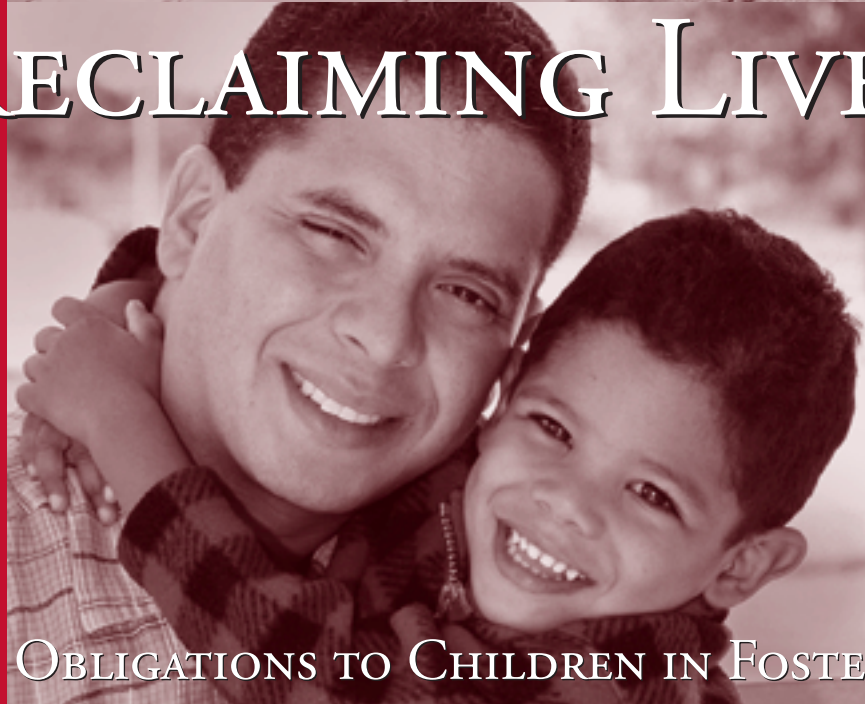




REBUILDING FAMILIES, RECLAIMING LIVES



STATE OBLIGATIONS TO CHILDREN IN FOSTER CARE
AND THEIR INCARCERATED PARENTS



by Patricia E. Allard
Lynn D. Lu



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Foreword

By Nell Bernstein

Anthony was four years old the day his mother Elizabeth made the mistake that would separate the two forever. Elizabeth had filled her cart with 80 dollars' worth of groceries and was standing in line waiting to pay for them. On impulse, she picked up a cigarette lighter and slipped it into her pocket. In a lifetime that had already given her plenty to regret, Elizabeth would come to regret this action more than any she had ever taken. It would trigger a chain of events that left her unlikely ever to see her child again.

Elizabeth, 39, was not simply a shoplifter; she had a lengthy history of using and selling methamphetamine. It is a history she said drew to a close within the last few years, as, in fits and starts, she managed to get herself into a rehab program, secure permanent housing, stop using drugs, and stabilize her life. But Elizabeth didn't do these things quickly or consistently enough; didn't do them on the timetable handed to her by the court that claimed jurisdiction over her son in the wake of her shoplifting arrest. As a result, she saw her parental rights permanently terminated and her child placed for adoption.

Elizabeth often wonders how Anthony understands her disappearance from his life. "He'd just turned four when all this happened," she said,

and what he understood as far as why he wasn't in mother's care was, "Mom had a drug problem and she had no place for you to live." So he always thought if Mom got a home and went to this [rehab] program, that he'd come back home. Now he's seven, and Mom did all these things, and he's still not home. You've got to wonder where his little mind takes him. He's still my child, and there's always going to be that question in his mind: "How come I'm not with Mama?"

In this most necessary report, the Brennan Center for Justice at NYU School of Law explores the Bermuda Triangle of criminal and child welfare law into which Anthony and his mother were swept. Since the passage of the Adoption and Safe Families Act of 1997 ("ASFA"), which requires that states cease efforts to reunify families in the child welfare system and begin proceedings to terminate parental rights as soon as a child has been in foster care for 15 out of the most recent 22 months, termination proceedings involving incarcerated parents — who routinely serve sentences, even for non-violent property or drug crimes, that exceed 15 months — have more than doubled.¹ The collision between these two systems — child welfare and criminal justice — was largely overlooked by those who drafted ASFA, but has had the most profound effect imaginable on children with incarcerated parents, consigning them to permanent separation not only from their parents but also, too often, from the rest of their family as well.

Ahmad² is a child who learned the hard way that when his recently incarcerated mother's parental rights were terminated, he would lose his right not only to her care and company, but to remain part of his extended family as well — a sister, grandparents, aunts, and cousins erased with a sweep of the judicial wand.

“Mommy, I’m sorry, I won’t be bad again,” he recalls screaming as he was hauled away from his mother, after the court rescinded forever their right to remain a family. Ahmad went on to be adopted by a single father and taken to another state; even his family photos were taken, in order, he was told, to spare him “confusion.” “I was reaching out to her, begging, trying to have that last hug. They picked me up and just took me away.”

This report highlights the urgent need to give families caught up in both the criminal justice and child welfare systems a fighting chance to survive and strengthen their communities. Particularly valuable is the report's consideration of the terminal vagueness of the “reasonable efforts” standard — the requirement that states give families the support they need to reunify successfully before taking the extreme measure of dissolving those families forever. While the demands made of parents seeking to get their families out of the child welfare system — and the timelines under which they must meet those demands — are grindingly specific, the state's end of the bargain remains so ill-defined as to be unenforceable, leaving otherwise viable families without the supports they need to reunite and thrive.

Tightening and enforcing the requirement that states make reasonable efforts to reunify children in their care with their incarcerated parents is certainly essential to fulfilling the implicit promise of child welfare — that we will keep children safe without unnecessarily compromising their connection and future with their families, and that we will sever that connection only as a genuine last resort. But the question of how much help is “enough” to reunify families facing the difficult challenges that may lead to parental incarceration — such as poverty and substance abuse — and when withdrawing help becomes “reasonable,” remains difficult to answer.

What might aid in this determination, I've come to believe, is a “reasonable child” standard, akin to case law's “reasonable person” standard; a measure that at least strives to recognize the intensity of a child's connection to, and need for, her parent, however imperfect that parent might be. When the court is considering an act as radical as severing a child from her family, this may be the only standard rigorous enough to do justice to the finality of that breach, and the depth of that child's potential loss over a lifetime.

Having talked to a number of children who have seen their familial fate decided by the court, this standard seems to me neither excessive nor unattainable. Here, for example, are Ahmad's eminently reasonable suggestions for what might have been in his own best interest as a child whose mother loved him, and was addicted to drugs:

The system, all they saw was a drug-addicted mother. “We don’t want this baby to be affected by this drug-addicted mother. The baby could do better without her.” They wanted to protect little Ahmad. Why didn’t they care about his mother?

There are mothers out there that are abusive to their kids, so the system has to step in and do something about that. That’s understood. But when there’s a mother struggling with an addiction, struggling with herself, but is not abusive towards her kids, then the system has to help better that situation. Help the mother as well as the child.

What would have helped me most is compassion for my mom. Services must be provided to the mom. We have to bring the mom back, so the mom can be a mother to the child.

Ahmad’s analysis makes clear that there is in fact only rarely a dichotomy between a child’s rights and his parent’s; that protecting a child in the majority of cases *includes* protecting his right to be part of his family. *What would have helped me most is compassion for my mom.*

“Kids own the right to have a relationship with their parents,” asserts Ellen Barry, the founding director of Legal Services for Prisoners with Children, “even if they’re not the best parents.... Society does have an obligation to keep children safe, but that’s very different from terminating parental rights.”

In fact, Barry observes, termination itself is a concept the most reasonable child will have a hard time even grasping. “It makes no sense to them that the court could come in and, with a wave of the hand, decide that the mother who gave birth to them is no longer their mother. Whether she’s able to take care of them at this moment is a separate question.” Stuck on the notion of children as property that can’t be “owned” by more than one family, we gloss over this distinction, at children’s expense.

At age 15, Terrence³ spent five months alone in an empty apartment after police removed his drug-addicted mother. Like Ahmad, he offered an alternative vision of a potential response to his mother’s drug use, one that respected both his need for safety and his connection to his mother:

I think they shouldn’t have took my mama to jail that first time. Just gave her a ticket or something, and made her go to court, and give her some community service. Some type of alternative, where she can go to the program down the street, or they can come check on her at the house. Give her the opportunity to make up for what she did.

Using drugs, she’s hurting herself. Take her away from me, and now you’re hurting me.

As I’ve spoken and written over the years about child welfare and criminal justice, a not-uncommon response has been some version of, “This is all very sad, but really, this is what you get. This is what happens to children whose

parents use drugs, or otherwise break the law, and if you didn't want it to happen to YOUR children, well, you should have thought of that first." Here, for example, is an excerpt from a reader's response to a piece I wrote about the fact that increasing numbers of women are losing their parental rights after being arrested even on minor charges: "It is about time our government got it together and realized that mothers who use drugs are UNFIT mothers and do not deserve to be mothers. I am so glad to see that these junkie losers are finally getting what they deserve."

Disparaging language aside, the question of how to enforce parental responsibility is a fair one. But our obsession with just deserts — under a retributive model of justice — does children no favors. In fact, even when their name is invoked to perpetuate this punitive model of child "welfare," it remains one in which children's needs are very much overlooked.

"Aren't there some people who just don't deserve to be parents?" a talk-radio host asked me recently, on-air. I don't know the answer to that, but I do know this: I've yet to meet the child who doesn't deserve parents. What children of incarcerated parents deserve is to be treated, wherever possible, as part of a viable, vital, existing family unit whose bonds can be strengthened, rather than severed.

Emani Davis, who's spoken widely about the experience of having a parent incarcerated for most of her life, said something once that has always stayed with me. Her great struggle, she said, is to "have people truly understand our loss as children of incarcerated persons. Because somehow, many people have convinced themselves that we're special families, unique families. That we're a different kind of kids. And we're just like everyone else. We love our parents as deeply. They love us as deeply. And loss is just as painful for us as it is for anybody else."

The challenge that Ahmad, and Terrence, and Emani pose — that we find a way of addressing both a parent's crime and a child's need for safety that does not require the wholesale erasure of family connections — is more than reasonable. It is, on the most fundamental level, just.

NELL BERNSTEIN is the author of *All Alone in the World: Children of the Incarcerated* (2005). She coordinates the San Francisco Children of Incarcerated Parents Partnership (www.sfcipp.org).

Notes

1 Women in Prison Project, Corr. Ass'n of N.Y., *When "Free" Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State* (2006), available at http://www.correctionalassociation.org/WIPP/publications/Incarcerated_Mothers_report.pdf.

2 "Ahmad" is a pseudonym.

3 "Terrence" is a pseudonym.

Executive Summary

The impulse to simply write off families with parents in prison and children in foster care is strong. After all, both the criminal justice and child welfare systems are systems of last resort — places where people and kids end up when something in their lives or families has gone terribly wrong. As instinctive as this impulse may be, it is flawed. Where the state has intervened in a family in such powerful ways, both by incapacitating a parent and removing a child from his or her home, the state also has an obligation and an opportunity to help the family overcome its challenges.

According to the Adoption and Foster Care Analysis and Reporting System (“AFCARS”),¹ administered by the U.S. Department of Health and Human Services, of the children in foster care at the end of fiscal year 2003, over 29,000, or 6%, had been removed because of parental incarceration. The majority of parents in state prison are convicted of non-violent offenses, including drug offenses. As a growing number of families suffer the consequences of parental incarceration, states need federal guidance and support in order to help families reunify.

Federal child welfare law requires states to make “reasonable efforts” to reunify families, including many families with incarcerated parents. At the same time, the Adoption and Safe Families Act of 1997 (“ASFA”) limits efforts to reunify families and the time children may spend in foster care before their families are dissolved forever. All children who have a parent in prison, even children in private substitute care, face great challenges to preserving a connection with their parents. Children in foster care who have an imprisoned parent encounter additional hurdles to maintaining a relationship with their parents — obstacles that cannot be overcome without assistance from the child welfare authorities that have taken over their care.

Maintaining familial bonds between parents and children despite separation due to parental incarceration is essential to all children’s emotional well-being. The preservation of bonds between a child and

an incarcerated parent — whether through prison visits or regular communication by phone, video, or audiotape — may reduce the negative effects on children of the parent’s sudden physical absence. Preserving relationships is not only important for children of incarcerated parents, it also has positive effects on parents’ rehabilitation.² Corrections agencies have long recognized that strong parent-child relationships during parental incarceration further important penological goals.

In light of the unique barriers to reunification that families with incarcerated parents face, “reasonable” reunification efforts must include not only services tailored to the physical and emotional needs of parents and children separated by prison walls, but also a reasonable time period in which to draw meaningful and lasting benefits from such services both during and after parental incarceration. A few states have taken affirmative steps to alleviate the harsh consequences of parental incarceration on children by specifying efforts agencies must make to facilitate reunification. However, most state agencies — and the courts that oversee them — lack clear guidance in how to implement or evaluate reasonable reunification efforts for families with incarcerated parents. As a result, a patchwork of “reasonable efforts” standards for incarcerated parents and their children exists among the states, with many states making no effort to address the unique needs created by a parent’s incarceration. State child welfare agencies and corrections departments need strong federal guidance on how to meet the needs of children in foster care and their incarcerated parents. Without this guidance, states will not meet their obligation to rebuild families and reclaim lives.

Recommendations

Federal policy makers have the opportunity to address family reunification needs of children and their incarcerated parents by:

- Specifying the scope of reasonable efforts and family reunification services states should provide in order to meet the unique needs of incarcerated parents and their children;
- Mitigating the harsh effects on incarcerated parents and their children of ASFA's mandate to seek termination of parental rights when a child has been in foster care for 15 of the last 22 months by developing a time frame taking into account their unique situation; and
- Increasing the availability of comprehensive family- and community-based substance abuse treatment programs at the federal and state levels to divert parents from prison.

Notes

1 AFCARS, "a federally mandated data collection system intended to provide case specific information on all children covered by the protections of Title IV-B/E of the Social Security Act (Section 427)" — in other words, for all children who are currently in the custody of state child welfare agencies — provides one of the most reliable national pictures of children in foster care. Nat'l Data Archive on Child Abuse and Neglect, Cornell University, *Adoption and Foster Care Analysis and Reporting System User's Guide and Codebook for Fiscal Years 2000 to Present IV* (2002), available at http://www.ndacan.cornell.edu/NDACAN/Datasets/UserGuidePDFs/AFCARS_Guide_2000-Present.pdf. All states are required to collect and report information on each of their child welfare cases, which is in turn analyzed through AFCARS. See *id.*

2 Re-Entry Policy Council, Council of State Gov'ts, Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community 192 (2004), available at <http://www.reentrypolicy.org/rp/AGPNet/Components/DocumentViewer/Download.aspxnz?DocumentID=1152>.

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Introduction

When my mother was sentenced, I felt that I was sentenced.... She was sentenced to prison — to be away from her kids and her family. I was sentenced, as a child, to be without my mother.

— Antoinette, now an adult,
who was 8 years old when
her mother was incarcerated¹

The impulse to simply write off families with parents in prison and children in foster care is strong. After all, both the criminal justice and child welfare systems are systems of last resort — places where people end up when something in their lives or families has gone terribly wrong. So the thinking goes, parents who break the law cannot possibly be good mothers or fathers, and their children are better off without them; the best thing society can do for children with the misfortune of being born to parents who end up in prison is remove them from those parents and find them better ones. As instinctive as this impulse may be, it is flawed. Parents who break the law can still be good, attentive, and supportive parents. And children with an incarcerated parent may be better off if allowed to build or maintain a strong relationship with that parent instead of being directed to move on and bond with a new family.

Family relationships are complex — perhaps the most complex relationships there are. Recognizing this, our nation has developed a system of legal standards to address those complexities effectively, ensuring our instincts do not overwhelm reason when deciding what is best for parents, children, and families in crisis.

Families with a parent in prison and a child in foster care present a particularly thorny set of questions. Isn't evidence of criminal wrongdoing a sign that someone is a poor parent? Even if someone is a good mother, how can she parent when she is separated from her child by prison walls? Isn't society better off protecting children from criminals, even if those criminals happen to be their parents?

As more and more parents go to prison while their children go into foster care, there are sure to be more child welfare caseworkers, corrections officials, and courts grappling with these questions. This report explores how federal policymakers can better guide state and local decision makers as they address the needs of families affected by incarceration, and determine whether to reunify them or sever their ties permanently. Section I provides an overview of the impact of parental incarceration on families, including those with children in foster care. Section II explores current federal child welfare policies encouraging states to limit family reunification efforts based on timelines and classifications that fail to factor in the unique and complex situations in which families with incarcerated parents find themselves. Section III examines how states have implemented federal child welfare policies affecting families straddling both the child welfare and criminal justice systems. Section IV identifies opportunities to improve reunification efforts for families with incarcerated parents and children in foster care.

I. Families Affected by Parental Incarceration

Over the past decade, the number of incarcerated parents has increased significantly, reflecting the growth in the numbers of people serving longer sentences for non-violent offenses.² The Bureau of Justice Statistics reports that between 1991 and 1999 the number of minor children with a parent in state or federal prison rose by over 500,000 — from 936,500 to 1,498,800.³ Incarceration rates for women also skyrocketed in the 1990s, nearly doubling the number of children with an incarcerated mother.⁴ Most incarcerated parents — 64% of mothers and 44% of fathers in state prison, and 84% of mothers and 55% of fathers in federal prison — lived with their children before their arrest.⁵

Momentary arrests, where she's out in two days, mean a woman could lose her kids. She gets arrested for petty theft. There's nobody to take the kids. Child Protective Services gets involved. They take the kids to the nearest emergency shelter. Now they've opened a case. When that person gets out in two days or two weeks she can't meet the requirements to get her kids back.

— Ida McCray,
Families with a Future⁶

While all families separated by prison walls must contend with correctional policies and social bias in their efforts to maintain familial bonds, many children and incarcerated parents are also subject to the policies of the child welfare system. Since its passage, the Adoption and Safe Families Act of 1997 (“ASFA”), imposing strict limits on efforts to reunify families, has had a particularly severe impact on children of incarcerated parents.

In 1997, an estimated 10% of children with an incarcerated mother and 2% of those with an incarcerated father were in foster care — in the legal custody of the state and often in the physical care of institutions or

strangers.⁷ According to the Adoption and Foster Care Analysis and Reporting System (“AFCARS”),⁸ administered by the U.S. Department of Health and Human Services, of the children in foster care at the end of fiscal year 2003, over 29,000, or 6%, had been removed because of parental incarceration.⁹ As state reporting of AFCARS data is in some cases incomplete, this figure represents a conservative estimate.¹⁰

African-American children are nearly nine times more likely than their white counterparts to have an incarcerated parent, while Latino children are three times more likely than white children to have a parent behind bars.¹¹ African-American children are also disproportionately overrepresented in the foster care system. Nationwide, 40% of children in the legal custody of the state are white and 34% are black,¹² while 69% of the nation’s population of children are white and only 15% are black.¹³

A. Reasons for Child Removal and Parental Incarceration

Poverty and substance abuse play integral roles in increasing both parental incarceration and the placement of children in foster care. In the month before arrest, 54% of all parents incarcerated in state prison reported monthly incomes below \$1,000.¹⁴ Homelessness, another indicator of poverty, affected almost 1 in 10 parents who were later incarcerated.¹⁵ Of the 29,000 children removed from their homes nationwide in fiscal year 2003 due to parental incarceration, a parent’s drug use was a concurrent reason for removal in 45% of those cases,¹⁶ while in nearly 1 in 4 cases inadequate housing was listed as a co-existing reason for removal.¹⁷

The majority of parents in state prison — 54% of fathers and 73% of mothers — were convicted of non-violent offenses, including drug offenses,¹⁸ where the median sentence length imposed by state courts for drug offenses is 36 months’ imprisonment, and for property offenses, 28 months’.¹⁹ Mothers in state prison were more likely than fathers to have been convicted of drug and drug-related crimes.²⁰ Indeed, drug offenses represent the most significant reason for maternal incarceration. Most incarcerated parents, especially incarcerated mothers, suffer from drug addiction, leading to disproportionately high incarceration rates for drug or drug-related offenses.²¹ Although their rate of drug use is less than or comparable to that of men or white women,²² Latina and African-American women are more likely than

any other social group to be incarcerated for drug offenses.²³ The majority of parents in state prison reported using drugs in the month before their arrest, and a significant proportion of parents reported being under the influence at the time they committed the offense for which they were incarcerated.²⁴

When people are in crisis, it's one of the best opportunities to change... If you can intervene during the crisis of arrest and incarceration, and help someone identify ways to change, it's a tremendous opportunity.

— Arlene Lee,
Federal Resource Center
for Children of Prisoners²⁵

A study of mothers in New York state prisons and jails conducted at the request of New York City's Administration for Children's Services found that the majority of mothers were incarcerated for property and drug offenses, and that "[t]he vast majority (90 percent) of maternal incarcerations that overlapped child placement started *after* child placement, as did 85 percent of the arrests that led to those incarcerations."²⁶ Researchers concluded that "child removal appear[ed] to accelerate criminal activity among the study group's mothers."²⁷ This study's findings suggest that if children are coming into contact with state child welfare agencies prior to parental arrest or incarceration, it may be possible to provide family services, such as family-based substance abuse treatment, to prevent both child removal and subsequent parental incarceration. The researchers conclude that "family preservation efforts may function as a crime reduction tool. Successful efforts to avert placement not only keep families together and children out of foster care, but can also prevent the increase in maternal criminal activity that can take place following a child's removal."²⁸

B. Benefits of Preserving Relationships Between Children and Their Incarcerated Parents

Families benefit when bonds between parents and children remain intact despite a parent's incarceration. According to the Women in Prison Project of the Correctional Association of New York, "[r]esearch on children in foster care reveals that family visits are vital to maintaining ties, bolstering children's well-being and healthy development, reducing the trauma of separation, and assisting families to reunify after a parent's

release.”²⁹ Agency efforts to help parents and children in “maintain[ing] contact during incarceration reassures children of their parents’ love...[and] increases the likelihood that families can be successfully reunited when prisoners return home.”³⁰

She[’s] still the same,...except that she can’t be there physically.... She encourage[s] me so much to keep going.... I love that about her. Even though she [is] in a negative situation, she’s just a positive person. She makes anything feel better when I talk to her.

— Carl, 18, whose mother is serving a life sentence in federal prison³¹

We made the most of each visit that we had.... My mom was very special about trying to give time to each child....but just me being relaxed and having fun with my mother is what I remember most.

I couldn’t even begin to express to you in words...how fulfilling that was to my soul to give my mother a hug. For her to give me a kiss. For me to sit on her lap. And for me to not do that — I would have felt very empty then, as a child, and maybe as well now.

— Jundid, 17, describing his mother’s arrest when he was three years old³²

For families with children in foster care, who face not just physical separation but also strict time limits for reunification efforts, contact is critical to successful reunification. As one state court has observed: “It may be increasingly difficult to maintain bonding” where parent and child have been physically separated without regular contact or communication.³³ “In essence, the process makes the bonding difficult, then social services agencies rely on the lack of bonding as one of the reasons” for permanently breaking up families.³⁴

We have heard numerous complaints of incarcerated parents being told that if they want the foster care worker to recommend re-unification upon the parent’s release from prison, the parent should waive his or her right to visitation; after all, the parent is told, any caring and loving parent would not ask their child to go

through such an arduous journey and then have to face a prison visiting room. Thus parents are pressured into waiving their only opportunity for direct contact with their children.

— Dori Lewis and John Boston,
New York Legal Aid Society
Prisoners' Rights Project³⁵

Preserving relationships is not only important for children of incarcerated parents; it also has positive effects on parents' rehabilitation.³⁶ Corrections agencies have long recognized that strong parent-child relationships during parental incarceration further important penological goals. Maintenance of family ties promotes "inmate morale, better staff-inmate interactions, and more connection to the community, which in turn has made [inmates] less likely to return to prison" upon release.³⁷ "Prison officials and researchers agree that strong family ties motivate inmates to participate in programs and maintain good behavior, improve inmates' state of mind, lead to easier prison management, and greatly reduce recidivism."³⁸

It's very healing for [these] kids to have the kind of loving relationship that other kids have with their mothers.... And it restores something really precious to the women; it gives them a chance to fulfill their most important role in life. When people are doing well emotionally, when they feel hope, feel encouraged, they can do much better in here.

— Corrections official, describing
impact of Girl Scouts Beyond Bars,
which permits girls and their mothers
to participate in troop activities in prison³⁹

C. Barriers to Family Reunification for Children and Their Incarcerated Parents

Children, parents, and corrections officials value strong family bonds during incarceration. Still, the most recent data collected show the majority of mothers (54%) and fathers (57%) in state prison had not visited with their children.⁴⁰ Eighty-four percent of parents in federal prison and 62% of those in state prison are housed 100 miles or more from where their children live, and many prison facilities are inaccessible by public transportation.⁴¹ Incarcerated parents may be transferred to

other prisons without notice to their families or their children's caseworkers, interrupting contact between parents and their children.⁴² Professor Creasia Finney Hairston, Dean of the Jane Addams College of Social Work at the University of Illinois at Chicago, observes that “[i]mprisonment, in and of itself, presents major obstacles to the maintenance of family ties. Prisoners are not at liberty to see or talk to their children whenever they like. They cannot engage in their children's daily care, nor can they be present to assure their children's safety. They have no control over their own jobs or income and are not likely to have much to contribute to their families' financial support.”⁴³ Where children are in foster care, parents may face the added burden of locating them or reaching caseworkers to facilitate contact.

When children are able to visit their parents, the experience may prove difficult for both. Most prisons do not offer child-sensitive visiting facilities and often impose severe restrictions on how parents and children may communicate during visits.⁴⁴ Prison procedures, such as lockdowns or unanticipated inmate head counts, may result in children waiting long periods before seeing their parents, and limited time to actually spend together.⁴⁵ Intrusive security checks and encounters with prison guards ill-equipped to interact appropriately with children can also sour prison visits.⁴⁶ Communication by telephone presents its own obstacles. Accepting collect calls from prison is costly.⁴⁷ According to a Bureau of Justice Statistics study, 43% of fathers and 33% of mothers in state prison had never communicated with children by phone, and 32% and 21%, respectively, had never exchanged letters.⁴⁸

Children depend on their substitute caregivers — who may be low-income, be elderly, or lack access to transportation — to invest time, effort, and money to visit, call, or write their parents. Some substitute caregivers — even those related to the incarcerated parent — may object to any communication or visits between a child and the parent, and therefore not facilitate it.⁴⁹

Where a child is in state care, contact between an incarcerated parent and the child's caseworker is of vital importance as well. Yet the prison policies discussed above also prevent communication between parents and caseworkers,⁵⁰ undermining both a parent's ability to remain apprised of a child's safety and well-being and her ability to be an active participant in planning for the child's future.

Despite the importance of parental contact with caseworkers, many agencies do not accept collect calls.⁵¹ Additionally, incarcerated parents may have restricted phone privileges, further limiting their ability to reach caseworkers.⁵² Even if parents are successful in establishing contact with caseworkers, prison transfers or rapid staff turnover at child welfare agencies may lead to a breakdown in communication.⁵³ While telephone and mail are the most likely forms of communication between caseworkers and parents, actual visits with caseworkers to discuss plans for family reunification or to demonstrate the vitality of the parent-child bond, clearly the most desirable form of contact, are rare.⁵⁴

II. Federal Child Welfare Law

Since 1935, Congress has provided financial and technical assistance to states for the protection of abused and neglected children.⁵⁵ Through the introduction of the Adoption Assistance and Child Welfare Act of 1980 (“Child Welfare Act”)⁵⁶ and the Adoption and Safe Families Act of 1997 (“ASFA”),⁵⁷ Congress attempted to limit the placement of children in foster care for unnecessarily long periods of time. The Child Welfare Act encouraged states to reunify children in foster care with their families whenever possible by assisting them with improvement of parenting skills and other challenges, such as those stemming from poverty and substance abuse. Nearly two decades later, ASFA encouraged states to promote adoption, rather than family reunification, as the ultimate goal for children who have been in foster care for longer than 15 out of the most recent 22 months.

Families dealing with parental incarceration present a growing and complex issue in the child welfare arena. With assistance, many such families stand a chance of healthy and safe family reunification. However, Congress has yet to address the unique needs of the increasing number of children who are in state care not because of physical abuse, but because of parental incarceration for non-violent offenses.

A. The Adoption Assistance and Child Welfare Act of 1980

Congress passed the Child Welfare Act in 1980 because it viewed the national child welfare system — under which half a million children were in foster care — as being in a state of crisis. The foster care case-load nationwide nearly tripled between 1961 and 1977.⁵⁸ Around the same time, the number of people in prison, many of them parents, began to increase steadily — from 196,000 in 1970 to 316,000 in 1980.⁵⁹ As state legislatures and Congress enacted punitive “tough on crime” laws fueling unprecedented growth in the prison population,⁶⁰ Congress simultaneously urged states to reduce the number of children in state care.

As Congress made substantive reforms to shift state child welfare agencies’ focus towards keeping or moving children out of foster care,

it recognized the crucial importance of successful family reunification as one way of ending children's stays in foster care. Accordingly, Congress conditioned states' receipt of federal child welfare funds on state agencies' making "reasonable efforts" to prevent the removal of children from their families and, where removal could not be prevented, to facilitate family reunification.⁶¹ Policymakers attempted unsuccessfully to increase the availability of family services by expanding federal matching grants to states for family reunification services, and by placing a cap on federal matching funds for foster care maintenance.⁶²

The "reasonable efforts" provision of the Child Welfare Act represents one of its most important contributions to state child welfare reform, directing states to help parents overcome their difficulties as a way of returning children safely to their own homes. Yet because Congress did not define "reasonable efforts," it left states with no guidance as to the scope of efforts they were required to undertake to help families in crisis remain intact. Nor did the Department of Health and Human Services ("HHS"), authorized to promulgate federal regulations implementing the Child Welfare Act, ever define "reasonable efforts."⁶³ HHS actually proposed federal regulations in December 1980, during the administration of President Jimmy Carter. Those draft regulations required state child welfare plans to include a range of services available to families in contact with the child welfare system to reunify families in the event child removal into foster care was necessary, as well as to establish written guidelines to aid caseworkers in their efforts to reunify families. However, the agency never implemented those regulations.⁶⁴

The "reasonable efforts" provision of the Child Welfare Act represents one of its most important contributions to state child welfare reform, directing states to help parents overcome their difficulties as a way of returning children safely to their own homes.

The commentary accompanying the 1980 proposed regulations identified a list of required services that formed "the core of agency support to families which allow reunification while reducing the risk of neglect, abuse, etc. and reinforcing the family's own strengths."⁶⁵ Moreover, the commentary clarified, "[a] reasonable effort must go beyond an explanation in the case plan that these services were not available," and

1980 Proposed Reasonable Efforts Regulation

A state's program of services designed to help children return to their homes *shall* include —

(A) Day care services, homemaker or caretaker services, and family or individual counseling for parent(s) and child available to all children and families in need;

(B) Other services which the State agency identifies as necessary and appropriate to facilitate reunification of children and families such as respite care; parent education; self-help groups; provision of, or arrangements for, mental health, alcohol and drug abuse counseling, and vocational counseling or rehabilitation.

(C) Written guidelines which stress the value of worker involvement with the family of the child early in the placement and the importance of maintaining and strengthening parent-child relationships through frequent and regular visits. The guidelines shall contain principles, policies and procedures which workers must follow....⁶⁶

“[s]tates must have a program of essential services available for children in need.”⁶⁷ While requiring a certain level of accountability through the implementation of written guidelines for caseworkers, the proposed regulations recognized the need for “[s]tate flexibility in tailoring its child welfare services program to the precise needs of its local constituencies.”⁶⁸ The proposed regulations thus sought to strike a balance between state discretion and federal directive in addressing the “reasonable efforts” requirement.

In 1983, during the administration of President Ronald Reagan, HHS issued final regulations which primarily repeated language in the Child Welfare Act instead of clarifying states’ responsibilities under the “reasonable efforts” requirement.⁶⁹ Rather than mandating the development of federal “reasonable efforts” guidelines or the provision of particular services to facilitate family reunification if child removal was required, the final rule left even greater discretion to states in defining “reasonable efforts.” The final rules did include examples of services that states *could* choose to provide, including the daycare, homemaker, and counseling services the Carter administration had proposed as the mandatory “core of agency support to families.”⁷⁰ Still, the rules required only that “the State agency...identify, in [each] child’s case plan, those services offered and the services provided to the child and/or his parent(s) to prevent placement or achieve reunification of the family.”⁷¹

In the absence of strong federal guidance, states faced difficulty enforcing affirmative obligations to facilitate family reunification for children in

1983 Final Reasonable Efforts Regulation

The services specified *may* include: twenty-four hour emergency caretaker, and homemaker services; day care; crisis counseling; individual and family counseling; emergency shelters; procedures and arrangements for access to available emergency financial assistance; arrangements for the provision of temporary child care to provide respite to the family for a brief period, as part of a plan for preventing children's removal from home; other services which the agency identifies as necessary and appropriate such as home-based family services, self-help groups, services to unmarried parents, provision of, or arrangements for, mental health, drug and alcohol abuse counseling, vocational counseling or vocational rehabilitation; and post adoption services.⁷²

foster care. A 1987 report by the National Council of Juvenile and Family Court Judges found that many judges “remain[ed] unaware of their obligation to determine if reasonable efforts to preserve families ha[d] been made. Other judges routinely ‘rubber stamp[ed]’ assertions by social service agencies” that reasonable efforts had been made.”⁷³ The Child Welfare League of America found that in New York City, “in 52 percent of the cases studied, the service needed most was...day care or babysitting. But the ‘service’ offered most often was foster care.”⁷⁴

In sum, in spite of Congress members’ intent to remedy the problems facing the child welfare system by requiring reasonable efforts towards family reunification, the Child Welfare Act had two significant shortcomings. First, states did not have sufficient guidance from Congress about which services constituted reasonable efforts to preserve and reunify families. Second, Congress failed to give states adequate financial incentives to reunify families with children in foster care.⁷⁵ These two significant oversights shaped the legislative landscape into which policy-makers introduced ASFA.

B. The Adoption and Safe Families Act of 1997

Throughout the 1980s and into the 1990s, the Child Welfare Act’s failure to define the “reasonable efforts” requirement led to confusion among state agencies as to their responsibilities under this new requirement. In the meantime the already high number of children consigned to long-term foster care continued to grow, raising concerns in Congress. In response to that concern Congress took action by enacting ASFA. But instead of defining the “reasonable efforts” requirement and specifying the kinds of reunification efforts required to be “reasonable,”

ASFA dictates *when* efforts to reunify families — regardless of what those efforts actually entail — should cease. As a co-sponsor of ASFA stated, “[e]arly on in the 1980’s we wrote legislation...saying every reasonable effort should be made to return a child to the family. And in the States, those who were working very hard to bring this about did not know where to end that. It was not clear.”⁷⁶ Yet, states were never required to make *every* effort to reunify families. Indeed, federal law required only that states “identify, in [each] child’s case plan, those [available] services offered and the services provided to the child and/or his parent(s) to prevent placement or achieve reunification of the family.”⁷⁷ Nevertheless, Congress ignored the lack of quality reunification services in diagnosing the foster care problem. Instead, policymakers focused on the length of time such services, if any, were to be provided, and chose to stem the rising tide of children in foster care by imposing strict timelines for the provision of reunification efforts. Once such hastened efforts concluded, states could then remove children from foster care by placing them in adoptive homes.⁷⁸

ASFA made several substantive reforms to accelerate the process of moving children from foster care into permanent placements, with an emphasis on adoption. In particular, Congress (1) set forth specific circumstances in which states need not make reunification efforts;⁷⁹ (2) required states to finalize a permanency plan for each child 12 months after entry into foster care, thereby imposing an initial time limit on states’ reasonable efforts; and (3) required states to seek termination of parental rights (“TPR”) — the permanent destruction of existing families in the eyes of the law — once a child has been in foster care for 15 of the most recent 22 months (“mandatory 15/22 TPR requirement”).⁸⁰

ASFA provides for three exceptions to the mandatory 15/22 TPR requirement. A state need not file an otherwise mandatory petition for termination of parental rights where: (1) the child is in foster care with a relative, that is, in the legal custody of the state, while in the physical care of an extended family member,⁸¹ (2) compelling reasons make filing a TPR petition contrary to the child’s best interests, or (3) the state has failed to make required efforts towards family reunification.⁸² While the exceptions may permit many families in the child welfare system to avoid imminent, permanent family dissolution, states retain great discretion in applying the exceptions, including the initial determination that the state’s own reunification efforts have been insufficient.⁸³ It is

unlikely that a state will admit its own failure to make required family reunification efforts.⁸⁴ Even children in foster care with relatives who are theoretically eligible for an exception from the mandatory 15/22 TPR requirement may not be insulated from eventual permanent family dissolution should the relative become unable to continue caring for the child. Finally, in the absence of meaningful agency efforts to maintain relationships between parents and children in foster care, it is difficult for families to demonstrate compelling reasons to avoid initiating legal proceedings to terminate parental rights after the 15-month deadline has passed. In practice, then, given ASFA's clear intent to expedite family dissolution, families attempting to address complex parenting challenges without the reliable assistance of relatives or state agencies may have difficulty taking advantage of an exception to the mandatory 15/22 TPR requirement.

ASFA simply exacerbated the difficulty of successfully reunifying families, both by providing little guidance and little time to realistically address family problems. The law signaled to states that whatever minimal efforts they chose to make to reunify families were fine with Congress, so long as they ended on time, either through family reunification or, more likely, family severance

In sum, while ASFA did not eliminate state agencies' obligation to make reasonable efforts to reunify families with children in foster care, it imposed strict time limits on those efforts while once again failing to provide guidance on what reunification services were actually required.⁸⁵ As a result, ASFA simply exacerbated the difficulty of successfully reunifying families, both by providing little guidance and little time to realistically address family problems. The law signaled to states that whatever minimal efforts they chose to make to reunify families were fine with Congress, so long as they ended on time, either through family reunification or, more likely, family severance.

C. The Effects of Federal Child Welfare Law on Incarcerated Parents and Their Children in Foster Care

The Child Welfare Act's "reasonable efforts" requirement remains in desperate need of greater clarification by federal lawmakers, particularly in view of ASFA's strict time limits. While Congress must give meaning

to the “reasonable efforts” requirement as it applies to all families in the child welfare system, it must take special care to specify states’ obligations with respect to families in the system who are also dealing with parental incarceration. As the number of people in prison continues to grow,⁸⁶ more children of incarcerated parents find themselves in foster care and in need of child welfare policies suited to their particular needs.

ASFA’s strict time limits for permanency hearings and initiating petitions to terminate parental rights uniquely undermine families with an incarcerated parent and children in foster care. ASFA requires states to finalize a child’s permanency plan “within twelve months of the date the child is considered to have entered foster care...and at least once every twelve months thereafter while the child is in foster care.”⁸⁷ Thus, once a child has been in foster care for 12 months, states are required to hold a hearing to determine whether a child’s permanency goal should remain family reunification or be altered to some other permanent arrangement, often requiring termination of parental rights. At the permanency hearing, states must establish that reasonable efforts have been made to reunify a child with his/her birth parent(s) if that is the current permanency plan. For families with incarcerated parents, however, demonstrating that reunification should remain the permanency goal after only 12 months may be difficult. In the months and weeks leading up to the hearing, the parent may be unable to communicate regularly with the caseworker, or the caseworker may not be able to determine whether the parent has been able to participate in prison-administered rehabilitation programs.

Incarcerated parents, including those who are incarcerated for drug-related or other non-violent offenses, can expect an average sentence that generally exceeds 15 months. When combined with ASFA, this increases the initial risk under the statute’s 15/22 TPR requirement that a prison sentence for an incarcerated parent will ultimately lead to permanent loss of a child.

The mandatory 15/22 TPR requirement creates similar difficulties. Incarcerated parents, including those who are incarcerated for drug-related or other non-violent offenses, can expect an average sentence that generally exceeds 15 months. When combined with ASFA, this increases the initial risk under the statute’s 15/22 TPR requirement

that a prison sentence for an incarcerated parent will ultimately lead to permanent loss of a child. For these families, the exceptions to the mandatory 15/22 TPR requirement are crucial for avoiding premature, permanent family dissolution and continuing to receive agency assistance to reunify. For those incarcerated parents and children for whom the “in foster care with a relative” exception does not apply, clarification and enforcement of the “reasonable efforts” requirement are critical for establishing the other TPR exception available to them — the “compelling reasons” exception.

A recent study suggests “ASFA has had an important effect” on incarcerated parents, based on “the significant overall increase” between 1997 and 2002 in the number of cases in which parental rights have been terminated permanently.⁸⁸ Compounding the sheer passage of time, parental involvement with the criminal justice system presents inherent challenges to a parent’s ability to provide for a child’s physical and financial needs, and additional barriers to the maintenance of existing emotional bonds between parent and child. Parental incarceration also adds one more layer of bureaucracy for a child’s caseworker to negotiate in facilitating family reunification. As a result, for incarcerated parents and their children, 15 months is an especially unrealistic time limit for reunification, even where a parent’s sentence of imprisonment is relatively short.

Parents behind bars may have difficulty establishing sufficiently compelling reasons to convince agencies to forestall otherwise mandatory proceedings to dissolve their families forever. Access to rehabilitative programs for parents in prison is limited and often entails significant waiting periods, making the resolution of the factors which contributed to incarceration challenging.⁸⁹ Finally, the collateral consequences of a criminal conviction, particularly for drug-related offenses, may severely impair a formerly incarcerated parent’s ability to find employment or housing, or to access public benefits or post-secondary education upon release.⁹⁰

At the time of ASFA’s enactment, lawmakers admittedly gave scant attention to the needs of families with incarcerated parents. One of the creators of ASFA and a senior policy advisor in the House of Representatives admits, “We looked at prison sentences, but we weren’t that sympathetic.”⁹¹ Parents suffering from drug addiction have long

experienced similar disregard from child welfare policymakers. Yet the complexities of addressing parental substance abuse gained some recognition in the implementation of ASFA's time limits. For instance, the commentary to the federal regulations implementing ASFA recognizes that cases involving parental substance abuse may require more time to prepare for successful reunification — albeit while emphasizing Congress's choice to impose strict time limits on efforts to address such complex barriers to family reunification:

Congress understood that families often present very complicated issues that must be resolved prior to reunification. For example, parents dealing with substance abuse issues may require more than [the] 12 months [preceding a permanency plan review] to resolve those issues. However, a parent must be complying with the established case plan, making significant measurable progress toward achieving the goals established in the case plan, and diligently working toward reunification in order to maintain it as the permanency plan at the permanency hearing.⁹²

Similarly, while the barriers to maintenance of parent-child relationships through prison walls are substantial, parental incarceration need not result in imminent, permanent family dissolution where state child welfare agencies are equipped to assist parents and children in maintaining existing emotional ties, permitting children to benefit from their parents' love, care, and guidance. As Professor Philip Genty of Columbia University School of Law explains, “[f]or cases in which it is determined that a viable parent-child relationship exists,...the time of parental confinement should be looked at as an interlude, during which the parental ties can be nurtured and supported so that, to the greatest extent possible, the parent-child relationship is as strong after the parent's release as it was before.”⁹³

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III. State Implementation of Federal Child Welfare Law Regarding Incarcerated Parents and Their Children

Even after a TPR petition has been filed, many states require a court assessment of the child welfare agency's family reunification efforts, either as a prerequisite to the final and permanent act of family dissolution⁹⁴ or as one of several relevant factors in the TPR determination.⁹⁵ In light of the unique barriers to and strict time limits for family reunification facing families with incarcerated parents, "reasonable" reunification efforts must include not only services tailored to the physical and emotional needs of parents and children separated by prison walls, but also a reasonable time period in which to draw meaningful and lasting benefits from such services both during and after parental incarceration. However, as discussed below, given ASFA's emphasis on expedited permanency planning, a court's evaluation of an agency's reunification efforts by the time a TPR proceeding is underway may be influenced by the strict time limit within which any such reunification must occur.

In 1999, after the passage of ASFA, states received limited guidance regarding the implementation of "reasonable efforts" in the form of advisory guidelines developed by an HHS expert work group.⁹⁶ While the guidelines do not specify reunification efforts in the context of parental incarceration, they provide standards for use in evaluating the reasonableness of state agencies' family reunification efforts for families with children in foster care. The guidelines are one way of helping "[s]tates identify and clarify what core services might be appropriate to assure meaningful rehabilitation services for a dysfunctional family."⁹⁷ They advise that "[s]tate agency policies or regulations should clearly define the agency's obligations to make reasonable efforts to reunify the family."⁹⁸ Recognizing the need for timely provision of reunification services under ASFA's focus on expedient permanency planning, the guidelines stress: "Though agencies need flexibility to determine the

appropriate treatment techniques applicable to an individual family, many agency clients always need certain services. An organized set of these frequently needed services, available in sufficient quantities, will help avoid service delays that hinder timely attainment of permanent homes for children.”⁹⁹

Since the guidelines were only advisory, states’ implementation of federal requirements for reasonable efforts and time limits varies — both in their statutory schemes and in their courts’ oversight of those schemes.¹⁰⁰ For incarcerated parents and their children in particular, successful reunification depends further on each state’s treatment of the unique circumstances presented by parental incarceration. Without adequate guidelines as to how to meet the particular needs of imprisoned parents and their children, reunification efforts for these families are often unrealized hopes.

A. State Child Welfare Laws and Families with Incarcerated Parents

ASFA permits states to forego providing family reunification efforts where a parent has been convicted of an enumerated violent offense against his or her child.¹⁰¹ Only a handful of states, however, explicitly address parental incarceration or convictions for other offenses in the provision of reunification efforts in their child welfare statutes. While several states permit child welfare agencies to waive family reunification efforts in some circumstances in which a parent is incarcerated,¹⁰² the majority of states require child welfare agencies to undertake reasonable efforts to reunify incarcerated parents with their children.¹⁰³ As a majority of the HHS expert working group on adoption and foster care concluded in 1999, waiving the “reasonable efforts” requirement for all cases in which a parent is incarcerated would inappropriately “include[] situations in which there is no[] history of abuse or neglect prior to imprisonment.”¹⁰⁴ The majority of the working group “emphasized that, in many cases, the parent-child relationship can be preserved through ongoing visits and contacts while the parent remains in prison.”¹⁰⁵

Several states recognize that agency reunification efforts are essential to assist incarcerated parents and their children in preserving their relationships, and go further to explicitly and affirmatively require child welfare agencies to provide appropriate services tailored specifically to

the needs of families with incarcerated parents. For example, legislation in California and Utah provides that when the parent of a dependent child is incarcerated, “the court shall order reasonable services” unless such services “would be detrimental” to the child.¹⁰⁶ In determining whether such services would be detrimental, courts consider factors including the child’s age, “the degree of parent-child bonding,” “the length of the sentence,” and “the nature of the crime.”¹⁰⁷ In addition, New York clarifies by statute that “‘parent’ shall include an incarcerated parent unless otherwise [specified]” for purposes of its “diligent efforts” requirement.¹⁰⁸

Several states recognize that agency reunification efforts are essential to assist incarcerated parents and their children in preserving their relationships, and go further to explicitly and affirmatively require child welfare agencies to provide appropriate services tailored specifically to the needs of families with incarcerated parents.

In the absence of federal guidance, determining what services must be provided to incarcerated parents is difficult. Journalist Nell Bernstein, who coordinates the San Francisco Children of Incarcerated Parents Partnership, reports that when asked, only five child welfare systems nationwide “were able even to offer estimates of how many of the children in their care had an incarcerated parent (these estimates ranged between 10 and 30 percent). Only six states had a policy in place to address the needs of children of incarcerated parents, and only two provided their staff any training specific to these children.”¹⁰⁹

Recognizing the difficulty of applying vague directives in the context of parental incarceration, a few states elaborate on the type of reunification services incarcerated parents and their children need. Because maintenance of existing emotional ties is one of the most challenging tasks facing incarcerated parents and their children, these reunification services naturally emphasize agency obligations to facilitate regular communication and visits between children and their incarcerated parents. For example, California’s child welfare code sets forth a non-exhaustive list of possible reunification services for incarcerated parents and their children, including: “[m]aintaining contact between the parent and child through collect telephone calls,” “[t]ransportation

services, where appropriate,” “[v]isitation services, where appropriate,” and “[r]easonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child.”¹¹⁰ Similarly, New York’s child welfare statute includes, as part of the “diligent efforts” to reunify incarcerated parents with their children,

making suitable arrangements with a correctional facility and other appropriate persons for an incarcerated parent to visit the child within the correctional facility, if such visiting is in the best interests of the child...Such arrangements shall include, but shall not be limited to, the transportation of the child to the correctional facility, and providing or suggesting social or rehabilitative services to resolve or correct the problems, other than incarceration itself, which impair the incarcerated parent’s ability to maintain contact with the child.¹¹¹

By regulation, Massachusetts provides that its “Department [of Social Services] shall make all reasonable efforts to work in cooperation with incarcerated parents to promote a healthy relationship with their children, and to avoid permanent separation,” in recognition of “the special efforts required to prevent permanent or irremediable separation of children from their incarcerated parents.”¹¹² These efforts “shall include regular visitation at the correctional facility, as well as the holding of case conferences and other consultations at the correctional facility.”¹¹³

Missouri has established a Children of Incarcerated Parents Task Force to evaluate and recommend policy changes regarding families with incarcerated parents.¹¹⁴ Among the Task Force’s recommendations in its 2003 report are to “[f]acilitate visitation between children and parents, when contact is in the best interest of the child,” by coordinating the policies of the Department of Corrections and the Division of Family Services, and to “[p]rovide transportation for children of incarcerated parents in an effort to maintain the parental bond,” again, “when contact is in the best interest of the child.”¹¹⁵ Finally, the Task Force recommends “[u]s[ing] teleconferencing for custodial placement meetings so that incarcerated parents can participate in this decision-making process about the future of their children.”¹¹⁶

Additionally, some states explicitly recognize the need to provide rehabilitative services to incarcerated parents to facilitate self-improvement in preparation for family reunification. For instance, by statute,

California provides for some rehabilitation services for incarcerated parents that are designed to develop skills for successful parenting and reentry into society: “An incarcerated parent may be required to attend counseling, parenting classes, or vocational training programs as part of the service plan if these programs are available.”¹¹⁷

As these states recognize, given the challenges of parenting from within prison, family reunification can only occur if incarcerated parents and their children have the support necessary to nurture existing emotional bonds, if caseworkers are able to involve incarcerated parents in case planning, if incarcerated parents have the resources to develop parenting and life skills, and if parents can address addiction or other obstacles to self-sufficiency. Yet states’ reunification efforts for families with incarcerated parents remain subject to strict time limits that such families are hard-pressed to meet.¹¹⁸

In recognition of the harsh effects of ASFA’s mandatory 15/22 TPR requirement and other expedited permanency provisions on incarcerated parents and their children, several states have crafted legislative measures relaxing these requirements for families with incarcerated parents in appropriate cases. For example, the Colorado child welfare statute permits a court to delay the filing or joining of a petition to terminate parental rights for a reasonable time where “[t]he child has been in foster care under the responsibility of the county department for such period of time due to circumstances beyond the control of the parent *such as incarceration of the parent for a reasonable period of time*, court delays or continuances that are not attributable to the parent, or such other reasonable circumstances that the court finds are beyond the control of the parent.”¹¹⁹ The child welfare statutes in Nebraska¹²⁰ and New Mexico¹²¹ preclude the filing of an otherwise mandatory 15/22 TPR petition where incarceration is the sole ground for termination of parental rights.¹²²

Absent a federal directive to follow the lead of the few states that have mitigated the effects of the 15/22 TPR requirement as applied to incarcerated parents, however, the majority of states remain free to enforce the mandatory TPR requirement against families with parents in prison for more than 15 months or those struggling with complex reentry challenges, unless state agencies choose to invoke one of the three statutory exceptions.¹²³

Crucially, where reasonable family reunification efforts are made for incarcerated parents and their children with positive results, state agencies may find compelling reasons to decline to file an otherwise mandatory TPR petition after 15 months, thereby permitting the continuation of reunification services. As Professor Genty explains, “a state agency may avoid the time-limited permanency planning requirements by carefully documenting in the case plan that severance of the parent-child relationship would be contrary to the child’s best interests.”¹²⁴ Where thorough reunification efforts are provided and assessment is documented, child welfare caseworkers and courts are in a better position to make sound decisions regarding an incarcerated parent’s prospect of successfully reunifying with his or her children.

As in the context of the “reasonable efforts” requirement, however, federal law does not specify how and when states should determine when to invoke the “compelling reasons” exception to the mandatory TPR filing requirement. The federal regulations indicate that state agencies retain substantial discretion in applying the “compelling reason” exception, subject only to court oversight during permanency hearings.¹²⁵ However, the regulation commentary does offer some broad examples that can serve as guideposts to states in their determination of whether the “compelling reason” exception should be invoked to support continuing reunification efforts for incarcerated parents and their children. These examples include situations in which “the parent and child have a significant bond but the parent is unable to care for the child because of an emotional or physical disability,”¹²⁶ or in which “the parent has made significant measurable progress and continues to make diligent efforts to complete the requirements of the case plan but needs more than 15 months to do so.”¹²⁷

Incarcerated parents and their children may meet these conditions where regular visitation and communication have permitted maintenance of a strong emotional relationship and where the parent is actively engaged in case planning and self-improvement efforts that, but for the fact of incarceration, improve the family’s prospects for reunification. In particular, the existence of “a viable parent-child relationship” that, with assistance, may survive and thrive despite parental incarceration should compel the agency to continue its efforts towards reunification instead of immediately seeking to dissolve the family.¹²⁸ As the Women in Prison Project of the Correctional Association of New York states: “In a statutory

scheme that is otherwise based on generalized, crude timeframes, this exception provides some traction to the notion that the nature of a [parent's] relationship with her child is relevant to whether the state can or should legally sever that relationship."¹²⁹

Because agency efforts are required in order for families with incarcerated parents to demonstrate compelling reasons why termination of parental rights is not warranted, agencies must provide reunification services that are appropriately designed to meet the needs of such families quickly and effectively in order to give them a fair chance to stay intact. In light of the timeline established to finalize a permanency plan for each child, it is essential that agencies provide comprehensive family reunification services within the first 12 months of a child's placement in foster care, and that courts scrutinize such efforts at each opportunity, creating the possibility of extending family reunification efforts beyond 12 months. The commentary to federal regulations implementing ASFA emphasizes:

The enactment of a legal framework requiring permanency decisions to be made more promptly heightens the importance of providing quality services as quickly as possible to enable families in crisis to address problems. It is only when timely and intensive services are provided to families that agencies and courts can make informed decisions about parents' ability to protect and care for their children.¹³⁰

ASFA's emphasis on expedited permanency planning, mandatory TPR petitions, and financial encouragement for adoption fails to ensure that agencies provide meaningful reunification services to families with incarcerated parents. To the contrary, it reduces the incentive for agencies to provide these families with necessary services.

B. State Courts' Evaluation of Reasonable Efforts

By the time states seek to dissolve a family forever through termination of parental rights, agency efforts at reunification may receive little scrutiny. Research suggests that some state courts may relax the "reasonable efforts" standard in the context of parental incarceration. Courts have granted petitions to terminate parental rights based on factors such as the effects of the sheer passage of time on the child's developmental needs or the agency's lack of financial or human resources in cases where agencies failed to provide reasonable reunification efforts to families with incarcerated parents. Even where agencies have failed in

their statutory obligation to make reunification efforts for families with incarcerated parents, then, such families may suffer permanent dissolution through termination of parental rights.

Kathleen S. Bean, Professor of Law at Louis D. Brandeis School of Law at the University of Louisville, observes that, in the context of TPR proceedings,¹³¹ courts generally weigh several factors when evaluating the reasonableness of agency reunification efforts. Most significantly, courts consider: “(1) whether the case plan and services address the problems that caused the child to be removed from the home; (2) whether the time period for the efforts was reasonable and the specific efforts during that period timely; and (3) whether there were arrangements for visitation.”¹³² Some courts have suggested factors for consideration in evaluating the reasonableness of agency reunification efforts for families with incarcerated parents, such as “the physical location of the child and the parent, the limitations of the place of confinement, the services available in the prison setting, the nature of the offense, and the length of the parent’s sentence.”¹³³ However, Professor Bean notes that where a parent is incarcerated, several “particularly troublesome” factors tend to “work against” her and her child.¹³⁴

First, recognizing that agencies have limited resources and that some reunification services, such as parenting classes or adequate substance abuse treatment, may not exist or be readily available in a prison setting, “[j]udges may allow for [agency] lapses in following federal reasonable efforts requirements so that agencies may conserve their resources.”¹³⁵ For example, the Hawaii Supreme Court has announced that it is “not reasonable to expect [a child welfare agency] to provide services beyond what [is] available within the corrections system.”¹³⁶ Financial constraints may also result in inadequate training for caseworkers or corrections officials, on whom incarcerated parents rely in order to access scarce services, engage in case planning for their child’s future, or, most importantly, visit and communicate with their children. Yet families should not bear the burden of agency failure to make crucial services available to parents and children in the care and custody of the state.¹³⁷

Second, courts may excuse agencies’ failure to facilitate parent-child visits because of the many barriers to communication in prisons. Even in states where caseworkers are required to facilitate prison visits between children and their incarcerated parents, caseworkers often are not

provided with sufficient training or support to fulfill their obligations, particularly where they must contend with prison policies that obstruct rather than promote family visits.¹³⁸ In combination with “the courts’ frequent unwillingness to hold foster care agencies and correctional facilities accountable,” these agency failings “lead many already overworked caseworkers to disregard — either intentionally or not — their legal responsibilities to provide visits.”¹³⁹ Thus, “[w]hile an incarcerated [parent] will be held to strict standards for planning for the

The damage to existing parent-child bonds that may result from a family’s inability to surmount communication barriers in prison without agency assistance ultimately may doom the family’s chances of withstanding a petition to terminate parental rights.

future of and maintaining contact with her child, she has little recourse if the child welfare agency fails in its mandated responsibility to assist her with those goals.”¹⁴⁰ The damage to existing parent-child bonds that may result from a family’s inability to surmount communication barriers in prison without agency assistance ultimately may doom the family’s chances of withstanding a petition to terminate parental rights.

Third, courts may feel pressure to terminate promptly the rights of incarcerated parents whose sentences exceed 15 months. “For the agencies, the most obvious challenges to facilitating a continued parent-child relationship relate to separation over time and distance. Increasing sentence lengths mean that parents and children are being kept apart for longer periods of time.”¹⁴¹ By the time the court is asked to determine whether parental rights should be terminated, the inadequacy of an agency’s reunification efforts simply may not outweigh the harm of the passage of time.¹⁴²

Relatedly, courts may excuse agencies’ failure to make reasonable efforts towards family reunification on the theory that provision of any such services to incarcerated parents would be futile in light of ASFA’s focus on expedited permanency. Under this theory, an agency’s failure to make reasonable efforts may be overlooked by the court because reunification would not occur in any event until a parent’s release, long after the time limits for reunification have passed.¹⁴³ Because most incarcerated parents will serve sentences longer than 15 months, even for non-violent offenses, they are vulnerable to the argument that even

if the agency's efforts at reunification had been adequate, they would not be able to reunify with their children in time anyway.¹⁴⁴ This approach ignores the possibility of avoiding the time limit altogether by demonstrating compelling reasons to do so. Of course, families given inadequate services have less of a chance to demonstrate compelling reasons for the agency to decline to file an otherwise mandatory TPR petition. As one Ohio court has cautioned, such an argument lets agencies off the hook too easily, as "the appearance of futility may be furthered by *agency* acts or omissions."¹⁴⁵

Finally, and most devastatingly, courts may "treat incarceration as a circumstance created by the parent"¹⁴⁶ and "view the obstacles of incarceration as self-imposed by the parent"¹⁴⁷ — in effect blaming the parent for being in a prison setting where reunification services may be unavailable, costly, or difficult to provide and, as a result, imposing the additional punishment of family dissolution on both parent and child.¹⁴⁸ This mindset fails to consider the need of the child to maintain a relationship with his/her parent and permits child welfare agencies to dismiss families' chances of survival because of parental incarceration without thoroughly investigating the viability of family reunification.

In a recent case reviewing a child welfare agency's reasonable efforts at a permanency hearing, the Oregon Court of Appeals determined that the agency had failed to make reasonable efforts at family reunification with respect to an incarcerated father. Given the "father's relatively short incarceration, the lack of any information about his relationship with child, and his apparently imminent release from jail within four months of the permanency hearing," the Court listed a number of efforts the agency could have made to involve the father in case planning for his child and to prevent termination of parental rights:

DHS could have contacted father and investigated the history and extent of father's relationship with child. It could have assessed father's parental strengths and deficiencies. It could have explored services available to father during his incarceration, incorporated those services into a service agreement, and documented whether father participated in those services. It could have monitored father's progress through his corrections counselor or another employee of the jail. It could have looked into whether visitation at the jail was possible and appropriate. It could have compared father's release date with the dependency case time lines and child's

particular needs to determine whether reunification was possible within a reasonable time and, if so, it could have inquired into father's probable post-release situation and plan. In general, DHS could have attempted to engage and work with father. It completely failed to do so in this case.¹⁴⁹

By setting out a comprehensive list of possible agency efforts to facilitate reunification between parent and child, the Oregon court made a first step towards setting the bar for what efforts would be reasonable in the context of parental incarceration.

While a few states have taken similar affirmative steps, whether by statute or judicial decision, to specify efforts agencies must make to facilitate eventual reunification, most state agencies — and the courts that oversee them — lack clear guidance. Congress can and must ensure that states fully address the unique challenges of parenting from prison, protect the futures of families with incarcerated parents, and make reunification a reality for these families by clarifying states' obligations towards them.

IV. Opportunities for Improvement

Federal legislators should undertake several key reforms to guide and support state efforts to reunify families with incarcerated parents and children in foster care. First, Congress must ensure that state agencies make reasonable efforts by requiring state child welfare and correctional agencies to develop joint policies explicitly addressing the needs of the parents and children in their custody. Second, Congress should consider whether the mandatory 15/22 TPR requirement gives families a reasonable opportunity to address parenting challenges, including those posed by parental incarceration itself, before being wrested apart forever. Where reunification is truly unlikely, states should consider, as a viable option to termination of parental rights, subsidizing legal guardianship arrangements, in which a child's caretaker receives the necessary support to overcome the challenges of facilitating a lasting relationship between the child and an incarcerated parent. Finally, policymakers must reduce the number of children and parents physically separated by parental incarceration by encouraging the diversion of more parents from prison and into community- and family-based treatment programs, so that children need not be removed from their families at all.

***O**ppportunity for Improvement: Specify the scope of reasonable efforts and family reunification services to be provided jointly by state child welfare and corrections agencies and to be tailored to the unique needs of incarcerated parents and their children.*

Congress must provide standards for state agencies and courts to use in evaluating the reasonableness of agencies' reunification efforts for families with incarcerated parents and children in foster care. Reasonable efforts aimed at family reunification should address at least three broad elements: (1) **Maintenance of the parent-child bond.** Agency support should be required to facilitate regular, meaningful physical contact or communication between parent and child, which permits the maintenance of strong emotional bonds. (2) **Parental**

involvement in planning for the future and well-being of their children. Incarcerated parents must remain actively involved in decision-making about their children's future, including their educational, health, and emotional concerns. (3) **Parental self-improvement.** Many incarcerated parents require treatment for addiction or classes on effective parenting skills. Services meeting these needs promote incarcerated parents' capacity to maintain healthy relationships with their children and meet complex parenting challenges after rehabilitation and release.

If effective reunification services are to be provided to children in the care of child welfare agencies and parents in the custody of corrections, collaboration between those government agencies is critical.

If effective reunification services are to be provided to children in the care of child welfare agencies and parents in the custody of corrections, collaboration between those government agencies is critical. Oregon, recognizing the need for such collaboration, passed legislation "requir[ing] agencies to work together to develop recommendations designed to improve outcomes for children whose parents are involved in the criminal justice system and to report those recommendations to the appropriate legislative committee."¹⁵⁰ In December 2002, a workgroup including representatives of the state's corrections department and child welfare agencies made broad recommendations for agency action from the moment of a parent's arrest to her release. Those recommendations include making arrests outside the presence of children, considering alternative sanctions for people with parental obligations, facilitating family visitation, requiring the corrections department to collect information on incarcerated parents and their children, facilitating family and caregiver input into corrections plans and rehabilitative services provided to incarcerated parents, and requiring assistance to parents upon release.¹⁵¹ Borrowing a page from Oregon's book, Congress should direct state child welfare agencies and departments of corrections to develop inter-agency protocols that establish the scope of reasonable efforts for incarcerated parents and their children before, during, and after incarceration.

Several bills introduced in Congress addressing the needs of formerly incarcerated people returning to society contain provisions aimed at

facilitating family reunification.¹⁵² Of these, the Re-Entry Enhancement Act, introduced in the House on November 2, 2005 by Representative John Conyers of Michigan, mandates the most comprehensive family reunification efforts for incarcerated parents and their children. The Act conceives of “reentry” broadly, recognizing that families with incarcerated parents require a continuing array of rehabilitative services from the moment of parental incarceration through release and reintegration into society. In addition, a recent amendment to the Second Chance Act of 2005, offered on July 19, 2006 would provide federal guidance to states to develop inter-agency family reunification protocols tailored to the needs of incarcerated parents and their children, including those in foster care and kinship care. The amendment directs the Attorney General, in consultation with the Secretary of Health and Human Services, to develop best practices for state child welfare agencies and departments of corrections that may be used to address the family reunification needs of children and their incarcerated parents. The amendment directs that these practices include (1) parental self-improvement, (2) parental involvement in planning for the future and well-being of the child, and (3) maintenance of the parent-child bond during incarceration.¹⁵³ (See Appendix for an example of an inter-agency protocol.)

Each of the bills reauthorizes and expands federal funding administered by the Attorney General for the development of reentry demonstration projects in a wide range of areas, with a particular emphasis on the maintenance of the parent-child relationship.¹⁵⁴ Importantly, the proposed legislation also includes funding for programs “identifying and addressing barriers to collaborating with child welfare agencies in the provision of services jointly” to incarcerated parents and their children.¹⁵⁵ In addition, the Second Chance Act encourages the Department of Health and Human Services to “establish such services as the Secretary determines necessary for the preservation of the families that have been impacted by the incarceration of a family member with special attention given to the impact on children.”¹⁵⁶

The Re-Entry Enhancement Act goes even further in addressing the needs of children in foster care who have an imprisoned parent and seeks funding for programs that promote family reunification. Section 209(b) of the Act is a model for all re-entry legislation under congressional consideration. Section 209(b)(1) specifies that reasonable efforts

to reunify families, “when applied to parents incarcerated for crimes unrelated to the abuse of a child,” must include:

- (i) coordinating visitation between the child [and parent], unless such contact is found by a court to be contrary to the child’s best interest, including transporting the child to visits where other means of transportation are unavailable;
- (ii) giving preference to family members when placing a child in foster care absent a finding of unfitness;
- (iii) coordinating the receipt of transitional services upon release from incarceration when return of custody to the parent will be impossible without such services;
- (iv) providing the incarcerated parent with the opportunity to participate in planning meetings and hearings concerning the child, unless prohibited by the institution in which the parent is incarcerated; and
- (v) providing a means of communication, such as acceptance of collect telephone calls, between the incarcerated parent and the agency, and between the incarcerated parent and child unless such contact is found by a court to be contrary to the child’s best interest.¹⁵⁷

Further, recognizing the difficulty of achieving successful family reunification when parental incarceration coincides with substance abuse, the bill also authorizes the awarding of federal grants to states to develop “family-based comprehensive treatment services for parents and their children as a complete family unit,”¹⁵⁸ “jail-based substance abuse treatment programs in women’s correctional facilities for female offenders with minor children,”¹⁵⁹ or community family-based “[a]ftercare treatment services for custodial parents” with minor children who have been released from prison or who are on parole.¹⁶⁰

Funding comprehensive services ranging from prison visitation to family-based substance abuse treatment addresses the needs of incarcerated parents and their children for a variety of services in different settings, at a variety of times, including during incarceration and continuing through a parent’s release and return home.

Opportunity for Improvement: Mitigate ASFA's harsh effects on families with incarcerated parents by amending the 15/22 TPR filing requirement to permit states to decline to file or join a petition for the termination of parental rights where the parent is incarcerated for a reasonable time and/or where parental incarceration is the sole factual basis for the petition. Facilitate permanent placement of children in subsidized legal guardianship arrangements as an alternative to termination of parental rights.

ASFA's emphasis on expedited permanency planning, particularly the mandatory 15/22 TPR filing requirement, frustrates incarcerated parents' reunification efforts. ASFA's strict timelines for termination of parental rights fail to account for the complex reunification challenges facing families with incarcerated parents, which usually require more than 15 months to resolve. Above all, ASFA's timelines fail to account for children's lifelong need for a permanent connection to their parents — even those facing long-term parenting challenges.

Earlier versions of ASFA demonstrate that Congress members struggled to establish an appropriate time limit for the filing of a TPR petition and considered limiting its application to younger children. For instance, an early draft of the House's ASFA bill provided that TPR proceedings should be commenced only when a child under the age of 10 has been in foster care for 18 of the last 24 months.¹⁶¹ However, the Senate version of the bill required a state to file the TPR petition after the child had spent 12 of the last 18 months in foster care, and made no mention of age requirements.¹⁶² The timeline in the enacted law appears to have been a compromise between the one proposed in the House and the one proposed in the Senate, with no age restriction. The congressional record provides no evidence of the suitability of the 15/22 TPR provision. Congress should reconsider the appropriateness of the 15-month time limit for the filing of a TPR petition in all cases involving incarcerated parents. Given that most parents are serving prison terms that extend beyond 15 months, even those convicted of non-violent, minor offenses, Congress should extend the TPR timeline.

As discussed earlier, Colorado, Nebraska and New Mexico mitigate the effects of the 15/22 TPR requirement as applied to incarcerated parents.¹⁶³ Following the lead of these three states, Congress can amend 42 U.S.C. § 675(5)(E) — the statutory provision mandating

the filing of a TPR petition after a child has been in foster care for 15 out of the most recent 22 months — to permit states to forego filing or joining such a petition where a parent is incarcerated for a reasonable period of time or where parental incarceration is the sole factual basis for the petition.

Where family reunification is ultimately not possible, Congress should encourage states to subsidize legal guardianship arrangements without terminating parental rights. Such permanency placements can ensure that children have safe and stable homes, while supporting the maintenance of enduring relationships with their incarcerated parents wherever possible.¹⁶⁴

O*pportunity for Improvement: Increase the availability of comprehensive family- and community-based substance abuse treatment programs at the federal and state levels to divert parents from prison and enable them to remain in their families and communities.*

Sentencing reformers and policymakers are increasingly recognizing the social benefits of alternatives to incarceration.¹⁶⁵ Yet there continues to be a shortage of diversion programs for parents and children.¹⁶⁶ As Congress and state policymakers explore funding demonstration projects focused on community-based treatment programs as an alternative to incarceration, particular attention should be given to increasing the number of family-based treatment programs designed for children and their parents who are at risk of incarceration.

Diversion programs that include family-based substance abuse treatment can be less costly to the public than parental incarceration and foster care for children.¹⁶⁷ Several cash-strapped states have already diverted people convicted of broad categories of non-violent offenses to more cost-effective alternative programs in order to reduce the size of bloated corrections budgets.¹⁶⁸ Parents charged with addiction-related offenses may be particularly good candidates for diversion programs involving family-based substance abuse treatment, as their children receive the benefit of targeted support, while they are provided important motivation to succeed in their rehabilitation efforts.¹⁶⁹ Because family is often a source of support to people during rehabilitation and an inspiration to refrain from criminal activity, diversion programs providing

family-based services can also reduce the likelihood of recidivism.¹⁷⁰ More important than the financial savings are the social and developmental benefits children reap from having stable family relationships.¹⁷¹

California's Family Foundations Program, authorized by California's 1994 Pregnant and Parenting Women's Alternative Sentencing Act,¹⁷² provides an alternative to incarceration to non-violent substance-abusing women who are pregnant or have children younger than six years of age.¹⁷³ The program gives women the opportunity to bond with their young children while learning parenting and life skills and undergoing substance abuse treatment.¹⁷⁴ North Carolina's Summit House program provides an alternative to incarceration for pregnant or parenting women convicted of non-violent felonies. "Instead of mom going to prison and the child going into foster care, they come to Summit House as a family," where the mother serves probation.¹⁷⁵ The 12-24 month residential program is designed to "maintain[] the family unit, teach[] parenting skills, address[] potential developmental delays" and attachment disorders, "and provid[e] treatment."¹⁷⁶

The federal government has also created some limited diversion initiatives. In 1994, Congress passed the Family Unity Demonstration Project Act.¹⁷⁷ The stated purposes of the Act were to alleviate harm to children and primary-caretaker parents caused by separation due to incarceration, to reduce recidivism rates, and to explore the cost-effectiveness of community correctional facilities.¹⁷⁸ The statute authorized appropriations for state and federal family unity demonstration projects enabling eligible individuals — custodial parents — to live in community correctional facilities with their children.¹⁷⁹ In such facilities, residents would have received both personal and family-based services, including parenting classes, substance abuse treatment, and employment training.

"The creation of additional community correctional facilities for nonviolent mothers would ensure the maintenance of strong family ties and keep children from being placed outside their home...[The projects] would have constituted a positive step towards bettering the lives of parents whose crimes did not warrant imprisonment that separates them from their children."

Although the Family Unity Demonstration Project Act authorized funding through the year 2000, no money was ever appropriated for the projects.¹⁸⁰ In 2000, the American Bar Association recommended reauthorization and funding of the Act, stating in its accompanying report: “The creation of additional community correctional facilities for nonviolent mothers would ensure the maintenance of strong family ties and keep children from being placed outside their home...[The projects] would have constituted a positive step towards bettering the lives of parents whose crimes did not warrant imprisonment that separates them from their children.”¹⁸¹

The most recent reauthorization of the USA PATRIOT Act called for programs addressing the unique needs of pregnant or parenting women potentially facing incarceration due specifically to methamphetamine abuse.¹⁸² Title VII, the Combat Methamphetamine Epidemic Act of 2005, permits the Attorney General to award three-year competitive grants to states to develop and carry out programs addressing methamphetamine use by pregnant and parenting women.¹⁸³ A state’s grant application must contain a description of family treatment programs to be administered if clinically appropriate, and if not appropriate, cross-agency family reunification services to be provided.¹⁸⁴

While methamphetamine use represents a growing concern that must be addressed, it is but one drug among many controlled substances leading to parental addiction and contact with the criminal justice system.¹⁸⁵ According to the Bureau of Justice Statistics, “Parents in state prison most commonly reported using marijuana (39%) and cocaine-based drugs (27%), including crack, in the month before their crimes, followed by heroin and other opiates (10%), stimulants (9%), depressants (5%), hallucinogens (3%), and inhalants (1%).”¹⁸⁶

Several re-entry bills introduced in Congress in 2005 recognize the need for treatment for a broader range of addictions, and accordingly provide funding for “family-based drug treatment alternatives to prison programs for custodial parents who are convicted of non-violent or drug-related felonies.”¹⁸⁷ Such efforts should include coordination between criminal courts, corrections agencies, treatment providers, and child welfare agencies to maximize recovery outcomes for parents, and ensure children’s safety and well-being.

As Congress reconsiders a range of federal and state criminal justice and child welfare policies, it must pay close attention to the needs of children in foster care whose parents are incarcerated or at risk of incarceration. Policymakers should increase opportunities to divert parents to family- and community-based treatment programs to prevent parent-child separation. Such programs can provide families in crisis with comprehensive services to help parents rebuild their lives while caring for their children in a safe and structured environment, so they may avoid the devastation of permanent family dissolution through termination of parental rights.

Conclusion

At least 29,000 children across the country are in foster care because of parental incarceration. State interventions like these in the lives of parents and their children need not result in destruction of their families. Congress can amend federal child welfare law, which currently provides little time, but much pressure, for families to reunify as they struggle through incarceration and foster care systems. With clear congressional leadership and guidance, and appropriate funding, state child welfare workers and corrections authorities can jointly devise “reasonable efforts” these agencies may undertake in collaboration to reunify families. Together, through family-sensitive policies and procedures, state officials can both address parental crime and provide safety and stability for children without erasing families.

Appendix: Sample Inter-agency Protocol

The following is a non-exhaustive list of reasonable reunification efforts Congress should require child welfare agencies and departments of corrections to make to aid families with incarcerated parents:

Parental Self-Improvement

Child welfare agencies and corrections departments shall develop a protocol to facilitate a parent's self-improvement while in prison and following release.

- (1) Agencies shall identify the problems leading to parental incarceration.
- (2) Agencies shall facilitate expedited access to appropriate rehabilitative programs. Where programs are not available in prison, efforts shall be made to establish the necessary programs or provide alternatives to such programs.
- (3) Where programs needed for self-improvement are not available, through no fault of the parent, the inability to access rehabilitative services shall not be held against the parent, but shall be held against the agency in any determination of the reasonableness of the agency's reunification efforts.
- (4) Agencies shall aid parents to develop a transition plan from prison to their communities that can enable successful reunification with their children and that does not conflict with any existing service plan with the child welfare agency.

Parental Involvement

To facilitate incarcerated parents' involvement in planning for the future and well-being of their children, corrections departments and child welfare agencies shall develop a protocol that addresses the following:

- (1) Agencies shall implement procedures to locate the parents of children in the foster care system to facilitate immediate efforts towards reunification.
- (2) Agencies shall implement procedures to facilitate incarcerated parents' communication with their children's caseworkers and the adults caring for their children.
- (3) Agencies shall implement procedures to facilitate parents' participation in Family Court hearings and case planning reviews.
- (4) Agencies shall develop procedures so that parents' absences from prison for Family Court hearings or case planning reviews will not detrimentally affect their participation in rehabilitative programs.

Parent-Child Bond

Agencies shall establish procedures to facilitate meaningful contact between children and their parents.

- (1) Agencies shall provide at least one monthly visit, provided it is in the best interest of the child.
- (2) Agencies shall establish visiting policies sensitive to the needs of children and their caregivers.
- (3) Agencies shall provide visiting rooms that are child-friendly.
- (4) Agencies shall facilitate weekly telephone calls.

Notes

- 1 Nell Bernstein, *All Alone in the World: Children of the Incarcerated* 122 (2005).
- 2 “[T]he length of prison sentences has increased consistently throughout the 1980s and 1990s, resulting in longer periods of separation of parents and their children.” N.Y. State Bar Ass’n (“NYSBA”), *Re-Entry and Reintegration: The Road to Public Safety, Report and Recommendations of Special Committee on Collateral Consequences of Criminal Proceedings* 265 (2006), available at http://www.nysba.org/Content/ContentGroups/News1/Collateral_Consequences_Report/Collateral_ConsequencesReport-section5.pdf. The national average length of time served by parents is 6.5 years. Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 *Fordham Urb. L.J.* 1671, 1677 (2003). The average sentence length for single mothers is 18 months. Jeremy Travis, Elizabeth Cincotta McBride & Amy L. Solomon, The Urban Institute, *Families Left Behind: The Hidden Costs of Incarceration and Reentry* 7 (2003), available at http://www.urban.org/uploadedPDF/310882_families_left_behind.pdf.
- 3 Christopher J. Mumola, U.S. Dep’t of Justice, *Incarcerated Parents and Their Children* 2 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ipetc.pdf>.
- 4 Mumola, *Incarcerated Parents* 2; Natasha A. Frost, Judith Greene & Kevin Pranis, Institute on Women & Criminal Justice, *Hard Hit: The Growth in the Imprisonment of Women, 1977-2004* (2006), available at <http://www.wpaonline.org/institute/hardhit/HardHitReport4.pdf> (reporting growth trends in the female prison population); NYSBA, *Re-Entry and Reintegration* 265 (“As females are the fastest growing sector of the US prison population, growing at 8.3% per year between 1990 and 2000 (compared with 6.4% for males), the number of people in prison who are parents is likely to increase over the next decade”).
- 5 Mumola, *Incarcerated Parents* 3-4.
- 6 Bernstein, *All Alone in the World* 155 (“In various surveys, half or more of child welfare supervisors have confirmed that even in cases where an arrested parent is released within a few days and there is no indication of abuse or neglect, they will not automatically return a child to his parent’s care.”).
- 7 Mumola, *Incarcerated Parents* 4.
- 8 AFCARS, “a federally mandated data collection system intended to provide case specific information on all children covered by the protections of Title IV-B/E of the Social Security Act (Section 427)” — in other words, for all children who are currently in the custody of state child welfare agencies — provides one of the most reliable national pictures of children in foster care. Nat’l Data Archive on Child Abuse and Neglect, Cornell University, *Adoption and Foster Care Analysis and Reporting System User’s Guide and Codebook for Fiscal Years 2000 to Present IV* (2002), available at http://www.ndacan.cornell.edu/NDACAN/Datasets/UserGuidePDFs/AFCARS_Guide_2000-Present.pdf. All states are required to collect and report information on each of their child welfare cases, which is in turn analyzed through AFCARS. See *id.*
- 9 National Data Archive on Child Abuse and Neglect, Cornell University, *Adoption and Foster Care Analysis and Reporting System (AFCARS) 2003* (2005), [NDACAN Dataset #118 – FC2003v1].
- 10 This figure provided by AFCARS is likely to represent an undercount of the number of children and parents who interface with both child welfare agencies and departments of corrections. The AFCARS data do not record the total number of children in foster care who have a parent in prison, but rather only those for whom parental incarceration was a reason for placement in foster care. Therefore, the number of children in foster care who have a parent in prison is likely to be greater than that reported currently by AFCARS. In addition, AFCARS does not report parental incarceration as a removal reason in three states — New York, Wyoming, and Alaska. National Data Archive on Child Abuse and Neglect, Cornell University, *Adoption and Foster Care Analysis and Reporting System (AFCARS) 2003* (2005), [NDACAN Dataset #118 – FC2003v1]. The degree to which the lack of data from these states contributes to an undercount is likely quite significant, particularly since New York’s prison population is the third largest in the nation. In addition, at least one other state with a large prison population, California, requires agencies to select a primary reason for removal from a list of options, not including parental incarceration. Agencies may, however, choose to specify additional reasons for

removal, including parental incarceration. As a result, not every case in which parental incarceration contributed to a child's removal into foster care is likely to be reported as such. Letter from Tom Burke, Acting Chief, Case Management System Support Branch, Dep't of Soc. Servs., State of Calif. Health and Human Services Agency, to Lynn Lu, Brennan Center for Justice (July 6, 2006) (on file with the Brennan Center Criminal Justice Program).

11 Mumola, *Incarcerated Parents* 2.

12 Admin. for Children & Families, U.S. Dep't of Health & Human Servs., *The AFCARS Report, FY 2003 Estimates as of April 2005*, at www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report10.htm.

13 Calculations based on data compiled by the U.S. Census Bureau for Census 2000. "American Factfinder," tbls. P12A, P12B, and QT-P1, at http://factfinder.census.gov/home/saff/main.html?_lang=en.

14 Mumola, *Incarcerated Parents* 10 tbl. 13.

15 Mumola, *Incarcerated Parents* 10 tbl. 13. Mothers (18%) were twice as likely as fathers (9%) to have been homeless in the year before their arrest. *Id.*

16 National Data Archive on Child Abuse and Neglect, Cornell University, *Adoption and Foster Care Analysis and Reporting System (AFCARS) 2003* (2005), [NDACAN Dataset #118 – FC2003v1].

17 National Data Archive on Child Abuse and Neglect, Cornell University, *Adoption and Foster Care Analysis and Reporting System (AFCARS) 2003* (2005), [NDACAN Dataset #118 – FC2003v1].

18 Mumola, *Incarcerated Parents* 6. Non-violent offenses include property, drug, and public-order offenses. *Id.* tbl. 7.

19 Sourcebook of Criminal Justice Statistics Online, Table 5.48.2002, at <http://www.albany.edu/sourcebook/pdf/t5482002.pdf>.

20 Mumola, *Incarcerated Parents* 6. Of mothers in state prison, 35% were convicted of drug offenses — 12 percentage points more than fathers. Fathers were more likely than mothers to be convicted of violent offenses. Of fathers in state prison, 45% were convicted of violent offenses — 19 percentage points more than mothers. *Id.*

21 ACLU, Break the Chains & Brennan Center for Justice, *Caught in the Net: The Impact of Drug Policies on Women and Families* 8-9 (2005), available at <http://fairlaws4families.org/final-caught-in-the-net-report.pdf> ("Existing research indicates that, across the board, women's drug use is more likely to be triggered by negative experiences and stressors, and motivated by anxiety and depression than by a desire to experiment or to conform to social expectations.... The prevalence of emotional, physical, and sexual violence against women in our society is a significant contributing factor to women's use of illegal drugs. Researchers consistently have found high levels of past and current physical and emotional abuse in the lives of women drug abusers.") (footnotes omitted).

22 Nat'l Inst. on Drug Abuse, Nat'l Inst. of Health, *Drug Use Among Racial/Ethnic Minorities* 53 tbls. 9-10 (revised 2003), available at <http://www.drugabuse.gov/pdf/minorities03.pdf>.

23 Forty-four percent of Latinas and 39% of African American women in state prison in 1997 were incarcerated for drug offenses, compared to 23% of white women, 24% of African American men, 26% of Latinos, and 11% of white men. Bureau of Justice Statistics, "Correctional Population in the United States, 1997," tbl. 4.6, at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpus9704.pdf>.

24 Mumola, *Incarcerated Parents* 7-8. Over 65% of mothers and 58% of fathers in state prison reported using drugs in the month before their offenses, while 43% of mothers and 33% of fathers indicated they were under the influence at the time of their offense. *Id.* at 8.

25 Bernstein, *All Alone in the World* 164.

26 Vera Inst. of Justice, *Hard Times: An Empirical Analysis of Maternal Incarceration, Foster Care, and Visitation* Executive Summary (2004), available at http://www.vera.org/publication_pdf/245_461.pdf.

27 Vera Inst. of Justice, *Hard Times*, Executive Summary.

28 Vera Inst. of Justice, *Hard Times*, Executive Summary.

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- 29 Women in Prison Project, Corr. Ass'n of N.Y., *When "Free" Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State* 19 (2006), available at http://www.correctionalassociation.org/WIPP/publications/Incarcerated_Mothers_report.pdf. See also NYSBA, *Re-Entry and Reintegration* 264 ("The negative impact on family stability that often accompanies criminal proceedings or convictions can also contribute to a greater likelihood that children of such families will themselves be arrested or convicted of crimes").
- 30 Shay Bilchik, Executive Director of the Child Welfare League of America, Op-ed, *Children of Convicts Struggle with a Prison of Their Own*, Seattle Post-Intelligencer, May 12, 2002, at F9. In seeking grant proposals for mentoring programs for children of incarcerated parents, the Department of Health and Human Services Administration for Children and Families — the same federal agency that administers child welfare payments to the states, see 42 U.S.C. §§ 670-679b — recognizes the imperative for communication between children and their incarcerated parents. "[W]here incarcerated parents [are] actively engaged in the mentoring process, through visits, phone conversations or letters, reunification is a natural process." Admin. for Children & Families, Family & Youth Servs. Bureau, U.S. Dep't of Health & Human Servs., Notice of a Funding Opportunity, *Mentoring Children of Prisoners*, 69 Fed. Reg. 8201, 8202 (Feb. 23, 2004).
- 31 Bernstein, *All Alone in the World* 45.
- 32 Bernstein, *All Alone in the World* 84-85.
- 33 *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778, 794 n.20 (Md. 2002).
- 34 *In re Adoption/Guardianship Nos. J9610436 and J9711031*, 796 A.2d 778, 794 n.20 (Md. 2002).
- 35 Dori Lewis & John Boston, Legal Aid Society Prisoners' Rights Project, Testimony of the Legal Aid Society on the Effects of Incarceration on Families (May 30, 2000), available at <http://www.legal-aid.org/supportDocumentIndex.htm?docid=13>.
- 36 Re-Entry Policy Council, Council of State Gov'ts, *Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community* 192 (2004), available at <http://www.reentrypolicy.org/rp/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=1152>.
- 37 Office of the Inspector Gen. ("OIG"), U.S. Dep't of Justice, *Criminal Calls: A Review of the Bureau of Prisons' Management of Inmate Telephone Privileges* ch. II, n.6 (1999), available at <http://www.usdoj.gov/oig/special/9908/callsp2.htm#Background> (quoting reports provided to OIG by Bureau of Prisons).
- 38 Women in Prison Project, *When "Free" Means Losing Your Mother* 19. See also La. Dep't of Pub. Safety & Corr., *Time in Prison: The Adult Institutions* 5 (2004), available at <http://www.corrections.state.la.us/Whats%20New/PDFs/TimeInPrison.pdf> ("Maintaining family contacts is important to an inmate's ability to adjust in prison and to his/her future potential to return successfully to a community"); N.E. Schafer, *Exploring the Link Between Visits and Parole Success: A Survey of Prison Visitors*, 38 Int'l J. of Offender Therapy & Comparative Criminology 17, 17 (1994) (summarizing empirical studies that reveal significant correlation between family contact and successful completion of parole and noting "growing perception among prison officials that family visits are an essential component of the rehabilitative process"); Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 Ann. Rev. Soc. 89, 100 (2003) (reporting "lower recidivism rates and greater postrelease success" associated with greater family contact), available at <http://arjournals.annualreviews.org/doi/pdf/10.1146/annurev.soc.29.010202.095931>.
- 39 Elizabeth Lund, *No Bars to Love*, Christian Sci. Monitor, March 5, 2003 at 11. See also http://www.girlscouts.org/news/news_releases/2003/doj_national_release.asp.
- 40 Mumola, *Incarcerated Parents* 5.
- 41 Mumola, *Incarcerated Parents* 5; John Hagan & Juleigh Petty Coleman, *Returning Captives of the American War on Drugs: Issues of Community and Family Reentry*, 47 Crime and Delinquency 352, 355 (2001) ("most [fathers] are incarcerated more than 100 miles away [from their children]"), available at <http://cad.sagepub.com/cgi/reprint/47/3/352.pdf>. See also *id.* at 357 ("due to the scarcity of federal prisons for women, an average female inmate is more than 160 miles farther from her family than a male inmate").
- 42 See, e.g., Martha L. Raimon, *Barriers to Achieving Justice for Incarcerated Parents*, 70 Fordham L. Rev. 421, 422 (2001) ("[c]ommunication difficulties are exacerbated when a parent is relocated to a different correctional facility. The case planner may have difficulty locating him or her, or the inmate may lose time while the foster care agency's phone number is in the process of being approved on the inmate's phone list at the new institution").
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43 Creasia Finney Hairston, *The Forgotten Parent: Understanding the Forces that Influence Incarcerated Fathers' Relationships with Their Children*, 77 Child Welfare J. of Policy, Practice & Programs 617, 623 (1998).

44 See, e.g., Lund, *No Bars to Love* (“[In the prison visiting rooms], instead of unlimited hugs, the families are allowed to have physical contact only at the beginning and ending of their visit, and guards monitor their every move”).

45 See, e.g., Women in Prison Project, *When “Free” Means Losing Your Mother* 22 (describing long waits for prison visits due to security processing delays and prisoner counts).

46 Women in Prison Project, *When “Free” Means Losing Your Mother* 31; see also Lund, *No Bars to Love* (“Before the girls [visiting their mothers in prison] can enter the visiting room, they must remove their shoes and belts, pull out their pockets for inspection, and pass through a metal detector”).

47 See Jeremy Travis, *Families and Children*, 69 Fed. Probation 31, 37 (2005) (documenting high cost of collect calls from prisons); Center for Constitutional Rights, *New York Families of Prisoners Launch Campaign to End the Backdoor Tax On Prison Phone Calls from the Kickback Contract with MCI: Collect Calls from Prisoners Cost More than 600% of Market Rates*, at <http://www.ccr-ny.org/v2/reports/report.asp?ObjID=0z90mxpZk5&Content=452>.

48 Mumola, *Incarcerated Parents* 5 tbl. 6.

49 See, e.g., Renny Golden, *War on the Family: Mothers in Prison and the Families They Leave Behind* 95-97 (2005) (recounting tensions that may arise between an incarcerated birth parent and a substitute caretaker, “whether a relative or not,” that may undermine the birth parent’s relationship without “help[ing] the children”); Barbara Bloom, *Imprisoned Mothers*, in *Children of Incarcerated Parents* 25 (Katherine Gabel & Denise Johnston eds., 1997) (noting potential conflicts between foster caregivers and incarcerated birth parents, including some caregivers’ belief “that it is unhealthy for the child to have contact” with an incarcerated parent).

50 See, e.g., Women in Prison Project, *When “Free” Means Losing Your Mother* 25 (noting that the New York State Department of Correctional Services “does not permit parents to be produced for SPRs [service plan reviews] at foster care agencies and [New York City Administration for Children’s Services] rarely conducts SPRs at correctional facilities or takes advantage of the opportunities to teleconference or videoconference these meetings”); see also Cynthia Seymour, *Children with Parents in Prison: Child Welfare Policy, Program, and Practice Issues*, 77 Child Welfare J. of Policy, Practice, & Programs 469, 474-75 (1998) (“children in out[-]of-home care with parents in prison have unique permanency planning needs because the length of the parent-child separation cannot be shortened or affected by the parent’s completion of a service plan or demonstrated ability to care for the child...the structure of the criminal justice system makes it difficult for parents, children, caregivers, and caseworkers to maintain contact with one another and to plan for the child’s future”).

51 Raimon, *Barriers to Achieving Justice*, 70 Fordham L. Rev. at 422.

52 Raimon, *Barriers to Achieving Justice*, 70 Fordham L. Rev. at 422.

53 Raimon, *Barriers to Achieving Justice*, 70 Fordham L. Rev. at 422. Incarcerated parents also face difficult procedural problems. See, e.g., Women in Prison Project, *When “Free” Means Losing Your Mother* 12-13 (order to produce inmate for Family Court hearing may not reach correctional facility in time for inmate to be produced; inmate may have been transferred; correctional staff may fail to arrange for production; time spent in city jail, away from prison, may place parent at risk of losing prison job or program placement; parent may be forced to choose between conflicting Family Court and Criminal Court or parole hearing dates).

54 See, e.g., Women in Prison Project, *When “Free” Means Losing Your Mother* 24 (“[c]aseworkers typically communicated with incarcerated parents by letter, by leaving messages with a prison counselor when possible, and occasionally through visits or seeing a parent in court”) (footnote omitted); Martha L. Raimon, *Barriers to Achieving Justice*, 70 Fordham L. Rev. at 422 (“[c]ase planners at foster care agencies generally communicate with parents via telephone, and sometimes by mail”).

55 Federal efforts included, in 1935, the Social Security Act’s Title IV-A and IV-B funding for foster care maintenance payments and protective and preventive services, Pub. L. No. 74-271, 49 Stat. 620 (1935); the Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (1974), which established standards for documenting the incidence of child maltreatment and provided some funding to states to implement programs to address child abuse and neglect; and, in 1975, Title XX of the Social Security Act, which provided block grants to states to fund prevention and child protection services, Pub. L. No. 93-647, 88 Stat. 2349 (1975).

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- 56 Pub. L. No. 96-272, 94 Stat. 500 (1980).
- 57 Pub. L. No. 105-89, 111 Stat. 2115 (1997).
- 58 125 Cong. Rec. 110, 59 (1979) (statement of Sen. Cranston).
- 59 Sourcebook of Criminal Justice Statistics Online, Table 6.28.2004, at <http://www.albany.edu/sourcebook/pdf/t6282004.pdf>.
- 60 The Rockefeller Drug Laws, named for New York Governor Nelson Rockefeller, were enacted in 1973. 1973 N.Y. Laws 1040-80, 2190-239, 3023-31 (codified as amended at N.Y. Penal Law sections 220.00-220.65 (offenses involving controlled substances), 221.00-221.55 (offenses involving marijuana). The Rockefeller Drug Laws have undergone some reforms. See Alan Rosenthal, Center for Community Alternatives, “A Guide to Rockefeller Drug Reform: Understanding the New Legislation,” at http://www.communityalternatives.org/articles/sentencing_guide.html; Center for Community Alternatives, “New Sentencing Chart for Drug Offenses Under Rockefeller Drug Law Reform,” at http://www.communityalternatives.org/articles/sentencing_chart.html. The Sentencing Reform Act of 1984 abolished parole in the federal system and authorized development of the Federal Sentencing Guidelines, as well as creating new federal crimes, as part of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, 98 Stat. 2017 (1984) (codified as amended at 18 U.S.C. §§ 3551-3626 and 28 U.S.C. §§ 991-998). These types of sentencing reforms extended the sentence length of many offenses, including drug offenses, and contributed to a doubling of the prison population from 1980 to 1990 — 740,000 — reaching 1.2 million in 1997 and 1.4 million in 2004. Sourcebook of Criminal Justice Statistics Online, Table 6.28.2004, at <http://www.albany.edu/sourcebook/pdf/t6282004.pdf>.
- 61 See 42 U.S.C. § 671(a)(15)(B) (requiring states to develop a statutory scheme providing that “reasonable efforts shall be made... (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home, and (ii) to make it possible for a child to safely return to the child’s home”); 45 C.F.R. § 1356.21(b) (specifying state obligation to make “reasonable efforts” on a case-by-case basis for each child in order to receive foster care maintenance payments under Title IV-E for children in their care). The U.S. Supreme Court has determined that no private right of action exists to enforce the reasonable efforts requirement. *Suter v. Artist M.*, 112 S.Ct. 1360 (1992).
- 62 See Robert M. Gordon, *Drifting through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 Minn. L. Rev. 637, 685 (1999) (“The Child Welfare Act of 1980 contained a clumsy but well-intentioned mechanism that limited increases in state foster care maintenance payments to ten percent per year and allowed states to transfer unused funds below the caps to services programs. The caps only became operative, however, if federal child welfare services were funded at the full authorization level. These services were never so funded after 1981, and Congress eliminated the incentive provisions altogether in 1994.”).
- 63 See Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 Cal. W. L. Rev. 223 (1989-90).
- 64 Statement of Mary Lee Allen, Director, Child Welfare Division, Children’s Defense Fund, Hearing on H.R. 867, the “Adoption Promotion Act of 1997.”
- 65 Foster Care Maintenance Assistance, 45 Fed. Reg. at 86830.
- 66 Foster Care Maintenance Assistance and Adoption Assistance; Child Welfare Services, 45 Fed. Reg. 86817, 86844 (proposed Dec. 31, 1980) (to be codified at 45 C.F.R. Pts. 1355, 1356, and 1357) (emphasis added). See also *id.* at 86846 (listing similar required “pre-placement preventive services”).
- 67 Foster Care Maintenance Assistance, 45 Fed. Reg. at 86823, 86830.
- 68 Foster Care Maintenance Assistance, 45 Fed. Reg. at 86830.
- 69 Statement of Mary Lee Allen, Director, Child Welfare Division, Children’s Defense Fund, Hearing on H.R. 867, the “Adoption Promotion Act of 1997.”
- 70 Foster Care Maintenance Assistance, 45 Fed. Reg. at 86830.
- 71 Foster Care Maintenance Payments, Adoption Assistance, and Child Welfare Services, 48 Fed. Reg. 23104, 23107 (May 23, 1983) (to be codified at 45 C.F.R. Pts. 1355, 1356, 1357, and 1392). See also *id.* at 23117 (state must “specify, in its title IV-B State plan, which preplacement preventive and reunification services are available to children and families in need”).
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72 45 C.F.R. § 1357.15(e)(2) (1983) (emphasis added). The language in this regulation was later replaced by unrelated language, and examples of services to be provided were included in new regulations implementing the Omnibus Budget Reconciliation Act of 1993, P.L. 103-66, 107 Stat. 649 (1993), which added Subpart 2, governing family preservation and support services, to Title IV-B of the Social Security Act. See 42 U.S.C. §§ 629-629i; Foster Care Maintenance Payments, Adoption Assistance, Child and Family Services, 61 Fed. Reg. 58632, 58640 (1996) (to be codified at 45 C.F.R. pts 1355, 1356, and 1357). ASFA amended the subpart to be headed “Promoting Safe and Stable Families,” and amended the statute to include, among the categories of services provided, “time-limited” family reunification services and services to facilitate adoption. Pub. L. No. 105-89, § 305, 111 Stat. at 2130-31.

73 National Coalition for Child Protection Reform, “The Unreasonable Assault on ‘Reasonable Efforts,’” at <http://www.nccpr.org/newissues/9.html> (quoting National Council of Juvenile and Family Court Judges et al., *Making Reasonable Efforts: Steps for Keeping Families Together* 8 (1987)).

74 National Coalition for Child Protection Reform, “The Unreasonable Assault on ‘Reasonable Efforts,’” at <http://www.nccpr.org/newissues/9.html> (quoting Mary Ann Jones, Child Welfare League of America, *Parental Lack of Supervision: Nature and Consequences of a Major Child Neglect Problem* 2 (1987)).

75 While the Child Welfare Act requires states to make reasonable efforts at family reunification as a condition of receiving federal child welfare funds through Title IV-E, it provides insufficient federal funding incentives to states for reunification services. See Gordon, *Drifting through Byzantium*, 83 Minn. L. Rev. at 685 (suggesting that the combination of too little money for services and too much for foster care undermines efforts to move children out of foster care).

76 143 Cong. Rec. H2017 (daily ed. Apr. 30, 1997) (statement of Rep. Kennelly). Representative Kennelly identified ASFA’s two basic goals as “[p]reventing children from being returned to unsafe homes, and finding safe and loving and permanent homes for children who cannot be reunified with their families.” *Id.* Where children could, with reasonable agency efforts, safely be returned to their parents, Rep. Kennelly offered no advice for states on how to achieve that goal in the absence of additional federal guidance or funding.

77 These were the minimal steps states needed to take to protect their funding. Foster Care Maintenance Payments, 48 Fed. Reg. at 23117 (to be codified at C.F.R. § 1357.15(e)(1)) (state must “specify, in its title IV-B State plan, which pre-placement preventive and reunification services are available to children and families in need”).

78 Congress also failed to provide states with much-needed financial incentive to increase reunification efforts. Instead, Congress encouraged states to place children in adoptive families by creating financial incentives in the form of adoption bonus payments of \$4,000 per adopted child (\$6,000 per child with special needs), see 42 U.S.C. § 673b, so states would focus their efforts on enforcing strict reunification time limits leading to more adoptions.

79 States are not required to make “reasonable efforts” where a court of competent jurisdiction has determined that the parent has committed an enumerated homicide or inchoate crime or a felony assault resulting in serious bodily injury against the child in question or another child of the parent. See 42 U.S.C. § 671(a)(15)(D)(ii). See also 42 U.S.C. § 678 (explicitly reserving states’ rights to add waiver grounds). ASFA also mandates the filing of a TPR in such cases, unless an exception is invoked. See 42 U.S.C. § 675(5)(E). These provisions of ASFA may have served only to codify existing practice. See Philip Genty, *Permanency Planning in Context of Parental Incarceration: Legal Issues and Recommendations*, 77 Child Welfare J. of Policy, Practice, & Programs 543, 552-53 (1998) (“agencies were almost certainly already forgoing reasonable efforts in many, if not most, such cases” and moving to TPR).

80 42 U.S.C. § 675(5)(E).

81 Around 20% of incarcerated parents report that their children are being cared for by grandparents or other relatives. Mumola, *Incarcerated Parents* 4. Where the children remain in the legal custody of the state, agencies may forego petitioning to terminate parental rights where a child in foster care is placed with a relative. Accordingly, kinship caregivers are an important resource for families with incarcerated parents that may facilitate eventual family reunification.

82 42 U.S.C. § 675(5)(E)(i)-(iii).

83 See Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4020 (Jan. 25, 2000) (to be codified at 45 C.F.R. § 1356.21(i)) (“[w]e do not believe it is necessary to elaborate in the regulation on how the State agency should make the determination that the necessary services have not been provided” for purposes of applying the exception).

84 See Genty, *Permanency Planning*, 77 Child Welfare at 554.

85 After ASFA's passage, the Department of Health and Human Services promulgated regulations implementing the Act. In the preamble to the proposed rules, the Department explained: "[ASFA] requires that reasonable efforts determinations be made on a case-by-case basis. We think any regulatory definition would either limit the courts' ability to make determinations on a case-by-case basis or be so broad as to be ineffective." Title IV-E Foster Care Eligibility Reviews and Child and Family Services, State Plan Reviews, 63 Fed. Reg. 50058, 50073 (proposed Sept. 18, 1998). Current federal regulations list some examples of state child welfare services that may "help children, where appropriate, return to families from which they have been removed," including respite care or parenting skills development. 45 C.F.R. § 1357.10(c).

86 Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, "Prisoners in 2004," at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>.

87 45 C.F.R. § 1356.21(b)(2).

88 Arlene F. Lee, Philip M. Genty & Mimi Laver, Child Welfare League of America, *The Impact of the Adoption and Safe Families Act on Children of Incarcerated Parents* 22 (2005), available at http://www.cwla.org/programs/incarcerated/cop_pubimpactbrief.pdf.

89 Even where a parent is eligible for diversion from the criminal justice system, for example, to participate in a substance abuse program, ASFA's timelines pose great challenges to service providers to offer effective treatment to support family reunification by the child welfare system's deadlines. See generally Nat'l Drug Court Inst. & Center for Substance Abuse Treatment, *Family Dependency Treatment Courts: Addressing Child Abuse and Neglect Cases Using the Drug Court Model*, 40 (2004) (discussing implications of ASFA for family drug treatment courts, noting "[i]t is...essential that agencies promptly provide substance abuse treatment services. Historically, treatment service providers have lacked sufficient capacity to help parents who seek it — but the short timeframe imposed by ASFA increases the need for court systems to ensure close judicial supervision of, and coordination and accountability among, service providers."), available at <http://www.ncjrs.gov/pdffiles1/bja/206809.pdf>; Barbara E. Smith, Sharon G. Elstein & Eva J. Klain, *Parental Substance Abuse, Child Protection and ASFA: Implications for Policy Makers and Practitioners*, Executive Summary submitted by American Bar Association Center on Children and the Law 6 (2005) (studying five communities who recognized that "[p]arents were not being assessed quickly and accurately; were not assisted in obtaining early treatment; were not being supported through the treatment process; and were not given other services needed to overcome their substance addiction and other barriers inhibiting reunification with their children" and explaining that "[s]ubstance abuse recovery takes time and relapse is a part of the process; therefore, it is important to identify parents with substance abuse issues and initiate treatment early in the case. All of the five study sites realized that reunification was being thwarted because services started too late."), available at http://www.abanet.org/child/executive_summary.pdf.

90 People convicted of drug offenses may be denied among other entitlements access to public housing, welfare benefits and federal financial aid for post-secondary education. In addition, they may be barred from certain types of employment or obtaining occupation licenses. See Center for Law & Social Policy & Cmty. Legal Servs., Inc., *Every Door Closed: Facts About Parents with Criminal Records* (2003), available at http://www.clasp.org/publications/EDC_fact_sheets.pdf.

91 Laurie P. Cohen, *A Law's Fallout: Women in Prison Fight for Custody*, Wall St. J., Feb. 27, 2006, at A1.

92 Title IV-E Foster Care Eligibility Reviews, 63 Fed. Reg. at 50072.

93 Genty, *Permanency Planning*, 77 Child Welfare at 550.

94 See Kathleen Bean, *Reasonable Efforts: What State Courts Think*, 36 U. Tol. L. Rev. 321, 331 & n.69 (2005).

95 See *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 56 (1981) (Blackmun, J., dissenting) (agency's "own 'diligence' in promoting the family's integrity...is surely significant in light of petitioner's incarceration and lack of access to her child."). See, e.g., Md. Fam. Law § 5-323(d)(1)(ii) (among factors court considers in determining whether termination of parental rights is in child's best interests are "the extent, nature, and timeliness of services offered by a local department to facilitate reunion of the child and parent").

96 In 1999, the Department of Health and Human Services' Administration on Children, Youth and Families, Children's Bureau published its *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, developed by a work group of child welfare experts as a "technical assistance document designed to help States review their own laws and

develop statutes and policies that reflect best practices in child welfare today. Donald N. Duquette et al., Children's Bureau, Admin. on Children, Youth & Families, Dep't of Health & Human Serv., *Guidelines for Public Policy and State Legislation Governing Permanence for Children I-1*, June 1999 (responding to President Clinton's Initiative on Adoption and Foster Care, Adoption 2002).

97 Duquette, *Guidelines* III-1.

98 Duquette, *Guidelines* III-3.

99 Duquette, *Guidelines* III-3.

100 Every state, as well as Puerto Rico and the District of Columbia, has modified its child welfare system to comply with ASFA's conditions of federal funding. See Lee, Genty & Laver, *The Impact of the Adoption and Safe Families Act on Children of Incarcerated Parents* 11.

101 ASFA permits the waiver of reasonable efforts on the ground of a parent's commission of certain types of homicide or assault against his/her own child. See 42 U.S.C. § 671(a)(15)(D)(ii) (reasonable efforts not required where court of competent jurisdiction has determined that the parent has committed enumerated homicide or inchoate crime or a felony assault resulting in serious bodily injury against the child in question or another child of the parent). See also 42 U.S.C. § 678 (explicitly reserving states' rights to add waiver grounds). ASFA also mandates the filing of a TPR in such cases, unless an exception is invoked. See 42 U.S.C. § 675(5)(E).

102 Most of these states do not specify what duration of incarceration will trigger the waiver and instead provide that the length of incarceration should be examined in relation to the specific circumstances of each child. See, e.g., Alaska Stat. § 47.10.086(c)(10) (reasonable efforts not required if "parent or guardian is incarcerated and unable to care for the child during a significant period of the child's minority, considering the child's age and need for care by an adult") (emphasis supplied); S.D. Codified Laws § 26-8A-21.1(4) (same); La. Child. Code Ann. Art. 672.1(C)(1) (efforts not required if parent's incarceration is "of such duration that the parent will not be able to care for the child for an extended period of time, considering the child's age and his need for a safe, stable, and permanent home"; parent must also have "refused or failed to provide a reasonable plan for the appropriate care of the child other than foster care") (emphasis supplied). Some of these states, however, allow exceptions to the reasonable efforts requirement after the period of incarceration has exceeded a certain duration. See, e.g., Ky. Rev. Stat. Ann. § 610.127(1) (reasonable efforts not required if parent has subjected child to "aggravated circumstances," including incarceration where the parent is unable 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 time"); N.D. Cent. Code § 27-20-32.2(4)(a) (efforts not required if parent has subjected child to "aggravated circumstances," including incarceration with a release date after a child age nine or older attains majority, or after a young child is twice the child's current age). See also Mont. Code Ann. § 41-3-609 (treatment plan not required where parent is incarcerated for more than one year and reunification is not in the child's best interests, considering age and developmental, cognitive, and psychological needs); Tenn. Code Ann. § 36-1-113 (aggravated circumstances waiving reasonable efforts include abandonment where parent is incarcerated for four months and has not provided support or visited during that time).

103 Even where state codes do not contain such explicit language, state courts have specified that parental incarceration does not excuse child welfare agencies from making reasonable efforts to facilitate family reunification for families with incarcerated parents as for other families in need. See, e.g., *In the Interest of S.J.*, 620 N.W.2d 522, 525 (Iowa Ct. App. 2000) ("Although we agree a parent's imprisonment may create difficulties in providing reunification services, we are not convinced imprisonment absolves the department of its statutory mandate to provide reunification services under all circumstances. Instead, we conclude the department must assess the nature of its reasonable efforts obligation based on the circumstances of each case. The services required to be supplied an incarcerated parent, as with any other parent, are only those that are reasonable under the circumstances.") (citations omitted); *In re Adoption/Guardianship Nos. CAA 92-10852, 92-10853*, 651 A.2d 891, 895-96 (Md. Ct. Spec. App. 1994) (agency required to provide reunification services to incarcerated father "prior to taking the extreme measure of terminating his parental rights"); *In re Children of Wildey*, 669 N.W.2d 408, 413 (Minn. Ct. App. 2003) ("[T]here is no case law cited that supports the district court's conclusion that appellant's incarceration vitiates his ability to comply with any case plan. Case plans for inmates can and have been formed for a long time in Minnesota."); *In the Matter of Deion Christian Crook Williams*, 130 P.3d 801 (Ore. Ct. App. 2006) (on appeal from permanency hearing order, "incarceration of a parent, without more, is not an aggravated circumstance that may serve as a basis for excusing DHS from making reasonable efforts toward reunifying the family").

104 Duquette, *Guidelines* III-12. “A minority thought that children should not have to spend years in foster care because needed services to families do not exist. They said there are better ways to encourage the development of services. They questioned whether requiring courts to refuse to terminate parental rights in such cases actually would cause States to expand services for families.” *Id.* at VI-11.

105 Duquette, *Guidelines* III-12-13.

106 See Calif. Welf. & Inst. Code § 361.5(e)(1) (requiring clear and convincing evidence of detriment); Utah Code Ann. § 78-3a-311(6)(a).

107 See Calif. Welf. & Inst. Code § 361.5(e)(1); Utah Code Ann. § 78-3a-311(6)(b) (factors also include, “for a minor ten years of age or older, the minor’s attitude toward the implementation of family reunification services,” and “any other appropriate factors”).

108 N.Y. Soc. Serv. Law § 384-b(2)(b).

109 Bernstein, *All Alone in the World* 152.

110 Cal. Welf. & Inst. Code § 361.5(e)(1)(A)-(D).

111 Genty, *Permanency Planning*, 77 Child Welfare at 546 (citing New York Social Services Law § 384-b(7)(f)(5)). See also Women in Prison Project, *When “Free” Means Losing Your Mother* 11 (“as part of the law’s “diligent efforts” requirement, foster care agencies must provide services to assist incarcerated parents in fulfilling their legal obligations to maintain contact with and plan for the future of their children.”).

112 Mass. Regs. Code tit. 110, § 1.10.

113 Mass. Regs. Code tit. 110, § 1.10.

114 See Mo. Ann. Stat. § 210.875 (authorizing Missouri children’s services commission to “develop and recommend specific legislative proposals and propose state and local programs to respond to the needs of children of incarcerated parents including, but not limited to, alternative sentencing laws and the establishment of community-based care facilities to maintain custody in the incarcerated parent and to promote the welfare of such parents’ children”).

115 Children of Incarcerated Parents Task Force, *Report to the [Missouri] Children’s Services Commission* 11 (2003) available at <http://www.csc.mo.gov/reports/2003CSCcpreport.pdf>.

116 Children of Incarcerated Parents Task Force, *Report to the [Missouri] Children’s Services Commission*.

117 Cal. Welf. & Inst. Code § 361.5(e)(1)(D). See also *id.* § 361.5(e)(2) (authorizing development of interagency “protocols for ensuring the notification, transportation, and presence of an incarcerated or institutionalized parent” at statutory court hearings); *id.* § 361.5(e)(3) (incarcerated mother may seek to participate in statutory corrections department community treatment program and court shall determine suitability).

118 For example, California restricts the provision of services (whether parents are incarcerated or not) to a period shorter than ASFA’s time limitation: for children removed from custody at age three or older, “court-ordered services shall not exceed a period of 12 months from the date the child entered foster care,” and for children under three, services shall not exceed six months. A court may extend services up to a period of 18 months only if it finds there is a “substantial probability that the child will be returned to the physical custody of his or her parent or guardian within the extended time period or that reasonable services have not been provided to the parent or guardian.” Cal. Welf. & Inst. Code § 361.5(a)(1)-(3). Utah limits the provision of reunification services to families with incarcerated parents to 12 months, and eight months for “a minor who is 36 months of age or younger at the time the minor is initially removed from the home.” Utah Code Ann. § 78-3a-311(6)(c), (2)(d)(iii)(A), (2)(g)(ii).

119 Colo. Rev. Stat. Ann. § 19-3-604(2)(k)(IV) (emphasis added). A separate provision in the Colorado statute, however, permits a finding of parental unfitness for purposes of terminating parental rights based on “[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, in [designated] count[ies]..., if the child is under six years of age at the time a [TPR] 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.” *Id.* § 19-3-604(1)(b)(III).

120 Neb. Rev. Stat. § 43-292.02(2)(b) (“A petition shall not be filed on behalf of the state to terminate the parental rights of the juvenile’s parents...if the sole factual basis for the petition is that...the parent or parents of the juvenile are incarcerated.”).

121 N.M. Stat. Ann. § 32A-4-28(D) (“The department shall not file a motion, and shall not join a motion filed by another party, to terminate parental rights when the sole factual basis for the motion is that a child’s parent is incarcerated.”).

122 Many other states explicitly provide that incarceration alone is not a ground for TPR on the merits. See, e.g., La. Child. Code Ann. Art. 1036(E) (“the incarceration of a parent shall not in and of itself be sufficient to deprive a parent of his parental rights”); Mass. Gen. Laws ch. 210, § 3(c)(xiii) (same); Mo. Rev. Stat. § 211.447(6)(6) (same); N.H. Rev. Stat. Ann. § 170-C:5(VI) (same); Okla. Stat. Ann. Tit. 10, § 7006-1.1(A)(12) (same). See also, e.g., *V.M. v. Dept of Children & Families*, 922 So.2d 1085, 1086 (Fla. Dist. Ct. App. 2006) (“parental rights should not be terminated merely because of the Father’s criminal history and incarceration history, without more.”); *In re J.L.N.*, 55 P.3d 955, 959-60 (Nev. 2002) (incarceration alone does not establish parental fault, and “[t]he majority of other jurisdictions that have considered this issue have concluded that termination should not be granted on the parent’s incarceration alone”); *In re Children of Wildey*, 669 N.W.2d 408, 412 (Minn. Ct. App. 2003) (“parent’s incarceration alone is not enough to warrant termination of parental rights”); *In the Matter of R.P.*, 498 N.W.2d 364, 368 (S.D. 1993) (“[i]ncarceration itself is not sufficient reason to terminate parental rights”); *In re B.J.D.*, 550 S.E.2d 73, 77 (W.Va. 2001) (incarceration for drug trafficking conviction per se does not support termination of parental rights).

123 Approximately 30 states permit consideration of parental incarceration as a factor in a TPR proceeding. See Lee, Genty & Laver, *The Impact of the Adoption and Safe Families Act on Children of Incarcerated Parents* Appendix A for detailed discussion of state application of the termination of parental rights requirement. Particularly harsh provisions include Colo. Rev. Stat. § 19-3-604(1)(b)(III) (parental unfitness may be based in part on parent’s ineligibility for parole for at least six years or, in specified counties, if the child is under six years of age at the time a petition is filed ineligibility for parole for at least three years); Ill. Comp. Stat. § 750 50/1(D)(r), (s) (unfit parent includes parent who, “prior to incarceration...had little or no contact with the child or provided little or no support of the child, and the parent’s incarceration will prevent the parent from discharging his or her parental responsibilities for the child for a period in excess of two years after the filing of the [TPR] petition,” or whose “repeated incarceration has prevented the parent from discharging his or her parental responsibilities for the child”); Mich. Comp. Laws § 712A.19b(3)(h) (TPR may be based on parental incarceration depriving child of normal home for more than two years, where parent has not provided for care, and no reasonable expectation exists that parent will be able to provide proper care within a reasonable time considering the child’s age); Ohio Rev. Code Ann. § 2151.414(E)(12) (TPR may be based on parental incarceration for at least 18 months or repeated incarceration that prevents parent from caring for child); Tex. Fam. Code Ann. § 161.001 (TPR may be based on parental incarceration rendering parent unable to care for child for two more years at time of TPR filing); Utah Code Ann. § 78-3a-408(2)(e) (TPR may be based in part on parental incarceration depriving child of home for more than one year).

124 Genty, *Permanency Planning*, 77 Child Welfare at 554.

125 “The statutory language is clear that for a compelling reason, or any other exception to the requirement to file a petition for TPR, there is no requirement for a judicial determination. However, the State agency is to document in the case plan, which is available for court review, the compelling reason for why filing a petition for TPR is not in the best interests of the child. Clearly, courts play an important oversight role for children in foster care. The court exercises authority in making decisions at permanency hearings regarding the child’s permanency plan. It is at these times that the court should review State agency decisions with regard to the requirement to file a petition for TPR.” Title IV-E Foster Care Eligibility Reviews, 65 Fed. Reg. at 4062.

126 Title IV-E Foster Care Eligibility Reviews, 63 Fed. Reg. at 50077.

127 Title IV-E Foster Care Eligibility Reviews, 63 Fed. Reg. at 50077.

128 Genty, *Permanency Planning*, 77 Child Welfare at 555-56.

129 Women in Prison Project, *When “Free” Means Losing Your Mother* 17-18.

130 Title IV-E Foster Care Eligibility Reviews, 63 Fed. Reg. at 50072.

131 See Bean, *Reasonable Efforts*, 36 U. Tol. L. Rev. at 323 n.11 (discussing research methodology for analyzing state courts' assessments of reasonable efforts in the context of TPR proceedings). See also Lee, Genty & Laver, *The Impact of the Adoption and Safe Families Act on Children of Incarcerated Parents* 6-7 (explaining difficulty of researching TPR cases in part because “[m]ost state trial court cases and some intermediate appellate cases are not reported and do not show up in a [legal database] search”).

132 Bean, *Reasonable Efforts*, 36 U. Tol. L. Rev. at 344 (footnotes omitted). Similarly, the HHS expert work group that convened after the passage of ASFA recommended that states require courts determining whether reasonable reunification efforts have been made to “consider whether services to the family have been accessible, available, and appropriate.” Duquette, *Guidelines* III-5. In making that determination, the following factors are relevant:

- a. Dangers to the child and the family problems precipitating those dangers;
- b. Whether the agency has selected services specifically relevant to the family’s problems and needs;
- c. Whether caseworkers have diligently arranged those services;
- d. Whether appropriate services have been available to the family on a timely basis; and
- e. The results of those interventions.

Id. However, four additional “precepts” emerge from Bean’s non-exhaustive summary of courts’ considerations: “(1) the agency need only do that which is reasonable; (2) agency efforts must be meaningful and done in good faith; (3) the reasonableness of agency efforts cannot be assessed independently of the response of parents to the agency’s efforts; and (4) resource limitations of the state are a legitimate consideration when assessing reasonableness.” Bean, *Reasonable Efforts*, 36 U. Tol. L. Rev. at 344 (footnotes omitted).

133 *In the Interest of S.J.*, 620 N.W.2d 522, 525 (Iowa Ct. App. 2000).

134 Bean, *Reasonable Efforts*, 36 U. Tol. L. Rev. at 350 n.222.

135 Bean, *Reasonable Efforts*, 36 U. Tol. L. Rev. at 334. According to Professor Bean, judges in cases not specifically relating to incarcerated parents may be reluctant to find no reasonable efforts, thereby placing an agency’s federal funding in jeopardy. “While a number of services are frequently available in prisons, e.g., domestic violence counseling, parenting classes, anger management counseling, and drug and alcohol counseling...availability [of services] is not as great as outside of prison.” *Id.* at 350 n.222.

136 *In re Doe*, 60 P.3d 285, 295 (Haw. 2002).

137 See, e.g., Duquette, *Guidelines* VI-11 (“The Expert Work Group disagreed about whether termination of parental rights should be allowed when important services to preserve the family were not available. The majority thought that if termination is allowed when services are not available States will be encouraged to terminate parental rights rather than to spend money, when needed, to preserve families. A minority thought that children should not have to spend years in foster care because needed services to families do not exist. They said there are better ways to encourage the development of services. They questioned whether requiring courts to refuse to terminate parental rights in such cases actually would cause States to expand services for families.”).

138 See, e.g., Women in Prison Project, *When “Free” Means Losing Your Mother* 19.

139 Women in Prison Project, *When “Free” Means Losing Your Mother* 19 (footnote omitted); *id.* at 53 n.76 (“New York State correctional policies and practices — such as limited visiting hours, restrictive telephone policies, lengthy visitor security procedures, unfriendly visiting environments, and sometimes disrespectful security staff — often make it even more difficult for foster care caseworkers to fulfill their legal responsibilities in meeting permanency planning requirements.”); *id.* at 17 (noting “high turnover rate for foster care caseworkers, caused by low pay, large caseloads, and inadequate training and resources.”).

140 Women in Prison Project, *When “Free” Means Losing Your Mother* 11.

141 Genty, *Permanency Planning*, 77 Child Welfare at 546.

142 See, e.g., *In the Interest of C.C. and C.C.*, 2003 WL 22017237, at *2 (Iowa App. Aug. 27, 2003) (Vaitheswaran, J., concurring in the judgment) (agency’s failure to to implement court order to provide supervised visits between children

and incarcerated father based on social worker's opinion that it was not in the children's best interest "to be transported over an hour or more for a short visit with either parent" amounted to inadequate provision of reunification services, but termination of parental rights affirmed because father nevertheless "failed to become minimally fit during the period from removal to permanency" (internal citations omitted).

143 See N.C. Gen. Stat. § 7B-507(b)(1) (reasonable efforts not required upon a judicial finding that "such efforts would be futile"); Minn. Stat. § 260.012(a)(5) (reasonable efforts not required upon judicial determination that "petition has been filed stating a prima facie case that...the provision of services or further services for the purposes of reunification is futile and therefore unreasonable under the circumstances"); Bean, *Reasonable Efforts*, 36 U. Tol. L. Rev. at 338 n.112; see also *In Re Adoption/Guardianship No. J970013*, 737 A.2d 604, 612 (Md. Ct. Spec. App. 1999) (trial court did not err in finding agency relieved of obligation to provide reunification services to incarcerated father serving lengthy sentence of 20 years to life, where "there is a possibility that the appellant will remain incarcerated for the rest of his life").

144 Bean, *Reasonable Efforts*, 36 U. Tol. L. Rev. at 340 n.125 (noting that "the parent's incarceration is frequently a circumstance that supports a court's invocation of 'futility'" and discussing the Minnesota Court of Appeals holding in *In re Children of Vasquez*, 658 N.W.2d 249, 253 (Minn. Ct. App. 2003) ("We hold now that when the futility of reunification efforts is irrefutable, as here where the father will be incarcerated until his children's adulthood and efforts at rehabilitation would be futile, the county need not provide the parent with a case plan.")).

145 *In re Norris*, Nos. 00CA038, 00CA041, 2000 WL 33226187, at *5 (Ohio Ct. App. Dec. 12, 2000) (emphasis supplied).

146 Bean, *Reasonable Efforts*, 36 U. Tol. L. Rev. at 349.

147 Bean, *Reasonable Efforts*, 36 U. Tol. L. Rev. at 350 n.222.

148 Bean, *Reasonable Efforts*, 36 U. Tol. L. Rev. at 362 ("While it is the agency that is subject to ASFA's reasonable efforts requirement, those efforts are rarely assessed without regard to corresponding parental efforts.") (footnotes omitted). But see *Kenosha Dep't of Human Servs. v. Jodie W.*, No. 2005AP2-NM, 2006 Wisc. LEXIS 391, **41, **39 (Wis. July 11, 2006) (trial court determination that agency's imposition of impossible condition requiring parent sentenced to 4-year prison term to acquire housing within 12 months was reasonable for purposes of determining parental unfitness is unconstitutional application of statute governing termination of parental rights; statute requires that "court-ordered conditions of return [be] tailored to the particular needs of the parent and child").

149 *In re Williams*, 130 P.3d 801, 806 (Or. Ct. App. 2006).

150 Children of Incarcerated Parents Project, *Report to the Oregon Legislature on Senate Bill 133 1* (2002), available at http://www.oregon.gov/DOC/PUBAFF/docs/pdf/legreport_bill133.pdf.

151 Children of Incarcerated Parents Project, *Report to the Oregon Legislature 9-22*.

152 See Re-Entry Enhancement Act, H.R. 4202, 109th Cong. (2005); Second Chance Act of 2005, H.R. 1704, 109th Cong. (2005) and S. 1934, 109th Cong. (2005).

153 See Amendment to the Amendment in the Nature of a Substitute to H.R. 1704 (offered by Representative Jackson-Lee of Texas, July 19, 2006).

154 Such projects include "programs that facilitate [prison] visitation and maintenance of family relationships" for incarcerated parents, H.R. 4202, § 101(a)(12), for example, through the use of "telephone conferencing," "videoconferencing," "longer visitation hours or family activities," and "the creation of children's areas in visitation rooms with parent-child activities," *id.* § 101(a)(17); see also S. 1934, § 3(a)(18).

155 H.R. 4202, § 101(a)(13); H.R. 1704, § 3(a)(13); see also S. 1934, § 3(a)(12).

156 S. 1934, § 6(2); H.R. 1704, § 6(2).

157 H.R. 4202, § 209(b).

158 H.R. 4202, §§ 101(a)(13), (18). See also S. 1934, § 3(a)(19).

159 H.R. 4202, § 215.

160 H.R. 4202, § 216.

161 H.R. 867, 105th Cong. § 5(3) (1997).

162 S. 742, 105th Cong. § 2(a)(3) (1997).

163 For example, the Colorado child welfare statute permits “[t]he Court [to] postpone the filing or joining of a petition to terminate parental rights for a reasonable time where [t]he child has been in foster care under the responsibility of the county department for such period of time due to circumstances beyond the control of the parent *such as incarceration of the parent for a reasonable period of time...*” Colo. Rev. Stat. § 19-3-604(2)(k)(IV) (emphasis supplied); N.M. Stat. Ann. § 32A-4-28(D) (“The department shall not file a motion, and shall not join a motion filed by another party, to terminate parental rights when the sole factual basis for the motion is that a child’s parent is incarcerated.”); Neb. Rev. Stat. § 43-292.02 (2)(b) (“A petition shall not be filed on behalf of the state to terminate the parental rights of the juvenile’s parents... if the sole factual basis for the petition is that...the parent or parents of the juvenile are incarcerated.”). Experts in the field are also recommending reform to the 15/22 TPR requirement. See Women in Prison Project, *When “Free” Means Losing Your Mother* 34 (recommending relaxing 15/22 TPR requirement for incarcerated parents); see also NYSBA, *Re-Entry and Reintegration* 429 (recommending “that the New York state implementation of ASFA be amended to allow for an automatic stay of termination proceedings for those incarcerated parents who will be released within 18 months”).

164 See Mary Bissell & Jennifer L. Miller, eds., Children’s Defense Fund & Cornerstone Consulting Group, *Using Subsidized Guardianship to Improve Outcomes for Children: Key Questions to Consider* 3 (2004). Bills have been introduced in Congress that would authorize federal funding for subsidized legal guardianship programs. See Kinship Caregiver Support Act, S. 985, 109th Cong. §§ 102, 107 (2005) (establishing “kinship navigator programs...to assist kinship caregivers in navigating their way through programs and services,” including “special services for incarcerated parents”); Guardianship Assistance Promotion and Kinship Act, H.R. 3380, 109th Cong. § 102 (2006) (authorizing federal funds for “legal guardianship assistance payments”); *id.* § 301 (establishing “kinship navigator programs...to assist kinship caregivers in navigating their way through programs and services”).

165 For example, California’s Proposition 36, which was enacted into law in 2001 as the Substance Abuse Crime Prevention Act, authorizes placement of those convicted for the first or second time of nonviolent drug possession in treatment rather than prison. Cal. Penal Code § 1201.1; see also State of California Alcohol and Drug Programs, *Substance Abuse and Crime Prevention Act of 2000* (Prop. 36), available at <http://www.adp.cahwnet.gov/sacpa/prop36.shtml>. Initial evaluations of the law have been positive, with outcomes showing drops in new arrests and drug use, and increases in employment. Douglas Longshore et al., UCLA Integrated Substance Abuse Programs, *Evaluation of the Substance Abuse and Crime Prevention Act, 2004 Report* (2005), available at <http://www.uclaisap.org/Prop36/documents/sacpa080405.pdf>. See generally Allison C. Colker, National Conference of State Legislatures, *California’s Proposition 36 and Other State Diversion Programs: Moving Drug Offenders out of Prison and Into Treatment* (2004), available at <http://www.ncsl.org/programs/health/capropib.htm#LegislativePol04>.

166 See Rebecca Project for Human Rights, *Speaking Our Truth: Families, Substance Abuse, and Recovery* 5 (2003) (“Only one third of the mothers who need treatment are able to access appropriate treatment; and only 11.5 percent of treatment programs provide on-site day care”).

167 See ACLU, Break the Chains & Brennan Ctr. for Justice, *Caught in the Net* 19-20.

168 See Jon Wool & Don Stemen, Vera Inst. of Justice, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003* 8-14 (2004), available at http://www.vera.org/publication_pdf/226_431.pdf. See generally Michael Jacobson, *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* 173-214 (2005).

169 See Rebecca Project for Human Rights, *Speaking Our Truth* 5 (“Family treatment...is a distinct and comprehensive process of recovery focused on the substance abusing parent and her children. The family is healed as a whole. Comprehensive family treatment generally extends to 12 months, the duration of treatment time that yields the best outcomes for success in sobriety, child well-being, and economic stability. Parenting classes, individual therapy, family therapy, early childhood intervention, educational training, and job placement comprise critical program components of family treatment. These treatment programs consequently enjoy unprecedented success outcomes of upwards to 60 percent of mothers who maintain their recovery.”).

170 Stefanie Fleischer Seldin, *A Strategy for Advocacy on Behalf of Women Offenders*, 5 Colum. J. Gender & L. 1, 23-24 (1995); see also John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 Crime and Justice: A Review of Research 121, 142 (1999).

- 171 See Hagan & Dinovitzer, *Collateral Consequences of Imprisonment* 145-48.
- 172 Cal. Penal Code §§ 1174-1174.9.
- 173 C.A. “Cal” Terhune, *The Family Foundation Program: Breaking the Cycle of Criminality, in Association of State Correctional Administrators: Correctional Best Practices: Directors’ Perspectives* 155, 155-56 (2000), available at <http://www.asca.net/public/bestprac.pdf>.
- 174 Terhune, *The Family Foundation Program* 157-58.
- 175 “The Summit House Program,” at <http://www.summithouse.org/program.html>.
- 176 “The Summit House Program,” at <http://www.summithouse.org/program.html>.
- 177 Pub. L. No. 103-322, §§ 31901-31922 (1994).
- 178 Pub. L. No. 103-322, § 31902.
- 179 Pub. L. No. 103-322, §§ 31903-31904.
- 180 Myrna S. Raeder, *Creating Correctional Alternatives for Nonviolent Women Offenders and Their Children*, 44 St. Louis L.J. 377, 381 (2000).
- 181 Raeder, *Creating Correctional Alternatives*, 44 St. Louis L.J. at 378, 381 (setting forth ABA Resolution 102A and report in support thereof).
- 182 USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 (2006).
- 183 USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 756. As of May 17, 2006, U.S. Senator Jim Talent (R-Mo.) had requested \$20 million from the Subcommittee on Commerce, Justice, Science, and Related Agencies under the PATRIOT Act provisions. See “Sen. Talent Seeks \$20 Million for Family-Based Meth Treatment” (May 17, 2006), at <http://talent.senate.gov/News/singleNews.cfm?NewsID=1652>. Sen. Talent and Rep. Barbara Cubin (R-Wyo.) also introduced the Family-Based Treatment Access Act on May 25, 2006, “which would provide counseling, medical treatment, parenting training, education and legal services to mothers recovering from meth and their children.” “Talent-Cubin Announce Family-Based Meth Treatment Legislation” (May 25, 2006), at <http://talent.senate.gov/News/singleNews.cfm?NewsID=1656>.
- 184 Pub. L. No. 109-177, § 756(c)(4)(E).
- 185 More than 4 in 5 parents (85%) in state prison reported some type of past drug use, and a majority (58%) said that they were using drugs in the month before their current offense. Mumola, *Incarcerated Parents* 7.
- 186 Mumola, *Incarcerated Parents* 7.
- 187 H.R. 4202, § 214. See also H.R. 1704, § 3(a)(19) and Amendments to the Amendment in the Nature of a Substitute to H.R. 1704 (offered July 19 and 26, 2006); S. 1934, § 3(a)(19).

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