

## I NEED TO FEEL YOUR TOUCH: ALLOWING NEWBORNS AND INFANTS CONTACT VISITATION WITH JAILED PARENTS

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*While incarceration is intended to affect the well-being of the offender, the separation it causes can have equally devastating effects on the innocent children of the incarcerated. The lack of physical contact with jailed parents can affect a young child's social development, which can lead to mental health problems as well as an increased potential for criminal behavior. The lack of physical contact can also lead to increased rates of recidivism in parents and increased likelihood of experiencing a termination of parental rights. Despite these effects, most jails do not allow young children contact visitation with jailed parents because of costs and security concerns.*

*This Note examines jail contact visitation policies—or lack thereof—with respect to parents of young children and argues that county jails should be required to allow parents of both genders contact visitation with their children who are under two years of age. To address the power of local jail administrators, this Note proposes state legislation mandating that county jails establish contact visitation programs, but which allows local administrators flexibility in the implementation of the program. To adequately address the problems that arise from a lack of contact, the Author argues that any program must be available to both mothers and fathers, must be available to pretrial detainees as well as convicted offenders, and must be implemented over the likely objection of local administrators. Ultimately, the Author concludes that contact visitation between young children and their jailed parents is essential to the well-being of the children, parents, and society as a whole.*

### I. INTRODUCTION

For most parents, having a baby is an exciting and life-changing experience. The time following a child's birth is full of laughter, exploration, and the now obligatory picture taking. New parents establish and

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develop an intense bond with their child that is nearly impossible to break. For incarcerated parents, however, this time is much different, much scarier, and much bleaker. Rarely does a new parent in a correctional facility get to spend more than a few hours (and certainly no more than a few days) with his or her newborn infant before the baby is sent to be cared for by someone else.<sup>1</sup> There is precious little time for cuddling, only fleeting moments for picture taking, and virtually no opportunity to establish a deep family bond. For both parent and child, it is a devastating experience.<sup>2</sup>

Most jails and pretrial holding facilities have strict no-contact visitation policies,<sup>3</sup> and children are completely separated from their parents “from the time of arrest through subsequent incarceration.”<sup>4</sup> For infants and newborns, this leads to a traumatic separation that results in severe damage to the parent-child bond.<sup>5</sup> This Note addresses some of the problems that result when the parent of a very young child is jailed. It proposes that reformation of visitation policies is the best solution for these problems. Part II delves into jail policies regarding visitation as they currently exist: what those policies are, who creates them and why, the problems associated with such policies, and the effects they have on newborns. Part III looks critically at how the problems of jail visitation and parental separation have been addressed through judicial and statutory intervention and alternative correctional arrangements. Finally, Part IV proposes that the best way to deal with these problems is through state legislation mandating contact visitation for newborns and infants.

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1. Each jail and prison has different policies and procedures regarding inmates with newborns (prisons typically being more baby friendly than jails), but the general approach is that new parents get very little time with their children after birth. See CYNTHIA MARTONE, *LOVING THROUGH BARS: CHILDREN WITH PARENTS IN PRISON* 178–79 (2005); Nicole S. Mauskopf, Note, *Reaching Beyond the Bars: An Analysis of Prison Nurseries*, 5 *CARDOZO WOMEN'S L.J.* 101, 110 (1998) (“In most institutions, when an inmate is ready to give birth, she does so at a local hospital and then is immediately separated from the newborn. The newborn is usually given to a family member, or, if none are available, the baby is placed in the foster care system.”); Amnesty Int’l, “*Not Part of My Sentence*”: *Violations of the Human Rights of Women in Custody*, AI Index AMR 51/19/99 (Mar. 1999) (“In at least 40 states, babies are taken from their imprisoned mothers almost immediately after birth or at the time the mother is discharged from the hospital.”); see also discussion *infra* Part II.A.1.

2. Leda M. Pojman, *Cuffed Love: Do Prison Babies Ever Smile?*, 10 *BUFF. WOMEN'S L.J.* 46, 50 (2002) (“[C]hildren are always traumatized by separation . . .”).

3. Julie A. Norman, *Children of Prisoners in Foster Care*, in *CHILDREN OF INCARCERATED PARENTS* 124, 128 (Katherine Gabel & Denise Johnston eds., 1995) (“[M]any jails and prisons do not allow [contact visits] and visitation rooms are not set up for use by young children. . . . [M]ost correctional facilities do not allow prisoners and visitors to touch during their visits . . .”).

4. Barbara Bloom, *Imprisoned Mothers*, in *CHILDREN OF INCARCERATED PARENTS*, *supra* note 3, at 21, 27.

5. The damage this separation causes is the subject of Part II.C.1.

## II. BACKGROUND

Sadly, the conditions of confinement parents face while in jail are poor and often inhumane.<sup>6</sup> Among other things, overcrowding and lack of access to adequate medical care are common hardships during confinement.<sup>7</sup> The focus of this Note, however, is the lack of contact visitation in jails, and the effects that no-contact policies have on parents and young children. This Note focuses on newborns and infants from birth to around two years of age, as this is an extremely critical time of sensorimotor development—one in which babies develop and learn through interactions with the world.<sup>8</sup> During this time babies also form attachments<sup>9</sup> that serve important social functions and can lead to serious harm if disrupted.<sup>10</sup> Birth and infancy present unique challenges to jail visitation that cannot be addressed by looking at children of all ages as a single group.

This Note also focuses on jails rather than prisons, not only because of the vast amount of children affected by parental jailing but because, as will be discussed, jails are more likely to disallow contact visitation than prisons.<sup>11</sup> To fully understand the problems associated with no-contact visitation and how to fix them, it is necessary to know just what the policies at issue are, how they work, and how they affect young children and their parents. Only then can possible solutions for the problems that these policies present be analyzed. This Part addresses the current visitation policies in jails, how and why jail visitation is different from prison visitation, and the effects that jail visitation policies can have on both newborns and parents.

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6. See LINDA L. ZUPAN, *JAILS: REFORM AND THE NEW GENERATION PHILOSOPHY* 2-3, 19 (1991).

7. Ellen Barry et al., *Legal Issues for Prisoners with Children*, in *CHILDREN OF INCARCERATED PARENTS*, *supra* note 3, at 147, 157-61 (discussing the medical needs and poor treatment of pregnant prisoners); ZUPAN, *supra* note 6, at 44-47.

8. DAVID G. MYERS, *PSYCHOLOGY: SEVENTH EDITION IN MODULES* 141 (2004). Psychologist Jean Piaget's influential research on stages of cognitive development led to the conclusion that young children "construct their understandings from their *interactions* with the world," and that their cognitive immaturity is adaptive, "keeping children close to protective adults and providing time for learning and socialization." *Id.* at 145. The important role parents play in this cognitive development is the subject of Part II.C.1. This Note also uses age two as a general cutoff point because this is when children begin to develop language skills that will better enable them to use existing visitation mechanisms (discussed in Part II.A.1). LINDA C. MAYES ET AL., *THE YALE CHILD STUDY CENTER GUIDE TO UNDERSTANDING YOUR CHILD* 235 (2002) ("By eighteen months the average child uses between 50 and 150 words. . . . [A] vocabulary spurt follows for about three out of four children. A two-year-old probably uses over 300 words and understands up to 1,000."). Children older than two also should be allowed contact visitation, but that is beyond the scope of this Note.

9. Note, *On Prisoners and Parenting: Preserving the Ties That Bind*, 87 *YALE L.J.* 1408, 1413 (1978) [hereinafter *On Prisoners and Parenting*] ("[A]n attachment bond is formed when the child is between the ages of six months and two years.").

10. Attachment and its functions will be discussed in Part II.C.1.

11. See *infra* Part II.B.

### A. Current Jail Visitation Policies

Before assessing jail visitation policies and suggesting ways to improve upon these policies, it is important to understand just what jailed parents—and their young children—are facing. This may be a somewhat futile endeavor in light of the disassociated and fragmented nature of county jails (within the greater scheme of the U.S. correctional system),<sup>12</sup> but enough policy similarities are present that a need to address the problems associated with these common policies quickly emerges. This Section discusses current jail visitation policies, who is responsible for them, and some of the justifications offered for these policies.

#### 1. What Are the Current Policies?

Though each city and county is different, visitation in most county jails is, at best, a difficult endeavor. Most facilities allow visitation, but only on one or two days a week and for a restricted number of hours.<sup>13</sup> For inmates who are allowed visitation, it usually only occurs through a glass wall with a telephone for audio communication.<sup>14</sup> Visiting rooms can be loud, and partitions separating visitors and inmates can be so high that the only way a child can see his or her parent is to be held up by another person.<sup>15</sup> The critical feature of jail visitation policies—and what is most detrimental to newborns—is that few jails allow physical contact between the prisoner and visitor during a visitation session.<sup>16</sup> For adults and older children, this impaired communication is uncomfortable and unsettling but at least both parties are aware of and involved in the visit. For infants and newborns, this is decidedly not the case. A visit through a thick glass wall or a high partition, preventing any contact, is essentially no visit at all for such a small child.<sup>17</sup>

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12. As most jails are controlled and administered by local sheriffs and officials, without much oversight from states and none from the federal government, there is no coherent U.S. jail system. See, e.g., ZUPAN, *supra* note 6, at 47–49 (describing the administration of jails by county departments of corrections and sheriffs); see also *infra* note 128 and accompanying text.

13. See WES DENHAM, ARRESTED: WHAT TO DO WHEN YOUR LOVED ONE'S IN JAIL 39 (2010); JOHN IRWIN, THE JAIL: MANAGING THE UNDERCLASS IN AMERICAN SOCIETY 49 (1985).

14. See, e.g., Block v. Rutherford, 468 U.S. 576, 578 n.1 (1984) (describing a visitation procedure in Los Angeles, California where “[p]rivacy partitions separated each individual visiting location from the others, and clear glass panels separated the inmates from the visitors, who visit over telephones.”); NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED 72, 78–79 (2005); IRWIN, *supra* note 13, at 49; Barry et al., *supra* note 7, at 151. Inmates at Cook County Jail give particularly abhorrent descriptions of the visitation processes and procedures they endured, commenting in particular that visits were behind glass partitions and that the rooms were crowded, loud, filthy, and foul smelling (though despite all this, visits were still “well worth it”). *Visitor Policy*, COOK COUNTY JAIL, <http://www.cookcojail.com/visitor-policy.php> (last visited Aug. 16, 2012) [hereinafter *Visitor Policy*] (compiling inmate responses to questions regarding visitation at Cook County jails).

15. Norman, *supra* note 3, at 128.

16. *Id.*

17. “A baby looking through a plate of glass at his incarcerated mother would really be looking at his reflection in the window, not making a connection with the parent at all.” BERNSTEIN, *supra*

## 2. *Who Is Responsible for These Policies?*

State laws typically establish jails and provide guidelines for their procedures and operations.<sup>18</sup> Each city or county department of corrections, however, is responsible for running its jail(s) and formulating and publishing jail rules<sup>19</sup> in accordance with state laws and applicable judicial decisions.<sup>20</sup> Jail administrators, typically, the county sheriff,<sup>21</sup> are responsible for determining the proper objectives of the correctional facility and establishing the policies that will further those objectives.<sup>22</sup> For example, jail policies in Champaign County, Illinois (which apply to both a downtown jail and a “satellite” facility a few miles away) are promulgated by the Jail Superintendent and the local Sheriff.<sup>23</sup> While there is no review board per se for these policies, the Superintendent, Sheriff, and Chief Deputy typically review them once a year.<sup>24</sup>

Courts give great deference to the administrators in promulgating and implementing jail policies.<sup>25</sup> When a policy raises constitutional issues, such as due process or the right of association implicated by policies regarding visitation, it need only bear a rational relationship to legitimate penological interests to be deemed constitutional.<sup>26</sup> The factors considered in this determination are: (1) whether there is a “‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it,” (2) “whether there are alternative means of exercising the right that remain open to prison inmates,” (3) “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally,” and (4) “the absence of ready alternatives [a]s evidence of the reasonableness of a prison regulation.”<sup>27</sup> Judicial analysis of

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note 14, at 79 (quoting Dr. Barbara Howard, professor of pediatrics) (internal quotation marks omitted).

18. See *infra* text accompanying notes 173–74.

19. See DENHAM, *supra* note 13, at 21, 27.

20. See, e.g., BOULDER CNTY. SHERIFF’S OFFICE, JAIL DIV., BOULDER COUNTY JAIL POLICY AND PROCEDURES MANUAL No. 01-01-01 (2007), [http://www.bouldercounty.org/find/library/public\\_safety/jailpolicy.pdf](http://www.bouldercounty.org/find/library/public_safety/jailpolicy.pdf).

21. See, e.g., ARK. CODE ANN. § 12-41-502 (West 2012); GA. CODE ANN. § 42-4-95 (West 2011); 55 ILL. COMP. STAT. 5/3-15003 (2010).

22. See *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). Although that case dealt with a challenge to prison policies, the same idea applies to jails: the administrator(s) of the individual correctional facility are responsible for promulgating that facility’s rules.

23. Telephone Interview with Michael L. Moore, Jail Superintendent, Champaign Cnty., Sheriff’s Office (July 28, 2010) (notes on file with author). Inmates in Champaign County facilities are allowed two twenty minute visits a week, with no contact visitation allowed except for attorneys and police officers. *Id.*

24. *Id.* Commenting on Champaign’s no-contact visitation policy, Superintendent Moore remarked, “[t]hat is one [policy] I don’t see changing.” *Id.*

25. *Bazzetta*, 539 U.S. at 132 (stating that the Supreme Court would “accord substantial deference to the professional judgment of prison administrators”).

26. *Turner v. Safley*, 482 U.S. 78, 89 (1987); *Block v. Rutherford*, 468 U.S. 576, 584 (1984).

27. *Turner*, 482 U.S. at 89–90 (quoting *Block*, 468 U.S. at 586); see also *Bazzetta*, 539 U.S. at 132 (paraphrasing the factors outlined in *Turner*).

these factors, however, is minimal, and authority is granted to administrators, “not the courts, to make the difficult judgments concerning institutional operations.”<sup>28</sup>

States also play a role in jail visitation policies. They have the power to establish visitation rights for inmates, which can then be protected through due process.<sup>29</sup> Though states have the power to adopt legislation regarding contact between incarcerated parents and their children, few have enacted legislation mandating that jails implement policies that truly connect these severed families.<sup>30</sup> This means that while jailed parents typically are allowed some kind of visitation, the impediments discussed in Part II.A.1 prevent meaningful interactions with small children. Legislatures have not stepped in to address the situation.<sup>31</sup> While there is a growing acknowledgment by states that the children of incarcerated parents deserve better policies and practices,<sup>32</sup> there is no indication that contact visitation (or really any kind of jail visitation) has been addressed by state legislatures. Other state efforts to provide for the welfare of newborns and small children of inmates is discussed in Part III.C.

### 3. *Why Maintain No-Contact Visitation Policies?*

Jail administrators cite many reasons for enacting no-contact visitation policies; when inmates challenge these policies, administrators must identify the legitimate penological interests involved.<sup>33</sup> One of the biggest concerns jail administrators have is security, as a 1984 Supreme Court case demonstrates:

[E]stablishment of any program of contact visits [would] increase the importation of narcotics into [the] jail, despite all safeguards and precautions. . . . [I]f all or most of the inmates were al-

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28. *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977). This same idea is repeatedly expressed in Supreme Court decisions. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 540 n.23 (1979) (stating that considerations of security and order in detention facilities are “peculiarly within the province and professional expertise of corrections officials, and . . . courts should ordinarily defer to their expert judgment in such matters.”) (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

29. *Barry et al., supra* note 7, at 150.

30. *See* Barbara Bloom, *Public Policy and the Children of Incarcerated Parents*, in *CHILDREN OF INCARCERATED PARENTS, supra* note 3, at 271, 274–75. The author laments that:

Only a small number of the 50 states specifically address the issue of the birth of babies to incarcerated women, or the fact that incarcerated women are mothers of infants or young children. The vast majority of states make no mention in their legislative codes of either providing services to inmate mothers or securing the placement of children of women prisoners at the time of their incarceration. Even in those states that have significant populations of female prisoners, no provisions for the placement of inmate's children are specified in the legislative codes.

*Id.* at 275. The author goes on to note that while individual departments of corrections may establish visitation policies that benefit incarcerated parents and their children, there are huge disparities from facility to facility and from state to state. *Id.*

31. *See* discussion *infra* Part III.C.2.

32. *See Updates on the Bill of Rights Project*, NAT'L RES. CTR. ON CHILDREN & FAMILIES OF THE INCARCERATED, <http://fcnetwork.org/policy-practicebor-projectupdates.php> (last visited Aug. 16, 2012) (chronicling state-by-state efforts at reform).

33. *See Turner v. Safley*, 482 U.S. 78, 89 (1987).

lowed contact visits, a great burden would be imposed on the jail authorities and the public. Modification of existing visiting areas, if not additional facilities, would be necessary. New procedures for processing visitors—possibly including interviews, personal searches, and searches of all packages carried by the visitors—would be required. Strip searches of inmates following contact visits would be needed.<sup>34</sup>

This interest in the internal security of a detention facility is considered by courts to be a sufficient justification for restrictions on inmates' rights.<sup>35</sup> The additional resources that administrators need to implement a higher level of security are an inherent part of the security justification for no-contact visitation policies. Administrators have concerns about the costs associated with both the increased number of personnel that would be necessary to interview, search, and process visitors before and after a contact visit and the construction or modification of buildings to facilitate such visits, if necessary.<sup>36</sup> But above all of these administrative issues is the concept that incarcerated individuals—even those awaiting trial who have not been found guilty—have fewer rights than everyone else.<sup>37</sup> As the Supreme Court stated in *Bell v. Wolfish*:

[S]imply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. “Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.” The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights. There must be a “mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.” This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual.<sup>38</sup>

This belief is at the core of visitation-limiting policies that are further justified on administrative grounds. The weaknesses of the rationale underlying these administrative policies are discussed later in this Note.

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34. *Block v. Rutherford*, 468 U.S. 576, 579 (1984) (citations omitted) (internal quotation marks omitted). The Court went on to agree with the administrators' concerns, stating that contact visitation involves “a host of security problems. [It] open[s] the institution to the introduction of drugs, weapons, and other contraband. Visitors can easily conceal guns, knives, drugs, or other contraband . . . [Which can be] slipped from the clothing of an innocent child, or transferred by other visitors permitted close contact with inmates.” *Id.* at 586.

35. *See id.* at 588; *O'Bryan v. Cnty. of Saginaw, Mich.*, 741 F.2d 283, 285 (6th Cir. 1984).

36. *Rutherford*, 468 U.S. at 588 n.9.

37. *Bell v. Wolfish*, 441 U.S. 520, 545–46 (1979).

38. *Id.* (internal citations omitted).

*B. Focus on Jails Instead of Prisons*

This Note focuses on visitation policies in jails and pretrial holding facilities rather than prisons. The distinction is important for many reasons. Jails are locally operated facilities that primarily house those awaiting trial (in pretrial detention) and those who have been sentenced to incarceration for less than a year (typically for misdemeanors).<sup>39</sup> The majority of these people are pretrial detainees.<sup>40</sup> Many of these detainees are in jail because they cannot afford to post bond.<sup>41</sup> Prisons, on the other hand, are federal- and state-operated facilities that house those who were convicted and sentenced to incarceration for more than a year (usually for felonies).<sup>42</sup> Thus, jailed parents typically are not convicted of a crime yet, or if so, usually are convicted of lesser, nonviolent crimes<sup>43</sup> and are usually geographically closer to their children because jails are county operated.<sup>44</sup> Both correctional systems detain people and limit their personal freedoms, but the differences between the two systems lead to different effects for the many children affected by parental incarceration. This Section discusses the differences between visits in prison versus in jail and presents information on the number of children affected by the jailing of a parent.

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39. BLACK'S LAW DICTIONARY 910 (9th ed. 2009); DORIS J. JAMES, U.S. DEP'T OF JUSTICE, PROFILE OF JAIL INMATES, 2002, at 2 (2004), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pji02.pdf>; Denise Johnston, *Jailed Mothers*, in CHILDREN OF INCARCERATED PARENTS, *supra* note 3, at 41, 41; AMANDA PETTERUTI & NASTASSIA WALSH, JUSTICE POLICY INST., JAILING COMMUNITIES: THE IMPACT OF JAIL EXPANSION AND EFFECTIVE PUBLIC SAFETY STRATEGIES 5 (2008); ZUPAN, *supra* note 6 at 25. See IDAHO CODE ANN. § 20-601 (West 2011) for a good description of generally who is kept in jail. Sometimes, however, inmates convicted of more serious crimes and who would normally stay in state prisons must be housed in local jails. See, e.g., OFFICE OF THE UTAH LEGIS. AUDITOR GEN., A PERFORMANCE AUDIT OF UTAH'S JAIL CONTRACTING PROGRAM, No. 2008-08, at 2 (2008), [http://www.le.state.ut.us/audit/08\\_08rpt.pdf](http://www.le.state.ut.us/audit/08_08rpt.pdf) [hereinafter PERFORMANCE AUDIT].

40. TODD D. MINTON, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2009—STATISTICAL TABLES 17 tbl.13 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf>.

41. Jean Harris, *Foreword* to CHILDREN OF INCARCERATED PARENTS, *supra* note 3, at vii, vii; see Johnston, *supra* note 39, at 41; PETTERUTI & WALSH, *supra* note 39, at 5.

42. BLACK'S LAW DICTIONARY, *supra* note 39, at 1314; IRWIN, *supra* note 13, at 1; PETTERUTI & WALSH, *supra* note 39, at 5.

43. A misdemeanor is defined as “[a] crime that is less serious than a felony and is usu[ally] punishable by fine, penalty, forfeiture, or confinement (usu[ally] for a brief term) in a place other than prison (such as a county jail).” BLACK'S LAW DICTIONARY, *supra* note 39, at 1089. Common examples are disorderly conduct, petty theft, prostitution, public intoxication, simple assault, trespass, vandalism, and driving under the influence. See *Misdemeanor Crimes*, LEGAL LAW HELP, [http://www.legallawhelp.com/legal\\_law\\_channels/criminal\\_law/misdemeanor.html](http://www.legallawhelp.com/legal_law_channels/criminal_law/misdemeanor.html) (last visited Aug. 16, 2012); *What Are the Most Common Types of Misdemeanor Cases?*, WISEGEEK, <http://www.wisegeek.com/what-are-the-most-common-types-of-misdemeanor-cases.htm> (last visited Aug. 16, 2012).

44. See PETTERUTI & WALSH, *supra* note 39, at 5.

### 1. *Visits in Prisons Versus in Jails*

Contrary to popular belief, those in jail rarely fit the common descriptions of a dangerous criminal; rather, they are often unfortunate members of society who get swept up in the “catchall asylum[] for poor people” and are labeled as undereducated, underemployed social refuse.<sup>45</sup> Often, it is because of those sad social conditions that a jailed parent faces the major destruction of family ties and parenting abilities; as already discussed, many jailed parents have not been convicted—they are just poor.<sup>46</sup> And if they are in jail for actual punishment, it is often for engaging in only minor offenses.<sup>47</sup> But because they are poor or because they committed misdemeanors, they are allowed less contact and connection with potential newborn and infant children (and, really, with everyone) than those convicted of serious, violent offenses.<sup>48</sup>

This seemingly inexplicable result is due, in part, to the fact that many prisons implement policies that allow for contact visitation,<sup>49</sup> in contrast with the more restrictive policies of jails. Some prisons also have playgrounds, playrooms with toys, and supervised playrooms, which make children feel more comfortable, happy, and relaxed.<sup>50</sup> And while the geographical distance between an imprisoned parent and his or her child(ren) may affect the frequency of visits,<sup>51</sup> the possibility of contact visitation is an undeniable benefit.<sup>52</sup> County jail administrators also may not feel they have the resources, staff, and space needed to implement contact visitation<sup>53</sup> that federally and state-funded prisons have.<sup>54</sup>

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45. Irwin, *supra* note 13, at 1 (quoting RONALD GOLDFARB, *JAILS: THE ULTIMATE GHETTO* 27 (1975)) (internal quotation marks omitted).

46. See Mosi Secret, *Low Bail, But Weeks in Jail Before Misdemeanor Trials*, N.Y. TIMES, Dec. 3, 2010, at A27; Aimee Mayer, *For the Poor, Bail Often Means Jail*, HUM. RTS. BRIEF (Mar. 11, 2011), <http://hrbrief.org/2011/03/for-the-poor-bail-often-means-jail/>.

47. PETTERUTI & WALSH, *supra* note 39, at 5 (“[J]ails are intended to hold people who are . . . sentenced to a year or less.”).

48. Visitation is not the only aspect of incarceration that is generally better in prisons than in jails. People who have been in both county jails and state prisons state that they actually prefer the prisons to jails; this may be due to the fact that “a jailed prisoner generally experiences more punishment per day than a convict in a state prison.” IRWIN, *supra* note 13, at 45.

49. BERNSTEIN, *supra* note 14, at 80.

50. *Id.* at 97–98; Norman, *supra* note 3, at 128. The process leading up to this visitation is grueling and may prevent small children from visiting with their imprisoned parent. See BERNSTEIN, *supra* note 14, at 81. But not having the opportunity to have meaningful visits at all is a much worse alternative. *Id.* at 85.

51. Norman, *supra* note 3, at 128–29.

52. See *infra* Part II.C.

53. See discussion *supra* Part II.A.3. As the later discussion will show, however, the amount of resources jail administrators need to allow only parents with newborns and infants to contact visitation with those children (and perhaps with even more restrictions, such as only for those parents with good behavior or involvement in only nonviolent crime) is far less than if contact visitation were proposed for the whole jail population. See *supra* Part IV.A.

54. PETTERUTI & WALSH, *supra* note 36, at 20; *What is the Difference Between a Jail and a Prison?*, WISEGEEK, <http://www.wisegeek.com/what-is-the-difference-between-a-jail-and-a-prison.htm> (last visited Aug. 16, 2012).

## 2. *The Number of Children Affected*

Simply put, there are too many children with jailed parents for society to continue to ignore.<sup>55</sup> It is estimated that three out of every one hundred American children have a parent behind bars.<sup>56</sup> Other studies estimate that the total number of children with an incarcerated parent is over 1.5 million.<sup>57</sup> Exact information about these children—how many are up to two years of age or how many of those parents are in jail as opposed to prison—is not available. Why is this? Quite simply, it is nobody's job to find out. As two commentators lament:

Although the number of children affected by parental incarceration can be estimated, the true scope of the problem is uncertain because few reliable statistics exist. For the most part, law enforcement does not gather information about the children of arrested adults and correctional institutions do not ask prisoners for specific information about their children. Because there is no specific agency or system charged with collecting data about this population, it is unclear how many children are affected, who they are, or where they live.<sup>58</sup>

A look at what information is available, however, can help place the number of children affected by jail visitation policies into perspective.

One study indicated that, in 1992, there were about 225,000 jailed fathers<sup>59</sup> and about 30,000 jailed mothers,<sup>60</sup> for a total of about 255,000 jailed parents. A 2002 estimate put the total number of jailed persons at 665,475, with more than eighty-eight percent male (approximately 585,618) and more than eleven percent female (approximately 79,857).<sup>61</sup> If seventy-five to eighty percent of incarcerated women and sixty-five percent of incarcerated men have children,<sup>62</sup> in 2002 there were about 380,650 jailed fathers and 59,900 to 63,900 jailed mothers (for a total of between 440,550 and 444,550 jailed parents). By 2009, the total number of jailed persons increased to 767,620<sup>63</sup> (673,891 males, 93,729 fe-

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55. See MARTONE, *supra* note 1, at 17 (“These children are most certainly a neglected segment of our society, and the impact on all of our lives cannot be underestimated. We can no longer ignore them.”).

56. BERNSTEIN, *supra* note 14, at 4.

57. Harris, *supra* note 41, at vii.

58. Cynthia Seymour, *Introduction to CHILDREN WITH PARENTS IN PRISON: CHILD WELFARE POLICY, PROGRAM, & PRACTICE ISSUES 1, 2* (Cynthia Seymour & Creasia Finney Hairston eds., 2001); see also William H. Sack & Jack Seidler, *Should Children Visit Their Parents in Prison?*, 2 *LAW & HUM. BEHAV.* 261, 261 (1978).

59. Denise Johnston & Katherine Gabel, *Incarcerated Parents*, in *CHILDREN OF INCARCERATED PARENTS*, *supra* note 3, at 3, 3.

60. *Id.* at 9.

61. JAMES, *supra* note 39, at 1–2.

62. Harris, *supra* note 41, at vi.

63. MINTON, *supra* note 40, at 4 tbl.1. For a breakdown of jail population of the largest fifty counties, see *id.* at 12–13 tbl.9.

males)<sup>64</sup>—a significant increase since 2002, presumably including an increased number of jailed parents as well. While the total number of jailed persons decreased slightly in the year 2009,<sup>65</sup> the general trend is that more and more people—and parents—are jailed each year.<sup>66</sup>

Further, it is estimated that up to twenty-five percent of women in prisons and jails are pregnant or were pregnant within the previous year,<sup>67</sup> that seven to ten percent of women enter jail or prison pregnant,<sup>68</sup> and that over 6,000 babies are born to an incarcerated mother.<sup>69</sup> Regardless of what the true numbers are, however, the number of children affected by jail visitation policies is significant. A considerable number of newborns and infants are separated from their parents in jail.<sup>70</sup> As the next Section indicates, the effects of current visitation policies are far-reaching and devastating, and there is a pressing need for a reform of the policies that affect these young children.

### C. *The Effects of No-Contact Visitation Policies on Newborns and Infants*

Unfortunately, children of incarcerated parents have always been a neglected segment of society.<sup>71</sup> Little is known about these children, and few agencies or studies compile accurate information on them.<sup>72</sup> With poor information on children in general, information on newborns and infants is especially lacking. Looking at several different variables and

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64. *Id.* at 9 tbl.6.

65. *Id.* at 4 tbl.1.

66. See PETERUTI & WALSH, *supra* note 39, at 2.

67. Barry et al., *supra* note 7, at 157.

68. Harris, *supra* note 41, at vii; Ellen M. Barry, *Pregnant Prisoners*, 12 HARV. WOMEN'S L.J. 189, 190 (1989).

69. Harris, *supra* note 41, at vii.

70. For example, in California alone, it is estimated that 97,000 children had jailed parents in 1999. CHARLENE WEAR SIMMONS, CAL. RES. BUREAU, CHILDREN OF INCARCERATED PARENTS 2-3 (2000), <http://www.library.ca.gov/crb/00/notes/V7N2.pdf>. Assuming that for purposes of that study “children” meant any minor child up to age eighteen, roughly 11,000 of these children were likely newborns and infants (because ages zero through two are one-ninth of all ages up to eighteen, and one-ninth of 97,000 is approximately 11,000).

71. Compare Sack & Seidler, *supra* note 58, at 261 (published in 1978) with the very similar views expressed in MARTONE, *supra* note 1, at 183-84 (published in 2005). Just as no agency had the responsibility to inquire after the children of adults arrested or incarcerated in 1978, the same is true today. It is also interesting to note that as of 2000, the federal government was “spending [six] times more to incarcerate 1.2 million nonviolent offenders than [it] spent on child care for 1.25 million children” and that states spend more money building prisons than colleges and universities. JUSTICE POLICY INST., THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 6 (2000), [http://www.justicepolicy.org/images/upload/00-05\\_rep\\_punishingdecade\\_ac.pdf](http://www.justicepolicy.org/images/upload/00-05_rep_punishingdecade_ac.pdf). Cf. Marilyn C. Moses, *Children of the Incarcerated Must Be Studied, and Responded to, Comprehensively*, CORR. TODAY, June 1, 2010, available at <http://www.faqs.org/periodicals/201006/2067156051.html> (“During the last two decades, considerable attention has been given to the plight of children of incarcerated parents—and deservedly so. Through the hard fought efforts of advocates, researchers, practitioners, family members and policymakers, these children have gained recognition as the ‘hidden victims’ of the criminal justice system.”).

72. See *supra* note 58 and accompanying text.

sources, however, it is possible to predict what effects having a parent in jail—and separated by glass—may have on newborns, infants, and parents alike. This Section discusses the primary cause of problems arising from lack of contact visitation, the disruption in attachment between parent and child, as well as other potential problems, such as childhood psychological problems, increased criminality in the child, increased chances of recidivism for the parent, and an increased potential for termination of parental rights.

### 1. *Disruption in Attachment and Its Effects*

Attachment is an intense infant-parent bond that children develop during their first twelve months of life.<sup>73</sup> This bond is considered “the number one social achievement of infancy.”<sup>74</sup> A child demonstrates his or her attachment by becoming distressed and anxious when separated from a comfortable, familiar, and responsible caregiver; this powerful survival impulse keeps parents and infants close.<sup>75</sup> Familiarity is one key requirement for attachment formation; body contact is another.<sup>76</sup> Infants form attachments with parents “who are soft and warm and who rock, feed, and pat. And human attachment also consists of one person providing another with a *safe haven* when distressed and a *secure base* from which to explore.”<sup>77</sup>

Secure attachment, which is created by “sensitive, responsive” parenting within the first year of life, promotes social competence and basic trust later in development and life.<sup>78</sup> A child who is securely attached to his or her parent will likely suffer less trauma upon separation from a parent,<sup>79</sup> but for newborns and infants who are still in the process of becoming attached, such separation can lead to severe trauma and insecure attachment.<sup>80</sup>

Insecure attachment is the result of insensitive, inconsistent, and unresponsive parenting during the first year of life.<sup>81</sup> These poor attachments can lead to fear later in life<sup>82</sup> and cause children to be “mistrustful, dependent, and/or rejecting in subsequent relationships.”<sup>83</sup> But poor attachment can also have far more insidious effects. Research indicates

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73. MYERS, *supra* note 8, at 146.

74. *Id.* at 152.

75. *Id.* at 146.

76. *Id.* at 146–47.

77. *Id.* at 147.

78. *Id.* at 148–49.

79. *See id.* at 148; Norman, *supra* note 3, at 124.

80. *See On Prisoners and Parenting, supra* note 9, at 1413–14.

81. MYERS, *supra* note 8, at 148; THOMAS F. OLTMANN & ROBERT E. EMERY, *ABNORMAL PSYCHOLOGY: CUSTOM EDITION FOR UNIVERSITY OF ILLINOIS 54* (2004).

82. MYERS, *supra* note 8, at 149.

83. OLTMANN & EMERY, *supra* note 81, at 54.

that attachment difficulties can lead to anxiety disorders.<sup>84</sup> Further, if attachment is disrupted through separation in the first year of life, evidence shows that the child's "ability to sympathize or show concern for others is drastically impaired later in life," and if the "mother-child bond is disrupted between the ages of six months and four years, a child's development may be greatly [a]ffected."<sup>85</sup>

One would anticipate that effects caused by inconsistent and unresponsive parenting and lack of body contact and familiarity would, therefore, also result from having a parent in jail who is completely physically inaccessible.<sup>86</sup> This is not to assume that the incarcerated parent is the only source of attachment for the infant or newborn—children often stay with other adults who could theoretically be a source of attachment and security, including the other parent, grandparents, relatives, and foster parents.<sup>87</sup> For those children who cannot live with the other parent, however, the quality and amount of attention they receive is likely reduced, and the harms associated with separation from a parent are salient.<sup>88</sup>

Many children are placed in foster care because they have no family members or friends to care for them after their parent is arrested.<sup>89</sup> This was the case for over 40,000 children in 1993.<sup>90</sup> Because the number of children with an incarcerated parent is increasing, one can only expect this number to similarly increase. Sadly, over half of the children in foster care get shuffled around different foster care placements.<sup>91</sup> For children not placed in foster care—those children who are able to live with a relative—lack of access to resources, increased stress, and decreased ability or willingness to take on the child can impair the caregiver's ability to meet the child's needs.<sup>92</sup>

Studies indicate, though, that regardless of a child's placement after parental arrest, attachment is, in fact, disrupted when a parent is incar-

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84. *Id.*

85. Pojman, *supra* note 2, at 61.

86. *See On Prisoners and Parenting*, *supra* note 9, at 1413–15 (describing the failure to form attachments or disruption in attachment that can result from parental incarceration).

87. *See* MARTONE, *supra* note 1, at 179–80 (internal citation omitted).

The majority (77 percent) of children whose fathers are incarcerated remain or go to live with their mothers, while about five percent live with a grandparent or relative. When mothers are incarcerated, children most often live with grandparents or other relatives. Only 17 percent live with their fathers. Children of incarcerated mothers are also more likely to be placed in a foster home—six percent compared with 1 percent of incarcerated fathers' children.

*Id.* (quoting Elizabeth I. Johnson & Jane Waldfogel, *Where Children Live While Parents Are Incarcerated*, JCPR POLICY BRIEFS (2003), [http://www.ipr.northwestern.edu/jcpr/policybriefs/vol5\\_num4.html](http://www.ipr.northwestern.edu/jcpr/policybriefs/vol5_num4.html)) (internal quotation marks omitted); *see also* Denise Johnston, *The Care and Placement of Prisoners' Children*, in *THE CHILDREN OF INCARCERATED PARENTS*, *supra* note 3, at 103, 106–07.

88. *See On Prisoners and Parenting*, *supra* note 9, at 1419–22 (describing the inadequacies of child placement in state, foster, and even relatives' care).

89. Norman, *supra* note 3, at 124; *see also On Prisoners and Parenting*, *supra* note 9, at 1410–11 (describing the placement of children into state care after parents are incarcerated).

90. Johnston, *supra* note 87, at 108.

91. Norman, *supra* note 3, at 124.

92. *See* Johnston, *supra* note 87, at 113–15.

cerated, which likely leads to effects similar to those mentioned above.<sup>93</sup> The manifestations of disrupted attachment include developmental and behavior problems:

An infant (under the age of four), who is directly placed with a relative or in foster care immediately after birth, or an infant who in the months immediately following birth is returned to his or her mother after release from prison, may not only experience developmental problems but behavioral problems as well. This disorganized attachment relationship during infancy is the strongest predictor of excessive hostile behaviors toward peers in preschool.<sup>94</sup>

Even if a child who was separated from a parent at an early age is able to attach to a new caretaker, the child may still become “clingy, anxious, and angry.”<sup>95</sup> Additionally, it will likely be difficult to reestablish bonds with the parent upon release.<sup>96</sup> While studies on the effects on children of parental incarceration are generally poor,<sup>97</sup> there are indications that children of incarcerated parents are at a higher risk for these problems than their peers.<sup>98</sup>

The implications for jail visitation policies seem clear. When the parent of an infant is put in jail, there is an obvious physical separation. For securely attached children, this separation is traumatic and can lead to distress and anxiety. For newborns and some infants, the physical separation may lead to anxious and insecure attachments or a complete lack of attachment entirely.<sup>99</sup> Providing visitation through a glass wall does nothing to help prevent this disruption in attachment, while visitation that allows the child to be held and cuddled by his or her parent would help prevent further disruption in attachment and foster more secure attachment. Policies that prevent contact visitation thus contribute to an increase in anxiety, antisocial behavior, and mental health prob-

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93. JOSEPH MURRAY ET AL., EFFECTS OF PARENTAL IMPRISONMENT ON CHILD ANTISOCIAL BEHAVIOUR AND MENTAL HEALTH: A SYSTEMATIC REVIEW 12, 35 (2009), <http://www.campbellcollaboration.org/lib/download/683/>. These authors make sure to point out, however, that other factors may be involved, including loss of family income and life stresses. *Id.* at 12.

94. Pojman, *supra* note 2, at 62.

95. *Id.* (internal quotation marks omitted).

96. *Id.* The risk of not being able to reestablish a parental bond may be more serious for younger children with jailed parents. Older children can tolerate longer periods of separation without harm, but even for them, more than a year of separation can lead to serious emotional harm that reunification with the parent will not fix. *See On Prisoners and Parenting, supra* note 9, at 1416. This indicates that a separation period of less than a year (the time frame that correlates with jail incarceration) is tolerable for older children, but for younger children this leads to more harsh results.

97. MURRAY ET AL., *supra* note 93, at 13–14.

98. *See supra* note 94 and accompanying text.

99. “When a parent is arrested and abruptly taken away, initially there is confusion. For many younger children withdrawal follows; they stop eating, learn slower and detach themselves from people . . .” Lucille Renwick & E.J. Gong, Jr., *When Parents Do Time*, L.A. TIMES, Dec. 26, 1993, at 14 [hereinafter *When Parents Do Time*].

lems in small children, whereas policies allowing contact visitation would likely reduce these effects.<sup>100</sup>

## 2. *Potential for Increased Criminality in Children*

As indicated in the previous Section, some of the effects on children of disruptions in parental attachment include fear, mistrust and problems in relationships, anxiety, child delinquency, and antisocial behavior (evidenced by high-risk behaviors such as stealing, fire setting, delinquency, and other behavioral problems).<sup>101</sup> A correlation between parental imprisonment and antisocial outcomes in the child<sup>102</sup> is especially troubling, because antisocial behavior is strongly correlated with criminal activity.<sup>103</sup> While the researchers who found a correlation between antisocial behavior and parental incarceration are quick to point out that there is no evidence that parental incarceration *causes* antisocial behavior in children, they echo the sentiments of most other researchers in this area: more research is needed.<sup>104</sup> Further, antisocial behavior is not the only cause of criminal behavior implicated by parental incarceration. “Family criminality, including convicted parents” and “[p]oor parental child-rearing behaviour, including . . . separation from parents” have also been found to lead to increased delinquency (and criminal conviction) in children.<sup>105</sup> Studies generally indicate that, even controlling for other factors, parental incarceration has a significant impact on a child’s risk for future criminal behavior.<sup>106</sup>

As noted before, no-contact visitation policies certainly do not decrease a child’s risk for future criminal behavior and could, in fact, increase it. These policies prevent parental attachment from being a miti-

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100. See MURRAY ET AL., *supra* note 93, at 58–59 (explaining that “good-quality contact” with an incarcerated parent will help counteract threats to attachment); BERNSTEIN, *supra* note 14, at 79 (quoting Dr. Barbara Howard explaining that if parents “don’t have a good relationship with the[ir] child, then their ability to take care of the child and have the child be responsive to them will be much diminished. If there were no bodily contact, I would expect no relationship at all with young children.”). This has further implications for termination of parental rights, discussed later in this Note.

101. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, *YOUR CHILD: WHAT EVERY PARENT NEEDS TO KNOW ABOUT CHILDHOOD DEVELOPMENT FROM BIRTH TO PREADOLESCENCE* 264–66 (David B. Pruitt ed., 1998).

102. MURRAY ET AL., *supra* note 93, at 45–47, 56.

103. See OLTMANN & EMERY, *supra* note 81, at 326–27.

104. MURRAY ET AL., *supra* note 93, at 57; see also MARTONE, *supra* note 1, at 182 (highlighting the need for more and better studies of the effects on children of parental incarceration in general).

105. David P. Farrington, *The Development of Offending and Antisocial Behaviour from Childhood: Key Findings from the Cambridge Study in Delinquent Development*, 360 J. CHILD PSYCHOL. & PSYCHIATRY 929, 940–41 (1995). Parental criminality and conviction are relevant to this discussion because (1) although many parents in jail have not been convicted of a crime, they have, at the very least, often been connected to criminal activity, and (2) many parents are in jail for convictions, albeit for less serious offenses that do not necessitate imprisonment. See discussion *supra* Part II.B.1.

106. See NANCY G. LAVIGNE ET AL., *URBAN INST., BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS* 7–8 (2008), <http://www.aecf.org/~media/Pubs/Topics/Child%20Welfare%20Permanence/Permanence/BrokenBondsUnderstandingandAddressingtheNeeds/broken%20bonds.pdf>.

gating factor in the child's risk of offending. Parent-child visitation in jails "reduces the negative effects of parent-child separation and may therefore also contribute to a reduction of future crime and incarceration" among the children.<sup>107</sup> For visitation to be meaningful for newborns and infants, there must be contact between parent and child. Thus, contact visitation can facilitate the establishment and maintenance of strong bonds that lessen the child's risk for future criminal behavior. As the next Section demonstrates, it can also decrease the parent's chances of engaging in criminal activity in the future.

### 3. *Potential for Increased Recidivism Rates in Offending Parents*

People who are released from jail face the often difficult task of re-integrating themselves into society.<sup>108</sup> The more difficult this is, the more likely they are to reoffend.<sup>109</sup> Meaningful visitation (or lack thereof) plays a key role in integration and the likelihood of recidivism. It is a widely held belief that poor visitation for inmates leads to a higher chance of reinvolvement in criminal activity and recidivism, and meaningful visitation lowers this chance.<sup>110</sup> This is likely due to the fact that "increased contact between inmates and their families can contribute to an inmate's re-integration into the community after release. . . . [V]isitations can encourage healthier family relationships, further developing a critical element in the offender's post-release support system."<sup>111</sup>

In general, connections to informal social institutions and controls aid in reform and desistance from crime.<sup>112</sup> Fostering connections with children and families helps preserve those connections, which in turn de-

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107. Denise Johnston, *Parent-Child Visitation in the Jail or Prison*, in CHILDREN OF INCARCERATED PARENTS, *supra* note 3, at 135, 142.

108. JEFF MELLOW ET AL., NAT'L INST. OF CORR. & URBAN INST., TRANSITION FROM JAIL TO COMMUNITY ONLINE LEARNING TOOLKIT 1 (2011), <http://www.urban.org/projects/tjc/Toolkit/Compleat-TJC-Toolkit.pdf>.

109. Jennifer E. Cobbina, *From Prison to Home: Women's Pathways In and Out of Crime 1* (May 2009) (unpublished Ph.D. dissertation, University of Missouri—St. Louis), <http://www.ncjrs.gov/pdffiles1/nij/grants/226812.pdf>.

110. See BERNSTEIN, *supra* note 14, at 106 (arguing that a major goal of incarceration, rehabilitation, is achieved through social and familial connection and that "[r]estricting access to family only ups the odds of failure once a parent gets out"); *id.* at 76 ("Consistent, ongoing contact . . . lowers recidivism . . ."); MARTONE, *supra* note 1, at 22 (stating that parent-child visitation can "foster the[] bonds between parent and child, ties that can play a crucial role in keeping a parent from returning to prison once they've been released"); Cobbina, *supra* note 109, at 190 (stating that "it is important to encourage rather than discourage maternal-child relationships" because children can provide motivation for desistance from crime and implying that physical contact is the best means for doing such); Terry A. Kupers, *Effects of Visiting and Education on Prisoners & Family*, PATRICK CRUSADE (Feb. 5, 2002), [http://www.patrickcrusade.org/EFFECTS\\_VISITING.html](http://www.patrickcrusade.org/EFFECTS_VISITING.html) ("Quality visitation throughout a prisoner's term has . . . impressive effects on the recidivism rate.")

111. NAT'L INST. OF CORR., SERVICES FOR FAMILIES OF PRISON INMATES 1 (2001), <http://www.static.nicic.gov/Library/017272.pdf>.

112. Cobbina, *supra* note 109, at 2–3.

creases the risk of recidivism.<sup>113</sup> For women especially, relationships with children can serve as a “catalyst for change” and a “motivating factor for desistance.”<sup>114</sup> It thus follows that the higher the quality of visitation between parents and children, the less likely the parent is to recidivate. As discussed, visitation for newborns is essentially nonexistent in jails with physical barriers; the only way to increase the quality of visitation in such facilities, such that recidivism is positively affected, is to allow contact between the newborn and his or her parent.

#### 4. *Potential for Increased Termination of Parental Rights*

The separation of parent and child that occurs when a parent is put in jail can ultimately become permanent through termination of a parent’s rights. Any time a parent is incarcerated, he or she faces a very real risk of not only losing custody of a child but also of losing parental rights entirely.<sup>115</sup> Incarceration, in and of itself, is not a sufficient cause for termination of parental rights,<sup>116</sup> but the effects of incarceration can lead to such termination. For example, if a parent fails to maintain “an adequate relationship” with a child placed in foster care for as little as twelve months postincarceration, many state child welfare laws allow termination of parental rights.<sup>117</sup> “Incarcerated mothers with children in foster

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113. See Justin Brooks & Kimberly Bahna, “*It’s a Family Affair*”—*The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 285 (1994) (“Studies have demonstrated that parolees who return to their families, specifically to a spouse and children, have a better chance of leading productive and law-abiding lives. A system that destroys family ties during incarceration incurs the tremendous societal costs of future crimes.”).

114. Cobbina, *supra* note 109, at 9–10, 158; see also Mauskopf, *supra* note 1, at 104 (explaining how the separation of young children from an incarcerated mother causes the mother to lose “the critical support that she can get from her child and the incentive to help her change”).

115. Philip M. Genty, *Termination of Parental Rights Among Prisoners: A National Perspective*, in CHILDREN OF INCARCERATED PARENTS, *supra* note 3, at 167, 168. As of 1995, at least twenty-five states had statutes regarding termination of parental rights explicitly dealing with incarcerated parents. *Id.* at 168, 176 n.2; see also Bloom, *supra* note 4, at 27; Mauskopf, *supra* note 1, at 112 n.119; Constantino Diaz-Duran, *They Stole My Baby*, DAILY BEAST (Nov. 15, 2010, 7:42 PM), <http://www.thedailybeast.com/articles/2010/11/16/adoption-nightmare-for-a-guatemalan-immigrant-and-missouri-couple.html?cid=hp:mainpromo>.

116. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state.”); Genty, *supra* note 115, at 170–71. In termination proceedings, a court “must look beyond the parent’s inability to care physically for the child and focus instead upon the ‘parent’s responsibility to provide a nurturing parental relationship.’” *Id.* at 171 (quoting *In re Daniel C.*, 480 A.2d 766, 769 (Me. 1984)). Six states have explicitly recognized that incarceration in and of itself cannot lead to termination of parental rights. MASS. GEN. LAWS ANN. ch. 210, § 3(c)(xiii) (West 2011); MO. ANN. STAT. § 211.447(6) (West 2011); NEB. REV. STAT. § 43-292.02(2) (2008); N.H. REV. STAT. ANN. § 170-C:5(VI) (2010); N.M. STAT. ANN. § 32A-4-28(D) (West 2010); OKLA. STAT. tit. 10A, § 1-4-904(B)(12) (2011).

117. Bloom, *supra* note 4, at 26; Genty, *supra* note 115, at 173–74. New York law provides a good example of this kind of legislation. A child is deemed permanently neglected if for twelve months (or fifteen out of the most recent twenty-two months) a parent fails to “substantially and continuously or repeatedly to maintain contact with or plan for the future of the child,” taking into account the special circumstances of incarceration and limitations on family contact. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 2010). The law goes on to say, however, that “[a] visit or communication by a parent with

care are often unable to meet court-mandated family reunification requirements for contact and visitation with their children, and consequently lose their parental rights.<sup>118</sup> Further, a few states view incarceration as a type of abandonment that can lead to termination unless a parent maintains contact with his or her children.<sup>119</sup>

Preserving a meaningful relationship with children is clearly an important aspect of retaining parental rights. A parent's efforts to maintain such a relationship is a factor that courts look at in termination proceedings.<sup>120</sup> Lack of contact visitation, by itself, is not counted against a parent because visitation policies are constraints beyond the parent's control.<sup>121</sup> Incidental side effects of these policies, however, can work against a parent. For example, it seems impossible to really maintain a relationship (or sometimes even establish one in the first place, such as when a baby is born to an incarcerated mother and immediately taken away) with a newborn or infant without physical contact.<sup>122</sup> The loss of the parent-child bond that can result "when the conditions of incarceration prevent contact between the parent and child"<sup>123</sup> may lead to termination of parental rights as in the best interest of the child.<sup>124</sup> Further, a parent who is unable to hold his or her child may choose not to have visits, and custodians may not bring such young children to see their parent, since, after all, "what is the point?"<sup>125</sup>

These sad realities can ultimately work against a parent facing termination proceedings down the line. Thus, no-contact visitation policies may indirectly lead to permanent termination of a parent's rights. When keeping parental rights is partially dependent upon the quality of the parent-child relationship, and when this relationship is severely inhibited

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the child which is of such character as to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact." *Id.* § 384-b(7)(b). It is hard to imagine how parents who cannot coddle and hold their babies could otherwise show affection towards them.

118. REBECCA PROJECT FOR HUM. RTS. & NAT'L WOMEN'S LAW CTR., *MOTHERS BEHIND BARS: A STATE-BY-STATE REPORT CARD AND ANALYSIS OF FEDERAL POLICIES ON CONDITIONS OF CONFINEMENT AND PARENTING WOMEN AND THE EFFECT ON THEIR CHILDREN 13* (2010) [hereinafter REBECCA PROJECT]; see also *When Parents Do Time*, *supra* note 99, at 14 ("[F]or a number of other parents, the first order of business is regaining custody of their children. In many cases, parents who are jailed or imprisoned can leave their children with relatives. But there are those whose children wind up in the foster-care system and getting them back can be difficult."). "Parents are powerless once they're incarcerated because they're stripped of their responsibility and authority . . . ." *Id.* (quoting Denise Johnston, director of the Center for Children of Incarcerated Parents).

119. Barry et al., *supra* note 7, at 151; see Diaz-Duran, *supra* note 115.

120. Genty, *supra* note 115, at 172.

121. *Id.* at 175 (stating that courts must take into account "constraints imposed by the parent's imprisonment").

122. See *supra* note 117.

123. *On Prisoners and Parenting*, *supra* note 9, at 1417; see also *When Parents Do Time*, *supra* note 99, at 14 ("[A jailed mother] is also concerned that her daughter will forget who she is if she does not have enough contact with her, a common problem for babies who don't see their mothers often . . .").

124. *On Prisoners and Parenting*, *supra* note 9, at 1418.

125. See *supra* note 17 and accompanying text.

by physical barriers that effectively prevent a parent from maintaining any sort of meaningful relationship with a newborn or infant, a parent's rights can be jeopardized.<sup>126</sup> Were contact visitation a viable option, however, meaningful relationships with infants and newborns could be established and maintained, visits would be more worthwhile (and thus more likely to occur), and parental rights would not be as jeopardized.

### III. ANALYSIS

The effects on young children, parents, and communities of no-contact visitation policies in jails are unfortunate and heart wrenching, but not unavoidable. These serious harms could be mitigated with one change: allowing contact visitation for newborns and infants.<sup>127</sup> This, however, is not as easy as it sounds. Jails are the responsibility of cities and local communities; state and federal governments generally do not (and often cannot) interfere with that responsibility.<sup>128</sup> As of 1991, only six states placed administration of jails with state, rather than county, officials.<sup>129</sup> Further, as previously discussed, many of these local jail administrators have legitimate concerns with allowing contact visitation (including the need for heightened security screenings and the modification or creation of facilities to support such visitation) that prevent the implementation of such policies.

There are, however, other potential sources of policy change than just the goodwill of the Sheriff. State legislatures, Congress, and courts of law have all played a role in defining how incarcerated parents interact with their children; some efforts, however, have been more successful than others. The following analysis attempts to address the relative strengths and weaknesses of different approaches to dealing with the problems facing jailed parents and their children, including judicial intervention, federal and state intervention and legislation, and alternative correctional arrangements.

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126. See STEVE CHRISTIAN, NAT'L CONF. OF STATE LEG., CHILDREN OF INCARCERATED PARENTS 6 (2009), <http://www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf> (“[S]tates have defined a variety of conditions related to incarceration that, together with imprisonment, constitute grounds for termination. These conditions include . . . the quality of the parent-child relationship and the effect of incarceration thereon . . .”).

127. Ideally, of course, contact visitation should be allowed for all potential jail visitors. Practical considerations (to be discussed later) as well as the narrow scope of this Note require limiting the scope of the solution to only newborns and infants.

128. See John M. Klofas, *The Jail and the Community*, 7 JUST. Q. 69, 88 (1990) (“The American jail owes its unique organizational characteristics to the fact that no single unit or branch of government has the power, interest or resources to alter fundamentally its purpose, organization, management, and operation.” (quoting Edith E. Flynn, *Jails*, in ENCYCLOPEDIA OF CRIME & JUSTICE 915, 918 (Sanford H. Kadish ed., 1983))); Daniel J. Bell, *Book Review: Jail Management*, 4 CRIM. JUST. REV., Fall 1979, at 149, 149 (reviewing E. EUGENE MILLER, *JAIL MANAGEMENT* (1978)).

129. ZUPAN, *supra* note 6, at 47–49.

### A. *Judicial Intervention*

Though conditions in county jails have been deplorable since the establishment of the institution, courts did not intervene in their administration until the mid-1960s.<sup>130</sup> Only then did courts begin to question the ability of local administrators to provide inmates with adequate living conditions and constitutional protections; only then did courts begin to “hear inmate allegations as to violations of their constitutional rights and to intervene in the administration of local jails . . . .”<sup>131</sup> In response to the growing number of inmate lawsuits, many jails did in fact improve living conditions and safeguard more rights.<sup>132</sup> Inmates were not, however, granted every right that was challenged.

Unfortunately, courts never found that incarcerated individuals have an absolute right to visitation because it is a privilege subject to the discretion of corrections officials.<sup>133</sup> Inmates, just like everyone else, have a right to association guaranteed by the First and Fourteenth Amendments.<sup>134</sup> As the Supreme Court held in *Overton v. Bazzetta*, however, this is a type of right that can be restricted for inmates, provided the restriction is the result of legitimate penological objectives and not an end unto itself (for example, as punishment).<sup>135</sup> The Supreme Court stated that “the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility.”<sup>136</sup> In a related analysis, prohibitions on contact visitation were held not to be punishment, such that due process is violated.<sup>137</sup> Surely, if pretrial detainees have no constitutional right to contact visitation, neither do those convicted of crimes and serving their time in the same facility. Thus, the Supreme Court made it clear: jailed inmates do not have an absolute right to contact visitation.<sup>138</sup> There is just one caveat: the justification for policies restricting visitation must serve a legitimate penological objective.<sup>139</sup>

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130. *Id.* at 15–19, 65.

131. *Id.* at 65.

132. *Id.* at 65–66.

133. Dan Markel et al., *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1178–79; George L. Blum, Annotation, *Right of Jailed or Imprisoned Parent to Visit from Minor Child*, 6 A.L.R. 6th 483 (2005).

134. For a discussion on the right of association and its Supreme Court developments, see *Right of Association*, JUSTIA, <http://supreme.justia.com/constitution/amendment-01/26-right-of-association.html> (last visited Aug. 16, 2012).

135. *Overton v. Bazzetta*, 539 U.S. 126, 131–32 (2003).

136. *Block v. Rutherford*, 468 U.S. 576, 589 (1984).

137. *Id.* at 588.

138. The right to association is not absolute, thus neither is any manifestation of that right through visitation. It is a right that can be curtailed. See *Bazzetta*, 539 U.S. at 131 (“[F]reedom of association is among the rights least compatible with incarceration. Some curtailment of that freedom must be expected in the prison context.” (internal citations omitted)).

139. See *Turner v. Safley*, 482 U.S. 78, 89 (1987).

As previously discussed, examples of legitimate penological objectives include, among others, those related to the security of the facility and its financial stability.<sup>140</sup> Some justifications, however, have not passed muster. For example, in *In re Smith*, a California court rejected the argument that a ban on visitation by minor children was reasonably related to prison security.<sup>141</sup> Acknowledging that it would be difficult to reject a justification based on security, the court still held the ban to be arbitrary and excessive; total interference with the parent-child relationship required a better justification than jail officials could give.<sup>142</sup> Though the policy at issue in that case involved a complete ban on child visitation, and not merely a restriction on the type of visitation allowed, the case gives strong support to the idea that jail visitation policies announced in the name of “security” and other penological interests will not automatically be given deference.<sup>143</sup> The review these policies receive may be limited, but it is still a review nonetheless.

The judicial system will always remain open to those jailed inmates who wish to challenge a policy or procedure they consider unconstitutional. The track record for those inmates who challenge visitation policies in the past, however, is decidedly poor (as the previous discussion indicates). The future, therefore, does not seem bright for challenges to policies forbidding contact visitation. Courts recognize, however, that parents and children have a special relationship that should be protected<sup>144</sup> and that visits fostering these relationships may benefit both the inmate and society in the future.<sup>145</sup> These considerations may overcome feeble attempts to justify bans on contact visitation based on security or other penological interests. For the time being, though, the bar has been set very low; it is very likely that most policies justified in the name of security or economy will pass without much of a judicial fuss.

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140. See discussion *supra* Part II.A.3.

141. *In re Smith*, 169 Cal. Rptr. 564, 570 (Cal. Ct. App. 1980).

142. *Id.* at 569–70. The “security” justification for the ban on child visits was that “children do not fear reprisal and are nonresponsive to oral and written rules and regulations; that they can be directed to rush past security personnel, and to secrete, carry and transfer contraband . . . [and] because of their inquisitive nature, children could create diversions which would drain off limited security staff . . .” *Id.* at 566.

143. *Id.* at 565.

144. See, e.g., *id.* at 570 (“Separating parent and child for long periods of time in the good faith claim of maintaining jail security is a denial of the rights between parent and child . . .”).

145. See, e.g., *Block v. Rutherford*, 468 U.S. 576, 589 (1984) (“[W]e do not in any sense denigrate the importance of visits from family or friends to the detainee. Nor do we intend to suggest that contact visits might not be a factor contributing to the ultimate reintegration of the detainee into society.”).

### B. Federal Intervention

There is a sad lack of federal intervention for jailed parents facing separation from their young children. This is likely due to the fact that, as previously discussed, local sheriffs predominantly have jurisdiction over the administration of local facilities.<sup>146</sup> In 1988, however, the Federal Bureau of Prisons did acknowledge the problems facing mothers incarcerated in federal facilities and enacted the Mothers and Infants Together Program (MINT).<sup>147</sup> In this program, community-based facilities in seven locations house pregnant inmates for two months before birth and three months afterward; at MINT locations, mothers receive parenting classes, pre- and postnatal care, preemployment training, and physical and sexual abuse services, among other benefits.<sup>148</sup> In 1997, almost eighty-five percent of federal inmates who gave birth were able to participate in the MINT program.<sup>149</sup> The benefit of this program is obvious: newborns are not immediately and traumatically separated from their mothers postbirth, allowing for bonding and attachment.

The downsides of this program are also readily apparent. As it is a federal program, only those incarcerated in federal prisons are eligible (that is, those who have been convicted of federal crimes). Further, only pregnant inmates are given this option; this means that expectant fathers are excluded. As a final problem, the mothers are only allowed to stay with their newborns for three months postbirth.<sup>150</sup> Not only does this mean that mothers who enter prison with already born infants are excluded, but even those who are pregnant are not given very much time to establish bonds. Three month old babies are then sent to live with an alternate caregiver until the mother is released. Thus, the attachment problems come right back into the picture.

The Federal Bureau of Prisons also implemented family oriented and parenting programming that is intended to promote family values, “counteract negative family consequences resulting from . . . incarceration,” and allow the “institutional social environment [to] be improved through opportunities for inmates to maintain positive and sustaining contacts with their families.”<sup>151</sup> While beneficial in their focus on family contact, these programs, again, only apply to those incarcerated in federal prisons and do nothing to address family contact and connections in

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146. See ZUPAN, *supra* note 6, at 47; discussion *supra* Part II.A.2.

147. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-00-22, WOMEN IN PRISON: ISSUES AND CHALLENGES CONFRONTING U.S. CORRECTIONAL SYSTEMS 58–59 (1999) [hereinafter WOMEN IN PRISON]; Pojman, *supra* note 2, at 56–57.

148. WOMEN IN PRISON, *supra* note 147, at 58–59.

149. *Id.* at 59 (noting participation by sixty-four out of seventy-five inmates who gave birth).

150. See *supra* note 148 and accompanying text.

151. FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5355.03: PARENTING PROGRAM STANDARDS 1 (1995); see also Markel et al., *supra* note 133, at 1183.

local facilities. Further, these programs require the expenditure of “substantial governmental resources” to implement.<sup>152</sup>

### C. State Intervention

While courts and federal agencies are hesitant to play too much of an authoritative role in jail administration, state legislatures do not give as much deference to local officials.<sup>153</sup> Statutory mandates can limit the ability of sheriffs and other administrators to arbitrarily impose visitation policies and procedures. They can also propose legislation that promotes healthy parent-child relationships and offender rehabilitation through funding and development of alternative correctional arrangements. These limitations and alternative arrangements all occur at the state level; as of yet, there have been no federal legislative or administrative attempts to control local jail conditions or procedures.<sup>154</sup> Thus, the discussion that follows only addresses state attempts at bridging the gap between jailed parents and their young children.

#### 1. General State Standards and Accreditation

Due in part to inmate challenges to jail conditions during the 1970s and 1980s, there was a push for increased state control over jail administration,<sup>155</sup> and many states adopted mandatory jail standards relating to such issues as visitation and inmate programming.<sup>156</sup> Many of these requirements were based on standards promulgated by the American Correctional Association (ACA) and the National Sheriff's Association, which states could then independently adopt.<sup>157</sup> The ACA continues to generate standards for all correctional facilities, but it is effectuated primarily through accreditation and subsequent monitoring.<sup>158</sup> Accreditation occurs on a case-by-case basis, however, so states or individual insti-

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152. Markel et al., *supra* note 133, at 1183.

153. By 1978, forty-five states adopted comprehensive standards regarding jail operation and administration (some of which addressed visitation), despite the fact that most jails are still controlled by local officials. ZUPAN, *supra* note 6, at 43, 49; *see also* Rhodes v. Chapman, 452 U.S. 337, 362 (1981) (Brennan, J., concurring) (“Courts must and do recognize the primacy of the legislative and executive authorities in the administration of prisons . . . .”); Bell v. Wolfish, 441 U.S. 520, 568 (1979) (Marshall, J., dissenting) (highlighting that the majority equated deference to jail administrators to that given prison administrators).

154. The MINT program discussed in Part III.B attempts to foster mother/child bonds, but, again, it is only for those who would be incarcerated in federal prisons and has nothing to do with potentially similar local jail programs.

155. ZUPAN, *supra* note 6, at 43.

156. *Id.*

157. *Id.*; *see also Accreditation in Florida Leading the Nation*, FLA. DEP'T OF CORR., <http://www.dc.state.fl.us/pub/ACA/index.html> (last visited Aug. 16, 2012).

158. *See* AM. CORR. ASS'N, CONSULTANT MANUAL 8–10 (4th ed. 2008).

tutions may or may not choose to model their own rules after the ACA's.<sup>159</sup>

Furthermore, the effectiveness of state standards (whatever their source) is debatable. "Establishment and enforcement of minimum standards is a highly political exercise. Products of political bargaining and consensus-building, the standards adopted by states are often vague and unenforceable. . . . [E]ven where states have adopted standards, local jails have failed to live up to them."<sup>160</sup> These problems with specificity and monitoring/enforcement could potentially be resolved with more particularized state legislation, but as the next Section indicates, such legislation is practically nonexistent.

## 2. *State Legislation*

Even though many states and individual institutions have not adopted the ACA's or similar standards, state legislatures remain free to dictate their own standards regarding the incarceration of offenders and pretrial detainees. There are many types of state legislation that can affect and improve the confinement of inmates in county jails. The most common types of legislation are community corrections acts and general county jail acts.

Many state corrections acts provide for the establishment of community corrections and diversion programs that are authorized and funded by the state but managed by individual counties.<sup>161</sup> These programs are essentially alternatives to state or county incarceration.<sup>162</sup> Tennessee law provides a useful definition of what may constitute community corrections: "[S]ervices and programs provided in local jurisdictions for eligible offenders in lieu of incarceration in state penal institutions or local jails and workhouses. The alternatives include noncustodial community corrections options, short-term community residential treatment options and individualized evaluation and treatment services . . . ."<sup>163</sup> Examples

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159. It remains unclear how many institutions actually follow the ACA's rules. The ACA itself maintains that 1,500 institutions were accredited by 2008; other sources indicate that the number of jails, in particular, that have been accredited is much lower, at 100. *Id.* at 8; David M. Parrish, *Jails Are Not What They Used To Be*, CORR. TODAY, Feb. 1, 2006, at 6.

160. ZUPAN, *supra* note 6, at 43–44.

161. As of 1998, twenty-three states had community corrections facilities. Pojman, *supra* note 2, at 58. For examples of statutes that provide for the establishment of community corrections or diversion programs, see generally ALA. CODE § 15-18-172 (2011); COLO. REV. STAT. § 17-27-103 (West 2011); IND. CODE ANN. § 11-12-1-2 (West 2011); KAN. STAT. ANN. § 75-5291 (West 1997); MICH. COMP. LAWS ANN. § 791.404 (West 2010); MINN. STAT. ANN. § 401.01 (West 2012); MISS. CODE ANN. § 9-7-201 (West 2012); MONT. CODE ANN. § 53-30-311 (2011); NEB. REV. STAT. § 47-620 (2010); N.M. STAT. ANN. § 33-9-3(A) (West 2011); TENN. CODE ANN. § 40-36-103 (West 2010); VA. CODE ANN. § 9.1-173 (2006); W. VA. CODE ANN. § 62-11C-1 (West 2010).

162. Common examples of what constitutes "community corrections" are found in IND. CODE ANN. § 11-12-1-2.5 (West 2011) and MISS. CODE ANN. § 9-7-201(4) (West 2011).

163. TENN. CODE ANN. § 40-36-102(5) (West 2010). Though this may not be a comprehensive definition of what types of programs could qualify as community corrections, it covers the main ideas.

of some common goals for these programs are highlighted in Minnesota's community corrections legislation:

- (1) to provide eligible offenders with an alternative to confinement and a criminal conviction;
- (2) to reduce the costs and caseload burdens on district courts and the criminal justice system;
- (3) to minimize recidivism among diverted offenders;
- (4) to promote the collection of restitution to the victim of the offender's crime; and
- (5) to develop responsible alternatives to the criminal justice system for eligible offenders.<sup>164</sup>

Some of these programs explicitly recognize the special needs of certain offenders and the implications that their incarceration can have on others (including family members).<sup>165</sup> Tennessee, for example, states that one of the goals of its community corrections programs is to “[p]rovide opportunities for offenders demonstrating special needs to receive services that enhance their ability to provide for their families and become contributing members of their community.”<sup>166</sup> Some also indicate that the state will establish standards for the programs even though the local government may actually control the program.<sup>167</sup> These programs certainly provide a wonderful alternative for parents facing incarceration, but their limitations prevent them from being a panacea to the problems that arise when small children have parents in jail.

One major drawback to community corrections programs is that they typically only affect those who have been convicted—not pretrial detainees.<sup>168</sup> In Kansas, for example, only those convicted of felonies are eligible for community correctional services.<sup>169</sup> Further, these programs do nothing for jailed parents who do not qualify for the programs (perhaps because of prior offenses) and who are, thus, subject to the already-discussed problems associated with jail visitation. The programs do nothing to address the current situation of those who are in jail and not eligible for other placements. As a final drawback, while these programs provide for correctional arrangements that circumvent the overall prob-

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164. MINN. STAT. ANN. § 401.065 Subd. 2 (West 2012).

165. See, e.g., ALA. CODE § 15-18-173(4) (2011); MINN. STAT. ANN. § 401.065 Subd. 3 (West 2012); MONT. CODE ANN. § 53-30-302(3), (4) (2011); NEB. REV. STAT. § 47-621 (2010).

166. TENN. CODE ANN. § 40-36-104(5) (West 2010).

167. See, e.g., COLO. REV. STAT. § 17-27-108(2)(a) (West 2011); MICH. COMP. LAWS ANN. § 791.404(b) (West 2010); MINN. STAT. ANN. § 401.06 (West 2012); VA. CODE ANN. § 9.1-175 (2006); W. VA. CODE § 62-11C-3(a) (West 2010).

168. See, e.g., ALA. CODE § 15-18-175 (2011). But see MINN. STAT. ANN. § 401.065 Subd. 1(1) (West 2012); W. VA. CODE § 62-11C-5 (West 2010).

169. KAN. STAT. ANN. § 75-5291(a)(2) (West 2011). Some states generally allow only nonviolent felony offenders to participate in these programs. See, e.g., TENN. CODE ANN. § 40-36-106 (West 2010).

lems associated with jail confinement for certain inmates, they are not primarily focused on family reunification or increasing the quality of parent-child contact.<sup>170</sup> While states often have the authority to set standards for the programs, and could theoretically mandate family reunification projects, none appear to have done so.<sup>171</sup> Other state programs that provide alternatives to incarceration, discussed below, may come closer to achieving these goals.

For those who do not qualify for community correctional services, or for those in states without that alternative, jail is often the only option.<sup>172</sup> Though few states have explicit “county jail acts,”<sup>173</sup> all states have legislation regarding county jails generally.<sup>174</sup> These statutes address the administration, maintenance, and condition of jails in each particular state.<sup>175</sup> Unfortunately, few of these statutes have standards pertaining to visitation specifically. Visitation, apparently, is one of those areas of jail life that is left entirely to the jail administrator’s discretion; state legislatures have failed to encroach on this discretion.

Some of these statutes relate to visitation indirectly and in such a manner as to keep control with jail administrators. For example, Idaho law mandates county officials to inspect jails every three months and inquire into the jail’s security and the treatment and condition of those in jail.<sup>176</sup> One could make the argument that visitation policies are folded into security, condition, and treatment, but Idaho has no minimum standards regarding visitation that inspection would be designed to enforce. As another example, Illinois law states that any county jail that has agreed to hold immigration detainees is required to give religious workers “reasonable access” to the jail.<sup>177</sup> This access, however, is de-

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170. This is not to say that community corrections or diversion programs do not have elements that focus on developing quality family relationships. For example, Minnesota’s programs may provide for individual and family counseling services as well as access to other helpful community resources. MINN. STAT. ANN. § 401.065 Subd. 3 (West 1997). This focus on families, however, is not the primary focus of community corrections or diversion programs. By way of example, the purposes for Nebraska’s community corrections program are to:

Serve the interests of society by promoting the rehabilitation of offenders and deterring offenders from engaging in further criminal activity, by making community-based facilities and programs available to adult offenders while emphasizing offender culpability, offender accountability, and public safety and reducing reliance upon incarceration as a means of managing nonviolent offenders.

NEB. REV. STAT. § 47-620(2) (2010).

171. See Bloom, *supra* note 30, at 274–76.

172. Again, this Note focuses on jails specifically. Of course, incarceration in state and federal penitentiaries is always a possibility, but for purposes of this Note these options are not discussed.

173. See, e.g., 730 ILL. COMP. STAT. 125/0.01 (2010); WASH. REV. CODE ANN. § 70.48.170 (West 2011).

174. See, e.g., COLO. REV. STAT. § 17-26-101–102 (West 2011).

175. In the interest of brevity, the statutes in every state that pertain to county jails will not be listed. Colorado, however, has a good example of these statutes as its law provides a coherent and comprehensive statutory framework for establishing, maintaining, and regulating county jails. *Id.*

176. IDAHO CODE ANN. § 20-622 (West 2012).

177. 730 ILL. COMP. STAT. 125/26 (2010).

fined as “the ability of the religious worker to enter the jail facility to be available to meet with immigration detainees who wish to consult with the religious worker” and must be “consistent with the safety, security, and the orderly operation of the facility.”<sup>178</sup> Even though the statute requires jails to give access to such workers, how exactly such access is provided—and how much access is given—is left to the sheriff. Visitation policies for religious workers and the general public alike would, therefore, probably be the same.

Recently, state legislatures realized the need for more information regarding the children of incarcerated parents and called for policy reviews and multi-organizational collaboration to determine the best way to address the needs of these children.<sup>179</sup> Unfortunately, these statutes are usually only resolutions to create task forces or committees to look into the issues further; for example, “[i]n 2001, Oregon established by legislation a planning and advisory committee to make recommendations on how to increase family bonding for children of incarcerated parents.”<sup>180</sup> While these committees may have good intentions, apparently they have not yet led to any substantial reform. Further, it is unclear what the scope of these committees are and whether any effects will be felt at the local level.

Private state-based organizations may attempt to do, independently, what statutorily created task forces are supposed to do: investigate corrections facilities and inmate complaints and create reports in the hopes of effectuating change.<sup>181</sup> An example of one such organization is Illinois’s John Howard Association (JHA), which investigates the state’s correctional facilities and prepares reports to effectuate legislative action.<sup>182</sup> The Cook County Sheriff’s Office claims that it “strives to meet and exceed the standards of the American Correctional Association and the Illinois Department of Corrections Jail and Detention Standards Unit, and the John Howard Association, which monitors the rights of all jail and prison inmates.”<sup>183</sup> Given the despicable state of visitation in Cook County Jail,<sup>184</sup> however, either the Sheriff is not listening to JHA’s recommendations, or JHA is not providing recommendations on visita-

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178. *Id.*

179. *See* CHRISTIAN, *supra* note 126, at 12–14.

180. *Id.*

181. *See, e.g., Our Mission*, JOHN HOWARD ASS’N OF ILL., <http://www.thejha.org/mission> (last visited Aug. 16, 2012) (“[T]eams interview staff and inmates and use that research to issue fact-based reports to the public and policy makers aimed at forging policies that ensure public safety, create opportunities for rehabilitation and make the most prudent use of tax dollars. It reviews legislative activity and regularly provides testimony and information on sentencing and correctional policies.”).

182. *Id.*

183. *Department of Corrections*, COOK CNTY. SHERIFF, [http://web.archive.org/web/20101121195530/http://cookcountysheriff.org/doc/doc\\_main.html](http://web.archive.org/web/20101121195530/http://cookcountysheriff.org/doc/doc_main.html) (last visited Aug. 16, 2012).

184. *See Visitor Policy*, *supra* note 14.

tion.<sup>185</sup> Either way, these private organizations can only do so much. They can, along with anybody else, lobby for improved visitation in local facilities, but there is no guarantee (and only a very small hope) that legislatures will listen.

3. *Alternative Correctional Arrangements Specifically Addressing the Needs of Parents and Children*

In addition to the legislation already discussed, states may choose to authorize the use of nontraditional correctional arrangements. In the current context, this means that states can enact legislation providing alternatives to traditional incarceration that explicitly benefits parents and their newborns and infants.<sup>186</sup> Examples of such alternatives include in-house nurseries that allow mothers to take care of newborns and infants in prison, deferred incarceration, and community-based alternatives to incarceration.<sup>187</sup> Each of these programs allows for increased contact with small children and helps to establish and foster bonds between parent and child, though each is not without its problems.

a. *Prison Nurseries*

Prison nurseries are programs that allow babies and small children to stay with their incarcerated mothers.<sup>188</sup> Currently, thirteen states provide incarcerated mothers access to prison nursery programs.<sup>189</sup> There are generally two types of prison nurseries: long-term programs that allow newborns to stay with their mother for up to age eighteen months, and interim nurseries, which allow infants to stay with their mother for a shorter period of time, usually up to six weeks.<sup>190</sup> The obvious benefit of these programs is that because the child stays with his or her mother, there is no disruption in attachment and no need for contact visitation for the child because, obviously, there is no need for visitation at all. Detractors argue that children should not be raised in prison,<sup>191</sup> but such small babies who are still in the process of attachment cannot perceive that they are in prison; as one mother commented, “[babies] know they are

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185. Though JHA names one of its major efforts to be the Prison Monitoring Project, through which it claims to “conduct[] regular monitoring tours of the Department of Corrections’ adult facilities,” it does not appear that they actually monitor jails. *Prison Monitoring Project*, JOHN HOWARD ASS’N OF ILL., <http://www.thejha.org/monitor> (last visited Aug. 16, 2012).

186. Bloom, *supra* note 30, at 274–75.

187. *Id.*

188. Katherine Gabel & Kathryn Girard, *Long-Term Care Nurseries in Prisons: A Descriptive Study*, in CHILDREN OF INCARCERATED PARENTS, *supra* note 3, at 237, 238.

189. REBECCA PROJECT, *supra* note 118, at 7.

190. Gabel & Girard, *supra* note 188, at 238.

191. Mauskopf, *supra* note 1, at 110; *see, e.g.*, Suzanne Smalley, *Bringing Up Baby in the Big House*, DAILY BEAST (May 13, 2009, 8:00 PM), <http://www.thedailybeast.com/newsweek/2009/05/13/bringing-up-baby-in-the-big-house.html> (“Some prison guards aren’t sympathetic toward the [incarcerated mothers]. They make snide remarks that children don’t belong in jail.”).

with their mothers and that's where they want to be."<sup>192</sup> Nursery programs also provide other advantages, including assistance from other mothers and staff, increased self-respect, socialization of babies, and services and supplies for them.<sup>193</sup> "Mothers who participate in prison nursery programs show lower rates of recidivism. Moreover, the mother-child bond is preserved during a formative and critical time in an infant's development, and the emotional and financial costs of foster care involvement are avoided."<sup>194</sup> Mothers are given the opportunity to take parenting classes, and the ability to care for their children can provide a powerful incentive for mothers to change any criminal habits, such as drug use.<sup>195</sup> Amidst these benefits, though, the limitations of these programs become readily apparent.

Perhaps the biggest problem with these nursery programs is that, similar to the MINT program, they predominantly pertain only to those who have been convicted of offenses and sentenced to prison—not pre-trial detainees or those sentenced to time in jail.<sup>196</sup> Further, only mothers are given the opportunity to keep their small children with them—not fathers.<sup>197</sup> The cost of such programs could also prevent their enactment. At one New York prison nursery, for example, mothers are provided all the supplies they need for their babies, including diapers, formula, and health care.<sup>198</sup> The amount of staffing and supervision needed to implement such programs, educate and evaluate the mothers, and help care for the babies also increases the cost of such programs.<sup>199</sup> Further, even though several states have legislation allowing for the implementation of prison nurseries, few states actually have such programs in place.<sup>200</sup> Finally, there may be legitimate concerns regarding negative effects on the development of children raised in prison.<sup>201</sup>

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192. Mauskopf, *supra* note 1, at 111 (quoting Jean Harris, a former inmate) (internal quotation marks omitted); accord Smalley, *supra* note 191.

193. Gabel & Girard, *supra* note 188, at 246–48.

194. REBECCA PROJECT, *supra* note 118, at 13.

195. Mauskopf, *supra* note 1, at 111–12; see also Gabel & Girard, *supra* note 188, at 246.

196. Riker's Island jail in New York is the only jail that offers a nursery for mothers awaiting trial. See Pojman, *supra* note 2, at 56.

197. Mauskopf, *supra* note 1, at 116–19 (also discussing the potential equal protection problems that could arise from such disparity).

198. *Id.* at 108.

199. See, e.g., Gabel & Girard, *supra* note 188, at 239 (discussing the pre-program evaluations of potential mothers that must occur in a New York prison nursery); *id.* at 240–41 (discussing the programs and treatments that mothers at a New York prison nursery receive). But see Mauskopf, *supra* note 1, at 115 (arguing that prison nurseries may be less expensive per child than having children placed in foster care).

200. Bloom, *supra* note 30, at 274–75.

201. Pojman, *supra* note 2, at 65.

### b. Deferred Incarceration

While judges have some latitude in determining a person's sentence once he or she has been convicted, many mandatory sentencing laws inhibit judges' ability to fully factor in the need for parental support of small children in determining these sentences;<sup>202</sup> in fact, federal courts have split on whether to even consider family responsibilities at all.<sup>203</sup> Both Congress and the U.S. Sentencing Commission "discourage sentencing departures based on family ties and responsibilities."<sup>204</sup> When deferred incarceration is an option, however, the judge may postpone a parent's inevitable incarceration until a later date: "[I]f an offender is the irreplaceable caregiver for children, the offender in a time-delayed sentencing scheme would defer his incarceration until after the children reach the age of majority or until alternative and feasible care can be arranged."<sup>205</sup>

These deferral programs can be tailored to the particular offender or to the particular needs of the children involved; for example, a program might allow a deferral period of up to six weeks postbirth for pregnant offenders but only if they have committed nonviolent crimes.<sup>206</sup> The programs can also mandate supervised release conditions such as community service requirements, drug testing, or the use of tracking devices (electronic bracelets, for example).<sup>207</sup> While these programs explicitly address the needs of some parents to establish bonds with their children and the opportunity to set up adequate alternative placements for young children,<sup>208</sup> their benefits are extremely limited.

At the risk of sounding like a broken record, the main problem with deferred incarceration is that it is only available to those who have been convicted, not to pretrial detainees. And even for those who are eligible for deferral, the amount of time they are allowed to spend with their newborns and infants may be significantly limited. For families who may face up to a year of separation, a few weeks is not much time to establish strong parent-child bonds and is likely a small consolation to parents.

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202. The primary area in which minimum sentencing laws are enacted is drug-related offenses. Bloom, *supra* note 30, at 274; Mauskopf, *supra* note 1, at 104–05. See Markel et al., *supra* note 133, at 1171–78 for a description of federal and state sentencing guidelines and the consideration of family ties as mitigating factors in sentencing decisions.

203. Mauskopf, *supra* note 1, at 105.

204. Markel et al., *supra* note 133, at 1181.

205. Jennifer Collins et al., *Sentencing Discounts for Parents? A Guest Post*, FREAKONOMICS (Jul. 15, 2009, 12:25 PM), <http://www.freakonomics.com/2009/07/15/sentencing-discounts-for-parents-a-guest-post/>.

206. Bloom, *supra* note 30, at 275.

207. Collins et al., *supra* note 205.

208. Bloom, *supra* note 30, at 275.

## c. Community-Based Alternatives to Incarceration

Similar to the MINT program and community corrections programs already discussed, explicitly child-oriented community-based alternatives to incarceration have been implemented in several states.<sup>209</sup> These programs allow mothers to live and interact with newborns as well as any of their other children in a community context (as opposed to a “lock-down facility”).<sup>210</sup> As an alternative to serving a prison sentence, these programs provide a “supervised and structured community” where mothers receive help in dealing with family issues and addictions, job training, and personal finance instruction.<sup>211</sup> California’s Community Prisoner Mother (Mother-Infant Care) Program is perhaps the best example of a community-based alternative to incarceration that is focused explicitly on families.<sup>212</sup> This program allows young children, up to the age of six, to stay with their mothers for up to six years; the services provided include “parenting/child development education, substance abuse treatment, preemployment training, aftercare planning, and counseling.”<sup>213</sup> Currently, thirty-four states have family-based treatment centers and thirty-two states sentence mothers to family-based treatment programs as an alternative to prison.<sup>214</sup>

In this context of community treatment, “developing the mother-child relationship has shown considerable rehabilitative effects, including improved outcomes for economic independence and lowered recidivism rates.”<sup>215</sup> Again, mothers are allowed to establish parent-child bonds as well as gain valuable experience, which increases their chances of becoming loving, supportive mothers in the future. As California’s program highlights, children may remain with their mothers for a relatively long period of time, allowing bonding and attachment to fully develop and flourish. As with many of the arrangements already discussed, however, the focus of these programs is on *mothers* and their children—not fathers. These options are also usually only available as sentencing alternatives, meaning that those parents awaiting trial in jail are not eligible for these benefits. As a final point, the fact that these programs are a viable option, but have not flourished nationally, indicates that it will take considerable effort for these programs to become the norm.<sup>216</sup>

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209. REBECCA PROJECT, *supra* note 118, at 19.

210. *Id.* at 12.

211. *Id.* at 29.

212. See Bloom, *supra* note 30, at 275.

213. WOMEN IN PRISON, *supra* note 147, at 59; Markel et al., *supra* note 133, at 1182.

214. See REBECCA PROJECT, *supra* note 118, at 19.

215. *Id.* at 12.

216. Markel et al., *supra* note 133, at 1182.

#### D. Individual Jail Intervention

The possible solutions that have been discussed offer many promising benefits, despite their own individual problems. But when judicial intervention fails, when states have not adopted legislation or alternatives to incarceration, or when these options are not available to certain inmates or detainees, there is only one other option: the individual county or jail must decide, on its own, to allow contact visitation or create programs promoting parent-child relationships. While jail administrators often do not exercise their discretion and ability to enact such policies and programs, they certainly have the option to do so. An example of one such program is Prison MATCH (Mothers, Fathers, and Their Children).<sup>217</sup>

The Prison MATCH model has four main components: “the Children’s Center . . . supportive social services, parenting skills and child development training for inmates, and a program to break the intergenerational cycle of addiction.”<sup>218</sup> The program, which can be implemented in jails, encourages children of all ages to spend at least a few hours once a week with their parents to establish and strengthen the parent-child relationship.<sup>219</sup> The specifics of these programs can vary, such as who is eligible for special visitation, what sorts of activities are involved, and how often visits occur,<sup>220</sup> and the programs can be implemented at individual-institution, county-wide, or state-wide levels.<sup>221</sup> The general idea, however, is the same: kids need to see their parents, and these programs help facilitate better visitation.

The benefits of these programs are that they can apply equally to both mothers and fathers<sup>222</sup> and can be implemented at the local level for

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217. Rose Weilerstein, *The Prison MATCH Program*, in CHILDREN OF INCARCERATED PARENTS, *supra* note 3, at 255, 257–59. Note that the program’s acronym was derived from its original name—Prison Mothers and Their Children. *Id.* at 257.

218. *Id.* at 259.

219. *Id.*

220. See, e.g., *MATCH Center Visits*, MOTHERS AND THEIR CHILD., <http://www.mothersandtheirchildren.org/pmweb/our-programs/match-center> (last visited Aug. 16, 2012) (explaining the visits for children and incarcerated mothers in North Carolina); *Parenting Education*, MOTHERS AND THEIR CHILD., <http://www.mothersandtheirchildren.org/pmweb/our-programs/parenting-classes> (last visited Aug. 16, 2012) (explaining the criteria for participation in the North Carolina program).

221. Los Angeles, for example, implemented the TALK (Teaching and Loving Kids) visitation program for its county jail system. *When Parents Do Time*, *supra* note 99, at 14. In the “County Jail system’s parent-child visitation program, [parents] are able to do the things with their kids that they took for granted before they were incarcerated: hold them, play and laugh with them. Nearly three-quarters of the 2,300 prisoners at Sybil Brand are mothers; another 10% are pregnant.” *Id.* at 13.

222. The availability of visitation programs depends, however, on the type of institution in which the program is adopted. Programs at all-female institutions would not automatically apply to all-male or mixed-population institutions; programs at mixed-population institutions, however, could be offered to both mothers and fathers. See, e.g., Frank Stoltze, *LA Seeks to Bring Children Closer to Mothers Behind Bars*, S. CAL. PUB. RADIO (Jul. 20, 2010), <http://www.scpr.org/news/2010/07/20/17472/la-seeks-bring-children-closer-mothers/> (describing a visitation program at a Los Angeles County women’s facility and administrators’ hopes to extend the program to fathers).

those parents who are incarcerated or detained in jail. Parents and children can be encouraged to have interactive, fun visits and to maintain and strengthen their family bonds. For infants and newborns, this means that parents would be able to establish the parent-child bond in the first place and hopefully avoid the problems associated with attachment disruption, termination of parental rights, and recidivism discussed in Part II.C.

Perhaps the biggest impediments to these programs are that they require a vast amount of effort and resources to implement and operationalize.<sup>223</sup> This may include drumming up a large amount of community support and involvement,<sup>224</sup> which in many areas may be difficult, if not impossible, to do. And, as has been made evident throughout this Note, individual jail administrators ultimately make the decisions regarding visitation in their own facilities. Getting past this hurdle to set up visitation programs like Prison MATCH or other individualized programs may be nearly impossible to do.

#### IV. RECOMMENDATION

For the newborns and infants whose lives have been drastically and traumatically affected by having a parent put in jail, the need arises to make sure that they are not denied the intimate physical contact with their parents that they need to become confident, well-adjusted adults. Parental incarceration in county jails and a lack of quality visitation present some serious issues that the U.S. correctional system fails to address. As the previous review indicates, there are several ways that the quality and strength of the parent-child relationship can be maintained and increased despite parental jailing. Unfortunately, many of these judicial, federal, state, and individualized solutions fall below par. Common and related problems are evident; any comprehensive solution must address all of these problems to be successful and to help families stay in contact. The solution must require that jailed parents and their newborn and infant children have the ability to stay in physical contact; it must allow such contact for all types of jailed parents (pretrial detainees and convicted offenders alike); it must focus on jailed fathers<sup>225</sup> as well as jailed

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223. Weilerstein, *supra* note 217, at 261–63.

224. *Id.* at 261–62.

225. While it is true that many children with a jailed father are able to remain with their mother, this does not mean that the father is not profoundly affected by the separation from his child or that the child is not also similarly affected. *See, e.g., When Parents Do Time, supra* note 99.

[I]ncarcerated fathers also feel the impact of separation from their children. And although men are not the primary care givers in most cases, an increasing number are participating in parenting classes and visitation programs, at least in the [Los Angeles] County Jail system.

Each of the 12 parenting classes offered to men in the county jails are filled to capacity, with as many as 40 to each class and a long waiting list . . . . Some men are ordered by the court to participate, while others do it for custody reasons or for the same reasons as some female inmates. About 20% are the legal guardians of their children . . . .

mothers; and it must overcome the obstacle of the all-powerful sheriff's discretion.

The only solution that meets all of these requirements is state legislation mandating county jails to establish visitation programs allowing newborns and infants to have physical contact with their jailed parents. This Part discusses some of the critical features that need to be included in the legislation and anticipates some of the arguments that might be lodged against such a proposal. Ultimately, this Part demonstrates that state mandated contact visitation is the best way to establish, maintain, and reinforce the parent-child bond and, in doing so, to provide important benefits to jailed parents, their young children, and society alike.

#### A. *Mechanics of the Legislation*

This legislative approach can best be viewed as a hybrid between existing state legislation and individualized programs like the Prison MATCH program. As already discussed, existing state legislation is often vague and always deferential to jail administrators' decisions; on the contrary, individualized programs can be very complex, costly, and difficult to implement.<sup>226</sup> Were state legislators to mandate contact visitation between newborns and their jailed parents, they could still allow jail administrator to determine how best to implement that mandate, whether through an extensive MATCH-like program or something more basic. They could set the terms for visitation programs to harmonize with existing policies, procedures, and facilities.<sup>227</sup> Further, as this Section discusses, legislatures should allow for certain requirements, including limitations on who is eligible for contact visitation, utilization of existing resources to create programs for contact visitation, and supervision and enforcement of the legislation. While this approach would not be without its own problems, it would address some of the biggest concerns regarding jail visitation for newborns and infants.

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Gordon Heiden . . . participates in parenting classes and the TALK program to learn how to break the cycle of absentee parents like his own and build a greater trust with his daughter Kari-rissa, 4. Russell Kuiken . . . wants to better understand how to care for his 3-year-old son, Russell Jr., and be assured of gaining custody of the boy when he is released.

*Id.* at 14.

226. See *supra* note 223 and accompanying text (discussing the costs associated with the Prison MATCH program).

227. A similar idea was proposed regarding the transition of inmates from jail to society so as to reduce recidivism. The Urban Institute and the National Institute of Corrections developed a "Jail to Community (TJC) model that can be adopted in jurisdictions large and small, urban and rural. . . . [It was developed] in collaboration with an experienced group of advisors . . . including sheriffs . . . jail administrators, service providers, and formerly incarcerated individuals. The model was informed by innovative practices already under way . . . ." *The First Line of Defense: Reducing Recidivism at the Local Level*: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 111th Cong. 4 (2009) (statement of Amy L. Solomon, Senior Research Associate, Justice Policy Center, Urban Institute), [http://www.urban.org/UploadedPDF/901296\\_reducing\\_recidivism.pdf](http://www.urban.org/UploadedPDF/901296_reducing_recidivism.pdf).

### 1. *Limiting Visits*

Limiting the scope of this visitation legislation will likely be key to its approval and success.<sup>228</sup> Contact visitation could only be allowed for parents with children up to the age of two, including mothers who give birth to babies while in jail. Individual institutions could decide to implement programs similar to the MINT program<sup>229</sup> and allow newborns to stay with their parents indefinitely, but the amount of resources that such a program would require would likely make legislation mandating it far-fetched. Thus, legislation should only address contact visitation and only mandate such visitation between parents and small children. Using a cut-off point of age two for qualifying children is a good guideline, as hopefully by that point a parent-child bond will have been established and the child will have learned to communicate verbally (though this age cutoff is relatively arbitrary and could certainly extend to later ages).<sup>230</sup>

The program could also limit which parents are eligible for contact visitation with their children. In already existing programs, only those parents who have demonstrated good behavior are allowed special visitation privileges,<sup>231</sup> and similar restrictions can and should be put in place via legislation. Further, parents convicted or suspected of certain classes of crime, such as violent crimes or crimes against children, should not be eligible for contact visitation,<sup>232</sup> as research has noted:

It is important to note that not all contact should be maintained; many children whose parents become incarcerated are relieved of a stressful, dangerous home environment. One study found that one out of eight children who are reported victims of

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228. It would be wonderful if a legislature decided to allow contact visitation for all visitors, and to allow all jailed inmates to have such visitation, but this is unrealistic. The concerns that administrators voiced, including security and budget concerns, among others, is hard to reconcile with such an expansive visitation program. See discussion *supra* Part II.A.3.

229. See *supra* Part III.B.

230. See discussion *supra* note 8.

231. See, e.g., CREASIE FINNEY HAIRSTON, FOCUS ON CHILDREN WITH INCARCERATED PARENTS: AN OVERVIEW OF THE RESEARCH LITERATURE 30 (2007), <http://www.aecf.org/-/media/Pubs/Topics/Special%20Interest%20Areas/Incarceration%20and%20Reentry/FocusonChildrenwithIncarceratedParentsAnOverv/HAIRSTON.pdf> (describing how parents in visitation programs “must often . . . participate in a parent education course, avoid rule infractions and participate in post-visiting counseling sessions”).

232. *When Parents Do Time*, *supra* note 99, at 14 (quoting Ellen Barry, director of Legal Services for Prisoners with Children, describing the parents eligible for contact visitation and parenting classes through a California program as follows: “We’re not talking about cases where children are physically or sexually abused . . . . We’re talking about cases where women (and men) are not angels, trip up, get caught and may potentially lose their children who they love.”); Stoltze, *supra* note 222 (quoting Mary Weaver, head of Friends Outside in Los Angeles, as asserting: “We are not going to set up visits for an inappropriate person—meaning somebody who was molesting their children or something like that . . . .”); see also HAIRSTON, *supra* note 231, at 30 (“Parents who participate in [visitation] programs must usually meet certain requirements in terms of the type of criminal offenses they have on their records.”).

maltreatment have parents who were recently arrested; in 90 percent of cases, it was the child's mother who was arrested.<sup>233</sup>

In setting these limitations, however, legislatures need to be firm; essentially, there must be limits to the limits. Administrators should not be given so much discretion in deciding who is eligible for contact visits and what requirements parents need to meet in order to have such visitation that they effectively form a barrier to contact visitation. The whole point of state legislation in the first place is to avoid this potential side effect of unbridled discretion.

## 2. *Utilizing Existing Resources*

Similar to allowing administrators to tailor criteria for contact visitation to the needs of the particular facility, administrators should also be allowed to utilize existing resources and procedures in implementing contact visitation for newborns and infants. The same staff members who are responsible for the security of the jail, and for searching visitors before visits and inmates afterward,<sup>234</sup> could be responsible for overseeing the visitation of newborns and infants. Contact visitation could take place on the same days, and during the same hours, that a jail already has in place for visitation, and/or a special day or days for child contact visitation could be established within the already existing visitation schedule so as to minimize any additional burdens on jail staff. Contact visitation could also take place within the spaces and facilities available at the jail, perhaps in a gymnasium or classroom<sup>235</sup> so as to avoid the need for renovation or construction of additional facilities.

Perhaps the best preexisting resources for jail administrators are the guidelines and procedures generated by programs such as MATCH, Los Angeles' TALK program,<sup>236</sup> and other state or institutional programs. Administrators should be allowed, and in fact encouraged, to investigate which techniques and procedures would work best for their particular jail. They should be allowed to implement policies that reflect their particular abilities, needs, and limitations, perhaps even using prison visitation as a model.

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233. LAVIGNE ET AL., *supra* note 106, at 5.

234. See Peter M. Carlson, *Diversity of Correctional Officers*, in PRISON AND JAIL ADMINISTRATION: PRACTICE & THEORY 243, 243 (Peter M. Carlson & Judith Simon Garrett eds., 2d ed. 2008) (describing the duties of correctional officers in prisons and jails); Reginald A. Wilkinson & Tessa Unwin, *Visitation*, in PRISON AND JAIL ADMINISTRATION, *supra*, at 383, 385 (describing searches of visitors).

235. Virginia A. Huie, *Mom's in Prison—Where Are the Kids?*, USA TODAY MAG., Nov. 1993, at 30, 31 (describing the transformation of a "large gray, windowless room" in a San Francisco jail into a cheerful, fun, kid-friendly visitation room and the use of a jail gymnasium for the same purpose).

236. See *supra* notes 217–21 and accompanying text.

### 3. *Supervising Jail Programs*

Even in states that have adopted particular standards for local jails, monitoring and enforcement of these standards has been lax.<sup>237</sup> Further, existing statutory language can be vague and subject to differing interpretations by jail administrators.<sup>238</sup> Thus, the need for supervision of jails to ensure they adhere to the contact visitation legislation is critical. This supervision could take the form of mandatory self-reporting, announced and/or unannounced inspections,<sup>239</sup> or monitoring by the committees and task forces that have been set up in some states to investigate ways to increase inmate/family bonding.<sup>240</sup> While, again, jail administrators should be given deference in establishing methods and means for child contact visitation, states need to ensure that administrators are in fact doing so.

#### *B. Concerns Regarding the Legislation*

As with any solution to any problem, there are sure to be critics of this proposed solution—most likely, the sheriffs and jail administrators who would be responsible for upholding the legislation. As discussed in the beginning of this Part, however, allowing administrators to tailor their contact visitation rules or programs to fit the confines and resources of the existing jail should mollify many detractors. Still, jail administrators will likely perceive at least two consequences of the legislation with which they will take issue and which this Section attempts to address: (1) any associated costs of implementing the legislation, and (2) the security issues that result from allowing contact visitation.

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237. ZUPAN, *supra* note 6, at 43–44; PERFORMANCE AUDIT, *supra* note 39, at i–ii.

238. See *supra* notes 175–78 and accompanying text.

239. See, e.g., PERFORMANCE AUDIT, *supra* note 39, at 53 (recommending such inspections).

240. See CHRISTIAN, *supra* note 126, at 12–13 (discussing various states' legislation that calls for task forces and commissions to investigate and report on issues faced by children with incarcerated parents).

### 1. *Concerns Regarding Cost*

These days, any legislation that could potentially cause a government to spend more money is automatically suspect.<sup>241</sup> Understandably, county governments and administrative agencies are not immune to these concerns<sup>242</sup> and neither are jail administrators.<sup>243</sup> Thus, ensuring that the proposed legislation will put as little strain on local budgets as possible is critical to its success. By allowing jail administrators to determine the scope of contact visitation programs, economic flexibility will be built into the legislation. This means that for counties facing budget difficulties, only minimum contact requirements need to be met. There may be financial concerns, however, even with providing just the minimum.

Administrators may fear that they do not have the space in which to provide contact visitation and that they will have to either construct (costly) special facilities or pay for the use of and transfer of inmates to other community facilities. As has already been discussed, however, creative uses of existing spaces in jails will likely suffice.<sup>244</sup> Administrators may also fear that supervision of visits will require extra personnel and added payroll expenses. Contact visitation certainly requires added supervision<sup>245</sup>—but it does not necessarily have to be by paid jail employees. Reliance on specially trained community volunteers to supervise

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241. For example, the Congressional Budget Office (CBO) recently issued a report regarding the federal budget and suggested ways for Congress to decrease spending and reduce the budget deficit; one substantial chapter is devoted to reducing mandatory spending (i.e. spending due to authorizing legislation). U.S. CONG. BUDGET OFFICE, REDUCING THE DEFICIT: SPENDING AND REVENUE OPTIONS, PUB. NO. 4212, at 11–67 (2011), <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/120xx/doc12085/03-10-reducingthedeficit.pdf>. The CBO is quick to point out, however, that options that would increase Congressional spending were included only because of requests to do so (not, apparently, because the CBO would actually advise Congress to increase spending on anything). *Id.* at 18.

242. See, e.g., Karen Forman, *Economic Issues Top Concerns for Local County Legislators*, HUNTINGTON PATCH (Jan. 11, 2011), <http://huntington.patch.com/articles/economic-issues-top-concerns-for-local-county-legislators-2> (identifying the budget concerns of legislators in Suffolk County, NY).

243. Proposals for video visiting demonstrate this type of financial concern. The Illinois Department of Corrections (IDOC) has begun to install video cameras by which inmates can have virtual visits with family members. But, as indicated by Illinois State Representative Karen Yarbrough, “video visiting will have to be revenue neutral, as the state’s financial crisis prohibits all but the most vital expenditures.” As a result, “[m]anagers at IDOC are considering out-sourcing the video visits to minimize costs. Users might be asked to pay a small fee in exchange for an hour with an inmate.” Robert Manor, *Video Visits for Illinois Inmates and Families*, JOHN HOWARD ASS’N OF ILL., <http://www.thejha.org/videovisits> (last visited Aug. 16, 2012). Though this is a state concern, as it involves the state prisons, similar concerns could, and likely do, arise at the jail level.

244. See *supra* note 235 and accompanying text.

245. See, e.g., *Inmate Information*, SEQUATCHIE CNTY. SHERIFF’S DEP’T, <http://www.sequatchie.sheriff.com/inmate-information/> (last visited Aug. 16, 2012) (“Any contact visit allowed by the Jail Administrator requires direct supervision by an officer on a one-on-one basis.”).

and facilitate contact visitation between children and their parents can ease the burden on paid staff.<sup>246</sup> Furthermore, any program that has the potential to reduce recidivism rates and help children stay out of jail later in life<sup>247</sup> has the potential to keep jail costs down in the long run—an economic incentive that jail administrators need to take seriously.

## 2. Concerns Regarding Jail Safety

Security is a major concern anytime outsiders are brought into a correctional facility, mostly because of the risk of introducing contraband into the general jail population.<sup>248</sup> As cases like *Overton v. Bazzetta* and *Block v. Rutherford* indicate, administrators are quick to point out the great importance that security plays in the successful administration of jails.<sup>249</sup> While security is obviously an important consideration, it must be noted that jails already have security forces and screening mechanisms in place.<sup>250</sup> These are the same security measures that would be utilized for children's contact visits, though there would be the added need to monitor the visits and perhaps search inmates afterward.<sup>251</sup> Utilizing existing staff or trained volunteers, however, to perform these added security measures would ensure that the security of the jail is not compromised at any point during the visit. This would also ensure the safety of young children brought into the jail.

It must be noted that the visitors in these cases would be newborns and infants who are incapable of formulating and carrying out a plan to smuggle contraband. While caregivers could certainly attempt to use babies as smuggling vehicles,<sup>252</sup> a simple diaper change in the presence of

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246. Richard L. Stalder, *Volunteering*, in PRISON AND JAIL ADMINISTRATION, *supra* note 234, at 291, 291–92; see, e.g., *Service Opportunities*, MOTHERS AND THEIR CHILD., <http://www.mothersandtheirchildren.org/pmweb/get-involved/volunteer/service-opportunities> (last visited Aug. 16, 2012).

247. See *infra* Part IV.C.3.

248. See Michael B. Cooksey, *Custody and Security*, in PRISON AND JAIL ADMINISTRATION, *supra* note 234, at 61, 64 (“[Correctional S]taff must know what items enter and exit . . . Visitors should pass through a metal detector. Because most serious contraband is introduced by inmate visitors, visitors who behave suspiciously should be subject to a more thorough search prior to visiting. Thoroughly searching inmates following visits also will deter the introduction of contraband.”).

249. See *Overton v. Bazzetta*, 539 U.S. 126, 131–33 (2003); *Block v. Rutherford*, 468 U.S. 576, 589 (1984).

250. See IRWIN, *supra* note 13, at 43 (“[S]ecurity has been the fundamental concern in the construction of jails. . . . [T]his concern almost invariably results in massive buildings, complicated locking systems, and elaborate surveillance techniques, which not only increase security but also restrict the prisoners’ movement and form almost impassable barriers between them and outsiders.”); ZUPAN, *supra* note 6, at 54 (“[Jail correctional] officers, whose primary responsibility is to control inmates, are . . . governed by an exhaustive list of rules that prescribe expected behavior in all situations.”).

251. See Cooksey, *supra* note 248, at 64.

252. See, e.g., *La. Jail Trusty Used Prosthetic Leg for Smuggling*, CORR. ONE (June 9, 2010), <http://www.correctionsone.com/contraband/articles/2080495-La-jail-trusty-used-prosthetic-leg-for-smuggling/> (noting that contraband was allegedly smuggled into a Louisiana jail in a prosthetic leg). If contraband is smuggled into jails using prosthetic legs, there is no reason to think that babies’ diapers are any less suspect. And sadly, there is evidence that this does, in fact, happen. See, e.g., *Babies Being Used to Smuggle Drugs into B.C. Prisons, Warns Guard*, CANADA.COM (Jan. 25, 2008),

a guard should alleviate any concerns. Further, if jail personnel apprehend an inmate or caregiver trying to sneak in contraband via the child's contact visitation, such visitation could very easily be suspended or permanently terminated.<sup>253</sup>

### C. *Benefits of This Solution*

Despite the previous discussion of how to implement the proposed legislation and what people might argue in opposition to it, the ultimate question really is *why* states should implement mandatory contact visitation legislation. As Part II.C explained, there are several negative effects that parental jailing and the subsequent lack of contact can have on a newborn or infant. This Section attempts to demonstrate how contact visitation would help. It links the problems already discussed—bonding and attachment issues, termination of parental rights implications, and the negative social consequences of increased recidivism rates and higher chances of criminality in children—with the proposed solution and hopefully demonstrates just why contact visitation legislation would be beneficial.

#### 1. *The Benefit of Bonding and Attachment*

Perhaps the greatest benefit that contact visitation legislation will have is the increased likelihood of a strong parent-child bond between the jailed parent and his or her newborn or infant child.<sup>254</sup> Preserving the parent's ability to touch, hold, and interact with these small children is crucial during the first years of a child's life, and incarceration will likely result in the inability to do these things: "Parents incarcerated before or soon after the birth of their child may not see their child until after the critical period for attachment has ended."<sup>255</sup> Maintaining parent-child contact is thus vital for establishing and maintaining attachment and the parent-child bond:

When a parent and child must be separated, frequent contact between parent and child will be instrumental in preserving the parent-child bond and in reducing the child's emotional distress. . . . A child should be permitted to visit her parent for several hours at a time at least once a week, and comfortable surroundings that permit normal interaction and physical contact between parent and child should be provided.<sup>256</sup>

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<http://www.canada.com/theprovince/news/story.html?id=e3a93651-7c87-42d5-aa26-1577ddc7ceb7&k=5651>.

253. See *supra* note 231 and accompanying text.

254. See discussion *supra* Part II.C.1.

255. LAVIGNE ET AL., *supra* note 106, at 5.

256. *On Prisoners and Parenting*, *supra* note 9, at 1425.

When a parent is in jail, the only way to preserve this bond is to remove the physical barriers between parent and child and allow intimate parent-child contact during visitation. The opportunity for establishment and maintenance of this attachment bond is thus a major benefit of mandating some form of contact visitation whereby jail administrators would be required to allow parents to touch and hold their newborn and infant children.

### 2. *The Benefit of Decreased Chances of Termination of Parental Rights*

Another potential benefit of state mandated contact visitation in jails for infants and newborns is its potential to reduce the jailed parent's risk of termination of parental rights.<sup>257</sup> Conditions of confinement that prevent the maintenance of a parent-child relationship pose a great risk to parents in states where the quality of the parent-child relationship is a factor in termination proceedings.<sup>258</sup> As the previous Section indicated, removing the physical barriers of visitation allows young children to attach to and bond with their parents; removing the barriers thus also allows parents to maintain a quality relationship with their child that can help safeguard their parental rights. Further, for parents who may not want their young children to visit them in jail because the physical barriers prevent any meaningful visitation,<sup>259</sup> allowing contact visitation would provide an incentive to have visitation in the first place. Again, this visitation would allow the parent to establish a relationship with the child and help the parent avoid termination of parental rights. As a final benefit in this area, allowing contact visitation and fostering strong parent-child bonds will help to prevent termination of parental rights after parents are released from jail. Babies will be less likely to form bonds with other caregivers and the risk of termination of parental rights as in the best interest of the child could be reduced.<sup>260</sup>

### 3. *The Benefits to Society*

A mainstay of this entire Part (and, really, this Note) is that support and preservation of the parent-child bond is a root source from which the benefits of contact visitation flow. Social benefits also flow from the parent-child bond in the potential for reduced parental recidivism and reduced tendencies for criminality in children.

For jailed parents, maintaining ties with family members in general can be a powerful motivator to stay out of the system.<sup>261</sup> “The family

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257. See discussion *supra* Part II.C.4.

258. See CHRISTIAN, *supra* note 126, at 5–6.

259. See *supra* note 17 and accompanying text.

260. See *On Prisoners and Parenting*, *supra* note 9, at 1418.

261. “[T]o improve reentry outcomes. . . it is important to draw on other positive networks of support, such as family members . . . .” AMY L. SOLOMON ET AL., LIFE AFTER LOCKUP: IMPROVING

serves a vital role for people returning from jail . . . Positive family connections may be a key factor in preventing recidivism and relapse. Accordingly, allowing family visits and encouraging ongoing contact can have a substantial impact in the transition process.”<sup>262</sup> Newborns and infants are certainly a big part of this family support and motivation for change.<sup>263</sup> Through contact visitation, the motivational benefit that newborns and infants provide may be truly realized. The potential for reduced recidivism is thus an important benefit that this contact visitation legislation can provide.

Not only is a lower risk of parental criminal behavior implicated, but so is a reduced risk of criminality in the child. Contact visitation for newborns and infants not only preserves the parent-child bond, but in doing so, it also reduces the child’s chances of engaging in criminal behavior in the future: “[E]nhanced visitation programs . . . view visitation as a beneficial, low-cost intervention that ameliorates the negative impacts of separation, can play a key role in children’s future development, and may help reduce future antisocial behavior among prisoners’ children. . . .”<sup>264</sup> Through contact visitation mandates, the risks discussed in Part II.C.2, including anxiety, behavior problems, and criminality, can be mitigated.<sup>265</sup> This legislation would thus likely provide a great benefit to society through reduced child criminality.

## V. CONCLUSION

“Humans need touch. We crave it, we hunger for it, and we get sick and can even die from the lack of it.”<sup>266</sup> Though perhaps not in as drastic a way, the lack of contact visitation in most local jails creates serious problems for newborns and infants who do, in fact, crave their parent’s touch. As this Note attempts to demonstrate, a lack of parental contact has significant implications for a young child’s psychological and developmental health, the jailed parents’ parental rights, and society’s interest in reduced crime rates. Jail administrators, however, either have not gotten this message or have chosen to ignore it. Further, judicial intervention, federal programs, existing state legislation, and alternative correctional arrangements also fail to provide a comprehensive, successful

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REENTRY FROM JAIL TO THE COMMUNITY 49 (2008), [http://www.jjay.cuny.edu/Final\\_Life\\_After\\_Lockup.pdf](http://www.jjay.cuny.edu/Final_Life_After_Lockup.pdf).

262. *Id.* at 39 (internal citation omitted).

263. See sources cited *supra* notes 112–14 and accompanying text.

264. *The Impacts of Enhanced Visitation Programs: A Research Synthesis*, LIVING INTERACTIVE FAMILY EDUC. PROGRAM, <http://extension.missouri.edu/4hlife/lifeevaluation/visitsimpact.htm> (last visited Aug. 16, 2012). “Frequent visitation in a non-threatening environment can lead to improvements in parent-child relationships, which can, in turn, lead to reductions in anti-social behavior . . . among the children of incarcerated parents.” *Id.*

265. See *supra* text accompanying notes 100–07.

266. Ben E. Benjamin & Ruth Werner, *Touch in the Western World*, MASSAGE THERAPY J., Winter 2004, at 28, 32.

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solution to the problem of jail visitation for newborns and infants. State legislators, therefore, need to step up and enact legislation that mandates contact visitation for this sensitive group. Such legislation should take care to realistically approach the limitations faced by many jail administrators and be flexible in its implementation, but it should be firm enough to guarantee that maintaining parent-child contact is at least possible. Though there are many negative consequences of parental jailing, and though some of them are necessary evils in the correctional system, unnecessary damage to critical parent-child bonds should not be one of them. In this context, the healing power of touch might just be the simplest solution to a complex problem.

