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# **COMPARATIVE LEGAL APPROACHES FOR INCARCERATION AND AFFECTED CHILDREN**

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## **INTRODUCTION**

Incarceration has far-reaching consequences not only for the individual imprisoned but also for their families, especially the children. A parent's incarceration disrupts a child's life and can have long-term social, emotional, and psychological consequences. Legal systems worldwide have developed a variety of approaches to manage such situations, which focus on the welfare of the child, legal rights, and parental responsibilities. Some legal frameworks are focused on reducing disruption caused by incarceration, while others work towards reunifying families and rehabilitating incarcerated parents.

### **Origins and Background:**

**Historical context:** The issue of children's welfare has been paid more attention over the past centuries, especially in the 20th century. It was only after the formation of international human rights norms like the United Nations Convention on the Rights of the Child in 1989 that such issues were put forward.

**Key milestones:** The last few decades have seen more and more national and international organizations push for the need to protect the children of prisoners. For instance, the U.S. saw the establishment of the Children of Incarcerated Parents Initiative in order to provide advocacy for policies that reduce the harm caused by parental incarceration on children. A number of countries in Europe also formulated policies and enacted laws that promoted family ties while offering support for children whose parents were behind bars.

### **Comparative Legal Approaches:**

**Child protection laws:** They deal with the safety and well-being of children whose parents are in prison. The legal system often has provisions that ensure care arrangements for children are

secure; this is by considering whether a child should remain in the home or be put in alternative care, such as foster care.

**Parent-Child Relationship Laws:** Most legal systems have provisions that are aimed at maintaining the relationship between the incarcerated parent and the child. This includes visitation rights, communication opportunities, and other forms of contact.<sup>1</sup>

**Custody and Guardianship Laws:** If a parent is incarcerated, family courts may have to decide on the custody of the child. In some jurisdictions, the state or a relative may take guardianship if the parent cannot care for the child.

### **Timing of Intervention and Legal Action:**

**Immediate intervention.** In many jurisdictions, intervention begins at the point of incarceration of the parent, even when the welfare of the child is in question. Social services or child protection agencies may act immediately to observe the child's home environment and decide if other arrangements must be made.

**Long-term impact and interventions:** The impact of parental incarceration on children may only be evident in the long term, and legal interventions may be modified to address changing needs. For example, many countries have enacted legal systems that guarantee children's rights during the parent's incarceration, with regular reviews to determine whether the child's needs are being met.

### **Mechanisms of Legal Approaches:**

**Social Services and Family Courts:** Many jurisdictions have the integration of family courts and social services for children's welfare. In such a system, the family courts might take decisions about the custody and visitation rights of children, whereas child welfare agencies would be concerned with children's safety and well-being.

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<sup>1</sup> Derrick M Gordon, Bronwyn A Hunter and Christina Alicia Campbell, Children of incarcerated parents: Promising intervention programs and future recommendations, Research Gate (January 2018), [https://www.researchgate.net/publication/345034230\\_Children\\_of\\_incarcerated\\_parents\\_Promising\\_intervention\\_programs\\_and\\_future\\_recommendations](https://www.researchgate.net/publication/345034230_Children_of_incarcerated_parents_Promising_intervention_programs_and_future_recommendations), accessed on 1 February, 2024

Visitation and Communication Programs: Most legal systems have programs that allow the incarcerated parent to maintain contact with the child. This may be through physical visitation, phone calls, or video communications, and can be crucial in maintaining family bonds.

Foster Care and Kinship Care When the biological parent cannot care for the child, because of incarceration for example, these alternative care systems might be foster care or placement in extended family (kinship care). Legal processes govern these as well, assuring that a child is cared for in safety and support.

#### Rationale for Legal Approaches:

Rights to children's care and protection: The child's right to be taken care of and protected does not depend on his or her parent's legal status. International instruments, such as the CRC, suggest that no parental imprisonment should serve as an excuse to infringe children's rights.

Human rights considerations: Most legal systems emphasize the importance of human rights for all individuals, including children and incarcerated parents. Efforts to protect the rights of children affected by incarceration are often grounded in these broader human rights principles.<sup>2</sup>

### **International Legal Frameworks on Incarceration and Children's Right**

#### 1. United Nations Convention on the Rights of the Child (UNCRC)

Article 9: "Separation from Parents" states that a child should not, save in circumstances where such separation appears necessary for the child's best interests as set out by law for the cases listed on this article or for similar situations, be separated from his or her parents. In terms of imprisonment, separation of a parent from his/her child is, therefore, automatically not to follow imprisonment and measures should be used to maintain contact as much as is possible.

Article 20: "Children Deprived of their Family Environment" – This article emphasizes that children who are deprived of their family environment (such as by the incarceration of a parent) should be given alternative care that respects their dignity and promotes their well-being. The

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<sup>2</sup> Daragh Bradshaw, Ann-Marie Creaven and Orla Muldoon, Parental incarceration affects children's emotional and behavioural outcomes: A longitudinal cohort study of children aged 9 to 13 years, Research Gate, ( February 2021), [https://www.researchgate.net/publication/349599112\\_Parental\\_incarceration\\_affects\\_children's\\_emotional\\_and\\_behavioral\\_outcomes\\_A\\_longitudinal\\_cohort\\_study\\_of\\_children\\_aged\\_9\\_to\\_13\\_years](https://www.researchgate.net/publication/349599112_Parental_incarceration_affects_children's_emotional_and_behavioral_outcomes_A_longitudinal_cohort_study_of_children_aged_9_to_13_years), accessed on 3 February, 2024

state must take into account the child's emotional and developmental needs in decisions about care arrangements.

Article 40: This pertains to the handling of children in conflict with the law, but indirectly impacts children of incarcerated parents. It highlights rehabilitation and reintegration into society, which could be applicable to the child's relationship with their incarcerated parent.<sup>3</sup>

## 2. International Covenant on Civil and Political Rights :

Article 23: Although this article is generally about the protection of the family unit, it applies to children of inmates. The family is identified as the nucleus of society and imprisonment of a parent should not be a form of punishment to the family, especially the child, in a disproportionate manner.

Article 10: This article affirms the rights of individuals deprived of liberty to be treated with humanity and dignity. While this primarily concerns prisoners, its broader interpretation includes ensuring that incarcerated parents maintain their parental roles, including communication and access to their children.

## 3. UN Guidelines (Alternative Care of Children) :

These recommend that family ties be maintained as far as possible and stress the adverse effects on children that often result from unnecessary separation from their parents. In cases of prison sentence, in determining whether alternative care arrangements are necessary to best ensure the child's best interests.

## 4. UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules):

These standards have specific provisions for the treatment of incarcerated parents. While not children's rights instruments per se, they do provide the impetus that prisons should seek to support family relationships where families exist. Both the facilitation of contact between an incarcerated parent and a child can occur, as well as alternative means for maintaining family relationships with provision of supervised visits.

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<sup>3</sup> Commission for Children and Young People Submission to the Inquiry into children affected by parental incarceration, Commission for Children and Young People, <https://ccyp.vic.gov.au/assets/Submissions/Inquiry-into-children-affected-by-parental-incarceration-submission.pdf>, accessed on 2 February, 2024

## 5. Regional Human Rights Frameworks:

European Convention on Human Rights (ECHR): In particular, through Article 8, which guarantees the right to family life, imprisonment of a parent may amount to an interference with family life. The state, however, must justify this interference and demonstrate that actions taken in the best interests of the child—for example, separation of the child from the imprisoned parent—are necessary and proportionate.<sup>4</sup>

## **National legal Approaches: Case studies of Different Countries.**

### 1. United States:

The United States legal system concerning children of inmates primarily focuses on the separation of the parent and child due to imprisonment, often with little regard for maintaining the parent-child bond. Although the Second Chance Act of 2008 provides funding for programs intended to support re-entry and family reunification, the system is primarily punitive and does not offer many opportunities for inmates to have meaningful relationships with their children. PREA aimed at the eradication of rape in prison incorporates provisions on children visiting parents while in prison. Nonetheless, US prisons lack sufficient programs to help their children meet the emotional needs after the parents have been imprisoned. Many of the children therefore are traumatized and stigmatized and find themselves in unstable homes, where some end up in foster care and other institutional setups.

### 2. Norway:

In contrast, in Norway, there is more rehabilitation and protecting of family ties, hence the two enactments - Norwegian Penal Code 2001 and Child Welfare Act 1992. For example, in some Norwegian prisons, mothers are allowed to live with their children up until the child reaches the age of three. The policy is a part of the overall approach of ensuring that children's emotional needs are met, even if the parent is behind bars. Also, the rights of visitation are very robust, and there are alternative care options available for children if they cannot be provided with prison-based care. Norway's jurisprudence will always be driven by the child's best interests, as determined by the United Nations Convention on the Rights of the Child, which emphasizes family ties to remain intact as far as possible.<sup>5</sup>

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<sup>4</sup> Beth A Easterling & Elizabeth I. Johnson, Conducting Qualitative Research on Parental Incarcerations: Personal Reflections on Challenges & Contributions, May 10, 2015, <https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=2322&context=tqr>, accessed on 3 February, 2024

<sup>5</sup> Veronika Haasz, Children of imprisoned parents - A child rights perspective, (PDF) [Children of imprisoned parents - A child rights perspective](#), accessed on 2 February, 2024

### 3. United Kingdom:

Britain's legal stance is a little more balanced compared to the United States, still focusing on preserving family unity; however, challenges are still major. The Children Act 1989 and Children and Families Act 2014 are some of the major legislations in place that guarantee the protection of children's rights, even if a parent is behind bars. The UK has introduced several programs designed to support children whose parents are incarcerated, such as child-friendly visiting areas and programs to help parents stay connected with their children. The prison system is overcrowded, however, which makes it impossible for the full realization of family preservation programs. In addition, the Ministry of Justice has its own Family Justice Initiative, under which support for parents in prison can be extended in terms of enrolling in parenting programs; but access is sometimes limited by factors such as distance and available space in the prisons.

### 4. Brazil:

Brazil's legal approach focuses attention on family care and protection, as determined by the Brazilian Child and Adolescent Statute (ECA). This policy reflects Brazil's commitment to the preservation of maternal bonds, although overcrowding in prisons and a lack of resources make this approach less effective. The National Penitentiary Department has also made an effort to offer child care services within prison systems, but this country faces enormous barriers in ensuring adequate living conditions for both mothers and children. However, the overall legal structure of Brazil favors the interest of the child and tends to avoid separation of the children from their imprisoned parents except for extreme reasons.

### Preservation of Family Ties:

Norway is very proactive, allowing children to live with their incarcerated mothers, while the U.S. is more punitive and less supportive of maintaining familial connections. The UK and Brazil take an intermediate position, with programs and provisions for maintaining relationships, though these are often limited by prison conditions.

### Legal Frameworks:

Norway and Brazil have legal frameworks that emphasize the best interest of the child in cases of parental incarceration, in line with international human rights standards such as the UNCRC. The U.S. and South Africa, although recognizing these issues, are unable to provide a

comprehensive support system because of overcrowding, resource constraints, and punitive policies.

### **Impact of Incarceration on Children: Legal and Psychological Perspectives**

The incarceration of a parent can have severe legal and psychological consequences for children. From the legal point of view, issues related to their rights, family separation, and their ability to maintain a relationship with the incarcerated parent may arise. Psychologically, children of incarcerated parents are at risk of experiencing emotional trauma, developmental challenges, and increased vulnerability to various social problems. The impacts are multifaceted and require a holistic approach that considers both legal protections and psychological interventions.

#### Legal Consequences:

The imprisonment of a parent may also lead to separation from the child, which in most cases does not favor the child. Under the United Nations Convention on the Rights of the Child (UNCRC), it is stated that children have a right to grow with their parents, except when separated for their own welfare (Article 9). In many instances, a child might end up in foster care or extended family homes, or institutional care. These transitions often make a child's emotional security and stability unstable.

#### Psychological Support and Protection under the Law:

To reduce the adverse effects of parental incarceration, legal frameworks and psychological interventions are needed. Legal provisions, such as those in the UNCRC, should ensure that children's rights to family life and contact with incarcerated parents are respected, with necessary accommodations made for communication and visits. Countries should also consider programs designed to support both the child and the incarcerated parent, focusing on preserving the family bond and supporting the child's emotional well-being.

### **Parental Incarceration and Child Welfare Laws**

Incarceration of parents raises significant challenges in child welfare issues, which directly affect the children's physical, emotional, and psychological well-being. The legal frameworks protecting the rights of children, particularly the child welfare laws, have become a very essential tool in combating these challenges. These laws establish the rights of parents and the

state regarding their responsibilities toward ensuring the care, safety, and development of the child, especially when one of the parents is incarcerated. Still, the efficacy of such legal protections differs in various jurisdictions.

#### International Legal Frameworks:

One such article deals with the children's right, specifically Article 9, with a focus placed on the entitlement of children in regard to accessing and maintaining personal relations with parents, except as deemed necessary or desirable for its welfare. This is aligned with the principle that children should not be punished for the actions of their parents, and every effort should be made to preserve the parent-child bond during imprisonment.

The UN Guidelines for Alternative Care of Children (2010) go further to advance that children removed from their parental care due to imprisonment should have alternative care befitting for them. The guidelines pointed out that if institutional care happens, it shall be the very last resort the state has had to ensure there is a chance for children's physical and psychological needs are met.

#### National Child Welfare Laws:

Many countries have enacted child welfare laws to protect children's rights while their parents are in prison, which are always child-centered and family-friendly. Such laws contain provisions on matters of custody, visitation, and support so that the child will not lose touch with the incarcerated parent.

In the United Kingdom, the Children Act 1989 is also important because it provides that a child's best interests should be of paramount importance in all decisions made concerning a child, even if the parent is in prison. The law provides for children to visit an incarcerated parent and, whenever possible, keep the child within the family network. The Children and Families Act 2014 introduced additional support for parents in the criminal justice system, including provisions for maintaining family ties and facilitating parenting programs for incarcerated parents.

#### Challenges in Child Welfare Law:

Despite the existence of legal protections, challenges persist in the application of child welfare laws to children of incarcerated parents. Institutional care can also be considered overused if a

child is taken away from the incarcerated parent. Most of the time, this can place a child in foster care or even other relatives' homes. However, sometimes it is not always in the child's best interest. Such placements may interrupt attachment bonds of a child with emotional and behavioural complications.<sup>6</sup>

#### Legal Reform and Solutions:

Legal gaps should be filled through reforms so that the welfare of the child is not harmed due to the incarceration of a parent. Governments must provide comprehensive family support programs under which an incarcerated parent can be in regular contact with his child. Child-friendly visiting areas in prisons should be established, and virtual communication facilities should be more accessible, especially in cases of long-term incarceration.

### **Alternatives to Incarceration and Family Preservation Laws**

Alternatives to incarceration and family preservation laws are becoming an increasingly essential tool toward reducing adverse impacts associated with the imprisonment of parents on children. Traditional punitive measures commonly involve family separations, thus leading to emotional trauma and destabilization for children. Alternatives to incarceration, therefore aim to provide more rehabilitative, restorative solutions that preserve family units and advance the well-being of children. They recognize that even with a parent involved in the criminal justice system, a child's rights and needs are prioritized.

#### Alternatives to Incarceration

Alternative programs to imprisonment stress rehabilitation efforts allowing the offenders to stay within the community while also maintaining their relations with families without severely disrupting their lifestyles. This can be of most importance for those parents who would not constitute any serious danger for society but incarceration would bring highly negative effects upon their children's lives.

#### Community-Based Sentencing:

By these alternatives, the individual continues staying at home with possibly under supervision instead of being incarcerated. The incarcerated parent is able to provide care and emotional

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<sup>6</sup> Suvansh Majmudar, Child Incarceration Laws in India, Burnished Law Journal, 2021, <https://burnishedlawjournal.in/wp-content/uploads/2021/06/CHILD-INCARCERATION-LAWS-IN-INDIA-by-Suvansh-Majmudar.pdf>, accessed on 2 February, 2024

support to their children upon staying in the home, which is needed for the emotional well-being and development of the child. These measures are especially effective for non-violent offenders or those convicted of low-level crimes.

#### Restorative Justice Programs:

Restorative justice is based on the repair of harm resulting from criminal activity through dialogue, accountability, and community involvement. In restorative justice programs, offenders meet with victims and members of the community to discuss the effects of their behaviour and work towards reconciliation. In cases of parental incarceration, restorative justice programs can be highly effective because they encourage accountability but promote healing in the family and the community as well.

#### Family Preservation Laws

Family preservation laws are concerned with keeping the family unit intact. This involves supporting parents that are involved with the criminal justice system so that children can be kept at home or with extended family members, rather than ending up in foster care. In essence, the family preservation law is important as it reduces trauma for children through parental incarceration.

#### Supportive Family Services:

Family preservation laws often provide for social services that help parents to maintain their roles as parents despite their involvement in the criminal justice system. The services may include parenting classes, counselling, financial support, and mental health treatment. By providing these supportive services, such laws are less likely to remove children from their homes and place them in foster care.

#### Preservation of Parental Rights:

Some of the family preservation legislation aims to automatically stop termination of parental rights with a jail sentence. Incarceration per se is held to not necessarily be an offence to dissolve parental ties. For instance, in the United States, the Adoption and Safe Families Act of 1997 sets standards that prevent the termination of parental rights when parents are temporarily incarcerated, thereby allowing parents who are incarcerated to regain custody of their children when they are released.

## Challenges and Considerations

Despite the potential benefits of alternatives to incarceration and family preservation laws, challenges remain. Many of these programs are underfunded or lack the resources necessary to effectively support families. Furthermore, the availability of alternatives to incarceration varies by jurisdiction, and some regions may still rely heavily on punitive measures rather than rehabilitative approaches.<sup>7</sup>

## **The Role of Family Courts in Managing Parental Incarceration Cases**

Since it is the decisions of family courts that affect children, whose parents happen to be arrested by the criminal justice system, case management in issues of parental imprisonment is very much a role and responsibility of these courts. On the one hand, they balance the best interest of the child with the fact of the incarceration of the parent. Family courts are central to ensuring that children maintain stable relationships with their parents, whenever possible, and that their emotional, psychological, and physical needs are met during a challenging time.

### 1. Custody and Visitation Decisions

One of the primary roles of family courts in parental incarceration cases is determining custody and visitation arrangements. In making these decisions, family courts typically consider factors such as the child's age, the emotional bond with the incarcerated parent, and the overall stability of the alternative caregivers.

### 2. Parental rights and loss of rights

In cases where incarceration leads to separation for a protracted period, family courts must assess whether rights should be terminated. In many jurisdictions, parental rights are terminated when a parent cannot care for the child for an extended period, for example, during incarceration for an extended sentence. However, termination of rights can only be considered by family courts when it would be in the best interest of the child.

### 3. Support Services and Reunification Efforts

Family courts also provide support services that can be of help to both the incarcerated parents and their children. The courts can order programs on parenting education, counselling, and

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<sup>7</sup> Devina Srivastava, Legal Protection of Children of Incarcerated Parents-A Modern Day Necessity, Academia, [https://www.academia.edu/91285233/Legal\\_Protection\\_of\\_Children\\_of\\_Incarcerated\\_Parents\\_A\\_Modern\\_Day\\_Necessity](https://www.academia.edu/91285233/Legal_Protection_of_Children_of_Incarcerated_Parents_A_Modern_Day_Necessity), accessed on 2 February, 2024

therapy for children on the psychological impact of parental incarceration. These services are crucial in ensuring reunification of the family and restoring the parent-child bond once the parent is released.

#### 4. Child's Best Interests and Legal Advocacy

The principle of the best interest of the child acts as the foundation of decision-making in cases of parental incarceration. For each case regarding custody, visitation, and decision on parental rights, courts have a responsibility to provide for the safety, emotional soundness, and stability of the child involved. The judiciary usually appoints legal advocates for children who, for example, serve as guardian ad litem or child advocates to promote the needs and wishes of the child during proceedings.

#### 5. Avoiding Placement in Foster Care

One of the roles of family courts in cases where parents are in prison is avoiding unnecessary foster placement by providing possible alternatives, for example, giving the child over to extended relatives. Family courts can order the assessment of kinship care to assess whether a particular relative can safely care for a child. Keeping the child as close as possible to the network of extended families helps maintain identity, cultural bonding, and psychological stability.

### **Rehabilitation and Reintegration Programs for Incarcerated Parents**

Rehabilitation and reintegration programs for criminal justice systems address the needs of children when parents are imprisoned by rehabilitating such parents and assisting them in changing root causes of crime behaviour, equipping them on preparation for a reintegration plan into society positively and maintaining an affectionate bond with their children. The aim is not only to reduce recidivism but also to ensure that the incarcerated parent can become a more effective and responsible caregiver upon release, ultimately benefiting both the individual and their family.

#### 1. Parenting Programs

Among the most significant aspects of rehabilitation for incarcerated parents is the focus on improving parenting skills. Parenting programs within prisons help individuals learn effective parenting techniques, which can be particularly beneficial for parents who may have been

incarcerated for long periods or who lacked strong parental role models themselves. These programs typically focus on topics such as:

**Child Development:** Educating parents on what to expect from their child at a certain age, the emotional and developmental needs of children, and how to encourage healthy relationships.

**Positive Discipline:** Teaching non-violent and constructive discipline methods that promote respect, communication, and emotional well-being.

## 2. Family Reunification and Support Services

Family reunification programs are meant to ensure a smooth transition of an incarcerated parent back into family life. The services provided through these programs assist the incarcerated parent in maintaining contact with the child and preparing them for the challenges of reintegration upon release.<sup>8</sup>

**Visitation facilitation:** Systematic, meaningful visits between inmates and their children to maintain an emotional bond and counteract the psychological impact of separation. Some programs also offer child-friendly visiting facilities in prisons, which can reduce the intimidating effect and help create a supportive environment for children.

## 3. Vocational and Educational Training

Vocational and educational programs are integral parts of rehabilitation, so these measures are about equipping the confined parents with the tools for their self-support and their families after release. Such programs aim at reducing recidivism by providing the confined with marketable skills and qualifications that enhance their probabilities of finding stable employment after completion of the sentence. The key elements of vocational and educational programs include:

## 4. Treatment for Substance Abuse and Mental Health

For many inmates, substance abuse or untreated mental health issues are a contributing factor to their criminal behaviour. Many correctional facilities offer specialized programs that focus on treating substance abuse and mental health disorders. These programs often include:

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<sup>8</sup> Dr. Randhir Singh Ranta, Rights of Children of Incarnated Parents: A Constitutional Perspective, 2018 JETIR March 2018, Volume 5, Issue 3, <https://www.jetir.org/papers/JETIR1803365.pdf>, accessed on 1 February, 2024

### **Conclusion-**

In conclusion, the examination of comparative legal approaches to imprisonment and its impact on children reveals a wide array of practices and policies across countries that are influenced by cultural, social, and economic factors. Such international frameworks as UNCRC and ICCPR offer a universal basis of safeguarding child rights. However, domestic legal systems have enormous variations in implementing such rights. Countries like Norway and Sweden focus on rehabilitation, family preservation, and policies that allow incarcerated parents to maintain meaningful connections with their children, which helps mitigate the emotional and psychological harm caused by separation. Conversely, the focus in such countries as the United States is generally on the legality and financial stability of children and may lead to the loss of parental rights or foster care placements, which, in turn, can further exacerbate the destruction of the bond between the child and parent. However, with these differences in mind, there is a common need for an integrated approach that addresses the child's needs regarding their incarcerated parents. Adding to the outcomes, an enhancement of adherence to international frameworks in legal systems across the world should focus on strengthening family court procedures that favor the emotional well-being of children, expand alternatives to incarceration such as community-based sentencing for non-violent offenders, and invest in comprehensive rehabilitation programs for incarcerated parents, including parenting courses, mental health support, and family reunification services. In addition, universal policies should advance regular, child-friendly visitation and communication to ensure that children are not further marginalized by the criminal justice system. Through a more holistic and child-centered approach, legal frameworks will be better situated to achieve the welfare of children, avoid intergenerational cycles of incarceration, and ultimately promote stronger family units and healthier communities.