It’s Time We Consider the Best Interest of the Child

by sentencing parents and caretakers

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Why does this matter? “More than five million children, or approximately seven percent of all U.S. children, have had a parent who lived with them go to jail or prison. This percentage is even higher among black, poor, and rural children.” (See, David Murphey and P. Mae Cooper, Parents Behind Bars, What Happens to Their Children? Child Trends, October 2015).

Nearly 2.6 million children had an incarcerated parent in 2012, with the number of children with incarcerated parents having grown five times from 1980 to 2012. (See Bryan Sykes and Becky Petit, Mass Incarceration, Family Complexity, and the Reproduction of Childhood Disadvantage, The...
Children who experience parental incarceration have been found to be vulnerable to an array of deleterious health and educational outcomes, including attention deficit disorder (ADD) and attention deficit hyperactivity disorder (ADHD), behavioral problems, learning disabilities, anxiety and developmental delays. (See Kristin Turney, *Stress Proliferation Across Generations? Examining the Relationship between Parental Incarceration and Childhood Health*, Journal of Health and Social Behavior, 55, no. 3, (2014) 302-319. Children whose fathers were incarcerated were found to be over five times more likely to be suspended or expelled from school. (Pew Charitable Trust, *Collateral Costs: Incarcerations Effect on Economic Mobility*, 2010, citing Johnson, 2009.)

Incarceration of a household member has been identified as one of the adverse childhood experiences (ACEs) that can impact a child’s development and lifelong health concerns. Other ACEs include physical abuse, sexual abuse, emotional abuse, physical neglect, emotional neglect, intimate partner violence, violence against one’s mother, substance misuse within household, household mental illness, and parental separation or divorce. (U.S. Department of Health and Human Services’ Substance Abuse and Mental Health Services Administration (SAMHSA). ACEs have been linked to risky health behaviors, chronic health conditions, low life potential, and early death.

The greater the number of ACEs, the higher the risk of these outcomes. (Center for Disease Control and Prevention, Violence Prevention. https://www.cdc.gov/violenceprevention/acesstudy/about_ace.html). Given that children of incarcerated parents are associated with a higher number of other major, potentially traumatic life events, (Murphey and Cooper, supra, at 2), it is imperative that our criminal laws and procedures give due consideration to reducing the trauma and stigma these children experience as a result of our criminal justice system, not only for the sake of our children, but as a matter of public health and safety. Accordingly, when sentencing a parent or caretaker with dependent children, the impact on the children should be a requisite consideration.

While most states have yet to do so, there are jurisdictions that consider the impact of parental incarceration on children.

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In Oregon, the Department of Correction oversees the Children of Incarcerated Parents Project, a 12-year-old public-private initiative that includes Head Start programs, mental-health services, and educational opportunities for children with incarcerated parents. (See http://www.oregon.gov/DOC/OMR/PROGMS/pages/oam_children.aspx.)

San Francisco employs a family impact statement at sentencing, focusing on the family’s strengths and assets, as well as their challenges. The San Francisco Children of Incarcerated Parents Project created a bill of rights for children of incarcerated parents. The bill declares that children have the right to be heard when decision are made about them and to be considered when decisions are made about their parent. (San Francisco Children of Incarcerated Parents Project, http://www.sfciipp.org/)

Thanks to the efforts of the Osborne Association, since 2014, “Family Responsibility Statements” are highlighted as a best practice in the New York State Office of Probation and Correctional Alternatives training for new probation officers.

Washington State has passed a parenting sentencing alternative for primary caretakers with a child under the age of 18 at the time of the offense. If a parent is found to be eligible, imposition of the sentence is waived and the parent is sentenced to twelve months of community custody. Among the conditions that may be ordered are parenting classes, chemical dependency treatment, mental health treatment, vocational training, and life skills classes. RCW 9.94A.655

Evidence from Washington State suggests that family-centered sentencing provides a progressive alternative to incarceration that would otherwise separate children from their parents, while serving as an effective recidivism reduction tool resulting in substantial savings. (Eitenmiller, Katherine, *Bending the Bars for Mothers: How Prison Alternatives Can Build a Stronger Oregon*. Oregon Law Review 92:755-781 (2014)). Offenders who report higher levels of family contact and positive family relationships have better post-release employment outcomes and lower recidivism rates. (Nancy La Vigne, Elizabeth Davies and Diana Brazzell, *Broken Bonds, Understanding and Addressing the Needs of Children with Incarcerated Parents*, Urban Institute Report, February, 2008).

In Maryland, the Governor’s Office for Children has identified the reduction of the impact of parental incarceration on children, families, and communities as a priority, and Maryland’s Justice Reinvestment Act provides a philosophical foundation for the adoption of reforms such as child impact statements, community based alternatives to incarceration, and other family focused initiatives. In Prince George’s County, the Circuit Court has teamed with the Department of Social Services and the Division of Parole and Probation to implement a pilot project that provides for the inclusion of a section on caretaking responsibilities in presentence investigations (PSI’s) and an offer of voluntary family preservation services to families in which a caretaker is incarcerated. However, statewide, we have yet to sufficiently adopt policies and practices that appropriately consider and reduce the harmful impact of our criminal justice system on our children.

Michelle Alexander’s “The New Jim Crow, Mass Incarceration in the Age of Colorblindness” meticulously documented, “the rebirth of a caste-like system in the United States, one that has resulted in millions of African Americans locked behind bars and then relegated to a permanent second-class status—denied the very rights supposedly won in the Civil Rights Movement.” (Michelle Alexander, *The New Jim Crow, Mass Incarceration in the Age of Colorblindness*, (2010), NewJimCrow.com/about). Among the victims are the children of those ensnared, many of whom may also end up in this caste-like system of incarceration as a result of the trauma and loss resulting from the incarceration of their parents or caregivers. And while there are...
During the last Congress President Trump indicated that he would sign legislation that would give some protection to the Dreamers if the bill also included a substantial overhaul of the INA and many billions of dollars for construction of a border wall. Several versions of bills were introduced, but none received enough votes to pass. After the 2018 Congressional election, the House of Representatives on June 5, 2019 passed a bill entitled the “Dream and Promise Act” that would grant lawful permanent residence to the Dreamers. However, the Senate is not expected to take up the bill. While the future of the Dreamer’s status remains uncertain, for the time being DACA recipients are able to reregister for renewal of their DACA status and work authorization.

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local and state initiatives demonstrating the viability of sentencing policies that require consideration of defendants’ children and a plethora of well researched articles documenting the harm our current policies impose on children, for the most part, criminal justice legislation and policies fail to mandate that the best interest of children be considered.

Just as therapeutic jurisprudence has been widely adopted in the family law arena, therapeutic jurisprudence in support of children and families should be applied in the criminal law arena. We have seen the successful application of therapeutic jurisprudence with problem-solving courts. (National Institute of Justice, Specialized Courts, https://www.nij.gov/topics/courts/pages/specialized-courts.aspx). The lessons learned in the family law arena and problem-solving courts should be broadly incorporated into criminal procedures, especially when children are involved.

An important first step would be a requirement that judges be advised of the needs of defendants’ children and that the impact of a sentence on a defendant’s children be considered at sentencing. This does not mean shorter sentences for all defendants who have children or giving parents preferential treatment over nonparents. Rather, consideration of the impact of a sentence upon the children of a defendant adds a heretofore too often neglected consideration of the broader consequences of our sentences, reinforces our obligation as a community to promote the welfare of our children, and begins to address the fact that there are over two million children in this country suffering from having lost a parent to jail. To be sure, in some cases it is in the best interest of a child for a parent who has committed a violent offense to be incarcerated. But there are many parents whose presence in their children’s lives is key to the children’s well-being, and the imposition of a sentence of incarceration extracts too high a toll.


Community-based sentencing options should be expanded, and when incarceration is imposed, the sentence should be designed to minimize the detrimental effect on children. In jurisdictions with sentencing guidelines based on points, consideration of parental or caretaking responsibilities could be factored into the calculations. When a parent or primary caretaker is removed from the home, consideration should be given to the location in which a sentence will be served and visitation policies should be family/children friendly.

Child and family focused sentencing is a vital component in protecting millions of children injured by our current criminal justice policies. Clearly, however, the revision of sentencing practices is not enough. Consideration of the best interest of the child should be inserted into every aspect of the criminal justice system from arrest to re-entry. (See, e.g., New Mexico has adopted protocols outlining the treatment to be afforded children in specific kinds of arrest situations, http://nmlea.dps.state.nm.us/safePursuitAct/docs/Children%20of%20Arrested%20Parents%20Protocol.pdf). Many of the tools we have incorporated into family law, such as parenting classes, substance abuse treatment, mental health treatment, mediation, community conferencing and employment training should also be employed in the criminal law arena with the understanding that the well-being of the child, the family and the community are intricately related.