

## **Mothers in the Margins: Addressing the Consequences of Criminal Records for Young Mothers of Color**

### **I. Introduction: What about the boys?**

As young women pull ahead of young men in higher education;<sup>1</sup> the wage gap narrows;<sup>2</sup> and young men continue to be arrested and incarcerated at higher rates than young women,<sup>3</sup> there has been much discussion at the policy level and in the media regarding the need to concentrate resources on men and boys. President Barack Obama's "My Brother's Keeper"<sup>4</sup> and "Responsible Fatherhood"<sup>5</sup> initiatives typify this shift.

As legal aid lawyers who represent youth, many of whom have been involved in the juvenile and criminal legal systems,<sup>6</sup> we are pulled into the debate and asked to answer with increasing frequency: "What about the boys?" While young men of color certainly face discrimination and hardships that are worthy of attention, any conversation about the impact of mass incarceration on communities of color that ignores the voices and experiences of young women of color is inherently misguided.

Individually and through our offices, we assist hundreds of clients each year in coping with the collateral consequences of criminal records, primarily with employment and family law issues. Contrary to popular expectations, the vast majority of our clients presenting with these issues are female, and the barriers they face are unique to their gender.

In this article, we will explore a number of these gendered barriers. We begin with a discussion of the oft-gendered roots of criminal involvement for women, who are far more likely than men to be incarcerated for drug and property related crimes, and far less likely to be incarcerated for violent crimes.<sup>7</sup> This includes the prevalence of substance

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<sup>1</sup> Kurt Bauman & Camille Ryan, *Women Now at the Head of the Class, Lead Men in College Attainment*, RANDOM SAMPLINGS: THE OFFICIAL BLOG OF THE U.S. CENSUS BUREAU, Oct. 7, 2015, <http://blogs.census.gov/2015/10/07/women-now-at-the-head-of-the-class-lead-men-in-college-attainment/?cid=RS23> (noting that women are now more likely than men to hold a bachelor's degree).

<sup>2</sup> Jena McGregor, *Young Women Are Closing the Pay Gap*, THE WASHINGTON POST, Dec. 11, 2013, <https://www.washingtonpost.com/news/on-leadership/wp/2013/12/11/young-women-are-closing-the-pay-gap/> (observing that young women "'have entered into the workplace at a place of near-parity'" to their male counterparts).

<sup>3</sup> E. Ann Carson, *Prisoners in 2013*, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, Sept. 30, 2014, <http://www.bjs.gov/content/pub/pdf/p13.pdf> (showing that approximately 93% of federal and state prisoners are male).

<sup>4</sup> President Barack Obama, Remarks on "My Brother's Keeper" Initiative (Feb. 27, 2014), <https://www.whitehouse.gov/the-press-office/2014/02/27/remarks-president-my-brothers-keeper-initiative> (announcing the investment of approximately 200 million foundation dollars in research and advocacy for young men and boys of color who are "by almost every measure, the group that is facing some of the most severe challenges in the 21st century").

<sup>5</sup> President Barack Obama, Remarks at a Father's Day Event (June 21, 2010), <https://www.whitehouse.gov/the-press-office/remarks-president-a-fathers-day-event> (announcing the "nationwide Fatherhood and Mentoring Initiative") (hereinafter the "Fatherhood Initiative").

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<sup>7</sup> See Carson, *supra* note 3, at 15 (showing that 24.6% of incarcerated women are incarcerated for drug offenses, compared to 15.4% of incarcerated men, and 28.2% of incarcerated women are incarcerated for property offenses, compared to 18.1% of incarcerated men; overall, only 37.1% of incarcerated women are incarcerated for violent offenses, compared to 55% of incarcerated men).

abuse in women who have experienced domestic violence.<sup>8</sup>

We continue on to explore the misconception that, because women with criminal records are more likely than men with records to have been arrested or convicted of low-level and non-violent crimes, their prospects for employment are less affected by the collateral consequences. We note that women are likely to be seeking employment in caregiving jobs for which even minor offenses are likely to preclude employment opportunities,<sup>9</sup> and that women are likely to be viewed more harshly for criminal behavior than men due to their perceived gender aberrance.<sup>10</sup>

We then link women's struggles with employment to their struggles to maintain family stability by preserving their status as primary caregivers to their children. Women are more likely than their male counterparts to be serving as primary caregivers to children,<sup>11</sup> and single mothers are likely to be poor,<sup>12</sup> even before differentiating mothers with criminal histories.<sup>13</sup> Poverty also increases the likelihood of child welfare involvement,<sup>14</sup> and may perversely prompt a loss of custody to fathers whose non-custodial status has enabled them to reach financial stability. Mothers are harmed not only by the financial consequences of their criminal histories, but again by negative stereotypes of women with criminal records—stereotypes which often do not attach to men to the same degree.<sup>15</sup> There may also be legal

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<sup>8</sup> See generally Ann L. Coker, et al, *Physical and Mental Health Effects of Intimate Partner Violence for Men and Women*, 23 AMER. J. OF PREVENTIVE MED. 4 (2002).

<sup>9</sup> *Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, Feb. 12, 2015, <http://www.bls.gov/cps/cpsaat11.pdf> (demonstrating that women comprise, for example, 88.5% of home health aides and 95.5% of child care workers).

<sup>10</sup> See, e.g., Scott H. Decker, et al, *Criminal Stigma, Race, Gender, and Employment: An Expanded Assessment of the Consequences of Imprisonment for Employment*, FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 57 (Jan. 2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf>.

<sup>11</sup> Jonathan Vespa, Jamie M. Lewis, & Rose M. Kreider, *America's Families and Living Arrangements: 2012, Population Characteristics*, U.S. CENSUS BUREAU 14-15 (Aug. 2013), <https://www.census.gov/prod/2013pubs/p20-570.pdf> (showing that less than 17% of single parent homes are headed by men).

<sup>12</sup> More than two thirds of female-headed single parent households have incomes below 200% of the federal poverty guidelines. *Id.* at 14.

<sup>13</sup> Mothers with criminal records may also be plunged deeper into poverty when their access to public / subsidized housing and other vital public benefits are severed because of their records, as discussed further, *infra*. See generally, Amy E. Hirsch, Sharon M. Dietrich, Rue Landau, Peter D. Schneider, Irv Ackelsberg, Judith Bernstein-Baker, & Joseph Hohenstein, *Every Door Closed: Barriers Facing Parents With Criminal Records*, CENTER FOR LAW AND SOCIAL POLICY AND COMMUNITY LEGAL SERVICES OF PHILADELPHIA (2002), [http://www.clasp.org/resources-and-publications/files/every\\_door\\_closed.pdf](http://www.clasp.org/resources-and-publications/files/every_door_closed.pdf).

<sup>14</sup> The difficulty in distinguishing child neglect from poverty has been well-documented, with studies showing that financial hardships increase a family's risk of interaction with the child welfare system. See, e.g., Maria Cancian, Kristen Shook Slack, & Mi Youn Yang, *The Effect of Family Income on Risk of Child Maltreatment: Discussion Paper No. 1385-10*, INST. FOR RESEARCH ON POVERTY (Aug. 2010).

<sup>15</sup> See, e.g., Christa J. Richer, *Fetal Abuse Law: Punitive Approach & the Honorable Status of Motherhood*, 50 SYRACUSE L. REV. 1127, 1142 (2000) (Observing, in the context of criminal prosecution, that “[t]he legal system, including its judges, has exercised a harsh review of women who depart from the norm of the ideal mother, especially when they commit ‘unfeminine crimes.’ Their defiance of gender roles is treated as deviance of a higher order.”) (internal citations omitted).

barriers enacted that present challenges for parents with criminal records.<sup>16,17</sup>

Due to gender stereotyping, low-income young women of color struggling to find employment and create stable homes for their children face unique challenges in coping with the collateral consequences of criminal conviction. Treating the impact of mass incarceration as solely a “men’s issue” is short-sighted and inaccurate, and allows many vulnerable young women of color and their children to fall through the cracks. We conclude with recommendations for how to best serve young women of color with criminal records as they strive to find employment and family stability.

## II. Gender in the Age of Mass Incarceration

Alex has a criminal record for simple assault from 2006 and is having difficulty finding a job, often labeled by employers as a “violent offender.” Alex is the family breadwinner, and struggles due to lack of income from employment. When hearing Alex’s story, the picture that most likely comes to mind—strongly shaped by the media—is that of a black man. However, Alex is a young black mother, and her story is all too common among poor clients seeking legal services.

For good reason, there has been a growing focus on the disturbing rates at which men of color are over-criminalized in America, along a continuum which includes disproportionate targeting for stop, frisk, and arrest; greater likelihood of conviction and incarceration; lengthier sentences; and harassment and violence at the hands of police. At current rates, one out of every three black men will be incarcerated during his lifetime.<sup>18</sup> Awareness of these facts, in conjunction with such high-profile initiatives as “My Brother’s Keeper,” has led to a steady stream of media coverage and a slew of programming geared toward justice-involved men at the state and local levels.<sup>19</sup>

While any attention paid to issues pertaining to mass criminalization and mass incarceration is welcome, any conversation or call to action that ignores the experiences and needs of justice-involved women—and in particular, women of color—is inherently flawed.

### A. The Fastest Growing Segment of the Correctional Population

Women are the fastest growing segment of the correctional population.<sup>20</sup> Arrest data from 2000 and 2009 reveals that arrest rates of women in the United States increased by 11.4% during that time, while declining by 5% for men.<sup>21</sup> There has been a 22% increase in the number of incarcerated women, and women now represent one fourth of the

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<sup>16</sup> In many jurisdictions, the attachment of a criminal record to a party in a child custody case is one factor to be considered in determining the best interests of the child. For example, in Delaware, a court must consider “[t]he criminal history of any party or any other resident of the household including whether the criminal history contains pleas of guilty or no contest or a conviction of a criminal offense.” DEL. CODE ANN. Tit. 13, § 722 (a)(8) (also requiring consideration of “[e]vidence of domestic violence,” at (a)(7)). In other jurisdictions, criminal records are given heightened consideration. For example, in Pennsylvania, criminal convictions for offenses enumerated on a lengthy list trigger a mandatory evaluation, with the court to consider whether the party with the conviction “pose[s] a threat of harm to the child before making any order of custody to that parent...” 23 PA. CONS. STAT. ANN. § 5329. Compare 23 PA. CONS. STAT. ANN. § 5328(a)(2) (considering as one of a list of factors “[t]he present and past abuse committed by a party or member of the party’s household....”). This topic will be discussed further, *infra*.

<sup>17</sup> This article does not focus on the population of parents whose parental rights have been terminated due to incarceration, often per the “15/22” mandate of the Adoption and Safe Families Act (“ASFA”) (Public Law 105-89, requiring that states move—with exceptions—to terminate the parental rights of parents whose children have been in foster care for 15 out of 22 consecutive months).

<sup>18</sup> *Regarding Racial Disparities in United States Criminal Justice System*, THE SENTENCING PROJECT 1 (Aug. 2013), [http://sentencingproject.org/doc/publications/rd\\_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf](http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf).

<sup>19</sup> See Obama, “My Brother’s Keeper,” *supra* note 4.

<sup>20</sup> *Uniform Crime Report*, FED. BUREAU OF INVESTIGATION (2012), available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012>.

<sup>21</sup> *Crime in the United States*, FED. BUREAU OF INVESTIGATION (2009), available at [http://www2.fbi.gov/ucr/cius2009/data/table\\_33.html](http://www2.fbi.gov/ucr/cius2009/data/table_33.html).

probation and parole population.<sup>22</sup> Moreover, black women are now as likely to be incarcerated as white men: one in seventeen white men will be incarcerated over a lifetime, while one in eighteen black women will.<sup>23</sup>

Women are also more likely than men to be arrested and convicted for low-level, non-violent offenses. This means they are more likely to be out in the community than confined, and are better able to access services. A study of clients who came to Community Legal Services (“CLS”) through walk-in intake during 2012 and 2013 revealed that young women of color disproportionately sought help dealing with criminal records that were acting as barriers to employment.<sup>24</sup> CLS provided legal assistance to 406 people between the ages of 16 and 30 during those years.<sup>25</sup> Of these young people, 260 (63.88%) were women, while 146 (35.87%) were men.<sup>26</sup> Among the young women, 87% were black and 6% were Latina.<sup>27</sup>

During that same time period, CLS provided legal assistance to 988 clients aged 30 and older with criminal records barriers.<sup>28</sup> Of these older clients, 469 (47.37%) were women, while 519 (52.42%) were men.<sup>29</sup> Despite this more even split, women were still overrepresented in comparison with their overall proportion of the general population of people with criminal records.

Research shows that most women of color who are released from prison return to impoverished communities, and report a lack of access to programs and services, leading to feelings of marginalization while confronting the challenges of reintegrating into an economically distressed neighborhood.<sup>30</sup> When it comes to the collateral consequences of criminal records, young women of color are in tremendous need of support and services, and their voices must be included in the national conversation.

#### *B. Reasons for Becoming System-Involved*

Women’s pathways to becoming system-involved differ from those of men. Women are more likely than men to enter the justice system because of a history of sexual assault or domestic violence, addiction, mental health challenges, a romantic partner who is involved in crime, and the instability caused by living in extreme poverty.<sup>31</sup> Many women who become system-involved can trace their involvement to their intimate relationships, a struggle for survival, or both.<sup>32</sup> For women living in poor neighborhoods deprived of legitimate employment opportunities, a combination of illegal and legal ventures may be used to patch together enough to survive.<sup>33</sup>

Additionally, the concept of “blurred boundaries” provides important insight into the ways that gender-based abuse and victimization, including sexual assault and domestic violence, lead to women becoming system-involved.<sup>34</sup> Early

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<sup>22</sup> *Id.*

<sup>23</sup> Sandra Enos, *Mass Incarceration: Triple Jeopardy for Women in a “Color-Blind” and Gender-Neutral Justice System*, 6 J. OF INTERDISCIPLINARY FEMINIST THOUGHT 10 (2012).

<sup>24</sup> *Young Women of Color with Criminal Records: A Barrier to Economic Stability for Low-Income Families and Communities*, COMTY LEGAL SERVICES 2 (2014), available at [clsphila.org/](http://clsphila.org/) <http://clsphila.org/learn-about-issues/young-women-color-criminal-records>.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Beth M. Huebner, et al., *Women Coming Home: Long-Term Patterns of Recidivism*, 27 JUSTICE QUARTERLY 225, 230 (2010).

<sup>31</sup> Enos, *supra* note 23, at 6. See also Amy Hirsch, “Some Days are Harder Than Hard”: *Welfare Reform and Women with Drug Convictions in Pennsylvania*, CENTER FOR LAW AND SOCIAL POLICY (1999).

<sup>32</sup> *Id.*

<sup>33</sup> See Kathryn J. Edin & H. Luke Shaefer, *\$2.00 a Day: Living on Almost Nothing in America*, HOUGHTON MIFFLIN HARCOURT (2015) (describing the ways in which women engage in a combination of activities, some of which are illegal—like selling food stamps for cash, in order to survive).

<sup>34</sup> Enos, *supra* note 23, at 6.

victimization in particular causes tremendous emotional vulnerability that can lead women into illegal activities, even of a violent nature.<sup>35</sup>

Just as women's pathways into the system differ from men's, the types of criminal records women are likely to have differ as well. Women tend to have more limited criminal histories, consisting mostly of non-violent offenses.<sup>36</sup> Women are more likely to be arrested for drug and property crimes, like drug possession or retail theft, than they are to be arrested for violent offenses.<sup>37</sup> The increased representation of women of color in the justice system can be at least partially traced to the war on drugs.<sup>38</sup> In some states, like New York, up to 90% of the increase in the female prison population is due to prosecution under draconian drug laws.<sup>39</sup>

When women do have violent offenses on their records, they are often traced back to domestic violence incidents or interpersonal conflicts rather than offenses against strangers.<sup>40</sup> For example, CLS client Jamila was arrested at twenty-two and charged with felony aggravated assault. She was six months pregnant when the father of her child, who had a history of physically abusing her, began choking her. Unable to breathe and fearing for her life, Jamila grabbed a ceramic mug and hit him in the head to get away. When the police arrived, Jamila was arrested because her abuser's head was bleeding. Jamila also had to get medical treatment and was bruised around her neck, yet she was the only one arrested. Ultimately the charges were dismissed, but Jamila still faced stigma being labeled as a "violent offender" when she was actually a survivor of domestic abuse.

Another prototypical example is that of CLS client Tina, who was convicted of aggravated assault arising from a physical altercation her husband instigated after being involved in a car accident. When Tina entered the fray, trying to pull her husband away from the fight, she ended up being assaulted herself and having to fight back. When police arrived, Tina was arrested and ultimately convicted of aggravated assault. This scenario illustrates the principle that when women are arrested or convicted of violent offenses, it is rarely because of any intentional or pre-meditated act of violence. This has important implications for how women with "violent" offenses on their records are perceived in family court, by employers, and by society.

Despite the distinct differences in how women become system-involved and the types of criminal records they are most likely to have, neither services in prison or out in the community are focused on the needs of women.<sup>41</sup> A great emphasis on gender-responsive treatment and services is essential to ensure women are getting the assistance they need to move past their criminal system-involvement upon release.

### III. Women, Work, and Criminal Records

Although female clients with criminal records tend to have less serious and more limited criminal records, female clients with records have more difficulty finding employment than male clients with lengthier and more serious records. Consider the female client with a single drug conviction from the 1990s who cannot find a job despite years of searching, compared with a male client with a dozen cases on his record ranging from theft to drugs to multiple violent offenses who found a unionized job doing environmental clean-up work.

These anecdotal observations are born out by the limited research that has been done on women with criminal records searching for employment. In a series of studies conducted by the Urban Institute from 2001 to 2006 in several states, researchers found that men were employed post-release at higher rates than women.<sup>42</sup> For example, in a survey of

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Enos, *supra* note 23, at 16.

<sup>39</sup> *Id.* at 17.

<sup>40</sup> *Id.*

<sup>41</sup> Becki Ney et al., *Ten Truths That Matter When Working With Justice-Involved Women*, NAT'L RESOURCE CTR ON JUSTICE INVOLVED WOMEN 1 (2012), available at [http://cjinvolvementwomen.org/sites/all/documents/Ten\\_Truths.pdf](http://cjinvolvementwomen.org/sites/all/documents/Ten_Truths.pdf).

<sup>42</sup> Christy A. Visher, Nancy G. La Vigne & Jeremy Travis, *Returning Home: Understanding the Challenges of Prisoner Reentry, Maryland Pilot Study: Findings from Baltimore*, URBAN INST. 2 (2004), available at [http://www.urban.org/research/publication/returning-home-understanding-challenges-prisoner-reentry/view/full\\_report](http://www.urban.org/research/publication/returning-home-understanding-challenges-prisoner-reentry/view/full_report).

people returning from prison in Texas and Ohio, 53.5% of men were employed eight to ten months after release, as opposed to only 33.3% of women.<sup>43</sup> Although the statistics on employment for reentering men are sobering, the statistics for their female counterparts are even worse.

There are several possible explanations for this disparity, including the type of work women are most likely to seek, as well as the intersection of gender and racial bias. The result is that young women, particularly low-income women of color, are facing tremendous barriers to employment at the same time they are trying to provide for their families. The result is that many families are surviving on meager public benefits, or barely anything at all, greatly impacting the lives and future prospects of the next generation of children.

#### *A. Women as Caregivers and the Impact of Criminal Records in the Post-Sandusky Era*

Socially conditioned gender dynamics play out in professions across the class divide, but the implications for low-wage workers are important and drastically under-acknowledged. While popular books like “Lean In” address issues facing wealthy, predominantly white women trying to break in to male-dominated fields like business, the gendered nature of low-wage work is also critically important.

Low-income women cluster in caregiving and customer service work.<sup>44</sup> Nationally, 20.51% of the female workforce is employed in retail, while 46.64% of the female workforce is employed in service and caregiving fields.<sup>45</sup> Caregiving and service work are highly undervalued in our society and pay very low wages, in large part because they have been historically associated with being “women’s work” and the province of women of color in particular.<sup>46</sup> Moreover, these fields are rife for exploitation, including wage theft by employers.<sup>47</sup> However, they are high growth fields in which there are jobs available. For example, home health care is the largest industry in Pennsylvania—a state with one of the highest elderly populations in the country.<sup>48</sup> As the baby boomers continue to age, the demand for health care workers will only increase, making it an essential field for low-income workers.<sup>49</sup> The impact of criminal records on the ability of low-income women to find work in such fields is therefore of critical importance.

While the percentage of employers performing criminal background checks has risen drastically over the past decade, this is particularly true in the retail field, as well as in fields like caregiving where employers may be legally mandated to perform background checks.<sup>50</sup> Male-dominated fields, such as manufacturing and construction, tend to be more willing to hire individuals with criminal records, while employers in the retail and service sectors tend to be less

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<sup>43</sup> Christy A. Visher & Kamala Mallik-Kane, *Health and Prisoner Reentry: How Physical, Mental, and Substance Abuse Conditions Shape the Process of Reintegration*, URBAN INST. 14 (2008), available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411617-Health-and-Prisoner-Reentry.PDF>.

<sup>44</sup> Marlene Kim, *Women Paid Low Wages: Who They Are and Where They Work*, BUREAU OF LABOR STATISTICS (2000), <http://www.bls.gov/opub/mlr/2000/09/art3full.pdf>.

<sup>45</sup> Kim, *supra* note 44.

<sup>46</sup> Ariela Migdal, *Home Health Care Workers Aren’t Guaranteed Minimum Wage or Overtime, and the Legacies of Slavery and Jim Crow Are the Reason Why*, ACLU WOMEN’S RIGHTS PROJECT, <https://www.aclu.org/blog/speak-freely/home-health-care-workers-arent-guaranteed-minimum-wage-or-overtime-and-legacies>.

<sup>47</sup> *Shortchanged: How Wage Theft Harms Pennsylvania’s Workers and Economy*, SHELLER CTR FOR SOCIAL JUSTICE, TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW 3 (2015) (finding that 90% of home health care workers suffer from pay violations).

<sup>48</sup> *Impact of the Homecare and Hospice Industry on Pennsylvania’s Economy*, PA. HOMECARE ASS’N 6 (2013), available at [http://www.pahomecare.org/\\_files/live/Report\\_-\\_Low\\_Resolution.pdf](http://www.pahomecare.org/_files/live/Report_-_Low_Resolution.pdf); Emily Previti, *Pennsylvania’s Population Keeps Aging*, NEWSWORKS (June 28, 2014), <http://crossroads.newsworks.org/index.php/local/keystone-crossroads/69773-pennsylvanias-population-keeps-aging> (explaining that Pennsylvania has the fifth highest senior population in the country, and it is growing at the fastest rate).

<sup>49</sup> *Id.* at 4. Personal care and home health care jobs are expected to grow by an additional 70% over the next seven years, the highest growth rate for any occupation in the United States. *Id.*

<sup>50</sup> Harry J. Holzer, Steven Raphael, & Michael A. Stoll, *How Willing Are Employers to Hire Ex-offenders?* 23 FOCUS 40 (2004), available at <http://www.irp.wisc.edu/publications/focus/pdfs/foc232h.pdf>.

willing.<sup>51</sup> In many states, including Pennsylvania, state laws bar people with certain records from certain fields, particularly caregiving jobs working with seniors and children.<sup>52</sup>

Pennsylvania's Older Adult Protective Services Act ("OAPSA") bars individuals with certain convictions—including drug offenses and retail theft—from ever working in home health care or at long-term residential facilities. CLS recently received a favorable decision from Pennsylvania's Commonwealth Court declaring OAPSA's lifetime employment bans to be unconstitutional. Yet OAPSA has prevented thousands of women from working in the health care industry over the past several decades. Consider CLS client Vanita who had a single felony theft conviction on her record and was therefore barred from working at a home health care agency. As a woman with a very low literacy level and mental health challenges, providing home care was one of the only jobs she was able to do without further schooling. Unfortunately, Vanita was denied employment in the field and continues to struggle to survive on her SSI benefits, despite her strong desire to work.

Childcare is also heavily regulated against those with criminal records. In Pennsylvania, the Child Protective Services Law ("CPSL") and Act 24 of the Pennsylvania School Code bar people with certain records from working in childcare and education jobs, sometimes for life. In the wake of the Pennsylvania State University child abuse scandal concerning children abused by football coach Jerry Sandusky, the Pennsylvania legislature expanded the types of positions covered under the CPSL and the type of conduct that can prevent people from working.<sup>53</sup> For example, people with certain records are now barred from working in any job that has direct contact with children, no matter how minimal that contact may be.<sup>54</sup> Even jobs in the school cafeteria are out of reach for women with certain criminal records.

Accusations of child abuse or neglect outside the criminal system can also lead to placement on a "child abuse registry," which can prevent people from working in fields like child care and home health care. Low-income women of color are the demographic most likely to be accused of child abuse and neglect, often for incidents attributable to poverty and stress rather than intentional harm towards children.<sup>55</sup> For example, CLS client Kristina was placed on the child abuse registry after missing a handful of doctor's appointments for her medically fragile son. Her son was not harmed, and Kristina, an overwhelmed teen mother, recognized that she needed help. Kristina restored her relationship with her own mother, as well as her child's father, who had just returned home from prison. With the help of her family, Kristina was able to graduate from high school and her son is thriving in her care. Yet she is barred from working in childcare, the very field her case managers and school officials keep trying to place her in given her experience providing care to her own child.

It is certainly reasonable for legislatures and employers in sensitive fields like health care and childcare to perform background checks and consider certain kinds of criminal records. Yet, the current laws and practices are far too exclusionary. They keep low-income mothers like Kristina and Vanita from providing for their families even though women's criminal records are likely to be very poor proxies for actual risk to an employer because of the unique circumstances that lead most women into the criminal justice system.

When legal barriers prevent access to certain high-growth fields, like caregiving, it is essential to re-think overbroad restrictions on work that keep low-income women out. Even when there are no formal legal barriers, employers should consider the nature of the offense and the likelihood that the individual woman with a record actually poses a liability

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<sup>51</sup> Harry J. Holzer, Steven Raphael & Michael A. Stoll, *The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles*, NAT'L POVERTY CTR WORKING PAPER SERIES #04-05 (2004), available at [http://www.npc.umich.edu/publications/workingpaper04/paper\\_15/04-15.pdf](http://www.npc.umich.edu/publications/workingpaper04/paper_15/04-15.pdf).

<sup>52</sup> See OLDER ADULT PROTECTIVE SERVICES ACT, 35 PA. CONS. STAT. §§ 10225.101-10225.5102, CHILD PROTECTIVE SERVICES LAW, 23 PA. CONS. STAT. §§ 6301, 24 P.S. 1-111.

<sup>53</sup> See Jan Murphy, *Lawmaker Pushing to Waive Background Check Fees for Volunteers*, PENNLIVE.COM (May 22, 2015), [http://www.pennlive.com/midstate/index.ssf/2015/05/lawmaker\\_pushing\\_to\\_waive\\_back.html](http://www.pennlive.com/midstate/index.ssf/2015/05/lawmaker_pushing_to_waive_back.html).

<sup>54</sup> 2014 Pa. Laws 153.

<sup>55</sup> See, e.g., Lawrence M. Berger, et al., *How Does Race Influence Judgments about Parenting?* 24 FOCUS 24, 29 (2006) (finding "systematic racial differences in how black and white interviewers rate parenting techniques, mothers' characteristics, and the behavior and appearance of children"). The over-involvement with this population in the child welfare system is discussed extensively, *infra*.

risk. However, employers' perceptions of women with criminal records are likely to be skewed by gender and racial bias, making employment access even more challenging.

### *B. Intersectionality, Bias, and Employment: Boys will Be Boys, but Beware the Angry Black Woman*

Differences in background checking and consideration of criminal records in the fields men and women are likely to seek out tell only part of the story. Women of color with criminal records also face additional stigma when applying for work, and are often stereotyped based on the intersectionality of race and gender bias.

Consider the story of CLS client Shanae. Shanae was a single mother of a two year old son when she came to CLS for help at age nineteen. She had lost a promising job working in a mailroom, after she had already worked for several days without incident. Her background check had come back, revealing that Shanae had two summary-level disorderly conduct convictions from when she was a juvenile.

Summary offenses are the most minor level of offense in Pennsylvania.<sup>56</sup> Citations are often handed out like traffic tickets without an arrest being made.<sup>57</sup> There is no right to counsel, as jail time is so rarely imposed, and an individual can be found guilty in absentia if they fail to come to court to fight the case.<sup>58</sup> Because summary offenses are so minor, employers are not supposed to consider them in the hiring process under Pennsylvania law.<sup>59</sup>

At the time Shanae got her two citations, she was a minor, and still in high school. She had been facing persistent harassment at school from a male student, and on several occasions they had gotten into verbal altercations in the hallway. The school police officer cited Shanae for "disorderly conduct—making a loud noise in a public place." Not understanding what the citation would mean, Shanae did not go to court to fight it and was found guilty in absentia.

When Shanae graduated from high school, she began looking for work but struggled to find a job. She kept being denied for positions she should have been qualified for, and did not understand why. Things got so bad that she and her son experienced a period of homelessness. Finally, when the mail room employer told her why they were letting her go and gave her a copy of her background check, she understood what had been happening and came to CLS to get help.

In trying to resolve the case with the employer,<sup>60</sup> it became apparent that the employer's perception of Shanae was colored by her race and gender. Even after explaining the situation that led to the citations, as well as the facts that Shanae was a juvenile at the time and that summary offenses cannot be considered under Pennsylvania law, the employer would not even consider re-hiring Shanae. The employer kept saying that they cannot have "violent offenders" working in their mail rooms because it poses a safety risk to the other employees.

If Shanae had been male or white, the employer may not have reacted the same way. If she had been male, the employer may have dismissed the disorderly conduct citations as a rambunctious scrape: boys will be boys. If Shanae had been a white woman, the employer may have been more likely to see her, correctly, as a victim of male harassment and free of any wrongdoing. However, stereotypes of the "angry black woman" appeared to be leading the employer to view Shanae as a "violent offender," as not a single fact presented could fairly lead to that conclusion.

The limited research on gender differences in employment for people with criminal records confirms this phenomenon. A team of researchers at the School of Criminology and Criminal Justice at Arizona State University conducted a three-year study of the impact of a prison record on gaining employment in the food service and restaurant sector.<sup>61</sup>

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<sup>56</sup> See 101 PA. CONS. STAT. § 15.66.

<sup>57</sup> Ryan Briggs, *Philly Cops Hand Out Thousands More Citations Every Year Following a Rule Change*, CITYPAPER.NET (April 10, 2014), <http://citypaper.net/News/Philly-cops-hand-out-thousands-more-citations-every-year-following-a-rule-change/>.

<sup>58</sup> 234 PA. CONS. STAT. §§ 401(c)(1); 1002(D).

<sup>59</sup> See 18 PA. CONS. STAT. § 9125 (explaining that employers can consider misdemeanor and felony convictions only to extent that they relate to suitability for the job).

<sup>60</sup> The case was ultimately settled subject to a confidentiality agreement, and specific details cannot be revealed regarding the employer or settlement.

<sup>61</sup> Decker, *supra* note 10.

The authors acknowledge that past research has focused on men, obscuring “the effect of a criminal record on women’s employment, much less how the effect, if any, might differ between white and non-white women.”<sup>62</sup> The study showed that when employers were presented with resumes of equally qualified applicants of different genders with and without criminal records, women with records were less likely to be called for an interview than their male counterparts.<sup>63</sup> Employers would have called 57.1% of male job applicants with a prison record for a job interview, as opposed to only 30% of women with the same prison record.<sup>64</sup> The authors posit that this difference “could reflect an additional punishment for women in that they violated employers’ gendered role expectations. . . women with a prison record are seen as having committed two offenses, one against the law and one against social expectations of how women are supposed to behave.”<sup>65</sup>

Moreover, research on women’s treatment in the justice system shows that white women who are seen as reflecting traditional female gender stereotypes and models of mothering are given more lenient treatment.<sup>66</sup> Women of color, however, are not viewed as embodying these conventions and receive harsher punishments and more aggressive treatment by law enforcement, even though they are also caregivers.<sup>67</sup>

More research on the impact of gender and criminal records on employment prospects is needed to better understand the challenges women face, especially when other intersectionalities such as race, sexual orientation and gender identity, disability status, and others are considered.

### *C. A New Generation of Child Poverty: What Happens When Women Cannot Work*

The tremendous barriers women of color with criminal records face and the lack of discourse surrounding these issues have serious implications not just for individual women, but for entire families. In 40% of households with children under age 18, mothers are either the sole or primary source of income for the family, up from 11% in 1960.<sup>68</sup> When women are shut out of the workforce, children are far more likely to live in poverty.

The share of children living in poverty in the United States declined slightly from 22% in 2010 to 20% in 2013, but poverty among black children has not declined.<sup>69</sup> Black children are more than four times as likely to live in poverty as white children.<sup>70</sup> For the first time since census data has been collected, there are more black children living in poverty than white children, despite the fact that there are three times as many white children in America.<sup>71</sup> A large driver of child poverty is the inability of parents with criminal records to find work, as it is estimated that nearly half of all children in America have at least one parent with a criminal record.<sup>72</sup>

When a mother cannot find work, there are few available options to keep the family afloat. Federal law imposes a lifetime ban on the receipt of benefits through Temporary Assistance for Needy Families (“TANF”) and the Supplemental Nutrition Assistance Program (“SNAP” or “Food Stamps”) for people with felony drug convictions acquired for conduct occurring after August 22, 1996, unless their states passed alternative legislation ameliorating

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<sup>62</sup> *Id.* at 13.

<sup>63</sup> *Id.* at 57.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Enos, *supra* note 23, at 4.

<sup>67</sup> *Id.*

<sup>68</sup> Wendy Wang, et al., *Breadwinner Moms*, PEW RESEARCH CTR. (2013), <http://www.pewsocialtrends.org/2013/05/29/breadwinner-moms/>.

<sup>69</sup> Eileen Patten & Jens Manuel Krogstad, *Black Child Poverty Rate Holds Steady, Even As Other Groups See Declines*, PEW RESEARCH CTR. (2015), <http://www.pewresearch.org/fact-tank/2015/07/14/black-child-poverty-rate-holds-steady-even-as-other-groups-see-declines/> (relying on 2011 data).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Rebecca Vallas, et al., *Removing Barriers to Opportunity for Parents With Criminal Records and Their Children: A Two-Generation Approach*, CTR. FOR AMERICAN PROGRESS 1 (2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf>.

the effects of the ban. These families may also be cut off from subsidized housing.<sup>73</sup> Even in states like Pennsylvania that do not ban people with certain convictions from receiving TANF, very few people benefit from the program, and those who do receive very little income support.

CLS client Tanya has three children. She was able to receive TANF in the amount of \$497 per month, but once she paid for school supplies and uniforms, household supplies, and court-mandated fines and costs from an old conviction, Tanya was unable to make ends meet. When she failed to keep up with a payment plan for her court debt, she was kicked out of the TANF program and was forced to figure out how to survive on nothing but her food stamps. Tanya had searched for months to find a job, but had been denied dozens of times because of her conviction. She broke down crying one day talking about the impact on her children, and how damaging it was to them to see that she couldn't work or provide for them.

Tanya's story is all too common, and tracks a rise not just in child poverty, but in deep poverty. In 2011, 1.5 million American households housing 3 million children were surviving on \$2 a day or less in cash per family member.<sup>74</sup> This number had nearly doubled over the previous decade and half.<sup>75</sup> Single parent families headed by women are most likely to live in \$2 per day poverty, and the rate of growth of deep poverty is highest among blacks and Latinos.<sup>76</sup>

A growing body of research shows the impact of dire poverty on children and the long-term consequences on their development. For one, growing up in deep poverty is a form of trauma that can effect brain development and have an impact on decision-making, cognition, and memory well into adulthood.<sup>77</sup> On the flip side, research has also shown that infusing families with an even a moderate increase in income has hugely beneficial long-term impacts on children.<sup>78</sup>

The implications of these studies are clear: we must find ways to increase family income and halt the rise in child poverty. To do so, we must remove barriers to employment caused by criminal records, as well as ensure full and meaningful access to public benefits programs. To succeed in these initiatives, it is essential that low-income women of color who are heads of household and primary earners are part of the discussion and the push for reform.

#### **IV. Impact of Criminal Records on Women in Family Court Proceedings**

##### *A. Different Standards: Harming Mothers, Helping Fathers*

A few years ago, Dana, a 20 year old mother of one, sought assistance with a child custody matter. Dana has a mild cognitive impairment, and had been in special education classes her whole life; she receives Supplemental Security Income ("SSI") because of this disability, and is unable to work. Instead, she performs homemaking responsibilities for her large extended family, with whom she lives in a working class neighborhood in Northeast Philadelphia. Dana did not use drugs or alcohol and had no criminal record. She had served as her child's primary caregiver since birth.

Darryl, the father of Dana's child, is tall, handsome, and always neatly dressed in casual but expensive athletic clothing. He works as a home health aide and speaks with a low, calm voice. Two years older than Dana, Darryl is quick to regale you with tales of his prowess as a basketball star back in high school. However, Darryl's smooth exterior

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<sup>73</sup> *Id.* at 5 (As of July 2015, seven states maintain a full ban on SNAP and twelve continue to enforce a full ban on TANF). See also Lavanya Mohan & Elizabeth Lower-Basch, *No More Double Punishments: Lifting the Lifetime Ban on Basic Human Needs Help for People with a Prior Drug Felony Conviction*, CTR FOR LAW AND SOCIAL POLICY, 5-6 (Sept. 2014) (updated July 2015); Hirsch, et al, *supra* n. 13 at 28, 41-51; Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub.L. 104-193, Sec. 115 (as amended) (also excluding from TANF, SNAP, and Supplemental Security Income ("SSI") individuals with outstanding felony warrants and probation/parole violations, Sec. 103, 821, 202).

<sup>74</sup> Edin & Shaefer, *supra* note 33, at xvii.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> Marsha Levick, et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 296-297 (2012).

<sup>78</sup> Moises Velasquez-Manoff, *What Happens When the Poor Receive a Stipend?*, N.Y. TIMES (Jan. 18, 2014), <http://opinionator.blogs.nytimes.com/2014/01/18/what-happens-when-the-poor-receive-a-stipend/>.

masks some troubling attributes. He had been physically abusive towards Dana on a handful of occasions, with Dana ending the relationship after an incident in which Darryl hit her in the face, forced her to the ground, and spat on her. She sought and received a protection order against Darryl, by agreement without admission, meaning that there were no findings of abuse. Darryl was later arrested for violating the order on two separate occasions and pleaded guilty to violating a protective order, making terroristic threats, and harassment.

Darryl and Dana were able to reach a settlement, and we entered the courtroom to put the custody agreement on the record. The judge—who at that point knew no facts pertaining to the case—immediately expressed concern that Darryl had only day visits at his grandmother’s home. We explained that Darryl had not sought more substantial time with his son, and that, due to the history of domestic violence and Darryl’s volatile behavior, Dana believed that what had been agreed upon was appropriate and necessary to protect the child’s safety. The judge exclaimed that Darryl “may not be perfect,” but neither was Dana. He began to interrogate her about why she was on SSI; why she was still living with her parents at the age of 20; whether she had a cell phone and if she paid the bill “with a welfare check”; and if she believed her son would ever be proud of her if she tried to keep his father away from him. As he praised Darryl for his work ethic and desire to see his son, silent tears began to pour down Dana’s normally cheerful, round face.

Although the judge ultimately accepted the agreement as written, this bruising experience is illustrative of a common experience for black mothers: seeing their children’s fathers praised for presence and the provision of financial support, while even as they bear the far heavier burden of childrearing, their own lives and choices are picked apart.

Stereotypes of black men can lead to fathers being perceived positively “solely because he is married to the mother of his children, or has not fathered children with other women,” “for not having a criminal record, or for being gainfully employed,” “because he is a professional, and is part of a higher socio-economic class than society expected of him,” or “if he is current on his child support payments, as the law generally finds fathers who pay child support by assuming they are ‘good fathers.’”<sup>79</sup> By contrast, black mothers are held to far more punishing standards: “the stereotypes that are attached to the legal construct of the ideal mother continue to include: self sacrificing, nurturing, married, stay at home, monogamous and heterosexual.”<sup>80</sup>

In addition to being required to meet traditional standards of motherhood, these mothers must also navigate the complex interaction between these traditional standards and their place in the modern world, with mothers being “expected to fit both the traditional ‘stereotypical’ notions...while simultaneously being the ‘modern’ woman.”<sup>81</sup> For example, “[w]hen an expectant mother continues working throughout her pregnancy and returns shortly after giving birth, she is often subjected to continuous criticism for not being at home with her child. On the other hand, if she chooses to stay at home she is not taken seriously and is often devalued.”<sup>82</sup> For low-income black women, they must navigate further complexities based on race and class, with the white, middle class stay at home mother being celebrated while poor, black mothers who do not work are considered freeloaders. This stereotype is reflected in welfare-to-work requirements, which presuppose that it is better for poor mothers to work than to care for their children, and that welfare recipients are lazy and would not seek employment if not forced to do so.<sup>83</sup>

Because men are not socially expected to serve as caregivers for their children, men who do wish to assert custodial rights are celebrated for bucking the stereotypes to try to be involved, and are often rewarded for even minimal effort. In Dana’s case, Darryl had been seeing his child only a few days per month, and always under the watchful eye of his grandmother. Yet, the judge treated his attempts at parenting as far more significant. As Jennifer Sumi Kim observes:

Typically, a father is not expected to be nurturing to his children, or to be the primary caretaker, as such actions are historically considered to be the role of the mother. Consequently, a father’s

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<sup>79</sup> Jennifer Sumi Kim, *A Father's Race to Custody: An Argument for Multidimensional Masculinities for Black Men*, 16 BERKELEY J. AFR-AM L. & POL’Y 1, 58 (2014).

<sup>80</sup> Richer, *supra* note 15, at 1139 (internal citation omitted).

<sup>81</sup> *Id.* at 1140.

<sup>82</sup> *Id.*

<sup>83</sup> Frances Fox Piven, *Why Welfare Is Racist*, in RACE AND THE POLITICS OF WELFARE REFORM 323, 333 (Sanford F. Schram, Joe Soss, & Richard C. Fording eds., 2003) (depicting the racially-charged political discourse surrounding the welfare reform push of the 1990s and observing that “race-laden political contests have helped keep racist political attitudes alive, and the campaign to reform welfare is a good example of just such an entrepreneurial use of racism.”).

contributions to childrearing are exaggerated. This is particularly the case when a black father is involved with childrearing, because such actions conflict with the excessively masculine, Bad Black Man/Absent Black Father image. As a result, a black father's contributions to childrearing can be exaggerated even more than a father of any other race.<sup>84</sup>

Expressing a wish to parent ameliorates negative stereotypes of black fathers, even black fathers like Darryl, who have criminal records. His willingness to accept a feminine, caregiving role counteracts the image of the hypermasculine black male, while the mother's pushing back on this phenomenon results in her being cast in the corresponding role of "angry black woman," and dubbed "pushy" and "difficult."<sup>85</sup>

When the "tender years" presumption in favor of mothers first began to disappear, it was observed that there was an overcorrection, and that "[i]n some cases, courts gave fathers more time with their children than they had generally spent with them while living with the children's mother; in these cases the goal was not merely to continue the father/child relationship, but to try to strengthen it."<sup>86</sup> As practitioners, we see this practice continuing in the present day.

While we routinely warn mothers to expect disapproval in court for such "offenses" as having been arrested, being on welfare, not having graduated from high school, or having dated abusive men, we have substantially more confidence for our male clients that such issues will be overlooked as part of the societal narrative that young men make mistakes, but are trying to make right. A teen father we represented, Jason, stands out as an example. Although Jason had graduated from high school, at nineteen he was unemployed and living with his mother; he occasionally smoked marijuana and had been adjudicated delinquent as a juvenile for assaulting a police officer. He respected that the mother—Katie, eighteen years old—had been serving as their child's primary caregiver, but wanted to be a part of his daughter's life. Katie was not permitting him access, and she conditioned time with their daughter on him bringing diapers and other childcare supplies which he could not afford.

When we went to court on Jason's complaint for partial physical custody, the judge excoriated Katie for not encouraging Jason to see their daughter, for putting up social media posts featuring her daughter with Katie's new boyfriend, and for having a baby while still in high school. When Katie, who lacked counsel, attempted to argue that Jason smoked marijuana; had a juvenile criminal record; had initially denied paternity, not even meeting their child until she was three months old; and had posted negative statements about Katie and her new boyfriend on social media, she was further criticized for being "difficult" and "demanding." Although we had sought only every other Saturday through Sunday, the judge granted Jason every other Friday through Monday (six overnights per month as opposed to two), as well as shared legal custody (decision-making ability), which was not even relief sought in our petition. It was deeply discomfiting how *easy* it was to attain this result for a young male client compared to a young woman who has faced similar struggles.

It is not hard to see why this may be the case, when no less a figure of importance than the President of the United States has focused on the importance of engaging fathers. While introducing his Fatherhood Initiative, President

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<sup>84</sup> Kim, *supra* note 73, at 58. It should be noted that the "Absent Black Father" stereotype has little factual basis; studies have shown that black fathers not living in intact relationships with their children's mothers are more actively engaged with their children than fathers of other races who are so situated. *See, e.g.,* Kenrya Rankin Naasel, *It's a Myth That Black Fathers Are Absent*, N. Y. TIMES (Mar. 12, 2014), <http://www.nytimes.com/roomfordebate/2014/03/12/the-assumptions-behind-obamas-initiative/its-a-myth-that-black-fathers-are-absent> ("Yes, more than half of black households are headed by women, but the Centers for Disease Control and Prevention reports that whether or not they live under the same roof, black dads are actually *more* involved with their children than their white and Latino counterparts, spending more time feeding, dressing, playing with and reading to their children.") (emphasis in original) (citing Jo Jones & William D. Mosher, *Fathers' Involvement With Their Children: United States, 2006–2010*, NAT'L HEALTH STAT. REPORTS NUMBER 71, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CTR. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STAT. (Dec. 20, 2013), <http://www.cdc.gov/nchs/data/nhsr/nhsr071.pdf>)).

<sup>85</sup> Kim, *supra* note 73, at 1-2.

<sup>86</sup> Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody To Batters: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 605 (2001). Interestingly, many men perceive themselves to be at a disadvantage in family court, despite there being no evidence that when men contest custody, they are unsuccessful; rather, there is ample evidence to the contrary.

Obama referred to absent fathers as “a hole in a child’s life that no government can fill” and asked: “How can we as a nation—not just the government, but businesses and community groups and concerned citizens—how can we all come together to help fathers meet their responsibilities to our families and their communities?”<sup>87</sup> It is hard to imagine such a call to action to help single mothers, when our government has spent years stripping them of critical benefits;<sup>88</sup> businesses have systematically paid them lower wages than men and penalized them for serving as caregivers;<sup>89</sup> and “concerned citizens” and politicians have villainized them as “welfare queens” and freeloaders.<sup>90</sup>

While it is true that children who grow up in single parent homes are more likely to experience negative outcomes long-term than children who grow up in two-parent households,<sup>91</sup> fathers are not a panacea—these negative outcomes are also linked to poverty, racism, poor investment in schools and the school to prison pipeline, and poor mental and physical health care. And, although, President Obama’s adage that mothers “shouldn’t have to do it alone”<sup>92</sup> is appealing in theory, there are plenty of mothers who would prefer to do so when faced with the prospect of reintroducing an abusive partner into their lives or disrupting their children’s lives to accommodate a father who may ultimately prove to be unstable. It can be particularly galling to mothers, who have been held to impossible standards, to hear fathers being told: “Our children don’t need us to be superheroes. They don’t need us to be perfect. They do need us to be present. They need us to show up and give it our best shot, no matter what else is going on in our lives.”<sup>93</sup>

### *B. Under the Microscope: Mothers with Criminal Histories*

The experience of mothers being castigated for the same behaviors that are perceived as neutral for fathers is intensified for mothers who have criminal histories. Consider the case of Lena, a 22 year old mother of two, and Esteban, the father of her oldest child. Per a custody provision in a protective order that Lena had obtained against Esteban, Lena had their daughter every weekend, Friday through Sunday. When Lena agreed to this arrangement, she was pregnant with her second child, trying to finish high school and working in retail, and thus was unable to serve as her daughter’s primary caregiver. Lena and Esteban followed this schedule without incident for about two years, until Esteban got married. He abruptly began withholding access to their daughter, and sent Lena nasty text messages calling her an “egg donor” and expressing his belief that his new wife was their daughter’s true mother. Esteban was then deployed with the armed forces, and his wife continued to deny Lena access to her child.

Due to a failed attempt at negotiation and substantial court delays, Lena did not have a hearing for more than eight months after she last saw her daughter. Esteban appeared by CCTV from Iraq, and his wife was present with their attorney. Lena had a stable home, a job, and had been caring for her younger child without incident. Combined with Esteban’s obstructionist behavior, the history of abuse, and the fact that he was not even present to exercise his physical custody, Lena could feel confident that she would be restored access to her child. That confidence evaporated when opposing counsel began his cross examination of Lena by introducing a photo from her Facebook page in which she was pictured sitting at a table with a burning joint in an ashtray. The photo was captioned: “Let’s get this party started.”

Lena admitted that she smoked marijuana occasionally, and that the photo introduced by Esteban’s attorney had been

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<sup>87</sup> Obama, *supra* note 5.

<sup>88</sup> See Ife Floyd & Liz Schott, *TANF Cash Benefits Continued To Lose Value in 2013*, CTR ON BUDGET AND POLICY PRIORITIES (Oct. 21, 2013), <http://www.cbpp.org/sites/default/files/atoms/files/10-21-13tanf.pdf> (noting that cash assistance benefits were in 2013 “at least 20 percent below their 1996 levels in 37 states, after adjusting for inflation” and that “[f]or 99 percent of TANF recipients, the purchasing power of TANF benefits is below 1996 levels, after adjusting for inflation,” with every state’s benefits for a family of three falling below 50 percent of the federal poverty line, and below 30 percent of the poverty line in most states).

<sup>89</sup> See, e.g., Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 688, 724 (1998) (“[M]others’ predominant role in child rearing means that they are particularly disadvantaged in the labor force.”).

<sup>90</sup> See Kim, *supra* n. 73 at 42.

<sup>91</sup> President Obama hit “the big ones”: “We know that children who grow up without a father are more likely to live in poverty. They’re more likely to drop out of school. They’re more likely to wind up in prison. They’re more likely to abuse drugs and alcohol. They’re more likely to run away from home. They’re more likely to become teenage parents themselves.” Obama, *supra* note 5.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

taken at a party one weekend when her younger daughter was vacationing on the Jersey Shore with Lena's mother. She stated that if tested, she would test negative for marijuana, as she had not smoked in more than two months (and in fact, she did test negative later that day). She further testified that she had never smoked marijuana when either child was in her care and did not drive while under the influence; she had once been arrested for marijuana possession, but she was not convicted, and the charge was expunged.

The judge ordered that Lena have supervised custody of her daughter for two hours every other Sunday at the Family Court nursery, and stated that he would personally be contacting child welfare to instruct them to perform a safety assessment regarding Lena's younger daughter. He called Lena a "careless mother," suggesting that she otherwise would not have agreed to cede primary custody to Esteban almost three years earlier, and lectured Lena for having engaged in criminal behavior. The judge did not remark that Esteban's violation of the terms of the protective order was also a crime, 18 Pa. C.S. Sec. 2904, interference with custody of children. His refusal to abide by a court order, his nasty messages, and his absence from the jurisdiction were not addressed. The case was listed for a status four months later, during which time Lena would see her daughter for approximately 16 hours total: 16 hours in more than a year.

Less than a week later in the same judge's courtroom, a mother was seeking to suspend the father's weekend visitation because he had repeatedly failed to take the children to soccer practice and to church, as he had agreed to do. The children were present in the waiting area, and the mother stated that they would testify that the father, who had previously been convicted of DUI, would get drunk on Friday and Saturday nights, then sleep all day. The children would prepare meals for themselves and watch television all day. The father arrived well over an hour late, looking disheveled. He testified that he did not drink, and if he wanted the children with him instead of at activities, it was his right to keep them home, despite their previous agreement.

The judge agreed, stating that as the father only had two days per week with the children, it was natural for him to want to spend time with them rather than send them out for activities. When the mother protested that the children's testimony would contradict the father's claims, the judge refused to speak to the children and castigated the mother for "alienating the children from their father," then dismissed the mother's petition. There was no lecture about substance abuse and no lecture about criminal behavior. The father was not considered careless or unfatherly for not having sought primary custody.

Stigma for criminal behavior simply does not, in our experience as practitioners, attach as firmly to fathers as it does to mothers. Christa Richer observed, in the context of criminal prosecution, that "[t]he legal system, including its judges, has exercised a harsh review of women who depart from the norm of the ideal mother, especially when they commit 'unfeminine crimes.' Their defiance of gender roles is treated as deviance of a higher order."<sup>94</sup> These women have committed two crimes: their violation of the penal law, and their violation of the natural law, deviating from "what the law perceives as their 'natural capacity to nurture and protect.'"<sup>95</sup> Fathers are not so punished, as "their aggressive behavior is deemed compatible with mainstream masculine gender roles."<sup>96</sup> Women who already do not fit the mold of the ideal mother—women who are poor, black, unmarried—are viewed even more poorly by judges.<sup>97,98</sup>

### *C. Comparing the Treatment of Mothers with Criminal Records With Fathers Who Batter*

Not only do fathers not experience the "double punishment" of sex stereotyping attached to criminal conviction, it has been repeatedly shown that despite advancements in the consideration of domestic violence in child custody disputes,

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<sup>94</sup> Richer, *supra* note 15, at 1142 (internal citations omitted). It should be noted that there is little reliable research on the effect of criminal conviction on judges' perception of women in custody matters, a research deficit that emphasizes a key principle of this paper, the need for further study of the gendered collateral consequences of criminal records.

<sup>95</sup> *Id.* at 1141 (citing Murphy, *supra* note 83, at 713).

<sup>96</sup> Richer, *supra* note 15, at 1142-43.

<sup>97</sup> Richer, *supra* note 15, at 1141-42 ("Contrary to a middle-class white woman, whose crimes are described as the result of mere misdirection, those women who do not fit the status of an ideal mother cannot be so easily restored to conforming motherhood") (internal citation omitted).

<sup>98</sup> There is an obvious parallel here to the employment context, discussed *supra*, with women being punished more harshly for criminal behavior than men, with the effect being pronounced for women of color. The study authored by Decker, *et al*, cited previously, is illustrative.

men who commit the criminal act of battery still generally experience success in custody court, a principle we see reflected clearly in our practice.<sup>99</sup>

Dana Harrington Conner posits that, “[b]ecause domestic violence often takes place behind closed doors, with little documented evidence of its occurrence, it is rather easy for a trial judge to disregard the validity of an allegation of intimate partner violence.”<sup>100</sup> Although a criminal conviction for domestic violence is certainly conclusive evidence of abuse in family court, due to the higher standard of proof in criminal court (“beyond a reasonable doubt,” as compared to the civil court standard of “by a preponderance of the evidence”), such convictions are vanishingly rare when considered in the context of the vast prevalence of domestic abuse.<sup>101</sup> And, although civil judges are certainly able to make findings of abuse absent a criminal conviction, “analysis of judicial decisions involving intimate partner violence may suggest that a higher standard is applied, possibly unknowingly, by some trial judges.”<sup>102</sup>

This is due to a number of gendered factors. With few trial judges having expertise in domestic violence, judges may be perversely more likely to disregard stories of prolonged or particularly severe abuse, failing to understand how the survivor could have waited so long to come forward, when in fact it is precisely those most severe cases in which the survivors may be most isolated and reluctant to leave.<sup>103</sup> Survivors of domestic violence may be poor witnesses due to the after-effects of the abuse, including extreme anger, defensiveness, or post-traumatic stress disorder, which can cause a lack of affect. Abusers often appear calm and credible, while survivors often come across as hysterical, unreasonable, overdramatic, litigious, and uncooperative.<sup>104</sup> This can give the abuser an advantage, as he proclaims to be willing and able to cooperate with the uncooperative mother.<sup>105</sup> As a result, mothers are punished for committing crimes, and for being victims of crime.

The case of Cordelia typifies this principle. Cordelia’s long-time partner, David, was exceptionally abusive, hitting, kicking, and punching Cordelia, pushing her down the stairs, and threatening her. He was also sexually abusive and raped Cordelia on several occasions. Cordelia ultimately ended the relationship when she feared the loss of her life was imminent: she had found a “to do” list in David’s handwriting that included as the third item “Kill Cordy.” She

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<sup>99</sup> Megan Shipley, *Reviled Mothers: Custody Modification Cases Involving Domestic Violence*, 86 IND. L.J. 1587, 1595 (2011) ([A] history of abuse does not appear to affect abusive fathers' ability to get custody in disputed custody cases. A study of custody disputes in Seattle, Washington, showed that allegations of male-to-female domestic violence did not affect the rate at which mothers and fathers were awarded custody, as compared to cases where there were no allegations of domestic violence.) (internal citations omitted). Many suspect that a battering partner may be perversely *more* likely to get custody, as discussed further, *infra*. See, e.g., Nancy K. D. Lemon, *Statutes Creating Rebuttable Presumptions Against Custody To Batters: How Effective Are They?*, 28 WM. MITCHELL L. REV. 601, 608-9 (2001) (reflecting on studies showing that when batterers fight for custody, they win).

<sup>100</sup> Dana Harrington Conner, *Back to the Drawing Board: Barriers to Joint Decision-Making in Custody Cases Involving Intimate Partner Violence*, 18 DUKE J. GENDER L. & POL'Y 223, 249 (2011).

<sup>101</sup> *Id.* at 225. (“Research suggests that battered women are often reluctant to contact law enforcement or press charges. As a result, many incidents of violence between intimate partners are never brought to the attention of law enforcement. Additionally, when a victim contacts the police, there is no guarantee that her abuser will be arrested, charged, or convicted for the crimes he has committed against her. Because these crimes are either never adjudicated or the batterer is charged with a lesser offense, the criminal evidence often carries little weight during any subsequent child custody trial. If the presumption is not triggered, domestic violence becomes just one of many factors considered. Furthermore, even if the presumption is triggered, it may be overcome.”) (internal citations omitted).

<sup>102</sup> *Id.* at 250.

<sup>103</sup> Shipley, *supra* note 93, at 1597 (citing Dana Harrington Conner, *Abuse and Discretion: Evaluating Judicial Discretion in Custody Cases Involving Violence Against Women*, 17 AM. U. J. GENDER SOC. POL'Y & L. 163, 176-77 (2009)). In Pennsylvania, it is axiomatic that past abuse can be considered in protection from abuse hearings, but that distance in time goes to weight. See, e.g., *Raker v. Raker*, 847 A.2d 720, 726 (Pa. Super. 2004).

<sup>104</sup> *Id.* at 1595, 1597 (citing Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions*, 11 AM. U. J. GENDER SOC. POL'Y & L. 657, 690-692 (2003)).

<sup>105</sup> See generally Conner, *supra* note 94 (arguing that in making awards of joint legal custody, courts should not just consider the parties’ stated willingness to cooperate, but also their “Equality of Negotiating Power,” as well as other factors that may be skewed in situations involving abuse, such as “Effective Communication,” “Trust,” and “How the Parties Behave Toward Each Other,” and should instruct parties on “Setting and Respecting Boundaries” to ensure that co-parenting does not turn into an opportunity to prolong abusive and controlling behavior).

was deeply depressed, unemployed, and had reached 400 pounds. After Cordelia ended the relationship, David broke into her new home, and defecated on and destroyed all the furniture.

Cordelia was unwilling to report the sexual abuse, but was surprised and disappointed when the police failed to even investigate the post-dissolution break-in at her home; she was instead given a pamphlet about domestic violence and encouraged to file a petition for a protection from abuse order. When Cordelia did so file, with the assistance of counsel, she managed to get a protective order, but primarily on the basis of the break-in and not the sexual abuse. Although Cordelia testified credibly, the judge expressed doubt that so many rapes could have taken place without her ever making a police report or leaving the relationship.

In both abuse and custody court, Cordelia alternately sobbed loudly, appeared emotionless and withdrawn, and expressed extreme anger, including interjecting loudly that David was just mad because she was no longer performing oral sex on him. By contrast, David—slim and neat in khaki trousers and a sweater stamped with the logo of the trucking company he drove for—made a far more favorable impression. The custody judge ordered that Cordelia undergo a psychological evaluation based on her behavior in court, and her criminal record, a felony assault conviction from sixteen years previous arising from a dispute with a female relative. David was not ordered to undergo any such evaluation, despite the allegations of severe abuse and the fact that he also had a criminal record for harassing Cordelia.

Family courts in all states have been presented mandates to consider domestic abuse, and some states have erected rebuttable presumptions against a parent who has battered the other parent. But, these presumptions are employed to varying levels of effectiveness, with most states reporting “mixed” results, depending on the training, investment, and compliance of individual judges.<sup>106</sup> There may also be unintended consequences, such as batterers filing for protective orders against their victims.<sup>107</sup> The filing of a “cross petition” for a civil protection order is a common and often successful tactic used to intimidate the survivor into withdrawing her petition; if she refuses, it is common for the judge to simply chalk the situation up to being an outgrowth of a volatile relationship and either deny or grant both petitions.<sup>108</sup> What often makes the difference is the presence of counsel, which the survivor often lacks, and the better-resourced abuser has. In Philadelphia Family Court, more than 80% of litigants are *pro se*.<sup>109</sup> David attempted to use this tactic against Cordelia, filing *five* petitions for protection from abuse against her over a two year period. How would her life be different if she had lacked the support of counsel?

#### *D. Legal Barriers Facing Mothers with Criminal Records*

Apart from the “soft” factor of stereotyping, mothers with criminal records may bump into legal barriers, statutory or from the case law, as many states have presumptions against parents with certain criminal convictions or their household members.<sup>110</sup> Some states single out parties convicted of sex offenses or murder, like Alabama,<sup>111</sup>

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<sup>106</sup> Lemon, *supra* note 93, at 630, 635-636.

<sup>107</sup> *Id.* at 635.

<sup>108</sup> Shipley, *supra* note 93, at 1597-98 (“[J]udges tend to see abusive relationships as ‘messes’ or ‘disasters’ with both sides contributing to the arguments and violence, even when one parent is clearly the aggressor....When there are allegations of violence by both parties, even when one party is more aggressive and dangerous, judges tend to ‘neutralize’ the allegations and treat the parties as having equal blame and equal standing to get custody of the child.”) (citing Meier, *supra* n. 98, 692-3).

<sup>109</sup> *Toward Equal Justice for All: Report of the Civil Legal Justice Coalition to the Pennsylvania State Senate Judiciary Committee*, at 24 (Apr. 2014). Lemon also found that “victims of domestic violence who have competent counsel have a great success rate in terms of getting custody, often at the settlement stage,” while “[o]n the other hand, unrepresented litigants and those with attorneys who think domestic violence is not that relevant to custody do poorly.” Lemon, *supra* note 93, at 636 (internal citations omitted).

<sup>110</sup> Many thanks to Sarah Katz, Assistant Clinical Professor of Law at Temple University’s Beasley School of Law, for her assistance with this section.

<sup>111</sup> *K.E.W. v. T.W.E.*, 990 So. 2d 375 (Ala. Civ. App. 2007) (interpreting a state statute regulating the residence of sex offenders to mean that it was, as a matter of law, in the best interests of a child to be in the custody of her father, when the mother was married to a convicted sex offender).

California,<sup>112</sup> Maine,<sup>113</sup> Oklahoma,<sup>114</sup> Connecticut,<sup>115</sup> or Maryland.<sup>116</sup> Others consider substance abuse related convictions as part of a best interests determination, like Alaska,<sup>117</sup> Kentucky,<sup>118</sup> or Arizona.<sup>119</sup> Still others permit a broad consideration of criminal convictions generally, like Georgia<sup>120</sup> or Utah.<sup>121</sup> The most restrictive still throw up walls to awards of custody for parents convicted of a wide array of enumerated crimes, or whose household members have been so convicted.

As noted, *supra*, in Pennsylvania, criminal convictions by a party or household member of a party for offenses enumerated on a lengthy list trigger a mandatory evaluation, with the court to consider whether the party with the conviction “pose[s] a threat of harm to the child before making any order of custody to that parent...”<sup>122</sup> The list of enumerated offenses is lengthy and includes, loosely, crimes of violence, regardless of who the victim is; sexual

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<sup>112</sup> CAL. FAM. CODE § 3030 (requiring courts to make findings of “no significant risk to the child” prior to any award of custody to a person who is convicted of murdering the child’s other parent, apart from self defense murders in cases of domestic violence, or who is required to be registered as a sex offender for offenses against children, or whose household member is so required).

<sup>113</sup> ME. REV. STAT. ANN. TIT. 19-A § 1653 (3)(Q),(R) (a parent or household member’s conviction for sex offenses is a best interests factor), ME. REV. STAT. ANN. TIT. 19-A, § 1653 (6)(A),(B) (permitting an award of primary physical custody to a person convicted of a child-related sexual offense only if the court finds that contact between the parent and child is in the best interest of the child and that adequate provision for the safety of the child can be made, with supervised visitation to be ordered in the alternative, and a rebuttable presumption that such contact is not in the best interest of the child).

<sup>114</sup> OKLA. STAT. ANN. TIT. 43 § 112.5 (A),(C),(D) (providing for a presumption in favor of parents and parental fitness in child custody matters involving a non-parent party, unless the parent is required to register a sex offender, has been convicted of enumerated sex offenses, or resides with someone who has).

<sup>115</sup> CONN. GEN. STAT. ANN. § 46B-59B (prohibiting courts from awarding custody or visitation to parents convicted of murder unless the subject child “is of sufficient age to signify such child’s wishes and such child assents to such order”).

<sup>116</sup> MD. CODE ANN., FAM. LAW § 9-101.2(A) (prohibiting courts from awarding custody or visitation to parents convicted of murdering the child’s other parent or household member “unless good cause...is shown by clear and convincing evidence”).

<sup>117</sup> *Barrett v. Alguire*, 35 P.3d 1, 11-12 (Alaska 2001) (as the state’s best interests factors include substance abuse and its effect on the emotional or physical well-being of children, *see* ALASKA STAT. ANN. § 25.24.150(C)(8), consideration of a father’s criminal conviction for DWI was permitted in ordering custody to the mother).

<sup>118</sup> *Miller v. Harris*, 320 S.W.3d 138, 144 (Ky. Ct. App. 2010) (affirming an award of custody to the subject children’s aunt and uncle when the maternal grandmother had three convictions for DUI, one conviction for public intoxication, and “one two-count conviction for trafficking in Xanax,” even though she testified that she had been sober for four years; the court found that “these convictions are part and parcel of who she is and the type of influence she may exert over [the children]”).

<sup>119</sup> ARIZ. REV. STAT. ANN. § 25-403.04 (“If the court determines that a parent has abused drugs or alcohol or has been convicted of any drug offense...within twelve months before the petition or the request for legal decision-making or parenting time is filed, there is a rebuttable presumption that sole or joint legal decision-making by that parent is not in the child’s best interests”). *See also* ARIZ. REV. STAT. ANN. § 25-403.05 (“Unless the court finds that there is no significant risk to the child and states its reasons in writing, the court shall not grant a person sole or joint legal decision-making of a child or unsupervised parenting time with a child if the person” is a registered sex offender or has been convicted of murdering the subject child’s other parent).

<sup>120</sup> GA. CODE ANN. § 19-9-3 (A)(3)(P) (“In determining the best interests of the child, the judge may consider any relevant factor including, but not limited to...Any evidence of family violence or sexual, mental, or physical child abuse or **criminal history** of either parent”) (emphasis added).

<sup>121</sup> UTAH CODE ANN. § 78A-6-508(6) (in the context of termination of parental rights, it is prima facie evidence of unfitness if the parent has sexually abused, injured, or caused the death of any child; caused “life-threatening or gravely disabling injury to or disfigurement of” the subject child; caused the death of the subject child’s other parent; or been convicted of “**a crime**, if the facts surrounding the crime are of such a nature as to indicate the unfitness of the parent to provide adequate care to the extent necessary for the child’s physical, mental, or emotional health and development”) (emphasis added).

<sup>122</sup> 23 PA. CONS. STAT. ANN. § 5329.

offenses, including prostitution; crimes against children; and all drug crimes and DUI.<sup>123</sup> Minnesota appears to be similarly restrictive, putting parents with criminal convictions on the radar of the family courts even if they otherwise would not be. MINN. STAT. ANN. § 631.52 provides that “[i]f a person who has court-ordered custody of a child or parenting time rights is convicted of a[n enumerated] crime...and if no action is pending regarding custody or parenting time, the sentencing court shall refer the matter to the appropriate family court,” which shall transfer custody to the noncustodial parent or suspend visitation, unless it finds that to do so would not be in the best interests of the child. As in Pennsylvania, the list of enumerated offenses is quite long, and includes offenses regardless of whether the victim was the other parent, the subject child, or indeed any child, although the burden on the person with the conviction to prove that the continuation of their custodial or visitation rights is in the best interest of the child is heightened in such cases to the standard of “clear and convincing evidence.”<sup>124</sup>

As Deborah Ahrens observes, these laws “require no showing that the parent’s conduct toward the child has been deleterious, either via some objective external standard or from testimony or psychiatric evaluation of the child involved.”<sup>125</sup> There is simply no evidence that putting the burden on the parent to demonstrate that their criminal behavior does not render them unfit makes children safer than requiring the other party to prove that it does. Additionally, it is concerning that “courts and legislatures have focused on criminal activity rather than on similar behaviors outside of the parenting ambit that might logically affect child rearing—for example, spending eighteen hours each day at a law firm or exposing oneself to unnecessary recreational risk (such as racing cars).”<sup>126</sup>

If ill-conceived or misapplied, there may be unintended consequences to these presumptions. For example, provisions applying to homicides by one parent against the other must not be drafted so as to harm the true victim of domestic abuse, hence California explicitly carving out an exception for self-defense homicides in the context of domestic abuse.<sup>127</sup> Although, as noted, only about one third of incarcerated women are incarcerated for violent offenses, as compared to more than half of incarcerated men,<sup>128</sup> “women who do commit acts of violence are more likely than men to commit those acts against relatives or partners, [so] presumptions against child custody for persons who assault intimates may particularly affect women.”<sup>129</sup>

For example, a recent client, Tanya, had stabbed her abusive boyfriend to death after he accused her of speaking to another man on a cell phone and began beating her. She was just eighteen years old and served less than seven years in prison after being convicted of voluntary manslaughter. Upon her release, she had a child with Elijah, with whom she did not reside. Tanya served as primary caregiver for the first three years of their child’s life; she also had a second, younger child in her care. Unable to secure employment due to her criminal record, Tanya had difficulty maintaining stable housing and for several months the children were with her during the day, and at their grandmother’s at night. But, Tanya had a detailed calendar of dates and times that the children were with her, demonstrating that she was continuing to serve as primary caregiver; there were no allegations of abuse or neglect for either child; and the children were healthy and appropriately cared for and supervised.

After Tanya and Elijah ended their relationship, Elijah filed for primary physical custody. At the parties’ first listing, Elijah was given primary physical and sole legal custody. Pending the completion of a psychological evaluation due to her criminal record (which would ultimately take months to complete), Tanya was given *no* partial physical custody or visitation with her daughter. The custody master cited the statute and stated that his hands were tied. It was difficult to explain to Tanya why no one had previously had a problem with her caring for her daughter, or why she was allowed to continue caring for her son, simply because his father had not taken her to court.

An obvious issue is that these requirements apply equally to custodial and non-custodial parents, putting decidedly unequal actors on equal footing. An alternative approach would permit the absence of abuse or neglect by the parent already caring for the child to suffice to show there is no risk. This may be of particular import to low-income parents,

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<sup>123</sup> 23 PA. CONS. STAT. ANN. § 5329.

<sup>124</sup> MINN. STAT. ANN. § 631.52.

<sup>125</sup> Deborah Ahrens, *Not In Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. Rev. 737, 740 (2000).

<sup>126</sup> *Id.* at 740.

<sup>127</sup> CAL. FAM. CODE § 3030, *supra* note 106.

<sup>128</sup> *See* Carson, *supra* note 3, at 15.

<sup>129</sup> Ahrens, *supra* note 119, at 741 (citation omitted).

who may be most harmed by provisions that include criminal convictions of other household members, as these parents may have limited ability to change their residence. This is especially the case for teen and minor parents, who must reside with their own parents or caregivers even if those adults have criminal convictions that could compromise the ability of the young parents to maintain custody of their children. Teen parents may ultimately decide not to go forward with complaints for custody for this reason. For example, our client Maya was hamstrung by her mother's fourteen year-old drug offense, which we feared could have outweighed the behavior of the father, who would slap Maya on the arms and legs and impregnated her when she was just thirteen years old and he almost seventeen. Also vulnerable are parents residing with new partners who are abusive, as they may be unable to extricate themselves safely.<sup>130</sup>

#### *E. Poverty Caused by Criminal Conviction Prompting Loss of Custody*

Finally, as noted, the struggle to find employment with a criminal record particularly harms young women, who are more likely than their male counterparts to be serving as primary caregivers to children, by putting them at risk of losing those children due to poverty. Nearly 84% of single parent homes are headed by women; when broken down by race, 91% of African American households headed by single parents are headed by women, and 85% of such Hispanic households, compared to 79% of non-Hispanic white households.<sup>131</sup> These mothers are likely to be poor: More than two thirds of female-headed single parent households have incomes below 200% of the federal poverty guidelines.<sup>132</sup> Single mothers with criminal records experience an even higher rate of poverty due to their inability to secure employment and, in some jurisdictions, to access public benefits, as discussed, *supra*.

Poverty increases the risk of child welfare involvement, even in the absence of actual abuse or neglect. The difficulty in distinguishing child neglect from poverty has been well-documented, with studies showing that financial hardships “such as utility shut-offs, difficulty paying for housing, food insecurity, and self-reported material economic stress” increase a family's risk of interaction with the child welfare system.<sup>133</sup> This is so even after controlling for factors such as mental health problems, which are “known to increase the probability both of poverty and child maltreatment.”<sup>134</sup> Consider our client Keisha, who was investigated for negligent entrustment after she left her daughter with a neighbor, who then molested the child. Keisha had just begun working, and was unable to get a subsidy to help her pay for appropriate childcare because she was not working enough hours, but she was not able to work more hours because she had no reliable, affordable childcare, prompting her to rely on the neighbor.

There may be a strong racial component as well, due to stereotypes about the parenting skills of black mothers, dealing poor black mothers a double hit. Black women are negatively characterized as “pushy, overbearing . . . , assertive and domineering,” with such “unfeminine characteristics conflict[ing] with the normative image of the white, pristine, innocent, and feminine ideal mother, thus contributing to the negative stereotyping of black mothers.”<sup>135</sup> Indeed, a study of parenting characteristics linked to child welfare involvement found that parents reported to child welfare “tend to employ harsher discipline, spank and punish their children more often, reason less with them, become more easily frustrated, and have more difficulty managing parenting stress compared to unreported parents.”<sup>136</sup> These are all characteristics linked to poor mothers, with parents receiving welfare ending to “have more authoritarian parenting

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<sup>130</sup> Interestingly, despite courts' general unwillingness to deny custody to perpetrators of domestic violence, courts are generally willing to change custody to the father in cases when “it is the father rather than the mother who is asking the court to consider evidence of domestic violence, and the threat to the children comes from a new boyfriend or husband (and from the mother who has ‘allowed’ her children to be exposed to the violence) rather than from the children's biological father,” even if the biological father had been abusive as well, as it is the boyfriend who poses the immediate threat. Shipley, *supra* note 93, at 1588-89. We have worked on a number of such cases.

<sup>131</sup> Vespa et al, *supra* note 11, at 14-15.

<sup>132</sup> *Id.* at 14.

<sup>133</sup> Cancian et al., *supra* note 14, at 3 (internal citations omitted). Generally speaking, “child maltreatment risk is associated with various indicators of economic hardship, including welfare receipt; unemployment; and single-parent family structure,” and “child maltreatment has been shown to correlate with community- or state-level poverty rates; unemployment rates; and welfare receipt rates and benefit levels.” *Id.* (internal citations omitted).

<sup>134</sup> *Id.* at 1.

<sup>135</sup> Kim, *supra* note 73, at 40 (internal citations omitted).

<sup>136</sup> Kristen Shook Slack, Jane L. Holl, Marla McDaniel, Joan Yoo, & Kerry Bolger, *Understanding the Risks of Child Neglect: An Exploration of Poverty and Parenting Characteristics*, 9 CHILD MALTREATMENT 4, 396 (2004) (internal citations omitted).

styles, and parents living below the poverty line [being] less physically affectionate toward and more likely to spank their children than parents with incomes above the poverty line.”<sup>137</sup>

This makes sense—material hardship and TANF receipt are both positively correlated with parental stress and spanking, and negatively correlated with maternal warmth.<sup>138</sup> Yet, although these parenting characteristics are “persistent across multiple racial and ethnic groups”<sup>139</sup> and, importantly, do not actual constitute child abuse within the meaning of the law, they are in the public imagination linked to negative stereotypes of black mothers specifically: the stereotype of the careless black mother, the welfare queen, the “lazy, greedy, black ghetto mother.”<sup>140</sup> It may be, then, that child welfare intervention “results, at least in part, from the child welfare system’s adherence to the traditional idealized definition of the ‘good mother’ rather than from thorough investigations and documentation of child abuse and neglect,”<sup>141</sup> with “[p]oor minority women frequently bear[ing] the punishment for deviating from the stereotype of the ideal mother....”<sup>142</sup>

Child welfare involvement increases the risk of struggling mothers losing custody of their children to the fathers, whose non-custodial status has enabled them to achieve financial stability. Single parent households headed by men are more likely than those headed by women to be headed by parents with higher educational attainment, higher rates of employment and homeownership, and lower rates of food stamp receipt.<sup>143</sup> This may be linked to the fact that single fathers are in the aggregate older than single mothers, and generally become single fathers after divorce, as opposed to never marrying.<sup>144</sup> This means they are becoming primary caregivers of older, more self-sufficient children, and may have avoided paying the penalties primary caregivers to infants and small children do in the workplace, “sacrific[ing] career advancement for parental responsibilities,” “tak[ing] time off for childbirth and, more often than fathers, work[ing] part time...,” and “tak[ing] time off to care for sick children or when there is a lack of child care.”<sup>145</sup>

These fathers are also able to stay off the radar of the child welfare authorities. Many mothers become involved with child welfare because they are already involved in public systems through the receipt of social services.<sup>146</sup> Or, they pop up on the radar for the first time when they are incarcerated. In 2000, although “[r]oughly equal numbers of male and female inmates reported having minor children[,]...mothers in both state and federal prison were more than three times as likely to have been the only parent living with their children in the month preceding their arrest.<sup>147</sup> While incarcerated fathers can at least know that their children are being cared for by their mothers, with ninety percent of incarcerated fathers reporting that at least one of their minor children resides in the care of the child’s mother,

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<sup>137</sup> *Id.* at 397 (internal citations omitted).

<sup>138</sup> *Id.* at 401 (internal citations omitted). The stresses of poverty have a radiating effect, with overall neighborhood poverty being linked to lower maternal warmth and “a poorer quality physical home environment.” *Id.* at 397.

<sup>139</sup> *Id.* at 397 (internal citations omitted).

<sup>140</sup> Kim, *supra* note 73, at 42 (internal citations omitted).

<sup>141</sup> Murphy, *supra* note 83, at 709.

<sup>142</sup> *Id.* at 691.

<sup>143</sup> Vespa et al, *supra* note 11, at 13.

<sup>144</sup> *Id.* at 15.

<sup>145</sup> Murphy, *supra* note 83, at 724 (internal citations omitted) (noting also that “child support and welfare laws reveal[] an underlying policy decision that custodial parents of small children should be in the workplace rather than at home caring for children,” which is “based upon a flawed premise of women’s economic equality, and hurts both mothers and their children.”).

<sup>146</sup> It has been posited that “welfare receipt is associated with heightened surveillance by potential maltreatment reporters...due to the client’s involvement in multiple public or social service systems,” leading to a link between welfare receipt and child welfare involvement. Kristen Shook Slack, Bong Joo Lee, & Lawrence M. Berger, *Do Welfare Sanctions Increase Child Protection System Involvement? A Cautious Answer*, 81 SOCIAL SERVICE REVIEW 2, 208 (2007) (internal citations omitted) (also suggesting, as discussed, *supra*, that “some of the characteristics of clients who receive welfare are also associated with [child welfare] intervention” and observing that “welfare receipt occurs when clients suffer extreme economic hardship; such hardship undermines caregivers’ abilities to provide sufficient food, shelter, and other basic necessities to children [and] may also heighten levels of stress or depression that affect the client’s ability to provide care.”).

<sup>147</sup> Marne L. Lenox, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. Rev. 280, 291 (2011) (citing Christopher J. Mumola, *Special Report: Incarcerated Parents and Their Children*, BUREAU OF JUSTICE STATISTICS (2000), <http://bjs.ojp.usdoj.gov/content/pub/pdf/iptc.pdf>).

incarcerated mothers cannot so rely on their children's fathers: only 31% of mothers in federal prison reported that their children were with their fathers,<sup>148</sup> while "[m]others in state prison were five times more likely than incarcerated fathers to report that their children were in a foster home or under the control of a child welfare agency as a result of their incarceration."<sup>149</sup> Accordingly, fathers' lack of involvement "immunizes them from civil or criminal prosecution for neglect. It is the behavior of mothers, not fathers, that juvenile courts scrutinize."<sup>150</sup>

When Keisha was investigated after her daughter was molested, it was she alone who was scrutinized, not the father, although he should have been equally responsible. It was argued that had Keisha never left her daughter with the neighbor, the incident would never have occurred. But, one could just as easily argue that had the father not abandoned Keisha and their baby and moved to Florida to avoid paying child support, as he did, Keisha would have been able to afford childcare, and the incident would never have occurred. This disparity often results in mothers being held accountable for the consequences of poverty, and their children removed to the custody of the fathers, who only avoided being held accountable due to their having failed to care for the children in the first place. They are thus rewarded for being absentee parents.

Our client Nevaeh, barely out of her teens, married a man almost fifteen years her senior, who abandoned her less than a year after the marriage. After Nevaeh filed for support, he went to her home with his new girlfriend and hit Nevaeh in the head with a tire iron. With only her SSI and welfare to survive on, Nevaeh had just \$1000 cash each month with which to support herself and three children. She picked up a retail theft conviction, which caused her to lose the job she had just gotten, and she was unable to get another one. One night, Nevaeh was attacked in the street by a neighbor, who strangled her until she became unconscious. She was taken to the hospital, while another neighbor called child welfare because the children were unattended. The children were removed, with the social worker alleging that they were living in poor quality housing with insufficient furniture, and were being exposed to violence. They were placed with Nevaeh's husband, known to the court as a perpetrator of domestic violence, with a protective order against him and pending criminal charges for the incident with the tire iron.

There could not be a clearer example of criminal conviction thrusting a mother into poverty; child welfare becoming involved due to poverty, rather than abuse or neglect; domestic violence being disregarded as pertains to the father (the husband's abuse of Nevaeh) but held against the mother (Nevaeh being held responsible for being attacked by the neighbor); and a father's lack of involvement "immuniz[ing him] from civil or criminal prosecution for neglect,"<sup>151</sup> and in fact being viewed as having a more appropriate home for the children than the primary caregiver.

## V. Conclusion & Recommendations

As we have shown, the consequences of criminal conviction on women's employment opportunities and family stability differ from men's. For women of color, these collateral consequences are even more severe. Yet, policy debates about reentry, including sealing/expungement, limitations on the consideration of criminal conviction in employment, and the engagement of reentering parents, focus almost exclusively on men.

In order to have a policy space that is inclusive and responsive to the needs of women with criminal records—a rapidly growing and marginalized population—more research must be conducted on the impact of criminal records on women. This research must be calibrated to identify differences based on race, class, age, and family status in areas including employment, family, housing, public benefits, and others. This will require an investment in such research, as well as in program development.

In announcing "My Brother's Keeper," President Obama cited examples of programming he hoped would proliferate, such as a drop out prevention program for boys in Miami, and the Young Men's Initiative for African American and Latino boys in New York City. Analogous programs should be developed for young women and girls—My Sister's Keeper?, or these programs should evolve to be more holistic—My Neighbor's Child?<sup>152</sup>

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<sup>148</sup> Lenox, *supra* note 141, at 292 (citing Mumola, *supra* note 141, at 4).

<sup>149</sup> Lenox, *supra* note 141, at 292 (citation omitted).

<sup>150</sup> Murphy, *supra* note 83, at 710.

<sup>151</sup> *Id.*

<sup>152</sup> Obama, *supra* note 4 ("[M]y neighbor's child is my child.").

Programming inside of women's prisons and reentry programming for when women return to the community must be as robust as the programming provided to men, while also being gender-sensitive and appropriate. For example, policy initiatives aimed at keeping children connected to their incarcerated mothers—who are very likely to be primary or sole caregivers—are essential both to children's well-being and to helping mothers re-acclimate to family life successfully upon return home.

Existing policy and advocacy efforts must also include and emphasize substantive areas of particularized import to women. In the employment context, ameliorating the impact of minor criminal records by offering women entry into diversion programs that emphasize treatment and services rather than incarceration and conviction records are essential. Moreover, expanding sealing and expungement laws to shield minor and irrelevant criminal records from public view is critical to ensuring that women of color in particular are given a fair opportunity to compete in the private job market. Overbroad state laws that bar people with certain records, including drug and property convictions, from ever working in care-giving fields must also be reformed to allow women an opportunity to become employed in high growth fields.

In the family context, there remains a decades-old unmet need for judicial training and education, and for legal counsel for low-income parents in family court. We need to re-think statutes that throw up legal barriers to parents with criminal convictions to ensure that they are not overbroad and will actually protect the best interests of children. For example, if a parent has been serving as primary caregiver for a child with the consent, tacit or explicit, of the other parent, and the child has not been abused or neglected, that should suffice to demonstrate that the parent's criminal record does not pose a risk of harm to the subject child. And, we need to better fund social programs to ensure that children are not removed from their custodial parents due to poverty alone: if the parent cannot provide sanitary living conditions for the children due to a leaky roof, pay to fix the roof rather than paying for foster care or placing the child with a non-custodial parent, which may not be in the child's best interests.

Additionally, other areas including the child welfare and public benefits systems must be reformed. States that continue to bar receipt of vital public benefits because of criminal convictions must reverse course and allow women and families access to these essential means of survival. Public housing authorities must take less restrictive approaches to allowing tenants and family members of tenants who have criminal records to reside in public housing facilities. Child welfare authorities must ensure that racial and socio-economic bias are not infiltrating investigations into allegations of child abuse and neglect. Moreover, states should ensure robust due process protections for people accused of child abuse or neglect before placing people on life-time registries. That process should include an ability to show rehabilitative steps parents and caregivers have taken to demonstrate they are fit to be employed providing care to children.

Reforming law and policy to ensure that young women of color can truly attain stability and access opportunity will only be possible if such women's voices are included in the conversation. The stories of people like Jamila, Shanae, Vanita, Keisha, Tanya, Lena, and others must be heard. We must make clear to stakeholders—government, businesses, community groups, and concerned citizens alike—that issues surrounding mass criminalization are women's issues. Only then can we all come together to help both mothers and father meet their responsibilities to their families and their communities.<sup>153</sup>

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<sup>153</sup> Invoking Obama, *supra* note 5.