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Losing More Than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997

Mariely Downey

Approximately eighty percent of incarcerated women are mothers. Of this number, seventy-five percent have children under the age of eighteen. Five percent of the women entering prison are pregnant. ¹ Most of these women are imprisoned for drug or property related offenses and the lengths of many drug related prison terms are determined by mandatory sentencing guidelines. ² The effects of mandatory sentencing in combination with the Adoption and Safe Families Act of 1997 (ASFA) on incarcerated mothers have raised questions about what is in the best interest of the child.

of an imprisoned mother and whether family bonds should be preserved while the mother is in prison. Under ASFA, termination of parental rights is expedited to ensure that children do not languish in foster care while parents and social workers attempt to determine whether the family can be reunified. However, this has also resulted in incarcerated women being at greater risk for having their parental rights terminated based on the length of their prison sentence. This article will address the implications of ASFA for incarcerated mothers and the difficulty of balancing the needs of the child against the preservation of family bonds.

The Supreme Court has consistently held that the Fourteenth Amendment to the Constitution gives parents a qualified right to raise their children as they wish. This right is balanced by the states' interest in promoting the children's well being and the children's right to be free from harm. The rights and responsibilities of the mother have been presumed in this regard, whereas those of the father have been seen as conditional; the "mere existence of a biological link" has not been considered enough to give the unmarried father the same rights under the Due Process Clause as the mother. The government has had to balance the rights of the parent and state when crafting child welfare policy, especially when dealing with adoption, foster care, and the termination of parental rights. In *Santosky v. Kramer*, the court recognized that "when the State moves to destroy weakened familial bonds, it must provide the parents with

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4 Id. at 334.

5 Id. at 335. See also, *Parnham v. Hughes*, 441 U.S. 347 (1979) (Upheld a law baring the biological father from suing for his non-marital child's wrongful death because the father had chosen not to legitimate the child) and *Lehr v. Robertson*, 463 U.S. 248 (1983) (Upheld a law denying the biological father a notice or hearing prior to the adoption of his child because he had never established a substantial relationship with the child).
fundamentally fair procedures.”

The Adoption Assistance and Child Welfare Act of 1980 emphasized the reduction of the time a child spent in foster care by focusing on the reunification of the family and encouraging adoption if reunification was not possible. In 1993, the Family Preservation and Family Support Act was passed with an even greater emphasis on reunification. Many criticized this emphasis on family reunification because while all “reasonable efforts” were made to solve the families’ problems, children were often left in foster care for long periods of time. These prolonged stays in the foster care system can be detrimental to the children’s emotional and social development. Children in foster care are often moved from foster home to foster home without knowing whether or not they will be reunited with their biological family. Consequently, they are unable to form secure bonds with a consistent caregiver. Justice Evelyn Lundberg Stratton, a children’s advocate for more than two decades, eloquently stated, “Cases involving termination of parental rights and adoption issues are about the lives of children, rather than contracts, insurance, business disputes, or water rights. The legal system views these cases as numbers on a docket. However, to a child, waiting for a resolution seems like forever – an eternity with no real family and no sense of belonging.”

The policy shifted again in 1997 when the Adoption and Safe Families Act was passed into law. This Act favors the termination of parental rights at an even faster rate so the child can be adopted into a permanent home. ASFA has the stated goal of doubling the number of children adopted by

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6 Mauskopf, supra note 1, at 113 (citing Santosky v. Kramer, 455 U.S. 745 (1982)).
8 Wan, supra note 3, at 340.
the year 2002. The new emphasis is on the safety of the child, rather than the reunification of the family. First, the “reasonable efforts” made toward reunification are more specifically defined and limited under ASFA than in previous legislation. Second, an expedited timetable is written into the legislation; when a child has been in foster care for 15 of the most recent 22 months, the law mandates the filing of a petition for termination of parental rights. The law also provides bonuses to states that increase the number of adoptions from year to year.

Critics of ASFA charge that because the law so heavily emphasizes adoption, adequate resources are not directed to support services for biological families who want to maintain their parental rights. Consequently, these families are not given a sufficient opportunity to be reunified.

Critics also charge that the law’s emphasis on child safety also does not address the fact that most children are removed from their homes due to neglect, not abuse. Neglect of children is often related to poverty and the heightened risks that accompany a family’s lack of resources. A greater emphasis on the termination of parental rights does not address the problems related to child poverty. Additionally, not only do children typically want to maintain a relationship with their biological parents, but if there is no family available to adopt them, the termination of parental rights does not mean that the child will have a new permanent family.

Due to mandatory sentencing and the on-going war on drugs, women have

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12 Freundlich, supra note 7, at 100.
13 Roberts, supra note 11, at 67.
15 Roberts, supra note 11, at 68.
16 Id. at 69. Freundlich, supra note 7, at 108.
become the fastest growing segment of the prison population. In many cases, mandatory sentencing laws do not give judges the option of taking into account the woman’s family responsibilities and whether there will be anyone to care for her child while she is incarcerated.\(^\text{17}\) Of the eighty percent of women in prison who are mothers, most are single mothers.\(^\text{18}\) Seventy to ninety percent of incarcerated mothers are the sole caregivers for their children.\(^\text{19}\) ASFA has had grave implications for incarcerated mothers. Because of the forced separation between a mother and her child when she is incarcerated, there is a greater risk for the possibility of termination of parental rights on the basis of abandonment or permanent neglect.\(^\text{20}\) Under ASFA, the expedited timetable for filing for termination based on the

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\(^{17}\) Mauskopf, supra note 1, at 104.


\(^{19}\) Mauskopf, supra note 1, at 116.

\(^{20}\) Wan, supra note 3, at 337.

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length of time a child has been in foster care is especially problematic. Women who are incarcerated on even relatively minor charges are now at risk for forfeiting their motherhood under ASFA. Without the ability of a judge to use his or her discretion in sentencing, many convicted mothers face the permanent loss of custody of their child.\(^\text{21}\)

Under New York’s Social Services Law and Family Court Act, the standard of proof for permitting the termination of parental rights is higher than in many states and more stringent than ASFA requires.\(^\text{22}\) A judicial determination of unfitness in a fact-finding hearing is required for the state to show that the parent has not provided suitable care for the child. The standard of “clear and convincing evidence” has replaced the previous standard of a “preponderance of the evidence” in *Santosky v. Kramer*.\(^\text{23}\) The higher standard was instituted to better deal

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\(^{21}\) Mauskopf, supra note 1, at 105.

\(^{22}\) Wan, supra note 3, at 336 (citing N.Y. Soc. Serv. Law 384-b (4)(a) (McKinney 1992)).

\(^{23}\) Id. at 337 (citing Santosky v. Kramer 455 U.S. 745 (1982)).
with the disparity in resources between the state and the often poor parents who come in contact with the system. The New York state law and its higher standard are generally favorable to incarcerated parents because the parents are assured adequate procedural protections. In addition, because the possibility of parental rehabilitation is recognized by the state, resources are given to reunification efforts.  

However, an incarcerated parent in New York must still navigate the two most common possibilities for parental termination; abandonment and permanent neglect. Under New York law, a child is considered abandoned “if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency.” Courts have held that the mother’s incarceration is not considered an excuse for not being able to visit or communicate with the child and that an incarcerated parent must do more than contact the child or the agency once in a six-month period. Permanent neglect occurs when a parent fails to maintain substantial and frequent contact with the child for more than one year or to develop a plan for the provision of necessary social services. Even though the social service agency does have a codified responsibility to make “diligent efforts” to aid the mother in visiting, communicating with or planning for her child, the mother’s incarceration still severely limits her ability to work with an agency in some circumstances.

24 Id. at 339.
25 Philip M. Genty, Protecting the Parental Rights of Incarcerated Mothers Whose Children are in Foster Care: Proposed Changes to New York’s Termination of Parental Rights Law, 17 FORDHAM URB. L.J. 1, 8 (1989).
26 Wan, supra note 3, at 337 (citing N.Y. Soc. Serv. Law 384-b(5)(a) (McKinney 1983)).
28 Genty, supra note 25, at 9 (citing N.Y. Soc. Serv. Law 384-b(7)(a) (McKinney 1983)).
29 Id. at 11.
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percent of women convicted of felonies are sentenced to serve at least 18 months, with the time limit under ASFA set at 15 of the last 22 months for a child in foster care, mothers must still combat the mandatory filing for termination written into the timetable in ASFA. So, even though some aspects of New York's law are more favorable to incarcerated mothers, ASFA's incorporation of the onerous timetables still leaves some women at risk of losing their children for no other reason than the length of their prison sentence.

The intent of ASFA is to lessen the time children must spend in foster care and to protect them from having to

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31 Bernstein, supra note 18, at 2.
return to unsafe homes. However, the way ASFA intersects with mandatory prison sentences for incarcerated mothers may result in the termination of parental rights when it is not in the best interest of the child. According to the Children's Defense Fund, an estimated 547,000 children were in foster care as of March 31, 1999—a 35 percent increase since 1990. Approximately 117,000 of these are waiting for permanent adoptive families.\textsuperscript{32} It is unclear whether there are enough qualified adoptive families for these children as well as the support services needed to ensure stability and permanency.\textsuperscript{33} Robert Borgman's study of adoption practices involving involuntary termination of parental rights suggests that when such adoptions occur, a significant number of children resist the placement and later return to foster care.\textsuperscript{34} In addition, keeping incarcerated mothers in contact with their children is also a powerful rehabilitation tool.

Although there is no clear answer to the complications associated with the care of children whose mothers are incarcerated, a law more variable than ASFA is needed. Flexibility within the legal and social welfare systems must be preserved in order to make the best decision for each child in regard to their permanency planning options. Judges should have discretion in sentencing so that they can take into account whether the mother is the primary caretaker of the child. There should also be more than two dichotomous options for children: reunification with the birth family or termination of parental rights. The unique situation of each child should determine what kind of an arrangement would provide the child with stability, commitment and consistency. Philip Genty, Clinical law


\textsuperscript{33} Freundlich, \textit{supra} note 7, at 109.

\textsuperscript{34} Id. at 107 (citing Robert Borgman, \textit{Antecedents and Consequences of Parental Rights Termination for Abused and Neglected Children}, 60 Child Welfare 391, 391-404 (1991)).
professor and director of the Prisoners and Families Clinic at Columbia University Law school has noted that social service departments “feel that ASFA puts pressure on them to move children out of the system quickly even when they think there may be a decent relationship between parent and child. They don’t have the ability to wait for the parent to get out of prison.”35 Neither incarcerated mothers or their children are best served by a law as rigid and uncompromising as ASFA.

35 Bernstein, supra note 18 (quoting Philip Genty).