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Protecting the Parental Rights of Incarcerated Mothers Whose Children are in Foster Care: Proposed Changes to New York's Termination of Parental Rights Law

Cover Page Footnote

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PROTECTING THE PARENTAL RIGHTS OF INCARCERATED MOTHERS WHOSE CHILDREN ARE IN FOSTER CARE: PROPOSED CHANGES TO NEW YORK'S TERMINATION OF PARENTAL RIGHTS LAW

*Philip M. Genty**

I. Introduction

In the past decade, the number of female prisoners in New York state and city jails has risen dramatically.¹ Currently, there are 1,890 women incarcerated in New York State prisons,² and an additional 1,626 women confined in New York City jails.³ Approximately seventy-two percent of the women in state prisons are parents,⁴ and, ac-

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1. See Hernandez, *Women Behind Bars*, N.Y. Newsday, Jan. 29, 1989, at 4, col. 4 [hereinafter Hernandez].

During the past 10 years, the number of women in New York City jails has grown almost fivefold, from 291 in 1979 to 1,479 today. The increase mirrors a dramatic rise in the numbers of incarcerated women at the state and national level, as well.

The rise is blamed mainly on increased crack use among women, mandatory sentencing laws and cutbacks in federal programs for the poor.

Id.

2. See Letter from the New York State Department of Correctional Services (Feb. 23, 1989) and attached computer printouts (available at the *Fordham Urban Law Journal* office) [hereinafter Department of Correctional Services Letter].

From 1960 to 1986, the total population of women confined in state and federal prisons in the United States grew from 7,688 to 24,782. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1987, at 486, tab. 6.17 (1987).

3. Individuals confined in jails fall into four categories: (1) pretrial detainees; (2) persons serving misdemeanor sentences of less than one year; (3) persons who have been convicted of felonies, but are awaiting transfer to prisons; and (4) persons returned to jail for violating probation or parole. Nationally, 52% of jail inmates are pretrial detainees, while 48% are in the latter three categories. U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN^o- JAIL INMATES 1987, at 1. For the purposes of this Article, "incarcerated" shall refer to all types of confinement to prisons and jails.

4. The New York State Department of Correctional Services reported that as of February 18, 1989, 72% of women incarcerated in New York State prisons have at least one child. This figure includes adult as well as minor children, and the data were self-reported by the inmates. See Department of Correctional Services Letter, *supra* note 2; cf. Note, *On Prisoners and Parenting: Preserving the Tie that Binds*, 87 YALE L.J. 1408,

ording to one informal study, nearly sixty percent of the women in city prisons are single parents with minor children.⁵ While some of these women can make formal or informal child care arrangements with relatives or close friends,⁶ many others must turn to state-regulated foster care.⁷

An incarcerated mother⁸ whose children are in foster care must maintain contact with her children if she wants to retain her parental rights⁹ while in prison and to regain her custody rights upon leaving prison.¹⁰ She faces many unique legal and personal challenges, however, if she wishes to maintain such contact. An incarcerated mother must attempt to care for her children and at the same time negotiate a

1408 n.1 (1978) (in 1974, 70 to 80 % of incarcerated women "have given birth to one or more children") [hereinafter *Tie that Binds*]; Bohlen, *Number of Mothers in Jail Surges with Drug Arrests*, N.Y. Times, Apr. 17, 1989, at A1, col. 4 ("the female jail population—while still less than 10 percent of the total inmates, at 1,626—is rising at more than twice the rate of the male population, exceeding projections and forcing the city into a continual search for more room").

5. See Hernandez, *supra* note 1, at 30, col. 4. "Officials [at Rikers Island jail in New York City] say about 8 [percent] of [women incarcerated at Rikers] are pregnant when they are arrested. An informal correction department study also found that nearly 75 [percent] have children under 18, and 80 [percent] of those women are single parents." *Id.*

6. It is estimated that between 30 and 38% of the children of incarcerated mothers are in some type of nonrelative placement. See *Tie that Binds*, *supra* note 4, at 1411 n.10. "Almost 25 percent of the women at Rikers [Island jail in New York City] had children being cared for by family members. In most instances, that family member is another woman—the child's grandmother or aunt, often, too, a single parent . . ." Hernandez, *For Most, No One to Care for the Kids*, N.Y. Newsday, Jan. 29, 1989, at 31, cols. 1-2.

7. One of the most urgent concerns of incarcerated mothers is obtaining child care. Hernandez, *supra* note 1, at 30, col. 4. "When the [incarcerated mothers] go to jail, their children often end up in an already overburdened foster care system." *Id.*; see also *infra* notes 18-37 and accompanying text.

There does not appear to be a reliable source of statistics concerning the number of incarcerated women's children in foster care in New York. The New York State Department of Social Services and New York City Child Welfare Administration (previously "Special Services for Children") are responsible for providing services to incarcerated parents and their children. See New York State Department of Social Services, Administrative Directive 85-ADM-42 (Sept. 3, 1985). Neither agency, however, has the necessary data.

8. The legal issues discussed in this Article are generally relevant to incarcerated fathers, as well as incarcerated mothers. Approximately 59% of male prisoners in New York State prisons are fathers of at least one child. See Department of Correctional Services Letter, *supra* note 2. Because there are no available statistics as to how many incarcerated men are single fathers, this Article will focus on the parental rights of incarcerated mothers.

9. For a description of the parental rights of parents whose children are in foster care, see *infra* notes 36-37 and accompanying text.

10. For a discussion of the grounds for termination of parental rights in New York, see *infra* notes 38-62 and accompanying text.

large social services bureaucracy ruled by a maze of foster care laws.¹¹ If she is not able to meet these challenges, she will lose her parental rights through a permanent "termination of parental rights proceeding."¹² If the state terminates the incarcerated mother's parental rights, her children will be adopted without her consent, and her relationship with her children will be permanently severed.¹³

Recognizing the unique predicament of incarcerated parents with children in foster care, the New York Legislature amended section 384-b of the New York Social Services Law in 1983. These amendments made it more difficult for the state to terminate incarcerated mothers' parental rights.¹⁴ Despite this reform, however, two problems persist. First, incarcerated mothers lack effective access to court proceedings involving their children.¹⁵ Second, the 1983 amendments misallocate parental duties with respect to planning the child's future and visitation: the amendments allow incarcerated mothers to maintain their parental rights only if they fulfill a strict duty to cooperate with social service agencies in planning for their children's futures and in visiting with their children,¹⁶ but the amendments do not require agencies and prisons to provide the mother with the adequate planning resources and visitation that will enable her to meet this duty.¹⁷

This Article examines the parental rights of incarcerated mothers under New York's foster care and termination of parental rights laws. Part II describes the foster care system in New York and details the grounds for a termination of parental rights proceeding. Part II also discusses the parental rights of incarcerated mothers that existed in New York prior to the 1983 amendments, and analyzes the effects of that legislation on these rights. Part III addresses the two problems that persist despite New York's legislative reforms. After examining these problems, Part IV proposes several legislative solutions, which

11. See *infra* notes 18-62 and accompanying text.

12. See *infra* notes 38-62 and accompanying text.

13. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 748 (1982) (holding that, given grave, irreversible consequences of judgment terminating parental rights, Constitution mandates that state prove its case by clear and convincing evidence so as to minimize risk of erroneous determination).

14. 1983 N.Y. Laws 911. The legislation incorporated many of the recommendations of a 1982 report of the New York State Council on Children and Families. See New York State Council on Children and Families: *Incarcerated Women and Their Children* (April 1982) (unpublished manuscript) (available at *Fordham Urban Law Journal* office) [hereinafter *Incarcerated Women*]; see *infra* notes 68-78 and accompanying text for detailed discussion of the 1983 amendments.

15. See *infra* notes 97-103 and accompanying text.

16. See *infra* notes 76-78 and accompanying text.

17. See *infra* notes 104-19 and accompanying text.

include: (1) improving incarcerated parents' access to court proceedings; and (2) requiring social services agencies and prison officials to provide the services necessary to maintain and strengthen the parents' parental relationships. This Article concludes that, while New York has enacted legislation that recognizes the special needs of incarcerated parents whose children are in foster care, further legislation is necessary to address the problems that remain unresolved.

II. Background: Parental Rights Under New York Law

Incarcerated mothers who cannot make child care arrangements with friends or relatives must place their children in foster care, and in certain circumstances may permanently lose their parental rights through a termination of parental rights proceeding. This section describes New York's foster care system, termination of parental rights proceedings, and the effects of the 1983 amendments on the parental rights of incarcerated mothers.

A. Foster Care

Foster care¹⁸ involves the temporary transfer of custody of a child¹⁹ from a parent to an authorized social services agency (agency).²⁰ Placement of a child into foster care in New York occurs either voluntarily²¹ or involuntarily.²² In a voluntary placement, the parent enters into a written contract with the social services agency whereby

18. The term "foster care" includes the following:

[C]are provided a child in a foster family free or boarding home, group home, agency boarding home, child care institution, health care facility or any combination thereof and for the purpose of court review under this section, shall include care for a child who has been freed for adoption and placed in a prospective adoptive home and no petition for adoption has been filed within [12] months after placement.

N.Y. Soc. Serv. Law § 392(1)(a) (McKinney Supp. 1989); *see also id.* § 358-a.

19. " 'Child' means a person actually or apparently under the age of [18] years." N.Y. Soc. Serv. Law § 371(1) (McKinney 1983).

20. *See* N.Y. Soc. Serv. Law § 371(10) (McKinney 1983). For simplification, the term "agency" will hereinafter be used to refer to both social service and foster care agencies.

21. *See* N.Y. Soc. Serv. Law § 384-a (McKinney 1983 & Supp. 1989).

22. *See* N.Y. Fam. Ct. Act art. 10, §§ 1011-1074 (McKinney 1983). The Family Court Act describes the purpose of article 10 in the following manner:

This article is designed to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.

Id. § 1011.

the parent gives up the right to custody of the child.²³ Theoretically, the parent has the right to negotiate specific provisions of the agreement. In practice, however, agencies typically use preprinted forms with all of the terms and conditions set by the agency. The placement is either indefinite or for a fixed duration.²⁴

An involuntary placement occurs when an agency brings a child protective proceeding against the parent, alleging child abuse or neglect.²⁵ If the social services agency proves the allegations against the parent, the court can then place the child in foster care for a maximum of eighteen months.²⁶ The agency, however, can later petition for one-year extensions of the placement period.²⁷

The placement of a child into foster care involves a number of important family court hearings. If the placement is voluntary, the agency must file a petition in family court within thirty days following removal of the child from his or her home. The petition allows the court to hold a hearing to review the placement agreement.²⁸ At this hearing the court determines whether: (1) the parent executed the agreement knowingly and voluntarily; (2) the agency made reasonable efforts to find an alternative to foster care placement; and (3) the placement agreement conforms to all legal requirements.²⁹

Additional review hearings are held thereafter. The first hearing occurs within eighteen months of the original foster care placement.³⁰ At each review hearing the court can order the agency to do one of the following: (1) continue the foster care; (2) return the child to the parent; or (3) bring a termination of parental rights proceeding against the parent.³¹

Involuntary placements follow a similar procedure. The initial proceeding includes a fact-finding hearing to determine whether the parent has been guilty of child abuse or neglect as well as a dispositional hearing to determine whether the child should be placed into foster care.³² If the court orders foster care, it then determines the duration of the placement. In an extension of placement hearing involving an involuntary placement, the court has the same three choices as in a

23. *See supra* note 21.

24. *See* N.Y. Soc. Serv. Law § 384-a(2) (McKinney 1983 & Supp. 1989).

25. *See* N.Y. Fam. Ct. Act art. 10, §§ 1011-1074 (McKinney 1983).

26. *See* N.Y. Fam. Ct. Act § 1055(b) (McKinney Supp. 1989).

27. *See id.*

28. N.Y. Soc. Serv. Law § 358-a(1)(b) (McKinney Supp. 1989).

29. *Id.* § 358-a(2), (3).

30. N.Y. Soc. Serv. Law § 392(2), (5) (McKinney Supp. 1989).

31. *Id.* § 392(6)(a)-(c) (McKinney Supp. 1989); *see also infra* notes 38-62 and accompanying text.

32. N.Y. Fam. Ct. Act §§ 1044-1045 (McKinney 1983).

voluntary placement.³³

Once a parent loses custody of her child through either a voluntary or an involuntary placement the agency can place the child either with a foster family, a group home or a relative in a "relative foster boarding home."³⁴ In New York City, the Child Welfare Administration, the agency responsible for administering the foster care system, contracts with private agencies for the provision and administration of foster homes.³⁵ Thus, in New York City, a parent who loses custody of a child through a foster care placement will deal with at least two caseworkers—one from the city social services agency and one from the contracting foster care agency.

Regardless of whether the placement is voluntary or involuntary, the parent retains certain parental rights and duties. These rights include visitation, planning for the future of the child, dictating the child's religious upbringing,³⁶ and choosing the child's health care and schooling. The agency is obligated to provide the parent with whatever social services are necessary to enable the parent to regain custody of and resume caring for her child at the earliest possible date.³⁷

B. Termination of Parental Rights Proceedings

Foster care placements are temporary, and agencies normally expect that the child will return to the parent's custody.³⁸ There are two instances, however, in which a parent whose child is in foster care can lose her parental rights. She can consent to the adoption of her child or her parental rights may be terminated without her consent

33. *Id.* § 1055(b), (d) (McKinney 1983 & Supp. 1989); *see supra* note 31 and accompanying text.

34. *See* N.Y. Soc. Serv. Law §§ 371, 375 (McKinney 1983 & Supp. 1989). The phrase "relative foster boarding home" refers to a foster home in which a relative of the child has been approved as the foster parent and is receiving a state foster care subsidy. There are special provisions allowing relatives to be approved as foster parents on an expedited basis. *See* New York State Department of Social Services Administrative Directive 86-ADM-33 (Sept. 26, 1986).

35. *See* *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 825 n.11 (1977).

36. *See id.* at 827-28; N.Y. Soc. Serv. Law § 373 (McKinney 1983); N.Y. Fam. Ct. Act § 116 (McKinney 1983).

37. *See, e.g., In re Jamie M.*, 63 N.Y.2d 388, 472 N.E.2d 311, 482 N.Y.S.2d 461 (1984), in which the New York Court of Appeals held that a child care agency must offer the parent services specifically designed to overcome the particular barriers preventing the discharge of the child to the parent. *Id.* at 394-95, 472 N.E.2d at 314, 482 N.Y.S.2d at 464.

38. *See* N.Y. Soc. Serv. Law § 384-b(1)(a) (McKinney 1983).

through a termination of parental rights proceeding.³⁹ This proceeding involves an adversarial "fact-finding" trial in which the rules of evidence apply.⁴⁰

In New York, an agency may bring a termination of parental rights proceeding on any of five grounds: (1) "both parents of the child are dead, and no guardian of the person of such child has been lawfully appointed;"⁴¹ (2) the parent has abandoned the child for six months or more immediately prior to the termination proceeding;⁴² (3) the parent has permanently neglected the child;⁴³ (4) the parent is "presently and for the foreseeable future unable, by reason of mental illness or mental retardation, to provide proper and adequate care for a child" who has been in foster care for at least one year prior to the date of the termination proceeding;⁴⁴ and (5) the parent has severely or repeatedly abused a child who has been in foster care for at least one year.⁴⁵

A parent's rights cannot be terminated unless the state has proven at least one of these five grounds in a "fact-finding" hearing by clear and convincing evidence.⁴⁶ If the state meets this burden of proof, the child may thereafter be adopted without the parent's knowledge or consent.⁴⁷ A termination of parental rights permanently severs all bonds between the parent and child.⁴⁸

39. See *id.* § 384 (consent); *id.* § 384-b (involuntary termination).

40. N.Y. Fam. Ct. Act §§ 622, 624 (McKinney 1983). In a dispositional hearing, see *infra* note 46 and accompanying text, however, hearsay evidence is admissible. N.Y. Fam. Ct. Act § 624 (McKinney 1983).

41. N.Y. Soc. Serv. Law § 384-b(4)(a) (McKinney 1983).

42. *Id.* § 384-b(4)(b).

43. *Id.* § 384-b(4)(d).

44. *Id.* § 384-b(4)(c).

45. *Id.* § 384-b(4)(e).

46. See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982); *In re Ricky Ralph M.*, 56 N.Y.2d 77, 85, 436 N.E.2d 491, 496, 451 N.Y.S.2d 41, 46 (1982); N.Y. Fam. Ct. Act § 622 (McKinney 1983).

In addition to the fact-finding hearing, a dispositional hearing may be required. Dispositional hearings are required only in cases involving permanent neglect and severe or repeated child abuse. See N.Y. Fam. Ct. Act § 623 (McKinney 1983); N.Y. Fam. Ct. Act § 614 (permanent neglect); N.Y. Soc. Serv. Law § 384-b(8)(c) (McKinney 1983) (severe or repeated child abuse). Conversely, dispositional hearings are not required in cases involving abandonment or mental illness or retardation. See N.Y. Soc. Serv. Law § 384-b(5) (McKinney 1983) (abandonment); *In re Dlane Bernice S.*, 72 A.D.2d 775, 421 N.Y.S.2d 396 (2d Dep't 1979) (abandonment); N.Y. Soc. Serv. Law § 384-b(6) (McKinney 1983) (severe mental illness or retardation).

47. See N.Y. Dom. Rel. Law § 111(2)(c), (3)(a) (McKinney Supp. 1989).

48. See N.Y. Soc. Serv. Law § 384-b(1)(b) (McKinney 1983). This subsection provides the following:

It is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also,

For the incarcerated mother, termination of parental rights on the grounds of abandonment or permanent neglect are of the greatest significance because these grounds concern the amount of contact the mother has had with her child. Incarceration severely circumscribes the mother's ability to stay meaningfully involved with her child, and, consequently, her ability to maintain her parental rights. For this reason, this Article will focus on abandonment and permanent neglect as grounds for the termination of parental rights.

"Abandonment" occurs when a parent "evinces an intent to forgo 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."⁴⁹ Thus, abandonment involves the virtual disappearance of a mother from her child's life. Even minimal contact or involvement with the child will defeat an allegation of abandonment.⁵⁰ In order to prove abandonment, however, an agency need not

where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs and rights of the child by terminating parental rights and freeing the child for adoption.

Id.

49. N.Y. Soc. Serv. Law § 384-b(5)(a) (McKinney 1983).

50. A party seeking to prove that a parent has abandoned a child must show "acts so unequivocal as to bear one interpretation and one only, that the parents manifested an intention to abandon their child forever." *In re Anonymous*, 40 N.Y.2d 96, 100, 351 N.E.2d 707, 709-10, 386 N.Y.S.2d 59, 62 (1976) (citation omitted). This holding does not specify what "acts" will satisfy the "intent to abandon" requirement. Presumably, this determination will depend upon the facts of each case. Some guidance has been provided, however, by several subsequent decisions.

In *Corey L. v. Martin L.*, 45 N.Y.2d 383, 380 N.E.2d 266, 408 N.Y.S.2d 439 (1978), the New York Court of Appeals reversed a finding of abandonment where, for two years after his discharge from military service, a father had visited his child only two or three times and had called the child four times. *Id.* at 387, 380 N.E.2d at 268, 408 N.Y.S.2d at 440. The court found that abandonment had not been proven because the father had visited his child while in the military, and because there was evidence that the mother had thwarted his attempts to visit the child following his discharge. *Id.* at 390, 380 N.E.2d at 269-70, 408 N.Y.S.2d at 442.

Similarly, the New York Appellate Division, Second Department, reversed a finding of abandonment in *In re Samantha B.*, 106 A.D.2d 634, 482 N.Y.S.2d 901 (2d Dep't 1984). In *Samantha B.*, the father had failed to visit the child for the two and one-half years preceding the adoption proceeding, but had submitted a written complaint to the court, describing the mother's refusal to allow visits. *Id.* at 635, 482 N.Y.S.2d at 902. In addition, the father had sent presents and cards to the child on special occasions and had made regular, although partial, court-ordered support payments. *Id.* The court held that the evidence was insufficient to prove abandonment. *Id.* at 635-36, 482 N.Y.S.2d at 902-03.

In *In re Vunk*, however, 127 Misc. 2d 828, 487 N.Y.S.2d 490 (Fam. Ct. Suffolk County 1985), the court held that a father had abandoned his daughter where, for seven months following his release from jail, the father had made no contact with his child other than sending her Thanksgiving and Christmas cards. *Id.* at 829, 487 N.Y.S.2d at 491. The

show that it made affirmative efforts to encourage the parent/child relationship.⁵¹

In contrast, to prove “permanent neglect”⁵² an agency must show that the parent failed for more than one year to maintain contact with or plan for the future of the child.⁵³ The agency also has the burden of showing that it made “diligent efforts to encourage and strengthen the parental relationship” or that such efforts were not in the child’s best interests.⁵⁴ Thus, proving permanent neglect requires the agency to show that it made “diligent efforts,” while proving abandonment does not.

court noted that the father had maintained regular contact with his daughter while he was in jail, and the court suggested that he would not have been guilty of abandonment had he at least written to his daughter or telephoned the child care agency to inquire about his daughter following his release from jail. *Id.* at 829-30, 487 N.Y.S.2d at 492.

51. See N.Y. Soc. Serv. Law § 384-b(5)(b) (McKinney 1983); *In re Anonymous*, 40 N.Y.2d 96, 103, 351 N.E.2d 707, 711, 386 N.Y.S.2d 59, 63 (1976). In *Anonymous*, a proceeding alleging abandonment, the lower court had dismissed the petition because the child care agency failed to make sufficient efforts to locate the absent mother. *Id.* at 99, 351 N.E.2d at 709, 386 N.Y.S.2d at 61. The court of appeals reversed, holding that abandonment and permanent neglect are separate and distinct grounds for termination of parental rights and that in cases involving alleged abandonment, unlike those involving alleged permanent neglect, a child care agency is not required to prove that it made diligent efforts to strengthen the parental relationship. *Id.* at 99, 351 N.E.2d at 709, 386 N.Y.S.2d at 61.

The dichotomy between the abandonment and permanent neglect provisions reflects the disparate legislative histories. Abandonment as a ground for termination of parental rights dates back to New York State’s first adoption and guardianship statutes. L. 1873, ch. 830; L. 1884, ch. 438. The permanent neglect statute, including the diligent efforts requirement, was enacted in 1959. L. 1959, chs. 448, 449, 450. These grounds for termination of parental rights were not brought together until 1976, with the enactment of § 384-b of the Social Services Law. L. 1976, ch. 666.

52. Permanent neglect means that a parent:

[H]as failed for a period of more than one year following [the date of the foster care placement] substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency’s diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.

N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney 1983).

53. See *id.*

54. See *id.*

As used in this subdivision, ‘diligent efforts’ shall mean reasonable attempts by an authorized agency to assist, develop and encourage a meaningful relationship between the parent and child, including but not limited to:

(1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;

(2) making suitable arrangements for the parents to visit the child except that with respect to an incarcerated parent, arrangements for the incarcerated parent to visit the child outside the correctional facility shall not be required unless reasonably feasible and in the best interest of the child;

(3) provision of services and other assistance to the parents, except incarcer-

“Diligent efforts” refers to the agency’s duty to: (1) work in cooperation with the parent to develop a plan for the provision of necessary social services; (2) arrange visits between parent and child; (3) provide the social services necessary to overcome barriers to the child’s discharge from foster care; and (4) inform the parent of the child’s overall development.⁵⁵ Unless an agency can show that it has satisfied all of these requirements, a court must dismiss a permanent neglect proceeding.⁵⁶

If an agency is able to establish that it has made “diligent efforts,” or that it was excused from doing so,⁵⁷ the agency must then show that the parent has not carried out her duties to maintain contact with and plan for the future⁵⁸ of her child. Failure by the parent *either* to maintain contact *or* to plan constitutes a basis for a finding of perma-

ated parents, so that problems preventing the discharge of the child from care may be resolved or ameliorated;

(4) informing the parents at appropriate intervals of the child’s progress, development and health; and

(5) making suitable arrangements with a correctional facility and other appropriate persons for an incarcerated parent to visit the child within the correctional facility, if such visiting is in the best interests of the child.

Id. § 384-b(7)(f) (McKinney Supp. 1989).

55. *Id.* § 384-b(7)(f) (McKinney 1983 & Supp. 1989).

56. *See, e.g., In re Sheila G.*, 61 N.Y.2d 368, 387-89, 462 N.E.2d 1139, 1149-50, 474 N.Y.S.2d 421, 431-32 (1984) (finding lack of “diligent efforts” to strengthen parental relationship where agency had failed, *inter alia*, to work with natural father in carrying out his plan to return to his mother’s home and thereafter take custody of his child; to assist father in establishing his paternity; to alter frequency, length or timing of visits to accommodate father’s work schedule; and to inform father of his child’s progress, development and health).

57. N.Y. Soc. Serv. Law § 384-b(7)(e) (McKinney Supp. 1989).

Notwithstanding the provisions of paragraph (a) of this subdivision, evidence of diligent efforts by an agency to encourage and strengthen the parental relationship shall not be required when:

(i) The parent has failed for a period of six months to keep the agency apprised of his or her location; or

(ii) An incarcerated parent has failed on more than one occasion while incarcerated to cooperate with an authorized agency in its efforts to assist such parent to plan for the future of the child, . . . or in such agency’s efforts to plan and arrange visits with the child.

Id.

58. For the purpose of permanent neglect, “planning” means:

[T]o take such steps as may be necessary to provide an adequate, stable home and parental care for the child within a period of time which is reasonable under the financial circumstances available to the parent. The plan must be realistic and feasible, and good faith effort shall not, of itself, be determinative. In determining whether a parent has planned for the future of the child, the court may consider the failure of the parent to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent.

N.Y. Soc. Serv. Law § 384-b(7)(c) (McKinney 1983).

nent neglect.⁵⁹

Contact must be substantial and frequent.⁶⁰ The "character" of visits and communications is relevant to the analysis; contact which is found "to overtly demonstrate a lack of affectionate and concerned parenthood shall not be deemed a substantial contact."⁶¹

The requirement that a parent plan for the future of her child involves four elements: (1) the parent must be physically and financially able to plan; (2) the plan must be realistic and feasible; (3) the plan must provide, at a minimum, a stable home and parental care for the child; and (4) the plan must be designed to correct the domestic conditions that led to the child's foster care placement.⁶²

C. History of Parental Rights of Incarcerated Mothers Under New York Law

The risk of parental rights termination under section 384-b of the New York Social Services Law means that, if she wants to retain her parental rights, an incarcerated mother must cooperate with the agency staff and have a substantial and meaningful relationship with her child. Incarceration, however, severely limits a mother's ability to work effectively with an agency, to visit or communicate with her child, and to contemplate and plan for her child's future. Prior to 1983, New York law contained no provisions designed to address the unique handicaps of incarcerated mothers.

1. *New York Social Services Law Section 384-b Prior to 1983*

Prior to the 1983 amendments, incarcerated mothers in New York

59. *In re Orlando F.*, 40 N.Y.2d 103, 110, 351 N.E.2d 711, 715, 386 N.Y.S.2d 64, 67 (1976).

60. See N.Y. Soc. Serv. Law § 384-b(7)(b) (McKinney 1983).

61. N.Y. Soc. Serv. Law § 384-b(7)(b) (McKinney 1983); see, e.g., *In re Roderick W.*, 96 A.D.2d 746, 747, 465 N.Y.S.2d 326, 327 (4th Dep't 1983). In *Roderick W.*, the court affirmed a finding of permanent neglect where the parent, during visits, "rarely, if ever, participated in [the child's] care and made little, if any, effort to develop a parental relationship with him." *Id.* at 746, 465 N.Y.S.2d at 327. But see *In re Kimberly I.*, 72 A.D.2d 831, 832, 421 N.Y.S.2d 649, 650 (3d Dep't 1979) (court reversed a finding of permanent neglect). In *Kimberly I.*, the agency contended that contact between mother and child had been insubstantial because there had been little interaction between the two at several scheduled meetings. *Id.* at 832, 421 N.Y.S.2d at 650. The court rejected this contention and noted that, although the mother was somewhat uncommunicative with most people, her subdued manner at the visits did not indicate a lack of concern for the child. *Id.*

62. See, e.g., *In re Orlando F.*, 40 N.Y.2d at 110, 351 N.E.2d at 715, 386 N.Y.S.2d at 67; *In re Leon R.R.*, 48 N.Y.2d 117, 125, 397 N.E.2d 374, 379, 421 N.Y.S.2d 863, 868 (1979).

were virtually "immune"⁶³ from termination of parental rights proceedings during the period of their incarceration.⁶⁴ They were explicitly protected from permanent neglect proceedings by two sections of the New York Social Services Law.⁶⁵ Termination of parental rights proceedings on other grounds—abandonment, mental illness or retardation, and severe or repeated child abuse—were similarly precluded, although this result was apparently inadvertent.⁶⁶ While it might ap-

63. This "immunity" arose from a peculiar combination of statutory provisions. See *infra* notes 65-66 and accompanying text.

64. See *infra* notes 65-66 and accompanying text.

65. N.Y. Soc. Serv. Law § 384-b(7)(d)(ii), (iii) (McKinney 1983). These two sections provide in pertinent part the following:

(ii) A parent shall be deemed unable to maintain contact with or plan for the future of the child while he is actually incarcerated; and

(iii) the time during which a parent is actually . . . incarcerated shall not interrupt, but shall not be part of, a period of failure to maintain contact with or plan for the future of a child.

Id.

Thus, an incarcerated mother was excused from the normal duties to maintain contact with and plan for the future of her child, and the time of incarceration tolled the statutory permanent neglect period. Because the failure to maintain contact with and plan for the future of the child for more than one year is a required element of proof in a permanent neglect proceeding, see *supra* note 52 and accompanying text, such a proceeding could not be brought against an incarcerated mother.

66. All three of these grounds for termination may be brought against a parent "whose consent to the adoption of the child would otherwise be required in accordance with [§ 111] of the [D]omestic [R]elations Law . . ." N.Y. Soc. Serv. Law § 384-b(4)(b), (c), (e) (McKinney 1983).

Section 111 of the Domestic Relations Law, as it existed prior to 1983, provided that consent to adoption was not required of a parent "who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored." N.Y. Dom. Rel. Law § 111(2)(d) (Consol. 1979). Section 79 of the New York Civil Rights Law provides for the suspension of an individual's civil rights, with certain exceptions, for the duration of any sentence of imprisonment in a state correctional institution. N.Y. Civ. Rights Law § 79 (McKinney 1976).

Thus, an incarcerated mother deprived of her civil rights under § 79 was not required to consent to an adoption. Because she was not a parent "whose consent to the adoption of the child would otherwise be required" she was not a permissible respondent in a termination of parental rights proceeding on grounds of abandonment, mental illness or retardation, or severe or repeated child abuse. Therefore, such a proceeding could not be brought against her. A combined reading of the Civil Rights, Domestic Relations and Social Services Laws effectively conferred "immunity" upon incarcerated mothers in such proceedings. *In re Sonia V.R.*, 97 Misc. 2d 694, 696-97, 412 N.Y.S.2d 257, 258-59 (Fam. Ct. N.Y. County 1978), *aff'd*, 74 A.D.2d 1009 (1st Dep't 1980). *Contra In re Lynda H.M.*, 115 Misc. 2d 40, 43, 453 N.Y.S.2d 355, 358 (Sur. Ct. Nassau Co. 1982) ("[C]ourts may in a proper case depart from a literal construction and sustain the legislative intention although it is contrary to the literal letter of the statute"). This result was described by one court as "bizarre and certainly unintended." *In re Sonia V.R.*, 97 Misc. 2d at 697, 412 N.Y.S.2d at 259.

This "immunity," however, apparently did not apply to mothers confined in federal prison. See *In re Malik*, 108 Misc. 2d 774, 438 N.Y.S.2d 888 (Fam. Ct. N.Y. County

pear that this "immunity" protected the parental rights of incarcerated mothers, such protection was illusory.

Before 1983, agencies had no legal duty to provide an incarcerated mother with the social services necessary to address her unique needs and to improve and strengthen her parental relationship. An agency's "diligent efforts" to provide services such as visits, parenting programs and counseling traditionally take place at the agency's office, a situation which was obviously impossible for an incarcerated mother. New York law contained no express mandate that visits and other services be provided to the mother *at the prison*. An agency could therefore simply ignore an incarcerated mother's needs, just as an incarcerated mother could ignore her own parental duties.

While this atmosphere of mutual neglect did not technically affect the incarcerated mother's parental rights while she was incarcerated, the groundwork was being laid for a future termination of parental rights proceeding. Without any regular visitation or communication between the mother and child, and without any services to strengthen the parental relationship, that relationship was seriously weakened during the mother's incarceration. The practical effect of this prolonged period of separation between mother and child was the likelihood that a mother would not be able to reestablish a meaningful relationship with her child after her release from prison. A formerly incarcerated mother's subsequent failure to fulfill her parental duties

1980) (because N.Y. Civ. Rights Law § 79 applies on its face only to imprisonment in state correctional facility, federal prisoner was not deprived of civil rights. Therefore, prisoner's consent was required for adoption, and termination of parental rights proceeding could be brought against prisoner on ground of abandonment).

In addition, this "immunity" did not apply to prisoners awaiting trial in local jails. Because civil rights are not lost under N.Y. Civ. Rights Law § 79 until an individual has been sentenced, the statute does not apply to pretrial detainees. Thus, a pretrial detainee's consent to adoption is required, and a termination of parental rights proceeding can be brought on the grounds of abandonment, as well as mental illness or retardation, or severe or repeated child abuse. *See Clair v. City of Utica*, 72 Misc. 2d 547, 549, 339 N.Y.S.2d 616, 619 (Sup. Ct. Oneida County 1972) (civil rights are not suspended if individual is confined to county jail); *cf. In re Ulysses T.*, 87 A.D.2d 998, 449 N.Y.S.2d 812 (4th Dep't 1982), *aff'd*, 66 N.Y.2d 773, 488 N.E.2d 114, 497 N.Y.S.2d 368 (1985) (two months during which father had been confined to county jail was part of six months statutory period of abandonment).

Section 111 of the Domestic Relations Law, as it existed prior to 1983, also had a profound impact on incarcerated parents whose children were *not* in foster care. If, for example, the nonincarcerated parent married or remarried, the new spouse could adopt the children without the incarcerated parent's consent. Incarcerated parents with children in foster care, however, were protected by the statutory "immunity" described above. Before a child in foster care can be adopted, the agency must acquire guardianship of the child through a parental surrender or a termination of parental rights proceeding. N.Y. Dom. Rel. Law § 111(2)(b)-(c) (McKinney Supp. 1989).

would result in the termination of her parental rights at a termination of parental rights proceeding.⁶⁷

The apparent advantages for incarcerated mothers under the pre-1983 law were actually outweighed by the law's disadvantages; the law did not protect these mothers' parental rights. Rather, the "immunity" granted under the pre-1983 law simply delayed, while making more likely, the ultimate termination of those rights. The 1983 amendments, however, alleviated many of these problems.

2. 1983 Amendments to Section 384-b of the New York Social Services Law

Chapter 911 of the Laws of 1983, which became effective on January 1, 1984,⁶⁸ made four important changes in the legal status of incarcerated parents in New York. First, incarcerated parents are expressly included within the term "parent" and, unless otherwise specified, have the same rights and duties as other parents.⁶⁹ Second, the legislation eliminated the provisions that had explicitly protected incarcerated parents from permanent neglect proceedings.⁷⁰ Third, the amendments eliminated the inadvertent loophole⁷¹ which had immunized incarcerated mothers from termination of parental rights proceedings brought on grounds other than permanent neglect.⁷²

The most important aspect of the 1983 amendments, however, is

67. See, e.g., *In re Anthony L. "CC"*, 48 A.D.2d 415, 418, 370 N.Y.S.2d 219, 222 (3d Dep't 1975), *appeal denied*, 37 N.Y.2d 708, 375 N.Y.S.2d 1028, 338 N.E.2d 330 (1975). In *Anthony L.*, the mother had been incarcerated several times. *Id.* at 418, 370 N.Y.S.2d at 221. She had face-to-face visitations with her son only three times in five years. *Id.* at 418, 370 N.Y.S.2d at 221. Despite some doubt as to whether the mother was physically and financially able to provide for the care of her child, the court found that the mother had failed to maintain contact with and plan for the future of her child, and affirmed the lower court's finding of permanent neglect. *Id.*; see also Barry, *Reunification Difficult for Incarcerated Parents and their Children*, 6 YOUTH LAW NEWS, July-Aug. 1985, at 14. Ms. Barry concludes that "without active intervention on the part of social services and community agencies, the relationship between an incarcerated mother and her child may deteriorate dramatically while the mother is in prison, to the ultimate detriment of the child as well as the mother." *Id.* at 16.

For a discussion of the problems caused by an agency's failure to provide services to incarcerated parents, see *Tie that Binds*, *supra* note 4, at 1427 n.92.

68. 1983 N.Y. Laws 911.

69. N.Y. Soc. Serv. Law § 384-b(2) (McKinney Supp. 1989).

70. 1983 N.Y. Laws 911, § 3; see *supra* note 65 and accompanying text.

71. See *supra* note 66 and accompanying text. The amendments deleted the Domestic Relations Law provision that dispensed with an incarcerated parent's consent to an adoption. 1983 N.Y. Laws 911, § 4. This change was one of the principal recommendations made by the New York State Council on Children and Families. See *Incarcerated Women*, *supra* note 14.

72. This change, also recommended by the New York State Council on Children and Families, protects incarcerated mothers whose children are not in foster care as well from

section 384-b(7)(f)(5) of the New York Social Services Law which mandates that the parent receive visits and necessary social services *at the prison*.⁷³ This law also grants incarcerated parents the right to visit their children *outside* the facility if such visitation is "reasonably feasible and in the best interest of the child."⁷⁴ Finally, prison administrators have a duty "to cooperate with [an agency] in making suitable arrangements for an inmate confined therein to visit with his or her child."⁷⁵

There are two situations in which an agency is excused from making "diligent efforts."⁷⁶ Such efforts are not required if a parent, incarcerated or otherwise, has failed for six months or more to keep the agency apprised of her location.⁷⁷ In addition, an agency does not have to make diligent efforts when "[a]n incarcerated parent has

having their children adopted without their consent. 1983 N.Y. Laws 911, § 4 (amending N.Y. Dom. Rel. Law § 111 (2)-(3)); *see supra* note 66.

73. The agency is required to make "diligent efforts" to strengthen the parental relationship. Such efforts include the following:

[M]aking suitable arrangements with a correctional facility and other appropriate persons for an incarcerated parent to visit the child within the correctional facility, if such visiting is in the best interests of the child. When no visitation between child and incarcerated parent has been arranged for or permitted by the authorized agency because such visitation is determined not to be in the best interest of the child, then no permanent neglect proceeding under this subdivision shall be initiated on the basis of the lack of such visitation. Such arrangements shall include, but shall not be limited to, the transportation of the child to the correctional facility, and providing or suggesting social or rehabilitative services to resolve or correct the problems other than incarceration itself which impair the incarcerated parent's ability to maintain contact with the child. When the parent is incarcerated in a correctional facility located outside the state, the provisions of this subparagraph shall be construed to require that an authorized agency make such arrangements with the correctional facility only if reasonably feasible and permissible in accordance with the laws and regulations applicable to such facility.

N.Y. Soc. Serv. Law § 384-b(7)(f)(5) (McKinney Supp. 1989). The New York State Council on Children and Families recommended such visitation rights for incarcerated parents. *See Incarcerated Women, supra* note 14.

74. *Id.* § 384-b(7)(f)(2) (McKinney Supp. 1989).

75. N.Y. Correct. Law § 619 (McKinney 1987). This provision has been applied to county jail administrators. *See, e.g., In re G. Children*, 124 Misc. 2d 1024, 1027, 478 N.Y.S.2d 498, 500 (Fam. Ct. Onondaga County 1984) (court required county jail to accept custody of state prisoner so that prisoner could have visits with her children, who were in placement in county where jail was located).

This duty of cooperation does not extend, however, to federal prison authorities. The Correction Law applies only to state facilities, and, in any event, the state legislature lacks jurisdiction over federal prison authorities. *See supra* note 66.

76. *See supra* note 57 and accompanying text.

77. N.Y. Soc. Serv. Law § 384-b(7)(e)(i) (McKinney Supp. 1989). For an incarcerated mother, such a situation might arise if she were transferred to another prison, or released.

failed on more than one occasion while incarcerated to cooperate with an authorized agency in its efforts to assist such parent to plan for the future of the child. . . or in such agency's efforts to plan and arrange visits with the child. . . ."⁷⁸

3. *Litigation Under the 1983 Amendments*

The 1983 legislation has allowed incarcerated parents to be full participants in the foster care system. They now have explicit parental rights, but they also have corresponding responsibilities. Three cases decided since the 1983 amendments became effective illustrate the marked effect—both positive and negative—that these changes have had on the lives of incarcerated parents.

In *In re G. Children*,⁷⁹ the Family Court of Onondaga County addressed the visitation rights of parents as well as the duty of the agency and the prison to facilitate such visitation. In *G. Children*, the mother was incarcerated at a prison north of New York City, while the children were placed with foster parents in western New York, a trip of five hours by bus.⁸⁰ The court ordered the prison to transport the *mother* twice a month to the jail in the county in which the children had been placed and directed the agency to arrange visits at the jail.⁸¹ The court ordered these arrangements to spare the children the long bus ride to visit their mother.⁸²

The New York Supreme Court, Appellate Division, recently discussed the scope of incarcerated parents' planning responsibilities. In *In re Delores B.*,⁸³ the Family Court of New York County dismissed a permanent neglect petition, holding that the father, who was serving a prison sentence for a term of twenty-five years to life, had satisfied his duties to maintain contact with and plan for the future of his child.⁸⁴ The father had written to the child and to the agency at regular intervals, had expressed interest in the child, had visited with the child whenever possible, and had offered a foster care "plan" for his child for the remainder of his sentence.⁸⁵ The lower court found that the father had fulfilled his parental duties under the 1983 amendments.⁸⁶

78. *Id.* § 384-b(7)(e)(ii).

79. 124 Misc. 2d 1024, 478 N.Y.S.2d 498 (Fam. Ct. Onondaga County 1984).

80. *Id.* at 1025, 478 N.Y.S.2d at 499.

81. *Id.* at 1026, 478 N.Y.S.2d at 499-500.

82. *Id.* at 1027, 478 N.Y.S.2d at 500.

83. 130 Misc. 2d 484, 496 N.Y.S.2d 930 (Family Ct., N.Y. County 1985), *rev'd*, 141 A.D.2d 100, 533 N.Y.S.2d 706 (1st Dep't 1988) (leave to appeal granted).

84. *Id.* at 487, 496 N.Y.S.2d at 932.

85. *Id.* at 485, 496 N.Y.S.2d at 932.

86. *Id.* at 486, 496 N.Y.S.2d at 932.

The appellate division reversed, holding that the father had failed to plan for the future of his child.⁸⁷ The father's sentence would not make him eligible for parole until his child was twenty-five years old.⁸⁸ Because there were no relatives who were willing or able to care for the child, the father's plan required that the child remain in foster care until she reached majority.⁸⁹ The court found that such extremely prolonged foster care, with no possibility of the father's regaining custody of the child, was contrary to the legislative intent behind the state foster care laws.⁹⁰ Thus, the appellate division effectively held that an incarcerated parent has the same planning duty as any other parent to project a future course of action which involves a stable home and parental care for the child.

Similarly, in *In re Stella B.*,⁹¹ the Family Court of Onondaga County addressed the incarcerated parent's duty to maintain contact with a child. The court, in denying a motion to dismiss a petition for abandonment, found that an incarcerated father had not made all possible efforts to communicate with his child and the agency, even

87. *In re Delores B.*, 141 A.D.2d 100, 105, 533 N.Y.S.2d 706, 709-10 (1st Dep't 1988).

88. *Id.* at 102, 533 N.Y.S.2d at 707.

89. *See id.* at 105, 533 N.Y.S.2d at 709.

90. *Id.* at 108, 533 N.Y.S.2d at 711; *see also supra* note 48.

Justice Carro, dissenting, and Justice Ellerin, concurring in part and dissenting in part, argued that a hearing should be held on the possibility of an "open adoption," which would permit the father to maintain some relationship with his children, including communicating and visiting, even after their adoption. *Id.* at 115-16, 533 N.Y.S.2d at 716 (Carro, J., dissenting); *id.* at 117-18, 533 N.Y.S.2d at 717-18 (Ellerin, J., concurring in part and dissenting in part). For a general discussion of open adoption, see *In re Joyce T.*, 65 N.Y.2d 39, 478 N.E.2d 1306, 489 N.Y.S.2d 705 (1985); *In re Dana Marie E.*, 128 Misc. 2d 1018, 492 N.Y.S.2d 340 (Fam. Ct. Queens County 1985); *In re Adoption of Anthony*, 113 Misc. 2d 26, 448 N.Y.S.2d 377 (Fam. Ct. Bronx County 1982).

A result similar to that in *In re Delores B.* was reached in *In re Guardianship of Kareem B.*, 135 Misc. 2d 324, 515 N.Y.S.2d 179 (Family Ct. N.Y. County 1987), *aff'd sub. nom. In re Brown*, 143 A.D.2d 548 (1st Dep't 1988), *leave to appeal granted sub. nom. In re Gregory B.*, 73 N.Y.2d 704 (1989). In *Kareem B.*, the court found that the incarcerated father's plan to have his children discharged to the paternal grandmother was neither viable, realistic, nor in the children's best interests. *Id.* at 326, 515 N.Y.S.2d at 180. The court held that the father's failure to have any plan other than continued foster care for the children constituted a failure to "plan" within the meaning of § 384-b(7)(a) of the New York Social Service Law, and terminated his parental rights on the grounds of permanent neglect. *Id.* at 326-27, 515 N.Y.S.2d at 181.

91. 130 Misc. 2d 148, 495 N.Y.S.2d 128 (Fam. Ct. Onondaga County 1985). In *Stella B.*, the local social services department brought a termination of parental rights proceeding on the ground of abandonment. *Id.* at 148, 495 N.Y.S.2d at 129. The petition alleged that the father had failed to visit or contact both his child and the social services department for over six months. *Id.* The father moved to dismiss, alleging that his incarceration had rendered him unable to visit and maintain contact with his child. *Id.* at 148-49, 495 N.Y.S.2d at 129.

though: (1) the agency had refused to provide visitation; and (2) the father's illiteracy had prevented him from writing letters.⁹² The court noted that the father had access to other forms of communication.⁹³

These cases illustrate that, although agencies and prison officials now have a greater duty to facilitate and strengthen parent-child relationships, incarcerated mothers also have a greater burden to maintain contact with, and to plan effectively for the future of their children. Unfortunately, the 1983 amendments did not go far enough to help incarcerated mothers obtain the means to enforce their parental rights and to carry out their parental duties.

III. Problems Left Unresolved by the 1983 Amendments

The 1983 amendments have greatly improved the ability of incarcerated mothers to protect their parental rights and to have meaningful relationships with their children.⁹⁴ Two important problems, however, left unresolved by the amendments, continue to jeopardize the parental rights of incarcerated mothers. First, incarcerated mothers lack effective access to courts for the purpose of protecting and enforcing their parental rights.⁹⁵ Second, incarcerated mothers who wish to maintain their parental rights have a strict obligation to "cooperate" in planning and visitation, but agencies and prisons are not required to provide them with the planning resources and visitation rights necessary to meet this obligation.⁹⁶ This allocation of duties fails to reflect the lack of resources available to incarcerated mothers who wish to plan for the future well-being of their children.

A. Lack of Access to the Courts

Placements of children into foster care involve several court hearings.⁹⁷ A parent has the right to be present for all of these hearings,⁹⁸ and her presence is crucial. It is at these hearings that a court will

92. *Id.* at 149, 495 N.Y.S.2d at 129.

93. *Id.* It is not clear from the court's opinion what other forms of communication were open to the father. The court held that this issue should be addressed at a fact-finding hearing. *Id.* at 149, 495 N.Y.S.2d at 129.

94. *See supra* notes 79-82 and accompanying text.

95. *See infra* notes 97-103 and accompanying text.

96. *See infra* notes 104-19 and accompanying text.

97. *See supra* notes 28-33 and accompanying text.

98. *See, e.g., In re Victory*, 78 A.D.2d 843, 433 N.Y.S.2d 445 (1st Dep't 1980) (reversing order that had terminated father's parental rights, where unwed father had not been permitted to participate in fact-finding hearing, despite his acknowledged paternity and previous involvement with his child).

assess the parent's concern for and involvement with her children as well as the parent's ability to resume caring for her children. If a parent can make a favorable impression at an intermediate review hearing, she may be able to preclude an agency from bringing a termination of parental rights proceeding at a later date. An unfavorable court appearance or a failure to appear may make such a proceeding inevitable. These hearings also give a parent her best opportunity to bring to the court's attention an agency's failure to provide adequate visitation and other services.⁹⁹ Unlike criminal proceedings, however, these hearings can be conducted in the parent's absence, and the court may draw inferences against the parent for her failure to appear and for her failure to testify in her defense.¹⁰⁰ A parent who fails to be present at these hearings will therefore forfeit important rights.

Despite the crucial importance of a parent's presence at all court hearings involving her children, neither the agency, the prison, nor the court is legally obligated to ensure the mother's presence. While an agency caseworker, a mother, or the court can make informal arrangements for the mother's production, no formal mechanism exists. Moreover, because the mother's statutory right to counsel does not generally attach until the mother has appeared in court and established her indigency,¹⁰¹ no attorney is available to protect the interests of an absent mother. Thus, an incarcerated mother has no effective access to the court for these critical, defensive hearings.

In addition to this lack of access in defensive court hearings, an incarcerated mother has no meaningful access to the court for *affirmative* proceedings, *i.e.*, court proceedings initiated by the mother herself.¹⁰² A mother who is denied visitation or other services may need to take legal action to remedy the situation. While a non-incarcerated

99. See N.Y. Fam. Ct. Act § 1055(c) (McKinney 1983); N.Y. Soc. Serv. Law §§ 358-a(3)(b), 392(9) (McKinney 1983 & Supp. 1989).

100. See, *e.g.*, N.Y. Fam. Ct. Act § 617(d)(3) (McKinney Supp. 1989); N.Y. Soc. Serv. Law § 384-b(7)(a) (McKinney 1983); *In re Raymond Dean L.*, 109 A.D.2d 87, 490 N.Y.S.2d 75 (4th Dep't 1985) (holding that parent's involuntary failure to appear at hearing because of heart attack was not sufficient to stop termination of parental rights proceeding); *cf.* New York City Comm'r of Social Servs. v. Eliminia E., 134 A.D.2d 501, 521 N.Y.S.2d 283 (2d Dep't 1987) (holding fifth amendment privilege against self-incrimination inapplicable to Family Court child abuse or neglect proceeding; court applied statutory presumption that child's unexplained injuries were result of parental abuse or neglect against parent who refused to testify out of fear that her testimony would be used against her in related criminal proceeding).

101. N.Y. Fam. Ct. Act § 262(a) (McKinney 1983 & Supp. 1989).

102. The family court has continuing jurisdiction over all foster care placements. N.Y. Soc. Serv. Law §§ 358-a(2-a); 392(10) (McKinney 1983 & Supp. 1989); see N.Y. Fam. Ct. Act §§ 1055, 1057 (McKinney 1983).

Meaningful access to the courts is constitutionally required under *Bounds v. Smith*,

parent can simply walk into the courthouse and file a motion with the assistance of a court clerk,¹⁰³ an incarcerated mother obviously has no such option. No legal mechanism exists that allows an incarcerated mother to commence motions or other court proceedings to secure her right to visitation and social services under section 384-b of the New York Social Services Law. Incarcerated mothers therefore lack effective access to courts to protect and enforce their parental rights in both defensive and affirmative proceedings.

B. Inappropriate Allocation of Duties of Cooperation in Planning and Visitation

The 1983 amendments placed a strict duty of cooperation in planning and visitation upon incarcerated parents who wish to retain their parental rights.¹⁰⁴ An agency is excused from making "diligent efforts" to encourage and strengthen the parental relationship when the parent has failed on more than one occasion to cooperate with agency efforts to assist the parent in planning and to provide the parent with visitation.¹⁰⁵ Although the precise scope of this provision is yet to be determined, it can have a detrimental effect on the parental rights of incarcerated mothers.¹⁰⁶ Under this provision, an agency caseworker's unilateral determination of "noncooperation" may be sufficient to trigger a termination of parental rights proceeding against the incarcerated mother.¹⁰⁷

Placing this burden of cooperation on an incarcerated mother is inappropriate in light of the disparity of resources available to the agency and the parent.¹⁰⁸ An agency is always in a superior position

430 U.S. 817 (1977), and therefore prison inmates are entitled to legal assistance. A full discussion of the relevant constitutional issues is beyond the scope of this Article.

103. N.Y. Fam. Ct. Act § 216-c (McKinney 1983).

104. *See supra* notes 76-78 and accompanying text.

105. N.Y. Soc. Serv. Law § 384-b(7)(e)(ii) (McKinney Supp. 1989).

106. The New York State Department of Social Services has interpreted this provision in the following manner:

The incarcerated parent must be given an opportunity to plan for the child's future or to plan and arrange visits with the child at the parent's place of incarceration. However, where the parent has failed on more than one occasion while incarcerated to cooperate with the agency making up such plans or arrangements, termination under the permanent neglect provision may then be obtained.

N.Y.S. Dept. of Soc. Serv. Informational Letter 85 INF-5, at 9 (Mar. 29, 1985).

107. *See id.*

108. The parties are by no means dealing on an equal basis. The parent is by definition saddled with problems: economic, physical, sociological, psychiatric, or any combination thereof. The agency, in contrast is vested with expertise, experience, capital, manpower and prestige. Agency efforts correlative to their superiority [are] obligatory.

to set and accomplish the goals of planning for and maintaining contact with the child. The 1983 amendments also fail to reflect the realities of prison life. As courts have noted in other contexts, "it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of [her] liberty, care for [her]self."¹⁰⁹ This principle has been applied in cases involving the prison's duty to provide medical care,¹¹⁰ to facilitate access to abortions,¹¹¹ and to protect prisoners from physical harm.¹¹² The principle is no less applicable when a prisoner's parental rights are involved.

The logistical details involved in planning and visitation are largely beyond the control of an incarcerated mother. An incarcerated mother's ability to cooperate in planning for the future of her child depends upon certain necessary resources, made available only by the prison or agency.¹¹³ Similarly, arrangements for visitation depend upon the prison's internal regulations of the day, time and duration of the visit, and the approval, typing and dissemination of the necessary security clearances to all prison checkpoints. Moreover, an incarcerated mother can never be certain that she will be able to keep an appointment to visit her child at a specific place and time. She can be transferred to another facility, sent to court on her criminal case, or sent to an outside facility for nonemergency outside medical care with little or no prior notice and without control of the timing of her move. Finally, because of security problems, such as a prison disturbance,

In re Sheila G., 61 N.Y.2d 368, 381, 462 N.E.2d 1139, 1145, 474 N.Y.S.2d 421, 427 (1984) (quoting *In re Sydney*, 84 Misc. 2d 932, 934, 377 N.Y.S.2d 908, 909 (Fam. Ct. Queens County 1975)).

109. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926)) (because prisoners are completely dependent on state for medical care, state is required under eighth amendment to provide such care. Deliberate indifference to prisoners' medical needs amounts to cruel and unusual punishment) *reh'g denied*, 429 U.S. 1066 (1977).

110. *See, e.g., Estelle*, 429 U.S. at 103-05.

111. *See, e.g., Monmouth Co. Correctional Inst. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987) (prison's failure to facilitate prisoners' access to abortion violates eighth amendment prohibition of cruel and unusual punishment and fourteenth amendment substantive due process right to privacy), *cert. denied*, 108 S. Ct. 1731 (1988).

112. *See, e.g., Jones v. Diamond*, 636 F.2d 1364 (5th Cir.) (holding that jail administration's failure to control or separate violent and dangerous inmates violated inmate population's right under eighth amendment to be free from cruel and unusual punishment because prisoners cannot protect themselves but must depend on prison for such protection), *cert. dismissed*, 453 U.S. 950 (1981).

113. With respect to planning, an incarcerated mother cannot improve her parenting skills, recover from a drug or alcohol problem, or arrange for post-release housing and financial support, unless the agency or prison provides the necessary training, treatment, counseling and other services within the prison itself, or arranges for the mother to be transported to an outside program.

the prison may require the confinement of inmates to their cells and the cancellation of all visitation privileges. In short, many factors that an incarcerated mother is powerless to prevent can sabotage a prearranged visit.

In addition to the failure to recognize these problems, the 1983 amendments fail to place sufficient responsibility upon the agency and the prison to improve the inmate's parental relationship. Although an incarcerated mother is required "to utilize medical, psychiatric, psychological and other social and rehabilitative services and material resources made available to such parent,"¹¹⁴ she is totally dependent upon the agency and the prison for such services, and the amendments do not require the agency or prison to provide any social services or other resources to enable the mother to plan for her children's future.

Similarly, although an agency has the duty to provide incarcerated mothers with visitation,¹¹⁵ the amendments do not specify how frequently a parent should be provided with visitation. A New York State Department of Social Services directive suggests that merely providing an incarcerated mother with *monthly* visitation will satisfy the agency's duty.¹¹⁶ Such a schedule is scarcely sufficient to permit the mother to discharge her duty of maintaining meaningful contact with her child,¹¹⁷ especially because prison regulations may limit the duration of visits to relatively short periods of time.

Incarcerated mothers have almost no control over the arrangements for planning and visitation. The current statutory provisions, therefore, place undue weight on the mother's "duty of cooperation." The clause in the 1983 amendments excusing an agency's "diligent efforts" where there has been more than one instance of parental noncooperation,¹¹⁸ jeopardizes the parental rights of incarcerated mothers. In effect, the incarcerated mother is forced to carry the burden of, and pay the penalty for, the acts and omissions of the agency and the prison. This situation is comparable to that of requiring a prisoner to provide for her own medical care, abortion or physical safety,¹¹⁹ and is similarly unacceptable.

114. N.Y. Soc. Serv. Law § 384-b(7)(c) (McKinney 1983).

115. See *supra* notes 73-75 and accompanying text.

116. N.Y.S. Dept. of Social Services, Administrative Directive 85 ADM-42, at 4 (Sept. 3, 1985).

117. See *supra* notes 58-61 and accompanying text.

118. See *supra* note 78 and accompanying text.

119. See *supra* notes 110-12 and accompanying text.

IV. Recommendations

While the 1983 amendments have improved incarcerated mothers' ability to protect their parental rights, this legislation has at least two important weaknesses. First, incarcerated mothers do not have effective access to court proceedings involving their children.¹²⁰ Second, the amendments place an unacceptably strict burden upon incarcerated mothers to "cooperate" in planning and visitation, while failing to require that agencies and prisons provide them with the social services necessary to fulfill this duty.¹²¹ The following is a proposed amendment to section 384-b of the New York Social Services Law, designed to address these problems:

A. Access to court proceedings involving the children of incarcerated parents.

1. Court proceedings involving the children of incarcerated parents cannot proceed in the absence of the incarcerated parent, unless the parent has waived her right to appear, in writing, after consultation with an attorney.
2. The court must order production of incarcerated parents for all court proceedings involving their children;
3. The court must order agencies and prison officials to facilitate an incarcerated parent's production for court proceedings. This duty includes, but is not limited to, the following:
 - a. an agency must notify the court of the need for production of the parent in advance of the hearing.
 - b. prison officials must notify the court promptly if they cannot comply with an order of production.
 - c. prison officials, agencies and the court, in consultation with the parent, shall schedule an adjourned date if the parent cannot be produced for the initial hearing.
4. The court must provide counsel for all indigent incarcerated parents at the filing of the petition, prior to the initial court appearance.
5. The Family Courts shall establish simplified procedures by which incarcerated parents can initiate court proceedings involving their children.

B. Duty of Cooperation.

1. "Diligent efforts" by an agency to strengthen and maintain the parental relationship shall not be excused merely because an incarcerated parent has failed on more than

120. See *supra* notes 97-103 and accompanying text.

121. See *supra* notes 104-19 and accompanying text.

one occasion to cooperate in planning or visitation.¹²²

The duties of cooperation of incarcerated parents are no greater than those of parents who are not incarcerated.

2. Agencies and prison officials must provide the social services necessary to enable incarcerated parents to plan meaningfully for the future of their children. Such services must include, but need not be limited to, medical, psychiatric, psychological and other social and rehabilitative services where necessary to improve parental skills, the lack of which will prevent the future discharge of the child to the parent's custody;¹²³

122. This provision is designed to rescind N.Y. Soc. Serv. Law § 384-b(7)(e). See *supra* note 78 and accompanying text.

123. The Children's Center at Bedford Hills Correctional Facility, a maximum security state prison for women in Westchester County, is a model for furnishing many such social services. Governor Cuomo, in approving chapter 911 of the Laws of 1983, specifically cited the Bedford Hills Children's Center (the Center) as an innovative example of a way to enable incarcerated parents to maintain family ties. Governor's Memorandum on Approval of ch. 911, N.Y. Laws (1983), *reprinted in* [1983] N.Y. Laws 2816-17 (McKinney 1983). The Center is comprised of five components, three of which are located within the prison itself: (1) a playroom for visiting children; (2) a parenting center; and (3) a nursery where qualifying mothers may keep their children for up to one year. See N.Y. Correctional Law § 611 (McKinney 1987). Two of the components are community-based: (1) Providence Houses which provide shelter to battered women and their children; and (2) foster homes exclusively for the children of women inmates. Bedford Hills Correctional Facility, Descriptive Booklet about the Bedford Hills Correctional Facility Children's Center, 2-3, 7-9, 19 (undated) (available at *Fordham Urban Law Journal* office).

The Children's Center provides the following description of its mission and services:

The Children's Center at Bedford Hills Correctional Facility offers a wide range of services to Bedford inmates and their children. The Center's main program is designed to help women preserve and strengthen family ties, receive visits from their children as often as possible in a warm, unthreatening, supportive atmosphere, and keep informed about their children's physical, intellectual and emotional well-being while they are apart. Through its various workshops, the program helps inmates better understand their roles as parents and breadwinners. By giving the inmates a responsible, decision-making role in the daily operation of the Center, they can begin to develop a feeling of self-worth and the courage to set new goals for themselves. Knowing that each of us can sometimes be both child as well as parent, the Center's outreach also includes work with women in the facility's Mental Hygiene Unit and the overseeing of the facility's nursery.

Id. at 1.

Unfortunately, within New York State, the Children's Center is unique to Bedford Hills Correctional Facility. Nothing similar exists at Albion Correctional Facility, a medium security women's prison in western New York State; Bayview Correctional Facility, a medium security women's prison in New York City; or any of the state's men's prisons. With respect to the local jails in New York State, only the Rose M. Singer Center, the women's jail in New York City, has a nursery. See Hernandez, *supra* note 1, at 4, col. 4. The Singer Center, however, has no children's center.

Programs similar to the Bedford Hills Children's Center are in operation in other

3. Social service agencies must provide the parent with visitation at least bi-weekly, unless the court has ordered otherwise after a hearing determining that such visitation is not in the children's best interests.¹²⁴
4. Prison officials must provide expanded visiting hours for visitation between incarcerated parents and their children.

V. Conclusion

Incarcerated mothers whose children are in foster care have special needs in maintaining their parental rights. In 1983, New York State enacted significant legislation that addressed these needs. The legislation strengthened the legal rights of such parents by requiring that child care agencies make diligent efforts to maintain and strengthen the relationship between incarcerated parents and their children. More important, agencies must now facilitate visitation between incarcerated parents and their children at the prison. This duty includes providing the children with transportation to the prison.

Despite these important advances, the legislation left two problems unresolved. First, incarcerated mothers lack effective access to court proceedings involving their children. Second, the legislation placed an inappropriately strict duty of cooperation in planning and visitation on incarcerated mothers while failing to require social services agencies and prison officials to provide the mother with the planning resources and visitation necessary to meet this duty.

To remedy these problems, this Article has proposed an amendment to section 384-b of the New York Social Services Law. Implementation of these changes will, of course, not meet all of the needs of incarcerated mothers. This amendment, however, will help ensure that incarcerated mothers who desire meaningful relationships with their children need not fear the permanent termination of their paren-

states, most notably in California through the Prison Mothers and their Children program (Prison MATCH) which operates a children's center at the Federal Correctional Institute at Pleasanton, California. See J. BETRAM, C. LOWENBERG, C. MCCALL, & L. ROSENKRANTZ, *MY REAL PRISON IS . . . BEING SEPARATED FROM MY CHILDREN: A MANUAL FOR DEVELOPING PROGRAMS FOR INCARCERATED PARENTS AND THEIR CHILDREN* (1982) (available at *Fordham Urban Law Journal* office).

124. This provision describes the minimum frequency of visitation currently required for parents who are not incarcerated. N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(d)(1)(i) (1987). Before an incarcerated parent can be denied visitation, a court must conduct a hearing to determine that such visitation is not in the child's best interests. *Wise v. Del Toro*, 122 A.D.2d 714, 714, 505 N.Y.S.2d 880, 881 (1st Dep't 1986) (reversing dismissal of incarcerated father's motion for visitation with his child, who was in mother's custody, where Family Court had dismissed motion without conducting hearing).

tal rights, but can instead look forward to the day when they are reunited with their children.