Comment,
BEHIND THE GLASS WALL: BARRIERS THAT INCARCERATED PARENTS FACE REGARDING THE CARE, CUSTODY AND CONTROL OF THEIR CHILDREN

> "Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."[1]

I. Introduction

Most adults incarcerated in the United States have children.[2] Since 1991, the number of minor children who have a parent in either state or federal prison has increased by more than 500,000.[3] Statistics from 1999 showed that an estimated 721,500 inmates who were held in state and federal prisons had children under the age of eighteen.[4] As a result, approximately 1,498,800 children under the age of 18 had a parent housed in the criminal justice system.[5]

Incarcerated parents possess many of the same characteristics as other prisoners. They generally came from low-income families, have little education or job skills, and were surrounded by substance abuse and violence throughout their childhood.[6] However, incarcerated parents are faced with additional concerns such as care for their children while they are in custody, whether they will be entitled to visitation with them and even the possibility of having their parental rights terminated.

Many studies that have researched incarcerated parents have found differences between incarcerated mothers and incarcerated fathers.[7] However, most of the differences involve the

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1 Turner v. Safley, 482 U.S. 78, 84 (1987).

2 KATHERINE GABEL ET AL., CHILDREN OF INCARCERATED PARENTS 3 (Katherine Gabel & Denise Johnston, M.D. ed., Lexington Books (1995).

3 , CHRISTOPHER J MUMOLA., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, INCARCERATED PARENTS AND THEIR CHILDREN (August 2000).

4 *Id.*

5 *Id.*

6 GABEL ET AL., *supra* note 2, at 3.

7 *Id.*

role women play in their children's life prior to arrest and the characteristics of male versus female offenders.[8]

This article will focus on the rights incarcerated parents have in regard to their children while the parents are in prison, including the constitutional protections that all parents, including incarcerated parents, possess. Part II of this article will evaluate the fundamental rights that parents have in the rearing of their children. It will also explore the nature of those fundamental rights as they apply to prisoners, and it will look at the standard of review that courts use in prisoner's rights cases. Part III will focus specifically on the rights that incarcerated parents have to visit their children and some of the barriers they have to overcome to prove that it is in the best interests of the child to have continuing contact with them while the parents are incarcerated. Part IV will describe termination of parental rights as the ultimate barrier that incarcerated parents face. It will review the procedural due process protections that are available for incarcerated parents who are at risk of having their parental rights terminated. This article will conclude by discussing a few of the factors that contribute to the termination of parental rights.

II. Constitutional Overview of the Fundamental Rights Protecting the Family

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law."[9]

Incorporated into the Fourteenth Amendment's Due Process Clause is the substantive component that recognizes certain fundamental rights and liberty interests.[10] Some of the most fundamental liberty interests protected by the Supreme Court involve the family. The Supreme Court has recognized the importance of family in society and has concluded that it deserves protection under the Constitution.[11] The Court has determined that many of the fundamental rights associated with the

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8 *Id.* at 3-17.

9 U.S. CONST. amend. XIV, § 1.

10 Troxel v. Granville, 530 U.S. 57, 65 (2000).

11 *See* Troxel v. Granville, 530 U.S. 57, 72-73 (2000); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535,

family, such as marriage, procreation and child rearing are related to the right to privacy, which is guaranteed under the Fourteenth Amendment.[12]

As early as 1923, the Court in *Meyer v. Nebraska*[13] held that the right to marry and the right to create a home and raise children were "essential rights" that constituted protected liberty interests under the Due Process Clause.[14] Two years later, in *Pierce v. Society of Sisters*,[15] the Court determined that parents and guardians were entitled to a liberty interest that ensured they could direct the "upbringing and education of children under their control."[16] The Court in *Pierce* further stated, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations."[17]

Many subsequent cases followed the precedent that was established in *Meyer* and *Pierce*. For example, *Prince v. Massachusetts*[18] reinforced that parents had a constitutionally protected right to the "custody, care and nurture" of their children.[19] *Stanley v. Illinois*[20] also recognized that parents have a fundamental right in the "companionship, care, custody, and management" of their children.[21] A more recent decision, *Troxel v. Granville*,[22] expanded the parent's fundamental interest to include the right to decide who will spend time with their children.[23] The Court

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541 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

12 *See* Planned Parenthood v. Casey 510 U.S. 1309 (1994); Zablocki v. Redhail 434 U.S. 374, 385-386 (1978); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

13 262 U.S. 390 (1923).

14 *Id*. at 399.

15 268 U.S. 510 (1925).

16 Id at 534-535.

17 *Id*. at 535.

18 321 U.S. 158 (1948)

19 *Id*. at 166.

20 405 U.S. 645 (1972).

21 *Id.* at 651.

22 530 U.S. 57 (2000)

23 *Id.*. at 72-73 (holding that the state may not award visitation rights to a child's grandparents over the objection of the child's fit custodial parent, unless the state first gives "special weight" to the parent's wishes).

has reiterated that parents have a constitutional right to raise their children as they wish; however, for the first time, in *Moore v. East Cleveland*,[24] the Court concluded that extended family members such as aunts, uncles, grandparents and cousins play important roles in the operation of the family and deserve similar constitutional protection as parents.[25]

The Supreme Court, through its decisions over the last 75 years, has illustrated that the family is an important aspect of society. "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, morals and culture."[26]

A. *Constitutional Rights of Incarcerated Parents*

> "[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."[27]

Many constitutional rights survive incarceration. "[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this county."[28] Some of the rights that prisoners have include: the ability to petition the government for grievances,[29] access to the court system,[30] the protection against invidious racial discrimination under the Equal Protection Clause of the Fourteenth Amendment,[31] the protection of Due Process,[32] and certain protections under the First Amendment.[33]

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24 431 U.S. 494 (1977)

25 *Id.* at 504-506 (1977) (holding that a city may not enact a zoning ordinance that prevents first cousins from living together because members of a family, even a non-nuclear family, have a fundamental right to live together).

26 *Id*. at 504-505.

27 Bell v. Wolfish, 441 U.S. 520, 545 (1979).

28 Wolff v. McDonnell, 418 U.S. 539, 555 (1974).

29 Johnson v. Avery, 393 U.S. 483 (1969).

30 Younger v. Gilmore, 404 U.S. 15 (1971).

31 Lee v. Washington, 390 U.S. 333, 19 L. Ed. 2d 1212, 88 S. Ct. 994 (1968) *(per curiam)*,

32 *Wolff*, 482 U.S. at 555-556.

33 Shaw v. Murphy, 532 U.S. 223, 229 (2001)

The right to marry, bear children as well as visit their children have been included as constitutionally protected rights that prisoners can enjoy.[34] In *Turner v. Safley*,[35] the Supreme Court held that prisoners had a constitutionally protected right to marry even though certain restrictions would be imposed on the marriage due to the incarceration of one spouse.[36] The Court noted that many important attributes of marriage, such as the spiritual significance, societal benefits, and the hope of consummation upon release,[37] could be sustained beyond the prison walls. In 2001, the Ninth Circuit decided the case of *Gerber v. Hickman*,[38] which held that a male prisoner had a fundamental right to procreate by artificial insemination.[39] However, *Gerber* was overruled in 2002 by the United States Court of Appeals for the Ninth Circuit which affirmed the district court's ruling that the "right to procreate while in prison is fundamentally inconsistent with incarceration."[40] The Court did not rule on whether women had the same right to procreation since obvious biological differences exist between the sexes.[41]

Other jurisdictions have lead the way in the protection of prisoner's rights. An area where this arises is in cases involving prisoners' right to visitation. Visitation has been considered an important tool in rehabilitating criminals, aiding in the reintegration of criminals with their families and society and reducing the recidivism rate.[42] As a result, several courts have held that denial of visitation between imprisoned parents and their minor children is an unconstitutional violation of the First and Fourteenth Amendments.[43]

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34 *See* Turner v. Safley, 482 U.S. 78 (1987); Gerber v. Hickman, 264 F.3d 882 (9th Cir. 2001); Nicholson v. Choctaw, 498 F. Supp. 295 (S.D. Ala. 1980); Valentine v. Englehardt, 474 F. Supp. 294 (D. N.J. 1979).

35 482 U.S. 78 (1987)

36 *Id.* at 96.

37 *Id*.

38 264 F. 3d 882 (9th. Cir. 2001).

39 *Id.*.

40 *Gerber*, 103 F.Supp. 2d 1214 (E.D. Cal. 2000), *aff'd,* 291 F.3d 617, 623 (9th Cir. 2002)

41 *Id*.

42 Bazzetta v. McGinnis, 148 F. Supp. 2d 813, 845 (E.D. Mich. 2001).

43 *See Nicholson*, 498 F. Supp. at 310-311 (holding that pretrial detainees have the right to reasonable visitation from their children under the First

B. *Standard of Review Applied to Prisoners' Rights Cases*

Although there is no "iron curtain drawn between the between the Constitution and the prisons,"[44] prisoners' constitutional rights are still subject to restrictions and limitations.[45] Fundamental rights are normally reviewed under the heightened standard of strict scrutiny; however, that is not the case when the person claiming the violation of a fundamental right is a prisoner.[46] The standard of review the Court has used in prisoners' rights cases is the "reasonable relationship" standard.[47] For a prison regulation to be valid, it must be "reasonably related to a legitimate penological objective" and not be an "exaggerated response" to prison concerns.[48]

The Court in *Turner* outlined four factors to be used to determine the reasonableness of a prison regulation.[49] The first is that there must be a "valid, rational, connection" between the prison's regulation and the government's interest behind the regulation.[50] The second factor is that the prisoners must have an alternative method available to exercise the fundamental right that the regulation is attempting to restrict.[51] The third factor that must be considered is whether or not the regulation will have an impact on prison staff and inmates.[52] The last factor is whether any obvious alternatives are available other than the prison regulation.[53] This last factor is not necessarily a "least restrictive means" test that requires prison officials to consider every possible alternative.[54] Rather, it is more of a test that allows prisoners the opportunity to point to other alternatives that

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Amendment right of association); *See also* O'Bryan v. County of Saginaw, 437 F. Supp. 582 (E.D. Mich. 1977) (holding that a rule banning visitation of pretrial inmates at a county jail by children under the age of sixteen is unconstitutional under the Fourteenth Amendment).

44 *Wolff*, 418 U.S. at 555-56.

45 *Bell*, 441 U.S. at 545.

46 *Turner*, 482 U.S. at 87.

47 *Id*.

48 *Id*. at 87-91.

49 *Id*. at 89-90.

50 *Id*. at 89.

51 *Turner*, 482 U.S. at 90.

52 *Id*.

53 *Id*.

54 *Id*.

would satisfy their rights at *de minimis* cost to valid penological interests.[55]

The rationale behind using a different standard of review for an incarcerated individual is relatively easy to understand. "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration."[56] Also, goals that the prison would like to achieve, such as institutional security, order and discipline would likely require a standard that allows them some flexibility.[57]

The prison regulations do not create a barrier for prisoners to exercise their constitutional rights as long as they are reasonably related to legitimate penological goals. Due to the low level of proof necessary, the prison regulation meets its relatively low burden to validate its regulations.

III. Visitation Rights of Incarcerated Parents

In 1999, almost 1.5 million children under the age of eighteen had a parent who was incarcerated.[58] In a sense the children of incarcerated parents become another victim of the parents. Barriers other than a glass partition often separate an incarcerated parent from their children. As a result, the children feel as if they had committed the wrong.

At the age of ten, Julia, and her seven-year-old sister, Jenny, found themselves without a mother. Julia and Jenny's mother had been sent to jail for possession of drugs and writing bad checks to pay for her drug habit. While their mother was incarcerated Julia and Jenny were sent to live with their alcoholic and abusive father who lived with his parents. Their mother served 120 days but the girls never visited their mother while she was in jail. They did manage to keep some contact with an occasional telephone call or letter. Julia and Jenny constantly asked their mother, "Why can't I see you. Is it something that I did?" The

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55 *Id*. at 91.

56 *Turner*, 482 U.S. at 89.

57 *Bell*, 441 U.S. at 546-547.

58 MUMOLA, *supra* note 3, at 1.

lack of visits was not due to the jail's visitation policy, but to her ex-husband.

> The same man that used to beat me and drink himself to oblivion was the same one blocking me from seeing my girls. Thank God for the letters and phone calls. It was the only thing that kept me clean, motivated me to get out and get help when I was released.[59]

While no legal barriers kept this family separated, many times it is something other than the legal barriers that can isolate parents indefinitely from their children.

A. *Legal Barriers to Visitation*

> "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[60]

The Supreme Court has established, through a long line of cases, that the parent-child relationship is one that deserves constitutional protection.[61] The right to visitation between parents and their children is included in the protection based on the parents' right to the "care, custody and control" of their children.[62] Most states have enacted legislation that creates a presumption that visitation with both parents is generally in the best interests of the children.[63] Many courts have even held that a parent's

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59 Based upon an interview with a former inmate of the Sedgwick County Jail in Wichita, Kan. (April 18, 2003). The names have been changed to protect the confidentiality of the parties involved.

60 Santosky v. Kramer, 455 U.S. 745, 753 (1982).

61 *See* Troxel v. Granville, 530 U.S. 57, 72-73 (2000); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

62 *Id*.

63 *See, e.g.,* ARIZ. REV. STAT. ANN. § 25-408 (West 2000); IND. CODE ANN. § 31-17-4-1 (West 1999); KAN. STAT. ANN. § 60-1616 (2003); KY. REV. STAT. ANN. § 403.320 (Banks-Baldwin 2002); MO. REV. STAT. § 452.400 (2003) (stating that the non-custodial parent is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation would endanger the child's physical or mental health).

incarceration may not be the sole basis to deny visitation with his children.[64]

In *M.L.B. v. W.R.B.*,[65] the divorce decree stated "that said minor children [were] not [to] be allowed visitation rights with the defendant [father] while and so long as [he] is in confinement at the Department of Corrections."[66] The court determined that past or current confinement alone should not be enough to deny a parent his right to see his children.[67] The court ordered that the language, which limited the father's access to his children, be deleted from the original divorce decree.[68] The court in *McCurdy v. McCurdy*,[69] went so far as to modify the dissolution decree that it compelled the mother to allow her children to visit their father in prison.

Not all incarcerated parents who request visitation with their children are as fortunate as the prisoners in *M.L.B.* or *McCurdy*. Most incarcerated parents are unaware that they have a right to a hearing before their visitation rights may be denied.[70] In *Alexander v. Alexander* the Kentucky Court of Appeals held that incarceration does not preclude or interfere with the parent's right to a hearing on the matter of visitation.[71] However, the hearing itself presents a problem for the incarcerated parents. They have limited access to legal services to address domestic issues.[72] Many states allow prisoners the right to court-appointed counsel only if their parental rights are being terminated but not for visitation issues.[73] They are forced to represent themselves or retain an attorney for any other proceedings.[74]

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64 *See* McCurdy v. McCurdy, 363 N.E.2d 1298, 1300-1301 (Ind. Ct. App. 1977); Alexander v. Alexander, 900 S.W.2d 615, 616 (Ky. Ct. App. 1995); M.L.B. v. W.R.B., 457 S.W.2d 465, 467 (Mo. Ct. App. 1970); Casper v. Casper, 254 N.W.2d 407, 409 (Neb. 1977).

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66 *Id.*

67 *Id*. at 467.

68 *Id*.

69 *McCurdy*, 363 N.E.2d at 1301

70 *See supra* ex. At note 55. The statutes dictate that reasonable visitation rights can only be denied *after a hearing* has been held to determine whether visitation is in the best interests of the child.

71 *Alexander*, 900 S.W.2d at 616.

72 GABEL ET AL., s*upra* note 2, at 150.

73 *Id*.

74 *Id*.

Best Interests of the Child Standard can be a Barrier to Visitation

Even if a prisoner asserts a right to a hearing regarding visitation, that does not necessarily mean visitation will occur nor does it mean that the parent will be represented by appointed counsel. The issue of visitation and custody is almost exclusively in the hands of family court judges. When making the determination regarding issues of visitation and custody, almost all jurisdictions use the test that has been referred to as the "best interests of the child" standard.[75] This standard is not a factor-specific test. "[I]n deciding the question of visitation when the parent is incarcerated, a majority of the courts have failed to set out concise factors to be considered under the 'best interest' standard."[76] In fact, some commentators consider the standard an arbitrary and inconsistent means by which judges replace important factors with personal bias.[77]

In *Casper v. Casper*, the Nebraska Supreme Court affirmed the trial courts order limiting visitation by finding that the "best interests of the children lay in the establishment of a stable home environment."[78] Based solely on the testimony of the children's mother and against the weight of all other evidence presented

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75 *See, e.g.,* UNIF. MARRIAGE AND DIVORCE ACT § 407, 9A U.L.A. 612 (1987) ("The general rule implies a 'best interest of the child' standard for visitation rights, and that visitation rights should be arranged to an extent and in a fashion which suits the child's interest rather than the interest of either the custodial or noncustodial parent."); McAlister v. Shaver, 633 So.2d 494, 496 (Fla. Dist. Ct. App. 1994) (finding that the best interest of the child controls over parental rights); Brewer v. Brewer, 760 P.2d 1225, 1227 (Kan. Ct. App. 1988) (stating that under state statute, the court must consider the best interest of the children when considering modification of a visitation order); Smith v. Smith, 869 S.W.2d 55, 56 (Ky. Ct. App. 1994) (finding that the state stature created the presumption that visitation is in the child's best interest); Harris v. Burns, 904 P.2d 648, 659 (Or. Ct. App. 1995) (stating that a noncustodial parent's right to visitation is not absolute; a primary concern is the best interest of the child standard); Sullivan v. Shaw, 650 A.2d 882, 883 (Pa. Super. Ct. 1994) (finding that in custody and visitation cases, the paramount concern is the best interests of the child).

76 Rachel Sims, *Can My Daddy Hug Me?: Deciding Whether Visiting Dad in a Prison Facility Is in the Best Interest of the Child*, 66 BROOK. L. REV. 933, 950 (Winter 2000 / Spring 2001).

77 *Id.*

78 *Casper*, 254 N.W.2d at 409.

the court concluded that the children's visits to the correctional facility were not beneficial to the children.[79]

The court in *McCurdy v. McCurdy* took the opposite view and found that it was in the children's best interest to visit their father.[80] The court stated:

> Reasonable men would agree that it would be better for the children to learn the truth about their father now so that they can renew their acquaintance with him and adjust their lives in accordance with reality, rather than in accordance with a story which has been fabricated to insulate them from a truth which they will ultimately discover.[81]

The Pennsylvania Superior Court took a proactive approach in deciding *Etter v. Rose*.[82] In formulating its opinion that visitation was in the best interests of the child, the court concluded that decisions should be made on a case-by-case basis using a number of factors.[83] The court listed the following factors: age of the child, distance and hardship to the child in traveling to the visitation site, the kind of supervision at the visit, the identity of the person transporting the child, the type of transportation, the effect on the child's physical, intellectual, moral and spiritual well-being, and all prior and current contact the incarcerated parent has had with the child.[84]

C. *Prison regulations as barriers to visitation*

In some instances it is not a judge but a prison administrator who is making the decision whether visitation is in the child's

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79 *Id*. The petitioner's (ex-wife of the prisoner) own mother testified that she frequently transported the children to visit their father and that they were anxious to see him, talked with him during visits and were no problem after the visits. A psychologist at the facility testified that he did not believe there was anything that would "unduly disturb" or "upset the children." However, it was the testimony of the petitioner that must have persuaded the court because she testified that the children demonstrated poor attitudes following visits with their father and that their attitudes and grades improved after she terminated their visits.

80 *McCurdy*, 363 N.E.2d at 1301.

81 *Id*.

82 684 A.2d 1092 (Pa. Super. Ct. 1996) (holding that the trial court erred in denying the prisoner's petition for visitation with his son without a hearing).

83 *Id*. at 1093.

84 *Id*.

best interest. In *Valentine v. Englehardt*,[85] the Passaic County Jail had a visitation policy that prevented all children under the age of eighteen from visiting inmates. Not only did the court strike down the regulation as unconstitutional,[86] but it also concluded that prison officials could not determine whether visitation was in the best interests of the inmates' children.[87]

Prison administration can enforce visitation restrictions so long as they are "rationally related to a legitimate penological interest."[88] The American Correctional Association Standards allows prison administration to place limitations on visitation if they are based upon the institution's schedule, space and personnel constraint.[89] The Correctional Association recognizes that other limitations may be applied to visitation as long as they are supported by a substantial need.[90]

IV. Termination of Parental Rights

For many incarcerated parents, just getting to the glass wall to visit their children can be quite an obstacle to overcome. However, many incarcerated parents are faced with a much tougher challenge – the termination of their parental rights.

Termination of one's parental rights is a possible consequence that an incarcerated parent faces. Termination results in a permanent severance of the parent-child relationship.[91] This severance is a permanent restriction on the parent's right to have any contact with his or her children.[92]

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85 474 F. Supp. 294, 298 (D. N.J. 1979).

86 *Id*. at 301. *See also Turner*, 482 U.S. at 87-91.

87 *Id*. at 302.

88 *See Turner*, 482 U.S. at 87-91. *Contra Valentine*, 474 F. Supp. at 298. ("The rule forbidding incarcerated parents from seeing their children is not only arbitrary, it is an exaggerated response.")

89 *Bazzetta*, 148 F. Supp. 2d at 819.

90 *Id*. (citing that "prisoners should be permitted to visit with people of their choice" unless there was "clear and convincing threat to the safety and security").

91 *See* Steven Fleischer, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 SETON HALL L. REV. 312 (1998) ("Termination of parental rights has server ramifications in that it permanently severs the parent-child relationship, rendering the parent legally unable to participate in the child's life.").

92 GABEL ET AL., s*upra* note 2, at 151.

Permanent losses of parental rights typically occur in one of three ways for incarcerated parents: first, when the child is in the care and custody of the state and the state initiates the proceeding,[93] second, when a non-incarcerated parent has custody of the child and remarries and initiates the proceeding so that the new spouse may adopt the child,[94] or finally when the child is living with a family member other than a natural parent and the family member initiates the proceeding.[95]

A. *Due Process: Procedural Protections for Incarcerated Parents*

All fifty states provide for the involuntary termination of parental rights by statute.[96] The statutes apply to non-incarcerated as well as incarcerated parents.[97] States termination statutes may vary but parental termination proceedings must meet the minimum safeguards prescribed under the Due Process Clause of the Fourteenth Amendment.

> Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.
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> When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[98]

For a procedural due process claim, the state must take an individual's life, liberty or property.[99] The Supreme Court has concluded that the parent's interest in their children is considered a fundamental liberty interest which is protected by the Fourteenth Amendment.[100] Therefore, the termination of one's parental

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93 *Id*. at 168.

94 *Id*.

95 Fleischer, *supra* note 82 at 313.

96 *Id*. *See* GABEL ET AL., s*upra* note 82, at 168. *See also e.g.* IOWA CODE § 232.116 (2003); KAN. STAT. ANN. § 38-1583 (2002); KY. REV. STAT. ANN. § 625.050 (2002);MO. REV. STAT. § 211.447 (2003).

97 *Id*.

98 *Santosky*, 455 U.S. at 753-754.

99 U.S. CONST. amend. XIV, § 1.

100 *See Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 534-535; *Skinner*, 316 U.S. at 541; *Prince*, 321 U.S. at 166; *Stanley*, 405 U.S. at 651; *Wisconsin*, 406 U.S. at 232.

rights would require compliance with procedural due process. The question that arises when the state seeks to terminate the parent-child relationship is what process is due.[101] "Due process is not a static concept; rather, its requirements vary to assure the basic fairness of each particular action according to its circumstances."[102]

Two Supreme Court cases, *Stanley v. Illinois*[103] and *Santosky v. Kramer*,[104] developed the constitutional standards for termination of parental rights cases. In *Stanley*, an unwed father challenged an Illinois law that allowed his children to become wards of the state upon the death of their mother.[105] The Illinois statute permitted the state to automatically terminate parental rights of unwed fathers without a particularized hearing or determination of parental fitness.[106] However, married parents, divorced parents, and even unmarried mothers in Illinois had the right to a hearing and proof of neglect before their parental rights could be terminated.[107] The Supreme Court concluded that "all Illinois parents" deserved protection under the Constitution and were "entitled to a hearing on their fitness before their children" could be removed from their custody.[108] The Court stated that most unmarried fathers are not suitable parents; however, that does not mean the State can rely on that presumption to automatically terminate their parental rights without a hearing on the matter.[109] Many incarcerated parents may not deserve to maintain their parental rights in which case termination may be the most appropriate remedy. However, it is not constitutionally acceptable to deny any parent the right to a meaningful hearing when the subject matter involves such a fundamental interest as the parent-child relationship.[110]

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101 *See e.g. In re* J.L.D., 794 P.2d 319, 322 (Kan. Ct. App. 1990).

102 *Id.* at 322.

103 *Stanley,* 405 U.S. at 647-648.

104 *Santosky*, 455 U.S. at 752-757.

105 *Stanley*, 405 U.S. at 646.

106 *Id*. at 646-647.

107 *Id*. at 658.

108 *Id*.

109 *Id*. at 654-655.

110 Fleischer, *supra* note 82 at 319.

The Court in *Santosky* elaborated on what process is required for involuntary termination of parental rights hearings,[111] holding that the "fair preponderance of the evidence" standard was not appropriate and violated due process.[112] The state must prove allegations of parental unfitness by "clear and convincing evidence".[113] The decision strongly reiterates the importance of the parent-child relationship.[114]

After *Stanley* and *Santosky*, involuntary termination requires the State to present "clear and convincing evidence" of unfitness at a hearing. However, that standard provides little guidance as to what constitutes unfitness.[115] "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."[116] Philip Genty,[117] director of the Family Advocacy Clinic at the Columbia University School of Law, states that when the court determines fitness it should look at the relationship between the incarcerated parent and his child,[118] the extent to which the incarcerated parent has been rehabilitated,[119] and the incarcerated parent's ability to provide the "intangible"

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111 *Santosky*, 455 U.S. at 758.

112 *Id*.

113 *Id*. at 769; *See also Id.* at 754 (citing Matthews v. Eldridge, 424 U.S. 319, 335 (1976) ("The nature of the process due in parental rights termination proceedings turns on a balancing of three factors: 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.")).

114 *See id*. at 758-761.

115 *See* GABEL ET AL., s*upra* note 2, at 169.

116 *Id*. at 171.

117 Chapter 11: *Termination of Parental Rights among Prisoners* is authored by Philip M. Genty, J.D., who is the Director of the Family Advocacy Clinic at the Columbia University School of Law. He has worked as an attorney for Prisoners' Legal Services of New York, for the New York City Department of Housing, Preservation and Development and for the Bedford-Stuyvesant Community Legal Services Corporation. He implemented the Rikers Island Parents' Legal Rights Clinic, for which he received the 1986 Mayor's Volunteer Service Award.

118 GABEL ET AL., s*upra* note 2, at 171.

119 *Id*.

qualities of love and affection rather than his ability to perform the "material, physical, and financial duties of parenting."[120] Genty argues that the courts should not solely base their decision on the incarcerated parent's past criminal history or status.[121] However, many state statutes do include incarceration as a basis for an involuntary termination of parental rights.[122] Even states that do not have incarceration as a statutory factor still use it to determine the parent's unfitness, abandonment or neglect.[123]

Mandating that incarcerated parents have a hearing prior to termination of their parental rights does not end the procedural battle. The status of an incarcerated parent is one that causes additional due process issues. The situation that typically arises is that the incarcerated parent is unable to be physically present at the termination hearing.[124] *In re J.L.D.*, the incarcerated father was not present but was represented by counsel at a hearing in which his parental rights were terminated.[125] The father did not provide testimony by deposition or written interrogatories, but he did consent to the adoption of his child by the maternal grandparents.[126] The Kansas Appellate Court balanced the rights of the child, the father and the State in determining that the father's absence did not violate due process.[127] The court

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120 *Id*.

121 *Id*.

122 *See e.g.*, ARIZ. REV. STAT. § 8-533 (2003); COLO. REV. STAT. § 19-3-604 (2002); IND. CODE § 31-35-3-4 (2003); IOWA CODE § 232.116 (2003); MONT. CODE ANN. § 41-3-609 (2002); NEV. REV. STAT. § 128.106 (2003).

123 Fleischer, *supra* note 82 at 320. *See also* Tiffany J. Jones, Comment, *Neglected by the System: A Call for Equal Treatment for Incarcerated Fathers and their Children – Will Father Absenteeism Perpetuate the Cycle of Criminality?*, 39 CAL. W. L. REV. 87 (2002) (noting that New York and California have abolished incarceration as a basis for the termination of parental rights).

124 *See e.g. In re* J.L.D., 794 P.2d 319 (Kan. Ct. App. 1990) (affirming the trial court's decision to proceed with severance of the incarcerated father's rights, even though he was not present at the hearing); *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).

125 *J.L.D.*, 794 P.2d at 321.

126 *Id*.

127 *Id*. at 322. *See also supra* note 107, in which the Court in *Matthews. v. Eldridge* set forth three criteria that was used in *J.L.D* to balance the interests of all the parties in order to determine what process was due.

further stated, "Loss of parental rights is extremely important, but it should be weighed against the loss by the child of the right to a prompt judicial determination of his status. A prisoner serving a lengthy prison term should not be able to use his due process rights to foreclose permanently any severance proceedings."[128]

Physical presence is not the only circumstance in which a prisoner's status can hinder his right to a "fundamentally fair procedure".[129] Many times, incarcerated parents are not appointed counsel until the actual termination proceeding.[130] In *Lassiter v. Department of Social Services*, the Supreme Court determined that there was no right to counsel in parental rights cases.[131] *Lassiter* held that an indigent's right to appointed counsel is only afforded when his physical liberty is in jeopardy of being lost.[132] Therefore, it is ultimately in the hands of trial court judges to decide whether or not counsel should be appointed in termination proceedings.[133]

B. *Practical Considerations that Promote Termination*

Even if the incarcerated parent is able to be present in the courtroom with an attorney at a termination hearing, that does not mean his or her parental rights will be saved. Other issues confront incarcerated parents and make it difficult for them to protect their fundamental liberty interest in their parent-child relationships.

"The probability of termination increases as a result of the limited contact incarcerated parents have with their children."[134] Unfortunately, for many incarcerated parents it is distance that keeps them separated from their children. In 1999, more than

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128 *Id*.

129 *Id.* "When the State seeks to terminate the relationship between a parent and a child, it must do so by fundamentally fair procedures that meet the requisites of due process." (citing *Santosky*, 455 U.S. at 752-754).

130 GABEL ET AL., s*upra* note 2, at 150.

131 *Lassiter*, 452 U.S. at 35. The Court did recognize that a majority of the states did provide appointed counsel in parental termination proceedings as well as dependency and neglect proceedings.

132 *Id*. at 25 (emphasizing that counsel is only required when the party has an interest in his or her own personal freedom).

133 *Glover*, 75 F.3d at 269.

134 GABEL ET AL., s*upra* note 2, at 151.

sixty percent of parents in state prison reported they were being held more than 100 miles from their children.[135] Nationwide, most state prisons are located in rural areas and not easily accessible by public transportation.[136] "This means that regular, frequent parent-child visits are the exception rather than the rule."[137] When children of incarcerated parents are in foster care, the agencies typically measure the parent-child relationship and bond by visitation.[138] This makes it difficult for caseworkers to recommend reintegration of the family when little visitation has taken place. However, often the remote location of the parent's placement prevents the caseworker from being able to commit a whole day to take the child to visit his parent.[139]

The lack of prison programs available to incarcerated parents presents other difficulties. For reintegration to take place, incarcerated parents are often required to complete necessary substance abuse treatment or counseling.[140] If they are not available, the parent is forced to take the blame and is considered uncooperative by the caseworker.[141]

The lack of legal counseling[142] for incarcerated parents has contributed to the inclination of courts to approve parental terminations. Since they do not have appointed counsel, the parents find themselves unrepresented in court because they are unable to afford counsel. As a result, the prisoners' ignorance of the law may be the biggest barrier between them and their children. Ignorance is a result of attorneys not being court appointed for all stages of the termination proceedings.[143] "[I]t is critical that parents have access to legal counseling and education about the law, so that they can make informed decisions about their children's placement and take steps to preserve their parental rights."[144]

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135 MUMOLA, *supra* note 3, at 1.

136 GABEL ET AL., s*upra* note 2, at 184.

137 *Id*.

138 *Id*.

139 *Id*.

140 *Id*. at 185-187.

141 GABEL ET AL., s*upra* note 2, at 185.

142 *See id*. at 187.

143 *See infra* note 123-124.

144 GABEL ET AL., s*upra* note 2, at 188.

V. Conclusion

Courts have made clear distinctions between incarcerated and non-incarcerated parents. Some courts have used the separation to deny substantive and procedural due process protections to incarcerated parents. Denying incarcerated parents their constitutional rights is preventing almost 1.5 million children[145] from having any contact with their parents.

While it may be true that many of the children would fair better in foster care or with a relative who could provide the child with a stable and loving home, it is difficult to believe that at least some of the almost 750,000 incarcerated parents[146] are not capable of fostering a parental relationship. Is it in the best interests of every child to not visit a parent in prison? Is it in the best interests of every child to have his relationship with his parent severed because of his parent's status? These are very difficult questions, but they can be better answered if parents are given an opportunity to be heard regarding the placement and care of their children. The plight of nearly 1.5 million children rests in the hands of judges alone. The best way to ensure that the children of incarcerated parents are protected is to ensure that their parents' rights are protected.

Pamela Lewis

145 MUMOLA, *supra* note 3, at 1.

146 *Id.*