ A regulation will be struck down if the “logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational.”¹⁷⁴ There is a “valid, rational connection” between prohibiting children from remaining with their incarcerated mothers and protecting the interest and well-being of the child.¹⁷⁵ The government is likely worried about subjecting children to prison life without the due process of law.¹⁷⁶ Additionally, the government may successfully argue that denying this right is legitimate and neutral because no specific group of people is targeted.¹⁷⁷ However, a counterargument might suggest that the overwhelming number of children of color who are disproportionately affected by parental incarceration illustrates the government’s objective in denying access to the program is not neutral.¹⁷⁸

The second factor is whether there are “alternative means to exercise the constitutional right.”¹⁷⁹ Here, the question is whether there is an alternative way for a mother to exercise her right to parent outside of being allowed to remain with her infant. Other potential methods include visits, telephone calls and letters, but those are not accessible to infants due to their age.¹⁸⁰

The third factor is the “impact that the constitutional right has on guards, other inmates or prison resources.”¹⁸¹ Here, allowing infants to remain with their mother would not have a negative impact.¹⁸² Incarcerated women who are permitted to remain with their children are typically mentally healthier,¹⁸³ which would positively

170. Halter, *supra* note 133, at 557.

171. *Id.* at 557-58.

172. *Id.* at 558.

173. *Turner*, 482 U.S. at 89.

174. *Id.* at 89-90.

175. Halter, *supra* note 133, at 558.

176. *Id.*

177. *Id.* For example, the prisons cannot prevent incarcerated individuals from practicing their religion; a program that eliminates worship privileges on Sundays for Christian inmates would fail this aspect of the *Turner* test. *See id.*

178. *Id.* Black and Hispanic children are overrepresented among the number of children with incarcerated parents. In 2007, 1 in 15 black children and 1 in 42 Hispanic children had a parent in prison, compared to only 1 in 111 white children. *Id.*; *see also* James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465, 467-68 (2014).

179. Halter, *supra* note 133, at 556.

180. *Id.* at 558.

181. *Turner v. Safley*, 482 U.S. 78, 90 (1987).

182. Halter, *supra* note 133, at 559.

183. *See also*, Jbara, *supra* note 85, at 1829.

impact the prison staff and overall morale of the facility.¹⁸⁴ Additionally, the women admitted into these programs typically have to meet the screening requirement of no violent crime or history of child abuse, making the likelihood that the women harm the infants extremely low.¹⁸⁵

Finally, the courts must consider the “presence or absence of alternatives.”¹⁸⁶ If there is “an alternative that fully accommodates the prisoner’s rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard.”¹⁸⁷ In this case, there are “obvious, easy alternatives” to separating an incarcerated mother from her children such as prison nurseries or community-based prison nurseries.¹⁸⁸ The programs that already exist in various states have requirements prior to entry into the program.¹⁸⁹

B. Wisconsin Case Law

The reasoning in *Turner v. Safley* has been adopted by Wisconsin courts in *Lomax v. Fiedler*.¹⁹⁰ In *Lomax*, the Court of Appeals of Wisconsin implemented the four factors from *Turner* to determine whether a prison had the right to discipline an inmate based on the content of the articles he wrote and sent to a newspaper that would eventually be distributed throughout the prison.¹⁹¹ In *Lomax*, the Wisconsin Court of Appeals applied the factors in *Turner* in order to determine whether the restrictions placed on an inmate’s First Amendment rights were valid.¹⁹² The issue in dispute was a prison magazine, EDGE.¹⁹³ Many of the articles in the issue were about prison affairs, including one about a Waupun correctional officer.¹⁹⁴ When a Department of Corrections administrator saw a copy of the issue containing this article, the administrator initiated an investigation, which eventually resulted in a conduct report for Lomax.¹⁹⁵ Following the conduct report, Lomax published another article in the EDGE about the security director at Racine Correctional Institution.¹⁹⁶ Lomax received another conduct report, charging him with disrespect and “lying about staff” in violation of another DOC rule.¹⁹⁷

184. *Id.*

185. Warner, *supra* note 45 at 69-70.

186. *Turner*, 482 U.S. at 90.

187. *Id.* at 91.

188. *Id.* at 90.

189. Halter, *supra* note 133, at 560.

190. *Lomax v. Fiedler*, 204 Wis. 2d 196, 202, 554 N.W.2d 841 (Ct. App. 1996).

191. *Id.* at 206.

192. *Id.* at 219-226.

193. *Id.* at 202.

194. *Id.* at 201.

195. *Lomax*, 204 Wis. 2d at 202.

196. *Id.*

197. *Id.* at 203.

Later, Lomax sued and his claims were analyzed under the *Turner* framework, which gives greater deference to the decisions of prison administrators in situations where the “offensive communications” are directed into the prison.¹⁹⁸

The trial court held that the undisputed evidence contained in the parties’ submissions on the summary judgment motion established as a matter of law that the prison’s action in disciplining Lomax for writing and publishing the articles was reasonably related to legitimate penological interests and thus should not be overturned.¹⁹⁹

Lomax utilized the analysis found in *Turner* to argue that the Constitution still applies to prison inmates: in *Turner*, the Court noted that, “[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution.”²⁰⁰ However, those rights may be appropriately restricted inside prison walls: they must necessarily be limited by consideration relating to the “‘inordinately difficult undertaking’ that is modern prison administration.”²⁰¹ Therefore, the law is well established that prison inmates retain their First Amendment and other constitutional rights only to the extent that they are not inconsistent with their status as prisoners or with the legitimate institutional needs and objectives of the corrections system.²⁰²

Applying the four *Turner* factors in *Lomax*, the Wisconsin Court of Appeals held that the regulation was valid because:

- (1) the security interests underlying the rule were legitimate beyond question, and the discretion granted prison officials by the regulation was rationally related to those interests;
- (2) other means of expression remained available to inmates in those regulations, which prohibit only such materials as may be determined to implicate prison security and related penological interest, still permit a broad range of publications to be sent, received and read by inmates;
- (3) accommodation of the asserted constitutional right would have a substantial effect on other inmates and prison staff because circulation of the types of materials prohibited by the regulation would require the prison to greatly increase scrutiny provisions at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike; and
- (4) no obvious, easy alternative to the regulation had been established.²⁰³

Although *Lomax* dealt with the First Amendment, other constitutional rights are also protected when evaluating programs and procedures under this decision. Under this framework, Wisconsin would be able to fully implement prison nurseries

198. *Id.* at 204-205.

199. *Id.* at 205.

200. *Turner v. Safley*, 482 U.S. 78, 84 (1987).

201. *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989) (quoting *Turner*, 482 U.S. at 85).

202. *Lomax v. Fiedler*, 204 Wis. 2d 196, 206, 554 N.W.2d 841 (Ct. App. 1996)

203. *Id.* 213-214.

or more widespread community-based prison nurseries for the reasons mentioned in the previous section.

C. Community-Based Sentencing Programs

Wisconsin should look to Tennessee as an example for community-based sentencing programs. The Keeping Kids and Parents Together report evaluates two new bills introduced to the legislature in February of 2018.²⁰⁴ The Keeping Kids and Parents Together report is a policy analysis that lays out the impacts of parental incarceration on mothers, relatives, and most importantly, children.²⁰⁵ The brief argues that community-based sentencing is a healthier and fiscally responsible alternative.²⁰⁶ Parents who participate in a community-based sentencing program are more likely to succeed in treatment for substance abuse disorders and less likely to return to prison.²⁰⁷ Children who remain connected to their parents have increased opportunities for healthy attachment and development, and thus fewer behavioral issues and better mental health.²⁰⁸ Additionally, the brief notes that “youth of color are more likely to experience their parent getting locked up.”²⁰⁹

With community-based sentencing, parents are able to foster a relationship with their child(ren) while remaining accountable for their actions.²¹⁰ There is legislation being considered in Tennessee, that calls for the expansion of community-based alternatives.²¹¹ A program of this nature has the potential to reach a large portion of the incarcerated population in Tennessee, where about 1 of every 10 children has an incarcerated parent.²¹² Similar to Wisconsin, Tennessee’s population of incarcerated women has continued to increase, meaning that the amount of incarcerated mothers continues to increase.²¹³ As noted earlier, once a mother loses rights to a child, it becomes incredibly difficult to maintain rights to a subsequent child or preserve a meaningful relationship.²¹⁴ Furthermore, incarcerated women who can communicate with their children are often mentally healthier than those who are unable to maintain their parental relationships.²¹⁵ Studies suggest that women who end up in the system suffer from depression, trauma, and addiction, which may be exacerbated by having poor relationships with their children.²¹⁶

204. KIM GILHULY & LEE TAYLOR-PENN, KEEPING KIDS AND PARENTS TOGETHER: A HEALTHIER APPROACH TO SENTENCING IN TENNESSEE (2018), https://humanimpact.org/wp-content/uploads/2018/02/HIP_PrimaryCare-TN-Report.pdf [<https://perma.cc/HQB4-TQ8L>].

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at i.

209. *Id.*

210. *Id.* at ii.

211. *Id.* at 1. The legislation is House Bill 0825 and Senate Bill 0910.

212. *See id.* at 3.

213. GILHULY & TAYLOR-PENN, *supra* note 204, at 4. The incarceration rate of women has increased by 37% from 2010-2016 in Tennessee. *Id.*

214. *See supra* Part I.

215. GILHULY & TAYLOR-PENN, *supra* note 204, at 10.

216. *See* The Rebecca Project for Human Rights, *supra* note 76.

D. International approaches to incarcerated mothers and their children.

The United States is one of the only countries that lacks a national system for incarcerated mothers and infants. In the United Kingdom, prison nurseries are used “for children between nine and eighteen months old.”²¹⁷ Prison nurseries are referred to as mother and baby units (MBUs).²¹⁸ There, a child does not have to be born in prison for a mother to raise them, meaning that the program is available to more than just infants.²¹⁹ The decision to raise an older child (up to the age of eighteen months) in the prison is left to an admissions board.²²⁰

The majority of other countries that have prison nurseries allow children to stay with their mothers over the age of eighteen months.²²¹ For example, in Germany, the Preungesheim prison is described as “the most comprehensive program in the world for imprisoned women and their children.”²²² This prison nursery houses women in both high and low security facilities.²²³ Another German policy allows incarcerated mothers with older children to travel home daily to help their children get ready for school.²²⁴ Additionally, Germany allows incarcerated mothers to leave the prison walls to help maintain their household by cooking and cleaning.²²⁵

Next, countries in Latin America have many prisons that allow incarcerated mothers to bring their children with them for extended periods of time.²²⁶ In Bolivia, both mothers and fathers are allowed to bring their children with them to prison.²²⁷ Colombia’s Good Shepard prison houses thirty-five babies and toddlers.²²⁸ Here, mothers drop off their children at the nursery in the morning and pick them up later

217. Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN’S L.J. 65, 74 (2015).

218. *Id.*

219. *Id.* at 75.

220. *Id.*

221. *Id.*

222. *Id.* at 76 (quoting J. MARK EDDY & JULIE POEHLMANN, CHILDREN OF INCARCERATED PARENTS: A HANDBOOK FOR RESEARCHERS AND PRACTITIONERS 162 (2010)).

223. *Id.* “Women classified as low security are allowed to keep their children with them until they are five years old; women classified as high-security are permitted to keep their children until age three. Mothers that are considered a low-security risk live in an open mother-child house, which faces the surrounding neighborhood of Frankfurt, rather than the prison. [This detail] provide[s] children with a more traditional childhood experience. Older children attend the local preschool and all of the children go on local field trips while their mothers work or take classes.” *Id.*

224. *Id.* at 76-77.

225. *Id.*

226. *Id.* at 77.

227. *Id.* (“The Bolivian Code of Criminal Procedure allows children six years of age or younger to live with their incarcerated parent. It is estimated that there are 2,000 children living with their parents in Bolivian prisons. Bolivia’s San Pedro Prison stands in stark contrast to any other prison nursery because it houses 2,000 male inmates and 200 children without any mothers allowed. [M]ale inmates must pay to stay in a cell with their children. [This type of program has] resulted in negative outcomes such as child . . . death”).

228. *Id.* at 78.

in the afternoon, similar to how a daycare would operate outside of prison walls.²²⁹ In Mexico, there is a bit more debate over the imprisonment of mothers with their children in Mexico.²³⁰ Santa Martha Acatitla prison in Mexico City houses 1680 incarcerated mothers; Mexico is unlike any other country in the world because it is mandatory for all children born in prison to stay with their incarcerated mother until they are six years old.²³¹

In Canada, the nursery program has both full-time and part-time options for children of low-risk incarcerated mothers.²³² Children have the option to live with their mothers in prison full-time until they turn four years old; or part-time (on weekends and holidays) until they turn twelve years old.²³³ Unlike children in other programs, Canadian children have a right to request an end to living in prison.²³⁴ In December 2013, the British Columbia Supreme court ruled that “imprisoned mothers have the constitutional right to care for their newborn babies” because of the critical bonding period between a mother and her child.²³⁵ There, the Court did not find any evidence suggesting that prison nurseries cause harm to in British Columbia or worldwide, therefore the Court concluded that “discriminating against incarcerated mothers “violates the right to security of the person.”²³⁶

These international models provide a strong example for the United States to follow. The United Kingdom, Germany, countries in Latin America, and Canada demonstrate the viability of a prison nursery program and the quantifiable decrease in recidivism as a result of these programs.

V. CRITICISMS

Critics of prison nurseries emphasize the well-being of the child.²³⁷ They argue that placing a child behind bars deprives them of their due process rights.²³⁸ Additionally, there have not been extensive studies outlining the impacts of raising

229. *Id.* (“Mothers here have three options: either to keep their children behind bars with them until they reach three years old; or they can elect to send their child to foster care or send their child to live with a family member.”).

230. *Id.*

231. *Id.* (“[T]he Mexican government believes that it is better for children to be with their mothers than left behind to stay with foster parents or relatives.”).

232. *Id.* at 81. *see also* Oliver Robertson, Quaker United Nations Office, CHILDREN IMPRISONED BY CIRCUMSTANCE 29 (2008), https://quono.org/sites/default/files/resources/ENGLISH_Children%20Imprisoned%20by%20Circumstance.pdf [<https://perma.cc/LZ9G-VFRE>] (“In Canada, mothers classified as a minimum or medium security risk can participate in the Mother-Child Program: their children may live in the prison either on a full-time basis . . . or on a part-time basis . . .”).

233. Warner, *supra* note 8, at 81.

234. *Id.*

235. *Id.* at 82.

236. *Id.*

237. Elizabeth Chuck, *Prison nurseries give incarcerated mothers a chance to raise their babies—behind bars*, NBC NEWS (Aug. 4, 2018, 6:00 AM), <https://www.nbcnews.com/news/us-news/prison-nurseries-give-incarcerated-mothers-chance-raise-their-babies-behind-n894171> [<https://perma.cc/JQQ9-Y7K6>].

238. *Id.*

a child in that environment.²³⁹ Popular alternatives to prison nurseries include adoption, foster care, or placing the child with extended family.²⁴⁰ In addition, those against prison nursery believe that prisons are for punishment and not rehabilitation.²⁴¹

Another issue with implementation of prison nurseries is cost. The annual cost of housing one infant in a United States prison nursery is about \$24,000.²⁴² Cost is one of the main concerns for many states that have not established prison nurseries because of their already minimal budgets and overcrowded prisons.²⁴³ An Ohio prison nursery estimated its cost for the state for one infant is about \$4.65 daily, or about \$1697 annually.²⁴⁴ New York's program is much more expensive, estimating \$13,980 in annual costs per infant.²⁴⁵ Many of the states that have established prison nurseries receive funds from outside groups such as Catholic Charities in New York and Early Head Start in West Virginia.²⁴⁶

In Wisconsin, the average cost of incarcerating a single person in 2015 was \$38,644.²⁴⁷ In 2017, Wisconsin spent \$1.2 billion on corrections services, which is more tax dollars than the state spent on the University of Wisconsin System.²⁴⁸ Wisconsin spends more on corrections than the national average.²⁴⁹ For example in 2015, Wisconsin spent \$1.5 billion on corrections in 2015 which is over a tenth more on corrections per state resident than the national average according to U.S. Census Bureau figures.²⁵⁰ Wisconsin state and local governments spend more on corrections

239. *See id.*

240. Warner, *supra* note 8, at 67.

241. *Id.*

242. *Id.* at 88.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* (“West Virginia’s statute-authorized prison nursery prohibits the use of any state funds to run the program-this is not abnormal: the majority of states that utilize prison nurseries across the United States depend on federal grants and other types of donations from non-profit or religious organizations.”).

247. Chris Mai & Ram Subramanian, THE PRICE OF PRISONS: EXAMINING STATE SPENDING TRENDS, 2010-2015 8 (Vera Institute of Justice, 2017), [https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending](https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending) [<https://perma.cc/L2GB-4WJK>].

248. Tamarine Cornelius, *State Prison Costs Still Growing*, URBAN MILWAUKEE (Nov. 1, 2017, 3:42 PM), <https://urbanmilwaukee.com/2017/11/01/wisconsin-budget-states-prison-costs-still-growing/> [<https://perma.cc/H7SA-A447>]; *see also* Paiwan Naidu, *Does Wisconsin Spend More on Prisons than the UW System?*, THE OBSERVATORY (Mar. 21, 2018), <https://observatory.journalism.wisc.edu/2018/03/21/does-wisconsin-spend-more-on-prisons-than-on-the-uw-system/> [<https://perma.cc/NCX6-VXC6>]. (“Bob Lang, Director of the Legislative Fiscal Bureau, provided information from the 2017-19 state budget: it appropriates \$2.26 billion in general state tax dollars to the DOC over two years . . . while appropriating \$2.14 billion to the UW System. As of late March, there were 23,246 prisoners and 66,079 offenders on probation or parole as of March 2018. System wide, there were 175,825 UW Students as of 2016.”).

249. Cornelius, *supra* note 249.

250. *Id.*

than the neighboring states of Michigan, Illinois, Minnesota, and Iowa.²⁵¹ One of the reasons Wisconsin spends more per state resident than the neighboring states is that Wisconsin incarcerates a larger share of the population than neighboring states.²⁵²

The initial cost of creating a prison nursery infrastructure may shock the conscience but would cost less in the long term due the positive effects prison nursery programs have on recidivism. It was previously noted that an increasing number of incarcerated women in Wisconsin are mothers, so providing a program that fosters parental development and involvement would decrease the cost of incarcerating women over the long-term.

To compare, the foster care system or placing the child with relatives are the typical “solutions” to the problem of maternal incarceration and childcare. Although sending children to live with relatives may seem like a simple and relatively free solution, many relatives are indigent and receive some type of public assistance to care for the children whose mother is incarcerated.²⁵³ For example, the average cost of supporting an individual on welfare is \$2499 annually, and the cost of supporting a child in the foster care system is about \$21,902 annually.²⁵⁴ Ultimately, the initial cost to build the infrastructure for a prison nursery in Wisconsin might be shocking, but the amount of money it would save in the long-run by preserving the maternal-infant bond, encouraging positive reintegration efforts, and reducing recidivism would be well worth it. Additionally, it is incredibly difficult to quantify the cost that parental involvement has in a child’s life—the data suggests that incarceration of a parent dramatically impacts a child’s life, coupled with the affected population already being at a notable disadvantage in other aspects of life.

VI. CONCLUSION

The constitutional right to be a parent is well-established in Wisconsin and should not be compromised due to incarceration. This note has highlighted the termination of parent rights process, how incarceration plays a role in those proceedings, as well as the impact that the Adoption and Safe Families Act has on parents facing long terms of incarceration.²⁵⁵ The merits of prison nurseries and community-based prison nurseries were discussed at length, pointing to a much greater benefit rather than deficit by investing in these programs.²⁵⁶ Wisconsin in particular has an increasing number of women with dependents coming in the criminal justice system without much statutory guidance on how to best serve this unique population.²⁵⁷ Accounting for the importance of parental involvement in a child’s life will improve the lives of children impacted by the criminal justice system. The established case law favors a reading of the ASFA to require more than just a

251. *Id.*

252. *Id.*

253. Warner, *supra* note 8, at 89.

254. *Id.*

255. Day, *supra* note 113, at 234-35.

256. See Halter, *supra* note 133, at 561-62.

257. Butler, *supra* note 98.

failure to meet the custodial requirement if that parent is incarcerated.²⁵⁸ The overwhelming view of prison is that it is a punishment rather than a method of rehabilitation. Implementing prison nurseries or supporting more community-based alternatives plays a crucial role in reducing recidivism and ensuring that women reenter society with the necessary skills to succeed.²⁵⁹

The implementation of prison programs is governed by the United States Supreme Court precedent, *Turner v. Safley*.²⁶⁰ In *Lomax v. Fielder*, Wisconsin adopted the four factors weighed in *Turner*.²⁶¹ Analysis of those four factors shows that creating prison nurseries is legal as well as practical. The only real barrier to implementing prison nurseries is the cost. New infrastructure will need to be built, but arguably that is long overdue because of the increase in the prison population since many of the female facilities were initially constructed. Additionally, women require unique considerations different from male prisons. The “one size fits all” message of the Wisconsin Department of Corrections continues to fail incarcerated mothers and their children.

As noted, some critics of prison nurseries point to due process and cost as drawbacks.²⁶² Children in the prison environment has yet to be studied, but the importance of the maternal bond in infancy outweighs any potential negative impacts of being behind bars.²⁶³ With strict requirements such as limiting the opportunity to non-violent offenders with only a certain amount of time left on their sentence, Wisconsin has the capability to divert many women and children away from the prison setting and towards a community-based prison nursery.²⁶⁴ By diverting resources, the Department of Corrections can provide more programming that focuses on reintegration and providing incarcerated individuals the necessary skills to be successful once they have served their time. Prison nurseries and community-based prison nurseries are imperative to preserving the bond between a mother and child as well as a tool to reduce recidivism, as well as address the cycle of crime and victimization for families in contact with the criminal justice system.

258. Kenosha Dep't of Human Servs. v. Jodie W. (*In re Max G.W.*), 2006 WI 93, ¶¶49-50, 293 Wis. 2d 530, 716 N.W.2d 485.

259. Halter, *supra* note 133, at 563.

260. 482 U.S. 78, 90 (1987).

261. 204 Wis. 2d 196, 202, 554 N.W.2d 841 (Ct. App. 1996).

262. Chuck, *supra* note 238.

263. Smyth, *supra* note 60, at 36.

264. Villaneuva, *supra* note 3, at 5.