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Children, Parents & the State:

The Construction of a New Family Ideology

Deseriee A. Kennedy[†]

ABSTRACT

More than twenty-five states allow courts to consider parental incarceration or conviction of a crime in determining whether to terminate parental rights. This problem is of increasing significance as a result of dramatic growth in incarceration rates, particularly among women who were often the primary and sole caretaker of their children before their imprisonment. Social scientists have recognized that the reality for parents in many communities is one of widespread and repeated incarceration, which has a devastating effect on families and communities. The problem is magnified by a failed drug policy and the Adoption and Safe Families Act, which, in many cases, requires states to institute termination proceedings against a parent whose child has been in state care for twelve out of the last fifteen months. Legal doctrine has been slow to respond to this pressing problem. This Article suggests reconceiving the state's role in intervening in these families. It suggests that the ubiquitous "best interests of the child" standard fails to adequately protect incarcerated parents' liberty interests in maintaining ties with their children and that, in these cases, the standard has metamorphosed into a "best parent" standard. To address this problem, this Article proposes a number of reforms including using a higher standard of proof than is currently required in termination proceedings and instituting policies to preserve families during periods of parental incarceration.

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INTRODUCTION

"When my mother was sentenced, I felt that I was sentenced . . . She was sentenced to prison . . . I was sentenced . . . to be without my mother."¹

Family law and policy are rooted in an ideology that privileges one familial ideal but excludes and marginalizes the many other forms that families take. A belief in the superiority of raising children in a family of two heterosexual married individuals continues to inform a wide array of laws and policies,² and these

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1. "Antoinette" is the child of an incarcerated parent in NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* 122 (2005).
 2. See, e.g., June Carbone, *Morality, Public Policy and the Family: The Role of Marriage and Public/Private Divide*, 36 SANTA CLARA L. REV. 267 (1996). Carbone notes that "[t]o the extent that the United States can ever be said to have had a national family policy, it is one that insists on marriage as the sole legitimate locus for childrearing." *Id.* This preference for two-parent heterosexual marriages as the best setting in which to raise children is not always explicitly stated but can be observed in various laws and policies such as those that have

socio-legal norms adversely impact poor families, families of color, single-parent families, and gay and lesbian parents.³ Failing to live up to these norms for poor families and families of color may often result in disproportionate state interference in their affairs.⁴ For single, gay, and lesbian parents, it may mean the failure of the state to recognize their families at all.⁵ As societal changes occur, states struggle to define “family” and continue to wrestle with what it means to be an effective parent and what settings and care are truly in a child’s best interests. The tensions that result are in part because of stubborn adherence to a belief in the supremacy of two-parent families as well as a reluctance to deal more practically with the consistent and historic diversity of family structures.⁶ These conflicts quite often result in policies that are unreflective of reality and cling to a mythology of the “American Family.” Unfortunately, this leads to less-than-optimal solutions to the very real problems that face families with children. Indeed, the socio-legal responses to families with incarcerated parents demonstrate this conflict.

criminalized sex outside of marriage, through the regulation of the entry into marriage and the means and financial consequences of its dissolution, as well as in adoption, social security, and tax laws. *Id.* at 270-71; Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L. J. 274 (1991). Myriad federal and state laws reify the heterosexual, middle class, two-parent family. See, e.g., Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996) (reauthorized by the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006)); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 2010) (regarding elective shares); N.Y. EST. POWERS & TRUSTS LAW § 5-3.1 (McKinney 2010) (regarding tax exemptions that benefit married families); Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007); Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax*, 11 THEORETICAL INQUIRIES L. 631, 653 (2010). In addition, the United States General Accounting Office has identified 1,049 federal laws that provide benefits, rights, and privileges to married couples. Letter from Barry R. Bredick, Associate General Counsel, General Accounting Office, to Henry J. Hyde, Chairman, House Committee on the Judiciary (Jan. 31, 1997) (responding to a request by the House in connection with the enactment of the Defense of Marriage Act); see also Pamela S. Katz, *The Case for Legal Recognition of Same-Sex Marriage*, 8 J.L. & POL’Y 61 (1999).

3. See, e.g., Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1006 (2001) (finding that black families are disproportionately adversely affected by the increase in mass incarceration). The “‘othering’ of poor families, particularly when they are of color, makes it easy for the dominant culture to devalue them: to view them as dysfunctional and not families at all.” Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 579 (1997); see also Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345 (1996) (explores how racism and sexism intersect to affect family law policy).
4. Appell, *supra* note 3, at 579-80; Perry, *supra* note 3, at 369-70; Roberts, *supra* note 3, at 1006.
5. *Id.*
6. John Vagelatos, *Heeding Cassandra: The Neutered Mother, The Sexual Family and “Other Twentieth Century Tragedies”*, 5 COLUM. J. GENDER & L. 127, 131 (1995); Appell, *supra* note 3, at 579-80; Fineman, *supra* note 2, at 278-79; Perry, *supra* note 3, at 369-70; Roberts, *supra* note 3, at 1006.

Rising rates of incarceration have created obstacles for families with incarcerated parents that family law doctrine has failed to adequately address.⁷ Close to 2 million children have a parent who is entangled in the criminal justice system.⁸ Many of these children will find their families affected by both the stigma of being involved with the criminal justice system and the trauma resulting from the physical separation of parent and child.⁹ Later, these families may face state efforts to terminate parental rights.¹⁰ These pressures weaken family ties, which increases the likelihood that children and their incarcerated parents will find themselves further entangled in crime and the penal system. Thus, researcher and journalist Nell Bernstein aptly asserts that “[t]he dissolution of families, the harm to children—and the resultant perpetuation of the cycle of crime and incarceration from one generation to the next—may be the most profound and damaging effect of our current penal structure.”¹¹

Family law has successfully adapted to maintain ties in some fractured families. While this change in approach is particularly noticeable with regard to divorce, the evolution has yet to occur for families with incarcerated parents.¹²

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7. Wm. Justin Dyer, *Prison, Fathers, and Identity: A Theory of How Incarceration Affects Men's Paternal Identity*, 3 FATHERING 201, 202 (2005). Dyer points to a number of studies that show that “[a]fter controlling for race, employment, education, drug/alcohol abuse, and violence . . . incarceration had a negative effect on family relationships.” *Id.*; Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 THE ANNALS AM. ACAD. POL. & SOC. SCI. 221, 234 (2009).
 8. BERNSTEIN, *supra* note 1, at 2; LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP'T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 3 (2008), available at bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf (“[P]arents in prison had nearly 1.9 million children.”); Philip M. Genty, *Termination of Parental Rights among Prisoners: A National Perspective*, in CHILDREN OF INCARCERATED PARENTS 167 (Katherine Gabel & Denise Johnston, M.D. eds.) (1995) (noting the significant numbers of families affected by parental incarceration) [hereinafter Genty, *A National Perspective*]; Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L. J. 1671 (2003) [hereinafter Genty, *Collateral Consequence*]. Parental incarceration affects one in every forty children. Danielle H. Dallaire, *Incarcerated Mothers and Fathers: A Comparison of Risks for Children and Families*, 56 FAM. REL. 440, 440 (2007).
 9. Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133, 172 (2008); DAVID BRAMAN, DOING TIME ON THE OUTSIDE, INCARCERATION AND FAMILY LIFE IN URBAN AMERICA 2 (2004); Tanya Krupat, *Invisibility and Children's Rights: The Consequences of Parental Incarceration*, 29 WOMEN'S RTS. REP. 39, 40 (2007).
 10. Jeremy Travis, *Families & Children*, FED. PROBATION, June 2005, at 31, 31. Travis notes that “[e]very individual sent to prison leaves behind a network of family relationships.” *Id.*
 11. BERNSTEIN, *supra* note 1, at 4. Murray and Farrington note that “[t]he UN Convention on the Rights of the Child states that children should be protected from any form of discrimination or punishment based on their parents' status or activities.” Murray & Farrington, *supra* note 9, at 187 (citing Articles 2 and 3, UN General Assembly 1989). The Convention has not yet been ratified by the United States. Krupat, *supra* note 9, at 43 (describing the importance of implementing the Convention).
 12. Some scholars have reflected on the differences in private versus public family law matters. See, e.g., Christina A. Zawisza, *Storied Anna Mae He Decision Clarifies Law but Leaves Unanswered Questions*, 38 U. MEM. L. REV. 637, 681-82 (2008); Appell, *supra* note 3, at 581. Professor Garrison notes that:

there has been little attempt by either legal commentators or child care experts to

For example, states have engaged in reforms to make divorce easier to obtain and to ease the stigma and trauma of divorce on families and children.¹³ No-fault divorce is now available in all fifty states,¹⁴ and some jurisdictions offer alternative methods of dispute resolution in dissolution proceedings to preserve family ties.¹⁵ In contrast, there has been no significant or cohesive effort to maintain the connection between incarcerated parents and their children despite the significant interruption in family life created by imprisonment and the advantages of maintaining family ties for children and recidivism rates.¹⁶ Children of incarcerated parents often lack sufficient support and opportunities to maintain contact with their imprisoned parents even though incarceration rates continue to rise, and research shows that having a parent in prison is “one of the more common psycho-

explain why divorce law reform has focused on maintaining family relationships while foster care reform has focused on providing one unconditional relationship. A historical explanation lies in the traditional contrast between private family law, which has consistently recognized parental rights, and the family law of the poor, which generally has not.

Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 454 (1983); Richard D. Palmer, *The Prisoner-Mother and Her Child*, 1 CAP. U. L. REV. 127, 132 (1972) (describing how courts treat incarcerated parents differently from non-incarcerated parents when determining parental fitness).

13. Michelle L. Evans, *Wrongs Committed During a Marriage: The Child That No Area of Law Wants to Adopt*, 66 WASH. & LEE L. REV. 465, 473-76 (2009).
14. *See Divorce, American-style: No Fault is now the Law in all 50 States*, CONSUMERREPORTS.ORG (Oct. 13, 2010), <http://blogs.consumerreports.org/money/2010/10/new-york-legal-no-fault-divorce-law-50-states-.html>.
15. *See generally* Elizabeth Kruse, *ADR, Technology, And New Court Rules—Family Law Trends for the Twenty-First Century*, 21 J. AM. ACAD. MATRIM. LAW. 207 (2008) (describing the growth of alternative dispute resolution in family law). Some jurisdictions require parents to participate in educational programs designed to teach them about the impact of divorce on their children. *See* Tali Schaefer, *Saving Children or Blaming Parents? Lessons From Mandated Parenting Classes*, 19 COLUM. J. GENDER & L. 491, 491-92 (2010). Some states have enacted a Parents Bill of Rights, which restrains a parent’s ability to make derogatory comments about the other parent. *See, e.g.*, TENN. CODE ANN. § 36-6-110 (2010). Jurisdictions have also become increasingly flexible in recognizing the need of a custodial parent to relocate and in permitting visitation across long distances. *See* Samara Nazir, *The Changing Path to Relocation: An Update on Post-Divorce Relocation Issues*, 22 J. AM. ACAD. MATRIM. LAW. 483, 485-87 (2009). In another shift, the Supreme Court has recognized the right of unwed fathers to due process protection prior to determinations affecting their parental rights. *See* *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (finding that unwed fathers who make an effort to participate in raising their children acquire “substantial protection under the due process clause”); *Caban v. Mohammed*, 441 U.S. 380 (1979) (using the Equal Protection Clause to strike down a distinction between unmarried fathers and mothers in adoption laws); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that unwed father has a right to have his fitness be examined before his children could be taken from him). Courts have routinely recognized that families have changed significantly, and there is a need to adapt legal principles and institutions to deal with the changes. *See* Gary A. Debele, *Custody and Parenting by Persons Other Than Biological Parents: When Non-Traditional Family Law Collides with the Constitution*, 83 N.D. L. REV. 1227, 1232 (2007).
16. Dyer, *supra* note 7, at 202. The lack of significant movement on this issue is troubling also because of the consistent and persistent grassroots efforts and support by advocates and scholars. *See, e.g.*, Genty, *Collateral Consequence*, *supra* note 8, at 1679-83; Genty, *A National Perspective*, *supra* note 8, at 167-68.

social and health problems facing children.”¹⁷

It is symptomatic of family law’s failure to evolve that a significant number of states continue to permit courts to weigh incarceration as a factor in terminating parental rights, which means that incarcerated parents can face termination of their parental rights for conduct not directly related to their role as parents.¹⁸ This reflects adherence to an exclusionary family ideal that ignores the reality of fractured families and raises significant privacy and liberty concerns.¹⁹ Reported decisions discussing the application of termination laws to families affected by parental imprisonment reveal a view of family that remains unrealistically tied to the physical presence of a parent and to impractical expectations of parenting.²⁰ However, research demonstrates that incarcerated parents can, with assistance, be effective parents and are not, by definition, bad or neglectful parents.²¹ In fact, families with a parent who is absent due to incarceration may,

17. Krupat, *supra* note 9, at 39-40; Kathi J. Kemper & Frederick P. Rivara, *Parents in Jail*, 92 PEDIATRICS 261, 263 (1993) (finding 36% of inmates have children under fifteen years old).

18. See, e.g., ALA. CODE § 12-15-319(a)(4) (2008); GA. CODE ANN. § 15-11-94(4)(B)(iii) (2004); TENN. CODE ANN. § 36-1-113(g)(6) (2008). Nell Bernstein estimates that “thirty-four states now have statutes in place that explicitly cite parental incarceration as a criterion for termination of parental rights.” BERNSTEIN, *supra* note 1, at 150. Professor Philip Genty asserts that “at least 25 states have termination-of-parental-rights or adoption statutes that explicitly pertain to incarcerated parents, and four other states . . . permit termination of parental rights for parents convicted of certain types of crimes against children.” Genty, *A National Perspective*, *supra* note 8, at 168. There are also a number of states that find abandonment or neglect as a result of a parent’s lack of communication with their child without making exceptions for parents in prison. See, e.g., *Doe v. Doe*, 220 P.3d 1062, 1065-66 (Idaho 2009) (upholding order terminating father’s parental rights where he was likely to be incarcerated for the remainder of the children’s minority). State approaches to terminating parental rights vary but, in general, in most states parental rights may be terminated on the grounds of abuse, neglect, and abandonment, among others. James G. Dwyer, *A Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 953 (2003); Orman W. Ketcham & Richard F. Babcock, Jr., *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUTGERS L. REV. 530, 531 (1975-1976); see, e.g., ALA. CODE § 12-15-319(a)(4) (2008), GA. CODE ANN. § 15-11-94 (2004), TENN. CODE ANN. § 36-1-113(g)(6) (2008).

19. See, e.g., Carbone, *supra* note 2, at 270; Perry, *supra* note 3, at 347-48.

20. See, e.g., *State ex. rel. A.H.*, 2009 UT App 637, ¶ 16, 217 P.3d 278 (upholding termination of parental rights on appeal when parent faced criminal charges and repeated incarceration); *In re Doe*, 144 P.3d 597 (Idaho 2006); *J.W.B. v. Dep’t of Children & Families*, 8 So. 3d 1191, 1193 (Fla. Dist. Ct. App. 2009) (concluding a father who had not been physically present during his child’s life, had not retained contact with his child, and would be incarcerated for a substantial portion of the child’s minority correctly had his parental rights terminated). Jurisdictions rely on a number of factors relating to incarceration such as the length of imprisonment as a basis for finding abandonment. Many of these families face a multitude of barriers to family stability, including poverty and inadequate resources. See, e.g., Geneva Brown, *The Wind Cries Mary-the Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women*, 24 ST. JOHN’S J. LEGAL COMMENT. 625, 639 (2010); Deborah Paruch, *The Orphaning of Underprivileged Children: America’s Failed Child Welfare Law & Policy*, 8 J. L. & FAM. STUD. 119, 143-44, 163 (2006) (recommending judicial and legislative reform and noting how the intersection of law, policy, and inadequate services to poor families can result in parental terminations); see *infra* note 107.

21. Margaret Graham Tebo, *A Parent in Prison*, A.B.A. J., Feb. 2006, at 12, 12-13; Travis, *supra* note 10, at 31, 40-41.

with assistance and appropriate resources, function as well as other families.

This Article proposes deconstructing the family ideology at work in parental termination cases and rethinking the policy and practice of state and judicial intervention in families with an incarcerated parent. It suggests that courts adopt a higher standard of proof than is typically required in deciding parental termination cases. It further proposes that courts work with a “suitable parent” standard as opposed to the “ideal parent” standard that is implicit in the current approaches to parental terminations.²² Under this standard, absent proof of direct harm to children, courts would find that the biological parent is a suitable one and that it is in children’s best interests to maintain their connection with their biological parents. In addition, courts would be required to take the barriers to maintaining parental ties created by imprisonment into account in assessing parental contact and would be prohibited from relying on incarceration or conviction of a crime in terminating parental rights without proof of harm or danger to the child. By taking these actions, the state can preserve rather than sever family ties.

Part I of the Article sets forth data about families and incarceration; Part II describes state approaches to parental terminations based on factors relating to the incarceration of a parent and explains the impact of the Adoption and Safe Families Act on parental terminations. Part III of the Article critiques the current approach to parental terminations, which permits states to consider parental incarceration as a factor in severing the parent-child relationship, and discusses constitutional concerns of the current model. Part IV proposes that states no longer use either incarceration or the length of imprisonment as factors in termination proceedings. Moreover, this Part suggests that courts adopt a higher standard of proof in termination proceedings and engage in a more searching inquiry of the facts before rendering a detailed decision with regard to terminations. Part IV also provides other recommendations for preserving the parent-child relationship including requiring counsel for indigent parents in termination proceedings, relying on mediation or other alternative methods of resolving disputes prior to or instead of court hearings, and requiring courts to consider the institutional and practical barriers faced by parents in prison.

I. IMPACT OF INCARCERATION ON CHILDREN, FAMILY, AND PARENTS

The legal and societal challenges facing incarcerated parents are directly related to the growth of the prison population. The number of incarcerated parents in the United States grew 79% from 1991 to 2007.²³ In fact, the United

22. Travis, *supra* note 10, at 41 (proposing that “[f]oster care agencies . . . ascertain whether a parent in prison would serve as a suitable parent upon release before moving for the termination of parental rights”); see Lynn Sametz, *Children of Incarcerated Women*, 25 SOCIAL WORK 298, 300 (1980).

23. In 2007, 809,000 parents were in prison, which is an increase of 79% since 1991. THE NATIONAL RESOURCE CENTER ON CHILDREN AND FAMILIES OF THE INCARCERATED,

States now has the highest incarceration rate in the world and a prison population that is disproportionately comprised of people of color.²⁴ Moreover, a national recidivism rate of more than 50% means that many of those who have been incarcerated are likely to return to prison.²⁵ The explosion in the prison population has also created a dramatic increase in the number of parents in prison.²⁶ More than 50% of men and 60% of women in prison are parents,²⁷ with an estimated 800,000 parents in prison.²⁸ Accordingly, more than 2% of children have a parent in prison,²⁹ and 7 million children have a parent under some form of correctional supervision.³⁰

Although most prisoners are male, the number of women in prison has also skyrocketed in recent years.³¹ In fact, women have experienced a significantly

FAMILY & CORRECTIONS NETWORK, CHILDREN AND FAMILIES OF THE INCARCERATED FACTSHEET (2009), available at <http://fcnetwork.org/wp/wp-content/uploads/fact-sheet.pdf>.

24. Joyce A. Arditti, *Locked Doors and Glass Walls: Family Visiting at a Local Jail*, 8 J. L. & TRAUMA 115, 115 (2003); Holly Foster & John Hagan, *The Mass Incarceration of Parents in America: Issues of Race/Ethnicity, Collateral Damage to Children, and Prisoner Reentry*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 179, 187 (2009); Human Rights Program, Justice Now, *Prisons as a Tool of Reproductive Oppression*, 5 STAN. J. C.R. & C.L. 309, 314 (2009); ROY WALMSLEY, INTERNATIONAL CENTER FOR PRISON STUDIES, KING'S COLLEGE LONDON, WORLD PRISON POPULATION LIST (7th ed. 2007).
25. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 58 (2002); Dyer, *supra* note 7, at 202 (noting a recidivism rate of 67.5% within 3 years for fathers released from prison).
26. GLAZE & MARUSCHAK, *supra* note 8, at 1; CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 1 (2000), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=981> (finding an increase of 500,000 from 1991 to 1999); Denise Johnston & Katherine Gabel, *Incarcerated Parents, in CHILDREN OF INCARCERATED PARENTS*, *supra* note 8, at 3, 3; Murray & Farrington, *supra* note 9, at 136-37.
27. Kim Harrison, *Parental Training for Incarcerated Fathers: Effects on Attitudes, Self-Esteem, and Children's Self-Perceptions*, 137 J. SOC. PSYCHOL. 588, 588 (2001); Garry L. Landreth & Alan F. Lobaugh, *Filial Therapy with Incarcerated Fathers: Effects on Parental Acceptance of Child, Parental Stress, and Child Adjustment*, 76 J. COUNSELING & DEV. 157, 157 (1998); Tebo, *supra* note 21, at 12-13. Previous studies demonstrate significant numbers of inmates are parents of young children. In fact, a "majority of state (55%) and federal (63%) prisoners reported having a child under the age of 18." GLAZE & MARUSCHAK, *supra* note 8, at 2, 14 (reporting statistics on state and federal inmates who reported having minor children by gender and race); MUMOLA, *supra* note 26, at 2; *see also* Kemper & Rivara, *supra* note 17, at 261 (finding that 36% of inmates in local jails have children under 15 years old).
28. GLAZE & MARUSCHAK, *supra* note 8, at 1.
29. BERNSTEIN, *supra* note 1, at 2; Dyer, *supra* note 7, at 202; GLAZE & MARUSCHAK, *supra* note 8, at 2.
30. Seven million children have a parent who is under criminal justice control. This number includes parents who are imprisoned, in jail, on probation, and on parole. *See* BERNSTEIN, *supra* note 1, at 2; GLAZE & MARUSCHAK, *supra* note 8, at 1; MUMOLA, *supra* note 26, at 2; ALLEN J. BECK, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES 1998 1 (2002); Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97, 110 (2008) (citing studies that estimate that, "2.3 million, or almost 3 percent of the under-18 population" have a parent in prison); Murray & Farrington, *supra* note 9, at 138.
31. BERNSTEIN, *supra* note 1, at 33; MUMOLA, *supra* note 26, at 1; Katherine P. Luke, *Mitigating the Ill Effects of Maternal Incarceration on Women in Prison and Their Children*, 81

greater increase in imprisonment than men,³² and this has led to a greater increase in the number of mothers who are incarcerated.³³ Since 1991, the number of mothers in prison grew 122%, while the number of imprisoned fathers increased by 76%.³⁴ The number of children with a mother in prison increased by 131% since 1991,³⁵ and estimates of the number of incarcerated women who have children under the age of eighteen vary.³⁶ These women are more likely than fathers to have been the primary caregiver prior to incarceration and are more likely to be reliant on the state to care for their child while imprisoned³⁷ because two-thirds of mothers reported living with their children before incarceration compared to less than half of fathers.³⁸ In addition, states typically have fewer prisons for women than men, and, as a result, women are frequently incarcerated in facilities farther from home than are men.³⁹ This likely makes it more difficult for mothers to maintain ties with their children than it is for fathers.⁴⁰

Families of color are more likely to experience the incarceration of a parent.⁴¹ Indeed, African-American or Hispanic/Latino children are disproportion-

CHILD WELFARE 929, 931-32 (2002); Erica D. Benites, Comment, *In Defense of the Family: An Argument for Maintaining the Parental Rights of Incarcerated Women in Texas*, 3 SCHOLAR 193, 194 (2001) (analyzing Texas parental terminations based on parental incarceration); One study found that three-quarters of all women in prison were mothers, most of whom had experienced physical or sexual abuse before imprisonment, committed a drug offense, were in prison for a non-violent offense, and/or committed their crime under the influence of drugs or alcohol. TRACY L. SNELL, UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, WOMEN IN PRISON (1991); see also GLAZE & MARUSCHAK, *supra* note 8, at 2.

32. Luke, *supra* note 31, at 931 (asserting that "incarceration rates of women have risen by more than 400% in the past 20 years"); Benites, *supra* note 31, at 194; Travis, *supra* note 10, at 33 ("Between 1991 and 2000, the number of incarcerated mothers increased by 87 percent, compared with a 60 percent increase in the number of incarcerated fathers.").
33. Adela Beckerman, *Mothers in Prison: Meeting the Prerequisite Conditions for Permanency Planning*, 39 SOC. WORK 9, 10 (1994); Kathleen J. Block & Margaret J. Potthast, *Girl Scouts Beyond Bars: Facilitating Parent-Child Contact in Correctional Settings*, 77 CHILD WELFARE 561, 562 (1998).
34. GLAZE & MARUSCHAK, *supra* note 8, at 2; MUMOLA, *supra* note 26, at 2 ("As a result, the number of children with a mother in prison nearly doubled since 1991."); Keva Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD & ADOLESCENT SOC. WORK J. 472 (2006).
35. GLAZE & MARUSCHAK, *supra* note 8, at 2.
36. Landreth & Lobaugh, *supra* note 27, at 157.
37. Benites, *supra* note 31, at 218-19.
38. NATIONAL RESOURCE CENTER ON CHILDREN AND FAMILIES OF THE INCARCERATED, CHILDREN AND FAMILIES OF THE INCARCERATED FACT SHEET 4 (2009), available at <http://fcnetwork.org/wp/wp-content/uploads/fact-sheet.pdf>; Travis, *supra* note 10, at 33.
39. John Hagan & Ronit Donovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 142 (1999).
40. Benites, *supra* note 31, at 219 (citing statistics on the Washington, D.C., prison system).
41. Travis, *supra* note 10 at 31 (asserting that having a parent in prison is now commonplace in some communities and that the "national experiment with mass incarceration seems, at the very least, incongruent with the rhetoric behind prevailing social policies"); Dorothy Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1288 (2004) (examining the pervasive influence of incarceration on African-American families); Clear, *supra* note 30, at 102-03.

ately likely to have incarcerated parents than white children.⁴² Statistics reveal that while 2% of children in the U.S. have a parent in prison, the percentages are far greater for African-American children (7%) and Hispanic children (2.6%) than for white children (.8%).⁴³ Disproportionate incarceration of parents of color means that African-American children are nine times and Latino children are three times more likely than white children to have a parent in prison.⁴⁴ Some researchers have gone so far as to assert that “parental incarceration has become commonplace” for black children.⁴⁵

Families with an incarcerated parent are also adversely affected by low levels of education, poverty, and the war on drugs.⁴⁶ Significant numbers of incarcerated parents have not graduated from high school; of those with a high school degree, most have a General Educational Development (GED) degree.⁴⁷ Prior to their arrest, approximately 53% of fathers in state prison had a personal income below \$1,000 per month, and another nearly 25% had a personal income below \$2,000 per month.⁴⁸ More than 51% of incarcerated mothers had a personal income below \$600 per month, and an additional 35% had a personal income below \$2,000 per month before their arrests.⁴⁹ In addition to wages, many of these parents relied on public assistance and/or illegal activity for financial support.⁵⁰ Further, because a large number of these parents are in prison due to drug-related offenses,⁵¹ they are affected by Anti-Drug Abuse Acts and the implementation of mandatory sentencing laws, which result in these parents serving

42. See BERNSTEIN, *supra* note 1, at 60; Luke, *supra* note 31, at 933.

43. MUMOLA, *supra* note 26, at 2; Luke, *supra* note 31, at 933 (“In 1999, black children were nearly nine times more likely to have a parent in prison than white children. Hispanic/Latino children were three times more likely than white children to have an incarcerated parent.”); Travis, *supra* note 10, at 35.

44. Luke, *supra* note 31, at 931.

45. Foster & Hagan, *supra* note 24, at 180; Roberts, *supra* note 41, at 1276-77.

46. JEFFREY H. REIMAN, *THE RICH GET RICHER AND THE POOR GET PRISON: IDEOLOGY, CLASS, & CRIMINAL JUSTICE* 96-97 (1979) (“For the same criminal behavior, the poor are more likely to be arrested; if arrested, they are more likely to be charged; if charged, more likely to be convicted; if convicted, more likely to be sentenced to prison; and if sentenced, more likely to be given longer prison terms than members of the middle and upper classes.”); Julie Poehlmann, *Children of Incarcerated Mothers and Fathers*, 24 WIS. J.L. GENDER & SOC’Y 331, 333, 339 (2009).

47. MUMOLA, *supra* note 26, at 10; Travis, *supra* note 10, at 33-35; Hagan & Dinovitzer, *supra* note 39, 134-37; Luke, *supra* note 31, at 930.

48. MUMOLA, *supra* note 26, at 10; Traci Schelsinger, *The Cumulative Effects of Racial Disparities in Criminal Processing*, J. INST. JUST. & INT’L STUD. 261, 261 (2007); *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 STAN. L. & POL’Y REV. 133, 137 (1999); Travis, *supra* note 10, at 33-35; Hagan & Dinovitzer, *supra* note 39, at 134-37; JEREMY TRAVIS ET AL., URBAN INSTITUTE, *FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY* (2005), http://www.urban.org/uploadedpdf/310882_families_left_behind.pdf.

49. MUMOLA, *supra* note 26, at 10; TRAVIS, *supra* note 48.

50. MUMOLA, *supra* note 26, at 9; TRAVIS, *supra* note 48.

51. MUMOLA, *supra* note 26, at 5 (finding that 24% of incarcerated parents are serving sentences for drug offenses, compared with 17% of non-parents).

lengthy sentences.⁵² The over-reliance on mass incarceration, the war on drugs, and mandatory sentencing policies can be especially harsh when there are insufficient drug treatment and rehabilitation facilities in and out of prison.⁵³

The penal system's tendency to exacerbate the struggles facing certain communities extends to the courtroom, where, in some termination proceedings, courts have demonstrated a belief that the commission of a crime supports a conclusion that an individual is a less fit parent.⁵⁴ This occurs despite the fact that incarcerated parents are frequently imprisoned for crimes that have no direct bearing on their ability to parent.⁵⁵ Often young and unmarried, incarcerated parents tend to be poor with little education, and their incarceration is typically not directly associated with their role or capacity as parents.⁵⁶ Rather, studies suggest that inmate parents are likely to be in prison for non-violent offenses like property or drug-related crimes, theft, or substance abuse.⁵⁷ According to these researchers, the rates of incarceration for sex crimes, family-related offenses, or child abuse is relatively low among parents.⁵⁸ Indeed, conviction data shows no evidence that incarcerated parents are more likely to harm or neglect their chil-

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52. Nekima Levy-Pounds, *Can These Bones Live? A Look at the Impacts of the War on Drugs on Poor African-American Children and Families*, 7 HASTINGS RACE & POVERTY L.J. 353, 357 (2010) ("The combination of the Anti-Drug Abuse Acts of 1984 and 1986 and the mandatory minimum sentencing scheme comprises the backbone of Congress's war on drugs. . . . Mandatory minimums caused judges to sentence defendants to an automatic, pre-determined term of imprisonment based upon the type and level of offense committed."); Poehlmann, *supra* note 46, at 331-32.
 53. Ellen M. Weber, *Bridging the Barriers: Public Health Strategies for Expanding Drug Treatment in Communities*, 57 RUTGERS L. REV. 631, 644-48 (2005); *In re Gwynne P.*, 830 N.E.2d 508, 514 (Ill. 2005) (finding an incarcerated mother unfit because of drug and alcohol use).
 54. See, e.g., *Doe v. Doe*, 220 P.3d 1062, 1065 (Idaho 2009) (upholding an order terminating father's parental rights upheld where he was likely to be incarcerated for the remainder of the children's minority); *In re K.A.S.*, 200 P.3d 567 (Or. Ct. App. 2009) (affirming termination of parental rights based on criminal conduct, alcohol use, domestic violence, and inadequate parenting skills); *K.D. v. People*, 139 P.3d 695, 700 (Colo. 2006) (finding no error in trial court's reliance on a parent's criminal conviction and incarceration in terminating parental rights and stating, "parental incarceration informs a court's fitness inquiry").
 55. See, e.g., *State Dep't of Children's Servs. v. J.S.*, 2001 WL 1285894 (Tenn. Ct. App., Oct. 25, 2001) (terminating parental rights of mother based upon incarceration for disorderly conduct and vandalism); *In re A.W.*, 501 S.E.2d 22 (1998) (deeming parents unfit due in part to drug and alcohol addiction and history of criminal activity); *In re J.M.C.*, 410 S.E.2d 368 (1991) (terminating parental rights based in part on mother's history of drug and shoplifting offenses).
 56. Seventy percent of parents in state prison do not have a high school diploma. MUMOLA, *supra* note 26, at 1; see also Kemper & Rivara, *supra* note 17, at 263; Luke, *supra* note 31, at 930 ("Women who become incarcerated are usually poorly educated single mothers from communities of color who are living in poverty and struggling to be the sole financial and emotional providers for their children.").
 57. Kemper & Rivara, *supra* note 17, at 262 tbl. 3. But see MUMOLA, *supra* note 26, at 6 tbl. 7 (approximately 44% of parents in prison were violent offenders).
 58. Kemper & Rivara, *supra* note 17, at 262 tbl. 3. It is important to note, however, that Kemper and Rivara also discuss the probable link between recidivist parents and increased potential for family violence. *Id.* at 263.

dren, and in fact, their crimes may be related to environmental factors such as low levels of education and poverty.

Mothers, in particular, may find themselves in prison for committing “survival crimes”—acts made necessary by poverty.⁵⁹ In fact, according to researchers, the crimes women commit may be related to their status as a single mothers and their efforts to provide for their families.⁶⁰ Thus, mothers are in prison primarily for drug violations and financial misdeeds and are less likely to have committed a violent crime than either male prisoners or non-mothers.⁶¹ As the primary caregivers in their households, incarcerated mothers are more likely than incarcerated fathers to have been their children’s primary source of emotional and financial support.⁶² One researcher found that “[i]t is plausible that mothers raising children without the support of a spouse, and with limited vocational resources, could become involved in drugs to relieve the stress of raising children. It is also plausible that the drug activity was motivated by a need to find funds to support the children.”⁶³ Unfortunately, it is these families that lack adequate resources to take over the care of a young child while a parent is in prison and are therefore placed in the greatest danger of facing a termination proceeding.⁶⁴

Research suggests that a child may be more adversely affected by a mother’s imprisonment than a father’s.⁶⁵ While the reasons for this phenomenon are uncertain, it may be because women are more likely to have been single parents before being imprisoned and their children are therefore more likely to have

59. Ann B. Loper, *How Do Mothers in Prison Differ from Non-Mothers*, 15 J. CHILD & FAM. STUD. 83, 92 (2006) (asserting the possibility that incarcerated mothers’ “drug activity was motivated by a need to find funds to support the children”); Luke, *supra* note 31, at 931 (“Many experts in criminal justice assert that the crime committed by women is directly related to their disadvantaged economic position in society.”).

60. Loper, *supra* note 59, at 92.

61. See MUMOLA, *supra* note 26, at 5; Luke, *supra* note 31, at 931 (“Many in the criminal justice field have suggested that the aggressive war on drugs and the subsequent mandatory minimum drug sentencing laws are the primary reasons that the rate of female incarceration is increasing at a rate twice that of male incarceration.”); see also PHYLLIS JO BAUNACH, *MOTHERS IN PRISON* 22-25 (1985). Women more often are viewed as committing survival crimes in response to poverty, homelessness, and abuse. See BARBARA OWEN, *IN THE MIX: STRUGGLE AND SURVIVAL IN A WOMEN’S PRISON* 11 (1998). According to research, almost 73% of women are in prison for non-violent offenses. LAWRENCE A. GREENFELD & TRACY L. SNELL, U.S. DEP’T OF JUSTICE, *WOMEN OFFENDERS* 9 (2002). Professor Katherine P. Luke maintains that, “[w]omen are more often convicted of low-level drug offenses than men.” Luke, *supra* note 31, at 931.

62. Luke, *supra* note 31, at 934; Travis, *supra* note 10, at 33 (finding that “close to two-thirds (64 percent) of mothers reported living with their children before incarceration, compared with slightly less than half (44 percent) of fathers in 1997.”).

63. Loper, *supra* note 59, at 92.

64. See *Dierfeld v. People*, 323 P.3d 628 (Colo. 1958) (en banc) (holding that a mother who arranged for a grandparent to care for child could have her parental rights terminated); MUMOLA, *supra* note 26, at 3 (finding that 10% of mothers and 2% of fathers in state prison report a child living in a foster home or agency).

65. Murray & Farrington, *supra* note 9, at 179.

been placed in state care.⁶⁶ Approximately 10% of mothers in prison have a child in foster or other state care, and 11% of children in foster care have a mother in prison.⁶⁷ These children are more at risk for social, emotional, and behavioral problems than other children.⁶⁸

Regardless of the socio-economic and other struggles facing many of these families prior to imprisonment, research supports the conclusion that their familial bonds are similar to that of other families.⁶⁹ Nearly half of imprisoned parents—disproportionately mothers—lived with their children before being incarcerated.⁷⁰ These parents and children often share a deep bond that makes the separation during incarceration particularly trying and painful.⁷¹ Many parents who find themselves in prison are not necessarily bad parents by virtue of their incarceration and may, in fact, be good and effective parents.⁷² One cannot generalize about the parenting skills of incarcerated parents because research on parenting styles of imprisoned parents before imprisonment shows a range of approaches. For example, one researcher “found inmate mothers to possess positive parenting attitudes (love, caring, and guidance) equivalent to those of mothers who are not incarcerated.”⁷³

Rather than fitting the stereotype of a neglectful or uncaring parent, re-

66. *Id.*; BAUNACH, *supra* note 61, at 6.

67. MUMOLA, *supra* note 26, at 1 (reporting figures for parents incarcerated in state prison); TIMOTHY ROSS ET AL., VERA INSTITUTE OF JUSTICE, HARD DATA ON HARD TIMES: AN EMPIRICAL ANALYSIS OF MATERNAL INCARCERATION, FOSTER CARE, AND VISITATION 6 (2004), <http://www.vera.org/download?file=123/Hard%2Bdata.pdf>; Z. W. HENRIQUES, IMPRISONED MOTHERS AND THEIR CHILDREN 61 (1982). *See generally* BRENDA G. MCGOWAN & KAREN L. BLUMENTHAL, NATIONAL COUNCIL ON CRIME AND DELINQUENCY WHY PUNISH THE CHILDREN? A STUDY OF CHILDREN OF WOMEN PRISONERS 54 (1978); MUMOLA, *supra* note 26, at 11; Beckerman, *supra* 33, at 9; BERNSTEIN, *supra* note 1, at 144; Loper, *supra* note 59, at 91; Block & Potthast, *supra* 33, at 561; *see* Lanette P. Dalley, *Imprisoned Mothers and Their Children: Their Often Conflicting Legal Rights*, 22 HAMLINE J. PUB. L. & POL'Y 1, 14 n. 44, 16-17 (2000); Ellen Barry, *Legal Issues for Prisoners with Children*, in CHILDREN OF INCARCERATED PARENTS, *supra* note 8, at 148; Sally Day, *Mothers in Prison: How the Adoption & Safe Families Act of 1997 Threatens Parental Rights*, 20 WIS. WOMEN'S L.J. 217, 226 (2005).

68. *See* Dalley, *supra* note 67, at 14 n.44; Murray & Farrington, *supra* note at 9.

69. BRAMAN, *supra* note 9, at 95 (noting that “there is nothing intrinsically different about these families [with an incarcerated parent] that sets them apart.”); Johnston & Gabel, *supra* note 26, at 7, 9, 12 (finding that “the concerns of imprisoned fathers, like those of incarcerated mothers, focus on the well-being of their children”).

70. BAUNACH, *supra* note 61, at 6-7; MUMOLA, *supra* note 26, at 4.

71. *See* Block & Potthast, *supra* note 33 (analyzing the effectiveness of one program designed to facilitate the relationship between incarcerated mothers and their daughters); Luke, *supra* note 31, at 935-36 (assessing the effect of incarceration on mothers from a child welfare perspective).

72. Johnston & Gabel, *supra* note 26, at 8 (finding that there is no evidence to support a conclusion that women prisoners are not good parents).

73. Block & Potthast, *supra* note 33, at 563-64 (citing Larry LeFlore & Mary Ann Hoiston, *Perceived Importance of Parenting Behaviors as Reported by Inmate Mothers: An Exploratory Study*, 14 J. OFFENDER COUNSELING SERVS. & REHAB. 5 (1989)); *see also* BAUNACH, *supra* note 61, at 6-7.

search suggests that “separation from their children [is] the most painful aspect of [parents’] imprisonment.”⁷⁴ Demonstrating familial bonds, imprisoned mothers report feelings of guilt, anxiety, and sadness as well as distress over their lack of parenting skills and concern over their children.⁷⁵ Imprisoned mothers often report feelings akin to grief for the loss of a child, feelings of helplessness, and a fear that their children may resent them or bond too well with their caregivers.⁷⁶ Luke states:

Fear of losing custody of their children is of extreme concern to many mothers who are incarcerated. . . . A primary issue for both incarcerated mothers and their children is who will care for the children while their mothers are in jail or prison and what quality of care the children will receive.⁷⁷

Many incarcerated mothers express a desire to maintain their bond with their children during and after their sentence and worry that their relationships will be irreparably damaged as a result of their incarceration.⁷⁸ In addition, mothers in prison report being separated from children as an ongoing source of stress.⁷⁹ One of the most obvious effects of parental incarceration is the physical disruption of the family, and because mothers are more frequently primary caretakers, incarcerated mothers and their children may feel this separation most acutely. The most damaging and stressful aspect of parental incarceration, however, may be the threat of the termination of parental rights.⁸⁰

The above research relating to the fears and concerns of incarcerated parents is inconsistent with a conclusion that the incarceration of a parent is necessarily a sign of her unsuitability. Further, this research undermines the assumption that incarcerated mothers are necessarily unfit, uncaring, or abusive.⁸¹ Current research, therefore, does not support a conclusion that imprisonment is a predictive factor in assessing parental fitness.⁸² Despite this, states’ laws continue to permit terminations to be based at least partially on parental incarceration.

74. See also BERNSTEIN, *supra* note 1, at 156; Luke, *supra* note 31, at 934.

75. CYNTHIA SEYMOUR, CHILDREN WITH PARENTS IN PRISON: CHILD WELFARE POLICY, PROGRAM, & PRACTICE ISSUES 95 (Cynthia Seymour & Creasie Finney Hairston eds., 2001); Block & Potthast, *supra* note 33, at 563-64; see BAUNACH, *supra* note 61, at 38.

76. Block & Potthast, *supra* note 33, at 563.

77. See Luke, *supra* note 31, at 934.

78. Block & Potthast, *supra* note 33, at 563.

79. Loper, *supra* note 59, at 84.

80. See Benites, *supra* note 31, at 196.

81. For example, despite the public and media attention paid to mothers who kill their children, the reality is that most imprisoned mothers are not incarcerated for harming their children, and less than one percent of homicides committed by females involve children that are less than thirteen years old. Loper, *supra* note 59, at 92.

82. *Id.* (“[T]he relatively smaller proportion of violent offending among mothers is intriguing and argues against stereotypes of incarcerated mothers as characteristically unfit because of their violent histories.”); see also Genty, *Collateral Consequence*, *supra* note 8; Genty, *A National Perspective*, *supra* note 8; Garrison, *supra* note 12, at 425.

tion.

In these proceedings, courts often express concerns that children will be adversely affected by their parents' incarceration,⁸³ but research on this subject suggests that these concerns have little foundation. While children with incarcerated parents face a number of hardships, they often have the same risk factors as other "at-risk" children.⁸⁴ It is unclear whether the "at-risk" characteristics of children of incarcerated parents are a result of the incarceration, the separation created by the parent's imprisonment, foster care, poverty, or other factors.⁸⁵ The extent to which barriers created by prisons to ensure safety and control of the facilities, including restrictions on family contact and visiting facilities, adversely affect the children and families of those who are incarcerated is also unclear.⁸⁶ As a result, although studies illustrate problems experienced by children with a parent in prison, it is not without dispute that the cause of these problems is the parent's incarceration.

It is clear that the effect of parental incarceration on children has not been sufficiently studied.⁸⁷ Some limited longitudinal studies of the children of imprisoned parents reveal that such children may be at greater risk for mental health problems,⁸⁸ and that they report feelings of abandonment, loneliness, sadness, anger, and resentment. The research also tends to show lower self-concepts and achievement scores.⁸⁹ In an assessment of therapy for incarcerated fathers and their children, Landreth and Lobaugh cite research finding that "children become confused about when and if their fathers will return and often question if being sent to prison can happen to them."⁹⁰ The children can display eating disorders, sleeping disorders, diminished academic performance, disruptive behav-

83. See, e.g., *Dep't of Revenue v. Jackson*, 846 So. 2d 486, 500 (Fla. 2003); *In re K.H.*, 688 N.E.2d 1303 (Ind. App. 1997).

84. Tebo, *supra* note 21, at 13.

85. See SEYMOUR, *supra* note 75, at 3-4, 6.

86. *Id.* at 7.

87. Leda M. Pojman, *Cuffed Love: Do Prison Babies Ever Smile?*, 10 BUFF. WOMEN'S L.J. 46, 49 (2001-2002); SEYMOUR, *supra* note 75, at 6-7; Travis, *supra* note 10, at 31; Dyer, *supra* note 7, at 202 ("While most of the negative effects of incarceration on the family are relatively visible, there has been little research or theory generated that describes *how* the incompatibilities between prison and family impact familial relationships.").

88. Murray & Farrington, *supra* note 9, at 158.

89. Low self-concept is equivalent to low self-esteem and is often associated with anti-social behavior, delinquency, anxiety, and depression. Murray & Farrington, *supra* note 9, at 136, 140. Generally speaking, "self-concept refers to how a child views himself or herself." Risa J. Garon et al., *From Infants to Adolescents: A Developmental Approach to Parenting Plans*, 38 FAM. & CONCILIATION CTS. REV. 168, 177 (2000). Lower achievement translates into lower school test scores, educational attainment, and future job and income achievement. These risks are 80% higher for children of female offenders, because these women were usually primary caregivers before incarceration. Jessamine L. Grice, *A Proposal to Increase Child Support Payments By Massachusetts State Prisoners*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 665, 671-72 (2007); see also Dalley, *supra* note 67, at 13-14 (finding that children of incarcerated mothers need more or different services than other children).

90. Landreth & Lobaugh, *supra* note 27, at 158.

ior, and signs of anxiety.⁹¹ Further, these children often feel a stigma associated with their parents' incarceration.⁹² Luke asserts that these children are more likely to engage in drug use, early sexual activity, and truancy than their peers who do not have a parent in prison.⁹³ Landreth and Lobaugh also report that children of incarcerated parents are at greater risk of engaging in criminal activities than other children from similar socioeconomic backgrounds.⁹⁴ These children have a higher chance of continuing to commit crimes as adults and being incarcerated as adults.⁹⁵ The studies, however, have not established a causal link between these problems and parental incarceration. Given the poor outcomes typically associated with foster care, the issues experienced by the child of an incarcerated parent may at least partially result from their placement in state care.⁹⁶ These children may also be suffering from the ill effects of living in poverty and impoverished neighborhoods.⁹⁷

Although the research on the impact of parental incarceration on children establishes no causal link between "at-risk" youth behaviors and parental incarceration,⁹⁸ it does suggest the need to more seriously address the needs of children whose parents are imprisoned.⁹⁹ With increasing numbers of children impacted by parental incarceration, it is important for states to develop a more precise standard for determining whether maintaining parental ties between an incarcerated parent and her child would be harmful to the child. Incarceration and the length of imprisonment are not adequate substitutes for a probing inquiry into the circumstances of each individual family affected by parental incarceration. Furthermore, the studies reveal myriad opportunities to disrupt these at-risk behaviors and improve their educational and social outcomes.¹⁰⁰ While more re-

91. Luke, *supra* note 31, at 933.

92. Murray & Farrington, *supra* note 9, at 135, 173, 175-76.

93. Luke, *supra* note 31, at 933; *see also* Murray & Farrington, *supra* note 9, at 162 (reviewing studies and suggesting "parental imprisonment was a risk factor for drug abuse and unemployment").

94. Landreth & Lobaugh, *supra* note 27, at 158.

95. *Id.*

96. *See* BERNSTEIN, *supra* note 1, at 146-47. Foster care placement triggers the operation of federal provisions that set time requirements for severing the legal ties between parent and child. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997); *see also infra* note 171.

97. Dallaire, *supra* note 8, at 441 ("Children with incarcerated parents may be particularly vulnerable to poor outcomes because of their exposure to an array of background, contextual, or sociodemographic factors such as poverty and single parenthood.").

98. Murray & Farrington, *supra* note 9, at 163, 171. The authors state that "[p]arental imprisonment is a strong predictor of adverse outcomes for children throughout their lives. However, that does not imply that parental imprisonment has a causal effect on children." *Id.* at 163.

99. Arlene Lee, *Children of Inmates: What Happens to These Unintended Victims*, CORRECTIONS TODAY, June 2005, at 84, 85; *see, e.g.*, BAUNACH, *supra* note 61, at 5.

100. Poehlmann, *supra* note 46, at 337. Strengthening the relationship between incarcerated parent and child may be one potential way to improve outcomes for parents and their children. Travis, *supra* note 10, at 41. *See generally* Barbara Bloom, *Imprisoned Mothers, in* CHILDREN OF INCARCERATED PARENTS, *supra* note 8, at 21, 28 (citing increasing recogni-

search is needed, studies that have been done tend to show that having a stable home environment may minimize risk.¹⁰¹ In addition, facilitating contact with the incarcerated parent and providing counseling may ease the stress for children who have a parent in prison.¹⁰² Such efforts have the potential to benefit children, their families, and communities, and to break a familial cycle of involvement in the criminal justice system.¹⁰³

In addition to the possible ill effects on families and children, incarceration may also damage parents' perception of themselves as parents.¹⁰⁴ Sametz reports one mother as stating: "[I]t's so hard to write my kids. There's nothing to write but bad things."¹⁰⁵ In an analysis of the impact of incarceration on fathers, Professor Dyer found that "the forms of interruption caused by incarceration not only affect levels of involvement but are also likely to force changes in the incarcerated fathers' perceptions of themselves as fathers."¹⁰⁶ In addition to the logistical difficulties in maintaining contact between the child and incarcerated parents such as distance and the cost of telephone calls, there is also a disconnect between being identified and treated as a prisoner in this society and the role of being a parent.¹⁰⁷ Dyer asserts that "prison ideology and norms" make it more difficult for fathers to view themselves as parents, and more can and should be done to encourage fathers to see themselves in that role given the positive benefits to both families and imprisoned parents in maintaining family ties.¹⁰⁸ The study concluded that finding ways to maintain incarcerated parents' self-perception as parents may positively affect the level of their involvement with their children.¹⁰⁹ Maintaining this involvement can benefit both the incarcerated parent and his or her children. Studies support the finding that maintaining a parent-child bond can foster childhood development and serve as a rehabilitation

tion that "experience with the criminal justice system is intergenerational" and that strengthening families should be the focus of public and private efforts).

101. Poehlmann, *supra* note 46, at 337.

102. See BAUNACH, *supra* note 61, at 8; SEYMOUR, *supra* note 75, at 12-13; Johnston & Gabel, *supra* note 26, at 18; William Wesley Patton, *Mommy's Gone, Daddy's in Prison, Now What About Me?: Family Reunification for Children of Single Custodial Fathers in Prison-Will the Sins of Incarcerated Fathers Be Inherited by Their Children?*, 75 N.D. L. REV. 179, 200 (1999). Reforming prison policy and procedure to make it more comfortable for children and their parents to having meaningful visits and placing parents who do not present a risk of harm to the community in half-way houses or community based programs closer to their homes would also ease the burden on incarcerated families. *Id.*

103. Lee, *supra* note 99, at 84-85; Travis, *supra* note 10, at 41.

104. Dyer, *supra* note 7, at 203. Professor Dyer applies "identity theory" to an analysis of the impact of incarceration on fathers. He asserts that the theory is frequently used to "assess the varying degrees of father involvement after a dramatic life change for the family (i.e. divorce)." *Id.*

105. Sametz, *supra* note 22, at 299.

106. Dyer, *supra* note 7, at 204.

107. See BERNSTEIN, *supra* note 1, at 85-87; Dyer, *supra* note 7, at 202-03.

108. Dyer, *supra* note 7, at 202, 213-14.

109. *Id.* at 214-15.

tool for parents.¹¹⁰

Although children with incarcerated parents experience high stress levels related to the loss of their parent, they continue to value their relationship with their parent.¹¹¹ The authors of one study report that “[m]any children reported that their incarcerated parent was just as helpful as their non-incarcerated caregivers, suggesting that the children . . . perceive their incarcerated parent to be an important person in their social support network.”¹¹² An anecdote from Nell Bernstein’s book, *ALL ALONE IN THE WORLD*, poignantly echoes this point:

Susanna does not remember ever seeing her father free. She recalls touching him only once, an embrace from which police forcibly removed her. He has never been able to feed or shelter his daughter. . . . Yet he remains the most important person in her life. . . . From the scraps of contact she has been granted over the years—a drawerful of letters, a few dozen collect calls, and intermittent visits—she has built herself a father.¹¹³

The question, then, becomes how to resolve the tensions between parents’ rights to raise their children and the state’s interest in protecting children and promoting the child’s best interests.¹¹⁴ The statistics alone suggest the need to think critically about the standards for termination of parental rights and sentencing, and to modify the construction and administration of prisons to support incarcerated parents. This requires not only an examination of the standards by which courts terminate the parental rights of incarcerated parents, but also the ways in which the criminal justice system relates to families.

II. EXISTING APPROACHES TO INCARCERATION & PARENTAL RIGHTS

A. State Law Approaches

The approach to incarceration and parental rights varies among states with some states permitting termination at least in part based on parental incarceration, while others focus on the length of incarceration or lack of contact with the child as a factor in parental termination proceedings. Despite the range in approaches, a majority of states at least weigh conditions related to incarceration as factors that may be considered in determining whether to terminate parental rights.¹¹⁵ More than half of the states have statutory provisions that include pa-

110. *Id.* at 202; BERNSTEIN, *supra* note 1, at 71.

111. Erika London Bocknek & Jessica Sanderson, *Ambiguous Loss and Posttraumatic Stress in School-Age Children of Prisoners*, 18 J. CHILD FAM. STUDS. 323, 330 (2009).

112. *Id.*

113. BERNSTEIN, *supra* note 1, at 71.

114. See Dalley, *supra* note 67, at 40. Dalley states that unlike in “the area of divorce cases, the state, the courts, and the guardians do not have a standard definition of the child’s best interest” and that the current approach is too subjective. *Id.*

115. Thirty-four states have statutes that include parental incarceration as a factor in terminating parental rights. BERNSTEIN, *supra* note 1, at 150.

rental incarceration as one of the criteria upon which a state may base a parental termination.¹¹⁶ This section outlines the various approaches that states have taken to using incarceration status in termination of parental rights.

1. “Clearly Bad Parent” Approach

Approximately twenty states have adopted a “clearly bad parent” approach to parental termination. These states permit the termination of parental rights when parents are incarcerated as a result of particular “bad acts” that directly affect the ability to parent safely and effectively.¹¹⁷ These statutes link termination

116. Dalley, *supra* note 67, at 17. The following states allow courts to consider incarceration or conviction as a factor to be considered in parental termination proceedings: ALA. CODE §12-15-319(4) (2010); ALASKA STAT. ANN. §§ 47.10.011(2), 47.10.088 (West 2010); ARIZ. REV. STAT. ANN. § 8-533(4) (2010); ARK. CODE ANN. § 9-27-341(viii) (2010); CAL. FAM. CODE § 7825 (West 2010); COLO. REV. STAT. § 19-3-604(1)(b)(iii) (2010); DEL. CODE ANN. tit. 13, § 1103(5)(a)(3) (2010); D.C. CODE §§ 16-2353, 16-2354(b)(3)(C) (2010); FLA. STAT. ANN. § 39.806(2)(d) (West 2010); GA. CODE ANN. § 15-11-94(B)(iii) (2010); IDAHO CODE ANN. § 16-2005(1)(e) (2010); 705 ILL. COMP. STAT. § 405/1-2 (2010); 750 ILL. COMP. STAT. ANN. 50/1(i), (r) (2010); IND. CODE § 31-34-21-5.6(b)(3) (2010); KAN. STAT. ANN. §§ 38-2269(b)(5), 38-2271 (2010); KY. REV. STAT. ANN. § 600.020(2)(b) (West 2010); LA. CHILD. CODE ANN. arts. 1015(6) (2010); ME. REV. STAT. ANN. tit. 22, § 4055(2010); MD. CODE ANN., FAM. LAW § 5-525.1(b)(1)(3) (2010); MASS. GEN. LAWS ch. 119, § 26(c)(xiii); MASS. GEN. LAWS ch. 210, § 3(b), (c)(xiii) (2010); MICH. COMP. LAWS § 712A.19b(3)(h) (2010); MISS. CODE ANN. § 93-15-103(3)(g) (2010) (as interpreted in *Vance v. Lincoln County Dept. of Pub. Welfare*, 582 So. 2d 414, 418 (Miss. 1991) (“Imprisonment, and the resulting conditions, can be rightfully considered as a significant factor when determining whether rights may be terminated.”)); MO. ANN. STAT. § 211.447(7)(6) (2010); MONT. CODE ANN. §§ 41-3-423, 41-3-609(4)(c) (2010); NEB. REV. STAT. § 43-292(10), (11) (2010); NEV. REV. STAT. §§ 128.105, 128.106(6), 432B.393 (2010); N.J. STAT. ANN. §§ 30:4C-11.2(a)(2), 30:4C-15 (West 2010); N.C. GEN. STAT. § 7B-1111(a)(8) (2010); N.D. CENT. CODE §§ 27-20-02(3)(f), 27-20-44 (2010); OHIO REV. CODE ANN. § 2151.414(E)(13) (2010); OKLA. STAT. tit. 10A, §§ 1-4-904(12) (2010); OR. REV. STAT. §§ 419B.504(6) (2010); 23 PA. CONS. STAT. § 2511(a)(9) (2010); P.R. LAWS ANN. tit. 31, §§ 634a(8), 634b (2010); R.I. GEN. LAWS § 15-7-7(a)(2)(i) (2010); S.C. CODE ANN. § 20-7-1572(9), (10) (2009); S.D. Codified Laws §§ 26-8A-26.1(4), 26-8A-27 (2010); TENN. CODE ANN. § 36-1-113(1)(A) (2010); TEX. FAM. CODE ANN. §§ 161.001(Q), 161.002(b), 161.007 (West 2010); UTAH CODE ANN. §§ 78A-6-507, 78A-6-508(2)(e) (2010); VT. STAT. ANN. tit. 15A, §3-504(a)(3) (2010); VA. CODE ANN. §16.1-283(E) (2010); WA. REV. CODE §§ 13.34.132(4), 13.34.180 (2010); W. VA. CODE § 49-6-5(a)(7)(B) (2010); WYO. STAT. ANN. § 14-2-309(a)(4) (2010).

117. In assessing the relevance of a parent’s incarceration or conviction of a crime in termination proceedings, a number of states focus on the nature of the acts committed and the extent to which those acts clearly demonstrate actual or potential harm to the child or the child’s parent and parental unfitness. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-533 (2010) (stating a parent must be convicted of a felony that is “of such a nature as to prove the parent’s unfitness”); CAL. WELF. & INST. § 361.5 (West 2010) (stating a parent must be “convicted of a felony indicating parental unfitness”); CAL. WELF. & INST. § 366.26 (West 2010) (same); D.C. CODE §§ 16-2353, 16-2354 (2010); GA. CODE ANN. § 15-11-94 (2010) (stating that incarceration has a “demonstrable negative effect on the quality of the parent-child relationship”); IND. CODE §§ 31-34-21-5.6, 31-35-24.5 (2010); IOWA CODE §§ 232.102, 232.111, 232.116 (2010); ME. REV. STAT. tit. 22, § 4055; MD. CODE ANN., FAM. LAW § 5-525.1 (2010); MISS. CODE ANN. §§ 43-21-603, 93-15-103; MO. REV. STAT. § 211.447 (2010); NEB. REV. STAT. § 43-292 (2010); NEV. REV. STAT. §§ 128.105, 128.106, 432B.393 (2000); N.H. REV. STAT. ANN. §§ 169-C:24-a, 170-C:5 (2010) (incarceration and abuse or neglect of a child); N.J.

directly to the parent's conduct with regard to the child and the nature of the crime. Parents who commit "bad acts" such as abuse of a child or co-parent, or other violent crimes that endanger their children are at risk of losing their parental rights. Under this view, the conviction for the commission of particular crimes against the child, such as abuse or domestic violence,¹¹⁸ provides a basis for parental termination. The "clearly bad parent" approach assumes that parents, having already engaged in culpable behaviors that adversely affect their children, have forfeited their right to parent.¹¹⁹ Moreover, in many such situations, the state is obligated to step in and protect the child under its police powers and the doctrine of *parens patriae*.¹²⁰

This approach, which requires a connection between conduct directly affecting the child and the risk of termination, is tied less to incarceration as a contributing factor toward termination and more to parental bad acts. These states correctly focus on the direct harm and the risk of danger to the child. In these states, incarceration or conviction is evidence of a child, their sibling, or parent having been harmed or placed in danger.

2. "Impliedly Bad Parent" Approach

Most states, however, require less of a connection between the parent's behavior and parental termination and weigh the fact of incarceration alone more

STAT. ANN. §§ 30:4C-11.2, 30:4C-15 (West 2010); N.C. GEN. STAT. § 7B-1111 (2010); 23 PA. CONS. STAT. § 2511 (2010); S.C. CODE ANN. § 20-7-1572 (2009); VT. STAT. ANN. tit. 15A, § 3-504 (2010); VA. CODE ANN. § 16.1-283 (2010); WASH. REV. CODE §§ 13.34.132, 13.34.180 (2010); W. VA. CODE § 49-6-5 (2010); WIS. STAT. § 48.415 (2010); *see also* Michelle Oberman, *Judging Vanessa: Norm Setting and Deviance in the Law of Motherhood*, 15 WM. & MARY J. WOMEN & L. 337 (2008) (exploring the way the law distinguishes "good" mothers from "bad" mothers).

118. *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-533(b)(3) (2010) ("[A]buse includes serious physical or emotional injury or situations in which the parent knew or reasonably should have known that a person was abusing or neglecting a child."); IND. CODE § 31-35-2-4 (b)(2)(B)(ii) (2010) ("[T]he petition must allege . . . [that] [t]here is a reasonable probability that the continuation of the parent-child relationship poses a threat to the well-being of the child"); NEV. REV. STAT. § 128.105(2) (2010) (listing abandonment, neglect, and "risk of serious physical, mental or emotional injury to the child" as grounds for termination); S.C. CODE ANN. § 20-7-1572(9) (2009) (listing "physical abuse of a child" and "criminal domestic violence" as grounds for termination).
119. *See, e.g.*, *In re William K.*, 73 Cal. Rptr. 3d 737 (Ct. App. 2008) (upholding termination on appeal in matter involving father who was as a registered sex offender); *Adoption of Allison C.*, 79 Cal. Rptr. 3d 743 (Ct. App. 2008) (upholding termination on appeal in case in which father was incarcerated for domestic violence).
120. *Parens patriae* is a common law doctrine that recognizes that the state has an interest in "preserving and promoting the welfare of the child" and if a parent or other individual responsible for the care of the child fails to do so, it is the duty of the state to step in and protect the child. *Schall v. Martin*, 467 U.S. 253, 265 (1984) (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)); *see also* Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 264 (2003) (explaining *parens patriae* and the state's role in removing children from their parents' custody).

heavily. More than twenty states permit parental rights to be terminated absent proof of parental wrongdoing that places the child in danger. These states have adopted an “impliedly bad parent” approach,¹²¹ which regards parents as unfit as a result of factors primarily related to their imprisonment as opposed to behavior or conduct directly related to parenting.¹²² Courts assess parental fitness based on factors such as incarceration itself, length of imprisonment,¹²³ the age of the child, and how much of the child’s minority the parent will spend behind bars.¹²⁴ This demonstrates legislatures’ skepticism of incarcerated parents’ ability to adequately care for their children from prison and allows judges to weigh incarceration as a factor in determining a parents’ right to their children.

This approach may reflect concerns about a parent’s ability to care for his or her child effectively while imprisoned; however, there is little agreement among researchers about whether and how children are affected or about what period of imprisonment should constitute neglect or abandonment.¹²⁵ The amount of time that triggers state intervention varies from state to state and from case to case.¹²⁶ States allow courts to consider periods of incarceration as little as

121. Barry, *supra* note 67, at 147; see, e.g., *In re K.A.S.*, 200 P.3d 567, 577-78 (Or. Ct. App. 2009); *K.D. v. People*, 139 P.3d 695, 700-02 (Colo. 2006); *In re J.H.*, 2000 MT 11, ¶¶ 32-36, 298 Mont. 41, 49-50, 994 P.2d 37, 42-43.

122. A number of states allow courts to consider incarceration or the length of incarceration as a factor without necessarily requiring proof or risk of harm to the child. See, e.g., ALA. CODE § 12-15-319(4) (2010) (conviction of or imprisonment for a felony); ALASKA STAT. §§ 47.10.011, 47.10.080, 47.10.086, 47.10.088 (2010) (parental termination if in child’s best interest and “parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile’s life”); ARK. CODE ANN. § 9-27-341 (2010); COLO. REV. STAT. § 19-3-604(1)(b)(3) (2010) (long term confinement of the parent is a basis for finding a parent unfit); DEL. CODE ANN. tit. 1103, § 1103(5)(a)(3) (2010) (parent failed to plan for child’s needs and respondent incapable of discharging parental responsibility due to extended or repeated incarceration); FLA. STAT. § 39.806 (2010); IDAHO CODE ANN. § 16-2005 (2010); 705 ILL. COMP. STAT. ANN. 405/1-2 (2010); 750 ILL. COMP. STAT. ANN. 50/1 (2010) (parent may be unfit if depraved and rebuttable presumption of depravity if parent convicted of at least 3 felonies and one of these convictions was within the last 5 years); KAN. STAT. ANN. §§ 38-2269, 38-2271 (2010); KY. REV. STAT. ANN. §§ 600.020, 610.127, 656.090 (West 2010); LA. CHILD. CODE ANN. art. 672.1, 1015 (2010); MASS. GEN. LAWS ch. 119, §§ 26, 29C, ch. 210, § 3 (2010); MICH. COMP. LAWS § 712A.19b (2010); MONT. CODE ANN. §§ 41-3-423, 41-3-609 (2010); N.H. REV. STAT. ANN. § 169-C:24-a, 170-C:5 (2010); N.D. CENT. CODE §§ 27-20-02, 27-20-44 (2010); OHIO REV. CODE ANN. § 2151.414 (West 2010); OKLA. STAT. tit. 10, § 7006-1.1 (2010); OR. REV. STAT. §§ 419B.502 (2010); P.R. LAWS ANN. tit. 31, §§ 634a, 634b (2010); R.I. GEN. LAWS § 15-7-7 (2010); S.D. CODIFIED LAWS §§ 226-8A-26.1, 26-8A-27 (2010); TENN. CODE ANN. § 36-1-113 (2010); TEX. FAM. CODE ANN. §§ 161.001, 161.002(b), 161.007 (West 2010); UTAH CODE ANN. § 78-6-508 (West 2010); WYO. STAT. ANN. § 14-2-309 (2010).

123. See sources cited *infra* note 126.

124. Dalley, *supra* note 67, at 19-23.

125. For a discussion of this research, see *supra* Part I.

126. See, e.g., COLO. REV. STAT. § 19-3-604(1)(3) (“Long-term confinement of the parent of such duration that the parent is not eligible for parole for at least six years . . . or . . . if the child is under six years of age . . . , the long-term confinement of the parent of such duration that the parent is not eligible for parole for at least thirty-six months”); KY. REV. STAT. ANN. § 600.020(2)(b) (“The parent is incarcerated and will be unavailable to care for the child for a period of at least one (1) year from the date of the child’s entry into foster care and there is

two years,¹²⁷ and many leave the term undefined and allow courts to consider incarceration of a “substantial” or “extended” period of time.¹²⁸ These standards leave a great degree of unfettered discretion in judicial assessments in determining what length of imprisonment impairs effective parenting. For example, in upholding the termination of parental rights of an inmate, a Kansas appellate court, with little explanation, stated that “[i]n these cases, we look at what we call ‘child time’ and not ‘adult time’; and another year, year and a half is an awful long time in the life of a two year old child.”¹²⁹ While addressing termination issues from the standpoint of how a child might perceive the separation is laudable, it is problematic to do so without clear and consistent standards, sufficient regard to the enduring parental connections that developed prior to incarceration,

no appropriate relative placement available during this period of time.”); MASS. GEN. LAWS ch. 119, §§ 26, 29C, ch. 210, §3 (a period of years); OHIO REV. CODE ANN. § 2151.414(E)(12)-(13) (“The parent is incarcerated . . . and will not be available to care for the child for at least eighteen months . . . [or] [t]he parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.”); OKLA. STAT. tit. 10A, § 1-4-904(12) (stating that one consideration is “the duration of incarceration and its detrimental effect on the parent/child relationship”); TEX. FAM. CODE ANN. § 161.001(1)(Q)(i) (“The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has knowingly engaged in criminal conduct that has resulted in the parent’s confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition.”); UTAH CODE ANN. § 78-6-508 (incarcerated for such a time that the child will be deprived of a normal home for more than 1 year).

127. See, e.g., KY. REV. STAT. ANN. § 600.020(2)(b) (“The parent is incarcerated and will be unavailable to care for the child for a period of at least one (1) year from the date of the child’s entry into foster care and there is no appropriate relative placement available during this period of time.”); LA. CHILD. CODE ANN. art. 672.1, 1015 (parent incarcerated for an extended period of time); OHIO REV. CODE ANN. § 2151.414(E)(12)-(13) (“The parent is incarcerated . . . and will not be available to care for the child for at least eighteen months . . . [or] [t]he parent is repeatedly incarcerated, and the repeated incarceration prevents the parent from providing care for the child.”); TEX. FAM. CODE ANN. § 161.001(1)(Q)(i) (“The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence that the parent has knowingly engaged in criminal conduct that has resulted in the parent’s confinement or imprisonment and inability to care for the child for not less than two years from the date of filing the petition.”); UTAH CODE ANN. § 78-6-508 (incarcerated for such a time that the child will be deprived of a normal home for more than 1 year).
128. See, e.g., ARK. CODE ANN. § 9-27-341(b)(3)(B)(viii) (2010) (“The parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile’s life.”); DEL. CODE ANN. tit. 13, § 1103(a)(5)(a)(3) (2010) (“The [parent] is incapable of discharging parental responsibilities due to extended or repeated incarceration.”); FLA. STAT. § 39.806(1)(d)(1) (2010) (“The period of time for which the parent is expected to be incarcerated will constitute a substantial portion of the period of time before the child will attain the age of 18 years.”); LA. CHILD. CODE ANN. art. 1015(6) (2010) (“[T]he parent has been convicted and sentenced to a period of incarceration of such duration that the parent will not be able to care for the child for an extended period of time”); R.I. GEN. LAWS § 15-7-7(a)(2)(i) (2010) (stating that “imprisonment, for a duration as to render it improbable for the parent to care for the child for an extended period of time” is one consideration); S.D. CODIFIED LAWS § 26-8A-26.1(4) (2010) (“[T]he court may find that good cause exists for termination of parental rights of a parent who . . . [i]s incarcerated and is unavailable to care for the child during a significant period of the child’s minority, considering the child’s age and the child’s need for care by an adult.”).
129. *In re D.T.*, 56 P.3d 840, 842 (Kan. Ct. App. 2002).

and sufficient study of the effect of parental imprisonment on children.

In these states, resting parental terminations primarily upon parental imprisonment is more problematic than the “clearly bad parent” approach largely because the relationship between imprisonment and parental fitness is more tenuous. Moreover, the connection between serving a child’s best interest and severing the parental rights of an incarcerated parent without establishing a nexus between parental imprisonment and specific proof of harm to the child raises concerns about whether parental rights are sufficiently protected. In addition, it ignores the extent to which terminating rights injures children and their families and disproportionately targets poor communities and communities of color.

Of these states, some permit tying terminations more specifically to the length of a parent’s prison sentence. For example, Florida law “provides for termination of parental rights when the parent is incarcerated . . . and . . . the period of expected incarceration constitutes a substantial portion of time before the child will attain the age of 18 years.”¹³⁰ The Code of Oregon likewise provides that

if a parent is imprisoned in a state or federal prison under a sentence for a term of not less than three years and has actually served three years, the petitioner . . . shall serve on the parent, if the parent has not consented in writing to the adoption, a summons and a motion and order to show cause why the adoption of the child should not be ordered without the parent’s consent.¹³¹

Under the Texas Code, terminations may occur when either parent is incarcerated for more than two years.¹³² The court may order termination if it finds, by clear and convincing evidence, that the parent has “knowingly engaged in criminal conduct that has resulted in the parent’s conviction of an offense and confinement or imprisonment and inability to care for the child for not less than two years.”¹³³ Texas courts may also consider imprisonment as conduct that endangers the well-being of a child.¹³⁴

130. FLA. STAT. § 39.806(1)(a)(2)(d) (2010).

131. OR. REV. STAT. §§ 109.330, 109.3222 (2010); see *In re K.A.S.*, 200 P.3d 567, 575-76 (Or. Ct. App. 2009) (applying a two-prong approach finding first “‘that the parent has engaged in some conduct or is characterized by some condition’ that is ‘seriously detrimental’ to the child. . . . Second, the court must find that ‘integration of the child or ward into the home of the parent or parents is improbable within a reasonable time due to conduct or conditions not likely to change.’”) (quoting *State ex rel. SOSCF v. Stillman*, 36 P.3d 490 (Or. 2001); *State ex rel. Dept. of Human Services v. J.A.C.*, 172 P.3d 295 (Or. 2007)).

132. TEX. FAM. CODE ANN. § 161.001(1)(Q)(ii); Benites, *supra* note 31, at 206 (“[T]he Texas Family Code provides for termination of parental rights in situations where a parent, either a mother or a father, is sentenced to prison for two or more years.”).

133. *Thompson v. Tex. Dep’t of Family and Protective Servs.*, 176 S.W.3d 121, 126 (Tex. Ct. App. 2004) (citing TEX. FAM. CODE ANN. § 161.001 (Vernon 2002)).

134. *In re S.T.*, 263 S.W.3d 394, 401 (Tex. Ct. App. 2008) (“[E]vidence of imprisonment may be considered with other evidence tending to establish that the parent has engaged in a course of

Similarly, under a Colorado statute, although incarceration alone is not enough to terminate parental rights, such rights may be terminated on the grounds of being dependent or neglected as a result of abandonment through:

[l]ong-term confinement of the parent of such duration that the parent is not eligible for parole for at least six years after the date the child was adjudicated dependent or neglected or . . . if the child is under six years of age at the time a petition is filed . . . the long-term confinement of the parent of such duration that the parent is not eligible for parole for at least thirty-six months after the date the child was adjudicated dependent or neglected and the court has found by clear and convincing evidence that no appropriate treatment plan can be devised to address the unfitness of the parent or parents.¹³⁵

Reflecting the judicial discretion inherent in these provisions, Colorado courts can also take into consideration incarceration for lesser periods of time if relevant.¹³⁶

Under this approach, it is not the specific crime that becomes a sign of unfitness. Rather, the term of incarceration itself is proof of abandonment or neglect and, as such, the basis of parental termination.¹³⁷ These statutes permit courts to conclude that incarceration renders a parent unfit and, without specific proof of harm, that “continuing the parental relationship would be harmful to the child.”¹³⁸

It is difficult to assess the impact of incarceration on parental termination proceedings in part, because even in states that do not list incarceration as a factor in termination proceedings, courts may be permitted to consider the length of imprisonment and the ability of the parent to maintain contact with the child in determining fitness. Many of these states may find a parent has effectively “abandoned” his or her child during the period of incarceration.¹³⁹ Although imprisonment alone is insufficient to terminate parental rights in these states, ter-

conduct which has the effect of endangering the child.”); *see also In re M.R.*, 243 S.W.3d 807, 819 (Tex. Ct. App. 2007) (“Imprisonment alone does not constitute endangering conduct; however, it is a fact to consider on the issue of endangerment. The State must show that the incarceration is part of a course of conduct endangering the child.”) (citation omitted).

135. COLO. REV. STAT. ANN. § 19-3-604 (1)(a)(III) (2010).

136. *See, e.g., In re K.D.*, 139 P.3d 695, 701 (Colo. 2006); *In re M.H.*, 10 P.3d 713, 714 (Colo. App. 2000).

137. *See Allred v. Harris Cnty. Child Welfare Unit*, 615 S.W.2d 803 (Tex. Civ. App. 1980) (finding that father who engaged in criminal activity knowing his wife was pregnant engaged in voluntary abandonment); *In re Pawling*, 679 P.2d 916 (Wash. 1984) (finding that incarcerated father “abandoned” his child).

138. *R.M. v. Dep’t of Children and Families*, 847 So. 2d 1103, 1104 (Fla. Dist. Ct. App. 2003).

139. BERNSTEIN, *supra* note 1, at 150-51. Bernstein notes difficulties for incarcerated parents in maintaining ties with their children, particularly when those children have been placed in foster care. *Id.* She notes that geographic distance of prisons, the unwillingness or inability of caretakers to facilitate visits, the prohibition on prisoners placing telephone calls, and the transfer of prisoners among facilities. *Id.* at 151.

mination can be based on other factors that demonstrate the failure to maintain contact with the child.¹⁴⁰

In assessing the level of communication between parent and child in many of these cases, courts often make no allowances for the difficulties imprisoned parents face in maintaining contact with their children.¹⁴¹ Courts are often critical of incarcerated parents' efforts to maintain relationships with their children and have been willing to find abandonment despite parental efforts to maintain ties.¹⁴² In reviewing termination decisions, these courts have found that incarceration does not discharge parents' statutory obligation to provide their children with a continuing relationship through communication and visitation.¹⁴³ Thus, courts have upheld the termination of parental rights and found that "imprisonment may not be used as an excuse to escape parental obligations"¹⁴⁴ or to fail to communicate and keep in contact with a child.¹⁴⁵ For example, in one Georgia case, the court found that a parent who is prevented from maintaining meaningful contact with a child due to incarceration "cannot object to the natural consequences brought about by his own voluntary commission of criminal acts."¹⁴⁶ This willingness to dismiss the circumstances that incarcerated parents face reflects a lack of empathy for parents who struggle to maintain contact with their children during the term of their incarceration.¹⁴⁷

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140. See *In re L.V.*, 482 N.W.2d 250, 260-61 (Neb. 1992) (finding that incarceration alone is not enough but a factor for the court to consider in termination proceedings and can constitute abandonment); *New Jersey Div. of Youth & Family Services v. R.C.*, 2010 WL 1526365 (N.J. Super. Ct. App. Div. 2010) (holding multiple incarcerations can constitute abandonment); *In re Z.P.*, 994 A.2d 1108, 1117, 1120 (Pa. Super. Ct. 2009) (holding that a parent who fails to fulfill his or her parental duty for six months may face parental termination and that parental responsibilities not tolled during incarceration); *In re Adoption of Allison C.*, 164 Cal. App. 4th 1004, 1011-1012 (Ct. App. 2008) (holding that incarceration does not render abandonment involuntary nor does it provide a legal defense to abandonment).
 141. See, e.g., *Adoption of Allison C.*, 164 Cal. App. 4th at 1012-13 (finding failure of the father to support or communicate with child).
 142. See, e.g., *Thompson v. Tex. Dep't of Family and Protective Servs.*, 176 S.W.3d 121 (Tex. Ct. App. 2004); *K.A.P. v. D.P.*, 11 So. 3d 812 (Ala. Civ. App. 2008); *B.L.L. v. W.D.C.*, 750 N.W.2d 466 (N.D. 2008); *State Dep't. of Children's Servs. v. V.N.*, 279 S.W.3d 306 (Tenn. Ct. App. 2008); *State Dep't of Children's Servs. v. J.S.*, 2001 WL 1285894 (Tenn. Ct. App. Oct. 25, 2001).
 143. *Linker-Flores v. Dep't of Human Servs.*, 217 S.W.3d 107, 114 (Ark. 2005).
 144. *State ex rel. C.M.O.*, 901 So. 2d 1168, 1171 (La. Ct. App. Cir. 2005).
 145. See *In re Terrance C.*, 755 A.2d 232, 236 (Conn. App. Ct. 2000).
 146. *In re T.G.Y.*, 631 S.E.2d 467 (Ga. Ct. App. 2006) (quoting *Turner v. Wright*, 457 S.E.2d 575 (Ga. Ct. App. 1995)). Georgia applies a two-prong test that looks to parental misconduct and whether termination is in the child's best interests. *In re K.B.E.*, 661 S.E.2d 217, 220 (Ga. Ct. App. 2008) (applying GA. CODE ANN. § 15-11-94(b)(4)(A)(i)-(iv) (2010)).
 147. See, e.g., *C.M.O.*, 901 So. 2d at 1171 ("[I]mprisonment may not be used as an excuse to escape parental obligations."); *In re Isabella C.*, 852 A.2d 550, 558 (R.I. 2004) ("[T]he trial justice is not required to consider parole eligibility, he or she is only required to consider the probable duration of imprisonment at the time of termination.") (quoting *In re Mercedes V.*, 788 A.2d 1152, 1153 (R.I. 2001)); *Adoption of Serge*, 750 N.E.2d 498, 504 (Mass. App. Ct. 2001) ("[P]hysical unavailability of the parent to provide day to day care for the child, including for reasons of incarceration, was relevant evidence of unfitness.").

Many of these legal approaches to termination of parental rights involve a level of judgment about the adequacy of the long-distance parenting that is often necessary as a result of parental imprisonment. Inherent in a number of the decisions is the sense that when measuring and weighing parental fitness in these termination hearings, the state, child welfare agencies, and the courts doubt the normalcy of a child's upbringing under the circumstances. However, statistics show that for many communities across the country, not only are single-parent families commonplace, but incarceration is a fact with which many families must live.¹⁴⁸ Incarceration of parents has become sufficiently common that judges' assessment about parenting from prison as outside the norm may reflect a class and race bias that adversely and disproportionately affects minority communities.

Indeed, relying on incarceration as a basis for terminating parent rights is problematic in a number of respects: it assumes that a criminal conviction is a rational substitute for assessing parental fitness, reflects a bias against those convicted of a crime by assuming that their criminal guilt affects the ability to adequately care for their child, and suggests a higher standard of parenting than may be realistic given the significant barriers to parenting from prison. This approach falls most heavily on those parents with few family resources.¹⁴⁹ Families disproportionately impacted by anti-drug laws, mandatory sentencing, poverty, and inadequate community resources are those that are most likely to be adversely impacted by parental termination statutes that allow courts to weigh incarceration as a factor in determining parental fitness.¹⁵⁰ Moreover, those who must rely on the state for assistance to care for their children while a parent is in prison are most likely to face the possibility of a parental termination.¹⁵¹ Parents with financial resources and the support of extended family do not have to rely on the state for child care assistance during the period of incarceration and are far less likely to have their parental rights challenged.¹⁵² The result is that the current approach to parental terminations privileges those families that more closely resemble societal norms of the ideal family.

148. BRAMAN, *supra* note 9, at 3; Murray & Farrington, *supra* note 9, at 185 (analyzing the hypothesis that the more common incarceration in communities, the less social stigma is felt by children of incarcerated parents); Travis, *supra* note 10, at 31.

149. *See supra* note 46.

150. *See supra* text accompanying notes 46-53.

151. *See id.*; *infra* text accompanying note 157.

152. *See supra* notes 46-53, *infra* notes 154-158; Virginia Sawyer Radding, *Intention v. Implementation: Are Many Children, Removed from Their Biological Families, Being Protected or Deprived?*, 6 U.C. DAVIS J. JUV. L. & POL'Y 29, 42 (2001) ("[A] large percentage of families involved in the Child Protection System are living in poverty.").

B. An Ostensible Move to Permanency and the Federal Adoption & Safe Families Act

Although state legislation plays a substantial role in terminations due to incarceration, federal provisions also impact families by pressuring states to move children out of foster care and into permanent homes. For example, in an effort to reduce the number of children in state and foster care and to encourage adoption and the stability of a permanent home, Congress passed the Adoption and Safe Families Act of 1997 ("ASFA").¹⁵³ The Act makes permanency "in a safe and stable home . . . the goal for all children who enter foster care."¹⁵⁴ The ASFA creates a timetable and incentives for moving children out of state care and making them available for adoption.¹⁵⁵ Under the Act, permanency hearings must be held within twelve months of the initial removal of the child from the home and into foster care.¹⁵⁶ Children who are out of the home and in foster care fifteen of the preceding twenty-two months must be moved toward permanency, and the Act requires that states, with some exceptions, file petitions to terminate parental rights under these circumstances.¹⁵⁷

Although the ASFA directs state agencies to make "reasonable efforts" to reunite families and to maintain family ties,¹⁵⁸ it allows the states and their agencies to define "reasonable efforts."¹⁵⁹ A number of researchers have been critical of the nature and kind of "reunification" efforts of state social welfare agencies by pointing out that overworked and understaffed child protective agencies often

153. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of Title 42 of the United States Code); see also Crossley, *supra* note 120, at 278 ("ASFA represented the first major change in federal requirements for child protection services since 1980."). For a discussion of the history and purpose of the ASFA, see Stephanie Sherry, *When Jail Fails: Amending the ASFA to Reduce its Negative Impact on Children of Incarcerated Parents*, 48 FAM. CT. REV. 380, 382-83 (2010).

154. Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 178 (2004).

155. In fact, the Act has been described as privileging safety of the child over reunification. See Mariely Downey, *Losing More than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN'S L. J. 41, 44 (2000-2001).

156. ASFA § 302. The Act also "awarded states \$4000 per adoption in excess of the state's average number of adoptions prior to 1997." Crossley, *supra* note 120, at 278.

157. ASFA § 103; Crossley, *supra* note 120 at 278-79 ("A state can be excused from this obligation if (1) the state has placed the child in the care of a relative; (2) the state can provide a compelling reason for maintaining the parental relationship; or (3) the state has failed to provide reasonable efforts to reunite the family."). Crossley critiques the "reasonable efforts" exception of the ASFA as "a hollow requirement" since it "stresses terminating parental rights over providing services," "only applies to the failure to provide those services the state deems necessary," and provides little guidance to the states about how to fulfill the requirement. *Id.* at 292; see also Benites, *supra* note 31, at 204-205.

158. ASFA § 101; Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272 § 471 (1980); Beckerman, *supra* note 33, at 9; Benites, *supra* note 31, at 214; Sherry, *supra* note 153, at 381.

159. See Jennifer Ayres Hand, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1261-68 (1996).

make insufficient and inconsistent efforts to reunite troubled families and pit these agencies against the families and communities they are charged with helping.¹⁶⁰

These concerns are magnified for families in which the separation between parent and child results from a parent's incarceration. While the ASFA may have been motivated by good intentions for the benefit of children, the practical result has been the termination of parental rights in families already experiencing the trauma of separation due to the imprisonment of a parent.¹⁶¹ The operation of the ASFA provisions coupled with state termination statutes allows courts to terminate parental rights based primarily on parental incarceration without independent incidents of abuse or significant neglect. The primary harm in these cases is the perceived harm created by the separation that results from incarceration.¹⁶² Since average prison sentences are longer than the twenty-two-month period specified in the statute,¹⁶³ considerable numbers of incarcerated parents may face efforts to terminate their parental rights because of the length of their incarceration alone.¹⁶⁴ Since more than 40% of parents in prison are serving sentences of at least ten years,¹⁶⁵ it is not surprising that there has been a 250% increase in cases terminating parental rights due to parental incarceration since the enactment of the ASFA.¹⁶⁶

The ASFA does provide some protections to incarcerated parents. Under the Act, terminations may not occur if the state is able to place the child with a relative instead of in state care, if the state can provide a compelling reason for maintaining the parental relationship, or if the state fails to provide "reasonable efforts" to reunite the family.¹⁶⁷ However, the statute provides financial incen-

160. BERNSTEIN, *supra* note 1, at 154-55; Hand, *supra* note 159, at 1261-68; Dorothy Roberts, *The Dialectic of Privacy and Punishment in the Gendered Regulation of Parenting*, 5 STAN. J. CIV. RTS. & CIV. LIB. 191, 192-93 (2009); Shakini Ahuja et al., *Too Fast for Families: Washington's Get-Tough Adoption Law Hits Home*, CHILD WELFARE WATCH, Winter 2000, at 1, 3.

161. See Antoinette Greenaway, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African American Women*, 17 NAT'L BLACK L.J. 247, 256-57 (2002-04); Roberts, *supra* note 160, at 192-93 (addressing the increasing state intervention in the lives of poor families and the shift away from preserving families under the ASFA).

162. Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 348-51 (2005).

163. Travis, *supra* note 10, at 34.

164. BERNSTEIN, *supra* note 1, at 149. Bernstein states: "Many prisoners do stints even for minor infractions that exceed ASFA's six- and fifteen-month time limits. In New York State, more than 90 percent of women convicted of felonies, including low-level nonviolent crimes, will serve at least eighteen months—three months more than the longer of the ASFA time limits. Nationwide, the average term being served by parents in state prison is eighty months." *Id.*

165. MUMOLA, *supra* note 26, at 6-7.

166. Travis, *supra* note 10, at 34; see Genty, *Collateral Consequence*, *supra* note 8, at 1678.

167. Maryann Zavez, *Use of the Adoption & Safe Families Act at 15/22 Months for Incarcerated Parents*, 33 VT. L. REV. 187, 195-96 (2008); Benites, *supra* note 31, at 204-05; Crossley, *supra* note 120, at 278. Under the ASFA, reasonable efforts are not required if the parent subjects the child to aggravated circumstances such as abandonment. See Kathleen S. Bean, *Ag-*

tives for states to increase the number of children adopted out of foster care: \$4,000 per adoption in excess of the state's average number of adoptions before 1997.¹⁶⁸ In addition, the "reasonable efforts" requirement is neither uniformly defined nor consistently applied.¹⁶⁹ This standard does not necessarily account for the practical limitations on maintaining contact with families while the parent is in prison,¹⁷⁰ nor does it create an obligation for the state to provide the resources and means for children to visit with or maintain contact with their imprisoned parents. While the ASFA's ideal of creating permanent families for children in state care in an expeditious manner may be a positive aim, that goal is difficult to meet and may cause immeasurable harm to families with an incarcerated parent.

Furthermore, terminating parental rights does not necessarily result in new permanent families for the children of incarcerated parents. The increase in parental terminations has not led to a corresponding increase in the hoped for adoptions for these children. The children of incarcerated parents are more likely to remain in foster care until they are 18 years old and "age out" of the system than other children in state care.¹⁷¹ Moreover, the goal of placing children in new families is based, in part, on an ideology about appropriate family structure. This is particularly true when the move to permanency is created by a parental termination precipitated primarily because of the separation caused by incarceration. This standard of parental termination, which equates incarceration for an offense unrelated to the ability to parent with parental unfitness, abandonment, or neglect adopts a seemingly impossible benchmark by measuring parenting from prison against a family ideal in which a parent is physically present for his or her child. The result of this standard is to allow the termination of parental rights in many cases in which the child is left in limbo, having biological parents to whom they are no longer legally related, but without the guarantee of a permanent home. Furthermore, even for those children who are placed with an adoptive family,

gravated Circumstances, Reasonable Efforts, and ASFA, 29 B. C. THIRD WORLD L. J. 223, 225 (2009).

168. Adoption and Safe Families Act of 1997 (AFSA), Pub. L. No. 105-89, § 201, 111 Stat. 2115, 2123 (1997); Crossley, *supra* note 120, at 278.

169. According to the Supreme Court, there is no "guidance as to how 'reasonable efforts' are to be measured," and within broad limits, the state may decide how to comply with the directive. *Suter v. Artist M.*, 503 U.S. 347, 360 (1992); *see also* Benites, *supra* note 31, at 215.

170. Sherry, *supra* note 153, at 385.

171. Marilyn C. Moses, *Correlating Incarcerated Mothers, Foster Care, & Mother-Child Reunification*, 68 CORRECTIONS TODAY 98, 98 (2006) ("[P]erhaps the most notable is that children of incarcerated mothers were four times more likely to be 'still in' foster care than all other children. These children linger in foster care until they are 18 when they 'age out' of the system."); Diane H. Schetky et. al., *Parents Who Fail: A Study of 51 Cases of Termination of Parental Rights*, 18 J. AM. ACAD. CHILD PSYCH. 366, 367 (1979). ("[S]tudies have shown that once a child is placed in foster care, he or she has a 50% chance of remaining there 3 years or longer. . . . Some studies even suggest that a child who has been in foster care for longer than 18 months has a remote chance of being either adopted or returned home.").

courts are effectively choosing between adoptive parents and imprisoned biological parents whose only demonstrated "failure" as parents is a state-imposed imprisonment. This is, at best, a difficult choice for a court to make and, at worst, an unconstitutional one.

III. STATE INTERVENTION IN FAMILIES OF INCARCERATED PARENTS & CONSTITUTIONAL CONCERNS

A. Incarcerated Parents' Constitutional Interests

There is an uneasy relationship between familial privacy rights and a state's interest in preserving and promoting the welfare of the child. The interplay between federal and state laws that articulate an interest in advancing a child's best interest and parental termination statutes raise questions about the privacy and liberty interests of parents. Because constitutional doctrine places a protective barrier around the parent-child relationship, the termination of parental rights as a result of incarceration raises significant constitutional concerns.¹⁷²

A number of Supreme Court opinions have reified parents' fundamental liberty interest in the upbringing, "care, custody, and control" of their children.¹⁷³ Furthermore, in a series of cases, the Court has articulated the burden a state faces in terminating the parent-child relationship.¹⁷⁴ States may not constitutionally terminate a parent's rights without showing parental unfitness.¹⁷⁵ The Supreme Court has recognized that because termination decrees "wor[k] a unique kind of deprivation,"¹⁷⁶ termination adjudications, "[i]n contrast to matters modifiable at the parties' will or based on changed circumstances . . . involve the awesome authority of the State 'to destroy permanently all legal recog-

172. "[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J. dissenting); *see also* *M.L.B. v. S.L.J.*, 519 U.S. 102, 117-18 (1996) ("[A] parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest") (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

173. The Supreme Court recognized that it is a parent's fundamental right to "make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)); *see, e.g., Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating that the right to raise one's children is "essential").

174. *See Troxel*, 530 U.S. 57; *Santosky*, 455 U.S. 745; *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley*, 405 U.S. 645; *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer*, 262 U.S. 390; *Benites*, *supra* note 31, at 212.

175. *See Quilloin*, 434 U.S. at 255 ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'") (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)).

176. *Lassiter*, 452 U.S. at 27.

inition of the parental relationship.”¹⁷⁷

In light of the fundamental nature of the rights at issue, the Supreme Court has held that courts must use a clear-and-convincing evidence standard to determine parental unfitness in termination proceedings.¹⁷⁸ In large part, this heightened standard applies in termination proceedings because, according to the Court in *Santosky*, the state’s interest in the unfitness stage of termination proceedings is in preserving the parent-child relationship.¹⁷⁹ In reaching its decision, the *Santosky* Court reflected on the relationship between the standard of proof and “the weight of the private and public interests affected.”¹⁸⁰ A higher standard than normally required in civil proceedings was warranted, according to the Court, since the risk of error should weigh more heavily on the state than on private litigants.¹⁸¹ In concluding that a “fair preponderance” standard is inadequate, the Court stated that, “[i]n parental rights termination proceedings, the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight.”¹⁸²

Reflecting on parental rights jurisprudence, the Court in *Santosky* noted that the liberty interest in family integrity is “far more precious than any property right.”¹⁸³ Recognizing the range of circumstances that parents in termination proceedings face, the Court went on to state:

The factfinding does not purport—and is not intended—to balance the child’s interest in a *normal* family home against the parents’ interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents. The State alleges that the natural parents are at fault. The questions disputed and decided are what the State did—“made diligent efforts,”—and what the natural parents did not do—“maintain contact with or plan for the future of the child.” The State marshals an array of public resources to prove its case and disprove the parents’ case. Victory by the State

177. *M.L.B. v. S.L.J.*, 519 U.S. 102, 127-28 (1996) (holding that a parent is entitled to a transcript on appeal of termination of parental rights even if she does not have the ability to pay) (quoting *Rivera v. Minnich*, 483 U.S. 574, 580 (1987)).

178. *Santosky*, 455 U.S. at 758 (rejecting New York’s use of a “fair preponderance of the evidence” standard in parental termination proceedings as a violation of a parent’s due process rights). The Supreme Court later distinguished paternity determinations from termination proceedings and refused to extend the higher standard of review to paternity cases. *Rivera*, 483 U.S. at 579-80.

179. *Santosky*, 455 U.S. at 749-50. The *Santosky* Court notes that the Indian Child Welfare Act of 1978 requires “evidence beyond a reasonable doubt” in termination proceedings. *Id.*; 25 U.S.C. § 1912 (2006).

180. *Santosky*, 455 U.S. at 755.

181. *Id.*

182. *Id.* at 758.

183. *Id.*

not only makes termination of parental rights possible; it entails a judicial determination that the parents are unfit to raise their own children.¹⁸⁴

Thus, it is important that “the State cannot presume that a child and his parents are adversaries” at the factfinding stage.¹⁸⁵ The *Santosky* Court recognized a potential bias against parents in termination proceedings and cautioned against an impulse to see these parents as unworthy. The Court noted that:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.¹⁸⁶

However, the *Santosky* Court required the higher standard of proof only when a court determines parental fitness.¹⁸⁷ “After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge.”¹⁸⁸ Once a parent is deemed unfit, courts may then determine whether termination is in the best interests of the child under a mere preponderance-of-the-evidence standard. While lowering the standard in the best-interests analysis may make sense when a nexus between parental behavior and harm or danger of harm to the child is established, it is more problematic when a fitness determination is based upon assumptions of harm that rest primarily upon incarceration without assessing evidence of specific harm to the child, analyzing barriers to maintaining contact with the child from prison, and requiring greater state efforts to maintain parent-child ties than are currently required under the ASFA.

The alarming phenomenon of the mass incarceration of parents of color and poor parents coupled with the rising rates of parental terminations necessarily raises questions about whether states’ termination proceedings comport with constitutional parental privacy standards and *Santosky*. The *Santosky* decision and other Supreme Court case law underscore the need to protect parental rights even when parents act in ways society may find socially unacceptable or unpal-

184. *Id.* at 759-60 (citations omitted) (emphasis added).

185. *Id.*; see also PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION & FAMILY VALUES* 140 (1997) (noting the imbalance of power between the state and parents and that “parents can easily be overwhelmed and rendered voiceless”).

186. *Santosky*, 455 U.S. at 753-54.

187. *Id.* at 760.

188. *Id.*

atable so long as their child is not in danger.¹⁸⁹ Short of a finding of unfitness or harm to the child, the right of parent to raise their child, however imperfectly, deserves respect and serious consideration. Unfortunately, family law tips in favor of the “good parent,” who is ideally married, employed, and not incarcerated. Since incarcerated parents are more likely to be struggling with poverty, addiction, and entanglement with the criminal justice system, their parental privacy rights are more uncertain.

B. Critique of State Court Analyses

An examination of the state cases reviewing parental termination proceedings for incarcerated parents reveals flaws in courts’ reasoning, and perhaps even a conflict with *Santosky*’s spirit. The *Santosky* Court’s imposition of a higher standard was partially driven by the magnitude of the interests at stake and the finality of termination proceedings,¹⁹⁰ yet state courts’ analyses in many termination cases is often conflated and compressed.¹⁹¹ Thus, even in states that do not provide for incarceration alone to be the basis of parental rights termination, cases often still appear to infuse a presumption of unfitness based on incarceration.¹⁹² The leap from parental incarceration to a finding of unfitness seems too easily crossed without a sufficient inquiry into the impact of the incarceration on the involved children and a thorough review of state efforts to facilitate a parent-child relationship.

Moreover, the determinations made in these cases are, by nature, highly subjective and may reveal judicial bias in favor of families that function “normally” and fit cultural ideals. Families that include parents convicted of a crime rarely fit cultural ideas about “normal” families.¹⁹³ Even the *Santosky* majority recognized that:

numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge . . . [T]he court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceed-

189. *Santosky*, 455 U.S. at 771; *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (striking down a statute that required students to attend public school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (striking down prohibition on foreign language education as a violation of teacher’s and parents’ fundamental rights).

190. *Id.* at 759 (“Few forms of state action are both so severe and so irreversible.”).

191. See, e.g., *In re L.V.*, 482 N.W.2d 250 (Neb. 1992); *Linker-Flores v. Ark. Dep’t. of Human Servs.*, 217 S.W.3d 107 (Ark. 2005).

192. *Linker-Flores*, 217 S.W.3d at 113-14.

193. Professor Appell notes the socioeconomic and racial differences that exist between judges, social workers, and their clients. Appell, *supra* note 3, at 585 (“Many agencies and the individuals that monitor these families see them as pathological, incompetent, and less worthy of preservation. Neither the families nor their heads—the mothers—fit dominant cultural paradigms, such as white, married, middle-class, and suburban.”) (footnote omitted).

ings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.¹⁹⁴

This effect may be at work in termination cases where the commission of a crime is viewed as a relevant factor in terminating parental rights.

Further, state courts' efforts to create a link between parental incarceration and a negative effect on parenting are weakened by the lack of social science research measuring the effects of incarceration.¹⁹⁵ Finding parents unfit because of their inability to maintain meaningful ties with their children while incarcerated seems unfair and perhaps unwise absent a systemic look at how states work to facilitate or repair these familial relationships and further research on the impact of parental incarceration on parenting.¹⁹⁶ Setting aside the question of whether states have a legal duty to facilitate the relationships between incarcerated parents and their children, there may still be a debate as to whether states have fulfilled their moral or policy-based obligations to children and families under *parens patriae*.¹⁹⁷

The ASFA may also lead state courts to be more cursory in their review of child welfare and termination cases.¹⁹⁸ One study of foster care cases in Virginia concluded that the ASFA has led courts away from examining the immediate family context and the specific risk factors of families relying on state-based care for their children.¹⁹⁹ It also found that post-ASFA cases seemed to be focused less on family context and more on whether the specific legal rules were followed when deciding to terminate parental rights.²⁰⁰

Given the magnitude of the rights at stake,²⁰¹ courts should engage in a more searching inquiry into whether the state should increase efforts to improve parent-child ties before basing termination on parental incarceration. Unfortunately, court analyses in this area are infused with a family ideology that adopts a parenting "best practices" approach. Contrary to the admonition in *Santosky* that judges must not presume that parents and children are adversaries,²⁰² trial

194. *Santosky*, 455 U.S. at 762 (citations omitted).

195. Travis, *supra* note 10, at 38 ("Very few studies have been conducted that directly examine the lives of the children of incarcerated parents.").

196. *Id.*

197. States have a common-law duty to protect children from harm under the doctrine of *parens patriae*. Jessica E. Marcus, *The Neglectful Parens Patriae: Using Child Protective Laws to Defend the Safety Net*, 30 N.Y.U. REV. L. & SOC. CHANGE 255, 260 (2006).

198. Lenore M. McWey et. al., *Parental Rights and the Foster Care System: A Glimpse of Decision Making in Virginia*, 29 J. FAM. ISS. 1031, 1047 (2008) (showing that before the ASFA, "more family-specific evidence was presented on the court on behalf of parents").

199. *Id.*

200. *Id.*

201. Steven Fleischer, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 SETON HALL L. REV. 312, 317-21 (1998) (describing the due process rights at issue in termination decisions).

202. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

courts in termination proceedings often view incarcerated parents as if their interests are necessarily in opposition to the best interests of their children and express skepticism about the capacity of parents in prison to care for and about their children.²⁰³

Moreover, the cases suggest that courts are slow to recognize the speed with which families and communities are changing. They also demonstrate that states have yet to directly deal with the dramatic increase of parents in prison and the impact of that increase on children and families.²⁰⁴ Courts continue to ignore the broad and significant ramifications for families and communities when a parent is incarcerated. Far too frequently, faced with a parental termination proceeding involving a parent in prison, judges treat the issue perfunctorily and without the serious regard precedent demands. For example, in *In re A.N.W.*, the dissent criticized the majority for terminating the parental rights of the imprisoned father.²⁰⁵ The dissent noted that the father's request to cross-examine the Court Appointed Special Advocates (CASA)²⁰⁶ volunteer and present additional witnesses on his behalf was rebuffed because the trial court was concerned that it had already spent one-and-a-half days on the matter when it had budgeted only one day and that courtroom personnel wanted to go to lunch.²⁰⁷ *In re A.N.W.* is representative of the ways in which many courts have become too casual about the importance of preserving the constitutional rights of parents to the care and custody of their children. Similarly, many court decisions terminating incarcerated individuals' parental rights are surprisingly short considering the magnitude of the rights at stake.²⁰⁸ Because courts frequently address the issues of parental fitness in a relatively cursory manner, it is difficult to ascertain on what basis a court decided to terminate parental rights. In fact, the Supreme Court took note of the brevity of a Mississippi court decision *M.L.B. v. S.L.J.* in deciding that it is unconstitutional to deny an appeal based only on the appellants' inability to afford the cost of ordering a transcript.²⁰⁹ The Court noted that:

203. See, e.g., *In re Parental Rights as to Q.L.R.*, 54 P.3d 56, 58 (Nev. 2002) (rejecting the lower court's rationale that committing a crime demonstrates an intent to abandon a child and urging an in-depth look at the parent-child relationship and whether continuing that relationship is in the best interests of the child).

204. See Travis, *supra* note 10, at 31.

205. *In re A.N.W.*, 130 P.3d 619, 633 (Mont. 2006) (Gray, C.J. dissenting in part) (finding that the failure to give the parent an "opportunity to be heard at a meaningful time and in a meaningful manner with regard to the liberty interest at stake" violated due process).

206. CASA is a nationwide volunteer program. Its purpose is "to support and promote court-appointed volunteer advocacy for abused and neglected children so that they can thrive in safe, permanent homes." *Organizational Profile*, CASA, <http://www.casaforchildren.org> (follow "About Us"; then follow "Organizational profile") (last visited Oct. 28, 2010).

207. *In re A.N.W.*, 130 P.3d. at 633 (Gray, C.J. dissenting in part).

208. See e.g., *In re K.B.E.*, 661 S.E.2d 217 (Ga. Ct. App. 2008); *M.E. v. Dep't. of Children and Family Servs.*, 959 So. 2d 1279 (Fla. 1st Dist. Ct. App. 2007); *T.B. v. Lauderdale Cnty. Dep't of Human Res.*, 920 So. 2d 565 (Ala. Civ. App. 2005); *CDB v. DJE*, 118 P.3d 439 (Wyo. 2005).

209. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996).

the Chancellor's termination order in this case simply recites statutory language; it describes no evidence, and otherwise details no reasons for finding M. L. B. "clearly and convincingly" unfit to be a parent. Only a transcript can reveal to judicial minds other than the Chancellor's the sufficiency, or insufficiency, of the evidence to support his stern judgment.²¹⁰

More detailed and reasoned opinions that lay out the grounds for termination and the evidentiary basis of a decision are crucial to ensuring fairness. The brevity of these cases reveals some of the greater institutional assumptions about the ability of an imprisoned (and flawed) parent to care for their child. The result is troubling in part because the individual cases suggest a cursory infringement of constitutional parental rights.

IV. A PROPOSAL FOR RECONSTRUCTING A FAMILY IDEOLOGY

This article posits that it may be unconstitutional to sever the parent-child relationship due to incarceration and that doing so is harmful to children and their communities. A parental termination can end the legal tie not only between a parent and child but also the ties between that child and their extended family and community.²¹¹ In order to protect the interests of both the parent and the child, this article proposes several solutions: heightening the standard for parental termination, rethinking the evidentiary standards in these proceedings, recognizing a right to counsel for indigent parents facing termination proceedings, modifying the Adoption and Safe Families Act, using non-adversarial systems of resolving situations in which parents are facing termination of their rights, and reforming prisons and other institutions to give incarcerated parents a reasonable shot at succeeding as parents.

A. Rethinking the Standard for Parental Termination

Relying on the length or fact of incarceration in termination proceedings is symptomatic of a family court structure that has lost its focus on preserving and strengthening the families most in need of assistance. Parental termination statutes are one example of the myriad ways in which family law doctrine and the institutions that enforce family law often stand in opposition to—rather than in

210. *Id.* at 121-22 (citation omitted).

211. Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 140 (1999) (engaging in an analysis of the ASFA and impact of removing children from black communities); Roberts, *supra* note 41, at 1281 ("Mass imprisonment damages social networks, distorts social norms, and destroys social citizenship."); see, e.g., Naomi R. Cahn, *Children's Interests in a Family Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L. J. 1189, 1210, 1212 (1999) (noting that in termination proceedings, "a sole focus on parent or child, or even a focus on the parent/child relationship, overlooks the child as a member of a family and a community").

support of—families, especially those who live at the margins of society.²¹² As Professor Clear has aptly noted, “[i]ncarceration policy has been a contributor to the deterioration of poor American families.”²¹³ Increased reliance on incarceration, the war on drugs, mandatory sentences, and failed drug policies have meant that poor communities and communities of color face mass incarceration of parents.²¹⁴ Yet, family law doctrine and policy have failed to evolve adequately to focus on the preservation of families, and faced with parental-termination statutes, many of these incarcerated parents have lost their parental rights.

Families in which a parent is incarcerated may challenge and strain commonly held beliefs about a functioning family and may suffer as a result of a family law ideology about how families *should* behave. Parental termination proceedings based on incarceration more clearly reveal this tension in large part because the terminations can occur without proof that the parent caused any real or direct harm to the child. In these cases, biases about families and normalcy are more easily revealed. If incarceration were no longer considered in termination proceedings, courts might acknowledge that in light of mass incarceration, family ideology must accommodate the reality of frequent separations rather than using separation as a signal of parental unfitness.²¹⁵ This seems particularly true since terminations do not necessarily result in better alternatives for many children and can result in the child remaining in foster care for the duration of their minority.²¹⁶

To avoid the negative outcomes associated with current approaches to termination of parental rights, states must reconsider the standards and assumptions courts use in termination proceedings. First, states should drop any presumption of unfitness or neglect based on parental incarceration, and courts should be prohibited from weighing incarceration as a factor in parental termination decisions,

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212. See Philip M. Genty, *Protecting the Parental Rights of Incarcerated Mothers Whose Children are in Foster Care: Proposed Changes to New York's Termination of Parental Rights Law*, 17 FORDHAM URB. L. J. 1 (1986) (criticizing the over-reliance on incarceration, the detrimental effects of the ASFA, and the impact on families and children); Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 772-73 (2001) (illustrating that indicators of poverty may be mistaken for indicators of neglect, particularly by state agents who are more likely to come into contact with people in poverty).
213. Clear, *supra* note 30, at 111; see BRAMAN, *supra* note 9, at 95 (“Many of our policies—particularly our criminal justice policies—presume a lack of interest in family life. . . . [T]hese policies not only draw from the mischaracterizations but go a far distance toward enforcing the same stereotypes that contributed to their creation.”).
214. Luke, *supra* note 31, at 931. Luke asserts that under the anti-drug laws and mandatory sentencing minimums women serve lengthy sentences. *Id.* She further states that “women are not likely to receive reduced sentences for these low level offenses, as they rarely inform on their associates in exchange for sentence reductions, either out of loyalty to their husbands, boyfriends, and other friends, or because they do not have access to such information.” *Id.*
215. See BRAMAN, *supra* note 9, at 8 (discussing incarceration’s impact on social and familial life).
216. See Fleischer, *supra* note 201, at 322-27; Appell, *supra* note 212, at 777-78; EVAN B. DONALDSON ADOPTION INSTITUTE, *Foster Care Facts* [hereinafter *Foster Care Facts*], <http://www.adoptioninstitute.org/FactOverview/foster.html> (last visited Nov. 22, 2010).

regardless of the length of incarceration. States should also not be permitted to conclude that the length of incarceration is abandonment or sufficient reason for terminating parental rights.²¹⁷ Instead, the state should be required to show proof of substantial risk of attempted or direct harm or serious neglect to the child, sibling, other parent, or caretaker in order to establish that a parent is unfit.²¹⁸ Neither incarceration nor sentence length should be evidence of substantial harm, and the state should be required to show evidence that the parent's conduct placed the child in danger.²¹⁹ This approach would raise the bar for parental termination and set the presumption in favor of preserving parent-child ties.

In addition, it should be enough that a parent is suitable and has provided adequate care or demonstrates concern for the child given the limitations of parenting from prison. Like the "least detrimental" standard,²²⁰ under a suitable parent standard, "the court recognizes its limited ability to predict the child's future relationship with an adult who is not the child's biological parent."²²¹ Imprisoned parents should not be held to a standard that requires best parenting practices. Instead, child protective services and judges should be required to be realistic about the stresses and barriers facing incarcerated families.²²² Included in any processes leading up to a possible parental termination, there should be an expectation that the parent be interviewed about the nature of the relationship both before and after incarceration, a guardian ad litem appointed to represent the child's interest, an examination of the availability of programs to assist the parent-child relationship, and a review of the barriers the parent faces in maintaining contact.²²³ A parental fitness standard that fails to address the practical difficulties of parenting from prison and considers a criminal conviction as evidence of unfitness has, in essence, transformed the test into a "best practices" standard that has become nearly impossible for many incarcerated parents to meet.

217. Palmer, *supra* note 12, at 136.

218. Radding, *supra* note 152, at 50 (suggesting a standard that would assess the parent's wishes, the child's wishes, the child's relationship with others, and the child's relationship to the community prior to state intervention in determining whether to remove an abused or neglected child from his or her family).

219. Garrison, *supra* note 12, at 474 (arguing against terminating parental rights unless a court "finds that the child would suffer specific, significant harm that cannot be averted by any less drastic alternative").

220. Sharon J. Fleming, *Custody Standards in New Mexico: Between Third Parties and Biological Parents, What is the Trend?*, 27 N.M. L. REV. 547, 566 (1997) (describing the least detrimental alternative which "focuses on identifying who has become the child's 'psychological parent'" and values the rights of children over the rights of adults).

221. Sametz, *supra* note 22, at 300.

222. See McWey et al., *supra* note 198, at 1047 (criticizing the shift from family-specific evidence to emphasis on procedural compliance with the law).

223. A guardian ad litem is appointed by a court to protect the interests of a minor or incompetent in a particular matter. Nancy J. Moore, *Conflicts of Interests in the Representation of Children*, 64 FORDHAM L. REV. 1819, 1842 (1996).

B. Heightening the Evidentiary Standard

Preserving parental ties might also be achieved by raising the state's burden of proof to that required in a criminal trial, as parental terminations are akin to the deprivations at risk in criminal proceedings.²²⁴ The beyond-a-reasonable-doubt standard is already in use and could be more widely adopted. For example, the Indian Child Welfare Act mandates this higher standard, so at least one jurisdiction relies on a beyond-a-reasonable-doubt standard without jeopardizing the well-being and safety of children.²²⁵ A beyond-a-reasonable-doubt standard would adequately protect the parent-child bond and protect the fundamental liberty interests at stake, as well as move toward achieving pro-family goals.²²⁶

Cases that present any real and immediate danger to children would certainly meet this higher burden. Only in cases in which proof of danger is uncertain, such as where incarceration is the primary basis for termination, would use of a higher standard possibly lead to different outcomes than use of the lower standard. Yet, it is precisely in these close cases that the state should be put to its proof. While this approach is supportive of a "parental rights" approach to child welfare, it does not ignore the importance of maintaining child safety.²²⁷ Rather, it requires the state to put forward sufficient evidence to support a finding that a child has been or may be harmed as a result of a parent's action or inaction. This approach merely refuses to permit incarceration to serve as a substitute for that proof in large part because the current model allows an assumption or bias that criminality is synonymous with parental unfitness. The gravity and permanence of parental terminations and the impact on poor communities and communities of color suggest that parental rights should not be taken away unless a standard akin to that used in criminal proceedings is met.²²⁸

224. The Court in *Santosky* noted that a termination proceeding "bears many of the indicia of a criminal trial." *Santosky v. Kramer*, 455 U.S. 745, 762 (1982). *But see* Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 10 J. FAM. L. 757, 843 (1991-92) [hereinafter Genty, *Procedural Due Process*] (suggesting a model statute that would provide incarcerated parents a number of protections, including the assistance of counsel and the inclusion of expert testimony but would allow courts to consider "previous incarcerations" and "any history of criminal behavior").

225. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(f) (2006) (requiring "evidence beyond a reasonable doubt"). At the time that *Santosky* was decided two states relied on the higher standard. *See Santosky*, 455 U.S. at 749-50 n.3 (pointing to New Hampshire and Louisiana as examples of jurisdictions that use the beyond-a-reasonable-doubt standard). Currently, however, only New Hampshire appears to apply the reasonable-doubt standard. *See In re Adam R.*, 992 A.2d 697, 700 (N.H. 2010) (noting before parental rights may be terminated "the petitioning party must prove a statutory ground for termination beyond a reasonable doubt").

226. *See* Douglas E. Cressler, *Requiring Proof Beyond a Reasonable Doubt in Parental Rights Termination Cases*, 32 U. LOUISVILLE J. FAM. L. 785 (1994) (advocating for raising the standard in parental termination cases in order to minimize the risk of error in these cases).

227. *See* McWey et al., *supra* note 198, at 1037.

228. *See* Roberts, *supra* note 41, at 1281-82 (discussing the negative impact mass incarceration has on the black community); Roberts, *supra* note 160, at 196 (discussing the impact of racial stereotypes on child welfare agencies' interaction with black families and communities).

The Court in *Santosky* rejected imposing the reasonable-doubt standard in termination proceedings because the higher standard would prove an “unreasonable barrier to state efforts to free permanently neglected children for adoption.”²²⁹ The Court further cautioned that “issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between the parent and child and failure of parental foresight and progress” are at stake in termination proceedings.²³⁰ However, in light of the magnitude of the issues at stake in these proceedings and the disproportionate impact on people of color, the proof problems that concerned the Court should not continue to prevent the acceptance of this higher standard.²³¹ There are significant similarities between the issues and rights at stake in termination and criminal proceedings. The severity and permanence of the decisions in termination proceedings combined with the uneven balance of power and resources between the state and the majority of parents in prison are evidence in favor of adopting the higher standard in termination proceedings. Therefore, it is imperative that the state be required to establish a nexus between parental acts or omissions and harm to the child before putting the child in this position.

Despite rejecting the reasonable-doubt standard, the *Santosky* Court noted that the higher standard is justified in Indian Child Welfare matters. This may have been attributable to the Court’s recognition of the nation’s history of ill treatment of Native Americans.²³² The same rationale could be used to support the use of the higher standard in incarceration cases in light of the impact on African-American and Latino families; indeed, they have faced their own unique and troubling histories of state interference with the sanctity of their families.²³³

229. *Santosky*, 455 U.S. at 769.

230. *Id.*

231. *Id.* at 769-70 (holding that the “‘clear and convincing evidence’ standard of proof strikes a fair balance between the rights of the natural parents and the State’s legitimate concerns” and that the use of this standard satisfies the parents’ due process rights and that if the state can meet this standard parental rights may be terminated).

232. *Id.* at 750-51; Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J. L. & SOC. POL’Y 303, 335 (“The ICWA was enacted because Congress recognized the problems associated with excessive state intrusion into Native American families.”); Catherine M. Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years, A Foundation for the Future*, 27 CREIGHTON L. REV. 661, 662 (1994) (“The protections of the ICWA embody the reactions of the House and Senate to the overwhelming testimony from congressional witnesses illustrating the inhumane treatment of American Indian families by local governmental agencies charged with child welfare.”).

233. See, e.g., DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (reviewing the disproportionate intervention into poor black families by child welfare agencies); JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* (1985) (engaging in a historical review of the discriminatory treatment of black women and black families); Human Rights Program, Justice Now, *supra* note 24, at 315 (detailing the history of reproductive oppression and eugenics in America); Roberts, *supra* note 160, at 196 (illustrating how racist family models imposed by welfare agencies impact black families); see also Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185, 192 (1994) (illustrating how Latina/os who pursue

Given the disproportionate number of people of color in prison, the history of discrimination and racial bias, as well as the importance of the rights at stake, it is not unreasonable to extend the logic supporting a higher burden of proof from cases related to Native American children to all termination proceedings.

Some may be concerned that increasing the burden runs counter to the goal of the ASFA to reduce the number of children in foster care by raising the number of children who would be unavailable for adoption. However, the Court in *Santosky* recognized that “even when a child’s natural home is imperfect, permanent removal from that home will not necessarily improve his welfare.”²³⁴ In fact, studies indicate that inmates benefit from maintaining their family connections and that strong family ties are related to reduced recidivism of incarcerated parents.²³⁵ So, the higher burden—which will help maintain parent-child ties—may be beneficial to the parent, the child, and the state. Further, significant numbers of children in foster care wait years to be adopted, and some never find a permanent home before aging out of the system.²³⁶ A state’s limited resources might better be spent supporting these children and preserving families than by straining the system through the termination of parental rights.

If they decline to adopt this higher standard of proof, courts should at least require a clear-and-convincing-evidence standard at all stages of termination proceedings. Under the current approach, once unfitness is established at the termination stage of the proceedings, the standard of proof drops in many states from clear and convincing to preponderance of the evidence.²³⁷ Therefore, once courts have decided that the state has met its burden of establishing unfitness, they determine under the lower preponderance standard whether termination is in the best interests of the child.²³⁸ The “best interests” standard as currently ap-

higher education are compelled to assimilate and shed cultural roots). Even under this higher standard, state agencies would retain their authority to remove children from their homes if doing so is necessary to maintain their security.

234. *Santosky*, 455 U.S. at 765 n. 15; see also Michael Wald, *State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 993 (1975) (“[T]here is substantial evidence that, except in cases involving seriously harmed children, we are unable to improve a child’s situation through coercive state intervention”); *Foster Care Facts*, *supra* note 216 (“Foster care adoptions increased 78 percent from 1996 to 2000, as a result of ASFA and earlier state initiatives.”).
235. See Johnston & Gabel, *supra* note 26, at 15; Foster & Hagan, *supra* note 24, at 187-88 (noting that parent-inmates reported that they expected to return to their children and families when they left prison and when surveyed reported their families as the most significant factor in their ability to stay out of prison); Travis, *supra* note 10, at 41 (concluding that keeping strong family ties would reduce future criminality).
236. See Fleischer, *supra* note 201, at 322-27; Appell, *supra* note 212, at 777-78; *Foster Care Facts*, *supra* note 216.
237. See, e.g., Katie Holtz, In Re The Termination of Parental Rights to Max G.W.: *Beginning to Pave the Way for Wisconsin’s Incarcerated Mothers to Retain Their Parental Rights and Serve the Best Interest of Their Children*, 22 WIS. WOMEN’S L.J. 289, 295-97 (2007); Brian C. Hill, *The State’s Burden of Proof at the Best Interests Stage of a Termination of Parental Rights*, 2004 U. CHI. LEGAL F. 557, 591-92.
238. Hill, *supra* note 237, at 565; see, e.g., Anne S. McIntyre, *Isolating Past Unfitness: The Ob-*

plied assumes a parent cannot be rehabilitated and taught to become a better parent. Research suggests that parenting programs in prison can be effective in improving parenting skills and the parent-child relationship.²³⁹ It seems particularly important to ask the state to engage in a more searching inquiry into parental fitness in the case of a parent whose primary failure as a parent has been to be convicted of a crime unrelated to parenting and whose failure to establish consistent and regular communication with their child is the primary basis for terminating their parental rights.

The current approach also fails to adequately weigh children's interest in maintaining their relationship with their parent.²⁴⁰ Children have no federally protected right to maintain these ties, since currently, courts do not recognize a constitutional right to preserve their relationships with parents.²⁴¹ Though children's right to bond with their parents is not constitutionally protected, advocacy groups in a several states, including Arkansas and New York, have been advocating for a children's right to a legal relationship with incarcerated parents.²⁴² Finding such a right might result in a higher burden of proof at all stages of the parental termination proceedings and would very likely require a more searching inquiry in this second stage of proceedings into the quality of the parent-child relationship prior to termination.²⁴³

By dropping the standard in the proceedings at the best-interests-of-the-child stage, courts undervalue the importance of the relationship being severed and fail to adequately correct for the inherently subjective nature of the test,

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- stacle of In Re Gwnnye P for Incacerated Parents in Illinois*, 27 N. ILL. U. L. REV. 281, 289 (2007) (describing Illinois' two-step process, which requires a court to first find a parent unfit and to then consider whether termination is in the best interests of the child).
239. See, e.g., Kristina Wilson et al., *The Effectiveness of Parent Education for Incarcerated Parents: An Evaluation of Parenting from Prison*, 61 J. CORRECTIONS EDUC. 114, 123-24 (2010); Kathy Boudin, *Lessons from a Mother's Program in Prison: A Psychological Approach Supports Women and Their Children*, 21 WOMEN & THERAPY 103, 103-04 (1998).
 240. See Jessica G. Gray, *De-Sensationalizing the Child "Divorce": A Jurisdictional Analysis on a Child's Role in Terminating Parental Rights*, 39 SUFFOLK U. L. REV. 489, 496-97, 504 (2006). *But see* Sherry, *supra* note 153, at 386 (proposing retaining the best interests test but sets forth six factors which a court must review in making a termination decision).
 241. A number of scholars have addressed the issue of whether children have constitutional rights to maintain or sever parental ties. These scholars query whether children have a constitutional right to bond with their parents. See Ross, *supra* note 154, at 177-78 (A child may have an interest in preserving a relationship with a neglectful parent.); Dwyer, *supra* note 18, at 846-47, 976 ("Only one of the nine Justices in *Troxel*, Justice Stevens, contended that children, too, have a (as-yet-unrecognized) constitutionally protected 'liberty interest' of some sort in connection with their relationships.").
 242. Tebo, *supra* note 21, at 12 (also noting that a measure of the US Patriot Act called for "more help to families of those incarcerated, including facilitating relationships between incarcerated parents and their children"); see Brief for the American Civil Liberties Union Children's Rights Project et. al. as Amicus Curiae supporting Petitioners, *Santosky v. Kramer*, 455 U.S. 745 (1982) (No. 80-5889) 1981 WL 389937 (arguing that children have a separate interest (right) in termination proceedings).
 243. See Fleischer, *supra* note 201, at 312; *Troxel v. Granville*, 530 U.S. 57, 65-66, 69 (2000) (discussing the constitutional dimensions of the parent-child relationship); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

which may lead to bias. The best-interests weighing is purposefully broad and amorphous to ensure flexibility in application.²⁴⁴ However, such a broad and flexible standard allows for reliance on prejudices about those convicted of crimes as well as assumptions about the ability of incarcerated individuals to parent while they are in prison. Furthermore, because incarcerated parents likely share few characteristics with the social workers and judges involved in their termination proceedings, they may face an uphill struggle to establish that retaining parental ties is in their child's best interest.²⁴⁵ By virtue of education and profession alone, judges' and case workers' perspectives on parenting may be fundamentally different from those of imprisoned parents.²⁴⁶ Moreover, the test may become unintentionally comparative by substituting an assessment of whether a better parent may be found for the intended test of whether the biological parent is suitable.²⁴⁷

A court should be prohibited from concluding that termination is in a child's best interest unless the state has established by clear-and-convincing evidence that the parent acted to harm the child or placed the child in danger. Incarceration resulting from crimes unrelated to the parent's conduct as a parent, regardless of the length of imprisonment, would not meet this burden. A parent who has not harmed her child or placed the child in danger should be found to be a "suitable" parent even if retaining parental rights means that the state has a continued obligation to provide parental education, assist the family, and improve communication and parental functioning. This approach is in line with social-science research that suggests that the children of the incarcerated parent benefit from a continued connection with their parent.²⁴⁸ It also recognizes that many of these parents had a relationship with their child prior to imprisonment and expect to continue that relationship after release.²⁴⁹ Research continues to

244. A qualitative study of what factors participants in the New York family court system used in applying the best interests test found that the standard is subjective and unnecessarily vague. Mary Banach, *The Best Interests of the Child: Decision-Making Factors*, 79 FAMILIES IN SOC'Y 331, 338 (1998); Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 66 (1995); DAVIS, *supra* note 185, at 242.

245. See Santosky, 455 U.S. at 760; Susan Stefan, *Whose Egg is it Anyway? Reproductive Rights of Incarcerated, Institutionalized and Incompetent Women*, 13 NOVA L. REV. 405, 407, 448-49 (1989); see also Appell, *supra* note 212, at 710; Appell, *supra* note 3, at 585; Kelli Lane, *Grounding Mother and Child in Their Intrinsic Relational Unit: An Analysis of Motherhood and the Parent-Child Relationship Within the Child Welfare System*, 25 WOMEN'S RTS. L. REP. 145, 160 (2004).

246. See, e.g., ROBERTS, *supra* note 233, at 59.

247. See Sametz, *supra* note 22, at 300 (noting that courts make custody decisions, in part, on the "least detrimental interests" of the child) (citing JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973)); see also Roberts, *supra* note 160.

248. See Johnston & Gabel, *supra* note 26, at 70-73; Luke, *supra* note 31, at 935-36; Block & Potthast, *supra* note 33, at 564-65.

249. Luke, *supra* note 31, at 930-931; Block & Potthast, *supra* note 33, at 563-654; Kathryn L. Modecki & Melvin N. Wilson, *Associations Between Individual & Family Level Characteristics & Parenting Practices in Incarcerated African American Fathers*, 18 J. CHILD FAM.

support that maintaining prisoner-family connections reduces recidivism and suggests that state intervention in these families adversely affects not only the individuals in question but their larger communities as well.²⁵⁰ Concerns about the importance of stability for children in foster care and the adverse effects of this system should propel foster care reform and efforts to increase the resources and support for kinship care.²⁵¹ As a matter of policy, the impetus should be to improve outcomes for the children in the communities most directly affected by the dramatic rise in incarceration. This is better done by addressing the needs for basic social services rather than by terminating parental rights to address the perceived cycle of crime, juvenile delinquency, and adult imprisonment.

In addition to raising the evidentiary standards, constitutional interests would also be more protected if judges were required to issue findings of fact and conclusions of law similar to those required in federal bench trials.²⁵² Detailed and reasoned opinions would encourage a more careful weighing of relevant facts, help reveal hidden biases, preserve the rights at issue, and provide a better record on appeal.

C. Recognizing a Right to Counsel for Indigent Parents

Given the magnitude of the concerns at issue, parents have repeatedly litigated whether there is a right to counsel in parental termination proceedings. While some states provide access to counsel to indigent parents in termination proceedings,²⁵³ others states fail to provide these protections.

STUD. 530, 530-31 (2009) (“[R]eports of contact between incarcerated parents and their children suggest that a sizeable number of families attempt to maintain family ties during imprisonment.”); Rudolph Alexander, Jr., *Associations and Predictors of Incarcerated African American Father’s Relationship with their Children*, 29 W. J. BLACK STUD. 667, 668, 674-75 (2005) (summarizing research finding that “prison does not terminate the concern and love that some fathers and their children have” and that “fathers do not transform into bad parents simply because they go to prison”); Carl Mazza, *And Then the World Fell Apart: The Children of Incarcerated Fathers*, 83 FAM. IN SOC’Y 521, 522 (2002) (“[P]rior to incarceration, most fathers live in the same household with at least one of their children[,] . . . contribute regularly to the financial and emotional support of their children. . . . [M]any incarcerated fathers express concern and worry about their child . . . [and] try to stay connected.”).

250. BERNSTEIN, *supra* note 1, at 76-77; Bocknek & Sanderson, *supra* note 111, at 328.

251. Proponents of the ASFA and short deadlines for terminating parental rights assert that doing so is in a child’s best interest. There is a vigorous debate about this issue in legal scholarship. See, e.g., Garrison, *supra* note 12, at 461; Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 658 (1999). Another suggestion is that biological parents be granted visitation with their children after their rights are terminated. See, e.g., Garrison, *supra* note 12, at 469; see also Melissa Holtzmann, *The “Family Relations” Doctrine: Extending Supreme Court Precedent to Custody Disputes Between Biological and Nonbiological Parents*, 51 FAM. REL. 335, 340 (2002) (proposing a family relations theory for determining custody that would legally recognize the parental status of biological and nonbiological parents).

252. See FED. R. CIV. P. 52.

253. ARIZ. REV. STAT. ANN. § 8-221 (2010); ARK. CODE ANN. § 9-27-316 (2009); CONN. GEN. STAT. § 46b-135 (2010); D.C. CODE § 16-2304 (2010); 705 ILL. COMP. STAT. § 405/1-5 (2006); IOWA CODE § 232.113 (2010); KY. REV. STAT. ANN. § 625.080(3) (West 2009);

In *Lassiter v. Dept. Social Services*, the Supreme Court held in a 5-4 decision that there is no constitutional right to counsel in termination proceedings.²⁵⁴ Despite the lack of a constitutional guarantee, the Court advised that the appointment of counsel is wise public policy and that, although such appointment is not always required, the determination should be made on a case-by-case basis.²⁵⁵ The dissent in *Lassiter* criticized the majority for giving short shrift to the “fundamental liberty interest” at stake and the “total and irrevocable” nature of a termination.²⁵⁶ The dissent found the impingement upon fundamental parental rights to care for a child and the “risk of error” as sufficient bases for finding a constitutional right to counsel.²⁵⁷ Justice Blackmun wrote: “Surely there can be few losses more grievous than the abrogation of parental rights.”²⁵⁸ In weighing the risk of error, the dissent noted the difficulty parents may have in persuading the judge of their willingness and capacity to care for their child.²⁵⁹ The dissent expressed its concern that the termination “standard is imprecise and open to the subjective values of the judge”²⁶⁰ by pointing to the “ill-defined notions of fault and adequate parenting” at play in termination proceedings.²⁶¹

The facts in *Lassiter* to which the dissent pointed demonstrate the difficulty unrepresented incarcerated parents face in trying to convince a court that they are adequate parents. In this way, *Lassiter* is strikingly similar to the facts of contemporary termination of parental rights cases involving incarcerated parents.²⁶²

N.Y. FAM. CT. ACT § 262 (McKinney 2010); N.C. § 7B-1109 (2010); N.D. CENT. CODE §§ 27-20-26, 27-20-44 (2010); OR. REV. STAT. § 419B.518 (2010); S.C. CODE ANN. § 20-7-1570 (2009); S.D. CODIFIED LAWS § 26-7A-30 (2010); TEX. FAM. CODE ANN. § 107.013 (West 2010); VA. CODE ANN. § 16.1-266 (2010); WASH. REV. CODE § 13.34.090(c) (2010); W. VA. CODE § 49-6-2 (2010); WIS. STAT. § 48.23(2) (2010); WYO. STAT. ANN. § 14-2-318 (2010); *see, e.g., In re Interest of D.J.H.*, 401 N.W.2d 694, 703 (N.D. 1987); *see also* Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States' Response to Lassiter*, 14 *TOURO L. REV.* 247 (1997).

254. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 25 (1981) (reasoning that the right to counsel is triggered only by the possibility of a loss of physical liberty, which is not present in termination proceedings).
255. *Lassiter*, 452 U.S. at 31, 33-34 (stopping short of finding a constitutional guarantee to legal counsel in parental terminations, the Court nonetheless asserted that having such counsel is wise public policy); *see also* *M.L.B. v. S.L.J.*, 519 U.S. 102, 124 (1996) (holding that the state must provide right to appeal for all parents whose parental rights are terminated regardless of ability to pay court fees); Ross, *supra* note 154, at 182.
256. *Lassiter*, 452 U.S. at 38-39 (Blackmun, J., dissenting).
257. *Id.* at 42 (Blackmun, J., dissenting). The majority and dissenting opinions apply the *Mathews v. Eldridge* test for determining whether due process requires counsel be appointed to parents in termination cases. *Id.* at 26, 37 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). *Mathews* requires an analysis of the private interests, the government's interests, and the risk of error. *Lassiter*, 452 U.S. at 27, 38.
258. *Lassiter*, 452 U.S. at 40 (Blackmun, J., dissenting).
259. *Id.* at 45-46.
260. *Id.* at 45.
261. *Id.* at 46.
262. *Id.* at 52.

Abby Gail Lassiter was imprisoned for second-degree murder.²⁶³ Ms. Lassiter's mother cared for her four children, but the state removed one of the sons from her custody and placed him in state care.²⁶⁴ The state then moved for the termination of Ms. Lassiter's parental rights for failure to maintain contact with the child.²⁶⁵ In its analysis, the dissent rightly noted that the lack of visitation was a direct result of the mother's imprisonment for a crime unrelated to her child.²⁶⁶ The dissent suggested that another picture of Ms. Lassiter's parenting could have been painted if she had been represented by counsel.²⁶⁷ The court recognized that counsel could present the facts and legal arguments to provide a fuller picture of the capability of incarcerated parents to care for their children while imprisoned.²⁶⁸ The reality is that many incarcerated parents are, like Ms. Lassiter, ill-equipped to represent themselves in a matter of such great significance. The facts in *Lassiter* lay bare the *Santosky* Court's concerns that the "State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense."²⁶⁹

Individuals facing parental termination should have a guaranteed right to counsel during termination proceedings. Doing so would more adequately account for the liberty interests at stake.²⁷⁰ Termination cases often involve parents of limited financial means²⁷¹ and may invoke deeply held biases by judges about good parenting.²⁷² The conclusions reached in termination cases may be based on assumptions about the ability of incarcerated parents to parent effectively. Such assumptions are based on incomplete data and a lack of understanding of the effects of incarceration on children.

D. Rethinking the Adoption & Safe Families Act

The ASFA purports to promote families but, in application, may actually

263. *Id.*

264. *Id.*

265. *Id.* at 23-24.

266. *Id.* at 52.

267. *Id.* at 57 (noting that "[p]etitioner plainly has not led the life of an exemplary citizen or model parent. . . . But the issue before the Court is not petitioner's character; it is whether she was given a meaningful opportunity to be heard when the State moved to terminate absolutely her parental rights.").

268. *Id.* at 50-51.

269. *Santosky v. Kramer*, 455 U.S. 745, 763 (1982).

270. *Lassiter*, 452 U.S. at 59-60 (Stevens, J., dissenting).

271. Parents of limited financial means are more likely to be faced with termination proceedings as a result of incarceration in large part because their children are more likely to end up in state care, triggering the operation of the ASFA. *See supra* notes 3, 46-53. The Supreme Court has previously taken notice of the importance of not permitting indigence to bar a parent from contesting a termination proceeding. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

272. *See, e.g., Roberts, supra* note 211, at 124-25 (noting judicial bias in child welfare proceedings); Paruch, *supra* note 20, at 143-44, 163.

force the premature and unnecessary dismantling of families.²⁷³ The timelines in ASFA can encourage termination proceedings before the state has made sufficient efforts to help families stay together.²⁷⁴ Some scholars have suggested extending the time period under ASFA before termination proceedings must occur.²⁷⁵ This approach, however, may be nothing more than a Band-Aid that fails to address the underlying issues and merely delays but does not prevent premature and unnecessary terminations. More fundamentally, it is possible that what is needed instead is “revisiting the concept of permanency, particularly for children of incarcerated mothers.”²⁷⁶ Professor Luke maintains that the ASFA was “designed to address the needs of families in which children are abused or neglected,” not incarcerated families.²⁷⁷ Luke states, “[d]espite often lengthy separations from a parent, a child may benefit more from the sense of permanency divined from maintaining a relationship with his or her birthmother than by severing all legal connection to that mother in [sic] attempt to give the child permanency in a new family.”²⁷⁸ Application of the ASFA in these cases without exemptions has diminished the fact that “parents and the child share an interest in avoiding erroneous termination.”²⁷⁹

As an alternative, Professor Luke suggests “exempting time spent in jail or prison from the cumulative TPR timeline for mothers whose children are involved with child welfare services.”²⁸⁰ She states, “[o]ne researcher proposed that the current child welfare timelines are similar to suggesting that all noncustodial (usually divorced or separated) parents should have their parental rights terminated after children have lived away from them for a set period of time.”²⁸¹

273. Adoption and Safe Families Act (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (1997); see Murray & Farrington, *supra* note 9, at 167 (The ASFA “makes it more difficult for prisoners to reunite with their children after release.”); Philip M. Genty, *The Inflexibility of the Adoption and Safe Families Act and its Unintended Impact Upon the Children of Incarcerated Parents and Their Families*, CHILD WELFARE 360, Spring 2008, at 10.

274. See, e.g., Philip M. Genty, *Some Reflections About Three Decades of Working with Incarcerated Mothers*, 29 WOMEN’S RTS L. REP. 11 (2007).

275. See, e.g., Luke, *supra* note 31, at 942; see also Greenaway, *supra* note 161, at 263 (suggesting extending the ASFA timeline).

276. Luke, *supra* note 31, at 942.

277. *Id.*

278. *Id.* at 943.

279. *Santosky*, 455 U.S. at 765.

280. Luke, *supra* note 31, at 943.

281. *Id.* at 943 (citing Philip Genty, *Permanency Planning in the Context of Parental Incarceration: Legal Issues & Recommendations*, 77 CHILD WELFARE 534 (1998)). Even if children are moved into permanent homes it may be possible to codify open adoptions and allow some limited parental involvement with their children after they have been placed. Cahn, *supra* note 211, at 1220 (addressing parental termination, poverty and race, Cahn notes, “[w]here adoption is clearly warranted, there can still be a possibility of ‘adoption-with-contact,’ or ‘open adoption’ through which the biological parent and child retain some connection or contact that could be legally enforceable.”). Although most states do not permit open adoption and do not guarantee biological parents any rights to access to their children once an adoption becomes final, anecdotal evidence suggests that open adoptions can work. *Id.*

It is clear that most modern jurists would reject such an approach to parental rights in dissolution proceedings as too draconian and might question its constitutionality. Professor Luke's approach would begin to resolve some of the inequities faced by imprisoned parents relying on state assistance to care for their child.

E. Taking the Family Out of Court

Perhaps the best solution is one that limits legal intervention in parental termination and takes the family out of court.²⁸² One suggestion is to "make courts the last resort rather than the first line of defense for protecting children."²⁸³ Borrowing from divorce and custody trends that are moving toward limited court intervention and encouraging mediation and collaborative law approaches, perhaps states can do more to negotiate solutions to the state-family conflict in these termination cases before the matters end up in front of a judge.²⁸⁴

Contested termination proceedings pit the state's social welfare system against the parents. The children and their best interests become center stage in a tug-of-war over whether the parent can retain legal rights to the care of custody of their children. However, the use of courts and adversarial approaches to resolving custody determinations is becoming increasingly less popular in other settings related to the welfare of the child such as in divorce proceedings.²⁸⁵ The clear trend in family dissolution proceedings has been an increasing reliance on non-adversarial methods of dispute resolution including the use of mediation and collaborative law.²⁸⁶ States are increasingly recognizing the value in moving disputes involving families away from the courtroom due to the importance of preserving family ties and relationships whenever possible.²⁸⁷

A similar revolution would make sense in the context of parental termination proceedings based on parental incarceration. In cases in which termination proceedings are instituted as a result of harm to the child or to the child's other parent or siblings, the more formal adversarial approach may best protect the

282. Bernardine Dohrn, *Care & Adoption Reform Legislation: Implementing the Adoption and Safe Families Act of 1997*, 14 ST. JOHN'S J. LEGAL COMMENT 419, 425-26 (2000).

283. *Id.* Dohrn notes that the "Netherlands, among other countries use non-judicial resources for resolving these issues." *Id.*

284. See Elizabeth F. Beyer, *A Pragmatic Look at Mediation and Collaborative Law as Alternatives to Family Law Litigation*, 40 ST. MARY'S L.J. 303 (2008).

285. See Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395 (2000).

286. See, e.g., *id.* at 428; Aaron E. Zurek, *All the King's Horses and All the King's Men: The American Family After Troxel, The Parens Patriae Power of the State, A Mere Eggshell Against the Fundamental Rights of Parents to Arbitrate Custody Disputes*, 27 HAMLINE J. PUB. L. & POL'Y 357, 366-71 (2006).

287. Zurek, *supra* note 286, at 387.

child's interests and keep him or her from harm since it is more clear that the parent's and child's interests are in conflict and an ongoing legal relationship is unlikely.²⁸⁸ However, when the harm to the child is primarily a result of incarceration or mere inferences of harm rooted in incarceration, some preliminary forms of intervention and assistance may better serve the child and family. Opting for more informal processes in cases in which there is no proof of direct harm to the child may more effectively preserve family unity than the current model.²⁸⁹ Moreover, these informal systems may more effectively integrate the myriad services that these families may need including counseling, job training, and substance abuse treatment. The need for non-adversarial processes is supported by the fact that some children of incarcerated parents often desire to maintain contact with their parents and feel harmed as a result of the barriers to their relationship created by the incarceration.²⁹⁰ In addition, these families are likely to be in need of substance abuse treatment or to have experienced family violence.²⁹¹

A first step to family preservation could include a greater reliance on mediation to work with the parent, the child, and the relevant social welfare agencies in order to investigate the range of issues facing the family and to facilitate a solution to the obstacles created by the incarceration.²⁹² Allowing parents to feel as though they are part of the solution by providing better care and communication with their children might increase the parents' sense of empowerment and responsibility toward their family and improve family outcomes.²⁹³ Much like the educational and community-based programs that are designed to educate children and families about relationships, the impact of divorce on families, and conflict resolution,²⁹⁴ states should expend greater resources on educational and

288. See Amy Sinden, "Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339 (1999) (describing the dangers of informal dispute resolution processes in child welfare proceedings and arguing in favor of, at least in the absence of a better alternative, the current procedural safeguards); see also Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79 (1997).

289. See, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006).

290. Fleischer, *supra* note 201, at 321-26.

291. Kemper & Rivara, *supra* note 17, at 263; Pamela Covington Katz, *Supporting Families & Children of Mothers in Jail: An Integrated Child Welfare & Criminal Justice Strategy*, in CHILDREN WITH PARENTS IN PRISON, *supra* note 75, at 27, 31.

292. See Schepard, *supra* note 285, at 396-97 (reviewing the movement of courts toward mediation in custody proceedings); Nancy Thoennes, *What We Know: Findings from Dependency Mediation Research*, 47 FAM. CT. REV. 21, 32 (2009); Kelly Browe Olson, *Lessons Learned From a Child Protection Mediation Program: If at First You Succeed and Then You Don't*, . . . , 41 FAM. CT. REV. 480, 484-85 (2003); JoAnne Maynard, *Permanency Mediation: A Path to Open Adoption for Children in Out-of-Home Care*, 84 CHILD WELFARE 507, 517, 524 (2005) (describing a study of permanency mediation that was used to mediate voluntary surrender of parental rights after a recommendation of parental termination that found the program had the potential to be successful).

293. See Thoennes, *supra* note 292, at 32.

294. See generally Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Edu-*

training programs designed to help address the rising numbers of parents in prison. Restorative justice programs that allow inmates to work with their communities, education programs, effective drug and alcohol treatment programs, and counseling based in the communities, for instance, would likely be more effective in preserving these families than a focus on incarceration has been.²⁹⁵

F. Prisons & Institutional Reform

Meeting the needs of children with incarcerated parents requires a more fundamental change than modifying termination standards and burdens of proof. States should rethink sentencing to create greater opportunities for diversion and allow low-risk and non-violent offenders to avoid prison.²⁹⁶ Furthermore, proposals that enhance and facilitate the relationships between parent and child may reduce concerns about parental neglect through the failure to communicate. For example, rethinking prison facilities may provide a way to enhance the parent-child connection. Prison reform is critical since “[c]orrectional facilities are not only contexts of punishment for the inmate, but for the families and children that spend many hours waiting and then visiting there.”²⁹⁷ However, the positive developments in facilitating the incarcerated parent and child relationship discussed *infra* are limited in scope and effect since they typically are state specific. These reforms are also quite often the result of prison policies that can vary among institutions and may depend upon the good will and direction of prison leadership instead of upon the force of law.

1. Work-Release Programs

One approach to revamping prisons has been to expand the opportunities

cation, 37 FAM. & CONCILIATION CTS. REV. 219 (1999) (showing the number of states authorizing or mandating parental education programs more than quadrupled from 1994 to 1999); M. Robin Dion, *Healthy Marriage Programs: Learning What Works*, 15 FUTURE OF CHILDREN 139 (2005) (reviewing various marriage and relationship education programs as they relate to low-income families); Leah Ward Sears, *The “Marriage Gap”: A Case for Strengthening Marriage in the 21st Century*, 82 N.Y.U. L. REV. 1243, 1264 (2007) (emphasizing the value of marriage for children’s wellbeing); Raymond C. O’Brien, *The Reawakening of Marriage*, 102 W. VA. L. REV. 339 (1999) (discussing “covenant marriage” and marriage preparation programs).

295. See generally Human Rights Program, Justice Now, *supra* note 24, at 353-54 (identifying restorative justice and substance abuse treatment as ways to reduce the prison population so that people receive better reproductive and other health services than they receive in prison); Marty Price, *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders*, DISP. RESOL. MAG., Fall 2001, at 8 (explaining the mediation process as allowing both victims and offenders to heal, whether the offender is imprisoned or not); Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413 (comparing punitive American justice system to restorative justice models in Australia and New Zealand).
296. Murray & Farrington, *supra* note 9, at 187-88, 189 (“An obvious option for preventing harmful effects of parental imprisonment is to imprison fewer parents.”).
297. Arditti, *supra* note 24, at 133.

for work release in lieu of prison.²⁹⁸ These programs allow incarcerated individuals to improve work skills and provide them with the financial resources to parent. Moreover, work release can also provide greater opportunities for incarcerated parents to participate in direct care of their children. Professor Sametz suggests an innovative twist on the concept of work release: “the development of a ‘mother-release’ program. The program’s operating structure would parallel that of a work-release program; however, the woman would undertake the *job of mother* to her children.”²⁹⁹ A gender-neutral version of this proposal might be more politically feasible. Under this approach, incarcerated parents without a history of violence should be eligible for work-release programs that help them develop work-related skills as well as opportunities to create or build the bond between the parent and the child.

2. Substance-Abuse Programs

Since many incarcerated parents are either in prison due to substance abuse or have substance abuse issues that affect their behavior, another proposal would involve expanding treatment programs and providing priority in these programs to parents facing incarceration.³⁰⁰ Courts deciding whether to terminate parental rights in part due to incarceration frequently note the presence of drug use as a relevant factor in deciding to terminate parental rights.³⁰¹ Research supports the position that treating drug addiction is more effective for reducing drug use than imprisonment.³⁰² Because without drug and alcohol programs it may not be reasonable for inmates to access treatment, courts should be required to take into account the availability of such programs in parental termination proceedings. Parental rights should not be terminated if programs are not readily available for imprisoned parents.

3. Minimizing Distance Between Imprisoned Parents and Children

Trial courts should also be required to assess the institutional barriers cre-

298. Sametz, *supra* note 22, at 301-02; *see, e.g.*, Mireya Navarro, *New York Widens Work Release To Reduce Prison Overcrowding*, N.Y. TIMES (Mar. 28, 1994), <http://www.nytimes.com/1994/03/28/nyregion/new-york-widens-work-release-to-reduce-prison-overcrowding.html>; Press Release, N.Y. State Dep’t of Corr. Servs., Work Release Inmates in Upstate New York Receiving Community Drug Treatment (Nov. 20, 2007), available at <http://www.doc.state.ny.us/pressrel/2007/drugtreatmentrelease.html>.

299. Sametz, *supra* note 22, at 302 (citing Palmer research).

300. Loper, *supra* note 59, at 92; Kemper & Rivara, *supra* note 17, at 263 (noting that many incarcerated parents have long histories of substance abuse).

301. *See, e.g.*, *In re Gwynne P.*, 830 N.E.2d 508 (Ill. 2005); *Idaho v. Doe*, 172 P.3d 1114 (Idaho 2007).

302. BERNSTEIN, *supra* note 1, at 56 (citing RAND Corporation study and noting the effectiveness of substance abuse treatment in lieu of prison); *see* Loper, *supra* note 59, at 93 (suggesting that interventions designed to help women in prison, such drug treatment programs, should take into account the stresses of parenting).

ated by imprisonment. The geographic location of prisons, in general, and women's prisons, in particular, makes visits from children difficult and expensive.³⁰³ In fact, most incarcerated parents are imprisoned more than 100 miles from their families with federal prisoners housed at far greater distances.³⁰⁴ Because there are fewer correctional facilities for women than men, mothers are often located even farther away from their children.³⁰⁵ When surveyed, imprisoned parents report few, if any, visits from their children.³⁰⁶ Among the causes for this are the cost of transportation and the time needed to travel to and from the facility.³⁰⁷ One solution to the problem of distance would be to redirect funds appropriated for prisons to smaller facilities or halfway houses that could be built in communities to accommodate non-violent inmates with children.³⁰⁸ The children could continue to attend school and be surrounded by members of their community.³⁰⁹

While moving prisons closer to city centers where many prisoners resided before incarceration may be impractical in most instances, there are a number of ways to reduce the effect of the distance between home and prison. In light of the structural and financial barriers to re-conceiving prisons, a less dramatic solution might lie in facilitating visitation through subsidies for transportation to prison facilities from downtown areas. For example, Pennsylvania's Program for Women and Girl Offenders, which began in 1976, sponsors bus trips twice a month from Philadelphia to the correctional facility in Muncy, Pennsylvania.³¹⁰

303. Johnna Christian, *Riding the Bus: Barriers to Prison Visitation and Family Management Strategies*, 21 J. CONTEMP. CRIM. JUST. 31, 37 (2005).

304. MUMOLA, *supra* note 26, at 5 (observing that 64% of parents incarcerated in state prison and 80% of parents incarcerated in federal prison are housed more than 100 miles from their last place of residence); BERNSTEIN, *supra* note 1, at 78. Prisoners may also be housed outside the state in which they live and were sentenced. *Id.* at 90-91; see Travis, *supra* note 10, at 37 (describing the large cost to families of maintaining telephone contact and new programs that use the internet to improve family contact with prisoners as well as programs to bring children to distant prisons).

305. See BAUNACH, *supra* note 61, at 32 ("The most frequently given reasons for few visits were the distance from the children's placement or the lack of transportation.").

306. Johnston & Gabel, *supra* note 26, at 8; Travis, *supra* note 10, at 36-37; Genty, *Collateral Consequence*, *supra* note 8, at 1674.

307. Johnston & Gabel, *supra* note 26, at 8; Travis, *supra* note 10, at 36; Block & Potthast, *supra* note 33, at 565; see also SEYMOUR, *supra* note 75, at 5 ("Inhibiting visits are such factors as the geographic location of many prisons, the family's inability to afford transportation, the unwillingness of caregivers to facilitate visits, visiting rooms that are inhospitable to children, and parent's reluctance to have contact."); Murray & Farrington, *supra* note 9, at 189 (suggesting that prisoners would be better able to cope after their release if funds were provided during their incarceration to allow family to visit); Christian, *supra* note 303, at 40 (noting that some prisoners may discourage family visits to spare their families the cost and inconvenience of visiting).

308. Sametz, *supra* note 22, at 301 (suggesting halfway houses as facilities within communities that allow women to serve their time and live with their children).

309. *Id.*

310. *Id.* For a description of another transportation program, see KATHERINE HARDESTY & JUDITH E. STURGES, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, A HANDBOOK FOR THE FRIENDS AND FAMILIES OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS PRISON

Other solutions could include providing transportation vouchers to children who qualify for assistance to help defray the cost of transportation to visit their incarcerated parent.

4. Easing Parent-Child Visitation and Contact

However, even families who are able to make the trip may face a multitude of barriers. The physical separation and distance from home may be exacerbated by visitation facilities that often were not constructed to facilitate relations between parents and children.³¹¹ Currently, therefore, the fact of being imprisoned alone makes it difficult to parent a child and can precipitate a finding of neglect.³¹² Prisons are free to impose restrictions on visitors that may prohibit or severely limit the interactions between parent and child.³¹³ For example, in *Overton v. Bazzetta*, the Supreme Court upheld Michigan Department of Corrections regulations requiring children visiting the prison to be accompanied by a family member or legal guardian and prohibiting visits between children and parents after parental rights had been terminated.³¹⁴ The Court similarly upheld a challenge to the bar on visitors for prisoners who committed multiple substance-abuse violations.³¹⁵ Despite the argument that the restrictions violated substantive due process and the First Amendment right of association, the Court reasoned in *Overton* that the regulations were rationally related to a legitimate penological goal of maintaining internal prison safety and protecting child visitors from exposure to misconduct or injury.³¹⁶ A state department of corrections, therefore, has wide discretion to impose visitation restrictions on prisoners even if those restrictions make maintaining a parent-child bond difficult. For individual prisoners and their children, therefore, increasing restrictions on visitation

INMATES 35-36 (2006), available at <http://www.cor.state.pa.us> (type "friends and family" into the search box and click on the first result) (describing Pennsylvania's transportation program to help families visit people in prison at lower cost than that of commercial carriers).

311. Arditti, *supra* note 24, at 116; Travis, *supra* note 10, at 36-37. Cf. Krupat, *supra* note 9, at 42 (discussing enhanced visiting programs in New York, Tennessee, Arkansas, and California).
312. Travis, *supra* note 10, at 35-36, 38 (noting the difficulties in maintaining parent-child contact when a parent is imprisoned); Johnston & Gabel, *supra* note 26, at 8, 16-18 (noting that reports cite transportation, opposition from custodial mothers, the restriction of prison telephone privileges, the construction of women's prisons in rural areas, and lack of financial support as reasons for the difficulty in maintaining a parent-child relationship). Ellen Barry reports that "[i]n the vast majority of cases, incarcerated parents have not had their children removed from their care because of [direct] abuse or neglect, but simply because they are unable to care for their children due to the fact of their incarceration." Barry, *supra* note 67, at 148-49, 184.
313. BERNSTEIN, *supra* note 1, at 78-81 (noting obstacles to maintaining a parent-child relationship when a parent is imprisoned, including bulletproof glass separating child visitors from their parents, long lines and waits, lengthy and cumbersome pre-approval processes, dress codes, and humiliating screenings).
314. *Overton v. Bazzetta*, 539 U.S. 126, 129-30, 133 (2003).
315. *Id.* at 134.
316. *Id.* at 133.

may often appear arbitrary and perhaps capricious.³¹⁷

In fact, researchers have noted that there appears to be an increase in the number of restrictions placed on prison visits.³¹⁸ In one example, Bernstein notes the reduction in the number of calls a prisoner may make per month, the imposition of greater limitations on the length of the calls, and a reduction in the number of visiting days provided at the prison each week.³¹⁹ Further reducing the ease with which prisoners can maintain contact with their children in Bernstein's example, "incarcerated minors are not allowed to write to, or receive letters from, adult prisoners, even if those prisoners are their parents."³²⁰ Easing visitation restrictions seems relevant to reducing terminations in states in which courts may weigh incarceration as a factor in deciding whether to terminate rights and in determining whether the parent has "abandoned" their child.

Improving prison visiting facilities and making them more family friendly might also improve parent-child communication. Some human development theorists suggest that individuals are influenced by the context in which their experiences occur.³²¹ Ecological theories of development indicate that the visiting room is a "'portal' by which the family is impacted by incarceration."³²² According to one researcher:

Families are influenced not only by the actual process of talking with and seeing their incarcerated family member, but also via their interactions with corrections staff, their interactions with other families that are waiting to visit, and their experience relative to the environmental conditions and policies connected to a particular jail setting.³²³

Under this view, "an ecological framework recognizes that the non-incarcerated parent and child are embedded in a broader sociocultural network that stigmatizes involvement in the criminal justice system."³²⁴ Joyce Arditti, an expert on ecological theories of development, conducted a qualitative study of local jails in Virginia. The study of family visiting at correctional facilities revealed that the visiting facilities do not support families³²⁵ and found problems with the lack of privacy, long waits, short visits,³²⁶ dirty and poorly maintained

317. See BERNSTEIN, *supra* note 1, at 39.

318. See *id.*, at 39 (noting stricter restrictions on every form of communication including number of cell phone photos and phone calls).

319. *Id.*

320. *Id.* at 74.

321. Arditti, *supra* note 24, at 116.

322. *Id.* at 116.

323. *Id.*

324. *Id.*; see also Block & Potthast, *supra* note 33, at 566 ("[S]tandard visiting practices in most prisons exacerbate the anxieties experienced by incarcerated parents and their young children. . . . Typical visiting rooms are uncomfortable.").

325. Arditti, *supra* note 24, at 119.

326. *Id.* at 123.

facilities,³²⁷ as well as harsh and disrespectful treatment by jail staff.³²⁸ Arditti concluded that the conditions observed through her study are “an ‘ecological nightmare’ in terms of its potential developmental impact.”³²⁹

Arditti suggests a number of reforms including on-site services for families to help with children’s developmental needs, providing play areas for children, and a “child friendly” environment.³³⁰ Developing visiting areas that encourage visitation might ease the strain on the parent-child relationship created by incarceration. Arditti also recommends reforms related to providing support, therapy, and counseling to families and children.³³¹ She notes the “ambiguous grief” caused by having a loved one incarcerated and the need for the criminal justice system to recognize and assist families with the grief and stigma associated with having a loved one imprisoned.³³² She and other researchers analogize the experience to the loss experienced as a result of the death of a loved one.³³³ However, the grief is complicated by the stigma associated with a criminal conviction. Finally, Arditti suggests creating partnerships between corrections departments and child welfare agencies and universities.³³⁴ She sees these partnerships as a way to improve support for families, encourage scholarly research of visiting conditions, and increase connections between the incarcerated and the greater surrounding communities.³³⁵ In fact, one of the most common criticisms of the current parental incarceration regime is the lack of coordination between criminal justice and welfare agencies.³³⁶ This is of particular concern to parents whose children are in state care while they are incarcerated since the operation of the ASFA can result in the termination of parental rights under the timetable.

In addition to these factors, researcher Nell Bernstein raises another layer to the discomfort faced by children visiting their incarcerated parents.³³⁷ She points to the racial disparities faced by many children visiting incarcerated parents³³⁸ and notes the disproportionate number of African-American children with

327. *Id.* at 126.

328. *Id.* at 126-28.

329. *Id.* at 133.

330. *Id.*; Murray & Farrington similarly suggest that outcomes for children of incarcerated parents might be improved by more “liberal prison policies.” Murray & Farrington, *supra* note 9, at 185-86, 188.

331. Arditti, *supra* note 24, at 134.

332. *Id.* at 117, 134.

333. *Id.*; Joyce A. Arditti et al., *Saturday Morning at the Jail: Implications of Incarceration for Families and Children*, 52 FAM. REL. 195, 196 (2003).

334. *Id.* at 135.

335. *Id.* (noting “Outreach scholarship within jail and prison settings could potentially enhance the ecology of visiting at correctional facilities by virtue of the research activity itself and the fact that someone outside the system is ‘showing up,’ providing much needed social validation.”).

336. Genty, *Collateral Consequence*, *supra* note 8, at 1682 (noting several commentators have discussed the critical need of criminal justice and child welfare systems to work together).

337. BERNSTEIN, *supra* note 1, at 60-61.

338. *Id.*

incarcerated parents often means that these children are visiting their parents in settings in which the majority of inmates and visitors are African American, while the geographic location of many prisons means that the majority of the guards are white.³³⁹ How the children perceive this setting and the impact on their development raises concerns and may explain a reluctance to visit.³⁴⁰

Facilitating visits and other forms of contact from prison would make it more difficult for “non-contact” or “abandonment” to be a basis for parental terminations. Moreover, the children and the inmates appear to benefit from ongoing contact.³⁴¹ Parent-child contact reduces many of the ill effects on children of parental incarceration and has been shown to improve inmate behavior and reduce recidivism.³⁴² There are a number of ways in which the visitation experience could be improved and the parent-child bond strengthened in ways to facilitate their relationship and avoid findings of neglect due to imprisonment.³⁴³ Federal and state funds should be provided to improve visiting rooms and parent-child communications. For example, prisons could set aside child friendly rooms in which parent-child visits can occur.³⁴⁴ A Fort Worth, Texas, program provides a playroom, parenting classes, and play therapy groups for inmates and their children that are held away from the prison. Prison staff reported that “the parenting programs improved inmate relations with their families and enhanced inmate’s self-esteem, thus preparing them to rejoin their families after release.”³⁴⁵ Other prisons have permitted Girl Scout programs for female parents in prison as a means of facilitating daughter-parent relationships.³⁴⁶ Still others have successfully instituted “webcam” technology that permits inmates and their families to engage in virtual visitation.³⁴⁷

339. *Id.*

340. See Arditti, *supra* note 24, at 133 (quoting a 2000 study by the Legal Aid Society of New York: “[V]isiting in prison is not pleasant for children because of security arrangements and the . . . grim physical setting of prison rooms.”).

341. Katz, *supra* note 291, at 37, 41.

342. Barry, *supra* note 67, at 150 (“Experts have concluded that visitation helps children adjust to parental incarceration . . . and that this consistent parent-child contact is critical for long-term healthy child development.”).

343. Block & Potthast, *supra* note 33, at 562; Miller, *supra* note 34, at 479. Miller found that more than twenty states have the Girl Scouts program. *Id.*

344. See generally Kerry Kazura & Kristina Toth, *Playrooms in Prison: Helping Offenders Connect with their Children*, CORRECTIONS TODAY (Dec. 1, 2004), http://www.accessmylibrary.com/coms2/summary_0286-18300046_ITM; Sametz, *supra* note 22, at 301; Block & Potthast, *supra* note 33, at 562-563.

345. Landreth & Lobaugh, *supra* note 27, at 158.

346. Block & Potthast, *supra* note 33, at 563-64. Girl Scout Beyond Bars programs can be found in at least 12 states. A review of the Maryland program found an increase in prison visits, an improvement in the mother-daughter bond, and improved communication between parent and child. *Id.* at 563, 568; Miller, *supra* note 34, at 479-80. Miller states that over 20 states have the Girl Scouts program. See also Krupat, *supra* note 9, at 41-42.

347. Virtual visitation is also increasingly being used in divorced families. See, e.g., David Welsh, *Virtual Parents: How Virtual Visitation Legislation is Shaping the Future of Custody Law*, 11 J.L. & FAM. STUD. 215, 215-16 (2008); Teresa Baldas, *Virtual Visitation Wins Approval*

5. Lowering Financial Barriers to Maintaining Contact

In addition to the physical space, another barrier to maintaining parental ties is the high cost of keeping in touch. State prison systems usually have phones that only allow collect calls and give the state a commission.³⁴⁸ Telephone calls from the facilities can cost up to six times more than the market rate.³⁴⁹ By contrast, federal prisons use a less expensive debit-calling system that allows inmates to use money in controlled accounts to place monitored calls to a limited group of phone numbers. Politicians have gotten involved in the issue of inequitable telephone charges from prison and have proposed a bill that would provide funding to subsidize telephone contact between prisoners and their children.³⁵⁰ Others have focused on investigating the reasons for inflated costs and have been working toward reducing these costs.³⁵¹ For example, Representative Bobby Rush introduced a bill that would have required the FCC to set fair rates for interstate phone calls made from prison and would prohibit the payment of commissions to correctional facility administrators by telephone service providers.³⁵² Unfortunately, the bill appears to be stalled in committee. As a result,

in Sixth State, N.Y.L.J., Aug. 26, 2009 (identifying Illinois, Florida, North Carolina, Texas, Utah, and Wisconsin as states that permit virtual visitation in divorced families).

348. BERNSTEIN, *supra* note 1, at 86.

349. Bernstein asserts that the cost of collect calls from prison is “as much as twenty times that of standard collect calls” in an arrangement that provides large profits for states as well as the phone companies. *Id.* Some families have successfully sued to obtain compensation for exorbitant telephone fees. *See, e.g.*, Zachary R. Dowdy, *Families of Prisoners Sue State Over Phone Charges*, NEWSDAY, Oct. 12, 2009, at A16, available at <http://www.newsday.com/news/region-state/families-of-prisoners-sue-state-over-phone-charges-1.1519293>.

350. *Id.*; *Keeping in Touch with a Parent in Prison*, N.Y. TIMES (Jan. 14, 2006), <http://www.nytimes.com/2006/01/14/> [hereinafter *Keeping In Touch*].

351. *See* Nicholas H. Weil, *Dialing While Incarcerated: Calling For Uniformity Among Prison Telephone Regulations*, 19 J.L. & POL’Y 427 (2005).

352. H.R. 1133, 111th Cong. (2009), available at <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=111> (search for “Family Telephone Connection Protection Act of 2009” and choose “Text of Legislation”). The bill was introduced in the House on February 23, 2009 and referred to committee. *Id.* The bill includes in its findings that, inter alia, the “telephone is the primary method by which individuals correspond and maintain contact with family members who are incarcerated in correctional institutions,” the “rates for calls from correctional institutions are some of the highest rates in the United States,” that “[i]t is clear from various studies that maintaining frequent and meaningful communications between people who are incarcerated and family members is key to the successful social reintegration of formerly incarcerated individuals. Such contact reduces recidivism and facilitates rehabilitation, which in turn reduces crime and the future costs of imprisonment,” and “[f]requent communications between incarcerated persons and family members is burdened, and in some cases, prevented, by excessive inmate telephone service rates. Excessive inmate telephone service rates thus weaken the family and community ties that are necessary for successful reentry into society by persons who were formerly incarcerated and the reduction in crime resulting from successful reentry.” *Id.*; *see also Keeping in Touch*, *supra* note 350. Advocacy groups continue to work on the issue. *See, e.g.*, MEDIA JUSTICE FUND OF THE FUNDING EXCHANGE REPORT, CRIMINAL CHARGES: EXCESSIVE PRISON PHONE RATES TAKE A TOLL ON INNOCENT FAMILIES (2009), available at http://www.fex.org/assets/395_mjfpisonphonesfinal.pdf.

there has been little movement towards making telephone contact less expensive and more accessible.

6. Offering Educational Opportunities for Parents and Families

Providing counseling and information may also help parents maintain a connection with their children and may increase the quality of parenting.³⁵³ Many parents who are incarcerated may not understand the impact their sentence may have on their rights or obligations as parents and that they are required to financially support their children despite their incarceration.³⁵⁴ Moreover, they may be unaware of how to go about fulfilling their role as parents and the resources that are available to them. In response to these concerns, a report released in June 2006 proposed that New York judges be required to advise criminal defendants of the civil consequences of pleading guilty.³⁵⁵

Families entangled in the criminal justice system would also benefit from parenting education programs,³⁵⁶ but they are almost nonexistent despite the fact that the few programs that have been implemented “to address family issues and provide parent training for incarcerated parents and their families have demonstrated the benefits of such interventions.”³⁵⁷ According to Landreth and Lobaugh:

Although the number of training programs for incarcerated parents reported in the literature is limited, the long-range impact of such programs seems to be substantial. . . . [and] family ties and parent training while the parent is in prison have a direct and positive correlation with parole success . . . [therefore] the maintenance of strong family ties with an incarcerated parent is positively related to healthy family functioning once the inmate is released.³⁵⁸

Landreth and Lobaugh note that “having a strong family relationship to return to has been highly associated with rehabilitation, successful release from prison, and lower recidivism rates.”³⁵⁹ Dr. Sametz suggests that “[t]he focus of

353. Kathryn L. Modecki & Melvin N. Wilson, *Associations Between Individual and Family Level Characteristics and Parenting Practices in Incarcerated African American Fathers*, 18 J. CHILD FAM. STUD. 530, 538 (2009).

354. Parents are still expected to maintain contact with their children and provide child support. See Travis, *supra* note 10, at 39.

355. John Caher, *Bar Mulls Civil Effects of Criminal Convictions*, N.Y.L.J., June 22, 2006. The report recommends encouraging contact between parents and children during periods of incarceration. The article also notes that the ABA is calling for codification of collateral consequences to make sure defendants are aware of these sanctions. *Id.*

356. Sametz, *supra* note 22, at 300; Murray & Farrington, *supra* note 9, at 188-89.

357. Landreth & Lobaugh, *supra* note 27, at 158.

358. *Id.*

359. *Id.*; see Harrison, *supra* note 27, at 589. Several programs are available to incarcerated parents across the country including programs in New York and Minnesota. For a description of the parental education and child-centered visiting room in the upstate New York prison, Sing Sing, see BERNSTEIN, *supra* note 1, at 96-107; see also Lynda Ferro, *Programs for Children*

this reform is not on a total revamping of the rehabilitation process . . . but on helping the incarcerated mother cope with her separation from her children, facilitating her acquisition of parental skills, and providing counseling services.”³⁶⁰

Given the right environment and sufficient programming, incarcerated individuals may actually thrive in their role as parents. Professor Luke proposes that “time spent in prison may actually improve an inmate mother’s parenting ability and relationships with her child.”³⁶¹ Indeed, “[t]he circumstances of incarceration may give these women time for introspection.”³⁶² Luke provides an example of a parenting program in a women’s prison in Shakopee, Minnesota.³⁶³ The prison provides a child friendly facility, parenting programs, an overnight visitation program for children under age twelve, and a special visitation program for teens.³⁶⁴ Corrections officers reported that the classes are “very popular with inmates and are consistently among the first classes to fill.”³⁶⁵

with *Incarcerated Parents*, MICHIGAN FAMILY IMPACT SEMINARS, http://www.familyimpactseminars.org/s_mifis05c06.pdf. The Bedford Hills Correctional Facility allows overnight and summer visits for older children. The program was founded in 1901, is funded by the Department of Correctional Services, and run by Catholic Charities. The center is open all year and has a playroom where children can visit with parents. The Bedford Center provides one of the most comprehensive set of programs available for the children of incarcerated parents. Services include: bilingual parenting, holiday activities, infant day care, parenting and prenatal classes, a transportation program for caregivers and children, and a nursery where mothers can be with their children for up to one year. *Id.* at 27, 30. The Nebraska Correctional Center for Women also has a nursery program that allows mothers to keep infants near them while they are incarcerated. *Id.* at 29; Dave Ghose, *Nursery Program Aids Jailed Moms in Four States*, STATELINE (Sept. 14, 2002), <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=14972>. For information on Minnesota, see Cecilia Hughes, *Volunteers Of America of Minnesota: Family Treatment Program’s Prison Visitation and Transportation Program*, CW360: A COMPREHENSIVE LOOK AT A CHILD WELFARE ISSUE, Spring 2008, at 27, 27, available at <http://www.cehd.umn.edu/ssw/cascw/attributes/PDF/publications/CW360.pdf>. The Volunteers of America of Minnesota Prison Visitation Program services mothers incarcerated at the Pekin Federal Prison in Illinois by allowing mothers with limited financial resources to visit with their children who reside in Minnesota. The program is need-based and a federal court determines eligibility. The program allows for quarterly visits of mother and child as well as support meetings before and after each visit. The trips are always for a weekend, and visitation occurs on Friday night, all day Saturday, and part of Sunday. *Id.*

360. Sametz, *supra* note 22, at 302.

361. Luke, *supra* note 31, at 936.

362. *Id.*

363. *Id.* at 936-42.

364. *Id.* at 936-37.

365. *Id.* at 936-38. Some studies have also been conducted on the benefits of providing therapy for children whose parents are incarcerated. See, e.g., Julie Poehlmann et al., *Children’s Contact with Their Incarcerated Parents: Research, Findings, and Recommendations*, 65 AMER. PSYCH. 575, 594 (2010) (discussing the importance of psychologists as instrumental in preparing a child to deal with visiting a parent in prison). Some material has been developed to help young children deal with the trauma of an imprisoned parent. See, e.g., REBECCA M. YAFFE & LONNIE F. HOADE, *WHEN A PARENT GOES TO JAIL: A COMPREHENSIVE GUIDE FOR COUNSELING CHILDREN OF INCARCERATED PARENTS* (2000) (providing a guide for young children about dealing with the arrest and incarceration of a parent).

7. Creating Programs for Children and Caretakers

Providing support for children whose parents are incarcerated may also help ease some of the ill effects of parental incarceration.³⁶⁶ In recognition of the importance of the issue, the United States government has allocated significant grant funding for programs to encourage mentoring of children with parents in prison.³⁶⁷ While a mentoring system has advantages, mentors can certainly not take the place of parents.

Finally, states should provide greater, more consistent support to the caretakers of children of imprisoned parents.³⁶⁸ The children of incarcerated parents often end up being cared for by grandparents, who can face significant challenges rearing children and helping them cope with the effects of their parent's incarceration.³⁶⁹ Therefore, it is not surprising that caregivers for children whose mothers are incarcerated report that they experience serious financial stress.³⁷⁰ Caregivers are concerned about how, given limited time and financial resources, they can help to maintain the ties between child and incarcerated parent.³⁷¹ With additional support, relatives would be better able to afford to support these children, rely less on state-based care, and avoid the impact of the ASFA goals and timetables. Without making greater and more consistent efforts to bridge the gap between incarcerated parent and child and concerted efforts to preserve these families, termination of parental rights of imprisoned parents remains problematic.

366. This Article does not address the additional problem raised by incarcerated parents who voluntarily relinquish their parental rights when incarcerated and the extent to which that might be a result of the lack of support to help them maintain their parent-child relationships. *See, e.g.,* Heather Britton, *Standing in the Wake of In Re Cesar L.: The Effect on Parents' Rights After Termination*, 19 GEO. MASON U. CIV. RTS. L.J. 663, 674-75 (2009).

367. The Family & Youth Services Bureau of the United States Department of Health & Human Services provides federal funding for Mentoring Children of Prisoners Programs. *Family and Youth Services Bureau, Mentoring Children of Prisoners*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, <http://www.acf.hhs.gov/programs/fysb/content/programs/mcp.htm> (last visited Dec. 15, 2010). Some programs are geared toward prisoners' children; others are more generally focused on mentoring at risk youth. *See, e.g.,* CHILDREN OF PROMISE, NYC, www.childrenofpromisenc.org (last visited Dec. 15, 2010) (describing organization that provides mentoring, academic enrichment, recreational activities and therapeutic services for children with a parent in prison as well as services for the child's caregiver); FOUNDATION FOR SECOND CHANCES, <http://www.ffscinc.org> (last visited Dec. 15, 2010) (describing organization that provides mentoring and teen programs); BIG BROTHERS BIG SISTERS, <http://www.bbbs.org> (last visited Dec. 15, 2010) (describing mentoring programs throughout the country).

368. Murray & Farrington, *supra* note 9, at 187-89 (offering state strategies to support caretakers of children of incarcerated parents to prevent adverse outcomes for said children).

369. BERNSTEIN, *supra* note 1, at 110.

370. *Id.* at 115-16; BAUNACH, *supra* note 61, at 33, 38-39; Arditti, *supra* note 333, at 199-200, 201.

371. Loper, *supra* note 59, at 84 (citing Arditti, *supra* note 333).

CONCLUSION

The current approach to parental terminations, which permits courts to weigh incarceration as a factor, fails to adequately address the needs of families and communities.³⁷² Given the strength of the predictive nature of parental incarceration as a risk factor for children, it is clear that greater attention needs to be paid to how to improve and facilitate these parent-child relationships when it is appropriate to do so.³⁷³ Incarceration should not be a proxy for or a factor in assessing parental fitness. Removing parental incarceration as a factor would still provide opportunities for states to protect children from harm while preserving parental bonds. Children deserve a more searching inquiry into their family context and greater access to resources. Rethinking ways in which current ideologies about family adversely affect the poor, people of color, and the incarcerated is warranted. These families are worth preserving not only because of the constitutional rights that may be at issue but because in many cases parents, the children, and their communities would benefit from maintaining these ties. Terminating parental rights is often the wrong solution to a complex set of problems; given increased parental incarceration, it is paramount that further efforts to maintain family connections be taken. Parental terminations and hoped-for adoptions are not adequate solutions to the myriad problems that plague these families, these communities, and an underfunded child welfare system. In one account, a child whose father is serving a life sentence states: “Many people think we’re doing a service to children, when a parent is doing life, in having them sever contact. . . . But as children, we understand who we are as human beings by understanding who our parents are.”³⁷⁴

372. High rates of incarceration likely decrease public safety in communities. Clear, *supra* note 30, at 102.

373. See BAUNACH, *supra* note 61, at 5.

374. BERNSTEIN, *supra* note 1, at 95.