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# The Scarlet eLetter and Other Roadblocks to Redemption for Female Offenders

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**THE SCARLET ELETTER AND OTHER  
ROADBLOCKS TO REDEMPTION FOR FEMALE  
OFFENDERS**

**Judge Eugene M. Hyman (ret.)\***

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## INTRODUCTION

Does redemption exist in today's criminal justice system? Conceptually, redemption stems from the Judeo-Christian belief that forgiveness shall be given for past misdeeds or sins.<sup>1</sup> In the context of law—once one has atoned for their misdeed, paid their debt to society, served time, moreover, has turned the corner and is living crime free—is a crime ever *really* forgiven, much less forgotten?

Looking at this issue from a longer-term perspective, history is replete with vivid examples of how criminals were punished, visibly distinguished, and in essence permanently branded. Thieves, for instance, had their hand cut off; ex-prisoners in the context of *Les Misérables* had to carry a yellow card of convict identification even after serving nineteen years in prison for stealing a loaf of bread, as was the case for Valjean.<sup>2</sup> Based on recent American history, and as fictionalized by author Nathaniel Hawthorne, an adulterous woman, Hester Prynne, had to sport a Scarlet Letter in a public exhibit of excoriation and shame.<sup>3</sup> Clearly, these punishments have the effect of placing an onerous “societal burden” of shame on criminals.

Although our modern society does not condone and actually decries these antediluvian displays, has it really progressed from these practices? Have we merely replaced Hester Prynne's Scarlet Letter with a scarlet criminal record that endures with equal stigma? The impacts of carrying a

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1. 6 *Matthew* 9–13; 11 *Luke* 2–4 (“Forgive us of our sins, as we forgive those who sin against us.”).

2. *See generally* VICTOR HUGO, *LES MISÉRABLES* (Charles E. Wilbour trans., Modern Library 1992) (classic novel original published in 1862 with the theme of redemption).

3. *See generally* NATHANIEL HAWTHORNE, *THE SCARLET LETTER*, (Ross C. Murfin ed., Bedford Books 1991).

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criminal record, while at first blush benign, are disabling to its holder, and perhaps even more enduring given the technological era we live in. The eternal nature of Internet information combined with computerized databases enable the transformation of a Scarlet Letter to a devastating *Scarlet eLetter*.

Having a criminal record triggers a host of “collateral consequences” that may deny employment, housing, welfare, and civic rights while also causing harmful child custody struggles. Some of these consequences are direct and attach to the offense. For example, collateral consequences of a drug abuse conviction include the denial of welfare benefits and employment difficulties, including problems obtaining any future professional licenses. As will be highlighted, these pernicious consequences can be harsh, lasting and with little relief in sight.

A review of collateral consequences will demonstrate the extent to which they can negatively impact and threaten the wellbeing of women offenders in general, but in particular and most importantly, their children.

While every person with a criminal record is forced to carry this record as a modern-day Scarlet Letter, female ex-offenders face particularly tough obstacles. Although females in the criminal justice system do not constitute a large number in absolute terms,<sup>4</sup> when compared to their male counterparts, they display unique characteristics that make them especially vulnerable to live a life of crime, poverty, despair, and hopelessness. There are three principal reasons that female ex-offenders are particularly susceptible to these stagnating conditions.

First, there is a proliferation in low-level drug crimes<sup>5</sup> in addition to property crimes committed by women.<sup>6</sup> In recent years, the rate of women committing these crimes is

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4. HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, NCJ 239423, ARREST IN THE UNITED STATES, 1990-2010 2 (Oct. 2012) (In 2010, for example, a total of 3,329,921 women were arrested for all crime types as compared to 9,792,192 for males.).

5. *Employment Discrimination Against Women with Criminal Convictions*, ACLU (Jun. 30, 2009), <http://www.aclu.org/womens-rights/employment-discrimination-against-women-criminal-convictions>.

6. SNYDER, *supra* note 4.

increasing at a higher rate than their male counterparts.<sup>7</sup> More vexing, this trend is occurring at a time when population rates in prisons are generally on the decline.<sup>8</sup>

Second, women often occupy traditional caretaking roles in society including nursing, healthcare and childcare. Caring for the chronically ill, disabled, etc., has mostly fallen into the lap of women, and continues to be the norm.<sup>9</sup> In addition, women also dominate health and social service jobs, accounting for a majority of the workforce in those fields.<sup>10</sup> They prevail in educational services, representing 73.6%.<sup>11</sup> These occupations are, understandably, highly sensitive to and intolerant of any criminal record. In fact, statutory bans may disqualify record holders altogether.

Last but not least, seven in ten females under criminal sanction are mothers.<sup>12</sup> Nationally, over two thirds of women in state prisons have a minor child.<sup>13</sup> Collectively, there are a staggering 1.3 million children with a mother under the supervision of the criminal justice system.<sup>14</sup> The changing social landscape is increasingly marked with single-parent households,<sup>15</sup> which face onerous challenges to provide for the physical and emotional wellbeing of the family.<sup>16</sup> However,

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7. See MONIQUE MORRIS ET AL., A HIGHER HURDLE: BARRIERS TO EMPLOYMENT FOR FORMERLY INCARCERATED WOMEN 2 (2008), [http://www.law.berkeley.edu/files/A\\_Higher\\_Hurdle\\_December\\_2008%281%29.pdf](http://www.law.berkeley.edu/files/A_Higher_Hurdle_December_2008%281%29.pdf).

8. LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 239972, U.S. CORRECTIONAL POPULATION DECLINED FOR SECOND CONSECUTIVE YEAR 1 (Nov. 2012).

9. See *Employment Discrimination Against Women with Criminal Convictions*, *supra* note 5.

10. Women make up 73.3% of non-clergy social service workers and 80.3% of non-physician healthcare workers. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY 3 (2012), available at <http://www.bls.gov/cps/cpsaat11.pdf>

11. *Id.*

12. Leonard A. Sipes, *Statistics on Women Offenders*, CORRECTIONS.COM (Feb. 6, 2012), <http://www.corrections.com/news/article/30166>.

13. LAWRENCE A. GREENFELD & TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, NCJ 175688, WOMEN OFFENDERS (Dec. 1999).

14. *Id.*

15. There were 15.3 million single-mother families and 5.8 million single-father families. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, C2010BR-14, HOUSEHOLDS AND FAMILIES: 2010 6 (Apr. 2012).

16. Ron Haskins, *Combating Poverty: Understanding New Challenges for Families, Testimony*, BROOKINGS INSTITUTE (Jun. 5 2012), <http://www.brookings.edu/research/testimony/2012/06/05-poverty-families-haskins>.

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when a single parent has a criminal record, the problems are exponential and the ability to provide the basics, such as food and shelter, is compromised even further.<sup>17</sup>

This Article highlights the plight of the beleaguered female offender in overcoming the stigma of a record and its consequences while also grappling with mental issues and caring for herself. The scope of this Article encompasses female offenders who commit lower level, non-violent crimes, but can be rehabilitated with some treatment and assistance. Let it be clearly stated that the safety of the community can never be compromised by the presence of dangerous, violent criminals whether male or female. No one is advocating a pass for these individuals.

Accepting the premise that gainful, stable employment is the *sine qua non* of integration to a normal life, it is a vital topic of discussion. Acknowledging that lack of employment is the foremost predictor of recidivism,<sup>18</sup> a discussion of the barriers to employment caused by a criminal record is paramount. Simply put, if an offender does not have some form of employment, the offender is three times more likely to recommit.<sup>19</sup> Recidivism is the hallmark of failure in the system. It costs society on so many levels: through bloated incarceration costs, causing emotional scars and blows to self-esteem for women, feeding the monstrous cycle of crime with the sacrifice of innocent children.

While race does play a role in the criminal justice system, it is not a topic that will be discussed in depth in this paper. There are two principal points to make. First, within the male offender group, African-Americans, Hispanics, and other minorities, are disproportionately incarcerated relative to

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17. PATRICIA ALLARD, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENCES 9–10 (Feb. 2002), *available at* [http://www.sentencingproject.org/doc/publications/women\\_smy\\_lifesentences.pdf](http://www.sentencingproject.org/doc/publications/women_smy_lifesentences.pdf).

18. See COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS, AMERICAN BAR ASSOCIATION, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 6 (2007), *available at* [http://www.pardonlaw.com/materials/rev\\_2ndchance\(3\).pdf](http://www.pardonlaw.com/materials/rev_2ndchance(3).pdf), [hereinafter SECOND CHANCES].

19. CITY OF CHICAGO, REBUILDING LIVES, RESTORING HOPE, STRENGTHENING COMMUNITIES: BREAKING THE CYCLE OF INCARCERATION AND BUILDING BRIGHTER FUTURES IN CHICAGO: FINAL REPORT OF THE MAYORAL POLICY CAUCUS ON PRISONER REENTRY 15 (2006).

their population demographics.<sup>20</sup> Minority female offenders follow a similar pattern where they are disproportionately represented in the crime figures.<sup>21</sup> Nonetheless, the focus will remain on women as a disparate group. Second, suffice it to say that any issue or problem encountered by a white female with a record will almost without exception be heightened and compounded for a woman of color.

Finally, this Article will explore what initiatives are currently being taken or considered to mitigate the barriers to employment and other stepping-stones necessary to a productive life. While the roadblocks to redemption are formidable must they be impossible or even worse—permanent?

### I. COLLATERAL CONSEQUENCES

While all collateral consequences are too numerous to mention, let alone discuss, this section will focus on those consequences that have the most profound impact on the female offenders. A distinction must be made about collateral consequences. Some are *direct* consequences that specifically attach to certain convictions, i.e. drug crimes. Others are more of an unintended consequence influencing the ability to obtain employment. Because of technology, records are etched with a permanency. Like a cancer, the *Scarlet eLetter* spreads its tentacles of destruction and rends the fabric of life.

#### A. *Employment*

Like the well-known axiom of real estate investing—location, location, location—a similar sentiment can be echoed for criminal offenders. What is most important for the future of the offender? Employment, employment, employment. Increased financial means, a sense of purpose through positive participation in society, boosts to self-esteem, and the attendant respect that is garnered are among the benefits of employment. Gainful employment is arguably the best

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20. See generally LAUREN E. GLAZE & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, NCJ 236019, PROBATION AND PAROLE IN THE UNITED STATES, 2010 (Nov. 2011).

21. See generally *id.*

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medium for reentry into society.<sup>22</sup> Yet it is elusive to record holders, causing the fate of many children to hang in the balance.

To put these women in an even more sobering perspective, compare them to a subgroup of single mothers termed ‘the disconnected.’<sup>23</sup> This group is stubbornly caught in the welfare net unable to achieve upward mobility. These women are considered to have more barriers to employment with “less education, younger children, higher rates of mental and physical health problems, higher rates of substance abuse, and a greater history of domestic violence.”<sup>24</sup> If this sounds familiar, add to this daunting list the crushing impact of a criminal record.

At the time of arrests, over a third of these women were unemployed with a majority being underemployed.<sup>25</sup> After incarceration, approximately 60% of males obtained employment whereas women were less successful, with just under half of this figure getting jobs.<sup>26</sup>

Clearly, a formidable confluence of factors is responsible for bolstering the roadblocks to employment. Chief among the factors, however, are the growing trend of background checks.<sup>27</sup> According to a number of surveys, the vast majority of employers stated that they are inclined to make criminal background checks on prospective employees.<sup>28</sup> The Society for Human Resource Management recently reported that over 80% of employers perform background checks on potential employees.<sup>29</sup> Certainly, it is understandable that an employer

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22. See Stephanie S. Covington, *Women in Prison: Approaches in the Treatment of our Most Invisible Populations*, 21 *WOMEN & THERAPY J.* 141, 143–44 (1998).

23. See Rebecca Black & Brian Novak, *Helping Disconnected Single Mothers*, BROOKINGS INST. (May 2008), <http://www.brookings.edu/research/papers/2008/05/single-mothers-blank>.

24. *Id.*

25. DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 201932, PROFILE OF JAIL INMATES, 2002 9 (2004).

26. *Women & Girls in the Criminal Justice System—Facts and Figures*, NAT’L CRIM. JUST. REFERENCE SERVICE, <https://www.ncjrs.gov/spotlight/wgcjs/facts.html>.

27. See generally NAT’L EMP’T LAW PROJECT, THE LOW-WAGE RECOVERY AND GROWING INEQUALITY (Aug. 2012), available at [http://nelp.3cdn.net/8ee4a46a37c86939c0\\_qjm6bkhe0.pdf](http://nelp.3cdn.net/8ee4a46a37c86939c0_qjm6bkhe0.pdf).

28. See generally *id.*

29. See generally *id.*



would want to protect itself from liabilities arising from recidivist acts and potential negligent hiring suits.

Many employers go even further and unequivocally state up front that record holders need not apply.<sup>30</sup> In a much cited recent Craigslist study, as reported by the National Employment Law Project, record holders are enjoined from applying for many jobs posted on Craigslist.<sup>31</sup> Needless to say, it becomes difficult to get a job when you are barred from applying in the first place.

For too long, government agencies have been notoriously heavy handed and assiduous in checking for records.<sup>32</sup> They have virtually unfettered access to records regardless of type or age and are obliged to check.<sup>33</sup> While they may be well intentioned in their desire to protect people from unscrupulous predators, there are cases where the unintended consequences are severe and unnecessarily punitive.<sup>34</sup>

Take for example the role of females as caretakers. Traditionally, women have assumed these roles and in many cases are involved in the care of a family member who is disabled, indigent, blind or incapacitated in some manner that receives government assistance specifically through IHSS, a government program which provides in-home care to 430,000 low-income seniors.<sup>35</sup>

In a recent example, a daughter caring for her blind mother is apt to lose her job because of a twenty-seven year old shoplifting record.<sup>36</sup> Apparently there is no dispensation for family members in a situation where the daughter relies on the government assistance and the mother benefits from

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30. *See generally id.*

31. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMMELM, NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 13, (Mar. 2011), *available at* [http://www.nelp.org/site/issues/category/criminal\\_records\\_and\\_employment/](http://www.nelp.org/site/issues/category/criminal_records_and_employment/).

32. *See generally* AMY E. HIRSCH ET AL., CTR. FOR LAW & SOC. POLICY AND CMTY. LEGAL SERVICES, INC., EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS (2002) (discussing legal barriers to employment in different types of employment).

33. *See generally id.*

34. *See generally id.*

35. Bob Egelko, *State Can't Exclude Felons From In-Home Care*, S.F. CHRON., Aug.25, 2010, at C3.

36. *Id.*

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care of a trusted family member and avoids being forced into a nursing facility. Does it make sense that such an antiquated record of a nonviolent nature could be so instrumental in denying government assistance? Assuming that all other criteria are met for this form of assistance, should the Scarlet Letter be relevant and if so for how long?

When approximately 28 million women assume the role of caretaker,<sup>37</sup> not only they, but their charges, are also affected if care is compromised. When this care is compromised, the resulting strain is twofold. The disabled and chronically ill members suffer and local budgets for chronic care will most assuredly be strained.

Even if a woman with a criminal record wanted to bypass the conventional employment route, where a specific job is applied for, she will face further obstacles to entry-level entrepreneurial jobs or self-employment opportunities such as in hairdressing or cosmetology. Women who are unemployed or want the convenience of being available to their family commonly set up small businesses, often in their homes.<sup>38</sup> The number of women in business has grown by 20% between 2002 and 2007.<sup>39</sup> Yet a foray into business is not unfettered. According to the Institute for Justice, there are approximately 102 jobs that require licensing.<sup>40</sup> To obtain these permits, applicants must invest in some cases, a considerable number of hours of training, then pay a fee to obtain a certificate.<sup>41</sup> In 1950, only 5% of Americans worked in jobs requiring a license; today that figure is roughly 30%.<sup>42</sup> Considering that the licensing bodies are likely to check for criminal records, more roadblocks are set in place.<sup>43</sup> Let it be clear, these jobs

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37. LENORA LAPIDUS ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 53, available at [http://www.aclu.org/files/images/asset\\_upload\\_file431\\_23513.pdf](http://www.aclu.org/files/images/asset_upload_file431_23513.pdf).

38. CENSUS BUREAU, U.S. DEP'T OF LABOR, SURVEY OF BUSINESS OWNERS—WOMEN-OWNED FIRMS: 2007, <http://www.census.gov/econ/sbo/getsof.html?07women>.

39. *Id.*

40. DICK CARPENTER ET AL., INST. FOR JUSTICE, LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING 4 (May 2012), available at <http://www.ij.org/license-to-work-release-5-8-12>.

41. *Id.*

42. Jacob Goldstein, *So you think you can be a Hair Braider?*, N.Y. TIMES (Jun. 12, 2012), [http://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html?pagewanted=all&_r=0).

43. See ALLARD, *supra* note 17, at 1.

are not the same as becoming lawyers. Typically, one may associate 'license' with a career requiring a certain level of education, responsibility—perhaps even fiduciary, but the reality is quite the contrary.<sup>44</sup> While it is easy to fathom that one with a criminal record is precluded from becoming a lawyer, should it bar one from becoming a hairdresser? Isn't the better response—it depends?

The California Business and Professional Code permits licensing bodies, especially as they pertain to professional designations from realtors to pharmacists to lawyers, to deny a license to a record holder under two different circumstances.<sup>45</sup> Under part (a), a board can deny a license to any person who has committed a felony.<sup>46</sup> Under part (b), a board can deny a license to a person who has "been convicted of a crime" and the crime is substantially related to the qualifications, functions, or duties of the business or profession for which the application is made.<sup>47</sup> Part (a) is wide-sweeping and without qualification, giving the power to deny a license for any type of conviction, whether it is robbery or drug-related.<sup>48</sup> Part (b), on the other hand, allows for some leeway in considering whether the crime convicted of has any relevance to the license.<sup>49</sup> For example, if a person has DUI convictions, the board can ask whether that person should be driving a taxi or a school bus. Similarly, if a person is applying for a real estate license, is a drug-related conviction really of any relevance?

The state of California requires licenses for sixty-two of the hundred moderate-income occupations including hairdressing, cosmetology, and manicurist, to name a few.<sup>50</sup> Relative to other states, it is considered the second most extensively and onerously licensed state.<sup>51</sup>

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44. Goldstein, *supra* note 42.

45. CAL. BUS. & PROF. CODE § 480 (LEXIS through 2013 Sess.).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. CARPENTER, *supra* note 40, at 20.

51. *Id.*

*B. Economic Barriers to Employment*

Difficulty finding employment cannot be reasonably addressed given the times we live in. Ostensibly, one of the most arduous roadblocks to redemption is the intractable state of the dismal economy. The prospects of reentry must be realistically contextualized and viewed through the prism of economic realities characterized by increasing levels of poverty.

Not only is unemployment highly correlated with poverty, but loss of employment is a factor leading to poverty.<sup>52</sup> The nexus of employment and poverty has been solidly established.<sup>53</sup> It is therefore logical to conclude that when there is unemployment—poverty will ensue. Similarly, if one seeks to climb out of poverty, seeking employment is the best path forward.<sup>54</sup>

Unfortunately, there is an unemployment crisis in this country that has pervaded over the last several years. In California, the rate hovers around 10.6%,<sup>55</sup> significantly higher than the national average of 7.9%.<sup>56</sup> At the same time, the rate for women in California is 11.3%.<sup>57</sup> Some argue that the unemployment figure is misleading and arbitrarily low due to the sheer number of people who became discouraged and stopped looking for a job altogether.<sup>58</sup> The low participation rate- people looking for employment- is at near historical low levels.<sup>59</sup> The employment picture presents an additional hurdle for criminal record holders at a time when there is more competition for scarce jobs.

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52. See generally Theodore G. Chiricos, *Rates of Crime And Unemployment: An Analysis of Aggregate Research Evidence*, 34 SOCIAL PROBLEMS 187, 187–212 (1987).

53. See generally *id.*

54. See generally *id.*

55. New Release, Bureau of Labor Statistics, Regional and State Employment and Unemployment—September 2012 (Oct. 19, 2012), [http://www.bls.gov/opub/ted/2012/ted\\_20121023.htm](http://www.bls.gov/opub/ted/2012/ted_20121023.htm).

56. *Id.*

57. *Id.*

58. See Press Release, Bureau of Labor Statistics, The Employment Situation—September 2012 (Oct. 5, 2012), [http://www.bls.gov/news.release/archives/empisit\\_10052012.pdf](http://www.bls.gov/news.release/archives/empisit_10052012.pdf).

59. See *id.*

As a result of the recession, poverty rates have been at unprecedented highs that have not been seen in decades.<sup>60</sup> For 2011, the rate was 15% for the general population, which is approximately 46 million individuals.<sup>61</sup> Alarmingly, 22% of children eighteen years and under live in poverty.<sup>62</sup> Unsurprisingly, when comparing a single parent family with a female head of household to a single parent family with a male head of household, the poverty rate doubles from 16.1% to 31.2%.<sup>63</sup>

The recent swelling of welfare and food stamp rolls is a stark testament to the disturbing level of poverty. Currently 46 million Americans rely on food stamps.<sup>64</sup>

Even more stunning, the forecasts for poverty over the next decade do not offer any cause for optimism. The poverty rate is expected to drop to 14% but only by 2020.<sup>65</sup> Even worse, some studies predict that it will take many more years before the rate returns to a level seen before the recession.<sup>66</sup> When coupled with any inevitable cuts to social assistance that loom on the horizon, the plight of the poor in general is bleak; but for the single parent female offender, it is impossible.

In the event that a record holder is fortunate and able to gain employment, she will command less pay than her male counterpart.<sup>67</sup> Adding insult to injury, in general, married

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60. Isabel Sawhill & Kimberly Howard, *The 2011 Poverty Rate: What to expect and how long will it last?*, BROOKINGS INST. (Sept. 10, 2012), <http://www.brookings.edu/research/papers/2012/09/10-poverty-rate-sawhill>.

61. Press Release, U.S. Census Bureau, *Child Poverty in the United States 2009 and 2010: Selected Race Groups and Hispanic Origin* (Nov. 2011), [http://www.census.gov/newsroom/releases/archives/income\\_wealth/cb12-172.html](http://www.census.gov/newsroom/releases/archives/income_wealth/cb12-172.html).

62. Press Release, U.S. Census Bureau, *Income, Poverty and Health Insurance Coverage in the United States: 2011* (Sept. 12, 2012), [http://www.census.gov/newsroom/releases/archives/income\\_wealth/cb12-172.html](http://www.census.gov/newsroom/releases/archives/income_wealth/cb12-172.html).

63. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, U.S. DEPT' OF COMMERCE, *INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2011* 17 (Sept. 2012), available at <http://www.census.gov/prod/2012pubs/p60-243.pdf> (married-couple households had a poverty rate of 6.2%).

64. *Welfare Statistics*, STATISTIC BRAIN (Sept. 9, 2013), <http://www.statisticbrain.com/welfare-statistics>.

65. Sawhill & Howard, *supra* note 60.

66. *Id.*

67. See ECON. MOBILITY PROJECT & PUB. SAFETY PERFORMANCE, PEW CHARITABLE TRUSTS, *COLLATERAL COSTS: INCARCERATIONS IMPACT ON ECONOMIC MOBILITY* 12 (2010).

mothers earn twice as much as single mothers.<sup>68</sup>

*C. Collateral Consequences of a Criminal Record Affect the Well-Being of Children*

Unfortunately, the hardest hit is the innocent child whose wellbeing is compromised when a parent's employment and the family's housing and food are substandard or inadequate. Where children are concerned, poverty is measured in a variety of ways, from general health to adequate access to food and housing. Quality of housing is of vital significance since public housing may be denied to holders of criminal records.<sup>69</sup> A child's physical, psychological, and material wellbeing is influenced by inadequate, unhealthy, crowded housing, and by being exposed to inappropriate tenants. In addition, housing costs can consume over 30% of the total family budget.<sup>70</sup> This level of spending is considered a ceiling in measuring poverty since high housing costs reduce the available funds for other expenditures such as clothing, food, and other essential amenities.<sup>71</sup> Research supports the hypothesis that children missing financial and emotional support do not fare as well as those who do have sufficient supports.<sup>72</sup> But the damage does not end there.

The more debilitating, long-term emotional and psychological harm strikes when a child is separated from parents. Consider also that a single mother cannot find regular employment and is forced to work at several menial jobs, leaving little quality time for child nurturing and providing emotional support. These children are more likely to become involved in the criminal justice system and perform

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68. ELISABETH DONAHUE ET AL, BROOKING INST., STRENGTHENING FRAGILE FAMILIES (Fall 2010), *available at* <http://www.brookings.edu/research/reports/2010/10/27-fragile-families-foc>.

69. HIRSCH ET AL., *supra* note 32, at 41–49.

70. MARY SCHWARTZ & ELLEN WILSON, U.S. CENSUS BUREAU, WHO CAN AFFORD TO LIVE IN A HOME?: A LOOK AT DATA FROM THE 2006 AMERICAN COMMUNITY SURVEY 4 (2007), *available at* <http://www.census.gov/housing/census/publications/who-can-afford.pdf>.

71. *See* NAT'L RESEARCH COUNCIL, MEASURING POVERTY: A NEW APPROACH 114–17 (Constance F. Citro & Robert T. Michael eds., 1995), *available at* <http://www.census.gov/hhes/povmeas/methodology/nas/report.html> (discussing measuring poverty on the basis of local housing prices).

72. *See generally* HIRSCH ET AL., *supra* note 32.

poorly in school.<sup>73</sup>

Another rather cruel burden placed upon the child of a prisoner or record holder worth mentioning is the judgmental and derisive attitudes of other families. The child may face ostracism from friends and peers at school simply because other parents do not want their own children associating with the children of criminals.<sup>74</sup> Once these children disengage with friends, they often become reluctant to attend school because it has become a hostile environment.<sup>75</sup> Not surprisingly, truancy issues ensue, heralding the onset of a rather predictable behavioral downward spiral.<sup>76</sup> School performance is compromised in school-age children as is school readiness in younger children.<sup>77</sup>

If society turns a blind eye to the plight of these children, the day of reckoning will arrive, forcing a most vivid eye-popping confrontation to the future manifestations of this neglect. Some of these future negative consequences include: substance abuse, crime, and delinquency.<sup>78</sup> The journey from the delinquency of alienated, disaffected youth to a more abhorrent life of crime is not a long one.<sup>79</sup> The deterrence of education, directly or indirectly, is a most unfortunate consequence crippling future prospects.

With substandard living conditions, deprivation of emotional stability, and deterrence of education, the stage is set to perpetuate the cycle of crime. This unhealthy blend of ingredients is eerily reminiscent of the ideal recipe to propagate the next generation of criminals.

Must the past be prologue? Are we foreclosing on the future of these children because of the defaults or shortcomings of the female record holder?

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73. Denise McKeon, *Research Talking Points on Dropout Statistics*, NAT'L EDUC. ASS'N (Feb. 2006), <http://www.nea.org?home/13579.htm>.

74. See LIZ GORDON, PILLARS, INVISIBLE CHILDREN 40–44 (2009), <http://www.pillars.org.nz/images/stories/A-Study-of-Children-of-Prisoners.pdf> (observing the children of New Zealand criminals).

75. *Id.*

76. *Id.*

77. See GORDON, *supra* note 74.

78. See *id.*

79. Christopher Wildman & Bruce Western, *Incarceration in Fragile Families*, 20 FRAGILE FAMILIES 157, 169 (2010), available at <http://futureofchildren.org/publications/journals/article/index.xml?journalid=73&articleid=535>.

*D. Domestic Violence and Custody of Children*

Where domestic violence is concerned, the consequences of a record have a very real and hard impact on the family. If a parent who has perpetrated domestic violence against the other parent is seeking custody of the child, there is a rebuttable presumption against that parent being granted sole or joint legal and physical custody of their children.<sup>80</sup>

Interestingly, while California judges are required to notify parties of some collateral consequences, notifying parties of what is referred to as a section 3044 presumption is not one of those.<sup>81</sup> Take the hypothetical case in which a mother takes a guilty plea to domestic violence to accelerate the disposition of her case to get back to her family. She will be faced with a presumption against her in a custody dispute in the following years, creating an obvious problem. In these cases, physical custody, including joint custody, may be denied, allowing limited visitation privileges and denying the woman the ability to make decisions regarding the care of her children.

*E. Welfare Benefits*

Nearly 30 percent of women in prison depended upon welfare before their convictions, and it is likely that even more women will need public assistance after leaving prison.<sup>82</sup> Many women exit prison lacking social connections or sufficient resources and are in dire need of assistance. These women depend on cash assistance in order to get back on their feet and to take care of their families.

Currently, if a woman has been convicted of a felony offense for using or selling drugs, she is subject to a lifetime ban on receiving cash assistance and food stamps.<sup>83</sup> This ban applies in every state, unless a state opts out.<sup>84</sup> As of 2001, forty-two states had adopted the ban in full or in part.<sup>85</sup> Nearly 100,000 women were affected by this ban from 1996-

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80. CAL. FAM. CODE § 3044 (LEXIS through 2013 Sess.).

81. CONTINUING EDUC. OF THE BAR, CALIFORNIA CRIMINAL LAW AND PRACTICE §§ 26.1, 26.10, 26.11, 26.15, 26.16 (2012).

82. GREENFELD & SNELL, *supra* note 13, at 8.

83. ALLARD, *supra* note 17, at 8–10.

84. *Id.* at 1.

85. *Id.* See also 21 U.S.C.A. § 862a (no other offense carries this ban).



1999, including about 38,000 in California.<sup>86</sup>

This ban on public assistance has a serious effect on women after their convictions. Where a single mother is subject to a ban, she will receive cash and food stamps only for her child, thereby significantly decreasing her total family income.<sup>87</sup> It is doubtful that the amount received is sufficient for two people to subsist on. Such a predicament is a stressor for the mother that would undoubtedly have negative impacts on her physical and mental health. The collateral consequences of the lack of welfare benefits compromise the ability to parent on any appropriate and necessary level.

The worst-case scenario is that a mother's child, under these circumstances, will be characterized as neglected. When a child is deemed neglected, child welfare services intervene and often remove the child from the home.<sup>88</sup> "If a mother is not able to support her child, [welfare services] will take the child; and at the end of twelve months of placement, [welfare services] has to terminate parental rights unless there are compelling circumstances."<sup>89</sup> Research has shown that most children are in foster care because of neglect. In most cases, that neglect is not related to parental treatment, but the financial resources of the parents.<sup>90</sup>

#### *F. Safe and Affordable Housing*

Many women are forced to rely on Section 8 Tenant Based Housing Assistance Program, which pays private landlords the difference between the fair market value of a unit and the rent that is affordable to a low income individual.<sup>91</sup> In 1996, the Federal Government passed the Housing Opportunity Program Extension Act of 1996,<sup>92</sup> which gives public housing agencies the authority to access criminal records of any applicant or current tenant and access records from drug treatment facilities in order to determine whether the

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86. ALLARD, *supra* note 17, at 5.

87. *Id.* at 8.

88. *Id.* at 10–11.

89. *Id.* at 10.

90. NATASHA A. FROST ET AL., INST. ON WOMEN & CRIM. JUST., HARD HIT: THE GROWTH IN THE IMPRISONMENT OF WOMEN 28 (May 2006).

91. See ALLARD, *supra* note 17, at 11–12 (discussing problems related to housing).

92. 42 U.S.C. § 1437d (2006).

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applicant or tenant is currently engaging in the illegal use of a controlled substance.

Public housing and Section 8 housing have sweeping powers that are often applied on an arbitrary basis. They may erroneously infer that a past drug conviction means the applicant or tenant is currently using drugs.<sup>93</sup> Therefore, low-income women who have a past drug conviction are vulnerable to the bias displayed against record holders when it comes to securing public housing. It does not matter how old or how minor the infraction is.

These women are especially susceptible to random evictions. Federal law provides landlords with the ability to include a “one-strike” clause in a lease.<sup>94</sup> These clauses provide that any criminal activity that threatens the “health, safety, or right to peaceful enjoyment of the premises by other tenants, or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.”<sup>95</sup>

This gives landlords and housing authorities the power to bypass normal grievance and eviction procedures, and sue for eviction in court directly. In a rather draconian manner, the tenant may be unknowingly and falsely evicted without any say or recourse.<sup>96</sup> Even worse, a convicted felon may be barred from reuniting with family residing in public housing. Restrictions may even apply to visitation.<sup>97</sup>

Clearly, a woman’s past drug conviction is an albatross that will continue to haunt her, even if she has cleaned up her act.

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93. See generally HIRSCH ET AL., *supra* note 32, at 44–48. See also 42 U.S.C. § 1437d.

94. HIRSCH ET AL., *supra* note 32, at 46–48.

95. *Id.* at 45.

96. See U.S. Dep’t of Hous. and Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002).

97. Under current housing rules, a family member who wishes to live with family who are currently public housing tenants must satisfy the admissions criteria for eligibility to be able to join them. See WPA—*Toolkit*, WOMEN’S PRISON ASS’N, [http://www.wpaonline.org/resources/housing\\_toolkit.htm](http://www.wpaonline.org/resources/housing_toolkit.htm).

*G. Access to Higher Education*

In 1998, an amendment to the Higher Education Grant created stricter guidelines for students eligible for federal aid.<sup>98</sup> Currently, those individuals who have been convicted of any drug-related crime are not eligible to receive grants, loans, or work-based assistance from the federal government for a specified period of time.<sup>99</sup> In 2002, about 48,629 students were denied access to financial aid because of these federal provisions.<sup>100</sup> A conviction for possession of a controlled substance will suspend eligibility for aid for one year.<sup>101</sup> A second conviction results in a two-year suspension.<sup>102</sup> A third conviction makes the suspension permanent.<sup>103</sup>

Furthermore, many individuals enrolled in higher education rely on the "Hope Credit," which provides for \$1,500 in tax credits. However, any student with a prior felony drug conviction is permanently excluded from claiming this credit.<sup>104</sup>

*H. Loss of Voting Rights*

In California, (as well as every other state in the United States with the exception of Maine and Vermont) convicted felons are not allowed to vote while in prison.<sup>105</sup> In total, 5.85 million Americans (or about 2.5 % of the total U.S. voting age population) are affected.<sup>106</sup> In some states, there is a lifetime ban on voting. If our ultimate goal is to facilitate felons to reintegrate back into society as law abiding and productive citizens, isn't denial to vote the ultimate Scarlet Letter?

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98. 20 U.S.C. § 1901(a).

99. *Id.*

100. ROBIN LEVY & JUDITH APPEL, DRUG POLICY ALLIANCE, COLLATERAL CONSEQUENCES: DENIAL OF BASIC SOCIAL SERVICES BASED UPON DRUG USE 4, (Jun. 13, 2003), available at [http://www.drugpolicy.org/docUploads/Postincarceration\\_abuses\\_memo.pdf](http://www.drugpolicy.org/docUploads/Postincarceration_abuses_memo.pdf).

101. 20 U.S.C. § 1901(a).

102. *Id.*

103. *Id.*

104. 26 U.S.C. § 25A.

105. CHRISTOPHER UGGEN, ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010 1 (July 2012), available at [http://www.sentencingproject.org/doc/publications/fd\\_State\\_Level\\_Estimates\\_of\\_Felon\\_Disen\\_2010.pdf](http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf).

106. *Id.* at 2.

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Notwithstanding that many do not exercise this basic democratic right, it has a glaring symbolic meaning that once tainted by a record, you may not participate with other voting citizens. How can one not feel an alienation from society?

*I. Other Consequences*

It should be noted however, that there are a few more consequences worth mentioning. For example, loans may be denied, as well as military service.<sup>107</sup> A certificate of good conduct may be required for purposes of adoption, school enrollment, and employment overseas.<sup>108</sup> As expected, a firearm cannot be obtained with a criminal record, but it is doubtful that anyone should be alarmed about this one but instead be relieved is evident, the consequences of a record are far reaching and not necessarily limited to the poorly educated, single mother. Many young women who aspire to say employment overseas in the future is not isolated from the effects of a record—even if for personal drug use. Unfortunately, the *Scarlet eLetter* does not discriminate.

In summary, the consequences of holding a record go beyond stigmatization alone. They effectively deter seemingly any effort or initiative to join civil society foremost being the inability to obtain employment. Against a backdrop of increasing background checks, onerous licensing requirements, and a tight job market, this problem cannot be emphasized enough. The denial of welfare and housing to single mothers attempting to turn their lives around should be unconscionable in a wealthy and progressive society. But the roadblocks do end there. As highlighted, other benefits and civil liberties are at stake. Societal judgment can be harsh and inflexible, resulting in damage to innocent children.

## II. PROFILE OF THE FEMALE OFFENDER

Understanding the female offender is critical. Although crime is crime, and there are many similarities to the male offenders, females do have special characteristics. Identifying

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107. NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, <http://www.abacollateralconsequences.org> (last visited Nov. 8, 2013).

108. *Criminal Record Checks*, U.S. DEP'T OF STATE, [http://travel.state.gov/travel/tips/emergencies/emergencies\\_1201.html](http://travel.state.gov/travel/tips/emergencies/emergencies_1201.html).

these differences should be the first step to fashioning solutions and programs that best redress the deficiencies of the system. To this end, this Article will offer a profile of the female offender by examining arrest trends, incarceration statistics and mental illness challenges resulting from abuse and violence.

#### *A. Incarcerated Population*

Overall, there are approximately 200,000 females incarcerated.<sup>109</sup> A further 956,000 are on probation and 93,000 are on parole (2005).<sup>110</sup> African-American women are three times more likely to come into the criminal justice system than white women; Hispanic women are 69% more likely than white women.<sup>111</sup> Black women represent 30% of incarcerated females. For Hispanics, the rate is 16%.<sup>112</sup>

#### CHART 1

*Sentenced prisoners under state jurisdiction Dec. 31, 2009*<sup>113</sup>

OFFENSE	MALE	FEMALE	WHITE	BLACK	HISPANIC
Violent	54.40%	35.90%	49.90%	54.90%	55.50%
Property	18.40%	29.60%	24.80%	15.20%	16.20%
Drug	17.20%	25.70 %	13.90%	21.10%	19.50%
Public Order	9.00%	7.20%	10.20%	8.00%	7.50%

**Violent:** murder, manslaughter, rape, other sexual assault, robbery assault, other

**Property:** burglary, larceny, motor vehicle theft, fraud, other

109. *Women in the Criminal Justice System*, THE SENTENCING PROJECT (May 2007), [http://sentencingproject.org/detail/publication.cfm?publication\\_id=161](http://sentencingproject.org/detail/publication.cfm?publication_id=161).

110. *Id.*

111. *Id.*

112. *Id.*

113. PAL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 236096, PRISONERS IN 2010 28 (Feb. 9, 2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>.

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**Public Order:** weapons, drunk driving, court offenses, vice, morals, liquor law violations

Marked and significant differences are evident between men and women when looking at the commission of crimes. More interesting, though, are the variations within female groups. Clearly, women are not a monolith with respect to crime. At the risk of oversimplification, minority groups are slightly more at risk for being incarcerated for violent crimes, whereas white women engaged in more property crime and blacks are convicted of more drug offenses.<sup>114</sup> Overall though, it is interesting to note the percentages of women incarcerated for property crimes and drug violations vis-a-vis their male cohorts.

*B. Arrests*

The metrics as presented in Chart 2 do not provide a comprehensive listing of all crimes committed. Instead, it is a synopsis of crimes that show growth trends for female offenders over this period of time. Nationwide, there were an estimated 13 million arrests (excluding traffic violations) in 2010.<sup>115</sup> Over 25% of these arrests were of females.<sup>116</sup>

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114. *See supra* Chart 1.

115. *Women & Girls in the Criminal Justice System—Facts and Figures*, *supra* note 26.

116. *Id.*

**CHART 2**  
*FBI Arrest Trends 2001-2010 Percentage*  
*Increases / Decreases*<sup>117</sup>

<b>NATURE OF ARREST</b>	<b>FEMALE</b>	<b>MALE</b>
DUI	35.90%	-10.70%
LARCENY THEFT	31.70%	-3.00%
ROBBERY	29.10%	1.70%
PROPERTY CRIMES	27.10%	-7.20%
BURGLARY	19.40%	0.09%
DRUNKENESS	18.00%	-10.40%
DRUG ABUSE VIOLATIONS	13.70%	3.70%
<b>OVERALL</b>	<b>10.50%</b>	<b>-6.80%</b>

Examining ten years of arrests as compiled by the FBI, an interesting albeit disturbing trend emerges. On a macro level, the arrest record tends to reflect to some extent the priorities and efforts of the police, as guided by policy directives.<sup>118</sup> When viewed alongside incarceration figures, arrest figures offer a foreboding vignette of what may transpire if the issues underlying arrest are not addressed. There is evidence of substance abuse involving drugs and alcohol. The connection is apparent if not abundantly clear.

It must be noted that only about one third of arrests actually result in a conviction.<sup>119</sup> However, arrest records are not without consequence. They pose their own set of problems and have a nasty way of lingering.<sup>120</sup> The record of an arrest without conviction should be eliminated, but when a background check is undertaken by the government, an arrest record does appear.<sup>121</sup>

The implications of this data are numerous. What is immediately obvious is that the crime rate for women is

117. *Uniform Crime Reports Table 33: Ten-Year Arrest Trends by Sex, 2001-2010*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl33.xls>.

118. *See generally id.*; GUERINO ET AL., *supra* note 113.

119. THOMAS COHEN & TRACY KYCKELHAHN, BUREAU OF JUSTICE STATISTIC, U.S. DEPT OF JUSTICE, NCL 228944, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 11 (May 2010), available at <http://www.bjs.gov/content/pub/pdf/fdluc06.pdf>.

120. *See id.*

121. *See supra* Chart 2.

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rising, but declining for men.<sup>122</sup> While men appear to be cleaning up their act, women are picking up the slack. It is a bit of ignominy to be seen as the up and coming criminal of the future. The DUI rates in particular show a marked contrast. Remarkably, almost 36% of female arrests are due to this crime.<sup>123</sup> Coupled with increased arrests for drunkenness, alcohol abuse seems as prominent as drug abuse. When you compare this figure to women incarcerated for drug crimes (25%), it is indeed dismaying that drug abuse continues to be an entrenched practice that eventually sends females to prison.

Crimes against property, burglaries, and larceny theft may or may not be due to the effects of the bad economy.<sup>124</sup> It is not a stretch to infer that desperate women will resort to desperate means. When you combine desperation with being under the influence of drugs and/or alcohol, you have a most unholy alliance that will ultimately end in negative outcomes.

*C. Mental Health Issues***CHART 3***Principal Issues Confronting Female Inmates*<sup>125</sup>

<b>ISSUE</b>	<b>FEMALE</b>	<b>MALE</b>
Mental Health	73.00%	55.00%
Physical and Sexual Abuse	57.00%	16.00%
Drug Use	40.00%	32.00%

The incarcerated female not only presents with more health problems, but depicts a chilling portrait of a damaged, vulnerable group with complicated and overlapping issues. It should be noted, however, that underlying psychological

122. *Uniform Crime Reports Table 33: Ten-Year Arrest Trends by Sex, 2001-2010*, *supra* note 117.

123. *See supra* Chart 2.

124. *See* Sandra B. Simkins et al., *The School to Prison Pipeline for Girls: The Role of Physical and Sexual Abuse*, 42 *CHILD. LEGAL RTS. J.* 56, 62–63 (2005).

125. *Data Collection: National Inmate Survey (NIS)*, BUREAU OF JUST. STAT., U.S. DEP'T OF JUSTICE, <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=278>.



issues do not connote a pass on culpability for crime, but rather point to areas where women differ from men in terms of the types of treatment programs needed.

Figures related to drug use are self-reported and appear understated when compared to an actual figure of close to 80%.<sup>126</sup> According to the National Institute on Drug Abuse (NIDA), in 2004, an astonishing 3.1 million women used illegal drugs regularly with an additional 3.5 million taking unauthorized prescription medications.<sup>127</sup>

Of female inmates reporting past physical and sexual abuse, the majority of women suffered the abuse before the age of eighteen.<sup>128</sup> In addition, over 70% of females are victims of family violence.<sup>129</sup> Clearly, instances of trauma are more prevalent among women.

Depression can become a prevalent issue for the incarcerated women that only adds to existing issues. The challenge of raising children while incarcerated can be heartbreaking for women and children. Nearly 90% of children of imprisoned women live with a grandparent, relative, or friend of the mother.<sup>130</sup> 9.6 % of women are forced to surrender their child to a foster home while they serve their sentence.<sup>131</sup> Needless to say, most women suffer symptoms of clinical depression and other ailments over the trauma of separating from their child, likely compounding existing mental health issues.<sup>132</sup> Similarly, the child does not fare well under these circumstances and would benefit from regular contact with the mother.<sup>133</sup> Few facilities allow or

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126. PAULA DITTON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUSTICE, NCJ 174463, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS (Jul. 1999).

127. BARBARA BLOOM ET AL., NAT'L INST. OF CORR., U.S. DEP'T OF JUST., RESEARCH, PRACTICE, AND GUIDING PRINCIPLES FOR WOMEN OFFENDERS 61 (Jun. 2003), available at <http://er.uqam.ca/nobel/k27114/doclucie/genderprison.pdf>.

128. Sipes, *supra* note 12, at 4.

129. *Id.*

130. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN 1 (Aug. 2000).

131. *Id.*

132. KATHLEEN J. FERRARO, NEITHER ANGELS NOR DEMONS: WOMEN CRIME, AND VICTIMIZATION 153 (2006).

133. MEDA CHESNEY-LIND, THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME 158 (2004).

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encourage visitation and those that allow visitation may be located in a prohibitively distant area.<sup>134</sup>

The profile of incarcerated females is complicated, to say the least. They are troubled by mental health issues and have been subject to the trauma of physical and sexual abuse to a much greater extent than their male incarcerated counterparts.<sup>135</sup> Neither group, however, has attained a high level of education with the majority not completing high school.<sup>136</sup> Nor do they have many marketable skills.<sup>137</sup> Women were likely to be unemployed and reliant on welfare at the time of arrest.<sup>138</sup>

Despite the prevalence of mental health issues, there is a real paucity of treatment available in prison and outside. Yet if these issues are left to fester, the ability to successfully reintegrate is compromised.<sup>139</sup> Drug abuse and dependency is treatable if the prescribed program is adhered to. In fact, most rehabilitation, if any, will be provided at the county jail level. After this point, the prospects of treatment are dismal at best. Worse yet, there is no real gender-specific treatment model. Traditionally, the business of crime was male-dominated, hence, the penal system followed a 'male' model of behavior and needs.<sup>140</sup>

It is apparent that many incarcerated women have drug dependency and alcohol abuse issues as evidenced by the types of crime of which they have been convicted.<sup>141</sup> Many causes are promulgated for this situation from genetic predisposition to economic disadvantage and general inequality.<sup>142</sup> There is a level of poignancy to the need for drugs to self-medicate to numb oneself from a world of sexual,

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134. HIRSCH ET AL., *supra* note 32, at 11, 61–63.

135. CHESNEY-LIND, *supra* note 133, at 25.

136. CAROLINE WOLF HARLOW, BUREAU OF JUST. STAT., U.S. DEPT OF JUST., NCJ 195670, EDUCATION AND CORRECTIONAL POPULATIONS 1 (Jan. 2003).

137. *See* SECOND CHANCES, *supra* note 18, at 27.

138. Briefing Sheets, The Sentencing Project, *supra* note 105.

139. E. FULLER TORREY, THE INSANITY OFFENSE: HOW AMERICA'S FAILURE TO TREAT THE SERIOUSLY MENTALLY ILL ENDANGERS ITS CITIZENS 1–7 (2012) (Dr. Torrey is the founder of Treatment Advocacy Center, which advocates the use of outpatient treatment to manage mental illness and reduce violence).

140. Simkins et al., *supra* note 124, at 56.

141. *See* Barbara Bloom, Barbara Owen & Stephanie Covington, *Women Offenders and the Gendered Effects of Public Policy*, 21 REV. OF POL'Y RES. 31, 31 (2004).

142. *See generally* Simkins et al., *supra* note 124.

emotional and physical abuse, and mental illness heavily steeped in an environment of poverty, racial bias and the responsibility of caring for a child.

Some have used a gender-based paradigm to explain the nature of female offenders, citing the usual factors of opportunity compounded by traditional gender stereotyping.<sup>143</sup> Having an unsavory cadre of acquaintances does not help. Contrarily, others opine that women are simply catching up to men, a nod to the progress of the woman's liberation movement.<sup>144</sup> Many blame the overzealous war on drugs; harsh law enforcement and sentencing policies cast a large net that has ensnared more women into the system.<sup>145</sup>

#### *D. Harbinger of the Future Female Offender*

Regardless of the numerous and varied underlying reasons proffered to explain the nature and etiology of female crimes, it is not the purpose of this paper to discuss them. The data paints a stark picture of a troubled group. This discussion and analysis is under the purview of sociologists and criminologists and other professionals.

Nevertheless, a recent study points to a perturbing trend of juvenile females entering the criminal justice system—at a rate faster than boys.<sup>146</sup> Like adult females discussed in this article, young women confront the challenges of “trauma, violence, neglect, mental and physical problems, family conflict, pregnancy, residential and academic instability, and school failure.”<sup>147</sup> Because of the differing nature of young female issues, the report concludes that these girls are poorly served by the assistance and rehabilitative model created

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143. Jennifer Schwartz & Darrell Steffensmeir, *The Nature of Female Offending: Patterns and Explanations*, in *FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS* 43–75 (Ruth T. Zaplin ed., 2d ed. 2008).

144. *Id.*

145. Stephanie R. Bush-Baskette, *The War on Drugs as a War Against Black Women*, in *CRIME CONTROL AND WOMEN* 113–29 (Susan L. Miller ed., 1998); see also CHESNEY-LIND, *supra* note 133, at 121–23.

146. LIZ WATSON & PETER EDELMAN, *IMPROVING THE JUVENILE JUSTICE SYSTEM FOR GIRLS: LESSONS FROM THE STATES 1* (2012), [http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/JDS\\_V1R4\\_Web\\_Singles.pdf](http://www.law.georgetown.edu/academics/centers-institutes/poverty-inequality/upload/JDS_V1R4_Web_Singles.pdf).

147. *Id.* at ii.

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around the needs of boys. Gender-responsive programming was considered demonstrably lacking, but imperative.<sup>148</sup> Starting with small crimes can be a slippery slope to more entrenched criminal patterns. The need to self-medicate can progress to drug and alcohol abuse, which can lead to the commission of more serious crimes.<sup>149</sup>

## III. FORGING A PATH TO REDEMPTION

Although the challenges to mitigate the consequences of records are formidable, some progress has been made in chipping away at the various roadblocks. This section will discuss how records can be erased, modified, and avoided. Many broad based initiatives that recognize that there is a problem with records are worth mentioning.

*A. The Myth of Record Sealing*

Record clearance, known in the state penal code as record sealing or expungement, are the same thing and are terms that can be used interchangeably and can also vary by state.<sup>150</sup> It is available under certain circumstances that may vary from state to state.<sup>151</sup> Theoretically speaking, once sealed, a record should become inactive. In reality, however, it does not go away. All it allows is for an offender to legally say, on a job application in the private sector, that they have no criminal record.<sup>152</sup> There are exceptions for licensing boards and governmental agencies. They will continue to have access to a sealed record.<sup>153</sup> In situations of establishing prioritability—say for a current DUI with a prior within ten years—record sealing does not exist.<sup>154</sup> For non-citizens, record expungement will not prevent deportation.<sup>155</sup>

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148. See Simkins et al., *supra* note 124, at 66–69.

149. See generally National Inventory of the Collateral Consequences of Conviction, *supra* note 107.

150. See, e.g., CAL. PENAL CODE § 1203.4.

151. See, e.g., *id.*

152. See, e.g., *id.* (“The order shall state, and the probationer shall be informed, that the order does not relieve him or her of the obligation to disclose the conviction in response to any direct question contained in any questionnaire or application for public office, for licensure by any state or local agency, or for contracting with the California State Lottery Commission.”).

153. See CAL. PENAL CODE § 1203.4.

154. CAL. VEH. CODE § 13555.

155. See generally Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) (noting

To apply to have a record sealed—whether a felony or misdemeanor, the individual must submit a petition to the court.<sup>156</sup> There are, however, important caveats. Sex offenders are precluded from applying for obvious reasons.<sup>157</sup> The petitioner must not have gone to prison and any conditions of parole must be successfully met. Additionally, petitioners must not have ongoing or concurrent issues regarding other criminal acts.

Private employers are not excepted from background checking when they are providing sub-contracting services to a government agency such as for military contracts or if security clearance is required.<sup>158</sup>

There are other subtleties involved when applying for sub-contracting situations. For example, a person seeking a job as a custodian in the school system, county, state, or federal government does not have protection from the sealing.<sup>159</sup> One may be employed by the private sector where sealing is applicable but if subcontracted to government, etc., her record is fair game regardless of how old it may be.<sup>160</sup> Licensing bodies and government agencies are virtually unrestricted in obtaining records and no statute specifically prohibits access.

Consider the example of an application for a Barbering and Cosmetology License. It is astonishing that the disclosure requirements for any criminal activity can be so thorough. The excerpt below is taken from an actual California Application. Most noteworthy is the requirement to include those misdemeanors/felonies that have been set aside or dismissed. Specifically, the application requests “all misdemeanor and felony convictions, regardless of the age of conviction, *including those which have been set aside and/or dismissed under California Penal Code Section 1000 or*

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that immigration consequences are one of a few collateral consequences of a guilty plea that criminal defense attorneys are required to advise non-citizens of).

156. CAL. PENAL CODE § 1203.4.

157. *Id.*; Doe. v. Brown, 177 Cal. App. 4th 408, 418–19 (2009).

158. There is no law per se that requires these checks to be made. Instead, one can infer from ordinances passed (see Richmond CA #118) prohibiting this practice that it is done.

159. CAL. BUS. & PROF. CODE §§ 480, 490, 1003 (West 2012).

160. *Cf.* Egelko, *supra* note 35.

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1203.4.”<sup>161</sup> Clearly, the disclosure required on this application must be considered overreaching at best and a draconian invasion of privacy at worst. What possible meaning is there for the notion of sealing if this information is requested?

**Board of Barbering and Cosmetology**<sup>162</sup>*Application for Examination and Initial License Fee*Sec.D: Background Information

- Include copies of arrest records, court documents, verification of restitution received by the court, and verification of successful completion of probation.
- A letter from you describing the underlying circumstances of arrest as well as any rehabilitation efforts or changes in life since that time to prevent future problems.
- Letters of reference from past and/or current employers.
- Include Disclosure Statement Regarding Criminal Pleas/Convictions.
- Include all misdemeanor and felony convictions, regardless of the age of the conviction, including those which have been set aside and/or dismissed under California Penal Code Section 1000 or 1203.4 (Traffic violations of \$500.00 or less need not be reported).

Moreover, if this type of information is obtained, the question arises with respect to the savvy of the average employer/licensing board member in deciphering the nuances of a legal document in assessing risk. Arrests, felonies, misdemeanors, felonies reduced to misdemeanors, etc., can be confusing and subject to misinterpretation, not to mention time consuming. The path of least resistance would be to simply separate record holders from other applicants.

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161. Application for Examination and Initial License Fee, Cal. Board of Barbering and Cosmetology, *available at* [http://www.barbercosmo.ca.gov/forms\\_pubs/examapp.pdf](http://www.barbercosmo.ca.gov/forms_pubs/examapp.pdf) [hereinafter Application].

162. *Id.*

Another issue is whether there is adequate knowledge and access to the process of sealing records on the part of offenders. Upon release from parole, presumably offenders are given forms and information about the sealing process. For those who may not be conversant in English, the forms may be onerous requiring assistance to complete. They indicated as much in a recent study.<sup>163</sup> Interestingly, a concern on the part of Spanish-speaking groups is increased access to the sealing process.<sup>164</sup> For others, there is a need to expand eligibility for expungements/sealing to include multiple offenses.

Anecdotal evidence to this effect arose from a Santa Clara County report<sup>165</sup> blueprinting a re-entry plan for the previously incarcerated. The report acknowledged and suggested useful approaches to a host of issues confronting the previously incarcerated: namely, education, mental health, substance abuse, and housing.

Even if records are sealed, there is no assurance that this will be accurately portrayed in the relevant record bodies—courts, police agencies, and the FBI. The Accuracy of records is an important issue. According to the Attorney General, a study of FBI records reveals that approximately 50% of records have final dispositions. Considering that they issue almost 9 million records per year, primarily for employment checks, it is a massive problem indeed.<sup>166</sup> A number of employment opportunities have been denied because of a mistaken report.<sup>167</sup> Furthermore, records may not be up to date. Arrests with no ensuing conviction may appear. A felony later reduced to a misdemeanor may be overlooked.

Criminal records in a technological era are ubiquitous and possibly eternal. Data sharing was more difficult in an age when a handwritten record was filed at the local police

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163. MARILYN BARNES ET AL., NAT'L COUNCIL ON CRIME & DELINQUENCY, SANTA CLARA COUNTY ADULT REENTRY STRATEGIC PLAN, READY TO CHANGE: PROMOTING SAFETY AND HEALTH FOR THE WHOLE COMMUNITY 24–25 (Sept. 2012), available at <http://www.sccgov.org/sites/reentry/governance/Documents/SCC-Reentry-Strategic-Plan-Board-Approved-10-23-2012.pdf>.

164. *Id.* at 25.

165. *Id.*

166. U.S. DEP'T OF JUST. THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 3, 21 (Jun. 2006), available at [www.justice.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.justice.gov/olp/ag_bgchecks_report.pdf).

167. *Id.* at 100–01.

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department. If someone perseveres enough today, a criminal record can be found.<sup>168</sup> It is most alarming that a plethora of YouTube videos and other Internet forms of information exist, offering tutorials on researching criminal records.<sup>169</sup>

There is a last resort available to a very limited extent but does not apply to misdemeanors. Seeking a pardon from the governor is the only recourse for those who have gone to prison.<sup>170</sup> A pardon essentially means that the crime did not happen. The conviction is vacated thereby removing all the consequences attached to a prison record. The record can no longer be used against you in any way. Obtaining a governor's pardon is never guaranteed and it could take years. Moreover, if a pardon is denied, no explanation or reasons are required.

### *B. Broad-Based Initiatives*

#### *1. The Kennedy Commission and the ABA*

There are numerous initiatives that acknowledge the difficulty of reentry with the stigma of a record. The Kennedy Commission is a seminal study bringing to light the problems confronted by ex-offenders who wish to get on with their lives.<sup>171</sup> It further reinforced and underscored the importance of employment as the most significant predictor of recidivism.<sup>172</sup> The Commission emphatically enjoined that barriers to employment and other benefits should be eliminated to the extent possible.<sup>173</sup>

Following the leadership of the Kennedy Commission, the ABA took up the cause to make the reduction of recidivism a

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168. This information came to light in a rather anecdotal manner. With some perseverance and creativity, one can access a number of videos on YouTube that instruct you on how to find a criminal record. In some cases the information is state-specific but an exhaustive survey of these videos was not conducted.

169. See, e.g., YOUTUBE, [http://www.youtube.com/watch?v=2seO94zF5\\_U](http://www.youtube.com/watch?v=2seO94zF5_U) (last visited Nov. 11, 2013).

170. CAL. PENAL CODE §§ 4800–4813, 4852.01–4852.21.

171. AM. BAR ASS'N, JUSTICE KENNEDY COMMISSION: REPORT AND RECOMMENDATIONS (2004), available at [http://www.abanow.org/wordpress/wp-content/files\\_flutter/1267821731\\_20\\_1\\_1\\_7\\_Upload\\_File.pdf](http://www.abanow.org/wordpress/wp-content/files_flutter/1267821731_20_1_1_7_Upload_File.pdf).

172. *Id.*

173. See *id.*



top priority.<sup>174</sup> Their Commission on Effective Criminal Sanctions (CECS)<sup>175</sup> generated many recommendations aimed specifically at the objective of assisting ex-offenders overcome obstacles to employment. The key recommendations are as follows:

- Except for law enforcement purposes, access to criminal background checks should be limited.
- Employers and credit report agencies must ensure that the information on a criminal history is accurate and does not contain sealed records.
- Disqualifications from employment should be limited to situations where the crime is substantially related to the job or when there are serious public safety concerns.
- There should be a process for relief when there is a finding of disqualification from certain employment.
- Employers should utilize discretionary factors on a case-by-case basis rather than automatic barriers to employment.
- Barriers should expire after a reasonable period of time has passed since conviction.

While these recommendations sound reasonable, it is difficult to fathom how employers and credit report agencies can ensure the accuracy of reports without the input of the offenders themselves. Ex-offenders should have some channel or recourse to vet their records. It is counter intuitive that citizens have access to their own credit reports but not criminal records. In light of all the possible errors and what is at stake, there should be an opportunity to provide feedback.

The Collateral Consequences of Conviction Project,<sup>176</sup> funded by the National Institute of Justice, made a commitment to establish a comprehensive database with a view to assist all stakeholders in the criminal justice system, including defense attorneys, prosecutors, and judges. The

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174. Stephen Saltzburg, Written Testimony at the Meeting of the EEOC 3 (Jul. 26, 2011), available at <http://www1.eeoc.gov/eeoc/meetings/7-26-11/saltzburg.cfm?>.

175. See SECOND CHANCES, *supra* note 18, at 3.

176. NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, *supra* note 107.

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study examined a breathtaking 38,000 statutes containing collateral consequences.<sup>177</sup> While this project is aimed at primarily informing defense attorneys about penalties that can attach upon conviction, there may not be sufficient information pertaining to the sheer volume of all the direct consequences. Nevertheless, according to the project such knowledge “can lead to more fair and accurate discussions of plea bargains, decisions to charge and prosecute, sentencing decisions, and lawmaking.”<sup>178</sup> Plea-bargaining has gained prominence in recent years, becoming the standard practice in federal courts.<sup>179</sup> Has the pursuit of a fair trial and justice given way to expediency and hedging risks of a greater sentence? Are women subject to the same forces, where fear of separation from family puts pressure on them to plead in a risk-averse manner without complete information regarding consequences? The answer is—not necessarily so. In cases involving personal drug use, diversion or treatment is possible and normally accepted by the defendant.<sup>180</sup>

Among some of the more notable findings of the Project are as follows:

- 84% of the collateral consequences relate to employment.
- License applicants (from cosmetology to law) can be denied because of a previous criminal conviction, regardless of time that has elapsed since conviction.
- 82% of the statutes fail to specify an end date for the exclusion.
- 91% of the statutes provided no form of relief.

## 2. *Ban the Box*

A laudable and noteworthy initiative by National Employment Law Project (NELP)<sup>181</sup> aimed at the “systemic”

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177. *Id.*

178. Saltzburg, *supra* note 174, at 3.

179. Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, WALL ST. J., Sept. 23, 2012, at A1.

180. Hypothetically speaking, where a second burglary charge is a set up for three strikes, the defendant can be offered a plea for one charge with more time to be served in county jail. Accepting the former deal could have jail time reduced to between two and three months.

181. NAT'L EMP'T LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 1 (Nov. 2012), *available at*

bias inherent in job applications, such as the one from the Barber and Cosmetology example, is to ban the use of the box requiring disclosure of a criminal record. This initiative allows a prospective employee to be considered for his/her qualifications and experience without the wet blanket of a record hanging over the initial screening process. Only when a conditional offer is on the table can a background check be conducted. To this end, significant inroads have been made. A handful of states including Colorado and New Mexico have implemented a statewide ban on the box. Over forty cities/counties from Alameda County, California to Worcester County, Massachusetts have implemented the ban. While the ban primarily pertains to public employees, it has been extended to private contractors and in even more progressive cases to private employees. In Richmond, California, ordinances were passed as a case in point.<sup>182</sup> NELP goes further and provides a guide<sup>183</sup> highlighting, in a blueprint fashion, the various ways that a ban may be implemented by underscoring the efforts of various cities throughout the country. Examples include: whether the ban is applicable to civic employees, contractors, or specific positions only and if there is a process for appeal available.

Legislation, forged on a bipartisan basis, has been passed in support of these re-entry initiatives. The Second Chance Act was passed and enacted into law in 2008. The Second Chance Reauthorization act was introduced in 2011.<sup>184</sup>

### 3. *NIJ Redemption Study*

A breakthrough study conducted by the National Institute for Justice (NIJ) attempts to quantify a date that an ex-offender's record would become stale and have no relevance to the decision making process of employers. The NIJ Redemption study shed light on ascertaining the 'hazard rate'<sup>185</sup> or the likelihood of recidivism after a period of staying

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<http://nationinside.org/images/pdf/CityandCountyHiringInitiatives.pdf>.

182. *Id.* at 18–19.

183. *See generally id.* (describing the reform and the localities that have implemented it).

184. S. 1231, 112st Cong. (2011) (as reported to the Senate) (this bill was introduced by Senators Patrick Leahy (D-VT) and Rob Portman (R-OH)).

185. Alfred Blumstein & Kiminori Nakamura, 'Redemption' in an Era of Widespread Criminal Background Checks, 263 NAT'L INST. OF JUST. J. 10, 12

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clean. The point where recidivism is likely to ebb is in three years.<sup>186</sup> After this time and the longer one does not recommit or stays clean, the more obsolete a record is in predicting future commissions of crime. The longer one goes without recommitting—the better the chances of not reoffending at all. The study calculates this figure to be approximately eight years, with a caveat that the younger the age at the commission of crime, the longer the time to redemption.<sup>187</sup> At the eight-year mark, there is equal risk of hiring an ex-offender as compared to the general population. To the extent that anyone can predict human behavior accurately, there is no guarantee that after 8 years a person will not reoffend. At best, this is a tangible figure that can serve as a useful guideline. Being able to stamp a past due date on records, based on empirical evidence, is an important step forward.<sup>188</sup>

The point on younger offenders is a cogent finding. Given what is known about youth development, it is entirely plausible that the younger one commits crimes the longer one has to reach the redemption point. Increasingly, studies consider the cognitive development of the brain to be incomplete up until about age twenty-five. It is well-accepted research that the human brain is still developing in the area of judgment—an important finding since many crimes are being committed by youth, particularly young girls. Not to excuse these crimes but age may be a factor in the punitive or rehabilitative measures taken.<sup>189</sup>

Seldom, in fact, is this taken into account when considering the foibles and stupidity of youthful acts in

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(2009).

186. *Id.*

187. *Id.*

188. *Id.* at 11.

189. Brief for Rutgers Urban Legal Clinic, et al. as Amici Curiae, New Jersey in the interest of P.M.P., No. 63,589 (Sup. Ct. N.J. Apr. 17, 2009); Francine M. Benes, *The Development of Prefrontal Cortex: The Maturation of Neurotransmitter Systems and their Interactions*, in HANDBOOK OF COGNITIVE NEUROSCIENCE 79, 79–89 (Charles A. Nelson & Monica Luciana eds., 2001) (concluding that the development of prefrontal cortex includes the early adult period and possibly even beyond); see also Elizabeth Williamson, *Brain Immaturity Could Explain Teen Crash Rates*, WASH. POST, Feb. 1, 2005, at A1 (explaining that the point of intellectual maturity—the age of reason—does not occur until age twenty-five).

general.

*C. Role of the DA: The Real Locus of Power*

All the aforementioned remedies, while commendable, are back-loaded. In other words, they are all attempts to move, diminish, or ease the way around or through the roadblocks to reentry. If we are to be assiduous, then all options to enable the offender to overcome the burdens of a record must be on the table. Most specifically, the district attorney must also be accountable.

At the crux, the very viscera of the criminal justice system, the prosecutor assumes, knowingly or not, the role as the Superman of justice. The importance of this role cannot be emphasized enough. Seemingly, the district attorney's discretion in the charging of crimes will have a profound effect upon what may be sealed or expunged or whether or not a conviction will become an eternal albatross.

Consider the charge of theft. According to the profile of the female offender, this is a common charge accounting for over a third of arrests.<sup>190</sup> While petty theft is pervasive, the consequences may be anything but petty. In California, if the property or services stolen are valued at \$950 or less,<sup>191</sup> the crime is considered shoplifting, which is a misdemeanor.<sup>192</sup> But if the stolen items exceed \$950 in value, the crime becomes grand theft.<sup>193</sup> Grand theft is commonly referred to as a "wobbler."<sup>194</sup> This means that it may be charged as a misdemeanor or a felony depending upon two factors: 1) the defendant's criminal history and 2) the circumstances of each case. The prosecutor has the discretion to make this determination.

Although the district attorney is an elected official with a mandate driven by the ethos and fiat of his constituency, the pursuit of this mandate does not trump the overriding duty to seek justice. Oftentimes, pursuing the proper path, doing due diligence and protecting the interests of the innocent gives

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190. Offenses that can be either felonies or misdemeanors are commonly referred to as "wobblers." CONTINUING EDUC. OF THE BAR, *supra* note 81, § 24.13. Either way, a record is generated.

191. CAL. PENAL CODE § 484-488.

192. *Id.*

193. *Id.* § 484-487(a).

194. *Id.* § 484-488.

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way to the short-term benefits of political expediency. For instance, political motivations of not appearing to be ‘soft’ on crime should not cloud the underlying fundamental pursuit of justice, but instead prosecutors should endeavor to be ‘smart’ on crime.

As a member of the executive branch of government and by law, the district attorney is entitled to file charges as he or she deems appropriate provided that decisions are made in the ‘interest of justice.’ The duty of the prosecutor is not only to convict but to pursue two goals inherent in the concept of justice. One is to not let the guilty escape the other is to protect the innocent from suffering.

Given these basic guideposts marking the broad spectrum of duty, there exists a vast array of interpretations and applications of the law.

Considering that there are fifty-eight counties in California and therefore fifty-eight elected district attorneys, the charging outcomes can have numerous permutations and combinations allowing for all shades of grey. What is the meaning of ‘justice’ if meted out in fifty-eight possible different ways? Worse yet, in a heady display of unmitigated power, prosecutors are seldom required to justify their discretionary decisions—such as charge selection or plea terms—either orally or in writing.<sup>195</sup>

At the highest level, the duty of the district attorney is to see that justice is done.<sup>196</sup> The district attorney also has an obligation to inform of any consequences at the time of charging. In fact, before a judge can accept a plea of guilty from a defendant, both legislative and case law require that a defendant fully understand their constitutional rights and have a willingness to waive those rights.<sup>197</sup> Furthermore, the accused need to understand, to the extent that is reasonable, the direct consequences of their plea, including but not limited to: length of prison time, fines, immigration consequences, possible sexual registration requirements, and ineligibility for government assistance such as food stamps

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195. LAPIDUS ET AL., *supra* note 37, at 31–32.

196. See *Berger v. U.S.*, 295 U.S. 78, 88 (1935); see also *In re Sakarias*, 35 Cal. 4th 140, 159–60 (2005); *People v. Zuringa*, 148 Cal. App. 4th 1248, 1250–51 (2007).

197. See *Berger*, 295 U.S. at 88; see also *In re Sakarias*, 35 Cal. 4th at 159.

and welfare.

Although the list of potential consequences is lengthy, the failure to admonish can lead to pleas being later withdrawn and prohibited to be used in subsequent prosecutions. With respect to information about licensing, the gesture can be meaningless when licensing boards have broad discretionary power. They can determine which convictions are relevant for their purposes. Therefore it is not reasonable to inform defendants about what possible, future license applications may be affected.<sup>198</sup>

Even if required by appellate law to admonish a defendant about a conviction's possible consequences in obtaining a professional license, the requirement would almost be meaningless. Broad discretion is given to licensing boards to determine which convictions are relevant for their purposes and case law is of little guidance to court or counsel.

The National District Attorney Association (NDAA) National Prosecution Standards<sup>199</sup> provides a list of factors that may be considered when making a charging decision and factors that must not be considered. These factors include:

- Availability of adequate civil remedies.
- Availability of suitable diversion and rehabilitative programs.
- Undue hardship that would be caused to the accused by the prosecution.

Not to disparage prosecutors, but it is human nature to behave in an incentive driven manner. If the rewards of the office are bestowed on the basis of conviction rate, what is the motivation for behaving otherwise? Add to this the public pressure to avoid the perception of being soft on crime. Sometimes it seems that expediency and selecting the path of least resistance leads the course of action selected.

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198. CONTINUING EDUC. OF THE BAR, *supra* note 81, §§ 26.10, 26.11, 26.15, 26.16, 26.17.

199. NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS §§ 4-1.3, 4-1.4 (3d ed. 2009). One of the factors not to be taken into consideration is the conviction rate of the office. By inference it must be an issue because after all, that is what prosecutors do.

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*D. Diversion*

A potential and powerful tool that is in the hands of the district attorney is diversion. Pursuing this option has the distinct advantage of enabling one to completely avoid a record for drug use.

Specifically the purpose of diversion is delineated as follows: “Reducing the incidence of offender recidivism by providing community-based rehabilitation that would be more effective and less costly than the alternatives available in continued prosecution.”<sup>200</sup>

At the discretion of the district attorney, diversion to drug court, for some drug offenses is possible. Upon successful completion of the program, there is an automatic record expungement. Conversely, there is no expungement provision if the program is not completed for whatever reason.

Section 1001.9 of the Penal Code further stipulates that completion of the program should not result in a denial of employment, benefit, license or certificate. However, the arrest record may be used by the Department of Justice in some situations; *e.g.* a peace officer application.<sup>201</sup>

Although broad discretion exists, the NDAA does generally guide the district attorney:

- To be knowledgeable about diversionary disposition
- To encourage community agencies to provide counseling services for employment, education, family issues and substance abuse<sup>202</sup>

The district attorney is uniquely positioned with the power to deter roadblocks from emerging and stemming the proliferation of records. The former can be achieved through diversion programs, the latter by taking measured consideration of the charge to be made. The power of this position cannot be underscored enough.

With respect to diversion programs, there is a current propensity or practice to look at prospective candidates in

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200. *Id.* § 4-3.8 ctm.

201. CAL. GOV'T CODE § 1029 (LEXIS through 2013 Sess.) (a person convicted of a felony, even a felony reduced to a misdemeanor and expunged, may not serve as a peace officer).

202. NAT'L DIST. ATTORNEYS ASS'N, *supra* note 199, §§ 2-11.1, 2-11.2.



terms of how they do not qualify. Instead, the district attorney should turn this focus around, look at the individual merits and circumstances and assume they should qualify and then discount those who clearly do not. If an offender has another conviction, they are denied diversion. Similarly, if one is in possession of a marginally larger amount of drugs than for personal use,<sup>203</sup> they may also be denied. Again this practice varies from county to county.

#### CONCLUSION

The beleaguered female offender is in a precarious situation which makes reentry into society an insurmountable struggle. She tends to be young, not highly educated, a victim of physical and sexual abuse, and plagued with mental health issues. She is likely to be a minority, lacking in marketable skills, drug abusing, possibly homeless, typically unemployed or working as a caregiver, living in poverty, generally non-violent and responsible for a child. The collateral consequences of having a record, seemingly in perpetuity, preclude this group from attaining the basic necessities of life and gainful employment, thus hindering successful reentry into society. It is not hyperbole to affirm that these women are in serious peril of falling into an abyss—a permanent gulag of poverty.

With respect to their criminal record, the salient question is when is enough enough? Is it unrealistic to expect that there be finality to records—a time when they should no longer hold any currency in one's life? How long must the *Scarlet eLetter* be worn? Hasn't the ensuing tsunami of consequences done enough damage? Are lifetime bans on welfare just where this is the only means of sustenance with no transitional aid in sight? Is it possible for reasonableness

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203. A rock is usually between .20 to .25 grams. It depends on the type of drug being used. For example "rock cocaine" and Meth are solid "rocks." Then there are drugs that are more powder and they are called "bundles." Like "rocks," four or more are usually charged as possession for sale. This is all done on a jurisdiction-by-jurisdiction basis (county-by-county). County A might treat four rocks or bundles as simple possession and allow the person to participate in a treatment program whereas County B may charge it for possession for sale and thereby making a defendant ineligible for a treatment program. Telephone interview with Deputy District Attorney Robert Johnson, (Santa Clara County, San Jose, California) (Nov. 18, 2013) (on file with author).

to prevail where the type of crime committed, the time elapsed since the crime was committed and the comportment of the individual since are considered?

While many ideas have been highlighted in this article, it is in reality just scratching the surface. The broad initiatives are just that— a broad acknowledgment that an issue exists. Without a voice and with so many players involved from data management to policy makers and legislators, a tectonic shift will not occur overnight, in the short term and at a minimum, the following actions can be taken:

The ban on welfare and Section 8 housing are perhaps the most egregious damages and must end, preferably on a post haste basis. It is unconscionable and cruel to haphazardly deny a single mother and child a roof over their head and basic sustenance for a non-violent drug offense. What is done to these alienated women in the name of the state is arguably a worse crime than what was committed by the offender. In stark contrast, the violent, hardened criminals in prison have accommodations, receive regular meals, and even qualify for health care services.

If re-entry into society is a goal of the criminal justice system, then we must also consider restoring voting rights and civil liberties that have been permanently denied in some states to those with felony convictions. The dignity and self-worth of an ex-offender has been beaten down, perhaps justifiably so. But the portrait of the female offender is a fragile one at best. Does “the quality of mercy” not exist for these dispossessed, alienated individuals?

The management of record databases must be taken seriously. Arrest records that do not result in a conviction must be permanently erased and deleted, but they are not. With the millions of records generated on an annual basis, computerized and managed in a questionable database, errors do abound and needlessly wreak havoc.

A system of identifying an aged record should be implemented to indicate when a record is no longer relevant to employment and other decisions. The NIJ Redemption study<sup>204</sup> provides a valuable guide based on empirical evidence. Assuming that records are accurate, they can be

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204. Blumstein & Nakamura, *supra* note 184, at 14–15.

designated as stale.

Since records have been found to be rife with errors and omissions, there should be an opportunity for offenders to view their record perhaps in a manner similar to viewing a credit record- and provide feedback for any necessary changes. For example, a felony charge may have been reduced to a misdemeanor but this information is not reflected on the record.

Besides seeking information about sealed records,<sup>205</sup> licensing bodies will, as a matter of course, continue to treat felonies, even those reduced to misdemeanors, as felonies. To the extent that this practice prevails, it must be reviewed and limited.

The nullification of records, while imperative, could be all for naught if the underlying and overlapping issues of treatment and educational needs tailored specifically to women are not addressed. We cannot afford to turn a blind eye to the pathos of these women when their levels of crime are increasing and the next generation of female offenders is squarely in the rear view mirror. These women may indeed fall through cracks of the system, but with the future of children hanging in the balance, can we take this risk? Eventually, the children of ex-convicts, without proper nurturing, will likely succumb to crime and be caught in the ringier of the justice system as they mature.

Do we value the protection and wellbeing of innocent children? Do we seek a durable resolution to poverty and the cycle of crime?

Treatment and education costs<sup>206</sup> are not as steep as they are for incarceration. The costs of ignoring treatment and education are excessive. Consideration should be given to the following:

- Ensuring that gender-specific treatment programs are available at every stage of the justice process. Women have suffered different traumas than men. Without

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205. Application, *supra* note 161.

206. VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 8 (Nov. 2010), available at <http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf>.

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mental health treatment it is next to impossible to move forward.<sup>207</sup>

- Diversion should be used more frequently. Since many women have drug dependency issues, they will benefit from successful completion of diversion and drug programs in addition to record expungement.
- Changes should be made to diversion laws to broaden the terms of eligibility by a) reconsidering the quantity of drugs for possession versus intent to distribute, especially where the amounts are marginal b) consider that a non-violent charge such as theft not be preclusive.
- Diversion should be applied on case by case basis taking into account the individual's situation.

Acknowledging that a low level of education is a major barrier to employment, women should be afforded the opportunity to at least complete high school. Making matters worse, the current economic situation is such that the uneducated criminal record holder will be relegated to the bottom of the barrel for employment opportunities vis-a-vis the millions of unemployed and underemployed individuals vying for the same job.

Perhaps creativity is called for in seeking a remedy that permits women at the margins to attend classes, do community service, and upon completion of their prescribed duty, have their arrest dismissed without a conviction.

The critical role of the district attorney cannot be overstated. The district attorney is the crucial linchpin and has the power to demonstrate leadership to affect change. The guidelines for district attorneys<sup>208</sup> hold the template for progressive, preventative measures that will go a long way to aiding the female offender. Perhaps their feet should be held to the fire to honor the spirit of these guidelines, especially as it pertains to admittance to diversion programs. As justice is currently meted out with vast differences between counties, there is a need for consistency and an even-handed approach to charging decisions. We cannot abide a seemingly inchoate principle of justice as evident in the decisions made. On a long term basis, a paradigm shift needs to occur with an

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207. TORREY, *supra* note 139, at 182.

208. *See, e.g.*, NAT'L DIST. ATTORNEYS ASS'N, *supra* note 199.

underlying conceptual framework based on rehabilitation over retribution, inclusion over alienation, treatment over conviction, with a decided detour from the prevailing over criminalization resulting in over 92 million having criminal records.<sup>209</sup>

The problem is clear, priorities have been set by the ABA, and road maps have been laid out -now we need a clarion call to action. If ever there was a need, cause, urgency for real reform, surely this must be a priority. There is no greater purpose than aiding and diverting vulnerable women, young girls, and innocent children from a moribund path in life. The *Scarlet eLetter* has flashed in neon for far too long. The time has come to put an end to this Byzantine practice and embrace a progressive, humane approach that on balance makes enormous economic sense.

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209. DENNIS DEBACCO & OWEN GREENSPAN, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS 29 (2008), <http://www.fbi.gov/ucr/09cius.htm>.