

Who cares? Analysing the place of children in maternal sentencing decisions in England and Wales

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Abstract

When children face separation from their parents as a consequence of state action in the family courts, their best interests are the paramount consideration of the court and they have legal representation. Children who face separation from their mother as a consequence of sentencing proceedings in the criminal courts are neither represented nor acknowledged. The thesis analyses this differentiated treatment and explores its consequences for children, society and the state.

Explanations for the differentiated treatment are tested with reference to existing literature and original empirical research. The impact on children of imprisoned mothers is investigated to determine whether or not they suffer harm. The parameters of the state duty of care towards children are explored, to see if children of defendant mothers fall outside of it, and the way sentencing judges construct and interpret their duty towards mothers and their children within the sentencing process is examined.

This thesis establishes that without legal or moral justification, children of maternal defendants are treated without the concern given to children who face separation from their parents in the family courts. Children of defendant mothers suffer as a consequence of the 'secondary prisonisation', 'secondary stigmatisation' and 'confounding grief' which they experience, and the state has failed to uphold their rights under Articles 3, 12 and 20, and is in breach of its duty under Article 2 of the United Nations Convention on the Rights of the Child 1989. The guidance and mechanisms for considering their welfare exist but are not engaged with by the sentencing courts, local authorities, legislators or policy makers. This has negative consequences for children, their caregivers and wider society. The thesis concludes with consideration of the implications of these findings for the state and suggests changes to ensure equitable treatment of children of defendant mothers in England and Wales.

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Introduction

On a winters day in 2011 I sat in a university library researching women's imprisonment. As a former family and criminal barrister I had some awareness of the consequences of parental imprisonment for families, and I assumed that maternal imprisonment carried particular difficulties for children. In my search for academic literature on the experiences of children of imprisoned mothers in England and Wales I came across a study which focused on an overnight visits scheme at Askham Grange prison. The scheme allowed children to spend an extended period with their mother and provided them with the opportunity to undertake normal activities together: cooking, doing homework, watching TV, playing games and sleeping (Raikes and Lockwood, 2011). The study referenced the difficulties the children faced without their mother, and it made me question how sentencers incorporated the impacts upon dependent children into their sentencing calculus when sentencing a primary carer. At that time I was unable to find research which either explored the impacts of maternal imprisonment for children, or focused on the sentencing of mothers.

I knew that in order to ensure the best outcomes for children in family proceedings, children whom the state wants to separate from their parents because of abuse or neglect are represented by their own lawyers and have a court appointed guardian who acts on their behalf. The Children Act 1989 states in section 1(1) that the child's interests are the paramount consideration in any family court proceedings, and the family courts are very conscious of the displacement and disruption that follows for children when they undergo enforced separation from their parents. The absence of similar provisions covering the state invoked separation of children from parents in the criminal courts (albeit the separation is not the primary purpose of the court, rather a by-product of a punishment), and the lack of any requirement in the sentencing guidelines for judges to inquire as to

whether the defendant they are sentencing has dependent children, seemed anomalous given the family court provision. That anomaly led to the development of this thesis.

I am particularly interested in the impact on children when their primary carer is imprisoned, as that is most similar to the family court situation which I wish to hold as a contrast, and it is likely that the impacts on children are increased when it is their primary carer who is removed from the family unit. The information available indicates that the loss of a primary carer to imprisonment is more likely to occur when a mother rather than a father is imprisoned. When a mother goes to prison only five per cent of children remain in the family home during their mother's imprisonment (Caddle and Crisp, 1997) and only nine per cent are cared for by their fathers (Corston, 2007: 20), contrasting with the situation of children of imprisoned fathers who generally remain with their mothers in the family home (Boswell and Wedge, 2002). I have therefore chosen to focus this study on the population of children who are affected by maternal imprisonment in England and Wales.

In 2015 the quarterly statistics published by the Ministry of Justice indicated that between 3,825 and 3,904 women were held in custody in England and Wales during each quarter of the year (Ministry of Justice, 2015). There is no figure for the *total* number of women imprisoned in that time, but in the twelve months to March 2014, the quarterly figures were very similar and the total number of women imprisoned in that period was 9,176 (Ministry of Justice, 2014). The women's prison population is small when considered against the male population which numbers approximately 81,000 (Ministry of Justice, 2016a) but it has increased significantly in the past three decades, trebling since 1990, and increasing by 27 per cent between 2000 and 2010 (Ministry of Justice, 2016b).

It has been estimated that around 17,000 children are affected each year by maternal imprisonment (Wilks-Wiffen, 2011). This number is equivalent to one quarter of the population of children in the care of the local authorities in England (Department for Education, 2016). One would assume with a population this size there would be processes and pathways for these children, but in fact they are a population so overlooked that the question of whether a woman has dependent children is not even included in routine data collection at sentencing or imprisonment (Scharff Smith and Gampell, 2011). Of course these children are a subset of the larger group of children of imprisoned parents, and it is estimated that there are 200,000 children each year who have a mother or father in prison (Williams et al, 2012). These children are an invisible population despite the fact that there are approximately 24 per 1000 across the country (extrapolated from general population data).

Aims and structure

In the thesis I aim to answer two questions:

Firstly, why are children of defendant mothers, who face separation from their mother as a consequence of criminal sentencing proceedings, treated differently to children who face separation from their parents by the state in the family court?

Secondly, what are the implications of this differentiated treatment for wider society and for the state?

In answering these questions my work makes an original contribution to research on the sentencing of mothers, the understanding of the harms of punishment beyond the offender, and the experiences of children of imprisoned mothers and those who care for them. The thesis is divided into three parts, and the structure of the work is set out below.

Part I

This section consists of two chapters and is the foundation upon which the work is built. The thesis questions are provoked by an overarching concern that children who experience the consequences of maternal imprisonment are negatively impacted by those consequences in both the short and long term without any acknowledgement of these harms by those who have a duty to protect children. Chapter one of the thesis therefore begins with an account of the way in which women in prison have been viewed by the state, and in particular the invisibility of their children's experience. What follows is an exploration of the way in which 'harms' or 'negative impacts' are conceptualised within the thesis, drawing on the literature on prisoners' families, collateral consequences and kinship care. The particularity of the situation and the harms arising because imprisonment is the reason for the separation of parent and child will be outlined.

The research design is set out in chapter two, and explains the reasons for the methodological choice to use multiple data strands and to engage directly with three different populations. It examines how Article 12 of the United Nations Convention on the Rights of the Child 1989 (hereafter UNCRC 1989), influenced the collection of the data and the decision to speak with children whose mother was in prison. When exploring the lived experience of a group of children who have been rendered invisible through the non-engagement of adults with their circumstances, it was of fundamental importance that I respected their right to be heard in any matter concerning them (UNCRC, 1989). As a consequence I listened to them directly rather than hearing of their lives through adult voices which might mediate or interpret their experience. I spoke to the adults who cared for them during the separation from their mothers, initially because I believed it would add another dimension to the understanding of children's experiences, but as the study

progressed it became apparent that the caregivers also suffered negative consequences as a result of the mothers' imprisonment. The third population whose input to the study will be detailed in this chapter, were a group of Crown Court judges who make sentencing decisions which result in mothers being imprisoned, and whose perspective and practice have not previously been explored through research. Before engaging with the data in subsequent sections of the thesis, I discuss the ethics and challenges of direct engagement with children and elites, including the particular issues around access, and power dynamics within the context and meaning of this study. The challenges of reflexivity and researcher bias were ongoing throughout the work and their possible impacts on the study, along with the general parameters and limitations of the work, are set out at this early stage.

Part II

From these introductory and foundational chapters I move to Part II of the thesis in which I consider the first question, why are children of defendant mothers, who face separation from their mother as a consequence of criminal sentencing proceedings, treated differently to children who face separation from their parents by the state in the family court? In chapters three, four and five the reasons for the differentiated treatment of the children of imprisoned mothers are explored. Three explanations for such differentiation are proposed, with each examined in turn to determine whether any, or all of them, provide a reason which justifies why children who are at risk of experiencing the same outcome (that is separation from their parent through no fault of their own as a consequence of a court decision), are given the protection of the state in proceedings in the family court, but are not protected by the state in adult sentencing proceedings in the criminal court.

Chapter three examines the first explanation: if a child's welfare is unaffected when their mother is imprisoned, there is no need for them to be given protection or consideration by the sentencing court. Drawing on interviews with 14 children and 22 caregivers I use the voices of the children to provide hitherto unknown details of the lived experience and consequences children face when their mother is imprisoned. The literature on the experience of parental and maternal imprisonment is scrutinised and the concepts of secondary prisonisation and secondary stigmatisation frame the chapter. I consider firstly the harms which stem from secondary prisonisation: the tangible changes which flow to home life and education, and the way in which the prison restricts children's relationships with their mothers. I then explore the ways in which their secondary stigmatisation, as children of imprisoned mothers, affects their relationships and their ability to engage in normal interactions. Finally the consequences of those changes affect their behaviours and emotions, and these impacts are described using the term 'confounding grief'. The chapter concludes that children's welfare is profoundly affected by maternal imprisonment, and so this first proposed explanation does not provide satisfactory reasons for differentiated treatment.

The second possible explanation is considered in chapter four: even if children do suffer negative impacts from their mothers' imprisonment, the state duty of care towards children does not extend to children of defendant mothers. In considering the state's derogation of responsibility towards children whose mothers are defendants in the criminal courts, it is imperative to begin with consideration of a context in which the state has assumed responsibility for children, and to question why that responsibility has been undertaken and in what way the context differs from the criminal sentencing context. There are a number of different areas in which the state has assumed a duty of care towards children, most significantly in the areas of health, education, unaccompanied

migrant children, children in criminal detention, and children in state care (Bedingfield, 1998; Archard, 2004; Bainham, 1988). To explore all areas is beyond the scope of the thesis, and therefore the focus will be on the separation of children from their parents in public law care proceedings within the family court jurisdiction, as that situation bears a strong similarity to the criminal sentencing context which is the primary focus of the research. The court processes in each jurisdiction are explained, and the chapter provides a detailed examination of the development of the legislation which has permitted state intervention in the lives of children and families. Based on that data, assumptions are made about the parameters and mechanics of such state intervention. The interplay of existing court practice with a construction of children as rights holders under the United Nations Convention on the Rights of the Child is examined, with a particular focus on the relevance of Articles 3, 12 and 20 of the UNCRC 1989 to the situations of children who face separation from their parents in both the family and criminal courts, and the state's duty under Article 2 to protect children from 'discrimination which they may suffer as a consequence of the status or activities of their parents'. The analysis of the literature, legislation and empirical data examined in the chapter leads to the conclusion that the state has historically and presently assumed a duty of care towards children, and by treating the children of imprisoned mothers differently to similarly situated children in the family court jurisdiction, and not upholding their rights under the UNCRC 1989, the state risks breaching Article 2.

The final chapter of this section, chapter five, explores the third proposed explanation. If it is found that children do suffer negatively as a consequence of maternal imprisonment, and they are owed a duty of care from the state, then it must be that judges are not permitted to consider the needs of child dependents when they sentence mothers to imprisonment, or, if that is not found to be the case, that they do not know or

understand the consequences of maternal imprisonment for children. The chapter will begin with an investigation of the means by which sentencers in England and Wales can incorporate the existence of child dependents into sentencing decisions. The place of discretion in sentencing decisions, the judicial approach to personal mitigation, the role of the sentencing guidelines, and the decisions of the Supreme and Appeal Court on the place of child dependents in sentencing calculus will inform the discussion. The chapter will consider the practice of judges through the analysis of transcripts of sentencing appeals and the data gathered in the course of interviews with 20 Crown Court judges. Judicial understanding of the impacts of maternal imprisonment on children and their caregivers will be explored in conjunction with the way in which the judges interviewed understood the boundaries and guidance on their discretion to include dependent children as a factor in their sentencing calculus. Analysis leads to the conclusion that judges are expected to consider dependent children in sentencing decisions, but not all judges are aware of this requirement. In addition, even when judges understand their duty they do not always have sufficient knowledge of the consequences for children of maternal imprisonment to properly weigh that factor against other factors in sentencing decisions.

Part II concludes with a discussion of why the differentiated treatment has come into existence, and why it has been able to continue without question. Constructions of children and childhood which have been operational in the development of the law have impacted upon the procedural and legislative protections in place for children within the family and criminal law jurisdictions. The separation of the branches of the courts, with each prioritising particular aspects of justice, and the problems inherent in misunderstood notions of gender equality and fairness, have allowed such differentiated treatment to continue.

Part III

Having established in Part II that children of imprisoned mothers are subject to differentiated treatment in the courts, this section of the thesis turns to the second question posed at the outset: what are the impacts of this differentiated treatment for society and the state?

In chapter six I suggest that the consequence of the differentiated treatment within the sentencing process is that children are separated from their mother by imprisonment when it is not in the best interests of the child to do so. The impacts felt during the period of imprisonment are not limited to the children as the separation of primary carer and child leaves the child in need of another adult to take on their care; consequently another adult and their family and dependents are also affected. The support given to state appointed foster carers in public law proceedings, and the lack of support given to kin caregivers who take on the care of children of imprisoned mothers, will be contrasted. In addition the research literature indicates that children who have experienced parental imprisonment are likely to suffer from diminished life chances (Mears and Siennick, 2016), so this chapter focuses on the impact of maternal imprisonment on caregivers before considering how such care and other factors affect the children's future life chances, and the implications of this for society.

The final chapter of the thesis addresses the implications for the state of these findings. I examine the theoretical understandings of punishment alongside the experiences of the children and caregivers, who at times describe their suffering as 'punishment', to ascertain whether or not the harms could properly be described as punishment. If the harms are not intentional punishment I explore whether the term 'collateral consequences' of punishment provides sufficient explanation for them, referring to military literature as I examine the origins of the term. I question whether the terminology

used to describe the experiences of children has played a part in limiting the attention given to this anomalous treatment, and other possible justifications for the harms are considered such as the doctrine of double effect. I propose that a communitarian understanding of punishment would permit a proper understanding of the implications of the punishments given to individuals. I suggest that the state has residual obligations to those citizens whom it has harmed in contravention of their rights (Bulow, 2014). Such residual obligations acknowledge that rights have been removed from the individual and the state must take whatever action it can to minimise the harms which follow from the removal of the rights.

The conclusion of the thesis will consider the developments in case law and sentencing guidance which have aided the recognition of the children of defendant mothers. The policy implications and the limitations of the study are set out, and there is discussion of the ways in which the state could act to minimise the harms to caregivers and children.

The Invisibility of Women and their Children in the Criminal Justice System: Reconceptualising the Implications for their Children

Chapter summary

I begin Part I of the thesis by setting out in this chapter the details of the differentiated treatment of children facing separation from their parent by the state in the family and criminal courts in England and Wales. The practice of the family court in public law care proceedings, and the practice of the criminal court in sentencing proceedings are explained, and after establishing the contexts for the differentiated treatment the chapter focuses on the children of imprisoned women in England and Wales. I commence with an account of the increased visibility of women in prison since 1997, and the concerns which have been raised about their children. It is important to understand the reasons for increased female imprisonment over this period before addressing the outcomes of such imprisonment for children. I offer an analysis of the increase in the female prison population which occurred despite no corresponding increase in volume or seriousness of offending. I then give an overview, in very brief terms, of what is currently known and understood about children of prisoners.

The remainder of the chapter focuses on the way in which the impact of parental imprisonment on children is conceptualised in the literature, and the way in which the impacts will be theorised in the remainder of the thesis. Drawing on the work of Goffman (1963), Link and Phelan (2001), Comfort (2003, 2007, 2008), Condry (2007), Phillips and Gates (2011), Lacey and Pickard (2015), and Granja (2016), this chapter sets out the formulation of the conceptual framework with which the differentiated treatment of children of imprisoned mothers will be interrogated within the thesis.

The meaning of differentiated treatment of children within this thesis

When a mother is sentenced to imprisonment in the criminal court the children are without blame and the separation takes place because the state judges their parent to be blameworthy, and the parent's offence is punishable by imprisonment. In this thesis a comparison is drawn with children who become the subject of public law care proceedings under Section 31 of the Children Act 1989 in the family court jurisdiction. These are children who are judged to have suffered or to be at risk of suffering significant harm because of the care given to them by their parents not being what it would be reasonable to expect a parent to give. Although the powers that allow the courts to separate the children from their parents are different in each case, the outcomes for the children can be almost identical, including the loss of parent, home, siblings and a change of school and environment. There is however a significant contrast between the family court approach to the child who is involved in Children Act proceedings and the child who is at risk of experiencing state-determined separation from their mother as a consequence of criminal sentencing proceedings. In both situations it is the decision of a judge or magistrate which determines whether or not a child is separated from their parent, and the congruence of the forums, both being courts of law within the same jurisdiction, permits a close analysis from which possible explanations for the differentiated treatment of children experiencing state controlled separation from a parent can be formulated. This section will commence with an explanation of the family court practice before contrasting it with the criminal court.

The family court practice

The Family Division of the courts hears cases which are either private law or public law proceedings concerning children and families. Private law proceedings include divorce or separation cases in which the court determines matters of finance and children. Public law proceedings are those instituted by the local authority, and the subject of those proceedings is a child or children who is deemed to be in need of something which can only be granted through an order of the court. The most draconian order is a care order, which allows the local authority to take on the responsibility for the child, and in doing so to remove the child from his or her family. Other orders can be made whereby a child is placed under the supervision of the local authority, but is not removed from his or her family. Proceedings in the Family Division of the courts are governed by legislation, most importantly the Children Act 1989 (as amended by the Children Act 2004). In any proceedings which take place under the legislative domain of the Children Act 1989, the welfare of the child must be the paramount consideration in the proceedings:

Section 1(1) When a court determines any question with respect to—
(a) the upbringing of a child; or
(b) the administration of a child's property or the application of any income arising from it,
the child's welfare shall be the court's paramount consideration.

Guidance is provided on what constitutes the child's welfare through the 'Welfare Checklist' set out at section 1(3). This is a long and varied list of all that the court should think about in relation to the child before making a decision which will significantly affect that child, its relationship with its parents and ultimately its future. The list includes the child's wishes and feelings, the child's needs, the effect on him of any change in his circumstances, any harm that he has suffered or is at risk of suffering, and the range of powers available to the court in the situation. The court must in each case it determines, actively engage with the welfare checklist and only after doing so can it make a decision

about the future of that child. The child is a party to the court proceedings through an appointed Guardian ad Litem, and has legal representation. For a care order to be made which will remove the child from the day-to-day care of the parents and give the local authority parental responsibility for the child, separate threshold criteria need to be met. It is only after those criteria are met that the court will consider whether an order is in the child's best interests. If a child is separated from a parent this is a managed process and detailed consideration is given by the parties and the judge, to the way in which any change of carer will be undertaken. Even in cases of permanent separation it is likely that a 'goodbye' visit will be arranged for the parent and child, indicating a recognition that even when the parenting is not 'good enough' the child and parent will still have established bonds which cannot be broken or disturbed without consideration of the impact of this on the child's present and future welfare. In a case which emphasised the seriousness of such state intervention in family life (*Re J (a child)* [2013]) the President of the Family Division Sir James Munby said this:

I have said this many times in the past but it must never be forgotten that, with the state's abandonment of the right to impose capital sentences, orders of the kind which family judges are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. When a family judge makes a placement order or an adoption order in relation to a twenty-year old mother's baby, the mother will have to live with the consequences of that decision for what may be upwards of 60 or even 70 years, and the baby for what may be upwards of 80 or even 90 years. We must be vigilant to guard against the risks. (2013: paragraph 28)

The criminal court practice

The approach taken in the Family Division contrasts with the lack of concern that is shown for children who risk separation from their mother because of a sentence of imprisonment imposed by the criminal courts. The state through the judiciary is, by the act of sentencing mothers to imprisonment, enforcing the separation of children from

their mother. This separation takes place in the absence of any legislative protection for the children, as the Children Act 1989 does not operate outside the family law jurisdiction, and although sentencing guidelines include a defendant's primary caring responsibilities for dependent children as a mitigating factor which can be considered in sentencing (Sentencing Council, 2011), no guidance is given to judges as to how they should do so. The Court of Appeal has stated that judges ought to perform a balancing exercise between the rights of the child to family life under Article 8 of the Human Rights Act (1998) and the severity of the sentence for the mother, and if the court does not have sufficient information to conduct this balancing exercise then the court should acquire it (R (on the application of P and Q) v Secretary of state for the Home Department [2001]; R v Petherick [2012]). However research has shown that this balancing exercise has not become standard practice in the courts (Epstein, 2012; Minson, 2013) and this will be further discussed in chapter five. Recommendations were made to the Sentencing Council in 2009 that a pre-sentence report (hereafter PSR) should be provided in all cases involving a defendant mother (Sentencing Advisory Panel, 2009), but this recommendation has not been incorporated into the sentencing guidelines. The situation therefore remains that although a judge can ask the probation service to prepare a PSR, such a report potentially providing the court with information about the defendant's background, family circumstances and family responsibilities, there is no obligation on the judge to request such a report. As a consequence a child may be separated from her primary or sole carer by a judge who, in some instances, may not even be aware of the existence of the dependent child, and if aware regards it as of such limited significance that no mention is made of the child in the sentencing remarks (Minson, 2013; Minson and Condry, 2015). The child is separated from his or her parent without the court being required or compelled to give regard to the child's wishes, feelings, needs or the effect on

the child of the change in circumstances. The consequence of this is that when a custodial sentence is imposed in many instances no preparation has been made for the separation between mother and child. It is not unusual for a recently imprisoned mother to have no knowledge of who has the care of her child or children. The Corston Report, a review of women with particular vulnerabilities in the criminal justice system, reported that out of 1400 women serving a first sentence in Holloway Prison, 42 did not know who was looking after their children (Corston, 2007).

Children of imprisoned parents: An introduction

Children of prisoners have retained a degree of invisibility disproportionate to their numbers, and it is only the societal impacts of increased penal populism seen both in the United States and in Europe that has pushed the focus of attention on to the thousands of children whose lives are altered when their parent is imprisoned (Scharff Smith, 2014). The mass imprisonment of adults across these countries, and the consequential effects on societal inequality and stability (Wakefield and Wildeman, 2014) has caused us to begin to question the merits of separating so many children from their parents. It seems to be 'more like something caused by war or perhaps natural disaster than a product of a carefully planned and well-thought-out policy on crime and imprisonment in a modern democratic nation' (Scharff Smith, 2014: 210). It is estimated that approximately five million children in the United States have had a parent in prison in that country (Huffington Post, 2015), and around 800,000 children across Europe are separated from a parent by imprisonment on any given day in the year (Ayre et al, 2006). It is suggested that there are typically more children of prisoners than prisoners (Scharff Smith, 2014), and indeed this is true in England and Wales which at the 11th November 2016 had a prison population of approximately 85,975 (Ministry of Justice, 2016a), whilst estimates suggested that among

that population are the parents of more than 200,000 dependent children under the age of 18 (Williams et al, 2012). Data is not routinely collected about dependents, but as was mentioned in the introduction to this chapter, a study published in 2011 estimated that more than 17,240 children were separated from their mother by imprisonment (Wilks-Wiffen, 2011), and a more recent government report using linked data estimated that 13-19 per cent of all women receiving immediate custody had child dependents (Ministry of Justice, 2015a). This figure seems rather low given the last proper census of the female prison population found that the majority of women in prison were mothers (Caddle and Crisp, 1997) however until proper data is collected it is impossible to have certainty about the actual number of children affected.

Due to their greater numbers such work as there has been has tended to focus on the children of imprisoned fathers, however in terms of disruption to a child's day to day life, maternal imprisonment is much more disruptive as it is more usual for a mother rather than a father to be a primary carer of dependent children. In the general population around 90 per cent of children are cared for by mothers (Office of National Statistics, January 2013) and this is also true of imprisoned parents; in most cases when a father goes into prison the children are still cared for by their mother (Boswell and Wedge, 2002), yet when a mother is imprisoned in England and Wales the children are cared for by their father in only nine per cent of cases (Corston, 2007: 20). The consequences for children of maternal imprisonment are not just the loss of a parent, or their only parent (one third of mothers in prison are lone parents (Ibid), but the loss of, or disruption to, their home, siblings, school and friends (see chapter three). The numbers affected have increased as the number of women in prison has increased. In England and Wales the women's prison population tripled between 1990 and 2005 (Ministry of Justice, 2016b), and although it has reduced

since then, it is still more than double the 1990 population (Ministry of Justice, 2016c) currently standing at 3,919 (Ministry of Justice, 2016a).

The omission of children's experiences from both research and policy is of no surprise when one realises that the experience of imprisoned women as mothers has also been overlooked until the past few decades. Although women have been imprisoned for centuries, prior to the publication of 'Women in Prison: A Thematic Review' (Home Office, 1997) the specific needs of women in prison were rarely recognised and were not specifically addressed in prison policy. The annual reports of the prison inspectorate did not focus on women or women's prisons as a separate entity, and there were few mentions of women within the reports. The difference between males and females within the prison estate seemed to be relevant only amongst staff and officers rather than inmates, for example in the 1994-1995 report the only mention of women's particular needs was a recommendation that women officers in male prisons should have toilet and changing facilities within the prison (Tumin, 1995: 11). Across the prison estate women prisoners were the poor relation receiving minimal focus, to the extent that, 'injuries to women were recorded on a diagram of a man's body' (Ramsbotham in Carlen, 2002: ix). Women were often housed in former men's prisons under regimes designed for men. Since 1997 however, government departments, government funded commissions, public bodies and third sector organisations have published in excess of thirty reports on women in the criminal justice system. This new focus on women has raised the characteristic of their motherhood, and drawn some attention to the children they leave behind. The next section of the chapter will provide information about women as mothers in prison, and the progress which has been made since 1997 in identifying their particular needs within the criminal justice system. Identifying needs is the first step, and as will be seen, although many needs have now been identified they remain unaddressed.

Women in Prison

The women's prison population in the UK is a small percentage of the overall prison population. It currently stands at 3,919 whilst the total prison population is 85,975 (Ministry of Justice, 2016a). Since the late 1970's and the advent of feminist criminology there has been growing recognition led by academic researchers such as Gibbs, Carlen, Dowds and Hedderman, and confirmed by countless reviews, inquiries and reports, that women experience imprisonment differently to men. There is strong evidence that women in prison are a vulnerable and disadvantaged group of people who have experienced multiple hardships and health issues by the time they are imprisoned. 31 per cent have spent time in care as a child (Williams et al, 2012: 8), and over half report having suffered from domestic violence (Corston, 2007: 17), and/or having experienced physical, emotional or sexual abuse (Williams et al, 2012: 9). Nearly 40 per cent have low educational attainment having left school before the age of 16 (Social Exclusion Unit, 2002: 137). Female prisoners are five times more likely to have a mental health concern than women in the general population and many also have problems with drug use (Plugge et al, 2006). 46 per cent say they have attempted suicide at some time in their life (Light et al, 2013). Compared to the male prison population, women prisoners have more psychotic disorders, fewer qualifications and a less stable background (Social Exclusion Unit, 2002: 18). The incidence of self-harm in prisons may indicate the robustness of the population with 26 per cent of self harm incidents in the total prison population involving women, despite women representing just five per cent of the overall prison population (Ministry of Justice, 2015b).

Women in prison: 1995 – 2006

Prior to 1997 women in prison were largely invisible, both within the prison and in society, however that has changed with the publication in the past two decades of a plethora of

reports specifically focused on the women's prison population and women in the criminal justice system. What follows is a chronological account of the reports published in that period showing the development of thinking about women in prison. In each of the two decades studied there was a precipitating event, which resulted in the commissioning and publication of a report on the female prison estate, which in turn triggered follow up reports. The first of those precipitating events took place in December 1995 when the Chief Inspector of Prisons, Sir David Ramsbotham, and a team of 11 inspectors, visited HMP Holloway (a women's prison in London) to conduct an unannounced inspection.

[The inspectors] pulled out early, on Thursday, appalled by what prison sources describe as "the incredibly tense atmosphere" and "very bad living conditions" inside the prison. A statement from the inspection team said: "Our early findings identified such shortfalls in the treatment of prisoners and in the conditions at Holloway Prison that the proper course for us was to seek immediate improvements." (Brace, 1995)

The inspectors returned to complete their inspection in June 1996, and in the aftermath of that inspection Sir David Ramsbotham made public that the Holloway inspection had confirmed that 'many aspects of the regimes they found had been constructed as if male rather than female prisoners were being held in these establishments' (Ramsbotham, 1997: 1.02). With the agreement of the Secretary of State and the co-operation of the Director General of the Prison Service, the Chief Inspector decided to conduct a thematic review of the conditions and treatment of women in all those prisons in England and Wales in which they were held (Ibid.). The choice to focus a report exclusively on women (2,750 women were held in prison across England and Wales at that time) was an important first step in altering both the visibility and the understanding of women in prison. The premise of the report was that women in prison have different needs to male prisoners, and in the words of the authors they wished:

to encourage the Prison Service to make better arrangements for the separate management of the fast rising numbers of women in prison, and to provide regimes appropriate to their needs, not merely to adapt those designed for men. (Ibid.: Preface)

It was a fully comprehensive review analysing previously unknown data collected from the Prison Service in addition to 234 detailed interviews with randomly selected women. The review team also visited all the establishments where women were held. The review found that the majority of women in prison had never been in prison before (Ibid.: 2.08), were mothers of children aged under 16, the care of whom, in a large number of cases, was unsettled (Ibid.: 2.04), and the women had accommodation problems as well as poor employment and education histories (Ibid.: 2.06-2.09). Additionally many reported that they had suffered physical and sexual abuse at the hands of men close to them (Ibid.: 2.11), were serious drug misusers with long histories of poly-substance abuse (Ibid.: 2.12) and had self-harmed or attempted suicide (Ibid.: 2.13). The Prison Inspectorate took the view that these findings should influence the use of resources and inform all policy going forward, and they drew particular attention to the issues for women in prison who are mothers of dependent children. In contrast to a previous survey of male prisoners which found that 90 per cent of their children were cared for by their mother or current partner (Dodd and Hunter, 1992), the Inspectorate found that only 25 per cent of children were being cared for by either their father or their mother's current partner (Ramsbotham, 1997: 2.05). For women who held the primary carer role in relation to their children prior to their imprisonment, the distance they were held from home and the lack of contact with their children caused the greatest concern to them (Ibid.: 2.15).

In the same year two Home Office commissioned research studies were published; the first on imprisoned women and mothers, and the second on the sentencing of women (Caddle and Crisp, 1997; Dowds and Hedderman, 1997). As the previous most detailed survey of the women's prison population had taken place almost 30 years earlier (Gibbs,

1971) these studies provided much needed up to date information. The study on imprisoned women and mothers was based on a survey carried out in 1994 in which screening interviews were conducted with 1,766 women (out of a total of 1,896 women prisoners) with follow up interviews conducted with 1,057 mothers of children under 18 years of age. I will return to this survey in more detail in chapter three¹, but its findings highlighted a significant difference in the experiences of male and female prisoners. The authors said this:

All the evidence from this study and previous studies (e.g. Richards et al, 1996) suggests that imprisoned mothers are, in a sense, doubly penalised – they are serving a sentence and at the same time trying to make provision for their children with all the associated difficulties and strains. Fathers on the other hand generally serve their sentence in the knowledge that their partners will continue to care for their children, albeit with difficulty. This fundamental difference in the experience of imprisonment between men and women perhaps needs greater recognition than it currently receives by sentencers and the Prison Service. (Caddle and Crisp, 1997: 55)

The second report analysed 13,000 magistrates' sentencing decisions, and 200 interviews with magistrates (Dowds and Hedderman, 1997). At the time it was commissioned there was concern about the rapid increase in the number of women in prison in England and Wales as the women's prison population had slowly increased from 901 in 1960 to 1,597 in 1990, but through the 1990's rose rapidly and by 1997 it stood at 2,675. The aim of the report was, 'to describe how Magistrates set about taking account of substantive differences in men's and women's lives', indicating an appreciation of the reality that men and women could not be treated identically in sentencing decisions (Ibid.: 1).

Following on from the publication of the HMIP review, the Prison Reform Trust established a 'Committee on Women's Imprisonment' who were tasked with looking into the use of imprisonment for women and considering how to reduce reliance on custody as a means of punishment for that population. At the time of writing their report, the number of

¹ p.83 and following

² p.153 and following

women in prison had risen to 3,315 (Ministry of Justice, 2016b). The report of the committee chaired by Professor Dorothy Wedderburn was entitled 'Justice for Women: The Need for Reform' (Prison Reform Trust, hereafter PRT, 2000). The report aimed to add a different perspective to that of HMIP by considering the principles that should be applied to women's contact with the criminal justice system as a whole and not just to prison. The committee found that 'the majority of women entering the prison system do so without having committed a serious offence and without being a risk to public safety', and that in general, women experience imprisonment more severely than men because due to 'social structures which still accord women primary responsibility for domestic labour and child-rearing along with the growing number of female-headed households', the implications of a woman's imprisonment for her family are much more devastating than when a man is imprisoned (PRT, 2000).

In considering the function and form of the punishment of women offenders, the Committee placed emphasis on the need to justify, rather than assume the appropriateness of punishment, and situated punishment within the context of social structures and social policy. It suggested that in future, discussions about reductions in imprisonment must take place 'against the backcloth' of other practices, with a recognition that 'penal policy must serve broader social goals', particularly that it should accord with principles of citizenship and social inclusion and be capable of being applied without discrimination. There was concern expressed that the social exclusion of women prisoners was transmitted across the generations and through the life course, and therefore imprisoning women disadvantaged society in the longer term. The report made it clear that the recommendations to consider particular issues of parenthood and family were not a case of 'special pleading' for women, but that equality of sentence was achieved when sentencers considered the impact of sentence on all, including dependents (PRT, 2000: 43).

Later in 2000 the Home Office published its consultation document, 'The Government's Strategy for Women Offenders'. There was strong support from respondents for alternatives to custody to be favoured for women, particularly when the offences were non-violent and caring responsibilities and family ties would be affected by imprisonment. The Royal College of Psychiatrists argued that 'for humanitarian reasons' women with children should be given fewer and shorter prison sentences. The Government was urged to look at examples of overseas practice which allowed women to serve sentences at home if they had dependent children (Home Office, 2000: 11). The Government announced its intention to develop 'The Women's Offending Reduction Programme', a three year programme aimed to increase community based ways of managing women's offending in order to reduce the use of imprisonment because they recognised that 'the separation of children from women serving custodial sentences, may be a prime cause of 'inherited' disadvantage.' (Ibid.: 6)

In 2004 the 'Commission on Women and the Criminal Justice System' established by the Fawcett Society added its voice to the debate: its first report concluded that women suffered systemic discrimination in a system 'designed by men, for men' (Fawcett, 2004). A report on the women's remand population (Edgar, 2004) drew further attention to the harmful impact of women's imprisonment on children. Its findings were that the majority of women on remand (one in five of whom are never convicted) have family caring responsibilities (Ibid.: 18) and in 2002 the average length of time spent on remand was 37 days, a period which is 'more than enough time to cause huge disruption to the women, their family and friends, and to aggravate any problems they had previously had with housing, finances etc.'(Ibid.: 25). That report called on the Judicial Studies Board to provide training to judges about the effects of imprisonment on women and their families. Although in 2004 a chapter regarding gender issues was added to the Equal Treatment

Bench Book, a guide for all sentencers (Judicial College, 2013), the amendments may in fact have hindered progress by directing sentencers not to assume that a woman will be the primary caregiver for children. In a misunderstanding of what exactly constitutes equal treatment, judges became anxious that enquiries about a woman's dependents were discriminatory, and it became more difficult for women to receive appropriate recognition for that role in sentencing calculus decisions.²

In 2006 the '2nd Annual review of the Commission on Women and the Criminal Justice System' (Fawcett, 2006) referred to the judgment of Lord Woolf (R v Mills [2002]) in which he said that 'a judge must bear in mind the likely consequences on children when the accused is the sole carer'. The commission suggested that in the future women with caring responsibilities should not be remanded or imprisoned without a probation report on the impact of incarceration on their dependents (Fawcett, 2006: 11). Despite the increased focus on imprisoned women, and the high number of reports from 1997 onwards, many of which included policy recommendations to reduce imprisonment, the women's prison population nearly trebled between 1993 and 2005, and when in a 12 month period between 2002 and 2003 six women died in HMP Styal, it was clear that there were still problems within the female prison estate (Shaw, 2003). The Home Office commissioned a report and the next decade of reports and commissions commenced.

Women in prison: 2007 – 2016

In March 2007 'The report on Women in the Criminal Justice System with Particular Vulnerabilities', (commonly known as 'The Corston Report' after Baroness Jean Corston who chaired the review) was published by the Home Office. In the Executive Summary Baroness Corston wrote this of women in prison:

² p.153 and following

I consider these women in terms of their ‘vulnerabilities’, which fall into three categories. First, domestic circumstances and problems such as domestic violence, child-care issues, being a single-parent; second, personal circumstances such as mental illness, low self esteem, eating disorders, substance misuse; and third socio-economic factors such as poverty, isolation and unemployment. When women are experiencing a combination of factors from each of these three types of vulnerabilities, it is likely to lead to a crisis point that ultimately results in prison. (Corston 2007: 2)

The recommendations of the report were broad ranging and called once again for a distinct approach to be taken to women and mothers. Recommendation 22 was an echo of the previous suggestions of the Prison Reform Trust (Edgar, 2004) and the Commission on Women in the Criminal Justice System (Fawcett, 2006):

Defendants who are primary carers of young children should be remanded in custody only after consideration of a probation report on the probable impact a custodial sentence would have on children. (Corston, 2007: 9)

The Government response was that such reports were unnecessary as the information was provided in other ways (Ministry of Justice, 2007a: 29). A Government review on the children of offenders was published in 2007 and the report writers asserted that due to the ‘invisible’ nature of these children it was difficult to find out who they are and what their needs are. The report did find that although these children are at risk of poorer outcomes, these might not be caused by parental imprisonment but by other social factors (Department for Children, Schools and Families and Ministry of Justice, 2007: 2).

The Government’s commissioning and broad acceptance of the Corston report (Ministry of Justice, 2007: 3) suggested that the following years would see a number of significant changes in the treatment of women offenders. Indeed by 2009 an inter-ministerial sub-group and a cross-departmental criminal justice women’s strategy unit had been created, gender specific standards had been introduced to women’s prisons, and routine strip-searching was abolished (Fawcett, 2009: 90). However in the ‘Short Study on Women Offenders’ (Social Exclusion Task Force, 2009), and the ‘Final Report of the

Commission on Women and the Criminal Justice System' (Fawcett, 2009), concern was expressed that the implementation of many recommendations was not progressing (Fawcett, 2009: 5) and particular concern was raised about the lack of change in areas which had wide social consequences, such as the impact of maternal imprisonment on children, social exclusion and generational disadvantage (Ibid.: 22, 24, 33), and the continuing misunderstanding of sentencers who mistook formal equality for substantive equality (Ibid.: 19, 27).³

The 'Advice to the Sentencing Council: Overarching Principles of Sentencing' (Sentencing Advisory Panel, 2009), included a section on 'Women offenders and other equality and human rights issues'. The section began by referencing the debates that had taken place over the sentencing of women and the (then) recently published study on the particular characteristics and needs of women who offend (Social Exclusion Task Force, 2009), and the Government sponsored independent review into the courts and sentencing (Fawcett, 2009). The 'Advice to the Sentencing Council' acknowledged that sentencing should be gender neutral but stated:

It is recognised that many women offenders are particularly vulnerable and that sentencing them within a criminal justice system that primarily has been developed to deal with the majority of offenders, who are male, may sometimes result in unfair treatment and outcomes. (Sentencing Advisory Panel, 2009: 218 paragraph 68)

In 2010 'A Short Thematic Review on Women Offenders' did not paint a picture of improving conditions across the women's estate; instead it noted that women's prisons had been 're-roled' to make room for the increasing numbers of men held in custody with the consequence that more women were held at increased distances from their families (HMIP, 2010: 5). Despite evidence that women do better in open or semi-open prisons, all the semi-open prisons for women became closed prisons (Ibid.). In that same year The Prison

³ p.214 and following

Reform Trust established the Women's Justice Taskforce, a time limited body, whose remit was to consider the needs of women in the criminal justice system in an attempt to identify additional activity which could be undertaken to maximise the benefit of work already underway in this area (PRT, 2014). The formation of this taskforce coincided with the UK becoming a signatory to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial measures for Women Offenders ('the Bangkok Rules') (United Nations, 2010). The rules consisted of a set of standards providing for the specific characteristics and needs of women in the criminal justice system. The Prison Inspectorate incorporated them into their inspection criteria, but the rules extended beyond prisons and made it clear that women's family and childcare responsibilities should be taken into account when sentencing and custodial sentences should be a last resort for women with children (United Nations, 2010: rule 64).

The All Party Parliamentary Group (APPG) on Women in the Penal System reported in 2011. They considered the changes that had taken place since Corston (2007), whilst also drawing attention to the fact that at that time 68 per cent of women were in prison for non-violent offences, compared to 47 per cent of men (APPG, 2011: 8); an indication that for women, prison was not reserved for serious and violent offenders. This was confirmed by the Criminal Justice Joint Inspection (CJJI) report on alternatives to custody for women offenders, published in October 2011, which found that 13 per cent of all women in prison were imprisoned because they had breached the terms of a non-custodial penalty for an offence for which a custodial sentence could not have been imposed (Criminal Justice Joint Inspection, 2011: 14). The report echoed the assessment of Baroness Corston that a complex mixture of vulnerabilities moved women towards prison at a cost to their dependents:

We picked up a trend where women who appeared repeatedly for offences that in isolation would not pass the seriousness threshold for custody,

received custodial sentences. The cumulative impact of their behaviour, coupled with their often difficult life circumstances, led them inexorably along the path to prison. Such custody impacted disproportionately on these women and in particular on their dependents. (CJJI, 2011: 49)

There were also concerns around misinterpretations of gender equality and they reported that ‘sentencers were adamant that it would be unlawful to treat women differently to men’ (CJJI, 2011: 47):

It was evident that sentencers were working hard to establish the right balance, when taking decisions in court, between the gravity of the offence, the needs of the woman and the risk of harm she posed to others. Nevertheless, many women, often those who posed only a low risk of harm to others, continued to find themselves in custody, frequently for breaching their community order or licence. (Ibid.)

Over the next three years as more Government and publicly funded reports on women offenders were published, it became apparent that the Government commitment to implementing the recommendations of the Corston report was not as robust as had been originally presumed. In October 2013, the Ministry of Justice denied the evidence-based suggestion that prison was often an ineffective and expensive way to deal with many women who posed no threat to public safety (Ministry of Justice, 2013a: 5) and the Government also sidestepped the critical issue of the sentencing of women by deferring all responsibility for sentencing guidelines to the Sentencing Council (Ibid.: 11).

To find the Government so vehemently denying the need for gendered justice was surprising given its own publications in the previous 12 months. ‘A Guide to Working with Women Offenders’ (National Offender Management Service (NOMS), 2012) provided stage-by-stage guidance for professionals managing women through the criminal justice system from pre-sentence to completion of the sentence. It made reference to the need to consider women’s caring responsibilities by referencing NOMS’ own data which found that women were six times more likely to be carers than men (NOMS, 2012: 17), and 18

per cent of women in prison were single with dependent children, compared to 3.5 per cent of men (Ibid.: 37). Non-governmental organisations continued to report on the women's prison population, and in early 2015, twenty years after the notorious failed inspection of HMP Holloway, and eight years since the publication of the Corston Report, the Prison Reform Trust in conjunction with Soroptimist International, launched a three year project for the reduction of women's imprisonment with a report entitled 'Transforming Lives' (PRT, 2014). The report found that the recommendations of the Corston report were not being implemented. Instead, the 2013 response to the Justice Committee (Ministry of Justice, 2013a) accurately reflected the disconnect between policy and implementation, and despite clear opportunities to reduce the women's prison population it remained at broadly the same level (PRT, 2014: 6). Gender specific approaches were the exception rather than the rule, attitudes to women in trouble were barriers to progress, and the uncertain funding of women's services was counter productive. There was little evidence to suggest that women's childcare responsibilities were taken into account and there was concern that children were being harmed by the imprisonment of their mothers (Ibid.: 5-6). The continuing use of short sentences was another area in which there seemed to be internal policy confusion even though it was known that 'short sentences were wasteful and plunged women into further chaos as even a brief spell in custody often led to loss of accommodation, employment and custody of children.' (APPG, 2015: 5)

In the first decade of reports and commissions focusing on women's imprisonment the information gathered about women in prison was new, and the prison service in particular acted to implement changes in accordance with that newly acquired knowledge. The reports highlighted the factors linked to offending, the poor social background of many women in prison and the concerns about the social exclusion which many women were subject to. Generational disadvantage and exclusion were recognised as products of

imprisonment, as was the way in which the imprisonment of mothers negatively affected their children. In the second decade from 2007 onwards, there was repetition of much of the data about the character and needs of the female prison population. Throughout that period the same issues were raised as had first been brought to light in the aftermath of the 1995 inspection; more information was needed about dependents, sentencers should have training on the consequences of custody and the use of non-custodial sentences, women in prison were a broadly speaking excluded and vulnerable group, and short prison sentences do not stop offending. However instead of a progressive reduction in prison numbers, the number of women in prison continued to increase until 2010, and although it has fallen from its peak, it today stands at 3,919 (11th November 2016) compared to 1,979 in 1995 (Ministry of Justice, 2016a, 2016b). It is estimated that almost double the number of children are affected by maternal imprisonment today than were affected twenty years ago. In the reports produced from 1997 onwards questions were asked and concerns were raised about the impact which maternal imprisonment had on children, including the potentially damaging effects of inter-generational exclusion and disadvantage. However, even in combination with other factors this was not a strong enough reason for policy makers or sentencers to change the approach to punishing women. When changes did take place to reflect an understanding that women were often also mothers, they took the form of improved visiting conditions, the provision of family days, and an understanding that the maintenance of family ties has positive effects on the reduction of recidivism (Mills and Codd, 2008).

Increased visibility equals more women in prison

In a period in which criminal justice policy has been closely scrutinised and few believe that short sentences have a useful purpose it is perhaps surprising that women represented

one of the fastest growing populations within the prison estate, despite no corresponding increase in the volume or seriousness of women's offending. Between 1997 and 2007, the female prison population rose by 60 per cent (Ministry of Justice, 2016b) and there was a general increase in the number of women sentenced for all offences, rising by 12 per cent from 258,600 in 2002 to 289,500 in 2007 (Ministry of Justice, 2009). This at a time when there was a decrease of three per cent in the number of men sentenced for all offences (Ibid.). The mid-year figures continued to show an increase over a 15 year period; in 1995 the mid-year population was 1,979, in 2000 it was 3,355 and in 2010 although the rate of growth had become slower, the population was 4,267 (Ministry of Justice, 2013b). Since that time the female prison population has decreased year on year as a percentage of the overall prison estate, and as noted above on the 11th November 2016 3,895 women were imprisoned (Ministry of Justice, 2016a). It is worth noting however in relation to the percentage decrease, that shorter sentences mean a higher turnover of females than males in custody (Criminal Justice Joint Inspection, 2011).

The Home Secretary commissioned a review of the sentencing framework in England and Wales in 2000 and two of the main issues which the review sought to address were the inefficacy of short sentences and the need to punish proportionately for repeated offending. The changes to sentencing practice proposed in the subsequent report (Halliday, 2001) had a disproportionate impact on women. Persistent offending was viewed as 'dangerous', and there was no longer consensus that non-violent, less serious property offences should result in non-custodial sentences (Hudson, 2002: 32). More than double the number of women than men in prison have no previous convictions (Ministry of Justice, 2013b), and 82 per cent of women are in prison for non-violent offences (Ministry of Justice, 2015c). Women convicted for the offence of 'theft and handling stolen goods' (a 'non-violent, less serious property crime'), account for 41 per cent of all women sentenced to custody (Ibid.). As

was noted above, women in prison for breach of a court order (which could be civil rather than criminal) account for 13 per cent of all women under an immediate custodial sentence (CJJI, 2011). It is likely that prior to the Halliday report many of these women would have been given non-custodial sentences. It has also been suggested that the report conflated women's 'need' with 'risk', and therefore those with high needs came to be thought of as high risk, causing sentencers to impose more custodial sentences on women (Worrall, 2002: 63; Evans and Walklate, 2011: 10).

The first half of this chapter has outlined the context in which the research in this thesis has been undertaken; a situation where there is both increased visibility, and increasing numbers of mothers in prison in England. Of course one impact of this increase is that as more women are imprisoned, more children are separated from their mother. The next section of the chapter will provide a brief review of some of the consequences for children of parental and maternal imprisonment, before examining the way in which those consequences have been discussed in the literature. The chapter will conclude with an introduction to the conceptual framework that I propose to use to theorise those impacts and interrogate the empirical data in later chapters.

The impacts on children of parental imprisonment

Since the 1980's concern has been expressed that the children of prisoners are adversely affected by their parents' imprisonment. Shaw even referred to the pain inflicted on children by the sentencer of their father as 'institutionalised child abuse' (Shaw, 1987: 64). Their fast track to crime and delinquency was alleged and children of imprisoned parents were said to be as much as six times more likely than other similarly situated children to enter the criminal justice system (Barnhill and Dressel, 1991 cited in Sandifer and Kurth, 2000). 'Children of incarcerated parents are already at high risk, living in conditions of

poverty, instability and diminished access to sources of support' (Travis and Waul, 2004: 13), and there is consensus that parental imprisonment is linked to harms or disadvantages to children although 'a thorough understanding of the causal nature of this does not currently exist' (Flynn, 2013: 216; Travis and Waul 2004: 17). It is unclear whether 'exposure to crime infested neighbourhoods, poverty, family substance abuse, and violence' are more significant risk factors than imprisonment alone (Gabel & Shindlecker, 1993 cited in Miller, 2006). Numerous attempts have been made to separate out the mediators and moderators of risks, in other words the mechanisms by which certain factors increase risks whilst others protect against them, but this has proved to be extremely challenging (Dallaire, 2007a; Foster and Hagan, 2007). Throughout the research literature it is argued that it is difficult to isolate the particular impacts of imprisonment on the lives of children from other factors for two main reasons. Firstly children of prisoners are not a homogenous group. They differ in age, gender, family ties, educational attainment and understanding of the circumstances, and thus are heterogeneous in every way. Consequently the characteristics of their life circumstances which mediate or moderate the harms of parental imprisonment will vary for each individual, and the temptation to treat 'children of prisoners' as an aggregate should be avoided as their experience with parental incarceration varies greatly (Johnson and Easterling, 2012). The second reason why the separation of factors is difficult is because many studies on children of imprisoned parents involve small scale, qualitative data sets in which it is impossible to control for mediating and moderating factors. Many researchers suggest that what is needed are large-scale data sets which include pre-imprisonment data (Dallaire, 2007b; Flynn, 2012). As there are no records kept of children of prisoners in the UK, it may be some time before those kinds of analyses are available in this country.

Although it may be unclear as to the degree to which imprisonment is the trigger or cause of the harms or disadvantages which children of imprisoned parents suffer, parental imprisonment has been linked to problems including trauma and loss, financial stress, disrupted attachments, internalising behaviours (depression, anger, distress), externalising behaviours (anti-social behaviour, criminal activity, drug and alcohol abuse), disrupted schooling, and difficulties with social situations (Parke and Clarke-Steward, 2001; Travis and Waul, 2004; Miller, 2006; Comfort, 2007; Dallaire, 2007a, 2007b; Children's Commissioner for Scotland, 2008; Murray and Farrington, 2008; Nesmith and Ruhland, 2008; Barnardo's, 2009; Dallaire and Wilson, 2010; Hissel et al, 2011; Raikes and Lockwood, 2011; Sampson, 2011; Scharff Smith and Gampell, 2011; Wakefield and Wildeman, 2011; Arditti, 2012; Johnson and Easterling, 2012; Flynn, 2013; Morgan, 2014; Wakefield and Wildeman, 2014; Dennison and Smallbone, 2015; Flynn, 2015; Minson and Condry, 2015; Minson et al 2015).

The research literature referenced above argues that it is difficult to isolate the particular impacts of imprisonment on children from other circumstantial or pre-existing factors, and therefore although harms can be linked it is not possible to directly attribute the harms to the punishment of a child's mother through imprisonment. It is my contention that a reconceptualisation of the harms which links them directly to maternal imprisonment will enable the impact on children to be understood in a way which will allow academics, policy makers and legislators to engage with them more fully. I will return in detail to the impacts of maternal imprisonment on children in chapter three, but at this point in the thesis it is necessary to explore the way in which the harms flowing from maternal imprisonment to children and their caregivers have been understood in the past, before setting out the way in which they will be conceptualised within the thesis.

Describing the Harms

There is not yet any recognition by the state that if innocent children are harmed by the imprisonment of a parent it is necessary for the state to have a moral justification for such harm. Nor has there been an acknowledgement by the state that Article 2 of the United Nations Convention on the Rights of the Child 1989 places a duty on the state to protect children from discrimination or punishment which they suffer due to the status or activities of their parents, and Article 2 may have application to children of imprisoned mothers (UNCRC, 1989). I would suggest that these blind spots have occurred because, as yet, the harms to children of prisoners have not been understood or described in ways which allow a discussion of how such harms should be explained, justified or modified by the state. Kolber called them the ‘unintentional burdens of punishment’ (Kolber, 2012), and this idea is also present in academic scholarship on sentencing, framed in terms of the impact of sentence (Ashworth, 2010). Kolber does not offer justification for this position but recognises that the separation of parent from child through imprisonment causes harm to both and so is a form of harm which ‘is especially in need of justification’ (Kolber, 2012: 17). I will briefly outline some of the justifications which have been offered in the literature.

The doctrine of double effect

In the few pieces of scholarship directly concerned with the description of and justification for the harm to families, the doctrine of double effect is mentioned (Bulow, 2014; Manning, 2011). Bulow sets out the key points of the doctrine, following Jonathan Bennett (2001), and they are as follows: the act is not bad in itself, the agent’s intentions are good, the good does not flow from the bad and / or the agent does not intend the bad as a means to the good, and the good is good enough, compared to the bad, and there is no better route

to the former. The doctrine of double effect states that if each of the conditions is fulfilled, one is permitted to act in a way that predictably leads to bad results. In terms of imprisoning a parent, conditions one, two and three can all be met. The complexity arises in determining whether the ‘good is good enough’ to justify the bad. Is punishing the guilty so valuable in itself that it compensates for, or even outweighs the harms to families and children of the person being imprisoned? The answer to this question is dependent on what we believe to be the good effect of punishment. I will return to this discussion, suffice to say at this stage that Bulow and Manning, for slightly different reasons, conclude that the doctrine of double effect cannot provide justification for the harms suffered by children and families, as there are likely to be other ways that a parent can be punished without resulting in such harms.⁴

Defendant responsibility

Research suggests that those who determine sentence may take the view with regard to a defendant that, ‘she brought it on herself’, and they therefore place all responsibility for any harms of imprisonments on the offender, whilst other sentencers attempt to mediate the harms of punishment when they feel a family is more or less deserving. Manning (2011) argues that even if some responsibility for the harms attaches to the defendant, the state must also take responsibility for the outcome of the punishment. Again, this will be discussed more fully in later chapters.⁵

Collateral damage or collateral consequences

The term ‘collateral damage’ was first used by the US military in the Vietnam War to describe the US caused deaths of non-combatants. To quote Perice (2007), it was a term

⁴ p.215 and following

⁵ p.148 and following

which ‘deflects atrocity’, and its acceptance and usage linked the military terminology and strategy to a change in social policy which allowed groups of people to be categorised as unwanted, surplus, or unnecessary. In accepting the rationale behind ‘collateral damage’ militarily and societally, collateral damage, or foreseeable harm, became not simply a by-product but part of the assumed consequence of any ‘progressive’ action. The impacts of imprisonment on children of prisoners are not described in the literature as ‘collateral damage’, but as ‘collateral consequences’ (Hagan and Dinovitzer, 1999). Are the harms that they suffer simply the unfortunate consequence of having been born ‘too close to the battlefield’ (Perice, 2007: 120)? Is the lack of justification for the consequences they suffer an indication that the families of prisoners are treated as superfluous population, surplus people; non-citizens whose lives have less worth than those whose family members have not offended?

I suggest that without a more complete theorising of the negative consequences which flow to children from maternal imprisonment it is impossible to determine whether such consequences are justified or not. In the concluding section of this chapter I offer a reconceptualisation of the harms linked to maternal imprisonment which I propose to utilise as a framework for examining the explanations for and justifications of the lack of state involvement in the lives of children whose mothers are imprisoned. I suggest that this reconceptualisation will enable a more thorough and nuanced analysis of this topic to be developed.

Reconceptualising the Harms

It is my contention that all the harms suffered by a child whose parent is being punished through imprisonment have their origin in prison culture and stigmatisation relating to the parent’s imprisonment, and consequently these harms are different to those suffered due to

parent and child separation experienced for any other reason, for example marital breakdown or bereavement. Drawing on Comfort's work I suggest that the harms raise particular concerns and have 'corrosive' damaging impacts on children because their origin is in punishment within the criminal justice system:

the criminal justice system is distinct...in that it is charged with exacting control and distributing punishment, and hence a spillover effect is inherently more corrosive to bystanders than that of an institutional process concerned with providing a social good, such as medical treatment or education. (Comfort, 2007: 3)

I offer the suggestion that harms which children of imprisoned mothers experience come from two different social acts and attach to children in two specific ways. Children experience the first group of harms because the prison's reach extends into their lives through 'secondary prisonisation' (Comfort, 2003, Granja, 2016), and they attach to the children through the prison's regulation of their relationship with their parent and the demands which the physical separation and limited contact place upon them. The second group of harms is attributable to the stigmatisation of children and their carers by society due to the mother's imprisonment. Drawing on the work of a number of theorists (Goffman, 1963; Link and Phelan, 2001; Condry, 2007; Phillips and Gates, 2011; Lacey and Pickard, 2015) I argue that in the same way that a prisoner is stigmatised and socially isolated, a label attaches by way of courtesy stigma (Goffman, 1963) to the children of prisoners and to those who care for them during the parents' imprisonment. Such stigmatisation leads not only to isolation, but also to discrimination against that group of children.

Secondary prisonisation of children of imprisoned mothers

Prisonisation is the process by which a prisoner is socialised into the culture and life of prison. It is a recognised impact of prison on prisoners (Clemmer, 1958), and was adapted

by Megan Comfort (2003) when she extended Sykes 'pains of imprisonment' analysis (1954) to include the pain for women of visiting their partners in prison. Comfort used the term 'secondary prisonisation' to describe the effect of sustained contact with the correctional institution on the women. By placing themselves physically at the prison, the women found themselves subject to 'a weakened but still compelling version of the elaborate regulations, concentrated surveillance, and corporeal confinement governing the lives of ensnared felons' (Comfort, 2003: 101). In her later work on the topic she extended the use of the term 'secondary prisonisation' to include the impacts which prison had on the women's time and home life:

Women are subjected to secondary prisonisation via institutional management and exploitation since the methods for staying in touch with a mate require surrendering the private domicile as an extended site of penal control. (2008: 97)

Carceral geographers such as Moran have referred to the porous nature of the prison walls (2013), and Granja refers to the 'permeability of prisons' placing 'correctional facilities in permanent intersection with the social implications both behind and beyond prison walls.' (2016: 274). Granja suggests a new term to describe the cost to prisoners' families; she suggests that family members serve a "parallel sentence":

Prisoners' relatives (re)organize personal and family routines, defer future plans, deal with the reverberations of social stigma, rearrange family responsibilities and face a reduction of available resources. In short, prisoners' family members end up living a 'parallel sentence' beyond prison walls. This means that incarceration also becomes, implicitly and explicitly, inscribed in their bodies, behaviours, practices, choices and activities, and carved into the social interactions they construct and how they are managed. (2016: 288)

I reject the terminology of a 'parallel sentence' with its suggestion of legitimate punishment, and therefore moral justification, but I support the contention that carceral power, 'the pervasiveness of incarceration' (Christian, 2005), reaches into the lives of children and their caregivers not only when they visit the prison, but also in their daily

routines. For children, their relationship with their mother becomes boundaried, not just by the prison walls, but by the control and limitation of contact between parent and child; their time is regulated by the prison either through the uncertainty of sentence length and the consequences of ‘suspended time’ (Fishman, 1990; Comfort, 2008; Granja, 2016: 278), or whilst attending prison visits with their mother and reorganising their time to fit with a new routine of prison visiting. Their personal comfort is disrupted by the physical separation they must have from their parent when visiting, the loss of intimacy, and the strict limitations regarding what they can bring into the prison. Children experience the burden of long journeys because of the prison’s location far from their home, and the physical structures of the prison cause fear and distress in children. Their relationship with their mother must exist in the public not private sphere, whether through direct visits, or through letters or telephone calls, all of which are monitored. When handling visitors, prison is intended to be a ‘people-processing organisation’ but the experience of children trying to maintain relationship with their mothers suggests that instead it is more akin to a ‘people-changing organisation’ (Hasenfeld, 1972: 257-258 in Comfort, 2003: 103). It is well documented that children experience emotional and behavioural changes following the imprisonment of their mother, and the awareness of carceral power in their own lives and the lives of those who care for them may be a factor in those changes. In theorising the harms to children of imprisoned mothers I wish to extend the term ‘secondary prisonisation’ to include not only the impact on the child when they enter within the prison’s physical boundaries, but also the way in which carceral power affects the daily life and relationships of the child when away from the prison environment.⁶

This thesis also addresses the impacts of maternal imprisonment on caregivers, as it is a necessary consequence of maternal imprisonment that an alternative adult will take on the

⁶ p.85 and following

care of any dependent children. Caregivers too must restructure their lives around the reality of the prison. They are often the prisoners' closest female relative and so find themselves with the additional burden of maintaining contact with her on behalf of the adult family members, and providing for her financially. Caregivers are doubly burdened by responsibilities which tend to 'reproduce gender asymmetries' in prisoners' families (Granja, 2016: 288). The caring burden placed upon them, along with the restrictions and schedules of bringing children to visit their mother in prison may also interfere with their ability to maintain work outside of the home.⁷

Stigmatisation, courtesy stigma, secondary stigma

The second way in which the harms attach to children and their caregivers is through stigmatisation. Stigma, as defined by Goffman (1963), is when an individual has 'a spoiled identity', for example as a consequence of their status as a prisoner. A further definition of stigmatisation is that it has five key elements: firstly there must be a distinguishing and labeling of difference. Secondly that label must be associated with negative attributes. Thirdly there must be a distinguishing of 'them' and 'us' based on the label, before fourthly, the labeled individuals will be devalued and discriminated against, and fifthly, this will take place within the context of and perpetuation of differences in social, cultural, political and economic power (Link and Phelan, 2001). Another way of describing the 'them' and 'us' division which takes place when a person is imprisoned is set out in Lacey and Pickard's important paper on blame and forgiveness in criminal justice:

Such offenders are therefore already at the margins of society— deprived of many goods and opportunities that others possess, they are people whose early and later experiences may naturally make them feel outcast and uncared for—and so may for good reason believe that their relationships to others as well as to society at large have little proven value or benefit to them. Their mindset entering the criminal justice system may be that people are not to be trusted, and that society

⁷ p.188 and following

does not work in their favour. Retributive punishment that stigmatises and gives license to expressions of affective blame may therefore serve to further alienate such offenders from society—in effect, increasing the divide between ‘us’ and ‘them’ and shifting an already marginalised and underprivileged faction of our community into a bona fide out-group, thereby confirming their belief that there can be no valuable relationship between society and them—no mutual ‘fitness benefits’ in the language of evolutionary psychology. (Lacey and Pickard, 2015: 22)

Of course the children of imprisoned mothers do not attract the ‘retributive punishment’ nor the ‘spoiled identity’ of an imprisoned offender, but I suggest that the stigmatisation which takes place as a consequence of their parent’s imprisonment, attaches to both children and their caregivers. Goffman calls the attachment of stigma to ‘the individual who is related through the social structure to a stigmatised individual’ a ‘courtesy stigma’, and argues that the relationship between the two parties leads wider society to treat both as sharing the same stigmatising characteristics. This leads to children of imprisoned parents being labeled as ‘a problem child’, a ‘potential criminal’, or a ‘chip off the old block’ (Mazza, 2002, in Codd, 2008: 72). Condry defines courtesy stigma somewhat differently in relation to the partners or mothers of offenders. In her work she found that relatives of serious offenders are perceived as tainted or contaminated and they are treated as though they have done something wrong (2007: 66-67):

I will use the term secondary stigma because it is both a stigma by contagion – an extension of the offender’s stigma travelling through kinship ties – and a stigma attached to the new identity the relative holds as a ‘*mother* of a murderer’ or the ‘*wife* of a sex offender’ and the blame this new status attracts. (Condry, 2007: 62)

The fact that children of prisoners experience stigma, even though it is by association, and not culpability, indicates the strength of stigma by contagion.

In this thesis I will utilise the concept of secondary stigma to analyse the experiences of children of imprisoned mothers and their caregivers. Phillips and Gates (2011) identified that little is currently known about how stigmatisation manifests in children’s lives or in

their emotional or behavioural processes, so they created a conceptual framework for understanding the stigmatisation of children of incarcerated parents. They note at the outset that differences between people are not innately consequential, but that they become meaningful through social processes and social interactions (2011: 286), and they use Link and Phelan's definition above (2001), as a framework to examine the way in which stigmatisation impacts on children of prisoners. The attachment of negative attributes to the label 'children of imprisoned parents' causes such children to become socially isolated and experience civic disenfranchisement as they see themselves relocated to the margins of society (Lacey and Pickard, 2015: 22). Children make choices about what to tell and who to tell, and consequently live in a constant state of anxiety and fear (Link and Phelan, 2001: 287). Their differences ('them' and 'us') become central to their identity, and they are discriminated against and devalued both in personal and intimate relationships and in the public sphere. This stigmatisation perpetuates and increases the differences in social, economic, political and cultural power (Ibid.: 288-294).

In describing the 'relegation of stigmatised individuals to a lower social status...subjected to social distancing' (2011: 289), Phillips and Gates suggest that this may lead to fundamental changes in their standing with society, 'At a more distal level they may be unwelcome in communities or even as citizens' (2011: 289). I will draw upon the stigmatisation process in later chapters when considering why children are separated from their mothers without concern for their welfare, and why relatives are expected to take on the care of the children of imprisoned mothers without the support that is usually provided to carers when taking on a child in other circumstances. I contend that the stigmatisation of these children is a key factor in their differentiated treatment.

Conclusion

Theorising the impact of maternal imprisonment on children as harms originating from the prison and the mother's status as a prisoner provides a framework within which the operation and justification of such harms can be considered, and the questions about differentiated treatment can be answered.

Having set out the contextual and theoretical foundations of the study, the next chapter focuses on a discussion of the methodological framework and the research methods that I used to undertake empirical work with the purpose of gaining a greater understanding of these harms. I used several data sets to explore the experience of maternal imprisonment for dependent children and their carers and to answer the question of how those experiencing the harms, and those whose actions may trigger the harms (the judiciary), interpret and justify the consequences. I will explain how the empirical data, in association with the pre-existing research literature, was analysed. In addition the chapter contains short biopics of the families who took part in this project.

Methodological Choices and Challenges

Chapter summary

In this thesis the central questions are firstly, why are children of defendant mothers who face separation from their mother as a consequence of criminal sentencing proceedings treated differently to children who face separation from their parents by the state in the family court? And secondly, what are the implications of this differentiated treatment for wider society and for the state? In developing the research methodology it became apparent that in order to fully explore the thesis questions it was essential to combine empirical work with the pre-existing research literature. The majority of the qualitative and quantitative research on children separated from their mothers by imprisonment has taken place in North America, but without similar research in England and Wales it is difficult to know whether the experiences of children and families in those countries are similar to the experiences of children and families in England and Wales. A possible explanation for differentiated treatment is that children of mothers in prison do not suffer harm, and that hypothesis needed to be tested using a sample population from England and Wales. The research aimed to explore the lived experience of children and caregivers and therefore needed multiple perspectives on the harms rather than being limited to the imprisoned mother's assessment of the children's wellbeing, as much of the existing research has been. There were no pre-existing studies in England and Wales which looked at the impacts which flow from maternal imprisonment to both the child and the caregiver, and I thought that a dual perspective would provide insight into the breadth of the outcomes for children and their caregivers. Finally, I wanted to understand how those imposing the sentences of imprisonment which separate children from their mothers,

understand, interpret, and justify the impacts. As this had not previously been researched it seemed that direct research with the judiciary should be an essential part of my work.

In this chapter I will explain my methodological approach, and the methods used to gather and analyse data. I will discuss some of the challenges raised by the methods, and the limitations of the research. The chapter will conclude with biographies of the research participants.

Research design

The first methodological decision was whether the research should be quantitative or qualitative in nature. As no data on children of imprisoned mothers is routinely collected in England and Wales and no large scale studies have been established, there is a lack of longitudinal data for quantitative research. In the absence of such data I chose to undertake a qualitative study bringing together multiple viewpoints on the impacts and experiences of children separated from their mothers by imprisonment. Having decided to conduct a qualitative enquiry the next step was to determine who was to be included in the research sample. I initially conceived of a study in which I would undertake research with mothers in prison and the adults who were taking care of the children during the mothers' imprisonment. Through their voices I would gain knowledge of the children's experiences, and would discover whether or not children are negatively impacted or harmed by their mothers' imprisonment. I reviewed the literature on the impact of parental and maternal imprisonment and noted that within the growing body of literature on the experiences of children whose mothers are imprisoned, there were relatively few studies which engaged with children directly. Studies on children of prisoners tended to be based on the few larger quantitative data sets, for example the Murray and Farrington study (2008), or the child's voice was 'heard' through the perceptions of adult parents or

carers. I began with the assumption that I should do the same, however I questioned this assumption at a very early stage as it became clear to me that children's own perceptions of their experience were a crucial part of understanding whether or not they suffer harm, and therefore it was necessary for this research to engage with children directly.

I looked at a number of studies which had engaged directly with children as participants to see how feasible such a study might be, and to ascertain whether there was a need for such research in England and Wales. The 'Children of Incarcerated Mothers project' in Canada included interviews with six children and one adolescent (Cunningham and Baker, 2003). In the United States a 2005 study interviewed 60 children of imprisoned mothers (Poelmann, 2005), whilst Hernandez (2006) spoke to five children and Lotze et al (2010) conducted interviews with 50 children of imprisoned mothers in a summer camp setting. In Australia Flynn considered the role of fathers in caring for children when their mother is in prison, and she spoke with 14 children aged between 10 and 18 (2012), and in the Netherlands Hissel et al spoke with 68 children (2011). In the UK Wilks-Wiffen interviewed 17 children visiting their mothers in HMP Holloway (2011), Raikes and Lockwood spoke with four children about an overnight visiting scheme at a women's prison (2011), and in 2016 Raikes explored the experiences of three grandmother carers. The North American studies had larger research samples than the studies conducted in England and Wales which had 17, four and three participants respectively (Wilks-Wiffen, 2011; Raikes and Lockwood, 2011; Raikes, 2016). It was clear that research could engage directly with children, that children of imprisoned mothers are an under researched population in England and Wales, and that more knowledge is needed about their circumstances. Children of imprisoned mothers in England and Wales were therefore selected as my first group of research participants.

The second group I wanted to research were the caregivers of children of imprisoned mothers. It was my original belief that data collected from caregivers would be interwoven with the children's data to build a picture of the impact on children of maternal imprisonment, as I thought that the caregivers' accounts would aid understanding of the children's experiences. Again, direct engagement with this population was necessary as it was their own perceptions of the impacts which were of importance. With both groups, children and caregivers, I chose to gather contemporaneous narratives, as memory alters accounts of events and I wanted to explore their perceptions of their lives during the period of the mother's removal from the family.

The third population I chose to research were sentencing judges at the Crown Court level. I recognised that if the children of imprisoned mothers are treated differently to other children being separated from their parent by the state, as set out in chapter one, and if the experiences that flow from the imprisonment of a mother are harmful to children and their caregivers, it is then essential for the purposes of defining, understanding and justifying such differentiated treatment, to know whether judges have an awareness of those impacts on children when they pass custodial sentences on mothers. I wanted to know whether or not judges consider the existence of children when sentencing, and I also wanted to explore how information about the children and their proposed caregivers was interpreted by the judiciary, and weighted in the sentencing calculus against other factors. Finally I wanted to investigate the ways in which judges justify the negative impacts of a mother's sentence on her children and their caregivers. Before discussing the methods used to gather data from each of these populations the next section of the chapter will provide a more detailed account of the reasons for incorporating a number of methodologically interesting approaches into the research design; mixed methods research, triangulation of data and direct engagement with children.

Methodological choices

Mixed methods design

Although essentially a qualitative study, the design utilised a mixed-methods approach in order to engage with the research questions in the most efficacious way. In the first edition of the Journal of Mixed Methods Research, mixed methods research was defined as:

research in which the investigator collects and analyses data, integrates the findings, and draws inferences using both qualitative and quantitative approaches or methods in a single study or a program of inquiry. (Tashakkori and Cresswell, 2007: 4)

In this study mixed methods were employed in order to reveal ‘the complexity of social phenomenon’ and increase ‘the credibility and external validity of the work’ (Green et al, 2001). Mixed methods research can be classified as such if it has at least one strand of qualitative research and one quantitative research strand (Cresswell and Plano Clark, 2011: 63). A strand is a component of a study that encompasses the basic process of conducting quantitative or qualitative research: posing a question, collecting data, analysing data and interpreting results based on that data (Teddlie and Tashakkori, 2009). In this study there were five strands which incorporated the three different groups of research participants: a subjective well-being questionnaire which was answered by the children, semi-structured interviews with children, semi-structured interviews with caregivers, the analysis of sentencing transcripts, and semi-structured interviews with judges. When considering the place of different strands in mixed methods research decisions need to be made about the level of interaction between the strands, their relative priorities, the timing of the strands and the procedures for mixing the strands, that is the point of interface between them (Cresswell and Plano Clark, 2011: 64). In this research the strands were interactive (influencing each other throughout), sometimes sequential

and sometimes convergent, with a point of interface at the data collection level. The study is pragmatic mixed-methods research and falls within Merten's description of transformative research (2004: 142), as it commenced with a definition of the problem and a literature search which led to identification of the research design, data sources and data collection instruments and methods, and it concluded with collection, analysis, interpretation, reporting and then adoption of the results for transformation.

Triangulation of data

Triangulation of data and complementarity of approach are two benefits to be gained from approaching the questions from different perspectives and using multiple strands (Greene et al, 1989; Bryman, 2006). In this study triangulation of the data was used to assist in the analytic process, but taking note of the concerns frequently expressed about triangulation (Fielding and Fielding, 1986; Richards, 2009: 148; Fielding, 2012), a finding did not achieve validity through replication in different data sets; instead each data set was treated as a facet of a complicated whole. In this study the 'intertwined sets of findings' provided:

evidence of the nature of the phenomenon under investigation, including the contexts and situations in which it emerges, as well as insights in to the cultural frames people use to make sense of their experiences. (Miller and Glassner in Silverman, 2010: 145)

Direct engagement with children

There has been a recent shift from viewing children as passive objects of study unable to directly provide information, to recognition of them as active and competent participants capable of speaking for themselves and of providing reliable information about their situation. (Mishna et al, 2004)

Children's rights have had an increasing profile in a growing global conversation and one of the fundamental rights of children is that they should directly participate in matters

which involve them (UNCRC 1989, Article 12). This 'shift' has taken place as a consequence of the principle of direct participation established by Article 12. As explained by General Comment No.12 published in July 2009 by the United Nations Committee on the Rights of the Child, Article 12 establishes the right of every child to freely express his or her views in all matters affecting her or him, and the subsequent right for those views to be given due weight according to age and maturity (UNCRC, 2009: paragraph 15). Judicial and administrative proceedings are referenced specifically but the research community have understood the relevance and application of this principle to research concerned with children. In the past, adults were asked about children's experiences, but 'adult "proxies" such as parents or teachers, are unlikely to be able to accurately represent children's social worlds, no matter how well intentioned or informed the adult' (Mahon et al, 1996: Miller, 2000). The General Comment on Article 12 provides a list of values which must be incorporated in all processes in which children participate. It is a useful checklist for direct research with children and is as follows: the process must be transparent and informative, voluntary, respectful, relevant, child-friendly, inclusive, supported by training, safe and sensitive to risk, and accountable (UNCRC, 2009). No longer can one say that it is too difficult to involve children directly in research, instead one must start from the decision to directly engage and then ensure that the process is safe and appropriate for children.

Ethics

Ethical considerations have been at the forefront of the research design. Due to direct engagement with the children of imprisoned mothers both procedural and practice ethics (Guillemin and Gillam, 2004) were considered. Procedural ethics include the issues around consent and assent whilst practice ethics encompass all that may arise in the course of the research such as issues of disclosure, power imbalances, and the

representation of the child in the research. The issue of consent and assent in this study was complex, particularly as the children were unlikely to be living with a parent. It was of vital importance that the children took part in the research voluntarily and understood that they could withdraw from the research, or any aspect of it, at any time. It was anticipated that in this study there might be children who were not aware that their mother was imprisoned and also those who would be distressed by the imprisonment of their mother. Children of imprisoned mothers live in a variety of settings; some looked after by their father or other family members, others living with friends, and some in local authority care. The different settings and contexts meant that a variety of actors were involved in the consent process and I needed to remain mindful of the ‘potential disparities’ between the adult consent and the child’s assent (Warin, 2011).

The IDREC Committee of the University of Oxford who considered my research application were satisfied that I had thought through the issues of consent and assent within the particularities of this research population and had appropriate plans for consent and assent procedures. However the Committee also understood that given the lack of knowledge around the whereabouts of the research population at the time of application, there were inevitably going to be unanticipated issues surrounding consent and assent as the study progressed which required me to remain reflexive throughout, aware of the obligation ‘to ensure that [children’s] rights, freedoms, safety and dignity are protected and that the search for understanding does not overshadow concern for the vulnerable’ (Mishna et al, 2004: 464). I created a number of age-appropriate documents to explain the research to children, along with information about assent and provision for their feedback, all of which I piloted on children across the age span I intended to interview. I amended the documentation a number of times following the piloting of it. A sample of documentation is available at Appendix A.

The research adhered fully to the ESRC's Research Ethics Framework, the British Sociological Association's Statement of Ethical Practice, the British Society of Criminology's Code of Ethics for Researchers in the Field of Criminology, and the Guidelines for Researchers published by the Judicial Office.

The Methods

I used three methods of data collection although one method, semi-structured interview, was used with each of the three sample populations. The next section of this chapter will detail the methods used to gather the data before addressing some of the challenges I faced when conducting the research.

Children and Caregivers

Recruitment: Families of prisoners are a very difficult population to reach, and that is one of the reasons why so little qualitative research has taken place among them. Convenience sampling was used as I recruited children and caregivers through organisations that work with families of imprisoned people and through prison visitors' centres. I had a selection of age-appropriate information leaflets which were provided to several different organisations and interested parties. The specific challenges of accessing these populations are explored later in the chapter.

Questionnaires: I initially offered children a questionnaire to complete before inviting them to participate in a semi-structured interview. The questionnaire measured subjective well-being, and was developed by The Children's Society and the University of York as part of their 'Well-Being' research which has been ongoing since 2005. The aim of their research is to:

Develop a better understanding of the concept of well-being as it relates to young people, taking full account of the perspectives of young people themselves [and] establish self-report measures of young people's well-being and use these to identify the reasons for variations in well-being and to monitor changes in well-being over time. (Rees et al, 2010:1)

The questionnaire has been administered to more than 25,000 children in the UK in the years since 2008. The researchers on that project agreed to provide the questionnaire for use in this study. One of the difficulties in creating a measure could have been the creation of a control group but by using a pre-existing measure there was a pre-existing control population. The questionnaire did not specifically address family circumstances, but by using the questionnaire, even with a very small sample of children of imprisoned mothers, it was hoped that it would be possible to provide a comparison between the subjective well being of children with an imprisoned mother and the subjective well being of a larger generalised population of children within England. The questions related to their general sense of well being in three areas of their life: self, relationships and environment (Pople et al., 2015). It included topics such as school, home, appearance, friends, and autonomy. The children knew that they had been invited to participate in the research because their mother was in prison, but at the time of completing the questionnaire I did not ask them anything about their mothers' imprisonment nor its effect on them. My intention was to conduct the research with children aged between 8 and 15 years as this matched the age group of the control population for the questionnaire, but my final sample were aged between 11 and 17.

The questionnaire which I used included 11 ratings based questions, for example, 'On a scale of 1-10 how happy are you with your life as a whole?' and five statement based questions, 'Please say how much you agree or disagree with the following statements' with a six point scale ranging from 'strongly agree' to 'strongly disagree', with 'don't know' as a possible option. In total, 17 children completed the questionnaire and 9 of

those children also took part in a semi-structured interview. This was unfortunately too small a sample to enable me to draw any useful conclusions and on reflection I decided not to use the questionnaires as a data set for the study.

Interviews: After children completed the questionnaire I invited them to participate in an interview. The purpose of the interview was to gain rich data around the personal implications for each child of their mother's imprisonment, and to record details of their lived experience of maternal imprisonment during the time period in which they were experiencing it. The interview was semi-structured and suitable for use with children aged 7 to 17 years. It consisted of 13 open questions about the child's living arrangements, schooling, friendships, family, and their wishes and feelings. The last question in the interview schedule was an invitation for them to tell me anything else that they thought I should know about them (Appendix B). 14 children participated in interviews. As a former criminal and family law barrister, family mediator, and Citizen's Advice Bureau advisor, I have many years of interview experience. I have been trained to conduct interviews and have worked in professions which required me to interview vulnerable people about sensitive issues. I am also the mother of three children whose ages span the age range of the children I was speaking with, and so I understood the importance of age appropriate engagement with each child. I balanced the necessity to gain information from the children with an understanding of their own needs within the process, and on occasions I refrained from asking questions as I sensed that the child was no longer comfortable, or might disclose more than they wanted to simply because of the interview environment (Phelen and Kinsella, 2013). I met the children either in their own homes or at a prison visitors' centre outside the prison, before or after they spent time with their mothers at an extended children's visiting day.

The research design also included interviews with the caregivers of the children, using a semi-structured interview format. The questions focused on the caregiver's perception of the child's experience, and it was my original intention that data collected in that way would be analysed with the children's data to build a picture of the impact on children of maternal imprisonment. In the course of the research, and as the literature suggested, it became apparent that the mothers' imprisonment had a significant impact on the caregivers' own lives (see chapter six). That acquired knowledge prompted adaptation of the research design in order to give the caregivers' status in their own right within the research rather than including them simply as narrators of the children's experiences. The semi-structured interview consisted of 18 open questions about their home situation, the ways in which their life had changed since taking on the care of the child, their relationship with the child, and the ways in which the caring had impacted their relationships (Appendix C). 22 caregivers participated and I found them to be very open and keen to tell their stories. For many it was a rare opportunity to talk about the way in which their lives had changed since taking on the care of a child or children. I travelled to meet the caregivers at whatever location they chose. Some met me at a prison visitors' centre whilst others preferred their home or a neutral venue such as a café. Not all of the children looked after by the caregivers I interviewed took part in the research, as some were too young, and others did not want to participate.

Sentencers

The third population with whom I conducted semi-structured interviews were members of the Crown Court judiciary. I hoped to gain an understanding of the complex balancing of factors which judges engage in as part of the sentencing process and the status of dependant children and their caregivers within that. Using Mason's five questions (2002:14) a framework was developed to investigate the understandings, interpretations,

motivations and ideas that judges have when sentencing defendant mothers. The design anticipated that the knowledge or evidence of these would be found in the sentencing decisions that judges make and the personal accounts that they could give. I intended to explore this area by combining a literature review on the issues around sentencing policy with ‘systematic empirical inquiry into meaning’ (Shank, 2006: 5).

Recruitment: Purposive sampling was used as it ‘demands that we think critically about the parameters of the population we are studying’ (Silverman, 2010: 141) before seeking ‘out groups, settings and individuals where...the processes being studied are most likely to occur’ (Denzin and Lincoln, 2011: 202). The parameters for sampling were aligned with the numbers of judges and recorders (part-time judges) sitting in the relevant courts in England and Wales, and gender was also a consideration. Although the Judicial and Court Statistics do not provide gender breakdown for circuit judges who sit in the Crown Courts, at the time of planning the research, of those recommended for judicial appointment in the most recent judicial selection exercise, 61 per cent were male and 33 per cent were female, with the remainder unknown (Judicial Appointments Committee, 2012). The sample aimed to replicate those percentages. The judges were recruited through my contacts within the profession (I was a member of the Bar and practised from chambers in London), and then via ‘snowball’ recruitment (Morgan, 2008). Permission was needed from the Judicial Office to undertake the study, and they determined the sample size. I applied for permission to interview 30 Crown Court judges and was given permission to interview 20. Although the sample size was small, within the methodological framework and constraints of resources and access to ‘an elite’ it provided sufficient data for this study through which a process rather than a population was being studied (Mason, 2002: 135).

Sentencing and appeal transcripts: In the Crown Court sentencing takes place either after a trial at which the defendant is found guilty, or at a separate sentencing hearing following either a plea of guilty by the defendant, or after a trial or plea when sentencing has been adjourned for pre-sentence reports to be prepared. In the Crown Court the judge passes sentence and makes remarks about why the sentence is being given, which may be very brief, particularly if it follows immediately after a trial. Sentencing transcripts are the official court record of these remarks, and are generally not published, although they are available to the public on application. At an early stage in my research I was provided with 43 sentencing transcripts from the Crown Court and the Court of Appeal, covering the period 2003-2011. These were provided to me by another researcher who was working on the sentencing of mothers (Epstein, 2012). They were transcripts of cases in which defendant mothers were sentenced to imprisonment, or cases in which they had appealed against a sentence of imprisonment. I analysed the transcripts, identifying the variables involved in the sentencing decision before considering the impact of those variables on the judges' consideration of dependent children.

Judicial interviews and sentencing exercises:

Since judicial deliberations are not public and not all considerations made by individual judges are revealed in the judgments of the selected highest courts, talking to the judges themselves was required to establish which personal approaches of judges exist and how influential these approaches are. (Jaremba and Mak, 2014: 3.2)

I knew from the outset that sentencing transcripts would not provide insight into the way in which judges understand and balance competing factors in sentencing, and for that reason the research design also included semi-structured interviews with judges. This qualitative research method can be used in order to understand 'the meanings which

people attach to phenomena' (Ritchie and Lewis, 2003: 3), and it was anticipated that it would provide insight into how the social world (in this case the sentencing of a mother) is interpreted, understood, experienced or produced by the judges (Mason, 2002: 7). The questions explored the judges' understanding of the consequences of maternal imprisonment for dependent children and their caregivers, and the ways in which Crown Court judges balance different mitigating factors in sentencing calculus. The interviews focused on the judges' approach to personal mitigation and sentencing: the factors considered by a judge when sentencing a mother who is the primary carer of dependent children; judicial use of pre-sentence reports; whether the concept of equal impact of sentence plays any part in sentencing decisions; and judicial knowledge of the particular impact of imprisonment for children of imprisoned mothers. The interviews were structured to include a mix of stimuli including a mitigation 'weighting' exercise, three sentencing exercises, and four stimuli statements. I developed the mitigation 'weighting' exercise using the list of personal mitigation taken from the 'Sentencing Council Guidelines on Assault' (2011). The judges were asked to give a number to each category on the list with '1' indicating that the factor would carry minimal weight in sentencing decisions and '10' indicating that it would carry maximum weight in sentencing decisions. The same number could be used multiple times and it was not a ranking exercise. This exercise was previously used in exploratory research on the topic (Minson, 2013) and the sentencing exercises were taken from a previous study (Jacobson and Hough, 2007) and were reproduced without alteration. By using qualitative research methods it was anticipated that more nuance would be captured than if a quantitative survey, or sentencing remarks alone, were studied (Jaremba and Mak, 2014). All of the interviews were conducted at the judges' chambers or an alternative work location chosen by them, and each interview lasted between 30 minutes and one hour.

Data Analysis

Upon completion of the field work I had five different data sets: recordings of interviews with 14 children, 22 carers and 20 judges or recorders; 43 sentencing and appeal transcripts; and sentencing and mitigation weighting exercises from 20 judges or recorders. Each data set required a different analytical approach and each is discussed below.

Interviews: I transcribed the interview recordings and then uploaded all interview transcripts to NVivo 10. I coded the child and caregiver interviews using the same codes, but I applied different codes to the judicial interviews.

Child and caregiver interviews: From reading the transcripts, and against the background of the academic literature and the research questions of the thesis, I established an initial list of 94 issues which I wished to code. These were grouped under eight major headings: negative changes in family roles and relationships; pre-existing disadvantage; changes in behaviour; stigma; loss of parental relationship or difficulties in maintaining the parental relationship; stress; changes in day to day life; longer term impacts. Once thematic coding began there was an increase to 139 issues which were arranged under 15 sub-headings, and finer delineation between the themes became necessary as analysis progressed.

I used the functionality of NVivo to see which aspects of their experience were emphasised by the children and caregivers. I analysed the data to see how their experiences aligned with the literature and sought to discover some of the more hidden aspects of their experience. I selected a number of codes to look at in more detail, and I re-read all the interviews looking again for those codes. I then chose three broad areas of the children's experience to focus on, whilst noting a number of other matters of

importance which have not previously been raised in the literature. Analysis of the caregiver experience prompted me to look again at the literature on foster carers, and using NVivo I was able to see which experiences were uppermost in caregivers' minds when they were given the opportunity to talk about the impact of taking care of a child whose mother is in prison.

Judicial interviews: Following multiple read throughs of the interview transcripts, and against the background of the academic literature, the data collected in the child and caregiver interviews, the analysis of the sentencing transcripts, and the research questions of the thesis, I established an initial list of 20 codes from the judicial interviews. Once coding began this increased to 26 codes. Unlike analysis of the child and caregiver interview material, in which the overarching themes emerged from the data, I sought the answers to specific questions from the judicial data and used it to test the parameters of judicial understanding of the impact on children and caregivers of maternal imprisonment, in addition to investigating the judicial interpretation of those consequences.

Mitigation weighting exercise and sentencing exercises: I used exactly the same method of analysis for the mitigation weighting exercise and the sentencing exercises as when they were first used as a measurement tool in my previous exploratory research study (Minson, 2013). An Excel spreadsheet of the judges' weighting for each category was created, with a column added to show the range of results within each category. This was then imported to NVivo 10 to allow for easy comparison with other data. At a later stage, equivalent categories in the sentencing exercises were incorporated into the spreadsheet in order to compare inter and intra judicial decisions. The sentencing exercise results were tabulated in Excel, using the same conversion equivalents as the study from which they

were taken (Jacobson and Hough, 2007), and the alphabetical answers were converted into numeric results. This facilitated the ranking of the mitigation factors, enabling comparison with the original study.

Sentencing transcripts: I began analysis of the transcripts by selecting a number of variables which, on the basis of earlier research (Minson, 2013) and the literature on women's imprisonment, I hypothesised might influence a judge's sentencing decision when sentencing a mother to imprisonment. I then searched each transcript for any reference to the variables and recorded the information on an Excel spreadsheet. The variables were: the defendant mother's age; whether or not she was a single parent; her offence; her drug or alcohol dependency status; her mental health status; whether she was a victim of domestic abuse; her plea; her previous convictions; whether she had any previous custodial sentences; whether the offence was committed whilst on licence for a previous offence; whether the offence contained aggravating factors; mitigation (not including children); whether there was a pre-sentence report prepared; whether any pre-sentence report was followed by the sentencing court; any acknowledgement of the children by the court; whether the judge made reference to the Sentencing Guidelines; whether the sentence was reduced due to children or the recommendations of the pre-sentence report; the sentence given; other relevant remarks; the decision of the appeal court; reasons for the decision. I uploaded the data to NVivo 10 and searched to see if patterns emerged which indicated the variables which either influenced sentence, or improved the likelihood of a successful appeal against sentence.

Challenges of the methods

Conducting qualitative research is a challenging pursuit (Jaremba and Mak, 2014), and in

this section I highlight three issues I faced which merit further discussion: access, power dynamics, and researcher bias.

Access

The research relied upon accessing members of hard to reach populations: the families of currently imprisoned mothers, and members of the judiciary. I knew from the outset that it would be challenging to complete the work that I wanted to do and it took two years to complete the field work from first to last participant contact. As has been previously mentioned, in England and Wales data on children of prisoners is not routinely collected by any organisation or statutory body. They are a disparate population, and due to issues of stigma and a lack of support children of imprisoned mothers do not tend to self identify in schools or other social settings. In the year prior to my field work I built up contacts within charities that support prisoners' families. Once ethical clearance was gained I spent months visiting prisons and visitors' centres and pursuing every possible lead in order to meet children and carers. I placed flyers on twitter, which were well circulated by a number of prominent prisoners' families organisations, and attended meetings with family support workers in a number of locations. From those networks I was given permission to spend two days at Styal prison visitors' centre in Manchester, where I met families arriving for weekend visits. A probation officer facilitated a meeting with another family in another part of the country. The organisation 'Grandparents Plus', which supports kin carers, included a briefing about my research in their newsletter and as a result of that three families in the south east were recruited for the research. A London charity, Housing for Women which focused on the resettlement of women with their families after imprisonment, introduced me to two families. Nine months after my first contact with HMP Holloway and the charity Spurgeons, who ran the visitors' centre at the prison, I was given permission to spend time at the HMP Holloway visitors' centre

on extended children's visits days, where I met a number of children and carers who agreed to participate in the research. The difficulties in access meant that I took every opportunity offered to me, and consequently I had a number of thwarted journeys to meet families who either changed their minds or did not keep the appointment due to other commitments; the farthest of these was to Liverpool, the nearest, London. When I did meet people who wanted to talk to me, for example at HMP Holloway visitors' centre, I interviewed more people in a day than one would normally plan for. I was unable to interview any children in local authority care, as even when I did meet such children the local authority gatekeepers did not consent to their participation. When the fieldwork was completed 27 different family groupings had participated in the research. Of those, 22 carers and 14 children took part in semi-structured interviews and 17 children completed questionnaires. To date I believe this to be the largest research sample of carers and children of imprisoned mothers interviewed for criminological research purposes in England and Wales.

To interview judges permission is required from the Judicial Office and the research must have the approval of the Senior Presiding Judge. I submitted a business proposal outlining the public interest justification for my research and including all the questions I intended to ask. I applied for permission to interview 30 Crown Court judges and recorders, and after seven months I was given permission to interview 20 Crown Court judges and recorders. In 2012 I conducted a small exploratory study of judges (Minson, 2013), so I began the fieldwork for this study by contacting the judges who participated in 2012 and I asked them if they could suggest any judges who might be willing to engage with this research. I also contacted judges I knew personally through my time at the Bar and asked if either they or their colleagues were willing to be interviewed. I circulated a

flier inviting participants to contact me. It took six months from permission being granted to complete the permitted number of interviews.

Power dynamics: children and the judiciary

The issues of disclosure and power imbalances are closely intertwined, and in research with children there must be an awareness of the latter in order to enable the child to make disclosures which are appropriate and within the boundaries of acceptability to the child (Phelan and Kinsella, 2013). When interviewing children a researcher must walk a fine line between becoming a ‘friend’ of the child, whereby a false sense of intimacy may be created through language, behaviour and setting, and presenting as an adult authority figure who requires certain answers or behaviour (Ibid.: 86). Reflexivity is required on the part of the researcher to create conditions for interviews where the children ‘have agency and share power’ (Punch, 2002). Retaining reflexivity throughout is of the utmost importance when conducting qualitative research and in particular child focused research, as good ethical practice is not about following set procedures and responses, but is achieved when the researcher retains a sensitivity to ethical practice throughout (Phelan and Kinsella, 2013). Another issue is the representation of the child in the research. This is of greater concern when images of either the child himself, or images that he has produced, are published as part of the research. However the way in which a child’s voice is heard through an interview, as in this study, could also be open to misrepresentation. Wang and Redwood-Jones (2001) raise the issue of participants being ‘placed in a false light by images and by words’, and Phelan and Kinsella urge researchers to remember that their interpretation of a child’s words is only one possible interpretation (2013). I endeavoured to remain aware of the potential for misrepresentation throughout the writing process, in order to reduce the risk of reinterpreting the voice of the child.

When interviewing elites it is important to be aware of one's 'positionality' in relation to the interviewee, and to recognise that one's position can be moved by the demonstration of an increased understanding of the interviewee (Mikecz, 2012). I found my former experience as a barrister invaluable as prior knowledge of judicial shorthand and legal terminology enabled me to correctly understand not only the judges' answers to questions, but also their queries and concerns around their participation in the research (Berger, 2015). I understood that the exercises I asked them to undertake bore no resemblance to the way in which they conduct a real sentencing case, but because I understood why the questions concerned them I was able to reassure them as to the purpose of the questions. In most instances I was not attempting to replicate their practise in sentencing, but rather was setting a particular benchmark for my own purposes. I found that perhaps because of my legal background, they were willing to speak freely with me, and due to my previous work as a barrister I have been trained in the skills necessary for elite interviewing (Berry, 2002). I dressed in court dress (a dark suit), and observed appropriate conventions when meeting them in courts or their chambers. All of these actions created positionality which enabled the interviews to be used as an extremely effective data collection tool.

Bias and reflexivity

Reflexivity is commonly viewed as the process of a continual internal dialogue and critical self-evaluation of researcher's positionality as well as active acknowledgement and explicit recognition that this position may affect the research process and outcome. (Berger, 2015)

There is extensive literature on reflexivity in qualitative research (Pillow, 2003; Guillemin and Gillam, 2004; Bradbury-Jones, 2007; Stronach et al., 2007) as reflexive thinking should be at the core of all qualitative research. Reflexivity throughout the process of research enhances the credibility of the work, as by noticing one's own

reactions to participants and their accounts, it is possible to see where personal bias or sensitivity either enhances or limits the process (Cutcliffe, 2003; Lietz et al, 2006; Berger, 2015). Berger's work on researcher positioning provided insight into the way in which my own positioning altered my research findings. With the judiciary I had 'insider' status, which offered me three advantages of 'easier entrée, a head start in knowing about the topic and understanding nuanced reactions of participants' (Kacen and Chaitin, 2006; Padgett, 2008; Berger, 2015).

With children and caregivers I didn't have experience of their situation, but as a mother and caregiver to children there was some overlap, which did at times mean that caregivers were willing to be more open with me. Choosing how much personal information to disclose to interviewees was a live issue in every interview (Berger, 2015). I shared that I had children, and occasionally their ages, when I judged that it would reassure the caregiver that I was not sitting in judgment over him or her but had some understanding of the day-to-day work and cost involved in looking after children. With children I sometimes mentioned my own children, particularly if they were of a similar age, usually in relation to shared interests or activities when I was building rapport with the interview subject.

My own reflexivity led to some modifications in the way in which I conducted the research. I realised early on in the fieldwork that I could not interview a judge and a child in close temporal proximity, as I found myself overlaying the judge's responses with the child's insights, and if the disparity between the two was too great I found it difficult to retain neutrality as I interviewed. Other modifications were made in the timetable for transcription and analysis of interview data. Initially I transcribed interviews as soon as they had taken place, but when the interviewing schedule became very full I was unable to continue that practice. I returned to transcription when all the interviews were

completed, however, as I transcribed I found myself experiencing various emotional reactions to the speakers and what they said. I was unable to deal with re-hearing such a large volume of interview material so soon after conducting the interviews. I realised that I had suffered from secondary trauma; defined by Figley (1995) as ‘the stress resulting from helping or wanting to help a traumatized or suffering person.’ The secondary trauma I experienced may have been intensified by my own life experience as a mother who has been able to raise her children without them experiencing deeply traumatising events. I found it very distressing at times to hear the children’s accounts and the caregivers’ accounts of the devastating impact caring for their grandchildren had on their own family life and children. Reflexivity is critical in any research but perhaps more so when interviewing individuals whose views or situations you have personal feelings about. Following the realisation that my own emotions were preventing me from working as I had intended, I interspersed transcription with other types of work in order to dilute the intensity. It had been my intention to move straight from transcription to analysis of the interviews, but I decided to leave the data for a few months, to ensure that I considered it with as much objectivity as possible. Part way through the analysis of the child and caregiver interviews I heard news of one of the families I had interviewed. The mother’s sentence had been reviewed on appeal by the prosecution and was doubled in length. Having met with her family I was all too aware of the impacts of that decision for them, and I was concerned that my responses to that sentencing appeal would affect my analysis of the interview material. I decided once again to pause from the analysis until I could return to it with a less emotionally affected viewpoint.

Limitations

Methodologically there are limitations to this piece of research.

Access

Access to children whose mothers were in prison was difficult. There are no means to identify such children, and the only way to recruit them was through contacting families who were already connected to an organisation offering support to families of prisoners, or if I met them when they visited their mothers in prison. Knowing that many women in prison do not receive any visits from their families during their imprisonment it is likely that the samples were not fully representative. The families who took part in the research were also likely to be those who had more resources and coping abilities, and who were less stigmatised or less afraid of stigma and exclusion than others. A further limitation was that I was unable to interview any children who were in local authority approved foster care, because even when I met such children at prison visitors' centres, and they and their foster carer were happy to take part in the research, the local authority gatekeepers did not give consent. There is no data on the number of children of imprisoned mothers who are in state care, nor their experience of it, and unfortunately this research has not contributed anything to that knowledge gap.

Longitudinal data

As was set out in chapter one, it is currently almost impossible to disentangle the impacts of maternal criminal behaviour, arrest, and pre-existing vulnerabilities from the impact of maternal imprisonment on children and caregivers. In order to do so research needs to follow children from an early stage, and as I only met the children and caregivers after imprisonment it was difficult to ascertain the proportionate impact of multiple traumatic events in their lives. The research only provides a snapshot of one point in time, and it is therefore impossible to know with certainty what the medium and long-term impacts to the children and caregivers will be, whether positive or negative. Future research, which

includes follow up interviews at intervals over a twenty year period, would provide much needed information on the longer term outcomes for children affected by maternal imprisonment.

Lack of prior research

This research was exploratory rather than explanatory, as there has not been previous research in England and Wales on the harms suffered by children of imprisoned mothers.

Sample size and selection

Although the judicial sample was small, when interviewing an elite, saturation is reached more quickly, and as this research was exploratory the sample size was sufficient for the purposes of the study. It was not, however, randomly selected as snowball sampling was used, meaning that it cannot be judged to be truly representative of the entire population. This could be improved upon in future research, however with the constraints placed by the Judicial Office on the recruitment of judges in research it might be difficult to achieve randomised sampling. The small number of participant children meant that the questionnaire sample size was much too small to draw sound conclusions from, and therefore comparison with the control group was not possible.

The research participants

The final section of the chapter will discuss how research participants will be identified in the thesis. Judges will be referred to by a number, along with the court they sit in (Crown Court: CC), whilst children and caregivers will be identified by the family grouping they form part of. In total 27 family groupings took part in the research. In seven instances both the caregiver and the child(ren) were interviewed. In 13 family groupings the caregiver(s) were interviewed but not the children. Four children were interviewed

wtihout any other member of their family grouping taking part, and eight children, representing four families, completed questionnaires, but neither they nor their caregiver participated in an interview. Not all children who were interviewed completed questionnaires; of the 14 children who were interviewed five did not want to answer the questionnaire. The remainder of this section will provide mini biographies of each family. All names have been changed to protect the identity of the participants.

Families in which child(ren) and caregiver were interviewed:

ADELA Joanna, maternal grandmother, and grandfather looking after two teenage grandchildren, Blake (male aged 15), and Ted (male aged 13) for previous 11 years.

Mother's Sentence: *Both parents in and out of prison.*

Research participation: *Joanna and Blake interviewed. Blake also completed a questionnaire.*

COLLIER Davina (female aged 21) looking after younger siblings Robert (male aged 16), and Tino (male aged 7). Living with partner and own child aged 4.

Mother's Sentence: *4 years. 2 years served.*

Research participation: *Davina and Robert both interviewed and Robert also completed a questionnaire.*

DENA Shelley, maternal grandmother, looking after 2 grandchildren, Daisy (female aged 11) and Jed (male aged 10).

Mother's Sentence: *13 year sentence. 9 years served.*

Research participation: *Shelley, Daisy and Jed interviewed and children completed questionnaires.*

IABONI Daniel, a father looking after his children Miriam (female aged 15), and Sam (male aged 14).

Mother's Sentence: *4 years. 4 months served.*

Research Participation: *Daniel, Miriam and Sam interviewed, and children completed questionnaires.*

PETERS Janice, maternal grandmother looking after twin grandchildren, Casey (female aged 13), and Susie (female aged 13). Mother (Lily) just released and living with them.

Mother's Sentence: *5 years served.*

Research Participation: *Janice, Casey and Susie interviewed, and teen girls also completed questionnaires.*

QUINCY Patricia, maternal grandmother looking after teen grandson Lucas (male aged 12). Older grandson was also living with them until recently. Grandsons lived with them for 12 years, since mother's first period of imprisonment.

Mother's Sentence: *Both parents imprisoned. Mother recently released but no knowledge of her whereabouts.*

Research Participation: *Patricia and Lucas interviewed.*

TAIT Jermaine, maternal uncle, taking care of his nephew Michael (male aged 9). Uncle took on care of child after another family placement failed.

Mother's Sentence: *2 years. 18 months served.*

Research Participation: *Jermaine and Michael interviewed*

Families in which only the child(ren) were interviewed:

USHER Taylor (female aged 16) living alone since mother's imprisonment. Three other siblings including Caleb (male aged 7) cared for elsewhere.

Mother's Sentence: *18 month sentence. 8 months served.*

Research Participation: *Taylor and Caleb interviewed. Taylor completed questionnaire.*

VANCE Molly (female aged 13) living with grandparents. 3 year old sibling living elsewhere. Both parents in prison.

Mother's Sentence: *3 year sentence. 12 months served.*

Research Participation: *Molly interviewed and completed questionnaire.*

WILSON Isla (female aged 9) living with grandmother, grandmother's partner auntie, father and two younger siblings.

Mother's Sentence: *Sentence unknown. 6 months served.*

Research Participation: *Isla was interviewed and completed questionnaire.*

Families in which only the caregiver was interviewed:

BARRETT Angela, maternal grandmother looking after granddaughter (female aged 3) since birth. Returned to the UK to do so whilst husband remained overseas.

Mother's Sentence: *9 ½ year sentence. 3 years served.*

Research participation: *Angela was interviewed.*

FRASER Marcus, father, separated from mother prior to imprisonment, looking after his daughter Jenny (female aged 5).

Mother's sentence: *4 year sentence. 7 months served.*

Research participation: *Marcus interviewed.*

GORDON Mel, maternal grandmother looking after two grandchildren under 4 years of age. Both parents in prison.

Mother's sentence: *4 year sentence. 7 months served.*

Research participation: *Mel interviewed.*

HAYES Dee, maternal grandmother in household with her own daughter aged 11. Looking after grandson (male aged 2 ½). Child came to her from another family placement which failed.

Mother's Sentence: *2 ½ year sentence. 7 months served.*

Research Participation: *Dee interviewed.*

- JONES** Ana, maternal grandmother and Nina, her 21 year old daughter, looking after 5 males aged 12 years and under.
- Mother's Sentence:** *On remand for 3 months. Subsequently sentence passed 5 ½ years.*
- Research Participation:** *Ana and Nina interviewed separately.*
- KAUR** Jim, father (ex-partner) looking after son (male aged 3). Half sibling looked after elsewhere.
- Mother's Sentence:** *5 year sentence. 13 months served.*
- Research Participation:** *Jim interviewed.*
- LITTON** Barbara, maternal grandmother and grandfather sharing care of grandchild (female aged 6) with father during mother's imprisonment. Half sibling looked after elsewhere.
- Mother's Sentence:** *5 year sentence. 12 months served.*
- Research Participation:** *Barbara interviewed.*
- MACA** Febe, maternal great aunt living with her teenage daughters looking after child (male aged 5).
- Mother's Sentence:** *5 year sentence. 2 years served.*
- Research Participation:** *Febe interviewed*
- NAGY** Tony (partner) looking after two daughters (females under 10 years of age).
- Mother's Sentence:** *32 week sentence. 7 weeks served.*
- Research Participation:** *Tony interviewed.*

- OWEN** Ivan (ex-husband) looking after son (male aged 5).
Mother's Sentence: *Remand. 3 months served. Subsequently 5 year sentence.*
Research Participation: *Ivan interviewed.*
- REES** Carol, maternal grandmother living with adult son, sharing care of 3 grandsons aged 4-12 with their paternal grandmother.
Mother's Sentence: *3 year sentence. 5 months served.*
Research Participation: *Carol interviewed.*
- SYKES** Declan, maternal uncle taking care of young niece.
Mother's Sentence: *5 year sentence. 2 months served.*
Research Participation: *Declan interviewed.*
- THOMAS** Emma, maternal grandmother, taking care of 3 year old grandson.
Mother's sentence: *unclear*
Research Participation: *Emma interviewed.*

Families in which only the child took part by completing the questionnaire

- XANG** Trina (female aged 15), Tasha (female aged 16).
Mother's Sentence: *Unknown.*
Research Participation: *Trina and Tasha completed questionnaire.*
- ZANDER** Chris (male aged 17).
Mother's Sentence: *Unknown.*
Research Participation: *Chris completed questionnaire.*

ZABA Three siblings, Jess (female aged 18), Seb (male aged 15), Maddy (female aged 12).

Mother's Sentence: *Unknown.*

Research Participation: *Jess, Seb, Maddy completed questionnaire.*

Part II: Three Possible Explanations for the Differentiated Treatment of Children of Defendant Mothers

In chapters three, four and five I will examine three possible explanations for the differentiated treatment of children described in chapter one. In chapter three I will explore the hypothesis that perhaps the children separated from their mother by imprisonment do not suffer any negative consequences and therefore require no particular consideration by the sentencing courts or other authorities. In chapter four I will test the explanation that the state duty of care towards children does not extend to children of prisoners. In chapter five I will ascertain whether it is the case that judges are either not permitted to consider the welfare of children when sentencing a mother to imprisonment, or they do not understand what the impacts on a child might be and are therefore unable to consider any welfare related issues for the child when sentencing a defendant mother. Part II will conclude with a discussion of the adequacy of the explanations and will identify other factors which may have influenced the development of the differentiated treatment.

Explanation 1: Children are not adversely affected if they are separated from their mother by imprisonment, and therefore they do not require consideration within the sentencing process

Chapter summary

I have two children. I send Child A to school with a lunch, but because I know that Child B will be given a school meal that day I do not supply her with a lunch. I am treating them differently, but I know that Child B will not suffer any negative impacts from my differentiation. However, if Child B were not provided with a meal at school my treatment of her would cause harm to that child, and would be inequitable. So it is with the lack of consideration for children's welfare when their mother is sentenced to imprisonment. It would be justifiable to differentiate between children separated from their parents in different court forums if the outcomes for the children were in no way comparable. If there are no negative consequences for the child separated from their mother as a consequence of maternal imprisonment, then there is no need for the court to be concerned and we need go no further in this enquiry. If on the other hand children do suffer harm as a consequence of their separation from their mothers, then it raises questions about the way these children are considered within adult sentencing proceedings in the criminal courts. In order to test the explanation offered in this chapter, I begin with a summary of what is known from research literature about the impact on children of parental and maternal imprisonment. This provides a context for the remainder of the chapter in which the interview data is explored within the conceptual framework of the thesis. The voices of children and caregivers who participated in

research interviews provide hitherto unknown details of the lived experience and consequences children face when their mother is imprisoned, and the concepts of secondary prisonisation and secondary stigmatisation will be utilised to analyse this impact.

An overview of the impact on children of maternal imprisonment

Although it is difficult to determine whether parental imprisonment is the sole cause, or an additional event which triggers harm, as was set out in chapter one, parental imprisonment has been linked with many of the difficulties and disadvantages which children of imprisoned parents suffer. Maternal imprisonment has been identified as an intensifying risk factor for children (Dallaire, 2007a) and a child with an imprisoned mother is likely to suffer more negative effects of parental imprisonment than a child with an imprisoned father (Dallaire, 2007a; Murray and Farrington, 2008; Murray, 2010; Gilham, 2012). The reasons for this are as yet unclear, but a few possible factors have been suggested. It may be due to the social constructions of motherhood and the perceptions of mothers who are involved in criminal activity resulting in harsher punishments of women as a consequence of their motherhood (Hagan and Foster, 2012). There is also evidence to suggest that although fewer mothers are imprisoned, the threshold at which their absence has an impact upon their children is lower than that of fathers (Kruttschnitt, 2010). As with children of imprisoned fathers, children of imprisoned mothers are not a homogeneous group and although some general patterns have emerged, there is also a variation in research findings, consistent with the fact that children and their circumstances differ. For example, a recent study in the United States found that for some children maternal imprisonment has a null or even positive effect (Wildeman et al, 2016); perhaps because those children have the protective factors of pre-existing secure attachments, good carer relationships, social

support and hopefulness (Dallaire, 2007b). In contrast with that finding, other research has found that some children have pre-existing promoting factors which intensify the negative impacts of maternal imprisonment (Dallaire, 2007a). As Parke and Clarke-Steward noted there are complex 'interacting trajectories followed by parents, alternative caregivers, and children across time' (2001) which mean that one would expect such variability. Proceeding with that caveat, the literature from the United States and Europe does link maternal imprisonment to a wide variety of negative consequences for children: diminished future outcomes due to disrupted primary attachments in childhood (Dallaire, 2007a); disrupted education (Dallaire and Wilson, 2010; Cho, 2011; Hagan and Foster, 2012); difficulty in following a 'pro-social' pathway (Hirschi, 1969; Fox and Benson, 2000; Green and Scholes, 2004); a very high aggregate, in number and range, of worrisome adversities and risk factors (Cunningham and Baker, 2003; Dallaire, 2007a; Miller, 2014); a greater risk of future criminality or anti-social behaviour when a mother rather than a father is imprisoned (Murray and Farrington, 2008); and care arrangements which may not be in the child's best interests (Caddle and Crisp, 1997; Poehlmann, 2005).

Focusing specifically on England and Wales there are only a few studies available on the experience of children of imprisoned mothers, and these provide some insight into the nature of the impacts which children experience. The first study on mothers in prison in England took place in 1965, when a census of women prisoners conducted by the Home Office Statistical Division found that of 530 women in prison on the 1st January 1965, 376 of those women were mothers, with more than 1,000 children between them (Goodman and Price, 1976). At the time of publication, Professor Gibbens from the Institute of Psychiatry was working in HMP Holloway conducting a medical study, and it was agreed that the data from his study could be used for further analysis of the impact on children of their mothers' imprisonment. Based on that data the first research on the children of

imprisoned mothers in England and Wales was published in the British Journal of Criminology (Gibbs, 1971). At that time 25 per cent of all new receptions to HMP Holloway were mothers of dependent children and Gibbs found that the women and their children had experienced a wide range of 'social disruption' which included, but was not limited to, imprisonment. Indicating the newness of the topic in academic literature only five other pieces of literature were referenced, two of which related to work on children separated from their mothers due to the mothers' mental illness. The second major research study on the children of imprisoned mothers in England and Wales was conducted 26 years later (Caddle and Crisp, 1997). It provided detailed information about children's living arrangements and the issues faced by children and caregivers when a mother is imprisoned. 1,766 women were interviewed, 61 per cent of whom were pregnant or mothers of children under the age of 18; a significant increase from 25 per cent in 1967. 98 per cent of their children were aged 16 or under, and 71 per cent of those children had lived with their mother prior to her imprisonment, and for 85 per cent of them it was the first time they had been separated from her. After imprisonment only nine per cent were cared for by their fathers, and even when children lived with their mother and father prior to imprisonment they were twice as likely to be cared for during the imprisonment by their grandparents rather than their fathers. Mothers reported that their children experienced a wide range of problems during their imprisonment: 44 per cent had behavioural problems, 30 per cent became withdrawn, 27 per cent had problems sleeping, 26 per cent developed health problems, 22 per cent had problems with eating, 18 per cent began to experience night time enuresis and 17 per cent had problems with their friendships. The problems seemed to increase when children were separated from their siblings, and became more serious, or more apparent, the older the child. When children experienced a change of home due to maternal imprisonment, 33 per cent had a problem with the new home and 20

per cent a problem with the new area. With children over 10 years of age, 17 per cent responded to their mother's imprisonment by 'mixing with the wrong crowd', with four per cent drinking alcohol and three per cent taking drugs. 31 per cent had to change school and for a third of the children that was problematic both for school work and attendance. 29 of the mothers interviewed had children who were living by themselves as a consequence of the mother's imprisonment, with 10 per cent of those children caring for younger siblings. Of those living alone, 75 per cent were experiencing money problems whilst a third had problems with accommodation and employment. Only 53 per cent of the mothers who had lived with their children prior to imprisonment received visits from their children whilst in prison, and 54 per cent of those mothers said that their children had experienced difficulties in visiting them. Most children lost their principal carer and one-third, their only carer (Caddle and Crisp, 1997). Despite the findings of the 1997 government commissioned research there is no evidence that these problems have been taken into account in policy and practice, and no further studies have taken place since then with the consequence that the experiences of children affected by maternal imprisonment have not been given wider consideration.

Understanding the impact

The available research literature provides evidence which strongly contradicts the suggestion that children of imprisoned mothers do not suffer any harm as a consequence of their mothers' imprisonment. However the literature provides little insight into the children's own interpretation of their experiences. The remainder of this chapter uses the data from interviews I conducted with children and their caregivers to explore how children themselves experience their mother's imprisonment. All the children who participated in this study had been physically separated from their mother as a

consequence of her imprisonment; children who remain with their mother in prison are outside the scope of this thesis.

I conducted interviews with children in England during the period of their mother's imprisonment or shortly after her release. All interviews took place between April 2014 and March 2015. In total I spoke with 27 family groupings. I interviewed 14 children including 4 pairs of siblings. One child was living independently but all others were in the care of adults, and I interviewed seven out of 10 of those caregivers. In total I spoke to 22 adult caregivers, two of whom were caregivers for the same family group. I interviewed 13 caregivers without also interviewing the children they cared for because the children were too young to take part in the research, and in two instances I spoke to the carers without also interviewing the children because the carers did not want the children to participate.

In chapter one I suggested that the harms which children of imprisoned mothers experience come from two different social acts and attach to children in two specific ways. The first group of harms flow directly from the physical imprisonment and removal of a mother and are experienced as '*secondary prisonisation*' by the child. These harms include the change of residence and change of carer which many children experience, the prison's regulation of the mother and child relationship, and the demands which are placed on the child as a consequence of their physical separation from their mother. The second group of harms come from the '*secondary stigmatisation*' which the children and their caregivers experience as a consequence of the mother's imprisonment. These two categories of harms create a framework within which the children's experiences are explored.

'Secondary prisonisation' as it is experienced by children of imprisoned mothers

'Prisonisation' is the process by which a prisoner is socialised into the culture and life of the prison (Clemmer, 1958), and Comfort extended the term to include the way in which

carceral power affects prisoner's partners when visiting the prison (2003). I suggest a further extension of the term to include not only the impact on the child when they enter within the prison's physical boundaries to visit their mother, but also the way in which carceral power affects their daily lives and relationships even when away from the prison. The impacts fall into two categories: the physical changes which a child experiences in carer, home, and education as they lose their mother's physical presence and, in parallel with her change of physical location, they too undergo a change of residence, and secondly the changes to the mother and child relationship as it becomes constrained by the regulations of the prison.

The changes children experience as a consequence of their mother's physical removal from home to prison

Physical separation

As part of this research project I asked Crown Court judges what changes they thought a child might experience when their mother is sentenced to imprisonment. Their first, and sometimes only response was to say that the child would experience physical separation from his or her mother.⁸ This is of course true; no matter what relationship the child has with their mother prior to imprisonment, whether the mother is the primary carer or an occasional visitor, the relationship will be changed through the physical separation brought about by imprisonment. The boundaries of the prison walls are experienced not just by the prisoner inside the prison but by their children outside the prison as well, as they grieve the physical removal of their mother. When children who had been living with their mother prior to her imprisonment described how they felt when they heard that their mother was going to prison and would not be coming home, they spoke of being

⁸ p.163

shocked and upset; Miriam (15) was ‘really, really upset’, and Casey (13) shared these memories:

I remember being told, that’s about it. We were round a friend’s house by school and my nan and granddad came and they were crying and [my sister] started crying and then I started crying. And then my friend started crying and then everyone basically was sitting there crying. (Casey, 13)

Even years after the event the children still had a very clear recall of the events of the day their mother was imprisoned. The pain of that initial loss was severe, as described by Molly (13) who said that ‘the day that mum went into prison’ was for her the hardest experience of her mum’s imprisonment. Caregivers also recalled the initial shock; Daniel, a father of two teenage children described telling his children that their mother had been sentenced to imprisonment as ‘possibly the worst day of my life. Outside death I can’t think of anything more traumatic’. Although the shock faded, the grief stemming from the loss of their mother did not seem to lessen. Most of the children described themselves as ‘sad’ with no one to talk to about how they felt. One child spoke of her younger brother’s ongoing grief and confusion, whilst an older child described his feelings of loss:

My little brother he’s confused; he’s not sure why she’s there or what she’s doing so he does cry a lot. (Taylor, 16)

It’s just like generally not having a mum. Like you don’t understand what it is – having her there and not seeing her is different from not having her there at all. Like you don’t understand how much she means to you when she’s actually gone. That was one of the hardest things I had to cope with. (Robert, 16)

Children did not believe that it would become easier as they became used to the situation. Miriam (15), whose mother had recently been imprisoned for a term of several years, said that her teachers told her ‘it gets easier... it will be over soon.’ I asked her if she thought it would become easier. ‘No’, she replied. Others said that it was easier to forget about their mothers’ imprisonment when they were younger, but as they grew older it was on their minds more. Central to their lives was the loss of their mother, as was evidenced by

seven year old Caleb's answer to the question, 'If you had three wishes what would they be?' 'My mum to come back, my mum to come back, my mum to come back.' (Caleb, 7)

Change of caregiver

There is no data available on the provision of care to children of imprisoned mothers in England and Wales, but it is thought that the majority are looked after by family members whilst a small proportion go to friends and an even smaller number are looked after in local authority care. Due to the difficulties in accessing children in local authority care, the children I interviewed were all in the care of family members. It is within that context that changes in wider family relationships were raised by both children and carers. When a child's mother is imprisoned and a grandmother, or auntie, or sister, or grandfather, takes on the role of primary caregiver for that child, their original relationship with the child is altered by the new role. For many children their grandparents, or other close relatives, provided love and support to them prior to their mother's imprisonment and played an important role in their lives. The mother's imprisonment alters that dynamic, and the grandparent or other relative finds themselves in the position of enforcer, disciplinarian, and surrogate parent. This can be experienced as a loss by both the children and the caregivers,⁹ and has differing impacts depending on the age of the child. Older children feel that not only have they lost their mother through imprisonment, but they have also lost their grandma, or sibling, as the role changes when they become primary carer (Robert, 16). Younger children display confusion, often calling their grandmother 'Mum', and being very unsure of their relationship with the person they visit in prison. A grandmother and an older sibling spoke of the confusion demonstrated by the children they cared for, in one family a grandchild and in the other a younger brother:

⁹ p.177 and following

I think she, from her perspective she thinks I'm her mother and her mother is just called mumma, and I'm not quite sure at what stage to explain things to her, and to what extent to explain things to her... So at the moment when I pick her up in the evenings she runs to me and says, 'Mama Mama' like the other children do. (Angela Barrett, grandmother of 3 year old girl)

SM: Does he think of you as Mum?

DC: I don't know. But then it's odd. He has called me mum a couple of times, but with him seeing his mum more often now it's different because he knows that that's his mum but before when she was in prison he couldn't see her so often. (Davina Collier, older sibling caring for 7 year old brother)

Children find themselves part of new family groupings, living with aunts and uncles, cousins and other relatives. For some this was a positive experience, but others were not wanted by the family members they encroached upon, and they experienced mistreatment or resentment:

I think that would have helped them quite a bit along the way not to feel like they were a burden ... our children who were resentful, who see us run ragged with everything and then saying things to them, like, 'well you don't live here anyway – go back to your parents, nobody wants you.' (Joanna Adela, grandmother, caring for two teenage grandsons)

Once separated, many children had very little contact with their siblings which was a cause for concern for maternal grandparents in particular:

A brother and sister had to be separated, and they're not very close and that's why we try to get them together to act as brother and sister and it's a bit hard really. (Barbara Litton, grandmother sharing care of her 6 year old grandchild)

Other children experienced multiple moves as initial placements broke down and the children had to adapt to more than one new 'home' situation:

He [nephew] was sort of between me and my brother because he [brother] is in his last year of uni. We were determined that he wasn't going to go into care...but it wasn't really working out with my brother. He was missing quite a lot of classes and stuff so we made the decision for him [nephew] to stay with me. (Jermaine Tait, uncle caring for 9 year old nephew)

M: I was living with my aunt for a little while and then I moved in with my nan and granddad...I think it was more better for me to live with my nan and granddad because its quiet.

SM: Where does your sister live?

M: With my aunt but she comes and sees me most days but she comes and stays with me every weekend. (Molly, 13)

The caregiver has influence over which wider family relationships the children are able to maintain in the mother's absence. In some instances, where there was ill feeling from the father's side of the family towards the mother's side, and the maternal grandparents had the care of the children, the children lost contact with the paternal relations as was the case with the Dena family. When a father took on care of a child the maternal grandparents often had a more peripheral role in the child's life than before imprisonment. The Litton family spoke of this change. Of course the opposite sometimes happened as children benefitted from new relationships with the wider family. For example, in the Maca family the maternal grandmother's relationship with the child was re-established by the great aunt who took on the care of the mother's child during the imprisonment.

Changes to home

Previous research suggested that in England and Wales when a mother is imprisoned only five per cent of children remain in the family home (Caddle and Crisp, 1997), and so, like their mother who has been moved to a prison, the children also find themselves being moved from their homes. In the sample of children who took part in this research study only two children, Miriam and Sam, remained in their home; all others had moved into the homes of new caregivers with the exception of an older child who was living alone for the first time as a consequence of her mother's imprisonment (Taylor, 16). When imprisonment was unexpected, the children's experience echoed their mother's as they moved home with little or no preparation, and the families they moved to lacked even the most basic necessities for them:

I just brought the children back here. It was the police, the police actually who bought all of the things we needed, all the practical things because I didn't have nappies or anything. (Shelley Dena, grandmother caring for two grandchildren)

When children move from their homes they also had to leave behind their possessions, giving up 'loads and loads of stuff' (Nina Jones, aunt caring for five nephews) because there was not sufficient room in the home they moved to for their belongings. Janice Peters, the grandmother of twin girls, described her granddaughters move to her home, an unfamiliar location where 'they knew nobody', with the ensuing loss of friendships as 'very hard'. Some children move in with childless relatives who live in housing which is not ideal for a child. I visited one child at the home of his caregiver, and found that the entrance was in a flooded back alley. To reach the doorway I had to walk through deep mud, along a passageway filled with old mattresses and people's rubbish. Michael (9) had to walk through that every day to go to school. Children not only experienced a physical move, but similar to their mother's integration into a prison regime they too had to fit into the routines and habits of their new household, 'different people who see things differently and the rules do change' (Nina Jones, aunt caring for five nephews). Caregivers knew that it was difficult for the children to understand that they must live with different rules and new ways of doing things. Overcrowding was an issue for many children and their carers. The most severe overcrowding among the families I interviewed involved two adults and five children living together in a two bedroomed flat. As the mother was on remand (for a period in excess of seven months) and the grandmother did not have parental responsibility, the family was unable to apply for more suitable housing. Due to re-location and overcrowding they became isolated from people outside of their own family grouping. Ana Jones, the grandmother of the pre-teen boys spoke of how the cramped conditions in their flat meant that she could not let the boys invite friends to play or for birthdays, as there simply was no room for anyone else:

It's cramped. What was my bedroom I've now got two lots of bunk beds and four boys sleep in there. The middle room is my daughter's room and the baby sleeps in there and I sleep on the settee in the front room and the front room it's a new apartment, the kitchen's in the front room so you ain't got a separate kitchen. (Ana Jones, grandmother caring for 5 grandsons)

A number of children lived between two or more homes spending part of their week with their father and the rest with their grandparents, perhaps as a consequence of the father's working hours not allowing him to take on full child care responsibilities, or because the grandparents were unable to care full-time for children. Occasionally both grandmothers shared the care between them. Other children had multiple moves when placements failed for various reasons. Below are extracts from two interviews. In the first, the child chose to make the move, and in the second the original carers did not wish to continue looking after the child, and the grandmother who had taken over the care of the child spoke about the effect of that placement on her grandson:

Afterwards [after Mum's imprisonment] my Dad kept getting really angry over like nonsense. At the time I was being a troublemaker I was sort of talking to him and we used to have arguments and I was like I'm going to live with my sister. So then yeah that's what happened. (Robert, 16)

He was in another family as well, but they didn't show him love, because when the mum goes to prison, it depends who they give the kid to look after, it damages them. You have to shower those kids with attention and love and emotions and make sure that they're not missed out. And if they are not going to get that they are going to sit and their little brain is going to be like a second hand going round. So that little boy was definitely withdrawn. He had some behavioural problems. (Dee Hayes, grandmother caring for a 2 ½ year old child)

Moving home, although potentially disruptive, was not a wholly negative experience for all the children, as for some the home situation into which they moved following their mother's imprisonment was more stable than anything they had previously experienced. For those who had lived relatively chaotic lives prior to their mother's imprisonment, a move to a new carer and new home enabled them to establish routines which seemed to benefit them. This was the experience of Davina Collier, an older sibling who was caring

for her four year old brother whilst their mother was in prison. However, within the group of children I interviewed this positive aspect of the change of home was an exception rather than the norm.

Changes to education

In addition to a change of home, many of the children I spoke with had to move school or childcare provider (e.g. nursery) as their new home was not in the same area. With over-subscribed schools, particularly in cities like London, it is not easy to find new school places and this negatively affected a number of the children I interviewed. Michael (9) made a 90 minute journey to school every day for a year following his move to live with his uncle until a place became available in a local school. In another family grouping four children did not attend school for several months after their move because there were no school places available in the area that they moved to, and it was too far to travel to their old school:

They were in a different school when they first moved with us [November], but then because we are too far away they couldn't go. I think it was about the end of January, the middle end of January time that they started. (Nina Jones, aunt caring for five nephews)

Children who did not experience a physical move which precipitated a change in their schooling often suffered disrupted schooling in any event, as their ability to concentrate was affected by their mother's imprisonment. Lower levels of achievement following their mother's imprisonment were not uncommon. For some, the absence of a caregiver who helped them with schoolwork contributed to declining success at school, as Sam (14) explained to me:

I don't get any help with homework apart from my sister anymore. If I'm struggling my Dad doesn't really know the answers and I can't get help with the techy stuff because I'm supposed to be the one now who knows the most, so I

don't have any help in the subjects I'm good at now. It's quite advanced now in maths and things, so I can't get any help for that.

Older children had to study in busy, noisy spaces as they moved into families with younger children, and in overcrowded housing it could be difficult to find the physical space to do homework. Robert (16) who was working towards G.C.S.E exams, used the local library as a study space as at home he shared his bedroom with a four year old and a five year old. A caregiver living in a two bedroomed flat with seven people described the difficulties of finding space in their home:

[they are] doing their homework all over the house, and sometimes we've even got someone doing their guitar practice in the toilet because there's no space. (Nina Jones, aunt caring for five nephews)

The changes children experience in their relationship with their mother as a consequence of her imprisonment

A nuanced and detailed account has emerged from this research of the changes children experience in the mother and child relationship due to the mother's imprisonment. Although a child may continue to have a relationship with her mother whilst she is in prison, the nature and quality of the relationship is altered by the fact that it can only exist within the boundaries placed upon it by imprisonment. The majority of children in this study described the limiting of their relationship with their mother as the most difficult aspect of the imprisonment. The relationship is, as noted above, limited by the mother's physical separation from the child, and for many children the period of their mother's imprisonment is the first time they experience separation from her, which for the youngest children is experienced as a profound trauma. Additionally however, the removal of the mother to prison necessitates that all communication, and therefore relationship, between a mother in prison and her children can only take place if the children visit the prison or make contact with her by letter or telephone. Such

communication is subject to limits which are outside of the child's control, and in this section I will begin by looking at the ways in which the limitations imposed by carceral power affect children's ability to maintain their relationship with their mother whilst she is in prison. This will lead to consideration of how the mother's ability to meet the child's needs is also affected by imprisonment, and the impact which a period of imprisonment, and the secondary prisonisation which accompanies it, has on a child's future relationship with his or her mother.

Maintaining a relationship

There are three ways in which children can maintain a relationship with their mother during her imprisonment: through face to face visits, through letters, or by telephone calls. It is known that children find it difficult to visit their mother in prison, and the Social Exclusion Unit reported in 2002 that only half of the mothers who had lived with, or were in contact with their children prior to imprisonment, had received a visit since going into prison (Social Exclusion Unit, 2002). I will firstly consider the barriers which prevent children from spending time with their mothers within prison, before exploring children's experiences of face to face visits. As outlined in chapter one the term 'secondary prisonisation' was first used by Comfort (2003) to describe the social processes which affect prison visitors, when as non-offending participants in prison visits they become subject to the rules and regulations of the prison. In exploring children's visitation with their mothers I will consider how they too are subject to secondary prisonisation.

Maintaining a relationship through face to face visits: Face to face time between a mother and her child is limited by two factors: firstly, by the prison's visiting regime and the

mother's capacity to access visits, and secondly, by the ability of the child to attend visits. These factors determine the frequency and duration of the visits, and (when visits do take place) the quality of the interaction is affected by the prison environment and prison regulations, both of which impose constraints upon the child's ability to build relationship with their mother through prison visits.

Visits between mothers and children are at the discretion of the prison, with frequency and duration determined by prison regulations and staffing levels. 'The Offenders' Family Helpline' website states that in general, remand (unconvicted) prisoners are entitled to daily visits whilst convicted prisoners can have three or four visits each month (Offenders' Family Helpline, 2016), however this level of visiting is not always available to prisoners. In a prison where a number of the mothers of children I interviewed were being held, convicted women were allowed two one hour visits each month, and a family support worker told me that this was due to the prison being understaffed. Visitor numbers may be restricted and when children reach their teens they may be regarded as adults for the purposes of visiting which can cause difficulties for mothers with several children due to the restrictions on adult visitor numbers. In some prisons women may be allowed additional visits if they progress from basic to enhanced status within the prison, but it is very difficult for a prisoner to achieve enhanced status if they are moved between prisons. Extended family visits are available in some prisons but women have to apply for their children to be allowed to visit on those days, and in many prisons extended family visits are not a right but a privilege. A family support worker at an extended children's visits day spoke of such visits as 'a reward' for the women, and there was competition for places on family days as the prison held 500 women, but due to staffing shortages only 30 women could participate in the extra visits scheme.

Visiting times also vary significantly between prisons, for example at HMP Askham Grange prisoners can have social visits for two hours each Saturday and Sunday, but at HMP Eastwood Park people have a choice of five afternoons each week when they can make their visits, and extra visits can be arranged between mothers and children every Monday to Friday morning (Ministry of Justice, 2016d). In an era of cuts to prison funding it is inevitable that in more crowded prisons visits have been reduced and are subject to cancellation. Two children I interviewed, Daisy (11) and Jed (10), had not seen their mother for a six-year period, due to the fact that she was held hundreds of miles away from the family. They tried to see her during that time, but on two out of three occasions their intended visit was cancelled at short notice by the prison, with no explanation given for the cancellation. It was not uncommon for families to feel that they had no control over their plans to visit; as Carol Rees a grandmother said, ‘really the control is more [in the hands of] the prison and the offender.’

A child’s ability to attend visits is the other factor which impacts upon a child’s face-to-face contact with their mother. Children are reliant on a caregiver who has sufficient financial resources to make the journey, is willing to bring them, and who, along with the child, is available to visit at the hours prescribed by the prison. Women are often held a long way from their homes due to the lack of prison places for women, with on average one in five women placed more than 100 miles away from their home (Social Exclusion Task Force, 2009). Prisons, with a few exceptions, are not found within urban areas, and therefore to reach prison by public transport can be both expensive and very difficult. Visiting expenses can be re-claimed by those in receipt of certain benefits but do not include taxi fares, and therefore if the prison is some distance from a rail or bus station it may not be financially viable for a caregiver to bring a child to visit their mother. Daisy and Jed Dena, mentioned above, did not see their mother for six years as their

grandmother did not have enough money to make the journey with the children to see her. Those who visit regularly tend to be those with their own transport and a willingness to make a significant commitment of time to the visits. The Litton family was an example of this, bringing their two grandchildren to visit their mother regularly. Their grandson lived with his father, but as the father did not want to bring the child to visit his mother the grandparents took on the burden of facilitating his visits too:

We do fortnightly from [our home]. A two hour drive. Up at 5.30am to be here for 10am...we come up here sometimes for an hour, and it's a long way. And the children moan all the way 'are we there yet?' We get back at 7pm from a one hour visit. (Barbara Litton, grandmother, sharing care of 6 year old grandchild, and additionally taking 2 year old grandson to visit Mum)

Visiting times are often during school hours and therefore children of school age are unable to attend at those times, and even when children can be made available they are dependent on having a caregiver who does not have commitments during normal working hours. For school age children their visits usually take place at the weekend; on a day when most children spend time at home or with friends, children of imprisoned mothers travel to and from prisons. Daniel, the father of two teenage children, told me how the timing of visits made it difficult for his children to see their mother:

SM: So how often are you able to visit?

DI: This [mid-February] is the first time since just before Christmas - so every couple of months. It's a long way to come. It's expensive ... And the timings of it is awful. Here they have it 9-10am so you're travelling through the rush hour. They never thought maybe 10 -11am. So you could actually travel off peak so that your cost of travel is less. That's Monday to Friday. And then there's another from 2-3pm. Well what use is that? The kids finish school at 3pm.

Even when children are physically able to attend the prison to visit their mother, a number of caregivers, usually in agreement with the children's mothers, felt that the normal (one hour) visits were too short and traumatic for the children to attend. Their discomfort stemmed from the rules imposed by the prison on the children's behaviour, and the

difficulties inherent in visits for the children. Angela Barrett, the grandmother of a three year old girl whose mother was in prison explained why this is:

I mean when we go for a visit my daughter has to sit in a seat. We're all allowed to move but she's not allowed to move. Of course there's hugs and so on that's allowed but it's completely artificial.

Another grandmother described the sense of discomfort experienced by herself and her five grandsons when they visited the prison:

I don't know it's just, but I think it's because it's so alien to me and a lot of other people. It's the first time that ever, you know we've not ever come. It's not like so and so's in that way. There are people here who try and make it easier but I don't know. For them [grandsons] it's really hard as well. They come here and it's I don't know, it's really strange going through there. And sometimes they go in the family room as opposed to sitting in where everybody is, but obviously it's not very private. (Ana Jones, grandmother caring for 5 grandsons)

Travelling to the prison can be arduous for younger children. One carer described a child becoming 'really agitated' because of his fears of using public transport (Nina Jones, aunt caring for five nephews). For many small children the journey felt very long and a number of grandparents mentioned this as the reason children gave for not wanting to make the visits (Barbara Litton, grandmother to 2½ year old boy). Even for older children the journey added to the difficulty of visits:

I quite enjoyed them [visits] but it was quite hard to get there because we had to get like a few trains and a couple of tubes to get there. (Sam, 14)

The experience of being inside a prison is also an ordeal for children. Many talked about the sniffer dogs scaring them, or their dislike of being searched, or the crowded and noisy nature of the visits hall (Lucas, 12). Prison was described as 'weird' and even the appearance of the buildings frightened some children:

[Visits were] quite good but intimidating because you could see the fences, unlike HMP X where you couldn't see the big fences but at HMP Y you could. When you were inside it looked like a small little village. It didn't look as bad as HMP X inside, but outside it was more intimidating. (Lucas, 12)

Prison security necessitates the enforcement of strict regulations around visits, and as a consequence food and drinks cannot be brought in to the visits areas in most prisons. For children who have travelled a long way and who are often hungry and thirsty, it is an added discomfort (and expense to the carer) to buy food and drink from the small selection available in the visits hall, rather than providing their own snacks. Even bottles of water cannot be carried in to the prison. Although this is a seemingly minor inconvenience it may negatively impact the entire visit for a child, as was evidenced by 11 year old Daisy's account of her first visit in six years to see her Mum:

Well the last time we saw her it was just in a massive room but there was nobody in it and it was really weird and I didn't really like it because, I don't know, you weren't really even allowed to take water in and at that point I was car sick.
(Daisy, 11)

The consequence of these difficulties for children is that caregivers choose to bring the children to the prison only when they are able to access family visits and extended children's visits. This means that children may have better visits with their mothers but they are less frequent:

I don't really feel comfortable with him being around this sort of thing and neither does my sister, so we try to keep it [contact] for the longer extended visits.
(Jermaine Tait, uncle caring for his 9 year old nephew)

I think the nicest thing is when they do the day where we can all go, my daughter comes, brings the children and we all go. That's a really nice day. We've had that twice now. That's a lovely day, you can play with them and do colouring and it's a five hour quality visit. It's a nice day. It's packed in there as well. Which is nice.
(Barbara Litton, grandmother caring for 6 year old granddaughter)

In prisons where those rules around visiting have been relaxed, children seem to enjoy visits more:

It was kind of more fun, because they had this family room and you could go in there and you could have up to 8 people in there, so we spent the two days before our birthday in there, and our cousins came and we had cake - chocolate cake.
(Susie, 13)

Children described the emotional cost of maintaining relationship with their mothers through prison visits. Visits were often emotionally fraught as they felt the reality of their mother's imprisonment when she was unable to leave the prison with them at the end of the visit. Robert described his first visit to his Mum six months after she was imprisoned:

That's when it ... you always think yeah your mum's in prison but that was my first time even visiting a prison so obviously seeing in over the gates I was like 'whoa is my Mum actually here?' So I hadn't seen her for like 6 months before that. So you go 6 months without seeing your Mum and then you see her walk out and you're like 'ok, this is actually real.' So yeah, it was really hard then. When you have to leave as well. She's just sitting there and you have to walk out. That was hard as well. (Robert, 16)

Younger children described their emotional responses to visiting in more simplistic terms. When asked, 'What are visits like?' Michael (9) said '...the good thing is that I see my Mum. The bad thing about it is that I leave', and Caleb (7) simply described them as 'sad'. From the interview data it was apparent that it is common for children to both enjoy and to be upset by visits. Although the time with their mother is something which they look forward to and appreciate, they are unhappy after it has taken place, and it can negatively affect their mood for some days after the visit as Miriam (15) told me: 'I like them, I like going in there and seeing her and stuff but I don't like leaving. I'm just upset.' Carers used words such as 'awful and emotional' (Daniel, Miriam's father) and Tony, another father said that after a family visit his daughters would be 'so upset for a couple of days now'. Barbara, a grandmother told me, 'It's quite traumatic when you drive them away crying and they want to stay and they don't understand'. Carol spoke of her three year old grandchild holding on to his mother's leg, crying and refusing to leave.

Maintaining a relationship through telephone calls and letters: Visits are not the only way for children to maintain a relationship with their mother whilst she is in prison;

letters and telephone calls are permitted, although they too are subject to conditions and restrictions. Telephone calls can only be made during association time, and as there is high demand for the use of the telephones, calls are limited; carers spoke of calls ‘cutting out’ after 15 minutes to ‘give everybody else a chance’ (Angela Barrett, grandmother). Families cannot make telephone calls into the prison to speak with a prisoner and therefore telephone calls can only take place if the mother in prison has sufficient money to pay for calls, which are charged well above the normal rates for telephone communication. Phone credit is managed by a PIN card system, and credit can only be used to call numbers that have been cleared by the prison. Prisoners need money to buy PIN credit and if a woman is on basic status or has no job within the prison, and therefore no earnings, she can only make telephone calls if friends or family outside the prison send her money for telephone calls (Offenders’ Families Helpline b). The prison regime and governance therefore determine the amount of telephone contact children can have with their mother. Daisy (11) was unable to visit her mother because of the distance to the prison, so I asked her about telephone calls:

Well she can’t really ring us that much anymore because she doesn’t have any money to use the phone and my Grandma can’t send her any money because she doesn’t have enough money to send her. So we can but we don’t really get to talk to her. (Daisy, 11)

Although most of the children in the families I interviewed had telephone contact with their mothers, very few of them talked about it in a positive way. In some families short calls were used to maintain daily or frequent contact with children, but the length of the calls meant that they were often a source of frustration, rather than satisfaction or comfort to the children:

SM: And how often do you get to talk to your mum then?

M: Every day, but it’s only for a couple of minutes because obviously she can’t get much on the phone, so I’m not able to tell her all that’s happened in the day because I have to pass it to Sam or Dad. (Miriam, 15)

Miriam's father Daniel found it difficult to watch the inevitable 'dip when they put the phone down' knowing that his children 'don't come off the phone positive.' Children have to be available for the entire duration of the period during which the call may be made, as their mother does not know at what time she will have telephone access. Waiting for phone calls from prison was used by Comfort (2003) as an example of the way in which prison life extends into the lives of family members outside of the prison. If children want to maintain relationship with their mother through telephone calls they too must become subject to the timetable of the prison. Younger children who initially loved the routine of daily phone calls found their enthusiasm waning as the sentence progressed. Mel Gordon described her granddaughter no longer running to the phone but instead sighing when she had to interrupt her activity to talk with her mum. Older children expressed frustration that they were unable to talk to their mother when they needed to. Miriam said:

I miss talking. Yeah talking basically, if there's something that would happen like, I have to wait for her to call me, instead of being able to tell her straight away what's happened. (Miriam, 15)

Children can send letters to their mothers although this is not a private means of communication as all letters are checked by staff before being passed on to recipients. Letter contact does not seem to be widely used between children and their mothers, which is perhaps unsurprising given its declining usage in life outside of prison. Only those children who had no face-to-face visits due to distance, and no telephone contact due to finance, used letter contact. For other children the uncertainty of not knowing whether their Mum received their letter, and the wait for any kind of response, meant that they did not want to engage with letter writing (Nina Jones, aunt caring for five nephews). Some

children sent email, but had not received replies and were not sure if the emails had reached their mothers (Miriam, 15).

Although one might expect that telephone and letter contact would enable relationships to continue between mothers and children, it seems that children find these modes of communication with their mothers frustrating rather than satisfying. Children who lived with their mother prior to imprisonment, and who were used to having her available to them at all times, found it very difficult to lose that availability. Nina Jones, the aunt of five young boys, described their experience:

The phone calls, because they're so expensive she can't do a lot of them, and because she wants to keep up regular phone calls it's like a ten minute phone call or a five minute phone call every day to say good morning to them and to have a good day at school, or to say good night to them ... I think for a normal child they'd want a lot more talking because they're so used to, because that's how they grew up, being able to share everything, and now to just say, yup I had a good day and then there's not really any time to say anything else over the phone, and it gets cut short. (Nina Jones, aunt)

Children are used to choice and immediacy in their communications with their mothers, and when that is removed as a consequence of imprisonment children find it very difficult. A number of children emphasised that although people, most often teachers, equate their situation with that of children of divorced or separated parents, it is not at all similar as they cannot see or talk to their mothers whenever they need to. Imprisonment forces communication into short periods of time, at a frequency and duration determined by the institution, and as children grow older there is a decreasing likelihood that those pre-set times for communication will coincide with the time that they either need or want to talk to their mother. Isla (9) talked to me as she waited to go in to visit her mother, 'Sometimes you can talk to them and sometimes you just don't feel like you want to talk to them at all.' For children of imprisoned mothers too often the moment passes, and the time spent together is difficult. This limitation of all forms of communication is a form of

secondary prisonisation, as the prison regulates the way in which a child can relate to their mother. The next section of the chapter discusses the impacts of this limited communication on the mother and child relationship.

The changed relationship dynamic between mother and child as a consequence of the mother's imprisonment

As a consequence of the limited nature of communication available between an imprisoned mother and child, a mother has to relinquish any caring role she previously had for the child when she is sent to prison. Another adult has the day to day care of her child, and although a mother may still be involved indirectly in decision making about the child she has very limited ability to meet the child's physical or emotional needs. Children respond to this change by making adjustments to the relationship. Some impose boundaries on the conversations they have with their mothers in an attempt to protect her from an awareness of the more difficult aspects of their life. They believe that their mother has 'suffered enough' from her imprisonment:

[I] don't really want to make it worse for her. It's already bad enough I don't want to make it even worse by telling her bad stuff here, because then like she'd prefer just to hear everything good that's going on while she's stuck in that place.
(Miriam, 15)

The relationship is altered as the child feels a duty or responsibility towards the parent, and the parent is no longer able to meet the needs of the child. Robert (16) talked to me about this:

SM: Do you think your Mum has any idea of how much it affected you?
R: I think, like, she has an idea but again she hasn't asked me how it's affected me. I think she's just happy to be out and to see me. I think she just wants to get past that and like try to mend bridges and stuff instead of trying to ask me how I felt and go over the emotions again.

The bond between mother and child is also inevitably diminished as much less is shared between them. A father observed this occurring in the relationship between his imprisoned wife and their children:

I'd have to say, she rings as often as she can. She tries to talk. You could see in her face how excited she was to see them today. I don't think I can really say, can answer for her, but I think she feels she's losing her children. (Daniel Iaboni, father caring for two teenage children)

The impact of maternal imprisonment continues after the sentence is served, and during the period of imprisonment children worry about what will happen when their mother is released from prison. For some children the relationship has been so significantly altered by the time spent apart that they choose not to live with their mother after her release. 'Basically they came out and I got asked if I wanted to live with them and I said no' (Lucas, aged 12). Others are faced with a dilemma when their mother is released to an area which is not their hometown and they are unsure whether they should move to be with her or stay with their caregivers. Daisy (11) said this was hard. Even when the mother is re-integrated into the family the relationship remains significantly changed as a consequence of the imprisonment. The children may continue to suffer from fear and anxiety when their mother is released on licence as they worry that she will disappear from their lives again:

L: Sometimes I worry where she is. Sometimes I forget.

SM: When you worry what are you worrying about?

L: That she's alright. (Lucas, 12)

The children's experiences, as described in this section provide an understanding of the way in which children's lives are completely changed by their mother's imprisonment, as they too live their lives 'in the shadow of the prison' (Comfort, 2008). The next section of the chapter considers the second group of harms which children experience: those which originate from stigma due to their mothers' imprisonment.

‘Secondary stigmatisation’ as it is experienced by children of imprisoned mothers

In chapter one I suggested as part of the reconceptualisation of harms which children suffer as a consequence of maternal imprisonment, that the concept of secondary stigma (Goffman, 1963; Condry, 2007) could be utilised to analyse the experiences of children when their mother is imprisoned. Phillips and Gates (2011) suggest that negative attributes attach to the label ‘children of imprisoned parents’, and this causes children to become socially marginalised, with consequences for their mental health and their social identity (Link and Phelan, 2001: 287-294). The next section of this chapter will explore how children experience this social process.

The children I interviewed had almost without exception chosen not to share the fact of their mother’s imprisonment with other people. Caregivers, who had been unable to keep the imprisonment a secret, believed that when it had become known at school, the children were treated differently by the parents of their classmates. They spoke of whispers in the playground (Marcus Fraser, father of a 5 year old), and believed that the children they cared for had been excluded from class social events e.g. birthday parties, or they had experienced other parents declining their invitations for their children to play or come to birthday parties for the child whose mother was in prison:

PQ: I used to take [grandchild] to school and there was always chatter and you could see the people looking at you...I’d have a birthday party for [older grandchild] or a birthday party for [younger grandchild] and a lot of kids wouldn’t turn up and I thought how sad.

SM: Were the children aware of that?

PQ: No. I tried not to let them. Five or six children would come but not as many as I’d anticipated. (Patricia Quincy, grandmother caring for grandsons)

The children self-reported in interview that they had become guarded in their relationships with people, and no longer had openness in their friendships (Link and Phelan, 2001:287). They didn’t want people ‘to judge me for the situation’ (Molly, 13).

Some had experienced classmates using the information of their mother's imprisonment in a way that upset them:

I wish I hadn't told Sara because she always uses it against me...whenever we're in an argument she brings it up because she knows it's like a hard subject. (Daisy, 11)

Children whose mother's crime had been reported in the papers without anonymity, lived with constant anxiety, worried that someone might mention their mother's offending to them. Sam, (14) spoke about this:

SM: So after your Mum was sent to prison you had a few days off and then you went back to school. Was that really hard?

Sam: Yes. People would know anyway because people would read the Daily Mail which it was in, so that was not the best thing.

Many older children said that they had no-one that they could talk to about their mother's imprisonment, and when I spoke with 16 year old Robert, whose mother had been in prison for two years, he told me that I was the first person who had asked him how he felt about his mother's imprisonment. Many older children identified themselves as being different to other children, but were unable to articulate what it was that made them different, or why they felt different; however that feeling of 'difference' meant that they became guarded in their relationships with friends and with teachers:

L: Sometimes [I feel different] but I don't like to think of that, I want to feel normal.

SM: And when you feel different what is the difference?

L: People don't know what I've been through, they don't understand. (Lucas, 12)

In general their internalised behaviours led to isolation, and although very few of them felt that they had experienced direct incidents of shaming or stigma related to their mothers' imprisonment, many of them believed that if they were to share that aspect of their lives more freely they would experience negative social interactions. This was the same whether the mother was in prison for a short period or a period of several years.

When asked what they would advise other children to do the advice given was simple: Blake (15) would tell another child to ‘Lie...[long pause]..... well not lie just don’t let on the full story, just change it.’ The fear was not always that someone would be unpleasant about the situation or would tease the child, but that the mention of it when a child was not prepared for it was too painful to experience. Children also expressed concern about their mother’s release, not only how it would affect them, but their worries about their mother’s friendships and relationships and her re-integration into society:

M: Third one [third wish] - make it so that when mum gets out that people who know the family, her old friends and stuff, a few of them talk to me sometimes, but to not treat her differently.

S: Does it worry you that that is going to happen?

M: Yes

S: Why ? What do you think will happen?

M: That mum’s old friends and people she’s known for ages and ages are going to believe everything and not be friends with her, or judge her and be horrible ... It just worries me. (Miriam, 15)

When children experience such difficult and far-reaching life changes, and have to live their lives subject to the effects of secondary prisonisation and secondary stigmatisation, it is inevitable that their emotions and behaviours will be affected. When I spoke with children they talked to me about their emotional responses to their mothers’ imprisonment, whilst their adult caregivers shared their observations of the children’s behavioural changes following their mothers’ imprisonment. The combination of both perspectives provides insight into the more private and intangible impacts of maternal imprisonment on children, and these are shared in the final section of the chapter.

Confounding Grief: The effects of secondary prisonisation and secondary stigmatisation on children’s emotions and behaviours

Although as was noted at the outset of this chapter, behavioural changes in children of imprisoned mothers cannot be irrefutably linked to the imprisonment of the mother, I

suggest that there is a high incidence of certain emotions and behaviours in this group of children and one should not exclude the possibility that they are attributable to the mothers' imprisonment and the impacts of secondary prisonisation and secondary stigmatisation on the children. In this section of the chapter the voices of the children and caregivers allow the reader to hear of very similar behavioural changes in children who have no shared experience other than the imprisonment of their mothers. The fact that children of all ages and both genders, living with parents but also living with grandparents or other kin carers, seemed to exhibit corresponding behaviours and emotions is I would suggest, indicative of the reality that the imprisonment of a child's mother creates common difficulties for most children. The children were described by their caregivers as having intense emotional needs, far beyond those that a 'normal' child of the same age would have. The carers talked of 'intensive parenting' being required due to the very complex emotions which the children in their care were experiencing. Children had been diagnosed with attachment disorders stemming from their mother's imprisonment (Susie, 13) and many exhibited aggressive and threatening behaviour towards either their new carers or their peers at school. Several of the younger children demonstrated regressive behaviours. Sleep was disrupted and children refused to sleep alone. Behaviour and age appropriate development also regressed, at times in quite serious ways. More than half the caregivers described the children as angry, agitated, aggressive, violent, or having problems at school. In all cases the caregivers reported that the troubling and disturbed behaviour began after the mother's imprisonment. In the following sections on grief, anger and physical aggression, sleep problems, regressive behaviours, problems at school, and anger at authority.

I called this section of the chapter 'Confounding Grief' because having heard children and caregiver's accounts of children's lives during maternal imprisonment this is the best

term to describe all that they experience. The overarching emotion these children experienced is grief; they miss their mother. They are sad that they cannot see her or talk to her, but many other emotions and behaviours also become part of their experience. I have used the word ‘confounding’ to describe these because to confound is, according to the Oxford English Dictionary, to confuse by not according to expectations; to defeat a plan, aim or hope; to overthrow, and to mix things up. This describes perfectly what this grief does to children. All their expectations are changed, their life plans alter, and their life course is upturned and confused as a consequence of their mother’s imprisonment. It is also ‘confounding’ in the sense that it is not properly understood by society. Stigmatisation means that their grief is hidden and unacknowledged due to an underlying, unspoken idea that if a mother is imprisoned she deserves to be there and these children are therefore not entitled to the grief they feel. There is no doubt however, that this confounding grief is a key element of the experience of children of imprisoned mothers.

Grief

Adult caregivers corroborated the recounts of the children shared at an earlier point in this chapter, with many of them recalling the distress of the children, both at the initial separation, and then in the days, weeks, months, and years that followed. They regarded the sadness of the children as overwhelming at times and reported that the children had experienced significant grief:

Emotionally, it’s terrible. It’s like they’ve changed so much, they’ve got behavioural problems. They weren’t like that before. Especially the little one cries for his mum all the time. (Tara Williams, grandmother caring for grandchildren aged 9 and 5)

Carers described children as unable to articulate their sadness and spoke of how it manifested in nightmares or sudden outbursts of grief:

They have their moments and they get upset and they've had nightmares and I think their biggest fear is not being able to see her and they don't even think, they can't comprehend about what's going to happen. (Ana Jones, grandmother caring for five grandsons aged between 3 and 11)

It did affect Casey very badly. It affected Susie badly but Susie dealt with it differently. After a while she'd come and talk to us. We tried to get them to talk to us but Casey would just bottle it up and bottle it up, and yeah it was hard there was lots and lots of tears for months and even a year on, all of a sudden one of them would burst into tears. (Janice Peters, grandmother caring for twin granddaughters aged 13)

The grief was not linked to the age of the children, and in fact for those who had looked after the children since early childhood they sometimes felt that it was becoming more difficult for the children to manage as they grew older:

It's getting harder as they're getting older. It's getting harder now. The children are getting more aware of what happened. They are getting more aware of relationships and things in life and they are getting more aware of what happened and why, and they are not easy questions to deal with. And they are not easy answers for them to deal with so it is getting harder. (Shelley Dena, grandmother caring for 10 and 11 year old grandchildren)

Anger and physical aggression

Some children were described as displaying anger from the very moment their mother was arrested, or the moment they first heard about their mother's imprisonment:

I had to go to fetch the children. They were distraught. Especially Zane because he understood a little bit because he was five. He was really angry, and he was angry at me because his mum had been arrested. (Patricia Quincy, grandmother caring for grandsons now aged 12 and 16)

I didn't know that she went to prison and then when I found out I just got angry. (Isla, 9)

Very young children displayed behaviours which had not existed prior to their mother's imprisonment:

I'm wondering if he'll come back, because he is just screaming and shouting, he just has tantrums all the time. He was such a sweet little boy. (Dee Hayes, grandmother caring for 2 ½ year old grandson)

For many caregivers they were the only person who experienced the child's anger and when it was expressed as physical aggression they were subjected to kicking and punching by the children:

SM: So how has it been?

M: Tough. Tough. I work full time as well so with the baby it's not so bad because he doesn't really know any different. He's been with me since he was a baby but with Elly (aged 4) it's more, she's very angry and she's lashing out at me. Quite a few things happened. She started school, she lost her home, she lost her mum, she lost her dad, she moved in with us, all round the end of July she started school in September. So it's quite tough. She's in a room with her brother now because we've only got one spare room. We talk to the school quite a lot just for guidance and support, because just now and then, with everybody else she's fine but with me she'll lash out, if it's really bad kicking, punching, slapping, which is quite hard because we had such a good relationship before. (Mel Gordon, grandmother caring for granddaughter aged 4 and grandson aged 15 months)

He used to have these terrible temper tantrums - he's got a lot better now. If he's really in a mood he'll throw a piece of paper at you, but it was knives and plates or everything would just be destroyed. I'm surprised nobody has been physically hurt with some of the assaults that have been going on. He's a lot better now than he used to be. There were golf balls through the front door. (Joanna Adela, grandmother caring for grandsons aged 14 and 15)

She wouldn't talk about anything unless she wanted to you know and she still doesn't now, but if she doesn't want to talk about something she won't talk about it and if you try to push her on it she'll flip out on you. She'd kick at you, she'd hit you, you know anything. (Janice Peters, grandmother caring for 13 year old twin granddaughters)

Sleep problems and regressive behaviours

Many of the children had difficulty sleeping when they first moved in with their new caregivers. Mel Gordon described her granddaughter's sleep behaviours:

SM: Have there been issues with sleep?

M: Initially there were. I would have to sleep with her. She'd go off to sleep but then I'd get back in my bed, but in the night she'd wake up and either she'd get in with us or I'd have to go back in her room. (Mel Gordon, grandmother caring for granddaughter aged 4 and grandson aged 15 months)

Younger children in particular seemed to suffer from regressive behaviours following the imprisonment of their mothers and the changes to their lives:

SM: What have been the hardest things taking on care of a child?

F: Seeing the changes in him. Because I've known him all the time he was growing up I'm now seeing the changes in him. (Febe Maca, great aunt caring for 4 year old great nephew)

That little boy was definitely withdrawn. He had some behavioural problems. He had withdrawn. He was withdrawn because he wasn't talking. He wasn't doing things that a normal three year old would have done so they decide for me to have him because I'm settled and have bought a property, so they said for me to have him then I'm trying. He has a behavioural problem. I think maybe he used to get smacked [at the previous placement]. Because when he poo'd he'd have a tantrum if anybody was near him. That's when he first came to me and if anybody is near him he would lash out. (Dee Hayes, grandmother caring for 2 ½ year old grandson)

Problems at school

Almost all of the children involved in this study had found it difficult to continue to go to school. In the most extreme cases they stopped going to school entirely:

He just started refusing to go to school. I don't know there didn't seem to be a cause. They didn't really find at the [school] either because he refused to speak. (Joanna Adela, grandmother caring for grandsons aged 14 and 15)

Other children struggled with changing school because their mother's imprisonment had necessitated their moving out of their home and into a new area:

There is a lot of things because they found it hard to make friends because they went in they weren't in the first school with their friends and had moved on. They'd come to an area where they knew nobody. They found it very hard. We've had, Susie used to throw a lot of tantrums to start with but then Casey got ten times worse. (Janice Peters, grandmother caring for 13 year old twin granddaughters)

He was not quite aggressive but he didn't make friends easily. He was always in trouble at home. He was always doing things to push me to the limit to see if I'd make him stay in. He always had to push and always that little bit more than anybody else. (Patricia Quincy, grandmother talking about grandson now aged 12)

For those who remained in schools where they were known they found the strain of people knowing that their mother was in prison, or asking them about their mother, too much to manage:

At school he's getting aggressive, he's getting upset now when people ask him where's his Mum. (Febe Maca, great aunt caring for 4 year old great nephew)

And then his mum was sentenced two days after. And he had problems at school and I know a lot of it was to do with that but with him I didn't want the school knowing for boys to find out and he might not be able to hold it in and he'd get into trouble. With [his brother] now I know with him he was being disruptive in the classroom and there were more incident reports. (Carol Rees, grandmother caring for 3 grandsons aged 4, 11 and 12)

In terms of impact on him it's coming out in aggression and things at school. He's loving and he knows when he does it and he'll say I'm sorry and he'll hug you and other times he'll get withdrawn and at school they say he doesn't know his numbers, but he does know his numbers and he can write. (Febe Maca, great aunt caring for 4 year old great nephew)

Others found it hard to focus on their studies when upset:

My daughter has had a pastoral care person assigned to her and she's had a time out card assigned to her so that if she felt emotional she could leave. My son they said, similar things to him, he hasn't done anything like that. He's managed to stay in lessons all the time. (Daniel, father caring for his children aged 14 and 15)

Anger at authority

Children also reported feelings of anger at the police or 'the law'. In their eyes, their mothers' treatment had been unfair, and they blamed those who had arrested or sentenced her. Lucas, aged 12, described himself as hating the police 'because they're trying to split my family apart.'

SM: Has it changed how you think about the police or law or anything?

Sam: Sort of, yeah. Not the police, just the law system...my dad told me they said where's the money and they can't prove where its gone so how could she be guilty of it so how could. It has affected the way I think of the law. (Sam 14)

Conclusion

From the literature and the accounts given by children in England whose mothers were at the time of interview imprisoned, it would appear that children of imprisoned mothers suffer from a wide range of harmful impacts as a consequence of the imprisonment. It begins with the physical removal of their mother from their lives, and children experience

the further limitation of their relationship with their mother, due to prison regulations as a painful and difficult loss. Even when cared for within their wider families they lose their home, sometimes their siblings, and their education is disrupted. Those who take on their care do not always do so willingly, and the subsequent breakdown of family placements causes harm to children. Their feelings of isolation within their communities due to their mother's removal from society inhibit their social and civic relationships, and they become guarded and less willing to trust people. They experience what I have termed 'confounding grief' which is expressed in angry and aggressive behaviours.

The explanation for the lack of state concern or intervention in the lives of children of imprisoned mothers proffered at the outset of this chapter would appear to be untenable. It is of course likely that not all children suffer from the harms explored in this chapter, but it certainly cannot be said that children of imprisoned mothers do not suffer any harms due to their mothers' imprisonment. The next chapter of the thesis will consider whether the state duty of care toward children, as demonstrated in care proceedings under section 31 of the Children Act 1989, within the jurisdiction of the family courts, does not, or cannot, extend to children whose mothers are sentenced to imprisonment in the criminal courts.

Explanation 2: The State Duty of Care Towards Children Does not Extend to Children of Defendant Mothers

Chapter summary

A duty of care exists when an individual or body has responsibility for a person or persons. That duty of care is the requirement that they take reasonable care to avoid acts or omissions that could expose those they are responsible for to a reasonably foreseeable risk of injury or harm. In England and Wales, the state is subject to a statutorily defined duty of care towards children according to the Children Act 1989, as amended by the Children Act 2004 and the Children and Families Act 2014. When the state removes a child from his or her birth parents the state is subject to a duty under section 22(3), to safeguard and promote that child's welfare, and to 'make use of services available for children cared for by their own parents as appears to the authority reasonable in his case' (Children Act, 1989). The Children Act 1989 does not apply outside the jurisdiction of the family courts in England and Wales, and the way in which children are treated within that jurisdiction when separated from their parents by a care order contrasts with the lack of concern shown for children separated from their mother by a sentence of imprisonment within the criminal courts. This contrast was set out in detail in chapter one. The purpose of this thesis is to understand why these contrasting approaches exist, and as the state duty of care towards children seems to be well established in family law this chapter will explore the development of the relationship between children and the state in English law and the conditions which must be met before the state will assume responsibility for particular children. In doing so, I will chart the way in which the state has understood and

progressed its duty of care and its responsibility towards children within wider society. From a broad historical perspective it can be seen that the state has constantly widened the parameters of both its duty towards, and authority over, children and families. This chapter will outline those developments, beginning with the state's initial involvement in the regulation of children's lives, which became an assumption of protection by the state of children without parents and those at risk from harm from within their family, before extending to the widely applied concern for the welfare and wellbeing of children which we see in evidence today. I will consider whether non-statutory obligations towards children exist, giving particular regard to the rights which the United Nations Convention on the Rights of the Child 1989 confers on children in England and Wales. Having established the parameters for state responsibility for children more generally, I will consider whether the state has obligations towards children whose mothers are imprisoned either under the statutory duty of care, or because the child has rights under UNCRC 1989, and if it does, whether it fulfills the obligations of its duty towards them.

The relationship between children and the state in England and Wales: 1601-2016

The presumption of a state duty of care towards some members of society is thought to originate from the doctrine of *parens patriae*, in practice from the 13th century and enacted in legislation in the 14th century (Custer, 1978), which gave the King guardianship of all people under a disability. The first legislative expression of the state's particular concern for children in any circumstances was the Poor Law (1601). At a time when there was little distinction between childhood and adulthood, the legislation directed that children who were orphaned or abandoned could learn a trade in order to support themselves. In the mid-eighteenth century there was a general recognition throughout society that childhood was not only a biological but also a social state (Sennett, 1993); childhood was

viewed as a seedbed for adult life throughout which children needed both protection and regulation as they were both dangerous and in danger (Hendricks, 2005; Moran-Ellis, 2010). The Health and Morals of Apprentices Act 1802, provided the mechanism by which the state, through the Home Office, could regulate conditions in factories where children were employed, and by the mid nineteenth century the state widened its parameters of concern for children from the regulation of their working environment to the regulation and enforcement of their education. The Reformatory Schools Act 1854 established schools for the containment and education of juvenile offenders, and the state extended its powers to educate and control with the Industrial Schools Act 1857 which gave the state power to send children to such schools if it believed they were in 'moral danger'. The Education Act 1870 made primary education compulsory for all, and the Factory and Workshop Act 1878 regulated the hours that children could work, the education which they should be given as part of their working conditions, and additionally provided a framework for the inspection of factories in which children were employed. In amongst these acts involving the state in children's working lives and education, the state began to protect the health of children within the context of public health concerns; the Vaccination Act 1867 section 16 stipulated that parents must have their child vaccinated against smallpox within three months of their birth. There remained however, a strict delineation between the private and public spheres, and state involvement did not extend to the protection of children in their home environments (Cretney, 2005: 629) because the view at the time was that 'to patrol industry on behalf of the young was England's Christian duty' but to 'patrol the home was sacrilege' (Behlmer, 1982: 9). State regulation of the care of children who were not living in their home environments began in the late nineteenth century. At that time 'baby farming' was a practice whereby parents could pay someone to take care of their child on a permanent

basis. The baby farmers often neglected and starved the babies and many died (Cretney, 2005). In an attempt to end this mistreatment of children the Infant Life Preservation Acts 1882 and 1887 were passed requiring carers of children to register, however this legislation had little impact on the mistreatment of children as inspections of premises and carers did not take place (Ibid.).

A series of legislative acts, passed from the late 1880's onwards, extended the state's protective powers into family life and the home. The Prevention of Cruelty to and Protection of Children Act 1889 enabled the state to intervene for the first time in relations between children and parents. It created a general offence of ill-treating, neglecting, abandoning or exposing a child in a manner likely to cause the child (defined as a boy under 14 years of age or a girl under the age of 16) unnecessary suffering or injury to health. If a parent was convicted of such an offence the child could be committed to the care of a 'fit person' or relative (section 5(1)), and the Act gave the police powers to enter a home if they thought that a child was in danger. The Act was amended in 1894 and the definition of mistreatment of children was extended to include mental cruelty. The widening of state protection into the home continued in 1908 in response to two particular societal problems of the time: children being suffocated in bed by drunken adults sleeping in the bed with them, and children in danger from unguarded fires with as many as 1600 burned to death each year (Cretney, 2005: 433). Two specific offences were created to deal with these problems but their creation was opposed by MP's who regarded these issues within the home as being beyond state regulation (Ibid.). At this time it was believed that the best way to protect children within the family was to criminalise certain adult activities, and so the act created the offence of treating 'a child in a manner likely to cause such child or young person unnecessary suffering or injury to his health' (section 12(1), Children Act 1908). The provisions in Part III of the 1908 act for

the ‘Arrest of Offenders and Provision for Safety of Children’ widened the circumstances in which a child could be brought before the court for an order for their ‘care and detention’ under section 20 of the Act. Although many of the provisions related to children without parents they also included children who were not being given appropriate care, for example a child under the care of a parent or guardian whose criminality or drunkenness rendered them an unfit caregiver.

Throughout the 20th century the emphasis moved from the control and regulation of children to state concern for the care and well being of children. With the enactment of the Guardianship of Infants Act 1925 and the first legislative enactment of what is now referred to as the ‘paramourcy principle’, the state established a positive obligation to consider children’s welfare in court proceedings. Section 45 of the Act directed courts to regard the welfare of the child as the *first and paramount consideration* whenever there was a dispute about property, upbringing, custody, or access involving a child. The Children and Young Persons Act 1932 section 21 extended this obligation by directing courts in every case to:

have regard to the welfare of the child or young person and ... in a proper case take steps for removing him from undesirable surroundings and for securing that proper provision is made for his education and training.

Such a requirement gave the state the right to make a judgment not only about the safety of a child, but more generally concerning the desirability of a child’s home environment and the sufficiency of his education.

Over the next fifty years, legislation was enacted which continued to develop the state’s role as the protector and promoter of children’s well being. The Children Act 1948 was based on the recommendations of the Curtis Committee, a committee established to consider how the state should ‘compensate [orphaned children] for the lack of parental care’ following the increase in orphaned children after the war. :

[it] gave statutory recognition to the principle that it was the State's duty to provide for children in need (and not merely as had been the case under the old law, for children who were in need because they were destitute)' (Curtis Committee, cited in Cretney, 2005:672, 685).

The Curtis Committee described their aspirations for state care of children as:

what the normal parent gives the normal child... a strong and constant flow of personal affection and a sense of security that comes from long and habitual experience of the same familiar faces in the same familiar surroundings. (Hansard, 1946)

Once in the care of the local authority, section 12(1) set out what was expected of the state acting in place of parents:

[the state should] exercise their powers with respect to him so as to ensure his best interests, and to afford him opportunity for the proper development of his character and abilities. (Children Act,1948)

In response to the death of 13 year old Dennis O'Neill in foster care the 1948 Act also established a 'Children's Committee' and 'Children's Officer' in every local authority. It is of importance to note in relation to the reluctance of the state to remove children from their parents, that when the Children and Young Persons Acts of 1963 and 1969 were brought into force there was an emphasis on the state providing 'advice, guidance and assistance as may promote the welfare of children' in order to keep more children with their families (section 1, Children and Young Persons Act 1963), however the state could remove children for reasons linked to the impairment of their health or development under section 1(2)(a) Children and Young Persons Act 1969, or if they were ill-treated (Ibid.: section 24). Lord MacDermott (J v C [1970]) set out the way in which a court should assess a child's welfare:

[It is] more than the child's welfare is to be treated as the top item in a list of items relevant to the matters in questions. [The words] connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child's welfare. (HL, 1970: 710-711)

Since the 1970's the plight of particular children and the accompanying public awareness of child welfare issues has significantly impacted on the development of policy and practice as the state has reacted to the public mood. In the 1970's, the case of Maria Colwell, a child who was killed by her step-father after she was taken from the care of her aunt by her mother despite the local authorities' concerns, brought to attention the situation of children who were placed at risk because the state did not have the power to prevent a parent from seeking the return of their child from an alternative carer. As a consequence of Maria Colwell's death the MP Dr David Owen introduced a Private Members Bill in 1973, but due to a change of government it was not debated by parliament. The bill was adopted by the new Labour Government as the basis for the Children Act 1975 and prompted the development of Area Child Protection Committees designed to safeguard children who were at risk. Unfortunately financial constraints meant that much of the act was not implemented for a decade (Cretney, 2005: 725).

In 1989 the United Nations Convention on the Rights of the Child (UNCRC) was published and the ratification of it by the UK government in April 1990 indicated the state's intention to be bound by its conventions. In October 1991, the Children Act 1989 came into force. It remains an extremely significant piece of legislation not only because of its codification of both private and public family law matters, but because Section 1 established the child's welfare as 'paramount' and set out an extensive 'welfare checklist' of all the matters that should be considered by the court when determining the child's best interests (section 1(3), Children Act 1989). By framing the parental role as 'parental responsibility' and making the child's welfare the paramount (and not simply 'first') consideration in any matter concerning the child, the legislation made it clear that the child's rights took precedence over those of the parent, and gave the local authority a duty to consider intervention when the child's physical, or behavioural development was

impaired or was likely to be impaired (section 17). The Act's central tenet is that children are usually best looked after in the family but that assumption can be overridden by the state if it is acting under a statutory duty to safeguard children's welfare as defined in section 1(3), giving every child the right to protection from abuse and exploitation and the right to inquiries to safeguard their welfare. The Children Act 1989 was amended by the Children Act 2004. It was a piece of legislation which developed in response to the tragic death on the 25th February 2000 of eight year old Victoria Climbié as a consequence of the abuse that she suffered at the hands of her great aunt and her great aunt's boyfriend. An inquiry was set up to hear evidence about the institutional failures that allowed her death to happen and the government responded to the findings of the Climbié Inquiry with the publication of a Green Paper entitled 'Every Child Matters' (Boateng, 2003). The Children Act (2004) followed and incorporated within it the five key aims of the paper: to promote children's physical and mental health and emotional well-being; to protect children from harm and neglect; to enable them to fulfill their potential in education, training and recreation; to enable them to make a contribution to society, and to promote their social and economic well-being. The Children and Families Act 2014 did not alter the provisions relating to the state's responsibility for safeguarding and promoting the welfare of children, and so the provisions of the Children Act 1989 as amended by the Children Act 2004 still provide the statutory framework for the state's responsibility for the care of particular children and its concern for the welfare of all children.

The state's relationship with, and duty of care towards children has developed significantly over the past four hundred years. It began as the protection of children who had no parents or guardians before being extended to protect children in their working environments, to enforce children's right to education, and to ensure their health. The

duty of care widened at the end of the nineteenth century to protect children within the home from ill treatment, and from 1908 the state's interpretation of the duty allowed it to remove children from the care of their parents if the court believed that the care they were receiving was inadequate. At that time the relief to the child through state intervention was still limited by the rights of the parent as the state could not retain the care of the child if the parents wished to have the child back, and parents continued to hold the ultimate authority over their children regardless of the harm done to the child whilst in their care. The interpretation of the duty of care was significantly modified and enhanced when the state began to give consideration to the 'welfare of the child' in its decision making (Guardianship of Infants Act 1925). The welfare of the child was the paramount consideration in the Children Act 1989, and by 2003 the language used by the state in relation to children focused on their protection and development:

we have to do more both to protect children and ensure each child fulfills their potential... underpinning this must be not just the resources but an attitude that reflects the value that our society places on children and childhood. Children are precious. The world they must learn to inhabit is one in which they will face hazards and obstacles alongside real and growing opportunities. They are entitled not just to the sentiment of adults but a strategy that safeguards them as children and realises their potential to the very best of our ability. (Boateng, 2003)

As referred to previously, section 10(2) of the 2004 Children Act outlined five areas of children's well being which public services should work towards improving. They were not intended to be read as the new parameters of the state duty of care, but they indicate the areas of a child's life which the state believes it has a right to be concerned with. Their breadth is extensive, and their inclusion in the Children Act 2004 set very high expectations on the state's ability to influence or improve children's lives.

The assumption of statutory responsibility for children

In the twentieth century the state extended its duty of care from children who were

without families to children in families, whilst holding two principles in tension: that of offering children protection from positive harm, whilst also giving families security that children will not be removed due to less than optimum care (Bainham, 1988: 77). Governments have over the years affirmed their belief that the family is the best place for a child to be raised, and the state takes on responsibility for children with reluctance and as a last resort. In 1932 in the official report prior to the enactment of the Children and Young Persons Act 1932 it was written that the government did not intend to:

substitute 'the State' for the parents, or [to break up] family life, because the fundamental basis in a matter of this kind is that parental control should be adequate, and that [State intervention is] legitimate when the proper parents or guardians are either unwilling or unable to exercise that parental control which we ... recognise to be the best guide for the upbringing of children. (Hansard, 1932)

In 1963 the state, through legislation, indicated the strength of its belief that children should remain within the family. The Children and Young Persons Act of that year placed a duty on the local authority to make available 'advice, guidance and assistance as may promote the welfare of children' in order to diminish the need for children to be looked after by the local authority. The Children and Young Persons Act 1969 was designed to promote the local authority provision of support to families so that they could bring their children up within the family, and the courts would only become involved if such support was unsuitable or ineffective (Halsbury's, 1969). In the Children Act 1989 the 'no order' principle was established, once again emphasising that state intervention should only be entered into if no alternative exists. According to the 'no order' principle in section 1(5) even if it is found that a child is suffering or is likely to suffer significant harm as the consequence of the care being given to the child not being what it would be reasonable to expect a parent to give, the court can only make an order for care or supervision by the local authority if it is in the child's best interests to make an order rather than no order at all. It is only when the presumption of familial privacy is defeated by the reaching of a

threshold at which significant harm has occurred or is likely to occur to the child, that the state can become involved in a family by taking on the duty to safeguard the interests of unprotected children (s.31, Children Act 1989; Archard, 2004: 125).

The Threshold Criteria

In the late 19th century the state protected children by criminalising the adults who harmed them, and the ‘threshold criteria’ at that time was to apply the criminal burden of proof to the actions of adults in order to determine whether they had ill treated, neglected, abandoned, or exposed a child in a manner likely to cause unnecessary suffering or injury to health (Prevention of Cruelty to and Protection of Children Act 1889). The Children Act 1908 allowed people to bring children before the court who were in need of ‘care and control’ and the threshold criteria was that the child’s behaviour indicated a lack of parental care, or the child was beyond parental control. If a child was found begging, wandering without a home, support or guardianship, destitute with parents in prison, under the care of parents who were unfit to care for him due to criminal or drunken habits, in the company of thieves or prostitutes, living in a place of prostitution, or the daughter of a man convicted of sexual offences, the state could determine that the child needed to be in the care and control of the state (either through ‘boarding out’ or in an industrial school) (Sections 14-18, Children Act 1908).

The threshold criteria remained broadly similar (a lack of proper parenting, a victim of criminal abuse, insufficient education or beyond parental control) until the Children Act 1989, however the lack of proper parenting became more explicitly defined in section 2(2)(b) of the Children and Young Persons Act 1963 as ‘a lack of care, protection or guidance likely to cause unnecessary suffering or to affect their [the child’s] health or proper development’, and section 1(2)(a) of the Children and Young Persons Act 1969

referred to the impairment or neglect of a 'child's proper development' or health.

The Children Act 1989 section 31 provides the threshold criteria that currently govern the state removal of children from their parents in care proceedings. For the court to consider removing the child from the care of his or her parents in order to place him or her in the care of the local authority, the court must find that the child has suffered, or is likely to suffer significant harm and that the harm or likelihood of harm is attributable to the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him. Harm is defined in section 31(9) as the ill treatment or the impairment of health or development, to include, as amended by the Children Act 2004, impairment suffered from seeing or hearing the ill treatment of another. 'Development' is defined as physical, intellectual, emotional, social or behavioural; 'health' means physical or mental health; 'ill treatment' includes sexual abuse and forms of ill treatment which are not physical. In determining whether to make a care order a court must conduct a two-stage test; firstly the threshold criteria must be met, and secondly the court must decide that it is better for the child's welfare for the court to make an order than to make no order.

Non-statutory obligations towards children: The UK's commitment to children's rights

The previous section has considered state initiated intervention in the lives of children which can take place under the powers given to local authorities through legislation. The next section of the chapter will look in more detail at the rights which the United Nations Convention on the Rights of the Child (1989) has conveyed upon children in the UK. The UNCRC was ratified by the UK in 1990 without reservation or declaration, however as it has never been fully incorporated into English law it does not legally compel the

protection of children's rights and is of 'persuasive influence only' (Fortin, 2009: 48). Despite its non-incorporation the UK has since ratification maintained its intention and commitment to uphold the rights of children as set out in the UNCRC.

The Children Act 1989 gained legislative force a year after the ratification of the UNCRC by the UK government, and is often regarded as primary evidence that the UK government takes the protection of children's rights seriously. Over the past decade a succession of governments have affirmed their commitment to the principles of the treaty (Boateng, 2003). The UK Joint Committee on Human Rights, a select committee of both the House of Commons and House of Lords, has a remit to consider human rights issues in the United Kingdom. It undertakes thematic inquiries on human rights issues and has a mandate to report on the UK's compliance with the UNCRC. In 2009 the Committee asked for information from the government about the extent to which UNCRC rights were already protected by UK law. The government responded to that request with a report maintaining the UK's commitment to children's rights:

The Government is fully committed to children's rights and the continued implementation of the UNCRC to make the Convention a reality for all children and young people in the UK. (Department for Children, Schools and Families, 2009)

There is a requirement on every state party that has ratified the UNCRC to report regularly to the Committee on the Rights of the Child on its progress in fulfilling its human rights obligations, and the most recent report to the Committee from the UK was submitted in May 2014. In the introduction to that report the commitment to protect children's rights in accordance with the UNCRC was once again asserted, 'We hope ... that it [the report] will demonstrate our firm commitment to the progressive implementation of children's rights under the Convention.' The report specifically mentioned the fact that the convention has not been incorporated into domestic law:

As a general principle, the State Party does not incorporate international treaties directly into domestic law. Alternative steps have been taken within each jurisdiction to ensure that all aspects of law and practice are compliant with the Convention on the Rights of the Child.

15. The UK Government reaffirmed its commitment to give due consideration to the Convention in policy and legislation through a Ministerial statement to Parliament in December 2010. (Hansard, 2010)

The report also referenced the Children Act 1989 as proof that the UK government is committed to ensuring that children's rights are enshrined in law by way of the 'best interests' principle set out in Section 1(1) of that Act. In March 2015, the report of the Joint Committee on Human Rights (JCHR), made reference to this fact:

At that time the Committee heard evidence from the government and asked directly about the incorporation of the UNCRC into English law. They were told by Edward Timpson MP, the Minister of State for Children and Families at the Department for Education: 'there was no "block" upon incorporation, but rather that the position of the Government is that it was "confident that the laws and policies that [...] [the Government] [...] has in place already are strong enough to comply with the Convention...Moreover, while the Convention has not been incorporated into UK law and is therefore not directly justiciable in UK courts—that is to say, an individual cannot go to a UK court to complain about a breach of any of the rights in the Convention—the conclusions and recommendations of the UN Committee, while strictly speaking not legally binding, do provide an authoritative interpretation of the individual treaty obligations which are themselves legally binding on the UK. (JCHR, 2015: paragraph 33)

In addition the UK is bound by the jurisprudence of the European Court of Human Rights through its judgments in cases against the UK, and despite its unwillingness to enshrine the articles of the UNCRC 1989 in domestic law it is evident that it maintains a declared commitment to upholding the Convention Rights of children. Additionally, although it does not specifically mention children, the Human Rights Act 1998 applies to all citizens and remains in force.

Rights which should be upheld when a child faces separation from their parent by the state

Having ascertained that the UK government has publicly affirmed its intention to uphold children's rights I turn now to consider which rights the state is obliged to uphold when a child faces separation from their parents. Article 8 of the Human Rights Act 1998 states that everyone has the right to respect for his private and family life, and this right can only be interfered with under certain conditions which include 'the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.' Within the UNCRC 1989, Article 9 states that children have a right to live with their parents but that right can be overridden if separation is in the child's best interests as determined by competent authorities 'in accordance with applicable laws and procedures'. Articles 3 and 12 of the UNCRC 1989 are of particular relevance to court proceedings leading to separation as Article 3 states that in all actions 'concerning children... the best interests of the child shall be a primary consideration', whilst Article 12 obliges 'states parties' to give a child:

who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. (UNCRC, 1989)

It goes on to say that 'judicial and administrative proceedings affecting the child' are included in the definition of 'all matters'. Article 20 provides that any child who is without their family is 'entitled to special protection and assistance provided by the State,' and the state is obliged to provide such children with alternative care. Underpinning all of these rights is Article 2, which places a duty upon the state to protect children from any form of discrimination or punishment which may stem from the status or activities of their parents. Before considering whether or not these rights are upheld in the case of children of imprisoned mothers it is important to consider whether the state

has upheld them in relation to any other child separated from their parent by the state. I will therefore examine the way in which these rights are treated within the family courts when a child is separated from their parent under section 31 of the Children Act 1989.

The UK Government has often stated that the Children Act 1989 provides protection for children's rights, and this would indeed seem to be true as far as family proceedings are concerned. The Children Act 1989 goes beyond the primacy of the child's welfare as required by Article 3 and states in section 1 that the child's welfare is the paramount consideration of the court. The Article 12 right of a child to have their views heard in any proceedings concerning them is both respected and given appropriate weight in section 31 proceedings. The child is a party to the court proceedings through an appointed Guardian ad Litem and has legal representation funded by the state. If the child is of an age at which he or she can articulate views they have the opportunity to speak with the Guardian ad Litem, usually on a number of occasions, and the Guardian ad Litem represents their views to the court through their legal representative. A child's Article 20 rights to be given special protection and assistance when unable to live with their family are also met under the existing primary legislation of the Children Act 1989, the Children Act 2004, and the Children and Families Act 2014. When a child is removed from the care of their parents by the state through the local authority, the local authority ensures that the child is provided with alternative care. This may be within the extended family or with external foster carers or adoptive parents, and the local authority maintains on-going assessment of the suitability of the placement. It is clear that the state does intend to uphold the rights of children as set out in UNCRC 1989 Articles 3, 12 and 20, with respect to children who are separated from their parents as a consequence of proceedings under section 31 of the Children Act 1989. The child may not always feel that the final decision and plan is what they wanted, 'coercive paternalism' may still influence outcomes (Eeklaar in Fortin,

2009: 298), but mechanisms are in place which allow their rights to be upheld throughout the process.

From the above analysis it is clear that the state assumes responsibility for children in certain situations and having assumed responsibility it acts upon its duty of care towards them and upholds their rights when they are separated, or face separation, from their parents. The next section of the chapter will examine whether the explanation offered at the outset of this chapter for the differentiated treatment of children of defendant mothers, that the state does not have a duty of care towards them and their rights are not interfered with, is valid.

The duties of the state towards children of defendant mothers

There is no reason to think that the underlying principles concerning the state's responsibility towards children as set out in this chapter should not also apply to children of defendant mothers. If the state holds the belief that 'every child matters' (Boateng, 2003) it has a duty to protect all children from harm and to promote their welfare. However Section 1 of the Children Act 1989 does not apply to proceedings outside of the family courts and therefore cannot be relied upon in adult sentencing proceedings to ensure that the child's welfare is considered. Once the child has been separated from their mother the Children Act 1989 does apply more generally and it provides a mechanism by which the state can offer support to this group of children. Section 17 of the Children Act 1989 gives local authorities the power to intervene in children's lives:

- 17(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)-
- (a) to safeguard and promote the welfare of children within their area who are in need; and (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
- by providing a range and level of services appropriate to those children's needs.

17(10) For the purposes of this Part a child shall be taken to be in need if –

- (a) he is unlikely to achieve or maintain, or to have the opportunity to achieve or maintain, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
- (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
- (c) he is disabled.

The research I have undertaken suggests that local authorities are not using the powers given to them under section 17 to support children of imprisoned mothers (see chapters three and six of this thesis). According to Neera Sharma, Assistant Director of Policy at Barnardo's, only Essex and Somerset Councils recognise children of imprisoned parents as 'children in need'. Ofsted, the Office for Standards in Education, Children's Services and Skills, includes children of imprisoned parents in its list of 'children in need' when assessing Early Years providers (APPG, 2017), but not more generally.

Turning to the rights based obligations of the state there has been very little mention of the rights of children of prisoners in the academic and practitioner literature since the ratification of the UNCRC. There have been suggestions that legislative bodies should consider the rights of these children but they have not been given further consideration or implementation (Child Right's Development Unit, 1994; Carlen and Worrall, 2004; Silvestri, 2006). When children of prisoners are referred to it is usually with respect to maintaining relationship with a parent in prison, and not with reference to their rights to non-discrimination, participation, and special assistance (Van Bueren, 1995; Freeman, 1996; Fottrell, 2000; Franklin, 2001; LeBlanc, 2005; Fortin, 2009; Choudry and Herring, 2010; MacDonald, 2011). Even in UK-focused discussions about the legislative implications of Article 9, the right of children not to be separated from their parents, children of prisoners are not included in the lists of children to whom this article applies (Department for Children, Schools and Families, 2009). In particular, the right to

protection from discrimination is only referred to directly in one text, ‘The Implementation Handbook for the Convention on the Rights of the Child’:

In its examination of reports, the Committee has noted a variety of examples of the child suffering discrimination ... Implementation requires States to ensure that any existing Constitution, relevant legislation, court decisions and administrative policy and practice comply with this principle. For example, are “all appropriate measures” taken to protect children from discrimination or punishment when their parents are subject to action on the ground of criminal behaviour? (in addition article 9 emphasises that children must be separated from their parents only when separation is necessary for the best interests of the child.)

Discussing the implementation of Article 12 it states:

“Any judicial proceedings affecting the child” covers a very wide range of court hearings, including all civil proceedings such as divorce, custody, care and adoption proceedings, name changing, judicial applications relating to place of residence, religion, education, disposal of money and so forth, judicial decision making on nationality, immigration and refugee status and criminal proceedings; it also covers States' involvement in international courts. Arguably, it covers criminal prosecutions of parents, the outcome of which can affect children dramatically. (Hodgkin and Newell, 2002)

The cases of *R v Petherick* [2012], and *ZH v Secretary of State for the Home Department* [2011], have established that Article 3 of the UNCRC applies to *any* court whose actions will have the consequence of separating a child from their parent, and therefore in the criminal courts when a mother is sentenced the welfare of any children that she has should be a ‘primary consideration’ of the court. There is in existence already a mechanism by which a judge can gain information about the child’s needs and welfare; a pre-sentence report can be requested from the probation service, such a report potentially providing to the court information about the defendant’s background, family circumstances and family responsibilities. However research has found that judges sentencing mothers are unaware of their Article 3 obligations, nor do they consistently request pre-sentence reports (Epstein, 2012; Minson, 2013; see also chapter five). The consequence of this is that a child may be separated from her primary or sole carer by a judge in the criminal courts who, in some instances, may not even be aware of the

existence of the dependent child, and in other instances although aware, regards it to be of such limited significance that no mention is made of the child in the sentencing remarks and the child is not considered at all in the sentencing decision (Minson and Condry, 2015). The right of a child to have their welfare treated as a primary consideration in all actions concerning them is not upheld within the adult criminal sentencing process.

Article 12 of the UNCRC 1989 requires a child's views to be heard and due weight accorded to them. Although the criminal sentencing courts do have the option of using pre-sentence reports, it is not the practice of the probation services to speak directly with children of a defendant in order to ascertain their views. There is therefore no mechanism by which a child's wishes or feelings can be heard by the sentencing court when their parent is sentenced. As was noted above, as the Children Act 1989 does not apply outside of the family court jurisdiction there is no legislative requirement for the court to give consideration to the child's views, and therefore children are separated from their parent without the court giving regard to the child's wishes, feelings and needs, or the effect on the child of any possible change in circumstances which might result from their decision. The child's views are not sought, nor are there any means by which a child can make their views known to the court.

Despite the requirement of Article 20 and the availability of a mechanism by which the state could meet that duty (Children Act 1989; Children Act 2004), children of imprisoned mothers are not given special protection or assistance by the state during the period in which they are separated from their mothers. When a custodial sentence is given it is common for no preparation to have been made for the separation between mother and child (see chapter three). The state does not make any provision for these children; women are not systematically asked if they have children who have been left as a consequence of their imprisonment and it is often the case that the state only becomes

aware of the existence of these children when the families who take on their care contact the local authority asking for help. It is not unusual for a recently imprisoned mother to have no knowledge as to the whereabouts of her child or children. As was mentioned previously The Corston Report, a review of women with particular vulnerabilities in the criminal justice system, found that in a group of 1400 women serving a first sentence in Holloway Prison 42 women did not know who was looking after their children (Corston, 2007). This is in breach of Article 20 of the UNCRC 1989 which states that, 'a child temporarily or permanently deprived of his or her family environment ... shall be entitled to special protection and assistance provided by the State.' It goes on to say that 'States' parties shall in accordance with their national laws ensure alternative care for such a child' (UNCRC, 1989). Section 17 of the Children Act 1989 gives local authorities the power to intervene in children's lives in this way.

Research into foster care has shown that initial assessment and preparation combined with ongoing support (including financial support) are key to providing a child with a positive placement when they can no longer live with their family (Sinclair and Wilson, 2009). Despite this those who care for children whilst their mother is in prison receive no preparation, assessment, training, or support. Local authorities or fostering agencies have non-negotiable requirements which include in all circumstances that the carer is over 21 years of age, they are fit and well, and they have a spare room in their accommodation which can be given to the child as a bedroom. Application for approval is voluntary and those who seek to become foster carers are encouraged to attend information meetings and have informal discussions about it with the agencies before they decide to proceed with the formal application process. In contrast, very few of the caregivers I interviewed who were caring for children of imprisoned mothers met the basic criteria for fostering children; they did not have spare rooms in their homes, and many were in poor health (see

chapter six). When judges ascertain who will take on the care of the children following a mother's imprisonment, they do not in general seek detailed information, but are content in most circumstances to be provided with a named relative, and an assumption is made by them that the relative is in a position to provide appropriate care.¹⁰ The local authority do not exercise their duty under section 17 of the Children Act 1989 to provide support and assistance to such children and families despite the fact that experts in this area know that fostering a child is likely to put pressure on a caregiver's health and other family relationships which may ultimately lead to breakdown of the placement and harm to the child (Sinclair and Wilson, 2009). The contrast between the support given to state appointed foster carers in public law proceedings, and the lack of support given to kin carers who take on the care of children of imprisoned mothers, further demonstrates the failure of the state to uphold the Article 2 and Article 20 rights of this group of children.

Conclusion

As one of the underpinning principles of the UNCRC 1989, Article 2 specifically relates to the state's duty to protect children from differentiated treatment which they may receive due to the status or activities of their parents:

Article 2:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

¹⁰ p.160 and following

It is apparent that unlike the procedures around the separation of parent and child in the family courts, children are barely visible when parental separation takes place due to criminal sentencing and their status as rights holders is entirely overlooked. Thus children who may lose their primary or sole carer, in one third of cases when a mother is imprisoned she is the sole carer for children (Social Exclusion Unit, 2002), are deprived of the rights to have their welfare considered, to be heard, and to receive special care and protection from the state. Such disregard for the rights of children whose parents face imprisonment within the sentencing process has the appearance of discriminatory behaviour by the state, in breach of its obligations under Article 2 of the UNCRC, and I will return to a discussion of this point in chapter seven.

Even if it is argued that the UNCRC (1989) is persuasive rather than binding, the cases on the rights of children (*R v Petherick* [2012]; *ZH v Secretary of State for the Home Department* [2011]) and the section 17 provisions of the Children Act 1989 when held alongside the state duty of care towards children which has existed for centuries in England and Wales and which was examined in this chapter, show that the state does have a duty of care towards children of imprisoned mothers, arising from both statute and rights. This duty requires the state to consider the welfare of children of defendant mothers within sentencing decisions and also following their separation from their mother if she is sent to prison.

This chapter set out to examine whether the reason for the differentiated treatment which children of defendant mothers experience is because the state duty of care towards children does not or cannot extend to children of prisoners. The historical development of state intervention in the lives of children and families, the legislative provisions, the recent case law, and the United Kingdoms' ratification and expressed intention to uphold the rights of children as enshrined in the United Nations Convention on the Rights of the

Child 1989, all counter that explanation. There is no reason why the duty of care should not apply to children of imprisoned mothers, nor why their rights should be ignored.

Given that children do suffer harm when separated from their mothers by imprisonment (chapter three), and the state does have a duty of care towards them, the proposed final explanation for their differentiated treatment is that the judiciary are not permitted or for some other reason do not take their welfare into account when sentencing mothers, and this is the focus of chapter five.

Explanation 3: Sentencers are not permitted, or are unable, to consider the welfare of children of defendant mothers as part of the sentencing process

Chapter summary

This final chapter of Part II explores the third proposed explanation. If it is found that children do suffer negatively as a consequence of maternal imprisonment, and they are owed a duty of care by the state, then the reason for differentiated treatment in the sentencing process must be that judges are not permitted to consider the needs of child dependents when they sentence mothers to imprisonment, or if that is not found to be the case, that they do not know or understand the consequences of maternal imprisonment for children. Judicial understanding of the impacts of maternal imprisonment on children and their caregivers will be explored in conjunction with the way in which the judges interviewed for this research understood the boundaries and guidance on their discretion to include dependent children as a factor in their sentencing calculus. The chapter begins with an exploration of whether sentencers in England and Wales are permitted to consider the existence of child dependents as a factor in sentencing decisions. The place of discretion in sentencing decisions, the judicial approach to personal mitigation, the role of the sentencing guidelines, and the decisions of the Supreme and Appeal Court on the place of child dependents in sentencing calculus will inform the discussion. The second part of the chapter will consider the practice of judges through the analysis of transcripts of sentencing appeals and the data gathered in the course of interviews with 20 Crown Court judges.

Sentencing practice in England and Wales

After a defendant is found, or has pleaded guilty the representative of the state, be it magistrate or judge, determines what punishment is appropriate for the crime committed and a sentence is passed. It is usual for there to be a 'sentencing judge' each day, who will conduct all the sentencing hearings in a particular court centre. The judge sees the case papers for the first time the night before, or on the morning of the hearing when the list is prepared, and they have several hearings to conduct within a short period.

In England and Wales different theories of sentencing, primarily deterrence, rehabilitation, incapacitation, and retribution (Ashworth, 2010: 78), have been used to justify punishment but no theory has pre-eminence. In 1990 the Government promised that it would establish 'a new and more coherent statutory framework for sentencing' (Home Office, 1990: paragraph 1.5), one which would be 'based on the seriousness of the offence or just deserts' (Ibid.: paragraph 2.3), but unfortunately the Criminal Justice Act 1991 did not deliver on this promise. Some years later in 1998 the Sentencing Advisory Panel was formed in an attempt to establish overarching sentencing principles. The government commissioned 'Halliday Report' published in 2001 suggested that sentencing should be based on proportionality; the sentence should be proportionate to the seriousness of the offence and the seriousness of the criminal record. Despite this strong recommendation when the Criminal Justice Act 2003 came into force it maintained the pre-existing ambiguity with a section setting out five different sentencing rationale:

Any court dealing with an offender [aged 18 or over] in respect of his offence must have regard to the following purposes of sentencing –

- a) The punishment of offenders
 - b) The reduction of crime (including its reduction by deterrence)
 - c) The reform and rehabilitation of offenders
 - d) The protection of the public
 - e) The making of reparation by offenders to persons affected by their offences
- (The Criminal Justice Act 2003 s.142)

In 2003 the Sentencing Guidelines Council was established and it emphasised proportionality and just deserts rationale, stating that the sentencers must begin by considering the seriousness of the offence and:

the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused. (Sentencing Guidelines Council, 2004)

The Sentencing Council (established in 2009 replacing both the Sentencing Advisory Panel and the Sentencing Guidelines Council), produces 'Sentencing Guidelines' which must be followed unless 'it is in the interests of justice not to do so' (Coroners and Justice Act, 2009). The guidelines are intended to promote greater consistency in sentencing, whilst maintaining the independence of the judiciary. The 'Overarching Principles – Seriousness' guideline published in 2004 remains in force and therefore seriousness can be assumed to be the dominant sentencing rationale. It is within this context that I explore whether the current sentencing framework permits judges to consider dependent children when mothers are sentenced in England and Wales.

Sentencing guidelines and authorities

Sentencers have two main sources of authority when they make sentencing decisions; sentencing guidelines and sentencing authorities (case law). Sentencing guidelines provide limited guidance on judicial consideration of dependents. In 2004 the 'Overarching Principles: Seriousness' guideline was issued by the Sentencing Guidelines Council, and it referenced Section 166(1) of the Criminal Justice Act 2003 which makes provision for a sentencer to take account of any matters that 'in the opinion of the court, are relevant in mitigation of sentence', thus giving permission for dependents to be considered if a judge believed it to be relevant, and for the sentence to be reduced accordingly. In 2011 the Assault Guideline was the first sentencing guideline to include in

the list of ‘Factors reducing seriousness or reflecting personal mitigation’, the characteristic, ‘Sole or primary carer for dependent relatives’ (Sentencing Council, 2011). This factor has been included in every guideline since then and can be taken into account as a mitigating factor when prescribing sentence. The current sentencing structure therefore sets the consideration of dependents within the category of ‘personal mitigation’, however no guidance is provided in the guidelines on the weight which should be given to it, nor the way in which it ought to be balanced against other personal or offence related factors in sentencing.

Turning to case law, a defendant’s primary care responsibilities and the duties of the court to consider them have been specifically addressed in a series of Court of Appeal decisions. The principles established by case law give judges permission, and indeed instruction, to take dependents into account when sentencing adult caregivers. There are four principles to follow: firstly the sentencing of a parent for a criminal offence engages the right to family life of both the parent and the child as the right is not lost automatically by reason of criminal conviction (*R (on the application of P and Q) v Secretary of State for the Home Department* [2001] paragraph 78). Secondly any interference by the state with a person’s right to family life must be in response to a pressing social need and proportionate to the legitimate aim pursued (*Ibid.*: paragraph 87). Thirdly, the more serious the interference the more compelling the justification must be and it cannot be much more serious than the act of separating a mother from a very young child (*Ibid.*: paragraph 78 iv; *R (on the application of Amanda Aldous) v Dartford Magistrates Court* [2011]; *R v Petherick* [2012]). Fourthly non-custodial sentences are preferable for women with dependent children, with custodial sentences to be considered when the offence is serious or violent or the woman represents a continuing danger. Even when that is the case a custodial sentence should only be given after considering the best interests of the

child or children whilst ensuring that appropriate provision has been made for their care (United Nations 'Bangkok Rules', 2010; UNCRC, 1989: Article 3; Minson et al, 2015). Subsequent decisions have provided clear guidance on the application of the above principles. The case of *R v Bishop* [2011] established that the sentencing court must obtain sufficient information to allow it to balance the punishment of the offender against the impact of the offender's punishment on the child. It is the court's responsibility to seek further information if necessary to allow the sentencer to make a properly informed judgment. The case of *R v Petherick* [2012] set out the process the court should follow in such cases. Where the right to family life applies, the court should ask three questions: firstly, is there an interference with family life? Secondly, is the interference in accordance with law and in pursuit of a legitimate aim? Thirdly is the interference proportionate given the balance between various factors? (*R v Petherick* [2012]: paragraph 18). *R v Petherick* [2012] also directed that in a case which is on the threshold between a custodial and non-custodial or suspended sentence, the impact on a dependent child can tip the scales, and a proportionate sentence can become disproportionate (*Ibid.*: paragraph 22). The case confirmed the application of UNCRC Article 3(1) (1989) and stated that although there is no standard or normative adjustment for dependent children their best interests must be 'a primary consideration' of the court (*Ibid.*: paragraph 19). Finally, the welfare of the child should be at the forefront of the judge's mind (*Ibid.*: paragraph 24; *ZH(Tanzania)(FC) Appellant v Secretary of State for the Home Department* [2011]: paragraph 25 - 26).

It is clear from this preliminary investigation of case law and sentencing guidelines that judges ought to be considering the welfare of child dependents in adult sentencing cases, but an analysis of sentencing transcripts of Crown Court and Court of Appeal decisions after the 2001 decision (*R (on the application of P and Q) v Secretary of State*

for the Home Department [2001]) and prior to the decisions made in 2011 and 2012 (R v Bishop [2011]; ZH(Tanzania)(FC) Appellant v Secretary of State for the Home Department [2011]; R v Petherick [2012]) suggests that the lower courts were not sentencing in accordance with the guidance (Minson and Condry, 2015). In a review of 33 sentencing appeals by mothers who had been sentenced to imprisonment, heard in the Court of Appeal between 2003 and 2011, in 21 of the 27 cases in which sentence was reduced the mitigation of sentence due to dependent children was a specified factor leading to that reduction. This indicated that the lower courts were not conducting the correct balancing exercise and were passing sentences of imprisonment on mothers which were disproportionate when the harm the children would suffer due to maternal imprisonment was considered alongside the appropriate punishment for the crime. Epstein (2012) found in a similar review of sentencing decisions that sentencers were not conducting the balancing exercise as required by the case law.

Knowing that judges are permitted to consider child dependents in sentencing decisions, the next section of the chapter will draw upon the data collected from interviews with 20 Crown Court sentencers to explore their interpretation of the case law and guidelines and their understanding of its relevance to their sentencing practice.

Judicial awareness of sentencing guidelines and authorities

Through the interviews I sought to explore whether judges have an awareness of the authorities and whether or not they follow the principles established in those cases. Each judge was asked the direct question, ‘Do you know of any sentencing guidelines or authorities which you would follow when determining the weight that should be given to a defendant’s primary or sole caregiving status?’ Three judges said they were not aware that the sentencing guidelines contained any guidance on the consideration of dependents

in sentencing. With regard to the Court of Appeal and Supreme Court authorities on dependent children I found the following: three judges said they knew of no Court of Appeal authorities on this subject; two knew of authorities but did not think that they needed to be considered in every case; three judges knew of the authorities and interpreted them to mean that children should not be a factor which mitigated in favour of a shorter or non-custodial sentence. Thirteen judges knew that there were Court of Appeal and Supreme Court authorities on the point and understood that these required them to balance the impact on the family with the other factors in the case. Two of those thirteen specifically referred to the leading authority of *R v Petherick* [2012]. Eleven judges asserted that they used their own judgment to determine the relevance of dependents to sentence. Only one judge said that the ‘welfare of the child’ should be at the forefront of every judge’s mind (the principle established in the cases mentioned in the previous section of the chapter). No judge said that the best interests of the child must always be a consideration (as set out in *R v Petherick* [2012]), nor did any judge refer to the duty on the court to ensure that they have sufficient information about the children to undertake the correct balancing exercise (*R v Bishop* [2011]).

It also emerged that some of the judges I interviewed believe there are a number of reasons why they should not take dependent children into account when sentencing mothers. Three judges in this sample regarded consideration of dependent children as being contrary to ‘justice’. They explained that if they were to impose a non-custodial penalty or a shorter sentence because of the impact that maternal imprisonment would have on dependent children they would not be acting as they should:

I think if your house was burgled or your daughter was raped, you’re not going to want the judge to think, well this man’s the sole carer of three children and start sentencing from that point. (CC7)

We are there to sentence the offender. Not to take into account the rights of other people, except for a direct victim. (CC9)

Children must be borne in mind but the court must not allow itself to be dragged along putting the children ahead of victims ... don't go soft just because of the children, in other words don't allow yourself to not do justice just because somebody's got a child. That's what they are really saying; I'm familiar with these authorities, they all say that if it's appropriate you can and should take into account the effect on children but you mustn't allow it to divert you from doing justice. (CC20)

It is interesting that in the final quotation above, the judge describes taking into account the effect on children as a diversion from doing justice. This is contrary to the authorities which state that for the sentencing courts to correctly do justice, they should take into account the impact on dependent children when sentencing their primary carer (ZH (Tanzania)(FC) Appellant v Secretary of State for the Home Department [2011]; R v Petherick [2012]).

Another justification for not considering dependent children in sentencing is the belief held by a few judges in this sample that the consequences of maternal imprisonment which affect dependent children are entirely the responsibility of the defendant mother. Therefore the court does not need, nor should it try, to reduce the harms which might be suffered. Wallis and Dennison discuss this attitude and describe it as 'problematic':

Unlike their parents, children of prisoners have committed no crime and there is no proper justification for the impact of parental imprisonment on them. In addition, placing responsibility on an offending parent to buffer and protect their children from the consequences of their actions can leave children at risk; and many parents are not capable or willing to act protectively in this manner. (Wallis and Dennison, 2015: 96).

This view was held by four judges I interviewed and extracts from their interviews are set out below. In the final extract below, one judge even went so far as to say that when a defendant is a parent their parenthood makes them more culpable:

They are responsible for what they are about to inflict on those children by way of sentence. They've done that, not the judge. They should have thought about their children before committing a crime. (CC20)

It's [the fact that a defendant is a sole or primary carer for dependent children] relevant, but usually I put it to one side. At the end of the day there is you do the crime you can do the time as well. (CC3)

If people cared about their children then they wouldn't go and commit offences and put themselves at risk of going to prison. (CC13)

The child didn't commit the offence. The child can be a victim of the decision by the parent. There's an argument for saying that the parent is more culpable for committing an offence when they have three children, because in fact they have more responsibility for those children, so how much is the court invading the right to family life, when in a lot of respects it's already been infringed by the parent who commits the offence. (CC7)

Only one judge took a strongly contrary opinion, dismissing the idea that the impacts on children should have been thought about by the parent before the commission of the offence:

We're not talking about what they should have thought of. People are feckless. We don't think of everything all the time. We don't live life like that. Even those of us who regard ourselves as more cerebral don't do that. Thinking doesn't determine behaviour. (CC11)

Although the judges I interviewed did not all have an awareness of the guidelines and authorities they did recognise that they had permission to consider the defendant's caring responsibilities as a mitigating factor, and it was 'within their discretion' to reduce sentence accordingly if they believed it to be appropriate. Although guidelines have promoted a move towards a tariff based system similar to the United States they have not removed judicial discretion, and judges work towards an 'equal decision making process' rather than equal sentencing outcomes (Wasik, 2008: 216). It is of particular relevance to this enquiry that judicial discretion operates in the decisions which a judge makes about the role of mitigation in any sentencing decision. Despite the clear principles set out in the authorities and the generally held view that dependent children can be a mitigating factor, judges do not have an agreed or consistent practise with regards to the degree to which

the impact of the sentence on the defendant's dependents should be treated as a factor which mitigates the sentence. Earlier research focused on this issue, and drew on studies of judicial reasoning to understand the way in which judges assessed the impact of a defendant's status as the carer for a dependent (Minson, 2013). This limited, exploratory study found that judges apply a series of filters to their sentencing decisions whether consciously or unconsciously; the interpretation of mitigation is determined by a judge's own knowledge and understanding, and judges with a greater understanding of the impact of maternal imprisonment on families are more likely to make enquiries about child dependents through the mechanism of pre-sentence reports. When a pre-sentence report is prepared, even if the judge does not agree with the recommendations of the report the defendant's motherhood is more likely to mitigate the sentence (Minson, 2013).

Given the nuance and complexity of judicial thinking I used the interviews with the Crown Court judiciary to discuss their understanding of the place of mitigation and the use of discretion in sentencing decisions. The interviews followed an interview guide (Appendix D) and included a mitigation weighting exercise, three sentencing vignettes, a number of questions, and four statements which acted as stimuli for discussion (Appendix E). The vignettes were taken from a study on personal mitigation (Jacobson and Hough, 2007). The first question asked of each judge was 'What kinds of personal mitigation most often influence you in sentencing decisions?'. Half the judges interviewed thought of family dependents when they thought of personal mitigating circumstances and half the judges did not. Their variability was further demonstrated when each judge was given the list included in every sentencing guideline under the heading 'Factors reducing seriousness or reflecting personal mitigation' (Appendix E), and was asked to give every item on the list a weighting between one and ten; the higher the number the more weight it was likely to carry in a sentencing decision. The factor 'sole or primary carer for

dependent relatives' was on the list, but at the stage in the interview when it was considered there had been no specific mention of mothers or dependents unless the judge themselves had raised it in answer to the first question. Of course this was an artificial exercise, as sentencing never takes place without context and three judges were unwilling to complete the exercise due to its artificiality. However the answers of those who did agree to undertake the exercise demonstrated the extreme variability of judicial consideration of dependents in sentencing, and the generally low importance attached to it by the judiciary. Of the ten factors on the list, 'sole or primary carer for dependent relatives' received the second lowest cumulative score across the judges, and was the only factor which was weighted as both a one and a ten. Analysis of the completed sentencing exercises also indicated that it was more generally regarded as having minimal impact on sentencing decisions. It was ranked 8th out of 13 factors across three scenarios with depression, remorse, a one-off incident, the victim's family supporting the defendant, regret, a steady job, and seeking treatment for a drug problem, all regarded as potentially having a more significant impact on sentence reduction. These findings illustrate that the judiciary I interviewed were not a homogenous group; their views differed and there was little inter judicial consistency in the sentencing exercises.

After the completion of the exercises I asked each judge whether they thought that being the sole or primary carer for dependent children was a matter that is relevant in mitigation. 18 of the judges believed that it was sometimes relevant, and nine of those judges said that it was a factor they would always consider in determining sentence length. A few judges did not usually consider that it should have any impact upon sentence, and described it in the following terms:

I don't think it's of great significance. (CC14)

Usually I put it to one side. (CC3)

Only if there's no one else to care for them and that's seldom the case, so no. (CC6)

The judges were consistent in their approach to personal mitigation expressing in different ways the view that 'the more serious the offence the less impact it is going to have' (CC7). Consequently, although the particular fact of the defendant being the sole or primary carer for child dependents was regarded by judges as mitigation 'in a significant number of sentencing cases' (CC12), in cases of a repeat offender or with more serious criminality or dangerousness, it was considered 'irrelevant' (this term was used by judges CC5, CC8, CC16, CC18, CC19). Only a few judges regarded it as relevant mitigation in every case, but one who did said this:

Sending anyone to prison is a serious step and the impact of that on innocent members of the family is something that I, and I'm sure most judges, take very seriously. You are not just sending a defendant to prison, and there are consequences and I think it is incumbent on the judge to consider the consequences. (CC10)

The judges interviewed acknowledged that although dependent children would be in their minds as a factor which they should take into account, there would be times when that would be outweighed by the aggravating factors and the seriousness of the offence (CC12). In those cases it was 'an unfortunate consequence' that a custodial sentence would 'cause a lot of suffering to others at the same time, but sometimes that's unavoidable if the offence is sufficiently serious' (CC16). One suggested that the judiciary more generally took a dismissive view of family circumstances:

Most judges are still of the school of thinking that family mitigation is neither here nor there. (CC6)

In summary, judges are permitted to take dependent children into account when sentencing mothers and in fact they ought to undertake a 'balancing exercise' in which they weigh the impact of the sentence on the children against the need to punish the

offender (R v Petherick, [2012]). The sentence should be proportionate, taking into account the impact it will have on child dependents. Although the judges I interviewed did not always have a clear understanding of the guidelines and case law, and no evidence was found of any of those judges conducting the balancing act as prescribed in the case law (R v Bishop [2011]; R v Petherick [2012]), most of the judges did believe that they could if they wanted to, consider children as a mitigating factor when sentencing an adult mother.

Judicial understanding of the impact of imprisoning a mother

The first section of this chapter has established that when sentencing, judges should take into account the way in which dependents will be impacted by the imprisonment of a sole or primary carer. The authorities are clear on the importance of this, but the delivery of consistent justice relies upon judges following the guidance and understanding the consequences which flow from maternal imprisonment. Given the lack of research evidence on this topic, and the time and resource limited nature of enquiries made by the courts, I used the interviews to explore whether the judiciary I spoke with had sufficient insight into the impacts to seek out the pertinent information, or if they failed to adequately take dependents into account because they did not understand the nature of the impacts and therefore the scope of the enquiries they should make in each case.

Over half the judges interviewed believed that the imprisonment of a child's mother could have serious consequences for the children. They used words such as 'crippling' (CC1) and 'devastating' (CC2), and described it as punishing 'the next generation (CC19) and wrecking the lives of those who've 'done no wrong' (CC20). Those who believed it was detrimental viewed maternal imprisonment as a traumatic or negative event in the life of a child, with both short and long term consequences. Some judges in this sample

however, viewed the harms flowing from maternal imprisonment to children as the exception rather than the rule, suggesting or believing that only the particularly vulnerable are harmed by the removal of their primary carer from the family:

I would like if I could be told something about the dependent so as opposed to just a bland conclusion that the dependent would find it awful. Sometimes maybe, not often, the dependent, unless actually they are a very young child, will be fine. Sometimes they may be vulnerable and might completely fall apart, so what sort of dependent the person is leaving behind. (CC1)

When asked what information they would seek if they were faced with a case where dependent children might form part of the relevant mitigation some judges said that they would want to know about the age of the children and ‘as much as possible’. Their source for such information was in most cases a pre-sentence report (PSR) prepared by the probation service. It seemed that the quality and nature of reports varied between court centres and as the sentencing judge may on occasion not be the trial judge who ordered the preparation of a PSR, the information the sentencing judge wanted might not be in the report. In such instances the judges I interviewed expected to hear representations from the defendant’s solicitor or barrister, and the practice of some was to speak with the defendant. The judges recognised that the information they were presented with at sentence was no more than a ‘snapshot’ of the situation at that time, and often contained very little information about what would happen to the children in the event of the mother’s imprisonment. The judges within this sample who took the view that ‘not all children’ were harmed by maternal imprisonment thought that a number of factors including the child’s age, the mother and child relationship, the adequacy of the mother as a parent, the child’s socio economic status and potential, and the availability of a kin carer for the child, mediated the harm to the child during the period of imprisonment. Each of these assumptions will be examined in turn and in the discussion in later chapters these

assumptions will be considered in the light of what is known about the experiences of children of imprisoned mothers as set out previously in chapter three.

The age of the child

Some of the judges said that in order to factor the impact upon dependents into their sentencing calculus, they want to know the ages of any dependent children, but they did not explain what difference age would make. Others spoke of the impact of depriving ‘young children’ of their parent as an ‘important factor’ (CC15). Concern for younger children seemed to be predicated on two beliefs. Firstly a belief that a younger child will suffer more from the loss of their mother:

The age is going to be more important the younger a child is. You really are going to think twice about a baby or a child who is still forming attachments, you are going to be much more cautious about that than if you’re dealing with a school child or adolescent. (CC 17)

Secondly a belief that it is easier to make alternative care arrangements for older children:

The age of the children implicitly is relevant. So are those older children who can stay with friends or be looked after by a next-door neighbour for a couple of months...or are we looking at completely dependent babies? (CC 17)

I think the younger the child the more I would be inclined not to separate mother and children. The older a child, a child aged 12 and above, usually other arrangements can be made, even if it’s to go and live with a friend for a few weeks or months. (CC 12)

An exception to the particular concern for younger children is when a child is young enough to accompany the mother to prison; in such cases an assumption is often made that the child will go into prison with the mother. The reality is that when a judge sentences a defendant mother they have no knowledge of whether there will be a space in a mother and baby unit for that defendant and her child, nor is it guaranteed that the unit

will accept the mother and baby. One judge had it very clearly in mind that the mother and baby unit was a desirable place for mothers and babies, and for that reason had no need to consider harms to a baby from maternal imprisonment when sentencing. This was despite the fact that the unit they were thinking of had been shut down:

CC20: Age is crucial, if it was a baby it would cut little ice because they can take the baby into prison and the Holloway Mother and Baby Unit, it's the most sought after postnatal unit in the world

SM: That unit closed some time ago.

CC20: Oh

Some judges felt that harm was not limited to very young children, but did differentiate between children on the basis of age. These ideas did not always have an evidential basis and were inconsistent between the judges interviewed:

If you've got children or babies under five that's going to have a big impact. On the other hand I recognise that having teenagers, there may be a time when they really need somebody around, so I don't think I'd be more inclined to keep somebody out if they've got a five year old rather than a thirteen year old, but if I'm talking about a 16 year old I might be looking at it differently. (CC7)

I think sub 10 years I think then probably it would be a factor that would just tip you... but I think the age of the children do, if you're dealing with teens, but if you read that someone [aged 16] is about to take their GCSE's in three or four weeks time then you would [consider it as a factor in sentencing]. (CC18)

The children and caregiver accounts in chapters three and six, and the research literature, provide very clear evidence that the loss of a mother to imprisonment can have a detrimental effect on children of any age (Parke and Clarke-Steward, 2001; Travis and Waul, 2004; Miller, 2006; Comfort, 2007; Dallaire, 2007a, 2007b; Children's Commissioner for Scotland, 2008; Nesmith and Ruhland, 2008; Murray and Farrington, 2008; Barnardo's, 2009; Dallaire and Wilson, 2010; Hissel et al, 2011; Raikes and Lockwood, 2011; Sampson, 2011; Scharff Smith and Gampell, 2011; Wakefield and Wildeman, 2011; Arditti, 2012; Johnson and Easterling, 2012; Wakefield and Wildeman,

2014; Flynn, 2013; Morgan, 2014; Dennison and Smallbone, 2015; Flynn, 2015; Minson and Condry, 2015; Minson et al 2015). Older and younger children have different needs, but all children will place demands on caregivers (Caddle and Crisp, 1997; Fox and Benson, 2000; Parke and Clarke-Steward, 2001; Poehlmann, 2005; Mackintosh et al, 2006; Comfort, 2007; Murray and Farrington, 2008; Denby, 2012; Turanovic et al, 2012; Raikes, 2016). Similarly, the issues a child faces due to the loss of their mother to imprisonment will differ according to their age and maturity, but the challenges and harms remain significant irrespective of age.

The mother and child relationship: the adequacy of the mother as a parent

A few judges I spoke with voiced the opinion that children might be better off without their mother in their lives:

Sometimes when people are parents who are offenders, it may not be a bad thing for the children to have a break from that parent. (CC13)

When this assumption was made by a judge in interview it seemed to be based on the nature of the mothers' offending rather than information or knowledge about the parent and child relationship. The excerpt below is an example of this:

I think that sometimes you take the view that particularly if someone has got a record of offending that although they may be the primary carer, the way in which they've behaved in their life has led them to offend is reflective of perhaps not a terribly good influence in their home environment, and so I think that it's less important, albeit you accept it's going to have some affect on their dependents. It's perhaps less of an affect than in other circumstances because you take the view that the affect they are having at home is pretty negative in terms of the example they are setting and their behaviour. (CC18)

In other instances the mother's offending behaviour might impact her ability to parent well and in such instances, particularly when the mother was abusive or addicted to

alcohol or drugs, some judges said that they would question whether keeping the family together is in the best interests of the children:

If you have a mother who is abusive or drug addicted, which is what is often seen, well then you think how much is it in the long term interest of the children? I remember thinking of this mother that the kids were better off without her. She wasn't interested in the kids anyway. (CC16)

For some judges their willingness to consider the impact of a mother's imprisonment on her dependents was linked to their judgment of whether a woman is a good or bad mother. This has the effect of making the mother's behaviour, rather than the impact of her removal on her child dependents, the factor which is considered in mitigation. Historically women who committed criminal offences were viewed as 'doubly deviant'; not only had they broken the law but in doing so they had departed from the societally accepted norms of female behaviour and 'good' mothering (Dobash et al, 1986). One judge gave a nuanced example of the continuation of that attitude to women:

If they are out selling drugs and they know they are the sole carer and if this is all for extra pin money or luxuries and I've had this where they all were for luxuries, I'm afraid they must think of their child rather than blame it all on the judge. That is one end. The other is when somebody has done something on a night off, say, having been a perfectly good mum, she's had a night off where she's got drunk and done something stupid, where otherwise she's a very good mum, clearly that would weigh in a very different way. Same factor but very different. (CC20)

The determination of a parent's worth by reference to her criminal activity is contrary to research which has found that the child's experience of maternal loss is significant regardless of the criminality of the mother. Even if she is on a judge's assessment, a 'bad' mother, her child will still have significant attachment to her as primary carer (Wakefield and Wildeman, 2014).

The child's socio-economic status

One judge when talking about determining the weight which should be given to the consequences of maternal imprisonment for children, explained that they differentiated between children on the basis of their socio-economic status and their future potential in life. According to this judge some children whose mother offends are 'true victims' but not all children can be treated as such. The excerpt from the interview is set out in full:

The children of most offenders are not what I would call true victims. The children of the bank manager who'd done this one off offending which potentially could result in her family being split up and losing and being put into care, those I would have called true victims. Most of them come from the sort of parents who don't quite choose to offend, but dad will be a petty offender throughout, and mum will go out and do her bit of shop lifting and they are therefore living in a family where they are taught that crime is ok, and they become criminals too.... When I say the family of the bank manager were the true victims – she had done something that suddenly dumped them in the potential to have their family ripped apart, whereas the other children, the children who are born and bred in a family where they've got neighbour disputes, mum and dad are out drinking and all the rest of it, any child is of course a victim, they don't choose to be born into this scenario but there comes a stage where they pick it up and they run with both hands, and of course they're going to because they don't know any better. But those who are suddenly plunged into it from a moment of madness, or in the bank managers case it had been a period of 3, 4 years defrauding her employers ... I'd tend to try to keep the family of the bank manager type family together, because she's not actually a bad mother, but the recidivist type where you've got mum and dad offending, normally it's dad only and mum is doing her best to stop little Jonny going the way of Dad but she's up against it really with the whole ethos within the family of no respect for the law and just general offending. (CC9)

The judge demonstrated bias towards those in higher socio economic brackets and made assumptions about the impact of the loss of a primary carer to a child, based on the financial circumstances and perceived ethos of the family. The judge took the view that repeated low level petty crime is a stronger indicator of bad mothering than four years of embezzling substantial sums from an employer. This is difficult to understand, but I would suggest that in this case the bank manager mother had a lifestyle which was recognisable and familiar to the judge, and that recognition caused the judge to take the view that the children of that mother deserved protection from the harms of maternal

imprisonment. This was not the case for similarly innocent children in a home life which was not familiar to the judge. Although only one judge in the interview sample expressed this view it was a great surprise to me that even one member of the judiciary both held and voiced this viewpoint.

Kinship care

Whilst some judges in this study expressed the opinion that the existence of child dependents would rarely if ever affect their sentencing of a mother, others made it clear that they would give it much more weight if the mother's imprisonment would result in the children being taken into the care of the local authority. There was consensus amongst the judges I interviewed, with only one dissenting voice, that local authority care was a much worse option for any child than kinship care:

It's when you find there actually is nobody else and the kids go into care, that then becomes rather difficult because you are looking at a specific and extreme end of the circumstances. (CC3)

If they will stay with a family member they already have a relationship with, even if it's not going to be a parent that will be significantly better than if they go into care, so it probably will have less mitigating force. (CC17)

And if you've someone who says there's really nobody to care for those kids, that is pretty compelling evidence to say to me that you better think of something that is going to nail this person down adequately punish them but at the same time enable them to look after these kids. (CC3)

The reasons for believing that local authority care is a more damaging experience for children varied among the judges. A few had a background in family law and an awareness of what life in foster care is like for children and it was that knowledge of the system that caused them concern:

They may end up in separate foster care, that's them doomed for the rest of their lives. That's probably me coming from sitting in family cases as well. (CC4)

[State care is a tipping point] because I do a lot of care cases as well and I know what it's like for children going into foster care. (CC7)

Those who took the view that local authority care is harmful, believed that sibling separation which they viewed as damaging to children, was more likely to occur within local authority care, and many also believed that the harms of maternal imprisonment are significantly mitigated when a child lives with a relative or friend who is already known to them:

The idea that the child is going into care to complete strangers, and it's likely to be more difficult to get those children back and there's more than one child the possibility that they're not going to be kept together, as frequently happens, yeah, I don't think I'd want any child to go into care if you can possibly avoid it. (CC7)

It may be that judges prefer the idea of kinship care because the child will experience less change, but other more surprising ideas may also influence this belief as was shown by the answer given by one judge:

It's much easier, and not wanting to encourage deception, but it's much easier to create a deception if they live with auntie – that mummy had to go away for a couple of weeks. (CC10)

A great deal of importance may be placed by judges on family ties and the fact that a prospective caregiver is a relative of the child appeared to provide judges in this sample with significant reassurance that the child will be protected from some of the harmful impacts of maternal imprisonment. As explored in earlier chapters this is not always the case and even within kin caregiver placements the children suffer considerable harm. If there is judicial reluctance to imprison a mother if her child will go into local authority care, coupled with a belief that kinship care will make it possible to pass a custodial sentence without negative consequences for dependent children, it can lead to judicial pressure on defendants to find someone within their family or friendship circle who will take on the care of the child. The judiciary I interviewed did not seem to have any

comprehension of the cost involved, emotionally, physically, and financially to a caregiver. Among the judges I spoke with there was an assumption that anyone would be able to take on this role:

I wouldn't accept that she's the only one who can look after them because I'd say 'Who's looking after them today?' (CC4)

Often you probe a little bit, 'so where are the children today?' 'Oh, they're with their grandparents', or their aunt, and there are in fact alternative ways of caring for the children. (CC13)

These judges seemed to equate taking care of children for a few hours with taking on the full time, longer term care of children. The two have little in common and for judges to use that, as a test of caregiver availability is an inappropriate comparison. The judges quoted above did not believe they were being told the truth when a defendant mother said there was no one suitable to care for her children, but as was noted in the previous chapter the cost to caregivers is high and the impact of becoming a caregiver to a child whose mother is in prison is potentially life changing. There may of course be cases in which it is not true that there is no suitable carer to look after the children, but it is significant that some members of the judiciary seemed to believe that everyone has someone in their life who can take on the medium term care of their children without financial or other support. Given the demographic of most female offenders it is likely that those in their support networks may also suffer from poverty and do not have the financial or social resources to provide for more children (Prison Reform Trust, 2015). It is therefore not surprising that sometimes defendant mothers do tell the court that they have no one to care for the child. This may be because a) they have no relatives with whom they or the children have relationship, b) they do not wish for their children to be cared for in unsuitable conditions, or c) their relatives do not want to take on the burden of care for their children. Two judges I spoke to regarded a lack of alternative caregivers as an

attempt to ‘blackmail the court’ (CC18) and said that they ‘have a degree of skepticism about whether there really is nobody available’ (CC7). Another believed that defendants are trying to ‘put the judge under pressure’ (CC12). The judges who told me that they took this view appeared to respond to the alleged lack of caregiver for the child not by taking the child’s welfare into account and imposing a non-custodial sentence, but by treating it as manipulation and imposing a period of custody. If family members then made themselves available to care for the children the judges believed this vindicated their position:

I mean some people are bound to say there’s nobody to look after the children in the hope that the judge will be more lenient, when the truth is the moment she does get custody the grandmother steps in and does look after the children. (CC7)

They are outside and they tell the court they’ve got nobody to care for them. It’s your problem. You can’t do a lot. So you say I’ll get the OS [Official Solicitor] to deal with this. We’ll remand you in custody and deal with it at two o’clock, and that’s when reality dawns and suddenly a sister turns up to take them away. You can call their bluff. I’m not really daft in that department. (CC20)

One judge who had taken on the care of a relative’s child, used their own experience as an illustration that kin care is always better than local authority care. Their account was that they could not have watched their relative go to a stranger. It should therefore not surprise judges that family members step forward to care for children when imprisonment is imposed, but there should be a recognition among sentencers that it is often not their choice (see chapters three and four), and they are without adequate resources to properly care for additional children. I asked the judges directly whether those providing care for children of imprisoned mothers receive any form of financial support. Most thought not, and some did not feel that it mattered, whilst a few assumed that they would receive financial support:

I would imagine there must be some kind of fund but I couldn’t tell you. (CC7)

I'd always rather assumed that if the carers were stepping forward then they had the means to cope, but I've never looked at it. That's bad isn't it? (CC8)

If I was told they'd go to Granny and she'll have to manage on £80 per week, but if they stay with Mum they'll have £200 it won't influence me. (CC4)

I think if someone is being put forward, has come forward, then I would accept that and leave it at face value. In a way that's leaving it to social services to make the decision if that's appropriate. (CC12)

Within the samples of children, caregivers and judges in this study it was the norm for judges to make no assessment of the caregivers availability or suitability for the role, nor to ascertain the child's views. The expectation, which some judges I interviewed expressed was that any female member of the defendant's family could, and should, take care of the children (Granja, 2016), and that a kin carer will always reduce the harmful impact of maternal imprisonment. Only one judge spoke of potentially problematic kin care situations. In answer to a question about whether the children's dependency was a factor in sentencing they said:

It is a factor, it is relevant, certainly to those children who may find themselves taken into care or being looked after by relatives who don't really want them or can't really cope with them being there. (CC1)

To summarise, the judges I spoke with had a very limited understanding of the consequences which flow to children from the imprisonment of their mothers. The majority of those interviewed thought that only a small subset of children suffer harm: those who are taken into local authority care, the very young, or those who have a 'good' mother. Other than separation from siblings and the loss of their parent these judges did not seem to be aware of the breadth and depth of the consequences for children. They made no reference to issues of education, behavioural problems, attachment issues, overcrowded housing, unsuitable carers, anxiety, stigma or stress, all of which were explored in chapter three. With the exception of a single judge, none of the judges

mentioned the kin caregivers at all in their analysis of harms or consequences, and when they were referred to it was in relation to the harms the children might suffer if the caregiver was unwilling or unable to look after them properly. There was no recognition whatsoever among this group of sentencers that an incredibly heavy burden is placed on kin caregivers. None of the judges gave any thought to the appropriateness of the caregivers, and even when asked directly about financial difficulties they might face they took the view that that was irrelevant. The only outcome this small sample of judges seemed to wish to avoid was a sentence which would result in children being placed in state care. I will return to this issue towards the end of the chapter, but from an investigation of a sample of sentencers' understanding of the impact of maternal imprisonment it would seem that certainly these judges know that separation from a primary carer will disadvantage or harm a child, but if in their own minds they were able to believe that the harm is reduced to a negligible level if a kin caregiver steps forward, then by identifying such a carer they felt assured that they had not contributed to any harm which a child might experience.

Conclusion

I have found that judges are not only permitted, but are in fact expected to consider the impact on child dependents when a parent is sentenced in the criminal courts. The research conducted with 20 members of the Crown Court judiciary found that in general they do not sentence mothers according to those principles, instead they use their discretion and make assessments of the impacts based on an incomplete and misinformed understanding of the consequences for children of maternal imprisonment.

It is my contention that whether they believe them to be a relevant factor in their sentencing decisions or not, all judges know that children will be affected by the

imprisonment of their mother. They may not have a proper understanding of the depth and breadth of the impacts but the concern expressed about children's placement in local authority care, which I suspect would be replicated in a larger sample, demonstrates an understanding of the short and longer term harms which a child suffers if separated from siblings, moved into a strange, new home, and removed from their primary caregiver. I would therefore suggest that judges can foresee a level of harm to children, although they may not fully understand it. If those that I spoke with are representative of judges more generally it is of concern that they had no understanding at all of the impact on caregivers, and mistakenly viewed the presence of a kinship carer as a factor which minimised harm.

Finally, from the remarks made by a few of the judges I spoke with, it is arguable that some judges interpret the harms to dependents as part of the punishment of the mother:

I think it [prison] would have a far more severe impact because for me ... if I had to live without my children for any period of time it would have a significant impact, not because of the effect on me, but because of what I'd fear it would do to my children. (CC6)

[Imprisonment is harder on a woman] knowing that her children are in care must be a terrible burden. I take the view that if I can accept a submission in a particular case that the defendant is acutely conscious of the problems she is creating for others, then that is genuinely a factor which makes imprisonment harder to bear. (CC1)

In summary, although the judges interviewed knew that they had discretion in sentencing decisions and were aware that there is potential for a child to suffer negatively from the imprisonment of their mother, the majority believed that they themselves do not deal with those cases. They seemed to distance themselves from the responsibility of considering children's welfare by taking the view that either the mother was not a good mother and the children would be better off without her, or if the child was going to be cared for by a member of the family during the mother's imprisonment the negative impact on the child

is minimised. If the judges could not minimise the impacts in these ways some of them took the view that the harms suffered by the dependent children attach to the offender and the offence and are a consequence of the mother's criminality, with her lack of care for her children expressed through her criminal offending. Judicial decision-making is informed by judges' own concepts of good and bad mothers, and some link the child's value and worth to the mother's status as a criminally convicted woman. These findings were of course based on interviews with a small sample of judges, but they raise important questions about the secondary stigmatisation of prisoner's children by the judiciary.

Part II Concluding Discussion

Reasons for the differentiated treatment

At the outset of the thesis I questioned why children whose mothers are being sentenced in the criminal courts are treated differently from children who face separation from their parents by the state in the family courts in proceedings under section 31 of the Children Act 1989. The previous three chapters have explored possible explanations for such differentiated treatment but none of the explanations proffered provided a fully satisfactory reason for treating children differently. Chapter three considered the harms which children suffer when their mother is imprisoned, and from the literature and the accounts of children interviewed for this study it became clear that the differentiated treatment cannot be justified due to a lack of harm caused to that population. Chapter four concluded that it is not because of limits on state responsibility that such children experience differentiated treatment, as the state have a duty of care toward children of imprisoned mothers and an obligation to protect those children under the United Nations Convention on the Rights of the Child 1989. Finally in chapter five it was established that the judiciary are expected to recognise the needs of children when they sentence mothers, however some of the differentiated treatment at sentencing may be explained by the fact that the likely consequences for children of maternal imprisonment are not fully understood by those making sentencing decisions. In this concluding section of Part II I suggest that it is not that the state cannot make provision for these children, nor is there a conscious policy choice to exclude these children from state provision, but instead a number of institutional and social processes have allowed these children to be treated as ‘other’ within maternal sentencing decisions. I will detail each in turn: firstly the way in

which children have been constructed and understood in the different branches of the courts has enabled differentiated thinking to develop; secondly the separation of the courts into Criminal and Family Divisions has provided a reason for alternate constructions of children to continue, and the silo mentality which exists within different branches of the courts in England and Wales means that such differentiated consideration has neither been acknowledged nor addressed; thirdly the general invisibility of women in the criminal justice system (as set out in chapter one) and misapplied notions of gender equality and fairness have also contributed to the way in which children are regarded within maternal sentencing decisions and during the imprisonment of their mothers.

Constructions of children within the courts

By considering the ways in which children are viewed in the criminal and family courts it may be possible to trace the origins of the thinking which has led to the differentiated treatment between children who face separation from their parents in the family courts and those who face separation from their parents in the criminal courts. Historically the law treated children as either possessions or problems (Freeman, 2001: 199) and although there is now a greater emphasis on children as participants, perhaps indicating the influence of the sociological models of childhood of the ‘social structural child’ and ‘minority child’ as proposed by Jenks (2001), their standing under the law is a ‘hotchpotch of legal principles’ (Fortin, 2009). Those who have written on this topic draw attention to the ‘contradictions and nonsensical paradoxes’ apparent in the treatment of children (Fionda, 2001). The prevailing thinking in the sphere of law whose jurisdiction they are under, and their role within that jurisdiction be they victim, witness, offender, or a child caught up in the collateral consequences of their parents’ involvement, determines their standing. Fionda suggests that such variation can be explained by the fact that the

legal system is an adult centered environment, and therefore children's 'conceptual malleability' (Ibid.: 17) is manipulated in order to 'fit the dominant interests in that adult world'. Adult preconceptions of children, and the construction of children with group characteristics (Piper, 2007a) leads to distortion of children's individual identities in an attempt to make them 'fit' into an adult orientated framework (Fortin, 2009: 741). Within the legal framework children are assigned a role that does not treat them as individuals but as a homogenous group linked purely by their status within legal proceedings. This model of understanding children is based on sociological constructions of childhood in which the child is a construction of his circumstances (James et al., 1998; Jenks, 2001). Defining children's legal status as their 'master status' has echoes of labeling theory and leads to adult-centric, unindividualised treatment of children within the legal processes.

Another way of constructing children was developed by King and Piper (1995) who utilised Teubner's theory of semantic artifacts (1989). Teubner saw the law 'through its internal communications as producing 'role bundles' or 'character masks' which populate the legal world' (Ibid.: 741) and according to King and Piper:

[the law] inevitably constructs and operates upon semantic artifacts while at the same time giving the impression in its communications to the external social world that it is dealing with and communicating about 'real flesh-and-blood human beings', whether they be children or adults. (1995: 64)

They proposed that children within the legal system could be divided into four groups: 'child as victim', 'child as witness', 'child as bundle of needs', and 'child as bearer of rights' (Ibid.). The weakness is, as with all labeling, that the models overlook the complexity of individuals and group together those who are dissimilar save for the circumstances in which they find themselves. The four classifications seem to be both overlapping and incomplete. They overlap when the law steps in to protect and assist the child as victim or witness, whilst also recognising that they are 'a bundle of needs' and 'a

bearer of rights'. It is arguably incomplete, as the classification does not include a category into which the child as offender could fit. Although an offending child is both 'a bundle of needs' and 'a bearer of rights' the reality is that although not outwardly identified as such, the dominant label applied to defendant children within both the legal system and the media is the pre-sociological construct of the 'evil' child.

Across the legal system these concepts are attributed to children differently by different courts, and although there is some intra-court consistency (within the Family Division children will be constructed in a broadly similar way) there is not inter-court consistency. Although this thesis focuses on two very specific situations within the family and criminal courts it is helpful to consider some general examples of this differentiation between children in those jurisdictions. A child is held to be responsible for criminal activity at the age of ten, and can therefore stand trial alone as a defendant in the Criminal Division of the courts, yet that same child would have no right for her views to be directly heard or to be separately represented in proceedings in the Family Division of the courts which concern her future upbringing following parental separation or divorce. In criminal proceedings the child as offender is constructed as a child who is 'no good' and in the worst cases 'evil' (for example the defendants in the James Bulger murder case), deemed fully responsible for her actions, and undeserving of the protection a child of her age would normally be accorded. In family proceedings the court's conception of her as a 'bundle of needs' or 'minority child' leads to her being excluded from proceedings as she is regarded as too immature to know what would be best for her. In the first instance the child is a problem and in the second the child needs protection. As has been outlined in chapter four the state has adopted a protectionist and welfare based approach to children within the family courts based on a perception of the child as a 'victim' (of adult behaviours) and the child as 'a bundle of needs', which the court must recognise and

address in its decision making. This was evident in Lord Ennals' speech to the House of Lords at the introduction of the Children Act 1989, 'The care system is designed primarily to provide protection for children against adult society rather than the protection of society against children' (Hansard, 1988: 530). The problem with the operational constructions is that the child's construction is based on the dominant philosophy of the court or the child's status within it, and consequently there will always be a lack of consistency and arguably equality for children caught up in the court system. What this thesis proposes, and I return to this argument in later chapters, is that any child appearing before a court, or whose life will be impacted directly by a court decision, should be entitled to be regarded in the same way whatever the nature of the process which has brought them to the attention of the court, be it criminal or civil proceedings and whether they are victim, witness, the subject of the order as in care proceedings within the family courts, or affected by the criminal sentencing of their parents.

Separation of the courts: labeling and secondary stigmatisation of children

When differentiated treatment exists across different courts it is not easily recognised, as the criminal and family courts have an entirely separate existence and their processes and procedures are not often compared. The Courts Act 1971 established the Crown Courts for hearing exclusively criminal matters. Crown Court judges sit only in the Crown Court, and they do not have jurisdiction in family matters. The courts with jurisdiction over family matters are in the Family Division of the High Court and in the Family Court, which was established by the Crime and Courts Act 2013 when it merged the family law functions of the County Court and the Magistrates Court into a unified court. There is occasional overlap between judicial function and experience, for example a circuit judge may sit in a Crown Court for most of the year but will spend a few weeks every year

sitting as a deputy High Court judge in the Family Division if they have the appropriate 'ticket'. Similarly magistrates who are qualified to consider family proceedings will also sit on criminal matters in the Magistrates Court. Despite this occasional overlapping of judicial experience, each court has a prevailing view of the children with whom they have the most familiarity. In the branches of the Family Courts the judiciary treat the child's welfare as the paramount consideration. Judges who sit in courts hearing criminal matters will usually only encounter children in two circumstances. The first of these is when a child over the age of 10 is charged with committing a criminal offence and is brought before a Youth Court which is held in the Magistrates Court with specially trained magistrates and district judges, or a Magistrates Court (when charged with an adult), or the Crown Court. In all those instances the child is the defendant and the dominant construction of that child is child as offender, with the court focused on punishment. The other instance in which a child is in contact with the criminal courts is when they are a witness in criminal proceedings; they are treated as a victim, and their needs are considered. They are given special protection and consideration by the court and even anonymity on occasions. When a defendant mother is sentenced, a label of 'offender' attaches to her, and in the absence of an alternative construction, I suggest that the label of 'offender' is also attached to her children. A form of secondary stigmatisation exists which permits sentencers to remain unchallenged over the lesser care and lack of protection extended to children of defendant mothers. By consciously or unconsciously labeling these children with offender status by association any negative impacts which flow from the punishment of their mother become understandable, or permissible. A few members of the judiciary who were interviewed for this study spoke of the children in those terms and although there is currently insufficient evidence to be certain of the truth of this hypothesis, I suggest that if further research were undertaken it is likely that more

evidence of secondary stigmatisation of children of defendant mothers by sentencers would be found to exist.

The invisibility of women in the criminal justice system and misunderstood notions of gender equality and fairness

As was set out in chapter one women make up only a small percentage of the entire prison population in England and Wales, and until the past thirty years very little attention was paid to their particular needs or circumstances. Although this has changed there has been a reluctance to recognise and consider their role as mothers, and I suggest that this is for a number of reasons. Firstly, the sentencing process is a binary model based on libertarian theories of justice and therefore it places emphasis on the punishment of the offender and restoration of the victim. In such a construction the impact of the sentence on wider society, including the offender's family, is of no relevance to the court. In the interviews I conducted a number of the judges articulated that they considered their sentencing decisions within this binary framework of victim and offender. Secondly there has been an increased awareness and understanding of the need for equality between all genders and there is some evidence that this has led to reluctance on the part of both sentencers and policy makers to do anything which might be interpreted as giving an unfair advantage to women. Some sentencers hold the belief that if consideration of a defendant mother's children resulted in a shorter custodial sentence or a non-custodial sentence they would be at risk of criticism for unfair treatment. The contrary is of course true as the Supreme Court and Court of Appeal have made it clear that child dependents should be considered in sentencing and the sentence may be altered accordingly, but as was noted in chapter five there is seemingly some hesitation on the part of the judiciary to do so.

Conclusion

I suggest that a number of factors, outlined above, contribute to the current differentiated treatment between children in proceedings under section 31 of the Children Act 1989 and children whose mother is before the court in criminal sentencing proceedings. These influences are not properly understood or acknowledged and for that reason there is a lack of consciousness on the part of both the judiciary and policy makers about this issue. The state is discriminating against a group of children by its failure to recognise their existence and their rights in court proceedings and by its failure to offer them protection and special assistance when they are separated from their mother. Section III of the thesis will examine the implications of this differentiated treatment and in chapter six I will focus on the way in which the lack of concern for children of defendant mothers affects wider society.

Part III The Implications of the Differentiated Treatment

6

The Way in Which the Differentiated Treatment of Children of Defendant Mothers Impacts on Wider Society

Chapter summary

Having analysed the nature of the differentiated treatment which children of defendant mothers experience in the criminal courts, I turn now to consider the implications of such differentiated treatment for wider society. In this thesis I suggest that the consequence of the differentiated treatment within the sentencing process (e.g. the non-observance of the child's rights to be heard, to have their welfare considered by the court, and to be protected from discrimination) is that children are separated from their mother by imprisonment when it is not in the best interests of the child to do so. In addition once the separation takes place the state does not recognise its duty of care towards such children, nor does it offer them protection and assistance in accordance with Article 20 of the UNCRC 1989, using the provisions of section 17 of the Children Act 1989 to provide such support. The review of the literature in chapter three, and the interviews with children of imprisoned mothers and their caregivers, provide some information about the consequences for children during the period of their mother's imprisonment, but the impact felt during the period of imprisonment is not limited to the children. By the fact of their childhood the separation of primary carer and child leaves the child in need of another adult to take on their care; that adult and their family and dependents are therefore also affected. The caregiver and child relationship can act as a protective factor to

children as when caregivers feel supported, or are given resources to meet their needs, they are more likely to feel warmth and acceptance towards the children in their care. In turn if children feel positive regard and acceptance from caregivers they are less likely to develop internalising and externalising problem behaviours (Mackintosh et al, 2006). Furthermore the research literature indicates that children who have experienced parental imprisonment are likely to suffer from diminished life chances (Wakefield and Wildeman, 2014; Mears and Siennick, 2016). The disruption and alteration to their childhood, caused by the imprisonment of their parent, has longer-term effects on their lives and potential outcomes which in turn affects communities. This chapter focuses on the way in which maternal imprisonment impacts upon caregivers, before considering how such care and other factors affect the children's future life chances, and the implications of this for society.

The impact on caregivers who provide care for the children of imprisoned mothers

Custodial grandparents have poorer physical health, are more likely to be depressed, and have a lower level of satisfaction with the grandparent role than non-caregiving grandparents. (Mackintosh et al, 2006)

Little attention has been paid to caregivers by either sentencers or statutory authorities, but it is now becoming apparent through research conducted primarily in the United States that caregivers face enormous challenges when they take on the care of a child who is not their own. The challenges are exponentially increased when the child requires care due to maternal imprisonment. Grandparents, and more specifically grandmothers, are most often the carers for children during the period of their mothers' imprisonment but other carers include fathers, siblings, other relatives, family friends, and in a small number of cases state appointed foster carers. As has been described in previous chapters

children of imprisoned mothers often have pre-existing vulnerabilities and are exposed to multiple risk factors before they experience the traumatic loss of their parent to prison (Travis and Waul, 2004: 13). Their placement in alternative care may be sudden and unplanned, adding to the difficulties a kin carer will face (Baker et al, 2010). In 1995 a report published in the UK by the charity 'Save the Children' set out six principles which it proposed should form the basis for good practice in relation to children of prisoners. The list included a need for statutory agencies to recognise and respond to the support needs of the parent or carer looking after the child, and a recommendation that the home life of the child should be given priority in arrangements concerning him or her (Lloyd, 1995). Unfortunately those recommendations were not implemented in policy or practice. The 1997 report on women prisoners conducted for the Home Office provided greater insight into the situations of carers: it reported that 43 per cent of caregivers had money problems; 27 per cent found it difficult to cope with young children; 24 per cent suffered health problems; 17 per cent experienced problems with employment; 15 per cent were living in inadequate accommodation and 10 per cent found caring difficult due to their age. Less than 50 per cent of mothers said that the care arrangements for their children were 'satisfactory' and 25 per cent described them as 'fairly or very unsatisfactory' (Caddle and Crisp, 1997).

The differentiated treatment which has been referenced in relation to court processes, extends to the support provided to those who care for the children once their mother is imprisoned. In this chapter I draw upon studies from the United States and the United Kingdom which have considered the situation of those who care for the children of imprisoned mothers, and the interviews which I conducted with caregivers. I contrast the appointment and support of foster carers, the individuals who under the supervision of the local authority take on the care of children separated from their parents by proceedings

under section 31 of the Children Act 1989, with the experience of those who take on the care of children of imprisoned mothers. I interviewed 22 adults who were at the time of interview the primary caregivers for a child or children whose mother was in prison. It was my original intention that the caregiver interviews would provide insight into the children's experiences however it became apparent that the caregivers themselves were severely affected by the mothers' imprisonment. All the caregivers in my study were family members and included five fathers, 12 grandparents, one aunt, two uncles, one great aunt, and one sibling of the children.

Selection of caregivers

When an adult in England and Wales seeks approval to become a foster carer they go through a rigorous selection process and must meet a number of conditions. Local authorities or fostering agencies have non-negotiable requirements which include in all circumstances that the carer is over 21 years of age, they are fit and well, and they have a spare room in their accommodation which can be given to the child as a bedroom (e.g. Barnardo's, 2016). Application for approval is voluntary and those who seek to become foster carers are encouraged to attend information meetings and have informal discussions with the agencies before they decide to proceed with the formal application process. In contrast when a family member is asked to take on the care of a child when a mother is sentenced to imprisonment, although presented as a choice it is not experienced in that way by caregivers. For some caregivers the request is made at the time of arrest by the police, at a moment when the caregivers are processing their own shock at the arrest of most often a daughter, whilst also wanting to do whatever they can to protect their grandchildren. Those crisis decisions can lead to a long-term commitment to care for young children. One grandmother said very honestly to me:

When you've got two little boys delivered on your doorstep and the social worker said 'can you have them for a while' it was difficult to not do anything else because we'd been involved with them since birth. If we knew then what we know now we would have said maybe go for adoption straight away. (Joanna Adela, grandmother caring for grandsons aged 14 and 15)

Families do not want to see the children in their family placed in the care of the local authority and so they go to great lengths to ensure that does not happen. One reason for not wanting the children to go into local authority care is that families believe it may reduce the mother's chance of having her children returned to her when she is released from prison. If that happened, not only the mother but they too would lose family members as a consequence. An older sibling explained that this had motivated her to offer to look after her seven year old brother:

I chose to take B. I said 'let me have him so that when you sort yourself out you can have him back whereas if you were to put him in somebody else's care you might not get him back' so that's why I said that. (Davina Collier, older sibling caring for her brothers aged 7 and 16)

The fact that the caregiver agrees to care for the child and it is not court ordered does not make the experience easier:

I'd just say it's quite stressful. Not many people would do it. There have been times when I've just thought this is too much, too many, too soon, and it's indefinite because you don't know what's going to happen. (Davina Collier, older sibling caring for her brothers aged 7 and 16)

Very few of the caregivers I interviewed met the basic criteria for fostering children; they did not have spare rooms in their homes and many were older and in poor health, a finding which accords with the literature:

Kinship caregivers typically are older, more impoverished, and less educated than foster parents.... In addition, relative caregivers are more likely to be working outside the home and therefore less available for the children...Women raising grandchildren under these circumstances experience grief and anger over the incarceration of their daughters or daughter in law, and bereavement for the life they had expected that is now gone. (Heywood, 1999, cited in Mackintosh et al, 2006: 583)

When and if judges ascertain who will take on the care of the children in the mother's absence, they do not usually seek detailed information but are content in most circumstances to be provided with a named relative (see chapter five), and if a relative is put forward as a caregiver an assumption may be made that the relative is in a position to provide appropriate care. This contrasts with the selection of local authority appointed foster carers. They are thoroughly assessed and the following text from the Barnardo's website provides the reasons for such detailed assessment:

We will also take into consideration:

Your health – as part of the fostering process, your medical health will be checked. Not all disabilities or medical conditions will stop you from fostering.

If you have children – we will discuss with you how you'll meet the needs of a foster child as well as your existing children.

If you have a partner – your relationship will be assessed to make sure a child will be placed in a stable home.

If you smoke – there are significant health risks of smoking and passive smoking. It is unlikely that a young child will be placed in a home where there are smokers.

Your criminal record - as part of the fostering process we will do a police check. Not all criminal convictions will stop you from fostering, but people with a history of sexual offences and/or cruelty to children will not be considered.

Your finances – you will receive a fostering allowance, this will cover food, clothing, travel expenses, household expenses and gifts. As a carer you will also receive a professional fee from Barnardo's. State pensions may be available for foster carers. (Barnardo's, 2016)

Using this checklist as a guide I will explore how the health and family relationships of the caregivers who participated in this study were affected by their caring responsibilities, before considering the impact of caregiving on their jobs and finances. I did not find out if the caregivers who took part in this study smoked or had a criminal record.

Health

Your health – as part of the fostering process, your medical health will be checked.

Not all disabilities or medical conditions will stop you from fostering.

Research has found that the introduction of children into a household, and the stress and strain of caring for dependent children at a time in life when carers are not expecting to take on that role affects both the physical and mental health of caregivers (Caddle and Crisp, 1997; Parke and Clarke-Steward, 2001; Poehlmann, 2005; Mackintosh et al, 2006; Comfort, 2007; Turanovic et al, 2012; Williams, 2011, cited in Raikes, 2016). The caregivers I interviewed were no exception to this. A number of them suffered from pre-existing health problems which increased in severity when they took on the care of children. This was a consequence of the demands of caregiving and a reduction in the time available to them to prioritise their own well-being. Their health problems were not minor or inconsequential but unlike foster carers their health was not considered by the courts sentencing the mother to the imprisonment, or by any other authority figures before the child moved to live with them. Carol Rees the sole carer for three children aged four, eleven and twelve, had not been asked by the sentencing judge about her health:

I've always suffered from scoliosis and arthritis in my spine so as you get older I've got degenerative changes. I have arthritis in my knees. Three years ago I was diagnosed with [a] thyroid cancer tumour... I'm now in remission.

Many carers described living with permanent stress and anxiety. This was widespread, and seemed to affect caregivers whether young or old, single or co-parenting. Jim Kaur, a young father described being 'in a panic' initially and 13 months later he was still anxious:

I'm really nervous about when he starts school in September because I don't know how he's going to go to school or get picked up every day...I find it really difficult, and it upsets me that I'm trying to give him to a stranger to take him and

pick him up from school, and the biggest anger that I've had is that there's nothing for the other parent. You don't have anyone to talk to, you have no guidance, you're just expected to change your life, literally over night. That day I just went home and picked him up and he's lived with me ever since that day.

Some carers were prescribed either counselling or medication to enable them to cope with their circumstances:

I can't remember what's normal. And a couple of times I've lost my temper and shouted at her and got really upset and then I feel guilty. And I do see a counsellor at work as well and I said, but you know I feel really guilty. And she says 'didn't you ever shout at your children? You must have, you can't not.' And that makes me feel a little bit better, but I hate losing my temper with her [granddaughter]. Just because I don't want to add any more stress so that's really hard... sometimes I just think I can't cope with this. (Mel Gordon, grandmother caring for granddaughter aged 4 and grandson aged 15 months)

Others reached such a low point they thought of ending their own life:

I have felt like that on a few occasions where I've just felt it's too much and if I hadn't had the kids I don't know what I would have done, and times like that is quite (frightening) yeah, yeah 'cos I'm not that kind of person. I've never been that kind of person...I've always been the loud person in the room, the party person and that's gone. As a person I'm a completely different human being and to have those thoughts that if I killed myself they'd let her out isn't necessarily a good thing. That the life assurance would pay the house and that she'd have the house. (Daniel Iaboni, father to children aged 14 and 15)

The mental stress of caring exacerbated some caregivers' physical health problems. I met a grandmother who lost her mobility and became a brittle asthmatic after taking on the care of her grandchildren. Prior to becoming their caregiver she worked 60-hour weeks, held a senior management position, and was in good health:

It's just the stress and the strain of it all is what the GP's said and the hospital's said. Sadly I got so low I nearly died ... and I was in hospital for five weeks and it frightened [my grandchild] ... I have to have a walker when I go out, but I'm starting to be able to do things I couldn't do for a long time... Depression played a huge part in it, and when I got low I just got lower. Normally I'd have kicked back and thought 'bugger this I'm just going to get on' and I didn't have the energy. And people will think that's crazy but you've got no energy. I can't explain it to anybody. Even today I still find it hard to sleep at night. And I still find it hard to you know, on a daily basis, sometimes I have to kick myself to get myself out of bed. It's not easy but I do it. (Patricia Quincy, grandmother caring for grandsons aged 12 and 16)

Dependents

If you have children – we will discuss with you how you'll meet the needs of a foster child as well as your existing children...

At the time of taking on the care of children whose mother was imprisoned four of the caregivers I interviewed had their own dependent children living with them, four were living with their spouse or partner without any dependent children, three of the caregivers were fathers living with the mother, and eleven caregivers were living alone or with an adult who wasn't their partner. Fathers living with their children before and after the imprisonment of the mother struggled with their own grief and their new single parent role, but the mother's imprisonment did not affect other children or adults other than their own children. The two groups of caregivers whose other relationships were detrimentally affected were those with their own dependent children, and those who were living with a spouse or partner. In those instances the arrival of extra children into the household not only affected the relationship between the caregiver and his or her other family members but also in some family groupings the children of that family suffered harm because of their parent's commitment to the additional children. It is important to recognise that not all caregivers who have their own dependent children feel that their children are negatively affected by the arrival of additional children to the family. For some, to live with a younger cousin, nephew or niece is a positive thing. Dee Hayes a grandmother caring for her two and a half year old grandson spoke of how much her daughter enjoyed having her grandson in their family. However in most families there was both a tangible and intangible cost to the children, even if it was not perceived as harm by the caregiver. Tangible costs included overcrowded housing necessitating shared bedroom space, and as would be expected finances become strained in most families with the arrival of more children. Families no longer took holidays, either because they could not afford them or

because the dynamic between the children of the family and the looked after children was so difficult that taking them away together was impossible:

So our three younger children never really had a chance of having any sort of attention, if we went on holiday or if it was anything we were always doing it separately because we just couldn't do it with them. (Joanna Adela, grandmother caring for grandsons aged 14 and 15)

The caregivers also have to divide their time, emotional energy, and care among more children and when the children who are brought into the family have intense parenting needs, which are often due in part to the trauma of maternal imprisonment, they take a disproportionate share of their time and attention. When the presence of additional children also disrupts normal family life, particularly when their behaviour is difficult, the children of the family may become resentful, angry, and frustrated. Although this had not happened in very many of the caregivers' families, when it did happen it had serious and lasting consequences for both the caregiver and the child:

Our middle daughter then who was about 12, she wasn't coping too well with the move and the boys there and everything and she started to go out [with an older female] a lot and she introduced her to sex work basically when she was 12 or 13, but we didn't know any of this until she was 18...she's never wanted to do anything about it but it has led her to severe clinical depression and alcohol use. So she always sort of took, the boys were always the blame for everything that went on... she's 25 now, and that was her young life and her teenage life because we were so caught up with their parents and the boys there was no support for your own children. (Joanna Adela, grandmother caring for grandsons aged 14 and 15)

Another grandmother spoke of the impact which an older sister's imprisonment and the entry of two very young children into the family home had on her 12 year old daughter:

She lost everything really because she lost her big sister, she lost Mum as well because I became a Mum overnight to two little ones. She feels a great loss. She has a lot of anger. You know, a lot of upset over what has happened... even in visits she's not included, because the children are the priority because they've got to see Mum, and she gets quite tearful and says 'but I was 12 at the time.' She was a child. (Shelley Dena, grandmother caring for grandchildren aged 10 and 11)

Other caregivers found that their own children chose to distance themselves from the situation and ultimately this led to a loosening of their relationship with their parent:

Our younger son, he used to become distraught when he was about 11 or 12 thinking 'is this what people are going to think about me?' He used to get in a terrible state, so he really doesn't tolerate any of this or talk about them, there's quite an emotional detachment really and he just sort of got on with school work and uni life and I think he loves the dog and the cat which we had then, more than anything else. (Joanna Adela, grandmother caring for grandsons aged 14 and 15)

Caregivers spoke about these events with great sadness, and regret. They referred to the lack of support available to them and felt that the cost of that was the damage to their own family. Caregivers also spoke of how their involvement with the children they were caring for on occasion caused resentment amongst other members of their families as they were seen as favouring some above others:

The only thing I'd say, it's a little bit unfair it hasn't given me time with my other grandchildren as much. I used to have time with all of them and I try and have all of them till it's too much, and in all honesty my younger son is now a dad. His baby is three months, and he has made little comments and I know he does understand but I've not had time. (Carol Rees, grandmother caring for grandchildren aged 4, 11 and 12)

These accounts bring to light impacts of maternal imprisonment which have not previously been considered in the research on the consequences of imprisonment. It is particularly concerning that children who are not the children of the imprisoned mothers may suffer harm resulting from a mother's imprisonment. This is not an unforeseeable consequence as fostering agencies recognise that a foster placement could be detrimental to the well-being of other children in the family and also to the adult's own relationship, as can be seen from their websites which state clearly that they would not advise fostering to proceed if children in the family feel negative about it (Barnardo's, 2016).

Spouses and Partners

If you have a partner – your relationship will be assessed to make sure a child will be placed in a stable home

Caregivers who are married or living with a partner at the time of the imprisonment worry about the impact of the stress and strain on that partner, and in a few of the families I met the arrival of the child(ren) led to the married couple living separately, either sporadically or for the entire duration of the mother's imprisonment. In the Barrett family the grandparents lived abroad and Angela Barrett moved back to the UK to care for her granddaughter when her daughter was imprisoned whilst the grandfather remained abroad in order to work. In the Adela family the dynamic between the children of the family and the children whose mother was in prison was so poor that the grandfather moved away from his own children to live with the children whose mother was in prison in an attempt to manage all the children's needs. Additional tension is added when the maternal grandmother is married to a man who is not her daughter's father. In such instances the grandmother feels duty bound to take on the care of the grandchildren but does not feel that the step-grandparent is similarly obliged to do so. Patricia Quincy told me of the conversation that she had with her husband when it became clear that her daughter was going to be imprisoned:

The solicitor asked what I was going to do. Was I going to put them up for fostering, and the amount of sentence she got if they'd gone into foster care they'd probably have been adopted, and I couldn't imagine that happening to the two boys. They hadn't done anything wrong, so me and my husband sat down here one day and said what are we going to do? And I said 'we've got to look after them but it's your choice you either stay with me and help me or I'll leave'. And he said 'you've never got to leave'. I said 'that's really good'. I had to be honest with him. I couldn't say, 'oh here you are love, we've got two kids now'. You know the guy was in his 50s and it was like, suddenly we had a one year old and a five year old. He was 58 he was coming up to retirement age. He didn't need that but like I said it changed our lives.

Couples shared a sense of loss. They were grieving not just the loss of in many cases, their daughter to imprisonment, but also the loss of the life that they thought they would have. They were no longer available to each other in the way that they had anticipated they would be once their own children were grown up. Instead of relaxing together on days off work, visiting friends or pursuing shared interests, they found themselves on motorways driving their grandchildren to prison visits:

We'd just bought this house. We used to have a big house down by the river which would have housed us all beautifully, but the year before the children came to us we decided to sell it because there was only the two of us left. So we sold the house, got this place and we were quite happy and then all of a sudden this house was full from just me and my husband. (Patricia Quincy, grandmother caring for grandsons aged 12 and 16)

The attention paid by fostering agencies to the stability of relationships indicates an assumption that the adult relationships will be placed under pressure when a child moves into the household.

Changes to work and finance

Your finances – you will receive a fostering allowance, this will cover food, clothing, travel expenses, household expenses and gifts. As a carer you will also receive a professional fee from Barnardo's. State pensions may be available for foster carers.

In addition to training and assessment foster carers are given significant financial support in the form of a weekly fostering allowance. This is paid presumably as a recognition by the state that it is costly to care for a child, and it acknowledges that when a person takes on the care of a child who is not their own they should be given additional funding by the state. On the 17th January 2017 in one local authority in the South East of England (Surrey County Council, 2017), the basic rate fostering allowance payable weekly from the outset of placement following approval was £168.28 for a child aged 0-10 and £254.45 for children aged 11–18. This rose to £249.83 for children aged 0-10 and £336 for children

aged 11-18 following the completion of further training which is usually undertaken within 6 months of approval as a foster carer. On the completion of an additional two and a half days of training it rose to £282.11 and £368.28 respectively. For those providing enhanced care which is care for the most traumatised and vulnerable young people only undertaken by those with two years experience of working with young people, carers are paid a retainer of £510.03 per week even when no child is placed with them, and then a weekly sum of £678.31 for children under 10 and £764.48 for those aged 11-18. Enhanced carers look after only one child at a time and must live in a household with no other children under the age of 16. Foster carers also receive tax exemption, tax relief, and national insurance credits towards the state pension. When an informal friendship or family arrangement is made to care for a child whilst their mother is in prison financial support is at the discretion of the local authority. It is no surprise therefore that kin caregivers report that the greatest impact on them of taking children into their home when their mother is imprisoned is financial (Caddle and Crisp, 1997; Fox and Benson, 2000; Poehlmann, 2005; Mackintosh et al, 2006; Comfort, 2007; Murray and Farrington, 2008; Denby, 2012; Turanovic et al, 2012; Raikes, 2016). All the caregivers I interviewed were of working age and for those working full time the need to provide childcare during working hours was one of the most difficult aspects of their new role as carer. This has also been observed in the research literature (Caddle and Crisp, 1997; Raikes, 2016). If children are too young to attend school the caregivers have to choose between giving up their employment or finding significant sums of money each month for childcare. The caregivers I spoke with managed the difficulty in a range of ways, all of which held some cost for the caregivers. Some continued in their employment or study but found it more stressful than before, others gave up their study plans or left their jobs, whilst another option was to continue in their employment but negotiate to work fewer hours. Older

caregivers continued to work beyond the point they had intended to retire in order to provide financially. The extracts below are taken from interviews with caregivers and begin with the accounts of caregivers who continued to work whilst caring for children whose mother was in prison:

I'm so lucky that where I work that they actually changed all my hours so that I can take her to school and pick her up. (Barbara Litton, grandmother sharing the care of her six year old granddaughter)

It's really hard. I was signed off. I work for the NHS they were really good. They let me do annualised hours from last March so I had six weeks off for the trial, but after the guilty I just couldn't face it, so I didn't go back to work until the end of November so I've got quite a lot of annual leave, so I'm just working four days at the moment ...but it's really hard. It's quite a demanding job. (Mel Gordon, grandmother caring for grandchild aged 4 and grandchild 15 months)

For those who continue to work whilst responsible for a very young child the cost of childcare is a significant expense:

Childcare's a killer. All of a sudden we've got £1,100, £1,200 a month to find. We're not entitled to anything so we'll probably end up in debt because we haven't got spare. (Mel Gordon, grandmother caring for grandchild aged 4 and grandchild aged 15 months)

For many childcare is unaffordable and those who manage to retain their employment rely on friends and family to take care of the children. Again this is not without cost to both the caregiver and the child:

The biggest impact has been him being constantly passed round various places whilst I'm at work. That's had the biggest impact...I mean I've got a full time job and all of a sudden I'm meant to look after my son as well full time, and there's no help. I'd no help whatsoever so I put him into a nursery full time but the bills that were coming back were extortionate; it was costing me £900 a month. (Jim Kaur, father of three year old boy)

Other caregivers explained why they found it impossible to remain in work or to find jobs given their situation:

[I left my job] because there's only two of us to keep track of them, there's so many of them, it clashes a lot because when my mum had to come to see her

[children's mother in prison] they needed someone to take care of them because they hadn't started school yet and there was nowhere for them to go. So I had to stay and take care of them. (Nina Jones, aunt sharing the care of five nephews)

I had a little toddler who clung to me like you wouldn't believe, he would not let me go anywhere, he still doesn't now, and I didn't know what to do so I had this time off work and me and my husband sat here one night in this room and started to discuss it and he said 'you're going to have to give up work'. And I said 'what are we going to do financially?' I had a couple of months that I was entitled to anyway, and then they kept my job open for three months and then probably six months actually ... I had a choice of putting [grandson] with a carer and then me going to work but every time I tried giving [grandson] to anyone else he absolutely went mental. He had a fit. And when I say he was screaming... I left him with my sister, my sister phoned me at the supermarket, I'd only gone to the supermarket and he was absolutely beside himself and when I got home I was hugging him and he was gasping nearly all day and he wouldn't let me go for love nor money. So I think he obviously felt you know, I can't let her go and he doesn't even go out very much now. He still clings to me all the time. (Patricia Quincy, grandmother caring for grandsons aged 12 and 16)

I've started a little business but obviously I can't focus on that because I've got him. So I'm just trying to find a little bit of part time work. But corporate [employers] want you to be flexible and that's a bit difficult. (Jermaine Tait, Uncle caring for 9 year old nephew)

I can't work with him because he's not in any nursery. I'm trying to get him.... I was looking at a job because I only moved there last June and I was job hunting but I stopped but I want to look because I want to look after him full time and he's not going to nursery until September. (Dee Hayes, caregiver for grandson aged 2 ½)

I've tried to start working, but who's going to give me a job at the moment? 13 years out of work because I've been house husband since my son was born. (Daniel Iaboni, father caring for children aged 14 and 15)

When caregivers stop working they need to claim benefits in order to have sufficient money to live on, but they are placed in a very difficult situation due to the fact that they are not recognised as 'carers'. They may be able to arrange for child benefit to be transferred to them but the only additional benefit they are likely to be entitled to is Job Seekers' Allowance, which is payable to those who are willing and available to work. As carers are not always able to work or attend appointments or interviews due to their care responsibilities this is problematic and in instances can lead to benefits, including housing

benefit, being withheld. The failure to make rent payments may then in turn bring about the initiation of eviction proceedings. Shelly Dena, a grandmother caring for her two grandchildren found herself in this difficult situation:

I need to be recognised as being the carer for the children because by not being recognised as their carer I don't tick anybody else's box. I keep being put into the 'job seekers' category. Now Job Seeker's Allowance means I've got to be available for work and I'm not available. I've got two little ones whose needs are greater than the average children and now probation are talking about upping the visits and contacts with Mum. How am I going to do visits you know, we're talking about two or three a week? Last year I wasn't able to fulfill my jobseekers agreement because I had other things to do and I was sanctioned. The money was stopped and I got into debt for no fault of my own; it was a short time, only a couple of weeks because I was able to get some help, some support. But it's not just that it's the emotional pressure the worry about what's going to happen because you're getting into debt. You worry. I was threatened with eviction from this house you know because my benefits were stopped it had a knock on effect on to all the others. So although it wasn't for a long time everything got in a mess. It caused a big mess which made me get extremely anxious and depressed, and yeah it's just something I could do without.

Strain is placed on families as they adapt to working practices that are not of their choosing. Women who made the choice not to work when their own children were very young find that due to financial pressure they must work whilst also caring for young children. A 52 year old grandmother told me that she was contemplating taking early retirement in order to concentrate on her grandchildren's care:

I never worked full time when I had my kids. Now I'm 30 odd years older and having to work full time and cope with children. I've thought about taking early retirement just so I can concentrate on the kids but I'm 52. I can retire. I have a pension scheme. I could take early retirement. Obviously I'm going to lose them again, but sometimes I just think I can't cope with this. I need to do one or the other, I can't do both. So I might even do that. We'll just see. (Mel Gordon, grandmother caring for 4 year old grandchild and 15 month old grandchild)

Of course the care of one or more children adds additional strain to household budgets. It is expensive to feed and clothe a child and when households are not equipped for children there may be additional purchases necessary such as furniture, bedding, and toys. Financial stress is also added to the family when one grandparent stops working in order

to care for the children. For some families the solution to that was for the other grandparent to work for additional hours or even years to cover the drop in income and the extra costs the family incur. A grandmother spoke of how her husband had planned to retire at 60 but due to the long term care of their grandchildren he was working full time at 70 years of age (Patricia Quincy). In some households the care of the children required both grandparents to give up their jobs in order to manage their behaviour. I asked a grandmother what she felt the decision to care for their grandchildren had cost herself and her husband financially:

You couldn't put a price on it. If I thought they could pay something – thousands of pounds, it would be great but it won't take back the 20 years that we've lost really now. He took early retirement he had a good job as an engineer. I wouldn't have stopped working, we wouldn't have moved from our nice four bed roomed house. (Joanna Adela, grandmother caring for grandsons aged 14 and 15)

In other households the emotional toll and sudden role reversal made it impossible for a caregiver to find employment. Daniel Iaboni was a father who had chosen to be a 'house husband' as he called it as his wife earned more. When she was imprisoned he suffered extreme anxiety, 'my nerves are shot to pieces. Medication and stuff. It's just nervous tension, anxiety'. He was unable to find employment as he had been out of the work place for 13 years and due to his wife's absence he needed a job that would allow him to meet his full time caring responsibilities, which included taking care of a child with a life limiting condition. Some grandparents I spoke to had 'downsized' not long before they took on the care of the children as their own children had left home. When the grandchildren moved in with them those that had money spent it to extend their homes to create enough space for the children. Other caregivers faced the accrual of debts as they borrowed money to cover the cost of additional children in their household. Ana Jones a grandmother caring for her five grandchildren was supporting the family on Income Support payments and the Carer's Allowance she received as a carer for her sister. That

was insufficient to pay for their basic necessities and so she borrowed the shortfall. Another caregiver Janice Peters, who was registered disabled, was still in debt five years after her grandchildren moved in with her because of the cost of the items they had to buy when the children first arrived:

We were already on some Housing Benefit and Council Tax Benefit because my husband was on a low wage and all of a sudden we've got to support two more ... We got into extreme, severe debt. I've been paying for five years now to pay off the debts we got into to just buy food and some clothes, school uniforms, and everything. (Janice Peters, grandmother caring for twin granddaughters aged 13)

Another household with two employed adults was in debt because of the childcare costs they had to pay each month, 'financially it's going to kind of kill us' (Mel Gordon). Barnardo's estimate the cost to a family of supporting a prisoner as £175 per week (APPG, 2017). Families I spoke with had to pay for the cost of travel to prison visits and many also felt under obligation to send money into the mother in prison in order to allow her to make telephone calls and buy items that she needed. These perceived 'needs' added pressure to already overstretched budgets:

She needs to ring. She hardly rings because I can't send her money because we are rock bottom broke. (Shelley Dena, grandmother caring for two children aged 10 and 11)

Personal cost

The foster carer assessment list does not name as an area for enquiry the personal impact that fostering will have on the adult caregiver. That may be because it is assumed that the prospective foster carer will already have considered the personal implications of foster care and will only make an application if they are satisfied that the impact will not be detrimental to them. It is also likely that during the very thorough assessment and training process foster carers undergo any concerns about personal impact will be raised prior to the placement of a child. In contrast no consideration is given to the burden which is

placed on a relative who undertakes to care for a child during their mother's imprisonment. The burden includes both the taking on of responsibilities and the giving up of the life they previously lived. For most carers the lifestyle changes affect their work, their finances, their space, their sleep, their privacy, and their social interactions and I will detail such experiences below, but occasionally the lifestyle change includes every aspect of their lives:

You have to understand that these are people who have a life, who have work. Suddenly they have to look after a baby and kids that go to school, and usually it's Grandma, and she has to take it and she's 60 and she's working so this person has childcare problems let alone all the duties surrounding children and their difficulties. (Family Support Worker)

Angela Barrett was an example of this. Her daughter's baby was born in prison and as the prison had no mother and baby facility the baby needed to be removed to the care of someone outside of the prison. Angela had lived abroad with her husband for the previous thirty years but due to visa requirements in that country she was unable to care for the baby at her home and so she returned to the United Kingdom leaving her husband, job, home, life, and friends behind. Her husband needed to remain in his job to provide income for the family including the baby. Her daughter was given a nine year sentence and when I met Angela her grandchild was three years old. Angela planned to look after her grandchild until her daughter the baby's mother, was released and then she intended to remain in the UK to support her daughter as she attempted to find work and re-establish herself in society:

I would say it has destroyed my life as I know it. I'd say the biggest thing for me is I want my life back... I say it's a sentence for me. In fact it's more of a sentence for me than it is for my daughter. (Angela Barrett, grandmother caring for grandchild aged 3)

The literature on caregivers reflects that for many grandparent carers parenting small children is no longer something they wish to do, nor do they feel confident about it

(Caddle and Crisp, 1997; Fox and Benson, 2000; Mackintosh et al, 2006; Baker et al, 2010; Denby, 2012; Turanovic et al, 2012).

I feel like I'm the innocent victim in a system, unfortunately they can't do anything else but I don't get any help financially from the state. I've given up my livelihood, we've paid her fines, we're looking after the child, and the only things I've managed to get is child benefit and that was a struggle and a fight to get, and that's £8.41 per week. So it's huge. My constant lament is let the woman go. Let her pay the price of the mistake that she has made. Let her be the single parent that she wanted to be. Let her run around looking after this child doing the shopping, cooking, da da da. Why should I do it? But no, she's back in student land. She's got her food, her laundry, the only thing she's to keep clean is her room, she gets her education, she's got her peace and quiet, she's got TV. I mean I'm not gunning for my daughter, but I'm saying let's get real. (Angela Barrett, grandmother caring for grandchild aged 3)

Angela's experience is not common but it does indicate the severity of the changes which may be experienced by the caregiver. Many caregivers remain in their homes but their living conditions are significantly altered. Unlike official foster care where there is a requirement that the child moves into a house with a spare room, in the case of caregivers who take on the care of the children of imprisoned mothers, overcrowded housing becomes an issue in many families as there is no extra space and they are unable to afford more appropriate housing (Caddle and Crisp, 1997; Mackintosh et al, 2006; Denby, 2012). Ana Jones a grandmother in her late fifties was living in a two bedroomed flat with her adult son and daughter when she became responsible overnight for the care of her five grandchildren. Her son moved out and she gave up her bedroom for the children, moving to sleep on the settee in the open plan kitchen and living area of the flat. In other households the caregivers may have retained their own beds but they took on the care of children who were so unsettled that they needed to co-sleep and consequently several grandmothers found themselves sharing their bed with one or more children on a nightly basis. At a stage in life where they had become unused to disrupted nights this was a difficult adjustment to make, particularly when they were also working full time and had

to get up for work each day regardless of how difficult their night had been. Mel Gordon experienced this with her four year old granddaughter:

I would have to sleep with her. She'd go off to sleep but then I'd get back in my bed, but in the night she'd wake up and either she'd get in with us or I'd have to go back in her room. That probably stopped just before Christmas so it was quite a while [five months]. We did a reward chart to say 'sleep in your own bed' to try to encourage her. So she got stickers and everything and then at the end of the week she gets a present. So that's helped. Yeah it took a while.

Grandparent caregivers face the double grief of losing a child to imprisonment and also losing their grandparental role as they become quasi parents. If imprisonment has been unexpected they may also have to tell the children what has happened and manage the child's on-going grief (Bowers and Myers, 1999; Heywood, 1999; Fox and Benson, 2000; Mackintosh et al, 2006; Turanovic et al, 2012). In chapter three I described how behavioural regression and anger affected a number of children during maternal imprisonment and living in a house with children who are experiencing 'confounding grief' and anger is a challenge for caregivers. In one family the grandparents then in their late sixties, spoke of all that they had given up in their home as a consequence of their grandsons' behaviour:

There's nothing breakable .We shouldn't have to have a house like this at our age when our children have left, but we still can't have anything that costs a lot of money... 'cos I think oh I'll just plant some things in the garden. What's the point...Telly's on the wall. I'm surprised that's still there. (Joanna Adela, grandmother caring for grandsons aged 14 and 15).

Social isolation was a cost felt by most of the caregivers I spoke to whether related to the loss of a job, or to the stigma of a family member's imprisonment (Turanovic, 2012; Raikes, 2016). A number of carers could no longer work outside of the home and consequently the work interactions they had previously enjoyed were lost and in addition as was mentioned in chapter four, caregivers were aware of stigma attaching to their link

with an imprisoned person. Among those I interviewed isolation due to stigma appeared to be most acute for fathers who were the mother's current partner, or for family members when the details of the offence and sentence had been reported in the press. A father and grandmother described the way in which stigma affected their lives:

Well I feel there's a stigma. I walk with my head down. My neighbours, I don't make eye contact with my neighbours anything like that, and as I say, I feel like shouting out that I haven't done anything wrong. (Daniel Iaboni, father caring for teenage children aged 14 and 15)

It was all in the papers again it was drug related, it's like I can't even explain to anybody what it's like when you've never done anything like that in your life and then all of a sudden part of your family being involved in it, and it also makes you realise who your friends are, because a lot of friends that we used to have originally went to the wayside. They were too busy or they were always doing something. We actually kept probably six people in total out of all the friends we used to have. (Patricia Quincy, grandmother caring for grandsons aged 12 and 16)

Social isolation is exacerbated by the practicalities of a caregiver's new role as the demands of dependent children do not allow them to continue to socialise as they did before the children moved in with them. Carol Rees a grandmother caring for three children said:

I've given up a lot. My time of relaxing, socialising, and really just doing things that I enjoy doing. (Carol Rees, grandmother caring for grandchildren aged 4, 11 and 12)

Fathers found that they had no time available to see their friends as they took on sole care rather than a shared care arrangement. Older couples most usually grandparents, found it very isolating as their peers no longer had dependent children and their social lives did not include children. They missed the freedom they had previously enjoyed to go out with friends or even just with each other. Janice Peters told me that in the five years they had their grandchildren living with them she and her husband only went out once together as they were limited by their lack of child care, finance, and friendships. Joanna Adela said that she and her husband were rarely invited to go out because the children were so badly

behaved and even when they were included in invitations, for example to a family wedding, they were unable to attend because they did not have anyone who would look after the children in their absence. Older caregivers who tried to do things socially with the children they looked after felt out of place in the school playground with younger parents or at groups aimed at pre-school children:

I've tried a few times in the early days to go to coffee mornings and children's play groups with other children and their mums, but they're in their 20's and I'm in my 60s, it's, it's just too awkward. 'Cos the first thing is, you know, 'where's her Mum?' and I'm, I can't say that I'm exactly ashamed, but it's not something I want to talk about all the time. It's a nasty reminder all the time so I avoid it. So yeah, it's tricky. (Angela Barrett, grandmother caring for 3 year old grandchild)

Caregivers sometimes choose isolation, because they want to protect the imprisoned mother's future relationships, and so feel unable to tell anyone about their circumstances, particularly if the mother is going to return to live with them. Angela Barrett described her interactions with a neighbour in her building:

And I say I'm not prepared to talk about that right yet. Ok, maybe later. And I say no, and we go on joshing each other, but it's awkward. I'm not really like that but I have to grow this shell around me, of 'don't touch me I'm impervious. I'm not going to answer your questions', because I just don't want the world to know. My daughter might have to come and live with me and I don't want, because once she's done her time she's done her time and gets to pick up the pieces and I have no training in all of this. (Angela Barrett, grandmother caring for 3 year old grandchild)

The intensive assessment work and ongoing support which fostering agencies provide to foster carers in order to guard against the breakdown of placements and to secure the best outcomes for the child demonstrate that taking on the care of an additional child is not something which everyone over the age of 21 automatically has the skills and ability to manage well. The recruitment, training, and ongoing support for foster carers contrasts with the lack of support for kin carers. It is my contention that the lack of support for caregivers of children with imprisoned mothers exacerbates the difficulties which both the children and the caregivers face. Although the living circumstances of those I

interviewed were diverse, and their ages ranged from 21 to 70, all of the caregivers I interviewed experienced similar changes to their lives because of their new caregiving responsibilities. As has been highlighted in this chapter they suffered detrimental impacts or harms, both personally and to their other family relationships. The interview data suggests that the harms attach to the role and are not particular to individuals or their circumstances, although it was noted that significant wealth was a buffer against a number of the harms because financial stress affects so many areas of life.

The impact of maternal imprisonment on a child's life chances and the influence of the caregiver and child relationship

As was noted in chapter three, although it has been suggested that children of imprisoned parents have diminished life chances across multiple life domains it has been difficult to determine whether parental imprisonment is causal, contributory, or irrelevant as the children of imprisoned parents often experience a number of other difficulties in childhood such as poverty or an absent parent. The Cambridge Study in Delinquent Development (Murray and Farrington, 2005, 2008b) and the Dutch Criminal Career and Life Course Study (Murray et al., 2007; Besemer et al., 2011; van de Rakt et al., 2012) have suggested that the imprisonment of a parent during childhood may be linked to an increased likelihood of criminal convictions and imprisonment for those children in adulthood, as well as to other longer term impacts on children's well-being (see also Williams et al., 2012). A study found that paternal imprisonment and higher levels of children's marijuana and other drug use through their teens and early twenties were linked (Roettger et al, 2011), and Foster and Hagan (2007) found that adult children of imprisoned fathers had higher rates of homelessness and political disengagement. In the most recent research on this topic propensity score management analysis (PSM) is used to

explore whether ‘parental incarceration in fact constitutes a turning point that influences children as they progress into adulthood’ (Mears and Siennick, 2016: 9). The research is based on theories of life course development which highlight the importance of ‘turning points’ in people’s lives. They cite Sampson and Laub (2005: 16) who define a turning point as ‘an alteration or deflection in a long-term pathway or trajectory that was initiated at an earlier point in time.’ Such turning points have two features, ‘they cause marked changes in context or circumstances, and they create or close off opportunities for achievement, social networks and relationships’ (Rutter, 1996). Research has suggested that parental imprisonment constitutes such a turning point for children when it disrupts their ‘social, psychological, and emotional development as they transition into adulthood’ (Foster and Hagan, 2007). Mears and Siennick hypothesise that if parental imprisonment is a ‘turning point’ for children then they will experience adverse effects across ‘varied life domains’ which will become more pronounced over time (2016: 9). Drawing on the work of others (Ibid.) they anticipate that the adverse effects will include the potential for increased offending, educational failure, drug use, physical and mental health problems, unemployment or poor earnings, and romantic relationship problems (Hagan and Dinovitzer, 1999; Osgood et al., 2005; Giordano, 2010; Turney, 2014). Using Ad Health wave data they isolated a ‘treatment’ group of individuals whose parents had been imprisoned by the time of wave 3 ($N=1,865$) and they matched them with individuals whose parents had not been imprisoned ($N= 4,454$). They were compared on outcomes when they were aged 18-28 and again when they were aged 26-34 years of age. For the matching analysis they used a number of measures which were indicated in the parental imprisonment literature including gender, race and ethnicity, household socio-economic status, parental economic hardship, intact family during adolescence, number of siblings,

parent and child separation, parental alcoholism, household illegal drug use, parental-adolescent closeness, neighbourhood safety, and childhood sexual abuse (2016:15).

The ‘treatment group’ was matched to the control group based on the above measures or ‘confounders’ and therefore any difference between the treatment and control group should be due to the impact of parental imprisonment. They found that parental imprisonment was predicted by socio-economic status, race and ethnicity, illegal drug use, alcoholism, and residential mobility. In terms of the seemingly harmful effects of parental imprisonment they found that it was associated with greater levels of grown children’s offending, mental health problems, and drug use. Parental imprisonment increases the number of crimes that a young adult commits by 26 per cent, the likelihood of suffering from depression by 14 per cent and:

a greater range of harms occur by late young adulthood. Thus, alongside persistent or larger adverse effects on offending, depression, marijuana use, educational attainment, and cohabiting, two other harms emerge as statistically significant, namely heavy alcohol use (drunkenness) and earnings. (Mears and Siennick, 2015: 22)

The study found that children of imprisoned parents were 33 per cent less likely to achieve higher educational levels and their levels of earnings were on average US \$2,953 less than their counterparts in the control group by the time of the later comparison. The analysis supported the hypothesis that parental imprisonment does constitute a ‘turning point’ which adversely affects the life course of children across multiple domains during their transition to adulthood and beyond (Ibid.). The authors of the study urge caution in interpreting and relying on the findings but the findings correspond with thinking outside of the parental imprisonment discussion on the measures which improve children’s future life chances.

In January 2016, David Cameron MP, the then Prime Minister of the United Kingdom launched an initiative known as the ‘Life Chances Strategy’ (Gov.uk, 2016). It was the

Government's contention that children in the UK were not all experiencing the same life chances, and in order to redress the balance the Government wanted to focus on strengthening families and parenting, improving the consistency of early years education, and giving all children access to opportunity with particular input for those suffering from mental health and addiction issues. The vote by the UK to leave the European Union in June 2016 brought about a change of leadership and the Life Chances Strategy which was due to be launched in the spring and then summer of 2016 is no longer a Government priority. However the content of the Prime Minister's speech in January 2016 indicated an understanding within the Government of the way in which poverty and social disruption including poor housing and incomplete education affect a child's life course. Chapter three examined how these experiences are present in the lives of children of imprisoned mothers and the caregiver is a key determinant to the way in which a child experiences the impacts of maternal imprisonment. The relationship can act either as a protective factor, buffering the child against risks, or as a negative variable, increasing the child's vulnerability to risk. The caregiver's 'socio-demographic risks' will predict children's cognitive abilities but the quality of the home environment may mediate this outcome (Poehlmann, 2005), and the caregivers' ability to cope and to avoid depression 'will affect children indirectly through the caregiving process' (Parke and Clarke-Steward, 2001). Experiencing 'warm and stable ties' with a caregiver can be a protective factor which maintains a child's emotional health through a stressful time (Werner, 2000 cited in Mackintosh et al, 2006), but on the other hand children who 'felt lower levels of warmth and acceptance from their caregivers self-reported greater internalizing and externalizing behaviours' (Mackintosh et al, 2006). Stable, supportive care which 'promotes connections to family, school and non delinquent peers' results in a decreased likelihood that teenage children will engage in delinquent and risky behaviours (Dallaire, 2007a; Cecil et al, 2008), but when parents and

caregivers do not work together to manage the children, children's behaviour problems escalate as co-caregiving is a 'centrally important determinant of young children's social emotional and behavioural adaptation' (Cecil et al, 2008). Positive mother-grandmother co-parenting relationships were associated in one study with 'fewer child problems related to attention, defiance and aggression' (Baker et al, 2010) whilst caregiver changes 'cause an exponential risk in the development of behaviour problems' (Ibid.) and children who are looked after by a succession of carers perceive less acceptance and warmth from their carer (Mackintosh et al, 2006).

Conclusion

The impact of imprisonment spreads far beyond the offender when a mother is imprisoned. The needs of her children mean that the consequences of her punishment extend into the lives of family members or friends who adopt the role of caregivers to those children and those adults experience severe disruption to their lives which affects their health, well-being, and finances. The separation from their parent and the removal into a new family setting combine to lessen the child's future life chances as they face increased risk of become an offender themselves, achieving lower educational outcomes, and bearing the risks associated with living in a lower income or impoverished family (Hirschi, 1969; Caddle and Crisp, 1997; Fox and Benson, 2000; Cunningham and Baker, 2003; Green and Scholes, 2004; Poehlmann, 2005; Dallaire, 2007a; Murray and Farrington, 2008; Dallaire and Wilson, 2010; Cho, 2011; Hagan and Foster, 2012; Miller, 2014). Ultimately wider society is affected if children suffer from increased health or dependency needs e.g. alcohol or drug addiction (Mears and Siennick, 2016), become criminally active, or experience social and civic disenfranchisement (Lacey and Pickard, 2015).

The differentiated treatment of children of imprisoned mothers continues after sentencing as their caregivers are not offered the support or assistance which the local authority makes available to those who care for children following other instances of state sanctioned parental separation. Under section 17 of the Children Act 1989 the local authority is empowered to make enquiries about children who may be in need and it is tasked under Article 20 of the United Nations Convention on the Rights of the Child 1989 to provide special assistance and protection to children who cannot live with their parents. The factors which diminish a child's life chances have been identified by both academic research and the Government of the United Kingdom, yet although many of them are present in the lives of children as a consequence of their mothers' imprisonment there is currently no state-led acknowledgement of this fact. There is an obvious dichotomy between the importance to children, families, and society of those who provide care to children during their mothers' imprisonment and the lack of support and recognition given to them (Raikes, 2016). It is paradoxical that for the sake of caring for children, carers 'alter their behavior, reorient their expectations, suffer changes in their health, and otherwise experience the social and economic repercussions of punitive surveillance, confinement and control' (Comfort, 2007), and yet the result of this disruption and lack of resourcing is stress and strain which increases the risk of poorer outcomes for the children (Mackintosh et al, 2006).

The Consequences for the State of the Differentiated Treatment of Children of Defendant Mothers

Chapter summary

In this thesis I have asked and answered two questions: Firstly, why are children of defendant mothers who face separation from their mother as a consequence of criminal sentencing proceedings treated differently to children who face separation from their parents by the state in the family court, and secondly what are the implications of this differentiated treatment for wider society and for the state?

One would expect in a democratic society which upholds the rule of law and the rights of each citizen that any deviation from the appropriate acknowledgment of the rights of the citizen and the duties of the state would have a clear and legitimate basis. Accordingly this thesis began by exploring whether the difference could be justified by three possible explanations, all of which could lead to legitimate or explicable differentiated treatment of children of defendant mothers. The first explanation I tested was that the children of imprisoned mothers do not suffer any harm as a consequence of their mothers' imprisonment and it is wrong to assume that they will be negatively affected. The accounts of the children themselves and the body of academic literature on this topic provided a strong rebuttal of this proposition, and I concluded that children suffer multiple and broad ranging negative impacts as a consequence of their mothers' imprisonment. The second proposed explanation was that the state has specifically and deliberately excluded children of prisoners from its duty of care towards children. Once again this explanation was rebutted following consideration of domestic statutes and international conventions on human rights to which the UK is a signatory. There has been no exclusion of particular children from the state duty of care. The third possible

explanation was that the judiciary are not permitted to consider the welfare of children when they sentence mothers but this too was found to be untrue. Case law, statute and international conventions all confirm that the adult sentencing court should consider the welfare of the child. Chapters three, four, and five established that there is no clear explanation for the differentiated treatment and so I considered the social and institutional constructs which have allowed differentiated treatment to develop unchecked. In the concluding discussions of Part II of the thesis I noted a number of factors which may have influenced the situation, although none provide a full explanation for the denial of rights to this particular population of children.

In chapter six I considered the far-reaching consequences of such differentiated treatment. If children are not considered within the adult sentencing process and their mother is consequently imprisoned not only do the children suffer harms but those who provide care for them during their mother's imprisonment are negatively impacted. In addition, longitudinal research suggests that society will bear an increased economic and social burden in the longer term as children of prisoners have a risk of significantly diminished life chances in the areas of health, education, employment, and criminality.

This final chapter of the thesis addresses the implications for the state of these findings, but before doing so I ask one more question: Is the reason that no other explanation exists for these harms because they are part of the state's intended punishment of the mother? To answer this question I examine the theoretical understandings of punishment alongside the experiences of the children and caregivers, who at times described their suffering as 'punishment'. If the harms are not part of intentional punishment I explore whether the term 'collateral consequences of punishment' provides sufficient explanation for them. Drawing upon military literature on the origins and development of the term 'collateral damage' and the use of the term

‘collateral consequences’ in prisoners’ families literature I question whether the terminology used to describe the experiences of children has played a part in limiting the attention given to this anomalous treatment. Other possible justifications for the harms are considered such as the doctrine of double effect before I examine whether a communitarian analysis of punishment would permit a proper understanding of the implications of the punishments given to individuals. Bulow’s work on ‘residual obligations’ in situations of opposing moral obligations (2014) provides the basis for an alternative framework within which to view the harms suffered by children when their mother is imprisoned. The final section of the chapter considers the obligations on the state to minimise harm to children of defendant mothers and when such harm is unavoidable, the scope of the state’s residual obligations to children and families.

Punishment or punishing?

Are the harms which children experience *part of* the punishment of their mother or are they *due* to the punishment of their mother? If they form part of the punishment of the mother then they have legitimacy and even though damaging are permissible. If they do not form part of justified punishment (Zedner, 2016: 6) and instead are *due* to the punishment of the mother then the state must provide an alternative moral justification for subjecting its citizens to harm. It is only by understanding the meaning of the harms that we can assess whether overriding the rights of children in these circumstances is legitimate and justified. I begin this section with consideration of the meaning of ‘punishment’ in order to see whether the harms explored in chapters three and six fall within that definition.

The term punishment is an ‘essentially contested concept’ (Zedner, 2016: 4) and I do not propose to recite all the possible ways in which it has been defined, rather I will focus

on some core principles which are broadly accepted. The legal philosopher Hart defined punishment as consisting of five elements: it must involve pain or other consequences normally considered unpleasant; it must be for an offence against legal rules; it must be of an actual or supposed offender for his offence; it must be intentionally administered by human beings other than the offender; it must be imposed and administered by an authority constituted by a legal system against which the offence is committed (Hart, 1959). Others theorists place emphasis on additional considerations: it must be temporal in nature with an identifiable end point (Foucault, 1977: 107), and it should ‘communicate society’s condemnation of a criminal for their wrongdoing’ (Hoskins, 2015). Ashworth and Zedner (2014: 14) provide a more concise definition of ‘justified punishment’: it is ‘i) the censure of an offender for an offence, and ii) the intentional imposition of hard treatment on the offender for the offence.’ It is usually agreed that punishment is the imposition of suffering on a wrongdoer and it is arguable that we cannot ‘punish’ the innocent as ‘the infliction of suffering on a person is only properly described as punishment if that person is guilty’ (Quinton, 1954). Zedner also properly draws our attention to the difference between ‘punishing’ experiences and ‘justified punishment’:

Pain, coercion, repression, deprivation and exclusion are all common characteristics of punishment but they are not synonymous with it and nor are they justified *as* punishment. Using punishment as a crude synonym for pain or coercion fails to address whether and to what extent the burdens inflicted can be justified *as* punishment. And it obscures the stark fact that if a coercive measure is not justified as punishment then its burdens require independent justification. (Zedner, 2016: 6)

The purpose of punishment is also much debated. Utilitarian theories of punishment prescribe that punishment should yield a further benefit: whilst the suffering of punishment is itself evil the threat of punishment strengthened by enforcement may serve a good (deterrent) purpose (Bentham, 1948). Retributivists believe that deserved suffering for wrong doing is just and/or intrinsically valuable irrespective of any further good

consequences, but such accounts are less common today. Hybrid theories mesh the utilitarian and retributivist strands and suggest that justice is served if ‘teleological aims are held in check by principles of justice e.g. that the suffering of punishment should not exceed the offender’s desert’ (Ezorsky, 1972). The symbolic and communicative significance of punishment is central to other theorists’ understandings of the purpose of punishment:

Punishment is a conventional device for the expression of attitudes of resentment and indignation and of judgments of disapproval and reprobation, either on the part of the punishing authority himself, or of those ‘in whose name’ the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalties. (Feinberg, 1965)

In the context of this thesis the question is whether the harms to children and caregivers are ‘punishment’. If they are punishment then they become visible and part of the legal process meaning that legal protections apply to them, and we must then consider whether the ‘harms’ are consistent with the aims of punishment and ask the question which should be asked of all punishment, ‘are these kinds of response to crime appropriate?’ (Hoskins, 2015: 251). Some of the caregivers who were interviewed described their life after the imprisonment of the mother as a ‘sentence’ or punishment:

It’s a sentence for us and for everybody involved not just the Mum. That sentence is for the whole family. (Shelley Dena, grandmother caring for grandchildren aged 10 and 11)

The judge punished the children and he punished us. He didn’t really punish her. We’re doing the prison sentence as well. (Barbara Litton, grandmother sharing the care of a six year old grandchild)

It was her [the imprisoned daughter] mistake, but I feel like I’m the innocent victim in a system... we are protecting her while we’re punishing me. (Angela Barrett, grandmother caring for three year old grandchild)

Despite the caregivers’ perception that the burdens that flow from the mothers’ imprisonment are ‘punishment’, when held up against the widely used definitions of punishment their experiences cannot be described as such as they have done no wrong

themselves. The caregivers are not offenders and legitimate or ‘justified’ (Zedner, 2016) punishment cannot be inflicted on innocent people. However if sentencers foresee that by imprisoning a mother, her children and their prospective caregiver will suffer harms and the knowledge of such harms will increase the severity of the punishment for the mother could it be construed that the suffering which the children and caregivers experience *is* intended to be part of the mother’s punishment? From the interview data in chapter five of this thesis it was apparent that some sentencers do have an awareness of the likelihood that a child will experience significant disruption to their lives upon their mother’s imprisonment and this may be harmful to them. As noted in chapter five, two of the judges who were interviewed for this study articulated that they understood the potential harms to the children and in addition they viewed the hardship which the children would suffer as an element which increased the severity of the sentence for the mother:

I think it [prison] would have a far more severe impact because for me ... if I had to live without my children for any period of time it would have a significant impact, not because of the effect on me, but because of what I’d fear it would do to my children. (CC6)

[Imprisonment is harder on a woman] knowing that her children are in care must be a terrible burden. I take the view that if I can accept a submission in a particular case that the defendant is acutely conscious of the problems he is creating for others, then that is genuinely a factor which makes imprisonment harder to bear. (CC1)

Although those comments accord with my suggestion that a situation could arise when the harm to the children formed part of the punishment of the mother I would suggest that in neither case did the judge in question indicate that they would sentence a mother with the intention that the hardship to her children would increase the severity of her sentence. Their comments show the difficulties they face in knowing how to properly address and consider the impacts of punishment on innocent third parties. The absence of any mention of the child’s hardship forming part of the mother’s punishment in either sentencing

guidelines or case law suggests that it is not regarded as such by those who sentence or who form sentencing policy.

If the harms to children and caregivers are *not* punishment then ‘we must instead ask what would justify these additional non punitive exercises of coercive state power’ (Hoskins, 2015: 251) as ‘any act which involves the infliction of extensive harm therefore stands in need of some grounding reasons which explains why that particular act is morally justified’ (Bulow, 2014: 785). The term ‘collateral consequences’ has been widely used in association with the impacts which families experience when a family member is imprisoned. In the next section of this chapter I will examine the origin and use of this term with respect to the experiences of children of imprisoned mothers and those who care for them and consider the sufficiency of it in this context.

Collateral consequences

In punishment literature and prisoners’ families’ literature the term ‘collateral consequences’ is used to describe secondary effects of punishment but it has a very different meaning in each context. In the former it refers to punishment that is secondary to the offender e.g. it follows on after the completion of his or her sentence and the term is used to describe the civil disqualifications which impact upon a person who has served a period of imprisonment (von Hirsch and Wasik, 1997). Such disqualifications exist primarily in the United States rather than in England and Wales and include restrictions on voting, future employment, eligibility for welfare support, and numerous other matters. They are not dependent on an individual’s personal circumstances but attach to any individual who has served a sentence of imprisonment. When the term is used in that context it does not include social consequences such as stigma or shame. In prisoners’ families’ literature however ‘collateral consequences’ refers to the way in which punishment of the offender affects others who are not the primary target of the

punishment e.g. prisoners' families. The term is used to capture the entirety of the experience of those whose family member is imprisoned. For example an article entitled 'The collateral consequences of incarceration revisited: a qualitative analysis of the effects on caregivers of children of incarcerated parents' (Turanovic et al, 2012) includes as 'collateral consequences': family disruption, emotional difficulties, financial difficulties, the burden of child care, the breakdown of social networks, and disrupted home and working environments. Surprisingly there has been no attempt in academic or policy literature to seek justification for such wide spread collateral consequences even though:

it is beyond disingenuous to pretend we still do not know what the impact of prisons are on prisoners, prison employees and prisoners' families...the vast majority of this research demonstrates the considerable damage that prisons can cause at the individual level. (Armstrong and Maruna, 2016: 139)

It is my contention that the use of the term 'collateral consequences' to describe the harm suffered by family members has carried with it an assumed acceptance of the legitimacy of such damage extending from the imprisonment of offenders. To understand why that might be I turn to military literature from where the term seemingly originates. The term 'collateral damage' was first used by the United States military in the Vietnam War to describe the US caused deaths of non-combatants. It is a term which 'deflects atrocity' (Perice, 2007) and its use indicated a desire to reframe the deaths of innocent, unintended victims of war as a necessary and acceptable part of war. In 2003 a doctor said this of the deaths of civilians in the Iraq war:

The Pentagon will refer to the innocent victims of this assault as 'collateral damage', but I've seen their faces, and I think that they should have another name. One that occurs to me is 'children', since half the population of Iraq is under 18 years old. (Clements, 2003)

The acceptance and usage of the term allowed groups of people to be categorised as unwanted, surplus or unnecessary. It created, or named, a values measure in which some

lives were worth more than other lives. In accepting the rationale which lay behind ‘collateral damage’ militarily and societally, ‘collateral damage’ or foreseeable harm became not simply a by-product but part of the assumed consequence of any ‘progressive’ action:

By cultural constructions of worthy and worthless lives we justify social policies and military actions that multiply death and misery...The same cultural processes are at work in the bombing of civilians as are at work in the appalling social policies enacted by the ruling elite in America based upon a cultural arrogance to declare war on those considered part of the superfluous population. (Perice, 2007: 115)

I wonder whether by using terminology which has its origins in the destruction of lives that are deemed unimportant it has permitted a similar lack of value to be placed on the lives of children and families of offenders? Are the harms that they suffer simply the unfortunate consequence for the children of having been born ‘too close to the battlefield’ (Perice, 2007: 120)? Is the lack of justification for the consequences they suffer an indication that the families of prisoners are treated as superfluous population, non-citizens whose lives have less worth than those whose family members have not offended? In discussion of prisoners’ families the word ‘damage’ has been exchanged for ‘consequence’ and in the light of the above I suggest that this causes a further downgrading of this group of people. The neutrality of the term hides the damage they suffer and reinforces their lack of value within society.

Other constructions of third party harms

‘Collateral consequences’ is not the only term which has been used to describe the way in which the harms of imprisonment impact upon innocent third parties. Kolber (2012) calls them the ‘unintentional burdens of punishment’ and suggests that such burdens beg the question whether both sentence severity and sentence length have meaning in the way that

I set out above: if the sentencer understands that the impact on third parties will be negative this adds to the severity of the sentence. The notion of considering sentence severity as well as sentence length is present in academic scholarship on sentencing, framed in terms of the impact of sentence. The principle of equal impact which I will return to in more detail later in the chapter, states that in circumstances where an offender is likely to suffer from the sentence to a significantly different degree than most other people there is a case for reducing its length (Ashworth, 2010: 185). The current sentencing guidelines provide for an ‘equal decision making process in determining a sentence’ rather than providing for an equal outcome (Wasik, 2008: 216) however the focus in such decision making is on the offender and not on third parties who are affected by the sentence. Kolber does not offer any sort of justification for these ‘unintentional burdens’ but recognises that the separation of parent from child as a consequence of imprisonment causes harm to both and ‘is especially in need of justification’ (2012: 17).

A further possible justification for harms to children and caregivers is the doctrine of double effect. Bulow (2014) sets out the key points of the doctrine following Bennett’s analysis (2001). For the doctrine of double effect to apply the following conditions must be in existence: firstly the act must not be bad in itself; the agent’s intentions must be good; the good does not flow from the bad and / or the agent does not intend the bad as a means to the good; and finally the good is good enough, compared to the bad, and there is no better route to the former. The doctrine states that if each condition is fulfilled one is permitted to act in a way that predictably leads to bad results. When this doctrine is applied to the imprisonment of a mother conditions one, two, and three can all be met. The complexity however, arises in determining whether the ‘good is good enough’ to justify the bad. ‘Is punishing the guilty so valuable in itself that it compensates for, or even outweighs the harms to families and children of the person being imprisoned?’

(Bulow, 2014: 784). The answer to this question is dependent on what we believe is the good effect of punishment. Bulow himself concludes that the doctrine of double effect cannot provide justification for the harms suffered by children and families as there are likely to be other ways that a parent can be punished without this resulting in harms to their children (Ibid.: 785). Manning also rejects the application of the doctrine of double effect with regards to children of prisoners, and refutes the ‘collateral consequences’ argument (2011). She points to war theory as incorporated in the Geneva Convention, which ‘expressly forbids’ the targeting of innocent civilians (Ibid.: 275). She also argues that:

a reasonable principle of obligation is that if one’s actions cause foreseeable harm to an innocent person, one has an obligation to alleviate the harm, whether or not one is held fully morally culpable for the harm. (Ibid.)

She goes on to say that the Department of Defense in the United States no longer regards ‘collateral damage’ as inevitable and justified and since May 2003 it has paid money to cover the costs of ‘providing health care, income generation, and the rehabilitation of destroyed homes, schools and clinics, for civilian victims of the war in Iraq.’ In addition payments are made to civilians who are killed or injured or incur property damage as a consequence of combatant activities (Ibid.: 286). Given the term ‘collateral consequences’ as applied to prisoners’ families originates from the military ‘collateral damage’ it is of relevance to note the development of the attitude of the military to such damage.

An alternative way of constructing the harms suffered by children and caregivers when a mother is imprisoned is to view them as a direct consequence of the actions of the mother for which she alone bears all responsibility. Some judges interviewed for this study articulated this viewpoint.¹¹ Manning frames it within the military collateral damage

¹¹ p.148

context, ‘combatants choose to put their families at risk... since they are the cause, they alone have the obligation of reparation’ (2011: 276), however she suggests that there are difficulties with this position. Firstly she refutes the assumption that responsibility for the children cannot be a shared responsibility; even if the imprisoned parent does bear some responsibility she argues that ‘it does not absolve the general society of such responsibility’ (Ibid.). Furthermore according to her analysis children have unique status which places upon the state an obligation to take care of them when they are left without a parent or carer. The state in general provides care for children based not on the guilt or innocence of the parent they have lost but on the needs of the child. It is Manning’s contention that the same principles should apply to children of imprisoned parents (Ibid.: 277). I concur with that view, relying on the findings of chapter four of the thesis which established that the state has a duty of care towards children who are left without the care of a parent.

The way forward

It cannot be argued that the harms to children are unforeseen as by their very nature as children the sentencing of their mother to imprisonment, particularly if she is their primary carer, will cause them significant loss and harm as was set out in chapter three. However the term ‘collateral consequences’, the criminal courts focus on the offender, and the non-application of the state duty of care towards children of defendant mothers have allowed the consequences to go unchallenged. What is true of the hidden nature of punishment is even more true of the invisibility of harms to children of prisoners:

Punishment, then, will tend to become the most hidden part of the penal process. This has several consequences: it leaves the domain of more or less everyday perception and enters that of abstract consciousness; its effectiveness is seen as resulting from its inevitability, not from its visible intensity ... As a result, justice no longer takes public responsibility for the violence that is bound up with its practice. If it too strikes, if it too kills, it is not as glorification of its strength, but

as an element of itself that it is obliged to tolerate, that it finds difficult to account for. (Foucault, 1977: 9)

The literature on the military use of the term ‘collateral damage’ is helpful in considering how and why the state, theorists, and policy makers have not given much thought to the ways in which children are affected following a mother’s imprisonment. If they are not named as ‘children’ but instead become ‘collateral’, and if the harm which they suffer is not called harm but instead the neutral term ‘consequences’ is used then they remain invisible and their invisibility obviates the need to debate, consider or determine whether their experiences are intended or justified. Thus we have an explanation for the way children of defendant mothers are treated but it is clear that such treatment is neither justified punishment nor is there an alternative moral justification for it. On the contrary the legislation, case law, and government documents pertaining to the issue indicate that the state has an awareness of the problems which children face when their mother is sentenced to imprisonment in the criminal courts of England and Wales and although statutory mechanisms exist to ensure their rights are not overlooked these are not currently engaged with by the bodies acting with state authority. Every person has ‘a prima facie moral right not to be harmed’ (Bulow, 2014: 785) and in addition the state’s failure to uphold the rights of these children under the UNCRC 1989 is a failure of its duty to protect children of defendant mothers from discrimination or punishment that they experience because of the status or activities of their parent (UNCRC 1989, Article 2). In light of the current differentiated treatment and the lack of any moral or legitimate reason for such treatment the state must remedy this situation. In the final section of this chapter I will suggest that a number of changes are necessary to fulfill the state’s duty of care towards these children.

A change in penological thinking

The justice system in England and Wales is based on liberal rather than communitarian values and ‘the institutional framework of modern penology tends to narrow our perceptions of the phenomenon and obscure the social ramifications of punishment’ (Garland, 1990: 1). Liberal theories of justice and punishment focus on the individual and are evident in the binary nature of sentencing processes in England and Wales which regard the assessment of guilt and the punishment of the offender as a matter between the state and the offender. It is only relatively recently that victims were given regard within the process. For other affected third parties such as children of defendant mothers, to be taken into consideration within the justice system liberal thinking will have to give way to a communitarian understanding of justice and punishment which acknowledges that punishment has wider societal implications. A communitarian conception of a person is ‘one that recognises human identity as a fundamentally social construction’ (Lacey, 2003: 186), and a communitarian approach to punishment would:

give real consideration to the inevitable suffering of those who are materially and emotionally involved with prisoners: people whose position is generally ignored in both theoretical and policy debates. In abandoning a totally individualistic perspective, we become aware of the nature of imprisonment as a penal measure that inevitably leads to punishment of innocent parties. (Ibid.: 192)

This thesis has shown that the imprisonment of a particular population, mothers of dependent children, has wide reaching social implications and communitarian theorists recognise that the harmful impact of imprisonment on third parties ultimately reduces social cohesion. These issues are currently unaddressed within a punishment framework focusing on the individual but communitarians argue that they are disregarded at a cost to communities:

If the proper social functions of punishment have to do with the maintenance of and respect for fundamental community values, then any inhumanity in a prison

system must be seen as directly, both symbolically and instrumentally, counterproductive. (Lacey, 2003:190)

A number of the children I interviewed spoke about their loss of trust in the criminal justice system including the police, and it is apparent from the literature and the interviews (chapters three and six) that many children lose their faith in civic society and no longer feel part of the community. Secondary stigmatisation causes them to isolate themselves from others as they feel they can no longer trust other people (see chapter three). This lack of trust is problematic at a societal level. Barker describes it as ‘a basic building block of society’ which is:

intimately tied to norms of reciprocity, the practice of mutual exchange between interdependent parties. It holds societies together by making cooperation possible. By having confidence in others, believing that others will not take advantage of one’s vulnerability (Misztal, 2011), and engaging in reciprocity, trust eases our more mundane daily exchanges and enables more complex forms of collaboration across all areas of social, economic, political and private life. (Barker, 2016: 82)

I would suggest that children of imprisoned mothers lose their confidence in others and are taken advantage of because of their vulnerability (Misztal, 2011, above). Children are one of the least powerful and most vulnerable groups in our society and therefore when their needs are not met, or their rights are overridden, they do not have the standing to address that. Consequently they no longer trust that if they do no wrong they will be protected. In addition, the suffering of unfair and unjustified hardship may impact upon a child in ways which will influence their future responses to the state and their community and it is arguable that their loss of trust and enhanced vulnerability may be contributing factors to their longer-term outcomes. The dangers of allowing children to experience punishing circumstances as a consequence of their mother’s imprisonment are partially known. The likelihood of future criminogenic behavior is increased (Murray and Farrington, 2008), as is the likelihood of experiencing addiction and mental health

problems (Tasca et al, 2014). If punishment is intended to promote social good then consequential effects which detract from that reduce the value of punishment.

A child who suffers the loss of their mother due to her imprisonment is unlikely to take from that experience positive understandings of the need for wrongdoing to be punished. Instead their suffering will obfuscate all else:

Harsh punishment of a child frequently produces strong emotional reactions in that child even while the undesired behaviour is being suppressed. Hostility, fear, screaming and crying are not unusual responses to harsh punishments. One problem is that these emotional reactions may interfere with the learning of competing behaviours and the extinction of the undesirable behavior. ... we can expect the hostility and fear that one experiences while being punished to become classically conditioned responses to all sorts of characteristics associated with the punishment, - the person, the setting, and the institution. This may make future positive reinforcements very difficult to deliver. (Huesmann and Podolski, 2003)

As more children experience the imprisonment of their parents it might be wise to heed the warnings coming from the United States about the societal impacts of mass imprisonment of adults (Wakefield and Wildeman, 2014) alongside the insights from psychology. Reflecting on these should cause us to question the value of imprisoning mothers. Not only is there a risk that the children develop ‘hostility and fear.... to all sorts of characteristics associated with the punishment – the person, the setting, the institution’ (Huesmann and Podolski, 2003), but the imprisoned mothers who feel the pain of their children’s suffering will also develop the same hostilities towards the criminal justice system. By ignoring these costs it is likely that our society will gain an ever-increasing number of disenfranchised citizens (Lacey and Pickard, 2015) which in turn will weaken our communities.

There is however an alternative. If the state in England and Wales accepts that punishment is not an act which applies only to an individual, that it is currently in breach of its duty of care towards a population of its most vulnerable citizens, and it is in breach of its duties under the UNCRC (1989) through its denial of Article 2, 3, 12 and 20 rights

to children of defendant mothers, there are a number of ways that it could alter the current status and prevent longer term individual and societal harm. The next section of the chapter will set out the ways in which the state could minimise harm to children of defendant mothers.

A change in the use of imprisonment

The most obvious way to decrease the harms to children of defendant mothers is to reduce the number of mothers who are sentenced to terms of imprisonment. It is already the case in England and Wales that imprisonment is intended to be reserved for only the most serious cases. Section 152(2) of the Criminal Justice Act 2003 states that a custodial sentence must not be imposed unless the offence ‘was so serious that neither a fine alone nor a community sentence can be justified for the offence.’ The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (UN, 2010) re-iterated that principle with regard to women but despite those provisions many women are imprisoned for non-violent offences or breaches of community orders (see chapter one). Academics have called for prison to be a sanction of last resort and for a presumption against imprisonment in all but the most serious cases (Arditti et al, 2003; Manning, 2011; British Academy, 2014). There are of course objections raised to what is perceived as ‘more lenient’ sentences for a particular group of offenders based on their personal characteristics and the issue has been raised in academic debates about ‘equal impact’ in sentencing. As was noted earlier in this chapter, equality of impact is achieved when in circumstances where an offender is likely to suffer from the sentence to a significantly different degree than most other people there is a reduction in its length (Ashworth, 2010: 185). It has been argued that the impact of imprisonment on those who are primary carers for dependents is greater than on those who do not have any primary

care responsibilities and therefore shorter custodial or non-custodial penalties should be used for primary carers (Piper, 2007b: 141). Although she acknowledged that it could be problematic for defendants with children to receive more lenient sentences Piper argued that it was better to apply principles to these situations (Ibid.: 155) rather than relying on sentencers 'drifting into the blancmange of mercy' (Ashworth, 2010: 187). Easton did not disagree with the premise of the argument, that inequality of impact exists for those with dependents, but was unhappy with it being addressed at the point of sentence (2008: 112). Roberts called for some direction in the form of sentencing guidelines on mitigation (2008: 275) and Loueiro suggested that there should be a legislative measure enacted to standardise the way in which children were considered in adult sentencing decisions (2009: 57). The justification for 'family ties benefits' mitigating sentences was questioned by Markel et al (2009):

although, we advance the unusual position ... that, ordinarily, a defendant's family ties and responsibilities should not serve as a basis for a lighter sentence, we are sensitive to the serious arguments made by proponents of sentencing departures for those with significant caregiving responsibilities. (Markel et al, 2009: 50)

They did however go on to propose that 'the law should reject a categorical effort to accommodate only those innocent third parties who are family members' (Markel et al, 2009: 52).

Despite these arguments and concerns about inappropriate leniency towards certain defendants based on their caregiving responsibilities it is in fact the case, as was set out in chapter five, that the sentencing guidelines and case law precedents in England and Wales have already provided for the caregiving responsibilities of adult defendants to be properly taken into account in sentencing decisions (*R (on the application of P and Q) v Secretary of State for the Home Department* [2001]; *R v Mills* [2002]; *R v Bishop* [2011]; *R v Petherick* [2012]). The sentencing authorities and the provision for dependents to be

considered as a mitigating factor in sentencing place a duty on sentencers to consider the best interests of the child when they sentence a mother. The change that is required is not therefore as fundamental as a new principle to be incorporated into sentencing practice for the first time, rather it is for those who sentence to understand what it is they must consider and to alter their sentencing accordingly. The misconceptions of sentencers that to do so is to exhibit gender bias need to be addressed so that sentencers understand that not only are they free to consider dependents but they are obliged to do so. Of course there will still be occasions when despite a defendant mother's caring responsibilities imprisonment is the only appropriate punishment, either because of the seriousness of the offence or for the protection of the public. The next section of the chapter will consider the obligations upon the state which arise in that situation.

A change in the state's response to maternal imprisonment: mitigating harm and residual obligations

When a defendant before a sentencing court in England and Wales is a mother of dependent children, the state knowing now that it has duties towards children of that woman should ensure that the rights of those children are upheld. This will mean offering them the same duty of care as is offered to any other child who is separated from their primary carer, and placing the best interests of the child as a primary consideration in all decision making. Although the court may still make a decision to imprison a mother of dependent children the state should endeavour to 'mitigate' the harms suffered. Manning suggests that this could include ensuring that children are immediately provided with alternative appropriate care and financial support whilst also accommodating generous visitation between the children and their mother and providing transportation to visits. The 'mitigation' should continue after release, recognising the challenges of re-

integration by providing family reunification therapy and support (Manning, 2011: 279). Bulow suggests another basis for the provision of support to these children. He argues that the failure of the state to avoid harming families and children of prisoners 'creates residual obligations towards them' (Bulow, 2014: 785). Drawing on philosophical concepts of moral obligations he proposes that rather than approaching the issue with the belief that one can either imprison mothers or protect children one should recognise that there are conflicting moral obligations, and when one moral obligation (the state duty to punish offenders) overrides another moral obligation (the state duty to protect children from harm) a 'residual obligation' remains:

As every individual has a right not to be harmed, the state also has a corresponding moral obligation not to harm its citizens. At the same time, the state has an obligation to protect its citizens from potential assaults. Put together, we can see that when using legal punishment, the state creates a moral conflict. In order to fulfill its obligations towards its citizens, it has to uphold safety and security and respect for individual rights, but in doing so it also violates prison inmates' family members' and children's right not to be harmed. It is therefore reasonable to say that the use of imprisonment as a legal sanction gives rise to residual obligations at least towards those being indirectly harmed as an inevitable side effect of this sanction. (Bulow, 2014: 786)

Hansson and Peterson (2001) provide a typology of residual obligations and suggest that they fall into five categories: obligations to communicate; obligations to improve; obligations to search for knowledge; attitudinal obligations; obligations to compensate. Bulow applies these to children of prisoners and suggests that obligations to communicate mean that the state authorities e.g. prison officers, should listen to families who feel unhappy with procedures and they should be willing to admit mistakes. The obligation to improve may take the form of improving prison visits or prison conditions and the obligation to search for knowledge includes the authorities making efforts to understand the children's situation. The attitudinal obligations would be fulfilled by treating families and children with respect and ensuring that they are not subject to further stigmatisation.

The obligation to compensation includes the kind of ‘mitigation’ suggested by Manning above (Bulow, 2014: 787). I would suggest that the argument for residual obligations in respect of children of imprisoned mothers is strong. If the state comes to the decision that a mother must be imprisoned despite proper consideration of the child’s welfare and with an understanding of the harmful impacts of secondary prisonisation and secondary stigmatisation upon that child’s life in both the short and long term, then the state will have no trouble in recognising that its duty to the child does not end after sentence has been passed. The mechanisms for continuing to support the child already exist under section 17 of the Children Act 1989 which places the local authority under a duty to promote and safeguard the welfare of children in their area who are in need: ‘in need’ being defined as the child is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority; or his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services (section 17(10)). I contend that research evidence provides any local authority with the evidence that is required to prove that children of imprisoned mothers are such ‘children in need’. Although there have been debates amongst organisations working with prisoners’ families about the issues around local authority involvement in the lives of children of imprisoned mothers, if the involvement is supportive rather than condemnatory or judgemental and if it is offered in recognition of the children’s rights and the state’s residual obligations towards them then it is likely that the support would be welcomed. The disparity between the financial and other support given to local authority foster carers and kin carers could be addressed as part of the recognition of the state’s residual obligations and a number of the kin caregivers I spoke with would have welcomed such support.

An example of change: South Africa

Although it may seem daunting to consider and implement a new way of understanding the state's duties towards children of defendant mothers this change has been managed successfully in other jurisdictions. In a number of countries unique punishments are available for parents who are primary carers of dependent children; in Germany mothers can have any sentence less than two years suspended, and probation can last for between two and five years. In Italy mothers with children up to the age of ten are permitted in some circumstances to serve their sentence at home so that they can continue to look after their child. The country, which has most notably altered its sentencing practices in order to give regard to the children of adult defendants, is South Africa, and in the final section of this chapter I will focus on the judgment which changed the treatment of children whose primary carer was before the court as a defendant. In the landmark case (*M v the State* [2007]) heard in the Constitutional Court of South Africa, Justice Albie Sachs gave the leading judgment on an appeal to determine whether the sentencing courts had paid appropriate attention to the constitutional provision that in all matters concerning children the children's interests should be paramount. The defendant in the case was a 35 year old single mother of three boys aged 16, 12 and 8. She was convicted of a large number of fraud offences and was sentenced to imprisonment. She appealed the decision on the basis that section 28 of the Constitution required sentencing courts 'to give specific and independent consideration to the impact that a custodial sentence in respect of a primary caregiver would have on minor children' (2007: 4). The National Director of Public Prosecution refuted this claim replying that the current procedures in the courts already took account of the interests of children (Ibid.). The section 28 requirement of the Constitution stemmed from the UNCRC 1989 and the African Charter on the Rights and

Welfare of the Child 1990. It required all courts to consider children's rights and embedded the paramountcy principle in law. It was not unlike the obligations that currently exist in England and Wales under the UNCRC 1989 and the Children Act 1989. Sachs J acknowledged the broad-reaching nature of the provision and stated in paragraph 15 of his judgment that 'statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children' and that courts must function 'in a manner which at all times follows due respect for children's rights.' In his judgment he emphasised the citizenship of children:

If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children. (2007: paragraph 18)

He referred to the state's duty to minimise the harms which children suffer when their parents are unable to care for them properly:

It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can. (2007:20)

The counsel for the state argued, as it would be argued in the courts of England and Wales, that the impact of children was already taken account of by looking at the crime, the criminal, and the community:

She contended that sentencing courts as a matter of routine consider the personal circumstances of the criminal, including their parental obligations, and weigh them against the gravity of the crime and its impact on the community. Hence, it was said, no change in present sentencing practice is called for. (2007: 29)

The 'amicus' acting on behalf of the children responded to that statement:

A child of a primary caregiver is not a "circumstance", but an individual whose interests needed to be considered independently. The weight to be given to those interests and the manner in which they were to be protected would depend on the

particular circumstances. But ...these interests were not to be swallowed up by and subsumed into the consideration of the culpability and circumstances of the primary caregiver. (2007: 30)

Sachs J. addressed the question of whether such consideration of children gave an unfair advantage of leniency to parents. He made it quite clear that this was not the case. It was not the punishment of the parent for wrong doing which violated the rights of the child, rather it was the form which that punishment took which could violate the child's rights:

The purpose of emphasising the duty of the sentencing court to acknowledge the interests of the children, then, is not to permit errant parents unreasonably to avoid appropriate punishment. Rather, it is to protect the innocent children as much as is reasonably possible in the circumstances from avoidable harm. (2007: 35)

Ultimately the court decided that insufficient attention had been paid to the children's interests in the lower courts, the appeal was allowed and the case set an important precedent in criminal cases. It has been followed in other South African cases including the case of a father who pleaded guilty to the culpable homicide of his wife and was sentenced to 'periodic imprisonment of 2000 hours', meaning that he was imprisoned every weekend between 6pm Friday and 2pm Sunday so that he could look after his children and continue to work and provide income for his family (*S v Ntikedzeni* [2011]). The South African case law very clearly addresses the concerns which have been raised in the jurisdiction of England and Wales about the adoption of a more intentional focus on the best interests of the child. I interviewed Sachs J in December 2014 and discussed with him the concerns of judiciary that such a change would make them a 'welfare court' rather than a criminal court:

In some cases, in rare cases it [consideration of the child's interests] can actually make a difference whether to go to jail. It can be a tipping point which encourages a non-custodial sentence ... I think it happens and it should be acknowledged and I think it should become part and parcel of the jurisprudence. In other cases if you know that the children exist, they've been very dependent, it's going to be a shock, then its not for the judge to make arrangements but just to ensure that the relevant authorities are informed and that's where the council would have a very big role to

play and you can't say I wash my hands of it. State action is producing that result. A necessary result but the state action must also encompass the ripple effect in as much as it relates to children.... the prosecution have a duty too. It's a serious part of their function, to ensure that the children who are going to lose their primary carer as a result of state action initiated by the prosecution are not left high and dry.... I explain to the judges they are not being called on themselves to provide protection to the children. They are called upon to ensure that the impact on the children will be dealt with... They are all officers of the court and the courts are the upper guardians of children. (Sachs, 2014)

Conclusion

The genie is out of the bottle and we cannot put it back. Children have rights, the state has responsibilities, and an analysis of the experiences of children of defendant mothers in England and Wales shows very clearly that the rights are not being upheld and the responsibilities are not being honoured. How this has remained invisible for so long remains an unanswered question but that is not of primary concern. Instead the focus must move to identifying the ways in which these obligations can become, to quote Justice Albie Sachs, 'part and parcel' of the justice process. Whenever it is suggested that children require particular consideration there will always be objections raised but the detailed judgment of the South African Constitutional Court (*M v the State* [2007]) provides an extremely helpful blueprint for the way forward. The state must firstly recognise its duty of care towards the children of defendant mothers as citizens and as a vulnerable population. Sentencing practice must evolve to a place where every sentencer in England and Wales understands that the best interests of any child dependent are a primary consideration of the court. Every sentencer should be aware of the need to uphold the child's right to be heard in any proceedings concerning them and every sentencer should feel free to use the mechanism of a pre-sentence report to find out all the information which they are duty bound to know about the likely impacts upon a child if their mother is imprisoned.

In Conclusion

In the beginning

Five years ago on a winter's day I sat in a library researching women's imprisonment and I began to ask the questions which brought this thesis into being. As I set out in the introduction I was puzzled by the anomalous situation I found existing between the treatment of two different groups of children who were separated from their parents by the state: those who came before the family courts in 'care proceedings' under section 31 of the Children Act 1989 whose best interests were the paramount consideration of the court, and those whose mothers faced imprisonment as a consequence of sentencing proceedings in the criminal courts where sometimes their existence was not even known. The work I undertook sought to investigate why the children of defendant mothers are treated so differently to children in care proceedings, and to explore the consequences of such differentiated treatment for wider society and the state.

I write this conclusion on a winter's day in 2016 with an awareness that in those years a great deal has changed in the areas with which this thesis is concerned. When I began this work I thought that the grounds for parity between the two populations of children would be rights based and the Articles of the UNCRC 1989, in particular Article 2 which places upon the state a duty to protect children from discrimination or punishment which they experience because of the status or activities of their parents, would provide the basis on which it could be argued that the children of defendant mothers should be given similar provision to the children in section 31 care proceedings. I thought that more than a quarter of a century after the United Kingdom ratified the UNCRC 1989 it would be time for the courts, local authorities, and policy makers to recognise its relevance to children of prisoners. What I have discovered instead is that there are now multiple grounds for

proposing that such differentiated treatment should not be tolerated any longer and the United Kingdom's commitment to uphold the rights of children as set out in the UNCRC 1989 is just one of those reasons. Since 2011 when I began to ask questions about the anomalous treatment, new precedents have been set on the issue of the consideration of dependent children in sentencing decisions in England and Wales (R v Bishop [2011]; ZH (Tanzania) (FC) Appellant v Secretary of State for the Home Department [2011]; R v Petherick [2012]) and the Sentencing Guidelines issued since 2011 specifically mention the primary care responsibilities of defendants as a matter which can be taken into account as personal mitigation in sentencing decisions. These developments have provided a clear, legal basis for considering the children of defendant mothers at sentencing and have removed any grounds for arguing that by doing so sentencers are involving themselves with matters that are outside of their jurisdiction.

Of course the procedural differences in the treatment of children e.g. their lack of standing before the criminal court, should be addressed whether or not the children suffer harm as a consequence of that lack of standing but by providing empirical evidence which proves the presence of substantive harm to children of imprisoned mothers, including the mid to long term diminution of their life chances, another ground emerged on which to challenge the differentiated behaviour of the state. That ground was the non-fulfilment of the state duty under section 17 of the Children Act 1989 to safeguard and promote the welfare of children 'in need'. The findings of chapter three and the extensive research literature on the impact of maternal imprisonment referenced in the thesis, provide evidence that inquiries should be made concerning all children of imprisoned mothers to see if they fall within the statutory definition of 'in need'.

Policy implications

A number of the policy suggestions which I make could be made without the particular findings of this thesis. There is already a strong case for reducing the number of women imprisoned for non-violent offences. Overcrowded prisons and a reduction in prison budgets have focussed attention on the need to lock up fewer people. There have been many calls for money to be invested in diversion schemes and community sentencing alternatives so that fewer women are imprisoned. The findings of this thesis however, add weight to particular proposals with regard to the sentencing of women. Although only 20 Crown Court judges were interviewed their responses allied with the findings from the sentencing transcript analysis and the work of others in this field (Epstein, 2012) and demonstrate that judges and magistrates do not place sufficient weight on the welfare of the children of defendant mothers when sentencing despite the mention of dependents in the mitigation factors, case law, and authorities. I therefore propose again (Minson et al, 2015) that there should be a Sentencing Guideline published by the Sentencing Council which addresses this issue specifically. It could apply in all situations when a defendant before the court is the primary carer of a dependent child, irrespective of the gender of the parent. Setting out the principles established through case law, the commitments which the UK has made to the UNCRC 1989, and the 'Bangkok Rules (UN 2010) it would serve as a guideline in every case to ensure that sentencers at every level of court understand that it is their duty to consider the welfare of child dependents when sentencing a child's primary carer. Having looked in more depth than any previous study in England and Wales at the extreme disruption caused to children's lives by the imprisonment of their mother I would also suggest that judicial education of judges and magistrates on sentencing should include the provision of information on the breadth and depth of the impacts on children and caregivers of maternal imprisonment. By doing so, when judges

have cause to consider children's welfare and to ascertain if there is someone who will care for the child if the mother is absent, they will understand what they are asking of the caregiver, and what the short, medium and long term effects on the child may be.

It was apparent from speaking with the judges that there is a fear of being seen to be too lenient in their sentencing of women. It would assist greatly if a metric could be devised by the Sentencing Council which in recognition of the fact that although an offence is serious there may be other factors which outweigh the importance of imposing a sentence of imprisonment provides equivalent non-custodial sentences to match terms of imprisonment. For example, a six month term of imprisonment might be equivalent to 24 months of probation with 60 hours of community service. South Africa has shown that sentencing can be more creative but no less punishing and I suggest that the Sentencing Council need to address the normative viewpoint that non-custodial sentences are less punishing than imprisonment in all cases.

This study focused only on the sentencing practices of the Crown Court but as 61 per cent of women entering prison in 2015 were serving sentences of less than six months duration (MOJ, 2016b) it is likely that many women in prison are sentenced by the Magistrates Courts. I am concerned that because the magistrates only adjudicate on less serious criminal offences their interpretation of an offence which is 'so serious that only custody is appropriate' is very subjective, and they consider the seriousness of the offence within the range of offences which they see in the Magistrates Court. All of the Crown Court judiciary I interviewed said that they rarely sentenced anyone to less than 12 months as they felt that a non-custodial sentence could be imposed instead of what they regarded as a short term of imprisonment. Crown Court judges are also expected to consider the suspension of all sentences which are shorter than two years imprisonment. To a Crown Court judge offences which attract a six month term are not serious and this

creates a significant sentencing dichotomy which should not exist. Given the seriousness of the consequences of even a 'short' sentence of imprisonment for the children of a defendant mother as shown in chapter three of this thesis, and the unsupported burden which it places on caregivers, I contend that the sentencing powers of magistrates should be reconsidered in order to align Magistrates Court sentencing with Crown Court decision making.

Relevance of the findings beyond children of defendant mothers

The findings of this thesis have application beyond the situation of children of defendant mothers in the criminal courts of England and Wales. The state duty of care towards children who are separated from their primary carer by state action has been found to exist without limitations. Women were the population through which I chose to study this topic but all the findings apply similarly to a male defendant who is the primary carer for dependent children. In addition in the same way as it applies to children of defendant mothers it must therefore apply to children whose parents are placed in immigration detention, or the children of parents detained under the Mental Health Act 1983. I do not believe that it is known how those children are currently regarded by the tribunals which make decisions about their parents, and I would suggest that there is a need for research to be undertaken in these areas to ensure that similarly vulnerable children have their rights upheld and receive the appropriate duty of care from the state when separated from their parents.

Limitations of the Research

Although this study brought much new information to light about the lived experiences of children and caregivers following the imprisonment of the children's mothers, and has

provided some insight into the way in which some members of the Crown Court judiciary construct and interpret child dependents and their meaning within sentencing decisions, it is of course limited in a number of ways. Firstly the size of the sample populations was small. Although larger than any previous studies in England and Wales the children and caregiver interviews provide only a small glimpse of a much bigger picture. As was mentioned in chapter two it is very difficult to identify children affected by maternal imprisonment and those who took part in this study were either families who were connected with a support organisation or who attended prison visits. This inevitably led to a skewed sample as it is known that many women in prison do not receive any visits from their children during their imprisonment and all of the children who took part in this had visited their mother. I also had no contact with any children who were in the care of the local authority and so the perspective of those children is entirely missing from this research. I did not meet any children who felt that their life was better without their mother but I am aware that in some literature it is suggested that for some children the imprisonment of a parent is a relief to a child. Again a larger sample size might have allowed me to test that hypothesis.

The Judicial Office gave permission for only 20 interviews and although this was again a larger number of interviews than have been undertaken with Crown Court judges on this topic ever before it is still a small sample. As mentioned earlier in the chapter I did not undertake any interviews with magistrates and it is likely that their approach to sentencing differs from the Crown Court approach. I would suggest that in any future research on the topic a focus on magistrates sentencing practice would be very important.

The size of the sample also meant that the intersectionality of race, gender, and class were not included in the analysis of the data even though it is very likely that experiences and outcomes are affected by those factors. I chose not to identify the gender or racial

background of the judges, nor the racial background of the children or caregivers as a protective measure against assumptions being made which could not be tested due to the limited nature of the data. I recognise that the inclusion of these factors in the data analysis would add significant depth to the understanding of the issues, and again in future research I would hope that larger sample sizes would allow a deeper level of analysis.

Who Cares?

I have explored the two questions I set out at the beginning of the thesis, firstly why are children of defendant mothers who face separation from their mother as a consequence of criminal sentencing proceedings treated differently to children who face separation from their parents by the state in the family court, and secondly what are the implications of this differentiated treatment for wider society and for the state?

I cannot claim at this point to have answered them. I sought an explanation for the differentiated treatment of the children of defendant mothers and this research has enabled a number of possible explanations for the differentiated treatment to be excluded. However in the absence of an explanation which justifies from a moral or legal standpoint the practices of the courts and the state with regard to such children, it is now clear that the existence of such differentiated treatment is not acceptable in a democracy which claims to uphold the rights of children and citizens, and which acts upon a duty of care towards many children within its jurisdiction.

The title of this thesis includes the words ‘Who Cares?’ because although I began with two main questions to consider there was an additional question niggling at the back of my mind: ‘Why does it matter if these children are treated differently: who cares?’. I have an answer to that question. It matters because due to their invisibility within the court

process and their invisibility throughout the period of their mother's imprisonment a group of children in England and Wales spend some proportion of their formative years experiencing the impacts of secondary prisonisation and secondary stigmatisation. These children have done nothing which offends society's moral or legal codes and yet they have been left without the protection or assistance of the state whilst they experience what may become the most life-changing and potentially destructive experiences of their lives. Of course this is not the case for every single child whose mother or primary carer is imprisoned but it is the experience of many children. The children are likely to have diminished life chances and opportunities. Those who care for them during their mother's absence are likely to suffer from a number of significant hardships affecting their ability to work, their economic stability, their family dynamics, and their health. Society will experience the cost both economically and socially as a group of children grow up with a sense that they are of little value and undeserving of protection and without a reason to want to commit to civic life. The consequences of this are broad reaching and the answer to the question 'Who Cares?' is that we all should care:

It is impossible to isolate punishment as practiced in most societies to a single individual, when we are all connected in families, communities and societies.
(Maruna, 2016: 100)

Appendix A

Child Participation Documents

- i) Sample sections from the information form

Would YOU like to help me?



My name is Shona Minson and I am a doctoral student at Oxford University. I'm asking questions and finding out what it's like for children whose Mum is in prison.



This booklet will tell you a bit more about what I'd like your help with.

After you've read it or someone has read it to you, you can decide if you would like to take part in my work.

If you would like to tell me more about yourself then we can have a longer chat after you've filled in the questionnaire.



If you would like to have another grown up there when we meet, that would be fine.

If we have a longer chat I will have to record it so that I can remember everything you tell me.

If I use any of your answers in my big report I will make sure that no-one can even guess that they were your answers!

No-one who reads the report will even know that you were one of the children who helped me!



ii) Sample sections from the Assent form

In order for you to answer the questions in the questionnaire I need you to fill in this form first.

This form is so that you and I can check that you understand about taking part in my study.

It's really important that we do this properly, so I'm sorry if this bit doesn't seem very interesting.

In the next two columns there are questions for you and you can answer yes or no to each question.

If you don't understand any of the questions then you can ask me to explain it to you again.

Ok?



Question 1

Have you read (or has someone read to you) the booklet about taking part in this study?

Yes No

Question 2

Do you understand what it told you about the work that I am doing?

Yes No

Question 3

Do you understand that it is up to you to decide whether you want to answer the questionnaire?

Yes No

Question 4

Do you understand that you can decide to stop answering the questions if you want to?

Yes No

Appendix B Interview Schedule for Children

	Interview Guide Young People
Introduction	<p>Thank you for agreeing to be interviewed</p> <p>Explanation of study</p> <p>Informed consent and forms</p> <p>Anonymity and confidentiality and reminder of limits if harm disclosed</p> <p>Recording of interview</p> <p>Reminder: the interview can be stopped at any time or we can take a break if you need one.</p>
1. Can you tell me who is in your family?	<p>Parents</p> <p>Siblings</p> <p>Other significant adults</p>
2. Are you living with any of your family at the moment?	<p>If not where are they?</p> <p>Do you see them?</p> <p>Have you ever lived with your family?</p>
3. How long have you lived in this flat/ house?	<p>Why did you move here?</p> <p>How long do you think you'll stay here?</p>
4. Who lives in this house/ flat with you?	<p>Adults</p> <p>Children</p> <p>Family members</p> <p>Do you have your own room?</p>
5. Do you go to school?	
6. How long have you been at that school?	
7. Do you have friends there?	<p>If you've moved to that school when you moved in to this house, did you already know people at the school?</p>
8. Do your friends know where your Mum is?	<p>Is that ok?</p>
9. What do you like to do in your free time?	<p>Hobbies?</p> <p>Going out?</p> <p>Staying around the house?</p>

<p>10. What has been hard about having your Mum in prison?</p> <p>11. If you had three wishes what would you wish for?</p> <p>12. If you could talk to a judge about what it's like to have your Mum in prison what would you tell them?</p> <p>13. Is there anything else you'd like to tell me?</p>	<p>Visits? Letters? Calls? Practical things? Change of home/ school? Separation from siblings? Living with new people?</p>
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Appendix C Interview Schedule for Caregivers

	Interview Guide Carers
<p>Introduction</p>	<p>Thank you for agreeing to be interviewed Explanation of Study Informed consent and forms Anonymity & confidentiality and reminder of limits if harm disclosed Recording of interview Reminder: the interview can be stopped at any time or we can take a break if you need one</p>
<p>1. Can you tell me who lives in your family? Who lives in your household?</p>	<p>Children and ages? Partner? Other adults? Other relatives?</p>
<p>2. Can you tell me how long X (child whose mother is in prison) has been living with you for?</p>	<p>Is that from the outset of sentence? Is X going to stay with you for the duration of the sentence? How long is the sentence? How far through is his mother now?</p>
<p>3. What age is X?</p>	
<p>4. Did X live with his Mum before she was imprisoned?</p>	
<p>5. Did you know X before he moved in with you?</p>	<p>In what capacity? For how long? Was he/ she familiar with your house and family?</p>
<p>6. Did you know his Mum or any of the family?</p>	<p>Was there a plan that X would move in with you?</p>
<p>7. Were you expecting her to go to prison?</p>	
<p>8. Does X have other family members that you know of, apart from his mother?</p>	<p>Father? Siblings? Grandparents? Aunts/ uncles?</p>
<p>9. Does X see the other members of his family?</p>	<p>Who? Frequency? Location? Difficulties in that?</p>
<p>10. Does X attend school?</p>	

<p>11. Has X changed school since living with you?</p> <p>12. How has X settled with you?</p> <p>13. How has X fitted in with your household?</p> <p>14. What do you think have been the biggest changes for X?</p> <p>15. What do you think has been the hardest thing for X?</p> <p>16. Do you think X is doing ok?</p> <p>17. What have the impact been on you and your family to care for X at this time?</p> <p>18. If you could talk to a judge about the experience of caring for a child whose mother is in prison what would you want to tell them?</p>	<p>Why? Was that straightforward? Did X know people at the new school already?</p> <p>Behaviour? Change of routines? Sleep? Eating?</p> <p>With other children? With other adults? Sharing a bedroom?</p> <p>Positive? Negative?</p> <p>Do you think X has any awareness of this, and if yes, how does X feel?</p>
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Appendix D Interview Schedule for Judges

Thank you very much for your time today. I'd like to talk to you today about sentencing, and in particular the role that personal mitigation plays in it.

Q1 To begin with, can I ask you **what kinds of personal mitigation most often influence you in sentencing?**

Probes

- Is that because they are the issues most frequently raised?
 - Does personal mitigation play a role in every case?
-

Can you please take a look at this list of personal mitigation? This is taken from the Sentencing councils Guidelines on Assault from June 2011.

Q2 Please can you consider these and put a number between 1 – 10 beside each factor, to indicate how much weight they would bring to bear in a sentencing decision. 1 being the least weight and 10 being the most weight.

Probes

- was that difficult to do?
 - Why or why not?
-

Now I'd like to continue with consideration of the issue of personal mitigation by considering some sentencing vignettes.

Q3 I have three scenarios. In each please can you 'score' each statement of mitigation as to how it would impact sentence as follows:

A = a big impact eg. Shift from custodial to non-custodial sentence, or halving of sentence length

B= some impact – e.g. some reduction in sentence length

C = Minimal or no impact

I'd like to focus on just one item on the list of personal mitigation which also made an appearance in the vignettes, and that is when the defendant is the sole or primary carer for dependant relatives, the most likely incidence of this being when they are a parent of dependent children.

Q4 When you have a parent who is the sole or primary carer for children before you for sentence, how do you assess the weight that should be given to their caring responsibilities?

Probes –

- what additional information do you need to have about the defendant / dependants?
- Do you always have pre-sentence reports in this situation?
- How useful are pre sentence reports to you?

- Does it make a difference if the defendant is male or female?
- Are there situations when you would not consider that it falls within personal mitigation?

I'd like to now consider the concept of equal impact of sentence

Q.5 Can you tell me what you understand by equality of impact and whether it's a consideration for you when sentencing?

Probe

- Upon what do you base your assessment of impact of sentence?
- Is this something covered in judicial training?
- Does research inform your thinking?

Finally I would like you to consider some statements and give me your views on them.

Questions on A

- What do you think are the multiple harms referred to?
- Do you think it is right that this principle should have special force in relation to women offenders?

Questions on B

- Do you agree with the principle proposed by Ashworth?
- What kind of circumstances do you think would give rise to a sentence having a significantly greater impact on a defendant?

Questions on C

- Do you agree with this statement?
- Do you think this should make a difference to the way in which women are sentenced?

Questions on D

- In what circumstances do you think a short custodial sentence would result in the loss of home and / or children?
- If this were assumed to be true of a parent living with their children as sole carer in a tenancy situation, would it be right to give them an alternative to custody, when another man or woman living in a secure property who did not have children and had committed the same offence would be given a custodial sentence?

That concludes my questions. Thank you very much for your time.

Appendix E

Mitigation Weighting Exercise and Sentencing Vignettes

Personal Mitigation

Please put a number between 1 – 10 beside each factor, to indicate how much weight they would bring to bear in a sentencing decision; 1 being the least weight and 10 being the most. The same number can be applied to more than one statement

- No previous convictions or no relevant/recent convictions
- Lapse of time since the offence where this is not the fault of the offender
- Remorse
- Good character and/or exemplary conduct
- Determination and/or demonstration of steps taken to address addiction or offending behaviour
- Sole or primary carer for dependent relatives
- Serious medical conditions requiring urgent, intensive or long-term treatment
- Isolated incident
- Age and/or lack of maturity where it affects the responsibility of the offender
- Mental disorder or learning disability, where not linked to the commission of the offence

Sentencing Vignettes

Scenario 1: Burglary

Offender

22-year-old man; several previous shoplifting

Early guilty plea to burglary

Victim

76 year old woman

Alone in the house

Mitigation		A	A/ B	B	B/ C	C
i)	Physically and emotionally abusive parents. Childhood mainly in care.					
ii)	Lives with 20 year old girlfriend and daughter of 18 months. Has shown himself to be a devoted father.					
iii)	Dependent on heroin for 5 years. Now highly motivated to get treatment; started on a drug programme following arrest.					
iv)	Functionally illiterate (mother discouraged school attendance) and never had a regular job.					
v)	Has had same job for 18 months. Letter of support from employer confirming prospect of promotion.					

Each factor has to be scored as follows:

A: a big impact e.g. shift from custodial to non-custodial sentence, or halving of sentence length

B: some impact e.g. some reduction in sentence length

C: minimal or no impact

Scenario 2: Death by dangerous driving

Offender

45-year-old woman of previous good character

Early guilty plea to causing death by dangerous driving

Lost control on motorway, distracted by radio

Victim

Her passenger

A personal friend

Mitigation		<i>A</i>	<i>A/B</i>	<i>B</i>	<i>B/C</i>	<i>C</i>
i)	Letter from victim's family saying they forgive the offender & don't want her sent to prison. Are in court to support her.					
ii)	Defendant married with children aged 8, 10 and 13.					
iii)	Defendant intensely remorseful; attempted suicide.					

Each factor has to be scored as follows:

A: a big impact e.g. shift from custodial to non-custodial sentence, or halving of sentence length

B: some impact e.g. some reduction in sentence length

C: minimal or no impact

Scenario 3: Assault occasioning actual bodily harm

Offender

*35-year-old man of previous good character
 Early guilty plea to assault occasioning ABH (Sn 47)
 Dispute over change*

Victim

*Bus driver
 Received facial cut requiring stitches & severe bruising*

Mitigation		A	A/B	B	B/C	C
i)	Psychiatric report indicates severe clinical depression; offender under treatment at time of offence.					
ii)	Defendant’s family have attended all court hearings, & offer practical, financial & emotional help.					
iii)	Defendant has expressed profound regret. Has written to the court to stress his remorse and has written to the victim and victim’s family.					
iv)	Defendant is a respected individual with responsible job. Stress of prosecution extremely high.					
v)	Offence utterly out of character: a ‘moment of madness’. Under stress after break-up with girlfriend.					

Each factor has to be scored as follows:

A: a big impact e.g. shift from custodial to non-custodial sentence, or halving of sentence length

B: some impact e.g. some reduction in sentence length

C: minimal or no impact

Stimuli Statements for Interviews

A

The statutory requirement that a custodial sentence must not be imposed unless the offence is so serious that neither a fine alone nor a community sentence can be justified has a special force in relation to women offenders because of the multiple harms that are likely to result from incarceration.

(Overarching Principles of Sentencing – Advice to the Sentencing Guidelines Council 2009)

B

Where an offender is likely to suffer from the sentence to a significantly different degree than most other people, there is a case for reducing its length.

(Ashworth 2010)

C

Of course, women in prison have different relationships with their family than men. These range from all the issues surrounding pregnancy and mothers and babies in custody, to the disruption of many women's role as the primary carer when they are taken into custody, to contact with family once a women is in prison. These issues are vastly different in type and scale to those experienced by men.

(Hardwick 2011)

D

It is disproportionate to impose a short custodial sentence on a parent where this will lead to the loss of a home and possible custody of children, in addition to the punishment imposed by the court for the offence.

(Women's Justice Taskforce 2011)

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