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Cover Page Footnote

The Author gratefully acknowledges the research work of Amy Mody, Steven Olivas, and the late Jessica Billingslea. Support for this Article was provided by a research stipend from the Columbia University School of Law.

DAMAGE TO FAMILY RELATIONSHIPS AS A COLLATERAL CONSEQUENCE OF PARENTAL INCARCERATION

*Philip M. Genty**

INTRODUCTION

The most obvious and perhaps most serious collateral consequence of incarceration is family separation. Imprisonment undermines families and has a detrimental impact upon children, caretakers, and the communities in which they live. Unlike other collateral consequences, family separation has an irreversible impact upon both parents and children. The time apart is lost forever, because a childhood can never be recovered.

This Essay will review the available statistical information about incarcerated parents and their children and discuss the detrimental effects of parental incarceration upon families. The Essay will conclude with some reflections about why the adverse consequences of incarceration for prisoners' families remain largely unaddressed.

I. DATA ON PARENTAL INCARCERATION

By now, the statistics on parental incarceration are well known. The statistics were thoroughly documented in 2000 in a report produced by the United States Department of Justice's Bureau of Justice Statistics.¹ This report provides a wealth of information. The majority of prisoners are parents of minor children.² Among state prisoners, almost half of the fathers and two-thirds of the mothers lived with their children prior to incarceration.³ Among federal prisoners, the corresponding figures were fifty-five percent of fathers and eighty-four percent of mothers.⁴ Approximately eighty

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1. CHRISTOPHER MUMOLA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 1 (2002) [hereinafter BJS SPECIAL REPORT].

2. *Id.* at 1 tbl. 1 (State: 54.7 percent men; 65.3 percent women. Federal: 63.4 percent men; 58.8 percent women).

3. *Id.*

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

percent of the mothers who lived with their children prior to incarceration were single parents.⁵ The number of children with at least one incarcerated parent increased in the past decade, from 936,000 in 1991 to 1.5 million in 1999.⁶ The number of children with an incarcerated mother almost doubled during that period, increasing from 64,000 to 126,000.⁷ The average age of children with an incarcerated parent was eight years old. Almost sixty percent of the children were less than ten years old.⁸ The impact of incarceration has fallen disproportionately upon families of color. One out of every fourteen African-American children nationwide, seven percent, had at least one parent in prison in 1999.⁹ The corresponding figure for all children was two percent.¹⁰ In New York State, approximately eighty-one percent of the prisoners are African-American or Latino.¹¹

The extent of parental incarceration is therefore apparent. Equally obvious are the factors that have the greatest impact upon incarcerated parents and their families—time and distance. The increasing severity of sentencing laws ensures that incarcerated parents, and their children, will be separated for a significant portion of the children's lives. The mean length of time to be served for incarcerated fathers is almost seven years in the state systems and nine years in the federal system.¹² For mothers, the averages are four years in state prisons and five and one-half years in federal prisons.¹³ Among those mothers, sixty-two percent in state prisons and seventy-four percent in federal prisons will serve two or more years.¹⁴ In New York State, approximately eighty-two percent of women and eighty-nine percent of men will serve at least two years.¹⁵

5. *Id.* at 4 tbl. 5. (stating that of all incarcerated mothers, 56.5 percent lived with children; forty-six percent of all incarcerated mothers were single parents).

6. *Id.* at 8.

7. *Id.* at 2 tbl. 2 (state and federal combined). The number of incarcerated parents increased from 450,000 to 720,000 during this same period. *Id.*

8. *Id.* at 2.

9. *Id.*

10. *Id.*

11. DEP'T OF CORR. SERVS., STATE OF N.Y., HUB SYSTEM: PROFILE OF INMATE POPULATION UNDERCUSTODY ON JANUARY 1, 2002, at 7 (2002). The racial/ethnic categories referred to in the text are those used in the statistical report.

12. BJS SPECIAL REPORT, *supra* note 1, at 6 tbl. 8.

13. *Id.*

14. *Id.* (stating that sixty percent of mothers in state prison and fifty percent in federal prison will serve at least four years).

15. Derived from statistics provided by the New York State Department of Correctional Services, August 2002.

The extent of physical separation is equally pronounced: sixty-two percent of incarcerated parents in state prison and eighty-two percent in federal prison are incarcerated more than one hundred miles from their homes.¹⁶ The situation is especially acute in the federal system where more than forty percent of incarcerated parents are imprisoned at least 500 miles from their homes.¹⁷ For women, the distance from families is often a function of the limited number of available prisons.¹⁸ For example, within the federal system, there are only *six* prisons in the entire United States: one each in Arizona, California, Connecticut, Florida, Texas, and West Virginia.¹⁹ The distance separating incarcerated parents from their children severely limits their contact with each other.

II. THE IMPACT OF INCARCERATION UPON FAMILIES

Family separation is a collateral consequence of incarceration that is unique in its severity. Although parenting involves intangible qualities that survive the loss of day-to-day physical presence,²⁰ “parenting from a distance” places serious, undeniable limitations on the parent-child relationship.²¹ The adverse effects of parental

16. BJS SPECIAL REPORT, *supra* note 1, at 5.

17. *Id.*

18. Philip M. Genty, *Permanency Planning in the Context of Parental Incarceration: Legal Topics and Recommendations*, 77 CHILD WELFARE 543, 547 (1998).

19. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 88-89 (2001). There are also six minimum security camps: one in Arizona, two in Florida, two in Illinois, and one in Kentucky. There are also a number of local jails, which house both men and women. Federal Bureau of Prisons, BOP/NIC Directory, at <http://www.bop.gov/facilnot.html> (last visited July 15, 2003).

20. The Author has argued elsewhere:

In both the private and public spheres, family relationships survive the demise of their physical qualities. This is true because these family relationships involve intangible aspects that are at least as important as the more obvious physical characteristics. Such qualities may include love and affection, religious or moral guidance, emotional support and a sense of “roots” and family identity.

Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 767 (1991-92).

21. The phrase “parenting from a distance” originated at Bedford Hills Correctional Facility as the title of a class designed and taught by Kathy Boudin and other prisoners. See generally PARENTING FROM INSIDE/OUT: THE VOICES OF MOTHERS IN PRISON (Kathy Boudin & Rozenn Greco eds., 1998). In November 2002, students in a family law class and the Author taught at Green Haven Correctional Facility, a maximum security men’s prison in New York State. A group of incarcerated fathers in the facility listed the following attributes of a father: person of trust and respect, teacher, protector, role model, provider, student, friend, cultivator, leader, motivator, coun-

incarceration upon families are only exacerbated when incarcerated parents and their children lack regular contact with each other.²² The importance to children of maintaining regular contact with their parents in prison has been well-documented.²³ Yet, despite the widely recognized importance of such regular contact, recent surveys reveal that this rarely occurs: fewer than half of the incarcerated parents in state prisons *ever* see their children in person.²⁴ Of those who do see their children, only about twenty percent have visits at least once a month.²⁵ Of those parents who have phone contact, only about half of the mothers and forty percent of the fathers in state prison make at least monthly phone calls. The figures are much better for parents in federal prison, with approximately eighty percent of the mothers and seventy percent of the fathers making phone calls at least once a month.²⁶

Oregon has conducted an extensive survey of incarcerated parents, that provides additional data about parent-child contact.²⁷ Of 6,250 incarcerated parents as of July 2002, nineteen percent of the fathers and forty-two percent of the mothers reported visiting with their children in the past three months; forty-seven percent of the fathers and seventy percent of the mothers reported phone contact within the past three months.²⁸ Among only those parents who expected to live with their children after release, seventy percent of the fathers and fifty percent of the mothers had no visits with their

selor, and disciplinarian. The men movingly discussed the effect of incarceration on their ability to perform these parental roles.

22. See Genty, *supra* note 18, at 545-46.

23. See, e.g., Adela Beckerman, *Incarcerated Mothers and Their Children in Foster Care: The Dilemma of Visitation*, 11 CHILD. & YOUTH SERVICES REV. 175 (1989); Dorothy Driscoll, *Mother's Day Once a Month*, 47 CORRECTIONS TODAY 18 (1985); C.F. Hairston, *The Forgotten Parent: Understanding the Forces that Influence Incarcerated Fathers' Relationships with Their Children*, 77 CHILD WELFARE 617 (1998); C.F. Hairston & P.M. Hess, *Family Ties, Maintaining Child-Parent Bonds is Important*, 51 CORRECTIONS TODAY 102 (1989); Donna C. Hale, *The Impact of Mothers' Incarceration on the Family System: Research and Recommendations*, 12 MARRIAGE & FAM. REV. 143 (1987); Denise Johnston, *Effects of Parental Incarceration*, in CHILDREN OF INCARCERATED PARENTS (Katherine Gabel & Denise Johnston eds., 1995); Christina Jose Kampfner, *Post-Traumatic Stress Reactions in Children of Imprisoned Mothers*, in CHILDREN OF INCARCERATED PARENTS, *supra*; Florence W. Kaslow, *Couples or Family Therapy for Prisoners and Their Significant Others*, 15 AM. J. FAM. THERAPY 352 (1987); Ariela Lowenstein, *Temporary Single Parenthood—The Case of Prisoners' Families*, 35 FAM. REL. 79 (1986).

24. BJS SPECIAL REPORT, *supra* note 1, at 5 tbl. 6.

25. *Id.*

26. *Id.*

27. OFFICE OF THE GOVERNOR, STATE OF OR., CHILDREN OF INCARCERATED PARENTS i (2002).

28. *Id.*

children in the past three months.²⁹ The main reasons given for the lack of visits were distance, lack of transportation, the schedule or wishes of the caretaker, and prison policies.³⁰

The limited contact between incarcerated parents and their children has a long-lasting, damaging impact upon the parent-child relationship. The impact, however, upon children in foster care is potentially even more severe.³¹ As discussed more fully below, it is impossible to know with certainty what percentage of the children with an imprisoned parent are in foster care, because neither child welfare agencies, nor correctional officials compile such statistics. According to the Bureau of Justice Statistics Survey approximately, ten percent of the mothers and two percent of the fathers in state prison had children in foster care.³² For New York State, the numbers were somewhat higher for mothers included in this national study: 18.1 percent of these mothers had a child in foster care.³³ The Oregon study reported that fifteen percent of the mothers had children in foster care.³⁴ These numbers for mothers probably undercount the percentage of children in foster care.³⁵ A study of children in long-term foster care conducted in 1998 by the Center for Children of Incarcerated Parents measured this not only from the perspective of children with a parent who was *currently* incarcerated, but also from the perspective of children who had *ever* experienced parental incarceration.³⁶ The study found that while ten percent of the children had a currently incarcerated mother and thirty-three percent had a currently incarcerated father, approximately *seventy percent* of the children had had a parent incarcerated at some point during their time in foster care.³⁷

29. *Id.* at ii.

30. *Id.* at iii.

31. See *infra* text accompanying notes 42-58.

32. BJS SPECIAL REPORT, *supra* note 1, at 4.

33. See HUMAN RIGHTS WATCH, COLLATERAL CASUALTIES: CHILDREN OF INCARCERATED DRUG OFFENDERS IN NEW YORK tbl. 6 (2002).

34. OFFICE OF THE GOVERNOR, STATE OF OR., *supra* note 27, at 5.

35. While ninety-two percent of the fathers reported that their children were living with the mother, only thirty-one percent of the mothers reported that the children were living with the father. As discussed above, most of the mothers who were living with their children prior to incarceration were single mothers without another parent to provide backup care of the children. See *supra* text accompanying note 5. While a significant percentage of the mothers reported that their children were living with other family members, it is likely that many of these arrangements were "kinship foster care" placements.

36. See Denise Johnston, *Children of Criminal Offenders & Foster Care*, 22 FAM. & CORRECTIONS NETWORK REP., Oct. 1999, at 7.

37. *Id.*

For the foster care population, the enactment of the Adoption and Safe Families Act (“ASFA”)³⁸ in 1997 created a push for permanency. For children of incarcerated parents, this will most often mean adoption. ASFA is a federal reimbursement statute. To receive federal reimbursement for their child welfare and foster care systems, states were required to enact conforming legislation, and the states have done so in the years since the federal ASFA was enacted.³⁹ ASFA sets out the general rule that permanency decisions about children must be made within twelve months of the children’s entries into foster care.⁴⁰ ASFA also sets a general limit on foster care placements by requiring, with limited exceptions, that petitions to terminate parental rights be filed when a child has been in foster care for fifteen out of the past twenty-two months.⁴¹ In addition, ASFA sets out circumstances under which a state is not required to make “reasonable efforts” to reunite parents and children.⁴² In at least five states—Alaska, Kentucky, North Da-

38. Adoption and Safe Families Act, 42 U.S.C. §§ 670-679a (1997).

39. *Id.* § 67(a).

40. *Id.* § 675(5)(c).

41. *Id.* § 675(5)(E)(i)-(iii). The statute itself provides three exceptions to the fifteen month filing requirement. A termination of parental rights proceeding does not have to be brought if:

- (i) at the option of the State, the child is being cared for by a relative;
- (ii) a State agency has documented in the case plan . . . a compelling reason for determining that filing such a petition would not be in the best interests of the child; or
- (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child’s home, if reasonable efforts . . . are required to be made with respect to the child.

42. *Id.* § 671(a)(15)(D). ASFA allows an agency to forgo reasonable efforts where:

- (i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);
- (ii) the parent has—
 - (I) committed murder . . . of another child of the parent;
 - (II) committed voluntary manslaughter . . . of another child of the parent;
 - (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or
 - (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
- (iii) the parental rights of the parent to a sibling have been terminated involuntarily.

Id.

kota, South Dakota, and Tennessee—parental incarceration is one such circumstance.⁴³

ASFA has likely had a disproportionate impact upon incarcerated parents with children in foster care.⁴⁴ In particular, the mandatory termination petition filing requirement has the potential to sweep broadly, given that the average length of time served by incarcerated parents is six and one-half years.⁴⁵ The vast majority of incarcerated parents will serve more than the fifteen-month ASFA limit for foster care placements.⁴⁶ Because child welfare agencies do not categorize cases according to whether the parent of a child is in prison, it is impossible to measure precisely the effect of ASFA upon families of incarcerated parents.⁴⁷

43. Alaska: a court may determine that reasonable efforts are not required where “the parent or guardian is incarcerated and is unavailable to care for the child during a significant period of the child’s minority, considering the child’s age and need for care by an adult.” ALASKA STAT. § 47.10.088(d) (Michie 2002)

Kentucky: “aggravated circumstances” includes cases where “the parent is incarcerated and will be unavailable to care for the child for a period of at least one (1) year from the date of the child’s entry into foster care and there is no appropriate relative placement available during this period of time.” KY. REV. STAT. ANN. § 600.020(2)(b) (Michie 2002).

North Dakota: “aggravated circumstances” includes circumstances where a parent’s latest release date will occur after the child’s majority if the child is nine or older, or after the child is twice her current age if the child is under nine. N.D. CENT. CODE § 27-20-02(f) (2001).

South Dakota: reunification not required where a parent “Is incarcerated and is unavailable to care for the child during a significant period of the child’s minority, considering the child’s age and the child’s need for care by an adult.” S.D. CODIFIED LAWS § 26-8A-21(4) (Michie 2002).

Tennessee: “aggravated circumstances” includes “abandonment,” one definition of which applies to parents and guardians who are incarcerated at the time of the institution of the proceeding to terminate parental rights, or who have been incarcerated during all or part of the previous four months and who have wilfully failed to visit or provide reasonable support for their children in the four months prior to incarceration or have “engaged in conduct prior to incarceration which exhibits a wanton disregard for the welfare of the child.” TENN. CODE ANN. § 36-1-102(1)(A)(iv) (2002).

44. The potential impact of ASFA upon incarcerated parents is discussed in detail elsewhere. See Philip M. Genty, *Incarcerated Parents and the Adoption and Safe Families Act (ASFA): A Challenge for Correctional Services Providers*, THE ICCA JOURNAL ON COMMUNITY CORRECTIONS 5 (2002). In addition to the five states listed above, which include parental incarceration as a ground for excusing reasonable reunification efforts, two states, California and Utah, place a twelve-month limit on the provision of such efforts when a parent is incarcerated. At least half of the states include some form of parental incarceration as a ground for termination of parental rights. *Id.* at 46-47 nn. 9 & 15.

45. BJS SPECIAL REPORT, *supra* note 1, at 6. The mean is eighty months.

46. *Id.*

47. Cynthia Seymour, *Children with Parents in Prison: Child Welfare Policy, Program and Practice Issues*, 77 CHILD WELFARE 469, 470 (1993).

One rough indicator, however, is available. As shown on the following chart, reported termination of parental rights decisions involving parental incarceration have increased by approximately 250 percent in the five years since 1997, the year that ASFA was enacted.

**Number of Reported Termination Proceedings
Involving Prisoners⁴⁸**

1997: 260
1998: 359 (thirty-eight percent increase)
1999: 393 (nine percent increase)
2000: 493 (twenty-five percent increase)
2001: 655 (thirty-three percent increase)
2002: 909 (thirty-nine percent increase)

In contrast, for the five years before ASFA was enacted, the number of such termination proceedings remained relatively flat, increasing by only about thirty percent:⁴⁹

1992: 169
1993: 159 (six percent decrease)
1994: 171 (seven percent increase)
1995: 189 (six percent increase)
1996: 218 (thirteen percent increase)

Most trial level decisions are not reported, and not all states report intermediate level appeals. These statistics, therefore, almost certainly understate the number of termination cases that have been litigated since 1997.

Thus, when parents go to prison, they can expect to be separated from their children at great distances for a significant portion of their children's lives.⁵⁰ They can expect to have only limited personal contact with their children.⁵¹ They can also expect to have their relationship with their children impaired or, if their children are in foster care, permanently severed through the termination of

48. These data were obtained using a Lexis search for cases involving parental incarceration and termination of parental rights and comparing results for each of the years indicated. The cases have not yet been analyzed.

49. Seymour, *supra* note 47, at 470.

50. See BJS SPECIAL REPORT, *supra* note 1, at 5-6 (table 6 shows frequency of contact and table 8 shows length of incarceration); Kathleen Block & Margaret Potthast, *Girl Scouts Behind Bars: Facilitating Parent-Child Contact in Correctional Settings*, 77 CHILD WELFARE 561, 565-66 (1998).

51. See BJS SPECIAL REPORT, *supra* note 1, at 6.

their parental rights.⁵² The concluding Section discusses the difficulties involved in addressing these collateral consequences of incarceration.

III. THE DIFFICULTIES OF REMEDYING THE CONSEQUENCES TO FAMILIES OF PARENTAL INCARCERATION

The issues described in the preceding Sections are not new. Twenty-five years ago, McGowan and Blumenthal documented the effects of maternal incarceration upon children in their groundbreaking study, *Why Punish the Children? A Study of the Children of Women Prisoners*.⁵³ In the years since, commentators have written extensively about the importance of maintaining family relationships while parents are incarcerated and the difficulties of doing so.⁵⁴ Despite all of the research that has been done on these issues, public policy aimed at preserving family relationships during and after incarceration is still severely lacking.⁵⁵ The detrimental impact upon family relationships continues to be a serious, often permanent collateral consequence of parental incarceration.⁵⁶

There are a number of reasons why the impact of incarceration upon families is so difficult to address. First, unlike other collateral consequences of incarceration, the effect upon family relationships is not technically part of the punishment. Criminal statutes generally articulate the specific civil rights lost as a direct result of incarceration. These statutes, with few exceptions, do not address the effect on family relationships as a consequence of criminal conviction.⁵⁷

52. BRENDA MCGOWAN & KAREN BLUMENTHAL, *WHY PUNISH THE CHILDREN? A STUDY OF CHILDREN OF WOMEN PRISONERS* 30-33 (1978). This study remains the most powerful piece about the importance of the bonds between children and their incarcerated parents. The study concludes with a number of policy suggestions.

53. *Id.*

54. *See supra* note 23 and accompanying text.

55. *See, e.g.*, Pamela Covington Katz, *Supporting Families and Children of Mothers in Jail: An Integrated Child Welfare and Criminal Justice Strategy*, 77 *CHILD WELFARE* 495, 500-05 (1998).

56. *Id.*

57. The so-called "civil death" statutes are an exception to this. For example, N.Y. CIV. RIGHTS LAW § 79-a (1992) provides that persons serving a sentence with a minimum of more than one day and a maximum of life are "civilly dead" and may not enter into marriage. The ban on marriage has been found to be a part of the punishment itself and has been held to be constitutional:

Inssofar as the deprivation of the right to participate in the ceremony of marriage can be considered as imposing punishment in addition to incarceration it is a penalty which is well within New York's power to prescribe. A state has considerable freedom within the limits of the Eighth Amendment in de-

Family relationships are instead affected more indirectly, not through the act of imprisonment itself, but through the circumstances of that imprisonment and through a division of responsibility among the branches of government.⁵⁸ For example, the legislative branch defines crimes and sets the sentences. It is the executive branch through prison administration agencies, however, that decides where the prisons will be built.⁵⁹

This decision alone may have the greatest impact upon family relationships because prisons tend to be built in remote rural locations. These rural sites are far from the urban centers from which most prisoners come and in which most of the families of prisoners continue to live.⁶⁰ The practical difficulties of maintaining regular contact between parents and children separated by several hundred miles become insurmountable for many families.⁶¹ In addition, the distance becomes a barrier to the provision of meaningful therapeutic services to families.⁶² Agencies that provide services to children in the community will not be able to do meaningful family work because of the difficulty of making a connection with a parent in a distant prison.⁶³ Service providers within the prison will have

termining what form punishment for crime shall take. Deprivation of physical liberty is not the sole permissible consequence of a criminal conviction.”

Johnson v. Rockefeller, 365 F. Supp. 377, 380 (S.D.N.Y. 1973).

58. Susan Phillips & Barbara Bloom, *In Whose Best Interest? The Impact of Changing Public Policy on Relatives Caring for Children with Incarcerated Parents*, 77 CHILD WELFARE 531, 534-38 (1998).

59. *Id.*

60. For example, in New York State, seventy-two percent of the prisoners came from New York City and the surrounding suburban counties (62.2 percent from New York City; 10.3 percent from Nassau, Rockland, Suffolk, and Westchester Counties). Of the approximately 49,000 prisoners from New York City and the surrounding suburban counties, however, only about 10,000 were incarcerated in the New York City and Green Haven “hubs,” the clusters of prisons located closest to the New York City metropolitan region. In contrast, approximately 24,000 were incarcerated in the Clinton and Watertown hubs, in the rural far northern section of the state, and the Oneida and Wende hubs, in the western section of the state. DEP’T OF CORRECTIONAL SERVS., *supra* note 11, at 1, 9-10.

61. See MCGOWAN & BLUMENTHAL, *supra* note 52, at 50-53.

62. *Id.*

63. See Carl Mazza, *And Then the World Fell Apart: The Children of Incarcerated Fathers*, 83 FAMILIES IN SOC’Y: J. CONTEMP. HUM. SERVICES 521, 527 (2002). Mazza both describes the barriers to this work and offers practical recommendations for carrying it out:

Social workers working with children of incarcerated fathers need to be in contact with the fathers—not just the mothers or caretakers in the community. It may not be possible to visit the men in prison, but contacting them through the mail, stating the nature of their children’s problems, and how they need to play a part in helping their children adjust to their father’s incarceration can be useful to both the children and the fathers. Social

the same problem attempting to make contact with the children of prisoners. Finally, for advocates, there is no readily available way of addressing this situation. It is impossible to advocate for a transfer to a prison closer to the parent's home if no such prison exists. As discussed above, this is a particular problem for incarcerated mothers because of the limited number of women's prisons. Family relationships are, therefore, most affected not by conscious penal theory, but by the practical administrative decisions about prison construction.

A second factor preventing the consequences to families of parental incarceration from being addressed is the lack of meaningful policy coordination between criminal justice and child welfare agencies. These two systems see their missions as distinct—criminal justice policymakers are concerned with sentencing and punishment, while child welfare officials are concerned with safety and permanency for children.⁶⁴ The two systems are making decisions that, with respect to family relationships, are in conflict.⁶⁵ As sentences become longer, foster care time limits become shorter.⁶⁶ As a result, parents who have no alternative to the foster care system for their children cannot avoid permanent termination of parental rights. In addition, both systems are becoming increasingly inflexible—judges have been deprived of discretion in sentencing,⁶⁷ and caseworkers have been deprived of discretion in deciding when and under what circumstances to seek termination of parental rights.⁶⁸ Caseworkers, therefore, lack the needed flexibility to determine when it is in a child's best interests to preserve the relationships with incarcerated parents and to provide the services necessary to accomplish this.

This apparent conflict between agencies might be acceptable public policy if it were the result of conscious, careful thought and study, but it is not. Criminal justice decisions are made without regard to the impact upon family members, and child welfare decisions are made without taking into account the unique situation of incarcerated parents. Despite ASFA's profound, potential impact upon incarcerated parents, there is no indication that parental in-

workers should also be encouraged to accept collect telephone calls from fathers trying to assist the children.

64. See Katz, *supra* note 55, at 502-03.

65. *Id.* at 506.

66. *Id.* at 501.

67. *Id.* at 501-02.

68. *Id.* at 501.

carceration was even considered as a possible factor when the ASFA provisions were being formulated.⁶⁹

It is, therefore, critically important that the criminal justice and child welfare systems work together to develop sound policies for incarcerated parents and their families. Several commentators have discussed this critical need.⁷⁰ The development of such policies is impossible, however, in the absence of reliable data. The importance of determining what portion of the child welfare caseload involves parental incarceration and assessing the particular needs of children of incarcerated parents (as well as children whose parents were previously incarcerated) seems obvious. No such information, however, appears to be available. An attempt to survey child welfare and correctional agencies around the country indicated that there is general agreement on the importance of knowing more about the relationship between child welfare and incarceration.⁷¹ The state agencies, however, are not tracking this information.⁷² As a result, child welfare agencies do not know how many of their termination of parental rights proceedings involve prisoners. Without this and other data agencies cannot even begin to determine the extent to which such proceedings further the best interests of the children.⁷³

69. See Adela Beckerman, *Charting a Course: Meeting the Challenge of Permanency Planning for Children with Incarcerated Mothers*, 77 CHILD WELFARE 513, 513-27 (1978); Katz, *supra* note 55, at 502-03; Phillips & Bloom, *supra* note 58, at 434-38.

70. Beckerman, *supra* note 69, at 513-27; Katz, *supra* note 55, at 502-03; Phillips & Bloom, *supra* note 58, at 434-38.

71. During the spring and summer of 2002, two Columbia University School of Law students conducted a telephone survey of child welfare and corrections personnel throughout the country. With two exceptions, the individuals contacted were not able to provide any information about the number of children of incarcerated parents who are part of the child welfare caseload or the number of incarcerated parents who are involved in termination of parental rights proceedings. The only two jurisdictions that reported compiling any of this information were Oregon and Pennsylvania. As noted above, the Oregon prison system has conducted a study of incarcerated parents, and the Governor's Office was able to provide information for 11,000 prisoners as of July 2002. The study, however, did not include information about foster care placements and termination of parental rights proceedings. SHEILA REED, OFFICE OF THE GOVERNOR OF OR., EXECUTIVE SUMMARY: CHILDREN OF INCARCEATED PARENTS 2 (2002). The Pennsylvania Department of Corrections—Inmate Services, was able to provide some mostly anecdotal information, but it has apparently not conducted a systematic survey of the extent to which prisoners are facing termination of parental rights programs.

72. *Id.*

73. See Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament?*, 28 CAP. U. L. REV. 97, 97-110 (1999) (expressing concern that the Adoption and Safe Families Act's emphasis on expedited termination of parental rights may not serve the long-term interests of the

Child welfare agencies have the ability to track these data. They are, in fact, required to keep detailed case records and conduct periodic service reviews for all families under their supervision.⁷⁴ Thus, if agencies made it a priority to identify the portion of their caseload in which a parent is incarcerated, they would have the means to do so. They must resolve to take on this task.

It is even more difficult to obtain information about children of incarcerated parents who are not in foster care. Using empirical data about neighborhood incarceration rates,⁷⁵ it would be possible to target the communities in which the children of incarcerated parents and their caretakers most likely live and the schools the children most likely attend. This is a delicate task, however, for the children and caretakers may not want to be identified because of the stigma they feel. Any attempt to identify and work with such families must, therefore, be handled with extreme care.⁷⁶

CONCLUSION

The collateral consequences of parental incarceration to families are both intractable and difficult to measure precisely. The only real solution to the problem of family dissolution through incarceration is to expand the availability of alternatives to incarceration for those incarcerated parents who do not require high security

children involved and that there may not be a sufficient number of suitable adoptive homes to meet the demand created by the increased number of termination proceedings).

74. See, e.g., Genty *supra* note 18, at 550.

75. See Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 *FORDHAM URB. L.J.* 1551, 1568 (2003). The authors describe ingenious statistical methods for generating this information and map prison and jail rates by neighborhoods and police precincts.

76. See Mazza, *supra* note 63, at 526-27. Mazza writes:

Programs must be careful not to label these children, certainly never referring to them as the "Children of Incarcerated Parents" groups. The children already feel labeled and often rejected, and the staff must be very sensitive to this issue. The issue of stigma may be so strong that it is quite possible that many social workers who are currently working with children and adolescents are working with children of incarcerated fathers and not know it. It is therefore imperative that social workers conduct careful assessments. . . . The children should not be confronted with the fact that the social workers know that the fathers are incarcerated. Rather, as the relationship builds, the subject of incarceration should be slowly introduced. Because of the stigma, it is important for the children to know that there are others who have experienced the same situations. Therefore, it is vital for children to meet and share feelings and stories.

Id.

confinement.⁷⁷ The defendant's role as a parent must be an explicit factor in sentencing. In the short-term, it is essential that precise data about the children of incarcerated parents be developed so that informed public policies can be formulated.⁷⁸

77. See BJS SPECIAL REPORT, *supra* note 1, at 7. Almost three-quarters of the women in state prison, and more than ninety percent of the women in federal prison are incarcerated on non-violent offenses.

78. The Federal Resource Center for Children of Prisoners, funded by the National Institute of Corrections and administered by the Child Welfare League of America, is undertaking research that will address some of these informational needs. The Center is also developing training materials for school personnel and other individuals who are likely to be working with children of incarcerated parents. For more information on this program, see the website for the Federal Resource Center for Children of Prisoners, at <http://www.childrenofprisons.org> (last visited July 15, 2003).