

TERMINATION OF PARENTAL RIGHTS: AN ADDITIONAL SENTENCE FOR INCARCERATED PARENTS

INTRODUCTION

Termination of parental rights has severe ramifications in that it permanently severs the parent-child relationship, rendering the parent legally unable to participate in the child's life.¹ For incarcerated parents, termination of parental rights poses particular problems and considerations.² Each state handles termination for imprisoned parents differently, ranging from states that allow termination based on incarceration for a specified period of time³ to states that conduct a full-scale critique of the parent-child relationship with incarceration as only one consideration.⁴ Based on the available psychological data⁵ and constitutional concerns,⁶ the only acceptable approach to termination of parental rights for incarcerated parents is one that looks beyond the parent's status as incarcerated and analyzes the parent-child relationship as a whole. Less thorough approaches may legitimately conserve time and resources, but these savings fail to outweigh the damage caused by erroneous termination or the countervailing risk of leaving a child in a harmful relationship.⁷

¹ See, e.g., IND. CODE ANN. § 31-35-6-4 (West Supp. 1997) (stating that termination of parental rights ends all rights and obligations between the natural parent and child, including any rights to custody, control, visitation, or support); N.J. STAT. ANN. § 9:3-50 (West 1993) (declaring that adoption ends all rights and responsibilities between the natural parent and the child).

² See *In re Caldwell*, 571 N.W.2d 218, 219 (Mich. Ct. App. 1997) (noting the difficulty in applying the State's termination statute to incarcerated parents since it is difficult to analyze contact and support when the parent is incarcerated); *In re L.V.*, 482 N.W.2d 250, 258-59 (Neb. 1992) (discussing the problem of the presence of an incarcerated parent at hearings with respect to transportation, delay, and inconvenience).

³ See, e.g., COLO. REV. STAT. ANN. § 19-3-604 (West 1990 & Supp. 1997) (permitting termination of parental rights if the State is to incarcerate the parent for more than six years from the date the child was adjudicated dependent or neglected).

⁴ See, e.g., *In re L.A.S.*, 134 N.J. 127, 631 A.2d 928 (1993).

⁵ See *infra* Part I-B and accompanying notes.

⁶ See *infra* Part I-A and accompanying notes.

⁷ See *In re D.P.*, 465 N.W.2d 313, 315-16 (Iowa Ct. App. 1990). The court ter-

In the context of imprisoned parents, termination proceedings are usually initiated in one of three ways: (1) by the state,⁸ (2) by the non-incarcerated natural parent who has remarried and would like his or her new spouse to adopt the child,⁹ or (3) by a family member or foster family with whom the child lives during the parent's incarceration.¹⁰ For incarcerated and non-incarcerated parents alike, every state has a statute authorizing involuntary termination of parental rights.¹¹ Termination generally requires clear and convincing evidence of parental unfitness, severe neglect, or abandonment to be presented at a full hearing.¹² Some states terminate incarcerated parents' rights simply because they will be incarcerated for a specified period of time¹³ or have committed certain types of crimes.¹⁴ In these states, the burden to demonstrate unfitness or abandonment is greatly diminished or nonexistent because criminal status essentially provides the basis for termination.¹⁵ Other states look to efforts

minated parental rights after focusing largely on the fact of incarceration and overlooked the strong emotional relationship shared by the mother and children and the distress that would result from termination. *See id.*; *see also* *E.W.R. v. W.T.J.*, 702 So. 2d 1343, 1345 (Fla. Dist. Ct. App. 1997). The court focused on the efforts of the father to maintain contact with and to provide support for his child and decided not to terminate parental rights. *See id.* Although the court received information that continuing the relationship could prove harmful, the child was left in a relationship with a father who would be in prison for sexual battery until the child was 17. *See id.*

⁸ *See, e.g., D.P.*, 465 N.W.2d at 314 (noting that the state instituted the proceedings for termination of parental rights).

⁹ *See, e.g., E.W.R.*, 702 So. 2d at 1343-44 (evidencing an attempt by a biological mother's new husband to adopt the mother's child).

¹⁰ *See, e.g., In re M.F.*, 660 So. 2d 952, 953 (La. Ct. App. 1995) (setting forth the facts of the case as a petition by a grandmother for adoption of the child); *In re Christina P.*, 220 Cal. Rptr. 525, 526 (Cal. Ct. App. 1985) (explaining the factual situation as a petition by a foster family to terminate the parental rights of an incarcerated father, thereby freeing the child for adoption).

¹¹ *See, e.g., IOWA CODE ANN.* § 232.116 (West 1994 & Supp. 1998); *KY. REV. STAT. ANN.* § 625.050 to § 625.090 (Michie 1990 & Supp. 1996); *LA. CHILDREN'S CODE ANN.*, art. 1015 (West 1995 & Supp. 1998); *ME. REV. STAT ANN.* tit. 22, § 4055 (West 1992 & Supp. 1997).

¹² *See Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982) (requiring clear and convincing evidence as the standard of proof prior to termination); *In re L.A.S.*, 134 N.J. 127, 133-35, 631 A.2d 928, 931-32 (1993) (noting that unfitness, abandonment, or neglect will justify termination).

¹³ *See COLO. REV. STAT. ANN.* § 19-3-604 (West 1990 & Supp. 1997) (allowing termination of parental rights if the length of a parent's incarceration extends for more than six years from the date the child was adjudicated dependent or neglected).

¹⁴ *See IND. CODE ANN.* § 31-35-3-4 (West Supp. 1997) (setting forth that convictions for certain types of crimes including murder, rape, or involuntary manslaughter may be grounds for termination of parental rights).

¹⁵ *See infra* Part II-A and accompanying notes.

made by the parent during incarceration to maintain contact with the child or the incarcerated parent's ability to provide for the child.¹⁶ Failure to make these efforts or to provide for the child will allow for termination based on neglect or abandonment.¹⁷ Some states engage in a full-scale analysis of the parent-child relationship by considering the nature of the relationship before and after incarceration and the effects of parental incarceration on the child in order to determine if the statutory criteria for termination have been met.¹⁸

In light of the psychological data¹⁹ and due process concerns,²⁰ the most beneficial approach is one that analyzes the parent-child relationship as a whole. Specifically, all states should provide a full adversarial hearing at which the parent is present and represented by counsel.²¹ At the hearing, the court should consider several factors in assessing whether to terminate parental rights. Specifically, the court should examine the parent-child relationship before and after incarceration as well as the psychological impact of the parent's incarceration on the child.²² The court should also consider the parent's ability to fulfill his or her responsibilities as a parent during incarceration.²³ While it is true that the fact of incarceration is an important factor to consider in termination proceedings, it should not be dispositive.²⁴ States that terminate parental rights based on incarceration status may permanently sever the important, positive

¹⁶ See *infra* Part II-C and accompanying notes.

¹⁷ See *infra* Part II-C and accompanying notes.

¹⁸ See *infra* Part II-D and accompanying notes.

¹⁹ See *infra* Part I-B and accompanying notes.

²⁰ See *infra* Part I-A and accompanying notes.

²¹ See Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 773-81 (1991-92) (emphasizing the importance of a parent's presence and representation at termination hearings).

²² See *In re L.A.S.*, 134 N.J. 127, 143, 631 A.2d 928, 936 (1993) (discussing the psychological issues and due process concerns raised in termination proceedings for incarcerated parents and citing these factors as considerations in assessing termination for incarcerated parents).

²³ See *id.*

²⁴ See *id.* (arguing that termination for incarcerated parents cannot be decided "without a full and conscientious consideration of all relevant facts and circumstances"); see also MO. ANN. STAT. §211.447(3)(6) (West 1996 & Supp. 1998) ("Incarceration in and of itself shall not be a grounds for termination of parental rights."); *In re D.S.G.*, 947 S.W.2d 516, 519 (Mo. Ct. App. 1997) (explaining that incarceration alone does not establish abandonment sufficient to support termination of parental rights).

relationship that a parent and child share.²⁵ This decision would seem shortsighted in cases in which the parent will be incarcerated for a relatively short period of time or wherein the crime committed is not indicative of the prisoner's parenting skills.²⁶ Conversely, failure to undertake a full analysis of the parent-child relationship may leave a child in a damaging, harmful relationship with a parent merely because the parent maintained minimal contacts²⁷ or because the parent did not commit the "right" kind of crime to allow for termination.²⁸

States have a legitimate interest in conserving time and administrative resources, which would be achieved by using less-than-thorough approaches for termination.²⁹ Termination based on less than a comprehensive hearing will conserve time and resources because decisions can be made quickly and testimony by experts regarding the psychological impact of incarceration on children may not be required.³⁰ Further, if the parent-child relationship is not

²⁵ See Note, *On Prisoners and Parenting: Preserving the Tie That Binds*, 87 YALE L.J. 1408, 1414 (1978) [hereinafter *On Prisoners and Parenting*] (maintaining that separating the child from a parent once the parent-child bond has been formed can seriously disrupt the emotional development of the child).

²⁶ See, e.g., COLO. REV. STAT. ANN. § 19-3-604 (West Supp. 1997) (stating that incarceration of at least six years shows unfitness and permits termination); IOWA CODE ANN. § 232.116 (West 1994 & Supp. 1998) (permitting termination when the parent will be incarcerated for more than five years from the date of the termination hearing and the child is in state care); MD. CODE ANN., FAM. LAW § 5-313 (1991 & Supp. 1997) (allowing termination of parental rights for children in state care for more than a year, thereby forcing any incarcerated parent who cannot arrange for private care to face termination of parental rights after one year).

²⁷ See, e.g., *E.W.R. v. W.T.J.*, 702 So. 2d 1343, 1343-45 (Fla. Dist. Ct. App. 1997). A Florida court decided not to terminate a natural father's rights when the father would be in jail until the child was 17, although the court was presented with evidence that the child's relationship with the father was harmful. See *id.* The court considered only efforts to contact and support the child and decided not to terminate the father's rights. See *id.* It is ironic to note that the father actually provided very little contact or support, but, because he was incarcerated, the court determined that he had made enough of an effort to avoid termination. See *id.* at 1345. The court, focusing solely on contact and support, left the child in the harmful relationship. See *id.*

²⁸ See ARIZ. REV. STAT. ANN. § 8-533 (West 1989 & Supp. 1997) (permitting termination if the parent is convicted of a felony where the felony "is of such nature as to prove the unfitness of such parent to have future custody and control of the child"); IND. CODE ANN. § 31-35-3-4 (West Supp. 1997) (allowing termination if the parent has been convicted of certain types of crimes including murder or rape or involuntary manslaughter).

²⁹ See *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("The establishment of prompt, efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication.").

³⁰ See *infra* Part II-A.

terminated, the state must address the issues of visitation in prison and reunification of the family upon release.³¹ Lesser approaches may be fiscally attractive, but the money saved does not justify the harm of wrongful termination of parental rights or the potential risk of leaving a child in a harmful relationship.³²

Part I of this Note will discuss the available psychological data related to a parent's incarceration and the effect of parental incarceration on children. In addition, Part I will discuss the constitutional concerns that are implicated when parental rights are terminated. Part II will look at various ways in which states approach termination of parental rights for incarcerated parents. Part II will also suggest that the most appropriate approach is one that looks beyond the state of incarceration, the nature of the parent's crime, or the parent's minimal contacts and instead engages in a full-scale analysis of the parent-child relationship when considering whether to terminate parental rights of incarcerated parents.

I. PSYCHOLOGICAL AND DUE PROCESS CONCERNS REGARDING TERMINATION OF PARENTAL RIGHTS FOR INCARCERATED PARENTS

Whenever parental rights are terminated, it is important to address due process concerns³³ and to discuss the potential psychological impact of that termination on the child.³⁴ These issues become more convoluted in the context of prisoners and their children.³⁵

³¹ See *On Prisoners and Parenting*, *supra* note 25, at 1422-27 (discussing the special efforts that states must make to maintain a healthy relationship between an incarcerated parent and the child if the relationship is not terminated, as well as the problems that arise upon the parent's release).

³² See *Stanley*, 405 U.S. at 656-57. As the Court explained:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Id.

³³ See *id.* at 656-58 (addressing the due process concerns in termination cases).

³⁴ See *In re L.A.S.*, 134 N.J. 127, 138-41, 631 A.2d 928, 933-35 (1993) (emphasizing the importance of addressing psychological issues regarding termination for incarcerated parents).

³⁵ See William H. Sack, *Children of Imprisoned Parents*, 40 PSYCHIATRY 163, 163 (1977). The author contends that separation caused by imprisonment raises special problems and concerns for the parent-child relationship. See *id.* For example, the author notes that children of incarcerated fathers may show an increase in aggressive and anti-social behavior. See *id.* at 163, 169. Arguably, termination of rights for incarcerated parents will be more difficult in light of the problems caused by separation due to imprisonment. Additional problematic issues that arise in assessing

The psychological ramifications of parental imprisonment and termination of parental rights on a child are very complex, and the legal community must understand how these considerations will affect the child when contemplating termination.³⁶ Due process concerns are present in any termination case, but these issues are complicated by the fact of a parent's incarceration if a state is to provide a meaningful hearing and avoid termination based on a mere presumption.

A. *Due Process Concerns*

It is well established that the parent-child relationship is entitled to constitutional protection.³⁷ Therefore, any termination proceeding raises numerous constitutional concerns, the most essential of which involve due process rights.³⁸ *Stanley v. Illinois*³⁹ and *Santosky v. Kramer*⁴⁰ were two cases in which the United State Supreme Court addressed these concerns and struck down state procedures for termination of parental rights as violative of due process.

Stanley considered the constitutionality of an Illinois statute that allowed the State to terminate automatically the parental rights of unwed fathers without a particularized hearing or a determination of parental unfitness.⁴¹ Specifically, upon the death of the natural mother, the children of unwed fathers became wards of the State, thereby invalidating a father's parental rights.⁴² The State maintained that unwed fathers were unqualified to raise their illegitimate

termination for incarcerated parents include reunification upon release from prison, visitation while the parent is in prison, temporary child care while the parent is in prison, the age of the child, and the length of the parent's incarceration. *See On Prisoners and Parenting, supra* note 25, at 1416-29.

³⁶ *See infra* Part I-B and accompanying notes.

³⁷ *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (declaring that parents have a fundamental interest in "the religious future and education of their children"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)) ("[T]he 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."); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (stating that parents have a fundamental interest in controlling the education of their children).

³⁸ *See Stanley*, 405 U.S. at 651-52 (acknowledging that due process and equal protection are implicated in termination proceedings).

³⁹ 405 U.S. 645 (1972).

⁴⁰ 455 U.S. 745 (1982).

⁴¹ *See Stanley*, 405 U.S. at 646-47. Joan and Peter Stanley lived together intermittently for 18 years and produced three children, but never married. *See id.* at 646. Upon Joan's death, Peter lost custody of the children pursuant to an Illinois statute. *See id.* The statute declared that children born out of wedlock became wards of the state upon the death of the mother. *See id.*

⁴² *See id.*

children.⁴³ The State contended that unwed fathers demonstrated their unfitness as parents by virtue of their marital status alone, which warranted an automatic termination of parental rights.⁴⁴ By contrast, unwed mothers or divorced parents lost their children only after a court made an individualized determination of parental unfitness that rose to the level of neglect.⁴⁵

The Supreme Court invalidated the Illinois statute and required the State to conduct a hearing and make a particularized finding of unfitness or some other statutory basis before allowing termination.⁴⁶ In so holding, the Court opined that the Due Process Clause⁴⁷ and the Equal Protection Clause⁴⁸ mandate a thorough procedure to ensure that the rights of the parent and the child are protected.⁴⁹ The Court expressed its disapproval of presumptions, declaring them tolerable only when reasonable and necessary to promote a legitimate governmental interest.⁵⁰ It is important to note that the Court in

⁴³ See *id.* at 653.

⁴⁴ See *id.* at 650.

⁴⁵ See *id.*

⁴⁶ See *id.* at 657-58.

⁴⁷ See U.S. CONST. amend. XIV. The Due Process Clause states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." *Id.* The Due Process Clause clearly applies when the state interferes with the parent-child relationship. See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1922). Thus, the Court mandated individualized procedures to protect against inappropriate interference in the parent-child relationship. See *Stanley*, 405 U.S. at 656-58.

⁴⁸ See U.S. CONST. amend. XIV. The Equal Protection Clause provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* The Equal Protection Clause has been interpreted as forbidding states from discriminating against citizens based on their status. See *Glona v. American Guarantee Co.*, 391 U.S. 73, 75-76 (1968). The *Stanley* Court felt the Illinois legislation violated the Equal Protection Clause because it discriminated against Stanley based on his status as an unwed father without a particularized determination of unfitness. See *Stanley*, 405 U.S. at 656-58.

⁴⁹ See *Stanley*, 405 U.S. at 656-58. The Illinois statute violated the Due Process Clause and the Equal Protection Clause because it treated individuals differently based on their status with respect to a fundamental right. See *id.* at 658. Specifically, unwed fathers automatically lost their children due to their status rather than based on a specific finding of unfitness. See *id.*

⁵⁰ See *id.* at 655-57. The Court discussed *Carrington v. Rash*, 380 U.S. 89, 95-97 (1965), in which the Court struck down a Texas statute that forbade servicemen stationed in Texas from voting in local elections. See *Stanley*, 405 U.S. at 655-57. Although the *Carrington* Court agreed that Texas had a legitimate interest in limiting the voting pool to bona fide residents who intended to remain in the State, the Court did not approve of the blanket presumption that servicemen would not remain in the State and thus could be denied their fundamental right to vote. See *Carrington*, 380 U.S. at 95. Rather, the Court required the State to make individualized determinations regarding each serviceman's intent to remain in the State. See

Stanley mentioned that many unwed fathers may in fact be unfit and may, therefore, deserve to have their rights terminated.⁵¹ Despite the Court's recognition of this fact, the majority took issue with the State's procedure of automatic termination based on a presumption without a particularized showing of unfitness.⁵² This point is vital to the discussion of incarcerated parents. Termination may be the appropriate remedy for many incarcerated parents, but termination without a meaningful hearing — which includes a detailed analysis of the parent-child relationship and some individualized determination of unfitness, abuse, or neglect — is constitutionally unacceptable.⁵³

The Court, in *Santosky*, discussed the appropriate burden of proof for involuntary termination proceedings.⁵⁴ The Court reinforced the importance of the parent-child relationship and the fundamental interest that parents have in the "care, custody, and management" of their children.⁵⁵ In light of these interests, the Court noted that termination proceedings, and other procedures interfering with the parent-child relationship, must comply with the Due Process Clause.⁵⁶ The Court explained that due process requires at least clear and convincing evidence⁵⁷ of statutory criteria such as unfitness or abandonment before termination will be permitted.⁵⁸ In

id.

⁵¹ See *Stanley*, 405 U.S. at 654.

⁵² See *id.* at 654-58.

⁵³ See Genty, *supra* note 21, at 822. The author argues that termination of parental rights is unconstitutional where there is no individualized determination of unfitness or termination hearing at which the parent is present or represented by counsel. See *id.* at 771.

⁵⁴ See *Santosky v. Kramer*, 455 U.S. 745, 750-51 (1982).

⁵⁵ See *id.* at 753.

⁵⁶ See *id.* at 753-54.

⁵⁷ See *id.* at 747-48. The Court found, "Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence." *Id.* The Court indicated that states would be responsible for defining this standard of proof or adopting and defining a higher standard of proof. See *id.* at 769-70.

⁵⁸ See *id.* The Court balanced three factors to arrive at the clear and convincing evidence standard: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Id.* at 754. The Court announced that the private interest was strong and included parents' interests in raising their children. See *id.* at 758-61. The government's interests, the Court explained, included a desire to protect children and the need to conserve costs and resources. See *id.* at 766. The Court further posited that under the preponderance of the evidence standard, the risk of error was split equally between the parent and the State. See *id.* at 768. The Court noted that this risk was unacceptable in light of the important private interest at stake. See *id.* at 768-69. Accordingly, the Court

light of that requirement, the Court struck down New York's preponderance of the evidence standard as violative of the Due Process Clause.⁵⁹

Santosky established an increased burden that the government must meet in proceedings for termination of parental rights.⁶⁰ The opinion also strongly advocated the rights of parents to their children and the strength of the parent-child relationship.⁶¹ The Court clearly stated that parents do not lose their fundamental interest in their children "simply because they have not been model parents or have lost temporary custody of their child to the State."⁶² Thus, incarceration on its own should not negate a parent's interests in the child, and factors such as the parent-child relationship and the impact of a parent's incarceration on the child should be considered.⁶³

After *Santosky* and *Stanley*, involuntary termination requires the movant to produce at a hearing clear and convincing evidence of unfitness or some other statutory criteria permitting termination in the respective state. States now technically comply with this mandate by providing a hearing prior to termination and requiring at least clear and convincing evidence of unfitness, abandonment, or neglect before a parent's rights may be terminated.⁶⁴ In many states, however, this process adheres only to the letter and not to the true spirit of *Santosky* and *Stanley*.⁶⁵ Some states, either statutorily or judicially, determine unfitness, abandonment, or neglect based on the fact of incarceration for a specified time period or incarceration resulting from the commission of certain crimes, thus constituting a sufficient basis for termination.⁶⁶ Some states do not require or permit the parent to be present at the termination hearing, and counsel is often not provided.⁶⁷ If termination of parental rights continues to rest on

struck down the preponderance standard and required clear and convincing evidence as the requisite minimum burden in termination proceedings. *See id.*

⁵⁹ *See id.* at 768-69.

⁶⁰ *See Santosky*, 455 U.S. at 768-69.

⁶¹ *See id.* at 758-61.

⁶² *Id.* at 753.

⁶³ *See, e.g., Genty, supra* note 21, at 805-25 (analyzing state statutes that permit termination based on incarceration and pointing to the need to consider other factors).

⁶⁴ *See, e.g., WASH. REV. CODE ANN. § 13.34.190* (West 1993 & Supp. 1998) (requiring a hearing and clear and convincing evidence of specific statutory criteria prior to termination); *OHIO REV. CODE ANN. § 2151.41.4* (Anderson 1994 & Supp. 1997) (permitting termination if there exists clear and convincing evidence of certain statutory criteria including abandonment).

⁶⁵ *See infra* Parts II-A to II-C and accompanying notes.

⁶⁶ *See infra* Parts II-A to II-B and accompanying notes.

⁶⁷ *See, e.g., Lassiter v. Department of Social Servs.*, 452 U.S. 18, 31-32, (1980)

the nature of the crime or the length of incarceration, then unfitness is essentially presumed before the hearing, thereby negating the individualized determination required by *Stanley*. It is necessary that a procedure respect the interests of a parent in his or her child and the constitutional protection owed to the parent-child relationship.⁶⁸ States must require that a hearing, at which the parent is present and represented by counsel, be structured to enable the judge to engage in a detailed analysis of whether termination is proper.⁶⁹ Unfortunately, many states have failed to meet this requirement.

B. Psychological Data

The psychological effects of parental incarceration on children vary greatly from child to child.⁷⁰ Parental incarceration can have a pronounced negative effect on a child and may temporarily or permanently affect the child's development and future relationships.⁷¹ Conversely, many children can have healthy and productive relationships with an incarcerated parent, and, in fact, it is the termination of this relationship that can have serious and damaging effects.⁷² Because the effects of incarceration are so varied, individualized hearings and termination procedures become imperative and presump-

(noting that a right to counsel does not exist for every termination proceeding); *In re C.G.*, 885 P.2d 355, 357 (Colo. Ct. App. 1994) (finding that incarcerated parents do not have a constitutional right to be present at termination hearings); *In re L.V.*, 482 N.W.2d 250, 258 (Neb. 1992) (finding no due process violation when a court terminated the parental rights of an inmate who was not present at the hearing).

⁶⁸ See *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972) (recognizing that "procedure by presumption is always cheaper and easier" than procedures requiring individualized determinations, but mandating that parents should not be robbed of their rights, among which is a meaningful hearing prior to termination of custody).

⁶⁹ See *Genty*, supra note 21, at 771 (arguing that in deciding termination for the children of incarcerated parents "[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.")

⁷⁰ See *On Prisoners and Parenting*, supra note 25, at 1411-22. The author contends that the effects of parental incarceration on a child can vary depending on individual factors including: the age of the child when the parent is incarcerated; whether the child will be placed with a relative, in a foster home, or in an institution; and the nature of the parent-child relationship prior to incarceration. See *id.*

⁷¹ See *id.* at 1413-16 (discussing the negative effects on a child that can result from separation caused by the parent's incarceration, including development of a psychopathic personality, loss of verbal skills, academic difficulties, and delinquent behavior).

⁷² See *id.* at 1416 ("The impact of a temporary separation [due to incarceration] can be lessened by measures that encourage the child to maintain the relationship with the parent.").

tive approaches are inadequate.⁷³ Specifically, it is important to avoid the termination of a potentially positive relationship simply because the parent has committed a crime. The temporary loss of the parent during imprisonment can be extremely harmful without the added distress of permanent separation.⁷⁴ Alternatively, it is important to avoid leaving a child in a damaging relationship with an incarcerated parent simply because the conduct or crime of the parent does not trigger the presumption of unfitness.⁷⁵ In light of the inconsistent effects of parental incarceration on a child, a thorough analysis, which would consider the impact of a parent's incarceration on the child, is warranted to make the proper determination in a termination proceeding.⁷⁶

Data indicate that an incarcerated parent can have a beneficial relationship with his or her child.⁷⁷ Despite incarceration, healthy

⁷³ See *Fusco v. Fusco*, 186 N.J. Super. 321, 326-27, 452 A.2d 681, 684-85 (App. Div. 1982) (requiring an individualized hearing to determine visitation for an incarcerated parent due to the potentially varied psychological effects of a parent's incarceration on children).

⁷⁴ See Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 461-67 (1983) (discussing several studies that emphasize the importance of maintaining contacts between natural parents and children when the children are placed in foster care); see also *Frail v. Frail*, 370 N.E.2d 303, 304-05 (Ill. App. Ct. 1977) (holding that visitation with the incarcerated mother could be beneficial and rewarding for the child and noting that forbidding visitation could have an overall harmful effect).

⁷⁵ See *E.W.R. v. W.T.J.*, 702 So. 2d 1343, 1345 (Fla. Dist. Ct. App. 1997) (receiving evidence that continuing the parent-child relationship could be dangerous to the child in the future, yet not terminating parental rights because the father's behavior did not trigger the statute's definition of abandonment).

⁷⁶ See *On Prisoners and Parenting*, *supra* note 25, at 1418-19 (noting that in dealing with children of imprisoned parents it is important to consider the psychological effects of incarceration because "the psychological and emotional needs of a child whose parent is imprisoned are as important in assuring the child's normal development as are education or physical health and safety") (citations omitted); see also *In re L.A.S.*, 134 N.J. 127, 139, 631 A.2d 928, 934 (1993) (finding that the potential effects of incarceration on a child's psychological well-being are "extremely fact sensitive" and that "[t]he parent's incarceration must be assessed in terms of whether the attempts to maintain a parent-child relationship will be harmful to the child").

⁷⁷ See, e.g., *On Prisoners and Parenting*, *supra* note 25, at 1416-17 ("[I]n most cases of parental incarceration the child's welfare will best be served by maintaining the parent-child bond," which is generally done through visitation); see also Eva Lee Homer, *Inmate-Family Ties: Desirable But Difficult*, FED. PROBATION, Mar. 1979, at 47-48 (finding that interaction between inmates and their children can have positive effects such as lower recidivism, more successful parole for parents, and stronger family ties); Sack, *supra* note 35, at 168 (1977) (citing one case study in which visitation with an incarcerated father had calming, positive effects and helped to eliminate negative behavior in which the children had engaged since the father's incarceration).

interaction between parent and child is possible and the imprisoned parent can, in some cases, fulfill the child's psychological and emotional needs.⁷⁸ When the parent and child are separated, contact can mitigate the distress caused by separation.⁷⁹ Termination, which would erase this contact, can be very damaging.⁸⁰ In these cases, contact should be encouraged and termination should be discouraged, but only a full-scale analysis will reveal the benefits or detriments of maintaining the parent-child relationship.⁸¹ The length of incarceration and the possibility of frequent contact are important considerations in determining if a healthy relationship is possible or if termination is appropriate.⁸² States that look only to the underlying crime that resulted in incarceration, or to the minimal efforts made by incarcerated parents to maintain contact, will not address these concerns.⁸³

Negative effects on a child resulting from the detention of a parent can include anger, aggressive behavior, decline in school performance, and an increased risk of the child's own incarceration in the future.⁸⁴ These negative effects may spring from the lack of consistent parental interaction.⁸⁵ For infants, separation from the parent can be particularly harmful because babies form a critical bond with

⁷⁸ See Sack, *supra* note 35, at 168; see also *In re Daniel C.*, 480 A.2d 766, 769 (Me. 1984) (noting that incarcerated parents and children can form the appropriate parent-child relationship); *On Prisoners and Parenting*, *supra* note 25, at 1425-26 (arguing that an incarcerated parent and child can have a positive relationship and suggesting ways to facilitate the relationship); cf. *Turner v. Safley*, 482 U.S. 78, 95-96 (1987) (holding that the positive emotional aspects of marriage can exist despite the incarceration of one spouse).

⁷⁹ See Garrison, *supra* note 74, at 461-67 (discussing several studies that emphasize the importance of continued contact between parents and children).

⁸⁰ See *In re C.A.W.*, 683 A.2d 911, 918 (Pa. Super. Ct. 1996) (noting that termination of parental rights can be traumatic for a child and that the emotional bond between the parent and child must be considered prior to termination).

⁸¹ See, e.g., *In re Caldwell*, 571 N.W.2d 218, 219-21 (Mich. Ct. App. 1997). The court discussed section 710.51(6) of the Michigan Compiled Laws and section 27.3178(555.51)(6) of the Michigan Statutes Annotated, which permit termination based on visitation and support. See *id.* at 219-20. Accordingly, the appellate court stated that termination may be appropriate without a full-scale analysis that would consider evidence of the child's best interests. See *id.* at 220.

⁸² See *On Prisoners and Parenting*, *supra* note 25, at 1411-17 (listing length of incarceration, age of the child, and visitation as important factors in evaluating the effect of parental incarceration as those factors relate to forming a bond that will help avoid later psychotic behavior).

⁸³ See *Caldwell*, 571 N.W.2d at 220.

⁸⁴ See Justin Brooks and Kimberly Bahna, "It's a Family Affair" — *The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 281 (1994).

⁸⁵ See *On Prisoners and Parenting*, *supra* note 25, at 1411-14.

parents in the first six to twenty-four months of life.⁸⁶ Failure to form this bond can result in lifelong distress and socialization problems.⁸⁷ If a parent is incarcerated, the bond is not formed, and it generally cannot be formed with a foster family because the foster care system discourages caregivers from forming attachments to their foster children.⁸⁸ Shifting a child from one foster family to another exacerbates this effect and can increase the possibility of a child developing a psychopathic personality.⁸⁹ For very young children of incarcerated parents, therefore, termination may be the appropriate alternative so that the child may be adopted and can then form this bond with the adoptive parent.⁹⁰ States failing to engage in a full-scale analysis of the parent-child relationship that considers the age of the child do not address this concern. Thus, they ignore very important psychological and developmental considerations.

For older children, visits to prison may be disturbing and can result in aggressive, antisocial behavior.⁹¹ Older children who are shifted from caregiver to caregiver may lack educational influence, which can lead to delinquent or criminal behavior.⁹² In such cases,

⁸⁶ See *id.* at 1413. This critical bond is usually formed with the natural parent but can be formed with a caregiver, such as an adoptive parent, who acts as the natural parent. See *id.* at 1414-15.

⁸⁷ See *id.* at 1413-14; see also *In re F.N.M.*, 951 S.W.2d 702, 705, 707 (Mo. Ct. App. 1997) and *In re Nadene*, 701 A.2d 1021, 1022 (R.I. 1997) (both discussing the bond between a parent and child in deciding termination, thus underscoring the importance of the bond in the parent-child relationship).

⁸⁸ See *On Prisoners and Parenting*, *supra* note 25, at 1420. The author contends: [F]oster care is also unlikely to provide the needed parental figure and the continuity of care the children require. Although foster care is intended to replicate the conditions of normal family life, this ideal is seldom realized in practice [B]ecause foster parents know that a child has been placed with them only temporarily, they may be unwilling to invest in an emotional relationship with the child in their care. Indeed, foster parents are often warned not to become too attached to the child so that their eventual separation will not be too painful for the child, and child welfare agencies often remove a child from a foster home if it is found that a foster parent has become too attached to the child.

Id. (citations omitted).

⁸⁹ See *id.* at 1414-15.

⁹⁰ See *id.* at 1417-18 (suggesting that termination may be the best solution where there is to be a long incarceration, frequent contact is not possible, or the parent has harmed the child).

⁹¹ See Sack, *supra* note 35, at 169 (discussing one case study in which the effects of parental incarceration included aggressive behavior toward siblings and peers).

⁹² See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 34 (1973) (maintaining that for older children, the disruption of the psychological relationship with the parent that is caused by the parent's incarceration and the pos-

termination of the parent-child relationship may be appropriate to break this criminal cycle. If the parent-child relationship suffered prior to incarceration, then prison will obviously not improve matters.⁹³ Further, the reunion upon the parent's release can be difficult and potentially harmful.⁹⁴ The parent will generally have difficulty adjusting to the outside world, and the child may have trouble readjusting to the relationship with a parent whom he may have seen only sporadically for several years.⁹⁵ Thus, for older children, termination may be appropriate, but states that fail to engage in a detailed analysis of the parent-child relationship will never address these concerns and may, therefore, make an improper decision as to the future of the parent-child relationship.

While a parent's incarceration can have serious, damaging effects on a child, it is also possible for children to maintain a healthy, positive relationship with an incarcerated parent. In such cases, termination of parental rights may result in harm to the child. Because the effects of a parent's incarceration on the child are so varied, a full-scale analysis of the parent-child relationship, which makes individualized determinations of the impact of a parent's incarceration on the child, would best serve both parents and children.

II. STATE APPROACHES TO TERMINATION OF PARENTAL RIGHTS FOR INCARCERATED PARENTS

State treatment of termination of parental rights for incarcerated parents varies, with states generally falling into one of four categories. One approach terminates the parent-child relationship because a parent will be incarcerated for a specified time period.⁹⁶ Other states look at the nature of the crime committed and the facts surrounding the crime.⁹⁷ These states disregard the possibility that a positive parent-child relationship may exist with an incarcerated parent and seem to ignore due process concerns by terminating parental rights based on a presumption rather than a meaningful, indi-

sibility of multiple placement can lead the child to engage in delinquent behavior).

⁹³ See C.S. Lanier, Jr., *Dimensions of Father-Child Interaction in a New York State Prison Population*, 16 J. OFFENDER REHAB. 27, 36 (1991).

⁹⁴ See *On Prisoners and Parenting*, *supra* note 25, at 1417.

⁹⁵ See *id.*

⁹⁶ See, e.g., COLO. REV. STAT. ANN. § 19-3-604 (West 1990 & Supp. 1997) (permitting termination of parental rights if the parent will be incarcerated for more than six years from the date the child was adjudicated dependent or neglected).

⁹⁷ See, e.g., IND. CODE ANN. § 31-35-3-4 (West Supp. 1997) (setting forth that a conviction for certain crimes, including murder, involuntary manslaughter, or rape, can be grounds for termination of parental rights).

vidualized determination of parental fitness.⁹⁸ Other states look to the parent's incarceration and the minimal efforts made by the parent to maintain contact or the parent's ability to provide for the child.⁹⁹ This approach may deprive a parent of parental rights because he or she is unable to contribute monetary support to the child or to provide a home for the child at the time.¹⁰⁰ Conversely, such an approach may leave a child in a damaging relationship with an incarcerated parent because the parent has made minimal efforts or contributions sufficient to meet the statutory criteria although the parent and child will be separated for years.¹⁰¹ The remaining states engage in a full-scale analysis of the parent-child relationship and consider all relevant circumstances.¹⁰² These states acknowledge the gravity of termination of parental rights, the varied psychological effects of parental incarceration on the child, and the due process concerns raised by termination.¹⁰³ Less detailed approaches may save time and resources. However, a comprehensive, fair determination that considers all aspects of the parent-child relationship best serves the interests of parent and child.

⁹⁸ See *Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972) (emphasizing the importance of hearings and meaningful evaluations in termination proceedings).

⁹⁹ See *infra* Part II-C and accompanying notes.

¹⁰⁰ See *infra* Part II-C and accompanying notes.

¹⁰¹ See *In re C.A.W.*, 683 A.2d 911, 916 (Pa. Super. Ct. 1996) (citing *In re M.J.H.*, 501 A.2d 648, 651-54 (Pa. Super. Ct. 1985)) (noting that termination may be inappropriate, under the State's statute for termination based on abandonment, for a father serving a life sentence for killing the child's mother when the father made consistent efforts to contact and to support the child).

¹⁰² See, e.g., *In re L.A.S.*, 134 N.J. 127, 143-44, 631 A.2d 928, 936 (1993). New Jersey courts are required to consider several factors prior to terminating parental rights of incarcerated parents. See *id.* These factors include: the parent-child relationship before and after incarceration; the potential for communication, support, and visitation after incarceration; the potential harm to the child if the relationship is continued; and the effect that continuing the relationship would have on the psychological and emotional well-being of the child. See *id.*

¹⁰³ See, e.g., *id.* The New Jersey Supreme Court addressed the importance of the parent-child relationship, the constitutional protection afforded this relationship, and the care that must be taken in making the decision to terminate parental rights. See *id.* at 132-37, 631 A.2d at 930-31. Later, the court discussed the potentially varied impact of a parent's incarceration and the termination of parental rights on a child and the resultant need to make individualized determinations before terminating an incarcerated parent's custody rights. See *id.* at 138-44, 631 A.2d at 933-36.

A. *States that Terminate Based on Duration of Incarceration*

Some states will terminate incarcerated parents' rights merely because they will be in prison for a given period of time.¹⁰⁴ Generally, these states have statutes that allow for termination based on unfitness, abandonment, or neglect.¹⁰⁵ These states rely on the argument that criminals intend the consequences of their actions, including the resulting imprisonment.¹⁰⁶ Thus, the argument proceeds, by committing a crime, the parent intended to go to prison and to abandon or neglect his or her child.¹⁰⁷ Accordingly, it is appropriate to terminate the incarcerated person's parental rights.¹⁰⁸ It can also be argued that incarceration indicates unfitness, which permits the state to terminate parental rights.¹⁰⁹ Proceedings in these states do not necessarily consider the effects of a parent's incarceration on the child or on the relationship shared by the parent and child.¹¹⁰ These states ignore the fundamental nature of the parent-child relationship by terminating this important relationship based wholly on one's status as incarcerated without any type of meaningful investigation.¹¹¹ While *Stanley* requires states to give the parent a hearing, the parent does not receive the meaningful analysis envisioned by *Stanley* because termination is permitted based on

¹⁰⁴ See, e.g., COLO. REV. STAT. ANN. § 19-3-604 (West 1990 & Supp. 1997) (mandating the period of time as six years from date of adjudication of dependency or neglect); IOWA CODE ANN. § 232.116 (West 1994 & Supp. 1998) (setting forth the length of time as more than five years if the child is in state care).

¹⁰⁵ See COLO. REV. STAT. ANN. § 19-3-604; IOWA CODE ANN. § 232.116.

¹⁰⁶ See Philip J. Prygoski, *When A Hearing Is Not A Hearing: Irrebuttable Presumptions and Termination of Parental Rights Based on Status*, 44 U. PITT. L. REV. 879, 888-92 (1983) (analyzing several cases that stand for the proposition that an offender intends the consequences of his actions, including incarceration and the attendant determination of parental unfitness and subsequent loss of parental rights).

¹⁰⁷ See *In re L.A.S.*, 134 N.J. at 137, 631 A.2d at 933. The New Jersey Supreme Court noted:

The trial court here concluded that H.E. should be deemed to have intended the consequences of his criminal acts. The result of H.E.'s conviction has been his extended incarceration, which has rendered him unable to render any of the 'regular and expected functions of care and support of [his] child as required' by statute N.J.S.A. 9:3-46a.

Id.

¹⁰⁸ See Prygoski, *supra* note 106, at 888-92.

¹⁰⁹ See COLO. REV. STAT. ANN. § 19-3-604 (West 1990 & Supp. 1997).

¹¹⁰ See, e.g., *id.*

¹¹¹ See Genty, *supra* note 21, at 766-73. The author argues that termination procedures of this type are constitutionally inadequate and draw impermissible presumptions. See *id.* Genty explains that "strict, formal hearing procedures must be followed" to satisfy the Due Process Clause. See *id.* at 771.

incarceration status without consideration of other factors.¹¹² Further, these states ignore the available psychological data, which indicate both that incarcerated parents and children can have healthy, positive relationships and that permanent separation can have damaging effects.¹¹³ To provide the constitutional protection owed the parent-child relationship and to protect the interests of both parent and child, these states must enact legislation implementing more effective and progressive termination procedures for incarcerated parents.¹¹⁴

States that permit termination of parental rights based on incarceration fall into several groups. Iowa and Colorado are typical of states with statutes that permit termination based solely on incarceration for a specified period of time.¹¹⁵ Parents whose children are in state care pursuant to an adjudication of dependency or neglect may lose their parental rights if the parents are to be incarcerated for a certain amount of time from the date the child was deemed dependent or neglected.¹¹⁶ In Oregon, a parent may lose his or her rights by way of adoption if the child is not in foster care and the parent has been incarcerated for three years.¹¹⁷ Other states' statutes mention incarceration as a basis to terminate, but do not specify a period of time that will allow for termination.¹¹⁸ A harsher alternative exists in some states.¹¹⁹ Maryland, for example, does not explicitly list incarceration as a basis for termination in its statute.¹²⁰ Despite this omission, any parent whose child remains in foster care for more than one year is at risk of losing his or her child.¹²¹ In a state such as this,

¹¹² See *supra* notes 41-53 and accompanying text.

¹¹³ See *supra* notes 77-83 and accompanying text.

¹¹⁴ See Genty, *supra* note 21, at 771, 822-23. The author contends that termination based solely on incarceration ignores the importance of the parent-child relationship, the constitutional protection afforded the relationship, and the data that suggest incarcerated parents and their children can share positive relationships. See *id.*

¹¹⁵ See COLO. REV. STAT. ANN. § 19-3-604 (West 1990 & Supp. 1997); IOWA CODE ANN. § 232.116 (West 1994 & Supp. 1998).

¹¹⁶ See COLO. REV. STAT. ANN. § 19-3-604; IOWA CODE ANN. § 232.116.

¹¹⁷ See OR. REV. STAT. § 109.322 (1997).

¹¹⁸ See ARIZ. REV. STAT. ANN. § 8-533 (West 1989 & Supp. 1997) (permitting termination where the parent will be imprisoned for "such length that the child will be deprived of a normal home for a period of years"); R.I. GEN. LAWS § 15-7-7 (1996) (allowing termination when there will be "imprisonment, of such duration as to render it improbable for the parent to care for the child for an extended period of time").

¹¹⁹ See, e.g., MD. CODE ANN., FAM. LAW § 5-313 (1991 & Supp. 1997).

¹²⁰ See *id.*

¹²¹ See *id.*

an incarcerated parent who cannot make private arrangements for his or her child's care and must rely on the state's foster care network can potentially lose the child in as little as one year.¹²²

The danger of statutes that consider only the length of incarceration as a basis for termination is clearly demonstrated in an Arizona Appellate Court decision. *In re Juvenile Action No. JS-5609*¹²³ involved a father's appeal of the order terminating his parental rights.¹²⁴ The father was serving a nine-year jail term with five years remaining at the time of the termination proceedings.¹²⁵ Prior to incarceration, the father had close contact with his child despite his divorce from the child's natural mother.¹²⁶ After his incarceration, he attempted to remain in contact with his child, but the natural mother thwarted these attempts.¹²⁷ While in prison, the father effectively dealt with his drug and alcohol problems and worked to rehabilitate himself.¹²⁸ Additionally, he took college courses, and his record contained letters supporting his character and strong work ethic.¹²⁹

Based on this evidence, it appears as if the father had the ability to be a positive influence in his child's life. Irrespective of this evidence of parental "fitness," the court chose to terminate his parental rights based on the length of his sentence.¹³⁰ Although the child lived at home with the mother, the court determined that failing to terminate the father's rights would rob the child of a normal home life.¹³¹ The court did not consider the positive role the father could have played in his child's life or the potentially damaging effects of termination of parental rights. After a full analysis, termination may indeed have been the appropriate remedy, but the risk of error in making this determination without a full analysis is too great considering the different relationship each parent and child share.¹³²

¹²² See, e.g., *In re Nadene*, 701 A.2d 1021 (R.I. 1997) (terminating parental rights under this type of statute where mother was incarcerated and child was in State care for more than 12 months).

¹²³ 720 P.2d 548 (Ariz. Ct. App. 1986).

¹²⁴ See *id.* at 549.

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *Juvenile Action No. JS-5609*, 720 P.2d at 549.

¹³⁰ See *id.* at 551.

¹³¹ See *id.* at 550-51.

¹³² See *Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972) (emphasizing the need for individualized determinations before terminating such an important right); *On Prisoners and Parenting*, *supra* note 25, at 1411-18 (describing the varied effects of pa-

The varied effects of incarceration mandate an individualized approach to termination.¹⁵³ Looking at incarceration in a vacuum is ineffective.¹⁵⁴ The risk is too great that a potentially positive relationship will be terminated and the negative effects of incarceration will be heightened by permanent separation.¹⁵⁵ Further, any approach that terminates such an important relationship without a meaningful investigation does not respect the fundamental nature of the parent-child relationship.¹⁵⁶ Technically, parents are afforded the individual hearing required by *Stanley*, but termination follows based solely on incarceration status if the court fails to consider other factors. Lesser approaches shun the constitutional dimension of the parent-child relationship and completely ignore the varied effects that parental incarceration has on children.

B. States that Terminate Based on the Nature of the Crime

Several states consider the nature of the crime and the surrounding circumstances as factors that could suggest unfitness and warrant termination of parental rights.¹⁵⁷ This approach appears better than others that look solely at incarceration status. It assesses the person individually and his specific acts — an approach that at least

rental incarceration on children).

¹⁵³ See *In re C.A.W.*, 683 A.2d 911, 918 (Pa. Super. Ct. 1996) (“Before granting a petition to terminate parental rights, it is imperative that a trial court carefully consider the intangible dimension of the needs and welfare of a child — the love, comfort, security, and closeness — entailed in a parent-child relationship, as well as the tangible dimension.”).

¹⁵⁴ See *Genty*, *supra* note 21, at 771 (emphasizing the importance of meaningful, individualized determinations prior to terminating parental rights).

¹⁵⁵ See *C.A.W.*, 683 A.2d at 917-18 (discussing the serious ramifications of termination of parental rights and the attendant need to look at the child, his bond to the parent, and the potential effects of termination prior to ordering termination, in order to prevent the erroneous destruction of a positive and beneficial parent-child relationship).

¹⁵⁶ See *supra* Part I-A and accompanying notes.

¹⁵⁷ See, e.g., ARIZ. REV. STAT. ANN. § 8-533 (West 1989 & Supp. 1997) (stating in general terms that termination is permitted if the parent is convicted of a felony where the felony “is of such nature as to prove the unfitness of such parent to have future custody and control of the child”); IND. CODE ANN. § 31-35-3-4 (West Supp. 1997) (permitting termination based on certain crimes including murder, involuntary manslaughter, and rape as indicia of parental unfitness); MONT. CODE ANN. § 41-3-609 (1997) (allowing termination of parental rights if the parent is convicted of a felony in which sexual intercourse occurred and, as a result of the intercourse, the child is born); NEV. REV. STAT. ANN. § 128.106 (Michie 1993 & Supp. 1997) (permitting termination for a “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”).

nominally considers the constitutional nature of the parent-child relationship as well as the available psychological information. The shortcomings of this approach, however, are similar to termination based solely on incarceration. One potential problem exists because a healthy and positive relationship may be terminated based on the nature of the crime the incarcerated parent committed, which does not necessarily indicate his or her parenting abilities.¹³⁸ Parents have lost their children based on convictions for arson¹³⁹ and murder.¹⁴⁰ The argument that the parent committed the crime and intended its consequences, including a finding of unfitness and abandonment, is too tenuous. A parent who committed arson or even murder may not necessarily be an unfit parent who deserves to lose his or her child.¹⁴¹ Several courts have seized on this reasoning and require the state to demonstrate a link between the crime and parental unfitness prior to termination of parental rights.¹⁴² One court refused to terminate parental rights when the father killed the mother and noted that it may have been a crime of passion, "not the product of a violent and vicious character."¹⁴³ Thus, the court did not view the crime as indicative of the offender's parenting abilities and, accordingly, did not terminate parental rights.¹⁴⁴ Other courts have held that this scenario has such a devastating impact on the child and shows such disregard for the child that termination is appropriate.¹⁴⁵ But crimes alone do not necessarily negate the positive relationship that a par-

¹³⁸ See, e.g., IND. CODE ANN. § 31-35-3-4. The Indiana involuntary termination statute permits termination based on the commission of certain crimes including involuntary manslaughter. See *id.* Accidentally killing someone while driving an automobile can potentially result in a conviction for involuntary manslaughter. See IND. CODE ANN. § 35-42-1-4 (West 1998). Arguably, accidentally killing someone while driving is not indicative of an individual's parenting skills or fitness to maintain custody of a child.

¹³⁹ See *In re Strickler*, 514 A.2d 140, 141-42 (Pa. Super. Ct. 1986).

¹⁴⁰ See *In re A.R.M.*, 750 S.W.2d 86, 89-90 (Mo. Ct. App. 1988).

¹⁴¹ See *In re H.L.T.*, 298 S.E.2d 33, 35-36 (Ga. Ct. App. 1982) (finding that a father convicted of manslaughter did not deserve to lose parental rights where he was devoted, maintained contact with his child while in prison, was eligible for parole, and had a job waiting for him upon release).

¹⁴² See *In re B.C.*, 356 N.W.2d 328, 331 (Minn. Ct. App. 1984) (holding that termination was appropriate not solely because the mother murdered one of her children, but because her psychological condition that led to the crime made her unfit to retain parental rights over the other child); *In re D.S.C.*, 155 Cal. Rptr. 406, 413-14 (Cal. Ct. App. 1979) (upholding lower court's termination of parental rights and noting that the lower court properly evaluated the link between the crime and the offender's fitness as a parent).

¹⁴³ *In re James M.*, 135 Cal. Rptr. 222, 229 (Cal. Ct. App. 1976).

¹⁴⁴ See *id.* at 265-66.

¹⁴⁵ See *In re Adoption of Doe*, 657 P.2d 134, 138 (N.M. Ct. App. 1982).

ent and child may share — a relationship that may continue to thrive while the parent is in prison.¹⁴⁶

The argument for termination of parental rights based on the nature of the crime and surrounding facts becomes more compelling when the child is the victim of the parent's crime.¹⁴⁷ The desire to save time and energy appears reasonable in these scenarios. To respect the constitutional protection afforded the parent-child relationship, however, a full hearing is necessary. Several states do conduct such an analysis prior to termination of parental rights, even though termination is most likely the appropriate result in such circumstances.¹⁴⁸ Again, these parents may deserve to lose their children, but this determination cannot be made without exploring the specific parent-child relationship and the effect of parental incarceration on that relationship. Looking solely at incarceration status and the nature of the crime simply cannot determine the appropriateness of termination and does not respect the fundamental nature of the parent-child relationship or the available psychological information.

C. States that Terminate Based on Incarceration Status

Other states considering whether to terminate an incarcerated individual's parental rights look at incarceration status plus either the parent's ability to provide a normal home for the child, or basic efforts made by the parent to support and contact the child during the parent's incarceration.¹⁴⁹ This approach improves on those de-

¹⁴⁶ See *supra* notes 76-82 and accompanying text.

¹⁴⁷ See ME. REV. STAT. ANN. tit. 22, § 4055 (West 1992 & Supp. 1997) (permitting termination based on certain crimes against children such as sexual abuse); see also *In re J.M.*, 702 So. 2d 45, 49-50 (La. Ct. App. 1997) (permitting termination when mother was serving a 21-year sentence for killing her other child).

¹⁴⁸ See *In re Baby Girl Suchy*, 281 N.W.2d 723, 724 (Minn. 1979) (terminating parental rights when a mother was convicted of attempted murder of her child, but the decision was based on her mental incapacity and unfitness to care for the child, not on her incarceration status); *In re Sego*, 513 P.2d 831, 832-34 (Wash. 1973) (terminating parental rights of a father convicted of murdering the child's mother not based on the crime itself, but rather on a determination of parental unfitness after exploring the parent-child relationship as a whole).

¹⁴⁹ See, e.g., MICH. COMP. LAWS ANN. § 712A.19b(3)(h) (West 1993 & Supp. 1998) (permitting termination based on incarceration for two years and inability to provide a normal home in the foreseeable future); MO. ANN. STAT. § 211.447 (West 1996 & Supp. 1998) (permitting termination based on "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"); see also *Bergmann v. McCullough*, 461 S.E.2d 544, 547 (Ga. Ct. App. 1995) (noting that in-

linedated above in that it involves individualized determinations of parental fitness in compliance with the Due Process Clause.¹⁵⁰ However, this approach also can be problematic and ineffective. One court held that a father's unwillingness to share his \$1.50 per day prison salary indicated his unwillingness to provide for his children and allowed for termination of parental rights on that basis.¹⁵¹ Sharing this salary, which he may have needed to survive in prison, did not necessarily indicate his parenting abilities or the possibility of a positive parent-child relationship. Thus, focusing solely on contacts and support may be an ineffective manner in which to assess the parental rights of an incarcerated parent and may result in inappropriate severance of the parent-child relationship.

Another problem is that a child may be left in a harmful relationship with a parent who makes the minimum contacts or provides the minimum support that the statute requires. *E.W.R. v. W.T.J.*¹⁵² involved a father's appeal of the termination of his parental rights.¹⁵³ The father was serving a sentence for three sexual battery convictions and was ineligible for parole until the child was seventeen.¹⁵⁴ The court also received information that the father could be a danger to the child.¹⁵⁵ Focusing solely on contacts and support while the father was in prison, the court decided not to terminate the father's rights since the statutory criteria for abandonment had not been met.¹⁵⁶ It is ironic to note that the father actually failed to contact or support his child during his incarceration, but the court excused him from these obligations because the incarceration itself, and the natural mother's refusal to cooperate, made maintenance of a parent-child relationship impossible.¹⁵⁷ As this case demonstrates, looking solely

carceration plus a failure to contact and support the child for one year justified termination); *In re Caldwell*, 571 N.W.2d 218, 218-19 (Mich. Ct. App. 1997) (analyzing termination for incarcerated parent looking at the parent's efforts to contact and support the child).

¹⁵⁰ See *Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972).

¹⁵¹ See *In re R.H.N.*, 710 P.2d 482, 483-85 (Colo. 1985).

¹⁵² 702 So. 2d 1343 (Fla. Dist. Ct. App. 1997).

¹⁵³ See *id.*

¹⁵⁴ See *id.* at 1344.

¹⁵⁵ See *id.* at 1345.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* The trial court itself expressed displeasure with this result, but nonetheless was bound by the Florida Supreme Court's ruling in *In re B.W.*, 498 So. 2d 946 (Fla. 1986). See *E.W.R.*, 702 So. 2d at 1345. The court opined:

[W]e are prompted to ask whether blood is thicker than common sense and the best interests of the child. In the instant situation, the child had no contact prior to appellant's incarceration, and she will have no meaningful contact until at least the age of 17 when appellant

to support and contact can be ineffective because it overlooks the potential harmful impact of a continued relationship and ignores the best interests of the child.

Another problem of this approach is that a prison sentence of a certain length will be interpreted to mean that the parent cannot provide a normal home, thereby allowing for termination of parental rights.¹⁵⁸ A presumption based on the length of incarceration negates the individualized, meaningful hearing anticipated by *Stanley*.¹⁵⁹

This approach is problematic. Considering only the ability to provide a home or valuing minimum contacts ignores the psychological data and the possible effects of parental incarceration on a child. The positive emotional qualities of the parent-child relationship and the nurturing aspect can survive a parent's imprisonment even though the parent presently cannot provide a suitable home or financial security for the child. This approach also ignores the constitutional protection afforded the parent-child relationship by allowing termination based on a less-than-full-scale analysis. Again, a strong parent-child relationship may not exist, and the need for permanency in a child's life may warrant termination of the incarcerated parent's rights. This determination cannot be made, however, without an in-depth, individualized investigation.

D. States that Analyze all Facets of the Parent-Child Relationship

Some states do engage in a meaningful analysis of the parent-child relationship prior to termination of parental rights for incarcerated parents.¹⁶⁰ These states consider the varied psychological ef-

may be released. The child does, however, have a stepfather willing to adopt her.

Id.

¹⁵⁸ See *Neal v. Johnson*, 414 N.W.2d 916, 919 (Mich. Ct. App. 1987). The State's statute permitted termination if the parent would be unable to establish a home within 12 months. See *id.* When the parent was serving an extended sentence and there was no evidence he would be out on parole in 12 months, termination was appropriate. See *id.*

¹⁵⁹ See *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).

¹⁶⁰ See, e.g., *Genty*, *supra* note 21, at 831-35. California has a comprehensive system for termination proceedings for incarcerated parents. See *id.* at 831. The parent has the right to be present at the hearing and to be represented by counsel. See *id.* The court must initially determine if reunification is in the child's best interests. See *id.* The court should consider several factors to make this determination, including: the age of the child, the degree of parent-child bonding, the length of the sentence, the nature of treatment, the nature of the crime, the degree of detriment to the child if the relationship is continued, the child's attitude toward reunification, and other appropriate factors. See *id.* If continuation of the relationship is in the best interest of the child, the state must make efforts to facilitate the relation-

fects of incarceration and understand the need for an approach that focuses on the child's best interests and makes individualized determinations prior to terminating a parent's rights.¹⁶¹ These states also acknowledge the fundamental nature of the parent-child relationship and the unfairness of terminating this important relationship based on anything less than a full-scale, individualized determination.¹⁶² Specifically, these states look beyond incarceration, the nature of the crime, or minimum contacts when making a determination of parental fitness.¹⁶³ They analyze the parent-child relationship before and after incarceration, the effect of parental incarceration on the child, the possibility of having a beneficial relationship during the parent's incarceration, and the parent's ability to fulfill his or her obligations.¹⁶⁴ The ideal approach is a full-scale analysis that determines if there is a statutory basis to allow termination while primarily considering the best interests of the child.¹⁶⁵ In the end, termination may be the appropriate step, but a well-thought-out decision fulfills the mandates of both the Due Process Clause and the available psychological data.¹⁶⁶

New Jersey's approach to termination of parental rights for incarcerated parents is one of the most comprehensive and empathetic approaches to the constitutional requirements and the unique problems raised in a termination proceeding. The New Jersey Supreme Court demonstrated this approach best in *In re Adoption of Children by L.A.S.*¹⁶⁷ This case involved the attempt of L.A.S. to adopt his wife's children because the children's natural father was in prison for murder and was ineligible for parole for thirty years.¹⁶⁸ Adoption

ship and termination is, accordingly, inappropriate. *See id.*

¹⁶¹ *See In re Carmen G.*, 1998 WL 46228 at *3-4 (Conn. Super. Ct., Jan. 26, 1998); *In re L.A.S.*, 134 N.J. 127, 139-44, 631 A.2d 928, 933-36 (1993).

¹⁶² *See L.A.S.*, 134 N.J. at 143, 631 A.2d at 936 ("Because the parental interest itself is so fundamental, that determination cannot be made without a full and conscientious consideration of all relevant facts and circumstances.").

¹⁶³ *See Carmen G.*, 1998 WL 46228 at *3-4. Connecticut also engages in a meaningful analysis prior to termination for incarcerated parents. *See id.*

¹⁶⁴ *See id.* Factors considered by the Connecticut courts include: the age of the child and the need for permanency, the child's emotional attachment to the parent, the effect of termination on the child, the effect of a continued relationship on the child, and the parent's ability to provide for the child and to be a positive influence in the child's life. *See id.*

¹⁶⁵ *See Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (Stewart, J., concurring) (holding that termination based solely on the best interests of the child would violate the Due Process Clause and that there must also be some statutory basis to justify termination).

¹⁶⁶ *See supra* Parts I-A & I-B and accompanying notes.

¹⁶⁷ 134 N.J. 127, 631 A.2d 928 (1993).

¹⁶⁸ *See id.* at 129, 631 A.2d at 929.

would require terminating the natural father's parental rights.¹⁶⁹ H.E., the natural father, opposed the adoption.¹⁷⁰ The trial court held that H.E.'s lengthy incarceration rendered him unable to perform his duties as a parent, which the court equated to abandonment of his children, a basis for termination in New Jersey.¹⁷¹ The court ruled that termination, therefore, should follow.¹⁷² The trial court noted that committing a crime is "equivalent to intending the consequences of that crime, including imprisonment."¹⁷³ The trial court's reasoning surmised that the father intended to be imprisoned for a lengthy period by virtue of the crime he committed.¹⁷⁴ The natural result of his crime, the opinion reasoned, rendered him unable to care for his children.¹⁷⁵ The trial court found that the father essentially abandoned his children and that termination of his parental rights was appropriate.¹⁷⁶

The appellate division reversed the trial court's ruling in *L.A.S.*¹⁷⁷ and held that termination based solely on incarceration is unacceptable.¹⁷⁸ The appellate court further held that termination should occur only after "the trial court has engaged in a 'multi-facet [sic] evaluation of abandonment in which incarceration is but one of the factors considered.'"¹⁷⁹

The New Jersey Supreme Court affirmed the appellate division's ruling in an insightful opinion that laid down comprehensive guidelines for courts considering termination of parental rights for incarcerated parents.¹⁸⁰ The court began by reiterating the fundamental nature of the parent-child relationship, the constitutional protection afforded to this relationship, and the severity of termination of parental rights.¹⁸¹ The court noted that, in order to comply with the United States Supreme Court's criteria set out in *Stanley* and *Santosky*, lower courts must find clear and convincing evidence of the statutory

¹⁶⁹ See N.J. STAT. ANN. § 9:3-50 (West 1993). Adoption terminates the rights and obligations between the child and natural parent. See *id.*

¹⁷⁰ See *L.A.S.*, 134 N.J. at 129, 631 A.2d at 929.

¹⁷¹ See *id.* at 131-32, 631 A.2d at 930.

¹⁷² See *id.*

¹⁷³ See *id.* at 132, 631 A.2d at 930.

¹⁷⁴ See *id.* at 131-32, 631 A.2d at 930.

¹⁷⁵ See *id.*

¹⁷⁶ See *L.A.S.*, 134 N.J. at 131-32, 631 A.2d at 930.

¹⁷⁷ See *id.* at 132, 631 A.2d at 930.

¹⁷⁸ See *id.*

¹⁷⁹ *Id.* (quoting *In re L.A.S.*, 258 N.J. Super. 614, 621, 610 A.2d 925, 929 (App. Div. 1992)).

¹⁸⁰ See *id.* at 143-44, 631 A.2d at 936.

¹⁸¹ See *id.* at 132-33, 631 A.2d at 930-31.

criteria at a full hearing before permitting termination of parental rights.¹⁸² Further, the court noted the varied effects of parental incarceration on children and indicated that individualized determinations of parental fitness are required.¹⁸³

The court then announced the approach New Jersey courts should employ when considering termination of parental rights for incarcerated parents.¹⁸⁴ The court explained that under the relevant New Jersey statutes at the time, termination of parental rights was permitted in cases of abandonment; substantial neglect of parental duties; failure to perform normal parental functions including care, support, and maintenance of an emotional relationship; or when a child is in the care of the Division of Youth and Family Services or a state-approved agency, and the parent fails to rectify the problem that led to the placement for at least one year.¹⁸⁵

The New Jersey court held that incarceration alone cannot be the basis to demonstrate any of these grounds for termination of parental rights.¹⁸⁶ Rather, in deciding whether or not to terminate a prisoner's parental rights, the supreme court stated that New Jersey courts must look to several factors.¹⁸⁷ First, the court began, courts must consider the nature of the parent-child relationship prior to incarceration, whether the parent performed his or her duties, and the ability of the children to rely on the parent.¹⁸⁸ Second, the court posited, courts must also consider the parent-child relationship after the parent's incarceration, including communication and visitation.¹⁸⁹ The court further maintained that a prisoner's ability to continue contacting, visiting, and emotionally supporting and guiding his or her children in the future are also important considerations.¹⁹⁰ Moreover, the court determined, New Jersey courts should focus on the parent's criminal disposition and the potential effects of that disposition on the children, as well as the parent's attempts at rehabilitation while in prison.¹⁹¹ Finally, the court directed, courts should use an expert to determine "the need of the children for permanency and stability and whether continuation of the parent-child re-

¹⁸² See *L.A.S.*, 134 N.J. at 132-33, 631 A.2d at 930-31.

¹⁸³ See *id.* at 138-43, 631 A.2d at 933-36.

¹⁸⁴ See *id.* at 143-44, 631 A.2d at 936.

¹⁸⁵ See *id.* at 133-34, 631 A.2d at 931.

¹⁸⁶ See *id.* at 143-44, 631 A.2d at 936.

¹⁸⁷ See *id.*

¹⁸⁸ See *L.A.S.*, 134 N.J. at 143, 631 A.2d at 936.

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.* at 143-44, 631 A.2d at 936.

lationship . . . will undermine that need."¹⁹² The court concluded that lower courts also should look to "the effect that the continuation of the parent-child relationship will have on the psychological and emotional well-being of the children."¹⁹³

The New Jersey approach is valuable because it ascertains whether there is a basis for termination while keeping the best interests of the child in the forefront. This approach recognizes the importance of the parent-child relationship and the complex issues raised by termination of an incarcerated person's parental rights.¹⁹⁴ This in-depth, individualized approach respects the fundamental interest parents have in their children and recognizes the gravity and finality of parental rights termination.¹⁹⁵

When a parent stands to lose his or her child, a fundamental right is at stake. In such instances, a less-than-thorough approach is simply unacceptable to safeguard these interests. New Jersey's approach respects the spirit of *Stanley*, due process concerns, and the constitutional protection given to the parent-child relationship because it requires an individualized determination before an important right is extinguished. The New Jersey method also recognizes the uniqueness of every parent-child relationship and the fact that incarceration will have a different psychological effect on every child.

New York also employs a unique approach to proceedings for termination of a prisoner's parental rights. Prior to 1983, New York law permitted termination based solely on incarceration status.¹⁹⁶ This rule has subsequently changed.¹⁹⁷ Under current New York law, abandonment is still a basis to terminate the rights of any parent.¹⁹⁸ Incarceration alone, however, does not prove abandonment and does not, therefore, allow for termination.¹⁹⁹ Detailed analysis must

¹⁹² *Id.* at 144, 631 A.2d at 936.

¹⁹³ *Id.*

¹⁹⁴ *See L.A.S.*, 134 N.J. at 138-41, 631 A.2d at 933-35.

¹⁹⁵ *See id.* at 143-44, 631 A.2d at 936.

¹⁹⁶ *See* Joseph R. Carrieri, *The Rights of Incarcerated Parents*, N.Y. L.J., Jan. 12, 1990, at 1. The author discusses New York's involuntary termination statute. *See id.* Prior to 1983 an incarcerated parent's consent was not required for adoption, which essentially terminated a prisoner's parental rights based on incarceration status. *See id.* This rule was held not to violate due process because the State considered inmates incapable of caring for their children, thus justifying termination. *See id.* at 1,4 (citing *In re Eric J.B.*, 460 N.Y.S.2d 133, 133-34 (N.Y. App. Div. 1983)).

¹⁹⁷ *See id.* at 1, 4 (discussing Chapter 911 of the Laws of 1983, which overruled Domestic Relations Law Section III (2)(d) — a law that allowed termination for parents serving an indeterminate sentence with a maximum of life imprisonment).

¹⁹⁸ *See id.* at 4.

¹⁹⁹ *See id.*

be performed and procedures must be followed prior to termination.²⁰⁰ Initially, a court must determine the likely impact of visitation on the parent-child relationship.²⁰¹ There are several factors to consider in making this determination, including: the parent's desire or capacity to maintain the parent-child relationship, the permanency planning goal already in place or the potential to develop one, the length of time the parent is to be incarcerated, the parent-child relationship prior to the parent's incarceration, the child's age and desire to visit, the nature of the parent's crime, and the circumstances surrounding the crime.²⁰²

If continued contact serves the child's best interests, then the parent and state agency must devise a plan that provides for the child's needs and helps the parent with his or her problems.²⁰³ The state must then make diligent efforts to carry out the plan and to help the parent and child develop a meaningful relationship.²⁰⁴ Such efforts focus on facilitating visitation and providing rehabilitative services to help the parent with any problems.²⁰⁵ If visitation is in the child's best interest and an effective plan can be implemented, then an incarcerated parent's rights should only be terminated if he or she, on more than one occasion while incarcerated, fails to cooperate with the agency in planning the child's future or arranging visitation.²⁰⁶

E. A Suggested Approach

Looking at these varying state approaches, the constitutional protection afforded the parent-child relationship, and the available psychological data, an ideal approach to termination of parental rights for incarcerated parents begins to emerge. The parent-child relationship is fundamental. It is simply unsatisfactory to terminate such an important relationship without a meaningful hearing in which an individualized determination is made that considers several factors in addition to the fact of incarceration itself. Further, the psychological data indicate that incarceration of a parent affects

²⁰⁰ See *id.*

²⁰¹ See *id.*

²⁰² See Carrieri, *supra* note 196, at 4.

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ See *id.*

²⁰⁶ See *id.*

children differently, which also speaks to the need for individualized determinations.²⁰⁷

An ideal approach to parental rights termination proceedings would be one that provides a full hearing at which the parent is present and represented by counsel. The court should look at several criteria to determine if a statutory basis exists to terminate parental rights as well as what is in the best interests of the child. These criteria should include: the nature of the parent-child relationship before and during the parent's incarceration; the parent's ability to maintain a relationship with the child and to fulfill his parental duties, focusing especially on the length of the incarceration; the psychological effects of incarceration and visitation in prison on the child; and the child's age and need for stability and permanency.²⁰⁸ Only after considering these factors can an accurate decision be made as to whether termination of parental rights is warranted. This procedure could be expensive and time consuming,²⁰⁹ but terminating a fundamental relationship with a lesser procedure is constitutionally unacceptable and fails to acknowledge the varied effects of parental incarceration on children.²¹⁰ Because of the constitutional protection owed to parent-child relationships, the sanctity of those relationships, and the varied impact of parental incarceration and termination of parental rights, states should enact legislation that implements thorough procedures assuring a full and fair hearing of all relevant facts and circumstances before parental rights are terminated.

CONCLUSION

Termination of parental rights has serious ramifications in that it permanently severs the parent-child relationship.²¹¹ Termination is especially difficult for incarcerated parents.²¹² Parental incarceration and termination of parental rights psychologically affect children dif-

²⁰⁷ See *supra* Part I-B and accompanying notes.

²⁰⁸ See *In re L.A.S.*, 134 N.J. 127, 143-44, 631 A.2d 928, 936 (indicating the need to consider these factors in termination proceedings for incarcerated parents after discussing the due process and psychological issues raised by termination for incarcerated parents); *On Prisoners and Parenting*, *supra* note 25, at 1411-17 (mentioning length of incarceration, age of the child, and nature of the parent-child relationship as important factors in assessing the impact of parental incarceration on a child).

²⁰⁹ See *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

²¹⁰ See *supra* Parts I-A & I-B and accompanying notes.

²¹¹ See, e.g., IND. CODE ANN. § 31-35-6-4 (West Supp. 1997).

²¹² See *In re Caldwell*, 571 N.W.2d 218, 218-19 (Mich. Ct. App. 1997) (pointing to the difficulties in applying traditional termination criteria to incarcerated parents).

ferently and thus should be important considerations in any termination proceeding.²¹³ It is necessary to avoid exacerbating the effects of incarceration by permanently ending the parent-child relationship, but it is also important not to leave a child in a harmful relationship. Another essential consideration is the constitutional protection afforded the parent-child relationship, which is implicated by any attempt to terminate.²¹⁴ Terminating such a fundamental relationship is a dire step and deserves careful consideration.²¹⁵ The constitutional protection afforded the parent-child relationship and the varied psychological effects of parental incarceration on the child indicate the need for individualized determinations and close scrutiny before the parent-child relationship is severed.

States vary in their approaches to termination of parental rights for incarcerated parents. While the desire to conserve time and resources is valid, states that look to the fact of incarceration alone, the nature of the crime, the parent's ability to provide for the child, or efforts to maintain minimum contacts overlook the psychological data and the due process concerns involved in termination. States should engage in an in-depth, individualized analysis prior to terminating an incarcerated parent's rights. Such an analysis is the only way to respect the psychological and constitutional concerns raised by termination of parental rights for incarcerated parents and to avoid errors that could be extremely harmful to the parent and child.

Steven Fleischer

²¹³ See *On Prisoners and Parenting*, *supra* note 25, at 1411-17 (acknowledging the varied effects of parental incarceration on children).

²¹⁴ See *Stanley*, 405 U.S. at 651-52 (addressing the constitutional concerns raised by termination).

²¹⁵ See *id.* at 657 (noting that administrative convenience does not excuse the failure to hold a meaningful hearing).