

**IN THEIR ABSENCE WE REMAIN:  
EMBRACING THE VICTIMS OF PARENTAL  
INCARCERATION**

Reece M. McGovern\*

ABSTRACT

*Laws designed to address the consequences of crime scarcely acknowledge children whose parents are incarcerated. For instance, legislation providing rights and benefits to victims of crime defines victims in a way that excludes offenders' children. The absence of government aid to children with incarcerated parents demonstrates a massive oversight affecting millions of our most vulnerable citizens each year.*

*The impact of parental incarceration is well-documented and devastating. Children who lose even one parent to incarceration miss out on critical emotional and mental support, face financial instability, are negatively socialized toward and distrust authority figures, and are at risk of entering an intergenerational cycle wherein they and their children are more likely to be poor and engage in criminal behavior.*

*Several private programs exist throughout the United States to address the needs of children with incarcerated parents. But given that this population is composed of approximately two million children nationwide, private programs simply lack the resources to fully address every child's needs. There are state and local governments in*

---

\* J.D. Candidate, 2021, Drexel University Thomas R. Kline School of Law. Thank you to Professors Rachel Lopez, Adam Benforado, and Bret Asbury. I am indebted to your guidance and feedback. Thank you to Dr. Guillermo G. Caliendo, Professor Abbe DePretis, and Professor Kimmika Williams-Witherspoon for teaching me the value of tenacious study, that it is important to uplift the voices of communities denied the ability to speak to their struggle, and how to write with my soul. Thank you to Matt and Garrett Broad. You are excellent role models and you both taught me how important it is to incite change with creativity and intellect.. Thank you to my parents, Beth and Darren McGovern, for loving me unconditionally and supporting me always. And thank you to my Zaida, Lester Broad. Without you none of this would be possible.

*the United States taking small steps toward addressing parental incarceration, but each existing public program is insufficient.*

*To make meaningful progress, states should recognize the central role children with incarcerated parents play in the criminal legal system and they should revise their victims' rights legislation to include children whose parents are incarcerated in the definition of "victim." Additional governmental support should be directed to offenders' children and to organizations working to remedy parental incarceration.*

#### TABLE OF CONTENTS

INTRODUCTION .....	535
I. THE HARM WE IGNORE.....	538
A. <i>Impact of Parental Incarceration on Children</i> .....	538
B. <i>One-Sided Victimhood</i> .....	547
C. <i>Embracing and Surviving Victimhood</i> .....	550
II. PRIVATE SOLUTIONS, PUBLIC SHORTCOMINGS (AND A GLIMMER OF HOPE) .....	552
A. <i>Private Harm Reduction Programs for Children of Incarcerated Parents</i> .....	553
B. <i>Available Public Solutions at Home and Abroad</i> .....	555
1. <i>Current efforts in state and local governments</i> .....	555
2. <i>Government programs outside the United States</i> .....	560
C. <i>Recourse in Existing State Legislation</i> .....	562
1. <i>How victims' rights benefits could help children with incarcerated parents</i> .....	562
2. <i>Categories of legal victimhood definitions</i> .....	568
III. INTEGRATING PARENTAL INCARCERATION INTO LEGAL VICTIMHOOD.....	571
A. <i>New or Expanded Definitions and Legislative Goals</i> .....	571
B. <i>Rights and Benefits Available Through Revised Definitions and Goals</i> .....	574
CONCLUSION .....	578

## INTRODUCTION

*Papa, come home cause I miss you.  
I miss you waking me up in the morning and telling me you love  
me.  
Papa, come home, cause there's things I don't know  
and I thought maybe you could teach me:  
how to shave;  
how to dribble a ball;  
how to talk to a lady;  
how to walk like a man.  
Papa, come home because I decided a while back  
I wanted to be just like you.  
But I'm forgetting who you are.<sup>1</sup>*

The overwhelming majority of states do not recognize that children<sup>2</sup> whose parents are incarcerated need support,<sup>3</sup> and no state explicitly defines such children as victims. And yet, the children of incarcerated people, like those traditionally labeled victims, are thrust into harmful and traumatizing experiences by the conduct of a third party. Unless the child plays a material role in the commission of a crime, that child's innocence is unquestionable. When parents commit a crime, the likelihood

---

1. DANIEL BEATY, KNOCK KNOCK (2013), <https://www.commonlit.org/en/texts/knock-knock>. Beaty originally performed a reading of this poem on an episode of *Def Poetry Jam*. *Def Poetry Jam, Def Poetry: Daniel Beaty—Knock Knock (Official Video)*, YOUTUBE (Mar. 15, 2010), <https://www.youtube.com/watch?v=9eYH0AFx6yI>.

2. The age-range of childhood is a contentious topic. While courts and legislatures often identify the age of eighteen as the end of adulthood, neuroscientific and psychological research demonstrate that in terms of brain maturation, individuals remain in a stage of age-related development until their mid-twenties. Compare *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (defining the end of childhood as eighteen-years-old), and Elissa Suh, *The Age of Majority (and the UTMA Account Distribution Age) in Every State*, POLICYGENIUS, <https://www.policygenius.com/retirement/age-of-majority-by-state/> (Dec. 30, 2020) (surveying the age of majority in the United States and demonstrating that in most states the age of majority is eighteen-years-old), with Catherine Lebel & Christian Beaulieu, *Longitudinal Development of Human Brain Wiring Continues from Childhood into Adulthood*, 31 J. NEUROSCIENCE 10937, 10943 (2011) (finding that the brain does not fully mature until a person's mid-twenties). While this Note refers primarily to children below the age of eighteen, it does not take a stance on either side of that debate.

3. See Michal Gilad, *Falling Between the Cracks: Understanding Why States Fail in Protecting Our Children from Crime*, 19 U. ILL. L. REV. 907, 934 (2019).

that their child will face emotional, mental, physical, social, and economic harm increases significantly.<sup>4</sup> The experiences of a child whose parent is incarcerated fit nearly every common-use definition of “victim.”<sup>5</sup> Victims’ rights legislation at the state level—and at the federal level—should recognize children of incarcerated parents as victims.

A society that supports and advocates for children whose parents are incarcerated will inhibit the outgrowth of unnecessary harm. Children with parents in jail or prison often face even greater levels of struggle than incarcerated peoples’ spouses, parents, or siblings.<sup>6</sup> Children are impressionable<sup>7</sup> and often have a much longer life ahead of them than the adults in their lives. With that in mind, it is concerning that a child’s proximity to criminal offenses and the consequences of criminal offenses leave that child with “acute, and often long lasting” emotional and psychological trauma.<sup>8</sup>

Between 1991 and 2007, the number of children in the United States with a parent in prison increased 82%.<sup>9</sup> Statistics suggest that 52% of people incarcerated in state facilities and 63% of

---

4. See *infra* Section I.A.

5. See *Victim*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/victim> (last visited Jan. 7, 2021) (“1: one that is acted on and usually adversely affected by a force or agent . . . such as [a](1): one that is injured, destroyed, or sacrificed under any of various conditions . . . (2): one that is subjected to oppression, hardship, or mistreatment.”); see also *Victim*, LEXICO, <https://www.lexico.com/en/definition/victim> (last visited Jan. 7, 2021) (“A person harmed, injured, or killed as a result of a crime . . .”); *Victim*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/dictionary/english/victim> (last visited Oct. 27, 2020) (“[S]omeone or something that has been hurt, damaged, or killed or has suffered . . . because of the actions of someone or something else . . .”).

6. *United States v. Bannister*, 786 F. Supp. 2d 617, 653–56 (E.D.N.Y. 2011).

7. See e.g., Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD. DEV. 841, 848 (1986) (explaining that children become more susceptible to peer pressure and outside influences as they become emotionally autonomous from their parents).

8. Gilad, *supra* note 3, at 911.

9. Chesha Boudin, *Children of Incarcerated Parents: The Child’s Constitutional Right to the Family Relationship*, 101 J. CRIM. L. & CRIMINOLOGY, 77, 81 (2011). In 2007 1.7 million out of the 74 million children in the United States, “or 2.3%, had a parent in prison.” *Id.* That figure does not account for the number of parents in jail rather than prison. *Id.*

people incarcerated in federal facilities are parents.<sup>10</sup> That means there are at least 1,706,600 children in the United States with an incarcerated parent.<sup>11</sup> Many of those children are younger than ten years old; most will become adults before their parents are released.<sup>12</sup> Children, especially young children, are much more susceptible to the negative consequences of stress.<sup>13</sup> As a result, early exposure to something distressing—like the loss of a close relationship with a parent—can negatively impact a child’s chemical balance and neurological development.<sup>14</sup>

This Note expands on scholarship regarding the legal rights of parental-incarceration victims. Legal victimhood and the benefits it provides could reduce the impact of parental incarceration. This Note’s proposed expansion of legal victimhood draws from several existing private programs, some government efforts in the United States, and the policies of governments outside the United States. Part I of this Note discusses the harmful impact parental incarceration has on children, reviews the history of victims’ rights movements in the United States, and observes how victimhood can serve to reduce harm in a criminal legal system. Part II introduces what options currently exist for children of incarcerated parents, including programs in the private sector. Further, Part II demonstrates the inadequate public support that children of incarcerated parents receive in the United States and explores government programs in other countries that do address parental incarceration. Finally, Part III proposes that legal victimhood is a viable source of economic, social, and legal relief for children with incarcerated parents. Part III proposes to fill the gaps left by existing private programs by expanding the

---

10. Stephany Trejos, Letter, *We Must Advocate for Children with Parents in Prison*, ST. J. REG., (Dec. 3, 2019, 4:31 PM), <https://www.sj-r.com/news/20191203/letter-we-must-advocate-for-children-with-parents-in-prison>.

11. *Id.*

12. Boudin, *supra* note 9.

13. Gilad, *supra* note 3, at 911.

14. *Id.*

legal definition of “victim” to include children with incarcerated parents.

### I. THE HARM WE IGNORE

The United States incarcerates its citizens at extreme rates.<sup>15</sup> The number of Americans in federal and state prison far exceeds the international scale of incarceration.<sup>16</sup> In fact, the incarceration rate in the United States is significantly higher than the second-highest incarceration rate in the world.<sup>17</sup> Additionally, the impact of mass incarceration falls heavily on communities of color.<sup>18</sup> The massive population of incarcerated people inevitably includes parents. Children experience devastating harm when their parents are incarcerated—in ways comparable to those traditionally defined as victims—yet they are excluded from victims’ rights. The history of victims’ rights demonstrates why the current trend in U.S. legislation is an understanding of victimhood that excludes children with incarcerated parents.<sup>19</sup> Despite that trend, children with parents in jail or prison are also victims and should be recognized as such.

#### A. Impact of Parental Incarceration on Children

Victimhood as it is currently understood in legislation is limited and ignores a crucial population involved in the

---

15. See *United States v. Bannister*, 786 F. Supp. 2d 617, 649–53 (E.D.N.Y. 2011).

16. *Id.* at 650.

17. The prison population in the United States is currently at 2,094,000. *Highest to Lowest - Prison Population Total*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) (last visited Jan. 7, 2021). The second highest prison population is in China, at 1,710,000, about a quarter less than the prison population in the United States. *Id.*

18. See *Bannister*, 786 F. Supp. 2d at 651–53; see also Kim Eckart, *Dads in Prison Can Bring Poverty, Instability for Families on the Outside*, PHYS ORG (Nov. 27, 2019), <https://m.phys.org/news/2019-11-dads-prison-poverty-instability-families.html> (“A report from the U.S. Department of Justice found that in 2007 . . . The impact of parent incarceration fell disproportionately on black and Hispanic children; black children were 7.5 times as likely, and Hispanic children 2.5 times as likely, as white children to have a parent in prison.”).

19. See *infra* Section I.B.

criminal legal system. The communities that experience the highest levels of incarceration experience suffering and trauma outside of the direct consequence of losing a family member's presence to lengthy or permanent incarceration.<sup>20</sup> Families of incarcerated individuals struggle more with domestic issues, including divorce and domestic violence.<sup>21</sup> Those effects are, in part, due to the overwhelming burden borne by parents "left to raise families in free society."<sup>22</sup> Spouses or partners whose lives are suddenly dictated by the need to function without their significant other are not the only members in a family structure who bear the burden of a parent's incarceration. The effects of incarceration on families can weigh heaviest on children, given their greater dependence on adults and the impact they experience when they lose a parental bond.

A child's home provides a base for familial structures—it is the source of security, shelter, and a sense of identity. When a parent is incarcerated, the fate of the child's homelife is uncertain.<sup>23</sup> More than half of people incarcerated at the federal and state level are parents.<sup>24</sup> Without a parent in the home as a result of incarceration, children are at greater risk of social misfortune, economic insecurity, and susceptibility to the same behaviors that resulted in their parents' incarceration—including drug use and violence.<sup>25</sup> Parental incarceration can damage the executive function in a child's brain, which controls "planning, memory, focusing attention, impulse control, and decision-making."<sup>26</sup> Additionally, because "children are in

---

20. See *Bannister*, 786 F. Supp. 2d at 653.

21. *Id.*

22. Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, DAEDALUS J. AM. ACAD. ARTS & SCI., Summer 2010, at 15.

23. Boudin, *supra* note 9, at 82.

24. *Id.* This figure is from a 2007 study. However, due to the increasing incarceration rates in the United States, it can be presumed that the statistics are equal to or less than the amount of currently incarcerated parents.

25. *Bannister*, 786 F. Supp. 2d at 653; see also PATRICIA ALLARD & JUDITH GREENE, JUST. STRATEGIES, CHILDREN ON THE OUTSIDE: VOICING THE PAIN AND HUMAN COSTS OF PARENTAL INCARCERATION 15 (2011).

26. Gilad, *supra* note 3, at 911.

critical stages of their emotional and cognitive development," they are at greater risk of falling victim to negative external pressures.<sup>27</sup>

Overall, children with incarcerated parents face greater threats to stability and safety, economic security, feelings of connectedness and worthiness, attachments, and the ability to maintain trust in relationships.<sup>28</sup> Children of incarcerated parents experience a long list of harm that includes, but is not limited to, the following:

1. A damaged family structure that can lead to increased pressure on the remaining parent and a loss of the full support necessary for a healthy upbringing.<sup>29</sup>
2. The absence of a parental bond necessary for physical, emotional, and mental support. This absence can cause a child to act out and can lead to intellectual and physical harm later in life.<sup>30</sup>
3. An intergenerational cycle of negative interactions with the criminal legal system.<sup>31</sup>
4. A degradation of trust in adults, authority figures, peers, and potential mentors.<sup>32</sup>
5. Economic instability that can lead to stress over security and caregiver burnout.<sup>33</sup>
6. Burdensome visits to parents placed in prisons several hours away from where the child lives.<sup>34</sup>

---

27. *Id.* at 912.

28. ALLARD & GREENE, *supra* note 25, at 11–13.

29. *See, e.g., id.* at 11–15; Eckart, *supra* note 18.

30. *See infra* notes 38–49 and accompanying text.

31. *See infra* notes 50–56 and accompanying text.

32. *See infra* notes 57–62 and accompanying text.

33. *See infra* notes 64–70 and accompanying text.

34. *See infra* notes 72–81 and accompanying text.



7. Internalized trauma that the child can pass to their own offspring.<sup>35</sup>

Oftentimes, victims lose family members without explanation.<sup>36</sup> When a parent is suddenly removed and incarcerated, children can lose the ability to focus on everyday activities.<sup>37</sup> Thoughts regarding their damaged family structure and the safety of homelife often become an overwhelming influence in the lives of children with incarcerated parents.<sup>38</sup> Even if one parent remains in the household, the absence of a parent can severely impact a child's life.<sup>39</sup> First and foremost, there can be increased pressure on a child's remaining parent. Without a spouse or second adult to play a parental role, single caregivers often struggle to maintain adequate resources "to address the emotional, psychological and financial needs of the children."<sup>40</sup> Research shows that the absence of a father in a young child's life "gravely impairs the ability . . . to internalize positive values as they mature."<sup>41</sup> Trouble in school, poor grades, lack of interest, and even being separated from siblings are among the host of consequences for children with incarcerated parents.<sup>42</sup>

Multifaceted and nuanced parent-child bonds can be destroyed when a parent is incarcerated. Children depend on the adults in their lives, especially their parents, for basic needs like shelter, emotional support, and physical nutrition.<sup>43</sup> Parents

---

35. See *infra* notes 82–85 and accompanying text.

36. ALLARD & GREENE, *supra* note 25, at 8.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. United States v. Bannister, 786 F. Supp. 2d 617, 639 (E.D.N.Y. 2011); see also Michael C. Lu, Loretta Jones, Melton J. Bond, Kynna Wright, Maiteeny Pumpuang, Molly Maidenber, Drew Jones, Craig Garfield & Diane L. Rowley, *Where Is the F in MCH? Father Involvement in African American Families*, 20 ETHNICITY & DISEASE S2–49, S2–49 (2010) ("[C]hildren growing up in father-absent families are at greater risk for various educational or behavioral problems and poorer developmental outcomes, even after controlling for parental education, income and other factors.").

42. ALLARD & GREENE, *supra* note 25, at 11.

43. See Gilad, *supra* note 3, at 912.

or parent figures guide young children through life, to a point where the absence of their guidance significantly impedes the child's overall development.<sup>44</sup> Lengthy periods of separation from a parent correlate with lowered IQ in children and can result in hypertension, diabetes, and PTSD-related symptoms later in life.<sup>45</sup> Parents and children often have an "unconditional connection" through which children are able to "bond, to clash, to disengage, and—eventually—to find their own personhood and sense of personal worth."<sup>46</sup> Maintaining that bond is extremely challenging when a co-parent is incarcerated.<sup>47</sup> That kind of development in a child's life is often lost with the absence of a parent.<sup>48</sup> The practical effect of that loss in a child's life is less attention to the child's whereabouts and their behavior outside of the home.<sup>49</sup> Children who lack attention or supervision may feel neglected and a loss of self-worth.<sup>50</sup> As a result, children may seek acceptance elsewhere by engaging in risky behaviors,<sup>51</sup> creating "intergenerational" harm that transmits "the penalties of a prison record from one generation to the next."<sup>52</sup>

The harm transmitted from parents to parental-incarceration victims also contributes to an intergenerational cycle of criminal legal trouble. Every human being has or will experience "legal socialization," or the process of aligning oneself against a schema of legality and developing "inclination[s] towards

---

44. *See id.* at 912–13.

45. Elizabeth Brico, *How Child Services Punishes Mothers with Substance Use Disorder—and Their Children*, APPEAL (Nov. 15, 2019), <https://theappeal.org/how-child-services-punishes-mothers-with-substance-use-disorder-and-their-children/>.

46. ALLARD & GREENE, *supra* note 25, at 17.

47. *Id.*

48. *Id.*

49. *Id.* at 17–18.

50. *Id.* at 18.

51. *Id.* at 18–19.

52. Western & Petit, *supra* note 22, at 12.

compliance with the law and cooperation with legal actors.”<sup>53</sup> The amount and nature of a child’s interaction with crime, law enforcement, criminal legal systems, and other legal actors implies serious consequences for a child’s legal socialization.<sup>54</sup> When a child’s parent is incarcerated, the child’s interactions with a criminal legal system and officials working within it will likely increase in number and can represent an antagonistic force in the child’s life.<sup>55</sup> Living at the margins of legal socialization can lead to a child’s “proclivity towards criminal behavior” and other risky or illegal behaviors.<sup>56</sup> Thus, in a number of ways, the incarceration of a child’s parent will inevitably dictate that child’s relationships with both institutions and people.

Parental incarceration also degrades a child’s ability to trust others.<sup>57</sup> Children may develop mistrust of incarcerated parents who return from prison for fear of losing the parent again and fear of abandonment.<sup>58</sup> Children of incarcerated parents can also lose their willingness to build trust with others, which in turn leads to unstable relationships in the future.<sup>59</sup> The pain and

---

53. Gilad, *supra* note 3, at 914; *see also* Jeffrey Fagan & Tom R. Tyler, *Legal Socialization of Children and Adolescents*, 18 SOC. JUST. RSCH. 217, 218 (2005) (proposing that legal socialization is a process that “unfolds during childhood and adolescence as part of a vector of developmental capital that promotes compliance with the law and cooperation with legal actors”).

54. *See* Gilad, *supra* note 3, at 914; *see also* Alex R. Piquero, Jeffrey Fagan, Edward P. Mulvey, Laurence Steinberg & Candice Odgers, *Developmental Trajectories of Legal Socialization Among Serious Adolescent Offenders*, 96 J. CRIM. L. & CRIMINOLOGY 267, 269 (2005) (“[I]t is reasonable to expect that interactions with legal authorities during late childhood and into adolescence should influence the development of notions of law, rules, and agreements among members of society, including adolescents, as well as the legitimacy of authority to deal fairly with citizens who violate society’s rules.”).

55. *See* Gilad, *supra* note 3, at 914; *see generally* Fagan & Tyler, *supra* note 53, at 218–19 (describing how legal socialization during childhood affects law-related behavior in adolescence and adulthood).

56. Gilad, *supra* note 3, at 914 (citing Dean G. Kilpatrick, Ron Acierno, Benjamin Saunders, Heidi S. Resnick, Connie L. Best & Paula P. Schnurr, *Risk Factors for Adolescent Substance Abuse and Dependence: Data from a National Sample*, 68 J. CONSULTING & CLINICAL PSYCHOL. 19, 19 (2000)).

57. *See* ALLARD & GREENE, *supra* note 25, at 24.

58. *See id.* at 25.

59. *See id.* at 24 (discussing the impact having incarcerated parents has on attachments and ability to trust).

confusion that come with losing a parent can lead a child to question whether any relationship at all will last.<sup>60</sup> Further, lack of trust is not limited to external relationships. Without the crucial experience of building trust with a parent, children can struggle to trust themselves and their abilities to succeed into adulthood.<sup>61</sup> The combination of an inability to trust others and oneself creates an isolating effect in professional and social settings.<sup>62</sup> The psychological consequences of parental incarceration are evident. However, children who lose a parent to jail or prison can also face hardship that affects their material conditions, including access to housing, food, and clothing.<sup>63</sup>

Children with incarcerated parents often suffer from economic instability.<sup>64</sup> A child's loss of a primary caretaker can lead to "a sense that life has become extremely precarious and that no one can be counted on to protect them."<sup>65</sup> Relatedly, the incarceration of one parent can cause the remaining parent significant economic strife.<sup>66</sup> Research indicates that young children with an incarcerated father disproportionately inhabit socioeconomically disadvantaged neighborhoods with higher rates of single motherhood, poverty, and the receipt of public assistance, as well as lower rates of high school graduates.<sup>67</sup> An incarcerated spouse can force the child's only nonincarcerated parent to restructure his or her source of income.<sup>68</sup> With one less source of income, nonincarcerated spouses often work multiple jobs, "limiting their physical, mental and emotional availability for children who desperately need the support of adults around them to help them feel safe and grounded."<sup>69</sup> Restructured

---

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.* at 13.

64. *See id.*

65. *Id.*

66. *See id.* at 14.

67. Eckart, *supra* note 18.

68. ALLARD & GREENE, *supra* note 25, at 14.

69. *Id.*

sources and quantities of income often generate reduced funds or eviction that force the nonincarcerated parent and child to involuntarily move.<sup>70</sup> The resulting effects of these financial struggles lead to traumatized, stressed, and burnt-out children and caregivers outside the prison walls.<sup>71</sup> Inside the prison walls, the harm of parental incarceration persists.

An inability to visit incarcerated parents perpetuates trauma.<sup>72</sup> Visitation is not always viable for children whose parents are incarcerated.<sup>73</sup> For some, visitation opportunities require extraordinarily lengthy periods of travel. More than half of individuals incarcerated in state prisons are placed more than 100 miles from their families.<sup>74</sup> For instance, a woman in West Virginia whose son was incarcerated near Dallas, Texas, described one trip that took nearly ten hours of travel.<sup>75</sup> Upon arrival, she was turned away by prison staff because the thin khaki stripes on her dress resembled the color worn by the incarcerated individuals, which was prohibited for visitors.<sup>76</sup>

---

70. See Eckart, *supra* note 18.

71. See ALLARD & GREENE, *supra* note 25, at 14.

72. See Kathy Morse & Homer Venters, *A Visit with My (Incarcerated) Mother*, HILL (Sept. 24, 2019, 7:00 PM), <https://thehill.com/opinion/criminal-justice/462870-a-visit-with-my-incarcerated-mother>.

73. Chesa Boudin provides a comprehensive inquiry into the rights of children to relationships with their parents. See generally Boudin, *supra* note 9. However, Boudin's proposed solution—that the rights of children with parents in prison is best resolved by reformed sentencing guidelines and prison visitation policies, *id.* at 91, does not go far enough. Boudin states that “[t]here are two key areas where the rights and interests of children might come into play during parental incarceration”: in sentencing and in visitation. *Id.* While that point is valuable to the burgeoning legal scholarship on parental incarceration, Boudin's two discrete proposals would address only a small portion of the harm that parental incarceration creates.

74. Beatrix Lockwood & Nicole Lewis, *The Long Journey To Visit a Family Member in Prison*, MARSHALL PROJECT (Dec. 18, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/12/18/the-long-journey-to-visit-a-family-member-in-prison>. Much of the source of these extreme distances between family members is a result of policies dating back to the 1980s and 1990s, when states began increasingly constructing prisons in rural areas to promote economic revitalization following a loss of agricultural and manufacturing jobs throughout rural America. *Id.* Many prison towns are majority white. Black and Latino people are disproportionately incarcerated throughout America, so visitation can often lend to the reproduction of racial stereotypes when local residents' only interactions with people of color occurs in the course of outsiders visiting their incarcerated loved ones. See *id.*

75. *Id.*

76. *Id.*

Similarly disturbing experiences are not uncommon. The visitation experience often forces family members of the incarcerated “to undergo harassment and humiliation.”<sup>77</sup> Women visiting partners or spouses with their children experience sexual and verbal harassment.<sup>78</sup> Heightened security procedures are abusive even without harassment: many prison visits are lengthy experiences and include multiple intrusive searches.<sup>79</sup> Children are sometimes unable to meet with parents in private visitation rooms.<sup>80</sup> For children, visitation is often “harmful, traumatizing and degrading.”<sup>81</sup>

The traumatizing experiences on either side of the prison walls have longstanding effects on children. The human body “remembers” trauma experienced during childhood.<sup>82</sup> Children of incarcerated parents may one day themselves become parents. When a parent has childhood trauma, the likelihood that their child experiences trauma increases.<sup>83</sup> “Adverse childhood experiences” (ACEs) are factors researchers use to measure childhood trauma.<sup>84</sup> Parental incarceration is a particularly stigmatizing ACE. Children of incarcerated parents may carry the trauma of parental incarceration into their own experiences as parents, which consequently may increase by 2.5% the likelihood that their own child will have an “ACE burden.”<sup>85</sup>

The harm parental incarceration creates for children is intolerable. People—especially children—who, through no

---

77. Morse & Venters, *supra* note 72.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Abraham Gutman, Opinion, *How Do We End the Cycle of Childhood Trauma Passed from Parents to Kids?*, PHILA. INQUIRER, <https://www.inquirer.com/opinion/commentary/childhood-trauma-philadelphia-intergenerational-ace-20191109.html> (Nov. 9, 2019, 7:00 AM).

83. *Id.*

84. Vincent J. Felitti, Robert F. Anda, Dale Nordenberg, David F. Williamson, Alison M. Spitz, Valerie Edwards, Mary P. Koss & James S. Marks, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245, 245 (1998).

85. *Id.*

2021] *VICTIMS OF PARENTAL INCARCERATION* 547

fault of their own, experience consequences and lifelong trauma because of another person's conduct deserve support. Direct victims are undoubtedly victims. They are harmed, sometimes fatally,<sup>86</sup> and they deserve support. The families of direct victims are undoubtedly victims. They suffer immense pain and suffering when their loved ones are harmed or pass away, and they deserve support. But indirect victims, like children with incarcerated parents, are undoubtedly victims as well and are no less deserving of legal victim status than "traditional" or directly harmed victims.

### B. *One-Sided Victimhood*

Today, victim legislation is a sword for retributive policymakers intent on using stories from direct victims and their families as fire to forge their punitive steel. It was not always that way, and it need not be. The history of victim legislation shows that the movement's initial goal was not harming offenders.<sup>87</sup> Conversely, early stages of the victims' rights movement sought to repair the harm that violence causes.<sup>88</sup>

In the 1960s, American legislatures began proposing "victims' compensation schemes."<sup>89</sup> Notably, in at least one pioneering state legislature, the statutory language of victims' rights legislation "used the term 'aid' rather than compensation or restitution."<sup>90</sup> The basis for aid-based victims' rights, as opposed to the punitive approach, in part has its roots in twentieth-century British and Kiwi penal policy.<sup>91</sup> In the 1950s, Margery Fry, the first secretary of a leading British criminal reform organization called the Howard League, advocated for

---

86. See Kristin Turney, *Adverse Childhood Experiences Among Children of Incarcerated Parents*, 89 CHILD. & YOUTH SERVS. REV. 218, 221 (2018).

87. MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 82 (Alfred Blumstein & David Farrington eds., 2006).

88. *Id.*

89. *Id.* at 83.

90. *Id.*

91. *Id.* at 80–81.

the “plight of victims.”<sup>92</sup> Fry’s philosophy was founded in “reparation schemes, seeing them as a way to reintegrate offenders back into the community by allowing them to make amends to their victims.”<sup>93</sup> Using Fry’s and the Howard League’s philosophy, New Zealand adopted the world’s first ever victim compensation legislation in 1964. The 1964 legislation was part of New Zealand’s redesigned social welfare programs.<sup>94</sup> By 1965, California enacted the first victims’ compensation legislation in the United States.<sup>95</sup> Early attempts at aiding crime victims, although rudimentary,<sup>96</sup> were initially aimed at supporting those affected by crime, not punishing those who commit crime.

In the United States, however, the aid-based victims’ rights legislation was short-lived, and the country experienced a nationwide shift in its approach to criminal justice in the late 1960s. In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act as a blueprint for the “war on crime.”<sup>97</sup> The Act created the Law Enforcement Assistance Administration, an agency that pushed “huge amounts of federal money to state and local law enforcement agencies.”<sup>98</sup> Though the agency was short-lived,<sup>99</sup> its policy framed victimhood in a manner consistent with conservative penal philosophy: an ideology based in the notion “that crime could be reduced by increasing the capacity of law enforcement to capture, convict, and punish offenders.”<sup>100</sup> Law Enforcement Assistance Administration leadership used victims’ identities as a mechanism of promulgating “tougher penalties for offenders.”<sup>101</sup> Tough-on-

---

92. *Id.* at 80.

93. *Id.*

94. *Id.* at 81.

95. *Id.* at 83.

96. *See id.* at 82–83.

97. *Id.* at 85.

98. *Id.* at 86.

99. *Id.*

100. *Id.*

101. *Id.*



crime politicians and “penal conservatives successfully framed the issue [of victimhood] as a zero-sum game” in which the rights of victims are pitted against the rights of offenders.<sup>102</sup> By the late 1970s and into the 1980s, interest in victims in the United States experienced a “second wave” aligned with the tough-on-crime policies that gained popularity in the previous decades. This second wave significantly departed from the earlier aid-based philosophy.<sup>103</sup> Victim advocacy groups in this era, such as the National Organization for Victim Assistance, helped pass legislation “that enlarged victims’ rights and toughened penalties for offenders,” including the Victims of Crime Act, the Victim Rights and Restitution Act, and the Violent Crime Control and Law Enforcement Act.<sup>104</sup>

The shift from aid-based to tough-on-crime victims’ rights laws represents a shift in the goal of contemporary American legal systems. Rather than seek to reduce the harm crime causes for each party involved, state governments control who constitutes a victim as leverage to impose harsher punishments on criminal offenders. The consequences of that shift dispossess children of incarcerated parents of the aid necessary for adequate development and wellbeing.

---

102. *Id.* at 77.

103. *Id.* at 83.

104. *Id.* at 87–89. The Victims of Crime Act, passed in 1984, created a state grant fund “for victims’ compensation and assistance programs, and for child abuse prevention and treatment.” *Id.* at 89. The Victims’ Rights and Restitution Act increased victims’ participation in criminal proceedings. *Id.* The Violent Crime Control and Law Enforcement Act was an omnibus act that created opportunities for victims to speak in federal sentencing hearings, “made restitution mandatory in sexual assault cases and increased the amount of federal money available for local victims’ services.” *Id.* (citing ROBERT C. DAVIS, NICOLE J. HENDERSON & CAITILIN RABBITT, EFFECTS OF STATE VICTIM RIGHTS LEGISLATION ON LOCAL CRIMINAL JUSTICE SYSTEMS, at Executive Summary (2002)); *see also* Victims of Crimes Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837; Victims’ Rights and Restitution Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

*C. Embracing and Surviving Victimhood*

When violence<sup>105</sup> occurs, a ripple effect occurs. The most intuitive effect, the drop in the water, is the harm that impacts the direct victim of violence. That drop ripples outward as the harm extends to impact every party involved.<sup>106</sup> Those closest to the direct victim experience harm, both vicariously from witnessing the impact on the direct victim and directly from the change that takes place in their relationship to the direct victim.<sup>107</sup> An act of violence offends community morals. The more that violence occurs, the more that direct victims and their kin experience harm. In our current criminal legal systems, punishment is the way that the community holds offenders accountable. As a result of punishment, especially in the case of imprisonment, the offender experiences a ripple effect as a result of their own act of violence. Finally, at the fringe of this ripple effect, the kin of the offender experience harm from the punishment imposed on their loved one. Each person involved in the ripple effect of crime and violence experiences harm to varying degrees. Nonetheless, each person experiences harm.

Harm reduction *should* be the ultimate goal of a criminal legal system. That statement begs the question: what is harm reduction? It certainly cannot mean the total absence of harm. The term harm here is synonymous with conflict and failure; harm is the necessary underbelly of healthy communities and healthy individuals. This is not to say that harm is a positive. Harm in its simplest form is merely unavoidable. The notion of harm reduction must necessarily assume harm occurs. If we can accept that harm is natural and will occur, we can recognize that our reactions to harm are truly powerful. Each generation

---

105. The phrase “violence” here is intended for use in the abstract and does not specifically refer to violent crime. Violence exists on both a macro and micro level—there is state-defined violence, like violent crime, but also small aggressions that are not necessarily legally defined as violence. The term violence here encompasses all its forms—large-scale, legally defined violence—and also small acts that create harm in some form.

106. See, e.g., Gilad, *supra* note 3, at 923.

107. See *id.*

2021] *VICTIMS OF PARENTAL INCARCERATION* 551

confronts the question of what a society must do to effectively hold its people accountable and support the wronged without proliferating wrongdoing. In the realm of criminal law, policies focused on harm reduction should be holistic in contemplating the breadth of individuals harmed by violence, crime, discipline, and punishment.

The systems we live in that labor to respond to harm have consistently reproduced it. A system that perpetuates harm is complicit in the recreation of violence. Programs—like repayment-based incarceration insurance<sup>108</sup>—that increase burdens for people in criminal legal systems are counterproductive. There needs to be support for everyone whose lives are altered by criminal legal matters.

Legal victimhood can function as a safety net for the numerous parties affected by violence. Victimhood is the experience of being subjected to mistreatment or violence.<sup>109</sup> The plain meaning of the word victim is not limited to one specified group of people, but rather expresses the notion of those individuals negatively impacted by the conduct of another person or entity, socio-historical inequality, or legal underprivilege.<sup>110</sup> Victims are innocent. Victims are vulnerable. Throughout history, governments have defined victims and provided those who fit the definition with aid and support.<sup>111</sup> But those definitions have historically fallen short of recognizing everyone impacted by mistreatment or violence. Legal victimhood as it exists today must be broadened.

The notion that conflict in criminal proceedings is only between the offender and the state degrades any opportunity for thorough harm reduction. For instance, when the state takes matters into its own hands, the victim of the crime giving rise to the proceeding loses twice: first at the hands of the offender,

---

108. See Angela Cai, *Insuring Children Against Parental Incarceration Risk*, 26 *YALE J.L. & FEMINISM* 91, 94 (2014).

109. See *supra* note 5.

110. See *supra* note 5.

111. See *supra* Section I.B.

and second “by being denied rights to full participation in what might have been one of the more important ritual encounters in life.”<sup>112</sup> Criminal legal systems currently fragment parties involved in an act of violence into “nonentit[ies]” to be represented and “thing[s]” to be studied, manipulated, and controlled.<sup>113</sup> That fragmentation turns conflicts that touch entire communities into “other people’s property,” primarily the property of the system.<sup>114</sup> When conflict becomes property, the community loses its ability to inform itself as to what behavior and consequences to violence are appropriate.<sup>115</sup> There are alternatives to the way our criminal legal systems currently fragment conflicts. The actions of private organizations throughout the country, a few American state legislatures, and a handful of governments throughout the world embody those alternatives.

## II. PRIVATE SOLUTIONS, PUBLIC SHORTCOMINGS (AND A GLIMMER OF HOPE)

People within and without the legal academy understand that the negative consequences of parental incarceration are among the most unfair and nonsensical in American criminal legal systems.<sup>116</sup> Calls to support children with incarcerated parents have not gone completely unanswered. There are countless private, often nonprofit, organizations in the United States dedicated to uplifting parental-incarceration victims.<sup>117</sup>

---

112. Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 3 (1977).

113. *Id.* at 5.

114. *Id.*

115. *See id.*

116. *See generally* Cai, *supra* note 108 (discussing the unique harms suffered by children who lose their parents to incarceration, including direct financial harm, diversion of household resources, and deficits in future contributions); Amy B. Cyphert, *Prisoners of Fate: The Challenges of Creating Change for Children of Incarcerated Parents*, 77 MD. L. REV. 385 (2018) (discussing the physical, psychological, educational, and financial effects of the United States Sentencing Commission Guidelines Manual’s instructions to ignore children when fashioning parents’ sentences); Trejos, *supra* note 10 (outlining the traumatic experiences children of incarcerated parents face).

117. *See infra* Section II.A.

Nonprofit organizations provide spaces for children with incarcerated parents to interact with others similarly situated.<sup>118</sup> Some state and local governments have implemented reforms to mitigate the consequences of parental incarceration.<sup>119</sup> Still, public institutions fail to fully address the issue.<sup>120</sup> And government aid throughout the country is piecemeal. States must consolidate aid into one comprehensive program: victims' rights. Additionally, private programs that already exist offer options states could consider. Victims' legislation could incorporate examples from and fund private programs to increase support for parental-incarceration victims.

*A. Private Harm Reduction Programs for Children of Incarcerated Parents*

There are private organizations that focus entirely on relieving the burdens attached to being the child of someone in prison or jail. One such group is The Children of Promise (CPNYC), a New York-based after-school program and summer camp designed "[t]o embrace children of incarcerated

---

118. See *infra* Section II.A.

119. See *infra* Section II.B.1.

120. Michal Gilad, in two companion articles—one written individually, and the other co-written—discusses the absence of statutorily created rights that reduce harm for children with incarcerated parents. Gilad, *supra* note 3, at 933–34; Michal Gilad, Abraham Gutman & Stephen P. Chawaga, *The Snowball Effect of Crime and Violence: Measuring the Triple-C Impact*, 46 *FORDHAM URB. L.J.* 1, 22–23 (2019). Gilad coined the phrase “Comprehensive Childhood Crime Impact,” or “Triple-C Impact,” to describe “the full effect of all forms of direct and indirect crime exposure on children.” Gilad, *supra* note 3, at 910. Gilad pointed to six “categories of exposure” included under the umbrella experience of Triple-C Impact: (1) children who directly experience violence; (2) children who witness family crime and violence; (3) children living in violence-free home environments but whose communities are rife with crime and violence; (4) children whose parents are victims of a violent crime; (5) children who witness violence and provide testimony in the criminal justice system; and (6) children whose parents are incarcerated. *Id.* at 914–28. Gilad hypothesized before conducting a nationwide study that “children under most of the Triple-C Impact categories are not formally recognized by law, and thus are ineligible to receive services to facilitate their recovery.” *Id.* at 933. Despite this hypothesis, Gilad has found that throughout the country there is “a sizable prevalence of statutory recognition of . . . the Triple-C Impact categories.” *Id.* However, Gilad noted that children affected by parental incarceration were “[c]onsistently excluded” from the statutory schemes of all but one State, Vermont. *Id.* at 934. Even with the recent New Jersey enactment, most States still ignore the victims of parental incarceration. See *infra* Section II.B.1.

parents & empower them to break the cycle of intergenerational involvement in the criminal justice system.”<sup>121</sup> CPNYC’s model is holistic and incorporates academic support, mental health services, one-to-one mentoring, family engagement, arts and culture, social justice initiatives, and recreational activities to support the children it serves.<sup>122</sup> Another organization provides “toolkits” for how to interact with children in a way that is productive for their development.<sup>123</sup> Others create supportive “circle[s]” of positive relationships for children in such circumstances,<sup>124</sup> promote increased access to visitation,<sup>125</sup> and advocate for increased access to communication with incarcerated parents.<sup>126</sup>

The range of issues private organizations work on shows the wide scope of harm that children with incarcerated parents in the United States encounter. However, given that their work takes place in the private sector, the number of resources and individuals they can impact is limited. Many of these programs only impact children in specific regions: for instance, a program in New York City more than likely does nothing to help children in San Jose. Further, a lack of resources can translate to an organization’s limited capabilities. Increased visitation is necessary, but it does little to lend financial assistance to a child’s parent whose incarcerated spouse was formerly the family’s main source of income. Parental incarceration negatively impacts so many children throughout the country in so many different ways. Without thorough and far-reaching

---

121. *Mission + History*, CHILD. PROMISE NYC, <https://www.cpnyc.org/mission> (last visited Jan. 8, 2021).

122. *Our Model*, CHILD. PROMISE NYC, <https://www.cpnyc.org/our-model> (last visited Jan. 8, 2021).

123. *Coping with Incarceration*, SESAME ST. CMTYS., <https://sesamestreetincommunities.org/topics/incarceration/> (last visited Jan. 8, 2021).

124. *What We Do*, SAVE KIDS INCARCERATED PARENTS, <https://www.skipinc.org/> (last visited Jan. 8, 2021).

125. *About AFOI*, ASSISTING FAMS. INMATES, <https://afoi.org/about-afoi> (last visited Jan. 8, 2021).

126. *What We Do*, SERV. NETWORK FOR CHILD. INMATES, <https://www.childrenofinmates.org> (last visited Jan. 8, 2021).

2021] *VICTIMS OF PARENTAL INCARCERATION* 555

public support, more and more children will fall through the cracks.

*B. Available Public Solutions at Home and Abroad*

Despite calls for criminal justice reform or the abolition movement, there are few public institutions whose work directly aims to support the victims of parental incarceration. State legislatures are just now considering legislation that may mitigate the consequences of having a parent in prison or jail.<sup>127</sup> In addition, there is a relatively new movement within municipal criminal legal systems who see prosecutorial policy shifts as an avenue for change.<sup>128</sup> However, the efforts taking place across the United States to reform criminal legal systems still fall short of addressing parental incarceration directly.<sup>129</sup> No legislature in the United States has passed anything near adequate. Throughout the country, lawmakers and law enforcement could benefit from looking abroad to establish programs and policies to fill this gap. International programs have come much closer to reducing as much harm for children with incarcerated parents as possible.

As lawmakers in the United States begin to address this issue, it will become clear that identifying children in this population as legal victims is not only common sense but is possible and necessary.

*1. Current efforts in state and local governments*

There are currently reform movements taking place in the executive branches of some local governments. One movement that has impacted criminal legal reform throughout the country

---

127. See, e.g., Noor Adatia, *Bill Would Make It Easier for People to Visit Loved Ones in Prison*, DAILY HAMPSHIRE GAZETTE (Oct. 28, 2019, 2:38:28 PM), <https://www.gazettenet.com/prison-visitation-bill-29782726>.

128. CYRUS R. VANCE JR., STANLEY RICHARDS & COURTNEY M. OLIVA, INST. FOR INNOVATION IN PROSECUTION AT JOHN JAY COLL., PROSECUTORS, REENTRY, AND PUBLIC SAFETY 11 (2019), <https://www.prosecution.org/executive-session-papers>.

129. See Gilad, *supra* note 3, at 934.

is the push for “progressive prosecutors.”<sup>130</sup> Cities throughout the country are electing reform-minded district attorneys.<sup>131</sup> In the context of parental incarceration, some district attorneys’ offices incorporate family concerns at sentencing that can lead to “noncustodial and community-based sentences for parents.”<sup>132</sup> Proponents of progressive prosecutorial practices note that in the area of parental incarceration, children and other family members are “often ‘hidden victims’” to whom prosecutors are accountable.<sup>133</sup> However, similar to legislation that does not fully address the impact of parental incarceration, progressive prosecution is a half-measure because the prosecutorial role can be antagonistic to criminal legal reform and reducing incarceration rates. Fairer sentencing and the option to not press charges could certainly reduce the number of incarcerated parents in the long term, but this fails to account for children whose parents are currently in prison and jail. For those children, the harm has already occurred. They are already victims. If the lawmaking and law-enforcing bodies of state and local governments intend to address this form of victimization, they need to take action that directly accounts for the actual experiences of children whose parents have already been taken away.

At the state level, two legislative bodies are taking steps either to address the existence of harm caused by parental incarceration or to alleviate the harm itself. Recent actions in the Massachusetts<sup>134</sup> and New Jersey<sup>135</sup> legislatures are crucial to

---

130. *Id.*

131. Ebony Underwood & Miriam Aroni Krinsky, *Millions of Children Lose Their Parents to Incarceration. That Doesn't Have to Happen*, APPEAL (Oct. 24, 2019), <https://theappeal.org/millions-of-children-lose-their-parents-to-incarceration-that-doesnt-have-to-happen/>. For instance, recently elected district attorneys in Boston, Brooklyn, Philadelphia, and Seattle have begun practicing reform strategies like opting out of prosecuting low-level offenses and building new reentry programs. *Id.*

132. *Id.*

133. *Should Prosecutors Be Reformers?*, CRIME REP. (Oct. 10, 2019), <https://thecrimereport.org/2019/10/10/should-prosecutors-be-reformers/>.

134. Adatia, *supra* note 127.

135. N.J. STAT. ANN. §§ 30:1B-6.5 to -6.9 (West 2020).



this Note's proposal that children of incarcerated parents should be considered victims. Massachusetts and New Jersey demonstrate two things: first, there is legitimate public support for children with incarcerated parents; second, states do have the resources and ability to address parental incarceration. The efforts taking place in both states are very promising. However, absent a more holistic approach to reducing harm from parental incarceration, neither state comes close to achieving what is necessary.

At the moment of writing, Massachusetts has two bills working through both chambers of its legislature that confront some of the harm parental incarceration creates. A bill in the House would, if enacted, counteract regulations and restrictions enacted by the State's Department of Correction regarding the number of visitors and visitation dress codes.<sup>136</sup> In the Senate, legislators are pushing to eliminate the cost of telephone services in prisons.<sup>137</sup> There is a significant lack of contact opportunities for incarcerated people and their children at both the state and federal level.<sup>138</sup> This lack of contact can, in part, be attributed to the disrespect and humiliation that family members experience during the visitation process.<sup>139</sup> Additionally, when individuals forego in-person visitation, the steep financial barrier to making phone calls can further deter contact.<sup>140</sup>

Massachusetts is taking the steps necessary to address issues with visitation and telephone communication. However hopeful these changes are, success in supporting visitation and telephone communication is not a huge victory. While children would indeed benefit from contact with an incarcerated parent,

---

136. H.R. 2047, 2019–2020 Gen. Ct., 191st Sess. (Mass. 2019); Adatia, *supra* note 127.

137. S. 1372, 2019–2020 Gen. Ct., 191st Sess. (2020); Sarah Betancourt, *Families Want To End Prison Phone Call Charges*, COMMONWEALTH (Oct. 22, 2019), <https://commonwealthmagazine.org/criminal-justice/families-want-to-end-prison-phone-call-charges/>.

138. Boudin, *supra* note 9, at 102–04.

139. See *supra* Section I.A; see also Adatia, *supra* note 127.

140. See Betancourt, *supra* note 137 (discussing how “typical charges for two 20-minute calls each week from a prison inmate can approach \$2,000 a year”).

legislation that focuses only on contact is less than a half measure—it ignores the economic and social consequences of parental incarceration. Children who can visit their parents can maintain limited relationships.<sup>141</sup> However, absent from these policies is any consideration of the need for financial support at home and the need to foster positive relationships between criminal legal officials and parental-incarceration victims. In order to ensure that increased visitation accomplishes the goal of enhancing a child’s relationship with an incarcerated parent, legislatures must take into account the often-traumatizing encounters with prison officials that visitors can face.<sup>142</sup> Legislatures must create more impactful programs when they consider the victimization of children in this population.

A recent addition to New Jersey law represents state legislation that is at least taking a step in the right direction to address parental incarceration. In January 2020, New Jersey’s Governor Phil Murphy signed into law NJ A.B. 3979, titled the Dignity for Incarcerated Primary Caretaker Parents Act.<sup>143</sup> Senator Linda Greenstein, one of the Act’s sponsors, asserted her support for the legislation because it supports the dignity of the incarcerated and their ability to retain a relationship with their children.<sup>144</sup> Another sponsor, Assemblywoman Verlina Reynolds-Jackson, noted that “[c]hildren often bear emotional and psychological scars due to the actions of their parents, many of whom were victims of similar wounds themselves.”<sup>145</sup> The Act primarily requires the New Jersey Commissioner of Corrections and every county’s chief executive officer to adopt policies regarding incarcerated primary caretakers.<sup>146</sup> If the Act

---

141. See, e.g., Morse & Venters, *supra* note 72.

142. See *id.*

143. N.J. STAT. ANN. §§ 30:1B-6.5 to -6.9 (West 2020).

144. Greenstein, Cruz-Perez, Ruiz ‘Dignity for Incarcerated Primary Caretaker Parents Act’ Clears Committee, INSIDER NJ (Dec. 6, 2019, 11:11 AM) [hereinafter *New Jersey Committee Bill*], <https://www.insidernj.com/press-release/greenstein-cruz-perez-ruiz-dignity-incarcerated-primary-caretaker-parents-act-clears-committee/>.

145. Governor Murphy Signs Dignity for Incarcerated Primary Caretaker Parents Act, OFF. SITE ST. N.J. (Jan. 9, 2020), <https://nj.gov/governor/news/news/562020/approved/20200109b.shtml>.

146. See *New Jersey Committee Bill*, *supra* note 144.

2021] *VICTIMS OF PARENTAL INCARCERATION* 559

works as intended, it will require placement of incarcerated parents in facilities as close to their children as possible, establish minimum visitation periods, disband any restrictions on the number of children allowed to visit, increase the number of adults permitted to visit, and permit contact visits.<sup>147</sup> The Act will require the following:

[P]rohibiti[on] [of] solitary confinement and the shackling of pregnant inmates; [t]he availability of parenting classes; [t]rauma-informed care for inmates and the training of corrections officers to interact with victims of trauma; [m]entoring by former inmates to assist with reentry; [f]eminine hygiene products to be made available free-of-charge; [p]rohibit[ing] corrections officers from entering the restrooms or showers of the opposite sex unless deemed necessary by the commissioner; [and] [t]he option for primary caretaker parents to enroll in residential drug abuse and mental health programs.<sup>148</sup>

New Jersey's Primary Caretakers Act is a prime example of state legislation that remedies the harm a criminal legal system created for caretakers. However, the Act fails to account for the innocent children those individuals care for. Outside of its promise to reduce the distance between families and their incarcerated loved ones and to expand visitation access, much of the Act focuses less on children and more on incarcerated parents. Supporting the rights, opportunities, and rehabilitation of incarcerated people surely generates significant progress in a criminal legal system. But laws titled "primary caretaker"—sponsored by legislatures who emphasize detriment to children—that focus more on caretakers themselves than the person being cared for—or in this instance, not being cared for—are misleading at best. If state governments propose to

---

147. *Id.*

148. *Id.*

enact laws that support children with incarcerated parents, those laws must actually relieve the consequences of parental incarceration.

## 2. *Government programs outside the United States*

International reforms offer helpful insights into the potential for state-supported parental-incarceration remedies. The State Legal Service Authority (SLSA) in Chandigarh, India, advocates for reforms to counteract the harm of parental incarceration.<sup>149</sup> The reform arose following the release of a report entitled *Clipped Wings – Impact of Incarceration on Family Members of Prisoners*.<sup>150</sup> In particular, the SLSA advocates for “a helpdesk or helpline for families of prisoners . . . [a program wherein] [p]olice stations . . . give [families] information about free legal aid . . . a special scheme for kin of the prisoners, and effective information, education, and communication (IEC) material[s] . . . [and] mental health services for families of prisoners.”<sup>151</sup>

Another program in South Korea promises to provide an immense amount of relief for families of incarcerated people. In October, 2019, the Supreme Prosecutors’ Office announced its development and implementation of “an emergency welfare support related system.”<sup>152</sup> Following this system’s protocol, South Korean prosecutors are responsible for inquiring into the financial circumstances of families following the arrest of a family member.<sup>153</sup> If the prosecutors determine that the arrested family member is the primary financial provider for the family, they will “connect the family members with the city, county,

---

149. Naina Mishra, *SLSA for Protection of Convicts’ Children*, TRIB. INDIA (Oct. 20, 2019, 6:58 AM), <https://www.tribuneindia.com/news/chandigarh/slsa-for-protection-of-convicts-children/849468.html>.

150. *Id.*

151. *Id.*

152. D.M. Park, *Gov’t to Offer Financial Support to Families Whose Breadwinners Are Incarcerated*, KOR. BIZWIRE (Oct. 8, 2019), <http://koreabizwire.com/govt-to-offer-financial-support-to-families-whose-breadwinners-are-incarcerated/145567>.

153. *Id.*

2021] *VICTIMS OF PARENTAL INCARCERATION* 561

and district offices to receive support.”<sup>154</sup> Local governments participating in this program will then act “to support living, medical and housing expenses for low-income people” following these unexpected crises.<sup>155</sup> According to a Supreme Prosecutors’ Office official, the goal of this program is “to protect the human rights of family members.”<sup>156</sup>

Overall, the efforts taking place in South Korea and in Chandigarh, India demonstrate that government entities are capable of forming comprehensive plans to address the harm that occurs as a result of parental incarceration. However, there is no comparable government-sponsored program in the United States that provides comprehensive aid to children whose parents are incarcerated. State legislatures in the United States should take note and consider what programs that address the multifaceted harm of parental incarcerations look like. The need for such programs is evident.<sup>157</sup> But existing measures do little to address more than discrete portions of the harm taking place.<sup>158</sup> Existing private sector programs demonstrate frameworks states could implement to address parental incarceration. Public institutions should institute the more comprehensive solutions implemented by private organizations throughout the country to support the victims of parental incarceration. That being said, states need not start from scratch to address this issue. Victims’ legislation presents an excellent opportunity to confront parental incarceration without the need for significant change or revision to state laws.

---

154. *Id.*

155. *Id.*

156. *Id.*

157. *See supra* Section I.A.

158. One pushback to the proposal that states amend their victims’ rights legislation to address parental incarceration might be that some states may simply lack the infrastructure or resources to do so. That would be a legitimate concern. This proposal is limited only to a normative recommendation that children with parents in jail or prison are victims. Any discussion regarding the actual process by which states should allocate resources is beyond the scope of this Note.

*C. Recourse in Existing State Legislation*

Every state and most territories in the United States have victims' rights legislation. However, no state or territory expressly defines the children of incarcerated people as victims. A simple revision in the definition of victimhood could significantly reduce the harmful consequences of parental incarceration. Victims' rights laws in the United States include rights and benefits that, if provided to children with incarcerated parents, could ameliorate the sociohistorical harm they face.

1. *How victims' rights benefits could help children with incarcerated parents*

Many states declare an enumerated list of rights in order to effectuate the goals of victims' rights legislation for those the states define as victims. The declaration of rights listed in the Kansas Crime Victims Compensation Board law provides a good example of this kind of rights declaration:

(a) In order to ensure the fair and compassionate treatment of victims of crime and to increase the effectiveness of the criminal justice system by affording victims of crime certain basic rights and considerations, victims of crime shall have the following rights:

(1) Victims should be treated with courtesy, compassion and with respect for their dignity and privacy and should suffer the minimum of necessary inconvenience from their involvement with the criminal justice system.

(2) Victims should receive, through formal and informal procedures, prompt and fair redress for the harm which they have suffered.

2021]

*VICTIMS OF PARENTAL INCARCERATION*

563

(3) Information regarding the availability of criminal restitution, recovery of damages in a civil cause of action, the crime victims compensation fund and other remedies and the mechanisms to obtain such remedies should be made available to victims.

(4) Information should be made available to victims about their participation in criminal proceedings and the scheduling, progress and ultimate disposition of the proceedings.

(5) The views and concerns of victims should be ascertained and the appropriate assistance provided throughout the criminal process.

(6) When the personal interests of victims are affected, the views or concerns of the victim should, when appropriate and consistent with criminal law and procedure, be brought to the attention of the court.

(7) Measures may be taken when necessary to provide for the safety of victims and their families and to protect them from intimidation and retaliation.

(8) Enhanced training should be made available to sensitize criminal justice personnel to the needs and concerns of victims and guidelines should be developed for this purpose.

(9) Victims should be informed of the availability of health and social services and other relevant assistance that they might continue to receive the necessary medical, psychological and social assistance through existing programs and services.

(10) Victims should report the crime and cooperate with law enforcement authorities.<sup>159</sup>

The rights that Kansas declares for victims could provide, *inter alia*, the economic and emotional support parental-incarceration victims require. Additionally, Wisconsin's Rights of Victims and Witnesses of Crime legislation creates a list of rights specific to children defined as victims.<sup>160</sup> Wisconsin encourages counties to provide children, in addition to the rights provided adult victims, the following "additional services":

Explanations, in language understood by the child, of all legal proceedings in which the child would be involved.

Advice to the judge, when appropriate and as a friend of the court, regarding the child's ability to understand proceedings and questions . . . .

Information about and referrals to appropriate social services programs to assist the child and the child's family in coping with the emotional impact of the crime and the subsequent proceedings in which the child is involved.<sup>161</sup>

Like Kansas, Wisconsin declares rights that criminal legal systems must provide to victims. However, Wisconsin's rights declaration takes another step further to ensure that when a child is a victim, officials take appropriate measures to tailor their interactions to a child's unique needs. Along with general victims' rights declarations, child-specific guidelines would create the necessary environment to advocate for a child facing the consequences of parental incarceration.

Even where states do not have an enumerated list of victims' rights, every state provides separate rights and benefits to

---

159. KAN. STAT. ANN. § 74-7333(a)(1)-(10) (2020).

160. WIS. STAT. § 950.055(2)(a)-(d) (2020).

161. *Id.*



people they define as victims.<sup>162</sup> States create assistance funds through which their legislatures appropriate moneys specifically to compensate victims.<sup>163</sup> Through assistance funds, states can provide parental-incarceration victims compensation for medical care, mental health care, lost wages, lost income, and loss of support for dependents.<sup>164</sup>

Victims legislation also provides victims the opportunity to access post-conviction information and participate in proceedings on the crime at issue. In many states, victims or their representatives are given the right to be present at hearings and trial.<sup>165</sup> Other states allow victims to consult with the prosecution prior to and after proceedings.<sup>166</sup> At least one state—Wisconsin—requires age-appropriate language when child victims participate in proceedings.<sup>167</sup> Victim impact statements provide crucial opportunities for victims to express to the court the extent of harm the crime has on the victim.<sup>168</sup> And while prosecutors often wield victim impact statements as tools to condemn criminal defendants, those statements could be effective tools that parental-incarceration victims could utilize to express the full impact of a parent's incarceration during sentencing or parole hearings. Moreover, even once proceedings are over, states give victims the ability to remain informed regarding the status of the incarcerated person.<sup>169</sup>

States invoke different means to inform victims of their rights. Law enforcement agencies investigating the crime at issue in

---

162. See *Victims' Rights*, PRETRIAL JUST. CTR. CTS., <https://www.ncsc.org/pjcc/topics/victims> (last visited Jan. 9, 2021).

163. See, e.g., NEB. REV. STAT. § 81-1844 (2020); IOWA CODE § 915.94 (2020).

164. See, e.g., IOWA CODE § 915.86 (2020).

165. See, e.g., ARK. CODE ANN. § 16-90-1103 (2020).

166. See, e.g., COLO. REV. STAT. § 24-4.1-302.5 (2019).

167. See WIS. STAT. § 950.055(2)(a) (2020).

168. See, e.g., IOWA CODE § 915.21 (2019); 725 ILL. COMP. STAT. 120/6(a) (2020); KY. REV. STAT. ANN. §§ 421.520, 421.530 (LexisNexis 2020).

169. See e.g., ARK. CODE ANN. § 16-90-1109 (2020).

Arkansas,<sup>170</sup> the District of Columbia,<sup>171</sup> and Kentucky<sup>172</sup> provide victims information on their rights, available services, and access to protection and public records. The district attorney's office in Colorado is required to explain to victims their rights and the benefits available to them.<sup>173</sup> Other states create "[v]ictim and witness assistance centers"<sup>174</sup> or "victim assistance program[s],"<sup>175</sup> which are representative bodies that promote community support for victims, and inform victims of their rights and available services.

Victims' legislation can also provide funds for groups that support children of incarcerated parents. For instance, the Pennsylvania Crime Victims Act incorporates a grant program<sup>176</sup> that demonstrates one option other states could use to more comprehensively ameliorate harm for all victims. Under the "Grant program for services," Pennsylvania authorizes the Pennsylvania Commission on Crime and Delinquency to grant "district attorneys and other criminal justice agencies" funds for victims' services.<sup>177</sup> Granting funds only to district attorneys and criminal justice agencies limits the number of organizations that can affect the lives of parental-incarceration victims in a significant way. However, states could implement grant programs that allocate funds to community-based private organizations in order to provide support to groups intimately involved in victims' rights.

---

170. *Id.* § 16-90-1107.

171. D.C. CODE § 23-1902(a)-(c) (2020).

172. KY. REV. STAT. ANN. § 421.500(3) (LexisNexis 2020).

173. COLO. REV. STAT. § 24-4.1-303 (2019). The benefits available to victims in Colorado include services for children, "counseling facilities and community service agencies" that provide "crisis intervention services, victim compensation funds, victim assistance resources, legal resources, mental health services, social services, medical resources, rehabilitative services, financial assistance, and other support services," transportation and household assistance, help in dealing with creditors if financial setbacks occur, and interpreters and information in the victim's first language. *Id.* § 24-4.1-303(9)(c)-(f).

174. NEB. REV. STAT. §§ 81-1846 to -1847 (2020).

175. *E.g.*, IND. CODE § 35-40-6-4 (2020); VT. STAT. ANN. tit. 13, § 5304 (2019).

176. 18 PA. CONS. STAT. § 11.903 (2020).

177. *Id.* § 11.903(a).

Finally, there are two aspects of many states' victims' rights laws that must be considered before they are applied to parental-incarceration victims. First, many states incorporate "eligibility" requirements to qualify for victimhood.<sup>178</sup> Many eligibility requirements require individuals to report the occurrence of the crime at issue to become qualified for victims' rights and services. Requiring reporting would have to be abandoned or revised to include children who do not report their parent's crime. Massachusetts already implements a non-reporting eligibility requirement,<sup>179</sup> which is something all states should incorporate into their victims' rights statutes.

Second, most states permit victims to hold defendants or incarcerated individuals liable for restitution.<sup>180</sup> Restitution may be valuable for direct victims of crime and their families. Children of incarcerated people may also wish to seek damages from their parents if states include them in victims' rights laws. However, this Note operates from the assumption that parental incarceration victims are victims because of the relationship they lose when their parents are imprisoned. Inclusion in victims' rights would give children the opportunity to remain intimately connected to their parents and would give them access to services unique to their circumstances. In those cases where children wish to maintain a relationship to their incarcerated parents, restitution is not an attractive option because it posits a financial obligation on the parent as a form of punishment. Thus, states providing restitution for victims will likely need to create an exception that makes parental incarceration victims ineligible for restitution.

Overall, victims' rights laws are useful tools through which state and local governments can support children whose

---

178. *See, e.g.*, HAW. REV. STAT. § 801D-3 (2020); LA. STAT. ANN. § 46:1843 (2020); MO. REV. STAT. § 595.206 (2016); VT. STAT. ANN. tit. 13, § 5302 (2019); WIS. STAT. § 950.03 (2020).

179. MASS. GEN. LAWS ch. 258B, § 2 (2019).

180. *See, e.g.*, IOWA CODE § 915.100(2)(a) (2020); MO. REV. STAT. § 559.105 (2016); N.C. GEN. STAT. § 15A-834 (2020); 12 R.I. GEN. LAWS § 12-28-5.1 (2020); S.D. CODIFIED LAWS § 23A-28C-1(9) (2020); TENN. CODE ANN. § 40-38-103(H) (2020); VA. CODE ANN. § 19.2-11.01(A)(2)(c) (2020); WASH. REV. CODE § 7.69.030(15) (2020); W. VA. CODE ANN. § 61-11A-4 (LexisNexis 2020).

parents are incarcerated. Crime victims' laws that include provisions for compensation, health care, and grant programs would adequately fill the gaps other legislation leaves. In revising victims' rights legislation, states should look abroad for examples of what more comprehensive parental incarceration programs look like, as well as to other states' applicable victims' rights provisions.

## 2. *Categories of legal victimhood definitions*

There are generally two ways victims' rights legislation defines victims. First, some state legislatures define victims broadly. Those broad definitions provide enough interpretive leeway that the officials authorized to define victims could include children with incarcerated parents without any legislative action. Second, some state legislatures define victims with specific, enumerated classifications. In those states, legislatures would have to revise their definitional statutes to include parental incarceration victims.

Certain state statutes include victim definitions broad enough to include children with parents in prison without any legislative change. For instance, some states give law enforcement, prosecutors, and judges the ability to label someone a victim.<sup>181</sup> Other states qualify victims as individuals harmed "as the result of" a crime.<sup>182</sup> Finally, at the broadest end

---

181. See DEL. CODE ANN. tit. 11, § 9401(7) (2020) (deeming a victim any "person, organization, partnership, business, corporation, agency or governmental entity identified as the victim of a crime in a police report, a criminal complaint or warrant, an indictment or information or other charging instrument"); see also OHIO REV. CODE ANN. § 2930.01(H)(1) (LexisNexis 2020) (deeming a victim "[a] person who is identified as the victim of a crime . . . in a police report or in a complaint, indictment, or information that charges the commission of a crime").

182. IOWA CODE § 915.10(3) (2020) (defining a victim as "a person who has suffered physical, emotional, or financial harm as the result of a public offense or a delinquent act, other than a simple misdemeanor, committed in this state"); see also KAN. STAT. ANN. § 74-7301(m) (2020) (defining a victim as "a person who suffers personal injury or death as a result of: (1) Criminally injurious conduct; (2) the good faith effort of any person to prevent criminally injurious conduct; or (3) the good faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct"); N.J. STAT. ANN. § 52:4B-37 (West 2020) ("As used in this act,

of the spectrum, some states, including Missouri, Maryland, and North Dakota, define victims as those actually harmed or “threatened” with harm as the result of a crime.<sup>183</sup>

Additionally, many states, such as Colorado, Tennessee, and Utah, include in their victims definitions language expressly excluding any person directly involved in the commission of the crime at issue.<sup>184</sup> This indicates that in order to fit the victim definition in those states, a person’s innocence is just as relevant as the impact the crime or violence has on them. Children of people who commit a criminal offense should not face the harm parental incarceration causes merely because of their relationship to their parents. So long as they are innocent regarding the crime at issue, their victimhood is deserving of recognition and support.

On the other hand, there are states that require revisions to their victimhood definitions to include children of incarcerated people. The Pennsylvania Crime Victims Act, for example, defines “victim” as follows:

- (1) A direct victim.
- (2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.

---

‘victim’ means a person who suffers personal, physical, or psychological injury or death or incurs loss of or injury to personal or real property as a result of a crime . . . .”)

183. See MO. REV. STAT. § 595.200(6) (2016) (defining a victim as “a natural person who suffers direct or threatened physical, emotional, or financial harm as the result of the commission or attempted commission of a crime”); see also MD. CODE ANN. CRIM. PROC. § 11-104(a)(4) (LexisNexis 2020) (defining a victim as “a person who suffers actual or threatened physical, emotional, or financial harm as a direct result of a crime or delinquent act”); N.D. CENT. CODE § 12.1-35-01(7) (2019) (defining a child victim as “a living child who has suffered direct or threatened physical, financial, or emotional harm as a result of the commission or attempted commission of a crime”).

184. See, e.g., COLO. REV. STAT. § 24-4.1-302(5) (2019) (excluding from victimhood those “accountable for the crime or a crime arising from the same conduct”); TENN. CODE ANN. § 40-38-302(4)(B) (2020) (“‘Victim’ does not include any person charged with or alleged to have committed the crime or who is charged with some form of criminal responsibility for commission of the crime.”); UTAH CODE ANN. § 77-38-2(9)(a) (LexisNexis 2020) (excluding from victimhood those “accused or [who] appear[] to be accountable or otherwise criminally responsible for or criminally involved in the crime or conduct”).

(3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child's family:

Chapter 25 (relating to criminal homicide).

Section 2702 (relating to aggravated assault).

Section 3121 (relating to rape).

(4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiancé [sic], one of whom is to be identified to receive communication as provided for in this act, except where the family member is the alleged offender.<sup>185</sup>

The Pennsylvania legislature would need to revise its victims' rights law because children with incarcerated parents simply do not fit any of the allocated victimhood classifications in the statute. That definitional revision need not be drastic. Rather, simply adding a fifth classification—a child whose parent is incarcerated<sup>186</sup>—would accomplish the changes necessary to support parental incarceration victims.

The legislative intent expressed by many victims' rights laws can easily be read to include the states' concern for parental incarceration victims. There are states that speak directly to the harm victims experience. Nebraska's law states that victims experience "trauma and discomfort . . . because often such victims . . . are further victimized by the criminal justice system."<sup>187</sup> Indiana's law states that "many innocent persons suffer economic loss and personal injury" as a result of crime.<sup>188</sup> Innocent parental incarceration victims certainly experience

---

185. 18 PA. CONS. STAT. § 11.103 (West 2020).

186. *See infra* Section III.A.

187. NEB. REV. STAT. § 81-1843(1)(a) (2020).

188. IND. CODE § 35-40-1-1 (2020).

2021] *VICTIMS OF PARENTAL INCARCERATION* 571

trauma and discomfort at the hands of the criminal justice system.<sup>189</sup> One way to reduce that trauma and discomfort is to encourage positive relationships with criminal legal officials and parental incarceration victims through mutual aid and support. Many states recognize that victims' rights laws exist to encourage those relationships.<sup>190</sup>

### III. INTEGRATING PARENTAL INCARCERATION INTO LEGAL VICTIMHOOD

The children of people incarcerated in prisons and jails throughout the United States are victims. They are innocent. They are vulnerable. One day, their lives are proceeding in one direction. The next day, because of a third party's conduct, their lives change significantly and often for the worse. They experience mental, emotional, and physical trauma. They can lose contact with a loved one and they often experience financial hardship. That experience is the experience of a victim. This reality is true for the direct victim of a crime or violence and their family members, and it is true for the children of the person who committed that crime or violent act. The failure to include children of incarcerated parents in the legal definitions of victimhood is unacceptable. It is logically inconsistent and morally corrupt. It represents a lack of respect and human compassion. States must revise their definitions of victimhood to include this population of children.

#### *A. New or Expanded Definitions and Legislative Goals*

In states where the definition of victimhood is limited to specific, enumerated classes of people, the legislatures will have to revise their statutory definitions to comply with this

---

189. *See supra* Section I.A.

190. *See, e.g.*, COLO. REV. STAT. § 24-4.1-301 (2019) (“[T]he full and voluntary cooperation of victims of and witnesses to crimes with state and local law enforcement . . . is imperative for the general effectiveness and well-being of the criminal justice system . . .”); MONT. CODE ANN. § 46-24-101 (2019) (expressing the goal of its victims legislation to “protect the role of crime victims” in the criminal system and to assure victims “receive fair and proper treatment”).

proposal. For instance, the Pennsylvania General Assembly could revise its Crime Victims Act to include children whose parents are incarcerated as follows:

“Victim.” The term means the following:

(1) A direct victim.

(2) A parent or legal guardian of a child who is a direct victim, except when the parent or legal guardian of the child is the alleged offender.

(3) A minor child who is a material witness to any of the following crimes and offenses under 18 Pa.C.S. (relating to crimes and offenses) committed or attempted against a member of the child’s family:

Chapter 25 (relating to criminal homicide)

Section 2702 (relating to aggravated assault)

Section 3121 (relating to rape)

(4) A family member of a homicide victim, including stepbrothers or stepsisters, stepchildren, stepparents or a fiancé [sic], one of whom is to be identified to receive communication as provided for in this act, except where the family member is the alleged offender.<sup>191</sup>

*[(5) A child whose parent or guardian is incarcerated in a state prison or county jail.]*<sup>192</sup>

Criminal legal officials responsible for identifying victims in states where the definition of victim is broader or more ambiguous would also need to take additional steps to include parental incarceration victims. Law enforcement officials write

---

191. 18 PA. CONS. STAT. § 11.103 (West 2020). These four subsections are directly quoted from the existing statute.

192. Subsection 5 is the author’s proposed addition.



2021] *VICTIMS OF PARENTAL INCARCERATION* 573

criminal complaints, prosecutors file those complaints, and judges oversee proceedings. Each actor must identify all victims to ensure the crime does not cause a ripple effect that harms direct victims, direct victims' families, and the children of defendants.

States could ensure parental incarceration victims are included in these broader definitions through their declarations of legislative intent. As an example, states legislatures could combine the declarations of legislative intent in Nebraska<sup>193</sup> and Indiana<sup>194</sup> while emphasizing the importance of harm reduction in any criminal proceeding:

1. The Legislature finds and declares:
  - A. That many innocent persons suffer economic loss and personal injury or death as a result of criminal or delinquent acts;
  - B. That there is a need to develop methods to reduce the trauma and discomfort that victims of a crime *including children with incarcerated parents* may experience because often such victims, *including children with incarcerated parents*, are further victimized by the criminal justice system;
  - C. That when crime strikes, the chief concern of the criminal justice system is apprehending and dealing with the criminal and the victim's needs are frequently forgotten;
  - D. That victims often become isolated and receive little practical advice or necessary care;
  - E. That a large number of victims are unaware of both their rights and obligations.

---

193. NEB. REV. STAT. § 81-1843(1)(a) (2020).

194. IND. CODE § 35-40-1-1 (2020).

*B. Rights and Benefits Available Through Revised Definitions and Goals*

States could effectuate new definitions, goals, and findings in numerous ways. One option is to utilize an enumerated list of victims' rights. States that choose that route could look to Kansas<sup>195</sup> or Wisconsin<sup>196</sup> for exemplary victims' rights declarations that consider the needs of victims and child victims without over-emphasizing punitive goals. Alternatively, states that utilize separate victims' rights statutes could maintain that legislation so long as it includes parental incarceration victims. Overall, adding children of incarcerated parents to the definition of victim could result in the following rights and benefits for those children throughout the United States:

1. Fair treatment by criminal legal systems and a recognition of dignity and privacy;
2. Redress for the harm they experience as a result of their parent's incarceration;
3. Protection from intimidation and harassment regarding their parent's incarceration;
4. The opportunity to be present, either personally or through a representative, at their parent's proceedings;
5. The right to be accompanied by a parent or guardian throughout all proceedings;
6. The opportunity to consult with prosecutors regarding their parent's prosecution;
7. The opportunity to recommend alternative means of holding their parent accountable for the crime they committed;

---

195. See KAN. STAT. ANN. § 74-7333(a)(1)–(10) (2020).

196. See WIS. STAT. § 950.055(2)(a)–(d) (2020).

2021] *VICTIMS OF PARENTAL INCARCERATION* 575

8. Access to age-appropriate language during their parent's proceeding;
9. The opportunity to express in victim impact statements how their parent's offense and consequent incarceration impacts their life;
10. Direct access to information regarding their parent's confinement, including notice when their parent is released or transferred to a mental health facility;
11. Access to health and social services for medical, psychological, and emotional support;
12. Assistance from victims' assistance programs that can provide community support and inform victims of their rights and available services;
13. Access to compensation and financial assistance through victims' assistance funds.

Additionally, if states implement a revised version of Pennsylvania's grant program, children with incarcerated parents could have access to private programs funded by the state. Allocating funds strictly to law enforcement officials and entities demonstrates a tough-on-crime approach to victim advocacy that is antithetical to harm reduction.<sup>197</sup> Existing alternatives to this grant program demonstrate a better commitment to reducing harm—specifically for those impacted by crime and violence. For instance, in 1935 as part of the Social Security program the federal government enacted a statute that provided “[g]rants for programs for mentoring children of prisoners.”<sup>198</sup> The federal government, through that legislation, was keeping track of parental incarceration and its effects as late as 1999.<sup>199</sup> The purpose of the legislation was “to make

---

197. *See supra* Section I.B.

198. 42 U.S.C. § 629i.

199. § 629i(a)(1).

competitive grants to applicants in areas with substantial numbers of children of incarcerated parents, [and] to support the establishment or expansion and operation of programs using a network of public and private community entities to provide mentoring services for children of prisoners.”<sup>200</sup> The legislation defines mentoring as programs that provide “one-on-one relationships” to meet “the child’s need for involvement with a caring and supportive adult.”<sup>201</sup>

Given the sheer size of the entire United States population, the impact of the federal grant program is surely unable to meet the needs of every child with an incarcerated parent. However, this legislation not only demonstrates that the federal government recognizes the harm parental incarceration produces, it also provides an excellent roadmap for states to follow. If states, including Pennsylvania, were to implement grant programs with similar language, they could facilitate an avenue to provide resources for private organizations supporting all victims, including children of incarcerated people. Those who work in existing programs for traditional victims or parental incarceration victims are already intimately involved in that work. With additional funds and resources, they could significantly impact the victims they serve.

As suggested above, this Note is operating from the assumption that children and their families do not want to hold incarcerated family members liable for restitution. Requiring an incarcerated person to accrue debt or provide financial assistance from within the walls of a prison or jail is antithetical to any legitimate legislation seeking to reduce harm for children of incarcerated people. Furthermore, restitution for the direct victim or their family members is often an empty promise due to the incarcerated person’s already limited financial

---

200. § 629i(a)(2)(A).

201. § 629i(b)(2).

resources.<sup>202</sup> State and local governments that take on the responsibility to mitigate and reduce harm for children of incarcerated parents should do so completely. The public in general could benefit from a system wherein each member of a population strives to assist the most vulnerable among us. That being said, restitution can play an important role in vindicating victims' experiences—especially for direct victims and their families who face especially heinous offenses. While this Note proposes avoiding restitution in the case of parental incarceration, it does not propose eliminating restitution in victims' rights wholesale.

The rights and benefits of victims' rights legislation could ameliorate the harm parental incarceration victims face. Although arrested and convicted parents are inevitably removed from the home, children who are afforded the opportunity to be present during proceedings and to communicate with prosecution will at least receive an explanation of their parent's removal. Those explanations can be even more impactful in age-appropriate language. An opportunity to voice their concerns in victim impact statements can increase a child's feeling of being heard and recognized by criminal legal systems. Additionally, fair and respectful treatment with the law enforcement officials, prosecutors, and judges can increase a child's trust in others, including legal officials.

Another useful aspect of victims' rights for parental incarceration victims is access to information regarding their parent's confinement. Incarceration will inevitably intervene in the parent-child relationship. However, staying up-to-date on where a parent is incarcerated and the status of their sentence can lead to an increased connection between parents and children. That information, along with increased visitation

---

202. See R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1797–98 (2015); Alana Semuels, *What Incarceration Costs American Families*, ATLANTIC (Sept. 15, 2020), <https://www.theatlantic.com/business/archive/2015/09/the-true-costs-of-mass-incarceration/405412/>.

access, could prove crucial to maintaining the important facets of a child's relationship to a parent.

Victims' rights can provide parental incarceration victims access to services. Health and social services can help to address the consequences of being separated from a parent that increased visitation cannot mitigate. Psychological and emotional care services can help support a child's development, sense of self-worth, and socialization. Those services can promote positive interactions toward others and can dissuade a proclivity toward criminal or risky behaviors.

Finally, perhaps the most important benefit victims' rights laws can provide children with incarcerated parents is financial assistance. The ability to buffer the loss in wages and profits from an incarcerated caretaker can significantly release stress on non-incarcerated parents. Parents with financial assistance may be more capable for supporting their children. Further financial assistance can lead to a sense of stability and safety for the child at home and in school.

When a person has a safe and stable childhood, they are likely to have less trauma. Support for their health and a more meaningful connection with a parent can also reduce a child's trauma. Children of incarcerated parents eventually grow older and may have children themselves. With less internalized trauma, their own children are less likely to inherit trauma. With all the benefits and rights that victims' rights legislation offers, states could reduce the intergenerational cycle of crime and poverty.

#### CONCLUSION

Parental incarceration victimizes children. Children of incarcerated parents experience emotional, mental, social, physical, and financial harm similar to the harm those within the traditional definition of victimhood experience. Furthermore, children of incarcerated parents face the unique risk of an intergenerational cycle of criminal conduct and violence similar to what their parents experience. This Note

2021] *VICTIMS OF PARENTAL INCARCERATION* 579

proposes a new approach to existing efforts that support children with incarcerated parents. To prevent the harmful consequences of parental incarceration, states should include children with incarcerated parents in the definition of victimhood. Doing so would consolidate an entire group of people similarly affected by crime and violence.

If the goal of a criminal legal system is reducing harm, and it indeed should be a principal goal, then the systems we live in must labor to confront harm at every angle rather than reproduce it. Innocent and vulnerable people need support. Victims need support. The children of those within the walls of America's prisons and jails are victims and require support. If we recognize that including children of incarcerated people in legal victimhood is a moral imperative, and if we recognize and provide the support those children need, we will reduce the harm crime and violence inflict upon the innocent and vulnerable. And perhaps we will move closer to finding more effective and compassionate ways to hold people accountable and to resolve conflict.

*. . . for as long as you are free,  
these prison gates cannot contain my spirit.  
The best of me still lives in you.*

*. . .  
[Y]ou are my son, but you are not my choices.  
Yes, we are our fathers' sons and daughters,  
but we are not their choices.  
For despite their absences we are still here,  
still alive, still breathing,  
with the power to change this world,  
one little boy and girl at a time.<sup>203</sup>*

---

203. BEATY, *supra* note 1.