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Rebecca Covington

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INCARCERATED MOTHER, INVISIBLE CHILD

ABSTRACT

Today, the United States incarcerates more of its population than any other country, leading the world in a global three-decade increase in prison populations. Media and political attention recently focused on this significant increase, generating a nationwide discussion about the need to reform the U.S. criminal justice system and reduce the size of prison populations. This nationwide discussion has largely ignored the wider impact of incarceration on children. While parental incarceration was once relatively rare in the United States and internationally, today an estimated 2.5-2.7 million children in the United States have an incarcerated parent. Parental incarceration has negative consequences for children and its lasting, detrimental impact particularly affects the children of incarcerated mothers. This Comment argues that the United States should make supporting incarcerated mothers and their children a priority in its criminal justice system. This Comment proposes that the United States look to international standards while reforming its criminal justice system, particularly the Bangkok Rules governing the treatment of women prisoners and the United Nations Convention on the Rights of the Child. The United States should also be guided by the reform work to support mothers and children already underway in Scotland's criminal justice system. Like in Scotland, reform of the American criminal justice system should be structured to build resilience in mothers and their children. This Comment proposes that Martha Fineman's vulnerability theory provides the United States with a framework to ensure criminal justice reform is accomplished with a goal of reducing vulnerability and increasing resilience in incarcerated mothers and their children, with broader implications for overall criminal justice reform.

INTRODUCTION

The children of prisoners are the invisible victims of crime and the penal system. They have done no wrong, yet they suffer the stigma of criminality. Their rights to nurture are affected both by the criminal action of their parent and by the state's response to it in the name of justice.¹

When media and political attention recently focused on the American criminal justice system, they inspired talk of reform² and rare bipartisan support.³ This attention generated a national discussion about the injustice of mandatory sentencing,⁴ systemic racism,⁵ and the need to reduce prison populations,⁶ with some arguing for a complete overhaul of the system.⁷ Although prison populations have been increasing internationally over the last three decades, the United States has experienced the largest increase by far—both in amount of prisoners and in the length of time that increase has been sustained.⁸ Today, the United States incarcerates more of its population than any other country⁹ at five times the rate of the 1970s.¹⁰ While parental

¹ KATHLEEN MARSHALL, SCOT. COMM'R FOR CHILD. & YOUNG PEOPLE, CCYP/2008/1, NOT SEEN. NOT HEARD. NOT GUILTY. THE RIGHTS AND STATUS OF THE CHILDREN OF PRISONERS IN SCOTLAND 8 (July 2, 2008).

² Associated Press, *Federal Task Force on Criminal Justice Reform Visits Georgia*, WABE (Sept. 8, 2015), <http://wabe.org/post/federal-task-force-criminal-justice-reform-visits-georgia>; O.R., *President Obama for the Prisoners*, ECONOMIST: DEMOCRACY IN AMERICA (July 16, 2015, 12:29 AM), <http://www.economist.com/blogs/democracyinamerica/2015/07/criminal-justice-reform>.

³ Van Jones & Christine Leonard, *The Stars Have Aligned for Real Prison Reform*, CNN (July 22, 2015), <http://www.cnn.com/2015/07/22/opinions/jones-leonard-criminal-justice-reform/>; Jennifer Steinhauer, *Bipartisan Push Builds to Relax Sentencing Laws*, N.Y. TIMES (July 28, 2015), http://www.nytimes.com/2015/07/29/us/push-to-scale-back-sentencing-laws-gains-momentum.html?_r=0.

⁴ Andrea Jones, *The Nation's Shame: The Injustice of Mandatory Minimums*, ROLLING STONE (Oct. 7, 2014), <http://www.rollingstone.com/politics/news/the-nations-shame-the-injustice-of-mandatory-minimums-20141007>.

⁵ Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <http://www.theatlantic.com/magazine/archive/2015/10/the-black-family-in-the-age-of-mass-incarceration/403246/>.

⁶ Carl Hulse & Jennifer Steinhauer, *Sentencing Overhaul Proposed in Senate With Bipartisan Backing*, N.Y. TIMES (Oct. 1, 2015), <http://www.nytimes.com/2015/10/02/us/politics/senate-plan-to-ease-sentencing-laws.html>; Steinhauer, *supra* note 3.

⁷ Eugene O'Donnell, Op-Ed., *We Don't Need to Reform America's Criminal Justice System, We Need to Tear It Down*, VICE (Oct. 6, 2015), <http://www.vice.com/read/a-veteran-brooklyn-cop-and-prosecutor-explains-why-so-many-americans-are-behind-bars-1006>.

⁸ SARAH WAKEFIELD & CHRISTOPHER WILDEMAN, CHILDREN OF THE PRISON BOOM: MASS INCARCERATION AND THE FUTURE OF AMERICAN INEQUALITY 8 (2014).

⁹ *Id.* at 4. In fact, the United States has maintained the highest rate of incarceration in the world for more than a decade. *Id.* at 13.

incarceration was rare in the 1970s and would likely still be rare if incarceration rates stayed stable,¹¹ today an estimated 2.5 to 2.7 million children in the United States have an incarcerated parent.¹² In comparison, Scotland has one of the highest incarceration rates in Western Europe and experienced a similar increase in parental incarceration,¹³ yet its incarceration rates are still overshadowed by the rates in the United States.¹⁴ Unlike the United States, Scotland responded by incorporating support for the children of incarcerated individuals into its criminal justice system.¹⁵

The American criminal justice system primarily focuses on “identifying and responding to individual guilt or innocence” and largely ignores the impact on the children of incarcerated individuals,¹⁶ even though today incarcerated

¹⁰ *Id.* at 13. In the 1970s, the United States incarcerated approximately 150 people per 100,000. Coates, *supra* note 5. This increased to 300 people per 100,000 in the 1980s and then to 767 people per 100,000 in the mid 2000s. *Id.* Today, 707 people per 100,000 are incarcerated in the United States, accounting for 25% of the world’s prison population. *Id.* But the United States makes up less than 5% of the world’s total population. *Id.*

¹¹ See WAKEFIELD & WILDEMAN, *supra* note 8, at 12.

¹² *Id.* at 4, 19. This means at least three percent of American children today have been affected by parental incarceration. *Id.* In 1980, there were 500,000 children in America with an incarcerated parent. *Id.* at 4. A new study now estimates that over five million (or seven percent) of American children have experienced parental incarceration at some point in their lives. DAVID MURPHEY & P. MAE COOPER, CHILD TRENDS, PARENTS BEHIND BARS: WHAT HAPPENS TO THEIR CHILDREN 1 (Oct. 2015), <http://www.childtrends.org/wp-content/uploads/2015/10/2015-42ParentsBehindBars.pdf> (discussing that this number does not take into account non-residential parents who were incarcerated and so is likely an underestimate). Parental incarceration has become so prevalent that *Sesame Street* introduced a character with an incarcerated father in 2013. WAKEFIELD & WILDEMAN, *supra* note 8, at 4. *Sesame Street* also released an accompanying support guide. SESAME STREET, LITTLE CHILDREN, BIG CHALLENGES: INCARCERATION (2013), http://www.sesamestreet.org/cms_services/services?action=download&uid=784d4f44-425b-445a-842b-86b5088cbcc5.

¹³ TAM BAILLE, SCOT. COMM’R FOR CHILD. & YOUNG PEOPLE, CCYP/2011/2, NOT SEEN. NOT HEARD. NOT GUILTY. THE RIGHTS AND STATUS OF THE CHILDREN OF PRISONERS IN SCOTLAND 5 (June 6, 2011).

¹⁴ WAKEFIELD & WILDEMAN, *supra* note 8, at 13–14. The United States incarcerates people at four times the rate of Scotland. *Id.* at 14.

¹⁵ BAILLE, *supra* note 13, at 9 (June 6, 2011) (citing SCOT. GOV’T, DO THE RIGHT THING: A RESPONSE BY THE SCOTTISH GOVERNMENT TO THE 2008 CONCLUDING OBSERVATIONS FROM THE UN COMMITTEE ON THE RIGHTS OF THE CHILD 30f (2009)). Scotland’s response was influenced largely by the recommendations of the United Nations Committee on the Rights of the Child to the United Kingdom in 2008. *Id.* (citing UN Comm. on the Rights of the Child, *Consideration of Reports by States Parties under Article 44 of the Convention, Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, ¶¶ 44(c), 45(d), UN Doc. CRC/C/GBR/CO/4 (Oct. 20, 2008)).

¹⁶ OLIVER ROBERTSON, QUAKER UNITED NATIONS OFF., COLLATERAL CONVICTS: CHILDREN OF INCARCERATED PARENTS 2 (Mar. 2012). Originally, incarceration in the United States was used to punish the most violent or persistent offenders; today it is primarily used to punish struggling drug addicts and alcoholics. WAKEFIELD & WILDEMAN, *supra* note 8, at 16.

Americans are more likely to have children than they were in the past.¹⁷ Parental incarceration can have negative consequences¹⁸ and “lasting and detrimental effects” for children.¹⁹ In particular, children of incarcerated mothers experience more risk factors and are more likely to be incarcerated as adults than children of incarcerated fathers.²⁰ By focusing discussions of criminal justice reform on the situation of maternal incarceration, we can tailor reform to the needs of the most vulnerable—like the children of incarcerated women—with widespread implications for overall reform.

This Comment will discuss children of incarcerated mothers specifically, looking at how the criminal justice system can support the mother-child relationship. It will focus on the period of incarceration, although there is potential for significant impact on children and for reform throughout the entire interaction of families with the criminal justice system. This Comment will not focus on race, although there are significant racial disparities in the U.S. criminal justice system.²¹ Likewise, it will not discuss the effectiveness of incarceration on public safety and public order. While these issues are important in discussions about criminal justice reform, they are beyond the scope of this Comment.

This Comment proceeds as follows. Part I will provide background information: first, it will introduce the international standards for incarcerated women under the United Nations Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules); second, it will detail maternal incarceration in the United States and in Scotland; third, it will provide a background on the United Nations Convention on the Rights of the Child (CRC); and finally, it will briefly summarize Professor Martha Fineman’s vulnerability theory. Part II will explore the implications of incarceration and the mother-child relationship: first, it will examine the impact of physical separation of the mother and the child in the United States and in Scotland; second, it will study cohabitation arrangements in the United States and in Scotland; and finally, it will look at how the United States and Scotland respond differently to maternal incarceration. Part III will

¹⁷ See WAKEFIELD & WILDEMAN, *supra* note 8, at 4–5. Incarcerated Americans are also more likely to have been unemployed prior to incarceration and to have committed a nonviolent crime. *Id.* at 6.

¹⁸ *Id.* at 6–7.

¹⁹ Joyce A. Arditti, *Family Process Perspective on the Heterogeneous Effects of Maternal Incarceration on Child Wellbeing: The Trouble with Differences*, 14 CRIMINOLOGY & PUB. POL’Y 169, 169 (2015).

²⁰ Julie Poehlmann, *Children of Incarcerated Mothers and Fathers*, 24 WIS. J.L. GENDER & SOC’Y 331, 332 (2009).

²¹ See, e.g., Coates, *supra* note 5.

apply vulnerability theory to the issue of maternal incarceration: first, it will introduce the vulnerable subject as both the vulnerable mother and the vulnerable child; second, it will analyze how the state can be responsive to individual vulnerability in maternal incarceration; and finally, it will provide recommendations of how the state can build resilience in both the incarcerated mother and her child.

Incarceration is intended primarily to punish the individual; it should not punish the individual's children.²² This is the effect, however, when the state responds to a parent's criminality without considering the impact on the child.²³ Although some impact is unavoidable whenever a parent is incarcerated, this impact can be minimized.²⁴ However, the state should go beyond minimizing impact and institute programs that actively build resilience in incarcerated mothers and their children. This Comment concludes that the United States should take guidance from two sources: vulnerability theory and international and foreign law—in particular drawing from the Bangkok Rules, the CRC, and Scotland's criminal justice reform work. Reformers of the U.S. criminal justice system should ensure that the system responds to the needs of the most vulnerable. Instead of maintaining a system that simply punishes the mother, reformers should make it a priority to build resilience in both the mother and the child.

I. BACKGROUND

A. *Consequences of Increased Maternal Incarceration*

Studies suggest that mandatory sentencing and over-reliance on incarceration for drug crimes and abuse have contributed to the large increase in incarceration rates in the United States²⁵ and worldwide.²⁶ While it is easy to

²² BAILLE, *supra* note 13, at 9.

²³ See MARSHALL, *supra* note 1, at 8.

²⁴ See Strathclyde Centre for Law, Crime and Justice, *Doing Children Justice: What is the Impact of Imprisonment on Dependent Children?* YOUTUBE 1:08:20 (Mar. 15, 2014), <https://www.youtube.com/watch?v=DwwjcPoSfFI> (Kate Philbrick) [hereinafter *Doing Children Justice*].

²⁵ See Deseriee A. Kennedy, "The Good Mother": *Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 167–68 (2012). Although the United States has seen a decrease in crime over the last few decades, it does not appear that the trend of increased incarceration is the primary reason that non-violent crimes make up the majority of incarcerations today. See WAKEFIELD & WILDEMAN, *supra* note 8, at 15.

²⁶ See PENAL REFORM INT'L, GLOBAL PRISON TRENDS 10–11 (2015), <http://www.penalreform.org/wp-content/uploads/2015/04/PRI-Prisons-global-trends-report-LR.pdf> [hereinafter GLOBAL PRISON TRENDS]; PENAL REFORM INT'L, GLOBAL PRISON TRENDS SPECIAL FOCUS: DRUGS AND IMPRISONMENT 2 (2015),

disregard the punishment of incarcerated individuals as merely the consequence of their antisocial and unlawful behavior, criminal records extend beyond those individuals, affecting their children, their families, and their communities.²⁷ Individuals who have been incarcerated face increased stigma, leading to a drop in earning potential,²⁸ which leaves their families to bear the financial burden.²⁹ Individual and familial costs have widespread and detrimental effects on society, as individuals are removed from the workforce, families need more aid, and a generation of children grows up bearing the brunt of those costs.³⁰ Ultimately, the long-term potential consequences may have much larger effects on the children than on the incarcerated individual.³¹ Because the consequences of incarcerating just one individual can have such wide-reaching effects, it is vital that criminal justice reformers limit the negative consequences as much as possible. In particular, incarceration must be structured to support the individual as well as her children.

The increase in the prison population led to a large increase in the number of children with a parent in prison.³² The effect on these children is well documented,³³ and there may be greater consequences for children with mothers in prison than for children with fathers in prison.³⁴ This section will introduce international trends and standards for incarcerated women, and then it will detail the divergent approaches of the United States and Scotland to maternal incarceration.

1. Incarcerated Women and the Bangkok Rules

Approximately 6.5% of prisoners in the world are women.³⁵ Because women generally represent less than one tenth of the international prison

<http://www.penalreform.org/wp-content/uploads/2015/04/PRI-Prisons-global-trends-report-LR.pdf> [hereinafter DRUGS AND IMPRISONMENT].

²⁷ WAKEFIELD & WILDEMAN, *supra* note 8, at 17.

²⁸ *Id.* at 17–18.

²⁹ *Id.* at 18.

³⁰ See generally ECON. MOBILITY PROJECT & PUB. SAFETY PERFORMANCE PROJECT, COLLATERAL COSTS: INCARCERATION'S EFFECTS ON ECONOMIC MOBILITY (PEW Charitable Trusts 2010), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf.

³¹ WAKEFIELD & WILDEMAN, *supra* note 8, at 20.

³² *Id.* at 4–5.

³³ MARSHALL, *supra* note 1, at 16. Although there are many factors at play—such as socioeconomic stress—that could explain the observed negative outcomes for children of incarcerated parents, incarceration cannot be ignored as a significant factor. See Poehlmann, *supra* note 20, at 334.

³⁴ Poehlmann, *supra* note 20, at 332.

³⁵ GLOBAL PRISON TRENDS, *supra* note 26, at 12–13. The amount of incarcerated women increased more than forty percent from 2000 to 2013. *Id.* at 12. Women are commonly incarcerated for drug use and non-

population, prison facilities, procedures, and standards regularly fail to take into account their differing needs and situations.³⁶ This discrepancy was specifically addressed in 2010 when the United Nations (U.N.) set international standards for the treatment of incarcerated women in the United Nations Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders, commonly referred to as the Bangkok Rules.³⁷ The Bangkok Rules seek to explicitly address the particular needs and situations of women prisoners by giving guidance to legislators, policy makers, and sentencing and prison authorities.³⁸ With the Bangkok Rules, the international community recognized that, for women in particular, incarceration is likely an ineffective solution to the antisocial behaviors that bring them into contact with the criminal justice system.³⁹ In addition, incarceration often damages a woman's ability to reintegrate into society and live a productive life post-incarceration.⁴⁰ To help female prisoners overcome these problems, the Bangkok Rules call for prisons to implement programs that include training focused on mental health treatment,⁴¹ substance abuse treatment,⁴² and prevention of suicide and self-harm.⁴³

In addition to the needs of incarcerated women, the Bangkok Rules address the importance of accounting for the effects of maternal incarceration on children.⁴⁴ The majority of women incarcerated globally are mothers and are often either the sole or primary caregiver for their children.⁴⁵ The Bangkok Rules call for non-custodial alternatives to incarceration when possible and sensitivity during sentencing, especially when the mother is the primary or sole caregiver.⁴⁶ The Bangkok Rules stress that the state should encourage

violent offenses. *Id.* at 12–14. Prior to incarceration many of these women are affected by poverty, poor education, and violence or abuse. *Id.* at 14.

³⁶ PENAL REFORM INT'L, U.K. BANGKOK RULES ON WOMEN OFFENDERS AND PRISONERS: SHORT GUIDE 4 (2013), <http://www.penalreform.org/wp-content/uploads/2013/07/PRI-Short-Guide-Bangkok-Rules-2013-Web-Final.pdf> [hereinafter BANGKOK RULES SHORT GUIDE].

³⁷ GLOBAL PRISON TRENDS, *supra* note 26, at 14.

³⁸ BANGKOK RULES SHORT GUIDE, *supra* note 36, at 4, 6.

³⁹ *Id.* at 6.

⁴⁰ *Id.*

⁴¹ G.A. Res. 65/229, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), r. 12–13, 35 (Dec. 21, 2010), https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf [hereinafter The Bangkok Rules].

⁴² *Id.* r. 15.

⁴³ *Id.* r. 16.

⁴⁴ GLOBAL PRISON TRENDS, *supra* note 26, at 15.

⁴⁵ *Id.* at 14.

⁴⁶ *Id.* at 15.

incarcerated mothers to maintain contact with their children⁴⁷ and support child-centered visitation policies and facilities.⁴⁸ The United States and Scotland both supported the creation of the Bangkok Rules.⁴⁹ Although they are not binding, the Bangkok Rules provide both countries with guidance on how to reduce reliance on unnecessary incarceration and address the specific needs of incarcerated mothers.⁵⁰

2. *Maternal Incarceration in the United States*

Before the Bangkok Rules were accepted internationally, the United States began a similar investigation into the circumstances of incarcerated women.⁵¹ The United States issued a report recommending a more gender-responsive approach to criminal justice, taking into account the differences between male and female offenders and acknowledging the differing situations women face in their communities.⁵² In addition, the report recommended that the management, treatment, and supervision of incarcerated women should be accomplished while keeping six guiding principles in mind: gender,⁵³ environment,⁵⁴ relationships,⁵⁵ services and supervision,⁵⁶ socioeconomic status,⁵⁷ and community.⁵⁸ These proposed guiding principles recognize that a woman's social and economic environment has a large impact on her life⁵⁹ and that by making the criminal justice system more responsive to a woman's needs, her involvement with the criminal justice system can be reduced.⁶⁰

⁴⁷ The Bangkok Rules, *supra* note 41, r. 26.

⁴⁸ *Id.* r. 28.

⁴⁹ See BANGKOK RULES SHORT GUIDE, *supra* note 36, at 4.

⁵⁰ See *id.* at 6.

⁵¹ Barbara Bloom, et al., U.S. DEP'T JUSTICE, *Forward to RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS: GENDER RESPONSIVE STRATEGIES* (2003), <https://s3.amazonaws.com/static.nicic.gov/Library/018017.pdf>.

⁵² See *id.* at 75.

⁵³ *Id.* at 76 ("Acknowledge that gender makes a difference.").

⁵⁴ *Id.* ("Create an environment based on safety, respect, and dignity.").

⁵⁵ *Id.* ("Develop policies, practices, and programs that are relational and promote healthy connections to children, family, significant others, and the community.").

⁵⁶ *Id.* ("Address substance abuse, trauma, and mental health issues through comprehensive, integrated, and culturally relevant services and appropriate supervision.").

⁵⁷ *Id.* ("Provide women with opportunities to improve their socioeconomic conditions.").

⁵⁸ *Id.* ("Establish a system of community supervision and reentry with comprehensive, collaborative services.").

⁵⁹ See *id.*

⁶⁰ See *id.* at 90.

The U.S. report also considered that the majority of incarcerated women are mothers with minor children⁶¹ and acknowledged both the impact of incarceration on children and the importance of children as a factor in reducing the recidivism of their incarcerated mothers.⁶² Today the majority of incarcerated mothers in the United States are single parents and primary caregivers⁶³ who experience high rates of pre-incarceration poverty,⁶⁴ drug and alcohol abuse, and mental health issues.⁶⁵ Unlike the children of incarcerated fathers, the children of incarcerated mothers often will not have another parent to care for them during the mother's incarceration.⁶⁶ Maternal incarceration, once rare in the United States,⁶⁷ has increased by 122% in federal and state prisons from 1990-2007,⁶⁸ and the number of minor children with a mother in prison has doubled since 1991.⁶⁹ Despite this increase, the rights of the children themselves are largely dismissed from consideration.⁷⁰

Because many incarcerated mothers are primary or sole caregivers, they have no choice but to rely on extended family or state resources for childcare.⁷¹ The majority of incarcerated mothers have two to three children under the age of thirteen⁷² and they are more likely to report their children being cared for by a non-relative, such as a foster parent.⁷³ In addition, incarcerated mothers are often dealing with higher levels of socioeconomic stress, addiction, and abuse.⁷⁴ The lack of familial and community resources means it is more likely that incarceration will permanently cut off women's parental rights.⁷⁵ Although there is an increased reliance on child welfare in maternal incarceration

⁶¹ *Id.* at 7.

⁶² *See id.* at 29, 79.

⁶³ Arditti, *supra* note 19, at 170; Kennedy, *supra* note 25, at 163.

⁶⁴ Kennedy, *supra* note 25, at 170. Incarcerated mothers are also more likely to be incarcerated for drug or property crimes than for violent crimes. *Id.*

⁶⁵ Bloom, *supra* note 51, at 6-7.

⁶⁶ ROBERTSON, *supra* note 16, at 3.

⁶⁷ WAKEFIELD & WILDEMAN, *supra* note 8, at 12.

⁶⁸ Kennedy, *supra* note 25, at 168-69. The increase in paternal incarceration was seventy-six percent. *Id.* The overall incarceration of women increased 646% from 1980 to 2010. Arditti, *supra* note 19, at 170. This is 1.5 times the increase for men during that same time period. *Id.*

⁶⁹ Arditti, *supra* note 19, at 170.

⁷⁰ *See, e.g.,* Bloom, *supra* note 51, at 29, 79.

⁷¹ Kennedy, *supra* note 25, at 164.

⁷² *Id.* at 170.

⁷³ Poehlmann, *supra* note 20, at 332.

⁷⁴ Kennedy, *supra* note 25, at 164; Poehlmann, *supra* note 20, at 333.

⁷⁵ Kennedy, *supra* note 25, at 164.

situations, a common complaint is that the child welfare system fails to work together with the criminal justice system.⁷⁶

3. *Maternal Incarceration in Scotland*

Like the United States, Scotland predated the Bangkok Rules in acknowledging the need to address the specific circumstances of incarcerated women.⁷⁷ In a direct response to the country's rising incarceration rates,⁷⁸ a Parliament committee made recommendations similar to those later set in the Bangkok Rules as standards for female incarceration. These included improved support and sentencing for women with mental health issues,⁷⁹ the implementation of addiction programs to support incarcerated women and their children,⁸⁰ and the importance of maintaining the child's right to visitation.⁸¹ In its own recommendations, the United States did not place a great deal of importance on the rights of the children of incarcerated mothers.⁸² Scotland, on the other hand, recognized that not only were the specific circumstances of incarcerated women an important consideration, but that the circumstances and rights of their children should be a priority.⁸³

Approximately two-thirds of incarcerated women in Scotland are mothers⁸⁴ and an estimated 16,500 to 27,000 Scottish children are affected by parental incarceration each year.⁸⁵ Like American incarcerated mothers, Scottish incarcerated mothers are more likely to be the primary or sole caregiver of

⁷⁶ *Id.* at 198.

⁷⁷ EQUAL OPPORTUNITIES COMMITTEE, EO/S3/09/R3, FEMALE OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM ¶¶ 2, 10–13 (2009), <http://archive.scottish.parliament.uk/s3/committees/equal/reports-09/eor09-03.htm> (Scot.).

⁷⁸ *See id.* ¶ 2.

⁷⁹ *Id.* ¶¶ 51–52; The Bangkok Rules, *supra* note 41, r. 12.

⁸⁰ The Bangkok Rules, *supra* note 41, r. 15; FEMALE OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 77, ¶ 68.

⁸¹ The Bangkok Rules, *supra* note 41, r. 26, 28; FEMALE OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 77, ¶ 67.

⁸² *See, e.g.,* Bloom, *supra* note 51, at 29, 79.

⁸³ *See* BAILLE, *supra* note 13, at 5.

⁸⁴ Jim Murphy, *Too Many of Scotland's Women End Up in Jail—And That's Bad News For Us All*, GUARDIAN (Jan. 18, 2015), <http://www.theguardian.com/commentisfree/2015/jan/18/scottish-women-jail-offenders-crime-children>. A 2011 report found that 435 out of 8,054 prisoners in Scotland were women. BAILLE, *supra* note 13, at 13. This was a disproportionate eighty-seven percent increase over the numbers cited in an earlier 2008 report. *Id.*

⁸⁵ BAILLE, *supra* note 13, at 5; Alicia Queiro, *Innocent Victims: Life for Children with Mothers Behind Bars*, BBC SCOTLAND (Oct. 15, 2014), <http://www.bbc.com/news/uk-scotland-29621654>. This large range represents an estimate, as Scottish authorities do not know the exact number because “no one is counting” and with prison populations increasing, this number will likely continue to increase. BAILLE, *supra* note 13, at 5.

their children and must rely on extended family or the foster care system for childcare during incarceration.⁸⁶ Incarcerated women in Scotland tend to suffer from mental health and addiction problems and have past histories of victimization due to violence and abuse.⁸⁷ While incarcerated, they typically spend a great deal of time trying to run their families and keep their children out of foster care and often report feelings of guilt and helplessness over the fates of their children.⁸⁸ While the United States and Scotland have both experienced disproportionate increases in maternal incarceration over the last few decades and incarcerated women in the two countries find themselves in similar circumstances, Scotland places more emphasis on the rights of the child when considering the mother's incarceration.

C. *United Nations Convention on the Rights of the Child*

In the Bangkok Rules, the international community recognized the need to consider the individual circumstances of women in domestic criminal justice procedures.⁸⁹ The United States and Scotland both made recommendations similar to those in the Bangkok Rules, but the two countries respond differently to maternal incarceration. A reason for the difference may be that Scotland ratified⁹⁰ the 1989 CRC,⁹¹ while the United States only signed, but did not ratify it.⁹² The CRC makes it clear that children have their own rights and sets minimum standards for how they should be treated.⁹³

When discussing maternal incarceration, it is important to consider children's rights. These include the right to: be protected from discrimination due to parental activities,⁹⁴ be cared for by their parents,⁹⁵ contact and maintain relationships with their parents,⁹⁶ privacy and freedom from attack on their

⁸⁶ Murphy, *supra* note 84.

⁸⁷ FEMALE OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 77, ¶ 10.

⁸⁸ Kevin McKenna, Op-Ed., *Let's Keep Mothers Out of Scotland's Prisons*, GUARDIAN (Mar. 28, 2015), <http://www.theguardian.com/commentisfree/2015/mar/28/women-prisons-alternatives>.

⁸⁹ See generally The Bangkok Rules, *supra* note 41.

⁹⁰ The United Kingdom ratified the CRC in 1991. MARSHALL, *supra* note 1, at 9.

⁹¹ See *id.*; BAILLE, *supra* note 13, at 9 (citing Scottish Government, *Do the Right Thing: A Response by the Scottish Government to the 2008 Concluding Observations from the UN Committee on the Rights of the Child*, 30f (2009)).

⁹² UN Lauds South Sudan as Country Ratifies Landmark Child Rights Treaty, UN NEWS CENTRE (May 4, 2015), <http://www.un.org/apps/news/story.asp?NewsID=50759#.Ve8CUbRUXmA>.

⁹³ BAILLE, *supra* note 13, at 8.

⁹⁴ Convention on the Rights of the Child art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC];

ROBERTSON, *supra* note 16, at 2.

⁹⁵ CRC, *supra* note 94, art. 7.

⁹⁶ *Id.* art. 9.

reputations,⁹⁷ be looked after and accommodated,⁹⁸ health,⁹⁹ a standard of living,¹⁰⁰ and education.¹⁰¹ Government actors must make the best interests of the child a priority when they are making decisions that affect children.¹⁰² While the meaning of the best interests of the child has not been universally defined, it is generally understood to include such things as “physical safety, emotional well-being, and a child’s healthy growth and development.”¹⁰³

In addition, states should honor children’s rights to maintain parental contact¹⁰⁴ and have their upbringing and development be the primary responsibility of their parents¹⁰⁵ by planning and designing prisons to support contact between parent and child.¹⁰⁶ The parent-child relationship is an important part of the child’s basic rights, and when the state intervenes in this relationship by incarcerating a parent, it should support the continuation of that relationship.¹⁰⁷ The government has the responsibility to ensure that the rights to survival and development are upheld “to the maximum extent possible.”¹⁰⁸ The development of the child is interpreted broadly and considers “physical, mental, emotional, cognitive, social, and cultural” aspects.¹⁰⁹ Part of the state’s responsibility in ensuring the child’s survival and development includes an economic and social supportive duty toward the parents to help them meet their responsibilities.¹¹⁰

In addition, the CRC gives children protection against unwanted separation from their parents.¹¹¹ As rights holders under the CRC, children have the right to participate and have their views heard in any judicial or administration

⁹⁷ *Id.* art. 16.

⁹⁸ *Id.* art. 20.

⁹⁹ *Id.* art. 24.

¹⁰⁰ *Id.* art. 28.

¹⁰¹ *Id.* art. 28–29.

¹⁰² *Id.* art. 3; Barbara Bennett Woodhouse & Kathryn A. Johnson, *The United Nations Convention on the Rights of the Child: Empowering Parents to Protect Their Children’s Rights*, in *WHAT IS RIGHT FOR CHILDREN? THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS* 7 (2009); BAILLE, *supra* note 13, at 9.

¹⁰³ Woodhouse & Johnson, *supra* note 102, at 7.

¹⁰⁴ CRC, *supra* note 94, art. 9.

¹⁰⁵ *Id.* art. 18.

¹⁰⁶ BAILLE, *supra* note 13, at 15.

¹⁰⁷ *See id.* at 15.

¹⁰⁸ CRC, *supra* note 94, art. 6; Woodhouse & Johnson, *supra* note 102, at 7.

¹⁰⁹ Woodhouse & Johnson, *supra* note 102, at 8.

¹¹⁰ *Id.* at 8.

¹¹¹ CRC, *supra* note 94, art. 9; Woodhouse & Johnson, *supra* note 102, at 11.

proceedings affecting them.¹¹² Thus, when a parent is incarcerated, the CRC requires the state to facilitate the child's participation in all proceedings and preserve parent-child contact when the child so desires and when it is in the child's best interests.¹¹³ This understanding of the child as a rights holder differs from U.S. law, where rights are considered purely in terms of the parent.¹¹⁴

D. Vulnerability Theory

Vulnerability theory pushes beyond the best interests of the child into actively building resilience in the mothers, the children, and society as a whole. For this reason, vulnerability theory serves as a useful tool in conversations about maternal incarceration. Vulnerability theory is based on the idea that individual vulnerability is “universal and constant, [and] inherent in the human condition.”¹¹⁵ All individuals are susceptible to harm, whether that harm is due to illness, injury, or manmade or natural disasters.¹¹⁶ While individuals can work toward ameliorating vulnerability, it can never be fully overcome or prevented.¹¹⁷ While vulnerability is universal, constant, and embedded in daily reality, each individual will experience it differently due to that individual's unique societal placement and relationships.¹¹⁸ Ultimately, individuals form societal groups—families, communities, and states—because vulnerability requires that we come together to survive and thrive.¹¹⁹

The Western legal tradition focuses on the autonomous subject as its ideal, presuming that each individual in society is competent and wholly self-sufficient.¹²⁰ Individuals are imagined to be equally capable of self-sufficiency and independence, trapped in a static adult stage.¹²¹ Vulnerability theory calls

¹¹² CRC, *supra* note 94, art. 9; Woodhouse & Johnson, *supra* note 102, at 8.

¹¹³ See CRC, *supra* note 94, art. 9.

¹¹⁴ Woodhouse & Johnson, *supra* note 102, at 11 (citing *Santosky v. Kramer*, 455 U.S. 745 (1982)).

¹¹⁵ Martha Albertson Fineman, *Grappling with Equality: One Feminist Journey*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 161 (Martha Albertson Fineman ed., 2011) [hereinafter Fineman, *Grappling with Equality*]. Professor Martha Fineman developed vulnerability theory as an “alternative to traditional equal protection analysis.” *Id.* While the term vulnerable is often used to separate groups from society that may be considered disadvantaged in some way, Professor Fineman reclaims the term to define the human condition as we all experience it. Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 *EMORY L.J.* 251, 266 (2010) [hereinafter Fineman, *Responsive State*].

¹¹⁶ Fineman, *Grappling with Equality*, *supra* note 115, at 166–67.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 167.

¹¹⁹ Fineman, *Grappling with Equality*, *supra* note 115, at 167.

¹²⁰ *Id.*

¹²¹ *Id.* at 167–68.

for replacing this autonomous subject with a vulnerable subject.¹²² The vulnerable subject acknowledges that individuals go through different developmental stages during life and face different levels of dependency and vulnerability.¹²³ The vulnerable subject is a constant reminder that vulnerability is something no one can control or avoid completely.¹²⁴

Because vulnerability cannot be avoided and it draws individuals together into societal groups, an understanding of vulnerability should play a role in how the state is structured.¹²⁵ Vulnerability theory calls for focusing attention on how societal institutions, especially those created and managed by the state, respond to vulnerability.¹²⁶ Requiring the state to be responsive to the vulnerable subject can empower the individual.¹²⁷ The focus can then shift to building resilience in the individual and building the assets that help each individual overcome misfortune.¹²⁸

II. INCARCERATION AND MOTHER-CHILD RELATIONSHIP

After incarceration, the state can handle the mother-child relationship in different ways. The two primary methods discussed here are physical separation and cohabitation. This Part will discuss physical separation and cohabitation arrangements in both the United States and in Scotland, then it will outline the key differences in the American and Scottish responses to maternal incarceration.

A. *Physical Separation of Mother and Child*

1. *Physical Separation in the United States*

Incarcerating the mother is typically the default legal response to even minor, non-violent infractions, leading to the physical separation of the mother

¹²² *Id.* at 168.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 168–69.

¹²⁶ *Id.* at 169.

¹²⁷ *Id.* at 173.

¹²⁸ *Id.* at 169–71. Resilience-building assets may be in the form of physical or material goods, human assets like education or healthcare, and social assets like family and cultural relationships, to name just a few. *Id.*

and child.¹²⁹ This preference for incarceration persists despite the potential harm to the mother and child and the viability of community alternatives.¹³⁰ In the United States, incarcerated women are generally placed in prisons farther from home than men are, often at distances of more than one hundred miles from their families and—in the case of federal prisoners—often outside their home state.¹³¹ These distances make it difficult for children to visit because travel is “expensive and time consuming.”¹³² Phone calls are also expensive and maintaining long distance contact is difficult.¹³³ In addition, prison facilities are not designed to be family-friendly.¹³⁴ In-person contact is therefore relatively rare and long distance communication is semi-regular at best.¹³⁵ Maintaining familial contact can help reduce recidivism rates and promote rehabilitation,¹³⁶ and more importantly, it is critical for the wellbeing of the child.¹³⁷

Because physical separation can cause children to be placed in foster care situations,¹³⁸ maternal incarceration can also lead to legal separation through the termination of the mother’s parental rights.¹³⁹ U.S. federal law places limits on the amount of time a child can remain in foster care¹⁴⁰ before the state is encouraged to terminate parental rights.¹⁴¹ There has been an increase in such terminations of parental rights since 1991 with no corresponding increase in

¹²⁹ See Gail Smith, *Why Mother-Child Alternatives to Incarceration Are Vital*, JUSTICE STRATEGIES: CHILDREN OF INCARCERATED PARENTS (Nov. 14, 2014), <http://www.justicestrategies.org/coip/blog/2014/11/why-mother-child-alternatives-incarceration-are-vital>.

¹³⁰ *Id.*

¹³¹ Kennedy, *supra* note 25, at 178.

¹³² *Id.*

¹³³ *Id.* The Federal Communications Commission recently voted to cap the rates and fees currently charged for phone calls, meaning that by the end of 2016 incarcerated individuals and their families will pay significantly lower, more reasonable prices to maintain contact. Associated Press, *FCC Votes to Cut Cost of Phone Calls for Inmates*, WALL STREET J. (Oct. 22, 2015), <http://www.wsj.com/articles/fcc-votes-to-cut-cost-of-phone-calls-for-inmates-1445569620>.

¹³⁴ Kennedy, *supra* note 25, at 178.

¹³⁵ MURPHEY & COOPER, *supra* note 12, at 9.

¹³⁶ Dana Liebelson, *Obama Administration Approves Plan to Make Prison Phone Calls More Affordable*, HUFFINGTON POST (Oct. 22, 2015), http://www.huffingtonpost.com/entry/prison-phone-costs-fcc-obama_5628f5f0e4b0443bb562d907; Letter from ACLU et al. to Thomas Wheeler, Chairman, FCC (Oct. 15, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001329418> (writing to recommend a reduction in phone call rates and fees).

¹³⁷ ROBERTSON, *supra* note 16, at 31.

¹³⁸ Poehlmann, *supra* note 20, at 332.

¹³⁹ Kennedy, *supra* note 25, at 174.

¹⁴⁰ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

¹⁴¹ Kennedy, *supra* note 25, at, 165.

government response or adoption rates.¹⁴² Once parental rights have been terminated, the child is more likely to remain in foster care permanently.¹⁴³ It is often difficult for incarcerated mothers to retain parental rights,¹⁴⁴ and although the state “must make reasonable efforts to reunite families and maintain family ties,” it is left up to the state to decide what a “reasonable effort” might be.¹⁴⁵

The United States should look for alternatives to terminating parental rights, except when termination is in the best interests of the child—such as in situations of abuse. The United States can begin to accomplish this by making incarceration a last resort, rather than a default response to criminal infractions. When incarceration is necessary, the United States should make the mother-child relationship a priority, ensuring that the mother and child maintain contact. Women should be housed as close to home as possible and there should be supportive structures in place—both in prisons and in communities—to facilitate contact between mothers and their children.

2. *Physical Separation in Scotland*

In Scotland, incarceration of the mother is also the typical default response, leading to physical separation.¹⁴⁶ The barriers to maintaining the mother-child relationship in the United States are similar to those in Scotland. Prisons are often located far from home, visiting times may conflict with school hours, there may be a lack of public transportation options, and travel costs may be prohibitive.¹⁴⁷ Prison rules do not refer to children as individual rights holders, making no reference to children outside of their relationship to parental rehabilitation.¹⁴⁸ In addition, the government’s primary response makes protection of children the only goal.¹⁴⁹ Although this is an important consideration—and one that should factor largely into any determination—the best interests of the child should extend beyond mere protection of the child. Because the criminal justice system largely does not consider the best interests of the child, the children of prisoners exist as an “invisible population.”¹⁵⁰

¹⁴² *Id.* The Adoption and Safe Families Act pushes states to terminate parental rights if a child has spent fifteen of the last twenty-two months in foster care. *Id.* at 175.

¹⁴³ *Id.* at 166.

¹⁴⁴ *Id.* at 174.

¹⁴⁵ *Id.* at 175.

¹⁴⁶ *See generally* BAILLE, *supra* note 13.

¹⁴⁷ *Id.* at 28.

¹⁴⁸ MARSHALL, *supra* note 1, at 4.

¹⁴⁹ BAILLE, *supra* note 13, at 21.

¹⁵⁰ *Id.*

Recognizing these problems, Scotland developed supportive systems, including a national confidential hotline where the children of incarcerated individuals can talk with trained counselors.¹⁵¹ This gives children access to community support that may otherwise be unavailable. Scottish prisons also have Family Contact Officers on staff to provide general support, access to information about their options, and advice to prisoners and their families.¹⁵² Despite these organized structures, existing resources are still inadequate and incarcerated mothers and their families often are unaware of their options and find the situation confusing.¹⁵³

Because maintaining the mother-child relationship can be an important factor in reducing recidivism,¹⁵⁴ Scotland recommends that child-focused visitation be a priority, with a focus on bringing as much normality to the relationship as possible.¹⁵⁵ Visitation is a child's right and not the mother's privilege, thus it should not fall to budget cuts or be treated as something to be earned or taken away based on parental behavior.¹⁵⁶ Scotland also recommends maintaining visitor centers as a "bridge" between community and prison and as an important resource for families who may not have access to other resources in their local communities.¹⁵⁷

B. Cohabitation Arrangements of Mother and Child

Although the Bangkok Rules primarily address the needs of incarcerated women, they also represent the first time the international community came together to address the specific needs of children living in prisons with their mothers.¹⁵⁸ International law provides for the possibility of nursing children to stay with their incarcerated mothers;¹⁵⁹ in such situations, the Bangkok Rules call for prison staff to be trained in child development and basic healthcare.¹⁶⁰ The Bangkok Rules recommend that any determination about a child staying

¹⁵¹ MARSHALL, *supra* note 1, at 18.

¹⁵² BAILLE, *supra* note 13, at 26–27.

¹⁵³ See MARSHALL, *supra* note 1, at 16 (referencing the Assisted Prisoner Visiting Scheme).

¹⁵⁴ BAILLE, *supra* note 13, at 25.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 25–26.

¹⁵⁷ *Id.* at 27–28.

¹⁵⁸ BANGKOK RULES SHORT GUIDE, *supra* note 36, at 4.

¹⁵⁹ *Laws on Children Residing with Parents in Prison*, LAW LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/children-residing-with-parents-in-prison/international-policy.php> (discussing Rule 23 of the U.N. Standard Minimum Rules for the Treatment of Prisoners).

¹⁶⁰ The Bangkok Rules, *supra* note 41, r. 33.

with the incarcerated mother should be based on the best interests of the child.¹⁶¹

1. *Prison Nurseries in the United States*

Although it is common in Europe, the practice of keeping mothers and infants together in prison is now relatively rare in the United States.¹⁶² Prison nurseries in the United States lost their appeal as the American criminal justice system moved away from rehabilitation to a more punitive focus.¹⁶³ The oldest program in the United States is at Bedford Hills in New York, which allows for dormitory style living for mothers and their infants.¹⁶⁴ This program creates a self-contained and supportive situation for incarcerated women, which is often unobtainable in their home communities.¹⁶⁵ The program provides educational and vocational classes, substance abuse treatment for the mothers, and an infant development center to care for children during the mothers' classes.¹⁶⁶ Even Bedford Hills, however, treats the mother-child relationship as a privilege that can be lost as a result of even simple mistakes such as falling asleep while holding the baby or leaving an extra blanket in the crib.¹⁶⁷

Some scholars argue that cohabitation programs not only fail to account for the best interests of the child, but also violate the child's constitutionally protected rights.¹⁶⁸ But there are benefits for both incarcerated mothers and their children, and such programs should not be rejected absolutely.¹⁶⁹ For example, cohabitation programs increase parental care of the child, and the mother-child bond developed by such care has long-lasting effects on the child's wellbeing.¹⁷⁰ The recidivism rates for participating mothers tend to be

¹⁶¹ *Id.* r. 49; *Laws on Children Residing with Parents in Prison*, *supra* note 161 (discussing the Bangkok Rules).

¹⁶² Pamela Laufer-Ukeles, *The Case Against Separating the Care from the Caregiver: Reuniting Caregiver's Rights and Children's Rights*, 15 NEV. L.J. 236, 269 (2014) (listing Illinois, Indiana, Nebraska, New York, South Dakota, Washington, West Virginia, and Wyoming as the only states with active programs).

¹⁶³ Sarah Yager, *Prison Born*, ATLANTIC (July/Aug. 2015), <http://www.theatlantic.com/magazine/archive/2015/07/prison-born/395297/>.

¹⁶⁴ *Id.* "The age limit for children at Bedford Hills is one year, but women who will be out before their babies turn 18 months old can apply for an extension so that they can leave prison with their child." *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Laufer-Ukeles, *supra* note 162, at 269 (citing James G. Dwyer, *Jailing Black Babies*, 2014 UTAH L. REV. 465, 470–71 (2014)).

¹⁶⁹ *Id.* at 270.

¹⁷⁰ *Id.* at 272.

much lower than for those in the general prison population.¹⁷¹ Prison nurseries can also support breastfeeding, which has numerous benefits for both the mother and child.¹⁷² In addition, the costs of such programs are lower than the costs of foster care and have the potential of breaking the multi-generational cycle of involvement in the criminal justice system by providing education and support to mothers bonding with their children.¹⁷³

States are now starting to develop prison nursery programs to accommodate the increasing number of pregnant inmates.¹⁷⁴ Although community alternatives may be a better solution overall, the United States should invest in mother-baby units for situations where incarceration is necessary. The cohabitation arrangements can provide much needed support for mothers and allow women to maintain close relationships with their young children.¹⁷⁵ Although critics worry about the constitutional rights of the infants living in such prisons nurseries,¹⁷⁶ the long-term benefits of maintaining the children's rights to relationships with their parents should outweigh the short-term risk of violating the children's due process rights.¹⁷⁷

2. Prison Nurseries in Scotland

Cohabitation arrangements are more common in Scotland than in the United States.¹⁷⁸ Scotland's only all-female prison at Cornton Vale¹⁷⁹ provides

¹⁷¹ *Id.*; Yager, *supra* note 163.

¹⁷² Laufer-Ukeles, *supra* note 162, at 274.

¹⁷³ Yager, *supra* note 163.

¹⁷⁴ *Id.* An estimated one in twenty-five women are pregnant when arrested. *Id.* Nine states now offer such programs. *Id.*

¹⁷⁵ Laufer-Ukeles, *supra* note 162, at 270.

¹⁷⁶ Dwyer, *supra* note 168, at 466.

¹⁷⁷ See Laufer-Ukeles, *supra* note 162, at 269, 272.

¹⁷⁸ Compare Laufer-Ukeles, *supra* note 162, at 269 (listing the eight states in the United States with active cohabitation programs), and *Female Offenders*, FEDERAL BUREAU OF PRISONS https://www.bop.gov/inmates/custody_and_care/female_offenders.jsp (last visited Oct. 18, 2016) (after giving birth, incarcerated mothers in federal prison are not allowed to bring their newborn infants back with them to prison), with The Prisons and Young Offenders Institutions (Scotland) Rules 2011, (ASP 331) § 13, ¶ 128 (specifically permitting mother-baby cohabitation in Scottish prisons), and Stephen Naysmith, *New Prisons for Women Will Look Like Flats and Children Will Be Able to Stay Over*, *Prison Chief Reveals*, HERALD SCOTLAND, Feb. 5, 2016, http://www.heraldscotland.com/news/14257941.New_prisons_for_women_will_look_like_flats_and_children_will_be_able_to_stay_over_prison_chief_reveals/ (discussing plans for new Scottish prisons with short-term cohabitation arrangements for incarcerated mothers and their older children).

¹⁷⁹ *New Women's Prison to Replace Cornton Vale*, BBC SCOTLAND (June 22, 2015), <http://www.bbc.com/news/uk-scotland-scotland-politics-33221338>. While still open, there are plans to replace Cornton Vale with smaller, regional units and community based alternatives that will allow women to stay closer to their families. *Id.*

child-related facilities, including mother-baby housing for children up to two years old.¹⁸⁰ Like Bedford Hills in the United States, the Cornton Vale program includes classes and support for mothers.¹⁸¹ This support continues post-release by connecting women with external organizations.¹⁸² Other prisons have now added housing where young children can spend time with their mothers.¹⁸³ Recently, Scotland also considered expanding cohabitation arrangements to include programs allowing older children and teenagers to stay with their mothers for weekends or school vacations.¹⁸⁴ These proposed programs would increase visitation time and help maintain a more normalized relationship past the infancy period that the prison nursery programs typically support.¹⁸⁵

The Scottish government places a great deal of emphasis on ensuring that early childhood intervention is a priority.¹⁸⁶ Accordingly, Scotland instituted a national framework to set standards for prison parenting programs.¹⁸⁷ Building strong family relationships reduces recidivism and can help address the adversities that incarcerated women often face.¹⁸⁸ Scotland plans on building smaller, regional prisons with a greater capacity for cohabitation arrangements so that women can better maintain relationships with their children, families, and communities.¹⁸⁹ Scotland also plans to extend cohabitation programs beyond infancy, recognizing that every child has a right to maintain a relationship with his or her parent.¹⁹⁰

C. Difference of Response to Maternal Incarceration

As mentioned above, the different responses to maternal incarceration by the United States and Scotland, evinced by Scotland's greater emphasis on

¹⁸⁰ MARSHALL, *supra* note 1, at 19.

¹⁸¹ SUSAN GALLOWAY ET AL., AN UNFAIR SENTENCE, ALL BABIES COUNT: SPOTLIGHT ON THE CRIMINAL JUSTICE SYSTEM 32 (2014), <http://www.barnardos.org.uk/an-unfair-sentence.pdf>.

¹⁸² *Id.* at 32–33.

¹⁸³ Queiro, *supra* note 85.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ GALLOWAY ET AL., *supra* note 181, at 28.

¹⁸⁷ *Id.* at 28.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 18.

¹⁹⁰ See Queiro, *supra* note 85; Naysmith, *supra* note 178.

children's rights, may be attributed to Scotland's ratification of the CRC.¹⁹¹ Scotland, as part of the United Kingdom, ratified the CRC in 1991.¹⁹² In 2008, the U.N. Committee on the Rights of the Child called on the United Kingdom to "[e]nsure support to children with one or both parents in prison, in particular to maintain contact with the parent(s) (unless this is contrary to their best interests) and to prevent their stigmatization and discrimination against them."¹⁹³ In response, the Scottish government pledged to "establish[] . . . Children and Families Groups at every prison and . . . develop[] 'Minimum Standards for Children and Families.'"¹⁹⁴ These standards include the "timing and structure of visits between prisoners and their children, particularly preventing enhanced family visits from being withdrawn as punishment."¹⁹⁵ By incorporating the CRC guidelines into its criminal justice system, Scotland made children's rights a relevant consideration in criminal justice and policy.¹⁹⁶

A more child-focused criminal justice system means that "where a child is, or is likely to be, affected by a decision about a parent, the best interests of the child must take centre stage as a factor that 'rank[s] higher than any other' and may only be trumped by competing claims of 'considerable force.'"¹⁹⁷ In light of this, Scotland developed guidelines for working with children and families of incarcerated individuals; these guidelines established groups at all public prisons¹⁹⁸ to provide local leadership and implement the national guidelines.¹⁹⁹

¹⁹¹ See *id.*; BAILLE, *supra* note 13, at 9 (citing Scottish Government, *Do the Right Thing: A Response by the Scottish Government to the 2008 Concluding Observations from the UN Committee on the Rights of the Child*, 30f (2009)).

¹⁹² MARSHALL, *supra* note 1, at 9. In addition, Scotland goes further by making the best interests of the child 'paramount' in domestic family and child-care law. *Id.* Although ratification does not give the CRC legal effect under Scottish law, it does bring obligations under international law to implement the provisions and ensure the realization of the rights guaranteed. BAILLE, *supra* note 13, at 9. The Human Rights Act of 1998 and the Scotland Act of 1998 guarantee the same rights to children and adults. MARSHALL, *supra* note 1, at 5.

¹⁹³ BAILLE, *supra* note 13, at 9 (citing UN Committee on the Rights of the Child, *Consideration of Reports by States Parties under Article 44 of the Convention, Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/4, ¶¶ 44(c), 45(d) (Oct. 20, 2008)).

¹⁹⁴ *Id.* at 9 (citing Scottish Government, *Do the Right Thing: A Response by the Scottish Government to the 2008 Concluding Observations from the UN Committee on the Rights of the Child*, 30f (2009)).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 5.

¹⁹⁷ *Id.* at 10.

¹⁹⁸ *Id.* at 24. This focus on children's rights has largely been due to the work of the office of Scotland's Commissioner for Children and Young People. See *id.* at 3. The Commissioner ensures children's rights are adequately considered and is responsible for "rais[ing] awareness of the CRC, review[ing] relevant law, policy, practice relating to children and young people, promoting best practices, and undertaking[,] commissioning[,] and publishing research." *Id.*

¹⁹⁹ *Id.* at 24.

Although Scotland has made significant progress, there is still a need for better cooperation between children, family services, and the criminal justice system, especially because parent-child contact is still viewed as a parental privilege that can be revoked as punishment for poor behavior.²⁰⁰ In addition, Scotland needs to offer assistance and support to children without exposing them to adverse effects of stigma.²⁰¹ To foster this support, government organizations must cooperate and share information.²⁰²

Although the CRC does not treat mothers and fathers differently, the Scottish lawmakers realized that mothers are more frequently the primary caregivers.²⁰³ Scotland initiated a presumption against short (three months or less) prison sentences²⁰⁴ and there are now only three situations in which courts must impose a mandatory minimum sentence.²⁰⁵ The presumption against short sentences and mandatory minimum sentences gives the Scottish criminal justice system more flexibility in deciding whether to incarcerate mothers at all and for how long.²⁰⁶ This flexibility allows courts to more fully account for the best interests of the child when determining how to hold the mother responsible for her actions.

The United States is the only country that did not ratify the CRC after signing it.²⁰⁷ The reasoning for this may be rooted in concern for respecting parental rights and a fear that the CRC would “undermine parental authority, interfere with parents’ ability to raise and discipline their children, and make children’s rights more important than the rights of parents.”²⁰⁸ However, the CRC upholds the “importance of the parent-child relationship, . . . and requires governments to respect the rights and duties of parents.”²⁰⁹ It is important to understand that children’s rights and parental rights go together—children’s

²⁰⁰ *Id.* at 5.

²⁰¹ *Id.* at 21.

²⁰² *Id.* at 23.

²⁰³ MARSHALL, *supra* note 1, at 19.

²⁰⁴ BAILLE, *supra* note 13, at 7.

²⁰⁵ MARSHALL, *supra* note 1, at 22. The three mandatory minimum sentences are: “life imprisonment for murder; 3-5 years (age-dependent) for illegal possession or distribution of firearms; and 7 years for offenders over 18 for some drug trafficking offenses.” *Id.*

²⁰⁶ *See id.*

²⁰⁷ *UN Lauds South Sudan as Country Ratifies Landmark Child Rights Treaty*, *supra* note 92.

²⁰⁸ Woodhouse & Johnson, *supra* note 102, at 9. Some scholars suggest there may also be a fear of additional causes of action against the state. *Id.*

²⁰⁹ *Id.*

rights are held in trust by parents²¹⁰—and the CRC protects children and parents from unnecessary government intrusion on their rights.²¹¹

When it signs the CRC, a member nation is obliged not to act contrary to its purposes.²¹² Without ratification, there is no international legal obligation on the United States to abide by its provisions.²¹³ Therefore, the United States has not faced the same international pressure as Scotland to make the rights of children a priority in its criminal justice system. Nonetheless, U.S. national interest in this cause has led to a step in the right direction with the creation of an intergovernmental working group tasked with identifying areas of support for the children of incarcerated parents and their caregivers.²¹⁴ However, this group only acts as a resource for policymakers and prison officials and is not binding law in the United States.²¹⁵

Because there are lasting and often detrimental effects for children when mothers are incarcerated, the views and rights of children must be an important consideration. The United States should join the rest of the international community in ratifying the CRC and bring children's rights into a more central position in policy and legal determinations. Maternal incarceration and prison facilities should be restructured to support the rights guaranteed by the CRC. The best interests of the child should be a priority in any state proceedings involving the parents.

III. APPLYING VULNERABILITY THEORY TO MATERNAL INCARCERATION

Although the CRC calls for states to make the best interests of the child a priority,²¹⁶ determining what that means and how to incorporate the “best interests standard” into state interactions with children can be difficult. The ambiguity of the “best interests standard” risks cooptation by state interests.²¹⁷ In reality, what constitutes the best interests of the child is complicated, highly individualized, and may bear little resemblance to the idealized nuclear family

²¹⁰ *Id.* at 10.

²¹¹ *Id.* at 9.

²¹² See U.N., UNDERSTANDING INTERNATIONAL LAW (2011) https://treaties.un.org/doc/source/events/2011/Press_kit/fact_sheet_1_english.pdf (last visited Oct. 15, 2016).

²¹³ See *id.*

²¹⁴ Jesus Garcia, *Improving the Future for Children of Incarcerated Parents*, ADMIN. CHILD. & FAM. (June 13, 2013), <http://www.acf.hhs.gov/blog/2013/06/improving-the-future-for-children-of-incarcerated-parents> (discussing the Children of Incarcerated Parents Working Group).

²¹⁵ See *id.*

²¹⁶ CRC, *supra* note 94, art. 3.

²¹⁷ Laufer-Ukeles, *supra* note 162, at 259.

that courts and legislatures imagine.²¹⁸ It is generally agreed that physical and emotional safety and wellbeing, along with healthy development, are at the heart of the best interests of the child.²¹⁹ But the word ‘best’ sets an impossible and uncertain standard and should be viewed primarily as a goal.²²⁰

Because the definition of the best interests of the child is so nebulous, it would be useful to have some additional framework to structure the interpretation. The interests of children and parents are intertwined,²²¹ but the United States often focuses on the rights of the adult or parent to the detriment of the child.²²² Applying vulnerability theory can help develop the definition of the best interests of the child by focusing on building resilience. This Part will first identify the vulnerable subject as both the vulnerable mother and the vulnerable child. Second, it will explore how the state can be more responsive to vulnerability in maternal incarceration. Finally, it will lay out the ways in which the state can build resilience in light of this vulnerability.

A. *The Vulnerable Subject*

In vulnerability theory, the vulnerable subject replaces the autonomous liberal subject as the ideal.²²³ This vulnerable subject represents all developmental stages as well as the unavoidable and uncontrollable dependency and vulnerability that individuals face throughout their lives.²²⁴

1. *The Vulnerable Mother*

Comparing the incarcerated mother to the vulnerable subject does not remove fault for past wrongs and crimes, but it does reinforce an understanding that the vulnerable mother is better served through rehabilitation than through punishment. In the Bangkok Rules, the international community reflected this understanding, recognizing that female prisoners have different needs and come from different situations than the average male prisoner.²²⁵ Most women, and mothers in particular, have not been incarcerated for violent crime.²²⁶

²¹⁸ *Id.* at 268.

²¹⁹ Woodhouse & Johnson, *supra* note 102, at 7.

²²⁰ Laufer-Ukeles, *supra* note 162, at 259–60.

²²¹ *Id.* at 277.

²²² *Id.* at 278.

²²³ Fineman, *Grappling with Equality*, *supra* note 115, at 168.

²²⁴ *Id.*

²²⁵ BANGKOK RULES SHORT GUIDE, *supra* note 36, at 4.

²²⁶ Kennedy, *supra* note 25, at 169–70.

Incarcerated mothers are more likely to be young, poor, uneducated, and unskilled, and to suffer from addiction and mental health issues.²²⁷ In the United States, these mothers are often caught up in a series of pre-incarceration factors beyond their control, including low wages, lack of family leave, barriers to higher education, and high costs of childcare.²²⁸

In the United States, the punitive focus of the criminal justice system over the last few decades means that mothers have largely been punished for failing to live up to an impossible ideal.²²⁹ Incarcerated mothers report high levels of stress caused by the separation from their children²³⁰ and are usually not dangerous to their children, their families, or society.²³¹ Despite knowing that mothers often face significant pre-incarceration adversity, prisons remain limited in their resources.²³² Incarcerated mothers thus have inadequate support for maintaining relationships with their children or for reintegrating into society after release.²³³ There should not be a presumption that incarceration means a mother is “unfit, uncaring, neglectful, [or] abusive.”²³⁴ Incarceration should not be viewed as an automatic disqualifier for parenthood.²³⁵ The legal system’s default response, however, is to regard conviction as evidence that a mother is an unfit parent and as ample reason for state intervention.²³⁶

Rather than focusing on punishment, the legal system should focus on encouraging and supporting the mother so she can care for her child.²³⁷ The presumption should not be incarceration, especially in cases where health issues such as addiction or alcohol abuse are involved.²³⁸ Instead, our default response should focus on community alternatives whenever possible, and on providing support for mothers through classes, counseling, and substance

²²⁷ *Id.* at 169.

²²⁸ Ellen Friedrichs, *4 Ways the US Keeps Single Moms in Poverty—And What We Can Do About It*, EVERYDAY FEMINISM MAG. (Oct. 28, 2015), <http://everydayfeminism.com/2015/10/keeping-single-moms-poverty/>.

²²⁹ See Laufer-Ukeles, *supra* note 162, at 277.

²³⁰ Kennedy, *supra* note 25, at 192–93.

²³¹ *Id.* at 169.

²³² *Id.*

²³³ *Id.* at 171.

²³⁴ *Id.*

²³⁵ *But see* Dwyer, *supra* note 168, at 535–36 (discussing that many of the risk factors experienced by incarcerated mothers—poverty, mental illness, history of victimization and drug abuse—are factors that should require the removal of the child).

²³⁶ Kennedy, *supra* note 25, at 171.

²³⁷ Laufer-Ukeles, *supra* note 162, at 273–75.

²³⁸ TÂNIA LOUREIRO, SCOT. COMM’R FOR CHILD. & YOUNG PEOPLE, PERSPECTIVES OF CHILDREN AND YOUNG PEOPLE WITH A PARENT IN PRISON 39 (2010).

abuse programs. And when incarceration is necessary, the maintenance of the mother-child bond should be a priority, unless it is detrimental to the child. Prison facilities, programs, and cohabitation arrangements should focus on supporting the mother rather than punishing her. Currently, however, both the state and the mother are not given enough support.²³⁹

Maternal incarceration is important in discussions about criminal justice reform not just because of the vulnerability of the individual mother, but also because of the additional impact on an incarcerated mother's child. Although men are sometimes the primary caregivers, the reality of U.S. society and much of the rest of the world is that this responsibility falls more heavily on women.²⁴⁰ This means that the bond between the mother and child is usually stronger than that between the father and child.²⁴¹ The mother-child bond is important to the child's development both in the earliest years²⁴² and in the teenage years.²⁴³ The developmental impact of removing the mother from the child's life is measurable²⁴⁴ and can have "lasting and detrimental effects."²⁴⁵ Disruption of the relationship between the mother and child is generally more damaging to the child than a similar disruption to the child's relationship with the father.²⁴⁶ This means that it is crucial that the criminal justice system consider the impact on the child, particularly in situations of maternal incarceration.²⁴⁷

2. *The Vulnerable Child*

It is easier to see children as being vulnerable and distinct from the current autonomous ideal.²⁴⁸ Children occupy a place of unavoidable dependence in society, and because of this they are not expected to conform to that ideal in the same way as their mothers.²⁴⁹ While children are generally more sympathetic subjects than their incarcerated mothers, it is also easier for them to become invisible both in their individual interactions with the criminal

²³⁹ Kennedy, *supra* note 25, at 175.

²⁴⁰ GLOBAL PRISON TRENDS, *supra* note 26, at 15.

²⁴¹ See *Doing Children Justice*, *supra* note 24, at 19:40 (Justice Albie Sachs).

²⁴² See *id.* at 45:50 (Commissioner Baille).

²⁴³ See *id.* at 48:30 (Commissioner Baille).

²⁴⁴ See *id.* at 48:00 (Commissioner Baille).

²⁴⁵ Arditti, *supra* note 19, at 169.

²⁴⁶ See Poehlmann, *supra* note 20, at 332.

²⁴⁷ See *id.*

²⁴⁸ See Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, TEMPLE POL. & C.R. L. REV. 307, 312–14 (2014).

²⁴⁹ See *id.*

justice system and in broader discussions about its reform. Much of the discussion about criminal justice reform in the United States focuses on the interests and rights of the incarcerated adult and leaves the child out.²⁵⁰ Even when the interests of the child do enter the discussion, it is often as an appendage to the parent's punishment.²⁵¹ Critics of prison nurseries in the United States, for example, ask if incarcerated mothers should even be allowed to take such an active role in their children's lives while ignoring that the child has a right to be cared for by his or her parents.²⁵²

Because it is easy for the children of incarcerated mothers to be invisible—both in discussions of reform and in actual interactions—it is important to separate the rights of the child from the rights of the mother.²⁵³ Maintaining a clear separation allows children to be considered in their own individual capacity, rather than as supplements to the mother's punishment.²⁵⁴ Children must be viewed as people with their own rights and not merely as placeholders for future adults.²⁵⁵ The CRC accomplishes this by requiring that the rights of children be the primary consideration in any actions concerning them, which maintains the visibility of children in state proceedings.²⁵⁶ Some countries, including Scotland, go a step beyond the CRC requirements by making the rights of children paramount.²⁵⁷

By considering the views of children, the CRC upholds their right to participate and voice their opinions in state proceedings affecting them.²⁵⁸ Without giving children a voice in the proceedings, it can be more difficult to know how the incarceration of their mothers affects them,²⁵⁹ which in turn makes it easier for them to become invisible.²⁶⁰ The CRC requires states to take into account children's views, which forces states to tailor proceedings to

²⁵⁰ See MURPHEY & COOPER, *supra* note 12, at 1.

²⁵¹ See ROBERTSON, *supra* note 16, at 2; Press Release, Office of the Press Secretary, White House, FACT SHEET: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (Nov. 2, 2015), <https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation> (discussing primarily the importance of maintaining contact with children for reducing recidivism).

²⁵² Yager, *supra* note 163; see also Dwyer, *supra* note 168, at 484 (discussing that incarcerated women should be encouraged to release children for adoption or have their parental rights terminated involuntarily).

²⁵³ See *Doing Children Justice*, *supra* note 24, at 35:00 (Justice Sachs).

²⁵⁴ See *id.*

²⁵⁵ See *id.*

²⁵⁶ See CRC, *supra* note 94, art. 3.

²⁵⁷ MARSHALL, *supra* note 1, at 9.

²⁵⁸ CRC, *supra* note 94, art. 12; Woodhouse & Johnson, *supra* note 102, at 8.

²⁵⁹ See Arditti, *supra* note 19, at 176.

²⁶⁰ See MARSHALL, *supra* note 1, at 8.

the individual situation of the child.²⁶¹ This analysis considers that the emotional impact on the child will vary based on the child's relationship with and his or her attachment to the incarcerated parent.²⁶²

Protecting children's rights to have their voices heard during the mother's interactions with the criminal justice system is crucial because children experience maternal incarceration differently.²⁶³ The risk factors of maternal incarceration are not outcome determinative, and it is important to recognize that an individual child could grow up to be a successful, well-adjusted adult.²⁶⁴ For some children, the incarceration of their mothers may even be a relief.²⁶⁵ For most children, however, maternal incarceration will have a negative impact²⁶⁶ and the haphazard methods of handling the mother-child relationship during incarceration may actually harm them.²⁶⁷ Children of incarcerated parents are at risk of suffering from "alcohol and substance abuse, behavior problems, attachment insecurity, cognitive delays, academic failure, truancy, criminal activity, and adult conviction and incarceration."²⁶⁸ They may experience financial disadvantage, social stigma, bullying,²⁶⁹ and problems at school.²⁷⁰ The negative effects of maternal incarceration can carry forward into adulthood, manifesting in mental and physical health issues.²⁷¹

The individual social context of each child must be considered before blindly jumping into intervention,²⁷² and the interests of the child should be an important consideration in the mother's criminal proceedings.²⁷³ In these proceedings, the court should have an obligation to inquire into and examine the potential impact on children.²⁷⁴ This inquiry could be facilitated through periodic welfare reports,²⁷⁵ child's rights impact studies,²⁷⁶ and the appointment of a guardian ad litem to represent the child's interests while the

²⁶¹ See CRC, *supra* note 94, arts. 9, 12.

²⁶² BAILLE, *supra* note 13, at 6–7.

²⁶³ Arditti, *supra* note 19, at 176.

²⁶⁴ See Poehlmann, *supra* note 20, at 337.

²⁶⁵ BAILLE, *supra* note 13, at 7.

²⁶⁶ See MURPHEY & COOPER, *supra* note 12, at 3.

²⁶⁷ Arditti, *supra* note 19, at 176.

²⁶⁸ Poehlmann, *supra* note 20, at 336–37.

²⁶⁹ BAILLE, *supra* note 13, at 7.

²⁷⁰ MURPHEY & COOPER, *supra* note 12, at 7.

²⁷¹ *Id.* at 3–4.

²⁷² Arditti, *supra* note 19, at 176.

²⁷³ See CRC, *supra* note 94, arts. 9, 12.

²⁷⁴ See *Doing Children Justice*, *supra* note 24, at 31:17 (Justice Sachs).

²⁷⁵ See *id.* at 27:45 (Justice Sachs).

²⁷⁶ See *id.* at 46:20 (Commissioner Baille).

mother is involved with the criminal justice system.²⁷⁷ Using these tools would help ensure that the best interests of the child inform every decision relating to the child and that those interests are assessed with a consideration of the child's views.²⁷⁸

The state should also consider building resilience in the child when assessing the child's best interests. The state must support more than just the survival of children; it must respond to their vulnerability by building resilience so that the children can thrive.²⁷⁹ Some factors that could build resilience include having relatives as caregivers; reducing the stigma of having an incarcerated parent; building social support networks;²⁸⁰ and having secure, stable care and a responsive home.²⁸¹ Children are "more likely to build secure attachments when cared for by the same caregiver during maternal incarceration, rather than being shifted around."²⁸² Care from a relative tends to show better results than residential or foster care.²⁸³ When children have a more responsive and stimulating home environment, they are more likely to exhibit optimal cognitive development.²⁸⁴

It is important to remember that for some children, maternal incarceration can be a relief. It can represent an improvement in the child's life by removing the child from a neglectful or abusive relationship.²⁸⁵ Some of those children may try to cope by distancing themselves from the incarcerated parent and bonding with another adult with whom the child has a close, stable relationship.²⁸⁶ Although an individual child may benefit from or cope well with maternal incarceration, building individual resilience does not mean that all children will handle maternal incarceration well.²⁸⁷ Maternal incarceration is often incredibly damaging to the child²⁸⁸ and the state is in the best position to mitigate that damage.²⁸⁹ The state should be responsive to the needs of the

²⁷⁷ See *id.* at 28:00 (Justice Sachs).

²⁷⁸ See *id.* at 46:20 (Commissioner Bailie); see also MARSHALL, *supra* note 1, at 18.

²⁷⁹ See *Doing Children Justice*, *supra* note 24, at 33:20 (Justice Sachs).

²⁸⁰ Arditti, *supra* note 19, at 175.

²⁸¹ Poehlmann, *supra* note 20, at 337.

²⁸² *Id.*

²⁸³ Arditti, *supra* note 19, at 175.

²⁸⁴ Poehlmann, *supra* note 20, at 337.

²⁸⁵ Arditti, *supra* note 19, at 172.

²⁸⁶ *Id.* at 174.

²⁸⁷ *Id.* at 176.

²⁸⁸ See Poehlmann, *supra* note 20, at 332.

²⁸⁹ See *Doing Children Justice*, *supra* note 24, at 31:17 (Justice Sachs).

children of incarcerated mothers by promoting supportive networks and programs in both schools and the community.²⁹⁰

B. *The Responsive State*

When the liberal subject is replaced with the vulnerable subject, one can begin to reimagine the role of the state and how the state interacts with individuals.²⁹¹ Because human vulnerability draws individuals together into societies, the state should therefore be responsible for ameliorating that vulnerability.²⁹² Through law, the state pervades every aspect of society and maternal incarceration, from deciding what constitutes a crime to when and how to punish those crimes.²⁹³ It decides the extent of family contact and how that contact will occur.²⁹⁴ Because maternal incarceration is within the state's control, the state has a responsibility to ensure that it is responsive to the individual needs and vulnerabilities of both the mothers and their children.²⁹⁵

With this responsibility, the state should take into account the real-world barriers to mother-child contact, such as the distance between prison and home, limited and inconvenient visiting times, a lack of public transportation, and high travel costs.²⁹⁶ These real-world barriers may seem insignificant, but they can cause serious problems for some children who are trying to maintain relationships with their incarcerated mothers.²⁹⁷ The state should be responsive to such problems and to community-wide vulnerability by working to support individuals and families. A good starting point would be listening to and assessing the needs of the individual women and children who come into contact with the criminal justice system.²⁹⁸

The state should also be responsible for supporting the children of incarcerated adults in a way that discourages future criminality.²⁹⁹ The children

²⁹⁰ See LOUREIRO, *supra* note 238, at 39–40.

²⁹¹ Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 19 (2008) [hereinafter Fineman, *Anchoring Equality*].

²⁹² Fineman, *Grappling with Equality*, *supra* note 115, at 168–69, 173.

²⁹³ See Fineman, *Anchoring Equality*, *supra* note 291, at 19.

²⁹⁴ See, e.g., *General Visiting Information*, FED. BUREAU PRISONS, <https://www.bop.gov/inmates/visiting.jsp> (last visited Oct. 25, 2016).

²⁹⁵ See Fineman, *Responsive State*, *supra* note 115, at 274.

²⁹⁶ BAILLE, *supra* note 13, at 28.

²⁹⁷ *Id.*

²⁹⁸ See *Doing Children Justice*, *supra* note 24, at 1:05:50 (Sarah Roberts).

²⁹⁹ See LOUREIRO, *supra* note 238, at 18–19; David Hudson, *President Obama: "Our Criminal Justice System Isn't as Smart as It Should Be,"* WHITE HOUSE (July 15, 2015), <https://www.whitehouse.gov/blog/>

of incarcerated parents—particularly of incarcerated mothers³⁰⁰—are far more likely to be incarcerated as adults.³⁰¹ This cycle of criminal behavior has significant costs not just for the individuals but also the state, in the form of financial costs to the criminal justice system, lost productivity of those individuals, and increased need for community support.³⁰² Early intervention for children at risk of delinquency is crucial to break this cycle.³⁰³ By investing resources to support children, the state can reduce the chances that children will turn to criminal behavior as adults,³⁰⁴ thus lessening the burden on the state.³⁰⁵

Although Scotland did not begin its criminal justice reform with vulnerability theory in mind, its reforms provide a good example of how the state can respond to the individual vulnerabilities of incarcerated mothers and their children. Inspired by the CRC, Scotland made a commitment to evaluate its parental incarceration procedures and make children’s rights a priority when incarcerating a parent.³⁰⁶ This commitment included an understanding of the importance of the mother-child relationship and the need to treat children as independent rights holders.³⁰⁷ After establishing that children’s rights are important considerations in maternal incarceration proceedings, Scotland introduced supportive programs and periodic reviews of its progress.³⁰⁸ Scotland recognized that it had a responsibility to the children of incarcerated mothers. Although progress has not been perfect, the insistence on periodic review and recommended improvements demonstrates Scotland’s responsiveness to vulnerability.³⁰⁹

2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be (discussing President Obama’s speech on criminal justice reform at the NAACP’s 106th national convention in which he said, “Our nation is being robbed of men and women who could be workers and taxpayers . . . If we make investments early in our children, we will reduce the need to incarcerate those kids.”).

³⁰⁰ Poehlmann, *supra* note 20, at 332.

³⁰¹ LOUREIRO, *supra* note 238, at 18–19.

³⁰² Talia Glesner, *Addressing the Needs of Children of Incarcerated Parents*, 2 UNIV. VT. JAMES M. JEFFORDS CTR. ISSUE BRIEF 1 (2012), https://www.uvm.edu/~jeffords/reports/pdfs/Issue%20Brief_Children%20of%20Incarcerated%20Parents%20issue%20brief.pdf.

³⁰³ *See Prevention & Early Intervention*, YOUTH.GOV, <http://youth.gov/youth-topics/juvenile-justice/prevention-and-early-intervention> (last visited Oct. 15, 2016).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ BAILLE, *supra* note 13, at 9 (citing Scottish Government, *Do the Right Thing: A Response by the Scottish Government to the 2008 Concluding Observations from the UN Committee on the Rights of the Child*, ¶ 30f (2009)).

³⁰⁷ *See id.*

³⁰⁸ *See generally* BAILLE, *supra* note 13; MARSHALL, *supra* note 1.

³⁰⁹ *See generally* BAILLE, *supra* note 13; MARSHALL, *supra* note 1.

C. *Building Resilience*

The state can respond to vulnerability by building resilience in individuals.³¹⁰ Resilience is the counterpoint to our vulnerability.³¹¹ Resilience can be built through the accumulation of five primary types of resources: “physical, human, social, ecological or environmental, and existential.”³¹² Physical resources include material assets such as food and shelter.³¹³ Human resources include assets such as education and training.³¹⁴ Social resources are assets derived from social networks, such as families and communities.³¹⁵ Ecological or environmental resources encompass assets derived from the natural environment.³¹⁶ Existential resources include assets acquired from beliefs or aesthetics.³¹⁷

The state can most directly increase resilience in those affected by maternal incarceration by providing physical, human, and social resources.³¹⁸ Incarcerating an individual removes that individual from the community; incarcerating a mother, however, also results in removing the primary caregiver from a child’s life.³¹⁹ This significantly affects the child’s physical, human, and social resources because the child’s home, daily life, and maternal relationship are disrupted.³²⁰ Maternal incarceration is an arena in which the state can identify and support some of the more vulnerable individuals in society.³²¹ Unfortunately, by focusing on punishing the mother and ignoring the rights of the child, the current U.S. criminal justice system is far more likely to increase vulnerability and decrease resilience.³²²

While the United States should lessen its reliance on incarceration as a mechanism for dealing with anti-social behaviors,³²³ it can use current incarceration situations to build resilience in the mother and child.³²⁴ For

³¹⁰ See Fineman, *Responsive State*, *supra* note 115, at 269.

³¹¹ *Id.*

³¹² *Id.* at 270.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 271.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ See *id.* at 270–75.

³¹⁹ GLOBAL PRISON TRENDS, *supra* note 26, at 14.

³²⁰ See ROBERTSON, *supra* note 16, at 2–3.

³²¹ See Laufer-Ukeles, *supra* note 162, at 273.

³²² See ROBERTSON, *supra* note 16, at 2–3.

³²³ See MURPHEY & COOPER, *supra* note 12, at 2.

³²⁴ See Arditti, *supra* note 19, at 176.

example, the state can use incarceration as an opportunity to increase human and social resources by providing vocational training and education in parenting skills, ultimately building resilience in the mother.³²⁵ The state can also focus on actively increasing and encouraging mother-child communication and improving the quality of visitation and cohabitation facilities.³²⁶ Prison visitation is often infrequent and can be stressful for children largely due to security features and procedures.³²⁷ Studies have shown that more child-friendly facilities, policies, and procedures can improve visitation experiences for children and their incarcerated mothers,³²⁸ thereby building resilience through increased social resources.³²⁹

Additionally, a secure attachment during the first year of life can build resilience in the child, even if the mother and child are later separated.³³⁰ For example, children who spent their first year in a prison nursery showed lower levels of depression and anxiety as preschoolers when compared to children who had been immediately separated from their incarcerated mothers.³³¹ This means that improving cohabitation arrangements should be a priority, especially for infants, in order to increase the strength of the mother-child bond and build resilience.³³² The state should also institute programs to increase visitation for older children.³³³ While prison nurseries and visitation programs can help build resilience in the mother and child while the mother is incarcerated, supportive community structures should also be in place for both upon release.³³⁴

Building resilience in the incarcerated mother and her child should be a community-wide endeavor. The state should coordinate prison and community programs to better respond to the individual vulnerabilities of the incarcerated mother and her child.³³⁵ Many suggested reforms may face resistance because

³²⁵ Laufer-Ukeles, *supra* note 162, at 273.

³²⁶ MURPHEY & COOPER, *supra* note 12, at 10.

³²⁷ *Id.* at 9.

³²⁸ *Id.*

³²⁹ *See id.* at 2.

³³⁰ Yager, *supra* note 163.

³³¹ *Id.*

³³² *See Doing Children Justice, supra* note 24, at 45:50 (Commissioner Bailie).

³³³ Laufer-Ukeles, *supra* note 162, at 267, 273.

³³⁴ *See* Yager, *supra* note 163.

³³⁵ *See* ROBERTSON, *supra* note 16, at 48. Prison programs in the United States include educational and vocational programs for the mother. Laufer-Ukeles, *supra* note 162, at 273. There are recommendations in Scotland for prison programs to also include mental health and addiction programs. FEMALE OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM, *supra* note 77, ¶¶ 51–52, 68. On the community level, recommended

they will be expensive to implement.³³⁶ Criminal justice reform, however, alleviates much of the burden on the state because building resilience in individuals allows them to be productive members of society.³³⁷ In addition, there are smaller steps the state can take that would go a long way in building resilience in the mother and child. Both the mother and child can be involved in the decision-making process in a way that ensures they are listened to and included.³³⁸ And in all proceedings involving a parent, the state could maintain the parent's anonymity,³³⁹ which can both protect and reduce the social stigma on the child.³⁴⁰

CONCLUSION

If prison is, in fact, “no place for a child”³⁴¹—whether that child is living in a prison nursery or just visiting—then it is likely not fit for the mother. Considering that there are more American children who have experienced parental incarceration than there are adults currently incarcerated,³⁴² criminal justice reformers must take into account the impact that maternal incarceration has on children. Despite this need, the rights of the children often go unmentioned in discussions of criminal justice reform.³⁴³ Reforms must include efforts to actively build resilience in both the mother and child.³⁴⁴ Reform discussions should focus primarily on building resilience in the most vulnerable population, the children of incarcerated mothers. The Bangkok Rules, the CRC, and the reforms the CRC inspired in Scotland's criminal justice system all encourage the state to take into account the rights and interests of the child when the mother is incarcerated. Vulnerability theory then serves as a tool to help further refine the nebulous definition of the best interests of the child as contained in the CRC and demonstrates how the state can build resilience in both the mother and the child.

programs include teacher trainings in interactions with children of prisoners and special school programs for children. MURPHEY & COOPER, *supra* note 12, at 9–10.

³³⁶ See Sidney Powell & Bernard B. Kerik, Opinion, *Criminal Justice Reform Isn't 'Soft on Crime,'* OBSERVER (Sept. 17, 2015, 8:00 AM), <http://observer.com/2015/09/criminal-justice-reform-isnt-soft-on-crime/>.

³³⁷ *Id.*

³³⁸ *See id.*

³³⁹ *See id.* at 23:30 (Justice Sachs).

³⁴⁰ *See id.*

³⁴¹ Yager, *supra* note 163.

³⁴² *See* MURPHEY & COOPER, *supra* note 12, at 9.

³⁴³ *Id.*

³⁴⁴ *See id.* at 9–10.

Vulnerability theory also has broader implications for the treatment of incarcerated fathers and overall criminal justice reform. Although fathers are usually not the sole or primary caregivers, paternal incarceration still has an impact on the child. Furthermore, the obligation of the state to respond to vulnerability and build resilience extends beyond incarcerated mothers and their children to all individuals within, and affected by, the state's control. There are many points in which the CRC and vulnerability theory can inform our discussions of reform, especially in the interactions of children with the criminal justice system. For example, understanding the interests and rights of children might inform arrest procedures and sentencing.

There may be some additional questions that reformers would need to address. For example, do we want a criminal justice system that is generally more lenient? Is it fair to introduce a system that may have more variation in sentencing or treats parents more leniently than non-parents?³⁴⁵ While these questions are beyond the scope of this Comment, it is important to remember that any time a parent comes into contact with the criminal justice system, the consequences extend beyond that individual and have an impact on the rights and interests of the child. By looking to international and foreign law as well as vulnerability theory, we can better understand how to address the rights and interests of children in American criminal justice reform.

REBECCA COVINGTON*

³⁴⁵ See MARSHALL, *supra* note 1, at 23.

* Executive Notes and Comments Editor, *Emory International Law Review*; J.D. Candidate, Emory University School of Law (2017); B.A., *magna cum laude*, University of Georgia (2003). The author would like to thank Professor Martha Fineman for her brilliant guidance and advice in writing this Comment; her editor, Carla Elias-Nava, for her thoughtful suggestions; and her family, particularly Cody and Desmond Covington, for their love and support.