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Ensuring Effective Counsel for Parents: Extending *Padilla* to Termination of Parental Rights Proceedings

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NOTE

ENSURING EFFECTIVE COUNSEL FOR PARENTS: EXTENDING *PADILLA* TO TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

I. INTRODUCTION

Three years ago, a twenty-one year old woman named Jennifer met with a victim advocate at a domestic violence crisis center seeking information and support.[1] She had two children, ages four and six, both the product of intimate partner rape.[2] Her ex-husband, the father of her children, was physically, sexually, and emotionally abusive to Jennifer and the children.[3] She divorced her husband but he refused to pay any child support.[4] She was working but her boss fired her because of her ex-husband's repeated telephone calls.[5] Jennifer attempted to apply for welfare benefits, but her income, based upon the child support owed to but not received by her, exceeded the income cap for benefits.[6] The welfare administrator was not sympathetic, and Jennifer walked away without receiving any assistance.[7]

1. *See* Telephone Interview with Tina, Domestic Violence Specialist, Voices Against Violence (Mar. 29, 2013) (on file with *Hofstra Law Review*) (omitting last name of interviewee per agency policy, and using the pseudonym "Jennifer" to protect the identity of the survivor).

2. *See id.* Intimate partner rape refers to a sexual assault committed by a person with whom the victim has had a consensual intimate or sexual relationship. *Intimate Partner Rape Resources*, BAND BACK TOGETHER, http://www.bandbacktogether.com/intimate-partner-rape-resources (last visited Nov. 23, 2013).

3. *See* Telephone Interview with Tina, *supra* note 1.

4. *See id.*

5. *See id.*; *see also Economic Abuse*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, http://www.uncfsp.org/projects/userfiles/File/DCE-STOP_NOW/NCADV_Economic_Abuse_Fact_Sheet.pdf (last visited Nov. 23, 2013) (including interference with the victim's ability to keep a job and refusal to pay child support as two forms of economic abuse).

6. *See* Telephone Interview with Tina, *supra* note 1.

7. *See id.*; *see also* Mike Jackson & David Garvin, Domestic Violence Inst. of Mich., *Community Accountability Wheel*, NAT'L CENTER ON DOMESTIC & SEXUAL VIOLENCE, http://www.ncdsv.org/images/CommunityAccountwheelNOSHADING.pdf (last visited Nov. 23, 2013) (contrasting a society perpetuating domestic violence with an ideal community minimizing the effects of domestic violence by "deliver[ing] services that are sensitive to women and children's safety needs").

Frustrated and determined to feed her children and pay her rent, she confronted her ex-husband at a court-ordered child exchange.[8] Her ex-husband responded by quickly backing up the car, which was hers prior to the divorce, and then speeding forward toward Jennifer and their two children.[9] She pushed the children aside and just managed to avoid being struck by the car.[10] Her ex-husband sped off.[11] She called the police; they told her nothing could be done because it was "he-said, she-said."[12] The woman, desperate and afraid for the safety of her children, dropped her children off with her only other family member, her father.[13] Jennifer drove to her ex-husband's house intending to slash the tires of the car with a small pocket knife so the car could not be used to threaten her or the children again.[14] Unfortunately, her ex-husband saw her and ran outside.[15] He wrestled Jennifer to the ground and used the pocketknife to stab himself; then he called the police.[16]

Jennifer was arrested for felony assault, strip-searched, and incarcerated.[17] The judge set a "low" bail for the woman, $5000, which she could not afford, and appointed a public defender to represent her.[18] While in jail trying to make bail, Jennifer's children were removed from her father's care by child protective services ("CPS") because her father had been suspected of using drugs around Jennifer when she was a minor.[19] With no other family to care for the children, CPS placed them in foster care.[20] After a month, Jennifer raised enough money to make

8. *See* Telephone Interview with Tina, *supra* note 1; *see generally* KATHLEEN BIRD & DAWN KUHLMAN, SEVENTH JUDICIAL CIRCUIT OF MO., CHILD FRIENDLY EXCHANGE HANDBOOK (2007), *available at* http://www.circuit7.net/documents/familycourt/child_exchange.pdf (providing information about court-ordered child exchanges).

9. Telephone Interview with Tina, *supra* note 1.

10. *Id.*

11. *Id.*

12. *Id. But cf. 12 Teaching Scenarios: Responding to Rape, Domestic Violence, and Child Abuse*, WOMEN'S JUST. CENTER (2010), http://www.justicewomen.com/help_teach.html (debunking the myth that gender-based crimes cannot be prosecuted).

13. Telephone Interview with Tina, *supra* note 1.

14. *See id.*

15. *Id.*

16. *Id.*

17. *See id.*; *see also* Stephanie S. Covington, *A Woman's Journey Home: Challenges for Female Offenders*, *in* PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 82 (Jeremy Travis & Michelle Waul eds., 2003) (describing how strip-searches re-traumatize victims of sexual violence).

18. *See* Telephone Interview with Tina, *supra* note 1.

19. *Id.*

20. *Id.*; *see* CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN 1, 3 tbl.4 (2000), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf (indicating that children of incarcerated mothers are more likely than children of incarcerated fathers to be placed in foster care).

bail and was released.[21] Her criminal trial was repeatedly delayed with the consent of both the prosecutor and her criminal defense attorney.[22] The children remained in foster care because CPS was not convinced that Jennifer would avoid a jail sentence.[23] Nevertheless, she worked closely with CPS to meet and exceed all service plan goals set by her caseworker.[24]

After an additional six months, she was convicted and sentenced to one-year in jail with the possibility of being released in nine months.[25] While incarcerated, a CPS caseworker informed the woman that she would be served with a petition for termination of parental rights.[26] Despite meeting and exceeding all goals set by the caseworker, her children were in foster care for more than fifteen months during the prior twenty-two months.[27] Therefore, due to "permanency" concerns, she was likely to lose the right to parent her children despite never having abused or neglected them.[28] Because her criminal defense attorney failed to advocate for a quick resolution of the criminal matter and because she had no family to care for her children while she was incarcerated, she was losing her children.[29] In the spring of 2013, a judge granted the petition; Jennifer's parental rights to her children have been severed.[30]

Jennifer's story is not a legal abnormality or just a sad exception to an otherwise sound rule.[31] In 2007, over 1.7 million children in the United States had at least one incarcerated parent.[32] The average sentence that incarcerated parents will serve is 80 to 100 months.[33]

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21. *See* Telephone Interview with Tina, *supra* note 1.

22. *See id.*

23. *See id.*

24. *See id.* Case workers set individualized goals, such as parenting classes or family therapy. *See* DIANE DEPANFILIS & MARSHA K. SALUS, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF CHILD ABUSE & NEGLECT, CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS 90 exhibit 9-2 (2003), *available at* http://www.childwelfare.gov/pubs/usermanuals/cps/cps.pdf. These goals must be met in order to achieve reunification. *See id.* at 96-97.

25. Telephone Interview with Tina, *supra* note 1.

26. *See id.*; *see also infra* Part II.B (describing the legal consequences of a TPR).

27. *See* Telephone Interview with Tina, *supra* note 1; *see also infra* Part II.C (describing the Adoption and Safe Families Act ("ASFA")).

28. *See* Telephone Interview with Tina, *supra* note 1; *see also infra* Part II.C (describing ASFA's goal of permanency).

29. *See* Telephone Interview with Tina, *supra* note 1.

30. *Id.*

31. *See, e.g.*, Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1678-79 (2003) [hereinafter Genty, *Damage*].

32. Press Release, Bureau of Justice Statistics, An Estimated 809,800 Inmates in the Nation's Prisons Were Parents to 1,706,600 Minor Children at Midyear 2007 (Aug. 26, 2008) (on file with *Hofstra Law Review*).

33. STEVE CHRISTIAN, NAT'L CONFERENCE OF STATE LEGISLATURES, CHILDREN OF

Further, over 10% of incarcerated mothers and over 2% of incarcerated fathers have a minor child in foster care.[34] For these families, the Adoption and Safe Families Act of 1997 ("ASFA"),[35] which requires that the state commence termination of parental rights ("TPR") proceedings against any parent whose child has been in foster care for fifteen of the last twenty-two months, is a harsh collateral penalty.[36] Researchers estimate that following the enactment of ASFA, there has been a 250% increase in the number of TPR petitions filed based upon parental incarceration.[37] Of those, a judge granted the petition in 91% to 100% of the cases.[38] Despite the clear connection between the criminal justice punishments and the termination of parental rights, TPR petitions have remained largely relegated to the status of collateral consequences.[39] Accordingly, advice and counsel pertaining to a TPR has largely been outside the purview of services provided by criminal defense attorneys.[40]

Part II of this Note will discuss collateral consequences of incarceration within the context of the U.S. criminal justice system.[41] Over the last several decades, the number of incarcerated parents in the United States has dramatically increased.[42] These

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INCARCERATED PARENTS 5 (2009), *available at* http://www.f2f.ca.gov/res/pdf/ChildrenOfIncarceratedParents2.pdf.

34. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 222984, PARENTS IN PRISON AND THEIR MINOR CHILDREN 5 tbl.8 (2010), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf.

35. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

36. *Id.* § 103.

37. *See* Genty, *Damage*, *supra* note 31, at 1678. There is a lack of empirical data on the total number of TPR petitions granted based solely or partially upon parental incarceration. *See id.* at 1677-78.

38. *See* ARLENE F. LEE ET AL., THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT ON CHILDREN OF INCARCERATED FAMILIES 55-56 (2005) (finding TPR was granted in 92.9% of instances where the mother was incarcerated, in 91.4% of instances where the father was incarcerated, and in 100% of instances where both parents were incarcerated).

39. *See id.* at 26; Genty, *Damage*, *supra* note 31, at 1679.

40. *See* Florian Miedel, *Increasing Awareness of Collateral Consequences Among Participants of the Criminal Justice System: Is Education Enough?* 2-3 (N.Y. Unified Court Sys., Working Paper, 2005), *available at* http://www.nycourts.gov/ip/partnersinjustice/Is-Education-Enough.pdf.

41. *See infra* Part II.

42. *See* SARAH SCHIRMER ET AL., THE SENTENCING PROJECT, INCARCERATED PARENTS AND THEIR CHILDREN: TRENDS 1991-2007, at 3 & tbl.1 (2009) [hereinafter SENTENCING PROJECT], *available at* http://www.sentencingproject.org/doc/publications/publications/inc_incarceratedparents.pdf. There is more research currently available on incarcerated mothers than on incarcerated fathers. *See generally, e.g.*, Myrna S. Raeder, *A Primer on Gender-Related Issues that Affect Female Offenders*, CRIM. JUST., Spring 2005, at 4, 4. Additionally, incarcerated mothers are disproportionately impacted by termination of parental rights proceedings. *See id.* at 7-8, 18-19.

incarcerated individuals face a myriad of non-criminal sanctions.[43] Termination of their parental rights, which has become increasingly common following the enactment of ASFA, is a particularly severe collateral consequence.[44]

Part III of this Note will suggest that current legal practices in the context of child protection law fail to protect the interests of parents facing incarceration.[45] Attempts at statutory reform have not successfully protected parents.[46] Although most states provide civil defense attorneys to parents facing a TPR, the rights of incarcerated parents facing a TPR petition based upon parental incarceration will be best protected through legal obligations placed upon their criminal defense attorneys.[47] Unfortunately, existing legal obligations requiring attorneys to advise their client as to the collateral consequences of a criminal proceeding are insufficient to protect these clients.[48] Nevertheless, these parents have a right under the Sixth Amendment[49] to receive advice from their criminal defense attorney regarding the potential effect of the criminal proceeding on their parenting rights.[50]

Part IV of this Note will argue that *Padilla v. Kentucky*[51] requires criminal defense attorneys to provide advice to their clients regarding TPR proceedings.[52] Specifically, (1) the holding in *Padilla* should be extended to include consequences other than automatic deportation of

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Accordingly, at times, this Note will refer to incarcerated mothers rather than incarcerated parents. The decision to refer to incarcerated "mothers" as opposed to "parents" is not intended to suggest that the legal principles discussed should not apply to incarcerated fathers as well.

43. *See* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 770 (2011) [hereinafter Love, *UCCCA*].

44. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2115, 2118 (codified as amended in scattered sections of 42 U.S.C.); Genty, *Damage*, *supra* note 31, at 1673, 1678-79.

45. *See infra* Part III.

46. *See infra* Part III.A.

47. *See In re* Adoption of S.P., 47 A.3d 817, 819-22, 831 (Pa. 2012) (observing that, although "there was no affirmative [abusive or neglectful] act of Father that resulted in Child being forced into foster care," the Father's incarceration was an acceptable ground for the termination of his parental rights); *In re* Cecil T., 717 S.E.2d 873, 878, 881 (W. Va. 2011) (noting that, while parental incarceration does "not *automatically* result in termination of person's parental rights," the facts surrounding the incarceration may provide suitable grounds for termination); *infra* notes 188-91 and accompanying text.

48. *See* UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT prefatory n. (amended 2010).

49. U.S. CONST. amend. VI.

50. *See id.*; *infra* Part III.D.

51. 130 S. Ct. 1473 (2010).

52. *See infra* Part IV.

immigrants convicted of crimes;[53] (2) TPR is both "severe" and "enmeshed" in criminal proceedings and thus renders a TPR the type of consequences contemplated by the Court in *Padilla*;[54] and (3) the TPR process is not a particularly complex area of law and therefore criminal defense attorneys must provide substantive advice to their clients regarding the impact that a criminal proceeding may have on CPS's decision to file for TPR.[55] Finally, this Part will suggest that while *Padilla* does create an obligation on criminal defense attorneys to provide advice to their parent-clients about the possibility of a TPR, there are practical limitations to this protection.[56] Therefore, to adequately protect the interests of parents, the government should not only recognize the constitutional obligation imposed on criminal defense attorneys in *Padilla*, it must also enact and enforce statutory and ethical duties on criminal defense attorneys representing parents.[57] Part V will conclude this Note.[58]

II. THE RISE OF PARENTAL "CIVIL DEATH" IN THE UNITED STATES

Although conceptions of due process typically require that the government provide clear notice of any penalty stemming from a criminal conviction, collateral consequences of criminal convictions are becoming increasingly common in the United States.[59] ASFA, which mandates that a state commence TPR proceedings when a child has spent fifteen of the last twenty-two months in foster care, typifies the type of collateral consequence that an incarcerated person may face.[60] As the number of incarcerated parents grows in the United States, so does the number of families affected by TPR proceedings.[61]

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53. *Cf.* Taylor v. State, 698 S.E.2d 384, 387-88 (Ga. Ct. App. 2010) (applying *Padilla* to a sex-offender registry); People v. Fonville, 804 N.W.2d 878, 894-95 (Mich. Ct. App. 2011) (applying *Padilla* to a sex-offender registry).

54. *Cf. Padilla*, 130 S. Ct. at 1481.

55. *See* U.S. CONST. art. I, § 9, cl. 3; United States. v. Batchelder, 442 U.S. 114, 123 (1979); Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 689-90 (2011).

56. *See infra* Part IV.D.

57. *See infra* Part IV.D.

58. *See infra* Part V.

59. *See* U.S. CONST. art. I, § 9, cl. 3; *Batchelder*, 442 U.S. at 123; Love, *UCCCA*, *supra* note 43, at 770-73.

60. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2115, 2118 (codified as amended in scattered sections of 42 U.S.C.); NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, http://www.abacollateralconsequences.org/ (last visited Nov. 23, 2013) [hereinafter NATIONAL INVENTORY].

61. *See* Genty, *Damage*, *supra* note 31, at 1678.

A. Collateral Consequences of the Criminal Justice Process Lead to "Civil Death"

The Constitution provides a variety of protections for individuals accused of crimes.[62] For instance, the Supreme Court has held that a criminal statute violates constitutional due process if it fails to "state with sufficient clarity the consequences of violating a given criminal statute."[63] Accordingly, criminal statutes must provide a statement of the possible punishment, usually a limitation on the individual's freedom,[64] which may be imposed if the individual engages in the prohibited behavior.[65] Despite constitutional protections requiring notice,[66] individuals routinely face an additional "secret sentence" in the form of civil sanctions.[67] For example, incarceration may lead to deportation, ineligibility for public benefits, restriction on employment, or termination of parental rights.[68] These civil sanctions, known as collateral consequences, are not explicitly tied to the criminal statute, and thus, offenders are not on notice of their existence.[69] Furthermore, unlike the traditional direct punishments of criminality which take effect only upon a conviction following a trial or guilty plea, collateral consequences may occur prior to conviction or even when a charging instrument is never filed.[70] For example, a single arrest, even if erroneously executed and without any subsequent conviction, may prevent the arrested person from obtaining future employment.[71]

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62. *See, e.g.*, U.S. CONST. art. I, § 9, cl. 3 (prohibiting ex post facto laws); *id.* amend. IV (prohibiting unreasonable search and seizure); *id.* amend. VIII (prohibiting excessive bail, fines, and cruel and unusual punishment).

63. United States v. Batchelder, 442 U.S. 114, 123 (1979).

64. *See, e.g.*, MODEL PENAL CODE § 6.06 (2011).

65. *See, e.g.*, 18 U.S.C. § 1201(d) (setting a maximum of twenty years of imprisonment for committing a kidnapping under this statute).

66. *See Batchelder*, 442 U.S. at 123.

67. *See* Love, *UCCCA*, *supra* note 43, at 770; *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002) (describing collateral consequences as a "secret sentence").

68. *See* NATIONAL INVENTORY, *supra* note 60.

69. *See* Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670, 678 (2008).

70. *See* Shawn D. Stuckey, Comment, *Collateral Effects of Arrests in Minnesota*, 5 U. ST. THOMAS L.J. 335, 345 (2008); *see also, e.g.*, Paul v. Davis, 424 U.S. 693, 695, 713 (1976) (holding that there is no due process violation when the police distributed a flyer captioned "Active Shoplifters," which included a photograph of an individual arrested for, but not convicted of, shoplifting).

71. Stuckey, *supra* note 70, at 345; *see* J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, CRIM. JUST., Fall 2009, at 42, 46.

Notwithstanding American ideals of due process, the United States has a long history of imposing, attempting to mitigate, and then re-inflicting the collateral consequences on criminal defendants.[72] For instance, in eighteenth and nineteenth century America, if a man engaged in immoral behavior, he could lose his right to vote for some period of time and face a "civil death" whereby he would permanently become a second-class citizen.[73] Beginning in the 1950s, there was a movement among state and federal legislatures to restore civil rights to individuations after they served their criminal sentence.[74] These efforts continued until 1984, when the Sentencing Reform Act[75] severely curtailed efforts to restore civil rights to those with criminal convictions.[76] Over time, as technology has improved, both the number of government-imposed collateral consequences and the ease of enforcing those consequences have amplified.[77]

B. Termination of Parental Rights

Parents have a "fundamental liberty interest . . . in the care, custody, and management of their child."[78] Accordingly, the Supreme Court has consistently struck down state action that unreasonably intrudes upon a parent's ability to make parenting decisions.[79] Even

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72. *See* Love, *UCCCA*, *supra* note 43, at 764-74 (detailing the history of collateral consequences in the United States).

73. Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1062-64 (discussing penalties such as loss of "freeman" status, loss of suffrage, or disenfranchisement).

74. *See* Love, *UCCCA*, *supra* note 43, at 765-66. In 1956, the National Conference on Parole called for laws "to expunge the record of conviction." *Id.* at 765 (internal quotation marks omitted).

75. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified in scattered sections of 18 U.S.C.).

76. *See* Love, *UCCCA*, *supra* note 43, at 769-70. Instead of ending "civil death," this Act declared that the effective posture of the United States vis-à-vis collateral consequences was to limit re-integration of the offender into society. *See id.*

77. *See, e.g.*, Dorothy Roberts, *Collateral Consequences, Genetic Surveillance, and the New Biopolitics of Race*, 54 HOW. L.J. 567, 579 (2011). In recognition of the increasingly severe problem of collateral consequences, Congress passed the Court Security Improvement Act of 2007. Pub. L. No. 110-177, § 510, 121 Stat. 2534, 2543-44 (2007). The Act requires that the National Institute of Justice study and report on the collateral consequences of convictions in each of the fifty states. *Id.* While the results of this study are ongoing, the American Bar Association, in conjunction with the National Institute of Justice, has begun to develop a website to display the thousands of collateral consequences of criminal *conviction*. NATIONAL INVENTORY, *supra* note 60. Currently, collateral consequences of *incarceration* are not included on the website. *See id.*

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

79. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 604 (1979) (noting that parents have "plenary authority" to seek medical care for their children); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (invalidating a state law requiring all children to attend public schools on the grounds that it "unreasonably interfere[d] with the liberty of parents . . . to direct the upbringing and education of

when parents have failed to be "model parents," the Court has held that they "retain a vital interest in preventing the irretrievable destruction of their family life."[80] And thus, it has acknowledged TPR is among the most severe collateral consequences of incarceration that a parent may face.[81]

A judicial grant of a TPR petition permanently severs the parent-child relationship.[82] Each state has enacted statutory grounds and procedures for TPR proceedings.[83] In order to commence these proceedings, an interested party, usually the state, files a petition for TPR in state court.[84] Most states require that a judge only grant this petition if there is clear and convincing evidence[85] that a TPR is in the best interest of the child.[86] If the judge grants the petition for TPR, the effect is to legally dissolve the relationship between the parent and the child.[87] Following a TPR, the parent and child are "legal strangers" and the parent no longer has any claim to that child.[88]

Although this Note will focus exclusively upon protecting parental rights vis-à-vis involuntary TPR proceedings, in addition to statutory provisions for involuntary relinquishment of parental rights, each state also provides for voluntary TPR under certain conditions.[89] These TPR proceedings are usually commenced by state CPS when evidence of one

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children").

80. *Santosky*, 455 U.S. at 753.

81. *See* Genty, *Damage*, *supra* note 31, at 1673, 1677.

82. CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2013) [hereinafter CWIG, TPR], *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf.

83. *See id.* at 2; *see generally* NAT'L DIST. ATT'YS ASS'N, CHILD NEGLECT AND TERMINATION OF PARENTAL RIGHTS (2012), http://www.ndaa.org/pdf/Child%20Neglect%20and%20Termination%20of%20Parental%20Rights.pdf (cataloging the child abuse and neglect statutes for all fifty states and Puerto Rico).

84. *See* CWIG, TPR, *supra* note 82, at 1; *see also* CHILD WELFARE INFO. GATEWAY, DEFINITIONS OF CHILD ABUSE AND NEGLECT 1-3 (2011) [hereinafter CWIG, CHILD ABUSE], *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/define.pdf (describing the grounds for child abuse and neglect among each of the fifty states).

85. *See Santosky*, 455 U.S. at 747-48, 767-68.

86. CWIG, TPR, *supra* note 82, at 2.

87. *See Santosky*, 455 U.S. at 747-48.

88. *See id.*; James B. Boskey, *The Swamps of Home: A Reconstruction of the Parent-Child Relationship*, 26 U. TOL. L. REV. 805, 839, 842 (1995).

89. *See* CWIG, TPR, *supra* note 82, at 1. Voluntary consent to relinquish one's parental rights most often occurs when birth parents choose to place an infant up for adoption. *See id.* Each state provides procedural protections to ensure that birth parents, who choose to relinquish their parental rights, understand the legal ramifications of TPR proceedings and are not coerced into consenting to the relinquishment. *See* CHILD WELFARE INFO. GATEWAY, CONSENT TO ADOPTION 2, 5-6 (2010), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/consent.pdf. The majority of states require that older children consent prior to granting a petition for the voluntary relinquishment of parental rights. *Id.* at 3.

of the statutorily authorized grounds for abuse or neglect is discovered.[90] The most common of these grounds include severe abuse or neglect of the child or another child in the parent's care; abandonment of the child; or the parent's incapacity due to severe mental illness or substance abuse.[91] If CPS's investigation finds evidence of abuse or neglect and further finds that a TPR would be in the best interest of the child, CPS initiates the legal action to terminate the parent's rights to her children.[92] Since these TPR proceedings are generally commenced over the objection of the parent, they are considered involuntary.[93]

C. Evolution of Federal Legislation Pertaining to Child Protection

Historically, the protection of children from abuse and neglect was not primarily a governmental function.[94] Prior to 1962, the vast majority of efforts to protect children from abuse and neglect came from non-governmental agencies and private individuals, not the state or federal government.[95] Dissatisfied with the efficacy of these child protection efforts and in response to public discussion of the horrors of child abuse, Congress amended the Social Security Act in 1962[96] to provide federal funding for state CPS programs.[97] Despite the passage of these amendments, the federal government played a minimal role in child protection efforts over the next decade.[98]

However, in 1974, Congress renewed its focus on child abuse prevention with the passage of the Child Abuse Prevention and Treatment Act ("CAPTA").[99] CAPTA provided federal funding and training for the investigation and reporting of instances of child abuse and neglect.[100] It also set off a wave of child abuse and neglect investigations against parents suspected of maltreatment.[101]

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90. *See* CWIG, CHILD ABUSE, *supra* note 84, at 1-2, 5 (describing the grounds for child abuse and neglect among each of the fifty states).

91. CWIG, TPR, *supra* note 82, at 2; *see also* CWIG, CHILD ABUSE, *supra* note 84, at 1-2, 5.

92. *See* CWIG, TPR, *supra* note 82, at 2 (noting that services are usually provided to the family prior to filing for an involuntary TPR petition).

93. *See id.* at 1.

94. *See generally* John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449 (2008) (tracking the evolution of child protective services in the United States).

95. *Id.*

96. Public Welfare Amendments of 1962, Pub. L. No. 87-543, 76 Stat. 172 (codified in scattered sections of 42 U.S.C.).

97. *See* Myers, *supra* note 94, at 455-57.

98. *Id.* at 456-57.

99. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. § 5101 et seq.); *see* Myers, *supra* note 94, at 457.

100. Child Abuse Prevention and Treatment Act § 4.

101. *See* Myers, *supra* note 94, at 459.

Unfortunately, the good intentions behind CAPTA were met with a disturbing consequence—children were being placed outside the home in foster-care settings at alarming rates.[102]

Again, Congress responded and enacted the Adoption Assistance and Child Welfare Act of 1980 ("AACWA"),[103] which placed particular emphasis on preservation of the family unit.[104] In particular, AACWA required that state CPS agencies make "reasonable efforts" to keep and return children to their homes.[105] Under AACWA, child protection agencies had three major obligations: (1) to provide families with services prior to removal; (2) to provide proper care to children placed in foster care; and (3) to return children placed in foster care to their homes as soon as possible.[106]

Following AACWA, foster care could only be considered a last resort by child protection agencies.[107] Increasingly, however, the "reasonable efforts" mandated by AACWA were being construed by child protection agencies as extraordinary efforts or even "unreasonable efforts."[108] Children were not being removed from their homes even when significant safety concerns existed.[109] When children were removed from their homes and placed in foster care, they were not being returned to their families or other permanent situations.[110] The median stay for foster care jumped from fifteen months in 1987 to more than two years in 1994.[111] Moreover, the majority of those children placed in foster care experienced multiple placements.[112] AACWA appeared to be putting children at an increased risk of continued abuse and lack of permanency.[113]

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102. *Id.*; *see* S. REP. NO. 96-336, at 11 (1979) (finding that, in 1977, more than 500,000 children had been removed from their homes and placed in state-sponsored care; and, of those children, thirty-eight percent had been in foster care for more than two years).

103. Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified in scattered sections of 42 U.S.C.).

104. *See id.* § 101, 94 Stat. at 503; Myers, *supra* note 94, at 459.

105. § 101, 94 Stat. at 503.

106. Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES. 1, 14-15 (1994).

107. *See* 126 CONG. REC. S6940-42 (daily ed. June 13, 1980) (statement of Sen. Cranston).

108. Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 646 (1999).

109. *Id.* at 647; *see, e.g.*, Mack Reed & Santiago O'Donnell, *Child-Abuse Case May Be 'Tip of the Iceberg,'* L.A. TIMES, Nov. 25, 1991, at A3 (reporting that a mother, whose infant was removed from her custody by state social workers after she tried to flush him down the toilet, drowned a second child, and severely burned the infant after the infant was returned to her custody).

110. *See* Gordon, *supra* note 108, at 648.

111. *Id.*

112. *Id.*

113. *See id.* at 646-50.

In response to AACWA's failure, Congress passed ASFA.[114] Unlike its predecessor, ASFA shifted the predominant paradigm for best interest of the children from family preservation to "permanency."[115] Accordingly, under ASFA, states are required to commence TPR proceedings against parents whose child has been in foster care for fifteen of the most recent twenty-two months ("15/22 rule").[116] The 15/22 rule has supplemented many of the traditional grounds for involuntary termination.[117]

D. The Growing Number of Incarcerated Parents in the United States

The number of parents confronting the 15/22 rule is significant, in part due to the large number of incarcerated parents in the United States.[118] The rate of incarceration in the United States has skyrocketed over the last several decades.[119] Currently, compared to all other nations, the United States has both the largest total population of incarcerated individuals,[120] as well as the highest rate of incarcerated individuals as a percentage of the general population.[121] The incarceration rate in the United States is sustained, in part, by high recidivism rates.[122] In a 2002

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114. *See id.* at 650.

115. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

116. *Id.* § 103. This is a spending measure and states do not have to follow ASFA if they choose not to accept federal money for welfare. *See* 42 U.S.C. § 670 (2006). Further, there are some exceptions to the 15/22 rule. *See* Adoption and Safe Families Act of 1997 § 103. For instance, if a parent is convicted of certain enumerated egregious crimes, such as murder, voluntary manslaughter, or felony assault of a child, TPR proceedings must be commenced without waiting for the 15/22 rule to apply. *See id.* Conversely, TPR proceedings might be deferred even if the 15/22 rule might otherwise apply when TPR is not in the "best interests" of the child. *Id.* The use application of the best interest of the child exception has varied considerably among the individual states with some states choosing to defer a TPR frequently and some states rarely granting a reprieve for parents subject to the 15/22 rule. *See* LEE ET AL., *supra* note 38, at 80-95.

117. *Compare* Adoption and Safe Families Act of 1997 § 103 (enacting the 15/22 rule), *with* CWIG, TPR, *supra* note 82, at 2-4 (listing traditional grounds for TPR such as physical abuse, neglect, and parental substance abuse).

118. *See* Genty, *Damage*, *supra* note 31, at 1676-77.

119. *See* Deseriee A. Kennedy, *Children, Parents & the State:* The Construction of a New Family Ideology, 26 BERKELEY J. GENDER L. & JUST. 78, 85-86 (2011); Raeder, *supra* note 42, at 4, 6.

120. *See* LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 236319, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, at 3 tbls.1-2 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf (reporting that the U.S. prison population exceeded 2.2 million in 2010); ROY WALMSLEY, KING'S COLLEGE LONDON, WORLD PRISON POPULATION LIST 1, 3 tbl.2 (8th ed. 2009), *available at* http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf.

121. *See* WALMSLEY, *supra* note 120, at 1 (noting that the United States surpasses Russia, Rwanda, and Cuba in terms of incarceration rates).

122. *See* TIMOTHY HUGHES & DORIS JAMES WILSON, BUREAU OF JUSTICE STATISTICS, U.S.

report released by the U.S. Department of Justice, more than two-thirds of individuals released from state and federal detention centers were re-arrested within three years.[123]

Furthermore, the increase in the number of women who are incarcerated in the United States is startling.[124] As of 1974, fewer than 150,000 women had *ever* been incarcerated in the United States.[125] In comparison, more than 100,000 women were incarcerated in 2007 *alone*.[126] This increase is not likely attributable to an increasingly violent female population in the United States, but rather can be attributed to an increasingly punitive society.[127] Incarcerated women, for instance, are far more likely than their male counterparts to be incarcerated for non-violent criminal offenses such as drug-possession or property crimes.[128]

Additionally, prior to their incarceration, women are much more likely than men to have been a member of a disenfranchised group.[129] Similarly, they are also more likely to be a member of a disenfranchised group as compared to the general female population.[130] In particular, incarcerated women are more likely to be victims or survivors of domestic or sexual violence.[131] Prior to incarceration, these women are more likely than the general population to have suffered from mental illness or to have lived in poverty.[132] Finally, the majority of incarcerated women are ethnic minorities.[133] Accordingly, the plight of incarcerated

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DEP'T OF JUSTICE, REENTRY TRENDS IN THE UNITED STATES (2002), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1138.

123. *Id.*

124. *See* Raeder, *supra* note 42, at 4, 6; *see also* Deseriee A. Kennedy, *"The Good Mother": Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 167-68 (2012) [hereinafter Kennedy, *Mothering*].

125. Raeder, *supra* note 42, at 4.

126. TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 237961, JAIL INMATES AT MIDYEAR 2011 - STATISTICAL TABLES, at 6 tbl.6 (2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf.

127. Raeder, *supra* note 42, at 6. *But see* EILEEN POE-YAMAGATA & JEFFREY A. BUTTS, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, FEMALE OFFENDERS IN THE JUVENILE JUSTICE SYSTEM 4 tbl.2 (1996), *available at* https://www.ncjrs.gov/pdffiles/femof.pdf (reporting that the number of female violent offenders as a proportion of all violent offenders increased from sixteen percent in 1983 to nineteen percent in 1993).

128. *See* Raeder, *supra* note 42, at 6 (reporting that women account for less than twenty percent of convictions for violent offenses).

129. *See* LENORA LAPIDUS ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 11, 18 (2005), *available at* http://www.aclu.org/files/images/asset_upload_file431_23513.pdf (discussing incarcerated women and issues of poverty, ethnic minority, mental and physical disability, et cetera).

130. *See id* at 18.

131. *See id.* at 9, 18, 47-48.

132. *See id* at 18-19; Raeder, *supra* note 42, at 6-7.

133. *See* PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE,

women, and thus incarcerated mothers and their children, has attracted the attention of feminist scholars,[134] government agencies,[135] and advocacy groups.[136]

The dramatic rise in adult incarceration has led to an increase in the number of incarcerated parents of minor children in the United States.[137] The impact on these children has been substantial.[138] Between 1991 and 2007, the number of incarcerated parents increased by 79%, from fewer than 500,000 to more than 800,000 parents.[139] Of these incarcerated parents, approximately half of the mothers have at least one child under the age of nine.[140] Moreover, during the period from 1991 to 2007, the number of incarcerated mothers increased from approximately 29,500 to 65,600 mothers, and the number of children with an incarcerated mother increased 131%.[141] Likewise, the number of children with an incarcerated father increased by 77% during this time, with the number of incarcerated fathers growing from approximately 423,300 to 744,200.[142] The difference in the increase of children with incarcerated mothers versus incarcerated fathers reflects that the rate of incarcerated mothers is growing faster than that of incarcerated fathers.[143]

Moreover, the structural limitations of the criminal justice system place a dramatic burden on the parent-child relationship.[144] More than 60% of parents detained at state correctional facilities were housed at these facilities in excess of 100 miles from their pre-incarceration homes.[145] More than 80% of parents incarcerated in a federal correctional facility were detained at facilities in excess of 100 miles from their pre-incarceration homes, with more than half of those parents

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NCJ 236096, PRISONERS IN 2010, at 7, 27 app. tbl.14 (rev. ed. 2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf.

134. *See, e.g.*, Raeder, *supra* note 42, at 2, 4.

135. *See, e.g.*, Susan B. Carbon, Dir., Office on Violence Against Women, Speech at the Launching of the Anti-Violence Initiative for the Northern District of West Virginia (July 11, 2011).

136. *See, e.g.*, LAPIDUS, *supra* note 129, at 16, 19. Because of this attention, scholarly works often focus on "incarcerated mothers" rather than "incarcerated parents." *See, e.g.*, *id.* at 16-20; Kennedy, *Mothering*, *supra* note 124, at 167-70. Accordingly, at times this Note may refer to "incarcerated mothers"; however, this is not to suggest that the legal proposition discussed throughout this Note should not apply to all incarcerated parents regardless of sex or gender.

137. *See* SENTENCING PROJECT, *supra* note 42, at 3 & tbl.1.

138. *See* GLAZE & MARUSCHAK, *supra* note 34, at 1-2.

139. SENTENCING PROJECT, *supra* note 42, at 3 tbl.1.

140. Carbon, *supra* note 135.

141. GLAZE & MARUSCHAK, *supra* note 34, at 2, 13 app. tbl.1.

142. *Id.*

143. *See id.*

144. *See* Genty, *Damage*, *supra* note 31, at 1673.

145. MUMOLA, *supra* note 20, at 5.

in excess of 500 miles from their pre-incarceration homes.[146] For mothers incarcerated in the federal system, the distance between them and their children may even be greater, as only six federal correctional institutes nation-wide are capable of housing women.[147] The time and monetary costs of travel between the correctional institute where the parent is detained and their child's home often make frequent visitation infeasible.[148] Accordingly, less than one quarter of incarcerated parents had frequent personal contact with their children.[149] CPS, in turn, can use this lack of contact as evidence against a parent in a TPR proceeding.[150]

The consequences of this sizeable physical separation of parents and children due to incarceration far exceeds just "missing" one another.[151] Prior to incarceration, 64% of mothers and 44% of fathers detained in state correctional facilities lived with their children, whereas 84% and 55% of incarcerated mothers and fathers, respectively, lived with their children prior to detention in a federal prison.[152] During incarceration, the vast majority of incarcerated fathers reported that their children lived with their children's mothers.[153] Conversely, less than one-third of incarcerated mothers reported that their children lived with their children's fathers following their own incarceration.[154] Children of mothers incarcerated at state correctional facilities are at least five times more likely than children of fathers incarcerated at state correctional facilities to be residing in foster care; and children of mothers incarcerated at federal correctional facilities are almost three times more likely than children of fathers incarcerated at federal correctional facilities to reside in foster care.[155] For incarcerated parents, especially mothers with children living in temporary situations under state or other non-parental guardianship, ASFA's goal of "permanency" is frightening.[156]

146. *Id.*

147. *See* Genty, *Damage*, *supra* note 31, at 1673.

148. *See id.* at 1673-74, 1680-81.

149. MUMOLA, *supra* note 20, at 5 tbl.6 (indicating that fewer than twenty-five percent of incarcerated parents had personal contact with their children at least one time per month).

150. *See* CWIG, TPR, *supra* note 82, at 2.

151. *See* Genty, *Damage*, *supra* note 31, at 1673-79.

152. MUMOLA, *supra* note 20, at 4.

153. *Id.* The report did not note how it accounted for children with same-sex parents. *Id.*

154. *Id.*

155. *Id.* at 3 tbl.4.

156. *See* Genty, *Damage*, *supra* note 31, at 1675-77; *see also* Telephone Interview with Tina, *supra* note 1.

III. EXISTING LEGAL PROTECTIONS ARE INSUFFICIENT TO PROTECT INCARCERATED PARENTS FACING TERMINATION OF PARENTAL RIGHTS

Current and proposed statutory provisions have failed to protect incarcerated parents' interests during the TPR process.[157] Similarly, ethical obligations on criminal defense attorneys to provide competent advice to their clients are not sufficient to protect parents' rights today.[158] The Sixth Amendment right to effective assistance of counsel, however, may include the right to receive advice from criminal defense attorneys about the effect that a criminal proceeding will have on a defendant's parental rights.[159] This constitutional protection is available to incarcerated parents currently facing a TPR.[160]

A. Statutory Protections Have Failed to Sufficiently Protect Parents' Interests

Congress's attempt to draft effective child protection legislation has repeatedly expanded and reduced the statutory protection of parental rights.[161] The disproportionate effect of ASFA on incarcerated parents suggests that existing child protection insufficiently protects the rights of those parents.[162] Consequently, enacting additional statutory protections may be one way to protect the rights of these parents.[163] The Uniform Collateral Consequences of Conviction Act ("UCCCA")[164] has been one attempt to mitigate collateral consequences generally.[165] This model act focuses primarily on providing notice of the collateral consequences of criminal *convictions* to the defendant and on mitigating the effects of collateral consequences after criminal *convictions*.[166] It structures collateral consequences as related to particular offenses and not as

157. *See* Press Release, Brennan Ctr. for Justice, National Study Faults "Adoption & Safe Families Act" for Consigning Children to Permanent Separation from Parents (Sept. 7, 2006) [hereinafter Press Release, Brennan Ctr.], *available at* http://www.brennancenter.org/content/resource/national_study_faults_federal_adoption_safe_families_act_for_consigning_chi/.

158. *See* Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 685-88 (2003); *cf.* Monroe H. Freedman, *Professional Discipline of Death Penalty Lawyers and Judges*, 41 HOFSTRA L. REV. 603, 620 (2013).

159. *Cf.* Padilla v. Kentucky, 130 S. Ct. 1473, 1481-82 (2010) (applying the Sixth Amendment protection to instances of deportation).

160. *See infra* Part III.D.

161. *See supra* Part II.C.

162. *See supra* Part II.C–D.

163. *See* LEE ET AL., *supra* note 38, at 4-5.

164. UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT (2003), 11 U.L.A. 8-37 (Supp. 2013).

165. *Id.* prefatory n.

166. *See id.* §§ 5, 10–11, 11 U.L.A. at 20-21, 30, 32; Love, *UCCCA*, *supra* note 43, at 784-88.

related to incarceration generally.[167] It neither addresses the collateral consequences independent of incarceration nor addresses the collateral consequences of multiple unrelated instances of incarceration.[168]

Accordingly, this model statute is insufficient to protect the interests of incarcerated parents facing a TPR.[169] A TPR stemming from incarceration is not necessarily associated with any particular conviction and thus is not well-suited for the UCCCA's conviction-centric framework.[170] Moreover, as the UCCCA does not account for collateral consequences of pre-conviction detention or multiple periods of incarcerations stemming from different offenses,[171] parents subjected to the 15/22 rule due to an inability to post bail prior to trial or who are incarcerated on more than one occasion may not be protected by the UCCCA.[172] Finally, the lack of state support for the UCCCA has limited the number of incarcerated parents who could benefit from its provisions; specifically, as of May 2013, the UCCCA has only been enacted by one state.[173]

Unlike the relative generality of the UCCCA, some states and individual members of Congress have acted with the specific aim at reducing the collateral consequences of ASFA on incarcerated parents.[174] At the state and local level, these efforts include creating task forces between child protection agencies and corrections agencies to

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167. *See, e.g.*, UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT § 6(a)(1), 11 U.L.A. 24.

168. *See generally id.* §§ 3–7, 11 U.L.A. 17-25.

169. *Compare id.* §§ 5–6, 11 U.L.A. 20-21, 24 (relying on a conviction-centric paradigm), *with* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2115, 2118 (codified as amended in scattered sections of 42 U.S.C.) (creating the possibility that the 15/22 rule may be triggered by pre-trial incarceration, alleged probation violations, and other non-conviction related detention).

170. *Compare* UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT §§ 5–6, 11 U.L.A. 20-21, 24 (linking notification of collateral consequences to conviction), *with* Adoption and Safe Families Act of 1997 § 103, 111 Stat. at 2118 (allowing for TPR when a child has been in foster care for an extended period of time regardless of the underlying reasons, which may include pre-trial detention of the parent).

171. *See generally* UNIF. COLLATERAL CONSEQUENCES OF CONVICTION ACT §§ 3–7, 11 U.L.A. 17-25.

172. *Compare id.* §§ 5–6, *with* Adoption and Safe Families Act of 1997 § 103, 111 Stat. at 2118.

173. *See Legislative Enactment Status: Collateral Consequences of Conviction Act*, UNIFORM L. COMMISSION (May 24, 2013, 12:09 PM), http://www.uniformlaws.org/LegislativeMap.aspx?title=Collateral_Consequences_of_Conviction_Act (reporting that a version of UCCCA was enacted in North Carolina).

174. PATRICIA E. ALLARD & LYNN D. LU, BRENNAN CTR. FOR JUSTICE, REBUILDING FAMILIES, RECLAIMING LIVES: STATE OBLIGATIONS TO CHILDREN IN FOSTER CARE AND THEIR INCARCERATED PARENTS 19-25 (2006), *available at* http://brennan.3cdn.net/a714f3bf3bc8235faf_4am6b84bh.pdf.

develop best practices as to how to promote healthy relationships between incarcerated parents and their children.[175] Federally, Congress has provided funding for the U.S. Attorney General to study and report on ways to maintain relationships between incarcerated parents and their children.[176] These state and federal measures have focused on identifying issues and creating best practice models prospectively, but do not address issues facing parents now.[177]

Unfortunately, these legislative initiatives have largely failed to address the rights of parents currently facing TPR due to incarceration.[178] Incarcerated parents, however, need legal protection now without the uncertainty and delay of the legislative process.[179] Therefore, parents seeking protections must look elsewhere.[180]

B. Right to a Civil Defense Attorney for TPR Proceedings Is Insufficient to Protect Parents' Rights

Despite limited legislation pertaining to collateral consequence mitigation, the majority of states provide for a court-appointed civil defense attorney for indigent parents during involuntary TPR proceedings.[181] The right to counsel in a TPR proceeding protects a parent's right to the "companionship, care, custody, and management of his or her children."[182] Legal counsel can protect a parent's right to her children, not only by acting as an advocate during adversarial proceedings, but also by counseling his client concerning ways to correct CPS's underlying concerns.[183] The civil defense attorney's effectiveness can depend on the procedural point at which the state provides a right to counsel.[184] The procedural point during a child abuse and neglect proceeding when a parent's right to counsel attaches varies dramatically

175. Press Release, Brennan Ctr., *supra* note 157.

176. 42 U.S.C. § 17553 (Supp. V 2012).

177. *See id.*; Press Release, Brennan Ctr., *supra* note 157.

178. *Cf.* Press Release, Brennan Ctr., *supra* note 157.

179. *See* ALLARD & LU, *supra* note 174, at 30, 34 (suggesting that a well-drafted statute could provide additional protections to parents facing a TPR); *supra* notes 155-57 and accompanying text.

180. *See supra* notes 178-79 and accompanying text.

181. *See, e.g.*, COLO. REV. STAT. ANN. § 19-3-202(1) (West 2005) (providing right to counsel at all stages of child abuse and neglect proceedings if the parent is indigent).

182. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27-28 (1981) (internal quotation marks omitted).

183. *See* Vivek S. Sankaran, *Protecting a Parent's Right to Counsel in Child Welfare Cases*, 28 CHILD L. PRAC. 97, 102 (2009).

184. *See* Peter Marshall Varney, State v. Adams*: When Mommy Talks, You Better Pay Attention . . . and, if No Indictment Has Been Issued, You Can Use Her Uncounseled Statements Against Her in Court*, 76 N.C. L. REV. 2388, 2389-90, 2407-09 (1998).

between states, and many states do not provide for court-appointed legal counsel until the TPR petition is filed.[185]

For parents facing a TPR petition based partially or solely on parental incarceration, a court-appointed civil defense attorney is not in the best position to help his client remedy the underlying grounds for the petition.[186] In traditional TPR proceedings initiated against parents for abuse and neglect,[187] civil defense attorneys could counsel their clients to cease the abusive or neglectful behavior, seek parenting classes, and improve their social support systems.[188] For incarcerated parents or parents facing incarceration, a civil defense attorney is not in a position to provide counsel regarding a criminal proceeding.[189] In situations where a parent is incarcerated as a result of either a judicial denial of bail or as a result of conviction, the civil defense attorney cannot defend the client against an adverse criminal court order.[190] In these cases, a civil defense attorney may not be capable of providing guidance as to the criminal proceeding.[191] Therefore, the incarcerated parent's criminal, rather than civil, defense attorney is in the best position to assist his client with protecting her parental rights in these scenarios.[192]

C. *Ethical Obligations on Criminal Defense Attorneys Have Failed to Sufficiently Protect Parents' Interests*

Criminal defense attorneys representing clients who are parents may have an ethical obligation to counsel their clients with respect to the

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185. *See, e.g.*, H.B. 2-FN-A-LOCAL, 2011 Sess. (2011 N.H.), *available at* http://www.gencourt.state.nh.us/legislation/2011/HB0002.html (eliminating the right to counsel for indigent parents altogether); *see also* Sankaran, *supra* note 183, at 97, 102 (discussing the need for legal counsel during all stages of child abuse and neglect proceedings in order to protect the parent's rights and promote better outcomes generally). A parent's rights vis-à-vis their children are usually best protected if a civil defense attorney can protect a parent's rights during the child protection investigation phase, rather than during the final adjudication stage of a TPR proceeding. *See* Varney, *supra* note 184, at 2389-90.

186. *See, e.g.*, *In re* Adoption of S.P., 47 A.3d 817, 831 (Pa. 2012) (reinstating the trial court's decision to terminate a father's parental rights primarily on the grounds of incarceration); *In re* Cecil T., 717 S.E.2d 873, 883 (W. Va. 2011) (remanding the case for entry of an order terminating the father's parental rights primarily on the grounds of incarceration).

187. *See* CWIG, CHILD ABUSE, *supra* note 84, at 1-2; CWIG, TPR, *supra* note 82, at 1.

188. *See* Jeremy Evans & Debra Rothstein, *Practice Tips for Representing Parents in Child Protection Cases*, CHILD. RTS., Spring 2010, at 6, 6-8.

189. *See* Kathleen Creamer, Representing Incarcerated Parents, 64-65, 69 (unpublished training presentation) (on file with *Hofstra Law Review*).

190. *See id.* at 64-65, 68, 76-77 (suggesting that civil defense attorneys coordinate with criminal defense attorneys but acknowledging that criminal and civil defense attorneys have different functions).

191. *See id.* at 65-69.

192. *See id.* at 69; *see also supra* notes 155-57 and accompanying text.

potential consequence of the criminal proceeding on their parental rights.[193] The Model Rules of Professional Conduct ("Model Rules")[194] requires attorneys to provide competent counsel to their clients.[195] The Model Rules further require that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[196] As such, a lawyer may breach his ethical duty to his client if he fails to inform his client of the effect that a decision will have on her legal rights and liabilities on matters not directly related to the legal proceeding at hand.[197] Moreover, an attorney has the ethical obligation to "abide by a client's decisions concerning the objectives of representation."[198] Thus, in criminal proceedings, the defense attorney cannot assume that his client's goal is solely to maintain her liberty.[199] Instead, a criminal defense attorney representing a parent, who may face termination of her parental rights as a result of incarceration, must conduct the criminal proceedings in a way so as to best effectuate a favorable outcome in the TPR proceeding if the client so desires.[200]

Although it is likely that an ethical obligation exists for criminal defense attorneys to counsel their clients as to the potential collateral consequences of TPR, this obligation is insufficient to protect the interests of the client.[201] The purpose of prosecuting an attorney for an ethics violation is similar to the purpose of charging a criminal for a crime.[202] Both proceedings are intended to punish the wrongdoer for their offenses against society, but not necessarily to provide relief for the

193. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 & cmt. 5 (2013) (requiring attorneys to provide competent legal representation which includes "analysis of the factual . . . elements of the problem"); *infra* Part IV.D.

194. MODEL RULES OF PROF'L CONDUCT (2013).

195. *Id.* R. 1.1.

196. *Id.* R. 1.4.

197. *See, e.g.*, *In re* Cohen, 82 P.3d 224, 227, 234 (Wash. 2004) (en banc) (finding ineffective counsel where attorney transferred a case to arbitration without informing the client that a loss in that forum would result in liability for the opposing party's attorney fees); *In re* Winkel, 577 N.W.2d 9, 10-11 (Wis. 1998) (finding ineffective counsel where attorney failed to inform client of the risk of criminal prosecution if the client surrendered assets to a bank without arranging to pay bills).

198. MODEL RULES OF PROF'L CONDUCT R. 1.2 (2013).

199. *See, e.g.*, *In re* Garnett, 603 S.E.2d 281, 283 (Ga. 2004) (per curiam) (finding unethical conduct where an attorney refused to enter a guilty plea on behalf of his client where the client wanted to enter the guilty plea).

200. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1–.2, 1.4 (2013).

201. *See id.* R. 1.1 cmt. 5.

202. *See* Zacharias, *supra* note 158, at 693-94. Likewise, a civil malpractice claim against a criminal defense attorney for failing to provide advice and counsel concerning a TPR proceeding can only provide monetary damages and not equitable relief such as the reinstatement of the legal relationship between parent and child. *See id.*

victims.[203] Accordingly, attorneys who engage in unethical conduct usually face sanctions or disbarment, but not an obligation to provide a remedy to their injured client.[204]

D. *The Sixth Amendment Right to Effective Assistance of Counsel Can Provide Protection for Parents*

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defense.*[205]

The Sixth Amendment unquestionably provides protection to defendants facing criminal prosecution by the government.[206] Equally as clear is that the Sixth Amendment provides criminal defendants with the right to legal representation.[207] However, the extent of this right to legal representation is less obvious.[208]

In 1984, the Supreme Court, in *Strickland v. Washington*,[209] decided the standard to which attorneys should be held under the Sixth Amendment.[210] In *Strickland*, the defendant pled guilty to three counts of capital murder, despite the advice of counsel;[211] following a sentencing proceeding, the trial judge sentenced the defendant to death.[212] The defendant appealed his conviction on the ground that his attorney provided ineffective assistance of counsel during the sentencing proceeding when the attorney failed to prepare adequately and present character witnesses on behalf of the defendant.[213] Upholding the

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203. *See id.*

204. *Id.* at 685-86; *see, e.g.*, *In re* Henry, 811 P.2d 1078, 1080 (Ariz. 1991) (en banc). *But see infra* Part IV.D (suggesting that consistent enforcement of ethical misconduct may help provide prospective relief to parents facing a TPR).

205. U.S. CONST. amend. VI (emphasis added).

206. *Id.*

207. *Id.*; Gideon v. Wainwright, 372 U.S. 335, 342-44 (1963) (affirming the accused person's fundamental right to counsel in criminal prosecutions).

208. *See generally* Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1 (2009) (analyzing the history of Sixth Amendment "effective counsel" jurisprudence prior to *Padilla*).

209. 466 U.S. 668 (1984).

210. *Id.* at 671.

211. *Id.* at 672.

212. *Id.* at 675.

213. *Id.* at 675-76.

conviction, the Court held that criminal defendants are entitled to reasonably effective counsel and that the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[214]

For over two decades, the *Strickland* test prevailed.[215] However, this holding did not address whether criminal defendants had the right to advice from counsel pertaining to collateral consequences of criminal convictions.[216] The lower courts were left to determine whether defendants had the right to be advised as to the civil collateral consequences of a criminal conviction.[217] While the majority of jurisdictions held that defense attorneys were not obligated to advise their clients about collateral consequences,[218] a growing minority recognized the existence of ineffective counsel when there was affirmative misinformation given to the client regarding a collateral consequence.[219]

Finally, in 2010, the Supreme Court directly addressed the issue of whether ineffective assistance of counsel could ever exist where the attorney fails to advise a defendant about certain civil collateral consequences of a criminal conviction.[220] The Court, in *Padilla*, found that a defense attorney provided ineffective assistance of counsel when

214. *Id.* at 686.

215. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1487 (2010) (describing the *Strickland* test as the "longstanding and unanimous position of the federal courts" with respect to effective assistance of counsel in criminal matters).

216. *See Strickland*, 466 U.S. at 686. In a 1985 case, *Hill v. Lockhart*, the Supreme Court avoided determining whether counsel provided ineffective assistance in a case where the criminal defense attorney failed to inform his client about the additional consequences he faced as a repeat offender under state law. 474 U.S. 52, 60 (1985). Instead, the Court analyzed the case under the second prong of the *Strickland* test and found that the defendant failed to show any "prejudice" had resulted from the attorney's actions. *Id.* (internal quotation marks omitted). Thus, the Court avoided deciding the question of whether the Sixth Amendment covers collateral consequences. *See id.*

217. *See, e.g.*, United States v. Couto, 311 F.3d 179, 187 (2d Cir. 2002) (holding there is no duty for a criminal defense attorney to inform his clients as to the effect that a criminal plea deal would have on deportation proceedings); United States v. Yearwood, 863 F.2d 6, 8 (4th Cir. 1988) (holding there is no duty to inform regarding the effect of a plea deal on immigration status); People v. Garcia, 815 P.2d 937, 942-43 (Colo. 1991) (en banc) (as modified on denial of rehearing) (finding that a defense attorney provided ineffective counsel when he failed to inform his client that a plea deal would subject the defendant to civil liability).

218. Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 131-32 (2009) [hereinafter Roberts, *Ignorance*]; *see, e.g.*, State v. Paredez, 101 P.3d 799, 803 (N.M. 2004) (citing several federal circuit decisions holding that there is no right to information about the collateral consequences of criminal convictions).

219. Roberts, *Ignorance*, *supra* note 218, at 132-34; *see, e.g.*, United States v. Kwan, 407 F.3d 1005, 1015-17 (9th Cir. 2005); *Couto*, 311 F.3d at 187.

220. *Padilla*, 130 S. Ct. at 1487.

he failed to advise the defendant that accepting a guilty plea would subject him to virtually automatic deportation.[221] The majority held that the criminal defense attorney was required to counsel his client regarding the potential consequences of automatic deportations based upon the following: (1) the particularly "severe" nature of deportation as a penalty;[222] (2) the quasi-criminal nature of deportation hearings and their "enmesh[ment]" with the criminal proceedings;[223] and (3) whether the criminal defense attorney's actions "fell below an objective standard of reasonableness."[224]

Justice Samuel Alito, however, suggested a limitation on the majority's decision in his concurring opinion.[225] While he acknowledged that criminal defendants have a right to more than mere silence from their defense attorneys on certain collateral matters, he would refrain from obligating attorneys to provide actual advice to defendants.[226] Instead, his opinion suggests that, where a non-criminal consequence of a criminal matter involves a particularly complex issue, rather than a straightforward issue, the criminal defense attorney might only be required to advise his client to seek advice from an attorney in that field.[227]

After *Padilla*, it became evident that criminal defense attorneys, in certain instances, are required to advise their clients as to the existence of non-criminal consequences of a criminal conviction.[228] Beyond informing a defendant of the existence of a collateral consequence, it is less clear when, if ever, a criminal defense attorney has a duty to provide guidance to a client beyond suggesting that she consult another attorney specializing in the applicable field of law.[229] If a non-criminal consequence is sufficiently "severe" and "enmeshed" with the criminal proceeding,[230] it appears that there are two tracks, depending on the legal complexity of the potential consequence, governing the obligation of a criminal defense attorney.[231] If the collateral consequence involves a

221. *Id.* at 1486.

222. *Id.* at 1481.

223. *Id.*

224. *Id.* at 1482 (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)) (internal quotation marks omitted).

225. *Id.* at 1494 (Alito, J., concurring).

226. *Id.*

227. *Id.* at 1487-88 (majority opinion).

228. *See* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 799-800 (2011) [hereinafter Smyth, *Collateral*].

229. *See Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring).

230. *See id.* at 1481 (majority opinion).

231. *See* Smyth, *Collateral*, *supra* note 228, at 812-14.

complex area of law, it may be sufficient under the Sixth Amendment for a criminal defense attorney to merely refer his client to another attorney specializing in that field.[232] However, in areas of law that are more straightforward, effective assistance of counsel requires the attorney to provide actual guidance regarding the collateral consequence.[233]

IV. SIXTH AMENDMENT PROTECTION SHOULD EXTEND TO TPR PROCEEDINGS

The Court in *Padilla* did not expressly limit the holding to instances of automatic deportation.[234] Accordingly, lower courts should extend the *Padilla* framework to other types of collateral consequences in order to protect individuals facing an ever-burgeoning number of non-criminal consequences of conviction.[235] In terms of Sixth Amendment protection, a TPR is analogous to deportation as both are "severe" consequences, which are "enmeshed" in the criminal process.[236] Additionally, a TPR proceeding is not a complex area of law that requires specialized legal knowledge.[237] Consequently, *Padilla* requires criminal defense attorneys to provide advice and guidance to parents about TPR proceedings.[238] Despite the legal protection found in *Padilla*, the practical limitations on this protection may ultimately provide only limited relief to parents facing incarceration.[239]

A. Padilla *Should Not Be Limited to Instances of Deportation*

As our society has become more punitive,[240] the likelihood of severe collateral consequences stemming from involvement with the criminal justice system has increased.[241] However, there are few

232. *See* Margaret Colgate Love, *Collateral Consequences After* Padilla v. Kentucky*: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 107 (2011).

233. *See id.*

234. *See Padilla*, 130 S. Ct. at 1481 (finding that the distinction between collateral and direct consequences for the purposes of a Sixth Amendment effective counsel analysis is inappropriate where the consequences are severe and enmeshed in the criminal proceeding).

235. *See infra* Part IV.A. Although the Court in *Padilla* specifically refrained from categorizing immigration as a "collateral consequence," this Note will refer to non-criminal sanctions such as deportation and TPR proceedings as collateral consequences in order to clarify that the consequences are not criminal penalties. *See Padilla*, 130 S. Ct. at 1481.

236. *See infra* Part IV.B.

237. *See infra* Part IV.C.

238. *See infra* Part IV.C.

239. *See infra* Part IV.D.

240. *See* Raeder, *supra* note 42, at 6.

241. *See* Love, *UCCCA*, *supra* note 43, at 770-74.

protections for criminal defendants from incompetent criminal defense attorneys.[242] Accordingly, a high constitutional minimum for effective counsel is necessary for the immediate protection of the rights of individuals facing criminal prosecution.[243]

The Court in *Padilla* did not necessarily limit its application to the collateral consequence of deportation,[244] and its rationale can be applied, and should be applied, to other collateral consequences, such as TPR proceedings. The majority opinion does engage in a lengthy discussion of the evolution of federal deportation law.[245] It notes that over the last several decades federal legislation has increased the risk of deportation for noncitizens.[246] As a result, these changes have "dramatically raised the stakes of a noncitizen's criminal conviction" to such an extent as to make "deportation . . . the most important part—of the penalty" in certain instances.[247] Likewise, changes in federal legislation have increased the risk of TPR for incarcerated parents.[248] This is particularly true for single mothers facing incarceration.[249] Accordingly, the changes in child protection legislation are analogous to those changes in federal law, which increased the severity of deportation, and thus have "raised the stakes" of a parent's criminal conviction to make a TPR "the most important part—of the penalty."[250]

In several instances, lower courts have begun to enforce a higher constitutional minimum for effective counsel by extending the *Padilla* holding to cover other non-criminal consequences.[251] As a matter of public policy, courts should continue to avoid limiting *Padilla* to advice

242. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 692-93 (1984).

243. Smyth, *Collateral*, *supra* note 228, at 820-21.

244. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

245. *Id.* at 1478-80.

246. *See id.* The Immigration Act of 1917, which "radical[ly] change[d]" immigration law, allowed deportation of aliens in very limited circumstances following conviction of egregious felonies soon after entering the United States. Pub. L. No. 64-301, § 19, 39 Stat. 874, 889; *Padilla*, 130 S. Ct. at 1478-79 (internal quotation marks omitted). This Act did have a significant procedural protection known as a "judicial recommendation against deportation" ("JRAD") which allowed a sentencing judge to "ameliorate unjust results on a case-by-case basis." *Padilla*, 130 S. Ct. at 1479; *see* § 19, 39 Stat. at 889. However, beginning in 1952, Congress began limiting the scope of JRAD and completely eliminated it in 1990. *Padilla*, 130 S. Ct. at 1480. In 1996, Congress also eliminated the Attorney General's power to grant reprieve from deportation. *Id.*

247. *Padilla*, 130 S. Ct. at 1480 (footnote omitted).

248. *See supra* Part II.C (discussing the paradigm shift in federal legislation from "family reunification" to "permanency" and the resulting 15/22 rule).

249. *See supra* Part II.C–D (noting that single mothers who are the sole care-giver to a minor child are at an increased risk of facing a TPR due to the 15/22 rule as compared to other parents).

250. *Cf. Padilla*, 130 S. Ct. at 1480.

251. Taylor v. State, 698 S.E.2d 384, 387-88 (Ga. Ct. App. 2010) (applying *Padilla* to a sex-offender registry); People v. Fonville, 804 N.W.2d 878, 894-95 (Mich. Ct. App. 2011) (applying *Padilla* to a sex-offender registry).

regarding automatic deportation cases in the context of plea deals.[252] Instead, criminal defense attorneys should be obligated to advise and counsel clients about the potential for collateral consequences throughout a criminal proceeding in order to meet the standard for effective counsel under the Sixth Amendment.[253] Nevertheless, in order to avoid creating an unworkable standard whereby effective counsel is defined as requiring information and guidance pertaining to every possible consequence of the criminal justice process, consequences should be evaluated in light of the test established in *Padilla*.[254] Only those potential consequences that are severe and quasi-criminal should warrant advice and guidance under the Sixth Amendment.[255]

B. Termination of Parental Rights Is the Type of Consequence Contemplated by the Court in Padilla

The Court in *Padilla* chose not to explicitly differentiate between direct and collateral consequences.[256] However, the decision marked the first time that the Supreme Court applied the Sixth Amendment *Strickland* rationale to a consequence that was "civil in nature."[257] It held that defendants were entitled to effective counsel with respect to deportation because deportation was a "particularly severe penalty" that was "intimately related to the criminal process."[258] Similarly, a TPR is a severe civil penalty that is "enmeshed" with the criminal process, and therefore, it cannot be "categorically removed from the ambit of the Sixth Amendment right to counsel."[259]

1. Severity

The severity of a TPR stems from its legal destruction of a family.[260] The Supreme Court has repeatedly held that the family unit

252. *See Taylor*, 698 S.E.2d at 387-88. *But see* Thomas v. State, 365 S.W.3d 537, 542-43 (Tex. Ct. App. 2012) (declining to extend *Padilla*).

253. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION standard 4-3.6 (3d ed. 1993).

254. *See* Daniel Kanstroom, Padilla v. Kentucky *and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305, 316-17 (2011).

255. *See Padilla*, 130 S. Ct. at 1481.

256. *Id.*

257. *See id.*

258. *Id.* (internal quotation marks omitted).

259. *Cf. id.* at 1481-82.

260. *Cf. id.* at 1481; *see also* Genty, *Damage*, *supra* note 31, at 1678 (noting a 250% increase in TPR petitions following the adoption of ASFA). *But see* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2115, 2118 (codified as amended in scattered sections of 42 U.S.C.) (allowing states to implement a "best interests" provision, which allows child protection agencies to not file a 15/22 rule TPR petition if it is not in the child's best interest).

must be protected from unnecessary governmental intrusion.[261] For instance, the Court noted that "[f]ew consequences of judicial action are so grave as the severance of natural family ties" and that TPR is a form of legal "brand[ing]" whereby a parent is forever marked as "unfit" to care for her children.[262] The impact of a TPR on incarcerated parents may be devastating, leading to increased incidence of severe depression and criminal recidivism.[263] For children, foster care following a parent's incarceration may cause feelings of "shame and humiliation," which is exacerbated by the legal destruction of the parent-child bond.[264]

Additionally, the severity of a TPR is compounded by its permanence.[265] Once a petition for TPR has been granted, it is very unlikely, absent a significant procedural error, that a parent will be able to reverse that judgment.[266] Even if there is such an error, in many cases the child's best interest standard, which places a premium on "permanency," may lead to a result whereby the child remains with an adoptive family.[267] Although some adoptive parents might allow birth parents to continue visitation with the child, advocacy groups report that the adoptive parents can stop contact at any time, for any reason, without any repercussions.[268] Accordingly, under the 15/22 rule, incarcerated parents face a "particularly severe penalty" under *Padilla*.[269]

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261. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting) (noting that "parents have a fundamental liberty interest in caring for and guiding their children"); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (explaining that the Court had "little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness'" (alteration in original) (citing Smith v. Org. of Foster Families, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring))); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) ("[E]stablish[ing] that the Constitution protects the sanctity of the family.").

262. M.L.B. v. S.L.J., 519 U.S. 102, 119 (1996) (first alteration in original) (internal quotation marks omitted).

263. *See* Kennedy, *Mothering*, *supra* note 124, at 184-87.

264. Peter Milosheff, *Children with Incarcerated Parents*, BRONX TIMES, Nov. 15, 2010, *available at* http://www.bronx.com/news/Society/1242.html; *see* Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 813-14 (2011).

265. *See* David Crary, *Prison Moms Fight Termination of Parental Rights*, L.A. TIMES, Jan. 12, 2003, at 16.

266. *Id.*; Court Improvement Program, Office of the Exec. Sec'y, Supreme Court of Va., *Table of Appeals of Termination of Parental Rights Cases to the Supreme Court of Virginia and the Court of Appeals of Virginia: Cases Disposed from January 1, 1996 Through April 9, 2013*, at 21-23, *available at* http://www.courts.state.va.us/courtadmin/aoc/cip/resources/tpr_table.pdf (last modified May 23, 2013) (noting only one case during a seventeen-year period where a TPR was reversed when the parent was incarcerated).

267. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, 111 Stat. 2115, 2116 (codified as amended in scattered sections of 42 U.S.C.).

268. Crary, *supra* note 265, at 16.

269. *See* § 103, 111 Stat. at 2118; Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (internal quotation marks omitted); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 119-20 (1996); Santosky v.

2. Enmeshment

TPR proceedings, like deportation proceedings, are so "enmeshed" with the criminal process that they are effectively quasi-criminal proceedings.[270] Incarcerated parents who face a TPR under the 15/22 rule may not have committed any act of abuse or neglect other than the criminal act that resulted in their criminal conviction.[271] These parents see a termination of their parental rights as a direct consequence of their incarceration—a direct result of the criminal process.[272] Accordingly, the criminal proceeding and the TPR proceeding are "most difficult to divorce."[273]

Moreover, in recognition of the fundamental right to parent one's children,[274] the procedural protections provided by the state in TPR proceedings are more extensive than in other civil proceedings.[275] As previously discussed, most states provide a court-appointed civil defense attorney for indigent parents facing a TPR proceeding.[276] Additionally, the burden of proof in TPR proceedings is higher than in other civil proceedings.[277] Generally, petitioners in civil trials have the burden of proving their case by a preponderance of the evidence.[278] However, a TPR involves a "loss[] of individual liberty sufficiently serious to warrant imposition of an elevated burden of proof," and thus, most states require the state to meet an elevated burden of proof akin to clear and convincing evidence.[279] Although this standard is not equivalent to the "reasonable doubt" standard in criminal cases, it is significantly higher than "preponderance of the evidence."[280]

Kramer, 455 U.S. 745, 753 (1982); Genty, *Damage*, *supra* note 31, at 1673-74; Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C. J. L. & SOC. JUST. 63, 68-71 (2012).

270. *See Padilla*, 130 S. Ct. at 1481; *M.L.B.*, 519 U.S. at 119-20; *see* Genty, *Damage*, *supra* note 31, at 1677-78.

271. *See* CWIG, TPR, *supra* note 82, at 3.

272. *See* Genty, *Damage*, *supra* note 31, at 1678.

273. *Cf. Padilla*, 130 S. Ct. at 1481 (internal quotation marks omitted) (noting that deportation proceedings are "difficult to divorce" from the criminal process (internal quotation marks omitted)).

274. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting).

275. *See* Mark Gruber, *The Burden of Proof in Divorce Cases: How to Win or Lose Divorce Issues*, AM. ACAD. MATRIMONIAL LAW., *available at* http://www.aaml.org/sites/default/files/the%20burden%20of%20proof%20in%20divorce-trial.pdf; *see also supra* Part III.B.

276. *See supra* Part III.B.

277. *Cf.* Gruber, *supra* note 275 (describing the standard or burden of proof in divorce cases).

278. Santosky v. Kramer, 455 U.S. 745, 755 (1982).

279. *Id.* at 759, 767-68. Indeed, some states even require that the party petitioning for a TPR prove their case beyond a reasonable doubt. *See, e.g.*, *In re* Deven O., No. 2013-368, slip op. at 3 (N.H. Nov. 7, 2013).

280. *See* BLACK'S LAW DICTIONARY 1301, 1380 (9th ed. 2009).

C. Criminal Defense Counsel's Duty

Whereas the first prong of the *Padilla* analysis focuses on the nature of the consequences, the second prong focuses on the defense counsel's actions with respect to the consequence.[281] Justice Alito's concurrence suggests that defense counsel's obligation depends on the legal complexity of the collateral consequence.[282] The law governing termination of parental rights is not complex, and thus, even under Alito's concurrence, defense attorneys have a heightened obligation to provide advice and counsel to their clients.[283] While the inquiry into whether an attorney provided effective counsel will be highly fact-intensive, his actions will be judged against an "objective standard of reasonableness."[284] Accordingly, criminal defense attorneys representing parents of minor children have the duty to provide advice and counsel concerning a TPR.[285]

1. Two Tracks Depending on Complexity

It is likely that the concurrence in *Padilla* establishes two standards, based upon the complexity of the legal issue, governing the extent of advice that criminal defense attorneys are obligated to provide to their clients.[286] When the terms of the law's collateral consequences are "succinct, clear, and explicit," defense attorneys are required to provide actual advice to their clients.[287] However, the burden on attorneys is much lower if the area of law is "complex" or specialized.[288] In these situations, the attorney need only refer the client to an attorney who specializes in that area of law.[289] The terms of the 15/22 rule are "succinct, clear, and explicit" in defining the termination of parental rights consequences, and therefore, attorneys representing parents should be required to provide more extensive advice to clients.[290]

Immigration law is generally much more specialized than family law.[291] Immigration law is governed by its own set of laws and

281. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010).
282. *See id.* at 1494 (Alito, J., concurring).
283. *See infra* Part IV.C.1.
284. *See Padilla*, 130 S. Ct. at 1482 (majority opinion) (internal quotation marks omitted).
285. *See infra* Part IV.C.3.
286. *See Padilla*, 130 S. Ct. at 1483.
287. *Id.*
288. *Id.*
289. *Id.*
290. *Cf. id.*
291. *See* Jill S. Bloom & Ronald M. Bookholder, *Immigration and Family Law: What Every Family Law Attorney Needs to Know About Immigration Law and Its Impact on Divorce and Related Matters*, MICH. B.J., July 2003, at 34, 34.

administrative regulations and is practiced largely within its own administrative courts.[292] Attorneys specializing in immigration law must be familiar not only with the U.S. immigration laws but also with criminal law, family law, the laws of other countries, and the political and social conditions of foreign nations.[293] These attorneys face language and cultural barriers, vague regulations, and a broken immigration system.[294] Most practicing attorneys, who do not specialize in immigration law, will spend little, if any, time on immigration issues either in their professional or their personal lives.[295]

On the other hand, every attorney experiences family law in some way—family law impacts our relationships with our parents, our children, and our current and former romantic partners.[296] Further, family law is considered a core course by bar examiners as it, unlike immigration law, is tested by on nearly every state bar examination.[297] Accordingly, all attorneys practicing law, including criminal defense attorneys, are assumed to have some basic competency in family law.[298] The complexity of family law lies not necessarily with the law itself but with the non-legal aspects that affect the legal practice, such as: the number of pro se litigants; the overburdened court system; the nature of the personal relationships involved; and the need to forge interdisciplinary relationships.[299] Accordingly, the benefit of an attorney specializing in family law is not his specialized knowledge of the law, but rather that the attorney has the ability to practice law in the unique set of circumstances belying most family law issues.[300]

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292. *See id.* at 34-37.

293. *See* Margaret D. Stock, *The Road Less Traveled: Becoming an Immigration Attorney*, 27 HARV. WOMEN'S L.J. 387, 390-92 (2004) (describing the author's career as an immigration attorney).

294. *See id.* at 390-93.

295. *See* Mirriam Seddiq, *Immigration Law: A Primer*, GPSOLO, Apr.–May 2011, at 47, 47.

296. *See* Michael Saini & Jessica Barnes, *A 50-Year Scoping Review of* Family Court Review*: An Analysis of the Journal's Core Values*, 51 FAM. CT. REV. 74, 78, 82-83 tbls.6, 7 & 8 (2013) (describing the areas of family law that have garnered the attention of family law practitioners).

297. *See generally Selected State Bar Examination Subjects*, UNIV. OF MD., FRANCIS KING CAREY SCH. OF L., http://www.law.umaryland.edu/students/resources/bar/documents/bar_subjects.pdf (last visited Nov. 23, 2013) (listing the topics tested on the bar examinations of select states).

298. *See id.*

299. *See* Barbara Glesner Fines, *Fifty Years of Family Law Practice - The Evolving Role of the Family Law Attorney*, 24 J. AM. ACAD. MATRIMONIAL L. 391, 405-06, 409 (2012); Mary Kay O'Malley, *Through a Different Lens: Using Film to Teach Family Law*, 49 FAM. CT. REV. 715, 716 (2011).

300. *See* Fines, *supra* note 299, at 405-06.

With respect to termination of parental rights specifically, the law triggering a TPR petition is "succinct, clear, and explicit."[301] As described above, ASFA clearly requires states to adopt a 15/22 rule.[302] In turn, each state implements its own TPR statutes, none of which are particularly complicated,[303] and the majority of which enumerates a fairly standard list of triggering conditions.[304] Further, since child protection agencies have the sole responsibility to file a TPR petition,[305] criminal defense attorneys can simply place a phone call to a child protection worker or a government attorney for the agency to discuss the likelihood of a TPR proceeding.[306]

Nevertheless, a TPR proceeding does have some complexities.[307] The decision by a child protection agency to file a TPR petition is highly fact specific, and rarely automatic.[308] Therefore, any legal generalizations may be difficult for a criminal defense attorney to make without further investigation.[309] Individual characteristics of the parent, child, or even extended family may determine whether TPR proceedings are commenced.[310] Whether or not a parent will have a TPR petition filed against them may depend on whether there is a statutory or case law "best interests of the child" safety valve.[311] Moreover, unlike other consequences that only apply after a conviction, TPR proceedings may stem from a pre-conviction detainment.[312] Accordingly, family-specific circumstances, repeated delays in a trial where the defendant is detained prior to trial, or multiple arrests may trigger TPR proceedings.[313]

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301. *Cf.* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (applying the same standard to deportation).

302. *See supra* Part II.C.

303. *See generally* CWIG, TPR, *supra* note 82 (listing each state's TPR law).

304. *See id.* at 2-4.

305. *See id.* at 3.

306. *See* Mimi Laver, *Incarcerated Parents: What You Should Know When Handling an Abuse or Neglect Case*, 20 CHILD L. PRAC. 145, 150-51, 154 (2001).

307. *Cf.* Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010) (contemplating a distinction between complex and straightforward areas of law).

308. *See* LEE ET AL., *supra* note 38, at 1, 7-8.

309. *See generally id.* (analyzing a variety of TPR cases involving parental incarceration).

310. *See* CWIG, TPR, *supra* note 82, at 2-4; *see also* 3 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 16:6 (4th ed. 2009).

311. *See* CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 2-4 (2012) (internal quotation marks omitted), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf.

312. *See* LEE ET AL., *supra* note 38, at 78, 115, 131-32, 175.

313. *See, e.g.*, Charleston Cnty. Dep't of Soc. Servs. v. Marccuci, 721 S.E.2d 768, 770-72 (S.C. 2011) (discussing a TPR petition filed against a father whose minor child was removed from his custody after he was erroneously arrested, but upon that arrest, the police discovered an unrelated out-of-state probation violation, which required his further detention while court proceedings were scheduled).

However, when analyzed in light of *Padilla*, the complexity of a TPR proceeding and a deportation hearing are comparable.[314] In both, the event triggering the proceeding may be explicitly enumerated.[315] A crime of "moral turpitude" may automatically trigger a deportation hearing, just as a child's absence from his parent's care due to parental incarceration may automatically trigger a TPR hearing.[316] Both proceedings have consequences that affect much more than the individual clients; for instance, the outcome of either deporation or TPR can lead to the permanent separation of families.[317] Finally, both proceedings may be a consequence that a criminal defendant finds more unbearable than the loss of liberty.[318]

2. Objective Standard of Reasonableness

Whether an attorney provided effective assistance of counsel will be judged against an "objective standard of reasonableness."[319] In *Padilla*, the Court offered two alternative rationales for its decision; namely, whether "preserving the client's right [vis-à-vis the collateral consequence] . . . may be more important to the client than any potential jail sentence,"[320] or whether the attorney's actions "fell below an objective standard of reasonableness."[321] Criminal defense attorneys can be held accountable for providing advice pertaining to a TPR under the first rationale.[322] It is also possible that criminal defense attorneys who fail to advise their client about the risk of TPR may fail within the ambit of *Padilla*'s second rationale.[323]

Generally, judges have assumed that an individual will strive to protect her liberty interest or her freedom from incarceration.[324]

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314. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring).

315. *See id.*

316. *Cf. id.* (internal quotation marks omitted) (discussing how deportation can be an almost automatic consequence of conviction in certain instances); CWIG, TPR, *supra* note 82, at 2.

317. *See Padilla*, 130 S. Ct. at 1484 (majority opinion); CWIG, TPR, *supra* note 82, at 1.

318. *See Padilla*, 130 S. Ct. at 1480.

319. *See id.* at 1482 (internal quotation marks omitted).

320. *See id.* at 1483 (internal quotation marks omitted).

321. *See id.* at 1482 (internal quotation marks omitted).

322. *See* Interview with Tina, *supra* note 1. For parents facing the possibility of a TPR, it is reasonable that preserving their parental rights may be more important than avoiding a jail sentence. *Id.*

323. *See infra* notes 333-42 and accompanying text; *cf. Padilla*, 130 S. Ct. at 1482.

324. *See, e.g.*, Martinez v. Court of Appeals of Cal., 528 U.S. 152, 160-61 (2000) (noting that constitutional protections during criminal proceedings are "grounded in part in a respect for individual autonomy," as it is the individual who will "bear the consequences" of the process); Baker v. McCollan, 443 U.S. 137, 153, 156 (1979) (Stevens, J., dissenting) (discussing the severe burden of incarceration on the individual and the societal interest in avoiding incarceration of the innocent); Smith v. State, 869 So. 2d 425, 428 (Miss. Ct. App. 2004) (finding effective assistance of

However, a parent is more than just an individual; she is the mother and caregiver of a child.[325] The Court has recognized that the bond between the parent and the child is incredibly important and should be protected, unless there is a countervailing compelling state interest.[326] Additionally, as previously discussed, a TPR is a particularly "severe" consequence.[327] Therefore, even under an objective standard whereby preserving one's freedom from incarceration is viewed as extremely important to the client, protecting the parent-child relationship "may be more important to the client than any potential jail sentence."[328]

Alternatively, the attorney's actions may be compared against the "expectations of the legal community."[329] In the context of criminal defense attorneys representing non-citizens, the Court found that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[330] As evidence, the Court pointed to professional standards adopted by groups such as the National Legal Aid and Defender Association and the American Bar Association.[331] Admittedly, there are far fewer examples of professional norms requiring criminal defense attorneys to counsel their clients regarding TPR proceedings.[332] However, a growing number of professional guides direct criminal defense attorneys to advise their clients as to the collateral consequences of criminal convictions including termination of parental rights.[333] For instance, in

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counsel when the defendant's attorney negotiated a plea deal that allowed the defendant to avoid incarceration).

325. *See* Raeder, *supra* note 42, at 8.

326. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 87 (2000).

327. *See* Kennedy, *Mothering*, *supra* note 124, at 184-87; *supra* notes 81-89 and accompanying text.

328. *Cf. Padilla*, 130 S. Ct. at 1483 (internal quotation marks omitted).

329. *Id.* at 1482.

330. *Id.*

331. *Id.*

332. *See, e.g.*, Andrew L. Cohen, *Special Considerations in Representing Parents*, *in* CHILD WELFARE PRACTICE IN MASSACHUSETTS § 22.3.5–.6 (2012).

333. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (2013); ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION standards 4-1.2, 4-4.1, 4-5.1 (3d ed. 1993); Howard Davidson, Policy Update, *ABA House of Delegates Passes Nine Policy Resolutions with Child/Youth Impact*, 29 CHILD L. PRAC. 27, 28 (2009); *see also* LEGAL MOMENTUM, ATTORNEY GUIDE TO REPRESENTING IMMIGRANT VICTIM PARENTS WHO ARE AT RISK OF DETENTION/DEPORTATION, IN DETENTION, OR HAVE BEEN DEPORTED 1, *available at* http://iwp.legalmomentum.org/family-law-for-immigrants/parental-rights-of-detained-immigrants/AttyGuidetoParentalTermination%20of%20Parental%20Rights.pdf; THE PUB. DEFENDER SERV. FOR D.C., COLLATERAL CONSEQUENCES OF CRIMINAL RECORDS IN THE DISTRICT OF COLUMBIA: A GUIDE FOR CRIMINAL DEFENSE LAWYERS 21 (2010), *available at* http://www.reentry.net/search/item.121665Collateral_Consequences_of_Criminal_Convictions_in_the_District_of_Columbia?tab=pane_search-results-1.

Massachusetts, there are Continuing Legal Education programs for practitioners representing parents in a variety of criminal and civil contexts.[334] In addition, as previously discussed, there is likely an ethical obligation for defense attorneys to provide guidance to their parent-clients about the risk of a TPR.[335]

Additionally, advising clients of the potential collateral consequences of a criminal conviction is becoming less daunting due to technological advancements.[336] Prior to *Padilla*, policymakers began expressing growing awareness of the severe effects of collateral consequences.[337] Accordingly, in 2007, Congress passed the Court Security Act of 2007,[338] which mandated that the National Institute of Justice study and report on the collateral consequences of criminal convictions in all fifty states.[339] In response to this congressional mandate, the National Institute of Justice contracted with the American Bar Association to create the National Inventory of the Collateral Consequences of Conviction.[340] This website has begun to create a user-friendly tool which would allow users to search by state for a variety of collateral consequences resulting from individual convictions.[341] While not yet completed for all crimes, collateral consequences, or jurisdictions, in the future, this could be a very helpful tool for criminal defense attorneys when advising their clients.[342] Future grant money for this project should be tied to improving the tool with respect to the potential for a TPR proceeding.[343]

3. Duty of Criminal Defense Counsel with Respect to TPR

The Court in *Padilla* held that, "[w]hen attorneys know that their clients face possible . . . separation from their families, they should not

334. *See generally, e.g.*, Cohen, *supra* note 332.

335. *See supra* Part III.C.

336. *See* NATIONAL INVENTORY, *supra* note 60.

337. *See* Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510, 121 Stat. 2534, 2543-44; Velmanette Montgomery, *Support Senator Montgomery's "Incarcerated Parents" Bill*, N.Y. SENATE (Sept. 30, 2009), http://www.nysenate.gov/news/support-senator-montgomerys-incarcerated-parents-bill (describing a proposed bill which would mitigate ASFA's impact when the primary grounds for TPR is parental incarceration).

338. Pub. L. No. 110-177, 121 Stat. 2534 (2007).

339. § 510, 121 Stat. at 2543-44.

340. NATIONAL INVENTORY, *supra* note 60.

341. *Id.* (allowing for searches based upon keyword, offense, or collateral consequence, and noting whether the consequence is automatic or discretionary and the length of time that the consequence is applicable). However, as of February 13, 2013, very few searches with this tool indicated that a TPR was a consequence of a crime. *See id.*

342. *See id.*

343. *Id.*

be encouraged to say nothing at all."[344] However, the Court also expressed concern that the attorneys should not be required to advise their client regarding matters of specialized, complex areas of law.[345] In those instances, criminal defense attorneys would only be obligated to advise their clients to seek advice from an attorney specializing in the applicable area of law.[346] If the Court determined that the law of TPR proceedings is complex rather than straightforward, then any additional burden on criminal defense attorneys would be nominal at best.[347] Therefore, the majority of those parents facing incarceration, who have very limited funds and would not be able to afford additional legal advice, would not gain any real protection under *Padilla*.[348] However, since the collateral consequence of TPR is generally clear, criminal defense attorneys have "the duty to give correct advice."[349]

Criminal defense attorneys who are representing parents should swiftly determine what the child's living arrangement is and whether a child protection agency is involved.[350] Parents should be interviewed to learn about their goals—staying out of jail may not be the most pressing concern.[351] For parents who are concerned about the possibility of a TPR, the attorney should provide ongoing advice that reflects how changes in the criminal proceedings may affect the likelihood of a TPR petition.[352] If a parent is also represented by a civil defense attorney for the child protection proceeding, both attorneys have an obligation to coordinate with one another to develop the best holistic legal strategy for the client.[353] Furthermore, criminal defense attorneys should advocate for alternative sanctions for criminal offenses that would limit the effect of incarceration on the family.[354]

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344. *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1484 (2010).

345. *Id.* at 1483.

346. *Id.*

347. *See id.;* MUMOLA, *supra* note 20, at 10 tbl.13.

348. *See* MUMOLA, *supra* note 20, at 10 tbl.13 (reporting that more than a third of incarcerated parents had personal income of less than $600 in the month prior to incarceration); *see also Padilla*, 130 S. Ct. at 1483.

349. *Padilla*, 130 S. Ct. at 1483.

350. *See* McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 486 (2005) [hereinafter Smyth, *Holistic*].

351. *See Padilla*, 130 S. Ct. at 1480 (noting that incarceration may not be the most pressing concern for the accused person).

352. *See* Smyth, *Holistic*, *supra* note 350, at 487.

353. *See id.* at 486.

354. *See Alternative Sanctions for Female Offenders*, 111 HARV. L. REV. 1863, 1921-22 (1998); *see also* Abramowicz, *supra* note 264, at 868-74.

D. A Three-Prong Solution

By extending the rationale in *Padilla* to address TPR proceedings, parents currently facing incarceration would have immediate protection from surprise TPR petitions.[355] These parents would no longer lack protection from losing the rights to their children, while partisan legislatures attempt to pass statutory protections.[356] Moreover, these parents would no longer have to rely on ethical obligations that provide little, if any, relief when criminal defense attorneys fail to meet these ethical obligations.[357] The protection provided by *Padilla*, however, does have several practical limitations.[358]

If a parent overcomes the presumption that the legal advice rendered by her defense counsel concerning the TPR proceeding is sufficient and meets the threshold in *Padilla*,[359] she faces additional procedural requirements to prevail on her claim.[360] Most notably, she must also satisfy the second prong of the test for ineffective counsel established in *Strickland*.[361] To satisfy the second prong of *Strickland*, that parent must also prove that she was "prejudiced" by the ineffective assistance of counsel.[362] In order to do so, a parent must prove that, but for the ineffectiveness of counsel, it would have been rational under the circumstances to have chosen a different legal strategy.[363] While a full analysis of the second prong of *Strickland* is outside the scope of this Note, this additional hurdle may significantly limit the ability of parents to gain relief.[364]

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355. *See Padilla*, 130 S. Ct. at 1486. Extending this rationale to current and future TPR proceedings will not likely benefit parents whose rights have already been terminated. *See* Chaidez v. U.S., 133 S. Ct. 1103, 1113 (2013) (declining to apply the "new rule in *Padilla*. . . . [to] defendants whose convictions became final prior to *Padilla*"); *see also* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, 111 Stat. 2116, 2116 (codified as amended in scattered sections of 42 U.S.C.) (emphasizing the need for permanency).

356. *See* George A. Nation III, *We the People: The Consent of the Governed in the Twenty-First Century: The People's Unalienable Right to Make Law*, 4 DREXEL L. REV. 319, 392-93 (2012).

357. *See supra* Part III.C.

358. *See supra* Part IV.C; *see also Padilla*, 130 S. Ct. at 1482-84.

359. *See Padilla*, 130 S. Ct. at 1485 (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).

360. *See, e.g.*, *id.* The Court in *Padilla* also notes that a parent who collaterally attacks a guilty plea based upon an ineffective assistance of counsel claim will lose the benefit of the plea. *Id.* This Note will not discuss this consequence of pursing a *Padilla-Strickland* claim, but the *Padilla* Court did note that this procedural hurdle may discourage some individuals from bringing this claim out of fear of achieving a worse outcome. *Id.* at 1485-86.

361. *Strickland*, 466 U.S. 668, 687 (1984).

362. *Id.*

363. *See Padilla*, 130 S. Ct. at 1485 (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000)).

364. *See id.* (noting that lower courts are adept at using the second prong of *Strickland* to limit

Additionally, although a TPR proceeding is likely a straightforward, rather than complex, area of law, a court may determine otherwise.[365] Accordingly, under *Padilla*, if a TPR proceeding is considered a complex consequence, then a criminal defense attorney may only be obligated to suggest to his client that she should consult an attorney specializing in TPR.[366] This is not an ideal interpretation, as the defendant-parent is not likely to be in the position to afford a second attorney.[367]

These limitations on *Padilla-Strickland* relief for incarcerated parents facing a TPR proceeding necessitate a more comprehensive solution; consequently, a three-prong approach should be utilized to protect the interests of incarcerated parents.[368] The first prong must entail courts extending *Padilla* to situations involving TPR proceedings.[369] This would provide immediate protection to vulnerable parents.[370]

The second prong requires statutory protections for parents.[371] Legislatures need to implement statutes mitigating the collateral consequences of incarceration on parents and their children.[372] State legislatures are in the best position to address the particular needs of incarcerated parents in their states.[373] Carefully tailored statutes could create state-specific social safety nets for incarcerated parents; improve local child protection agencies; and place specific duties on practicing criminal defense attorneys when parents of minor children are involved in the criminal justice system.[374] Additionally, Congress must amend ASFA to provide more procedural protections for incarcerated parents to mitigate the severity of the 15/22 rule.[375] An ideal statute would specifically provide that criminal defense attorneys who represent parents must identify the living arrangement of the children; assess the

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the number of successful appeals).

365. *See supra* Part IV.C.

366. *Cf. Padilla*, 130 S. Ct. at 1483.

367. *See* Raeder, *supra* note 42, at 7.

368. *See supra* Parts III–IV.

369. *See supra* Part IV.C.

370. *Cf. supra* Part III.A.

371. *Cf. supra* Part III.A.

372. *See* ALLARD & LU, *supra* note 174, at 30-34.

373. *See* Thomas S. Ulen, *Economic and Public-Choice Forces in Federalism*, 6 GEO. MASON L. REV. 921, 946 (1998) (suggesting that state governments are "sensitive to local interests and residents" and able to develop innovative solutions in response to their residents' needs in a way that a larger federal government cannot).

374. *Cf. supra* Part III.A.

375. *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103, 111 Stat. 2116 2118 (codified as amended in scattered sections of 42 U.S.C.).

risk of a TPR; advise their clients as to that risk; assess the client's desire to avoid a TPR; and advocate for their client within the context of the criminal justice system, as necessary.[376] Statutory changes could provide more protection for future parents than parents are currently entitled to under *Padilla*.[377]

Finally, the third prong requires enforcement of ethical obligations on criminal defense attorneys to provide competent advice to clients who are parents.[378] Strict enforcement of an ethical obligation for criminal defense attorneys to provide effective counsel will provide prospective, systemic relief.[379] By creating an ethical norm that requires attorneys to advise their clients about TPR proceedings, more parents would receive guidance about the process and would not receive a surprise TPR petition.[380] The three-prong approach is preferred over any one approach individually, as it relies on the judiciary, legislatures, and members of the bar to protect the vulnerable population of incarcerated persons.[381] Each prong is necessary to provide comprehensive protection for both currently incarcerated parents and for parents facing incarceration in the future.[382]

V. CONCLUSION

The increase in the number of incarcerated women, combined with the severe effects of the 15/22 rule, has dramatically increased the risk that a incarcerated mother face a termination of her parental rights.[383] Currently, existing ethical and statutory protections have been insufficient to protect these mothers' rights to parent their child.[384] However, after *Padilla*, it is likely that there is a Sixth Amendment obligation on criminal defense attorneys to advise their clients about the effect of the criminal process on a TPR proceeding.[385] This advice should not be limited to a mere suggestion that clients seek legal advice

376. *Cf. supra* Part III.A–B.

377. *Cf. supra* Part IV.D.

378. *See supra* Part III.C.

379. *See* Zacharias, *supra* note 158, at 693-94; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1–.2, 1.4 (2013).

380. *Cf.* Teresa Stanton Collett, *Teaching Professional Responsibility in the Future: Continuing the Discussion*, 39 WM. & MARY L. REV. 439, 444-45 (1998) (suggesting that ethics education will do little until ethics violations are taken seriously by the legal profession).

381. *See supra* Part III.

382. *See supra* Part III.

383. *See supra* Part II.C–D.

384. *See supra* Part III.A–C.

385. *Cf.* Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010); *see also supra* Part IV.B–C.

from an attorney specializing in TPR law.[386] Instead, criminal defense attorneys are obligated to protect this unique population by providing advice and counsel throughout the criminal proceeding to their clients concerning how best to protect the family unit from TPR proceedings.[387]

Despite this constitutional protection, a more comprehensive approach is desirable.[388] The Sixth Amendment obligation creates the minimum protection for parents.[389] From there, legislatures should draft legislation that specifically codifies the right for criminal defendants to be advised as to the effect of the criminal process on their parental rights.[390] Further, states need to codify ethical obligations for criminal defense attorneys, which specify that in order to provide competent representation, they must counsel their clients about the potential for TPR.[391] Finally, grievance committees must uniformly enforce these ethical norms in a way that creates a universal standard of competency that protects incarcerated parents.[392] This three-fold approach is most likely to ensure that parents facing incarceration are surprised by a termination of parental rights.[393] Instead, the fundamental right to parent one's child will be protected.[394]

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386. *See supra* Part IV.C.3.
387. *See supra* Part IV.C.3.
388. *See supra* Part IV.D.
389. *See supra* Part IV.D.
390. *See supra* Part IV.D.
391. *See supra* Part IV.D.
392. *See supra* Part IV.D.
393. *See supra* Part IV.D.
394. *See supra* Part IV.D; *see also supra* notes 261-62 and accompanying text.

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