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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

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

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. DEPT' 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 Amendment⁴⁹ 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

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

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

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 Act⁷⁵ 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

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 evidence⁸⁵ 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

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 1962⁹⁶ 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

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

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

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

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

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

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

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

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. Paredes*, 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

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/tp_r_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

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

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 deportation 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

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

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

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

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 pursuing 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

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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