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January 2012

The Long Arm of the Law: Incarceration and the Ordinary Family

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THE LONG ARM OF THE LAW:

INCARCERATION AND THE ORDINARY FAMILY

By Kimberly L. Alderman*

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ABSTRACT:

This Article examines how the ordinary family uses popular narratives about the criminal justice system to cope with and reconcile the increasing intrusion of the system into the family experience. It explores these narratives in the context of a morality play, discussing common perceptions about the court, law enforcement, criminals, and the law itself, as reflected through dramatic television shows and movies. The Article argues that these narratives cultivate a common bond that crosses race and class, giving ordinary families a common enemy: a dysfunctional criminal justice system that systematically overpunishes and overincarcerates.

I. INTRODUCTION

Incarceration rates in the United States have risen exponentially over the past three decades.[1] While incarceration disproportionately affects racial minorities and men, no race, gender, or class is exempt from the ever-expanding reach of punitive law enforcement measures.[2] Increasing criminal prosecution and incarceration rates are touching more and more ordinary families.[3]

This Article explores how the ordinary family uses popular narratives about the criminal justice system to cope with and reconcile the increasing intrusion of the system into the family experience. Part II discusses rising incarceration rates and demonstrates that incarceration is touching more ordinary families every day. Part III considers how the ordinary family adopts narratives

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[1] Angela Rudolph, *Building Brighter Futures in Chicago*, CORRECTIONS TODAY, April 2007, at 38, 30

[2] Adam Liptak, *1 in 100 U.S. Adults Behind Bars, New Study Says*, N. Y. TIMES, Feb. 28, 2008, at A14 (showing disproportionate incarceration rates between invididuals of different race and gender); *see also* THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA IN 2008 3 (2008) (showing increased incarceration rates in general for all groups of people).

[3] Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361, 1419 n. 19 (2004) (defining ordinary people as "non-elite Asians, blacks, American Indians, Latinos, whites, and women, including immigrants").

about the criminal justice system as a means of coping with and reconciling having an incarcerated loved one.[4] Part IV concludes.

II. SOMEONE'S FATHER, BROTHER, OR SON

In the last thirty years, incarceration rates in the United States have more than tripled.[5] In 2007, the prison population peaked, with 1 in 100 U.S. adults behind bars.[6] Incarceration disproportionately affects minorities, men, and the poor, but no race, gender, or class can escape its increasing pervasiveness.[7]

The exponential increase in incarceration is touching all ordinary families, not just minorities and the socioeconomically disadvantaged.[8] Each of the 1.5 million incarcerated men in America is someone's father, brother, or son.[9] Each

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[4] Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC'Y REV. 197, 200 (1995) ("[T]o qualify as a narrative, a particular communication must minimally have three elements or features. First, a narrative relies on some form of selective appropriation of past events and charactesr. Second, within a narrative the events must be temporally ordered . . . . Third, the events and character must be related to one another and to some overarching structure, often in the context of an opposition or struggle.").

[5] BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *Key Facts at a Glance, Imprisonment Rate Data Table* (last updated Sept. 30, 2011), http://bjs.ojp.usdoj.gov/content/glance/tables/incrttab.cfm [hereinafter BJS *Imprisonment Rates*] (showing 139 per 100,000 incarcerated in 1980 and 502 per 100,000 incarcerated in 2009).

[6] BJS *Imprisonment Rates*, *supra* note 5 (showing a peak of 506 incarcerated persons per 100,000 in 2007, then a slight decline in 2008-09).

[7] Liptak, *supra* note 2 (citing THE PEW CENTER ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA IN 2008 3 (2008)) (referring to incarceration rates of 1 in 64 Hispanic adults, 1 in 29 black adults, and 1 in 194 white adults as well as rates of 1 in 54 men and 1 in 580 women, with rates for black women between the ages of 35 and 39 matching the national trend of 1 in 100).

[8] Citation needed

[9] BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PRISONERS IN 2008 36 (Dec. 2009) [hereinafter PRISONERS IN 2008].

of the 105,300 incarcerated women is someone's mother, sister, or daughter.[10] Every year, more people have to deal with the emotional and practical consequences of having a close family member incarcerated.[11]

When a family member is incarcerated, the family unit is disrupted. The state regulates all contact and familial support with incarcerated family members, thereby entering into the once-private family sphere.[12] The incarcerated family member is unable to contribute financial support to his or her family, and the resources of the remaining family members are strained.[13] Families must increasingly turn to public assistance, further involving the state in family affairs.[14]

The ordinary family is further disrupted by the desocialization of the incarcerated family member from family life.[15] Among parents, the unincarcerated caregiver must assume primary financial and emotional

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[10] *See id.*

[11] *See id*. at 1.

[12] Justin Brooks & Kimberly Bahna, *"It's a Family Affair" – The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 274 (1994) ("[A] family is often unable to function as a unit when one of its members is incarcerated. The state regulates the contact and familial support between inmates and their families for the period of incarceration.").

[13] *See* Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 813 (2011).

[14] Brooks & Bahna, *supra* note 12, at 272 ("Finally, society ultimatly bears the burden of familial incarceration because . . . their families often become increasingly unstable, and economically dependent on the public assistance system.").

[15] Debra A. Harley, *Vocational Rehabilitation Services for an Offender Population*, 62 J. REHABILITATION 45, *3 (1996) ("[P]risoners are deliberatly de-socialized . . . .").

responsibility for children.[16] Many primary caregivers must take on this additional responsibility while they simultaneously cope with the loss of a partner, creating feelings of abandonment and, ultimately, anger.[17] Consequently, there is a high divorce rate among inmates and spouses, further splintering already challenged families.[18]

A devastating domino effect results. Formerly incarcerated people are likely to become reincarcerated without the support of their families.[19] Children of incarcerated parents are more likely to become incarcerated themselves later in life as a direct result of separation from their incarcerated parent.[20] More immediately, the children experience educational, behavioral, and emotional problems and feelings of loss, anger, and embarassment.[21] These stressors prompt

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[16] Brooks & Bahna, *supra* note 12, at 282.

[17] *Id*. at 283.

[18] *See id.*; Ellen Barry, River Ginchild & Doreen Lee, *Legal Issues for Prisoners with Children*, *in* CHILDREN OF INCARCERATED PARENTS 147, 148 (Katherine Gabel & Denise Johnston eds., 1995) ("[A] significant number of families fall apart under the strain of the arrest and incarceration of the father, and in these circumstances many wives of prisoners separate from their partners or initiate divorce actions.") (citation omitted).

[19] Citation needed.

[20] *See* Note, *On Prisoners and Parenting: Preserving the Tie That Binds*, 87 YALE L.J. 1408, 1416 (1978) ("Lack of continuity in parenting of a school-age child can cause academic difficulties and delinquent or criminal behavior.").

[21] *See* Brooks & Bahna, *supra* note 12, at 281-82.

ordinary families to develop narratives to cope with and reconcile the disordered family structure and the invasion of the state into the once-private family life.[22]

III. THE MORALITY PLAY

The ordinary family adopts narratives to reconcile the incarceration of loved ones and the corresponding intrusion of the state into family life.[23] Psychologist Robyn Fivush explains:

> Narratives are the way in which humans make sense of the world. It is as we create organized, explanatory accounts of actions in the world, which are integrated with subjective thoughts and emotions about those actions and outcomes, that we create meaning from these experiences. Especially in the case of negative and stressful events which create a problem to be solved, the ability to construct a coherent narrative that allows for the expression and regulation of thoughts and emotions may be a critical aspect of meaning making.[24]

Ordinary families' narratives are reflected in popular culture, such as television and movie dramas rooted in realism.[25] These dramas attempt to bring viewers a realistic account of the world by using fictional yet believable

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[22] Citation Needed

[23] Robyn Fivush et al., *Meaning Making in Mothers' and Children's Narratives of Emotional Events*, 2008 MEMORY §16(6), at 579 (citations omitted).

[24] *Id.*

[25] Citation Needed?

characters.[26] They are produced in a manner that makes them feel more "real" by decreasing frame rate,[27] omitting artificial exposition,[28] and employing non-professional actors.[29] The popular narratives revealed in realist dramas show the criminal justice system as a morality play, with each actor playing his or her role accordingly.[30]

Law enforcement officers are our misled heroes.[31] They are "incompetent, brutal, and self-aggrandizing."[32] As a general rule, they are either evil or

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[26] *See* Jason Mittell, *The Wire in the Context of American Television*, JUST TV BLOG (Feb. 9, 2010), http://justtv.wordpress.com/2010/02/09/the-wire-in-the-context-of-american-television/ (discussing how television show *The Wire* does not incorporate "explicit exposition") (last visited Nov. 9, 2011).

[27] Suggest footnote defining "decreased frame rate."

[28] Suggest footnote explaining "artificial exposition.

[29] *See* Mittell, *supra* note 26; *see also* Margaret Talbot, *Stealing Life: The Crusader Behind "The Wire"*, NEW YORKER (Oct. 22, 2007), http://www.newyorker.com/reporting/2007/10/22/071022fa_fact_talbot?currentPage=1 ("The show's departure from Hollywood formulas may be nowhere more palpable than in its routine use of nonactors to fill the minor roles.").

[30] Citation needed?

[31] *See* Randy Cohen, *Good Cops, Bad Cops…and Bad Emmys*, N.Y. TIMES (Sept. 14, 2009, 11:59 PM), http://ethicist.blogs.nytimes.com/2009/09/14/good-cops-bad-cops-and-bad-emmys/ ("[V]arious police programs [are] . . . built around the Hero Cop. It might be a Hero Cop with a flaw – a drinking problem, a disdain for the rules . . . ."); *see also* Susan Glen, *Naked-Ass Swan Song*, POP MATTERS, http://www.popmatters.com/tv/reviews/n/nypd-blue.html (last updated Nov. 1, 2011) (describing the lead detective, Andy Sipowicz, on *NYPD Blue* as "a racist and homophobic jerk you can't help but love").

[32] *Realism*, WIRE FAN (March 10, 2008, 2:30 AM), http://thewirefans.wordpress.com/2008/03/10/realism/ ("Many officers portrayed on the show are incompetent, brutal, self-aggrandizing, or hamstrung by bureaucracy and politics."); *see also* Kevin K. Ho, Comment, *"The Simpsons" and the Law: Revealing Truth and Justice to the Masses*, 10 UCLA ENT. L. REV. 275, 279 (2003) (describing the chief of police on a popular telivision show *The Simpsons* as "plainly incompetent" and "only somewhat concerned"); Joe Rhodes, *Letting Go of all That Grime is Tougher Than He Thought*, N.Y. TIMES, Sept. 2, 2008, at

ineffective.[33] This perception is reflected in the shows *The Shield* and *The Wire*, and in the movie *Training Day*, each of which suggests that police corruption is the norm rather than the exception.[34]

The occasional ethical officer is hamstrung by bureaucracy and politics.[35] One of the earliest examples of this type of character is Harry Callahan of *Dirty Harry*, whose ruthlessness made him effective.[36] Popular narratives suggest that police officers--regardless of whether they are corrupt or of the vigilante type--suffer the "intellectual vanity" of believing they are smarter than criminals.[37]

E (discussing Michael Chilkis' portrayal of the "brutal and besieged rouge cop" on television series *The Shield*).

[33] *See* Ho, *supra* note 32, at 279; *see also* Douglas Durden, *It's Corruption as Usual 'Shield' Cops at Their Evil Best in Season Two*, RICHMOND TIMES-DISPATCH, January 4, 2003, at G-4 (discussing *The Shield's* Officer Mackey: "I can't think of another leading character so evil . . . . [However,] Mackey is being out-eviled by his fellow officers.").

[34] *See* Durden, *supra* note 33; *see also* Bennett Capers, *Crime, Legitimacy, Our Criminal Network, and the Wire*, 8 OHIO ST. J. CRIM. L. 495, 460 (2011) ("[The cops] are plagued by nepotism and internal corruption"); *see also* Jon Loevy, *Truth or Consequences: Police "Testilying"*, 36 No. 3 LITIGATION 13, 16 n. 3 (Spring 2011) (describing the movie *Training Day* as "the story of rogue cops on a criminal rampage . . . .").

[35] *Realism*, *supra* note 32.

[36] *See* Russell D. Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375, 1413 (2009) (describing one of the earlier examples of this character type: "[Dirty Harry] Callahan is compelled to break the law on the books in order to bring about a more morally satisfying law on the ground . . . . *Dirty Harry* spawned a vast army of sequels and other subsequent films that exploited the same basic [vigilante police drama] themes.").

[37] *Creator David Simon on Cutting "The Wire,"* THE WIRE FAN (Mar. 10, 2008) http://thewirefans.wordpress.com/category/creator-david-simon-on-cutting-the-wire/ (discussing the character of Detective McNulty, the creator of the television series *The Wire* explains how fans didn't want to believe that McNulty was acting in an unethical manner: "His intellectual vanity has been on display since the first season.").

Criminals are portrayed in two ways: either as victims of their situation, or as bad, evil characters.[38] As main characters, they are victims of their situation.[39] They resort to crime because society has failed them.[40] In instances where criminals are bad or evil, they are not real, three-dimensional people; they are stereotypes completing acts necessary to propel the plot forward.[41] The true villain, both complex and evil, has been retired to superhero films.[42] Popular narratives cast criminals as either nameless thugs, who assault innocent citizens, or as victims of circumstance, resorting to crime because society has failed them. They are then further punished by the police and courts for their misfortune.[43]

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[38] Citation Needed?

[39] *See* Susan A. Bandes, *And All the Pieces Matter: Thoughts on The Wire and the Criminal Justice System*, 8 OHIO ST. J. CRIM. L. 435, 444 (2011) (discussing the criminal character D'Angelo Barksdale on *The Wire*: "It is clear that he has been raised to fill a certain role. It is evident that despite his moral qualms and deep unease about that role, he has no real grasp of what other options might be available to him . . . .").

[40] Citation needed

[41] *See* Bandes, *supra*, note 39 at 435 ("[Police shows focus] on good, if sometimes imperfect, cops trying to find the real bad guys - the perpetrators . . . . [They do] not raise disquieting questions about . . . the social and political arrangements that lead to a permanent underclass.").

[42] *See, e.g.*, Ra's al Ghul in BATMAN BEGINS (Warner Bros. Pictures 2005); the Joker in THE DARK KNIGHT (Warner Bros. Pictures 2008); and the Green Goblin in the SPIDER-MAN series (Sony Pictures Entertainment 2002-2007). Complex and evil villains can also be seen in characters such as Bill in KILL BILL (Miramax Films 2003) and Agent Smith in the MATRIX series (Warner Bros. Pictures 1999-2003), both of whom mimic the traditional villain role in westerns and martial arts movies, which lack the realism component prevalent in modern dramas.

[43] *See generally* Bandes, *supra*, note 39 (discussing characters who are forced to perform criminal activities because of society and then further punished by the law).

The "victims of situation" narrative is demonstrated by the main characters of the television shows *Breaking Bad* and *Weeds*.[44] In *Breaking Bad*, a high school chemistry teacher must manufacture methamphetamine in order to pay for medical treatment for his advanced lung cancer.[45] In *Weeds*, a suburban mother is forced to manufacture marijuana to keep the family house after her husband suddenly dies.[46] These are normal, arguably blameless, people who are in tough situations and have little choice but to resort to criminal activity to protect their families.[47] They are middle-class; they are white; they are ordinary; and they are forgiveable. In these particular examples, the crimes are strongly driven by a positive character trait: the desire to take care of one's family. In this way, the ordinary family can respect the characters *for* their crimes, not just in spite of them.

The ordinary family views the court system as inherently dysfunctional.[48] Judges are believed to be presumptively biased against criminal defendants.[49]

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[44] *Breaking Bad* (AMC 2008-Present); *Weeds* (Showtime 2005-Present).

[45] Ginia Bellafante, *Better Living Through Chemistry*, N.Y. TIMES, Mar. 6, 2009, at C1.

[46] Dave Itzkoff, *Mommy, What's That in Your Purse?*, N.Y. TIMES, July 31, 2005, at 21.

[47] Citation Needed?

[48] Ho, *supra* note 32, at 282-83 ("The emphasis on truth lying outside of the legal system in *The Simpsons* reveals a public distrust of the deliberative process of trial . . . "). Consider also how *And Justice for All* (1979) and *Presumed Innocent* (1990) served as starting points for the popular inquiry into whether the court system is dysfunctional.

[49] Susan Bandes, *We Lost it at the Movies: The Rule of Law Goes from Washington to Hollywood and Back Again*, 40 Loy. L.A. L. REV. 621, 627 (2007) ("If [the judge] does have 'character,' this

The jurors are portrayed as disinterested and ignorant, not truly engaged in the process of finding justice.[50] These elements of dysfunction combine to make the trial process not a search for truth, but instead a formality and mere precursor to incarceration.[51]

Early examples of the dysfunctional criminal justice system narrative include *And Justice for All* and *Presumed Innocent*.[52] In *And Justice for All*, ethical and idealistic defense lawyer Arthur Kirkland has two clients who become victims of the legal system, including a transgender client who commits suicide after being sent to jail for a minor offense.[53] In a dramatic climax, Kirkland erupts in court, screaming at the judge, "You're out of order! You're out of order! The whole trial's out of order!"[54] *Presumed Innocent* is another such example,

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is likely an indication that he is at best temperamentally unsuited for the job, and at worst incompetent, biased, or a criminal.").

[50] *See* Ho, *supra* note 32, at 287 (discussing the portrayal of jurors in the television show *The Simpsons* as bored, burdened, and not taking their duty seriously).

[51] Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 125 (2005) ("Indeed, we rarely if ever see the inside of a courtroom in this series [*Law & Order: Criminal Intent*]. It would be unnecessary and redundant after the heroism of the detective has ensured the just outcome to see the anti-climactic acceptance of the inevitable by the jury or judge.").

[52] Vincent Canby, *Screen: Al Pacino in '...and Justice for All': Sorts of Breakdowns*, N.Y. TIMES, Oct. 19, 1979, http://movies.nytimes.com/movie/review?res=9B0DE3D71F39F93AA35751C1A965948260 (" '…and Justice for All,' pretends to be about the shortcommings in our judicial system . . . "); David A. Kaplan, *FILM; 'Presumed Innocent' Tackles a Tough Case*, N.Y. TIMES, July 27, 1990, at 29 (" 'We tried to show how the system works, for good and for bad – that the pursuit of truth and the system of justice may not be the same thing.' ").

[53] …AND JUSTICE FOR ALL (Columbia Pictures 1979).

[54] *Id*.

wherein a prosecutor is tried for a murder that he ultimately discovers was commited by his wife.[55] Before the case against him is dismissed, however, it is revealed that there is extensive corruption and incompetence in the local criminal justice system.[56]

Narratives have also developed about the law as a codification of a dysfunctional criminal justice system. The war on drugs is viewed as a war on the underclass.[57] Those with power take advantage of those without it; superiors use subordinates as scapegoats, both in the police and criminal communities.[58] Individual actors—be they criminal, cop, or official—are betrayed by the institutions to which they belong. *The Wire* creator David Simon explained, "[w]hatever institution you as an individual commit to will somehow find a way to betray you . . . ."[59]

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[55] PRESUMED INNOCENT (Warner Bros. Pictures 1990).

[56] *Id.*

[57] Ed Burns, David Simon, & George Pelecanos, *The Wire's War on the Drug War*, TIME MAGAZINE, Mar. 5, 2008, http://www.time.com/time/magazine/article/0,9171,1720240,00.html ("And what once began, perhaps, as a battle against dangerous substances long ago transformed itself into a venal war on our underclass.").

[58] Citation needed

[59] Alasdair McMillian, *Dramatizing Individuation: Institutions, Assemblages, and The Wire*, 4 CINEPHILE 41, 46 (SUMMER 2008), http://cinephile.ca/archives/volume-4-post-genre/dramatizing-individuation-institutions-assemblages-and-the-wire/.

The common theme among these narratives is a reinforcement of a deterministic mindset.[60] The police do not know any better; they are products of their institutional and historic environments.[61] The court system is broken; the innocent are imprisoned and the guilty go free. Criminals are driven to crime by misfortune, and then unfairly treated by the dysfunctional criminal justice system. The institutions are at fault, the individuals are absolved of responsibility, and norms become both unchangeable and unavoidable. If a suburban widow must sell marijuana to keep her house and a high school teacher must manufacture methamphetamines to fund his cancer treatment, then the world is simply unfair and crime is the only realistic solution to some of life's problems.[62]

The positive aspect of these narratives is a leveling of the playing field—no longer is incarceration exclusively the purview of racial minorities and the poor. The game has changed from Minority Men versus "The Man" to The Ordinary Family versus "The Man." This reflects the broadening incarceration statistics in the U.S. and the fact that having an incarcerated family member is no longer the exception but instead the norm.

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[60] Determinism posits that human beings are social constructions, and that their lives and actions are controlled by a social or legal structure that keeps them subjugated. It is often contrasted with the notion of free will. *See* TED HONDERICH, ON DETERMINISM AND FREEDOM 36 (2005).

[61] Citation needed

[62] The television show *Weeds* follows Nancy Botwin, a widow who began selling marijuana after her husband suffered an untimley death in order to support her family. *Weeds* (Showtime 2005). Television show *Breaking Bad* follows high school chemistry teacher, Walter White, who manufactures and sells methamphetamines to provide for his disabled son and expensive cancer treatments. *Breaking Bad* (AMC 2008).

Adopting narratives that legitimize criminal behavior is a natural response to broadening the class of people affected by the systematic unfairness in the criminal justice system.[63] Through these narratives, the ordinary family is able to contextualize and reconcile their experience. Those with an incarcerated family member are no longer being punished because they are subnormal, but instead because they are ordinary. The criminal justice system's intrusion into family life can itself legitimize; it tells people that they are part of something bigger, and that they matter.

The construct of this morality play also apportions fault among the players, reducing the blame levied on the incarcerated family member.[64] He may have done something criminal, but perhaps like the criminals in *Weeds*, *Breaking Bad*, and *The Wire* he had no other choice. He may have then been treated unfairly by the police and the court system, much like the defendants in *In Justice for All* and *Presumed Innocent*. He may have been a victim of corruption in law enforcement, subject to the whims of officers like those in *The Shield*, *NYPD Blue*, and *Training Day.* And perhaps his incarceration was inevitable from the start, due to unfortunate circumstances in combination with an unjust legal system.

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[63] Citation needed?

[64] Citation needed?

IV. INCARCERATION AS VALIDATION

The narratives adopted by the ordinary family to reconcile rising incarceration rates and the corresponding intrusion of the state into family life have a common theme of shifting responsibility away from criminals and onto other actors in the narrative, including law enforcement, the court system, and the law itself. These narratives inform the ordinary family that having an incarcerated family member no longer represents marginalization, but is instead a sign that the family is, indeed, ordinary. They further cultivate a common bond that crosses race and class, giving ordinary families a common enemy: a dysfunctional criminal justice system that systematically overpunishes and overincarcerates.