Removing the Bias of Criminal Convictions from Family Law

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ABSTRACT: What happens when a legal system reduces a person to a record of arrests and prosecutions and prioritizes that information in family court? And what are the implications when this legal system is rooted in racism; disproportionately arrests, charges, and sentences people of color; and increasingly criminalizes domestic violence survivors?

The Black Lives Matter movement brought attention to the need to expose racial injustice in areas that scholars often overlook. This Article is the first legal scholarship to examine judicial reliance on convictions in family law and domestic violence proceedings. Judges are currently provided with entire criminal histories, and statutes explicitly allow for or require family court judges to consider past criminal convictions and the probation and parole status of litigants seeking to secure custody or visitation of their children, form a family through adoption, or receive protection from domestic violence, as revealed by the research and fifty-state survey conducted for this Article.

Given the stark racial disparities that pervade the criminal legal system, the convergence of heuristics and bias profoundly impacts litigants’ lives, relationships, families, and communities. Judges’ implicit biases coupled with structural hurdles, such as the high-volume dockets of criminal and family courts, further affect adjudication and pressure parties to accept plea offers or settlements. This Article also addresses survivors’ advocates’ potential objections to decreasing judicial reliance on criminal convictions and the imperative to avoid minimizing harms experienced by people of color. The Article concludes by offering a statutory framework to reform the role of

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criminal convictions in domestic violence and family court proceedings. The recommended statutory reforms are positioned alongside emerging expungement and vacatur laws. Without the remedy recommended in this Article, racial bias and the stigma of criminality will continue infecting family law cases, protection from domestic abuse, and caretaking relationships.

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INTRODUCTION

“I know your client better than you do. I’ve seen her RAP sheet,”¹ said the family court judge as my Domestic Violence Clinic law students and I approached counsel’s table with our client, R.H. This judge’s statement at the outset of an evidentiary hearing on cross petitions for civil domestic violence restraining orders² illustrates how arrests and convictions haunt litigants seeking safety for themselves and their children.

Consider what is visible, perceptible, and invisible.

A record of arrests and prosecutions (a “RAP sheet”) is visible to a judicial officer. The amount of time since criminal-legal system involvement is perceptible. Everything else about the person is invisible unless made known.³ The person’s love of and care for their children or parents, their role in a family or community, their work ethic, their sobriety, the music and art they make, what they cook and who they cook for, and the many traumas they have survived are invisible to a judge or jury unless made explicit and revealed.

What happens when a legal system reduces a person to a RAP sheet and prioritizes that information in family court? And what if this legal system is

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¹ RAP sheets include arrests, charges, convictions, and probation violations or modifications, which means that the same underlying incident may be listed multiple times, resulting in what appears to be a lengthy criminal history. How to Read a California Criminal History Report “RAP Sheet,” SAN JOSE STATE UNIVERSITY RECORD CLEARANCE PROJECT, July 2018, https://nsu.edu/rcp/docs/legal-services/How%20to%20Read%20a%20RAP%20Sheet%20Updated.pdf [https://perma.cc/9HKN-2983]; see also JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 32-37 (2015) (describing the development of the “RAP sheet” in the early 1900s).

² In cross-petitioning domestic violence cases, both parties are alleging that they have experienced domestic violence and need protection from abuse. Mutual civil protection orders or restraining orders are disfavored because they equate the parties’ abuse and danger and are prone to being deployed as mechanisms of control and criminalization by an abusive partner. California’s Domestic Violence Prevention Act, for example, prohibits mutual orders unless the court “makes detailed findings of fact indicating that both parties acted as a primary aggressor and that neither party acted primarily in self-defense.” CAL. FAM. CODE § 6305(a)(2); see also Elizabeth Topliffe, Why Civil Protective Orders Are Effective Remedies for Domestic Violence but Mutual Restraining Orders Are Not, 67 IND. L.J. 1039, 1060-1064 (1992), Jacqueline Andrenno, Note, The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims, 108 CAL. L. REV. 1047, 1058-1059 (2020).

³ See KOJI KOMATSU, MEANING-MAKING FOR LIVING 102 (2019) (discussing the tensions of the visible and invisible in relation to constructing meaning and presenting oneself in social contexts).
rooted in racism;\textsuperscript{4} disproportionately arrests, charges, and sentences people of color;\textsuperscript{5} and increasingly criminalizes domestic violence survivors.\textsuperscript{6}

Nearly one-third of the adult population in America has a criminal record,\textsuperscript{7} and the Federal Bureau of Investigation adds more than ten thousand people to its criminal records database every day.\textsuperscript{8} While "America has a rap sheet,"\textsuperscript{9} the deep racial disparities of the criminal legal system mean that criminalization and the collateral consequences of convictions disproportionately harm Black Americans and abuse survivors, especially survivors of color.\textsuperscript{10}

During the past two decades, scholars and advocates have brought attention to the collateral consequences of criminal convictions and how the persistent obstacles of criminal histories aggravate poverty and racial disparities.\textsuperscript{11} Namely, research and advocacy have revealed the barriers and challenges criminal convictions pose to accessing housing,\textsuperscript{12} finding and

\begin{itemize}
\item[4.] Elizabeth Hinton & DeAnna Cook, \textit{The Mass Criminalization of Black Americans: A Historical Overview}, \textit{4 ANN. REV. CRIMINOLOGY} 261 (2021) (identifying how policing has been central to racial domination in America throughout history).
\item[5.] David A. Harris, \textit{The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection}, \textit{66 LAW \& CONTEMP. PROBS.} 71, 71 (2003) (noting disparities throughout the criminal legal system and calling for "significant policy changes").
\item[6.] Leigh Goodmark, \textit{Imperfect Victims} (2023) (describing state intervention leading to increased arrest, prosecution, and incarceration of victims and the criminalization of survival, and arguing for dismantling carceral systems); Susan L. Miller, \textit{The Paradox of Women Arrested for Domestic Violence: Criminal Justice Professionals and Service Providers Respond}, \textit{7 VIOLENCE AGAINST WOMEN} 1339, 1343 (2001) (finding that mandatory arrest policies lead to an increase in dual arrests, even in jurisdictions with policies recommending only the arrest of the primary aggressor).
\item[7.] Gary Fields & John R. Emshwiller, \textit{As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime}, \textit{Wall St. J.}, Aug. 18, 2014; see also Alexander L. Burton et al., \textit{Beyond the Eternal Criminal Record: Public Support for Expungement}, \textit{20 CRIMINOLOGY \& PUB. POL."Y} 123, 124 (2021) (finding that between seventy and one hundred million Americans have a criminal record).
\item[9.] Fields \& Emshwiller, supra note 7.
\item[11.] See, e.g., Margaret Colgate Love et al., \textit{Collateral Consequences of Criminal Convictions: Law, Policy and Practice} (2013) (discussing employment, housing, and public benefits law); Devah Pager, \textit{The Mark of a Criminal Record}, 108 AM. J. SOCIO. 937, 960 (2003) (Pager establishes a causal relationship between criminal convictions and employment outcomes and explains "the persistent effect of race on employment opportunities is painfully clear in these results. Blacks are less than half as likely to receive consideration by employers, relative to their white counterparts, and [B]lack nonoffenders fall behind even whites with prior felony convictions."); Michael Pinard, \textit{Criminal Convictions: Confronting Issues of Race and Dignity}, 85 N.Y.U. L. REV. 457 (2010) (providing comparative analyses across several countries concerning the severity of collateral consequences of convictions on housing, employment, public benefits, and voting).
\item[12.] See Brielle Bryan, \textit{Housing Instability Following Felony Conviction and Incarceration: Disentangling Being Marked from Being Locked Up}, \textit{39 J. QUANTITATIVE CRIMINOLOGY} 833, 847 (2023) (finding that never-incarcerated people with felony convictions experience elevated housing instability); Ann Camnett, \textit{Confronting Race and Collateral Consequences in Public Housing}, \textit{39 SEATTLE U. L. REV.} 1123, 1124 (2015) (discussing how any type of criminal system exposure can prompt eviction, denial of admission, and permanent exclusion from public housing, which disrupts families); see also Matthew Desmond \& Nicol Valdez, \textit{Unpolicing the Urban Poor: Consequences of
keeping employment, qualifying for public benefits and student loans, becoming financially stable, securing legal immigration status, and voting and serving on juries. For example, the National Inventory of Collateral Consequences of Conviction focuses on “legal and regulatory sanctions and restrictions that limit or prohibit people with criminal records from accessing employment, occupational licensing, housing, voting, education, and other

Third-Party Policing for Inner-City Women, 78 AM. SOC. REV. 117, 118, 132, 137 (2013) (finding that chronic nuisance ordinances are enforced against domestic violence victims, often leading to the eviction of victims who repeatedly call the police, and that the enforcement disproportionately affects Black women).

13. See, e.g., Dallas Augustine, Working Around the Law: Navigating Legal Barriers to Employment During Reentry, 44 LAW & SOC. INQUIRY 726, 726 (2019) (“Employment has been cited as one of the most effective protections against recidivism for formerly incarcerated people. . . . They find themselves in a legal double bind where they are simultaneously compelled to obey the law (by finding ‘legit’ work) but also legally barred from doing so.”); Patricia M. Harris & Kimberly S. Keller, Ex-Offenders Need Not Apply: The Criminal Background Check in Hiring Decisions, 21 J. CONTEMP. CRIM. JUST. 6, 7-11 (2005); 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, 4 BARRIERS TO REENTRY 117 (2007); Andrés Páez, Negligent Algorithmic Discrimination, 84 LAW & CONTEMP. PROBS. 19 (2021) (explaining how supervised machine learning algorithms in the sourcing, screening, interviewing, and selection of employment candidates have unlawful discriminatory effects in every step of the hiring process); Devah Pager, Bruce Western & Naomi Sugie, Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195 (2009).


15. Higher Education Act, 20 U.S.C. § 1091(e) (1965) (explaining that if while receiving federal financial aid, a student is convicted of a drug crime, they may not receive additional aid until regaining eligibility).

16. BANNON ET AL., supra note 14, at 27 (finding that criminal justice debt often damages credit scores, which affects housing and employment prospects); Breanne Pleggenkuhle, The Financial Cost of a Criminal Conviction: Context and Consequences, 45 CRIM. JUST. & BEHAV. 121, 121 (2018) (finding that “a majority of ex-offenders experience some form of [legal financial obligation[,] including fines, supervision costs, and child-support-related fees” and that legal financial obligations “diminished positive opportunities for offenders by compounding precarious financial states, limiting opportunities for upward social movement, and weakening positive cognitive change”); DOUGLAS N. EVANS, THE DEBT PENALTY: EXPOSING THE FINANCIAL BARRIERS TO OFFENDER REINTEGRATION 1 (2014) (explaining that financial obligations like criminal justice fees and child support “overwhelmingly consign many ex-offenders to perpetual debt and poverty, increasing their likelihood of returning to the criminal justice system”); see also Caterina Roman & Nathan Link, Community Reintegration Among Prisoners with Child Support Obligations: An Examination of Debt, Needs, and Service Receipt, 28 CRIM. JUST. POL’Y REV. 896 (2017).

17. Immigration and Nationality Act, 8 U.S.C. § 1182(a)(2) (outlining crimes that can be the grounds of inadmissibility for individuals in the United States).

opportunities," similar to the American Bar Association’s compilation and focus areas. One area that has not been examined is family law.

Yet family is arguably what matters most to people. Whether securing custody or visitation of children, forming a family through adoption, or receiving safety protections from domestic violence, these legal determinations profoundly affect our relationships and lives.

Judges are currently provided with the full criminal histories of litigants appearing before them. Furthermore, multiple areas of family law allow for the consideration of criminal convictions, and some statutes explicitly require judges to examine all records of arrests and prosecutions, along with probation and parole status. These state statutes fail to instruct how the judicial officer should weigh and apply this information. With judicial access to full criminal histories in family court, litigants’ histories are automatically before the judge when seeking protection from domestic violence or custody of their children, often unbeknownst to the parties who are unable to offer context and explanation. Even when only particular crimes are to be statutorily considered, the fact that the judge has viewed the entire record can bias or influence the judge. And some judges refuse explanations.

Returning to R.H.’s experience post-conviction, her ex-boyfriend successfully weaponized her RAP sheet against her. His lead argument in every court filing and evidentiary hearing was that R.H. is a child abuser who has a conviction for child endangerment. As background, R.H. is a Black woman who was arrested after leaving a department store where her sister, unbeknownst to her, had put clothing items in her baby stroller. At age eighteen and without advice of counsel, R.H. claimed responsibility because her sister lacked secure immigration status.

But the family court judge hearing the domestic violence cross petitions refused any explanation about the facts or circumstances around R.H.’s RAP


21. See, e.g., Simone Ispa-Landa & Charles E. Loeffler, Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois, 54 CRIMINOLOGY 387, 388 (2016) ("[T]he smear of criminal justice contact can follow individuals throughout their lives, continually impacting their opportunities for employment, education, and housing.").

22. See, e.g., 28 U.S.C. § 534(a)(1) (requiring the Attorney General to collect, classify, and provide criminal information records to federal, state, city, penal, and other institutions); CAL. PENAL CODE § 11105(b)(1) (2022) (requiring the Attorney General to furnish state criminal history information to courts).

23. Infra Part I (reporting results of 50-state surveys of domestic violence, child custody, adoption, and foster care statutes).

24. Details shared with client’s permission (on file with Author).
sheet. Lawyers seek to make the perceptible and invisible visible and to reveal context and meaning, but the judge was angered that we would attempt an explanation. He instead read the penal code section on child endangerment into the record.25 At the conclusion of a multi-day hearing, the judge issued mutual orders. He found that our client had experienced sexual assault, gun violence, and physical abuse, including during pregnancy and while protected by a temporary restraining order, but also found that she had used foul language and possibly made a threat. Plus, the judge cited her child endangerment conviction as evidence that she was an abuser, which the appellate court deemed legal error.26

Our client’s charges of child endangerment and commercial burglary on these facts and her guilty plea to both charges without counsel reflect the racism and bias that pervade every aspect of the criminal legal system. Interrogating the use of convictions in family court is a racial justice issue because of the overwhelming racial disparity in arrests, prosecutions, convictions, and sentences, particularly for Black people. The implication of judicial reliance on criminal histories is especially acute for domestic violence survivors, who are often also parents and who are increasingly criminalized.27 Arrests and convictions then haunt people as they seek access to shelter, custody or visitation rights of their children, adoption of children for whom they are caring, and protection from domestic violence.

Analysis of race and the legal system traditionally concerns criminal justice, juvenile justice, and immigration, and has overlooked how racialized convictions and race-consciousness impact family law.28 This Article provides a comprehensive analysis of the policy benefits of reconsidering how criminal convictions are used in the family law context. This endeavor is particularly necessary because people of color have been and remain vulnerable to over-policing and over-criminalization,29 and are stigmatized by criminal histories that often lack validity and relevance to custody, caretaking, and domestic violence cases. This criminalization and the corresponding judicial reliance on convictions affect personal and familial relationships and, more broadly, rights and communities.

25. Transcript on file with the Author.
26. K.L. v. R.H., 285 Cal. Rptr. 3d 563, 575-76 (Cal. Ct. App. 2021) (ruled that the trial court erred by relying on the survivor’s previous criminal convictions to issue a mutual restraining order against her because the convictions did not relate to domestic violence or other serious violence).
27. Infra Part II.B.
Part I explores how criminal convictions explicitly and implicitly affect domestic violence and family court proceedings. This Part features a fifty-state survey conducted for this Article of domestic violence, child custody, adoption and foster care, and evidence code statutes. Sections A, B, and C analyze the substantive statutory content and prevalence of reliance on criminal convictions in family law and domestic violence cases. Interference of past convictions with present safety and stability is substantial because domestic violence protection orders are associated with meaningful reductions in violence and harassment, and custodial orders are often necessary for children’s security. Following the examination of statutes in Sections A to C, Section D explains how convictions prevent access to domestic violence advocacy and shelter services.

Part II addresses how the American criminal legal system is historically rooted in slavery, and how racism persists today through continued targeting of people of color, differential charging and sentencing, and presumptions of criminality. Section A provides examples of the range of ways civilians are funneled into the criminal legal system, including people of color being disproportionately surveilled and arrested through (1) traffic enforcement, (2) youth being sentenced as adults, (3) drug possession charges and convictions, (4) child support enforcement actions, (5) the criminalization of solicitation and sex work that disproportionately affects women of color, and (6) biases of predictive policing and artificial intelligence.

Part II.B. considers the increasing criminalization of abuse survivors and of parents. This section reveals how domestic violence mandatory arrest and prosecution policies have produced heightened criminalization of abuse survivors and critiques the criminalization of abuse victims who fail to cooperate with prosecution. This section also examines various justifications put forth by the state for its policing and criminalization of parents. Examples include the application of expansive definitions of abuse and neglect through “failure to protect” laws, which criminalize and remove children from non-

30. Reenie Cordier, Donna Chung, Sarah Wilkes-Gillan & Renee Speyer, The Effectiveness of Protection Orders in Reducing Recidivism in Domestic Violence: A Systematic Review and Meta-Analysis, 22 TRAUMA, VIOLENCE & ABUSE 804, 821 (2019) (discussing reasons abuse survivors find protective orders to be beneficial); Victoria Folt, Mary Kernic, Thomas Lumley, Marsha Wolf & Frederick Rivara, Civil Protection Orders and Risk of Subsequent Police-Reported Violence, 288 J. AM. MED. ASS’N 589, 593 (2002) (conducting a population-based study and reviewing police records to examine the effectiveness of protection orders, and finding that having a protection order was associated with a significantly decreased risk of new abuse); TK Logan & Robert Walker, Civil Protection Order Outcomes: Violations and Perceptions of Effectiveness, 24 J. INTERPERSONAL VIOLENCE 675, 682 (2009) (examining protection order outcomes for nearly seven hundred women across multiple jurisdictions for twelve months, and finding that recipients reported that the order was extremely (51%) or fairly (27%) effective).
violent parents who have “allowed” their children to be exposed to domestic violence.

Part III discusses the high frequency with which criminal defendants and family law or domestic violence litigants lack any legal representation. Despite the Sixth Amendment’s guarantee of representation for defendants potentially facing incarceration, national research reveals that seventy percent “of criminal defendants plead guilty without counsel in proceedings that often last under three minutes.”\textsuperscript{31} Guilty pleas are then viewed by family court judges, but these convictions often lack validity and do not mean what they purport; convictions are often labels that don’t accurately reflect underlying facts or circumstances and that have only prejudicial communicative value. The vast majority of family court litigants are also unrepresented, which affects case proceedings and outcomes, particularly when criminal histories are considered.

Part IV applies research on implicit bias to family court and domestic violence proceedings. During these bench hearings, presiding judges view RAP sheets that they cannot unsee, and research on implicit bias suggests that this knowledge influences case outcomes. Section A explores research on racial bias, and Section B describes gender bias data. This Part demonstrates that countering the stigma and bias attached to RAP sheets necessitates a significantly more restrained and tailored approach.

Part V makes normative recommendations about the role of convictions in family law and advises that whole RAP sheets no longer be included in case files or electronically accessible to judges. It proposes a statutory scheme for the type and timeframe of convictions that judges may view so that only highly relevant recent convictions for domestic violence, child abuse, firearm offenses, or violent felonies are before the court. Litigants then shall be given opportunities to provide context, explanation, and narratives of change and redemption. Part V additionally addresses potential objections to decreasing judicial reliance on criminal convictions in the family law context\textsuperscript{32} and situates the Article’s recommendations alongside recently expanded expungement and vacatur laws. Without the remedy recommended in this Article, racial bias and the stigma of criminality will continue infecting family law cases, protection from domestic abuse, and caretaking relationships.


\textsuperscript{32} Michael Rempel, Melissa Labriola & Robert C. Davis, \textit{Does Judicial Monitoring Deter Domestic Violence Recidivism?}, 14 VIOLENCE AGAINST WOMEN 185, 202 (2008) (“As in most criminological research, past criminality predicted future criminality; criminal history predicted reoffending across every multivariate model. . . . And as might be expected, those whose instant case arrest was more severe, involving felony rather than misdemeanor charges, were more likely to reoffend, but this was the case only for any reoffending, not for domestic violence reoffending in particular.”).
I. OVERLOOKED COLLATERAL CONSEQUENCES: CRIMINAL HISTORY IMPACT ON FAMILY LAW AND DOMESTIC VIOLENCE PROTECTIONS

Criminal convictions have profound collateral consequences on domestic violence and family court proceedings. Federal and state statutes currently require judges and courts to be furnished with criminal history information, and multiple areas of family law require or allow for the consideration of criminal convictions.

The Federal Rules of Evidence (FRE) bar evidence of prior criminal convictions or “bad acts” as evidence of propensity to commit the relevant offense, with some exceptions for past instances of domestic violence or sexual assault. The fifty-state survey conducted for this Article, along with a review of federal and state law, reveals explicit statutory exceptions to the state-level FRE 404 equivalent in domestic violence protection order and child custody, adoption, and foster care cases. Instead, federal and state laws often require examination of criminal histories, and criminal records are considered in child custody, adoption, and foster or kinship care decisions. Additionally, in the absence of explicit statutory authority, state courts often relax the state-level FRE 404 equivalents in domestic violence and family law cases. When examining these relaxed rules, two general theories emerge: (1) prior crimes as propensity evidence based on domestic violence being a recurring crime by nature, and (2) prior crimes for other non-propensity purposes such as for the history surrounding the abusive relationship.

Judicial officers, however, lack instruction on how to weigh and apply information about criminal records to family law matters, and viewing RAP sheets permits bias to influence judicial decisions. Professor Leah Hill notes, “At best, the [Family] Court is an institution that is ill-equipped to deal with the

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34. FED. R. EVID. 404.
35. ALASKA R. EVID. 404(b)(4); CAL. EVID. CODE § 1109 (2009); COLO. REV. STAT. ANN. § 18-6-801.5 (2014); ILL. COMP. STAT. ANN. 5/115-7.4 (2014); MICH. COMP. LAWS ANN. § 768.27b (2014); MINN. STAT. ANN. § 634.20 (2015); MO. ANN. STAT. § 565.063(13) (2015). Georgia case law, for example, permits judicial consideration of prior intimate partner abuse, sexual assault, or family violence. See, e.g., Smith v. State, 232 Ga. App. 290, 295 (Ga. 1998) (“In cases of domestic violence, prior incidents of abuse against family members or sexual partners are more generally permitted because there is a logical connection between violent acts against two persons with whom the accused had a similar emotional or intimate attachment.”); Lewis v. State, 317 Ga. App. 218 (Ga. 2012) (establishing that prior acts of abuse, even against a third party outside of the current relationship, are admissible in domestic violence cases to show a respondent’s state of mind and course of conduct); Long v. State, 324 Ga. App. 882 (Ga. 2013).
36. Infra Part I.A-C.
complexities of family life for the hundreds of thousands of litigants who seek justice there. At worst, it is an institution that by default obliquely perpetuates bias."\(^{39}\) Given the overwhelming racial disparity in arrests, prosecutions, convictions, and sentences, the collateral consequences of RAP sheets on family law matters are racial justice problems.

Perhaps most significantly, because judges nationwide are routinely given litigants’ entire RAP sheets as part of the case file and search for criminal histories electronically when litigants appear before them, the presence of past arrests or convictions—even for unrelated or dated allegations—can cause judges to view litigants less sympathetically and influence whether a factfinder deems a petitioner to be a victim in need of court protection or a capable caretaker for children. Research shows that judges have difficulty ignoring evidence they have deemed or ruled to be inadmissible because it has already given them an intuitive sense of how the case should be resolved.\(^{40}\) This shadow practice exists apart from statutory authority or due process protections and influences family law outcomes.

This Part analyzes the substantive statutory content and prevalence of reliance on criminal convictions in family law and domestic violence cases. Section A discusses how judges are invited to consider convictions when determining who should receive protection from domestic violence, Section B analyzes child custody laws and standards, and Section C evaluates criminal histories that disqualify applicants or households from serving as foster, kinship, or adoptive placements. Finally, Section D discusses the effects of convictions on receiving victim services.

A. Domestic Violence Protection Orders

Multiple states require judges to conduct a criminal history search in domestic violence civil protection order cases,\(^{41}\) while other state statutes invite or allow courts to consider prior criminal convictions.\(^{42}\) Like mandatory arrest laws, many of these laws were enacted in the 1990s, at the height of the anti-violence movement. A fifty-state survey conducted for this Article reveals that

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41. See, e.g., CAL. FAM. CODE § 6306; DEL. CODE § 1045(4); FLA. STAT. ANN. § 741.30. States refer to civil domestic violence injunctive orders as civil protection orders, orders of protection, or civil restraining orders, all of which have a preponderance of the evidence standard and protective purpose to intervene in and prevent future abuse.

42. COLO. REV. STAT. ANN. § 13-14.5-105(4)(b); CONN. GEN. STAT. ANN. § 46b-15(b); KY. REV. STAT. ANN. § 403.735(1)(a); 22 OKL.ST.ANN. § 60.4(G)(1).
six states and the District of Columbia require courts to consider prior criminal convictions of any kind in civil domestic violence proceedings, including convictions unrelated to domestic violence; twelve states mandate consideration of violent crimes or convictions related to domestic violence; and six states’ protection order statutes explicitly permit judicial review of criminal histories.

As an example of mandated judicial consideration of any criminal history, Maryland law specifies, “Before granting, denying, or modifying a final protective order under this section, the court shall review all open and shielded court records involving the person eligible for relief and the respondent, including records of proceedings under: (i) the Criminal Law Article.”

Some states focus judicial attention on criminal histories concerning violence. Florida, Massachusetts, and New York, for example, require courts to consider any history of violence or threats, including incidents not considered to be domestic violence. Florida law states, “the court shall consider . . . whether the respondent has a criminal history involving violence or the threat of violence.” Other states statutorily require family courts to consider prior criminal convictions specifically relating to domestic violence, harassment, sexual assault, or stalking when determining whether to grant an order of protection restraining the abusive partner. This statutory focus intends a more relevant history than broadly inviting evidence of criminal legal involvement in economic, drug possession, solicitation, or other matters. However, the court,

43. D.C. DOM. VIOLENCE UNIT R. 2(g)(1); IND. CODE ANN. § 34-26-5-5; IOWA CODE ANN. § 664A.5; MD. CODE ANN., FAM. LAW § 4-506(c); N.D. CENT. CODE ANN. § 14-07.1-02(8) (West); 22 OKLA. STAT. ANN. § 60.4; VA. CODE ANN. § 19.2-152.10.

44. CAL. FAM. CODE § 6306(b)(1); DEL. CODE § 1045(f); FLA. STAT. ANN. § 741.30; 725 ILL. COMP. STAT. ANN. § 112A-11.5; KAN. STAT. ANN. § 60-3107(c)(2); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 1994); MO. ANN. STAT. § 455.032; NEV. REV. STAT. § 33.018, N.J. REV. STAT. § 2C:25-29; N.Y. FAM. CT. ACT § 842 (McKinney); VT. STAT. ANN. tit. 15 § 1103 (West); WIS. STAT. ANN. 813.12.

45. ALA. CODE § 30-5-4; COLO. REV. STAT. ANN. § 13-14.5-105; CONN. GEN. STAT. ANN. § 46b-15(b); KY. REV. STAT. ANN. § 403.735; OREG. REV. CODE § 3113.31; UTAH CODE ANN. 1953 § 78B-7-105.

46. MD. CODE ANN., FAM. LAW § 4-506(c).

47. FLA. STAT. ANN. § 741.30(6)(b) (West 2023) ("[T]he court shall consider . . . whether the respondent has a criminal history involving violence or the threat of violence."); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 1994) (requiring search of criminal and civil databases and consideration of a "record involving domestic or other violence"); N.Y. FAM. CT. ACT § 842(a) (McKinney 2020) ("[T]he court shall consider, but shall not be limited to consideration of . . . conduct subject to prior orders of protection, prior incidents of abuse, extent of past or present injury, threats, drug or alcohol abuse, and access to weapons.").

48. 725 ILL. COMP. STAT. ANN. 5/112A-11.5 (West 2018) ("[T]he court shall grant the petition and enter a protective order if the court finds prima facie evidence that a crime involving domestic violence, a sexual offense, or a crime involving stalking has been committed."); MASS. GEN. LAWS ANN. ch. 209A, § 7 (West 1994) ("When considering a complaint filed under this chapter, a judge shall cause a search to be made of the records contained within the statewide domestic violence record keeping system maintained by the office of the commissioner of probation and shall review the resulting data to determine whether the named defendant has a civil or criminal record involving domestic or other violence.").
in reviewing criminal histories for statutorily permitted convictions, will see and be influenced by parties’ entire RAP sheets. Overall, state statutes vary as to whether courts must or may consider prior criminal convictions in determining whether to grant a civil protection order, but we can presume a judge will do so when provided with entire criminal histories as part of the civil case file.

States also commonly require judges to search for outstanding warrants and probation and parole status, including for matters unrelated to domestic violence. Many states additionally require court clerks, petitioners, or the parties in domestic violence matters to identify any civil and criminal cases in which parties have been involved, including matters unrelated to the present case. For example, Indiana requires each party to notify the court of any juvenile court, family law, or other civil or criminal case involving any party or child of a party. North Dakota law states, “The petition for an order for protection must contain a statement listing each civil or criminal action involving both parties.” California petitions for temporary and permanent domestic violence civil restraining orders cannot be filed without the petitioner’s Notice of Related Cases, which requires information pertaining to any case involving either party. Across some states, parties in protection order cases also have a statutory duty to inform the court of any pending and new criminal charges.

Notably, statutes pertaining to review of criminal histories fail to instruct judicial officers how to weigh and assess the existence of a prior conviction when determining whether to issue a protective order. Illinois is an example of an exception in that merely being charged with domestic violence provides the “prima facie evidence of the crime” necessary for entry of a civil protection order. In Washington, the rules of evidence “need not be applied” in domestic violence matters, which permits propensity evidence to be considered. Washington’s evidence code further provides that, if a judge is considering

50. D.C. DOM. VIOLENCE UNIT R. 2(c)(1).
51. IND. CODE ANN. § 34-26-5-5.
53. See, e.g., ALA. CODE § 30-5-4; IND. CODE ANN. § 34-26-5-5 (“At a hearing to obtain an order for protection, each party has a continuing duty to inform the court of... each criminal case.”).
54. As an example of more explicit statutory language, Kentucky specifies that the court may consider the criminal and civil history for determining relief and sanctions. KY. REV. STAT. ANN. § 403.735(1)(a).
55. 725 ILL. COMP. STAT. § 112A-11.5(a).
56. WASH. EVID. R. 1101(c)(4).
information from state databases, “[t]he judge has discretion not to disclose information that they do not propose to consider.” In this way, the evidence code explicitly codifies a system where litigants are unaware of and unable to respond to prejudicial information the judge has viewed. Even in states that apply the rules of evidence to domestic violence matters, judges are provided with access to litigants’ RAP sheets and cannot unsee this information.

B. Child Custody

In determining child custody, all states statutorily require judges to consider the “best interests of the child,” a legal standard that has been the prevailing legal rule for half a century. The best-interest standard has been heavily critiqued for its vagueness, indeterminacy, and ability to shield judicial bias as judges have broad discretion to consider parents’ “moral fitness” and any evidence deemed relevant to custody. Scholars observe that the best-interest standard is a “calculus prone to error” that invites “subjective value judgment” and “the exercise of unprincipled judicial discretion based on poorly thought-out factors,” and that custody decisions are “marred by personal and cultural bias.”

Within a court’s broad consideration of best interests of a child, “[p]roceedings revolve around the fitness of the respective parents,” and judges review the criminal history of any person asserting parental rights or seeking visitation, including solicitation, drug possession, traffic offenses, and other past histories that are often irrelevant to present caretaking. The stigma of

57. Id.
60. Id.; see, e.g., FLA. STAT. § 61.13(3)(f) (including consideration of “the moral fitness of the parents”); Pettinato v. Pettinato, 582 A.2d 909, 913 (R.I. 1990) (identifying “moral fitness of the child’s parents” as a “best interests” factor); R.I. GEN. LAWS § 15-5-29 (requiring courts to consider “the moral fitness of the child’s parents”).
61. Scott & Emery, supra note 59, at 75.
63. Charlow, supra note 58, at 267 (“Because the ‘best interests of the child’ standard is more a vague platitude than a legal or scientific standard, it is subject to abuse both by judges who administer it and parents who use it to further their own interests.”).
64. Id. at 268.
arrests and convictions can sway outcomes, as happened to R.H. before the trial court’s custody determination was vacated upon finding the trial court had improperly considered the mother’s prior criminal history.

The most relevant history pertaining to child custody is a parent’s history of domestic violence—including sexual abuse—to a child or intimate partner, and all states now consider domestic violence in making custody and visitation determinations. Domestic violence against a child, siblings, or child’s protective parent can have long-lasting traumatic effects and health consequences, and extensive research shows the importance of fostering and nurturing an abused child’s bond with their non-violent, protective parent. California, for example, has a rebuttable presumption against awarding sole or joint physical or legal custody to a parent who has committed domestic violence during the past five years. Common statutorily listed convictions for judicial consideration include domestic violence, child abuse, sex offenses, and various assault and battery convictions. Beyond convictions, family court judges can receive testimony and other evidence as proof of abuse.

65. Regina Austin, “The Shame of It All”: Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons, 36 COLUM. HUM. RTS. L. REV. 173, 175-76 (2004) (describing the process of stigmatization as beginning with arrest and conviction, “public events that are intended to produce shame. . . . [T]he stigma reattaches when the convicted are released from physical custody or freed from the supervision of the criminal justice system.”); Meghan L. Smith, Christina W. Hoven, Keely Cheslack-Postava, George Musa, Judith Wicks, Larkin McReynolds, Michaeline Bresnahan & Bruce Link, Arrest History, Stigma, and Self-Esteem: A Modified Labeling Theory Approach to Understanding How Arrests Impact Lives, 57 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 1849, 1849 (2022) (“[I]ndividuals who are arrested are ‘officially labeled’ as having an arrest record. The result is often social exclusion, denial of employment, discrimination by employers, denial of housing, and/or other forms discrimination.”).


70. CAL. FAM. CODE § 3044(a) (stating that awarding custody to a parent with a history of abuse is contrary to a child’s best interests).

71. See, e.g., ARIZ. REV. STAT. § 8-533; COLO. REV. STAT. ANN. § 14-10-124; FLA. STAT. ANN. § 39.806; GA. CODE ANN. § 15-11-311; 750 ILL. COMP. STAT. ANN. 50/1; LA. CHILDREN'S CODE §§ 1015; ME. REV. STAT. ANN. TIT. 22, § 4055; MINN. STAT. § 631.52 (2017); MISS. CODE ANN. § 93-15-121 (2017); NEB. REV. STAT. ANN. § 43-292; N.H. REV. STAT. ANN. § 170-C:5; N.C. GEN. STAT. ANN. § 7B-
The recommendations in Part V allow for judges to receive and make transparent on the record recent convictions for domestic violence, child abuse, firearm offenses, and violent felonies, and for litigants to be able to provide explanation. While histories of abuse are crucial for factfinders to understand when determining child custody and visitation orders, a RAP sheet provides labels instead of facts and fails to explain context, contributing or compounding factors, or redemption. Additionally, abuse victims are increasingly criminalized. Rather than the shortcut of a RAP sheet, a full inquiry should be made into select relevant convictions to understand the factual background, assess ongoing probative value, and protect children.

The LGBTQ+ community is particularly harmed by criminal convictions. Gay and bisexual men of all races and ethnicities experience higher rates of criminalization and incarceration than the general United States population, which means that they are more likely to have convictions that negatively affect their family law cases. Furthermore, LGBTQ+ abuse survivors who seek help from the police are more likely to be arrested by law enforcement making dual arrests, which can further affect custody determinations. Multiple states prejudicially consider sexual orientation in determining child custody, although sexual orientation is irrelevant to a person’s parenting. Anti-sodomy laws once criminalized many sexual acts between gay or transgender people, and remnants of sodomy laws persist in states such as Alabama and Louisiana, although such laws are unconstitutional under Lawrence v. California.
Texas. Many states now apply a nexus approach that considers a parent’s sexual orientation relevant to a custody determination only if the parent’s sexual orientation is purportedly harmful to the child. Parents who lack a biological tie or formal legal recognition of parentage must prove they have functioned as a parent, and courts conduct in-depth examination of their fitness.

The racial bias in drug-related arrests, charges, and convictions discussed in Part II.A. has collateral consequences on child custody because state law commonly considers a parent’s substance abuse history when determining both child custody and parental rights. For example, Hawaii custody law states that the court shall consider any “past or current drug or alcohol abuse by a parent.” In Texas, if a parent uses a controlled substance and fails to complete a court-ordered treatment program, parental rights may be terminated.

Regarding familial effects of incarceration, in addition to the federal Adoption and Safe Families Act that requires states to terminate parental rights when a child has been in foster care for fifteen of twenty-two consecutive months, multiple states consider the length of incarceration or repeated

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77. In re Marriage of Black, 188 Wash.2d 114, 130 (Wash. 2017); M.A.T. v. G.S.G., 989 A.2d 11, 17 (2010); Damron v. Damron, 670 N.W.2d 871, 875 (N.D. 2003); see also Susan M. Moss, McGriff v. McGriff: Consideration of a Parent’s Sexual Orientation in Child Custody Disputes, 41 IDAHO L. REV. 593, 619-620 (2005) (While the nexus approach “does not utilize a facial presumption of unfitness . . . permitting the presentation of evidence that indicates that homosexuality could cause harm to the child shows a lingering bias and homophobia.” Moss concludes, “[T]he nexus test takes the focus off the actual relationships or conduct of the parent and onto his or her very identity. It encourages the adversarial parent to seek out evidence that sexual orientation is harmful, and it presupposes that evidence exists. And it makes gay and lesbian parents vulnerable to presumptive findings of harm.”).
79. See, e.g., ALASKA STAT. § 25.24.150(C)(8) (“In determining the best interest of the child the court shall consider . . . evidence that substance abuse by either parent or other members of the household directly affects the emotional or physical well-being of the child.”); IOWA CODE § 232.116 (explaining that a ground for parental termination includes “[t]he parent has a severe substance-related disorder and presents a danger to self or others as evidenced by prior acts”); NEV. REV. STAT. ANN. § 128.166(1)(d) (“In determining neglect by or unfitness of a parent, the court shall consider, without limitation, the following conditions which may diminish suitability as a parent . . . [e]xcessive use of intoxicating liquors, controlled substances or dangerous drugs which renders the parent consistently unable to care for the child.”); N.D. CENT. CODE 27-20.3-01(h) (listing as an “aggravated circumstance” situations in which a parent “allows the child to be present in an environment subjecting the child to exposure to a controlled substance, chemical substance, or drug paraphernalia”); OR. REV. STAT. ANN. § 419B.504(1)(b) (“[T]he rights of the parent or parents may be terminated . . . if the court finds that the parent or parents are unfit by reason of conduct or condition seriously detrimental to the child or ward” including “[a]ddictive or habitual use of intoxicating liquors, cannabis or controlled substances to the extent that parental ability has been substantially impaired.”).
80. HAW. REV. STAT. § 571-46(b)(13) (“In determining what constitutes the best interest of the child under this section, the court shall consider . . . [a]ny evidence of past or current drug or alcohol abuse by a parent.”).
81. TEX. FAM. CODE § 161.001(b)(1)(P).
82. PUB. L. 105-89.
incarceration when deciding custody or whether parental rights should be terminated. Overall, broad judicial consideration of criminal history in child custody decisions permits racial bias to pervade family matters and results in the disproportionate separation of parents of color from their children, including as described in the next section.

C. Ability to Adopt or Provide Foster or Kinship Care

When parents are incarcerated, siblings or grandparents commonly care for their children and may seek to be a foster placement or to adopt those children—often with consent of the incarcerated parent. These family members strive to provide security and familial care for children they know and love. Such kinship care facilitates financial support for these children and eventually reduces governmental surveillance from a system that polices families and particularly oppresses Black communities. The caretaking family member’s criminal record, or that of any other adult residing in the home, however, can create impediments for adoption, even when years have passed since criminal legal involvement and when sobriety and non-violence are maintained.

Significantly, forty-two states disqualify a person who has ever been convicted of domestic violence from prospective foster, adoptive, or kinship care. Many abuse survivors, however, are charged with domestic violence and are commonly instructed by defense counsel to “plead guilty so you can go home to your children.” Fraud, forgery, or property crimes also disqualify applicants in most states, even with compelling or sympathetic circumstances. Most states additionally impose lifetime or five-year disqualification rules for

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83. See, e.g., FLA. STAT. ANN. § 39.806(1)(D); N.H. REV. STAT. ANN. § 170-C:5(vi); OKLA. STAT. ANN. tit. 10A, § 1-4-904(B)(12); S.D. CODIFIED LAWS § 26-8A-26.1(5); UTAH CODE ANN. § 78a-6-508(2)(E); WASH. REV. CODE ANN. § 13.34.180(5).
84. See, e.g., CAL. WELF. & FAM. CODE § 11460(a).
85. Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World 24-30, 35 (2022) (revealing that the child welfare system is better understood as a “family-policing system” that collaborates with law enforcement and prisons to oppress Black communities, and child protection investigations ensnare the majority of Black children, putting their families under intense state surveillance and regulation).
86. See 42 U.S.C. § 671(a)(20) (requiring states to perform criminal background checks on prospective adoptive parents and searches of child abuse and neglect registries for prospective adoptive parents and any other adults residing in the home).
88. Infra Part II.B.
89. Client experiences are on file with the Author.
90. DEPT. HEALTH & HUMAN SERVS., supra note 87, at 4.
any drug-related offense.\textsuperscript{91} Furthermore, under the broad child’s “best interest” standard, judges retain discretion to consider other convictions, including for misdemeanor offenses, in making a judicial determination about whether the placement or adoption is in a child’s best interest.\textsuperscript{92}

Federal law imposes a lifetime ban on approval of a home for foster, adoptive, or relative or kinship care if a resident has a felony conviction for child abuse or neglect, spousal abuse, sexual assault, or certain violent crimes.\textsuperscript{93} Adoptions and caretaking placements are also not permitted for five years following “a felony conviction for physical assault, battery, or a drug-related offense.”\textsuperscript{94} In addition, all states disqualify an applicant if the applicant or a household member “has ever been convicted of any crime that raises concerns that the person poses a risk to the safety and well-being of a child.”\textsuperscript{95} For example, states commonly bar placements if a person on the sex offender registry resides in the home,\textsuperscript{96} including for statutory rape juvenile offenses.\textsuperscript{97}

In a legal system in which judges view RAP sheets before they hear evidence and abuse survivors and communities of color are disproportionately criminalized, consideration of criminal history has adverse effects on survivors seeking protection from abuse and security in parenting.

\section*{D. Domestic Violence Services}

While many community-based domestic violence service agencies recognize the complexity of survivors’ lives and circumstances and that a person might both have a criminal history and need protection from abuse, some government-funded agencies refuse services to individuals with criminal cases. The presence or absence of a past arrest and prosecution record then determines whether a victimized individual is viewed as “worthy” of services from a domestic violence agency.

Family Justice Centers (FJCs), for example, co-locate law enforcement, prosecution, and victim services and have proliferated through substantial government funding. Approximately one hundred twenty FJCs exist across the

\begin{thebibliography}{99}
\bibitem{91} \textit{Id.}
\bibitem{92} See, e.g.,\textit{ CAL. FAM. CODE § 8712 (2022); 23 PA. C.S.A. §5329; see also Sarah Katz, \textit{Parental Criminal Convictions and the Best Interest of the Child}, 90 PA. BAR ASS’N Q. 27 (2019) (discussing rebuttable presumptions regarding criminal convictions in Pennsylvania custody matters).}
\bibitem{93} 42 U.S.C. § 671(a)(20)(A).
\bibitem{94} \textit{Id.}
\bibitem{95} DEPT. HEALTH & HUMAN SERVS., supra note 87, at 4.
\bibitem{96} \textit{Id.}
\bibitem{97} Michele Goodwin, \textit{Law’s Limits: Regulating Statutory Rape Law}, 2013 Wis. L. REV. 481, 508 (2013) ("Most states require juveniles convicted of statutory rape to register as sex offenders. States that require registration do not distinguish between juvenile and adult registrants.").
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United States,98 and these state-funded services exclude many criminalized survivors. FJC's state as best practices, "No criminal defendants should be provided services at a family justice center."99 The FJC best practices reiterate that offenders are not served at FJC's, but advise assessing case-by-case for service eligibility for abuse victims with prior or current criminalization and identifying off-site services.100 FJC co-founders rightly acknowledge, "Some fear that battered women who are also defendants may be arrested, turned away and/or not served at Family Justice Centers."101

The FJC concept was devised by prosecutors, and police and prosecutors are foundational parts of each Center.102 The Centers are often formed as governmental entities, and some centers are located within police departments.103 For abuse survivors who have previously been arrested, for the many victims who fear unpredictable police response, for survivors with outstanding warrants for their arrest, and for communities that have experienced police brutality, the Centers' criminal justice locus and location are entry barriers.104 Immigrant victims who lack secure immigration status; "lesbian, gay, or transgender" or gender nonconforming "survivors who have had negative interactions with law enforcement"; and "survivors whose abusive partners are law enforcement" face additional barriers to accessing victim services.105

Broadly, most domestic violence shelters and programs have greater demand for their services than capacity to house and serve all abuse survivors and children who seek safety.106 As the anti-battering movement began...
soliciting and accepting state funding during the 1980s, many domestic violence shelters professionalized their operations and adopted intake policies, outcome-oriented metrics, and alliances with law enforcement, all of which made it more difficult for abuse survivors with convictions to qualify for shelter and services.107 When making intake decisions and determinations about allocating scarce housing, counseling, legal, economic, and other safety resources, past criminal legal involvement—which disproportionately affects survivors of color—often interferes with present safety.108 In addition to affecting family court outcomes, arrests, charges, or convictions can prevent access to domestic violence shelters and other safety resources.

II. RACE-BASED “JUSTICE” AND ARRESTED SURVIVAL

Providing judges with litigants’ criminal histories and enacting statutes requiring judicial review of criminal convictions occur in the context of policing and the American criminal system being historically rooted in slavery and other historical manifestations of racism.109 Policing in southern slave-holding states began through slave patrols in the early 1700s, with white squads empowered to use vigilante tactics to enforce laws upholding slavery and to punish enslaved people believed to have violated plantation rules.110 During the early nineteenth century, centralized municipal police departments—overwhelmingly comprised of white men who sought to control Black people, immigrants, and the impoverished—formed in major cities.111


In a practice she terms “preservation through transformation,” Professor Reva Siegel identifies how the rules and reasons the legal system employs to enforce racial status relationships evolve as they are contested, with dominant groups essentially modernizing rhetoric to maintain unequal status regimes.112 Following a formal end to slavery, states enacted Black Codes to limit the freedom of Black people.113 The ratification of the Fourteenth Amendment in 1868 made the Black Codes illegal by giving formerly enslaved Black people equal protection of laws through the Constitution. Jim Crow laws, however, then denied civil rights to Black people and mandated segregation, often enforced through police brutality.114

A. Racial Disparities Persist

Policing’s institutional racism persists, and explicit and implicit bias results in the overcriminalization of people of color. Racial discrimination is rampant in all aspects of American life, including the labor115 and housing markets,116 credit markets and consumer interactions,117 schooling,118 healthcare and health policing is both a race-making institution and a gender-making institution because it is “deeply rooted in ideologies of physical bravery and brotherhood that stem from hegemonic masculinity”).


113. Although the Thirteenth Amendment prohibited slavery and involuntary servitude, it carved out an exception for those convicted of a crime. U.S. CONST. amend. XIII, § 1. Black Codes were then developed to subject Black people to criminal prosecution for meager “offenses” like breaking curfew or vagrancy. Robinson, supra note 111, at 552, Convict Leasing, EQUAL JUST. INITIATIVE (Nov. 1, 2013), https://ceji.org/news/history-racial-injustice-convict-leasing/ [https://perma.cc/9X21-NZ9F] (“Crafted to ensnare Black people and return them to chains, these laws were effective; for the first time in U.S. history, many state penal systems held more Black prisoners than white — all of whom could be leased for profit.”).

114. Hasse‘t-Walker, supra note 109 (explaining that for approximately eighty years, police enforced Jim Crow laws that mandated separate schools, water fountains, restaurants, libraries, and public spaces for Black and white people); see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 184, 185-95 (2010) (describing the parallels between today’s criminal legal system and formal racial segregation under Jim Crow laws).


118. U.S. DEP’T OF EDUC., 2013-2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 3 (2016) ("While 6% of all K-12 students received one or more out-of-school suspensions, the percentage is 18% for [B]lack boys; 10% for [B]lack girls; 5% for white boys; and 2% for white girls. Black K-12 students are 3.8 times as likely to receive one or more out-of-school suspensions as white students."); George Farmer, What Racism in Schools Looks Like, EDUC. NEXT (Jun. 23, 2020), https://
outcomes, and courtrooms. Furthermore, racism and racial discrimination are forms of violence that cause psychological and physical harm to people of color.

In May 2020, the murder of George Floyd by Minneapolis police sparked mass international protests and brought unprecedented attention to the Black Lives Matter movement. In the United States, it is estimated that approximately twenty-five million Americans participated in racial justice protests during June 2020, making them the largest protests in the nation’s history. Black Lives Matter has built on the work of a centuries-long racial justice movement to connect “individual instances of police brutality against Black individuals to a larger narrative about systemic racism in the United States.” The movement has highlighted the myriad ways that policing, and the criminal legal system as a whole, are rooted in and continue to perpetuate racial violence.

Our nation is increasingly aware of the grave racial disparities that continue to pervade every aspect of the criminal legal system, from who is surveilled to who is arrested and charged, what charges are brought, how the bail system operates, the quality of defense, and resulting guilty pleas, convictions, and sentences. Extensive empirical evidence shows that people of color are exponentially more likely than white individuals to be stopped, [https://perma.cc/4SSS-29Y7] ("American schools are de facto segregated based on income and ethnicity. Where students live determines the quality of education students will receive. . . . What magnifies the discriminatory practices of educating by zip codes are the deep-rooted biases, conscious or subconscious, of educational staff."); Michael Rocque & Raymond Paternoster, Understanding the Antecedents of the “School-to-Jail” Link: The Relationship Between Race and School Discipline, 101 J. CRIM. L. & CRIMINOLOGY 633, 662 (2011) (Beginning in elementary school, “[D]ark students feel the sting of discipline at much higher rates than whites. . . . [D]isproportionality in discipline is not explained by differential behavior and is thus unjustified.").


121. Carter et al., supra note 119, at 233; see also HUSSEIN A. BULHAN, FRANTZ FANON AND THE PSYCHOLOGY OF OPPRESSION (1985).


questioned, searched, and arrested by police in America. These police stops are disproportionately deadly; unarmed Black men are nearly five hundred percent more likely than unarmed white men to be killed by police, and tragic examples abound.

Regarding racial bias, researchers conclude, “[P]olicing . . . is about policing poor people in poor places,” who experience “[r]acially disparate policing . . . under non-particularized suspicion and are therefore targeted for aggressive stop and frisk policing.” Later in court, “judges, defense lawyers, and prosecutors transform race-neutral due process protections into the tools of racial punishment.” In sum, criminal legal systems produce and reproduce racial inequalities.

Rather than being geographically isolated or pertaining to particular forms of alleged criminal activity, people of color are overrepresented—from arrest to

125. MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995) (reporting that in 1995, one in three Black men in America ages twenty to twenty-nine were under the control of the criminal legal system, whether “in prison or jail, on probation or parole”); U.S. Criminal Justice Data, THE SENTENCING PROJECT https://www.sentencingproject.org/the-facts/#detail?state1Option=U.S%20Total&state2Option=0 (last visited Feb. 15, 2023) (showing that the prison population has continued to grow, outpacing national population growth and disproportionately impacting the lives of people of color); see also DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 34-41 (1999) (describing the Colorado, Florida, Iowa, Louisiana, Maryland, and New Jersey police departments’ explicit use of race in traffic stops); Joint Application for Entry of Consent Decree, United States v. New Jersey, No. 99-5970 (MLC) (D. N.J. Dec. 30, 1999) (establishing New Jersey’s consent to comply with policies and procedures to remedy racial profiling by the state police); George E. Higgins, Wesley G. Jennings, Kareem L. Jordan & Shaun L. Gabbidon, Racial Profiling in Decisions to Search: A Preliminary Analysis Using Propensity-Score Matching, 13 J. POLICE SCI. & MGMT. 336, 343 (2011) (finding that Black drivers were more likely to be searched than white drivers).

126. Robinson, supra note 111, at 561.


128. Jeffrey Fagan & Garth Davies, Street Stops and Broken Windows: Terry, Race, and Disorder in New York City, 28 FORDHAM URBAN L.J. 457, 457, 504 (2001) (finding that racial bias is evident in high stop-to-arrest ratios for people of color compared to white people in New York City).

129. Id. at 457.

incarceration—across types of crimes and geographic regions. Misdemeanor docketst largely involve indigent individuals of color accused of nonviolent offenses, and courts generally lack the resources to adjudicate individual cases. Instead of a system of justice where the government must prove its case and defenses are heard by a jury at trial, defendants are encouraged to plead guilty, and criminal cases are largely processed as guilty pleas. Moreover, as a defendant amasses a criminal record, the individual is treated “more severely . . . at every stage of the criminal . . . process.”

Six examples are provided in the sub-sections below to show the ubiquity and persistence of racially disparate policing and criminalization. Section 1 identifies how traffic enforcement funnels civilians—particularly Black and Latino motorists—into the criminal legal system. Section 2 addresses youth charged and sentenced as adults. Drug possession charges are examined in Section 3, and Section 4 discusses child support enforcement actions. Section 5 describes how women of color are criminalized for solicitation and sex work. Utilization of artificial intelligence, and resulting bias and ways of automating inequality, are discussed in Section 6.

1. Traffic Enforcement

Interaction between police and civilians most commonly occurs through traffic stops, which are “a persistent source of racial and economic injustice.” Extensive research documents how Black and Latino motorists are disproportionately stopped—especially through pretextual traffic stops or

133. Carissa Byrne Hessick, Punishment without Trial: Why Plea Bargaining Is a Bad Deal (2021) (finding that jury trials have all but disappeared since affirmed as constitutional by the Supreme Court in 1971, and defendants—whether guilty or innocent—are encouraged to take pleas); Jed S. Rakoff, Why the Innocent Plead Guilty and the Guilty Go Free (2021) (examining why innocent people plead guilty, why high-level executives are not prosecuted, and why the judiciary is curtiling its own constitutionally mandated power).
135. Frank R. Baumgartner, Derek A. Epp & Kelsey Shour, Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race 30 (2018) (“Traffic stops are the most common type of encounter that Americans have with the police.”).
137. See Angela J. Davis, Race, Cops, and Traffic Stops, 51 U. Miami L. Rev. 425, 427-32 (1997) (discussing the discriminatory nature of pretextual traffic stops); Elizabeth Joh, Discretionless Policing: Technology and the Fourth Amendment, 95 Calif. L. Rev. 199, 209 (2007) (defining pretextual stops as “occasions when the justification offered for the detention is legally sufficient, but is not the actual reason for the stop”).
stops in which an officer cites a minor traffic or code violation to stop a motorist or pedestrian to investigate more serious crimes.138

Once stopped, motorists of color are disproportionately questioned, frisked, cited, and arrested.139 Researchers have documented significant racial differences in the rate at which the vehicles of Black, Latino, and white motorists are searched during traffic stops; furthermore, "if the race of the officer differs from the race of the motorist, then the officer is more likely to conduct a search than otherwise."140

But how are traffic stops related to family matters?

Traffic stops are often merely the precursor to searches, giving police the opportunity to operationalize racial bias.141 With traffic enforcement serving as a "common gateway for funneling overpoliced and marginalized communities into the criminal-justice system,"142 pretextual stops and resulting criminal history follow them to family court. Traffic stops additionally produce fines

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138. See, e.g., Kirk Miller, Police Stops, Pretext, and Racial Profiling: Explaining Warning and Ticket Stops Using Citizen Self-Reports, 6 J. ETHNICITY CRIM. JUST. 123 (2008); Robin Shepard Engel & Jennifer M. Calmon, Examining the Influence of Drivers’ Characteristics During Traffic Stops with Police: Results from a National Survey, 21 JUST. Q. 49 (2004). In Whren v. U.S., the Supreme Court validated these pretextual stops by holding that the subjective reason for a traffic stop is irrelevant to the constitutional reasonableness of the stop as long as police can produce evidence of an objective traffic infraction. 517 U.S. 806, 806 (1996). See also Miller, supra note 138, at 123 ("The effect is that the court has sanctioned the use of traffic violations as a pretext to stop citizens, regardless of the real purpose of the stop.").


140. Kate Antonovics & Brian G. Knight, A New Look at Racial Profiling: Evidence from the Boston Police Department, 91 REV. ECON. & STATS. 163, 163 (2009) (evaluating over 112,000 citations issued by 1,369 officers in a two-year period in Boston).


and debts that trap many low-income individuals in cycles of debt, government surveillance, and jail.\footnote{143}

\section*{2. Youth Sentencing}

Criminal convictions haunt a person throughout their life. For some, this starts at a young age.

Youths’ entrance into the juvenile or criminal system often starts at school through the “school-to-prison pipeline,” where youth of color are disproportionately referred to law enforcement for school discipline issues, resulting in disparate involvement in the juvenile and criminal legal systems.\footnote{144}

Laws facilitating the transfer of youth to adult criminal legal systems worsen existing racial disparities. Black youth are over four times more likely than their white peers to be detained in juvenile facilities,\footnote{145} and the majority of youth charged as adults and serving time in state prisons are Black males.\footnote{146} Despite findings that white youth engage in acts of violence at similar rates to youth of color,\footnote{147} “Black youth represent[] approximately 54 percent of all youth . . . judicially waived to adult court and 58 percent of youth transferred to adult court for persons offenses.”\footnote{148}

Youth who receive adult sanctions are at greater risk of recidivism than youth who receive juvenile sanctions.\footnote{149} After controlling for potential influencing factors such as race, initial charges, and age, research shows that youth given adult sanctions are at heightened risk of re-offending compared to

\begin{itemize}
\item \textbf{147.} THE CHILD NOT THE CHARGE: TRANSFER LAWS ARE NOT ADVANCING PUBLIC SAFETY, JUST. POL’Y INST. 12 (2022) (“[A]n increasing percentage of youth sent to the adult justice system are young people of color sentenced for a violent offense, despite findings that youth of color are engaged in acts of violence at similar rates than white youth.”).
\item \textbf{149.} Craig A. Mason, Derek A. Chapman, Shau Chang \& Julie Simons, \textit{Impacting Re-Arrest Rates Among Youth Sentenced in Adult Court: An Epidemiological Examination of the Juvenile Sentencing Advocacy Project}, 32 J. CLINICAL CHILD \& ADOLESCENT PSYCH. 205, 206, 212 (2003).}
\end{itemize}
youth given juvenile sanctions. Nearly one-third of instances in which youths re-offended are found to be related to their receiving adult sanctions. Criminalized youth who avoid adult prison still experience collateral consequences when tried as adults, including laws that limit their employment, student loan eligibility, and housing options, hindering their security and prospects when they reach adulthood or become parents.

Even youth who receive juvenile sanctions alone are at significant risk of recidivism and are more likely to enter the criminal legal system as adults and suffer from negative educational and employment outcomes. As criminalized youth experience intimate partner violence and have children, their criminal records can interfere with receiving protection from abuse and custody of their children.

3. Drug Possession Charges and Convictions

Over the last fifty years, the United States has seen dramatic increases in the incarceration of individuals charged with nonviolent drug offenses, whose sentences have gotten longer since the origins of the “war on drugs.”

Extreme racial disparities exist in drug arrests. Findings show that in the early 1980s, white and Black juveniles were arrested at nearly the same rate for drug possession, but by 1990, Black juveniles’ drug arrest rates were six times higher than that of white youth. Research—after controlling for drug and

150. Id. at 213 (finding that “transferred youth receiving either adult probation or boot camp were 2.29 times more likely to re-offend with either a new case or a technical violation than were youth receiving juvenile sanctions”).
151. Id.
152. Welcome to the NICCC, Nat’l Inventory Collateral Consequence Conviction https://niccc.nationalreentryresourcecenter.org/ [https://perma.cc/9AFA-L7HA] (The American Bar Association has developed a nationwide database that is comprised of over 40,000 collateral consequences of a criminal conviction that prevent formerly incarcerated individuals from leading normal lives after they leave the system.).
153. This critique of transferring youth to adult courts and sanctions is not to suggest that juvenile correctional facilities are free from concern. Juvenile facilities have historically failed to conduct diagnostic evaluations and to provide minimal rehabilitative services, have reported high rates of injuries to residents, and have violated juveniles’ constitutional and statutory rights, including inadequate mental health care. Just. Pol’y Inst., Raise the Age: Shifting to a Safer and More Effective Juvenile Justice System (2017), https://justicepolicy.org/wp-content/uploads/2021/06/raisetheage_fullreport.pdf [https://perma.cc/33V5-8M8W] (“The adult justice system is poorly equipped to provide young people with appropriate schooling, job training, and mental and physical health treatment opportunities, which prevents young people from gaining the necessary tools to move past crime and delinquency.”), Redding, supra note 146, at 138 (discussing U.S. Department of Justice monitoring of juvenile facilities under consent decrees and investigations of ongoing violations).
155. Pinard, supra note 11, at 459.
nondrug offending differences and prevalence of community crime problems—found that Black people face higher likelihoods of drug arrest, and this likelihood grows in magnitude with age.\textsuperscript{157} Further, these racial disparities, which can be attributed to racial bias in law enforcement,\textsuperscript{158} go beyond the arrest stage to bias in prosecution and sentencing.\textsuperscript{159}

Despite the low-level and nonviolent nature of most drug possession charges, harsh sentencing guidelines apply to drug possession convictions, and many individuals charged with low-level drug possession offenses face disproportional mandatory punishments.\textsuperscript{160} Those without secure citizenship are further punished by low-level drug possession convictions, as their convictions often result in the suspension of work permits or visas and potential deportation, preventing them—sometimes forever—from securing legal status in the United States.\textsuperscript{161}

As the “war on drugs” increased incarceration rates across the United States, rates of women’s incarceration particularly skyrocketed: from 1977 to 2004, rates increased by over 750%.\textsuperscript{162} Women's drug-related arrests generally follow a pattern of experiencing physical or sexual “abuse, self-medication, addiction, incarceration, [and] termination of parental rights.”\textsuperscript{163} This “chain of events . . . is particularly likely for low-income women, especially women of color.”\textsuperscript{164} Although women with higher socioeconomic status also experience abuse, self-medicate, and struggle with addiction, they are significantly less likely to be arrested.\textsuperscript{165}

Such incarceration limits employment options, job-skill development, and education while causing dire consequences related to health and homelessness.\textsuperscript{166} Additionally, incarceration can result in situations where women are again subjected to abuse—for example, upon release from jail or prison “women are forced back into abusive relationships because options are foreclosed by bans on public benefits, student loans, employment, and

\begin{thebibliography}{99}
\bibitem{}\textit{Id.} at 309.
\bibitem{}\textit{Id.} at 309-10.
\bibitem{}See, e.g., \textit{Id.} at 58.
\bibitem{}\textit{Id.}
\bibitem{}\textit{Id.}
\bibitem{}\textit{Id.}
\bibitem{}\textit{Id.} at 157-58; see Femina P. Varghese, Erin Hardin, Rebecca Bauer & Robert Morgan, \textit{Attitudes Toward Hiring Offenders}, 54 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 769, 778 (2010) (finding that job applicants with a drug possession charge, regardless of its severity, receive significantly weaker recommendations for hiring than applicants with no criminal history).
\end{thebibliography}
housing. Nevertheless, under federal law, women who have felony drug convictions are often banned from receiving food stamp benefits and welfare assistance.

Even though drug-related crimes are often nonviolent, victimless, and low-level in nature, they can have a significant effect throughout one’s life and family. The impact of drug-related convictions extends beyond those who are convicted and affects their children, their relatives caring for their children during incarceration, their friends, and their communities.

4. Child Support Enforcement

A paradoxical example of undesired carceral intervention in families is how the state routinely brings criminal enforcement actions in child support cases contrary to the custodial parent’s wishes. The custodial parent often does not wish for the child support case to be initiated and plays no role in seeking the non-custodial parent’s incarceration. These custodial parents rightly recognize that incarceration has detrimental long-term financial effects, and such adversarial cases create relational harms to the parent-child relationship.

167. Hirsch, supra note 162, at 158; see also Emily Ponder Williams, Fair Housing’s Drug Problem: Combating the Racialized Impact of Drug-Based Housing Exclusions Alongside Drug Law Reform, 54 HARV. C.R.-C.L. L. REV. 769, 772 (2019) (Drug charges can also make it difficult to find housing; private landlords regularly turn away rental applicants who have any criminal history, and public housing imposes severe restrictions and exclusions on people who use drugs or have a household member convicted of a drug-related offense.).


169. Varghese et al., supra note 166, at 778.

170. See id.

171. Hirsch, supra note 162, at 158.

172. See JENNIFER HAMER, WHAT IT MEANS TO BE DADDY: FATHERHOOD FOR BLACK MEN LIVING AWAY FROM THEIR CHILDREN 121, 125 (2001) (describing Black mothers who chose not to pursue child support from their children’s fathers); Kimberly Seals Allers, Forgiving $38,750 in Child Support, for My Kids’ Sake, N.Y. TIMES (Apr. 19, 2015), https://parenting.blogs.nytimes.com/2015/04/19/forgiving-38750-in-child-support-for-my-kids-sake/?_r=0 (One custodial parent who sought the court’s permission to forgive her ex-husband’s child support arrears of nearly $40,000 wrote, “I could do was to . . . take the words ‘arrest warrant’ out of the language my children associate with their father. I don’t want the father of my children to be criminalized or to live in fear of prison.”).

173. See ELAINE SORENSEN & MARK TURNER, BARRIERS IN CHILD SUPPORT POLICY 14 (1996) (describing a multitude of reasons custodial mothers may not wish to seek child support enforcement); Jane C. Murphy, Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children, 81 NOTRE DAME L. REV. 325, 373 (2005) (noting that although the custodial parent’s name appears in the caption of the child support case, the custodial parent is often not aware of the state’s case until he or she receives a summons to appear in court).

174. See DEVIAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 937 (2007); ELAINE SORENSEN, LILIANA SOUSA & SIMONE SCHANER, THE URBAN INST., ASSESSING CHILD SUPPORT ARREARS IN NINE LARGE STATES AND THE NATION 3, 9 (2007), https://www.urban.org/research/publication/assessing-child-support-arrears-nine-large-states-and-nation (determining that most unpaid child support is owed by the very poor, with a nine-state study revealing that seventy percent of child support arrears are owed by individuals with annual incomes of less than $10,000, and further finding that these parents are ordered to pay an average of eighty-three percent of
and co-parenting relationships,175 which may especially present danger in the context of domestic violence.176

Even though Congress created mechanisms to waive child support cooperation requirements for domestic violence victims,177 these options are rarely presented to custodial parents.178 Instead, state agents at domestic violence intake centers automatically initiate child support cases against abusive non-custodial parents, endangering abuse survivors by involving them in numerous court proceedings as witnesses for the state.179

5. Criminalization of Solicitation and Sex Work

Criminalization of sexual services for compensation180 disproportionately affects those most visible: women, trans and gender-nonconforming people,

their income in child support); Robert Apel & Gary Sweeten, The Impact of Incarceration on Employment During the Transition to Adulthood, 57 SOC. PROBS. 448, 468 (2010); Solangel Maldonado, Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers, 39 U.C. DAVIS L. REV. 991, 1010, 1015 (2006); Leslie Kaufman, When Child Support Is Due, Even the Poor Find Little Mercy, N.Y. TIMES, (Feb. 19, 2005), http://www.nytimes.com/2005/02/19/nyregion/when-child-support-is-due-even-the-poor-find-little-mercy.html (identifying that in 2003, fathers earning more than $40,000 were responsible for less than four percent of the money owed in back child support nationally).

175. See Murphy, supra note 173, at 373 (observing that the adversarial aspect of child support enforcement harms low-income families, stating, “[b]eing forced into repeated court appearances with mother as plaintiff (although the state initiated the case) and father as defendant undermines relationships in these fragile families”).

176. See Naomi Stern, Battered by the System: How Advocates Against Domestic Violence Have Improved Victims’ Access to Child Support and TANF, 14 HASTINGS WOMEN’S L.J. 47, 49 (2003) (“Because of a batterer’s desire to control his former partner, his contact with her in a courtroom setting could result in renewed violence against her.”).

177. Although welfare regulations originally mandated that custodial parents cooperate with the establishment of paternity and collection of child support from the non-custodial parent, when Congress recognized the danger this created for domestic violence victims, it created the “good cause” waiver to the former Aid to Families with Dependent Children program and the Family Violence Option to the Temporary Assistance to Needy Families program to permit state child support agencies to waive the child support cooperation requirements for victims of domestic violence. See 45 C.F.R. § 232.40 (1997); U.S. DEP’T OF HEALTH & HUMAN SERVS., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM: EIGHTH ANNUAL REPORT TO CONGRESS 131–32 (2009), https://www.acf.hhs.gov/ofa/resource/eighth-annual-report-to-congress [https://perma.cc/K4PM-RJWD] (reporting that thirty-nine states, the District of Columbia, and Puerto Rico have adopted the Family Violence Option).


people of color, and immigrants selling sexual services, not those who are purchasing sex or facilitating trafficking.181 In Connecticut, for example, from 2009 to 2018, seventy-six percent of arrests for prostitution or solicitation charges were of women, who make up half the population, and twenty-four percent of arrests were of Black people, who comprise only eleven percent of the population.182

The criminalization of solicitation and sex work fails to take account of structural forces that severely circumscribe the options and choices available to people who engage in sex work. It also fails to consider relational or temporal circumstances, and instead furthers male and state control.183 Many women and trans or gender-nonconforming people who partake in solicitation struggle with poverty, childhood trauma, domestic violence, and substance addiction184 and are “survivors of police violence, including sexual harassment, physical abuse, improper strip searches and rape by law enforcement officers.”185 These criminalized individuals are often simultaneously experiencing domestic violence and sexual assault, including their partners’ overseeing their solicitation or trafficking them, which has been the experience of some of the Author’s clients.

Further compounding struggles with violence, addiction, and trauma, those who are convicted for offering sexual services for compensation are often branded “sex offenders,” which affects family law cases, as described in Part I. This label also impedes access to services and resources for safety and recovery.186

Incarceration interferes with parental and familial duties and poses reunification challenges, which makes it more likely for the children of incarcerated parents to remain in foster care beyond their parents’ release from prison.187 Undocumented and documented immigrants who are arrested for

and buying sexual services is criminalized throughout the United States, with the exception of Nevada, which allows counties to legislate legality.


182. Id. citing supra note 181.

183. CARISA R. SHOWDEN, CHOICES WOMEN MAKE: AGENCY IN DOMESTIC VIOLENCE, ASSISTED REPRODUCTION, AND SEX WORK (2011).


186. Id.

prostitution-related offenses may be detained and removed from the United States.\footnote{188} Whereas multiple services exist for domestic violence victimization, solicitation is criminalized and stigmatized.\footnote{189} Fear of being criminalized makes those engaged in the sale of sexual services understandably reluctant to report violence and abuse experienced while engaged in sex work or while interacting with police,\footnote{190} thus furthering their silencing. The stigma of solicitation convictions affects abuse survivors seeking protection from violence or parents seeking child custody, and penalties related to sex-offender registries obstruct parental rights.

6. Artificial Intelligence and Predictive Sentencing Biases

Government agencies now use technology for data collection, automated decision making, and predictive analytics that reinforces social inequality and creates new antidemocratic methods of social control.\footnote{191} Although intended to improve the “accuracy, efficiency, and neutrality” of their decisions and functions,\footnote{192} the outcomes of these tools depend on the inputs, ideologies, and methods that govern the technology,\footnote{193} which are often affected by racial bias\footnote{194}—thus resulting in even greater policing of communities of color.\footnote{195} Many public assistance programs, for example, now utilize eligibility determinations called “computerized risk assessments” to regulate poor and

\footnote{188} Margaret H. Wurth, Rebecca Schleifer, Megan McLemore, Katherine W. Rodrys & Joseph J. Amon, Condoms as Evidence of Prostitution in the United States and the Criminalization of Sex Work, 16 HUM. R. INST’L AIDS SOC’Y 1, 1 (2013).
\footnote{189} Ritchie, supra note 185, at 359, 373; see also Maybell Romero, “Ruined,” 111 GEO. L. J. 237, 265 (2022) (describing judicial stigmatization).
\footnote{190} See Wurth et al., supra note 188, at 2.
\footnote{192} Roberts, supra note 191, at 1696; Joo-Wha Hong & Dmitri Williams, Racism, Responsibility, and Autonomy in HCI: Testing Perceptions of an AI Agent, 100 COMPUT. HUM. BEHAV. 79, 80 (2019) (arguing that although the artificial intelligence “programs themselves are neutral, [] the people who built them are biased by either their own identity-based perspectives or by a profit motive”).
\footnote{193} Roberts, supra note 191, at 1697, 1712; Hong & Williams, supra note 192, at 80.
\footnote{195} Roberts, supra note 191, at 1697 (“In the United States today, government digitization targets marginalized groups for tracking and containment in order to exclude them from full democratic participation.”).
working-class people. Public assistance resources are necessary for low-income families’ survival and safety; however, these families are “forced to trade their rights to privacy, protection from unreasonable searches, and due process” to participate.

Technology has also taken a dangerous turn in developing predictive policing programs and “risk-based” sentencing that disproportionately targets and punishes people of color. Criminal courts are increasingly relying on “risk-based” sentencing, a computerized assessment tool that attempts to predict a defendant’s likelihood of engaging in future criminal behavior. The effect is extended incarceration, which unjustly harms individuals, families, and communities.

B. Arrested Survival

Criminal law operates inequitably both in family enforcement and against abuse survivors in ways that reverberate when judges view criminal histories in family law. Although the doctrine of family privacy once trumped state intervention, the pendulum has swung to the other extreme, resulting in both over-policing and under-protecting parents who may have experienced domestic abuse. Current laws and policies promote hyper-surveillance of families of color, leading to the criminalization of abuse survivors—who are also often mothers—and the separation of families.

Examples of detrimental state interventions abound. Unwarranted state intervention often has troubling safety, relational, psychological, and economic effects, which are explored in this Part. Section 1 reveals the state’s criminalization of abuse survivors through domestic violence mandatory arrest and prosecution policies and when abuse victims fail to cooperate in prosecution, which then haunts them in family court. Section 2 considers the state’s policing of abused parents through “failure to protect” laws, which

196. Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor (2018) (studying the threats to social equality posed by governmental use of big data in three public assistance programs); Roberts, supra note 191, at 1697.
197. Eubanks, supra note 196, at 158.
199. See Howard & Borenstein, supra note 194, at 1521 (identifying how relying on biased information “unjustly affects those who are arrested and possibly ruins the lives of their families”).
201. See Stoever, Mirandizing Family Justice, supra note 104, at 256.
criminalize abuse survivors and remove children from non-violent parents, and via expanding definitions of abuse and neglect.

1. Criminalizing Abuse Survivors

Paradoxically, domestic violence survivors are often penalized when they seek help from abuse, and “anti-essentialist and intersectional feminist scholars have critiqued the state’s autonomy-denying interventions regarding domestic violence arrest and prosecution policies.”

Beginning in the 1970s, anti-violence advocates seeking to eliminate gender-based violence turned to the criminal legal system. Framing domestic violence through the lens of crime control became a strategy for some feminists to engender public support and gain valuable resources, in a trend that is now known as carceral feminism.

In the 1990s, the efforts of the anti-violence movement culminated in the enactment of mandatory arrest laws, which require police officers to make an arrest if they have probable cause to believe a domestic assault or battery occurred. The intention was to treat domestic abuse as seriously as stranger violence, prevent abuse survivors from having to determine whether their abusers should be arrested, and protect survivors from their partners’ coercion. However, in recent years, abolition feminists, sometimes referred to as anti-


205. Ahmet Çelik, An Analysis of Mandatory Arrest Policies on Domestic Violence, 10 INT’L J. HUM. SCI. 1503, 1504 (2013); see also Susan J. Hoppe, Yan Zhang, Brittany E. Hayes & Matthew A. Bills, Mandatory Arrest for Domestic Violence and Repeat Offending: A Meta-Analysis, 53 AGGRESSION & VIOLENT BEHAV. 101430 (2020) (analyzing effectiveness of mandatory arrest policies for domestic violence in reducing repeat offending and finding such policies do not have a deterrent effect).

Mandatory arrest laws are currently in effect in 18 states and the District of Columbia. ALASKA STAT. § 18.65.530(A) (2018); ARIZ. REV. STAT. ANN. §13-3601(B) (2018); COLO. REV. STAT. § 18-6-803.6 (2019); CONN. GEN. STAT. § 46b-38b(A) (2018); D.C. CODE ANN. § 16-1031(A) (2019); KAN. STAT. ANN. § 22-2307(B)(1) (2019); IOWA CODE ANN. § 236.12(2)(B) (2018); LA. STAT. ANN. § 46:2140A (2015); ME. REV. STAT. ANN. tit. 19-A § 4012(5) (2019); MISS. CODE ANN. § 99-3-7 (3) (2017); NEV. REV. STAT. § 171.137 (2019); N.J. STAT. ANN. § 2C:25-21(a) (WEST 2019); N.Y. CRIM. PROC. LAW § 140.10(1) (2019); OHIO REV. CODE ANN. § 2935.032(A)(1)(A) (2019); OR. REV. STAT. §§ 133.055(2)(A), (B), (C), (D) (2019); 12 R.I. GEN. LAWS § 12-29-3(b), (c) (2014); S.C. CODE ANN. § 16-25-70 (2015); S.D. CODEFIED LAWS § 23A-3-2.1 (2015); UTAH CODE ANN. § 77-36-2.2 (2) (2013); WASH. REV. CODE ANN. §10.31.100(2)(a), (d) (2019).
carceral feminists, have exposed the mechanisms through which mandatory arrest and other similar laws co-construct gender violence and result in the criminalization of survivors.206

For instance, mandatory arrest policies have produced increased arrests and prosecution of abuse survivors.207 In some instances, this occurs when officers are unable to identify the primary aggressor or when a victimized person acts in self-defense.208 Mandatory arrest laws are especially problematic for women of color, who are more vulnerable to arrest and police brutality when they seek help from abuse.209 Gay, lesbian, bisexual, transgender, and gender-nonconforming victims are also particularly vulnerable to dual arrests where police inappropriately rely on traditional gender roles and gendered expectations of aggressors and victims to make arrests.210 As a result of arrest, abuse survivors can temporarily lose the ability to care for their children and lose access to shelters and safe housing, and they will not have the protection of an emergency protection order. For individuals who lack secure immigration status, arrest or prosecution for domestic violence may lead to deportation.

Mandatory domestic violence prosecution policies under which prosecutors pursue cases regardless of the victimized person's desire for criminalization or safety and economic concerns about the effects of

207. See Jessica Dayton, The Silencing of a Woman’s Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases, 9 CARDozo WOMEN’S L.J. 281, 287 (2003) (finding that three times as many women were arrested for domestic abuse after a mandatory arrest statute was adopted in Los Angeles); Simiao Li, Ani Levick, Adelaide Eichman & Judy C. Chang, Women’s Perspectives on the Context of Violence and Role of Police in Their Intimate Partner Violence Arrest Experiences, 30 J. INTERPERSONAL VIOLENCE 400, 402 (2015) (discussing the implementation of mandatory arrest laws, the subsequent increase of female arrests, and how women’s use of violence typically occurs within the context of their own victimization).
209. Michele R. Decker, Chavonne N. Holliday, Zaynab Hameeduddin, Roma Shah, Janice Miller, Joyce Dantzler & Leigh Goodmark, “You Do Not Think of Me as a Human Being”: Race and Gender Inequities Intersect to Discourage Police Reporting of Violence Against Women, 96 J. URB. HEALTH 772, 780 (2019); Sue Osthoff, But, Gertrude, I Beg to Differ, a Hit Is Not a Hit Is Not a Hit: When Battered Women Are Arrested for Assaulting Their Partners, 8 VIOLENCE AGAINST WOMEN 1521, 1533 (2002) (“One of the unintended consequences of intensive arrest policies has been the arrest of large numbers of battered women, especially women of color.”).
prosecution have also harmed abuse survivors.211 While these policies were
designed to protect survivors, “studies have found that criminal domestic
violence interventions fail to deter abuse perpetrators from further
victimization and actually increase domestic violence homicides.”212 In fact,
domestic violence homicide rates in states with mandatory arrest policies are
sixty percent higher than in states without such laws.213

Aggressive prosecution attendant to the criminalization of domestic
violence has problematically resulted in abuse survivors being incarcerated for
failing to adequately cooperate with the government’s prosecution.
Prosecutors’ offices commonly procure victims’ testimony at trial by subpoena
to compel their testimony,214 particularly since Supreme Court decisions
regarding the Confrontation Clause made “victimless prosecution” more
difficult.215 When abuse survivors fail to appear pursuant to subpoena,
prosecution seeks bench warrants for their arrest and files contempt charges.216

211. See Kimberly D. Bailey, It’s Complicated: Privacy and Domestic Violence, 49 AM. CRIM. L.
REV. 1777, 1784–85 (2012) (discussing the prevalence of mandatory arrest and prosecution policies for
domestic violence); Donald J. Rebovich, Prosecution Response to Domestic Violence: Results of a
Survey of Large Jurisdictions, in DO ARRESTS AND RESTRAINING ORDERS WORK? 176, 180, 182–83
(Eve S. Buzawa & Carl G. Buzawa eds., 1996) (reporting that a survey conducted in the early 1990s
showed that sixty-six percent of prosecutors’ offices in major urban areas had adopted no-drop policies).
212. Stoever, Parental Abduction, supra note 202, at 869. See Lawrence W. Sherman & Heather
M. Harris, Increased Death Rates of Domestic Violence Victims from Arresting vs. Warning Suspects in
the Milwaukee Domestic Violence Experiment (MiDVE), 11 J. EXPERIMENTAL CRIMINOLOGY 1
(2015) (evaluating whether domestic violence arrest deters or increases future domestic homicide by
studying death rates of victims of misdemeanor domestic violence twenty-three years after the random
assignment of the arrest or warning of the abuser, and concluding that arrests increased the premature
death of the victim, particularly for Black abuse victims, and suggesting the repeal or judicial
invalidation of mandatory arrest laws. Researchers concluded that “victims of domestic violence were
64% more likely to die if their partner was arrested for domestic violence, compared to those who only
received a warning. For Black survivors, arrests increased mortality by 98%”); see also Donna Coker,
L. REV. 801, 826 (2001) (identifying how the criminal justice system often offers no better alternative to
a batterer’s coercion); Linda G. Mills, Killing Her Softly: Intimate Abuse and the Violence of State
Intervention, 113 HARV. L. REV. 550, 567–68 (1999) (finding that prosecution has no effect on the
probability of the batterer’s re-arrest during a six-month period, and identifying that the victim’s ability
to exercise control over the decision to prosecute reduces risk for subsequent abuse).
213. Radha Iyengar, Does the Certainty of Arrest Reduce Domestic Violence? Evidence from
Mandatory and Recommended Arrest Laws, 93 J. PUB. ECON. 85, 85 (2009) (finding that mandatory
arrest laws may lead to the perverse effect of increasing intimate partner homicides because of the
abuser’s likelihood of seeking retribution).
214. Tamara Kuenen, Private Relationships and Public Problems: Applying Principles of
Relational Contract Theory to Domestic Violence, 2010 B.Y.U. L. REV. 515, 586 (2010); see, e.g., Tom
Dart, Rape Victim Sues After Being Jailed During Trial for “Mental Breakdown,” THE GUARDIAN (July
22, 2016), https://www.theguardian.com/us-news/2016/jul/22/texas-rape-victim-county-jail-bipolar-
disorder-lawsuit [https://perma.cc/W7GG-ATL6] (reporting that after a rape victim had a mental
breakdown while testifying against her attacker, she was then incarcerated for nearly a month at the
prosecutor’s request to ensure she would return to court to conclude her testimony).
216. See Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence
Prosecutions, 109 HARV. L. REV. 1849, 1863 (1996) (identifying that prosecutors in Duluth, Minnesota,
subpoena all domestic violence victims and that prosecutors in San Diego request bench warrants when
Jailing abuse survivors on contempt warrants “has resulted in significant numbers of victims being arrested and incarcerated while their abusers have avoided jail time altogether.”217 While jail sentences for committing domestic violence are rare and brief,218 abused individuals who fail to comply with subpoenas to testify have been jailed for lengthier durations.219 Abuse survivors have also been charged with and jailed for perjury for allegedly failing to provide truthful testimony about their experiences of abuse.220

victims fail to appear or cooperate with the prosecution); Rebovich, supra note 211, at 186 (reporting that ninety-two percent of prosecutorial agencies use subpoenas to require victims to testify); Emily J. Sack, Battered Women and the State: The Struggle for the Future of Domestic Violence Policy, 2004 WIS. L. REV. 1657, 1681 (2004); see, e.g., VT R. EVID. 504(d) (West 2016) (identifying that there is no marital privilege when one spouse is charged with committing a crime against the other spouse, thus making domestic violence victims compellable witnesses).


218. Linda G. Mills, The Heart of Intimate Abuse: New Interventions in Child Welfare, Criminal Justice, and Health Settings 56 (1998) (reporting study results that only one percent of perpetrators of domestic violence received jail sentences beyond the time they served at arrest); see Erin L. Han, Mandatory Arrest and No-Drop Policies: Victim Empowerment in Domestic Violence Cases, 23 B.C. THIRD WORLD L.J. 159, 183 (2003) (“Given the reality that even aggressive prosecution will likely yield only a mild, if any, punishment, there are many reasons why a victim might be far safer by not aligning herself with the state.”); Frank Sloan, Alyssa Platt, Lindsey Chepke & Claire Bleivins, Deterring Domestic Violence: Do Criminal Sanctions Reduce Repeat Offenses?, 46 J. RISK UNCERTAINTY 51, 62 (2013) (estimating that “only 0.15 to 0.2% of cases involving [domestic violence] lead to an arrest,” and “the probability of [domestic violence] resulting in a fine or jail is slightly under 0.04”).

219. See Laurie S. Kohn, The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 203 (2008). Across the nation, examples can be found of abuse victims who were jailed when they failed to comply with a subpoena for their testimony. See, e.g., Commonwealth v. Kirkner, 805 A.2d 514 (Pa. 2002) (reversing the lower court’s quashing of a subpoena ordering the victim to testify); Jessica Pishko, She Didn’t Want Her Boyfriend to Go to Jail So They Sent Her to Jail Instead, COSMOPOLITAN (Apr. 13, 2017), http://www.cosmopolitan.com/politics/a9241242/cleopatra-harrison-schr-domestic-violence-victims-fors-no-drop-policy/ [https://perma.cc/C551-WC34] (detailing recent instances of abuse survivors being fined or jailed for refusing to participate in the prosecution of their batterers), Emily Shugerman, Rape Survivors Face Jail If They Won’t Testify in Louisiana, INDEP. (Apr. 21, 2017), http://www.independent.co.uk/news/world/americas/rape-victims-survivors-face-jail-if-dont-testify-court-louisiana-attorney-leo-cannizzaro-a7694061.html [https://perma.cc/XH6B-7DN8] (reporting on the Orleans Parish District Attorney’s practice and identifying that six alleged victims of domestic violence or sexual assault were jailed in 2016 to compel their testimony).

220. Maureen O’Hagan, In Baltimore, a Victim Becomes a Criminal, WASH. POST (Mar. 30, 2001), https://www.washingtonpost.com/archive/politics/2001/03/30/in-baltimore-a-victim-becomes-a-criminal/69c95f15e6f1d41dd93a3a3d77f1d007d?utm_term=b96484ed3c [https://perma.cc/S65Q-Q3BB] (reporting that a domestic violence victim in Baltimore was arrested to compel her testimony, and she then lied to the grand jury out of fear for her life. She was prosecuted for perjury and was sentenced to thirty months in jail for this crime.).
In addition to the state’s increasing criminalization of abuse survivors, abused parents experience investigations, coercion, and charges related to their parenting. Some prosecutors, for example, coerce domestic violence survivors’ cooperation with threats to refer uncooperative abused parents for child welfare investigations and ultimatums that they could lose their children if they do not cooperate with the state’s prosecution. Policing of parenting is further described in the next section.

2. Policing Abused Parents Through Child Dependency Systems

One in three children nationwide—and half of Black children—experience a child welfare investigation during childhood. The child dependency system, which some low-income parents call the “Parent Police” and scholars increasingly refer to as the “family regulation system” or the “family policing system,” disproportionately surveils and investigates low-income Black, Latino, and Indigenous families. Across America, investigators annually enter millions of homes, conduct warrantless searches under the auspices of child protection, and have the power to remove children from their home without a court order. The racial discrimination of the child welfare system reflects prevalence and vectors of inequality, produces mass insecurity

221. Thomas L. Kirsch II, Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of Their Abusers?, 7 WM. & MARY J. WOMEN & L. 383, 402 (2001) (regarding common fear tactics, one prosecutor said he routinely told victims: “I was going to subpoena her and if she didn’t show up I was going to have her thrown in jail with a body attachment. I tried to make them believe that it would be more painful for them to not cooperate than it would be to cooperate.”)


223. Regarding racialized targeting, in twenty-nine states, over half of Black children experience a Child Protection Services (CPS) investigation before age eighteen. Youngmin Yi, Frank Edwards, Natalia Emanuel, Hedwig Lee, John M. Leventhal, Jane Waldfogel & Christopher Wildeman, State-Level Variation in the Cumulative Prevalence of Child Welfare System Contact, 2015–2019, 147 CHILD. & YOUTH SERV. REV. 10 (2023). In eleven additional states, over forty percent of Black children’s homes and families are investigated by CPS. In only three states in all of America do more than half of CPS investigations pertain to white children. Yi.


in neighborhoods of color, and results in racialized family separations. 228 A recent presidential proclamation even recognized that “the enduring effects of systemic racism [of the child welfare system] and economic barriers mean that families of color are disproportionately affected.” 229

Investigations typically last sixty to ninety days, and the impact of an investigation has been described as “rupturing the village of the child’s ecological system, which has ripple effects and brings not just stigma, but also fear and distrust, as it tears the fabric of a child’s life and community.” 230 Caseworkers investigating claims of abuse or neglect often speak to neighbors, teachers, and medical providers before alerting parents of the allegation or that an investigation is underway. The caseworker evaluates a child’s living conditions, including assessing refrigerator and pantry contents, bathrooms, bedrooms and sleeping arrangements, closets and dressers, parents’ bedside drawers, recreational activities, and the home’s condition, and makes repeat unannounced visits to the home and child’s school. 231 Children are also required to reveal their bodies to investigators for their examination, again, often without notice to parents. 232 Unsurprisingly, research shows that children often experience severe stress from child welfare investigations, the cumulative effect of which leads to toxic stress and significantly harms children’s health and development. 233 They are also burdened by witnessing their parents being

228. See generally WENDY BACH, PROSECUTING POVERTY, CRIMINALIZING CARE (2022) (documenting the criminalization of Black, poor, and working-class mothers); ROBERTS, supra note 85; DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) (arguing that child welfare policy reflects political choices to punish Black poverty by disproportionately removing Black children from their parents instead of remediating poverty’s societal roots).


“humiliated, rendered powerless, and turned into second-class citizens in their own homes.”

Certainly, some forms of abuse warrant immediate intervention, removal, or other high-level protection of children, as should have occurred for Joshua DeShaney, who experienced extensive physical abuse by his father. Child welfare investigators were aware of Joshua’s obvious life-threatening abuse and resulting hospitalization yet responded with persistent inaction. For Joshua, the government’s failure to protect him from his father’s abuse left him brain damaged, paralyzed, and institutionalized at age four, yet the U.S. Supreme Court found that the county welfare agency’s inaction did not violate the child’s Fourteenth Amendment rights. In contrast, many child welfare cases concern poverty, false allegations by an abusive partner, or simply different parenting styles from the reporter or investigator. Examining recent data, in 2019, nearly eight million children were the subject of a suspected maltreatment report. Of these reports to Child Protective Services, more than half were deemed to not warrant an investigation at all, and almost 3.5 million children were subjected to an investigation. Of those children, over eighty percent of the reports of abuse were determined to be entirely unsubstantiated, and physical or sexual abuse was found in only five percent of the cases.

Data show that the family regulation system pathologizes poor Black and Latino parents, placing blame for societal problems on individual parents of color and punishing them and their children. Professor Lisa Washington examines the impact of pathologizing impoverished and racialized groups in the family regulations system and shows how ostensibly neutral behavioral descriptors are used to police emotions and label marginalized families “deficient.” She explains, “Pathology logics distract from the structures that render families in marginalized communities hyper-visible to the state, conceal the interconnectedness of carceral systems, obscure the destabilizing effects of

Burke Harris, Toxic Stress in Children and Adolescents, 63 ADVANCES IN PEDIATRICS 403, 408 (2007) (describing toxic stress as “the maladaptive and chronically dysregulated stress response that occurs in relation to prolonged or severe early life adversity”).


236. See generally LYNNE CURRY, THE DESHANEY CASE: CHILD ABUSE, FAMILY RIGHTS, AND THE DILEMMA OF STATE INTERVENTION (2007) (examining the due process legal arguments regarding Joshua’s rights to life and liberty, which were unsuccessful, and the familial, social, political, and historical contexts of the child’s life and the court case Joshua’s mother pursued to the Supreme Court).


poverty and racism, and erase the expertise of directly impacted families by equating resistance with pathology.\textsuperscript{240}

When mandated reporters of child abuse and neglect report domestic violence to Child Protective Services, far too often battered mothers are criminally prosecuted or charged with neglect for failing to protect their children from being exposed to domestic violence.\textsuperscript{241} While domestic violence is a factor that courts must consider when making custody and visitation determinations,\textsuperscript{242} many states also explicitly identify exposure to domestic violence as a form of child abuse.\textsuperscript{243} Under these “failure to protect” laws, battered women, particularly women of color, face removal of their children and the possible termination of their parental rights because they are presumed to be unfit parents.\textsuperscript{244} Paradoxically, abuse survivors are often treated as culpable as the violent parent.\textsuperscript{245} Further confounding, because mandatory reporters including domestic violence shelter workers, teachers, and medical professionals are required to report children exposed to domestic violence to child welfare agencies,\textsuperscript{246} it is often when abuse survivors are seeking help

\textsuperscript{240} Id. at 1523.

\textsuperscript{241} In states with “failure to protect” laws, this practice continues to be commonplace even after the widely publicized class action brought on behalf of battered mothers in New York in 2000, who had been charged with child neglect and had their children removed from their care solely because the mothers had experienced abuse. See Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002).

\textsuperscript{242} See, e.g., Martinez v. Driscoll, 209 A.D.3d 653, 654 (N.Y. Sup. Ct. 2022) (describing factors considered in determining a child’s best interests in a custody dispute, including “the effect of domestic violence on the child’s best interests”); Smith v. Smith, 98-1 A.3d 304, 311 (Pa. Super. Ct. 2022) (listing factors relevant to determining child’s best interest when ordering custody, including the present and past abuse committed by a party, if there is a continued risk of harm to child or an abused party, and which party can better provide adequate physical safeguards and supervision for child).

\textsuperscript{243} See Matter of Sydelle P., 210 A.D.3d 1098, 1099-1100 (N.Y. Sup. Ct. 2022) (“Even a single act of domestic violence, either in the presence of a child or within the hearing of a child, may be sufficient for a neglect finding.”); see also Colleen Henry, Exposure to Domestic Violence as Abuse and Neglect: Constructions of Child Maltreatment in Daily Practice, 86 CHILDBRACE & NEGLECT 79, 80 (2018) (describing how child exposure to domestic violence has been statutorily recognized as a type of child maltreatment by some states and is otherwise also typologized as child maltreatment).

\textsuperscript{244} Justine A. Dunlap, Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect, 50 LOY. L. REV. 565, 601-02 (2004); The “Failure to Protect” Working Group, Charging Battered Mothers with “Failure to Protect”: Still Blaming the Victim, 27 FORDHAM URB. L.J. 849, 849 (2000); see, e.g., TEX. FAM. CODE ANN. §§ 161.001(b)(1)(D)-(E) (West 2016) (“The court may order termination of the parent-child relationship if the court finds by clear and convincing evidence . . . that the parent has . . . knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child.”).

\textsuperscript{245} See The “Failure to Protect” Working Group, supra note 244, at 854 (“A battered mother’s attempts to protect her children, to seek services or to leave her batterer are rarely considered. There are still strong prejudices against women who do not leave their batterers, and the players in the child welfare system routinely blame the victims of domestic violence for the harm to the children.”); Justine A. Dunlap, The “Pitiless Double Abuse” of Battered Mothers, 11 AM. U.J. GENDER SOC. POL’Y & L. 523, 523 (2003) (identifying how abused mothers “not only bear the scars of their abuser, but they also shoulder the blame for the harms others cause to their children.”).

\textsuperscript{246} Stoever, Mirandizing Family Justice, supra note 104, at 192.
escaping violence that they then face abuse and neglect charges themselves.247
And while abuse survivors can leave abusive relationships, and family law
indeed requires abused parents to leave their abusive partners in order to
protect their children from being exposed to abuse, the reality of judicial
handling of cases—with “friendly parent” provisions248 and periodic increases
of custodial time for the allegedly abusive parent—is that children cannot
leave.249

“Failure to protect” regimes create needless state intrusion and remove
children from their non-abusive parent, and operate contrary to studies showing
that experiencing abuse does not negatively affect an abuse survivor’s ability to
parent250 and that risks to children—both direct and indirect—“in domestic
violence cases are typically non-emergent.”251 Under “failure to protect” laws,
non-violent parents are criminalized and often receive longer prison sentences
than the abusive individual.252 While the harms of separation from a non-
abusive parent are well established,253 as are the adverse effects254 and dangers

247. See Evan Stark, The Battered Mother in the Child Protective Service Caseload: Developing
an Appropriate Response, 23 WOMEN’S RTS. L. REP. 107, 125 (2002); see, e.g., Nicholson, 203 F. Supp.
2d at 153, 163–64.
248. Jennifer L. Hardesty, Jason D. Hans, Megan L. Haselschwerdt, Lyndal Khaw & Kimberly A.
Crossman, The Influence of Divorcing Mothers’ Demeanor on Custody Evaluators’ Assessment of Their
Domestic Violence Allegations, 12 J. CHILD CUSTODY 47, 65 (2015); see also B. Archer-Kuhn,
Domestic Violence and High Conflict Are Not the Same: A Gendered Analysis, 40 J. SOC. WELFARE &
249. Stephanie Holt, Domestic Violence and the Paradox of Post-Separation Mothering, 47
BRITISH J. SOC. WORK 2049, 2051 (2017) (discussing children’s recovery from abuse being
compromised due to ongoing visitation). Protective parents are often met with allegations from the
abusive parent/partner of alienating the child from the abusive parent. Joan S. Meier, U.S. Child Custody
Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?, 42
J. SOC. WELFARE & FAM. L. 92, 92 (2020) (conducting “an empirical study of ten years of U.S. cases
involving abuse and alienation claims,” and finding “that mothers’ claims of abuse, especially child
physical or sexual abuse, increase their risk of losing custody,” while “fathers’ cross-claims of alienation
virtually double that risk”); see also Joan S. Meier & Sean Dickson, Mapping Gender: Shedding
Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation, 35 MINN. J. L.
& INEQUALITY 311 (2017).
250. Stark, supra note 247, at 111–12; see also Cris M. Sullivan, Huong Nguyen, Nicole Allen,
Deborah Bybee & Jennifer Juras, Beyond Searching for Deficits: Evidence that Physically and
Emotionally Abused Women Are Nurturing Parents, 2 J. EMOTIONAL ABUSE 51, 51 (2000) (reporting on
a study of battered women in shelters and concluding that “mothers’ experience of physical and
tional abuse had no direct impact on their level of parenting stress or use of discipline with their
children”).
251. Stark, supra note 247, at 130.
252. See e.g., Samantha Michaels, Her Boyfriend Killed Her Baby While She Was at Work.
Oklahoma Is Sending Her to Prison, MOTHER JONES (Feb. 10, 2022), https://www.motherjones.com/
crime-justice/2022/02/child-abuse-mothers-sexist-failure-to-protect-law-rebecca-hogue-oklahoma/
[https://perma.cc/4WEN-28SV] (describing the prevalence of “failure to protect” laws and examples of
survivors being criminalized, noting, “Almost all states have similar laws or legal theories that
criminalize caregivers who ‘enable’ or ‘permit’ a child’s injuries, even when they tried to stop the
violence”).
253. See generally Joan S. Meier & Vivek Sankuran, Breaking Down the Silos that Harm
Children: A Call to Child Welfare, Domestic Violence, and Family Court Professionals, 28 VA. J. SOC.
POL’Y 275, 295 n.99 (2021) (identifying potential lifelong harm to a child who is removed from their nonviolent
of foster care, children are frequently removed from their protective parent and placed in foster care when their exposure to domestic violence becomes known. Experts instead recommend promoting the non-offending parent’s safety and supporting a nurturing relationship between the abused parent and child. “Indeed, the child’s continued relationship with the abused parent is the most critical resiliency factor and predictor of lifetime positive outcomes for a child who has witnessed domestic violence.”

Expanding definitions of abuse and neglect—such as to include medical child abuse and childhood obesity charges—have added opportunities for

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254. Youth in foster care are significantly more likely to be involved in the criminal legal system later in life, creating cycles of violence. See Laura Gypen, Laura Gypen, Johan Vanderfaeille, Skrallan De Maeyer, Laurence Belenger & Frank Van Holen, "Outcomes of Children Who Grew up in Foster Care: Systematic Review," 76 Child. & Youth Serv’s Rev. 74, 80 (2017) (reviewing thirty-two quantitative studies and finding that children who leave care continue to struggle in all areas, including criminal system involvement). Foster youth are also more likely to suffer from poor outcomes in education, employment, income, housing, and mental and physical health. See Vanessa X. Barrat & Bethann Berliner, The Invisible Achievement Gap: Part I: Education Outcomes of Students in Foster Care in California’s Public Schools (2013).

255. Timothy Arcaro, Florida’s Foster Care System Fails Its Children, 25 Nova L. Rev. 641, 671-72 (2001) (describing a state class action on behalf of children in the Florida child welfare system, alleging beatings, sexual abuse, malnutrition, torture, and neglect, and describing how caseworkers routinely falsified records, placed children in dangerous conditions, and misled judges); Clare Huntington, "Rights Myopia in Child Welfare," 53 UCLA L. Rev. 637, 661–62 (2006) (describing studies of child maltreatment in foster care and that foster families are four times more likely to be reported for sexually abuse than non-foster families); Stark, supra note 247, at 130 (identifying that children from homes with domestic violence are especially vulnerable to the trauma associated with foster care placement).

256. Rosewater & Moore, supra note 69, at 6.

257. Sooever, Parental Abduction, supra note 202, at 873.

258. Parents with ill children are increasingly facing charges from doctors and hospitals of “medical child abuse,” a diagnosis coined in the 1990s that is now supported by the American Board of Pediatrics, despite critiques. “Medical Child Abuse” Lacks Adequate Standards, Guidelines, The Boston Globe (Dec. 23, 2013), https://www.bostonglobe.com/opinion/editorials/2013/12/23/medical-child-abuse-needs-clearer-standards-and-guidelines/0g4a07zm40QXbXPZC7p/story.html (referring to “medical child abuse” as an “ill-defined umbrella term,” identifying the lack of standards and process that lead to state intervention, even contrary to well-respected doctors’ recommendations, and the lack of medical expertise and independent confirmation that occurs prior to the child welfare agency acting); see, e.g., Joseph Avila, Teen’s Care Spurs Wider Fight: Connecticut Couple Heads to Court to Try to Have a Say Over Daughter’s Treatment, Wall St. J. (Feb. 23, 2014), https://www.wsj.com/articles/SB105014240527023048347045794012068231912 [https://perma.cc/DZ2G-GLNB] (describing the case of Justina Pelletier and how her parents quickly lost custody. After being denied custody for over a year, “[t]he Pelletiers now see their daughter under supervision once a week and for an hour at a time. Mr. Pelletier said he and his wife are worried their daughter isn’t receiving the treatment she needs, complaining that she can’t sit up, is physically weak, and has generally declined in health since they lost custody.”); Christy Gutowski, Women Fights Lorie Children’s Hospital on Medical Child Abuse Claims, Chil. Trib., May 28, 2014, at 8 (reporting that when a mother sought to transfer hospitals for her
state surveillance and intervention in the family. Like other areas of state intervention and policing parents, the medical decisions of and parenting by parents of color receive heightened scrutiny. 260

Preconceptions about parenting and about how people who experience domestic violence are supposed to present, along with implicit bias and unconscious stereotypes, lead judges to doubt criminalized survivors’ credibility. Judges may also fault survivors for their own abuse when viewing their experiences of abuse alongside a RAP sheet. Judicial preconceptions based on criminal history then unfairly penalize survivors or individuals who parent when they seek protection from abuse, custody of their children, or legal acknowledgement of their parenting.

III. PRO SE PREVALENCE IN CRIMINAL AND FAMILY COURTS

The historic failure to remedy the disproportionate harm of criminal and family court systems upon litigants of color perpetuates bias. Both family court and criminal court are high-volume, high-stakes venues featuring overwhelming caseloads, complex problems, hurried paces, long waits, and inadequate resources. 261 These structural conditions encourage shortcuts. The absence of representation in criminal law leads to convictions that lack due process and validity, as reflected in R.H.’s case in terms of the mismatch

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259. States are increasingly characterizing childhood obesity as a form of child neglect, even though removing children from their parents’ care is ineffective at solving any identified weight challenge, adds psychological harms due to separation from one’s parents, and is unconstitutional in the absence of an imminent threat of harm. Across the nation, children have been removed from their parents’ custody because of obesity, even when parents fully comply with medical and social service orders. See, e.g., In re L.T., 494 N.W.2d 450 (Iowa Ct. App. 1992) (interpreting child obesity as a form of neglect that justifies removal from parental custody); In re D.K., 58 Pa. D. & C.4th 353 (C.P. Northumberland Cty. 2002) (removing D.K. from his parent’s custody despite the youth’s desire to return home and his parent’s willingness to help him lose weight). See generally Stacey L. Fabros, A Cry for Health: State and Federal Measures in the Battle Against Childhood Obesity, 7 J.L. & FAM. STUD. 447 (2005) (discussing laws intended to target childhood obesity); Cheryl George, Parents Super-Sizing Their Children: Criminalizing and Prosecuting the Rising Incidence of Childhood Obesity as Child Abuse, 13 DEPAUL J. HEALTH CARE L. 33 (2010); Deena Patel, Super-Sized Kids: Using the Law to Combat Morbid Obesity in Children, 43 FAM. CT. REV. 164, 170 (2005) (discussing unpublished cases from California and Indiana).


between the underlying facts and overcharged label of the crime. Such convictions shouldn’t hold weight in family law decisions, but the general lack of representation in family law limits opportunities to address and overcome past criminal records.

While the Sixth Amendment guarantees criminal defendants adequate and effective representation at all “critical stages,” the right to counsel only attaches when formal judicial proceedings begin for which the accused could face incarceration. In actuality, defendants commonly plead guilty without any legal guidance as to the consequences of the plea. Despite the constitutional right to counsel, inadequately funded public defender systems, overwhelming caseloads, lack of public defense infrastructure, and late access to counsel mean many defendants lack any representation.

Self-represented defendants are now the norm in our criminal legal system. In Florida, for example, seventy percent of criminal defendants plead guilty without counsel in proceedings that often last under three minutes. State-reported data reveal that nearly fifty percent of outgoing criminal cases in Georgia, Indiana, and Missouri in 2019 involved one or more self-represented defendants. Similarly, the Judicial Council of California estimates that “as many as 40 percent of misdemeanor defendants represent themselves—often to enter a plea.” Rather than a conviction signifying guilt following a jury trial, guilty pleas are often the result of lack of legal counsel or adequate defense, and reflect parents’ need to return home to their children.

These defendants are often then pro se litigants in family court who face significant challenges explaining their criminal histories. Black men and women of color are disproportionately criminalized, and parents or abuse survivors must then negotiate and manage any RAP sheet in family court. While attorneys may presume they will be able to provide context and

264. Infra notes 266-68 and accompanying text. See, e.g., Wesley Caines, Lucy Cutolo & Kendea Johnson, Long Term Effects of Involvement in the Criminal Justice System: Mitigating Collateral Consequences & Tackling Voter Disenfranchisement, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 351, 354 (2019) (identifying that in New York City, fifty-three percent of criminal cases in arraignments “are resolved by way of pleading guilty,” before counsel is appointed).
266. Buskey & Lucas, supra note 31, at 2315.
exploration for their own clients' criminal records, R.H.'s case shows the
difficulty in doing so, and unrepresented litigants can be expected to have an
even more difficult time explaining their RAP sheets.

In family law cases in America, at least one party is unrepresented in an
estimated eighty to ninety percent of cases. Pro se litigants in family court
are disproportionately women of color who are mothers and who lack
economic means. Nationwide, nearly two-thirds of pro se litigants are
women, over ninety percent of whom have one or more children. A data-
intensive study of New York City Family Court and Housing Court litigants
found that eighty-three percent of self-represented litigants were Black, Asian,
or Latino. These self-represented litigants "had less education and lower
income[s] than New York City residents as a whole." In family court, "most proceedings conclude in ten minutes or less" and
"patience is ... in short supply" for litigants who are "often invisible." Pro
se litigants understandably often lack knowledge of legal procedures and
substantive law and are disadvantaged in advocating for themselves, especially
in family court's high-volume and high-personal-stakes courtrooms.


270 John M. Greacen, Self Represented Litigants and Court and Legal Services Responses to Their Needs 7 (2001) (A 2001 analysis conducted by San Diego Superior Court reported that eighty-eight percent of family law cases involved at least one self-represented litigant.)

271 Natalie Anne Knowlton, Inst. For the Advancement of the Am. Legal Sys., Cases Without Counsel 9 (2016).

272 Office of the Deputy Chief Administrative Judge for Justice Initiatives, Self-Represented Litigants in the New York City Family Court and New York City Housing Court (2005).

273 Id. Approximately half of the self-represented litigants reported a high school education or less. Eighty-three percent of self-represented litigants reported household income of under $30,000, and fifty-three percent of self-represented litigants in Family Court reported household income of under $20,000. Id. at 4.

274 Hill, supra note 39, at 530.

Litigants who attempt to offer an explanation are often silenced for speaking “out of turn.”276 Case outcomes reflect the difference that having counsel makes in receiving a favorable disposition,277 which sometimes is only achieved through appeal.278

IV. IMPLICIT BIAS AND CREDIBILITY DISCOUNTS

People of color are overrepresented in the criminal legal system, and Black women are “doubly disbelieved” and discredited as they encounter race- and gender-based stereotypes and biases by judicial officers, law enforcement, custody evaluators, and other justice system actors.279 In the family court system, many shortcuts are taken, such as mandatory custody mediation in domestic violence cases before evidence of abuse is heard,280 ex partee communications between judges and institutional providers in family court281 and consideration of criminal histories. Because Black women are significantly overrepresented in the criminal legal system, preconceptions based on criminal history particularly unfairly influence how Black women are treated in family court and when seeking protection from domestic violence.282 Judges and court actors in the family law and domestic violence context are commonly “swayed by myths that surround domestic violence and are influenced by gender, class, and racial bias.”283 Professor Dana Harrington Conner observes, “For battered women of color, the effect of judicial bias is often devastating given the multiple forms of oppression they face and the nature of racial bias.” She adds,

278. See, e.g., Daniel Pollack & Toby Kleinman, When to File an Emergency Appeal in Family Court, N.Y. L.J. 1, 1 (2021).
281. Hill, supra note 39, at 532.
282. Vicki Lens, Judging the Other: The Intersection of Race, Gender, and Class in Family Court, 57 Fam. Ct. Rev. 72, 75 (2019).
“Yet in other ways, justice is not blind; it sees clearly the battered woman’s gender, class, and race. Justice takes it in, assesses it, and finds her to be less believable, less deserving, and less relevant than her abusive male counterpart.” Race and gender biases are further compounded by mothers being held to higher standards of parenting, and criminal records prompt biases.

The economic disparities between judges and litigants also can fuel judicial biases and can make it difficult for judges to understand the hardships experienced by indigent litigants. Often, the issues raised in criminal and family courts “fundamentally arise out of poverty or lack of resources on the part of litigants.” Although the American Bar Association’s Model Code of Judicial Conduct prohibits judges from exercising socioeconomic bias when deciding cases, “judges can and do favor wealthy litigants over those living in poverty, with significant negative consequences for low-income people.” Socioeconomic inequalities, unjust economic structures, and oppressions exacerbated by poverty “demand[] renewed attention to the problem of judicial bias against the poor,” which is often compounded by racial bias and institutionalized racism.

Implicit bias, or “the process whereby the human mind automatically and unintentionally reacts to different groups in divergent ways,” operates in numerous contexts, but most often emerges when someone is in a stressful situation or “must make a decision under time constraints.” Judges are particularly susceptible to implicit bias because they are frequently in high-stress, time-constrained situations in which they make quick decisions with limited information in the process of maintaining objectivity and seeking the truth. Moreover, when persons believe themselves to be objective, they are more susceptible to the effects of implicit bias. Because a judge’s role also

284. Id. at 191-93.
291. Id.
actually involves substantial subjectivity, discretion exacerbates “the potential for the influence of bias, which constrains the information actually heard and considered.”

Reducing the negative impact of implicit bias is possible through awareness of implicit bias and conscious efforts to recognize bias and pause when making decisions. However, judges may be uniquely positioned to ignore or be unaware of their bias. While all individuals harbor implicit biases, judges are expected to cull through and “transcend such internal biases.” As a result, many judges believe they either do not harbor any bias or are not affected by internal bias, due to training to shield their decisions from extraneous influences, which makes it difficult for them to contend with implicit bias as a universal phenomenon and how their own unconscious biases may be embedded in their decision-making process. For example, in a survey of thirty-six judges, thirty-five of them (ninety-seven percent) believed that, relative to the other judges, they were in the top twenty-five percent in terms of their ability to avoid racial prejudice in judicial decision-making.

Even with additional training, some judges may not prioritize conscious deliberation and recognition of their biases due to the fast-paced, emotionally challenging nature of criminal and family law. As Professor Melissa Breger notes, “In an ideal world, countering bias would be an ongoing daily process, but as a practical matter, fighting bias may often fall lower on the priority list due to substantial dockets and the emotional toll of tough cases.” Across criminal and family courts, which both feature challenging issues, high emotion, crowded courtrooms with lengthy dockets, and repeat players, the quick decision making from the bench can be influenced by biases, including the stigma of a RAP sheet.

Empirical studies examining implicit bias in justice systems reveal implicit racial, gender, and socioeconomic biases flourish among judges in both

293. See, e.g., Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1225 (2009) ("When [judges] are motivated to avoid the appearance of bias, and face clear cues that risk a charge of bias, they can compensate for implicit bias."); Breger, supra note 286, at 1057 ("Psychological data repeatedly supports the proposition that both being aware of one’s own implicit bias and also being willing to change it actually lessons the effect of the bias."); see also Fatma E. Marouf, Implicit Bias and Immigration Courts, 45 NEW ENG. L. REV. 417, 447 (2011) ("Judges must become aware of the impact of implicit bias in order to question the soundness of their decisions and make the effort to render more impartial judgments.").
295. See Breger, supra note 286, at 1059; Kang et al., supra note 289, at 1172.
297. See id., at 1225.
298. Breger, supra note 286, at 1060.
criminal and family law realms and more broadly pervade law enforcement and the legal system. The following sections examine racial and gender bias.

A. Racial Bias

Unconscious stereotypes and implicit bias function automatically, and people act on race-based stereotypes in decision making even without being overtly racist. Under conditions of systemic triage—in systems challenged with allocating scarce resources—implicit racial biases thrive.

Extensive empirical research shows judicial race-based implicit bias and attitudes favoring white litigants over Black litigants. The Rachlinski study in 2009 produced the first set of data about implicit racial bias among criminal court trial judges and its impact on the criminal legal system. The researchers found that implicit bias is “widespread” among criminal court trial judges and that their implicit biases impact their decision-making. Notably, the white judges in the study demonstrated “a significantly larger white preference” than the Black judges. A more recent nationwide study examining implicit bias among over two hundred judges found that federal and state judges commonly held implicit biases against “even so-called privileged minorities.” These judges “harbored strong to moderate negative implicit stereotypes against Asian-Americans and Jews, while holding favorable implicit stereotypes towards Whites and Christians.” Scholars also observe that given the overrepresentation of Black defendants in criminal court, judges’

299. See Mark W. Bennett, The Implicit Racial Bias in Sentencing: The Next Frontier, 126 YALE L.J. F. 391, 398 (2017) (discussing implicit racial bias); Breger, supra note 286, at 1051-52 n.61 (discussing implicit gender bias); Kang et al., supra note 289, at 1146-53 (discussing implicit racial bias); Neitz, supra note 285, at 154-60.
300. See Baer, supra note 292, at 305.
301. See Kang et al., supra note 289, at 1129 (describing empirical research study showing implicit racial bias in judges).
302. Richardson, supra note 130, at 866 (noting that the challenge of implicit bias under conditions of systemic triage “is even more pernicious because its subtle nature makes it more challenging to expose and correct”).
304. Rachlinski et al., supra note 293, at 1196–97.
305. Id. at 1225.
306. Id. at 1210.
308. Id. at 63, 68-69 (These negative stereotypes associate Asians and Jews with immoral traits, such as “greedy,” “dishonest,” and “controlling,” and associate Whites and Christians with moral traits, such as “trustworthy,” “honest,” and “giving.” The study further found that federal district court judges sentenced Jewish defendants to marginally longer prison terms than identical Christian defendants and that implicit bias was likely the cause of the disparity).
repeat exposure to Black defendants “is apt to perpetuate negative associations” with any Black litigants appearing in court. 309

In addition to judges, the law enforcement officers, investigators, prosecutors, defense counsel, clerks, court personnel, and other legal actors across the adjudicative process are affected by implicit bias and exercise discretion, making the cumulative impacts of bias considerable. Compounded layers of bias permeate criminal matters, from responding police officers interpreting a suspect’s behavior through their own lenses and biases, 310 to prosecutors making charging decisions from these law enforcement reports while influenced by their own biases, meaning multiple levels of bias influence discretion in charging decisions. 311

Justice [Michael] Hyman notes that “these discretionary decisions are closely tied to the prosecutor’s evaluation of the suspect’s behavior and whether a suspect seems likely to be a future danger to society.” In short, “the perception of the defendant . . . alters the perception of the seriousness of the crime.” 312

Similarly, research reveals that race-based implicit bias infects prosecutorial decision-making, 313 public defense triaging, 314 and plea-bargaining. 315 Among criminal defense attorneys, implicit racial bias can impact the decisions they make about which cases to take, which witnesses to call to the stand, and whether they assume their client is guilty or innocent. 316

Likewise, system actors in family law hold implicit racial biases that impact the individuals involved in the cases. Researchers have concluded that “[c]ustody evaluators, lawyers, and judges are influenced by the racial, ethnic, and cultural backgrounds of the parents and the child in custody disputes”;

309. Rachlinski et al., supra note 293, at 1227.
312. Id. at 31.
316. Goodman, supra note 311, at 33.
“[i]mplicit biases may influence how custody evaluators, lawyers, and judges interpret parents’ behaviors and testimony”; and “[p]references for parenting styles favored by middle-class families disproportionately disadvantage racial and ethnic minorities and low-income families.”\textsuperscript{317} Court clerks, for example, serve as gatekeepers in civil court, and “may unconsciously respond differently to individuals of different races leading them to provide more help to some individuals than to others.”\textsuperscript{318} For example, the Author witnessed a court clerk tearing up a Black woman’s handwritten petition for a domestic violence civil protection order, with the clerk telling the pro se petitioner she did not have a case.

Overall, implicit biases of custody evaluators, mediators, and other court personnel and dispute resolution actors “exacerbate the prejudice to the fair administration of justice.”\textsuperscript{319} Given racial bias that pervades the criminal legal system, litigants of color are disproportionately affected when their criminal histories are used against them—often without being brought to their attention or addressed on the record—in family court. Black mothers are especially penalized.

\textbf{B. Gender Bias}

Judges and court actors also hold implicit biases regarding gender and often “view women as less credible than men.”\textsuperscript{320} A study conducted by the National Center for State Courts examined implicit bias within the judicial systems of forty-two states and found that judges in most jurisdictions “reached unfair decisions on the basis of personal characteristics such as gender.”\textsuperscript{321} The Gender Bias Task Forces of the 1990s\textsuperscript{322} consistently found that women “experience hostile, demeaning, or condescending treatment by attorneys and judges,” are often “held to higher standards than their male counterparts,”\textsuperscript{323} and “face continuing problems of credibility in the courtroom.”\textsuperscript{324} “Women are

\textsuperscript{318} Goodman, supra note 311, at 38–39.
\textsuperscript{319} Id.; see also Debra Lyn Bassett, Deconstruct and Superstruct: Examining Bias Across the Legal System, 46 U.C. Davis L. Rev. 1563, 1579 (2013).
\textsuperscript{320} Conner, supra note 283, at 176, 184.
\textsuperscript{322} Lynn Hecht Schafran, Overwhelming Evidence: Reports on Gender Bias in the Courts, 26 Trial 28-20, 28-30 (1990); Lynn Hecht Schafran, There’s No Accounting for Judges, 58 Albany L. Rev. 1063 (1995).
\textsuperscript{324} Washington State Task Force on Gender and Justice in the Courts, Executive Summary 4 (1989).
often denied equal justice, equal treatment, and opportunity," and "biased behaviors and attitudes at all levels of the judicial system affect women’s credibility in court" and impact "both the litigation process and case outcome." Additionally, the "adversarial nature of the family law system perpetuates gender inequities and often has severe financial repercussions for women." Recent research confirms that such gender bias in the judicial system persists today.

1. Disbelieving Abuse Survivors

In family law cases involving domestic violence, "judges tend to doubt the testimony of survivors" and are prone to question a female victim’s credibility and view her as exaggerating, especially in contrast with a self-confident male litigant accused of abuse.

Interviews of judges, prosecutors, and public defenders reveal common perceptions of domestic violence survivors.

They were frequently viewed as pathetic, stupid, or even deserving of the abuse they experienced if they stayed with the defendant and/or were uncooperative with the court officials. At the same time, when the women actively pursued the cases against their abusers, they were viewed as vindictive, crazy, or falsely charging domestic violence to meet their own selfish needs.

Because judicial gender bias is pervasive, "it is nearly impossible for the battered female litigant to receive a fair [custody] trial in the face of judicial gender bias." In a 2019 qualitative study based on interviews with judges adjudicating civil protection order cases, judges often discussed what they perceived as "flawed behavior on the part of the female plaintiff, suggesting

326. STATE BAR OF TEXAS, supra note 323, at 3.
327. Id.
328. Epstein & Goodman, supra note 279; Meier & Dickson, supra note 249.
329. Conner, supra note 283, at 177–78; see, e.g., In re Marriage of Goodpaster, G047295, 2014 WL 526494 (Cal. Ct. App. Feb. 11, 2014) (The trial court overlooked the wife’s claims of marital rape, and her argument on appeal of judicial bias was also denied.)
331. Conner supra note 283, at 191.
shared blame for the violence.”

Additionally, for cases the judges deemed “frivolous,” they “often characterized women as jealous and vengeful provocateurs, while male defendants were portrayed as rational actors.”

2. Penalizing Motherhood

Mothers face heightened scrutiny and paradoxical responses. Despite public perception that mothers fare better in family court than fathers, men who seek custody are often awarded sole or joint custody, even when facing allegations of domestic violence. Mothers are in a double bind. In a recent study of domestic violence protection orders and judicial decision making, researchers determined that judges simultaneously found that the presence of a child increased the judges’ perceptions of the severity of the seriousness of the domestic violence, and that “when a plaintiff uses words that may suggest custody is in dispute, it poses a threat to his or her credibility in the eyes of the judge hearing the case and in turn may prevent the judge from issuing the [domestic violence protection order].”

In addition to biases in favor of fathers’ expressions of desire for custodial time, judges often hold mothers to heightened parenting standards. For example, in the cross-over context of criminal or family law and dependency cases, a judge’s implicit bias that mothers are nurturing caretakers can result in finding that a mother was neglectful if she was not completely selfless in her actions. Professor Melissa Breger explains:

[A] judge holding implicit bias about what a “bad” mother should be, could result in a mother having her child put in foster care or later having her rights terminated. The judge may have an untenable standard of “mother” to live up to and “compound this with issues of poverty and lack of resources, along with race and age, and now you have a litigant facing a system that expects her to fail before she even walks into the courtroom.” In addition, “if a judge believes the litigant in the

333. Id. at 1140.
334. Meier, supra note 249, at 1.
courtroom has not mothered appropriately, it is much easier to agree with the child welfare agency that intervention or continued intervention is necessary.” Perhaps this is an explanation for why the majority of people accused of engaging in abuse or neglect are mothers. 338

Research shows that the “expertise that judges possess does not buffer them against the biasing influence of gender ideology” and that “judges’ support for traditional gender roles” 339 harshly penalizes mothers.

Implicit bias affects how cases are adjudicated, in part due to the significant judicial discretion judges have, including in applying a broad “best interests of the child” standard to any legal question regarding children, including decisions about child custody and visitation. 340 As noted in Part I, this best-interest standard “increases the risk of intuitive and biased assessments” 341 and creates the danger that a judge’s bias will result in the discounting of a litigant who is “at the margins of the dominant frame[work]” in family law. 342 Judges’ worldviews particularly “may guide what they will see and hear and credit,” 343 and affect their application of the best interest of the child standard in reflecting “narrow views of ‘mothering’” that are also reliant “on extrajudicial personal knowledge of a litigant or an event.” 344

V. FAMILY JUSTICE

R.H.’s case demonstrates how the title of a crime is a label divorced from underlying facts and then applied against a person to detrimental ends, without allowing for context, relevance, or redemption. R.H.’s RAP sheet stigmatized her and affected her ability to receive custody of her child and protection from


340. See Maldonado, supra note 317, at 213; Neitz, supra note 285, at 158–59 (finding that despite statutory and common law provisions outlining what trial courts may consider when deciding what is in the best interests of the child, some judges have demonstrated that they hold implicit biases in favor of the wealthier of the two parents); see also Elisa Reiter & Daniel Pollack, Evaluating the Evaluator: Implicit Bias in Determining Parental Judgment, TEX. LAW. (May 31, 2023), https://www.law.com/texaslawyer/2023/05/31/evaluating-the-evaluator-implicit-bias-in-determining-parental-judgment/?slidextension=20230501124928 [https://perma.cc/3U57-EHH7].

341. Baer, supra note 292, at 333 (“The more vague and ambiguous a term or phrase in a statute and with the allowance for judicial discretion, the more room there is for judicial bias of all types to play a part in defining it.”); Conner, supra note 283, 165, 197; Maldonado, supra note 317, at 213.


343. Id. at 587, 605.

344. Id. at 561, 573.
domestic violence. Her experience of the family court judge viewing her RAP sheet before hearing evidence is not unique; this occurs in family courts across the nation. What was unique was that, at the outset of the case and before taking evidence, the judge stated in open court his view of R.H. based on her criminal history, and, in delivering his ruling, articulated his reliance on her criminal history in judging her credibility and in deciding child custody and the cross-petitions for civil restraining orders.\textsuperscript{345} This reliance on criminal history is typically more covert and veiled in family court.

Law has the capacity for reproducing violence and entrenching systemic inequities. This occurs frequently through the influence of and reliance on criminal convictions when adjudicating domestic violence protections and children’s custody and adoption. To begin to unravel family court’s reliance on criminal convictions and harm emanating from biases that accompany RAP sheets, a continuum of measures can be implemented.

This Part offers normative recommendations about the role of convictions in family law. Section A sets forth a statutory scheme to remedy the harmful reliance on convictions in family court. Subsection 1 classifies specific types of convictions that may be viewed by judges and the timeframe since disposition. Subsection 2 provides research on reforming domestically abusive behavior, which is relevant for the recommended timeframe. Subsection 3 identifies the imperative to provide litigants with opportunities for offering explanation, context, and narratives of changed circumstances or redemption. Section B discusses parallels to recently expanded expungement and vacatur relief, arguing that the recommendations of Section A are a necessary extension.

\textit{A. Statutory Reforms to Remedy Harmful Reliance on Convictions}

The currently covert practice of viewing entire criminal histories must be legislatively reformed and restricted so criminal convictions cease being a shortcut to adjudicating safety and caretaking.

\textit{1. Limiting Type and Timeframe of Convictions Judges View}

Rather than judges viewing entire RAP sheets before or while litigants appear before them, the stigma of convictions and the racial bias that pervades the criminal legal system warrant the wholesale removal of RAP sheets from case files—including electronic access to litigants’ lifetime criminal case histories. To this end, legislatures can limit judges’ access to and reliance on litigants’ criminal records through statutory reform.

\textsuperscript{345} Transcript on file with the Author.
A system that only brings highly relevant, probative, and recent criminal convictions to the judge’s purview is needed. Currently, courts and judges are broadly furnished with criminal history information. Judges are left to devise how to utilize the criminal histories they view, in addition to applying the statutes requiring or permitting review of criminal histories and convictions in domestic violence, child custody, adoption, foster care, and other family law matters. But the presence of any criminal history can bias a factfinder, and much of the content of a RAP sheet reveals surveillance based on race and income instead of being probative or relevant to the present need for protection from domestic violence or to custodial decisions.

Legislatures should specify that only convictions for domestic violence, child abuse, firearms, or violent felonies can be included in case files or accessible to judges when litigants come before them. To further mitigate bias, legislatures can also require that judges only view the limited criminal conviction information after the case in chief is presented by both parties. Court rules, which are promulgated through a combination of legislative and judicial action, govern the operation of courts and can set forth the process for permitting review of enumerated convictions while limiting judicial access to broader arrest and criminal history. Clerks can review criminal records for the presence of specified crimes, or, more pragmatically, because criminal histories are held in electronic databases, computer programs can be developed with search parameters and produce the outputs.

Rules of evidence generally prohibit evidence of other crimes, wrongs, or acts to show propensity for particular conduct, but exceptions for domestic and sexual violence and child abuse now exist, recognizing the pattern of abuse and coercive control and recurrent nature of intimate partner and family violence. The proposal to eliminate entire RAP sheets from view and instead reveal only select convictions is consistent with recent jurisprudence and social science on preventing domestic violence, but importantly does not expose entire criminal histories including solicitation or prostitution charges, drug possession, economic crimes, and other offenses.

347. Infra Part I.
350. FED. R. EVID. 404; CAL. EVID. CODE § 1101; IDAHO R. EVID. 404.
In reversing the unfavorable rulings against R.H., the Court of Appeal held that R.H.’s misdemeanor convictions for child endangerment and second-degree burglary were not “violent” offenses or among the statutorily listed convictions to be considered. Instead, “violent” crimes involve “physical force, sexual contact, physical injury or destruction of property, fear, coercion, or duress.” Moreover, these crimes had no connection to the acts of violence between K.L. and R.H.; they were committed before these two individuals even began a dating relationship, and were not committed against K.L., which the trial court judge had failed to hear or weigh.

Timeframes should be imposed by statute, such as considering criminal records from only the past five or ten years, as discussed in the next section. Imposing a time limit is necessary to prevent dated histories from forever haunting litigants now needing protection from domestic abuse or seeking child custody or caretaking rights. Litigants could raise additional histories they posit to be relevant, but such histories would not automatically be available to and viewed by factfinders.

2. Timeframe Consistent with Reforming Domestically Abusive Behavior

Survivors’ advocates who routinely rely on arguments about convictions to gain advantages in civil family law cases may argue that past behavior predicts future behavior and object to limits on use of criminal histories. However, survivors, too, are criminalized and unfairly have criminal histories interfere with their safety and parenting. Furthermore, allowing awareness of convictions for domestic violence, child abuse, firearm offenses, and violent felonies from the prior five to ten years is consistent with research on recidivism and is lengthier than the post-conviction duration for eligibility for expungement or vacatur.

Regarding reforming domestically abusive behavior, turning points in the lives of those experiencing or utilizing abuse in relationships include specific incidents, circumstances, or “wake-up call[s]” that permanently change how

354. R.H., 285 Cal. Rptr. 3d at 576.
355. Cf. CAL. FAM. CODE § 3044 (imposing a rebuttable presumption against anyone claiming parental rights to receive sole or joint legal or physical custody if they have been found to commit domestic violence or child abuse during the prior five years).
356. Infra notes 369-71 and accompanying text; see also Hyanghee Lee, Stability and Change in Men’s Intimate Partner Violence and Substance Use in Early Adulthood, 38 J. INTERPERSONAL VIOLENCE (2023) (finding over a two-year period that two-thirds of men they studied remained in the same abuse classification, while those who transitioned categories “was most often to a less severe IPV typology”).
they] view the violence, their relationship[s], and how they wish to respond." Particularly significant turning points in abusive partners’ decisions to change their abusive behavior include “fear of losing their partner or family,” criminal sanctions, “and an awareness that they were becoming like their abusive father.” An external motivation for abusive parents to change is a desire to reconnect with their children; however, seeking access to one’s children does not equate with motivation to realize the harm that domestic violence inflicts on children. Parallel to the external motivation of wanting to see one’s children, an abusive parent’s internal motivation might be to become a better father or mother. Intrinsic motivation for transformation is associated with increased long-term behavior change away from utilizing violence and coercive control and factors such as absence of stalking and having higher socioeconomic status are associated with the cessation of physical abuse.

As can be expected, in some cases when an abusive partner or parent believes they have changed their behaviors, their understanding of the harm they have caused or how to sustain changed behavior does not translate to increased safety for survivors. For example, perpetrators of abuse commonly deny their use of violence against a partner and instead reframe physical abuse as being against an object rather than a person. Some abusive individuals characterize their violence as one-off incidents that resulted from not thinking, constructing their abuse as “minor, context-specific, and limited in its impacts, rather than a major and destructive force in their families’ lives.” Histories of committing high-level, severe violence also are associated with ongoing abuse. The balance struck by this Article’s proposal would allow a litigant to testify to problem behaviors and raise relevant histories, while preventing or limiting the introduction of entire histories of irrelevant criminal legal interactions.

359. Id. at 36.
361. Id. at 272.
362. Id. at 271.
364. Sheehan et al., supra note 358, at 31.
366. See id. at 889 (reporting on interviews of thirteen people who have been abusive).
367. Id. at 891.
368. Cordier et al., supra note 30, at 824.
Related to concerns of recidivism, expungement research across multiple categories of offenses, which is discussed in the final section, shows that few people who receive expungements reoffend. Research indicates that “people who have limited criminal records and have gone at least five years since their last conviction are simply very low risk to begin with.”

Regarding violent offenses, only 0.3% of defendants who had a violent offense expunged were convicted of a subsequent violent offense within two years, and only 0.8% are reconvicted within five years. Across all offenses, seven percent of all expungement recipients are rearrested within five years post-expungement, and reconviction rates are 4.2% for any crime and 0.6% for a violent crime. Community, socioeconomic, and other factors may affect who seeks expungement, which indicates the need for additional supports.

3. Opportunities for Context, Explanation, and Redemption

In R.H.’s case, when we sought to provide explanation and context about R.H.’s convictions, the judge chided us for daring to offer a defense. He instead read the statutory definition of child endangerment into the record. But the label of a conviction does not reveal underlying facts or context or allow for redemption, unlike recent expungement and vacatur laws allowing for “forgiving and forgetting.”

Inviting and understanding facts—including those that don’t match the criminal label—and context are crucial for overcoming the persistence of racial disparities in legal systems, especially to challenge the relevance and validity of criminal histories. Redemptive narratives can further recognize negative past histories or events and present an individual’s growth, recovery, resolution, and ways of overcoming adversity.

370. Id. at 2517.
371. Id. at 2466.
372. Transcript on file with the Author.
375. Brianna C. Delker, Rowan Salton & Kate C. McLean, Giving Voice to Silence: Empowerment and Disempowerment in the Developmental Shift from Trauma “Victim” to “Survivor-Advocate,” 21 J. TRAUMA & DISSOCIATION 242, 246, 251 (2020) (identifying both advantages and constraints of redemptive narratives, including how expressions of “feelings of raw anger attached to trauma and injustice” may be off-putting to the listener and to how white women’s experiences may be privileged); Merry Morash, Rebecca Stone, Kayla Hoskins, Deborah A. Kashy & Jennifer E. Cobbina, Narrative Identity Development and Desistance from Illegal Behavior Among Substance-Using Female Offenders: Implications for Narrative Therapy and Creating Opportunity, 83 SEX ROLES 64 (2020) (describing
If a judge receives criminal history information from a clerk or litigant, the judge should be required to identify this on the record. Covert judicial practices and lack of disclosures are increasingly of concern, and transparency is necessary to begin addressing judicial bias, including bias prompted by convictions.\textsuperscript{376} Without identifying on the record that convictions have been viewed, the stigma and bias of convictions persist and remain hidden from the record for appellate review.

Once statutorily enumerated convictions are identified, litigants must be allowed to provide explanation and context, in addition to arguments pertaining to the ongoing relevance and weight of the conviction. The importance of narrative has been extensively explored, including for making meaning in courtroom settings, countering assumptions and dominant narratives, and providing client-centered representation that supports litigants' dignity and autonomy.\textsuperscript{377} Creating opportunity for explanation, counternarratives, and understanding beyond factfinders' own lived experiences is necessary to enable them to properly evaluate the probative value of recent convictions for domestic violence, child abuse, firearm offenses, or violent felonies.\textsuperscript{378} Most women charged with domestic violence are abuse survivors whose use of “force for particular, contextualized reasons” was not taken into account pursuant to mandatory arrest policies.\textsuperscript{379} Instead, their “reasoning behind the choice to use violence remains unimportant in our current criminal legal system.”\textsuperscript{380} Given the criminalization of abuse survivors, the frequency with which survivors are arrested in the process of seeking help,\textsuperscript{381} and how successful redemption narratives as including efforts at internal change and identifying prosocial qualities within oneself).

\textsuperscript{376} See Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2023) (detailing that, since 2017, the Court has dramatically expanded its use of the behind-the-scenes “shadow docket” without public hearings or explanation); Paul Waldman, Welcome to the Supreme Court, Where Corruption Has No Meaning, WASH. POST (June 22, 2023), https://www.washingtonpost.com/opinions/2023/06/22/supreme-court-corruption-altlo/ [https://perma.cc/HST2-TWW3].


\textsuperscript{379} Cross, supra note 107, at 98.

\textsuperscript{380} Id. at 99.

\textsuperscript{381} Goodmark, supra note 6, at 44.
survivors with criminal histories challenge stock stories of “victimhood” and “worthiness,” inquiry should be made into facts surrounding arrests and convictions for abuse, rather than presuming harm, guilt, and any ongoing danger.

This Article refrains from recommending abolition of judicial awareness of all criminal records in the civil family law and domestic violence protection order context for several reasons. First, recent convictions for domestic violence or child abuse may reveal present and escalating danger or patterns of intimate terrorism. Firearm offenses particularly signify lethality and are relevant to protection from abuse. Convictions for violent felonies, while not dispositive, are more likely to have relevance to determinations of child custody, adoption, foster care, or protection from domestic violence compared to a system of misdemeanor processing by pleas.

Judges are influenced by the presence or absence of a criminal record, yet while evaluating the implications of criminal histories to family law, it is worth noting that most domestic violence is never reported to law enforcement, and the absence of related arrests and convictions fails to indicate a lack of history of abuse. Due to the unpredictability of police response, police as a force of oppression in vulnerable communities, and not wishing to criminalize one’s partner, most abuse is never reported. Like many abuse survivors, although R.H. had experienced gun violence, sexual assault, and physical abuse during pregnancy, she did not report this abuse to the police. Furthermore, the police response she received when she was abused outside of the police station at which visitation exchanges occurred did not protect her. In sum, inferences about the validity of domestic violence allegations cannot be made from the absence of police reporting.

Finally, imperatives of the Black Lives Matter movement include avoiding minimizing harms experienced by people of color, bringing justice to atrocities perpetrated against Black people, and supporting a broader consciousness

383. See, e.g., Smith v. State, 501 S. E. 2d 523 at 529 (Ga. Ct. App. 1998) (concluding that admission of a prior bad act against a separate victim was proper since the previous act, attacking a prior intimate partner with a machete, was sufficiently similar to the current charge of attacking the current intimate partner by dousing her in lighter fluid and igniting the fluid, in that defendant is motivated to attack his intimate partners with weapons).
determined to fight for justice for Black people, including Black women experiencing abuse. Justice looks different to different people, and given persistent disbelief and discounting of abuse—especially experienced by women of color—it may validate survivors to have records of their victimization available when seeking protection from abuse or child custody orders. Mindful of this history and continuing reality, this Article does not seek to abolish the awareness of all convictions and instead presents statutory recommendations regarding select and highly probative convictions.

B. Reform Consistent with Expanded Expungement and Vacatur Laws

With heightened attention to the harms of mass criminalization, collateral consequences of convictions, and the ready availability of criminal records via technology that prevents ex-offenders from securing stability, many states have adopted laws for expunging, sealing, or vacating criminal histories. States are increasingly loosening eligibility requirements for expungement and easing procedural burdens, and several states now provide for the automatic expungement of certain convictions. While judges, law enforcement, and court actors and government agencies can generally still view expunged records, the covert practice of judges viewing criminal records without informing litigants or providing opportunity for explanation is contrary to legislative intent behind the recent expansion of vacatur and expungement laws.

Expungement is the process by which records are destroyed, purged, sealed, or otherwise rendered unavailable from the view of certain


388. Decker et al., supra note 209, at 773-74.

389. See generally JACOBS, supra note 1 (identifying how, for over sixty million Americans, possessing a criminal record overshadows all aspects of their public identities); SARAH ESTHER LAGESON, DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARM OF DATA-DRIVEN CRIMINAL JUSTICE (2020) (examining the proliferation and dissemination of online criminal records).

390. Roberts, supra note 8, at 325; Love et al., supra note 8, at 348.

391. See CAL. PENAL CODE § 1203.425(a)(2)(E) (West 2020); CONN. GEN. STAT. §§ 54-130a, 54-142a, 54-142l (2023); N.J. STAT. ANN. § 2C:52-5.3 (2022); 18 Pa. CONS. STAT. § 9122.2 (2019); UTAH CODE ANN. § 77-40-102(5)(a)(ii)(A)- (C) (LexisNexis 2020).

392. See Burton et al., supra note 7, at 126.
individuals. Vacatur goes further by reversing the actual adjudication or finding of guilt, thereby removing a criminal conviction as if the person had never been found guilty of an offense. Legal relief of expungement or vacatur then allows individuals to apply for housing, jobs, schools, and public benefits “as though their convictions did not exist.”

Related to discussion of the criminalization of abuse survivors, vacatur has particularly become available for human trafficking survivors, as conceptions of those trafficked changed from villainizing to victimhood. While relief lacks uniformity across states, many states allow for prostitution or solicitation charges and convictions to be vacated, and some states extend relief to related offenses and nonviolent offenses. Vacatur laws treat with sympathy and nuance the complex dynamics experienced by sex trafficking survivors, and vacatur assists in stabilizing their lives and building futures apart from the commercial sex industry.

Legal and practical barriers, however, prevent many defendants from petitioning for expungement or utilizing vacatur laws. Empirical research of defendants across Michigan, for example, shows “that only 6.5 percent of all eligible individuals receive an expungement within [the first] five years” of qualifying for relief, a “discouragingly low” uptake rate. Nationwide

395. Prescott & Starr, supra note 369, at 2463.
397. Melissa Owens, Human Trafficking Victims’ Need for Vacatur: Demolishing Roadblocks to Freedom, 28 AM. U. J. GENDER, SOC. POL’Y & L. 203, 211-14 (2020) (As examples of statutory requirements, vacatur laws impose statutory limits on the nature of crimes for which relief is available across states, timeframes of criminalization occurring while someone was victimized instead of before or after, nexus requirements that alleged crimes were committed as a result of being victimized, and due diligence in timely pursuing relief), see, e.g., CAL. PENAL CODE 236.14 (2022).
398. Kate Mogulescu, The Public Defender as Anti-Trafficking Advocate, an Unlikely Role: How Current New York City Arrest and Prosecution Policies Systematically Criminalize Victims of Sex Trafficking, 15 CUNY L. REV. 471, 479 (2012), Vacatur of Convictions for Victims of Sex Trafficking, Jan. 2021, VIRGINIA STATE CRIME COMMISSION, https://vscc.virginia.gov/2021/VSCC%20Sex%20Trafficking%20Victim%20Vacatur%20Study%20Highlights%20FINAL.pdf [https://perma.cc/TM7C-GKS2] ("Sex trafficking victims engage in a variety of criminal activity as a result of manipulation, coercion, deception, force, or intimidation by their trafficker. These victims frequently form a bond with their trafficker, and therefore do not see themselves or self-identify as victims until after they have left the commercial sex industry. These dynamics cause significant challenges in identifying victims, and therefore the criminal justice system often treats victims of sex trafficking as criminals.").
399. Amy Shlosberg, Evan Mandery & Valerie West, The Expungement Myth, 75 ALB. L. REV. 1229, 1232 (2012) (finding that nearly half of exonerees have evidence of the crime for which they were wrongfully convicted on their criminal record).
400. Prescott & Starr, supra note 369, at 2466.
research strikingly shows that nearly half of exonerees still have evidence of the crime for which they were wrongfully convicted on their criminal record.401

Overall, recognition of the barriers convictions pose, often-sympathetic contexts in which convictions arise, and possibilities for forgiving or forgetting prior convictions can influence reform regarding reliance on convictions in family court. Given the bias of convictions and frequent lack of relevance and reliability, this Article proposes generally removing criminal histories from family court—with statutorily limited exceptions—to more fully achieve reform movements underway.

CONCLUSION

The anti-domestic violence movement of the 1970s controversially partnered with law enforcement and the criminal legal system in mandating criminal responses to domestic violence.402 Survivors of color warned against doing so,403 and decades have shown that our legal system cannot prosecute the way out of domestic violence.

The structural conditions of both family court and criminal court—as high-stakes venues featuring overwhelming caseloads, complex problems, hurried paces, and inadequate resources404—encourage shortcuts. With courts and judges being furnished with litigants’ criminal history information,405 the bias of and reliance on criminal histories in family court facilitates and perpetuates racialized harms.

R.H.’s case demonstrates how the title of a crime is a label divorced from explanatory facts and weaponized to detrimental ends, without allowing for context, relevance, or redemption. Anti-racist policymaking and reimagining our public safety systems require addressing the collateral consequences of convictions in family law, which haunt individuals, families, and communities, as R.H.’s RAP sheet stigmatized her and affected her ability to receive protection from domestic violence and custody of her child. Measures recommended in this Article can begin to remove and remedy family court’s harmful reliance on criminal convictions.

401. Shlosberg et al., supra note 399, at 1229.
404. Hill, supra note 39, at 531.