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ESSAY

Some Reflections About Three Decades of Working with Incarcerated Mothers

*Philip M. Genty**

Almost thirty years ago I was a second-year student in a law school clinic. I was making my first legal visit to a prison. My client, whom I will call “Dina,” was meeting me to talk about some visitation issues with her young son. When she came into the visiting room she was poised and professional in demeanor. She began to explain that her son was being cared for by his paternal grandmother. The grandmother was unwilling to bring him to the prison to see her. As a result Dina had not seen her son for several months. Suddenly, and without warning, she broke down and began to sob.

I was hooked. I knew that whatever else I could accomplish in my unfolding legal career, I wanted to make it possible for Dina to see her son.

This turned out to be one of my proudest legal “victories” – I simply visited Dina’s own mother to talk to her about the situation. She offered to call the paternal grandmother, and

her effort was successful. Dina and her son were finally able to start seeing each other. Soon after my graduation from law school I learned that Dina had been released from prison at her first parole board appearance.

I have continued working with women and men in prison more or less continuously since then. Much has changed in these thirty years:

- Many more women are in prison. From 1978 to 2003, the number of women in U.S. prisons grew from approximately 11,600 to 93,000.¹ During that same period of time, the “incarceration rate” (number of people per 100,000 in the population) for women increased five-fold, from ten to sixty-two.²
- Women are serving longer prison sentences. For example, from 1986 to 1997, the average maximum sentence for women incarcerated in state prisons increased by almost 50%, adding

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law and clinical education, and he has served as a trainer and consultant to many advocacy organizations. This essay is adapted from a Keynote Address delivered at Rutgers Law School in Newark on March 7, 2007, for the Symposium, *Behind Bars: The Impact of Incarceration on Women and Their Families*, sponsored by the *Women’s Rights Law Reporter*.

1. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 500 tbl. 6.28 (2003).

2. *Id.*

almost 2½ years to the average maximum sentence.³ Even more significant, the average time actually served *tripled* over that period.⁴

- More children are experiencing the effects of maternal incarceration. In just an eight-year period, the number of children with a mother in prison almost doubled.⁵

- Fewer women are being released on parole. Discretionary parole release has been abolished in whole or in part in at least twenty states.⁶

In addition to these trends in the criminal justice system, there have been significant changes in the foster care system. Incarcerated mothers whose children are in foster care face a much greater risk of having their parental rights terminated and their children adopted. The Adoption and Safe Families Act ("ASFA") was enacted ten years ago.⁷ This federal statute sets a ceiling of seventeen months on foster care placements.⁸ This is significantly less time than incarcerated mothers typically serve in prison: 62% of mothers in state prisons and 74% in federal prisons will serve two or more years in prison.⁹ Despite this, the ASFA time limit provides no exception for parental incarceration.

The impact of ASFA upon incarcerated parents has been predictable. In a study on which I worked for the Child Welfare League of America ("CWLA") with colleagues from the

CWLA and the American Bar Association ("ABA"), we found that thirty-six states now have termination of parental rights statutes that explicitly deal with parental incarceration, and almost half of these were enacted or modified in response to ASFA.¹⁰ The study also revealed that after ASFA's enactment, there was a significant increase in the filing of termination of parental rights cases against incarcerated parents.¹¹

My client Dina was lucky. Because her son was *not* in foster care, she was not at risk of having her parental rights terminated, no matter how long she remained in prison. Many other incarcerated mothers are much less fortunate.

So much has changed in these past thirty years, but two things remain constant. First, incarcerated parents and their children are disproportionately low income people of color. One out of every fourteen African American children (7%) has at least one parent in prison.¹² The corresponding rate for children in the population as a whole is 2%.¹³ Nationally, approximately 70% of incarcerated parents are African American or Latino.¹⁴

The second constant over the past thirty years is that prison has a destructive effect on families. We can debate the wisdom of penal policies and the goals of punishment, rehabilitation and deterrence all we want, but whatever

3. Compare CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN, 6 tbl. 8 (2000) (indicating that in 1997 the average maximum sentence for women was ninety-four months), with BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1990, at 617 tbl. 6.70 (1990) (indicating that in 1986 the average maximum sentence for women was sixty-six months).

4. Compare MUMOLA, *supra* note 3, at 6 tbl. 8 (indicating that in 1997 women in state prison served, on average, forty-nine months), with BUREAU OF JUSTICE STATISTICS, *supra* note 3, 617 tbl. 6.70 (indicating that in 1986 women in state prisons served, on average, a sentence of fifteen months).

5. MUMOLA, *supra* note 3, at 2 tbl. 2. As indicated in the cited table, this increase occurred on both the federal and state level.

6. TIMOTHY A. HUGHES, DORIS JAMES WILSON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: TRENDS IN STATE PAROLE, 1990-2000, at 2 (2001).

7. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

8. 42 U.S.C. § 675(5)(E) (2006). The statute provides that a petition to terminate parental rights must generally be filed

if the child has been in foster care for fifteen out of the last twenty-two months. *Id.* It is important to note that the statute defines the date of entry into foster care as the earlier of 1) the date of the judicial finding of abuse or neglect, or 2) the date that is sixty days after the child's removal from the home. *Id.* at § 675(F)(i)-(ii). Because the finding of abuse or neglect seldom happens within sixty days of removal in New York (and elsewhere, I suspect), we can assume that the sixty day period will often be the earlier date. Therefore, this figure was calculated by adding fifteen months to sixty days for a total of seventeen months.

9. MUMOLA, *supra* note 3, at 6 tbl. 8 (these figures were obtained by subtracting the percentage of women expected to serve prison sentences of fewer than twenty-four months from 100% of all incarcerated women).

10. ARLENE F. LEE, PHILIP M. GENTY & MIMI LAVER, CHILD WELFARE LEAGUE OF AM., THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT ON CHILDREN OF INCARCERATED PARENTS, 11, 17 tbl. 3 (2005).

11. *Id.* at 19-22.

12. MUMOLA, *supra* note 3, at 2.

13. *Id.*

14. *Id.* at 3 tbl. 3. This disparate percentage of incarceration is present in both federal and state prisons. *Id.*

we may think about the utility of prisons, one thing is clear – *they are not designed to preserve families*; if families are able to survive the incarceration of a parent, it is *despite* the prison system, not because of it.

The available data tell us that the impact of incarceration upon families is especially acute when it is the mother who goes to prison. Approximately two-thirds of incarcerated mothers in state prisons and more than four-fifths in federal prisons lived with their children prior to incarceration.¹⁵ And while the incarceration of a father is obviously traumatic for children, more than 90% of the children of incarcerated fathers continue to live with their mothers,¹⁶ which ensures a measure of stability in these children's lives. However, fewer than one-third of the children of incarcerated mothers live with their fathers.¹⁷ The rest are cared for by other, often elderly, family members or friends, or are placed in foster care.¹⁸

An additional consequence of parental incarceration is that contact with the child becomes difficult and expensive. Relationships with family members who are caring for the children become strained, as the burdens of long bus trips and expensive monthly phone bills mount. Over time, the parent-child contact becomes less frequent and regular, which, in turn, makes successful reunification that much harder.¹⁹

Thus, for incarcerated mothers and their children, the prison years are often a time of profound sadness, longing, confusion, anger and despair. And the great tragedy is that the opportunities for day-to-day maternal nurturing and companionship during the period of incarceration are lost forever.

These hardships and complicated emotions brought about by maternal incarceration are poignantly described in a classic study by Brenda G. McGowan and Karen L. Blumenthal, "Why Punish the Children?"²⁰ This report was published around the time that I was working with Dina. Several children are profiled.

One of the authors describes her encounter with Angela, age twelve, shortly after her mother's arrest on a drug charge. Angela pleads with the author:

"Tell them I can't be left alone. Someone has to feed me. They know we don't have a lot of money. All they have to do is come here and they can see that. . . . I've never been alone. Who's going to live with me and take care of me? It isn't fair that they put her in jail if she's a mother. . . . They're supposed to take care of their children. . . . MOTHER!" She screamed out loudly. "MOTHER! What are we going to do? How am I going to live? I don't even know if I can see her. She could be a million miles from here for all I know. Oh God. I don't even know where my own mother is. MOTHER!" She called out again. . . . "You have to get her out. And if you can't then you got to get me in there to see her. I'm not staying here alone. . . . I want to be where she is."²¹

The author then describes another conversation with Angela two years later, after her mother's release from prison.²² The difference in tone between this and the earlier interview is striking, as Angela expresses her feelings about her mother's incarceration:

"I don't know whether I've been dreaming of this day. Maybe I have. I don't think anybody thinks about any one thing *all* of the time. But I sure am glad it's over. I didn't think the time would ever pass. I'm proud of my mother. She's changed over these two years, you know. I guess she's learned her lesson. . . .

"Sometimes you don't know what to feel about a mother like the one I have. First you hate her, then you love her. Then you tell yourself you have to decide which one it is. It's not easy, you know. I was ashamed to be her daughter, like I said. Some kids say

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

16. *Id.*

17. MUMOLA, *supra* note 3, at 3 tbl. 4.

18. *Id.*

19. See Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 FORDHAM URB. L.J. 1671, 1673-75 (2003).

20. BRENDA G. MCGOWAN & KAREN L. BLUMENTHAL, NAT'L COUNCIL ON CRIME AND DELINQUENCY, WHY PUNISH THE CHILDREN? A STUDY OF CHILDREN OF WOMEN PRISONERS (1978).

21. *Id.* at 31-32.

22. *Id.* at 33.

their mother does this or that but I have to say my mother's a convict. I couldn't even use the excuse that she was innocent, 'cause she told me she wasn't. She admitted everything they said she did. I think that was good for her to do. But like, I had no mother for two years. You have to think about my side of the picture too. I've never really had a father and now for two years I didn't have a mother either."

"I don't want this to sound like everything's wonderful again, though. It was never wonderful with her, and I can't imagine that it will be wonderful with her again. I'm sure it will be a lot like it was. . . . We'll be together and see how it goes. If it works out, fine. If it doesn't, we'll split up."²³

This case example illustrates some of the complexities and challenges involved in achieving successful family reunification. Indeed, in my own work I have seen that not all post-release endings are happy. At the same time, we need to remember that incarcerated mothers and their children never stop wanting each other. During the prison years they are bodies in time and space, circling each other, yearning to be reconnected.

In the end, however, nothing can truly defeat this tyranny of time and distance. On some

level, those of us who work with incarcerated parents know that the most we can do is make the best of a difficult situation. The efforts of the parents and children during the parents' incarceration are often heroic, but these efforts are constrained by the very practical limitations imposed by the physical reality of incarceration.

The answer, I think, is deceptively simple – we should simply send fewer mothers to prison. To this end I want to offer two thoughts. First, if we truly cared about children and families, we would not rely upon prisons as our principal means of punishing women for crimes. Second, if we opened the gates of all of the nation's women's prisons tomorrow, with very few exceptions, society would not be in any way endangered.²⁴

Finally, after these thirty years of very gratifying work, I have a fervent wish and vision: At some point in the next thirty years I hope to attend a conference on a subject similar to this Symposium issue. The speaker will be telling the audience that once upon a time, mothers of young children were routinely imprisoned in large numbers for years at a time. And the audience will be left in a state of shocked disbelief that anyone ever thought that this was sound public policy.

23. *Id.*

24. Studies show that recidivism rates for women are typically lower than for men. For example, in New York, 12.3% of men released in 2000 were returned to prison for a new

crime. The corresponding figure for women was 5.8%. DEPT OF CORR. SERV., STATE OF N.Y., 2000 RELEASES: THREE YEAR POST RELEASE FOLLOW-UP 9 tbl. 4.1 (2004).