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Stretched Thin: Parents Lacking Resources Who Are Accused of Negligent Child Abuse Need Solutions, Not Prisons

Katie Scott†

Introduction

Lisa Marie Shane was a nineteen-year-old single mother of four children in rural southwest Minnesota when her youngest, A.C., passed away at three months old.¹ The morning before her death, A.C.'s father, Mr. Jose Chavarria, was released from a nearly six-week stint in jail on a domestic violence charge.² Ms. Shane was the primary caregiver for A.C., who was born prematurely.³ A.C. required complex medical care, including use of a feeding hole and an apnea monitor that measured her breathing and heart rates.⁴ Ms. Shane went through two days of training for use of the monitor, which sounded a loud alarm if A.C.'s breathing or heart rates dropped too low.⁵

Ms. Shane alleged that after being released from jail, Mr. Chavarria came to Ms. Shane's home "to see the 'babies.'"⁶ When Ms. Shane heard A.C. crying as Mr. Chavarria held her, Ms. Shane went to check on her daughter.⁷ Ms. Shane took A.C. from Mr. Chavarria, and he shoved Ms. Shane, causing her to drop

†. Katie Scott first learned about the impact of criminal justice and lack of access when she worked with homeless and at-risk youth—many of whom were young parents—prior to law school. She has since focused her work in service of indigent clients, particularly criminal defense. Katie plans to continue fighting mass incarceration with second chances as a means to the end of keeping families together. Many, many thanks to my faculty advisor, Professor Perry Moriearty, for providing the bones for this piece, and her feedback throughout the writing process. Special thanks to Professor JaneAnne Murray for introducing me to the injustices of mothers prosecuted and incarcerated, and for giving me opportunities to serve several of these women. Thank you most of all to my family and partner for supporting me through law school and this Note.

1. *State v. Shane*, No. A06-1581, 2008 Minn. App. LEXIS 245, at *1–5 (Minn. Ct. App. Mar. 11, 2008).

2. *Id.* at *5–6.

3. *Id.* at *2.

4. *Id.* at *1–2.

5. *Id.* at *2.

6. *Id.* at *5.

7. *Id.* at *6.

the baby.⁸ Ms. Shane heard A.C.'s head hit the bed rail, but the baby calmed down shortly thereafter.⁹ There was no visible injury.¹⁰

Although Ms. Shane did not initially admit it to authorities, A.C.'s monitor went off frequently that day.¹¹ A.C. was "fussy and seemed shaky" that afternoon, did not eat well, and, by the evening, A.C. became unresponsive.¹² Ms. Shane was concerned for A.C.'s wellbeing—records show she called her mother, a licensed practical nurse, twice that evening.¹³ Ms. Shane and her mother took A.C. to the hospital late that night.¹⁴ Upon arrival at the hospital, A.C. was gray, flaccid, and in severe respiratory distress.¹⁵ After five days on life support in the hospital, Ms. Shane made the difficult decision to withdraw life support.¹⁶ Ms. Shane's daughter passed away in her arms.¹⁷

Ms. Shane was convicted of felony murder while committing child neglect.¹⁸ She was sentenced to 180 months in prison, an upward departure from sentencing guidelines.¹⁹ Medical personnel testified that A.C. had a skull fracture on the entirety of the top of her skull, severe brain injury, and rib fractures indicative of child abuse.²⁰

Ms. Shane, a young mother in an abusive relationship who was responsible for the complex caretaking of her vulnerable, prematurely born daughter, experienced the worst loss a parent can go through and served time in prison for that loss. Ms. Shane's other three children lost their mother to the prison system.

Responses to these types of crimes, even within the same state, vary widely. Ms. Shane was convicted in southwest Minnesota, in rural Nobles County, 170 miles away, a father with a blood-alcohol content of .13 drove his family onto a frozen lake in Minnetonka, Minnesota, resulting in his infant daughter's drowning.²¹ Instead of

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at *6–7.

12. *Id.* at *6–7.

13. *Id.* at *7.

14. *Id.* at *7.

15. *Id.* at *3.

16. *Id.* at *5.

17. *Id.* at *5.

18. *Id.* at *9.

19. *Id.*

20. *Id.* at *4.

21. Mary Lynn Smith, *Fatal Plunge into Lake Minnetonka Tests a Father and a*

four years of imprisonment, he was ordered to tell his story as a cautionary tale one hundred times.²² Meanwhile, a judge in the neighboring county sentenced a different mother, Lia Pearson, to nearly five years in prison rather than probation when she “knowingly allowed her daughter to stay with a man who was repeatedly beating the child.”²³ The discrepancies in sentencing go beyond differences in judicial philosophy. They are arbitrary not only with regard to geography, but also race and socioeconomic factors. At the intersection of child welfare and criminal justice is a disproportionate representation of poor parents, particularly mothers of color like Lia Pearson.²⁴ When the child welfare system opens parents up to criminal charges, too often they lose their parental rights rather than receiving support from social services.²⁵

Punishment of such parents, however, is deeply unethical when it does not serve a purpose. It has long been acknowledged that in order for punishment to be justified, it must serve at least one purpose: incapacitation, deterrence, or retribution.²⁶ The purpose of punishment is not served when the criminal justice system prosecutes poor, and often undereducated, parents for the unintended deaths of their children.²⁷ Punishment as *retribution* is excessive for an already grieving parent, and an act cannot be *deterred*, either specifically to the offender or generally to society, if it was unintended in the first place. Finally, *incapacitating* parents by way of imprisonment does not ultimately serve the social good

Marriage, STAR TRIB. (Apr. 9, 2018, 8:27 AM), <http://www.startribune.com/fatal-plunge-into-lake-minnetonka-forces-family-to-reckon-with-future/478399163/> [<https://perma.cc/Q2ME-AWVY>]. Jon Markel and his wife, who was in the car, sober, when Mr. Markel drove onto the ice, maintained custody over their surviving child. *Id.*

22. *Id.*

23. Sarah Horner, ‘You Were Supposed to Be Her Mother,’ Judge Tells Woman Sentenced in Toddler’s Death, PIONEER PRESS (last updated Feb. 24, 2017, 2:14 PM), <https://www.twincities.com/2017/02/23/mom-sentenced-for-manslaughter-two-years-after-her-baby-was-beaten-to-death/> [<https://perma.cc/R3YQ-Y973>]. Lia Pearson lost custody of her three surviving children. *Id.* Judge Leonardo Castro sentenced Ms. Pearson to the maximum sentence. *Id.*

24. Eli Hager & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2, 2018), <https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever> [<https://perma.cc/4ENH-VYJG>].

25. *Id.*

26. *See, e.g.*, *Furman v. Georgia*, 408 U.S. 238, 301–04 (1972) (Brennan, J., concurring) (finding that the death penalty was a cruel and unusual punishment because it was not necessary to stop individuals from committing crimes and was not successful deterrence, protection for society, or appropriate retribution).

27. *See generally* BRYAN STEVENSON, *JUST MERCY* 227–41 (2014) (recounting stories of mothers who were convicted and imprisoned for the unintentional deaths of their children).

because their imprisonment sets up their surviving children for increased risk factors.²⁸

Punishing a parent who has already received the worst punishment of all—loss of a child—cannot be justified. Punishing such crimes is not only unjustifiable by traditional purposes of punishment, but it is fundamentally harmful to the incarcerated individuals themselves, their families, and their communities. For example, having a parent in the criminal justice system leads to negative outcomes like behavioral issues, including rule-breaking, irritability, and difficulty developing relationships.²⁹

Congress seems to be recognizing some of the ways in which incarceration can be damaging to families. The bipartisan Senate support and President Trump’s endorsement of the FIRST STEP Act³⁰ are very promising for prisoners.³¹ Senator Joni Ernst of Iowa expressed her support for the FIRST STEP Act on behalf of incarcerated mothers: “We need to address the disturbingly high rate of women - especially mothers - in prison and ensure our criminal justice system is addressing their unique needs. The sentencing reforms . . . support[] families and keep[] our communities safe . . .”³² Politicians at the federal level are working to reduce the number of people incarcerated, but the majority of the work to be done is at the state level.³³

28. HAYLI MILLAR & YVON DANDURAND, INT’L CTR. FOR CRIMINAL LAW REFORM & CRIMINAL JUSTICE POLICY, *THE IMPACT OF SENTENCING AND OTHER JUDICIAL DECISIONS ON THE CHILDREN OF PARENTS IN CONFLICT WITH THE LAW* 5 (2017), https://icclr.org/wp-content/uploads/2019/06/Millar-and-Dandurand-2017_Impact-of-Sentencing-on-Children-on-Parents_07_02_2017.pdf [<https://perma.cc/97UV-JU25>] (noting that “children are affected in many ways, including . . . emotional, psychological, financial, material, physical, and social impacts” from parents’ involvement in the criminal justice system). Barriers to employment and education for children of incarcerated mothers end up costing the state money. SHONA MINSON ET AL., PRISON REFORM TR., *SENTENCING OF MOTHERS* 8 (2015), http://www.prisonreformtrust.org.uk/Portals/0/Documents/sentencing_mothers.pdf [<https://perma.cc/433S-JHC2>].

29. MILLAR & DANDURAND, *supra* note 28, at 5–7.

30. FIRST STEP Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

31. Brittany Hunter, *The First Step Act Is a Giant Leap Forward for Criminal Justice Reform*, FOUND. FOR ECON. EDUC. (Nov. 16, 2018), <https://fee.org/articles/the-first-step-act-is-a-giant-leap-forward-for-criminal-justice-reform/> [<https://perma.cc/CR4E-FTW2>].

32. Joni Ernst (@SenJoniErnst), TWITTER (Nov. 16, 2018, 2:09 PM), <https://twitter.com/SenJoniErnst/status/1063554570549411842> [<https://perma.cc/ECN8-LU3Z>].

33. Only 180,000 out of two million U.S. prisoners are in federal prisons; the remainder occupy state prisons. Osita Nwanevu, *The Improbable Success of a Criminal-Justice-Reform Bill Under Trump*, NEW YORKER (Dec. 17, 2018), <https://www.newyorker.com/news/news-desk/the-improbable-success-of-a-criminal-justice-reform-bill-under-trump> [<https://perma.cc/Q3ZB-H7EM>].

This Note argues that in many cases, instances of negligent or reckless conduct causing harm³⁴—even those resulting in death³⁵—to children by indigent parents that would ordinarily result in lengthy prison sentences need to be diverted out of the prison system. Imprisoning parents for such acts is not supported by the purposes of punishment. The myriad harms caused by prison sentences for indigent parents outweigh any potential public safety benefit. Part I begins by providing a background of the circumstances contemplated by this Note by first attempting to capture the prevalence of negligent maltreatment (NM) by parents. Next, Part I explores possible causes of such unintentional acts. The final section of Part I explains that this issue is pressing now because of the impact on marginalized populations—particularly immigrants—in accessing help for parenting issues. Part II explains why a system that punishes parents for largely unintentional acts of negligence is flawed. Under accepted rationales for punishment in the criminal law, neither deterrence nor retribution carry any meaningful weight for parents who have lost or are at risk of losing their children. Moreover, the current system dissuades or prevents access to resources, resulting in more parents in prison. When considering the intersection between poverty and lack of access to resources, it is clear that punishing these types of crimes is fundamentally unjust. Part III explores the historical background of today’s criminal justice system and the roots of harsh sentencing practices. The discussion then turns to government alternatives to prison sentences, with a focus on problem-solving courts. Part IV concludes that a system that protects parents facing charges of NM from prison time encourages all parents to seek help when they need it, keeping all members of the family safe, alive, and together. Children whose parents stay out of prison avoid the devastating collateral consequences that prison imparts on families. This Note concludes by outlining a solution to the problem: a problem-solving court based on other problem-solving models. The parenting court envisioned by this Note applies a harm reduction philosophy to help parents achieve pro-social and pro-family outcomes through close judicial monitoring and social programs.

34. *See, e.g.*, MODEL PENAL CODE § 211.1 (AM. LAW INST. 1985) (Assault); MODEL PENAL CODE § 211.2 (AM. LAW INST. 1985) (Recklessly Endangering Another Person).

35. *See, e.g.*, MODEL PENAL CODE § 210.3 (AM. LAW INST. 1985) (Manslaughter); MODEL PENAL CODE § 210.4 (AM. LAW INST. 1985) (Negligent Homicide). This Note refers to all forms of the described conduct—both fatal and not—as negligent maltreatment (NM).

I. Background

This section begins by providing a baseline for the prevalence of maltreatment against children. Exact rates of such crimes are difficult or impossible to measure for several reasons. The definition of “unintentional” is difficult to operationalize. Additionally, the visibility of such acts is dependent on factors, such as whether the parent is caught, and then whether they are prosecuted, and also definitions of such crimes. Despite these difficulties, the data in Part I.A. make clear that scenarios of NM do happen to a measurable extent. Next, this Part provides context for why and how such crimes occur. The following two sections explain the impacts of incarceration, first by providing a demographic picture of families and communities impacted by incarceration, then providing the same demographic cross-section for children of incarcerated parents. Finally, this section explains why exploring alternatives to incarceration for poor parents who commit unintentional crimes of maltreatment against their children is important now. These issues sit against a backdrop that is dangerous to immigrant families, particularly those who may fear immigration ramifications. More generally, it is clear that imprisoning parents for such crimes creates a chilling effect on help-seeking and pro-social behaviors, causing parents instead to retreat from plain view for fear of incarceration.

A. *Prevalence of Unintentional Crimes of Maltreatment Against Children*

Data on child maltreatment and fatalities are necessarily subject to limitations due to challenges of operationalization and methodology.³⁶ In an attempt to measure the incidence of child maltreatment and fatalities, researchers have defined acts of omission, or child neglect, as “[t]he failure to provide for a child’s basic physical, emotional, or educational needs or to protect a child from harm or potential harm,” regardless of the intended consequence.³⁷ Physical health may be jeopardized by, *inter alia*, injury, avoidable illness, and inadequate nutrition.³⁸ Failure to provide includes physical, emotional, medical or dental, and

36. REBECCA T. LEEB ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, CHILD MALTREATMENT SURVEILLANCE 3 (2008), https://www.cdc.gov/violenceprevention/pdf/CM_Surveillance-a.pdf [<https://perma.cc/LSN8-HRGV>]. For the reasons discussed above, the rates of occurrence do not reflect the rates of arrest or conviction.

37. *Id.* at 11.

38. *Id.* at 12.

educational neglect.³⁹ Failure to supervise includes inadequate supervision and exposure to violent environments.⁴⁰

Every year, over six million children are the subjects of reports of abuse and neglect to state welfare agencies, revealing a disproportionate impact on children from poor families.⁴¹ From 1999 to 2002, Native American, Alaska Natives, and Black infants had more than twice the rate of fatal injury than White infants.⁴² Black infants had the highest rates of unintentional suffocation and homicide.⁴³ Racial disparities between mortality rates persisted throughout childhood.⁴⁴ One study, conducted in 1992, compared children who had allegations of maltreatment with those who did not. The study was not able “to match maltreated and non-maltreated children [based] on race or socioeconomic status[.]” which are two of the most accepted risk factors for child mortality.⁴⁵

In 2016, of the 43,521 deaths of children in the United States between ages 0–19, 8,266 were caused by unintentional injury.⁴⁶ In a different study conducted in 2005, 43% of fatal injuries sustained by children under age 6 were caused by inadequate supervision.⁴⁷

39. *Id.* at 17.

40. *Id.* at 18.

41. Kelley Fong, *Child Welfare Involvement and Contexts of Poverty: The Role of Parental Adversities, Social Networks, and Social Services*, 72 CHILD. & YOUTH SERVICES REV. 5, 5 (2017). In one study, children eligible for state Medicaid in California were more than twice as likely to be recipients of a report of suspected maltreatment by age five. *Id.*

42. STEPHANIE J. BERNARD ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, FATAL INJURIES AMONG CHILDREN BY RACE AND ETHNICITY — UNITED STATES, 1999–2002 (May 18, 2007), <https://www.cdc.gov/mmwr/preview/mmwrhtml/ss5605a1.htm> [<https://perma.cc/F76N-PV8C>].

43. *Id.*

44. *Id.*

45. Emily Putnam Hornstein, Do “Accidents” Happen? An Examination of Injury Mortality Among Maltreated Children 9–10 (2010) (unpublished Ph.D. dissertation, University of California, Berkeley), <https://escholarship.org/content/qt0522n5pp/qt0522n5pp.pdf> [<https://perma.cc/G9FZ-KCTQ>] (citing Eugene E. Sabotta & Robert L. Davis, *Fatality After Report to a Child Abuse Registry in Washington State, 1973–1986*, 16 CHILD ABUSE & NEGLECT 627–35 (1992)). But a paper by White and Widom ten years later was unable to find that children who were maltreated had a higher risk of mortality. *Id.* at 10 (citing Helene Raskin White & Cathy Spatz Widom, *Does Childhood Victimization Increase the Risk of Early Death? A 25-Year Prospective Study*, 27 CHILD ABUSE & NEGLECT 841–53 (2003)).

46. NAT’L CTR. FOR FATALITY REVIEW & PREVENTION, UNITED STATES CHILD MORTALITY, 2016 (2018), <https://www.ncfrp.org/wp-content/uploads/2016Data/US2016.pdf> [<https://perma.cc/MM54-KPYX>]. In 2005, the most frequent cause of death for children ages one to four was accidental injury. Hornstein, *supra* note 45, at 16–17. Also in 2005, nearly twice as many children under the age of five died of unintentional injuries as all children who died of intentional injuries. *Id.*

47. Hornstein, *supra* note 45, at 5.

The same study found that that number rose to 55% when including injuries caused by “failure to provide appropriate food, shelter and medical care,” “inflicted physical abuse,” and “supervision by persons impaired by alcohol or drugs.”⁴⁸

B. Causes of Child Maltreatment

Resources that parents have for investing in their children may fall into three categories: (1) material resources, like shelter and food, which fulfill physical needs, (2) human resources, including parenting abilities to keep children safe, and (3) social resources, including the support network around a parent, like an engaged partner.⁴⁹ Because legal definitions of neglect usually include a lack of shelter, food, and clothing, poverty is likely to factor into a finding of neglect.⁵⁰ Moreover, poverty is likely to play a role in parenting practices through increased stress and familial conflict, two risk factors for child maltreatment.⁵¹

There is a strong connection between children at risk of injury—both intentional and unintentional—and those born into environments with limited resources.⁵² Risk factors from the sociocultural environment, the parent, and the child can contribute to proximate stressors, which in turn can lead to an unintentional injury.⁵³

C. Impacts of Incarcerating Parents

The common risk factors found in children at risk of injury mirror those of children with incarcerated parents. Children with incarcerated parents tend to live in neighborhoods with fewer resources—parents tend to feel unsafe and have fewer people to rely on for parenting support.⁵⁴ Incarceration has a tendency to plunge families (further) into poverty from both loss of income and court-

48. *Id.*

49. *Id.* at 22.

50. Fong, *supra* note 41, at 5–6.

51. *Id.* For other risk factors for child maltreatment associated with poverty, including domestic violence, substance abuse, mental illness, and criminal justice involvement, see *id.*

52. Hornstein, *supra* note 45, at 23.

53. *Id.* at 25 (citing Lizette Peterson & Deborah Brown, *Integrating Child Injury and Abuse-Neglect Research*, 116 AM. PSYCHOLOGICAL ASS'N 293–316 (1994)).

54. ANNIE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES AND COMMUNITIES 2 (2016), <https://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf> [<https://perma.cc/G97W-RFVK>] [hereinafter CASEY FOUND.].

related fines and fees.⁵⁵ Families become increasingly reliant on food stamps; parents facing childcare expenses forego employment and struggle to meet their families' basic needs.⁵⁶ Families also face an increased risk of homelessness.⁵⁷

Single parents left to cope after the other parent has gone to jail are not only saddled with extra financial obligations,⁵⁸ but are likely to suffer themselves from health problems, including addiction, mental health barriers, and trauma.⁵⁹

These challenges have expanded beyond the family; incarceration has become a community problem. Communities with a large proportion of residents who are incarcerated increase all residents' "chances of suffering from depression and anxiety," even if they themselves are not incarcerated.⁶⁰ Heavy police presence in poor neighborhoods puts a strain on all community members.⁶¹ The absence of community members by way of incarceration weakens social networks and affects the economy.⁶² When parents return home and cannot find work, they are likely to resort to crime to make ends meet for their families.⁶³

D. Effects of Parental Incarceration on Children

When children are in turn separated from a parent, particularly a mother, during their formative years, they fail to learn how to develop healthy relationships and attachments. This

55. *Id.* at 3.

56. *Id.*

57. *Id.*

58. Half of incarcerated parents self-reported as the primary financial providers for their children prior to incarceration. FED. INTERAGENCY WORKING GRP. FOR CHILD. OF INCARCERATED PARENTS, PROMOTING SOCIAL AND EMOTIONAL WELL-BEING FOR CHILDREN OF INCARCERATED PARENTS 2 (2013), <https://csgjusticecenter.org/wp-content/uploads/2013/06/Promoting-Social-and-Emotional-Well-Being-for-Children-of-Incarcerated-Parents.pdf> [<https://perma.cc/JZ24-HH9H>] [hereinafter SOCIAL & EMOTIONAL WELL-BEING FOR COIP].

59. It is common in child abuse situations for a parent to also be a victim of abuse. The parent may fear with perceptive accuracy that leaving will escalate the violence. DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 107 (2009). Therefore, children of incarcerated parents may have trauma from witnessing drug abuse, violence, or parental arrests. SOCIAL & EMOTIONAL WELL-BEING FOR COIP, *supra* note 58, at 4.

60. CASEY FOUND., *supra* note 54, at 4.

61. *Id.*

62. *Id.*

63. *Id.*

causes a lasting adverse impact.⁶⁴ The Adverse Childhood Experiences study examines health outcomes of seven categories of adverse experiences during childhood, commonly referred to as ACEs.⁶⁵ One study examined the experience of growing up with a family member in prison.⁶⁶ The study shows the cumulative effects of multiple, co-occurring ACEs puts the child's future well-being at risk.⁶⁷ A child separated from her parent can experience mental illness, including depression and anxiety, and struggle in school.⁶⁸ Children with a parent in the criminal justice system often struggle with behavioral issues, including rule-breaking, irritability, and of course, difficulty developing relationships.⁶⁹ These mental and physical health struggles are likely to plague a person into adulthood.⁷⁰

The typical child with an incarcerated parent is under ten years old, lives in a low-income family of color, and has a single mother of limited education.⁷¹ Black children are over seven times

64. *Id.*; SOCIAL & EMOTIONAL WELL-BEING FOR COIP, *supra* note 58, at 3 (“Sudden separation from a primary caregiver predictably impacts a child’s emotional well-being. The parent-child relationship, starting in infancy, forms the foundation for all subsequent relationships by giving children the tools to develop essential interpersonal skills.”). See generally JESSICA NICKEL ET AL., COUNCIL OF STATE GOV’TS JUSTICE CTR., CHILDREN OF INCARCERATED PARENTS 1 (2009), <https://csgjusticecenter.org/nrrc/publications/children-of-incarcerated-parents-an-action-plan-for-federal-policymakers/> [<https://perma.cc/C68J-4JX3>] (describing a wide range of risk factors for children of incarcerated parents, including drug abuse, mental health problems, education, poverty, sexual abuse, physical abuse, family instability, and emotional and behavioral problems).

65. See Vincent J. Felitti et al., *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).

66. *Id.* at 245.

67. *Id.* at 250. Children of incarcerated parents are more likely to have experience with violence in the home. One study found that one in eight children who are subjects of child welfare intervention has a recently arrested parent. Moreover, children of incarcerated mothers are more likely to experience foster care. SOCIAL & EMOTIONAL WELL-BEING FOR COIP, *supra* note 58, at 4.

68. SOCIAL & EMOTIONAL WELL-BEING FOR COIP, *supra* note 58, at 3. Children whose mothers are incarcerated are especially at risk of dropping out of school. One study found that teachers rated students with incarcerated mothers as less competent than those with mothers who were absent for other reasons. *Id.*

69. *Id.* at 4.

70. *Id.*

71. CASEY FOUND., *supra* note 54, at 2. Sixty percent of mothers and 42.4% of fathers in state prisons reportedly lived with their children prior to incarceration. Of those parents, 19% were single-parent households. SOCIAL & EMOTIONAL WELL-BEING FOR COIP, *supra* note 58, at 3. The disproportionate impact of incarceration on parenting is clear between genders: 88% of men in prison compared with 37% of women say their child’s other parent is their primary caregiver while the imprisoned

more likely—and Latino children are two times more likely—than White children to have a parent who is incarcerated.⁷² Children whose mothers are in prison are more likely than children whose fathers are in prison to live with someone outside the home, like grandparents, family friends, or foster caregivers.⁷³ These alternative living arrangements may last even after a child's mother is released from prison. The 1997 Adoption and Safe Families Act⁷⁴ resulted in the termination of parental rights in many cases when a child had been in foster care fifteen out of the past twenty-two months.⁷⁵ Because Black parents are disproportionately incarcerated, this change in the statutory termination of parental rights also disparately impacts Black families.⁷⁶

E. Why Parental Incarceration Is an Issue Now

In 1969, Bernice and Walter Williams, Native Americans in Washington State, were convicted of manslaughter when their seventeen-month-old son died from lack of medical care.⁷⁷ Little William Joseph Tabafunda had an abscessed tooth which eventually turned gangrenous.⁷⁸ Neither parent had a high school diploma.⁷⁹ The Williamses were afraid of losing their son to the child welfare system⁸⁰ where there was actual, empirical support to show that Native American children were disproportionately removed from their homes.⁸¹ The court recognized that the Williamses did not realize that the boy was dying, and certainly not the seriousness of his illness.⁸² To soothe his discomfort, his parents gave him baby aspirin throughout his illness “until the night before

parent carries out their sentence. NICKEL ET AL., *supra* note 64, at 1. Forty-five percent of women reported their child lived with a grandparent; 11% reported their child lived in foster care (compared with 2% of men). *Id.*

72. CASEY FOUND., *supra* note 54, at 2. The limited data show that Native American children in Oklahoma are twice as likely—and in North and South Dakota are five times more likely—than White children to have a parent incarcerated.

73. *Id.*

74. Adoption and Safe Families Act of 1997, Pub L. No. 105-89, 111 Stat. 2115.

75. Hager & Flagg, *supra* note 24.

76. *Id.*

77. *State v. Williams*, 484 P.2d 1167, 1169 (Wash. Ct. App. 1971).

78. *Id.* at 1173.

79. *Id.* at 1169–70.

80. *Id.* at 1174.

81. Megan H. Dearth, *Defending the “Indefensible”: Replacing Ethnocentrism with a Native American Cultural Defense*, 35 AM. INDIAN L. REV. 621, 639 (2010/2011).

82. *Williams*, 484 P.2d at 1174.

the baby died.”⁸³ Despite the socioeconomic factors and despite their good faith efforts to provide the best care they knew of, the Washington Court of Appeals found that the Williamses had not met the standard of “ordinary caution” and upheld their convictions.⁸⁴ In the intervening fifty years, very little has changed with regard to the solutions—or lack thereof—in the criminal justice system for situations such as the Williams’.

How we treat parents who maltreat their children due to factors incident to poverty⁸⁵ matters because these tragedies are largely preventable. If a parent feels like they can seek help—either with their own domestic violence, addiction, employment, or other issues, or with issues around parenting—they may be able to avoid instances of unintentional maltreatment.⁸⁶ Mothers and women in marginalized communities may face barriers to seeking help,⁸⁷ and often belong to communities with high child mortality⁸⁸ and incarceration rates.⁸⁹ People, and particularly women and other gender minorities, in these marginalized communities are at a disadvantage for social services, public housing, and welfare before even taking into account the barriers they may face to seeking help.⁹⁰

83. *Id.*

84. *Id.*

85. These factors include failure to provide adequate food, shelter, or medical treatment, inadequate supervision, and even exposure to drugs and alcohol. See Fong, *supra* note 41.

86. This Note focuses on helping parents stay out of prison for *unintentional* acts by focusing on acts of negligence, like the Williams’. Acts or omissions in which parents lack the subjective intent to cause harm to their child but objectively act without due care are arguably less culpable than when parents cause harm to their children by acting out of malice. See *infra* Part II.A. While intent is virtually impossible to ascertain—both because subjective intent lies on a spectrum and because of the understandable reluctance of parents facing serious charges of NM to admit fault—this Note hopes to ascribe the benefit of the doubt to parents who (1) admit responsibility and (2) are accused of crimes involving negligence or recklessness. See *infra* IV.

87. Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender*, 11 VIOLENCE AGAINST WOMEN 38, 43 (2005) (using the examples of Vietnamese, lesbian, and other women of color, particularly African American women, as examples of women who may be afraid to seek help for domestic violence).

88. BERNARD ET AL., *supra* note 42.

89. CASEY FOUND., *supra* note 54, at 12. In fact, research shows that the disproportionate representation of poor families in the child welfare system is likely in part due to their high-visibility socioeconomic status. Fong, *supra* note 41, at 6 (including factors such as biased professionals, contact with welfare agencies, and neighborhood social processes, like retaliation).

90. Sokoloff & Dupont, *supra* note 87, at 43.

Issues around seeking help and lack of access are particularly poignant in immigrant communities, which have grown in recent years, with a large proportion of the communities consisting of children and families.⁹¹ Not only do immigrant communities have restricted access to basic social services because of immigration status, they also experience increased “economic, social, and psychological stress and family problems.”⁹² Immigrant communities may avoid seeking help because they may feel pressure to prevent promulgation of negative stereotypes.⁹³ Moreover, immigrant Latinas may avoid seeking help for fear of legal ramifications, including loss of services or deportation.⁹⁴ This fear of seeking help may lead to parenting problems down the line, increasing the chances of welfare intervention and risk of legal and/or immigration problems. These barriers to seeking help thus circuitously impact the safety and well-being of children in immigrant families, leading to an increase in welfare services intervention regardless of whether parents seek help or not.⁹⁵ In a Catch-22, parents who seek help may face immigration consequences, and parents who do not seek help may face child welfare intervention, followed by immigration consequences. Either way, immigrant families are at risk when the need for help arises.

Fear of immigration consequences is well-justified. The Patriot Act of 2001⁹⁶ may affect immigrant parents who face child welfare charges.⁹⁷ Social services advocates fear this may lead to a chilling effect, preventing help-seeking behaviors of immigrant parents before problems escalate.⁹⁸ In a study by Earner, out of eleven focus group participants, only one immigrant parent reported child welfare gave her a positive outcome.⁹⁹

91. Ilze Earner, *Immigrant Families and Public Child Welfare: Barriers to Services and Approaches for Change*, CHILD WELFARE, July/Aug. 2007, at 63, 64–65. In the new millennium, the Latinx population became the largest minority group in the United States. Krista M. Perreira et al., *Becoming an American Parent: Overcoming Challenges and Finding Strength in a New Immigrant Latino Community*, 27 J. FAM. ISSUES 1383, 1383 (2006).

92. Earner, *supra* note 91, at 65.

93. Sokoloff & Dupont, *supra* note 87, at 50.

94. *Id.* at 51–52.

95. Earner, *supra* note 91, at 65.

96. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56.

97. Earner, *supra* note 91, at 68.

98. *Id.*

99. *Id.* at 83.

Although receipt of state benefits is in theory a state-driven determination, for many immigrants, access to those benefits is hampered solely by virtue of being an immigrant.¹⁰⁰ Even when service providers attempt to help immigrant families, their help is often inadequate because they are unfamiliar with the relationship between immigration status and eligibility for benefits.¹⁰¹ Alternatively, even if a family is eligible for services, government workers incorrectly tell the family they are not eligible and deny services.¹⁰² This puts families on a track for greater risk of poverty and resulting family problems.¹⁰³

Access to healthcare is another issue that is both directly related to a parent's ability to avoid her child's unintended death and also at issue for immigrant parents.¹⁰⁴ Some of the barriers for immigrant parents seeking healthcare include transportation, language, and culture.¹⁰⁵

Barriers to support services for immigrants may not be the only factors at play. For Latinas in domestic abuse situations, their cultural values and norms may prevent them from leaving.¹⁰⁶ In one study, 60% of immigrant Latina women domestic abuse survivors surveyed had one to three children and 17% had four to eight children.¹⁰⁷ For parents like Ms. Shane, these numbers show a high risk of being held accountable for the dangers their children face in a domestic violence situation, even if the parents are domestic abuse survivors themselves.

Unintentional maltreatment and deaths of child immigrants may be easily written off with racist stereotypes about their

100. *Id.* at 69–70. (“Research findings suggest that for immigrants, regardless of their status or eligibility, access to benefits is also constrained by inadequate information about benefits, fear of being considered a public charge by United States Citizenship and Immigration Services, confusing application procedures, and lack of multilingual staff.”) (internal citations omitted).

101. *Id.* at 66.

102. *Id.* at 70–71.

103. *Id.* at 70.

104. Perreira et al., *supra* note 91, at 1386.

105. *Id.* at 1386–87.

106. Mary Ann Dutton et al., *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas*, 7 J. POVERTY L. & POL'Y 245, 249 (2000) (“Battered Latinas often marry younger, have larger families, are more economically and educationally disadvantaged, have been victims of violence for longer periods of time, and stay longer in the relationship than Caucasian or African-American battered women.”). Battered Latinas may have a different definition of what constitutes abuse, and therefore are more likely to be abused in the presence of family. *Id.* at 249–50.

107. *Id.* at 250–51.

parents. But the truth is that immigration is a rational choice made by parents who want to do right by their children:

Parents have goals and values for their children that cannot be fulfilled in their home countries because of societal factors such as poverty and war. So they choose to migrate. After migration, the process of becoming an American parent continues, as parents confront a change in social position that includes the loss of social support networks, the loss of social status or class, and the loss of familiar social roles. The change in social position associated with migration leads to . . . economic and social segregation . . . In their new homes, immigrant families encounter economic and racial diversity, confront racism, and contend with the fear and uncertainty associated with making a home in a new world.¹⁰⁸

II. The Faulty Criminalization of Indigent Parents

The myriad barriers and risks facing indigent parents are not on the radar of most criminal justice reformers. Instead, the new efforts to reduce prison populations are mainly targeted at prisoners who have committed nonviolent or victimless crimes, like drug crimes.¹⁰⁹ Thus, any changes the federal government—and many states¹¹⁰—are making to change prison populations and rates of incarceration are not likely to impact the population described in this Note. Recognition of problems in the way governments adjudicate special cases, however, is growing.¹¹¹ While some states are passing laws that allow incarcerated parents to retain child

108. Perreira et al., *supra* note 91, at 1391.

109. Mark Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 115 (2018) (“[T]he growing critique of the ‘war on drugs’ has greatly influenced beliefs about mass incarceration. A broad range of the public now recognizes that prioritizing punishment over treatment fails to recognize the supply and demand dynamics of the drug trade.”).

110. *Id.* at 116 (showing that in California, New York, and New Jersey, the reduction in prison population coincided with a decrease in crime).

111. See *About Justice Reinvestment*, THE COUNCIL OF STATE GOV'TS JUSTICE CTR., <https://csgjusticecenter.org/jr/about/> [<https://perma.cc/R54F-ERL9>] (showing, for example, that the Council of State Governments Justice Center deploys teams to states across the nation to implement criminal justice reform). Justice reinvestment is a “data-driven approach to reduce spending and reinvest savings in strategies that can decrease recidivism and increase public safety.” THE COUNCIL OF STATE GOV'TS JUSTICE CTR., NEW MEXICO JUSTICE REINVESTMENT (Dec. 14, 2018), <https://csgjusticecenter.org/wp-content/uploads/2018/12/JR-in-in-NM-first-presentation.pdf> [<https://perma.cc/UZY4-ZXSU>]. The Justice Center’s work has included reinvestment in behavioral health, supervision practices, social services, and more. *Justice Reinvestment Publications*, THE COUNCIL OF STATE GOV'TS JUSTICE CTR., <https://csgjusticecenter.org/jr/publications-library/> [<https://perma.cc/YHH2-R3JK>].

custody,¹¹² states should be helping parents avoid prison altogether. This Section explains why indigent parents who commit unintentional crimes against their children may have a lower culpability, and thus are less deserving of punishment than many other criminals. Based on accepted theories of punishment, this reduced culpability further undermines justification for punishing such crimes. Finally, this Section concludes by explaining how incarcerating non-culpable parents does not serve important social policy outcomes.

A. *Culpability as It Pertains to Bad Luck*

When the actual consequences of an alleged bad act are ultimately contingent on luck, the culpability of that act should be called into question.¹¹³ *Resultant luck* relates to the consequences of one's actions.¹¹⁴ *Circumstantial luck* relates to the particular circumstances in which an actor makes decisions about how to act.¹¹⁵ While one has control over their conduct in any given circumstance, they have no control over the circumstance itself. The idea of circumstantial luck is that a person makes the best decision that they can within the confines of their situation.¹¹⁶ Circumstantial luck, then, can result in an immoral act.¹¹⁷ Culpability is often assessed by asking whether a reasonable person would act in a similar fashion when put into the same situation.¹¹⁸

112. Hager & Flagg, *supra* note 24.

113. Kenneth Einar Himma, *Luck, Culpability, and the Retributivist Justification of Punishment*, 22 LEWIS & CLARK L. REV. 709, 718, 732–33 (2018) (“If the factors conditioning our acts are beyond our control, we are culpable for neither those factors nor the acts they help to condition and hence are not deserving of blame or punishment for wrongful acts.”).

114. *Id.* at 732. Himma uses a hypothetical in which Dee and Dum are both pointing guns at Tweedle. Dee and Dum fire simultaneously. Dee’s bullet strikes and kills Tweedle, while Dum’s bullet is intercepted by a bypassing bird. Neither Dee nor Dum controlled whose bullet killed Tweedle and whose did not; rather, the killing was pure luck. Both Dee and Dum had the same *intent* to kill Tweedle, and in this way, Himma argues Dee and Dum are equally blameworthy, regardless of the ultimate result. Although Himma uses resultant luck to discuss the culpability of attempts liability, the concept is useful here in the converse to discuss the *non-culpability* of unintentional crimes.

115. *Id.* at 730 (“[C]ircumstantial luck has to do with the features of an agent’s situation (1) that contribute to conditioning what the agent does and (2) that are beyond the agent’s control.”).

116. *Id.* at 739–40.

117. *Id.*

118. *Id.* at 742.

Finally, *constitutive luck* relates to factors about a person beyond their control, like personality and preferences.¹¹⁹

Parents in poverty who face charges of NM against their children are often on the bad end of one or more of the above-mentioned types of luck. Take Ms. Shane, the nineteen-year-old mother of four who went to prison for the unintentional death of her daughter, for example.¹²⁰ Ms. Shane, who was represented at trial and on appeal by a public defender, was likely experiencing poverty at the time of the accident.¹²¹ After having three children by age nineteen, Ms. Shane gave birth to another baby, this time with severe health complications.¹²² When the baby's father, previously known to be abusive, returned on the day of the accident, Ms. Shane faced possibly violent outbursts upon his return, caring for all her children, and then, eventually, addressing the health concerns of her ailing baby.¹²³ Ms. Shane's culpability must be assessed in the context of the trifecta of poor constitutive, resultant, and circumstantial luck—and whether a reasonable person would act as Ms. Shane did that day. When considering the risk of child welfare intervention, either for seeking medical attention for the baby, or for seeking domestic violence protection from the baby's father, on balance with the risk of inciting more violence, one has to question whether Ms. Shane truly acted with any choice or volition.

Ms. Shane is not alone. The clearly-established connections between reports of child maltreatment, poverty, and aggravating challenges for parents suggest that the vast majority of crimes of

119. *Id.* at 750 (“These factors include accidents associated with one’s upbringing and station, including place of birth and other environmental factors, genetic predispositions, as well as the character, maturity, and abilities of one’s parents.”). Of particular relevance to this Note is *soft* constitutive luck, which “refers to social determinants of personality traits, such as the environment in which one is raised, the quality of one’s parents, and the traits of people one comes to view as one’s peers.” *Id.* at 754.

120. The entirety of Ms. Shane’s situation at the time of her daughter’s death is unknowable, but certain factors are ascertainable merely by reading the Minnesota Court of Appeals decision that affirmed the lower court’s upward sentencing departure. *See State v. Shane*, No. A06-1581, 2008 Minn. App. LEXIS 245, *1 (Minn. Ct. App. Mar. 11, 2008).

121. The possible adverse causes and effects of this constitutive luck are too numerous and speculative to explore here. Suffice it to say that statistics show Ms. Shane’s poverty likely had far-reaching and profound challenges on Ms. Shane’s own life and her ability to parent. *See supra* Part I.

122. *See supra* note 120. The health complications, bad constitutive luck for the baby, resulted in her death. Meanwhile, the result of Ms. Shane’s fourth pregnancy in health complications was poor resultant luck for Ms. Shane herself.

123. *See supra* note 120. This combination of factors refers to Ms. Shane’s circumstantial luck on the day of the accident.

maltreatment do not arise out of malintent, but lack of resources.¹²⁴ It is well understood that people in poverty make rational decisions based on survival that, out of context, seem irrational to an outsider.¹²⁵

Of families experiencing any of the numerous challenges associated with poverty, only a portion of them will come to the attention of the authorities, resulting in child services intervention or a charge of maltreatment or neglect against the parent.¹²⁶ The parents whose drug addictions are detected for causing harm against their children cannot be said to be *more* blameworthy than parents whose children are not harmed, or whose indiscretions go unnoticed.

B. A Faulty Punishment Rationale

At its core, punishment in the criminal law system is a moral question.¹²⁷ Traditional rationales for punishment typically derive from either utilitarianism or retributivism.¹²⁸

Utilitarianism holds that punishment is only justified by its consequences.¹²⁹ One form of utilitarianism, deterrence, seeks to deter future crimes.¹³⁰ Another form, incapacitation, prevents future crimes from occurring by either removing criminals from society or removing their ability to reoffend.¹³¹ Retributivism is

124. See, e.g., Fong, *supra* note 41, at 5–6.

125. See generally Anuj K. Shah et al., *Some Consequences of Having Too Little*, 338 SCI. 682 (2012) (showing how and why decision-making processes of people in poverty tend to keep them in poverty); KillerGibsons, *Why I Make Terrible Decisions, or, Poverty Thoughts*, KINJA: KILLERMARTINIS (Oct. 22, 2013, 2:24 PM), <https://killermartinis.kinja.com/why-i-make-terrible-decisions-or-poverty-thoughts-1450123558> [<https://perma.cc/8YZF-N4LK>] (explaining the thought process behind decisions constituting short-term solutions for long-term problems of a person in poverty).

126. The total number of at-risk children in neglectful or recklessly dangerous households is difficult or impossible to measure when they slip through the child protective services net.

127. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16 (7th ed. 2015). Dressler defines punishment as when “an agent of the government, pursuant to authority granted to the agent by virtue of *D*’s criminal conviction, intentionally inflicts pain on *D* or otherwise causes *D* to suffer some consequence that is ordinarily considered to be unpleasant.” *Id.* at 12 (citation omitted).

128. *Id.* at 18.

129. *Id.* at 14.

130. *Id.* at 15. The goal of general deterrence is to use punishment of criminals as an example to society at large to prevent others from committing the same crime. *Id.* Specific deterrence, on the other hand, is meant to stop the same criminal from committing the same crime again. *Id.*

131. *Id.* Classic examples are prison and the death penalty.

founded on the idea that punishment is deserved as a consequence for violation of social rules.¹³²

Deterrence has no sway for a crime committed without the requisite intent. Because of the connection between lack of resources and parenting challenges,¹³³ it is a safe assumption that the vast majority of poor parents who commit crimes of NM against their children do so unintentionally. A person who did not intend for the harm to occur in the first place cannot be prevented from committing the crime in the future—the act could not have been prevented the first time, either. The case for general deterrence is more difficult to overcome, however.

Under general deterrence, seeing the punishment of parents who commit particular crimes—even if unintentional—may help prevent similar future intentional crimes. There is a large swath of the population, however, who general deterrence would not affect because they simply would not commit an intentional crime of maltreatment against their children. The majority of parents are well-intentioned actors who seek to protect and care for their children. In this majority of the population, the efficacy of a general deterrent would be slim at best. Moreover, under utilitarian theory, the negative impacts on society as a whole when a child has a parent in prison¹³⁴ would likely outweigh any benefit from general deterrence. Where general deterrence is effective, it may deter help-seeking behaviors, causing anti-social outcomes. Parents who see other parents receive criminal convictions for child maltreatment may avoid bringing attention to themselves in times of need for fear of being accused of a crime.¹³⁵

Incapacitation may serve a legitimate end if a parent has other children to whom they could cause harm. But a defendant facing a long prison sentence related to a traditionally serious crime like homicide is likely to ‘age out’ of crime,¹³⁶ particularly when the crime they are subject to committing is related exclusively to the parenting stage of life. Lengthy prison sentences have little bearing on deterrence because research shows that certainty, rather than severity, of punishment is the weightiest factor in deterrence.¹³⁷ Under utilitarian theory, moreover, the negative impact of

132. *Id.* at 16. Retributivists demand that a wrongdoer receive punishment, regardless of the impact on crime rates. *Id.*

133. *See* Fong, *supra* note 41.

134. *See supra* Part I.C.

135. *See infra* Part II.C.

136. Mauer, *supra* note 109, at 122.

137. *Id.* at 123.

imprisoning a parent would likely outweigh the benefit of preventing future harm to surviving children, particularly if they receive social services that help them improve parenting practices. If a parent truly is a danger to their other children, the incapacitation purpose would also be served by removing the children from the home. This provides the dual benefit of protecting the children and keeping the parent out of jail, with opportunities for improving parenting skills.

Retributivism, on the other hand, is only effective if an actor's conduct is considered morally wrong or harmful to society. The mitigating factors and extenuating circumstances pervasive in many of the circumstances contemplated by this Note render the culpability of such defendants questionable.¹³⁸ By drawing a direct connection between morality and the crime, the complex reasons behind such crimes are over-simplified.¹³⁹ The relationship between the three kinds of luck outlined above and poverty seriously undermines the value of retributivism in the context of unintentional crimes of maltreatment in impoverished families.

The punishment for crimes of NM against children is a somewhat moot point because, unlike many crimes, an element of retribution is built into the crime itself.¹⁴⁰ For a parent whose goal was to protect and care for her child, the very loss of or harm to that child—by their own hands—is arguably the worst punishment they can experience.¹⁴¹ A person in such a situation arguably does not need further state-sponsored punishment—loss of their child is punishment enough.

138. For example, drug offenders in drug courts may have become trapped in a criminal justice cycle not because of their culpability but due to a combination of addiction and other mental disorders and the heavy policing borne of the war on drugs. See Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1145 (2014).

139. Similarly, homeless courts often assume a spurious causation between mental disorders and criminality. *Id.* at 1155–56. Homeless courts are problem-solving courts that handle minor offenses and emphasize the treatment and rehabilitation of criminal defendants who are homeless. Claudia Lopez, *Homeless Courts*, NAT'L CTR. FOR STATE COURTS: TRENDS IN STATE COURTS (last visited Nov. 15, 2019), <https://www.ncsc.org/microsites/trends/home/Monthly-Trends-Articles/2017/Homeless-Courts.aspx> [<https://perma.cc/B3BF-56PV>].

140. This is arguably true for any unintended crime or any crime resulting from bad circumstantial luck. See Himma, *supra* note 113, at 740–42 (discussing the psychological and emotional consequences of hypothetically being forced to kill in self-defense).

141. See Smith, *supra* note 21.

C. Policy Rationales

When a parent commits a crime that harms or even kills their child, the natural reaction of both the State and most individuals would be to remove that child from the home in which they were hurt in order to prevent future harms.¹⁴² But almost always, maintaining a connection with the family that raised a child gives that child a better advantage in many ways.¹⁴³ When parents are provided with structured programming and tools to improve their skills, families see tangible, positive outcomes.¹⁴⁴ When parents without resources lose their rights after making a mistake and have no opportunities to rectify their errors, the punishment ultimately falls on the children who lose their parents.

There is also a valid argument that adverse outcomes of lengthy prison sentences on children do not outweigh the benefit to public safety.¹⁴⁵ Instead, the resources that lengthy prison sentences require could go toward other causes—like social programming that helps people stay out of prison in the first place.¹⁴⁶

Today's system, however, creates a chilling effect on parents seeking the social programs that are likely to mitigate criminal justice involvement. Even when parents seek help for social problems, for example, they are at jeopardy of child welfare involvement. In one qualitative study, researcher Kelley Fong found that parents' challenges, such as domestic violence, substance abuse, mental illness, and criminal justice involvement, led to "automatic" involvement in the child welfare system.¹⁴⁷ The parents

142. Many adoption advocates would like to see toddlers of incarcerated parents placed in a permanent home rather than shuffled around family members' homes and foster care. Hager & Flagg, *supra* note 24.

143. *Id.* Moreover, many parents are able to turn their lives around even if they failed to provide an adequate home before. For example, Mr. Markel, a previous "functional drunk" whose drunk driving resulted in the icy drowning of his infant daughter, has been sober since the day his daughter died. Smith, *supra* note 21.

144. For example, the Nurse-Family Partnership, "an evidence-based community health program that helps transform the lives of vulnerable, low-income mothers pregnant with their first child," shows dramatic trial outcomes. The program resulted in a 48% reduction in child abuse and neglect; a 56% reduction in ER visits for accidents and poisonings; a 61% fewer arrests for the mother; and a 59% reduction in child arrests at age 15. Nurse-Family Partnership, *Research Trials and Outcomes* (2018), <https://www.nursefamilypartnership.org/wp-content/uploads/2018/11/Research-Trials-and-Outcomes.pdf> [<https://perma.cc/8RZ7-MVKM>].

145. Mauer, *supra* note 109, at 121.

146. *Id.* at 124.

147. Fong, *supra* note 41, at 9.

reported that seeking help from social services set protocols in motion from agencies required to report suspected abuse.¹⁴⁸

This risk is increased for immigrant parents, who may also face immigration consequences for seeking help.¹⁴⁹ Given that immigrant parents overwhelmingly choose to immigrate for the benefit of their families,¹⁵⁰ they are put in the difficult position of deciding whether to undo the work of immigrating by seeking help and facing deportation or to risk the health or safety of their child by avoiding help—either way, jeopardizing the original purpose for immigrating.

The current system often prevents parents from seeking help for parenting skills and other services for fear of punishment. Because there is such a well-documented and clear connection between race and poverty, this system not only criminalizes parenting while poor, but also criminalizes parenting while Black, Latinx, Native American, immigrant, etc. Such a system is not pro-family, pro-social, or even pro-life; it puts children in poverty at risk because their parents are necessarily resistant to government help or intervention. The risk of child protective services involvement is a realistic threat that has been shown to prevent parents—particularly immigrants—from seeking help. The connection between poverty and lack of access to resources means that society cannot justify blindly punishing parents who commit crimes of NM.

III. How the U.S. Handles Criminals: From the Past to Today

It is by no mistake that parents today face particularly harsh sanctions for their actions even when their culpability is at question. In the last five or so decades, U.S. criminal justice policies have ratcheted up in a campaign against the archetypical criminal. This Section provides a broad, brief overview of our arrival at modern U.S. criminal justice policies. Next, this Section discusses current proposed solutions, focusing on problem-solving courts as a possible way to respond to criminal acts in a more effective and proportional manner than incarceration.

A. A History of Modern United States Criminal Justice

Crime, traditionally an area of the law reserved to the States, came into public consciousness as a federal issue in the 1960s when

148. *Id.* at 5.

149. Sokoloff & Dupont, *supra* note 87, at 51–52; Earner, *supra* note 91, at 69.

150. Perreira, *supra* note 91.

crime rates spiked.¹⁵¹ At this point, crime became a centerpiece of political campaigns in the United States; both sides agreed on the necessity of crime reduction, but not on how to achieve it.¹⁵² Beginning with President Nixon, a series of U.S. Presidents, up to and including the Bushes, increased prosecutorial power and punitive measures.¹⁵³

These years of policies led to a booming prison population which included a rise in incarcerated parents. The number of incarcerated parents increased by 357,000 between 1991 and 2007.¹⁵⁴ More than half of today's incarcerated people are parents of minors.¹⁵⁵ Altogether, the massive increase in the prison population led to the fiscal necessity of considering new ways to reduce incarceration rates.¹⁵⁶ The FIRST STEP Act is aimed at lowering prison populations and preventing recidivism.¹⁵⁷ The Act purports to, *inter alia*, move prisoners closer to their families, increase funding for vocational and rehabilitative programs,¹⁵⁸ reduce mandatory minimum sentences for future "three strikes" offenders,¹⁵⁹ reduce sentencing disparities for crack and powdered cocaine offenses, and expand opportunities for time credits.¹⁶⁰

151. NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960–1993, 9–10 (1994) (noting the federal effort to combat organized crime, as well as rising drug abuse, contributed to this new focus on crime).

152. *Id.* at 10–11.

153. *See generally id.* (summarizing developments in the criminal justice system in the late twentieth century); *see also* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (detailing the effects of the War on Crime on society).

154. Hager & Flagg, *supra* note 24.

155. *Id.*

156. GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 20 (2005) (noting that United States' inmates totaled 500,000 in 1980 and two million in 2001); *see also* Mauer, *supra* note 109, at 115 ("A popular framework to explain the growing movement for criminal justice reform is that it was occasioned by conservatives recognizing the high fiscal cost of incarceration, particularly following the financial crisis of 2008.")

157. *See* Newt Gingrich, Opinion, *This Bill Could Help Begin to Fix the Federal Prison System. It Must Pass.*, WASH. POST, Nov. 29, 2018, https://www.washingtonpost.com/opinions/this-bill-could-help-begin-to-fix-the-federal-prison-system-it-must-pass/2018/11/29/cdbf995e-f3fb-11e8-80d0-f7e1948d55f4_story.html [<https://perma.cc/MA66-CC8M>]; *see also* Nwanevu, *supra* note 33 (discussing the anti-recidivist motivations of the bill and noting that, with its passage, there will be thousands of prisoners who would qualify for early release).

158. *See* Gerard Robinson, Opinion, *First Step Act's Passage Represents a Starting Point to Address Issues in the Criminal Justice System*, HILL (Jan. 6, 2019, 2:25 PM), <https://thehill.com/blogs/congress-blog/judicial/424076-first-step-acts-passage-represents-a-starting-point-to-address> [<https://perma.cc/F8GE-EKC5>].

159. Gingrich, *supra* note 157.

160. Nwanevu, *supra* note 33.

However, the Act only affects the federal system's 180,000 inmates—a far cry from the two million total inmates in the United States.¹⁶¹ Moreover, the focus on reducing the number of inmates who were convicted of victimless crimes—in large part, drug crimes—does not change the underlying rationale for severe punishment of crimes with a victim.

In the late twentieth century, crime prevention was used as a tool by politicians to gain power.¹⁶² But how did those politicians convince the United States' people to cast their ballots based on crime prevention? At the center of crime legislation was the victim, the theoretical figure who could be any one of us.¹⁶³ Protecting the victim meant protecting oneself, because as United States' leaders told the People, rampant crime was an imminent threat.¹⁶⁴ This message was a non sequitur, however, because victims do not retroactively benefit from criminal punishment. Their benefit, instead, is in overall perceptions of enhanced public safety by punishing the offender.¹⁶⁵ Therefore, although modern crime legislation has focused on protecting victims' rights, victims are rarely referenced, shifting the focus instead to punishing the criminal.¹⁶⁶

*B. Today's Problem-Solving Courts: A Response to the
"Tough on Crime" Era*

In light of the rate and scale of criminal prosecutions in the post-"tough on crime" era, defendants are moved through courts at a rapid pace that hardly allows for consideration of maximizing

161. *Id.*

162. President Nixon started this trend by using the civil unrest of the 1960s to advocate for stability through law and order. MARION, *supra* note 151, at 70–71.

163. SIMON, *supra* note 153, at 75–76. *See generally*, BERMAN & FEINBLATT *supra* note 156, at 43–46 (outlining the rise of the victims' movement as a political voice beginning in the 1960s and 70s).

164. SIMON, *supra* note 153, at 77 ("Classifying the citizenry into types of actual and potential victims allows for a broad recognition of diversity within the unifying framework of 'fearing crime'—while our contemporary catalog of 'monsters,' including sex offenders, gang members, drug kingpins, and violent-crime recidivists, forms a constantly renewed rationale for legislative action.").

165. *Id.* at 76.

166. *See* Aya Gruber, *Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense*, 52 BUFF. L. REV. 433, 435–36 (2004) ("Victims' rights provisions often lead directly or indirectly to harsher sentences and decreased defendant protections, and the narrative of victims' rights serves as a rhetorical tool to justify and moralize the seemingly vengeful retributivist trend in criminal law."); *see also* SIMON, *supra* note 153, at 76 (observing incarceration is the ultimate embodiment of the State's promise to protect victims by providing security to all of society).

stakeholders' interests.¹⁶⁷ Across the country, however, jurisdictions have instituted many varying problem-solving courts to advance the goal of making an actual difference in the lives of everyone affected by crime, from the defendants, to victims, to communities.¹⁶⁸

Problem-solving courts are often served by a variety of social services.¹⁶⁹ Specialized judges in problem-solving courts have experience with the issues that participants are facing in court.¹⁷⁰ Close judicial monitoring gives participants accountability and gives judges the most accurate, holistic impression of the current situation of any given participant.¹⁷¹

Drug courts are the most common, but there are numerous other iterations of the problem-solving court.¹⁷² In New York drug courts, for example, defendants must meet eligibility criteria, agree to a formal plan of treatment, and access support services.¹⁷³ Following a plea, court administrators, including the judge, prosecutor, defense counsel, and social service providers work together to help the defendant work toward a drug-free future.¹⁷⁴

Another type, family treatment courts, provide a means for parents to get sober and retain custody of their children.¹⁷⁵ Parents in family treatment court must (1) admit that drug or alcohol abuse contributed to neglect and (2) not be facing charges of physical or sexual abuse.¹⁷⁶ Parents may graduate from the program and

167. BERMAN & FEINBLATT, *supra* note 156, at 25–28.

168. *Id.* at 32. Problem-solving courts are widely varying and rapidly expanding in the United States. They come in the form of drug, domestic violence, community, mental health, re-entry, juvenile drug, driving while intoxicated, family treatment, homeless, and youth courts. *Id.* at 8. Proponents of problem-solving courts find that they are effective where offenders who engage in the relevant behavior require special attention in a way that is different from other offenders. *Id.* at 55 (discussing juvenile courts).

169. Judith S. Kaye, *Delivering Justice Today: A Problem-Solving Approach*, 22 YALE L. & POL'Y REV. 125, 129–30 (2004).

170. *Id.* at 130.

171. *Id.*

172. BERMAN & FEINBLATT, *supra* note 156, at 8.

173. Kaye, *supra* note 169, at 135–36. In a midtown Manhattan community court, defendants receive a comprehensive pretrial assessment before even seeing the judge. *Id.* at 132.

174. *Id.* at 136. This means that a relapse may be considered part of recovery and can be handled with leniency in a system that understands the challenges of drug addiction. *Id.*

175. *Id.* at 137–38.

176. *Id.* at 138.

regain full custody by remaining sober for a full year and working or attending school.¹⁷⁷

While some courts have a strict set of rewards and sanctions developed through clear definitions of successes and failures, others take a more flexible harm-reduction approach.¹⁷⁸ The philosophy taken—whether focused on harm reduction or on stricter behavioral expectations—may turn on the nature of the population served and the ultimate goal of the court.¹⁷⁹ Although United States’ drug courts typically take a strict “total abstinence” approach, several programs in United Kingdom, Ireland, Canada, and Australia take a harm reduction approach.¹⁸⁰ Public perceptions of drug use and policies developed during the “war on drugs” in the U.S. have led to an abstinence-based treatment philosophy.¹⁸¹ The southern California homeless courts, however, take an approach similar to that of United Kingdom drug courts.¹⁸² By rejecting a simple, direct causal link between criminality and mental health, the courts use a more successful holistic approach.¹⁸³

Problem-solving courts work. They see a reduction in recidivism, improved accountability, stronger families, and increased public confidence in justice.¹⁸⁴

IV. Solutions

The criminal justice system needs to find a way to handle cases of child NM that does not punish parents for poverty, lack of resources, bad luck, and—in many cases—race and immigration status. Putting parents in prison by default increases the risk

177. *Id.*

178. Boldt, *supra* note 138, at 1150–51 (discussing Southern California’s homeless and mental health courts). Mental health courts prefer positive reinforcement and engagement instead of punishment. *Id.* at 1150.

179. In Southern California’s homeless court, a harm reduction approach is appropriate in light of the “severity and chronicity of the mental disabilities from which clients in these courts typically suffer.” *Id.* at 1150–51. The goal of homeless court is merely to reduce maladaptation and distress coherent with homelessness rather than eliminate symptoms altogether. *Id.* at 1150.

180. *Id.* at 1152–53. In the United Kingdom, offenders in drug court committed fewer crimes and spent less money on illegal drugs. *Id.* at 1153.

181. *Id.* at 1145, 1152.

182. *Id.* at 1155.

183. *Id.* at 1158.

184. Kaye, *supra* note 169, at 145–47. In data from six of New York’s drug courts, the Center for Court Innovation found recidivism declined 32% in the year after program completion. *Id.* at 145. Compliance rates in New York’s community courts are 50% higher than traditional courts, while New York’s drug courts see a one-year retention rate of 70%. *Id.* at 146. New York’s family treatment courts saw a reduction of time in foster care from four years to one year. *Id.*

factors for children of incarcerated parents, as well as increasing the likelihood of termination of parental rights.¹⁸⁵ Problem-solving courts are a way to use the criminal justice system both as a tool to improve parenting practices and to keep parents out of jail, stopping the cycle of poverty in its tracks. Problem-solving courts distinguish between case resolution and case disposal.¹⁸⁶

Problem-solving courts account for many of the deficiencies of typical courts. When so much discrepancy arises in the adjudication of crimes of NM, a systematic approach helps achieve a fair and holistic result.

A problem-solving court for parents who commit crimes of NM against their children would help parents improve their skills and practices while protecting their children from the adverse effects of an incarcerated parent. This court, referred to in this Note as ‘parenting court,’ would function as a model of a combination of drug court and family treatment court. Parents with any amount of custodial involvement with children would be eligible. Eligible parents must be accused of a crime involving recklessness or negligence—in short, an unintentional crime. They must also be willing to accept responsibility for their actions by entering the program. In order to serve the impoverished population, parents must receive public benefits, or be eligible to receive public benefits, to take part in the optional court.

Pre-Charge Parenting Court

In an ideal world, a parent could avoid a criminal charge altogether.¹⁸⁷ One iteration of the parenting court envisioned by this Note is one which would empower police officers to refer cases of NM to a specialized parenting court judge instead of a prosecutor. This would result in a parenting court that functions as a quasi-judicial proceeding wherein the judge could refer a parent who was not successful in the program to a more traditional courtroom setting. Thus, the parent would forego a criminal charge on the contingency that they undergo parenting court and face charges if they fail at the program.

185. Hager & Flagg, *supra* note 24.

186. BERMAN & FEINBLATT, *supra* note 156, at 33.

187. See Joshua Gaines, *How a Parent’s Criminal Record Limits Children*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Jan. 16, 2016), <https://ccresourcecenter.org/2016/01/06/6767/> [<https://perma.cc/Z42X-W4JA>] (observing parents and their families face serious collateral consequences for criminal charges, even non-custodial sentences and arrests without conviction).

Post-Charge Parenting Court

Alternatively, a parent could be referred to parenting court after a charge of NM. For cases that the prosecution determines are deserving of prosecution, parenting court would be a way to keep parents out of jail. This could be a determination by any of the professional actors during the criminal adjudication, including prosecution, defense counsel, or judge. In this iteration of the court, a parent would be required to plead guilty in order to be eligible for parenting court. The judge would then impose a stay of adjudication,¹⁸⁸ pending completion of parenting court. The guilty plea would allow the parent to take formal responsibility while the stay of adjudication would prevent a criminal conviction and provide an incentive for completing parenting court.

The two iterations, pre- and post-charge, could contemporaneously exist. As such, a parent would have two opportunities to avoid traditional adjudication: once, upon arrest, and once, after the criminal charge.¹⁸⁹ Police officers may be more likely to make such referrals in less serious or complex cases. In any case, this system requires professional actors, including police officers, to be willing to give parents the benefit of the doubt and have a comprehensive understanding of the social implications of race, poverty, and criminal punishment—an admittedly tall order.

Like in drug and family treatment courts, following a guilty plea (or prior to charging), a parent would receive an assessment to determine their needs in order to be a functional parent and retain custody over their children. They would then take part in a treatment plan agreed-upon by the defense counsel, prosecution, specialized parenting court judge, and case manager. The parent would then have access to social services tailored to their unique needs. These may include welfare benefits; drug treatment; domestic violence advocacy; individual, couples, or family therapy; and immigration services, to name a few. Through close judicial monitoring, the judge would have an accurate, updated, and holistic view of the participant's progress. Successful completion of the parenting court program would result in no prison time, full custody of surviving children, and a clean criminal record.

188. For example, Minnesota allows first-time drug offenders to attend a drug court, staying an adjudication of guilt unless the drug court participant violates its conditions. Minn. Stat. § 152.18 subd. 1(c) (2019).

189. Post-charge parenting court could substantively differ from pre-charge parenting court. Based on the idea that a post-charge parenting court referral stems from a more serious case of NM, the post-charge court could have heightened supervision and more structured programming.

Such state oversight and accountability on the part of the defendant would help keep the case out of the criminal justice system. This keeps parents out of jail and helps prevent them from developing criminal records. The parenting court would be premised upon enforcing positive behavior, rather than punishing bad behavior.

Parenting court should take the harm reduction approach of European drug courts and California mental health courts. The very presence of a parent in problem-solving court for what would ordinarily be a serious crime with a heavy penalty aligns with the harm reduction philosophy. This recognizes that harm has been done, and may even occur again, but aims merely to reduce the frequency and gravity of harm by keeping the parent out of prison. Likewise, if a parent receives a heavy, unforgiving penalty for failure to comply with an aspect of their program, the purpose of the program would be undermined. Parenting court judges should take a case-by-case approach, favoring second chances and avoiding sanctions where possible. For example, in a pre-charge sentencing court, a judge should take efforts to keep a parent in the program and away from referral for a criminal charge. After all, parenting court is premised on the notion that parents need the court because they ended up in their current situation as a result of disproportionate bad luck. Like the mental health and homeless courts in California, parenting court would seek to acknowledge the severity and chronicity of generational poverty.

In terms of practical implementation, states could establish a mandate for parenting courts, with counties overseeing their actual implementation. Because incarceration and oversight mechanisms—such as other problem-solving courts, parole, and probation—already exist, implementation of such a program would likely not be an insurmountable barrier. If the program is successful, it could replace much of the existing incarceration and oversight mechanisms.

Some opponents of problem-solving courts may argue that the courts require or assume responsibility, or at least legal guilt, on the part of the defendant. The idea behind this argument is that the program necessarily curbs due process. The problem-solving courts envisioned by this Note, however, are always optional; a parent who rejects the notion of guilt is never required to take a guilty plea or accept responsibility by going through the program.

An assumption of responsibility by the defendant is likely, however, to ultimately benefit the parent through a trade-off of sorts. By accepting the conditions of the program, the parent would

receive the benefit of the doubt from the court: that the act of maltreatment was unintentional, that the parent wants to atone for their mistakes, and that they are capable and worthy of keeping their family together. This would shield the parent from the trauma of a trial, and through the problem-solving court's program, they would receive benefits not otherwise easily attainable.¹⁹⁰

While it may be easy to object to a reduction or complete avoidance of prison time purely on the basis of parenthood,¹⁹¹ parents who commit crimes of NM are uniquely situated compared to parents who commit other crimes. For parents who commit crimes of maltreatment against their children, the crime and prison time are both inextricably linked with the welfare of the child. Therefore, while the child's welfare is an auxiliary consideration for crimes in which a culpable parent must answer for their unrelated actions, the child's welfare must be a central consideration when the crime involves the family.

While many may experience a visceral desire to see a parent punished for ineffective or even harmful parenting, this is unlikely to benefit either the parent or the surviving children. The parent is unlikely to benefit from traditional punishment—such as imprisonment—because traditional punishment rationales do not fit such crimes. When considering the negative impacts of parental incarceration, it is hard to justify even a purely retributive punishment in light of the alternative problem-solving court. Problem-solving courts have been influenced by the victims' rights movement, and, by their nature, work to improve the safety of victims and repair harm to the community at large.¹⁹²

Parenting court differs from traditional family courts—which handle civil cases of custody, divorce, paternity, and more—because parenting court is limited to criminal cases in which a parent has been charged with NM. Both courts are meant to help the family achieve their definition of success and sustainability, but parenting court arises after a crisis and family court appearances may occur for everyday legal needs. The courts could reasonably coexist in the same jurisdiction. Although the goal of parenting court is to keep a

190. Depending on the court's structure and capacity, they could receive parenting skills classes, parenting supervision and guidance, access to therapy, drug counseling, domestic violence advocacy, and more.

191. See Jennifer Collins et al., *Should Parents Who Offend Receive Sentencing Discounts?*, FREAKONOMICS: BLOG (July 15, 2009, 12:25 PM), <http://freakonomics.com/2009/07/15/sentencing-discounts-for-parents-a-guest-post/> [<https://perma.cc/HU6V-JHF8>]. The merits of sentencing discounts for parents who commit crimes unrelated to parenthood are not within the scope of this Note.

192. BERMAN & FEINBLATT, *supra* note 156, at 45.

parent out of prison, in many cases, a secondary goal is to help a parent achieve or retain custody of a child. This would not override the mandates of family court. The circumstances in which custody is at issue for another reason would still apply to a parent in traditional family court.

In addition to problem-solving courts, another way to keep parents out of prison is a confinement alternative post-conviction. For example, Washington State has Family Offender Sentencing Alternative and Community Parenting Alternative supervision programs.¹⁹³ Corrections Officers provide ongoing supervision and case management to set custodial parents on the path to effectively meeting their children's needs.¹⁹⁴ However, such close supervision requires extensive time, resources, and investment on the part of corrections officers.¹⁹⁵

Conclusion

Regardless of the approach, it is clear that parents in poverty need special protections when it comes to crimes surrounding parenting. The statistics show that crimes of NM have a connection to poverty and lack of access, particularly for minorities and immigrants. These connections lead to a fear of or inability to seek help, ultimately leading to child welfare intervention. Because of these social barriers and reduced culpability, it would be unjust to hold parents accountable in the current state of criminal law. Imprisoning such parents is not only unjust, it is an anti-social, anti-family policy. Imprisonment plunges the family deeper into poverty and greatly increases children's own risk factors, including the likelihood that they will grow up similarly situated to their parents. Because imprisoning parents so clearly perpetuates the cycle of intergenerational poverty, there must be an alternative solution. The solution proposed by this Note is to develop problem-solving parenting courts that give parents the tools to improve their parenting skills and resources to prevent future crimes of NM—while keeping parents out of prison.

193. See Susie Leavell, *A Role for Community Corrections in a Sentencing Alternative for Parents*, VERA INST. OF JUSTICE: THINK JUSTICE BLOG (Sept. 24, 2012), <https://www.vera.org/blog/a-role-for-community-corrections-in-a-sentencing-alternative-for-parents> [<https://perma.cc/89E2-9DBZ>].

194. *Id.*

195. *Id.*