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Comment

RACING AGAINST THE ASFA CLOCK: HOW INCARCERATED PARENTS LOSE MORE THAN FREEDOM

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I. INTRODUCTION

The Adoption and Safe Families Act (hereinafter “ASFA”) was signed into federal law by President Bill Clinton in 1997.¹ ASFA's primary goal is to reduce the length of time children spend in foster care by expediting the route to permanency, preferably through adoption.² In order for a child to be adopted, however, the parental rights of both the mother and father must be terminated. ASFA facilitates this process by mandating the commencement of termination proceedings after a child has been in foster care for fifteen of the most recent twenty-two months (hereinafter “15/22 provision”).³

The United States Supreme Court has repeatedly recognized the fundamental liberty interest of parents in the care, custody and management of their children.⁴ Because of the “irreversible” and “irretrievably destructive” nature of termination proceedings, ASFA's 15/22 provision seriously threatens one of our most personally and constitutionally important rights.⁵ This comment will explore the impact of ASFA's 15/22 provision on a particularly vulnerable subgroup of American citizens: incarcerated parents. After introducing the history, relevant portions and various state implementations of ASFA, this comment will address the nature of ASFA's “punishment” of incarcerated parents by discussing the interplay between the 15/22 provision and standard state grounds for parental rights termination. Further, this comment will demonstrate the disproportionate effects of the 15/22 provision on female and minority prisoners. Finally, suggestions for possible legislative, judicial and social remedies will be proposed.

84 A. *The Legislative Shift from Family Reunification to Adoption

ASFA's predecessor, the Adoption Assistance and Child Welfare Act of 1980 (hereinafter “AACWA”), encompassed a decidedly different approach towards securing permanency for children in the social welfare system.⁶ Specifically, AACWA required that “reasonable efforts ... be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home”⁷ Thus, AACWA favored reunification of the family whenever possible and provided federal funding as an incentive for state agencies to effectuate this goal.⁸

Between 1985 and 1995, however, the number of children in the foster care system nearly doubled.⁹ As a result of this alleged failure of the reunification strategy, legislators began to push for reform. Thus, ASFA was born, substantially replacing AACWA on November 19, 1997.¹⁰

ASFA seeks to cure the problem of “foster care drift” by shifting the focus of permanency planning to adoption, rather than reunification.¹¹ ASFA accomplishes this goal by financially reimbursing a state's child welfare system based on the number of adoptions achieved, but only if the state has enacted ASFA-complying legislation.¹² ASFA also significantly amends AACWA by no longer requiring reasonable reunification efforts if (1) the parent has committed one of a specified number of violent crimes against any other of the parent's children, (2) the parent has subjected the child at issue to certain “aggravating circumstances,” including abandonment, torture, chronic abuse, or sexual abuse, or (3) the *85 parent's rights have been involuntarily terminated as to any other children.¹³ Moreover, where no reasonable efforts are required, termination proceedings must take place within thirty days of the child's removal from the home.¹⁴ Finally, in all cases, a permanency hearing must be held within twelve months after the child's entry into foster care for the purpose of determining the state's permanency plan.¹⁵

The most drastic change, however, comes in the form of ASFA's 15/22 provision, which requires a state agency to file a petition to terminate parental rights after a child has been in foster care for fifteen of the most recent twenty-two months,¹⁶ unless (1) the child is being cared for by a fit and willing relative, (2) the state agency has documented a compelling reason why parental rights should not be terminated¹⁷ or (3) the state agency has not provided the family with the services necessary to achieve safe reunification.¹⁸ It is important to note, however, that these exceptions are merely suggested, rather than mandated, and their enactment rests in the discretion of the states.

**86 B. The Incorporation of ASFA into the Juvenile Laws of Pennsylvania and Other States*

Since the passage of ASFA, all states have amended their child welfare laws to varying degrees. At least thirty-two states have adopted two or more of the federally permitted exceptions to the 15/22 provision; some include slight, but meaningful, differences in language, while others mirror ASFA's statutory text.¹⁹ Additionally, several states have set forth specific “compelling reasons” for avoiding the commencement of termination proceedings after fifteen months, while others have left this exception undefined.²⁰ In New York, for example, compelling reasons may include the lack of sufficient grounds for filing a termination petition or the child's opposition to adoption if he is over fourteen years old.²¹ Regarding parental incarceration, at least two states, Colorado and Nebraska, consider it a mitigating factor with respect to the 15/22 provision, while at least four others have gone the opposite route and deemed it, with varying nuances, an aggravating circumstance under which reasonable efforts are no longer required.²²

Pennsylvania modified its Juvenile Act to comply with ASFA in 1998.²³ The Commonwealth requires child welfare agencies to engage in reasonable efforts to reunify biological families except where aggravated circumstances are found to exist.²⁴ Aggravated circumstances in Pennsylvania include those outlined in ASFA, as well as the following situations: where the parent's identity or location is unknown for three months since the child entered state *87 custody; where the parent has failed to maintain substantial and continuing contact with the child for a period of six months; where the parent has committed a violent or sexual crime against any other child; or where the parent's rights have been involuntarily terminated with respect to another child.²⁵

Pennsylvania chose to adopt all three federal exceptions to the 15/22 provision without deviation. The compelling reason exception, however, has not been specifically defined, and Pennsylvania courts have yet to confront the issue. The Juvenile Law Center in Philadelphia suggests restricting the compelling reason exception to situations in which a child of twelve or older does not wish to be adopted, the family is successfully progressing towards reunification, or statutory grounds for parental rights termination clearly do not exist.²⁶ There are currently eight statutory grounds for parental rights termination in Pennsylvania; however, as will be discussed more fully in the Analysis section below, for incarcerated parents, ASFA's 15/22 provision reacts most dangerously with only one of them, namely, the parent's failure to perform parental duties for a period of six months.²⁷

*88 II. ANALYSIS

A. The Problem Generally: ASFA's Punishment of Incarcerated Parents

ASFA presumes the unfitness of any parent who allows a child to remain in foster care past the arbitrary deadline of fifteen months, without regard to the reason for the child's placement. Yet, many common problems that are unrelated to parental fitness, such as domestic violence and incarceration, may require parent-child separation for a greater period of time.²⁸ Adoption in these instances may not always be the best alternative, yet ASFA categorically mandates the filing of a termination petition with little consideration for individual family situations. The mere commencement of termination proceedings places the parent in a dangerous and precarious position, for “[u]nlike other custody proceedings, [termination] leaves the parent with no right to visit or communicate with the child, [nor] to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development.”²⁹

Statistics demonstrate the depth of the problem with respect to incarcerated parents. According to a report by the Department of Justice's Bureau of Justice Statistics, a majority of all prisoners in state and federal penitentiaries are parents of minor children.³⁰ In 1999, the number of children under the age of eighteen with a parent in prison had increased to nearly 1.5 million.³¹ Moreover, the increased presence of minimum sentencing guidelines has led to overall longer prison terms, with the length of time served by incarcerated parents averaging 6.5 years in state prison and 8.5 years in federal prison.³² As a result of these factors, the termination *89 of parental rights of incarcerated parents had increased 250 percent by 2002.³³

Compounding the problem is the physical distance typically separating incarcerated parents from their children. Over sixty percent of parents in state prisons and over eighty percent of parents in federal prisons are located in facilities greater than one hundred miles from their homes.³⁴ Mothers are particularly likely to be placed at a substantial distance from their families due to the limited number of female correctional facilities across the nation.³⁵ This lack of proximity--combined with the general absence of state-provided travel and visitation assistance, the parent's dependence on limited, collect telephone calls, and the frequent relocation of foster children--severely restricts the amount and quality of contact occurring between incarcerated parents and their children.³⁶

Maintaining contact is crucial to maintaining the parent-child relationship, and maintaining the parent-child relationship, in turn, is crucial to maintaining parental rights. Pennsylvania, like many other states, provides for the termination of parental rights on a “permanent neglect” basis, where the parent has failed or refused to perform parental duties, including maintaining substantial and meaningful contact with the child, for a period of at least six months.³⁷

The Pennsylvania Superior Court has held that “parental duty requires that the parent not yield to every problem, but must act affirmatively, with good faith interest and effort, to maintain the parent-child relationship to the best of his or her ability, even in difficult circumstances.”³⁸ As such, “an incarcerated parent’s responsibilities are not tolled during his incarceration,” and “[p]arental rights may not be preserved by waiting for some more ... convenient time for the performance of parental duties and responsibilities.”³⁹

It is, therefore, easy to understand how the interplay between ASFA’s 15/22 provision and typical state termination grounds *90 poses an almost insurmountable obstacle to the maintenance of parental rights of incarcerated parents. After fifteen months of separation from the child, a petition to terminate an incarcerated parent’s rights will be filed, unless one of the limited and highly discretionary exceptions to the 15/22 provision applies. At the termination proceeding, the court must determine the existence of an independent ground for termination, as defined by state law.⁴⁰ In many states, grounds for termination exist if the parent has failed to maintain sufficient contact or a substantial relationship with the child for a specified period of time, typically three, six or twelve months.⁴¹ As has already been demonstrated, lengthy prison sentences, physical distance, and limited visitation and telephone calls may disrupt parent-child interaction for many months or years beyond the time period required for termination of parental rights, and many courts have held that incarceration is no excuse for such impairment of the parent-child bond.⁴² Thus, perhaps one commentator described it best when he summarized:

[W]hen parents go to prison, they can expect to be separated from their children at great distances for a significant portion of their children’s lives. They can expect to have only limited personal contact with their children. They can also expect to have their relationship with their children impaired or, if *91 their children are in foster care, permanently severed through the termination of their parental rights.⁴³

One final consequence of ASFA involves its adverse impact on the parental rights of formerly incarcerated parents. ASFA provides that reasonable efforts towards reunification with a specific child are not required if the parent’s rights have been previously terminated as to another child for any reason.⁴⁴ Thus, if a parent’s rights with respect to *one* of his children have been terminated while the parent was incarcerated due to the interplay between the 15/22 provision and the state’s “permanent neglect” termination grounds, the parent’s rights with respect to *all* of his other children are immediately put in jeopardy. Should any other of the parent’s children subsequently enter the foster care system for any reason, the state may completely ignore the reasonable efforts requirement, and a termination proceeding must take place within thirty days of removal from the home. Thus, ASFA carries the potential to “punish” incarcerated parents even after their release from prison by allowing the state to terminate their rights with respect to subsequent children based only on the tenuous factors that led to the original termination, i.e., the passage of time and the complications involved in parenting from prison. Moreover, the state may do so almost immediately after the child’s removal from the home and without having made any efforts whatsoever at family reunification. Indeed, ASFA “treats a parent in this situation the same as if the parent had killed or committed felony assault [against] the child or another child of the parent or as if the child had been subject to ‘aggravated circumstances’ as defined by state law.”⁴⁵

B. ASFA’s Disproportionate Effects on Women and Minorities

The War on Drugs has caused the number of women in prison to multiply steadily since the 1980s, and female offenders now represent the fastest-growing prison population group in the nation.⁴⁶ In 1997, sixty-five percent of women in state

prison reported having *92 a minor child.⁴⁷ While the vast majority of mothers in prison are serving sentences for non-violent crimes, most will serve significantly longer than fifteen months for their offenses.⁴⁸

Even more disturbing than the sheer number of mothers in prison is the fact that “seventy to ninety percent of incarcerated mothers [were] the sole caregivers for their children” prior to being incarcerated.⁴⁹ Conversely, approximately ninety percent of fathers in both federal and state penal systems report that at least one of their children resides with the child's non-incarcerated mother.⁵⁰ The greater incidence of single maternal caregiving over single paternal caregiving has led to significant disparity between mothers and fathers in the application of ASFA. Because incarcerated mothers are more likely to have children in foster care than incarcerated fathers,⁵¹ women have become more vulnerable to ASFA's 15/22 provision and thus more susceptible to losing their parental rights.

A similar concern lies in the disproportionately high rates at which minorities are incarcerated. Studies show that African-American and Hispanic children are nine times and three times more likely, respectively, to have a parent in prison than white children.⁵² In part because of the increasing prison population of African-American women, African-American children constitute nearly half of all children in foster care.⁵³ Thus, the overrepresentation of minorities in prison leads to an overrepresentation of minority children in foster care, which in turn leads to the increased vulnerability of minority parents to termination of their parental rights.

C. Suggestions and Solutions

Many commentators disagree with ASFA's rigidity and insensitivity towards individual family circumstances and instead argue for greater flexibility and cooperation between the nation's legal and child welfare systems. Indeed, “[c]riminal justice decisions are made without regard to the impact upon family members, and *93 child welfare decisions are made without taking into account the unique situation of incarcerated parents.”⁵⁴

Suggestions with regard to ASFA include providing for more individualized determinations of a child's best interests by taking into account the child's age, the nature of his relationship with the parent and any alternative placement options that may obviate the need for adoption.⁵⁵ These and other unique factors should be considered in determining what type of permanency plan would best provide the child with a stable and loving environment.

Further, the statutory deadline, which has been described as a result of “political haggling rather than a real showing that fifteen months should be the outer limit,” must be extended to allow parents a better chance at achieving reunification with their children.⁵⁶ Indeed, termination of a parent's rights upon the expiration of fifteen months does nothing to actually guarantee the child a permanent home. Thus, because “termination is largely irrelevant if the child is not ultimately adopted,” the existence of a strict timeline does not by itself further the goals espoused by ASFA.⁵⁷

With respect to the criminal justice system, ASFA's opponents believe that judges should be permitted to exercise discretion in sentencing and to consider such factors as whether the defendant is the primary caretaker of a child.⁵⁸ Minimum sentencing guidelines should be de-emphasized, and mitigating factors such as gender, nature of the crime, and family and community ties should be weighed by the court.⁵⁹ First-time, non-violent offenders with minor children should be sentenced to drug treatment or community service programs whenever necessary to prevent their children from

entering the child welfare system.⁶⁰ Additionally, early legal advice with respect to parental rights, preferably soon after arrest, should be provided to help parents “make more informed decisions and potentially avoid termination.”⁶¹

*94 Finally, the solution to the problem could be effectuated legislatively. Currently, two states, Nebraska and Colorado, take parental incarceration into consideration when applying ASFA's 15/22 provision. Nebraska forbids the state from filing a termination petition “if the sole factual basis for the petition is that ... the parent or parents of the juvenile are incarcerated.”⁶² Colorado has added parental incarceration as a fourth exception to the 15/22 provision in that a termination petition need not be filed if the “child has been in foster care ... due to circumstances beyond the control of the parent such as incarceration of the parent for a reasonable period of time.”⁶³ If all states followed the lead of the Colorado and Nebraska juvenile laws, the rights of incarcerated parents would be more adequately protected.

III. CONCLUSION

The current state of child welfare law in the United States allows a parent to easily lose parental rights with respect to a child if the parent has been incarcerated for more than fifteen months, regardless of whether the crime committed has anything to do with the parent's fitness to raise children. The United States Supreme Court recognized in *Santosky v. Kramer* that “until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.”⁶⁴ Incarcerated parents and their children share this vital interest to no lesser degree simply because of the existence of a prison sentence, yet ASFA significantly weakens their familial rights by mandating the initiation of termination proceedings in situations where, given the pre-ASFA focus on reunification, such extreme action might not otherwise have taken place.

The interplay between ASFA's 15/22 provision and state law termination grounds forces incarcerated parents into a dangerous race against the clock, one in which the odds are tremendously stacked against them. While reform of the child welfare system was certainly necessary to cure the problem of “foster care drift,” the solution has come at the expense of the parental rights of a large and ever-growing segment of the American population. When individuals are convicted of crimes, our justice system demands that they relinquish their freedom, privacy, employment, *95 and all other comforts and routines of their daily lives in order to pay back their debt to society. Now, thanks to ASFA, we can add something far more precious to this list of sacrifices: their children.

Footnotes

- 1 Adoption and Safe Families Act of 1997, [Pub. L. No. 105-89](#), [111 Stat. 2115](#) (codified in scattered sections of 42 U.S.C. (2000)).
- 2 ASFA's stated purpose is “to promote the adoption of children in foster care.” 111 Stat. at 2115.
- 3 [42 U.S.C. § 675\(5\)\(E\)](#) (2000).
- 4 *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Santosky v. Kramer*, 455 U.S. 745 (1982).
- 5 *M.L.B.*, 519 U.S. at 118, 121.
- 6 Adoption Assistance and Child Welfare Act of 1980, [Pub. L. No. 96-272](#), [94 Stat. 500](#) (1980) (codified in scattered sections of 42 U.S.C. (1994)).
- 7 94 Stat. at 503.

- 8 Amy Wilkinson-Hagen, *The Adoption and Safe Families Act of 1997: A Collision of Parens Patriae and Parents' Constitutional Rights*, 11 GEO. J. ON POVERTY L. & POL'Y 137, 143 (2004).
- 9 Sally Day, *Mothers in Prison: How the Adoption and Safe Families Act of 1997 Threatens Parental Rights*, 20 WIS. WOMEN'S L.J. 217, 220 (2005). Contributing factors to the increase of children in foster care may have included welfare reform legislation and the rise of crack-cocaine use. *Id.*
- 10 *Id.* at 221.
- 11 “Foster care drift” refers to “the problem of children entering the system and moving from foster home to foster home without any clear goals of permanency.” Wilkinson-Hagen, *supra* note 8, at 142.
- 12 42 U.S.C. § 673b (2000). Incentive funding for family reunification is no longer offered. See Antoinette Greenaway, *When Neutral Policies Aren't So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African-American Women*, 17 NAT'L BLACK L.J. 247, 257 (2004).
- 13 42 U.S.C. § 671(a)(15)(D)(i)-(iii) (2000). Such violent crimes include murder; voluntary manslaughter; aiding and abetting, soliciting, conspiring or attempting to commit murder or voluntary manslaughter; and felony assault that results in serious bodily injury. 42 U.S.C. § 671(a)(15)(D)(ii)(I)-(IV).
- 14 *Id.* at § 671(a)(15)(E)(i).
- 15 42 U.S.C. § 675(5)(C) (2000).
- 16 Note that the 15/22 provision triggers only the *filing* of a petition to terminate parental rights and does not constitute an independent basis for termination. In all states, the petitioning agency must still prove by clear and convincing evidence that grounds for termination, as defined by state law, exist. Typical grounds for termination include abandonment, permanent neglect or abuse. Only six states, Illinois, Indiana, Kentucky, Nebraska, Oklahoma and South Carolina, have attempted to establish the mere placement of a child in foster care for fifteen of the most recent twenty-two months as an independent ground for termination; however, Illinois' Supreme Court held this approach unconstitutional in *In re H.G.*, 757 N.E.2d 864 (Ill. 2001). See also 750 ILL. COMP. STAT. ANN. 50/1(D)(m-1) (West 1998); IND. CODE ANN. § 31-35-2-4(b)(2) (West 2000); KY. REV. STAT. ANN. § 625.090(2)(j) (LexisNexis 2000) (In Kentucky, however, grounds for termination are not the only consideration; rather, the court must also find either that the child has been abused or neglected or that the parent has been convicted of abusing or neglecting another child.); NEB. REV. STAT. ANN. § 43-292(7) (LexisNexis 1998); OKLA. STAT. ANN. tit. 10, § 7006-1.1(a)(15) (West Supp. 2001); S.C. CODE ANN. § 20-7-1572(8) (2000).
- 17 The Code of Federal Regulations indicates that such compelling reasons may include, but are not limited to: cases in which adoption is not the appropriate permanency goal for the child; no grounds exist to terminate parental rights; the child is an unaccompanied minor refugee; or there are international legal obligations or compelling foreign policy reasons against terminating parental rights. 45 C.F.R. § 1356.21(i)(2)(ii) (2000).
- 18 Such services may include counseling, visitation assistance and referrals to mental health, domestic violence or drug treatment programs. Day, *supra* note 9, at 221.
- 19 National Conference of State Legislatures, *State Legislation Enacted in Response to the Adoption and Safe Families Act*, <http://www.ncsl.org/statefed/cf/term.cfm?stateselect='ALL'> (last visited July 30, 2006). See also Maryann Zavez, *The Adoption and Safe Families Act, Implementation and Case Law with a Focus on 15/22 Month Terminations*, 28 MAR. VT. B.J. 37, 38 (2002).
- 20 Zavez, *supra* note 19, at 37.
- 21 N.Y. SOC. SERV. LAW § 384-b(3)(l)(ii)(C)-(D) (McKinney 2001).

- 22 See COLO. REV. STAT. § 19-3-604(2)(k)(IV) (2000); NEB. REV. STAT. ANN. § 43-292.02(2) (LexisNexis 1998); KY. REV. STAT. ANN. § 600.020(2)(b) (LexisNexis 2002); N.D. CENT. CODE § 27-20-02(3)(f) (2001); S.D. CODIFIED LAWS § 26-8A-21.1(4) (2002); TENN. CODE ANN. §§ 36-1-102(1)(A)(iv), (9) (2002).
- 23 42 PA. CONS. STAT. ANN. §§ 6301-6365 (West 2000 & Supp. 2003).
- 24 Reasonable efforts “require that county agencies provide or ensure the provision of services, which will preserve family unity whenever possible.” ALISA G. FIELD & NINA W. CHERNOFF, PENNSYLVANIA JUDICIAL DESKBOOK: A GUIDE TO STATUTES, JUDICIAL DECISIONS AND RECOMMENDED PRACTICES FOR CASES INVOLVING DEPENDENT CHILDREN IN PENNSYLVANIA 7 (4th ed. 2004), available at <http://www.jlc.org/File/publications/pajudicialdeskbook.pdf>. Specifically, child and welfare agencies must provide counseling services, parental education services, homemaker/caretaker services and part-day services. 55 PA. CODE § 3130.35 (2000).
- 25 42 PA. CONS. STAT. ANN. § 6302.
- 26 FIELD & CHERNOFF, *supra* note 24, at 112-13.
- 27 The remaining statutory grounds are as follows:
- (2) The repeated and continued incapacity, abuse, neglect or refusal of the parent has caused the child to be without essential parental care, control or subsistence necessary for his physical or mental well-being and the conditions and causes of the incapacity, abuse, neglect or refusal cannot or will not be remedied by the parent.
 - (3) The parent is the presumptive but not the natural father of the child.
 - (4) The child is in the custody of an agency, having been found under such circumstances that the identity or whereabouts of the parent is unknown and cannot be ascertained by diligent search and the parent does not claim the child within three months after the child is found.
 - (5) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency for a period of at least six months, the conditions which led to the removal or placement of the child continue to exist, the parent cannot or will not remedy those conditions within a reasonable period of time, the services or assistance reasonably available to the parent are not likely to remedy the conditions which led to the removal or placement of the child within a reasonable period of time, and termination of the parental rights would best serve the needs and welfare of the child.
 - (6) In the case of a newborn child, the parent knows or has reason to know of the child's birth, does not reside with the child, has not married the child's other parent, has failed for a period of four months immediately preceding the filing of the petition to make reasonable efforts to maintain substantial and continuing contact with the child and has failed during the same four-month period to provide substantial financial support for the child.
 - (7) The parent is the father of a child conceived as a result of a rape or incest.
 - (8) The child has been removed from the care of the parent by the court or under a voluntary agreement with an agency, 12 or more months have elapsed from the date of the removal or placement, the conditions which led to the removal or placement of the child continue to exist, and termination of parental rights would best serve the needs and welfare of the child.
- 23 PA. CONS. STAT. ANN. § 2511(a) (2000).
- 28 Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 209 (2004).
- 29 Katherine A. Hort, *Is Twenty-Two Months Beyond the Best Interest of the Child: ASFA's Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879, 1910 (2001) (quoting *Lassiter v. Dept. of Soc. Servs. of Durham County*, 452 U.S. 18, 39 (1981)).
- 30 Christopher J. Mumola, Bureau of Justice Statistics, *Incarcerated Parents and Their Children* 1 (2000), <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf>.
- 31 *Id.* at 2.
- 32 *Id.* at 6.

- 33 Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1678 (2003).
- 34 Mumola, *supra* note 30, at 5.
- 35 Genty, *supra* note 33, at 1673.
- 36 Day, *supra* note 9, at 228, 229.
- 37 23 PA. CONS. STAT. ANN. § 2511(a)(1) (West 2000).
- 38 *In re C.S.*, 761 A.2d 1197, 1201 (Pa. Super. Ct. 2000) (holding that incarcerated father's sporadic letters, birthday cards and gifts were insufficient attempts at maintaining a relationship with child).
- 39 *C.S.*, 761 A.2d at 1201.
- 40 This is so except in those states where placement in foster care for fifteen of the most recent twenty-two months is by itself a ground for termination of parental rights. *See supra* note 16.
- 41 National Conference of State Legislatures, *supra* note 19.
- 42 *See In re Juvenile Appeal*, 446 A.2d 808 (Conn. 1982) (inevitable restraints imposed by incarceration do not in themselves excuse failure to make use of available though limited resources for contact with distant child); *Stills v. Johnson*, 533 S.E.2d 695 (Ga. 2000) (in termination proceedings, courts may consider whether the incarcerated parent has made an effort to communicate with the child and, despite imprisonment, maintain a parental bond in a meaningful, supportive and parental manner); *In re J.L.W.*, 523 N.W.2d 622 (Iowa Ct. App. 1994) (unavailability of parent as a result of being incarcerated is no excuse for parent's conduct for purposes of proceedings to terminate parental rights); *In re M.L.K.*, 804 S.W.2d 398 (Mo. Ct. App. 1991) (incarceration does not excuse parent's statutory obligation to provide child with continuing relationship through communication and visitation, and parental rights may properly be terminated for incarcerated parent's failure to meet that obligation); *In re F.H.*, 283 N.W.2d 202 (N.D. 1979) (incarceration alone is not generally a defense to a claim that a parent has abandoned his child); *In re I.R.*, 544 N.Y.S.2d 216 (N.Y. App. Div. 1989) (father's incarceration and residence in drug treatment facility did not excuse him from maintaining required contact with his children); *In re DeKarri P.*, 787 A.2d 1170 (R.I. 2001) (failure of incarcerated father to contact agency regarding his child, or to visit with or engage in any other meaningful contact with child for more than six months, justified termination of father's parental rights).
- 43 Genty, *supra* note 33, at 1678-79.
- 44 42 U.S.C. § 671(a)(15)(D)(iii) (2000).
- 45 Day, *supra* note 9, at 234.
- 46 *Id.* at 223-24. *See also* Mariely Downey, *Losing More than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN'S L.J. 41, 44-45 (2001).
- 47 Mumola, *supra* note 30, at 2.
- 48 *Id.* at 6-7.
- 49 Downey, *supra* note 46, at 45.
- 50 Day, *supra* note 9, at 226.
- 51 *Id.* Statistics show that “[l]ess than two percent of the children of incarcerated fathers are in foster care, but ten percent of the children of incarcerated mothers live in a foster home or other agency placement.” *Id.*

- 52 *Id.*
- 53 Greenaway, *supra* note 12, at 256.
- 54 Genty, *supra* note 33, at 1681.
- 55 Ross, *supra* note 28, at 209.
- 56 Greenaway, *supra* note 12, at 263.
- 57 Hort, *supra* note 29, at 1907.
- 58 Downey, *supra* note 46, at 48.
- 59 Greenaway, *supra* note 12, at 261.
- 60 *Id.* at 262.
- 61 *Id.* at 265. Indeed, “[at] present, with the exception of a few law school clinics and pilot projects, the majority of incarcerated parents with children in foster care have virtually no means of obtaining legal representation, unless their case is in litigation pursuant to which they are produced in court and appointed an attorney.” *Id.* (quoting Martha Raimon of the Incarcerated Mothers Law Project).
- 62 NEB. REV. STAT. ANN. § 43-292.02(2) (LexisNexis 1998).
- 63 COLO. REV. STAT. § 19-3-604(2)(k)(IV) (2000).
- 64 Santosky v. Kramer, 455 U.S. 745, 760 (1982).