

## Incarcerated Parents and Their Children— Forgotten Families

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The adverse effects of child-parent separation due to death, divorce, or illness have been the subject of frequent research.<sup>1</sup> The problems facing incarcerated parents are in many ways unique, yet professional literature provides us with little on the problems incarcerated parents face.<sup>2</sup> When a family separates because of death or illness it often draws the remaining family members closer and the family's adjustment is aided by the sympathetic responses received from others.<sup>3</sup> Loss of a family member because of incarceration, however, seldom draws a family closer nor does it elicit sympathy from others; family members are forced to face the difficulties of separation alone.<sup>4</sup>

The number of incarcerated parents continues to grow.<sup>5</sup> In 1985, over 720,000 adult men and women were in over 6,600 prisons and jails in the U.S.<sup>6</sup> Eleven hundred fifty-seven new facilities with a potential capacity of 203,283 additional prisoners are currently being built.<sup>7</sup> The number of women prisoners is increasing at an even greater rate than the number of male prisoners. Wo-

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1. See, e.g., Albert Cain & Irene Fast, *Children's Disturbed Reactions to Parent Suicide*, 36 Am. J. Orthopsychiatry 873 (1966); Mark Fine, John Moreland & Andrew Schwebel, *Long-term Developmental Psychology*, 19 Developmental Psychology 703 (1983); Humberto Nagera, *Children's Reaction to Death of Important Objects: A Developmental Approach*, 25 Psychoanalytic Study Child 360 (1970); David Reinhard, *The Reaction of Adolescent Boys and Girls to the Divorce of Their Parents*, J. Clinical Child Psychology, Summer 1977, at 21; Edward Schiff, *The Effects Upon Children of Hospitalization of their Parents*, 44 Child Welfare 305-10 (1965); Martha Wolfenstein, *How is Morning Possible?* 21 Psychoanalytic Study Child 93 (1966).

2. See Lynn Sametz, *Children of Incarcerated Women*, 25 Soc. Work 298, 298 (1980).

3. Travis Fritsch & John Burkhead, *Behavioral Reactions of Children to Parental Absence Due to Imprisonment*, 30 Fam. Rel. 83, 83 (1981).

4. *Id.*

5. Ellen Barry, *Children of Prisoners: Punishing the Innocent*, Youth L. News, March-April 1985, at 12.

6. *Id.*

7. *Id.*

men incarcerated in state and federal prisons increased 133% between 1974 and 1983.<sup>8</sup> During the same period, the number of male prisoners increased 86%.<sup>9</sup> The increasing number of women prisoners is a special concern because incarcerated women leave behind more children than incarcerated men.<sup>10</sup>

Both incarcerated men and women with children face many of the same problems.<sup>11</sup> These problems include the child's confusion at the time of the arrest, poor visitation conditions, and inadequate termination statutes.

This article examines the problems facing incarcerated parents and their children, and potential reforms to help alleviate these difficulties. In analyzing these problems, this article will look at the arrest, visitation, and potential termination of parental rights. An analysis of current prison programs follows. Finally, potential statutory, prison, and administrative reforms will be examined.

## I. Examination of the Problems

### A. *The Arrest*

The problems facing incarcerated parents begin with arrest and continue until well after release of the individual. The arrest of the parent is the first time the separation becomes real. If proper provisions are not made, it can be a very traumatic time for the child. At the time of arrest, parents are often not given the opportunity to make arrangements for their children.<sup>12</sup> Arrested persons are frequently not asked if they have children.<sup>13</sup> Even in

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8. Kenneth John, *Behind Bars*, Law & Crime, Jan. 20-26, 1985, at 1.

9. *Id.*

10. Men committing felonies left behind an average of 1.3 children compared to a figure of 2.43 for women. William Sack, Jack Siedler & Susan Thomas, *The Children of Imprisoned Parents: A Psychosocial Exploration*, 46 Am. J. Orthopsychiatry 626 (1976).

11. Much of the research used in this article focuses specifically on incarcerated mothers, because this is the focus that much of the past research has taken. This is due to the fact that incarcerated women, more often than incarcerated men, are the primary caregivers within a home before their incarceration. When a primary caregiver leaves the home, it has a more profound effect on the children than when the secondary parent leaves the home. Note, *On Prisoners and Parenting: Preserving the Tie that Binds*, 87 Yale L.J. 1408, 1408 n.2 (1978) [hereinafter *On Prisoners*]. Though some of the problems facing incarcerated mothers are unique, this article focuses on problems which are faced equally by fathers and mothers.

12. Laura Boytz, *Incarcerated Mothers Kept from Children*, Plexis, Dec. 1984, at 1. A survey of 28 Georgia law enforcement departments found that 36% of police officers said they did not assure that a mother's arrest was explained to children present at the time. James Gaudin, *Social Work Roles and Tasks with Incarcerated Mothers*, 17 J. Contemp. Soc. Work 279, 283 (1984).

13. Brenda McGowan & Karen Blumenthal, *Why Punish the Children?* 122

states which have a statutory grace period,<sup>14</sup> which theoretically gives parents time to make arrangements for children, parents are seldom given time to make such arrangements.<sup>15</sup>

Two factors contribute to the lack of attention given to children during an arrest. First, at the time of the arrest, the officer making the arrest is primarily concerned with apprehending the alleged offender and/or concerned with community safety.<sup>16</sup> It is unlikely that the children's needs will be considered unless the children are present at the time of the arrest. Second, parents may be unwilling to answer questions about their children to arresting officers. Many fear that police will remove their children and they will never be returned.<sup>17</sup> Therefore, whether arrested parents make arrangements for their children appears to depend primarily on the arresting officers' attitudes and cooperation.<sup>18</sup>

### B. Visitation

Visitation becomes an important part of continuing the parent-child relationship once a parent is imprisoned. Several recent studies indicate that children of imprisoned parents often display some form of problematic behavior both because of the separation from their parents and from the lack of understanding about this separation.<sup>19</sup> Studies also show that visiting the parent in prison improves children's behavior and helps them understand what has

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(1978). A few police departments do, however, have internal regulations instructing officers to permit parents to make phone calls for child care.

14. For example, the New York City Police Department's Patrol Guide Procedure #106-12 provides:

When an officer arrests a woman, he is required to ask whether she has a dependent for whom she is responsible. If the answer is affirmative, he files an AIDED report, obtains permission from the woman to enter her home, and dispatches a radio car to verify the woman's statement. If a child is alone, the officer tries to find a relative or neighbor to care for him. If this cannot be done, he confers with the Borough's Emergency Children's Services of the N.Y.C. Bureau of Child Welfare to ascertain which kind of service might apply and how to provide the necessary transportation. In either case, the officer must report to the Bureau of Child Welfare [NYC Special Services for Children].

*Id.*

15. Jane Anderson, *Mothers in Prison: Maintaining Family Bonds*, Christian Science Monitor, June 16, 1983, at 5, col. 1.

16. McGowan & Blumenthal, *supra* note 13, at 9.

17. *Id.* at 9.

18. Phyllis Baunach, *Mothers in Prison* 42 (1985).

19. Fritsch & Burkhead, *supra* note 3, at 84; Gaudin, *supra* note 12, at 280; Ariela Lowenstein, *Temporary Single Parenthood: The Case of Prisoners' Families*, 35 Fam. Rel. 79 (1986); Sack, Seidler & Thomas, *supra* note 10, at 626.

happened to their parent.<sup>20</sup> Most authorities agree that a child's adjustment to separation from a parent will be facilitated by visits with the parent.<sup>21</sup>

In addition, prisoners clearly have visitation rights under certain circumstances which are protected under both the due process clause and the first amendment. The Court of Appeals for the Fourth Circuit affirmed a district court decision granting prisoners certain visitation rights, although these rights may properly be restricted for security reasons.<sup>22</sup> The court held that once states enact laws creating a right to visitation, prisoners have a constitutionally protected "liberty and property interest" in visiting with people they choose.<sup>23</sup> Thus, even if prisoners do not have a direct constitutional guarantee of visitation rights, state law can create such rights, which cannot be revoked without due process protections. Further, the Court of Appeals for the First Circuit has stated that "[a] refusal . . . to allow . . . any visitation privileges, or the laying down of capricious limitations not justified by considerations of jail security and order, would be unconstitutional."<sup>24</sup> The court based its decision on various constitutional rights, holding that "[v]isitation rights, besides having to meet the . . . due process standard, reflect first amendment values, most clearly the right of association."<sup>25</sup>

Most states have statutory provisions allowing for a right of visitation for prisoners' families. For example, a California statute provides that prisoners convicted of felonies retain the right to visitation restricted only by the prison's need for reasonable security.<sup>26</sup> In *In re Smith*,<sup>27</sup> the California Court of Appeals affirmed a visitation right stating: "Separating parent and child for long periods of time in the good faith claim of maintaining jail security is a denial of the rights between parent and child and a denial of the constitutional rights of association and privacy."<sup>28</sup>

Visitations often do not occur, however, even though courts and legislatures have determined that prisoners have a right to visitation and that this right is beneficial. A recent study found that

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20. William Sack, *Children of Imprisoned Fathers*, 40 *Psychiatry* 163, 173 (1977).

21. *On Prisoners*, *supra* note 11, at 1416.

22. *White v. Keller*, 438 F. Supp. 110 (D. Md. 1977), *aff'd* 588 F.2d 913 (4th Cir. 1978).

23. *Id.* at 120.

24. *Feeley v. Sampson*, 570 F.2d 364, 372 (1st Cir. 1978).

25. *Id.*

26. Cal. Penal Code, §§ 2600-2601 (West 1982).

27. 112 Cal. App. 3d 956, 169 Cal. Rptr. 564 (1981).

28. *Id.* at 969, 169 Cal. Rptr. at 570.

over half of the mothers questioned said that while they were in prison, their children never visited them.<sup>29</sup> Prison conditions and practical considerations are the primary reasons why children do not visit their parents. Incarcerated parents indicate that their children do not visit them because visiting conditions are so oppressive.<sup>30</sup> Visitors to county jail facilities are commonly required to remain behind glass partitions and to speak with prisoners through telephones.<sup>31</sup> There are also numerous cases where young children and even infants are pat-searched or strip-searched by correctional staff, without any clear security-related justification.<sup>32</sup> Children often do not understand and are frightened by these types of intrusions. Unfortunately, the right to contact visits has not yet been constitutionally guaranteed.

A prison's location is another factor which impedes visitation. Many prisons are located far from communities. Children often do not have access to transportation and if there is transportation it is frequently inadequate. For example, the Pennsylvania State Correctional Institute is located 160 miles from Philadelphia and is accessible only by car or bus. The bus, which is all many prisoners' families can afford, leaves Philadelphia at 8:00 a.m. and gets to the institution at 3:00 p.m. with visiting hours ending at 4:00 p.m.<sup>33</sup> Although visiting hours from 9:00 a.m. to 4:00 p.m. may appear adequate, in reality the hours, as well as the distance and cost, do not facilitate visitation.

### C. Termination of Parental Rights

One of a parent's greatest concerns upon incarceration is the fate of their children. Many parents fear losing their parental rights because of their inability to care for their children while in prison. The termination of parental rights is an unintentional punishment an incarcerated parent may be forced to face. If parents have to place their children in the state's custody due to the lack of a spouse, relatives, or friends to care for their children, the chance of their parental rights eventually being terminated becomes even greater. Once a court places the temporary custody of a child in the welfare department, loss of permanent custody is

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29. Baunach, *supra* note 18, at 43. In another study, 53% of incarcerated mothers stated they had no telephone contact with their children and 42% had only one telephone contact per month. Gaudin, *supra* note 12, at 279.

30. Baunach, *supra* note 18, at 43.

31. Barry, *supra* note 5, at 14.

32. See, e.g., *Blackburn v. Snow*, 771 F.2d 556 (1st Cir. 1985).

33. Sametz, *supra* note 2, at 299.

much more likely.<sup>34</sup> In many states when the court has granted permanent custody to another party, adoption can occur without the parent's consent.<sup>35</sup>

A comprehensive, universally accepted definition of "parental rights" has not been formulated. The United States Supreme Court, in *Santosky v. Kramer*, referred to parental rights as the "natural parent's desire for and right to the companionship, care, custody, and management of his or her children."<sup>36</sup> While no clear definition exists, one commentator identifies the following rights in an effort to provide a comprehensive definition: right to possession, right to visit the child, right to determine education, right to determine religious upbringing, right to discipline the child, right to choose medical treatment, right concerning the child's name, right to consent to marriage, right to services, right to determine nationality and domicile, and right to appoint guardians and consent to adoption.<sup>37</sup>

Upon permanent termination of parental rights, a parent has no right to contact his or her child again. A court may permanently terminate the parental rights of incarcerated parents in one of three ways, depending upon the jurisdiction: (1) an adjudication which determines that the children are neglected; (2) a special hearing which may be instituted for a variety of reasons including neglect or abusive behavior by the parent, depravity, open and notorious fornication, mental illness, failure to provide financial support, or divorce; or (3) an adoption proceeding where the court is permitted to waive the necessity of consent to the adoption by the natural parent.<sup>38</sup>

Every state has legislation providing for the legal adoption of children. Most state statutes are construed as favoring a natural

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34. In most cases where parental rights are severed, the following procedures are followed. First, the state petitions the court for a determination that the child is neglected or dependent. After these proceedings, if the condition which caused the dependency to occur is not corrected, there may be a divestiture proceeding which would terminate all parental rights after which time a child may be adopted without the natural parent's consent. See Annotation, *Parent's Involuntary Confinement, or Failure to Care for Child as Result Thereof, as Evincing Neglect, Unfitness, or the Like in Dependency or Divestiture Proceeding*, 79 A.L.R.3d 417 (1977 & Supp. 1986).

35. Many statutes provide that permanent custody is the first step toward adoption without parental consent. The statute may shift the burden of proof as to the child's best interest from the person wanting to adopt the child to the parent. See, e.g., Mass. Ann. Laws ch. 210, § 3 (Law Coop. 1981).

36. *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (citing *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).

37. See J.M. Eekelaar, *What are Parental Rights?* 89 Law Q. Rev. 210 (1973).

38. Kathleen Haley, *Mothers Behind Bars: A Look at the Parental Rights of Incarcerated Women*, 4 New Eng. J. on Prison L. 141, 146-47 (1977).

parent's rights over an adoptive parent's and require parental consent for adoption except where there is a showing of unfitness in the parent.<sup>39</sup> An exception to this general rule exists in some states, however, with respect to incarcerated parents. Several states have statutes expressly allowing adoption without parental consent if the parent is in prison.<sup>40</sup> For example, South Dakota's adoption statute provides, in relevant part:

No Child may be adopted without the consent of his parents. . . .

....

However, the judge may waive consent from a parent who:

- (1) Has been adjudged guilty of adultery or who has been convicted of any crime punishable by imprisonment in the penitentiary for a period that, in the opinion of the judge, will deprive the child of the parent's companionship for a critical period of time.<sup>41</sup>

Moreover, in a separate section of the statutory code, most states have enacted legislation regarding the care of dependent and neglected children. Under most state statutes, a finding of dependency or neglect may be made under any of the following circumstances: a finding of abandonment by the parents, a lack of proper parental care or support, an environment injurious to the child's morals, or a finding of parental unfitness. Several states have statutes that include incarceration as one of these circumstances.<sup>42</sup> For example, Michigan's statute allows children remaining in foster care to be placed in the permanent custody of the court "if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years."<sup>43</sup> Another example is Arizona's statute which provides for termination of the parent child relationship when:

[T]he parent is deprived of civil liberties due to the conviction of a felony. . . if the sentence of such parent is of such length that the child will be deprived of a normal home for a period of years.<sup>44</sup>

Courts have viewed incarceration as a strong indicator of abandonment or parental unfitness. In *In re Doege*,<sup>45</sup> the Minne-

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39. Julie Jackson, *The Loss of Parental Rights as a Consequence of Conviction and Imprisonment: Unintended Punishment*, 6 New Eng. J. on Prison L. 61, 66-67 (1979).

40. See, e.g., Or. Rev. Stat. § 109.322 (1984); S.D. Codified Laws Ann. § 25-6-4(1) (1984); R.I. Gen. Laws § 15-7-7 (1981).

41. S.D. Codified Laws Ann. § 25-6-4(1) (1984).

42. See, e.g., Mich. Comp. Laws Ann. § 712A.19a(d) (West Supp. 1986); Ariz. Rev. Stat. Ann. § 8-533 (1974).

43. Mich. Comp. Law Ann. § 712A.19(a)(d) (West Supp. 1986).

44. Ariz. Rev. Stat. Ann. § 8-533B(4) (1974).

45. 308 Minn. 104, 240 N.W.2d 562 (1976).

sota Supreme Court stated that parental incarceration was not per se abandonment,<sup>46</sup> but added that imprisonment presented severe obstacles to the parent seeking custody of a child. The court stated that "[b]y committing an intentional felony and going to prison . . . , the father . . . [had] deprived his son of proper parental care."<sup>47</sup> A Texas Court of Appeals in *Allred v. Harris County Child Welfare Unit*<sup>48</sup> reached a similar decision. In *Allred*, the court found that a father's willful criminal activity, done with the knowledge both of his wife's pregnancy and of the possible consequences of his course of conduct, implied conscious disregard and indifference to his parental responsibilities.<sup>49</sup> As a result, imprisonment for his conduct constituted "voluntary abandonment."<sup>50</sup>

Incarceration does not necessarily mean a parent is unfit. Parental unfitness, in general, means "unsuitable, incompetent, or not adapted for a particular use or service."<sup>51</sup> Most incarcerated persons are imprisoned for committing nonviolent crimes. During 1983, 70% of all federal prisoners were serving time for non-violent crimes.<sup>52</sup> Therefore, most parents who are prisoners pose no physical threat to their children. Incarceration evidences only a parent's present inability to perform parental duties. Incarceration does not mean parents seek to avoid performing parental duties or have abandoned their children; it simply means the child needs temporary placement.

At the present time, courts determine whether a parent is unfit within the meaning of ambiguous statutes. Too much discretion is granted to a seldom fully informed judiciary. Judges are often not knowledgeable about complex child-parent relationships. Judges must therefore rely completely on a caseworker's testimony and follow the caseworker's recommendations.<sup>53</sup> Such reliance is justified when a caseworker has had time to perform all the services necessary to help the family. Due to inadequate funding, however, providing adequate services is not always possible when dealing with families of incarcerated parents.

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46. See *id.* at 107 n.2, 240 N.W.2d at 564 n.2 (construing Minn. Stat. § 260.015(10) (a) (1976)).

47. *Id.* at 106, 240 N.W.2d at 564.

48. 615 S.W.2d 803 (Tex. Ct. App. 1980).

49. *Id.* at 807 (citing *Hutson v. Haggard*, 475 S.W.2d 330 (Tex. Ct. App. 1971)).

50. *Id.*

51. Mass. Gen. L. ch. 119, §§ 24-26 (1970), construed in *In re New England Home for Little Wanderers*, 367 Mass. 621, 626 n.7, 328 N.E.2d 854, 860 n.7 (1975).

52. Edmund McGarrell & Timothy Flanagan, *Sourcebook of Criminal Justice Statistics* 1984, U.S. Dept. of Justice, Bureau of Justice Statistics Table 6.44 (1985).

53. Richard Palmer, *The Prison-Mother and Her Child*, 1 Cap. U.L. Rev. 127, 131 (1972).



Some of the problems with termination proceedings were outlined by the United States Supreme Court. In *Santosky v. Kramer*,<sup>54</sup> the Court noted that termination proceedings often "employ imprecise substantive standards that leave determinations unusually open for the subjective values of the judge."<sup>55</sup> The Court concluded that "because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural and class bias."<sup>56</sup> Another problem that the Court observed with termination proceedings is that states are given too much control over the proceedings.<sup>57</sup> The Court stated that "[n]o predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding."<sup>58</sup> As the Court explained, "the State's attorney enjoys full access to all public records concerning the family;"<sup>59</sup> the state's witness is often the caseworker whom the state has empowered to investigate the family situation and to testify against the parents; and often since the child is already in state custody, "the state even has the power to shape the historical events that form the basis for termination."<sup>60</sup>

The Supreme Court's observations are clearly applicable to incarcerated parents and their children. Because the parents are in state custody, they must depend on the state's caseworker to provide family services. Caseworkers with heavy caseloads and lack of access to prisons may not have the time or funding to provide services to these families. In addition, these parents face inherent prejudices against criminal offenders and additional obstacles and biases if they are either members of a racial minority or are indigent.<sup>61</sup>

As previously stated, once a child has been placed in the temporary custody of the state, the chance of the parent eventually losing permanent custody is greatly increased.<sup>62</sup> A recent federal

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54. 455 U.S. 745 (1981).

55. *Id.* at 762; see also *Smith v. Organization of Foster Parents*, 431 U.S. 816, 835 n.36 (1977).

56. *Santosky*, 455 U.S. at 763.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* The Court took these factors into consideration, in ruling that the standard of proof to be applied in termination proceedings should be that of "clear and convincing evidence" rather than a "preponderance of the evidence" as many states had been using. *Id.* at 764.

61. Ellen Barry, *Reunification Difficult for Incarcerated Parents and Their Children*, *Youth L. News*, July-August 1985, at 14 [hereinafter *Barry, Reunification Difficult*].

62. See *supra* notes 34-35 and accompanying text.

law, the Adoption Assistance and Child Welfare Act of 1980<sup>63</sup> (hereinafter Child Welfare Act) was enacted to avoid this trend and to assure that permanency planning occurs for children in foster care.<sup>64</sup>

This federal act includes numerous provisions and requirements. In order to obtain federal funds for their foster care programs, states must implement services and protections for children in foster care and their families.<sup>65</sup> To assure that permanency planning occurs for each child in foster care, the Child Welfare Act requires a state to develop a written case plan for each child in foster care.<sup>66</sup> Permanency planning involves trying to establish the child in a permanent home as quickly as possible.<sup>67</sup> The Child Welfare Act also requires review sessions of the case plan every six months with a dispositional hearing by either a court or by a judicially sanctioned body within eighteen months.<sup>68</sup> In addition to these case plans and reviews, the Child Welfare Act requires procedural protections for certain circumstances of state intervention in family life<sup>69</sup> and preventive and reunification services programs.<sup>70</sup> The statute provides for preventive services to be "designed to help children remain with their families"<sup>71</sup> and for reunification services to be designed to "help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship."<sup>72</sup> States may determine exactly what these services will include because the Child Welfare Act does not list the components of preventive and reunification services programs.

For incarcerated parents whose children are in foster care, the Child Welfare Act has not provided much assistance. Since the enactment of the Child Welfare Act, one problem incarcerated parents face is the various congressional and state legislative attempts to limit the time children remain in foster care. These legislators legitimately believe that children should not have to endure the disruption and trauma resulting from multiple foster care placements and that children are entitled to a permanent

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63. Social Security Act, 42 U.S.C. §§ 627, 671, 675 (1982).

64. MaryLee Allen, *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in *Foster Children in the Courts* 575, 576 (Mark Hardin ed. 1982).

65. *See id.* at 579.

66. 42 U.S.C. § 675(5)(A) (1982).

67. Allen, *supra* note 64, at 592.

68. 42 U.S.C. §§ 627(a)(2)(B), 671(a)(16), 675(5)(B), (C) (1982).

69. 42 U.S.C. § 672(a), (d)-(g) (1982).

70. 42 U.S.C. § 627(a)(2)(C), (b)(3) (1982).

71. 42 U.S.C. § 627(a)(2)(c) (1982).

72. 42 U.S.C. § 627(b)(3) (1982).

home. California's dependency statute now allows the state to terminate parental rights if a child has been in foster care for a period of twelve months and if, during that time, the child's parents have "failed to maintain an adequate parental relationship with the child . . . [b]y providing both a home and care and control for the child."<sup>73</sup> This places incarcerated parents in an impossible situation because a parent incarcerated for any felony will be sentenced to at least a one-year prison term.<sup>74</sup>

As previously discussed, states receiving federal funds under the Child Welfare Act must provide reunification services.<sup>75</sup> These services require the courts overseeing foster care placement to make sure that "reasonable efforts" have been made to reunify a parent and child.<sup>76</sup> Although the Child Welfare Act does not specifically define "reunification services," federal regulations have developed guidelines of appropriate services and recent state cases have begun to define what "reasonable efforts" entail. The federal regulations provide that reunification services may include the following:

[T]wenty-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.<sup>77</sup>

State statutes vary in their guidelines as to what reunification services "should" or "may" include. For example, Maine's statute vaguely provides that the reunification plan shall include "[s]ervices available to assist the parents in rehabilitating and reunifying with the child, including reasonable transportation within the area in which the child is located for visits if the parents are unable to afford that transportation."<sup>78</sup> In contrast, California's statute explicitly provides:

If the parent or guardian is incarcerated or institutionalized,

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73. Calif. Civ. Code § 232(a)(7) (West Supp. 1986).

74. Barry, *Reunification Difficult*, *supra* note 61, at 15.

75. See *supra* notes 65-72 and accompanying text.

76. 42 U.S.C. §§ 672(a)(1), 671(a)(15) (1982).

77. 45 C.F.R. § 1357.15(e)(2) (1985).

78. Me. Rev. Stat. Ann. tit. 22, § 4041(1)(A)(1)(d) (1986).

reasonable services may include, but shall not be limited to, all of the following:

- (A) Maintaining contact between parent and child through collect phone calls.
- (B) Transportation services where appropriate.
- (C) Visitation services where appropriate.
- (D) Reasonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child.<sup>79</sup>

Even in states with statutes explicitly listing the services included in reunification, much discretion is left to courts to determine what is "reasonable." In determining what "reasonable services" include, a recent California case held that a "reunification plan must be internally consistent and have as its objective the provision of such services or counseling as will lead to the resumption of a normal family relationship."<sup>80</sup> When discussing what these services should include, the court went on to say that "visitation can be a vital component of a reunification program, since personal contact may strengthen the parent-child relationship and serve as an expression of a parent's desire to recover custody."<sup>81</sup>

Incarcerated parents with children in foster care rarely receive reunification services from the social service or welfare agencies.<sup>82</sup> Because incarcerated parents are controlled by the state, the state's help in providing these services is essential. Even though all states require notifying parents of dependency hearings,<sup>83</sup> and an express requirement of the Child Welfare Act includes the natural parents in any hearings,<sup>84</sup> it is common for an incarcerated parent to receive notice only a few days before a hearing or after the hearing has occurred.<sup>85</sup> Caseworkers seldom visit prisoners before hearings due to high caseloads, limited funding, or lack of access to prisons.<sup>86</sup> Caseworkers often submit reports to the court without including a statement from the parent.<sup>87</sup> It is very difficult for incarcerated parents to keep in touch with their children without caseworkers' help.<sup>88</sup> Many state prisons limit

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79. Cal. Welf. & Inst. Code § 361(f)(1) (West Supp. 1986).

80. *In re John B.*, 159 Cal. App. 3d 268, 275, 205 Cal. Rptr. 321, 324 (1984).

81. *Id.* at 276, 205 Cal. Rptr. at 321.

82. Barry, *Reunification Difficult*, *supra* note 61, at 15.

83. *Id.* at 16.

84. 42 U.S.C. § 675(6) (1982).

85. Barry, *Reunification Difficult*, *supra* note 61, at 15.

86. *Id.* at 16.

87. *Id.*

88. The majority of prisoners are more than 100 miles from their families. John, *supra* note 8, at 1.

phone calls.<sup>89</sup> If a parent has several children in different foster homes, it could take several calls to contact every child in the family. Moreover, foster parents often do not have the funds to accept collect calls.<sup>90</sup> Thus, even when reunification efforts may be required by federal law, when the parent is incarcerated, they often do not occur.

Further, the effectiveness of reunification services has been lost through state courts interpreting the services to be unnecessary. Maine courts have determined that reunification services may be required by social service departments, but failure to provide the services would not prevent a court from terminating parental rights. In *In re Daniel C.*,<sup>91</sup> Maine officials terminated an incarcerated father's parental rights. During the father's incarceration, the caseworker would not take his son to see him nor would she tell the father where his son was.<sup>92</sup> The court agreed with the father that the reunification efforts of the caseworker fell short of those required under section 4041 of the statute,<sup>93</sup> but the court stated that "there is no indication in the express terms of section

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89. Barry, *Reunification Difficult*, *supra* note 61, at 15.

90. *Id.* at 16.

91. 480 A.2d 766 (Me. 1984).

92. *Id.* at 769.

93. The statute provides:

§ 4041. Departmental responsibilities

1. Rehabilitation and reunification. When a child has been ordered into the custody of the department . . .

A. The department shall:

(1) develop a rehabilitation and reunification plan which shall include the following:

(a) The reasons for the child's removal;

(b) Any changes which must occur for the child to return home;

(c) Rehabilitation services which must be completed satisfactorily prior to the return home;

(d) Services available to assist the parents in rehabilitating and reunifying with the child, including reasonable transportation within the area in which the child is located for visits if the parents are unable to afford that transportation;

(e) A schedule of visits between the child and the parents when visits are not detrimental to the child's best interests, including any special conditions under which the visits shall take place;

(f) A reasonable time schedule for proposed reunification which is reasonably calculated to meet the child's needs; and

(g) A delineation of the financial responsibilities of the parents and the department during the reunification process;

(2) Provide the parents with prompt written notice of the following, unless that notice would be detrimental to the best interests of the child:

4041 that failure of the department to fulfill its requirements will preclude the termination of parental rights under section 4055."<sup>94</sup> The court further stated that section 4055 provided grounds for terminating parental rights without requiring proof by the department of compliance with section 4041.<sup>95</sup> The court's analysis referred to *Santosky v. Kramer*,<sup>96</sup> stating that *Santosky* only required that before a state could terminate parental rights they must show there is "clear and convincing evidence" for such a decision, but the court did not require a showing of clear and convincing evidence that the department had met its reunification obligation.<sup>97</sup> The Maine courts have continued to follow this interpretation.<sup>98</sup>

The effect of this decision on the Child Welfare Act is evident. As the dissent in *In re Daniel C.* stated, "while it is true that

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- (a) The child's residence and, when practicable, at least 7 days' advance written notice of a planned change of residence; and
  - (b) Any serious injuries, major medical care received or hospitalization of the child;
  - (3) Make good faith efforts to cooperate with the parents in the development and pursuit of the plan;
  - (4) Periodically review with the parents the progress of the reunification plan and make any appropriate changes in that plan;
  - (5) Petition for judicial review and return of custody of the child to his parents at the earliest appropriate time; and
  - (6) Petition for termination of parental rights at the earliest possible time that it is determined that family reunification efforts will be discontinued pursuant to subsection 2 and that termination is in the best interests of the child . . .

Mass. Gen. Laws ch. 22 § 4041 (West 1983).

94. *Id.* at 770;

Section 4055 provides in part:

- 1. Grounds. The court may order termination of parental rights if:
  - A. One of the following conditions has been met:
    - (1) Custody has been removed from the parent . . . ; or
    - (2) The petition has been filed as part of an adoption proceeding . . . ; and
  - B. Either:
    - (1) . . . ; or
    - (2) The court finds, based on clear and convincing evidence, that:
      - (a) The parent is unwilling or unable to protect the child from jeopardy or has willfully abandoned the child or has refused to take responsibility for the child;
      - (b) The circumstances are unlikely to change in a reasonable time; and
      - (c) termination is in the best interests of the child.

Mass. Gen. Laws Ann. ch. 22 § 4055 (West 1983).

95. *Id.*

96. 455 U.S. 745 (1982).

97. *Daniel C.*, 480 A.2d at 770.

98. See *In re Crystal S.*, 483 A.2d 1210 (Me. 1984); *In re Walter C.*, 481 A.2d 1312 (Me. 1984).

by its express terms section 4055 does not make the department's reunification effort a discrete element of proof in termination proceedings, it belies the express purpose of the Child and Family Services and Child Protection Act . . . to allow the department to seek termination without first showing that bona fide efforts at reuniting the family have failed."<sup>99</sup> If a social service department no longer had to prove to the court that an effort was made to reunify the family, the "department could in effect thwart the clearly expressed legislative policy of preserving the viability of the family unit."<sup>100</sup> Requiring reunification services is an effective way of lessening some of the excessively subjective control both caseworkers and the court have over a family with a child in foster care. By allowing the state to terminate parental rights without showing an effort to retain the family unit, the courts and caseworkers are free to completely control the lives of these families.

## II. Current and Suggested Reforms

### A. *Special Programs*

During the last several years, special programs have been set up at many prisons in order to help parents and children continue as a family once a parent has been incarcerated. Until recently, few prisons implemented these special programs, but the continuing success of established programs has led more prisons to adopt them.

There are special programs for women who give birth while in prison. One prison in Bedford, New York currently has a nursery in the prison in order for a mother to remain close to her baby once the baby is born.<sup>101</sup> The mother can stay in a wing of the prison near the nursery for up to a year after the baby is born.<sup>102</sup> The Federal Bureau of Prisons has developed a similar program outside of the prison environment for women who qualify. In this program, called "Shared Beginnings," the mothers move to a house outside the prison in the seventh month of their pregnancy and stay there with their infants up to four months after the birth.<sup>103</sup> These programs are very important because of the importance of a child being with a parent during infancy.<sup>104</sup>

Several special programs have been set up in order to facili-

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99. 480 A.2d at 769 (1985) (Violette, J., dissenting).

100. *Id.* at 773 (Violette, J., dissenting).

101. Baunach, *supra* note 18, at 75.

102. *Id.* at 75.

103. *Id.* at 76.

104. See *infra* notes 122-124 and accompanying text.

tate mothers visiting their children and to teach mothers good parenting skills. A California program entitled "Prison MATCH" (Prison Mothers and Their Children) was set up to strengthen bonds between inmate mothers and their children, to teach inmate mothers parenting skills, and to prepare them for careers in early childhood education.<sup>105</sup> In addition, the MATCH program reaches out to the community to generate positive community attitudes. Another program, MOLD (Mother Offspring Life Development), has been set up in Kentucky and Nebraska prisons. This program facilitates monthly visits between mothers and children,<sup>106</sup> and also provides special child care classes for incarcerated mothers.<sup>107</sup> Finally, Missouri devised a program, PATCH (Parents and Their Children), to facilitate visits between prisoners and their children in a non-prison atmosphere.<sup>108</sup> The state replaced the program in June, 1986 with CHIPS (Challenging Incarcerated Parents & Spouses). CHIPS focuses specifically on the male inmate and his family.<sup>109</sup> These programs are very helpful for parents and children not only while the parents are in prison, but also when they are out of prison. Some prisons aid parent-child visitation by having special times for children to visit and some prisons even provide special weekends for parents and children to be together.<sup>110</sup>

Some states have developed programs to help incarcerated mothers with their legal concerns. A program called AIM (Aid to Incarcerated Mothers) was set up in the Massachusetts Correctional Institution at Farmington. Inmate-mothers who are serving a year or more have advocates who facilitate visiting.<sup>111</sup> A California program, Legal Services for Prisoners with Children (LSPC), was set up in 1978 to help incarcerated parents with any legal concerns they may have.<sup>112</sup> These groups provide important legal representation to prisoners who have legal problems in civil matters.<sup>113</sup>

In the past several years, the number of prison programs has

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105. Baunach, *supra* note 18, at 76.

106. See Donna Bergen, *A Mold that Fits Nebraska's Mothers in Prison*, 44 Corrections Today 12 (1982).

107. *Prison Programs*, Family Ties, Fall 1984, at 5 (on file with *Law & Inequality*).

108. *Id.*

109. Telephone interview with Missouri State Penitentiary official (Jan. 27, 1987).

110. See Brenda Beaver-Lutheran, *Mother/Child Retreats*, 45 Corrections Today 93 (1983).

111. Boytz, *supra* note 12, at 1.

112. See Barry, *Reunification Difficult*, *supra* note 61, at 15.

113. Charlene Snow, *Women in Prison*, 14 Clearinghouse Rev. 1065, 1068 (1981).



grown. Currently, eighty percent of all prisons have at least one special program.<sup>114</sup> Mothers who are involved in these programs find them to be helpful in understanding and fostering relationships with their children.<sup>115</sup> The continued implementation of these programs is essential to help more families stay in contact. Special programs should also be expanded to include incarcerated fathers, since fathers, even those who are not the primary caregivers, are an important part of a child's development.<sup>116</sup>

### B. Changes in Prisons

Though programs for incarcerated mothers are becoming more common,<sup>117</sup> many prisons still have a long way to go before prisons have all the necessary services needed to help incarcerated parents and their children remain in contact. Also, several reforms to facilitate family contact are not currently being utilized.

Some prisons provide a prison nursery.<sup>118</sup> Three states have enacted legislation creating prison nursery programs.<sup>119</sup> A mother's right to keep her child with her has been upheld by New York courts.<sup>120</sup> Unfortunately, the legislatures in both California and Florida have rescinded their prison nursery legislation.<sup>121</sup>

Although many prisons have not implemented prison nurseries, there are strong reasons for allowing mothers to rear infants in prison at least up to the age of two years. Research in

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114. Associated Press Release, *Mothers in Prison*, June 1, 1985.

115. See Baunach, *supra* note 18, at 96; Louise Rosenkrantz & Virdia Joshua, Children of Incarcerated Parents: A Hidden Population, 10 *Children Today* 2,4 (1982).

116. See Sack, *supra* note 20, at 164.

117. See *supra* notes 100-113 and accompanying text.

118. See *supra* notes 100-103 and accompanying text.

119. These states are New York, California, and Florida. The New York Statute provides that:

A child so born may be returned with its mother to the correctional institution in which the mother is confined. . . . A child may remain in the correctional institution with its mother for such period as seems desirable for the welfare of such child, but not after it is one year of age . . . .

N.Y. Correct. Law § 611(2) (McKinney 1968).

120. In *Apgar v. Beauter*, 75 Misc. 2d 439, 347 N.Y.S.2d 872 (1973), the court held: Incarceration in a jail or correctional institution *per se* does not constitute such unfitness or exceptional circumstances so as to require that a newborn infant be taken away from its mother is attested to by the enactment by the legislature of Section 611(2) of the Correction Law. In fact, it has been New York's policy for over forty years to permit inmate mothers to keep their newborn infants.

*Id.* at 442, 347 N.Y.S.2d at 875 (emphasis in original).

121. This legislation was rescinded soon after the inmates brought suit to have it enforced. Barry, *supra* note 5, at 14.

developmental psychology has found that one of the most critical factors in the development of an emotionally healthy child is the formation of a strong and enduring attachment bond. This bond, which forms as a result of the day-to-day interaction of infant and parent, is an emotional tie that enables the child to learn to relate effectively to other people.<sup>122</sup> A child's emotional development can be seriously disrupted if this bond is prevented from forming or, if while this bond is forming, the infant is separated from a caregiver.<sup>123</sup> In a normal parent-child relationship, this bond is formed between the ages of six months and two years.<sup>124</sup> Therefore it is important for a mother and child to remain together during the first two years.

Another reform to help incarcerated parents and children stay in touch with one another would be to allow "contact" visits at prisons. Separation of the parent and child is exacerbated by the visitation environment which often limits normal interaction. In most visits, they are separated by glass in crowded rooms, unable even to touch.<sup>125</sup> Prisons allowing contact visits between parents and children have had very positive results.<sup>126</sup> Visits in special children's centers within the prisons have helped to calm children's fears of prison and helped them to understand what has happened to their parent.<sup>127</sup>

Providing regular transportation to prisons is also a necessary reform that would facilitate visits between parents and their children. Because 85% of incarcerated parents' children live over fifty miles from their parent and 64% live over 100 miles,<sup>128</sup> many of the difficulties with visitations are the result of the prison's location. Moving prisons closer to city limits would eliminate many of the difficulties. New prisons being constructed should be built within cities in order to encourage visitation between parents and children. Once prisons are placed within communities, programs could be developed between the prison and the community to help the general public understand many of the difficulties prisoners' families face, thus eliminating some of the stigma attached to being a child of an incarcerated parent.

The present work release program presents another possible reform. Work release programs are provided for prisoners who

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122. *On Prisoners*, *supra* note 11, at 1412.

123. *Id.* at 1413.

124. *Id.*

125. Sametz, *supra* note 2, at 301.

126. Baunach, *supra* note 18, at 102.

127. Rosenkrantz & Joshua, *supra* note 115, at 4.

128. *Id.*

are considered less dangerous, and allow a prisoner to work at a job during the day and return to the prison in the evening. Rather than having a parent go out to work at a specific employment position, parents would leave the prison during the day in order to care for their children and return to the prison in the evening. The children would spend their evenings at a foster home. The parents' job would be that of caring for their children. This program could be implemented much like the present work release programs that many prisons have and would give parents time to be with their children away from the prison environment.<sup>129</sup>

Rehabilitation programs to teach parenting skills are also important. These could be a part of the rehabilitation programs that many prisons currently have.<sup>130</sup> The program would focus on helping incarcerated parents cope with the separation from their children, teaching parents parenting skills, and providing counseling services. Follow-up counseling should be provided for parents after their release to help deal with difficulties encountered by the parent. Though these prison reforms may be expensive, they are important in helping to keep families together.

### C. Statutory Reforms

While courts make the ultimate decision concerning termination of parental rights, the decision remains subject to statutory guidelines established by legislatures. Many statutes presently leave too much discretion to the courts.<sup>131</sup> Whether dealing with removal of a child during neglect or dependency hearings, or terminating parental rights without consent before adoption proceedings, the statutory focus should be on potential harm to the child, rather than on the general conduct of the parent. Limiting the focus to the child's well-being would decrease the potential prejudice which attaches to people in prison. Rather than focusing on the parent, the focus would be on the child. Orman Ketcham and Richard Babcock have proposed guidelines for drafting and applying statutes that would authorize involuntary termination of parental rights.<sup>132</sup> They suggest that legislatures: (1) limit the circumstances to where involuntary termination is genuinely warranted, (2) aid the court to focus on relevant questions, and (3) minimize the child's ordeal by reducing time for making and

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129. Barry, *Reunification Difficult*, *supra* note 61, at 15.

130. Gaudin, *supra* note 12, at 285.

131. See *supra* notes 53-61 and accompanying text.

132. Orman Ketcham & Richard Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 Rutgers L. Rev. 530 (1976).

administering a decision.<sup>133</sup> By following these guidelines, statutes would provide more guidance to courts in making decisions involving involuntary termination of parental rights.

When a state revises its child custody and adoption statutes, incarceration should not be a *per se* reason for termination of parental rights. Maintenance of the natural parent-child relationship should be expressly assumed.<sup>134</sup> In order to remove some of the subjectivity involved in termination proceedings, statutes should list factors judges must consider in determining whether or not to terminate parental rights.<sup>135</sup> Each factor would be given weight depending on the severity of the problem. The factors would include such considerations as whether the child had been physically or emotionally abused. Incarceration would be included as a factor, with little weight granted to it. Whether a child would likely be adopted should also be a factor. If there are no adoptive parents, termination would be drastic. In addition to having factors, judges should be required to document their decisions. This would aid in the reviewing of cases and would also force judges to use the criteria listed in the statute.<sup>136</sup>

Some changes are also needed in the state's statutes which apply to the Child Welfare Act. States should list within their statutes the type of reunification efforts required by social service departments. By requiring reunification services, a caseworker's subjective discretion would be limited. Some of the required reunification services could include: funding to foster parents to make it possible for parents to call their children collect, transportation costs to bring children to visit parents, funding for social service departments to allow parents to call caseworkers collect, funding to transport parents to and from court hearings, and first and last months' rent payment for parents being released into the community.<sup>137</sup> Statutes should also require the social service department to prove that these reunification service obligations were met before the state could sever parental rights. Considering the permanency and drastic effect of terminating parental rights, it is reasonable to require the social service department to prove that reunification services have been implemented.

In many states, other statutes in addition to those involving

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133. *Id.* at 546.

134. Jackson, *supra* note 39, at 107.

135. *Id.* at 108.

136. *Id.*

137. Some studies have found that 66% of incarcerated women were unemployed at the time of their incarceration; most prisons give prisoners a minimal amount of "release" money. Barry, *Reunification Difficult*, *supra* note 61, at 16.

termination of parental rights also need reform. Changes should be made in the arresting officer's role. Although the parent is the one being arrested, children suffer unnecessarily unless provisions are made for them. Statutes should require police officers to ask about children and to allow the parent to make child care arrangements. In order to encourage police officers to follow these statutes, disciplinary measures should be taken if the statute is not followed.

#### *D. Foster Parents' Roles*

The best alternative for an incarcerated parent is to avoid foster care altogether. Nevertheless, when it is not possible to place children with relatives or friends, foster care becomes an unavoidable part of a family's life. Foster parents play a significant role in helping children understand and adjust to their parents incarceration. Foster parents need special training to learn what these children and parents are experiencing. They also need to be aware of the importance of continuing communication between parents and children.

Foster parents who care for children of incarcerated parents need funding in order to take children to prison for visits and to accept collect telephone calls. If possible, foster homes should be close to the prison where the child's parent is located. If foster parents are aware of the problems facing these families, they could help alleviate many of the difficulties facing an incarcerated parent.

#### *E. Caseworkers' Roles*

Caseworkers probably play the most significant role in the decision-making process concerning the future for incarcerated parents and their children. According to one commentator, the "real locus of decision-making [in Massachusetts] is within the DCG [Division of Child Guardianship, a division of the Massachusetts Department of Public Welfare], and the individual who tends to be the ultimate decision maker there, is the caseworker."<sup>138</sup>

It is often the caseworker who decides when there will be legal intervention. The caseworker, who has often been involved with a family through other departments, can determine when state custody is necessary and may move for this before a parent

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138. John Campbell, *The Neglected Child: His and His Family's Treatment Under Massachusetts Law and Practice and Their Rights Under the Due Process Clause*, 4 Suffolk U.L. Rev. 631, 645-46 (1970).

has had time to prepare a defense. Once the department has had temporary custody for an extended period of time the department may then move for permanent custody.<sup>139</sup> The caseworker in this situation has the power to make the all-important decision of whether and when to move for custody of the child.

In order to better serve incarcerated parents, and because caseworkers have so much control over the situation, caseworkers need to be educated on the special needs of incarcerated parents. Special workshops should be made available to educate caseworkers. Caseworkers should also be sensitized to the possible advocacy role they can play in informing the public about the need for funding prison reforms.

Finally, the general public needs to change its attitude toward families with incarcerated parents. Many of the problems these children face would be alleviated if the stigma of being a child of an incarcerated parent no longer existed. The public must be aware of the fact that these children have not been found guilty of anything and that although their parents may have been found guilty of a crime, this does not necessarily mean that their parents are unfit.

### III. Conclusion

Incarcerated parents and their children face many difficulties starting from the time of their arrest and continuing until after their release. A lack of concern for the children at the time of a parent's arrest can cause increased and unnecessary trauma for a child during this initial separation. Arresting officers need to understand the importance of making sure there is someone available at the time of arrest to care for the children of an alleged offender. Once a parent is imprisoned, the trauma of separation can be lessened by allowing, encouraging, and facilitating visits by the child to the prison. While imprisoned, many parents fear the involuntary termination of their parental rights. Terminating parental rights should only be allowed when the parent has been truly found "unfit," which does not necessarily coincide with "incarceration." Several prisons currently are developing special programs to help incarcerated parents and their children have a healthy, continuing relationship while the parent is in prison. Along with prison programs, other necessary reforms include revisions of termination statutes and changes in the handling of visitations and arrests. Finally, the most difficult and yet most necessary change

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139. See *supra* note 34 and accompanying text.

is that of the public's attitude. Until people begin to understand and empathize with incarcerated parents and their children, necessary reforms will be frustrated.

