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# Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System

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# Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System

**Tamar Lerer**·

ABSTRACT

*Hundreds of thousands of incarcerated persons are parents; in many instances, their incarceration has profound effects on their young children. Despite the predictable harm that the these children experience when their caretakers are incarcerated, the criminal justice system lacks a uniform, principled, and transparent way to consider their interests at critical stages in the process.*

*In this Article, I argue that the interests of the children of incarcerated offenders should be considered and demonstrate how this can be done. The paper proceeds in three Parts. In the first Part, I explain why we should care about caretaker incarceration: it harms individual children, it may be criminogenic and therefore harm society in the future, and it disparately impacts children of color. These harms, I argue, threaten the very legitimacy of our criminal justice system and undermine our society's liberal values. In the second Part, I make explicit the way in which these interests can be taken into account, by drawing on the experience of family law and the best interests of the child standard. In Part II, I also attempt to refine the category of "caretaker" offenders, who are the focus of this paper, with the help of the concept of a "psychological parent"—a person who fulfills a child's physical and psychological needs on a continuous basis. Finally, I put this standard into use in three contexts that incarcerated caretakers face—bail, sentencing, and visitation policies—and show how consideration of the interests of children can be easily inserted into already existing balancing tests. By building upon these tests, we can create formal protections to help structure the use of prosecutorial and judicial discretion.*

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## INTRODUCTION

Mary is thirty-five years old and lives in Georgia.[1] She is the mother of three children, who all live with her. Their father does not live with them, and he pays child

[1] Georgia was selected because it allows us to see many of the typical issues that can occur in many states around the country; in this way, it was selected because it is typical, not because it is outstanding. Georgia bans gay marriage, so if one member of a gay couple raising children were to be arrested, the other would have problems accessing the benefits, such as visitation in prison and automatic custody of their children available to heterosexual married couples. *See* Georgia Constitutional Amendment 1, 2004 (now Ga. Const. art. I, § 4, ¶ I (2011)). Thirty-five other states have statutes or constitutional amendments restricting recognition of same-sex relationships. *Marriage and Relationship Recognition Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap. org/equality-maps/marriage_relationship_laws. The availability of second-parent adoption is uncertain, heightening this issue. *See* Bates v. Bates, 730 S.E.2d 482, 486 (2012), *reconsideration denied* (July 31, 2012), *cert. denied* (Mar. 25, 2013) (holding second-parent adoption on the basis of *res judicata* but "decid[ing] nothing in this case about whether Georgia law permits a 'second parent' adoption").Without second-parent adoption, the non-biological parent may not be able to exercise any legal rights over her child, even as simple as signing a permission slip for a school trip, were the biological parent to be incarcerated. Second-parent adoption is allowed in 13 states and the District of Columbia, restricted in seven states, and uncertain in 30. *Foster and Adoption Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.
In terms of criminal justice policy, Georgia has harsh drug laws and sentencing; though those laws are in line with the United States' general policies. For instance, the average Georgian inmate released in 2009 on a drug possession charge spent 21 months behind bars. Bill Rankin & Carrie Teegardin, *A Billion-Dollar Burden or Justice?*, *THE* ATLANTA JOURNAL-CONSTITUTION (May 23, 2010), http://www.ajc.com/news/news/local-govt-politics/a-billion-dollar-burden-or-justice/nQgFp/. Similarly, the average state sentence for felony drug possession nationwide was 23 months in 2006. BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN 2006, tbl. 1.3 (Dec. 2009). All possession of marijuana is a criminal offense in Georgia, with all but first-time possession of less than one ounce a felony. GA. CODE ANN. §§ 16-13-2, 30 (West 2012). This comports with the rest of the country; possession of any amount of marijuana is criminalized in 33

support intermittently. She has a great relationship with her children who excel in school and are very well-behaved. Mary has been supporting her three children economically as well as providing the children with emotional support—taking her asthmatic middle child to and from doctors' appointments, attending meetings with her eldest child's teacher about the bullying he is experiencing at school, preparing food for all of them, and tucking them in at night. In order to support them, she works seventy-hour weeks between two different restaurants. She sometimes also sells small quantities of marijuana to other adults.

One night, while she is on her way home, Mary is pulled over for making an incomplete stop at a stop sign. The police officer who pulls her over has a drug-sniffing dog with him, who alerts at her car. The police officer finds a bag with marijuana in it. Mary is arrested and brought to the local jail. She is charged with possession of narcotics with intent to distribute.

What is Mary's trip through the criminal justice system going to look like for her and her family? Certainly, each procedural step—including bail, sentencing, and visitation policies at the correctional facility where she is sent—will affect her ability to provide care for her children. And yet, at each step, consideration of Mary's children will be almost entirely non-existent. At ages thirteen, seven, and two, they are each in a different stage of development with accordingly different needs and capacities. Unfortunately, none of these needs will be considered in any formalized way.

The criminal justice system rips families apart and deprives children from those who provide them financial and emotional care. It does not consider the effects of such incarceration on children or the net societal gain or loss from this incarceration. Although it is easy to understand that certain violent individuals should be incapacitated to protect their children as well as society, it is harder to believe that children of low-level, non-violent offenders are truly better off without their caretakers. Mary is a particularly sympathetic defendant, but she is not unusual. Almost three-quarters of mothers in state correctional facilities in 2004 were incarcerated for non-violent offenses.[2] What is missing from Mary's story is that no one ever asked if her children would be better off without her.

In this Article, I first argue that the interests of the children of incarcerated offenders should be considered in decisions affecting such offenders—including bail, sentencing, and visitation rights hearings—and second, demonstrate how this can be done. The paper proceeds in three Parts. In Part I, I explain why we should care about caretaker incarceration: it harms individual children, it may be criminogenic and therefore harm society in the future, and it disparately impacts children of color. These harms, I argue, threaten the very legitimacy of our criminal justice system and undermine our society's liberal values. In Part II, I make explicit the way in which these interests can

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states. Zach Howard, *Vermont Moves Towards Decriminalizing Small Amounts of Marijuana*, REUTERS (May 13, 2013), http://www.reuters.com/assets/print?aid=USBRE94C0VZ20130513. Despite the typical nature of these aspects of drug law and sentencing, Georgia is outstanding in regards to the proportion of the population behind bars. At the end of 2007, Georgia had the fourth highest incarceration rate in the country. SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS, REPORT OF THE SPECIAL COUNCIL ON CRIMINAL JUSTICE REFORM FOR GEORGIANS 7 (2011).

[2] BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN 4 (2008) *available at* http://www.bjs.gov/content/pub/pdf/pptmc.pdf. See Part I, *infra*, for more statistics on the population of parents within the prison system.

be taken into account by drawing on the experience of family law and the best interests of the child standard. I also attempt to refine the category of "caretaker" offenders who are the focus of this paper, taking guidance from the concept of a "psychological parent," a person who fulfills a child's physical and psychological needs on a continuous basis. Finally, in Part III, I put this standard into use in three contexts that incarcerated caretakers face—bail, sentencing, and visitation policies—and show how consideration of the interests of children can be easily inserted into already existing balancing tests. By building upon these tests, we can create formal protections to help structure the use of prosecutorial and judicial discretion. In this way, the paper proceeds from describing the problem of caretaker incarceration, to proposing a solution to this problem, to applying the proposed solution, and finally, to responding to criticisms of this application.

The most immediate criticism against accounting for the interests of offenders' children during the sentencing process is that such consideration violates the traditional intent and purpose of criminal law. Traditionally, criminal law has four purposes: retribution, incapacitation, deterrence, and rehabilitation.[3] It is considered axiomatic that the needs of third persons should have no relevance in these determinations. This traditional view of the purpose of criminal law is inaccurate. Criminal law already accounts for a broad range of third parties. Considering the best interests of the children of incarcerated caretakers is in no way a radical departure from the criminal justice system we already have in place. Those who believe that third-party interests should never be taken into account in these situations must undertake an overhaul of the system as it exists now.

Generally, consideration of the interests of children is not foreign to the law; other fields of the law have developed mechanisms and principles with which to care for the interests of children. Most relevant to the purposes of this paper, family law insists on legal consideration of children's needs and devotes huge amounts of judicial time to these needs in custody cases, neglect and abuses cases, and many other proceedings. The standards used in family law could be adapted for use in criminal procedure and thereby transform sentencing, bail, and prison visitation determinations into canonical occasions in which the law considers children's interests. This Article argues for consideration before the foreseeable harm to the children of incarcerated caretakers occurs and demands consideration by legal actors in the criminal justice system, not just in the parallel family law proceedings that inevitably occur when incarceration disrupts family life.

## I. WHY SHOULD WE CARE ABOUT CARETAKER INCARCERATION?

Before understanding how we should implement reforms in caretaker criminal procedure, we need a normative account for why we as a society should care about caretaker incarceration. Part I.A revisits Mary's story to demonstrate how a caretaker and her children might experience the criminal justice system. Parts I.B and I.C explore the harms that caretaker incarceration visits upon children, with emphasis on the negative life outcomes of children of incarcerated parents, the criminogenic effects of caretaker incarceration, and the racial disparity in those most harmed by such incarceration. Part I.C additionally seeks to explain why these effects threaten one of liberalism's core

[3] *See* text accompanying notes 170 and 172, *infra.*

tenets: equality of opportunity. Based on these foundations, Part II seeks to determine the capacity of the law and its institutions to consider the harms visited upon children by caretaker incarceration.

### *A. Mary's Story*

From the moment of her arrest, officials of the justice system will make a series of determinations concerning Mary that will profoundly affect her children, yet it is likely these officials will hardly consider the interests of her children at any single decision point. After being arrested, Mary will appear before a judge who will decide whether she should be released on bail and, if so, how high that bail should be set. In Georgia, a state with relatively standard criminal procedures as compared to other states, the judge who sets bail must consider whether Mary poses a significant risk of: 1) fleeing from the jurisdiction of the court or failing to appear in court when required; 2) threat or danger to any person, to the community, or to any property in the community; 3) committing any felony pending trial; and 4) of intimidating witnesses or otherwise obstructing the administration of justice.[4] It is possible Mary's lawyer will present evidence of her caretaking responsibilities to the judge,[5] and it is possible the judge will note such responsibilities in assessing whether Mary poses these risks. It is also possible that the judge will not.

At sentencing, the judge is to consider "all aspects of the crime, the past criminal record or lack thereof, and the defendant's general moral character [as well as] [a]ny lawful evidence which tends to show the motive of the defendant, [her] lack of remorse, [her] general moral character, and [her] predisposition to commit other crimes."[6] As with bail, perhaps the finder of fact may deem Mary's family caretaking responsibilities relevant. But perhaps she does not. Perhaps Mary is one of the lucky offenders who is sent to a diversionary drug court and avoids jail time, and perhaps she is not. If Mary goes to jail, her children might be sent to live with relatives or friends. If Mary is not lucky enough to have such a network, her children will go to foster care. If her children are in foster care for fifteen in the next twenty-two months, the state is required to move to terminate her parental rights.[7]

Mary is sent to one of the three women's prisons in Georgia, more likely than not over 100 miles from home.[8] The distance makes it quite difficult to visit. Further, because visitation is considered a "privilege and not a right," the Georgia Department of

[4] GA. CODE ANN. § 17-6-1 (West 2013).
[5] *See* Howard v. State, 399 S.E.2d 283, 283 (Ga. App. 1990) ("At a bond hearing, evidence was also presented that defendant was 50 years old, married, with three children, had lived most of his life in the area, and had never been convicted of any crime.").
[6] Ansley v. State, 399 S.E.2d 558, 559 (1990).
[7] Adoption and Safe Families Act of 1997 § 103(a)(3), 42 U.S.C. 675(5)(E) (2006). The Georgia statute for terminating parental rights considers that such an order terminates all the parent's rights and obligations with respect to the child, removes any notice entitlement the parent had to adoption proceedings, has no time limit regarding duration, and does not currently contemplate any procedures for reinstating such rights. *See* GA. CODE ANN. § 15-11-93 (West 2013).
[8] BUREAU OF JUSTICE STATISTICS, INCARCERATED PARENTS AND THEIR CHILDREN (2000) at 5 (reporting that 62% of state prisoners are being held in facilities over 100 miles from home; 84% of federal prisoners are over 100 miles from home, with an astounding 43.4% of total federal prisoners being housed over 500 miles from home).

Corrections can bar Mary's family from visiting her for minor disciplinary infractions.[9] That will only be a problem, however, if Mary's children move into the care of someone who is able and willing to take them to visit their mother. Eleven percent of minor children whose mothers are in jail end up in foster care, compared to a little over two percent of those children whose fathers are in jail. This is largely because only 37% of minor children whose mothers are incarcerated are taken care of by their fathers, as compared to the 88.4% of children of incarcerated fathers who live with their mothers.[10] If none of Mary's relatives can care for her children, or if the department of child services or family court does not find the relatives to be fit caretakers, then the children will end up in foster care, perhaps together, and perhaps not.

Why are the best interests of Mary's children hardly considered by any of the actors in the criminal justice system? Unfortunately, the traditional philosophies regarding criminal punishment—retributive and utilitarian—limit our understanding of what role the system already plays in the lives of third parties and what role the system can and should play. These actors may or may not consider the children's interests, but even in the best case, the children's interests will be considered ad hoc by actors with no training in child development. Despite this misalignment, 53.3% of prisoners are parents of minor children; therefore, the criminal justice system is essentially ignoring the interests of an estimated 1,706,600 children.[11] Lest one assume these prisoners were not "involved" parents, it is important to note that in 2004, almost half of state prisoners reported living with their minor children in the month before arrest or just prior to incarceration.[12] Further, this number is likely both over- and under-inclusive. It is over-inclusive because it includes some parents who are not involved in their child's life at all but retain parental rights under law, such as estranged fathers. It is simultaneously under-inclusive because it fails to include non-parents and non-guardians who, while not natural parents, are nonetheless important caretakers in the lives of children.[13]

### *B. Who Is in Prison, and Who Are Their Children?*

In order to determine the scope of the problem, this Part lays out the current state of parental incarceration.[14] Unfortunately, statistics regarding the effects of mass incarceration on children remain hard to find. Research on the effects of mass incarceration on children largely examines parental incarceration rather than the children themselves. However, this information is critical because without understanding the scope and breadth of parental incarceration and its effects, we cannot accurately gauge the necessary response.

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[9] Georgia Department of Corrections, Standard Operating Procedures, Reference Number IIB01-0005 at 18.

[10] PARENTS IN PRISON AND THEIR MINOR CHILDREN, *supra* note 2, at 5.

[11] PARENTS IN PRISON AND THEIR MINOR CHILDREN, *supra* note 2, at 1. Fifty-two percent of state inmates and 63% of federal inmates reported having children. *Id.* Although it is purely speculative to imagine what impact the interests of the child would have in the sentencing of these cases, it remains true that those interests are not systematically, transparently, and evenly considered by courts in these cases.

[12] *Id.* at 4.

[13] For a discussion on determining whose children actually rely upon for their general well-being, that is, who their caretakers are, see Part II.B.i, *infra.*

[14] PARENTS IN PRISON AND THEIR MINOR CHILDREN, *supra* note 2.

Hundreds of thousands of incarcerated persons are parents, and in many instances, their incarceration has profound effects on their young children. In 2007, 1,518,535 people were held in American prisons.[15] An estimated 809,800 of these prisoners, or 53.3%, were parents of minor children.[16] Prisoners have an estimated 1,706,600 minor children, which accounts for 2.3% of the U.S. resident population under age eighteen.[17] Fifty percent of these children are under the age of ten.[18] Female prisoners are more likely than male prisoners to be parents with 61.7% of female and 51.2% of male prisoners being parents.[19] Furthermore, many of these parents are not violent offenders. Among male prisoners, public-order and drug offenders are more likely to be parents than violent and property offenders.[20] Similarly, among state female prisoners, violent offenders were least likely to be parents.[21] Of incarcerated fathers, 45.2% were incarcerated for a violent offense, 23.9% for a drug offense, 17% for a property offense, and 13.9% on a public order offense.[22] Of incarcerated mothers in state prisons, 31.2% were jailed for drug offenses, 30% for property offenses, 27.5% for violent offenses, and 11.2% for public order offenses.[23] Thus, hundreds of thousands of children experience the incarceration of a parent arrested for something other than a violent crime.

### *C. The Negative Effects of Parental Incarceration*

#### 1. Harm to Individual Children

Interest in the effect of parental incarceration on children is a relatively recent phenomenon; for this reason, some criminologists have referred to children as the "invisible" victims of mass incarceration.[24] Because of this, there is a lack of rigorous studies and reliable data about this population. But despite the lack of research, policymakers often assume that parental incarceration harms children. Congress recognized in the Second Chance Act of 2004 that "[t]he long-term generational effects of a social structure in which imprisonment is the norm and law-abiding role models are absent are difficult to measure but undoubtedly exist."[25] The Family Unity Demonstration

[15] *Id.* at 1.
[16] *Id.*
[17] *Id.* The percentage varies dramatically based on race. For instance, black children (6.7%) were seven and a half times more likely than white children (0.9%) to have a parent in prison. The racial disparity in parental incarceration will be discussed further in Part I.B.ii, *infra*.
[18] *Id*. at 3.
[19] *Id.*
[20] *Id.* at 4. This is true for both state and federal male prisoners.
[21] *Id.* No patterns were discerned for female federal prisoners.
[22] *Id.*
[23] *Id.*
[24] *See, e.g.*, Tanya Krupat, *Invisibility and Children's Rights: The Consequences of Parental Incarceration*, 29 WOMEN'S RTS. L. REP. 39 (2007); Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133, 134 (2008)("Children of prisoners have been called the 'forgotten victims' of crime, the 'orphans of justice,' the 'hidden victims of imprisonment,' 'the Cinderella of penology' and the 'unseen victims of the prison boom'") (internal citations omitted); CENTRE FOR CHILDREN AND FAMILIES IN THE JUSTICE SYSTEM, INVISIBLE VICTIMS: THE CHILDREN OF WOMEN IN PRISON (2004).
[25] S. Res. 2789, 108th Cong. (2004).

Project, another congressional initiative, seeks to "alleviate the harm to children and primary caretaker parents caused by separation due to the incarceration of the parents."[26]

In many ways, parental incarceration is much like other parental loss, such as the death, divorce, or moving away of a parent.[27] Children often experience the loss of a parent as a traumatic event, and trauma diverts children's energy from developmental tasks, which may further result in delayed development, regression, or other maladaptive coping strategies.[28] Children consequently suffer collateral harms from parental incarceration and the trauma it can create.[29] Children find it even more difficult to cope in situations characterized by uncertainty, as is often the case with parental loss or incarceration. In those situations, children may not know who is to care for them, how long they will receive care, and when and if the missing parent will return. [30]

It could be, however, that parental incarceration wreaks a different degree of havoc on the lives of children. Research has found parental imprisonment to be a strong risk factor for antisocial behavior, future offending, mental health problems—including depression and anxiety—drug abuse, school failure, and unemployment. [31] Other issues specific to the incarceration of a caretaker, such as the stigma children face after a caretaker is incarcerated, are hard to quantitatively assess but have also been found to negatively impact children's well-being.[32]

Some carefully-crafted studies support the conclusion that paternal (as opposed to parental) incarceration has detrimental economic and psychological effects on many children. Though limited in its focus on fathers, this research implicates the general concerns of parental incarceration broadly. A meta-review of sociological data on parental incarceration by Professors Christopher Wildeman, Sara Wakefield, and Kristin Turney concluded that "paternal incarceration may have negative consequences for child well-being above and beyond paternal absence, at least for some vital outcomes."[33] Another study has found that, across all age groups, paternal incarceration increases aggression, delinquency, anxiety, and depression in children.[34]

Many studies suggest that the impact of maternal incarceration is different than that of paternal incarceration; though studies disagree as to whether the effects are more or less harmful for the children of incarcerated mothers.[35] Any difference may be caused

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[26] 42 U.S.C.A. § 13881.
[27] Jeremy Travis & Michelle Waul, *Prisoners Once Removed: The Children and Families of Prisoners*, *in* PRISONERS ONCE REMOVED 1, 16 (Travis and Waul eds., 2003).
[28] *Id.*
[29] *See, e.g.*, NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED (2005).
[30] *Id.*
[31] Joseph Murray & David P. Farrington, *The Effects of Parental Imprisonment on Children*, 37 CRIME & JUST. 133, 135 (2008); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1284 (2004).
[32] Travis & Waul, *supra* note 27, at 16.
[33] Christopher Wildeman, Sara Wakefield, & Kristin Turney, *Misidentifying the Effects of Parental Incarceration? A Comment on Johnson and Easterling*, 75 J. MARRIAGE & THE FAM. 252, 256 (2013). *See also* Amanda Geller et al., *Beyond Absenteeism: Father Incarceration and Childhood Development*, Fragile Families Working Paper WP09-20-FF (July 2010) (concluding that incarceration places children at risk through family hardships including and beyond parent-child separation).
[34] Sara Wakefield & Christopher Wildeman, *Mass Imprisonment and Racial Disparities in Childhood Behavioral Problems*, 10 CRIMINOLOGY & PUB. POL'Y 793, 800-01 (2011).
[35] *Compare* Myrna S. Raeder, *Gender-Related Issues in A Post*-Booker *Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 703-04 (2006), *and* Dorothy E. Roberts, *Criminal Justice and Black Families:*

partially by the fact that mothers are more often the children's primary caretakers prior to incarceration. Over 55% of incarcerated women, as compared to 35.5% of men, reported living with their children in the month prior to arrest.[36] Almost 42% of incarcerated mothers reported being the only parent in the household prior to incarceration, as compared to 17.2% of incarcerated fathers.[37] This means that when a father is incarcerated, very often his child may have already been living with her mother, or may be able to move to her mother's home. Over 88% of incarcerated fathers reported that their child at the time was living with the child's mother, as opposed to 37% of incarcerated mothers reporting that their child at the time was living with the father.[38] As a result, when a mother is incarcerated, children will much more often have to be cared for by a grandparent, a more distant relative, or friends or move in to foster care. This underscores an important point: although the living situations of some children prior to parental incarceration may not be ideal, the alternative living situation may well be worse. There is much evidence to suggest that the foster care system in the United States is deeply flawed,[39] yet "parental bonds are blithely severed without checking to see if anything is substituted in their place."[40] Foster care is supposed to be a temporary placement for children but has become "a long-term state of uncertainty for many children," with approximately 24,000 teenagers a year aging out of the system without ever being placed with a permanent family.[41] One recent study concluded that there are "better outcomes when children on the margin of placement [in foster care] remain at home [with family]."[42]

Parental incarceration also increases the economic burden on these children and their remaining caretakers, which likely leads to and exacerbates the negative impact of the trauma of separation itself. Prisoners cannot contribute financially to their children.[43] This is especially problematic given that about half of parents in state prison provided the

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*The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1016 (2001), *with* Wildeman, Wakefield & Turney, *supra* note 33.

[36] PARENTS IN PRISON AND THEIR MINOR CHILDREN, *supra* note 2 at 4.

[37] *Id.*

[38] *Id.*

[39] *See, e.g.* PEW COMM'N ON CHILDREN IN FOSTER CARE, TIME FOR REFORM: TOO MANY BIRTHDAYS IN FOSTER CARE 2 (2007) ("Foster care is necessary to protect vulnerable children, but no one would argue that being in foster care is better than living with a safe, permanent family of one's own. While in foster care, children are wards of the state, waiting in limbo for a court to decide what will happen to them.").

[40] Raeder, *supra* note 35, at 703-4.

[41] PEW COMMISSION ON CHILDREN IN FOSTER CARE, *supra* note 39, at 1. Aging out is the process by which youths 18 and older transition from foster care to independent living.

[42] James Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1584 (2007). *See also* Christopher A. Swann & Michelle Sheran Sylvester, *The Foster Care Crisis: What Caused Caseloads to Grow?*, 43 DEMOGRAPHY 309 (2006) (concluding that incarcerations were the largest contributor to the rise in foster care caseloads from 1985 to 2000). *But see* Lawrence M. Berger et. al., *Estimating the ''Impact'' of Out-of-Home Placement on Child Well-Being: Approaching the Problem of Selection Bias*, 80 CHILD DEVELOPMENT 1856, 1871 (2009) (concluding that "out-of-home placement appears to neither place additional burden on the already vulnerable children who enter state custody nor contribute to improved well-being for these children, at least in terms of short term changes in cognitive skills and behavior problems."). *See also* Christopher A. Swann and Michelle Sheran Sylvester, *The Foster Care Crisis: What Caused Caseloads to Grow?*, 43 DEMOGRAPHY 309 (2006) (concluding that incarcerations were the largest contributor to the rise in foster care caseloads from 1985 to 2000).

[43] Roberts, *supra* note 35, at 1016.

primary financial support for their minor children before they were incarcerated.[44] Childhood poverty is correlated with many adverse outcomes such as substandard housing, homelessness, inadequate nutrition and food insecurity, inadequate child care, lack of access to health care, living in unsafe neighborhoods, attending under-resourced schools, poor academic achievement, school dropout, abuse and neglect, behavioral and socio-emotional problems, physical health problems, and developmental delays.[45]

The causal relationship between parental incarceration and adverse outcomes for children is complicated because it is hard to isolate the effects of incarceration from other kinds of disadvantage. Almost half of parents in prison report having had a close family member incarcerated, 56.5% report having mental health issues, and 67.4% report having a substance dependence or abuse problem.[46] Over 63% of incarcerated parents reported earning less than $2,000 a month prior to incarceration.[47] Yet, some studies show that parental imprisonment increases the risk of the negative developmental, psychological, health, and academic outcomes described above even when they control for parental criminality, low family income, poor parenting, and parental traits such as substance abuse and mental health issues.[48]

We should not disregard the effect of these children's parents' incarceration simply because many of the children already live in fragile families. In fact, it should concern us even more; there is no reason to blithely heap additional difficulties upon children who were having difficulties before parental incarceration. In other words, parental incarceration "has the effect of additionally burdening already vulnerable children."[49] When considering the relative importance of this incarceration, we should recognize that for this already vulnerable population, "the increase in mental health problems reaches clinical levels."[50]

Lastly, parental incarceration can harm children's emotional and intellectual development in ways that are hard to quantify. At its best, a family provides children with continuous care, which fosters emotional, moral, and intellectual growth and identity.[51] Parents, as the providers of this care, are necessary to serve these functions.[52] If a parent who is able to provide such care is incarcerated and the child is placed with a person who is unable to provide such care, the child may suffer developmental and emotional harm. Whether or not a parent was in fact providing such care is, of course, a critical issue, and the following Part discusses methods for determining whether parents are providing this care.

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[44] PARENTS IN PRISON AND THEIR MINOR CHILDREN, *supra* note 2, at 5.
[45] AMERICAN PSYCHOLOGICAL ASSOCIATION, EFFECTS OF POVERTY, HUNGER, AND HOMELESSNESS ON CHILDREN AND YOUTH (2013).
[46] PARENTS IN PRISON AND THEIR MINOR CHILDREN, *supra* note 2, at 7.
[47] *Id.* at 17.
[48] Candace Kruttschnitt, *The Paradox of Women's Imprisonment*, 139 DAEDALUS 32, 36 (2010).
[49] Wakefield & Wildeman, *supra* note 34 at 800-01.
[50] *Id.*
[51] For a paradigmatic account of continuity of care, see JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1979).
[52] *Id.*

### 2. The Disparate Impact on Minority Children

Not all children are equally likely to experience the incarceration of a parent and its attendant adverse consequences. Mass incarceration disproportionately affects minority communities. Black Americans are more likely to go to jail than whites, and therefore, their children are more likely to be affected by this loss. This racial disparity compounds the threat to our society presented by parental incarceration.

One in 40 white children born in 1978 and 1 in 25 white children born in 1990 had a parent in prison at some point in their lives. Conversely, 1 in 7 black children born in 1978 and 1 in 4 black children born in 1990 had a parent in prison.[53] These disparate parental incarceration rates contribute to the disproportionate removal of black children from their parents' custody to state control.[54] Like many forms of childhood disadvantage, "parental imprisonment has emerged as a novel—and distinctively American—childhood risk that is concentrated among black children and children of low-education parents."[55] Given that parental incarceration has negative effects, and black children and other minority groups are more likely to experience these negative effects,[56] parental incarceration exacerbates already existing racial inequalities.

There is persuasive evidence to suggest that mass incarceration is criminogenic, or leads to more crime and criminality.[57] Some sociologists have concluded that "[t]he experience of prison itself may increase the likelihood of reoffense postrelease."[58] This effect is attributed to the routinization and restriction of prison life and isolation from family, friends, and other social supports.[59] Further, the inability of a released inmate to find a place to live and gainful employment results in the inmate having little access to legitimate work, which can lead to a return towards criminal behavior.[60] Additionally, criminologists have found that the incarceration and release of prisoners "may disrupt the social networks of a community by affecting family formation, reducing informal control of children and income ties to families, and lessening ties among residents. These factors, which lead to neighborhood instability and low informal social control, have been linked to higher crimes rates."[61] Community vulnerability and incarceration combine to create negative feedback loops of increased crime by increasing "the spatial concentration of

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[53] Christopher Wildeman, *Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage,* 46 DEMOGRAPHY 265, 265 (2009). There is also a disparity between parental incarceration rates between white and Hispanic children, but currently more information is availablefor black children.
[54] Roberts, *Criminal Justice and Black Families*, *supra* note 35, at 1009.
[55] Wildeman, *supra* note 53.
[56] One study suggests that there is a racial disparity in the behavioral issues children experience after the incarceration of a parent, with black children displaying greater behavioral issues. Wakefield & Wildeman, *supra* note 34, at 803.
[57] "Criminogenic." Merriam-Webster Online Disctionary, http://www.merriam-webster.com/dictionary/criminogenic; Paul Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 J. MARSHALL L. REV. 911, 919 (1997); DONALD BRAMAN & JENIFER WOOD, *From One Generation to the Next: How Criminal Sanctions are Reshaping Family Life in Urban America*, *in* PRISONERS ONCE REMOVED 157, 158-69 (Travis & Waul eds., 2003).
[58] Lynne E. Vieraitis, Tomislav V. Kovandzic & Thomas B. Marvell, *The Criminogenic Effects of Imprisonment; Evidence from State Panel Data, 1974-2002*, 6 CRIMINOLOGY & PUB. POL'Y 589, 591 (2007).
[59] *Id.* at 590-91.
[60] *Id.* at 591-92.
[61] *Id.* at 590.

disadvantage."[62] In sum, mass incarceration, as a whole, breeds further crime in the communities it disproportionally affects: "Every family, every household, every individual in these neighborhoods has direct personal knowledge of the prison. . . . Imprisonment ceases to be the fate of a few criminal individuals and becomes a shaping institution for whole sectors of the population."[63] The data above suggests that parental incarceration, as part of mass incarceration, may harm children by increasing crime in their own neighborhoods, another result that disproportionately affects minority children.

### 3. Parental Incarceration and the Liberal State

Several different normative strands of liberalism all show that this level of caretaker incarceration perpetuates inequality. Liberal theories grapple with ideal equality and patrol the boundaries of permissible inequalities.[64] An ideal account of fully realized equality is beyond the scope of the paper, but instead I draw on three different strands of liberalism that use different parameters to measure equality as well as opportunity: Dworkin's theory of equality of resources, Nussbaum's theory of rights to certain capabilities, and Rawls's primary goods theory. Together, they provide a cluster of different, but related, conceptions of what it is to enjoy "fair equality of opportunity."[65] This central liberal tenet stands for the ideal "that every individual has an equal chance to live a life of her own choosing."[66] The incarceration of caretakers coupled with the "unchosen" and debilitating consequences of the incarceration on children are fundamentally incompatible with these theories of liberalism.

The first strand of liberalism focuses on equality of resources and on responsibility. In Dworkin's view, only when every citizen has a "fair" share of resources can each have a meaningful opportunity to choose their life plan. This theory distinguishes between a person's choices, which we honor as a matter of respect, and the circumstances beyond their choosing, both of which affect the amount of resources a person commands.[67] The theory explains that we as a society should hold people responsible for the consequences of their choices, the results of "option luck", but not the consequences of their circumstances, the results of "brute luck."[68] Dworkin argues that some people face certain circumstances that are impossible to insure against and that it is profoundly unfair to hold individuals responsible for the results of those circumstances. Having one's caretaker incarcerated is one example of brute luck. The negative outcomes correlated with parental incarceration discussed above[69]—childhood poverty, school failure, and mental health issues—mean that children whose parents are incarcerated do

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[62] Robert J. Sampson & Charles Loeffler, *Punishment's Place: The Local Concentration of Mass Incarceration*, 139 DAEDALUS 20, 27 (2010); *see also* Roberts, *supra* note 35, at 1009.
[63] DAVID GARLAND, *Introduction: The Meaning of Mass Imprisonment*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCE 1 (2000).
[64] *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1971) (providing an account of two principles of justice); JOHN RAWLS, POLITICAL LIBERALISM 137 (Expanded Ed. 2005) (articulating a principle of liberal legitimacy to determine what forms of state power cannot be justified).
[65] RAWLS, A THEORY OF JUSTICE, *supra* note 64, at 302.
[66] Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1, 2 (2008).
[67] RONALD DWORKIN, SOVEREIGN VIRTUE (2000).
[68] *Id.* at 73-77.
[69] *See supra* Part I.C.i

not have the same opportunities as their peers, through no fault of their own. From an equality-of-resources view, it is unjust for some children to lose access to the basic developmental resources they need due to their brute luck.

Another related theory focuses on capabilities and development of all persons. Martha Nussbaum explains that each person should have the right to certain central human capabilities, such as being able to reason practically, to have attachments to people and things, and to be treated as a dignified being.[70] We can think of the rights to develop into an autonomous adult as one of these capabilities; such development is necessary in order to make use of resources. Anne Dailey takes this perspective, focusing on children's development rights, the "opportunity to acquire the skills of adult autonomy."[71] She writes that children have the right to develop the "attributes of mind associated with the capacity for autonomous decision-making."[72] She reviews psychological literature and concludes that the capacity of autonomous choice—which includes the skills of cognitive thinking, emotional self-mastery, and strong reality-testing skills—is fostered by continuous care-giving.[73] In this view, by removing the person who could provide such care, a society cripples the chances that these children will become fully autonomous adults because they will not possess the cognitive and non-cognitive skills they need to be effective decision-makers. Caretaker incarceration robs children of their ability to develop into independent adults by preventing them from developing the capabilities essential to function as autonomous adults. Thus, within a theoretical framework that cares about such capability development, caretaker incarceration is unjust.

Finally, the problem of caretaker incarceration can be conceived of in terms of another liberal theory that concerns itself with primary goods. Rawls defines "primary goods" as "things . . . a rational [person] wants whatever else [that person] wants."[74] In other words, primary goods are things that a typical individual would desire regardless of their station in life. Elizabeth Brake conceives of "the social bases of caring relationships" as primary goods.[75] As Brake explains, "[m]aterial caretaking for children is necessary for the development and exercise of their moral powers and pursuit of conceptions of the good. None of us would have moral powers, or conceptions to pursue, were it not for care as children."[76] The children of incarcerated caretakers are deprived of these caring relationships when their parents are removed from them. According to this view of liberalism, these children are therefore worse off, because they lack this primary good.

The liberal state assigns important basic goods and opportunities through the family as an institution, with the state as a backdrop.[77] Looking at the problem of caretaker incarceration through any of the three theories of liberalism—Dworkin's

[70] MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 77-80 (2000).
[71] Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2145 (2011).
[72] *Id.* at 2146.
[73] *Id.* at 2151-54.
[74] RAWLS, A THEORY OF JUSTICE, *supra* note 64, at 79.
[75] Elizabeth Brake, *Minimal Marriage: What Political Liberals Implies for Marriage Law*, 120 ETHICS 302, 326 (2010).
[76] *Id.* at 328.
[77] *See* Alstott, *supra* note 66; SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY (1991).

resource distribution view, Nussbaum's capabilities approach, or Rawls's primary good framework—substantial, systematic, and discriminatory interventions such as caretaker incarceration deeply implicate the legitimacy of the liberal state by denying the children of incarcerated caretakers the same equality of opportunity as children who have not experienced caretaker incarceration.

## II. WHAT ARE THE BEST INTERESTS OF THE CHILD?

Before we may consider the "interests" of children in decisions regarding their incarcerated or soon-to-be-incarcerated caretakers, we must first be able to identify these "interests." This task cannot be completed without referring to the seemingly ubiquitous "best interests of the child standard" (BICS) of family law. Depending on the jurisdiction, BICS determinations typically take into account a variety of factors, such as the health and safety of the child and integrity of the family, to assess the type of judicial actions and assignments of responsibility that will best serve a child.[78] The BICS has faced criticism since its inception, with its detractors claiming that it is arbitrary, value-laden, and unpredictable.[79]

Yet, even while promulgating a set of rules supposedly in opposition to the BICS, ALI acknowledged that "there is consensus that the law should seek to promote the child's best interests."[80] BICS retains this consensus because it is not as much a standard as an ideal. In the fifty states, District of Columbia, and the American territories, courts are charged with making custody, adoption, and termination of parental rights decisions in the child's best interest.[81] As one scholar, who traced the history and evolution of the BICS noted, the BICS is "at once the most heralded, derided, and relied upon standard in family law today. It is heralded because it espouses the best and highest standard; it is derided because it is necessarily subjective; and it is relied upon because there is nothing better."[82] For practical purposes, BICS is the standard that courts predominantly use, and therefore, it is part of the existing framework that courts can build on to consider the rights of children of incarcerated caretakers.

This Part first describes the general idea and implementation of the BICS. Next, it explores the criticisms of the BICS. Finally, it explores the application of the standard to children of incarcerated parents, concluding that some of its shortcomings are less salient in this context than in the traditional applications of the BICS to family law. In this

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[78] *See, infra* Part II.A.

[79] *See, e.g.*, Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 81-82 (1995) (claiming that prejudices often influence BICS determinations); Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 279 (1987) ("[T]he best interests of the child' is not a standard, but a euphemism for unbridled judicial discretion."). In fact, when the American Law Institute promulgated its new "Principles of the Law of Family Dissolution," it claimed that the BICS is "uniformly disparaged." American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 2, 2-3 (2001).

[80] American Law Institute, *Principles of the Law*, *supra* note 79, at 3.

[81] Child Welfare Information Gateway, Determining the Best Interests of the Child, Summary of State Laws (2010), *available at* http://www.maine.gov/legis/opla/BIofChildSumStateLaw.pdf.

[82] Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 337 (2008).

context as well as in family law, I conclude that we should strive to implement the best, most concrete form of the BICS rather than abandon it.[83]

### *A. What Is the Best Interests of the Child Standard?*

Every American jurisdiction requires the use of some form of the BICS in a number of contexts: custody, placement or adoption, termination of parental rights, and other critical life issues affecting children.[84] As the Child Welfare Information Gateway aptly summarizes in its review of the BICS statutes across America, there is no "standard definition" for the BICS, but such determinations are "generally made by considering a number of factors related to the circumstances of the child and the circumstances and capacity of the child's potential caregiver(s), with the child's ultimate safety and well-being as the paramount concern."[85] Eighteen states and the District of Columbia list in their statutes specific factors for courts to consider in making determinations regarding the best interests of the child.[86] These guidelines range from Maine's exhaustive twenty-two-factor list[87] to Kentucky's six-factor list.[88] These factors are not weighted in importance. In some states, courts must consider all factors; in some states, courts may consider all factors; and in some states, courts may consider all other relevant factors. Twenty-six[89] other states have what the Gateway calls "guiding principles of best interest determinations," which range from the detailed to the perfunctory.[90] The five remaining state statutes contain more general exhortations to consider the best interests of the child. With such disparate and varied tests, this ubiquitous standard lacks a clear meaning and requires refinement before application to the case of incarcerated caretakers.

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[83] Barbara Bennett Woodhouse, *Child Custody in the Age of Children's Rights: The Search for A Just and Workable Standard*, 33 FAM. L.Q. 815, 815 (1999) ("[T]he future of custody law lies in perfecting the best interest standard, not in abandoning it for simpler alternatives that lack a child-centered justification.").
[84] Child Welfare Information Gateway, *supra* note 81, at 1.
[85] Child Welfare Information Gateway, *supra* note 81, at 2.
[86] CONN. GEN. STAT. ANN. § 45a-719 (West 2013); DEL. CODE ANN. tit. 13, § 722 (2013); D.C. CODE § 16-2353; FLA. STAT. ANN. § 39.810 (West 2006); 705 ILL. COMP. STAT. ANN. 405/1-3 (West 2013); KY. REV. STAT. ANN. § 620.023 (West 2012); ME. REV. STAT. ANN. tit. 22, § 4055(2)-(3) (2010); MD. CODE ANN. FAM. LAW § 5-525(f)(1) (West 2011); MASS. GEN. LAWS ANN. CH. 119, § 1 (West 2008); MICH. COMP. LAWS ANN. § 722.23 (West 2013); N.D. CENT. CODE ANN. § 14-09-06.2(1); OHIO REV. CODE ANN. § 2151.414(D)(1) (West 2009); OR. REV. STAT. ANN. § 107.137(1); TENN. CODE ANN. § 36-1-113; TEX. FAM. CODE ANN. § 263.307 (West 2013); VT. STAT. ANN. tit. 33, § 5114 (West 2013); VT. STAT. ANN. tit. 15A, § 3-504(c) (West 2013); VA. CODE ANN. § 20-124.3 (West 2012); WIS. STAT. ANN. § 48.426(2)-(3) (West 2013); WYO. STAT. ANN. § 20-2-201 (West 2013).
[87] ME. REV. STAT. tit. 19-A, § 1653 (2012).
[88] KY. REV. STAT. ANN. § 620.023 (West 2012).
[89] Child Welfare Information Gateway, *supra* note 81, at 2.
[90] *See, e.g.*, Alaska Stat. 47.05.065 ("It is in the best interests of a child who has been removed from the child's own home for the state to apply the following principles in resolving the situation: (A) the child should be placed in a safe, secure, and stable environment; (B) the child should not be moved unnecessarily; (C) a planning process should be followed to lead to permanent placement of the child; (D) every effort should be made to encourage psychological attachment between the adult caregiver and the child; (E) frequent, regular, and reasonable visitation with the parent or guardian and family members should be encouraged; and (F) parents and guardians must actively participate in family support services so as to facilitate the child's being able to remain in the home; when children are removed from the home, the parents and guardians must actively participate in family support services to make return of their children to the home possible.").

### *B. The Best Interests of the Child Standard in the Context of Incarcerated Parents*

With the various standards discussed above, which BICS should be applied to incarcerated caretakers and parents? Certainly some iterations of the standard are better than others. The BICS is not perfect, and any "alternative" is simply a refined version of the core concept of the BICS.

The BICS that should be used in the context of caretaker incarceration is the same BICS that should be used elsewhere: one that is a clear legal standard of effective and useful guidelines that also assigns weight to various factors and requires judges to articulate their determinations regarding each of them. It should explicitly grapple with issues of equality and evolving social science research, taking into account the entire network of care within which the child exists, while still being explicitly child-focused.

Under this standard, the needs of children should be considered in two steps when a caretaker is facing incarceration. First, the court must ask if the person to be incarcerated is the child's psychological parent. If so, the court must assess the child's current living situation with the parent and compare it with the living situation the child would face if her caretaker were incarcerated. In the latter step, it is critical that the court distinguish the defendant's offense from her ability to provide quality care for her child.

#### 1. Is the Person Incarcerated a "Psychological Parent"?

In order to determine when to use the BICS standard discussed above, a court must determine whether the incarcerated person serves as a true caretaker to the child. One prominent conceptualization of who is really caring for a child is that of the "psychological parent," which was pioneered by Joseph Goldstein, Anna Freud, and Joseph Solnit.[91] A psychological parent is one who "on a continuing day-to-day basis through interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs."[92] Based on this definition, many psychological parents may not be the biological or adoptive parents of these children. The focus on biological parents in family law often excludes those who truly care for children such as grandparents, step-parents, and same-sex partners.[93] To more accurately reflect a child's interests, we must more accurately focus on the systems of care-giving that exist in our society. This requires inquiry into "who does the caring work, who is in need of care, and how the needs of both groups may be provided for."[94] This starting point would shift much of the analysis regarding children away from status-based definitions of biological or adoptive parents and towards care-based definitions of psychological parents. If we are to recognize that "care and care-giving relationships are central to the lives of children, then this care should be clearly at the center of decisions—legal and political—about their lives."[95] Any real theory that accounts for the effects of incarceration on children

[91] JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, BEFORE THE BEST INTEREST OF THE CHILD 98 (1979).
[92] *Id.*
[93] *See, e.g.*, Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 888-912 (1984).
[94] Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to A Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 85 (2004).
[95] *Id.*

must identify these psychological parents and delineate the limits of who the law can recognize as giving care.

It is essential that the law recognize more diverse family forms as the traditional nuclear family no longer reflects reality.[96] For instance, the number of children under 18 who are living with two married parents has declined from 87% to 64%.[97] Almost 30% of children who live with at least one parent live with a parent who is divorced or has never been married.[98] As the shape of the American family evolves, courts' ideas of what constitutes a family must evolve as well.

Some courts have recognized non-biological or adoptive parents as parents using the psychological parent or de facto parent doctrine. A typical formulation of the psychological parent doctrine weighs four factors:

> (1) that the biological or adoptive parent consented to, and fostered, the [third party's] formation and establishment of a parent-like relationship with the child; (2) that the [third party] and the child lived together in the same household; (3) that the [third party] assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the [third party] has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[99]

Similarly, a de facto parent has been defined as an individual "who has no biological relation to the child, but has participated in the child's life as a member of the child's family," who lives with the child, and who "with the consent and encouragement of the legal parent, perform[s] a share of caretaking functions at least as great as the legal parent."[100] It is encouraging that some courts, and legislatures, have recognized a non-biological parent may function as a child's primary caretaker and should therefore have standing in certain legal disputes.[101] However, the doctrines have been very divisive and have not been adopted by most jurisdictions.[102] Their uneven application puts children with incarcerated caretakers in jeopardy.

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[96] *See* FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 2007, 87 tbl.FAM1.B (2007) (showing that in 2004 only sixty percent of America's children lived with two married biological or adoptive parents).
[97] PEW RESEARCH CENTER, THE DECLINE OF MARRIAGE AND THE RISE OF NEW FAMILI*ES* 55 (2010).
[98] *Id.* at 59.
[99] *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 435-36 (Wis. 1995).
[100] *Id.* at 700.
[101] *See, e.g.*, IND. CODE. ANN. 31-17-2-8.5 (Consideration of *de facto* custodian factors);
[102] *See In re* Parentage of L.B., 122 P.3d 161, 174–75 (Wash. 2005) (noting several jurisdictions that have recognized psychological or de facto parentage and several that have rejected the doctrines); *Id.* at 175 n. 23 (same); Petition for a Writ of Certiorari at 11–24, Britain v. Carvin, 547 U.S. 114, No. 05-974, 2006 WL 263544 (Feb. 1, 2006) (discussing the "pervasive conflict" among the states on the issue of de facto parentage and describing the holdings of the states on both sides of the issue); HOMER H. CLARK, JR. & ANN LAQUER ESTIN, CASES AND PROBLEMS ON DOMESTIC RELATIONS 1031 (7th ed. 2005) (listing several cases that extend standing to psychological parents as well as several cases that deny such standing).

Beyond uneven application, these definitions are too narrow to cover all caretakers. Care does not only occur in nuclear families and does not only occur between children and parent-like adults. To be truly attuned to the needs of children, the law must begin to recognize networks of care. Professor Melissa Murray states that, "[t]his preoccupation with parenthood as the model for care-giving and the inability to recognize more broadly networks of care" leads to inaccurate understandings of the needs of children.[103] The law cannot support the maintenance of care networks it does not recognize, however critical they are to the stability of a child's life.

A broader conception of "caretaker" leads to knotty challenges when applied. For example, a broad conception of caretaker requires us to consider such questions as whether a nanny for two children of very wealthy parents is the true psychological parent of a young child and whether a court should consider the effects of her incarceration in a bail or sentencing hearing. Similarly, if a child has many loving but unrelated adults who create a thick and supportive network of care, a broad conception of caretaker would require us to consider whether the effect on the child would not be legally cognizable if her mother were incarcerated because of the existence of this network. Some of these questions will be answered by creating a robust BICS. Some of these questions will have to be answered prudentially. For administrative reasons as well as the possibility of perverse incentives, not every adult who has close psychological ties with a child and who provides for her in some way would be able to claim the benefits of that relationship when facing incarceration. For the purposes of this paper, I must simply flag this issue and move forward—determining exactly what kinds of adults should be viewed as caretakers is an exercise beyond the scope of this paper. It is a worthy exercise, though, and we should be aware that however we choose to define caretaker or parent, we will certainly be over-inclusive and under-inclusive at different times.

2. What is the Child's Current Living Situation—and Future Options?

In decisions affecting a caretaker facing incarceration, courts should assess the current situation of the child as well as the living situation the child faces in the event her caretaker is incarcerated. The best interests of children do not exist in a vacuum. As Goldstein and his co-authors point out, they live within a set of often less-than-ideal alternatives.[104] Consequently, instead of comparing the living situation that children would face with each of their parents, courts must compare the situation that each child currently faces to the most realistic alternative. Factors such as "the stability of any proposed living arrangements of the child," and "the motivation of the parties involved and their capacity to give the child love, affection, and guidance," are necessary considerations for courts to realistically determine what is best for the child. At least one state has recognized the importance of these factors and has included both in their BICS statute.[105]

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[103] Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 387-88 (2008).

[104] GOLDSTEIN ET. AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE xii (1996). ("'[B]est' is no longer an option. Realism requires that we look instead to the *least detrimental* placement.") (emphasis in original).

[105] MICH. COMP. LAWS ANN. § 722.23 (West 2013).

It is true that some children of incarcerated parents may potentially be in a better situation with their parents in detention, even if faced with foster care. The BICS in any context is supposed to help courts recognize harmful situations, not simply pick among good options. A parent who is not fit to parent is certainly no more fit to do so when faced with imminent incarceration. In fact, even though some studies have shown that parental incarceration is harmful to children, others also show that it can sometimes benefit children. [106] One study in particular showed that paternal incarceration does not harm children if the father has a history of domestic violence or is incarcerated for a violent offense.[107] However, if the presence of a nonviolent offending caretaker can benefit children, many children may be harmed by parental incarceration. After all, many offenders are not arrested for violent crimes. In 2010, 52% of state prisoners and fewer than 10% of federal prisoners were incarcerated for a violent offense.[108] Further, many of those imprisoned are first-time offenders and are not chronic offenders.[109] Most caretakers, therefore, do not fall into the categories of violent or abusive offenders whose presence is detrimental to their children's well-being.

All this is to say that parents who have committed criminal offenses may still very well be fit parents, or at least their children would benefit from regular contact with them. Despite prevailing assumptions about criminality's relation to parental fitness, the literature shows that many parents have good parent–child relationships with their children despite their criminal involvement.[110] As such, when courts consider potential caretaker incarceration, they must accurately weigh the benefits provided by a caretaker against the real alternative living situation of the child.

### 3. Grappling with Criticism

As discussed above, many scholars have criticized the BICS for being arbitrary, unpredictable, and value-laden.[111] However, when we look at the diversity of incarnations of the BICS, we see that the BICS is not a single concept implemented in a unitary way; rather, "the [BICS] standard merely means that the welfare of the child is of paramount concern to the court and ought to be to the parents as well."[112] Thus, the criticisms discussed below depend more or less on the legislation and case law surrounding a state's use of the BICS.

The salience of the criticisms of the BICS depends on context, and in the case of caretaker incarceration, many criticisms of the BICS are mitigated or simply do not apply. For example, the general presumption against state intrusion into family relationships for competence reasons is largely inapplicable here because the state has

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[106] See Part I.C.i. *infra.*
[107] Wakefield & Wildeman, *supra* note 34.
[108] BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010 1 (2010).
[109] BUREAU OF JUSTICE STATISTICS, PROFILE OF JAIL INMATES IN 2002 (2002) (finding that 26.9% of jail inmates in 2002 had never been sentenced before).
[110] Irwin Farfinkle, Sara S. McLanahan & Thomas L. Hanson, A Patchwork Portrait of Nonresident Fathers 39, *in* FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT AND ENFORCEMENT (Irwin Garfinkel et. al. eds., 2001) ("[W]hile many young fathers have trouble holding a job and may even spend time in jail, most have something to offer their children.").
[111] See *supra* notes 79-82.
[112] Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 373 (2008).

already intruded through arrest and potential incarceration of the caretaker.[113] In contrast to adoption or termination hearings, applying the BICS to caretaker incarceration could only serve to keep the family intact or more intact. Furthermore, unlike most cases involving the BICS, battles associated with parental incarceration are often more about access than custody. Although critics may rightfully be skeptical about the courts' competence to choose between two fit parents, it is apparent to me that determining the degree of a child's access to an incarcerated parent, whether in the form of less restrictive visitation policies or access to community correctional programs, does not raise the same issues. Once access is established, courts would defer to a child's caretaker to determine if actual visitation was in the best interests of the individual child.

Finally, in the context of parental incarceration, the best interests of the child are not to be paramount. The imperfect nature of the BICS is not as problematic when weighing a caretaker's incarceration, as it is only to be one factor considered along with society's other needs for retribution, incapacitation, rehabilitation, and deterrence.[114] Part III will discuss in detail how a more robust BICS standard will balance with these other factors in the criminal justice system.

## III. WHAT COULD THE LAW DO?

This Part explores three specific legal contexts in the criminal justice system in which a court may consider the best interests of an offender's children at minimal cost, with considerable efficacy, and without substantially undermining retribution and punishment. Many criminologists and sociologists have advocated for criminal law to minimize the harm of caretaker incarceration, calling for the expansion of alternatives to incarceration (especially for women), an increase in prison nurseries, the lowering of sentences (especially for non-violent drug offenders), and the liberalization of prison visitation. [115] Each of these policies would alleviate some of the harmful effects of caretaker incarceration has on children. However, legal scholars have not examined what space there is in the current legal system for these changes and what such a legal regime would look like. I aim to do so here.

Notably, this paper looks at these changes through a policy lens instead of through a constitutional lens. Some legal scholars advocate reaching similar ends by constitutionalizing children's rights, arguing that a child's right to a family should at times outweigh state interests in punishing parents.[116] In this Part, I review the current state of the law on children's rights and conclude that it is more pragmatic to broach the problem of the negative effects of caretaker incarceration on children through a policy

[113] JONATHAN W. GOULD & DAVID A. MARTINDALE, THE ART AND SCIENCE OF CHILD CUSTODY EVALUATIONS 33 (2007).

[114] Other criticisms leveled against the BICS apply in the context of caretaker incarceration, but they are not as damning as they may seem. One of the most pervasive, that the use of BICS gives judges too much discretion, is grappled with in the following Part.

[115] *See, e.g.*, NELL BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED (2005); BARBARA BLOOM, *Public Policy and the Children of Incarcerated Parents*, *in* CHILDREN OF INCARCERATED PARENTS 271(Gabel and Johnston eds.) (1995); Wakefield & Wildeman, *supra* note 34, at 805-08; Myrna S. Raeder, *Creating Correctional Alternatives for Nonviolent Women Offenders and Their Children*, 44 ST. LOUIS U. L.J. 377 (2000).

[116] Dailey, *supra* note 71, at 2104-06; Chesa Boudin, *Children of Incarcerated Parents: The Child's Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY 77, 80 (2011).

lens. Finally, I show that the law already takes third-party harms into account in a variety of different contexts, and thus, it is not a radical departure for it to do so in this context. However, courts must weigh these harms in an organized and principled way.

### *A. A Criminal Justice System That Considers Children*

In order to imagine a criminal justice system that considers third-party effects on offenders' children, we can look at existing systems. Some courts already consider family responsibilities in certain situations where parents are incarcerated,[117] while others completely ignore them.[118] Even in the scenarios where family responsibilities are taken into account, the responsibilities are taken into account inconsistently between jurisdictions, and even between judges in the same jurisdictions. Further, caretaking responsibilities are most often viewed from the point of view of a parent's functions, rather than her children's needs.[119]

This Part argues that there is room in the law to take the best interests of children into account in a consistent, structured way at many points within our legal system. Here, I focus on three scenarios—pretrial detention, sentencing, and prison visitation—to show that when a parent is incarcerated, her children's interests are taken into account haphazardly, and there is plenty of potential for courts to consider these children's interests in a more substantive manner. Each of these scenarios involves a judicially- or legislatively- created multi-factor test that can be amended to include the best interests of the children of the individual facing incarceration. This additional factor should not be the sole probative factor, but it must be systematically and uniformly considered by courts. These tests would structure existing discretion in a more systematic and transparent way. Prosecutors and judges currently have some informal discretion to take children's interests into account. Formally taking into account children's interests is fundamentally outside the traditional norms of prosecutors and judges, which emphasize individual culpability and de-emphasize third-party interests. The proposals set forth in this Part would formalize consideration of these interests and would authorize prosecutors and judges to investigate individual families to obtain the information they need to make valid decisions in the best interests of these children.

#### 1. Pretrial Detention

Pretrial detention hearings present an initial phase in which caretakers are separated from their children without systematized consideration of their children's interests. When an individual is arrested, the court must decide if and at what dollar amount to set bail for that individual to be released before trial. In federal court, a judge must order pretrial release on the defendant's recognizance or unsecured bond unless that judge "determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community."[120]

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[117] *See* Kathleen Daly, *Rethinking Judicial Paternalism: Gender, Work-Family Relations, and Sentencing*, 3 GENDER & SOC'Y 9, 6-24 (1989) (reporting that judges in criminal courts often considered care giving when sentencing defendants).

[118] *See, e.g.*, U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 5H1.6 (2012) (noting that "family ties and responsibilities are not ordinarily relevant in determining whether a departure may be warranted").

[119] *Id.*

[120] 18 U.S.C.A. § 3142(b) (West 2012).

If the judge determines that the defendant is a flight risk or a danger to the community, the judge will order the defendant released "subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure" such appearance or community safety.[121] Sometimes the least restrictive condition will be no release at all, or preventive detention. The federal statute states that the judge should consider available information regarding "family ties" as one of many factors to determine the appropriate conditions for pretrial release.[122]

Many states require similar determinations regarding flight risk and the danger the defendant poses to others,[123] and also require that judges consider family ties when making bail determinations.[124] Even if these statutes were employed in every jurisdiction, which they currently are not, they are far from ideal. Most fundamentally, these statutes allow the consideration of family ties only insofar as they relate to a defendant's flight risk or the danger the defendant presents to society rather than as they relate to the best interests of the child. While a child's interests should not be the sole determining factor, they are a factor that must be considered. If a defendant's flight risk is high, or if the defendant presents a substantial danger to the community, the child's interests are subsumed by society's interest in confining the defendant and protecting the public. However, we cannot reach this balancing test under the current regime. The adult-centric view of family responsibilities refuses to account for the interests of children.

In sum, under our current law, the decision whether or not to grant bail is a two-factor inquiry—it requires a determination of the defendant's: (1) flight risk and (2) danger to the community. To truly minimize the harm a child may suffer when her parents are incarcerated, the existing test must be amended to include a third factor: the child's best interests. This is simple enough to do, theoretically if not politically, because these two factors are legislatively created rather than constitutionally mandated. The history of the federal bail statute further illustrates the malleability of these factors.

Prior to 1984, federal judges were only allowed to consider flight risk when making bail determinations.[125] In 1984, Congress passed the Bail Reform Act which allowed a judge to impose preventive detention if the defendant posed a danger to the community.[126] In *United States v. Salerno*, a defendant challenged the constitutionality of this statute claiming that the purpose of imposing bail and other release conditions is to ensure that the defendant appears in court when required, not to punish or prejudge the merits of the case.[127] The Supreme Court held that "[n]othing in the text of the Bail

[121] 18 U.S.C.A. § 3142(c)(B) (West 2012).
[122] 18 U.S.C.A. § 3142(g)(3)(A) (West 2012) (explaining the judicial officer shall take into account "the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings").
[123] *See, e.g.*, Conn. Superior Ct. Procedure in Criminal Matters, 38-4.
[124] *See, e.g.*, Ala. R. Crim. P. 7.2(a)(1)(2006) (requiring court to consider a range of factors including family ties); Fla. Stat. Ann. §903.046(2)(2001) (requiring court to consider "family ties"); *Watson v. State*, 158 S.W.3d 647, 648 (Tex. Crim. App. 2005) (noting that the Court has determined that the judge setting bail should consider "family ties").
[125] *See, e.g.*, Bail Reform Act of 1966, Pub. L. 89-465, June 22, 1966, 80 Stat. 214 (requiring bail to be set unless the judicial officer determines that such incentives "will not reasonably assure the appearance of the person are required").
[126] Codified at 18 U.S.C. §§ 3142-50.
[127] United States v. Salerno, 481 U.S. 739, 746 (1987).

Clause limits permissible Government considerations solely to questions of flight," and the prevention of violence was a "compelling interest" that Congress could mandate judges to consider when setting bail.[128]

Using the same reasoning, there are many compelling state interests that would allow Congress to mandate that judges consider the best interests of the child of a defendant caretaker when setting bail. The Court has previously held that the state "has an independent interest in the well-being of its youth."[129] It has also recognized that the state has an interest to see that children are given opportunities for "growth into free and independent well-developed men and citizens."[130] Congress could certainly find that the incarceration of caretakers negatively affects both the current well-being of children and their futures as developed citizens—there is compelling evidence that this is the case, as I argued in Part I.

The best interests of the child should be added as a factor that judges must consider when setting a dollar amount for bail. This requirement would codify and make more consistent a practice that is already taking place, either under the guise of "family ties" that reduce a defendant's flight risks or due to the sympathies of judges, prosecutors, or other actors in the system. Requiring systemized consideration of the best interests of the children of offenders would also force actors to gather more information about offenders and their families. Judges who must obtain accurate information about offenders' caretaking responsibilities can make sentencing determinations that take into account these obligations.

Additionally, there is no reason to believe that this factor would necessarily be at odds with the other two. A defendant who is the sole supporter of her children is less likely to pose a flight risk. An alleged serial killer who poses grave danger to the community most likely should not be at home with her children. This balancing test is where a robust BICS, discussed in Part II, that recognizes children are sometimes better off without their parent would play an important role. Such a standard would also require a deeper understanding of who actually is a caretaker. The incarceration of a biological father who has no relationship with his children and does not support them in any way would not have much, if any, effect on his children. In that situation, the BICS factor may have almost no weight. On the other hand, when determining bail for a same-sex partner of a child's biological mother who cares for her partner's biological children and her ailing partner, the best interests of the children she is providing care for should be taken into account.

We can take a look at the effects of this change by returning to Mary. In the second version of this story, Mary is presented at arraignment in a state that has altered the traditional balancing test to take Mary's children into account. The magistrate who determines bail considers: (1) her future dangerousness; (2) the flight risk she presents; and (3) the best interests of her children, as defined by a scientifically-informed, class- and race-sensitive BICS that lists numerous, specific factors and the weight each should be accorded. She is released subject to a manageable amount of bail and is able to continue providing care for her children while awaiting the outcome of her case.

[128] *Id.* at 754.
[129] Ginsberg v. N.Y., 390 U.S. 629, 640 (1968).
[130] *Id.* (quoting Prince v. Massachusetts, 321 U.S. 158, 165 (1944)).

### 2. Sentencing

Traditional sentencing determinations look very much like bail determinations. Within defined parameters, a judge must make an individualized assessment of what amount of time a defendant should spend in jail. Just as in bail determinations, sentencing schemes vary among the fifty states and the federal government.[131] The Supreme Court has long recognized that sentencing must involve an individualized assessment in front of a judge with broad discretion, that "justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender."[132] The move from indeterminate sentencing to determinate sentencing over the last few decades sought to minimize judges' discretion, and therefore disparity, in sentencing.[133] The tools of this movement include mandatory minimums, three-strikes laws, and sentencing guidelines. However, at least thirty-two states still have some form of an indeterminate sentencing scheme.[134]

Even in determinate sentencing jurisdictions, there is generally room for discretion, as illustrated by the Federal Sentencing Guidelines. Although these guidelines have been advisory since 2005, they are still influential—only 2.4% of federal sentences given in 2010 departed from the guidelines range.[135] Within the range suggested by the guidelines, a judge must sentence an offender based on "the nature and circumstances of the offense and the history and characteristics of the defendant" as well as "the need for the sentence imposed," which contemplates the four traditional goals of sentencing: retribution, deterrence, incapacitation, and rehabilitation.[136] The Federal Sentencing Guidelines Manual encourages judges to take offenders' characteristics into account through their criminal history and other related factors.[137] The Guidelines must, by statute, reflect the "general inappropriateness of considering the education, vocational skills, employment record, family ties and responsibilities, and community ties of the defendant."[138] Before the Guidelines were rendered advisory, one judge wrote that this provision "is so cruelly delusive as to make those who have to apply the guidelines to human beings, families, and the community want to weep."[139] Despite the discouragement of the Federal Sentencing Commission and Congress, federal judges since 2005 have been able to take into account family ties among other factors.[140] In 2010, 5.2% of departures downwards from the Guidelines were made because of family ties, and 0.2% of total sentences departed downwards from the Guidelines because of

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[131] *See* BUREAU OF JUSTICE STATICS, 1996 SURVEY OF STATE SENTENCING STRUCTURES xi-xiii (1996).
[132] Com. of Pa. ex rel. Sullivan v. Ashley, 302 U.S. 51, 55 (1937).
[133] *See, e.g.*, UNITED STATES SENTENCING COMM'N, SENTENCING GUIDELINES MANUAL 12 (1987)
[134] DAN MARKEL, JENNIFER M. COLLINS, & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 15 (2009).
[135] UNITED STATES SENTENCING COMM'N, 2010 Sourcebook, tbls. 24 & 25 (2010).
[136] 18 U.S.C.A. § 3553(a) (West 2010)
[137] UNITED STATES SENTENCING COMM'N, 2011 SENTENCING GUIDELINES MANUAL, *supra* note 137, at 456.
[138] 28 U.S.C.A. § 994 (West 2006).
[139] Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169 (1996)
[140] United States v. Booker, 543 U.S. 220 (2005).

family ties.[141] Thus, judges are able to use some discretion to include a child's best interests, even within a more determinate sentencing framework.

The current state of the law on sentencing creates similar problems as the current state of the law on bail. First, a concern for family ties is not employed in every jurisdiction. Second, even in jurisdictions that consider family ties as a factor, they are considered inconsistently. Eight states expressly permit consideration of family ties and responsibilities in sentencing,[142] but these states do not uniformly apply these factors.[143] Judicial discretion and indeterminate sentencing schemes may yield disparate results in sentencing. Third, judges only consider "family ties" from the adult's point of view. Currently, an offender without a monetary or legal tie to the dependent—such as a non-guardian grandparent who provides childcare but does not contribute to the household income—would not have grounds to argue for mitigation based on family ties in some courts.[144] It is for this reason that judges should consider the best interests of the child rather than family ties. Whether an offender has a "tie" to a child is not determinative of whether that child would be better off with the offender in their home. As with bail determinations, there is a simple way to fix the current state of sentencing: mandate that judges consider the best interests of any children for which the offender is the caretaker when deciding upon a sentence. As with bail, this factor should not be determinative. But it must be considered systematically for each offender, in front of each judge, in each courtroom, and guided by a uniform standard that channels the judge's discretion.

Requiring judges to consider family ties in sentencing would not solve much of the problem of mandating consideration of the best interests of the children affected, because in many jurisdictions, prosecutors rather than judges carry out sentencing. In these jurisdictions, such considerations would need to occur in the prosecutors' offices. Plea bargains—which are the source of ninety-four percent of convictions[145]—often come with a sentence recommended or even guaranteed by the prosecutor. Sentencing guidelines or statutes that mandate judges consider the best interests of the child in sentencing would therefore have little force in the vast majority of cases. It would probably be best if a third party assessed the best interests of the children in a report given to every prosecutor before a final plea bargain is reached. Guardians ad litem or court-appointed social workers would be likely candidates to fulfill this role. In some jurisdictions, there are officials, unrelated to the prosecution, who prepare reports before sentencing.[146] In those jurisdictions, states could easily mandate these officials to include findings regarding the best interests of any children for which the defendant credibly claims that she is a caretaker.

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[141] UNITED STATES SENTENCING COMM'N, 2010 Sourcebook, tbl 25.
[142] PRIVILEGE OR PUNISH, *supra* note 134 at 16.
[143] *Compare* State v. Jones, 398 So. 2d 1049, 1053 (La. 1981) (holding that trial judge abused discretion by failing to consider a defendant's "family responsibility" among other factors) *with* Commonwealth v. Childs, 664 A.2d 994, 999 (Pa. Super. 1995) (holding that a court improperly lowered a sentence after considering the importance of a defendant beyond his earning power).
[144] *See Childs*, 664 A.2d at 997.
[145] DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 5.22.2009, *available at* http://www.albany.edu/sourcebook/pdf/t5222009.pdf; *Cf.* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).
[146] *See, e.g.*, CONN. GEN. STAT. ANN. § 54-91a (West 2013) (mandating that almost all defendants be sentenced only after a "written report of investigation by a probation officer has been presented to and considered by the court.")

What happens to Mary at sentencing in a state that has modified its sentencing scheme as suggested in this section? At sentencing, the judge explicitly considers: (1) the nature and circumstances of Mary's offense, her history, and characteristics, including criminal history and acceptance of responsibility; (2) the need for the sentence imposed as relates to the traditional goals of sentencing: retribution, deterrence, incapacitation, and rehabilitation; and (3) the best interests of her children and the effect sentences within the appropriate range will have on them. Mary is sentenced on the lower end of the range of applicable punishments and made eligible for parole relatively quickly. Because of the relatively short time of her incarceration, a cousin of hers will be able to care for her children. She will not be in jail for long enough that the state must move to terminate her parental rights and therefore her children will only experience a brief break in the care they have received from their mother for their whole lives.

### 3. A Note on Discretion

One obvious criticism of mandating judges to consider the best interests of children at sentencing and bail determinations is that this would afford judges the opportunity to exercise too much discretion. However, as the discussion above highlights and as many scholars have pointed out,[147] judges and prosecutors possess extraordinary amounts of discretion. Even the basic determination of who presents a flight risk, which is an accepted role of a judge in setting bail, requires judges to use their discretion to make an educated prediction. The Court's rejection of mandatory sentencing guidelines in *Booker* was an affirmation of "the authority of a judge to exercise broad discretion in imposing a sentence" limited only by a statutory range.[148]

All this is to say that judges already use discretion in every bail and sentencing determination. This proposal would bring to light what is most likely occurring *sub rosa*, standardize what is occurring in a myriad of different ways, and guide discretion through the use of a robust and psychologically attuned BICS. It is true that such a system would not eliminate judges' often-biased discretion, but a system with such discretion currently exists and will likely remain. We should harness that existing system to mandate the consideration of the real interests of the children left behind by real incarcerated caretakers. In fact, the lack of judicial discretion that does exist in some states due to especially rigid sentencing guidelines and statutes has been criticized by many scholars and judges.[149] Especially salient among these criticisms, for the purposes of this paper, is that such a policy renders invisible the children of incarcerated caretakers and makes it impossible for the law to recognize the tangible harm caretaker incarceration may bring to the child and to society as a whole.

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[147] *See, e.g.*, William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 674 (1990) (exploring distrust of judicial discretion in the new textualism constitutional interpretation movement.); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 551 (1983) (arguing for limits on the scope of judicial discretion).

[148] *United States v. Booker*, 543 U.S. 220, 233 (2005).

[149] *See, e.g.*, Boudin, *supra* note 116, at 92-93; Erik Luna, *Gridland: An Allegorical Criticism of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 81 (2005); Ian Weinstein *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing,* 40 AM. CRIM. L. REV. 87 (2003) (examining the ways in which mandatory minimum sentences undermine just sentencing).

### 4. Visitation

Once a caretaker is sentenced, the criminal justice system should consider whether the best interest of a child requires regular visits with the caretaker. Prison visitation policies vary wildly between and within jurisdictions, and tracking these differences would be beyond the scope of this paper.[150] What is important for the purposes of this Part, however, is that courts rarely intrude on decisions made by prison officials regarding visitation polices. In the landmark case *Turner v. Safley*, the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[151] There are four prongs in that inquiry: (1) whether there is a valid, rational connection between the prison policy and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) the impact that accommodation of the constitutional right will have on guards, other inmates, or the allocation of prison resources; and (4) whether there are ready alternatives to the regulation.[152] The *Turner* test is incredibly difficult for prisoners to overcome and leads to some very troubling outcomes, including in the visitation context. For instance, in *Overton v. Bazzetta*, the Court held that prison regulations that did not allow visits to any minor nieces and nephews whose parental rights had been terminated, prohibited inmates from visiting other inmates, required children to be accompanied by a family member or legal guardian when visiting, and banned inmates with two substance-abuse violations from future visitation for up to two years, all passed the *Turner* test.[153]

The interests of children are conspicuously absent in the *Turner* analysis. One way to address this would be to modify the interpretation of *Turner*'s first factor. In *Overton*, the Court recognized a state interest of maintaining security and "protecting child visitors from exposure to sexual or other misconduct or accidental injury."[154] Notably, this was the only mention of children in the entire decision. As discussed above, a state also has an interest in the well-being of its children. In cases concerning visitation and other prison policies that impact children, this interest should be discussed in the first factor. Once it is clear that the policy works against that specific state interest, the fourth prong should address whether there are ready alternatives to the regulation. This would require an inquiry into whether prisoners' rights could be better accommodated and whether the state's interest in the well-being of its children could be better accommodated.

More radically, the Supreme Court could modify the traditional *Turner* test when policies that implicate the interests of children are being considered. In its modified form, courts would consider three interests: the interests of prison administrators, prisoners, and their children. The interests of the children of incarcerated caretakers need not have equal weight to the other two categories; each jurisdiction could decide how to best balance each of these interests. This formulation likely constitutes the best process. It squarely addresses the independent needs and interests of children without subsuming them to

[150] Chesa Boudin, Trevor Stutz, & Aaron Littman, *Prison Visitation Policies: A Fifty State Survey* (2012), *available at*: http://ssrn.com/abstract=2171412.
[151] 482 U.S. 78, 89 (1987).
[152] *Id*.
[153] 539 U.S. 126, 126 (2003).
[154] *Id.* at 133.

those of adults, be they prison administrators or their own parents. *Turner* is simply a judicially crafted balancing test, and the Court could modify it as easily as it created it. However, given the current state of prison litigation and children's rights jurisprudence, this move is highly unlikely.[155]

Mary's story is impacted by the modification of the *Turner* test as well as by the more expansive understanding of who a caretaker is. Regardless of the composition of Mary's family, its members are allowed the same visitation rights as more "traditional" family members. When the jail administrators are considering a new restrictive visitation policy as a way to discipline Mary, they would consider: (1) their own interest in prison discipline and safety; (2) the other inmates' interests in visitation with their families; and (3) the children's interests in maintaining a relationship with their incarcerated parents. In some cases, the administrators could still decide that limiting visitation is the only appropriate disciplinary tool in their arsenal.

### *B. The Sad State of Children's Constitutional Rights*

At first glance, the field of constitutional rights may seem like a fruitful avenue to secure the rights of children of caretakers subject to incarceration. Children's rights scholars Anne C. Dailey and Chesa Boudin recently argued that the rights of incarcerated caretakers derive from the Due Process Clause of the Fourteenth Amendment and First Amendment associational rights.[156] But in light of recent trends in children's and parents' rights jurisprudence and the natural vagueness of such constitutional rights, the foundation of any real rights must inevitably become a discussion of legislative and administrative policy, rather than one of judicial lawmaking.[157] First, given the unfortunate current state of parents' and children's rights jurisprudence, an affirmative recognition of the rights of children would require an almost seismic shift in the attitudes of the courts. For this reason, I believe that pushing for recognition of children's rights in prudentially-created balancing tests is a course of action more likely to succeed. Second, even if the Court were to find affirmative rights for children, the Court would need to clearly articulate these rights, give them content, and defend them. The judiciary and legislature would have to create new tests and standards, as well as modify already existing ones. Therefore, the work in this paper is still vital.

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[155] Courts have upheld a wide array of prison policies that restrict prisoners' rights under this deferential test. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342, 342 (1987) (upholding a policy precluding Islamic inmates from attending weekly Friday religious service); Washington v. Harper, 494 U.S. 210, 210 (1990) (upholding a policy permitting the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and if the treatment is in the inmate's medical interest); Kikumura v. Hurley, 242 F.3d 950, 965 (10th Cir. 2001) (upholding a regulation allowing pastoral visits only when prisoner initiated request and only when the clergy member was from inmate's faith group); Sheets v. Moore, 97 F.3d 164, 165 (6th Cir. 1996) (upholding blanket prohibition against inmates receiving bulk mail).

[156] Dailey, *supra* note 71, at 2179; Boudin, *supra* note 116, at 105 ( "put[ing] forward the First Amendment freedom of association and the due process liberty interest as the legal bases for children's right to a relationship with their convicted parents").

[157] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); DeShaney v. Winnebago County, 489 U.S. 189 (1989); Troxell v. Granville, 530 U.S. 57, 66 (2000). For additional discussion, see notes 164-169 and accompanying text.

Despite recognition by some courts of children's constitutional rights, modern jurisprudence involving determinations of the care of children inexplicably ignores children's rights. Courts have found that children have some rights in the contexts of avoiding involuntary confinement,[158] criminal proceedings,[159] and the First[160] and Fourth Amendments;[161] though these rights are more limited than those the Court recognizes for adults. The Court has recognized robust rights of parental autonomy and the state's interest in caring for its children, but "[d]espite the concern for children's 'best interests,' the parameters of legal discourse have been based on parents' rights to their children instead of on a child's right to be parented."[162]

The Court has had many opportunities to expand children's constitutional rights when dealing with children's welfare and has repeatedly failed to do so. Three canonical cases illustrate this trend. In *Wisconsin v. Yoder*,[163] the Court found unconstitutional a statute compelling all students to attend formal high school until age sixteen.[164] As Justice Douglas noted in his dissent, the majority viewed the only interests at stake as those of the parents and those of the state; the interests of the children were disregarded entirely.[165] In *Troxel v. Granville*, the Court found unconstitutional a Washington statute that allowed any person to petition for visitation rights and that allowed the court to grant these visitation rights if a court determined they were in the best interests of the children involved.[166] The Supreme Court found that an order allowing visitation by the paternal grandparents of children who lived with their mother was an unconstitutional infringement on the mother's rights, regardless of the Washington court's findings regarding the children's best interests. Most infamous and tragic is *DeShaney v. Winnebago County*, in which the Court held that the state had no duty to protect a child from parental abuse even when authorities had been alerted to the abuse, and the lack of intervention ultimately led to the child's death.[167] These cases are landmarks in a line of jurisprudence that sees cases that involve children as involving only the interests of the parents that control them.

The Court's decisions in these cases exemplify a judicial unwillingness to expand the constitutional rights of children, foreclosing this potentially fruitful path. Out of this jurisprudence, it does not seem possible that the Court will find a constitutionally protected right to "maintain primary care-giving relationships"[168] or to a "family relationship."[169] As much as children's advocates would like to see those rights given effect, I believe it is much more practicable to press for a robust form of the best interests of the child inquiry to be included as a factor in decisions that weigh the interests of

[158] Parham v. Hughes, 441 U.S. 347 (1979).
[159] In re Gault, 387 U.S. 1 (1967).
[160] Tinker v. Des Moines School District, 393 U.S. 503 (1969).
[161] New Jersey v. T.L.O., 469 U.S. 325 (1985).
[162] Kavanagh, *supra* note 94, at 124.
[163] 406 U.S. 205 (1972).
[164] Though the precise grounds on which the decision in *Yoder* was reached is likely outdated, the Court's decision in *Smith* explicitly gave greater protection to First Amendment challenges brought in conjunction to challenges to parental rights.
[165] *See Yoder*, 406 U.S. at 241-42 (Douglas, J., dissenting).
[166] 530 U.S. 57, 66 (2000).
[167] *DeShaney v. Winnebago Cnty.*, 489 U.S. 189, 189 (1989).
[168] Dailey, *supra* note 71, at 2162.
[169] Boudin, *supra* note116, at 108

parents, the state, and private actors, but do not acknowledge the interests of the children involved. Further, were the Court to recognize the constitutional status of such interests, it would still have to make these rights concrete through the balancing test or legislative change this paper seeks to describe.

### *C. Third-Party Harms and the Purposes of Punishment*

Taking children's interests into account in caretaker incarceration requires the consideration of third-party harms in the criminal justice system, consideration that is traditionally thought of as outside the scope of this system. The criminal justice system is generally conceived of as serving the traditional retributive and utilitarian purposes of punishment. Retributive justifications focus on just deserts and forfeiture of rights proportional to the crime committed. Utilitarian justifications focus on deterrence of the offender, incapacitation of the offender, and rehabilitation of the offender.[170] All of these ends are met by focusing on the characteristics of the offender and the offense he committed. Related to these goals is the goal of uniformity in the administration of the criminal justice system.[171] The axiom that similarly situated defendants should receive similar sentences drove the development of the Federal Sentencing Guidelines.[172] For these reasons, taking third-party harms into account seems, at first blush, contrary to the aims of the criminal justice system. However, I demonstrate in this Part that: (1) criminal law should adopt a more robust definition of which defendants are similarly situated; and (2) our criminal justice system already takes into account third-party harms in a variety of contexts.

First, a more robust idea of what it means for defendants to truly be similarly situated, and therefore be treated equally, allows us to take into account the interests of the children of incarcerated caretakers without violating the equality principle. One widely cited case to show the injustice of taking third-party harms into account is *United States v. Johnson*.[173] In *Johnson*, two female co-defendants were convicted of conspiracy, bribery, and theft of public money. Although they were convicted for the same crimes, Cheryl Purvis received a sentence of twenty-seven months in prison followed by two years of supervised release,[174] while Cynthia Johnson received six months of home detention followed by three years of supervised release. The reason for the difference was the ten downward level departures from the Sentencing Guidelines that Johnson received

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[170] *See* Sanford H. Kadish et al., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 90 (9th ed. 2012); ARTHUR W. CAMPBELL, LAW OF SENTENCING § 2:1 (2012) ("Although judicial decisions and scholarly texts abound with myriad labels for current sentencing rationales, when one examines their essence, virtually all are variations of one or more of the following four: (1) deterrence, (2) incapacitation, (3) rehabilitation, or (4) retribution."). *See also* Ewing v. California, 538 U.S. 11, 25 (2003) ("A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.").

[171] The axiom that similarly situated defendants should receive similar sentences drove the development of the Federal Sentencing Guidelines. *See, e.g.*, UNITED STATES SENTENCING COMM'N, SENTENCING GUIDELINES MANUAL 12 (1987) ("Congress sought uniformity in sentencing by narrowing the wide disparity in sentences imposed by different federal courts for similar criminal conduct by similar offenders.")

[171] *Id.*

[173] 964 F.2d 124 (2d Cir. 1992).

[174] Brief for the United States, United States v. Johnson, 964 F.2d 124, (Nos. 91-1515(L), -1541), 1991 WL 11015452, at *11.

for "extraordinary family circumstances." Johnson was "solely responsible" for care of four children: her own three young children, including one infant, as well as the young child of her institutionalized daughter.[175] Although some argue that this story is a prime example of a judge breaking the cardinal rule that similarly situated person should be treated similarly,[176] this mindset requires a limited definition of "similarly situated" defendants. The story of Cynthia Johnson and Cheryl Purvis is a story about two women who were not similarly situated, despite having committed the same crime together. They were dissimilarly situated in their caretaking responsibilities—Johnson was a fit[177] and irreplaceable provider of care to four very young and vulnerable children.[178]

Even if one does not accept the dissimilarity of caretaker and non-caretaker offenders, third-party harms are already a part of our criminal justice system, from areas as disparate as prosecutorial discretion in corporate crime to victim-impact statements in sentencing hearings. In fact, when creating the Sentence Guidelines, the Sentencing Commission was required to take into account the deterrent effect of a punishment on the offender, but also the possible deterrent effect on other future offenders.[179] This, of course, evinces a concern for multiple third parties: future offenders and future victims.[180] As outlined above, family ties—often viewed as familial responsibilities—are already taken into account in bail and sentencing decisions.[181] Currently, determinations regarding parole, furlough, and alternatives to incarceration may also involve considerations of a defendant's family responsibilities. Standardizing the way they are

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[175] *Johnson*, 964 F.2d at 129.

[176] *See* Douglas A. Berman, *Balanced and Purposeful Departures: Fixing A Jurisprudence That Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 63-64 (2000); Donald C. Wayne, *Chaotic Sentencing: Downward Departures Based on Extraordinary Family Circumstances*, 71 WASH U. L.Q. 443, 452-53 (1993).

[177] *Johnson*, 964 F.2d at 126 (noting a lower court finding that "[t]here are no signs of use [of] drugs or alcohol, and she apparently has no mental or emotional health problems.").

[178] A full explication of what it means for criminal defendants to be similarly situated is beyond the scope of this paper. For a discussion of what defendants are similarly situated and the elusive goal of sentencing uniformity see Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749, 750 (2006) ("[U]niformity seeks to eliminate unwarranted sentencing disparities, but also to provide for warranted disparities. The problem lies in distinguishing the warranted from the unwarranted. What factors, in other words, will be considered relevant in distinguishing among defendants at sentencing? For instance, does the fact that a defendant is a single parent with small children justify a different sentence than would be given an otherwise identically situated defendant?"); Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 81 (2005) ("A just sentencing system must thus distinguish between defendants who are not, in fact, similarly situated, ensuring that individuals who differ in relevant respects do not receive the same sentence. The real challenge is determining those factors that are morally relevant.").

[179] 28 U.S.C. § 994(6) (mandating that the Commission take into account to the extent that it is relevant "the deterrent effect a particular sentence may have on the commission of the offense by others.").

[180] Another argument that the sentences for many offenders with children could be reduced without hampering the purposes of the criminal justice system is that harsh sentences have minimal deterrent effect. In essence, there might not be much of a trade-off between allowing for a shorter separation between a child and their incarcerated caretaker and the traditional deterrent purpose of the criminal justice system. *See, e.g.*, VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF JUSTICE 6-8 (2010); LIN SONG & ROXANNE LIEB, WASHINGTON STATE INSTITUTE OF PUBLIC POLICY, RECIDIVISM: THE EFFECT OF INCARCERATION AND LENGTH OF TIME SERVED 4-8 (1993).

[181] *See supra* Subparts III.A.i. and III.A.ii.

considered instead of having wild discrepancies between and within jurisdictions will give the criminal justice system more legitimacy, not less.

Additionally, third parties related to victims often play a large role in the criminal justice system. For instance, in *Payne v. Tennessee*, the Supreme Court held that it was constitutional to allow victim-impact statements which highlight the "impact of the murder on the victim's family" in the sentencing phase of capital cases. [182] Although one surely can, and the Court in fact did, conceive of the family of the victim and society itself as victims in a homicide, they are not the direct victims. Giving a harsher sentence to a murderer because of the impact his crime had on the victim's small children is no different in kind than giving a more lenient sentence to a drug dealer because of the impact a long jail sentence would have on the offender's small children. Just as society suffers when it loses a productive and beloved member to homicide, it likewise suffers when the child of an incarcerated parent is sent into foster care and faces ruined life opportunities.[183]

Other considerations unrelated to the offender and his direct victims are also often considered in criminal law. Darryl Brown catalogues the myriad ways that criminal law takes into account third-party harms.[184] He points to a 1996 memo from Eric Holder, the Deputy Attorney General at the time, to all United States Attorneys that empowered them "to consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense."[185] Further, as Robinson and Cahill show, there are a number of doctrines and practices that prevent punishment of the culpable, including witness immunity, statutes of limitation, resource limits, and exclusionary rules.[186] To this I would add the political and personal aspirations of prosecutors and the cultures in their offices, which many scholars have noticed is a driving force in charging and sentencing procedures in some offices.[187] These practices do not constitute consideration of third-party harms, but they certainly do constitute consideration of goals other than the four traditional goals of punishment.

In short, the criminal justice system currently accounts for third-party harms, and considerations other than retribution, deterrence, culpability, and rehabilitation often control decisions made in the system. Given that the system takes effects on third-parties into account, traditional retributivist and deterrence theories, even those that consider general deterrence, no longer adequately explain or justify our practices of punishment. As it stands, the system already considers more than the culpability of the offender and his dangerousness. As Brown says, "giving third-party interests a greater role complicates the calculus but hardly calls for a departure from established criminal law practices. It

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[182] 501 U.S. 808, 808 (1991).

[183] This is not a personal endorsement of victim impact statements. I mention them simply as an example of a way in which the criminal justice system is already taking into account third-party harms. Defendants are also allowed to present evidence of harm that would result to their families were they to be executed during the penalty phase of a capital trial.

[184] Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1426 (2002).

[185] Memorandum from Eric Holder, Deputy Attorney General on Bringing Criminal Charges Against Corporations 9 (June 16, 1999)Lerer for Final Version (1).docx (on file with author).

[186] PAUL H. ROBSINON & MICHAEL T. CAHILL, LAW WITHOUT JUSTICE: WHY CRIMINAL LAW DOESN'T GIVE PEOPLE WHAT THEY DESERVE (2005).

[187] Sandra Caron George, *Prosecutorial Discretion: What's Politics Got to Do with It?*, 18 GEO. J. LEGAL ETHICS 739, 727-57 (2005).

calls only for a departure from traditional theories that inadequately describe practice."[188] This lack of an adequate theory to explain what goes on in our criminal justice system and the inconsistent and highly discretionary way in which third-party harms are currently taken into account is what undermines the legitimacy of the criminal justice system.

Brown is correct in saying that "what we need are broader theories of criminal justice, of which punishment theory is only a part, and which situates criminal law as one tool in a larger social policy."[189] The discussion above is simply to highlight that accounting for the best interests of children would not be a departure from the real practice in the criminal justice system that already takes into account third-party harms in a variety of contexts. Nor does taking their interests into account undermine the traditional theories that explain punishment, because these theories have already been undermined by practice. Thus, though there is room to argue about the wisdom of taking into account any third-party harms, the statist argument—that the criminal justice system should not do so because it never has done so and therefore never should—is simply inaccurate.

## CONCLUSION – REVISITING MARY

Mary, the loving primary caretaker of three children, is arrested on the same drug charges. This time, however, she is arrested in a state that has implemented all of the suggestions put forth in this paper. Mary is able to make bail while awaiting the disposition of her case, enabling her to continue supporting her family before she pleads guilty and giving her time to prepare her family for the upcoming transition when she is incarcerated. Next, Mary receives a sentence at the lower end of the possible range, allowing her to leave her children in a family member's care without unduly burdening her or risking the termination of her parental rights. While she is in jail, her children are able to visit her regularly due to visitation policies that do not revoke such privileges arbitrarily or as a disproportionate response to minor disciplinary infractions. At each step along this way, Mary's gender, the gender of her partner, and the biological relationship she may or may not have with the children she cares for are not at issue. The only issue in determining the best interests of these children is what sort of care she provides for them.

Mary's story, retold subject to the proposals in this paper, should highlight how easy it would be to take children's needs into account when incarcerating their caretakers. Such consideration fits easily into the determinations that judges, legislators, and prison administrators make on a regular basis—determinations in which these actors already use their discretion and balance different priorities. The proposals in this paper are in no way a radical departure from existing practice. They simply reorient current policies, articulating instincts that are already in play in many jurisdictions and standardizing the inconsistent way these instincts about justice and harm are currently being taken into account.

The ideas that animate this paper could be expanded in a number of other contexts in the criminal justice system. The availability of alternatives to incarceration, prison

[188] Brown, *supra* note 184, at 1426.
[189] *Id.* at 1400.

nurseries, release on parole, the locations of prisons, and the choice of which prison an offender is sentenced to all implicate the interests of the children of incarcerated offenders. Even outside of the criminal justice system, caretakers are being incarcerated, thereby losing their civil rights to function as parents, without consideration of their children's interests. For instance, in 2011, the Court decided in *Turner v. Rogers*, that there is no right to counsel in a civil contempt proceeding, even in the case of an indigent noncustodial parent who is subject to a child support order and faces incarceration for up to a year.[190] In these situations, as in the contexts that make up the bulk of this paper, the formulae being used are missing a critical variable: the interests of the children of incarcerated caretakers. Therefore, the formula must be changed.

It is necessary to start acknowledging the harm that one generation of incarceration imposes on the next generation. It is necessary to start taking these harms into account because we have to stop victimizing the most vulnerable of our children and ensure that all of our children have some degree of equality in their life chances. It is necessary and it is possible to do so. This paper sought to illustrate one way in which taking the interests of children into account could be done. My hope is that it will spur more creative thinking regarding other contexts in which courts should consider children's interests as well as regarding other relevant relationships of care. However it is done, it is time that the law recognizes the harm mass incarceration inflicts both on the people behind bars as well as those who depend on them.

[190] 131 S. Ct. 2507, 2509 (2011).