

Clearinghouse REVIEW

Shriver
Center 4@

July–August 2007

Volume 41, Numbers 3–4

Journal of
Poverty Law
and Policy

What's a Civil Lawyer to Do?

THE SHADOW OF
CRIMINAL RECORDS



SHRIVER
CENTER

Sargent Shriver National Center on Poverty Law

Parental Incarceration: How to Avoid a “Death Sentence” for Families

By Tiffany Conway and
Rutledge Q. Hutson

Tiffany Conway
Research Assistant

Rutledge Q. Hutson
Senior Staff Attorney

Center for Law and Social Policy
1015 15th St. NW Suite 400
Washington, DC 20005
tconway@clasp.org
202.906.8031
rhutson@clasp.org
202.906.8007

Parental incarceration has far-reaching implications for the parents, their children, extended family members, and the community. Children are affected by the incarceration of either parent, but they typically experience more disruption in their living arrangements when their mother is sent to prison. Almost two-thirds of mothers (64 percent) and one-half (44 percent) of fathers live with their children at the time of admission.¹ During their parent’s incarceration, 90 percent of children with a father in prison live with their mother, whereas almost 80 percent of children with an incarcerated mother live with a grandparent (53 percent) or other relative (26 percent).²

Although a relatively small number of children are placed in foster care when their parent is incarcerated—10 percent of children with incarcerated mothers and 2 percent with incarcerated fathers—these children face particularly grave consequences.³ In addition to being separated from their parents, incarcerated parents’ children who are placed in foster care face the prospect of having their parents’ rights terminated. Many of their parents will lose custody of and contact with their children permanently. The result, as at least one court has noted, is a “death sentence” for the family.⁴

Whether one believes that the severing of parental ties is appropriate for the parents, such punishment has a profound impact on their children.⁵ In this article, we discuss

¹CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 1 (2000), available at www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf. However, suggesting a history of family instability, these percentages were lower in the month before arrest. *Id.*

²*Id.* at 3.

³*Id.* at 1.

⁴AMY HIRSCH ET AL., EVERY DOOR CLOSED, BARRIERS FACING PARENTS WITH CRIMINAL RECORDS ch. 4, 80 (2002), available at www.clasp.org/publications/every_door_closed.pdf (citing *In re Coast*, 561 A. 2d 762, 778 (1989) (Tamilia, J., concurring): “Termination of parental rights is the death sentence to a parent-child relationship.”).

⁵Some argue that parents who are incarcerated, especially those who are incarcerated for a long period, deserve to have their parental rights terminated. They argue that the parents should have thought about the consequences to their children before they engaged in the criminal activity that led to incarceration. Others argue that loss of parental rights as a result of incarceration is equivalent to imposing an additional sentence and thus constitutes *ex post facto* punishment, which the Constitution prohibits. U.S. CONST. art. I, § 9. For varying perspectives, see HIRSCH ET AL., *supra* note 4, ch. 4; DOROTHY ROBERTS, SHATTERED BONDS, THE COLOR OF CHILD WELFARE (2002). We do not take up in this article the relative merit of these arguments. Instead we focus on the impact of parental incarceration on the child and whether termination of parental rights—as a result of parental incarceration—is right for a child.

the legal parameters guiding child welfare decisions and what are “reasonable efforts” to preserve and reunify families. To help avoid inappropriate terminations and minimize harm to children, we highlight a number of promising services and supports for incarcerated parents and recommend what attorneys representing or working with incarcerated parents and their children can do.⁶

What Are the Legal Parameters Guiding Child Welfare Decisions?

All parents have a fundamental liberty interest in the custody and care of their children.⁷ The U.S. Constitution guarantees that the state, absent a compelling interest on the part of the state, may not infringe on parents’ rights to raise their children as they see fit.⁸ However, when parents jeopardize the health and safety of their children, for example through abuse or neglect, the state may intervene to protect the children.⁹

The legal framework for infringing on constitutionally protected parental rights is set forth in a combination of state and federal laws. State laws define abuse and neglect and the procedures for interven-

ing in families’ lives, subject to constitutional parameters (parents’ rights versus compelling state interest) and federal funding statutes.¹⁰ Federal law requires that states make “reasonable efforts” to keep children safe without removing them from their home.¹¹ If doing so is not possible, the state generally must make “reasonable efforts” to reunify the child with the child’s family in a timely manner.¹² If returning the child safely to the child’s family is not possible, the state must make “reasonable efforts” to find an alternative permanent family for the child; doing so includes terminating parental rights so that a child may be adopted.¹³ While agreement is widespread that this effort to balance family preservation or reunification and child safety makes sense, disagreement often arises around the meaning and scope of “reasonable efforts.”¹⁴

What Are “Reasonable Efforts” to Preserve and Reunify Families?

Ten years ago, the Adoption and Safe Families Act attempted to strike the right balance by providing guidance on when “reasonable efforts” to preserve and re-

⁶Children of incarcerated parents and their families have similar needs whether or not they are living with the other parent, relatives, or a foster family. E.g., the parent-child bond with the incarcerated parent must be maintained and strengthened. The incarcerated parent needs services to deal with any substance abuse, mental health problems, and their own maltreatment histories. They also need services to enhance their economic stability. However, the potential termination of parental rights is an additional risk for children who are in foster care or at risk of foster care. Thus in this article we focus on the needs of such children.

⁷See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (“While this Court has not attempted to define with exactness the liberty thus guaranteed ... [w]ithout doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”); see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (balancing parental rights against the state’s interest in compulsory education); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (balancing parental rights against the state’s interest in the prohibition of child labor).

⁸U.S. CONST. amend. XIV, § 1; see cases cited *supra* note 7.

⁹See *Santosky v. Kramer*, 455 U.S. 745 (1982).

¹⁰See funding statutes such as 42 U.S.C. §§ 621 *et seq.*, 629 *et seq.*, 671 *et seq.*, 5106 *et seq.* (Cornell University Law School Legal Information Institute, available at www.law.cornell.edu/uscode/ (last visited June 20, 2007)).

¹¹*Id.* §§ 671(a)(15)(B)(i), 675(5).

¹²*Id.* §§ 671(a)(15)(B)(ii), 675(5).

¹³*Id.* §§ 671(a)(15)(C), 675(5).

¹⁴Compare ROBERTS, *supra* note 5 (policies such as the fifteen-month time limit, discussed *infra* in sentence accompanying note 20, often fail to give parents enough time to resolve their problems, particularly when incarceration or substance abuse is involved, and thus the efforts to reunify such families are never “reasonable”), with ELIZABETH BARTHOLET, *NOBODY’S CHILDREN, ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999) (what many consider “reasonable efforts” go too far so that children linger in foster care while their parents try to resolve problems; instead moving more quickly toward adoption to meet children’s developmental needs is necessary).

unify families are required.¹⁵ First, the law clarified that a child’s health and safety are the paramount concerns when determining what constitutes “reasonable efforts.”¹⁶ Second, the law clarified that providing “reasonable efforts” does not mean that families must always be preserved and reunified; courts may determine, on a case-by-case basis, that “reasonable efforts” are not required due to “aggravated circumstances.”¹⁷ The statute includes a nonexclusive list of aggravated circumstances that a court may consider in determining what, if any, efforts to preserve and reunify families are reasonable, but states may include other “aggravated circumstances” that a court may consider to be grounds for not providing efforts to preserve and reunify families.¹⁸

The Adoption and Safe Families Act of 1997 also took several steps to ensure that children who are removed from their homes find permanent families as quickly as possible. States must develop a permanency plan and conduct a permanency hearing within twelve months of a foster care placement.¹⁹ States also

must file a petition to terminate parental rights when a child has been in foster care for fifteen of the most recent twenty-two months unless (1) the child is being cared for by a relative; (2) the state failed to render “reasonable efforts” to promote reunification; or (3) there is a compelling reason for determining that filing such a petition is not in the child’s best interest.²⁰ However, the law did not further define “reasonable efforts” in part because the circumstances and needs of each child and family are unique.

The decisions that child welfare agencies and courts must make about the type of services to provide and the length of time a child should remain in foster care before they move to terminate parental rights can be particularly challenging when a parent is incarcerated.²¹ Some state legislatures include incarceration among the “aggravated circumstances” that justify making no efforts to reunify families.²² Other states take the opposite approach and conclude that incarceration may be a “compelling reason for determining that filing a petition to terminate parental rights is not in the child’s best interest.”²³

¹⁵Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. §§ 629 *et seq.*, 671 *et seq.* (Cornell University Law School Legal Information Institute, available at www.law.cornell.edu/uscode/ (last visited June 20, 2007)). For an overview of the policy context leading up to the adoption of the Adoption and Safe Families Act, see MaryLee Allen & Mary Bissell, *Safety and Stability for Foster Children: The Policy Context*, 14 THE FUTURE OF CHILDREN 49 (2004), available at www.futureofchildren.org/usr_doc/4-allen.pdf.

¹⁶42 U.S.C. § 671(a)(15)(A).

¹⁷*Id.*

¹⁸*Id.* § 671(a)(15)(D). The statute gives as examples situations where a parent commits murder or voluntary manslaughter of another of the parent’s children, a parent commits a felony assault that results in serious bodily injury to the child or to another of the parent’s children, a court involuntarily terminates the parental rights to the sibling of the child, or a parent abandons the child. *Id.* States may delineate other circumstances under which courts may determine that “reasonable efforts” are not required. *Id.*

¹⁹Permanency hearings must be held and petitions to terminate parental rights must be filed within thirty days of a court determination that a child is an abandoned infant or a determination that “reasonable efforts” are not required because of aggravated circumstances. See *id.* §§ 671(a)(15)(E), 675(5).

²⁰*Id.* § 675(5).

²¹Making these decisions is especially challenging because parents are typically incarcerated for longer than 15 months, the point at which the state must petition to terminate parental rights if the child has been in foster care for that long. On average, mothers in state prisons are expected to serve 49 months, while fathers are expected to serve 82 months. MUMOLA, *supra* note 1, at 6. Mothers in federal prison are expected to serve 66 months, while fathers in federal prison are expected to serve 105 months. *Id.*

²²The Child Welfare League of America found that, as of 2005, Alaska, Kentucky, North Dakota, and South Dakota adopted statutes that excuse reasonable reunification efforts if the parent is incarcerated. ARLENE F. LEE ET AL., CHILD WELFARE LEAGUE OF AMERICA, THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT ON CHILDREN OF INCARCERATED PARENTS 17–18 (2005), available at www.fcnetwork.org/Resource%20Center/cop_pubimpact.pdf.

²³*Id.* at 18. Colorado added a provision that the general requirement to file a petition to terminate parental rights after a child has been in foster care for fifteen months does not apply when the parent is incarcerated for a “reasonable period of time.” *Id.* at 17. Similarly Nebraska and New Mexico prohibit the termination of parental rights solely on the basis of the parent’s incarceration. *Id.* at 18.

In making decisions about “reasonable efforts,” a range of factors should be considered, including (1) the nature of the maltreatment and injury to the child, (2) the underlying factors contributing to the maltreatment and the potential services and supports that can root out those factors, (3) the child’s age and developmental needs, and (4) the placement if the child has been removed from the home. The first two factors help identify what services a child and the child’s family need to move toward reunification.²⁴ The second two factors are likely to influence the length of time the services are offered and the number of chances a parent has to meet challenges that led to maltreatment.

For example, a parent who has an untreated substance abuse problem that led to drug offenses and a two-year prison sentence probably needs similar substance abuse and other treatment services whether the parent has a newborn or a 10-year-old child. However, the length of time for making “reasonable efforts” to reunify the parent and the newborn may be shorter to meet the infant’s developmental needs than the length of time for making “reasonable efforts” to reunify the parent and the 10 year-old, who may already have a close bond with the parent. The nature of the placement also matters for the length of time for making “reasonable efforts” to reunify families. On the one hand, if the child is living with a relative who plans to be an integral part of the child’s life after the prison sentence is completed and the substance abuse problem overcome, a longer time may be reasonable for reunification efforts. On the other hand, if the child is living with nonrelative foster parents, particularly if the child is quite young and has no significant prior relationship with the parent, a shorter time may be reasonable.

What Services and Supports Constitute “Reasonable Efforts” When a Parent Is Incarcerated?

In most cases, when the parent of a child in foster care is incarcerated, child welfare agencies should provide services to help reunify the parent and child. Although individualized tailoring of case plans is essential, certain services, supports, agency obligations, and parent obligations are nearly universal. Services may include (1) maintaining and nurturing parent-child relationships, (2) treating substance abuse and mental health problems, and (3) enhancing economic stability upon release.

Services to Maintain and Nurture Parent-Child Relationships. The child welfare agency has a responsibility to facilitate appropriate contact between parents and children. While the nature, frequency, and duration of the contact may vary with the age of the child and the parents’ progress toward solving the problems that led to maltreatment, contact is critical to maintaining their relationships and preparing for reunification. For children of incarcerated parents, such contact can be infrequent, unpredictable, and of poor quality.

More than 60 percent of parents in state prisons are incarcerated more than 100 miles from their last place of residence; only 17 percent are within 50 miles.²⁵ Only 42 percent of mothers and 30 percent of fathers in prison reported some type of contact with their children at least once a week through, for example, in-person visits, video camera communications, telephone calls, mail, e-mail, or audiotapes.²⁶ And more than one-half of both mothers and fathers reported that they never had an in-person visit with their child.²⁷

²⁴Because in this article we are focusing on children who are unable to live with their incarcerated parents, we discuss “reasonable efforts” to reunify families rather than preserve them.

²⁵MUMOLA, *supra* note 1, at 5. Parents incarcerated in federal prisons are likely to be located even farther away. *Id.*

²⁶*Id.*

²⁷*Id.* Although more current data are not yet officially available, estimates for 2002 suggest that, while incarcerated, more than one-half of parents (57 percent of fathers and 54 percent of mothers) continue to receive no visits from their child. Christopher J. Mumola, *Parents Under Correctional Supervision: Past Estimates, New Measures*, Presented to the U.S. Department of Health and Human Services Working Group on Promoting Responsible Fatherhood in Washington, D.C. (April 4, 2007) (on file with Rutledge Q. Hutson).

Prison Nurseries. One way to maintain and nurture relationships between incarcerated mothers and very young children is to design correctional facilities with nurseries to allow mothers to bring their children with them to prison and avoid separation.²⁸ The Bedford Hills Correctional Facility in New York, a maximum-security prison for women, houses one of the very few prison nurseries in the country. Mothers who participate in the program are offered prenatal services and a pre-GED (general educational development) program and may keep their infants with them for up to eighteen months depending on their release date.²⁹ For most parents who are incarcerated, however, such day-to-day contact is not an option; the parent-child relationship must be maintained through visitation, telephone contact, and other forms of communication.³⁰

Visitation Policies and Programs. When children are in foster care, whether with relatives or nonrelatives, the child welfare agency generally should help facilitate visitation as part of “reasonable efforts” to reunify the family. However, a regular visitation schedule is difficult to maintain. A caseworker’s typical caseload is twice the level that the Child Welfare League of America and the Council on Accreditation recommend; such a caseload can make transporting children hundreds of miles for visits difficult.³¹ Caseworkers may be intimidated about

such visits and fear that visits will traumatize children; such fears may make caseworkers less likely to seek input from and actively work with incarcerated parents, particularly fathers.³² Lack of experience on the part of many caseworkers—the average caseworker has a tenure of less than two years—may exacerbate these feelings.³³

Relatives may make an effort to facilitate contact between the children in their care and the incarcerated parents through visits and other means. However, many kinship caregivers have low incomes—more than 20 percent live below the poverty line—and the costs associated with taking children to visit parents in distant prisons can be prohibitive.³⁴ Limited visiting hours may create logistical challenges when they conflict with children’s schooling and caregivers’ work obligations. Correctional system policies often require that visitors be approved, and submitting the requisite documents to get approval can be problematic for new caregivers.³⁵ Another challenge for relative caregivers is helping children deal with feelings about a parent’s incarceration while struggling with their own emotional reactions.

Several programs facilitate visitation when children are living with relatives. The Osborne Association’s FamilyWorks program in New York operates a Family Resource Center that provides informa-

²⁸A discussion of the pros and cons of these “prison nurseries,” the potential benefits and risks to children, and the potential benefits and challenges for parents is beyond the scope of this article.

²⁹CORRECTIONAL ASSOCIATION OF NEW YORK, BEDFORD HILLS CORRECTIONAL FACILITY 17 (2006), available at www.correctionalassociation.org/WIPP/prison_monitoring/bedford_2005.pdf.

³⁰Although the number of mothers whom prison nurseries serve is unclear, the programs appear to be available in only three states other than New York: Nebraska, Ohio, and Washington. See Dave Ghose, Nursery Program Aids Jailed Moms in Four States, Sept. 24, 2002, www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=14972.

³¹U.S. GOVERNMENT ACCOUNTING OFFICE, PUB. NO. GAO-03-357, HHS [U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES] COULD PLAY A GREATER ROLE IN HELPING CHILD WELFARE AGENCIES RECRUIT AND RETAIN STAFF 3, 11, 14 (2003), available at www.gao.gov/new.items/d03357.pdf.

³²KARIN MALM ET AL., WHAT ABOUT THE DADS? CHILD WELFARE AGENCIES’ EFFORTS TO IDENTIFY, LOCATE AND INVOLVE NONRESIDENT FATHERS 26 (2006), available at www.urban.org/publications/411316.html.

³³U.S. GOVERNMENT ACCOUNTING OFFICE, *supra* note 31, at 5.

³⁴TERRY LUGAILA & JULIA OVERTURF, U.S. CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, CHILDREN AND THE HOUSEHOLDS THEY LIVE IN: 2000, at 8 (2004), available at www.census.gov/prod/2004pubs/censr-14.pdf.

³⁵NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED 81 (2005).

tion, support, and links to services as well as a toll-free information hotline that is staffed by former prisoners and prison family members.³⁶ Aid to Children of Imprisoned Mothers in Georgia provides services such as transportation to and supervision of visitation as well as supportive programs for children, parents, and caregivers.³⁷

The challenges associated with visitation extend beyond simply getting the child to the prison. Correctional facilities are rarely “kid-friendly,” and the policies governing children’s visits may be uncomfortable or intrusive (such as looking into a baby’s diaper to check for contraband).³⁸ The parent hugging or kissing the child to ease discomfort may be impossible because correctional facilities often severely limit or prohibit physical contact.³⁹

Despite the challenges, several programs acknowledge the value of and facilitate visitation between incarcerated parents and children. The Tennessee Prison for Women’s Child Visitation Program allows children from 3 months old up to 6 years old to spend the weekend with their mother or grandmother in separate quarters at the prison.⁴⁰ The Bedford Hills Correctional Facilities in New York offer an array of services, including summer and overnight programs and individual counseling, to incarcerated parents and their children.

“*Virtual Visitation.*” The parent-child relationship can be maintained otherwise through telephone calls, letters, video cameras, and computers. These forms of contact present challenges as well. Prisoners generally have limited opportunities to make telephone calls, which must almost always be collect and at exorbitant rates.⁴¹ Families may not have access to technology that would allow for contact through video cameras or computers.

Some programs offer additional opportunities for nurturing and maintaining the parent-child bond through “virtual visitation.” A partnership between the Pennsylvania Department of Corrections and the Prison Society, through a grant from the Pennsylvania Commission on Crime and Delinquency, allows inmates in eight state prisons to have a videoconference with their families for fifty-five minutes once a month; families are charged a \$15 copayment.⁴² Aunt Mary’s Storybook Project allows incarcerated parents to record themselves reading a book to their child; this project allows the child to hear the sound of the parent’s voice and enhances parent and child literacy.⁴³

Parenting Programs in Prison. Parents who are incarcerated often need services to strengthen their parenting skills and manage anger. Mastering these skills can help nurture and enhance the parent-child bond. Several programs encourage positive relationships between incarcerated parents and their children through

³⁶Osborne Association, Family Resource Center, www.osborneny.org/Family_Resource_Center.htm (last updated June 5, 2007).

³⁷Aid to Children of Imprisoned Mothers [AIM], About AIM, www.takingaim.net/programs.asp (last visited May 1, 2007).

³⁸FLORIDA CORRECTIONS COMMISSION, 2001 ANNUAL REPORT 71–72 (2001), available at www.fcc.state.fl.us/fcc/reports/final01/pdf01.htm; BERNSTEIN, *supra* note 35, at 81–89, 99.

³⁹BERNSTEIN, *supra* note 35, at 82–83, 99.

⁴⁰Tennessee Department of Correction, Child Visitation Program, www.state.tn.us/correction/inmateprograms/child.html (last visited April 30, 2007).

⁴¹BERNSTEIN, *supra* note 35, at 81–89, 99.

⁴²Pennsylvania Prison Society, Virtual Visitation, www.prisonersociety.org/progs/ifs_fvv.shtml (last visited April 30, 2007).

⁴³Companions Journeying Together, Projects/Programs, www.cjtinc.org/Projects/Projects.htm (last updated Nov. 14, 2006). Some 40 percent of incarcerated parents have neither a high school diploma nor GED [general educational development certificate] and may have limited literacy skills and thus may require assistance in reading. MUMOLA, *supra* note 1, at 3.

opportunities for interaction and parenting skills.⁴⁴

Services to Treat Substance Abuse and Mental Health Problems. “Reasonable efforts” to reunify families should cover services, such as treatment for substance abuse and mental health problems, to help parents overcome the factors that led to maltreatment.⁴⁵ In 45 percent of cases where children were removed due to parental incarceration, parental drug use was also a reason for removal.⁴⁶ Criminal justice data confirm the prevalence of parental substance abuse. More than one-half of parents used drugs in the month before the offense, and one-third used drugs when they committed the offense. A similar proportion of parents reported abusing alcohol at the time of the offense.⁴⁷ Mothers in state prison reported more serious drug-use histories than fathers, and one in three mothers in state prison committed their crime to get drugs or money for drugs.⁴⁸ Despite the obvious need for services, only about 40 percent of state inmates who met drug-dependence or drug-abuse criteria in 2004 reported participating in any drug treatment or program since admission.⁴⁹

Many incarcerated parents also struggle with mental health problems. Some 23

percent of incarcerated mothers and 13 percent of incarcerated fathers reported being “mentally ill” in 1997.⁵⁰ As many as 73 percent of women and 55 percent of men incarcerated in state prisons in 2004 reported having a mental health problem.⁵¹ Given the large proportion of prisoners who are parents, these more recent data on the extent of mental health problems among prisoners suggest that mental health problems continue to be a challenge for incarcerated parents.⁵² Mental health problems and substance abuse commonly occur simultaneously. Approximately 74 percent of state prisoners with mental health problems also meet the criteria for substance dependence or abuse.⁵³ Of all state prisoners, 42 percent experienced both, and only 19.5 percent neither.⁵⁴ Despite the need for services, only about one-third of state prisoners with mental health problems report receiving treatment since admission.⁵⁵

Services to Enhance Economic Stability. A child welfare case plan that makes “reasonable efforts” to reunify families should include services to help parents obtain employment and economic stability. An adequate, reliable income is vital to being able to comply with mul-

⁴⁴See Ann Booker Loper & Elena Hontoria Tuerk, *Parenting Programs for Incarcerated Parents: Current Research and Future Directions*, 17 CRIMINAL JUSTICE POLICY REVIEW 407 (2006), available at <http://cjp.sagepub.com/cgi/reprint/17/4/407.pdf> (overview of such programs, the unique parenting needs of incarcerated parents, and the effectiveness of parenting programs for inmates); see also Washington State Department of Corrections, McNeil Island Corrections Center Family and Fathering Program Overview, www.doc.wa.gov/news/stories/pre2005/miccfather.asp (last visited May 2, 2007) (description of program specifically focused on enhancing fathers’ parenting skills).

⁴⁵Often mental health and substance abuse problems are intertwined with the parent’s own history of abuse or neglect. See Amy E. Hirsch, *Civil Consequences of Women’s Criminal Records: Strategies for Advocates*, in this issue.

⁴⁶PATRICIA E. ALLARD & LYNN D. LU, BRENNAN CENTER FOR JUSTICE, REBUILDING FAMILIES, RECLAIMING LIVES: STATE OBLIGATIONS TO CHILDREN IN FOSTER CARE AND THEIR INCARCERATED PARENTS 4 (2006) (citing National Data Archive on Child Abuse and Neglect, Cornell University, Adoption and Foster Care Analysis and Reporting System (AFCARS) 2003 (2005) (NNDACAN Dataset #118 – FC2003v1)).

⁴⁷See MUMOLA, *supra* note 1, at 8.

⁴⁸*Id.*

⁴⁹CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF STATISTICS, U.S. DEPARTMENT OF JUSTICE, PUB. NO. NCJ 213530, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS 1, 8, 9 (2006), available at www.ojp.usdoj.gov/bjs/pub/pdf/dudsfp04.pdf.

⁵⁰MUMOLA, *supra* note 1, at 9.

⁵¹DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEPARTMENT OF JUSTICE, PUB. NO. NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 4 (2006), available at www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf.

⁵²MUMOLA, *supra* note 1, at 1.

⁵³JAMES & GLAZE, *supra* note 51, at 5.

⁵⁴*Id.*

⁵⁵*Id.* at 9.

multiple aspects of one’s case plan—housing, child care, and so forth. Yet 40 percent of parents incarcerated in state prisons lack a high school diploma or general educational development certificate and most earned less than \$1,000 per month before incarceration.⁵⁶ Nonetheless, few prisoners receive educational or vocational services while incarcerated.⁵⁷ Also, parents who exit prison are likely to find their criminal record an additional barrier to obtaining economic stability.⁵⁸

For many parents who are incarcerated the accumulation of child support and criminal justice–related debt while incarcerated can pose significant challenges to maintaining economic stability. Many states are reexamining their policies in both of these areas.⁵⁹

What’s an Attorney to Do?

Parents facing criminal charges are exposed to dire civil as well as criminal consequences. Such parents must confront, besides incarceration, the potential of losing their parental rights especially if their children are in foster care. Both criminal defense and civil attorneys should work together to preserve families, beginning long before a petition to terminate parental rights is filed.⁶⁰ Collaboration is even more relevant because of the restrictions on programs funded by the Legal Services Corporation (LSC)

in representing clients in criminal matters and clients who are incarcerated after being arrested for or convicted of a crime.⁶¹ However, even attorneys facing those restrictions can take a number of steps, in collaboration with the parent, to minimize harm to the children and thus minimize the risk of losing parental rights.

A parent’s criminal defense attorney should handle some of these steps before civil child welfare questions arise. Other steps may be taken by any attorney because they do not constitute representation of a client in a court proceeding; these advocacy efforts are to avoid additional court proceedings. Attorneys faced with LSC restrictions on representing parents involved in the criminal justice system are not similarly constrained in representing the children of those parents. The child then becomes the client, but, to avoid unnecessary termination of parental rights, the interests of children and their parents are often aligned. Thus our recommendations below apply to all attorneys involved with incarcerated parents and their children.

The attorney and the parent should work to maintain and build on the parent-child relationship. In some circumstances a mother may have the opportunity to care for young children in the prison with her. When this is not possible, the attorney

⁵⁶MUMOLA, *supra* note 1, at 10.

⁵⁷JAMES P. LYNCH & WILLIAM J. SABOL, PRISONER REENTRY IN PERSPECTIVE 2, 3, 11–12 (2001), available at www.urban.org/publications/410213.html. For an overview of the educational and vocational needs of prisoners and the services they receive to meet these needs, see REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY chs. 15–16 (2005), available at www.reentrypolicy.org/reentry/THE_REPORT.aspx.

⁵⁸REPORT OF THE RE-ENTRY POLICY COUNCIL, *supra* note 57; see also Sharon M. Dietrich, *When “Your Permanent Record” Is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, in this issue (how advocates can challenge the availability and extent of their clients’ criminal records).

⁵⁹See Kirsten D. Livingston & Vicki Turetsky, *Debtors’ Prison—Prisoners’ Accumulation of Debt as a Barrier to Reentry*, in this issue; see also Eve A. Stotland, *Resolving the Tension Between Child Support Enforcement and Family Reunification*, 35 CLEARINGHOUSE REVIEW 317 (Sept.–Oct. 2001) (policy recommendations for states to ensure that child support enforcement never interferes with appropriate reunification).

⁶⁰See Jack Daniel, *Pipe Dreams for Legal Aid Lawyers: A Civil Practice that Considers the Criminal Side*, in this issue; McGregor Smyth, *Cross-Sector Collaboration in Reentry: Building an Infrastructure for Change*, in this issue; Cynthia Works, *Reentry—the Tie That Binds Civil Legal Aid Attorneys and Public Defenders*, 37 CLEARINGHOUSE REVIEW 328 (Sept.–Oct. 2003); McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 CLEARINGHOUSE REVIEW 56 (May–June 2003); see also Anne Lee & Brent Pattison, *Meeting the Civil Legal Needs of Youth Involved in the Juvenile Justice System*, 39 CLEARINGHOUSE REVIEW 195 (July–Aug. 2005) (civil legal advocates should build connections with juvenile courts and public defenders to serve court-involved youth better).

⁶¹45 C.F.R. §§ 1613, 1637 (Cornell University Law School Legal Information Institute, available at <http://www.law.cornell.edu/cfr/> (last visited June 15, 2007)). For information on the conditions under which legal aid programs funded by the Legal Services Corporation (LSC) may represent ex-offenders, see Alan W. Houseman and Linda E. Perle, *Representing Individuals with Criminal Records Under the LSC Act and Regulations*, in this issue.

and the parent should identify a suitable relative who can care for the child while the parent is incarcerated.⁶² Children generally fare better with relative foster parents than nonrelative foster parents when they must be placed away from their parents.⁶³ Placing the child with a relative also prevents the state from having to file a petition to terminate parental rights after the child has been in foster care for fifteen months because living with a relative is an explicit exception to the federal requirement that states file a petition to terminate parental rights after fifteen months.⁶⁴

The attorney should help facilitate visitation and frequent contact between the parent and the child, both by working with the child welfare agency to ensure visitation and by connecting the parent to programs that facilitate visitation and communication and enhance parenting skills.⁶⁵ At a minimum, the attorney should help make it possible for the parent to write to and telephone the child often.

The attorney should work with the parent and the child welfare agency to ensure that the parent receives the services and supports needed to solve the problems that contributed to incarceration. This likely will be challenging because services are often limited. However, the attorney should work with the child welfare agency, the courts, the corrections department, community providers, and others to ensure that the parent receives as many needed services in prison as possible to begin preparing the parent to

reenter the community and resume parental responsibility.

The attorney should help the parent prepare for greater economic stability upon release from prison. This includes helping the parent obtain cash assistance, access to health care, job training, skill building, and other services that are not always thought of as child welfare services. This also may include helping the parent obtain a reasonable child support order so that debt does not accumulate during incarceration and threaten economic stability when the parent reenters the community.

How Can Coordination Between the Criminal Justice and Child Welfare Systems Be Improved?

Incarcerated parents whose children are in or at risk of entering foster care may have their parental rights severed and never see their children again—an extreme outcome that can devastate both parents and children. The steps described above can lessen the risk of this outcome. We do not suggest that attorneys alone are responsible for preserving and reunifying families; child welfare agencies, courts, the corrections system, and community-based service providers each have critical responsibilities in keeping families together.

Increased access to needed services for all parents is critical: services that prevent both maltreatment and incarceration, services to reunify families when parents are incarcerated, and services that can help the children of incarcer-

⁶²If identifying a suitable relative who can care for the child while the parent is incarcerated is done early on, the family may avoid becoming involved with the child welfare system at all. Also, the attorney should work toward alternative sentencing when possible and take advantage of drug courts and enrollment in residential treatment rather than incarceration. However, such alternative sentencing recommendations are beyond the scope of this article.

⁶³See CHILDREN AND FAMILY RESEARCH CENTER OF THE UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN ET AL., TIME FOR REFORM: SUPPORT RELATIVES IN PROVIDING FOSTER CARE AND PERMANENT FAMILIES FOR CHILDREN 1, 2 (2007), available at http://ipath.gu.org/documents/A0/Time_for_Reform.pdf; TIFFANY CONWAY & RUTLEDGE Q. HUTSON, IS KINSHIP CARE GOOD FOR KIDS? (2007), available at www.clasp.org/publications/is_kinship_care_good.pdf.

⁶⁴42 U.S.C. § 675(5)(E)(i). See text accompanying *supra* note 20. The state may—but need not—still file a petition to terminate parental rights if it deems such a filing to be best for the child. *Id.* § 671 (a)(15). The parent’s efforts, in conjunction with the parent’s attorney, to have the child placed with someone who already knows and loves the child is evidence that the parent is taking responsibility for the child’s care.

⁶⁵See also Lauren Shapiro et al., *Family Ties: Representing Formerly Incarcerated Women with Children in Family Court*, 35 CLEARINGHOUSE REVIEW 243 (Sept.–Oct. 2001) (a legal aid project tackles the challenge of helping formerly incarcerated women maintain relationships with their children by providing legal advocacy in family court as well as in social service agencies).

ated parents succeed and reach their full potential. Policy changes that make the criminal justice system more family-oriented must be implemented. The system must recognize that most prisoners return to the community and their families and that their successful return requires the system to be more responsive to their needs.

Commentators and policy experts have suggested policy changes that would accomplish these goals. For example, a report from the Council of State Governments called on state agencies to (1) promote access to appropriate health and human services for low-income families; (2) conduct family assessments of individuals receiving human services and improve service delivery program compliance through a family-centered approach; (3) strengthen access and service delivery for families in the child welfare program; (4) increase coordination across programs for children and families and among service systems; and (5) partner with community-based organizations to improve service access and delivery.⁶⁶

The Second Chance Act, pending before Congress as of June 2007, would autho-

alize grants for family-based substance-abuse treatment alternatives to prison and for prison-based family treatment programs for incarcerated parents of minor children.⁶⁷ It would require the attorney general to develop best practices for coordination between state criminal justice and child welfare agencies to improve the safety and support of children with incarcerated parents.⁶⁸ The Second Chance Act would, by reauthorizing adult and juvenile offender state and local re-entry demonstration projects, create opportunities to remove visitation obstacles, offer programs and services, and help incarcerated parents enhance their parenting skills.⁶⁹

Defense attorneys, legal aid attorneys, and others should join together to advocate improved coordination between the criminal justice and child welfare systems and to advocate policies that support successful reunification of incarcerated parents and their children. In the meantime, we outline here steps that defense attorneys and legal aid attorneys can take to minimize the harm to incarcerated parents and their children.

⁶⁶REPORT OF THE RE-ENTRY POLICY COUNCIL, *supra* note 57, ch. 34.

⁶⁷Second Chance Act of 2007, S. 1060, 110th Cong. § 101; Second Chance Act of 2007, H.R. 1593, 110th Cong. § 101. Family-based substance-abuse treatment is different from traditional substance-abuse treatment, the latter being often confrontational and encouraging the individual to focus on himself and his recovery first and foremost. Family-based treatment focuses on multiple aspects of the individual's life—particularly the individual's responsibilities to children and other family members. Family-based treatment provides treatment to the individual struggling with substance abuse and both family counseling and individual counseling for children and other family members. The family-based treatment model, unlike the traditional treatment model, has been demonstrated to work with women, including women with children. For further information about family-based treatment, see CENTER FOR SUBSTANCE ABUSE TREATMENT, BENEFITS OF RESIDENTIAL SUBSTANCE ABUSE TREATMENT FOR PREGNANT AND PARENTING WOMEN: HIGHLIGHTS FROM A STUDY OF 50 DEMONSTRATION PROGRAMS OF THE CENTER FOR SUBSTANCE ABUSE TREATMENT (2001), available at http://csat.samhsa.gov/publications/residential/residential_home_toc.aspx; Rebecca Project for Human Rights, www.rebeccaproject.org/index.php?option=com_content&task=blogcategory&id=31&Itemid=106 (last visited June 14, 2007).

⁶⁸S. 1060 § 243; H.R. 1593 § 243.

⁶⁹S. 1060 § 101; H.R. 1593 § 101.

Subscribe to CLEARINGHOUSE REVIEW and www.povertylaw.org

Annual subscription price covers

- six issues (hard copy) of CLEARINGHOUSE REVIEW and
- www.povertylaw.org access to the Poverty Law Library containing CLEARINGHOUSE REVIEW issues back to 1990, case reports and case documents, and other materials

Annual prices (effective January 1, 2006):

- \$250—Nonprofit entities (including small foundations and law school clinics)
- \$400—Individual private subscriber
- \$500—Law school libraries, law firm libraries, other law libraries, and foundations (price covers a site license)

Subscription Order Form

Name _____

Fill in applicable institution below

Nonprofit entity _____

Library or foundation* _____

Street address _____ Floor, suite, or unit _____

City _____ State _____ Zip _____

E-mail _____

Telephone _____ Fax _____

*For Internet Provider-based access, give your IP address range _____

Order

Number of subscriptions ordered _____

Total cost (see prices above) \$ _____

Payment

- My payment is enclosed.
*Make your check payable to **Sargent Shriver National Center on Poverty Law.***

- Charge my credit card: Visa or Mastercard.

Card No. _____ Expiration Date _____

Signature _____

We will mail you a receipt.

- Bill me.

Please mail or fax this form to:
Sargent Shriver National Center on Poverty Law
50 E. Washington St. Suite 500
Chicago, IL 60602
Fax 312.263.3846

CUT HERE