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Babies Behind Bars: Should Incarcerated Mothers be Allowed to Keep Their Newborns with Them in Prison?

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BABIES BEHIND BARS: SHOULD INCARCERATED MOTHERS BE ALLOWED TO KEEP THEIR NEWBORNS WITH THEM IN PRISON?

I. INTRODUCTION

Society's traditional approach to women offenders has been focused on "women as prisoners and not . . . prisoners as women."[1] Harsh implications for female offenders who are mothers can result from the view that incarceration not only curtails the prisoner's freedom of movement but also terminates many of the individual's civil rights as well.[2] In reality, these women are doubly penalized with a prison sentence as well as temporary or permanent loss of their parental rights.[3] Modern courts are beginning to recognize that "[a] prisoner retains all of the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[4] This comment focuses on what impact this trend will have on one facet of a female offender's parental rights: her right to keep a child she bears while incarcerated.[5] An analysis will be made of the

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1. Note, *Female Offenders: A Challenge to the Courts and the Legislature*, 51 NOTRE DAME L. REV. 827, 829 (1975).

2. This attitude is typified by the Virginia Supreme Court's statement in Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871): "The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. Such men have some rights it is true, such as the law in its benignity accords to them, but not the rights of freemen."

3. The effect that a parent's incarceration has on her parental rights varies depending on the jurisdiction. Three of the most commonly used methods in dealing with the rights of incarcerated parents are:

> 1. an adjudication that the child is neglected;
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> 2. a special hearing which may be instituted under a variety of circumstances, such as neglectful or abusive behavior by the parent; open and notorious fornication; mental illness; intoxication or habitual use of drugs; failure to provide support; or divorce due to a parent's incarceration;
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> 3. an adoption proceeding by permitting the court to waive the necessity of consent to the adoption by the natural parent. These statutes authorize such waiver when: the child has been abandoned; the consent is being withheld contrary to the best interest of the child; or the parent has been declared unfit.

Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975).

4. Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944).

5. It is beyond the scope of this comment to address the incarcerated mother's parental rights as they pertain to maintaining her relationship with children she had prior to her incarceration. Some of the most obvious problems incarcerated women encounter in trying to keep their relationships with their children current include the rural locations of most institutions for women, the limited visiting hours, and the conditions under which visiting must take place. *See* Sametz, *Children of Incarcerated Women*, 25 SOC. WORKER 298, 299 (1980). For some of the proposed solutions, see *On Prisoners and Parenting: Preserving the Tie That Binds*, 87 YALE L.J. 1408, 1425-27 (1978) [hereinafter cited as *On Prisoners and*

current situation nationwide with particular emphasis on Virginia's treatment of this phenomenon.

II. Wainwright v. Moore

The Florida case of *Wainwright v. Moore*[6] brought to the forefront of the nation's consciousness the issue of an incarcerated mother's right to keep with her the children she bears while in prison. The case dealt with the plight of Terry Jean Moore, a twenty-two year old, first-offender who was sentenced to fifteen years (seven and a half years to serve) for an unarmed robbery which netted five dollars. In 1979 Moore became pregnant by a prison guard while serving her sentence at Broward Correctional Institution, Florida's only maximum security institution for women.[7] Moore wanted to keep her child with her, but had no hope of doing so until she accidentally discovered, while working in the prison library, a Florida statute that stated in pertinent part:

> If any woman received by or committed to said institution shall give birth to a child while an inmate of said institution, such child may be retained in said institution until it reaches the age of 18 months, at which time the Department of Offender Rehabilitation may arrange for its care elsewhere; and provided further, that at its discretion, in exceptional cases, the division may retain such child for a longer period of time.[8]

Moore contacted the Broward County Legal Aid Society which agreed to

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Parenting]. Programs directed toward maintaining the parent-child relationship during incarceration include: (1) a weekend program at the Maryland Correctional Institution for Women that includes organized games, films, and leisure visitation; (2) MOLD, a Nebraska program that allows children under sixteen to spend a week per month with their mothers; and (3) a program of cooperation between the incarcerated mother and her children's foster mother in Washington State. *See also The Prison Mother and Her Child*, 1 CAP. U.L. REV. 127, 140-42 (1972) (mother release).

6. 374 So. 2d 586 (Fla. Dist. Ct. App. 1979).

7. Memorandum from Florida Clearinghouse on Criminal Justice to All Interested Persons (Feb. 4, 1981) [hereinafter cited as February Memorandum].

8. FLA. STAT. ANN. § 944.24(2) (West 1977) (amended 1979). This statute derives from a 1957 enactment by the Florida legislature. The statute was not the basis of litigation until 1979 because prior to that time women were permitted to keep their babies if they so desired. This practice was stopped when the prison nursery was eliminated by the Department of Corrections in 1975. The Florida legislature amended the statute in 1979 to read:

> (2) If any women received by or committed to said institution shall give birth to a child while an inmate of said institution, such child and its welfare shall be within the jurisdicton of the appropriate circuit court if the mother chooses to keep the infant. Upon petition by the Department of Corrections, the mother, or another interested party, a temporary custody hearing before the circuit court judge without a jury shall be held as soon as possible to determine the best interests of the child. The department shall provide and maintain facilities or parts of facilities, within existing facilities, suitable to ensure the safety and welfare of such mothers and children, to be used at the discretion of the court.

FLA. STAT. ANN. § 944.24(2) (West 1979) (repealed 1981).

represent her. When negotiations with the Department of Corrections to obtain voluntary compliance with the statute were unsuccessful, the Legal Aid Society filed suit on Terry Moore's behalf seeking an order enjoining the Florida Correctional officials from separating Moore's child from her once it was born. On February 28, 1979, the trial court issued a temporary injunction prohibiting the state from depriving Terry Moore of the right to the care, custody, and control of her child for the first eighteen months of its life.[9] Her baby, Precious Agnes Moore, was born approximately one month later on March 23, 1979.[10] The battle was not over, for the state appealed the circuit court's decision to the Florida District Court of Appeals. The appeals court heard the case in August, 1979 and reversed on the grounds that the statute did not specifically grant to the mother the sole authority for making the decision to retain the child at the institution and that the primary consideration should be the best interests of the child.[11] The case was remanded back to the trial court for further proceedings consistent with the findings of the appeals court.[12] Terry Jean Moore was paroled later the same month and left prison with her baby before the trial court could rehear the case.[13] Since the court's ruling, there have been suits by other incarcerated pregnant women in Florida seeking to keep their babies. Ten successful suits[14] were brought before the Florida legislature repealed the statute on which such cases were based.[15]

Wainwright v. Moore[16] probed the complexities of the mother-child re-

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9. Moore v. Wainwright, No. 79-3425 (Cir. Ct.), *rev'd*, 374 So. 2d 586 (Fla. Dist. Ct. App. 1979).

10. February Memorandum, *supra* note 7, at 3. Terry Moore and her baby were transferred in April, 1979 to a medium security institution at Lowell, Florida.

11. The Florida appellate court held that:

> [The statute] does not give to the mother of a child born in prison an absolute right to determine where the child will be for the first eighteen months of its life. We further hold that the statute does not vest exclusive authority regarding placement of the child with the Department of Corrections. The statute is actually silent as to who, the mother or the Department, has the right to make this decision. Since the statute is silent on the subject, the rights of all interested parties; the child, the mother, the prison officials, in an appropriate case the father, and the State of Florida, must be considered all in light of the welfare of the child which remains the guiding principle.

Wainwright v. Moore, 374 So. 2d at 588.

12. *Id.*

13. February Memorandum, *supra* note 7, at 3.

14. There were ten mothers and eleven babies at the Florida Correctional Institution as of June, 1981. Memorandum from Florida Clearinghouse on Criminal Justice to Christine Arguello (June 25, 1981) [hereinafter cited as June Memorandum).

15. FLA. STAT. ANN. § 944.24(2) (West 1979) was repealed by the 1981 session of the Florida legislature. Observers do not expect the state to try to remove all the babies at once. Their strategy will probably be to move first against those women and babies who are in the nursery under temporary restraining orders. The state has already filed a petition to remove custody from one such woman. June Memorandum, *supra* note 14, at 5.

16. 374 So. 2d 586 (Fla. Dist. Ct. App. 1979).

lationship and examined the issue of family integrity as a fundamental right in deciding whether an incarcerated mother should be allowed to keep with her a child she bears while in prison.[17] The issues *Wainwright* raised deserve special examination because of their applicability in subsequent cases which are likely to arise in states with similar statutes such as Virginia.

III. The Importance of Mother-Child Bonding

The mother-child bond results from biological dependence and parental response and is the starting point for the chain of development leading toward the child's functioning as a healthy adult. "The bond or attachment begins during pregnancy. The days immediately subsequent to birth are especially influential in the initiation of the maternal bond, triggering a sequence of maturing responses that may have long lasting effects on the mother-child relationship."[18] In arguing that Moore should not be deprived of the right to care for her child, the Legal Aid Society contended that the legislature had voted to preserve the mother-child relationship in recognition of the importance of the bonding process.[19]

"From a developmental perspective, neither the mother's nor the child's best interests are served by separating a newborn from his or her mother."[20] Research has shown that "[t]he role of the mother is crucial for the mother herself . . . her separation from her children and the concomitant major change in her role . . . strikes at her essential personal identity and her self image as a woman."[21] In addition to being important to the mother, the mother-child bond may be critical to the child. A child needs continuity of care. Although this care may be provided by someone other than the natural mother, if the incarcerated mother is to resume care of the child, it should be provided by her. Lack of adequate mothering endangers an infant's mental health or the child's very survival since the child is deprived of the sensory stimulation and nouishment through

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17. February Memorandum, *supra* note 7, at 4-10.

18. D. Young, Bonding, How Parents Become Attached to Their Baby 5 (1978). *See generally* Hartman, Kris & Loewenstein, *Comments on the Formation of Psychic Structure*, 2 Psychoanalysis 90 (1949).

19. The Legal Aid Society noted:

> This original mother-infant bond is the wellspring for all the infant's subsequent attachments and is the formative relationship in the course of which the child develops a sense of himself. Throughout his lifetime the strength and character of this attachment will influence the quality of all future bonds to other individuals.

Brief for Appellee at 11, Wainwright v. Moore, 374 So.2d 586 (Fla. Dist. Ct. App. 1979) (quoting Klaus & Kennell, Maternal Infant Bonding, The Impact of Early Separation or Loss on Family Development (1976)).

20. Sametz, *supra* note 5, at 300 (quoting Ainsworth, *The Development of Infant Mother Attachment* in 3 Rev. Child Dev. Research (1973)).

21. Note, *supra* note 1, at 840-41 (quoting M. Buckley, Breaking Into Prison 97 (1974)).

which it develops a sense of self.[22] Separating the child from its parent or primary caregiver is harmful at any age, but its most serious effects are seen between the ages of birth to two years.[23] It is during this critical period that the bond must be maintained between mother and child; for if it is not, the bond may be impossible to reconstruct.[24] The fact that the breach in the bond may be irreparable is an ill omen for a mother who, upon her release, is going to be responsible for resuming the care of her child.[25]

> Reunion with a parent . . . represents another major change in a child's life and may produce anxiety and insecurity . . . . A parent who interprets this anxiety reaction as a reluctance of the child to [establish a] relationship may reject the child and thus further complicate the child's readjustment.[26]

The best way to ensure that the bond is maintained is to allow mother and child to remain together for the critical period of birth to two years.[27]

Those in opposition to incarcerated mothers being allowed to keep their newborns with them point out that most prisons do not have the facilities nor the finances to renovate existing facilities so that they would be adequate for mothers and children.[28] It has been claimed that prison would be an unhealthy environment for children both physically[29] and emotionally.[30] These are certainly concerns to be considered, but none of

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22. A MONTAGUE, TOUCHING: THE HUMAN SIGNIFICANCE OF THE SKIN (1971).

23. Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645 (1977).

24. J. BOWLBY, ATTACHMENT AND LOSS: ATTACHMENT 324 (1969).

25. A recent study found that seventy-five percent of incarcerated mothers resume care of their children upon release. A. STANTON, WHEN MOTHERS GO TO JAIL (1980).

26. J. BOWLBY, ATTACHMENT AND LOSS: SEPARATION 12-16 (1973).

27. Allowing the child to stay with its mother till the age of two ensures that the mother-child bond has a good foundation. However, it should be noted that:

> A child above the age of two or three . . . should not remain in prison with the parent. By this time the parent-child bond is well established, and the child's physical and emotional needs require freedom of movement and contact with other children that may not be available in the prison setting.

On Prisoners and Parenting, *supra* note 5, at 142.

> Children learn how to interact with the environment by exploration. The tendency to explore usually begins around the age of 18 months and increases greatly over the next few years. Children whose exploratory behavior is overly restricted during these early years may grow up with strong inhibitions against trying anything new or challenging, including attempts to develop relationships with other people.

Id. at 1425 n. 81.

28. Sametz, *supra* note 5, at 301.

29. June Memorandum, *supra* note 14, at 2. The Florida Department of Corrections, in lobbying to have the statute amended so that babies would no longer be permitted to remain with their mothers, cited the en masse living conditions of a prison as exposing the infants to a higher risk of disease and argued that the babies' presence creates an additional security risk in that they might be taken hostage in an escape attempt. *Id.*

30. One objection that might be raised to housing children with offenders is that children are likely to imitate the behavior they see around them and thus become

these fears have materialized in the studies that have been conducted on the longest running program where incarcerated mothers were allowed to keep their babies.[31]

IV. The Constitutional Issue

In states where statutory grounds exist to support an incarcerated mother's claim to the care and custody of her child, the constitutional questions usually will not be reached.[32] However, in those states without statutory grounds, an incarcerated mother's claim relies heavily on the argument that the parent (mother-child) relationship has been recognized as fundamental. The concept that babies should be allowed to stay with their mothers in prison was bolstered by the following language of the Supreme Court: "[I]t is cardinal with us that the custody, care and nurture of the child reside *first* in the parents . . . ."[33] Although there is no specific mention of the family relationship in the Constitution, the Supreme Court in a long line of cases,[34] has recognized that "[t]he entire fabric of the Constitution and the purposes that underlie its specific guarantees demonstrate that the rights to marital privacy, to marry and *raise a family* are of similar order and magnitude as the fundamental rights specifically protected."[35] These are incorporated into the Constitution

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criminals themselves. This does not, however, seem to be a realistic concern. Parents are unlikely to be engaging in visible criminal behavior while they are residents of a supervised community.

On Prisoners and Parenting, supra note 5, at 1423 n.74.

31. Junior League of the City of New York, Prison Nursery Study: A Summary Report of Findings (August 1974), *cited in On Prisoners and Parenting, supra* note 5, at 1. New York state has had an on-going program for the last forty years which allows a mother to keep her newborn infant until the child reaches one year of age. The mothers and children are housed on the prison grounds, but their living quarters are separate from the rest of the prison population.

32. Brief for Appellee at 15, Wainwright v. Moore, 374 So. 2d 586 (Fla. Dist. Ct. App. 1979). In those states which have statutes allowing an inmate mother to keep her newborn with her, the courts should not reach the constitutional issue when a statutory interpretation would suffice to satisfy the parties' claim. The state issues should be decided first, and, if dispositive, the need to reach the federal questions would be precluded. *See* Siler v. Louisville & Nashville R. Co., 213 U.S. 175, 193 (1909).

33. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (emphasis added) (state inteference with parent's right to control religious training of child).

34. *See* Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (right to live with family members); May v. Anderson, 345 U.S. 528, 533 (1953) (liberty under the fourteenth amendment includes parent's "right to the care, custody, . . . and companionship of . . . minor children."); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (proper to enjoin an Oregon statute which interfered "with the liberty of parents and guardians to direct the upbringing and education of children under their control"); Myer v. Nebraska, 262 U.S. 390, 399 (1923) (existence of a constitutionally protected interest in preserving the family unit and raising one's children).

35. Griswold v. Connecticut, 381 U.S. 479, 495 (1965) (Goldberg, J., concurring) (emphasis added).

under the due process clause of the fourteenth amendment.

Once an interest is recognized as being protected by the fourteenth amendment, the government must afford "some kind of hearing" before the deprivation of the interest, absent exigent circumstances.[36] Removing an infant from the care of its incarcerated mother without a hearing is analogous to the situation in *Stanley v. Illinois*,[37] where an unwed father's children were declared wards of the state upon their mother's death. The Supreme Court in *Stanley* found that the state's legitimate interest in "the moral, emotional, mental, and physical welfare of the minor" did not outweigh the unwed father's interest in his child.[38] A parent is entitled to a forum and the opportunity to show why his interest in his children should not be terminated.[39]

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care . . . it needlessly risks running roughshod over the important interests of both parent and child. . . . It insists on presuming rather than proving [the parent's] unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a hearing . . . .[40]

The Supreme Court's holding in *Stanley* supports the contention that separating a baby from its incarcerated mother without a hearing where a case by case determination can be made, is violative of the mother's and baby's right to due process under the fourteenth amendment.[41]

Those who oppose allowing incarcerated mothers to care for their babies seek to justify the intrusion into the custodial arrangements between mother and child on the sole basis of the mother's incarceration.[42] Incarceration alone, however, is not an adequate reason for such an intrusion upon the mother's rights; for although a prisoner's rights "may be dimin-

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36. Goldberg v. Kelly, 397 U.S. 254 (1970).

37. 405 U.S. 645 (1972).

38. *Id.* at 652.

39. *Id.* at 658.

40. *Id.* at 656-58.

41. The fourteenth amendment reads in pertinent part: "Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. XIV. Since requirements of procedural due process apply only to the deprivation of interests protected by the fourteenth amendment, it is mandatory to look to the "*nature* of the interest at stake." Board of Regents v. Roth, 408 U.S. 564, 571 (1972) (emphasis in original). There is no definitive listing of protected interests but the interest in family integrity has been recognized as one whose nature is "essential to the orderly pursuit of happiness." Myer v. Nebraska, 262 U.S. at 390.

42. *See* Price v. Johnston, 334 U.S. 266, 285 (1948) (constitutional rights become circumscribed as a result of incarceration). *See also Tales of the Unborn*, NAT'L L.J., June 15, 1981, at 35, col. 1. (Illinois Supreme Court denied a habeas corpus petition on behalf of a six month fetus whose mother was in jail.)

ished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisoners of this country."[43] Assuming for the sake of argument that the incarceration rationale is a sufficient basis for curtailing the mother's right to family integrity, the infringement of the child's right to family integrity would still have to be justified.

V. Nationwide Status of Babies Behind Bars

Currently there are no specific figures on how many children are being retained nationwide in correctional institutions in order to be with their mothers. However:

> [The] 1970 Census [listed] 53 children under the age of 5 in correctional institutions and another 60 in local jails and workhouses. The census also shows 67 children between the ages of 5 and 9 in prison and 76 in local jails. These children are distinguished from those living in training schools for juvenile delinquents and thus it is unlikely that they are in correctional institutions as a result of their own criminal activity.[44]

There are only seven states whose statutes have provisions allowing infants to stay with their incarcerated mothers for any period of time. These states are California, Connecticut, Illinois, New Jersey, New York, North Carolina and Virginia.[45] A majority of the states' statutes do not address the issue at all. At least three states have had statutes in the past allowng the practice, but have since repealed them.[46] The statutes of five other states refer only to the procedure for dealing with pregnant woman offenders who are under the death sentence.[47] In all cases the execution is

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43. Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

44. U.S. Dep't of Commerce Bureau of Census, Persons in Institutions and Other Group Quarters Table 3, at 5 (1973). This was the most up-to-date information available at the time of publication.

45. Cal. Penal Code §§ 3410-3424 (West 1980) (community correctional setting for mothers and their babies as a result of a court's refusal to allow a mother to keep her child for the two-year period authorized by Cal. Penal Code § 3401 (West 1970) (repealed 1980)); Conn. Gen. Stat. Ann. § 18.69A (West Supp. 1981) (baby may stay for 60 days while permanent placement arranged); Ill. Ann. Stat. ch. 38, § 1003-6-2 (Smith-Hurd 1981) (baby may stay under special circumstances if deemed in the best interest of the child); N.J. Rev. State § 44.105 (1937) (child's place of settlement with inmate mother); N.Y. Correc. Law § 611 (McKinney 1968) (babies can remain with their mother for one year); N.C. Gen. Stat. § 148-47 (Repl. Vol. 1978) (baby can stay only until permanent placement is made elsewhere); Va. Code Ann. § 53.285 (Repl. Vol. 1978) (baby may remain with mother if deemed in its best interest).

46. Fla. Stat. Ann. § 944.24(2) (West 1977) (repealed 1981); Kan. Crim. Proc. Code Ann. § 76.2506 (Vernon 1917) (repealed 1977); Me. Rev. Stat. Ann. § tit. 34, § 875 (1930) (repealed 1977).

47. Miss. Code Ann. § 99-19-57 (1972); Mo. Ann. Stat. § 546.800 (Vernon Supp. 1982); Nev. Rev. Stat. § 176.465 (1979); Ohio Rev. Code Ann. § 2949.31 (Baldwin 1982); Okla.

stayed until after the woman has given birth. Two states give their governors specific authority to commute the sentences of pregnant women.[48]

Of those states which have statutes permitting inmate mothers to keep their newborn children, the program in New York has undergone the most thorough evaluation.[49] On two occasions the interpretation of section 611 of the New York Correctional Law[50] has been the subject of litigation. In *Apgar v. Beauter*,[51] the Supreme Court of Tioga County found that it was in the child's best interests to stay with its mother. The court enjoined the sheriff from continuing to keep them apart, and stated:

> It is a general and well-established principle in this state that the welfare of a child is best served by remaining with its natural parent . . . . That incarceration in a jail or correctional institution *per se* does not constitute such unfitness or exceptional circumstances so as to require that a newborn infant be taken from its mother is attested to by the enactment by the legislature of Section 611(2) of the Correction Law. In fact, it has been New York's policy for over forty years to permit inmate mothers to keep their newborn infants. So important does the Legislature consider the natural mother-child relationship that even the father does not have the power under this statute to countermand the decision of an inmate mother to keep her child.[52]

More recently, in *Bailey v. Lombard*,[53] the Supreme Court of Monroe County decided it would not be in the best interests of the child to remain with his mother. The decision, however, was based on the lack of parenting skills the mother had exhibited in the past with her other children rather than on the fact that she was incarcerated.[54]

Recently, various groups have addressed the issue of allowing incarcer-

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STAT. ANN. tit. 22, § 1010-1011 (West 1981).

48. MASS. ANN. LAWS ANN. ch. 127, § 142 (Michie Law Co-op 1981); VA. CODE ANN. § 53-281 to -283 (Repl. Vol. 1978).

49. Junior League of the City of New York, Prison Nursery Study: A Summary Report of Findings (August 1974) *cited in On Prisoners and Parenting, supra* note 5, at 1.

50. N.Y. CORREC. LAW § 611 (McKinney 1968). The pertinent part of § 611 of New York Correctional Law reads:

> A child so born may be returned with its mother to the correctional institution in which the mother is confined unless the chief medical officer of the correctional institution shall certify that the mother is physically unfit to care for the child, in which case the statement of the said medical officer shall be final. A child may remain in the correctional institution with its mother for such period as seems desirable for the welfare of such child, but not after it is one year of age, provided, however, if the mother is in a state reformatory and is to be paroled shortly after the child becomes one year of age, such child may remain at the state reformatory until its mother is paroled, but in no case after the child is eighteen months old.

Id.

51. 75 Misc. 2d 439, 347 N.Y.S.2d 872 (1973).

52. *Id.* at _, 347 N.Y.S.2d at 875.

53. 101 Misc. 2d 56, 420 N.Y.S.2d 650 (1979).

54. *Id.* at _, 420 N.Y.S.2d at 655.

ated women to keep their newborns with them. The American Correctional Association, in articulating its suggested standards, stated:

> It is generally believed that babies should be delivered in community hospitals, and in most cases placed directly in the community. However, in those states where deliveries do occur at the institution hospital, they should be placed as soon as possible in the community, either with relatives or in some foster home . . . . [H]owever, flexibility should allow for the mother who has only a short period of her sentence left and who is in a position to care for her baby when she returns to the community to care for the baby in the institution until she leaves.[55]

While not sanctioning mothers keeping their babies with them in prison, the American Correctional Association does recognize the need for flexibility.

The American Bar Association, in their tentative draft of *The Legal Status of Prisoners,* recommended that "[t]he domestic relationships of persons convicted of criminal offenses should be governed by rules applicable to free citizens. Conviction or confinement alone should not be sufficient to deprive a person of . . . parental rights, including the right to direct the rearing of their children."[56] In the Commentary to their standards, the American Bar Association elaborated by observing that:

> Many states now provide nursery facilities for children born during confinement. The newly born child remains with the mother generally during the nursing period. American institutions should experiment with providing facilities for a more extended period to allow prisoners of either sex to keep their children with them during confinement, either continuously or for short periods regardless of the child's age.[57]

To date, the most positive endorsement of the concept of babies staying with their incarcerated mothers is by the National Conference of Commissioners on Uniform State Laws.[58] It drafted model legislation which had as its goal the preservation of incarcerated individuals' parental rights. The proposed legislation provides the guidelines for establishing a program where the incarcerated mother could retain her child.

VI. Virginia's Treatment of the Issue

In 1918, the Virginia General Assembly provided for the disposition of infants of convict mothers by passing legislation that allowed the mother to keep with her the infant that she had prior to her incarceration or

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55. American Correctional Ass'n, Manual of Correctional Standards 568 (1966).

56. ABA Joint Comm. on the Legal Status of Prisoners, *The Legal Status of Prisoners* 14 Am. Crim. L. Rev. 377, 619-20 (1977) (tentative draft).

57. *Id.* at 620.

58. Model Sentencing and Corrections Act § 4-116, Comment (approved by the National Conference of Commissioners on Uniform State Law in 1978).

infants born during her incarceration until they reached the age of four years. When the infants reached the age of four, they were returned to the jurisdicton from which their mother was sentenced to be disposed of as the circuit court saw fit.[59] In 1930 the Code of Virginia was amended to read much as it does today.[60] Section 53-285 of the Virginia Code currently provides that when a woman confined in a penal institution gives birth, "[a] child so born *may be returned* with its mother to the institution in which its mother is confined, if the Director of the Department of Corrections, *in his judgment,* deems it will be for the best interest of the child."[61]

Virginia has had statutory authority allowing incarcerated women to keep their babies for a period of time since 1918. The vital question is how, if ever, that authority was implemented. Unlike New York, Virginia has never had a highly organized program, and the Virginia Department of Corrections has maintained few, if any, records concerning the program in Virginia.[62]

There is no information available either in written or oral form concerning Virginia's execution of the statute prior to 1943. From 1943 to the early sixties, women were allowed to keep their babies until they were released or until the babies reached the age of two.[63] Infants were born in

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59. 1918 Va. Acts, ch. 276 (emphasis added) (amended 1930).

> Be it enacted by the general assembly of Virginia, That an infant accompanying a convict mother to the penitentiary *or born after her imprisonment therein,* shall be committed to the State board of charities, or returned, on attaining the age of four years, to the county or city from which the mother came, to be disposed of as the circuit court of said county, or the hustings or corporation court of said city, having jurisdiction, may order.

60. VA. CODE ANN. § 1903a (1930) (current version at VA. CODE ANN. § 53.285 (Repl. Vol. 1978)).

61. VA. CODE ANN. § 53.285 (Repl. Vol. 1978) (emphasis added).

62. Women offenders in Virginia were housed in a separate section of the men's penitentiary in Richmond until 1932 when a facility known as the State Industrial Farm for Women (later changed to Virginia Correctional Center for Women) was built in Goochland, Virginia.

There is little written documentation available about the program which allowed infants to stay with their incarcerated mothers. This lack of written information was verified by checking the Director's Office, the Department of Corrections, their central files and reseach and reporting sections, and by searching the minutes of the Board of Corrections and its predecessor, the Board of Welfare and Institutions. The records of the Virginia Correctional Center were also checked. Due to this lack of written material, most information for this section was obtained from oral interviews with past and present staff members of the Virginia Correctional Center for Women. There is no satisfactory explanation concerning the Department of Corrections lack of documentation of the policies of the in-house care of infants by their inmate mothers. The data from such a program would be significant to all involved parties. One can speculate that the reason for such faulty record-keeping is that, since only one state institution housed women prisoners, a formal state-wide policy was not considered necessary.

63. Interview with Clara Kent, retired correctional officer, in Goochland County (Sept. 23, 1981). Mrs. Kent was employed at the Virginia Correctional Center for Women from 1943 to

the clinic and were kept in the nursery. The women stayed on the clinic hall until the doctor released them to go back to their regular living unit. The babies remained on the clinic hall and were cared for by an inmate whose job assignment was to work on that hall. The mothers were allowed to visit with their children for several hours on Sunday afternoon following chapel services. The majority of the women kept their infants at the institution. The greatest number of babies ever in the nursery at one time was twenty-one, although the number averaged from ten to twelve. Most babies left the institution between nine months and eighteen months of age.[64]

The length of time the babies were allowed to stay decreased to three months around 1964[65] and to thirty days in 1968.[66] In the early 1970's infants began staying in their mothers' rooms in the clinic. The mother was responsible for caring for her own child until it left the institution at the end of the thirty-day period.[67] Beginning in 1972, the women were no longer delivered at the institution but were taken to the Medical College of Virginia.[68] However, they were still allowed to bring their babies back to the institution for thirty days.[69] In 1976 the new superintendent, Ann Houston Downes, discontinued the policy which permitted women inmates to bring their babies back to the institution for thirty days.[70] Since

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1980 and is the earliest source of information that could be located.

64. Telephone interview with Jane Doe, a retired nurse, in Goochland County (Sept. 23, 1981). Jane Doe, who wishes to remain anonymous, was employed in the clinic at the Virginia Correctional Center for Women from 1947 to 1968 and was Supervisor of the nursery.

65. Interview with Shirley Burton, Assistant Superintendent, Virginia Correctional Center for Women, in Goochland County (Sept. 23, 1981). Shirley Burton has been employed at the Virginia Correctional Center since 1964. Burton remembers the time period infants were allowed to stay with their mothers being changed to three months right after she started work, but she does not remember who changed it or why it was changed.

66. *Id.* Shirley Burton stated that the time period was changed to 30 days in 1968. Leake Parrish and Brenda Hill both verified that the time period was changed to 30 days in 1968. Interview with Leake Parrish, retired Superintendent, Virginia Correctional Center for Women, in Goochland County (Oct. 4, 1981); Interview with Brenda Hill, Head Nurse, Virginia Correctional Center for Women, in Goochland County (Sept. 23, 1981).

67. Interview with Brenda Hill, *supra* note 66. As Head Nurse, Brenda Hill was responsible for changing the procedure so the inmate mothers could keep their babies in their rooms.

68. Inter-Office Correspondence from Byron Marshall, Hospital Administrator, to Director of the State Bureau of Child Health (Mar. 13, 1972) (notification that maternity delivery at the State Industrial Farm for Women had been closed).

69. Interview with Leake Parrish, *supra* note 66; Interview with Brenda Hill, *supra* note 66.

70. Interview with Ann Houston Downes, Superintendent, Virginia Correctional Center for Women, in Goochland County (Sept. 31, 1981). Superintendent Downes, who has held her present position since 1976, stated:

> I discontinued the policy of allowing the infants to stay with their mothers for thirty days as I felt it was not in the best interests of either the infant or mother, that it would be easier on both if the separation was made before they became attached to

that time women inmates have had to make plans for their family or friends to pick up infants from the hospital. If a woman is unable to make arrangements for her child, it is placed with the Department of Welfare in the locality from which the woman was sentenced.[71]

It is interesting to note that no case has ever been litigated in Virginia under the statute which requires a determination by the Director of the Department of Corrections of what is in the best interest of the child. If an incarcerated pregnant woman in Virginia should bring suit to keep her baby, as Moore did in Florida, arguably the court should determine that, at the very least, she has a right to a hearing before her request is denied. There would be two bases for such a finding.

First, the validity of the present policy can be challenged on the grounds that the guidelines set out in the statute have not been adhered to. The prospective mother is being deprived of the opportunity to have the question of custody and control of her child decided, not by the individual vested by statute with the authority to make such a decision but by a *blanket* institutional policy. The Director of Corrections is not given the opportunity to determine the best interests of a particular child since that question is never brought to his attention.

Second, the statutory language very clearly states that the judgment of the Director of the Department of Corrections should be based on the best interests of the child.[72] It would be difficult, if not impossible, to determine the best interests of a particular child without making a case by case determination based on the facts of the individual situation.

The decision making power vested in the Director is analogous to a judicial custody hearing. In custody hearings, Virginia courts are guided by section 31-15 of the Virginia Code, which states that in any case in which the parents are living apart, the court "in awarding the custody of the child to either parent or to some other person, shall give primary consideration to the welfare of the child."[73] The court in *Burnside v. Burnside*[74] reiterated the premise that "in determining custody, we are concerned first and foremost with what is best for the child. Always the

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each other. Other factors that I considered were the inadequate facilities available, and the feelings of other women inmates whose incarceration had forced them to leave their children behind.

Id. (quote approved by Superintendent Downes). The Superintendent also felt that a prison was not the proper environment for a child in its formative years. The policy of not allowing the babies to return to the institution with their mothers has never been reduced to writing.

71. *Id.* Superintendent Downes explained that the pregnant woman's institutional counselor helps her find living arrangements for her child. The counselor tries to place the child with relatives; if that cannot be arranged, the Welfare Department is contacted.

72. VA. CODE ANN. § 53.285 (Repl. Vol. 1978).

73. VA. CODE ANN. § 31-15 (Repl. Vol. 1979).

74. 216 Va. 691, 222 S.E.2d 529 (1976).

primary and controlling consideration is the child's welfare. All other matters are secondary."[75] By implication, considerations of the availability of facilities within prisons, the extra planning required, and the effect of the arrangement on the rest of the prison population should be secondary to the needs of the child.

The following criteria have been established by the courts in child custody cases for the purpose of determining the best interests of a child. These same criteria should be considered in determining the custody of a child whose mother is incarcerated. First, it is to the child's benefit to remain with its natural parent.[76] In the majority of cases when a child is not allowed to stay with its incarcerated mother its alternative living arrangement is not to live with its other natural parent, but rather with relatives of the mother or in a foster home.[77] Second, the child's needs are best served by continuity of care from a specific individual.[78] Records indicate that most incarcerated women resume the care of their children when released.[79] The caregiver also must be physically and emotionally capable of raising her child.[80] The Department of Corrections has medical doctors and psychologists who would be available to provide the director with information regarding each incarcerated mother's ability to adequately care for her child.

The moral character of the caregiver is another factor which is considered by the courts.[81] In evaluating this element the director should keep in mind that incarceration alone is not evidence of unfitness per se as evidenced by section 53-285 of the Virginia Code. Additionally, a child's material needs must be taken into account although they are not controlling.[82] The legislature must have been mindful in enacting section 53-285 of the Virginia Code that there would be some expense involved.[83] Fi-

75. *Id.* at 691-92, 222 S.E.2d 529-30.

76. McCreery v. McCreery, 218 Va. 352, 237 S.E.2d 167 (1977).

77. *Mothers Behind Bars: A Look at the Parental Rights of Incarcerated Women*, 4 NEW ENGLAND J. PRISON L. 141, 143 (1977) (for a variety of reasons most incarcerated women are single parents).

78. Harper v. Harper, 217 Va. 477, 229 S.E.2d 875 (1976).

79. A. STANTON, *supra* note 25.

80. 218 Va. at 355, 237 S.E.2d at 168-69.

81. Campbell v. Campbell, 203 Va. 61, 122 S.E.2d 658 (1961).

82. 218 Va. at 356, 237 S.E.2d at 171.

83. The child's material needs could be met with nominal expenditure by the Department of Corrections. In computing the expense, however, it is necessary to remember that the program would only involve between 10 and 20 babies per year. Interview with Betty Browning, Records Custodian, Virginia Correctional Center for Women, in Goochland County (Sept. 23, 1981). The following statistics are available for the number of infants born at the institution for the years 1971 through 1974: 20 infants from 1971 to 1972, 4 infants from 1972 to 1973, and 10 infants from 1973 to 1974. Head Nurse Brenda Hill recalled that seven babies were born to women incarcerated at the Virginia Correctional Center for Women in 1980, two were stillborn. Interview with Brenda Hill, *supra* note 66. Two were stillborn. Statistics were not available for other years.

nally, the courts have considered the child's age in making custody decisions. The "tender years doctrine," first enunciated in Virginia in *Mullen v. Mullen*,[84] illustrates the principle that as long as the mother is fit,[85] there is a rebuttable inference that a child's place is with the mother, particularly in those cases where the child is of tender years. Although the tender years inference only becomes operative as a matter of law in custody disputes between natural parents, the Supreme Court of Virginia has noted that:

> [I]t has nothing to do with the respective rights of the two parents. Rather, it has to do with the right of the child. The "presumption" is, in fact, an inference society has drawn that such right is best served when a child of tender years is awarded the custodial care of its mother.[86]

Just as the child's best interest must be considered in custody disputes between natural parents, it is clear that the reasoning of the tender years doctrine is equally applicable where the mother is incarcerated.

A second reason to find a hearing necessary is the constitutional argument that the right to family integrity is fundamental.[87] A fundamental right cannot be denied absent a due process hearing.[88]

Virginia is at a crossroads. Its statute is not an accurate reflection of actual practice; in fact, the statute and reality are diametrically opposed. There are clearly two options open if the state wishes to correct the current situation. The General Assembly can either repeal section 53-285 of the Virginia Code, or the Department of Corrections can formulate a policy to bring its actions into compliance with the statute as written. If the legislature determines that incarcerated women should not be allowed to keep their infants in prison, whether this determination is based on lack of facilities, lack of financial resources or the physically and emotionally unhealthy impact of a prison on children, then the current statute should be revised or repealed.

If, however, the Department of Corrections decides on the second alternative, the policy should provide for an individualized hearing by the Director. In this manner, the Director would be able to make a case by case determination based on the facts of each case. The prospective mother should also be provided the opportunity to present information favorable to her request to care for her child. Finally, the policy should delineate

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84. 188 Va. 259, 49 S.E.2d 349 (1948).

85. Some opponents point to the mother's incarceration as evidence of her unfitness per se. This viewpoint is not compatible with section 53-285 of the Virginia Code. If the legislators had believed a mother could or should be declared unfit based solely on the fact that she was incarcerated, they would never have enacted section 53-285 of the Virginia Code.

86. McCreery v. McCreery, 218 Va. 352, 354, 237 S.E.2d 167, 169 (1977).

87. Alsager v. District Court, 406 F. Supp. 10, 19 (S.D. Iowa 1975).

88. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

factors which the Director could evaluate in making his judgment, such as: the mother's physical and emotional ability to care for the child, the woman's institutional record, the plans made for the child after the mother's release, and the alternate plan for the child if the mother's request is denied.

VII. Conclusion

The question of whether a woman who gives birth while incarcerated should be allowed to keep her child with her is in a state of flux. In the final analysis, the solution must balance the needs of the prison officials, the state, and the incarcerated woman with paramount attention given to the needs of the individual child. While opponents point to the dangers of prison life, it is essential to recognize that their catastrophic predictions have not materialized in those states which have experimented with the idea. For instance, no child has been held hostage. Children face comparable dangers in the free world. All of these dangers are speculative and one does the best one can to protect children from them. The potential physical risk does not outweigh the recognized emotional benefits the child receives from being with its mother. The best way to ensure in the balancing process, that the child's best interests are the pivotal factor, is to decide on a case by case basis, as called for in *Wainwright v. Moore*,[89] whether an individual child should be cared for by its inmate mother.

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89. 374 So. 2d 586 (Fla. Dist. Ct. App. 1979).