MOVING BEYOND GENERALIZATIONS AND STEREOTYPES TO 
DEVELOP INDIVIDUALIZED APPROACHES FOR WORKING WITH 
FAMILIES AFFECTED BY PARENTAL INCARCERATION 

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Competing narratives about incarcerated parents and their children are provided by the Adoption and Safe Families Act ("ASFA") and the Children of Incarcerated Parents Bill of Rights ("Bill of Rights"). Both the "child-at-risk" narrative of ASFA and the "good mother" narrative of the Bill of Rights are stereotyped and oversimplified and contribute, in opposite ways, to misperceptions about incarcerated parents and their children by suggesting a uniformity of situations and appropriate responses that does not actually exist. The time-driven approach of ASFA—and many state termination of parental rights statutes—is overly rigid, while the Bill of Rights overlooks important differences among families, as well as tensions and trade-offs among policy choices. In actuality, the situations of the parents and children involved vary widely and defy easy analysis and solutions. We should therefore be taking an individualized, qualitative approach that is nuanced and based on actual information about incarcerated parents and their children, rather than a quantitative, categorical approach based on generalized and simplistic assumptions. Only if we recognize and grapple with the complexities of parental incarceration can we develop sound legal and social policy to meet the needs of these families.

Keywords: children; parents; incarceration; termination; rights; statutes; ASFA

INTRODUCTION

The label "children of incarcerated parents" provides a useful shorthand for a social phenomenon that cuts across the family law, child welfare, and criminal justice systems. However, the attractive simplicity of this label may actually risk doing more harm than good because it creates the potential for competing generalized narratives, which often distort the issues rather than clarify and explain them. One narrative presents the children as victims: vulnerable children who need to be rescued from their bad parents and damaged lives. The competing narrative tells a story of a parent (usually a mother) who is living with and caring for her children until she is arrested and separated from her children by an uncaring criminal justice system.

Neither story is especially helpful in understanding the complex mix of issues that are implicated by parental incarceration. The situations of the children and parents involved—and the circumstances and duration of the parents’ incarceration—vary widely and defy easy analysis and solutions. Only if we approach the issues honestly—without preconceptions and stereotypes—and grapple directly with their complexity can we develop sound legal and social policy to meet the needs of these families.

Of course, some facts about parental incarceration are well established because we have a great deal of statistical information. We know the number, age, and racial breakdown of the children, as well as the time and distance that separate them from their parents. The number of minor children with at least one incarcerated parent has grown significantly, almost doubling between 1991 and 2007, when it reached 1.7 million. The numbers of children are fairly evenly divided between those under the age of nine and those ages 10 to 17. While children of incarcerated parents as a
whole make up 2.3 percent of the population of children, among African American children the percentage is 6.7 percent, which means that approximately 1 out of every 15 African American children in the U.S. has at least one incarcerated parent. In New York, the median minimum sentence is five years for men and three years for women. The average minimum sentence is almost ten years for men and six years for women. One-third of children of incarcerated parents (715,600) will reach 18 while their parents are incarcerated. Fifty percent of incarcerated parents in state prisons are imprisoned between 100 and 500 miles from home, and 11 percent are incarcerated more than 500 miles away. For federal prisoners, 43 percent are incarcerated more than 500 miles from home.

We also know that penal and child welfare policies have been aggravating the plight of these families. Despite the fact that the number of children with at least one incarcerated parent has been growing steadily, sentencing and prison construction policies have resulted in incarcerated parents being separated from their children by greater distances for longer periods. Concurrently, the goal of child welfare policy, as embodied in the Adoption and Safe Families Act ("ASFA"), has been to reduce the length of time a child is permitted to remain in foster care by setting a strict general limit of 15 months for foster care placements. This tight timeline has made it harder for incarcerated parents with children in foster care to achieve reunification and has made it more likely that parental rights will be terminated.

This article argues that despite obvious gains in the amount of research and advocacy that is being done on issues relating to parental incarceration, we are still taking too much of a quantitative, categorical approach based on generalized and simplistic assumptions about incarcerated parents and their children. We should instead be taking an individualized, qualitative approach that is more nuanced and is based on actual information about the families. This criticism applies to proponents of both of the competing narratives described above. This article suggests that proponents of the "bad parent" story have relied upon ASFA to move for early termination of parental rights and adoption, an approach that has been incorporated into the statutes of approximately one-half of the states. Proponents of the "bad criminal justice system" story have promulgated the Children of Incarcerated Parents Bill of Rights ("Bill of Rights") to suggest that problems can be addressed by focusing on the rights of children to have relationships with their imprisoned parents and by providing support for those relationships. As discussed below, both sides overlook the complexities of the issues in the interest of telling a compellingly simple story.

Part I of the article reviews the way that ASFA has affected child welfare policy for incarcerated parents with children in foster care, and contains a brief survey of state termination of parental rights statutes that explicitly address parental incarceration. Part II looks at the Bill of Rights, which was designed to focus policy makers' attention on the issue of parental incarceration, and argues that this Bill of Rights, like ASFA, oversimplifies the issues in ways that are not ultimately helpful. Part III suggests an alternative, qualitative approach and cites recently enacted New York legislation as an example of such an approach.

I. THE ADOPTION AND SAFE FAMILIES ACT

ASFA, enacted in 1997, is a federal funding statute that does not regulate state child welfare and foster care systems directly. Rather, it provides detailed conditions for reimbursing states for part of the costs of their systems. It requires the states, as a condition of obtaining reimbursement, to enact statutes that comply with the federal requirements. The states have done so, and as a result, the child welfare and foster care laws of the states now have a good deal of uniformity.

Among the most significant provisions of the federal ASFA law is the general requirement that termination of parental rights proceedings must be commenced when a child has been in foster care for 15 out of the past 22 months. ASFA provides three exceptions to this requirement: 1) the child is in the care of a relative; 2) the agency has documented a compelling reason why filing a termination
petition would not be in the best interests of the child; or 3) the agency has not provided the parents or child with necessary reunification services.\textsuperscript{11}

As discussed above, this 15-month time limit has the potential to affect incarcerated parents significantly because increasing sentence lengths make reunification impossible within the short window allowed by ASFA. This reality is reflected in state termination statutes, many of which have been amended in response to ASFA.

Twenty-four state statutes explicitly connect termination of parental rights to the parent's absence due to incarceration.\textsuperscript{12} Of these, several are primarily quantitative, linking termination to a specific period of incarceration: Illinois\textsuperscript{13} (incarceration for two years after the filing of the termination petition, and prior to incarceration parent had little or no contact with or provided little or no support for child); Iowa\textsuperscript{14} (parent unlikely to be released from prison for five or more years); Kentucky\textsuperscript{15} (reasonable reunification efforts may be excused where parent incarcerated for at least one year from date of child's entry into foster care); Louisiana\textsuperscript{16} (sentence of at least five years raises a presumption of parent's inability to care for child for an extended period of time, justifying termination); Ohio\textsuperscript{17} (parent is incarcerated for at least 18 months or repeatedly incarcerated); Texas\textsuperscript{18} (incarceration for two years); Utah\textsuperscript{19} (incarceration for more than one year).

Several statutes tie the period of incarceration to the child's age or psychological development: Colorado\textsuperscript{20} (parent ineligible for parole for at least six years after date child was adjudicated dependent or neglected, or, if child is under age six, parent is not eligible for parole for at least 36 months); Michigan\textsuperscript{21} (incarceration for more than two years and parent will be unable to provide proper care and custody within a reasonable time considering the child's age); Montana\textsuperscript{22} (incarceration for more than one year and reunification is not in child's best interests considering child's circumstances, including placement options, age, and developmental, cognitive and psychological needs); North Dakota\textsuperscript{23} (incarceration under a sentence for which the latest release date is: in the case of child age nine or older, after child's majority; in the case of younger child, twice the child's current age); Tennessee\textsuperscript{24} (incarceration for 10 or more years if child is under age eight).

The third and largest group of statutes are framed in general terms and do not include specific time frames: Alaska\textsuperscript{25} (period of incarceration is significant considering child's age and need for adult's care and supervision); Arizona\textsuperscript{26} (sentence of such length that child will be deprived of normal home for period of years); Arkansas\textsuperscript{27} (sentence for period of time that would constitute substantial period of juvenile's life); Delaware\textsuperscript{28} (extended or repeated incarceration); Florida\textsuperscript{29} (time for which parent is expected to be incarcerated will constitute substantial portion of time before child is 18); Idaho\textsuperscript{30} (parent likely to remain incarcerated for substantial period of time during child's minority); Massachusetts\textsuperscript{31} (conviction that will deprive child of stable home for period of years, although incarceration itself shall not be ground for termination); Mississippi\textsuperscript{32} (prolonged imprisonment causes child's extreme and deep-seated antipathy toward parent or substantial erosion of relationship between parent and child); Missouri\textsuperscript{33} (conviction will deprive child of stable home for period of years, although incarceration itself shall not be ground for termination); New Hampshire\textsuperscript{34} (incarceration will deprive child of proper parental care and protection and leave child in unstable or impermanent environment for longer than would be prudent, although incarceration itself shall not be ground for termination); Rhode Island\textsuperscript{35} (imprisonment for extended period of time); South Dakota\textsuperscript{36} (incarceration during "significant period of the child's minority, considering the child's age and the child's need for care by an adult").

These statutes, along with ASFA, reflect a narrative that describes an incarcerated parent as unable to provide meaningful parenting. Prison is seen, essentially, as "dead time" during which nothing positive is able to happen in the parent-child relationship. The setting of strict time limits is a kind of "damage control"; the assumption is that the relationship between an incarcerated parent and her/his child is too fragile to survive for an extended period. After the passage of time, the relationship is broken beyond repair, and the child is, \textit{per se}, better off finding "permanency" through adoption and a complete severance of the child's relationship with her/his parent.
II. THE CHILDREN OF INCARCERATED PARENTS BILL OF RIGHTS

At the other end of the policy spectrum from ASFA is the Bill of Rights. The Bill of Rights was developed by the San Francisco Children of Incarcerated Parents Partnership in consultation with a number of child welfare experts. The Bill of Rights comprises the following eight principles:

1. I have the right to be kept safe and informed at the time of my parent’s arrest.
2. I have the right to be heard when decisions are made about me.
3. I have the right to be considered when decisions are made about my parent.
4. I have the right to be well cared for in my parent’s absence.
5. I have the right to speak with, see and touch my parent.
6. I have the right to support, as I struggle with my parent’s incarceration.
7. I have the right not to be judged, blamed or labeled because of my parent’s incarceration.
8. I have the right to a lifelong relationship with my parent.

The principles are inspiring and, at first glance, seem sensible. But as with ASFA’s one-size-fits-all time-driven approach to permanency, the Bill of Rights is deceptively simple and masks some important complexities, as well as some tensions among the Rights themselves. Like ASFA, the Bill of Rights reflects an implicit story about the incarcerated parent and her/his relationship to the child. In this narrative, parents and children are living together as an intact family at the time of the parent’s arrest. The arrest causes the first rupture of what had previously been a strong, stable relationship. The parent-child relationship will be preserved if the child’s rights are recognized and honored. The Bill of Rights narrative is in direct contrast with that of ASFA, which assumes that children of parents who are serving long prison sentences are better off in alternative permanent homes. The Bill of Rights narrative instead assumes that children of incarcerated parents will always want and benefit from continuing relationships with their parents and that termination of parental rights is never warranted.

In fact, the story is often much more complicated. With respect to the assumption that parents were living with and caring for their children prior to their arrests, according to available data only about 55 percent of mothers in prison and 37 percent of fathers in prison were living with their children at the time of their arrest. Although the standard narrative has the children entering care as a result of their parent’s arrest, available data suggest that the opposite is frequently true—the children enter care for other reasons, for example a parent’s drug use, and the parent is later arrested and imprisoned.

Thus, it is difficult to generalize about the family circumstances that existed prior to parental incarceration. The circumstances following incarceration are likewise quite varied. First, the parents’ situations are often fluid. A 1998 California study of children in long-term foster care found that while ten percent of the children had a currently incarcerated mother and 33 percent had a currently incarcerated father, approximately 70 percent of the children had had a parent incarcerated at some point during their time in foster care. This study indicates that parents often move in and out of jail or prison during the time their children are in foster care.

Second, children of incarcerated parents live in a variety of placements and family settings. Self-reported data provide most of the available estimates: at least 11 percent of children of incarcerated mothers are in foster care, with most of the others (2/3) living with relatives (45 percent living with grandparents and 1/3 living with fathers). The situation is different for children of incarcerated fathers—only two percent are in foster care, while 90 percent live with the mothers.

Thus, although the Bill of Rights seems to be a straightforward response to a narrative about how incarcerated parents and their children came to be separated, it is impossible to give practical effect to the Bill of Rights without knowing more about the varied circumstances of these parents and children. For example, Rights #4, 5, and 8 relate to care and contact during the separation of the parent and child:
4. I have the right to be well cared for in my parent’s absence;
5. I have the right to speak with, see and touch my parent; and
8. I have the right to a lifelong relationship with my parent.

The meaning of these rights will first depend upon whether the children are in foster care or in a private custodial arrangement with other family members.

If the children are in the foster care system, the strict ASFA time limits may make it impossible to ensure that children have both a good home during a parent’s lengthy incarceration (Right #4) and a lifelong relationship with the parent (Right #8). For children who are not in foster care and are living with nonparent relatives, the challenge is different. An indigent—and often elderly—relative will find it expensive to accept collect phone calls from the parent, and find it both difficult and expensive to take the child on a trip of many hours—possibly with an overnight stay included—to visit a parent in prison. Such a relative may therefore have to choose between paying to feed, clothe, and shelter the child in order to provide the child with a good home (Right #4), and ensuring that the child is able to see, speak with and touch the parent (Right #5), and has an ongoing relationship with the parent (Right #8).

The need to know exactly where children of incarcerated parents are living, combined with the legal constraints of foster care laws and practical economic struggles facing families, make it difficult to meet the Bill of Rights’ goals of ensuring that children are provided with both a good substitute home during their parent’s absence and a lifelong relationship with their parent.

Even more challenging, however, is the fact that we do not really know enough about who these children are. We can get a rough sense—for example, researchers in New York City have used arrest and incarceration data to map the neighborhoods from which people in prisons come. These data provide a proxy for determining the neighborhoods in which the children of incarcerated parents live, as well as which schools they attend.

But even if we can identify the schools, additional challenges remain. As teachers in these neighborhood schools look out over their classrooms, they will know that a significant number of the students are or have been affected by parental incarceration. If the children are African American, the teachers will know that approximately 1 out of every 15 of these students has an incarcerated parent.

So the teachers and the schools should be ideally suited to carry out Right #6 of the Bill of Rights: “I have the right to support, as I struggle with my parent’s incarceration.” In short, this is the perfect place to begin providing supportive services to children of incarcerated parents. But what kind of support is needed? The situations of these children are far from uniform. As teachers look over their classrooms, they will be confronted with some combination of the following:

1. **Children not in foster care who have incarcerated fathers**
   Ninety percent of these children will be living with their mothers and appear as a single parent family to the outside world. But their weekends may be dominated by long bus trips to prisons and the physical exhaustion and emotional difficulty that entails.

2. **Children not in foster care who have incarcerated mothers**
   More than two-thirds will be living with a relative, often elderly. These caregivers may be financially unable to afford to provide for the child’s ongoing contact with the parent, and the children will be emotionally vulnerable as a result. The caregivers may also be physically unable to provide supervision and guidance for the child.

3. **Children in foster care**
   Placements of these children may be unstable, with movement among homes, neighborhoods, and schools. Additionally, among these children, there are further important distinctions:
   a. **Long-term incarceration, with no chance of reunification during minority**
      Parents may be facing termination of parental rights, and the child will be faced with the prospect of further loss.
   b. **Short-term incarceration, with reunification possible**
      The child will feel excitement/anxiety as the time approaches.
previous incarceration is a “significant factor” in the child remaining in foster care beyond the 15 month limit; 2) the agency has not documented a reason why it would otherwise be appropriate to file for termination (e.g., that it would be in the child’s best interest to do so); and 3) the parent maintains a "meaningful role" in the child’s life.

The third factor is arguably the most important aspect of the new legislation. Unlike ASFA itself, or even the Bill of Rights, the “meaningful role” standard creates a qualitative, individualized standard that focuses on the relationship between particular children and their parents, rather than constructing a standardized, stereotypical image of incarcerated parents and their children and implementing policy based on that image.

Equally important is the way the question of “meaningful role” is to be determined. The ASFA Expanded Discretion Law provides the following criteria for evaluating the extent of the parent’s concern and serious engagement:

[In assessment of whether a parent maintains a meaningful role in his or her child’s life shall be based on evidence, which may include the following: a parent’s expressions or acts manifesting concern for the child, such as letters, telephone calls, visits, and other forms of communication with the child; efforts by the parent to communicate and work with the authorized agency, law guardian, foster parent, the court, and the parent’s attorney or other individuals providing services to the parent, including correctional, mental health and substance abuse treatment program personnel; the purpose of complying with the service plan and repairing, maintaining or building the parent-child relationship; a positive response by the parent to the authorized agency’s diligent efforts; and whether the continued involvement of the parent in the child’s life is in the child’s best interest.]

The legislation further provides that this assessment must draw upon a wide range of people who might have information about the relationship between the incarcerated parent and the child:

In assessing whether a parent maintains a meaningful role in his or her child’s life, the authorized agency shall gather input from individuals and agencies in a reasonable position to help make this assessment, including but not limited to, the authorized agency, law guardian, parent, child, foster parent or other individuals of importance in the child’s life, and parent’s attorney or other individuals providing services to the parent, including correctional, mental health and substance abuse treatment program personnel.

Finally, the legislation involves the court in this assessment, stating: "The court may make an order directing the authorized agency to undertake further steps to aid in completing its assessment."

This assessment has real substance. It requires a level of investigation into the relationship between children and their incarcerated parent far beyond what was required or typically done before. It requires an agency to conduct a searching inquiry into the parent’s communication with the child and efforts to work with the professionals who are involved with the parent, child, and court. Further, it requires that the assessment be conducted in a thorough and balanced way, by requiring the agency to consult with a variety of sources including advocates for the parent.

Beyond the assessment criteria, the ASFA Expanded Discretion Law places additional duties on the agencies to become knowledgeable about the services that are available to incarcerated parents and their children. In defining the agencies’ duties to provide “diligent efforts to encourage and strengthen the parental relationship,” the legislation adds the following required services for incarcerated parents and their families:

providing information... outlining the legal rights and obligations of a parent who is incarcerated... whose child is in custody of an authorized agency, and on social or rehabilitative services available in the community, including family visiting services, to aid in the development of a meaningful relationship between the parent and child. Wherever possible, such information shall include transitional and family support services located in the community to which an incarcerated parent or parent shall return.
c. **Sporadic incarceration, with parents moving in and out of jail or prison, typically due to substance abuse.**

The child may be anxious in the face of this instability.

Overall, these children may experience a sense of loss, anger, fear, excitement, loneliness, or a combination of these at different times. There will be an acute need for support services, which will vary depending on the child’s particular family circumstances. In order for the school to provide these services (Right #6), it needs to be able to identify children who have a parent who is or has been incarcerated. However, identifying these children puts them at risk of being labeled, which is a risk that Right #7 of the Bill of Rights seeks to avoid: “I have the right not to be judged, blamed or labeled because of my parent’s incarceration.”

How do policy makers and service providers identify children of incarcerated parents and assess their particular needs, while avoiding the risk that in being identified they will be labeled and stigmatized? This is a delicate task.

The Bill of Rights is an important statement of principles, reflecting noble aspirations. But like ASFA and its resulting time-driven state legislation, the Bill of Rights oversimplifies a complex set of issues in a way that obscures some of the trade-offs and hard choices that must be made to develop sound approaches to working with and meeting the needs of these families. To be effective, such approaches require recognition that families who are affected by parental incarceration are not a homogeneous group. The catchall phrase “children of incarcerated parents” actually masks some significant differences that call for varied responses.

In short, this population contains many family stories, each of which must be analyzed and dealt with on an individual basis, without stereotyped assumptions that either demonize or idealize the parents. The following section will discuss one such promising approach, recently piloted in New York.

### III. NEW YORK’S ASFA EXPANDED DISCRETION LAW

As discussed above, ASFA’s requirement that termination proceedings generally be brought after a child has been in foster care for 15 months creates a significant problem for incarcerated parents, whose time in prison will typically exceed that limit. Because of this concern, the Correctional Association of New York worked with a larger advocacy community to have legislation introduced and passed that creates an additional exception to the 15-month filing requirement for parents who are or were previously incarcerated (the “ASFA Expanded Discretion Law”). Like the other exceptions, this new exception restores discretion to foster care agencies to refrain from initiating termination proceedings in appropriate cases, even when a child will remain in foster care for more than 15 months. It is important to stress that the exceptions do not preclude an agency from filing a termination proceeding if the agency has grounds for doing so.

The core of the new legislation is the exception itself:

Notwithstanding any other law to the contrary, whenever the child shall have been in foster care for fifteen months of the most recent twenty-two months . . . the authorized agency having care of the child shall file a petition pursuant to this section unless based on a case by case determination:

(D) The parent or parents are incarcerated . . . , or the prior incarceration . . . is a significant factor in why the child has been in foster care for fifteen of the last twenty-two months, provided that the parent maintains a meaningful role in the child’s life based on the criteria set forth in [the statute] . . . and the agency has not documented a reason why it would otherwise be appropriate to file a petition pursuant to this section.

Thus, the new legislation does not create a blanket exception for incarcerated parents. Rather, the exception is subject to three requirements: 1) the parent is currently incarcerated, or the parent’s
previous incarceration is a "significant factor" in the child remaining in foster care beyond the 15 month limit; 2) the agency has not documented a reason why it would otherwise be appropriate to file for termination (e.g., that it would be in the child's best interest to do so); and 3) the parent maintains a "meaningful role" in the child's life.

The third factor is arguably the most important aspect of the new legislation. Unlike ASFA itself, or even the Bill of Rights, the "meaningful role" standard creates a qualitative, individualized standard that focuses on the relationship between particular children and their parents, rather than constructing a standardized, stereotypical image of incarcerated parents and their children and implementing policy based on that image.

Equally important is the way the question of "meaningful role" is to be determined. The ASFA Expanded Discretion Law provides the following criteria for evaluating the extent of the parent's concern and serious engagement:

[A]n assessment of whether a parent maintains a meaningful role in his or her child's life shall be based on evidence, which may include the following: a parent's expressions or acts manifesting concern for the child, such as letters, telephone calls, visits, and other forms of communication with the child; efforts by the parent to communicate and work with the authorized agency, law guardian, foster parent, the court, and the parent's attorney or other individuals providing services to the parent, including correctional, mental health and substance abuse treatment program personnel for the purpose of complying with the service plan and repairing, maintaining or building the parent-child relationship; a positive response by the parent to the authorized agency's diligent efforts . . .; and whether the continued involvement of the parent in the child's life is in the child's best interest.50

The legislation further provides that this assessment must draw upon a wide range of people who might have information about the relationship between the incarcerated parent and the child:

In assessing whether a parent maintains a meaningful role in his or her child’s life, the authorized agency shall gather input from individuals and agencies in a reasonable position to help make this assessment, including but not limited to, the authorized agency, law guardian, parent, child, foster parent or other individuals of importance in the child’s life, and parent’s attorney or other individuals providing services to the parent, including correctional, mental health and substance abuse treatment program personnel.51

Finally, the legislation involves the court in this assessment, stating: "The court may make an order directing the authorized agency to undertake further steps to aid in completing its assessment."52

This assessment has real substance. It requires a level of investigation into the relationship between children and their incarcerated parent far beyond what was required or typically done before. It requires an agency to conduct a searching inquiry into the parent's communication with the child and efforts to work with the professionals who are involved with the parent, child, and court. Further, it ensures that the assessment be conducted in a thorough and balanced way, by requiring the agency to consult with a variety of sources including advocates for the parent.

Beyond the assessment criteria, the ASFA Expanded Discretion Law places additional duties on the agencies to become knowledgeable about the services that are available to incarcerated parents and their children. In defining the agencies’ duties to provide "diligent efforts to encourage and strengthen the parental relationship," the legislation adds the following required services for incarcerated parents and their families:

providing information . . . outlining the legal rights and obligations of a parent who is incarcerated . . . whose child is in custody of an authorized agency, and on social or rehabilitative services available in the community, including family visiting services, to aid in the development of a meaningful relationship between the parent and child. Wherever possible, such information shall include transitional and family support services located in the community to which an incarcerated parent or parent shall return.53
The ASFA Expanded Discretion Law also provides for greater awareness by the court of the challenges facing incarcerated parents by requiring the court to handle cases involving incarcerated parents with extra care and insightfulness:

The court shall consider the special circumstances of an incarcerated parent or parents . . . when determining whether a child is a "permanently neglected child" as defined in this paragraph. In such cases, the court also shall consider the particular constraints, including but not limited to, limitations placed on family contact and the unavailability of social or rehabilitative services to aid in the development of a meaningful relationship between the parent and his or her child, that may impact the parent's ability to substantially and continuously or repeatedly maintain contact with his or her child and to plan for the future of his or her child . . . .

The legislation provides further that when an agency has alleged that it should be excused from making diligent efforts because the parent has failed to keep the agency apprised of her/his location, "the court may consider the particular delays or barriers an incarcerated parent or parents . . . may experience in keeping the agency apprised of his or her location." Thus, the requirements of the ASFA Expanded Discretion Law enlist the agencies and the court, as well as advocates for the parent and child, in efforts to learn as much as possible about the particular circumstances of incarcerated parents and their families. These requirements have the potential to lead to better-informed and sounder decisions in individual cases involving incarcerated parents. Such cases are especially challenging and resource-intensive for agencies, attorneys, and courts. The "meaningful role" assessments will reveal which of the cases involve a viable parent-child relationship and therefore warrant the commitment of time and resources to preserve and strengthen that relationship. These assessments will also show which cases would best be served by moving forward with a termination of parental rights proceeding.

It is important to realize that this determination will not be obvious and intuitive; it cannot reliably be based on "easy," quantitative factors such as the length of the prison sentence or the age of the child. In some cases, children and families will be best served by preserving a relationship with a parent who is serving a long sentence for a serious crime but who nonetheless has a strong, positive relationship with her/his children. In other cases, termination and adoption may be warranted for a parent who is serving a short sentence for a relatively minor offense but who is unable to care for the child because of ongoing problems that have taken the parent out of the child's life (e.g. chronic substance abuse). Only through a process that is free of generalizations, assumptions, and stereotypes can agencies and courts hope to make enlightened long-term decisions that will best serve these families.

An additional potential benefit of the "meaningful role" assessment process is that it can be used to generate empirical information about families involved in the foster care system who have been affected by parental incarceration. Such information is typically not collected on a systematic basis. The assessment procedure required by the ASFA Expanded Discretion Law will make such data collection possible and increase the pool of knowledge for the service providers and policy makers who work with these families and issues.

New York's approach is virtually unique among the states. At present, California is the only state that has an approach resembling New York's "meaningful role" assessment. The relevant California statute provides detailed criteria for determining when services to incarcerated parents with children in foster care should be provided, as well as the criteria for determining what services to provide:

If the parent or guardian is incarcerated or institutionalized, the court shall order reasonable services unless the court determines, by clear and convincing evidence, those services would be detrimental to the child. In determining detriment, the court shall consider the age of the child, the degree of parent-child bonding, the length of the sentence, the length and nature of the treatment, the nature of the crime or illness, the degree of detriment to the child if services are not offered and, for children 10 years of age or older, the
child's attitude toward the implementation of family reunification services, the likelihood of the parent's discharge from incarceration or institutionalization within the reunification time limitations described elsewhere in the statute, and any other appropriate factors. In determining the content of reasonable services, the court shall consider the particular barriers to an incarcerated or otherwise institutionalized parent's access to those court-mandated services and ability to maintain contact with his or her child, and shall document this information in the child's case plan.56

The California statute also provides a list of services specifically tailored to incarcerated parents:57

(A) Maintaining contact between the parent and child through collect telephone calls.
(B) Transportation services, where appropriate.
(C) Visitation services, where appropriate.
(D) Reasonable services to extended family members or foster parents providing care for the child if the services are not detrimental to the child.

The statute also requires the agency to take into account particular barriers imposed by the parent's incarceration.58

However, the provision of these services is time-limited: For a child who is three years or older, services may generally be provided to the family only for one year. For younger children, the general limit is six months. The time limit may be extended to 18 or 24 months, but only if there is a "substantial probability" that reunification will be achieved within the extended time period.59 Thus, unlike the New York ASFA Expanded Discretion Law, the California statute applies only to incarcerated parents who are serving relatively short prison sentences and does not contemplate the possibility of a meaningful long-term parenting role from prison.

The New York ASFA Expanded Discretion Law is therefore an innovative and promising approach to addressing the needs of the portion of children and incarcerated parents who are involved in the foster care system. It is an approach that could be replicated in other states.60 Although the foster care population targeted by the New York law is a relatively small segment of the total population of incarcerated parents and children,61 the protocols developed by foster care agencies for conducting these "meaningful role" assessments could be adapted for use by other service providers who work with incarcerated parents and their children outside the foster care context.

CONCLUSION

"Children of Incarcerated Parents" is a catchy and compelling label and a useful tool for organizing advocacy efforts. However, the use of this phrase may ultimately be misleading and counterproductive by suggesting a uniformity of situations and appropriate responses that does not actually exist. ASFA and the Children of Incarcerated Parents Bill of Rights contribute, in opposite ways, to this misperception by providing stereotyped and oversimplified "narratives" about incarcerated parents and their children.

In contrast, the New York ASFA Expanded Discretion Law forgoes these simple stories about the identity and circumstances of, and appropriate responses to, incarcerated parents and their children. Instead the New York law substitutes a kind of "counter-narrative" of complicated, individualized, widely varying family situations that defy easy solutions.

Parental incarceration involves interplay of complex issues. Only by discarding preconceptions and simplistic approaches, can we hope to provide appropriate services and support for children and families affected by parental incarceration. There are no easy answers or shortcuts. Careful, sensitive, labor-intensive effort—informed by actual knowledge about the individual families—is required. New York's Expanded Discretion Law is one possible approach to this critically important undertaking.
NOTES

1. Everett B. Birch, Innovative Teaching Clinical Professor in Professional Responsibility, Columbia Law School. I want to thank Tung San Victoria Kwan, JD 2011 for her research assistance.


3. Id. at 3 Table 3.

4. Id. at 2 Table 2.


6. Parents in Prison, supra note 2, at 3.


11. Id.: (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.

12. For a more complete analysis of the state statutes, including the specific provisions that were adopted in response to ASFA, see ARLENE F. LEE, PHILIP M. GENTY, AND MIMI LAYER, THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT ON CHILDREN OF INCARCERATED PARENTS, at 11–18 (Child Welfare League of America 2005). As a result of the federal ASFA requirements, all state statutes provide for termination on the basis of the parent’s conviction of specified crimes in which a child was the victim. These state statutes are not discussed in this article, the focus of which is time-driven, rather than crime-specific, termination of parental rights statutes.

13. 750 ILL. COMP. STAT. ANN. 50/1, § 1(2)(c) (LexisNexis 2011).


15. KY. REV. STAT. ANN. § 600.030(2)(c) (LexisNexis 2011).

16. LA. REV. STAT. ANN. §§ 1015(6); 1036(E)(2011).


20. Colo. Rev. Stat. § 19-3-604(1)(b)(III) (2010). However, the statute also contains an important safeguard. An exception to the 15 month rule for filing a termination proceeding is where the child has remained in foster care due to circumstances beyond the control of the parent, such as incarceration of the parent for a reasonable period of time, court delays or continuances that are not attributable to the parent, or such other reasonable circumstances that the court finds are beyond the control of the parent. Id. §(3)(b)(IV).


34. N.H. rev. stat. ann. § 170-C:5(VI) (LexisNexis 2011).


Many observers fear that more punitive law enforcement sanctions may have increased foster care placements. This concern arises from the possibility that increased punishment for minor crimes has resulted in more incarcerated mothers. Because some of these mothers will not be able to arrange for the care of their children, foster care placements will escalate as a direct result of more aggressive policing.

Our data strongly suggest that the opposite is true. Instead of criminal activity leading to placement, placement may produce increases in maternal criminal activity that lead to incarceration. If children entered foster care because of maternal incarceration, then arrest and incarceration should occur prior to placement. For nine in 10 children in the study group, the mother’s incarceration that overlapped for 30 days or more started after placement. ... 85 percent of the arrests that led to 30 day overlaps occurred after placement, not before.

42. Glaze & Marruschnak, supra note 2.
43. Id.
45. Glaze & Marruschnak, supra note 2.
46. The effort was conceived and spearheaded by the Women in Prison Project, under the direction of Tamara Kraft-Stolar, Jaya Vasandani, and Serena Alfieri.
47. Adoption & Safe Families Act Expanded Discretion Bill, 2010 N.Y. Laws 113. The exception also applies to parents who are in residential drug treatment, but this discussion will focus only on parents who are or were previously incarcerated.
48. This is in addition to the three federal exceptions set out at supra note 11.
51. Id.
52. Id.
54. Adoption & Safe Families Act Expanded Discretion Bill, 2010 N.Y. Laws 113 § 2 (codified at N.Y. Soc. Serv. Law § 384-b(7)(a)).
55. Adoption & Safe Families Act Expanded Discretion Bill, 2010 N.Y. Laws 113 § 3 (codified at N.Y. Soc. Serv. Law § 384-b(7)(c)(i)).
57. Id.
58. Id. An incarcerated parent may be required to attend counseling, parenting classes, or vocational training programs as part of the reunification service plan if actual access to these services is provided. The social worker shall document in the child’s case plan the particular barriers to an incarcerated or institutionalized parent’s access to those court-mandated services and ability to maintain contact with his or her child.
59. Id. §§ 361.5(e)(1),(3),(4).
60. While no other state has a law equivalent to those of New York or California, several states do take a somewhat nuanced approach to termination cases involving incarcerated parents. See:

Nebraska: Neb. Rev. Stat. Ann. §43-292.02 (LexisNexis 2011): “A petition shall not be filed on behalf of the state to terminate the parental rights of the juvenile’s parents or, if such a petition has been filed by another party, the state shall not join as a party to the petition if the sole factual basis for the petition is that ... (b) the parent or parents of the juvenile are incarcerated. The fact that a qualified family for an adoption of the juvenile has been identified, recruited, processed, and approved shall have no bearing on whether parental rights shall be terminated.”

New Mexico: N.M. Stat. Ann. §32A-4-28(D) (LexisNexis 2011): “The department shall not file a motion, and shall not join a motion filed by another party, to terminate parental rights when the sole factual basis for the motion is that a child’s parent is incarcerated.”

Oklahoma: Okla. Stat. tit. 10A, §1-4-904 (2011): (B) The court may terminate the rights of a parent to a child based upon the following legal grounds:
(12) A finding that the parent whose rights are sought to be terminated is incarcerated, and the continuation of parental rights would result in harm to the child based on consideration of the following factors, among others:
a. the duration of incarceration and its detrimental effect on the parent-child relationship,
b. any previous convictions resulting in involuntary confinement in a secure facility,
c. the parent's history of criminal behavior, including crimes against children,
d. the age of the child,
e. any evidence of abuse or neglect or failure to protect from abuse or neglect of the child or siblings of the child by the parent,
f. the current relationship between the parent and the child, and

g. the manner in which the parent has exercised parental rights and duties in the past.

Provided, that the incarceration of a parent shall not in and of itself be sufficient to deprive a parent of parental rights.

61. See Glaze & Laura M. Matschak, supra notes 42 and 43 and accompanying text.

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