

Through the looking glass? Prisoners' children and penal policy

by Helen Codd

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Thinking about prisoners' children and penal policy is a frustrating exercise which raises more questions than are easily answered. On the one hand, reports such as that of the Social Exclusion Unit (2002) stress the role played by prisoners' family ties in preventing reoffending and emphasise the importance of prisons facilitating the maintenance of positive family relationships. Academic research has documented the collateral consequences of imprisonment for prisoners' families and has explored the often highly disruptive socio-economic and emotional effects of imprisonment experienced by prisoners' children (Johnston, 1995; van Nijnatten, 1998; Travis & Waul, 2003; Chesney-Lind & Mauer, 2002; Boswell, 2002; Mills & Codd, 2007). On the other hand, youth justice policies stress diversion and restorative approaches at the same time as "getting tough" on persistent young offenders.

These policies have been accompanied by the introduction of an array of measures designed to combat antisocial behaviour and incivilities (see Brown, 2004). Thus we find ourselves considering prisoners' children within a web of contradictions. Family ties are recognised as important in preventing reoffending (Ditchfield, 1994) but families are implicated in the intergenerational transmission of criminal behaviour (Farrington & Coid, 2003). Prisoners' children are seen as in need of protection and support and as suffering a range of negative collateral consequences of parental imprisonment (Murray, 2005) at the same time as some are portrayed as out of control and as "the hardened criminals of the future." As the research indicates, parental imprisonment leads to an increased risk of offending in later life (Murray & Farrington, 2005); thus, the children who experience stigmatisation, poverty, housing instability, lack of role models and behavioural problems are also likely to be children who come into contact with the youth justice system.

In this brief article I would like to consider how penal policy should respond to the research on the impact of imprisonment on the children of prisoners. I then suggest two responses. One is the "impossible dream" response; the other, borrowing from Renny Golden's inspirational and vivid book on the impact of maternal imprisonment in the US, *War on the Family* (Golden, 2005), is the "What is to be done in the meantime?" response.

1. THE 'IMPOSSIBLE DREAM' RESPONSE

In an influential address to the National Youth Advocacy Service, Munby J (2004a and 2004b) stressed the fundamental importance of listening to children. In contrast with children who are involved in court cases, prisoners' children often exist on the edges of the legal system and may never have the chance to make their wishes known to the courts and public authorities. Of course, if we listened to prisoners' children then, with the exception of children whose parents were living a chaotic lifestyle prior to their incarceration or who were themselves the victims, many children would not want their parent to be imprisoned at all (Brown, 2001). This applies particularly in relation to the imprisonment of mothers; as Renny Golden writes, for many of these children their socio-economic circumstances are such that when their mother is imprisoned then they lose the one anchor they have left (Golden, 2005).

While it is clear that the most straightforward way of minimising collateral harm to children in this context lies in limiting prison numbers, a previous Home Secretary made it clear in his address to the Prison Reform Trust in September 2005 that he did not intend to do this (Clarke, 2005). The "punitive turn in corrections" in the UK and the USA (Pratt et al, 2005) means that at the moment to suggest this as a solution to the negative impact of imprisonment on prisoners' children is unrealistic.

2. THE “WHAT IS TO BE DONE IN THE MEANTIME”? RESPONSE

First of all, there is the possibility of aiming for a “child-wise” penology in the mould of Pat Carlen’s proposed “woman-wise penology” (Carlen, 1990). Such an approach could aim to avoid treating adults in ways which brutalise or harm children. There are already a number of promising community and prison-based initiatives which aim to strengthen prisoners’ family ties and to minimise the harmful effects on children. Innovative projects, such as the Homework Club at Wormwood Scrubs; Storybook Dad and Storybook Mum, or, as in my own area, extended visits and family days all contribute to attempting to diminish the negative consequences of parental imprisonment.

Second, the law can play a fundamental role because the future prospects for prisoners’ children depend a great deal not only on penal policies but on the intersection of these policies with several areas of law. For example, shifts from the use of community penalties to short prison sentences may pose challenges to the maintenance of parent-child relationships, but this may also be affected by the prison rules and their implementation in particular institutions. Where there are contact disputes or care proceedings, prisoners’ children may find themselves being dealt with in the family courts. The relationship between prison regimes, sentencing policies and human rights law is of fundamental importance.

It is often forgotten that prisoners’ children are holders of enforceable rights under the European Convention of Human Rights. I would suggest that is is important not simply to listen to children as Munby J suggests but to give greater emphasis to their rights. Although of course the Human Rights Act 1998 applies to children, Jane Fortin has argued in a recent article in the Modern Law Review (Fortin, 2006) that “the family judiciary assume that section 1 of the Children Act 1989 requires them to determine all cases by reference to children’s welfare, rather than by reference to their Convention rights.”

Thus there has been little attempt, with the exception of the cases on mother-and-baby-units, to conceptualise the problems faced by prisoners’ children within the framework of the HRA. Article 8, however, may provide fertile ground for potential challenges. A good example of its possible use could be in relation to the denial of visits under specific regulations governing prisoners’ visits from children where the prisoner is assessed as posing an ongoing risk to children (see Creighton et al, 2005; Brooks-Gordon & Bainham, 2004).

In this context, the courts would be required to balance conflicting rights. It is difficult to reconcile dangerousness with parenthood, but it is important to remember that not all individuals who have, for example, behaved violently, have been, or are likely to be, violent in all contexts. It is uncontroversial to suggest that, if a parent has been

convicted of the physical or sexual abuse of the child then they should not be allowed to contact with that child, but what of the parent who has responded well to an in-prison treatment programme, and what of the child who expresses a legally-competent and informed wish that despite the abuse they still wish to see that parent? The blood tie is not everything -and indeed in some situations it may mean nothing-but in some situations it may not be easily dismissed. Jane Fortin (2006) argues that

“Children’s cases would certainly require the development of an entirely different approach by the family judiciary were their interests to be articulated as rights. In many cases, the articulation of children’s rights as such, would require them to be placed alongside and balanced against those of other parties in the case. Those other parties will usually be adults; often they will be the children’s own parents, but sometimes they will be complete strangers. The articulation of children’s rights may also produce a more complicated situation where the child’s own rights appear to conflict with each other. Such a conflict would then require a different and more complex balancing act. In each set of circumstances, a decision would have to be made as to how the evidence relating to the children’s best interests should be dealt with and what place it should occupy in the balancing act. As discussed below, such an approach might produce unforeseen consequences for children. Nevertheless, as various authors have argued, by ignoring children’s Convention rights, the domestic courts currently risk infringing their duty under section 6 of the HRA.”

Greater emphasis on children as empowered bearers of enforceable rights could lead to new challenges to prison regimes and decisions. Although Munby J (2004a and b) has also stressed the importance of adequate representation of children’s interests to date, there have been few cases where children have sought to exercise their human rights. This reflects the marginal and socially excluded position of prisoners’ families: prisoners’ rights are recognised and often prisoners are aware of their legal status, entitlements and grievance procedures, but partners and children may not have the same knowledge, expertise or resources.

Thus, when viewed from the perspective of a commitment to children’s rights, it could be argued that the full potential of the Human Rights Act in promoting and preserving the interests of the children of prisoners has not yet been fully explored or realised. While penal policies may not change and the prison population may continue to rise, there are still promising legal opportunities to enable family relationships to survive imprisonment, and to minimise the negative effects on children. 

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