The New Criminal Justice Thinking

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Making Prisoner Rights Real

The Case of Mothers

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The idea that prisoners do not forfeit legal identity and constitutional protection by reason of their confinement is now widely accepted as a matter of formal law. Beginning in the 1970s and in many cases since, the US Supreme Court has mandated that the rule of constitutional law must run behind prison walls. No reasonable lawyer, judge, or prison warden would now suggest otherwise, and the idea of constitutional rights for prisoners should, in theory, be a significant constraint on both the administration and lived experience of imprisonment. The delineation of rights in the prison context is, however, a more complicated story. The details of specific acts of interpretation of constitutional law for the prison context tend to depart from the grand metaphor that there is "no iron curtain" between prisons and the Constitution.[1]

The idea that constitutional law extends to the prison must mean that rights enjoyed in the community continue during incarceration, so long as they are compatible with the objectives of incarceration and the prison as an institutional form.[2] US courts confirm this principle in general, but fail to meaningfully fulfill it in particular cases. Courts easily deny claims even where prisoners are able to demonstrate the practical compatibility of a right with imprisonment as a matter of fact. Judges defer to the preferences of prison administrators and their bare assertions as to what is burdensome, expensive, or risky in the institutional context to justify extinguishing or seriously constraining even the most fundamental rights. In this sense, prison law is a field filled not only with the standard problem of gaps between *law on the books* and *law in action*, but with gaps between a general legal principle (that prisoners retain constitutional rights) and specific instances of legal

interpretation (where rights are easily subordinated to institutional preferences).

One particularly vivid example, explored in this chapter, appears in the legal treatment of the claims of incarcerated mothers who seek to remain with newborn infants. In recent years, the number of states that elect to provide prison nurseries has increased, likely due to a substantial increase in rates of female imprisonment. The growth of prison nurseries confirms the potential compatibility of mother-infant unification with incarceration.[3] To date, however, US law has not even gestured toward the idea of constitutional protection for any maternal custody interests of prisoners. There is no recognized right to be considered for mother-infant unification programs, and no fixed duty for prisons and jails to make them available.[4] Relatedly, the topic of custody rights for incarcerated mothers does not appear on the strategic constitutional litigation agendas of US rights organizations. On this topic and more generally, the substantive content of the constitutional doctrine that applies to prisons allows a prisoner's claim to be extinguished based on little evidence and with a standard of review unknown in other areas of state action that implicate fundamental rights. The idea that constitutional law applies to prisons can no longer be contested as a matter of formal law, but a principled account of retained constitutional rights for prisoners has scarcely been grappled with abstractly, let alone delivered with regularity on the ground.

The topic of maternal custody rights, particularly with respect to newborn infants, highlights the stark difference in the content of rights enjoyed in the community versus in the prison. The family unit, in many of its forms, enjoys a near-sacred status in American law and the wider culture. In constitutional terms, the right to rear a child and make decisions in matters of family relationships is considered fundamental. This status assures protection under the Fourteenth Amendment and careful judicial scrutiny of any abridgement.[5] On the right to breastfeed, state interference outside the prison has attracted strict scrutiny, meaning that there must be "sufficiently important state interests" to justify any infringement, paired with measures that are "closely tailored to effectuate only those interests."[6]

In addition, the medical benefits of breastfeeding for both mother and child are now so widely endorsed that it has become what Linda

Blum calls the emblematic practice of "moral motherhood."[7] Women in the community have to cope with the multiple forms of surveillance and coercion arising from the "hegemonic medical endorsement" of breastfeeding.[8] Meanwhile, the legal system allows the prison system to automatically extinguish the breastfeeding dyad, and for the infants of incarcerated mothers to suffer the psychological and physical losses that are presumed to follow. Women prisoners are most often separated from infants within hours of a birth, even where the foster system is the only alternative for placing the infant. Postnatal women are returned to prison with engorgement and mastitis and also face the prospect of permanent loss of parental rights.

Prisoners have been the occasional beneficiaries of judicial protection under the general heading of familial interests, but only in the clearest of cases that raise little administrative burden for the prison. In *Turner v. Safley*, the US Supreme Court struck down a ban on prisoner marriages, reasoning that the categorical ban at issue in the case was not "reasonably related to legitimate penological objectives" and was thus an impermissible burden on the "right to marry."[9] This aspect of the *Turner* case does not, however, signal a deep jurisprudential commitment to the familial interests of prisoners. The Court elected not to apply strict scrutiny, but found that the marriage ban was not even "reasonably related" to a legitimate penological goal. The holding was no doubt colored by the fact that prisoner marriages absorb no state resources and raise no plausible security concerns.

The claims of incarcerated women who seek to retain physical custody of newborn infants raise more difficult issues. Protection of the family unit in this form clearly demands positive action in the prison system, which explains but does not justify greater hesitation from courts; the fulfillment of rights does occasionally require affirmative steps rather than just a prohibition on abuse and irrational deprivations. But like many marginalized families in the community, female prisoners do not enjoy the benefits of devotion to the cultivation of family life that pervades US political, legal, and social discourse.[10] Where the state interferes with the rights of mothers and infants through incarceration, the judiciary tends to yield uncritically to the consequences.

Comparative perspective sheds critical light on the state of US law and helps to specify *how* constitutional litigation and judicial reasoning

could attend more carefully to the meaning of retained rights for prisoners on this topic. For much of its history, judicial review in Canada has been similarly deferential on topics of prison administration, and has similarly delegated the issue of prison nurseries to the policy preferences of legislatures and prison officials. Until recently, only the federal prisons and a few provincial jails allowed eligible mothers to remain with infants and young children while incarcerated, and there was no recognized constitutional right to be considered for the programs. The decided cases suggested that any such claims would fail given one 1994 holding and a general trend wherein Canadian courts defer expansively to administrators who assert institutional imperatives.[11]

A more recent Canadian decision, explored in detail here, breaks sharply from that pattern and serves as a model of judicial scrutiny of the prospect of meaningful familial rights in the prison context. In *Inglis v. British Columbia (Minister of Public Safety)*, a trial judge considered a large evidentiary record and found that it demonstrated the compatibility and indeed the benefits—from both a public health and penological perspective—of facilitating an option for mothers and infants to remain together in the jail context.[12] In short, mother-infant programs can align with both the penological objectives and administrative demands of the prison. The *Inglis* case shows how judicial investigation into specific empirical questions is required so as to faithfully pursue an ideal of retained rights for prisoners. The case also confirms that it is possible for judges, in a constitutional posture, to discern the consequences of penal policies, and to insist that the effects of such policies align with the official goals of the system.

The criminal justice system often operates in ways that compromise its official goals of family reunification, successful prisoner reentry, and preserving the safety and well-being of children.[13] As Issa Kohler-Hausmann helpfully suggests in her contribution to this volume, we should cease being surprised at the fact of disconnect between things like a formal purpose and the actual operation of a system.[14] We should, instead, turn our attention to the precise details and mechanisms by which legal rules become disconnected practices. In that spirit, this chapter considers the logic by which the judiciary denies the interests that incarcerated mother and child have in remaining together, and how that denial compromises both the promise of constitutional law for the

prison context and, in many cases, the social outcomes that the criminal justice system delivers.

The chapter concludes that a large part of the problem in US law is that the *Turner v. Safley* standard directs courts to condone rights infringements where some lesser means of exercising a right is offered. *Turner v. Safley* holds that rights infringements can be justified in the light of four factors: whether the policy is "reasonably related" to "legitimate penological objectives"; whether an alternative way of exercising the right is open to the prisoner; whether accommodation of the right would impact prison staff, other inmates, and prison resources; and whether there are "ready alternatives" to the infringement that the prison could employ instead.[15] Sharon Dolovich has aptly characterized the *Turner* test as "creating a space in which prison officials can violate constitutional rights if they can show that doing so facilitates the running of the prison."[16] The Court's elaboration of each factor supplied the language for lower courts to frame deference as a legal mandate.[17]

In *Overton v. Bazetta*, for example, the Supreme Court considered a prison restriction on visits by minor children where parental rights had been terminated. The Court accepted the argument from correctional officials that a parent could send a letter to a child as an acceptable alternative to a visit—ignoring the issue of the age of the child and any literacy issues that might prevent both child and parent from making good use of this option.[18] In a ruling that reflects a weak principle of retained rights and a highly deferential posture to the assertions of correctional officials, the Court accepted the state's argument that the restrictions promoted internal security by reducing the total number of visitors and limiting disruption caused by children.

Judicial reasoning in the *Inglis* case models an alternative approach, in the way that the court rejects the suitability of lesser alternatives that would likely be endorsed under the *Turner* standard. Correctional officials in *Inglis* argued that new mothers could make do without a nursery program. The jail suggested that pregnant defendants could ask for sentence reductions, for placement in the federal prison system with its nursery program, or for enhanced visiting with their newborns in the jail and the pumping and storage of breast milk. The court examined each option, but concluded that these alternatives did not amount to meaningful fulfillment of the interests at stake and instead mandated

that the jail continue to facilitate the option of access to prison nurseries. The *Inglis* case confirms the crucial step that courts must be willing to take in order to make prisoner rights real: to insist that constitutional law must protect the *full expression of rights* that are compatible with incarceration, rather than endorsing a view of rights as *subordinate to institutional preferences*. The latter simply amounts to a view of prisoner rights as defeasible interests, secondary in importance to administrative expedience.

I turn now to a selection of cases in which incarcerated women have attempted in various ways to use US courts to protect their custody interests as new mothers, and the terse analysis that has been deployed to deny such claims, suggesting the limited viability of constitutional arguments. I then compare the *Inglis* decision, where dozens of expert witnesses and multiple constitutional arguments fill a lengthy judgment, and where we see the crucial judicial moves that underpin a remarkable but logical interpretation of the idea that prisoners retain constitutional protection. The case generates a roadmap for faithful pursuit of the widely endorsed principle of retained rights in a way that accords with the judicial role. The implications of the approach are relevant not only to incarcerated mothers but to the project of principled legal control over the vast range of deprivations that incarceration entails.

Defining Imprisonment to Preclude Rights

The growth of female incarceration in the US renders the subject of the legal rights of incarcerated mothers increasingly urgent. In a story that is now well known, the 1970s saw a convergence of social and political factors that led to the widespread adoption of legislation stripping judges of discretion in favor of guideline and mandatory sentencing. In the federal system and many states, judges lost the ability to order community sanctions for the many female defendants who appeared before them as the sole caretakers of children. These legislative factors, combined with the war on drugs, produced a vast increase in numbers of non-violent incarcerated women.[19] Between 1980 and 2008, the number of women in US prisons increased sixfold, rising from 11 to 69 per 100,000 people.[20] The increased rate of male incarceration was about half of that—rising from 275 to 957 per 100,000 people.[21] In 2012, there

were 201,200 women in penal institutions, up from a number closer to 10,000 in the early 1970s.[22]

The legal struggles of incarcerated pregnant women have been focused in recent decades on securing access to prenatal and postpartum healthcare and nutrition, adequate responses to pregnancy-related emergencies, and limits on the use of restraints during delivery.[23] Significant progress has been achieved on the topic of perinatal shackling: several states and the federal government have now passed legislative and policy reforms ordering prison officials to stop using shackles in almost all cases.[24] A majority of US jurisdictions, however, still lack law and policy on the topic, despite legal holdings that such practices violate contemporary standards of decency and are prohibited by the Eighth Amendment.[25] While shackling reforms are headed in the right direction, the prevalence of the practice remains a disturbing example of penal policies that defy a humane or sensible understanding of pregnancy and childbirth. While shackling affects female prisoners of all races today, Priscilla Ocen argues that the persistence of the US practice is connected to the historical devaluation, regulation, and punishment of the reproductive rights of black women.[26] In practice, women are often still shackled even in jurisdictions where it is explicitly banned.

Of course, the question of whether incarcerated mothers should retain custody of their children is far more complex than the question of whether they should have appropriate access to healthcare and a dignified form of childbirth. Lynne Haney's ethnographic work in California generates a number of warnings about programs designed to keep mother and child together during a custodial sentence, tracing the pains of mothering in the penal context and showing how a promising feminist alternative morphed into its own form of power and control. [27] Moreover, litigation is an unlikely context within which to effectively resolve a delicate web of interests such as those that arise in connection with mother-child prison programs. The striking point, however, is that US courts have not even attempted the task. In the standard authorities cited on this subject, courts have simply rejected the notion that maternal custody rights could ever survive incarceration. As a result, states are not forced to seriously grapple with their treatment of the mother-infant pairing.

In the 1976 case of *Pendergrass v. Toombs*, for example, the Oregon Court of Appeals rejected a woman's claim in a two-paragraph decision,

relying on presumptions that persist in the legal system today.[28] The petitioner was pregnant at the time she was sentenced and committed to the Oregon Women's Correctional Center. She was taken to a local hospital for the birth of her child. A few days later, she was separated from the child and returned to the Correctional Center. The Superintendent of the Correctional Center refused to grant her temporary leave so that she could be with and breastfeed her child. In its decision, the court accepted that there is a constitutional right to raise one's children, and that, in the "unlikely event that a governmental unit would attempt to interfere with breastfeeding by a free citizen," such action would undoubtedly be held to be unconstitutional. But breastfeeding is a right that is incompatible with incarceration: "during a period of incarceration that right must give way to the right of the state to incarcerate." To hold otherwise "would be to hold that no parent of an unemancipated minor child can be imprisoned for commission of a crime." Incarceration means separation, no matter the effects or alternatives.

Another standard citation on this topic comes from Mississippi, where Diane Southerland sought an injunction to prevent the state from interfering with her breastfeeding of her infant son.[29] The 1986 Fifth Circuit opinion reports that Southerland had received what appears to be a very severe sentence: five years for embezzling $388.21. At the time she was sentenced, Southerland was pregnant. She gave birth while in custody and commenced breastfeeding immediately. Two days later, the state attempted to remove Southerland from the hospital, and two days after that the district court heard her injunction application. At the hearing, she presented evidence on the benefits of breastfeeding and the particular risk of allergies and diabetes faced by her son in the absence of it. The district court denied the application, and denied an application for a stay pending appeal. The opinion reports a unique act of clemency, where the Mississippi governor granted a temporary suspension of sentence pending the appeal such that Southerland could remain with her child while the appeal was heard.

In a brief decision denying the appeal, the Fifth Circuit took care to confirm the central principle of modern penal law: that Southerland did not forfeit constitutional protections by reason of her incarceration. But the court moves rapidly to confirm another equally clear principle: that prisoner rights are subject to restrictions, such as the institutional needs

of prison facilities. The crux of the court's approach, which is broadly representative of judicial reasoning in prisoner cases, appears in the following paragraph:

> The considerations that underlie our penal system justify the separation of prisoners from their spouses and children and necessitate the curtailment of many parental rights that otherwise would be protected. In this case, allowing Southerland to breast-feed would impair legitimate goals of the penal system. The state's interest in deterrence and retribution would be undermined by allowing temporary suspensions for female prisoners who choose to breast-feed or by attempting to house nursing infants. Such accommodation also would interfere with the maintenance of internal security. Moreover, the Mississippi penitentiary system does not have the proper facilities or resources to take care of nursing infants. The added financial burden of infant care would further undercut important goals of the already heavily burdened prison system. Plaintiffs argue that the state should transfer Southerland to a minimum security center that generally houses property offenders, where she might be able to nurse Matthew. However, it appears that these centers are not equipped to handle infants, and that even this limited approach would create substantial problems for the Mississippi penal system. The accommodation of nursing prisoners who share Southerland's circumstances is not compatible with the objectives of the penal system.[30]

Packed into this paragraph are several of the standard features of judicial resistance to careful scrutiny of prisoner claims. Internal security and resource allocation are cited as legitimate reasons for denial of a right, though we learn no details about what the costs or risks of such programs would actually be. The notion that constitutional modes of confinement may properly require some level of resource allocation or affirmative state burden is implicitly rejected. The prison system is "already heavily burdened" at the time of this 1986 opinion, although we get no concrete data or temporal comparator. While we learn that Mississippi does not currently have facilities for housing mothers with infants, the court does not query, and perhaps counsel failed to address, whether change is possible nor the relevance of evidence that such possibilities exist in other jurisdictions. The purposes of deterrence and

retribution are cited, but there is no argument as to why such principles would be undermined by arranging for mother-infant unification. The court proceeds as if separation of mother and child is in fact the definition of the state's punishment. Imprisonment is defined so as to preclude recognition of the right. The court frames the problem in such a way that empties the constitutional duties—duties that it acknowledges and formally accepts—of all meaningful content.

Turning to the rights of the child, the Fifth Circuit in *Southerland* recognized that a child's right to personal association with a parent was not "wholly lacking" constitutional protection from governmental interference.[31] However, here too the court simply accepts the status quo and a definition of imprisonment that denies the right. The court reasons that children suffer many adverse consequences when a parent is imprisoned, such as loss of the parent's earning power, but that there was clearly no state obligation to limit or ameliorate those consequences. Under this logic, the loss of one right justifies the loss of another. The court accepts the medical evidence that this child had an interest in breastfeeding that was "a good bit stronger" than that of the usual child, but the court was satisfied that the plaintiff's expert "admitted" that termination of breastfeeding "would not be life threatening."[32] Satisfied that the child would only suffer harms short of death, the court found that the state had a legitimate interest—namely to avoid a "material burden on the prison system"—that overrode the interests of the child to breastfeed.[33]

Contrary to the presumptions at the heart of these holdings, the real world confirms that prison nurseries can be compatible with imprisonment, and that they can be designed so as to protect prisoner interests while still allowing discretion to affect individual cases. New York State runs the oldest continuously operated prison nursery program in the country, first established in 1901.[34] The legislation says that women prisoners "may" retain physical custody of newborn infants for one year, unless the chief medical officer of the correctional institution certifies that the mother is "physically unfit" to care for the child. The child is able to remain in the correctional institution for such period "as seems desirable for the welfare of the child, but not after it is one year of age." Cases brought by women seeking access to the program are thus matters of statutory interpretation rather than freestanding rights claims. The New York courts have tended to protect access to the program, holding

that the statute implies a standard of "best interests of the child" as the governing principle in placement decisions.[35] The history of the New York program confirms that mother-infant unification is not, in fact, incompatible with the prison context. Security issues, the best interests of the child, and the allocation of resources can be balanced and managed, in this case over the course of many decades.

The constitutional and statutory cases are illuminating to consider together. The first involves constitutional claims by female prisoners that they should retain physical custody of a newborn child, primarily to bond and breastfeed. These claims are rejected in light of easily accepted narratives about the inevitable features of imprisonment. The second line of cases concerns statutory interpretation, brought by women in New York seeking access to prison nurseries long provided for through legislation. The constitutional cases accept a definition of imprisonment that necessarily excludes infant mothering, whereas the New York statutory cases protect the functioning of a program that we learn has been compatible with imprisonment for over a century. In the constitutional cases, courts admit that prisoners retain rights, but such rights are so narrowly conceived that little evidence and little analysis is needed to extinguish them.

Retained Rights in Comparative Light

Like the US, Canadian courts have often articulated standards of extreme deference to prison administrators, both before and after the 1982 advent of the *Charter of Rights and Freedoms*,[36] and despite the fact that the *Charter* places a burden on government to justify any infringement of rights. To be sure, there are certain issues where Canadian prisoners have had success in the courts. As one example, in *Sauvé v. Canada (Chief Electoral Officer)* the Supreme Court of Canada struck down a legislative ban on prisoner voting, reasoning that the right to vote explicitly granted to all citizens in section 3 of the *Charter* cannot be infringed for "symbolic and abstract reasons" but rather demands a justification grounded in evidence that the government failed to provide.[37] The case was expressively significant, but the voting right is occasional and entails little burden for prison administrators.[38] Like the US, cases where rights claims are adjacent to daily operational imperatives tend to generate outcomes far more deferential to the administrative context.

Canada has long had a federal program for eligible women to keep custody of children younger than four years old, but in recent years criteria for admission tightened such that the program now exists in name only.[39] The outright cancellation of a similar provincial program sparked the *Inglis* case. Prior to *Inglis*, it seemed that there was little constitutional basis upon which to insist on mother-infant unification. In a 1994 case, Mary Ann Turner had recently given birth to a baby boy.[40] She was on a short sentence, with less than two months remaining before she was eligible for release. Because of her security classification, Turner was unable to access the "open living unit" where women are eligible to apply to have their infant children live with them. Turner did not challenge the decision to keep her at a more secure level of custody, which was based on previous escape attempts and substance abuse violations. But Turner did ask the court to permit her baby to live with her in the more secure setting, pending her imminent release.

The reviewing court denied the application, emphasizing that a mother-infant program *was* available for women considered to be a lower security risk by the prison. That reasoning seems fair enough, but the court went further to make several remarks suggesting that all constitutional claims on this subject would be weak. In an echo of the US reasoning, the court observed that people who go to jail are "separated from their children" and that such inevitable separation could not be considered "cruel and unusual punishment." The court also rejected the idea that the separation of mother from child amounted to gender discrimination, reasoning that men have even less opportunity for custody of their children while incarcerated. Finally, the court found that "it simply would not be safe" for women to have children in the secure custody area, but the court did not specify what, if any, evidence had been presented to support that assertion.

While the holding in this 1994 trial decision may have been justified on its particular facts, the court seemed to shut the door generally. The court defined imprisonment so as to preemptively justify extinguishing the right: going to jail simply means family separation. The court used a formal equality framework to deny the unique severity of incarceration for women and their children, concluding that women were no worse off than men. Finally, the court made clear that little evidence would be required to support institutional concerns about safety and risk. The

Inglis case—skillfully litigated with a robust evidentiary record, in an era when the frame of formal equality had been explicitly rejected in Canadian law—generated a far different judicial response.

The Inglis Case: Contesting a Decision from Out of the Blue

The plaintiffs in *Inglis v. British Columbia (Minister of Public Safety)* were former inmates of Alouette Correctional Centre for Women (Alouette) and their children. The litigation arose from a decision to cancel a program, in place in some form since 1973, permitting mothers to have their infants with them while they served sentences of provincial incarceration of two years or less (the Program). Access to the Program was contingent upon approvals by the Ministry of Children and Family Development, acting pursuant to legislation that emphasized the best interests of the child.[41] Mothers with babies were housed in a separate structure within Alouette, which included equipment for children and a safe play area, with nursing staff present for any first aid needs throughout the day. Correctional officers staffed the unit 24 hours per day, and each was trained in infant CPR. Physicians and public health nurses regularly visited the infants.[42]

In a judgment that was not appealed, the trial court ruled that the provincial government's decision to close the Program was unconstitutional, violating both equality rights under section 15 and "security of the person" protections under section 7 of the *Charter*. In the section 7 analysis, the court held that the separation of mother and child constituted "serious state-imposed psychological stress."[43] The remainder of the section 7 test required the court to analyze whether that deprivation was "in accordance with the principles of fundamental justice."[44] Because of the way that the decision to cancel the Program was made, discussed in greater detail below, the court found those principles were not satisfied.

In the equality analysis under section 15, the court found that the cancellation of the Program "increased the disadvantage" of an already vulnerable population, and that such disadvantage was related to the protected grounds of race, ethnicity, disability, and sex.[45] The trial judge accepted that the Program cancellation affected prisoners who are both female and disproportionately Aboriginal, which entailed present and

historical experiences of addiction and abuse, mental health issues, poverty, foster or institutional care, and child apprehension.[46] The court followed the decision of the Supreme Court of Canada in *Quebec v. A*, where Justice Abella confirmed a substantive equality approach and put the test as follows: "if the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[47]

The key factual findings concerned the decision to cancel the Program. The main decision-maker, prison director Brent Merchant, testified that he cancelled the Program because of his view that infants do not fall within the "mandate" of corrections.[48] Merchant made the standard move: asserting that incarceration itself extinguished the right. But the trial judge turned to the facts. After finding that constitutional rights were engaged, Justice Ross moved to ask whether such rights were or could be compatible with incarceration. Critical to the outcome was the fact that the record revealed the longstanding, successful operation of the Program and similar programs in the Canadian federal system and abroad. Notably, Justice Ross pointed to New York State as evidence of the potential success of such programs.[49]

A range of experts confirmed the benefits of the Program.[50] The medical evidence indicated that babies in the Program were healthy, happy, and developing at a normal rate.[51] The court cited a "consensus of international health experts" that infants should be exclusively breastfed until age six months and on demand until age two, and that breastfeeding is important for the infant's psychosocial development and healthy immune system.[52] The court also found that breastfeeding provides health benefits to mothers, including lower rates of breast and ovarian cancer and Type II diabetes and reduced risk of post-partum depression.[53] The court's attention to these topics suggests a view that compromised health is not a proper part of a sanction of incarceration.

Evidence from developmental psychology was also central. The court considered the harm caused by insecure attachment in infants, which follows from interruption in maternal bonding in the two-to-ten-month period. The evidence made clear that successful attachment is related to the ability to form future intimate relationships, retain emotional balance, find happiness and satisfaction being with others, and rebound from disappointment and misfortune.[54] Particularly in the immediate

post-partum period, staying together delivers significant health and psychosocial benefits to both mother and child.[55] The significance of these interests, to both mother and child, made clear that the case engaged important constitutionally protected interests. The goal being pursued by the government in cancellation had to be an important one in order to survive judicial review.

But evidence of an important governmental objective was absent. The jail conducted no research on the costs and benefits of the Program before cancelling it. The decision to cancel came abruptly in the midst of its successful operation, with the evidence indicating that Merchant had become irritated when he was not notified in advance of a decision to admit a particular mother and infant. What began as slight resistance escalated over time—Merchant had "soured" on the program when he decided to cancel it.[56] Under cross-examination at trial, even government witnesses invariably agreed on the benefits of the Program and the total absence of actual safety incidents, maintaining only that the question of whether the benefits outweighed the risks must be assessed on a case-by-case basis.[57] This was, in fact, how the Program had always been conducted, given the involvement of the relevant children's ministry in placement decisions. The court concluded, in sum, that the decision to eject the Program from the jail was not the sort of studied decision that could properly extinguish the interests that prisoners maintain while incarcerated.

The prisoner director in *Inglis* testified about his view that the jail's task is, primarily, to deliver the secure custody of inmates. The court had a different view, reasoning that inmates are to be secured while retaining whatever rights are compatible with the custodial setting.[58] The key findings of fact were thus the longstanding domestic and international success of prison nurseries. Comparative and historical perspective makes clear what is possible.

The Inglis Legal Analysis

There are four additional dimensions to the *Inglis* reasoning that represent key components of the concept of retained rights in prison. First, Justice Ross found that offers to protect a lesser version of a prisoner right is not, without more, an adequate justification for impairment.

Perhaps most notably for a legal field that has seen so much judicial reticence to scrutinize the claims of prison officials, her method was to analyze the logical and evidentiary plausibility of the alternatives that the government offered up, rather than accepting the suggestions at face value. Second, Justice Ross refused to treat the jail as an entity sealed off from ordinary society. She analyzed the risks and benefits of the Program in light of the limited alternatives that the community could offer. Third, Justice Ross refused to allow the jail to operate in a closed legal compartment where only correctional law applies. She brought family law concepts to bear upon the question of the jail's legal duties as a public institution. Finally, Justice Ross rejected the idea that incarceration can simply be defined as the legitimate cause of any rights infringements. She examined the empirical possibilities rather than defining incarceration so as to preclude the recognition and accommodation of the right.

RESISTING LESSER RIGHTS

Recall that under US law, the *Turner v. Safley* standard has seen courts condone rights infringements where the government points to some lesser means of exercising the right. The *Inglis* defendant asked the Canadian court to take a similar approach, pointing to measures that the institution had taken, or could take, to ameliorate mother-infant separation, such as: encouraging prosecutors and the courts to impose community-based sentences, enhanced visitation, facilities for pumping, storing, and delivering breast milk, and the possibility of transfer to a federal institution (where mother-infant programs still formally exist).[59] Justice Ross interrogated the proffered alternatives by delving into the workings of sentencing law, the substance of the expert evidence, and the realities of prison administration.

Regarding the sentencing option, Justice Ross said that while pregnancy or parenthood can be a factor taken into account at sentencing, mandatory minimum sentences and other restricted offenses prevent judges from imposing community-based sanctions in at least some cases.[60] Regarding the promise of visits, she noted that the expert evidence made clear that even enhanced visitation does not afford an adequate opportunity for the infant to attach to the parent.[61] Finally, Justice Ross noted the obvious practical difficulties with pumping and storing breast milk, and noted that transfer to a federal institution was only a

theoretical possibility, given the lengthy federal assessment process and the comparatively short length of sentences for women sentenced to provincial institutions.[62] There were alternatives to the right of mothers and infants to remain together, but with minimal scrutiny it was clear that they did not approach satisfactory fulfillment of the interests at stake.

PRISON NOT SEALED OFF

The government in *Inglis* attempted to justify its cancellation of the Program by arguing that it could not guarantee the safety of infants. In response, Justice Ross resisted treating the jail as an entity sealed off from ordinary society, either judicially or sociologically. Rather, she considered it to be just one institutional space on the spectrum of environments that a child, and particularly a child of an incarcerated person, may come to experience. The court went further and examined in detail the evidence on risks for children in government care, citing evidence that these children are more likely to be diagnosed with a health condition, more likely to be prescribed mental health-related drugs, more frequently admitted to hospital, four times more likely to be diagnosed with a mental disorder, and much more likely to die of both natural causes and external causes than children in the general population.[63] The court accepted that the jail context raised some possibility of harm to infants, but Justice Ross found that there was a risk of harm to infants in virtually any environment, particularly foster care as well as with relatives in the community.

The jail did submit evidence indicating "low-grade harms" that infants face in the custodial context.[64] The first claim under this heading was that, in the past, mothers would occasionally break a rule that infants were to sleep in cribs rather than with them. Justice Ross accepted that it was best practice for infants not to sleep in the same bed as mothers, but she also found that "the practice is widespread in the community and throughout the world."[65] To the extent it was a risk to an infant, it was not one arising exclusively from the custodial environment. There was also evidence that persons other than mothers and designated babysitters would occasionally break the Program rules and touch the babies. Once again, Justice Ross noted that it was impossible to imagine that "in the community or in foster care that only mothers or approved caregiv-

ers would touch infants."[66] The risk of harm associated with the jail was contextualized in light of ordinary community experience.

Finally, Justice Ross cautioned against approaches that would immunize penal decisions from scrutiny, such as allowing prison administrators to apply a standard of "guaranteed safety" to their decisions.[67] This standard would be "particularly inappropriate" in this case, given that babies affected by the decision would have to be placed somewhere, and "anywhere they are placed is associated with some level of risk."[68] The concept of retained rights for prisoners means that the prison is not an exceptional space within which any level of risk justifies any type of institutional response.

NO LEGAL COMPARTMENTALIZATION

The government in *Inglis* argued that the only relevant law governing their work is Canada's Corrections and Conditional Release Act and the subsidiary jail policies. This plea for legal insulation occurred because the jail insisted that it was not required to consider family law concepts in its penal administrative decisions.[69] In response, Justice Ross developed a broad conceptualization of the state and its sources of responsibility in administering incarceration. She held that the principle of "best interests of the child" was relevant to the "legislative and social context" of the constitutional issues to be decided in *Inglis*.[70]

In an unprecedented but principled judicial move, Justice Ross rejected "compartmentalization" of the punishment context and the law that applies there.[71] Corrections was responsible for considering and applying the full range of sources of domestic and international law, all of which make clear that "the best interests of the child" apply to "all state actions."[72] With the Program abolished, decisions about infant custody could no longer be made in light of the full range of proper factors. Justice Ross described the problem with the new "blanket exclusion" as follows:

> Now instead of a decision based on the best interest of the child following a consideration of all relevant factors, including the importance of continuity in the child's care, the quality of the relationship the child has with a parent and the effect of maintaining that relationship, there is a blanket exclusion that takes into consideration neither the needs and circumstances of the mother nor those of the child.[73]

When the full picture of family law is brought back into sight, the jail would have to recognize that cancelling the Program would result in at least some children being put into foster care. The question as to whether that option is preferable had to be an open one. In sum, Justice Ross found that the government could not avoid the full range of legal obligations that bear upon it by segregating the custodial context from the rest of public law. She conceptualized the jail as simply one mechanism of the government, responsible to the full spectrum of law governing state action. She held that the jail could not "circumvent the requirement to consider the best interests of the children affected by relying on the fact that a different arm of the state would be actually seizing the children."[74] Relatedly, corrections is responsible for seeking input from other agencies before making decisions that would affect other aspects of public administration. Justice Ross found that, on the facts of this case, "when the other agencies expressed concern over the decision, they were ignored."[75] She insisted upon the unity of government when she assessed its conduct under constitutional light.

TESTING CAUSATION

Prisoner cases are often defended on the basis that imprisonment is the inevitable cause of any and all subsequent rights infringements. This standard argument appeared in *Inglis* too—the government even cited the US *Southerland* decision to suggest that the Program is "fundamentally inconsistent with imprisonment itself."[76] The government argued that any separation of mother and infant is not caused by the cancellation of the Program, but rather flows from the custodial sentence. In other words, the separation was caused by the actions of the plaintiffs, whom the criminal justice system had already adjudicated and designated responsible. But Justice Ross scrutinized the suggestion that incarceration itself was the cause of mother-infant separation, finding that "there is nothing in the criminal law, policy or objectives that requires the separation of mothers and infants as a consequence of a criminal sentence."[77] The history of the Program proved the government's claim wrong.

To summarize, the *Inglis* court conducts a holistic analysis of the justifications offered by the state for its rights infringement. The inquiry undertaken by the court goes well beyond the standard question of whether

accommodation of a right would encumber the prison or generate some level of risk for those working and living in the institution—queries that could be enough to extinguish a claim under current US law. The *Inglis* court conducts a comprehensive analysis of what Sharon Dolovich has called the "state's carceral burden," namely the price society must pay for the decision to incarcerate.[78] Under this framework, the individual may be removed from shared public space, but the state assumes an ongoing positive obligation to meet basic human needs throughout the administration of the custodial sanction; the incarceration of pregnant women and new mothers entails a positive duty to facilitate an option for the mother-infant pair to remain physically together, in conditions appropriate for childrearing. Even where the government may face certain costs in order to protect the right, those costs may be part of the state's burden, incurred by the election to make use of incarceration.[79]

Conclusion

Several contributions in this volume critique the ways that legal rules are transformed and defeated when they are interpreted and operationalized by actors on the ground. In most jails and prisons, however, there are no nursery programs and no legal doctrines with which to demand them. There can be no occasion to critique the *law in action* where legislation is absent and where the judiciary has yet to make a first interpretive move of constitutional standards.

New York State is one of the few places where the key issue is enforcement of a legislative scheme. The New York law contains only two bars to admission to prison nurseries: if the mother is "physically unfit" to care for her child, and if staying in the nursery would not be "desirable for the welfare" of the child, which state courts have repeatedly interpreted as a test about the "best interests of the child." Within this legal frame, advocates struggle on the ground to maintain a principle of individualized decision-making for a wide range of women and fight against practices that would automatically bar women with particular criminal records and child welfare histories. At Bedford Hills, critics point to delays in processing applications and problematic security and programming protocols that prevent mothers and other prisoners from participating as caregivers in the program.[80]

In most US jurisdictions, however, prison nurseries do not exist and states are under no hard legal pressure to develop them. And while successful constitutional litigation rarely ends a conversation, on many occasions it has started one. Indeed, the victory in *Inglis* is far from the end of the story. A lengthy and elaborate process of policy development, with input from all stakeholders, has followed in the wake of the decision that new mothers effectively have a constitutional right to apply to access a prison nursery program.[81] The effect of the judgment in terms of the quality of the nursery and fair access to it remains to be seen, but the articulation of constitutional boundaries has compelled action on the topic. Perhaps most significantly, the *Inglis* court refused to allow a seemingly random change of mind among low-level officials to determine significant dimensions of state punishment. Even those concerned with the quality and effects of prison nursery programs likely agree that the rights engaged by the topic merit reasoned interpretation.

The *Inglis* court thought that prisoners retain constitutional rights unless such rights are incompatible with the unavoidable features of the prison. The key difference from US approaches to date is that *Inglis* demands that the government adduce support for its assertions about the necessary features of incarceration, treating the issue of whether particular rights are compatible with imprisonment as an open empirical question. Ironically, the Canadian judge points to the few US prison nursery programs as evidence of what is possible—as evidence that automatic mother-infant separation is not, in fact, one of the unavoidable features of imprisonment. This is clearly not the *Turner v. Safley* standard of judicial review, which favors the preferences and resource priorities of prison officials as the key determinants of the scope of prisoner rights.

The *Turner* Court stressed that running a prison is an "inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."[82] There are few areas of constitutional interpretation that would *not* raise such issues, but prisoner cases have attracted a particularly hesitant posture. Judicial deference to prison officials is also often articulated on the grounds of lack of judicial expertise, only to be accompanied by a refusal to come to know more. This is perhaps most striking in those cases where prisoner claims are dismissed on summary application, where courts pre-

fer the presumed good faith expertise of prison administrators over the ordinary testing of facts through trial process.[83] It was only once the evidence in *Inglis* was laid out at trial—particularly the insights from attachment theory and the medical benefits of breastfeeding, paired with the dearth of evidence showing the downsides of the Program—that the public and penal interest in maintaining close bonds between mother and infant became so clear. This may even explain why the government did not appeal, as officials were exposed to an evidentiary showing that was not canvassed internally prior to cancellation of the Program. Thoughtful litigation educated not only the judge, but also the officials at the jail.

The *Southerland* court did not deny the right to breastfeed an infant and remain united by denying the notion that prisoners retain rights. Such a position would now be anachronistic. But the acknowledged right was too quickly defined as incompatible with imprisonment itself. Rather than allowing the criminal justice system to generate negative social effects with no pushback, the *Inglis* court pushed for benefits to outweigh costs and demanded sensible connections between the long-range goals of the system and its present-day actual operation. Rather than treating the prison as an exceptional space, where the difficulties of managing problematic residents can justify any managerial approach, the court constructed penal facilities as ordinary state institutions responsible to the full spectrum of public law commitments and values. In a great many other prisoner cases, courts fail to delineate meaningful boundaries within which prison policies can be forced to progress. The result is that the fundamental rights of prisoners can be the contingent product of local policy trends, rather than matters bounded by higher law.

NOTES

Thanks to Sharon Dolovich for substantial feedback on this chapter. Thanks also to Benjamin Berger, Kyle Kirkup, Darryl Robinson, and Jacob Weinrib for important comments and discussion.

1 *Wolff v. McDonnell*, 418 US 539 (1974), at 555–556.

2 This principle is endorsed, among other places, in the majority decision in *Hudson v. Palmer*, 468 US 517 (1984), at 517: "prisoners enjoy many protections of the Constitution that are not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration."

3 Women's Prison Association, *Mothers, Infants and Imprisonment: A National Look at Prison Nurseries and Community-Based Alternatives* (2009), at 4–5 (www.wpa-online.org.), noting that nine states have prison nursery programs in operation or under development. With the exception of the program at Bedford Hills Correctional Facility in New York, all other prison nurseries opened within the last 20 years.

4 Of course, some if not many incarcerated mothers would not participate in such programs, either because they do not want to parent in the penal setting or because their specific histories do not satisfy reasonable admission criteria. This chapter is focused on the issue of the right to apply to mother-child programs, and the question of the state's duty to make them available.

5 See, for example, *Santosky v. Kramer*, 455 US 743 (1982). But for an argument that courts do not consistently apply strict scrutiny in the childrearing context, see Jeffrey Shulman, *The Constitutional Parent: Rights, Responsibilities, and the Enfranchisement of the Child* (New Haven, CT: Yale University Press, 2014).

6 See *Dike v. School Board*, 650 F. 2d 783 (1981), where a public school teacher successfully challenged a rule that she could not breastfeed her child during a duty-free break. The Fifth Circuit held in favor of the teacher and remanded for a determination of whether the school's regulations were justified on the basis of sufficiently important governmental interests and closely tailored to effectuate only those interests.

7 Linda Blum, *At the Breast: Ideologies of Breastfeeding and Motherhood in the Contemporary United States* (Boston: Beacon Press, 1999), at 43.

8 *Ibid.*

9 *Turner v. Safley*, 482 US 78 (1987).

10 Of course, this discourse is contradicted by actual policies on the ground in the non-prison context as well, such as by the fact that the United States is one of the few countries in the world that does not mandate a period of paid maternity leave at the national level, and that protects only 12 weeks of unpaid maternity leave. See International Labour Organization, "Maternity and Paternity at Work: Law and Practice Across the World" (Geneva: International Labour Office, 2014), at 16.

11 See Debra Parkes, "A Prisoners' Charter? Reflections on Prisoner Litigation under the Canadian Charter of Rights and Freedoms," *University of British Columbia Law Review* 40:2 (2007): 629–676; Lisa Kerr, "Contesting Expertise in Prison Law," *McGill Law Journal* 60:1 (2014): 43–94.

12 *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309.

13 Parental incarceration is generally associated with negative effects on the future prospects of children, and those with incarcerated mothers encounter more "risk factors" for poor life outcomes, including substance abuse and mental illness. Elizabeth I. Johnson and Jane Waldfogel, "Children of Incarcerated Parents: Multiple Risks and Children's Living Arrangements," in David Weiman, Bruce Western, and Mary Patillo (eds.), *Imprisoning America: The Social Effects of Mass Incarceration*, (New York: Russell Sage Foundation, 2004). For a systematic review

of the literature, including attention to the methodological problems in discerning the effects of parental incarceration, see Joseph Murray and David P. Farrington, "The Effects of Parental Incarceration on Children," *Crime and Justice* 37:1 (2008): 133–206.

14 Issa Kohler-Haussman, "Jumping Bunnies and Legal Rules: The Organizational Sociologist and the Legal Scholar Should Be Friends," this volume.

15 Part of the *Turner* decision upheld a regulation that prohibited prisoners from corresponding with prisoners at other institutions, regardless of their relationship. The Court admitted that the prison could simply monitor prisoner communications so as to prevent any correspondence that would threaten safety and security, but found that this would impose more than a *de minimis* cost on the prison. The Court accepted, further, that the regulation does not deprive prisoners of all means of expression, but simply bars communication with a limited class of people, and upheld the ban on that basis. *Turner* at 89–93.

16 Sharon Dolovich, "Forms of Deference in Prison Law," *Federal Sentencing Reporter* 24:4 (2012): 245–259, at 246.

17 *Ibid.*

18 *Overton v. Bazetta*, 539 US 126 (2003).

19 The drug laws changed the composition of the female prison population: in the 1980s, most women in prison were convicted of either violent crimes or property offenses, and only 12% percent were incarcerated for a drug offense. By the late 1990s, violent offenders made up only 28% of the female population, and drug offenders were 35%. See Candace Kruttschnitt and Rosemary Gartner, "Women's Imprisonment," in Michael Tonry (ed.), *Crime and Justice: A Review of Research*, vol. 30 (Chicago: University of Chicago Press, 2003), Table 3.

20 Candace Kruttschnitt, "Women's Prisons," in Michael Tonry (ed.), *Oxford Handbook of Crime and Criminal Justice* (New York: Oxford University Press, 2010), Table 2.

21 *Ibid.*

22 Roy Walmsley, "World Female Imprisonment List," 2nd ed. (2012), International Centre of Justice, Kings College London (www.prisonstudies.org).

23 See Ellen Barry, "Pregnant Prisoners," *Harvard Women's Law Journal* 12 (1989): 189–203.

24 Brett Dignam and Eli Y. Adashi, "Health Rights in the Balance: The Case against Perinatal Shackling of Women behind Bars," *Health and Human Rights Journal* 16:2 (2014): 8–18.

25 *Women Prisoners of District of Columbia Department of Corrections v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994), *vacated in part, modified in part*, 899 F. Supp. 659 (D.D.C. 1995).

26 Priscilla A. Ocen, "Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners," *California Law Review* 100 (2012): 1239–1311.

27 Lynne Haney, *Offending Women: Power, Punishment, and the Regulation of Desire*, (Berkeley: University of California Press, 2010); Lynne Haney, "Motherhood as

Punishment: The Case of Parenting in Prison," *Signs* 39:1 (Autumn 2013): 105–130, at 107.

28 *Pendergrass v. Toombs*, 546 P.2d 1103 (1976).

29 *Southerland v. Thigpen*, 784 F. 2d 713, 717 (5th Cir. 1986).

30 *Southerland* at 716.

31 *Southerland* at 717.

32 *Southerland* at 718.

33 *Southerland* at 718. The doctrine of "legitimate interest" in restricting the rights of incarcerated people stems from *Pell v. Procunier*, 417 US 817 (1973). The state interest asserted in the cases tends to be something along the lines of "maintaining the orderly and efficient operation of its criminal justice system."

34 N.Y. Correct. Law § 611 (McKinney 2003 & Supp. 2014). For a leading study on the New York prison nurseries, indicating that infants in these settings experience secure attachment at rates comparable to healthy community children, see M. W. Byrne, L.S. Goshin, and S. S. Joestl, "Intergenerational Transmission of Attachment for Infants Raised in a Prison Nursery," *Attachment and Human Development* 12:4 (2010): 375–393.

35 *Apgar v. Beauter*, 347 N.Y.S. 2d 872 (Sup 1973); *Bailey v. Lombard*, 420 N.Y.S. 2d 650 (Supp. 1979). While the *Bailey* court sided with the institutional defendant on the facts of the specific case, the court rejects several of the institution's arguments in a way that ensures ongoing access to the program. The court dismissed the suggestion that keeping infants in jail creates unacceptable security hazards, and found that a decision based on these factors alone would be arbitrary and capricious, emphasizing that the only relevant test was the statutory principle of individual best interests of the child. The court identified four factors that were proper to consider: the availability of facilities adequate to insure the child's health and safety, the mother's psychological health and parenting background, the crime for which the mother was convicted as it might reflect on her parenting capabilities, and the length of the mother's sentence (654). In a description of the holding that is prescient of the *Inglis* holistic mode of analysis, Mary Deck describes how "the *Bailey* court directed the sheriff to weigh the benefits and detriments of parental care in jail against the effects of placing the child in foster care." Mary Deck, "Incarcerated Mothers and Their Infants: Separation or Legislation?," *Boston College Law Review* 29:3 (1988): 689–713, at 702; *Bailey* at 654.

36 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

37 2002 SCC 68 at para. 23.

38 For arguments about how the *Sauvé* case is not representative of the tone and substance of judicial review of prisoner rights in Canadian law, see Debra Parkes, "Prisoner Voting Rights in Canada: Rejecting the Notion of Temporary Outcasts," in Christopher Mele and Teresa A Miller (eds.), *Civil Penalties, Social Consequences* (New York: Routledge, 2005), at 238; Efrat Arbel, "Contesting Unmodu-

lated Deprivation: *Sauvé v. Canada* and the Normative Limits of Punishment," *Canadian Journal of Human Rights* 3:2 (2015): 121–141.

39 See the *Office of the Correctional Investigator's Annual Report* (Ottawa: Office of the Correctional Investigator, 2009–2010) noting that eligibility restrictions announced by the government in 2008 resulted in de facto abolition of the federal mother-baby program.

40 *Turner v. MacMillan*, 1994 CanLII 1218 (BCSC).

41 *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46.

42 The additional elements of the Program are described at para. 73 of *Inglis*. A system was in place regarding eligibility, MCFD involvement, babysitting and other personnel issues, behavioral requirements for mothers, and arrangements with a local hospital for delivery services.

43 *Inglis* at para. 395.

44 The full text of section 7 is: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

45 The full text of section 15(1) is: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

46 *Inglis* at para. 544.

47 *Quebec (Attorney General) v. A*, 2013 SCC 5, at para. 332.

48 *Inglis* at para. 481.

49 *Inglis* at para. 465.

50 Expert witnesses who recommended the Program included a nurse within federal corrections (para. 84); a Ph.D. in sociology and health education with relevant research experience (para. 89); a physician with a background in obstetrics and addiction (paras. 93–94); a psychologist with extensive experience in corrections (para. 255); the prison physician at Alouette during the pendency of the Program (para. 262); and a law professor who advised that similar programs were available in modern prisons across the world, including the US, Europe, Australia, and New Zealand (para. 76).

51 *Inglis* at paras. 78 and 265.

52 *Inglis* at para. 329.

53 *Inglis* at para. 330.

54 *Inglis* at para. 334.

55 *Inglis* at para. 328.

56 *Inglis* at para. 318.

57 *Inglis* at paras. 289–292. On the lack of risk facing the infants, see paras. 171, 184, 186, and 292.

58 *Inglis* at para. 379.

59 *Inglis* at para. 400. For a summary of the evidence cited by the defendants on alternatives, see para. 435.

60 *Inglis* at para. 401.
61 *Inglis* at para. 402.
62 *Inglis* at para. 402. Justice Ross also observed that the argument regarding transfer to federal institutions contradicted the rest of the government's argument: "this suggests to me that, notwithstanding submissions made in the litigation, Corrections recognized that the prison environment is not necessarily incompatible with a safe and nurturing environment for infants" (para. 468).
63 *Inglis* at para. 485, citing Jane Morely, Q.C., and Dr. Perry Kendall, "Joint Special Report—Health and Well-Being of Children in Care in British Columbia: Report 1 on Health Services Utilization and Mortality" (September 2006), a joint publication of the Child and Youth Officer for British Columbia and the Provincial Health Officer.
64 *Inglis* at para. 437.
65 *Inglis* at para. 463.
66 *Inglis* at para. 463.
67 *Inglis* at para. 483.
68 *Inglis* at para. 484.
69 The defendants argued, in particular, that "the concept of the best interests of the child is not applicable and that Mr. Merchant was not obliged to consider or to attempt to maximize the best interests of the children affected by his decision." *Inglis* at para. 434.
70 *Inglis* at para. 358, following settled law that "the analysis of rights under the *Charter* must be contextual," citing *Winnipeg Child and Family Services v. K.L.W.*, 2000 SCC 48, at para. 71.
71 *Inglis* at para. 369.
72 *Inglis* at para. 370.
73 *Inglis* at para. 474.
74 *Inglis* at para. 454.
75 *Inglis* at para. 451.
76 *Inglis* at para. 405.
77 *Inglis* at paras. 407 and 410.
78 Sharon Dolovich, "Cruelty, Prison Conditions, and the Eighth Amendment," *New York University Law Review* 84:4 (2009): 881–979, at 892.
79 The question of the cost of the Program was not a central part of the litigation, but this is another topic where Justice Ross scrutinized the foundations of the state's plea for deference. The defendants alluded to scarce resources and the need for efficiency. Counsel asserted that the resource-intensive nature of the program required the "disproportionate re-allocation of operational resources, such as full-time medical staff, staff trained in infant care and infrastructure itself, away from programs with proven effectiveness that serve larger groups within the correctional system" (*Inglis* at para. 439). But Justice Ross pointed to both the minimal evidence actually filed on cost and held further that it could not trump the analysis. She noted that Merchant admitted in his testimony that cost was not

a factor in his decision, which was consistent with other evidence of the generally low cost of the Program (*Inglis* at para. 471).

80 For a recent comprehensive study, see Tamar Kraft-Stolar, *Reproductive Injustice: The State of Reproductive Health Care for Women in New York State Prisons* (Report of the Women in Prison Project of the Correctional Association of New York, 2015), at 123–134.

81 See "Guidelines for the Implementation of Prison Mother-Child Units in Canada" (June 2014, Penultimate Version) (on file with the author).

82 *Turner* at 84–85. Also see *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 US 119, 126 (1977), noting that "the realities of running a penal institution are complex and difficult"; and *Procunier v. Martinez*, 416 US 396, 404–405 (1974), citing "Herculean obstacles" to maintaining order and discipline, preventing unauthorized access or escape, and rehabilitating prisoners.

83 Doctrine in this area stipulates that "substantial deference" will be offered to the "professional judgment" of prison administrators, which means that even where there is a serious factual dispute at the heart of a case, claims can be dismissed where the defendant alludes to the fact of "professional judgment" (*Overton v. Bazetta*). Constitutional claims can be dismissed even on summary application, where the mere assertion of the "professional judgment" of prison administrators is enough to entitle the prison system to judgment in advance of trial (*Singer v. Raemisch*, 593 F.3d 529 (7th Cir. 2010), and *Beard v. Banks*, 548 US 521 (2006)).