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# ASFA in the Age of Mass Incarceration: Go to Prison—Lose Your Child

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**ASFA IN THE AGE OF MASS INCARCERATION:  
GO TO PRISON—LOSE YOUR CHILD?**

Jean C. Lawrence<sup>†</sup>

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I. INTRODUCTION—THE PROBLEM

*Several officers descend on a family home in a drug raid. The young mother's three children, ages eight, four, and two, are shepherded out of the*

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*home by a caseworker while the police conduct their search and subsequently arrest the young mother. The children are placed in three different foster homes and are not allowed in-person or telephone contact with their mother while she is in jail pending trial because it is “not in their best interests.”*

*A father is sent to prison for a four- to six-month term at a crucial point in the juvenile court case regarding his son. The judge denies the father’s request to be transported to the review hearing because “he just wants a field trip out of his cell.”*

These are just a few examples of the treatment that incarcerated parents frequently encounter in the juvenile system. As an attorney representing parents in dependency proceedings, the prevailing attitude that I encounter is that children are better off without parents who have been swept into the criminal justice system. However, with incarceration rates so high that one in nine African American children, one in twenty-eight Hispanic children, and one in fifty-seven white children have a parent in prison,<sup>1</sup> it is time to look beyond the mere status of incarceration in determining what is in our children’s best interests.

The United States incarcerates more people by far than any other country in the world.<sup>2</sup> With a rate of 716 adults imprisoned per 100,000,<sup>3</sup> the United States imprisons about 50% more people per capita than the Russian Federation (475 per 100,000), 400% more than the United Kingdom (148 per 100,000) and 800% more than Germany (79 per 100,000).<sup>4</sup> These numbers have increased dramatically in the United States over the last thirty years,<sup>5</sup> due primarily to the “war on drugs,”<sup>6</sup> mandatory minimum sentencing

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1. THE ECON. MOBILITY PROJECT & THE PUB. SAFETY PERFORMANCE PROJECT, THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY 4 (2010), *available at* [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic\\_Mobility/Collateral%20Costs%20FINAL.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf) [hereinafter THE PEW STUDY].

2. *See* ROY WALMSLEY, INT’L CTR. FOR PRISON STUD., WORLD POPULATION LIST 1 (10th ed. 2013), *available at* [http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1\\_10.pdf](http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wpp1_10.pdf).

3. *Id.*

4. *Id.* at 5.

5. Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 430 n.38 (2013).

6. *Id.* at 429.

laws,<sup>7</sup> and habitual offender statutes.<sup>8</sup> The average length of prison sentences has also been on the rise, increasing by 36% in the last twenty years.<sup>9</sup> The current average state sentence is 2.9 years.<sup>10</sup>

When these numbers are broken down by race, the results are even more staggering. According to 2008 statistics, adult male Caucasians in the United States are incarcerated at the rate of 1 in 106, Hispanics at the rate of 1 in 36, and African Americans at the rate of 1 in 15.<sup>11</sup>

While it appears that, over the last few years, these numbers are starting to level off or even decrease slightly, we still had 1,571,013 prisoners in U.S. state and federal prisons at the end of 2012,<sup>12</sup> and 735,983 inmates in our state jail systems as of June 2012.<sup>13</sup> How does this impact our children? A 2010 Pew Charitable Trusts report found that 1.2 million inmates had children under the age of eighteen.<sup>14</sup> The report estimated that 2.7 million minor children had a parent in jail or prison, which translates to 1 in 28 children (3.6%) with an incarcerated parent, up from 1 in 125 only 25 years prior.<sup>15</sup> The situation has become so pervasive that *Sesame Street* now has a new character—Alex—a child whose father is in prison.<sup>16</sup> The nature of the offenses is also important to note.

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7. See, e.g., FAMILIES AGAINST MANDATORY MINIMUMS, FEDERAL MANDATORY MINIMUMS (2012), available at <http://www.famm.org/Repository/Files/Chart%20All%20Fed%20MMs%202.25.13.pdf>.

8. Traum, *supra* note 5, at 429–30.

9. THE PEW CTR. ON THE STATES, THE PEW CHARITABLE TRUSTS, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 2 (2012), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Pew\\_Time\\_Served\\_report.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Time_Served_report.pdf).

10. *Id.* at 13.

11. Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, NAT'L INST. JUST. J., June 2012, at 42, 45 fig.2.

12. E. ANN CARSON & DANIELA GOLINELLI, U.S. DEP'T OF JUSTICE, PRISONERS IN 2012—ADVANCE COUNTS 2 tbl.1 (2013), available at <http://www.bjs.gov/content/pub/pdf/p12ac.pdf>.

13. TODD D. MINTON, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2012—STATISTICAL TABLES 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/jim12st.pdf>.

14. THE PEW STUDY, *supra* note 1, at 18.

15. *Id.*

16. Katie Reilly, *Sesame Street Reaches Out to 2.7 Million American Children with an Incarcerated Parent*, PEW RES. CTR. (June 21, 2013), <http://www.pewresearch.org/fact-tank/2013/06/21/sesame-street-reaches-out-to-2-7-million-american-children-with-an-incarcerated-parent>.

Incarcerated parents are more likely to be in prison for drug, property, and public order offenses than for violent crimes.<sup>17</sup>

Simultaneously with this trend of “mass incarceration,” our child welfare system has grown increasingly impatient with parents who are unable to successfully and expeditiously address their problems. The Adoption and Safe Families Act, which was passed by the U.S. Congress in 1997, requires that a petition to terminate parental rights be filed if a child has been removed from the home for fifteen out of the previous twenty-two months (“15/22 rule”).<sup>18</sup> Indiscriminate application of this 15/22 rule can fall quite harshly on families with an incarcerated parent. In fact, one study found that between the passage of the Adoption and Safe Families Act in 1997 and 2002, termination proceedings of incarcerated parents more than doubled.<sup>19</sup> Another study found that, in that five-year period, “parental rights were terminated in 92.9% of cases of maternal incarceration, in 91.4% of cases of paternal incarceration, and in 100% of cases when both parents were incarcerated.”<sup>20</sup>

This article will explore the collision of policies promoting strict timelines for termination of parental rights with policies favoring family contact and reunification in the context of the current correctional philosophy of mass incarceration. We will then look at how these often-conflicting policies have been resolved in state statutes and court decisions. Lastly, we will explore ways that our juvenile system can acknowledge the value that incarcerated parents have to their families while still honoring children’s need for permanency.

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17. LAUREN E. GLAZE & LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, PARENTS IN PRISON AND THEIR MINOR CHILDREN 4 (rev. 2010), *available at* <http://bjs.gov/content/pub/pdf/pptmc.pdf>.

18. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a) (3), 111 Stat. 2115, 2118 (codified as amended at 42 U.S.C. § 675(5) (E) (2006)).

19. THE ANNIE E. CASEY FOUND., WHEN A PARENT IS INCARCERATED: A PRIMER FOR SOCIAL WORKERS 9 (2011), *available at* <http://www.aecf.org/KnowledgeCenter/SpecialInterestAreas/ChildreWithIncarceratedParents.aspx>.

20. KRISTIN S. WALLACE, NAT’L RES. CTR. FOR PERMANENCY & FAMILY CONNECTIONS, INFORMATION PACKET: THE ADOPTION AND SAFE FAMILIES ACT: BARRIER TO REUNIFICATION BETWEEN CHILDREN & INCARCERATED MOTHERS 4 (2012), *available at* [http://www.nrcpfc.org/is/downloads/info\\_packets/TheAdoptions&SafeFamiliesAct.pdf](http://www.nrcpfc.org/is/downloads/info_packets/TheAdoptions&SafeFamiliesAct.pdf).

## II. POLICY CONFLICT—ASFA VS. FAMILY REUNIFICATION

## A. ASFA

1. *Background*

The Adoption Assistance and Child Welfare Act of 1980 (AACWA)<sup>21</sup> was the first federal legislation designed to address the problem of foster care “limbo.”<sup>22</sup> The perception at the time was that too many children were being placed unnecessarily into foster care, and for excessive amounts of time.<sup>23</sup> One of the primary ways the legislation addressed these issues was by requiring that reasonable efforts be made to keep children in their families or, once removed, in returning children to their families.<sup>24</sup> AACWA did not define the term “reasonable efforts,” instead leaving this to state policymakers, legislators, and courts to determine.<sup>25</sup>

Initially, the legislation was effective and foster care numbers did start to decline.<sup>26</sup> However, a combination of the AIDS epidemic, the rise of crack cocaine use, and federal policies that slashed public benefits to poor and working families resulted in foster care numbers again increasing.<sup>27</sup> The number of children in foster care in 1982 was about 250,000.<sup>28</sup> By 1993 this number had increased to 464,000.<sup>29</sup>

2. *Purpose*

The Adoption and Safe Families Act of 1997 (ASFA)<sup>30</sup> was passed by Congress primarily to limit what was perceived to be an

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21. Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

22. Frank E. Vandervort, *Federal Child Welfare Legislation*, in CHILD WELFARE LAW AND PRACTICE 203–04 (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010).

23. *Id.*

24. *Id.* at 204.

25. See Adoption Assistance and Child Welfare Act, 94 Stat. 500.

26. Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 FAM. & CONCILIATION CTS. REV. 25, 27 (2001) (noting low of 276,000 children in 1985).

27. Vandervort, *supra* note 22, at 206.

28. *Id.*

29. *Id.*

30. Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered

overly liberal use of the requirement under AACWA that reasonable efforts must be made to reunify a family under juvenile court jurisdiction.<sup>31</sup> Testimony at the hearings on ASFA focused on concepts such as “respect[ing] the child’s sense of time” and the assertion that the primary goal of our child welfare system should be “to act as expeditiously as necessary to achieve permanency” for the child’s benefit.<sup>32</sup>

ASFA continues AACWA’s commitment to family preservation and the requirement that reasonable efforts be made to keep families together. However, ASFA also sends a clear message that these efforts may have gone too far in the past. The legislation states that “in determining reasonable efforts to be made with respect to a child . . . the child’s health and safety shall be the paramount concern . . . .”<sup>33</sup> ASFA, as did AACWA before it, provides no guidance as to how the term “reasonable efforts” should be defined. Instead, it utilizes a strategy of putting time limits on how long reasonable efforts should be provided.<sup>34</sup>

### 3. Major Provisions

In addition to the clarification that reasonable efforts must be assessed with a lens focused on child safety, ASFA included several provisions with the intention of moving cases more quickly to permanency. The ASFA provision that has the greatest impact on incarcerated parents<sup>35</sup> is the 15/22 rule, which states that if a child has been in foster care for fifteen out of the prior twenty-two

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sections of 42 U.S.C.).

31. See Vandervort, *supra* note 22, at 206.

32. Cassie Statuto Bevan, *Adoption and Safe Families Act: No Second Chances?*, in URBAN INST., *INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT* 52, 53 (2009), available at [http://www.urban.org/uploadedpdf/1001351\\_safe\\_families\\_act.pdf](http://www.urban.org/uploadedpdf/1001351_safe_families_act.pdf).

33. 42 U.S.C. § 671(a)(15)(A) (2006) (effective Mar. 23, 2010).

34. See Nell Berstein, *Foreword* to PATRICIA E. ALLARD & LYNN D. LU, *REBUILDING FAMILIES, RECLAIMING LIVES*, at iii, iv (2006), available at [http://www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_37203.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_37203.pdf).

35. ASFA also contains a provision allowing waiver of reasonable efforts in certain circumstances, most of which involve violent assaults by the parents on their children. See 42 U.S.C. § 671(a)(15)(D). Additionally, it allows the states to define what other “aggravated circumstances” justify waiver. *Id.* While this provision does primarily impact incarcerated parents, it applies to a very small subset of this population.

months, the State shall initiate termination proceedings.<sup>36</sup> This provision implements ASFA's purpose of putting a time limit on reasonable efforts. There are three exceptions to this requirement: (1) if the child is placed with a relative, (2) if a determination is made that termination is not in the best interests of the child, or (3) timely family services were not provided.<sup>37</sup> Neither the rule itself nor any of the exceptions directly address how incarceration is to be treated under ASFA. In light of the fact that the average sentence length necessarily entails removal of a child from an incarcerated parent for more than twice the mandatory time limit in the 15/22 rule, clearly this has a huge impact on dependency proceedings involving incarcerated parents.

### B. *State Interpretation*

This section will look at how various states have addressed incarcerated parents in their statutes on termination of parental rights, with a focus on Iowa law. The Iowa statutory scheme contains termination timelines that are even more restrictive than ASFA, so it is illuminating to see how incarcerated parents are treated under these strict guidelines.

#### 1. *Iowa Statutes on Termination of Parental Rights*

As required by ASFA, Iowa law mandates the filing of a petition for Termination of Parental Rights (TPR) if a child has been placed in foster care for fifteen months of the most recent twenty-two-month period,<sup>38</sup> as well as in those cases where reasonable efforts have been waived or other aggravated circumstances exist.<sup>39</sup> The Iowa statute includes the three "ASFA approved" exceptions to the mandatory filing rule: (1) for relative care, (2) where compelling reasons have been documented that termination is not in the best interests of the child, or (3) where timely services have not been provided.<sup>40</sup>

Several of the discretionary grounds for termination under Iowa law impact incarcerated parents. For example, a court may

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36. *Id.* § 675(5)(E).

37. *Id.*

38. IOWA CODE ANN. § 232.111(2)(a)(1) (West, Westlaw through 2013 Reg. Sess.).

39. *Id.* § 232.111(2)(a)(2), (4)–(6).

40. *Id.* § 232.111(2)(b).



terminate parental rights when there is evidence of abandonment.<sup>41</sup> Where a court has determined that a child is in need of assistance, Iowa law provides the following as grounds for termination:

- (1) The child has been removed for at least six consecutive months and the parent has not maintained “significant and meaningful contact with the child”;<sup>42</sup>
- (2) The child is four years old or older, has been removed for at least twelve of the last eighteen months or the last twelve consecutive months, and the child cannot be returned to the custody of the parent at the present time;<sup>43</sup>
- (3) The child is three years old or younger, has been removed for at least six of the last twelve months or for the last six consecutive months, and the child cannot be returned to the custody of the parent at the present time;<sup>44</sup> and
- (4) The child is in placement and the parent has been imprisoned for a crime against the child, the child’s sibling, or another child in the household, or the parent has been imprisoned and it is unlikely that the parent will be released from prison for a period of five or more years.<sup>45</sup>

Iowa law contains a three-prong analysis for terminations. First, one of the statutory grounds must be proven. Then it must be shown that termination is in the best interests of the child.<sup>46</sup> In considering the factors to determine the best interests, the Iowa statute specifically states that one of the considerations may include the parent’s imprisonment for a felony, regardless of the underlying criminal charge or the length of the sentence.<sup>47</sup> Lastly, the statute sets out five circumstances in which a court need not terminate even though the statutory grounds are proven.<sup>48</sup> None of the exceptions specifically addresses incarceration.

Thus, while the State is required to file for termination under Iowa’s 15/22 rule, there are several additional circumstances in which the State has apparent discretion to seek termination even earlier that could be applied to incarcerated parents. There is

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41. *Id.* § 232.116(1)(b).

42. *Id.* § 232.116(1)(e).

43. *Id.* § 232.116(1)(f).

44. *Id.* § 232.116(1)(h).

45. *Id.* § 232.116(1)(j).

46. *Id.* § 232.116(2).

47. *Id.* § 232.116(2)(a).

48. *Id.* § 232.116(3).

nothing in the Iowa Code that specifically makes an exception if the passage of time is due entirely to the fact the parent is incarcerated and has no real opportunity to regain custody of the child. In fact, the only provisions that speak to incarceration seem to favor the premise that absence due to incarceration is alone a valid reason to terminate.

## 2. *Statutes of Other States*

There is a wide divergence in how states treat the status of incarceration for purposes of TPR. Some states consider incarceration, regardless of the offense, as justification for skipping reasonable efforts altogether and proceeding directly to termination. Alaska,<sup>49</sup> Kentucky,<sup>50</sup> and North Dakota<sup>51</sup> all include incarceration alone as an aggravated circumstance warranting the waiver of reasonable efforts to reunify.

On the other end of the spectrum are state statutes that specifically make an exception to the 15/22 rule for incarcerated parents. Massachusetts,<sup>52</sup> Missouri,<sup>53</sup> and Nebraska<sup>54</sup> have statutes that specifically state that incarceration alone is not a basis for termination of parental rights. This position is supported by ABA Resolution 102E,<sup>55</sup> passed in 2010, which calls upon the states and the federal government to clarify that incarceration alone should never be a sufficient ground upon which to terminate parental rights or waive the reasonable efforts requirement. Statutes such as these send a clear message to the agencies, attorneys, and judges in the child welfare system that they have to look beyond the mere

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49. ALASKA STAT. ANN. § 47.10.080(o) (West, Westlaw through 2013 1st Reg. Sess.).

50. KY. REV. STAT. ANN. §§ 600.020(2)(b), 610.127(1) (West, Westlaw through 2013 Extraordinary Sess.).

51. N.D. CENT. CODE ANN. §§ 27-20-02(3)(f), 27-20-32.2(4)(a) (West, Westlaw through 2013 Legis. Sess.).

52. MASS. GEN. LAWS ANN. ch. 210, § 3(c)(xiii) (West, Westlaw through 2013 1st Sess. and Chapter I of 2014 2d Sess.).

53. MO. ANN. STAT. § 211.447(7)(6) (West, Westlaw through 2013 Legis. Sess.).

54. NEB. REV. STAT. ANN. § 43-292.02(2)(b) (West, Westlaw through 2013 Legis. Sess.).

55. See JANE H. AIKEN & ZATHRINA ZASELL G. PEREZ, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES: RESOLUTION 102E, at 4 (2010), available at [http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily\\_journal/102E.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/daily_journal/102E.authcheckdam.pdf).

fact of incarceration to determine what is in the best interests of the child.

Colorado<sup>56</sup> and New Mexico<sup>57</sup> have taken this a step further and passed legislation which allows for an exception to the 15/22 rule when a parent is incarcerated. California has done a commendable job of filling the policy void in ASFA by defining what are considered reasonable efforts in a case where a parent is incarcerated, including providing for telephone contact and visitation services where appropriate.<sup>58</sup>

Many states have interpreted ASFA's lack of guidance in cases involving incarcerated parents as permission to set up a statutory scheme which essentially makes the passage of time sufficient to terminate rights, even when incarceration is the reason for the parents' inability to reunify with their child. Some states are beginning to recognize that a clear statement has to be made that incarceration alone should not be a ground for termination, or the discretion granted to the system will cause incarcerated parents to be dealt with in an unduly harsh manner.

### 3. *What Constitutes Reasonable Efforts When a Parent Is Incarcerated?—Iowa Case Law*

A review of state case law gives us an opportunity not only to see how courts are interpreting these statutes, but also how the State is using its discretion in applying them. In this section, we will look at some examples of Iowa case law in the area of what constitutes reasonable efforts for an incarcerated parent.

In the case of *In re S.J.*,<sup>59</sup> the Iowa Court of Appeals considered the case of a father who had been incarcerated for approximately the first three years of his four-year-old son's life, but had been released to a community correctional facility and started visits with his son approximately one month before the termination trial.<sup>60</sup> The agency had also arranged for the father to begin attending child development and parenting classes upon his release to the

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56. COLO. REV. STAT. ANN. § 19-3-604(2)(k)(IV) (West, Westlaw through 2013 Legis. Sess.).

57. N.M. STAT. ANN. § 32A-4-29(G)(9) (West, Westlaw through 2013 Legis. Sess.).

58. CAL. WELF. & INST. CODE § 361.5(e)(1) (West, Westlaw through 2013–2014 1st Extraordinary Sess.).

59. 620 N.W.2d 522 (Iowa Ct. App. 2000).

60. *Id.* at 524–25.

halfway house.<sup>61</sup> The State argued that it had no obligation to provide reunification services in a case like this because the father's incarceration rendered him unavailable to receive such services.<sup>62</sup> The court disagreed with this position and found that the agency must "assess the nature of its reasonable efforts obligation based on the circumstances of each case."<sup>63</sup> The court went on to say:

The services required to be supplied an incarcerated parent, as with any other parent, are only those that are reasonable under the circumstances. In determining what services are reasonable under the circumstances, the department may wish to consider some or all of the following factors, among others, if applicable: the age of the children, the bonding the children have or do not have with their parent, including any existing clinical or other recommendations concerning visitation, the nature of parenting deficiencies, the physical location of the child and the parent, the limitations of the place of confinement, the services available in the prison setting, the nature of the offense, and the length of the parent's sentence. The department has an obligation to make a record concerning its consideration of this issue.<sup>64</sup>

*In re S.J.* sets out a good framework for evaluating the adequacy of services in cases involving incarcerated parents. Subsequent case law, however, has approved very minimal efforts by the agency as meeting the necessary reasonable efforts requirement. For example, in *In re A.T.-M.*,<sup>65</sup> the court held that the agency provided reasonable efforts to an incarcerated father when it had secured social history information from him, arranged for paternity testing, and helped arrange three telephone calls and two letters from the father to the child's caregiver.<sup>66</sup> There are also cases in which the agency provided no services while the parent was incarcerated, and the court found that the reasonable efforts standard had been met.<sup>67</sup>

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61. *Id.* at 525.

62. *Id.* at 524.

63. *Id.* at 525.

64. *Id.*

65. No. 11-1204, 2011 WL 4579605 (Iowa Ct. App. Oct. 5, 2011).

66. *Id.* at \*2.

67. See *In re T.J.L.R.*, No. 12-1138, 2013 WL 100214, at \*2-3 (Iowa Ct. App. Jan. 9, 2013); *In re M.L.F.*, No. 04-2059, 2005 WL 724659, at \*2 (Iowa Ct. App. Mar. 31, 2005).

In the absence of any clear guidance from federal or state legislation, the agency may provide minimal services to incarcerated parents and the courts have upheld their actions as reasonable under the circumstances.

*C. Family Reunification*

*1. Federal/Iowa Law and Policy on Family Reunification*

ASFA continued the federal commitment to family preservation and reunification set out in AACWA; however, it also ensured that the primary focus would be the safety of the child.<sup>68</sup> This commitment is reflected in Iowa Code section 232.1, which states, “This chapter shall be liberally construed to the end that each child under the jurisdiction of the court shall receive, preferably in the child’s own home, the care, guidance and control that will best serve the child’s welfare and the best interest of the state.”<sup>69</sup>

The policy manual of the Iowa Department of Human Services states its mission in carrying out this commitment to families as follows:

Case planning for child welfare is focused on achieving the following outcomes for children and families:

- Safety:
  - Children are, first and foremost, protected from abuse and neglect.
  - Children are safely maintained in their homes whenever possible.
- Permanency:
  - Children have permanency and stability in their living situations.
  - The continuity of family relationships and connections is preserved for children.
- Child and family well-being:
  - Families have enhanced capacity to provide for their children’s needs.
  - Children receive appropriate services to meet their educational needs.

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68. 42 U.S.C. § 671(a)(15)(A) (2006).

69. IOWA CODE ANN. § 232.1 (West, Westlaw through 2013 Reg. Sess.).

- Children receive adequate services to meet their physical and mental health needs.<sup>70</sup>

The overarching purpose of child welfare law, as stated in law and policy, favors reunification of families.<sup>71</sup>

2. *The Impact of Contact Between Children and Their Incarcerated Parents*

Social science research indicates that parental incarceration has a tremendous impact on children.<sup>72</sup> It also shows that continuing contact between the incarcerated parent and the child can have an ameliorating and positive effect on both the parent and the child.<sup>73</sup>

a. *The Devastating Impact of Parental Incarceration on Children*

The effect of a parent's incarceration on a child begins with the arrest itself. One study found that one out of every five children in the study was present at the time of their mother's arrest.<sup>74</sup> The experience of watching a parent's arrest makes a child more likely to have elevated post-traumatic stress symptoms,<sup>75</sup> anxiety, and

70. IOWA DEP'T OF HUMAN SERVS., CHILD WELFARE, CASE PLANNING PROCEDURES 1 (rev. 2013), available at [http://www.dhs.state.ia.us/policyanalysis/policymanualpages/Manual\\_Documents/Master/17-C1.pdf](http://www.dhs.state.ia.us/policyanalysis/policymanualpages/Manual_Documents/Master/17-C1.pdf).

71. See, e.g., 42 U.S.C. § 671(a)(15)(A)–(B) (effective Mar. 23, 2010); IOWA CODE ANN. § 232.1; CASE PLANNING PROCEDURES, *supra* note 70, at 1.

72. ROSS D. PARKE & K. ALISON CLARKE-STEWART, EFFECTS OF PARENTAL INCARCERATION ON YOUNG CHILDREN 3–7 (2001), available at <http://aspe.hhs.gov/hsp/prison2home02/parke%26stewart.pdf>.

73. See *id.* at 7–9.

74. *Id.* at 4.

75. CTR. FOR EXCELLENCE IN CHILD WELFARE, CHILDREN WHO WITNESS ARRESTS HAVE ELEVATED SYMPTOMS OF POST-TRAUMATIC STRESS 1 (2011), available at <http://www.cofcca.org/wp-content/uploads/2011/11/Spotlight-Edition-1-May-2011.pdf> (reporting that children who “witnessed the arrest of someone with whom they lived had approximately a 57% greater likelihood of having elevated PTS symptoms relative to children who never witnessed an arrest,” and that children whose parent was recently arrested “had a 73% greater likelihood of having elevated PTS symptoms relative to children who had never seen an arrest and whose parents were not recently arrested” (quoting Susan D. Phillips & Jian Zhao, *The Relationship Between Witnessing Arrest and Elevated Symptoms of Posttraumatic Stress: Findings from a National Study of Children Involved in the Child Welfare System*, 32 CHILD. & YOUTH SERVICES REV. 1246 (2010))); Research in Brief, *Witnessing Arrests Increases Posttraumatic Stress Symptoms in Children*, 30 CHILD. L. PRAC., Sept. 2011, at 110, 110 (finding that “children who saw the arrest of a household

depression.<sup>76</sup> Children can suffer further anxiety when they are kept in the dark about the circumstances of the arrest or where their parent is post-arrest.<sup>77</sup> As these children progress through school, they experience further problems such as academic<sup>78</sup> or disciplinary problems at school,<sup>79</sup> aggression or withdrawal, or a distrust of authority.<sup>80</sup> Studies have found that children of incarcerated parents are up to five times more likely to become involved in the criminal justice system themselves.<sup>81</sup>

As a result of these and other findings about the impact of incarceration on children, the Center for Disease Control has determined that parental incarceration is an “adverse childhood experience” (ACE) that “significantly increases the likelihood of long-term negative outcomes for children.”<sup>82</sup>

*b. The Benefits of Contact Between Incarcerated Parents and Their Children*

Continuing contact between children and their parents in prison can have a beneficial impact on the parents, the children, and the family. The ability to have contact with their children can improve the mental health<sup>83</sup> and general morale of inmates.<sup>84</sup> In-

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member had elevated symptoms of posttraumatic stress,” even after controlling for other possible causal factors).

76. MINDY HERMAN-STAHN ET AL., RTI INT’L, INCARCERATION AND THE FAMILY: A REVIEW OF RESEARCH AND PROMISING APPROACHES FOR SERVING FATHERS AND FAMILIES 4-2 (2008), available at <http://www.aspe.hhs.gov/hsp/08/mfs-ip/incarceration&family/report.pdf>.

77. PARKE & CLARKE-STEWART, *supra* note 72, at 4–5.

78. *Id.* at 6 (citations omitted) (noting sixteen percent of six- to eight-year-olds with an incarcerated parent “exhibited transient school phobias and were unwilling to go to school for a 4–6 week period after their parent’s incarceration,” and that “70% of 166 children of incarcerated mothers showed poor academic performance”).

79. Martha L. Raimon et al., *Sometimes Good Intentions Yield Bad Results: ASFA’s Effect on Incarcerated Parents and Their Children*, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 121, 124 (2009), available at [http://www.urban.org/UploadedPDF/1001351\\_safe\\_families\\_act.pdf](http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf).

80. *Id.* (citations omitted).

81. Charlene Wear Simmons, *Children of Incarcerated Parents*, 7 CAL. RES. BUREAU 1, 6 (2000), available at <http://www.library.ca.gov/crb/00/notes/v7n2.pdf>.

82. Raimon et al., *supra* note 79, at 124; see also *Adverse Childhood Experiences (ACE) Study: Data and Statistics*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ace/prevalence.htm#ACED> (last updated Jan. 18, 2013).

83. Creasie Finney Hairston, *Family Ties During Imprisonment: Important to*

person visitation has been found to result in better-behaved inmates, because they are motivated to avoid behavior that could jeopardize their visitation rights.<sup>85</sup>

This continuing relationship has many potential benefits for the children as well. Studies have suggested that letters, telephone calls, and visits between children and their incarcerated parents lead to children's improved self-esteem<sup>86</sup> and lower levels of anxiety.<sup>87</sup> Furthermore, "the single most important factor to ameliorate the harmful impacts of parental incarceration is the parent/child relationship itself."<sup>88</sup> The best way to repair and build that relationship is to encourage continuing contact.<sup>89</sup>

The family as a whole also benefits from a continuing relationship while the parent is incarcerated. Frequent parent-child contact can make parents more likely to want to reunite with their children<sup>90</sup> and is one of the best predictors of whether a family will reunify once the parent is released.<sup>91</sup> Further, inmates who have

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*Whom and For What?*, 18 J. SOC. & SOC. WELFARE 87, 93–94 (1991).

84. ALLARD & LU, *supra* note 34, at 7.

85. See Charlotte H. Rudel & Margaret L. Hayes, *Behind No Bars*, CHILD. TODAY, May-June 1990, at 20, 22 ("Because a visit involving physical contact with family members is the highest prison privilege, inmates are careful not to jeopardize their advantage, and thus they present fewer disciplinary problems."); Christina Ramirez, *PATCHing Torn Families: Dads Behind Bars Stay in Touch with Their Kids*, SAN ANTONIO EXPRESS-NEWS, June 13, 1997, at 1G, available at 1997 WLNR 6822816 (reporting incarcerated offenders are better behaved when they are required to earn visitation privileges through good conduct).

86. EMILY SANDERS & RACHEL DUNIFON, CHILDREN OF INCARCERATED PARENTS 3–4 (2011), available at <http://www.human.cornell.edu/pam/outreach/parenting/research/upload/Children-of-Incarcerated-Parents.pdf>.

87. Susan Hoffman Fishman, *The Impact of Incarceration on Children of Offenders*, in CHILDREN OF EXCEPTIONAL PARENTS 89, 94 (Mary Frank ed., 1983) ("[V]isiting is especially helpful for children because it calms their fears about their father's health and welfare as well as their concerns about his feelings for them."); Hairston, *supra* note 83, at 96 (discussing a study finding children are worried about how their incarcerated parents are treated in prison and "feel rejected when they are unable to see the imprisoned parent and the parent makes no effort to communicate with them").

88. Raimon et al., *supra* note 79, at 125.

89. See Nancy G. La Vigne et al., *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. CONTEMP. CRIM. JUST. 314, 328 (2005) ("[C]ontact with children . . . is a predictor of released prisoners' attachment to and involvement with children after release.").

90. See, e.g., Hairston, *supra* note 83, at 91.

91. Denise Johnston & Katherine Gabel, *Incarcerated Parents*, in CHILDREN OF



continuing family contact are more likely to be successful upon release, which benefits the entire family.<sup>92</sup> Thus, social science research supports efforts in the child welfare system to encourage continuing relationships between incarcerated parents and their children.

### III. THE PATH FORWARD

The primary goal of ASFA is to ensure timely permanency decisions for children.<sup>93</sup> The underlying reason for the sad state of the foster care system, in the opinion of the drafters of AFSA, was an overly liberal interpretation of the amount of reasonable efforts a family was entitled to before termination of parental rights was considered.<sup>94</sup> In order to address this problem, ASFA put a time limit on those efforts so that children would not have to wait an inordinate amount of time for their parents to “get their act together.”<sup>95</sup> In coming up with this solution, Congress did not consider or specifically address the rising number of incarcerated parents.<sup>96</sup> We cannot ascribe any intent on the part of Congress to apply the strict timelines to incarcerated parents because ASFA is silent on this matter.

ASFA certainly invites us to do a more in-depth analysis of cases involving incarcerated parents by making an exception to the 15/22 rule when termination is not in the best interests of the child. Social science research indicates there are many benefits to encouraging a continuing relationship between an incarcerated

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INCARCERATED PARENTS 3, 16 (Katherine Gabel & Denise Johnston eds., 1995).

92. See, e.g., Hairston, *supra* note 83, at 97–99; N.E. Schafer, *Exploring the Link Between Visits and Parole Success: A Survey of Prison Visitors*, 38 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 17, 17 (1994) (summarizing empirical studies that reveal significant correlation between family contact and successful completion of parole and noting “a growing perception among prison officials that family visits are an essential component of the rehabilitative process”); Christy A. Visher & Jeremy Travis, *Transitions from Prison to Community: Understanding Individual Pathways*, 29 ANN. REV. SOC. 89, 100 (2003), available at <http://arjournals.annualreviews.org/doi/pdf/10.1146/annurev.soc.29.010202.095931> (reporting “lower recidivism rates and greater postrelease success” associated with greater family contact).

93. See ALLARD & LU, *supra* note 34, at iii–iv; Bevan, *supra* note 32, at 52; Vandervort, *supra* note 22, at 206–07.

94. See Bevan, *supra* note 32, at 53.

95. *Id.* at 54.

96. See *id.*

parent and his or her child.<sup>97</sup> In a case involving an imprisoned parent, the best interests exception should require that we look beyond the mere fact of incarceration and weigh the parent-child relationship prior to incarceration, the efforts that have been made to continue contact during incarceration, the barriers that exist to that contact, the amount of time until release, the age of the child, and other factors. In properly weighing all these factors, there are situations involving incarcerated parents in which family reunification can and should be the main goal.

However, ASFA's silence on this issue has led many involved in the child welfare system to treat incarceration as disqualifying a person from being a fit parent.<sup>98</sup> A greater knowledge of the reasons behind the increase in our incarceration rates, the types of offenses for which we are imprisoning people, and the increase in the length of sentences may help those working in the child welfare system to realize that a more open-minded approach must be taken in these cases. Considering the high rates of incarceration that we are currently experiencing,<sup>99</sup> as well as the fact that many inmates committed nonviolent, lower-level drug offenses,<sup>100</sup> it is inexcusable for the system to treat all imprisoned parents as unfit to raise their children.

There are three ways to address this issue. The first and probably most effective path would be for the federal government to pass legislation that would clarify what "reasonable efforts" are required in a case of this nature, and making an exception to the 15/22 rule for incarcerated parents, when warranted. The second option is for the states to address this through their legislatures, as has been done in California and other states. The third option is to educate the people working in the child welfare system, including judges and attorneys, on the magnitude of this problem and the potential benefits of maintaining ties between a child and an incarcerated parent. If we could address these cases in a more open-minded and individualized way, families would benefit.

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97. See *supra* Part II.C.2.b.

98. See WALLACE, *supra* note 20, at 4; see also ALASKA STAT. ANN. § 47.10.080(o) (West, Westlaw through 2013 1st Reg. Sess.); KY. REV. STAT. ANN. §§ 600.020(2) (b), 610.127(1) (West, Westlaw through 2013 Extraordinary Sess.); N.D. CENT. CODE ANN. §§ 27-20-02(3) (f), 27-20-32.2(4) (a) (West, Westlaw through 2013 Legis. Sess.).

99. See Traum, *supra* note 5, at 430 n.38.

100. GLAZE & MARUSCHAK, *supra* note 17, at 4.

#### IV. CONCLUSION

ASFA does not, on its face, favor termination of parental rights for incarcerated parents. However, it sets up a statutory scheme that can be harsh when indiscriminately applied to incarcerated parents. While the exceptions to ASFA's 15/22 rule do allow room for an incarcerated parent to argue that application is not warranted, ASFA's failure to directly address this issue has left a vacuum that many states have used to essentially determine that incarceration status alone warrants practically no reasonable efforts to reunify and allows little consideration in the termination process.

It is time that the child welfare system takes a closer look at these cases. We need to determine on a policy level what weight is appropriate to give to the status of incarceration in dependency cases. Then each case involving an incarcerated parent has to be carefully assessed, on a case-by-case basis, to determine what is in the best interests of the child.