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Articles

“It’s a Family Affair”—The Incarceration of the American Family: Confronting Legal and Social Issues

By JUSTIN BROOKS* AND KIMBERLY BAHNA**

If a man strike the daughter of a free man, and causes her foetus to fall: he shall pay ten shekels of silver for her foetus. If that woman die, his daughter shall be slain.¹

TODAY, THIS ANCIENT law would be rejected as barbaric. In modern day America, however, children are still punished as a result of their parents’ criminal conduct. More than eighty percent of women in prison are mothers, and two-thirds of them have children under the age of eighteen.² Correspondingly, sixty percent of men in prison are fathers.³ The effects of separation on families due to incarceration are always powerful. When children are separated from their parents, the effects can be particularly devastating.

When loved ones are incarcerated, their families must go through many changes. Prisoners’ families must become familiar with a confusing list of prison rules, regulations and visiting guidelines.⁴ Prisoners necessar-

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1. CHILPERIC EDWARDS, *THE HAMMURABI CODE AND THE SINAITIC LEGISLATION* 63 (C. Edwards trans., 2d ed. 1971).

2. Velma LaPoint, *Prison’s Effect on the African-American Community*, 34 *How. L.J.* 537, 539 (1991). See also IRA P. ROBBINS, *PRISONERS AND THE LAW* xv (1991).

3. LaPoint, *supra* note 2, at 539.

4. See *infra* part II.A.1.

ily give up both child-care responsibilities and access to much needed income, thereby placing a great economical and emotional burden on the remaining parent.⁵ Families are often forced to move from their homes to be nearer the incarcerated family member, creating upheaval and further disrupting the family routine.⁶ Inmates' children are apt to experience behavioral problems due to lack of contact with one of their parents, which often translates into future criminal activity.⁷ Finally, society ultimately bears the burden of familial incarceration because inmates separated from their families have a higher rate of recidivism, their children have a greater likelihood of becoming criminals themselves, and their families often become increasingly unstable, and economically dependent on the public assistance system.⁸

Few courts are willing to consider these issues at the sentencing stage. Although the federal courts evaluate family ties when imposing sentences,⁹ few depart from the Federal Sentencing Guidelines ("Guidelines" or "Sentencing Guidelines") due to familial considerations. Some programmatic efforts at various correctional facilities have attempted to address the effects of incarceration on prisoners' families. These programs, however, are not system-wide. The degree to which families are affected by the incarceration of a family member depends largely on the judge and the correctional facility to which the prisoner is sentenced.

This Article examines the impact of incarceration on families from both a legal and social perspective. Part I examines the question of whether the theories of incarceration are consistent with the practice of separating inmates from their families. Part II explores the familial and social costs which result from the incarceration of a family member. Part III discusses the legal efforts to address familial issues associated with incarceration, and argues that the disparate treatment of defendants contributes to the familial costs that exist nationwide. Part IV describes programmatic efforts which address the needs of inmates and their families. These efforts, while effective at their respective facilities, do not cure the ills that infect the country's entire correctional system. The Article concludes that, while programmatic efforts and judicial discretion may have some success in reducing the debilitating effects on prisoners' families, a system-wide policy must be enacted to rehabilitate inmates, reduce recidivism, and hopefully, prevent today's children from becoming tomorrow's inmates.

5. See *infra* part II.A.2.

6. See *infra* part II.A.3.

7. See *infra* part II.A.5.

8. See *infra* part II.B.

9. See *infra* note 126 and accompanying text.

I. Theories of Incarceration

Traditionally, the four major goals of the correctional system have been incapacitation,¹⁰ retribution,¹¹ deterrence¹² and rehabilitation.¹³ Imprisonment is the primary means our society has chosen to serve these goals, and the United States leads the world in its incarceration rate.¹⁴ Imprisonment separates inmates from their families. The following section discusses how this familial separation due to incarceration meshes with the stated correctional goals.

A. Incapacitation

The concept of incapacitation evolved from society's desire to separate criminals from non-criminals.¹⁵ The goal of incapacitation is to prevent criminals from committing crimes against non-criminals for the duration of their incarceration.¹⁶ While separated from non-criminals, the criminals are also removed from their families. Only when crimes have been committed against family members does separating inmates from their families fulfill the goal of incapacitation. In those cases, inmates will be incapacitated

10. See Jacqueline Cohen, *Incapacitating Criminals: Recent Research Findings*, in RES. IN BRIEF 1 (U.S. Nat'l Dep't of Justice, National Institute of Justice ed., 1984) (defining incapacitation as the act of controlling an individual so that he cannot commit any additional crimes).

11. See generally IMMANUEL KANT, *THE PHILOSOPHY OF LAW* (W. Hastie trans., 1974) (defining retribution as the infliction of punishment upon someone for having committed a crime).

12. See JEREMY BENTHAM, *Principles of Penal Law*, in J. BENTHAM'S WORKS 396, 402 (J. Browning ed., 1843) (defining deterrence as the example punishment sets for the rest of society in order to decrease crime).

13. See Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1150 (1990) (defining rehabilitation as the process of turning an inmate into someone who can function in society without turning to lawless activity).

14. A 1991 report issued by The Sentencing Project noted that in the United States, an average of 426 of every 100,000 people are incarcerated. South Africa had the second highest rate with a ratio of 333 to every 100,000, and the former Soviet Union was third with 268 per 100,000. Sharon La Franiere, *U.S. Has Most Prisoners Per Capita in the World*, WASH. POST, Jan. 5, 1991, at A3.

15. See LARRY E. SULLIVAN, *THE PRISON REFORM MOVEMENT* 1-3 (1990). Mr. Sullivan states that since the late eighteenth century, the primary method of dealing with society's criminals has been to punish them through imprisonment: the detention of a person against his or her will in a jail or prison. Prior to the late eighteenth century, people were generally punished for their crimes by death, slavery, maiming or paying fines. Confinement was merely a period of detention until trial or execution took place. During the Enlightenment period, however, a new science of penology developed intending imprisonment to eradicate evil human behavior and decrease the number of crimes.

16. Incapacitation takes criminals out of mainstream society and isolates them in prison so they are not capable of committing further crimes within the general population. The theory is based largely on the premise that people who have committed crimes are likely to commit future crimes, and incapacitation through incarceration will prevent those crimes, and thus decrease the number of crimes being committed. See generally Cohen, *supra* note 10.

from committing further crimes against their family members for the period of incarceration.¹⁷ When crimes have been committed against other members of society, however, separating inmates from their families is merely incidental to the general goal of preventing the inmate from committing further crimes, because there is no societal need to protect families from incarcerated family members.

The effect of incarceration on inmates' abilities to fulfill their responsibilities as family members is also incidental to the goal of incapacitation. In fact, a family is often unable to function as a unit when one of its members is incarcerated.¹⁸ The state regulates the contact and familial support between inmates and their families for the period of incarceration.

B. Retribution

The goal of retribution evolved from society's desire to punish those who transgress its laws. Retribution involves the infliction of punishment—a goal apart from the control of crime and criminals. The separation of inmates from their families through incarceration fulfills the goal of retribution. Such separations are very painful. In fact, the separation element of incarceration is probably its most punitive aspect. Once again, however, the punishment of inmates' families is incidental to the punishment of inmates.¹⁹ Although not a goal of retribution, inmates' families also experience the punitive impact of the incarceration. Part II of this Article fully explores the costs and effects associated with this separation and its punitive impact on inmates' families.

17. For example, in *United States v. Bell*, 974 F.2d 537 (4th Cir. 1992), the defendant pled guilty to sexual exploitation of his children. The district court could have sentenced Bell from 97 to 121 months in prison under the United States Sentencing Guidelines, but sentenced him to only 12 months in prison due to extraordinary family responsibilities. *Id.* at 538. The Fourth Circuit reversed this departure from the Guidelines due to the nature of the crime. *Id.* at 539. The Sentencing Guidelines and departures from them due to family circumstances are discussed in part III of this article.

18. See Robert L. Marsh, *Services for Families: A Model Project to Provide Services for Families of Prisoners*, 27 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 156 (1983). The effects on the families, including issues of lost income and support, are explored in part II of this article.

19. *Id.* Marital and parental relationships are particularly vulnerable when a parent is incarcerated. *Id.* Children may develop behavioral problems as a result of the loss of a parent. *Id.* Lack of continuity in parental relations may cause problems at school and may cause juvenile delinquency. See Note, *Prisoners and Parenting*, 87 YALE L.J. 1408, 1411-13 (1978). Research has documented both a child's need for continuity in parental relationships and the trauma that results when the child is separated from a parent who is a caretaker. See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 17-20 (1973). The prolonged absence of a parent may place a child at risk and cause regression in terms of his mental and physical development, affections, skills, achievements and social adaptation. See *id.* at 18.

C. Deterrence

The goal of deterrence involves the theory that people can be deterred from committing crimes by both experiencing and witnessing punishment. Under this theory, inmates are less likely to commit further crimes if punished, and members of society who witness the punishment are similarly less likely to commit crimes as a result of this exposure.²⁰ Since the separation of inmates from their families increases the punitive or retributive nature of incarceration,²¹ it should further the goals of deterrence. Similarly, the separation should deter members of society who witness this additional punishment. This equation, unfortunately, is far too simple.

Separating inmates from their families does not in fact serve the goal of deterring inmates from committing future crimes because separation destroys family structures. Research has shown that the disruption in family ties during incarceration actually *increases* the criminal behavior of ex-inmates.²² Furthermore, a disrupted family support network is likely to cause inmates to return to their only existing support network: prison.²³ Accordingly, strong family ties have always been a critical positive factor in parole decisions.²⁴

20. See Cohen, *supra* note 10, at 3. Deterrence theory was developed by the Italian philosopher Cesare Beccaria in the late eighteenth century. He theorized that in order to deter people from committing crimes, grave offenses must have the greatest penalties attached to them. Punishment by imprisonment acts as a general deterrent for society in that the threat of incarceration deters potential criminal offenders from committing crimes to avoid being imprisoned. Punishment by imprisonment also acts as a specific deterrent in that an individual who has been imprisoned will be deterred from committing a crime in the future once he is released from prison. See BENTHAM, *supra* note 12.

21. See *supra* parts IA, IB.

22. See Creasia F. Hairston, *Family Ties During Imprisonment: Important to Whom and for What?* 18(1) J. SOC. & SOC. WELFARE 87 (1991).

23. See Don Adams & Joel Fischer, *Effects of Prison Residents' Community Contacts on Recidivism Rates*, 22(4) CORRECTIVE & SOC. PSYCHIATRY 21 (1976). The relationship between strength of family-social bonds and parole success has held up for more than 50 years, across very diverse offender populations and in different locales. Hairston, *supra* note 22. Findings also indicate that men who live with their parents or wives are significantly less likely to violate parole. The greatest amount of parole difficulty is associated with ex-inmates who live alone, live with siblings or live with non-family members. Eva Lee Homer, *Inmate-Family Ties: Desirable But Difficult*, FED. PROBATION, Mar. 1979, at 47, 48-49.

24. As one inmate put it, "There are no more fervent friendships than those made in prison." EUGENIA GINZBURG, *JOURNEY INTO THE WHIRLWIND* 99 (1967). Because inmates are virtually closed off from the rest of the world, prison is often a place where they form strong friendships which substitute for family and society. When inmates spend years of their lives in close communion with other inmates and lose contact with their families, it is often difficult to readjust to life outside and to people with whom they were once close. Martha G. Duncan, "Cradled on the Sea": *Positive Images of Prison and Theories of Punishment*, 76 CAL. L. REV. 1202, 1209-11 (1988).

Even if the added punishment of separating inmates from their families deters others from committing crimes, it may have the inverse effect on the inmates' family members. Although the children of inmates directly witness the punishment of incarceration, and therefore, should be the most affected under a deterrence theory, the children of incarcerated parents are in fact more likely to commit crimes as a direct result of the separation from the incarcerated parent.²⁵ Instead of achieving the goal of deterrence, separating children from their inmate parents creates a new generation of inmates.²⁶

D. Rehabilitation

Rehabilitation involves changing inmates' attitudes and providing skill development in prison to enable them to live crime-free lives after release from prison.²⁷ In order to achieve the goal of rehabilitation, inmates must be prepared to deal with the challenges of post-prison life. The rehabilitation process should foster inmates' abilities to deal with their responsibilities, not prevent them from fulfilling these responsibilities. Separating inmates from their families allows the inmates to forget their responsibilities, and is thus directly contrary to the goal of rehabilitation.²⁸

25. Studies have shown that the disruption to the family, such as that caused by the incarceration of a parent, may lead to delinquent and criminal behavior in children. GOLDSTEIN ET AL., *supra* note 19, at 34. According to the Georgia Department of Corrections, children of prisoners are five times more likely than other children to end up in prison. See AIM (Aid to Incarcerated Mothers) brochure materials, 61 Eighth Street, N.E., Atlanta, GA 30309 [hereinafter AIM, Materials].

26. AIM, Materials, *supra* note 25.

27. In 1870, the National Congress of Prisons declared rehabilitation, not punishment, to be the main purpose of imprisonment. Incarceration was to focus not on the nature of the crime, but rather on the reformation of each individual prisoner. See Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893 (1990). To this end, Congress finally implemented a system of indeterminate sentencing in 1910. *Id.* at 894-95. By 1960, every state in the U.S. had passed an indeterminate sentencing scheme. *Id.* at 894. Under these schemes, judges had the discretion to impose a sentence from within a legislatively prescribed range, and after the inmate had served one-third of his sentence, the parole board determined the length of prison time remaining, which was calculated by the amount of time the inmate still needed to be rehabilitated. Theresa W. Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?*, 40 EMORY L.J. 393, 393-94 (1991). During the 1960s and 1970s, although the emphasis continued to be on rehabilitation, it was unusual for a corrections department to spend more than two percent of its budget on treatment, and many argue that rehabilitation was never given a fair chance. Jerome Miller, *Is Rehabilitation a Waste of Time?*, WASH. POST, Apr. 23, 1989, at C3.

28. See Adams & Fischer, *supra* note 23, at 21-23 (study showed that non-recidivist inmates had more community contacts with family and friends while incarcerated than did recidivist inmates); Homer, *supra* note 23, at 47-48 (concluding that strong ties between an inmate and his family result in reduced recidivism rates and greater parole success).

The demise of inmates' families increases the likelihood that inmates will commit crimes upon release.²⁹ When inmates are de-socialized from a life with their families and socialized to the life of an inmate, they are more likely to end up back in prison.³⁰ Simply put, "the behavior patterns one learns in a cage teach one how to survive in a cage, not how to live fruitfully in society as a whole."³¹

Many commentators believe that the structure of modern day incarceration itself fails to fulfill the goals of rehabilitation because inmates become nonfunctional.³² The day-to-day life of a prisoner has little connection to the day-to-day realities of life outside prison (e.g., paying bills, working and parenting). Separating inmates from their families undermines the goal of rehabilitation because inmates are separated from their responsibilities and socialized to the life of an inmate. To be rehabilitated, inmates must instead be transformed into individuals who have the necessary skills and emotional stability to face up to their responsibilities as citizens, parents and spouses.³³

Clearly, it is questionable whether separating inmates from their families fulfills the goals of our correctional system in any significant way. Therefore, the societal interest in maintaining this separation is suspect, especially when weighed against the heavy familial and societal costs associated with these separations.

II. The Effects of Incarceration on Families

A. Familial Costs

Incarceration exacts an immense emotional and physical toll on families. "For most inmates who face a prison term, their families will also begin a sentence: of physical, social, and psychological hardship. They will do so, in most instances, with a minimum of resources to draw upon and with little power to meet the additional demands on their troubled lives."³⁴ In particular, inmates' families face such burdens as an

29. Homer, *supra* note 23, at 48. See also Susan H. Fishman & Albert S. Alissi, *Strengthening Families as Natural Support Systems for Offenders*, FED. PROBATION, Sept. 1979, at 16 (arguing that post-incarceration family support will allow inmates to make successful transitions into the community and avoid future trouble with the law).

30. Cohen, *supra* note 10, at 2.

31. Cohen, *supra* note 10, at 2.

32. See Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991).

33. See Duncan, *supra* note 24, at 1243.

34. James D. Jorgensen et al., *Addressing the Social Needs of Families of Prisoners: A Tool for Inmate Rehabilitation*, FED. PROBATION, Dec. 1986, at 47. "The families of prisoners suffer disabilities which stem from situations which they themselves have not, for the most part, brought about. Every stress suffered by such families weakens the family and increases the likelihood of

unfamiliar correctional system, additional economic hardship and the emotional stress resulting from an abrupt change in the family structure. This section discusses the impact of these burdens on both the inmates and their families.

1. A Crisis of Information³⁵

A crisis for the family members of inmates begins at the time of arrest,³⁶ and continues through the pretrial, trial, sentencing and incarceration periods. For most families, the judicial system is a mystery and no one is available to explain what their loved one is experiencing. These families do not understand how much time may elapse between arrest and trial, and many are unprepared for a guilty verdict.³⁷ Moreover, family members often do not understand the sentencing procedures and have unrealistic expectations about the length of the sentence their family member will serve.³⁸

Once the inmate is sentenced and incarcerated, the family must then contend with the Department of Corrections and its rules and regulations.³⁹ Most correctional institutions do not explain the special requirements and safety regulations enforced in their facilities. In addition, families are often unaware that it may be quite some time before they will be permitted to meet with their incarcerated family member.⁴⁰

The lack of knowledge about the system creates a period of great anxiety for all members of the family. Both children and adults may be uncer-

other family members, especially the children, becoming social casualties." Donna C. Hale, *The Impact of Mothers' Incarceration on the Family System: Research and Recommendations*, 12 1/2 MARRIAGE & FAM. REV. 143, 147 (1987) (quoting PAULINE MORRIS, *PRISONERS AND THEIR FAMILIES* 11 (1965)).

35. Judith F. Weintraub, *The Delivery of Services to Families of Prisoners*, FED. PROBATION, Dec. 1976, at 28, 28-29. Ms. Weintraub uses the phrase "crisis of information" to describe the initial experience families encounter when their loved ones enter the criminal justice system.

36. One study found that in most cases children were not present when their parents were arrested, but children who were present felt great bitterness about the way their parents were arrested and experienced anger towards police. William H. Sack et al., *The Children of Imprisoned Parents: A Psychosocial Exploration*, 46(4) AM. J. ORTHOPSYCHIATRY 620 (1976) [hereinafter Sack, *Imprisoned Parents*].

37. Regardless of the nature of the crime committed by an offender and the likelihood that the offense would necessitate his incarceration, most families are not prepared for the possibility that the man will, in fact, be going to prison for an indefinite length of time, and, as a result, display symptoms of shock, panic or emotional turmoil in court when sentencing does occur.

Fishman & Alissi, *supra* note 29, at 18.

38. Mary C. Schwartz & Judith F. Weintraub, *The Prisoner's Wife: A Study in Crisis*, FED. PROBATION, Dec. 1974, at 20, 21.

39. See Jorgensen et al., *supra* note 34, at 48.

40. See Jorgensen et al., *supra* note 34, at 48.

tain as to the incarcerated family member's health, treatment and representation during the confusing incarceration process.⁴¹ This "crisis of information," however, is just the beginning of the incarceration of the inmates' family members.

2. Care of Children During Incarceration

The care of an inmate's child is another hurdle the family must face. There are significant differences in the care and treatment of inmates' children when a father (as opposed to a mother) is incarcerated. If the father is the incarcerated parent, it is likely that the mother will remain the child's primary caregiver. Thus, the child will have less upheaval in terms of living arrangements and his or her relationship with the primary caregiver.⁴² Economically, however, the loss of the father's income can be both devastating to the family and a source of constant frustration to the incarcerated father.⁴³

If the mother is incarcerated, many additional concerns arise for both the incarcerated parent and the judicial system. Until this century, it was common for incarcerated mothers to maintain custody of their children because it was believed that keeping the children with their mothers furthered the mothers' rehabilitation.⁴⁴ Today, children are rarely allowed to remain

41. See Weintraub, *supra* note 35, at 28.

42. While men prisoners rest assured that their children are well cared for by their mothers, female prisoners do not have this luxury. Usually single mothers, these women watch their families fall apart when they are in prison. As a result, children are bounced from one foster home to another, from one relative to another, and contact with the children becomes less frequent as time progresses.

Consuelo Marshall, *Plenary Session*, 34 How. L.J. 512, 514 (1991).

43. One vivid story that illustrates the difficulty of families faced with this situation is the story of Vincent H., an inmate serving a 15-year armed robbery sentence. After serving three years he achieved residence in the honor unit and the majority of his needs were provided by the state. Meanwhile, Vincent's wife (Mildred H.) slept on a thin floor mattress with her nine-year-old son, Mike. Her daughter, Debbie, age seven, was born with water on the brain and paralyzed legs and slept on the couch. The family lived in a one-room house they rented for \$88 a month with no telephone. Mildred awoke at 5:15 each morning to take the children to a baby sitter in order to get to her job by 7:30 a.m. She earned \$240 a month hemming 1,020 pairs of trousers a day. After work she picked the children up from the baby sitter and returned to make dinner, give baths, do the laundry by hand, and get to bed by 10:00 p.m. The only social service aid she received was Medicaid for Debbie, who needed constant medical attention including 10 operations.

"She's just wore out," said Vincent. "She's hanging on by shoe strings now. . . . I don't know how she's doing it. . . . I'm afraid she'll fall apart. I'm the one who's supposed to pay, not Mildred and the kids." Homer, *supra* note 23, at 49.

44. See Terri L. Shupak, Comment, *Women and Children First: An Examination of the Unique Needs of Women in Prison*, 16 GOLDEN GATE U. L. REV. 455, 465 (1986).

with their incarcerated mothers⁴⁵ and mothers are often forced to find an alternative caregiver for their children. Many of these women are single parents and must rely on their mothers, sisters or other relatives to take care of their children.⁴⁶ Absent such support from other family members, the children are likely to end up in the foster care system.⁴⁷

3. Effects on the Family Unit

There are major changes during the period of incarceration which affect the family as a unit. Because incarceration most commonly occurs in the lowest socioeconomic strata of our society—those families with the fewest resources⁴⁸—inmates' families often face economic difficulties. In fact, the number of families dependent on state public assistance programs as a result of losing a source (sometimes the only source) of the family's income due to incarceration⁴⁹ is significant.⁵⁰

Incarceration causes physical disruption as well. Some families are forced to move from their homes as a result of financial crises, while some choose to move closer to their incarcerated loved one.⁵¹ Even when families elect this option there is no guarantee that the family member will con-

45. The State of New York has a prison nursery system which allows children born to inmates to return with the mother to prison and permits the children to remain with their mother up until the age of one. *Id.* at 468. California has permitted inmate mothers to retain physical custody of their young children up to the age of two since 1929. *Id.* at 470.

46. Approximately 75% of incarcerated mothers place their children with relatives. See McCall et al., *Pregnancy in Prison: A Needs Assessment of Perinatal Outcome in Three California Penal Institutions* 3 (1985) (a report to the State of California Department of Health Services).

The primary caregivers for these children are their maternal grandmothers. These women need help raising their grandchildren who are at risk. Not only must they cope with parenting again, they must do so in a world far different from when they raised their own children—a world in which drug use is all too common and peer pressure threatens the well being of all children.

AIM, Materials, *supra* note 25.

47. See Shupak, *supra* note 44, at 465. Aside from the less than ideal conditions that children in foster care must face, foster care also raises additional concerns for the incarcerated parent. It is possible that the foster parent will not allow visitation with the incarcerated parent during the period of incarceration, or that he or she will try to gain custody or possibly terminate the incarcerated parent's rights during a period when the incarcerated parent is least able to fight for her children or herself. See generally Shupak, *supra* note 44.

48. William H. Sack, *Children of Imprisoned Fathers*, 40 *PSYCHIATRY* 163, 164 (1977) [hereinafter Sack, *Imprisoned Fathers*].

49. "Imprisonment of the family provider has the effect of forcing dependents to rely financially on extended family, if available, or public assistance. Schneller noted that 60 percent of families in his study reported reduced incomes following the incarceration of the breadwinner." Jorgensen et al., *supra* note 34, at 49.

50. See Sack, *Imprisoned Fathers*, *supra* note 48, at 172.

51. See Sack, *Imprisoned Parents*, *supra* note 36, at 622. Further, prison facilities are often located in remote areas far from the cities where many inmates' families are located. These transportation difficulties often prevent families from visiting because of the distance and cost, and

tinue to be housed at a particular correctional facility, because under current law inmates may be transferred to another facility for any reason.⁵²

In *Olim v. Wakinekona*,⁵³ the United States Supreme Court held that transferring an inmate 2500 miles across the Pacific Ocean, from the Hawaii State Prison to Folsom State Prison in California, did not implicate a liberty interest or necessitate Due Process protections.⁵⁴ These transfers have become commonplace, with no consideration given to the desires of the inmates or the plight of their families who do not have the financial resources to continue contact with them.⁵⁵

Feelings of isolation are another common effect on the members of inmates' families.⁵⁶ A general lack of programs aimed at their special needs, combined with the societal stigma attached to a conviction and prison sentence, leave these families on their own to cope with major changes and crises.⁵⁷ Children often feel isolated from their incarcerated parent, and those who cannot visit their parents often have only frightening media images and their imaginations to define their ideas of prison life and its effect on their parents.⁵⁸

4. Effects on the Inmates' Children

Children of incarcerated parents experience behavioral problems similar to those of children who lose a parent through death or divorce.⁵⁹ In one study, the sons of incarcerated fathers exhibited aggressive, delinquent and criminal behavior, in some cases similar to that of their father prior to incarceration.⁶⁰ In addition to behavioral problems, many of these children experience a marked decline in their school performance.⁶¹ One study

force some to move closer to the facility to allow more regular visits. See Sack, *Imprisoned Parents*, *supra* note 36, at 622.

52. See *Olim v. Wakinekona*, 461 U.S. 238, 247 (1983). See also Justin Brooks, *Exile on Main Street: Inmate Transfers From Puerto Rico to the Continental United States Violate Due Process*, 27 REV. JUR. U.I. (forthcoming Spring 1994).

53. 461 U.S. 238 (1983).

54. *Id.* at 247.

55. See generally Brooks, *supra* note 52.

56. See Sack, *Imprisoned Parents*, *supra* note 36, at 622.

57. See Sack, *Imprisoned Parents*, *supra* note 36, at 620.

58. See Sack, *Imprisoned Fathers*, *supra* note 48, at 168.

59. See Schwartz & Weintraub, *supra* note 38, at 21.

60. "In each of the six families a male child between the ages of 6 and 13 rather suddenly demonstrated aggressive and/or antisocial behavior within the first two months of his father's imprisonment." Sack, *Imprisoned Fathers*, *supra* note 48, at 164. "Of interest was the fact that the boys' symptomatic behavior had an antisocial quality closely resembling the father's recent antisocial act, leading to incarceration." Sack, *Imprisoned Fathers*, *supra* note 48, at 165.

61. See Sidney Friedman & T. Conway Esselstyn, *The Adjustment of Children of Jail Inmates*, FED. PROBATION, Dec. 1965, at 55, 59.

indicated that girls may experience more severe problems related to school performance as a result of their father's incarceration than boys.⁶² Regardless of which gender suffers more, the incarceration of a parent significantly impacts all children involved.

Inmates' children experience feelings of loss because one of their parents, perhaps their only parent, is inaccessible and no longer participates in their life on a daily basis. In addition to feelings of loss, these children experience embarrassment that their parent is incarcerated,⁶³ anger at the incarcerated parent for leaving them, and in some cases, anger at the non-incarcerated parent or caregiver for not preventing the incarceration.⁶⁴ Unfortunately, children commonly do not deal with or express their anger toward the incarcerated parent.⁶⁵

Children of inmates also stand a greater chance of being incarcerated later in life.⁶⁶ The effects discussed above, combined with the lack of support for these children and their families, increase the risk of these children committing future crimes. Intervention to assist these children in dealing with their emotional reactions to parental incarceration may help to avoid some of these "inevitable" results.

5. Effects on the Inmate's Spouse⁶⁷ or the Caregiver⁶⁸

When a parent is incarcerated, the non-incarcerated parent or caregiver takes on additional single-parent responsibilities. The non-incarcerated parent becomes solely responsible for the financial, social, emotional and physical well-being of the children.⁶⁹ As discussed above, these additional

62. See Jorgensen et al., *supra* note 34, at 48.

63. See Janet Scott, *The Forgotten Family*, J. OFFENDER COUNSELING, Apr. 1983, at 38.

64. See Schwartz & Weintraub, *supra* note 38, at 22.

65. It can be very difficult for families to discuss their anger because of the tenor of the prison visits, the lack of any personal time to talk and the discomfort of being angry with someone who cannot return home. "When I day dream, I think how it could be with my father home. We need him around the house If I had a chance to really talk to my father I would say how bad and terrible it is what I'm going through I never have a chance to really talk to him." *Hairston*, *supra* note 22.

66. See GOLDSTEIN ET AL., *supra* note 25 and accompanying text.

67. The term "spouse" in this section includes marital relationships along with any other relationship where the couple has a child together. This is done primarily for ease of reference and does not imply that only marital relationships are valid or only "spouses" as literally defined experience these difficulties.

68. "Caregiver" generally refers to family members who take care of the incarcerated parent's child during his or her prison term.

69. As illustrated by the Vincent H. story, see *supra* note 43, the incarcerated parent is provided with food, clothing, shelter, some opportunity for job training and other types of physical and emotional support, while the family has to deal with its needs alone. Not only must the non-incarcerated parents establish new lives, care for their children and withstand the type of social criticism that can occur as a result of the crime committed by the incarcerated parent, but they

financial responsibilities can force reliance on public assistance and significantly curtail family activities and opportunities.⁷⁰

These single-parent responsibilities can be overwhelming, and the spouse or caregiver undertakes them "at a time when the children are most in need of support, explanation, and general consideration."⁷¹ The spouse or caregiver must explain the parent's incarceration to the children and make them feel secure despite the parent's absence.⁷² She⁷³ must also deal with the added behavioral and school problems that the children may experience as well as her own reaction to the incarceration.⁷⁴

An additional source of stress and disruption resulting from incarceration is the high divorce rate among inmates and their spouses. Some articles suggest that divorces occur in already unstable relationships and the incarceration is used simply as an excuse to depart from an already unsatisfactory relationship.⁷⁵ While the existing unstable relationships are certainly a factor, marriages do in fact fall apart when the spouses cannot deal with the stresses accompanying one partner's incarceration.⁷⁶ If these stresses do not bring about the dissolution of the marriage, at a minimum they create an extreme disruption to the marital relationship that requires significant countering efforts by both spouses.

In addition to the difficulties in her relationship with the inmate, the spouse or caregiver may feel isolated from her community and her own family.⁷⁷ This isolation leads to other problems because the family has no

must also learn to cope with the unfamiliar and often frightening court and prison systems in order to maintain meaningful contact with the offender. See Schwartz & Weintraub, *supra* note 38, at 22.

70. This occurs especially if the family must pay additional money in order to visit its family member:

If the wife and children of a prisoner should be forced to turn to Welfare to remain alive and maintain themselves as a family unit, even one visit a year to a distant prison may be a financial impossibility Since one must pay for rent, utilities and food, and since welfare allotments are based on subsistence levels, the study hypothesized that with determination, it would be possible to save five percent of the welfare allotment towards a visit to [an imprisoned] husband or son At this five percent rate, it would take 36 weeks to save [the amount] required for the trip; in other words, only one visit per year is possible!

Homer, *supra* note 23, at 50.

71. Schwartz & Weintraub, *supra* note 38, at 22.

72. See Schwartz & Weintraub, *supra* note 38, at 22.

73. In most cases, regardless of whether the incarcerated parent is the mother or father, the person who cares for the child is a woman. Usually she is the child's mother or grandmother. See McCall, *supra* note 46. Some men, of course, do in fact care for their children while mothers are incarcerated.

74. See Schwartz & Weintraub, *supra* note 38, at 22.

75. See Sack, *Imprisoned Fathers*, *supra* note 48, at 168.

76. See Hairston, *supra* note 22, at 89.

77. See Schwartz & Weintraub, *supra* note 38, at 21-22.

one to provide the added emotional and financial support that is needed during the incarceration period.⁷⁸ Combined with the isolation from her incarcerated family member, the spouse or caretaker often has no one with whom to share concerns and frustrations.⁷⁹ The responsibilities of the spouse or caregiver increase substantially without the availability of needed support from the other parent, who in fact may be unaware of the day-to-day problems facing the family as a result of the incarceration.⁸⁰

The immediate emotional impact of incarceration on a spouse is quite similar to loss by death.⁸¹ Although the incarcerated spouse may one day return to the family, the incarcerated parent is absent from everyday family life and can offer only a limited amount of support, both emotional and physical, from prison.⁸² In addition, the emotional impact of incarceration, which, like loss from death may include feelings of grief, fear, shame, anger and confusion, results in additional emotional problems. Such problems may include pressure from family members to separate from the incarcerated spouse, sexual deprivation and loneliness, embarrassment and resentment resulting from maltreatment by prison officials, and increased reliance on public assistance.⁸³

B. Social Costs of Family Incarceration

Incarceration also results in increased burdens to society. As discussed above, the children of inmates are more likely to commit future crimes.⁸⁴ Many of these children have educational and behavioral problems and do not receive the attention needed to decrease the possibility they will inhabit the same prisons as their parents. Society must bear the costs of the public welfare system as well as other social services offered to families with incarcerated loved ones because of the lack of familial and community support.⁸⁵ In sum, notwithstanding the expense of incarcerating one parent, society ultimately pays for the financial support of the children, spouse or caregiver and *their* "incarceration."

78. Schwartz & Weintraub, *supra* note 38, at 22.

79. Schwartz & Weintraub, *supra* note 38, at 23.

80. Schwartz & Weintraub, *supra* note 38, at 23.

81. "There is grief and fear; he is gone, he is not there to help with any of the problems of the family's life." Homer, *supra* note 23, at 49.

82. "Yet the feelings and reactions are more complicated than those which follow death. In addition to grief and fear, there is also shame, anger and confusion. How will they manage? What should she tell the children? How will she and the children be treated in the community?" Homer, *supra* note 23, at 49.

83. See Susan C. Cobean & Paul W. Power, *The Role of the Family in the Rehabilitation of the Offender*, 22 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 29, 30 (1978).

84. See *supra* note 25 and accompanying text.

85. See generally Sack, *Imprisoned Fathers*, *supra* note 48 and accompanying text.

Finally, one of the most significant societal costs of parental incarceration is the recidivism of the parent offenders. Studies have demonstrated that parolees who return to their families, specifically to a spouse and children,⁸⁶ have a better chance of leading productive and law-abiding lives.⁸⁷ A system that destroys family ties during incarceration incurs the tremendous societal costs of future crimes.⁸⁸

Despite the devastating effects of parental incarceration, there has been limited effort to address these problems. Both the legal system and community-based organizations are beginning to recognize the impact of incarceration on our society, but the response has been minimal and inconsistent. The following sections discuss efforts by courts and lay organizations to combat the maleffects of incarceration.

III. Legal Efforts to Address Familial Issues Raised by Incarceration

The familial and societal costs incurred when inmates are separated from their families incident to incarceration should be the responsibility of the legal system. The system, therefore, must address and attempt to remedy the costs which it creates. Although there have been some efforts in this direction, the results have been highly unsatisfactory and inconsistent. Some courts consider incarceration a ground for termination of parental rights. Further, while some courts consider the effects of incarceration on a defendant's family during the sentencing process, others refuse to do so, resulting in a wide disparity in sentencing of defendants with families.

A. Termination of Parental Rights

In 1982, the United States Supreme Court reaffirmed that "freedom of personal choice in matters of family life is a fundamental liberty interest," in the decision of *Santosky v. Kramer*.⁸⁹ The Court recognized the impor-

86. Inmates who return to a spouse and a child have the most success on parole. See Adams & Fischer, *supra* note 23 and accompanying text.

87. See Adams & Fischer, *supra* note 23 and accompanying text.

88. The cost of crime in the United States has reached astronomical proportions. "For the first time in American history cities are spending more on law enforcement than on education." WILLIAM J. CHAMBLISS, *TRADING TEXTBOOKS FOR PRISON CELLS: 1991* (report available from National Center on Institutions and Alternatives, 635 Slatyers Lane, Suite G-100, Alexandria, VA 22314).

89. 455 U.S. 745, 753 (1982). Other cases holding that freedom of personal choice in matters of family life is a protected liberty interest include the following: *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 845 (1977); *Moore v. East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974); *Stanley v. Illinois*, 405

tance of maintaining parent-child relationships during incarceration when it held:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state. Even when the blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.⁹⁰

The Court further held that a preponderance of the evidence standard was inappropriate in a termination of parental rights hearing because it was "inconsistent with due process."⁹¹ The Court recognized a parent's interest in termination proceedings and initiated a decade of court decisions which considered the rights of incarcerated parents along with their children's best interests.⁹²

Despite the Court's pronouncement, the judiciary has offered little assistance in maintaining the families of incarcerated parents. Although many of the factors that lead to termination of an inmate's parental rights are a direct result of incarceration, generally courts have been unsympathetic to the dilemmas of incarcerated parents.

For example, in *In re R.H.N.*,⁹³ the Colorado Supreme Court reviewed a case in which an incarcerated father's parental rights were terminated based partly on the fact that he failed to share his \$1.50-a-day prison salary with his children.⁹⁴ The purpose in termination proceedings involving incarcerated parents is typically to allow foster parents to legally adopt the inmates' children; in *R.H.N.*, however, it was the stepfather who sought termination.⁹⁵

U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); and *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

90. 455 U.S. at 753.

91. *Id.* at 758.

92. See Joseph R. Carrieri, *The Rights of Incarcerated Parents*, N.Y. L.J., Jan. 12, 1990, at 1, 4. In New York, before 1983, incarcerated parents typically lost their parental rights. *Id.* Because these parents were deprived of their civil liberties while incarcerated, their consent was deemed unnecessary before a child was adopted if the adoption was found to be in the child's best interests. *Id.* After 1984, New York law changed to eliminate adoption without parental consent. *Id.* Under present New York law, incarcerated parents need only to visit with their children and participate in planning their future in order to maintain parental rights. *Id.* The State is required to exercise diligent efforts to assist a parent and child to develop a meaningful relationship—this includes providing transportation for children to correctional facilities and providing social or rehabilitative services to parents. *Id.*

93. 710 P.2d 482 (Colo. 1985).

94. *Id.* at 483.

95. *Id.* at 483-84.

In the lower court decision, Judge Berman reflected upon the impact of the case, stating that with this decision, "whenever the factors of imprisonment and poverty coincide with respect to a parent, the state may, without further questions, wrench that parent from his child and terminate all rights that the impoverished inmate has to his children."⁹⁶ The Colorado Supreme Court affirmed the termination, finding that the incarcerated father "refused to provide his children with a reasonable proportion of his income of \$1.50 per day."⁹⁷

Michigan courts also appear to lack sympathy for incarcerated parents. In Michigan, parental rights can be terminated if a parent is incarcerated for more than two years, and is unable to provide for the care of his or her child during this time.⁹⁸ In fact, in *In Re Welch*,⁹⁹ a parent's rights were terminated when he was sentenced to one to five years because "a respondent's parental rights may be terminated under subsection 3(e) where a period of imprisonment, not of any particular length, will result in the child being deprived of a normal home for a period exceeding two years."¹⁰⁰

Recognizing the problems inherent in the incarceration of parents, the New York Legislature abolished incarceration as a basis for the termination of parental rights in 1983.¹⁰¹ The New York Legislature does require, however, that incarcerated parents cooperate with an authorized child care agency to maintain continued contact with their children *and* have a realistic plan for the future care of their children.¹⁰² The child care agency must make "diligent efforts to strengthen and nurture the parent-child relationship" by making arrangements for visitation within the correctional facility.¹⁰³ If incarcerated parents fail to maintain contact with their children or

96. *Lawyer Will Appeal Parental Finding*, UPI, Jan. 15, 1984, available in LEXIS, Nexis Library, Archiv File.

97. 710 P.2d at 488.

98. MICH. COMP. LAWS ANN. § 712A.19b(3)(h) (West 1993). See also *In re Neal*, 414 N.W.2d 916 (Mich. Ct. App. 1987).

99. *The Week's Opinions*, MICH. LAW. WKLY., Apr. 20, 1992, at 13, available in LEXIS, Nexis Library, LGLNEW File (unpublished opinion).

100. *Id.*

101. In 1983, the New York legislature removed § 111(2)(d) of the New York Domestic Relations Law from the books which provided that the consent of an incarcerated parent was unnecessary for the adoption of an infant, and amended § 384-b(7)(d) of the New York Social Services Law to require incarcerated parents maintain relationships with their children to retain their parental rights. See N.Y. DOM. REL. LAW § 111(2) (McKinney 1983); N.Y. SOC. SERV. LAW § 384-b(7) (McKinney 1983).

102. N.Y. SOC. SERV. LAW § 384-b(7) (McKinney 1983); *In re Gregory B.*, 542 N.E.2d 1052, 1056 (N.Y. 1989).

103. *In re Gregory B.*, 542 N.E.2d at 1056.

provide a realistic plan for the future care of their children for a period of one year, they risk losing their parental rights.¹⁰⁴

An incarcerated parent's plan for the future care of his or her children in New York cannot simply consist of keeping the children in foster care throughout their childhood.¹⁰⁵ In *In re Gregory B.*,¹⁰⁶ incarcerated parents argued that their parental rights should not be terminated even though they had no relatives who were willing or able to care for their children during their imprisonment, and were unable to provide an alternative to foster care. The New York Court of Appeals noted that although New York law stresses the importance of maintaining the cohesiveness of the family unit, permanence in a child's life was also important, and children should be freed for adoption when "it is clear that natural parents cannot offer a normal home for a child."¹⁰⁷

California, like New York, does not provide for termination of parental rights when a parent is given a particular sentence. Under section 7825 of the California Family Code,¹⁰⁸ a parent will not automatically lose custody of his or her child if he or she is convicted of a felony.¹⁰⁹ Termination can occur, however, if the felony results in a determination that the parent is unfit to provide further care for the child.¹¹⁰ As a matter of public policy, the best interests of the child are the focus of such determinations.¹¹¹

For example, in *In re Terry E.*,¹¹² the mother of two children appealed a judgment declaring her minor children free from her custody based on a

104. *Id.*

105. *In re Delores B.*, 533 N.Y.S.2d 706 (N.Y. App. Div. 1988). This case involved an incarcerated father serving 25 years-to-life for murder. The court ruled that a plan that his children remain in foster care throughout their childhood was contrary to the intent of the legislature. *Id.* at 710-11.

106. 542 N.E.2d at 1057.

107. *Id.* at 1058 (quoting *In re Joyce T.*, 478 N.E.2d 1306, 1311 (N.Y. 1985)).

108. CAL. FAMILY CODE § 7825 (West 1994).

109. *Id.*

110. CAL. FAMILY CODE § 7825 provides:

A proceeding under this part may be brought where both of the following requirements are satisfied: (a) The child is one whose parent or parents are convicted of a felony. (b) The facts of the crime of which the parent or parents were convicted are of such a nature so as to prove the unfitness of the parent or parents to have further custody and control of the child.

This section is a continuation of former California Civil Code § 232(a)(4) without substantive change. *See also* *In Re Christina P.*, 220 Cal. Rptr. 525 (Ct. App. 1985). In *Christina P.*, the court noted that the felony must show a parent's unfitness and the probability that the parent will fail in a substantial degree to discharge his or her parental duties. *Id.* at 535. The court further noted that a parent-felon's rap sheet does not necessarily show unfitness. *Id.* at 535-36.

111. *See* CAL. FAMILY CODE § 3020 (West 1994).

112. 225 Cal. Rptr. 803, 805 (Ct. App. 1986). The mother of two minor children was convicted of false imprisonment, oral copulation, and penetration by a foreign instrument, which she committed on the ex-wife of her current live-in lover. *Id.* at 807.

felony conviction. The appellate court held that it was improper to only consider a parent's felony conviction when deciding whether or not to terminate parental rights.¹¹³ The court concluded that the mother had taken appropriate action to be reunited with her children, and the welfare department had not presented valid evidence to rebut the mother's argument that she could care for her children after her release from prison.¹¹⁴ Therefore, the appellate court determined that no grounds existed for termination of the parental relationship.¹¹⁵

Although the appellate court in *Terry E.* ruled that there were insufficient grounds for termination, certain felony convictions have resulted in termination. In *In Re Arthur C.*,¹¹⁶ a father's custody of his children was terminated after he was convicted of assault with a deadly weapon. On appeal, the father argued that because the children were neither in danger nor present when the felony occurred, his unfitness to have future custody and control of the children could not be established.¹¹⁷ The court held, however, that the circumstances of the felony need only be those which, in the trial court's discretion, prove the parent's unfitness. The court found there were "inferences . . . sufficient to establish a reasonable relationship between appellant's crime and the likelihood his continuing to parent would be detrimental to the children."¹¹⁸ In fact, most California courts hold that violence, especially extreme acts of violence against a child's mother, demonstrates that the parent is unfit to carry out parental duties.¹¹⁹

Clearly, states have not adopted a uniform approach to deal with incarcerated parents. One of the major issues on which the states disagree is whether or not the incarceration of a parent should be considered abandon-

113. *Id.* at 815. The court noted that former California Civil Code § 232(a)(4) "must be read and harmonized with [former California Civil Code] section 4600 which requires that . . . the court . . . make a finding that an award of custody to a parent *would be* detrimental to the child and the award of custody to a nonparent *is required* to serve the best interests of the child." *Id.*

114. *Id.*

115. *Id.* at 817. The court noted that "the welfare of the child is not the sole determining factor; the statute requires clear and convincing proof of the parent's unfitness to have the future custody and control of the child." *Id.* It further noted that "prison incarceration does not ipso facto show a parent's unfitness under the statute." *Id.*

116. 222 Cal. Rptr. 388, 389 (Ct. App. 1986). The father had a drug and alcohol problem, and had stabbed his wife 17 times. *Id.*

117. *Id.* at 390.

118. *Id.* at 391. The lower court had "considered the father's 'overall criminal history,' and the father's drug and drinking problems." *Id.*

119. See *In re Sarah H.*, 165 Cal. Rptr. 61, 63 (Ct. App. 1980) (the father of two minors was an unfit parent due to his alcohol problems, the beating death of the minors' mother, and the fact that one of the children was "still suffering ill effects from witnessing the beating"); *In re Geoffrey G.*, 159 Cal. Rptr. 460, 464-65 (Ct. App. 1979) (the father of a minor child was an unfit parent based on his drug and alcohol problems and the death of the child's mother caused by an act of extreme violence by the father).

ment,¹²⁰ and whether parental rights should be terminated based on that abandonment. In *In re Adoption of Children by L.A.S.*,¹²¹ the Appellate Division of the New Jersey Superior Court considered incarceration only one factor in determining whether two children had been abandoned by their incarcerated father (who was serving a thirty-year sentence).¹²² The lower court reasoned that the father had chosen to commit the crime which caused him to be incarcerated and had, therefore, chosen to abandon his children.¹²³ The appellate division recognized that some states consider incarceration alone as abandonment, but followed the approach of remanding the case for consideration of additional factors including the "care, love, protection and affection" the father provided his children before incarceration, and the efforts made to maintain contact during incarceration.

When considering whether or not to terminate parental rights, it is appropriate to consider the best interests of the children. If courts weigh a parent's criminal conviction heavily, however, they do not truly consider the best interests of children nor the reality of being a participant in the correctional system. Furthermore, classifying incarceration as abandonment assumes that people who commit crimes intend to get caught, arrested, convicted and incarcerated. Even if we accept this leap of logic, courts must consider the impact of incarceration on the family. Courts make their task of evaluating a parent's crimes easier when they consider only the punishment of the parent and not the consequent punishment of the child.

B. The Role of Sentencing

Before making sentencing decisions, federal courts have the opportunity to maintain family unity by considering parental responsibilities. While some federal courts have recognized the devastating effects of incarceration on families, no consensus exists on whether familial responsibilities should be considered by the sentencing judge.¹²⁴

120. Definitions of "abandonment" or "permanent neglect" vary from state to state. For instance, in New York, a parent has permanently neglected a child when he fails both to maintain contact with the child and realistically plan for the child's future for a period of one year. N.Y. SOC. SERV. LAW § 384-b(7) (McKinney 1992). In New Jersey, parental rights may be terminated if there has been "intentional abandonment or very substantial neglect of parental duties without a reasonable expectation of a reversal of that conduct in the future." N.J. STAT. ANN. § 9:3-48(c)(1) (West 1993). Black's Law Dictionary defines abandonment in part as the intention to abandon and the external act by which the intention is carried into effect. BLACK'S LAW DICTIONARY 2 (6th ed. 1990).

121. 610 A.2d 925 (N.J. Super. Ct. App. Div. 1992).

122. *Id.* at 929.

123. *Id.* at 927.

124. Susan E. Ellingstad, Note, *The Sentencing Guidelines: Downward Departures Based on a Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 970 (1992).

Under the Sentencing Reform Act of 1984, the Senate Judiciary Committee directed the Sentencing Commission to consider familial obligations in creating federal sentencing guidelines. Specifically, under § 994 of Title 28, the Commission is instructed to consider family ties when imposing sentences of probation, fines or imprisonment.¹²⁵ However, a conflict exists because § 994(e) directs the Commission to assure that the guidelines reflect the inappropriateness of considering family ties in sentencing.¹²⁶ In reality, the Sentencing Guidelines give little regard to familial obligations, as these obligations were deemed "not ordinarily relevant" in sentencing determinations.¹²⁷ As a result, federal judges may consider family obligations, but only do so under "extraordinary circumstances."¹²⁸ Of course, federal judges differ in their definitions of extraordinary, leading some commentators to describe the application of discretion as chaotic.¹²⁹

For example, in *United States v. Pokuaa*,¹³⁰ the United States District Court for the Eastern District of New York considered the fact that the defendant was seven months pregnant and likely to lose custody of her child if she was sentenced under the Sentencing Guidelines to twenty-seven to thirty-three months for her crime of smuggling heroin.¹³¹ Because the federal prisons do not allow parents to care for their children while incarcerated, and the defendant had no family members in the country who could care for her child, the court deemed it appropriate to depart from the Guidelines.¹³² Citing other cases in the district which had held that loss of paren-

125. 28 U.S.C. § 994(d)(7) (1993).

126. 28 U.S.C. § 994(e) (1993). Section 994(e) provides: "The Commission shall assure that the guidelines and policy statements, in recommending a term of imprisonment or length of a term of imprisonment, reflect the general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."

127. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5H1.6 (1992) [hereinafter GUIDELINES MANUAL]. Section 5H1.6 provides: "Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range. Family responsibilities that are complied with may be relevant to the determination of the amount of restitution or fine."

128. The Commission did not draft a conclusive rule regarding departures from the Guidelines based on familial considerations. As the following discussion points out, however, some courts are willing to depart from the Guidelines based on extraordinary circumstances. See, e.g., *United States v. Thomas*, 930 F.2d 526, 529 (7th Cir.), cert. denied, 112 S. Ct. 171 (1991).

129. See Donald C. Wayne, Comment, *Chaotic Sentencing: Downward Departures Based on Extraordinary Family Circumstances*, 71 WASH. U. L.Q. 443 (1993).

130. 782 F. Supp. 747 (E.D.N.Y. 1992).

131. Under the Sentencing Guidelines the court would take into account that it was her first offense, that she acted only as a courier, and that she accepted responsibility. Such a crime would call for a sentence of 27 to 33 months. *Id.* at 748; see also GUIDELINES MANUAL, *supra* note 127, §§ 2D1.1(a)(3), 3B1.2(a), 3E1.1(a).

132. 782 F. Supp. at 748.

tal rights was a basis for departing from the Guidelines,¹³³ the court sentenced the defendant to time served (six weeks), five years of supervised release, and a fifty dollar special assessment.¹³⁴

Similarly, in *United States v. Arize*,¹³⁵ the same court, on its own motion, departed from the Guidelines to reduce a woman's sentence from the suggested forty-one to fifty-one month sentence to twenty-three months and a fifty dollar special assessment. The court stated, that in combination with the potential loss of custody of her child, the woman's unknown pregnancy at the time of the crime justified this downward departure.¹³⁶ As in *Pokuua*, the defendant would likely have lost custody of the child if she had been imprisoned for more than two years.¹³⁷

Although the judges in *Pokuua* and *Arize* used their discretion to depart from the Guidelines, other judges have not followed suit. In *United States v. Headley*,¹³⁸ for example, the defendant was convicted on several drug-related charges. The trial court considered the defendant's family situation, including five young children, but concluded that it did not have the authority to depart from the Guidelines and reduce her sentence.¹³⁹ The Third Circuit held that the district court had the authority to depart downward, but only if it determined that the family circumstances were extraordinary.¹⁴⁰

Another problem that arises in considering family circumstances in sentencing is the lack of uniformity in interpreting § 5H1.6 of the Guidelines.¹⁴¹ As noted, some courts will not consider family circumstances in cases where the defendant is to be incarcerated. In *United States v.*

133. *Id.*

134. *Id.* The defendant, a citizen of Ghana, also agreed to return to Ghana. *Id.* The court stated that while the sentence "may appear to coddle the criminal, [it] is necessary in light of the serious health risks. It is also practical since it will prove less expensive to the public than paying for Ms. Pokuua's detention and parturition." *Id.*

135. 792 F. Supp. 920, 921 (E.D.N.Y. 1992).

136. *Id.*

137. *Id.*

138. 923 F.2d 1079 (3d Cir. 1991).

139. The court concluded that it had no authority to depart downward based on § 5H1.6 of the Guidelines Manual. *Id.* at 1081-82. It sentenced the defendant to 17.5 years in prison. *Id.* at 1082.

140. *Id.* at 1082-83. The court stated: "[A]lthough the district court had the authority to depart downward on the basis of extraordinary circumstances, Headley failed to show that the circumstances in this case were extraordinary." *Id.* at 1083. See also *United States v. Califano*, 978 F.2d 65 (2d Cir. 1992) (noting the discretion of district courts to depart downward for extraordinary family circumstances).

141. See *supra* notes 126-28 (various considerations of family ties and responsibilities, whether they should apply in sentences of probation, fines or incarceration, and whether they are extraordinary); see also *United States v. Cacho*, 951 F.2d 308, 310-11 (11th Cir. 1992).

Thomas,¹⁴² for example, the defendant was sentenced to probation after being arrested and convicted of possessing more than a kilogram of cocaine. The trial court departed from the Guidelines based on the defendant's assistance in the investigation and her burdensome family responsibilities.¹⁴³ The government appealed the sentence asserting that the court's downward departure was unreasonable since the government had recommended a six-year sentence as opposed to a mandatory ten-year sentence.¹⁴⁴ On appeal, the Seventh Circuit held that § 5H1.6 should be read narrowly and should not apply to cases involving incarceration.¹⁴⁵ Consequently, it vacated the sentence and remanded the case for resentencing.¹⁴⁶

Many federal courts have determined that they are authorized to depart downward from the Guidelines for extraordinary family circumstances and that § 5H1.6 applies even in situations where incarceration is mandatory. Adding to the chaos is the courts' inconsistent approach to what constitutes "extraordinary." The cases below demonstrate how courts have determined what constitutes "extraordinary family circumstances" and whether a family's dependence on the defendant justifies a downward departure.

In *United States v. Califano*,¹⁴⁷ the defendant appealed his sentence which entailed a prison term of 235 months, five years supervised release, a \$10,000 fine and a fifty dollar special assessment. He contended that the district court judge who sentenced him did not appreciate the power to downwardly depart from the Guidelines.¹⁴⁸ The Second Circuit held that the district court had authority to make a downward departure in sentenc-

142. 930 F.2d 526 (7th Cir.), *cert. denied*, 112 S. Ct. 171 (1991).

143. *Id.* at 529. Thomas cared for two mentally disabled adult children, a four-year-old grandson, and had a third child who was institutionalized. *Id.*

144. *Id.* at 527.

145. *Id.* at 530. The court reasoned that § 5H1.6 should apply only when probation is an option. *Id.* In this situation the court recommended that only Thomas' assistance with the investigation should be taken into account. The court quoted § 5H1.6 as follows:

Family responsibilities that are complied with are relevant in determining whether to impose restitution and fines. Where the guidelines provide probation as an option, these factors may be relevant in this determination. If a defendant is sentenced to probation or supervised release, family ties and responsibilities that are met may be relevant in the determination of the length and conditions of supervision.

Id.

146. *Id.* at 531.

147. 978 F.2d 65 (2d Cir. 1992).

148. *Id.* at 65.

ing.¹⁴⁹ Since the judge had stated he was uncertain as to his authority, Califano's sentence was vacated.¹⁵⁰

The Second Circuit once again allowed a downward departure in *United States v. Johnson*.¹⁵¹ There, the defendant was convicted of conspiracy, bribery and theft of public money.¹⁵² The judge gave the defendant a sentence ten levels below the Guidelines' recommendation because the defendant had the sole responsibility to care for four young children.¹⁵³ Affirming this sentence, the court of appeal held that extraordinary family circumstances existed, justifying a downward departure from the Sentencing Guidelines.¹⁵⁴ The court explained that the hardship of leaving children motherless created an extraordinary circumstance.¹⁵⁵

The Second Circuit made a third determination of extraordinary family circumstances in *United States v. Alba*.¹⁵⁶ In *Alba*, the defendant pled guilty to conspiracy to possess and distribute cocaine.¹⁵⁷ The court noted his minimal role in the crime and departed from the Sentencing Guidelines range of forty-one to fifty-one months incarceration, and instead sentenced him to six months in a halfway house, two years supervised release and a fifty dollar fine.¹⁵⁸ The Second Circuit held that the district court's decision to consider the defendant's extraordinary family circumstances was not an abuse of discretion.¹⁵⁹ In so doing, it noted that the defendant had to care for a wife, two children, a disabled father and a paternal grandmother.¹⁶⁰

149. *Id.* at 66. The case was remanded for resentencing based on the court's opinion that the lower court judge would have the authority to depart based on *United States v. Johnson*, 964 F.2d 124 (2d Cir. 1992). The district court judge noted that the defendant needed to return to help his family since "his children are in bad shape." 978 F.2d at 66.

150. 978 F.2d at 66.

151. 964 F.2d 124 (2d Cir. 1992).

152. *Id.* at 125.

153. *Id.* at 126. The children consisted of two six-year-olds, a five-year-old and a five-month-old baby. *Id.*

154. *Id.* at 129. The court reasoned that "[t]he rationale for a downward departure here is not that [defendant's] family circumstances decrease her culpability, but that we are reluctant to wreak extraordinary destruction on dependents who rely solely on the defendant for their upbringing." *Id.*

155. *Id.* at 130. The court also noted that "[t]he United States Sentencing Guidelines do not require a judge to leave compassion and common sense at the door to the courtroom." *Id.* at 125.

156. 933 F.2d 1117 (2d Cir. 1991).

157. *Id.* at 1118.

158. *Id.*

159. *Id.* at 1122.

160. The court reasoned that "[t]he sentencing court found that Gonzalez' incarceration in accordance with the Guidelines might well result in the destruction of an otherwise strong family unit and concluded that these circumstances were sufficiently extraordinary in this case to support a downward departure." *Id.*

Other circuit courts have also allowed downward departures. In *United States v. Pena*,¹⁶¹ the Tenth Circuit considered the sentence of a defendant convicted of possession with intent to distribute marijuana.¹⁶² The trial court sentenced her to a five-year probation term rather than the required imprisonment of twenty-seven to thirty-three months under the Guidelines.¹⁶³ The sentence was based partly on the fact that the defendant was the sole supporter of her two-month-old child and was helping to support her sixteen-year-old daughter who also had a two-month-old child.¹⁶⁴ The court held that the defendant's five-year probation term would sufficiently deter and rehabilitate her.¹⁶⁵ The Tenth Circuit affirmed that these considerations were appropriate.¹⁶⁶

Notwithstanding these decisions, other federal courts have held that the potential separation of families is not an extraordinary family circumstance, but instead is a mere disruption of spousal and parental relationships.¹⁶⁷ These courts view situations such as those described in *Pokuaa*, *Headley*, *Arize* and *Califano* as ordinary, not requiring downward departure.¹⁶⁸ As described below, many courts have held that defendants' family responsibilities are not considered extraordinary enough to justify downward departure.

In *United States v. Cacho*,¹⁶⁹ for example, the defendant pled guilty to conspiracy to import cocaine.¹⁷⁰ The Guidelines provided a range of seventy-eight to ninety-seven months in prison. Cacho was sentenced to seventy-eight months.¹⁷¹ On appeal, Cacho argued that the court should have downwardly departed because she had played a minor role in the crime and had to care for four young children.¹⁷² The Eleventh Circuit held that

161. 930 F.2d 1486 (10th Cir. 1991).

162. *Id.* at 1489.

163. *Id.*

164. *Id.* at 1494.

165. *Id.* The court also reasoned that the defendant's children would be placed at risk should the defendant be incarcerated for a potentially long period of time. *Id.*

166. *Id.* at 1496.

167. *See United States v. Daly*, 883 F.2d 313, 319 (4th Cir. 1989), *cert. denied*, 110 S. Ct. 2622 (1990).

168. *See, e.g., United States v. Mogel*, 956 F.2d 1555, 1565 (11th Cir.), *cert. denied*, 113 S. Ct. 167 (1992) (holding that judges may depart downward under § 5H1.6 for extraordinary family circumstances, but finding that the defendant's family circumstances were ordinary).

169. 951 F.2d 308 (11th Cir. 1992).

170. *Id.* at 309.

171. *Id.*

172. *Id.*

Cacho's four small children did not create an extraordinary circumstance, and therefore, downward departure was inappropriate.¹⁷³

The First Circuit reached a similar conclusion in *United States v. Carr*.¹⁷⁴ There, the defendants, a husband and wife, pled guilty to mail fraud.¹⁷⁵ The applicable Guideline range for Terry Carr was fifteen to twenty-one months, and the applicable range for Mark Carr was twelve to eighteen months.¹⁷⁶ Upon sentencing, the district court allowed a downward departure since the Carrs had a four-year-old son to care for.¹⁷⁷ The First Circuit, however, ruled that the departure was improper because the Carr's case was not "outside the 'heartland' of typical cases," and did not constitute legitimate grounds for departure.¹⁷⁸

Similarly, in the Fourth Circuit case of *United States v. Brand*,¹⁷⁹ the defendant pled guilty to a charge of distributing cocaine which carries a recommended minimum sentence under the Guidelines of ten to sixteen months in prison.¹⁸⁰ The district court considered her family situation (she had two young children) and sentenced her to five years probation.¹⁸¹ The Fourth Circuit held that her situation was not extraordinary, only unfortunate, and thus there would be no downward departure.¹⁸²

173. *Id.* at 311. The court noted that the Sentencing Commission considered family ties and responsibilities relevant if the sentence involves restitution and fines, probation and supervised release. *Id.* The court reasoned that Cacho "has shown nothing more than that which innumerable defendants could no doubt establish: namely, that the imposition of prison sentences normally disrupts . . . parental relationships." *Id.* (quoting *United States v. Daly*, 883 F.2d 313, 319 (4th Cir. 1989), *cert. denied*, 496 U.S. 297 (1990)).

174. 932 F.2d 67 (1st Cir. 1991).

175. *Id.* at 68.

176. *Id.*

177. *Id.* Terry Carr was sentenced to a community treatment center for 10 months, and Mark Carr was sentenced to five months in prison and five months in community treatment. *Id.*

178. *Id.* at 72. The court reasoned that the defendant's "responsibilities to a young child are neither atypical nor unusual." *Id.* The court noted that the defendants agreed that a grandparent would care for the child. *Id.* The court vacated and remanded the sentence. *Id.* at 73.

179. 907 F.2d 31 (4th Cir.), *cert. denied*, 498 U.S. 1014 (1990).

180. *Id.* at 32.

181. *Id.* at 32-33. At the sentencing hearing, the court focused on Mrs. Brand's two children, ages seven and 18 months. Mrs. Brand noted that she was in the process of separating from her second husband, with whom, according to the pre-sentence report, she was engaged in a bitter custody battle. *Id.* at 32. Fully expecting to go to jail, Mrs. Brand stated that the older child was going to live with her foster parents in Pennsylvania and the younger one would live with her mother-in-law because neither of the proposed custodians could care for both children. *Id.*

182. *Id.* at 33. The court reasoned that it was ordinary for a child to be placed with "blood strangers" in a situation where the parent is incarcerated. *Id.* The court further noted:

A sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children. It is apparent that in many cases the other parent may be unable or unwilling to care for the children, and that the children will have to live with relatives, friends, or even in foster homes.

Id.

The Ninth Circuit has encountered some of the same dilemmas faced by other federal courts including the issue of whether judges have the authority to depart downward from the Guidelines. In *United States v. Pimentel*,¹⁸³ the defendant was convicted of conspiracy and subscribing and presenting false statements in government documents.¹⁸⁴ The defendant appealed the district court's sentence because the court believed that it had no authority to depart downward based on extraordinary family circumstances.¹⁸⁵ The Ninth Circuit ruled that extraordinary family circumstances can create a possibility of downward departure.¹⁸⁶ It remanded the case for further proceedings because the defendant had a young, diabetic child.¹⁸⁷

Although the Ninth Circuit has held that extraordinary family circumstances may justify downward departure,¹⁸⁸ the defendant still must show that there are particular family responsibilities which are extraordinary. For example, in *United States v. Shrewsberry*,¹⁸⁹ the defendant, having pled guilty to a drug charge, argued on appeal that the court erred in failing to depart downward on the basis of her family obligations.¹⁹⁰ The court noted that the district court found the defendant's family obligations "not sufficiently unusual to justify departure" and refused to upset that determination on appeal.¹⁹¹ Similarly, in *United States v. Berlier*,¹⁹² the defendant pled

183. No. 92-50097, 1993 U.S. App. LEXIS 24299, at *1 (9th Cir. Sept. 17, 1993).

184. *Id.*

185. *Id.* at *2.

186. *Id.* at *3. It was not clear whether the district court erroneously believed it had no authority to downward depart under § 5H1.6 of the Sentencing Guidelines, or if it just exercised its sentencing discretion. *Id.*

187. *Id.*

188. See *United States v. Anders*, 956 F.2d 907, 912 (9th Cir.), *cert. denied*, 113 S. Ct. 1592 (1992) (noting that family ties and responsibilities may support departure in extraordinary circumstances); *United States v. Boshell*, 952 F.2d 1101, 1107 (9th Cir. 1991) ("Only in extraordinary circumstances may a court rely on one of the six factors listed in section 5H1.1-6 to depart from the guidelines range."); *United States v. Floyd*, 945 F.2d 1096, 1100-01 (9th Cir. 1991) (acknowledging that § 5H1.6 provides that family ties and responsibilities are ordinarily not relevant in determining whether a sentence should be outside the guidelines, but departing in this case because the defendant was abandoned at youth); *United States v. Mondello*, 927 F.2d 1463, 1470 (9th Cir. 1991) (holding that the "[Sentencing] Commission's decision to deem the six factors 'not ordinarily relevant' to departure determinations accords fully with Congress's expression in 28 U.S.C. § 994(e) (1988) of the 'general inappropriateness' of considering them in sentencing").

189. 980 F.2d 1296, 1297 (9th Cir. 1992). In *Shrewsberry*, the government dismissed certain charges because the defendant cooperated with authorities, but would not recommend downward departure. *Id.*

190. *Id.* at 1298.

191. *Id.* The court reasoned that its decision was consistent with the Guidelines' policy to downplay the relevance of family ties. *Id.*

192. 948 F.2d 1093 (9th Cir. 1991).

guilty to embezzlement and was sentenced to probation and a fine.¹⁹³ The district court noted that the defendant's family ties were one reason to depart downward.¹⁹⁴ On appeal, however, the Ninth Circuit held that these family ties did not justify downward departure and remanded the case for resentencing.¹⁹⁵

The ambiguity within the Guidelines and the disparity in federal court decisions reflect the often conflicting desires to consider family responsibilities in sentencing, as well as political and judicial realities. While individual courts have fashioned sentences that are responsive to defendants' family responsibilities, the sentencing system as a whole has failed to deal with the problems inmates' families face. A system that considers only extraordinary family responsibilities cannot solve the problems faced by a majority of inmates and their families.

IV. Programmatic Efforts Which Address the Needs of Inmates and Their Families

Although the problems of inmates' families are largely ignored, various correctional systems and community-based organizations have made efforts to address these difficulties once sentences have begun. These efforts fall into five categories: family time programs, inmate educational programs involving children, parenting education programs, family service programs and family education programs.¹⁹⁶ These programs serve a vital role in combatting the effects of incarceration on inmates and their families, but because their existence depends on the particular correctional facility and its community, inmates do not typically have access to them. The programs described below serve as examples of the type of approach correc-

193. *Id.* at 1094. "The government appeals a downward departure from the Guideline sentence in this case of a repentant white collar embezzler who made restitution and pled guilty. . . . The resulting sentencing range was 15-21 months imprisonment and a fine." *Id.*

194. *Id.* at 1095-96. On appeal, the defendant argued "that his efforts to keep his family together [were] sufficiently unusual to justify a downward departure." *Id.* at 1096.

195. *Id.* at 1096-97. The court reasoned that the Guidelines expressly provide that family ties and responsibilities are not ordinarily relevant in determining whether a sentence should be outside the guidelines. *Id.* at 1096. It determined, therefore, that "family ties ordinarily should not be a factor in departing from Guideline Sentences." *Id.* Noting that other courts had refused to depart based on family circumstances that some might consider more poignant than those found in the present cases, the court found the defendant "has shown nothing more than that which innumerable defendants could no doubt establish: namely, that the imposition of prison sentences normally disrupts spousal and parental relationships . . ." *Id.* at 1096 (quoting *United States v. Brand*, 907 F.2d 31, 33 (4th Cir.) (internal citations omitted), *cert. denied*, 498 U.S. 1014 (1990)).

196. In this section we have chosen a representative sampling of the various types of programs available to inmates and their families. While these programs share similar goals, their methods and particular practices vary based on their individual community needs and resources.

tional facilities should take in meeting the goals of incarceration while remedying its most adverse effects.

A. Family Time Programs

Family time programs give inmates and their families the opportunity, time and freedom to interact as a family unit.¹⁹⁷ Since prison visiting halls are typically crowded, uncomfortable and impersonal, they do not provide families with the opportunity to discuss important concerns and issues that arise during their time of separation.¹⁹⁸ These programs confront this need by providing additional facilities, extra time, materials and other necessities to make family visits more productive and helpful in keeping the family intact.

One such family program instituted at the Louisiana State Penitentiary is known as Butler Park. The prison administration describes it as "a spacious tree-shaded park, . . . created at the prison for eligible trusty inmates to have picnics with their approved visitors."¹⁹⁹ The program emphasizes giving inmates and their relatives time together as a family.

Family time programs attempt to help inmates reintegrate into free society by maintaining their family ties while incarcerated.²⁰⁰ In Butler Park a "father can play tag with his kids, they can move around, the family can cook and do something together as a family. This type of visiting is a much

197. These programs include: Creative Connections, P.O. Box 274, Waterford, CT 06835, which provides all-day gatherings for the families; New Hope Children's Center, P.O. Box 410, Milan, GA 31060, which provides transportation assistance and a home-type setting for visitation; CHIPS (Challenging Incarcerated Parents and Spouses) Program, P.O. Box 417, Jefferson, MO 65101, which provides parenting skills classes and special family visits in a home-like setting; Edna Mahon Correctional Facility, Drawer E, Clinton, NJ 08809, which provides visits two times each month with transportation, lunch and play activities, and camp retreats for selected inmates and their children one Saturday each month; Parent-Action Network, State Correctional Institute-Graterford, P.O. Box 246, Graterford, PA 19426, which helps inmates operate children's play centers; LIFT (Linking Inmate Families Together) Program, P.O. Box 70, Alderson, WV 24910, which provides a children's center next to the visiting room where inmate mothers and their children can play on weekend days and holidays; and New York State Department of Correctional Services, Building 2, State Campus, Albany, NY 12226, which offers a Family Reunion Program at 13 sites serving 15 facilities and provides residential units for visits lasting from 36-44 hours. For additional program information, see *DIRECTORY OF PROGRAMS SERVING FAMILIES OF ADULT OFFENDERS* (James W. Mustin ed., 1992).

198. "Regardless of the frequency of family visits . . . and the conditions under which such visits are held . . . family visits are in fact quite artificial. They are closely monitored as a rule and lack the privacy in which family issues might be resolved." Jorgensen et al., *supra* note 34, at 49.

199. WILBERT RIDEAU, *LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS* 196 (Wilbert Rideau & Ron Wikberg eds., 1992).

200. *Id.* at 197.

more meaningful way to let the inmate remain a husband to his wife, . . . [and] a father to his children."²⁰¹

The administration also sees security benefits resulting from this program. To qualify for time in Butler Park with his family, an inmate must go one year without a disciplinary report.²⁰² One inmate commented that "after the first visit in the park, my wife served notice on me that, if I cause her to lose this privilege, I'm in trouble."²⁰³ Butler Park is an excellent example of a program which can address the security concerns of prison administrators while providing a forum for meaningful family interaction.

B. Inmate Educational Programming Involving Children

Educational programs that involve inmates and their children represent a second type of approach to the problem.²⁰⁴ These programs attempt to put an end to the cycle of educational deficiency and illiteracy that many of these families experience by educating incarcerated parents, and then creating the opportunity for parents to teach their children. By making learning a cooperative effort where inmate parents can practice and use their new skills with their children, both children and parents are able to benefit from these increased skills.

Motherread is one such program aimed at incarcerated mothers in the North Carolina prison system. The program is based on "the belief that the parent-child connection and the desire to preserve and strengthen it are profoundly motivating to the adult learner."²⁰⁵ The mothers participate in a class where they learn to read and write. This process includes reading and writing stories about themselves for their children. During visits with their children, the family also participates in story sharing activities.²⁰⁶ The incarcerated mothers improve their own reading abilities, and at the same time improve their relationships with their children and develop their parenting skills and self-esteem.²⁰⁷ The mothers' improvement in reading skills has also led to improvement in the childrens' attitudes about read-

201. *Id.*

202. *Id.* at 200.

203. *Id.* at 197.

204. These programs include: Safer Foundation, 571 West Jackson, Chicago, IL 60661, which provides literacy tutoring to the inmates; and the Iowa Correctional Institute for Women, P.O. Box 700, Mitchellville, IA 50169, which distributes booklets for the inmate parents to send to their children which describe their daily routine and the institution. For a full list of these type of programs, see DIRECTORY OF PROGRAMS SERVING FAMILIES OF ADULT OFFENDERS, *supra* note 197.

205. Emily Herrick, *The Prison Literacy Connection*, XVI CORRECTIONS COMPENDIUM, Dec. 1991, at 5, 9.

206. *Id.*

207. *Id.*

ing.²⁰⁸ By educating inmate mothers, the program achieves the additional benefit of reaching out to the "innocent victims of crime, the children[,] [because] if parents don't read, chances are children won't either."²⁰⁹

C. Parenting Education Programs

Parenting education programs teach parenting skills and methods to incarcerated parents.²¹⁰ These classes explore alternative parenting approaches in the hope that when these parents return to their families they will be better prepared to deal with parenthood, and the particular stresses associated with incarcerated parents returning to their families.

Parents in Prison is a program that was started by the residents of the Tennessee State Penitentiary. The residents submitted a proposal to the administration "for a program to teach parenting skills relevant for the prison population."²¹¹ Their main purpose was to create a program that could help

208. *Id.*

209. *Id.*

210. These programs include: Hope House, 3789 Hoover Street, Redwood City, CA 94063, which provides parenting education, self-esteem classes and training in life skills; Family Integration Program, P.O. Box 500, Canon City, CO 81210, which provides groups and classes on parenting and family issues, retreats for incarcerated mothers and their children, and pre- and post-natal programs for pregnant inmates; Family Re-Entry, Inc., 61 Roton Avenue, Norwalk, CT 06853, which provides family-focused support/skills groups for inmates; Mothers in Prison Project, 199 West Main Street, Niantic, CT 16357, which provides parenting education as well as public education on parenting issues and resources for visitation and parenting programs; Project REACH (Reunite Each Child), Women's Correctional Institution, P.O. Box 218, Hardwick, GA 31304, which provides parenting skills education to female prisoners and special visiting programs for their children; Topeka Correctional Facility Central, 3401 Southeast Rice Road, Topeka, KS 66607, which provides parenting skills training, prenatal classes, classes on child development, nutrition, self-esteem and anger management; Penquis C.A.P., Inc., P.O. Box 1162, Bangor, ME 04401, which provides an eight-week parenting skills program for inmates; Central Mississippi Correctional Facility, P.O. Box 88550, Pearl, MS 38208, which provides classes for female offenders on parenting skills, child abuse, self-esteem, communication and values; Nebraska Center for Women, Mother-Offspring Life Development Program, Route 1, Box 33, York, NE 68467, which coordinates child visits and provides classes to inmates on human development, sexuality, parenting, Lamaze childbirth and life skills management; Wilmington College, P.O. Box 1285, Wilmington, OH 45177, which provides parenting programs for male and female offenders, a prenatal program and life-coping classes for female offenders; Oklahoma Department of Corrections, FACT (Fathers and Children Together) Program, P.O. Box 548, Lexington, OK 73051, which provides parenting skills education to inmate fathers and opportunities to practice those skills with children; Parent Resource Association/Incarcerated Parents and Their Children, 213 Fernbrook Avenue, Wyncote, PA 19095, which provides family counseling programs for parole offenders and focuses on parent-child relationships; and PACT, Inc. (Parents and Children Together), P.O. Box 15543, Fort Worth, TX 76119, which provides parenting classes for inmates. For additional program information, see DIRECTORY OF PROGRAMS SERVING FAMILIES OF ADULT OFFENDERS, *supra* note 197.

211. Creasie F. Hairston & Patricia W. Lockett, *Parents in Prison: New Directions for Social Services*, 32 Soc. WORK, Mar.-Apr. 1987, at 162, 162.

to create a better life for the inmates and their children.²¹² Through educational activities and special events, the program, "seeks to increase participants' knowledge of child development, effective parenting styles and techniques, and family communication patterns."²¹³ The program places particular emphasis on understanding the impact of incarceration on children.²¹⁴

The unique aspect of Parents in Prison is that it is run by the inmates themselves. An inmate committee does the planning and coordinating of all of the program activities including recruiting volunteers and program participants, disseminating program information, developing resource materials, identifying program needs and evaluating the program.²¹⁵ The program has four separate components: home study courses, classroom courses, monthly special event/rap sessions and special projects.²¹⁶ The classroom discussions are concerned with "ways fathers can become involved in a positive manner in their children's lives [as well as] recognition and positive management of problems related to reentering family life after a period of incarceration."²¹⁷ One program participant explained the program's benefits by saying, "Being an incarcerated parent, I have long wondered about questions concerning my child, such as what to tell my son when he asks why I am in prison and when will I be coming home. These questions and answers are being addressed in this program."²¹⁸

D. Family Service Programs

Other programs have been created to address the emotional and financial stresses that result from familial incarceration. These programs attempt to provide families with financial advice, counseling services for children and caregivers, and transportation needed for families to visit their loved ones in prison.²¹⁹ One of these programs, Aid to Imprisoned Mothers, Inc.

212. *Id.*

213. *Id.*

214. *Id.* Inmate parents need support from other parents who are experiencing the unique difficulties of being a parent from prison. Through experience and discussion they can help one another deal with issues that other parents do not experience. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 162-63.

218. *Id.* at 163.

219. These programs include: Friends Outside National Organization, 2105 Hamilton Avenue, #290, San Jose, CA 95125, which through 14 chapter organizations offers support groups for families, prison visitor centers, family transportation to prisons, educational, social, recreational activities and counseling for prisoners' children, and emergency services such as food, clothing, transportation and lodging; Families in Crisis, Inc., 30 Arbor Street, Hartford, CT 06106, which provides information and outreach and family counseling; Mott's Children's Health Center, 806 Tuuri Place, Flint, MI 48503, which provides home visits, case management support groups for

("AIM"), is a private, non-profit, community-based agency that addresses the critical needs of the families of incarcerated mothers.²²⁰ AIM provides services to predominantly African-American, low-income, inner-city families in which the grandmother cares for the grandchildren while the mother is incarcerated. The program provides "intergenerational support by working with the incarcerated mother, her children, and the grandparent caretaker."²²¹ AIM seeks to improve the chances that families will remain intact through the incarceration period, and to assist the children of incarcerated parents in becoming "productive members of society."²²²

In addition to providing support groups, and educational and preventive programming for the children and caregivers, AIM offers self-help manuals, referrals and information on parental rights and responsibilities.²²³ AIM also supplies transportation for a monthly visit between the mothers and their children.²²⁴ Attorney Sandra Barnhill founded the program because "mothers are not the only ones who do time when they're in prison. Their families do too. What I've come to realize is that whatever help that comes will have to come from the community, not from the Government."²²⁵ AIM helps these incarcerated mothers find the hope, vision and ability to help themselves and their families.²²⁶

children ages five to 10 and their caregivers, advocacy for children and caregivers, health services and flexible funding for crises and special needs; Prison PATCH (Parents and Their Children), P.O. Box 871, Chillicothe, MO 64601, which provides support groups, transportation for children, counseling for women and children, and liaison for mothers with family service agencies and the courts; New Jersey Association on Correction, 986 South Broad Street, Trenton, NJ 08611, which provides weekly parent/child visits, emergency food, shelter and clothing; Project Impact/Peanut Butter and Jelly Center, 1101 Lopez Southwest, Albuquerque, NM 87105, which provides support and education to inmate families, therapeutic visitation in a secure, stimulating environment and follow-up support for ex-inmates and families; My Mother's House, 36-30 12th Street, Long Island City, NY 11106, which provides foster care for inmates' children, maintenance of relationship between parent and child, and assistance to reunite parent and child; Family Awareness Project, P.O. Box 85458, Sioux Falls, SD 57118-5458, which promotes family unity in prison, educates the public regarding the lack of rehabilitation and helps families deal with the separation; and OPEN, Inc. (Offender Preparation and Education Network), P.O. Box 566025, Dallas, TX 75356-6025, which develops self-help handbooks and educational materials to help reduce adult recidivism crime by improving offenders' ability to readjust to society and by strengthening family ties. For additional programming information, see *DIRECTORY OF PROGRAMS SERVING FAMILIES OF ADULT OFFENDERS*, *supra* note 197.

220. See AIM, Materials, *supra* note 25.

221. See AIM, Materials, *supra* note 25.

222. See AIM, Materials, *supra* note 25.

223. See AIM, Materials, *supra* note 25.

224. See AIM, Materials, *supra* note 25.

225. See AIM, Materials, *supra* note 25.

226. See AIM, Materials, *supra* note 25. As one released mother said, "I have missed out on a whole lot while I was incarcerated. But I want to thank AIM for bringing my children to see me. Had it not been for AIM, we would not have had a chance to continue our relationship. We would have been complete strangers to one another." See AIM, Materials, *supra* note 25.

E. Family Education Programs

Family education programs integrate the goals of education, family unity and inmate parenting skills to create a synergistic effect. By taking a holistic approach to the needs of inmates and their families, these programs address many of the problems discussed above. As one program observed, "addressing real-life issues, such as drug use or family relationships within a prison literacy program, in addition to the ABC's, may be one of the keys to success."²²⁷

The mission of one such program, the D.C. Family Literacy Project,²²⁸ is to "connect incarcerated parents with their families through literacy-building activities and parenting skill development."²²⁹ The program seeks to break the inter-generational cycle of diminished literacy for inmates and their children by using children's literature and book-related activities to introduce issues in child development, to model developmentally appropriate activities which build literacy, and to provide positive shared experiences between incarcerated parents and their families.²³⁰

Unlike the purely community-based programs or purely correctional-based programs, the Project is a cooperative effort among Georgetown University Law Center, the D.C. Department of Corrections, the D.C. Public Library, community literacy providers and various volunteer groups. The cooperative nature of the program invites input from non-correctional disciplines, enhancing both the program's day-to-day effectiveness and its ability to assist incarcerated families with their adjustment to post-incarceration life.²³¹

Three times a year in the D.C. correctional facilities, the Project runs a two-component program. The first component is a child development/parenting/literacy-building seminar. A child development educator teaches this seminar to the incarcerated parents. Participants talk about their own parenting styles and experiences, including separation from their families, sibling rivalry, discipline, age-appropriate reading materials, communicating with their children and self-esteem.²³² The seminar introduces topics in

227. Herrick, *supra* note 205, at 6.

228. The Project was founded by Professor Richard L. Roe of the Georgetown University Law Center and one of the authors of this article (Professor Brooks).

229. RICHARD L. ROE, MISSION STATEMENT OF THE D.C. FAMILY LITERACY PROJECT (1992).

230. *Id.*

231. Furthermore, by integrating community-based agencies into a correctional program, families can be referred to these agencies outside of the correctional facility. For example, an abundance of literacy programs cannot fill their classrooms. The families of current and former inmates can be channeled into these programs by involving them during incarceration.

232. The discussions are not intended to present the "right" way to parent but to challenge preconceptions and present alternatives in a supportive and encouraging atmosphere. There is no

parenting and child development, and includes the unique innovation of exploring child-development issues through the use of children's literature.²³³ The seminar provides an opportunity to learn skills that can be applied in the second component of the program, the family visit, and to discuss the nature of those visits.²³⁴

Once a week the incarcerated parents have a structured, educational family visit with their children and the non-incarcerated caregivers of their children. The Project provides transportation, as well as books, toys and supplies needed for literacy-building activities. During the family visit, time is allotted for a literacy-building family activity,²³⁵ for a group literacy activity,²³⁶ and for the incarcerated parents to read with their children while the non-incarcerated parents attend a parenting session.²³⁷

way to inculcate the parents into the "right" way to raise their children. The instructor must be willing to listen to the participants' opinions and experiences and guide discussions with the ultimate goal of "discovering" effective parenting methods.

233. Each subject in the seminar is approached using children's literature. Modern children's literature deals with issues such as self-esteem, discipline and absent parents. The incarcerated parents can read these books with their children and deal with these issues together.

234. During one family visit following a child development class which dealt with sibling rivalry and how to encourage sharing among children, two resident fathers were observed dealing with their sons in a fight over the same toy. The two fathers play-acted the fight that their sons were having as well as their "sharing" solution in an attempt to show the boys how to cooperatively settle their dispute as their fathers had just done. The seminar then gives the incarcerated parent the opportunity to discuss the effectiveness of such approaches. D.C. Family Literacy Project, Family Visit Evaluation by Kimberly Bahna (one of the authors), March 1, 1992.

235. Each family visit begins with some family time during which the families greet one another and work together on a project that the entire group is working on. During this time, the children typically work on a large paper mural representation of that week's theme (e.g., Thanksgiving, Halloween, Colors, Shapes). During this time the families also work on putting together a family book, which is a project they work on together throughout the cycle.

236. The group activities include making playdough, planting seeds, making musical instruments and learning songs. Incarcerated parents, whose families are unable to attend that particular session end the session by presenting a story to the class which they prepare during the visit in a separate room. These presentations are typically dramatizations of children's stories and have included rap versions of *Goldilocks and the Three Bears*, a dramatization of Ezra Jack Keats' book, *A Snowy Day*, and jazz versions of poems by Eloise Greenfield.

237. D.C. Family Literacy Project Interview with Alvin Whitlow, Inmate, Medium Security Facility, District of Columbia Department of Corrections, in Lorton, VA (Oct. 1992). The caregivers discuss parenting concerns, literacy ideas and issues that are specific to having the father or mother of their children in prison. *Id.* Such support from people in similar situations allows the caretakers the freedom to talk about issues of which the general public has no concept. *Id.* While the caretakers are having their discussion, the inmate parents have time alone with their children to build a relationship as parents on their own. *Id.* That time is usually devoted to reading, and incarcerated parents are given the opportunity to show their children that they are interested in the children's learning, that reading is a fun activity, and that they genuinely care about the children in a day-to-day way that their children do not see because of the parents' absence from the home. *Id.* "It gives me the chance to sit down with my family and show my commitment to them and to my daughter's education. The program has helped my family understand my commitment to them and education." *Id.*

These visits help to rebuild the fractured families²³⁸ while addressing the educational deficiencies commonly found among these inmates and their families.²³⁹ Furthermore, incarcerated parents and their non-incarcer-

238. D.C. Family Literacy Project Written Evaluation by Denise Marshall, Medium Security Facility, District of Columbia Department of Corrections, in Lorton, VA (Oct. 1992). One inmate's family in the program illustrates the importance of the program in terms of helping to rebuild the fragile family structures of incarcerated families. *Id.* William is a 27-year-old man and a participant in the program. *Id.* He has been incarcerated for 10 years and is up for parole release in early 1994. *Id.* While incarcerated, William married a woman with one daughter; since then, the woman has given birth to another daughter. *Id.* For William, the concept of family, and how to be a good father/husband, was not within his experience. *Id.* Before the program William's two daughters did not know him well, and only in the context of a crowded and loud visiting hall. *Id.* As his wife said in evaluating the program, "This will give us as a family, a little time to really be together without guards looking down your throat. Then he can really open up to the children." *Id.* The program evaluator also felt that the program was important because "[t]hey [the girls] will get a chance to see a different side of him that they do not often get to see." *Id.* During the course of the program, William was concerned about his ability to meet the needs of his daughters, who are eight years apart in age. *Id.* Obviously, the strategies that would work with the two-year-old would not work the same, or as well, with the nine-year-old. *Id.* It was meaningful to observe this family during the twelve family visits and note their progress as a family and William's progress as a father.

In an early program evaluation William said, "The program helps to open up their minds. They are beginning to talk to me more openly." *Id.* D.C. Family Literacy Project Written Evaluation by William Wheeler-Bey, Medium Security Facility, District of Columbia Department of Corrections, in Lorton, VA (Oct. 1992) [hereinafter Wheeler-Bey, Evaluation]. By the end of the program the Site Coordinator and other program volunteers noted an obvious difference in his comfort level with the girls on his own. *Id.* Although it was more difficult for him in some ways because of the disparity in the girls' ages, he had adapted to that by having his older daughter read to both him and his younger daughter. *Id.*

As a family, they developed their skills while the older daughter was encouraged to read to all of them. *Id.* This gave her many messages about her importance to the family and her father's interest in her reading and other school activities. *Id.* In the end, William said that the program had built in him a sense of responsibility to his family and given him a better idea of his family's needs and wants. *Id.* It also gave him a sense that he was part of the family and able to work with them. *Id.* That sense of responsibility and family are vitally important for a family who will live together for the first time six or seven years into the marriage. D.C. Family Literacy Project Observations of Site Coordinator (Fall 1992); Wheeler-Bey, Evaluation.

239. An interview with one of the incarcerated parents in the program illustrates the effectiveness of the program in terms of developing the educational ability of both the children and the parents. D.C. Family Literacy Project, Interview with Kevin James, Medium Security Facility, District of Columbia Department of Corrections, in Lorton, VA (Dec. 1992). Kevin James, an inmate at the Medium Security Facility at Lorton, Virginia, and his family participated in the D.C. Family Literacy Project for the first cycle of the program before his release on parole. *Id.* As an alumnus and a member of the very first cycle of the program, he has helped to orient new inmates and their families to the program, and was very helpful in evaluating the program. *Id.* Before the program, his nine-year-old daughter was getting C's and D's in school, and after the program, where she and both of her parents began to concentrate on her reading skills and to talk about her schoolwork, her grades improved to A's and B's. *Id.* While this provides only one example, it is indicative of a larger impact. *Id.* Once these children know that both of their parents are interested in what and how they are learning, and they see their incarcerated parent both reading and enjoying learning, they are more likely to see education in a positive light. *Id.* It is this family

ated counterparts are given the opportunity to practice parenting in a structured educational environment. In this way, these parents learn how to be teachers to their children.²⁴⁰

While all of the above programs are tailored to fulfill the needs of their respective constituencies, and do so in powerful ways, they simply do not have the resources to address the needs of the more than one million families with an incarcerated family member. These programs do, however, model a progressive approach to addressing the problems of these families. Unfortunately, there are no systematic or comprehensive programs that exist at a national or even state level. As a result, an incarcerated parent's relationship with his or her family largely depends on the region in which he or she is incarcerated, and whether the correctional facility offers family-oriented programs.

Conclusion

Ever since the first prison school was created in 1798 in the Walnut Street Jail in Philadelphia, the United States correctional system has purported to support goals beyond mere punishment.²⁴¹ Almost two hundred years later the separation of inmates from their families only furthers the punitive nature of incarceration while directly undermining other stated goals which have evolved over time. Separating inmates from their families entails tremendous costs, both to individual families and to a society which must ultimately bear the costs of escalating crime, a growing reliance on public assistance and increasing family instability. In light of these costs, and considering how familial separation defeats the stated goals of correctional facilities, these concerns must be integrated into policy.

Undoubtedly, some situations do require the termination of inmates' parental rights, just as some cases compel the termination of non-incarcerated parents' rights. Courts have a responsibility to consider the best interests of the children in making these determinations. In addition to this consideration, however, there should be a legal presumption that a child's best interests are served by maintaining a parent-child relationship with his or her biological parent. Only in the event that this presumption is overcome should a court consider terminating parental rights.

involvement in building literacy skills and interest in education and in the family itself which will impact on both the children and the parents. *Id.*

240. One participant commented: "[T]hrough the program I got to know and understand myself in the role of parent and got to know my wife and children in a different way." D.C. Family Literacy Project Written Evaluation by Charles Nowlin, Medium Security Facility, District of Columbia Department of Corrections, in Lorton, VA (Dec. 1992).

241. ALBERT R. ROBERTS, SOURCEBOOK ON PRISON EDUCATION 3 (1971).

Similarly, punishments should be fashioned with consideration for the impact on the families of those being punished. Those who transgress laws should not go unpunished simply because they have children to support, but courts should use alternative sentencing when it will both serve punitive goals, and diminish the impact on families and society.

Finally, the correctional system should provide incarcerated defendants with meaningful opportunities to interact as family members. The potential success of the programmatic efforts discussed above indicates that this kind of aid to incarcerated family members would reduce the familial and societal costs nationwide. The correctional system should provide as much opportunity for the parent and child to maintain their relationship, not because the inmate deserves special privileges, but because it serves the best interests of the children, the parents and society.