

Recidivism and Paternal Engagement

SOLANGEL MALDONADO*

Many scholars have argued that lawmakers must encourage and facilitate female prisoners' relationships with their children. Few legal scholars, however, have focused on the importance of parental relationships between incarcerated fathers and their children. The social science literature suggests that children who share close relationships with their nonresident fathers are less likely to engage in delinquent acts and other antisocial behavior than children without such relationships. The literature also suggests that exconvicts who share close relationships with their children are less likely to recidivate than those who do not. Using this literature, I argue that lawmakers and society as a whole have an interest in ensuring that incarcerated fathers develop and maintain nurturing relationships with their children. Prison may present an "ideal" opportunity for the law to facilitate such relationships.

This article proceeds in four parts. Part I provides a brief overview of incarcerated fathers and their children, focusing on the lack of a parent-child relationship in most cases. Part II summarizes the literature on the detrimental effect of paternal disengagement on children who have lost their fathers as a result of their parents' separation or divorce. Although few legal scholars have studied paternal disengagement amongst incarcerated fathers, I argue that the negative effects of paternal disengagement in the context of divorce are magnified when children lose their fathers as a result of incarceration. Thus, the numerous studies on divorce and children are helpful to researchers seeking to address the needs of children of incarcerated fathers. Part III examines the reasons the majority of incarcerated fathers have little or no contact with their children and argues that the law is partly to blame. Finally, Part IV argues that children and society

* Associate Professor of Law, Seton Hall University School of Law. Thanks to Jeffrey Key, Kristan Lockett, and Jody Walker for excellent research assistance. Special thanks to Michael Ricciardelli for his insights about the needs of incarcerated fathers and their children.

benefit when incarcerated fathers are involved in their children's lives and suggests ways the law can bring these fathers into their children's lives.

I. Incarcerated Fathers and Their Children

The United States incarcerates more of its citizens than any other democratic nation.¹ In 1997, there were approximately 1.7 million individuals in U.S. jails and prisons.² Most are men, and the majority are fathers to minor children.³ Contrary to popular opinion, many incarcerated fathers lived with their children and actively participated in their upbringing before they were incarcerated.⁴ Approximately half had lived with at least one of their children prior to incarceration, and almost an equal number planned to live with them after their release.⁵ Amongst those who did not live with their children, two-thirds reported providing some financial support and/or spending time with at least one of their children prior to incarceration.⁶ These reports are consistent with studies findings that, even when they do not live with their children, fathers often contribute not only income but child care and social support to the resident parent.⁷

The effect of parental incarceration on children cannot be overempha-

1. John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 129 (1999) (in 1997, the U.S. incarceration rate was 645 persons per 100,000 as compared to other industrial democracies whose rates were 55–130 persons per 100,000).

2. *Id.*

3. Ninety-three percent of incarcerated parents are male, see Christopher J. Mumola, *Incarcerated Parents and Their Children*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, Special Report (August 2000), at 2. Fifty-six percent have a child under the age of eighteen. Creasie Finney Hairston, *Fathers in Prison: Responsible Fatherhood and Responsible Public Policies*, 32 MARRIAGE & FAM. REV. 111, 115–16 (2001) [hereinafter Hairston, *Fathers in Prison*]. Approximately 55% of all men in state prisons in 1997 had one or more children, as did 63.4% of men in federal prisons. Mumola, *supra* at 2.

4. Hairston, *Fathers in Prison*, *supra* note 3, at 115–17. One half of the incarcerated fathers in one study had lived with at least one of their children (the children often had different mothers) and their mothers before incarceration and generally provided for the child's financial support and shared caregiving with the mother. *Id.*; see also Mumola, *supra* note 3, at 3 (55.2% of fathers in federal prisons and 43.8% of fathers in state prisons lived with their children before they were incarcerated); Hagan & Dinovitzer, *supra* note 1, at 139 (over 74% of fathers in New York maximum security prison had lived with at least one of their children before they were incarcerated).

5. Philip Genty, *Termination of Parental Rights Among Prisoners*, in CHILDREN OF INCARCERATED PARENTS 167, 167 (1995).

6. Hairston, *supra* note 3, at 117; Hagan & Dinovitzer, *supra* note 1, at 139. A study of gang members found that of the members who had children with whom they did not reside, all but one saw his child every day or nearly every day. *Id.*

7. Hagan & Dinovitzer, *supra* note 1, at 138–39. Nonresident minority fathers often make informal contributions to their children, for example, by buying toys and diapers or providing babysitting services. See Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS. L. REV. 991, 1005–07 (2006).

sized. More than two-million children in the U.S., the majority of whom are ten years of age or younger, have a parent in prison.⁸ As a result of the war on drugs and mandatory sentencing laws (including life terms for repeat offenders), millions more will experience their fathers' incarceration at some point during their minority.⁹ The impact of parental incarceration on African-American and Latino children is even greater. African-American children are nine times more likely than white children to have a parent in prison and Latino children are three times more likely to have an incarcerated parent.¹⁰ Although African-Americans comprise only 13% of the United States population, nearly half of all imprisoned parents are African-American.¹¹

Most incarcerated fathers play little or no role in their children's daily lives. The majority have not seen their children at all since they were incarcerated, and only 25% have weekly telephone or mail contact with them.¹² According to one study, only 55% of incarcerated fathers had any contact with their children (*i.e.*, telephone calls, letters, visits) at least three times during the six month period preceding the study.¹³ When asked what they did to maintain relationships with their children while incarcerated, more than half did not respond, and those who did, replied that incarceration limited any paternal activities. Notably absent from their response was any reference to involvement or interest in their children's daily activities or in celebrating holidays or birthdays or sending gifts to their children, exchanging photos, etc.¹⁴ Not surprisingly, researchers have concluded that incarcerated fathers are less invested in their children's futures than incarcerated mothers and are less likely to reunite with them after their release.¹⁵ Unfortunately, as shown below, paternal disengagement might be just as common amongst many civilian (nonincarcerated) fathers.

8. Margaret Graham Tebo, *A Parent in Prison*, 92 A.B.A. J. 12, 13 (Feb. 2006); Mumola, *supra* note 3, at 1 (as of 1999, 1.498 million children in the U.S. had a parent in state or federal prison, not counting parents in jail). Fifty-eight percent of these children were less than ten years old, and 22% were less than five years old. *Id.*

9. Hairston, *supra* note 3, at 113. Two-thirds of fathers in federal prisons were convicted of drug offenses. Mumola, *supra* note 3, at 6.

10. Mumola, *supra* note 3, at 2.

11. Mumola, *supra* note 3, at 3 (finding African-American inmates are significantly more likely to be parents than white inmates); Hagan & Dinovitzer, *supra* note 1, at 133.

12. Mumola, *supra* note 3, at 1, 5; *see also* Hairston, *supra* note 3, at 118 (fewer than 50% of incarcerated fathers had seen at least one of their children at least once in the six months preceding the study). In contrast, nearly 40% of mothers in state prisons spoke to their children by telephone at least weekly, and 45% reported weekly mail contact. Mumola, *supra* note 3, at 5.

13. Hairston, *supra* note 3, at 118.

14. Genty, *supra* note 5, at 8, 36.

15. *Id.* at 8.

II. The Negative Effects of Paternal Disengagement

Paternal disengagement is not limited to incarcerated fathers. Many divorced fathers see their children as infrequently as do incarcerated fathers. Nearly 60% of children of divorced or separated parents see their fathers a few times a year or less.¹⁶ Approximately 30% have not seen their non-resident fathers at all in the past year.¹⁷ Contact is even less frequent amongst fathers of nonmarital children. Given that 40% of all children see their nonresident fathers less than once a year or never,¹⁸ one could argue that paternal disengagement amongst incarcerated fathers is a small part of a larger problem which the law has yet to adequately address. Incarceration, however, provides lawmakers with opportunities to change those fathers' attitudes and behaviors; opportunities that are not present in cases involving civilian fathers. Before I explore these opportunities, it is important to first address why lawmakers should be concerned with paternal disengagement amongst incarcerated fathers.

Fathers are important to most children.¹⁹ Most child development experts agree that a relationship with their nonresident father is important to most children's development and self-esteem. Studies have found a positive correlation between paternal contact and children's adjustment to their parents' separation.²⁰ They have also found that children who have ongoing contact with their fathers tend to enjoy higher self-esteem and fewer behavioral problems than children who are alienated from their fathers. Researchers have concluded that children who share positive relationships with their fathers are less likely to experience academic, social, and emotional difficulties, to drop out of school, or to engage in early sexual activity. They are also less likely to abuse drugs and engage in delinquent activity.²¹ Numerous studies have consistently found a correlation between paternal absence and higher rates of juvenile delinquency and later adult criminality.²² One study of 6,300 adolescent boys found that paternal absence doubled the likelihood of incarceration, even after accounting for the parents' level of education, family income, urban residence, race, and whether the child's

16. Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 946 (2005) [hereinafter *Beyond Economic Fatherhood*].

17. *Id.* at 947.

18. Maldonado, *Deadbeat or Deadbroke*, *supra* note 7, at 996.

19. "The importance to children of maintaining regular contact with their fathers has been well-documented." Philip Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1674 & n.23 (2003) [hereinafter *Damage to Family Relationships*] (citing studies).

20. Maldonado, *Beyond Economic Fatherhood*, *supra* note 16, at 949–50.

21. *Id.* at 951–52.

22. *Id.*; Hairston, *supra* note 3, at 113.

mother was an adolescent herself when she gave birth to the study participant.²³ These studies all suggest that paternal absence is detrimental to children.²⁴

Although most studies have focused on paternal absence resulting from parents' divorce or separation, a few researchers have studied the detrimental effects of paternal absence resulting from incarceration. They have found that when a father who was residing with his children is incarcerated, the effect on his children is similar to that on children who lose their fathers as a result of divorce. Both groups experience behavioral problems such as poor academic performance, drug and alcohol use, school truancy, and delinquency.²⁵ They also experience fear, anxiety, sadness, anger, loneliness, low self-esteem, guilt, depression, and emotional withdrawal from friends and family.²⁶ In addition, children of incarcerated fathers often wonder if they will be incarcerated themselves and worry that their fathers are being mistreated or will die in prison.²⁷ Children whose parents are in prison are at significantly higher risk of being involved in the criminal justice system than all other children.²⁸ Indeed, one study found that 51% of all incarcerated juveniles had a parent who had been incarcerated.²⁹

Unlike children who lose their parent as a result of divorce and at least theoretically retain their father's financial support, children of incarcerated

23. Hagan & Dinovitzer, *supra* note 1, at 147. Another study found that young men raised in father-absent homes were incarcerated three times as often as men from father-present homes. Tiffany Jones, *Neglected by the System: A Call for Equal Treatment for Incarcerated Fathers and Their Children*, 39 CAL. W. L. REV. 87, 97 (2002) (citing DAVID MYERS, *THE AMERICAN PARADOX* 117 (2000)).

24. It is not necessarily the father's physical absence from the home that has a detrimental effect on children, but rather paternal disengagement. Recent studies have found that significant paternal involvement can reduce many of the negative effects associated with growing up in a single-parent family. Maldonado, *Deadbeat or Deadbroke*, *supra* note 7, at 994.

25. Hagan & Dinovitzer, *supra* note 1, at 139, 148. Children of incarcerated parents are six times more likely than their counterparts to become incarcerated. *Id.* at 148.

26. Denise Johnston, *Parent-Child Visitation in the Jail or Prison*, in *CHILDREN OF INCARCERATED PARENTS* 136-37 (1995); Justice Brooks & Kimberly Bahna, *It's a Family Affair—The Incarceration of the American Family*, 28 U.S.F. L. REV. 271, 280 (1994); Stewart Gabel, *Behavioral Problems in Sons of Incarcerated or Otherwise Absent Fathers*, 31 FAM. PROCESS 303, 306-07 (1992).

27. Peter Breen, *Families in Peril, Bridging the Barriers*, CORRECTIONS TODAY, Dec. 1995, at 99; Gary Landreth & Alan Lobaugh, *Filial Therapy with Incarcerated Fathers*, 76(2) J. COUNSELING & DEV. 157, 163 (1998).

28. John M. Jeffries et al., *Serving Incarcerated and Ex-offender Fathers and Their Families*, VERA INSTITUTE OF JUSTICE, at 3 (Feb. 2001); Hagan & Dinovitzer, *supra* note 1, at 146-47.

29. Michelle Locke, *Children of Inmates Suffer for Sins of Fathers—and Mothers*, L.A. TIMES, July 5, 1992, at B6 (citing U.S. Bureau of Justice statistics); see also Peter Breen, *Advocacy Efforts on Behalf of the Children of Incarcerated Parents*, in *CHILDREN OF INCARCERATED PARENTS* 292, 293 (1995).

fathers almost always lose their fathers' financial support.³⁰ They also lose the guidance of a parent. Studies suggest that most fathers, even those who are involved in criminal activities or who have spent time in jail, can steer children to obey the law and "have something to offer their children."³¹ Adolescents and preteens often struggle between following their parents' advice and following their peers, who may be engaged in delinquent behavior. When fathers are not present in their children's lives, children are more likely to follow the lead of their anti-social peers.³² In short, the loss of their fathers' support, guidance, and contact may cause children of incarcerated fathers to suffer behavioral, psychological and emotional difficulties.

Paternal disengagement harms more than just those children whose fathers are in prison; it also impacts society as a whole. One of the goals of the criminal justice system is to punish and remove dangerous persons from society. However, there is another goal: that upon release (and most prisoners will eventually be released), the ex-prisoner will cease to be a costly societal and financial burden. Society hopes that the former prisoner will not commit another crime. Unfortunately, more than two-thirds of male prisoners are rearrested within three years of their release.³³ Given the cost of incarceration,³⁴ it is in society's interest to reduce the rate of recidivism. Paternal engagement may do just that.

The single best predictor of successful release from prison is whether the former inmate has a family relationship to which he can return.³⁵ Studies have shown that prisoners who maintain family ties during imprisonment are less likely to violate parole or commit future crimes after their release than prisoners without such ties.³⁶ Inmates who participated in

30. Hagan & Dinovitzer, *supra* note 1, at 140.

31. *Id.* at 125, 140.

32. *Id.* at 126.

33. Genty, *supra* note 5, at 6.

34. The U.S. spends \$32 billion per year on prisons. Hagan & Dinovitzer, *supra* note 1, at 130. States such as California and Florida spend more to incarcerate young adults than they do on college education. *Id.*

35. Ginger L. Wilczak & Carol A. Marstrom, *The Effects of Parent Education on Parental Locus of Control and Satisfaction of Incarcerated Fathers*, 43 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 90, 92 (1999).

36. Hagan & Dinovitzer, *supra* note 1, at 142; Fox Butterfield, *Children Bear Burden of Jailed Parents*, NY TIMES, Apr. 18, 1999 ("There is a growing body of research that shows maintaining family ties while in prison leads to lower rates of re-arrests for the fathers."). Researchers believe that prisoners often go through a "process of prisonization" where they adapt to and adopt the prison culture, thereby developing a criminal identity even where one was not present before. This criminal identity makes it more likely that they will engage in criminal activity once released from prison. Wilczak & Marstrom, *supra* note 35, at 91. However, strong family ties during incarceration reduce the risk of prisonization, thereby reducing the potential for recidivism. *Id.*

programs designed to help them learn how to maintain family relationships have a recidivism rate of only 2% to 4%.³⁷ Keeping inmates from seeing their children likely has the opposite effect. Prisoners who do not see their families while they are incarcerated are more likely to engage in criminal behavior.³⁸

The child's best interest is always paramount. Thus, contact with an incarcerated parent is not warranted if such contact would be detrimental to the child, regardless of the benefit to society of lower recidivism rates. However, "[t]here is simply no evidence in the literature, either from empirical studies or statements of expert opinion that parent-child visitation in the jail or prison setting has any significant or long-term negative consequences for participating children."³⁹ Researchers have found that, unless the incarcerated father has a history of violence against the child or other close family members, the child most often benefits from maintaining contact. When children are separated from their parents, they often experience feelings of abandonment, rejection, and guilt. Studies have repeatedly found that children of divorced parents feel rejected when their fathers do not visit or contact them. They blame themselves for their parents' separation, reasoning that they must have done something to alienate the other parent or that they must simply be unlovable. Some children also experience anger and fear and entertain unrealistic fantasies about the parent with whom they have no contact.⁴⁰ Not surprisingly, children of incarcerated parents experience the same feelings, especially because family members seeking to protect them from emotional distress and possible shame do not tell them where their fathers are and why they have not come to see them. Visiting their fathers in prison can help children deal with their emotions over the

37. Kim Harrison, *Parental Training for Incarcerated Fathers: Effects on Attitudes, Self-Esteem, and Children's Self-Perceptions*, 137 J. SOC. PSYCH. 588, 588 (1997); Wilczak & Marstrom, *supra* note 35, at 92 (noting much lower recidivism rates among inmates who completed parenting skills programs). They are also less likely to violate prison rules while incarcerated. See Joe Halliman, *Family Visits Bring Inmate Closer to Home*, THE STAR-LEDGER, Feb. 11, 1996, at B1 (prison staff believe that family visits may lead to better behavior amongst inmates and increase likelihood of rehabilitation); Christina Ramirez, *Patching Torn Families, Dads Behind Bars Stay in Touch with Their Kids*, SAN ANTONIO EXPRESS-NEWS, June 13, 1997, at G1 (reporting that inmates are better behaved when they must earn visitation privileges through good behavior).

38. Creasie Finney Hairston, *Family Ties During Imprisonment: Important to Whom and for What?* 18 J. SOC. & SOC. WELFARE 87 (1991); Jones, *supra* note 23, at 93, 100. (Inmates who do not participate in family visitation programs violate parole 60% more frequently and are more likely to commit future crimes than inmates who regularly see their children.)

39. Johnston, *supra* note 26, at 141. Children's most common reaction to visiting an incarcerated parent is excitability or hyperactivity usually lasting no more than a day but sometimes as long as a week. *Id.* at 139.

40. *Id.* at 138; Maldonado, *Beyond Economic Fatherhood*, *supra* note 16, at 958-59.

separation and allows them to see their parents as they are.⁴¹ It also reassures children that their parents are alive and unharmed and has been found to lead to greater well-being and emotional adjustment, and improved behavior.⁴² Most important, children want to visit their fathers in prison.⁴³

Most researchers agree that face-to-face contact with their incarcerated fathers is beneficial to most children in most cases. However, as noted, the majority of incarcerated fathers see their children less than once a year. Further, while prison visits raise significant logistical challenges that might be difficult to overcome, many incarcerated fathers have no contact of any kind with their children. They do not communicate via letters, e-mail, or telephone—methods that do not raise the challenges of face-to-face contact and which could supplement infrequent visits. In the next section, I address some of the reasons incarcerated fathers have so little contact with their children.

III. The Law's Failure to Facilitate Paternal Contact

There are many ways that the legal system has contributed to paternal disengagement amongst incarcerated fathers. The most obvious is physical separation in a distant location. Prisons are generally located in remote areas far away from the cities where most fathers resided before incarceration and hours away from their children's homes, making regular prison visits difficult.⁴⁴ Incarcerated mothers are similarly separated from their children and are often housed in prisons that are even farther away from their children. Yet, incarcerated mothers are more likely than incarcerated fathers to be involved in their children's lives, to know with whom and how they are living, and to have frequent contact with their children.⁴⁵ One study of 6,250 incarcerated parents found that while 42% of mothers had visited with their children in the last three months, only 19% of fathers had done so and only 47% of fathers as compared to 70% of mothers reported

41. Tebo, *supra* note 8, at 12, 13; Johnston, *supra* note 26, at 138; Karen Tilbor, *Prisoners as Parents: Building Parenting Skills on the Inside*, Edmund S. Muskie Institute for Public Affairs (1993) (visitation with incarcerated parents helps children reduce their sense of loss).

42. Johnston, *supra* note 26, at 138, 140. Children whose contact (of any kind) with their incarcerated fathers was less than once a month experienced significant emotional needs. Landreth & Lobaugh, *supra* note 27, at 163.

43. Interviews with children and mothers reveal that many children want to visit their incarcerated fathers even if their mothers are opposed. Hairston, *supra* note 3, at 118.

44. Sixty-two percent of parents in state prisons and 84% of parents in federal prison are held more than 100 miles from their last place of residence. Mumola, *supra* note 3, at 5.

45. Seventy-eight percent of mothers in state prison, as compared with 62% of fathers in state prison, reported some type of monthly contact with their children. Mumola, *supra* note 3, at 5. Sixty percent of mothers as compared with 40% of fathers in state prison reported weekly contact (either personal contact, letters, or telephone, etc.) with their children. *Id.* at 4.

telephone contact with their children during the same period.⁴⁶ Thus, there must be reasons other than physical distance for why incarcerated fathers have so little contact with their children. As I have argued in other contexts, societal and legal norms of nonresidential fatherhood may be to blame.

A. *Social and Legal Norms of Nonresidential Fatherhood*

Historically, fathers have been defined primarily by their role as breadwinners. This norm of economic fatherhood is possibly even stronger for nonresident fathers who are expected to pay child support, but who are expected to do little else for their children. Unlike expectations of nurturing motherhood, there is no expectation that nonresident fathers nurture their children. This is evident in the law's treatment of divorced fathers. So long as fathers support their children financially, the law does not expect them to play an active role in raising them or expect them to contact them regularly. Paternal visitation is treated as a right of the father to exercise if he so wishes, but it is not a duty or even a legal or societal expectation. Importantly, the law has not been a mere passive observer of paternal disengagement, but rather has contributed to it. Scholars have argued that current custody laws, limited visitation arrangements, the failure to enforce mothers' interference with visitation, and the focus on child support have signaled to fathers that they do not matter apart from their financial contributions.⁴⁷

This norm of economic fatherhood is also evident when one considers the law's failure to acknowledge the contributions that poor nonresident fathers make to their children. Many poor nonresident fathers, many of whom are African-American, cannot afford to make regular child support payments. However, they are more involved with their children than many divorced middle-class fathers who pay child support, but never see their children.⁴⁸ These poor fathers support their children by taking them to school or picking them up, helping them with their homework, taking them to the doctor, and watching them while their mothers work or run errands.⁴⁹ In other words, they do the things that are usually associated with mothers. They also bring items such as groceries, diapers, baby formula, clothing, and toys for their children. However, none of these acts count as child support even though they are likely to facilitate paternal involvement.

If the duty to financially support their children is central to nonresident fatherhood, incarcerated fathers will almost always come up short. By virtue

46. Genty, *supra* note 19, at 1674.

47. Maldonado, *Beyond Economic Fatherhood*, *supra* note 16, at 939–42, 962–69, 976–77, 980–82.

48. Maldonado, *Deadbeat or Deadbroke*, *supra* note 7, at 1001–02.

49. *Id.* at 1004–07.

of their incarceration, most fathers in prison cannot support their children, and many are accumulating child support arrears as they serve their sentences.⁵⁰ They are considered deadbeat dads because they are not supporting their children financially. Further, given the law's failure to acknowledge nonresident fathers' nurturing acts or to encourage paternal involvement amongst nonincarcerated nonresident fathers, it is not surprising that incarcerated fathers are perceived as incapable of providing any benefit to their children. When one considers that most incarcerated fathers are African-American and Latino—men society has deemed inadequate to be fathers⁵¹—it is clear why the law has not facilitated paternal contact.

Incarcerated fathers have often been perceived as absent fathers who were not involved with their children prior to incarceration, who do not care about their children, and whose children are better off without them.⁵² As a result, few organizations have focused on the parenting roles and responsibilities of incarcerated fathers.⁵³ Lawmakers and prison administrators have generally not encouraged or expected incarcerated fathers to fulfill any parental obligations during incarceration (other than child support). They also have not supported fathers who have sought to maintain relationships with their children and carry out parenting obligations or commitments.⁵⁴ These negative perceptions of incarcerated fathers are similar to the assumptions made about other nonresident fathers, but which studies have shown to be erroneous and misguided. They are also misguided with respect to incarcerated fathers. The majority of incarcerated fathers lived with their children or had regular contact with them before incarceration, and there is no evidence that their children are better off having no contact with them. To the contrary, the evidence suggests that most children would benefit from continued contact with their fathers during incarceration.

Unfortunately, like many divorced fathers, many incarcerated fathers have internalized this norm of economic fatherhood. Men in prison, like most

50. Some courts have interpreted incarceration as voluntary unemployment and have refused to reduce or suspend child support orders while the nonresident parent is in prison. *Layman v. Layman*, 488 S.E.2d 658, 659 (Va. Ct. App. 1997); *Ohler v. Ohler*, 369 N.W.2d 615, 618 (Neb. 1985).

51. See Dorothy Roberts, *The Absent Black Father*, in *LOST FATHERS* 145, 147-48 (Cynthia R. Daniels ed., 1998).

52. Jeffries et al., *supra* note 28 at 8; Tebo, *supra* note 8, at 12. The ease and frequency with which courts terminate the parental rights of incarcerated fathers is evidence that legal actors believe these men's children are better off without them. See *COLO. REV. STAT. ANN.* § 19-3-604 (West Supp. 1997) (permitting termination of parental rights if parent has been incarcerated for six years or longer); Genty, *supra* note 5, at 167.

53. Hairston, *supra* note 3, at 112.

54. *Id.* at 31, 112.

fathers, equate being a good father primarily with providing financially for their children, being physically present to protect them, and having decision-making authority over their lives. As a result, scholars speculate that incarcerated fathers who have little control over their day-to-day routines and cannot fulfill the traditional fatherhood role of provider are likely to devalue their role as parents.⁵⁵ Many nonresident fathers are unaware of their importance to their children and their influence over them.⁵⁶ Incarcerated fathers are no different. Few realize that, even from prison, they can provide their children with the social and emotional support necessary for their development and well-being, such as telling them that they love them and encouraging them to succeed in school.⁵⁷

B. Denial of Visitation

These social and legal norms about nonresident fatherhood and, specifically, perceptions about incarcerated fathers affect fathers' access to their children. Incarcerated parents do not have an absolute right to visitation in prison, and for years states have declined to order visitation or other regular contact between incarcerated parents and their children.⁵⁸ Some courts have held that they lack the authority to order visitation between an incarcerated parent and the child because such determinations are within the exclusive jurisdiction of the department of corrections.⁵⁹ Others have held that incarceration alone is not sufficient ground for denying visitation, but often deny incarcerated fathers visitation, in effect, for that reason.⁶⁰ For example, courts have denied visitation where the prison facility is far from the child's home; in effect denying fathers visitation merely because they were sent to a prison far from home.⁶¹ Similarly, courts have denied visitation to incarcerated fathers who failed to show that the prison facility was appropriate for a child to visit. When one father recently raised that the Illinois courts had granted visitation to an incarcerated mother, the court noted that was "the only reported case in Illinois allowing visitation with

55. *Id.* at 119.

56. See Maldonado, *Beyond Economic Fatherhood*, *supra* note 16, at 942 & n.105.

57. Hairston, *supra* note 3, at 119.

58. Harmon v. Harmon, 943 P.2d 599, 603 (Okla. 1997); Harris v. Burns, 904 P.2d 648, 652 (Or. Ct. App. 1995); Wolfe v. Wolfe, 899 P.2d 46, 48 (Wyo. 1995); Tebo, *supra* note 8, at 12.

59. See, e.g., Singletary v. Carpenter, 705 So. 2d 110, 111 (Fla. Dist. Ct. App. 1998).

60. See, e.g., Casper v. Casper, 254 N.W.2d 407 (Neb. 1977) (holding that mere fact of incarceration is not sufficient reason to deny visitation, but upholding trial court order denying incarcerated father visitation despite testimony that the children looked forward to seeing their father and were not negatively affected by the prison environment).

61. Ellett v. Ellett, 698 N.Y.S.2d 740 (App. Div. 1999); *In re Davis*, 648 N.Y.S.2d 742 (App. Div. 1996); McCrone v. Parker, 697 N.Y.S.2d 379 (App. Div. 1999).

a parent at a correctional center.”⁶²

Courts also consider the quality of the relationship between the parent and child and have denied visitation to incarcerated fathers who failed to show that they shared a close relationship with their children.⁶³ One court reasoned that, “because development of a parent–child relationship is in itself a difficult process, the child should not have to be faced with the additional burden of attempting this process in a prison environment.”⁶⁴ The legal basis for denying visitation in these cases is not clear. Most states’ statutes provide that a nonresident parent shall be awarded visitation unless it would “endanger seriously the child’s physical, mental, moral or emotional health.”⁶⁵ In cases involving civilian (nonincarcerated) fathers, the absence of a close relationship with the child is not a reason to deny visitation. Indeed, courts have ordered visitation even when the child does not want to see his father and becomes physically ill when forced to visit him, so long as there is no serious risk to the child’s health.⁶⁶ However, where the father is incarcerated, courts have denied visitation at the first inkling that any visit has been even mildly upsetting to the child.⁶⁷

Finally, courts also consider whether the incarcerated father was the custodial parent and/or whether he is likely to reside with the child after his release. Courts do not impose these requirements on civilian fathers. Civilian fathers are presumptively entitled to visitation even if they never lived with their children or plan to in the future. The same standard has not been applied to incarcerated fathers.

In short, although most states have a statutory presumption in favor of reasonable visitation,⁶⁸ courts routinely deny incarcerated parents visitation. For example, *In re Brewer*, the Kansas Court of Appeals upheld an order

62. *In re Sims*, 719 N.E.2d 1166, 1167 (Ill. App. Ct. 1999) (citing *Frail v. Frail*, 370 N.E.2d 303 (Ill. App. Ct. 1977)); *see also Woods v. Woods*, 498 N.E.2d 906, 909 (Ill. App. Ct. 1986) (denying visitation because facility was inadequate).

63. *Sims*, 719 N.E.2d at 1167; *Woods*, 498 N.E.2d at 909; *see also Ellett*, 698 N.Y.S.2d 740.

64. *Woods*, 498 N.E.2d at 909.

65. 705 ILL. COMP. STAT. ANN. 5/602(c) (West 2006).

66. *Egle v. Egle*, 715 F.2d 999 (5th Cir. 1983); *Kemp v. Kemp*, 399 A.2d 923 (Md. Ct. Spec. App. 1979), *rev’d on other grounds*, 411 A.2d 1028 (Md. 1980).

67. *Carter v. DEC*, 480 N.E.2d 564 (Ind. Ct. App. 1985) (denying incarcerated father visitation because visits were sometimes upsetting to the child).

68. *See* KAN. STAT. ANN. § 60-1616(a) (1994) (“[a] parent is entitled to reasonable parenting time unless the court finds, after a hearing, that the exercise of parenting time would seriously endanger the child’s physical, mental, moral or emotional health”); N.D. CENT. CODE § 14-05-22 (2005) (“the court shall upon the request of the noncustodial parent, grant such rights of visitation as will enable the child and the noncustodial parent to maintain a parent–child relationship that will be beneficial to the child, unless the court finds after a hearing that visitation is likely to endanger the child’s physical or emotional health”); TENN. CODE ANN. § 36-6-301 (2006) (same); IND. CODE ANN. § 31-17-4-1(a) (West 2006) (same); MO. ANN. STAT. §

denying visitation to an incarcerated father, holding that visitation was not in the children's best interests where the father had virtually no relationship with them.⁶⁹ There was no evidence, however, that the "exercise of parenting time would seriously endanger the child's physical, mental, moral or emotional health," as required by the Kansas statute.⁷⁰ A year later, the same court, in a case involving a civilian father, upheld an award of weekend visitation even though the father had played a minimal role in the child's life.⁷¹ The court noted that the mother had discouraged the father's participation in their child's life. However, in cases where the father seeking visitation is incarcerated, courts have given little weight to the mother's interference with the father's access to the child.

In some cases, a court might have no choice but to deny visitation to a father who is serving his sentence in a facility that cannot accommodate young children or that is located hundreds of miles from his children's home. In other cases, however, it is clear that judges' biases against incarcerated fathers are influencing their decisions. For example, in *Casper v. Casper*, the trial court denied visitation because "the best interests of the children lay in the establishment of a stable home environment, free of the unsettling influences, rather than in the continued disruptions the court felt were caused by the visitations . . . and the court's feeling that the institutional setting was against the best interests of the children."⁷² Interestingly, the mother had voluntarily taken the children to see their father over a dozen times until she remarried, but the court disregarded these past successful visits. Similarly, in *In re Marriage of Brewer*, the trial judge stated that in his "personal opinion . . . it would be better for the children, both socially, psychologically, and otherwise . . . not to be taken to such a setting [prison] and visit with their father."⁷³ The trial judge went on to add (as justification) that the children were "young enough they probably didn't know their father, anyway."⁷⁴

More recently, an Oregon court rejected an incarcerated father's argument that incarceration can never be the basis for denying all visitation and upheld an order denying his request to send letters, cards, and birth-

452.400(1) (West 2006) (same); ARIZ. REV. STAT. § 25-408(A) (1981) (same); KY REV. STAT. ANN. § 403.320(1) (West 2003) (same); *Wise v. Del Toro*, 505 N.Y.S.2d 880 (App. Div. 1986) (It is presumed that parental visitation is in the best interests of the child, absent proof that such visitation would be harmful).

69. 760 P.2d 1225 (Kan. Ct. App. 1988)

70. KAN. STAT. ANN. § 60-1616(a) (2005).

71. *In re Robinson*, 778 P.2d 858 (Kan. Ct. App. 1989).

72. *Casper v. Casper*, 254 N.W.2d 407, 409 (Neb. 1977).

73. *In re Marriage of Brewer*, 760 P.2d at 1225.

74. *Id.*

day and Christmas presents to his two-year-old son.⁷⁵ The court found that even this minimal level of contact (which did not include a request for visitation) would be contrary to the child's best interests because the father was serving a life sentence and "the child will probably never again even see, let alone enjoy, a parental relationship with [him]."⁷⁶ The dissenting justices noted that the majority assumed that persons convicted of violent crimes can never have positive relationships with their children, an assumption not supported by the evidence. There was no evidence that the father had ever mistreated the child and nothing in the record suggested that it was not in the child's best interests to have the kind of limited contact the father had requested.

We expect appellate courts to defer to trial judges' decisions concerning visitation. However, the trial court's biases in *Harris* were so apparent that the court of appeals' decision to uphold it is surprising. The trial court ruminated:

So what would be the impact of allowing visitation upon the child? . . . [W]hat would be the impact on this child of growing up being exposed to that situation, and being reminded through life that this is his origin? I think it almost goes without saying that it would be devastating to the child. I don't think there's any way that we can say it would be in his best interest, but I think it can be almost automatically said that it would be horrendously against this child's best interest to grow up with that.⁷⁷

The trial judge then went off on a tangent as he remembered some irrelevant experiences. He stated:

I can't help remembering two friends of mine in high school who grew up knowing their father killed their mother. . . . They both became drunk derelicts, and died, I think, before age thirty. And I think that's simply illustrative of the kind of impact that it would have in great probability on this child to grow up with this association and with this knowledge. So when we look at what's the best interest of this child, I think we have to conclude that absolute cessation of visitation from [father] or any members of his family are the only thing that could be in the best interest of this child so that this child has the chance to grow up with a normal, healthy mental attitude towards life, parents, and that sort of thing.⁷⁸

The trial judge seemed persuaded by his friends' tragic ending not to allow visitation, but that case and *Harris* are not at all similar. The father in *Harris* never committed any violent acts against the child's mother, the child, or any family member.

75. *Matter of Harris*, 904 P.2d 648 (Or. Ct. App. 1995).

76. *Id.* at 648.

77. *Id.* at 652.

78. *Id.*

Even when incarcerated fathers obtain visitation orders, it is often a pyrrhic victory because such orders are rarely enforced. There is often no one willing to bring the children to the prison, or their mother may not allow them to visit, even though children want to see their fathers.⁷⁹ In many cases, children are turned away at the prison because they do not have proper identification, proof of paternity, or are not accompanied by their mothers, as some prisons require.⁸⁰ These are some of the requirements imposed by prisons, and about which visitors are often unaware until they arrive at the facility.

C. Limited Opportunities for Father–Child Contact

The official policy of most corrections departments is that contact between prisoners and their families is desirable because it leads to better behaved prisoners.⁸¹ The official policy also provides for contact via telephone, letters, or visits. However, researchers have found that helping fathers maintain relationships with their children ranks quite low in policymakers' and prison administrators' list of priorities. Prison visits will always raise many logistical challenges, and the main concern of lawmakers, courts, and prison officials must always be the safety and security of its visitors, inmates, and society. Prison officials have raised concerns that children will be used to distract the guards, thereby creating a security risk. These concerns are legitimate. However, even if it is necessary to limit face-to-face contact, it does not explain why incarcerated fathers have so little telephone contact and other forms of non-face-to-face contact with their children. As shown, some courts have denied incarcerated fathers' requests to mail their children letters, cards, and presents. In many cases, however, such contact is allowed, but fathers do not request it. Some fathers truly are disengaged from their children, whereas others fear that their cards and presents will never get to their children because mothers who wish to terminate all contact will destroy or hide them. Other fathers simply cannot write or are too ashamed of their limited skills.

Although telephone contact appears to be a viable option, phone calls from prison facilities are prohibitively expensive for most families, costing approximately \$15 for thirty minutes.⁸² Prisoners also do not have e-mail access,⁸³ a method used by civilian fathers to maintain contact with their

79. Hairston, *supra* note 3, at 118. Interviews with children and mothers reveal that many children want to visit their incarcerated fathers, even if their mothers are opposed. *Id.*

80. *Id.* at 124.

81. *Id.* at 122.

82. In contrast, a thirty-minute phone call from a residential phone usually costs \$1.50. Hairston, *supra* note 3, at 125.

83. *Inmates Using Intermediaries to Escape into Internet* (April 15, 2005), available at http://www.kvoa.com/Global/story.asp?S=3216762&nav=menu216_9 ("State and federal prisons don't

children. Although a few states provide prisoners with virtual visits,⁸⁴ and some lawmakers have even proposed eliminating prison visits altogether and replacing them with virtual visits,⁸⁵ virtual visitation is not available in most prisons. Thus, aside from letters, incarcerated fathers' opportunities for contact with their children are quite limited.

D. Incarcerated Mothers

Society does not think very highly of prisoners, regardless of parental status. However, negative perceptions of inmates in general intersect with social and legal norms of nonresidential fatherhood to produce biases against incarcerated fathers that are possibly greater than those against incarcerated mothers.⁸⁶ Society expects (and hopes) that mothers will take care of their children once they are released.⁸⁷ Consequently, states provide numerous programs for incarcerated mothers and opportunities for contact with their children, which are not available to incarcerated fathers. The oldest of these programs are prison nurseries, which allow incarcerated mothers to reside with their infants on the prison premises.⁸⁸ Some women's prisons allow older children to spend five or more nights at the facility each month so that they can spend substantial quality time with their mothers.⁸⁹ Other states provide community-based correction programs for nonviolent female offenders with young children.⁹⁰ Rather than serving their time in a prison setting, convicted mothers participate in a residential program in an urban or suburban area that provides job training, substance abuse treatment, and

let inmates use the Internet. Neither do many county jails."); available at <http://www.inmate.com/inmates.htm> ("[I]nmates do not have access to the Internet. They cannot respond via email.")

84. See The Pennsylvania Prison Society, available at http://www.prisonersociety.org/progs/ifs_fvv.shtml (eight state prisons in Pennsylvania provide inmates with virtual visits).

85. Hairston, *supra* note 3, at 124; see Associated Press, *Video Jail Visits Becoming Common at Phoenix Jail* (Nov. 03, 2005), available at <http://www.policeone.com/police-products/corrections/articles/120510/> (noting that at this jail, virtual visits are the only visits allowed).

86. Cf. William L. Patton, *Mommy's Gone, Daddy's in Prison, Now What About Me?*, 75 N.D. L. REV. 179, 191 (1999) ("Society in general is not sympathetic to fathers in jail. There is less consideration for the impact of fathering on a developing child and more a feeling for cutting him off from the child because he is too evil.")

87. Judges have admitted that because women are more often than not the primary caregivers, "they are more inclined to recommend probation rather than imprisonment for women and if they sentence a woman, it is usually for a shorter time than if the crime had been committed by a man." Irene Nagel & Barry Johnson, *The Role of Gender in a Structured Sentencing System*, 85 J. CRIM. L. & CRIMINOLOGY 181, 187 (1994).

88. Note, Nicole S. Mauskopf, *Reaching Beyond the Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN'S L.J. 101, 109-10 (1998) (discussing The Bedford Hills Correctional Facility in New York).

89. *Id.* (discussing Nevada Correctional Center for Women).

90. Jones, *supra* note 23, at 95. Locke, *supra* note 29 (discussing California program that allows nonviolent mothers to live with their children under the age of six).

parent education.⁹¹

Although few states have prison nurseries or similar programs, the availability of such programs in a number of states demonstrates that lawmakers recognize the importance to a child's development of bonding with a parent.⁹² Lawmakers also believe that providing job training, substance abuse treatment, and parent education may prevent recidivism. Indeed, fewer program participants were rearrested and convicted as compared with women who served their sentences in state prisons.⁹³ Unfortunately, no similar programs are available for incarcerated fathers. Similarly, although almost all women's prisons (federal and state) offer at least one parent education course, few male prisons do.⁹⁴

I focus on the efforts that lawmakers have made to maintain incarcerated mothers' relationships with their children to show that the law has not made similar efforts to keep fathers involved in their children's lives. In the next part, I address efforts lawmakers can make to facilitate paternal engagement amongst incarcerated fathers and what society must expect from fathers in return.

IV. Making Incarcerated Fathers into Parents

Most incarcerated men want to be good fathers.⁹⁵ They also want prisons to offer courses and materials that will help them understand their children's needs and help strengthen their parenting skills.⁹⁶ Apparently, some lawmakers have started listening to incarcerated fathers' wishes to become effective parents and are recognizing that children and society benefit when incarcerated parents maintain relationships with their children. A measure introduced in late 2005, as part of the renewal of the USA Patriot Act, provides that the Department of Health and Human Services shall facilitate relationships between incarcerated parents and their children.⁹⁷ In addition,

91. Jeffries et al., *supra* note 28, at 7; Jones, *supra* note 23, at 95.

92. Jeffries et al., *supra* note 28, at 7.

93. Jones, *supra* note 23, at 97 Twenty percent of program participants were rearrested and convicted as compared with 39% of women who served their sentences in state prisons. The women who are accepted into these programs are nonviolent first-time offenders with short sentences, those least likely to recidivate. Thus, the decrease in the rate of recidivism might not be as drastic.

94. Jeffries et al., *supra* note 28, at 7.

95. Hairston, *supra* note 3, at 132. Many incarcerated fathers worry that they will be replaced in the parental role and that their children will forget them. Karen DeBord, *Incarcerated Fathers: Extending Their Parenting Knowledge to the Outside*, available at <http://www.ces.ncsu.edu/depts/fcs/smp9/incar.htm>.

96. Hairston, *supra* note 3, at 37 (80% of incarcerated fathers are willing to strengthen and improve their parenting skills, and 91% are interested in learning how to become better fathers); see also Harrison, *supra* note 3, at 588; Hagan & Dinovitzer, *supra* note 1, at 139.

97. Tebo, *supra* note 8, at 12.

an increasing (although small) number of prisons have begun providing parenting skills programs for incarcerated fathers. These programs range from parenting skills courses alone to a combination of classes and increased visitation privileges.⁹⁸ For example, New York's Family Works program offers both basic and advanced sixteen-week parenting courses,⁹⁹ inmate counseling, and children's centers—a room with toys, games, and educational materials conducive to parent-child visits.¹⁰⁰ A program in Ohio allows Girl Scout troops to conduct their bimonthly meetings inside the prison so they can spend time with their fathers and then participate in scout activities.¹⁰¹ The PATCH program in Texas allows incarcerated fathers to earn weekly hour-long visits by attending five hours of parenting education sessions per week and maintaining good behavior.¹⁰²

One reason states have begun providing such programs is that they believe that parenting education will lead to greater paternal contact, which, in turn, may lower the rate of recidivism.¹⁰³ Many inmate fathers received ineffective parenting and, thus, never learned the necessary skills to interact with and parent their children. Studies have shown that poor parenting is a major predictor of criminal activity.¹⁰⁴ Thus, if incarcerated fathers acquire effective parenting techniques, it might also reduce the likelihood that their children will engage in criminal activity.¹⁰⁵

These programs have been somewhat successful. Studies show that incarcerated fathers who participate in parent-education programs may be better prepared for the challenges of fatherhood.¹⁰⁶ The most successful programs are those that not only offer parenting courses, but also provide increased visitation privileges and a child-friendly area or center with games, toys, and educational materials for fathers to use with their children.¹⁰⁷ For

98. See, e.g., The Osborne Association in New York, Fathers Behind Bars in Michigan, Family Time in Lima Correctional Institution in Ohio, Beyond Bars, Behind No Bars in Pennsylvania. See Elise Zealand, *Protecting the Ties that Bind From Behind Bars*, 31 COLUM. J.L. & SOC. PROBS., 247, 248–49 (1998); Jeffries et al., *supra* note 28, at 14–15.

99. The course meets for twenty-two hours—the equivalent of a three- or four-credit law school seminar. Carl Mazza, *Teaching Parenting Skills to Incarcerated Parents*, REFLECTIONS, at 5 (Fall 2001), available at www.fcnetwork.org/reading/cmazza.pdf.

100. Jeffries et al., *supra* note 28, at 14–15; see also Patton, *supra* note 93 (discussing a ten-week parenting program at another New York prison).

101. Jones, *supra* note 23, at 108.

102. Ramirez, *supra* note 37, at G1. One of the advantages of the PATCH program is that participants can interact with their families without a glass wall separating them. *Id.* For a description of prison parenting programs nationwide, see Jeffries et al., *supra* note 28, at 14–27.

103. Wilczak & Marstrom, *supra* note 35, at 90.

104. *Id.* at 90–91.

105. *Id.*

106. Harrison, *supra* note 37, at 592.

107. See Patton, *supra* note 86, at 201 (describing one New York program).

example, fathers who participated in New York's Family Reunion Program, which grants inmates overnight visits with their children in a private, home-like setting on the facility grounds, reported stronger relationships with their children and feeling that they were better parents.¹⁰⁸ It is not clear, however, that as many children as possible are benefitting from their fathers' newly improved parenting skills. One reason is that many programs provide only courses without additional visitation privileges. Another reason is that some fathers complete the program, but do not increase their level of permitted contact (*i.e.*, sending frequent letters and cards). Thus, even though studies show that fathers' attitudes towards parenting improve after participating in parenting skills programs,¹⁰⁹ in the end, children may not be benefitting from the change in their fathers' attitudes if the level of contact remains the same.

This is where I part ways with the few commentators who have examined the effect of paternal incarceration on children. Commentators have proposed increasing services and programs for incarcerated fathers and increasing opportunities for visits with their children.¹¹⁰ Although I agree that all prisons should provide parenting skills courses and children's centers and that courts must provide and enforce visitation orders, these efforts alone are not sufficient to facilitate paternal engagement. Fathers must be given the opportunity to learn how to become effective parents and to visit with their children, but they must also be expected to maintain frequent contact with them. As I have argued in prior work, the law must impose a duty on fathers to nurture their children. The questions that lawmakers will ask before they fund any programs for incarcerated fathers are "Do these programs work?" "Are fathers who complete these programs more engaged with their children or are they obtaining a certificate of completion and continuing to do very little for their children?" Society will not invest in these programs unless fathers are required to give something back to their children and society.

My proposal is twofold. First, the law must provide incarcerated fathers with greater opportunities for contact with their children. For example, the state could subsidize prisoners' telephone calls to their children, possibly paying for three telephone calls per week. The state could also provide weekly virtual visits to supplement actual visits. It could also create a child-friendly space in the facility and allow fathers to interact with their children without glass walls or restrictions on physical contact such as hugging.¹¹¹

108. Harrison, *supra* note 37, at 589. New York is one of the few states that permit overnight visits for husbands, wives, and their children. Hairston, *supra* note 3, at 123.

109. Wilczak & Marstrom, *supra* note 35, at 100; Harrison, *supra* note 37, at 592.

110. See, *e.g.*, Hairston, *supra* note 3; Tebo, *supra* note 8, at 12–13; Genty, *supra* note 19; Johnston, *supra* note 26.

111. One of the hardest things about a prison visit for the child is being separated from her

Courts should start treating incarcerated fathers like other nonresident fathers and apply a presumption in favor of visitation unless it would risk harm to the child's physical or mental health. It should also be irrelevant when determining whether to award visitation to an incarcerated father whether he lived with the child before or will do so after his release. The state should encourage incarcerated fathers' relationship with their children, regardless of their prior or future living arrangements.

Courts must also stop denying visitation because the prison is geographically distant from the child's home. As New York courts have held, concerns about the prison distance, the child's age, and the frequency of visitation could be addressed by an appropriately limited visitation schedule, but visitation should not be denied outright for these reasons.¹¹² Courts must also enforce visitation orders. If the child's mother or guardian refuses to or cannot accompany the child to visit her incarcerated father, the state must provide ways for the child to get to the prison. We do this all the time in another context. When a child is in foster care, the social services agency is responsible for facilitating visits between the child and the parents, even if this requires scheduling separate visits with each parent, picking up the child at the foster home, and then transporting the child to the location where the visit will take place.¹¹³ Similarly, courts can make agencies responsible for transporting children to prisons to visit their incarcerated fathers. Courts should also not deny visitation because the prison lacks appropriate facilities for children. The obvious solution would be to order the prison to provide adequate facilities, such as a children's center.

Second, the law must impose responsibilities on fathers. Thus, my proposal requires that fathers actually increase contact with their children and become involved in their lives. To illustrate, incarcerated fathers want more visitation,¹¹⁴ but they should have to earn increased visitation privileges by showing that they are making other efforts to communicate with their children. For example, although it might be difficult logistically for children to make frequent trips to the prison facility, fathers could earn weekly virtual visits by showing that they are making other efforts to nurture their

father by a wall of glass. See Locke, *supra* note 29.

112. See, e.g., *Rhynes v. Rhynes*, 662 N.Y.S.2d 667 (App. Div. 1997) (granting incarcerated father visitation with eighteen-month-old son and noting that the mother's concern about the inconvenience, cost, and frequency of visitation could be addressed by an appropriate visitation schedule); *Davis v. Davis*, 648 N.Y.S.2d 742 (App. Div. 1996) (ordering biannual visits instead of the monthly visitation requested because the child would be required to make a seven-hour round-trip drive).

113. Telephone interview with Maxiel Maldonado, Social Caseworker, Westchester County Department of Social Services, Foster Care Unit (April 1, 2006).

114. Hairston, *supra* note 3.

children. A father could be required to write a letter, poem or story to his child twice a week as a condition of virtual and actual visits.¹¹⁵ He could also be required to telephone his child every other day or write an essay describing his child. These efforts facilitate paternal engagement and reassure lawmakers that parenting skills programs are benefitting children.

The law should provide other significant incentives for fathers to nurture their children, such as early parole (or time off for good behavior) for fathers who show that they are nurturing their children. Children's perceptions of their fathers' attitudes and behaviors, along with progress reports from the parenting skills course instructors would be relevant to a committee determining whether a father is ready to rejoin society.

Critics of my proposal would argue that society does not want incarcerated fathers to have more contact with their children if the law in effect has to "bribe" them to communicate with their children. However, most incarcerated fathers want to be good fathers and all the law would be doing is giving a push in the right direction to men it has historically deemed inadequate parents. By encouraging incarcerated fathers to see their children, lawmakers would be signaling that they recognize that although incarcerated, these men have something to offer their children. For fathers who have accepted the norm of economic fatherhood, and who believe that they are not important to their children, it might not be enough merely to provide opportunities for paternal involvement without making frequent contact and nurturing almost mandatory. The law has contributed to this norm of paternal disengagement and, thus, has some responsibility for changing it.

V. Conclusion

Millions of children might lose their fathers as a result of incarceration, putting them at risk for depression, low academic achievement, behavioral problems, and juvenile delinquency. Making prisoners into effective parents is a significant task that cannot be borne by incarcerated fathers alone or by law and policymakers alone. It is joint effort, which if successful could benefit not only millions of children, but also fathers who are more likely to abandon a life of crime in exchange for a meaningful relationship with their children. Incarceration provides lawmakers with the opportunity to help fathers become involved in their children's lives, even if their ties to their children prior to incarceration were weak or nonexistent. Fathers must take advantage of this opportunity.

115. Some prison programs require that fathers write letters or a story to send to their children. Wilczak & Marstrom, *supra* note 35, at 96. Children like receiving letters from their fathers and speaking to them on the telephone. GWYNETH BOSWELL & PETER WEDGE, *IMPRISONED FATHERS AND THEIR CHILDREN* 76–77 (2002).