

California Law and the Children of Prisoners

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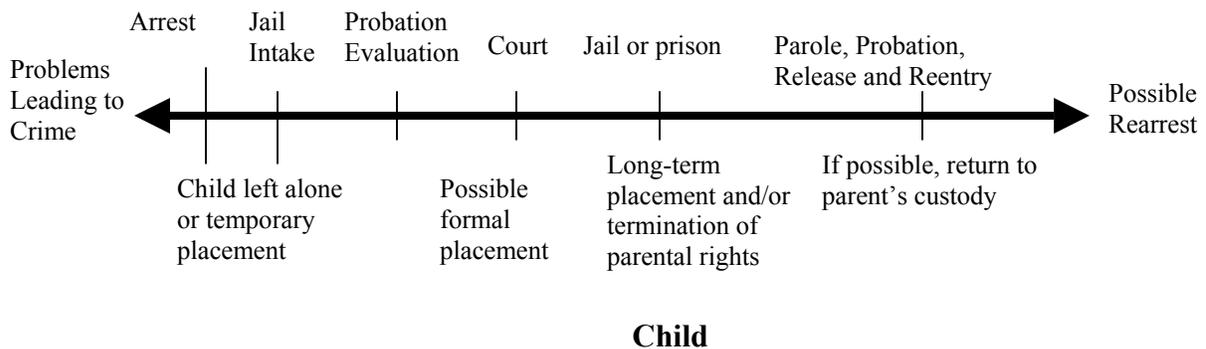
EXECUTIVE SUMMARY

This report examines California law as it touches on the lives of prisoners and their children. Most prisoners are parents (79 percent of women and two-thirds of men in California prisons),¹ making the state's criminal justice system an unwitting but important participant in the lives of their families. Law enforcement practices, criminal court procedures and sentencing laws, and correctional practices designed to catch, convict and punish prisoners also have a major, but not generally well understood, impact on children. An estimated nine percent of California's minor children have a parent in the state's criminal justice system. Yet state law provides very limited direction on how criminal justice authorities should interact with the families and children of prisoners. As a result, few agencies have clear policies.

The state's institutions designed to protect children-- the child welfare system and Juvenile Courts—also do not have clear policies to respond to the special circumstances and issues raised by incarcerated parents and their children. The Juvenile Courts may find that children of arrested and/or incarcerated parents are in need of care and supervision in some situations, but their ability to find out about and ensure the safety and well being of these children is limited, given that police officers generally do not inquire about children at the time of parental arrest. The children fall into a statutory hole— police are mandated reporters but only if child abuse and neglect has already occurred.

The arrest of a parent of minor children is a family affair. It is the precipitating event that catapults a troubled parent and his or her family into the public arena. As the report details, a complex series of events unfolds over time, in which the parent and child interact with police, local correctional authorities, the criminal and juvenile courts, the child welfare system, and possibly with state correctional authorities. Criminal, family, and child welfare laws from at least six California codes (Penal, Welfare and Institutions, Civil, Government, Family, Probate) may be applied in a family's case. The combined impact on families and children is significant, and in some cases, such as the increased likelihood of terminating parental rights, perhaps unintended.

Figure 1
Parent



Arresting and incarcerating a parent, especially a mother, has a profound impact on the children. “When Mothers do the Crime, Kids Do Hard Time,” reads the headline above one sad article.² The children’s lives are disrupted, often more than once, as they are moved to a new relative caregiver or placed in temporary or long-term foster care. Young children especially do not understand what is happening and experience guilt and trauma over the separation, sometimes with long-term negative behavior consequences such as failure in school or juvenile delinquency.

California law does not articulate a clear set of official actions for criminal justice authorities relative to prisoner’s children. A convergence of official actions and inactions may place a child at serious risk. Law enforcement is responsible when “..the fact that the child is left unattended poses an immediate threat to the child’s health or safety,” but is not required to ask about children at the time of parental arrest (see *Welfare and Institutions Code §305*). Most law enforcement departments do not have policies to guide their officers about whether or how to respond to children or to locate caregivers. Arrested parents may not be afforded an opportunity to call from the jail to select a caregiver. Children may be left with caregivers who do not undergo background checks by police or child welfare agencies. As a result, some children are left alone or in unsafe situations.

California law does not require the criminal courts or probation to consider family issues, and jails and prisons generally do not collect information about families or consider or attend to their needs. Inattention to prisoners’ families creates a de facto policy. In contrast, Oregon regards a parent’s arrest and incarceration as an opportunity to intervene in the family to assist the children, caregivers and parent in order to avoid further familial involvement in crime. Criminal judges and probation are partners with child welfare and the Family and Juvenile Courts in this effort. This kind of multiagency collaboration between the criminal justice and Juvenile and Family Courts is not the norm in California.

On the civil law side of the equation, local child welfare authorities and the Juvenile Courts in California do not have clearly articulated responses to the special needs of prisoner parents and their children. If a child is judged to be at risk for abuse and/or neglect under *Welfare and Institutions Code §300*, the child may become a dependent of the Juvenile Court in order to protect the child from further harm. The court is then responsible for establishing the criteria for family reunification, ordering social services, and determining a child’s short-term and long-term placement. However the law provides limited guidance to the courts as to the “reasonable efforts” that are required by social services agencies to assist prisoners and their families so that they may reunify. Many prisoners do not receive the required reunification services or visits from their children. Their children end up in the state’s troubled foster care system. The legal standard underlying judicial decision-making is a vague one, the “best interests” of the child.

Under the federal Safe Families and Adoption Act of 1996, incarcerated parents face the likelihood of losing their parental rights forever, with their children placed in long-term

foster care or adopted. This legal process raises due process issues. Should parent-prisoners be provided with information about the impact that a plea-bargain or lengthy criminal sentence might have on their parental rights? Some advocates argue that the effect of current law is to create a “commit a crime and lose your child” policy, given lengthy sentences and clear federal and state policies to expedite termination of parental rights.

The state’s criminal and civil justice institutions--law enforcement, the criminal courts, jail and prisons, child welfare and the juvenile courts—each focus on their own clientele. They have not developed relationships or formal memoranda of understanding that might allow them to work together to assist prisoner’s families, and there are no legal requirements that they do so. “Far from supporting each others’ efforts in working with women in jail and their families, the criminal justice and child welfare systems often seem to be at odds with each other.”³ Each institution concentrates on its piece of the family puzzle—parent prisoner or child and caregiver. This disjunction is a reflection of a lack of clarity and standards in the underlying statutes. As a public policy, this may be a costly oversight, as research finds that both the parents and their children are at high-risk for negative inter-generational outcomes requiring expensive public interventions.

The report considers a number of policy options in the last chapter (pages 42-45) that address potential changes in state law. These include clarifying the application of *Welfare and Institutions Code §§300-305* and the mandated reporting statutes to situations of parental arrest and imprisonment. When should law enforcement and the courts become involved? A related option is to consider an alternative statutory scheme to ensure the safety of children whose arrested parents identify a caregiver. For example, should there be a child welfare and law enforcement review of the caretaker’s suitability? Other options address actions that might create a more productive partnership between the child welfare and criminal justice systems to address the unique needs of the families of prisoners. Finally, the Legislature might want to carefully consider when the termination of parental rights of imprisoned single parents is appropriate, and what actions might be taken to carefully limit this severe sanction.

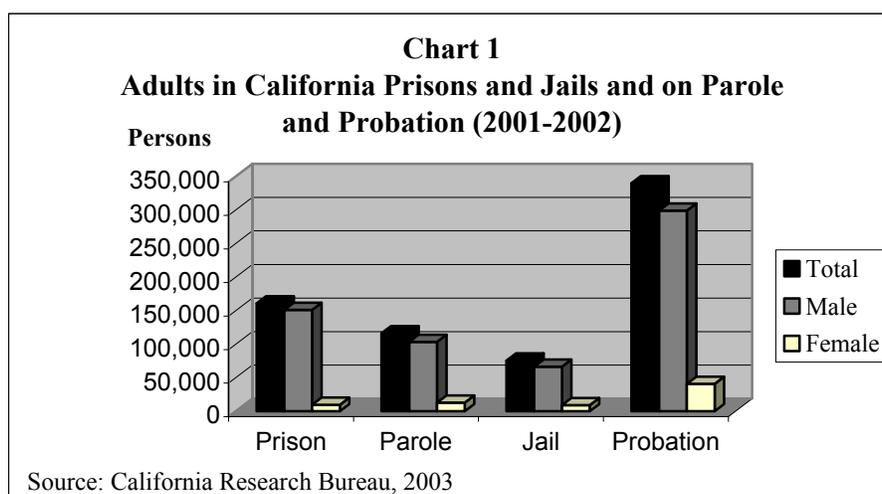
INTRODUCTION

INCREASING NUMBERS OF CHILDREN HAVE PARENTS IN JAIL OR PRISON

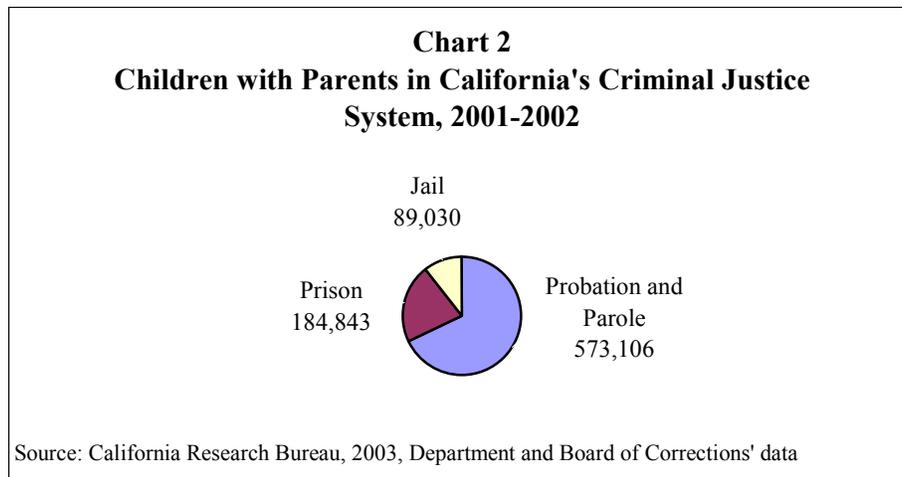
Over the last 15 years, federal and state governments have expanded and lengthened criminal sentences, particularly for drug offenses, incarcerating an increasing number of adults. The number of men in state and federal prisons increased 80 percent from 1990 to 2001, and the number of female prisoners increased 114 percent. In June 2001, one in every 145 U.S. residents was incarcerated in prison or jail--1,334,255 adults in federal and state prisons and 631,240 in local jails.⁴ An unintended consequence of this rapid increase in adult incarceration has been the growing number of children whose parents are, or have been, in jail or prison.

Nationally, an estimated 1.5 million children (or two percent of the nation's children) had a parent in state or federal prison in 1999; 22 percent of those children were under five years old.⁵ The California sample of this national survey found that two thirds of the state's male prison inmates and 79 percent of female prison inmates were parents, with an average of 2.5 children for the men and 2.9 children for the women.⁶ This data closely tracks a 1995 survey of California women prisoners, which found that 80 percent of women prison inmates had two or more children and that about two-thirds had minor children (ages 18 and younger).⁷ There are no official statewide figures because California correctional systems do not consistently keep information about prisoners' families.

California jails and prisons held 352,732 adult prisoners in mid-2002, and an additional 162,176 persons were on parole. In 2001, 339,760 adults were on probation. Most prisoners are men. Women comprise about 12 percent of the adults in jail, six percent of state prison inmates, and 11 percent of parolees.⁸



A significant impressive number of children in California are affected by parental arrest and imprisonment. Based on the number of prisoners charted above, and on estimates of California inmates' children drawn from 1995 survey data, adults in California's criminal justice system were parents to an estimated 846,980 children (see Chart 2), of which 694,635 children had fathers in the criminal justice system, and 152,345 children had mothers in the system. There are about 9.3 million children in California, according to the 2000 U.S. Census. Thus an estimated nine percent of the state's children had a parent in the criminal justice system in 2001-2002. The actual number of minor children is likely to be less, as some of these children are now over the age of 18.



PARENTAL ARREST DISRUPTS CHILDREN'S LIVES

Each one of these children has experienced the absence of a parent due to arrest and confinement. As many as one in five of the children were present at the arrest and may have witnessed police officers handcuff and take their parent away.⁹ Many of these children are five years of age and younger.

The trauma of an arrest event and the resulting parent-child separation can have a profound effect on a child's development, lasting well into adulthood. The child may experience guilt—did they do something wrong, was the arrest and separation somehow their fault? Emotional reactions to the separation are age-related, and can include denial, anger, anxiety, inability to concentrate, depression, sadness, grief, shame, and fear.

The extent to which a child will be affected by parental incarceration depends on a large number of variables, including the age at which the parent-child separation occurs, length of the separation, health of the family, disruptiveness of the incarceration, child's familiarity with the placement or new caregiver, strength of the parent-child relationship, number and result of previous separation experiences, nature of the parent's crime, length of the parent's sentence, available of family or community support, and degree of stigma that the community associates with incarceration.¹⁰

Negative behavioral manifestations may include difficulty sleeping, poor school performance, truancy, use of alcohol or drugs, and delinquency and intergenerational incarceration.¹¹ A study of the children of 70 mothers awaiting trial in Boston, Massachusetts, found that 52 percent suffered from at least one major psychological disturbance (anxiety, depression, and hyperactivity), making it difficult to succeed in school. Over one-third of the children were enrolled in special education classes because of emotional issues, and one-third had repeated a grade. Many of the children exhibited aggressive and violent behavior, making it "...unlikely that they will become successful adults without early intervention by social service agencies."¹²

According to the Bureau of Justice Statistics, 47 percent of inmates in state prisons have a parent or other close relative who has also been incarcerated, and half of all juveniles in custody have a father, mother or other close relative who has been in jail or prison.¹³ Nineteen percent of state prison inmates surveyed in 1997 reported that one of their parents had been incarcerated.¹⁴ A study in Sacramento County found that of all children arrested between the ages of nine and 12 years old, 45 percent had an incarcerated parent.¹⁵ In the following interview, "Charles" talks about this connection:

Later, when I was living in group homes... I'd go to juvenile hall for a change of placement, until about my third time, when I got introduced to crime. I learned how to steal a car in 30 seconds. After that it was high-speed chases. I had one assault and battery case. One burglary.

When I was in juvenile hall all I could think about was my mom being in jail. I think that's why I was in most of the situations I was in. I didn't care about going to juvenile hall, 'cause my mom's in jail.

I think what would have helped me is just somebody to talk to. Somebody to take me somewhere, do something.

Although the child of a prisoner has not committed a crime, that child is nonetheless drawn into a complex legal and institutional process that can feel like a punishment: "Prisoners' families are the unintended victims of incarceration."¹⁶ In a very real sense, children can be victims of their parents' crimes:¹⁷

Amanda: My sister is 11. It (mother's arrest) affects her so much, she's gone to mental hospitals, she's tried to kill herself. At schools she sees everyone talking about their mothers and she just cries. Someone was teasing her at school 'cause she didn't have her mother and she had an anxiety attack and couldn't catch her breath. They called an ambulance and she was in the hospital for a week... When my little brother sees cops now he'll run, because he's scared of them. He says: "They took my mommy and they hurt her."

Where Children Go After a Parent's Arrest

Mothers are more likely than fathers to have been the primary caregivers and custodial parents of their children. About two-thirds of imprisoned mothers lived with their children prior to their arrest. In contrast, only 44 percent of imprisoned fathers were living with their children at the time of their arrest.¹⁸ When a single parent mother is arrested, "...it is clear that the lives of children have been disrupted to a greater degree than the lives of children of jailed fathers."¹⁹

When an arrested parent is a father, nearly 90 percent of the children continue to live with their mothers. However when the arrested parent is a mother, over half the children live with grandparents, as many live with other relatives and friends as with their fathers, and ten percent are in foster care (see Table 1).

Current caregiver*	Female parents	Male parents
Child's other parents	28%	89.6%
Child's grandparent	52.9%	13.3%
Other relative	25.7%	4.9%
Foster home	9.6%	1.8%
Friends/other	10.4%	4.9%

*Adds up to more than 100% because some prisoners had children in different homes.
Source: Christopher J. Mumola, *Incarcerated Parents and Their Children*, Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistic, 2000,

The long-term impact of parental arrest and incarceration on a child varies depending on which parent is arrested, and whether that parent is a single parent. The children of imprisoned single caregiver mothers are the most likely to experience major disruptions in their lives, including at least one change of caregiver and of home environment, with an associated loss of friends, changes in school, and perhaps separation from siblings. Research indicates that "the greater the number of family transitions that children experience, the more detrimental the effect on their well-being, particularly for adolescent girls."²⁰

The maternal grandmothers who provide most of the care to these children are often elderly and infirm, with limited financial resources. They are challenged to deal with the emotional and social problems of children who have been suddenly separated from their mothers, often while also assisting the imprisoned parent, their child. The following interviews are with members of a support group for grandmothers who care for the children of their own incarcerated children.

Denise: As you get older, your life changes. You've got grown children, you've got grandchildren. Then all of a sudden you're thrust back into the parent role again. My grandson Martin...there's this underlying anger, all the time...Martin was having so much trouble in school ...that I couldn't get a job.

Emily: I've cared for two sets of grandchildren—I've raised nine in all... You have worked real hard to try and do your best to make your kids fit into society, go to school, do all the right things, and then they get involved in drugs.

Eva: My daughter has been incarcerated off and on for drugs. Her daughters are with me... But what if the day comes that I'm gone? What are these girls going to do?... Sometimes it is too much for me. I'm a diabetic; my health's not that great. I get tired, I get depressed. I can't even go on vacation.²¹

The arrest of a parent of minor children is a family affair. It's the precipitating event that catapults a troubled parent and his or her extended family into the public arena in a very visible and costly way. The following discussion examines the legal structure that underlies this process.

PARENTAL ARREST

The arrest of a parent is the precipitating event that involves a family in the criminal justice system. In 2000, there were 1.32 million misdemeanor and felony adult arrests in California, of which 19.7 percent were of women.²² Some adults cycle in and out of jail multiple times, even within a year, particularly for nonviolent offenses such as drug possession. Approximately twice as many adults are arrested during a year as are involved in the state's correctional institutions and parole/probation systems at any point in time. Thus considerably more children are affected by parental arrest than by parental incarceration.

Figure 2

Children Affected by Parental Arrest and Incarceration
(not drawn to relative scale)



The problems that lead to the involvement of police and the judicial and correctional systems in a family predate a parent's crime. A 1995 study of California's female prisoners, for example, found that their "...involvement in criminal behavior is tied directly to drug use and a lack of viable economic skills."²³ The women who end up in California's jails and prisons have disproportionately experienced poverty, poor education, substance abuse, and physical and sexual abuse.²⁴ These conditions have disrupted their lives and their families, so that about a third of imprisoned mothers are already not living with their children by the time they are arrested. For some offenders, particularly those with substance abuse issues, jail and prison are revolving doors. As they cycle in and out of the criminal justice system, they leave and reenter their children's lives.

LAW ENFORCEMENT AND CHILDREN OF PRISONERS

Parents are sometimes arrested in their children's presence, particularly young children who are not yet in school. If the child is not present at the arrest, for instance at school, he or she may come home to an empty house and not know what happened to the parent. Children may be exposed to a repeating pattern of parental arrest, with the resulting trauma and change in caregivers. For example, a study of women incarcerated in three Montana state prisons found that they had previously been in jail an average of 7.3 times.²⁵ Thus law enforcement is frequently and intensively involved in these families.

What is the responsibility of an arresting officer for a child, whether the child is present at the time of parental arrest or not? California law does not directly address this issue, and there are very few local police guidelines or protocols to guide an officer's response. The result is a range of ad hoc decisions made by officers in the field.²⁶ Law enforcement officers are necessarily focused on making sure that the arrest is accomplished in a safe manner. Dealing with children is not part of a law enforcement officer's primary duty, nor are most law enforcement officers trained as to an appropriate response.

UNCLEAR LEGAL STANDARDS FOR LAW ENFORCEMENT INVOLVEMENT

California Welfare and Institutions Code Sections 300-305 (WIC §§300-305) is the controlling law that defines the critical threshold for official involvement. It clarifies the meaning of "abuse and neglect," and defines when a child can be subject to the Juvenile Court's jurisdiction. The court determines the circumstances that create a "substantial risk" that a child will suffer "serious physical and emotional harm" and is in need of care and supervision. The application of *WIC §300* sets in motion a series of actions by law enforcement, child welfare agencies and the courts, and triggers a timeframe for their implementation.

WIC §305 describes the circumstances under which a police officer may take temporary custody of a child without a warrant. It is triggered by *WIC §300*, and by a police officer's reasonable belief that the fact a child is left unattended poses an immediate threat to the child's health and safety.

WIC §305(a) When the officer has reasonable cause for believing that the minor is a person described in Section 300, and, in addition, that the minor has an immediate need for medical care, or the minor is in immediate danger of physical or sexual abuse, or the physical environment *or the fact that the child is left unattended poses an immediate threat to the child's health or safety.* (Italics added)

If a child is left unattended, *WIC §305* requires a police officer to attempt to contact a parent or guardian. The statute charges the officer with notifying the county welfare department only if the child fits within the situations described in *WIC §300*, is in immediate danger, and the parent or guardian cannot be contacted. This statutory

construction does not address the situation of parental arrest, because the parent is present and can be contacted. However the officer could find that the child falls under *WIC §300* and needs care and supervision, and still not do anything, since the officer is not required by the statute to take the child into custody.

In order to trigger mandated reporting by law enforcement officials of child abuse and neglect (under *Penal Code §§11165.6 and 11165.7*), there must be a reasonable belief that abuse or neglect has *already* occurred. *Penal Code §11165.2(b)* defines “general neglect” of a child as meaning “...the negligent failure of a person having the care or custody of a child to provide adequate food, clothing, shelter, medical care, or supervision where no physical injury to the child has occurred.” A determination that a child is at risk is not enough to trigger mandatory child abuse and neglect reporting requirements.

Child abuse and neglect are regulated by the state through mandatory reporting statutes. These statutes typically require certain professionals to report to an appropriate state official when they have ‘reason to believe’ that a child has been abused or neglected.²⁷

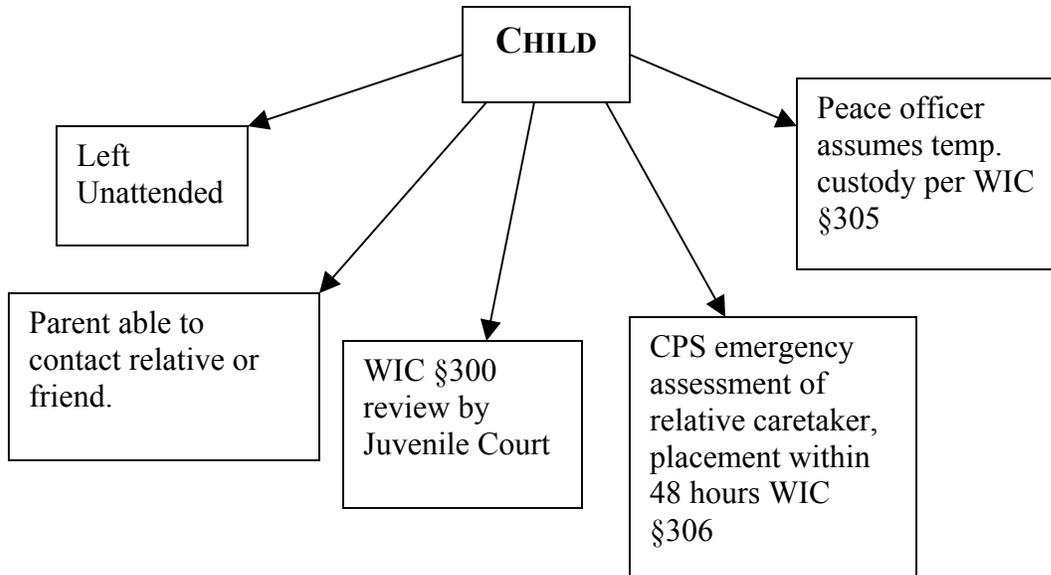
Since California law does not require an arresting officer to ask whether an arrestee is a custodial parent or to report when a child is at risk of being left without care or supervision, and mandated reporting requirements apply only after the incidence of abuse and neglect, there is no clear mechanism to ensure that a child will be cared for after a parents’ arrest. According to a statewide survey, law enforcement agencies lack clear procedures about how to respond to an arrestee’s children and do not uniformly ask about children.²⁸ Their actions turn on circumstances such as whether the child is present, the nature of the crime and how busy they are.²⁹

An officer’s action or inaction determines what happens to a child at the time of parental arrest. It could, for example, trigger the involvement of the county welfare department under *WIC §306(1)* which is required to: “Receive and maintain, pending investigation, temporary custody of a minor who is described in Section 300, and who has been delivered by a peace officer.” Children may be left alone, cared for by neighbors or relatives without official involvement, or placed in temporary custody and care.

Should a friend or relative become aware that a child has been left unattended due to parental arrest and incarceration, they may intervene to care for the child without official review or involvement (this is the most common outcome). Alternatively, they could refer the child to county custody, thereby initiating dependency proceedings (*WIC §329*). If a child has been placed in an emergency shelter through the county Child Protective Services Agency (CPS), the child must be placed with a relative within 48 hours or dependency proceedings may be initiated in the Juvenile Court.

Figure 3

What Can Happen to a Child Following a Parent's Arrest?



Interviews find that at times children present at the crime scene are left with neighbors or relatives, or are taken along to the police station or juvenile hall. Some children are left without care. The following interview with “Dave” describes being left alone after his mother’s arrest.

I was nine when my mom got arrested. The police came and took her. I was trying to ask them what was going on and they wouldn’t say, and then everything went so fast...They arrested her and just left us here. For two or three weeks, I took care of my one-year-old brother and myself. I knew how to change his diapers and feed him and stuff...[My Mom’s] friend across the street...figured out something was wrong. She called Child Protective Services and they came and took us.³⁰

In summary, the statutory scheme established by California law places a high priority on a child remaining in parental custody whenever possible, and does not directly address what should happen when a child is left unattended at the time of parental arrest, nor ensure an appropriate caregiver. An arresting officer is not required to question an arrestee about children or to make sure that the children have care. No official responsibility is assigned to assist an arrested parent to make arrangements for a child’s care, arrange transport for the child to a caregiver’s residence, or investigate the suitability of a caregiver. If the Juvenile Court does become involved under *WIC §300*, there may be a significant time delay before a child is declared a dependent and placed under the court’s supervision (see discussion in Chapter 4). Thus some children may be left without care or in unsuitable placements following their parent’s arrest.

Police Liability

The issue of police liability is an important concern in discussions about how to best protect the children of arrested parents. In policy discussions, police officers have expressed concern about exposure to liability should California law more clearly establish their responsibility for ensuring the safety of the children of arrested parents.

In extreme cases, officers are already liable if harm comes to a child as a result of an officer's inaction. In an Illinois case, *White v. Rochford*, a police officer arrested an adult caretaker, leaving a young child alone at night in a car on a freeway. The officer was found to have violated the child's civil rights under federal law (42 U.S.C. § 1983), by placing the child in danger and demonstrating deliberate indifference to the child's risky situation.

Under the California Torts Claims Act police officers and departments are civilly liable if they fail to comply with a *mandatory* statutory duty and that failure causes harm. For example, Penal Code § 11166 requires police officers to investigate any reported incidents of child abuse and to take further action when an objectively reasonable person in the same situation would do so. There could be special circumstances in which an arresting officer has a duty to protect a minor child under this statute. Facts such as the age of the child, the location, and whether other adults are present would be part of the analysis. Leaving a child in a methamphetamine lab is an example of a situation in which there could be liability. Stanislaus County, California, has a policy that ensures that police officers notify CPS immediately if children are present at a meth lab bust (many of these children have been found to have associated chemicals in their blood).

Since California peace officers are not now required to take custody of an arrested parent's child, they are not generally liable for failure to do so. In addition, under California law officers are immune from liability for failure to enforce a law, for failure to arrest, and for discretionary acts generally.³¹

PARENTAL ROLE DURING ARREST AND ARRAIGNMENT

An arrest is a coercive action that can involve the use of physical force, guns, and handcuffs. An arrested parent is quickly removed from a position of authority and is unable to exercise her/his responsibilities to care for a child, as the following interview with "Anne" describes.

One day I was taken into custody in front of my daughter. That was very traumatic...The parole officer was not even sympathetic to the fact that my daughter was there. I asked him, "Can we wait till someone comes for her?" He said no. Very cut and dried. Another time, the police came in the house when she was there. It was very early in the morning, and they broke out the windows and pointed guns in. When they came in, they tore the house up. My daughter had her schoolbooks and her phone book and her personal papers. They asked, "Whose is this?" She said, "That's mine." And then they tossed it.³²

The *Incarcerated Parents Manual* advises an arrestee to “...ask the first attorney assigned to you to get a court order allowing you to make emergency phone calls to locate your child and arrange for her care.”³³ The *Manual* further advises the arrested parent to quickly locate a relative or responsible friend to care for the child. Underlying this advice is concern that the child will become a dependent of the juvenile court, with the possibility of foster care and eventual termination of parental rights (see below for a full discussion). For this reason, many arrested and incarcerated parents do not tell authorities about their children.

Arrested parents may have difficulty obtaining the information they need to act in the civil law matters involving their children in a timely manner. The immediate focus of their defense attorney is the criminal case, not the legal status or custody of the children. Many arrest parents lack financial resources to consult with a private attorney about their children. A recent report by the California Access to Justice Commission of the State Bar found that only 28 percent of the civil legal needs of the state’s poor and low-income residents are being met.³⁴ A study in Riverside, California, found that few incarcerated parents are able to secure legal representation for their cases in juvenile dependency or family courts.³⁵

The civil and criminal elements of an arrested parent’s case come together at the time of plea-bargaining. Agreement to a sentence longer than 18 months may effectively result in termination of parental rights if children are placed in foster care during the parent’s incarceration. This is an aspect of punishment that few parents realize, and which the state has not expressly articulated.

CRIMINAL JUSTICE AND PRISONERS' FAMILIES

Parents involved with both the child welfare and criminal justice systems do not fall within a well-defined cohort within either system. Child welfare issues are not addressed [well] by the criminal justice system, and conversely, the child welfare system [often] does not take into account the particular challenges facing parents involved in the criminal justice system.³⁶

Families can be involved in a cycle of crime and violence. A national survey found that 40 percent of the families who came to court on a child abuse and neglect matter were also involved in other domestic court actions. Child abuse and neglect cases were the most likely cases to have family members involved in other court actions.³⁷ A recent *New York Times* article profiled an Oregon family with 28 members who are current or former convicts. Oregon has enacted legislation requiring that³⁸

...all newly admitted inmates be asked whether they have a relative who has been incarcerated and whether they themselves have children. If the inmates do have a relative who has been locked up, the state is now offering services for them, including drug and alcohol counseling and courses in preventing domestic violence. In addition, Oregon has begun to try to keep track of the inmates' children more carefully, identifying who they are staying with and whether the children are at risk of being exposed to physical or sexual abuse.

Unlike Oregon, California does not keep track of prisoner's children. There is no statutory requirement that probation reports include information about a prisoner's children. The *2002 California Rules of Court*, Rule 4.411.5, specifies the contents of a probation officer's presentence investigation report in felony cases, which is to include "any relevant facts concerning the defendant's social history" including "Family." This might include information about a defendant's children, although the focus appears to be on the family in which the defendant was raised.

A national study found that "...probation department employees, including intake officers, are the most important sources of information on related cases involving the family."³⁹ The authors of this study recommend active engagement of probation officers and criminal judges in finding out about, and attending to, the needs of a prisoner's family:⁴⁰

Courts must mandate systematic information on related cases affecting the family...Court Officials also need to convey the importance of this type of information to probation departments, the single most important source of information on related cases involving the family...coordinated services are essential for families with multiple problems...information on custody status of children would enable a criminal judge sentencing a mother to make provision for her to stay informed about her children.

The type of collaboration that this recommendation envisions between criminal courts, service providers, and civil courts does not exist in California. California criminal court judges have actively objected to any legislative requirement that they become involved in matters pertaining to prisoners' families.⁴¹ The following portion of an interview with "Christina" illustrates this disjunction:

If he [her son] wasn't with me, they [the police] didn't ask. I guess they figured that's something else they'd have to write up and deal with. Even in court, they never said, "Do you have children?" I don't really think they place a concern on that.⁴²

California's 2002 *California Rules of Court* allow family considerations to be considered by a judge when sentencing for minor violations. Rule 4.414(b)(5) lists "The likely effect of imprisonment on the defendant and his or her dependents" as one of the factors affecting a court's decision to grant or deny probation.⁴³ As noted above, defendants are not given information at the time of plea-bargaining as to the potential impact of a sentence over one year in length on the possible termination of their parental rights.

Lack of official involvement in attending to a prisoner's family does not suggest that all is well. The family is likely to be a high risk of poverty, grandparent and other relative caregivers may be overburdened, and the children may be experiencing psychosocial difficulties that, left unattended, can lead to more serious problems.

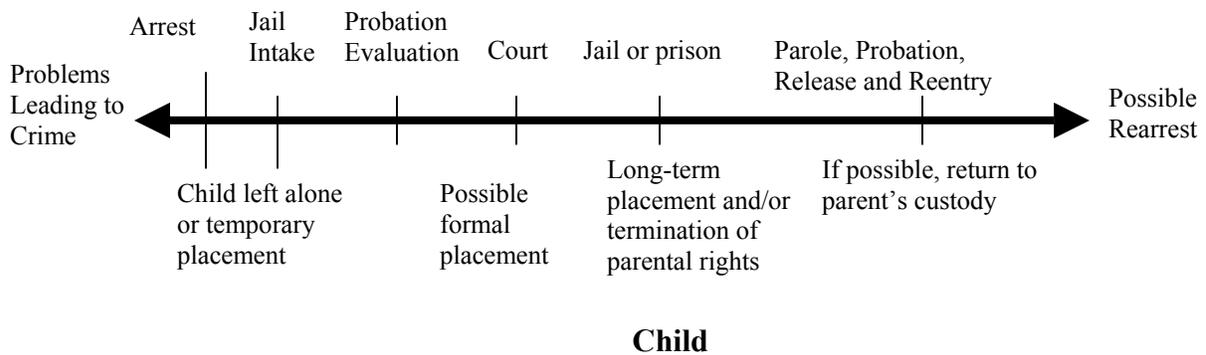
Information about a prisoner's children is not widely used to offer the children services or to check on their safety and well being. However local public and private agencies in some California counties do offer services to these at-risk families. For example, Santa Clara County's Family Resource Centers are "one-stop, conveniently located operations offering on-site support groups and counseling for problems of family violence, drug/alcohol abuse, parenting effectiveness, appropriate discipline, caring for medically fragile children and other issues that can cause family dysfunction."⁴⁴ Friends Outside, a volunteer organization with chapters in a number of California counties, offers family services to children, families and individuals who are coping with imprisonment:⁴⁵

We believe that the trauma of arrest, separation, public trial and confinement can be as devastating to a family, especially children, as it is to the arrested person. Children are particularly bewildered by this experience, and are victimized by the embarrassment and poverty frequently thrust upon them through no fault of their own.

PARENTAL INCARCERATION AND CHILD DEPENDENCY

After a parent's arrest, a complex series of events, in which the parent and child interact with police, local correctional authorities, the courts, the child welfare system, and possibly with state correctional authorities, unfolds over time. Criminal, family, and child welfare laws from at least six California codes (Penal, Welfare and Institutions, Civil, Government, Family, Probate) may be applied in a family's case.

Figure 4
Parent



As Figure 4 shows, the child of a prisoner experiences a series of events and legal interventions that somewhat track their parent's involvement in the criminal justice system. Each individual case varies, but many prisoners, who are parents, and their children and their caretakers, will be involved in complex civil legal processes that can result in a child's placement in foster care and the termination of parental rights.

INFORMAL CARE FOR MOST CHILDREN

When the children of prisoners are left with friends and relatives, they generally do not come to the attention of the legal system. The care of most is resolved without official involvement, particularly when the prisoner is a father—90 percent of those children remain with their mothers. In other circumstances, most caregivers informally assume responsibility for the children. A 1995 study of the caregivers of children with incarcerated parents found that only 13 percent had been involved in court proceedings to obtain custody of the children.⁴⁶

In California, if a child of a prisoner is left informally with a friend or neighbor, the child's placement may come to the attention of authorities when the child needs medical care. A Family Court Judge reports having the informal caregivers of young children come to her court when the children are ready to enter school. The children were left as babies with a friend or neighbor when their parents were arrested, and now require legal

authorization to obtain immunizations for school. In some cases, the judge determined that these informal placements were not appropriate.

Family Code §6550 authorizes a “caregiver authorization affidavit,” which a relative must sign, to enroll a minor child in school and consent to school-related medical care. The form, which is printed in Family Code §6552, is valid for one year and can be renewed. Prisoners and the informal caregivers of their children may not know about this option, however. Legal Services for Prisoners with Children publishes and distributes the *Incarcerated Parents Manual; Your Rights and Responsibilities* to inform prisoners about their rights as parents. The *Manual* is available on the organization’s website at <http://prisonerswithchildren.org/pubs.htm>⁴⁷

Temporary Custody

Under California law, when a peace officer takes a child described in *WIC §300* (abuse and neglect) into temporary custody (under *WIC §305*), the officer must notify the county welfare department, and may take the child to a community service program for shelter care or counseling (*WIC §307.5*). In either case, the organizations are to immediately notify a parent, guardian or relative.

A social worker is charged with immediately investigating the circumstances and, whenever possible, releasing the child to the custody of a parent, guardian or responsible relative (*WIC §309*). The social worker will conduct a background check and home study similar to those required before an adoption; not meeting the required standards excludes a family as a possible placement for the child. Recently enacted California law requires relative caretakers to meet the same standards as foster care providers and prospective adopting parents. This is difficult, as many relative caregivers are grandparents and have limited resources. Some counties are assisting relative caregivers to meet the requirements, particularly with better housing. The public investment is less expensive than the alternative, foster care, and is generally better for the child.

County welfare departments can provide family maintenance services for six months (with a possible six month extension) to children in danger of abuse or neglect who are living with a guardian or a parent. The goal is to maintain the child in the home through the provision of services, and avoid formal involvement in the juvenile court system.

CHILD ABUSE AND NEGLECT

According to the National Clearinghouse on Child Abuse and Neglect Information, three million referrals concerning approximately five million children were made to Child Protective Service (CPS) agencies in the U.S. in 2000. About one third of the referrals were screened out, and the rest were investigated or assessed to determine whether the allegations could be substantiated. Professionals such as law enforcement officers and teachers made more than half (56 percent) of the investigated reports, and family members and members of the community made the rest. About one third of the investigations resulted in a finding of child maltreatment or risk of maltreatment (879,000

children). Nearly two thirds of the child victims suffered neglect, 19 percent were physically abused, ten percent were sexually abused, and eight percent were psychologically maltreated.⁴⁸

The causes of child abuse and neglect are not well understood, and the effectiveness of traditional individual counseling and related therapeutic interventions has not been demonstrated. Under an “ecological perspective,” four broad factors explain this human behavior: individual, familial, social, and cultural.⁴⁹

- Individual factors include physical and psychological characteristics of the parent and child and their unique life histories.
- Familial factors emphasize the structure and function of the family, and problems including marital instability and family violence.
- Social factors include income, housing, and peer relationships; families below the poverty level are at greater risk.
- Cultural factors include acceptance of violence, corporal punishment and sexism.

Child protective services and the Juvenile Courts are charged with intervening in a family and providing specialized services in order to protect and treat “neglected, abused, exploited, or rejected” children. When CPS receives an allegation of abuse and neglect, a social worker determines if an investigation is required, and identifies services for the family and children if an allegation is substantiated. During the investigation, the agency attempts to balance the rights and interests of the children with those of the parents. In some situations, a child may be removed and placed in protective care with a foster family.

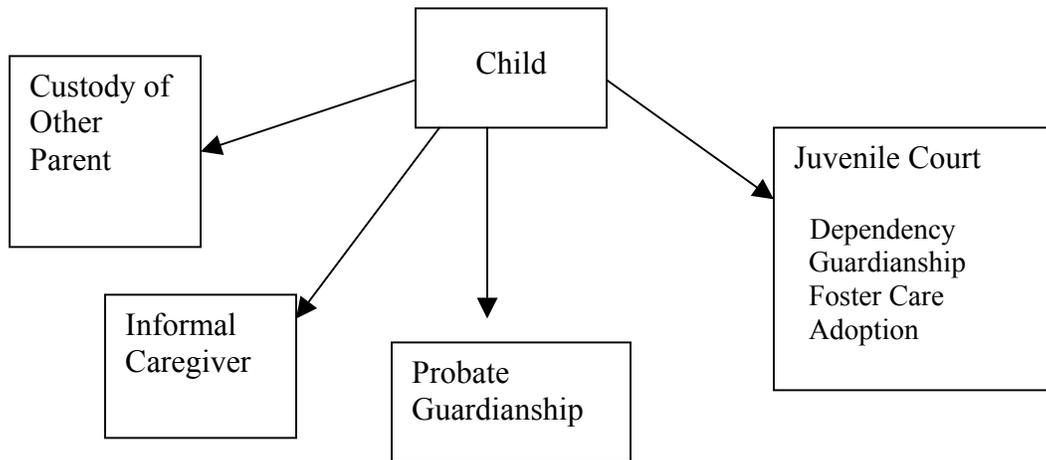
COURT INVOLVEMENT IN CHILDREN’S PLACEMENT

Although most children of incarcerated parents are cared for by a custodial parent or an informal caregiver, a substantial but unknown number become involved in the judicial system. CPS does not keep data on how many of the children under its supervision have incarcerated parents.

The situation of each arrestee’s family is unique, although there are common themes. The complexity of the underlying law and the implementing court structure is one. In any family, a variety of legal actions concerning the children’s care and custody may be involved, as the following example illustrates. In this case, the arrested single caregiver mother had four children, each by a different father. Two of the children were placed in the custody of their fathers. These cases required two separate actions in the Family (Superior) Court to establish the fathers’ custody of the children. In the third case, a paternal grandmother assumed care of the child. Her guardianship was established by the Probate Court. The fourth child was not claimed by a relative and became a dependent of the juvenile court, which placed the child in foster care.

Figure 5

Placement Options for Children of Arrested and Incarcerated Parents



Although California law favors placing minor siblings together (*WIC §306.5*), as a practical matter this may not occur. Interviews with children suggest that separation from their siblings can be as emotionally distressing as separation from a parent, as this interview with “Charles” shows:

First they kept us with one foster family for a few months and everything was goin’ cool. Then they split us up. They had to hold me down and pull my brothers and sister away from me. I get very upset about that, still to this day.⁵⁰

Guardianships

California Court guidelines define guardianship as “...a court process by which a person other than a parent is given custody of a child or authority over a child’s property.”⁵¹ The state does not collect data on the number of guardianships established each year.

Relatives and unrelated caregivers of the children of incarcerated parents may seek the formal legal status of guardianship for the children under their care. There are two kinds of guardianships in California. Most guardianships are handled by the Probate Court (see *Probate Code §§1510-1517*). The Probate Courts grant custody of a child and/or the power to manage the child’s property to a person who is not the child’s parent (this is similar to a conservator for an adult who cannot take care of him or herself and finances). If a child is a dependent of the Juvenile Court, then only the Juvenile Court may appoint a legal guardian for the child and the background investigation is conducted by CPS.

Any person, or a child 12 years or older, may file a petition to establish a probate guardianship. The Probate Court may order an investigation before making a decision. A guardianship lasts until the child reaches the age of 18 unless the child is adopted, marries, is emancipated by court order, or enters the military. A parent, guardian or child

may petition to have a guardianship terminated. The court must agree that termination would be in the child's best interest. Procedural requirements in the Juvenile Court are similar.⁵²

A guardianship grants a caregiver full legal and physical custody of the child. Unlike adoption, the parents' rights are not terminated, allowing the parent to participate in matters relating to the child. The court may require that the parent be allowed to visit or have contact with the child, perhaps in a supervised setting. In families with incarcerated parents, a guardianship may serve a useful function. The caregiver relative or friend has legal and financial responsibility for the child, providing stability and permanency, and the court has investigated the appropriateness of the placement. This can be a positive experience for a child, as the following interview with "Randall" suggests:

When I was five, the police came to my mom's. They kicked the door in and broke the floor in. They broke a whole bunch of my uncle's stuff that belonged to his father. I was scared. They took me away to the children's shelter. In the shelter, I cried for my grandma and my mom.

My grandma came to visit me and she said to me, "I'm gonna get you out." She went to court over and over a whole bunch of times, and she got custody of me. Living with my grandma is great, because she's very nice to me. My mom barely paid me any attention. My grandma pays me a lot more attention than my mother did. She does stuff with me. Like she plays games with me sometimes.⁵³

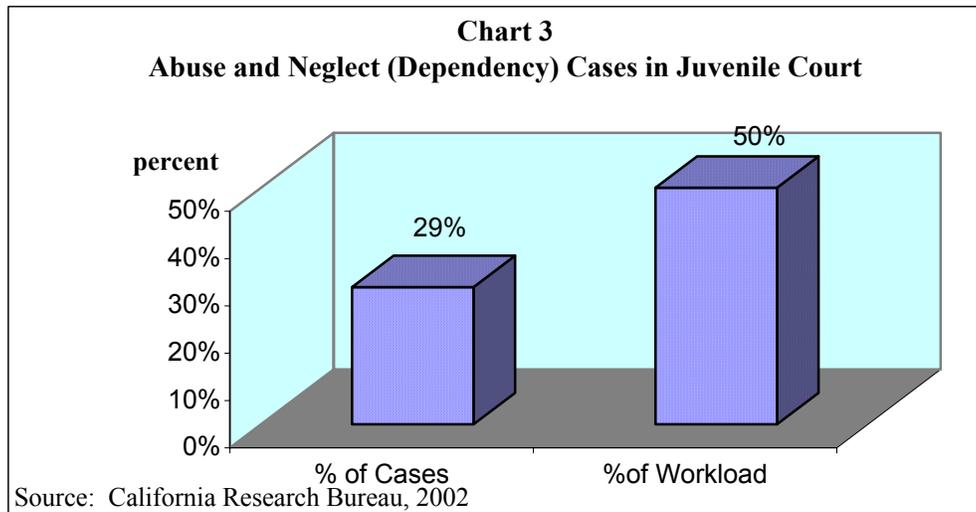
Relative guardians appointed by the Juvenile Court may qualify for financial assistance similar to county foster care payments. California's Kinship Guardianship Assistance Payment Program (Kin-GAP) assisted 10,842 cases in September 2002, and referred another 50 other cases to CalWORKS and AFDC-FC (Aid to Families with Dependent Children-Foster Care).⁵⁴

Cost and complexity may be one reason that many caregivers do not obtain guardianships for the children in their care. Qualified low-income persons applying to become a guardian may receive a waiver of courts fees and costs. Legal Services for Prisoners with Children publishes a *Manual for Grandparent-Relative Caregivers and Their Advocates*, that advises that the court has the discretion to appoint a lawyer, paid for by the county, to assist with the guardianship process. The 2002 edition of the *Manual* is available on the organization's website at <http://prisonerswithchildren.org/pubs.htm/>.

THE JUVENILE COURT

Jurisdiction and Caseload

The Juvenile Courts deal with children in three types of cases: delinquency (primarily larceny, vandalism and motor vehicle theft), status offenses (truancy, running away), and dependency (child abuse and neglect). A 1993 study found that abuse and neglect cases composed 29 percent of the juvenile courts' caseload, and accounted for as much as 50 percent of the courts' time due to their complexity.⁵⁵



Recently Judge Leonard P. Edwards of the Superior Court of Santa Clara County wrote that, "So-called dependency cases now compose at least half of the work of the juvenile court."⁵⁶ According to the Administrative Office of the Courts, more than 100,000 children and their parents are involved in California dependency proceedings in Juvenile Court each year.⁵⁷ A significant but unknown number of these cases involve the children of prisoners.

California Juvenile Courts and child welfare agencies are overwhelmed by increasing caseloads of abused and neglected dependent children. Due to perennial under funding and increasing litigation, there are "...growing concerns about the ability of such agencies to manage the burdens placed upon them."⁵⁸

Dependency

The California Juvenile Court generally becomes involved when an arrested and/or incarcerated parent is unable to provide care and supervision for a child, and the child is brought to the court's attention. The court has broad authority: it can "...remove children from their homes, order their placement with relatives or in foster care or group homes, terminate parental rights, create new parental rights, and join various agencies to provide needed services."⁵⁹ The court places responsibility for the child with the county welfare department and its Child Protective Services (CPS) agency.

WIC §300(b) describes a situation in which “The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child...” The determination of whether a child is at risk and in need of supervised care is up to the Juvenile Court, which can assert its jurisdiction by making the child a dependent of the court.

Parental incarceration can also trigger a judicial finding that a child falls within the Juvenile Court’s jurisdiction, but only if a parent cannot arrange for the child’s care:

(WIC 300(g): “The child has been left without any provision for support;...the child’s parent has been incarcerated or institutionalized and cannot arrange for the care of the child; or a relative or other adult custodian with whom the child resides or has been left is unwilling or unable to provide care or support for the child...” (Italics added).

The courts have interpreted “incarcerated” in this statute as meaning “jailed,” which would apply to a parent who has been arrested and charged but not yet convicted [*Edgar O. v. Superior Court of Los Angeles County* (84 Ca. App. 4th 13)].⁶⁰ Prisoners are generally charged within 24 hours. However it is not clear whether the statute applies to the time period between a parent’s arrest and being charged.

The courts have also held that a parent’s deadline for arranging for a caregiver is the child’s second dependency hearing (“jurisdiction hearing”),⁶¹ which might not be for some time if continuances delay the hearing. If the parent is unable to arrange for a caregiver, the Juvenile Court can assume jurisdiction over the child. If the parent arranges for the child’s care, there is no legal requirement that the suitability of the selected caregiver be evaluated.⁶²

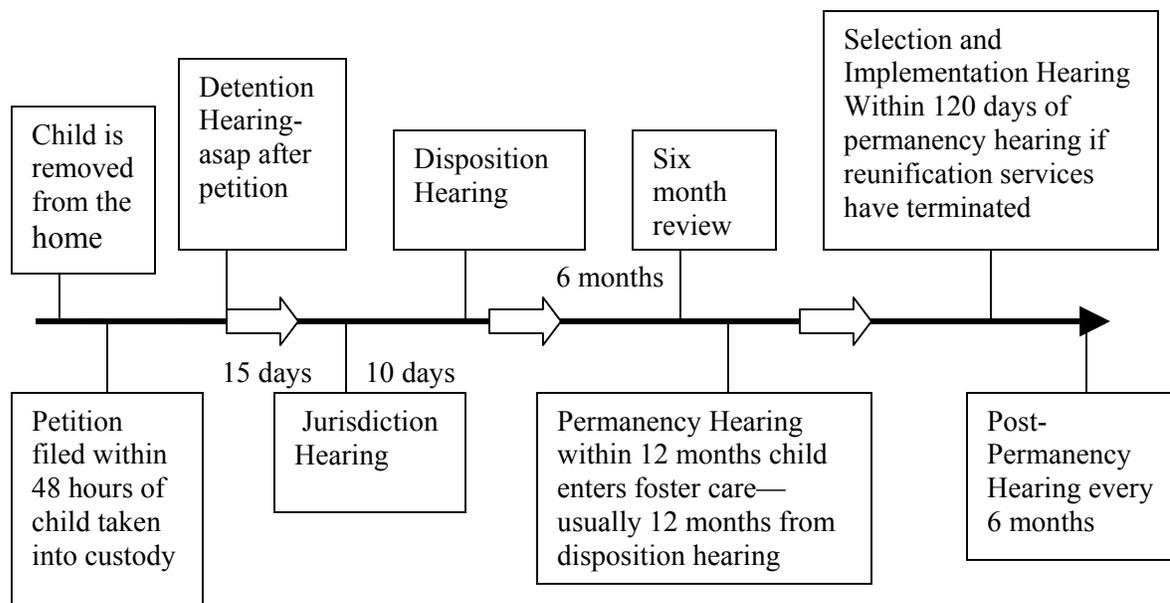
A significant number of the children of prisoners become dependents of the Juvenile Court and are placed in foster care because they do not have friends or relatives to care for them. For example, a recent study of 70 mothers awaiting trial in Boston, Massachusetts, found that 45 percent of the children has already been involved with the Massachusetts Department of Social Services due to abuse and/or neglect, and that 31 percent had been placed in foster care at least once.⁶³

Dependency Proceedings

Once a child is involved in dependency proceedings in the Juvenile Court, there is a clear process, involving at least five hearings, that is prescribed by federal and state law (see Figure 6). Although the timeframe for this process is carefully specified by statute, in reality there are often continuances that prolong the process. The goal is to establish a permanent home for the child. The state must petition to terminate parental rights of any child over age six who has been in foster care 15 of the last 18 months (or 12 months for younger children), unless a relative is caring for the child or the termination would not be in the *best interests* of the child.

Figure 6

Dependency Proceedings



Source: Judicial Council of California, *Caregivers and the Courts*, www.courtinfo.ca.gov

Detention Hearing

If CPS cannot place a child with relatives or believes the child is at risk, it will file a Juvenile Dependency Petition (or *WIC §300* petition) with the Juvenile Court (under *WIC §§311 and 332*), place the child in emergency care (often with a foster family) and make an emergency assessment. Once the petition has been filed, the court holds a Detention Hearing as soon as possible to determine whether the court should detain the child, placing the child in substitute care on a temporary basis.

An incarcerated parent has the right to be notified of the Detention Hearing and to be present (*Penal Code §2625*). *Penal Code 2625(d)* specifies that the hearing may not be held without the physical presence of the prisoner parent, or a signed affidavit indicating the parent’s intent not to appear at the proceeding. However, a parent may not receive the notice in a timely manner in jail, and may not be able to obtain a court order for transportation within the time allowed, according to the *Manual* published by Legal Services for Children with Parents.⁶⁴ The *Manual* advises the parent to be sure to talk to the social worker that is writing the report about the family.

Both the parent and the child in a dependency case have the right to an attorney, and to confront and cross examine the people who prepared police, probation or social work reports for the court. The court will appoint dependency counsel for the parent or guardian and for the child if they are financially unable to employ legal counsel (*WIC §317*). According to the Administrative Office of the Courts, more than 1,000 dependency counsels are appointed in California each year.⁶⁵

In many counties, children are assisted by volunteer Court Appointed Special Advocates (CASA).^{*} A similar role may be filled by a Guardian *ad litem*, who is "...a person with formal legal training appointed by a judge to represent the best interests of an allegedly abused or neglected child."⁶⁶ The court may also recognize *de facto* parents and grant them standing to participate in hearings regarding the status of a dependent child. California Rule of Court 1401(a)(4) defines a *de facto* parent as "...a person who has been found by the court to have assumed, on a day to day basis, the role of parent, fulfilling the child's physical and psychological needs for care and affection..."[†]

After hearing from the child's parents or guardians, and reviewing the social worker's report,[‡] the Juvenile Court judge decides whether the child should be detained or returned to parental custody. *WIC §319* specifies the conditions under which a court may find that continuance in the parent's or guardian's home is contrary to the child's welfare. These include substantial danger to the physical and emotional health of the child, evidence that the parent or guardian may flee the jurisdiction, whether the child has left a previous placement, or if the child is unwilling to return home due to physical or sexual abuse. The court may order the child be detained further by being placed in the approved home of a relative or nonrelative (foster care) or an emergency shelter for 15 "judicial" (working) days.

Both county probation and child welfare agencies become responsible once a child is detained (*WIC §636*): "Whenever a court orders a child detained, the court shall state the facts on which the detention is based, shall specify why the initial removal was necessary, and shall order services to be provided as soon as possible to reunify the child with his or her family if appropriate. Whenever the court orders a child detained, the child's placement and care shall be the responsibility of the probation department pending disposition or the further order of the court."

Reasonable Efforts

At the Detention Hearing, the Juvenile Court is required, under California *WIC §319(d)(1)*, to find that social workers have made "...reasonable efforts...to prevent or eliminate the need for removal of the child from his or her home." Reasonable efforts specified in the statute include "...case management, counseling, emergency shelter care, emergency in-home caretakers, out-of-home respite care, teaching and demonstrating

* "A CASA is a trained volunteer appointed by a judge or commissioner to advocate for a child is under the jurisdiction of the court. The CASA is responsible for conducting an independent investigation, providing information to the court about the child's needs, ensuring that court-ordered services are being provided, helping the child understand court proceedings, and making child-focused recommendations to the court based on the best interest of the child." "CASA Program," *Court News*, September-October 2002, 9.

† The concept of *de facto* parent has evolved through case law, and is not expressly created by statute (see *In re B.G.* (11 Cal. 3d 679, 114 Cal. Rptr. 444 [1974]).

‡ The social worker's report submitted to the court must state why the child was removed from the parent's custody, a description of the services that have been and might be provided so that the child can remain in the parent's custody, and information about a non-custodial parent or relative with whom the child might be placed. Legal Services for Prisoners with Children, *Incarcerated Parents Manual*, 2001, 7.

homemakers, parental training, transportation, any other authorized child welfare services, and referral to public assistance.”

The federal Adoption Assistance and Child Welfare Act of 1980 first required child welfare agencies to make “reasonable efforts” to maintain and/or reunify children with their families. The Adoption and Safe Families Act of 1997 limited the definition of “reasonable” in order to shorten the amount of time a child might spend in foster care awaiting family reunification. The changes in law encompass different policy judgments about the importance of two conflicting goals: protecting children and preserving families. Recent “...significant changes in federal and state laws and policy reflect a re-emphasis of child safety over family preservation.”⁶⁷

The Juvenile Court is responsible for scrutinizing child welfare agency efforts at family reunification in every case to determine if they are “reasonable.” California law requires the court to make a “reasonable efforts” determination at every hearing, from detention to termination hearings: “Under California’s statutory scheme, judicial findings of ‘reasonable efforts’ are tantamount to due process.”⁶⁸ For example, *WIC §366.26(E)(2)* states that “The court shall not terminate parental rights if at each and every hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable efforts were not made or that reasonable services were not offered or provided.” [See also *WIC §§306, 361, 366.21(3), 366.21(f), 366.22(a)* and *Civil Code §232(a)(7)*] Nonetheless, the care with which the courts apply this standard varies considerably. Occasionally appellate courts have overturned decisions because an agency only evaluated the parent’s shortcomings, without considering what the agency did to remedy these shortcomings.⁶⁹

The statutes are quite explicit that the court must determine that *reasonable services* have been offered to the parent or guardian to assist them to overcome the problems that led to the initial removal of the child [see *WIC §§366.1(f)(1), (1)(C) and (2)*]. However, “The failure of the parent or legal guardian to participate regularly and make substantive progress in court-ordered treatment program shall be prima facie evidence that return would be detrimental.” [*WIC §366.1(f)*].

Court attention to the “reasonable efforts” standard is particularly important because many child welfare agencies have not developed appropriate practices and procedures to ensure that “reasonable efforts” are made to address the needs of incarcerated parents and their children. This omission can greatly affect parents’ ability to reunify with their children after incarceration. The California Department of Social Services, in a recent statewide assessment of child and family services, found that⁷⁰

Involvement and engagement of the child’s parents(s) is crucial to California’s case planning system...There are continuing challenges, however...Serious problems, such as lack of transportation, chronic drug abuse, incarceration and the adversarial court system remain significant challenges to parental engagement. High caseloads, staff turnover and limited community resources remain ongoing barriers to more effective parental engagement.

Similarly, a Judicial Council Advisory Committee examining gender bias in the courts found that:

In prison, the majority of adult women inmates are single mothers, whose children are frequently dependents of the court. The committee found **a general failure to coordinate services and programs between the criminal and juvenile dependency systems**, creating great hardship for incarcerated mothers and their children. These families also suffer from the geographical remoteness of many of the female prisons, as well as the justice system's **failure to provide adequate reunification** services. (Emphasis in original)⁷¹

Social workers are sometimes the only link between incarcerated parents and their children in care. Parents express frustration about not receiving timely and sufficient information about their children or about dependency proceedings, and they may be unable to access the services they need in jail or prison to complete the service plans required by the court. On the other hand, social workers "...often find it difficult to obtain the most basic information about a parent's actual sentence, eligibility for parole, or expected release date."⁷²

Although child welfare case workers are seeing increasing numbers of children with parents in prison, few child welfare policies and procedures have been developed...As part of their legal mandate to make "reasonable efforts" to reunify families, case workers are obligated to facilitate contact between parents and their children and to help parents access those services that might allow them to parent their children appropriately upon release. The challenges...are great. Geographical distance, prison security requirements, and high caseloads impede caseworker communication with parents. And though caseworkers may recognize a parent's need for drug treatment, job training, education, or parenting classes, they often have little knowledge of services available inside the prison or have difficulties linking parents to available programs.⁷³

A recent survey of all 58 county child welfare services agencies by the Department of Social Services found that of the 49 responding counties, only 29 had a specialized process for engaging incarcerated parents in addition to required phone and mail contacts, and that ten counties cited parental incarceration at distant facilities as a barrier to parental involvement.⁷⁴ A study in Riverside County found that incarcerated mothers "...typically had difficulties in communicating with their social workers, received no social services support for parent-child communication or visitation, received no referrals or assistance with placements in correctional or reentry programs, and/or perceived their social workers as hostile or opposed to reunification."⁷⁵

In the following interview, "Rochelle" reflects on whether drug treatment for her mother and counseling would have made a difference in her family:

Women who are incarcerated are looked at like, 'Once in jail, always in jail. They're never going to get their act together.' There was never anyone coming to

the housing asking, ‘How are things going? What do you need now? I know you really want to get off of this stuff. How are you going to get there? Have you made a plan? If not, let’s do that.’ I think some counseling would have done wonders for my family.

There should be some kind of task force that specializes in dealing with kids whose parents have been incarcerated. That group, or an individual within that group, will stay with that child. It’s all about consistency. Someone there who they can call on, and continue to grow a relationship.⁷⁶

Jurisdiction Hearing

Within 15 days of the Detention Hearing, and sometimes the same day, the court holds the Jurisdiction Hearing (*WIC* §§355-356). Either the county probation or welfare department prepares a “social study” upon which the court bases its findings, along with any evidence presented at the hearing. The county must prove, and the court find, that the child falls within *WIC* §300.

A key issue is whether or not the parent is able to make alternative care arrangements for the child. The court may determine, by a preponderance of the evidence, that allegations of abuse and neglect (under *WIC* §300) are true, and/or that a parent’s incarceration, and inability to arrange care for the child, requires the court to assert jurisdiction over the child [*WIC* §300(g)].

Disposition Hearing

Two working weeks after the first hearing (“Detention hearing”), the court determines whether the child should be declared a dependent of the court. Options include dismissing the case, providing services to keep the family together, placing the child in foster care,[§] adoption, or a guardianship. Generally the court orders family maintenance or reunification services. The court also projects “...a likely date by which the child may be returned to the home or is likely to be placed for adoption, legal guardianship, or in another planned permanent arrangement.”⁷⁷

The *Manual for Incarcerated Parents* informs parents that the court will decide “...where your child will live and what services CPS needs to provide to you and your child and what you need to do to reunify with her.” The *Manual* further advises that, “It is important to object to and refute any false allegations or unproven statements that are in the [child’s case plan] report because the information in the report is used as a basis to require a reunification plan.”⁷⁸

[§] “Foster care...is defined as 24-hour out-of-home care provided to children in need of temporary or long-term substitute parenting because their own families are unable or unwilling to care for them...Children in foster care are found in a range of settings: relative home, family homes, small group homes, residential treatment settings, and community treatment facilities...[that] provide different levels of structure and services.” Lisa K. Foster, *Foster Care Fundamentals: An Overview of California’s Foster Care System*, Sacramento: California Research Bureau, 2001, 7, 20.

In making its decision, the court takes into consideration the social study submitted by the social worker (or by a child advocate appointed by the court), which contains the child's case plan. The case plan lays out goals and objectives for the child and the family. Among other things, it considers whether the appropriate services have been offered to the parent (see discussion of "reasonable efforts" above), and discusses visitation rights, plans for reunifying the child with the parent or achieving other "legal permanence" (guardianship or adoption), relationships with siblings and grandparents, whether the child is eligible for emancipation, and the appropriateness of any relative placement. Court-ordered services are limited to six months for children under the age of three, and 12 to 18 months for older children.

The case plan is the "foundation and central unifying tool in child welfare services" (*WIC §16501.1*). Parents have the right to review the case plan proposed for the child and to object to any false or unproven statements (*WIC §355*), to ask that the child be placed in a specific home and location (*WIC §361*), to request a court order to help stay in touch with the child (visits, transport plan, phone calls, counseling, etc.), and to request reunification services. Nonetheless, researchers have found that women in jail often do not have a copy of their child's case plan, do not receive adequate notice of court hearings and lack transportation, and do not receive visits from their child welfare care workers.⁷⁹

After considering the evidence, the court may dismiss the case, order services to keep a family together, appoint a legal guardian for the child, grant custody to the other parent, or declare the child a dependent of the court (*WIC §360*). The court is required by statute [*WIC §361(c)(5)*] to find by "clear and convincing evidence" that the child falls under *WIC §300*, and that *reasonable efforts* were made to prevent the child's removal from home in the instance of parental incarceration. Once a determination is made that a child falls within *WIC §300*, placement outside the home is likely and reunification with the parent is not assured.

"Best Interest of the Child"

A Juvenile Court judge has considerable discretion in determining what should happen to a child who enters the dependency system [*Family Code §3040(3)(b)*]. The basic statutory guide for judicial decision-making-- the "best interest" of the child**--is an "elastic" one, according to a new review by the American Law Institute.⁸⁰ Other analysts use the term "vague." A recently published book on children's right finds that, "Another problem with state intervention into family life is that the standards that guide this intrusion are not very clear and at times arbitrary."⁸¹ Judges make highly individualized decisions as to the *best interests* of a child in each case.

How does one know what policies best serve the interests of children? This question exposes what I believe to be the root problem facing anyone concerned with children's policy. Because of our limited ability to predict the consequences of alternative policies and the lack of consensus about the values that should inform choice, broad conclusions about the interests of children are necessarily

** See for example, *WIC* §§349, 361.3(a)(1), 361.5(c), and especially 361.5(e)(3), among others.

indeterminate and speculative. From the perspective of rational discourse, the argument that anyone, including judges, can discover and articulate the best interest of children is tenuous at best.⁸²

American legal scholars stress the importance of family and adult relationships to the healthy development and “best interests” of children.

- There is “strong empirical evidence” that a child needs “...an unbroken continuity of affection and stimulating relationships with an adult.” Data confirm how “vital the family is in the crucial areas of individual motivation, personality structure, and creativeness.”⁸³
- “Studies indicate that the best interests of the child are usually served by keeping the child in the home with his or her parents...Even where the parent-child relationship is ‘marginal,’ it is usually in the best interests of the child to remain at home and still benefit from a family environment.”⁸⁴

The delicate balance of ensuring child safety while maintaining family relationships underlies the wide (and probably necessary) degree of latitude accorded to California courts in determining a child’s best interests. *Family Code §3020(a)* states that: “The Legislature finds and declares that it is the public policy of this state to assure that the health, safety and welfare of the child shall be the court’s primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children.” The 2002 California Rules of Court, Sec. 24.6(b)(2), advises that the “safety and best interest of the child” refers to the child’s physical, psychological, and emotional well-being, and requires consideration of the following:

- (A) The ongoing need of the child to cope with the issues that caused his or her involvement in the juvenile dependency system;
- (B) The preservation and strengthening of the family and family relationships whenever appropriate and possible;
- (C) The manner in which the child may be protected from the risk of future abuse or neglect; and
- (D) The child’s need for safety, stability, and permanency.

International law also establishes the “best interests of the child” as a primary standard. Article 3(1) of the Convention on the Rights of the Child^{††} states that “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”⁸⁵ *The Implementation Handbook for the Convention on the Rights of the Child* observes that best interests of children are to be considered in situations of adoption and of separation from parents, among others: “...States must respect the right of the child to maintain personal relations and direct

^{††} The United States is not a signatory to the Convention.

contact with both parents on a regular basis ‘except if it is contrary to the child’s best interests.’[(Article 9(1) and (3)].”⁸⁶

However at some point in a spectrum of events, a court may determine that it is no longer in the best interests of a child to remain in the family home: “It is at this point that the child’s interest no longer coincides with that of the parent, thereby diminishing the magnitude of the parent’s right to family integrity; and therefore the state’s intervention as *parens patriae* to protect the child becomes so necessary that it can be considered paramount.”⁸⁷

Here the intersection between criminal justice policy and child welfare law becomes particularly important. Under the federal Adoption and Safe Families Act (AFSA) of 1997, and conforming state law, there is an expedited timetable for determining whether a child can be reunified with his or her family, or whether parental rights should be terminated. States must initiate proceedings to terminate parental rights when a child has been in foster care for 15 of the last 22 months, or six months for children under three years of age (see *WIC* §361.5). The average sentence of a female inmate in state prison is five years.⁸⁸ As a result, the parental rights of an increasing number of prisoners, primarily single mothers, whose children are court dependents and in foster care, are being terminated.

The effects of mandatory sentencing in combination with the Adoption and Safe Families Act of 1997 (ASFA) on incarcerated mothers have raised questions about what is in the best interest of the child of an imprisoned mother and whether family bonds should be preserved while the mother is in prison. ...incarcerated women [are] at greater risk for having their parental rights terminated based on the length of their prison sentences.⁸⁹

A perhaps unintended consequence of a parent’s plea bargain or guilty plea on a criminal charge could be the termination of parental rights, placing the children in long term foster care and/or with an adoptive family.

The dramatic increase in the number of mothers being incarcerated in recent years has brought a growing recognition of the interplay between the criminal justice system, changing welfare legislation, and child welfare policy...The fundamental question for the child welfare community to raise about these changing policies is whose best interest do they serve?⁹⁰

Permanency Planning

Following the Juvenile Court’s decision as to a child’s placement, the court reviews the case again in six months. During this time, the child welfare agency is charged with “concurrent planning,” with the goal of moving a child out of foster care and toward adoption and guardianship should the court so decide. The guiding principle in this statutory scheme is that children are entitled to a swift and certain permanency decision so as to minimize the damage of prolonged temporary care (*WIC* §352).

At the six month Status Review Hearing, the court considers the extent to which the parent/guardian is complying with the conditions set in the case plan, such as family counseling or parenting classes. The child must be returned home unless there is a “substantial risk of detriment” to the physical or emotional well-being of the child. The court may also order six more months of services (for older children or terminate family reunification services. If a parent has followed the reunification requirements in the child’s case plan, the court may order that the child be returned to the parent. If not, the court sets a Permanent Plan Hearing for 12 months after the child was first detained. At that hearing, the court considers the long-term plan for the child, with one of the following goals: adoption, guardianship or long-term foster care placement.

PARENTAL RIGHTS AND INCARCERATION

The involuntary termination of parental rights is a striking example of the ways in which the needs, rights, and obligations of parents, families, children, and the state can come into conflict.⁹¹

When the children of incarcerated parents are brought under the jurisdiction of the Juvenile Court, federal and state laws support *reasonable efforts* to preserve birth families, as described above. However these efforts are time-limited. The federal Adoption and Safe Families Act of 1997 and conforming California law require that the court hold a permanency hearing within 12 months of a child's entering foster care. The state must petition to terminate parental rights of any child over age six who has been in foster care 15 of the last 18 months (or 12 months for younger children), unless a relative is caring for the child or the termination would not be in the *best interests* of the child. Recognition that long-term and multiple foster care placement can be damaging to a child drives this expedited timeframe:

..there does exist general agreement among child psychologists that the lack of a solid and enduring bond between a child and a primary caretaker will cause psychological harm. ...It is also clear that the person with whom an attachment bond is formed need not be the biological parent; it can be any person with whom the child has substantial and continual interaction...there is considerable agreement that even older children are harmed by the subsequent lack of continuity in parenting that often follows separation from a natural parent.⁹²

California law requires that a court hear all the evidence and determine whether a child can be returned home safely at a 12 month Permanent Plan Hearing [*WIC §366.1(f)*]. In determining not to return a child to a parent or legal guardian, the court must find, by a preponderance of the evidence, that the child's return would "...create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child."⁹³

FAMILY REUNIFICATION

The *Incarcerated Parents Manual* advises that prisoners must prove to the court that they are good parents in order to get their child back once they are released: "In the eyes of the court, this means that you have completed your reunification requirements and your child is not at risk of harm."⁹³ Reunification requirements often include keeping in contact with the child and following court-ordered treatment plans (such as for parenting classes, anger management, or substance abuse treatment). A parent may have to obtain housing and employment after release from jail or prison before the court will allow a child to return to the parent's care. If the child has been in foster care, the parent must reimburse the state for the costs of that care. This is a daunting set of challenges for a newly released inmate-parent. In the case of single mothers, many of whom were incarcerated

⁹³ See also Family Code Part 4, *Freedom from Parental Custody and Control*, §7800 et. seq.

for substance abuse (which is often associated with domestic violence), the pressures of these requirements, without outside assistance, may prove insurmountable.

Incarcerated parents, particularly single caregivers, can find it difficult to obtain timely information about the legal status of their children and to follow court-ordered reunification plans for a variety of reasons, including

- lack of or irregular contact by social workers,
- the distance of state prisons from the children's caregivers,
- limited parenting and treatment resources and programs in jails and prisons, and
- the expense of calls and visits.

Although family visitation increases the chances of successful family reunification upon release from prison, more than half the mothers incarcerated in state prisons report they have never had a visit with their minor children.⁹⁴ Reasons include distance, cost, transportation, rules restricting contact visits, and the need for permission by correctional authorities (which may be denied/withdrawn). Central California Women's Facility and Valley State Prison allow 18 hours for visiting per week, on Thursdays and Fridays from 2-8 pm and on Saturdays and Sundays from 9-3 pm. These prisons are located in rural areas far from where most families live. Visiting areas originally intended for children have been converted to offices because so few children visit.

A study in Riverside County found that lack of reunification services was the most common child custody problem, "...experienced by 46 percent of all incarcerated mothers and 58.8 percent of incarcerated mothers with children in foster care."⁹⁵ The same study found that

...parent-child reunification was associated with the type of drug treatment received by the incarcerated parent immediately after release. Clients who left prison to enter residential drug treatment programs had significantly higher rates of reunification (92.4%) with their children than clients who entered outpatient treatment or did not enter treatment at all (36%).

Recently released prisoners may not be ready to assume parenting responsibilities. They often need to first attend to their own issues, which include adjusting to life outside of prison, substance abuse treatment, finding employment, and securing housing. They may not be willing or able to respond to their children's needs for some time.

TERMINATION OF PARENTAL RIGHTS

Termination of parental rights is irreversible and effectively severs a parent's rights over his or her child, as well as the child's extended family relationships.

Termination of parental rights is one of the most momentous procedures in the U.S. legal system. In part this is because of the fundamental rights in our society of families to be free from state interference and the right of parents to raise their children as they see fit...Consequently, terminating a parent's rights strikes at one of the core legal and social values of our society.⁹⁶

A casebook on Family Law notes that "...most courts...are very reluctant to terminate parental rights except upon a showing of parental unfitness, abandonment, or other additional, extraordinary circumstances [and that]...most courts will not terminate parental rights if the agency has not yet used 'reasonable efforts' to reunite the family."⁹⁷

The U.S. Supreme Court has found that parents have an interest in their relationship with their children that is protected under the Due Process Clause of the Fourteenth Amendment of the Constitution, but it is not absolute:

The parent-child relationship is generally regarded as fundamental to society and entitled to substantial legal protection. But a rule protecting parental decision making from state interference may sometimes conflict with other important values. The state has an interest in protecting the welfare of the child as vulnerable members of society, and an instrumental interest in producing healthy, well-educated and productive future citizens...⁹⁸

A parent's Constitutionally-protected, fundamental interest in their relationship with their children can be qualified under the following circumstances: "Where fundamental rights are concerned we have a two-part test: '[1] regulations limiting these rights may be justified only by a 'compelling state interest,' and...[2] legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."⁹⁹ California courts have ruled that "The interest of a parent in the care, custody, and management of his or her children is a basic civil right entitling the parent to due process." *In re Sara D.* (2001) 87 Ca.App.4th 661 [104 Ca. Rptr. 2d. 909] Court of Appeal, Fifth District.¹⁰⁰

Involuntary termination of parental rights involves the state, through a department of social services, petitioning a court to have a parent's rights terminated. Most cases involve children who have been removed from their parents because of severe or chronic abuse and neglect, leading to a judgment that they are no longer able to care for their children. The fact that a parent is a prisoner who has committed a felony is not sufficient grounds to terminate parental rights. The felony must show a parent's unfitness and the probability that the parent will fail in a substantial degree to discharge his or her parental duties [*In re Christina P.*, 220 Cal. Rptr. 525 (Ct. App. 1985)]. *In re Terry E.* [225 Ca. Rptr. 803 (Ct. App. 1986)] the court held that "...it was improper to only consider a parent's felony conviction when deciding whether or not to terminate parental rights...the

mother had taken appropriate action to be reunited with her children and therefore there were insufficient grounds for termination.¹⁰¹

Under California law, if a Juvenile Court determines by “clear and convincing evidence” that a child cannot be returned to the custodial parent, the court sets a “.26 hearing” (after *WIC* §366.26) to terminate parental rights within 120 days of the permanency review hearing. The mother, father (presumed and alleged), child (ten years and older), and any counsel of record are to be notified of the time and place of the proceedings and advised that they may appear (*WIC* §366.23). *Penal Code* §2625 expressly gives incarcerated parents the right to be present at a court hearing involving the termination of parental rights.

The mandatory timeframes mandated in the federal Adoption and Safe Families Act of 1997 and conforming state law mean that prisoners with children in foster care are at risk of having their parental rights terminated: “It is a very rare situation where a woman prisoner with a child in foster care has not been confronted with this,” according to Philip Genty, clinical professor of law and Director of the Prisoners and Families Clinic at Columbia University Law School.¹⁰² The following interview with “Teresa,” who worked in a prison law library as an inmate, shows the lack of understanding that many incarcerated mothers have about this process:

A lot of women don’t realize that when they take a three-year prison term—which is the norm nowadays on a probation violation—if they have an infant or they’re pregnant, taking that plea bargain means they’re gonna lose their child. If they do not have a family member who can take custody—and oftentimes even if they do—once CPS is involved, that’s it.

The latest is to place the children with a prospective adoptive parent as soon as they’re taken. The mothers come in really naive and say, ‘Oh, they’re with a nice family. There’s gonna be pictures, and they’re gonna bring the baby to visit.’ I watched one after another lose their child. It’s heart wrenching. These women do not even understand the significance of the court documents they receive.

I saw hundreds of women lose their parental rights. The last hearing, where the rights are terminated, is the most pathetic. They do not know, when they go out for that hearing, that they will probably never see the child again.

Even at the last hearing, the court can decide not to terminate parental rights if it determines that reasonable reunification efforts or services were not offered or provided to the parent. However, “Courts sometimes find reunification efforts futile in cases involving long periods of parental imprisonment. A parent’s failure to keep in touch, or to make use of offered services, may excuse an agency’s failure to provide further services.”¹⁰³ Given the length of average sentence for women prisoners, it is likely that many will have their parental rights terminated absent considerable assistance from correctional officials and social workers. Ellen Barry, a founder of Legal Services for Prisoners with Children, asserts that: “In some cases, [California] counties have made a

de facto determination that it is not possible to provide reunification services when a parent is incarcerated.”¹⁰⁴

Some advocates contend that this is double punishment and unconstitutional—go to jail and lose your children. A 50 state analysis found that “Despite language in many of these cases that incarceration cannot by itself be a reason for terminating parental rights, a close examination of state court decisions reveals that they often treat incarceration as a sufficient reason for the permanent termination of parental rights.”¹⁰⁵ When parental rights are terminated, the parent no longer has the right to care for or even visit the child, and other family ties (such as with grandparents) are also legally severed.

The following interview with “Ahmad” relates the feelings and thoughtful comments of a young man who was placed in foster care when his mother was arrested. His mother’s parental rights were terminated when he was five years old.¹⁰⁶

When I was five, my mother’s parental rights were terminated. I wasn’t even allowed to be by her in the courtroom. I was away from her when they did the decision-making. But I just knew from her expression, her tears, begging the judge, what had happened. I was reaching out to her, begging, trying to have that last hug. They picked me up and just took me away. Me screaming and yelling, “Mommy, I’m sorry, I won’t be bad again.

After that, I was adopted. I was totally separated from my mom and the rest of my family. They said it was for my “mental stability”—that if I continued to see my family, I would be confused. I was always taught to say nothing about it. That really impacted me and the way I felt about myself. Was I that bad of a child? Was I that much of a problem that people don’t want to take care of me?

Later, I learned that it actually had nothing to do with me. It was something my mother had to battle her way through herself, and I couldn’t change it.

The devastating effect of substance abuse on a parent’s life, and on their children, lies at the root of a significant number of cases in which the parental rights of incarcerated parents are terminated. This is because of the reoccurring nature of the addictive disease, which can result in multiple incarcerations, each for a longer period of time. The majority of incarcerated women suffer from this addiction. In the following interview with “Amber,” she acknowledges her addiction as the cause of losing her daughter:

Every time I would smoke some crack or shoot some heroin, I’d be thinking about my daughter. I always took it for granted that I could get her back once I got myself together. Then one day in jail a caseworker told me, ‘It’s over. You can’t get her back.’ She had been adopted. It was devastating. But I’ll be the first to tell you that it’s my fault. I take responsibility.¹⁰⁷

After determining to terminate parental rights, under California law the Juvenile Court must “...consider three permanent plans in order of legal preference: (1) Adoption [with

preference to relatives and caregivers], (2) Legal guardianship; and (3) Long-term foster care.”¹⁰⁸ In making its decision, the court is to take the *best interests* of the child into consideration. The following discussion briefly describes adoption and long-term foster care; guardianship is described on pages 22-23.

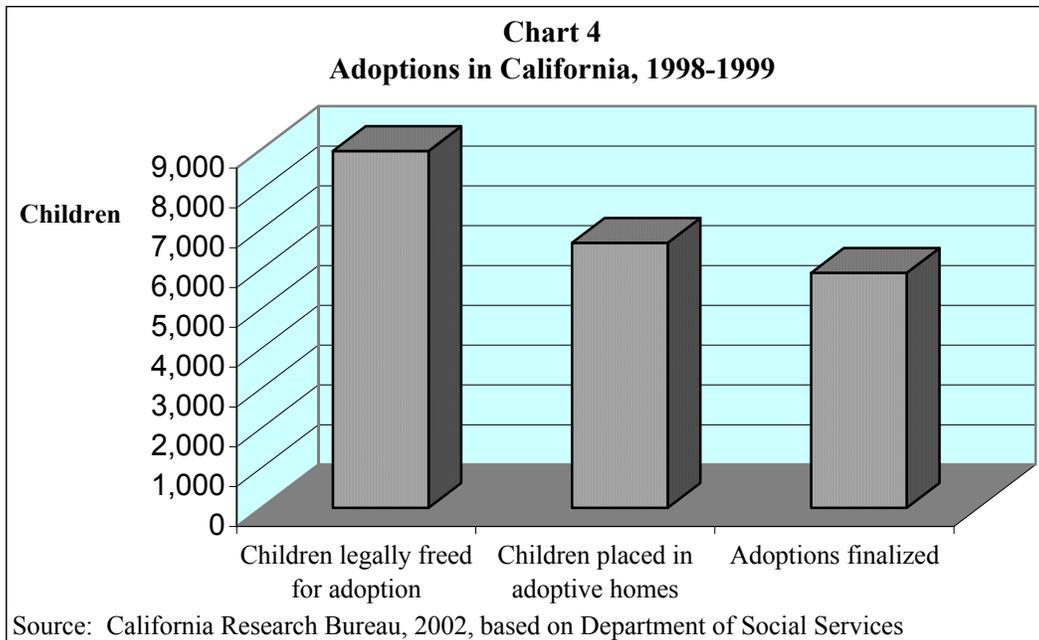
Adoption

Adoption permanently places a child in a family, giving parental rights to adoptive parents and severing contact with the birth parents. In contrast, parents may maintain contact with their children when the children live with a legal guardian. In some adoptions limited contact between the birth parents and children is maintained, a practice recommended by the National Council of Juvenile and Family Court Judges.¹⁰⁹ This contact may alleviate some of the distress that children feel when they are separated from their parents. Research generally shows that “...children raised in adoptive homes have better outcomes than those who are returned to problematic birth homes.”¹¹⁰

Adoption is a legal process involving the prospective parents, the courts, and public and private adoption agencies. It is outside the scope of this paper to describe the complexities of the adoptive process. Both the Judicial Council and Department of Social Services websites provide basic information about the legal process, agencies, and financial assistance (see www.courtinfo.ca.gov and www.childworld.ca.gov/Adoption).

Under California law, parental rights may be severed whether or not adoptive parents have been located. The juvenile court may determine, by a “clear and convincing standard,” that adoption is likely, whether or not adoptive parents have been identified [*WIC §366.26(c)*]. The National Council of Juvenile and Family Court Judges advises that “Judges should not use the concern that an adoptive home may not be found for a child as a reason not to move forward with termination of parental rights.”¹¹¹ Thus children whose parents have had their parental rights terminated may be placed in long term foster care, a placement that may not be in their *best interests*.

There are not enough adoptive families, despite federal incentive payments to states under the Adoption and Safe Families Act. More than 100,000 children were living apart from their families in California in 2002.¹¹² Older children are less likely to be adopted, and less likely to experience successful adoptions.



Long-Term Foster Care

Long-term foster care is “Extended care away from the biological parents provided to a minor child placed pursuant to a neglect or dependency hearing; [and] can include care by a relative, a non-biological foster family, group care, residential care or institutional care.”¹¹³ According to the Department of Social Services, nearly a quarter of the children placed in non-kin foster care in California were still in the foster care system three years later. Many of these children have a parent with a history of arrest and incarceration—over three-quarters of the children in long-term foster care in a San Diego study.¹¹⁴

If a child is placed in long-term foster care, possibly awaiting adoption, the Juvenile Court will hold Post-Permanent Plan Hearings every six months to review the child’s progress and needs. (Six counties in California permit administrative hearings to be conducted for the six-month status reviews between annual court hearings: Kern, Monterey, Sacramento, Santa Cruz, Shasta, and Stanislaus).¹¹⁵

Foster care is a problematic solution to the long-term care of the children of incarcerated parents. Academic studies of children in foster care, and the relatively poor outcomes for children who leave foster care, find that “...these children would have been better off if they were left at home.”¹¹⁶ Philip Genty, a well-known legal scholar, writes that

The traditional model of foster care placement is ill-equipped to deal with the growing phenomenon of parental incarceration...This time-drive model of foster care placement simply cannot cope with the situation of an incarcerated parent who has an ongoing, viable, positive relationship with her child but who is unable to resume physical custody of her child for many years...the parent who cannot meet the tangible, physical responsibilities of parents, such as providing a

dwelling space and financial support, may still be able to offer intangible qualities of parental love and nurturing, which are perhaps of greater importance to the children and which no one except the parents can provide.”¹¹⁷

Nonetheless, some children with incarcerated mothers thrive in foster care, particularly when they are able to maintain contact with their parent, as this interview with “Rochelle” shows:¹¹⁸

I was in the same foster home from seven to 18. It was a nice house, nice neighborhood, great school—I loved my teachers. And I just adjusted to it. My foster mom and my mom struck up a nice relationship, and my foster mom allowed my mom to come over.

The California Department of Social Services is required by state law to ensure that child welfare service providers offer quality services that protect the health and safety of children in foster care. The department monitors county public and private agencies for compliance with state and federal law and regulations. Counties, as the primary service providers, undergo regular performance reviews. According to the department, 80 percent of counties reviewed over a three-year period were required to develop corrective action plans. The department has assembled the California Child Welfare Services Stakeholders Group “...with the goal of improving the State’s child welfare system.”¹¹⁹ However, a recent federal study has found that “California’s system of care for abused and neglected children... fails to meet national standards for protecting kids and for training case workers and foster parents.”¹²⁰

OPTIONS

The following options are not necessarily recommended by the Bureau or the author, but are offered for potential legislative and administrative consideration and action.

RESPONSES TO CHILDREN WHOSE PARENTS HAVE BEEN ARRESTED

Clarify the Application of WIC §300

Welfare and Institutions Code §300 is the keystone statute for child abuse and neglect. It does not clearly apply to the children at the time of parental arrest or incarceration. Currently there is a tacit “don’t ask, don’t tell” policy, in which police don’t ask and parents don’t tell. As a result, some children are left alone and in unsafe situations. The following are possible legislative options:

1. Establish a clear responsibility for police officers to inquire about minor children at the time of parental arrest, whether or not children are present. In order to avoid costly litigation, this requirement may require a waiver of police liability.
2. Clarify in the statute that if a parent is not able to identify a caregiver for minor children *at the time of arrest*, the children are at risk of neglect, triggering law enforcement, CPS and judicial involvement to ensure both the short term and long term safety and well-being of the children.
3. Require the California Commission on Peace Officers Standards and Training (POST) to develop and offer a training module for police officers on how to ensure the safety and well being of the minor children of arrested parents.
4. Encourage law enforcement agencies to develop their own protocols and training program to guide their officers’ responses to children at the time of parental arrest.
5. Provide jail counselors with training about the child welfare system so that they are able to advise women about their rights and responsibilities, and help them arrange for their children’s care.
6. Authorize law enforcement agencies to develop collaborative agreements with child protective service agencies and local community based organizations to improve responses to the minor children of arrested parents.
7. Ensure that arrested parents are provided the opportunity either by police, or upon arraignment, to immediately contact friends and relatives to care for their children.
8. Authorize law enforcement agencies to provide the Social Security number of arrested parents to child welfare agencies to check if the parents or their children have been involved in the child welfare system. Consider crosschecking with public assistance and food stamp programs to ensure that all children are accounted for and that none “fall through the cracks.” Parents could be asked to authorize this review.

9. Consider encouraging all county courts to appoint an independent representative for children who come before the juvenile courts in dependency proceedings, so that their best interests are fully taken into consideration.

Consider Creating a Statutory Alternative to WIC §300

This statutory scheme would apply to the children of arrested parents who are not in immediate danger of neglect, because the parent has identified a caregiver. (It would still require that police inquire about children and their care at the time of arrest, as discussed above.) The goal would be to ensure that the parent's selection is appropriate and to identify needed services. These children would not enter the child welfare system unless a background check of the caregiver revealed a significant problem. Making this alternative explicit in the statute might encourage better parental cooperation with authorities at the time of arrest, as it would lessen the fear of termination of parental rights.

1. Authorize or require local law enforcement and child welfare agencies to develop protocols to better cooperate to address the needs of the children of arrested parents.
2. Authorize child welfare agencies to collect the Social Security numbers of the caregivers of the children of arrested parents to compare against the child welfare database, and to identify potential problems, such as a previous criminal record, that might require removal of the children to a safer environment.
3. Require that the child welfare system database include information about whether a parent of a child in the system is, or has been, involved in the criminal justice system. This information is not currently collected.
4. Encourage Boards of Supervisors and School Boards to develop local collaboratives with non-profit organizations, such as Friends Outside, to provide mentoring and services to these at-risk children and their caregivers.

ARRESTED AND INCARCERATED PARENTS

Currently the criminal justice system in California takes very little notice of the families of prisoners. In contrast in some states this information is collected and taken into consideration in providing services, and sometimes in sentencing. Since most incarcerated parents are arrested and jailed multiple times before being sentenced to state prison, local jails are a crucial potential intervention point.

1. Require the probation report of each arrested adult to include information about any minor children and their care and location.
2. Support the development of programs and facilities that enable children to visit their parents in jail and prison.

3. Consider giving priority to the arrested single caregivers of minor children for drug and alcohol treatment (Proposition 36) and domestic abuse prevention counseling.
4. Authorize counties to establish correctional counseling units within local probation departments to address the needs of inmates who are the sole caregivers for minor children, primarily mothers. Services might include individual (child or parent) and family treatment, therapeutic interventions and medical referrals. The Department of Corrections' parole division could also create such a unit.
5. In some cases, such those as involving single mothers with non-violent offenses, give statutory priority to *California Rules of Court* 4.414(b)(5), which lists "the likely effect of imprisonment on the defendant and his or her dependents" as one of the factors that may affect a court's decision to grant or deny probation.
6. Create a sentencing guidelines task force focusing on female offenders to consider alternative sentences that reflect their gender-specific patterns of criminality, backgrounds of poverty and abuse, and family responsibility, and to recommend appropriate programs and facilities for sentenced women and their families.
7. Ensure that arrested single caregivers whose children are in the dependency system receive information about that civil process, and its potential impact on parental rights, prior to any plea bargain on a criminal charge. This might include providing a copy of the *Incarcerated Parents Manual*, by Legal Services for Prisoners with Children, which is available on the Internet. (www.prisonerswithchildren.org/pubs/ipm.pdf).
8. Authorize child welfare agencies to create special units, when appropriate, for children in their caseloads with arrested and incarcerated parents. These units could establish long-term relationships with correctional authorities to ensure that the parents and children receive the reasonable and appropriate services (such as visitation and specialized classes) that courts require as a condition of reunification after the parent has served time.
9. Conduct a legislative oversight hearing into the Department of Corrections' programming for female prisoners. Does it meet their unique needs given their high prevalence of past victimization and abuse, lack of education and skills, substance abuse issues, and parenting concerns? Also, are the eligibility standards for its Prison Mother and Family Foundation programs appropriate, given that they are underutilized. (For example, mothers with substance abuse problems may not qualify.)
10. Include the location of an incarcerated parent's children as a priority criteria for the Department of Corrections when deciding where to house an inmate.
11. Authorize the position of "family coordinator and liaison" in each state prison and the parole division, to facilitate visitation and provision of the services required by the court for family reunification. This person could also develop a discharge plan, in coordination with community-based service providers, for follow-up services required to achieve successful and safe family reunification.

12. Whenever possible, encourage correctional agencies to address the family needs of inmates. These efforts could include family time programs (visitation and better visiting facilities), inmate education programs involving children (literacy programs), parenting education programs, and family service programs (financial advice, counseling).

PARENTAL RIGHTS

The federal Adoption and Safe Families Act is resulting in the termination of parental rights for the children of incarcerated single caregivers.

1. The Legislature might want to consider whether this unintended result is in the best interest of the children, and in accordance with federal law, to clearly define the children and parents to whom this very severe sanction is applied (see the above discussion of an alternative statutory scheme to *WIC §300*).
2. The Legislature could create a special commission to develop detailed recommendations on how to best improve coordination between the criminal (parent) and civil juvenile dependency (child) systems. Ensuring the provision of reasonable services to incarcerated parents might improve the likelihood of successful family reunification.

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