

A CONSTITUTIONAL ANALYSIS OF A PROPOSAL TO EXPAND THE PRISON NURSERY PROGRAMS

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TABLE OF CONTENTS

I.	INTRODUCTION	172
II.	BACKGROUND.....	174
	<i>A. The Increasing Rate of Female Incarceration</i>	174
	<i>B. The Adoption and Safe Families Act of 1997</i>	175
	<i>C. Prison Nursery Programs</i>	178
III.	A PROPOSAL TO EXPAND PNPs TO MOTHERS WHO GAVE BIRTH UP TO TWELVE MONTHS BEFORE BEING INCARCERATED	182
	<i>A. How Mothers who gave Birth up to Twelve Months before being Incarcerated are Similarly Situated to the Current Eligible Mothers, yet are Denied Admission to PNPs</i>	182
	1. Physical Health	182
	2. Mental Health	184
IV.	THE CONSTITUTIONALITY OF EXTENDING THE PRISON NURSERY PROGRAM TO MOTHERS WHO GAVE BIRTH UP TO TWELVE MONTHS BEFORE BEING INCARCERATED.....	187
	<i>A. Equal Protection Clause Challenge</i>	187
	<i>B. Standards of Review</i>	187
	<i>C. Legitimate state interests</i>	188
	<i>D. Is the Restriction on PNPs rationally related to the state interests?</i>	190
	1. Preservation of Child Custody	192
	2. The Safety and Health of the Infants	193
	3. Saving Taxpayer Money	195
VI.	CONCLUSION.....	196

I. INTRODUCTION

In 2016, police arrested Lindsay Landon after discovering her with drugs.¹ Landon was a mother of two young children, and even though she worked overtime, her job milking cows in Vermont was insufficient to pay the bills. As a result, she became desperate for money and sold drugs to provide for her family.² After pleading guilty to possession of a controlled substance, Landon discovered she was pregnant.³ She was to serve a three-year sentence that could be reduced by eight months for good behavior.⁴ She began serving her sentence in the beginning of 2012, when she was already two months pregnant.⁵ Landon discovered that there was a special nursery at a women's prison in Bedford Hills, New York that would allow her to keep her child with her in prison for up to eighteen months.⁶ This program is called a prison nursery program ("PNP").

At the time the article describing Landon's situation was published, she had already given birth and was living in prison with her ten-month-old baby, Gabriel.⁷ She said, "[t]o be in prison with my baby every day for the past 10 months has been a beautiful gift."⁸ Landon was grateful for the opportunity to participate in a PNP.⁹ Through the PNP, she was able to breastfeed her son, nourish him, watch him grow, and share an intimate bond with her son.¹⁰ Although Gabriel would have to leave the PNP at the end of his twelve-month stay, Landon was granted work release for the remainder of her sentence.¹¹ Landon chose to work for Hour Children, the same nonprofit organization that would take care of Gabriel after the twelve-month stay, allowing her to see Gabriel after work on weekdays and return to prison at night until her release date.¹²

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¹ See Elizabeth Chuck, *Prison nurseries give incarcerated mothers a chance to raise their babies—behind bars*, NBC News (Aug. 4, 2018, 7:00 AM), <https://www.nbcnews.com/news/us-news/prison-nurseries-give-incarcerated-mothers-chance-raise-their-babies-behind-n894171>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

Although PNPs for incarcerated mothers and soon-to-be mothers exist in just ten states throughout the United States, they are becoming increasingly popular. To be admitted to the Bedford Hills PNP, “pregnant women must be approved by the New York State Department of Corrections and Community Supervision, which considers the severity of their crime, any past history with a child welfare agency, and the length of their sentence.”¹³ PNPs are limited to mothers who gave birth during their sentences, but do not provide mothers who gave birth just before incarceration the same opportunity.¹⁴ The nursery has its own separate wing and a playroom for the infants.¹⁵ During this period, incarcerated mothers and their newborns spend time together, bond, and receive medical treatment.¹⁶ Mothers are also required to continue parenting programs before and after giving birth.¹⁷

Although PNPs have existed for many years and have proven to generate beneficial outcomes, mothers who give birth before incarceration are unable to participate in them.¹⁸ In this Note, I propose that PNPs should not be limited to incarcerated women who are pregnant when they begin their sentences, but rather should be expanded to allow mothers who gave birth up to twelve months before incarceration an opportunity to participate in them as well. In Part II, after a discussion of the increased rate of female incarceration and the policies of the Adoption and Safe Families Act of 1997, I explain the positive results and lasting effects that PNPs have on mothers, infants, and society. I explain how PNPs have led to positive mother-child relationships and have reduced the rate of recidivism among mothers who were part of the PNPs. In Part III, I propose an expansion of PNPs to permit mothers who gave birth up to twelve months before incarceration to participate in them. I argue that the proposed group of mothers and mothers who give birth during their sentences are similarly situated in the sense that they and their infants can benefit in essentially identical ways, and thus should be afforded the same opportunity to participate in PNPs. In Part IV, I explain what would happen if the proposed group of mothers were to challenge their right to participate in PNPs through the Equal Protection Clause of the Fourteenth Amendment. I analyze the different standards of review under the Equal Protection Clause and find that a court would conduct its analysis under the rational basis review test. I identify potential state

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See John Caniglia, *Growing up Behind Bars: How 11 States Handle Prison Nurseries*, THE PLAIN DEALER (Mar. 4, 2018), https://www.cleveland.com/metro/2018/03/growing_up_behind_bars_how_sta.html.

¹⁷ *Id.*

¹⁸ See *e.g.*, OHIO ADMIN. CODE ANN. § 512-9-27 (WEST 2016); ILL. ADMIN. CODE tit. 20, § 475.25.

interests in limiting PNPs by analyzing different state statutes and administrative codes that enable PNPs. Ultimately, I conclude that a mother who gave birth up to twelve months before incarceration would have a strong Equal Protection claim because her denial of the right to participate in PNPs is not rationally related to the legitimate state interests.

II. BACKGROUND

A. The Increasing Rate of Female Incarceration

In the past few decades, there has been a drastic increase in the rate of incarceration of women in the United States.¹⁹ This has largely been a consequence of harsher laws punishing non-violent crimes.²⁰ Incarceration of mothers has increased by 88 percent between 1991 and 2002.²¹ In 2007, 1.7 million minor children had at least one parent in prison in the United States.²²

Women are often incarcerated for gender and class-based crimes. Criminal justice experts have found that “the types of crimes that women commit . . . may be intricately related to women’s overall economic and political position in society” as “[i]ncarcerated women are more likely to be women of color, young, poor, less educated and largely unskilled.”²³ Incarcerated women and mothers are more likely to have experienced child abuse, domestic violence, and mental health issues than incarcerated men have.²⁴ Moreover, incarcerated mothers are more likely to be in prison for committing a non-violent crime than are other incarcerated women.²⁵ Studies suggest that their crimes are often related to their struggles as mothers, and “may be related to the stress of raising children, providing for their families,

¹⁹ See Deseriee A. Kennedy, “*The Good Mother*”: *Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. OF WOMEN & L. 161, 163 (2012).

²⁰ *Id.* at 168; See also, Clare Foran, *What Can the U.S. Do About Mass Incarceration?*, ATLANTIC (April 28, 2016), <https://www.theatlantic.com/politics/archive/2016/04/ending-mass-incarceration/475563/>. (“Roughly half of all inmates under federal correctional authority in 2014 were incarcerated for drug-related offenses, according to the Bureau of Justice Statistics...[i]f everyone in America currently held for a drug-related offense in state and federal prison were released, that would reduce prison populations by approximately 20 percent.”); E. Ann Carson, *Prisoners in 2014*, BUREAU OF JUSTICE STATISTICS BULLETIN (U.S. Department of Justice) Sept. 2015, at 1 (statistics showing that 59% of all women in federal prison were incarcerated for drug-related crimes as of 2014.).

²¹ Kennedy, *supra* note 19, at 168.

²² DAVID MURPHEY & P. MAE COOPER, PARENTS BEHIND BARS, 1 (2015).

²³ Kennedy, *supra* note 19, at 169.

²⁴ *Id.*

²⁵ *Id.* at 170.

and merely surviving.”²⁶ To put this in perspective, incarcerated mothers are usually single parents and the primary caretakers of their children, who are typically below the age of thirteen.²⁷

This is especially concerning when coupled with the rise in the rate of incarcerated mothers.²⁸ When mothers are incarcerated, the effect is often more detrimental to family relationships than when a father is incarcerated. Incarcerated fathers can often rely on their children’s mothers to care for the children during their time in prison, as mothers are more likely to be the primary caretakers.²⁹ However, incarcerated mothers often have no alternative but to leave their children with either extended family, or otherwise the state during their prison sentences, and when left with the state, they often become susceptible to losing custody of their child.³⁰

B. The Adoption and Safe Families Act of 1997

The Adoption and Safe Families Act of 1997, Public Law 105-89, (“ASFA”), is a federal law that was enacted to “strike a balance between family preservation and reunification with the health and safety of children, purposefully erring on the side of child safety.”³¹ Congress enacted the ASFA because of the negative effects of foster care in the 1990s.³² During this time, “[a]lthough foster care was designed as a temporary expedient and was administered as if it were in fact temporary, increasing numbers of children were spending three years or more in foster care, many of them in a series of homes,” and thus Congress began looking for better solutions to fit the childrens’ needs.³³ On November 19, 1997, President Bill Clinton signed the ASFA into law, with child safety as the primary concern and finding a permanent home for children in a timely manner as the ultimate goal.³⁴ The ASFA has strict requirements that parents must follow in order to maintain

²⁶ *Id.* (“Based on the higher rates of poverty, their status as single parents, and the high percentage of inmate women who are domestic abuse survivors, it is very likely that their crimes may be related to the stress of raising children, providing for their families, and merely surviving.”) (citing Jeremy Travis, *Families and Children*, 69 *FED. PROBATION* 31, 34 (2005) (“Nearly half (46 percent) of incarcerated fathers were imprisoned for a violent crime, as were one-quarter (26 percent) of the mothers. . . . Nearly one-third of the mothers reported committing their crime to get either drugs or money for drugs . . .”).

²⁷ Kennedy, *supra*, note 19, at 170.

²⁸ *Id.* at 168–69 (Between 1990 and 2007, the rate of incarceration of mothers increased by 122 percent, while the rate of incarceration for fathers increased by a significantly lower 76 percent.).

²⁹ *Id.* at 163–64.

³⁰ *Id.* at 164.

³¹ Judge Ernestine Steward Gray, *The Adoption and Safe Families Act of 1997*, 46 *LA. B.J.* 477, 478 (1999).

³² Catherine J. Ross, *A Delicate Task: Balancing the Rights of Children and Mothers in Parental Termination Proceedings*, 33 *STUDIES IN LAW, POLITICS, AND SOCIETY* 163, 171 (2004).

³³ *Id.*

³⁴ Gray, *supra* note 31, at 478.

custody of their children, and such requirements could be difficult to satisfy if a parent is incarcerated.³⁵ However, PNPs help satisfy those requirements and afford mothers an opportunity to maintain custody of their children.

Under the ASFA, the State is required to terminate parental rights under several circumstances.³⁶ First, a State must file a petition for the termination of parental rights when a child is under state foster care “for 15 of the most recent 22 months,” which is often called the “15/22 rule.”³⁷ A State must also file one if a child is deemed an “abandoned infant” under state law.³⁸ Finally, a State must file a petition if a court determines that the parent committed murder, voluntary manslaughter, helped in committing a murder or voluntary manslaughter, or committed a felony assault against any of their children.³⁹ When filing the petition, the State must, at the same time, “identify, recruit, process, and approve a qualified family for an adoption.”⁴⁰

There are three exceptions to filing a petition to terminate parental rights. A petition does not need to be filed if (1) a child is taken care of by a relative during the length of the incarceration, (2) a state agency shows a compelling reason that the petition would not be in the child’s best interest, or (3) if the state fails to timely provide services necessary to make sure the child is safely returned to his or her home.⁴¹ Overall, the strict policies of the Act make it extremely difficult for incarcerated mothers to retain custody of their children after incarceration.

Statistics show that the average incarcerated mother is detained in state prison for forty-nine months.⁴² As a result, these mothers are susceptible to losing custody just based on their length of incarceration—mothers are usually incarcerated longer than the twenty-two month period allotted by the 15/22 rule of the ASFA.⁴³ Under a direct application of the rule, “the 15/22 months rule would be a death knell for the parental rights of all parents with children in foster care who remain in jail for more than a year and a half.”⁴⁴ Ultimately, losing custody of a child becomes an additional punishment for being convicted of a crime.⁴⁵

³⁵ See Kennedy, *supra* note 19, at 177. See also, Ross, *supra* note 32, at 184-85.

³⁶ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 1305, 11 Stat. 215 (1997), amending 42 USC § 675(5)(E).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² See Ross, *supra* note 32, at 184.

⁴³ *Id.* See also, Kennedy, *supra* note 19, at 177.

⁴⁴ Ross, *supra* note 32, at 184.

⁴⁵ Kennedy, *supra* note 19, at 177.

Under the ASFA, if an incarcerated mother is able to leave her child with a relative, she has a much better chance of maintaining child custody after incarceration.⁴⁶ While most incarcerated mothers are able to find a relative to care for their child, 10 percent of incarcerated mothers are unable to find one.⁴⁷ This group of incarcerated mothers is then required to put their children in foster care while they are incarcerated.⁴⁸ Moreover, visitation is extremely difficult and expensive, and mothers tend to lose their relationships with their children as a consequence.⁴⁹ Many states still require mothers to maintain relationships with their children while serving their sentences in order to maintain custody of their children, and the failure to maintain a steady relationship with their children gives states another opportunity to terminate parental rights.⁵⁰ This requirement ignores the fact that incarcerated mothers lose touch with their children not because of their personal indifference, but rather because of the far distances of the prisons, the inconvenience of visitation areas, and the costliness of communication.⁵¹

It is important to note that the ASFA requires states to make reasonable efforts to preserve and reunify families “(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and (ii) to make it possible for a child to safely return to the child’s home.”⁵² The ASFA also states that reasonable efforts to preserve and reunify families are not necessary under three circumstances.⁵³ Reasonable effort is not required when the parent “subjected the child to aggravated circumstances;”⁵⁴ when the parent has committed murder, voluntary manslaughter, helped in committing a murder or voluntary

⁴⁶ Adoption and Safe Families Act § 1305 (the State does not need to file a petition for termination if “at the option of the state, the child is being cared for by a relative.”).

⁴⁷ Ross, *supra* note 32, at 184.

⁴⁸ *Id.*

⁴⁹ Kennedy, *supra* note 19, at 178.

⁵⁰ *Id.* at 179. (“[S]ome courts have found that incarceration does not discharge a parent’s statutory obligation to provide for her child with a continuing relationship through communication and visitation. . . Courts reason that a parent who is prevented from maintaining meaningful contact with a child by his incarceration and who thereby risks having his parental rights terminated ‘cannot object to the natural consequences brought about by his own voluntary commission of criminal acts.’”).

⁵¹ Kennedy, *supra* note 19, at 178 (“[M]ost incarcerated mothers are imprisoned more than 100 miles from their families, while federal prisoners are housed at far greater distances not infrequently in states other than their state home. This adds to the high cost of staying in touch by making it more expensive and time consuming to visit a female prisoner. In addition, prison and jail facilities are designed with security as a primary goal and do not typically provide convenient and family-friendly visiting areas. Telephone contact is maintained through collect calls at exorbitant rates, and visiting is often made so difficult, expensive, and time consuming that many families cannot afford to do so often.”).

⁵² Adoption and Safe Families Act § 1305.

⁵³ *Id.*

⁵⁴ *Id.* (requiring the definition of “aggravated circumstances” to follow the state law definition which “may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse.”).

manslaughter, or committed a felony assault against any of the parent's children⁵⁵; or when "the parental rights of the parent to a sibling have been terminated involuntarily."⁵⁶ Although the ASFA itself requires "reasonable efforts" by the states, the states decide themselves what is considered a reasonable effort, and "[f]ar too frequently, there is insufficient support for parents who, because of their incarceration, are unable to follow a permanency plan put in place for them by case workers."⁵⁷

Lastly, it is important to understand the psychological effect of temporary parent-child separation on both children and mothers. Although everyone is affected differently, in general, "[c]aregivers and children affected by parental incarceration experience more trauma than other families, which can manifest as depression, anxiety, irritability, aggression, social isolation, difficulty sleeping, behavioral regression, and an inability to regulate emotions and behaviors."⁵⁸ Ultimately, PNPs are "a viable alternative in appropriate cases to prevent separation during the mother's incarceration, and to provide tools for the mother and child to maintain a familial structure upon release."⁵⁹

C. Prison Nursery Programs

PNPs serve as a solution to the increased rate of incarcerated mothers, child custody issues, and the health concerns of incarcerated mothers and their infants. There are currently ten states that have established PNPs in the United States.⁶⁰ These states are California, Illinois, Indiana, Nebraska, New

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Kennedy, *supra* note 19 at 175.

⁵⁸ Lindsey Cramer et al., *Parent-Child Visiting Practices in Prisons and Jails*, URBAN INSTITUTE (April 13, 2017), <https://www.urban.org/research/publication/parent-child-visiting-practices-prisons-and-jails>.

⁵⁹ See generally, Michal Gilad & Tal Gat, *U.S. v. My Mommy: Evaluation of Prison Nurseries as a Solution for Children of Incarcerated Women*, 36 N.Y.U REVIEW OF LAW & SOCIAL CHANGE 371, 379, 382-83 (2013) (explaining how federal laws like the ASFA and state laws "ha[ve] significant implications for mothers' parental rights as well as the future of their children" and that when there are no relatives to take care of the child during the length of incarceration, "permanent separation is virtually inevitable." PNPs prevent such separation and provides an opportunity for mothers to maintain child custody. Gilad also finds that PNPs further both principal interests of the ASFA which is "(1) permanency and consistency in care and (2) the well-being and safety of the child.").

⁶⁰ See *Caniglia* *supra* note 16. Although *Caniglia* finds that there are 11 states that have established PNPs, Delaware's program, the New Expectations Group Home, is an alternative to prison and not necessarily a PNP. See also, Melissa Nann Burke & Jen Rini, *New home gives hope to pregnant offenders*, DELAWARE ONLINE (Jan. 28, 2015, 10:05 PM), <https://www.delawareonline.com/story/news/local/2015/01/28/new-home-gives-hope-pregnant-offenders/22497233/> (explaining that the New Expectations program can serve as an alternative to incarceration). Nevertheless, Delaware recently proposed a bill to establish PNPs in the state. See Sophia Schmidt, *Proposed bill would allow some inmates to stay with babies in prison*, DELAWARE PUBLIC MEDIA

York, Ohio, South Dakota, Texas, Washington, and West Virginia.⁶¹ Each program has different rules. For example, most PNPs allow infants to stay with their mothers for between twelve to twenty-four months.⁶² However, the length of stay can vary; South Dakota's PNP, "Mother Infant Program," only allows infants to stay in the PNP for thirty days, while Washington's PNP, "Residential Parenting Program," allows infants to stay with their mothers for up to thirty months.⁶³ While each PNP also implements its own eligibility requirements, the programs are generally similar. For example, most, if not all, PNPs require participating mothers to have no history of violence and child abuse.⁶⁴ They also require mothers to be serving short sentences,⁶⁵ presumably so that they can care for their infants after being released from prison. PNPs also vary in the types of prenatal classes, parental programs, and family services in which participating mothers must partake.⁶⁶

Many of the PNPs are relatively new. The "Moms & Babies Program" in Illinois began in 2007, the "Wee Ones Nursery Program" in Indiana began in 2008, and "KIDS" (Keeping Infant Development Successful) in West Virginia began in 2009.⁶⁷ Furthermore, new PNPs may be established in more States in the future. For example, as of the date of publication of this

(Jan. 29, 2020), <https://www.delawarepublic.org/post/proposed-bill-would-allow-some-inmates-stay-babies-prison>. See also, H.R. 258, 150th Gen. Assemb. Reg. Sess. (Del. 2019).

⁶¹ See Caniglia, *supra* note 16.

⁶² See *id.* (Illinois's "Moms and Babies" program allows for 24 months, Indiana's "Wee Ones Nursery" and Nebraska's "Nursery Program," allows for about 18 to 24 months, West Virginia's "Keeping Infant Development Successful," allows for 18 months and the length of stay "can be extended by the prison's warden," and Texas's "Baby and Mother Bonding Initiative" allows for 12 months.).

⁶³ Caniglia, *supra* note 16.

⁶⁴ See *id.*; Hendrik DeBoer, *Prison Nursery Programs in Other States*, OFFICE OF LEGISLATIVE RESEARCH (Mar. 30, 2012), <https://www.cga.ct.gov/2012/rpt/2012-R-0157.htm>.; *Mothers, Infants and Imprisonment*, INSTITUTE ON WOMEN & CRIMINAL JUSTICE 1, 9 (May 2009).

⁶⁵ See *id.* See also, Lori A. Nohe, *Keeping Infant Development Successful: West Virginia's Premier Program for Incarcerated Mothers*, 76 CORRECTIONS TODAY 42 (2014), http://www.aca.org/aca_prod_imis/Docs/Corrections%20Today/2014%20Articles/Nohe.pdf (To participate in West Virginia's "Keeping Infant Development Successful" PNP, the incarcerated mother must "[b]e eligible for parole or discharge by the time the child reaches 18 months of age."); *Wee Ones Nursery*, INDIANA DEPARTMENT OF CORRECTION, <https://www.in.gov/idoc/about-idoc/special-initiatives/wee-ones-nursery/> (To participate in Indiana's "Wee Ones Nursery" PNP, the incarcerated mother's "earliest possible release date [cannot be] more than eighteen months after the projected delivery date.").

⁶⁶ See *id.* (listing the additional programs offered to participants of the "Wee Ones Nursery" in Indiana); *Rehabilitation Programs Division – Baby and Mother Bonding Initiative (BAMBI)*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, <https://www.tdcj.texas.gov/divisions/rpd/bambi.html> (In Texas's "Baby and Mother Bonding Initiative" PNP, "offender[s] receive[] child development education, life skills, infant first aid and CPR, nutrition, peer recovery, cognitive skills, anger management and family reunification sessions" and "[a]dditional programing may include substance abuse education and GED classes."); Caniglia, *supra* note 16.

⁶⁷ *Mothers, Infants, and Imprisonment*, *supra* note 64.

Note, Delaware is seeking to pass a bill that would allow PNPs in its state.⁶⁸ Delaware's state representative, Melissa Minor-Brown, a proponent of the bill, stated, "Instead of taking the baby away, putting the baby through the foster care system, and sending mom back to prison, we keep them together. We allow that baby and mom to bond, and we allow the mom to just be a mom, we teach her how to be a mom, that to me is true rehabilitation."⁶⁹ As it currently stands, the bill would need to pass the State House and Senate to be enacted.⁷⁰

The oldest PNP, located at the Bedford Hills Correctional Facility in Bedford Hills, NY, and founded in 1901, was the first PNP in America.⁷¹ The medical and mental staff are responsible for approving inmates into the program.⁷² Newly born infants can remain with their mothers in prison for twelve to eighteen months.⁷³ Mothers are required to take eight weeks of prenatal courses, a nine-week parenting program post-pregnancy, and must attend mandatory doctor appointments with their infants.⁷⁴ Infants must be healthy in order to stay in prison with their mothers.⁷⁵ Even though the PNP is located in a separate wing of the maximum-security prison, designed with bright paint, and filled with toys, the PNP is undeniably a prison.⁷⁶ Despite this fact, infants receive medical attention, mothers are educated on various parental skills, and infants are able to remain with their mothers. Stephanie Covington, the co-director of the Center of Gender and Justice, finds that, "[s]eparating a mother from her child at birth is a traumatic experience for both the child and mother" and "[a] baby doesn't know it's in prison. A baby knows it's with its mother."⁷⁷

In addition to offering a safe opportunity for incarcerated mothers and their newborns, PNPs are also beneficial to society as a whole. First, mothers who participate in PNPs tend to have a lower risk of being repeat-offenders and returning to prison. According to reports from the New York State Department of Corrections and Community Supervision, 29 percent of

⁶⁸ Schmidt, *supra* note 60.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Sarah Yager, *Prison Born*, ATLANTIC, July/August 2015, <https://www.theatlantic.com/magazine/archive/2015/07/prison-born/395297/>.

⁷² Caniglia, *supra* note 16.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Yager, *supra* note 71.

⁷⁶ *See id.*; *See also*, Chuck, *supra* note 1.

⁷⁷ Chuck, *supra* note 1. *See* CENTER FOR GENDER AND JUSTICE, <https://www.centerforgenderandjustice.org> (The Center of Gender and Justice is an organization that "seeks to develop gender-responsive policies and practices for women and girls under criminal justice supervision.").

female inmates in New York become repeat offenders and find themselves back in prison.⁷⁸ In comparison, only 3.5 percent of participants of the PNP at Bedford Hills become repeat offenders.⁷⁹ This can be attributed to the fact that the nursery helps mothers “change and prioritize their children like never before.”⁸⁰ In his research, Joseph Carlson, a professor of criminal justice at the University of Nebraska, found a “13 percent drop in misconduct reports among women who joined the nursery.”⁸¹ Carlson also compared statistics of incarcerated mothers who participated in the PNPs with incarcerated mothers who did not participate in the PNPs, and were therefore separated from their infants.⁸² He found that mothers who did not participate in a PNP were three times more likely to return to prison than those women who did participate.⁸³ Sharon Ricketts, the manager of the PNP at Bedford Hills, explained the success of one of the mothers in her program: “[b]eing locked in a prison with nothing to do but learn to be a good mother was instrumental in helping [the mother] re-prioritize her kids.”⁸⁴

Furthermore, PNPs can serve as a cost-efficient alternative to incarceration. Lower rates of recidivism and avoidance of foster care can save the taxpayer money.⁸⁵ Although establishing and maintaining PNPs is costly, the costs associated with PNPs can end up being 40 percent cheaper than incarcerating mothers and save taxpayers money.⁸⁶ Thus, PNPs help the government avoid costs of reincarceration and foster care.⁸⁷

⁷⁸ See generally, Johanna Li, *Inside the Prison Where Babies Serve Time with their Incarcerated Mothers*, INSIDE EDITION (January 26, 2019, 4:27 AM), <https://www.insideedition.com/inside-prison-where-babies-serve-time-their-incarcerated-mothers-50207>.

⁷⁹ *Id.* See also, Caniglia, *supra* note 16 (The article lists the recidivism rates of different PNPs throughout America. To list a few, the recidivism rate of mothers who went through the PNP in Indiana Women’s Prison in Indian is just 19%, while the recidivism rate of the overall female population is 35%. The recidivism rate of mothers who went through the PNP at the Nebraska Correctional Center for Women is 10%, while the rate for the state is 30%).

⁸⁰ Li, *supra* note 78.

⁸¹ Yager, *supra* note 71.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Li, *supra* note 78.

⁸⁵ See Yager, *supra* note 71.

⁸⁶ *Id.* (“[Carlson] calculated that nursery supplies, staff salaries, and medical expenses would total about 40 percent less each year than foster care for the babies who would otherwise end up there, and predicted more-significant savings from a decline in recidivism.”).

⁸⁷ *Id.*

III. A PROPOSAL TO EXPAND PNPs TO MOTHERS WHO GAVE BIRTH UP TO TWELVE MONTHS BEFORE BEING INCARCERATED

A. How Mothers who gave Birth up to Twelve Months before being Incarcerated are Similarly Situated to the Current Eligible Mothers, yet are Denied Admission to PNPs

Mothers who gave birth up to twelve months before incarceration and mothers who give birth while serving their sentences are similarly situated and should be afforded the same opportunity to participate in PNPs. However, even though both groups are similarly situated, only the latter is eligible to participate in PNPs. OAC 5120-9-57, the Ohio administrative code enabling PNPs, requires participants to “be pregnant at the time she is delivered into the custody of the department of rehabilitation and correction.” The Illinois PNP statute also limits participation to pregnant offenders.⁸⁸ Even Delaware’s proposed bill to create PNPs has a provision that would limit an “eligible offender” to an offender who “is pregnant at the time she is brought into the custody of the Department.”⁸⁹ Although it is difficult to argue that mothers with older children, such as teenagers, should be eligible to participate in PNPs, the health of children, the freedom of children, and other obvious concerns, show that mothers who gave birth up to twelve months before incarceration can benefit in the same ways from PNPs as mothers who gave birth in prison. If a particular group of mothers were to challenge PNPs, those who gave birth up to twelve months before incarceration would have the strongest claim because of the similarities between them and mothers who gave birth in prison.

1. Physical Health

Mothers who gave birth up to twelve months before incarceration are similarly situated to mothers who gave birth in prison, because both groups would obtain the same physical health benefits through participation in a PNP. First, both groups of mothers would equally benefit from the opportunity to breastfeed, as PNPs allow mothers to breastfeed. Prominent health organizations such as the American Academy of Pediatrics, the American Medical Association, and the World Health Organization emphasize that breastfeeding is the best form of nourishment for infants.⁹⁰ In

⁸⁸ ILL. ADMIN. CODE tit. 20, § 475.25(a) (“All pregnant offenders shall be screened for eligibility for the Moms and Babies Program.”).

⁸⁹ H.R. 258, 150th Gen. Assemb. Reg. Sess. (Del. 2019).

⁹⁰ Elana Pearl Ben-Joseph, *Breastfeeding vs. Formula Feeding*, KIDSHHEALTH FROM NERMOURS (June 2018), <https://kidshealth.org/en/parents/breast-bottle-feeding.html>.

fact, the American Academy of Pediatrics finds that mothers should exclusively breastfeed their infants for at least the first six months, and suggests breastfeeding for at least twelve months, if not longer.⁹¹ Breastfeeding protects infants from, and reduces the chances of, a variety of diseases and conditions including “bacteremia, diarrhea, respiratory tract infection, necrotizing enterocolitis, otitis media, urinary tract infection, late-onset sepsis in preterm infants, type 1 and type 2 diabetes, lymphoma, leukemia, Hodgkin’s disease, [and] childhood overweight and obesity.”⁹²

Moreover, formula feeding may not be as adequate as breastfeeding. First, breast milk is more nutritious and contains the vitamins and minerals infants need.⁹³ While baby formula tries to incorporate many of the necessary nutrients, baby formula is different and “can’t completely match breast milk’s exact composition. . . [because] milk is a living substance made by each mother for her individual infant, a process that can’t be duplicated in a factory.”⁹⁴ Breast milk has benefits that formula may not; for example, antibodies that could otherwise be found in breast milk cannot be found in formula.⁹⁵ Such antibodies give infants more protection from illness and infection.⁹⁶ Additionally, studies suggest that infants who were exclusively breastfed have slightly higher IQs than those who were not.⁹⁷ Second, breastfeeding is preferable over formula feed because breast milk is more practical. Breast milk is free, while formula can be costly.⁹⁸ This is especially significant as infants with incarcerated mothers tend to come from low-income families. Breast milk also introduces infants to a variety of tastes because breast milk tastes different depending on the types of food mothers consume.⁹⁹ Third, breast milk is preferable because it allows for mothers and infants to bond as skin-to-skin contact increases emotional connections between mothers and infants.¹⁰⁰

Even if mothers are allowed to pump breast milk, freeze it, and have it delivered to their child, as is the case in many prisons, it is unlikely that the breast milk will ever reach the infants. In California, a state that has PNPs, the correctional facilities have rules that allow an incarcerated mother who is not participating in a PNP to choose whether or not she wants to breastfeed

⁹¹ *Id.*

⁹² *Benefits of Breastfeeding*, AMERICAN ACADEMY OF PEDIATRICS, <https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/Breastfeeding/Pages/Benefits-of-Breastfeeding.aspx>.

⁹³ Ben-Joseph, *supra* note 90.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

her child after being educated on the benefits of breastfeeding. The California Department of Corrections and Rehabilitation Operations Manual states:

Offenders shall be informed of the benefits of breastfeeding. In addition to the benefits, offenders should be educated about breastfeeding with active tuberculosis, HIV infection, illicit drug use, and while on certain prescribed medication. Offenders who choose to breastfeed their baby shall be allowed access to a breast pump and refrigerator/freezer to store the pumped milk. The breast pump shall be a manual pump able to be cleaned with soap and water. Coordination for the milk to be picked-up by the child's care giver shall be arranged prior to pumping and storing the milk.¹⁰¹

While the rule in the correctional facility allows incarcerated mothers to freeze their milk and arrange the child's caregiver to pick up the milk, it is unlikely that this will occur consistently.¹⁰² It may be difficult for a child's caregiver to arrange a time to pick up the pumped breast milk because the women's prisons are often located in remote areas.¹⁰³

Since breastfeeding is beneficial for both infants' and mothers' health, and recommended for twelve months, mothers who gave birth up to twelve months before incarceration have a strong argument that they are similarly situated to mothers who gave birth in prison and should be afforded the same benefits. This would account for the mother who gave birth one week, or even one day, before incarceration.

2. Mental Health

Mothers who gave birth up to twelve months before being incarcerated are similarly situated to mothers who gave birth in prison, as studies suggest that both groups would obtain the same mental health benefits from participating in a PNP. Currently, prisons lack adequate mental health services even though many inmates suffer from mental health problems.¹⁰⁴ Female inmates are especially more susceptible to suffer from mental health

¹⁰¹ Breastfeeding, California Department of Corrections and Rehabilitation Operations Manual, § 54045.19 (2020). *See also*, Robin Levi, *Creating the "Bad Mother": How the U.S. Approach to Pregnancy in Prisons Violates the Right to be a Mother*, 18 *UCLA WOMEN'S L.J.* 1, 47 (2010).

¹⁰² *See id.* at 47-49.

¹⁰³ *See id.* at 49 ("In light of the size of California and the remote locations of its women's prisons, it would not be surprising to find that many caregivers are unable to travel to the prison regularly to pick up breast milk, assuming that prison staff informs postpartum individuals that ongoing breastfeeding is a possibility. In fact, we are not aware of any cases in which people were to continue breastfeeding once they returned to prison from the hospital or were even told this was a possibility.").

¹⁰⁴ Levi, *supra* note 101, at 51.

problems and to meet the threshold for serious psychological distress.¹⁰⁵ According to the Bureau of Justice Statistics, about 66 percent of female inmates in prison suffer from a mental health disorder, whereas about 33 percent of male inmates in prison suffer from one.¹⁰⁶ An incarcerated mother's inability to see her newborn child within twelve months of giving birth exacerbates this issue, as women are most susceptible to mental disorders while they are pregnant and up to twelve months after giving birth.¹⁰⁷

Postpartum depression is a common mental illness that one in nine mothers experiences after giving birth.¹⁰⁸ Symptoms include insomnia, fatigue, loss or gain of appetite, and negative feelings of guilt or worthlessness.¹⁰⁹ Postpartum depression is most commonly seen in the first few months after giving birth.¹¹⁰ The likelihood of experiencing postpartum depression is highest at three months after giving birth, with 19.2 percent of mothers experiencing either major or minor forms of postpartum depression.¹¹¹ Mothers can still experience postpartum depression *after* twelve months of giving birth as well.¹¹²

According to the Centers for Disease Control and Prevention, a federal agency within the Department of Health and Human Services, "postpartum depression is common and associated with adverse infant and maternal outcomes," such as "lower breastfeeding initiation and duration and poor maternal and infant bonding."¹¹³ The "adverse infant and maternal outcomes" are heightened when a woman is incarcerated and does not participate in a PNP, Mothers cannot breastfeed after giving birth, and are unable to bond with their infants unless they are admitted to a PNP. Additionally, Cheryl Beck, a professor at the University of Connecticut

¹⁰⁵ *BJS Finds Inmates Have Higher Rates of Serious Psychological Distress than the U.S. General Population*, OFFICE OF JUSTICE PROGRAMS (June 22, 2017, 10:00 AM), <https://www.bjs.gov/content/pub/press/imhprpj1112pr.cfm>.

¹⁰⁶ *Id.*

¹⁰⁷ See Levi, *supra* note 101, at 52 ("Add the physical and emotional stresses of pregnancy, which can lead to mental health problems, to the constant stresses of imprisonment, and it becomes clear that a failure to provide mental health care to pregnant and postpartum individuals in California's women's prisons seriously harms these individuals.").

¹⁰⁸ See *Postpartum Depression*, OFFICE OF WOMEN'S HEALTH, <https://www.womenshealth.gov/mental-health/mental-health-conditions/postpartum-depression> (last updated May 14, 2019).

¹⁰⁹ Cheryl T. Beck, *Postpartum Depression*, 106 *THE AMERICAN JOURNAL OF NURSING* 40, 42 (2006).

¹¹⁰ *Id.* at 42.

¹¹¹ *Id.*

¹¹² *Id.* ("[t]he point prevalence estimates of major depression ranged from 1% to 5.9% at different times during the first 12 months after childbirth.").

¹¹³ Jean Y. Ko et al., *Trends in Postpartum Depressive Symptoms – 27 States, 2004, 2008, and 2012*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Feb. 17, 2017), <https://www.cdc.gov/mmwr/volumes/66/wr/mm6606a1.htm>.

School of Nursing and who focuses on postpartum depression, identified thirteen factors that increase the risk of postpartum depression including, “prenatal depression, low self-esteem, difficulties with child care, prenatal anxiety, a high stress level, a low level of social support, poor marital relationship, a history of depression, difficult infant temperament, and maternity blues.”¹¹⁴ Incarceration exacerbates many of these factors.

Postpartum depression has lasting long-term effects on the children as well. Studies have shown that children whose mothers experience postpartum depression are more likely to experience emotional and behavioral problems.¹¹⁵ One study found that children whose mothers experienced postpartum depression were more likely to have violent behaviors, and more likely to develop some form of depression themselves in the future than children whose mothers did not experience postpartum depression.¹¹⁶ Research suggests that children whose mothers met the criteria for the “most vulnerable group,” which for the purposes of one study was defined as women at two months post-pregnancy and women at eight months post-pregnancy with moderate and severe postpartum depression, are at seven times greater risk of depression at eighteen years old than those whose mothers with less persistent or lower levels of postpartum depression.¹¹⁷

Inmates often receive inadequate treatment for postpartum depression.¹¹⁸ Furthermore, there is a lack of available mental health services for inmates, and it is rare for inmates to receive such services.¹¹⁹ Prisons that do not “provide postpartum treatment for psychological and psychiatric problems violates the right to health. . .”¹²⁰ Since mothers who gave birth up to twelve months before incarceration can receive the same physical and health benefits as mothers who gave birth in prison, this proposed group of mothers has the best chance to succeed on an Equal Protection claim.

¹¹⁴ Beck, *supra* note 109, at 43.

¹¹⁵ Beck, *supra* note 109, at 45.

¹¹⁶ *Id.* See also, Anyssa Garza, *Postpartum Depression and its Long-Term Effects on Children*, PHARMACY TIMES (June 15, 2018), <https://www.pharmacytimes.com/publications/issue/2018/June2018/patient-focus-postpartum-depression-and-its-longterm-effects-on-children>.

¹¹⁷ Garza, *supra* note 116 (“[C]hildren born to women in the most vulnerable group have a 2-fold increased risk of having lower math scores at 16 years, a 4-fold greater risk of having behavioral problems between ages 3 and 4 years, and a 7-fold higher risk of depression at 18 years.”).

¹¹⁸ Levi, *supra* note 109, at 50.

¹¹⁹ *Id.* at 53.

¹²⁰ See *id.*

IV. THE CONSTITUTIONALITY OF EXTENDING THE PRISON NURSERY PROGRAM TO MOTHERS WHO GAVE BIRTH UP TO TWELVE MONTHS BEFORE BEING INCARCERATED

A. Equal Protection Clause Challenge

Under the Equal Protection Clause of the Fourteenth Amendment, no state shall “deny to any person within its jurisdiction the equal protection of the laws.”¹²¹ The Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike.”¹²² If mothers who gave birth up to twelve months before incarceration were to challenge state rules governing PNP eligibility under the Equal Protection Clause of the Fourteenth Amendment, they may have strong arguments to succeed on an Equal Protection challenge.

B. Standards of Review

When analyzing an Equal Protection claim, courts will apply a different standard of review. There are three standards of review—strict scrutiny, intermediate scrutiny, and rational basis. Courts will apply strict scrutiny review if the alleged discrimination affects a suspect class or when a fundamental right has been violated.¹²³ For example, courts will apply strict scrutiny review “when a statute classifies by race, alienage, or national origin” and such laws “will be sustained only if they are suitably tailored to serve a compelling state interest.”¹²⁴ Courts will apply the intermediate scrutiny review for quasi-suspect classes such as gender.¹²⁵ Under this standard, the law in question must be “substantially related to a sufficiently important governmental interest.”¹²⁶ The rational basis review test is the “general rule” and will be applied when strict scrutiny review and intermediate scrutiny review are inapplicable.¹²⁷ Under the rational basis review test, “legislation is presumed to be valid and will be sustained if the

¹²¹ U.S. CONST. amend. XIV.

¹²² *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). *See also*, *Reed v. Reed*, 404 U.S. 71 (1971) (“In applying [the Equal Protection Clause], this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways.”).

¹²³ *See generally*, *Plyer v. Doe*, 457 U.S. 202, 202 (1982).

¹²⁴ *City of Cleburne*, 473 U.S. at 440.

¹²⁵ *City of Cleburne*, 473 U.S. at 441 (“Rather than resting on meaningful considerations, statutes distributing benefits and burdens between the sexes in different ways very likely reflect outmoded notions of the relative capabilities of men and women.”).

¹²⁶ *City of Cleburne*, 473 U.S. at 441 (“A gender classification fails unless it is substantially related to a sufficiently important governmental interest.”) (citing *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976)).

¹²⁷ *See City of Cleburne*, 473 U.S. at 440-42.

classification drawn by the statute is rationally related to a legitimate state interest.”¹²⁸

A court would classify incarcerated mothers who gave birth up to twelve months before incarceration as a non-suspect class. Incarcerated people are generally not “considered a suspect class for purposes of equal protection litigation.”¹²⁹ Strict scrutiny would not be applicable because the PNP statutes and administrative codes do not classify by race, alienage, or national origin. Likewise, courts would not apply the intermediate scrutiny review either because there are no quasi-suspect classes; the comparison is between two similarly situated groups of mothers. The court would apply rational basis review as they typically do for Equal Protection claims brought by incarcerated people challenging a certain prison condition.¹³⁰ Under the rational basis review test, courts will look at whether limiting PNPs to mothers who gave birth up to twelve months before incarceration is rationally related to a legitimate state interest.

C. Legitimate state interests

States appear to have several interests for limiting PNPs to mothers who give birth in prison, which can be inferred from state statutes and administrative codes. Ohio’s administrative code, OAC 5120-9-57 (C)(5) and (6), requires eligible inmates to be “the legal custodian of the child” and that “[n]o one else has been granted custody or shared parenting privileges,” respectively, suggesting that one of Ohio’s goals for its PNP is to provide an opportunity for mothers to maintain child custody after being released from prison.¹³¹ Similarly, OAC 5120-9-57(C)(2) allows an incarcerated woman to participate in a PNP if “she is subject to a prison term of not more than thirty-six months,”¹³² suggesting that Ohio is interested in ensuring a mother would still be qualified to maintain child custody after being released from prison. Lengthy sentences would lower the chance of a mother’s ability to maintain custody of her child even after participating in a PNP, especially because of

¹²⁸ *City of Cleburne*, 473 U.S. at 440.

¹²⁹ *Jackson v. Jamrog*, 411 F.3d 615, 619 (6th Cir. 2005). *See also*, *Dull v. Mohr*, No. 15 CV 1557, 2016 WL 29277 (N.D. Ohio Jan. 4, 2016) (applying rational basis review because “the plaintiff does not suggest infringement of a fundamental right or that he is a member of a suspect class, and indeed prisoners are not considered a suspect class for purpose of equal protection litigation.”).

¹³⁰ *See* *Howard v. Tibbals*, No. 1:12-CV-2628, 2013 WL 821339, at *8 (N.D. Ohio Mar. 4, 2013) (applying rational basis review test for an Equal Protection claim brought by an incarcerated person). *See also*, *Damron v. North Dakota Com’r. of Corrections*, 299 F.Supp.2d 970 (D.N.D. 2004); *Ruble v. Fleming*, 160 F.3d 213, 217 (5th Cir. 1988) (applying rational basis review and finding that classifying a group of inmates based on their eligibility for a community corrections center did not implicate a suspect class).

¹³¹ OHIO REV. CODE ANN. § 5120-9-27(C)(5) & (6) (WEST 2016).

¹³² §5120-9-27(C)(2).

the ASFA's stringent 15/22 rule. Furthermore, even the Ohio Final Bill Analysis states, "[i]f the Department [of Rehabilitation and Correction] establishes the program and an inmate participates in it, neither the inmate's participation nor any provision of the act affects, modifies, or interferes with the inmate's custodial rights of the child or establishes legal custody of the child with the Department."¹³³ A state interest in assisting mothers in maintaining child custody is evident in other legislation authorizing PNPs as well.¹³⁴

Ohio's interest in the safety and health of infants can also be inferred from its administrative code. OAC 5120-9-57(C)(3) requires eligible mothers to "ha[ve] never been convicted of a violent crime or any type of child abuse, or child endangerment."¹³⁵ Ohio likely implemented this requirement to ensure participating mothers will not hurt their infants or other infants in the program. Furthermore, "[the mother] and her child [must] meet established medical and mental health criteria."¹³⁶ The purpose of this requirement is to ensure that infants who need extra care beyond the medical treatment offered within the PNP have access to it. Participating mothers must also agree to follow additional program counseling requirements asked of them by the department.¹³⁷ Such counseling may include "child development, parenting skills, education, domestic violence counseling" and more.¹³⁸ State interest in the safety and health of children is evident in other state legislation as well.¹³⁹

A court may find that a state interest is to save taxpayers money by being financially conservative in what it spends on its detention centers. Currently, Delaware representatives are trying to pass legislation to create PNPs in the state.¹⁴⁰ According to a fiscal note by the 150th General Assembly, the Department of Corrections estimates that it would cost \$1,486,646 and \$1,516,072 in the fiscal years of 2022 and 2023, respectively,

¹³³ Ohio B. Analysis, 2000 H.B. 661 (2000).

¹³⁴ See ILL. ADMIN. CODE tit. 20, § 475.25(b) (Illinois PNP eligibility criteria to be considered include factors such as the length of sentence, "court order prohibiting contact with children" and "Department of Children and Family Services involvement, including, but not limited to, present or past investigations or cases regarding the offender and her children."). See also, H.R. 258, 150th Gen. Assemb. Reg. Sess. § 6802(5)(c) (Del. 2019) (Delaware bill to allow the state to create PNPs contains an eligibility requirement that the mother is "subject to a sentence of incarceration of not more than 3 years.").

¹³⁵ OHIO REV. CODE ANN. § 5120-9-57(C)(3).

¹³⁶ §5120-9-57(C)(4).

¹³⁷ §5120-9-57(D)(1).

¹³⁸ §5120-9-57(D)(1).

¹³⁹ See e.g., ILL. ADMIN. CODE tit. 20, § 475.25(b) (Illinois PNP eligibility criteria to be considered include factors such as "[h]istory of violence, abuse, criminal neglect, sexual offense, or crime against children," "[p]sychological evaluation," and "[m]edical or dental health").

¹⁴⁰ H.R. 258, 150th Gen. Assemb. Reg. Sess. (Del. 2019).

to fund a PNP in Delaware.¹⁴¹ These costs account for employing eighteen additional correctional officers in the proposed facility and other operating costs.¹⁴² PNPs are certainly costly, and from a cursory glance, expanding PNPs to more mothers may appear to cost the state even more money.

State interests in preserving child custody, ensuring the safety and health of infants, and saving taxpayer money are embedded in the statutes and administrative codes that enable PNPs. Defendants have argued similar state interests in other Equal Protection claims brought by incarcerated people.¹⁴³ Courts have found that not all discrimination is a violation of the Equal Protection Clause and that only “invidious discrimination” offends the Constitution.¹⁴⁴ Although the state may have legitimate interests, a court may find that limiting PNPs to only mothers who gave birth in prison is not rationally related to the interests.

D. Is the Restriction on PNPs rationally related to the state interests?

Admittedly, it is difficult to succeed on an Equal Protection claim under the rational basis review test as courts often find that a certain prison condition is rationally related to a legitimate state interest.¹⁴⁵ However, Equal Protection claims are frequently brought by incarcerated people, and some have found success under the rational basis review. For example, in *Stefanoff v. Hays County Texas*, Jeffrey Stefanoff, an inmate at the Hays County Jail serving a 180-day prison sentence for possession of marijuana, challenged the prison policy of denying “good time” credit to an inmate on the mere basis that the inmate was convicted and sentenced by a jury rather than a

¹⁴¹ Minor-Brown, Fiscal Note, H.R. 258 (Jan. 8, 2020).

¹⁴² *Id.*

¹⁴³ See e.g., *Little v. Terhune*, 200 F.Supp.2d 445, 451 (D.N.J. 2002) (“Defendants argue that rational bases supporting the disparate treatment of plaintiff are (1) budgetary policy and constraints, (2) institutional security and order, and (3) education policy in the form of a State statutory obligation to provide inmates under twenty-one with educational programming.”); *Fleming*, 160 F.3d at 217 (determining that reducing recidivism is a legitimate government interest because it was a stated purpose in the challenged statute.).

¹⁴⁴ See *Jamieson v. Robinson*, 641 F.2d 138, 142 (3d Cir. 1981). See also, *Little*, 200 F.Supp.2d at 450 (“Although inmates do not have a constitutional right to educational and work programs, once the state grants such rights to prisoners it may not invidiously discriminate against a class of inmates in connection with those programs unless the difference in treatment is rationally related to the legitimate governmental interest used to justify the disparate treatment.”).

¹⁴⁵ See e.g., *Gallegos-Hernandez v. U.S.*, 688 F.3d 190 (5th Cir. 2012) (finding that the Bureau of Prisons’ policy of excluding ICE detainees from the ability to participate in community-based reentry facilities was rationally related to preventing detainees from fleeing); *Jackson v. Russo*, 495 F.Supp.2d 255 (D. Mass. 2007) (finding that a rational basis exists for not paying incarcerated people for working as a barber in prison, but paying incarcerated people for working as a cook in the same prison); *Fleming*, 160 F.3d at 217.

judge.¹⁴⁶ Under a Texas statute (Texas Code of Criminal Procedure, Article 42.032), prison sheriffs could exercise their discretion in allotting “good time” credit to inmates for good conduct, which would reduce an inmate’s sentence.¹⁴⁷ However, the sheriff denied Stefanoff’s request on the mere basis that Stefanoff was convicted and sentenced by a jury and not a judge.¹⁴⁸ The sheriff argued that the rational basis for such policy was to “defer[] to the jury as the “conscience of the community.”¹⁴⁹ The Fifth Circuit rejected the argument, refusing to “accept as rational the proposition that a decision made by a jury of citizens more closely reflects the ‘conscience of the community’ than the decision of an elected judge.”¹⁵⁰

In *Williams v. Manson*, the United States District Court for the District of Connecticut found that there was no rational basis for a prison policy that denied inmates access to weekly state lottery tickets, even though other inmates were allowed to communicate with bankers and stockbrokers to make business-related transactions.¹⁵¹ The court rejected the notion that the policy was rationally related to internal security and prison safety.¹⁵² As support, the defendant contended that lottery tickets would be so valuable among the inmates and would “encourage inmates to engage in prohibited activities such as drug running in order to raise money for subscription purchases.”¹⁵³ The defendant also argued “that one inmate could take advantage of the availability of gift subscriptions to the lottery to pressure a second inmate to purchase such a gift to the first party’s benefit,” and that “confirmation receipts [from the lottery] . . . would be perceived as valuable and would therefore threaten the security of the facility.”¹⁵⁴ The court rejected all the arguments, finding that lottery tickets were just like any other commodity in prison such as food, cigarettes, and clothing.¹⁵⁵ *Williams* shows that mere speculation about what *could* occur absent the prison policy may not be enough to withstand rational basis review.

Since PNPs are already established and statistics about their effectiveness are readily available, it will be harder for the government to make arguments without showing supporting data. In *Fields v. Smith*, Wisconsin inmates with Gender Identity Disorder (“GID”) brought suit

¹⁴⁶ Stefanoff v. Hays Cnty, 154 F.3d 523 (5th Cir. 1998).

¹⁴⁷ *Id.* at 526.

¹⁴⁸ *Id.* at 525.

¹⁴⁹ *Id.* at 526.

¹⁵⁰ *Id.*

¹⁵¹ *Williams v. Manson*, 499 F.Supp. 773 (D. Conn. 1980).

¹⁵² *Id.* at 776.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 776-77.

against Department of Corrections officials, challenging a Wisconsin statute that prohibited the use of state or federal funds for hormone therapy and sex reassignment surgery for inmates with GID.¹⁵⁶ The inmates alleged a violation of the Equal Protection Clause, as those with GID were prevented from receiving hormone therapy even though it was available for inmates without GID.¹⁵⁷ The United States District Court for the Eastern District of Wisconsin found that prison safety and security concerns, especially of sexual activity, are legitimate government interests.¹⁵⁸ However, the court found no rational relationship between Wisconsin's statute and prison safety and security because there was no evidence showing that prohibiting GID inmates from receiving hormone therapy would decrease the risk of them being subject to sexual assaults.¹⁵⁹ The defendants' own expert witness, who had worked at the Colorado Department of Corrections that allowed GID inmates to receive hormone therapy, believed that "the policy has a good history and security staff are able to implement it well."¹⁶⁰ When asked whether he believed denying inmates with GID access to hormone therapy would prevent sexual assaults, he responded, "[t]hat question is an incredible stretch between hormonal therapy and preventing sexual assaults."¹⁶¹ Furthermore, although one of the plaintiffs had been sexually assaulted in the past, "there [was] nothing in the record to indicate [the plaintiff] would not have been assaulted in the absence of hormone therapy." In *Fields*, evidence from other prisons that allowed inmates with GID to receive hormone therapy, as well as evidence from the time before the Wisconsin statute abruptly prevented inmates with GID access to hormone therapy, helped the court in deciding that the Wisconsin statute was not rationally related to prison safety and security. Just like the plaintiffs in *Fields*, mothers seeking to challenge PNPs can use evidence from existing PNPs to support the notion that the policy of denying mothers who gave birth up to twelve months prior to incarceration is not rationally related to the state interests.

1. Preservation of Child Custody

States have a legitimate interest in child custody. States may argue that they limit access to PNPs because of their interest in ensuring incarcerated

¹⁵⁶ *Fields v. Smith*, 712 F.Supp.2d 830 (E.D. Wis. 2010).

¹⁵⁷ *Id.* at 867 ("It is undisputed that the DOC [Department of Corrections] sometimes prescribes hormone therapy for reasons that do not have to do with GID, such as estrogen replacement therapy in post-menopausal years, or for congenital or hormonal disorders.").

¹⁵⁸ *Id.* at 868.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

mothers can maintain custody of their children after prison. States may argue that under the ASFA, they are obligated to promptly find permanent homes for infants and that allowing mothers who gave birth up to twelve months before incarceration to participate in PNPs would not necessarily help in maintaining child custody or finding permanent homes for the infants. However, this argument is weak because in many situations, allowing the proposed group of mothers to participate in PNPs would ultimately *increase* the chances that the mother maintains child custody when she is released in the same way it does for the eligible group of mothers.

Under the ASFA, states are required to use “reasonable efforts” to preserve and reunify families *before* resorting to foster care, and to make it possible for the child to safely return home.¹⁶² At the same time, states must ensure that permanent homes are promptly found for children who, for example, were in foster care for fifteen of the most recent twenty-two months.¹⁶³ By allowing the proposed group of mothers to participate in PNPs, the “reasonable efforts” objective would be satisfied. A petition to terminate parental rights will not have to be filed because the PNP would keep the infant away from foster care and help satisfy the 15/22 rule of the ASFA. If the state interest is in the preservation of child custody, or to timely find a permanent home for a child, excluding mothers who gave birth up to twelve months before incarceration is not rationally related to such interest.

2. The Safety and Health of the Infants

The stringent health requirements of PNPs demonstrate the states’ strong interest in the safety and health of infants. However, excluding mothers who gave birth twelve months prior to incarceration is not a rational basis for advancing the government’s child safety and health interests.

The PNPs that are currently established are committed to the safety and health of infants.¹⁶⁴ For example, at the Nebraska Correctional Center for Women, a committee determines whether an incarcerated mother will be admitted to the PNP under strict requirements.¹⁶⁵ The Nebraska Correction Center for Women requires that the mother not commit a crime against children, not use drugs during pregnancy, and have overall good behavior in prison.¹⁶⁶ Similarly, the Ohio Reformatory for Women’s PNP requires mothers to have been convicted of a non-violent crime and requires certain health standards for both mothers and their infants.¹⁶⁷ Some PNPs make

¹⁶² Adoption and Safe Families Act §1305.

¹⁶³ *Id.*

¹⁶⁴ *See infra*, Part II, Section C.

¹⁶⁵ Caniglia, *supra* note 16.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

prenatal classes and parenting programs mandatory.¹⁶⁸ Screening processes involve extensive background and mental health history checks.¹⁶⁹

As seen through the PNP at the Bedford Hills Correctional Facility in New York, there are heavy screening processes for admission to the program. The facility is designed to foster a safe environment; the walls are painted with bright pastel, the infants are provided with toys, and the units have kitchens and dining rooms.¹⁷⁰ Mothers and their infants share their own rooms separate from other mothers and infants once the infant turns four months old.¹⁷¹ Since the current PNPs exemplify that the programs are committed to these stringent requirements, and studies have shown that they can be safe and can provide health benefits, a strong argument can be made that restricting mothers who gave birth up to twelve months before incarceration is not rationally related to the state interest in child safety and health.

Furthermore, the current limitations on how long a mother may keep her child with her in a PNP reflects how long the state believes a child can stay in a PNP safely and healthily. Thus, an incarcerated mother can argue that an infant who was born prior to the incarceration would reap the same health benefits as an infant who is born in prison. Being born inside or outside of prison does not affect how an infant will benefit from a PNP; only the infant's age will have an effect. For example, as is the case at the Nebraska Correctional Center for Women, mothers who give birth in prison are eligible to keep their infants with them in prison for eighteen to twenty-four months as long as the mother meets other requirements, including eligibility for release within twenty-four months.¹⁷² However, there would be no difference for a mother who gave birth twelve months prior to incarceration to be admitted to the PNP for six to twelve months, if she is eligible for release within twelve months.

To illustrate, if Mother A, an inmate at the Nebraska Correctional Facility, gave birth in prison, she could keep her infant with her until the infant is two years old as long as she is eligible for release by when the infant turns two years old. On the other hand, if Mother B, another inmate at the Nebraska Correctional Facility, were sentenced to prison when she had a twelve month old infant but was still admitted to the PNP, she could keep her infant with her until the infant is two years old as well; the only difference is that the infant would stay in the PNP for up to one year as long as she met

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Yager, *supra* note 71.

¹⁷¹ *Id.*

¹⁷² See Caniglia, *supra* note 16.

the other requirements. If the concern is that a PNP is dangerous and can have negative health consequences for infants over the age of two, and that is why the PNP had set the maximum amount of time an infant can stay in the PNP at two years of age, the concern can be addressed by setting a maximum age for eligible infants rather than denying mothers who gave birth prior to being incarcerated outright. Furthermore, the current limitation is even more concerning for Mother C who had a one-month old infant when she became incarcerated. Denying Mother C admission to a PNP cannot possibly be rationally related to the safety and health concern of the infant, when the infant is merely one month old even though some infants remain in PNPs until the age of two. If the state claims a legitimate interest in the safety of infants, excluding incarcerated mothers who gave birth twelve months before incarceration is not a rational basis for achieving those interests.

Aside from the cap that legislatures have placed on the length of stay in PNPs, other medical evidence suggests that an infant admitted to a PNP at the age of twelve months old can reap similar benefits to those born in prison. The American Academy of Pediatrics suggests breastfeeding for at least twelve months because it benefits both mothers and infants.¹⁷³ There is no rational basis for excluding infants born before their mother's incarceration from being breastfed for the state interest in the health and safety of children. In fact, if a mother gave birth just a month before incarceration, her infant is unlikely to have access to breastmilk for the remaining eleven months of the recommended twelve months of breastfeeding.¹⁷⁴ Instead, the mother would have to depend on the unreliable system of freezing her milk and arranging the milk to be picked up by a caretaker who may have to travel long distances just to get to the facility.¹⁷⁵ The mother could also rely on formula feeding, but, as explained earlier, formula feeding lacks the mother-infant bonding from skin-to-skin contact.¹⁷⁶

3. Saving Taxpayer Money

A state may also argue that excluding mothers who gave birth up to twelve months prior to giving birth is rationally related to the legitimate government interest in preserving taxpayer money. The state may argue that creating separate wings, housing mothers and infants in their personal rooms, and providing more prenatal and postnatal courses for more mothers is not the best way to spend taxpayer money. However, the current PNPs have proven that PNPs lower crime rates, which in turn lowers recidivism rates

¹⁷³ See *supra* Part III, Section A1.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

and overall costs for prisons.¹⁷⁷ Admittedly, this is one of the strongest arguments against an Equal Protection claim by mothers who gave birth up to twelve months before incarceration. However, a strong counterargument can be that expanding PNPs will eventually save taxpayer money by lowering recidivism rates and avoiding foster care, especially if data from new PNPs can continue to support this notion.

The cost to keep an infant in prison is reported to be around \$24,000 per year.¹⁷⁸ The costs vary based on the PNP.¹⁷⁹ While the numbers certainly appear high, the alternative is to put the child through foster care, which would cost about \$21,902 per year.¹⁸⁰ Moreover, PNPs help reduce recidivism rates. This can be seen at the Bedford Hills PNP; while the typical recidivism rate among female offenders in NY is about 29 percent, mothers who participated in the Bedford Hills PNP had only a 3.5 percent chance of becoming repeat offenders.¹⁸¹ When accounting for the costs saved from avoiding foster care and reincarceration, PNPs may save the government 40 percent of taxpayer money that would otherwise be spent on methods that cause termination of parental rights and overcrowded prisons.¹⁸² As a result, there would be no rational basis to exclude mothers who gave birth up to twelve months prior to incarceration. The proposed group of mothers would help the government save taxpayer money, just like the current eligible group of mothers do. In fact, states should be encouraged to expand PNPs to lower spending and overall crime rates.

VI. CONCLUSION

PNPs are an effective way of providing a healthy environment for incarcerated mothers and infants, maintaining mother-child relationships, and supporting mothers to maintain custody of their children once they are released from prison. Over 100 years ago, New York became the first state to establish a PNP. Today, there are still only ten states with PNPs, but the

¹⁷⁷ See *supra* Part II, Section C. Courts have also found that reducing recidivism is a legitimate state interest in an Equal Protection challenge. See e.g., *Fleming*, 160 F.3d at 217.

¹⁷⁸ Jennifer Warner, *Infants in Orange: An International Model-Based Approach to Prison Nurseries*, 26 HASTINGS WOMEN'S L.J. 65, 88 (2015) (citing *Reporter's notebook: A look at babies behind bars*, THE GRIO (Apr. 13, 2010), <https://thegrio.com/2010/04/13/reporters-notebook-a-look-at-babies-behind-bars/>).

¹⁷⁹ Warner, *supra* note 178, at 88 ("An Ohio prison nursery estimated its cost for the state for one infant is about \$4.65 daily, or only about \$1,697 annually. New York's program claims a very different expensive situation with about \$13,980 in annual costs per infant.") (citing Loris S. Goshin & Mary W. Byrne, *Converging Streams of Opportunity for Prison Nursery Programs in the United States*, 48 J. OFFENDER REHABIL. 271 (2009)).

¹⁸⁰ Warner, *supra* note 178, at 88.

¹⁸¹ Li, *supra* note 78.

¹⁸² Yager, *supra* note 71.

results of the programs are impressive.¹⁸³ Mothers who were admitted to PNPs became less likely to return to prison.¹⁸⁴ Lower recidivism rates are important for the public good and save taxpayer money.¹⁸⁵ Due to PNPs, mothers are able to maintain custody of their child after being released from prison, which is especially important given that the Adoption and Safe Families Act of 1997 requires a state to file a petition to terminate parental rights if the parent's child is in foster care for 15 of the past 22 months.¹⁸⁶

While PNPs have been effective in the ten states, they have been restricted to only mothers who are pregnant at the time of incarceration. This Note proposes that PNPs should be offered to mothers who gave birth up to twelve months before being incarcerated, rather than strictly to mothers who were pregnant at the beginning of their incarceration. The time period of twelve months is just, less exclusive, and reasonable when considering both the physical and mental well-being of both the mother and infant.¹⁸⁷ Allowing mothers who gave birth up to twelve months before incarceration gives infants an opportunity to be properly breastfed, and lowers the chances of mothers enduring mental disorders like postpartum depression, which in turn will have positive effects on the children as they grow older.¹⁸⁸

Incarcerated mothers who gave birth up to twelve months prior to incarceration will have a strong chance of succeeding on an Equal Protection claim under the rational basis test. A state would likely argue that it has a legitimate state interest in the preservation of child custody, the safety and health of infants, and saving taxpayer money.¹⁸⁹ However, the exclusive policy of PNPs are not rationally related to those state interests.¹⁹⁰ Hopefully, one day, we will be able to see not only more PNPs across the states, but more expansive ones as well.

¹⁸³ See *supra* Part II, Section C.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* Part II, Section B.

¹⁸⁷ See *supra* Part III, Section A.

¹⁸⁸ *Id.*

¹⁸⁹ See *supra* Part IV, Section C.

¹⁹⁰ See *supra* Part IV, Section D.