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## COMMENT

# HOW REASONABLE ARE REASONABLE EFFORTS FOR THE CHILDREN OF INCARCERATED PARENTS?

COURTNEY SERRATO\*

### INTRODUCTION

“For many children, a parent’s arrest is the moment when their invisibility is made visible; when it is made clear to them just how easily they may be overlooked within the systems and institutions that come to claim their parents.”<sup>1</sup>

In late November 1997, Pamela C., a Colorado resident, lost her husband to a heart attack.<sup>2</sup> This left her as a single mother to solely care for her son and daughter who were seven and four years of age.<sup>3</sup> Grieving the loss of her husband, coupled with an undiagnosed mental health condition, Pamela escalated her drug use.<sup>4</sup> In early December, she was arrested for drug possession, and because of an earlier felony conviction she was sentenced to six years in prison with an additional mandatory three years of parole.<sup>5</sup> Pamela’s children were placed in foster care and she came to quickly learn firsthand how the justice system could punish her for the crime she committed as well as potentially strip her of her parental rights if she did not satisfy the requirements of the federal law.<sup>6</sup>

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<sup>1</sup> Bureau of Justice Assistance, U.S. Dep’t of Justice, *Safeguarding Children of Arrested Parents* 5 (Aug. 2014), <https://www.bja.gov/Publications/IACP-SafeguardingChildren.pdf>.

<sup>2</sup> Sharona Coutts & Zoe Greenberg, ‘No Hope for Me’: *Women Stripped of Parental Rights After Minor Crimes*, RH Reality Check (Apr. 2, 2015, 9:43 AM), <http://rhrealitycheck.org/article/2015/04/02/hope-women-stripped-parental-rights-minor-crimes>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Pamela's incarceration was a harrowing experience marred by dispassionate caseworkers and further exasperated by the inability to communicate with her children.<sup>7</sup> She wrote numerous letters to her children, which she later found out never reached them, and only heard back from her children once a year, which made communicating very difficult.<sup>8</sup> Under federal law Pamela needed to comply with certain requirements, including communicating with her children, but she found these requirements extremely difficult to satisfy.<sup>9</sup> Eighteen months into her incarceration, Pamela received notice of a parental rights termination hearing, which she was not allowed to attend.<sup>10</sup> Two weeks later, her caseworker informed her that her parental rights had been terminated, and like most incarcerated parents, her parental rights were stripped away indefinitely.<sup>11</sup> Pamela dishearteningly recalled, "They just took my kids because there was no place for them to go. They said there was no hope for me, for rehabilitation."<sup>12</sup> Nonetheless, she strove to rehabilitate herself and sought to regain her parental rights.<sup>13</sup> After a grueling fourteen-year battle, Pamela ultimately regained custody of her children.<sup>14</sup>

When an individual is sentenced to prison, society focuses on the crime committed, the punishment that should be given, and the justice that must be served. Unfortunately, an individual's prison sentence can ultimately affect a number of other lives, including the convicted's children. Currently, 2.2 million people in the United States are incarcerated.<sup>15</sup> Over 1.5 million children in this country currently have one or both of their parents incarcerated.<sup>16</sup> Some children have the benefit of staying with a relative or guardian. However, the children who do not have alternative caretakers are sent to foster care where they ultimately start a new life. Regrettably, "foster care entails a number of additional potential harms to the child, such as an increased risk of physical or

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (Pamela completed parenting courses as well as treatment and now works as an advocate for a Colorado nonprofit).

<sup>15</sup> *Incarceration*, THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Nov. 25, 2015).

<sup>16</sup> NANCY G. LA VIGNE, ELIZABETH DAVIES, & DIANA BRAZZELL, *BROKEN BONDS: UNDERSTANDING AND ADDRESSING THE NEEDS OF CHILDREN WITH INCARCERATED PARENTS*, URBAN INSTITUTE (Feb. 2008), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411616-Broken-Bonds-Understanding-and-Addressing-the-Needs-of-Children-with-Incarcerated-Parents.PDF>.

sexual abuse.”<sup>17</sup> While there are differing opinions as to whether an incarcerated individual is fit to be a parent, once a child is removed from the home, reasonable efforts to return the child should ultimately be a decision that is made on a case-by-case basis.<sup>18</sup>

Often, incarcerated parents are assumed “unfit” to care for their children.<sup>19</sup> Furthermore, the law does not necessarily support the maintenance of a parent-child relationship for parents who are serving a prison sentence. In fact, research demonstrates that incarcerated parents are not bad parents, but can be effective parents with assistance.<sup>20</sup> Although California has taken steps toward reuniting children with incarcerated parents and maintaining that relationship within the prison walls,<sup>21</sup> these steps do not always foster a long-lasting relationship between the parent and child.

This article will discuss the development of the laws concerning children with incarcerated parents. Ultimately, the goal is to encourage states like California to (1) expand the law regarding reasonable efforts even further, (2) encourage California prisons to take into consideration exceptions for children and incarcerated parents in implementing prison policies, and (3) provide other states with a model for proposing new laws that can be put into practice. The background of this article will explain the federal implementation of The Adoption and Safe Families Act (ASFA)<sup>22</sup> and the necessary changes California made to state law after the enactment of ASFA,<sup>23</sup> as well as the policy behind California Department of Corrections and Rehabilitation’s (CDCR) visitation regulations. First, the article will discuss visitation as a reasonable effort and how visitation is viewed through the CDCR. Next, the article will examine the inconsistencies between California dependency law offering visitation and other reasonable efforts and CDCR’s view on visitation for incarcerated individuals. Finally, the article will provide recommendations for California dependency law and the CDCR to work together to create exceptions for the unique relationship between parent and child.

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<sup>17</sup> Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 814 – 15 (Summer 2011); see Myrna S. Raeder, *Remember the Family: Seven Myths About Single Parenting Departures*, 13 FED. SENT’G REP. 251, 253 (2001).

<sup>18</sup> Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 343 (Winter 2005).

<sup>19</sup> Laura J. Schoenbauer, Comment, *Incarcerated Parents and Their Children—Forgotten Families*, 4 LAW & INEQ. 579, 585 (1986).

<sup>20</sup> Deseriee A. Kennedy, *Children, Parents & the State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 83 (Winter 2011).

<sup>21</sup> CAL. WELF. & INST. CODE § 361.5(e)(1) (West, Westlaw through 2015 Reg. Sess. laws, and Ch. 1 of 2015-2016 2nd Ex. Sess)).

<sup>22</sup> The Adoption and Safe Families Act of 1997, Pub. L. No. 105 – 89, 111 Stat 2115.

<sup>23</sup> 42 U.S.C. § 671(a)(15)(A) (2011).

This includes how the CDCR and state dependency laws can coexist to create a relationship, including visitation between children and incarcerated parents if it is within the best interest of the child.

## I. BACKGROUND

### A. ENACTMENT OF THE ADOPTION AND SAFE FAMILIES ACT AND HOW REASONABLE EFFORTS AFFECT INCARCERATED PARENTS AND THEIR CHILDREN

In 1997, former President Bill Clinton signed The Adoption and Safe Families Act (ASFA).<sup>24</sup> The original purpose of ASFA was to ensure that children are placed in foster care only temporarily before a more permanent adoption placement can be secured.<sup>25</sup> The law provides stability for foster children and helps to ensure the children are quickly given a permanent place to call “home.”<sup>26</sup> In 2014 in the United States, 415,129 children were in foster care.<sup>27</sup> ASFA requires states to file a petition to terminate parental rights when a child is placed in foster care for fifteen of the previous twenty-two months.<sup>28</sup> The drawback with the law is that “Congress did not consider or specifically address the rising number of incarcerated parents,”<sup>29</sup> whose sentences often exceed fifteen months<sup>30</sup> and who are not given an exception with respect to the twenty-two month timeframe. For example, the average sentence for a non-violent criminal offense is 51.6 months for state prisons.<sup>31</sup> Consequently, parents incarcerated for non-violent crimes can be relinquished of their parental rights when reasonable efforts cease, but prior to their release

<sup>24</sup> The Adoption and Safe Families Act of 1997, Pub. L. No. 105 – 89, 111 Stat 2115.

<sup>25</sup> Kurtis A. Kemper, Annotation, *Construction and Application by State Courts of the Federal Adoption and Safe Families Act and Its Implementing State Statutes*, 10 A.L.R. 6TH 173 (2006).

<sup>26</sup> Stephanie Sherry, Note, *When Jail Fails: Amending the ASFA to Reduce Its Negative Impact on Children of Incarcerated Parents*, 48 FAM. CT. REV. 380, 383 (2010).

<sup>27</sup> THE AFCARS REPORT NO. 22, U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILDREN’S BUREAU 1 (2015), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport22.pdf>.

<sup>28</sup> Katherine A. Hort, Note, *Is Twenty-two Months Beyond the Best Interest of the Child? ASFA’s Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879, 1881 (2000), <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2060&context=ulj>.

<sup>29</sup> Jean C. Lawrence, *ASFA in the Age of Mass Incarceration: Go to Prison—Lose Your Child*, 40 WM. MITCHELL L. REV. (SPECIAL ISSUE) 990, 1005 (2014).

<sup>30</sup> STEVE CHRISTIAN, NAT’L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF INCARCERATED PARENTS 5 (2009), <http://www.f2f.ca.gov/res/pdf/ChildrenOfIncarceratedParents2.pdf>.

<sup>31</sup> Sherry, *supra* note 11, at 380; LAURA E. GLAZE & LAURA M. MARUSCHAK, U.S. DEPT. OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 10 (2008).

from prison.<sup>32</sup> This may occur in spite of a child's connection with their parent that may be essential to that particular child's well-being.

Prior to placing a child in foster care, ASFA requires reasonable efforts be made to reunify the child with his or her parent, unless it would be inconsistent with that child's permanency plan, then the child should be given a permanent placement in a timely manner.<sup>33</sup> No exception is mentioned for incarcerated parents. It is important to note that federal law does not define reasonable efforts and instead provides that "what is reasonable depends on the time, place, and circumstances. What may be reasonable in one community may not be in another. It is the judiciary that ultimately determines what is reasonable."<sup>34</sup> ASFA does little to define reasonable efforts; however, it does place time limits on how long reasonable efforts should be provided, which range from six months to one year.<sup>35</sup> Pursuant to federal law, the best interest of the child "prevail[s] over all other considerations. Parental fault, or lack thereof, is relevant only insofar as it bears upon the child's interests."<sup>36</sup> The paramount concern when offering reasonable efforts is the child's health and safety.<sup>37</sup> In addition, permanency is considered and takes into consideration immediate stability for the child.

With respect to California's state law, an exception is carved out for incarcerated parents. Accordingly, reasonable efforts require the maintenance of a parent-child relationship for the duration of an incarcerated parent's sentence, if it is within the child's best interest.<sup>38</sup> Reunification services are not required when the court finds by clear and convincing evidence that any of the following have occurred: the whereabouts of the parent are unknown;<sup>39</sup> the parent has a mental disability that makes him or her incapable of utilizing services;<sup>40</sup> there is a prior adjudication of physical or sexual abuse of a child, and after the child was returned home, the child has been removed due to additional physical or sexual

<sup>32</sup> PATRICIA E. ALLARD & LYNN D. LU, REBUILDING FAMILIES, RECLAIMING LIVES: STATE OBLIGATIONS TO CHILDREN IN FOSTER CARE AND THEIR INCARCERATED PARENTS, BRENNAN CTR. FOR JUSTICE, at iii (2006), [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_37203.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_37203.pdf).

<sup>33</sup> CAL. WELF. & INST. CODE § 361.5(e)(1) (West 2013).

<sup>34</sup> Leonard Edwards, *Reasonable Efforts: A Judicial Perspective*, THE JUDGES' PAGE, 5 (Oct. 2007), [http://www.casaforchildren.org/atf/cf/%7B9928CF18-EDE9-4AEB-9B1B-3FAA416A6C7B%7D/0710\\_reasonable\\_efforts\\_in\\_the\\_dependency\\_court\\_issue\\_0119.pdf](http://www.casaforchildren.org/atf/cf/%7B9928CF18-EDE9-4AEB-9B1B-3FAA416A6C7B%7D/0710_reasonable_efforts_in_the_dependency_court_issue_0119.pdf).

<sup>35</sup> Nell Bernstein, *Foreword to ALLARD & LU, supra* note 17, at iii, iv.

<sup>36</sup> Abramowicz, *supra* note 5, at 802.

<sup>37</sup> 42 U.S.C. § 671(a)(15)(B) (2011).

<sup>38</sup> 42 U.S.C. § 671(a)(15)(A) (2011).

<sup>39</sup> CAL. WELF. & INST. CODE § 361.5(a)(4)(b)(1) (West, Westlaw through Ch. 1 of 2015 – 2016 2nd Ex. Sess.).

<sup>40</sup> *Id.* at § 361.5(a)(4)(b)(2).

abuse;<sup>41</sup> the parent caused the death of another child through abuse or neglect;<sup>42</sup> a child younger than age five has suffered severe physical abuse that was inflicted by the parent;<sup>43</sup> the parent has inflicted severe physical or sexual abuse on the child or a sibling, and the court finds that it would not benefit the child to pursue reunification with the offending parent;<sup>44</sup> the parent is not receiving reunification services for a sibling of the child;<sup>45</sup> the child was conceived as a result of a sexual offense;<sup>46</sup> the parent has willfully abandoned the child;<sup>47</sup> the court ordered termination of reunification services for any siblings of the child because the parent failed to reunify with the sibling, and that parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling from the parent;<sup>48</sup> the parent's rights to another child have been terminated, and conditions that led to the termination have not been remedied;<sup>49</sup> the parent has been convicted of a violent felony;<sup>50</sup> the parent has a history of chronic use of drugs or alcohol and refused to comply with a treatment program;<sup>51</sup> the parent has indicated a lack of interest in reunification services;<sup>52</sup> or the parent has on one or more occasions abducted the child or a sibling from his or her placement.<sup>53</sup>

1. *Exceptions to filing a petition to terminate parental rights under ASFA*

Exceptions to filing a petition under ASFA may be made if (1) the child is living with a relative, (2) the state finds a compelling reason not to file because it is not within the best interest of the child, or (3) the state fails to provide services necessary for reunification.<sup>54</sup> Under the first exception, the law assumes that a child placed with a relative is essentially not in need of being placed in foster care. For incarcerated parents who do not have relatives to care for their children, exceptions two and three may apply in order to preserve their parental rights. For example, under exception two, a court finding that a child can be reuni-

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<sup>41</sup> *Id.* at § 361.5(a)(4)(b)(3).

<sup>42</sup> *Id.* at § 361.5(a)(4)(b)(4).

<sup>43</sup> *Id.* at § 361.5(a)(4)(b)(5).

<sup>44</sup> *Id.* at § 361.5(a)(4)(b)(6).

<sup>45</sup> *Id.* at § 361.5(a)(4)(b)(7).

<sup>46</sup> *Id.* at § 361.5(a)(4)(b)(8).

<sup>47</sup> *Id.* at § 361.5(a)(4)(b)(9).

<sup>48</sup> *Id.* at § 361.5(a)(4)(b)(10).

<sup>49</sup> *Id.* at § 361.5(a)(4)(b)(11).

<sup>50</sup> *Id.* at § 361.5(a)(4)(b)(12).

<sup>51</sup> *Id.* at § 361.5(a)(4)(b)(13).

<sup>52</sup> *Id.* at § 361.5(a)(4)(b)(14).

<sup>53</sup> *Id.* at § 361.5(a)(4)(b)(15).

<sup>54</sup> 42 U.S.C. § 671(a)(15)(A) (2007).

fied with a parent who is serving a short-term sentence for a non-violent crime may serve as a compelling reason not to terminate parental rights. Under exception three, the state's failure to provide reasonable efforts to reunify a child with his or her parent will thwart termination proceedings—this includes reasonable efforts for children with incarcerated parents. Conversely, “reasonable efforts” is not specifically defined under ASFA; therefore, no absolute line of demarcation exists between services that adequately foster reunification between children and incarcerated parents, and services that are merely rendered. The reason for this inconsistency may very well have been that each relationship of a parent and child is unique. However, it does not allow for uniformity in practice and essentially hinders reunification for incarcerated parents and their children.

**B. CALIFORNIA’S ENUMERATED REUNIFICATION SERVICES FOR INCARCERATED PARENTS AND CHILDREN THAT MET THE “REASONABLE EFFORTS” STANDARD**

As a response to the disputes over the meaning “reasonable efforts,” California enumerated reunification services offered to incarcerated parents and their children that met the “reasonable efforts” standard. However, prior to determining the adequacy of such services, a determination of whether it is in the best interest of the child to return to an incarcerated parent’s care or to relinquish parental rights must be made. There is no set formula; instead, a case-by-case approach should be taken.<sup>55</sup> ASFA was originally enacted “to promote the adoption of children in foster care.”<sup>56</sup> The Act states, “[n]othing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases.”<sup>57</sup> Due to ASFA’s broad language and because defining reasonable efforts “is a directive whose meaning will obviously vary with the circumstances of each individual case,” states such as California have included in the law what will be offered as reasonable reunification efforts, particularly for the children with incarcerated parents.<sup>58</sup>

California is one of the states that chose to narrow ASFA’s vague reasonable efforts standard by illustrating exactly what services should be included.<sup>59</sup> California demands reasonable efforts be made, unless it

<sup>55</sup> Bean, *supra* note 6, at 343.

<sup>56</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105 – 89, 111 Stat. 2115.

<sup>57</sup> 42 U.S.C.A. § 678 (West, Westlaw through Pub. L. No. 114 – 112 (excluding 114 – 92, 114 – 94 and 114 – 95) approved 12-18-2015)).

<sup>58</sup> Bean, *supra* note 6, at 329 (quoting *Suter v. Artist M.*, 503 U.S. 347, 360 (1992)).

<sup>59</sup> Bean, *supra* note 6, at 329.



can be shown by clear and convincing evidence the services would be detrimental to the child.<sup>60</sup> The reasonable efforts provided under California's statute include: transportation, telephone calls, visitation, and other resources when appropriate.<sup>61</sup> These resources may also extend to family members or foster parents taking care of the child, if they are within the child's best interests.<sup>62</sup> In deciding which reasonable efforts are appropriate, certain factors are considered, including:

. . . the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration [or] institutionalization, or detention . . . within the reunification time limitations . . . and any other appropriate factors.<sup>63</sup>

Regardless of whether the services provided will be successful or not, incarcerated parents must at the very least have access to these reasonable efforts.<sup>64</sup> Case law supports that the services need not be perfect, but they must be reasonable.<sup>65</sup>

These resources are specifically tailored to children with an incarcerated parent. Although the reasonable efforts are spelled out in the law, a number of obstacles prevent children from actually receiving these resources, especially for long periods of time. In particular, reasonable efforts have a cut-off date, after which they no longer have to be provided, depending on the age of the child. This includes services lasting no more than one year for children above three years of age, and between six months and one year for children under the age of three.<sup>66</sup> Time limits are in place to provide permanency for the child. In California, in determining if the services should be extended to twelve months, the court must take into account whether the incarcerated parent made good faith efforts to maintain a relationship with the child and whether there were

<sup>60</sup> CAL. WELF. & INST. CODE § 361.5(e)(1) (West, Westlaw through Ch. 1 of 2015-2016 2nd Ex. Sess.).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> CAL. WELF. & INST. CODE § 362 (West, Westlaw through 2015 Reg. Sess. laws, and Ch. 1 of 2015-2016 2nd Ex. Sess.).

<sup>65</sup> *Melinda K. v. Superior Court*, 116 Cal. App. 4th 1147, 1159, 11 Cal. Rptr. 3d 129, 138 (2004).

<sup>66</sup> CAL. WELF. & INST. CODE § 361.5(a)(1), (3)-(4) (2015) (West, Westlaw through 2015 Reg. Sess. laws, and Ch. 1 of 2015-2016 2nd Ex. Sess.).

any barriers that prevented the relationship from continuing.<sup>67</sup> As an additional requirement toward reunification and maintaining a relationship with the child, an incarcerated parent may be required to take training or vocational classes.<sup>68</sup> The unique dynamic of the parent-child relationship places an additional burden on those children with incarcerated parents because most prison sentences extend past the time frame for offering reasonable efforts. Moreover, the problem arises when these reasonable efforts defined in California's law cannot be put into practice because they conflict with prison regulations that often place the safety of the institution above all else.

### C. CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION

The California Department of Corrections and Rehabilitation (CDCR) is responsible for creating the regulations that govern prison institutions in California. The CDCR places strict policies on how prisons should run, particularly with regard to visitation.<sup>69</sup> In California, visitation is limited to certain days and hours depending on the institution, and children of incarcerated parents are offered no special exceptions.<sup>70</sup>

CDCR's general guidelines require that all prisons offer no less than twelve hours of visitation a week, and regular visiting days must be consecutive.<sup>71</sup> Some limitations for visiting include: prior notification to visit, designated visitation areas, and no visitation while inmates have work requirements.<sup>72</sup> Although there is no limit to the total amount of visitors, an inmate can only receive a maximum of five visitors at a time, including minors.<sup>73</sup> "These regulations are made in recognition and consideration of the value of inmate visitation as a means of increasing safety in prisons, maintaining family and community connections, and preparing inmates for successful release and rehabilitation."<sup>74</sup>

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<sup>67</sup> CAL. WELF. & INST. CODE § 361.5 (West, Westlaw through 2015 Reg. Sess. laws, and Ch. 1 of 2015-2016 2nd Ex. Sess)).

<sup>68</sup> CAL. WELF. & INST. CODE § 361.5(e)(1) (West, Westlaw through 2015 Reg. Sess. laws, and Ch. 1 of 2015-2016 2nd Ex. Sess)).

<sup>69</sup> CAL. CODE REGS. tit. 15, § 3170 (2015).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at § 3172.2.

<sup>72</sup> *Id.* at § 3170.1.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at § 3170.

## II. VISITATION

## A. SAFETY OF THE INSTITUTION RULES

Institutions believe “[v]isitation between an individual and an inmate is a privilege, and such visitation may be conditioned in ways reasonably consistent with the security of the custodial facility.”<sup>75</sup> Federal case law demonstrates that the judicial system does not place the best interest of the child superior to prison safety. *Block v. Rutherford* addressed allowing children contact visits with an incarcerated parent before pretrial confinement.<sup>76</sup> The Court held prohibiting contact visits to pretrial inmates was constitutional, and therefore did not violate the Due Process Clause.<sup>77</sup> The Court reasoned that the institution is given discretion to create the rules, as they are in the best position as professionals to make sound decisions regarding the safety of the prison.<sup>78</sup>

Moreover, *Overton v. Bazzetta* upheld the same visitation limitations, prohibiting visits from children and family as rationally related to legitimate penological objectives.<sup>79</sup> *Overton* upheld restrictions placed on visitation as valid interests and important for internal security, sexual misconduct, accidental injury, and any disruption that the children may cause the institution.<sup>80</sup> Overall, Supreme Court decisions demonstrate that safety is a legitimate penological interest and therefore regulations limiting visitation are in the best interest of the facility and the child.<sup>81</sup>

Examining both federal and state law, as well as California’s prison regulations illustrates the issues between parenting and incarceration. Federal and state law aim to maintain the relationship between a parent and child, incarcerated or not, if within the child’s best interest; California holds a duty to ensure safety and order within prison institutions, especially when creating visitation policies. Sometimes, these two goals conflict, which obstructs the child’s right to maintain a long-lasting relationship with their parent and severely limits the incarcerated parent’s liberty to be a parent to their child.

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<sup>75</sup> 49 CAL. JUR. 3d *Penal and Correctional Institutions* § 123 (2015).

<sup>76</sup> *Block v. Rutherford*, 468 U.S. 576, 586–87 (1984).

<sup>77</sup> *Id.* at 590–91.

<sup>78</sup> *Id.* at 589.

<sup>79</sup> *Overton v. Bazzetta*, 539 U.S. 126, 132–33 (2003).

<sup>80</sup> *Id.* at 133.

<sup>81</sup> *Id.*

## III. THE CONFLICT

## A. HOW VISITATION IS LIMITED AS A REASONABLE EFFORT FOR THE CHILDREN OF INCARCERATED PARENTS

Reasonable efforts conflict with prison regulations because children of incarcerated parents are not considered when creating and implementing prison policies. Furthermore, what might be in the best interest of the child is often at odds with maintaining the safety of the institution. Children are particularly overlooked when considering visitation policies. In particular, there is no provision within the CDCR's policies regarding the right of a child to visit his or her incarcerated parent.<sup>82</sup> Each child's relationship with his or her parent is different and requires its own special attention, but this is not the CDCR's priority.<sup>83</sup> The CDCR places safety among the most important considerations when creating policies. Nevertheless, inmates also identify as parents and individual liberties, such as the right to be a parent, should not be threatened within the context of prison.

In the case of an incarcerated parent, the stigma of their incarceration often leads to the conclusion that visitation, or contact in general, is not within the child's best interest. Legislation confirms this view because "[f]ewer than half of states have some level of visitation services for the children of prison inmates, with 43 institutions providing some visitation space for mothers and children."<sup>84</sup> Unfortunately, when a child does not have the ability to remain in contact with their incarcerated parent, they are at risk of losing the opportunity to maintain a strong parent-child relationship.<sup>85</sup> By California law placing a time constraint on visitation as a reasonable effort, and California institutions providing no exceptions to the unique parent-child relationship, California may ultimately prevent some children from having a long-lasting relationship with their incarcerated parent, even if it is not in the child's best interest.

Contrary to the actual practice of offering reasonable efforts, California courts have held "[t]he relationship between parent and child is so

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<sup>82</sup> See CAL. CODE REGS. tit. 15, § 3170 (2015).

<sup>83</sup> See also CAL. CODE REGS. tit. 15, § 3170 (2015) (increasing prison safety, maintaining familial relationships, and preparing inmates for a successful release is the main purpose for prison safety; however, the regulation does not address tailoring visits for the benefit of individual families).

<sup>84</sup> Sally Day, *Mothers in Prison: How the Adoption and Safe Families Act of 1997 Threatens Parental Rights*, 20 WIS. WOMEN'S L.J. 217, 227 (Fall 2005) (citing LIS, Inc., *Services for Families of Prison Inmates*, SPECIAL ISSUES IN CORRECTIONS, Feb. 2002, at 3, 5, [www.nicic.org/pubs/2002/017272.pdf](http://www.nicic.org/pubs/2002/017272.pdf)).

<sup>85</sup> JAMES J. GOBERT & NEIL P. COHEN, *RIGHTS OF PRISONERS* 130, 132 (1981).

basic to the human equation as to be considered a fundamental right. . . . Interference with that right should only be justified by some compelling necessity.”<sup>86</sup> In addition, federal courts require “there must be a showing of a substantial governmental interest serving legitimate and reasonable needs and exigencies of the institutional environment to warrant limitations on an individual inmate’s right to communicate with family and friends.”<sup>87</sup>

Ironically, studies show that a large number of parents do not have the privilege of visiting with their children, even though it is a constitutional right proven to be beneficial.<sup>88</sup> “In 2004, 59 percent of parents in a state correctional facility and 45 percent of parents in a federal correctional facility reported never having had a personal visit from their children.”<sup>89</sup> The primary reason is that the prison conditions are not suitable for children to visit, and even incarcerated parents state the environment is oppressive.<sup>90</sup> Even when visitation is offered, visitors, including children, speak with their incarcerated parent through a glass partition and must communicate through a telephone.<sup>91</sup> In theory, institutions promote visitation and the ability to maintain family relationships, however, in practice, the institutions regulations to ensure safety inhibit this goal.<sup>92</sup>

Visitation and contact in general with an incarcerated parent is a reasonable effort that has been shown to increase the likelihood of reunification between that parent and child.<sup>93</sup> Studies show that incarcerated parents who maintain contact with their families through personal visits, letters, and communication generally have higher rates of reunifi-

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<sup>86</sup> *In re Smith*, 112 Cal. App. 3d 956, 968 (1980), 169 Cal. Rptr. 564, 569. See also 3 B.E. WITKIN ET AL., CALIFORNIA CRIMINAL LAW § 20 (4th ed. 2012).

<sup>87</sup> George L. Blum, Annotation, *Right of Jailed or Imprisoned Parent to Visit from Minor Child*, 6 A.L.R. 6TH 483, § 2 (2005).

<sup>88</sup> Schoenbauer, *supra* note 7, at 582 – 83.

<sup>89</sup> SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991-2007, at 2 (2009). [http://www.sentencingproject.org/doc/publications/publications/inc\\_incarceratedparents.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf).

<sup>90</sup> Schoenbauer, *supra* note 7, at 583 (citing PHYLLIS JO BAUNACH, MOTHERS IN PRISON 42, 43 (1985)).

<sup>91</sup> Schoenbauer, *supra* note 7, at 583 (1986) (citing Ellen Barry, *Children of Prisoners: Punishing the Innocent*, YOUTH L. NEWS, Mar-Apr. 1985, at 14)).

<sup>92</sup> CHRISTIAN, *supra* note 15, at 4.

<sup>93</sup> JEREMY TRAVIS ET AL., URBAN INST., FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 6 (2005), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310882-Families-Left-Behind.PDF> (citing WOMEN’S PRISON ASS’N, WHEN A MOTHER IS ARRESTED: HOW THE CRIMINAL JUSTICE AND CHILD WELFARE SYSTEMS CAN WORK TOGETHER MORE EFFECTIVELY: A NEEDS ASSESSMENT INITIATED BY THE MARYLAND DEPARTMENT OF HUMAN RESOURCES 6 (1996)).

cation than those who do not.<sup>94</sup> Moreover, studies show incarcerated individuals also benefit when they are able to see their children.<sup>95</sup> Parent-child visitation may assist in dealing with separation and reduce recidivism.<sup>96</sup> For incarcerated parents, “[t]he ability to have contact with their children can improve [their] mental health<sup>97</sup> and general morale. . . .”<sup>98</sup> This also results in better-behaved inmates because of the incentive not to jeopardize visitation rights.<sup>99</sup> Evidence also shows that visits, telephone calls, and letters decrease levels of anxiety in children and improve self-esteem.<sup>100</sup> By allowing children and parents the opportunity to remain in contact in a meaningful way, the likelihood of maintaining that relationship after incarceration increases.

The best way to maintain a relationship between a parent and child is to encourage continuing contact.<sup>101</sup> Therefore, continuing contact, if it is within the best interests of the child, must be provided during incarceration to have a successful chance at a relationship after sentencing is served. This is only possible if California prison policies and California dependency laws allow this relationship to continue, including long-term if required. Essentially, the safety of institutions should not have to be compromised at the expense of allowing incarcerated parents to reunify with their children. Both goals should be attainable. However, when prisons create policies too rigidly focused on safety and overlook the needs of these incarcerated parents and children placed in this unique relationship, successful reunification becomes difficult.

Children and incarcerated parents also have very little legal basis for requesting special visitation or a child-friendly environment if the institution does not allow for it.<sup>102</sup> This is because the institution is given the discretion to make regulations that promote safety even if these regulations are not conducive to maintaining a relationship between parent and

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<sup>94</sup> TRAVIS ET AL., *supra* note 78, at 6 (citing Creasia Finney Hairston, *Family Ties During Imprisonment: Do They Influence Future Criminal Activity*, 52 FED. PROBATION 48 (1988), <https://www.ncjrs.gov/pdffiles1/Digitization/112936NCJRS.pdf>).

<sup>95</sup> ALLARD & LU, *supra* note 17, at 5.

<sup>96</sup> Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 83 (2011).

<sup>97</sup> Lawrence, *supra* note 14, at 1003 (citing Creasia Finney Hairston, *Family Ties During Imprisonment: Important to Whom and For What?*, 18 J. SOC. & SOC. WELFARE 87, 93–94 (1991)).

<sup>98</sup> Lawrence, *supra* note 14, at 1003 (citing Nell Berstein, *Foreword to ALLARD & LU, supra* note 17, at iii).

<sup>99</sup> Lawrence, *supra* note 14, at 1003–04.

<sup>100</sup> *Id.* at 1004; See SUSAN HOFFMAN FISHMAN, *THE IMPACT OF INCARCERATION ON CHILDREN OF OFFENDERS*, IN *CHILDREN OF EXCEPTIONAL PARENTS* 89, 94 (Mary Frank ed., 1983).

<sup>101</sup> Lawrence, *supra* note 14, at 1004; See Nancy G. La Vigne et al., *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. CONTEMP. CRIM. JUST. 314, 328 (2005).

<sup>102</sup> Boudin, *supra* note 81, at 99.

child. It seems hard to imagine fostering a successful relationship in a space that maintains security and safety as the one and only focus. Children are not taken into consideration when creating visiting policies,<sup>103</sup> “and in some cases they are targeted for exclusion.”<sup>104</sup> Each institution is permitted to interpret the security of the facility, which allows for much discretion and “prison officials must be accorded great latitude in drawing these lines.”<sup>105</sup> Although any policy that prohibits visitation between an incarcerated parent and child is a denial of a constitutional liberty,<sup>106</sup> the institution’s visitation policies are not created with the best interest of the child in mind. This essentially could defeat the purpose of providing the reasonable effort of visitation because prison policies do little to account for allowing the relationship between an incarcerated parent and child to flourish.

Another obstacle, and yet an important element in preserving the relationship of parent and child, is proximity.<sup>107</sup> “Today, over 60 percent of state prison inmates report that they are placed more than 100 miles from their last place of residence.”<sup>108</sup> California case law supports that services, particularly visitation, cannot be denied based on a mileage limitation or because of the child’s age, unless evidence supports that because of the mileage or the child’s age visitation would be a detriment to the child.<sup>109</sup> By creating obstacles out of the child’s control, maintaining a relationship with an incarcerated parent is made much more difficult. Scholars advocate for addressing children’s needs when creating prisons, and placing institutions in locations where visitation is possible minimizes the harm of having a parent incarcerated.<sup>110</sup> However, due to inadequate funding incarceration nearby is not always available.<sup>111</sup>

It is also difficult for reasonable efforts to be put into practice when the “[c]hildren of incarcerated parents often lack sufficient support and opportunities to maintain contact with their imprisoned parents.”<sup>112</sup> In

<sup>103</sup> Boudin, *supra* note 81, at 105.

<sup>104</sup> *Id.* at 99 (citing *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003)) (noting that children are excluded in some cases for visitation because safety of the institution is more important and is considered a legitimate penological interest).

<sup>105</sup> Blum, *supra* note 72, at 483.

<sup>106</sup> 49 CAL. JUR. 3d *Penal and Correctional Institutions* § 124 (2015).

<sup>107</sup> Day, *supra* note 69, at 228.

<sup>108</sup> Day, *supra* note 69, at 228 (citing Christopher J. Mumola, *Incarcerated Parents and Their Children*, NCJ 182335, BUREAU OF JUSTICE STATISTICS, 1 (Aug. 2000), available at <http://www.bjs.gov/content/pub/pdf/iptc.pdf>).

<sup>109</sup> See *In re Dylan T.*, 65 Cal. App. 4th 765, 769 (1998) (holding it was error to deprive mother of visitation without evidence showing that visitation would be detrimental to child); B.E. WITKIN ET AL., *SUMMARY OF CALIFORNIA LAW, PARENT & CHILD* § 646 (10th ed. 2012).

<sup>110</sup> Abramowicz, *supra* note 5, at 871.

<sup>111</sup> Schoenbauer, *supra* note 7, at 586.

<sup>112</sup> Kennedy, *supra* note 8, at 82.

particular, studies show children who are in foster care due to a parent's incarceration are least likely to visit even though visitation is most important for these children.<sup>113</sup> "That is because visits must be authorized and arranged by child welfare caseworkers who carry high caseloads and who may be inclined to 'abandon' the prospect of reunification with an imprisoned parent."<sup>114</sup> This highlights the discrepancies between states offering reasonable efforts for children of incarcerated parents and these efforts actually being put into practice.

Visitation is not always in the best interest of the child. In some cases, not seeing an incarcerated parent may be the best thing for the child, both physically and emotionally. But, where it is within the child's best interest to visit their parent, reasonable efforts, including visitation, should be offered for a period of time that takes into account an incarcerated parent's rights, including maintaining a long-term relationship with their child. A parent's incarceration should not be weighed against their right to be a parent.

#### B. COLLABORATION BETWEEN THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION AND CALIFORNIA DEPENDENCY LAWS

Unfortunately, a "lack of meaningful policy coordination between criminal justice and child welfare agencies" exists.<sup>115</sup> The two systems conflict with one another because "criminal justice policymakers are concerned with sentencing and punishment, while child welfare officials are concerned with safety and permanency for children."<sup>116</sup> In order to give children the right to preserve a relationship with their incarcerated parent, and the right of an incarcerated parent to sustain a relationship with their child, California needs to require prison policies to give greater significance to the best interest of the child. This would guarantee that the reasonable efforts offered to children are actually reasonable.

As researcher and journalist Nell Bernstein stated, "The dissolution of families, the harm to children – and the resultant perpetuation of the cycle of crime and incarceration from one generation to the next – may be the most profound and damaging effect of our current penal structure."<sup>117</sup> ASFA and state law counterparts have been scrutinized as violating the fundamental right to family integrity protected under the

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<sup>113</sup> CHRISTIAN, *supra* note 15, at 6.

<sup>114</sup> *Id.*

<sup>115</sup> Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1681 (July 2003).

<sup>116</sup> *Id.*

<sup>117</sup> NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED 4 (2005).



liberties of due process, especially for those parents who are incarcerated.<sup>118</sup> Even though California has expanded the definition of reasonable efforts, more can and should be done to make the policies of correctional institutions and dependency laws more compatible. This requires that California's dependency laws and prison regulations find common ground. While California's reasonable efforts include transportation, telephone calls, and visitation,<sup>119</sup> these resources are only offered for a maximum of twelve months<sup>120</sup> and they do not always coexist with prison regulations.

When considering if reasonable efforts should continue, courts have held that if a "substantial probability" exists that the child will be returned to the parent's custody within the time frame allowed, or that reasonable services were not provided, reasonable services must continue throughout the entire twelve-month period.<sup>121</sup> California courts take into consideration the following factors in determining whether a "substantial probability" of reunification exists: (1) whether the parent regularly contacts and or visits the child; (2) whether the parent shows substantial progress in fixing the issues that led to losing the child; and (3) whether the parent shows the ability to "provide for the child's safety, protection, physical and emotional health, and special needs."<sup>122</sup> By nature, prison confines people and limits the exercise of most rights, including the ability to do all that may be necessary to provide for a child.<sup>123</sup> The presumption of having a substantial probability of reunification for an incarcerated parent is already weak. Moreover, prison regulations are not created with the best interest of the child in mind, but instead for the safety of the institution. This conflicts with the idea of allowing reunification efforts for this unique relationship between a child and an incarcerated parent.

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<sup>118</sup> Caitlin Mitchell, Note, *Family Integrity and Incarcerated Parents: Bridging the Divide*, 24 YALE J.L. & FEMINISM 175, 177 (2012) (citing Emily K. Nicholson, Comment, *Racing Against the ASFA Clock: How Incarcerated Parents Lose More than Freedom*, 45 DUQ. L. REV. 83, 94 (Fall 2006)).

<sup>119</sup> CAL. WELF. & INST. CODE § 361.5(e)(1) (West, Westlaw through 2015 Reg. Sess. laws, and Ch. 1 of 2015-2016 2nd Ex. Sess)).

<sup>120</sup> CAL. WELF. & INST. CODE § 361.5(a)(1), (3)-(4) (West, Westlaw through 2015 Reg. Sess. laws, and Ch. 1 of 2015-2016 2nd Ex. Sess)).

<sup>121</sup> CAL. WELF. & INST. CODE § 361.5(a)(1)-(3) (West, Westlaw through 2015 Reg. Sess. laws, and Ch. 1 of 2015-2016 2nd Ex. Sess)).

<sup>122</sup> 49 CAL. JUR. 3D *Penal Institutions* § 123 (2014).

<sup>123</sup> *Id.*

## IV. RECOMMENDATIONS

## A. POLICY AND LEGISLATION RECOMMENDATIONS FOR CHILDREN WITH INCARCERATED PARENTS

Regrettably, a large number of states still allow courts to heavily weigh incarceration when considering the termination of parental rights.<sup>124</sup> Although incarceration should be one factor the court considers when determining termination of parental rights, it should not be the sole reason for termination. Parental rights should be terminated based on the individual's role as a parent, in addition to any other outside factors that would not be in the best interest of the child.<sup>125</sup> Although an incarcerated parent faces unusual barriers when trying to maintain a relationship with their child, the opportunity to have and maintain that relationship should not be taken away unless it can be proven to be detrimental to the child. The right to parent should not have an expiration date if the potential of maintaining a long-lasting relationship within the prison walls is available and within the child's best interests.

The San Francisco Children of Incarcerated Parents Partnership created a Children of Incarcerated Parents Bill of Rights ("Bill of Rights"). The Bill of Rights provides policymakers with guidelines to reference when creating laws that ultimately have an effect on children with incarcerated parents.<sup>126</sup> The bill was passed into California law in 2009 and is designed to "invite discussion and encourage relevant departments to use the Bill of Rights as a framework for analysis and determination of procedures when making decisions about services for these children."<sup>127</sup> The Bill of Rights is only used as a guideline because prisons are still given the discretion to create the laws that are best for the safety of the institution and its visitors, including visits from children.

A few specific principles that should be used when creating legislation within the CDCR and state dependency law include the following: the right to see and touch the parent, which could include providing non-intimidating child-centered visiting rooms in the institution, as well as considering the proximity to a family when assigning prisoners; the right to support, which could include training adults that work with young people with incarcerated parents and allocating a percent of the institutions' budget to support prisoners' families; and lastly, the right to a life-

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<sup>124</sup> Kennedy, *supra* note 8, at 83.

<sup>125</sup> *Id.*

<sup>126</sup> S. Con. Res. 20, 2009 Leg., Reg. Sess. (Cal. 2009), available at [http://leginfo.legislature.ca.gov:80/faces/billNavClient.xhtml?bill\\_id=200920100SCR20](http://leginfo.legislature.ca.gov:80/faces/billNavClient.xhtml?bill_id=200920100SCR20).

<sup>127</sup> *Id.*

long relationship between an incarcerated parent and child, which could include placing a family services coordinator at these institutions, as well as helping to rehabilitate those incarcerated.<sup>128</sup> These principles provide opportunities for policymakers to reduce recidivism and improve the lives of the children that are faced with the challenge of having a parent incarcerated.<sup>129</sup> This would allow children to see their parents and give parents the incentive not to act in a way that would revoke the privilege to see their children.

“Most literature suggests that separation due to incarceration has immediate effects on children such as feelings of guilt and shame, social stigma, loss of financial support, weakened ties to the parent, poor school performance, increased delinquency, and increased risk of abuse or neglect.”<sup>130</sup> Using these guidelines ensures the children of incarcerated parents are not neglected when creating laws and policy that ultimately have a tremendous impact on their lives.

There are a number of ways the criminal justice system and dependency courts can work together. One way is to “educate the people working in the child welfare system . . . on the magnitude of this problem and the potential benefits of maintaining ties between a child and an incarcerated parent.”<sup>131</sup> By informing the adults that work in the institutions and the dependency law sector of the benefits to maintaining the relationship between an incarcerated parent-child, these employees can find ways to change policies. For example, judges have the discretion to give children contact visits with their parents and if not, to maintain that connection in the closest alternative means available.<sup>132</sup> In addition, the child welfare community is in the best position to acknowledge the child’s needs and ensure the child is able to see and visit his or her parent, if within the child’s best interests, and if not, to advocate for other frequent communications.<sup>133</sup> Correctional facility staff and those within the prison context can help create child-friendly visitation centers and encourage quality parenting education.<sup>134</sup> Until the system is changed and the two separate institutions can work cohesively, children will continue to receive the partial benefits offered by state dependency laws and incarcerated parents will continue to lose their parental rights.

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Connecting Children with Incarcerated Parents*, CHILD PROTECTION BEST PRACTICES BULLETIN 2 (2011), <http://childlaw.unm.edu/assets/docs/best-practices/Connecting-children-with-incarcerated-parents-2011.pdf>.

<sup>131</sup> Lawrence, *supra* note 14, at 1006.

<sup>132</sup> *Connecting Children with Incarcerated Parents*, *supra* note 115, at 4.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

Other ways to ensure that reasonable efforts are actually reasonable for children with incarcerated parents are to assign inmates to facilities close to home, to provide child-friendly visiting areas within prisons and jails, to require training for corrections staff on treatment of visiting children, and to review and revise prison visitation policies to identify and remove unnecessary barriers to regular visitation.<sup>135</sup> In addition, prison policies should be more flexible and work cohesively with dependency law goals to ensure that the children offered reasonable efforts actually have the possibility of successful reunification with their parent. This includes creating more child-friendly visitation areas, which could potentially lead to more meaningful relationships within the institution.<sup>136</sup> Additionally, resources can be implemented that focus on the child with the incarcerated parent. For example, off-site visits between an incarcerated parent and child can be offered so that safety is not jeopardized. Moreover, visitation could be offered in the form of Internet Skype sessions to encourage maintaining communication if actual visitations are not feasible.<sup>137</sup> From the children's perspective, some "[c]ommunity-based services that have been adapted for prisoners' children include support groups, after-school programs, mentoring, and social-recreational activity programs."<sup>138</sup> California can also provide individualized time frames for the reasonable efforts offered to children with incarcerated parents that coincide with the length of parental sentences, if within the best interest of the child.<sup>139</sup>

Regrettably, funding is always a major issue. Although states offer services, generally lack of funds prohibits efforts from being put into practice. States should take into account funding when creating legislation to provide the necessary resources for children of incarcerated parents. Budgets should be changed and money reallocated in a way that offers programs that consider both the safety at the institution as well as reasonable efforts towards reunification, including visitation. This would be an investment that reduces recidivism and makes reunification after sentencing more likely. By offering children the resources to maintain a relationship with their parent in prison, but having prison regulations that

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<sup>135</sup> CHRISTIAN, *supra* note 15, at 6.

<sup>136</sup> *Id.* at 10.

<sup>137</sup> See Napa County CA, Department of Corrections: Visitation (2009), <http://www.countyofnapa.org/Pages/DepartmentContent.aspx?id=4294981158> (requiring at least twenty-four hours notice to conduct an at-home or on-site video visitation with an inmate in Napa County).

<sup>138</sup> Denise Johnston, *Services for Children of Incarcerated Parents*, 50 FAM. CT. REV. (SPECIAL ISSUE) 91, 97 (2012).

<sup>139</sup> Heidi Rosenberg, Comment, *California's Incarcerated Mothers: Legal Roadblocks to Reunification*, 30 GOLDEN GATE U. L. REV. 285, 328 (Spring 2000).

prevent these resources from actually being used, gives children nothing more than a slight attempt to return to their parent's custody.

California, as well as other states, should also take a close look at prison regulations and the effect these policies have on fundamental rights. When considering if a prison regulation violates a prisoner's fundamental rights, the due process factors should be considered:

- (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it;
- (2) whether there are alternative means of exercising the right;
- (3) the impact that accommodation of the constitutional right will have on guards, other inmates, or the allocation of prison resources; and
- (4) whether there are ready alternatives to the regulation.<sup>140</sup>

Examining these factors, the government surely has an interest in regulating prisons as well as children in the foster care system. However, the safety of the institution should not compromise the goal of reuniting incarcerated parents with their children. Given the uniqueness of each parent-child relationship, there really are no alternatives to offering each child reasonable efforts, including visitation, if it is what is needed to serve the best interests of the child. Moreover, proper procedures should offer certain exceptions to those children of incarcerated parents, because there is no reasonable alternative to seeing or being with a parent if it is deemed necessary for the child's best interests. In light of these factors and state legislation, the CDCR should also work closely with dependency courts to ensure children and parents in custody are not stripped of constitutional liberties, including the right to be a parent. In particular, California should determine what efforts should be made to continue or keep contact between a child and incarcerated parent if it is within the best interests of the child after the deadline provided in California's legislation.

Although safety should be a top priority within the criminal justice system, it is possible to create visitation policies that allow exceptions for the children of incarcerated parents without undermining the safety of the institution. This does not necessarily require contact visits in every case, but it should take into consideration the well-being of each child.

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<sup>140</sup> Tamar Lerer, Article, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 NW. J. L. & SOC. POL'Y 24, 50 (Summer 2013) (citing *Turner v. Safley*, 482 U.S. 78, 89-91 (1987)).

## CONCLUSION

There is much to be considered when examining the relationship between a parent and child. This is especially true when that relationship is in the context of prison. Since ASFA, many parents have lost parental rights in addition to serving a prison sentence. This law blurs the lines between parenting as a fundamental right and punishment through prison sentences. California took the first step in defining the reasonable efforts that must be offered in maintaining an incarcerated parent-child relationship before stripping away parental rights. Unfortunately, more must be done to ensure these reasonable efforts are not only listed as mandates, but also actually put into practice.

Specifically, visitation as a resource for the children of incarcerated parents must be centered around both the child and parent. Cooperation from the criminal justice system is required. California dependency law and the California Department of Corrections and Rehabilitation must complement each other to ensure that a child's opportunity to maintain a relationship with an incarcerated parent is made on an individual case-by-case basis. Allowing only some reasonable efforts be offered in California and enforcing limits on how long these reasonable efforts last, without carving out an exception for incarcerated parents, limits the ability of some children to form a long-lasting relationship with their parent.

By creating prison policies that take into consideration the best interest of the child standard and the dependency laws goal of permanency, there is a potential for increased rates of reunification, longer lasting relationships, and a reduction in recidivism. Every parent and child should be given an individual chance at restoring or continuing a relationship; even if this entails maintaining a relationship within prison.

