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COMMENTS

WOMEN AND CHILDREN FIRST: AN EXAMINATION OF THE UNIQUE NEEDS OF WOMEN IN PRISON

I. INTRODUCTION

In spite of the clear constitutional requirement that prisons and jails provide *adequate* medical care for prisoners, the poor quality of medical care is one of the most critical penological problems today. This is particularly true, and particularly consequential, with respect to the care provided to many pregnant women prisoners.¹

The inherent restrictions of the prison environment prevent incarcerated women from meeting their own medical needs.² As a result, inmates are completely dependent upon prison staff to respond to their medical demands³ and unless proper medical care is provided, it will not be received.⁴

Comprehensive prenatal care is vital to a successful pregnancy. Quality care begins with a thorough physical examination.⁵ At that time, the physician administers tests,⁶ compiles

1. Barry, *Quality of Prenatal Care for Incarcerated Women Challenged*, 6 YOUTH LAW NEWS 1 (Nov.-Dec. 1985).

2. The district court in *Todaro v. Ward*, 431 F. Supp. 1129 (S.D.N.Y.), *aff'd*, 565 F.2d 48 (2d Cir. 1977), pointed out that because a prisoner's freedom is so restricted, he or she cannot treat even a minor ailment. *Id.* at 1133.

3. *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Todaro*, 431 F. Supp. at 1133.

4. *Estelle*, 429 U.S. at 103.

5. Cal. Dept. of Health Services, STANDARDS AND RECOMMENDATIONS FOR PUBLIC PRENATAL CARE 7 (1984) [hereinafter cited as STANDARDS]. The purpose of this manual has been described by the department as follows: "This manual has been developed as a guide for public prenatal programs. It is based on present standards for obstetrical and

the woman's medical background and assesses her needs.⁷ She is also instructed on the importance of proper nutrition⁸ for her own health and the health of the fetus.⁹ To continually monitor her health during the pregnancy, a woman should have regular examinations throughout the duration.¹⁰

Prisons, however, commonly provide inadequate prenatal care.¹¹ Pregnancies are handled individually and sporadically rather than systematically,¹² and often both the mother and child suffer. In addition, the mother and child are separated shortly after birth¹³ which may adversely affect the mother-child

gynecological services of the American College of Obstetrics and Gynecology and for public health practice of the American Public Health Association." *Id.* The standards in this manual will be used herein as guidelines for minimally acceptable standards of prenatal care, because they "incorporate minimal standards set and observed nationally for perinatal services." McCall, Casteel & Shaw, *PREGNANCY IN PRISON: A NEEDS ASSESSMENT OF PERINATAL OUTCOME IN THREE CALIFORNIA PENAL INSTITUTIONS* 3 (1985) (a report to the State of California Department of Health Services) [hereinafter cited *PREGNANCY IN PRISON*].

6. *STANDARDS*, *supra* note 5, at 10. The tests are administered to determine any possible complications or risks the mother may encounter. *Id.* The tests given should include blood, urine, syphilis, rubella antibody titer, Rh, antibody screen, PAP, gonorrhea, TB, sickle cell (as indicated), and glucose and sonogram as may be needed. *PREGNANCY IN PRISON*, *supra* note 5, at 20.

7. A thorough needs and background assessment should include psychosocial, family medical, personal medical, obstetric and nutritional, and a determination of the individual's knowledge of her condition. *STANDARDS*, *supra* note 5, at 8.

8. Adequate intake of nutrients is important for fetal growth and the continued health of the mother. *Id.* at 14.

Since pregnancy is a time of growth and formulation of new life, it is a time when the nutrient stores of the mother need to be maintained to supply food across the placenta to the fetus. The amino acids from the protein food consumed by the mother are used by the fetus for synthesis and tissue building. Large amounts of iron are needed in addition to protein, to aid in synthesis of hemoglobin in the red blood cells, and carrying of oxygen from the lungs to the tissues.

Id. at 27 app. A.

9. *Id.* at 14. "Poor diets during pregnancy and poor nutritional status of the mother prior to pregnancy have been documented to be associated with higher incidence of low birth weight babies and increased infant mortality and morbidity." *Id.*

10. At a minimum, a pregnant woman should see a doctor once monthly during the first 28 weeks, twice monthly between 28 and 36 weeks, and once weekly thereafter. *Id.* at 13.

11. Barry, *supra* note 1, at 2; McHugh, *Protection of the Rights of Pregnant Women in Prisons and Detention Facilities*, 6 *NEW ENG. J. PRISON LAW* 231, 239 (1980).

12. McHugh, *supra* note 11, at 232.

13. In general, the mother is separated from her child within 48 hours after birth. Interview with Ellen Barry, Director of Legal Services for Prisoners with Children, San Francisco, California (August 1985) [hereinafter cited as Aug. Interview].

relationship.¹⁴

This Comment will examine the deficiencies of the prison prenatal care system. It will discuss current litigation in terms of its impact on the prison staff to effectuate change and its possible influence upon future litigation. Further, three states' models for permitting the retention of physical custody of a child by an incarcerated mother will be investigated.

II. MEDICAL CARE

A. LITIGATION

Historically, courts have approached prison litigation cautiously.¹⁵ Change, because it required expert planning and coordination, was better left to the legislature and the executive.¹⁶ The courts intervened only if constitutional rights were being violated.¹⁷ Today, in the medical care context, court intervention results when a prison medical care system is challenged as violative of the eighth amendment¹⁸ of the United States Constitution.¹⁹ The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."²⁰ Punishment that involves the "unnecessary and wanton infliction of pain"²¹ is a manifest violation of the eighth amendment.²²

14. RICHARDS, *Effects on Development of Medical Interventions and Separation of Newborns from their Parents*, in *THE FIRST YEAR OF LIFE . . . PSYCHOLOGICAL AND MEDICAL IMPLICATIONS OF EARLY EXPERIENCE* 49 (1979).

15. *E.g.*, *Todaro v. Ward*, 431 F. Supp. 1129 (S.D.N.Y.), *aff'd*, 565 F.2d 48 (2d Cir. 1977).

16. *Id.* at 1132 (citing *Priser v. Rodriguez*, 411 U.S. 475, 490-92, 93 (1973)). The district court in *Todaro* stated "The problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." *Id.* (citing *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974)).

17. *E.g.*, *Todaro*, 431 F. Supp. at 1132; *Newman v. Alabama*, 349 F. Supp. 278, 280 (M.D. 1972). The district court in *Newman* added, "Courts should not inquire into the adequacy or sufficiency of medical care of state prison inmates unless there appears to be an abuse of the broad discretion which prison officials possess in this area." *Id.*, at 278.

18. U.S. CONST. amend. VIII.

19. *Todaro*, 431 F. Supp. at 1132. "It cannot now be doubted that denial of medical care to a state prisoner constitutes a violation of the eighth amendment . . ." *Id.* See also *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

20. U.S. CONST. amend. VIII, made applicable to the states by U.S. CONST. amend. XIV.

21. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

22. *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976).

The United States Supreme Court in *Estelle v. Gamble*,²³ established the standard under which an inmate may challenge a prison medical care system as constitutionally inadequate in violation of the eighth amendment.²⁴ In *Estelle*,²⁵ an inmate of the Texas Department of Corrections instituted a federal civil rights action,²⁶ alleging he received inadequate medical attention for a back injury he sustained while performing a prison work assignment.²⁷ The Supreme Court held: "In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."²⁸ The Court stated that deliberate indifference results when prison doctors or prison staff intentionally deny access to medical care or when prescribed care is intentionally interfered with or not delivered.²⁹ Utilizing the "deliberate indifference" standard, the Court found that respondent's injury had been adequately treated, and that the decision not to x-ray the injury may, at most, have been medical malpractice.³⁰ His claim was accordingly denied.³¹

Two important principles result from the Supreme Court's decision in *Estelle v. Gamble*.³² First, the Court recognized that certain punishments are incompatible with "the evolving standards of decency that mark the progress of a maturing soci-

23. 429 U.S. 97 (1976).

24. *Id.* at 104-05.

25. *Id.*

26. Section 1983 of Title 42 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, as citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law

42 U.S.C. § 1983 (1981).

27. *Estelle*, 429 U.S. at 98.

28. *Id.* at 106. The Court stated: "We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the eighth amendment." *Id.* at 104.

29. *Id.* at 104-05.

30. *Id.* at 107. The Supreme Court said that neither inadvertent failure to provide adequate medical care, nor mere negligence meet the standard of deliberate indifference and hence there is no violation of the eighth amendment. *Id.* at 105.

31. *Id.* at 108.

32. 429 U.S. 97 (1976).

ety,"³³ and acknowledged the government's affirmative obligation to provide medical care to those it imprisons.³⁴ Second, the implication of *Estelle* was that subsequent cases challenging the constitutionality of a prison medical care system must be analyzed using the "deliberate indifference" standard.³⁵

Litigation by women inmates is scarce, in part because women are less litigious than men.³⁶ *Todaro v. Ward*³⁷ was the first suit brought by women challenging the adequacy of medical care delivered at a women's prison. The plaintiffs³⁸ alleged that the delivery of medical care at the Bedford Hills facility³⁹ in New York violated their rights under the eighth amendment of the United States Constitution.⁴⁰ This case presented an institution-wide challenge to the medical care system operating at Bedford Hills.⁴¹ Using the "deliberate indifference" standard, the court held the medical practices at Bedford Hills "constitutionally infirm."⁴² The court found that the use of the lobby clinic, a screening device whereby a nurse was appointed to screen inmate complaints and schedule doctor's appointments, caused serious delays in access to a physician.⁴³ The court also found that poor record-keeping and inadequate notice procedures routinely

33. *Id.* at 102 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

34. *Estelle*, 429 U.S. at 103.

35. Barry, *supra* note 1, at 1.

36. GABLE, *LEGAL ISSUES OF FEMALE INMATES* (1982) (a report prepared by the School for Social Work at Smith College). The study was conducted to determine if women are less litigious than men. The study concluded "it is not a lack of concern that limits activism, but a lack of resources stemming from the criminal justice system's failure to properly assess the needs of women in prison. Its consequent failure to provide resources relative to inmates' real needs creates passivity and feeds continued administrative neglect." *Id.* at 207.

37. 431 F. Supp. 1129 (S.D.N.Y.), *aff'd*, 565 F.2d 48 (2d Cir. 1977).

38. Plaintiffs represent a class "consisting of all persons who are or will be confined at Bedford Hills." *Todaro*, 431 F. Supp. at 1131.

39. Bedford Hills is a medium security facility housing female prisoners in the custody of the New York Department of Corrections. *Todaro*, 565 F.2d at 50.

40. *Todaro*, 431 F. Supp. at 1131.

41. This case did not involve an individual claim for relief, rather it raised the issue of when individual failures "in the overall operation of a prison medical care system add up to deliberate indifference which would render the entire system unconstitutional?" *Id.* at 1133.

42. *Todaro*, 565 F.2d at 52-53.

43. *Id.* at 51. The circuit court stated: "The effects of the screening procedure were, on occasion, devastating. Analysis of the medical records in evidence and the testimony of five inmate witnesses revealed that delays of two weeks to two months in achieving access to a physician were not uncommon." *Id.*

impeded scheduling physician ordered follow-up care.⁴⁴

The defendants⁴⁵ in *Todaro* argued that the district court's findings were based on a few isolated incidents.⁴⁶ The court of appeals rejected this contention, recognizing that the plaintiffs had evidence of many instances in which access to care was delayed or denied,⁴⁷ and that any limit in the number of examples was attributable to the court ordered discovery limitations.⁴⁸ The defendants also asserted that the procedures used at Bedford Hills were comparable to those used at other correctional institutions.⁴⁹ In response, the court said, "[T]his court has repeatedly rejected the argument that institutional practices must be defective in the maximum degree before a violation of constitutional rights can be found and corrected."⁵⁰

*Todaro v. Ward*⁵¹ illustrated what procedures may be constitutionally inadequate.⁵² In refining the definition of "deliberate indifference," the court indicated that whenever use of a screening procedure seriously delays access to care,⁵³ and poor record keeping results in deficient follow-up care, a constitutional violation exists, provided plaintiffs show more than iso-

44. *Id.* at 52. The court found that the delays were often several months. *Id.*

45. Named as defendants were Benjamin Ward, Commissioner of the New York Department of Corrections; Ian Loudon, Assistant Commissioner for Health Services of the New York State Department of Correctional Services; David Frost, Southern Regional Director of Health Services of the New York State Department of Correctional Services; Frances Clement, Superintendent of Bedford Hills; Henry Williams, Health Services Director of Bedford Hills; Robert Tschorn, Surgical Consultant at Bedford Hills and Marie Daly, Nurse Administrator at Bedford Hills. *Id.* at 1129.

46. *Todaro*, 565 F.2d at 53.

47. *Id.*

48. *Id.* at 53 n.4. The court's discovery order was issued in "response to the state's resistance to broader discovery." *Id.* The court stated, further, "[i]f the records introduced were atypical, the appellants were free to introduce others. This they failed to do." *Id.*

49. *Id.* at 53.

50. *Id.*

51. 431 F. Supp. 1129 (S.D.N.Y.), *aff'd*, 565 F.2d 48 (2d Cir. 1977).

52. A constitutional violation was found in "the procedure devised to screen inmates' requests for medical assistance, to follow-up doctors' orders, and to observe patients confined to sick wing . . ." *Todaro*, 565 F.2d at 53.

53. *Id.* The procedures used at Bedford Hills are not uncommon. For example, in California, the California Institution for Women (CIW), California Rehabilitation Center (CRC) and Santa Rita Rehabilitation Center (Santa Rita) all use screening devices to screen inmate complaints. See PREGNANCY IN PRISON *supra* note 5, at 146-47, 200, 251 (discussion of daily health care at CIW, CRC, and Santa Rita).

lated incidences.⁵⁴ *Todaro* did not specifically address the problems of pregnant women at Bedford Hills, but many of the procedures found to violate the eighth amendment impact significantly upon pregnant women.⁵⁵

Subsequently, in *West v. Manson*,⁵⁶ the care and treatment of incarcerated pregnant women in prison was challenged specifically.⁵⁷ This class action, filed on behalf of all female pretrial and sentenced inmates at the Connecticut Correction Institution at Niantic, challenged the conditions and policies of the institution.⁵⁸ Plaintiffs⁵⁹ alleged, inter alia, that pregnant women were provided no special diet.⁶⁰ They further alleged that the health of pregnant women was jeopardized by being shackled during transport for hospital visits,⁶¹ and from receiving inappropriate drug treatment.⁶²

*West v. Manson*⁶³ was settled out of court.⁶⁴ With respect to pregnant inmates, the parties⁶⁵ agreed that the standard inmate

54. The *Todaro* Court found that "while a single isolated instance of medical care denied or delayed viewed in isolation may appear to be the product of mere negligence, repeated examples of such treatment bespeak a deliberate indifference by prison authorities to the agony engendered by haphazard and ill conceived procedures." *Todaro*, 565 F.2d at 52.

55. A pregnant woman often requires emergency access to a physician, especially at the onset of labor. In addition, it is important that she see a physician regularly throughout her pregnancy. See *supra* notes 5-10 and accompanying text. If important care is denied or seriously delayed, the health of the mother and fetus may be jeopardized.

56. No. H83-366 (D. Conn. filed May 9, 1983).

57. Complaint at 1, *West*.

58. The suit was also filed on behalf of all children of Niantic inmates and challenged the adequacy of the facilities and services for inmate mothers and their children, but their claims will not be discussed here. *Id.* at 1.

59. The class certified consisted of all women who were in or in the future would be confined at Connecticut Correctional Institution at Niantic (CCIN) in pretrial or sentenced status, and all children whose mothers were or would be in the future confined at CCIN. Agreement of Settlement at 1, *West*.

60. Complaint at 9-10, *West*.

61. *Id.* at 10. Defendants had recently changed their policy of shackling inmates during labor and childbirth, but continued to shackle women going off the grounds for hospital visits, and during hospital stays, including the post-partum period. *Id.*

62. *Id.*

63. No. H83-366 (D. Conn. filed May 9, 1983).

64. Agreement of Settlement at 1, *West*.

65. Defendants were: Manson, the Commissioner of the Connecticut Department of Corrections; Marie Cerino, the Warden of the Niantic facility and Mark Marcus, the Commissioner of the Connecticut Department of Children and Youth Services. Complaint at 1, *West*.

diet should be supplemented with extra milk and bran.⁶⁶ The prison would make available any special dietary supplements.⁶⁷ Also, the women would receive prenatal vitamins, and have access to prenatal classes.⁶⁸ Finally, the parties agreed that if a pregnant woman had to be placed in leg irons, a nurse in the medical unit must give approval.⁶⁹

This was a comprehensive settlement designed to meet the unique needs of pregnant women.⁷⁰ Since it was settled out of court, it is unclear whether certain of defendants' practices violated the inmates' rights under the eighth amendment. The importance of the settlement is that it provides a good, comprehensive framework or set of guidelines to be followed by prison systems that desire to change their present practices to accommodate the needs of pregnant inmates.

West left unresolved the issue of what practices in the treatment of pregnant inmates are so inadequate as to rise to the level of "deliberate indifference to serious medical needs."⁷¹ *Harris v. McCarthy*,⁷² which is currently being litigated, may provide an answer. *Harris* is the first suit to challenge *solely* the quality of prenatal and post-partum care given pregnant inmates.⁷³ The action was filed on behalf of all pregnant and post-partum women in the custody of the California Department of Corrections.⁷⁴ Plaintiffs⁷⁵ alleged that defendants⁷⁶ failed to con-

66. Pregnant inmates will receive the standard inmate menu at all meals with the following additions: a) a serving of milk at each meal, b) an additional serving of milk at non-meal time, c) bran will be provided on request absent supply problems, and nourishing snack food such as crackers, nuts, peanut butter, dried fruit, soup and granola bars are to be kept in the commissary of the facility. Agreement of Settlement at 13-15, *West*.

67. The attending obstetrician will assess the dietary needs of each pregnant woman as soon after confirmation of pregnancy as possible. Special needs will be marked in her medical record, and any special diet prescribed will be made available. *Id.* at 15.

68. *Id.* at 14, 16.

69. *Id.* at 17.

70. According to Martha Stone, attorney for the plaintiffs in *West v. Manson*, the officials at CCIN have been meeting their obligations under the settlement as it concerns pregnant women. Telephone interview with Martha Stone, attorney with the Connecticut Civil Liberties Union (January 10, 1986).

71. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

72. No. 85-6002 (C.D. Cal. filed Sept. 11, 1985).

73. See Complaint for Declaratory and Injunctive Relief at 1, *Harris* [hereinafter cited as Complaint].

74. *Id.*

75. The women named as plaintiffs were pregnant or had recently delivered, and were incarcerated at the California Institution for Women (CIW) in Frontera, California.

duct or permit regular medical examinations of incarcerated pregnant women.⁷⁷ Further, the plaintiffs alleged that defendants routinely failed to detect and respond to complications experienced during pregnancy or to the particular needs to high risk pregnancies.⁷⁸ Among the other alleged infirm practices were failure to respond to emergencies relating to pregnancy and delivery,⁷⁹ failure to provide adequate post-partum care, and failure to provide appropriate medication and vitamins.⁸⁰

The California Institution for Women (CIW) does not have a doctor of obstetrics and gynecology on staff,⁸¹ nor does it have the personnel or facilities to conduct adequate medical examinations or provide sufficient care.⁸² To help alleviate problems caused by these deficiencies, CIW has contracted with Riverside General Hospital (RGH) located approximately thirty miles from the prison.⁸³ Plaintiffs alleged, however, that defendants continually failed to advise RGH staff of the status and number of pregnant women,⁸⁴ that defendants did not transport patients to RGH for regular examinations, and that defendants canceled examinations already scheduled by RGH medical staff.⁸⁵ Plaintiffs also alleged that defendants failed to maintain adequate medical records.⁸⁶ The sum of these allegations resulted in a claim that defendants' actions constituted "deliberate indifference" to the serious medical needs of the inmates in violation of the eighth and fourteenth amendments of the United States

Id.

76. Named as defendants were: Daniel McCarthy, Director of Corrections, California Department of Corrections; Anne Alexander, Acting Superintendent, CIW; Dr. K.K. Srivastava, Chief Medical Officer, CIW. *Id.*

77. *Id.* at 6.

78. *Id.* at 6-7.

79. *Id.* at 7. "Defendants' failure to provide adequate prenatal care to plaintiffs has resulted in the death of at least one infant and the disability of a second infant. Defendants' failure to provide adequate medical care following delivery has caused at least one plaintiff to have an unnecessary hysterectomy." *Id.* at 1.

80. *Id.* at 7.

81. *Id.* "To care adequately for female patients, medical personnel must have special training in and sensitivity to womens' distinctive biological and physiological needs." RESNIK & SHAW, *Prisoners of Their Sex: Health Problems of Incarcerated Women*, in 2 PRISONERS' RIGHTS SOURCEBOOK 326 (1980).

82. Complaint at 7, *Harris*.

83. *Id.* at 7. Inmates are transported to RGH for care. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 8.

Constitution.⁸⁷ A settlement in *Harris* is likely,⁸⁸ and should be forthcoming.

B. ANALYSIS

If *Harris v. McCarthy*⁸⁹ is litigated it will provide insight into which practices concerning pregnant women are constitutionally inadequate. Certain of plaintiffs' allegations are similar to the challenges raised in *Todaro v. Ward*,⁹⁰ namely that the inmates are not receiving medical examinations and defendants are not maintaining adequate records.⁹¹ These practices evidenced "deliberate indifference" to the inmates' medical needs in *Todaro*,⁹² so if they exist at CIW, the defendants may be forced to remedy such practices. If the parties agree to settle, the resulting agreement may be similar to the settlement reached in *West*.⁹³ The end result could be the elimination of practices such as shackling pregnant inmates during transport to the hospital,⁹⁴ and providing nutritionally inadequate meals to expectant mothers.⁹⁵ In an effort to avoid litigation, prison officials may remedy their deficient medical procedures before they are legally challenged.⁹⁶

87. *Id.* at 1.

88. Interview with Ellen Barry, Director of Legal Services for Prisoners With Children, in San Francisco, California. (January 7, 1986) [hereinafter cited as Jan. Interview]. According to Ms. Barry, the *Harris* litigation has sparked legislative interest in the controversy surrounding the adequacy of prenatal care in California prisons. A bill was introduced by Senator Presley that would provide for monitoring by the Maternal and Child Health Board of the State Department of the standards of perinatal care. *Id.* See S.B. 147, Cal. S. 147, 1985-86 Reg. Sess. (1985) (amended by Sen. on Jan. 29, 1986) which would add the following provision to the Health and Safety Code § 1267.10 (b): "The Maternal and Child Health Board of the state department shall monitor and evaluate the standards and protocols of perinatal care utilized by the state department for the treatment of pregnant prisoners or inmates." *Id.*

89. No. 85-6002 (C.D. Cal. filed Sept. 11, 1985).

90. 431 F. Supp. 1129 (S.D.N.Y.), *aff'd*, 565 F.2d 48 (2d Cir. 1977).

91. See *supra* notes 79-88 and accompanying text for relevant discussion.

92. See *supra* notes 37-55 and accompanying text for relevant discussion.

93. See *supra* notes 64-71 and accompanying text for relevant discussion.

94. It is common for states to handcuff and shackle inmates who are being transported outside the facility. The decision to shackle is a blanket rule, and hence is not related to an individual's particular security needs. PREGNANCY IN PRISON, *supra* note 5, at 214.

95. Prison diets tend to be high in starch and salt, and low in prenatal nutrients such as iron and protein. McHugh, *supra* note 11, at 241.

96. Similar challenges were alleged in a recent action filed in Alameda County California. *Jones v. Dyer*, No. (Sup. Ct. Alameda County, filed Feb. 25, 1986). The action is

III. PHYSICAL CUSTODY

Historically, incarcerated mothers retained custody of their children inside the prison.⁹⁷ Prison administrators believed that the presence of children had a rehabilitative effect on the women.⁹⁸ Children aided the effort to socialize women into the typically female roles of caretaker and homemaker.⁹⁹ Modernly, children are rarely permitted to remain with their incarcerated mothers. In the overwhelming majority of states the new mother is separated from her child within forty-eight hours after birth.¹⁰⁰ The mother returns to prison and the child must remain outside.¹⁰¹ This practice forces a woman to make alternative arrangements for the care of her child.¹⁰² Most often relatives care for the child.¹⁰³ Occasionally, he or she stays with the father¹⁰⁴ or is placed in foster care.¹⁰⁵ Two states, however, currently have statutory provisions allowing a mother to retain physical custody of her child after birth.¹⁰⁶ A third state had a similar provision,¹⁰⁷ which was later repealed.¹⁰⁸

brought by pregnant and post-partum women at Santa Rita Rehabilitation Center. Plaintiffs alleged, inter alia, that defendants place the prisoners in leg irons during transport for hospital visits, and that the prison diet is nutritionally inadequate. Complaint for Declaratory and Injunctive Relief at 2, *Jones*.

97. RESNIK & SHAW, *supra* note 81, at 321.

98. *Id.* at 322.

99. *Id.*

100. Aug. Interview, *supra* note 13.

101. *Id.*

102. See E. Barry & D. Lennon, *Incarcerated Mothers and Their Children Current Options and Possible Alternatives* 12 (1977) (unpublished paper on file at Legal Services for Prisoners With Children, San Francisco, California).

103. Approximately 75% of incarcerated mothers place their children with relatives. PREGNANCY IN PRISON, *supra* note 5, at 91. The statistics used in the study are based on inmates in California facilities, but the "data closely parallels that found in national studies and profiles which have focused on the female offender." *Id.* at 59.

104. Another 12% stay with the father. *Id.* at 91.

105. About eight percent live with foster parents. *Id.*

106. N.Y. CORRECT. LAW §611 (McKinney 1968); CAL. PENAL CODE §§ 3410-3425 (West 1982).

107. 1957 Fla. Laws ch. 121, § 22 (current version FLA. STAT. ANN. § 944.24 (West 1985)).

108. 1981 Fla. Laws ch. 15, § 2 (current version FLA. STAT. ANN. § 944.24 (West 1985)).

A. FLORIDA

Until 1981, Florida, by statute, permitted an inmate mother to keep her child within the institution.¹⁰⁹ As early as 1957, section 944.24(2) of the Florida statutes permitted a woman who gave birth to a child while incarcerated to retain custody of the child in the institution until the child reached eighteen months of age.¹¹⁰

An incarcerated woman at Broward Correctional Institution in Fort Lauderdale, Florida sought to enjoin the prison officials from depriving her of custody of her newborn in *Wainwright v. Moore*.¹¹¹ She claimed that she was pregnant and would be giving birth shortly.¹¹² She sought to retain physical custody of the child pursuant to section 944.24.¹¹³ The trial court interpreted the statute as giving the expectant mother sole discretion in deciding whether or not to keep her child.¹¹⁴ The appellate court reversed, holding that the paramount consideration is the best interests of the child.¹¹⁵ The court held that since the statute was silent as to who should make the decision regarding the child's placement "[t]he rights of all interested parties; the child, the mother, the prison officials, in an appropriate case the father, and the State of Florida must be considered all in light of the welfare of the child which remains the guiding principle."¹¹⁶ The court never actually said who was to make the final determination of whether or not the child may return to prison with his or her mother.

Subsequently, in 1979, the Florida Legislature substantially revised section 944.24 to provide for a hearing before a court

109. *Id.*

110. Section 944.24 (2) provided in pertinent part: "If any woman received by or committed to said institution shall give birth to a child while an inmate of said institution, such child may be retained in the said institution until it reaches the age of 18 months" 1957 Fla. Laws ch. 121, § 22.

111. 374 So. 2d 586 (Fla. Dist. Ct. App. 1979).

112. *Id.* at 587.

113. *Id.*

114. *Id.*

115. *Id.* The best interests of the child are generally the underlying concerns anytime placement of a child is questioned. The child's best interests are determined by examining his or her physical, moral and spiritual well being. 43 C.J.S. *Infants* § 13 (1978).

116. *Wainwright*, 374 So. 2d at 588.

judge to determine the best interests of the child¹¹⁷ should the mother elect to keep the infant in the institution.¹¹⁸ No longer did the statute provide simply that an incarcerated woman may retain custody of her child. Following this revision, an inmate at Florida Correctional Institution at Lowell filed a petition for retention of physical custody of a child born to her during her incarceration.¹¹⁹ In *Delancy v. Booth*,¹²⁰ the trial court found that retention of custody by the incarcerated mother would not be in the child's best interest.¹²¹ This determination was upheld on appeal,¹²² and the appellate court added, "The [mother] has no constitutional or statutory right to raise the child in prison."¹²³

In 1981, the Florida Legislature repealed the portions of section 944.24 that allowed for a child to stay in prison with his or her mother. The current statute provides simply that a woman shall give birth outside the institution and the child shall be suitably placed outside the prison system.¹²⁴

117. Essentially, the welfare of a child born in a prison was within the jurisdiction of the appropriate circuit court. 1979 Fla. Laws ch. 331, § 1 (current version FLA. STAT. ANN. § 944.24(2) (West 1981)).

118. The revised statute provided:

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

Id.

119. *Delancy v. Booth*, 400 So. 2d 1268 (Fla. Dist. Ct. App. 1981).

120. *Id.*

121. *Id.* at 1269. The court heard testimony by a psychologist who said the prison environment would not make any difference to the child. However, Booth, the Superintendent of the facility, testified the children had little stimulation in the facility. The trial court found that the child should not remain in the prison environment. *Id.*

122. *Id.* at 1270.

123. *Id.*

124. FLA. STAT. ANN. § 944.24 (West 1985).

B. NEW YORK

New York has extremely progressive laws governing the rights of incarcerated women to retain custody of their children.¹²⁵ Section 611(2) of the New York Correctional Law¹²⁶ allows a child born to an incarcerated woman to be returned with his or her mother to the correctional institution of her confinement, unless the mother is determined to be unfit by the chief medical officer.¹²⁷ The child may remain in the institution until it reaches one year of age.¹²⁸ However, the officer in charge of the institution may have a child removed at any time before it reaches one year of age.¹²⁹

Although seemingly limited by this latter provision, New York courts have interpreted the entire section quite broadly. In *Apgar v. Beauter*,¹³⁰ an inmate at Tioga County Jail sought to enjoin the sheriff from prohibiting her from retaining custody and care of her child while an inmate.¹³¹ A New York supreme court said, "[I]t is highly improbable that the Legislature intended to lodge in the person of a sheriff or prison warden an unbridled power to negate without cause a long-standing bias in this state in favor of a child remaining with its natural mother."¹³² The court found that the welfare of the child was

125. New York has adopted a prison nursery system. A nursery is actually maintained on the grounds of the Bedford Hills facility. E. Barry & D. Lennon, *supra* note 102, at 1-2.

126. The statute provides in pertinent part:

A child so born may be returned with its mother to the correctional institution in which the mother is confined unless the chief medical officer of the correctional institution shall certify that the mother is physically unfit to care for the child, in which case the statement of said medical officer shall be final.

N.Y. CORRECT. LAW § 611(2) (McKinney 1968).

127. *Id.*

128. Subsection (2) of section 611 continues: "A child may remain in the correctional institution with its mother for such period as seems desirable for the welfare of such child, but not after it is one year of age." *Id.*

129. *Id.* "The officer in charge of such institution may cause a child cared for therein with its mother to be removed from the institution at anytime before the child is one year of age." *Id.*

130. 347 N.Y.S.2d 872, 75 Misc.2d 439 (1973).

131. *Id.*

132. *Id.* at 875, 75 Misc.2d at 440. The court was responding to the sheriff's claim that he had absolute discretion under section 611(2) to separate a mother and child. *Id.* at 874-75, 75 Misc.2d at 439-40.

best served by remaining with his or her mother.¹³³

The supreme court of Monroe County reached a different conclusion six years later in *Bailey v. Lombard*.¹³⁴ Plaintiff, Ms. Bailey, an inmate at Monroe County Jail and mother of five, sought to retain physical custody of her newborn infant.¹³⁵ In reaching a decision, the court was able to distinguish the fact situation here from that presented in *Apgar*.¹³⁶ *Apgar*, the court said, involved a woman who was awaiting trial, and hence, "the rights of the petitioning mother did not at the time of the decision conflict with the rights and welfare of the child."¹³⁷ Here, Ms. Bailey was actually serving a sentence, which, the court said, was "subject to uncertain termination."¹³⁸ The court held that the paramount consideration was the best interests of the child,¹³⁹ and in this case the needs of Ms. Bailey's child would be better served outside the prison system.¹⁴⁰ In reaching the decision, the court thoroughly examined Ms. Bailey's prior conduct regarding her other children, and found that "she had never functioned as a nurturing parent to any of them."¹⁴¹ The court concluded that since the mother was the wrongdoer, in this instance, her rights should be subservient to the interests of the innocent child.¹⁴²

The court in *Bailey* indicated that the decision of whether or not a woman may keep her child in the institution of her confinement rests with the sheriff.¹⁴³ The sheriff's decision, however,

133. *Id.* at 875, 75 Misc.2d at 441. The court found that "incarceration in a jail or correctional institution per se does not constitute such unfitness or exceptional circumstances so as to require that a newborn infant be taken from its mother is attested to by the enactment by the Legislature of Section 611(2) of the Correction Law." *Id.*

134. 420 N.Y.S.2d 650, 101 Misc.2d 56 (1979).

135. *Id.* at 651, 101 Misc.2d at 57.

136. *Id.* at 653, 101 Misc.2d at 61.

137. *Id.* The court stated: "A factual distinction which makes a difference is the conviction . . ." *Id.*

138. *Id.*

139. *Id.*

140. *Id.*, 101 Misc.2d at 66

141. *Id.*, 101 Misc.2d at 65. The court found that there had been a pattern of parent-child separation, and that when petitioner was asked some basic questions about her children such as their favorite color or the name of their friends, she could not answer. *Id.* at 655, 101 Misc.2d at 64.

142. *Id.* at 656; 101 Misc.2d at 65.

143. *Id.* at 654, 101 Misc.2d at 62. The court stated: "When the sheriff, under his [her] statutory obligation, considers the best interests of the child . . ." *Id.* (emphasis

must be based on a determination of the welfare of the child.¹⁴⁴ The court delineated certain guidelines to be followed in reaching a decision. For example, the sheriff should consider the facilities available, the offense for which the mother is serving her sentence, the length of the sentence, and the parenting background of the mother.¹⁴⁵ Section 611(2) is actually silent as to who should make the decision concerning placement of the child. The *Apgar* court indicated that priority would be given to the mother's preference. The *Bailey* court, however, essentially found that the sheriff was actually the decisionmaker, provided his or her decision was not arbitrary.¹⁴⁶ There have been no subsequent decisions.

C. CALIFORNIA

Since 1929, California has allowed incarcerated women to retain physical custody of their young children.¹⁴⁷ The first statute in this area, Penal Code section 3401, promulgated in 1941, permitted women to keep children under the age of two inside the prison.¹⁴⁸

In 1978, Barbara Cardell, an inmate at the California Institution for Women (CIW) and mother of a newborn, filed a class action to compel the implementation of section 3401.¹⁴⁹ Ms.

added).

144. *Id.*

145. *Id.* The court stated:

The sheriff, in arriving at his [her] determination, should take the following factors into consideration:

1. what would be the benefits to the child in staying with its mother?
2. what would be the negative effects on the child?
3. what would be the benefits to the child in being placed in foster care by the Department of Social Services?
4. what would be the negative effects of foster care on the child?"

Id., 101 Misc. 2d at 62-63.

146. *Id.* at 653, 101 Misc. 2d at 62.

147. 1929 Cal. Stat. ch. 248, § 9.

148. Section 3401 of the California Penal Code formerly provided: "If any woman received by or committed to said institution have (sic) a child under two years of age, or gives birth to a child while an inmate of said institution, such child may be admitted to, and retained in, said institution until it reaches the age of two years" 1941 Cal. Stat. ch. 53, § 1.

149. *Cardell v. Enomoto*, No. 701-094 (Sup. Ct. San Francisco, 1976).

Cardell, while pregnant, informed CIW officials of her desire to keep her child with her in prison after its birth.¹⁵⁰ She requested that they arrange for the child's stay.¹⁵¹ Receiving no action, Ms. Cardell sought a writ of mandate.¹⁵² She argued, on behalf of herself and others similarly situated, that section 3401, "created an absolute right in the mother to keep her baby with her while she is incarcerated."¹⁵³ The court held that since the statute said "[s]uch child *may* be admitted to or retained in, said institution . . . ,"¹⁵⁴ it actually afforded prison officials the discretion to decide whether the mother may retain custody.¹⁵⁵

In 1978, the California Legislature repealed section 3401.¹⁵⁶ It was replaced with the Community Prisoner Mother-Infant Care Program (MIC).¹⁵⁷ The program enables qualified women to serve part of their sentences in a "half-way" house¹⁵⁸ with their children.¹⁵⁹ A woman who has children prior to incarceration, or who gives birth while in prison,¹⁶⁰ will qualify for the MIC program if she has a probable release date and maximum sentence of six years.¹⁶¹ If she had the child before entering prison,¹⁶² she must have been the child's primary caretaker,¹⁶³ and she must not have been found an unfit parent in any court proceeding.¹⁶⁴

Implementation of the MIC program has been slow, largely because the prison authorities claim that it is too costly.¹⁶⁵ Due

150. Petition for Writ of Mandate, Temporary Restraining Order at 4, *Cardell*.

151. *Id.*

152. *Id.* at 1.

153. Memorandum of Intended Decision at 2, *Cardell*.

154. 1978 Cal. Stat. ch. 1054, § 2 (emphasis added).

155. Memorandum of Intended Decision at 2, *Cardell*.

156. 1978 Cal. Stat. ch. 1054, § 3.

157. *Id.* § 2 (current version CAL. PENAL CODE §§ 3410-3425. (West 1982)) provides: "The Legislature finds that the separation of infants from their mothers, while their mothers are in prison, can cause serious psychological damage to such infants. To alleviate the harm to such infants, consistent with the interests of public safety and justice, the following pilot program is enacted." *Id.*

158. A half-way house is a less restrictive facility designed to house those eligible for participation in the program.

159. Aug. Interview, *supra* note 13.

160. CAL. PENAL CODE § 3419 (West 1982).

161. *Id.* § 3417(a).

162. *Id.* § 3417.

163. *Id.* § 3417(b).

164. *Id.* § 3417(c).

165. Jan. Interview, *supra* note 88. Ms. Barry said that following the promulgation

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to tremendous overcrowding at the women's prisons, it is now more cost effective to house women at the prison facility.¹⁶⁶ To challenge the inadequate implementation of the MIC program, a taxpayer,¹⁶⁷ and pregnant women and mothers in the custody of the California Department of Corrections filed an action.¹⁶⁸ The complaint, in *Rios v. McCarthy*,¹⁶⁹ alleged that defendants'¹⁷⁰ failure to implement the program in a "fair and reasonable manner" violated the incarcerated mother's statutory and constitutional rights.¹⁷¹ It alleged defendants failed to notify the eligible prisoners of the existence of the MIC program in violation of the Penal Code sections 3415¹⁷² and 3418.¹⁷³ The plaintiffs further alleged that defendants failed to provide them with applications for admission into the MIC program,¹⁷⁴ that defendants arbitrarily denied them admission to the program,¹⁷⁵ and that de-

of the mother-infant care program, it was actually less costly to place eligible women inmates in the community. Now, since the California Institution for Women (CIW) is so overcrowded, it is more expensive to house the women outside the facility. *Id.*

166. *Id.*

167. Nancy Shaw is the taxpayer plaintiff who was allegedly injured by defendants' failure to fully implement the MIC program. She alleged that defendants inappropriately administered tax dollars by failing to implement the program. Complaint at 24, *Rios v. McCarthy*, No. 330211 (Sup. Ct. Sacramento 1985).

168. *Rios v. McCarthy*, No. 330211 (Sup. Ct. Sacramento 1985).

169. *Id.*

170. Complaint at 1, *Rios*. Named as defendants are: Daniel McCarthy, Director of the California Department of Corrections (CDC); N.A. Chaderjian, Secretary of the Youth and Adult Correctional Authority (YACA); Edward Veit, Acting Deputy Director, Parole and Community Services, CDC; Wayne Estelle, Acting Superintendent of the California Institution for Women (CIW); Robert Borg, Superintendent of the California Rehabilitation Center. *Id.*

171. Complaint at 2, *Rios*.

172. *Id.* at 8-9. California Penal Code section 3415 requires the probation department to notify eligible women of the existence of the MIC program. CAL. PENAL CODE § 3415 (West 1982).

173. Women who give birth while serving their sentence must be notified about the MIC program. *Id.* § 3418.

174. Complaint at 9, *Rios*. The complaint alleges that defendants have an obligation, pursuant to California Penal Code sections 3416, 3417, 3419 and 3420, to provide potentially eligible women with applications if they are requested. Defendants allegedly give plaintiffs outdated applications or simply fail to give them any applications. *Id.* at 9-10.

175. *Id.* at 10. Examples of the allegedly arbitrary reasons for denying plaintiffs admission to the program include: (1) excluding women with more than one child from eligibility even though the language of the statute reads "[i]nmates who have one or more children . . .," CAL. PENAL CODE § 3411 (West 1982) (emphasis added), (2) excluding women who do not have birth certificates although the California Department of Corrections Manual states that a birth certificate need not be produced, and (3) excluding women based on the nature of their conviction even though Penal Code section 3420 states that only certain crimes are to be considered as affecting the burden of producing evidence. Complaint at 10-11, *Rios* (citing CAL. PENAL CODE § 3420 (West 1982)).

defendants simply failed to adequately fund existing facilities.¹⁷⁶

The superior court judge issued a temporary restraining order against defendants.¹⁷⁷ Defendants were ordered to immediately process the applications of the named plaintiffs.¹⁷⁸ Since this decision, the parties have had one formal settlement conference.¹⁷⁹ They have not reached a final agreement. The apparent success of *Rios* may result in a successful MIC program.

D. ANALYSIS

Forced separation of a mother and child may have long term consequences. A bond forms between a mother and her child that results from biological dependence and parental response both during pregnancy and after birth.¹⁸⁰ A mother is particularly sensitive to her child following the birth¹⁸¹ and forced separation adversely affects the initial adaptation process of a mother and her newborn.¹⁸² Since the majority of incarcerated women plan to resume care of their children upon release,¹⁸³ they should be provided with the opportunity to live with their children during this crucial developmental period.¹⁸⁴

The MIC program¹⁸⁵ adopted in California offers women the opportunity to remain with their young children. Unlike the prison nursery system adopted in New York,¹⁸⁶ the children of California prisoners actually live outside the institution. This situation may eliminate some of the negative effects the prison

176. *Id.* at 13. Although hundreds of women are potentially eligible for admission to the MIC program, there are only four facilities in operation and fewer than a dozen mothers are actually placed in the houses. *Id.* at 8.

177. Temporary Restraining Order at 2, *Rios*.

178. *Id.* at 3.

179. Jan. Interview, *supra* note 88.

180. OSOTSKY & CONNORS, *Mother-Infant Interaction: An Integrative View of A Complex System*, in HANDBOOK OF HUMAN DEVELOPMENT 519 (1979).

181. Richards, *supra* note 14, at 49.

182. *Id.* The author suggests that "early separation can have an effect on the initial adaptation process of parents to their newborns and this in itself is enough reason for those responsible for maternity and neonatal care to reduce separation to the barest minimum." *Id.*

183. PREGNANCY IN PRISON, *supra* note 5, at 13. The study found that 97% of incarcerated mothers planned to resume care of their children upon release. *Id.*

184. See E. Barry & D. Lennon, *supra* note 102, at 7-10.

185. See *supra* notes 156-64 and accompanying text for relevant discussion.

186. See *supra* note 125 for relevant discussion.

environment may have on the children, such as minimal cognitive stimulation.¹⁸⁷ In California, the children reside in a more home-like setting and can spend long periods of time with their mothers. Once fully implemented, the MIC program may prove to be an effective method of keeping mother and child together while minimizing the adverse effects of the prison environment.

IV. CONCLUSION

In an effort to avoid litigation, and insure healthy, successful pregnancies, prisons should adopt minimum, uniform standards governing the provision of health care to pregnant women. Deficient care that results in delay or denial of medical care is unconstitutional. Women in institutions who believe the care they receive is inadequate may challenge the system by alleging it evidences "deliberate indifference" to their medical needs. Women must recognize the effectiveness of litigation as a means to redress grievances.

Few states have statutes allowing for significant contact between mother and child. Two states have adopted different systems. New York's prison nursery system, although allowing the mother to stay with her child, may not be best for the mother and child because the children actually live inside the institution. California's system is better able to insure that mother and child stay together in an environment less restrictive than the prison structure. Once fully implemented, this may prove to be the better system.

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187. E. Barry & D. Lennon, *supra* note 102, at 24. The nursery at Bedford Hills in New York keeps the children in small cubicles which contain little more than a crib. The children are permitted few toys and hence receive little cognitive and sensory-motor stimulation. *Id.* at 13.

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