Involuntary Abandonment: Infants of Imprisoned Parents*

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Most laymen would agree that if a child is abandoned, the state has a duty to provide for the welfare of the child. The law reflects this belief: abandonment constitutes one of the legal grounds on which a juvenile or family court can move to take custody of a child and determine later placement. Legal abandonment includes a variety of parental actions in which a parent fails to provide for a child's health, welfare, and well-being, the most obvious being simple desertion of the child for long periods without adequate provision being made for the child's physical and psychological needs. While the *legal* definition of abandonment includes the common language use of the word, the legal construction of abandonment extends it to those situations in which parents fail to provide for their child's welfare for reasons that lie outside their willful or conscious control. In many states, legal abandonment occurs when a parent is jailed or is involuntarily committed because of mental illness. In these two situations, the state may assert jurisdiction and assume responsibility for the minor child left unattended by the parent's absence.

States differ somewhat in their laws on abandonment. Since the case to be presented is from Michigan, for illustration we cite the Michigan statute giving the juvenile court jurisdiction over abandoned minors, M.C.L.A. § 712A.2[1]

> Sect. 2. Except as provided herein, the juvenile division of the probate court shall have:
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> a) Exclusive original jurisdiction superior to and regardless of the jurisdictions of any other court in proceedings concerning any child under 17 years of age found within the county . . .
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> * * * *
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> b) Jurisdiction in proceedings concerning any child under 17 years of age found within the county
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> 1) Whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary support, education as required by law, medical, surgical or other care necessary for his health, morals, or who is deprived of emotional well-being, or

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who is abandoned by his parents, guardian or other custodian, or who is otherwise without proper custody or guardianship; or

2) Whose home environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, or other custodian, is an unfit place for such child to live in or whose mother is unmarried and without adequate provision for care and support.

Using the authority granted by these provisions, Michigan courts take jurisdiction of a child of a single parent who is unable to provide care by reason of a state-imposed deprivation of liberty. The legal theory on which the state proceeds is that the state, in so acting, is exercising its *parens patriae* power. Having assumed temporary custody of a child, the state then is empowered to determine a final placement under the statute, M.C.L.A. § 712A.19a[2]

> Where a child remains in foster care in the temporary custody of the court following the initial hearing provided by Section 19, the court may make a final determination and order placing the child in the permanent custody of the court, if it finds any of the following:
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> * * *
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> M.C.L.A. § 712A.19a(d)
> A parent or guardian of the child is convicted of a felony of a nature as to prove the unfitness of the parent or guardian to have future custody of the child or if the parent or guardian is imprisoned for such a period that the child will be deprived of a normal home for a period of more than 2 years.

These statutes, and the circumstances to which they can be made to apply, raise questions as to the role of the family as against the state in protecting and providing for the needs and interests of children. In looking to appellate court decisions for clarification of the respective obligations and prerogatives of family and the state in matters affecting minors, two contrasting themes are evident. They pose a dilemma that arises out of two divergent lines of appellate cases dealing with family policy. One line of cases takes and defends the family as a singular legal entity (or interest) and protects it from unwarranted intrusions from state authorities (*Pierce v. Society of Sisters*, 1925[3]; *Griswold v. Connecticut*, 1965[4]; *Stanley v. Illinois*, 1972[5]; *Wisconsin v. Yoder*, 1972[6]). These cases recognize privacy rights of the family *qua* family and do so through acknowledging parental prerogatives in matters affecting intrafamily conduct and beliefs. The other line of decisions being handed down by the courts recognizes certain legal rights and interests of minors that they can exercise independently of parental control or even in defiance of parental wishes (*In re Gault*, 1967[7]; *Carey v. Population Services International*, 1977[8]; *Bellotti v. Baird*, 1979[9]). Thus, on the one hand the courts protect the family against intrusion by the state by underscoring parental prerogatives, while on the other hand, by acknowledging independent legal rights of minors, the courts intrude on intrafamily dynamics by reapportioning the power traditionally reserved for parents.

The tension created by the judicial effort to protect the integrity of the family entity—while at the same time recognizing the individual rights of children within the family—presents a challenge to psychiatry because the new legal rights afforded to minors sometimes turn on factual determinations regarding what is in a child's psychological best interest in a complex set of circumstances. Although not usually addressed, the psychological interests of the family unit, as distinguished from the child, also might be of concern to psychiatrists. Certain situations in which "involuntary" abandonment constitutes the legal basis for a termination of parental rights give reason to examine whether the court's exercise of its power *in fact* serves to further a child's or family's interests.

Case Illustration

The case under consideration here demonstrates the difficulties encountered in balancing interests in family cases. Involved is the dilemma posed when a jailed woman, before or during a lengthy incarceration, gives birth to a child. When no family structure with the will and capacity to provide for the infant's care is available outside prison walls, and when, as in Michigan, the state's penal system does not permit "boarding in" of children, then the state assumes responsibility for and jurisdiction over the infant. Under its *parens patriae* power what is the state's obligation in serving the child's "best interests"? What role should psychological expertise in child development serve in assisting the courts to reach optimal decisions in such child placement cases? The factual situation presented below is derived from briefs and court transcripts submitted to the Michigan Supreme Court on appeal by Respondent-Appellant (mother) from adverse opinions issued by three lower Michigan courts. Only the most salient factual matters for purposes of the present discussion are emphasized. Suffice to say that there has been extensive fact finding, discovery, and testimony in this case with a number of important factual matters still at issue between the contesting parties. While these have relevance for the final resolution of litigation, we avoid the temptation to present a detailed account of the poignant and extensive record of the case.

In re Taurus F., (Michigan Supreme Court)

Case Vignette:

A young unmarried woman with a history of criminal behavior involving the sale and possession of controlled substances was sentenced to several years of incarceration following a felony conviction. Early in her prison term she effected an escape and some months later was apprehended on other drug-related charges. At the time of the rearrest she was in the third trimester of pregnancy. She was unmarried and the prospective father of the child was also serving a prison term. She was returned to a correctional institution to serve out her remaining sentence, convicted of heroin delivery perpetrated during her escape, and sentenced to a minimum of nine years with little possibility of parole until her prospective child would be over five.

Following her return to the correctional institution efforts were made by the prisoner with assistance from the Department of Social Services (hereafter referred to as the Department) to arrange for the prisoner's sister to care and provide for the expected infant. This proposed child-care arrangement involving the aunt was ultimately not sanctioned by the Department.

Taurus, a girl, was born on March 17, 1978. On March 23, 1978, the Department petitioned the Juvenile Court to issue an *ex parte* emergency order granting custody of the child to the Department. The petition, relying on portions of the Probate Code cited above, was intended to establish court jurisdiction over the minor child. Jurisdiction was based on the alleged abandonment of the child caused by mother's incarceration. The child was placed in foster care. On March 28, 1978, the Department filed a petition under M.C.L.A. § 712a(d) of the Probate Code (above) to terminate mother's parental rights. On April 3, 1978, a preliminary hearing was held at which mother was present but not represented by counsel. The infant was continued in foster care. Several other hearings were held, and on July 31, 1978, trial was held on the termination petition alleging mother's unfitness. Following the trial proceedings mother's parental rights were terminated and the Probate Court took permanent jurisdiction of the infant. In subsequent appellate hearings, the mother sought to reverse the decisions of the Juvenile Court. The state, through the Department of Social Services, became an adversarial party in mother's appeals of the trial court's and lower appellate courts' decisions. On May 9, 1980, the Michigan Supreme Court noted probable jurisdiction and remanded the case to the Probate Court (Juvenile Division) for further findings of fact to supplement the record and briefs already before the Court. Testimony was taken and transcripts of the proceedings were sent to the Supreme Court. This remains the present picture of the case.

During the course of the termination hearing, the court relied on expert psychiatric testimony. The evidence presented and the conclusion arrived at were not unexpected. The testimony emphasized the absence of an infant-mother attachment, the existence of a psychological bond between the child and the foster parents, and concerns about the mother's parental fitness given her legal difficulties and her personality. The psychiatric testimony was consistent with the guidelines set out in *Beyond the Best Interests of the Child*,[10] and concluded that the child's best interests would be served by termination of parental rights and by allowing the child to remain in her current custodial environment.

Discussion

This case challenges us with certain fundamental questions concerning the relationship between children, parents, and the state. The challenge is to seek a balance of interests that takes cognizance of the constitutional rights of parents and children while serving to further the psychological well-being of the child. There are questions for both the student of constitutional law and the behavioral expert who becomes involved in evidentiary hearings arising from such cases.

Grounds for Court Jurisdiction? Recognition of the special rights of the family as a social unit is firmly rooted in American jurisprudence and public policy and is underscored by a number of landmark U.S. Supreme Court cases (cited above). The family's right of privacy is a hurdle that prevents state intervention and judicial review of parental functioning except under particular circumstances. Once the statutory threshold is crossed, however, the state may pierce the family's shield of privacy and scrutinize the relationship between parent and child. If parental conduct vis-à-vis the child falls below minimum standards the state may restrict or terminate the rights of parents to the possession and custody of their children. For permanently terminating parental custody of a child, the usual ground is unfitness, based on parental abuse, neglect, or abandonment.

In the case cited, when the Department disapproved the mother's plan to place her infant with her sister, they already had asserted a right to review such a placement *without* needing to invoke unfitness explicitly, in contrast to the situation of, say, a mother voluntarily entering a mental hospital. Imprisonment, in Michigan, would appear to be an exception to the usual need to demonstrate unfitness.

Unfitness Does the law embody the principle that unfitness is present *per se* when a mother is incarcerated? This appears unlikely. In the Michigan statute covering placement, there is reference to "a felony of such a nature as to *prove* the unfitness of the parent" (M.C.L.A. § 712.A 19a(d) above, italics added), suggesting that unfitness is not presumed. Appellate decisions in other jurisdictions have expressly held that incarceration alone is not determinative of unfitness.[11] Nor does a separation of two years from the infant, alone, prove unfitness, if a parent makes other custody arrangements. Incarceration carries with it special circumstances (separation and lack of care) that in some jurisdictions might raise a presumption of unfitness, shifting the burden to a parent to prove adequacy.

Should Imprisonment Be a Special Case? If unfitness is the basis for terminating parental rights of prisoners, and if unfitness must be demonstrated (or if presumed then not rebutted) in each case, then "involuntary abandonment" loses its special status and becomes an evidentiary question of unfitness, to be argued on the usual grounds for unfitness. On the other hand, society may hold as public policy that unfitness need not be proved, that prisoners simply do not have the same rights to their children as non-prisoners, and that the hurdle for a court taking custody is different for prisoners than for non-prisoners. Such a holding would appear to be at variance with several recent court determinations. When a state enacts laws that differentiate classes or categories of persons and accords them different treatment under the law by reason of their membership in a particular class, the possibility of a Fourteenth Amendment "equal-protection" issue is raised. If the state law involves what have come to be known as "suspect classifications" the state law, on judicial review, will be subject to close scrutiny for possible violations of the constitutional guarantees of "equal

protection of the law." Suspect classifications, defined by U.S. Supreme Court decisions have come to include indigency (*James v. Strange*, 1972),[12] illegitimacy (*Weber v. Aetna Casualty and Surety Co.*, 1972),[13] and race (*Brown v. Board of Education of Topeka*, 1954).[14]

Other classifications of persons created by law and accorded different treatment thereby, though not "suspect," also may raise significant equal protection issues. This occurs when legislation abridges or touches on certain constitutionally protected individual liberties that have come to be recognized as "fundamental rights." Rights afforded this special status include freedom of speech, freedom of religion, and freedom from unwarranted state intrusion into individual privacy. Included among the "fundamental rights" guarded by the equal protection clause are the rights of parent(s) to the custody and control of their children, the rights of parents to maintain family integrity, and the right of related individuals to family privacy.[3–6] Whenever a "fundamental right" of a statutorily defined class of persons is differentially affected by legislation, the equal protection clause requires the state show a "compelling interest" in enacting its statutory classification if it is to survive a challenge to its constitutionality (*Reynolds v. Sims*, 1964).[15] In the case under consideration here, a Michigan statute treats incarcerated mothers differently than others in respect to their parental rights to custody of their children. For such a statute to be saved from constitutional attack the state must show both that it had a compelling interest in its enactment and that it employed the least restrictive incursion on a fundamental right in its furtherance of its compelling interest (*Shelton v. Tucker*, 1960).[16]

Best Interests Can the family's right to privacy be subsumed under the heading of the child's best interests? In custody contests, the child's best interests are the deciding factors. In cases between parents and third parties, placement with parents is presumed to be in the child's best interests, a presumption that can only be overcome, in Michigan, by "clear-and-convincing" evidence. The status accorded the family is reflected in an evidentiary burden that must be overcome by a third party seeking custody. What are the best interests of a child born to a prisoner?

There has been a growing interest in research on the children of prisoners, although research in this area is still scanty.[17] Some research suggests children of prisoners are more likely than normals to exhibit problematic and anti-social behavior.[18] Although not clear in the research related to prisoners, on theoretical grounds one would expect to see anxiety attendant on a separation from a parent, similar to anxiety from other separations such as death and divorce. For older children, separation from a parent is difficult, but in one study of prisoners' children, children who knew that separation was due to imprisonment exhibited more symptoms than children who did not know why their father was away.[19] These data exist as conglomerate statistics. In any individual case, a complicated variety of factors, including the characters of both parent and child, the degree of the

imprisoned parent's involvement via visits and letters, the age of the child, the length of separation, and the nature of alternative child care, all affect the outcome.

A major difficulty in having a mother retain custody during an incarceration of more than two years is that if the child is to be returned to her mother, she will be subjected to a separation from the care givers to whom she has become attached in her early years. While there is general agreement that such a separation is a stress for a child, opinion is divided as to the severity of the consequences. From a psychoanalytic perspective, Goldstein, Freud, and Solnit[20] argue forcefully that continuity of a parent-child relationship is crucial for a child's normal development. They argue that not only is the fact of separation a major interference, but also even the anticipation of such a separation can lead care givers to refrain from investing as strongly while they do have possession of the child. At the other pole, Rutter,[21] while acknowledging that attachment is important, argues that the consequences of separation may be less serious than those anticipated by the psychoanalysts, and that numerous other factors play a role in affecting outcome. These factors include capacities in the child that may make her less vulnerable, the stability of the new relationship, and the level of stress attendant on the separation. In the case of a prisoner assuming custody of a small child, one might reasonably have concern about the presence of psychopathology in the parent, the stress on the new family as the ex-prisoner attempts to manage a single-parent family and reintegrate with society, and the potential for the abrupt severance of not only a relationship to one primary care giver, but the severance of all the child's previous relationships.

The alternative to preserving the legal relationship of parental custody during the parent's incarceration is for the state to assume permanent jurisdiction over the child and seek either permanent foster care or adoptive placement. This alternative carries difficulties of its own. For an infant just born, no psychological bond from infant to parent has been established. One does not have the complicating factor, often seen in abuse and custody cases, of a parental attachment the disruption of which would be a significant blow to the child. In cases involving older children, one needs to weigh whether the psychological damage suffered by ending the relationship to a parent is outweighed by the benefits of a better environment.

What do we know about the effects on a child of permanent placement outside the family at or near birth? (If the state cannot provide permanent placement, it is easily arguable that life with a fit mother, should she be able to provide adequate care later, is better than bouncing from foster home to foster home.) Research on the long-term effects of adoption clearly indicates that adoption *per se* constitutes a stress for a child. A growing number of studies demonstrate that a greater proportion of adopted children than non-adopted children go to child guidance clinics,[22] and that the knowledge of being adopted frequently gives rise to disturbing fantasies in the child.[23,24] Adoption is not a benign intervention.

Best Interests v. Family Integrity With the above considerations in mind, we conclude that the dangers and detriments to a child from being adopted near birth are, in general, less than the difficulties that stem from being separated from care givers to whom she has become attached for more than her first two years. From a pure best-interests perspective, an infant or small child has very little to gain in being united with a natural parent after forming other attachments, while she stands to lose a great deal. (This reasoning may well lead to a different conclusion for a child who is attached to a parent who then becomes a prisoner. The particulars of the relationship, age of child, expected duration of separation, and amount of contact with the imprisoned parent by letters and telephone calls, would all need to be taken into account for a determination of an older child's best interests.)

Such an infant's best interests are in conflict with her parents' rights to determine placement of a child. The court is weighing, therefore, legal rights (and social policy) against the infant's best interests. The courts and legislatures have two different types of judgments to make in weighing these factors. First, best interests can be thought of as psychological facts that a court, in its role of fact-finder, can determine. Mental health professionals have a role to play in informing courts and legislatures as to what these facts are. We have argued that permanent placement near birth is less detrimental to a child than subjecting her to a later separation from primary care givers. Second, best interests are a value. The court (or legislature) has to decide what weighting to give its facts. The child's right to have her best interests ensured by the state is weighed against parental or family rights. This is a value trade-off problem. Value trade-off problems can be structured in different ways. One way is to attempt a direct balancing between competing values, in this case, to decide whether best interests are "more important" than parental rights.

Conceived in such general terms, the problem is very difficult to solve. If one can break the problem into procedural steps, it may be possible to specify that different values apply to different steps. In such a structure, values are not weighed against each other directly. In *Before the Best Interests of the Child,* Goldstein, Freud, and Solnit attempt this by proposing a hierarchical model of state interventions.[25] They propose specific grounds for each level of intervention. What we are calling parental rights serves to circumscribe what those grounds may be. In this model, only after such grounds are established does the child's best interests become the yardstick against which possible outcomes are to be measured. They argue that only failure to provide for a child's custody and care is a sufficient ground for determination of placement. As applied to *In re Taurus*, the mother's imprisonment would establish ground only for inquiring whether mother had made provision for her infant's care.[26] If she had proposed that her sister care for her infant,[27] the state would not be justified to continue intervention in the name of the child's best interests. Proving that adoptive placement is better for the child than mother's sister's home would not

justify continuing to the phase of adjudicating placement because mother has the right to choose a home for her infant. This right is bounded, as it is for any parent, by the adequacy of the proposed home. In order to continue to adjudication, the Department would need to provide evidence that the proposed home was unfit. Under the Michigan statute [M.C.L.A. § 712 A.2 (2)(b)(1), above] giving jurisdiction to proceed to adjudication, what constitutes "abandonment" is not well defined.

The Recourse Problem While a case involving custody of a young child is wending its way through the courts, much is happening in the child's development raising new difficulties regarding placement. Facts change while the review process goes on. Should the court find that the original custody determination was in error, based on constitutional or procedural grounds, or on erroneous findings of fact, it faces a significant problem in reversing the trial court and awarding custody to mother. In the case presented, the mother clearly wants her child, yet if the current best interests of the child control placement, it well may be that the child is best with the adults to whom she is attached who have been raising her for the past two and a half years. To disrupt those bonds and return the child to her mother for legal reasons makes the child an innocent victim of the legal system. The situation is not unlike other cases in which children for a variety of reasons (parent choice, divorce, illness) have been placed with temporary care providers to whom they subsequently formed psychological attachments. There is much legal precedent for continuing such arrangements, regardless of the reasons for which they were originally undertaken, although in other circumstances natural parents prevail over "psychological parents" in custody contests.[28] On the other hand, the mother might well argue that monetary damages alone are not sufficient to compensate for the loss of her child, and that in the face of legal error, the child's best interest should not be the test for determining final placement.

Must There be "Abandonment" at All? The statutes on involuntary abandonment begin with the assumption that an imprisoned parent cannot, herself, care for an infant. Alternatives exist to a statute that presumes "abandonment" of a child when the mother is incarcerated. Several states (for example, New York, Massachusetts, and New Jersey) allow for the possibility of "boarding in" of babies with mothers in prison. These states permit a judicial determination, on a case-by-case basis, of whether it is in an infant's best interests to remain in prison with the incarcerated mother. A Florida statute permitting boarding-in was enacted in 1957, F.S. § 944.24 (2).[29]

> If any woman received by or committed to said institution shall give birth to a child while an inmate of said institution, such child may be retained in said institution until it reaches the age of 18 months, at which time the Department of Offender Rehabilitation may arrange for its care elsewhere; and provided further, that at its discretion, in exceptional cases, the Department may retain such child for a longer period of time.

The Florida statute was not used to provide for boarding-in until 1979 when an action was brought by Ms. Terry Moore, an incarcerated, expectant mother who discovered F.S. 944.24(2) while reading in a prison law library. On February 28, 1979, a Florida judge ruled that the state could not separate Ms. Moore from her child for at least 18 months of its life. Following the birth of the child on March 23, 1979, mother and child were transferred to the Florida Correctional Institution where special housing arrangements were provided them. Shortly following this placement and the national publicity it received, the Florida legislature began to review F.S. 944.24. The statute was repealed by the legislature in 1981, but not before a number of other incarcerated mothers availed themselves of the provisions of the statute and gained judicial approval for boarding in with their infants. The advocates for the incarcerated mothers believe that the legislature's repeal of F.S. 944.24 was motivated by political, racial, and financial considerations rather than by concerns relating to the best interests of the children of the prisoner mothers. As of June 3, 1981, there remained ten mothers and eleven babies at the Florida Correctional Institute.[30] The future of the boarding-in program for these families, following repeal of F.S. § 944.24 is uncertain.

The Florida situation, even as it exists following repeal of the boarding-in provisions, is in contrast to the circumstances presented by *In re Taurus F*. The willingness of Florida to make special accommodations allowing incarcerated mothers to retain custody and possession of their children reflects the states' interest in preserving family integrity. Beyond safeguarding parental rights, promoting family life traditionally has been seen as a value. Evidence that prisoner-mothers are able to raise infants was reported as far back as Spitz, in his now-classic articles on hospitalism.[31] Using infants raised by delinquent minor mothers in prison nurseries as a comparison group, he found that although those infants began with subnormal development quotients, as they developed they approached family-reared infants and far outdistanced orphans in a foundling home.

Several lines of reasoning support the benefit to an infant of being raised by her natural mother. First, a very early bonding experience occuring just after delivery takes place only with the natural mother. The importance of early bonding is not year clear. Some studies have shown early differences (at one month[32] and at four days[33]) between infants who had a bonding experience with their mothers and those who had not, but other studies have not found later differences.[33,34] Second, the natural mother's tendency to experience the infant as part of herself interacts reciprocally with the child's early ways of relating. Finally, placment with natural parents avoids the discontinuity of relationship that all too often attends foster care and placement proceedings.

From the view of the child's need for continuity, we can only hope that states that allow for placement of the mothers in prison for the first eighteen months to two years will extend the length of care so that children in the

second year of life, who are particularly vulnerable to separation, will not be moved to alternate care givers. However, if not in the second year, is there a line to be drawn, and if so, when? The prospect of children living in prison for very long terms raises the specter of nineteenth century English debtors' prisons where entire families of debtors moved to prison to be with husbands and fathers and evokes Dickens' image of Little Dorrit toiling along London byways each evening to get home to her father before the turnkey closed "the lock."[35]

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