The Sentencing Judge's Role in Safeguarding the Parental Rights of Incarcerated Individuals

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Incarcerated parents face a disproportionate risk of having their parental rights terminated. According to a recent analysis of three million child-welfare cases nationwide, parents whose children have been placed in foster care due to their incarceration, but who have not been accused of child abuse, endangerment, or drug use, are more likely to lose their parental rights than parents who have physically or sexually assaulted their children. A dramatic rise in the prison population and the passage of the Adoption and Safe Families Act (ASFA) have driven the increase in the loss of parental rights among incarcerated parents. Furthermore, sentencing guidelines and mandatory minimums constrain a judge's ability to adequately consider a defendant's parenthood at sentencing.

This Note examines the sentencing judge's role in preventing the termination of parental rights of incarcerated parents and proposes the establishment of a judicial recommendation against termination proceedings while a parent is incarcerated. Part II of this Note examines the history of criminal sentencing and the historical practice of granting a judicial recommendation against deportation (JRAD) to noncitizen defendants. Part III analyzes the disproportionate rate at which incarcerated parents lose their parental rights as compared to non-incarcerated parents. Part IV argues for amending the ASFA to implement the JRAD's analog in the parental rights context and concludes that accounting for loss of parental rights at sentencing serves retributive, deterrent, and rehabilitative aims.

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I. INTRODUCTION

In 1999, Hurricane Floyd flooded and destroyed Lori Lynn Adams' trailer home in North Carolina.[1] Adams, a mother of four living in poverty, was later convicted and sentenced to two year-long prison terms for filing a fraudulent disaster-relief claim with the Federal Emergency Management Agency (FEMA) and for passing dozens of bad checks.[2] Following the conviction, Adams' four children were consequently placed under county supervision.[3]

Halfway through her second sentence, Adams received a phone call from her appointed family court attorney; her parental rights were being irrevocably terminated at a proceeding she could not attend due to her incarceration 300 miles away.[4] Adams was prohibited from ever seeing her children again, despite never having been charged with child abuse, neglect, or endangerment.[5] While acknowledging that she "had to pay the price" for the crimes she committed, Adams characterized the permanent loss of her parental rights as "the most extreme price there is."[6]

Adams' experience has become increasingly common in recent decades. Since 2006, over 32,000 incarcerated parents who had not been accused of physical or sexual abuse permanently lost their parental rights.[7] Approximately 5000 of those parents had their rights terminated solely due to their incarceration status.[8] More surprisingly, parents whose children have been placed in foster care due to their incarceration, but who have not been accused of child abuse, endangerment, or drug use, "are more likely to have their parental rights terminated than those who physical-

1. Eli Hager & Anna Flagg, *How Incarcerated Parents are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2, 2018), https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever [https://perma.cc/765M-ELMC].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* It is important to note, however, that "other factors, often related to [the incarcerated parent's] poverty, may have been involved" in the decision to terminate their parental rights. *Id.*

8. *Id.*

ly or sexually assault their kids."[9] Like Adams, many of these parents are poor and lack access to effective measures to safeguard their rights to their children.[10]

Changes in child welfare policy and a dramatic rise in the prison population have driven this increase in the loss of parental rights among incarcerated parents.[11] For instance, Congress passed the Adoption and Safe Families Act (ASFA) in 1997,[12] which required federally funded state child-welfare programs to initiate the termination of parental rights when a child has been in foster care for fifteen of the previous twenty-two months.[13] While the ASFA was enacted to reduce children's stay in foster care in favor of a permanent home, an unfortunate byproduct has been the disproportionate rate at which incarcerated parents lose their parental rights compared to those not incarcerated.[14]

Incarcerated parents "are by definition absent" and almost always lack access to measures that could prevent the termination of their parental rights.[15] Moreover, sentencing judges are hesitant to mitigate a defendant's sentence based on parenthood, thus setting lengthy sentences that irreparably disrupt the parent-child relationship. In federal sentencing, as well as in states that

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9. *Id.* Furthermore, between 2006 and 2016, "parents los[t] their parental rights regardless of the seriousness of their offenses" in thirteen percent of cases involving incarcerated parents. *Id.*

10. *Id.* ("Dorothy Roberts, an expert on race, gender and family law at the University of Pennsylvania, said the underlying problem in the child-welfare system is decision-makers' bias against poor parents, especially incarcerated mothers of color.") Roberts remarked that "Instead of actually responding to the struggles of poor families . . . we've decided that it's simpler to take their children away." *Id.*

11. The number of incarcerated parents has risen dramatically in recent decades, increasing by over 357,000 inmates from 1991 to 2007. A majority of today's 2.2 million inmates have minor children. *Id.* This Note uses the term "children" and "minor children" interchangeably to indicate offspring under the age of eighteen.

12. 42 U.S.C. §§ 670–679a (1997).

13. Hager & Flagg, *supra* note 1; *see also* Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1676 (2003).

14. *See* Hager & Flagg, *supra* note 1 (noting that the ASFA's "largely unintended consequence was to make incarcerated parents, who now spend well more than 15 months on average behind bars because of the tough prison sentences of the same era, more vulnerable to losing their children."); *see also* Genty, *supra* note 13, at 1676.

15. Hager & Flagg, *supra* note 1. Such measures include "spending time with [one's] children regularly, showing up for court hearings, taking parenting classes, being employed, having stable housing[,] and paying child support to reimburse the government for the costs of foster care." *Id.* Incarcerated parents are often unable to attend court hearings because prisons are not required to drive them to family court. *Id.* It is also often the case that incarcerated parents are unable to see their children because child-welfare agencies typically lack the resources to transport children to prison for visits. *Id.*

use a guidelines-based sentencing system, sentencing judges have limited discretion in considering a defendant's parenthood when setting a sentence; for instance, the federal Sentencing Guidelines state that "family ties are not ordinarily relevant in determining whether a departure may be warranted."[16] As such, sentencing judges in guidelines-based systems do not readily consider the responsibility of caring for minor children as a mitigating factor. Furthermore, some jurisdictions, as well as federal courts, carry an explicit presumption against downward departures[17] from the calculated sentencing range based on family relationships.[18]

The failure to adequately consider parenthood at sentencing reflects the institutional gap between criminal justice and child welfare agencies. The criminal justice system is concerned primarily with sentencing and punishment with inadequate regard to the collateral consequences that defendants face.[19] Historical-

16. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf [https://perma.cc/XX4J-RXLU]. Guidelines-based jurisdictions calculate a defendant's sentence based predominantly on two factors: (1) the offense conduct, and (2) the defendant's criminal history. *Id.* § 1B1.1. Some jurisdictions have mandatory guidelines, whereby sentencing judges are required to impose a sentence that falls within the range of months prescribed by the calculation of the defendant's offense and criminal history. A sentencing "departure" is the imposition of a sentence that falls outside of the applicable guidelines range, as calculated by the defendant's offense and criminal history. *Id.*

Other jurisdictions employ advisory guidelines, under which sentencing judges may depart from a presumptively valid term of incarceration. *See* National Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (July 2008), https://www.ncsc.org/~/media/microsites/files/csi/state_sentencing_guidelines.ashx [https://perma.cc/ETR3-KUNJ] ("Sentencing guidelines provide structure at the criminal sentencing stage by specifically defining offense and offender elements that should be considered in each case. After considering these elements using a grid or worksheet scoring system, the guidelines recommend a sentence or sentence range. Options usually include some period of incarceration (prison or jail), probation, or an alternative sanction. Goals of guidelines vary, but an underlying theme is that offenders with similar offenses and criminal histories be treated alike. Guidelines vary considerably in terms of whether they are promulgated by the legislature or judiciary, when judges must follow the recommendations, and what rights are afforded to those who disagree with imposed guidelines sentences."). For more information regarding sentences imposed pursuant to the Sentencing Guidelines, *see infra* Part II.A.3.

17. The Guidelines define "downward departure" as a "departure that effects a sentence less than a sentence that could be imposed under the applicable guideline range or a sentence that is otherwise less than the guideline sentence." *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM'N 2018).

18. *See id.* § 5H1.6 ("family ties are not ordinarily relevant in determining whether a departure may be warranted").

19. *See* Genty, *supra* note 13, at 1681 ("A second factor preventing the consequences to families of parental incarceration from being addressed is the lack of meaningful policy coordination between criminal justice and child welfare agencies. These two systems see

ly, however, sentencing judges have been empowered to consider collateral consequences that materially affect defendant's lives, albeit in a context different from parental rights.

The Immigration Act of 1917 authorized sentencing judges to issue what was known as the Judicial Recommendation Against Deportation (JRAD), which prevented noncitizen defendants from being deported after imprisonment.[20] The JRAD functioned to prevent noncitizen offenders from facing the "double punishment" of incarceration and deportation.[21] A similar approach in the parental rights context — empowering sentencing judges to prevent the termination of parental rights due to incarceration — would ameliorate the disproportionate impact of the ASFA on incarcerated parents and curtail the "double punishment" parents in prison face today.

This Note examines the sentencing judge's role in preventing the termination of parental rights of incarcerated parents and proposes the establishment of a judicial recommendation against termination proceedings while a parent is incarcerated. This Note follows from the premise that sentences resulting in the severe collateral consequence of loss of parental rights are not equivalent to criminal punishments of the same duration in which there is no loss of parental rights.[22] Part II of this Note discusses the history of criminal sentencing and contrasts the lack of consideration given to a criminal defendant's parenthood in sentencing with the historical practice of granting JRADs to

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their missions as distinct — criminal justice policymakers are concerned with sentencing and punishment, while child welfare officials are concerned with safety and permanency for children.").

20. *See* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143–44 n.3 (2002) (citing Immigration and Nationality Act (INA) § 237(a)(2)(A)–(B), 8 U.S.C. § 1227(a)(2)(A)–(B) (2000) and IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 40–48 (7th ed. 2000)).

21. *See* Marisa A. Marinelli, *Crimes and Punishment of the Alien: The Judicial Recommendation Against Deportation*, 14 HOFSTRA L. REV. 357, 357, 362–63 (1986). While deportation does not constitute criminal punishment per se, courts have described deportation as a "'drastic measure and at times the equivalent of banishment or exile. . . . It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.'" *Id.* at 363 (quoting Jordon v. DeGeorge, 341 U.S. 223, 231 (1951)).

22. While collateral consequences have traditionally not been thought of as constituting criminal punishment, this principle of proportionality is not novel. *See, e.g.*, Eleanor Bush, *Considering the Defendant's Children at Sentencing*, 2 FED. SENTENCING REP. 194 (1990) (arguing that a "two year prison sentence does not equal to two years in prison accompanied by permanent loss of child custody. Justice requires considering the consequences of a sentence for the defendant's children where they lead to such different effective quantities of punishment.").

noncitizen defendants. Part III analyzes the disproportionate rate at which incarcerated parents lose their parental rights as compared to non-incarcerated parents. It also discusses the interplay of the ASFA and state procedures initiating termination of parental rights proceedings. Next, Part IV argues for amending the ASFA to implement the JRAD's analog in the parental rights context. Part IV also identifies and responds to institutional impediments to such judicial action. Lastly, Part IV applies the traditional theories of punishment to the proposed solution, concluding that accounting for loss of parental rights at the sentencing stage serves retributive, deterrent, and rehabilitative aims.

II. THE HISTORY OF CONSIDERING A CRIMINAL DEFENDANT'S CHARACTERISTICS IN SENTENCING

A brief overview of twentieth century sentencing policy sheds light on the criminal justice system's failure to consider a defendant's minor children during sentencing proceedings. Part II.A discusses the penal system's early twentieth century focus on rehabilitation and the resulting problem of sentencing disparity. It then examines the Sentencing Reform Act and its attempt to introduce uniformity in sentencing by moving away from considering defendant characteristics. Part II.B argues that the Sentencing Guideline's lack of clear directives on a defendant's family circumstances has undermined the Sentencing Reform Act's uniformity objective. Part II.B further argues that this failure to consider defendant characteristics, namely parenthood, in sentencing has disproportionately punished incarcerated parents and their children. Part II.C then contrasts the lack of attention to a criminal defendant's parenthood in sentencing with the historical practice of granting JRADs to noncitizen defendants.

A. THE SENTENCING REFORM ACT AND THE DE-EMPHASIZING OF DEFENDANT CHARACTERISTICS IN SENTENCING

In 1910, Congress adopted a system of indeterminate sentencing to promote the rehabilitation of criminal defendants,[23] where judges focused on defendants' characteristics rather than the nature of the offense.[24] By 1960, every state had implemented an indeterminate sentencing system.[25] Under indeterminate sentencing, judges had discretion to impose a sentence that fell within a statutorily prescribed range. Because the prescribed range was quite broad and "few a priori rules or standards" existed to guide sentencing judges in their decision-making process, judges wielded great power in setting a term of punishment.[26] This power remained virtually unchecked because there was little-to-no appellate review of sentencing during this period.[27]

The unreviewed discretion of these judges resulted in unwarranted variances in sentencing, arising from differing sentencing philosophy and judicial values.[28] As such, offenders convicted of

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23. *See* Justin Brooks & Kimberly Bahna, *"It's a Family Affair" — The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 276 n.27 (1994) (citing Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893 (1990)).

24. *See* Susan E. Elingstad, *The Sentencing Guidelines: Downward Departure Based on A Defendant's Extraordinary Family Ties and Responsibilities*, 76 MINN. L. REV. 957, 958 (1992); *see also* Ilene H. Nagel & Barry L. Johnson, *The Role of Gender in a Structure Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders under the United States Sentencing Guidelines*, 85 J. CRIM. L. & CRIMINOLOGY 181, 184 (1994) (noting that the "focus on rehabilitation required a concomitant emphasis on the personal characteristics of the offender: 'a prevalent modern philosophy of penology [is] that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'") (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

25. *See* Brooks & Bahna, *supra* note 23.

26. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 696 (2010) (observing that "Congress took a back seat, prescribing a broad range of punishments for each offense, and intervening only occasionally to increase the maximum penalty for specific crimes in response to public demand" and concluding that "judges and parole authorities had the most power relative to the other sentencing players[;] they were acknowledged sentencing experts").

27. *Id.* at 696–97 (noting that "[i]n the absence of any review, judges had little incentive to generate standards for sentencing which might be applied in future cases; few judges bothered to write sentencing opinions at all").

28. Nagel & Johnson, *supra* note 24, at 185 ("The discretionary nature of [the indeterminate] sentencing system led to the emergence of unwarranted disparities in the sentencing of offenders convicted of similar offenses, and possessing similar criminal histo-

the same offense, and who shared similar criminal histories, were sentenced to vastly different terms of incarceration.[29] Furthermore, studies of indeterminate sentencing have shown that this disparity was often based on discriminatory criteria such as gender, socioeconomic status, and to a larger extent, race.[30] Thus, given the absence of clear rules or standards in indeterminate sentencing, as well as rehabilitation's emphasis on offender characteristics, judges *theoretically* could have considered a defendant's family obligations in sentencing.

In response to the flaws of indeterminate sentencing, Congress enacted the Sentencing Reform Act of 1984 (SRA or the Act) with the goals of enhancing consistency and fairness in sentencing and eliminating the widespread disparity that existed among similarly situated defendants.[31] The SRA also reflected the contemporaneous change in penal philosophy as Congress, scholars, and the public began rejecting rehabilitation as a valid purpose of punishment.[32] This change in ideology was largely due to a perceived lack of effectiveness.[33]

Instead, "limited" retribution gained popularity as the dominant purpose of criminal punishment. As a result, the nature of the offense became paramount instead of rehabilitation's prior emphasis on offender characteristics.[34] Notably, the Act provided

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ries."). Race, gender, age, and socioeconomic status influenced judges to sentence similarly situated defendants disparately. *Id.*

29. *Id.*

30. Elingstad, *supra* note 24, at 959; Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST J. CRIM. L. 523, 528 (2007) (asserting that "there were unquestionably racial disparities in sentencing, a tendency to punish black offenders more severely than white ones"). *See also* Nagel & Johnson, *supra* note 24, at 185 (noting that "[t]he results [of studies of indeterminate sentencing] consistently revealed that adult female offenders receive[d] more favorable sentences than similarly situated male offenders.").

31. Elingstad, *supra* note 24, at 959–60.

32. Gertner, *supra* note 26, at 698.

33. *Id.*; *see also* Elingstad, *supra* note 24, at 959 (asserting that "[s]tudies confirmed an increase in recidivism despite the efforts of many rehabilitative programs" and that "Congress concluded that rehabilitation fell outside the scope of incarceration") (citing S. REP. NO. 225, 98TH CONG., 1ST SESS. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221–23).

34. *Id.* (citing U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINE SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 14 (2004)) ("[limited retribution] places primary emphasis on punishment proportionate to the seriousness of the crime and, within the broad parameters of this retributivism, lengthier incarceration for offenders who are most likely to recidivate.").

for appellate review of sentencing decisions.[35] Thus, the SRA shifted sentencing authority away from the purview of sentencing judges and parole boards and instead toward Congress and the SRA-created Sentencing Commission.[36]

B. THE FEDERAL SENTENCING GUIDELINES AND THE DIRECTIVE AGAINST CONSIDERING A DEFENDANT'S FAMILY TIES

The SRA authorized the Sentencing Commission (hereinafter, the Commission) to promulgate sentencing guidelines and policies.[37] Pursuant to the Act, the Senate Judiciary Committee directed the Commission to consider an offender's familial responsibilities.[38] As originally enacted, however, Section 994(e) of Title 28 provided that "[t]he Commission shall assure that the guidelines and policy statements . . . reflect the general *inappropriateness* of considering the . . . [defendant's] family ties and responsibilities," among other characteristics.[39] Faced with these conflicting directives, the Commission chose to adopt the latter provision in drafting the Guidelines Manual.[40] This directive enumerates "family ties," as a factor, is "not ordinarily relevant" in sentencing.[41] Accordingly, when deciding to depart downward from the calculated guidelines range, sentencing judges were permitted to

35. Gertner, *supra* note 26, at 695–96 (noting that "[i]n the federal system, the 'doctrine of non-reviewability' prevailed until 1987, when the Federal Sentencing Guidelines became effective").

36. *Id.* at 698 (noting that "the locus of sentencing expertise moved from the judges and parole authorities to the [Sentencing] Commission, Congress, and, to a degree, the public"). The shift in sentencing authority was largely a result of widespread efforts by scholars, legislators, and the public to reform indeterminate sentencing. The SRA thus created the Sentencing Commission, an entirely new institutional actor, to create sentencing rules that would not be dictated by the political influence pervading the legislative set broad ranges of punishment in indeterminate sentencing. Another important motivation in the shift in sentencing authority was the abandonment of rehabilitation as the primary purpose of punishment. *Id.*

37. Elingstad, *supra* note 24, at 960 (citing 28 U.S.C. § 994(a)(2) (1988)).

38. Brooks & Bahna, *supra* note 24, at 291 (specifying that "under § 994 of Title 28, the Commission is instructed to consider family ties when imposing sentences of probation, fines or imprisonment").

39. *Id.* (emphasis added) (quoting 28 U.S.C. § 994(e) (1993)).

40. Elingstad, *supra* note 24, at 963–64.

41. U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (U.S. SENTENCING COMM'N 2018) ("Family ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the guidelines.").

consider family obligations only if an offender's family circumstances were extraordinary.[42]

The requirement that family ties be extraordinary left sentencing judges "the unenviable task of drawing a line between ordinary and extraordinary family ties and responsibilities" without much guidance.[43] Most circuits adopted a very narrow conception of circumstances that qualified as "extraordinary."[44] Generally, however, federal sentencing courts did not attribute much weight to a defendant's family ties and responsibilities.[45] This was consistent with the Commission's directive as the SRA's broader philosophy of emphasizing the nature of the offense rather than the offender's characteristics. As a result of this shift, defendants with minor children served lengthy sentences. A decade later, the ASFA's passage made these defendants highly susceptible to permanently losing their parental rights.[46]

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42. *See* Nagel & Johnson, *supra* note 24, at 193 (explaining that "[t]he Commission chose the words 'not ordinarily relevant' to make it clear that these factors may be relevant only in extraordinary cases"); *see also* Tali Yahalom Leinwand, *Family Matters: The Role of "Family Ties and Responsibilities" in Sentencing*, 2 STAN. J. CRIM. L. & POL'Y 63, 66 (2015) ("[S]entencing courts were only able to consider family ties and responsibilities 'if the factor [was] present to an exceptional degree or in some other way [made] the case different from the ordinary case where the factor [was] present.'") (citing Koon v. United States, 518 U.S. 81, 96 (1996)).

It is important to clarify that sentencing judges are not barred from considering a defendant's family ties in the absence of extraordinary family circumstances. For instance, a judge may impose a sentence at the low end of the calculated guidelines range if she finds the defendant's family circumstances mitigating, albeit short of extraordinary.

43. Leinwand, *supra* note 42, at 66.

44. *Id.* (citing United States v. Rodriguez-Velarde, 127 F.3d 966 (10th Cir. 1997) in which the court refused to grant a departure, finding the parental responsibilities of a widowed father of three not extraordinary); *see also* United States v. Brand, 907 F.2d 31, 33 (4th Cir. 1990) (finding the parental responsibilities of a sole custodial parent to multiple children not extraordinary). Only in circumstances involving disabled or mentally ill family members were judges willing to find the "extraordinary circumstances" necessary for downward departures. *See, e.g.*, United States v. Johnson, 964 F.2d 124, 129 (2d Cir. 1992) (finding extraordinary family ties where defendant "was solely responsible for the upbringing of her three young children, including an infant, and of the young child of her institutionalized [adult] daughter"); United States v. Pena, 930 F.2d 1486 (10th Cir. 1991) (finding extraordinary circumstances where defendant was the sole provider for her two-month-old infant child, as well as her sixteen-year-old daughter's infant child).

45. Leinwand, *supra* note 42, at 66 ("federal judges did not frequently attach much significance to a defendant's 'family ties and responsibilities' when configuring his or her sentence[; i]n large part, this approach was an intended effect of the Sentencing Commission, which 'discouraged' attention to a defendant's family ties and responsibilities, deeming consideration of such 'not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range.'") (citing 18 U.S.C. App § 5H1.6 (2004) and Koon v. United States, 518 U.S. 81, 94–95 (1996)).

46. *See infra* Part III.B.2 for a discussion on the ASFA's disproportionate impact on the parental rights of incarcerated people.

Despite the SRA's goal of reducing the sentencing disparity that pervaded the indeterminate sentencing scheme, judges inconsistently granted downward departures based on family responsibilities.[47] In 2003, Congress passed the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act) "in an effort to curtail departures and prevent sentencing judges from circumventing the Guidelines."[48] Pursuant to the PROTECT Act, sentencing judges contemplating a downward departure due to extraordinary family circumstances engaged in a two-pronged inquiry.[49] This test required a sentencing judge to examine whether (1) "the defendant provided an irreplaceable (or at least critical) role as caregiver to family dependents and (2) if so, whether the downward departure . . . would suffice to "cure" the harm that would otherwise be visited upon the family member."[50]

This standard of caregiver irreplaceability yielded disparate analyses and inconsistent results in sentencing.[51] For example, some judges looked to the defendant's extended family members, friends, or paid caregivers as potential alternative caregivers in the defendant's absence.[52] In some cases, even the availability of financial resources was deemed "adequate reassurance that a child would be accounted for" in a caregiver's absence.[53] The decision to look beyond immediate family members and instead to financial resources rendered a family-based departure unnecessary.[54] Some judges went further by rejecting family-based departures even in the absence of financial resources and alterna-

47. Leinwand, *supra* note 42, at 66–67 (explaining that while sentencing judges theoretically engaged in a two-pronged inquiry regarding caregiver irreplaceability, in practice, "the framework to determine downward departures based on extraordinary family ties and circumstances lacked consistent standards — and thus generated inconsistent results"). For a further discussion of the disparate sentencing results with respect to family-based departures, *see generally* Brittany P. Boatman, *A Continuing Conundrum: Applying Consistent Gender-Neutral Criteria to Federal Sentencing Departures Based on Family Ties and Responsibilities*, 48 VAL. U. L. REV. 217 (2013).

48. Boatman, *supra* note 47, at 236–37 (citing Pub. L. No. 108-21, 117 Stat. 650 (2003)).

49. Leinwand, *supra* note 42, at 66–67 (adding that the PROTECT Act "attempted 'to make it more difficult for federal district judges to grant downward departures from the Guidelines and for such departures to be upheld on appeal.'").

50. *Id.*

51. *Id.* at 68.

52. *Id.* (citing as examples, United States v. Pereira, 272 F.3d 76 (1st Cir. 2001) and United States v. McClatchey, 316 F.3d 1122 (10th Cir. 2003)).

53. *Id.* (citing United States v. Scoggins, 992 F.2d 164 (8th Cir. 1993) as an example).

54. *Id.*

tive caregivers.[55] In contrast, other judges granted departures even where an alternative caregiver was available.[56] As a result of these inconsistent interpretations of family circumstances, some parents received a windfall in the form of a sentencing discount. Others in more precarious circumstances found themselves sentenced to lengthy terms and with little opportunity to arrange for alternative caregivers for their minor children.

Twenty years after the SRA's enactment, the landmark case of *United States v. Booker* ushered in a new era of federal sentencing.[57] *Booker* declared unconstitutional the portion of the SRA that made the calculated guidelines range mandatory on sentencing judges, effectively rendering the Guidelines advisory.[58] This decision restored some of the discretion sentencing judges possessed prior to the SRA's enactment. *Booker* also established an "unreasonableness" standard for appellate review of sentences, instead of the de novo standard previously required, thus conferring greater power to sentencing courts.[59] Federal district judges gained even more discretion after *Booker* when the Supreme Court in *United States v. Gall*[60] held that "appellate courts may not presume that an outside-Guidelines sentence is unreasonable."[61] In the same year, the Supreme Court also held that district courts may impose sentences "that reflect policy disagreements with those embedded in the Guidelines."[62]

Despite being rendered advisory after *Booker*, the Guidelines continue to carry decisive force in sentencing, as the Supreme Court later clarified the Guidelines to "be the starting point and initial benchmark" in the sentencing calculus."[63] However, while

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55. *Id.* (citing United States v. Leandre, 132 F. 3d 739 (D.C. Cir. 1998) as an example).

56. *Id.* (citing United States v. Spero, 382 F. 3d 803 (8th Cir. 2004) as an example). The reasonableness or desirability of any of these approaches to family-based downward departures is beyond the scope of this Note.

57. 543 U.S. 220 (2005).

58. *Id.* at 245 ("So modified, the federal sentencing statute . . . makes the Guidelines effectively advisory.").

59. Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 705 (2006) (citing United States v. Booker, 543 U.S. 220, 261 (2005) and Pub. L. 108-21, § 401(d)(1), 117 Stat. 670 (2003), codified at 18 U.S.C.A. § 3742(e) (West Supp. 2005)).

60. 552 U.S. 38, 51 (2007).

61. Leinwand, *supra* note 42, at 71–72.

62. *Id.* at 72 (citing Kimbrough v. United States, 552 U.S. 85, 101, 111 (2007)).

63. Gall v. United States, 552 U.S. 38, 49 (2007). Despite Booker rendering the Sentencing Guidelines advisory, most sentences continue to fall within the calculated Guidelines range. For an empirical comparison of pre-*Booker* and post-*Booker* data from the

the post-*Booker* SRA continues to require sentencing judges to consider Guidelines ranges, it also "permits the court to tailor the sentence in light of other statutory concerns as well."[64] These statutory factors include, among others, "the nature and circumstances of the offense and the history and characteristics of the defendant"; "the need for the sentence imposed"; "the kinds of sentences available"; and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of the same conduct."[65] *Booker*'s directive to consider these statutory factors allowed for a more "individualized assessment" than the SRA's initial focus on the nature of the offense and the directive against considering certain offender characteristics.[66]

In the family ties context, *Booker* relieved sentencing courts "from the impossible task of parsing multitudinous families and identifying circumstances that might rise to 'extraordinary' levels."[67] However, the greater sentencing discretion conferred by *Booker* and related case law did not lead to significant changes in how judges viewed family circumstances.[68] While some judges began to grant downward departures more liberally, others continued using the same "extraordinary circumstances" framework prevailing before *Booker*.[69]

The lack of clear directives on how to treat family circumstances in sentencing has resulted in offenders with minor children being sentenced differently depending on the circuit or even

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Sentencing Commission, *see* Leinwand, *supra* note 42, at 75 (noting that "between 1996 and 2005, downward departures were given in 11.59 percent of federal sentences" and comparing that with federal sentences from 2005, i.e., the year *Booker* was decided, to 2012, during which judges granted downward departures or variances at 10.21 percent).

64. United States v. Booker, 543 U.S. 220, 245–46 (2005) (citing 18 U.S.C. § 3553(a) (Supp. 2018)).

65. 18 U.S.C. § 3553(a) (Supp. 2018).

66. Leinwand, *supra* note 42, at 71–72 ("[B]ecause the Guidelines are no longer mandatory and the district court need only consider them along with its analysis of the § 3553(a) factors, the decision to deny a Guidelines-based downward departure is a smaller factor in the sentencing calculus. Furthermore, many of the very factors that used to be grounds for a departure under the Guidelines are now considered by the district court — with greater latitude — under § 3553(a).").

67. *Id.* at 72.

68. *Id.* ("[T]hough *Booker* conferred greater discretion on judges to consider family circumstances in sentencing, most judges have not abused that discretion.").

69. *See* Boatman, *supra* note 47, at 241 (explaining that even after the Guidelines were amended pursuant to *Booker*, "district courts have continued to maintain differing family ties departure standards across the circuits by utilizing the 'extraordinary' standard set forth in *Koon*") (citing U.S. SENTENCING GUIDELINES MANUAL § 1B.1 (U.S. SENTENCING COMM'N 2012)).

district court that sentences them.[70] This result undermines the SRA's goal of enhancing uniformity in sentencing and leaves some inmates at greater risk of permanently losing their parental rights. Thus, these parents face the double punishment of both incarceration and permanent deprivation of parental rights.

C. THE JUDICIAL RECOMMENDATION AGAINST DEPORTATION: A TWENTIETH CENTURY EXAMPLE OF TAILORING PUNISHMENT TO DEFENDANT CHARACTERISTICS

Unlike the lack of attention surrounding a criminal defendant's parenthood in sentencing, sentencing judges readily considered a defendant's immigration status for much of the twentieth century. For example, while the Immigration Act of 1917[71] subjected noncitizen defendants to deportation if they were convicted of certain crimes,[72] it also permitted sentencing judges to issue a recommendation that a noncitizen offender not be deported, even if he were convicted of a crime involving moral turpitude.[73] The judicial recommendation against deportation (JRAD) was binding

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70. *Id.* at 242–45 (explaining that in addition to different interpretations of extraordinary family circumstances between circuits, district courts within the same circuit also follow varying departure standards.). For disparate treatment of parenthood among defendants convicted of fraud crimes, *compare* United States v. Capri, No. 03 CR 300-1, 2005 WL 1916720 (N.D. Ill. Jul. 5, 2005) (family-based departure granted where three of the mail fraud defendant's four children were disabled or special needs) *and* United States v. Roselli, 366 F.3d 58 (1st Cir. 2004) (granting family-based departure for tax fraud defendant where all four of defendant's children were under the age of ten and two of the children suffered from cystic fibrosis) *with* United States v. Davis, No. 3-06-CR-111 (JCH), 2006 WL 2165717 (D. Conn. Jul. 31, 2006) (family-based departure denied for embezzlement defendant where the children's father was available to care for them). For disparate treatment of parenthood among defendants convicted of drug crimes with an intent to distribute, *compare* United States v. Crawford, No. 07-CR-73, 2007 WL 2436764 (E.D. Wis. Aug. 22, 2007) (granting family-based departure to defendant convicted of conspiracy to distribute crack cocaine where defendant was the sole parental caregiver of five children, all of whom had special needs) *with* United States v. Palma, 376 F. Supp. 2d 1203 (D. N.M. Mar. 18, 2005) (family-based departure denied for defendant convicted of conspiracy to distribute cocaine despite her status as sole caretaker of her children) *and* United States v. Wilson, 114 F.3d 429 (4th Cir. 1997) (reversed the district court's grant of a family-based departure for defendant convicted of conspiracy to possess with intention to distribute cocaine base, finding no extraordinary circumstances in defendant's responsibility for his four children).

71. 39 Stat. 889–90.

72. *Id.*

73. Taylor & Wright, *supra* note 20, at 1143–44 n.45 (citing Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986) for the proposition that the JRAD provision "has consistently been interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation").

on the Immigration and Naturalization Service (INS) and prevented the INS from deporting a noncitizen offender upon release.[74]

Under the Immigration Act of 1917, the power to issue JRADs was not exclusive to federal judges.[75] As such, the JRAD permitted state court judges to decide the immigration consequences of a state criminal conviction.[76] In 1952, Congress narrowed the application of the JRAD by enacting the Immigration and Nationality Act[77] (INA), and in 1990, Congress repealed the JRAD entirely.[78]

The INA consequently required noncitizen defendants to comply with certain procedures in order to obtain a JRAD. Section 241(b) of the INA required defendants to provide notice of a JRAD proposal to the court and prosecution authorities at least five days prior to a court hearing on the recommendation against deportation, and the prosecution was to have an opportunity to oppose the JRAD proposal.[79] The INA also required the sentencing judge to issue the recommendation within thirty days of sentencing.[80] Once the parties complied with these procedures, the JRAD bound the INS, preventing the criminal conviction from being used as a basis for deportation.[81] The JRAD thus functioned to prevent noncitizen offenders from facing the "double punishment" of incarceration and deportation.[82] Indeed, the

74. *Id.* at 1143–44; *see also* Marinelli, *supra* note 21, at 357–58 ("Section 241(b) of the [Immigration and Nationality Act (INA)] permits the court that convicts the alien of the crime to recommend that the alien not be deported") (citing INA § 241(b), 8 U.S.C. § 1251(b) (1982)).

75. *Id.* at 1144.

76. *Id.*

77. 8 U.S.C. § 1252 (2012). *See* Padilla v. Kentucky, 559 U.S. 356, 392 (2010) (Stevens, J.) ("The INA separately codified the moral turpitude offense provision and the narcotics offense provision within 8 U.S.C. § 1252(a) (1994 ed.) under subsections (a)(4) and (a)(11), respectively. The JRAD procedure, codified in 8 U.S.C. § 1251(b) (1994 ed.), applied only to the 'provisions of subsection (a)(4),' the crimes-of-moral-turpitude provision.").

78. Taylor & Wright, *supra* note 20, at 1143.

79. Marinelli, *supra* note 21, at 358 n.5.

80. *Id.* (citing INA § 241(b), 8 U.S.C. § 1251(b) (1982)). According to the legislative history of the Immigration Act of 1917, "the thirty-day time limit was included to assure that the trial judge makes a well-informed recommendation on the basis of facts and considerations which are fresh in his or her mind." *Id.* at 363 (citing 53 CONG. REC. 5171 (1916)).

81. *Id.* (citing Haller v. Esperdy, 397 F.2d 211 (2d Cir. 1968)).

82. *Id.* at 357, 362–63. While deportation does not constitute criminal punishment per se, courts have described deportation as a "'drastic measure and at times the equivalent of banishment or exile. . . . It is the forfeiture for misconduct of a residence in this

JRAD's purpose "was to prevent a resident alien from being deported after he or she had already served a sentence for a crime."[83]

The permanent deprivation of parental rights during one's incarceration constitutes a similar "double punishment," and its dramatic rise in recent years calls for a solution analogous to the JRAD. The JRAD presents a useful framework for empowering sentencing judges to look beyond the defendant's offense and to craft a sentence that accounts for the collateral consequences of criminal punishment without running afoul of the SRA's goal of sentencing uniformity. Amending the ASFA to authorize judges to issue judicial recommendations against terminating parental rights will introduce proportionality to punishment and ameliorate the disproportionate rate at which incarcerated individuals risk losing their parental rights.

III. THE DISPROPORTIONATE LOSS OF PARENTAL RIGHTS AMONG INCARCERATED PARENTS

Incarcerated parents are among those who face the highest risk of permanently losing their parental rights. If a child's sole caregiver ends up in prison, the child will almost inevitably end up in foster care under the state's custody. In that event, neither the prison system nor the child welfare agency has any obligation to ensure that both the incarcerated parent and child maintain their relationship. Part III.A discusses the damaging impact of family separation when a parent is incarcerated and highlights the mitigative benefits of maintaining the parent-child relationship during the incarceration period. Part III.B examines the interplay of the ASFA and parental incarceration and argues that the ASFA is the appropriate locus for reform given its overbroad and disproportionate impact. Lastly, Part III.C sheds light on the unique problems that incarcerated parents face when at risk of losing their parental rights.

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country. Such a forfeiture is a penalty.'" *Id.* at 363 (quoting Jordon v. DeGeorge, 341 U.S. 223, 231 (1951)).

83. *Id.* at 362 (citing S. REP. NO. 352, 64TH CONG. 1ST SESS. 15 (1916)). This Senate Report pertains to a provision similar to the JRAD from the Immigration Act of 1917, which was the INA's predecessor. *Id.*

A. THE IMPACT OF INCARCERATING DEFENDANTS WITH MINOR CHILDREN

The problem of parental incarceration for both fathers and mothers has grown significantly in the past two decades as prison populations continue to rise.[84] Historically, families affected by incarceration disproportionately saw the loss of a father to the correctional system.[85] However, the rapid increase in the female prison population has shifted this trend and has consequently exacerbated the problems arising from parental incarceration.[86]

While paternal incarceration has demonstrably disruptive effects on the family structure, researchers have found that maternal incarceration results in much greater tension and disruption, which is particularly true in the context of child placement options.[87] This disparity is largely attributable to the fact that most incarcerated women are raising their children without alternative caregivers,[88] whereas their male counterparts are less likely to be the sole caregiver.[89] Thus, children of incarcerated mothers are more likely to be separated from their siblings, temporarily placed with other family members, and end up in the child wel-

84. *See* Keva M. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD & ADOLESCENT SOC. WORK J. 472 (2006), https://link.springer.com/content/pdf/10.1007%2Fs10560-006-0065-6.pdf [https://perma.cc/RY25-4XFF] ("In the past two decades, the unprecedented 3.8% annual growth of the United States prison population has created a burgeoning number of children with incarcerated parents. . . . Since 1991 the number of children with parents in the correctional system has doubled."); *see also* Ross D. Parke & K. Alison Clarke-Stewart, *From Prison to Home: The Effect of Incarceration and Reentry on Children, Families and Communities*, U.S. DEP'T HEALTH & HUMAN SERVICES, THE URBAN INSTITUTE 1 (Dec. 2001), https://aspe.hhs.gov/system/files/pdf/74981/parke%26stewart.pdf [https://perma.cc/29E5-S88Z] ("In 1991, there were 452,500 parents in state and federal prisons, with 936,500 minor children. By 2000, the number of parents in prisons had nearly double to 737,400, and the number of children affected rose by over a third to 1,531,500.").

85. Miller, *supra* note 84, at 474.

86. *Id.* ("Since 1986 the incarcerated female population has increased by 400% [and t]here are approximately 90,000–100,000 women in United States federal and state prisons.").

87. *Id.* ("Researchers have found that paternal incarceration usually results in mild to moderate family tensions while on average maternal incarceration may have a greater impact, specifically regarding child placement options and their ability to adjust to new family structures.").

88. The term "alternative caregiver" as used in this Note includes other natural parents, which may or may not be the spouse or significant other of the incarcerated parent, as well as extended family members or friends who assume parenting roles. For example, "[g]randmothers are the most likely candidates for either formal or informal kinship care." Miller, *supra* note 84, at 474.

89. *Id.*

fare systems.[90] Further, the lack of alternative caregivers also results in these children's placement in foster care, thereby setting in motion the potential permanence of family separation.[91] Given that the ASFA requires child welfare agencies to terminate parental rights when parents are absent from their children's lives for longer than fifteen months, this permanence of family separation is particularly true when the parent faces a lengthy sentence .[92]

Family separation is a uniquely severe collateral consequence of incarceration, particularly when it results in a permanent deprivation of parental rights.[93] The psychological impact of parental incarceration on children varies greatly from child to child, depending on factors such as the child's age, the parent-child relationship prior to incarceration, and the availability of alternative caregivers.[94] Regardless of these factors, separating a child from a parent once the parent-child bond has been formed can nevertheless seriously disrupt the child's emotional development and affect future relationships.[95]

Parental incarceration is particularly disruptive where the parent-child relationship is strong prior to the parent's imprisonment.[96] Examples of the disruptive impact of parental incarceration on children include aggressive behavior, decline in school performance, and an increased risk of the child's own incarcera-

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90. *Id.*

91. *Id.* (noting that "children residing with grandparents during their parents' imprisonment have a greater likelihood of returning to their parent's care once released from prison" as compared to children place in foster care).

92. *Id.* at 474–475 ("Despite the efforts of child welfare agencies to reunite children with parents, parental rights are at-risk of being relinquished when individuals serve longer sentences than the timeframes the Adoption and Safe Families Act (ASFA) of 1997 allows parents to reestablish custody . . . . [P]ermanent placement in the child welfare system is a strong possibility for children of single parents in the correctional system."). *See infra* Part III.B for a detailed discussion of the Adoption and Safe Families Act (ASFA) of 1997.

93. Genty, *supra* note 13, at 1673 ("Although parenting involves intangible qualities that survive the loss of day-to-day physical presence, 'parenting from a distance' places serious, undeniable limitations on the parent-child relationship.").

94. *See* Steven Fleischer, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 SETON HALL L. REV. 312, 321 (1998).

95. Note, *On Prisoners and Parenting: Preserving the Tie that Binds*, 87 YALE L.J. 1408, 1411–22 (1978).

96. *See* Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, 278 N.I.J. J. 1, 4 (2017), https://www.ncjrs.gov/pdffiles1/nij/250349.pdf [https://perma.cc/4273-KR6M].

tion in the future.[97] Children of incarcerated parents are also at higher risk of experiencing "cognitive delays, developmental regression or delays, and inappropriate coping strategies."[98] They also experience increased "difficulty successfully meeting developmental tasks, such as forming attachments, developing trust, autonomy, initiative, productivity, and achieving identity."[99] Children may also suffer from anxiety, depression, symptoms of post-traumatic stress akin to those whose parents have died, and immediate neuro-physiological responses, such as loss of speech.[100] In addition to harmful psychological impact, parental incarceration also presents detrimental economic consequences to the family.[101] This is particularly true where the incarcerated individual is a single parent earning a household's sole source of income.[102]

The damage of family separation extends to more than just the child and the inmate's family. Newly released inmates whose parental rights were terminated must cope with the permanent separation from their children, while facing the already daunting challenge of reintegrating into society. Such "double punishment" is counterproductive as research shows that maintaining the parent-child relationship during incarceration reduces recidivism among incarcerated parents.[103] For example, recently released male inmates in Ohio most frequently cited "family support" as the reason why they had been able to stay out of prison and they believed that this support increased their chances of

97. Fleischer, *supra* note 94, at 323; *see also* Miller, *supra* note 84, at 477–78 (arguing that "[m]aladaptive and contumacious behaviors such as withdrawing emotionally in school, truancy, pregnancy, drug abuse, diminished academic performance, and disruptive behavior may surface when youths experience emotional and psychological problems" and that children with incarcerated parents "are 5–6 times more at-risk to become involved in the criminal justice system").

98. Miller, *supra* note 84, at 478.

99. *Id.*

100. *Id.* (noting that parental incarceration may be arguably "more difficult to cope with [than the death of a parent] because death is naturally occurring and final, while separation due to incarceration is ambiguous. Children are confused about their feelings and unsure how to grieve the loss of a parent who is alive, yet emotionally and physically absent.").

101. *See id.* at 475.

102. *See id.*

103. *See* Martin, *supra* note 96 (citing Joshua Cochran, *The Ties that Bind or Break: Examining the Relationship Between Visitation and Prisoner Misconduct*, 40 J. CRIM. JUST. 433 (2012)).

finding employment.[104] The same study also reported that, among returning fathers, "close attachment to children decreased the[ir] likelihood of substance use."[105] Maintaining the parent-child relationship during incarceration also benefits children as "remaining in contact with a parent while in foster care gives children 'higher emotional security.'"[106] For example, a report cited by the United States Department of Health and Human Services showed that visiting parents in prison "can calm children's fears about their parent's welfare as well as their concerns about the parent's feelings for them."[107]

A number of children's advocates and commentators believe that if a child's parent is incarcerated and no alternative caregivers are available, the highest priority should be to work toward placing the child in a secure, financially stable home.[108] For instance, Professor Elizabeth Bartholet, who serves as the Faculty Director of Harvard Law School's Child Advocacy Program, believes that "children should not have to wait for a family" even though some incarcerated parents do successfully rehabilitate after serving time.[109] Accordingly, these advocates believe that adoption ensures a child's best interests, even though adoption requires a permanent severing of the natural parent-child relationship.

Adoption proponents raise important concerns about children's interest in being placed in a stable environment as well as their interest in permanence.[110] In particular, when foster parents permanently adopt the children under their care, those children benefit greatly from a newfound sense of belonging and "positive psychological shift in their sense of identity" because the adoption marks an end to the uncertainty of their stay in foster care.[111] These children also have the advantage of being adopted

104. Christy A. Visher & Shannon M. E. Courtney, *One Year Out: Experiences of Prisoners Returning to Cleveland*, URB. INST. 11 (2007).

105. *Id.*

106. Stephanie Sherry, *When Jail Fails: Amending the ASFA to Reduce its Negative Impact on Children of Incarcerated Parents*, 48 FAM. CT. REV. 380, 387 (2010) (citing Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983)).

107. Parke & Clarke-Stewart, *supra* note 84, at 9.

108. Hager & Flagg, *supra* note 1.

109. Hager & Flagg, *supra* note 1.

110. "Permanence" interests refer to the placement of a child in a permanent household as opposed to temporary living arrangements and foster homes.

111. Child Welfare Information Gateway, *Preparing and Supporting Foster Parents Who Adopt*, U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE CHILDREN'S BUREAU 1, 3

by parents familiar with their needs and better equipped to manage trauma-related emotional and behavioral challenges.[112] As a practical matter, these children also tend to remain in a familiar community, school, and neighborhood.[113]

However, severing the parent-child relationship while the parent is imprisoned is not a necessary measure to serve that interest.[114] The disruption caused by parental incarceration is "only exacerbated when incarcerated parents and their children lack regular contact with each other."[115] A growing number of family advocates have been expressing disapproval for the phenomenon of permanent removal of children from their birth families, arguing that incarceration alone "should not be grounds for severing the bond between birth parent and child, which can lead to profound negative effects on children's mental and physical health."[116] Furthermore, despite the complexity inherent in the reunification between birth parent and child, permanent foster care may not be a desirable option, "especially in light of the relative instability of foster-home placements."[117] While reunification with children may not be possible or ideal upon an inmate's release, parental rights should, at the very least, not be terminated while the parent is incarcerated.

B. THE ASFA'S EXACERBATION OF INCARCERATED PARENTS' RIGHTS

1. *The Enactment of the ASFA: From Family Reunification to Adoption*

The 1997 passage of the ASFA marked a significant policy shift in child welfare law, requiring child welfare agencies to decide where a child will live within one year of the child's entry

(Jan. 2013), https://www.childwelfare.gov/pubPDFs/f_fospro.pdf [https://perma.cc/W7AL-VBFQ].

112. *Id.*

113. *Id.*

114. Children's interest in permanence should be balanced against their interest in maintaining their relationship with their natural parent, as well as the natural parent's interest in preserving her parental rights.

115. Genty, *supra* note 13, at 1673–74.

116. Hager & Flagg, *supra* note 1 ("A growing contingent of family advocates, however, say that removing children from their birth families is a destructive act in itself.").

117. Parke & Clarke-Stewart, *supra* note 84 at 16.

into foster care.[118] Under the ASFA, states must initiate a proceeding to terminate parental rights after a child has been in foster care for fifteen out of the past twenty-two months.[119] Proponents of the ASFA hoped to ensure a faster track to adoption for children in foster homes whose biological parents had been unable to provide a stable home environment for them.[120] The ASFA thus presented a policy shift from family reunification toward adoption, reflecting a corresponding shift toward an automatic presumption against a biological parent's fitness to parent.[121] It has been argued extensively that such a presumption raises serious substantive and procedural due process concerns as it presents an increased risk of permanent deprivation of parental rights.[122]

While states are ordinarily required to undertake "reasonable efforts" to reunite parents with children in foster care, the ASFA specifies circumstances in which states are permitted to forgo such efforts.[123] Examples of these circumstances include a find-

118. Genty, *supra* note 13, at 1676 (citing 42 U.S.C. § 675(5)(c) (1997)).

119. 42 U.S.C. §§ 675(5)(E)(i)–(iii) (2012). To receive federal funding under the ASFA, states were required to enact certain legislation that puts children in the foster care system on track to be adopted within a specified time frame. 42 U.S.C. § 67(a) (2012). Since the ASFA's passage, states have received more than $639 million from the federal government for facilitating adoptions. *See* Hager & Flagg, *supra* note 1.

120. *See* Hager & Flagg, *supra* note 1.

121. *See* Emily K. Nicholson, *Racing Against the ASFA Clock: How Incarcerated Parents Lose More Than Freedom*, 45 DUQ. L. REV. 83, 88 (2006) ("ASFA presumes the unfitness of any parent who allows a child to remain in foster care past the arbitrary deadline of fifteen months, without regard to the reason for the child's placement.").

122. *See* Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 771 (1992) ("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."). With respect to procedural due process rights of parents facing termination proceedings, state termination procedures should be subject to three requirements: (1) "a full adversarial hearing and development of a full factual record"; (2) "a focus on current parental fitness, rather than simply on the parent's past commission of a crime"; and (3) "an inquiry into the qualitative, intangible aspects of parenting." *Id.* at 773. Compliance with these requirements is impossible if the incarcerated parent is unable to attend the adversarial proceeding due to her imprisonment. With respect to substantive due process, "the Supreme Court in *Santosky v. Kramer* mandated the use of a heightened burden of proof — clear and convincing evidence — in any judicial proceeding to determine whether a parent is unfit such that her rights may be terminated. The Court distinguished between quantitative and qualitative evaluations of parental conduct, stressing that the latter are constitutionally required." *Id.* at 769–70.

123. The term "'[r]easonable efforts' refers to activities of State social services agencies that aim to provide assistance and services needed to preserve and reunify families." CHILDREN'S BUREAU, *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children* 1 (Mar. 2016), https://www.childwelfare.gov/pubPDFs/reunify.pdf

ing of chronic abuse or abandonment, or the parent's commission of the murder or voluntary manslaughter of another child, among other serious crimes.[124] In several states, such as Alaska, North Dakota, South Dakota, and Tennessee, parental incarceration alone constitutes such a circumstance in which reasonable efforts are not considered.[125] By permitting states to forgo reasonable efforts due to parental incarceration, the ASFA became a blunt-force instrument that increased the number of incarcerated parents at risk of losing their children.

2. *The ASFA's Disproportionate Impact on Incarcerated Parents*

The ASFA's mandatory parental rights termination provision has disproportionately affected incarcerated parents.[126] The lengthy prison sentences of the era, coupled with the ASFA's directive for termination of parental rights within fifteen months of a child's entry into foster care, has had the unintended consequences of leaving incarcerated parents vulnerable to losing their parental rights.[127] Furthermore, the institutional gap between child welfare agencies and the criminal justice system presents a collective action problem,[128] whereby little regard is given to a

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[https://perma.cc/SJE8-UK44] ("Laws in all States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands require that child welfare agencies make reasonable efforts to provide services that will help families remedy the conditions that brought the child and family into the child welfare system.") *Id.* Most states define "reasonable standards" broadly, and such efforts may include "family therapy, parenting classes, drug and alcohol abuse treatment, respite care, parent support groups, and home visiting programs." *Id.*

124. Genty, *supra* note 13, at 1676 n.42 (citing 42 U.S.C. § 671(a)(15)(D) (1997)).

125. *Id.* at 1676–77.

126. *Id.* at 1676–77 (noting that "[f]or children of incarcerated parents, [the ASFA's implementation] will most often mean adoption" and that "ASFA has likely had a disproportionate impact upon incarcerated parents with children in foster care").

127. Hager & Flagg, *supra* note 1; *see also* Genty, *supra* note 13, at 1677 (noting that "the mandatory termination petition filing requirement has the potential to sweep broadly, given that the average length of time served by incarcerated parents is six and one-half years") (citing Christopher Mumola, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 1 (2002), https://www.bjs.gov/content/pub/pdf/iptc.pdf [https://perma.cc/6HJ8-NJAQ]); Nicholson, *supra* note 121, at 89–90 (maintaining that "the interplay between ASFA's 15/22 provision and typical state termination grounds poses an almost insurmountable obstacle to the maintenance of parental rights of incarcerated parents. After fifteen months of separation from the child, a petition to terminate an incarcerated parent's rights will be filed, unless one of the limited and highly discretionary exceptions to the 15/22 provision applies.").

128. This Note uses the term "collective action problem" to refer to the lack of communication between child welfare agencies, prisons, and other institutional actors in the criminal justice system.

parent's incarcerated status.[129] Since 2006, at least 32,000 incarcerated parents had their parental rights terminated despite not having been accused of physical or sexual abuse, "though other facts, often related to their poverty, may have been involved."[130] The Marshall Project study concluded that of those 32,000 parents, almost 5000 seem to have lost their parental rights due to their incarceration alone.[131]

To combat the issue of inmates permanently losing their parental rights, some states, such as New York and Washington, have enacted an exception to the ASFA's mandatory termination provision for incarcerated parents.[132] Such exceptions give parents the opportunity to be "judged individually by the roles they play in their children's lives, rather than the lengths of their sentences."[133] These exceptions also implement certain procedural safeguards for incarcerated parents who are at risk of losing their parental rights by requiring that they be informed of their rights and responsibilities and by providing them with notice as to how they can fulfill those duties while imprisoned.[134] Other states, such as Nebraska and New Mexico, have gone even further by enacting wholesale bans against initiating termination proceedings "if parental incarceration is the sole factual basis."[135] These

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129. *See* Genty, *supra* note 13, at 1677 (maintaining that "[b]ecause child welfare agencies do not categorize cases according to whether the parent of a child is in prison, it is impossible to measure precisely the effect of ASFA upon families of incarcerated parents").

130. Hager & Flagg, *supra* note 1.

131. *Id.*

132. *See* Alison Walsh, *States, Help Families Stay Together by Correcting a Consequence of the Adoption and Safe Families Act*, PRISON POL'Y INITIATIVE (May 24, 2016), https://www.prisonpolicy.org/blog/2016/05/24/asfa [https://perma.cc/6QXA-44AU].

133. *Id.* Passed in 2010, New York's ASFA Expanded Discretion Bill authorizes foster care agencies "to postpone filing for termination of parental rights when the petition is based solely on a parent's incarceration or participation in a residential drug treatment program." *Id.* Washington's version, the Children of Incarcerated Parents Bill, "awards similar discretion to courts in cases involving parental incarceration." *Id.* For a complete list of states that provide some form of protection for incarcerated parents with respect to the ASFA, *see* Connecticut Sentencing Commission, *Connecticut Explores a Parental Incarceration Exception to the Termination of Parental Rights under the Federal Adoption and Safe Families Act of 1997 (ASFA)*, INST. FOR MUNICIPAL & REGIONAL POL'Y (Sept. 20, 2017), http://ctsentencingcommission.org/wp-content/uploads/2018/01/09-20-17_ASFA_State_TPR_Exceptions.pdf [https://perma.cc/P82H-W9KA].

134. *See* Walsh, *supra* note 132 ("[T]he New York and Washington laws require the states to inform parents of their rights and responsibilities and take into account the challenges of meeting those responsibilities from behind prison walls.").

135. *See* Connecticut Sentencing Commission, *supra* note 133.

measures indicate a recognition of the severity of the loss of parental rights as a consequence of parental incarceration.

C. TERMINATION OF AN INCARCERATED INDIVIDUAL'S PARENTAL RIGHTS

The termination of parental rights is a procedure whereby the legal tie between a biological parent[136] and child is severed.[137] It then follows that a biological parent whose parental rights are terminated is "legally unable to participate in the child's life."[138] For incarcerated parents, termination proceedings are typically initiated by the state, or by the child's other natural parent,[139] or by another caregiver[140] with whom the child resides during the parent's imprisonment.[141] Generally, termination proceedings entail a full hearing in which clear and convincing evidence is required to show "parental unfitness, severe neglect, or abandonment."[142]

However, each state has a different procedure for how and why termination proceedings are initiated. While some states explicitly permit the termination of parental rights of parents incarcerated for a specified time period, others undertake a more holistic review of the parent-child relationship whereby parental incarceration is only one factor among many.[143] These differences present challenges for uniform implementation of a non-termination standard for incarcerated parents. This lack of uniformity also suggests that federal law is the appropriate locus of reform to safeguard incarcerated individuals' parental rights. After all, the ASFA functioned in exactly this manner by promul-

136. This Note uses the term "biological parent" to distinguish from adoptive parents, foster parents, or alternative caregivers who may be biologically related to the child despite not being the child's parent.

137. *See* Child Welfare Information Gateway, *Grounds for Involuntary Termination of Parental Rights*, U.S. DEP'T HEALTH & HUMAN SERVICES, CHILDREN'S BUREAU 1–2 (2017), https://www.childwelfare.gov/pubPDFs/groundtermin.pdf#page=4&view=When%20parental%20rights%20may%20be%20reinstated [https://perma.cc/6ZC7-225M].

138. Fleischer, *supra* note 94, at 312.

139. Typically, the child's natural parent has remarried and seeks to have the new spouse adopt the child. *Id.*

140. Potential caregivers are usually a family member or foster family. *Id.*

141. *Id.* at 313.

142. *Id.* (citing Santosky v. Kramer, 455 U.S. 745, 769–70 (1982)).

143. *Id.* at 312.

gating broad requirements mandating termination petitions. The ASFA then left it up to the states to comply with those requirements in accordance with existing state termination procedures.

Those who are at risk of having their parental rights terminated must maintain an active role in their children's lives. During a termination proceeding, the party seeking to terminate parental rights generally must show "parental unfitness, severe neglect, or abandonment" by clear and convincing evidence.[144] Accordingly, parents can preserve their parental rights by regularly spending time with their children, attending court hearings, taking parenting classes, maintaining regular employment and housing, and paying child support to reimburse the government for the costs of foster care.[145] These measures are virtually unavailable to imprisoned parents, who face tremendous obstacles in trying to maintain an ongoing relationship with their children behind bars.[146]

These obstacles prevent incarcerated individuals from demonstrating their parental fitness at termination hearings, often by the mere fact of their inability to attend at those hearings. One such obstacle is the physical distance between incarcerated parents and their children; the vast majority of state and federal prisons are located more than one hundred miles away from the inmate's home.[147] Because fewer female prisons exist as compared to the number of all-male prisons, mothers are even more likely to be imprisoned a substantial distance away from their families.[148]

Another obstacle that incarcerated parents face is that neither states nor the federal government have an obligation to transport inmates or families to one another or to family court hearings.[149] Additionally, child welfare agencies typically lack the resources to transport children to prisons to visit their parent.[150] These barriers to visitation stem in part from "cultural and institutional be-

144. *Id.*
145. *See* Hager & Flagg, *supra* note 1.
146. *Id.*
147. Nicholson, *supra* note 121, at 89.
148. *Id.* (citing Genty, *supra* note 13, at 1673).
149. Hager & Flagg, *supra* note 1; *see also* Nicholson, *supra* note 121, at 89 ("This lack of proximity — combined with the general absence of state-provided travel and visitation assistance, the parent's dependence on limited, collect telephone calls, and the frequent relocation of foster children — severely restricts the amount and quality of contact occurring between incarcerated parents and their children.").
150. Hager & Flagg, *supra* note 1.

liefs that incarcerated [parents] do not deserve privileges such as family visitation."[151] As such, incarcerated parents are often unable to maintain an active role in their children's lives, making termination a likely outcome of their imprisonment. Furthermore, some judges make the decision to terminate an incarcerated individual's parental rights even if the parent is not physically present at the termination hearings.[152] Without their day in court, incarcerated parents face an insurmountable challenge to proving their case against termination. Given these barriers and lack of resources to assist imprisoned parents in maintaining ties with their children, an intervening measure *prior* to imprisonment is necessary to ameliorate the lack of access to legal protections that incarcerated parents currently face. Empowering sentencing judges to take such an intervening measure, in the form of a judicial recommendation against the termination of parental rights, is examined below in Part IV.

IV. THE SENTENCING JUDGE'S ROLE IN PROTECTING THE DEFENDANT'S PARENTAL RIGHTS

Historically, family court judges have been the sole decisionmakers with respect to parental rights. Although the criminal justice system materially impacts parental rights and familial arrangements, sentencing courts have not played a direct role in the parental rights of incarcerated defendants. This Note argues that sentencing judges should play such a role by first assessing each defendant's family circumstances and then issuing an order upon sentencing that prevents the termination of parental rights. Using the JRAD as a model, Part IV.A examines the appropriate legislative avenue through which to grant judges the authority to prevent the termination of parental rights. Part IV.A also imagines the procedure that a criminal defendant would undertake in requesting a termination prevention order. Part IV.B goes on to discuss legislative and institutional impediments to the enactment of a termination prevention order and addresses the counterarguments of adoption proponents who favor the ASFA's termination directive. Additionally, Part IV.B argues that this Note's proposed solution is a more equitable than some of the al-

151. Parke & Clarke-Stewart, *supra* note 84.
152. Hager & Flagg, *supra* note 1.

ternative policy proposals to the ASFA's termination directive. Lastly, Part IV.C examines the penological and psychological benefits of a termination prevention order from the perspectives of both the child and the incarcerated parent.

A. THE JRAD'S ANALOG IN THE PARENTAL RIGHTS CONTEXT: IMPLEMENTATION AND PROCEDURE

Since the JRAD authority was granted via the Immigration Act of 1917,[153] the authority for its parental rights analog could appropriately be found in corresponding family-related legislation, such as the ASFA. This Note proposes that the ASFA should be amended to grant federal and state judges the authority to issue an order to prevent state child welfare agencies from filing petitions to terminate parental rights where the incarceration of a parent serves as the sole factual basis. Such an amendment would function as an exception to the ASFA's rule requiring termination petitions upon a child's completion of fifteen months in foster care.

The JRAD's procedural requirements also serve as a useful model in preventing the termination of parental rights. Procedurally, a defendant would petition the sentencing judge for a recommendation against termination of her parental rights during her sentencing proceeding, at which point the judge would determine whether to grant the request. The defendant would then be required to inform prosecution authorities in order to give the prosecution an opportunity to respond in opposition. Like the timely notice requirements of the JRAD, the issuance of a recommendation against the termination of parental rights would be subject to time constraints in order to enable the sentencing judge to "make a well-informed decision on the basis of facts and considerations which are fresh in his or her mind."[154] The judge's determination to grant this request would be based on a number of factors, such as the nature of the offense, the availability of alternative caregivers and familial support, and a showing of the strength of defendant's relationship with her child.

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153. *See* Taylor & Wright, *supra* note 20, at 1143–44 n.3 (citing Immigration and Nationality Act (INA) § 237(a)(2)(A)–(B), 8 U.S.C. § 1227(a)(2)(A)–(B) (2000) and IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 40–48 (7th ed. 2000)).

154. Marinelli, *supra* note 21, at 363 (citing 53 CONG. REC. 5171 (1916)).

B. INSTITUTIONAL IMPEDIMENTS TO A JUDICIAL RECOMMENDATION AGAINST THE TERMINATION OF PARENTAL RIGHTS

It is unlikely that the ASFA will be amended to grant sentencing judges the authority to prevent termination petitions against incarcerated parents because of the technical distinction between the direct and collateral consequences of criminal punishment; the civil repercussions of criminal punishment, such as deportation, ineligibility for public housing, disenfranchisement, loss of employment opportunities, and the termination of parental right are generally regarded as separate matters from criminal justice.[155] The likelihood of this type of reform is also low given the current political climate, though the issue has been gaining traction in recent years. For instance, in 2018, Representative Gwen Moore (D-Wis.) announced that she will be introducing an "incarcerated parents' bill of rights," which would ensure that those imprisoned parents who maintain an ongoing relationship with their children do not have their parental rights terminated.[156] At the very least, Representative Moore's initiative activates a dialogue about the rights of imprisoned parents and opens up the possibility for some degree of reform at the federal level.

Consistent with Representative Moore's call for increased procedural safeguards for imprisoned parents, the scholarship on parental incarceration tends to advocate for reduced prison sentences or alternative punishments not involving imprisonment. In particular, scholars have argued for greater discretion in sentencing to enable judges to engage in an individualized assessment of the defendant's familial responsibilities and to grant leniency where appropriate. Others have opposed such leniency, arguing that reduced or alternative sentences unfairly benefit defendants who have minor children — due merely to the fact of their parenthood — when these individuals have committed iden-

155. On the other hand, the existence of the JRAD, though currently an obsolete practice, indicates that there was a policy concern for preventing double punishment, at least in the immigration context. The legislative history of the JRAD's predecessor indicates that the policy purpose of the JRAD "was to prevent a resident alien from being deported after he or she had already served a sentence for a crime." Marinelli, *supra* note 21, at 362 (citing S. REP. NO. 352, 64th Cong. 1st Sess., 15 (1916)).

156. Hager & Flagg, *supra* note 1.

tical crimes as their childless counterparts.[157] Those opposing reduced sentences based on parenthood have also argued that "[l]eniency toward primary caregivers leaves ample room for manipulation of the system and could create perverse incentives for criminal enterprises to employ caregivers."[158] Lastly, these commentators argue that children's interest in reuniting with their biological parent, as well as the inmate's interest in retaining her parental rights, are often "at odds" with the "overarching goal of uniformity" in sentencing.[159] The harm suffered by a defendant's family as a result of her sentence "may reflect a set of concerns that are simply beyond the scope of sentencing law."[160]

The proposed solution of this Note does not advocate for greater leniency or strict uniformity in sentencing defendants with minor children. Rather, this Note argues for judicial action in preventing the permanent deprivation of parental rights that may result as a consequence of incarceration. Accordingly, the proposed solution does not run afoul of the SRA's policy of enhancing sentencing uniformity because it does not provide for disparate treatment of parent and non-parent offenders so far as their terms of incarceration are concerned. A judicial recommendation against termination petitions thus serves uniformity interests while also implementing a check on a severe collateral consequence for convicted parents.

Scholars have also argued for amending the ASFA to carve out an exception for incarcerated parents in which the fifteen-month trigger would not result in a termination petition for parents in prison.[161] Instead, termination decisions for incarcerated parents would entail more holistic, individualized assessments of the parent-child relationship prior to the incarceration; the inmate's at-

157. *See* Leinwand, *supra* note 42, at 77 (observing that the increased sentencing discretion following *Booker* "has the potential to confer a windfall on the defendant").

158. *Id.*

159. *Id.*

160. *Id.* On the other hand, those opposing leniency based on parenthood should acknowledge that *Booker*'s requirement for sentencing courts to take account of the statutory factors in 18 U.S.C. § 3553(a) suggests that sentencing law is moving toward factoring in the defendant's personal characteristics and family circumstances. Of note among the statutory factors in Section 3553(a) are "(1) . . . the history and characteristics of the defendant" as well as "(6) the need to avoid unwarranted sentence disparities among similarly situated defendants." 18 U.S.C. § 3553(a) (Supp. 2018).

161. *See, e.g.*, Sherry, *supra* note 106 at 380 (advocating for the amendment of the ASFA to include factors courts should consider when terminating the parental rights of incarcerated parents and encouraging states to focus not on a time frame for termination, but rather a consideration of circumstances relevant to each individual family).

tempts to maintain this relationship during incarceration; and the child's interest in preserving a relationship with his or her biological parent.[162] While amending the ASFA in this fashion is a step in the right direction, insofar as it provides for a more nuanced assessment of children's best interests, a wholesale exception for incarcerated parents is overinclusive and inequitable to parents not incarcerated.

A wholesale exception is overinclusive because not all incarcerated individuals may deserve the benefit of safeguarding their parental rights. For example, those convicted of the most heinous crimes or crimes against children, such as physical or sexual abuse, should not receive the benefit of a judicial recommendation against termination petitions; it could hardly be argued that a relationship between the incarcerated parent and victim child is in the child's best interest. A wholesale exception for incarcerated parents is also inequitable because of its disparate treatment of imprisoned and non-imprisoned parents. Such an exception would essentially confer a windfall to incarcerated parents in the form of preserving their parental rights due to the mere fact of their incarceration, whereas a non-incarcerated parent will continue to face the risk of losing parental rights at the ASFA's fifteen-month termination trigger.

Instead of advocating for a wholescale exception for incarcerated parents, this Note proposes a case by case determination of the ASFA's termination applicability to parents in prison. The proposed solution achieves this flexibility by placing the determination within the sentencing judge's discretion. Since sentencing judges are tasked with considering a variety of factors pertinent to the defendant's history and characteristics, they are in a good position to adequately assess a defendant's preexisting relationship with her children, her likelihood of rehabilitation, and the child's interest in maintaining a relationship with the defendant, and balance that with the child's interest in permanence. The proposed solution also avoids the problem of conferring a windfall

162. *Id.* at 386–87 (arguing that "to determine whether reunification is appropriate courts should apply a balancing test instead of applying a presumption of termination, merely because the parents are incarcerated leading to a separation of more than the fifteen months prescribed in [the] ASFA"); *see also* Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77 (2011) (arguing that the interests of dependent children should form part of the sentencing calculus and that children have a constitutional right to a relationship with their biological parents).

to incarcerated parents, as well as safeguarding the parental rights of defendants where reunification with children is not warranted. An order preventing the termination of parental rights concededly could result in children spending longer periods in foster care and thus runs afoul of the ASFA's policy favoring adoption.[163] Adoption proponents may argue that a judicial recommendation against termination proceedings undermines a child's interest in permanence by establishing a backstop for adoption.[164] Contrary to what critics may believe, adoption is not always in a child's best interest. To that point, studies have demonstrated that maintaining the relationship with an incarcerated parent alleviates many of the psychological problems that result from parental incarceration.[165] The proposed reform thus seeks to balance the child's interest in permanence with the interest of both the child and biological parent in maintaining their relationship.

C. PENAL BENEFITS OF A JUDICIAL RECOMMENDATION AGAINST TERMINATION OF PARENTAL RIGHTS

This Note follows from the premise that terminating parental rights as a consequence of conviction constitutes a double punishment for defendants with minor children. A judicial recommendation against terminating an incarcerated individual's parental rights serves retributive aims because it ensures proportionality in punishment: the incarcerated parent serves a sentence similar to those who have committed the same offense but is ensured that her punishment will conclude upon release by removing the possibility that she will permanently lose her right to a relationship with her children.

Safeguarding parental rights during incarceration also serves restorative aims by providing incarcerated parents with incentives to maintain an ongoing relationship with their children in

163. *See* Sherry, *supra* note 106, at 390 ("[E]xtended time in foster care counters the purpose of ASFA and would not create permanency for children.").

164. *See supra* Part III.A for a discussion on scholars favoring adoption as the best outcome for children in foster care.

165. Sherry, *supra* note 106 at 390 (stating that "maintaining relationships with their [incarcerated] parents may help [children] address their issues" and that "the best interests of the child are usually served by keeping the child in the home with his or her parents"). *See also* Parke & Clarke-Stewart, *supra* note 84 at 9 (noting that visiting parents in prison "can calm children's fears about their parent's welfare as well as their concerns about the parent's feelings for them.").

order to demonstrate their parental fitness upon release.[166] Research has demonstrated that post-incarceration reunification ameliorates the damaging impact incarceration inflicts on the family.[167] Maintaining ties with children while in prison and retaining the right to reunite with them thereafter also reduces recidivism and helps inmates reintegrate into society successfully.[168]

In addition to conferring restorative benefits, the possibility of reunifying with one's child also encourages the incarcerated parent to serve time in good behavior in order to be able to demonstrate parental fitness in impending parental rights hearings. The possibility of reunification also discourages future recidivism, whereas the lack of any form of reassurance regarding one's parental status, and in some cases termination altogether, imposes an additional punishment on the incarcerated parent.

The loss of parental rights will irreparably harm the offender who has a strong relationship with her biological children, and such similarly situated individuals will lack recourse no matter how successfully they reintegrate into society after imprisonment. Reduction of the likelihood of future recidivism as an independent factor may lend support to such a resolution's promise under a deterrence model as well. Lastly, placing the sentencing judge in the position of a family court judge for a single proceeding presents an ex ante measure that could save administrative resources by preventing a termination petition from being initiated for an inmate who is fit to parent.

V. CONCLUSION

Incarceration alone should not be grounds for terminating an incarcerated person's parental rights, but rather should be analyzed as one factor among others. Since current sentencing laws do not provide clear directives on how a defendant's status as a parent should affect the sentencing calculus, defendants unable to obtain sentencing leniency are left vulnerable to the prospect of permanently losing their parental rights. Parents in prison thus

166. *See* Sherry, *supra* note 106, at 386 (noting that "[m]aintaining family connections, especially between parents and children, benefits the prisons and the community because it motivates prisoners to behave better and participate in programs.").

167. *Id.*

168. *Id.*

face a high likelihood of incurring the double punishment of both incarceration and the permanent deprivation of their relationship with their children.

Although some states have taken affirmative steps to enact exceptions to the ASFA's fifteen-month termination mandate, a majority of states continue to permit the termination of an incarcerated individual's parental rights due to the sole fact of the parent's imprisonment. The ASFA should therefore be amended to grant sentencing judges the authority to issue a recommendation against the initiation of termination of parental rights proceedings against incarcerated parents.

The sentencing judge is well positioned to adequately assess a defendant's relationship with her children, her likelihood of rehabilitation, and the children's interest in maintaining a relationship with defendant, and balance that with children's interest in permanence. This authority will enable imprisoned parents to preserve a relationship with their children when it is determined that maintaining that relationship is in the child's best interest. In addition to restoring proportionality to the criminal justice system by preventing defendants with minor children from incurring a double punishment, the judicial recommendation against termination proceedings also serves important deterrent and rehabilitative aims.