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NEGLECTED BY THE SYSTEM: A CALL FOR EQUAL TREATMENT FOR INCARCERATED FATHERS AND THEIR CHILDREN—WILL FATHER ABSENTEEISM PERPETUATE THE CYCLE OF CRIMINALITY?

I. INTRODUCTION

At the tender age of two, Rudy found himself without a father. His father had been sent to prison for possessing drugs. For the next fourteen years, Rudy's contact with his father consisted only of telephone calls, letters, and sporadic visits. His family experienced financial troubles and was forced to live in an impoverished neighborhood while Rudy's father was in prison. Rudy had very little parental supervision because his mother was working hard to make ends meet. In school, Rudy's teachers noticed he had behavioral problems and violent tendencies.

When he returned from a visit with his father or received a letter from him in the mail, Rudy's mother and teachers would notice his behavior and academics improve instantly. The correlation between Rudy's increased contact with his father and emotional well-being was striking. There was hope for Rudy when his father was released from prison in 1990.

Unfortunately, hope was short-lived; Rudy's father returned to prison in 1991 for another drug possession charge. The court did not consider Mr. Lopez's familial responsibilities in sentencing him. The legal system dismissed Mr. Lopez as a hopeless drug addict; drug rehabilitation or other community-based programs were not considered. The court further disregarded Mr. Lopez's role as a father, ignoring the impact sending him to prison would have on his family, particularly young Rudy.

After his father returned to prison, Rudy's truancy at school increased. He began "hanging out" with a rough crowd. Rudy's bad behavior escalated soon after. His first visit to juvenile hall was at thirteen years old for vandalism, followed by subsequent visits for drug possession charges. At sixteen years old, Rudy was charged and convicted of second-degree murder. He is currently serving a life sentence at the age of twenty.

Rudy's life did not have to go this way. His father was a great candidate for a community-based treatment program that offered parenting classes, drug rehabilitation, and allowed frequent contact with his son. Clearly, Rudy and his father would have benefited from a closer and more consistent relationship. Had the prison and judicial systems considered the effect incarceration has on father inmates and their families, it is quite possible that three

lives could have been saved: Mr. Lopez's, Rudy's, and his teenage murder victim's.¹

As Rudy's story illustrates, the well being of America's children has reached an all time low in the 1990s and continues to decline into the twenty-first century.² The growth of one-parent families, specifically fatherless families, contributes to the suffering of our nation's children. Sixty-percent of men in prison are fathers; it is not surprising that these children suffer more economically, emotionally, and face more violence than children with two parents.³ These inmates' children are more likely to have behavioral problems, and this is likely a reason that the juvenile crime rate is higher in one-parent families.⁴ Compounding the problem, courts that sentence offenders do not consider the social costs of severing family ties where children are involved.⁵

This Comment will explain the adverse effect that father absenteeism, as a result of incarceration, has on families—specifically children—utilizing both a sociological and legal analysis. Part II examines whether the theories of incarceration are consistent with separating children from their fathers. Part III describes the literature on how incarcerating women affects children and explores how incarcerated fathers have not been given equal treatment. Part IV examines current in-prison nursery programs and community-based facilities created for female inmates, noting there are none specifically targeted for fathers. Part V discusses the judicial system's strict adherence to sentencing guidelines and explores alternative ways to enact punitive measures for fathers, other than incarceration, at the sentencing stage. This Comment concludes that a system-wide policy of alternative punitive measures for fathers is necessary in order to “prevent today's children from becoming tomorrow's inmates.”⁶

II. THEORIES OF INCARCERATION

A. Objectives of Punishment and Incarceration

Criminologists and sociologists identify the “four major goals of the correctional system [as] incapacitation, retribution, deterrence, and rehabili-

1. Based upon an interview with Jeffrey Reilly, San Diego County Public Defender, Juvenile Delinquency Division, in San Diego, Cal. (Mar. 11, 2002). The names and some facts have been changed to protect the confidentiality of the parties involved.

2. DAVID MYERS, *THE AMERICAN PARADOX: SPIRITUAL HUNGER IN AN AGE OF PLENTY* 60 (2000).

3. *Id.* at 77; Justin Brooks & Kimberly Bahna, “It’s a Family Affair”—*The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271 (Winter 1994) (citing Velma LaPoint, *Prison’s Effect on the African-American Community*, 34 HOW. L.J. 537, 539 (1991)).

4. MYERS, *supra* note 2, at 76; Brooks & Bahna, *supra* note 3, at 272.

5. Brooks & Bahna, *supra* note 3, at 272.

6. *Id.*

tation."⁷ Our society continues to use imprisonment as the primary means to achieve these goals.⁸ Imprisonment has the effect of separating inmates from their families. It is important to consider, therefore, whether familial separation is consistent with the intended goals of incarceration.⁹ If separating families is inconsistent with the intended goals of incarceration, then the legislature and judicial branches should examine other avenues to effectuate its goals.¹⁰

1. Incapacitation

Incapacitation evolved from society's desire to separate criminals from the general public.¹¹ It aims to prevent criminals from committing any further acts against the general public.¹² Sadly, the criminal defendant's family is not exempt from this purpose. The social cost of incarcerating criminal mothers and fathers is high because it removes the parent(s) from their families.¹³ Children with incarcerated fathers are at an increased risk for delinquency. Judith Wallerstein studied children living without fathers and determined that seventy percent of hard-core delinquents (overwhelmingly boys) serving time in long-term correctional facilities did not have their fathers at home consistently when growing up.¹⁴ Certainly, it makes sense to separate criminals from their families when the crimes have been committed against family members, so that future crimes cannot be committed against them.¹⁵ When crimes have been committed against the general public, however, separating fathers from their families is incidental to the general goal of preventing the inmate from committing further crimes, because there is no societal need to protect children from an incarcerated father.¹⁶ If crimes have not been committed against family members, then incapacitation is not a reason for separating fathers from their children.

7. Jessica Y. Kim, Note, *In-Prison Day Care: A Correctional Alternative for Women Offenders*, 7 CARDOZO WOMEN'S L. J. 221, 230 (2001).

8. Brooks & Bahna, *supra* note 3, at 273.

9. Kim, *supra* note 7, at 230.

10. *Id.*

11. LARRY E. SULLIVAN, *THE PRISON REFORM MOVEMENT 1-3* (1990); *see also* Brooks & Bahna, *supra* note 3, at 273 (citing 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)).

12. Kim, *supra* note 7, at 230.

13. Brooks & Bahna, *supra* note 3, at 273.

14. Judith Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, JOURNAL OF THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY 30, 349-60 (1991).

15. Brooks & Bahna, *supra* note 3, at 273.

16. *Id.*

Arguably, incarceration itself is a reason to find a parent unfit and justifies the separation of a father from his children.¹⁷ Society is especially unsympathetic to incarcerated fathers, concluding they should not have contact with their children because they are “bad” characters.¹⁸ Incarcerated parents are at a disadvantage because they obviously cannot care for their child’s everyday needs.¹⁹ This results in society labeling the incarcerated father as unfit, even though his questionable behavior is in the past and is not necessarily a predictor of future behavior.²⁰ The societal view that incarcerated fathers are less honorable or unfit parents disregards the reality that men still want to parent their children while behind bars.²¹ Our correctional system stifles parental contact by incapacitating fathers from their families. This is simply incidental to the goal of incapacitation and does not further it.

2. Retribution

The 1970s marked the revival of retribution as the justification for punishing criminal offenders.²² The goal of retribution is to punish those individuals who transgress society’s laws.²³ Separating criminals from their families and taking away their freedom satisfies this goal.²⁴ In fact, separating inmates from their families is perhaps the most punitive aspect.²⁵ Reducing or eliminating a child’s contact with a parent, however, terminates the parent’s functional role and threatens parent-child attachments.²⁶ Society not only punishes the criminal, but also punishes the innocent child of that criminal by promoting a goal of retribution.

Moreover, incarcerating fathers has two adverse effects. First, it also punishes the inmates’ families, particularly the children.²⁷ Children of an incarcerated parent, whether it is their mother or their father, frequently suffer

17. Kim, *supra* note 7, at 231.

18. William Patton, *Mommy’s Gone, Daddy’s in Prison, Now What About Me?: Family Reunification for Children of Single Custodial Fathers in Prison—Will the Sins of Incarcerated Fathers Be Inherited By Their Children?*, 75 N. D. L. REV. 179, 191 (1999).

19. Kim, *supra* note 7, at 231.

20. *Id.*

21. Inmate Arthur Hamilton founded Fathers Behind Bars, Inc. This program “is a non-profit organization designed to assist the incarcerated father, and his children by promoting programs which will stabilize the family, strengthen the ties, and deter the father from future criminal behavior.” Elise Zealand, *Protecting the Ties that Bind from Behind Bars: A Call for Equal Opportunities for Incarcerated Fathers and Their Children to Maintain the Parent-Child Relationship*, 31 COLUM. J.L. & SOC. PROBS. 247, 281 (1998).

22. Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1334 (2000).

23. *Id.* at 274.

24. Kim, *supra* note 7, at 232.

25. Brooks & Bahna, *supra* note 3, at 274.

26. Donna K. Metzler, *Neglected by the System: Children of Incarcerated Mothers*, 82 ILL. B.J. 428, 430 (1994).

27. Kim, *supra* note 7, at 232-33.

emotional, physical, and mental problems.²⁸ Also, incarcerating fathers may sharply reduce household income.²⁹ Consequently, the family might experience housing problems, a change in the standard of living, and difficulties obtaining other basic necessities.³⁰ Second, because men serve both a care taking and disciplinary role, especially with boys, their absence increases the likelihood that their children will act-out, become hostile, use drugs, run away, be truant from school, and engage in aggressive and delinquent acts.³¹ Once again, the punishment of inmates' children is incidental to the punishment of inmates.³²

3. Deterrence

The goal of deterrence assumes that people can be deterred from committing crimes by experiencing or witnessing punishment.³³ Called either "specific deterrence" or "general deterrence," its goal is to deter criminals from committing further crimes.³⁴ The reasoning behind specific deterrence is that the punitive experiences of imprisoned life will discourage criminals from engaging in future criminal activity.³⁵ For example, one commentator noted in her article concerning female inmates, that separation of these mothers from their children increases the punitive nature of incarceration.³⁶ Additionally, separating mothers from their children supposedly furthers the goals of general deterrence because it increases the mother's potential loss.³⁷ Separating women from their children, therefore, arguably furthers the goals of deterrence.³⁸

In determining whether the goal of incarceration is met under a general deterrence theory, it is important to examine its dual nature: (1) Does incarceration of fathers create deterrence from committing future crimes; and (2) will children of incarcerated fathers be deterred from engaging in criminal activity? First, research has demonstrated that separating inmates from their children is likely to have the opposite effect of deterrence.³⁹ Separation does not serve the goal of deterring inmates from committing future crimes because separation destroys family structures.⁴⁰ In fact, research has shown that the disruption in family ties during incarceration actually results in an in-

28. Zealand, *supra* note 21, at 277.

29. Kim, *supra* note 7, at 233.

30. *Id.*

31. Zealand, *supra* note 21, at 277.

32. Brooks & Bahna, *supra* note 3, at 274.

33. *Id.* at 275.

34. Kim, *supra* note 7, at 233.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 234.

40. Brooks & Bahna, *supra* note 3, at 275.

crease in criminal behavior of the ex-inmates.⁴¹ In contrast, strong family ties function as a support system for inmates.⁴² Inmates who maintain close relations with their families are more likely to remain out of prison after their release.⁴³

Another study of 412 prisoners in a California minimum-security facility in 1972, found that there was a consistently positive relationship between parole success and strong family ties during imprisonment.⁴⁴ This study demonstrates that support from family members is important in assisting the reintegration of the offender to society.⁴⁵ Specifically, fathers who maintain ties to their families have more success upon release.⁴⁶ While incarceration is intended to deter future criminal activity, disrupting the family ties increases the probability of the offender returning to prison, proving the deterrence theory counterproductive.

Further, incarcerating a child's father has a negative deterrent value for the child. Even though children of inmates may directly witness their father's incarceration, and, therefore, should be the most affected under a general deterrence theory, these children are more likely to commit crimes as a result of being separated from their father.⁴⁷ In a study of six lower-middle class Caucasian families, twelve of the twenty-four children studied showed behavioral problems soon after their father's incarceration.⁴⁸ Instead of achieving a goal of deterrence, separating children from their parents creates a new generation of inmates.⁴⁹ It should be the goal of the criminal justice system, therefore, to maintain a cohesive family unit because violence is rare where family ties are strong.⁵⁰

4. Rehabilitation

The goal of rehabilitation involves changing inmates' attitudes and providing skill development in prison, enabling them to live in society without

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

42. Kim, *supra* note 7, at 234.

43. *Id.*

44. *Id.*

45. *Id.*

46. Zealand, *supra* note 21, at 279.

47. See Brooks & Bahna, *supra* note 3, at 276. Studies have shown that children of incarcerated parents have lives full of great disruption that may lead to delinquent and criminal behavior. *Id.* n.25 (citing GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 34 (1973)). In addition, research shows that cultures where child-father contact is minimal actually witness more crime. MYERS, *supra* note 2, at 115.

48. In one instance, shortly after a father was sent to prison for auto theft, his son stole a stereo and regularly began skipping school. Although, after his father sent him a chess set from prison, he became the chess champion of his summer camp. Zealand, *supra* note 21, at 278.

49. See Brooks & Bahna, *supra* note 3, at 276.

50. MYERS, *supra* note 2, at 116.

resorting to criminal activity.⁵¹ Rehabilitation is successful if inmates are able to deal with life's challenges after prison.⁵² The rehabilitation process is intended to teach inmates how to deal with their responsibilities, not prevent them from fulfilling these responsibilities.⁵³ "To be rehabilitated, inmates must . . . be transformed into individuals who have the necessary skills and emotional stability to face up to their responsibilities as citizens, parents, and spouses."⁵⁴ Separating parents from their children does not allow these inmates to fulfill their parental responsibilities, and is thus directly contrary to the goal of rehabilitation.⁵⁵

Lack of contact with their families increases the likelihood that inmates will commit future crimes when released from prison.⁵⁶ Inmates no longer participate in the day-to-day activities of paying bills, working, or parenting while in prison. The inmates are nonfunctional in everyday society upon release from prison.⁵⁷ This lack of parental behavior does not benefit their families. "[S]eparating inmates from their families undermines the goal of rehabilitation because inmates are separated from their responsibilities and socialized to the life of an inmate."⁵⁸

The social costs of familial incarceration are high. Inmates separated from their families not only have a higher rate of recidivism, but, most alarmingly, the stability of their entire family suffers.⁵⁹ It is questionable, therefore, whether separating fathers from their families fulfills the goals of our correctional system in any significant way.⁶⁰ It appears that the opposite would fulfill the traditional goals of the correctional system; instead of separating fathers from their families, the system should ensure male inmates have consistent interaction with their children. That is in society's best interest.

51. Brooks & Bahna, *supra* note 3, at 276.

52. *Id.*

53. *Id.*

54. *Id.* at 277 (citing Martha G. Duncan, "Cradled on the Sea": *Positive Images of Prison and Theories of Punishment*, 76 CAL. L. REV. 1202, 1243 (1988)).

55. Brooks & Bahna, *supra* note 3, at 277.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 272. For example, soon after his father went to prison a young man committed the crime of burglary. Zealand, *supra* note 21, at 278. Another young boy attacked one of his classmates just two weeks after his father was imprisoned for armed robbery. *Id.* These examples demonstrate how children of incarcerated fathers are at risk of continuing the cycle of criminality.

60. See Brooks & Bahna, *supra* note 3, at 277.

III. PRISON SYSTEMS RESPOND TO THE NEEDS OF FEMALE INMATES WHILE VIRTUALLY IGNORING THE PARENTAL ROLE OF INCARCERATED FATHERS

A. Mothers In Prison

Historically, women comprised a minority of the state and federal prison populations.⁶¹ This was because men, rather than women, committed most crimes, especially violent crimes.⁶² Until recently, women's crimes were traditionally limited to prostitution, abortion (when illegal), and infanticide.⁶³ This is no longer the case. Currently, women frequently commit property and drug-related crimes.⁶⁴ Between 1980 and 1995, the number of incarcerated women exploded; increasing 185 percent.⁶⁵

Women's criminal conduct, particularly that of mothers, is of growing interest to criminologists and legal scholars. No such wide interest, however, has been devoted to incarcerated fathers. Recent data shows 56,000 women incarcerated in state and federal prisons are mothers.⁶⁶ This concerns legislators and correctional experts because they consider women to be a child's primary caretaker. It is believed that when mothers are incarcerated, their children are subject to considerable social and economic upheaval.⁶⁷ The legal system is biased in favor of mothers because it erroneously believes children of single mothers fare much worse when the mother is incarcerated; the children are often placed in the care of relatives or the state foster care system.⁶⁸ Mothers are not able to continue a consistent relationship with their children because the prison is usually a great distance from where the child resides. In fact, more than two thirds of women in federal prison are placed over 500 miles from their home.⁶⁹ Great distances make it difficult for children to visit and have the effect of severing the mother-child relationship. In addition, mothers experience severe separation anxiety and children suffer

61. Kim, *supra* note 7, at 222.

62. *Id.*

63. *Id.*

64. *Id.* at 224.

65. *Id.* at 222.

66. Zealand, *supra* note 21, at 255.

67. Kim, *supra* note 7, at 224.

68. *Id.* at 227. 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). Additionally, foster care raises further 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 not able to fight for his or her rights. See generally 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 (1986).

69. Kim, *supra* note 7, at 226.

developmentally.⁷⁰ To address these concerns, legislators have developed prison programs exclusively devoted to mothers.

B. Current Mother-Child Programs

Currently, the correctional system has created facilities that combine the model of female inmates living with their children in prison (in-prison nursery programs) with the concept of half-way-house style community-based infant/mother programs. Three prisons in this country allow women inmates to live with their infants during incarceration.⁷¹

The leading facility for in-prison nursery programs is the Children's Center at Bedford Hills in New York. The Children's Center houses approximately 800 mothers.⁷² If an inmate gives birth while in prison she is allowed to keep the baby until the child is one year old or if the mother will be paroled by the time the infant is eighteen months old, the infant will remain with its mother.⁷³ In addition, the Children's Center permits older children to visit their mothers for a week to foster the mother-child relationship, but they are not allowed to live with their mother on a consistent basis. Most children must say goodbye to their mother at the end of the day and return to a hosting family⁷⁴ while the mother returns to her cell.

The in-prison nursery programs represent a compromise for incarcerated mothers because they do not stray far from the traditional structure of incarceration while allowing women inmates to maintain consistent contact with their children. The obvious drawback to such programs is that the newborn is only permitted to stay with its mother for eighteen months. Then the child is taken from its mother, disrupting the parent-child bond that is formed within that time. As discussed earlier, the decreased contact with the incarcerated parent has an immediate adverse effect upon children's behavior.

The community-based correction programs, on the other hand, allow inmates increased contact with their children. In 1982, California constructed community-based treatment centers where imprisoned mothers could actually live with their children who were under the age of six.⁷⁵ These centers do not resemble the prison setting; instead, they are often set in either an urban or suburban area. For example, a program in Salinas, California, is located in a residential area, in three renovated Victorian homes.⁷⁶ Admission

70. *Id.* at 228.

71. These programs are located in the New York State facilities of Bedford Hill, Taconic Prison, and Riker's Island. *Id.* at 236.

72. *Id.*

73. *Id.*

74. A hosting family has an integral role in prison nursery programs. This "family" is an unrelated individual that hosts the child one Saturday each month so that a child may visit with their mother. *Id.* at 237.

75. Zealand, *supra* note 21, at 256.

76. *Id.*

to these programs is limited to women and entirely unavailable for single-parent fathers.

The women must satisfy certain criteria to be admitted into community-based programs. However, that does not guarantee admission because there are too few facilities compared to the number of women inmates. For instance, in California in 1992, there were approximately 5,000 women incarcerated on any given day, but only 100 community-based slots were available for mother-infant care.⁷⁷ Additionally, most programs limit admission to mothers with relatively short sentences, who commit nonviolent crimes, and have very young children.⁷⁸ California's Pregnant and Parenting Women's Alternative Sentencing Program Act only considers eligibility for women inmates who have: 1) an established history of substance abuse; 2) never been in prison before or committed crimes of violence against children; and 3) not been sentenced to state prison for more than thirty-six months.⁷⁹ Even if a female inmate meets these criteria, she is subject to a written evaluation by the probation department. The evaluation discusses whether the program would be in the best interest of the children, whether the inmate would benefit from the program, and whether the district attorney recommends the placement.⁸⁰ The judge, however, does not have the ultimate authority to order placement in the program; he or she can only make a recommendation.⁸¹ This program is not available for fathers because the statute is written explicitly for mothers. According to Karen Shain, "fathers are especially at a loss. They're kind of stuck."⁸² Because advocates fear the state simply would cut the program for women, rather than add room for men, "nobody wants to challenge" the exclusion of men.⁸³

These programs have proved quite successful in offering women the skills and resources necessary for parenting and rebuilding social ties. Mothers receive parenting classes, substance abuse counseling, and life skills and employment training.⁸⁴ The goal of these programs is to strengthen the mother-child bond and prepare mothers for reentry to the outside world.⁸⁵ Mother-infant programs also provide mothers with the opportunity to gain valuable education and job skills. The mothers no longer feel they must rely on future criminal activity to support their families.⁸⁶

77. Patton, *supra* note 18, at 186. The Taconic Prison nursery program in New York, discussed above, only "serves 23 inmate mothers and their infants. . . ." Metzler, *supra* note 26, at 432.

78. Patton, *supra* note 18, at 186-87.

79. *Id.*

80. *Id.* at 187.

81. *Id.*

82. Zealand, *supra* note 21, at 257.

83. *Id.*

84. Patton, *supra* note 18, at 187.

85. *Id.*

86. *Id.* at 188.

One advantage of community correctional programs is the large reduction in recidivism.⁸⁷ For example, the programs at the Elizabeth Fry Center in San Francisco have been very successful in reducing recidivism. Its statistics show the recidivism rate of its former women inmates is a low 20% compared to the 39% reconviction rate of traditionally incarcerated women in state prisons.⁸⁸ Additionally, the longevity and success of the Bedford Hills in-prison nursery program indicates that in-prison nurseries may also share a comparatively low recidivism rate.⁸⁹

The reason there are not more community correctional facilities are because they require a substantial departure from the traditional incarceration model and need a large amount of financial aid to implement and operate.⁹⁰ For several years, Congress has promised to provide funding of roughly nine million dollars, but has yet to follow through.⁹¹ These financial realities make it even more difficult for men to request equal treatment.

C. Father Absenteeism

Sociologists have studied the crucial role fathers play in their children's development and the detrimental effect on children when they grow up without a father. Courts also have stressed the importance of a natural father in a child's life. One court stated, "we cannot emphasize too strongly the . . . significance of recognizing a child's right to the 'nurturing, support and companionship of her father.'"⁹² Growing up in a fatherless household increases a male youth's risks of incarceration in the United States.⁹³ The next two sections discuss the importance of fathers in their children's lives and explore possibilities of how the 771,000 fathers currently in prison can continue relationships with their children and ensure they do not become tomorrow's criminals.

The following sociological studies consistently found that fatherless children do not fare as well as children from intact two-parent families. Judith Wallerstein's study of children living without fathers discovered that 70% of hard-core delinquents, serving time in long-term correctional facilities, did not consistently have fathers when growing up.⁹⁴ Another study of father-absent homes revealed that those children live with fewer economic

87. Kim, *supra* note 7, at 238.

88. *Id.* at 238-39.

89. *Id.* at 239.

90. *Id.*

91. *Id.*

92. Thomas v. Freeland, No. 97-CA-06, 1997 WL 624331, at *4 (Ohio App. 2d Dist. Oct. 10, 1997) (citing Holm v. Smilowitz, 615 N.E.2d 1047, 1060 (Ohio App. 4th Dist. 1992)).

93. CYNTHIA C. HARPER & SARA S. MCLANAHAN, FATHER ABSENCE AND YOUTH INCARCERATION I (Ctr. for Research on Child Wellbeing, Working Paper No. 1999-03, 1999).

94. Wallerstein, *supra* note 14, at 325-26.

resources, more poverty, more violence in neighborhoods with high unemployment, and a lower tax base to support schools.⁹⁵

Because fatherless children are faced with these disadvantages, they are most likely to turn to crime themselves. A study of a nationally representative sample of 6,403 young men concluded that those men who spent their teenage years in father-absent homes were incarcerated three times more often than young men from father-present families.⁹⁶ The statistics become even grimmer for each year that an incarcerated father is away from his children. Each year in a fatherless family, increases the odds of incarceration by five percent, and further, the addition of a stepfather into the home does not improve a young man's odds.⁹⁷ These studies demonstrate that father absence has become more widespread and is not just affecting a small group of children.

When a father is imprisoned, the child's life is significantly altered because he or she now must live in either a single-mother home or foster care. This has adverse economic effects and results in children spending less time with their parents than children in two-parent homes. If the father is incarcerated and the mother is forced to work more, the result is less child supervision, thus increasing the child's susceptibility to criminal activity.⁹⁸ If a child has strong emotional attachments with both parents, is supervised more, and spends quality time with his or her parents, that child is less likely to behave delinquently. As previously stated, single mothers simply do not have the time or resources to compensate for the lack of a father in the child's life,⁹⁹ explaining why the juvenile crime rate is higher in single parent families.¹⁰⁰

The statistics and studies described above demonstrate the crucial role fathers play in their children's development. Many children that grow up in single-parent families never had the opportunity to know their father or upon divorce from their mother, never heard from their fathers again. Children of incarcerated fathers, however, are a uniquely distinctive group. Incarcerated fathers often want to continue parenting their children but are unable to because the correctional system does not provide men with the same commu-

95. MYERS, *supra* note 2, at 85.

96. *Id.* at 117.

97. *Id.*

98. U.S. Census data, in 1994, showed that 13% of children living with two parents live in poverty, while an alarming 59% of children living with single mothers live in poverty. MYERS, *supra* note 2, at 73.

99. The discussion of single mothers is not an attack on their adequacy as a parent. The statistics show, however, that children from two parent families are less likely to have as many behavioral and delinquency problems as their counterparts. Sociologist Sara McLanahan, a single mother, states, "When I first [began researching this issue] I wanted to demonstrate that single mothers could do just as good a job of raising children as married moms. Unfortunately, the evidence led me to somewhat different conclusions." MYERS, *supra* note 2, at 85.

100. For most children, "single parent" means father absent because 5.5 times as many children live with their mother rather than their father. MYERS, *supra* note 2, at 68.

nity-based or in-prison nursery programs offered to women. Leaving incarcerated fathers out of contemporary penal efforts of family reunification harms children, gives male inmates one less reason to rehabilitate, and increases the burdens to society.¹⁰¹

D. The Impact of Father Incarceration on Their Children and Society

1. Impact on Children

Children of incarcerated parents, whether it is their mother or father who is imprisoned, will likely experience emotional, physical, mental, and behavioral problems. In one study, the sons of incarcerated fathers exhibited aggressive, delinquent and criminal behavior shortly after their father's incarceration.¹⁰² In addition to behavioral problems, many of these children's school performance declined rapidly upon incarceration of their fathers.¹⁰³ This reaction to their fathers' incarceration is likely because fathers normally assume disciplinarian duties.¹⁰⁴ Girls, on the other hand, may experience more severe problems related to school performance as a result of their father's incarceration.¹⁰⁵ Regardless of the sex of the child, research shows that the children of an incarcerated father are at risk of continuing the cycle of criminality.¹⁰⁶

2. Societal Impact of a Father's Incarceration

Commentators have remarked that "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 families often become increasingly unstable."¹⁰⁷ Many of these children experience behavioral and educational problems and do not receive the attention they need to discourage them from committing delinquent acts. Society then falls victim to these children's crimes and bears the financial and social costs of supporting them.

Another significant societal cost of incarcerating fathers is the recidivism of the father offender. Without strong familial ties during incarceration, the father offender is more likely to commit future crimes upon his release

101. Patton, *supra* note 18, at 192.

102. Brooks & Bahna, *supra* note 3, at 281.

103. *Id.*

104. Zealand, *supra* note 21, at 277. The clinical study of six lower-middle-class Caucasian families referred to in Part I is indicative of the typical behavior problems experienced soon after a father's incarceration—one son stole a stereo and began skipping school while another son attacked his classmate. *Id.* at 278.

105. Brooks & Bahna, *supra* note 3, at 282.

106. *Id.*

107. *Id.* at 272.

from prison. Studies have demonstrated that inmates who do not participate in family visitation programs violate parole sixty percent of the time compared to those inmates who regularly see their children.¹⁰⁸ Other studies have revealed that fathers who maintain ties to their families, specifically to a spouse and children, have a greater success upon release from prison.¹⁰⁹ One researcher has reported a correlation between strong inmate/family ties and later parole success.¹¹⁰

The story of inmate Arthur Hamilton demonstrates the positive effect strong inmate/familial ties can have during the period of incarceration. His story illustrates a father's desire to provide love, guidance, and support for his children from prison. Arthur Hamilton, an inmate in the State of Michigan, founded Fathers Behind Bars, Inc.¹¹¹ This non-profit organization is designed to assist incarcerated fathers and their children by promoting programs that "will stabilize the family, strengthen the ties, and deter the father from future criminal behavior."¹¹² Hamilton's wife sends interested father inmates a "starter-kit," which includes an overview of Michigan law, ideas on how to be an effective parent from prison, names of Michigan and national organizations willing to assist prisoners and their families, a list of books for incarcerated fathers, and information for spouses of inmates.¹¹³ Arthur has obtained a college degree in English and his two children are doing very well in school, with his oldest son attending college.¹¹⁴ Although Arthur's efforts have proven to be successful for his family and other Michigan inmates, the forty-nine other states are without similar programs for fathers. Arthur is only one man and it is not possible for him to spread his message throughout the entire United States without assistance from the legal system. The legal system and community-based organizations need to recognize the societal impact of incarcerating fathers and respond by enacting programs that allow incarcerated fathers to raise their children.

Despite the devastating effects of father incarceration, there has been limited effort to address these problems. Although the legal system and community organizations are recognizing the needs of incarcerated women and their children, with in-prison nursery programs and community correctional facilities, there are no similar programs for male inmates and their children. Judges, lawmakers, and corrections officials can no longer ignore the important role an imprisoned father can play in the lives of his children. The following sections discuss the courts and correctional organizations fail-

108. T.C. Brown, *When Dad Can't Come Out to Play Children of Inmates Spend a Week With Their Fathers in a Special Summer Camp in Bid to Cement Family Ties*, THE PLAIN DEALER, July 1, 2000, at 1B.

109. Brooks and Bahna, *supra* note 3, at 285.

110. Zealand, *supra* note 21, at 279.

111. *Id.* at 248.

112. *Id.* at 281 n.10.

113. *Id.* at 248-49.

114. *Id.*

ure to consider the importance of a father's role at the sentencing stage and what should be done to combat these problems.

IV. THE LEGAL SYSTEM'S DISREGARD FOR INCARCERATED FATHERS

The legal system should take responsibility for the familial and societal costs incurred when inmates are separated from their families due to incarceration.¹¹⁵ The system needs to address and attempt to deal with these costs.¹¹⁶ Although there have been some efforts in this direction for women inmates, the results for men have not been satisfactory. When a father is incarcerated, society and the courts "[relegate] him to the under-class."¹¹⁷ In fact, many courts consider incarceration ground for termination of the father's parental rights. The courts, however, do not act so quickly in terminating a mother inmate's rights. Further, while some courts consider the effects of incarceration on the female defendant's family during the sentencing process, others refuse to do the same for men, resulting in a wide disparity in sentencing of fathers with families.

A. Termination of Fathers' Rights

Incarcerated fathers and their children have failed to win the interest of legislators and judicial officers. One reason is the "sexist normative stereotypes and generalizations about fathers."¹¹⁸ The concept of the "dead-beat" dad has become the media's symbol of fatherhood.¹¹⁹ Another reason fathers have been neglected is because society is not sympathetic toward fathers in jail.¹²⁰ One commentator notes, "there is less consideration for the impact of fathering on a developing child and more a feeling of cutting him off from the child because he is too evil."¹²¹ Sadly, the judicial system reflects these negative views about incarcerated fathers when they terminate parental rights.

Incarcerated fathers who are no longer part of a nuclear family are especially vulnerable to losing their parental rights.¹²² In at least twenty-five states, parental rights or adoption statutes have provisions that explicitly pertain to inmates.¹²³ For example, an incarcerated father's parental rights were terminated because he failed to share his \$1.50-a-day prison salary with his

115. Brooks & Bahna, *supra* note 3, at 285.

116. *Id.*

117. Zealand, *supra* note 21, at 280.

118. Patton, *supra* note 18, at 189.

119. *Id.* at 189-90.

120. *Id.* at 191.

121. *Id.*

122. Zealand, *supra* note 21, at 260.

123. *Id.*

children.¹²⁴ The purpose of termination proceedings involving incarcerated parents is typically to allow foster parents or stepparents¹²⁵ to legally adopt the inmates' children.¹²⁶ The lower court decision in *R.H.N.* emphasized the resistance of the judiciary to recognize an incarcerated father's rights, stating, "[W]henever 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."¹²⁷ The Colorado Supreme Court also had no sympathy for the father/child relationship by concluding that the father's refusal to provide for his children with his \$1.50 per day wage was sufficient to terminate his rights.¹²⁸

Similarly, the state of Michigan does not value an incarcerated parent's rights. In Michigan, parental rights can be terminated if a parent is incarcerated for more than two years and is unable to support his or her child during this time.¹²⁹ If the children continue to live with their mothers, an incarcerated father is more likely to lose his children if his children's mother remarries and her spouse wants to adopt the children.¹³⁰ If there is inconsistent contact between the incarcerated father and their children, stepfathers often use that fact during a custody battle.¹³¹ It is surprising that courts are willing to terminate a father's rights when research has consistently demonstrated that "[a] father's absence from a child's life for any reason can cause disruptions in psychological and social development . . . [and] a father's imprisonment has been linked to social, emotional, and cognitive delays in children."¹³² In addition, research has also shown that children raised by stepparents fare much worse than single parent children.¹³³

Contrary to Michigan and Colorado, the New York and California legislatures have abolished incarceration as a basis for the termination of parental

124. *In re* Petition of R.H.N., 710 P.2d 482 (Colo. 1985).

125. One study has concluded that children living with a stepparent fare much worse than children living absent a father entirely. HARPER & MCLANAHAN, *supra* note 93, at 25-26. Youths living in stepparent families face odds of incarceration significantly higher than those in single-parent families. *Id.* Thus, the reasoning behind terminating an incarcerated father's rights and giving them to another seems to defeat the purpose for terminating the rights in the first place.

126. Brooks & Bahna, *supra* note 3, at 286.

127. *Inmate Father's Parental Rights Terminated*, UPI, Jan. 15, 1984, LEXIS, Nexis Library, UPI File.

128. *In re* Petition of R.H.N., 710 P.2d at 488.

129. Brooks & Bahna, *supra* note 3, at 287 (citing MICH. COMP. LAWS ANN. § 712A.19b(3)(h) (West 1993)).

130. Zealand, *supra* note 21, at 261.

131. *Id.*

132. Patton, *supra* note 18, at 192.

133. HARPER & MCLANAHAN, *supra* note 93, at 31-32. Youths in stepparent households face incarceration odds almost three times as high as those in mother-father families, and significantly higher than those in single-parent households. *Id.*

rights.¹³⁴ While this appears to be a step in the right direction, the statutes impose certain requirements. The New York statute requires that incarcerated parents maintain continued contact with their children and have a realistic plan for the future and care of their children.¹³⁵ If the incarcerated parent fails to abide by the statute, they risk losing their parental rights.¹³⁶ Similarly, California Family Code section 7825 provides that a parent will lose custody of his or her child if, as a result of a felony, the parent is unable to care for the child.¹³⁷

Clearly, there is no uniformity among the states in dealing with the incarcerated parents' rights. One of the major issues on which the courts disagree is whether incarceration of the parent should be considered abandonment, and whether parental rights should be terminated based on that abandonment.¹³⁸ A New Jersey court recognized that while some states consider a father's incarceration as abandoning his children,¹³⁹ additional factors must be considered before terminating his rights.¹⁴⁰ This includes the "care, love, protection, and affection" the father provided for his children before incarceration, and the efforts made to continue contact during incarceration.¹⁴¹

Rather than terminating a parent's right after incarceration, the court should place more emphasis on whether it is in the best interest of the child to terminate contact with his or her parent. By placing great weight on a father's criminal conviction and denying him contact with his child, the court

134. Brooks & Bahna, *supra* note 3, at 287-88.

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

136. *In re Gregory B.*, 542 N.E.2d at 1057.

137. CAL. FAM. CODE § 7825 (West 1994). This statute provides:

A proceeding under this part may be brought where both of the following requirements are satisfied:

- (1) The child is one whose parent or parents are convicted of a felony.
- (2) 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 the future custody and control of the child.

CAL. FAM. CODE § 7825 (West 1994). If the courts chose to terminate a father's rights based on these principles, his child stands to lose not only the opportunity to maintain a relationship with his or her father, but all rights inherent in the legal parent-child relationship, including the right of support and the right to inherit. *Zealand*, *supra* note 21, at 273.

138. Brooks & Bahna, *supra* note 3, at 290.

139. *In re Adoption of Children L.A.S.*, 610 A.2d 925, 928 (N.J. Super. Ct. App. Div. 1992). The lower court ruled that if a father has chosen to engage in criminal activity which caused him to be incarcerated, then he has voluntarily abandoned his children. *Id.* at 927. The Appellate Division did not agree with this limited finding. Furthermore, classifying incarceration as abandonment assumes that people who commit crimes think they will be caught, arrested, convicted and incarcerated. Brooks & Bahna, *supra* note 3, at 290. Thus, the courts reasoning for terminating parental rights based on a theory of abandonment appears illogical.

140. Brooks & Bahna, *supra* note 3, at 290.

141. *Id.*

is not deciding what is in the best interest of the child.¹⁴² If a child has a father like Arthur Hamilton, it is in that child's best interest to maintain a relationship with his or her father. The alternative seems worse because children in father-absent homes have higher risks of being incarcerated, along with increased emotional instability.¹⁴³ Although, it is inherent in our criminal justice system to penalize those who violate society's laws, the courts, by terminating an inmate's parental rights, further punish the criminal parent. They also penalize innocent children.

B. *The Role of Gender in a Sentencing System*

In the criminal justice system where judges are free to exercise discretion, they systematically favor female offenders over similarly situated male offenders.¹⁴⁴ Before making sentencing decisions, courts have the discretion to consider whether to mitigate a defendant's sentence if they have familial responsibilities. While some courts recognize the devastating effect incarceration has on the family, they often limit their concern strictly to mother inmates. When courts look at mitigating factors at the sentencing stage, having children is considered a mitigating factor for women.¹⁴⁵ Courts, therefore, treat mothers more leniently than fathers.¹⁴⁶

142. *Id.* In a recent decision, the Supreme Court provided "heightened protection against government interference with certain fundamental rights and liberty interests" such as one's right to parent their child. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Here, the Supreme Court struck down a state visitation statute as unconstitutional because it infringed upon a natural mother's right to the care, custody, and control of her children. *Id.* at 72. The Court recognized that this fundamental right to parent should not be disturbed by interference from third parties. *Id.* at 66. To date, an incarcerated father has not made a constitutional challenge regarding a state statute that terminates parental rights. For example, if an incarcerated father from Michigan challenged the statute requiring termination of parental rights after two years, under a *Troxel* analysis, he may prevail. The incarcerated father could argue that he has a fundamental right of parental autonomy over his children that should not be disturbed by the state. Further, it is in the best interests of the child to maintain a relationship with his or her father. Simply because the father is incarcerated does not necessarily mean he is an unfit parent and therefore does not justify termination of his parental rights.

143. HARPER & MCLANAHAN, *supra* note 93, at 4.

144. Irene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 182 (1994).

145. Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 104-05 (1993).

146. *Id.* While it appears that there are obvious equal protection implications here, such a claim is often not reached because the courts require a threshold showing that those claiming an equal protection violation are similarly situated. *Zealand*, *supra* note 21, at 269. This results in a rejection of most inmates' gender-based equal protection claims. *Id.* Courts refuse to engage in a program-by-program analysis in determining whether male and female inmates receive equal treatment, finding it self-evident that programming disparities will legally exist between men's and women's facilities. *Id.* Therefore, it is unlikely an incarcerated father would prevail on an equal protection challenge because the Court seems to the issue entirely.

1. Preferential Treatment in the Sentencing of Mother Inmates

Under the Sentencing Reform Act of 1984, the Senate Judiciary Committee instructed the Sentencing Commission to consider the effect of incarceration upon the offenders' children.¹⁴⁷ Specifically, under Section 994 of Title 28, the Commission must consider family ties when imposing sentences of probation, fines, or imprisonment.¹⁴⁸ The reality, however, is that this instruction is not followed. Rather, the Commission has issued a pronouncement that "family ties and responsibilities are not ordinarily relevant in determining whether a sentence should be outside the applicable guideline range."¹⁴⁹ Some courts, however, do allow departures from the sentencing guidelines and are more likely to do so for mother offenders.¹⁵⁰

The Sentencing Act protects women by allowing departure from the guidelines if a woman is either pregnant or a single mother.¹⁵¹ Programs like Bedford Hills, that allow pregnant women to stay with their children, are evidence of leniency toward women. A study conducted of twenty-three judges stated, "[t]hey are more inclined to recommend probation rather than imprisonment for women; and if they sentence a woman, it is usually for a shorter time than if the crime had been committed by a man."¹⁵² This favoring of women is largely because women, not men, are considered the primary caretakers.¹⁵³ The Second Circuit allowed a downward departure where a mother was convicted of conspiracy, bribery, and theft of public money.¹⁵⁴ She received a sentence ten levels below Guidelines' recommendations because she had the sole responsibility to care for four young children.¹⁵⁵ The court justified its departure by reasoning it would be an extreme hardship to leave the children without a mother.¹⁵⁶

Conversely, the courts routinely disallow departures for incarcerated fathers who may be the primary caretakers or partners in raising and providing for their children. In *United States v. Berlier*, a father was convicted of em-

147. Brooks & Bahna, *supra* note 3, at 291.

148. *Id.*

149. Patricia M. Wald, "What About the Kids?": Parenting Issues in Sentencing, 10 FEDERAL SENTENCING REPORTER 34.

150. Roberts, *supra* note 145, at 104-05.

151. Myrna S. Raeder, *Gender and Sentencing: Single Moms, Battered Women, and Other Sex-Based Anomalies in the Gender-Free World of the Federal Sentencing Guidelines*, 20 PEPP. L. REV. 905, 962 (1993). While the guidelines do not specifically mention pregnancy as a reason for departure, the language of section 5H1.4 of the guidelines provides that departures are allowed when a defendant is physically impaired. Nagel & Johnson, *supra* note 144, at 197-98. This is limited to extraordinary cases. *Id.* The effect of this guideline allows sentencing departures for pregnant women.

152. Nagel & Johnson, *supra* note 144, at 187.

153. Zealand, *supra* note 21, at 253.

154. *United States v. Johnson*, 964 F.2d 124, 125 (2d Cir. 1992).

155. *Id.* at 126.

156. *Id.* at 130.

bezzlement and was sentenced to probation and ordered to pay a fine.¹⁵⁷ Although it appeared the court was treating fathers equally, this changed swiftly on appeal. The Ninth Circuit held that the father's family ties did not justify a downward departure and the case was remanded for resentencing.¹⁵⁸

The narrow view of fathers, as expressed by Stephen J. Schulhofer, continues to limit sentencing departures for them. He views incarcerated fathers as poor providers who offer "the family nothing more than a thin wallet."¹⁵⁹ He opines that a "welfare check can often replace the only kind of family support that many male offenders ever provide, but when the mother goes to prison, the children lose their primary caretaker."¹⁶⁰ This argument ignores that fathers are more than a paycheck to the family. Fathers can provide for their children's emotional needs by loving, caring, and offering guidance to their children. While the importance of economic stability in a child's life cannot be ignored, economics should not be the sole criterion for evaluating a parent's contribution. In fact, where families are cohesive and loving, even though poverty is great, violent behavior by their children is rare.¹⁶¹ This explains why parental status, whether a mother or father, should be considered at sentencing.

In addressing the preferential treatment of women at sentencing, the point is not that a mother's role should not be considered; rather the courts should ensure equal treatment for fathers as well. Those that argue for mitigating sentences on the basis of parental status assert that excessive incarceration disrupts the parent/child relationship to the detriment of the child.¹⁶² A child who is accustomed to having either their father or mother in their lives will be adversely affected if he or she is no longer allowed to maintain relationships with his or her parent. The statistics reflect that, "[C]hildren of incarcerated parents form perhaps the largest single-issue group of at risk-children in the United States today."¹⁶³ The social costs of this disruption far outweigh the benefits of incarcerating parents, and, therefore, warrant mitigation at the sentencing stage to include fathers.

Unquestionably, the imprisonment of fathers has significant social costs. The disruption in a child's life caused by a father's incarceration and the ensuing lack of parental guidance can lead to behavioral problems.¹⁶⁴ Studies demonstrate that the more years a child lives without a father, the greater the

157. 948 F.2d 1093, 1094 (9th Cir. 1991).

158. *Id.* at 1096-97.

159. Zealand, *supra* note 21, at 253.

160. *Id.*

161. MYERS, *supra* note 2, at 116.

162. See, e.g., Nagel & Johnson, *supra* note 144.

163. Patton, *supra* note 18, at 200 (quoting Peter A. Breen, *Families in Peril, Bridging the Barrier*, 57 CORRECTIONS TODAY 98, 99 (1995)).

164. Nagel & Johnson, *supra* note 144, at 206.

child's risk of incarceration.¹⁶⁵ Myrna Raeder makes a plausible utilitarian case for taking these considerations into account:

Any cost benefit analysis would seem to dictate that children be considered in the sentencing decision, particularly when societal costs regarding any future criminality of the children are weighed. . . . Other societal costs that should be considered might include foster care to replace the incarcerated parent, permanent dissolution of the family when the incarceration provides grounds for terminating parental rights, and the child's dependence upon government aid.¹⁶⁶

The sentencing guidelines must be adjusted to promote family ties between fathers and their children to decrease the perpetuating cycle of criminality. The solution is one for legislative and judicial bodies. They can no longer adhere to the strict Federal Sentencing Guidelines and the mandatory sentencing schemes now in force in forty-nine states that put more fathers in jail for longer terms.¹⁶⁷ Both branches must realize the great social costs of distancing an incarcerated father from their children. Fathers play an important role in rearing their children and parent/child programs similar to the women's programs must be created.

V. DESIGNING FATHER/CHILD CORRECTIONS COMMUNITY BASED PROGRAMS

Although the problems of father inmates and their children are largely ignored, there have been some attempts by correctional systems and community-based organizations to address these difficulties. These attempts traditionally fall into three categories: family time programs, inmate educational programs involving children, and parenting education programs.¹⁶⁸ In addition to these programs, fathers should be eligible for participation in community correctional facilities or in-prison nursery programs. These programs serve an important role in addressing the familial problems resulting from incarceration, but because their existence depends on the availability of funding, incarcerated fathers do not typically have access to them. The types of programs explained below provide fathers some contact with their children. The two proposed programs for fathers—community correctional facilities and in-prison nursery programs—serve as examples of the most effective programs to foster parent/child relations. If judges nationwide were to consider the following approaches when sentencing defendant fathers, it is highly probable that it would help incarcerated fathers maintain ties to their children and reduce the cycle of criminality.

165. See HARPER & MCLANAHAN, *supra* note 93, at 24-25.

166. Raeder, *supra* note 151, at 959 (citing Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, 437-38 (1991)).

167. Zealand, *supra* note 21, at 249-50.

168. Brooks & Bahna, *supra* note 3, at 298.

A. Family Time Programs

Family time programs give fathers and their children the opportunity, time, and freedom to interact.¹⁶⁹ A prison in Lima, Ohio, could serve as a model for other prisons and jails. At the Lima Correctional Institution, fathers are receiving equal treatment with the program, known as “Beyond Bars—Daddies and Daughters.”¹⁷⁰ This program is similar to the Girl Scout effort from 1992, named “Girl Scouts Behind Bars” that allows incarcerated mothers and their daughters to spend time together.¹⁷¹ Beyond Bars in Lima was created for Girl Scouts who have fathers in prison. Lima’s Applesseed Ridge Girl Scout Troop 884 is the first troop in the country to conduct its meeting inside prison with their fathers, who participate in “badge-motivated” activities.¹⁷²

The eight Girl Scouts of Troop 884 spend time with their fathers, who are incarcerated for crimes ranging from murder to drug trafficking.¹⁷³ The meetings, which began in January 2000, occur in the prison’s visitation room every other Wednesday.¹⁷⁴ During the first fifteen minutes of the meeting, the girls have bonding time with their fathers and review their homework and test grades, just as though they were at home with them.¹⁷⁵ Clifford Adkins, a former drug dealer, stated that when his two daughters run into the visiting room on Wednesdays, “It lightens [me] up. . . [even though] I’m locked up, . . . I [still] want to be a part of my kids’ life. . . . Now I can sit down and have a one-on-one discussion with them.”¹⁷⁶ After the bonding time, the fathers participate with the girls’ badge activities which range from discussion about how to help an injured neighbor to making cards for nursing homes.¹⁷⁷

Experts realize the positive effect this program has on both the daughters and their fathers. Barry Holman from the National Center on Institutions and Alternatives asserted that the Lima program is a first and should be copied around the country.¹⁷⁸ The girls in Troop 884 have a special bond be-

169. *Id.* at 399.

170. Kim Bates Toledo Blade, *Prison No Bar to Girl Scouts, Their Fathers*, DAYTON DAILY NEWS, Feb. 5, 2000, at 3B; Bob Johnson, *Young Scouts Join Mothers Behind Bars; Families: A Group Called Aid to Inmate Mothers Unites Moms and Their Children in Jail-house Troop Meetings. Around the Country, 24 Prisons Have Similar Programs*, L.A. TIMES, Jan. 14, 2001, at A15.

171. Blade, *supra* note 170, at 3B.

172. *Id.*; see also Interview by Scott Simon with Jane Kreitz, Executive Director, Applesseed Ridge Girl Scout Council, National Public Radio (Apr. 8, 2000) [hereinafter Kreitz Interview].

173. Kreitz Interview, *supra* note 172.

174. Blade, *supra* note 170, at 3B.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

cause of the commonality they share with having fathers in prison. It is often shameful for children to express to their peers that their fathers are incarcerated. This group allots time for the daughters and fathers to discuss these feelings. In addition, this program allows children to have consistent contact with their parents and the children also serve as a great motivation for their fathers. For example, Jay Downton credits his young daughter with “keeping him going” by the things she says and does when they are together.¹⁷⁹ In turn, Downton’s daughter looks forward to seeing her father because he commends her about her good grades.¹⁸⁰

Not only does this visitation program allow fathers to maintain ties with their children but most importantly, it reduces the recidivism rate of the fathers and keeps the girls from a life of crime. The fathers look forward to seeing their girls every other Wednesday. This motivates the men while in prison and also creates hope for a fruitful life with their children when they are released. One father who was released from prison reported that this program helped him to rebuild his life. During a job interview, he provided the employer with reports and newspaper clippings from his involvement with the troop and credits this program as the reason he got the job.¹⁸¹ He is now at home with his children and has rehabilitated himself into society. The personal anecdotes from daughters and fathers of Troop 884 are excellent examples of a successful program that provides a forum for meaningful father-child bonding.¹⁸²

B. Inmate Educational Programs Involving Children

Educational programs that involve inmates and their children represent a second type of approach to the problem.¹⁸³ These programs seek to end the cycle of educational deficiency and illiteracy that many of these families experience by educating the incarcerated parent, and then creating the opportunity for parents to teach their children. This program allows both the parent and child to learn from one another.

179. *Id.*

180. *Id.*

181. Kreitz Interview, *supra* note 172.

182. There is another visitation type program located at the Bexar County Detention Center in San Antonio, Texas. Pappas and Their Children (“PATCH”) was modeled after Mothers and Their Children (“MATCH”), which was the first parenting program in the country for mothers. Zealand, *supra* note 21, at 274. The seventy fathers in the PATCH program live together in the same unit. *Id.* Fathers must meet certain criteria to participate in the program. Once they are in the program, they learn parenting skills and attend life classes four times a week. *Id.* at 274-75. Men who satisfy good behavior standards throughout the week are allowed to have a one-hour visit with their children on Saturday. *Id.* at 275. Unfortunately, fathers are only allowed to stay at Bexar for several months to a year before they are moved to other facilities where there may be little to no contact with their children. *Id.*

183. Brooks & Bahna, *supra* note 3, at 300.

The interactive learning and confidence building this program encourages has proved beneficial to mother inmates and their children. "Mother-read" is one such program aimed at incarcerated mothers and their children in the North Carolina prison system.¹⁸⁴ The mothers participate in classes where they learn to read and write.¹⁸⁵ This process includes writing stories about their children and themselves and sharing the stories with their children.¹⁸⁶ The improvement in the mother's education allows them to assist their children with schoolwork, improving their children's academic performance.¹⁸⁷ Although this program has benefited mothers and their children, fathers and their children remain neglected. To date, there is not a "Father-read" program, or anything similar, within the male correctional system.

C. Parenting Education Programs

Parenting education programs are beneficial because they teach parenting skills and methods to incarcerated parents.¹⁸⁸ These classes explore alternative parenting approaches, increase knowledge of child development, effective parenting styles and techniques, and family communication patterns.¹⁸⁹ The program places an emphasis on understanding the impact incarceration has on children.¹⁹⁰ The unique aspect of the "Parents in Prison" program is that it was created and is run by the inmates themselves. Similar to the "Father Behind Bars, Inc.," created by Arthur Hamilton, Parents in Prison was initiated by the inmates. The inmates recruit outside volunteers, coordinate, and plan all the events.

Both Parents in Prison and Fathers Behind Bars, Inc. have proven to be successful initiatives. Parenting educational programs could reach further and be more successful if the correctional system took an interest in establishing these programs nationwide.

D. In-Prison Nursery Programs

Although the above programs model a progressive approach to addressing the adverse impact father incarceration has on their children, these programs fail to provide fathers with consistent day-to-day interaction with their children. An in-prison nursery program, similar to the women's facility at Bedford Hills should also be created for fathers. Further, fathers should also be allowed contact with their newborn children for the first eighteen months,

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 301.

189. *Id.* at 301-02.

190. *Id.* at 302.

similar to the program for mothers. The reasoning behind the program—parent /infant bonding— is equally important for fathers.

The Children's Center at Bedford Hills also permits older children to visit their mother for a week. There is one program, sponsored by Hope House that affords the same privilege for fathers. This program allows children to participate in a camp for five days at their father's prison for five hours each day, returning to the host family in the evening.¹⁹¹ The benefit of this program is that family ties become stronger. The obvious drawbacks are that this is only a five-day visit once a year, and this is the only known camp program for fathers. Realistically, five days per year is not sufficient to foster a consistent father/child relationship. And having only one camp in the nation is not adequate to address the epidemic of fatherless children in our country. Society would reap greater benefits if the children were allowed to stay longer or even live with their fathers.

Individuals who place great emphasis on the mother's role in an infant's life will have a problem allowing incarcerated fathers to live with their infant in an in-prison nursery program, especially if the mother is not incarcerated. Given our system's preference toward mothers, it is unlikely that the correctional and judicial systems will allow an infant to live with its father in prison for the initial eighteen months of its life. Furthermore, the same arguments espoused for the effect father absenteeism has on children, can also be made for children without mothers.

E. Community Correctional Facilities

The community correctional facility is the best program for allowing fathers to maintain relationships with their children. The community correctional facilities serve two very important purposes: (1) Children and their fathers are allowed to build strong parent/child relationships; and (2) the parenting classes teach fathers how to be good parents. Many of the fathers desire contact with their children and want to be good parents, but are often ill equipped to handle parenthood. This is because many of them are second, third, or fourth-generation inmates who had absent fathers themselves.¹⁹² These programs, however, can offer fathers the skills and resources necessary for parenting and rebuilding social ties.

In addition to the parenting classes, fathers could receive substance abuse counseling, if applicable, life skills, and employment training. The classes and training would strengthen the father child bond and prepare the father for reentry to the outside world. It would also provide the father with an education and job skills so that he no longer feels the need to rely on criminal activity to support his family.

191. Brown, *supra* note 108, at 1B.

192. Zealand, *supra* note 21, at 275.

Given the vast benefits correctional facilities have to offer, legislators should create a statute for fathers similar to the Pregnant and Parenting Women's Alternative Sentencing Program Act. Eligibility for community based programs can be based on certain criteria: (1) No capital offenders or child molesters can participate; (2) the father can, however, have an established history of substance abuse or theft crimes (even including robbery); and (3) has not been sentenced to life in prison. If the probation department finds that a father meets these criteria then the judge should sentence the father to a community-based facility that allows his children to stay with him.

Mothers will likely oppose having their children stay in a community-based facility when they can provide a home for the child. The idea of having the mother and child live with the father in a community halfway house would be ideal, but the correctional system strictly adheres to its policy of separating women and men in prisons. Furthermore, the resources to institute community-based programs nationwide are lacking. Congress has promised to provide nine million dollars in funding for women's programs, but has yet to follow through. Many advocates fear that funds for the women's programs will be reduced to provide for fathers. It is unlikely adequate funding will be available for incarcerated fathers absent assistance from Congress. Given the adverse effect father absenteeism is having on our nation's children, however, Congress must make fathers a priority. Incarcerated fathers must have the same opportunities incarcerated mothers have to maintain the parent-child relationship during the parent's incarceration.

Another criticism of the alternative incarceration programs for fathers is fear that a father may use his role as a parent as a "get out of jail free card." The judiciary and legislature alike may fear that fathers do not genuinely care about their children; rather, they are using them to work the system. The proposal for community based programs, however, calls for screening by a probation officer and requires certain criteria is met so as to prevent fraudulent pleas.

VI. CONCLUSION

To break the cycle of criminality so that these children do not become tomorrow's criminals, our legal and correctional systems must recognize the important role a father plays in a child's life. The correctional system can no longer justify treating fathers differently or relegating them to under-class status merely because they are incarcerated.¹⁹³ It is one thing to recognize that society perceives male and female inmates differently.¹⁹⁴ It is quite another to look into a child's eyes and explain that the reason he or she cannot participate in a community-based program is solely because his or her parent

193. Zealand, *supra* note 21, at 280.

194. Patton, *supra* note 18, at 204.

is a male.¹⁹⁵ Moreover, advocates of continued prison expansion argue that longer sentences are necessary to protect families from crime while our current criminal justice policies make it increasingly difficult to create the very family units these people claim they want to protect. Our sentencing guidelines need to change so that they reflect greater emphasis on familial responsibilities. Without such father/child relationships, the chances that these children will be saved are greatly reduced.

As evidenced by the stories of Arthur Hamilton, the Lopez family and the fathers of Girl Scout Troop 884, children desire relationships with their fathers, just as these fathers want their children in their lives. Giving fathers equal access to parenting and visitation programs, and including them in alternatives to incarceration that allow fathers to live with their children, will help vulnerable families and break the bitter, intergenerational cycle of incarceration.¹⁹⁶

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195. *Id.*

196. Zealand, *supra* note 21, at 280-81.

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