THERE ARE MORE THAN 200,000 women incarcerated in prisons and jails in the United States, and an estimated 3% to 5% of them are pregnant. In 2016, between 6,400 and 10,600 incarcerated women were pregnant at intake. In some states, women’s prisons offer programs that allow inmates who have their babies while incarcerated to stay in a dedicated nursery area with their children. Advocates of prison nurseries argue that it is better for both mother and baby for the two to stay together, even behind bars.

Fewer than a dozen states have such programs, but because of the growth in the number of women in prison, there is increasing pressure to expand them. It is worth examining these programs more closely—not only because we do not fully understand the impact of such environments on children, but also as part of a larger effort to weigh the effects of incarceration on families and the effect that contact with imprisoned parents has on young children.

The nursery program at the Indiana Women’s Prison is the subject of a recent reality series on A&E called “Born Behind Bars,” which provides a glimpse into life inside a prison nursery. During one episode, a young mother looks at her infant son and says, “You’re incarcerated with me and [you] didn’t do anything.” Then she looks up at another mother also raising her baby in the nursery at Indiana’s maximum-security prison and says, “It makes you feel guilty. Pregnancy and prison are the two worst things in life together.” Not that they’re both bad, she explains; just a bad combination. “Pregnancy is supposed to be happy and prison is like the closest thing to dying.” Heartbreaking though her analysis is, hers is also a much more realistic understanding of what it means to raise

Naomi Schaefer Riley is a visiting fellow at the American Enterprise Institute focusing on child welfare.
a child in prison than many advocates of prison nurseries seem willing to acknowledge.

While prison-nursery programs vary, it is helpful to take Indiana’s Wee Ones program as an example of how they function in general and the challenges they present to the women and babies involved. Such programs raise a number of complex questions. While they tend to produce better outcomes for the incarcerated mothers, it is less clear that they are beneficial for their infant children. And while incarcerating babies may strike many as unconscionable, we must grapple with the ethical implications of the alternatives.

The oldest prison nursery in the nation was started at Bedford Hills in New York State in 1901 and has been in continuous operation since. There were others in the first half of the 20th century, but their popularity waned in the 1970s as people began to realize that this might not be an acceptable environment in which to raise children. There are currently eight states with prison-nursery programs, though some states have community-based residential parenting programs to handle this population.

The number of prison nurseries is still quite small, but the number of incarcerated women has been growing rapidly. Between 1980 and 2016, the number of women behind bars (including in jail or in state or federal prison) increased 700%, from 26,378 to 213,722. This has required a rapid increase in the number of women’s correctional facilities. As Seham Elmalak notes in her survey for the Pace Law Review, in the 1980s, “there was a boom in the growth of women’s prisons, which continued well into the [1990s]. By 1997, each of the fifty states had at least one facility for female inmates. In total there were 108 female-only facilities. At the end of 2000, approximately 93,234 women were incarcerated in federal and state prisons. By 2010, the number increased to approximately 112,822.”

What is responsible for this rise? Many attribute the problem to the war on drugs. According to a 2017 report from the Prison Policy Initiative, about a third of women in state prison are there for violent crimes. About a quarter are incarcerated for drug crimes and another quarter for property-related crimes; 10% are in for public disorder. In local jails, only about 5% of women have been convicted of a violent crime. In federal prisons, 8,500 out of 14,000 prisoners have been convicted of a violent crime. In federal prisons, 8,500 out of 14,000 prisoners have been convicted of drug crimes; only 600 are in for violent offenses.
Most of the mothers in Indiana’s prison nursery are serving time for financial crimes like forgery or for drug-related incidents — either dealing or possession. Indeed, as the women on “Born Behind Bars” tell their stories, it is clear that substance abuse above all is the reason for their incarceration. (Their children are, more often than not, the result of relationships with men who were providing them with drugs or who were literally their partners in crime.) It’s not clear, of course, whether these women were charged with more serious crimes and pleaded down, but they are not dangerous criminals. They are all in a maximum-security facility, however. Female prisoners are often not separated into types of institutions — minimum, medium, and maximum security — the way men are, because states generally have fewer facilities for women. A woman with a 24-month sentence for forgery could have a roommate serving 55 years for first-degree murder.

In order to be admitted to the Wee Ones program in Indiana, none of the women can be in prison for violent offenses (though it is important to recognize that an inmate may have a history of violence even if she has not been charged with committing a violent act). All must have sentences of less than 18 months because the babies may stay in the nursery only until they are 18 months old.

These rules are not universal to all nursery programs, however. Some prison nurseries do allow women who have committed violent offenses — even child abuse. At Bedford Hills in New York, for instance, a researcher describes a participant named “Carmen,” who was convicted of first-degree manslaughter at the age of 16, served a sentence, and was released. She had a history of drug abuse and at least one suicide attempt. Her son was born while she was at Rikers Island, and he lived with her there for four months and then at Bedford Hills for four months before he was released to live with his maternal grandmother. Some prison nurseries allow children to stay inside for as long as 30 months. And some allow mothers with longer sentences like Carmen to have their babies with them initially and then removed when the nursery’s age limit is reached.

The nursery units look radically different from ordinary correctional facilities. The one in Indiana is made up of hallways with rows of cells where pregnant mothers room together or where mothers who have given birth have a bed with a crib nearby. There is a large, sun-lit day room lined with mats, baby swings, and bins of toys. Mothers sit around
tables feeding their babies or playing with them on the floor, reading to
them or talking to them. When mothers have to leave the unit for work
or GED classes or some kind of group therapy to deal with substance-
abuse problems, the babies are cared for by other inmates who work as
nannies. The children are constantly supervised, and everything from
their eating to sleeping is monitored. Mothers are instructed in the
proper way to hold, feed, bathe, and otherwise stimulate their children.
With a few exceptions, these mothers have only one job every day—to
care for their children.

Indeed, the tightly managed environment inside the nursery wing
is almost certainly preferable to the kind of chaotic and neglectful en-
vironment that many of these babies would experience if they went
home. That is not to say there aren’t some obvious drawbacks. For ex-
ample, though there are usually small, dedicated outdoor play areas, the
children rarely get to go outside; one of the children featured on “Born
Behind Bars” had been outdoors only three times by her first birthday.
There are reports that children who spend a year or two in a prison en-
vIRONMENT are upset by things like wind when they leave prison.

More important, despite the colorful walls and baby toys, the mothers
and their babies are still in prison, and conditions are stressful. Outwardly
it seems like the prison-nursery unit is calm and stable, but one always
has the sense of tension bubbling just beneath the surface. The inmates’
rooms are regularly searched. Guards listen to their conversations, watch
their every interaction. A study of Bedford Hills and the nearby Taconic
Correctional Facility prison nursery found, in the words of the Institute
on Women and Criminal Justice, that “[b]ecause the program is inside a
correctional facility, the mothers are involuntarily together and are sub-
jected to an atmosphere of observation, suspicion and discipline.” Given
what we know about the ways that even small children can sense and
internalize the fear and stress experienced by the adults around them, this
should raise serious concerns about prison nurseries.

In addition, the relationships among the inmates can be fraught. The
women in these environments are often involved in turf battles of one
sort or another. And sometimes the mothers become involved in sex-
ual relationships with one another, despite its being prohibited. A 2001
study of Nebraska’s prison-nursery program found that, of the 44 babies
who were in the program, seven of their mothers were “involuntarily
removed,” and “the main reason was fighting with another inmate.”
The unit has a “zero tolerance” policy, meaning any rule infraction can result in expulsion. This is necessary for the safety of the babies, but it also increases the stress of the environment. Women who are caught fighting or even raising their voices at one another can be removed from the unit—which means their babies will be sent home. Indeed, if the women violate any of the regulations—for instance, leaving the baby with another mother instead of one of the officially designated nannies—the mother can be sent to another unit and the baby sent home. If the baby shows signs of any health problem, he will be sent home, even if the mother is not to blame. If, for instance, a premature baby is not gaining enough weight, the baby must leave; the prison is simply not equipped to handle other medical needs or assume the risks associated with keeping such a child in the unit.

All of this means that the slightest misstep on the part of a mother—or even an abnormal result on a physical for the baby—can result in sudden separation for the duration of the mother’s sentence. These decisions are often made in less than 24 hours. Prison guards, who already have extraordinary power over their wards, now also have the power to take away their children at the drop of a hat.

Even otherwise well-functioning adults would find it difficult to control their emotions behind bars. When you take account of the fact that these women have just given birth and are also dealing with substance-abuse withdrawal, mental illness, and a criminal past, it’s surprising more of these women aren’t kicked out of the program.

On the other hand, one might say that the presence of their children in the nurseries gives them an extra incentive to behave—and not simply because they want to stay with their children. These units tend to be nicer and more relaxed. Women are not walking around in handcuffs. The guards are trying to maintain a calm atmosphere. The inmates typically have few work responsibilities.

Indeed, advocates of these nurseries point to data showing that women who keep their babies with them during these early years have significantly lower rates of recidivism later on. In Nebraska, for instance, of the 30 women who gave birth in prison in the five years before the implementation of the nursery program, 33% reoffended. For a similar period of time after the program was implemented, for the 44 women who participated, there was a 9% recidivism rate, and another two individuals returned to prison for parole violations.
The problem with such analysis is that it doesn’t take account of selection bias. Some of the 30 women who did not participate may have been denied entry into the program because of the nature of their crimes, or may even have declined to be involved. It is obviously unethical to do a randomized experiment in which some women are admitted to the program and others are not simply in order to compare the results. Thus, we are left with incomplete information about the effects of prison nurseries on mothers’ behavior. Nevertheless, it is reasonable to assume that women who keep their babies with them in a nursery program might have a stronger bond with them and that, all things being equal, they would have a greater incentive to stay on the straight and narrow when they are released. Moreover, the fact that they have better training in how to handle their babies’ needs could put them on better footing when they leave and are faced with the pressures of ordinary life outside.

**Better Together?**

But we cannot simply measure the results of such a program by whether the women benefit. We must also look at how the babies are affected. Obviously the two are not entirely separable. Generally speaking, a baby whose mother stays out of prison is better off than one whose mother does not. But whether it’s good for a child to stay in that environment on the chance that it might improve his mother’s prospects is an open question.

When women go to prison, the consequences are different for children than when men go to prison. About half of women in state and federal prisons are mothers, and most of these mothers are the primary caretakers for their children. According to a study from the Annie E. Casey Foundation, “Children with a parent who is incarcerated are typically younger and living in low-income families of color, usually with a young single mother who has limited education. Most are younger than 10. More than 15 percent of children with parents in federal prison — and more than 20 percent with parents in state prison — are 4 or younger.”

So what happens to these children when their primary caretaker is incarcerated? According to the Sentencing Project, “[A]bout a third (37%) of the children of incarcerated women are living with their fathers. Most of these children are living with grandparents or other relatives, while one of every nine (10.9%) women in prison has a child living in foster care.” The women on “Born Behind Bars” typically have other older children,
and those children are cared for by the prisoners’ own mothers (or even grandmothers) during their incarceration. Some of them talk about how they didn’t really get to know their older children when they were young because they were doing stints in prison during their infancies as well.

But what if mothers of infants and toddlers could remain with their children in those important first months and years of attachment? As Joseph Carlson writes in a 1998 article for the Journal of Offender Rehabilitation, “Many studies have shown that maternal deprivation affects children. There is substantial evidence... that the effects of maternal deprivation are observable even in infra-human primates... Young children who are removed from their mothers for hospitalization or other reasons display immediate distress, followed by misery and apathy.” Carlson even notes the possibility of “developmental retardation and general impairment of developmental progress.... [The] longer the mother and child are separated, the greater the disturbance.”

The initial research on outcomes for children who spent time in these environments revealed decidedly mixed results. A study by Liza Catan, which was released in 1992, found that infants in the prison nursery showed a strong attachment to their mothers, but short-term detriments to development if they were there for four months or more. Another study by Nancy Busch-Rossnagel found that only about half of infants were securely attached and that 33% of infants were below the mean in overall development. An earlier British study from the 1980s found that all infants in the nursery experienced “progressive developmental decline in motor and cognitive scores.”

In a survey of mothers who participated in the Nebraska prison-nursery program, 95% said they felt a stronger bond with their children as a result. But often that is not enough. Life outside of prison means trying to find a job and child care, and most of all remain free of drugs. The inmates often seem skeptical that they will be able to do this. Many have already tried and failed.

The results for women who complete the program are mixed even if they don’t commit another crime. Of the 44 women studied in Nebraska, only 25 retained custody of their children after five years. Another 12 did not have custody, and there is no data on the remaining seven women. The fact that researchers are not able to locate them probably doesn’t inspire hope that they are living stable lives with their children somewhere.
The results for the Bedford Hills facility are similarly mixed. A 2010 study by Mary Woods Byrne and colleagues, “Intergenerational Transmission of Attachment for Infants Raised in a Prison Nursery,” started with 100 babies but then provided analysis for only 30 of them. Of those, they found indications of secure attachment forming in 18 of them, which means that they have developed the strong emotional bond with their mothers necessary for successful development. Of the infants who co-resided with their mothers for a year, 75% were classified as secure. For those who co-resided for less than a year, the secure-attachment rate was 43%.

In a paper called “Jailing Black Babies,” William and Mary law professor James Dwyer raises a number of difficult questions about Byrne’s study, which is cited regularly by advocates. He pieces together the results for the other 70 mother-child pairs and concludes that many of them could not have formed secure attachments because other disruptions occurred: The mothers were removed from the program, asked to be removed from the program, or were deported; one of the babies died from a respiratory infection contracted in the prison. Dwyer also suggests that the fact that the researchers were involved in working with the mothers in prison creates an inherent bias in their conclusions.

Even if some kind of secure attachment may occur in a prison-nursery environment, it is important to remember that no sooner do these babies and mothers bond than something might separate them completely, and for a long period of time. Whether because of a disciplinary action against a mother that would remove her from a program, a health problem with a baby, or simply the fact that her sentence is longer than the baby is allowed to stay in the program, the traumatic effects on the child of being removed from the single person he has formed an attachment with can be devastating. It’s also true that even if a prison nursery tries to ensure that the end of a mother’s sentence coincides with the point at which her baby ages out of the program, mothers can have their sentences lengthened for violating prison rules. This kind of bonding followed by extreme and sudden separation seems to be one of the worst imaginable outcomes for a child. Keep in mind that while they are in the prison nursery, they have almost no contact with any other adult like a father or grandmother—the people who are most likely to take them if they are forced to leave.

The other question, especially as children get older and stay behind bars, is how their earliest memories will shape their future. Children as old as three may easily have memories of being in prison.
important, they will grow up knowing from others around them that they spent their first years of life incarcerated. This has the effect both of normalizing prison as well as presumably bringing them a kind of shame that is unnecessary and hard to escape.

**Hard Questions**

What are the alternatives to a prison nursery? For the majority of children who remain with fathers or other relatives while their mothers are in prison, we have to assume that most will be better off. While attachment to the mother may be the most natural outcome, researchers have found that a secure attachment to one adult consistently is what matters most. That could be a father, a grandmother, or another relative. If a child has a stable primary caregiver for his first year—though ideally closer to three years—his chances for normal emotional, physical, and intellectual development are significantly higher.

What we don’t know is whether those infants who are being cared for by relatives develop these kinds of bonds. In many cases, these children are moved from one home to another. And then there is the possibility that children whose mothers are incarcerated will simply be placed into foster care. It is important to note that only about 2% of children go into foster care because of incarceration; another 8% are in foster care before their mothers actually go to prison. Foster care for these children is not ideal in terms of attachment because, when the mothers leave prison, the children are again taken from the only caregivers they have ever known. What we want is for children to be with one caregiver permanently.

The question then becomes, in cases where there truly is no good alternative, whether it wouldn’t be better to simply sever the parental rights of mothers who are going into prison for a long period. Federal law requires that child-protective services must file a petition to terminate parental rights if children have been in foster care for 15 of the previous 22 months. But in some cases, such as a pregnant mother sentenced to 18 months in prison, we give the mother more time.

Given children’s need for a bond with a single caregiver, perhaps the termination of parental rights should be filed immediately after a mother is incarcerated instead of waiting. This seems like an extreme measure, but when the only alternative is sending a baby into prison, maybe it’s one we should consider. There are loving, stable, middle-class
families who would happily adopt these babies and give them the life they deserve. And the sooner they are adopted, the less they will be scarred by moving from one neglectful home (or prison) to another.

But do we really want judges and juries, when they are convicting or sentencing a pregnant woman, to be deciding not only whether and how long she should be sent away but also whether she has to give her child away? No one would reasonably want to make this decision, and, when a conviction means that a mother loses her infant permanently, the defense has a very powerful human argument. On the other hand, maybe we should be instructing juries that sending a mother to prison means we are also sending an innocent child there.

If we are going to make use of prison-nursery programs, it is also worth considering whether our courts really have the authority to incarcerate babies. Defenders of the constitutionality of prison nurseries argue that babies don’t know they are in prison, and that parents in general are given a great deal of deference by the courts in terms of how to raise children and in what kind of environment. Seham Elmalak argues in the *Pace Law Review* that “the baby is not actually losing his liberty interest, because for all intents and purposes, he is not an inmate. He is not in state custody. He is not being punished. And he will not receive any disciplinary sanctions. Although it is unrealistic and not practical, he is, technically, free to leave.” This seems a little absurd. Perhaps the intent is not to punish the baby, but surely that is one interpretation of the effect. And suggesting that he is free to crawl away does not help the case.

Dwyer argues, on the other hand, that it is unconstitutional to imprison a person who has committed no crime and hasn’t been offered due process. After all, he argues, parents can’t simply decide to commit a child to a mental-health facility without a hearing to determine whether that is best for the child; surely the same standard should be applied in determining whether a year or two behind bars is in the best interests of the child. That hearing should include not only some understanding of the length of the mother’s sentence, but also whether the child will likely be separated after some kind of bonding period, whether there is a family placement that would be preferable, and whether the mother is likely (looking at past behavior) to have her sentence lengthened or be back in prison again. It should be noted that mothers in these situations will not always pick what is in the best interests of their children. Their
judgment may be poor—that’s often how they end up incarcerated to begin with. They may choose a relative who will not want to keep the child in the long run, making the child’s life less stable but putting it on hold until the mother’s release. Many women will choose the prison-nursery option because it will mean a more pleasant prison experience for themselves, regardless of the outcome for their babies.

There is another, less intuitive legal challenge that has been raised against prison nurseries: Is it discriminatory that women would get to keep their babies with them in prison, but men cannot? This may seem an absurd question, but those who believe that gender is a social construct will invariably be led to wonder whether fathers shouldn’t have the same access to their children that mothers do. Defenders of the nurseries will argue that laws that discriminate based on gender have a lower level of scrutiny than laws based on race, and that there is a “valid rational connection” between, as Elmalak puts it, “the placement of prison nurseries and legitimate governmental interests of promoting child-rearing, reducing misconduct in prisons, and reducing rates of recidivism, while maintaining security and safety.”

As we have seen, the connection between prison nurseries and these aims is somewhat tenuous. But the question of gender discrimination—and whether men and women should be treated differently when it comes to incarceration—is actually central to this debate.

A July 2018 article in the Chicago Tribune described a newly formed “100-member all-female task force of experts, current and former prison officials and formerly incarcerated women” who are working to bring down by 50% the number of women in the Illinois Department of Corrections in the next seven years. Advocates note that women are much less likely to have committed violent crimes, less likely to be charged with violent incidents inside of prisons, and less likely to commit another crime after being released.

Given these facts, should we be treating men and women the same in terms of the kinds of sentences they receive and the way they are treated behind bars? Moreover, if their imprisonment has a disproportionate impact on children, perhaps we should be doing more to keep them out of prison in the first place. Alyssa Benedict, one of the leaders of the Illinois project, told the Tribune, “Prison is not where women need to be. Even if prisons were highly functional places, they don’t belong there. It’s a train wreck, to be honest, a train wreck.” The task force suggests
that it’s not just nonviolent offenders who should be rehabilitated in
the community rather than in prison; they also note that violent female
offenders are often reacting to abusive situations and should therefore
be treated differently. Feminist scholars have called for “gender-specific”
prison policies, including but not limited to nurseries.

A critic of these suggestions might reasonably argue that the men
who are in prison haven’t had easy lives either, that they too are dispropor-
tionately poor and come from homes that are unstable or abusive.
But even if the feminist diagnosis of the problem leaves something to
be desired, we should not ignore the point about lower rates of violent
crime, recidivism, and rule violation among women in prison.

This is a very slippery legal slope, needless to say, but when it comes
to sentencing it makes sense to take account of a person’s likelihood of
re-offending or even trying to escape punishment. The idea that women
are living in maximum-security facilities simply because we don’t have
minimum-security ones for them is a problem. But it is even more of an
issue when we consider their children. If taking a hard look at what it’s
like to be born behind bars is what’s needed in order to rethink prison
policies, so be it.

MATERNALISM

In the meantime, though, we are left with the question of these chil-
dren. When a pregnant woman is incarcerated, there should be, as
Dwyer suggests, a legal hearing to determine what course of action is in
the best interests of the child, knowing that may be different from the
best interests of the mother.

In response to the notion that prison is not the best place for children
and that children generally benefit from more contact with their par-
ents, Washington State instituted the Family and Offender Sentencing
Alternative, whereby a judge can waive a prison sentence for a nonviolent
offender and instead sentence her to 12 months of intense supervision along
with substance-abuse or other counseling. There is also the Community
Parenting Alternative, which allows inmates to serve up to the last year of
their sentence in the community with electronic monitoring.

But is this enough? It makes sense that, if we are going to keep moth-
ers with their children after they are sentenced, they should be in the
least restrictive environment—not be behind bars at all, but in a kind
of halfway house. (Unfortunately, most halfway houses cannot take
children because of liability issues.) The problem is that these mothers need a great deal of guidance even if they don't need punishment.

Women with substance-abuse problems (a large segment of the mothers in prison) who are pregnant are better off with a program like Freedom House, where pregnant women and women with infants can receive substance-abuse counseling, parenting classes, child care, and vocational education in a setting that resembles the real world. Such an environment is far better in the long run than prison nurseries, which often don’t provide drug counseling and which don’t adequately prepare inmate mothers for the pressures of life outside.

In a 2015 article for the Atlantic on prison nurseries, Sarah Yager writes almost longingly of turn-of-the-century “reformatories” whose inmates sometimes included mothers with children. These institutions “mostly held women for moral offenses, like prostitution and ‘manifest danger of falling into vice.’” They “made it their mission to correct behavior, instructing inmates in everything from physical fitness to table manners to vocational trades.” Yager contrasts this with the rough, institutional way that female inmates are treated today — in other words, just like men.

More community-based facilities could be set up with the same goals in mind, where women who were hardly parented themselves are taught the correct way to behave in society. Policies to keep women from “falling into vice” are likely to face resistance. Indeed, in a study of one community-based facility by a team of Chicago researchers, residents resented the lessons that they were being offered in parenting; as one told interviewers, “I don’t feel I need the parenting classes. I already have kids.”

But as more states and federal policymakers are considering how incarceration of mothers (as well as fathers) disrupts family formation and infant attachment, and perpetuates a cycle of intergenerational poverty and dysfunction, these issues will demand solutions. And in terms of the welfare of the inmates’ children, this kind of paternalism (or maternalism) seems like a reasonable solution to a difficult problem.