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# INCARCERATED PARENTS AND CHILD WELFARE IN WASHINGTON

Sayer Rippey\*

*Abstract:* From 2006 to 2016, 32,000 incarcerated parents in the United States permanently lost their parental rights without ever being accused of child abuse.<sup>1</sup> Of these, approximately 5,000 lost their parental rights solely because of their incarceration.<sup>2</sup> This “family separation crisis”<sup>3</sup> followed on the heels of the Adoption and Safe Families Act (ASFA), a federal law which directs states to initiate parental termination proceedings against parents when their children have been in foster care for fifteen of the last twenty-two months.<sup>4</sup> Some states, including Washington, attempted to mitigate ASFA’s devastating impact on incarcerated parents by adding exceptions for incarceration.<sup>5</sup> This Comment explores the disparate effect of ASFA on families with incarcerated parents, and examines the structure and impact of Washington State’s incarceration exception to the termination requirement. It argues that more states should adopt exceptions for incarcerated parents, that Washington’s exception should go further to protect these parents, and that, ultimately, a wide variety of non-legislative changes are necessary to protect families before and during incarceration.

## INTRODUCTION

“A termination of parental rights is the family law equivalent of the death penalty in a criminal case.”<sup>6</sup>

The Adoption and Safe Families Act (ASFA) of 1997 dramatically reoriented child welfare proceedings across the United States. It changed the primary goal of child welfare proceedings from reuniting families to prioritizing child safety and speedily achieving “permanency” for

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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/TU2U-ZDFQ].

2. *Id.*

3. *See id.*

4. 42 U.S.C. § 675(5)(E) (2012).

5. Victoria Law, *New Law Gives Parents Behind Bars in Washington State a Way to Hold onto Their Children*, TRUTHOUT (May 11, 2013), <https://truthout.org/articles/new-law-gives-parents-behind-bars-in-washington-state-a-way-to-hold-onto-their-children/> [https://perma.cc/H3F6-HBZN] [hereinafter Law, *New Law*].

6. *In re Smith*, 601 N.E.2d 45, 55 (Ohio Ct. App. 1991).

children.<sup>7</sup> To achieve permanency, ASFA directs states to terminate parental rights if the child has been in foster care for too long, so that the child can be “freed” for adoption.<sup>8</sup> Today, to access federal funds for child welfare, states must initiate parental termination proceedings against parents whose children have been in foster care for fifteen of the last twenty-two months, unless the state can identify a good cause reason not to do so.<sup>9</sup>

In the era of mass incarceration<sup>10</sup> and mandatory minimum sentencing laws that leave the majority of incarcerated people behind bars for well over twenty-two months,<sup>11</sup> this provision leads to increasing numbers of incarcerated parents losing their parental rights.<sup>12</sup> In part because people of color (POC) are disproportionately policed and incarcerated,<sup>13</sup> and because children with incarcerated mothers are disproportionately likely to be placed in foster care,<sup>14</sup> Black<sup>15</sup> children and other children of color are especially impacted by this policy.<sup>16</sup>

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7. Sheila M. Huber, *The Influence of Federal Law on State Child Welfare Proceedings*, in COURT IMPROVEMENT TRAINING ACADEMY, WASHINGTON STATE JUVENILE NONOFFENDER BENCHBOOK 9, 9 (2011); see also Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1498 (2012).

8. Roberts, *supra* note 7 (noting that in addition to “establish[ing] deadlines for terminating the rights of birth parents with children in foster care,” ASFA “offers financial incentives to states to move more children from foster care into adoptive homes”).

9. 42 U.S.C. § 675(5)(E) (2012).

10. See *Mass Incarceration: An Animated Series*, ACLU, <https://www.aclu.org/issues/smart-justice/mass-incarceration/mass-incarceration-animated-series> [<https://perma.cc/QU9Q-G5EQ>]; Shante Cosme, *Black Lives Matter Co-Founder Patrisse Cullors on Mass Incarceration: ‘Our Everyday Lives are Criminalized’*, COMPLEX (Nov. 17, 2017), <https://www.complex.com/life/2017/11/patrisse-cullors-justice-la-blm-interview> [<https://perma.cc/CY22-B3DE>].

11. See DEP’T OF CORR., WASH. STATE, FACTS ABOUT INDIVIDUALS IN CONFINEMENT (2018), <https://www.doc.wa.gov/docs/publications/reports/100-QA001.pdf> [<https://perma.cc/C7HS-ZW2L>]; *Mandatory Minimums and Sentencing Reform*, CRIM. JUST. POL’Y FOUND., <https://www.cjpf.org/mandatory-minimums> [<https://perma.cc/UVC3-4J2X>].

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

13. See *Racial Disparity*, SENTENCING PROJECT, <https://www.sentencingproject.org/issues/racial-disparity/> [<https://perma.cc/3854-EJPX>].

14. Hager & Flagg, *supra* note 1 (reporting that incarcerated women’s children are five times more likely to go to foster care).

15. This Comment uses the term “Black” as opposed to African American. For discussion on this usage, see, for example, NABJ STYLE GUIDE A, <https://www.nabj.org/page/styleguideA> [<https://perma.cc/946N-YWQS>] (“In a story in which race is relevant and there is no stated preference for an individual or individuals, use black because it is an accurate description of race.”); David Lanham & Amy Liu, *Not Just a Typographical Change: Why Brookings is Capitalizing Black*, BROOKINGS (Sept. 23, 2019), <https://www.brookings.edu/research/brookingscapitalizesblack/> [<https://perma.cc/3M7S-J5N2>].

16. In 2014, Black and Native American youth were significantly more likely than white children

Recognizing the disproportionate impact ASFA would have on incarcerated parents, certain states implemented a statutory exception to this provision.<sup>17</sup> Washington State’s statutory exception allows a parent’s incarceration to be a good cause to excuse the fifteen-month deadline to file a Termination of Parental Rights (TPR) petition.<sup>18</sup> For the exception to apply, there must be no other reason to initiate termination proceedings, and the parent must maintain a “meaningful role” in their child’s life.<sup>19</sup>

This Comment discusses the concepts of collateral consequences and reproductive justice, and explores how they are, and have been, used to resist the impact of TPR on marginalized parents. It argues that state-level statutory exceptions to the ASFA timeline, such as Washington’s, are crucial to prevent a systematic dissolution of incarcerated people’s fundamental right to parent. This Comment also explores the efficacy of Washington’s statutory exception and proposes that it should go further to protect incarcerated parents. Specifically, it recommends that where the exception applies, it should be a mandatory bar to TPR rather than subject to judicial discretion. Furthermore, it argues that the “meaningful role” language should be removed from the exception, so that the State does not initiate termination proceedings against incarcerated parents unless there is an independent reason to do so.

## I. THE ADOPTION AND SAFE FAMILIES ACT

Congress passed ASFA in 1997 to encourage states to provide permanence and stability for children through adoption.<sup>20</sup> Enacted in response to highly publicized cases of child deaths, and to concerns of children languishing in foster care, the Act’s purpose was to get children out of foster care and adopted into safe and permanent homes as quickly

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to have their families referred to the Washington State Department of Children Youth and Families and were more likely to stay in foster care for more than two years. CHILDREN’S ADMIN., WASH. STATE DEP’T OF SOC. & HEALTH SERVS., REPORT TO THE LEGISLATURE: RACIAL DISPROPORTIONALITY AND DISPARITY IN WASHINGTON STATE 5, 7 (Jan. 1, 2016), <https://www.dshs.wa.gov/sites/default/files/CA/acw/documents/RacialDisproLegislativeReport2016.pdf> [<https://perma.cc/RP4N-HEJU>].

17. 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/WU3D-NC35>].

18. WASH. REV. CODE § 13.34.145 (2019). More specifically, this exception allows the State to receive federal funds for the child’s foster care placement where the failure to file a TPR petition would otherwise bar it. *See also* Law, *New Law, supra* note 5.

19. WASH. REV. CODE § 13.34.145.

20. Theodore J. Stein, *The Adoption and Safe Families Act: How Congress Overlooks Available Data and Ignores Systemic Obstacles in Its Pursuit of Political Goals*, 25 CHILD. & YOUTH SERV. REV. 669, 669 (2003).

as possible.<sup>21</sup> This federal statute did not directly regulate state foster care systems. Instead, it conditioned federal funds for child welfare on states' compliance.<sup>22</sup> To prevent the potential loss of millions of dollars in federal subsidies, all fifty states eventually passed legislation that conformed to the requirements of ASFA.<sup>23</sup>

One of the requirements of ASFA is that if a child has been in foster care "for 15 of the most recent 22 months, . . . the [s]tate shall file a petition to terminate the parental rights of the child's parents."<sup>24</sup> However, if "a [s]tate agency has documented . . . a compelling reason for determining that filing such a petition would not be in the best interests of the child," then the state does not have to initiate termination proceedings.<sup>25</sup> If a TPR petition is filed and ultimately granted, the child is then "freed" for adoption. There is no guarantee that this "free" child will ever be adopted,<sup>26</sup> and data regarding the number of these children who are ultimately adopted is scarce.<sup>27</sup> However, there is no question that this impacts many children. In 2017, there were 69,525 "legally free" children in the United States.<sup>28</sup> Fifty-three percent had been in foster care for more than two years, twenty-eight percent had been in foster care for three to four years, and nine percent had been in foster care for five years or more.<sup>29</sup>

States have implemented ASFA in different ways, but only a small minority provides exceptions to the TPR requirement for parents who are incarcerated.<sup>30</sup> For example, Nebraska and New Mexico, in their initial

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21. H.R. REP. NO. 105-77, at 7 (1997); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 107-08 (2002); Stein, *supra* note 20.

22. JULIE KOWITZ MARGOLIES & TAMAR KRAFT-STOLAR, WOMEN IN PRISON PROJECT OF THE CORR. ASS'N OF N.Y., WHEN "FREE" MEANS LOSING YOUR MOTHER: THE COLLISION OF CHILD WELFARE AND THE INCARCERATION OF WOMEN IN NEW YORK STATE 15 (2006).

23. *Id.* Note that ASFA made federal funds available to the states for foster care and adoption but not for services that could help avoid removal; the Family First Prevention Services Act has since changed this. See generally, *Family First Prevention Services Act*, NAT'L CONF. ON ST. LEGISLATURES (Sept. 25, 2019), <http://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx> [<https://perma.cc/Q9PU-WRAA>].

24. 42 U.S.C. § 675(5)(E) (2012).

25. *Id.* § 675(5)(E)(ii).

26. Margolies & Kraft-Stolar, *supra* note 22, at 18.

27. *Id.* at 16.

28. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 4 (2018), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport25.pdf> [<https://perma.cc/259H-ZEM8>].

29. *Id.* at 5.

30. See Philip M. Genty, *Moving Beyond Generalizations and Stereotypes to Develop Individualized Approaches for Working with Families Affected by Parental Incarceration*, 50 FAM. CT. REV. 36, 38 (2012) (noting that, as of 2012, twenty-four states explicitly include incarceration as

implementations of ASFA, excluded incarcerated parents from the fifteen-month TPR requirement if the only reason to file for termination was the parent's incarceration.<sup>31</sup> Colorado makes an exception that delays the termination proceedings if the child has been in foster care because of "circumstances beyond the parent's control, such as incarceration for a reasonable period of time."<sup>32</sup> New York allows foster care agencies discretion to delay termination proceedings where the child's foster care placement was in significant part a result of the parent's incarceration or participation in a drug treatment program.<sup>33</sup>

For any child who enters foster care, whether they have an incarcerated parent or not, ASFA increases the chance that they will be adopted rather than returned home. Aside from implementing a timetable to file TPR petitions, ASFA provides financial incentives to states for getting children adopted.<sup>34</sup> But the federal government did not provide any comparable financial incentives to states for preserving and reuniting existing families until it passed the Family First Prevention Services Act in 2018.<sup>35</sup> As one scholar noted, "there is a big difference between removing barriers to the adoption of children who are already available to be adopted and viewing the legal relationship between children in foster care and their parents as a barrier to adoption."<sup>36</sup>

## II. COLLATERAL CONSEQUENCES AND ASFA

One way of understanding, and critiquing, the impact of ASFA on incarcerated parents is through a discussion of collateral consequences. Criminal convictions today come with a host of consequences that persist after release from prison.<sup>37</sup> Convictions can affect a formerly incarcerated person's social status, as well as their ability to vote, to obtain housing, to get a job, to receive education, and to obtain public assistance.<sup>38</sup> The

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a factor that can help *contribute* to TPR); Law, *New Law*, *supra* note 5 (noting that only Nebraska and New Mexico originally excluded incarcerated parents from ASFA's time frame).

31. Law, *New Law*, *supra* note 5.

32. Margolies & Kraft-Stolar, *supra* note 22, at 34.

33. N.Y. ASFA Expanded Discretion Law § 3438 (McKinney 2010); *see also* Velmanette Montgomery, *Support Senator Montgomery's "Incarcerated Parents" Bill*, N.Y. STATE SENATE (Sept. 30, 2009), <https://www.nysenate.gov/newsroom/in-the-news/velmanette-montgomery/support-senator-montgomerys-incarcerated-parents-bill> [https://perma.cc/K36Y-93WY]; Law, *New Law*, *supra* note 5.

34. ROBERTS, *supra* note 21, at 110–11.

35. *Id.* at 111; Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 232–33.

36. *Id.* at 113.

37. *See* Margaret C. Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 755 (2011).

38. *Id.*; Adam Chandler, *Paying (and Paying and Paying) a Debt to Society*, ATLANTIC (May 31,

number of people impacted by these and other collateral consequences has grown dramatically.<sup>39</sup> For instance, a judge recently noted that there are “nationwide nearly 50,000 federal and state statutes and regulations that impose penalties, disabilities, or disadvantages on convicted felons.”<sup>40</sup>

Many experts are critical of the collateral consequences that come with incarceration.<sup>41</sup> Because the logic of the criminal legal system supposes that incarceration is a way to repay a debt to society, many believe that once an individual has paid this debt, their punishment should end.<sup>42</sup> This sentiment is shared even by many who are considered more “tough on crime.”<sup>43</sup> Especially as collateral consequences of incarceration become “more severe and harder to mitigate,” it becomes harder for formerly incarcerated individuals to re-enter society and succeed.<sup>44</sup> This outcome is hard to justify given that access to jobs and economic security have been shown to reduce recidivism.<sup>45</sup> Thus, advocates frequently argue that collateral consequences should be reduced or eliminated so that formerly incarcerated people are able to rejoin society and support themselves and their families without undue barriers.<sup>46</sup>

One pressing collateral consequence of incarceration can be the termination of parental rights.<sup>47</sup> This issue is especially pressing given that, in the United States, the majority of incarcerated people are parents.<sup>48</sup>

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2016), <https://www.theatlantic.com/business/archive/2016/05/ban-the-box-incarcerated/484919/> [<https://perma.cc/W86N-F5VF>] (quotation marks omitted).

39. See Love, *supra* note 37.

40. See Chandler, *supra* note 38.

41. *Id.*; Love, *supra* note 37.

42. Chandler, *supra* note 38.

43. See *Text of President Bush's 2004 State of the Union Address*, WASH. POST (Jan. 20, 2004), [http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext\\_012004.html](http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html) [<https://perma.cc/GY7Y-8QXN>] (“America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.”).

44. See Love, *supra* note 37.

45. Peter Cove & Lee Bowes, *Immediate Access to Employment Reduces Recidivism*, REALCLEAR POLITICS (June 11, 2015), [https://www.realclearpolitics.com/articles/2015/06/11/immediate\\_access\\_to\\_employment\\_reduces\\_recidivism\\_126939.html](https://www.realclearpolitics.com/articles/2015/06/11/immediate_access_to_employment_reduces_recidivism_126939.html) [<https://perma.cc/7WAJ-VSLQ>] (“It’s time to break the cycle. The results are in—work reduces recidivism.”).

46. Alicia Gathers, *Paying Our Debt to Society, But Not Really*, ACLU (Feb. 10, 2012), <https://www.aclu.org/blog/racial-justice/paying-our-debt-society-not-really> [<https://perma.cc/9M97-TPLC>] (“Our overcrowded jails and prisons are filled with people who have been over-sentenced and know that there are challenges ahead once they leave. If every door is shut, it is impossible for them to support themselves and families, and rejoin society. I’m not condoning criminal behavior, but the laws need to change so that people with records get a second chance.”).

47. See *supra* Part I.

48. Most imprisoned women are mothers. Carolyn Sufrin et al., *Reproductive Justice, Health Disparities and Incarcerated Women in the United States*, 47 PERSP. ON SEXUAL & REPROD. HEALTH 213, 214 (2015). A majority of people in prison are parents. LAUREN E. GLAZE & LAURA M.

In fact, if a child goes into foster care when their parent is incarcerated, there is a one-in-eight chance that the parent will have their parental rights terminated.<sup>49</sup> This disproportionately affects incarcerated women, whose children are five times more likely to end up in foster care than children of incarcerated men.<sup>50</sup>

The issue of incarcerated parents losing their children has received increasing attention in recent years.<sup>51</sup> According to one study, at least 32,000 incarcerated parents who had not been accused of physical or sexual abuse had their children permanently taken from them between 2006 and 2016.<sup>52</sup> For almost 5,000 of those parents, the only relevant factor in the loss of their parental rights was their incarceration.<sup>53</sup> For many of the rest, incarceration was likely a large barrier to getting their children back. In the five years after the 1997 passage of ASFA, proceedings to terminate the parental rights of incarcerated parents in the U.S. increased by 108%.<sup>54</sup>

This treatment of incarcerated parents is in many ways unique. For instance, “the lengthy absence of parents for military duty, missions, career, or private substance abuse treatment is not considered grounds to automatically sever their legal relationship with their children.”<sup>55</sup> Law professor Priscilla Ocen argues that incarceration, by contrast, is seen as a justifiable reason to end these familial relationships because of a view “that a criminal conviction necessarily means that an individual is presumptively unfit to parent,” or that their relationship to their child has less value.<sup>56</sup> Such a view would disproportionately “target individuals for reproductive forfeiture based on race, gender, class, and disability” because of the disparities in the criminal legal system.<sup>57</sup> When the bond between a child and parent is legally severed, it should be because that is what is necessary for the specific child’s wellbeing. It should not be just

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MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2008), <http://www.bjs.gov/content/pub/pdf/pptmc.pdf> (revised in 2010).

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

50. *Id.*

51. *Id.* (“Being stripped of parental rights while in prison, even for minor crimes, is ‘the family separation crisis that no one knows about,’ one advocate said.”).

52. *Id.*

53. *Id.*

54. Margolies & Kraft-Stolar, *supra* note 22, at xi (comparing the 67% increase that occurred during the five years preceding ASFA).

55. Roberts, *supra* note 7, at 1498.

56. Priscilla A. Ocen, *Incapacitating Motherhood*, 51 U.C. DAVIS L. REV. 2191, 2197–98 (2018).

57. *Id.* at 2198.



one more collateral consequence of incarceration, part of a systematic devaluation of incarcerated people's reproductive rights.

### III. REPRODUCTIVE JUSTICE AND ASFA

Reproductive justice is a useful framework for understanding parental rights in the context of incarceration. Reproductive justice encompasses the “complete physical, mental, spiritual, political, social, and economic well-being of women and girls, based on the full achievement and protection of women's human rights.”<sup>58</sup> It focuses not only on the right to have and to not have a child, but also on the right to parent one's children and control one's birthing and parenting options.<sup>59</sup> Reproductive justice advocates work to achieve conditions necessary to realize reproductive rights, recognizing the intersections between the pursuit of these rights and other social conditions, including economic, environmental, disability, and racial injustice.<sup>60</sup>

The right to parent is a fundamental right.<sup>61</sup> From a reproductive justice perspective, it is a right that needs to be supported by social conditions that enable successful parenting.<sup>62</sup> These include,

1. The right to economic resources sufficient to be a parent, including the right to earn a living wage;
2. The right to education and training in preparation for earning a living wage;
3. The right to decide whether or not to be the parent of the child one gives birth to;

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58. Loretta Ross, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 4, 4, <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051> [<https://perma.cc/VL4F-AVTP>].

59. *See id.*

60. *Id.*; *see also* Rachel Roth, *Incarceration as a Threat to Reproductive Justice in Massachusetts and the United States*, 39 W. NEW ENG. L. REV. 381, 382 (2017) (“While framed in terms of rights, the vision of these rights is not abstract but one where rights are supported by social conditions—‘power and resources’—to make them meaningful. In this way, reproductive justice shows its affinity with human rights, under which governments have an affirmative obligation to facilitate people's exercise of their rights. The emphasis on social conditions is critical given the deep race and class inequalities in the United States that contribute to and are reflected in the disproportionate incarceration of low-income people and people of color.”).

61. *Troxel v. Granville*, 530 U.S. 57, 66–67 (2000).

62. *See* Rickie Solinger, *Conditions of Reproductive Justice*, in REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE 42, 42, <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fID=4051> [<https://perma.cc/VL4F-AVTP>].

4. The right to parent in a physically and environmentally safe context;
5. The right to leave from work to care for newborns or others in need of care;
6. The right to affordable, high-quality child care.<sup>63</sup>

Access to these conditions has historically been disproportionately denied to marginalized groups in the United States.<sup>64</sup> For example, family separation was a “central strategy” of slavery, with parents and children routinely being sold to different owners.<sup>65</sup> It was also central to the U.S. government’s strategy for controlling indigenous communities and eradicating American Indian culture—beginning in the 1870s, indigenous children were taken from their families and communities to be placed in boarding schools where they were violently assimilated into white American culture.<sup>66</sup> During Japanese Internment, Japanese American boys were forced to take loyalty oaths and join the U.S. Army, or risk being sent to higher security camps away from their families.<sup>67</sup> Most recently, the U.S. government has faced serious condemnation for the practice of separating parents and children at the U.S. border.<sup>68</sup> Advocates have grounded their policy platform to “free our future” in family separation’s history as a tactic “against communities of color, indigenous people, and people with disabilities.”<sup>69</sup>

The child welfare system can be understood as a continuation of this history: most white children who enter the system stay with their families, while most Black children are separated from theirs, “even when they

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63. *See id.*

64. *See generally* MIJENTE, FREE OUR FUTURE: AN IMMIGRATION POLICY PLATFORM FOR BEYOND THE TRUMP ERA (2018), [https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform\\_0628.pdf](https://mijente.net/wp-content/uploads/2018/06/Mijente-Immigration-Policy-Platform_0628.pdf) [<https://perma.cc/JE7K-H637>] (exploring the history of family separation in the U.S.).

65. *Id.* at 2 (noting that “Jeff Sessions has justified his current separation of immigrant families by citing to the very same bible verse supporters of slavery used to defend the separation of children from their mothers”).

66. *See History and Culture: Boarding Schools*, NORTHERN PLAINS RESERVATION AID, [http://www.nativepartnership.org/site/PageServer?pagename=airc\\_hist\\_boardingschools](http://www.nativepartnership.org/site/PageServer?pagename=airc_hist_boardingschools) [<https://perma.cc/63AL-NGZV>] (noting that the first Indian boarding school was established in Washington State).

67. MIJENTE, *supra* note 64, at 4; *see also Questions of Loyalty*, THE UNITED STATES IN WORLD WAR II: HISTORICAL DEBATES ABOUT AMERICA AT WAR, [http://oberlinlibstaff.com/omeka\\_hist244/exhibits/show/japanese-internment/questions-of-loyalty](http://oberlinlibstaff.com/omeka_hist244/exhibits/show/japanese-internment/questions-of-loyalty) [<https://perma.cc/H4F9-XWU8>].

68. *E.g.*, Miriam Jordan, *Family Separation May Have Hit Thousands More Migrant Children Than Reported*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/us/family-separation-trump-administration-migrants.html> [<https://perma.cc/Z2QV-GQAJ>].

69. MIJENTE, *supra* note 64, at 2.

have the same problems and characteristics as white children.”<sup>70</sup> While state intervention in child welfare is certainly sometimes necessary to protect a child’s safety, “the need for this intervention is usually linked to poverty, racial injustice, and the state’s approach to caregiving, which addresses family economic deprivation with child removal rather than services and financial resources.”<sup>71</sup> This approach to caregiving is reflected in Congress’s passage of ASFA, which shifted the focus away from providing families with the resources to stay together and toward adopting children out of foster care.<sup>72</sup> Proponents saw the goal of family preservation as an obstacle to, or even the converse of, ensuring child safety.<sup>73</sup> In fact, law professor and advocate Dorothy Roberts argues that the campaign to pass ASFA made “devaluation of black family relationships a central component,” as “[t]erminating parental rights faster and abolishing race-matching policies” were central strategies for increasing adoptions.<sup>74</sup>

The criminal legal system compounds the reproductive justice issues raised by the United States’s approach to child welfare. In the United States, Black women and other women of color are overrepresented in prison<sup>75</sup> as a result of systemic racial inequality, including racially discriminatory policing, laws, and prosecution.<sup>76</sup> For instance, the American Civil Liberties Union found that Black Americans are almost four times as likely as white Americans to be arrested for cannabis possession, despite using the drug at similar rates.<sup>77</sup> According to the Vera

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70. ROBERTS, *supra* note 21, at 17.

71. Roberts, *supra* note 7, at 1484; *see also id.* at 1485 (“The end to the welfare safety net coincided with the passage of the Adoption and Safe Families Act in 1997, which emphasized adoption as the solution to the rising foster care population. Both can be seen as neoliberal measures that shifted government support for children toward reliance on private employment and adoptive parents to meet the needs of struggling families. This convergence marked *the first time the federal government mandated that states protect children from abuse and neglect without a corresponding mandate to provide basic economic support to poor families.*” (emphasis added)).

72. *See id.* at 1485.

73. ROBERTS, *supra* note 21.

74. Roberts, *supra* note 7, at 1488.

75. *Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/> [<https://perma.cc/35WM-5BXL>].

76. CONNOR MAXWELL & DANYELLE SOLOMON, CTR. FOR AM. PROGRESS, MASS INCARCERATION, STRESS, AND BLACK INFANT MORTALITY: A CASE STUDY IN STRUCTURAL RACISM 1 (2018), <https://cdn.americanprogress.org/content/uploads/2018/06/04134310/infant-mortality-and-criminal-justice.pdf> [<https://perma.cc/FV9L-P62K>].

77. ACLU, THE WAR ON MARIJUANA IN BLACK AND WHITE: BILLIONS OF DOLLARS WASTED ON RACIALLY BIASED ARRESTS 17 (2013), [https://www.aclu.org/sites/default/files/field\\_document/1114413-mj-report-rfs-re11.pdf](https://www.aclu.org/sites/default/files/field_document/1114413-mj-report-rfs-re11.pdf) [<https://perma.cc/HV6D-S8EJ>]; Roth, *supra* note 60, at 39.

Institute of Justice, almost two-thirds of women in jail are women of color,<sup>78</sup> and nearly 80% are mothers.<sup>79</sup>

In some cases, incarceration may be used to justify infringement on reproductive choices, especially for marginalized parents.<sup>80</sup> This is perhaps most apparent in the United States's history of forcibly sterilizing incarcerated men and women.<sup>81</sup> One prison physician who recommended and performed tubal ligations for incarcerated women as recently as 2013 justified using state funds for these procedures by saying the costs were minimal “compared to what you save in welfare paying for these unwanted children—as they procreated more.”<sup>82</sup> Priscilla Ocen argues that the curtailment of incarcerated women's reproductive rights is

rooted in perceived cultural pathology of incarcerated women and their families. As largely poor single mothers . . . they are deemed to be bad mothers whose poor child rearing will inevitably lead to offspring who commit crimes and threaten public order. As such, their reproductive capacities are deemed to be the source of crime, dependency, and disorder.<sup>83</sup>

For all these reasons, tackling criminalization and incarceration is critical for the pursuit of reproductive justice and ending family separation in marginalized communities.<sup>84</sup> The United States Supreme Court has recognized that parenting is a fundamental right that does not “evaporate simply because [people] have not been model parents or have lost

78. ELIZABETH SWAVOLA, KRISTINE RILEY, & RAM SUBRAMANIAN, VERA INST. OF JUSTICE, *OVERLOOKED: WOMEN AND JAILS IN A NEW ERA OF REFORM* 11 (2016), <https://www.vera.org/publications/overlooked-women-and-jails-report> [<https://perma.cc/MSF8-RS3H>].

79. *Id.* at 7.

80. Ocen, *supra* note 56, at 2196 (“[T]hese trends highlight the ways in which women's incarceration functions as a means to regulate the reproductive capacity of women viewed as unfit for procreation. Through imprisonment, women who are deemed deviant are incapacitated, removed from society, separated from their children, and prevented from reproducing.”); *see also, e.g.*, Rickie Solinger, *The Incompatibility of Neo-Liberal “Choice” and Reproductive Justice*, in *REPRODUCTIVE JUSTICE BRIEFING BOOK: A PRIMER ON REPRODUCTIVE JUSTICE AND SOCIAL CHANGE* 39, <https://www.law.berkeley.edu/php-programs/courses/fileDL.php?fileID=4051> [<https://perma.cc/VL4F-AVTP>] (“Politicians and policymakers support cutting inappropriately reproducing girls and women off welfare. Public opinion and public policy support expedited separation of these women from their children in various ways. Representations of ‘bad-choice-making women’ in the mass media justify these females as targets for sterilization and incarceration, as potential ‘surrogate mothers’ and ‘birth mothers,’ but not as ‘real mothers.’”).

81. *See* David M. Perry, *Our Long, Troubling History of Sterilizing the Incarcerated*, MARSHALL PROJECT (July 26, 2017), <https://www.themarshallproject.org/2017/07/26/our-long-troubling-history-of-sterilizing-the-incarcerated> [<https://perma.cc/EW4Q-5F47>].

82. Ocen, *supra* note 56, at 2197.

83. *Id.* at 2215.

84. Roth, *supra* note 60, at 382.

temporary custody of their child to the State.”<sup>85</sup> Despite this, in many cases, incarceration unrelated to a person’s parenting can lead to just that evaporation.<sup>86</sup> A reproductive justice framework calls for using the law along with social movements to resist all the circumstances that lead to this loss of familial bonds.<sup>87</sup> The remainder of this Comment focuses on one specific law that can be changed to protect these bonds.

#### IV. INCARCERATION AS A THREAT TO THE RIGHT TO PARENT IN WASHINGTON

Washington has taken certain step in its implementation of AFA to decrease its impact on incarcerated parents. However, understood in the context of reproductive justice and collateral consequences, Washington’s approach still fails to reach an equitable result for these parents.

##### A. *Washington’s Implementation of ASFA*

In 2007, to respond to the needs of incarcerated parents, the Washington State Legislature enacted a bill creating an Advisory Committee to “monitor and report on recommendations relating to policies and programs for children and families with incarcerated parents.”<sup>88</sup> In its 2009 annual report, the Committee recommended that the Department of Social and Health Services

[c]onsider creating a new state law to address state implementation of the child welfare timeline of the federal Adoption and Safe Families Act (ASFA) to name parental incarceration as a compelling reason to delay ASFA-timed termination court proceedings if the parent has successfully engaged in available services while incarcerated and no enduring safety concerns exist.<sup>89</sup>

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

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

87. Ocen, *supra* note 56, at 2200 (“Given the limitations of constitutional doctrine as a vehicle for protecting the reproductive capacities of incarcerated women, this Article suggests that scholars and advocates must look beyond formal doctrine to resist the incapacitation of motherhood specifically and the use of incarceration to manage social problems generally associated with poor women. Indeed, alternative frameworks, such as reproductive justice, that deploy law in concert with social movements may serve as a schema that can move beyond the incapacitation of motherhood to liberate it.”).

88. ADVISORY COMM., CHILDREN AND FAMILIES OF INCARCERATED PARENTS ADVISORY COMMITTEE ANNUAL REPORT 1 (2009), <https://www.k12.wa.us/sites/default/files/public/incarceratedparents/pubdocs/cfip2008committeereport.pdf> [<https://perma.cc/W5XG-45RU>].

89. *Id.* at 8.

Initially, nothing came of this recommendation.<sup>90</sup> However, a few years later, the combined advocacy of attorneys and formerly incarcerated parents led to the passage of a new state law.<sup>91</sup> The Children of Incarcerated Parents Act (CIPA)<sup>92</sup> was signed into law by Washington State Governor Jay Inslee on May 8, 2013.<sup>93</sup>

In Washington today, children entering the welfare system are impacted by both ASFA and CIPA. When a custodial parent is incarcerated, the State will place the child in foster care unless the parent is able to find a responsible guardian for their child.<sup>94</sup> The Department of Children Youth and Families (the Department) generally initiates a dependency action around the same time, which asks a judge to determine whether the child is “dependent” on the State.<sup>95</sup> A child is dependent if they have been abandoned, abused, neglected, or, most commonly, if they have “no parent, guardian, or custodian capable of adequately caring for [them], such that [they are] in circumstances which constitute a danger of substantial damage to [their] psychological or physical development.”<sup>96</sup> If dependency is found, a judge enters a disposition order specifying the child’s placement and visitation with family members.<sup>97</sup> From there, regular hearings are scheduled to review the parent’s progress and the child’s “permanency plan.”<sup>98</sup>

Parents are presumptively entitled to regular unsupervised visitation, unless the court decides that this visitation could harm the “health, safety, or welfare” of the child.<sup>99</sup> The dispositional order will also list the requirements for the parent to regain custody.<sup>100</sup> The Department is then required to ensure that visitation takes place and that the parent has access to services to remedy their parental deficiencies.<sup>101</sup> Because of Washington’s compliance with ASFA, if the child remains in foster care

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90. Law, *New Law*, *supra* note 5.

91. *Id.*

92. Children of Incarcerated Parents Act, S.H.B. 1284, 63d Leg., Reg. Sess. (Wash. 2013).

93. Law, *New Law*, *supra* note 5.

94. Washington Appleseed, *Family Law: Custody, Visitation, and Parental Rights*, WASHINGTON REENTRY GUIDE, <http://wareentryguide.org/family-law-custody-visitation-and-parental-rights/> [<https://perma.cc/AD9Y-ZR47>].

95. WASH. REV. CODE § 13.34.040(1) (2019); Washington Appleseed, *supra* note 94.

96. *Id.* § 13.34.030(6).

97. Thurman W. Lowans, *Disposition Hearing*, in WASHINGTON STATE JUVENILE NONOFFENDER BENCHMARK, COURT IMPROVEMENT TRAINING ACADEMY 105 (2011).

98. Jana Heyd, *Permanency Planning*, in WASHINGTON STATE JUVENILE NONOFFENDER BENCHMARK, COURT IMPROVEMENT TRAINING ACADEMY 117, 118 (2011).

99. WASH. REV. CODE § 13.34.136(2)(b)(ii)(C).

100. *Id.* § 13.34.136(2)(b)(i).

101. *Id.* § 13.34.136(2)(b)(iii), (vi).

for fifteen months, a judge must direct the Department to file a TPR petition unless there is good cause not to.<sup>102</sup>

This is the first point in the dependency and termination process where CIPA intercedes, by providing a statutorily established good cause exception.<sup>103</sup> This good cause exception applies if the child's placement in foster care is due to the parent's incarceration, the parent "maintains a meaningful role in the child's life," and there is no other reason to file a petition to terminate parental rights.<sup>104</sup> The statute then provides several factors for the court to determine in considering whether the parent maintains a meaningful role in the child's life, including their communication or visits, the parent's communication with the Department, information provided by third parties, and whether the parental relationship is in the child's best interest.<sup>105</sup>

If these conditions are met, then the court may not *order* the Department to file a TPR petition. Crucially, however, CIPA does not prevent the Department, or any other party, from filing a TPR petition on its own volition.<sup>106</sup> CIPA only prevents the petition from being filed by default. If a TPR petition is filed, then the parent will face a hearing before a judge to determine whether the parent-child relationship should be severed.<sup>107</sup>

The termination hearing is the second point in the process that CIPA affects: the court is required to consider incarceration and the meaningful relationship factors before it can grant an order terminating parental rights.<sup>108</sup> However, although CIPA requires the court to explicitly consider the factors in its record, it does not make them dispositive.<sup>109</sup> Therefore, even if the court finds that (1) the child is dependent and in foster care because of the parent's incarceration; (2) there is no separate reason for termination; and (3) the parent maintains a meaningful role in

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102. *Id.* § 13.34.145(5).

103. *Id.* § 13.34.145.

104. *Id.* § 13.34.145(5)(a)(iv).

105. *Id.* § 13.34.145(5)(b).

106. *Id.* § 13.34.180.

107. *Id.*

108. *See id.* § 13.34.145(5)(b) ("The court's assessment of whether a parent who is incarcerated maintains a meaningful role in the child's life may include consideration of the following . . . ."); *id.* § 13.34.180(1)(f) ("If the parent is incarcerated, the court shall consider whether a parent maintains a meaningful role in his or her child's life based on factors identified in RCW 13.34.145(5)(b) . . .").

109. *In re K.J.B.*, 187 Wash. 2d 592, 387 P.3d 1072 (2017); *see also In re M.J.*, 187 Wash. App. 399, 410, 348 P. 3d 1265, 1271 (2015) ("This record, however, does not tell us whether or not the court did consider these efforts. It may have found them unavailing, or it may not have considered them at all. Without some indication that this information was considered by the trial court, we simply are not in a position to uphold the determination.").

the child's life, the court can still choose to terminate parental rights if it determines that to be in the child's best interest.<sup>110</sup>

When a parental relationship is terminated, the child is "freed" for adoption.<sup>111</sup> However, many children stay in foster care for several years, and critics have argued that "[c]utting children's ties to their mothers without a likely prospect of providing them with a permanent and stable home not only seems precipitous, but also contrary to the sound child welfare policy espoused by ASFA's stated goals."<sup>112</sup>

Termination is generally permanent. However, Washington does allow TPR to be reversible in some situations.<sup>113</sup> If the parent-child relationship was terminated three or more years ago, but the child has not been adopted, the child may petition to have the relationship reinstated.<sup>114</sup> The parent may not file the petition.<sup>115</sup> Between 2007 and 2016, sixty-four such petitions were filed and only twenty-three were granted.<sup>116</sup>

### B. *The Efficacy of the Meaningful Relationship Factors*

In Washington in 2019, only 12.3% of people incarcerated in state prisons were serving a sentence that was less than two years.<sup>117</sup> Consequently, it is likely that the majority of incarcerated parents in Washington whose children go to foster care will see their children hit the fifteen-month ASFA mark and ultimately face TPR.<sup>118</sup> While Washington has provided some statutory recognition of the needs of incarcerated parents,<sup>119</sup> it only protects them from having a termination proceeding initiated against them if they can show that they maintain a meaningful role in their child's life.<sup>120</sup> Although the statute attempts to recognize the

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110. There are other limitations to the efficacy of this exception as well. For instance, courts have held that if the parent is no longer incarcerated, but their child was in foster care due to their incarceration, an application of the factors is not required. *In re D.L.B.*, 186 Wash. 2d 103, 116, 376 P.3d 1099, 1106 (2016) ("RCW 13.34.180(1)(f) applies only when the parent is incarcerated at the time of the termination hearing; other parts of the 2013 amendments require the court to consider and make accommodations for a parent's prior incarceration.").

111. WOMEN IN PRISON PROJECT, *supra* note 22, at xi.

112. *Id.* at xii.

113. WASH. REV. CODE § 13.34.215 (2019).

114. *Id.* Different standards apply to TPR involving Indian children, which can be challenged under the Indian Child Welfare Act. *See* 25 U.S.C. § 1914 (2012).

115. Meredith L. Schalick, *The Sky Is Not Falling: Lessons and Recommendations from Ten Years of Reinstating Parental Rights*, 51 FAM. L.Q. 219, 234–35 (2017).

116. *Id.* at 230.

117. DEP'T OF CORR., *supra* note 11.

118. *See* WASH. REV. CODE § 13.34.145.

119. *Id.*

120. *See id.* § 13.34.145(5)(a)(iv).



difficulty inherent in maintaining such a role,<sup>121</sup> the factors it lists to determine what constitutes a meaningful role are considerably harder to achieve while incarcerated.<sup>122</sup>

The first factor is the extent to which the parent “manifest[s] concern for the child,”<sup>123</sup> as demonstrated through phone calls, visits, and other forms of communication.<sup>124</sup> This seemingly straightforward criterion is complicated by the realities of incarceration.<sup>125</sup> For instance, because of exclusive contracts obtained by private companies,<sup>126</sup> phone calls in prisons are generally highly expensive collect calls that the recipient must pay for.<sup>127</sup> One study found that women with incarcerated loved ones spent between 9% and 26% of their income to pay for visits and phone calls.<sup>128</sup> Either because of the cost, conflict with the parents, or a perceived negative impact on the child, it is not uncommon for foster parents to stop accepting these collect calls.<sup>129</sup> When parents are consistently unable to reach their children, they may eventually stop trying, but a judge is unlikely to view this sympathetically.<sup>130</sup>

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121. *See id.* § 13.34.180(f).

122. *See id.* § 13.34.145(5)(b).

123. *See id.* § 13.34.145(5)(b)(i).

124. *Id.*

125. *See* Eric Markowitz, *How Prison Phone Calls Became a Tax on the Poor*, INT’L BUS. TIMES (Mar. 30, 2016, 4:00 AM), <http://www.ibtimes.com/how-prison-phone-calls-became-tax-poor-2342043> [<https://perma.cc/K2PH-EEPH>]; Peter Wagner & Alexi Jones, *State of Phone Justice: Local Jails, State Prisons, and Private Phone Providers*, PRISON POL’Y INITIATIVE (Feb. 2019), [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice.html](https://www.prisonpolicy.org/phones/state_of_phone_justice.html) [<https://perma.cc/2ZCZ-5WHT>].

126. Markowitz, *supra* note 125.

127. SANETA DE VUONO-POWELL ET AL., WHO PAYS? THE TRUE COST OF INCARCERATION ON FAMILIES 30 (2015), <https://ellabakercenter.org/sites/default/files/downloads/who-pays.pdf> [<https://perma.cc/Z8DM-ELYV>].

128. Olga Grinstead et al., *The Financial Cost of Maintaining Relationships with Incarcerated African American Men: A Survey of Women Prison Visitors*, 6 J. AFR. AM. MEN 59, 59 (2001) (reporting that women spent an average of \$292 per month to maintain contact with incarcerated men).

129. WOMEN IN PRISON PROJECT, *supra* note 22, at xi. It is common for children to “act out” after phone or in-person visitation with parents. Frequently, this is just because family separation is emotionally distressing, and not because visitation is bad for the child. Wendy L. Haight et al., *Understanding and Supporting Parent-Child Relationships During Foster Care Visits: Attachment Theory and Research*, 48 SOC. WORK 195, 198 (2003) (“Visits may cause the parent and child to repeatedly re-experience difficult emotions associated with reunion and separation. Parents and children’s behavior before, during, and after visits may reflect or anticipate those emotions, which may be expressed through crying, angry outbursts, or withdrawal.”); *see also* ROBERTS, *supra* note 21, at 141 (“When children react adversely to brief encounters with their estranged parents, caseworkers often respond by decreasing visitation instead of giving families more time to deal with the hardships of foster care.”).

130. Washington Appleseed, *supra* note 94.

In-person visits are also made far more difficult by incarceration. A study from 2000 found that more than half of mothers in state prisons in the United States have never had a visit with their children.<sup>131</sup> In 2016, only a quarter of mothers had seen their children in the last year.<sup>132</sup> There are many reasons for this. First, prisons are frequently located far from major cities,<sup>133</sup> and most incarcerated parents are held more than 100 miles from their previous residence.<sup>134</sup> The Vera Institute of Justice found that half the people incarcerated in Washington State prisons “previously lived at least 129 miles from the prison where they were serving their sentence—a trip that averaged nearly three hours’ driving time” each way.<sup>135</sup> A third of those incarcerated reported that their relatives or loved ones did not have access to transportation to visit them.<sup>136</sup> Second, in-person visits can be costly and infeasible for caregivers.<sup>137</sup> This is not just because of the cost of gas, but also “lost wages, childcare, a place to stay, food, and gas and other travel-related expenses.”<sup>138</sup> Third, even if visits can be arranged, the long distances,<sup>139</sup> “burdensome and humiliating” security rules,<sup>140</sup> glass barriers,<sup>141</sup> and lack of suitable childcare provisions<sup>142</sup> make visits unattractive to caregivers. For instance, a report from New York noted that “most child welfare agencies do not provide caseworkers with adequate training, resources or support to facilitate regular prison visits, and New York State corrections’ policies and practices often make visiting difficult and unpleasant even for the most

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131. WOMEN IN PRISON PROJECT, *supra* note 22, at x.

132. LÉON DIGARD ET AL., A NEW ROLE FOR TECHNOLOGY? IMPLEMENTING VIDEO VISITATION IN PRISON 10 (2016), <https://www.vera.org/publications/video-visitation-in-prison> [<https://perma.cc/DWM3-FGFV>] (“[O]nly 37 percent of men and 27 percent of women reported having had in-person visits with their children during the previous year.”).

133. *See id.* at 2.

134. CHRISTOPHER J. MUMOLA, INCARCERATED PARENTS AND THEIR CHILDREN 1 (Tom Hester & Ellen Goldberg eds., 2000) (reporting that 60% of incarcerated parents were held over 100 miles away from their last place of residence).

135. DIGARD ET AL., *supra* note 132, at 10.

136. *Id.*

137. *Id.* at 4.

138. *Id.*

139. *Id.* at 10.

140. WOMEN IN PRISON PROJECT, *supra* note 22, at xii.

141. *See Improving the Quality of Jail Visits for Children and Their Incarcerated Parents in WA State*, WASH. DEFENDER ASS’N, <https://defensenet.org/case-support/incarcerated-parents-project/advocacy-network/instituting-contact-visits-for-children-and-their-parents-in-county-jails/> [<https://perma.cc/3J5W-R9EK>].

142. *Id.*

experienced visitor.”<sup>143</sup> Parents cannot compel foster parents or caseworkers to bring their children for visits.<sup>144</sup>

Other options exist for contacting a child, but these can have similar barriers. For instance, a parent may wish to write their child letters, but the parent may not have an up-to-date address for their child. Even if a parent does write letters regularly, this may not be persuasive to a judge unless they keep a detailed log of their communication. Email can also be prohibitively expensive for incarcerated parents, and if their child does not have an email address, the parent may not know who to email.<sup>145</sup> Jail email systems have prices that increase with demand, and may be inaccessible to incarcerated parents, who tend to make less than a dollar per hour for their work.<sup>146</sup> Video visitation may also be an available option. By 2014, forty-three states had initiated video visitation in their jails or prisons.<sup>147</sup> However, at potentially more than one dollar per minute, video visitation may be both inaccessible and alienating for parents.<sup>148</sup> In Washington, a thirty-minute video call costs nearly thirteen dollars.<sup>149</sup> All this means visitation and communication with a child can be more of a measure of wealth, access to resources, and luck than of the parent’s manifestation of love and concern for their child.<sup>150</sup>

The second and third factors refer to the “parent’s efforts to communicate and work with the department or other individuals for the purpose of complying with the service plan and repairing, maintaining, or building the parent-child relationship” and to a “positive response by the parent to the reasonable efforts of the department,” respectively.<sup>151</sup> As with the previous factor, these factors depend on the parent’s ability to communicate with the outside world from an inherently isolating place. Thus, as with the first factor, the second and third factors hold parents to a standard that is significantly more burdensome because they are

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143. WOMEN IN PRISON PROJECT, *supra* note 22, at xi.

144. In fact, “[c]hild welfare agencies often fail to arrange regular prison visits and the handful of private organizations that facilitate visits do not have sufficient resources to provide services for most children of incarcerated parents who need them.” *Id.* at x.

145. Victoria Law, *Captive Audience: How Companies Make Millions Charging Prisoners to Send an Email*, WIRED (Aug. 3, 2018), <https://www.wired.com/story/jpay-securus-prison-email-charging-millions/> [https://perma.cc/YZ33-Q5G6] [hereinafter Law, *Captive Audience*].

146. *Id.*

147. *Dropped Connections: The Barriers to Communication Created by Video Visitation*, HARV. C.R.—C.L. L. REV. (Mar. 15, 2018), <http://harvardcrcl.org/dropped-connections-the-barriers-to-communication-created-by-video-visitation/> [https://perma.cc/DH2Q-MJKR].

148. *Id.*

149. DIGARD ET AL., *supra* note 132, at 9.

150. See WASH. REV. CODE § 13.34.145(5)(b)(i) (2019).

151. *Id.* § 13.34.145(5)(b)(ii–iii).

incarcerated.<sup>152</sup> More problematically, these factors reflect information about the parent's relationship with the Department, not with their own child. These factors are purportedly for determining whether the parent maintains a meaningful role in their child's life, but by their terms do not necessarily address this question.

The fourth factor is “[i]nformation provided by individuals or agencies in a reasonable position to assist the court in making this assessment,”<sup>153</sup> such as case workers, correctional and mental health personnel, or other “individuals providing services to the parent.”<sup>154</sup> There may not be many such individuals for indigent incarcerated parents.<sup>155</sup>

Advocates have noted that there is frequently “inadequate or non-existent legal representation in Family Court, and insufficient coordination between corrections departments, child welfare agencies and the courts.”<sup>156</sup> Caseworkers may not regularly bring children for visits,<sup>157</sup> leading to a lack of familiarity with the incarcerated parent's commitment to their children. The difficulty of communicating with the outside world directly affects an incarcerated parent's ability to communicate with the agencies and individuals specified in this factor.<sup>158</sup> The Women in Prison Project has noted various limits on an incarcerated mother's efforts to maintain contact with her children:

[S]he can only place extremely expensive collect calls which many foster care agencies, foster families, relatives and friends do not or cannot accept; she is rarely able to participate in important planning meetings with her child's caseworker; and she often faces difficulty being produced for Family Court hearings where she might meet her child's lawyer or caseworker and the judge.<sup>159</sup>

The fifth factor allows the court to take the parent's incarceration into account.<sup>160</sup> Specifically, the court can account for “[i]mitations in the parent's access to family support programs, therapeutic services, and visiting opportunities, restrictions to telephone and mail services, inability to participate in foster care planning meetings, and difficulty accessing

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152. See *Dropped Connections*, *supra* note 147; Law, *Captive Audience*, *supra* note 145.

153. WASH. REV. CODE § 13.34.145(5)(b)(iv).

154. *Id.*

155. Washington Appleseed, *supra* note 94.

156. WOMEN IN PRISON PROJECT, *supra* note 22, at x.

157. *Id.* at xi.

158. *Id.*

159. *Id.*

160. WASH. REV. CODE § 13.34.145(5)(b)(v) (2019).

lawyers and participating meaningfully in court proceedings.”<sup>161</sup> While this factor allows the court to consider the restrictions inherent to incarceration that affect the parent’s ability to participate, the court is still required to consider the first four factors, which are negatively impacted by incarceration.<sup>162</sup>

Finally, the sixth factor to determine whether the parent “maintains a meaningful role in the child’s life”<sup>163</sup> is “[w]hether the continued involvement of the parent in the child’s life is in the child’s best interest.”<sup>164</sup> The best interest of the child is an overarching goal in child welfare proceedings, and it is not clear what this broad term means in this context.

Overall, the six factors are ambiguous, place a high burden on incarcerated parents, and should not make the difference in whether a parent-child reunion can safely take place. The factors are supposed to determine whether the parent maintains a meaningful role in their child’s life, but instead invite the court to judge the parent’s relationship with the Department and factors that the parent does not necessarily have any control over.

## V. THE CASE FOR PROTECTING INCARCERATED PARENTS AND THEIR FAMILIES

Given the United States Supreme Court’s recognition of parenting as a fundamental right,<sup>165</sup> the breadth and severity of the collateral consequences of incarceration,<sup>166</sup> and an understanding informed by the reproductive justice movement’s analysis of societal barriers to equitable reproductive freedom,<sup>167</sup> states should seek to avoid unnecessary parental termination. Termination of parental rights should be a last recourse that only takes place when no other alternative is available to keep the child safe, healthy, and happy. Rules about the termination of parent-child relationships should be drafted with an understanding of the devastating impact they can have on Black and other marginalized families that are over-policed and disproportionately susceptible to state scrutiny. Given this country’s history of stripping POC parents of reproductive choices

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161. *Id.*

162. *Id.* § 13.34.145(5)(b).

163. *Id.* § 13.34.145(5)(a)(iv).

164. *Id.* § 13.34.145(5)(b)(vi).

165. *Troxel v. Granville*, 530 U.S. 57, 66–67 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

166. *See supra* Part II.

167. *See supra* Part III.

and rights,<sup>168</sup> and given that maintaining a parent-child relationship improves outcomes for families, legislators and agency decision-makers should be especially critical of any policies that will lead to a systematic denial of the rights of incarcerated parents.

*A. Good Cause Exceptions for Incarceration such as Washington's Are Potentially Effective Mitigations of ASFA's Harmful Effects on Incarcerated Parents.*

Washington is one of the few states that has attempted to mitigate the harsh impact of ASFA on incarcerated parents by statutorily providing a good cause exception for incarcerated parents.<sup>169</sup> Given the challenges that incarcerated parents face in keeping their children out of foster care,<sup>170</sup> a statutorily provided good cause exception for incarcerated parents is a crucial way to mitigate the disproportionate impact that ASFA has on incarcerated families. While child welfare officials in other states may find that incarceration constitutes a good cause reason to not initiate termination proceedings, the case-by-case nature of these exceptions means that incarcerated parents are still disproportionately in danger of having their rights terminated. Like Washington, other states should consider implementations of ASFA that are more likely to systematically protect the rights of incarcerated parents.

*B. Washington State's Exception Should be Expanded to More Strongly Protect Incarcerated Parents*

While Washington's effort to protect incarcerated parents is an important attempt to mitigate the disproportionate impact of ASFA on incarcerated parents, it does not go far enough. First, the CIPA exception should be mandatory. As is, because the factors do not ever mandate a specific outcome, the exception is entirely dependent on whether judges choose to apply it.<sup>171</sup> Instead, if the criteria are met, the Department should be precluded from filing a termination petition in the first place. Second, the CIPA exception should not include the meaningful role factors. By requiring a judge to determine that an incarcerated parent has maintained

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168. E.g., DeNeen L. Brown, 'You've Got Bad Blood': The Horror of the Tuskegee Syphilis Experiment, WASH. POST (May 16, 2017), <https://www.washingtonpost.com/news/retropolis/wp/2017/05/16/youve-got-bad-blood-the-horror-of-the-tuskegee-syphilis-experiment> [<https://perma.cc/QRE8-V2RL>].

169. See Roth, *supra* note 60, at 394; Law, *New Law*, *supra* note 5.

170. See *supra* Part II.

171. See WASH. REV. CODE § 13.34.145(5) (2019).

a meaningful role in their child's life,<sup>172</sup> the statutory exception places a burden on incarcerated parents that is not only self-defeating, but also unnecessary.

The exception's goal of preventing the State from automatically initiating termination proceedings in cases involving incarceration is undermined by its oxymoronic requirement that the parent maintain a meaningful role in their child's life.<sup>173</sup> Almost everything about jails and prisons makes this a nearly impossible request for an incarcerated parent.<sup>174</sup> One of the primary functions of incarceration is isolation. Prisons have become exceptionally effective and profitable through achieving this isolation. Their distance from cities, restrictions on visitation, and the high price of communication with the outside world all serve precisely to undermine the ability of any incarcerated parent from maintaining a meaningful role in their child's life.

Furthermore, because the criminal justice system disproportionately targets Black and low-income people,<sup>175</sup> the impact of having a judge analyze the strength of a relationship between an incarcerated parent and their children is disproportionately borne by Black and low-income people. Because women are most likely to have their children placed in foster care after they are incarcerated, this disproportionately impacts Black and low-income women. Furthermore, judges, who are mostly white,<sup>176</sup> middle-class<sup>177</sup> men,<sup>178</sup> are not well-positioned to make judgements regarding the relationship between these parents and their children. The fact that these factors are considered in the context of incarceration, where the judge can consider how incarceration affects the parent's access to visitation, telephone, mail, and interaction with court proceedings,<sup>179</sup> does not necessarily redeem this requirement.

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172. *See id.* § 13.34.145(5)(a)(iv).

173. *See id.*

174. *See supra* Part IV.

175. *See supra* Part III.

176. In Washington, about 90% of judges are white, compared to about 70% of the general population. TRACEY E. GEORGE & ALBERT H. YOON, *THE GAVEL GAP: WHO SITS IN JUDGMENT ON STATE COURTS?* 25 (2016).

177. Washington district court judges have a salary of \$164,313 as of February 2019, compared to a state average annual income \$58,977 in 2016. *Salary Information*, WASH. CITIZENS' COMM'N ON SALARIES FOR ELECTED OFFICIALS, <https://salaries.wa.gov/salary> [<https://perma.cc/KCR4-RSLJ>]; *Average Wages by County*, OFF. FIN. MGMT., <https://www.ofm.wa.gov/washington-data-research/statewide-data/washington-trends/economic-trends/washington-and-us-average-wages/average-wages-county-map> [<https://perma.cc/FY5L-9VGS>].

178. As of 2018, 61% of judges in Washington are men. *2018 US State Court Women Judges*, NAT'L ASS'N WOMEN JUDGES, <https://www.nawj.org/statistics/2018-us-state-court-women-judges> [<https://perma.cc/P6JW-EY77>].

179. *See* WASH. REV. CODE § 13.34.145(5)(b)(v) (2019).

Removing the meaningful role language would allow the State to protect incarcerated parents' right to parent while simultaneously allowing the State to pursue termination proceedings if there is another reason to do so.<sup>180</sup> For that reason, the meaningful role requirement is not necessary to protect children. In cases where remaining in their parent's care after their re-entry would be unsafe for the child, the State retains the power to terminate that relationship.<sup>181</sup> However, in cases where the extended time in foster care is the sole reason that a state would bring termination proceedings, the State should bear the burden of finding a stable placement for the child and preparing the family to be successfully reunited, rather than inquiring into the particulars of familial relationships. This is especially the case where, as here, that inquiry is unnecessary and will disproportionately burden poor and Black parents.

*C. Statutory Changes Should be Made Within a Framework of Other Changes*

This Comment has argued in large part that statutory changes should be made because of the disproportionate impact the laws can have on poor and racially marginalized parents. It follows, therefore, that while these changes should be made, at least equal effort should be made to change the underlying conditions that produce these disproportionate impacts. Efforts should focus on reducing the criminalization of Black and other POC communities, as well as the criminalization of poverty.<sup>182</sup> Furthermore, changes to the criminal justice system should include reduced policing in Black communities, changes to drug laws that disproportionately criminalize Black people, and an expansion of sentencing alternatives to prison.<sup>183</sup>

## CONCLUSION

Incarceration is an inherent obstruction in relationships between parents and their children. Everything from visitation and communication to participation in court proceedings is made much more difficult by

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180. *See id.* § 13.34.145(5)(a)(iv) (not requiring termination proceedings to be initiated in cases where the parent is incarcerated and “the department has not documented another reason why it would be otherwise appropriate to file a [termination] petition”).

181. *Id.*

182. *See, e.g.,* John Raphling, *Criminalizing Homelessness Violates Basic Human Rights*, NATION (July 5, 2018), <https://www.thenation.com/article/criminalizing-homelessness-violates-basic-human-rights/> [<https://perma.cc/6KRD-7BXZ>].

183. *See* LEGISLATIVE WORK GRP., PARENTING SENTENCING ALTERNATIVE: SUBSTITUTE SENATE BILL 6639 (2012), <http://www.doc.wa.gov/corrections/justice/sentencing/docs/fosa-legislative-work-group-presentation.pdf> [<https://perma.cc/X2M7-85WR>].



incarceration. This is especially true for those parents with less access to resources. These challenges do not vitiate the importance of the parent-child bond. While Congress decided to deprioritize family preservation with ASFA, states can choose to implement the law so that it does less harm to marginalized families. States should protect incarcerated parents' rights by barring the termination of parental relationships unless there is a reason to do so independent of the parent's incarceration. Beyond that, states should recognize that they cannot promote child welfare by devaluing the bonds between parents and children.