

Family Integrity and Incarcerated Parents: Bridging the Divide

Caitlin Mitchell†

“The interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court.”

—*Troxel v. Granville*, 530 U.S. 57, 65 (2000).

“While the parental rights of even an imprisoned father must not be disregarded, the best interests of the child must be kept paramount.”

—*Matter of Sasha*, 675 N.Y.S.2d 605, 606 (App. Div. 1998).

ABSTRACT: This Note seeks to understand how people in prison may lose their parental rights as a result of their incarceration, despite long-established Fourteenth Amendment doctrine protecting family integrity and the ability to care for one’s children. Focusing on New York State as a case study, I argue that parents in prison are governed by an alternative, social-welfare family law regime in which aggressive state interference is normalized and constitutional protections of liberty and privacy do not fully apply. I suggest that by exposing this approach as harmful to children, advocates for incarcerated parents can take a step towards bridging the two family law paradigms and bringing greater recognition to the rights of incarcerated parents and their families.

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INTRODUCTION

Today, it is not uncommon for parents in prison—particularly those who lack economic resources and supportive family networks—to lose their parental rights while they are incarcerated.¹ The Adoption and Safe Families Act (ASFA), a federal law passed in 1997, creates incentives to move children out of foster care and into adoption placements as quickly as possible. Specifically, ASFA requires states to file petitions to terminate parental rights when children have been in foster care for fifteen of the past twenty-two months.² Parents in prison are likely to trigger this filing deadline, as the typical sentence for an incarcerated parent is between 80 and 100 months.³ At the same time, practical and legal obstacles make it difficult for parents in prison to maintain contact

1. *See infra* notes 75-78 and accompanying text. *See also* ARLENE F. LEE ET AL., CHILD WELFARE LEAGUE OF AMERICA, THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT ON CHILDREN OF INCARCERATED PARENTS 7-8 (2005), available at www.fcnetwork.org/Rcsource%20Center/cop_pubimpact.pdf (finding a significant overall increase in the number of termination cases involving incarcerated parents since 1997).

2. Pub. L. No. 105-89, §103, 111 Stat. 2118-20 (codified as amended at 42 U.S.C. §675(5)).

3. STEVE CHRISTIAN, NAT'L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS PAGE (2009), available at www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf. *See also* Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 348-51 (2005) (noting that average prison sentences are longer than the twenty-two-months).

with and plan for the future of their children, actions that become crucial if a parent is to defend herself against accusations of unfitness.⁴

The severity of this problem becomes apparent in light of the rise in incarceration that has taken place over the past few decades. The United States incarcerates more people than any other country in the world, with 2.3 million people currently in the nation's prisons or jails—a 500% increase over the past thirty years.⁵ As the number of adults in prison increases, so does the number of children who are left behind.⁶ Of the 74 million children in the United States in mid-2007, one study has estimated that 1.7 million, or 2.3%, had an incarcerated parent,⁷ with roughly half of these children under ten years old.⁸ In 2007, most people incarcerated in the United States reported having minor children: 63% of federal inmates and 52% of state inmates.⁹ These statistics are even starker in communities of color, where 1 out of 15 black children reported having a parent in prison, compared to 1 out of every 111 white children.¹⁰ While this Note examines the rights of incarcerated parents across gender lines, incarcerated women face particular challenges because they are more likely to be primary caretakers and thus be compelled to put their children into foster care.¹¹

Scholars and practitioners have argued that ASFA and its implementation through state law violate the constitutional right to family integrity and undermine the due process protections that should safeguard the rights of parents.¹² Yet in the published termination of parental rights (TPR) decisions

4. See *infra* pp. 29-31.

5. WILLIAM J. SABOL ET AL., BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 (2008) (“State and federal prisons and local jails had custody or physical guardianship over 2,304,115 inmates.”).

6. Chesá Boudin, *Children of Incarcerated Parents: The Child’s Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 81 (2011) (citing LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, DEP’T OF JUSTICE, SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 1-2 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf>).

7. GLAZE & MARUSCHAK, *supra* note 6, at 1-2.

8. SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991-2007, at 6 (2009), available at http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf (providing comprehensive demographic data on incarcerated parents and their children).

9. GLAZE & MARUSCHAK, *supra* note 6, at 1.

10. SCHIRMER ET AL., *supra* note 8, at 1-2. It should also be noted that more than 70% of children with a parent behind bars are children of color. *Id.*

11. JOCELYN M. POLLACK, A NATIONAL SURVEY OF PARENTING PROGRAMS IN WOMEN’S PRISONS IN THE U.S., in WOMEN AND GIRLS IN THE CRIMINAL JUSTICE SYSTEM: POLICY ISSUES AND PRACTICE STRATEGIES 19-1, 19-2 (2006) (“Most incarcerated mothers have minor children and were, before their incarceration, the primary caretakers of their children.”); see also SCHIRMER ET AL., *supra* note 8, at 7 (“While the vast majority of children of male prisoners are living with their mothers, only about a third (37%) of the children of incarcerated women are living with their fathers. Most of these children are living with grandparents or other relatives, while one out of every nine (10.9%) women in prison has a child living in foster care.”).

12. Emily K. Nicholson, *Racing Against the ASFA Clock: How Incarcerated Parents Lose More than Freedom*, 45 DUQ. L. REV. 83, 94 (2006) (arguing that under *Santosky v. Kramer*, 455 U.S. 745 (1982), incarcerated parents and their children have a vital interest in preventing erroneous termination of parental rights); Christina White, *Federally Mandated Destruction of the Black Family: The Adoption*

that involve incarcerated parents, courts rarely invoke these constitutional rights. In fact, far from being perceived as meaningful and constitutionally protected, relationships between incarcerated parents and their children are diminished in status, with parents' and children's interests placed in opposition before parental unfitness has been determined. "While the parental rights of even an imprisoned father must not be disregarded," writes one Family Court in New York State, "the best interests of the child must be kept paramount."¹³ This approach to families falls in sharp contrast to Supreme Court doctrine that emphasizes the fundamental nature of the parent-child relationship and the interest that parents and children share in preserving family integrity. How is it that the Supreme Court recently held that a state had infringed upon parental rights by allowing courts to grant visitation privileges to a child's grandparents,¹⁴ while incarcerated parents of children in foster care may lose their parental rights, permanently and entirely, without so much as a nod to family integrity doctrine?

Drawing from the work of a number of theorists, I argue that the disparities between the treatment of incarcerated and free parents can be explained through an understanding of family law not as a single entity, but as bifurcated along lines of class, race, gender, and criminality, with economically self-sufficient families receiving different treatment from families perceived as economically dependent or deviant. Jill Hasday has argued that poor families that lack a male bread-winner have historically been governed by a "social welfare paradigm of family law," in which aggressive state intervention is not seen as violating the constitutional rights of the parents involved.¹⁵ Invoking the work of Dorothy E. Roberts,¹⁶ Deseriee A. Kennedy,¹⁷ and others, I expand Hasday's concept to argue that this aggressive state intervention is triggered not only by poverty and non-normative gender arrangements, but by racial difference and criminality as well. Because incarcerated parents fall at the intersection of these categories—because they have been convicted of crimes,

and Safe Families Act, 1 NW. J. L. & SOC. POL'Y 303, 327-31 (2006) (arguing that ASFA infringes on the constitutional right to family integrity); Amy Wilkinson-Hagen, *The Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137, 148-64 (2004) (arguing that ASFA violates Fourteenth Amendment substantive and procedural due process in a variety of different ways); see generally DOROTHY E. ROBERTS, SHATTERED BONDS (2002) (arguing that the current child welfare regime is destructive to black families and communities). For a pre-ASFA but still highly relevant assessment of how state child welfare law violates the constitutionally protected procedural due process rights of incarcerated parents, see Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 764-65 (1992).

13. *In re Sasha*, 675 N.Y.S.2d 605, 606 (App. Div. 1998).

14. *Troxel v. Granville*, 530 U.S. 57, 67-71 (2000).

15. Jill Hasday, *Parenthood Divided*, 90 GEO. L.J. 299, 301-03 (2002).

16. ROBERTS, *supra* note 12, at 8.

17. Deseriee A. Kennedy, *Children, Parents, & The State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 96 (2011).

are disproportionately poor people of color,¹⁸ and are not “normal” parents in that they are unable to physically care for their children—the social welfare paradigm of family law applies to them with particular force. Aggressive intervention is seen as necessary for the protection of their children, and constitutional principles of family integrity and parental rights do not fully apply.

I begin this Note with an exploration of the well-established constitutional right to family integrity. In Part II, I describe the alternative version of family law that applies to the incarcerated parents of children in foster care. I explore the mechanics of how an incarcerated parent’s rights can be terminated, focusing on AFSA and its application through state law. I show that the law fails to recognize incarcerated parents as deserving of the same protections as non-incarcerated parents, and that the social welfare framework helps us to understand why this is the case.

Finally, in Part III, I explore how we might shift existing legal regimes so that the integrity of all families—even those divided by incarceration—is recognized and valued. Using New York State¹⁹ as a case study, I argue that family integrity arguments will become cognizable to courts only when the laws that infringe on the rights of incarcerated parents are exposed as undermining the compelling state interest in protecting children. I suggest that current law is harmful to the children of incarcerated parents for three reasons: first, because it leads to the erroneous termination of parental rights in some cases, to the detriment of all involved; secondly, because the termination of parental rights does not by any means ensure that a child will subsequently be adopted into a stable home; and finally, because the law may be based on an inaccurate understanding of what children’s best interests actually are.

I: THE CONSTITUTIONAL RIGHT TO FAMILIAL INTEGRITY

A. *Origins and Scope*

Parental rights originally derived from the patriarchal idea, based in common law, that a man’s role as head of his household was to maintain authority over his wife and children.²⁰ Over time, this doctrine has been

18. SCHIRMER ET AL., *supra* note 8, at 4 (Two thirds of the incarcerated parent population is non-white).

19. I chose New York State as a case study because it is a site of recent litigation-based and legislative efforts at reform. In 2010 it passed the Adoption and Safe Families Expanded Discretion Act, (A.5462-A/S.2233-A) (2010), pioneering legislation offering greater protections to incarcerated parents, while its courts recently invoked the constitutional doctrine of family integrity to protect the interests of another group of vulnerable parents: survivors of domestic violence.

20. Hasday, *supra* note 15, at 309. *See also* PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 8 (1997) (“Feminist scholars have had special cause to resist family rights doctrine, for it has its origins in a male-centered ideology that asserts, vis-à-vis the state,

reconstituted as a broader set of liberty interests that find their authority in the Fourteenth Amendment's provision that no state shall "deprive any person of life, liberty, or property, without due process of law." On the broadest level, these liberty interests encompass an individual's right to make decisions concerning family formation, including the right to marry,²¹ the right to procreate,²² and the right to terminate a pregnancy.²³ Once a family has formed, parents have an interest in the "care, custody, and control"²⁴ of their children and in not being forcibly separated from them, sometimes referred to as an interest in "familial association"²⁵ or "family integrity."²⁶

The right to the "care and custody of one's children" extends to many forms of decision-making that parents exercise over their children's lives. In *Meyer v. Nebraska*, one of the first cases to constitutionalize the common-law rights of parents, the Court considered a ban on foreign language instruction in public schools.²⁷ It overturned the conviction of a teacher who was prosecuted for teaching German to a ten-year-old student, finding that the Fourteenth Amendment protects "the power of parents to control the education of their own."²⁸ A few years later, in *Pierce v. Society of Sisters*, the Court invalidated an Oregon law that required parents to send their children to public school, finding that "the child is not a mere creature of the state" and that parents "have the right, coupled with the high duty" to control their children's upbringing.²⁹ Most recently, in 2000 the Court held in *Troxel v. Granville* that until a parent has been adjudicated as unfit, courts may not grant visitation privileges to non-custodial third parties—even grandparents—without at least some degree of deference to the parent's wishes.³⁰

In addition to the right to care, custody, and control, courts have recognized a broader right to family integrity. "We have little doubt that the Due Process Clause would be offended," the Supreme Court held in *Quilloin v. Walcott*, "if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of

the primacy of the claims of male heads of households to act as they please with respect to wives and children, whom the law first conceptualized as men's property.").

21. *Loving v. Virginia*, 388 U.S. 1 (1967).

22. *Skinner v. State of Okl. ex rel. Williamson*, 316 U.S. 535 (1942).

23. *Roe v. Wade*, 410 U.S. 113 (1973), modified by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992).

24. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

25. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116-17 (1996) ("Choices about marriage, family life, and the upbringing of children are . . . sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.").

26. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citations omitted) (holding, in a case considering the rights of unwed fathers, that "[t]he integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment . . .").

27. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

28. *Id.* at 401.

29. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

30. *Troxel*, 530 U.S. at 66.

unfitness.”³¹ This interest is held by both parents and their children.³² While the “care and custody of one’s children” cases often involved the rights of privileged parents to control relatively minor details of their children’s lives, the right to family integrity has been developed in *M.L.B. v. S.L.J.*³³ and *Santosky v. Kramer*³⁴—cases which involved attempts by the state to permanently terminate the rights of poor or otherwise marginalized parents.

Courts have described the termination of parental rights as “the nadir in destruction of the family integrity interest,”³⁵ one of the most severe actions that a state can take vis-à-vis an individual. In *M.L.B.*, the Supreme Court described termination of parental rights as a form of “branding.”³⁶ Lower courts have used similarly powerful language, characterizing TPR as a “civil death penalty.”³⁷

Taking a broader historical perspective, Peggy Cooper Davis argues that the right to family integrity itself developed in reaction to the destruction of African American families during slavery.³⁸ Because the utter disrespect for family bonds was a defining element of slavery in the United States,³⁹ the right to family became central to the antislavery movement, with stories of violence inflicted on families motivating the development of the Reconstruction Amendments.⁴⁰ Thus, from its origins, the right to family integrity emerged as relevant and necessary precisely because the destruction of the family was seen as a powerful vehicle of subjugation and dehumanization that could be inflicted on minority groups. To combat this threat, parental and familial rights have

31. *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)).

32. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 215 (E.D.N.Y. 2002) (“The interest in not being forcibly separated by the state is shared by parents and children.”).

33. *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996).

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

35. *M.L.B.*, 519 U.S. at 116.

36. *M.L.B.*, 519 U.S. at 119, 126 (“Does the Fourteenth Amendment require Mississippi to accord M.L.B. access to an appeal . . . before she is forever branded unfit for affiliation with her children? . . . [M.L.B.] is endeavoring to defend against the State’s destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication. Like a defendant resisting criminal conviction, she seeks to be spared from the State’s devastatingly adverse action.”).

37. *J.L.N. v. Nevada*, 118 Nev. 621 (2002); *see also In re Smith*, 601 E.E.2d 45, 55 (Ohio App. 6 Dist. 1991) (describing permanent termination of parental rights as the “family law equivalent of the death penalty in a criminal case”).

38. DAVIS, *supra* note 20, at 9.

39. *Id.* (“Slavery . . . required that men, women, and children be bound more surely by ties of ownership than by ties of kinship. Slave Power supported itself by annulment of marital, parental, and paternal rights.”).

40. *Id.* at 10 (“Drafters and advocates of the Fourteenth Amendment had vivid impressions of what it meant to be denied family rights The people who struggled for abolition and reconstruction regarded denial of family liberty as a vice of slavery that inverted concepts of human dignity, citizenship, and natural law. And they regarded the Fourteenth Amendment as an instrument to re-enshrine family rights as inalienable aspects of national citizenship and natural law.”); *id.* at 105 (“Indignation against these violations of the parental bond was a central rallying cry of the antislavery movement.”); *id.* at 112 (“The Reconstruction Congress directly addressed the abolitionists’ insistence that former slaves, and all other citizens, be secure in the parental relation.”).

evolved along both procedural and substantive lines: first, parents must be given adequate procedural due process protections before their families are intruded upon; secondly, the denial of familial protections only becomes tenable when a compelling state interest—such as protecting children—requires it.

B. Procedural and Substantive Protections

The fundamental liberty interests in “family integrity” and “care and custody of one’s children” give rise to both procedural and substantive due process protections under the Fourteenth Amendment.⁴¹ These familial rights are considered “fundamental,” with the result that any law that interferes with them must generally withstand strict scrutiny.⁴² However, because the state has a long-recognized, compelling interest in the protection of children, the right to parental control and custody has always been subject to limitations.⁴³ In certain situations—namely, when parents have abused or neglected their children—the state may step in and order the parents to change their behavior; remove the children from their homes; and, in extreme cases, permanently terminate parental rights.

While the protection of children is undeniably a compelling interest, the Supreme Court has emphasized that parental rights do not disappear when parents have acted badly, are estranged from their children, or have lost custody: “[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child . . . does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.”⁴⁴ Individuals facing termination of their parental rights are thus entitled to particularly robust due process protections:

Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do

41. *Nicholson*, 203 F. Supp. 2d at 235 (characterizing the “rights of family integrity” and “parental authority” as fundamental liberty interests, and finding that proceedings which implicate said interests must be analyzed from both procedural and substantive due process standpoints).

42. *Troxel*, 530 U.S. at 59.

43. *Croft v. Westmoreland Cnty. Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997) (“This liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children—particularly where the children need to be protected from their own parents.”); see also *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (“[A] State is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.”); *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (“[T]he family itself is not beyond regulation in the public interest . . . and . . . the rights of parenthood are [not] beyond limitation The state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare”).

44. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); see also *Troxel*, 530 U.S. at 62.

those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.⁴⁵

The Supreme Court has required a standard of “clear and convincing evidence” in termination of parental rights proceedings⁴⁶ and has prohibited courts from barring a TPR appeal based on lack of financial resources.⁴⁷ In addition, the Court has mandated that all TPR decisions be based on “individual determinations” of parental fitness, rather than on “presumptions” based on a particular quality or status.⁴⁸

Because termination of parental rights is not a criminal matter, states are not constitutionally required to provide any additional due process protections to parents beyond what the Supreme Court has mandated. Specifically, the Court has held that states are not required to provide a parent facing TPR with an attorney, and that the necessity of counsel can instead be evaluated on a case-by-case basis.⁴⁹ In addition, parents are not necessarily guaranteed the right to attend a TPR hearing in person, a factor that becomes particularly relevant in the context of incarcerated parents.⁵⁰

The fundamental liberty interest in family integrity would appear to be a useful framework in advocating for people in prison facing the termination of their parental rights; yet this doctrine is almost never invoked by courts that adjudicate these claims. Battles are instead fought over the technicalities of the state statutes governing the TPR process: for example, what it means for an incarcerated parent to “maintain contact” with and “plan for the future” of her child; the efforts required by an agency to “strengthen the relationship” between an incarcerated parent and her child; and access to counsel. While any of these issues could be framed in terms of rights to family integrity, courts do

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

46. *Id.* at 747-48.

47. *M.L.B. v. S.L.J.*, 519 U.S. 102, 119-22 (1996).

48. *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972) (“Procedure by presumption is always cheaper and easier than individualized determination. But . . . the State cannot, consistently with due process requirements, merely presume that unmarried fathers in general and petitioner in particular are unsuitable and neglectful parents. Parental unfitness must be established on the basis of individualized proof.”).

49. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981) (holding that the Due Process Clause does not require the appointment of counsel for indigent parents in every parental status termination proceeding). For an analysis of *Lassiter*, see DAVIS, *supra* note 20, at 141 (“The Court seemed to forget that in an adversary system, complexity in litigation is, more often than not, the product of the very things its decision precluded: the presence of trained and assertive advocates who will investigate and articulate competing claims.”).

50. *See, e.g., In re Adoption of Quenette*, 341 N.W.2d 619 (N.D. 1983); *In re Darrow*, 649 P.2d 858 (Wash. 1982). Even states that give parents the right to appear often do nothing to ensure their presence, and courts may draw inferences against parents for their failure to appear. *See, e.g., In re Murphy*, 414 S.E.2d 396, 397 (N.C. Ct. App. 1992) (“We hold that an incarcerated parent does not have an absolute right to be transported to a termination of parental rights hearing in order that he may be present under either statutory or constitutional law.”).

not mention broad constitutional principles. In the section that follows, I argue that this can be explained by the fact that parents in prison fall into an alternative, social welfare family law regime, in which parental rights are in tension with a social-welfare-based understanding of the relationship between families and state.

II. A SECOND FAMILY LAW REGIME—HOW THE PARENTAL RIGHTS OF PEOPLE IN PRISON ARE TERMINATED BY THE STATE.

A. *Theoretical Framework: Family Law Bifurcation*

Family integrity language and doctrine is generally absent from cases involving the rights of parents in prison because parental rights do not fully apply to this population—instead, parents in prison are governed by an alternate paradigm of family law, in which aggressive state intervention into families, and the overriding of parental rights, is seen as both normal and necessary. In making this argument, I rely on the work of a number of theorists who share the general assertion that family law, both historically and today, has extended its protection and support only to those families that are perceived by the dominant culture to be self-sufficient or that conform to some kind of normative ideal.

Jill Hasday provides a comprehensive historical analysis of the dual-evolution of parental privacy doctrine on the one hand, and intervention into economically non-self-sufficient families on the other.⁵¹ She shows that common-law deference to parental authority did not traditionally extend to families that lacked a bread-winning husband and father figure. These families were seen as inherently dysfunctional and in need of state authority to fill the gap left by an absent or economically deficient man. Thus, in the late 19th century, societies for the prevention of child cruelty collaborated with courts to remove children from homes where the father was unable to financially support his wife and children, even as these same courts protected and reinforced the rights of parents in two-parent, economically stable households.⁵²

Hasday notes that even today, state intervention is not necessarily triggered by emergency situations of abuse and neglect; rather, states continue to intervene based on poverty, for example, by making economic aid contingent upon intrusive home visits and monitoring by social workers.⁵³ Marsha

51. Hasday, *supra* note 15, at 300 (“The American law of parent and child is conventionally understood to be extremely deferential to parental prerogatives and highly reluctant to intervene.”). *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 57 (2000); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

52. Hasday, *supra* note 15, at 333.

53. *Id.* at 357-60.

Garrison has made a similar argument about family law bifurcation in the contemporary child welfare context, theorizing a “dual family law—one for the rich and one for the poor.”⁵⁴ The failure of today’s foster care system to adequately acknowledge and respect the relationships between poor parents and their children, she writes, is “deeply rooted in the poor law traditions of the child welfare system.”⁵⁵ Family law today is bifurcated along racial lines as well as those of class. Scholars have argued that, like the early child cruelty prevention societies, current child welfare practices are both racially discriminatory and equate poverty with neglect.⁵⁶ Shani King describes the disparate racial impact of current child welfare policies on children of color, as well as the intentional discrimination embedded in the historical roots of many of these laws.⁵⁷

Hasday asserts that many people in the United States today would not subscribe to the assumptions and prejudices that underlie the bifurcated family law regime.⁵⁸ She argues that interventionist state practices are difficult to challenge primarily because the law that affects poor families is categorized as welfare rather than family law, disguising the implications that it has for family privacy and parental rights.⁵⁹ Yet the strongest argument in favor of a bifurcated regime—that the compelling state interest in protecting children justifies aggressive intervention into certain families, regardless of whether this disparately affects poor communities and communities of color—continues to find powerful support in the law.⁶⁰

In her book *Shattered Bonds*, Dorothy E. Roberts argues that the child welfare policy “pendulum” has swung away from the goal of family reunification and towards the goal of removing children from troubled homes. Roberts documents the ways in which “[f]amily preservation and child safety are treated as two opposing ends of the spectrum of child welfare concerns,”

54. Masha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 432 (1983).

55. *Id.* at 436-37.

56. ROBERTS, *supra* note 12, at vi (“Black children make up nearly half of the foster care population, although they constitute less than one-fifth of the nation’s children Once removed from their homes, Black children . . . are less likely to be either returned home or adopted than other children.”).

57. Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575 (2011).

58. Hasday, *supra* note 15, at 303-04 (“The divide in the law’s treatment of parenthood is generally taken to be . . . commonsensical and so familiar . . . even though many of the reasons historically offered to create and maintain the bifurcation would not persuade substantial numbers of contemporary Americans.”).

59. *Id.* at 303 (“[T]he divide in the regulation of parenthood has avoided critical attention because family law is still conventionally defined to include only those legal practices and presumptions applied to families considered financially self-sufficient The bodies of law that operate to constrain or deny household autonomy are typically understood as falling solely within the jurisdiction of welfare or poverty law, even though they regulate the rights, responsibilities, and relationships of family members and thus importantly function as forms of family law as well.”).

60. ROBERTS, *supra* note 12, at 103 (“The past five years have witnessed the passage of critical legislation that weakens family bonds In its place, a new orientation emphasizes ‘freeing’ children in foster care for adoption by speeding up termination of parental rights.”).

with the parental rights of black parents increasingly seen as a barrier to adoption by a stable, functional—and often white, middle or upper class—family.⁶¹ Incarcerated parents face a particularly acute version of what Roberts and others have identified: a societal assumption that the rights of parents necessarily conflict with, and are detrimental to, the best interests of their children.

In the paragraphs above, I suggest that laws that push states to terminate parental rights in order to more quickly “free” foster children for adoption disproportionately affect poor families of color in general and incarcerated parents in particular, and are an expression of a bifurcated family law regime in which the familial rights of these populations are devalued. In what follows, I provide a more specific description and analysis of how this devaluation occurs. First, I describe how the Adoption and Safe Families Act (ASFA) pushes states to initiate TPR petitions against incarcerated parents; second, I outline some of the structural and legal barriers that interfere with the ability of family courts to make fair and individualized determinations of parental fitness, once ASFA has set a TPR petition into motion.

B. The Adoption and Safe Families Act: Initiating the TPR Petition

The Adoption and Safe Families Act⁶² has made it dramatically easier for states to terminate the rights of parents with children in foster care. Referred to as “the most sweeping changes to the nation’s adoption and foster-care system in nearly two decades,”⁶³ ASFA was designed to move children from the foster care system into permanent homes and to prioritize children’s health and safety over family reunification.⁶⁴

ASFA requires that states file a petition to terminate parental rights if a child has been in foster care for fifteen of the most recent twenty-two months; if the child has been determined by a court to be abandoned; or if the parent has been convicted of particular crimes against a child for whom the parent was legally responsible.⁶⁵ There are some exceptions, most significantly if the child

61. *Id.* at 104.

62. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

63. Katharine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES, Nov. 17, 1997, available at <http://www.nytimes.com/1997/11/17/us/clinton-to-approve-sweeping-shift-in-adoption.html>.

64. *Id.* (“Senator John H. Chafee . . . a leading sponsor of the legislation, said . . . before the measure passed . . . ‘We will not continue the current system of always putting the needs and rights of the biological parents first.’ Although that is a worthy goal, he said, ‘it’s time we recognize that some families simply cannot and should not be kept together.’”); see also 42 U.S.C. § 671(a)(15)(A) (2006) (“[T]he child’s health and safety shall be the paramount concern.”).

65. 42 U.S.C. § 675(5)(E) (2006) (“[I]n the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant . . . or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of

is placed with a relative or if the state determines that it is in the child's best interest not to file for termination of parental rights.⁶⁶ ASFA also allows states to bypass the duty to make a "reasonable effort" to reunite children with their biological parents in certain situations.⁶⁷ Finally, ASFA provides bonuses to states that increase their adoption rates, particularly the adoption of older and disabled children, at rates of between \$4,000 and \$8,000 per child.⁶⁸

It is important to note that the initiation of a TPR petition does not necessarily mean that a parent's rights will in fact be terminated. A parent retains her constitutional rights, and the state must support its allegations with clear and convincing evidence.⁶⁹ A TPR hearing, however, is not a neutral process to check the status of a child's placement; it is a traumatic, adversarial proceeding in which the child protective services attempts "to convince the court that terminating . . . parental rights and placing [the] child up for adoption is the best solution for [the] child."⁷⁰ The Supreme Court in *Santosky* described the fact-finding stage of a hearing to terminate parental rights as a process that "pits the State directly against the parents."⁷¹ "When the State initiates a parental rights termination proceeding," the Court elaborated, "it seeks not merely to infringe that fundamental liberty interest, but to end it."⁷² It is also a hearing in which the State often has the upper hand, as "[t]he State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense."⁷³ It follows that ASFA's 15/22 months provision, particularly combined with other provisions that incentivize states to move children out of foster care as quickly as possible, results not merely in more TPR petitions being initiated, but in more parents losing their rights.

the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents . . . and, concurrently, to identify, recruit, process, and approve a qualified family for an adoption").

66. *Id.* (stating that the State shall file a petition to terminate parental rights unless "[A]t the option of the State, the child is being cared for by a relative; a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child; or the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home . . .").

67. 42 U.S.C. § 671(a)(15)(D) (2006) (stating that states do not have to make a reasonable effort at reunification if a parent has subjected the child to aggravated circumstances as defined by state law, if the parent has committed certain violent crimes against another of his or her children, or if the parent has previously had his or her rights terminated).

68. 42 U.S.C. § 673(d)(1) (2006).

69. *Santosky v. Kramer*, 455 U.S. 745, 746 (1982).

70. A JAILHOUSE LAWYER'S MANUAL, CHAP. 33 at D (Columbia Human Rights Law Review ed., 8th ed. 2009), available at www3.law.columbia.edu/hrlr/JLM/Chapter_33.pdf. (citing N.Y. SOC. SERV. LAW § 384-b(3)(b) (McKinney 203 & Supp. 2008)).

71. *Santosky*, 455 U.S. at 759.

72. *Id.*

73. *Id.* at 763.

It is difficult to measure the exact relationship between incarceration and termination of parental rights because incarceration can factor into a TPR determination in a variety of ways, some of which may not be immediately discernible from the record.⁷⁴ In addition, TPR determinations are made at the state level, where most trial court and some intermediate appellate cases are unreported.⁷⁵ Nonetheless, scholars and practitioners have argued that ASFA has caused an increase in the number of incarcerated parents who lose their parental rights.⁷⁶ Incarcerated parents are likely to fall into the category of parents whose children have been in foster care for fifteen out of the past twenty-two months and thus trigger the ASFA filing deadline, as the typical sentence for an incarcerated parent is between eighty and one hundred months.⁷⁷ A 2005 study by the Child Welfare League of America reports a significant increase in the number of termination cases involving incarcerated parents that were filed between 1997 and 2002, indicating a strong correlation between incarceration and termination of parental rights under ASFA.⁷⁸ Another study estimates a 250% increase in cases terminating parental rights due to parental incarceration since the enactment of ASFA.⁷⁹ Finally, some scholars have suggested that ASFA has reverberations beyond the mandates of the federal law itself, both encouraging states to amend their child welfare law

74. See *infra* pp. 22-24. In some states, incarceration itself can be a statutory ground for termination of parental rights; in others, it may inform the court's determination of whether a parent has been neglectful. In still other cases, incarceration may factor into the dispositional phase of the hearing, in which the court determines whether TPR would further the best interests of the child. See also Kennedy, *supra* note 17, at 101 ("It is difficult to assess the impact of incarceration on parental termination proceedings . . .").

75. LEE, *supra* note 1, at 7.

76. See, e.g., *id.* at 7-8; Antoinette Greenaway, Note, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African American Women*, 17 NAT'L BLACK L.J. 247, 256-57 (2002-04); Kennedy, *supra* note 17, at 105 ("While the ASFA may have been motivated by good intentions . . . the practical result has been the termination of parental rights in families already experiencing the trauma of separation due to the imprisonment of a parent."); see also Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1683 (2003).

77. STEVE CHRISTIAN, NAT'L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS 3 (2009), available at www.ncsl.org/documents/cyf/childrenofincarceratedparents.pdf; Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 348-51 (2005) (noting that average prison sentences are longer than the twenty-two-months). See also CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 6 (2000), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=981> (showing that in 1997, the average incarcerated parent was estimated to be serving 80 months).

78. LEE, *supra* note 1, at 7-8 ("In reviewing reported TPR cases, the significant overall increase in the number of termination cases involving incarcerated parents that were filed from 1997 to 2002 suggests that ASFA has had an important effect."). This study also includes data from judges, attorneys, and child welfare representatives, showing that, among other things, judges and attorneys believe that ASFA affects children of incarcerated parents differently than other children.

79. Kennedy, *supra* note 17, at 105 (citing Jeremy Travis, *Families & Children*, 69 FED. PROBATION 31, 34 (2005)).

to further incentivize TPR,⁸⁰ and causing family law courts to be more cursory in their review of child welfare and termination cases.⁸¹

Prior to ASFA, courts treated family integrity and the best interests of the child as congruent unless the parent was found to have committed abuse, neglect, abandonment, or any of the other state-law-determined statutory grounds for TPR. This framework was based on an understanding that fit parents are generally the best protectors of their children's interests.⁸² "Until the State proves parental unfitness," cautioned the Supreme Court in *Santosky*, "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."⁸³

ASFA's 15/22 month provision, and its overall approach of prioritizing and incentivizing adoptive placements over family reunification, has shifted the relationship between these two concerns for children in foster care. Under ASFA, once a child is in foster care for more than fifteen months, the default assumption is that his or her "best interests" are in conflict with familial reunification; and as I will show in the section that follows, if a parent is incarcerated, practical and legal barriers often prevent him or her from receiving the fair and individualized determination of fitness that *Santosky* requires.

C. Incarceration and Parental Fitness: Barriers to an Individualized Determination

While ASFA dictates when termination of parental rights petitions must be initiated, state law controls how termination of parental rights is actually carried out. Most relevantly for this Note, state law determines whether incarceration itself can be a statutory ground for termination of parental rights, and if not, whether incarceration makes it difficult for parents in prison to avoid termination of their rights on other grounds. State law also determines the scope of the procedural protections that are available to parents in TPR proceedings, beyond the baseline mandated by the Supreme Court.

In the following section, I will first provide a brief overview of state law on a national scale. I will then take a close look at New York State. I have chosen New York as a case study because it may be the most progressive state on the

80. LEE, *supra* note 1, at 11-18 (listing changes in state law after the passage of ASFA).

81. Kennedy, *supra* note 17, at 111 (citing Lenore M. McWey et al., *Parental Rights and the Foster Care System: A Glimpse of Decision Making in Virginia*, 29 J. FAM. ISSUES 1031, 1027 (2008) (showing that before the ASFA, "more family-specific evidence was presented on behalf of parents.")).

82. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) ("[S]o long as a parent adequately cares for his or her children . . . there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions . . ."); *Parham v. J.R.*, 442 U.S. 584, 603 (1979) ("[H]istorically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.").

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

issue of incarcerated parents and their children, both historically and today. New York has many organizations and community groups that advocate on behalf of women in prison.⁸⁴ Perhaps in part due to the activities of these groups, the New York State Legislature has recently adopted some creative approaches to making child welfare law fairer to parents in prison.⁸⁵ In addition, there is useful precedent in New York State in which advocates challenged unfair treatment of another class of marginalized parents—victims of domestic violence.⁸⁶ A closer look at the situation of incarcerated parents in New York State reveals the barriers that parents nationwide are facing as they struggle to maintain their rights, while offering various approaches to change.

State Law Overview

This section will provide a brief overview of state law implementation of ASFA. While ASFA requires that states initiate TPR proceedings once a child has been in foster care for 15 of the past 22 months, state law determines the conditions under which parental rights will actually be terminated. Most states allow TPR based on abuse, neglect, or abandonment⁸⁷—grounds that can interact with incarceration in a variety of ways.

In a recent article, Professor Deseriee A. Kennedy reports that the majority of states list parental incarceration as a statutory basis for TPR, and that others weigh conditions relating to incarceration when making a determination of parental fitness.⁸⁸ About twenty states focus on the conviction itself, permitting the termination of parental rights when parents are incarcerated “as a result of a particular bad act that directly affects the ability to parent safely and effectively,” such as a domestic violence or child abuse conviction.⁸⁹ This approach avoids categorically stigmatizing incarcerated parents and instead focuses on the underlying crime; at the same time, it assumes that by engaging

84. *Support Memos Written on Behalf of the ASFA Expanded Discretion Bill (A.5462-A/S.2233-A)*, WOMEN IN PRISON PROJECT, CORRECTIONAL ASSOCIATION OF NEW YORK (2010), available at www.correctionalassociation.org/WIPP/download/ASFA_Bill_Spt_Memo_List.pdf (listing sponsors of ASFA expanded discretion bill).

85. N.Y. SOC. SERV. LAW § 384-b(7)(a)(1) (2010).

86. *Nicholson v. Williams*, 203 F.Supp.2d 153 (E.D.N.Y. 2002).

87. Kennedy, *supra* note 17, at 138 n.18 (citing James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 953 (2003)); Orman W. Ketcham & Richard F. Babcock, Jr., *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUTGERS L. REV. 530, 531 (1975-1976).

88. Kennedy, *supra* note 17, at 95. For a slightly earlier but comprehensive survey of state statutes, see LEE, *supra* note 1, at 11 (reporting that as of 2005, 36 states had TPR statutes that dealt explicitly with incarceration, and that of these, 25 permitted rights to be terminated based on length of incarceration. The remaining states either included a felony conviction and imprisonment as a factor in a termination proceeding, provided for termination based on the nature of the conviction, or permitted termination based on the qualitative effect of the parent's incarceration on the parent-child relationship).

89. Kennedy, *supra* note 17, at 96.

in behaviors that adversely affect their children, parents have effectively forfeited their rights.

In contrast to the type of statute described above, Kennedy finds that in the majority of states either the fact of incarceration itself is a ground for TPR, or that courts evaluate factors related to incarceration that might interfere with a parent's ability to fulfill his or her role—for example, sentence length and the age of the child.⁹⁰ Philip Genty has done a recent survey of the state laws that fall into this category.⁹¹ He finds that twenty-four states currently have statutes that provide for termination of parental rights based on incarceration itself, most of which are framed in general terms—for example, providing for TPR when the period of incarceration is “significant considering the child’s age and need for adult’s care and supervision”⁹² or where the period of incarceration would “constitute a substantial period of juvenile’s life.”⁹³ Several other statutes link termination to a specific prison term length, for example, providing for TPR where a parent will be in prison for more than one year,⁹⁴ two years,⁹⁵ or five years.⁹⁶ A few states link TPR to the child’s age, such as a Tennessee law that provides for TPR where a parent is incarcerated for ten or more years and the child is under the age of eight.⁹⁷ Kennedy points out that because legal definitions of abuse and neglect differ among states, and because there is disagreement about how children are affected by parental incarceration, time frames relating to sentence length and the age of the child inevitably vary. In some states, incarceration for two years is a sufficient ground for termination of parental rights, while other states ask courts to determine, at their discretion, what might constitute a “substantial” or “extended” period of time.⁹⁸

State law also determines what procedural protections will be available to parents in TPR proceedings. The Supreme Court has held that a parent’s right to appointed counsel is dependent on the complexity of the issues involved and on the ability of an unrepresented parent to have a fair hearing.⁹⁹ Some states have passed legislation that requires appointment of counsel in certain kinds of child welfare proceedings.¹⁰⁰ In other states, courts have held that counsel

90. *Id.* at 98.

91. Philip Genty, *Moving Beyond Generalizations and Stereotypes to Develop Individualized Approaches for Working with Families Affected by Parental Incarceration*, 50 FAM. CT. REV. 36, 38 (2012).

92. ALASKA STAT. § 47.10.080(o) (2011).

93. ARK. CODE ANN. § 9-27-341(b)(3)(B)(viii) (2011).

94. UTAH CODE ANN. § 78A-6-508(2)(c) (2011).

95. TEX. FAM. CODE ANN. § 161.001(1)(Q)(ii) (2010).

96. IOWA CODE § 232.116(1)(j)(2) (2011).

97. TENN. CODE ANN. § 36-1-113(g)(6) (2011).

98. Kennedy, *supra* note 17, at 98-99.

99. *Lassiter*, 452 U.S. at 31.

100. *See, e.g.*, CONN. GEN. STAT. § 46b-135(b) (2012) (“At the commencement of any proceeding on behalf of a neglected, uncared-for, or dependent child or youth, the parent . . . of the child . . . shall have the right to counsel, and shall be so informed by the judge, that if they are unable to afford counsel, counsel will be provide for them . . . and such counsel and such parent . . . shall have the rights of

should be appointed only when termination of parental rights can result.¹⁰¹ The question of whether ineffective assistance of counsel guarantees apply in TPR proceedings also varies across states.¹⁰²

Case Study: Termination of Parental Rights in New York State

Because child welfare laws are inconsistent across states, I focus on one state in particular—New York—in order to provide a more nuanced look into how parents in prison may lose their parental rights. Under New York law, a parent has permanently neglected her child when, although physically and financially able to do so, she fails to maintain contact with or plan for the future of her child for a period of either one year or fifteen out of the most recent twenty-two months, even though the agency has made diligent efforts to strengthen the parental relationship.¹⁰³ Once a court has found permanent neglect, the inquiry shifts to the child's best interests: specifically, to the child's physical and emotional well-being, including the extent to which the parent can provide a permanent home and a normal, stable family atmosphere.¹⁰⁴

New York State has been one of the most progressive regarding the rights of incarcerated parents. While state supreme courts in Nevada and Wisconsin have only recently found that a determination of parental unfitness cannot be based on incarceration status alone,¹⁰⁵ New York came to this conclusion through a legislative amendment in 1983. The purpose of the amendment was to "prevent the automatic termination of parental rights of incarcerated persons,"¹⁰⁶ and courts have interpreted the amendments to require particular attention and sensitivity to the situation of parents in prison:

[I]n light of the drastic consequences of failing to plan, courts should not set unrealistically high standards in evaluating the parent's planning efforts and this directive undoubtedly applies with special

confrontation and cross-examination."); Fam. Ct. Act §§ 261, 262 (a)(iv) (2012) (requiring counsel in child welfare proceedings in New York state).

101. See, e.g., *In re D.F.*, 622 So. 2d 1102 (Fla. Dist. Ct. App. 1993); *In re Lindsey C.*, 473 S.E.2d 110 (W. Va. 1995).

102. See, e.g., *In re Oghenckvebc*, 473 S.E.2d 393, 396 (N.C. Ct. App. 1996) (parent's right to counsel includes the right to effective counsel); *Arteaga v. Texas Dep't of Protective & Regulatory Servs.*, 924 S.W.2d 756, 762 (Tex. Ct. App. 1996) (no guarantee of effective assistance of counsel).

103. N.Y. SOC. SERV. § 384-b(7)(a) (McKinney 2003 & Supp. 2008).

104. *In re Michael B.*, 80 N.Y.2d 299, 314-315 (1992) (finding that in determining the "best interests" of the child, the court should consider the fitness of the parent, the agency's plan for the child, and the child's emotional well-being).

105. *In re Max G.W.*, 716 N.W.2d 845, 860 (Wis. 2006) ("We . . . conclude that a parent's incarceration does not, in itself, demonstrate that the individual is an unfit parent."); *In re J.L.N.*, 55 P.3d 955, 959-60 (Nev. 2002) ("Incarceration alone is insufficient to satisfy the statutory requirement of parental fault as it relates to failure of parental adjustment.").

106. *In re Gregory B.*, 74 N.Y.2d 77, 88 (1989); see also N.Y. SOC. SERV. LAW § 384-b(7)(d) (McKinney 2003 & Supp. 2008).

force in cases where the parent is incarcerated and thus severely hampered in the ability to act on behalf of his or her child.¹⁰⁷

New York has also chosen to extend additional procedural protections to parents facing TPR. A law passed in 1975 extends the New York public defender system to “the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child.”¹⁰⁸ Courts have found that both the U.S. and New York constitutions protect a parent’s right to be present “throughout a proceeding implicating the termination of parental rights,” although this right may have to be balanced against the child’s right to a “prompt and permanent adjudication.”¹⁰⁹ If a parent is “unavoidably absent” from the hearing, due process is only satisfied if that parent “had some opportunity to participate in a meaningful way,” whether through a phone appearance or deposition.¹¹⁰

Finally, New York State has recognized that family integrity and the ability to care for one’s children are fundamental liberty interests protected both under the U.S. and New York constitutions.¹¹¹ Under a substantive due process analysis, a law that infringes on a fundamental liberty interest is generally subjected to strict scrutiny: it must be narrowly tailored to serve a compelling governmental interest. The District Court for the Eastern District of New York, for example, found that the state’s interest in protecting children must be “subject to strict justification” when a right as central as custody is at issue.¹¹² Understanding family integrity as a substantive due process right is important because it suggests that a high standard should be used when evaluating federal and state law that terminates parental rights.

While New York State recognizes the constitutional right to family integrity and provides strong procedural protections in some respects, the law continues to impose barriers for parents in prison.¹¹³ First, agencies are not required to make the same level of effort to assist a parent in maintaining

107. *Gregory B*, 74 N.Y.2d at 89.

108. Fam. Ct. Act §§ 261, 262 [a][iv]. See also Fam. Ct. Act § 262 (Consol. 2001).

109. *In re Casey L.*, 891 N.Y.S.2d 537, 538 (App. Div. 2009).

110. *In re Eileen R.*, 912 N.Y.S.2d 350, 354 (App. Div. 2010).

111. *People United for Children, Inc. v. City of New York*, 108 F. Supp. 2d 275, 293-97 (S.D.N.Y. 2000) (“It is beyond dispute that the substantive due process clause protects an individual’s liberty interest in familial relations, which includes a parent’s interest in the custody of his or her children.”); *In re Sanjivini K.*, 47 N.Y.2d 374, 382 (1979) (“In many cases the State may . . . find ‘better’ parents for a child even though the natural parents may be willing and able to provide proper care. But it is fundamental to our legal and social system that it is in the best interest of a child to be raised by his parents unless the parents are unfit.”).

112. *Nicholson*, 203 F. Supp. 2d 153, 245 (E.D.N.Y. 2002).

113. In this Note, I focus on legal barriers and their interaction with the circumstances of incarceration. Other barriers beyond the scope of this Note include racial and class bias of family court judges and state agency social workers; the fact that counsel, although appointed, may lack adequate time, incentives, and monetary compensation to represent clients effectively; and procedural barriers such as the difficulty of arranging transportation from prison to the court.

contact and planning for the child's future when the parent is incarcerated.¹¹⁴ This, combined with the fact that it is already difficult for incarcerated parents to communicate with their children, prevents many parents from defending themselves against accusations of permanent neglect. In addition, while incarceration in and of itself cannot be a ground for termination, New York courts have held that a prison sentence may amount to permanent neglect when the parent does not have the resources or family support to put the child into a private fostering arrangement.¹¹⁵

Barrier #1: Diminished Responsibility to Reunify the Family

In cases charging permanent neglect, the New York Department of Social Services must prove as an initial matter that it made diligent efforts to strengthen the relationship between the parent and child.¹¹⁶ There are, however, some crucial exceptions to this requirement. First, an agency does not have to make diligent efforts when a parent has failed for a period of six months to keep the agency informed of her location.¹¹⁷ This can become a problem if a child is already in foster care when a parent is sent to prison: service will be made to the parent's last known address, and while a court may order a "diligent search" for the absent parent, this may prove futile, particularly if the parent's name is inconsistent in the records.¹¹⁸ Because counsel will not be assigned unless and until the parent appears in court, a non-appearance under these circumstances would likely be perceived as a waiver of the parent's right to be present at the hearing.¹¹⁹ Courts have interpreted the 6-months provision against parents in a harsh manner, finding, for example, that an agency was excused from making a diligent effort despite the fact that it could have easily determined the parent's location in prison by questioning the child's foster mother, who was the sister of the biological parent.¹²⁰

114. N.Y. SOC. SERV. LAW § 384-b(7)(e)(ii) (McKinney 2003 & Supp. 2008).

115. *In re Gregory B.*, 74 N.Y.2d 77, 90 (1989).

116. N.Y. SOC. SERV. LAW § 384-b(7)(f) (McKinney 2003 & Supp. 2008); *see also In re Yvonne N.*, 775 N.Y.S.2d 87 (App. Div. 2004) (The threshold inquiry in permanent neglect proceeding is whether agency has made diligent efforts to strengthen parent-child relationship. The requirement of demonstrating diligent efforts is not necessary, however, when an incarcerated parent has failed on more than one occasion to cooperate with the agency in efforts to assist the parent in planning for future of the child or in efforts to plan and arrange visits with the child).

117. N.Y. SOC. SERV. LAW § 384(7)(e)(i) (McKinney 2003 & Supp. 2008); *see also In re Desire Star H.*, 609 N.Y.S.2d 268 (App. Div. 1994).

118. E-mail from Philip M. Genty, Everett B. Birch Innovative Teaching Clinical Professor in Professional Responsibility, Columbia University, to Caitlin Mitchell, JD Candidate, 2012 Law School (Jan. 25, 2012, 6:01:58 PM EST) (on file with author).

119. *Id.*

120. *In re Sheila G.*, 61 N.Y.2d 368 (1984); *see also In re Sasha R.*, 675 N.Y.S.2d 605 (App. Div. 1998) (agency excused from making diligent efforts when father failed to keep the agency apprised of his prison address and could not be located because he had used different surnames in his dealings with the agency).

In addition to the six-months exception, there is a second exception that applies specifically to incarcerated parents: an agency does not have to make diligent efforts to reunify the family when “[a]n incarcerated parent has failed on more than one occasion while incarcerated to cooperate with an authorized agency in its efforts to assist such parent to plan for the future of the child.”¹²¹ Under this provision, a few instances of conflict or miscommunication legally excuse the agency from its obligations.

Even when neither of these exceptions to the diligent efforts requirement applies, New York courts have often required less effort from agencies when parents are in prison. As bluntly expressed by the Family Court of New York, Kings County in 2010, “diligent efforts in the context of incarcerated parents are different from the efforts required for parents at liberty.”¹²² To meet their burden, agencies must make arrangements for counseling, visitation, and advice relating to the “child’s progress and development”¹²³—requirements that are lower than they would be for non-incarcerated parents. In *In re Love Russell J.*, the Appellate Court for the Second Department found that an agency had exercised diligent efforts by “facilitating visitation, keeping [the father] apprised of the children’s welfare, and repeatedly reminding him of the need to find a resource for the care of his children.”¹²⁴ The agency “apprised” the father that his sisters “were not viable resources” and “warned” him of the consequences of his failure to plan. The father, notes the court, “did not suggest any other potential resources.”¹²⁵ Here, it appears that the agency simply informed the father of his responsibilities, while doing nothing to help him figure out how to fulfill them.¹²⁶

121. N.Y. SOC. SERV. LAW § 384-b(7)(c)(ii) (McKinney 2003 & Supp. 2008); see, e.g., *In re Eric L.*, II, 857 N.Y.S.2d 851, 854 (App. Div. 2008) (“Here, the father indicated by letter to petitioner’s caseworker that he had some relatives, including his brother, with whom the child could be placed while he was incarcerated. When the caseworker asked the father to provide her with contact information for those relatives, the father never replied. We thus conclude that petitioner was relieved of its obligation to exercise diligent efforts while the father was incarcerated, based on the father’s failure to cooperate with petitioner during that period of time.”).

122. *In re Commitment of Alicia G.*, 908 N.Y.S.2d 810, 815 (N.Y. Fam. Ct. 2010) (“[W]hereas diligent efforts generally require provision of services and other assistance to the parents, so that problems preventing discharge of the child from care may be resolved or ameliorated, there is an exception for incarcerated parent.”).

123. *In re Star Leslie W.*, 63 N.Y.2d 136, 142 (1984) (“Those efforts must include counseling, making suitable arrangements for visitation, providing assistance to the parents to resolve or ameliorate the problems . . . and advising the parent at appropriate intervals of the child’s progress and development.”).

124. *In re Love Russell J.*, 776 N.Y.S.2d 859, 859-860 (App. Div. 2004).

125. *Love*, 776 N.Y.S.2d at 860.

126. See also *In re Gregory B.*, 74 N.Y.2d 77, 87 (1989) (observing that the agency satisfied the diligent efforts requirement when it “arranged for visitation between respondent and his child, communicated with respondent and kept him apprised of his child’s progress, and assisted respondent in formulating a plan for his child’s future”).

Barrier #2: Obstacles to Maintaining Contact and Planning for the Future

Once an agency has demonstrated that it fulfilled its obligation to make diligent efforts to strengthen the child-parent relationship, it must prove that the parent's actions constituted permanent neglect—that the parent failed to maintain contact with or to plan for the future of her child.¹²⁷ New York courts have taken a rather strict view of these provisions as they apply to incarcerated parents, emphasizing that incarcerated parents are expected to take responsibility for themselves and their children and to comply with the same time limits and requirements as non-incarcerated parents.¹²⁸ This is true despite the fact that most correctional facilities, particularly those for women, are located in remote, rural areas, posing a major logistical and financial barrier to visitation.¹²⁹ More than half of mothers never receive visits from their children during the time they are incarcerated.¹³⁰

Despite the difficulties that even loving, committed parents may have, courts routinely terminate the rights of parents in prison who fail to maintain regular and high-quality contact with their children.¹³¹ In determining whether “contact” was sustained, New York courts evaluate the quality of the interactions between parents and children, finding, for example, that visitation alone is insufficient where the “quality of the visitation was poor.”¹³² Thus, while New York law states that parental rights should only be terminated if the parent fails to maintain contact with her child although physically and financially able to do so, courts are often unsympathetic to the various barriers that incarcerated parents face and generally require the parent to show that it was effectively impossible for her to communicate with her child and the state agency.¹³³

127. N.Y. SOC. SERV. § 384-b(7)(a) (McKinney 2003 & Supp. 2008).

128. *In re Delores B.*, 533 N.Y.S.2d 706 (App. Div. 1988) (parent's incarceration does not in itself render him physically or financially unable to maintain contact with or plan for future of children, and incarcerated parent's obligation to child is same as that of any other parent).

129. See JULIE KOWITZ MARGOLIES & TAMAR KRAFT-STOLAR, WOMEN IN PRISON PROJECT, CORR. ASS'N OF N.Y. STATE, WHEN “FREE” MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND THE INCARCERATION OF WOMEN IN NEW YORK STATE 11 (2006).

130. BARBARA BLOOM, BARBARA OWEN, & STEPHANIE COVINGTON, NAT'L INST. OF CORR., GENDER RESPONSIVE STRATEGIES: RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS 7 (2003); Glaze, *supra* note 7 (noting that only 53% of parents in state prison had spoken with their children over the telephone, and only 42% had a personal visit, since admission).

131. See, e.g., *In re Shannon “QQ.”*, 690 N.Y.S.2d 788, 789 (App. Div. 1999) (finding that “incarceration alone does not excuse respondent's failure to contact his child” where parent did not attempt to contact Social Services to ascertain location of daughter); *In re Antia Siami D.*, 596 N.Y.S.2d 64 (App. Div. 1993) (terminating incarcerated parent's rights because parent had failed to contact children for more than six months); *In re Ravon Paul H.*, 161 A.D.2d 257, 257 (N.Y. App. Div. 1990) (“Sporadic and minimal attempts to maintain a parental relationship are insufficient to prevent a finding of abandonment.”).

132. *In re Tasha Monica B.*, 156 A.D.2d 247, 247 (N.Y. App. Div. 1989).

133. See, e.g., *In re Trudell J.W.*, 119 A.D.2d 828, 829 (N.Y. App. Div. 1986) (termination of parental rights appropriate where mother did not produce evidence that her failure to contact child or agency was result of circumstances that made it impossible for her to do so).

The requirement that parents “plan for the future” of their children is similarly demanding. Plans must be “reasonable” and “achievable,” and New York’s highest court has held that an adequate plan for a child’s future must solve the personal problems that led to the child’s initial removal—for example requiring employment, suitable housing, and psychological counseling.¹³⁴ This level of planning, resources, and projected stability would be difficult for many parents of foster care children to achieve, let alone parents in prison.

Barrier #3: Prison Sentence as Permanent Neglect

The requirement that parents plan for the future of their children poses a particular barrier for parents serving sentences that are longer than a few years. In *In re Gregory B.*, the New York Court of Appeals first held that a parent whose only option was to leave his children in foster care for the duration of his sentence should lose his rights, because leaving a child in foster care, even with visitation and other contact, was insufficient to fulfill the obligation to plan.¹³⁵ The court noted that even though there was a legislative concern for the rights of incarcerated parents, a child deserves “normal family life in a permanent home” with a nurturing family relationship, and Gregory B’s father could not provide this.¹³⁶

Other courts have extended this reasoning to justify TPR based on sentences that are much shorter. For example, courts have found that parental plans to leave children in foster care for seven years,¹³⁷ six years,¹³⁸ three years,¹³⁹ and two years¹⁴⁰ were inappropriate. In some TPR cases, courts failed to indicate the length of the sentence, stating only that an incarcerated parent’s reliance on the foster care system constituted a failure to plan.¹⁴¹

Under *Gregory* and subsequent case law, a parent’s sentence, combined with a lack of family members or resources, has come to constitute *ipso facto*

134. *In re Leon R.R.*, 48 N.Y.2d 117, 125-26 (1979).

135. *In re Gregory B.*, 74 N.Y.2d 77, 90 (1989) (“[A]n incarcerated parent may not satisfy the planning and requirement of the statute where the only plan offered is long-term foster care lasting potentially for the child’s entire minority.”).

136. *Gregory B.*, 74 N.Y.2d at 89-90.

137. See *In re Omar Garry G.*, 603 N.Y.S.2d 860, 860 (App. Div. 1993).

138. *In re Guardianship and Custody of Latasha C.*, 602 N.Y.S.2d 11 (App. Div. 1993).

139. *In re Carmen N.*, 655 N.Y.S.2d 651 (App. Div. 1997) (incarcerated father permanently neglected daughter, and thus his parental rights could be terminated, by failing to provide any realistic and feasible alternative to having daughter remain in foster care until his earliest possible release on parole in three years).

140. *In re C. Children*, 677 N.Y.S.2d 177, 178 (App. Div. 1998) (“Although the father made efforts to maintain contact with his children, the record reveals that he failed to plan for their future as he was unable to provide any ‘realistic and feasible’ alternative to having them remain in foster care until his earliest release from prison, some two years later . . .”).

141. See, e.g., *In re Samantha K.*, 872 N.Y.S.2d 813, 814 (App. Div. 2009) (“Even where an incarcerated parent makes an effort to develop a feasible plan for the future of his or her child, a finding of permanent neglect is appropriate where, as here, no alternative to foster care for the duration of the parent’s incarceration is provided. . .”).

parental unfitness. The *Gregory* court specifically approved a finding of permanent neglect “where an incarcerated father has maintained contact with his children but simply does not have the family resources to provide a realistic alternative to foster care during the period of his incarceration.”¹⁴² The idea that imprisonment combined with lack of resources can constitute a showing of permanent neglect seems to be a more lenient version of the law that pre-dated the 1983 amendment, which allowed courts to terminate parental rights based on the fact of incarceration alone.

III: BRIDGING THE DIVIDE

In the final section of this Note, I consider strategies for bringing the laws that affect parents in prison into alignment with the long-established constitutional values of family integrity and the right to care for one’s children. I begin my analysis with *Nicholson v. Williams*, a recent lawsuit in which survivors of domestic violence whose children were taken into custody by New York’s Administration for Child Services (ACS) challenged this state practice as a violation of their constitutional rights.¹⁴³ By arguing that the state’s policies failed to protect children, the plaintiffs were able to re-frame aggressive state intervention that had previously been seen as reasonable, revealing it instead to be based on constitutionally impermissible bias and bureaucratic convenience. In effect, the plaintiffs shifted the framework from the social welfare paradigm of family law to a family law paradigm centered on parental rights and family integrity.

The *Nicholson* strategy would be more difficult to use in the context of incarcerated parents; in fact, the *Nicholson* court defined its sympathetic, victimized plaintiff class against the named plaintiff in *Lassiter*, an incarcerated mother convicted of murder who was contesting the termination of her parental rights.¹⁴⁴ Yet the arguments made against ACS policy in *Nicholson* do in fact ring true in the context of parents in prison: the law as it stands not only compromises the family integrity and parental rights of incarcerated parents, but fails to further the best interests of their children. This is because current law sometimes results in parental rights being terminated erroneously, and because even when the law is correctly applied, it can reflect an inaccurate understanding of what the best interests of children truly are.

In the final part of this section, I argue that the *Nicholson* strategy need not be limited to litigation. The argument that the laws that undermine the rights of incarcerated parents actually contradict the best interests of their children is a powerful approach that can be used to advocate for legislative and policy

142. *In re Gregory B.*, 74 N.Y.2d 77, 88 (1989).

143. 203 F.Supp.2d 153 (E.D.N.Y. 2002).

144. *Id.* at 254.

reforms. In particular, I discuss a recent amendment to New York state law: the Adoption and Safe Families Expanded Discretion Act.¹⁴⁵

A. Nicholson v. Williams: Using Litigation to Expose Family Law Bifurcation

In *Nicholson v. Williams*, the U.S. District Court for the Eastern District of New York issued a preliminary injunction against the Agency for Children's Services (ACS), finding that ACS had violated the constitutional rights of the plaintiff class—a group of women who had temporarily lost custody of their children on the basis of being physically abused by their partners.¹⁴⁶ This case illustrates how an argument based on the right to family integrity can be successfully used to challenge abusive state practices towards a particularly vulnerable class of parents. The crucial argument in *Nicholson* is not that parental rights have been violated, however—rather, it is that agency practices that remove children from their homes for inappropriate reasons undermine the welfare of children. It is only by using this argument that parental rights and family integrity become compelling to the court.

The plaintiffs in *Nicholson v. Williams* challenged ACS's policy of taking the children of abused mothers into emergency custody. ACS failed to conduct any kind of investigation: it did not determine whether alternatives short of removal might exist, whether a mother was taking steps to protect her children or to address the problems in the home, or whether there were even objective indications that children were in danger.¹⁴⁷ Instead, ACS "automatically [held] both the abuser and the abusee liable as a unit and relie[d] on unfounded presumptions about the negative character and abilities of battered women."¹⁴⁸ The court found that the practices of ACS interfered with the mothers' liberty interest in familial integrity, both on procedural and substantive due process grounds.¹⁴⁹ Under New York law, ACS must show that there is "imminent" danger to a child, and an "objectively reasonable basis" for determining this danger, before it can remove a child from her home without judicial authorization.¹⁵⁰ By making blanket assumptions of danger based on domestic abuse, ACS both misinterpreted both the New York statute and violated the

145. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 203 & Supp. 2008).

146. *Nicholson*, 203 F. Supp. 2d at 249 (finding that removals conducted by ACS in relation to abused mothers constituted clear and convincing evidence of repeated misconduct, constituting a policy and practice for the purposes of a section 1983 analysis.).

147. *Id.* at 250 ("ACS did not conduct sufficient investigation before removing children . . . fail[ed] to determine what [could be] done . . . without forced removal . . . [and] fails to adequately investigate what the mother has done to try to protect herself and her children.").

148. *Id.*

149. *Id.* at 235 ("Plaintiffs have established that ACS has consistently violated this right of family integrity.").

150. *Id.* at 237.

more general procedural protections mandated by *Stanley v. Illinois*, which require that “states provide individual hearings to ascertain unfitness instead of relying on presumptions about categories of people.”¹⁵¹ The state can neither deny a hearing to a class of people, as it did in *Stanley*, nor can it infringe on a person’s familial rights solely because they belong to a particular class or category of person.¹⁵²

The *Nicholson* Court found that ACS and the New York Family Courts were implicated in a second set of procedural due process violations. Although indigent parents in New York state have a right to counsel in custody and termination of parental rights proceedings, numerous factors had converged to undermine this right, including low monetary compensation and nearly impossible work conditions for attorneys, resulting in inadequate preparation and long delays.¹⁵³ The court found that overburdened New York Family Court judges thus relied heavily on ACS to provide them with information and analysis of the situation, allowing the agency “expansive latitude.”¹⁵⁴ The “net effect,” stated the court, “is that where the health and safety of children are involved, a parent accused of neglect or abuse is guilty until proven innocent.”¹⁵⁵

Finally, the court found that ACS had violated the substantive due process rights of the plaintiff class by infringing on their fundamental rights in the absence of a compelling governmental interest. The court applied the three-part *Joyner* test for evaluating a substantive due process claim: under *Joyner*,¹⁵⁶ a state law or policy is unconstitutional if it “significantly infringe[s]” on a “fundamental right” without being justified by “an important state interest.”¹⁵⁷ The court found that taking children into custody against the will of their mothers constituted a “substantial” infringement of fundamental familial

151. *Stanley v. Illinois*, 405 U.S. 645, 645 (1972).

152. *Nicholson*, 203 F. Supp. 2d at 240 (“Whether a presumption be deemed procedural or substantive . . . the Supreme Court rejected the notion that a state can rely on a presumption that a class of people are unfit”) (citation omitted). 153. *Id.* at 255 (“The evidence overwhelmingly demonstrates that 18-B appointed counsel are not effective. . . . These problems are a direct result of the fact that 18-B lawyers are compensated at a level at which they cannot afford the essential accoutrements of basic professional service . . . [are] prevented from maintaining a separate private practice to supplement this inadequate compensation, and [are] required to take on unmanageable caseloads . . .”).

154. *Id.* at 255 (“The evidence overwhelmingly demonstrates that 18-B appointed counsel are not effective. . . . These problems are a direct result of the fact that 18-B lawyers are compensated at a level at which they cannot afford the essential accoutrements of basic professional service . . . [are] prevented from maintaining a separate private practice to supplement this inadequate compensation, and [are] required to take on unmanageable caseloads . . .”).

155. *Id.* at 222 (“Because of their heavy caseloads, [they] cannot immediately devote much time to each case Facing this quandary, judges allow ACS expansive latitude because they assume ACS has much better information. . . .”).

156. *Id.*

157. *Joyner v. Dumpson*, 712 F.2d 770 (2d Cir. 1983).

158. *Nicholson*, 203 F. Supp. 2d at 243.

rights.¹⁵⁸ It then found that the practice, due to its over-breadth, undermined the best interests of children because it resulted in some children being placed unnecessarily into state care, causing trauma and disruption in their lives.¹⁵⁹ Because the agency policies “work[ed] against the state interest in protecting the safety of children, not for it,” they violated the substantive due process rights of the plaintiffs, no matter what level of scrutiny was applied.¹⁶⁰

After establishing that ACS practices did not serve the best interests of children, the court considered what interests these practices might be serving instead. The abused mothers, reasoned the court, were improperly prosecuted “under what might at best be termed false assumptions and findings”—bias that an abused mother is not a fit parent.¹⁶¹ Thus, far from being fundamental or compelling, “[t]he government’s interests are particularly weak; its actions are motivated by bureaucratic pusillanimity and ignorance that harm rather than help the interests of the child.”¹⁶²

While it provides an example of how a successful lawsuit on behalf of a vulnerable parent-class might be framed, *Nicholson* also reveals some of the inherent difficulties in applying this approach to the context of incarcerated parents. Parents of children who are in foster care have already been adjudicated as unable to care for their children, at least temporarily. In the case of parents in prison, that inability to provide care is often considered to be a parent’s own fault, the result of a crime for which they have been convicted.

The *Nicholson* Court explicitly distinguished the *Nicholson* plaintiffs from the plaintiff in *Lassiter*, the sole Supreme Court case involving the termination of parental rights of an incarcerated person.¹⁶³ The *Nicholson* Court characterized *Lassiter* herself as “. . . an incarcerated murderer who had left her son languishing in foster care for over two years without trying to contact him”¹⁶⁴ The *Nicholson* plaintiffs, by contrast, were portrayed as sympathetic victims of violence who were “deeply concerned with caring for their children . . . [and had] a good chance of maintaining uninterrupted custody or of reacquiring their children sooner if represented by effective counsel.”¹⁶⁵ The New York court ignored the three dissenting Supreme Court justices in *Lassiter*, who argued that the plaintiff had failed to maintain contact with her

158. *Id.* at 251.

159. *See id.* at 253 (holding that such actions not only “fail to advance the best interests of children . . . [but actually] harm children”).

160. *See id.* at 266 (“ACS policies and practice result in routine removals that are unnecessary and ignore alternatives that would be far better for the children involved. These policies and practices cannot be justified by recourse to any state interest in the child’s welfare.”).

161. *Id.* at 252.

162. *Id.* at 255.

163. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981).

164. *Nicholson*, 203 F. Supp.2d at 254 (“Other parents in this broad class would have presented far more sympathetic cases.”).

165. *Id.*

son only because the state agency made little effort to facilitate visits and had refused to place the child with Lassiter's mother.¹⁶⁶

Ultimately, although the *Nicholson* court was sympathetic to the survivors of domestic violence whose children had been summarily taken into state custody, the case illustrates the way in which a parent's rights can dissolve when they are placed in tension with the state's interest in protecting children. As described above, the *Nicholson* Court found that policies involving the removal of children from their homes demanded a strict scrutiny analysis; yet it also suggested that the strict scrutiny standard might be relaxed in light of the "particularly compelling state interest to protect and promote child welfare."¹⁶⁷ Paradoxically, the court seemed to imply that strict scrutiny is appropriate only in cases where there is no tension between parental rights and state interests at all.¹⁶⁸

Based on the example of *Nicholson*, the success of any challenge to the laws and policies that detrimentally affect parents in prison would be contingent upon the ability of plaintiffs and their advocates to demonstrate that these practices, like the ones described in *Nicholson*, undermine the welfare of children—that premature or erroneous termination decisions based on bias, convenience, or lack of understanding of incarcerated parents and their children are never in a child's best interests.

B. Applying *Nicholson*: *The Best Interests of the Child*

I believe that a *Nicholson*-like argument could be made on behalf of parents in prison, despite the specter of *Lassiter*. Like the *Nicholson* plaintiffs, incarcerated parents experience violations of family integrity that undermine the best interests of their children. There is broad consensus that the erroneous termination of parental rights is harmful to children.¹⁶⁹ Under the current legal regime, an incarcerated parent who does in fact have a strong bond with her child, and who may be able to resume caring for the child in the relatively near future, may nonetheless lose her rights because of ACS's determination that "reasonable efforts" to unify the family can be waived. The waiver effectively destroys the ability of a parent to defend herself, because the physical and

166. *Lassiter*, 452 U.S. at 52-54 (Blackmun, J., dissenting).

167. *Nicholson*, 203 F. Supp. 2d at 245.

168. *Id.* ("[I]n the context of familial rights, if a government's intruding policies can be demonstrated not to advance child welfare then *any* infringement at all of the mother-child substantive due process right would trigger strict scrutiny.") (emphasis added).

169. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982) ("[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."); *Lassiter*, 452 U.S. at 47-48 (Blackmun, J., dissenting) ("The State may, and does, properly assert a legitimate interest in promoting the physical and emotional well-being of its minor children. But this interest is not served by terminating the rights of any concerned, responsible parent."); *Stanley v. Illinois*, 405 U.S. 645, 653 (1972) ("the State spites its own articulated goals when it needlessly separates" the parents from the child).

financial reality of incarceration makes it difficult, if not impossible, for a parent to maintain contact with and plan for her child's future without extensive assistance. In this type of case, current practices may lead courts to make erroneous determinations of parental fitness, to the detriment of all involved.

If empirically supported, policies and practices that lead to erroneous terminations of parental rights are easy targets for *Nicholson*-like litigation. Whether or not a TPR is decided in error, however, is often far from clear-cut. TPR determinations are necessarily complex, highly individualized determinations based on the balancing of numerous factors. In the end, judges retain broad discretion over the interpretation of standards such as the "best interest of the child," or whether a parent has made the threshold effort required to plan for her child's future.

Erroneous determinations of parental unfitness are not the only problem, however; more fundamentally, I would argue that the current legal regime is harmful to children because it reflects an inaccurate understanding of what the best interests of children with incarcerated parents actually are. This argument parallels the substantive due process claims in *Nicholson*: that ACS wrongly removed children from their homes based on bias, an inaccurate understanding of the dynamics of domestic violence, and bureaucratic convenience. This raises the decades-old, empirically-evasive question of what children with incarcerated parents need: when and how can an incarcerated parent play a meaningful role in a child's life? Are a child's interests served by fully severing ties with the troubled parent so that s/he can form a fuller, more complete bond with an adoptive parent, or is there some kind of middle ground? Is adoption even a realistic option? While a comprehensive investigation of best practices in relation to children with incarcerated parents is beyond the scope of this Note, recent studies indicate that parents in prison can play a meaningful and beneficial role in their children's lives.

Scholars have also argued that ASFA and other laws that incentivize termination of parental rights do not necessarily support the best interests of children because parental rights may be terminated without there being a family that wishes to adopt.¹⁷⁰ Thus, while Congress's intent in passing ASFA may have been to further the goal of achieving permanency for children, ASFA has in fact created a class of "legal orphans," children whose biological parents have lost their rights but who continue to live in the foster care system. Studies indicate that while the net number of adoptions has increased under ASFA, the number of children who are available to be adopted has also increased: for example, less than one percent of children in foster care from 1996-2000 were

170. See ROBERTS, *supra* note 12, at 157; Garrison, *supra* note 54, at 425; LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL'Y & L. 2, 318, 325 (2010).

adopted, while the foster care population increased at an average of four percent per year.¹⁷¹

Other laws, such as New York's waiver of the reasonable efforts requirement when a parent is incarcerated, underestimate the degree to which children can maintain relationships with their incarcerated parents—particularly with proper institutional support. In a number of recent articles and studies, scholars have argued that children are able to maintain meaningful and supportive relationships with their incarcerated parents,¹⁷² and that facilitating contact and communication between children and parents is highly beneficial to both.¹⁷³ These studies have been used to advocate for structural changes in prisons themselves that would allow parents and children to see each other more often and to have higher-quality experiences: for example, making it easier for incarcerated parents to visit with their children;¹⁷⁴ parenting classes;¹⁷⁵ and nurseries, which would allow mothers to care for their infants and establish the crucial parent-child bond.¹⁷⁶ Laws such as the exception to the diligent efforts requirement seem to be based on the idea that parents in prison will benefit less from, or are inherently less deserving of, agency support. Yet it is precisely in the context of parental incarceration that “diligent efforts” on the part of the agency are most important, since parents in prison are unable to maintain contact with and plan for their children's future without agency support in transportation and other logistics.

In addition to this waiver of the diligent efforts requirement, I would also argue that laws that allow courts to equate sentence length with permanent neglect do not necessarily serve the state's interest in protecting children. Even assuming that *Gregory B.* was correctly decided, it is possible to imagine scenarios where a lengthy sentence should not be categorically equated with neglect. For example, what if the child at issue is a teenager who has a strong relationship with his parent, was benefiting from visits and communication, has

171. Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 135-45 (2001).

172. Erika London Bocknek, Jessica Sanderson, & Preston A. Britner, *Ambiguous Loss and Posttraumatic Stress in School-Age Children of Prisoners*, 18 J. CHILD & FAM. STUDS. 323, 330 (2009) (arguing that children continue to value their relationship with their parent and that children perceive their incarcerated parent to be an important person in their social network); Wm. Justin Dyer, *Prison, Fathers, and Identity: A Theory of How Incarceration Affects Men's Paternal Identity*, 3 FATHERING 201, 202 (2005) (discussing how incarceration has a negative effect on family relationships); Genty, *supra* note 76, at 1683-84 (demonstrating that the importance of maintaining family relationships while parents are incarcerated is well-documented in numerous articles and studies); Kennedy, *supra* note 17, at 83 (“[R]esearch demonstrates that incarcerated parents can, with assistance, be effective parents and are not, by definition, bad or neglectful parents.”)

173. Boudin, *supra* note 6 at 83 (“The fact that parent-child visitation can help children overcome the challenges of parental separation and reduce recidivism rates is well-documented.”); Kennedy, *supra* note 17, at 94.

174. Kennedy, *supra* note 17, at 130-31.

175. *Id.* at 135.

176. REBECCA PROJECT FOR HUMAN RIGHTS & NAT'L WOMEN'S LAW CTR., *MOTHERS BEHIND BARS* 30 (2010), <http://www.rebeccaproject.org/images/stories/files/mothersbehindbarsreport-2010.pdf>.

no wish to identify another adult as his “parent,” and has no real prospect of being adopted?¹⁷⁷ Finally, even beyond best interests arguments, some scholars and courts have suggested that children themselves have a right to a relationship with their parents.¹⁷⁸

An advocate wishing to challenge current child welfare policy on the grounds that it undermines the constitutional rights of parents in prison could find a powerful strategy in the *Nicholson* litigation. As in *Nicholson*, the key element to prove would be that the law in question—whether New York’s exception to the diligent efforts requirement, or ASFA itself—harms children rather than protects them. This harm could occur on a number of levels: because inadequate safeguards result in erroneous terminations; because over-incentivizing TPR is in fact leading to an increase in “legal orphans” rather than permanency for foster children; or because current law reflects an inaccurate picture of the children of incarcerated parents and their needs.

Once a law is disconnected from the compelling governmental interest in protecting children, the infringement of parental rights and familial protections becomes unjustifiable. Like ACS’s practice of summarily assuming custody of children in the domestic violence context, the law at issue is revealed to be overbroad, allowing for state intervention without enough attention to individual circumstances and needs, based on the “particularly weak” motivations of “bureaucratic pusillanimity and ignorance”—motivations “that harm rather than help the interests of the child.”¹⁷⁹

The *Nicholson* strategy—advocating for the rights of incarcerated parents by arguing that the laws that compromise family integrity are harmful to children—can also be used to support forms of advocacy beyond litigation. In the section that follows, I examine one of these alternative approaches: legislative reform, in the form of New York State’s Adoption and Safe Families Act Expanded Discretion Bill. Other approaches to reform that are beyond the scope of this Note include bringing questions of children’s best interests into the sentencing process;¹⁸⁰ an expansion of programs that provide alternatives to incarceration that would allow parents and young children to remain together;¹⁸¹ and challenging the dichotomy between family reunification on the

177. Ideally, these kinds of considerations should be brought up in the dispositional phase of a TPR hearing. However, given that the outcome of the dispositional phase is based on a lower standard of proof and depends in such great part on the subjective view of the judge, I would argue that both the parent’s rights and the child’s interests would be best protected by strictly adhering to *Santosky*’s requirement that each and every parent receive an individualized hearing.

178. See, e.g., *Nicholson v. Williams*, 203 F.Supp.2d 153, 235 (E.D.N.Y. 2002) (“The interest in not being forcibly separated by the state is shared by parents and children.”); Boudin, *supra* note 6, at 104-12.

179. *Nicholson*, 203 F. Supp. 2d at 255.

180. Boudin, *supra* note 6, at 91-98.

181. LEE, *supra* note 1, at 9 (“The field should pay particular attention to the need for family-based and community-based substance abuse treatment programs, the lack of which appears to influence the frequency of TPR in cases involving incarcerated parents and their children.”); REBECCA PROJECT,

one hand and complete termination of parental rights on the other, by allowing children to visit and communicate with non-custodial biological parents.¹⁸²

C. *The ASFA Expanded Discretion Bill*

While perhaps not as visionary and dramatic as the *Nicholson* litigation, the ASFA Expanded Discretion Bill¹⁸³ is a concrete effort on the part of the New York State Legislature to specifically address some of the barriers that parents in prison currently face. The Bill gives courts and agencies greater discretionary latitude to exempt incarcerated parents from particular requirements at three different points in the termination process. First, the amendments address the ASFA requirement that states initiate TPR when a child has been in foster care for fifteen of the past twenty two months, requiring agencies to assess whether an incarcerated parent “maintains a meaningful role in the child’s life” *before* deciding to file.¹⁸⁴ More specifically, agencies are to consider overt acts manifesting concern for the child, such as letters, phone calls, and visits; efforts by the parent to work with the agency and other service providers; a “positive response by the parent to the agency’s diligent efforts;” and “whether the parent’s continued involvement is in the child’s best interests.”¹⁸⁵ The agency must consider the opinions of those familiar with the parent and the child, including the parent and the child themselves, as well as the parent’s attorney. Secondly, the amendments address the provision of New York law that creates an exception to the “diligent efforts” requirement when a parent has been out of contact with the agency for six months, allowing courts to “consider the particular delays or barriers an incarcerated parent . . . may experience in keeping the agency apprised of his or her location.”¹⁸⁶ Finally, the amendments require that a court deciding allegations of permanent neglect “consider the special circumstances of an incarcerated parent” more generally, noting that these parents may have trouble maintaining contact with their children and may lack access to social and rehabilitative services.¹⁸⁷ The 2010

supra note 176, at 36 (showing that thirty-four states already make alternative programs of some kind available to women, although they may have limited capacity. Prison nurseries, while much inferior to family-based alternative sentencing, also offer some opportunity for mother-child bonding and are available in thirteen states. Seventeen states do not offer family-based treatment programs of any kind).

182. Garrison, *supra* note 54, at 425.

183. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 203 & Supp. 2008).

184. N.Y. SOC. SERV. LAW § 384-b(3)(L)(i) (McKinney 203 & Supp. 2008) (stating that a state agency should not file a petition to terminate parental rights when “the parent or parents are incarcerated, or participating in a residential substance abuse treatment program, or the prior incarceration or participation of a parent or parents in a residential substance abuse treatment program is a significant factor in why the child has been in foster care for fifteen of the last twenty-two months, provided that the parent maintains a meaningful role in the child’s life.”).

185. N.Y. SOC. SERV. LAW § 384-b(3)(l)(v) (McKinney 203 & Supp. 2008).

186. N.Y. SOC. SERV. LAW § 384-b(7)(e)(i) (McKinney 203 & Supp. 2008).

187. N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 203 & Supp. 2008) (stating that “special circumstances” include, but are not limited to, “limitations placed on family contact and the

amendments push courts and agencies to take seriously the principle, established in earlier New York case law, that “in light of the drastic consequences . . . courts should not set unrealistically high standards . . . [especially] in cases where the parent is incarcerated and thus severely hampered in the ability to act on behalf of his or her child.”¹⁸⁸

The ASFA Expanded Discretion Bill does not fully remove the barriers that parents in prison face as they attempt to maintain their rights: the amendments call the attention of judges and agency workers to the specific situation of incarcerated parents, but ultimately, courts and agencies may choose whether or not they want to utilize this “expanded discretion.” I would argue, however, that the ASFA Expanded Discretion Bill brings termination proceedings in New York State closer to constitutional values of family integrity. First, by asking judges to consider various factors relating to the particular situation of parents in prison, the new law pushes courts to fulfill their obligation to provide an individualized hearing in which each family will be fully evaluated. At the same time, the new law educates judges about the barriers that incarcerated parents face and suggests that some amount of leeway or consideration should be granted. The amendment may also help to protect incarcerated parents from ASFA’s 15/22 month requirement by requiring state agencies to look at the particular child-parent relationship involved, rather than initiating TPR petitions based strictly on a time-based deadline.

While it is too early to know what the full effects will be, family courts have taken notice of the amendments. For example, in *In re Alicia G.*, the Family Court of New York, King’s County refused to terminate the parental rights of an incarcerated mother.¹⁸⁹ Invoking the recent amendments, the court took a hard look at the agency’s claims at diligent efforts and the mother’s attempts to comply. Among other things, it found that while Alicia’s mother had rejected counseling services at the prison—an action that the agency argued constituted a failure to plan—the agency had never shown that the mother actually needed counseling in the first place. While the agency argued that the services were recommended by the prison authorities, the court found that this was not enough; the agency needed to demonstrate that the prison’s evaluation of the parent’s needs were correct, or at least “reasonable.”¹⁹⁰ This kind of nuanced, detailed, assessment of the interactions between the parent and the agency demonstrates respect for the rights of the parent and a willingness on the part of the Family Court to actually make an individualized determination of fitness.

unavailability of social or rehabilitative services to aid in the development of a meaningful relationship between the parent and his or her child, that may impact the parent’s ability to . . . maintain contact with . . . and to plan for the future of his or her child”).

188. *Gregory B.*, 74 N.Y.2d 77, 89.

189. *In re Commitment of Alicia G.*, 908 N.Y.S.2d 810, 816-17 (Fam. Ct. 2010).

190. *Id.* at 817.

CONCLUSION

In this Note, I have attempted to shed light on the process by which a person may permanently lose her parental rights while serving a prison sentence. It would seem that the constitutional right to familial integrity could be used to challenge the laws that lead to this injustice. I argue, however, that there is a deep divide between parents who are considered deserving of constitutionally-based familial rights, and those for whom aggressive state intervention and weakened safeguards are considered appropriate.

As is evidenced in *Nicholson v. Williams*, the injustice of the family law divide can be exposed when state practices that violate family integrity are shown to undermine the welfare of children. Even within the framework of ASFA and other laws that emphasize permanency over reunification, the unnecessary severing of parent-child bonds is understood to be harmful to children as well as to their parents. In some situations, children will be freed for adoption because incarcerated parents receive inadequate agency support, and because the physical and financial conditions of prison life make communication and planning extremely difficult. Some of these children will not be adopted by other families. These outcomes violate parental rights without furthering the compelling state interest in promoting the welfare of children.

While *Nicholson* provides an important model for challenging policies that are over-broad and facilitate erroneous determinations, there are some situations in which family integrity and children's best interests do conflict. For example, a policy that allows courts to equate "lengthy sentences" with permanent neglect seems to undermine the interests of children when "lengthy" can mean a prison term as brief as two years and the parent and child are strongly bonded. Yet under some circumstances, parents' and children's interests will in fact diverge—what if a parent is serving a ten-year sentence and foster care is the only option for her very young child? Perhaps it is appropriate to distinguish between laws that are truly in the best interests of children and those that are not, even if this means that parental rights will sometimes be compromised. Our society has determined that state intervention is necessary when parents are unable to care for their children; at some point, after due process has been accorded, there is in fact a state interest in protecting children that must trump the rights of their parents.

The troubling reality, however, is that this point often falls where resources end, and thus along lines of race and class. It is parents without economic resources who must resort to placing their children in the non-kinship foster care arrangements that trigger ASFA in the first place. The problem becomes vaster when we consider the astounding number of people who are incarcerated in the United States; the fact that communities of color are disproportionately

affected; and that a parent can, under mandatory minimum sentencing laws or other harsh policies, receive a significant prison term for a minor drug offense, shop-lifting, or parole violation.¹⁹¹

Groups that advocate on behalf of women in prison have shown that most women who are incarcerated suffer from some combination of drug addiction, mental illness, and past physical or sexual trauma, and that for many of these women, incarceration comes as a result of unaffordable treatment and lack of support services.¹⁹² Perhaps a law that characterizes a lengthy prison sentence as permanent neglect furthers the state interest in protecting children; at the same time, it is deeply unjust that a parent could lose her rights because she shop-lifted or sold drugs and does not have the familial or economic resources to take her children out of non-kinship foster care.

To vindicate the rights of parents in prison, it is not enough to challenge particular policies that lead to erroneous TPR determinations. We need to advocate for a broader understanding of the best interests of children, whether through litigation, legislation, or other methods.¹⁹³ We must conduct more extensive research that demonstrates not only that ASFA has caused a major increase in TPR for incarcerated parents, but that in some significant portion of cases, TPR has resulted in poor outcomes for the children involved. Yet the best interests of children will only be fully realized when families and communities are supported, rather than incarcerated—when parents have access to the resources they need to be functional both in their own lives and as caregivers for their children.

191. Women are increasingly being arrested for drug crimes. See NATASHA A. FROST, JUDITH GREEN, & KEVIN PRANIS, WOMEN'S PRISON ASS'N, *HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN, 1977-2004*, at 25 (2006), available at www.wpaonline.org/institute/hardhit/HardHitReport4.pdf ("Between 1995 and 2004, arrests of women for drug offenses rose by 48 percent compared to 23 percent growth for men.")

192. See REBECCA PROJECT, *supra* note 176, at 23-25; Kennedy, *supra* note 17, at 89 (arguing that mothers "are less likely to have committed a violent crime than either male prisoners or non-mothers").

193. ROBERTS, *supra* note 12, at 268 ("ingredients for a strong child welfare program are clear and simple: first, reduce family poverty by increasing the minimum wage, instituting guaranteed income, and enacting aggressive job creation policies; second, establish . . . national health insurance; third, provide high-quality subsidized child care . . . [and] affordable housing").

