

NOTES

NOT IN FRONT OF THE CHILDREN: PROHIBITION ON CHILD CUSTODY AS CIVIL BRANDING FOR CRIMINAL ACTIVITY

DEBORAH AHRENS*

During the past twenty years, several states have implemented statutory and common law presumptions against child custody for persons convicted of selected crimes. In this Note, Deborah Ahrens argues that these measures represent an effort to mark convicted persons socially, rather than an attempt to protect children. Because the “best interest of the child” standard currently permits courts to take into account any factors which affect child well-being when awarding custody, and because conduct considered under new law includes conduct outside the parenting ambit, statutory and common law presumptions operate to brand convicted persons as “other.” Ahrens analogizes new child custody provisions to other forms of collateral civil punishment for convicted persons, including disenfranchisement and deportation. The Note concludes that because these legal measures assume that the sort of person who would commit a crime is the sort of person who would harm a child—absent any evidence that the parent poses a danger to the child—parents convicted of selected crimes are unjustly denied child custody.

INTRODUCTION

Among the sternest penalties a society can impose is to deny individuals the ability to maintain relationships with their own children or to designate them too dangerous to live with the children of their partners. Traditionally, the “best interest of the child” standard has required courts to allocate custody to parents based on the conduct of those parents toward the child, rather than on the conduct of those parents toward their community.¹ Over the course of the past fifteen years, however, states and courts have begun to qualify parental custodial² potential based on criminal conduct. Common law and stat-

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¹ See *infra* notes 66-70 and accompanying text.

² For the purposes of this Note, and unless otherwise indicated, “custodial” eligibility and “custody” determinations involve determinations of parental primary custody, joint custody, and visitation rights.

utes now single out parents convicted or accused of selected crimes and apply new presumptions and prohibitions against them. In many jurisdictions, persons who commit these crimes, even upon completion of their sentences, become presumptively unfit under the law to raise children.

This phenomenon represents something more than a change in American custody law. It also constitutes an important new form of "civil branding": criminal sanctions imposed as much for their communicative effect as for the policy aims they achieve.³ When a par-

³ "Othering" is the process by which a society defines what is "normal" through the use of counterexamples, creating a binarism in which the "normal" depends on the "other" for its normalcy. Eve Kosofsky Sedgwick, discussing the creation of a binarism in the sexual orientation context, provides an excellent narrative of the othering process. She describes it in terms of:

symmetrical binary oppositions . . . according to which, first, term B is not symmetrical with but subordinated to term A; but, second, the ontologically valorized term A actually depends for its meaning on the simultaneous subsumption and exclusion of term B; hence, third, the question of priority between the supposed central and the supposed marginal category of each dyad is irresolvably unstable, an instability caused by the fact that term B is constituted as at once internal and external to term A.

Eve Kosofsky Sedgwick, *Epistemology of the Closet* 9-10 (1990). Othering, furthermore, portrays the traits that distinguish the "other" as a constitutive part of the person's identity, rather than as narrower character traits or isolated actions.

An extensive literature explains how modern Western societies have utilized this technique to order and routinize behavior. Michel Foucault, for example, argues that the modern Western world has constructed the "criminal," the "insane," and the sexually "depraved" in order to normalize persons who are not constructed as members of these categories. See Michel Foucault, *Discipline and Punish* 251-56 (Alan Sheridan trans., Vintage Books 1979) (1978) [hereinafter Foucault, *Discipline and Punish*] (discussing construction of criminally "delinquent"); Michel Foucault, *The History of Sexuality* 36 (Robert Hurley trans., Vintage Books 1990) (1978) (discussing construction of persons "depraved" or "perverse"); Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason* 11-12 (Richard Howard trans., Pantheon 1965) (1961) (discussing social construction of "madness").

Foucault's methodology has played an important role in shaping the literature in the field of criminal sanctions. See, e.g., *Principled Sentencing: Readings on Theory and Policy* 414 (Andrew von Hirsch & Andrew Ashworth eds., 1998) [hereinafter *Principled Sentencing*] (describing ideological importance to modern penology of drawing "[s]harp distinctions . . . between ordinary, respectable persons and various 'undesirables' who supposedly threaten the physical and moral health of the community"). The criminal sanctions literature explicates the cultural meanings and social realities embedded in a given society's penological practices. See, e.g., David Garland, *Punishment and Modern Society: A Study in Social Theory* 251-52 (1990) ("Punishment . . . is a communicative and didactic institution [P]enality communicates meaning not just about crime and punishment but also about power, authority, legitimacy, normality, morality, personhood, [and] social relations"); Thomas Mathiesen, *Prison on Trial: A Critical Assessment* 137 (1990) (studying the "important ideological functions" prison serves "in advanced welfare-state capitalist societies"); see also Foucault, *Discipline and Punish*, supra, at 23 (describing his study of modern prison as investigation into "punishment as a complex social function" and describing punishment as "a political tactic").

ent's criminal actions represent a genuine danger to his or her child, the "best interest of the child" standard gives such actions their due weight. To the extent that new rules are aimed at such cases, they are duplicative. To the extent that they are directed at situations in which the parent poses no threat to the child, they are pernicious. What they have in common in all situations is that they reflect a societal need to mark those who have transgressed social boundaries as "other." As scholars have observed in the context of other criminal sanctions, "the convicted offender is excluded from the moral universe of discourse, and is made to serve merely as the object of and conduit for public messages of denunciation."⁴ By denying a person who commits a crime custody of a child, society reinforces his or her status as a "criminal."

Concededly, there never may have been a time when persons convicted of crimes⁵ emerged from prison purged of sin and restored to full citizenship.⁶ In practice, criminal convictions always may have tainted an individual's character in the eyes of society, and that taint never may have been eradicated by having been "cured" or by having paid a "debt to society." Nevertheless, the formalization of such opprobrium in law, particularly in the area of child custody and family formation, is a recent development. During the same period in which federal sentencing guidelines and state criminal laws have increased the length of time convicted persons spend imprisoned, jurisdictions increasingly have imposed additional civil sanctions on persons convicted of offenses.⁷ Further, courts now modify the custodial rights of persons who may have engaged in criminal behavior, but who never have been convicted in criminal court.⁸ The penalty paid by persons who break the law now complements increased time behind bars with increased post-release shunning by civil society. Assuming that the

⁴ Principled Sentencing, *supra* note 3, at 416.

⁵ This Note will refer to persons who have pleaded guilty to crimes, been found guilty at trial, or otherwise been found to have engaged in criminal activity as "persons convicted of sexual offenses" or "persons who have committed sexual offenses" rather than as "sexual offenders." The purpose of this Note is to indicate the extent to which an individual's "status" as a person who has perpetrated or been convicted of a crime now follows them into civil life and marks their civic identity. This Note will thus avoid referring to such persons by a shorthand designation that suggests that their convicted status comprises their identity.

⁶ See *infra* Part I.A.

⁷ This Note does not address the issue of whether civil sentencing alternatives are preferable to imprisonment; thoughtful critiques of current prisons as failed institutions are numerous. See, e.g., Roy D. King, Prisons, in *The Handbook of Crime and Punishment* 589 (Michael Tonry ed., 1998). This Note focuses on civil sanctions employed in addition to, rather than instead of, imprisonment.

⁸ See *infra* note 86 and accompanying text.

criminal justice system was once concerned with reclaiming or rehabilitating offenders and restoring them to their communities, our current program of sanctions undercuts that goal.

The extent to which such persons actually are considered dangerous is questionable. Several factors make new laws appear to be based less on careful consideration than on societal frustration with criminal activity. First, courts and legislatures have focused on criminal activity rather than on similar behaviors outside of the parenting ambit that might logically affect child rearing—for example, spending eighteen hours each day at a law firm or exposing oneself to unnecessary recreational risk (such as racing cars). Second, these presumptions require no showing that the parent's conduct toward the child has been deleterious, either via some objective external standard or from testimony or psychiatric evaluation of the child involved; the individual's transgressive conduct renders him or her *per se* an unfit parent. Finally, the particular crimes singled out through legislation and adjudication seem to be crimes that—sometimes appropriately, sometimes not—carry harsh social stigma. Sexual violence, “drug culture” involvement, and abuse of romantic partners are crimes that—in contrast with armed robbery, stranger assault, or insider trading—carry moral taint beyond the transgression of criminal statutes.

Ironically, family formation is one of the few factors that significantly affects the recidivism rates of persons who commit crimes; familial stability both provides a social network whereby persons can access housing, employment, and emotional support, and offers a disincentive for recidivism.⁹ When parents are constructed as criminal for the purposes of awarding custody, this determination does two things: First, it offers an additional punishment to the marked parents, multiplying whatever social sanction inheres in the criminal statute by civil sanctions not contemplated by the criminal code. Beyond that, it makes it less likely that parents will ever be able to reintegrate into society and reform.

These measures are of particular concern because of the populations that they affect. First, custodial presumptions generally are triggered only when a family moves away from the married heterosexual couple model and toward a position where custody is contested. Further, women and minorities in particular are likely to come under the scrutiny of both family courts and the criminal justice system: During

⁹ See Stephanie J. Millet, Note, *The Age of Criminal Responsibility in an Era of Violence: Has Great Britain Set a New International Standard?*, 28 *Vand. J. Transnat'l L.* 295, 332 n.241 (1995) (“Most studies show that family contact helps to reduce recidivism rates.”).

the past twenty-five years, arrest and incarceration rates for women¹⁰ and minorities¹¹ have increased relative to those of white men. Much of this growth is attributable to increased prosecution and incarceration of nonviolent persons who use or sell drugs.¹² Further, as women who do commit acts of violence are more likely than men to commit those acts against relatives or partners,¹³ presumptions against child custody for persons who assault intimates may particularly affect women.¹⁴

¹⁰ See Kate DeCou, *U.S. Social Policy on Prostitution: Whose Welfare is Served?*, 24 *New Eng. J. on Crim. & Civ. Confinement* 427, 442-43 (1998) (arguing that "getting tough on crime" movement and related criminal justice changes are responsible for increased incarceration of women); Paula C. Johnson, *At the Intersection of Injustice: Experiences of African American Women in Crime and Sentencing*, 4 *Am. U. J. Gender & L.* 1, 43-44 (1995) (finding that number of women in New York state prisons increased significantly during 1980s); Lorraine Schmally, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 *Wis. Women's L.J.* 283, 300 (1996) (describing women as fastest-growing segment of prison population, with their presence rising 75% from 1986 to 1991).

¹¹ See Bureau of Justice Statistics, *U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics* 546 (Kathleen Maguire & Ann L. Pastore eds., 1994) (noting that African American men represented 49% of state prison population and 33.7% of federal prisoners); Marc Maurer, *Intended and Unintended Consequences: State Racial Disparities in Imprisonment* (The Sentencing Project, 1997) <<http://www.sentencingproject.org/policy/9050.htm>> (finding that 38 states and District of Columbia increased racial disparity in their incarceration rates from 1988 to 1994, and that rate of incarceration for blacks in state prisons—compared to rate for whites—increased from 6.88 times to 7.66 times more).

¹² See Cynthia Godsoe, *The Ban on Welfare for Felony Drug Offenders: Giving a New Meaning to "Life Sentence,"* 13 *Berkeley Women's L.J.* 257, 261 (1998) (noting that, in California, 39.7% of women are in prison for drug-related offenses, and incarceration rate for black women has been particularly high); Honorable Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 *Notre Dame L. Rev.* 439, 494 n.296 (1999) ("In recent years, women, particularly women arrested on drug charges, have constituted the fastest growing population within the criminal justice system." (quoting Jean Wellisch et al., *U.S. Dep't of Justice, Drug-Abusing Women Offenders: Results of National Survey 1-6* (1994))); Johnson, *supra* note 10, at 44 (noting that in New York state prisons 61.2% of women, versus 32.2% of men, were incarcerated for drug offenses, and that incarceration rate was rising faster for women than for men); Maurer, *supra* note 11 (finding that number of African Americans imprisoned for drug offenses from 1986 to 1991 increased 465.5%, and that increase in number of convicted black drug offenders "far outpaced" white rate).

¹³ See Schmally, *supra* note 10, at 301 ("When women are violent, their violence is usually directed against a family member. Data from 1991 showed that, nationwide, one-quarter of the women in prison for violent crimes were convicted of the homicide of a relative or an intimate.").

¹⁴ A large number of incarcerated women either are currently mothers or enter prison pregnant. See Catherine Conly, *The Women's Prison Association: Supporting Women Offenders and Their Families* 3-4 (Nat'l Inst. of Justice Program Focus 1998) <<http://www.ncjrs.org/pdffiles/172858.pdf>> (finding that dramatic rise occurred in number of women in federal and state prison and that, in 1991, six percent of women were pregnant when they became incarcerated).

Past articles have located the discussion of these new custody measures in the policy literature: Advocates argue for presumptions against and prohibitions on persons convicted of crime by asserting that fewer children will be abused as a result.¹⁵ This Note, however, interprets these civil laws through the lens of the criminal sanctions literature.¹⁶ To understand the social meaning of this new sanction, this Note takes an expressly historical approach. Part I describes both the various sanctioning regimes that have at one time or another dominated in the United States and the modern phenomenon of attaching civil sanctions to criminal convictions and sentences. This Part demonstrates how, over time, persons who commit crimes have been transformed in their social construction, and now are constructed as intrinsically and irredeemably criminal. Part II focuses in detail on recent developments in civil sanctions relating to the ability of convicted persons, or persons suspected of crimes, to form or remain in families with children, and reviews legislation and case law in the areas of domestic violence, sexual offenses, and drug-related felonies. Reading these cases and laws with appreciation for both their historical roots and their cultural connotations, their gaps, silences, and repetitions, speak volumes. Whatever other policy goals they serve, custodial prohibitions now function to mark permanently those who transgress the law. Marked once as criminal, the parent serves for life.

I

THE (RE)EMERGENCE OF CIVIL BRANDING

Historically, persons in the United States who transgressed criminal law were socially marked so that community members could themselves regulate the social environment and contain crime.¹⁷ After two centuries of increasing dependence on the penitentiary as both a means for segregation and a site for treatment and rehabilitation, criminal law has come full circle: Persons committing crimes are again socially identified outside of a correctional setting.¹⁸ This Part describes the history of criminal sanction in the United States and the modern trends toward lengthy, fixed sentences, retribution-based justice, and civil branding. These modern trends provide context for increased modern regulation of the custodial relationships of adults who have violated criminal laws. Within this context, new prohibitions can

¹⁵ See *infra* notes 96-99 and accompanying text.

¹⁶ For a discussion of the goals and methods of the criminal sanctions literature, see *supra* note 3.

¹⁷ See *infra* note 22 and accompanying text.

¹⁸ See *infra* notes 43-49 and accompanying text.

be understood as an indication that, once again, we view "criminality" as an innate quality.

A. *A History of Sanction*

At its inception, American criminal justice did not place prisons or the notion of retribution at the center of its system of punishment.¹⁹ Crime was initially understood as a phenomenon produced by original sin and innate human flaws, one with which society need cope and manage, but which society could not cure.²⁰ Colonial America constructed criminals not as societal outcasts but as ordinary sinners; crime was not stigmatized as evidence of poor character, as it more closely resembled being struck by lightning than suffering from a moral failing.²¹ Crime was checked by community suspicion and regulation; colonial citizens figuratively and literally policed the boundaries between insiders and outsiders, community residents and nonresidents.²² Punishment for major offenses was death; for minor offenses, community shaming, fines, and banishment.²³ Jails were used to hold persons pending resolution of their criminal cases, rather than as sites for punishment.²⁴ The purpose of noncapital criminal sanction was not segregation and demarcation of a criminal class; rather, criminal law reintegrated those who had violated criminal law back into society.²⁵ The colonial conception of criminals, in other words, centered on community-based sanctions of community members, designed to restore persons convicted of crime to their original community status.

¹⁹ See David J. Rothman, *Perfecting the Prison: United States, 1789-1865*, in *The Oxford History of the Prison* 100, 101 (Norval Morris & David J. Rothman eds., 1998) ("The most popular sanctions included fines, whippings, mechanisms of shame (the stock and public cage), banishment, and of course, the gallows. What was not on the list was imprisonment.").

²⁰ See *id.* at 101 ("From [the] perspective [of colonial Americans], crime reflected on the human condition and failings—men were born in sin—and not on any basic flaws in social order.").

²¹ While the criminal status of individuals was noted for the purpose of policing behavior, the stigma of criminal activity was not permanent. See William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830*, at 39 (1994) ("Like sin, crime could strike in any man's family or among any man's neighbors.").

²² See Rothman, *supra* note 19, at 101 (noting that major aim of colonial American crime control policy was to maintain "a careful distinction between insiders and outsiders, town residents and nonresidents").

²³ See *id.*

²⁴ See *id.*; see also Nelson, *supra* note 21, at 40 (noting few instances of imprisonment for more than one year between 1760 and 1774).

²⁵ See Nelson, *supra* note 21, at 40.

Industrialization, urbanization, immigration, and population growth meant communities had more difficulty self-policing. By the 1820s and 1830s, the prison developed as the central site for the institutional rehabilitation communities could no longer perform effectively.²⁶ Convicts were not yet viewed as inherently depraved. Rather than suffering from original sin, offenders were viewed as victims of upbringings that had failed to shelter them from societal vices and as susceptible to contact with corruption.²⁷ The souls of prisoners were to be reclaimed and uplifted; retribution was not an acceptable goal of sanction.²⁸ Penitentiaries segregated offenders from corruption outside prison walls; within prisons, as well, prisoners generally were isolated from the temptations of one another.²⁹ In isolation, prisoners reflected on their errors and relearned social virtues.³⁰ The assumption of the penitentiary was, however, that these virtues would indeed be reinducted and souls reclaimed on a fixed timetable.³¹ As in the colonial era, convicted persons who had completed their punishment had fulfilled the requirements for reintegration into society.

By the early twentieth century, however, convicted persons were no longer constructed as bereft of inculcated community values, but as clinically sick and in need of cure.³² Progressives considered crime

²⁶ See Adam J. Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* 114 (1992) (noting that development of penitentiary should be viewed in light of "social context in which it was offered—namely, growing criminal anonymity, failing public punishments, and rampant property crime, particularly in urban centers and ports"); see also Lawrence M. Friedman, *Crime and Punishment in American History* 155 (1993) (discussing rise of penitentiary); Rothman, *supra* note 19, at 106 ("The shared assumption was that since the convict was not innately depraved but had failed to be trained to obedience by family, church, school, or community, he could be redeemed by the well-ordered routine of the prison.").

²⁷ See David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* 82-84 (1971) (demonstrating commitment of early prison designers to reclamation model whereby routines imposed on inmate would transform him into law-abiding citizen). Jacksonian Americans idealized their forefathers' world as one comprised of peaceful, cohesive communities lacking in social strain, conditions that prisons could recreate. See *id.* at 108.

²⁸ See Hirsch, *supra* note 26, at 18, 19, 113.

²⁹ See Rothman, *supra* note 27, at 85 ("[S]eparated from evil society . . . the progress of corruption is arrested." (internal quotation marks omitted)).

³⁰ See *id.* at 83-84 (stating idea that isolation would encourage moral reform both inside and outside prisons); see also Hirsch, *supra* note 26, at 18 (explaining that prisons had goal "not only of deterring others from the Commission of the like Crimes, but also of reforming the Individuals, and inuring them to Habits of Industry" (quoting Penitentiary Act, 1779, 19 Geo. 3, ch. 74, § 5 (Eng.))).

³¹ See Adrian Howe, *Punish and Critique: Towards a Feminist Analysis of Penalty* 86 (1994) (discussing Foucault's description of penal law in 1837 as timetabled form of punishment).

³² See Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, in *The Oxford History of the Prison*, *supra* note 19, at 151, 151 ("By the opening decades of the

amenable to a social science approach, where the "facts" of each convicted person's case and conduct could be analyzed and managed in a systematic fashion.³³ Persons violating the criminal law would be isolated and treated until safely restorable to society; persons who could not be so restored would be segregated indefinitely.³⁴ Punishment thus became individualized and approached through indeterminate prison sentences, probation, and parole. Despite these more flexible sanctions, however, the aim of progressives was not necessarily to return more offenders to the community.³⁵ Rather, the individualized approach suggested a shift from the view of social reintegration embraced in both the colonial era and the early days of the penitentiary. While earlier periods accepted convicted persons back into society at a specified time on the assumption that their souls had been reformed, Progressives accepted convicted persons only once *satisfied* that their souls had indeed reformed. The indeterminate sentences and individualized rehabilitative treatment of persons convicted of criminal offenses continued as the focus of the penal system through the social program heyday of the 1960s and into the early 1970s, when frustration with crime, combined with a variety of other social factors, reshaped the model of criminal sanctions from rehabilitation to punishment.³⁶

B. *Modern Criminal Justice*

The modern trend toward getting tough on crime is well documented.³⁷ More persons are convicted,³⁸ more persons convicted are

twentieth century, a frankly therapeutic model was in effect: offenders were 'sick' and were to be 'cured' of their criminality in a setting that approximated, as far as possible, a normal society."). Note that the environment in which a cure was to be effected was "a setting that approximated, as far as possible, a normal society." *Id.*

³³ See David J. Rothman, *Conscience and Convenience: The Asylum and Its Alternatives in Progressive America* 46 (1980).

³⁴ See, e.g., *The Positive School of Criminology: Three Lectures by Enrico Ferri* 102 (Stanley E. Grupp ed., 1968) (discussing utility of indeterminate sentences in context of rehabilitation model).

³⁵ See *id.* (arguing that indeterminate sentences were often used to inoculate society by imprisoning dangerous persons indefinitely).

³⁶ See generally Francis A. Allen, *The Decline of the Rehabilitative Ideal* 29-30 (1981); Marvin Zalman, *The Rise and Fall of the Indeterminate Sentence*, 24 *Wayne L. Rev.* 45, 84-88 (1977).

³⁷ See Elliott Currie, *Crime and Punishment in the United States: Myths, Realities, and Possibilities*, in *The Politics of Law: A Progressive Critique* 381, 382 (David Kairys ed., 1998) (noting trends toward prison labor, three-strikes-and-you're-out, and public shaming, and public perception of source of crime as "moral and cultural"). The implementation of federal and state sentencing guidelines, in particular, responded to both popular pressure for less lenient criminal justice and academic pressure to reduce the unjust disparity in sentencing policies. See Norval Morris, *The Contemporary Prison: 1965-Present*, in *The Oxford History of the Prison*, *supra* note 19, at 202, 217. While in the 1960s legislatures

serving time,³⁹ and they are serving more time.⁴⁰ As more persons enter prison and stay in prison longer, however, there is no concomitant growth in either prison-based or community-based programs to reintroduce or readapt persons released into society.⁴¹ The criminal sanctions literature views this law and order phenomenon critically: It views the "get tough on crime" movement as motivated by fear and detached from traditional penological purposes such as deterrence and rehabilitation.⁴²

Civil strictures recently enacted against persons convicted of crimes continue a century's worth of legal development.⁴³ For example, persons convicted of drug-related felonies may now be barred

traditionally set maximum, but not minimum, sentences for persons convicted, by the early 1990s judges in many cases no longer had the discretion to determine either when a prison sentence would be imposed or how long the duration of the sentence would be. See *id.* at 218.

³⁸ The United States now holds a record 1.8 million persons in prison—more people than does any other nation. See Eric Schlosser, *The Prison-Industrial Complex*, *Atlantic Monthly*, Dec. 1998, at 51, 52. As of 1995, the U.S. incarceration rate is second only to that of Russia as the highest in the world. See Currie, *supra* note 37, at 384. Of persons in custody, 100,000 are held in federal prison, 1.1 million in state prison, and 600,000 in local jails. See Schlosser, *supra*, at 52. The trend toward high levels of incarceration is recent. From the beginning of the century through the 1970s, the incarceration rate held steady at about 0.11%, then doubled in the 1980s, and again in the 1990s. The level is now between 0.445% and 0.6%. See *id.* Approximately 1,000 new prisons were constructed in the past 20 years. In New York, for example, Governor Mario Cuomo funded more new prison beds than all the state's previous governors combined. See Schlosser, *supra*, at 56.

Notably, the proportion of incarcerated, nonviolent persons has also increased. In 1980, half of state prisoners had been convicted of violent crimes; by 1995, less than a third of state prisoners served time for violent offenses. See Nicholas Confessore, *Prisoner Proliferation*, *Am. Prospect*, Sept.-Oct. 1999, at 69.

³⁹ After the implementation of minimum sentences in both federal and state criminal law, more convicted offenders were selected for prison. See Morris, *supra* note 37, at 216.

⁴⁰ In addition to providing statutory minimum sentences for persons convicted and eliminating the discretion of judges to set sentence lengths, sentencing reforms have also reduced the discretion of parole releasing authorities. See *id.* at 218.

⁴¹ See *id.* (recognizing lack of such post-release programs); see also Gordon Lafer, *Captive Labor: America's Prisoners as Corporate Workforce*, *Am. Prospect*, Sept.-Oct. 1999, at 66, 68 (noting that expenditures for training and education in prison have been declining and that prison-based work programs tend to employ prisoners already possessing required skills rather than train prisoners in new skills).

⁴² See generally *Principled Sentencing*, *supra* note 3, at 410-23.

⁴³ See, e.g., Magistrate Judge Paul J. Komives & Peggy S. Blotner, *Loss and Restoration of Civil Rights Affecting Disqualification for Federal Jury Service*, 70 *Mich. B.J.* 542, 543 (1991) (describing process by which potential jurors may be barred from jury service based on convictions); Steffanie Stracke, *Comment, The Criminal Activity Forfeiture Act: Replete with Constitutional Violations*, 57 *Mo. L. Rev.* 909, 910 (1992) (arguing that criminal activity forfeiture is used by law-enforcement agencies as "strong arm" tactic). There is also literature concerning reliance on formal community-based sanctions. See, e.g., Anthony E. Bottoms, *Neglected Features of Contemporary Penal Systems*, in *The Power to Punish: Contemporary Penalty and Social Analysis* 166, 174-75 (David Garland & Peter Young eds., 1983) (discussing growing phenomenon of community-based penalties).

from receiving public benefits.⁴⁴ Federal laws bar those convicted of felony offenses or domestic violence misdemeanors from owning or possessing handguns.⁴⁵ In several jurisdictions, persons convicted of felonies cannot vote⁴⁶ or hold public office.⁴⁷ Prior felony convictions increasingly are used as grounds for deporting aliens, often without traditional due process protections.⁴⁸ Incarceration itself is used both

⁴⁴ See Godsoe, *supra* note 12, at 257.

⁴⁵ See 18 U.S.C. § 922(g) (1994 & Supp. III 1998). Interestingly, a three-judge panel of the D.C. Circuit unanimously invalidated federal domestic violence misdemeanor prohibitions on handgun possession on equal protection grounds because the statute in question failed to include certain exceptions applicable under the federal felony handgun ban, notably those for police officers and military officials. See *Fraternal Order of Police v. United States*, 152 F.3d 998, 1002-03 (D.C. Cir. 1999), *rev'd*, 173 F.3d 898 (D.C. Cir. 1999), *cert. denied*, 120 S. Ct. 324 (1999). This failure created the "irrational" result that persons convicted of domestic violence felonies could retain positions as police officers or armed services officials while those convicted of misdemeanors would be required to give up their jobs. See *id.* On rehearing, the panel reversed, holding that rational basis review was satisfied because a reasonable Congress could have believed that persons convicted of domestic violence felonies were already subject to sufficient sanctions. See *Fraternal Order of Police*, 173 F.3d at 903-04.

As this Note argues in a different context, the illogical crafting of the statutes implicated in *Fraternal Order of Police* suggests that legislative provisions regarding collateral civil consequences are often created as political responses to public crises, rather than as statutes actually intended to reduce crime or to adopt a sensible criminal code. See generally Major Einwechter & Captain Christiansen, *Abuse Your Spouse and Lose Your Job: Federal Law Now Prohibits Some Soldiers from Possessing Military Weapons*, *Army Law.*, Aug. 1997, at 25.

⁴⁶ See, e.g., *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (upholding as constitutional voting restrictions based on status as convicted felon). The Sentencing Project has found that 3.9 million Americans, including 13% of black men (25% in the seven states which disenfranchise convicted felons), have been stripped of voting rights based on their status as convicted felons. See Summary, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States* (Sentencing Project Policy Report No. 9080, 1998) <<http://www.sentencingproject.org/policy/9080.htm>>. According to Marc Mauer, assistant director of the Sentencing Project, this is the highest disenfranchisement rate among democratic nations. See Clyde Haberman, *Filtering Out Taint of Bias from the Law*, *N.Y. Times*, Jan. 28, 2000, at B1. Mauer notes that "unnecessary policies such as the felony voting restrictions serve only to communicate a message of exclusion from the political process." *Id.*

⁴⁷ See, e.g., *Swan v. LaFollette*, 605 N.W.2d 640 (Wis. Ct. App. 1999) (upholding Wisconsin law prohibiting persons convicted of felonies from holding public office).

⁴⁸ See Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. Rev. 97, 160-61 (1998) (suggesting that retroactively applying recent deportation statutes may offend substantive due process rights); Iris Bennett, Note, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. Rev. 1696, 1699 (1999) (noting that passage of new statutes increases risk of deportation for noncitizens convicted of "aggravated felonies"). Employers also more informally use previous convictions to deny employment to job applicants. See, e.g., Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. Rev. 187, 188 (1995) ("State occupational licensing laws can operate to reduce the availability of employment opportunities for ex-felons.").

in statutes and in common law determinations to terminate the child custody of incarcerated parents.⁴⁹

Civil sanctions attached to persons convicted of criminal offenses can be viewed as additional criminal sanctions. Historically, formal civil penalties have been largely political; in many states, convicted felons may not, for example, vote or serve on juries.⁵⁰ Modern penalties, however, are intended to operate as prophylactics.⁵¹ Disenfranchisement, a political sanction, represents an attempt to prevent convicted felons from fully participating in society; in contrast, Megan's Law,⁵² for example, is at least nominally designed to prevent convicted child molesters from seeking new victims.⁵³ Similarly, fed-

⁴⁹ See generally Jean M. Johnson & Christa N. Flowers, *You Can Never Go Home Again: The Florida Legislature Adds Incarceration to the List of Statutory Grounds for Termination of Parental Rights*, 25 Fla. St. U. L. Rev. 335 (1998) (examining Florida law making incarceration statutory ground for terminating parental rights); Philip J. Prygoski, *When a Hearing Is Not a Hearing: Irrebuttable Presumptions and Termination of Parental Rights Based on Statutes*, 44 U. Pitt. L. Rev. 879, 880-900 (1983) (reviewing statutes and case law that make incarceration basis for termination of parental rights); Steven Fleischer, Note, *Termination of Parental Rights: An Additional Sentence for Incarcerated Parents*, 29 Seton Hall L. Rev. 312 (1998) (reviewing and critiquing such statutes and common law rules). Interestingly, early prisons permitted women to keep their infants and children in their physical custody while incarcerated. See Lucia Zedner, *Wayward Sisters: The Prison for Women*, in *The Oxford History of the Prison*, supra note 19, at 295, 307.

⁵⁰ All but three states prevent felony convicts from voting while incarcerated; 35 states also disenfranchise persons on probation and parole; and 14 states disenfranchise persons convicted of felonies for life. See Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537, 538-39 (1993); see also Komives & Blotner, supra note 43, at 543 (citing Mich. Ct. R. 2.511(D), which permits consideration of felony conviction when determining qualification for jury service).

Historically, the origin of these provisions is racial. Compare *Richardson*, 418 U.S. at 56 (holding legislation preventing persons convicted of felonies from voting to be constitutional), with *Hunter v. Underwood*, 471 U.S. 222, 231-33 (1985) (striking down Alabama constitutional provision preventing persons convicted of crimes of "moral turpitude" from voting because provision was enacted for racially discriminatory purpose). Cf. *Baker v. Pataki*, 85 F.3d 919, 943 (2d Cir. 1996) (en banc) (per curiam) (dismissing racial discrimination challenge to New York's felony disenfranchisement statute based on Voting Rights Act). See also Shapiro, supra, at 538-39 ("Criminal disenfranchisement . . . was the most subtle method of excluding blacks from the franchise.").

⁵¹ Convicted persons are currently socially "marked," arguably so that they may be identified by community members and watched or avoided; alternatively, persons convicted of crimes are simply so "bad" that they do not deserve a democratic voice. It strains credulity to suggest that convicted persons are disenfranchised in order to prevent them from exercising their political might so as either to make the government more sympathetic to lawbreakers or to decriminalize behavior (although it is certainly arguable that disenfranchisement is designed to prevent a disproportionately large racial minority population from voting). Preventing domestic violence perpetrators from owning firearms, however, seems intended directly to prevent convicted persons from repeating past assaults.

⁵² N.J. Stat. Ann. § 2C:7-1 to 7-11 (West 1995 & Supp. 1999).

⁵³ The author does not concede that Megan's Law is a measure enacted for the purpose of preventing the recidivism of child molesters. Since the enactment of Megan's Law and

eral felony provisions preventing persons convicted of partner abuse from owning handguns facially are intended to keep weapons out of the hands of people whom the law perceives might use them.⁵⁴ Inherent in such prophylactic measures is the notion that once convicted criminals are released from prison, they are likely either to repeat their crime or commit new offenses. Prison is not viewed as an institution capable of reforming convicted persons.

The Megan's Law rationale, however, cannot justify domestic violence law on a prophylactic theory. Persons who abuse one partner must be assumed—or must be assumed to be likely—to abuse either their children or subsequent sexual partners as well. This argument reaches a breaking point with persons convicted of either sexual offenses against or with other adults or of drug-related crimes. While it is possible (albeit unlikely) that legislators and judges believe that they are protecting children from sexually predatory parents or guardians who will entice them to ingest or sell illegal substances, the most reasonable reading of these statutes is that they assume that the sorts of individuals who would sexually assault other persons or traffic in drugs also will be ineffective parents.⁵⁵

The modern view appears to be that crime is an ineradicable part of the human condition—incurable and unrehabilitatable. Principles of retribution formerly eschewed by penologists and philosophers enjoy a growing base of academic and political support; the notion of rehabilitation as an explicit policy goal largely has been abandoned.⁵⁶ Notably, the federal sentencing guidelines represent an abandonment of the principles of rehabilitation and individualization.⁵⁷ At the same

similar provisions in several states, there has emerged a rich literature concerning the registration of persons convicted of sexual offenses which, using an analysis similar to that employed by this Note, suggests that Megan's Law is more about marking persons convicted and continuing their punishment after release than about protecting the community from future harms. For an examination of the effectiveness and constitutionality of child sex offender registration laws, see generally Michele L. Earl-Hubbard, *The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s*, 90 Nw. U. L. Rev. 788 (1996); Joel B. Rudin, *Megan's Law: Can it Stop Sexual Predators—And at What Cost to Constitutional Rights?*, *Crim. Just.*, Fall 1996, at 3.

⁵⁴ See *supra* note 45.

⁵⁵ See *infra* parts II.B and II.C.

⁵⁶ See generally Susan Jacoby, *Wild Justice: The Evolution of Revenge* (1983) (describing criminal justice as necessarily including element of controlled vengeance); Jean Hampton, *A New Theory of Retribution*, in *Liability and Responsibility* 377 (R.G. Frey & Christopher W. Morris eds., 1991) (articulating theory of retribution based on compensating victims for degradation in worth).

⁵⁷ The federal sentencing guidelines replace judicial discretion in sentencing with a grid that places persons convicted of crimes on a matrix according to their criminal history and

time, shaming punishments are enjoying a renaissance.⁵⁸ Whereas community sanctions might once have served a useful or valid purpose, the use of these sanctions makes less sense in a modern context. Shaming punishments originally were abandoned because communities had grown too large and loose to self regulate;⁵⁹ communities have not, in the past two centuries, grown smaller and more cohesive.

While some individuals who support increased civil sanctions undoubtedly are motivated by a belief that community-based sanctions deter or prevent crime, another motivating force lurks behind the general policy direction recently adopted. Individuals have transgressed the criminal law, and, as such, have shown themselves to be "other," deserving identification and demarcation. Punishment—either in the (modern) traditional form of incarceration or in the form of civil sanctions—can be understood as a form of moral communication, expressing social condemnation of a morally grave offense. Civil sanctions such as those described in this Note convey that this message is permanent, and the offense sufficiently morally grave to mark individuals for life and prevent them from engaging in the act of parenting.⁶⁰

II

MODERN LEGISLATIVE AND ADJUDICATIVE PRESUMPTIONS AGAINST CUSTODY FOR PERSONS COMMITTING CRIMINAL OFFENSES

Demarcation of persons convicted of crimes includes termination of or prohibitions on child custody. The designation of such persons as presumptively unfit contrasts sharply with the general shift away from presumptions in child custody determinations. Where custody law once perceived parents as fit or unfit based on status, the "best interest of the child" statute now governs child custody and looks only to the relationship between parent and child.⁶¹

Courts historically awarded custody to fathers, the assumed providers and heads of family; fathers were deprived of custody only if

the level of their convicted offense. See generally U.S. Sentencing Guidelines Manual (1995).

⁵⁸ See generally Stephen P. Garvey, Can Shaming Punishments Educate?, 65 U. Chi. L. Rev. 733 (1998) (discussing shaming model of punishment and its prevalence); Toni M. Massaro, The Meanings of Shame: Implications for Legal Reform, 3 Psychol. Pub. Pol'y & L. 645 (1997) (describing recent emergence of interest in shaming).

⁵⁹ See Hirsch, *supra* note 26.

⁶⁰ See Joel Feinberg, The Expressive Function of Punishment, in *Doing and Deserving* 95, 98 (1970) (describing expressive function of punishment).

⁶¹ See *infra* notes 66-70 and accompanying text.

found extraordinarily unfit.⁶² During the early nineteenth century, however, courts began to award custody to both mothers and fathers, generally preferring the party not found at fault for the divorce.⁶³ During the course of the nineteenth century, the custodial presumption shifted to mothers, whom courts characterized as nurturing, caring, and based at home.⁶⁴ Maternal preference dovetailed with a "tender years" presumption, favoring mothers in particular when determining custodial arrangements for very young children.⁶⁵

During the course of the twentieth century, however, legislatures and courts began to focus more on the relationship between parent and child than on the gender of the parent and its presumed constitutive traits. By the mid-1970s, child custody determinations were increasingly based on the discretionary "best interest of the child" principle rather than on explicit, delineated rules.⁶⁶ Most states now statutorily require a best interest standard;⁶⁷ the majority of states that do not have statutes nevertheless employ best interest as their common law standard in making custody determinations.⁶⁸ Best interest

⁶² See Harvey R. Sorkow, *Best Interest of the Child: By Whose Definition?*, 18 *Pepp. L. Rev.* 383, 384 (1991).

⁶³ See Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 *Issues L. & Med.* 283, 293 (1991).

⁶⁴ See Sorkow, *supra* note 62, at 384.

⁶⁵ Some states continue to consider the child's age as a factor when making custody determinations. See generally Barbara Ehrenreich & Dierdre English, *For Her Own Good: 150 Years of the Experts' Advice to Women* (1978); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* 239-41 (1985).

⁶⁶ See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *Law & Contemp. Probs.* 226, 227 (1975).

⁶⁷ See, e.g., Ira Mark Ellman, *Inventing Family Law*, 32 *U.C. Davis L. Rev.* 855, 863-64 (1999) ("The typical [child custody] statute directs that custody decisions be made according to the child's best interests."). One recent commentator listed statutes from 45 states adopting the best interest standard. See Amy B. Levin, *Comment, Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 *UCLA L. Rev.* 813, 820 n.5 (2000) (listing statutes). The Uniform Marriage and Divorce Act requires that:

The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

Unif. Marriage & Divorce Act § 402, 9A *U.L.A.* 282 (1998).

⁶⁸ See Mnookin, *supra* note 66, at 236-37.

statutes are generally quite vague, listing a short set of criteria directly relating to the relationship between the child and his or her parents.⁶⁹ Most importantly, these statutes explicitly contain provisions prohibiting the consideration of parental behavior that does not affect the parent's relationship to the child.⁷⁰

These best interest standards only recently have begun to include specific presumptions against parents with criminal convictions or reported criminal activity.⁷¹ These presumptions conceivably implicate the parent/child relationship;⁷² parents who abuse their partner, engage in criminal sexual activity, or are involved in the drug trade may poorly model acceptable adult behavior. Best interest standards may have been intended to remove from judicial review behavior that might be classified as immoral but not illegal: adultery or cohabitation, for example.⁷³ If these statutes really are intended to confine court review to the interaction between parent and child, however, this distinction seems less meaningful. As this Part will argue, the assumption that illegal activity equals poor parenting collapses the identity of implicated individuals into one that is criminal, "other," and dangerous.

The crimes to which presumptions against custody or prohibitions against family formation attach generally have been crimes containing an element of moral taint, an observation that lends additional credence to the argument that new child custody law is more about punishing parents than protecting children. No child custody statutes

⁶⁹ The absence of more detailed, demanding, or categorical statutory and common law rules in child custody determinations does not imply that these determinations are free from implicit biases. Indeterminate rules may permit courts to regulate custodial relationships without needing to provide adequate justification for their decisions. Indefinite rules also fail to put parties on notice so that either they may prospectively satisfy implicit legal requirements or address these requirements during litigation. See *id.* at 262-63. Furthermore, legislators are not always forthright with their motivations for enacting child custody statutes. See John E. Coons et al., *Deciding What's Best for Children*, 7 *Notre Dame J.L. Ethics & Pub. Pol'y* 465, 465-66 (1993).

⁷⁰ See, e.g., *Unif. Marriage & Divorce Act* § 402 ("The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.").

⁷¹ See *infra* notes 103-04 and accompanying text.

⁷² See *supra* Part I.B.

⁷³ In *Clear v. Clear*, for example, the South Carolina Court of Appeals held that a mother's topless dancing career, absent evidence that the dancing adversely affected her parenting ability, was not a relevant consideration to a custody determination. See 500 S.E.2d 790, 792 (S.C. Ct. App. 1998). The court specifically argued that "some may consider Mother's occupation, though legal, immoral. Nonetheless, the effect that a parent's morality may have on his or her fitness to have custody is limited to what relevancy it has, either directly or indirectly, to the welfare of the child." *Id.* The court further noted that, while it might not approve of topless dancing mothers, "[i]t is not necessary for the court to make a moral judgment on a parent's lifestyle absent evidence that the lifestyle adversely affects the welfare of the child." *Id.* at 792.

explicitly enumerate the violent crimes of murder or assault as per se barriers to childrearing, despite the equivalent violence inherent in assaulting a stranger and assaulting one's spouse.⁷⁴ Moreover, as this Part illustrates, specific crimes of equivalent or lesser violence have constrained the ability of offending persons to form families with children.⁷⁵ Further, courts that consider custody cases in the absence of such statutes seem to attach less concern and constraint to individuals convicted of violent crimes that do not include a specific sort of moral taint.⁷⁶ What unifies all of these laws and findings, however, is a focus on criminal activity; the fact that parents have committed criminal acts, in front of their children or not, violent or not, triggers the assumption that they are unfit.

The strength of empirical and logical justifications for statutory and common law custody proscriptions vary according to the proscription in question: Gay parents offer an easier case than men who batter their wives, and persons who lose their children because they use marijuana seem more sympathetic than habitual child molesters who lose theirs. Finally, it should be noted that, while no legislative history suggests that legislatures or courts have taken account of the potential effects losing custody has on parents,⁷⁷ social science data uniformly supports the fact that family contact reduces recidivism.⁷⁸ This Note highlights the extent to which an undercurrent of animus or assump-

⁷⁴ See *infra* Part II.A.

⁷⁵ In California, the legislative history behind the state's presumption against custody for persons convicted of sexual offenses refers to the state's other custodial presumption against parents who use or abuse drugs and alcohol:

According to the author, this bill is necessary to provide critical information to parents when the court determines that granting custody or unsupervised visitation to a sex offender or a person who has been convicted of certain crimes against a child would not pose a significant risk to the child.

The author comments that the Legislature recently recognized the importance of such findings by passing into law AB 200 . . . [which] required the court to make such findings when granting sole or joint custody to a parent who is alleged to have either a history of abuse or to be a habitual user of controlled substances or alcohol.

Custody and Visitation Orders: Hearing on A.B. 1645 Before the Senate Comm. on the Judiciary, 1997-98 Reg. Sess. (Cal. 1998), available in Westlaw, CCA database. In New York State, however, while the best interest standard does not incorporate nonsexual violent crimes, the adoption statute does. See N.Y. Soc. Serv. Law § 378-a(2)(e) (Consol. Supp. 2000).

⁷⁶ See, e.g., *Smith v. Smith*, 727 So. 2d 113 (Ala. Civ. App. 1998) (affirming custody award to father previously convicted of first-degree murder, theft, and robbery).

⁷⁷ See 42 U.S.C. § 13,881 (1994) (appropriating federal funds to Family Unity Demonstration Project whose purpose is to evaluate whether certain demonstration projects "reduce recidivism rates of prisoners by encouraging strong and supportive family relationships").

⁷⁸ See Millet, *supra* note 9, at 332 n.241.

tion runs through these new laws. Taken as a body, these laws signal that, as a society, our attitudes toward persons who commit certain criminal offenses have shifted to the point that we believe that they are incapable of reform and are inherently dangerous to children.

A. *Domestic Violence*

Domestic violence, appropriately, has received extensive attention over the past fifteen years as a public policy, public health, and criminal justice issue.⁷⁹ Persons⁸⁰ who physically abuse their partners are now subject to an array of criminal and civil penalties for acts that formerly were accepted as inevitable occurrences within romantic relationships.⁸¹ People who abuse their partners may face prison and parole; they may be subject to civil suit for violating the victims' civil rights; they may lose their entitlement to bear arms.⁸² Now, in several states, they may also lose their children.

During the past fifteen years, several states have implemented legislative provisions that limit the ability of persons who abuse their partners to obtain or retain custody of their children: If parents have physically abused their co-parents, they presumptively will lose custody of common children. The trend toward enacting such presumptions has been dramatic and swift.⁸³ Most states have implemented legislative presumptions against custody for persons convicted of domestic violence.⁸⁴ Some of these presumptions explicitly utilize felony

⁷⁹ For descriptions of the dramatic effects partner abuse has on the abused party's life, see generally Lenore E. Walker, *The Battered Woman Syndrome* (1984).

⁸⁰ Abuse in relationships is neither perpetrated only by men against women, nor is it confined to heterosexual relationships. Social science data indicates, however, that the most common perpetration of violence in an abusive relationship is by a male partner against a female partner. See, e.g., Mildred Daley Pagelow, *Children in Violent Families: Direct and Indirect Victims*, in *Young Children and Their Families* 47, 49-50 (Shirley Hill & B.J. Barnes eds., 1982). This Note adopts gender-neutral language in discussing partner abuse, but the heightened implications of domestic violence for women's lives should be stressed.

⁸¹ See Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 *Harv. Women's L.J.* 57, 70-71 (1984); Lisa G. Lerman et al., *State Legislation on Domestic Violence, Response to Violence in Fam. & Sexual Assault*, Sept.-Oct. 1983, at 1-4, 20-26.

⁸² See Einwechter & Christansen, *supra* note 45; see also *supra* note 45 and accompanying text (describing federal statutory prohibition against gun possession by persons convicted of domestic violence).

⁸³ See Family Violence Project, *Nat'l Council of Juvenile & Fam. Ct. Judges, Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 *Fam. L.Q.* 197, 198-99, 225-27 (1995) (listing child custody statutes incorporating domestic violence provisions up to 1995).

⁸⁴ See Del. Code Ann. tit. 13, § 705A (1999); Fla. Stat. Ann. § 61.13(2)(b)(2) (West 1997 & Supp. 2000); La. Rev. Stat. Ann. § 9:364(A) (West Supp. 2000); Minn. Stat. Ann. § 518.17(2)(d) (West 1990 & Supp. 2000); N.D. Cent. Code § 14-09-06.2(1)(j) (1997); Okla.

domestic violence convictions;⁸⁵ others either permit the court to use another civil court's finding that domestic violence has occurred or allow the court itself to determine that the partner has committed the crime of domestic violence.⁸⁶ Presumptions may require that a party rebut by proving, by a preponderance of the evidence, that, for example, "the perpetrating parent has successfully completed a treatment program . . . , is not abusing alcohol and the use of illegal drugs . . . , and that the best interest of the child requires that parent's participation as a custodial parent."⁸⁷ In total, all but two states explicitly consider domestic violence against partners when making determinations of child custody.⁸⁸

The political thrust behind laws affecting the custodial rights of abusive partners derives from a confluence of sources, including feminism⁸⁹ and the "get tough on crime"⁹⁰ movement. The Violence

Stat. Ann. tit. 10, § 21.1(D) (West 1997); Tex. Fam. Code Ann. § 153.004(c) (West 1996 & Supp. 2000); Wash. Rev. Code Ann. § 26.09.191(2) (West 1997); Wis. Stat. Ann. § 767.24(2)(b) (West 1993 & Supp. 1999); Wyo. Stat. Ann. § 20-2-113(a) (Michie 1994 & Supp. 1996).

⁸⁵ See, e.g., Fla. Stat. Ann. § 61.13(2)(b)(2):

Evidence that a parent has been convicted of a felony of the third degree or higher involving domestic violence . . . creates a rebuttable presumption of detriment to the child. If the presumption is not rebutted, shared parental responsibility, including visitation, residence of the child, and decisions made regarding the child, may not be granted to the convicted parent. However, the convicted parent is not relieved of any obligation to provide financial support.

⁸⁶ See, e.g., N.D. Cent. Code § 14-09-06.2(1)(j):

If the court finds credible evidence that domestic violence has occurred, and there exists one incident of domestic violence which resulted in serious bodily injury or involved the use of a dangerous weapon or there exists a pattern of domestic violence within a reasonable time proximate to the proceeding, this combination creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child.

The standard of proof used in determining whether or not the parent has committed criminal domestic abuse presents an interesting issue. Nevada, for example, requires "clear and convincing evidence" of such abuse. Nev. Rev. Stat. § 125.480(5) (1999). In contrast, Massachusetts adopted a "preponderance of the evidence" standard after receiving an advisory opinion from that state's Supreme Judicial Court holding that no higher standard is constitutionally required. See Opinion of the Justices to the Senate, 691 N.E.2d 911, 917 (Mass. 1998) (stating that "preponderance of evidence" standard proposed in senate bill violated neither state nor U.S. constitutions); see also, e.g., Mass. Gen. Laws ch. 209, § 38 (1999).

⁸⁷ La. Rev. Stat. Ann. § 9:364(A).

⁸⁸ See Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 974 (1995).

⁸⁹ The feminist movement views patriarchy as a force subjugating those it constructs as weaker persons; it sees the interests of women and children, both constructed in contrast with men, as closely bound. Within this hierarchy, tasks are gendered, with childcare gendered as the primary female responsibility. The stakes for women in battles over custody are thus higher than those for their batterers. Further, the manner in which society constructs motherhood is part of the reproduction of male dominance. See generally Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of*

Against Women Act,⁹¹ adopted in 1994, marks a recognition of the problems of domestic violence and a commitment to providing the structure for supporting domestic violence victims. The Act has, among other effects, spurred an increase in prosecutions of domestic assaults,⁹² generating a growing body of people likely to be affected by domestic violence presumptions. Further, while the media's grip on society can be overstated, few events so notoriously have riveted the public as the O.J. Simpson trial; publicity surrounding the case both focused national attention on domestic violence and inspired a flurry of social action, including legislative proposals to prohibit persons who murder their co-parent from assuming child custody.⁹³ Finally, states have been motivated by a congressional joint resolution, passed in 1990,⁹⁴ pressing states to establish statutory presumptions "that it is

Gender 9 (1978); Carole Pateman, *The Sexual Contract* 33-35 (1988). Patriarchy encompasses a linked system of male domination over women and parental domination over children; feminists have thus traditionally linked women's and children's rights in their rhetoric and advocacy. See Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence* vii (1988).

Courts do not, however, tend to consider the gender implications of domestic violence when awarding custody. Court decisions thus treat violence committed by men and women as equally culpable, absent any consideration of a gendered power dynamic. For example, the North Dakota Supreme Court, reviewing a lower court custody determination, remanded the case for the following reason:

[T]he majority recites evidence which reflects domestic violence committed by both parents. The majority then ignores the alleged violence committed by the mother, and focuses exclusively on that of the father The stereotyped assumption that all men are more powerful and violent than all women is unworthy of our judicial system. Participants in our legal system are entitled to be judged as individuals, not based on stereotypes.

Bruner v. Hager, 534 N.W.2d 825, 829 (N.D. 1995) (Sandstrom, J., concurring).

⁹⁰ See *supra* notes 37-40 and accompanying text.

⁹¹ 18 U.S.C. § 2261 (1994 & Supp. III 1998).

⁹² See Amy Waldman, *Striking Back*, N.Y. Times, June 28, 1998, § 14, at 1 (describing increase in domestic violence prosecutions in Brooklyn and creation of specialized domestic violence court).

⁹³ See, e.g., Brae Canlen, *I'm O.J.-You're O.J.: How the O.J. Simpson Case Has Affected the Legal System*, Cal. Law., Oct. 1997, at 28 ("After [Simpson's] acquittal, task forces were appointed, committees were formed, and legislative proposals scattered like buckshot."); Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 Alb. L. Rev. 1345, 1354 (1997) ("The high-profile O.J. Simpson murder trial was one important factor that helped contribute to society's changing views about domestic violence The reality that domestic violence exists and is a severe problem that cuts across class lines was brought into the homes of almost all Americans."). Among other proposals, the Simpson case inspired California Assembly Bill 260, which denied a convicted domestic partner killer custody of the couple's children. See Canlen, *supra*, at 30. For the version of this bill that was ultimately adopted, see Cal. Fam. Code § 3030(c) (West Supp. 2000).

⁹⁴ See H. Con. Res. 172, 101st Cong. (1990) (urging that credible evidence of physical abuse of spouse create statutory presumption that it is detrimental for child to be placed with abuser).

detrimental to the child to be placed in the custody of the abusive spouse."⁹⁵

There also has been a great deal of support from legal academics for presumptions against child custody for persons who commit domestic violence. A number of articles and student notes have advocated implementing or expanding legislative presumptions.⁹⁶ Academic proponents of legislation denying child custody to persons convicted of domestic violence propose three arguments concerning the effects exposure to such persons would have on children. First, children might experience direct, negative emotional effects from witnessing domestic violence.⁹⁷ Second, children who witness domestic violence may imitate parental behaviors once grown.⁹⁸ Finally, abuse against partners and against children may correlate predictively.⁹⁹ While the social science data does not suggest that persons who abuse their partners always or nearly always abuse their children, it is inconclusive on the question of whether parents who abuse their partners

⁹⁵ See 1996 N.Y. Laws ch. 85, § 1. Rather than implementing the recommended legislative presumption, New York ultimately elected to adopt legislation establishing domestic violence as a factor for consideration in child custody proceedings "regardless of whether the child has witnessed or has been a direct victim of the violence." *Id.* Note that this legislation explicitly refuses to consider whether the parent has abused the child or committed abuse in front of the child, belying public policy rationales.

⁹⁶ See generally, e.g., Kurtz, *supra* note 93 (arguing for statutory presumption against custody for persons who commit domestic violence); Linda R. Keenan, Note, Domestic Violence and Custody Litigation: The Need for Statutory Reform, 13 Hofstra L. Rev. 407 (1985) (same).

⁹⁷ See Kurtz, *supra* note 93, at 1350-51 (arguing that children witnessing domestic violence suffer emotional trauma, depression, anxiety, and "cognitive confusion"). Kurtz argues that child witnesses may become either excessively aggressive or overly passive. See *id.* at 1352. Other studies have found some links between witnessing family violence and child behavioral difficulties. See, e.g., Alan Rosenbaum & K. Daniel O'Leary, Children: The Unintended Victims of Marital Violence, 51 Am. J. Orthopsychiatry 692, 698 (1981) (finding "modest association" between witnessing marital conflict and child's behavior). Some academics have argued in favor of criminalizing exposure to domestic violence. See, e.g., Audrey E. Stone & Rebecca J. Fialk, Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse, 20 Harv. Women's L.J. 205, 206 (1997).

The cases cited unfavorably by proponents of legislative presumptions are compelling, representing cases where children were psychologically damaged by the abusive father's actions and should not have been offered to his custody. See, e.g., *In re James M.*, 135 Cal. Rptr. 222, 229 (Ct. App. 1976) (affirming decision not to strip father of custody rights upon his conviction for killing mother because such killing did not necessarily constitute "neglect," in that "the trial court might reasonably find that the crime was a crime of passion, not the product of a violent and vicious character, but comprehensible within the framework of human folly, weakness and imperfection"). It is difficult to imagine, however, that a best interest standard would have prompted such courts to award the father custody.

⁹⁸ See Kurtz, *supra* note 93, at 1352 (arguing that boys who witness domestic violence tend to abuse their partners in adulthood, while girls become victims).

⁹⁹ See *id.*

will be more likely to abuse their children.¹⁰⁰ The data problematically suggests that, where one partner abuses the other, the partners are equally likely to abuse the child;¹⁰¹ if the policy justification for

¹⁰⁰ Sociological and psychological research involving children is fraught with several difficulties. First, it is difficult to examine the long-term effects of childhood experiences on future welfare. Second, children are generally not socially acceptable research subjects. Finally, the family is traditionally viewed as a site for privacy, and it is often difficult to obtain good, honest information from children embedded in family structures. See Coons et al., *supra* note 69, at 479-80.

Several studies have been conducted analyzing the relationship between domestic violence against partners and child abuse. These studies indicate a correlation between domestic violence against women and domestic violence against children. These studies, however, do not establish firmly that the partner who abuses a partner also abuses a child. See Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in *Feminist Perspectives on Wife Abuse* 158, 160 (Kersti Yllo & Michele Bograd eds., 1988) (reviewing literature and finding that it "does not support a solid conclusion that wife beating is a causal factor in the incidence of child abuse"); *id.* at 161, 163 (citing Wisconsin study showing 41% of batterers have slapped; 16% have kicked, hit, or punched; 4% have thoroughly beaten up; and 9% have used weapons against one or more of their children); Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 *Int'l J. Health Services* 97, 100 (1988) (inferring from timing of onset of child battering by women that spousal abuse causes abused parent to batter child). See generally Margaret Varma, *Battered Women; Battered Children*, in *Battered Women: A Psychosociological Study of Domestic Violence* 263 (Maria Roy ed. 1977) (arguing most adults who abuse their children were themselves battered and witnessed child and spousal abuse). Much of the difficulty in measuring child abuse stems from the same source as the difficulty in measuring partner abuse: incidents occur in the home, victims are reluctant to report incidents or self-define them as abuse, and no academic or social consensus exists on the definition of abuse. See Pagelow, *supra* note 80, at 50-51.

An additional difficulty with sociological analysis is that correlations between male violence against women and household violence against children tend to mask which parent perpetrates the violence against the child. Evidence suggests that, in households where partner battering occurs, men and women are relatively equally likely physically to abuse the household's children. See Lenore E. Walker, *The Battered Woman* 27 (1979) (noting that one-third of battered women in sample abused their children, just as one-third of battering men abused their children); see also Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 *Vand. L. Rev.* 1041, 1056 n.92 (1991) (citing to study that reported that in families where spousal abuse was present, 75% of children were physically abused by father while 63% were physically abused by mother); Einat Peled, "Secondary" Victims No More: Refocusing Intervention with Children, in *Future Interventions with Battered Women and Their Families* 125, 139 (Jeffrey L. Edleson & Zvi C. Eisikovits eds., 1996) ("What is more disturbing, however, is the tendency of most writers to minimize or even completely ignore data (and clinical observations) regarding battered women's abusive behavior toward their children."). There is likely some causal, sequential relationship between these patterns of abuse. This phenomenon has been noted historically in Gordon, *supra* note 89, at 172.

Finally, while several state statutes explicitly do not require any showing that the child has been physically abused or has witnessed physical abuse, and although the legislative findings of these statutes have specifically argued that "the wealth of research demonstrat[es] the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed the violence," 1996 N.Y. Laws ch. 85, § 1, the academic research detailed above has made no finding to this effect.

¹⁰¹ See Walker, *supra* note 100, at 27.

statutory presumptions is prevention of child abuse, empirical data is not necessarily supportive.

Regardless of the strength or weakness of social science data, it does not appear to have provided the sole support for legislation linking child custody and domestic violence. Academic articles, advocating presumptions themselves, suggest that outrage over the fact that persons who batter their partners can be "rewarded" with child custody is a separate and important motivating factor for such legislation.¹⁰²

Statutes also often contradict the state's general policies on parental conduct outside of the presence of children and the extent to which a court is permitted to review such conduct. Colorado's statute, for example, contains back-to-back provisions creating a presumption against custody for persons who commit domestic violence and forbidding the court from "consider[ing] conduct of a proposed custodian that does not affect his relationship to the child."¹⁰³ States seem to recognize in general that the conduct of parents when away from their children is no longer considered an appropriate grounds for determining custody;¹⁰⁴ domestic violence presumptions, in contrast, focus on the past conduct of one partner toward another. Finally, while the legislative history of several statutes explicitly refers to social science data for the proposition that the best interest of the child cannot be served through placement in a violent household, this legislative history does not consider that the child will no longer be living in a household with both parents; also, day-to-day custodial or visitation-oriented transfer of a child need not involve contact between the parents, as such transfer can take place through a social-worker proxy.¹⁰⁵

¹⁰² See generally Pauline Quirion et al., *Protecting Children Exposed to Domestic Violence in Contested Custody and Visitation Litigation*, 6 B.U. Pub. Int. L.J. 501 (1997).

¹⁰³ Colo. Rev. Stat. § 14-10-124(2) (1999). Colorado employs a "best interest of the child" custody standard. See id. § 14-10-124.

¹⁰⁴ See, e.g., 2 John M. Feinberg, *Illinois Family Law* 101 (1998).

¹⁰⁵ In the absence of intervention by a court or social service agency, shuttling a child back and forth between parents sharing custody and/or visitation presents an opportunity for the person who has committed abuse in the past to perpetrate another violent episode. Further, when parents who have been involved in an abusive relationship share joint power to make decisions involving the child, additional issues tending to promote confrontation may arise. The legislative findings of New York's statute makes explicit reference to this issue, noting that "[s]tudies demonstrate that domestic violence frequently escalates and intensifies upon the separation of the parties . . . [G]reat consideration should be given to the corrosive impact of domestic violence and the increased danger to the family upon dissolution and into the foreseeable future." 1996 N.Y. Laws ch. 85, §1. However, there is no evidence in the legislative history suggesting that lawmakers attempted to fashion a system that addressed concerns about parental interactions in a manner less intrusive than terminating parental rights.

Courts have construed these state statutes liberally and literally. As courts have applied statutory presumptions, they have not evaluated whether particular children viewed, felt affected by, or were affected by domestic violence in the household. Rather, an individual's partner abuse "serves as a beacon to the trier of fact of his potential for violence and physical harm."¹⁰⁶ The courts have inferred this violent tendency and taken measures to insulate the child in the absence of any evidence of child abuse; in at least one case, the father's assault against the mother required not only that the mother be given custody, but also that the father's visits with the child be supervised.¹⁰⁷

More tellingly, to the extent that legislators have, in fact, "gotten it right," their efforts are duplicative of the best interest standard. The best interest standard has represented a shift away from consideration of spousal abuse in child custody hearings.¹⁰⁸ If proponents of legislation are correct in asserting that spousal batterers are child abusers, the legislation is coextensive with the current "best interest of the child" standard. If spousal abuse and child abuse are synonymous, batterers in most cases would be found unfit during custody hearings in the absence of any presumption.

The language of adopted provisions suggests that legislators may not actually assume—as with most presumptions—that there is a direct correlation between child and partner abuse. Ohio's statute, for example, mandates that courts consider "[any] history of, or potential for, child abuse, spouse abuse, [and] other domestic violence"¹⁰⁹ Since the wording of this statute considers spousal and child abuse separately, it seems implausible that legislators consider spousal and

¹⁰⁶ *Williams v. Williams* (In re Custody of Williams), 432 N.E.2d 375, 376 (Ill. App. Ct. 1982); accord *In re Marriage of Wiley*, 556 N.E.2d 809, 813-14 (Ill. App. Ct. 1990) (holding that allegations of father's domestic violence against mother were relevant and decisive factors in custody determination irrespective of violence toward children, because "continuing physical abuse by one parent to another will cause emotional damage to a child and thus constitute neglect" (quoting *In re Interest of A.D.R.*, 542 N.E.2d 487, 492 (Ill. App. Ct. 1989))). In light of these presumptions, appellate courts have held that awarding custody to parents who have been abusive toward their partner, in light of these presumptions, constitutes abuse of discretion. See, e.g., *Rinehart v. Rinehart*, 877 S.W.2d 205, 209 (Mo. Ct. App. 1994); see also Jack M. Dalglish, Jr., Annotation, Construction and Effect of Statutes Mandating Consideration of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children, 51 A.L.R. 5th 241 (1997) ("In some instances, the legislatures have created a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded custody of a child.").

¹⁰⁷ See *Tracy D.S. v. Danny D.W.*, Nos. CN93-11783, 96-37561, 1997 WL 905950, at *2 (Del. Fam. Ct. Nov. 10, 1997).

¹⁰⁸ Prior to implementation of the "best interest of the child" standard, the relationship between the parents was the primary criterion for awarding custody; the "best interest" standard de-emphasizes such considerations. See Cahn, *supra* note 100, at 1043.

¹⁰⁹ Ohio Rev. Code Ann. § 3109.04(F)(2)(c) (West 1995).

child abuse as proxies. The policy basis for legislative presumptions is undermined by their evidentiary requirements: None of the statutes concerning custody require a showing that a child has been exposed to, or directly victimized by, domestic violence.

Further, to the extent that legislators have "gotten it wrong," statutory presumptions are not merely duplicative of, but are in opposition to, the best interest standards. In *Kraft v. Kraft*,¹¹⁰ for example, a trial court, following a statutory rule permitting ongoing domestic violence as an evidentiary factor in awarding child custody, transferred child custody from the mother to the father based on the changed circumstance that the mother was currently living with a man who had assaulted her.¹¹¹ The North Dakota Supreme Court remanded for consideration in accordance with the state's relevant statutory presumption regarding the mother's allegation that the petitioning father had also assaulted her.¹¹² The domestic violence committed by the father had occurred five years previous to the case, and the domestic violence committed by the mother's current partner was ongoing.¹¹³ The court did not differentiate between past and current domestic violence in terms of its effect on the child involved, a curious omission if the court intended for the contested child to be awarded to the household with the least potential for violence (assuming a link exists between abuse of partner and abuse of child).¹¹⁴ While the lower court had argued that the effect of applying the presumption against the father was "that domestic violence perpetrated by a parent at any time in the past is given more weight than ongoing, present-day evidence of domestic violence by a live-in boyfriend," the supreme court insisted on a more rigorous application of the statutory presumption against the father on remand.¹¹⁵ This case ultimately suggests that even if the alleged paramount consideration was the best interest of the child (in particular, protecting him or her from possible violence), the court

¹¹⁰ 554 N.W.2d 657 (N.D. 1996).

¹¹¹ See *id.* at 658-59; see also N.D. Cent. Code § 14-09-06.2(1)(k) (1997) ("The court shall consider [the significant other's] history of inflicting, or tendency to inflict, physical harm, bodily injury, assault, or the fear of physical harm, bodily injury, or assault, on other persons.").

¹¹² N.D. Cent. Code § 14-09-06.2(1)(j) (1997) states:

If the court finds credible evidence that domestic violence has occurred, . . . this [evidence] creates a rebuttable presumption that a parent who has perpetrated domestic violence may not be awarded sole or joint custody of a child. This presumption may be overcome only by clear and convincing evidence that the best interests of the child require that parent's participation as a custodial parent.

¹¹³ See *Kraft*, 554 N.W.2d at 661.

¹¹⁴ See *id.*

¹¹⁵ *Id.*

was more concerned with punishing the father for criminal marital behavior than assessing what living situation might presently pose the most danger to the child.

Even a finding that abusive behavior toward a partner was past, minimal, and not directed toward children in the relationship may not overcome a statutory presumption against physical custody.¹¹⁶ Statutory presumptions against child custody for persons convicted of domestic abuse, at best, do the same work as best interest statutes and, at worst, impede them; such presumptions place punishment of parents above the protection of the child's interests.

B. Sex Crimes

Courts and legislatures generally limit policing of domestic violence perpetrators to regulation of the household in which the abuse occurred.¹¹⁷ Regardless of whether or not children were abused by their parent or exposed to abuse between their parents, they lived in a household where abuse occurred, and the abuse colorably implicated the domestic relationships formed by the persons who committed domestic violence. Sanctions against persons convicted of sexual offenses, in contrast, are not limited to either the particular relationships in which sex crimes were committed or even the class of persons against whose member the assault was perpetrated; the scope of relevant legislation and adjudication is far more general. As the generality of the legislation suggests, proponents of statutory provisions against persons convicted of sexual offenses obtaining child custody do not ground their arguments in social science literature. There is an honest, credible debate raging in the academic community over whether or not people who abuse their partners are unusually likely also to abuse their children;¹¹⁸ this sort of debate is not the foundation for statutory prohibitions respecting persons convicted of violent sexual offenses, and it is still further removed from adjudicative custody

¹¹⁶ See, e.g., *Bruner v. Hager*, 534 N.W.2d 825, 826 (N.D. 1995). The North Dakota statute interpreted in *Bruner* permits the presumption against custody for persons perpetrating domestic violence to be overcome "only by clear and convincing evidence that the best interests of the child require that parent's participation as a custodial parent." N.D. Cent. Code § 14-09-06.2(1)(j). Delaware's statute provides further illustration of the high level of evidence necessary to overcome presumptions. The statute requires that there have been no further acts of domestic violence and that the abusive partner have (1) successfully completed a counseling program for persons who batter partners; (2) successfully completed drug or alcohol counseling at the court's request; and (3) demonstrated that giving the partner certain custodial rights is in the best interest of the child or that extraordinary circumstances warrant rejection of the presumption. See Del. Code Ann. tit. 13, § 705A(c) (1999).

¹¹⁷ But see *supra* notes 110-15 and accompanying text.

¹¹⁸ See *supra* notes 97-100.

determinations based on the illegal conduct of parents, such as determinations that lesbians and statutory rapists cannot obtain custody. This Section will first discuss statutory presumptions and prohibitions against persons who have committed sexual offenses from obtaining custody, and then examine individual court cases where judges have used the convicted or presumptive sexual conduct of parents to deny custody.

1. *Violent Sexual Offenses*

During the 1990s, several states enacted statutory presumptions or prohibitions against persons convicted of sexual offenses from obtaining child custody or living in households containing children.¹¹⁹ The majority of these statutes only contemplate persons who have committed sexual offenses against minors (albeit not minors to whom the convicted persons were related or who lived in their household);¹²⁰ Alabama's statute, however, does not limit itself to policing persons whose past criminal activity concerned children.¹²¹

Alabama's statute showcases the extent to which the civil status of persons convicted of sexual offenses has been decoupled from legitimate arguments about the danger posed by these persons once released. The statute bars, for life, persons convicted of sexual offenses from living in households with children.¹²² The crimes implicated in

¹¹⁹ See, e.g., Ala. Code § 15-20-26(c) (Supp. 1999); Ark. Code Ann. § 16-93-305(a) (Michie Supp. 1999); Cal. Fam. Code § 3030(a) (West Supp. 2000); Wash. Rev. Code Ann. § 72.09.340(3) (West Supp. 2000).

¹²⁰ See Ark. Code Ann. § 16-93-305(a); Cal. Fam. Code § 3030(a); Wash. Rev. Code Ann. § 72.09.340(3).

¹²¹ Under Alabama's statute, a criminal sex offense is defined as:

a. Rape in the first or second degree b. Sodomy in the first or second degree c. Sexual torture d. Sexual abuse in the first or second degree e. Enticing a child to enter a vehicle, room, house, office, or other place for immoral purposes f. Promoting prostitution in the first or second degree g. Violation of the Alabama Child Pornography Act h. Kidnapping of a minor, except by a parent, in the first or second degree i. Incest . . . when the offender is an adult and the victim is a minor j. Soliciting a child by computer for the purposes of committing a sexual act and transmitting obscene material to a child by computer k. Any solicitation, attempt, or conspiracy to commit any of the offenses listed in paragraphs a. to j., inclusive l. Any crime committed in any state or a federal, military, Indian, or a foreign country jurisdiction which, if it had been committed in this state . . . would constitute an offense listed in paragraphs a. to k., inclusive.

Ala. Code § 15-20-21(4) (Supp. 1999).

¹²² See *id.* § 15-20-26 (Supp. 1999). The bulk of this legislation prescribes notification procedures for persons convicted of sexual offenses; the ability of convicted persons to form households including children, therefore, is tied to general provisions governing convicted persons' relationship to the community into which they are released. See, e.g., *id.* § 15-20-22 (Supp. 1999).

the statute neither uniformly involve children nor uniformly involve violence; the offenses enumerated include sodomy and promoting prostitution,¹²³ crimes which, while certainly violative of both criminal codes and traditional social norms, are traditionally considered “deviance” rather than offenses with clear victims. The inclusion of these crimes suggests that legislators are concerned with the threat to morality posed by offenders, rather than, or in addition to, their threat to society. It is difficult to perceive what the safety-based argument might be for protecting children from persons who have engaged in sodomy or prostitution. It seems unlikely, for example, that legislators were concerned that adults would sell into prostitution the children with whom they formed households. The more plausible explanation for this broadly drawn statute is that Alabama wished to restrict children’s exposure to people engaged in “immoral lifestyles” that were also illegal. The custody law thus forms an additional element of social stigma and punishment for persons for whom society wishes to express particularized moral opprobrium, and whose status as convicted offenders society wishes to enshrine.¹²⁴

The Alabama statute seriously affects family (re)formation. Because Alabama’s provisions affect convicted persons for the rest of their lives, once convicted, these persons may never marry an individual with children and reside in their household.¹²⁵ Persons who have committed sexual offenses may reside in a household with their own children, but juveniles or young adults who commit sexual offenses cannot reside in a household with their siblings.¹²⁶ Lest it be thought that the statute was drafted so broadly by mistake, it should be noted that the original statute was *enacted* in 1996 and *amended* in 1998 to include juveniles.¹²⁷

Statutes enacted in Arkansas, California, and Washington seem facially less troublesome; these statutes only affect the ability of persons convicted of sexual offenses against children to live in homes with children, and the Arkansas and Washington statutes only affect

¹²³ See *id.* § 15-20-21(4).

¹²⁴ For similar analysis in the context of lesbian custody cases, see *infra* notes 144-48 and accompanying text.

¹²⁵ When one considers that family formation is one of the factors that affects recidivism rates, this provision seems particularly ill-advised from a policy perspective. See *supra* note 9 and accompanying text.

¹²⁶ See Mike Cason, *Some Juvenile Sex Offenders Can’t Go Home*, *Montgomery Advertiser*, Sept. 10, 1998, at 1A, available in Lexis, News Library, Montad file (quoting Alabama Attorney General Bill Pryor).

¹²⁷ See *id.*

convicted persons during the period of their probation.¹²⁸ Further, these statutes are presumptions against custody, in contrast with the Alabama statute's absolute prohibition (although the requirements to overcome these presumptions can be substantial).¹²⁹ Some aspects of these statutes, however, are actually tougher on released persons; in particular, none of these states makes exception for the person's own children.¹³⁰ California's statute, further, was amended in 1998 to create a presumption, not only against physical custody for persons convicted of sexual offenses, but against any legal custody, including visitation.¹³¹

What these statutes represent, ultimately, is the extent to which the criminal justice system has abandoned historical notions of reclamation, reformation, or rehabilitation, and has begun to assume that "criminals" are simply unable to rehabilitate. These statutes, taken together with Alabama's, suggest that concerned legislatures no longer make any pretense that prison and parole serve to reintroduce convicted persons to society or reintegrate them into their community. Rather, these statutes serve as permanent markers for individuals, creating a barrier between them and the population into which they are released. The legislative history of these statutes suggests that legislatures are responding, not to cases where individuals have been granted custody and committed abuse against a child, but to persons who have committed sexual offenses as a class.¹³²

¹²⁸ See Ark. Code Ann. § 16-93-305(a) (Michie Supp. 1999); Cal. Fam. Code § 3030(a) (West 1994 & Supp. 2000); Wash. Rev. Code Ann. § 72.09.340(3) (West Supp. 2000).

¹²⁹ See Ark. Code Ann. § 16-93-305(a); Cal. Fam. Code § 3030(a); Wash. Rev. Code Ann. § 72.09.340(3). California's statute was amended in 1998 to require that the court enter its finding of "no significant risk to the child" in writing.

¹³⁰ See Ark. Code Ann. § 16-93-305(a) ("[T]he court shall prohibit, as a condition of granting probation, the accused, upon release, from residing in a residence with any minor, unless the court makes a specific finding that the accused poses no danger to the minors residing in residence."); Cal. Fam. Code § 3030(a) ("No person shall be granted physical or legal custody of, or unsupervised visitation with, a child if the person is required to be registered as a sex offender . . . where the victim was a minor . . . unless the court finds that there is no significant risk to the child."); Wash. Rev. Code Ann. § 72.09.340(3) ("[T]he department shall not approve a residence location if the proposed location: (a) Includes a minor victim or child of similar age or circumstances as a previous victim who the department determines may be put at substantial risk of harm by the offender's residence in the household . . .").

¹³¹ See Cal. Fam. Code § 3030(a).

¹³² In considering presumptions against custody for persons who have committed sexual offenses against children, the California Senate Committee on the Judiciary noted two developments motivating a proposed amendment: First, that "[t]he author has become aware of at least one recent case, now on appeal, where a superior court judge held the custody/unsupervised visitation prohibition of Family Code section 3030 did not apply to a felony sex crime (lewd and lascivious acts on a child)" and, second, that Marc Klaas had corresponded with the Chair of the Committee to urge that the statute be amended to include

Even in the absence of such statutes, judges may use sexual offenses against persons seeking to form households in which children reside. In 1996, the Circuit Court of Dade County, Florida revoked probation for Fernando Benavides, who had been paroled on a sexual offense, and sentenced him to twenty-five years in prison for failing to obtain written permission to date and move in with a woman with minor children.¹³³ Trial court testimony reflected that Benavides was not suspected of any misconduct toward the children, nor was any suggestion made that he might have had an inappropriate relationship with the children.¹³⁴ Benavides' counselor was aware of his living arrangement, and his domestic partner occasionally attended his counseling sessions with him in contemplation of marriage.¹³⁵ Benavides' conviction was overturned on the grounds that his counselor had been aware of his living situation, and, thus, his parole violation was not "willful and substantial"; however, this case highlights that strictures against persons convicted of sexual offenses residing with children are less about the actual danger they pose to children or harm they perpetrate, than about permanently separating convicted persons from children.

Whatever one thinks of the ultimate policy wisdom of a blanket rule prohibiting those who transgressed society's moral code from interacting with impressionable children, such a broad prohibition marks a new method of allocating child custody. Rather than allocating custody solely according to family law principles, new custody rules take into consideration the status of the potential parent as a "criminal" and use deprivation of custody as an additional sanction.

2. *Nonviolent Sexual Offenses: Statutory Rape and Sodomy*

Statutory rape is a crime of strict liability: When persons of ages enumerated in criminal statutes have sexual relations, the older partner commits a crime whether or not the relationship is consensual.¹³⁶

felony offenses committed against children. Family Law: Child Custody and Visitation: Hearing on S. 25 Before the Senate Comm. on Judiciary, 1993-94, 1st Extraord. Sess. (Cal. 1994), available in Westlaw, CCA-OLD database. Marc Klaas's daughter, Polly Klaas, was kidnapped and murdered by a person convicted of violent sexual offenses. See Josh Getlin, *Waiting, Hoping, Praying*, L.A. Times, Oct. 18, 1993, at E1. It is difficult to link these two factors with any real or even reasonably perceived broader problem of persons convicted of sexual offenses winning custody and subsequently abusing their children.

¹³³ See *Benavides v. State*, 679 So. 2d 1195, 1196 (Fla. Dist. Ct. App. 1996). Benavides had married the woman by the time of the appellate court's ruling, although the appellate court did not find this fact significant. See *id.* at 1196 n.2.

¹³⁴ See *id.* at 1196 n.3.

¹³⁵ See *id.* at 1196.

¹³⁶ See, e.g., Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 Seton Hall Legis. J. 1, 41-77 (1997) (surveying statutory schemes of 50 states

While these convictions do not fall within the statutory presumptions earlier detailed, they are used less formally to deny a man custody of the children he fathers through the statutory rape.¹³⁷ Rights are not terminated because the father has abused or neglected the child; rather, rights are terminated before the father knows of the child's existence or has had an opportunity to form a relationship with the child. The premise for termination is that parental rights cannot arise from a criminal act.¹³⁸ The logic underlying these decisions is that criminals should not—quite literally—enjoy the fruits of their crime.¹³⁹ Nonetheless, in many cases, the best interest of the child cannot be served by denying custodial rights to the convicted father. Although the father has shown no particular potential to endanger the child, and although statutory rape may not indicate the propensity of the individual to act in a violent, abusive, or neglectful manner, the fact of conviction has been held sufficient to terminate rights.

Similarly, the fact that a parent presumably is committing an illegal act by forming a domestic partnership with a member of the same sex has been used to deny the parent custody.¹⁴⁰ When reviewing custodial arrangements involving gay parents, courts have often included considerations of the parent's sexual orientation when determining the "best interest of the child."¹⁴¹ The illegal nature¹⁴² of the parent's

and noting that "the very nature of the offense recognizes that a child is incapable of consenting; thus, an adult who has intercourse with a child is always engaged in forcible and nonconsensual conduct").

¹³⁷ See Angela D. Lucchese, Note, *Pena v. Mattox*: The Parental Rights of a Statutory Rapist, 36 Brandeis J. Fam. L. 285, 291-94 (1998).

¹³⁸ See, e.g., *Peña v. Mattox*, 84 F.3d 894, 900 (7th Cir. 1996). Amanda Mattox, age 15, and Ruben Peña, age 19, were dating for a year when Mattox became pregnant. Immediately following Mattox's delivery, Peña was arrested and, originally, falsely charged with felony statutory rape; the charge was subsequently reduced to a misdemeanor. While Peña was in jail, unable to make bail, Mattox's parents drove her to a state where a father's consent is not necessary to place the child of a minor up for adoption; the child was put up for adoption in this state. Eighteen months later Peña brought suit for deprivation of parental rights under 42 U.S.C. § 1983. The Seventh Circuit rejected his claim. See *Peña*, 84 F.3d at 895-96.

¹³⁹ See Lucchese, *supra* note 137, at 292-93.

¹⁴⁰ See, e.g., *L. v. D.*, 630 S.W.2d 240, 245 (Mo. Ct. App. 1982) (denying custody to lesbian mother); *In re J.S. & C.*, 324 A.2d 90, 97 (N.J. Super. Ct. Ch. Div. 1974) (restricting visitation rights of homosexual father), *aff'd*, 362 A.2d 54 (N.J. Super. Ct. App. Div. 1976); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (denying custody to lesbian mother).

¹⁴¹ Courts historically have taken one of three approaches to dealing with parents' sexual orientation: (1) *per se* determination that gay parents are unfit as a matter of law; (2) presumption of harm from exposure to the social stigma attached to homosexuality, prompting courts to forbid parents from exposing the child to their "gay lifestyle"; (3) homosexuality as a factor in custodial determination if there is a nexus between the parents' sexual orientation and harm to the child, requiring an evidentiary showing that the orientation harms the child. See Katja M. Eichinger-Swainston, Note, *Fox v. Fox*: Redefining the Best Interest of the Child Standard for Lesbian Mothers and Their Families, 32

consensual sexual activity¹⁴³—rather than any demonstrated deleterious effects on the child whose custody is in consideration—has been used to deny the gay parent custody, most notably in the well-publicized case of *Bottoms v. Bottoms*.¹⁴⁴ The cases in which the illegal

Tulsa L.J. 57, 58-59 (1996); cf. Note, Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis, 102 Harv. L. Rev. 617, 630 (1989) (noting that courts typically justify sodomy laws on basis that child might be harassed or stigmatized, child might not grow up heterosexual, child's moral development could be harmed, and state sodomy statute mandates denial or restriction of custody).

¹⁴² Five states retain sodomy laws that implicitly criminalize gay relationships. See Ark. Code Ann. § 5-14-122 (Michie 1997); Kan. Crim. Code Ann. §§ 21-3501(2), 21-3505 (West 1999); Mich. Comp. Laws Ann. §§ 750.338, 750.338a (West 1991); Mo. Ann. Stat. § 566.090 (West 1999); Tex. Penal Code Ann. § 21.06 (West 1994). Fourteen states criminalize oral and anal sex in a gender-neutral fashion. See Ala. Code § 13A-6-63 (1994); Ariz. Rev. Stat. Ann. §§ 13-1411, 13-1412 (West 1989); Fla. Stat. Ann. § 800.02 (West Supp. 2000); Idaho Code § 18-6605 (1997); La. Rev. Stat. Ann. § 14:89 (West 1986); Md. Code Ann. art. 27, § 553 (1996); Mich. Comp. Laws Ann. §§ 750.158, 750.338b (West 1991); Minn. Stat. Ann. § 609.293 (West 1987); Miss. Code Ann. § 97-29-59 (1999); N.C. Gen. Stat. Ann. § 14-177 (1999); Okla. Stat. Ann. tit. 21, § 888 (West Supp. 2000); S.C. Code Ann. § 16-15-120 (Law. Co-op. 1985); Utah Code Ann. § 76-5-403 (1995); Va. Code Ann. § 18.2-361 (Michie 1996).

Sodomy laws are not generally enforced *per se*—few individuals are prosecuted specifically for acts of consensual sodomy. See *Baker v. Wade*, 553 F. Supp. 1121, 1147 (N.D. Tex. 1982) (noting that sodomy statute was not enforced through criminal prosecutions); Richard D. Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* 51 (1988) (“[S]odomy laws are virtually never enforced.”); Richard A. Posner, *Sex and Reason* 4, 292 (1992) (noting that sodomy laws are “dead letters”); see also Al Kamen, *Powell Changed Vote in Sodomy Case; Different Outcome Seen Likely if Homosexual Had Been Prosecuted*, Wash. Post, July 13, 1986, at A1 (noting that Justice Powell changed his vote overnight in *Bowers v. Hardwick*, 478 U.S. 186 (1986), because *Hardwick* had not been prosecuted for sodomy). States may, however, retain these laws in order to stigmatize gay and lesbian sexual relationships. See Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by ‘Unenforced’ Sodomy Laws* (forthcoming 2000).

¹⁴³ Sodomy laws are facially neutral with respect to the sexual orientation of the persons engaging in proscribed sexual activity, but the application of sodomy laws has evolved over time such that only same-sex couples are affected. See William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 Iowa L. Rev. 1007, 1012 (1997) (stating that in 1880s sodomy laws became increasingly enforced against same-sex couples); see also Nan D. Hunter, *Life After Hardwick*, 27 Harv. C.R.-C.L. L. Rev. 531, 542 n.48 (1992) (arguing that sodomy statutes are understood by society as “homosexual laws”). Further, there are no cases in which the conduct of heterosexual parents engaged in activity prohibited by sodomy laws formed a basis for terminating custody.

¹⁴⁴ 444 S.E.2d 276 (Va. Ct. App. 1994), rev'd, 457 S.E.2d 102 (Va. 1995). In *Bottoms*, the trial court denied physical custody to Sharon Bottoms, granting custody instead to Sharon's mother. The basis for denial of custody was that Bottoms' lesbian relationship rendered her an unfit parent: “[T]he mother's conduct is illegal. . . . I will tell you that it is the opinion of the court that her conduct is immoral. And it is the opinion of this court that the conduct of Sharon Bottoms renders her an unfit parent.” *Id.* at 279 (quoting trial court). The trial court was employing the “*per se*” standard described *supra* note 141. The Virginia appellate court reversed. See 444 S.E.2d 276 (Va. Ct. App. 1994). The Supreme Court of Virginia reversed once again, awarding custody to Bottoms' mother. See 457 S.E.2d 102 (Va. 1995). See generally Amy D. Ronner, *Bottoms v. Bottoms: The Lesbian*

nature of the parent's homosexual relations is used to deny custody provide a sharp illustration of the extent to which the construction of parent as criminal is both complete and permanent: In states where sodomy remains illegal, a parent with a gay sexual orientation is by definition "criminal,"¹⁴⁵ presumptively "unfit" for parenthood. The criminal sanctions attached to this sexual activity, in the context of consensual gay relationships, permit courts that consider gay sexuality immoral¹⁴⁶ to limit or terminate the custodial rights of persons who transgress the law without resorting to tenuous arguments about how the parent's sexual orientation might affect "the best interest of the child."¹⁴⁷ Courts use the

Mother and the Judicial Perpetuation of Damaging Stereotypes, 7 *Yale J.L. & Feminism* 341, 357-64 (1995).

¹⁴⁵ In a Tennessee custody case, a lesbian mother was repeatedly described as a "criminal" during the proceedings because of her lesbian relationships. See Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 *Va. L. Rev.* 1551, 1588 (1993). Persons who commit acts of sodomy are often explicitly categorized as criminals: For example, some states that require registration of sexual offenders specifically require gay men convicted of consensual sodomy to also register. See, e.g., Ala. Code § 13A-11-200 (1994); Mo. Ann. Stat. § 589.400(1)(4) (West Supp. 2000); S.C. Code Ann. § 23-3-430(c)(10) (Law. Co-op. Supp. 1999).

¹⁴⁶ Sodomy statutes survive, in part, for the purpose of constructing same-sex relations as immoral. See, e.g., Kenneth L. Karst, *Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion* 58 (1993). Further, gay persons who are "blatant" about their sexual orientation particularly are subject to custody review. See Katherine Arnup & Susan Boyd, *Familial Disputes? Sperm Donors, Lesbian Mothers, and Legal Parenthood*, in *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* 77, 82-83 (Didi Herman & Carl Stychin eds., 1995):

'Good' lesbian mothers—women who live quiet, discreet lives, who promise that they will raise their children to be heterosexual . . . have in recent years increasingly succeeded in winning custody of their children. 'Bad' lesbian mothers—women who are open about their sexual orientation, who attend gay and lesbian demonstrations and other public events, and who view their lesbianism positively—are almost certain to lose custody of their children to their ex-husbands.

¹⁴⁷ See, e.g., *Thigpen v. Carpenter*, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987) (equating parent's homosexual relationship with "illicit sexual conduct" that adversely affects child); *Chaffin v. Frye*, 119 Cal. Rptr. 22 (Ct. App. 1975) (holding that "possibility of homosexual conduct" would negatively affect child); *L. v. D.*, 630 S.W.2d 240, 244 (Mo. Ct. App. 1982) (same); *Roe v. Roe*, 324 S.E.2d 691, 692 (Va. 1985) (same). In addition, the criminality of homosexuality has also been used to demonstrate that the parent is unfit. See, e.g., *In re R.W. v. D.W.W.*, 717 So. 2d 793, 796 (Ala. 1998).

In contrast, the Supreme Court of Mississippi has considered the fitness of gay custodians and denied custodial access without "resorting" to a discussion of the criminal behavior of petitioning parents. See *Weigand v. Houghton*, 730 So. 2d 581, 586 (Miss. 1999). In *Weigand*, the court considered a gay father's petition to alter his son's custodial relationship given the presence of domestic violence in the home of his ex-wife. In considering whether the chancellor had appropriately considered the child's best interest, the supreme court determined that the chancellor was not manifestly wrong in finding that the father's gay relationship and the mother's exposure of the child to religious training required leaving the child in the mother's physical custody. The chancellor had given great weight to the

same logic to prevent gays, lesbians, and bisexuals from adopting children.¹⁴⁸

Two final observations should be made with respect to custody determinations and gay parents. First, the fact that sodomy remains illegal in several states in contrast with other traditionally proscribed sexual relationships indicates a continuing social opprobrium of homosexuality in some states. This opprobrium, discursively with the illegal nature of the conduct, renders judges more likely to examine the homosexual activity of a parent.¹⁴⁹ Secondly, while consensual sodomy does remain illegal in several states, it is rarely prosecuted as a crime;¹⁵⁰ the only punishment persons who commit the illegal act receive is, thus, collateral. In other words, depriving gay parents of custody is the punishment society intends to mete out for implicated parents.

C. Drug Offenses

Both domestic violence custody presumptions and sex offender prohibitions have the explicit force of statutory law behind them. In contrast, drug-related convictions and findings of controlled substance use are not treated legislatively as separate factors courts must consider when making custody determinations, but are employed by courts as implicitly subsumed in general best interest of the child considerations. Courts do not consider findings that parents have created actual harm: The argument for separating parents convicted of drug-related offenses from their children is not founded upon a claim of direct abuse.¹⁵¹ Even the most emphatic opponents of child custody

moral fitness of the father, "an admitted homosexual who lives with and engages in sexual activities with another on a day-to-day basis," and a parent who "admits that a heterosexual lifestyle would have no adverse effect, while acknowledging that a homosexual lifestyle or homosexual activity may well have the opposite effect." *Id.* The supreme court vacated the lower court's sua sponte decision to preclude the father's partner from being present during visitation. See *id.* at 587.

¹⁴⁸ See, e.g., *In re Appeal in Pima County Juvenile Action B-10489*, 727 P.2d 830 (Ariz. Ct. App. 1986) (finding that applicant's bisexuality may be used to prevent him from adopting children).

¹⁴⁹ See Leslie, *supra* note 142.

¹⁵⁰ In terms of enforcement, sodomy law should be distinguished from both drug and domestic violence law. While it is true that the majority of drug and domestic violence transgressions are not punished, domestic violence crimes usually go unpunished because the victims are pressured or frightened out of reporting the incidents that generally occur in their private homes, and drug violations go unpunished simply because the drug trade is so widespread—when drug users and purveyors are caught, they are in fact punished. In contrast, many gay persons live openly in states with sodomy laws where, despite the ease of detection, these crimes are very rarely prosecuted.

¹⁵¹ See, e.g., *Vernon Mc. v. Brenda N.*, 602 N.Y.S.2d 58, 60 (App. Div. 1993) (remanding custody for more in-depth review of mother's conviction, noting that "the mother's conviction

for persons so convicted do not claim that these parents slip their children heroin.¹⁵² In fact, courts have found that the absence of physical child abuse constitutes not a mitigating circumstance, but, rather, a fact attesting "to the parties' good fortune."¹⁵³

The argument for denying custody is arguably rooted in a theory of either *potential* neglect or exposure to a dangerous "lifestyle" as per se abuse. In other words, parents who sell or use drugs may neglect their children's basic needs as a result of their drug habits or may expose their children to weapons and violence in conjunction with participation in the drug trade.¹⁵⁴ Case law, however, belies such a simple or comforting explanation.

Drug activity and convictions carry express moral taint.¹⁵⁵ Such activity, standing alone, without other evidence of poor parental skills or any evidence that children have been exposed to drug use or trade,

tion for attempted transportation of drugs into this country indicates such a lack of judgment and respect for the law as to warrant a more meaningful appraisal of her parenting ability than the court's mere observation of her based upon a one-day hearing"). Social science data does not support the notion that parents who abuse drugs also abuse children. See Sandra Anderson Garcia, *Drug Addiction and Mother/Child Welfare*, 13 J. Legal Med. 129, 167 (1992) ("Although it seems logical to assume that drug addicts have a predilection for child abuse and neglect because of the panoply of social and psychological problems that often attend addiction, evidence that pregnant addicts later abuse their babies is equivocal and largely undocumented.").

¹⁵² The situation of women convicted of drug offenses should be contrasted with direct criminal prosecutions of and custody decisions regarding women who "deliver" drugs to fetuses in vitro while pregnant. See Barrie Becker & Judge Peggy Hora, *The Legal Community's Response to Drug Use During Pregnancy in the Criminal Sentencing and Dependency Contexts: A Survey of Judges, Prosecuting Attorneys, and Defense Attorneys in Ten California Counties*, 2 S. Cal. Rev. L. & Women's Stud. 527, 527-28 (1993); Lorraine Schmall, *Addicted Pregnancy as a Sex Crime*, 13 N. Ill. U. L. Rev. 263, 265-66 (1993). But see *Johnson v. State*, 602 So. 2d 1288, 1290 (Fla. 1992) (determining that transmission of cocaine during birthing process via umbilical cord did not constitute "delivery" of drug to minor).

¹⁵³ *Deskin v. Clarke County Dep't of Soc. Servs.*, No. 0623-97-4, 1997 WL 727746, at *1 (Va. Ct. App. Nov. 25, 1997).

¹⁵⁴ For example, parents might explicitly harm their child by supplying them with illegal drugs. See, e.g., *In re Marrs*, Nos. 97-CA-79, 97-CA-80, 1998 WL 896669, at *5 (Ohio Ct. App. Dec. 28, 1998) (barring custody for father previously convicted of corrupting child by providing illicit drugs); see also Garcia, *supra* note 151, at 129.

¹⁵⁵ Drug-related convictions tend to be grouped with "immoral" behavior rather than with evidence of a parent's neglect, abuse, or general relationship with the child. See, e.g., *Kroics v. Kroics*, 705 So. 2d 1302, 1305 (La. Ct. App. 1998) (finding as follows:

[W]e see little positive for the child to identify with in the instant case and much to negatively influence him. Presently, Sharon lives in a house with her second child, who is illegitimate Sharon's sister is also an illegitimate child, and, at the age of nineteen, has two illegitimate children of her own, from two different fathers In fact, the record indicates that almost all of the people in that household have been convicted of drug violations. For example, while pregnant with Michael Thomas, Sharon was charged with, and later convicted of, possession with intent to distribute marijuana Lastly,

may terminate all parental rights.¹⁵⁶ The mere fact of conviction—even in the absence of physical incarceration—has also been determined to constitute the sort of “change of circumstance” requiring review of custody arrangements.¹⁵⁷ The use of drugs within the home, even in the absence of either criminal conviction or any evidence of presence of or affect on children, also can be used as a factor in denying custody.¹⁵⁸ Courts commonly deny persons who use drugs custody or visitation, and often entirely terminate parental rights.¹⁵⁹ Because courts make custody determinations in the absence of evidence of abuse, they are forced to rely on stereotypical constructions of drug users, assuming that persons involved with drugs are necessarily poor parents.¹⁶⁰ Judges often step outside the judicial role to lecture drug-using parents. For example, one appellate court stated that “[w]e hope that the mother has learned her lesson that illegal drug usage and child custody are not compatible.”¹⁶¹ Further, courts terminate custody based on the argument that parents who would risk legal op-

Sharon’s companion, who often visited the house, was being prosecuted for drug-related offenses at the time of the hearing.);

see also Janet L. Dolgin, *The Law’s Response to Parental Alcohol and “Crack” Abuse*, 56 *Brook. L. Rev.* 1213, 1253 (1991) (discussing substance use and its role in child neglect proceedings and finding that “[t]he decision that a woman who uses drugs during pregnancy has no right to the resulting baby is essentially a moral decision. The difficulty with such a decision is that the court’s focus shifts away from the best interest of the child, and toward punishing the mother.”).

¹⁵⁶ In *In re Kennedy*, 550 N.Y.S.2d 73 (App. Div. 1989), the court determined that the best interest of the child required that the father be given custody. The mother had a criminal record that included drug crimes; her mother and brothers, with whom she did not live, had previously been convicted of drug crimes and burglary. See *id.* at 74. The court did not credit the mother’s claim that the father had committed physical abuse against the child on one occasion. See *id.*

¹⁵⁷ See, e.g., *In re Marriage of Ortiz*, 790 P.2d 555, 557 (Or. Ct. App. 1990), *aff’d*, 801 P.2d 767 (Or. 1990) (finding change of circumstance requiring reconsideration of visitation after father’s drug conviction). Notably, Oregon’s custody statute permits the court to consider the “conduct, marital status, income, social environment, or lifestyle of either party only if it is shown that any of these factors are causing or may cause emotional or physical damage to the child.” See Or. Rev. Stat. § 107.137(3) (1997).

¹⁵⁸ See *Bowman v. Bowman*, 686 N.E.2d 921, 923 (Ind. Ct. App. 1997) (finding no error in trial court’s consideration of mother’s use of marijuana with man with whom she married and resided and further noting that man was convicted of drug-related offenses and incarcerated after he and mother separated).

¹⁵⁹ See generally Mary E. Taylor, *Annotation, Parent’s Use of Drugs as Factor in Award of Custody of Children, Visitation Rights, or Termination of Parental Rights*, 20 *A.L.R.5th* 534 (1994).

¹⁶⁰ See Lauren Shapiro, *An HIV Advocate’s View of Family Court: Lessons from a Broken System*, 5 *Duke J. Gender L. & Pol’y* 133, 153 (1998) (“Too often, hysteria and stereotypes about parents with drug use histories dominate the decisionmaking process about whether children are at risk from a parent’s drug addiction or history of drug addiction.”).

¹⁶¹ *In re Marriage of Johnson*, 962 P.2d 752, 755 (Or. Ct. App. 1998).

probrium through drug involvement are unfit.¹⁶² Finally, courts terminate parental rights based on the drug convictions of persons with whom parents choose to form families. In one such case, a Pennsylvania court terminated the parental rights of a mother for refusing to cease contact with her partner, the child's natural father, whose parental rights previously had been terminated after a drug conviction.¹⁶³

While presumptions against domestic violence perpetrators predominantly affect men,¹⁶⁴ drug-based sanctions not only involve both genders, but seem particularly likely to be levied against women. In part this is because women and minorities have been especially hard hit in terms of convictions by the war on drugs.¹⁶⁵ The disproportionate effect on women also may be related to the higher percentage of women who have physical custody of their children in the first place. It may also be the case that courts tend to treat drug use as passive abuse or neglect, and courts may hold women more responsible for such passive abuse. Finally, custodial determinations with respect to drug involvement are most likely to be levied against lower-class women, as the substance use of middle and upper-class persons is less likely to come to the court's attention.¹⁶⁶

CONCLUSION

Persons who have committed criminal acts always may have been constructed as "other," but recent statutory enactments and case law

¹⁶² See, e.g., *Williams v. Texas Dep't of Protective and Regulatory Servs.*, No. 14-93-00700-CV, 2000 WL 4939, at *3 (Tex. Ct. App. Jan. 6, 2000) ("[T]he record indicates that even after knowing his parental rights were in jeopardy, appellant continued to engage in criminal activity that resulted in him being jailed.").

¹⁶³ See *In re Adoption of M.A.R.*, 591 A.2d 1133, 1136-37 (Pa. Super. Ct. 1991); cf. *State v. McSweeney*, 860 P.2d 305, 306 (Or. Ct. App. 1993) (conditioning mother's probation on requirement that she not reside with spouse if he resumed drug use).

¹⁶⁴ But see *supra* notes 110-15 and accompanying text.

¹⁶⁵ See *supra* notes 10-12 and accompanying text (discussing increase in incarceration rates for women and minorities, driven by drug-related crimes). While the arrest rate for whites committing drug offenses has been level at 300 per 100,000 from 1970 until the present, the arrest rate for blacks—300 per 100,000 in 1968—topped out at 1,500 per 100,000 in 1990 and leveled off to 1,050 per 100,000 in 1992. See *Morris*, *supra* note 37, at 215. For a broader discussion of racism in criminal justice, see generally Randall Kennedy, *Race, Crime, and the Law* (1997).

¹⁶⁶ See, e.g., *Dolgin*, *supra* note 155, at 1228 (stating that:

Neglect proceedings in general, and those brought against parents who misuse alcohol or drugs in particular, are almost always brought against poor parents Longstanding differences in the way American family law treats the rich and the poor have affected the law's approach to neglect proceedings [T]he drug habits of middle class families are rarely investigated by the state, or made the subject of neglect proceedings in court.)

represent a modern formalization of othering. Historically, persons convicted of crimes were reformable, treatable, rehabilitatable. Now, persons released, as well as persons never considered sufficiently dangerous to lock up, are treated in courts and by law as too volatile or unreliable to entrust with the care of children.

The best interest of the child standard permits courts to take into account the arguments made by proponents of presumptions against child custody for persons who participate in criminal activity. A child whose parent's drug addiction renders the parent unable to supervise her is better placed with a parent who can; a child who is afraid of her father because of the violence he has committed against her mother may be better left in her mother's care. As the cases outlined by this Note in the context of drug-related crimes indicate, courts can and do consider conduct relevant to child care when that conduct is presented. However, the denial of custody to persons who have been convicted of crimes or have participated in criminal activity based on the fact of that activity, rather than on its demonstrated impact on the child, signals that something is afoot other than an interest in protecting children.

As new legal measures reduce complicated conduct into presumptions against custody and collaterally deprive parents of access to their children, they extend or substitute punishment of parents by the criminal law. The parent is denied custody, not because he or she has mistreated the child, but because the parent is the "sort of person" who might.