

# The Fundamental Right to be Parented and the Implications for Children with Incarcerated Mothers

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## AUTHOR'S NOTE

*My interest in this topic is intensely personal. My mother was sentenced to twenty-two years in prison while she was six months pregnant with me. When she gave birth, we spent only twenty-four hours together before we were separated, and I was sent to live with my maternal grandparents. At that time, she was serving her sentence in a women's prison that had no available nursery program—but even if it did, we would not have been eligible to participate because she was labeled as a “violent offender.” Like many other children with incarcerated parents, I struggled with my own behavioral and developmental issues. And because I dealt with the collateral effects of mass incarceration firsthand, I am deeply invested in discovering how children's legal rights and wellbeing are implicated when their parents are imprisoned.*

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## INTRODUCTION

The day after Mother’s Day in 2021, Jennifer Brown recounted her experience of being separated from her newborn child to the Minnesota House of Representatives in an effort to enact legislation that would end the practice of separating incarcerated women from their babies hours after they have given birth.<sup>1</sup> Brown was only four months pregnant when she began her sentence at Shakopee Women’s Prison.<sup>2</sup> A few months later, she was allowed to temporarily leave for a scheduled C-section delivery.<sup>3</sup> Forty-eight short hours after her son was delivered, Brown had to say her goodbyes as her newborn was then placed in the custody of people she did not know.<sup>4</sup> During her testimony, Brown recalled that “it was so hard wanting to hold him, kiss him” and that she felt “a lot of emotions” that day.<sup>5</sup>

Unfortunately, Brown and her son’s experience is all too common. Research indicates that most children who are born to incarcerated mothers have only about twenty-four hours to bond before they are separated.<sup>6</sup> After an incarcerated mother

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1. Kent Erdahl, *A Mother’s Pain: Former Inmates Help Change MN Law After Speaking Out About Post-Birth Separations*, KARE 11 (May 12, 2021, 6:59 PM), <https://www.kare11.com/article/news/local/a-mothers-pain-former-inmates-help-change-mn-law-after-speaking-out-about-post-birth-separations/89-2852a2f6-04a8-4b7f-863a-e57fcfa52d8> [<https://perma.cc/8LPU-XQ3F>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Alysia Santo, *For Most Women Who Give Birth in Prison, ‘The Separation’ Soon Follows*,

gives birth, she is immediately sent back to lockup while her newborn is handed over to family or friends.<sup>7</sup> The child is placed into the State's custody when no one else is available to help.<sup>8</sup> According to the Director of Alabama Prison Birth Project, Ashley Lovell, not only does the mother experience intense trauma during the separation process, but so does the newborn.<sup>9</sup> Recently, advocates in some states have pushed to create prison nursery programs that allow children to remain with their mothers behind bars.<sup>10</sup> Currently, ten states operate these nursery programs,<sup>11</sup> each varying in terms of capacity.<sup>12</sup>

Children's rights as they relate to parental incarceration are an area ripe for legal exploration. Chesa Boudin writes that "[w]hile there is a body of literature on the social issues presented by parental incarceration and an assortment of services and programs offered to children and families of prisoners, there is surprisingly little written about the relevant legal issues."<sup>13</sup> Some scholars have creatively proposed that children possess a First Amendment freedom of association right and a due process liberty interest in a relationship with their convicted parents.<sup>14</sup> In this Comment, I contribute to the existing legal literature by arguing that children possess a substantive due process right to be parented. As such, this Comment is motivated by two key questions: Do children with incarcerated mothers in fact possess a fundamental right to be parented? And is this fundamental right infringed when children do not have access to their parents via prison nursery programs?

This Comment is organized into six parts. Part I highlights an increase in female incarceration rates and a corresponding increase in the number of children with incarcerated parents. Part II documents the historical practice of allowing infants to remain in correctional facilities under the care of their mothers and how this practice is gaining renewed traction within the United States. Part II also discusses the mechanics of prison nurseries, criteria for participation, and program variation across state facilities. Part III introduces the Children's Rights

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FRONTLINE (May 6, 2020), <https://www.pbs.org/wgbh/frontline/article/for-most-women-who-give-birth-in-prison-the-separation-soon-follows/> [https://perma.cc/4HC9-6KS6].

7. Rebecca Palsha, *Pregnant in Prison: What Happens to a Baby Born in Prison*, ALASKA'S NEWS SOURCE (Oct. 27, 2016, 4:19 PM), <https://www.alaskanewssource.com/content/news/Pregnant-in-prison-What-happens-to-a-baby-born-in-prison—398959951.html> [https://perma.cc/3V7M-A4CJ].
8. *Id.*
9. Santo, *supra* note 6.
10. Palsha, *supra* note 7.
11. Lion Song, *A Constitutional Analysis of a Proposal to Expand the Prison Nursery Programs*, 27 CARDOZO J. EQUAL RTS. & SOC. JUST. 171, 178 (2020).
12. CHANDRA VILLANUEVA, WOMEN'S PRISON ASS'N, MOTHERS, INFANTS AND IMPRISONMENT: A NATIONAL LOOK AT PRISON NURSERIES AND COMMUNITY-BASED ALTERNATIVES 10 (2009), [https://www.prisonlegalnews.org/media/publications/womens\\_prison\\_assoc\\_report\\_on\\_prison\\_nurseries\\_and\\_community\\_alternatives\\_2009.pdf](https://www.prisonlegalnews.org/media/publications/womens_prison_assoc_report_on_prison_nurseries_and_community_alternatives_2009.pdf) [https://perma.cc/7QBY-VKH9].
13. Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 78–79 (2011).
14. *See, e.g., id.* at 80.

Movement and documents the gradual social shift from viewing children as objects to rights bearers. This section also considers Justice Stevens's dissent in *Troxel v. Granville*,<sup>15</sup> in which he argues that children possess a fundamental right to preserve their intimate relationships. Part IV introduces the Supreme Court's liberal approach to interpreting the liberties protected by the Due Process Clause as unenumerated fundamental rights. Part V applies the Court's approach to argue that children possess a fundamental right to be parented, focusing on both the individual and social benefits of recognizing such a right. Finally, Part VI argues that children's fundamental right to be parented is violated when 1) States do not operate prison nursery programs or 2) States prevent infant-mother pairs from participating in nursery programs solely due to a mother's history of violence.<sup>16</sup> As the social commitment to the notion of children's rights continues to gain prominence, this Comment prescribes a tangible step in the right direction, but maintains that the ultimate goal is to no longer view prisons as a tool that can solve society's problems.

### I. THE GROWING NUMBER OF CHILDREN WITH INCARCERATED MOTHERS

The United States is the global leader in incarceration rates.<sup>17</sup> According to the Sentencing Project, there are currently two million people in prisons and jails combined – a 500 percent increase over the last forty years.<sup>18</sup> One explanation for this rapid increase is the overreliance on tough-on-crime policies and the war on drugs.<sup>19</sup> Although prison populations are growing in other nations throughout the world, the U.S. prison population dwarfs them all in size as a percent of the population, with incarceration levels commonly five to seven times higher.<sup>20</sup> Scholars note that very few nations approach the U.S. incarceration rate, aside from Russia, Cuba, Ukraine, Singapore, and South Africa, historically autocratic and nondemocratic nations.<sup>21</sup>

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15. *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

16. This paper focuses solely on how the fundamental right to be parented is infringed when a mother is incarcerated. While noteworthy, the implications of this right for children in the custody of Child Protective Services or forcefully confined in juvenile detention centers are outside the scope of this paper. Further scholarship should explore these issues, as well as related issues such as the State obligation to implement prison nursery programs in male prison facilities.

17. Sara Wakefield & Christopher Uggen, *Incarceration and Stratification*, 36 ANN. REV. SOCIO. 387, 390 (2010).

18. *Criminal Justice Facts*, THE SENTENCING PROJECT, <https://www.sentencingproject.org/criminal-justice-facts/> [https://perma.cc/68QM-HZHM] (last visited Feb. 13, 2022).

19. *See, e.g., Mass Incarceration and Mass Punishment*, FAIR FIGHT INITIATIVE, <https://www.fairfightinitiative.org/the-history-causes-and-facts-on-mass-incarceration/> [https://perma.cc/RE3U-4Z76] (last visited Nov. 13, 2021).

20. Wakefield & Uggen, *supra* note 17, at 390.

21. *See id.*

### A. Changing Prison Demographics

Over the past twenty-five years, the number of incarcerated women has drastically increased. Between 1980 and 2019, the number of women incarcerated in U.S. prisons and jails increased by more than 700 percent.<sup>22</sup> In 1980, 26,378 women were behind bars.<sup>23</sup> By 2019, over 200,000 women were confined.<sup>24</sup> While there are still many more men than women in prison, the female imprisonment rate is growing twice as fast as the male imprisonment rate.<sup>25</sup>

The increase in the number of incarcerated women is especially concerning due to the unintended consequences for children. Almost two-thirds of incarcerated women are mothers.<sup>26</sup> Researchers estimate that the median age of incarcerated women is thirty-four, and many of these women are the mothers of very young children.<sup>27</sup> According to a report issued by the U.S. Department of Justice, 62 percent of women incarcerated in state prison and 56 percent of women incarcerated in federal prison report being a parent.<sup>28</sup> This same report found that the number of children with a mother in prison specifically has increased over 130 percent since 1991.<sup>29</sup> Upon disaggregating the data, Black children were seven-and-a-half times more likely than White children to have a parent in prison, and Hispanic children were more than two-and-a-half times more likely than White children to have a parent in prison.<sup>30</sup>

## II. WHAT IS A PRISON NURSERY?

A prison nursery program allows a child born to an incarcerated woman to remain under her care while she is in a correctional facility.<sup>31</sup> While allowing infants to remain with their incarcerated mothers may sound unsettling to some, it is the norm internationally and was once a common practice in the U.S., but most states repealed this legislation by the 1960s.<sup>32</sup> As the female prison population continues to grow astronomically, prison nursery programs have witnessed a

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22. *Fact Sheet: Incarcerated Women and Girls*, THE SENTENCING PROJECT (Nov. 24, 2020), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls> [<https://perma.cc/TJ3E-EDJE>].

23. *Id.*

24. *Id.*

25. *Id.*

26. Emily Halter, *Parental Prisoners: The Incarcerated Mother's Constitutional Right to Parent*, 108 J. CRIM. L. & CRIMINOLOGY 539, 542 (2018).

27. *Id.* at 542–43.

28. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEPARTMENT OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 2 (2010), <https://bjs.ojp.gov/content/pub/pdf/pptmc.pdf> [<https://perma.cc/HFY5-9NBX>].

29. *Id.*

30. *Id.*

31. Sophia Dolan, *Babies Behind Bars: How Prison Nurseries Protect the Constitutional Right to Be a Parent in Wisconsin*, 34 WIS. J.L. GENDER & SOC'Y 207, 224 (2019).

32. Lorie Smith Goshin & Mary Woods Byrne, *Converging Streams of Opportunity for Prison Nursery Programs in the United States*, 48 J. OFFENDER REHABILITATION 271, 272 (2009).

“resurge in popularity.”<sup>33</sup> To be eligible to participate in a prison nursery program, the mother generally must be a non-violent offender with no history of child abuse or neglect.<sup>34</sup> Ten different states currently operate nursery programs: California, Illinois, Indiana, Nebraska, New York, Ohio, South Dakota, Texas, Washington, and West Virginia.<sup>35</sup>

The duration of the nursery program depends on the facility. The average length of stay for an infant is between twelve and twenty-four months.<sup>36</sup> But some states are clustered at the low and high end of the spectrum. At the South Dakota Women’s Prison, for example, infants are only permitted to stay up to 30 days.<sup>37</sup> At Washington Correctional Center for Women, however, children may stay with an incarcerated mother for up to three years.<sup>38</sup>

Prison nursery programs also vary in terms of their headcount. The Decatur Correctional Center in Illinois limits their capacity to five mother-child pairs.<sup>39</sup> In contrast, Nebraska Prison Nursery Program, the second oldest prison nursery in the country, currently houses around fifteen mother-child pairs.<sup>40</sup> Current estimates indicate that roughly twelve thousand pregnant women are incarcerated in the United States ever year, suggesting that the demand may be much higher than the number of available slots in nursery programs, but no government agency formally keeps track.<sup>41</sup> In some nursery programs, incarcerated mothers share private cells with their infants, but in most prison nurseries infant-mother pairs are separated from the general prison population to ensure the safety of the child.<sup>42</sup>

Nursery programs tend to have mandatory programming for mothers. In most prison nursery programs, mothers must complete a number of requirements in order to participate such as participating in “G.E.D courses, parenting classes, counseling, and rehabilitation programs.”<sup>43</sup> Several facilities have modeled their nursery programs after Bedford Hills Correctional Facility in New York, the longest-standing prison nursery in the United States.<sup>44</sup> In Bedford, incarcerated mothers also have access to a “parenting center, prenatal center, infant day care center, and child advocacy office.”<sup>45</sup>

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33. Carmen Hamper, *Can Life in Prison be in the Best Interests of the Child*, 41 OHIO N.U. L. REV. 201, 209 (2014).

34. Villanueva, *supra* note 12, at 9.

35. Song, *supra* note 11, at 178–79.

36. Michal Gilad & Tal Gat, *U.S. v. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women*, 37 N.Y.U REV. L. & SOC. CHANGE 371, 374 (2013) (citing Villanueva, *supra* note 12, at 10).

37. Villanueva, *supra* note 12, at 10.

38. *Id.*

39. *Id.*

40. Dolan, *supra* note 31, at 225 (citing Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTING’S WOMEN’S L. J. 65, 73 (2015)).

41. See Santo, *supra* note 6.

42. Gilad et al., *supra* note 36, at 374 (citing Villanueva, *supra* note 12, at 10–11).

43. Hamper, *supra* note 33, at 210.

44. Villanueva, *supra* note 12, at 10.

45. *Id.*

### III. EXPANDING CHILDREN'S RIGHTS

Although prison nursery programs have increased in popularity over the past few years,<sup>46</sup> only nine states operate them with very limited headcounts.<sup>47</sup> This Part surveys efforts by the Children's Rights Movement to expand and acknowledge the rights of children,<sup>48</sup> and it explores the current status of children's rights vis-à-vis those held by their parents.<sup>49</sup>

#### A. Children as Rights Bearers

The claim that children have rights is relatively new. Prior to the 16<sup>th</sup> century, "there [appeared] to be no conception of childhood as a unique or distinct period of life."<sup>50</sup> Children were conceptualized as the legal property of their parents, possessing no status or rights.<sup>51</sup> Further, those as young as six were considered to be small adults that needed to contribute to society.<sup>52</sup>

The Children's Rights Movement emerged during the Industrial Revolution, a time when technological and socioeconomic changes resulted in the conceptualization of children as victims of industrialization and in need of state intervention and protection.<sup>53</sup> During the early twentieth century, many children worked sixteen-hour days in damp and poorly ventilated factories where corporal punishment and sexual molestation were all too common.<sup>54</sup> When children came to be recognized as a vulnerable group throughout Western society, child labor became viewed as a social problem.<sup>55</sup> Subsequently, the child labor reform movement launched a successful campaign that resulted in the elimination of industrial child labor altogether in the United States.<sup>56</sup>

In the latter part of the twentieth century there was a shift from the focus on children's protection to recognizing children's right to self-determination.<sup>57</sup> As a result, there has been a substantial increase in the social and public commitment to the notion of children's rights.<sup>58</sup> According to Hanita Kosher, "after centuries of ignoring children's rights and of children being treated as property and objects, in the last century, children gradually began to gain status as human beings entitled

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46. Gilad et al., *supra* note 36, at 374 (citing Villanueva, *supra* note 12, at 9).

47. *See* Villanueva, *supra* note 12, at 5.

48. Paraskevas Xenophontos, *Children's Rights Movement*, QUEEN'S COLLEGE (Mar. 11, 2017), <http://understandingtheurban.qwriting.qc.cuny.edu/2017/03/11/childrens-rights-movement/> [<https://perma.cc/432H-8MVT>].

49. *See* Boudin, *supra* note 13, at 79.

50. HANITA KOSHER, ASHER BEN-ARIEH & YAEL HENDELSMAN, *CHILDREN'S RIGHTS AND SOCIAL WORK* 9 (2016).

51. *Id.*

52. *Id.* at 10.

53. *Id.*; Xenophontos, *supra* note 48.

54. KOSHER ET AL., *supra* note 50, at 10–11.

55. *Id.* at 10.

56. *Id.* at 11.

57. *Id.* at 14.

58. *Id.* at xix.

to rights and dignity.”<sup>59</sup> In 1989, leaders around the world committed to promoting children’s rights through the adoption of the United Nations Convention on the Rights of Children (CRC).<sup>60</sup> The most widely ratified human rights treaty in history,<sup>61</sup> “the principles and values of the CRC have had a remarkable impact on the status of children around the world, particularly on social policy, legislation, institutions, and services for children.”<sup>62</sup> Presently, every country has ratified this treaty with one notable exception – the United States.<sup>63</sup>

### **B. The Supreme Court Has Remained Silent on the Question of Whether Children Have a Liberty Interest in Preserving Intimate Relationships**

While discourse around children’s rights has become salient in the international community, the United States Supreme Court has yet to take a clear stance on the issue of whether children possess a fundamental right to maintain family relationships. The Court punted on this question in *Troxel v. Granville*, a case involving a Washington state statute that allowed any person to petition for visitation if it served the best interest of the child.<sup>64</sup> In this case, Petitioners petitioned Washington Superior Court for the right to visit their grandchildren shortly after their son, the father of the children, committed suicide. Respondent, the mother of the children, opposed the petition.<sup>65</sup> The majority ultimately held that the statute as applied was unconstitutional because it violated parents’ substantive due process rights by interfering with their liberty interest in the “care, custody, and control of their children.”<sup>66</sup>

While the majority in *Troxel* failed to take advantage of an opportunity to elucidate the nature of children’s liberty interest in preserving intimate bonds, Justice Stevens, in dissent, accomplishes what the majority does not.<sup>67</sup> Recognizing children as constitutionally-protected actors, Stevens argues that “to the extent that parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests.”<sup>68</sup> Thus, it is fair to say that Justice Stevens’ assertion has broad implications in a range of different contexts—namely, where children have been separated from their maternal figures. If the Court were to recognize that children do possess such

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59. *Id.*

60. *Id.* at 15.

61. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

62. KOSHER ET AL., *supra* note 50, at xix.

63. Sarah Mehta, *There’s Only One Country That Hasn’t Ratified the Convention on Children’s Rights: US* (Nov. 20, 2015) <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens> [<https://perma.cc/TD4A-CPKH>].

64. 530 U.S. 57, 57 (2000).

65. *Id.* at 60.

66. *Id.* at 65, 75.

67. *See id.* at 80.

68. *Id.* at 88.



a right to preserve intimate relationships, children could be required to remain under the custody of their incarcerated mothers in state-run prison nursery programs.

#### IV. THE LIBERAL APPROACH TO PROTECTING FUNDAMENTAL RIGHTS

Through a series of watershed cases, the Supreme Court has developed a liberal approach to interpreting liberties protected by the Due Process Clause as unenumerated fundamental rights.<sup>69</sup> Haochen Sun introduces this novel approach to understand how the Court interprets fundamental rights, arguing that it sheds a “new light on the role of the judiciary in protecting fundamental rights.” It has three major components.<sup>70</sup>

First, Justices who follow the liberal approach argue for a dynamic interpretation of the nature and scope of liberty, empowering courts to interpret the Due Process Clause and identify unenumerated rights. According to constitutional law scholar Erwin Chemerinsky, this idea can be traced back to the early 1900s, a famous era when the Court aggressively protected economic liberty from all government interference.<sup>71</sup> In *Lochner v. New York*, the Supreme Court held that freedom of contract was a fundamental right under the Due Process Clause and struck down a New York law that limited the number of hours of hours bakers could work.<sup>72</sup> During this period, the Court struck down hundreds of laws containing economic regulations, until 1937, when the Court finally “repudiated economic substantive due process.”<sup>73</sup>

*Meyer v. Nebraska* appears to be the first case where the Court expanded the definition of liberty under the Due Process Clause to protect civil liberties.<sup>74</sup> Liberty, according to the Court, has two dimensions – protecting bodily integrity and allowing individuals to make choices based on their own happiness.<sup>75</sup> Despite its broad definition of liberty, the Court did not elevate those liberties to fundamental rights until years down the road.<sup>76</sup>

Justice Harlan’s dissent in *Poe v. Ullman* marks a “critical turning point for the Supreme Court’s jurisprudence of fundamental rights protection.”<sup>77</sup> According to Justice Harlan:

“[T]he full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere

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69. Haochen Sun, *The Fundamental Right to Technology*, 48 HOFSTRA L. REV. 445, 452–58 (2019).

70. *Id.* at 452–53.

71. Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO. L. REV. 1501, 1502–1503 (1999).

72. *Id.*

73. *Id.*

74. See 262 U.S. 390, 399 (1923).

75. *Id.*

76. *Id.*; Sun, *supra* note 69 at 453.

77. Sun, *supra* note 69 at 453.; see *Poe v. Ullman*, 367 U.S. 497, 542 (1999).

provided by the Constitution. This “liberty” is not a series of isolated points pricked out in terms of taking of property; the freedom of speech, press, and religion; the right to bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary and purposeless restraints....”<sup>78</sup>

Justice Harlan’s dissent asserts an extremely broad understanding of the liberties protected by the Constitution, arguing that the constitutional protection of the Due Process Clause indeed stretched to fundamental rights not specifically identified by the Constitution.<sup>79</sup> The Court eventually relied on this robust definition of liberty in *Roe v. Wade*, where the Court reasoned that the fundamental right to privacy is “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” despite neither “privacy” nor “abortion” being expressly mentioned in the Constitution.<sup>80</sup>

Second, by applying the liberal approach, the Supreme Court maintains that reasoned judgment must be applied in “determining what personal interests of utmost value to individuals could amount to unenumerated fundamental rights.”<sup>81</sup> This reasoned-judgment standard first appeared in Justice Harlan’s dissent in *Poe v. Ullman* where he maintained that “certain interests require particularly careful scrutiny of the state needs to justify their abridgment.”<sup>82</sup> Over thirty years later, the Court in *Planned Parenthood v. Casey* affirmed that the Constitution protects a person’s right to terminate a pregnancy before fetal viability. It explained that reasoned judgment should be used to determine whether an unenumerated fundamental right exists by determining “the boundaries between the individual’s liberty and the demands of organized society.”<sup>83</sup> However, the Court maintained, this process should be categorized by the “liberty of all” rather than enforcing judges’ individual “moral code.”<sup>84</sup> The Court ultimately reaffirmed women’s liberty interest in obtaining an abortion and upheld abortion access as a fundamental right.<sup>85</sup>

Third, the Supreme Court has justified the constitutional protection of unenumerated rights based on societal interests.<sup>86</sup> According to Justice Harlan’s dissent in *Poe v. Ullman*, the liberty interest of individuals must be weighed with “the demands of an organized society.”<sup>87</sup> Similarly, in *Obergefell v. Hodges*, the majority partially justifies its elevation of marriage to fundamental right status

78. *Id.*

79. *Id.*

80. *Id.*; *Roe v. Wade*, 410 U.S. 113 (1973).

81. Sun, *supra* note 69 at 455.

82. *See* 367 U.S. at 543.

83. *Planned Parenthood v. Casey*, 505 U.S. 833, 834 (1992).

84. *Id.* at 850.

85. *Id.* at 852.

86. Sun, *supra* note 69, at 453.

87. 367 U.S. 497 at 542.

based on society's interest.<sup>88</sup> According to the Court, "marriage is a keystone of our social order."<sup>89</sup> The Court also discussed the ways in which the institution of marriage allocates benefits and responsibilities to married couples.<sup>90</sup> As such, Justices who rely on this three-part approach to interpreting unenumerated fundamental rights help us conceive of the Constitution as a dynamic body of law that can adapt as society continually changes.

## V. RECOGNIZING THE FUNDAMENTAL RIGHT TO BE PARENTED

In this Section, I will apply the liberal approach to a discussion of why a child's right to be parented should fall within the scope of the Due Process Clause and thereby be recognized as a fundamental right. Under the Due Process Clause, liberty encompasses new fundamental rights "provided that their intrinsic worth in ensuring basic individual freedoms and promoting social interests have been established through reasoned judgment."<sup>91</sup> Here, I will demonstrate how recognizing children's right to be parented is of fundamental importance to individual children and American society.

### A. Individual Benefit

Recognizing children's fundamental right to be parented by their incarcerated mother will drastically improve the quality of the infant's life in four major ways.

First, children will be shielded from experiencing strains resulting from economic deprivation when their mother is imprisoned.<sup>92</sup> In an analysis of the collateral consequences of imprisonment, John Hagan and Ronit Dinovitzer found that if an incarcerated mother previously contributed to a household, families may experience economic deprivation.<sup>93</sup> A number of things may occur when this happens. Older children may assume unexpected roles like caring for younger children, which diverts them from school into early labor force participation.<sup>94</sup> And other children may turn to the "underground economy."<sup>95</sup> Children who are permitted to remain with their mothers may not experience the same economic deprivation or strain that they otherwise would on the outside. While there is a compelling argument that states should economically support other family members to care for these children inside of their own communities, infants would still be unable to bond with their mothers during a critical stage in their

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88. 135 S. Ct. 2584, 2594 (2015).

89. *Id.*

90. *Id.*

91. Sun, *supra* note 69, at 453.

92. John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME. & JUST. 121, 124 (1999).

93. *Id.*

94. *Id.*

95. *Id.* (the underground economy refers to economic transactions that are deemed illegal).

development.<sup>96</sup>

Second, permitting infants to remain with an incarcerated mother aids in their healthy development. Currently, most newborns spend only twenty-four hours with an incarcerated mother before they are subsequently placed with relatives or in foster care.<sup>97</sup> This is particularly concerning for an infant's future development. Research shows that contact between an infant and mother immediately after birth is important because attachment bonds are formed when the child is between ages six months to two years old.<sup>98</sup> Children who fail to sufficiently bond with their mothers are more likely to have developmental problems.<sup>99</sup> According to Halter, "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>100</sup> In particular, having a parent in prison can make it difficult for children to bond with whatever alternative caregivers they have. Moreover, among infants living outside of prison, the risk of infant death is 2.9 times higher for those with an incarcerated parent."<sup>101</sup> Because there are known negative consequences for an infant's development when they are separated from their mothers, recognizing children's fundamental right to be parented promotes their healthy development.

Third, if the child has had a continuous relationship with their mother for some period after birth, the child-parent relationship will not suffer as it usually does when the child is unable to visit. Research indicates that there are financial barriers that prevent children from being able to visit their mothers.<sup>102</sup> According to Nancy G. La Vigne, "the majority of incarcerated parents reside over 100 miles away from the home they occupied before arrest, making travel to the prison facility time consuming, expensive, and difficult to coordinate."<sup>103</sup> Aside from financial barriers, many policies designed to promote safety also discourage visitation as families often encounter humiliating and intimidating conditions.<sup>104</sup> Children who remain in the custody of their mothers may develop stronger relationships than they would have in light of existing barriers to visitation.

Lastly, the child will no longer be at risk for homelessness due to maternal incarceration. Christopher Wilderman conducted a study in which he relied on

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96. See Halter, *supra* note 26, at 561.

97. Santo, *supra* note 6.

98. Halter, *supra* note 26, at 561.

99. *Id.*

100. *Id.*

101. *Id.*

102. Nancy G. La Vigne, *Broken Bonds: Understanding and Addressing the Needs of Children with Incarcerated Parents* (Feb. 2008), <https://www.urban.org/sites/default/files/publication/31486/411616-Broken-Bonds-Understanding-and-Addressing-the-Needs-of-Children-with-Incarcerated-Parents.PDF> [<https://perma.cc/R2DM-ZEFM>].

103. *Id.*

104. *Id.*

data from the Fragile Families and Childhood Wellbeing Study to investigate average and race-specific effects of maternal incarceration on the risk of child homelessness.<sup>105</sup> While he found that paternal incarceration more strongly increased the risk of child homelessness, maternal incarceration is still associated with some risk of homelessness.<sup>106</sup> Risk is especially concentrated among Black children, and Black-White inequality in child homelessness has increased by 65 percent since the 1970s.<sup>107</sup> Prison nursery programs ensure that children with incarcerated mothers have a habitable place to stay.

## B. Societal Benefit

From a societal standpoint, recognizing children's fundamental right to be parented bolsters the family unit, resulting in fewer terminations of parental rights. Currently, the Adoption and Safe Families Act of 1997 makes it incredibly difficult for families with an incarcerated parent to stay together by preventing incarcerated mothers from holding on to custody of their children.<sup>108</sup> The Marshall Project estimates that of the 32,000 incarcerated parents who have had their children permanently taken away since 2006, 5,000 appear to have lost their parental rights because of imprisonment alone.<sup>109</sup> According to Mariely Downer, the Adoption and Safe Families Act of 1997 deemphasized the public policy goal of family reunification and instead favored the termination of parental rights at a faster rate so that children can be adopted and placed into a home to foster a sense of permanency.<sup>110</sup> As a part of this Act, foster care agencies are mandated to begin termination proceedings when the child has been in foster care for "15 of the most recent 22 months."<sup>111</sup> Mothers who have been convicted of felonies are especially vulnerable to losing their parental rights because 91 percent of them are sentenced to serve at least eighteen months in prison.<sup>112</sup> States also receive financial incentives to increase the number of adoptions each year.<sup>113</sup> If we recognize children's right to remain under the care of their mothers, the Act's requirements will not be triggered during the mother's prison sentence and more families will be preserved. One might argue that instead of placing children in prison nursery programs, interest groups should simply advocate to repeal the AFSA, but efforts

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105. Christopher Wildeman, *Parental Incarceration, Child Homelessness, and the Invisible Consequences of Mass Imprisonment*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 74, 92 (2014).

106. *Id.*

107. *Id.*

108. Halter, *supra* note 26, at 547.

109. Eli Hagar & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, THE MARSHALL PROJECT (Dec. 02, 2018), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> [<https://perma.cc/DZ9L-855W>].

110. Mariely Downer, *Losing More Than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN'S L.J. 41, 44-48 (2000).

111. *Id.* at 44.

112. *Id.* at 47.

113. *Id.* at 44.

to repeal have been largely unsuccessful almost a quarter century after its adoption.<sup>114</sup>

As fewer parental rights are terminated and more children remain under the care of their incarcerated mothers, society will not need to rely on our already overburdened foster care system. In some areas of the country, the foster care system has already become unsustainable.<sup>115</sup> In a study of Los Angeles County, the country's largest foster care system, researchers found that almost 28,000 children under the age of 18 are under the supervision of the Department of Children and Family Services.<sup>116</sup> While 15,600 of these children have already been physically removed from their homes, there are only 9,000 foster homes currently available.<sup>117</sup> Children who have not yet been placed in individual homes are held in Welcome Centers while they wait for placement to become available.<sup>118</sup> The limited availability of foster homes can be explained by inadequate support from DCFS' social workers, insufficient financial support, and a "daunting" amount of paperwork required to become a foster parent. So long as the foster care system remains overburdened, it is in society's best interest to reduce the number of children who enter into the system.

Lastly, participating in prison nurse programs reduces recidivism rates, promoting society's interest in preventing crime. According to a 2010 study of recidivism rates, "58 percent of women are rearrested, 38 percent are reconvicted, and 30 percent are returned to prison in the three years following release from prison."<sup>119</sup> Researchers also conducted a study involving 139 women of color who resided with their infants between 2001–2007.<sup>120</sup> They analyzed three-year recidivism upon release.<sup>121</sup> Each of the participants had histories of substance abuse and depressive symptoms, were convicted of nonviolent offenses, and had multiple prior arrests.<sup>122</sup> Three years upon release, 83 percent of the women remained in the community and only 4 percent returned to prison after committing new crimes.<sup>123</sup>

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114. See Kathleen Creamer & Chris Gottlieb, *If Adoption and Safe Families Act Can't Be Repealed, Here's How to At Least Make it Better*, THE IMPRINT (Feb. 9, 2021), <https://imprintnews.org/uncategorized/afsa-repealed-how-make-better/51490> [<https://perma.cc/8C93-KTZ5>].

115. ChrisAnna Mink, *Better-Funded Programs Desperately Needed in Country's Largest Foster Care System*, CENTER FOR HEALTH JOURNALISM (Aug. 13, 2015), <https://centerforhealthjournalism.org/2015/08/11/better-funded-programs-desperately-needed-country's-largest-foster-care-system> [<https://perma.cc/UM9H-C9C4>].

116. *Id.*

117. *Id.*

118. *Id.*

119. Beth Huebner, Christina DeJong & Jennifer Cobbina, *Women Coming Home: Long-Term Patterns of Recidivism*, 27 JUST. Q. 225, 226 (2010).

120. Lorie Goshin, *Recidivism After Release from a Prison Nursery Program*, PUB. HEALTH NURSING 109, 117 (2014).

121. *Id.*

122. *Id.*

123. *Id.*

## **VI. CHILDREN’S FUNDAMENTAL RIGHT TO BE PARENTED IS VIOLATED WHEN THEY DO NOT HAVE ACCESS TO THEIR PARENTS VIA PRISON NURSERIES**

The Supreme Court has consistently held that government practices or statutes that restrict fundamental rights are subjected to strict scrutiny and can only be justified if they further a compelling government purpose, and “even then, only if no less restrictive alternative is available.”<sup>124</sup> If the right to be parented is fundamental, when a child does not have access to their mother via prison nurseries the strict scrutiny standard would be triggered.

### **A. States with No Prison Nursery Programs Violate Children’s Right to Be Parented**

#### **1. The Fundamental Right to Be Parented is Infringed**

In a traditional Due Process analysis, the Court first asks whether a fundamental right has been infringed before applying strict scrutiny. Currently, prison nursery programs are only offered in ten different states, meaning that forty states in the U.S. have prison facilities that currently operate without them.<sup>125</sup> Children’s fundamental right to be parented is infringed when a child is unable to remain in their mother’s care because they reside in a state that does not offer a prison nursery program.

#### **2. The Government Has a Compelling Interest in Promoting the Wellbeing of Children**

When the Court determines that a fundamental right has been infringed, it then considers whether the government has a compelling justification for the infringement. In this scenario, states would presumably argue that they have an interest in protecting children from being housed under hazardous and improper conditions. In *Jailing Black Babies*, James Dwyer—perhaps prison nursery programs’ staunchest critic—argues that “incarcerated women are generally not well functioning, psychologically healthy people” and that tightly controlled prison environments, often described by inmates as isolating and overcrowded, create stressors for imprisoned mothers and their babies.<sup>126</sup> While participating in these prison nursery programs, Dwyer contends, infants may also be exposed to other inmates, which elevates their risk for disease and illness.<sup>127</sup>

Concerns about the potential drawbacks of placing children into prison nursery programs have some merit, so it is likely that the Court would find the state’s interest to be compelling in light of its decision in *Lassiter v. Department*

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124. *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 357 (1978).

125. Song, *supra* note 11.

126. James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465, 485–491.

127. *Id.* at 490.

of *Social Services of Durham City*.<sup>128</sup> There, the state terminated a mother's parental rights, and the Court ultimately found that states have an "urgent interest" in the welfare of children.<sup>129</sup> However, these drawbacks are outweighed by the many benefits, such as promoting healthy attachment bonds between infants and their mothers.<sup>130</sup> Some scholars are confident that so long as programs are well-developed, they will be able to overcome existing stressors for infant-mother pairs.<sup>131</sup> While conceding to the point that prisons are inherently stressful environments, a significant source of stress for women in prison derives from not knowing what is happening to their children and families.<sup>132</sup> Participating in prison nursery programs can directly alleviate this common stress factor for incarcerated women,<sup>133</sup> suggesting that opponents' concerns may be overstated. Additionally, some existing prison nursery programs have already taken reasonable steps to ensure the safety of infants by isolating infant-mother pairs from the general prison population and cultivating supportive environments that help mothers parent effectively.<sup>134</sup>

### 3. The Means Are Not Sufficiently Related to the Ends

Next, the Court would determine whether failing to run prison nursery programs is narrowly tailored to serve the State's interest in promoting the wellbeing of children. A state interest is not narrowly tailored when it is either overinclusive or underinclusive. Specifically, a state policy is overinclusive when it "encompasses more protected conduct than necessary" and it is underinclusive when it "fails to promote its purported compelling interest."<sup>135</sup>

The failure to run prison nursery programs is overinclusive because infants who are placed outside of their mother's care into the foster care system are uniquely susceptible to maltreatment. A study conducted by John Hopkins University found that children in foster care are four times more likely to be sexually abused than children outside of foster care and children in group homes are twenty-eight times more likely to be abused than children who do not reside in group homes.<sup>136</sup> Another study of Oregon and Washington state found that one-third of children were abused by their foster parent or another adult residing within the home at the time.<sup>137</sup> For these children, residing in a prison nursery with their

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128. See generally *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 27–28 (1981) (holding that the state's interest in the welfare of a child was enough to override the process of providing counsel to indigent parents in parental rights cases).

129. *Id.* at 27.

130. See Halter, *supra* note 26, at 561.

131. Halter, *supra* note 26, at 564.

132. *Id.*

133. *Id.*

134. Villanueva, *supra* note 12.

135. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 578 (1993).

136. *Sex Abuse and the Foster Care System*, <https://www.focusforhealth.org/sex-abuse-and-the-foster-care-system> [<https://perma.cc/U8Q2-BHLE>] (last visited Nov. 6, 2021).

137. *Id.*



mother under immediate supervision is a much safer alternative.

The state's interest is also overinclusive because infants of color and those who reside in rural communities may be more likely to receive better care while in nursery programs.<sup>138</sup> Pediatric research conducted by James Marcin found that the "regionalization of pediatric services" contributes to healthcare disparities by creating barriers to adequate care for those "living in underserved rural communities."<sup>139</sup> As a result of these barriers to access, children "frequently forgo" visits to specialists and instead rely on emergency care services when seeking care.<sup>140</sup> The results of this study are especially alarming considering the fact that around 20 percent of the United States population resides in rural areas and children living outside of metropolitan areas are almost 5 percent more likely to have experienced parental incarceration than those living in metropolitan areas.<sup>141</sup>

In another study, researchers found that despite recent Medicaid expansions, White people were still more likely to be insured than Black Americans and Hispanic people.<sup>142</sup> They also found that disparities between rural and urban health insurance have only increased because rural residents were less likely to reside in states that have expanded coverage.<sup>143</sup> Meanwhile, a pediatrician performs bi-weekly checkups at Bedford Hills Correctional Facility.<sup>144</sup> Several other correctional facilities have also modeled their nursery programs after Bedford Hills.<sup>145</sup> In light of these studies, it is evident that many infants would be unable to receive the level of care that they would receive in a prison nursery program on the outside.

#### 4. Less Restrictive Alternatives Are Available

The last step in the Court's strict scrutiny analysis is determining whether a less restrictive alternative exists. Even if the Court determined that the state's interest in promoting the child's wellbeing was in fact narrowly tailored, there are less restrictive options available.

First, states should model prison nursery programs after existing programs

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138. Mathew Clarke, *Benefits of Allowing Prisoners to Raise Babies Born in Prison* (June 26, 2016), <https://www.prisonlegalnews.org/news/2016/jun/3/benefits-allowing-prisoners-raise-babies-born-prison> [https://perma.cc/DR6F-TP5F].
  139. James Marcin, *Addressing Health Disparities in Rural Communities Using Telehealth*, 79 PEDIATRIC RSCH. 169, 169 (2016).
  140. *Id.*
  141. *Id.*; David Murphey & P. Mae Cooper, *Parents Behind Bars: What Happens to Their Children?* (Oct. 2015), [https://www.courts.ca.gov/documents/BTB\\_23\\_4K\\_6.pdf](https://www.courts.ca.gov/documents/BTB_23_4K_6.pdf) [https://perma.cc/2NAU-SG3T].
  142. Scott Sanders, *Infants Without Health Insurance: Racial/Ethnic and Rural/Urban Disparities in Infant Household's Insurance Coverage*, 15 PLOS ONE 1, 1–13 (2020).
  143. *Id.*
  144. Mathew Clarke, *Benefits of Allowing Prisoners to Raise Babies Born in Prison* (June 26, 2016), <https://www.prisonlegalnews.org/news/2016/jun/3/benefits-allowing-prisoners-raise-babies-born-prison> [https://perma.cc/MMV3-N92X].
  145. Villanueva, *supra* note 12, at 9.

that have implemented zero-tolerance policies for any behaviors that put the child in immediate danger.<sup>146</sup> For example, a premature baby that is not gaining enough weight because the prison is not equipped to handle other medical needs could be required to leave.<sup>147</sup> By implementing zero-tolerance policies, prison administrators can ensure that children will be removed when their wellbeing has been jeopardized without infringing on the fundamental right to be parented.

Second, prisons could continue to rely on correctional officers to monitor interactions between infants and their mothers to ensure children's physical safety.<sup>148</sup> Whenever a mother's conduct towards an infant is deemed inappropriate or concerning, states can ensure that correctional officers will be available to intervene on the child's behalf without denying all children the ability to participate in prison nursery programs.

Third, nursery programs could require infants to be housed separately from the general population. In most facilities, the nursery program is "in a wing or unit of the prison separated from the general population."<sup>149</sup> Insulating children from incarcerated persons who have not been vetted allows states to promote their interest in protecting children without creating barriers for these children to remain in the custody of their mothers.

Lastly, all prisons should require programming that promotes the wellbeing of the child. For example, at Bedford Hills Correctional Facility, in addition to the nursery, the program offers a "prenatal center, infant day care center, and a child advocacy office. Through these programs, incarcerated mothers are able to participate in support groups, gain support and information about breastfeeding and learn about infant growth and development."<sup>150</sup> Cultivating a supportive environment through programming allows states to emulate the outside world as much as possible to promote the healthy development of infants.

### **B. In States That do Operate Prison Nurseries, Policies That Exclude Mothers and Infants Based on the Mother's History of Violent Crime Violate the Fundamental Right to Be Parented**

Women are disproportionately incarcerated for drug and property offenses. These two offenses make up more than half of the offenses for which women are incarcerated.<sup>151</sup> Violent offenses, on the other hand, only account for roughly a quarter of all incarcerated women.<sup>152</sup>

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146. Naomi S. Riley, *On Prison Nurseries*, AMERICAN ENTERPRISE INSTITUTE (Mar. 22, 2019), <https://www.aei.org/articles/on-prison-nurseries/> [<https://perma.cc/VRQ6-QJHA>].

147. *Id.*

148. *Id.*

149. Villanueva, *supra* note 12, at 10.

150. *Id.*

151. Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Oct. 29, 2019), <https://www.prisonpolicy.org/reports/pie2019women.html> [<https://perma.cc/PYW9-QD7P>].

152. *Id.*

Prison nursery programs typically exclude infant-mother pairs when the mother has a history of violence.<sup>153</sup> Even though women who are violent offenders make up a smaller portion of the prison population, it is worthwhile to consider how policies that prevent infant-mother pairs from participating in nursery programs allow states to infringe on children's fundamental right to be parented.

### 1. Children's Fundamental Right to be Parented is Infringed

A child's fundamental right to be parented is infringed when an infant-mother pair is considered ineligible to participate in a prison nursery program based solely on the mother's history of violence. While the state's interest in promoting the welfare of children is compelling, barring infant-mother pairs from participating in prison nursery programs due to a mother's history of violence is not narrowly tailored for three reasons.

First, preventing infant-mother pairs from participating in the nursery program based on a mother's past history of violence is overinclusive because it implicates mothers who have not exhibited any violent tendencies towards children. Without more information, states should not infer that a mother who has committed vehicular manslaughter is more likely to abuse her child.

Second, the state's policy improperly implicates mothers who were defending themselves against abuse. Only one out of ten women are arrested for being the aggressor in instances of domestic violence.<sup>154</sup> Scholars are increasingly concerned that many of these women were actually defending themselves from their abuser at the time of arrest.<sup>155</sup> As such, a blanket bar on participation wrongfully assumes that women accused of being the aggressor would be more likely to hurt their children, when in reality these women may have been attempting to protect them.

Lastly, the state's policy fails to account for mothers who are unlikely to repeat a violent offense. Elizabeth Deschenes conducted a study to explore recidivism rates among incarcerated women.<sup>156</sup> She found that most women who were previously convicted and sentenced to prison for violent offenses did not later reoffend with a violent crime.<sup>157</sup> The strongest predictor of recidivism in women is the number of prior arrests and age of release from prison.<sup>158</sup> This suggests that a case-by-case analysis should be conducted when deciding whether an infant-mother pair should qualify to participate in a prison nursery program.

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153. Villanueva, *supra* note 12, at 5.

154. Brian Reneauer, *Investigating Intersections Between Gender and Intimate Partner Violence Recidivism*, 41 J. OFFENDER REHABILITATION 99, 124 (2005).

155. *Id.*

156. Elizabeth Piper Deschenes, Barbara Owen & Jason Crow, *Recidivism Among Female Prisoners: Secondary Analysis of the 1994 BJS Recidivism Data Set* (January 2007) (unpublished manuscript) (available at <https://www.ojp.gov/pdffiles1/nij/grants/216950.pdf> [<https://perma.cc/7M7Z-RNZV>]).

157. *Id.*

158. *Id.*

### CONCLUSION

As it stands, the majority of children born to an incarcerated mother are likely to immediately be separated from her 24 hours post-birth. This is a deeply traumatic event for the mother, and especially for the newborn who will be unable to breastfeed or have any skin-to-skin contact during a critical stage in the child's development. While there has been a push for more prison nurseries across the United States, very few prisons actually offer infants the option to remain in the custody of an incarcerated mother, and currently no prison nursery programs offer infants the option to remain in the custody of an incarcerated mother who has been labeled a violent offender.

The legal issues presented by parental incarceration are surprisingly understudied. This Comment sought to expand on the existing legal literature by arguing that not only do children possess a fundamental right to be parented, but that right is infringed upon when states do not allow children to access their mothers via prison nursery programs. While the goal of this Comment is to offer a temporary solution to address the routine practice of separating infants from their incarcerated mothers, the ultimate goal for child advocates, however, should not be to put children in prisons alongside their mothers. Child advocates should instead strive to end the proliferation of prisons, the disproportionate incarceration of people of color, and the practice of incarcerating mothers altogether. True solutions to the crisis of mass incarceration will require us all to stretch our imaginations. They will require us to make huge investments into our communities. They will require a shift from punitive approaches to solving crime to actively implementing restorative justice practices into our everyday life—only then can we ensure that we can live in a world where everyone's basic needs are met and where every child can be adequately taken care of by their parents.