1992

Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis

Philip Genty
Columbia Law School, pgenty@law.columbia.edu

JOURNAL OF FAMILY LAW

University of Louisville School of Law

Volume Thirty 1991-92 Number Four

PROCEDURAL DUE PROCESS RIGHTS OF INCARCERATED PARENTS IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS: A FIFTY STATE ANALYSIS

Philip M. Genty*

I. INTRODUCTION

Disruption of families through incarceration of parents has become an increasingly serious problem over the past decade. The prison population has grown dramatically, and for women prisoners the increases in the population are particularly striking. From 1980 through 1990, the number of women incarcerated in state and federal prisons in-

* Associate Clinical Professor of Law, Columbia University School of Law. Associate Director, Child Advocacy Clinic., J.D. 1980, New York University School of Law. Top Individual Winner, 1986 Mayor's Volunteer Service Awards, for implementation of Riker's Island Parents' Legal Rights Clinic. I am extremely grateful to Judith Waksberg for devoting many hours to reading an earlier draft and offering important suggestions for improvement. I would also like to thank Ellen Barry, Stacy Caplow, Susan Herman, Gail Smith and Jane Spinak for their helpful comments. Finally, I want to thank my research assistants, Michael Beloff, Roland Juarez, Elka Sachs and Robert Preston. Support for this article was provided by gifts to the Columbia University School of Law. This article is dedicated to my friends Precious Bedell, Kathy Boudin, Vivian Nettles and Candace Roman, women on the inside whose courageous efforts on behalf of themselves and other incarcerated mothers have been, and continue to be, an inspiration.

creased from 13,420 to 43,845, an increase of 227 percent.[1] In a single year, from 1988 to 1989, the number of incarcerated women increased by 24.4 percent.[2] In 1990 there were an additional 37,844 women in local jails.[3] For men the prison population increased by 130 percent from 316,401 to 727,398 between 1980 and 1990.[4]

A large portion of these prisoners are parents. Although statistics concerning the number of parents separated from their minor children through incarceration are imprecise and not entirely reliable, some information is available. In 1986, 67.5 percent of the state women prisoners in the United States had at least one child under the age of eighteen, and 68 percent of those women had more than one child. Assuming that a similar percentage of women confined to federal prisons and local jails are parents and that the 1986 estimate is valid for 1990 data, there probably were at least 55,000 mothers of minor children incarcerated nationally in 1990.[5] There were undoubtedly an even larger number of incarcerated fathers in 1990. In 1986, 54.4 percent of male prisoners had children under the age of eighteen.[6] In addition to the growing numbers of parents who are separated from their children, increasing sentence lengths mean that these families are being kept apart for longer periods of time. In 1986 approximately one-third of the women sentenced to state prison received maximum sentences of seven years or more, and almost 93 percent received sentences with a

---

[1] U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, WOMEN IN PRISON, Table A, at 7 (1991) (1980-1989 data) [Hereinafter WOMEN IN PRISON]; U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, BULLETIN, PRISONERS IN 1990, Table 6, at 4 (1991) (1990 statistics) [hereinafter PRISONERS IN 1990]. Note that in 1990 there were 38,834 women in state prisons and 5,011 women in federal prisons. *Id.*

[2] WOMEN IN PRISON, *supra* note 2, at 7 (Table A). Note that there were 36,121 women in state prisons and 4,435 in federal prisons. *Id.*

[3] U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, BULLETIN, JAIL INMATES, 1990, Appendix Table, at 4 (1991) (data cited are for 1990 average daily population).

[4] WOMEN IN PRISON, *supra* note 2, at 7 (Table A); PRISONERS IN 1990, *supra* note 2, at 4 (Table 5).

[5] WOMEN IN PRISON, *supra* note 2, at 6 (Table 13) (1986 data). Adding 43,845 state and federal prisoners plus 37,844 jail inmates, totaling 81,689, times 67.5% yields 55,140. *See supra* notes 2 & 4.

[6] *Id.*

maximum of four years or more.[7] For men the *average* maximum sentence was seven years.[8]

Another measure of the degree of family separation is the length of time actually served, since prisoners are typically paroled prior to the expiration of their maximum sentence. In 1986 women served an average of 16 months in state prisons (ranging from 10 months to 56 months, depending on offense).[9] In 1986 men served an average of 24 months in state prisons (ranging from 14 months to 84 months depending on offense).[10]

The profound impact of separation on families of incarcerated parents, and particularly mothers, is illustrated by the fact that in 1986, 85 percent of the mothers of minor children had legal custody of their children before entering prison, and 78 percent of the mothers lived with their children at that time. Furthermore, more than 85 percent of the incarcerated mothers intended to resume custody after their release from prison. Among men, approximately one-half of the fathers of minor children had lived with their children prior to their imprisonment, and an almost equal number planned to live with their children after their release.[11]

Consequently, particularly with respect to incarcerated mothers, imprisonment of a parent disrupts intact, viable families. The overwhelming majority of incarcerated mothers were active parents to their children prior to their incarceration and intend to continue in that role after their release. The time of parental confinement must therefore be viewed as an interlude, during which the parental ties must be nurtured and supported so that, to the greatest extent possible, the parent-child relationship is as strong after the parent's release as it was before.[12]

---

[7] WOMEN IN PRISON, *supra* note 2 (comparison of Table 2, at 2 and Table 6, at 4).

[8] U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NATIONAL CORRECTIONS REPORTING PROGRAM, 1986, at 19, Tables 1-7. Note that these data understate sentence lengths because they do not include data on mean sentence lengths for sentences "life without parole," "life plus additional years," "life" and "death." *Id.* n.c. Average maximum sentences ranged from four years to 28 years, depending on the crime.

[9] *Id.* at 27 (Tables 2-4). Note that these data understate sentence lengths, because they do not include time served in local jails in pre-trial detention which was credited to the state prison sentences. In addition, data for mean length of time served exclude sentences of "life without parole," "life plus additional years," "life" and "death." *Id.* n.b.

[10] *Id.*

[11] WOMEN IN PRISON, *supra* note 2, at 6 (Table 13).

[12] A number of commentators have written about the importance to both the parent and the child of maintaining strong family ties during the period of incarceration. *See, e.g.*, Beckerman, *Incarcerated Mothers and Their Children in Foster Care: The Dilemma of Visitation*, 11 CHIL-

Just the opposite often occurs in practice, however. For incarcerated parents who are confined for significant periods of time, there is an acute danger of dissolution of their families through termination of parental rights and adoption proceedings. This is especially true for incarcerated mothers, who are likely to have been the sole caretakers for their children prior to imprisonment. They frequently do not have family members available to care for their children and consequently may have to resort to the foster care system.[13] That the permanent loss of

---

DREN & YOUTH SERV. REV. 1975 (1989); Driscoll, *Mother's Day Once a Month*, 47 CORRECTIONS TODAY 18 (1985); Sack, Hairston & Hess, *Family Ties, Maintaining Child-Parent Bonds is Important*, 51 CORRECTIONS TODAY 102 (1989); Hale, *The Impact of Mothers' Incarceration on the Family System: Research and Recommendations*, 12 MARRIAGE AND FAM. REV. 143 (1987); Kaslow, *Couples or Family Therapy for Prisoners and Their Significant Others*, 15 AM. J. FAM. THERAPY 352 (1987); Lowenstein, *Temporary Single Parenthood - The Case of Prisoners' Families*, FAM. RELATIONS, Jan. 1986, at 79, 84; Sack, Seidler & Thomas, *The Children of Imprisoned Parents: A Psychosocial Exploration*, 46 AM. J. ORTHOPSYCHIATRY 618, 621-27 (1976); Comment, *The Prisoner-Mother and Her Child*, 1 CAP. U. L. REV. 127 (1972).

[13] *See, e.g.*, WOMEN IN PRISON, *supra* note 2, at 6, (Table 13), in which several significant disparities between men and women are apparent. Data are from 1986. First, for the vast majority of male prisoners, the children's mothers were available to care for the children, while most female prisoners had no such support from the children's fathers. Over 88% of the children of male prisoners were cared for by the children's mothers, but only 22.1% of the children of female prisoners were cared for by the children's fathers. Second, a much higher percentage of incarcerated women than men had to resort to the foster care system. Over 10% of the children of incarcerated women were in foster homes or institutional placements, while this was true for only 1.7% of the children of incarcerated men. Overall, more than 18% of the children of women prisoners were living with non-relatives, but only 4% of the children of men prisoners were with non-relatives.

The greater availability of family childcare resources for men than for women has also been noted in Hale, *The Impact of Mothers' Incarceration on the Family System: Research and Recommendations*, *supra* note 12, at 149.

While it is probably impossible to verify empirically, it is likely that the nature of adoption proceedings involving incarcerated parents has changed over time. As discussed more fully *infra* note 19 and the accompanying text, there are two contexts in which the termination of incarcerated parents' rights and the adoption of their children may occur. The first context is termination of rights of parents whose children are in foster care. The second context is an attempt by a *non*-incarcerated parent's new spouse to adopt the incarcerated parent's child without the incarcerated parent's consent. There would appear to be a gender distinction in the way in which the two scenarios occur. Because male prisoners are less likely than women to have to resort to the foster care system, female prisoners are probably more likely than men to be involved in the former type of cases. Just the opposite is true for the latter type of cases. Male prisoners are probably involved in such cases more often than are women since children of incarcerated fathers are more likely than children of incarcerated mothers to be cared for by the other parent, i.e., a non-incarcerated mother. Thus, male prisoners are more likely than female prisoners to be faced with the other parent's marriage or remarriage and a stepparent's subsequent attempt to adopt the incarcerated parent's child.

It therefore seems likely to find over time an increase in the number of cases involving the termination of parental rights of incarcerated parents whose children are in foster care. When almost no women were being imprisoned, the cases probably involved predominantly the newly

children is a very real possibility for such parents is reflected by the fact that at least twenty-five states have termination of parental rights or adoption statutes that explicitly pertain to incarcerated parents. The states with such statutes are: Alabama, Arizona, California, Colorado, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Wisconsin and Wyoming.[14] In addition, Illinois, Indiana, Maine and Tennessee, while not addressing parental incarceration generally, permit termination of parental rights for parents convicted of certain types of crimes against children.[15] Moreover, almost every state has reported cases dealing with these parents.

Permanent loss of parental rights during incarceration can occur in either of two contexts. First, when a child is in the care and custody of the state, an arrangement that will be referred to as "foster care" throughout this Article,[16] the state may bring a judicial proceeding to terminate the parent's rights permanently. Typically, once parental rights have been terminated, the parent loses all right to have contact

---

married stepfather's attempt to adopt the incarcerated father's child. As more families have come to be headed by single parents—usually women—and as more and more women have been imprisoned, the situation has changed. Today's cases are more likely to be those in which the prospective adoptive parent is a foster parent and the termination of the incarcerated parent's rights will result in the complete severence of the child's relationship with the natural family.

[14] ALA. CODE § 26-18-7(a)(4) (1986); ARIZ. REV. STAT. ANN. § 8-533(B)(4) (1989); CAL. WELF. & INST. CODE § 366.26(c)(1) (West Supp. 1992); COLO. REV. STAT. § 19-3-604(1)(b)(III) (Supp. 1986); GA. CODE ANN. § 15-11-81(b)(4)(B)(iii) (1990 & Supp. 1991); IDAHO CODE §§ 16-1602(s)(2), 16-1615, 16-2005 (Supp. 1991); IOWA CODE ANN. §§ 232.116(1)(i)(2), 232.116(2)(a) (West Supp. 1991); KAN. STAT. ANN. § 38-1583(b)(5) (1986); LA. STAT. ANN., CHILDREN'S CODE, art. 1015(1), (6) (West 1992 Supp.); MISS. CODE ANN. § 93-15-103(3)(e) (Supp. 1991); MO. ANN. STAT. § 211.447(3)(6) (Vernon Supp. 1992); MONT. CODE ANN. §§ 41-3-609(2)(e), 41-3-609 (4)(b) (1991); NEV. REV. STAT. ANN. §§ 128.105, 128.106(6) (Michie Supp. 1991); N.H. REV. STAT. ANN. § 170-C:5(VI) (Supp. 1991); N.M. STAT. ANN. §§ 32-1-3(L)(4), 32-1-54(B)(3) (1989); N.Y. SOC. SERV. LAW § 384-b(7)(e),(f) (McKinney Supp. 1991); OKLA. STAT. ANN. tit. 10, §§ 1130(A) (5-7) (West 1987); R.I. GEN. LAWS § 15-7-7(1)(b)(i) (1988); WIS. STAT. ANN. §§ 48.13(8), 48.415(5)(a) (West 1987); WYO. STAT. § 14-2-309(a)(iv) (1986). The Oregon statute involving the termination of rights of parents of children who are in foster care, OR. REV. STAT. § 419.523 (1991), does not address parental incarceration, while the statute dealing with adoption of children who are not in foster care, OR. REV. STAT. § 109.322 (1991), permits a child to be adopted without the consent of a parent who has been incarcerated for at least three years.

[15] ILL. ANN. STAT. ch. 40, para. 1501(D)(f),(g) (Smith-Hurd 1980); IND. CODE ANN. § 31-6-5-4.2(a) (Burns Supp. 1991); ME. REV. STAT. ANN. tit. 22, §4055(I-A)(B) (1992); TENN. CODE ANN. § 37-1-147(d)(3) (1991).

These statutes are discussed in Section IV, *infra*.

[16] The placement may be voluntary or involuntary through proceedings involving findings of neglect, abuse, dependency or other custodial deprivations for cause.

with her[17] child, and the child can thereafter be adopted without the parent's knowledge or consent.

The second context in which parental rights may be lost is through adoption of children who are *not* in foster care. A common way in which such cases arise is that the parent who is not incarcerated has custody of the child and marries or remarries. The new spouse, the child's stepparent, then wishes to adopt the child, but this necessitates terminating the rights of the incarcerated parent. All states have statutes that set out circumstances under which the adoption can proceed even without the consent of one or both parents, as for example, when the nonconsenting parent has had no contact with the child and has therefore "abandoned" the child.

This article is concerned primarily with the former scenario—state-commenced proceedings to terminate the rights of incarcerated parents whose children are in foster care—rather than the latter—adoption proceedings commenced by nonincarcerated parents or other relatives when it is argued that the consent of the incarcerated parent is not required. However, adoption is a statutory creation and cannot occur without the involvement or at least the sanction of the state, regardless of whether the child involved is in foster care.[18] Thus, in both the foster care and nonfoster care contexts, adoption involves a state deprivation of fundamental constitutional parental rights. Arguably, then, both foster care and nonfoster care proceedings may be treated as essentially equivalent for the purpose of analyzing the rights that are implicated and the policy issues involved.[19] For these reasons

---

[17] Because of the particular importance of the issue of parental rights to incarcerated women, the feminine pronouns will be used throughout this article. However, the principles discussed apply to incarcerated fathers as well, unless otherwise specified.

[18] Adoption was unknown at common law and is entirely a creation of statute. *See, e.g.*, Matter of Thorne's Will, 155 N.Y. 140, 49 N.E. 661 (1898); Zockert v. Fanning, 310 Or. 514, 517, 800 P.2d 773, 775 (1990). As such, all aspects of adoption involve state action in the form of state created rights, remedies and duties. *See Zockert*, 310 Or. at 517-18, 800 P.2d at 775 (noting that the state is a party to all adoptions).

[19] These two strands of analysis both flow from Stanley v. Illinois, 405 U.S. 645, 658 (1972), in which the Court held that a parent cannot lose parental rights permanently absent a showing of unfitness. In Quilloin v. Walcott, 434 U.S. 246 (1978), the father's consent to the adoption of his child by the mother's husband was found not to be required when the father had never shown any significant interest in his child. The Court implicitly found that the father's total lack of involvement in his child's life amounted to unfitness and justified allowing the adoption to proceed and his parental rights to be severed, without his consent.

The Court also relied extensively on *Stanley* in Santosky v. Kramer, 455 U.S. 745 (1982), a case involving the state's attempt to terminate the rights of parents whose children were in foster care. The state's goal was to permit foster parents to adopt the children. As discussed more fully

this article will look at statutes and cases in both the foster care and nonfoster care contexts, although the distinction will generally be noted.

This examination of state statutes and cases involving incarcerated parents reveals that the states have been unable to adjust adequately to the growing phenomenon of incarcerated parents. State laws pertaining to termination of parental rights and adoption were historically aimed at parents who voluntarily abandoned their children and thereafter

---

in Section II, *infra*, the Court held that parental rights to children in foster care cannot be terminated unless the state has proven parental unfitness by *clear and convincing evidence*. *Id.* at 747-48.

Thus, the principles in the *Quilloin* line of non-foster care cases and those in the *Santosky* line of foster care cases appear to be essentially the same in that both follow from the *Stanley* principle that parental rights cannot be severed in the absence of a showing of parental unfitness.

While some states have found that the non-foster care and foster care cases involve similar legal standards, other states have treated the two types of cases differently. *Compare* J. v. M., 157 N.J. Super. 478, 385 A.2d 240 (App. Div. 1978), *cert. denied*, 77 N.J. 490, 391 A.2d 504 (1978) (same standards) *with In re* Adoption of Cottrill, 388 So. 2d 302 (Fla. Dist. Ct. App. 1980) in which the court stated that a proceeding for termination of parental rights when the child is in foster care involves a "less stringent test for abandonment and has objectives far different than" a proceeding for adoption without the parent's consent where the child is not in foster care. *Id.* at 303 (*citing In re* J.F., No. 79-1223 (Fla. Dist. Ct. App. filed June 3, 1980)).

Oregon presents a more complex picture. While the Oregon Supreme Court has found that the parents' procedural rights are the same in both cases, *see* Zockert v. Fanning, 310 Or. 514, 800 P.2d 773 (1990) (the nature of both types of proceedings is the same; assignment of counsel and proof of parental unfitness by clear and convincing evidence is required in both types of proceedings), there is an important difference in the provisions of the respective statutes dealing with the two types of cases. The Oregon statute involving the termination of rights of parents of children who are in foster care, OR. REV. STAT. § 419.523 (1991), does not address parental incarceration, and at least one court has held that parental incarceration, by itself, cannot be a basis for termination of parental rights under this statute. *See* State v. Grady, 231 Or. 65, 371 P.2d 68 (1962). Conversely, the statute dealing with adoption of children who are not in foster care, OR. REV. STAT. § 109.322 (1991), permits a child to be adopted without the consent of a parent who has been incarcerated for at least three years. That statute provides in pertinent part as follows:

> 109.322 Consent where parent mentally ill, mentally deficient or imprisoned.
>
> If either parent . . . is imprisoned in a state or federal prison under a sentence for a term of not less than three years and has actually served three years, there shall be served upon such parent, if the parent has not consented in writing to the adoption, a citation . . . to show cause why the adoption of the child should not be decreed . . . . Upon hearing being had, if the court finds that the welfare of the child will be best promoted through the adoption of the child, the consent of the . . . imprisoned parent is not required, and the court shall have authority to proceed regardless of the objection of such parent . . . .

OR. REV. STAT. § 109.322 (1991).

This statute has been found to be constitutional. Stursa v. Kyle, 99 Or. App. 236, 782 P.2d 158 (1989).

failed to play any part in their children's lives.[20] The laws are therefore ill-equipped to deal with the problem of parents who are involuntarily separated from their children through incarceration but who actively strive to continue to be parents to their children. As noted above, 85 percent of incarcerated mothers fit this description.[21]

A result of this inability to grapple directly with the problems presented by parental incarceration is that parent-child relationships are needlessly and harmfully severed when a parent is imprisoned. Despite language in many of the cases that incarceration cannot by itself be a reason for terminating parental rights,[22] a close examination of state court decisions reveals that they often treat incarceration as a sufficient reason for the permanent termination of parental rights even when an incarcerated parent could continue to play a meaningful role in her child's life. Moreover, some state courts have shown a disturbing tendency to streamline termination proceedings in cases involving incarcerated parents, thereby sacrificing important procedural safeguards.

This Article argues that such results equate incarceration with parental unfitness in a way that violates procedural due process requirements. Because of the fundamental nature of the right to raise one's child, the Supreme Court has held that parental rights may not be terminated absent a showing, by clear and convincing evidence, that the parent is "unfit."[23] What is required is a way of defining "parental unfitness" in the context of the absent, incarcerated parent. Such a definition must recognize that an incarcerated parent is not "unfit" simply by virtue of her absence. This Article will argue that most states have failed to develop such a constitutionally acceptable standard for determining whether an incarcerated parent is unfit such that her parental

---

[20] For a discussion of the historical development of termination of parental rights proceedings in New York and the creation of standards less stringent than abandonment, see *In re* Anonymous v. Longobardi, 40 N.Y.2d 96, 351 N.E.2d 707, 386 N.Y.S.2d 59 (1976).

[21] *See supra* note 11 and accompanying text.

[22] *See, e.g., In re* B.W., 498 So. 2d 946 (Fla. 1986); Murphy v. Vanderver, 169 Ind. App. 528, 349 N.E.2d 202 (1976); *In re* Daniel C., 480 A.2d 766 (Me. 1984); Staat v. Hennepin Cty. Welfare Bd., 287 Minn. 501, 178 N.W.2d 709 (1970); *In re* J.D., 512 So. 2d 684 (Miss. 1987); *In re* Adoption of Doe, 99 N.M. 278, 657 P.2d 134 (Ct. App. 1982); *In re* Sego, 82 Wash. 2d 736, 513 P.2d 831 (1973).

[23] Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972).

rights should be terminated and that these states are therefore failing to meet minimal procedural due process requirements.[24]

In developing this discussion, Section II examines the nature of the parent-child relationship and the constitutional requirement that a parent be proved "unfit" by clear and convincing evidence before her rights may be terminated.[25] Section II argues that the "intangible" qualities of the parent-child relationship must receive at least as much consideration in termination proceedings as the more obvious tangible qualities and that Supreme Court precedent mandates a thorough judicial inquiry into the complexities of the particular parent-child relationship before that relationship may be forever severed.

Section II concludes that three principles of procedural due process follow from this analysis. First, states must provide a thorough, adversarial hearing at which the parent is physically present and represented by counsel, so that she may be fully involved in her own defense and so that the fact finder is fully able to assess the parent's demeanor and credibility as well as that of the other witnesses. Second, states may not focus exclusively on pre-incarceration conduct—whether or not such past conduct is directly relevant to the parent's present fitness to be a parent. States must take into account the parent's *present* circumstances, including the extent to which the parent has engaged in rehabilitative programs while in prison. Third, states may not place undue weight on the length of time before the family will be physically reunited. Rather, they must take into account the incarcerated parent's desire and ability to be a parent in the *present, while incarcerated.* That is, courts must focus on the extent to which the parent is able to discharge her *intangible, nonfinancial* parental responsiblities.

In Sections III, IV and V, relevant state statutes and cases are discussed and analyzed, and it is argued that many states are violating incarcerated parents' rights to procedural due process by failing to meet the standards outlined in Section II. Section III looks at those statutes and cases that define the particular procedural rights available to prisoners in termination of parental rights proceedings, Section IV at those that focus primarily on the parent's past conduct ("past-fo-

[24] It must be acknowledged, however, that family law is of a particularly local character, that is, it is controlled by the statutes and case law of the individual states, with little or no input from the federal level. Thus, the subject does not easily lend itself to development of a "model" law on termination of parental rights. Such a model is, however, suggested in this article.

[25] *Santosky*, 455 U.S. 745 (1982).

cused") and Section V at those that focus on the parent's future ability to be physically reunited with her child ("future-focused").

Finally, Section VI examines statutes and cases that look primarily at parental conduct while in prison and the nature and quality of the parent-child relationship. This article argues that such an approach is the constitutional ideal, and Section VI offers a model derived from these "present-focused" materials.

II. Constitutional Requirements in the Determination of Parental Fitness

The fundamental nature of parental rights is basic to American jurisprudence. The Supreme Court has stated:

> The rights to conceive and to raise one's children have been deemed "essential". . ., "basic civil rights of man,". . . and "[r]ights far more precious . . . than property rights,". . . . "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[26]

Thus, parents are entitled to raise their children without any interference from the state. Even in situations in which a parent has temporarily lost physical or legal custody of her child for a variety of reasons, the state may not permanently deprive the parent of all rights to her child unless the state has shown that she is "unfit." [27]

The constitutional requirement that the state prove parental "unfitness" before it can permanently terminate a parent's rights does not answer the question of what amounts to "unfitness." While the term "unfitness" appears to be inherently vague, this apparent vagueness is not inappropriate. A judicial inquiry into parental fitness necessarily involves a court in a complex inquiry into the very nature of family relationships generally and parent-child relationships in particular.

The most obvious aspect of such family relationships are physical and financial. Families generally live together and form a kind of economic unit. Spouses support and protect each other, parents support and protect their children and, in later years, children may support and protect their parents. Thus, marriage and childrearing are most clearly

---

[26] *Stanley*, 405 U.S. at 651 (citations omitted).

[27] *Santosky*, 455 U.S. 745 (1982); *Stanley*, 405 U.S. 645 (1971).

thought of in terms of the tangible physical and financial responsibilities that the family members owe to one another.

But family relationships and parental rights and responsibilities extend beyond these material considerations. Even after the family has lost its corporeal qualities, something of considerable substance remains. Divorces split families apart, often leaving noncustodial parents and children separated by great distances. Yet, no one would suggest that the rights of noncustodial parents should be terminated merely because of such physical separation.[28] Similarly, in the public law context, there is a clear distinction between loss of physical custody and termination of parental rights. Custody and parental rights are not coextensive; a parent who has lost physical custody to the state remains a parent unless and until her rights are terminated.[29]

In both the private and public spheres, family relationships survive the demise of their physical qualities. This is true because these family relationships involve intangible aspects that are at least as important as the more obvious physical characteristics. Such qualities may include love and affection, religious or moral guidance, emotional support and a sense of "roots" and family identity. These intangible qualities must therefore be closely examined any time the state seeks the permanent destruction of parental rights. This is true even in cases in which the parent and child have been separated for an extended period of time. Although such a relationship may be "a troubled and confused one that [has] been adversely affected by the separation from the natural mother and by the intervening formation of a new relationship between the child and her foster parents,"[30] this fact alone does not warrant permanently severing the parent-child relationship.

In discussing this issue, the Supreme Court of Connecticut has noted:

> The fact that the child may have established a loving relationship with someone besides her mother does not prove the absence of a mother-daughter rela-

---

[28] Professor Marsha Garrison has made this observation in arguing for alternatives to the permanent and complete severence of parental rights. Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 455-474 (1983).

[29] For discussions of the difference between custody and termination of parental rights, see *In re* Jones, 34 Ill. App. 3d 603, 607, 340 N.E.2d 269, 273 (1975); *In re* Adoption of Children by D., 61 N.J. 89, 93, 293 A.2d 171, 172-73 (1972); *In re* Ricky Ralph M., 56 N.Y.2d 77, 83-84, 436 N.E.2d 491, 495, 451 N.Y.S.2d 41, 43 (1982); *In re* Bistany, 239 N.Y. 19, 24, 145 N.E. 70, 72 (1924).

[30] *In re* Juvenile Appeal, 177 Conn. 648, ____, 420 A.2d 875, 885-86 (1979).

> tionship. It is insufficient to prove that the child has developed emotional ties with another person. Certainly children from two-parent homes may have two "psychological parents"; even children whose parents are divorced may retain close emotional ties to both, *although the relationship to one is maintained solely through visitation.*[31]

The principle that intangible qualities of love and affection may hold a family together despite physical separation applies fully to situations in which the cause of separation is incarceration. The United States Supreme Court has recognized this in the context of marriage. In *Turner v. Safly*,[32] the Court held that the constitutional right to marry survives incarceration notwithstanding the impossibility of exercising the physical attributes of marriage, such as establishing a home together and consummating the marriage.

In so deciding, the Court discussed the nonphysical attributes of marriage, including emotional support, public commitment, spiritual significance and the expectation that most marriages would be fully consummated after release.[33] The Court found these nonphysical attributes sufficiently important, in and of themselves, to warrant constitutional protection. The Court stated that these qualities are "unaffected by the fact of confinement or the pursuit of legitimate corrections goals."[34]

---

[31] *Id.* (emphasis added). In that case a mother had hired a full-time babysitter to care for her daughter while she was working. The mother had gone to a doctor because of nervousness and depression. The doctor referred her to a psychiatrist who apparently misdiagnosed her and had her involuntarily committed to a psychiatric hospital, where she stayed for six weeks. Her child was placed into foster care, with the babysitter being designated as the foster parent. The mother spent most of the following two years attempting to regain custody of her daughter, maintaining a relationship with her daughter through visitation, letters and telephone calls. The state commenced a proceeding to terminate the mother's rights so that the daughter could be adopted by the babysitter/foster mother. The trial court denied the mother's petition to revoke the foster care placement and granted the state's petition to terminate the mother's rights, primarily because of the close relationship that the child had developed with the foster mother. The intermediate appellate court affirmed the lower court's determination.

The supreme court affirmed the denial of the mother's application to revoke the placement, but reversed the order terminating the mother's rights, holding that the state had failed to satisfy the statutory requirement of "no ongoing parent-child relationship." The court held that the mother had maintained such a relationship through her efforts to visit, write and telephone her child, and that it was possible for the child to have close relationships with both her mother and the foster mother. *Id.* at _____, 420 A.2d at 887-88.

[32] Turner v. Safly, 482 U.S. 78 (1987).

[33] *Id.* at 95-96.

[34] *Id.* at 96.

Similarly, the nonphysical, intangible qualities of the parent-child relationship remain intact, albeit strained, after incarceration, and the parent-child relationship is entitled to constitutional protection even after the parent is confined to prison.[35] In a termination of parental rights proceeding involving an incarcerated parent, a court must look beyond the parent's inability to care physically for the child and focus instead on the "parent's responsibility to provide a nurturing parental relationship."[36]

The role an incarcerated parent may play in meeting the nonmaterial needs of her child has been summarized as follows:

> [Parental] duty encompasses more than a financial obligation; it requires continuing interest in the child and a genuine effort to maintain communication and association with the child. Because a child needs more than a benefactor, parental duty requires that a parent "exert himself *to take and maintain a place of importance in the child's life.*"[37]

The task of a court in evaluating the fitness of any parent, incarcerated or otherwise, in a termination of parental rights proceeding is therefore one of exceeding complexity. Because of this, the Supreme Court in *Santosky v. Kramer* mandated the use of a heightened burden of proof—clear and convincing evidence—in any judicial proceeding to determine whether a parent is unfit such that her rights may be terminated.[38] The Court distinguished between *quantitative* and *qualitative*

---

[35] It should be noted that a number of courts have found that the parent's duty to support her child, to the extent that she is financially able, continues during the parent's incarceration. *See, e.g.*, Smith v. Alaska Dep't of Revenue, 790 P.2d 1352 (Alaska 1990); *In re* R.H.N., 710 P.2d 482 (Colo. Sup. Ct. 1985); Division of Child Support Enforcement *ex rel.* Harper v. Barrows, 570 A.2d 1180 (Del. Sup. Ct. 1990); Illinois *ex rel.* Meyer v. Nein, 209 Ill. App. 3d 1087, 568 N.E.2d 436 (1991); Cardwell v. Gwaltney, 556 N.E.2d 953 (Ind. Ct. App. 1990); *In re* M.L.K., 804 S.W.2d 398 (Mo. App. 1991); Ohler v. Ohler, 220 Neb. 272, 369 N.W.2d 615 (1985); *In re* Bradley, 57 N.C. App. 475, 291 S.E.2d 800 (1982); Proctor v. Proctor, 773 P.2d 1389 (Utah Ct. App., 1989). *But see* Leasure v. Leasure, 378 Pa. Super. 613, 549 A.2d 225 (1988).

Arguably, the principle that a prisoner retains a duty to support her child implicitly acknowledges that an incarcerated parent continues to play an important role as a parent.

[36] *In re* Daniel C., 480 A.2d 766 (Me. 1984) (holding that "under proper circumstances an appropriate parent-child relationship can be developed despite the parent's incarceration and consequent inability physically 'to protect the child from jeopardy.' " *Id.* at 769. However, in that case the father had failed to maintain contact with his child not only while he was incarcerated on two separate sentences, but also during a brief period in between when he was free.

[37] *In re* Adoption of Sabrina, 325 Pa. Super. 17, 24, 472 A.2d 624, 627 (1984) (citations omitted) (emphasis added).

[38] Santosky v. Kramer, 455 U.S. 745 (1982).

evaluations of parental conduct, stressing that the latter are constitutionally required.[39]

In holding that this determination had to be made pursuant to a standard of clear and convincing evidence, rather than the less stringent preponderance of the evidence standard, the *Santosky* Court's primary concern was the risk of erroneous factual determinations. The Court expressed this explicitly:

> [Termination of parental rights] proceedings employ imprecise substantive standards that leave determinations unusually open to subjective values of the judge. . . . In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, . . . such proceedings are often vulnerable to judgments based on cultural or class bias.
>
> . . . .
>
> Like civil commitment hearings, termination proceedings often require the factfinder to evaluate medical and psychiatric testimony, and to decide issues difficult to prove to a level of absolute certainty, such as lack of parental motive, absence of affection between parent and child, and failure of parental foresight and progress.[40]

These concerns about careless and biased fact finding apply most vividly to incarcerated parents. Because of the emotional and practical difficulty associated with these cases, such as the prolonged physical separation, the complicated feelings children may have about their parents' confinement and the need to make special arrangements for visitation at the correctional facility, a court may be tempted to write the prisoner off as a "bad" parent who has, by virtue of her criminal actions, proved herself unworthy of parenthood.

Such an approach, however, would amount to a dangerous oversimplification of a complex social situation. In *Stanley v. Illinois* the Supreme Court made this point in another context. There the Court rejected the State's attempt to adjudicate parental rights solely by a rigid, formalistic focus on whether the father was married to the

---

[39] *Id.* "A standard of proof [preponderance of the evidence] that by its very terms demands consideration of the quantity, rather than the quality, of the evidence may misdirect, the factfinder in the marginal case . . . . Given the weight of the private interests at stake, the social cost of even occasional error is sizable." *Id.* at 764 (citation omitted).

[40] *Id.* at 762-63, 769.

mother of the child, without regard to the father's actions subsequent to the birth of his child. The Court cautioned:

> Procedure by presumption is always cheaper and easier than individualized determination. But when . . . the procedure forecloses the determinative issues of competency and care, when it explicitly disdains present realities in deference to past formalities, it needlessly runs roughshod over the important interests of both parent and child. [41]

Any judicial examination of parental unfitness must therefore recognize that, as with all cases involving the parent-child relationship, there is a wide variation of circumstances among cases involving incarcerated parents. These individual circumstances must be examined carefully in each case.

Given the importance of intangible aspects of the parent-child relationship and the Court's concern with avoiding erroneous judicial fact finding, several due process requirements emerge. First, courts may not *presume* an incarcerated parent is unfit, either explicitly or implicitly.[42] This means that strict, formal hearing procedures must be followed. A court must conduct a full adversarial hearing in which the parent is physically present and represented by counsel so that it is able to develop a complete factual basis on which to assess accurately the complex issues before it. This process cannot be short-circuited by resorting to streamlined procedures.

However, procedural due process considerations go beyond the question of the manner in which the hearing is to be conducted. The requirement of an *individualized* showing of parental unfitness necessitates a thorough, searching inquiry into the circumstances of the particular incarcerated parent and her family; the fact of the parent's crime and the length of her sentence cannot serve as proxies for a finding of unfitness.

From this follow two due process requirements, in addition to that of a full adversarial hearing. First, the court's inquiry must focus primarily on the parent's *present* fitness as measured by her relationship with her child and the degree to which she has been rehabilitated while in prison. In evaluating parental fitness, the court may not limit its inquiry to the fact of the parent's past criminal acts. Such a formalistic approach, without regard to individual circumstances, is impermissible

---

[41] Stanley v. Illinois, 405 U.S. 645, 656-57 (1972).

[42] *Id.* at 656-58.

under *Stanley v. Illinois*.[43] Instead, the court must examine the parent's conduct subsequent to her incarceration. A court must look at the "determinative issues of competency and care" in the context of "present realities."[44] The judge must go beyond the fact of the parent's crime and determine the extent to which that crime impairs the parent-child relationship today.

A court must therefore examine such factors as the parent's participation in rehabilitative programs and her efforts to maintain a meaningful relationship with her children while in prison. While a court may certainly consider the parent's past actions, these actions must be "reviewed in the light of subsequent events" to determine the extent of the parent's rehabilitation.[45]

Second, the court must evaluate the incarcerated parent's ability to provide the child with the "intangibles" of the parent-child relationship. Rights may not be terminated simply because the parent will be confined for an extended period of time and will therefore not be able to perform the material, physical and financial duties of parenting. The inquiry cannot be merely *quantitative*, looking only, for example, at the number of hours the parent is able to spend with her child or the amount of money the parent is able to contribute to her child's support. Rather, the court must determine the *quality* of the parent-child relationship and the extent to which the parent, during her confinement,

---

[43] *Id.* As previously discussed, the Court in *Stanley* held unconstitutional a state scheme that had the effect of presuming all unwed fathers to be unfit to have the custody of their children. The apparent rationale for the state approach was that the act of having a child out of wedlock was inherently irresponsible and showed that those men were unwilling to make the commitment necessary to be adequate parents to their children. The Court rejected this approach that focused on the fathers' past behavior without regard to their actions subsequent to the birth of their children.

The Court made this point more explicitly in Quilloin v. Walcott, 434 U.S. 246 (1978), a case involving an unwed father's challenge to the adoption of his child by the mother's husband. *See supra* note 20. The Court focused its inquiry on the extent to which the father had taken an active interest in his child since the child's birth.

Thus, in *Stanley* and *Quilloin*, the fathers' past, irresponsible act of having a child out of wedlock was relevant to, but not dispositive of, a determination of the fathers' present parental fitness. Likewise, while a parent's past criminal act surely reflects adversely on the parent's *past* fitness, that past act is insufficient to prove *present* unfitness. In short, even when a parent has been irresponsible -or worse - in the past, current circumstances must be examined before a finding of parental unfitness can be made.

[44] *Stanley*, 405 U.S. at 657.

[45] *In re* Terry E., 180 Cal. App. 3d 932, 949, 225 Cal. Rptr. 803, 814 (1986). For a full discussion of this case, see Section VI, *infra*.

continues to "maintain a place of importance in the child's life."[46] This is, of course, not just an issue of the *parent's* rights; it also concerns the *child's* right to a relationship with her parent.[47]

Thus, state termination of parental rights statutes involving incarcerated parents, and cases decided pursuant to those statutes, must be examined in light of three procedural due process requirements—a full adversarial hearing and development of a full factual record; a focus on *current* parental fitness, rather than simply on the parent's past commission of a crime; and an inquiry into the qualitative, intangible aspects of parenting. In the sections that follow, state statutes and cases are analyzed. As these sections will show, a number of states have failed to develop constitutionally acceptable approaches to dealing with parental incarceration.

III. When a Hearing is Something Less: Streamlined Hearing Procedures

The three most significant and most frequently litigated issues concerning the hearing procedures employed in termination proceedings are whether an incarcerated parent has a right to be physically present for the hearing, whether a termination proceeding may be disposed of on a motion for summary judgment and whether the incarcerated parent has a right to appointed counsel. Each of these is discussed below.[48]

---

[46] *In re* Adoption of Sabrina, 325 Pa. Super. 17, 24, 472 A.2d 624, 627 (1984); *cf. In re* Juvenile Appeal, 177 Conn. 648, ____, 420 A.2d 875, 882 (1979) ("The parent's loss of custody should not . . . be premised solely on 'tangible material benefits to the child at the expense of the intangible, non-material advantages which a parent's care can provide even when the parent has only limited financial resources.' ") (citation omitted).

[47] The Supreme Court in *Santosky* noted that the parent and the child share an interest in preventing the erroneous termination of parental rights. The Court observed:

> Some losses cannot be measured. In this case, for example, [the child] was removed from his natural parents' custody when he was only three days old; the judge's finding of permanent neglect effectively foreclosed the possibility that the [child] would ever know his natural parents.

Santosky v. Kramer, 455 U.S. 745, 760-61 n.11 (1982).

[48] Additional miscellaneous issues have been litigated. Two California courts have split on the question of whether a transcript is constitutionally required in a termination proceeding. *Compare In re* Christina P., 175 Cal. App. 3d 115, 220 Cal. Rptr. 525 (1985) (lack of court reporter at hearing requires reversal) *with In re* Geoffrey G., 98 Cal. App. 3d 412, 159 Cal. Rptr. 460 (1979) (lack of court reporter does not mandate reversal).

One California court has held that a state does not have a constitutional duty to advise a parent of all ancillary consequences of a guilty plea, including the possibility that the criminal

A. *Physical Presence at Hearings*

There is an apparent split among the states on whether a parent who is incarcerated has a right to appear in person at the court termination hearings, with at least four states recognizing such a right and at least one state finding to the contrary. However, with respect to a prisoner confined *outside the state* who seeks to be brought into the state for the hearing, there is unanimous agreement among at least eight states that no such right exists.

For in-state prisoners, California provides by statute that no termination hearing may be conducted in the absence of the prisoner.[49] This right may be waived,[50] and at least one court has held that the statute is inapplicable to prisoners confined outside the state,[51] but the statute otherwise provides for an absolute right to be present.

The right to be physically present at a termination of parental rights proceeding has likewise been recognized in New York.[52] In two

---

conviction may serve as the basis for termination of parental rights. *In re* Michele C., 64 Cal. App. 3d 818, 135 Cal. Rptr. 17 (1977).

[49] CAL. PENAL CODE § 2625 (West 1992) provides:

> In any action brought under Section 232 of the Civil Code, and Section 366.26 of the Welfare and Institutions Code, where the action seeks to terminate the parental rights of any prisoner or any action brought under Section 300 of the Welfare and Institutions Code, where the action seeks to adjudicate the child of a prisoner a dependent child of the court, the superior court of the county in which the action is pending, or a judge thereof, shall order notice of any court proceeding regarding the action transmitted to the prisoner.
>
> . . . .
>
> Upon receipt by the court of a statement from the prisoner or his or her attorney indicating the prisoner's desire to be present during the court's proceedings, the court shall issue an order for the temporary removal of the prisoner from the institution, and for the prisoner's production before the court. No proceeding may be held under Section 232 of the Civil Code or Section 366.26 of the Welfare and Institutions Code and no petition to adjudge the child of a prisoner a dependent child of the court pursuant to subdivision (a),(b), (c), or (d), (e), (f), (i), or (j) of Section 300 of the Welfare and Institutions Code may be adjudicated without the physical presence of the prisoner or the prisoner's attorney, unless the court has before it a knowing waiver of the right of physical presence signed by the prisoner or an affidavit signed by the warden, superintendent or other person in charge of the institution, or his or her designated representative stating that the prisoner has, by express statement or action, indicated an intent not to appear at the proceeding.

[50] *See In re* Rikki D., 227 Cal. App. 3d 1624, 278 Cal. Rptr. 565 (1991) (incarcerated father's presence waived by his refusal to be transported from prison to court on several occasions).

[51] *In re* Gary U., 136 Cal. App. 3d 494, 186 Cal. Rptr. 316 (1982). *See also supra* note 9.

[52] *In re* Kendra M., ____ A.D.2d ____, 572 N.Y.S.2d 583 (App. Div. 1991) (reversing a finding against the mother, entered in her absence while she was confined to the county jail; the

other states, the inmate's right to be present has been upheld in other types of court proceedings—in Arizona, in a divorce action initiated against an incarcerated man,[53] and in Florida, in a case involving an incarcerated mother's request to appear in court to contest the father's application for a modification in child custody and support.[54] Because the interests involved in termination proceedings are much more substantial than those in divorce or custody and support proceedings, the right to be present recognized in the Arizona and Florida cases should logically extend to incarcerated parents facing termination of parental rights. However, a Texas decision is to the contrary. There a court found that a prisoner confined within the state did not have a right to appear physically for the termination of parental rights proceeding.[55]

With respect to prisoners incarcerated outside the state, however, there is unanimity among the jurisdictions that have decided the issue that such prisoners do not have the right to be brought into the state for the termination hearing, as long as the parent is represented by counsel and provided with alternative means of participating in the

---

court held that the mother had a due process right to be present for the hearing, that she had not wilfully refused to appear or waived her right to be present, and that the lower court should therefore have ordered her production or adjourned the case if necessary to secure her presence).

[53] Strube v. Strube, 158 Ariz. 602, 764 P.2d 731 (1988). The Arizona Supreme Court vacated the property division and visitation portions of a divorce decree when the incarcerated husband's request to be physically present had been denied. The court stated:

> At least with respect to a significant civil proceeding initiated against a prisoner by others, we hold that there is a presumption that the prisoner is entitled to be personally present at critical proceedings, such as the trial itself, when he has made a timely request to be present. Of course, this is a rebuttable presumption and the ultimate decision is within the sound discretion of the trial court . . . . In considering requests of this type, a trial court may consider whether there are appropriate alternatives to a prisoner's personal appearance in a given matter. However, we disagree with the court of appeals' conclusion that an appropriate alternative exists merely because the prisoner is entitled to be represented by counsel at his trial.

Id. at ____, 764 P.2d at 735.

[54] Barnes v. Fucci, 563 So. 2d 175 (Fla. Dist. Ct. App. 1990) (reversing the lower court's denial of the mother's petition for a writ of habeas corpus ad testificandum, the court of appeal held that the mother had a due process right to be present).

But see Despres v. Pagel, 358 So. 2d 905, (Fla. Dist. Ct. App.), *cert. denied*, 365 So. 2d 711 (Sup. Ct. 1978) (default judgment against incarcerated father affirmed when father had not complied with formal procedures required for obtaining production for the court hearing).

[55] *In re* S.K.S., 648 S.W.2d 402 (Tex. Ct. App. 1983).

hearing. Courts in Alabama,[56] California,[57] Connecticut,[58] Kansas,[59] Maine,[60] North Dakota,[61] Oregon[62] and Washington[63] have so held.

---

[56] Pignolet v. State Dep't of Pensions & Sec., 489 So. 2d 588 (Ala. Civ. App. 1986) (due process did not require physical production of father who was incarcerated in Rhode Island for sex abuse conviction).

[57] *In re* Gary U., 136 Cal. App. 3d 494, 186 Cal. Rptr. 316 (1982). At the request of father who was incarcerated in Arizona, the court issued an order to the State of Arizona for the father's production in California, but the order was not obeyed. The court held that the father could not ask to represent himself and therefore prevent the termination hearing from proceeding in his absence. Under the circumstances, it was constitutional for the trial court to require that the father be represented by in-state counsel and that the hearing go forward in his absence.

[58] *In re* Juvenile Appeal, 187 Conn. 431, 446 A.2d 808 (1982). Father confined in California was represented by counsel. A transcript of adverse witness testimony with counsel's cross-examination was sent to the father, who had an opportunity to review and discuss it by telephone with his attorney and the right to have additional cross-examination conducted thereafter. The father testified and was cross-examined by speaker-phone audible to all attending the hearing.

[59] *In re* J.L.D., 14 Kan. App. 2d 487, 794 P.2d 319 (1990). There, the father was incarcerated in Florida on a sentence of 42 years. The proceeding had been delayed, and several unsuccessful attempts had been made to compel the State of Florida to produce the father for the Kansas termination proceeding. The lower court had ultimately proceeded in the father's absence, although the father had been represented by an attorney. In affirming the judgment of the lower court, the court of appeals held that a parent incarcerated out of state does not have an absolute due process right to be present for a termination of parental rights hearing. The court distinguished an earlier decision, *In re* S.M., 12 Kan. App. 2d 255, 738 P.2d 883 (1987). In that case the parent had been incarcerated within the state. Although his presence could have been obtained, the state court had summarily denied motions to have him produced.

[60] *In re* Randy Scott B., 511 A.2d 450 (Me. 1986). There, the father was confined in New Hampshire on a life sentence for the murder of his second wife. He had previously served a manslaughter sentence in Maine for the death of his first wife. The father's attorney stated that he had made arrangements with the State of New Hampshire to allow the State of Maine to pick father up and transport him to Maine for the hearing, or, in the alternative, to have the entire hearing conducted in the New Hampshire prison, but neither procedure was followed. Instead, the father was represented by local counsel. He testified through a deposition conducted at the New Hampshire prison by counsel for all parties, and the transcript of the deposition was made a part of the hearing record. The Supreme Judicial Court found that these procedures were constitutional and that the father had no right to be physically present in court. The court cited the State's interest in protecting the welfare of its citizens from the father's possible escape from custody while he was present in Maine, and the cost and administrative burden of transporting the father and keeping him in custody.

[61] *In re* F.H., 283 N.W.2d 202 (N.D. 1979) (Father confined in Oregon. At the hearing he was represented by local counsel and testified by deposition. Court noted that the father had not engaged in any prehearing discovery or asked for additional time to rebut adverse hearing testimony).

[62] State *ex rel.* Juvenile Dep't. v. Stevens, 100 Or. App. 481, 786 P.2d 1296 (1990), *review denied*, 310 Or. 71, 792 P.2d 104 (1990), *cert. denied sub nom.* Stevens v. Oregon, 111 S.Ct. 1071 (1991). The father was incarcerated in Washington. The lower court had refused to order the State of Oregon to pay the estimated cost of $2,500 to $3,700 to bring the father to Oregon for the termination of parental rights proceeding. Instead, local counsel had been appointed to represent the father, and the father had been allowed to testify by telephone. The court terminated the father's rights and he appealed.

These cases essentially reflect the principles articulated by the Seventh Circuit Court of Appeals in *Stone v. Morris*.[64] There the court held that a trial court has discretion to determine whether a prisoner should be physically produced for a trial in a civil proceeding. The court said that this determination rests on a number of factors, including:

> [T]he costs and inconvenience of transporting a prisoner from his place of incarceration to the courtroom, any potential danger or security risk which the presence of a particular inmate would pose to the court, the substantiality of the matter at issue, the need for an early determination of the matter, the possibility of delaying trial until the prisoner is released, the probability of success on the merits, the integrity of the correctional system, and the interests of the inmate in presenting his testimony in person rather than by deposition.[65]

While the *Stone* rule has been followed in a number of cases involving civil lawsuits initiated by prisoners, a more liberal rule in which production is the norm should be followed in lawsuits, such as termination

---

The intermediate appellate court affirmed, holding that the failure to allow the father to be physically present for the proceeding had not violated his constitutional rights. The majority concluded, "In view of the extensive safeguards that [the father] did enjoy, we cannot say that the probable value of his physical presence in assuring an accurate and just decision was great." *Id.* at 487, 786 P.2d at 1299.

One judge, in a vigorous dissent, argued otherwise:

> The purpose of a termination proceeding is to determine a person's fitness to continue as a parent. This is one of the most difficult tasks that a court can undertake . . . . To minimize the risk of error, the court must be able to determine as accurately as possible what kind of person the parent is. Demeanor has an importance that it does not have in other kinds of proceedings . . . .
>
> . . . .
>
> The majority asserts that [the] father failed to point to a 'specific portion of the trial [that] was affected by his absence[.]' He does not need to, because his absence affected the entire proceeding. The majority fails to evaluate correctly the importance to the trial court of observing [the] father when determining his credibility and parental fitness, as well as the importance to [the] father of an opportunity to be at his counsel's side and to face witnesses when they give adverse testimony.

Id. at 489-90, 786 P.2d at 1300-01 (citation omitted).

[63] *In re* Darrow, 32 Wash. App. 803, ____, 649 P.2d 858, 859 (1982), *review denied*, 98 Wash. 2d 1008 (1982) (The father was serving a 10 year sentence in Arizona. The state of Arizona agreed to allow the father to be transported to Washington, but the State of Washington refused to pay the costs of transportation and custody of the father. The court held that the father's due process rights were satisfied by allowing him to be represented by local counsel and permitting him to participate in the hearing "through alternative methods such as letters, photographs, depositions, or a possible continuance after the State's case in chief to provide additional information".

[64] 546 F.2d 730 (7th Cir. 1976).

[65] *Id.* at 735-36.

of parental rights proceedings, which are initiated by another party and in which the prisoner is an involuntary participant.[66]

B. *Disposition of Proceeding Through Summary Judgment*

In addition to the issue of whether an incarcerated parent has a right to be physically present for the termination hearing, a number of courts have addressed the question of whether termination proceedings may be disposed of through a summary judgment motion. Thus, for example in *In re Christina T.*,[67] the Supreme Court of Oklahoma reversed a termination of parental rights granted on the state's motion for summary judgment, holding, "[t]he very nature of juvenile proceedings renders the whole concept of summary judgment inappropriate and impermissible."[68] The case involved an incarcerated father who was serving a sentence of ten years. The court explained that procedural due process in a termination of parental rights proceeding requires a full adversarial hearing:

> [T]he fundamental integrity of the family unit . . . may not be intruded upon without affording parent and child due process of law. "The fundamental requisite of due process is the right to be heard. The hearing required by the Due Process Clause must be 'meaningful' and 'appropriate to the nature of the case.' These requisites are all the more important when the judicial procedure concerns the continuation of the parent-child relationship."
>
> . . . .
>
> Juvenile actions are not, and were never intended to be, the sort of proceeding capable of resolution upon a flurry of pleadings. No answer to the petition is required. The petition is deemed controverted in all respects upon its filing because the legal presumption is that the best interests of the children are served by their parents. The burden of proving otherwise is on the petitioner seeking to interrupt and restrict that relationship.[69]

The court noted that a full hearing would enable the father, among other things, to offer evidence concerning people who might be able to care for his child during his incarceration, such as relatives, friends or a private agency.[70] The court in *Christina T.* therefore vacated the termination of parental rights and remanded to the trial court for a full hearing. A California court reached the same result in *In re Mark K.*,[71]

---

[66] *See* Strube v. Strube, 158 Ariz. _____, 764 P.2d 731 (1988) (divorce action).

[67] *In re* Christina T., 590 P.2d 189 (Okla. 1979).

[68] *Id.* at 192.

[69] *Id.* at 191-92 (citations omitted) (footnotes omitted).

[70] *Id.* at 192.

[71] *In re* Mark K., 159 Cal. App. 3d 94, 205 Cal. Rptr. 393 (1984).

holding that summary judgment is inappropriate in termination proceedings.

However, at least two courts have held otherwise. In *People v. Ray*, the Illinois intermediate appellate court affirmed the grant of summary judgment on a finding of "depravity" against a mother who had been convicted of the death of one of her children.[72] More recently, in *In re Adoption of JLP*, a sharply divided Supreme Court of Wyoming affirmed the granting of summary judgment against a father who was serving a sentence of twenty-five to thirty years for rape.[73]

C. *Right to Counsel*

Despite the United States Supreme Court's holding in *Lassiter v. Department of Social Services*[74] that a parent does not have a constitutional right to counsel in every termination proceeding, several state cases have held that an incarcerated parent has such a right,[75] and at least three courts have found that effective assistance of counsel is required.[76] However, one court has limited the right to counsel to exclude the preliminary stages of a termination proceeding,[77] while another court has decreed that there is no right to counsel on appeal.[78] One court has held that a deaf parent's rights were not violated where he

---

[72] People v. Ray, 88 Ill. App. 3d 1010, 411 N.E.2d 88 (1980), *appeal dismissed sub nom.* Ray v. Illinois, 452 U.S. 956 (1981); *cf. In re* S.B., 742 P.2d 935 (Colo. Ct. App. 1987), *cert. denied sub non.* N.B. v. People, 754 P.2d 1177 (Colo. 1988) (summary judgment on finding of dependency and neglect for child's initial placement into foster care; father charged with killing child's mother).

[73] *In re* Adoption of JLP, 774 P.2d 624 (Wyo. 1989).

[74] Lassiter v. Department of Social Serv., 452 U.S. 18, *reh'g denied*, 453 U.S. 927 (1981).

[75] *See, e.g., In re* R.G., 165 Ill. App. 3d 112, 518 N.E.2d 691, *appeal denied*, 119 Ill. 2d 557, 522 N.E.2d 1256 (1988); *In re* B.L.E., 768 S.W.2d 86 (Mo. Ct. App. 1988); *In re* A.B., 239 Mont. 344, 780 P.2d 622 (1989); Crist v. New Jersey Div. of Youth & Fam. Serv., 135 N.J. Super. 573, 343 A.2d 815 (App. Div. 1975) (finding a constitutional right to appointed counsel in termination of parental rights proceedings, but no statutory requirement that counsel be compensated out of public funds; counsel must therefore be assigned to serve without compensation); *cf.* Allen v. Division of Child Support Enforcement *ex rel.* Ware, 575 A.2d 1176 (Del. 1990) (incarcerated father's right to counsel in state-initiated paternity proceeding).

[76] *In re* Christina P., 175 Cal. App. 3d 115, 220 Cal. Rptr. 525 (Ct. App. 1985); *In re* D.P., 465 N.W.2d 313 (Iowa Ct. App. 1990) (standard in termination of parental rights proceeding is the same as that for a criminal proceeding); *In re* R.G., 165 Ill. App. 3d 112, 518 N.E.2d 691, *appeal denied*, 119 Ill. 2d 557, 552 N.E.2d 1256 (1988).

[77] *In re* A.B., 239 Mont. 344, 780 P.2d 622 (1989).

[78] Casper v. Huber, 85 Nev. 474, 456 P.2d 436 (1969), *cert. denied*, 397 U.S. 1012 (1970).

was able to communicate with his attorney through use of hearing aids and written notes.[79]

D. Conclusion

In deciding whether the holdings of the cases concerning a parent's physical presence at a termination of parental rights proceeding are consistent with the requirements of *Santosky v. Kramer*,[80] two distinct procedural issues must be examined. The first and more obvious of these is the question of whether the alternatives to physical presence adopted by the courts permit the parent to participate meaningfully and effectively at the hearing. It is at least arguable that alternative means can be devised to allow a prisoner to assist the attorney in the conduct of the trial, although this type of arrangement can never be as effective as in-person, in-court collaboration.

However, the second requirement is more subtle and much harder to satisfy. The fact finder must be able to assess the parent's demeanor and credibility, the quality of the parent-child relationship and other intangible factors in determining whether the parent is unfit. Given the complexity of this task and the risk of error inherent in such a determination,[81] it is difficult to imagine how parental unfitness can constitutionally be evaluated in the parent's absence. Thus, *Santosky* must be read to require that the court have before it a flesh and blood human being, whose demeanor and credibility can be assessed, in deciding whether parental rights should be permanently severed.[82] Cases holding

---

[79] *In re* T.S.B., 532 So. 2d 866 (La. Ct. App. 1988), *writ denied*, 536 So. 2d 1239 (1989) (vacating and remanding the trial court's dismissal of the proceeding on the ground that the father's deafness and lack of education precluded his meaningful participation in his own defense).

[80] Santosky v. Kramer, 455 U.S. 745 (1982).

[81] *See In re* Terry E., 180 Cal. App. 3d 932, 225 Cal. Rptr. 803 (1986) and *supra* text accompanying note 46.

[82] The importance of the parent's physical presence in assessing demeanor and credibility is underscored by the case of Ornstead v. Kleba, 37 Ill. App. 3d 163, 345 N.E.2d 714 (1976), in which the intermediate appellate court affirmed a finding of unfitness against the incarcerated father on the ground of "depravity." The court rejected the father's argument that the trial court's finding had been based solely on the fact of the father's conviction, holding that the trial court had also relied on its assessment of the father's demeanor on the witness stand. The court stated:

> [T]he trial court also had properly before it the real evidence of [the father's] demeanor as he testified in the instant case . . . . The court could properly take into consideration [the father's] demeanor on the stand while giving this evidence when it determined whether or not he was depraved at the time of the hearing.

Id. at _____, 345 N.E.2d at 718.

to the contrary have largely ignored this second issue, and their validity must therefore be seriously questioned.[83] These considerations apply with equal force to attempts to resolve termination of parental rights proceedings through motions for summary judgment. The Supreme Court has repeatedly voiced concerns that rights not be terminated without an individualized showing of parental unfitness, supported by clear and convincing evidence.[84] It is inconceivable that a trial court could make any meaningful evaluation of the parent-child relationship on the basis of pleadings and affidavits alone. The Supreme Court's holding in *Santosky*[85] that a state must prove parental unfitness by clear and convincing evidence, and its discussion of the risks of erroneous fact finding in such proceedings, would appear to proscribe dispensing with a full adversarial hearing.

Finally, an incarcerated parent cannot begin to utilize any of these procedural rights without the assistance of an attorney. Far more than other parents, an incarcerated parent must depend almost completely on others for logistical assistance. For example, without the assistance of counsel, a prisoner cannot walk into a courthouse to look at court records, telephone and visit potential witnesses, arrange to appear for court hearings or talk to opposing counsel prior to the court date. All of these are basic tasks that may be essential to an effective defense in a termination proceeding. Accordingly, an imprisoned parent has a special need to be assigned counsel at the earliest possible moment in a termination proceeding.

In short, due process considerations require that incarcerated parents be provided with extensive procedural protections. The streamlined procedures described above therefore fail to satisfy constitutional requirements.

---

[83] *But see In re* Juvenile Appeal, 187 Conn. 431, 446 A.2d 808, 812 (1982) (the court acknowledged that "[the father's] argument, that the fact-finder could not evaluate the [father's] testimony in light of his demeanor, is somewhat . . . problematic." However, the court held that the risk of error in evaluating the father's credibility was marginal since the father had been permitted to testify and be cross-examined by speaker phone.)

[84] Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972).

[85] *Santosky*, 455 U.S. at 745.

IV. TERMINATION OF PARENTAL RIGHTS ON THE BASIS OF PAST UNFITNESS: "BACKWARD-LOOKING" STATUTES AND CASES

For the most part, state termination of parental rights statutes do not permit rights to be terminated solely on the basis of a parent's criminal conviction. The exceptions are statutes that permit rights to be terminated when parents have been convicted of particularly serious offenses. Thus, Illinois,[86] Indiana,[87] Iowa,[88] Louisiana,[89] Maine,[90] New

---

[86] The Illinois termination of parental rights statute provides in pertinent part as follows:
Adoption - Appointment of guardian with power to consent

§ 2-29. Adoption - appointment of guardian with power to consent.

. . . .

(2) If the petition prays and the court finds that it is in the best interest of the minor that a guardian of the person be appointed and authorized to consent to the adoption of the minor, the court with the consent of the parents, if living, or after finding, based upon clear and convincing evidence, that a non-consenting parent is an unfit person as defined in [Chapter 40, para. 1501, *et seq.*], may empower the guardian of the person of the minor, in the order appointing him or her as such guardian, to appear in court where any proceedings for the adoption of the minor may at any time be pending and to consent to the adoption. Such consent is sufficient to authorize the court in the adoption proceedings to enter a proper order or judgment of adoption without further notice to, or consent by, the parents of the minor. An order so empowering the guardian to consent to adoption terminates parental rights, deprives the parents of the minor of all parental responsibility for him or her, and frees the minor from all obligations of maintenance and obedience to his or her natural parents.

ILL. ANN. STAT. ch. 37, para. 802-29 (Smith-Hurd 1990).

The Illinois statute continues:

§1. Definitions. When used in this Act, unless the context otherwise requires:

D. "Unfit person" means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption, the grounds of such unfitness being any one or more of the following:

. . . .

(f) a criminal conviction resulting from the death of any child by physical child abuse. . . .

. . . .

(q) a finding of physical abuse of the child under Section 4-8 of the Juvenile Court Act or Section 2-21 of the Juvenile Court Act of 1987 and a criminal conviction of aggravated battery of the child.

ILL. ANN. STAT. ch. 40, para. 1501 (Smith-Hurd 1991).

[87] The Indiana termination of parental rights statute provides in pertinent part as follows:
Conviction of parent as grounds for termination

(a) If an individual is convicted of the offense of:

(1) Murder (IC 35-42-1-1);
(2) Causing suicide (IC 35-42-1-2);
(3) Voluntary manslaughter (IC 35-42-1-3);
(4) Involuntary manslaughter (IC 35-42-1-4);
(5) Rape (IC 35-42-4-1);
(6) Criminal deviate conduct (IC 35-42-4-2);
(7) Child molesting (IC 35-42-4-3);

(8) Child exploitation (IC 35-42-4-4); or

(9) Incest (IC 35-46-1-3)

and the victim of that offense was under sixteen (16) years of age at the time of the offense and is that individual's biological or adoptive child, or is the child of a spouse of the individual who has committed the offense, the prosecuting attorney, the attorney for the county department, or the child's guardian ad litem or court appointed special advocate may file a petition with the juvenile or probate court to terminate the parent-child relationship of the individual who has committed the offense with the victim of the offense, the victim's siblings, or any biological or adoptive child of that individual.

IND. CODE ANN. § 31-6-5-4.2 (Burns 1991).

[88] The Iowa termination of parental rights statute provides in pertinent part as follows:

Grounds for termination

1. Except as provided in subsection 3, the court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds:

. . . .

i. The court finds that both of the following have occurred:

(1) The child has been adjudicated a child in need of assistance pursuant to section 232.96 and custody has been transferred from the child's parents for placement pursuant to section 232.102.

(2) The parent has been imprisoned for a crime against the child, the child's sibling, or another child in the household, or the parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of five or more years.

. . . .

l. The court finds that both of the following have occurred:

(1) The child has been adjudicated a child in need of assistance pursuant to section 232.96 after finding that the child has been physically or sexually abused as a result of the acts or omissions of a parent.

(2) The parent found to have physically or sexually abused the child has been imprisoned for such abuse against the child, the child's sibling, or any other child in the household and the court finds it is unlikely that the parent will be released within five years.

2. In considering whether to terminate the rights of a parent under this section, the court shall give primary consideration to the physical, mental, and emotional condition and needs of the child. Such consideration may include any of the following:

a. Whether the parent's ability to provide the needs of the child is affected by the parent's mental capacity or mental condition or the parent's imprisonment for a felony.

. . . .

3. The court need not terminate the relationship between the parent and the child if the court finds any of the following:

a. A relative has legal custody of the child.

b. The child is over ten years of age and objects to the termination.

c. There is clear and convincing evidence that the termination would be detrimental to the child at the time due to the closeness of the parent-child relationship.

IOWA CODE ANN. § 232.116 (West 1991).

Another portion of the Iowa statute pertaining to parental incarceration generally is discussed in Section V, *infra*.

[89] The Louisiana termination of parental rights statute provides in pertinent part as follows:
Title X. Involuntary Termination of Rights Chapter 4. Grounds of Involuntary Termination Art. 1015. Grounds

The grounds set forth in the petition must meet all of the conditions of any one of the following paragarphs:

(1) Prior criminal conviction

(a) As a result of a criminal prosecution, the parent has been convicted, either as a principle or accessory, of a crime against the child who is the subject of this termination proceeding, or against another child of the parent.

(b) The parent is now unfit to retain parental control, and there is no reasonable expectation of his reformation in the foreseeable future.

(2) Criminal conduct

(a) The conduct of the parent, either as a principal or accessory, constitutes a crime against the child or against any other child of the parent.

(b) The parent is now unfit to retain parental control, and there is no reasonable expectation of his reformation in the foreseeable future.

. . .

Chapter 1. Preliminary Provisions; Definitions Art. 1003. Definitions

As used in this Title:

. . .

(4) "Crime against the child" shall include the commission or the attempted commission of any of the following crimes:

(a) Homicide
(b) Battery
(c) Assault
(d) Rape
(e) Sexual battery
(f) Kidnapping
(g) Criminal neglect
(h) Criminal abuse
(i) Incest
(j) Carnal knowledge of a juvenile
(k) Indecent behavior with juveniles
(l) Pornography involving juveniles
(m) Molestation of a juvenile
(n) Crime against nature
(p) Cruelty to juveniles
¶ Parent enticing child into prostitution
(q) Sale of minor children

. . .

Another portion of the Louisiana statute pertaining to parental incarceration generally is discussed in Section V, *infra*.

[90] The Maine termination of parental rights statute provides in pertinent part as follows:

Grounds for termination

I. Grounds. The court may order termination of parental rights if:

A. One of the following conditions has been met:

(1) Custody has been removed from the parent under:

(a) Section 4035 or 4038;

(b) Title 19, section 213, 214, or 752; or

(c) Section 3792 prior to the effective date of this chapter; or

York,[91] Oklahoma[92] and Tennessee[93] all have statutes that permit ter-

---

(2) The petition has been filed as part of an adoption proceeding in Title 19, [§531, *et seq.*]; and

B. Either:

(1) The parent consents to the termination . . . . or

(2) The court finds, based on clear and convincing evidence, that:

(a) Termination is in the best interest of the child; and

(b) Either:

(i) The parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs;

. . . .

1-A. Rebuttable presumption. The court may presume that the parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs if:

. . . .

B. The victim of any of the following crimes was a child for whom the parent was responsible or the victim was a child who was a member of a household lived in or frequented by the parent and the parent has been convicted of:

(1) Murder;
(2) Felony murder;
(3) Manslaughter;
(4) Aiding or soliciting suicide;
(5) Aggravated assault;
(6) Rape;
(7) Gross sexual misconduct;
(8) Sexual abuse of minors;
(9) Incest;
(10) Kidnapping;
(11) Promotion of prostitution;
(12) A comparable crime in another jurisdiction.

ME. REV. STAT. ANN. tit. 22, § 4055 (1992).

[91] For the text of the New York termination of parental rights statute pertaining to severe or repeated child abuse, see *infra* note 99. Another portion of the New York statute pertaining to parental incarceration generally is discussed in Section VI.

[92] The Oklahoma termination of parental rights statute provides in pertinent part as follows:

Termination of parental rights in certain situations

A. The finding that a child is delinquent, in need of supervision or deprived shall not deprive the parents of the child of their parental rights, but a court may terminate the rights of a parent to a child in the following situations:

. . . .

5. A conviction in a criminal action pursuant to the provisions of Sections 843, 845, 1021.3, 1111 and 1123 of Title 21 of the Oklahoma Statutes or a finding in a deprived child action either that:

a. the parent has physically or sexually abused the child or a sibling of such child or failed to protect the child or a sibling of such child from physical or sexual abuse that is heinous or shocking to the court or that the child or sibling of such child has suffered severe harm or injury as a result of such physical or sexual abuse, or

b. the parent has physically or sexually abused the child or a sibling of such child or failed to protect the child or a sibling of such child from

mination of rights on the basis of crimes in which a child was the victim, such as child abuse resulting in serious injury or death.

Arizona's and California's more openly worded statutes do not list specific offenses. Instead, the Arizona statute permits termination for conviction of a felony if the felony "is of such nature as to prove the unfitness of such parent to have future custody and control of the child."[94] The California statute permits termination when "the parent has been convicted of a felony indicating parental unfitness."[95] Simi-

---

physical or sexual abuse subsequent to a previous finding that such parent has physically or sexually abused the child or a sibling of such child or failed to protect the child or a sibling of such child from physical or sexual abuse; or

6. A conviction in a criminal action that the parent has caused the death of a sibling of the child as a result of the physical or sexual abuse or chronic neglect of such sibling;

OKLA. STAT. ANN. tit. 10, § 1130 (West 1987).

Another portion of the Oklahoma statute pertaining to parental incarceration generally is discussed in Section VI.

[93] The Tennessee termination of parental rights statute provides in pertinent part as follows:

Termination of parental rights.

. . . .

(d) After hearing evidence on a termination petition, the court may terminate parental rights if it finds on the basis of clear and convincing evidence that termination is in the child's best interest and that one (1) or more of the following conditions exist:

. . . .

(3) The parent has been sentenced to more than two (2) years' imprisonment for conduct which has been or is found to be severe child abuse;

TENN. CODE ANN. § 37-1-147 (1991).

[94] The relevant Arizona statute provides in pertinent part as follows:

§ 8-533. Petition; who may file; grounds

A. Any person or agency that has a legitimate interest in the welfare of a child, including, but not limited to, a relative, a foster parent, a physician, the department of economic security, or a private licensed child welfare agency, may file a petition for the termination of the parent-child relationship alleging grounds contained in subsection B . . . .

B. Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following grounds, the court may also consider the needs of the child:

. . . .

4. That the parent is deprived of civil liberties due to the conviction of a felony if the felony of which such parent was convicted is of such nature as to prove the unfitness of such parent to have future custody and control of the child, or if the sentence of such parent is of such length that the child will be deprived of a normal home for a period of years.

ARIZ. REV. STAT. ANN. § 8-533 (1989).

[95] CAL. WELF. & INST. CODE § 366.26 (West 1992), applicable to cases involving children adjudged to be dependent on or after January 1, 1989, provides in pertinent part:

larly, an additional portion of the Illinois statute permits a finding of unfitness on the ground of the parent's "depravity."[96]

---

§ 366.26 - Hearings terminating parental rights or establishing guardianship of minors adjudged dependent children of court on or after Jan. 1, 1989; procedure and orders

. . . .

(c) At the hearing the court shall proceed pursuant to one of the following procedures:

(1) The court shall terminate parental rights only if it determines by clear and convincing evidence that it is likely that the minor will be adopted. If the court so determines, the findings . . . that the parent has been convicted of a felony indicating parental unfitness . . . shall then constitute a sufficient basis for termination of parental rights unless the court finds that termination would be detrimental to the minor due to one of the following circumstances:

(A) The parents or guardians have maintained regular visitation and contact with the minor and the minor would benefit from continuing the relationship.

(B) A minor 10 years of age or older objects to termination of parental rights.

(C) The child is placed in a residential treatment facility, adoption is unlikely or undesirable, and continuation of parental rights will not prevent finding the child a permanent family placement if the parents cannot resume custody when residential care is no longer needed.

(D) The minor is living with a relative or foster parent who is unable or unwilling to adopt the minor because of exceptional circumstances, which do not include an unwillingness to accept legal responsibility for the minor, but who is willing and capable of providing the minor with a stable and permanent environment and the removal of the minor from the physical custody of his or her relative or foster parent would be detrimental to the emotional well-being of the minor.

Id.

For termination of parental rights cases involving children adjudged dependent prior to that date, CAL. CIV. CODE § 232(a)(4)(West 1992) applies. That provision permits termination of parental rights where "the facts of the crime . . . are of a nature so as to prove the unfitness of the parent . . . to have the future custody and control of the child." *Id.*

[96] *See* ILL. ANN. STAT. ch. 40, para. 1501 (Smith-Hurd 1991), which provides in part:

§ 1. Definitions. When used in this Act, unless the context otherwise requires:

D. "Unfit person" means any person whom the court shall find to be unfit to have a child, without regard to the likelihood that the child will be placed for adoption, the grounds of such unfitness being any one or more of the following:

. . . .

(i) depravity

Id.

This provision has been applied to incarcerated parents in several cases. *See, e.g., In re* Abdullah, 85 Ill. 2d 300, 423 N.E.2d 915 (1981) (father's murder of mother and 60 year prison sentence); *In re* RG, 165 Ill. App. 3d 112, 518 N.E.2d 691 (1988), *appeal denied*, 119 Ill. 2d 557, 522 N.E.2d 1256 (1988) (conviction for severe child abuse); *In re* M.B.C., 125 Ill. App. 3d 512, 466 N.E.2d 273 (1984), *appeal dismissed sub nom.*, Cornes v. Kellum, 471 U.S. 1062 (1985) (father had served twenty years on earlier rape conviction and currently serving 60 years for rape, robbery, deviate sexual assault and intimidation); Ornstead v. Kleba, 37 Ill. App. 3d 163, 345 N.E.2d 714 (1976) (father incarcerated for two counts of armed robbery and three counts of rape). *See also, infra* note 124 and accompanying text.

The Nevada statute resembles in its effect the Arizona, California and Illinois statutes. The statute permits termination of rights, *inter alia*, when the parent has neglected the child or when the parent is unfit. In making this determination of neglect or unfitness, the court may consider "[c]onviction of the parent for commission of a felony, if the facts of the crime are of such a nature as to indicate the unfitness of the parent to provide adequate care and control to the extent necessary for the child's physical, mental or emotional health and development."[97]

A. Rehabilitation of Parents

Such a focus on past conduct raises a number of issues. The first and most critical of these is the extent to which a state is willing to examine the parent's rehabilitation while in prison. As argued in Section II, a finding of parental unfitness cannot constitutionally be based on past conduct alone, without examining the parent's present circumstances, such as the extent of her rehabilitation and the quality of her current relationship with her children. However, there is a wide variation among the states both in the extent to which childcare agencies are required to arrange for incarcerated parents to receive rehabilitative and therapeutic services, and the degree to which courts will recognize

---

For the rest of the Illinois statute, see *supra* note 87.

[97] NEV. REV. STAT. ANN. § 128.106 (Michie 1991). The relevant Nevada statutes provide in pertinent part as follows:

> Grounds for terminating parental rights: Basic considerations.
>
> An order of the court for termination of parental rights must be made in light of the considerations set forth in this section and NRS 128.106, 128.107 and 128.108, with the initial and primary consideration being whether the best interests of the child would be served by the termination, but requiring a finding that the conduct of the parent or parents demonstrated at least one of the following:
>
> . . . .
>
> 2. Neglect of the child;
>
> 3. Unfitness of the parent;
>
> . . . .
>
> [§] 128.106. Specific considerations in determining neglect by or unfitness of parent. In determining neglect by or unfitness of a parent, the court shall consider, without limitation, the following conditions which may diminish suitability as a parent:
>
> . . . .
>
> 6. Conviction of the parent for commission of a felony, if the facts of the crime are of such a nature as to indicate the unfitness of the parent to provide adequate care and control to the extent necessary for the child's physical, mental or emotional health and development.

NEV. REV. STAT. ANN. §§ 128.105-06 (Michie 1991).

the possibility of an incarcerated parent's achieving rehabilitation in prison.[98]

Several states have addressed the issue of parental rehabilitation by statute. The New York statute explicitly requires that agencies make diligent efforts on behalf of incarcerated parents to strengthen and improve the parental relationship, even in cases involving severe or repeated child abuse.[99] The statute defines diligent efforts to include the provision of visitation at the prison and other necessary social services.[100]

---

[98] This is despite federal statutory requirements that states have a program for the provision of services to families to enable them to stay together and to reunite them. 42 U.S.C. § 671 (a)(15) (1988).

[99] N.Y. SOC. SERV. LAW § 384-b(8) (McKinney 1983) provides in pertinent part as follows:

> (a) For the purposes of this section a child is "severely abused" by his parent if (i) the child has been found to be an abused child as a result of reckless or intentional acts of the parent committed under circumstances evincing a depraved indifference to human life, which result in serious physical injury to the child . . ., *and (ii) the agency has made diligent efforts to encourage and strengthen the parental relationship, including efforts to rehabilitate the [parent], when such efforts will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future.*
>
> (b) For the purposes of this section a child is "repeatedly abused" by his parent if (i) the child has been found to be an abused child . . ., and the child or another child for whose care such parent is or has been legally responsible has been previously found, within the five years immediately preceding the initiation of the proceeding in which such abuse is found, to be an abused child . . ., *and (ii) the agency has made diligent efforts, to encourage and strengthen the parental relationship, including efforts to rehabilitate the [parent], when such efforts will not be detrimental to the best interests of the child, and such efforts have been unsuccessful and are unlikely to be successful in the foreseeable future.*

Id. (emphasis added).

[100] N.Y. SOC. SERV. LAW § 384-b(7)(f) (McKinney Supp. 1991) provides in pertinent part as follows:

> As used in this subdivision, "diligent efforts" shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:
>
> . . . .
>
> (5) making suitable arrangements with a correctional facility and other appropriate persons for an incarcerated parent to visit the child within the correctional facility, if such visiting is in the best interests of the child. When no visitation between child and incarcerated parent has been arranged for or permitted by the authorized agency because such visitation is determined not to be in the best interest of the child, then no permanent neglect proceeding under this subdivision shall be initiated on the basis of the lack of such visitation. Such arrangements shall include, but shall not be limited to, the transportation of the child to the correctional facility, and providing or suggesting social or rehabilitative services to resolve or correct the problems other than incarceration itself which impair the incarcerated parent's ability to maintain contact with the child. When the parent is incarcerated in a correctional facility located outside the

As in New York, the California statute sets out requirements for providing reunification services to incarcerated parents. Reasonable reunification efforts are mandated unless such services would be detrimental to the child. Reunification services are not required, however, for parents against whom there have been repeated findings of physical or sexual abuse or parents who have been convicted of serious neglect or abuse resulting in the death of a child. However, when appropriate, reunification services *may* be ordered in such cases.[101]

Colorado has also addressed this issue through statute. There, a court is permitted to determine that no appropriate treatment plan can be devised when a parent whose child has been found to be dependent or neglected is subject to long term confinement of such duration that she will not be eligible for parole for at least six years from the date the child was adjudicated dependent or neglected.[102] However, a treatment plan appears to be required for incarcerated parents who are not

---

state, the provisions of this subparagraph shall be construed to require that an authorized agency make such arrangements with the correctional facility only if reasonably feasible and permissible in accordance with the laws and regulations applicable to such facility.

Id.

However, in a case involving a mother who had been convicted of the killing of one of her children and who was serving a life sentences with no possibility of parole before her other children reached majority, one court held that the child care agency was excused from making any efforts to strengthen the parental relationship because such efforts would be detrimental to the mother's surviving children. *See In re* B. Children, 168 A.D.2d 312, 562 N.Y.S.2d 643 (1990).

[101] CAL. WELF. & INST. CODE § 361.5(b)(3),(4);(c) (West 1992). Section 361.5(c) provides that in cases involving repeated physical or sexual abuse or a conviction for neglect or abuse resulting in death of the child,

> the court shall not order reunification unless it finds that, based on competent testimony, those services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent . . . .
>
> . . . .
>
> The failure of the parent to respond to previous services, the fact that the child was abused while the parent was under the influence of drugs or alcohol, a past history of violent behavior, or testimony by a competent professional that the parent's behavior is unlikely to be changed by services are among the factors indicating that reunification services are unlikely to be successful. The fact that a parent or guardian is no longer living with an individual who severely abused the minor may be considered in deciding that reunification services are likely to be successful, provided that the court shall consider any pattern of behavior on the part of the parent that has exposed the child to repeated abuse.

Id.

For a fuller discussion of the California statute, see Section VI, *infra*.

[102] COLO. REV. STAT. §§ 19-3-604(1)(b), (b)(III)(1991). *See* discussion *infra* note 103. The Colorado statute is reproduced *infra* note 152.

subject to long term confinement.[103] The Wyoming Supreme Court has similarly interpreted the state statute as not requiring efforts to rehabilitate the family when termination of rights is sought on the ground of the parent's incarceration.[104]

The issue of parental rehabilitation has also been dealt with in other states through case law. Courts in North Carolina and Virginia have expressly held that prior to terminating rights, an agency must make efforts to provide incarcerated parents with rehabilitative services designed to improve and strengthen the parental relationship and have dismissed termination proceedings when the agencies were unable to show they had made such efforts.[105] A similar result has been reached

---

[103] *See* COLO. REV. STAT. § 19-3-604 (1)(c)(I)(1991); *In re* M.C.C., 641 P.2d 306 (Colo. Ct. App. 1982) (termination of incarcerated father's rights reversed when the agency had not developed a treatment plan as required by statute).

> The fact that a particular parent is incarcerated at the time of an adjudication of dependency or neglect may often render more difficult the crafting of a meaningful and workable plan. However, such single circumstance does not *per se* prohibit the creation and implementation of a treatment program appropriate for the goal the [Legislature] has indicated it should achieve -the building or re-building of a healthy parent-child relationship . . . . Such factors as the age of the child, the length of the parent's incarceration, the nature of the parent's criminal conduct, and all of the circumstances of the prior parent-child relationship are also among the matters which might be considered by a trial court when formulating a treatment plan.

In re M.C.C., 641 P.2d at 309 (citations omitted).

In re M.C.C. appears to remain good law with respect to incarcerated parents except those who are subject to long term confinement. *See* COLO. REV. STAT. §§ 19-3-604(1)(b), (b)(III)(1991).

[104] RW v. Laramie County Dep't of Pub. Assistance, 766 P.2d 555 (Wyo. 1989). The termination of parents' rights was affirmed when both parents were serving life sentences for the murder of one child. The court compared W.S. 14-2-309(a)(iii), which provides for termination of rights on basis of abuse or neglect of child and requires as an element "that efforts to rehabilitate the family have been unsuccessful or refused by the family," with W.S. 14-2-309(a)(iv), which provides for termination of rights based on parent's incarceration for a felony and parental unfitness and does not contain any provision for reunification efforts. The court concluded that in cases involving incarceration of the parent for a felony conviction, the state does not have the burden of proving the unavailablity of means less intrusive than termination. *Id.* at 557. One justice, in a concurring opinion, expressed concern that the majority's interpretation might allow parental incarceration to be construed as *per se* parental unfitness and permit rights to be terminated solely on the basis of incarceration. *Id.* at 558-59.

[105] North Carolina: *In re* Harris, 87 N.C. App. 179, 360 S.E.2d 485, 488-89 (1987) (in reversing termination of rights of two incarcerated putative fathers, the court held that the agency could not argue that efforts to provide services to parents were futile, when the agency had not attempted any such efforts; statute providing for termination when, *inter alia*, the parent has failed to respond positively to agency diligent efforts presumes that agency is required at least to attempt such efforts).

Virginia: Cain v. Commonwealth of Virginia, 12 Va. App. 42, 402 S.E.2d 682 (1991) (termination of incarcerated mother's rights reversed when the agency had not made any efforts, follow-

in Arizona in a case involving a short prison sentence.[106] In Missouri, Utah and Washington, it has also been held that such efforts are required, but courts there have upheld terminations of rights when such efforts, although offered, were unsuccessful at rehabilitating the parents.[107]

---

ing the mother's imprisonment, to provide her with social, medical, mental health or other rehabilitative services to remedy the conditions that led to placement of her children; an agency is required to show by clear and convincing evidence that it made such efforts and that, with this assistance, the parent has been unable or unwilling to correct the conditions of prior neglect). *But see* Harris v. Lynchburg Div. of Soc. Serv., 223 Va. 235, 288 S.E.2d 410 (1982) (further agency efforts excused when agency had unsuccessfully attempted reunification services for four years preceding mother's arrest).

[106] *In re* Juvenile Action No. S-624, 126 Ariz. 488, 616 P.2d 948 (Ct. App. 1980) (dismissal of termination petition against father affirmed when the agency had failed to make any effort to work with the father's family, despite the family's attempts to get the agency to do so; father was serving a sentence of two-to-five years but would be eligible for work release within a few months). "[Severance of the parent-child relationship] should be resorted to only where concerted efforts to preserve the relationship fail . . . . [T]he state and its courts should do everything in their power to keep the family together and not destroy it." *Id.* at 490, 616 P.2d at 950 (citations omitted).

[107] Missouri: *In re* R.H.S., 737 S.W.2d 227 (Mo. Ct. App. 1987). Prior to being incarcerated, the father had been expelled from a vocational rehabilitation program and had refused to attend a parenting class or cooperate with counseling referrals. After his arrest, he had participated in some rehabilitative programs but had subsequently refused to sign an information release for the agency caseworker. *Id.* at 230-31. Finding that because of the father's lack of cooperation, the agency had been "unsuccessful in aiding the [parent] on a continuing basis in adjusting his circumstances or conduct to provide a proper home for his children," the court affirmed the termination of parental rights. *Id.* at 235.

Utah: *In re* C.Y. v. Yates, 765 P.2d 251 (Utah 1988) (termination of father's rights affirmed when father had not successfully completed treatment plan). The father's inadequacies as parent, mental and emotional stability and violent behavior meant that he could not be successfully rehabilitated. "It is not sufficient to merely go through the motions of a treatment plan. The plan is developed to change attitudes and behavior. If after a reasonable period of time, no positive change in parenting skills occur [sic], a termination of parental rights is appropriate." *Id.* at 255-56.

Washington: *In re* Ferguson, 98 Wash. 2d 589, 656 P.2d 503 (1983) (all services reasonably available to correct the father's parental deficiencies were offered), *reversing* 32 Wash. App. 865, 650 P.2d 1118 (1982). The intermediate appellate court had noted that under prior case law, rehabilitative and supportive services are not required in two situations: 1) when such services would be futile; and 2) when "the prison term is so long the parent has little hope, even with counseling, of establishing a relationship with the child." 32 Wash. App. at ——, 650 P.2d at 1120-21 (citing *In re* Aschauer, 93 Wash. 2d 689, 611 P.2d 1245 (1980) and *In re* Clark, 26 Wash. App. 832, 611 P.2d 1343, *review denied*, 94 Wash. 2d 1018 (1980)); *see also In re* Siegfried, 42 Wash. App. 21, 708 P.2d 402, 405-06 (1985) (termination of mother's rights affirmed when agency had made unsuccessful efforts to provide services prior to the mother's incarceration; while recognizing the mother's participation in institutional programming, it noted that these programs were insufficient to give her the parenting skills required to handle a child with special needs).

The courts of several other states, however, have limited, either explicitly or implicitly, the extent to which agencies are required to provide rehabilitative services to incarcerated parents. The rationale for several of these cases is the alleged impracticality of requiring agencies to provide services to parents while they are in prison.[108] Another, more troubling rationale lies at the heart of a number of the cases. In those cases, the courts have found that because of limited services available in prison, it is not possible for the parent to achieve meaningful rehabilitation while incarcerated, and have therefore excused agencies from making any attempt to work with the parents.[109] The disturbing aspect of these cases is how the courts appear willing to dismiss the time during which the parent will be confined as dead time and to abandon any notion that a parent can improve herself, strengthen her relationship with her children and continue to parent while in prison.

This variation among judicial attitudes toward the possibility of a parent's becoming rehabilitated is reflected in the ways the states have treated past criminal conduct in evaluating parental unfitness in termi-

---

[108] *See, e.g., In re* A.B., 239 Mont. 344, 780 P.2d 622 (1989) (extremely limited plan of two months' duration required); *In re* C.L.R., 211 Mont. 381, 685 P.2d 926 (1984) (agency's failure to establish treatment plan excused, although court held that such a plan is generally required). "[W]e sound a stern warning that this Court will not permit the termination of parental rights without first establishing a treatment plan unless a showing of facts clearly proves the impossibility of any workable plan." *Id.* at ____, 685 P.2d at 928; *see also In re* Wagner, 209 Neb. 33, 305 N.W.2d 900, 902 (1981)("[Father's] incarceration made it impossible for the court to direct and supervise a plan of 'rehabilitating' [father] as a parent, even if it were required by law to do so"); *In re* Hederson, 30 Ohio App. 3d 187,189, 507 N.E.2d 418, 420 (1986) (termination of rights affirmed against father serving life sentence for murder of child's mother; reunification plan requirements were satisfied by plan which provided only that visitation between father and his daughter would be discussed after his release from prison; plan did not provide for any contact between the father and his daughter by phone, letters, cards, visitation or other means; court held that the child care agency had done all that was practical in view of the father's long term incarceration); *In re* T.H., 396 N.W.2d 145 (S.D. 1986) stating:

> The trial court specifically found that due to the incarceration of the parents, the [child care agency], at best, had limited access to the parents for the purpose of attempting to rehabilitate the family. We agree with the trial court's conclusion that the [agency] made reasonable efforts under the circumstances, to facilitate contact between Mother and her sons. We make no attempt to propound a rule for the Department in establishing a required course of rehabilitation in every case where one or both parents are incarcerated.

Id. at 151.

[109] *In re* JY v. JD, 545 So. 2d 547, 551 (La. Ct. App. 1989) (noting lack of opportunity for rehabilitation or reformation while in prison); *In re* A.D., 416 N.W.2d 264, 268 (S.D. 1987) (noting lack of meaningful drug and alcohol treatment, behavior modification programs and parent training available in prison); *cf. In re* Siegfried, 42 Wash. App. 21, 708 P.2d 402, 405-06 (1985) (institutional programs in which mother had participated were not sufficient to give her the parenting skills required to handle a child with special needs).

nation of parental rights proceedings. There are two primary contexts in which the issue of rehabilitation arises—situations involving the parent's repeated commission of crimes or other persistent, undesirable pre-incarceration conduct and cases in which the principal factor is the nature of the parent's crime.

B. Repeated Criminal Activity or Other Detrimental Conduct

In the first type of cases, where the parent has engaged in repeated criminal convictions or other persistent and detrimental pre-incarceration conduct, the focus is not on the particular crime or crimes the parent has committed. The parent has not been imprisoned for acts against her family, such as child abuse or the killing of another parent. Rather, these cases have been decided on the theory that the parent has been negligent with respect to her children. These cases therefore look in many ways like traditional permanent neglect or dependency cases involving parents who are not incarcerated. The state is arguing that rights should be terminated because the parent has been largely absent from her children's lives and because, when she has been present, she has acted irresponsibly. In some of the cases, courts even suggest that the parent has constructively abandoned her child.

The cases run across a spectrum. At one end are states in which cases have been decided on a strict abandonment theory. In these states, the parent's actions, including the act of repeatedly getting arrested and convicted, are seen as voluntary actions showing an intent to relinquish parental rights. Such an approach has been used in Arkan-

sas,[110] Missouri,[111] North Dakota,[112] Pennsylvania[113] and South Carolina.[114]

At the other end of the spectrum are states in which courts have not applied an abandonment theory and have required that there be a logical connection between the parent's past actions and her present fitness to be a parent. A case that illustrates this approach is *In re G.M.*.[115] There, the mother, who had a fourteen-year history of drug addiction, was incarcerated on a prescription fraud conviction. The Georgia appellate court reversed the termination of parental rights, holding that the lower court had improperly relied on the high recidivism rate for drug-related offenses in determining that the mother was unfit. The court held that the trial judge should have accorded greater weight to testimony about the mother's rehabilitation in prison, stating, "[t]he evidence presented at the hearing portrays a woman who has led a life laced with drug abuse who is genuinely attempting to overcome this dependency and to provide a stable and healthy atmosphere in which to raise her child."[116] In short, the appellate court found that the trial court had erred in failing to take into account the specific evidence of the mother's rehabilitation and *present fitness* and relying instead on

---

[110] *See In re* Titsworth, 11 Ark. App. 197, 669 S.W.2d 8 (1984) (reversing lower court's denial of father's adoption petition, intermediate appellate court held that incarcerated mother's consent to adoption was unnecessary because of her abandonment of her child through repeated commissions of crimes and periods of incarceration and extremely limited attempts to maintain contact with her child).

[111] *In re* H.M., 770 S.W.2d 442 (Mo. Ct. App. 1989) (mother found to have abandoned child when she had been in jail repeatedly for periods totalling all but 10 months of child's first five years, had not kept in contact through letters while in jail and had not visited regularly while out of jail); *but see In re* M.B., 768 S.W.2d 95 (Mo. Ct. App. 1988); *In re* B.L.E., 768 S.W.2d 86 (Mo. Ct. App. 1988) (termination of rights based on neglect, rather than abandonment theory).

[112] *In re* F.H., 283 N.W.2d 202, 213-14 (N.D. 1979) (father's commission of a crime resulting in a five year prison sentence was a voluntary act that, coupled with his failure to help support his child or attempt to communicate with the child, constituted abandonment).

[113] *In re* T.M., 389 Pa. Super. 303, 566 A.2d 1256 (1989) (termination of mother's rights affirmed). Mother, who had a serious drug problem and had been arrested several times and incarcerated, had visited her children only once during the first 15 months that they were in foster care placement. The court held that mother's improvement since entering drug rehabilitation was insufficient to overcome her past neglect of her children. *Id.* at 307, 566 A.2d at 1258.

[114] Department of Soc. Serv. v. Henry, 296 S.C. 507, 374 S.E.2d 298 (1988) (affirming termination of rights of mother who had been arrested and jailed several times). Mother had not maintained regular contact with her children when she was out of jail and was serving a 10 year sentence at the time of the trial. "Her voluntary pursuit of a course of lawlessness resulting in imprisonment, coupled with her flagrant indifference toward the children during intervening periods of freedom manifests an abandonment of [her children]." *Id.* at ____, 374 S.E.2d at 299-300.

[115] *In re* S.M., 169 Ga. App. 364, 312 S.E.2d 829 (1983).

[116] *Id.* at ____, 312 S.E.2d at 831.

generalized conclusions about the nature of the mother's criminal and drug history.

The extent of parental rehabilitation has likewise been the focus in other Georgia cases. Georgia courts have not terminated rights when there is evidence of parental rehabilitation;[117] contrary results have been reached when the proof at trial indicated that the parent was not rehabilitated and was therefore presently unfit.[118]

Other states have similarly required that there be proof that a parent's past unfitness continues. Courts in California,[119] Idaho,[120] Illinois,[121] Iowa,[122] Nebraska,[123] Texas[124] and Washington[125] have terminated rights when proof of continuing parental unfitness was shown by

---

[117] *In re* N.F.R., 179 Ga. App. 346, 346 S.E.2d 121 (1986) (mother was about to be released, had an offer of employment and would be involved in drug counseling; termination of parental rights based on past acts reversed because of no showing that mother was presently unfit to care for her child).

[118] *See In re* RLH, 188 Ga. App. 596, ____, 373 S.E.2d 666, 667-68 (1988) (in affirming the termination of the father's parental rights, court found "no prognosis of improvement" when he had been imprisoned almost continuously on various convictions and had not contacted the children during the period that he was not incarcerated); *In re* G.M.N., 183 Ga. App. 458, 359 S.E.2d 217 (1987) (termination affirmed when both parents had serious alcohol abuse problems and had been incarcerated repeatedly since the children's placement in foster care); *In re* A.A.G., 146 Ga. App. 534, 246 S.E.2d 739 (1978) (termination affirmed when father had a record of criminal arrests since the child's birth, was a heroin addict and when not in prison had attempted to get the child's mother to use heroin with him); *In re* Levi, 131 Ga. App. 348, 206 S.E.2d 82 (1974) (reversing dismissal of termination proceeding against mother who was a heroin addict, had been arrested and incarcerated on at least two drug related offenses and had had almost no contact with her child in 18 months; expert testimony offered at trial concerning unlikelihood of mother's improvement).

[119] *In re* D.S.C., 93 Cal. App. 3d 14, 155 Cal. Rptr. 406 (1979) (nexus between past criminal history and present unfitness found when father committed series of burglaries, including crime with 17-year-old wife as accomplice, committed while father was on parole).

> From these facts, the trial judge could reasonably have inferred that defendant had a propensity to violent crime, that he did not hesitate to involve family members of a tender age in crime, that he would turn to crime in the future should he find difficulty in making a living, and that he might violate parole and thus place himself in jeopardy of being taken from his family and returned to prison.

Id. at 25, 155 Cal. Rptr. at 412.

[120] *In re* Dayley, 112 Idaho 522, 733 P.2d 743 (1987) (parental unfitness established when father had two felony convictions, a parole violation resulting in additional incarceration, several arrests and a history of alcohol abuse).

[121] *In re* M.B.C., 125 Ill. App. 3d 512, 515, 466 N.E.2d 273, 276 (1984) (father unfit when he had committed series of five felonies over 30 year period, including two rapes, acts of deviate assault, armed robbery and intimidation; at trial the father "offered no significant evidence to show his rehabilitation;" he had spent 20 years in prison on earliest convictions), *appeal dismissed sub nom.* Cornes v. Kellum, 471 U.S. 1062 (1985). *But see* Young v. Prather, 120 Ill. App. 2d 395, 256 N.E.2d 670 (1970) (mother had been rehabilitated in prison and was no longer "depraved").

patterns of repeated criminal conduct, often in conjunction with persistent drug use.

C. *Nature of the Parent's Crime*

By far the more difficult cases are those in which the state is seeking to terminate rights based on the serious nature of the parent's crime. Unlike the first type of cases in which the state is arguing that the parent has been merely irresponsible or unavailable, in the second type of case, the state is arguing that the parent has acted so egregiously in the past that she may have irreparably damaged her relationship with her children and her ability to continue to be a parent to them. Admittedly, such cases present the strongest argument for termination of parental rights, for it cannot be doubted that the crimes involved have a profoundly detrimental impact on the parents' relationship with their children. However, as discussed in Section II, even in such extreme cases, a court is required to look beyond the facts of the parent's crime and examine the parent's present circumstances to determine whether a parent has been able to achieve rehabilitation so that a viable parent-child relationship can be salvaged.

Despite these constitutional requirements, however, a number of states appear to have adopted a rigid rule in which the conviction of the crime amounts to per se proof of parental unfitness and the possibility of rehabilitation is discounted. Representative of this approach are Illinois and New Jersey cases. An extreme example is *People v. Ray*,[126] an Illinois intermediate appellate court case interpreting the portion of the

---

[122] *In re* D.P., 465 N.W.2d 313 (Iowa Ct. App. 1990). The intermediate appellate court affirmed the termination of the mother's rights on the basis of her repeated arrests and incarceration for prostitution and her "unstable and chaotic lifestyle." *Id.* at 315. In so doing, the court explicitly disregarded the strong emotional ties between the mother and her children. For a further discussion of the case and the Iowa termination of parental rights statute, see *infra* note 153.

[123] *In re* J.C.G. and T.R.G., 214 Neb. 295, 333 N.W.2d 680 (1983) (mother's unfitness proven by three periods of incarceration in seven years on two felony convictions for forgery and robbery and violation of parole).

[124] *See In re* Guillory, 618 S.W.2d 948 (Tex. Ct. App. 1981) (mother found to be unfit where she had history of drug use, and two convictions within approximately two years, one for possession of heroin and another for aggravated robbery). For a discussion of the Texas termination of parental rights statute, see *infra* notes 143-44 and accompanying text.

[125] *In re* Tarango, 23 Wash. App. 126, 595 P.2d 552 (1979) (termination of rights affirmed where mother was twice convicted of drug-related offenses and child alleged that mother had continued to use drugs when out of prison), *review denied*, 92 Wash. 2d 1022 (1979).

[126] People v. Ray, 88 Ill. App. 3d 1010, 411 N.E.2d 88 (1980), *appeal dismissed sub nom.* Ray v. Illinois, 452 U.S. 956 (1981).

termination statute that makes a criminal conviction resulting from the death of a child a ground for termination of rights.[127] There the court affirmed the granting of summary judgment against the parent on the basis of the mother's conviction for the death of her daughter. The court rejected the mother's argument that she could be treated and rehabilitated.[128]

A comparable New Jersey case is *J. v. M.*.[129] That case involved parents who had been convicted of manslaughter of one child and abuse of another. The intermediate appellate court reversed the dismissal of a petition to terminate parental rights. The court rejected arguments about the possibility of the parents' rehabilitation and relied exclusively on their past conduct as a basis for terminating their rights.[130]

Similarly, in cases involving the father's killing of the mother, courts in Illinois, Missouri and New Mexico have found parental unfitness, placing great weight on the father's act of depriving his children

---

[127] ILL. ANN. STAT. ch. 40, para. 1501(D)(f) (Smith-Hurd 1991). *See supra* note 96. *See infra* discussion in Section III, concerning the use of summary judgment in termination of parental rights proceedings.

[128] People v. Ray, 88 Ill. App. 3d 1010, 1013, 411 N.E.2d 88, 91-92 (1980) ("To speak hopefully of the possibility of treatment and rehabilitation or to hypothesize circumstances where a parent may abuse one child but not another would be pure speculation on the record before us"), *appeal dismissed sub nom.*, Ray v. Illinois, 452 U.S. 956 (1981); *see also In re* R.G., 165 Ill. App. 3d 112, 518 N.E.2d 691 (1988), *appeal denied*, 119 Ill. 2d 557, 522 N.E.2d 1256 (1988) (mother convicted of sexual abuse found to be "depraved" under ILL. ANN. STAT. ch. 40, para. (D)(i), after a full trial in which an expert in child sexual abuse testified against the mother); *In re* M.B.C., 125 Ill. App. 3d 512, 515, 466 N.E.2d 273, 276 (1984) (father unfit when he had committed series of five felonies over 30 year period, including two rapes, acts of deviate assault, armed robbery and intimidation; at trial the father "offered no significant evidence to show his rehabilitation;" he had spent 20 years in prison on earliest convictions), *appeal dismissed sub nom.* Cornes v. Kellum, 471 U.S. 1062 (1985).

[129] J. v. M., 157 N.J. Super. 478, 385 A.2d 240 (App. Div. 1978), *cert. denied*, 77 N.J. 490, 391 A.2d 504 (1978).

[130] *Id.* at 493, 385 A.2d at 248, stating:

> Although rehabilitation in a prison environment is an accepted objective of prison life, we cannot, where the future life of a four-year-old girl is at stake, naively indulge in the fiction that service of part of a ten-year sentence has achieved that goal . . . . All any court can rely upon in determining whether to sever parental rights is the parents' past course of conduct, whether to the child in question or to other children in their care. Predictions as to probable future conduct can only be based upon past performance . . . . Evidence of parents' fitness or unfitness can be gleaned not only from their past treatment of the child in question but also from the quality of care given to other children in their custody."

Id., *accord In re* J.P.M., 210 N.J. Super. 512, 510 A.2d 117 (1985) (father physically abused one child and sexually abused another; court cited father's previous, unsuccessful therapy in determining that the father's past problems persist).

of their mother.[131] Interestingly, despite the apparent use of a per se rule in cases involving crimes against children, the New Jersey Supreme Court has rejected a per se approach with respect to the father's killing of the mother.[132]

Arizona appears to have taken something of a compromise approach with respect to termination cases focusing upon the nature of the parent's offense. In Arizona the proof that the parent has committed a felony against a child creates a rebuttable presumption against the parent. That is, once the state shows the felony conviction, the burden shifts to the parent to prove fitness.[133] To meet its burden, the state need not prove present parental unfitness; a showing of past serious criminal conduct is sufficient.[134] In order to rebut the presumption of

---

[131] *See, e.g., In re* Abdullah, 85 Ill. 2d 300, 423 N.E.2d 915 (1981) (single criminal conviction is insufficient to terminate rights; however, a court must weigh the nature of the crime, the identity of the victim and the severity of the sentence imposed; in the case of the defendant's murder of the child's mother, consideration of these factors compelled finding of unfitness); *In re* A.R.M., 750 S.W.2d 86 (Mo. Ct. App. 1988) (affirming maternal grandmother's adoption of child without father's consent, when father had been convicted of murder of child's mother and was serving sentence of 20 years). The court stated

> [T]he nature of the crime . . . resulted in the disintegration of the family unit and left the child without even a modicum of parental nurturing during the incarceration of the remaining parent. It is difficult to conceive of a more calamitous event for a child than the murder of her mother by her father. It is absurd for the perpetrator of such a vile act to argue that he should retain his parental rights concerning that child."

Id. at 89-90. *In re* Doe, 99 N.M. 278, 657 P.2d 134 (Ct. App. 1982) (father convicted of murdering child's mother and shooting the maternal grandmother). In affirming the termination of parental rights, the court stated, "[i]t is painfully plain that the father's killing of the mother forever deprives the child of her maternal presence and being - the essence of childhood. A more horrendous wrong to the child is difficult to conceive.' " *Id.* at 278, 657 P.2d at 137 (citation omitted).

[132] *In re* Adoption of J., 73 N.J. 68, 372 A.2d 607 (1977), *reversing* 139 N.J. Super. 533, 354 A.2d 662 (1976). The supreme court adopted the opinion of the dissenting judge of the appellate division that a court must look beyond the crime itself and examine the nature of the parent's ongoing realtionship with the child. The dissenting judge emphasized the distinction between custody, which can be changed, and adoption, which is irrevocable. 139 N.J. Super. at 547, 354 A.2d at 669.

[133] *In re* Juvenile Action Nos. S-826 and J-59015, 132 Ariz. 33, 643 P.2d 736 (Ct. App. 1982) (father's rape and sodomy of nine- year-old child, not his own); *In re* Juvenile No. J-2255, 126 Ariz. 144, 613 P.2d 304 (Ct. App. 1980) (father's molestation of girlfriend's 12-year-old daughter).

[134] Appeal No. J-2255, 126 Ariz. at 147, 613 P.2d at 307. In affirming the lower court's termination of parental rights, the intermediate appellate court analyzed the burden of proof as follows:

> [The father's] second contention is that the parent's fitness is to be tested as of the time of the hearing. On this analysis, to satisfy their production burden, the appellees had to supplement the evidence as to [the father's] felony convictions with evidence of his present unfitness. We disagree. Although the statute requires unfitness to have *future* custody and control of the child, it is the *nature* of the felony that must prove this

unfitness, a parent must, at a minimum, show that she is undergoing appropriate therapeutic treatment for the conduct underlying the criminal conviction.[135] However, such a showing, while necessary, may not be sufficient to rebut the presumption.[136] This analysis has been applied in the context both of crimes against children and of other serious crimes.[137]

A more constitutionally acceptable approach has been used in California, Georgia, Minnesota, Wyoming and Texas. In these states, courts have evaluated parental fitness in light of present circumstances, taking into account the parent's rehabilitation. In California the past commission of a crime is not in itself sufficient to terminate parental rights. There must be a showing that the parent is *presently unfit*. At a minimum the state must show a nexus between the crime and the parent's current fitness.[138] This principle holds true for cases involving crimes against children,[139] as well as those in which the father has killed the mother.[140]

> unfitness. Appellees, therefore, satisfied their burden by producing evidence of felony convictions of that nature. The [lower court] could properly conclude that these felonious acts of child molestation are of a nature to prove [the father's] unfitness to have future custody and control of the child.
>
> [W]e believe that the parent may rebut the assessment of unfitness based on a past act by showing actual fitness at the time of the hearing.

Id. (emphasis added).

[135] *See In re* Juvenile Action Nos. S-826 & J-59015, 132 Ariz. at ____, 643 P.2d at 738; *In re* Juvenile No. J-2255, 126 Ariz. at ____, 613 P.2d at 307.

[136] *See In re* Juvenile Action No. S-983, 133 Ariz. 182, 650 P.2d 487 (Ct. App. 1982) (father convicted for sexual assault, attempted sexual assault and kidnapping of young women who were unknown to him). The court stated:

> The counseling appellant had undertaken in prison was of short duration and therefore the juvenile court could have rejected the opinion that appellant was treatable . . . . Appellant's search, via counseling, for an understanding of his deviant behavior may have been too short-lived and self-oriented to show rehabilitation or a strong potential.

Id. at 185, 650 P.2d at 487.

[137] *See In re* Juvenile Action Nos. S-826 & J-59015, 132 Ariz. 33, 643 P.2d 736; *In re* Juvenile No. J-2255, 126 Ariz. 144, 613 P.2d 304.

[138] *See In re* Christina P., 175 Cal. App. 3d 115, 134, 220 Cal. Rptr. 525, 535 (1985); *In re* D.S.C., 93 Cal. App. 3d 14, 27-28, 155 Cal. Rptr. 406, 413-14, (1979); *In re* Michele C., 64 Cal. App. 3d 818, 823, 135 Cal. Rptr. 17, 20 (1976).

[139] *See In re Christina P.* at 134 220 Cal. Rptr. at 535 (termination of rights based on mere listing on rap sheet of father's conviction for sexual molestation of 13 year old reversed; at a minimum, "[a]mplification of facts" concerning the conduct was necessary to prove present parental unfitness); *In re Michele C.*, at 823, 135 Cal. Rptr. at 20 (current parental unfitness must be shown; however, the parents' conviction for murder of child was sufficient to establish continuing, present unfitness with respect to surviving child).

[140] In cases involving the mother's death, unfitness will not necessarily be established when "the crime was a crime of passion, not the product of a vicious and violent character, but compre-

Georgia cases set forth a comparable analysis. Rights have not been terminated when the father's killing of the mother was manslaughter, a crime of passion with mitigating circumstances, and when there is evidence of a positive, ongoing parent-child relationship. Conversely, when the father has been convicted of murder, which involves an element of malice, Georgia courts have found parental unfitness.[141]

The Minnesota, Washington and Wyoming cases similarly appear to require a trial court to conduct a detailed inquiry into the parent's present fitness, even in cases involving serious abuse of children or the killing of the child's mother. In cases when the state has demonstrated parental unfitness, the showing has been supported by expert testimony.[142]

---

hensible within the framework of human folly, weakness and imperfection." *In re* James M., 65 Cal. App. 3d 254, 266, 135 Cal. Rptr. 222, 229 (1976). There must be a showing of "a failure on the part of the neglecting parent in his or her direct relationship with the child." *Id.*

However, unfitness has been found and rights terminated when the father has a history of criminal convictions and alcohol abuse. *See In re* Arthur C., 176 Cal. App. 3d 442, 222 Cal. Rptr. 388 (1985); *In re* Geoffrey G., 98 Cal. App. 3d 412, 159 Cal. Rptr. 460 (1979).

> Appellant's criminal record showed numerous past arrests and convictions for intoxication; the trial judge could reasonably infer that appellant would continue his drinking habits and either do physical harm to the child while in a drunken rage or because of such intoxication fail to properly provide for the child, all resulting from what the trial judge in his memorandum of decision called "serious personality flaws and emotional instability."

Id. at 420-21, 159 Cal. Rptr. at 464-65.

Note that *Geoffrey G.* was a case involving consent to adoption, rather than termination of parental rights. *See supra* note 19 and accompanying text.

[141] *Compare In re* H.L.T., 164 Ga. App. 517, 298 S.E.2d 33, 35 (1982) (stating:

> There is no evidence that appellant had ever abused, injured or failed to provide for his child. Rather, the evidence discloses that he is a devoted father; that he has attempted to maintain contact with the child while in prison; and that he is a model inmate eligible for parole . . . . The evidence also disclosed that he has a job and a home waiting for him on his release from prison. The guardian ad litem appointed by the court to represent the child's interest did not recommend termination of appellant's parental rights . . . .)

with Heath v. McGuire, 167 Ga. App. 489, 306 S.E.2d 741, 743 (1983) (termination of parental rights affirmed when father convicted of murdering the mother). The court distinguished *H.L.T.* on the ground that the father in *H.L.T.* had been convicted of voluntary manslaughter, a crime that involves "a sudden, violent, and irresistable passion resulting from serious provocation." *Id.* (citation omitted).

See also In re D.S., 176 Ga. App. 482, ____, 336 S.E.2d 358, 360 (1985) (mother convicted of killing her child; psychologist testified that mother was a "lethal parent" and, as such, could not be rehabilitated given the limited resources available in the prison system; successful rehabilitation "would probably take at least five years under circumstances that were ideal for treatment and patient cooperation").

[142] Minnesota: *In re* Udstuen, 349 N.W.2d 300 (Minn. Ct. App. 1984) (father convicted of assaulting child; termination of rights affirmed because father unlikely to be able to meet child's

Finally, in Texas proof of a single criminal act cannot by itself establish parental unfitness.[143] However, a history of related detrimental conduct, in conjunction with the criminal conviction, can establish unfitness.[144]

---

special needs; father's expert acknowledged that if father were guilty of crime charged, rights should be terminated; and father had had only minimal contact with his child until the termination proceeding was commenced); *In re* Baby Girl Suchy, 281 N.W.2d 723 (Minn. 1979)(termination of rights affirmed against mother who was soon to be released from prison for conviction of attempted murder of her child; at trial experts offered testimony indicating that the mother was not and would not in the foreseeable future be a satisfactory parent because the mental condition that resulted in the crime would persist); *In re* B.C., 356 N.W.2d 328 (Minn. Ct. App. 1984) (termination affirmed against mother who had been convicted of murder of one of her children; expert testimony indicated that the mother was psychologically disturbed with religious beliefs bordering on delusional thinking and distorted perceptions of reality; evidence also showed that visits had a detrimental effect on the child who was the subject of the proceeding).

Washington: *In Re* Sego, 82 Wash. 2d 736, 513 P.2d 831, 833 (1973) (father convicted of murdering wife). The court stated:

> [I]mprisonment, alone, does not necessarily justify an order of permanent deprivation . . . . On the other hand, a parent's inability to perform his parental obligations because of imprisonment, the nature of the crime committed, as well as the person against whom the criminal act was perpetrated are all relevant to the issue of parental fitness and child welfare, as are the parent's conduct prior to imprisonment and during the period of incarceration.

Id. (citation ommitted).

The court affirmed the termination of rights based on a failure of expert opinion to show enough evidence of the father's successful rehabilitation. Although the father had been extensively involved in rehabilitative programs, the court expressed concern that the institutional programs might not be a reliable indicator of the father's ability to succeed as a parent after release. "[S]uch apparent rehabilitation is against a background of the structured life at the penitentiary, where he has endured none of the responsibilities attendant his duties as a father and head of the household." *Id.* at ____, 513 P.2d at 835.

Wyoming: *In re* JG, 742 P.2d 770 (Wyo. 1987) (father's sexual abuse of children after agency's unsuccessful attempt at rehabilitation; abuse occurred after father had participated for two years in parent training and counseling).

[143] *See* G.W.H. v. D.A.H., 650 S.W.2d 480, 481 (Tex. Ct. App. 1983). The Texas statute does not expressly mention incarceration. The section of the statute typically relied upon in cases involving termination of incarcerated parents' rights is TEX. FAM. CODE ANN. § 15.02(1)(E) (Vernon 1991), which permits termination of parental rights when the parent has "engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical or emotional well-being of the child." *Id.*

The Texas Supreme Court in interpreting this provision has stated:

> [M]ere imprisonment will not, standing alone, constitute engaging in conduct which endangers the emotional or physical well-being of a child . . . . We hold that if the evidence, including the imprisonment, shows a course of conduct which has the effect of endangering the physical or emotional well-being of the child, a finding under section 15.02(1)(E) is supportable.

Texas Dep't of Human Serv. v. Boyd, 727 S.W.2d 531, 534 (Tex. 1987) (citations omitted).

[144] *See In re* A.K.S., 736 S.W.2d 145 (Tex. Ct. App. 1987) (father's rape of a woman he did not know, combined with a history of compulsive exposure of genitals, established unfitness; the dissent argues that there was insufficient proof that the father's behavior couldn't be treated);

D. Conclusions

There is a dichotomy apparent in the statutes and cases discussed. On the one hand, some states require a court to inquire into the parent's current fitness, the extent of her rehabilitation and the efforts the state has made to assist her. While the statutes and cases of these states recognize that a parent's past criminal conduct may well be relevant to her current fitness, these states do not permit such past misconduct to be dispositive of this issue.

On the other hand, a number of states permit parental rights to be terminated solely on the basis of past criminal conduct without regard to the ways in which the parent may have changed while in prison. Such states appear to recognize neither the duty of the state to assist the parent in her rehabilitation through efforts to maintain and strengthen the parent-child relationship, nor even the possibility of parental rehabilitation.

The latter of these two approaches is constitutionally deficient. As discussed in Section II, a parent in a termination of rights proceeding has a due process right to an individualized hearing on her present parental fitness. At a minimum, this requires a showing of a nexus between the parent's past acts and her present unfitness—that the parent's past acts continue to render her unfit to be a parent to her children.

As explained, the most difficult cases are those in which the parent has been convicted of a crime against a child or another family member. A child whose parent has abused her or her siblings or has murdered her mother is, to say the least, unlikely ever to trust and accept the parent fully. Crimes of this nature inevitably cause permanent damage to the parent-child relationship. In some cases, the nature of the parent's crime may be so reprehensible that the parent will never be able to provide the child with the intangible qualities of a positive, nurturing family relationship.[145] In such cases, a court would be war-

---

G.W.H. v. D.A.H., 650 S.W.2d 480, 481 (Tex. Ct. App. 1983)(father's conviction of violent crime against a young woman combined with history of violence against women, including physical abuse of wife and girlfriend and arrest for rape, established unfitness; dissent notes father's extensive post-incarceration contact with child).

[145] *See supra* notes 30-37 and accompanying text.

ranted in concluding that the parent-child relationship is beyond repair and that parental rights should be severed.[146]

However, in other cases, it may be possible to begin to heal the parent-child relationship through therapeutic services and regular visitation. In such cases, even a damaged parent-child relationship is likely to be better than no relationship.[147] For this reason, a court in a termination of parental rights proceeding must always examine present circumstances as they bear on the parent's current fitness to have a meaningful family relationship with her children. When a court instead rests its determination solely on the parent's past misconduct, an essential element of the due process hearing is lost. While certain past conduct may create considerable doubts that a parent will ever be fit to raise her children, that is not a sufficient reason to forgo a full judicial inquiry.[148] As one court has put it:

> It may be true that [the incarcerated parent] will not be able to prevail in [an] action [to terminate parental rights] after evidence and testimony are presented. It may even be true that most [incarcerated] parents . . . would be unable to defeat a proceeding brought to declare their children wards of the court; but that opportunity *must* be afforded. [149]

---

[146] For examples of such extreme cases, see *In re* D.S., 176 Ga. App. 482, ____, 336 S.E.2d 358, 360 (1985); *In re* Frances, 505 A.2d 1380 (R.I. 1986) (termination of mother's parental rights affirmed when mother had been convicted of serious child abuse that left one child in permanent vegetative state and psychiatrist had testified at trial that rehabilitation was unlikely to be successful and recommended against return of the children). The court also cited the effect of the mother's prison sentence: "It is difficult to see how during her current five-year prison sentence any reunification could take place." *Id.* at 1385.

[147] *See* Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 461-67 (1983). Professor Garrison cites a number of studies showing the importance to children of maintaining contact with their parents.

[148] Cases in which the father has killed the child's mother are probably the most difficult. As discussed elsewhere, some cases have reasoned that by depriving his children permanently of their mother, a father has shown such disregard for their well-being that he does not deserve to be a father, and this reasoning is not unpersuasive. In addition, it is difficult to imagine many such cases in which the children would want to have anything to do with their mother's killer. However, even in these extreme situations, there are exceptional cases in which a constructive parent-child relationship can be salvaged. *See, e.g., In re* H.L.T., 164 Ga. App. 517, 298 S.E.2d 33 (1982). Without a full judicial inquiry into present circumstances, such exceptional cases may not be identified, and rights may be terminated erroneously. The balancing test articulated in Matthews v. Eldridge, 424 U.S. 319 (1976), therefore mandates that full hearings into *present* fitness be conducted in all termination of parental rights proceedings, even those involving extreme past parental misconduct.

[149] *In re* Christina T., 590 P.2d 189, 192 (Okla. 1979) (reversal of a lower court's granting of summary judgment motion to terminate parental rights of father serving sentence of 10 years for burglary).

Thus, given the grave consequences of an erroneous termination of rights, constitutional requirements are not satisfied by a state scheme premised on the assumption that parents who have engaged in a type of past misconduct are forever unfit to be parents. Indeed, it is in those extreme cases in which the parent's egregious conduct makes her least sympathetic that due process protections are most needed to prevent a fact finder from prejudging the case.[150] Those states that permit findings of parental unfitness to be made on the basis of past misconduct alone are therefore violating the procedural due process rights of incarcerated parents.

V. TERMINATION OF PARENTAL RIGHTS ON THE BASIS OF LENGTH OF PRISON SENTENCE: "FORWARD-LOOKING" STATUTES AND CASES

For the incarcerated parent, perhaps the most severe statutes and cases are those that focus primarily on the anticipated duration of the confinement and allow parental rights to be terminated solely on the basis of future, prolonged physical separation of the parent and the child. While cases from virtually every state have held that incarceration is not by itself sufficient to terminate parental rights, this principle is largely illusory for parents confined to long term sentences. As discussed below, statutes or cases from at least nineteen states[151] permit termination of parental rights based largely on the length of the parent's prison sentence.

A. Statutes

The statutes that contemplate such a result vary in their approach. The Colorado, Iowa and Louisiana statutes set out specific periods of incarceration that constitute per se parental unfitness sufficient to ter-

---

[150] The Supreme Court has noted:

> [Termination of parental rights] proceedings employ imprecise substantive standards that leave determinations unusually open to subjective values of the judge. . . . In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, . . . such proceedings are often vulnerable to judgments based on cultural or class bias.

Santosky v. Kramer, 455 U.S. 745, 762-63 (1982). *See supra* notes 41-42 and accompanying text.

[151] States permitting termination of parental rights based on the length of the parent's prison sentence include: Alabama, Arizona, Colorado, Idaho, Iowa, Kansas, Missouri, Montana, New Hampshire, Louisiana, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Wisconsin and Wyoming. *See infra* note 174 and accompanying text.

minate parental rights. In Colorado a court may make a finding of parental unfitness and terminate the rights of an incarcerated parent whose children are in foster care pursuant to a finding of neglect or dependency when the duration of the parent's confinement is such that she will not be eligible for parole for at least six years from the date the child was adjudicated dependent or neglected.[152] In Iowa and Louisiana, rights can be terminated when, at the time of the proceeding, the parent is likely to be incarcerated for at least five more years.[153] In Oregon the statute involving the termination of rights of parents of

---

[152] The Colorado termination of parental rights statute provides in pertinent part as follows:
Criteria for termination.
(1) The court may order a termination of the parent-child legal relationship upon the finding of any one of the following:

. . . .

(b) That the child is adjudicated dependent or neglected and the court has found by clear and convincing evidence that no appropriate treatment plan can be devised to address the unfitness of the parent or parents. In making such a determination, the court shall find one of the following as the basis for unfitness:

. . . .

(III) Long-term confinement of the parent of such duration that he is not eligible for parole for at least six years from the date the child was adjudicated dependent or neglected;

. . . .

(c) That the child is adjudicated dependent or neglected and all of the following exist:

(I) That an appropriate treatment plan approved by the court has not been reasonably complied with by the parent or parents or has not been successful or that the court has previously found . . . that an appropriate treatment plan could not be devised;

(II) That the parent is unfit;

(III) That the conduct or condition of the parent or parents is unlikely to change within a reasonable time.

(2) In determining unfitness, conduct, or condition for purposes of paragraph (c) of subsection (1) of this section, the court shall find that . . . the conduct or condition of the parent or parents renders the parent or parents unable or unwilling to give the child reasonable parental care. In making such determinations, the court shall consider, but not be limited to, the following:

(a) Any one of the bases for a finding of parental unfitness set forth in paragraph (b) of subsection (1) of this section. . . .

COLO. REV. STAT. § 19-3-604 (1986 & Supp. 1991).

[153] The Iowa termination of parental rights statute provides in pertinent part as follows:
Grounds for termination

1. Except as provided in subsection 3, the court may order the termination of both the parental rights with respect to a child and the relationship between the parent and the child on any of the following grounds:

. . . .

i. The court finds that both of the following have occurred:

(1) The child has been adjudicated a child in need of assistance pursuant to section 232.96 and custody has been transferred from the child's parents for placement pursuant to section 232.102.

children who are in foster care does not address parental incarceration, but the statute dealing with adoption of children who are not in foster

---

(2) The parent has been imprisoned for a crime against the child, the child's sibling, or another child in the household, *or the parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of five or more years.*

. . . .

2. In considering whether to terminate the rights of a parent under this section, the court shall give primary consideration to the physical, mental, and emotional condition and needs of the child. Such consideration may include any of the following:

a. Whether the parent's ability to provide the needs of the child is affected by the parent's mental capacity or mental condition or the parent's imprisonment for a felony.

IOWA CODE ANN. § 232.116 (West 1985 & Supp. 1991) (emphasis added).

An additional portion of the Iowa statute concerning crimes against children is set out *supra*, note 3.

It should also be noted that § 232.116(3)(c) provides that the court need not terminate rights if, *inter alia*, there is clear and convincing evidence that the termination of parental rights would be detrimental because of the closeness of the parent-child relationship.

However, in *In re* D.P., 465 N.W.2d 313 (Iowa Ct. App. 1990), the intermediate appellate court affirmed the termination of the mother's rights on the basis of her repeated arrests and incarceration for prostitution and her "unstable and chaotic lifestyle." *Id.* at 315. In so doing, the court conceded the strong emotional ties between the mother and her children, but held that § 232.116(3)(c) did not preclude termination of rights, stating:

> We recognize this termination does not carry with it any guarantees for a stable and permanent home for these children. Nor do we have any insight as to the emotional strain this termination will cause for these children who obviously find an anchor of support in their natural mother. However, we do not find these factors sufficient to support a finding there should not be a termination.

Id. at 316.

The Louisiana termination of parental rights statute provides in pertinent part as follows:

> The grounds set forth in the petition must meet all of the conditions of any one of the following Paragraphs:
>
> . . . .
>
> (6) Loss of custody due to parent's incarceration.
>
> (a) Two years have elapsed since the child was placed in the custody of the department either with or without court order.
>
> (b) The department received custody of the child due to the incarceration of the parent in a penal institution.
>
> (c) Despite notice by the department, the parent has refused or failed to provide a plan for the appropriate care of the child other than foster care.
>
> (d) There is no reasonable expectation of the parent's release from incarceration for at least five additional years.
>
> (e) According to expert testimony, termination of parental rights and adoption are in the child's best interest.

LA. STAT. ANN., CHILDREN'S CODE, art. 1015 (West Supp. 1992).

Significantly, the portion of the Louisiana statute pertaining to adoption of an incarcerated parent's children when the children are not in foster care, LA. STAT. ANN., CHILDREN'S CODE, art. 1194, is much more protective of parental rights than the foster care provisions quoted above. The adoption statute for children who are not in foster care, while permitting a child to be adopted over the objection of an incarcerated parent, requires a court to weigh carefully a number of factors designed to measure the *quality* of the incarcerated parent's relationship with her child. *Id.*, art. 1194 (3). The statute also provides explicitly that an incarcerated parent has the right to

care permits a child to be adopted without the consent of a parent who has been incarcerated for at least three years.[154]

---

attend the adoption hearing. *Id.*, art. 1194, subd. C. The adoption statute provides in pertinent part as follows:

> A. Notwithstanding provisions of law to the contrary, an adoption may be granted over the objection of a parent or parents incarcerated in a state or federal penal institution, following conviction of a felony which has not been appealed, or which has been affirmed at least once on appeal, when all of the following exist:
>
> (1) The nonincarcerated parent has executed an act of surrender for adoption of the child pursuant to Title XI; the nonincarceratd parent is deceased or the nonincarcerated parent's rights have been terminated.
>
> (2) The incarcerated parent has not developed or maintained a significant relationship with the child.
>
> (3) The adoption is manifestly in the best interest of the child. In determining the best interest of the child, the court shall consider the following factors:
>
> (a) The nature of the offense resulting in the incarceration of the parent, including all prior criminal activity.
>
> (b) The length of the sentence imposed upon the parent, and the impact of such on the parent's ability to provide a stable, permanent home for the child during the times in the child's life when permanence and stability are important.
>
> (c) Expert testimony concerning the fitness of the adoptive parent or parents and their relationship with the child, the child's relationship with the incarcerated parent, the fitness of the incarcerated parent, and the needs of the child.
>
> (d) Any relevant history of the incarcerated parent, including his or her relationship with the other parent, the child at issue or other children, any history of violence, substance abuse, sexual deviance, mental illness, or personality disorder.
>
> (e) The physical, psychological, and emotional needs of the child, considering the child's entire history and age.
>
> B. The incarcerated parent shall be served and cited as in any adoption proceeding, and shall have the right to attend the adoption hearing and to present any relevant evidence.
>
> C. Unless agreed to by the adoptive parent or parents, the incarcerated parent shall not be allowed to see the adoptive parent or to acquire any identifying information concerning the adoptive parents.
>
> D. The court shall give specific reasons for judgment should the court grant an adoption over the objection of an incarcerated parent under the provisions of this Article.

LA. STAT. ANN., CHILDREN'S CODE, art. 1194 (West Supp. 1992).

It should be noted that Michigan's previous statute, § 712A.19a (d), permitted termination of parental rights when the parent was incarcerated for more than two years. The statute was recently amended, however, and no longer contains a provision dealing explicitly with parental incarceration. *See* note 15, *infra*.

[154] OR. REV. STAT. § 109.322 (1991) provides, in pertinent part, as follows:

> 109.322 Consent where parent mentally ill, mentally deficient or imprisoned.
>
> If either parent . . . is imprisoned in a state or federal prison under a sentence for a term of not less than three years and has actually served three years, there shall be served upon such parent, if the parent has not consented in writing to the adoption, a citation . . . to show cause why the adoption of the child should not be decreed . . . . Upon hearing being had, if the court finds that the welfare of the child will be best promoted through the adoption of the child, the consent of the . . . imprisoned parent is

The Arizona, Kansas, New Hampshire and Rhode Island statutes are framed in more general terms. In Arizona rights may be terminated when a parent who has been convicted of a felony is serving a sentence of "such length that the child will be deprived of a normal home for a period of years."[155] In Kansas a parent may lose parental rights when conviction and imprisonment for a felony renders the parent unable to care properly for a child and that condition is unlikely to change in the foreseeable future.[156] In New Hampshire rights may be

---

not required, and the court shall have authority to proceed regardless of the objection of such parent . . . .

This statute has been found to be constitutional. Stursa v. Kyle, 99 Or. App. 236, 782 P.2d 158 (1989). The statute dealing with termination of rights of parents whose children are in foster care, OR. REV. STAT. § 419.523 (1991), contains no such provision.

[155] The Arizona termination of parental rights statute provides in pertinent part as follows: Petition; who may file; grounds

A. Any person or agency that has a legitimate interest in the welfare of a child, including, but not limited to, a relative, a foster parent, a physician, the department of economic security, or a private licensed child welfare agency, may file a petition for the termination of the parent-child relationship alleging grounds contained in subsection B .

. . .

B. Evidence sufficient to justify the termination of the parent-child relationship shall include any one of the following, and in considering any of the following grounds, the court may also consider the needs of the child:

. . . .

4. That the parent is deprived of civil liberties due to the conviction of a felony if the felony of which such parent was convicted is of such nature as to prove the unfitness of such parent to have future custody and control of the child, *or if the sentence of such parent is of such length that the child will be deprived of a normal home for a period of years.*

ARIZ. REV. STAT. ANN. § 8-533 (1989) (emphasis added).

The portion of the Arizona statute pertaining to a felony "of such a nature as to prove the unfitness" of the parent is discussed *supra* note 94 and accompanying text.

[156] The Kansas termination of parental rights statute provides in pertinent part as follows: Considerations in termination.

(a) When the child has been adjudicated to be a child in need of care, the court may terminate parental rights when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future.

(b) In making a determination hereunder, the court shall consider, but is not limited to, the following, if applicable:

. . . .

(5) conviction of a felony and imprisonment;

. . . .

(e) The existence of any one of the above standing alone may, but does not necessarily, establish grounds for termination of parental rights. The determination shall be based on an evaluation of all factors which are applicable. In considering any of the above factors for terminating the rights of a parent, the court shall give primary consideration to the physical, mental or emotional condition and needs of the child.

severed when "the period of incarceration imposed [is] of such duration, that the child would be deprived of proper parental care and protection and left in an unstable or impermanent environment for a longer period of time than would be prudent."[157] In Rhode Island parental unfitness sufficient to terminate rights includes "imprisonment of such duration as to render it improbable for the parent to care for the child for an extended period of time."[158]

KAN. STAT. ANN. § 38-1583 (1986).

It should be noted that many states have language that is similar to the Kansas statute concerning "conduct or condition . . . unlikely to change in the foreseeable future." While many of these statutes, unlike the Kansas statute, do not address parental incarceration, such statutes obviously have a direct, adverse application to incarcerated parents.

[157] The New Hampshire termination of parental rights statute provides in pertinent part as follows:

> Grounds for Termination of the Parent-Child Relationship
>
> The petition may be granted where the court finds that one or more of the following conditions exist:
>
> . . . .
>
> VI. If the parent or guardian is, as a result of incarceration for a felony offense, unable to discharge his responsibilities to and for the child and, in additon, has been found pursuant to RSA 169-C to have abused or neglected his child or children, the court may review the conviction of the parent or guardian to determine whether the felony offense is of such a nature, and the period of incarceration imposed of such duration, that the child would be deprived of proper parental care and protection and left in an unstable or impermanent environment for a longer period of time than would be prudent. Placement of the child in foster care shall not be considered proper parental care and protection for purposes of this paragraph. Incarceration in and of itself shall not be grounds for termination of parental rights.
>
> Testimony shall be provided by any combination of at least 2 of the following people: a licensed psychiatrist, a clinical psychologist, a physician, or a social worker who possesses a master's degree in social work and is a member of the Academy of Certified Social Workers.

N.H. REV. STAT. ANN. § 170-C:5 (1990 & Supp. 1991).

[158] The Rhode Island termination of parental rights statute provides in pertinent part as follows:

> Termination of parental rights.
>
> (1) The court shall, upon a petition duly filed after notice to the parent and hearing thereon, terminate any and all legal rights of the parent to the child, including the right to notice of any subsequent adoption proceedings involving the child if the court finds as a fact that:
>
> . . . .
>
> (b) The parent is unfit by reason of conduct or conditions seriously detrimental to the child; such as, but not limited to the following:
>
> (i) Emotional illness, mental illness, mental deficiency or institutionalization of the parent including imprisonment, of such duration as to render it improbable for the parent to care for the child for an extended period of time.
>
> . . . .
>
> (2)(a) In the event that the petition is filed pursuant to subsection (1)(a), (1)(b)(i), or (1)(b)(iii), the court shall find as a fact that prior to the granting of the petition such

A third group of statutes, including those from Alabama, Missouri, Montana and Wyoming, expressly state that the parent's incarceration is a factor to be taken into consideration in determining whether the parent is unfit. While, unlike those statutes discussed above, incarceration is not parental unfitness per se in these statutes, case law has given them virtually the same effect.

The statutes of Alabama, Missouri and Montana are worded similarly. Essentially, the statutes permit termination of rights when conditions that make parents unable to care for their children are unlikely to be remedied in the foreseeable future.[159] The statutes allow a court to consider the parent's incarceration as a factor in making this determination.[160] As with the laws discussed above, these statutes can therefore

---

parental conduct or conditions must have occurred or existed notwithstanding the reasonable efforts which shall be made by the agency prior to the filing of the petition to encourage and strengthen the parental relationship . . . .

R.I. GEN. LAWS § 15-7-7 (1988 & Supp. 1991).

[159] *See, e.g., supra* note 157. Many statutes have similar language.

[160] The Alabama termination of parental rights statute provides in pertinent part as follows:

Grounds for termination of parental rights; factors considered; presumption arising from abandonment.

(a) If the court finds from clear and convincing evidence, competent, material and relevant in nature, that the parents of a child are unable or unwilling to discharge their responsibilities to and for the child, or that the conduct or condition of the parents is such as to render them unable to properly care for the child and that such conduct or condition is unlikely to change in the forseeable future, it may terminate the parental rights of the parents. In determining whether or not the parents are unable or unwilling to discharge their responsibilities to and for the child, the court shall consider . . . , but not be limited to, the following:

. . . .

(4) Conviction of and imprisonment for a felony;

ALA. CODE § 26-18-7 (1986).

The Missouri termination of parental rights statute provides in pertinent part as follows:

Juvenile court may terminate parental rights, when - investigation to be made - grounds for termination

. . . .

2. The juvenile court may terminate the rights of a parent to a child upon a petition filed by the juvenile officer or in adoption cases, by a prospective parent, if it finds that the termination is in the best interests of the child and when it appears by clear, cogent and convincing evidence that one or more of the following grounds for termination exist:

(1) The child has been abandoned . . . .

. . . .

(2) The child has been adjudicated to have been abused or neglected . . . .

. . . .

(3) The child has been under the jurisdiction of the juvenile court for a period of one year, and the court finds that the conditions which led to the assumption of jurisdiction still persist, or conditions of a potentially harmful nature continue to exist, that

be thought of as allowing parental rights to be terminated on the basis of the parent's future physical separation from her child without examining the nature and quality of the parent-child relationship.

---

there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the parent in the near future, or the continuation of the parent-child relationship greatly diminishes the child's prospects for early integration into a stable and permanent
home . . . .

. . . .

3. When considering whether to terminate the parent-child relationship pursuant to subdivision (1), (2) or (3) of subsection 2 of this section, the court shall evaluate and make findings on the following factors, when appropriate and applicable to the case:

. . . .

(6) The conviction of the parent of a felony offense that the court finds is of such a nature that the child will be deprived of a stable home for a period of years; provided, however, that incarceration in and of itself shall not be grounds for termination of parental rights;

MO. ANN. STAT. § 211.447 (Vernon 1983 & Supp. 1992).

The Montana termination of parental rights statute provides in pertinent part as follows:

Criteria for termination.

(1) The court may order a termination of the parent-child legal relationship upon a finding that any of the following circumstances exist:

. . . .

(c) the child is an adjudicated youth in need of care and both of the following exist:

(i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and

(ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time; or

(d) the parent has failed to successfully complete a treatment plan approved by the court within the time periods allowed for the child to be in foster care under 41-3-410 unless it orders other permanent legal custody under 41-3-410.

(2) In determining whether the conduct or condition of the parents is unlikely to change within a reasonable time, the court must enter a finding that continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care. In making such determinations, the court shall consider but is not limited to the following:

. . . .

(e) present judicially ordered long-term confinement of the parent;

. . . .

(3) In considering any of the factors in subsection (2) in terminating the parent-child relationship, the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child . . . .

(4) A treatment plan is not required under this part upon a finding by the court following hearing if:

. . . .

(b) the parent is incarcerated for more than 1 year and such treatment plan is not practical considering the
incarceration; . . .

MONT. CODE ANN. § 41-3-609 (1991).

The Wyoming statute is less explicit than those of Alabama, Missouri and Montana in the guidance it gives to a court. The statute provides simply that rights may be terminated when an incarcerated parent is shown to be "unfit to have custody and control of the child."[161] However, the statute has been interpreted as permitting a finding of parental unfitness solely on the basis of long term confinement.[162]

A fourth group of statutes includes those states that, while not dealing explicitly with incarcerated parents in the context of the termination of parental rights statutes, deal with such parents indirectly through neglect or dependency statutes. In these three states—Idaho, New Mexico and Wisconsin—incarceration is a ground for a finding of dependency or neglect against the parent and for the initial placement of the child into foster care. The termination of parental rights statutes provide that rights may be terminated when the conditions that gave rise to a finding of dependency or neglect persist. Since incarceration is the condition that gave rise to the initial finding against the parent, and since that condition will continue for the long term incarcerated parent, a combined reading of the two sets of statutes in each state makes it possible for a parent to have his or her rights terminated solely on the

---

[161] The Wyoming termination of parental rights statute provides in pertinent part as follows:

Grounds for termination of parent-child legal relationship; clear and convincing evidence.

a. The parent-child legal relationship may be terminated if any one (1) or more of the following facts is established by clear and convincing evidence:

. . . .

(iv) The parent is incarcerated due to the conviction of a felony and a showing that the parent is unfit to have the custody and control of the child.

WYO. STAT. § 14-2-309 (1986).

[162] *See* RW v. Laramie Co. Dep't of Pub. Assistance, 766 P.2d 555 (Wyo. 1989) (parents convicted of murder and aiding and abetting murder of one of their children; father sentenced to 25 to 80 years and mother sentenced to 20 to 80 years; long term incarceration of parents constituted parental unfitness).

basis of incarceration.[163] These statutory schemes therefore resemble,

---

[163] The Idaho termination of parental rights statute provides in pertinent part as follows:

§ 16-1615. Termination of the parent-child relationship.

If the child has been placed in the custody of the department or under its protective supervision pursuant to section 16-1610, Idaho Code, the department may, after three (3) months, petition the court for termination of the parent and child relationship in accordance with chapter 20, title 16, Idaho Code . . . .

§ 16-2005. Conditions under which termination may be granted.

The court may grant an order terminating the relationship where it finds one or more of the following conditions exist:

. . . .

b. The parent has neglected or abused the child. Neglect as used herein shall mean a situation in which the child lacks parental care necessary for his health, morals and well-being.

. . . .

§ 16-1602. Definitions.

(s) "Neglected" means a child:

. . . .

(2) Whose parents, guardian or other custodian are unable to discharge their responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity; . . . .

IDAHO CODE §§ 16-1615, -2005, -1602 (1979 & Supp. 1991).

The New Mexico termination of parental rights statute provides in pertinent part as follows:

§ 32-1-54 Termination of parental rights.

A. The rights of a parent, including an adjudicated, acknowledged, biological, presumed or adoptive parent, may be terminated with reference to a child by the court as provided in this section. In proceedings to terminate parental rights, the court shall give primary consideration to the physical, mental and emotional welfare and needs of the child.

B. The court shall terminate parental rights with respect to a minor child when:

. . . .

(3) the child has been a neglected or abused child as defined in Section 32-1-3 NMSA 1978 and the court finds that the conditions and causes of the neglect and abuse are unlikely to change in the foreseeable future despite reasonable efforts by the department or other appropriate agency to assist the parent in adjusting the conditions which render the parent unable to properly care for the child; . . . .

. . . .

§ 32-1-3. Definitions.

As Used in the Children's Code:

. . . .

L. "neglected child" means a child:

. . . .

(4) whose parent, guardian or custodian is unable to discharge his responsibilities to and for the child because of incarceration, hospitalization or other physical or mental disorder or incapacity . . . .

N.M. STAT. ANN. §§ 32-1-54, -3 (1989).

The Wisconsin termination of parental rights statute provides in pertinent part as follows:

§ 48.415 Grounds for involuntary termination of parental rights.

At the fact-finding hearing the court or jury may make a finding that grounds exist for the termination of parental rights. Grounds for termination of parental rights shall be one of the following:

in their effect, the statutes discussed above.[164]

It should also be noted that the statutes of several states, while not addressing parental incarceration, are structured in a way that they could have the effect of the statutes described above; that is, they could result in a per se finding of parental unfitness for prisoners who are serving extended prison terms. These statutes provide that children can generally remain in foster care only for a specified maximum period and that parental rights can be terminated when the duration of a foster care placement exceeds that maximum. Examples of such states and their foster care placement limits are Maryland (one year),[165]

. . . .

(2) Continuing need of protection or services. Continuing need of protection or services may be established by a showing of all of the following:

(a) That the child has been adjudged to be in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.357, 48.363 or 48.365 containing the notice required by s. 48.356(2).

(b) That the agency responsible for the care of the child and the family has made a diligent effort to provide the services ordered by the court.

(c) That the child has been outside the home for a cumulative total period of one year or longer pursuant to such orders, the parent has substantially neglected, wilfully refused or been unable to meet the conditions established for the return of the child to the home and there is a substantial likelihood that the parent will not meet these conditions in the future.

. . . .

§ 48.13. Jurisdiction over children alleged to be in need of protection or services.

The court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court, and:

. . . .

(8) Who is receiving inadequate care during the period of time a parent is missing, incarcerated, hospitalized or institutionalized . . . .

WIS. STAT. ANN. §§ 48.415, 48.13 (West 1987 & Supp. 1991).

[164] *See In re* Adoption of Doe, 99 N.M. 278, 657 P.2d 134 (Ct. App. 1982) for an illustration of this combined reading of the statutes.

[165] The Maryland termination of parental rights statute provides in pertinent part:

Same - Guardianship; adoption in general.

(a) *In general.* - A court may grant a decree of adoption or a decree of guardianship, without the consent of the natural parent otherwise required . . . if the court finds by clear and convincing evidence that it is in the best interest of the child to terminate the natural parent's rights as to the child and that:

. . . .

(3) the following set of circumstances exist:

(i) the child has been continuously out of the custody of the natural parent and in the custody of a child placement agency for at least 1 year;

(ii) the conditions that led to the separation from the natural parent still exist or similar conditions of a potentially harmful nature still exist;

Michigan (one year)[166] and South Dakota (eighteen months).[167] Such statutes, if applied to incarcerated parents, would have the same draconian effect as the statutes of such states as Colorado, Iowa and Louisi-

---

(iii) there is little likelihood that those conditions will be remedied at an early date so that the child can be returned to the natural parent in the immediate future; and

(iv) a continuation of the relationship between the natural parent and the child would diminish greatly the child's prospects for early integration into a stable and permanent family.

MD. FAM. LAW CODE ANN. § 5-313 (1991).

[166] The Michigan termination of parental rights statute provides in pertinent part:

Foster care, permanency planning hearings; court orders

Sec. 19a. (1) If a child remains in foster care and parental rights to the child have not been terminated, the court shall conduct a permanency planning hearing not more than 364 days after entry of the order of disposition and every 364 days thereafter during the continuation of the child's placement in foster care . . . .

(2) A permanency planning hearing shall be conducted to review the status of the child and the progress being made toward the child's return home or to show why the child should not be placed in the permanent custody of the court.

. . . .

(5) If the court determines at a permanency planning hearing that the child should not be returned to his or her parent, the agency shall initiate proceedings to terminate parental rights to the child not later than 42 days after the permanency planning hearing, unless the agency demonstrates to the court that initiating the termination of parental rights to the child is clearly not in the child's best interests.

MICH. COMP. LAWS ANN. § 712A.19a (West 1988 & Supp. 1991).

When the court determines that termination of parental rights would not be in the best interests of the child, the court is authorized to order a disposition of long-term foster care. *Id.* § 712A.19a (6)(b).

This version of the statute was enacted in 1988. The previous version of the statute contained a provision permitting termination of parental rights solely on the basis of parental incarceration. That section, § 712A.19a(d), provided for termination, *inter alia*, on the following ground:

(d) A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years.

MICH. COMP. LAWS ANN. § 712 A.19a(d) (West 1992) (amended 1988).

[167] The South Dakota termination of parental rights statute provides in pertinent part as follows:

Termination of parental rights - Return of child to parent or continued placement.

If an adjudicated abused or neglected child whose parental rights have not been terminated has been in the custody of the department of social services approaching eighteen months without a court approved plan for long-term foster care and it appears at a review hearing that all reasonable efforts have been made to rehabilitate the family, that the conditions which led to the removal of the child still exist and there is little likelihood that those conditions will be remedied so the child can be returned to the custody of the child's parents, the court shall affirmatively find that good cause exists for termination of the parental rights of the child's parents and the court shall enter an order terminating parental rights.

S.D. CODIFIED LAWS ANN. § 26-8A-26 (1984 & Supp. 1991).

ana—virtually automatic termination of parental rights for all prisoners whose sentences exceed the statutory limits without regard to individual circumstances.

B. Cases

Cases interpreting these and other statutes have generally equated long term incarceration with parental unfitness. One of the few decisions holding otherwise is *In re Boston Children's Service Ass'n*,[168] a Massachusetts case. There, the mother was serving a life sentence for murder. The father was not in prison and had regained custody of one of the couple's two children. The other child, who had serious psychological impairments, had been with a foster mother for several years, and the foster mother wished to adopt the child. The lower court had terminated the rights of the parents. The appellate court reversed, holding that there had not been a showing of present parental unfitness of either parent. While finding the mother's life sentence to be "a circumstance which bears on her fitness because of her long unavailability,"[169] the court held that incarceration did not "conclusively render her unfit as a parent."[170]

In a Pennsylvania case, *In re Adoption of M.J.H.*, the court reached a similar conclusion, finding that a parent's imprisonment for life does not constitute abandonment when "the parent has made consistent efforts with the resources available to [her or] him 'to take and maintain a place of importance in the child's life,'. . . and has, with those resources, tried to take some responsibility for the '*composite* of tasks' associated with parenthood. . . ."[171] Likewise, at least one Florida court has held that incarceration on a life sentence does not amount to

---

[168] *In re* Boston's Children's Serv. Ass'n, 20 Mass. App. 566, 481 N.E.2d 516, *review denied*, 396 Mass. 1102, 484 N.E.2d 102 (1985). This case is discussed in more detail *infra* notes 237-243 and accompanying text.

[169] *Id.* at _____, 481 N.E.2d at 521.

[170] *Id.* at _____, 481 N.E.2d at 520.

[171] *In re* Adoption of M.J.H., 348 Pa. Super. 65, _____, 501 A.2d 648, 653-54 (1985) (emphasis in original) (quoting Adoption of McAhren, 460 Pa. 63, 71-72, 331 A.2d 419, 423 (1975)), *appeal denied*, 514 Pa. 636, 522 A.2d 1105 (1987), *appeal dismissed sub nom.*, W.L.H. v. K.B.M., 484 U.S. 804 (1987). However, the court affirmed a termination of rights on another ground, relying on § 2511(a)(2), which permits termination when there is continued incapacity, abuse, neglect or refusal that has deprived the child of essential parental care and that cannot be remedied. *Id.* at _____, 501 A.2d at 654-56. The court found that the father's murder of the mother, combined with the sentence to life imprisonment had deprived the child of all parental care and therefore satisfied this statutory ground. *Id.*

abandonment,[172] and one Oklahoma court has found that life imprisonment is insufficient per se to establish a wilful failure to support the child.[173]

However, in the majority of cases, courts have essentially equated long term incarceration with parental unfitness. In reported cases from at least eleven states, courts have terminated rights largely on this basis.[174] Some of these cases might be read as finding unfitness on the

---

[172] Harden v. Thomas, 329 So. 2d 389 (Fla. Ct. App. 1976) (father's sentence to life imprisonment for rape and kidnapping did not constitute abandonment permitting the child's stepfather to adopt the child without the father's consent). *But see In re* Adoption of Cottrill, 388 So. 2d 302, 303 (Fla. Ct. App. 1980) (stating that a proceeding for termination of parental rights when the child is in foster care involves a "less stringent test for abandonment and has objectives far different than" a proceeding for adoption without the parent's consent when the child is not in foster care) (*citing In re* J.F., 384 So. 2d 713 (Fla. Ct. App. 1980)). Thus, the holding in *Harden* may not be applicable to cases in which the child of a parent sentenced to life imprisonment is in foster care. *See also supra*, note 19 for cases that have found the standards to be the same in termination of parental rights and private adoption cases.

[173] *In re* Adoption of V.A.J., 660 P.2d 139 (Okla. 1983) (reversing the lower court's order dispensing with the father's consent to adoption of his child by the child's stepfather; the child was *not* in foster care).

[174] Alabama: *In re* Brand, 479 So. 2d 66 (Ala. Ct. App. 1985) (mother serving 12 year sentence).

Arizona: *In re* Juvenile Action No. JS-5609, 149 Ariz. 573, 720 P.2d 548 (Ct. App. 1986) (father serving nine-year sentence for assault and rape); *In re* Juvenile Action No. S-1147, 135 Ariz. 184, 659 P.2d 1329 (Ct. App. 1983) (father serving life sentence for second degree murder). Note that both cases were decided under A.R.S. § 8-533(B)(4), which permits termination of parental rights when the parent is incarcerated for conviction of a felony and the sentence "is of such length that the child will be deprived of a normal home for a period of years." For a discussion of the Arizona statute, see *supra* note 155 and accompanying text. *But see In re* Juvenile Action No. S-624, 126 Ariz. 488, ——, 616 P.2d 948, 951 (Ct. App. 1980) (no deprivation of normal home for a period of years proven when although father had been sentenced to five-year sentence, he was to be released to work-release program within approximately two years and his relatives were available to care for children; dismissal of termination of rights petition affirmed).

Louisiana: *In re* Brannon, 340 So. 2d 654 (La. Ct. App. 1976) (father's consent to adoption not required when the father was serving a 50-year sentence for first degree murder).

Missouri: *In re* C.B.K., 729 S.W.2d 649 (Mo. Ct. App. 1987) (father serving sentence of 25 years for murder of child's mother).

Nevada: Casper v. Huber, 85 Nev. 474, 456 P.2d 436 (1969) (father's consent to adoption of child by aunt and uncle not required where father serving a sentence of 25-30 years for murder), *cert. denied*, 397 U.S. 1012 (1970).

New York: *In re* Gregory B., 74 N.Y.2d 77, 542 N.E.2d 1052, 544 N.Y.S.2d 535 (1989) (consolidated cases involving father serving sentence of 10 to 20 years [the crime for which the father was convicted is not recorded in either of the reported opinions], and father serving sentence of 25 years to life for murder).

Ohio: *In re* Hederson, 30 Ohio App. 3d 187, 507 N.E.2d 418 (1986) (father serving life sentence for murder of child's mother).

Oregon: *In re* Troy, 27 Or. App. 185, 555 P.2d 933, *review denied*, 276 Or. 873 (1976) (father serving life sentence for murder of children's mother).

basis of the nature of the parent's crime[175] or the parent's failure to show an interest in and maintain contact with the child.[176] However, many of the other cases provide examples of a failure to conduct an inquiry into the parent's ability to have a meaningful relationship with her children. Courts in these cases have effectively ruled that long term incarceration is unfitness per se. As discussed below, the rationale for such cases is that parents serving long term prison sentences cannot have a *physical* presence in their children's homes.

Thus, for example, in an Arizona case, *In re Juvenile Action No. JS-5609*,[177] the father was incarcerated on a sentence of nine years, only five years of which remained at the time of the termination hearing. The father had kept in close contact with his child until his incarceration and had attempted to stay in contact thereafter, although his attempts had been hindered by the child's mother. In addition, the father had undergone extensive rehabilitation during the first few years of his incarceration. The court noted:

> Since his incarceration, the respondent has had a significant change in his life style. He apparently has seriously addressed his alcohol and drug abuse problem, the former of which especially was responsible for him being in the situation he presently finds himself. He has attended college; received his A.A. degree; and has 90 credit hours toward a Bachelor's degree. His file is replete with letters from various individuals attesting to his scholarship and work history. He has also taken a significant number of courses involving alcohol and drug abuse problems.[178]

Pennsylvania: *In re* Stickler, 356 Pa. Super. 56, 514 A.2d 140 (1986) (father serving sentence of five-to-ten years for arson); *In re* Adoption of M.J.H., 348 Pa. Super. 65, 501 A.2d 648 (1985) (father serving life sentence for murder of child's mother), *appeal denied*, 514 Pa. 636, 522 A.2d 1105 (1987), *appeal dismissed sub nom.* W.L.H. v. K.B.M., 484 U.S. 804 (1987).

South Dakota: *In re* B.A.M., 290 N.W.2d 498 (S.D. 1980) (father serving sentence of 10 years to life for murder of child's mother).

Wyoming: RW v. Laramie Co. Dep't of Pub. Assistance, 766 P.2d 555 (Wyo. 1989) (parents convicted of murder and aiding and abetting murder of one of their children; father sentenced to 25 to 80 years and mother sentenced to 20 to 80 years).

[175] *See, e.g.*, *In re* Hederson, 30 Ohio App. 3d 187, 507 N.E.2d 418 (1986) (father's murder of child's mother); *In re* Troy, 27 Or. App. 185, 555 P.2d 933, *review denied*, 276 Or. 873 (1976) (father's murder of children's mother); *In re* Adoption of M.J.H., 348 Pa. Super 65, 501 A.2d 648 (1985) (father's murder of child's mother), *appeal denied*, 514 Pa. 636, 522 A.2d 1105 (1987), *appeal dismissed sub nom.* W.L.H. v. K.B.M., 484 U.S. 804 (1987); *In re* B.A.M., 290 N.W.2d 498 (S.D. 1980) (father's murder of child's mother).

[176] *See In re* C.B.K., 729 S.W.2d 649, 649-50 (Mo. Ct. App. 1987) (father "had made no effort and had exercised no regular visitation or other contact with the child . . . until a petition to terminate his parental rights was filed . . . .").

[177] *In re* Juvenile Action No. JS-5609, 149 Ariz. 573, 720 P.2d 548 (Ct. App. 1986).

[178] *Id.* at 574, 720 P.2d at 549.

In light of these facts, the court expressly found that the father had shown *actual fitness at the time of the hearing*. The father also argued that because his child was living with the mother and the stepfather, the incarceration was not depriving his child of a "normal home" as required by the termination of parental rights statute.[179] However, the court nonetheless affirmed the termination of rights. The court found that the statutory term "normal home" means a home in which the parent has a physical presence and that the father's continued absence due to incarceration therefore constituted deprivation of a normal home under the statute.[180]

A New York case, *In re Gregory B.*,[181] followed similar reasoning. *Gregory B.* was a consolidated case involving two fathers who were serving sentences of ten to twenty years and twenty-five years to life, respectively. The relevant New York statute allows rights to be terminated when a parent has "failed for a period of more than one year following [the placement into foster care] substantially and continuously or repeatedly to maintain contact with *or* plan for the future of the child, although physically and financially able to do so, nothwithstanding the agency's [rehabilitation and reunification efforts]. . . ."[182] Both fathers had kept in contact with their children during incarceration, and the children had visited their fathers at the prisons regularly. The children ranged in age from five to nine at the time of the initial termination hearings and were eight to thirteen at the time of the appeal to the state's highest court.[183] Thus, although not expressly noted in the opinion of the court, the children had ongoing relationships with their fathers.

In affirming the trial courts' terminations of parental rights, the high court acknowledged that the fathers had done everything within their power to maintain contact with their children. However, the court

---

[179] *Id.* at 575, 720 P.2d at 550. *Cf. In re* Juvenile Action No. S-624, 126 Ariz. 488, 491, 616 P.2d 948, 951 (Ct. App. 1980) (no deprivation of normal home for a period of years proven when although father had been sentenced to five-year sentence, he was to be released to work-release program within approximately two years and his relatives were available to care for children; dismissal of termination of rights petition affirmed).

[180] *Id.* at 575-76, 720 P.2d at 550-51.

[181] *In re* Gregory B., 74 N.Y.2d 77, 542 N.E.2d 1052, 544 N.Y.S.2d 535 (1989).

[182] N.Y. SOC. SERV. LAW § 384-b(7)(a) (McKinney 1983). For a discussion of the agency's duties to make diligent efforts to provide rehabilitation and reunification services to incarcerated parents, see *supra* notes 99-100 and accompanying text.

[183] *In re* Gregory B., 74 N.Y.2d 77, 82, 84, 542 N.E.2d 1052, 1053-54, 544 N.Y.S.2d 535, 536-37 (1989).

found that because of their long term incarceration, the fathers were unable to "plan for the future" of their children. The court held that long term foster care lasting until the children reached majority was not an acceptable "plan" within the meaning of the statute because foster care is meant to be a temporary arrangement. The fathers had been unable to propose any viable alternatives to foster care, such as relatives who would be able to care for the children. As with the Arizona case discussed above, the court found that the fathers could not offer their children a "normal home" and therefore held that parental rights would have to be terminated.[184]

Significantly, the court also refused to order a hearing to determine whether an "open adoption" preserving some contact between the children and their fathers would be in the children's best interests, holding that the state's adoption statute did not permit a court to order such an arrangement. Rights were therefore terminated without any provision for further contact between the parents and their children.[185]

Similar results have been reached in other state cases, although the reasoning is less clearly articulated than in the Arizona and New

---

[184] *Id.* at 89-90, 542 N.E.2d at 1057-58, 544 N.Y.S.2d at 540-41.

[185] *Id.* at 90-91, 542 N.E.2d at 1058-59, 544 N.Y.S.2d at 541-42. *Cf.* dissenting opinion of Justice Carro in lower court decision, *In re* Delores B., 141 A.D.2d 100, 533 N.Y.S.2d 706 (1988) (citations omitted) (emphasis added):

> [The conclusion that termination of parental rights is in the best interests of the children] wholly ignores the emotional damage that will result when these children's relationship with their father is irrevocably terminated in order to provide them with the legal distinction of an adoptive home with their foster parents, as opposed to continued long-term care with their foster parents. In so doing, this court is extinguishing a parental relationship, not because of this father's unwillingness to care for his children, not because of any lack of mental capacity to provide his children with guidance, emotional support, and love, nor because he is abusive or otherwise harmful to his children. In other words, there is no termination because the parental relationship is injurious to the children. Rather, there is termination because for external reasons beyond [the father's] control, *although he can be a father to his children, he cannot be a home provider.* The statute precludes termination in such an instance . . . and does not prohibit a plan of long-term foster care.
>
> At the very least, if this court is to order termination of [the father's] parental rights and authorize release of his children for adoption, it must, on behalf of the best interests of these children, direct that hearings be held as to whether their interests would be served by an "open adoption." In this day, where the incidence of children living apart from at least one parent is so high and where courts frequently enter orders directing visitation with a noncustodial parent, at times even against the wishes of the custodial parent, then, in an adoption, a relationship created by the State not nature, we can certainly require the adoptive parent to continue to allow the child to maintain contact with his or her father or mother, if that will serve the best interests of that child.

York decisions. In other states, parental rights appear to have been terminated almost exclusively on the basis of the length of the parent's prison sentence with no inquiry into the nature and quality of the parent's relationship with her children.[186]

C. *Conclusions*

Most of these statutes and cases permit rights to be terminated solely or primarily on the basis of long term parental incarceration and consequent prolonged future physical separation between parent and child. This represents an unconstitutional approach to termination proceedings. Such an approach may reflect an assumption that such prisoners can no longer play a meaningful role in their children's lives. On the other hand, it may reflect something less principled—a desire not to have to deal with the emotional and logistical difficulties associated with such cases, such as the time and expense involved in taking children to prison to see their parents, arranging counseling and other services for parent and child so that they may better cope with the pain of separation and the expense of keeping a child in foster care for an extended period of time. Whatever the motivation, however, allowing a blanket termination of rights in such cases ignores at least two practical realities.

Incarcerated parents are, first and foremost, parents. As discussed in Section I, the vast majority of incarcerated women were mothers of minor children, had cared for their children immediately prior to their imprisonment and intended to resume caring for their children after their release.[187] This is true for the majority of incarcerated men as

---

[186] *See, e.g., In re* Brand, 479 So. 2d 66 (Ala. Ct. App. 1985) (mother serving 12-year sentence); *In re* Juvenile Action No. S-1147, 135 Ariz. 184, 659 P.2d 1329 (Ct. App. 1983) (father serving life sentence for second degree murder). Note that this case was decided under A.R.S. § 8-533(B)(4), which permits termination of parental rights when the parent is incarcerated for conviction of a felony and the sentence "is of such length that the child will be deprived of a normal home for a period of years." *See supra* notes 156 & 175 and accompanying text. *See also In re* Brannon, 340 So. 2d 654 (La. Ct. App. 1976) (father's consent to adoption not required when the father was serving a fifty-year sentence for first degree murder); RW v. Laramie Co. Dep't of Pub. Assistance, 766 P.2d 555 (Wyo. 1989) (parents convicted of murder and aiding and abetting murder of one of their children; father sentenced to 25 to 80 years and mother sentenced to 20 to 80 years).

[187] *See supra* notes 5, 6 & 11 and accompanying text. In 1986, 67.5% of the state women prisoners in the U.S. had at least one child under the age of 18, and 68% of those women had more than one child. Among men, 54.4% of the prisoners had children under the age of 18. Eighty-five percent of the mothers of minor children had legal custody of their children before entering prison, and 78% of the mothers lived with their children at that time. Furthermore, more

well.[188] Thus, a large number of incarcerated parents have viable, ongoing relationships with their children, relationships that can and should be preserved if possible. One way for the state or the parent to accomplish this is to locate relatives or friends who can care physically for the child while the parent is incarcerated.[189]

---

than 85% of the incarcerated mothers intended to resume custody after their release from prison. Among men, approximately one-half of the fathers of minor children had lived with their children prior to their imprisonment, and an almost equal number planned to live with their children after their release. *Id.*

[188] *See supra* note 11 and accompanying text.

[189] Courts in California and Massachusetts have recognized the duty of child welfare agencies to attempt to locate relatives who can care for children whose parents are unable to do so. *See In re* Terry E., 180 Cal. App. 3d 932, 946, 225 Cal. Rptr. 803, 812 (1986) (applicable statute "clearly implies that when the juvenile court orders removal of a child from the physical custody of his or her parents, the child should be placed, if at all possible, in the home of a relative, provided only that the relative's home is suitable for the child"); *In re* Department of Public Welfare to Dispense with Consent to Adoption, 383 Mass. 573, ———, 421 N.E.2d 28, 35 (1981) (reprimanding child welfare agency for not having investigated suitability of relatives to care for the child; however, the court refused to reverse the order terminating parental rights on this basis reversing, instead, on other grounds). *See infra* notes 245-48 and accompanying text for a discussion of this case.

An Oklahoma court has similarly held that the availability of relatives or friends who might be childcare resources was an important issue in a termination of parental rights proceeding involving an incarcerated parent. *See In re* Christina T., 590 P.2d 189, 192 (Okla. 1979). This case is discussed *supra* notes 67-70.

New York and Mississippi have dealt with this issue through statute. New York law requires that prior to accepting a child into foster care placement, a child welfare agency attempt to locate relatives of the child who can appropriately care for the child, either as custodians or as foster parents. N.Y. SOC. SERV. LAW § 384-a(1-a) (McKinney Supp. 1992) (voluntary placements); N.Y. FAM. CT. ACT § 1017 (McKinney Supp. 1992) (involuntary placements in child protective proceedings). The Mississippi statute mandates that "legal custody and guardianship by persons other than the parent . . . should be considered as alternatives to the termination of parental rights. . . ." MISS. CODE ANN. § 93-15-103(4) (Supp. 1992). *See also infra* note 235.

In cases in which the incarcerated parents themselves have been able to arrange for children to be cared for by relatives as an alternative to foster care, several courts have held that the child welfare agencies have no jurisdiction to intervene and may not interfere with the parent's custody arrangements in the absence of evidence that the relatives are not caring properly for the child. *See* Diernfeld v. People, 137 Colo. 238, 323 P.2d 628 (1958); Welfare Comm'r v. Anonymous, 33 Conn. Supp. 100, 364 A.2d 250 (1976); *In re* Valdez, 29 Utah 2d 63, 504 P.2d 1372 (1973). *But see In re* Price, 7 Kan. App. 2d 477, ———, 644 P.2d 467, 473 (1982) (rejecting incarcerated father's proposed alternative placement with his parents pending his release from prison); *In re* Taurus F., 415 Mich. 512, 330 N.W.2d 33 (1982), *appeal dismissed sub nom.*, Finney v. Michigan Dep't of Social Servs., 464 U.S. 923 (1983); (In *Taurus F.*, the Michigan Supreme Court affirmed the termination of the incarcerated mother's rights by an equally divided court. A parent has a right to place a child with a relative prior to court intervention. However, the mother had lost this right because the mother, who was pregnant in prison, and her sister had been unable to reach agreement on custody arrangements prior to the birth of the child. The child welfare agency had properly taken custody of the child at birth on the ground that the child was at that time "otherwise without proper custody." *Id.* at ———, 330 N.W.2d at 52. *See also In re* Futch, 144 Mich. App. 163, 375 N.W.2d 375 (1984) (parental rights terminated despite willingness of fa-

Second, state schemes that permit termination of rights on the basis of long term incarceration sweep too broadly in their potential effect. Some of the state statutes discussed above allow rights to be terminated for periods of separation as short as one year.[190] It may be that the legislatures in such states assumed that these statutes would be applied only in a limited number of extreme cases. However, increasing sentence lengths have undermined that assumption. A statute permitting termination of rights after one year of foster care placement could potentially be applied to at least ninety percent of incarcerated women.[191] Such a statute has a broad potential effect upon incarcerated fathers as well, since the average time served for male prisoners in 1986 was twenty-four months.[192] Similarly, statutes, such as those in Iowa and Louisiana, that permit termination of rights based on sentence lengths (rather than foster care) of five years or more could also potentially jeopardize the rights of more than forty percent of women prisoners.[193] Again, the potential effect on male prisoners is even greater, since the average maximum sentence length (as opposed to time served) for men in 1986 was almost seven years.[194]

As discussed in Section II, due process requires that *all* aspects of the parent-child relationship be examined in assessing parental fitness. Courts must recognize that even a parent who is confined on a lengthy prison sentence may occupy an essential place in her child's life, a place that cannot be filled by anyone else. Such a parent may therefore be in a unique position to perform the intangible aspects of parenting, such as providing the child with nurturing love and a sense of family identity. Courts conducting termination of parental rights proceedings

---

ther's relatives to care for child; nothing requires court to refrain from terminating rights solely because relatives may be able to care for children; the father's relatives were investigated by the child welfare agency and rejected primarily because of their past failure to take any actions to prevent parents from abusing child).

Note also that the Iowa termination of parental rights statute provides that even when grounds for termination of parental rights exist, the court need not terminate parental rights when "a relative has legal custody of the child." IOWA CODE § 232.116(3)(a) (West Supp. 1991).

[190] *See supra* notes 165-67 and accompanying text.

[191] Figures are derived from U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, WOMEN IN PRISON, (1991). Combining data from Table 2, "Most serious offense of female State prison inmates, 1979 and 1986", *id.* at 2, with data from Table 6, "Average maximum sentence for new court commitments and time served by first releases for female State prison inmates, 1986", *id.* at 4, indicates that in 1986, approximately 90% of incarcerated women served more than 12 months in prison. *See supra* notes 7 & 9 and accompanying text.

[192] *See supra* note 13 and accompanying text.

[193] *See supra* note 191.

[194] *See supra* note 8 and accompanying text.

involving incarcerated parents must therefore evaluate the *quality* of the parent-child relationship. State schemes that fail to require courts to engage in such meaningful, individualized inquiries into the intangible component of the parent-child relationship, and that instead permit courts to rely on the mere fact of the parent's prolonged physical separation from her child, therefore fail to satisfy constitutional requirements.

VI. PROTECTING THE PROCEDURAL DUE PROCESS RIGHTS OF INCARCERATED PARENTS: TOWARD A CONSTITUTIONALLY ACCEPTABLE FRAMEWORK FOR TERMINATION OF PARENTAL RIGHTS

Sections III through V discussed the statutes and case law that reveal the way states currently approach termination of parental rights proceedings involving prisoners. As discussed more fully in those sections, many of these state schemes fall short of meeting the minimal procedural due process requirements.[195] While it is easy enough to point out the shortcomings in the current state schemes, the more difficult task is to construct a model of a system that would offer constitutionally acceptable judicial determinations in this painfully complex area.

The initial part of this task is easy, for in at least one respect, an assessment of parental unfitness is no different for an incarcerated parent than for one who is not incarcerated. An incarcerated parent, like any parent, has a duty to communicate with and maintain an interest in her child to the best of her ability, and her rights can be terminated if she fails to discharge this duty. The Supreme Court of Pennsylvania has stated that an incarcerated parent must "utiliz[e] those resources at his or her command while in prison in continuing a close relationship with the child."[196] The Supreme Court of Minnesota has offered a more concrete description:

> [I]f a parental relationship existed prior to a [parent's] imprisonment and he continued this relationship to the best of his ability during incarceration through letters, cards, and visits where possible, and through inquiry as to [the] children's welfare, his parental rights would be preserved, both because of his actions and for the benefit of [the] children.[197]

---

[195] *See supra* notes 26-47 and accompanying text.

[196] *In re* Adoption of McCray, 460 Pa. 210, 217, 331 A.2d 652, 655 (1975).

[197] *In re* Staat, 287 Minn. 501, 507, 178 N.W.2d 709, 713 (1970).

In evaluating whether an incarcerated parent has satisfied these duties, evidence showing that the parent has manifested a lack of interest in and involvement with her child can properly establish present parental unfitness.[198] Many states have used this approach in terminating the rights of incarcerated parents who have effectively abandoned their children.[199] However, there are two important qualifications.

---

[198] *See In re* Adoption of McCray, 460 Pa. at 216, 331 A.2d at 655. The Pennsylvania Supreme Court affirmed the termination of the incarcerated father's parental rights. The court found a "refusal or failure to perform parental duties." *Id.* at 214, 331 A.2d at 654 (citing § 311(1) of the 1970 Adoption Act). The father's contact with child during incarceration on three different convictions had been limited to a birthday card and a small gift of money. Although it recognized the difficulty of discharging parental responsibilities while in prison, the court held that an incarcerated parent retains certain duties: "[W]e must inquire whether the parent has utilized those resources at his or her command while in prison in continuing a close relationship with the child. Where the parent does not exercise reasonable firmness 'in declining to yield to obstacles,' his other rights may be forfeited." *Id.* at 217, 331 A.2d at 655 (citation omitted); *In re* Staat, 287 Minn. 501, 178 N.W.2d 709 (1970). While holding that parental incarceration does not by itself constitute abandonment, the Minnesota Supreme Court affirmed the termination of the father's rights. The court found that the father had had no contact with his children prior to his imprisonment and that following his imprisonment he had not requested visits with his children, but had instead used his visiting hours to see his girlfriend. His contact with his children had been limited to one visit, one Christmas present and one birthday card. *Id.* at 506-07, 178 N.W.2d at 712-13. The court, however, recognized the possibility that a parent can maintain a meaningful relationship with children while incarcerated:

> We realize it is difficult to maintain a healthy parent-child relationship when a parent is confined to a penal institution. However, if a parental relationship existed prior to a father's imprisonment and he continued this relationship to the best of his ability during incarceration through letters, cards and visits where possible, and through inquiry as to his children's welfare, his parental rights would be preserved, both because of his actions and for the benefit of his children.

Id. at 507, 178 N.W.2d at 713; *In re* H.M., 770 S.W.2d 442 (Mo. Ct. App. 1989). The court of appeals affirmed the termination of the incarcerated mother's parental rights on the ground of abandonment, finding that the mother had been repeatedly and almost continuously incarcerated since her child was a few months old and that during that time she had made virtually no attempts to maintain contact with her child. *Id.* One judge, in dissent, argued that the facts did not support a finding of abandonment and stressed the agency's failure to make any efforts to provide the mother with visitation at the prison or other reunification services. *Id.* at 446-47 (Karohl, J., dissenting).

[199] *See, e.g.*, Zgleszewski v. Zgleszewski, 260 Ark. 629, 542 S.W.2d 765 (1976) (reversing denial of stepfather's petition to adopt children without the consent of the incarcerated father; father had not sent any money or attempted to communicate with his children in more than five years); *In re* Juvenile Appeal, 187 Conn. 431, 446 A.2d 808 (1982) (affirming finding of abandonment against father on basis, *inter alia*, of father's failure to have any contact with child in 26 months except one birthday card); *In re* Adoption of Herman, 406 N.E.2d 277 (Ind. Ct. App. 1980) (stepfather allowed to adopt without the consent of the incarcerated father when the father had had minimal contact with his children both prior to and since his imprisonment); *In re* Daniel C., 480 A.2d 766 (Me. 1984) (father did not try to communicate with his child while in prison, nor during the short time that he was out of prison); *In re* Walker, 287 N.W.2d 642 (Minn. 1979) (abandonment found when father had seen child three times in 11 years, and during the five years

First, a failure to satisfy these parental duties may be excused if the parent can show that the state or another person has thwarted her attempts to maintain a relationship with her child.[200] Second, the incarcerated parent's discharge of her parental responsibilities must be judged by a standard that takes into account the constraints imposed by the parent's imprisonment.[201]

Where the analysis becomes more difficult is in cases in which the incarcerated parent has shown through continuing efforts to maintain a relationship with her child that she wishes to continue her role as a

---

that he had been out of prison, he had not shown any interest in his children or contributed to their support); Adoption of M.D.L., 682 S.W.2d 886 (Mo. Ct. App. 1984) (father's only contact with child in two years was a birthday card and a Christmas present; father had made no attempt to contact his child during brief periods when he was not incarcerated); Adoption of Baby Boy A., 512 Pa. 517, 517 A.2d 1244 (1986) (father had abandoned his child when he had made no effort to communicate with his child during 15 months of incarceration; fact that father was illiterate did not excuse him from making such attempts; his minimal efforts to locate the child's mother after his release on parole were insufficient to remedy his inaction during the time he was incarcerated); Hamby v. Hamby, 264 S.C. 614, 216 S.E.2d 536 (1975) (stepfather allowed to adopt child without incarcerated father's consent since father had not seen his child in seven years and had written to his child only twice); Kaywood v. Halifax Dep't of Social Servs., 10 Va. App. 535, 394 S.E.2d 492 (1990) (father, who was serving 20 year sentence for abuse of another child, had not seen the child or requested any visitation in more than two years).

[200] *See, e.g., In re* B.W., 498 So. 2d 946 (Fla. 1986) (failure of father to communicate with children for six months because of refusal of foster parents and caseworker to bring children for visits cannot constitute abandonment; termination of parental rights reversed); Taylor v. Taylor, 30 Ill. App. 3d 906, 334 N.E.2d 194 (1975) (reversing a finding of unfitness against incarcerated mother when the childcare agency had thwarted the mother's attempts to communicate with her children by refusing to set up visitation or tell her where the children were and by discouraging her from communicating with the caseworker about the children; the agency had also hindered the maternal grandmother's efforts to have contact with the children); *In re* Baby Girl W., 728 S.W.2d 545 (Mo. Ct. App. 1987). In *Baby Girl W.*, the intermediate appeals court reversed the lower court's termination of the incarcerated father's rights, where the mother had concealed the child's birth from the father and, upon surrendering the child for adoption, had concealed the father's identity from the child welfare officials. The child welfare agency had refused to disclose the child's location to the father so that he could attempt to communicate with the child. The court noted: "There was never any recognition [by the child welfare agency] of even an ultimate prospect to reconcile father and daughter, only a studied purpose to consummate the adoption which [the mother] had arranged without [the father's] knowledge or participation." *Id.* at 549. The court therefore found that the child welfare agency had failed to prove abandonment against the father. *See also In re* Adoption of Maynor, 38 N.C. App. 724, 248 S.E.2d 875 (Ct. App. 1978) (finding of abandonment against incarcerated father reversed because father did not know that his child was in foster care and had been unable to locate his child).

[201] *See In re* Adoption of F.A.R., 242 Kan. 231, ____, 747 P.2d 145,150 (1987) ("When a . . . parent is incarcerated and unable to fulfill the customary parental duties required of an unrestrained parent, the court must determine whether such parent has pursued the opportunities and options which may be available to carry out such duties to the best of his or her ability.").

parent. Several states offer approaches that could readily be adapted as a national model. These approaches are summarized below.

A. Illustrative State Systems

The statutes of three states—New York, California[202] and Oklahoma—warrant special discussion because they are the most comprehensive in the nation in their treatment of incarcerated parents. These state schemes, taken together, address the constitutional requirements outlined in Section II, a full adversarial hearing and development of a full factual record; a focus on *current* parental fitness, rather than simply on the parent's past commission of a crime; and an inquiry into the parent's ability to perform the qualitative, intangible aspects of parenting, rather than on the mere fact that the parent will continue to be physically separated from her child. In addition, the statutes of Georgia and Mississippi and cases from Massachusetts offer further examples of constitutionally acceptable approaches to the issue of parental incarceration.

The New York statutory scheme is significant in several respects.[203] First, all indigent parents faced with termination of parental rights have a right to appointed counsel without charge.[204] Second, the court may order that a parent be provided with the services of an expert without cost.[205] Third, the statute outlines strict procedures to be followed in termination proceedings. Before a parent's rights may be terminated, the agency must make a threshold showing that it has satisfied its statutory duties of attempting to maintain and strengthen the parental relationship.[206] Thus, before parental fitness can even be examined, the state must show that it has discharged its affirmative duties to the parent.

These duties are specified in some detail. They include a duty to transport the children to prisons for visits with their parents at least once a month and to arrange for the parents to receive necessary reha-

---

[202] Note that the New York statutes are also discussed at Sections IV and V, *supra*, and the California statutes at Sections III and IV, *supra*.

[203] For a full discussion of the New York scheme which was amended significantly in 1983 with respect to incarcerated parents, see Genty, *Protecting the Parental Rights of Incarcerated Mothers Whose Children Are in Foster Care: Proposed Changes to New York's Termination of Parental Rights Law*, 17 FORDHAM URB. L.J. 1 (1989).

[204] N.Y. FAM. CT. ACT § 262(a)(iii)-(iv) (McKinney 1983).

[205] N.Y. COUNTY LAW § 722-c (McKinney 1991).

[206] *See In re* Sheila G., 61 N.Y.2d 368, 462 N.E.2d 1139, 474 N.Y.S.2d 421 (1984).

bilitative services.[207] Such rehabilitative services are required even in cases involving serious or repeated acts of child abuse.[208] The agency is also required to conduct an investigation to locate relatives of the child who may be able to care for the child during the parent's absence.[209] If an agency is unable to prove by clear and convincing evidence that it has satisfactorily performed these duties, the termination petition must be dismissed.[210]

Only after this showing of agency compliance has been made does the conduct of the parent come into question. The inquiry is two-fold. First, the court examines the extent to which the parent has shown interest in and involvement with her child by doing all she can to maintain regular contact with her child and the childcare agency. Second, the court ascertains the parent's progress in planning for the future of

---

[207] N.Y. SOC. SERV. LAW § 384-b(7)(f) (McKinney Supp. 1991) provides in pertinent part as follows:

> As used in this subdivision, "diligent efforts" shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:
>
> . . . .
>
> (5) making suitable arrangements with a correctional facility and other appropriate persons for an incarcerated parent to visit the child within the correctional facility, if such visiting is in the best interests of the child. When no visitation between child and incarcerated parent has been arranged for or permitted by the authorized agency because such visitation is determined not to be in the best interest of the child, then no permanent neglect proceeding under this subdivision shall be initiated on the basis of the lack of such visitation. Such arrangements shall include, but shall not be limited to, the transportation of the child to the correctional facility, and providing or suggesting social or rehabilitative services to resolve or correct the problems other than incarceration itself which impair the incarcerated parent's ability to maintain contact with the child. When the parent is incarcerated in a correctional facility located outside the state, the provisions of this subparagraph shall be construed to require that an authorized agency make such arrangements with the correctional facility only if reasonably feasible and permissible in accordance with the laws and regulations applicable to such facility.

Id.

Note, however, that these duties are not absolute and can be excused for parental noncooperation. *Id.* § 384-b(7)(e). *In re* Sheila G., 61 N.Y.2d at 385-86, 462 N.E.2d at 1148, 474 N.Y.S.2d at 427.

The applicable state regulations, 18 N.Y.C.R.R. § 430.12 (d)(1)(i) and an administrative directive of the New York State Department of Social Services, 85 ADM-42, September 3, 1985, provide that incarcerated parents must generally be provided with visits with their children at least once a month.

[208] N.Y. SOC. SERV. LAW § 384-b(8)(a)-(b) (McKinney 1983).

[209] *See* N.Y. FAM. CT. ACT § 1017 (McKinney Supp. 1992) (child protective proceedings); N.Y. SOC. SERV. LAW § 384-a(1-a) (McKinney Supp. 1992) (voluntary foster care placements).

[210] *See In re* Sheila G., 61 N.Y.2d at 387-89, 462 N.E.2d at 1149-50, 474 N.Y.S.2d at 431-32.

her child, a requirement that includes the duty to participate in necessary rehabilitative programs. A parent's failure to discharge *either* of these duties is sufficient for a finding of parental unfitness, provided the agency has made its threshold showing.[211]

Consequently, the New York statutory scheme achieves three important goals. First, it recognizes that the state has resources far superior to those available to the parent. Accordingly, New York offers the parent a number of important procedural protections and places a heavy burden on the state to prove its case.[212] Second, it emphasizes the possibility that parental rehabilitation will overcome past unfitness. It weighs heavily the agency's efforts to help the parent remedy past shortcomings and the parent's corresponding willingness to cooperate in those efforts.[213]

Third, the statute places incarcerated parents on a somewhat equal footing with other parents in the duty they have to maintain a relationship with their children. In so doing, the state scheme appropriately compels the court to examine the parent's conduct while in prison. The central inquiry in a termination case involving a prisoner is therefore precisely what it should be for any case: How much interest has the parent shown in her children? Has she done everything possible to maintain a place of importance in her children's lives? Have the agency and the prison facilitated her ability to do this? Has she recognized her past problems and made every effort to utilize the social services available to her? In short, the New York statute focuses the court's attention upon *present fitness*, as shown by her efforts to overcome past unfitness and maintain a positive, nurturing relationship with her children *while in prison*.[214]

---

[211] *See In re* Orlando F., 40 N.Y.2d 103, 110, 351 N.E.2d 711, 715, 386 N.Y.S.2d 64, 67 (1976).

[212] The New York Court of Appeals has noted:

> The parties [to a termination of parental rights proceeding] are by no means dealing on an equal basis. The parent is by definition saddled with problems: economic, physical, sociological, psychiatric, or any combination thereof. The agency, in contrast is vested with expertise, experience, capital, manpower and prestige. Agency efforts correlative to their superiority [are] obligatory.

In re Sheila G., 61 N.Y.2d at 381, 462 N.E.2d at 1145, 474 N.Y.S.2d at 427 (citation omitted).

[213] *See supra* note 99 and accompanying text. Diligent efforts are required even in cases in which the parent has been found to have severely or repeatedly abused her children.

[214] While from the perspective of an incarcerated parent the New York statute is perhaps the most favorable in the nation, recent case law has seriously eroded the scope of the statute for prisoners serving extremely long sentences. *See* discussions of *In re* B. Children, 168 A.D.2d 312,

Like the New York statute, the California statute provides important procedural protections for incarcerated parents and places strict affirmative duties on childcare agencies to assist the parents. As noted in Section III, for in-state prisoners, California provides by statute that no termination hearing may be conducted in the absence of the prisoner.[215] Thus, an incarcerated parent has the ability to assist in her own trial defense, and perhaps more important, the fact finder is able to assess the demeanor and credibility of the parent through personal observation and more effectively evaluate the parent's personal qualities as they affect her relationship with her child.[216]

With respect to the duties of childcare agencies, the California statute provides that reasonable reunification efforts are mandated unless such services would be detrimental to the child. The statute provides:

> In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the nature of the treatment, the nature of crime or illness, the degree of detriment to the child if services are not offered and, for minors 10 years of age or older, the minor's attitude toward the implementation of family reunification services, and any other appropriate factors.[217]

Under the California statute, reunification services to incarcerated parents may include: collect phone calls between parent and child, transportation services, visitation services and services to extended family members or foster parents providing care to the child. In addition, "[a]n incarcerated parent may be required to attend counseling, parenting classes, or vocational training programs as part of the service plan if these programs are available."[218]

---

562 N.Y.S.2d 643 (App. Div. 1990), *supra* note 100, and *In re* Gregory B., 74 N.Y.2d 77, 542 N.E.2d 1052, 544 N.Y.S.2d 535 (1989), *supra* note 185.

[215] CAL. PENAL CODE § 2625 (West 1981 & Supp. 1992). This provision is reproduced *supra* note 49.

[216] *See supra* notes 51 and 57. At least one court has held that the statute is inapplicable to prisoners confined outside the state. *In re* Gary U., 136 Cal. App. 3d 494, 186 Cal. Rptr. 316 (1982).

[217] CAL. WELF. & INST. CODE § 361.5(e) (West Supp. 1992).

[218] CAL. WELF. & INST. CODE § 361.5(e)(1-4) (West Supp. 1992).

As noted earlier, reunification services are not required for parents against whom there have been repeated findings of physical or sexual abuse, or parents who have been convicted for serious neglect or abuse resulting in the death of a child. However, when appropriate, reunification services *may* be ordered in such cases. *Id.* at § 361.5(b)(3),(4); (c). Section 361.5(c) provides that in cases involving repeated physical or sexual abuse or a conviction for neglect or abuse resulting in death of the child,

The California system's potential for ensuring that determinations of parental unfitness meet constitutional requirements is illustrated by the case of *In re Terry E.*[219] In *Terry E.*, the mother had been convicted of false imprisonment and two counts of sexual assault. The basis of the conviction was that she and her boyfriend had tied up and gagged the boyfriend's ex-wife, cut off all of her hair, physically assaulted her by jamming a night stick into her vagina, forced her to engage in oral sex with both of them and threatened to kill her. These acts had been committed while the mother's children were at home, and the children had heard some of what occurred and had seen the victim. The mother had received a maximum sentence of thirteen years, which had later been reduced to nine years.[220]

In addition to the grim nature of the mother's crime, at the time of her arrest her home had apparently been in disarray, with clothing strewn around the house, food on the floors and animal feces throughout. Her youngest child's room had been littered with dirty diapers and had smelled of urine, and her youngest child had been dirty, with soiled diapers and a serious diaper rash.[221]

During the almost four years that the mother had been incarcerated prior to the time of the termination of parental rights hearing, she had attempted to maintain regular contact with her children. She had had three visits with her children, but further visitation had been suspended. The mother had also written regularly to the children and sent them cards and presents for holidays, but the childcare agency had,

---

> the court shall not order reunification unless it finds that, based on competent testimony, those services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent . . . .
>
> The failure of the parent to respond to previous services, the fact that the child was abused while the parent was under the influence of drugs or alcohol, a past history of violent behavior, or testimony by a competent professional that the parent's behavior is unlikely to be changed by services are among the factors indicating that reunification services are unlikely to be successful. The fact that a parent or guardian is no longer living with an individual who severely abused the minor may be considered in deciding that reunification services are likely to be successful, provided that the court shall consider any pattern of behavior on the part of the parent that has exposed the child to repeated abuse.

Id. at § 361.5(c).

[219] *In re* Terry E., 180 Cal. App. 3d 932, 225 Cal. Rptr. 803 (1986).

[220] *Id.* at 939, 225 Cal. Rptr. at 807.

[221] *Id.* at 940, 225 Cal. Rptr. at 808.

after approximately two and a half years, stopped giving the mail to the children.[222]

The mother had also participated in a number of rehabilitative programs. She had taken a class on effective parenting for twelve weeks. She had also participated in a reunification program, counseling with a psychiatrist and stress management group therapy sessions and had obtained her G.E.D. Her work record had been excellent, and she had committed no prison disciplinary infractions.[223]

During this time the childcare agency had concluded that reunification efforts were not feasible because of the length of the mother's maximum prison sentence. In addition, the agency had refused the mother's request to have the children transferred from a foster home to their aunt and uncle's home, despite the agency's finding that the relatives were well qualified to care for the children. The lower court had granted the petition to terminate the mother's parental rights.[224]

The appellate court reversed that determination. The court was apparently most concerned with the lower court's focus on the mother's past acts, rather than her current fitness. The court stated:

> The basic defect in the findings . . . justifying the termination of appellant's parental rights is the absence of proof that the factors which gave rise to the [past acts] still persisted at the time of the [termination of parental rights] hearing . . . . [A]ppellant . . . was "entitled to have the circumstances leading to the [dependency] order[s] reviewed in the light of subsequent events," and to determine "whether *the conditions which gave rise to the . . . neglect still persisted*" at the time of the [termination of parental rights] hearing.[225]

The court found that the mother's activities in prison and the favorable reports she had obtained from the prison personnel showed that she had been rehabilitated. The court observed that despite the nature of the mother's crime, the agency had failed to present any evidence to show that the conditions underlying that crime continued to exist at the time of the hearing.[226]

The court further held that the agency had a duty to work with the mother on a reunification plan, despite the length of her prison sen-

---

[222] *Id.* at 943, 225 Cal. Rptr. at 810.

[223] *Id.* at 945, 225 Cal. Rptr. at 811.

[224] *Id.* at 943, 225 Cal. Rptr. at 810.

[225] *Id.* at 949-50, 225 Cal. Rptr. at 814 (emphasis in original) (quoting *In re* Carmaleta B., 21 Cal. 3d, 482, 493-94, 579 P.2d 514, 521, 146 Cal. Rptr. 623, 630 (1978)).

[226] *Id.* at 949, 225 Cal. Rptr. at 814.

tence. The court noted that such a plan, including continued contact with her children, would presumably have prevented the deterioration in the parent-child relationship that had occurred as a result of visits being suspended and correspondence being withheld. The court also concluded that the agency had violated its statutory duty to attempt to place the children with relatives rather than in foster care with strangers.[227]

In addition to finding that the mother had been rehabilitated and overcome her past unfitness and that the agency had failed in its duty to assist in her rehabilitation, the court distinguished termination of parental rights from custody. The court acknowledged that the children had grown very attached to the foster parents, but the court noted that the foster parents could remain as guardians of the children, stating:

> Our reversal of the judgment severing appellant's parental rights does not mean that the children should be taken from the custody of the foster parents upon appellant's release from prison. To the contrary, we contemplate that the foster parents will be appointed guardians of the children with the hope that, as the children mature, a reunification plan eventually will be consummated so that the children will have a continuing relationship both with their foster parents and their natural mother. [228]

The court therefore discounted the fact that the mother would not be able to take physical custody of her children in the immediate future.

Finally, the court commented on the procedures that are required at a proceeding to terminate parental rights:

> [F]irst, the welfare of the child is not the sole determining factor; the statute requires clear and convincing proof of the parent's unfitness to have the future custody and control of the child. This requires evidence such as expert opinion based on a personal examination of the parent, an evaluation of the parent's criminal history or conduct while in prison or other facts from which a rational inference may be drawn that the parent will be unable to properly care for the child in the future.
>
> Second, prison incarceration does not ipso facto show a parent's unfitness under the statute . . . . The petitioner must prove by clear and convincing evidence that the parent has not or cannot be rehabilitated during incarceration so that when he or she is released from prison the parent would be unable to properly care for the child. Again, this requires solid, credible evidence and not mere speculation. [229]

---

[227] *Id.* at 947, 225 Cal. Rptr. at 812-13. *See supra* note 189 for a discussion of the role of the agency and parent in arranging for relatives to care for the child during the parent's confinement.

[228] *In re* Terry E., 180 Cal. App. 3d at 953-54, 225 Cal. Rptr. at 817.

[229] *Id* at 953, 225 Cal. Rptr. at 817.

The court concluded that these standards had not been satisfied in the hearing before the lower court. The court accordingly reversed the lower court's determination and dismissed the petition.

In re Terry E. therefore illustrates the kind of searching inquiry into *present fitness* that is constitutionally mandated. The decision is especially noteworthy because the court was able to look beyond the heinous nature of the parent's crime. In so doing, the court observed all three of the procedural due process requirements discussed above. It stressed the importance of a full adversarial hearing with the active participation of the parent; it focused on present circumstances, particularly the extent of her rehabilitation; and it recognized the role the parent could play in her child's life, even if she did not have physical custody. *In re Terry E.* therefore illustrates the merits of California's statutory treatment of parental incarceration.

Oklahoma, like New York and California, grants strict hearing procedures to incarcerated parents. As discussed above, the Supreme Court of Oklahoma has held that termination proceedings may not be disposed of through motions for summary judgment and has discussed the importance of a full adversarial hearing in such cases.[230] In addition, the Oklahoma statute goes beyond those of New York and California in at least one important respect; it is the most explicit in the country in the guidance it gives to judges in determining whether an incarcerated parent separated from her child for an extended period of time is "unfit." A great virtue of the statute is the way it compels a court to go beyond a superficial conclusion about the parent's inability to resume physical custody of her child in the immediate future and to examine a variety of factors going to the parent's ability to play a meaningful role in her child's life while in prison.[231]

Thus, for parents confined on sentences of ten years or more, the court is directed to examine the following factors in determining whether the continuation of the parent-child relationship would harm the child:

> [1.] the duration of incarceration and its detrimental effect on the parent-child relationship;

---

[230] *See In re* Christina T., 590 P.2d 189 (Okla. 1979), discussed *supra* notes 67-70 and accompanying text.

[231] Unlike recent New York cases involving parents serving long term prison sentences, discussed *supra* note 214, the Oklahoma statute compels an individualized judicial inquiry into such cases.

[2.] any previous incarcerations;
[3.] any history of criminal behavior, including crimes against children;
[4.] the age of the child;
[5.] the evidence of abuse or neglect of the child or siblings of the child by the parent; and
[6.] the current relationship between the parent and the child and the manner in which the parent has exercised parental rights and duties in the past.[232]

The Oklahoma statute further provides that incarceration of the parent is not sufficient to terminate parental rights.[233] Thus, the Oklahoma statute provides a way of measuring the parent's fitness in terms of her ability to maintain a viable relationship with her child while in prison.

Similarly, the statutes of Georgia and Mississippi, although less comprehensive than the Oklahoma statute, provide a court with important guidance in assessing the parent's *present* relationship with her child. In Georgia the court may consider the "[c]onviction of the parent of a felony and imprisonment thereof which has a demonstrable negative effect on the quality of the parent-child relationship."[234] In

---

[232] OKLA. STAT. ANN. tit. 10, § 1130 (A)(7)(d) (West 1987). The Oklahoma termination of parental rights statute provides in pertinent part:

Termination of parental rights in certain situations
A. The finding that a child is delinquent, in need of supervision or deprived shall not deprive the parents of the child of their parental rights, but a court may terminate the rights of a parent to a child in the following situations:

. . . .

7. A finding that all of the following exist:
a. the child is deprived as defined in this chapter, and
b. custody of the child has been placed outside the home of a natural or adoptive parent, guardian or extended family member, and
c. the parent whose rights are sought to be terminated has been sentenced to a period of incarceration of not less than ten (10) years, and
d. the continuation of parental rights would result in harm to the child based on consideration of the following factors, among others: the duration of incarceration and its detrimental effect on the parent-child relationship; any previous incarcerations; any history of criminal behavior, including crimes against children; the age of the child; the evidence of abuse or neglect of the child or siblings of the child by the parent; and the current relationship between the parent and the child and the manner in which the parent has exercised parental rights and duties in the past, and
e. termination of parental rights is in the best interests of the child.
Provided, that the incarceration of a parent shall not in and of itself be sufficient to deprive a parent of his parental rights;

OKLA. STAT. ANN. tit. 10, § 1130 (West 1987).

Other portions of the Oklahoma statute pertaining to convictions for crimes against children are discussed in Section IV, *supra*.

[233] *Id.* at tit. 10, § 1130, following para. 7(e).

[234] GA. CODE ANN. § 15-11-81(b)(4)(B)(iii) (1990). The Georgia termination of parental rights statute provides in pertinent part as follows:

Mississippi rights may be terminated "[w]hen there is an extreme and deep-seated antipathy by the child toward the parent or when there is some other substantial erosion of the relationship between the parent and the child which was caused at least in part by the parent's . . . prolonged imprisonment."[235]

Grounds for termination; other dispositions

. . . .

(b) . . . [T]he court by order may terminate the parental rights of a parent with respect to the parent's child if:

. . . .

(4)(A) The court determines parental misconduct or inability by finding that:

(i) The child is a deprived child, as such term is defined in Code Section 15-11-2;

(ii) The lack of proper parental care or control by the parent in question is the cause of the child's status as deprived;

(iii) Such cause of deprivation is likely to continue or will not likely be remedied; and

(iv) The continued deprivation will cause or is likely to cause serious physical, mental, emotional, or moral harm to the child.

(B) In determining whether the child is without proper parental care and control, the court shall consider, without being limited to, the following:

. . . .

(iii) Conviction of the parent of a felony and imprisonment therefor which has a demonstrable negative effect on the quality of the parent-child relationship;

GA. CODE ANN. § 15-11-81 (1990).

An example of the application of the Georgia statute is *In re* H.L.T., 164 Ga. App. 517, 298 S.E.2d 33 (1982). There, the father had been convicted of manslaughter for killing his wife. The lower court had terminated the father's parental rights. The appellate court reversed. The court stated the rule that "[e]vidence of *past* unfitness, standing alone, is not enough; clear and convincing evidence of *present* unfitness is required." *Id.* at ____, 298 S.E.2d at 35. The court then concluded that the record did not contain sufficient evidence of the father's *present unfitness*, citing the father's devotion to his child, his attempts to maintain contact with his child while in prison, his model institutional behavior and impending release on parole, and the job and home he had lined up for after his release. *Id.* at ____, 298 S.E.2d at 35.

[235] MISS. CODE ANN. § 93-15-103 (3)(e) (Supp. 1992). The Mississippi termination of parental rights statute provides in pertinent part:

Factors justifying adoption - grounds for termination of parental rights - alternatives

(1) When a child has been removed from the home of its natural parents and cannot be returned to the home of his natural parents within a reasonable length of time because returning to the home would be damaging to the child or the parent is unable or unwilling to care for the child, and when adoption is in the best interest of the child, taking into account whether adoption is needed to secure a stable placement for the child and the strength of the child's bonds to his natural parents and the effect of future contacts between them, the grounds listed in subsections (2) and (3) of this section shall be considered as grounds for termination of parental rights. The grounds may apply singly or in combination in any given case.

. . . .

(3) Grounds for termination of parental rights shall be based on one or more of the following factors:

Finally, in Massachusetts, although the legislature has not addressed the issue of parental incarceration,[236] at least two courts have

. . . .

(e) When there is an extreme and deep-seated antipathy by the child toward the parent or when there is some other substantial erosion of the relationship between the parent and child which was caused at least in part by the parent's serious neglect, abuse, prolonged and unreasonable absence, unreasonable failure to visit or communicate, or prolonged imprisonment.

(4) Legal custody and guardianship by persons other than the parent as well as other permanent alternatives which end the supervision by the department of public welfare should be considered as alternatives to the termination of parental rights, and these alternatives should be selected when, in the best interest of the child, parental contacts are desirable and it is possible to secure such placement without termination of parental rights.

MISS. CODE ANN. § 93-15-103(3)(e) (Supp. 1992).

[236] The Massachusetts termination of parental rights statute provides in pertinent part as follows:

Consent not Required in Certain Cases.

. . . .

(b) The department of social services or any licensed child care agency may commence a proceeding, independent of a petition for adoption . . . to dispense with the need for consent of [the parent or other person whose consent would normally be required] to the adoption of a child in the care or custody of said department or agency . . . . The court shall issue a decree dispensing with the need of said consent or notice of any petition for adoption of such child subsequently sponsored by said department or agency if it finds that the best interests of the child as defined in paragraph (c) will be served by said decree . . . .

(c) . . .

In determining whether the best interests of the child will be served by issuing a decree dispensing with the need of consent as permitted under paragraph (b), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person [whose consent would normally be required] to assume parental responsibility, and shall also consider the plan proposed by the department or other agency initiating the petition.

If said child has been in the care of the department or a licensed child care agency for more than one year, in each case irrespective of incidental communications or visits from his parents or other person [whose consent would normally be required], irrespective of a court decree awarding custody of said child to another and notwithstanding the absence of a court decree ordering said parents or other person to pay for the support of said child there shall be a presumption that the best interests of the child will be served by . . . issuing a decree dispensing with the need for consent as permitted under paragraph (b).

MASS. ANN. LAWS, ch. 210, § 3 (Law. Co-op 1981).

This statutory presumption that the best interests of a child in care for more than one year will be served by allowing the child to be adopted was found to be unconstitutional in *In re* Department of Social Servs. to Dispense with Consent to Adoption, 389 Mass. 793, 452 N.E.2d 497 (1983). The court found that the presumption effectively shifted the burden of proof onto the parent to prove her *fitness*, in contravention of *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982), in which the Supreme Court held that in a termination of parental rights proceeding, the burden of proof is on the state to prove parental unfitness by clear and convincing evidence. However, the Massachusetts court affirmed the termination of the mother's rights, finding that the lower court

done so in a noteworthy fashion. The requirement that courts look beyond the parent's ability to care physically for the child, was discussed in *Petition of Boston Children's Service Association.*[237] There, the mother was serving a sentence of life imprisonment for murder. The father was not incarcerated. After her arrest, the mother had arranged for her two daughters to live with their maternal grandmother. This had not worked out, however, and the children had been placed in foster care in separate foster homes. The older child had subsequently been discharged to the father, and the father had been caring well for his daughter. However, the childcare agency had sought to terminate the rights of both parents to the younger child. This child had special needs and had for several years been with a foster mother who now wanted to adopt her. The lower court had granted the petition to terminate the parents' rights.[238]

The appellate court reversed, holding that the agency had failed to establish the parents' unfitness. The court first recognized that several factors in the case suggested that the parents were *not* unfit: the mother's initial arrangements for the children to be placed with a relative, the mother's efforts to maintain contact with her children, the father's early efforts to reunite the family, the parents' continued contact with one another after the mother's imprisonment and their efforts to regain custody of the children. In addition, with respect to the father, the court noted the excellent care he had been providing to his older daughter.[239]

As to the mother, while the court acknowledged that the mother's life sentence was "a circumstance which bears upon her fitness because of her long unavailability,"[240] the court stated that the mother's incarceration did not "conclusively render her unfit as a parent."[241] In so finding, the court drew distinctions between physical and legal custody. The court noted that while the mother was unable to obtain physical custody of her child, it was conceivable that she and the father could obtain legal custody, that the father could obtain physical custody and

---

had not relied on the statutory presumption in finding the mother to be unfit. *In re* Department of Social Servs., 389 Mass. at ____, 452 N.E.2d at 503.

[237] *In re* Boston Children's Serv. Ass'n, 20 Mass. App. 566, 481 N.E.2d 516, *review denied*, 396 Mass. 1102, 484 N.E.2d 102 (1985).

[238] *Id.* at ____, 481 N.E.2d at 518-19.

[239] *Id.* at ____, 481 N.E.2d at 520.

[240] *Id.* at ____, 481 N.E.2d at 521.

[241] *Id.* at ____, 481 N.E.2d at 517 (citing Petition to Dispense with Consent to Adoption, 383 Mass. 573, 581-582 & n.7, 421 N.E.2d 28, ____ (1981)).

that the mother was capable of assisting in issues concerning her children's health and education.[242] The court also distinguished between custody and adoption, noting that even if physical custody were to remain with the foster mother, the mother would retain her parental rights and could therefore continue to participate in decisionmaking. Thus, the court explicitly rejected the notion that the mother was unfit simply because she would not be able to care physically for her child for an extended period of time. Instead, the court vacated the termination of parental rights and remanded to the lower court for further proceedings to determine the parents' current fitness.[243]

Finally, the procedures to be followed at a termination hearing were the subject of another Massachusetts case, *Petition of Department of Public Welfare*.[244] There, despite explicit findings that the mother had reorganized her life, had participated extensively in educational, vocational and rehabilitative programs while in prison and appeared to be a fit mother,[245] the lower court had terminated parental rights primarily on the basis of the child's placement with a foster family who wished to adopt her.

The appellate court reversed. In so doing, the court held that the lower court had failed to conduct a thorough examination of the mother's current parental fitness.[246] Specifically, the lower court had erred by simply accepting *in toto* the psychiatric report submitted by the state.[247] The court therefore annulled the termination of parental rights and remanded the proceeding for a new hearing on the issue of

---

[242] *Id.* at ____, 481 N.E.2d at 521.

[243] *Id.* at ____, n.3, 481 N.E.2d at 521 n.3.

[244] Petition to Dispense with Consent to Adoption, 383 Mass. 573, 421 N.E.2d 28 (1981).

[245] *Id.* at ____ n.1, 421 N.E.2d at 29 n.1 (1981).

[246] The court defined the requirements of such an inquiry:

> [T]he personal rights implicated in proceedings of this character require the judge to exercise the utmost care in promulgating custody awards. Such care, in our view, demands that the judge enter specific and detailed findings demonstrating that close attention has been given the evidence and that *the necessity of removing a child from his or her parents has been persuasively shown.*

Id. at ____, 421 N.E.2d at 39 (emphasis in original) (quoting Custody of Minor, 377 Mass. 876, 885, 389 N.E.2d 68, 85 (1979)).

[247] The court stated:

> Wholesale incorporation of the psychiatrist's testimony in the absence of specific and detailed findings by the judge make it impossible for us to ascertain whether the judge has given close attention to the evidence and arrived at an independent judgment based upon that evidence, or whether the judge is simply rubberstamping the conclusion of the expert witness.

Id. at ____, 421 N.E.2d at 39.

the mother's current parental fitness. The court directed the agency immediately to resume visitation, which had been suspended during the pendency of the termination proceeding, unless the court on remand determined that visitation would be "a serious threat to the welfare of the child."[248]

Thus, the court in *Petition of Department of Public Welfare* was concerned that rights had been terminated without a careful, individualized judicial examination into the fitness of the parent. The decision implicitly recognizes the profound complexity of assessing the quality of a parent's relationship with her child and determining whether that relationship should be permanently severed.

In combination, the statutes and cases of New York, California, Oklahoma, Georgia, Mississippi and Massachusetts provide a framework that satisfies all three procedural due process requirements articulated in Section II. They provide a determination of parental fitness through a full adversarial hearing at which the parent is physically present; they focus on *present fitness*, rather than past misconduct; and they inquire into the nature and quality of the parent-child relationship as shown by the parent's ability to maintain a place of importance in her child's life while in prison through performance of the intangible aspects of parenting. From a composite of these states' approaches can be discerned a model for addressing parental incarceration in the context of termination of parental rights proceedings. Such a model is outlined below.

B. Model for Termination of Parental Rights Proceedings Involving Incarcerated Parents

A model system for termination of parental rights proceedings involving incarcerated parents comprises three central components: the procedures to be used in the hearing, the affirmative duties of the child-care agencies to assist the incarcerated parents and the manner in which parental fitness is to be evaluated. Drawing from the state examples discussed in Part A, such a model would contain the following features:

---

[248] *Id.* at _____, 421 N.E.2d at 40.

1. *Hearing Procedures*

State courts must provide the following due process protections for their proceedings to terminate incarcerated parents' rights to their children:

A. A full adversarial hearing is required; summary judgment is precluded.[249]
B. The incarcerated parent has a right to be physically present for the hearing.[250]
C. An indigent parent has a right to appointment of counsel.[251]

2. *Duties of Childcare Agency*

The childcare agency has the following duties:

A. To suggest appropriate rehabilitative services and assist the parent in obtaining those services.[252]
B. To transport children to prison to see their parents on a regular basis and to facilitate contact between parent and child through collect phone calls and other means.[253]
C. To conduct an investigation to locate relatives or friends of the parent or child who may be willing to care for the child during the parent's incarceration and to provide such caretakers with financial assistance and other services.[254]

3. *Requirements for Judicial Inquiry Into Parental Fitness*

In determining a parent is unfit, states must use the following safeguards:

A. The agency must make a threshold showing that it has discharged the duties specified in the previous section.[255]
B. The inquiry must focus on *present* parental fitness as shown by:

---

[249] *See In re* Christina T., 590 P.2d 189 (Okla. 1979), discussed *supra* notes 67-70 and accompanying text.

[250] *See* CAL. PENAL CODE § 2625 (West 1982 & Supp. 1992), discussed *supra* note 49 and accompanying text.

[251] *See* N.Y. FAM. CT. ACT § 262 (McKinney 1983), *supra* note 204 and accompanying text.

[252] *See* N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney Supp. 1992), quoted *supra* note 100.

[253] *See* N.Y. SOC. SERV. LAW § 384-b(7)(f)(5) (McKinney Supp. 1992). CAL. WELF. & INST. CODE § 361.5(e) (West Supp. 1992), quoted *supra* notes 100 & 101 respectively, and accompanying text.

[254] *See supra* note 189; and CAL. WELF. & INST. CODE § 361.5(e)(4) (West Supp. 1992), quoted *supra* note 101.

[255] *See In re* Sheila G., 61 N.Y.2d 368, 462 N.E.2d 1139, 474 N.Y.S. 2d 421 (1984), discussed *supra* note 206 and accompanying text.

1. the institutional programs in which the parent has participated and the extent of the parent's rehabilitation while in prison.[256]

a. If the parent so requests, the court must order the production of prison personnel who can offer first-hand testimony concerning the parent's participation and progress in programs.

b. Evidence concerning parental rehabilitation must be supported by in-court expert testimony, which, in turn, must be based upon a current evaluation.[257]

c. If the parent so requests, she must be provided with an expert without cost.[258]

2. the extent of the parent's efforts to maintain regular contact with her child.[259]

3. for parents serving prison sentences of ten years or longer, an evaluation of the quality of the parent-child relationship—the extent to which the parent is able to maintain a place of importance in her child's life and to perform the intangible aspects of parenting, such as providing the child with nurturing love.[260]

a. Parental unfitness may *not* be found solely on the basis of the parent's inability to resume *physical* custody of her child. [261]

b. If the parent so requests, the court must order the production of prison personnel who can offer first-hand testimony concerning the parent's relationship with her child.

c. Evidence concerning the quality of the parent-child relationship must be supported by in-court expert testimony, which, in turn, must be based upon a current evaluation.[262]

d. If the parent so requests, she must be provided with an expert without cost.[263]

e. Factors the court must consider include, but are not limited to: (1.) the duration of the parent-child relationship; (2.) any previous incarcerations; (3.) any history of criminal behavior, including crimes against children; (4.) the age of the child; (5.) the evidence of abuse or neglect of the child or siblings of the child by the parent; and (6.) the current relationship between the par-

---

[256] *See supra* notes 225 & 234 and accompanying text.

[257] *See supra* note 229 and accompanying text; *c.f. supra* note 234 and accompanying text.

[258] *See* N.Y. COUNTY LAW § 722-c (McKinney 1991).

[259] *See supra* notes 198-202 and accompanying text.

[260] *See* OKLA. STAT. ANN. tit. 10, § 1130 (A)(7)(d) (West 1987), reproduced *supra* note 232; GA. CODE ANN. § 15-11-81(4)(B)(iii) (1990), quoted *supra* note 234; MISS. CODE ANN. § 93-15-103 (3)(e) (Supp. 1991), quoted *supra* note 235.

[261] *See supra* note 242 and accompanying text.

[262] *See supra* note 229 and accompanying text; *c.f. supra* note 247 and accompanying text.

[263] *See* N.Y. COUNTY LAW § 722-c (McKinney 1991).

ent and the child and the manner in which the parent has exercised parental rights and duties in the past.[264]

The adoption of such a model in state termination of parental rights proceedings would help ensure accuracy in judicial fact finding concerning parental fitness, protect fundamental parental rights through individualized determinations, and preserve viable, nurturing parent-child relationships. In short, such a model would enable states to conform their practices to constitutional standards.

VII. CONCLUSIONS

As incarceration rates increase, the problems associated with parental incarceration worsen. Parents with no other available childcare resources must turn to the foster care system. State legislators, judiciaries and child welfare agencies are forced to deal with complex and emotionally wrenching family situations.

The traditional model of foster care placement is ill-equipped to deal with this growing phenomenon of parental incarceration. That model contemplates that a parent be prepared to resume physical custody of her child within a relatively short period of time, sometimes as little as one year after the initial placement in care.[265] Under that model, parents who are unwilling or unable to do this are deemed unfit parents with no meaningful relationship with their children, and such parents may have their parental rights terminated.

This time-driven model of foster care placement simply cannot cope with the situation of an incarcerated parent who has an ongoing, viable, positive relationship with her child but who is unable to resume physical custody of her child for many years. The traditional model does not recognize that parents who cannot meet the tangible, physical responsibilities of parenting, such as providing a dwelling space and financial support, may still be able to offer intangible qualities of parental love and nurturing, which are perhaps of even greater importance to the children and which no one except the parents can provide.

As discussed in Sections III through V, states only add to the problems of parental incarceration by needlessly severing viable parent-child relationships through termination of parental rights proceedings

---

[264] OKLA. STAT. ANN. tit 10, § 1130 (A)(7)(d) (West 1987). This portion of the statute is quoted *supra* note 232.

[265] *See supra* notes 165-67 and accompanying text.

that both fail to take full measure of the complexities of such family situations and violate the procedural due process rights of the parents. These constitutional shortcomings are apparent in three types of state responses.

First, in termination proceedings involving incarcerated parents, states utilize drastically streamlined hearing procedures, such as conducting hearings in the parents' absence or forgoing a hearing altogether and disposing of the case through a summary judgment motion. Second, states allow parental rights to be terminated on the basis of past conduct alone, without any inquiry into present parental fitness. Third, states permit parental rights to be extinguished solely on the basis of the length of the parent's prison sentence and her consequent prolonged future physical separation from her child.

These responses grossly simplify and distort what should be a profoundly complex inquiry into the parent-child relationship. All of these responses reflect, at the very least, confusion about how to address the problems of parental incarceration. The responses probably reflect frustration as well; these cases are messy, and many legislators, judges and child welfare officials would undoubtedly like to wish them away.[266]

While the constitutional inadequacies of state approaches to termination of incarcerated parents' rights are widespread, a few jurisdictions have developed systems noteworthy for their careful treatment of these cases. As noted in Section VI, Oklahoma, New York and California, and to a lesser extent Georgia and Mississippi, have enacted statutory schemes that require judges, child welfare officials and caseworkers to give these cases the thoughtful, balanced attention they require and protect the procedural due process rights of incarcerated parents. Courts in Oklahoma, California, Georgia and Massachusetts have dealt with these cases in a similarly insightful manner.

These statutes and cases provide a model for termination proceedings involving incarcerated parents that will satisfy procedural due process requirements. Such a model would compel courts and agencies dealing with incarcerated parents to conduct painstaking, individual-

---

[266] As discussed in Section V, *supra*, caseworkers undoubtedly prefer not to have to deal with the emotional and logistical difficulties associated with such cases, such as time and expense involved in taking children to prison to see their parents, arranging counseling and other services for parent and child so that they may better cope with the pain of separation or the expense of keeping a child in foster care for an extended period of time.

ized examinations of every family situation in order to recognize those cases in which a viable parent-child relationship exists.

These constitutional requirements are not the only consideration. Adoption of a model along the lines suggested would also amount to sound and farsighted public policy. By following such an approach, states can ensure that a parent's incarceration will not lead to the needless destruction of her family. The mere fact of a parent's incarceration is tragedy enough for her family; a state should not add to the family's agony by unnecessarily and permanently severing the bonds between parent and child. In those cases in which a viable parent-child relationship is found to exist, states must work to support, preserve and strengthen the relationship, complicated as that task may be.

However, even if state systems are restructured along the lines suggested, the problems associated with parental incarceration will remain. Indeed, those problems can probably only be solved by implementing alternatives to incarceration so that parents who are their children's primary caretakers are no longer being imprisoned. Sadly, such a radical rethinking of our criminal justice system is not likely to occur in the near future.