

## A LESSON IN UNINTENDED CONSEQUENCES: HOW JUVENILE JUSTICE AND DOMESTIC VIOLENCE REFORMS HARM GIRLS IN VIOLENT FAMILY SITUATIONS (AND HOW TO HELP THEM)

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*“Domestic violence and incorrigibility needs to be directed away  
from the courtroom and into specialized programs. We’re turning a lot of these girls into  
criminals.”*

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The increasing number of girls coming into the juvenile justice system, especially for violent offenses, has been well documented, but the causes are not well understood. Some contend that girls have become more violent, while others suggest that law enforcement policies toward girls have changed, and still others claim that the influx of girls in the system is attributable to both of these causes.<sup>2</sup> Although it has been hypothesized that the decriminalization of status offenses and the criminalization of domestic violence may have contributed to the increasing number of girls in the juvenile justice system, there have been few, if any, systematic studies to help explain the nature of the increase and the specific problems associated with it. This article will explore reforms in the juvenile justice system and domestic violence law, and will argue that the convergence of these two seemingly progressive and pro-feminist legal reforms have inadvertently harmed girls in violent family situations.

Regardless of cause, it is generally accepted that girls experience the juvenile justice system differently than boys and that the system is not well equipped to handle girls and their unique needs.<sup>3</sup> Female juvenile offenders have significantly higher rates of violent victimization, depression, post-traumatic stress, and other mental and physical health issues than their male counterparts.<sup>4</sup> Furthermore, girls are significantly more likely to be victimized inside detention.<sup>5</sup> This article will argue that girls entering the juvenile justice system for domestic violence related

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<sup>1</sup> Emily Gaarder, Nancy Rodriguez & Majorie S. Zatz, *Criers, Liars, and Manipulators: Probation Officers' Views of Girls*, 21 JUST. Q. 547, 566 (2004).

<sup>2</sup> See, e.g., Joseph R. Biden, Jr., *What about the Girls? The Role of the Federal Government in Addressing the Rise in Female Juvenile Offenders*, 14 STAN. L. & POL'Y REV. 29, 29-30 (2003); Sandra Simkins & Sarah Katz, *Criminalizing Abused Girls*, 8 VIOLENCE AGAINST WOMEN 1474, 1475-76 (2002). See generally Meda Chesney-Lind, *Are Girls Closing the Gender Gap in Violence?*, 16 CRIM. JUST. 19 (2001) (arguing that the increase in female juvenile arrests is more likely attributable to police practice than to an increase in the incidence of violence by girls).

<sup>3</sup> See *infra* Part III.

<sup>4</sup> See *infra* Part III(a)(ii).

<sup>5</sup> See *infra* Part III(a)(iii).

charges are themselves typically the victims of violence, are often unfairly targeted by law enforcement, and are those most likely to be harmed by detainment.

Part I of this article will briefly describe the history of the juvenile justice system in order to provide background for recent reform efforts. Part II will examine legal and social reforms leading to the recognition and criminalization of domestic violence. It will also examine different types of family violence (with a focus on child-to-parent violence) and associated variables, as well as explore anecdotal and statistical evidence suggesting the role of the domestic violence reforms in bringing more girls into the juvenile justice system. Part III will provide information about the profiles of, and problems faced by, girls in the juvenile justice system generally, and will explain why these problems are likely exacerbated in girls from violent families. Part IV will explore solutions to the problems posited, including ongoing and prospective reforms to better handle the needs of girls in the juvenile justice system, as well as a public health and service integration approach to overcome family violence and keep girls out of the system in the first place.

## I. THE JUVENILE JUSTICE SYSTEM: HISTORY AND REFORM

In early American history, children were generally subject to the same criminal prohibitions and sanctions as adults.<sup>6</sup> At common law, children as young as seven could be convicted of crimes and incarcerated.<sup>7</sup> In theory, wayward children were generally expected to be corrected by their parents and by community institutions, such as the church.<sup>8</sup> However, children who committed offenses found themselves incarcerated along with adults convicted of criminal offenses or those deemed seriously mentally ill.<sup>9</sup> Likewise, children who were orphaned, abandoned, or even just impoverished, were placed in the same prisons and institutions.<sup>10</sup>

Progressive social reformers took up the cause of wayward youth in the early nineteenth century, advocating for a number of changes to prevent delinquency and to rehabilitate child offenders to save them from lives of crime. Social workers, teachers, and psychologists advocated for sweeping social changes—including facilitating access to parks, blocking access to tobacco and alcohol, and restructuring the criminal justice system to provide separate courts and rehabilitative facilities for delinquent children.<sup>11</sup> Interestingly, girls were at the center of concerns in establishing juvenile courts: juvenile justice reformers allied with conservative social reformers seeking to abolish prostitution and institute a higher age of consent for marriage and sex.<sup>12</sup> In many ways, these reforms reflected and emerged from changing societal attitudes regarding childhood and adolescence, and corresponding child labor and compulsory school attendance

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<sup>6</sup> Douglas E. Abrams, *Lessons from Juvenile Justice History in the United States*, 4 J. INST. JUST. & INT'L. STUD. 7, 8 (2004).

<sup>7</sup> *Id.*

<sup>8</sup> Julie Zatz, *Problems and Issues in Deinstitutionalization: Historical Overview and Current Attitudes*, in NEITHER ANGELS NOR THIEVES: STUDIES IN DEINSTITUTIONALIZATION OF STATUS OFFENDERS 14, 15 (Joel F. Handler & Julie Zatz eds., 1982).

<sup>9</sup> Abrams, *supra* note 6, at 9.

<sup>10</sup> *Id.* at 9. Children could be imprisoned if their parents were deemed by the state to be too poor to care for their own children. *Id.*

<sup>11</sup> Zatz, *supra* note 8, at 21.

<sup>12</sup> Marty Beyer et al., *A Better Way to Spend \$500,000: How the Juvenile Justice System Fails Girls*, 18 WIS. WOMEN'S L.J. 51, 55 (2003).

laws.<sup>13</sup> Around the same time, judges and juries began to treat children differently from adults in criminal cases by releasing them to the custody of charities rather than imprisoning them, or by imposing shorter sentences.<sup>14</sup>

In 1899, the first juvenile court in the nation was established in Chicago.<sup>15</sup> Juvenile court jurisdiction was intended to cover all children, including those charged with criminal and status offenses, and those who were abused or neglected. By 1925, all but two states had established their own juvenile courts.<sup>16</sup> One of the early juvenile court judges characterized the court's mission as:

[I]nstead of merely asking whether a boy or girl has committed a specific offense, to find out what he is, physically, mentally, and morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.<sup>17</sup>

Thus, unlike the adult criminal justice system, which focused on punishment, incapacitation, and deterrence, the juvenile court focused on rehabilitation.<sup>18</sup>

The court exercised its jurisdiction over juveniles under the *parens patriae* doctrine, which has long enabled the state to take over the parenting role for children whose parents were "unwilling or unable to care for them properly."<sup>19</sup> Early on, the juvenile court system faced challenges to its legitimacy, particularly in regards to the lack of procedural and due process protections it afforded to minors.<sup>20</sup> The structure of the juvenile courts, with their unique functions and specific denial of rights to adolescents, was endorsed in *Commonwealth of Pennsylvania v. Fisher*, an important precedent, though only a state appellate case.<sup>21</sup> The court in *Fisher* held that, "(1) When the state's purpose is to rescue and rehabilitate the child, whatever means it must use to do so are justified; and (2) inasmuch as punishment is not the *object* of state action, procedural guarantees are both unnecessary and inappropriate."<sup>22</sup>

States established and administered juvenile courts with little to no federal involvement during the first half of the twentieth century.<sup>23</sup> Starting in 1912, the Children's Bureau, a federal agency, began to provide technical support to juvenile courts, and collected and disseminated statistics from different jurisdictions.<sup>24</sup> The federal government became increasingly involved starting in the 1960s, when the juvenile justice system attracted national attention after

<sup>13</sup> Zatz, *supra* note 8, at 17.

<sup>14</sup> Abrams, *supra* note 6, at 10.

<sup>15</sup> Zatz, *supra* note 8, at 20.

<sup>16</sup> *Id.* at 22.

<sup>17</sup> *Id.* (quoting Judge Julian Mack).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 18.

<sup>20</sup> The juvenile justice system is a civil system: children are charged with being delinquent by violating the law, and are adjudicated as having either been delinquent or not delinquent. They are not convicted of crimes. 14 AM. JUR. TRIALS 619 § 17 (2009).

<sup>21</sup> *Commonwealth v. Fisher*, 27 Pa. Super. 175 (1904).

<sup>22</sup> Zatz, *supra* note 8, at 22. See also *Fisher*, 27 Pa. Super. at 181-82.

<sup>23</sup> Zatz, *supra* note 8, at 25.

<sup>24</sup> *Id.* at 26.

delinquency rates rose to the point where more juveniles were being arrested than adults.<sup>25</sup> President Johnson appointed a Commission on Law Enforcement and Administration of Justice (the “Commission”) to study the problem.<sup>26</sup>

The Commission found that 80% of juvenile detentions and institutions were at or above capacity, and that a disturbing proportion of juveniles in detention were institutionalized because of status offenses.<sup>27</sup> Status offenses are generally defined as offenses that are only illegal when committed by individuals who are under a certain age, such as truancy, running away, disobeying parents (usually referred to as unruly, ungovernable or incorrigible), and tobacco and alcohol use.<sup>28</sup> Also in the 1960s, states began to recognize the problems associated with status offenses, and thus began to distinguish between status and criminal offenders in the law and in treatment.<sup>29</sup> During this time period, a number of groups began to advocate for changes to the law, including human rights advocates, fiscal conservatives, and scholars and practitioners interested in issues of gender and racial justice.<sup>30</sup> Status offenders were overwhelming the system, at great cost to the states and with disturbing implications for juveniles whose freedom and privacy were being greatly curtailed for non-criminal offenses.<sup>31</sup> Contrary to its mission, the juvenile justice system had become punitive and adversarial, and juvenile offenders lacked even the most basic constitutional and procedural protections afforded to adults in the criminal justice system.<sup>32</sup>

Finally in 1974, Congress acted upon some of the recommendations made by the President’s Commission and legal activists by passing the Juvenile Justice and Delinquency Prevention Act (“JJDP”).<sup>33</sup> In addition to establishing the Office of Juvenile Justice and Delinquency Prevention (“OJJDP”), the JJDP provided conditional funding and incentives to states to deinstitutionalize status offenses and prevent the placement of status offenders in secure facilities by developing and relying upon diversion and community-based programs.<sup>34</sup> The JJDP required states to distinguish between status and criminal offenders on the grounds that detaining the former class was “legally unjustifiable and morally reprehensible.”<sup>35</sup> Although the JJDP has reduced the number of juveniles arrested and detained for status offenses, the juvenile justice system continues to handle a significant portion of status offenses. In 2004, juvenile courts processed nearly 160,000 juvenile status offense cases, and placed 7% of status offenders in

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<sup>25</sup> *Id.* at 25-26.

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

<sup>27</sup> Zatz, *supra* note 8, at 26. The Commission also found horrendous conditions; these are documented extensively elsewhere. See, e.g., Abrams, *supra* note 6.

<sup>28</sup> Zatz, *supra* note 8, at 18, 21.

<sup>29</sup> *Id.* at 27. New York and California made these changes starting in the early 1960s. *Id.*

<sup>30</sup> *Id.* at 27.

<sup>31</sup> *Id.* at 26.

<sup>32</sup> *Id.* at 27.

<sup>33</sup> Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended in scattered sections of 18 & 42 U.S.C.).

<sup>34</sup> Anne Larason Schneider, *Divesting Status Offenses from Juvenile Court Jurisdiction*, 30 CRIME & DELINQ. 347, 347-48 (1984). The JJDP also mandated that juveniles be separated from adults when in the same correctional facility. See Ira M. Schwartz, Martha W. Steketee & Victoria W. Schneider, *Federal Juvenile Justice Policy and the Incarceration of Girls*, in GIRLS, WOMEN AND CRIME 115, 115 (Meda Chesney-Lind & Lisa Pasko eds., 2004).

<sup>35</sup> Zatz, *supra* note 8, at 48.

detention.<sup>36</sup> Girls also continue to disproportionately represent status offenders: although they only account for 19% of juvenile arrests, they nonetheless account for nearly half (44%) of all status offenses, including 62% of runaways.<sup>37</sup>

Paralleling these reforms in Congress, several important Supreme Court precedents expanded the rights of juveniles in the system, correspondingly reducing the overwhelming discretionary power of the juvenile court. In 1966, the Court recognized a juvenile's right to a full and fair hearing in *Kent v. United States*.<sup>38</sup> One year later, in the seminal case *In Re Gault*, the Court extended a number of constitutional protections to juveniles, including the rights to notice, counsel, confrontation of witnesses, cross examination, and the right against self-incrimination.<sup>39</sup> In 1970, the Court mandated that the burden of proof used in juvenile court be the same as the burden in the adult criminal court: beyond a reasonable doubt.<sup>40</sup> Yet the following year, the Court held that juveniles did not have the right to a jury trial.<sup>41</sup>

Thus by the early 1980s, juveniles had gained significant procedural protections, and, perhaps most importantly, were no longer facing detention for status offenses (at least in theory). These protections, however, were short-lived. Juvenile court judges persuaded Congress that the total prohibition on detaining status offenders was unworkable.<sup>42</sup> Specifically, the judges argued that the court lacked authority to enforce court orders violated by status offenders, and that court could not effectively deal with "chronic and habitual" status offenders who came before the court, only to be released and repeat the same offense.<sup>43</sup> In response, Congress amended the JJDP in 1980 to permit courts to detain status offenders who violate a court order, referred to as the "Valid Court Order Exception."<sup>44</sup> This amendment, coupled with the wide discretion afforded to the court and law enforcement officers in labeling offenses, removed the teeth from the prohibition on detention of status offenders. It opened the door for a practice called "bootstrapping," in which adolescents who are adjudicated as status offenders can later be detained for violating the terms of probation or a court order.<sup>45</sup>

Feminist scholars have demonstrated the manner in which bootstrapping particularly affects girls, who are frequently detained for running away from home or for other technical violations of court orders or probation orders.<sup>46</sup> The juvenile justice system criminalizes the coping and survival strategies of girls, including running away from violent family situations.<sup>47</sup>

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<sup>36</sup> Anne L. Stahl, OJJDP Fact Sheet, *Petitioned Status Offense Cases in Juvenile Courts, 2004* 1-2 (Feb. 2008).

<sup>37</sup> HOWARD N. SNYDER & MELISSA SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT* 125, 207 (2006); Stahl, *supra* note 36, at 1-2.

<sup>38</sup> Beyer et al., *supra* note 12, at 56 (citing *Kent v. United States*, 383 U.S. 541, 546 (1966)).

<sup>39</sup> *Id.* (citing *In Re Gault*, 387 U.S. 1, 36, 41, 55, 56 (1967)).

<sup>40</sup> *Id.* (citing *In Re Winship*, 397 U.S. 358, 368 (1970)).

<sup>41</sup> *Id.* (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971)).

<sup>42</sup> Claire Shubik & Jessica Kendall, *Rethinking Juvenile Status Offense Laws: Considerations for Congressional Review of the Juvenile Justice and Delinquency Prevention Act*, 45 *FAM. CT. REV.* 384, 388 (2007).

<sup>43</sup> *Id.*

<sup>44</sup> Shubik & Kendall, *supra* note 43, at 389.

<sup>45</sup> CHRISTY SHARP & JESSICA SIMON, *GIRLS IN THE JUVENILE JUSTICE SYSTEM: THE NEED FOR MORE GENDER RESPONSIVE SERVICES* 6 (2004).

<sup>46</sup> Shubik & Kendall, *supra* note 43, at 389.

<sup>47</sup> MEDA CHESNEY-LIND, *THE FEMALE OFFENDER: GIRLS, WOMEN, AND CRIME* 16, 26-27 (1997).

Warning that girls who are arrested for running away are often escaping from abusive homes, then-Senator Biden noted that our response is nonetheless to “‘protect,’ these victimized girls by bringing them into the criminal justice system.”<sup>48</sup> He argued that, “[w]e need to be asking hard questions about whether all female juvenile runaways are delinquents deserving of criminal penalties or dependents in need of state welfare services.”<sup>49</sup>

The practice of bootstrapping imposes on female offenders longer and more intensive involvement in the juvenile justice system. Girls are far less likely than boys to be detained for committing a new offense: 73% of girls never return on a new referral versus 54% of boys.<sup>50</sup> Yet once a girl is in the system, if she runs away and is picked up for violating her probation, the judge may send her to detention or a mental health facility, believing that she needs secure placement to protect her.<sup>51</sup> Furthermore, if the girl “acts out” in detention—as she may be prone to do, especially if she is experiencing flashbacks and other manifestations of Post-Traumatic Stress Disorder (“PTSD”)—“she might pick up new criminal charges and be placed in more secure treatment facilities.”<sup>52</sup> A 1992 study reported that in one state, “the typical female offender in [the] study had a 4.3% probability” of detention, but a female with a contempt charge faced a 29.9% chance of detention.<sup>53</sup>

## II. FAMILY VIOLENCE AND THE LAW

### A. Recognition of Domestic Violence in the Law

In the past forty years or so, the conceptualization of domestic violence has shifted from “social invisibility as a ‘private problem,’” to a “public concern,” as a direct result of feminist lawmaking.<sup>54</sup> Historically, family violence was not prohibited but rather authorized under the law. Parents have always had, and continue to have, the right to use corporal punishment as discipline against their children.<sup>55</sup> At common law, under the doctrine of *chastisement*, a man had a right to use corporal punishment against his wife to force her to submit to his authority.<sup>56</sup> Under the doctrine of *coverture*, a woman’s legal identity was subsumed under her husband’s: she had no independent rights, including recourse to civil or criminal court for transgressions committed

<sup>48</sup> Biden, *supra* note 2, at 36.

<sup>49</sup> *Id.*

<sup>50</sup> SHARP & SIMON, *supra* note 45, at 6.

<sup>51</sup> Simkins & Katz, *supra* note 2, at 1496 n.2 (citing MEDA CHESNEY-LIND & RANDALL SHELDON, GIRLS, DELINQUENCY AND JUVENILE JUSTICE (1992)) (arguing that status offenses are a primary pathway into the juvenile justice system for girls).

<sup>52</sup> *Id.* at 1489-90.

<sup>53</sup> CHESNEY-LIND, *supra* note 47, at 71.

<sup>54</sup> ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 5 (2000).

<sup>55</sup> John Bourdeau, Stephen Lease, Kimberly Simmons & Eric C. Surettee, PARENT AND CHILD: DISCIPLINE—CORPORAL PUNISHMENT, 67A C.J.S. § 51 (2008).

<sup>56</sup> Martha Chamallas, *Domestic Violence*, in INTRODUCTION TO FEMINIST LEGAL THEORY, 255, 264 (2d ed. 2003). “The English common law contained the infamous ‘rule of thumb,’ that purported to protect wives by limiting the size of the instrument that a husband could use to chastise his wife to a ‘rod not thicker than his thumb.’ The United States . . . adopted the English common law view . . . .” Victoria Mikesell Mather, *The Skeleton in the Closet: The Battered Woman Syndrome, Self-Defense, and Expert Testimony*, 39 MERCER L. REV. 545, 547-98 (1988).

against her by her husband.<sup>57</sup> A husband had control over his wife's property, possessions, and body, including unlimited sexual access.<sup>58</sup>

In the 1970s, the battered women's movement (a "grassroots offshoot of the feminist movement") began to agitate for reforms to address intimate partner violence committed against women.<sup>59</sup> Initially, the movement sought to establish shelters for abused women, improve women's access to courts, provide resources and programs to address and prevent domestic violence, and to generally alter public consciousness about the issue.<sup>60</sup> In the late 1970s and early 1980s, however, the battered women's movement allied closely with the conservative victims' rights movement, and began to focus on a criminal justice response to domestic violence.<sup>61</sup> Historically, police officers in most states have resisted involvement in domestic violence situations. According to Deborah Epstein, police officers ignored or delayed responding to domestic violence calls, and when they did respond, their training instructed them to avoid arrests and instead try to mediate the situation and encourage reconciliation.<sup>62</sup> Accordingly, in cases where police responded, only 3% to 14% of responses involved an arrest.<sup>63</sup> It is important to note that police officers generally had the authority to arrest in only three situations: when the officer obtained a valid arrest warrant, when the officer had probable cause to believe that a felony occurred, or when the officer witnessed a misdemeanor being committed.<sup>64</sup> Most domestic violence crimes were classified as misdemeanors and took place before an officer arrived, thus making arrest difficult.<sup>65</sup>

As a result of the battered women and victims' rights movements, some states began to experiment with more aggressive arrest responses to domestic violence. Police in Minneapolis undertook a famous experiment in which police officers tested three strategies in response to domestic violence calls: arresting the suspect, sending the suspect away from the home for eight hours, or giving the suspect advice.<sup>66</sup> The researchers claimed that arresting the suspect resulted in the lowest rate of recidivism among batterers.<sup>67</sup> Although this study has been criticized extensively for methodological flaws, short follow-up periods, and inconsistencies with other

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<sup>57</sup> Martha M. Ertman, *Private Ordering Under the ALI Principles: As Natural as Status*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 284, 294-95 (Robin Fretwell Wilson ed., 2006); see also BLACK'S LAW DICTIONARY 394, 1288 (8th ed. 2004) (defining *coverture* and marital rape). See generally Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373 (2000) (presenting a historical and legal context for a husband's traditional right of unlimited sexual access to his wife).

<sup>58</sup> Ertman, *supra* note 57, at 294-95.

<sup>59</sup> Chamallas, *supra* note 56, at 266.

<sup>60</sup> Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 748-49 (2007); Chamallas, *supra* note 56, at 266.

<sup>61</sup> Gruber, *supra* note 60, at 791-93.

<sup>62</sup> Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 2002 WM. & MARY L. REV. 1845, 1852 (2002).

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

<sup>64</sup> *Id.* at 1853.

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

<sup>66</sup> Gruber, *supra* note 60, at 802-03.

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

studies, it significantly impacted domestic violence policy,<sup>68</sup> resulting in twenty-eight states adopting warrantless arrest policies for domestic violence by 1983.<sup>69</sup>

In 1994, the National Council of Juvenile and Family Court Judges convened an advisory committee to draft a Model Code on Domestic and Family Violence (“Model Code”), with the purpose of promoting “(1) [t]he protection and safety of all victims of domestic or family violence in a fair, prompt, and effective manner; and (2) [t]he prevention of future violence in all families.”<sup>70</sup> The Model Code defines “[d]omestic or family violence,” as one or more of the following acts (excluding self-defense):

- (a) Attempting to cause or causing physical harm to another family or household member;
- (b) Placing a family or household member in fear of physical harm; or
- (c) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.<sup>71</sup>

Significantly, the Model Code defines an extensive list of individuals who can be considered “family or household members” for the purpose of construing who may commit domestic or family violence: “adults or minors” who are current or former spouses; former or current dating, cohabiting, or sexual partners; individuals related by blood or adoption; parents of a common child; or “*minor children of a person*” in any of the above relationships.<sup>72</sup> The Model Code also describes the “[p]owers and duties of law enforcement officers.” These provisions require the officer to arrest a suspect if there is probable cause that family or domestic violence occurred and directs the officer to arrest the “primary aggressor” if two or more persons file a complaint.<sup>73</sup> In the event the officer responds to a domestic or family violence call and either does not make an arrest or arrests more than one person, the officer must “submit a detailed, written report setting forth the grounds for not arresting or for arresting both parties.”<sup>74</sup> Thus, an officer is required to arrest in response to a domestic or family violence call and has a strong incentive to arrest only one perpetrator.

The federal government helped to expand and solidify these mandatory arrest policies through the Violence Against Women Act of 1994 (“VAWA”).<sup>75</sup> VAWA provides for education about rape, programs preventing rape, training for state and federal judges on rape, money for women’s shelters, a national domestic abuse hotline, and criminal enforcement of interstate orders

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<sup>68</sup> *Id.* at 803.

<sup>69</sup> Epstein, *supra* note 62, at 1853.

<sup>70</sup> MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 101(1)–(2) (1994) [hereinafter MODEL CODE].

<sup>71</sup> *Id.* § 102(1).

<sup>72</sup> *Id.* § 102(2) (emphasis added).

<sup>73</sup> *Id.* §§ 205(A), 205(B)(1)–(2).

<sup>74</sup> *Id.* § 205(B)(4).

<sup>75</sup> Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified as amended in scattered sections of 18 & 42 U.S.C.).



of protection.<sup>76</sup> VAWA also requires states to adopt mandatory or pro-arrest policies in order to become eligible for funding.<sup>77</sup>

In addition to adopting mandatory or pro-arrest policies, states have also changed prosecution policies regarding family violence. Historically, charges were often dropped after arrests, due in part to prosecutor preferences and victim unwillingness to participate in the process.<sup>78</sup> Furthermore, prosecutors who did prosecute consistently undercharged domestic violence offenders (many misdemeanor charges would have been filed as felonies if the victim and offender were strangers or acquaintances).<sup>79</sup> In response to perceived under-prosecution, a number of jurisdictions adopted “no-drop” prosecution policies, requiring the prosecutor to proceed even in instances where the victim recants, refuses to cooperate, or even opts to actively assist the defense.<sup>80</sup> To ensure prosecution, the Model Code and state legislatures have modified evidentiary rules in domestic violence cases by abolishing the spousal privilege and directing prosecutors to proceed as if the victim is unavailable if the victim is unwilling to assist the prosecution.<sup>81</sup>

To summarize, feminist reforms in the past thirty years have resulted in the unique treatment of family violence in the law, including mandatory, warrantless arrests and no-drop prosecutions.<sup>82</sup>

### B. Recognition of Child Abuse in the Law

Like spousal abuse, child abuse was not a recognized problem in law or society until fairly recently. Until the late nineteenth century, there were no private or public services to address child abuse.<sup>83</sup> In 1874, the American Society for the Prevention of Cruelty to Children was formed in response to the well-publicized case of a social worker who was forced to resort to the American Society for the Prevention of Cruelty to Animals to seek help for a severely abused child.<sup>84</sup> Then, in 1899, the first juvenile court was established in Chicago; since that time, juvenile courts have had jurisdiction over abused and neglected children.<sup>85</sup> Nevertheless, it was not until the child welfare movement of the 1960s, and the recognition of battered child syndrome in 1962,

<sup>76</sup> SCHNEIDER, *supra* note 54, at 188. VAWA originally provided a civil rights remedy, but the Supreme Court struck down this provision of the Act as unconstitutional in *United States v. Morrison*, 529 U.S. 598, 627 (2000). See also SCHNEIDER, *supra* note 54, at 188.

<sup>77</sup> Epstein, *supra* note 62, at 1856.

<sup>78</sup> *Id.* at 1857.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 1857–58.

<sup>81</sup> *Id.* at 1858; MODEL CODE, *supra* note 70, at § 215.

<sup>82</sup> An additional reform brought about by feminist lawmaking is the “no-contact order.” No-contact orders are orders that require defendants to stay away from the victim while the case is pending. See Epstein, *supra* note 62, at 1846, 1857–58 (discussing the rationale behind no-contact orders); MODEL CODE, *supra* note 70, at ch. 3 (proposing rules for civil protection orders). Although no-contact orders are intended for the victim’s protection, it has become popular to mandate their issuance regardless of the preference of the victim, and practitioners question their effectiveness. See Epstein, *supra* note 62, at 1858.

<sup>83</sup> Yara Fernandez-Aldana, *Child Abuse: An Overview*, 158 PRAC. L. INST. 161, 164 (1991).

<sup>84</sup> *Id.*

<sup>85</sup> Zatz, *supra* note 8, at 20–21. The first juvenile court in the nation was the Illinois Juvenile Court, founded in 1899. *Id.* at 20.

that legal institutions began to meaningfully or systematically address child abuse and neglect.<sup>86</sup> By 1964, all states had adopted legislation that required certain professionals to report suspected child abuse.<sup>87</sup> Relevant federal legislation includes the Child Abuse Prevention and Treatment Act of 1974,<sup>88</sup> which requires states to “adopt mandatory child abuse reporting laws” and “appoint a [guardian *ad litem*] for every child in maltreatment proceedings in juvenile court.”<sup>89</sup> Though all states criminalize child abuse and neglect, most child abuse and neglect cases are civil matters handled through the coordination of child protection agencies and juvenile or family courts. It is estimated that only 5% of alleged child abuse perpetrators are criminally prosecuted.<sup>90</sup> Thus, while intimate partner violence is handled more or less exclusively as a criminal matter, child abuse is handled more or less exclusively as a civil matter.

### i. Adolescent Abuse and Child-to-Parent Violence: Hidden Victims of Family Violence

Adolescent abuse and child-to-parent violence exist in the nether world between intimate partner violence in the criminal justice system and child abuse in the social services system. As discussed above, child abuse and intimate partner violence are well publicized, extensively researched, and targeted by social welfare and law enforcement agencies.<sup>91</sup> However, social science and legal literature often ignore victims of other types of family abuse, including adolescents, siblings, elders, and parents.<sup>92</sup>

Adolescent victims of parent violence are not as sympathetic as younger children because people tend to believe that the adolescent either deserved the violence or is able to escape it.<sup>93</sup> Not much is known about this type of violence, but it seems to be less common than abuse of younger children.<sup>94</sup> It is important to note, however, that teenagers who are abused are more likely to suffer severe “violence that has a high chance of inflicting physical injury” than their younger counterparts.<sup>95</sup>

Child-to-parent violence (“CPV”) is the least researched and least understood form of family violence.<sup>96</sup> This form of violence may be shocking to contemplate, as it violates societal norms and preconceived notions of the established power structures, in which parents are

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<sup>86</sup> Jeffrey A. Walsh & Jessie L. Krienart, *Child-Parent Violence: An Empirical Analysis of Offender, Victim, and Event Characteristics in a National Sample of Reported Incidents*, 22 J. FAM. VIOL. 563, 563 (2007); WILLIAM G. JONES, WORKING WITH THE COURTS IN CHILD PROTECTION 17 (2006).

<sup>87</sup> Fernandez-Aldana, *supra* note 84, at 165.

<sup>88</sup> Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5116 (1974).

<sup>89</sup> JONES, *supra* note 86, at 19. A guardian *ad litem* (“GAL”) is “an independent advocate for the children’s best interests.” *Id.* at 15.

<sup>90</sup> Fernandez-Aldana, *supra* note 84, at 166.

<sup>91</sup> *See infra* Part 2.

<sup>92</sup> Erika Gebo, *A Family Affair: The Juvenile Court and Family Violence Cases*, 22 J. FAM. VIOL. 501, 501 (2007); RICHARD J. GELLES, INTIMATE VIOLENCE IN FAMILIES 85-87 (1985). For example, sibling violence is the most common form of violence (up to 80% of children are physically violent toward their siblings) and yet, in our society, it is viewed as relatively normal and is not a form of recognized violence. *Id.*

<sup>93</sup> GELLES, *supra* note 92, at 54, 83; Claudette Brown, *Crossing Over: From Child Welfare to Juvenile Justice*, 36 MD. B. J. 18, 19 (2003).

<sup>94</sup> GELLES, *supra* note 92, at 81.

<sup>95</sup> *Id.* at 93.

<sup>96</sup> *Id.* at 96.

sanctioned to use violence against their children, but the reverse is not true.<sup>97</sup> Parents often avoid publicizing this form of abuse, as they are blamed by others, or blame themselves, for the violence.<sup>98</sup> There is not a consensus about the prevalence of this type of violence, but it is estimated to be more common than both spousal and child abuse (estimates suggest that anywhere from 5% to 29% of households annually experience this type of violence).<sup>99</sup> Mothers are significantly more likely to be victims of child-to-parent violence, but fathers are more likely to face disproportional levels of violence and parricide.<sup>100</sup>

Child-to-parent violence has been theorized to be “the intermediary step in the intergenerational transmission of violence,” as children who suffer abuse are more likely to act violently toward their parents in adolescence and toward their intimate partners in adulthood.<sup>101</sup> Research is conflicting as to whether there is a gender difference in incidence of CPV, however, most studies agree that girls are more likely to use objects or weapons than boys, which may be because girls do not feel as physically powerful as boys.<sup>102</sup>

All forms of family violence are usually considered to be “symptomatic of deeper family issues,” and are often reciprocal in nature.<sup>103</sup> In fact, youth interviewed about CPV report resorting to violence when their parents were using violence toward them, either as a coping mechanism or as an attempt to deter further violence by their parents.<sup>104</sup> This is consistent with the theory that families who use violence as a legitimate way to resolve conflict run greater risk of experiencing all forms of family violence, including parent abuse.<sup>105</sup> Most studies conclude that CPV is correlated both with parent-to-child violence, and violence between parents.<sup>106</sup> It appears that CPV is more highly correlated with parent-to-child violence than witnessing violence between parents, however, there seems to be a cumulative effect in a child who both witnesses and experiences abuse leading to a greater likelihood of CPV.<sup>107</sup>

## ii. Family Violence, Law Enforcement, and the Juvenile Justice System

About one half of person crimes (simple, aggravated, and sexual assaults) reported to police are committed by family members. Family members are much more likely to be arrested than offenders who harm strangers or acquaintances, due in no small part to the domestic violence

<sup>97</sup> *Id.* at 97; Walsh & Krienart, *supra* note 86, at 563-64.

<sup>98</sup> Nancy J. Eckstein, *Emergent Issues in Families Experiencing Adolescent-to-Parent Abuse*, 68 W. J. COMM. 365, 368-89 (2004).

<sup>99</sup> Walsh & Krienart, *supra* note 86, at 563-64.

<sup>100</sup> Gebo, *supra* note 92, at 502. In 90% of CPV cases reported to law enforcement in 2002, the mother was the victim. Walsh & Krienart, *supra* note 86, at 569.

<sup>101</sup> Gebo, *supra* note 92, at 502.

<sup>102</sup> *Id.* at 503.

<sup>103</sup> *Id.* at 506.

<sup>104</sup> *Id.* at 507.

<sup>105</sup> GELLES, *supra* note 92, at 101.

<sup>106</sup> Arina Ulman & Murray A. Straus, *Violence by Children Against Mothers in Relation to Violence Between Parents and Corporal Punishment by Parents*, 34 J. COMP. FAM. STUD. 41, 46-47 (2003).

<sup>107</sup> *Id.* at 54.

law reforms discussed above.<sup>108</sup> Though juveniles make up about 16% of annual arrests for all causes, juvenile offenders made up about 9% of domestic violence arrests.<sup>109</sup> More than half of juveniles arrested for domestic violence had assaulted a parent, and a quarter had assaulted a sibling.<sup>110</sup> Of all juvenile person offense arrests, 25% are for domestic violence.<sup>111</sup>

Arrest statistics illustrate how child-to-parent violence may account for some of the increasing number of girls coming into the juvenile justice system. Girls account for 29% of all juvenile arrests, but they account for 31% of assault arrests, 35% of domestic violence arrests, and 41% of all CPV arrests.<sup>112</sup> Of all juvenile assault arrests (not just domestic), parents were the victims in 16% of female arrests but only 10% of male arrests.<sup>113</sup> This reflects earlier findings that detained girls are more likely to engage in physical violence with family members in the home setting, while detained boys are more likely to engage in violence with acquaintances outside of the home.<sup>114</sup>

Across the board, juvenile arrests have fallen in the last decade: the total number of juveniles arrested fell by about 24% from 1997 to 2006.<sup>115</sup> However, girls' arrest rates for various offenses have risen, or dropped more slowly than boys' arrest rates, resulting in girls' increasing representation in the juvenile justice system since 1980.<sup>116</sup> From 1980 to 2003, girls' arrests for simple assault increased by 269%, compared to a 102% increase for boys.<sup>117</sup> From 1997 to 2006, boys' arrest rates fell for every type of offense, but girls' arrest rates rose for several categories, including a 19% increase for simple assault arrests compared to a 4% drop in boys' arrests for the same offense.<sup>118</sup> The vast majority of arrests for violent offenses result in simple assault charges; moreover, simple assault charges are more likely to result in family violence offenses than in stranger violence offenses.<sup>119</sup> This, and the fact that girls are more likely to engage in violence within the home, may help provide an explanation for the increase in simple assault arrests among girls.<sup>120</sup>

Researchers and workers in the juvenile justice system report that mandatory domestic violence arrest policies negatively impact girls: a significant portion of the increase in girls' arrests are for person offenses, and, moreover, while girls are not always the most blameworthy, they are often the target of law enforcement. In her research in the California juvenile justice system,

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<sup>108</sup> Howard N. Snyder & Carl McCurley, *Domestic Assaults by Juvenile Offenders*, JUVENILE JUSTICE BULLETIN, Nov. 2008, 1, at 1. It also seems fair to assume that family members are more easily identified to, and located by, police than other types of offenders.

<sup>109</sup> *Id.*; Howard N. Snyder, *Juvenile Arrests 2006*, JUVENILE JUSTICE BULLETIN, Nov. 2008, at 4; FBI, *Crime in the United States, 2006*, Sept. 2007, available at [http://www.fbi.gov/ucr/cius2006/data/table\\_41.html](http://www.fbi.gov/ucr/cius2006/data/table_41.html).

<sup>110</sup> Snyder, *supra* note 109, at 3; Snyder & McCurley, *supra* note 108, at 1.

<sup>111</sup> Snyder, *supra* note 109, at 3; Snyder & McCurley, *supra* note 108, at 2.

<sup>112</sup> Snyder & McCurley, *supra* note 108, at 3.

<sup>113</sup> *Id.* at 5.

<sup>114</sup> Chesney-Lind, *supra* note 2, at 22.

<sup>115</sup> Snyder, *supra* note 109, at 3.

<sup>116</sup> Chesney-Lind, *supra* note 2, at 19.

<sup>117</sup> SNYDER & SICKMUND, *supra* note 37, at 142.

<sup>118</sup> Snyder, *supra* note 109, at 8.

<sup>119</sup> *Id.* at 4-5; BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 8 (2005).

<sup>120</sup> Snyder, *supra* note 109, at 8.

Leslie Acoca noted that the majority of the girls with assault charges were “the result of nonserious, mutual combat situations with parents. In many cases the aggression was initiated by the adults.”<sup>121</sup> Acoca described “typical and telling” cases, including one case where a girl was arrested after her “[f]ather lunged at her while she was calling the police about a domestic dispute [and] she (girl) hit him.”<sup>122</sup> In another case, the events precipitating a girl’s arrest involved her trying to sneak out of the house at night, but “[her] mom caught her and pushed her against the wall.”<sup>123</sup> In one disturbingly trivial case, a girl “was arrested for throwing cookies at her mother.”<sup>124</sup>

The reports of probation officers working with females in the juvenile justice system are incredibly revealing. In one study, probation officers “expressed concern about domestic violence and noted that children were often punished for fights started by parents.”<sup>125</sup> The following excerpted quotes explain their views about how changing domestic violence law enforcement, particularly mandatory arrest policies and decisions on the ground by law enforcement, affects girls in violent family situations:

Politically there was a change roughly 10 years ago . . . the legislature decided if the police go into a home and there’s a domestic violence incident, somebody has got to leave. And starting at that point the kids are the obvious ones to take out of the home. If you arrest the parents, then you have to go shelter the kids . . . . So police just make the kids go away and the numbers of kids being referred to the juvenile court for assaulting their parents or for disorderly conduct for punching walls or doors . . . the numbers have just been increasing tremendously because of that political change.<sup>126</sup>

The whole thing just burns a hole in me . . . . Say the police respond to a case of domestic violence. You have a 3-year-old girl, a 16-year-old girl, and the mother fighting. Say the mother grabbed that girl and started pounding her face into cement. They’re not going to take Mom to jail when there is a 3-year-old daughter there. But they need to separate the two of them. So a lot of times it really is the parent’s fault but the kid gets hauled away to jail for protection and they’re not going to take Mom who has to support the 3-year old and go to work the next morning.<sup>127</sup>

These reports illustrate how a set of beliefs and policies have intersected to bring more girls into the juvenile justice system: mandatory arrest policies; police discretion and practical considerations making it easier to arrest a juvenile than a parent, especially when both seem to be at fault and other children are involved; and the commonly-held conception that arrest and detention ‘protects’ girls. This is not to suggest that the girls are never at fault. Given what we

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<sup>121</sup> Leslie Acoca, *Investing in Our Girls: A 21st Century Strategy*, 6 JUV. JUST. 3, 8 (Oct. 1999).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Gaarder et al., *supra* note 1, at 565.

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

<sup>127</sup> *Id.*

know about child-to-parent violence, however, including its often-mutual nature and high correlation with other types of family violence, we should be concerned that girls are unfairly and inappropriately being brought into the system. This lends credibility to the argument that, as one probation officer claimed, we are in fact “turning a lot of these girls into criminals.”<sup>128</sup>

### III. GIRLS AND THE JUVENILE JUSTICE SYSTEM

Against the now established backdrop of the Juvenile Justice Prevention Delinquency Act, the Violence Against Women Act, and state law enforcement policy changes regarding domestic violence, this paper will next attempt to explain how these changes in law have converged to harm girls in violent families. This background information about girls in the juvenile justice system will help to establish how these reforms have brought more girls into the system, and why this is problematic.

#### A. Why Focus on Girls?

Girls become involved in the juvenile justice system for different reasons than boys, girls are treated differently by those in the juvenile justice system, girls have unique needs, including significant mental health and trauma issues, and detention and community alternatives were designed for boys and are not well-equipped to handle girls. Moreover, girls experience the juvenile justice system differently than boys; this is due to the ways female offenders differ from male offenders in their “paths to delinquency” and because society views girls differently and the juvenile justice system handles their cases differently.

##### i. Arrest Rates & Offenses

Since at least the early 1970s, researchers have recognized the inequitable treatment of females in the juvenile justice system, criticizing the disproportionate number of girls brought in for status offenses and the differential treatment girls experience based upon community and parental intolerance of behaviors when manifested by girls as opposed to boys.<sup>129</sup>

Today, girls account for 29% of all juvenile arrests and 19% of juveniles in detention.<sup>130</sup> Girls are more likely than boys to be picked up and detained for minor offenses, including property, drug and status offenses, as opposed to person offenses.<sup>131</sup> There are two offenses for which girls are more likely to be arrested than boys: prostitution and running away (a status offense).<sup>132</sup> Girls are disproportionately arrested and detained for “violation[s] of a court order, probation violations, or contempt charges,” a practice referred to as “bootstrapping,” which is authorized by the 1980 amendment to the JJDP, as discussed above.<sup>133</sup> It has been suggested

<sup>128</sup> *Id.* at 566. New York is a conspicuous example of such differential treatment: New York distinguishes jurisdiction on the basis of sex, thus enabling courts to retain jurisdiction over girls for longer periods of time than boys. Zatz, *supra* note 8, at 31-32.

<sup>129</sup> Zatz, *supra* note 8, at 31-32.

<sup>130</sup> SNYDER & SICKMUND, *supra* note 37, at 125, 207.

<sup>131</sup> Acoca, *supra* note 121, at 7.

<sup>132</sup> Francine T. Sherman, *Detention Reform and Girls: Challenges and Solutions* 37 (Pathways to Juvenile Detention Reform Series 2005).

<sup>133</sup> SHARP & SIMON, *supra* note 45, at 6. See *infra* Part I.

that the gender differences in arrests can be accounted for, at least in part, due to the fact that parents, community members, law enforcement officers, and others are less tolerant of the deviance, aggression, non-cooperation, and non-compliance of females than males, probably due to gender role expectations.<sup>134</sup>

Boys and girls are detained for different reasons: decision-makers tend to detain boys based upon public safety considerations, while girls are detained more often because of the problems they experience at home, or “for [their] own safety.”<sup>135</sup> Decisions to detain girls have been shown to be influenced by paternalistic attitudes and justified by the need to obtain services for the girls, protect them from sexual abuse, and to prevent sexual behavior and teen pregnancy.<sup>136</sup> Although decision-makers in juvenile courts often rely on screening instruments to determine whether a given juvenile should be placed in detention, scores suggesting that detention is inappropriate are twice as likely to be overridden for girls than for boys.<sup>137</sup> In other words, girls are more likely than boys to be placed in detention even when screening instruments indicate that detention is inappropriate. Half of the overrides that keep girls in detention are motivated by either family violence or a parent’s refusal to take his or her daughter home.<sup>138</sup> There is also a lack of community advocacy programs and detention alternatives for females compared to males; as a result, girls are often detained due to either a lack of appropriate alternatives or while awaiting placement at an over-utilized program.<sup>139</sup>

Girls also have different risk factors for delinquency than boys. In one statistical model, the strongest predictive risk factors for boys were financial hardship, poor school behavior, prior offense history and poor peer groups; the strongest predictive factors for girls were special education placement, child abuse, running away, and prior person offense history.<sup>140</sup>

## ii. Abuse, Trauma & Mental Health Issues

Girls in detention have significant histories of trauma, abuse, and cross-system involvement. For example, one large study revealed that among juveniles in detention, 77.8% of girls had a documented history of physical abuse, but only 3% of boys did.<sup>141</sup> A history of abuse increases the risk of being arrested for a violent crime for girls and women, but not for boys.<sup>142</sup> Adolescent females have been found to be four times more likely than their male counterparts to be physically or verbally abused in the home, and 75% of sexually abused children are females.<sup>143</sup> Up to 92% of girls in the juvenile justice system have experienced physical, sexual, or emotional abuse.<sup>144</sup>

<sup>134</sup> Sherman, *supra* note 132, at 17.

<sup>135</sup> Gaarder et al., *supra* note 1, at 566.

<sup>136</sup> Sherman, *supra* note 132, at 17.

<sup>137</sup> *Id.* at 34.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 36.

<sup>140</sup> Stephen M. Gavazzi, Courtney M. Yarcheck & Meda Chesney-Lind, *Global Risk Indicators and The Role of Gender in a Juvenile Detention Sample*, 33 CRIM. JUST. & BEHAV. 597, 599 (2006).

<sup>141</sup> Sherman, *supra* note 132, at 21.

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

<sup>143</sup> Laurie Schaffner, *Violence and Female Delinquency: Gender Transgressions and Gender Invisibility*, 14 BERKELEY WOMEN’S L.J. 10, 55 (1999).

<sup>144</sup> Sherman, *supra* note 132, at 21.

Exposure to violence in childhood has been associated with depression, aggression, anxiety, low self-esteem, traumatic stress, and self-destructive behaviors.<sup>145</sup> Victims of abuse are more likely to have “distorted and deficient patterns of information processing,” including attributing hostility to others.<sup>146</sup> In what has been called “self-punishment syndrome,” a victim of abuse is more likely to harm herself, for example through self-mutilation, and “is more likely to put herself in harm’s way.”<sup>147</sup>

In part because of the strong correlation between past trauma and delinquency in girls, girls in the juvenile justice system are much more likely than their male peers to have mental health problems, most notably depression and PTSD.<sup>148</sup> They are six times more likely to have PTSD, but are often misdiagnosed with Oppositional Defiant Disorder (“ODD”).<sup>149</sup> In particular, aggressive or violent girls are more likely to have been both physically and sexually abused than non-violent girls.<sup>150</sup> Girls also have higher rates of undiagnosed learning disorders than boys.<sup>151</sup>

Girls have significant cross-system involvement. Girls are 44% more likely than boys to have a history of involvement with Child Protective Services (“CPS”).<sup>152</sup> A girl with prior CPS involvement is four times more likely than the average juvenile, and twice as likely as a boy with CPS involvement, to become involved with the juvenile justice system.<sup>153</sup> Children with foster care involvement are also more likely to become involved in the juvenile justice system than their peers; of those with foster care backgrounds, girls are twice as likely as boys to be detained.<sup>154</sup> The cross-system involvement gives credence to the charge that girls are being “dumped” in detention by other social services.<sup>155</sup>

### iii. Detention

Juvenile detention facilities were not designed for girls, and detention staffers were not trained to handle girls; as such, the trauma and mental health issues that many female offenders experience are likely to be exacerbated in detention.<sup>156</sup> Furthermore, there simply are not enough

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<sup>145</sup> Li-yu Song, Mark I. Singer & Trina M. Anglin, *Violence Exposure and Emotional Trauma as Contributors to Adolescents’ Violent Behaviors*, 152 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 531, 532 (1998).

<sup>146</sup> *Id.*

<sup>147</sup> David E. Arredondo, *Child Development, Children’s Mental Health and the Juvenile Justice System: Principles for Effective Decision Making*, 14 STAN. L. & POL’Y REV. 13, 25 (2003).

<sup>148</sup> Sherman, *supra* note 132, at 21, 23.

<sup>149</sup> SHARP & SIMON, *supra* note 45, at 12.

<sup>150</sup> Beth E. Molnar, Angela Browne, Magdalena Cerda & Stephen L. Buka, *Violent Behavior by Girls Reporting Violent Victimization: A Prospective Study*, 159 ARCH. PED. ADOLESC. MED. 731, 732 (Aug. 2005).

<sup>151</sup> Sherman, *supra* note 132, at 16. It is also relevant that girls in the juvenile justice system are more likely than their peers to have children. One study showed that 29% of the girls in detention had been pregnant at least once and 16% had been pregnant while in detention. *Id.* at 23. Upon detention, the system often forcibly separates these mothers and children. *Id.*

<sup>152</sup> *Id.* at 18.

<sup>153</sup> *Id.* at 18-19.

<sup>154</sup> *Id.* at 36-37.

<sup>155</sup> *Id.* at 19.

<sup>156</sup> *Id.* at 12, 24.



private and community-based services for girls, which leaves the court with the equally unattractive options of either keeping girls in detention for long periods of time while seeking placement, or releasing them without services back into their homes.<sup>157</sup> The space set aside for female juvenile offenders in detention facilities is limited; accordingly, increasing arrest and detention of girls results in overcrowding.<sup>158</sup>

Overcrowding has been shown to amplify stress on staff, escalate violence and suicidal behavior among detainees, and result in an increased reliance by staff on control measures such as lock down, isolation, and restraints.<sup>159</sup> These conditions exacerbate existing depression and post-traumatic stress disorders—conditions that are especially troubling for girls, given that adolescent females are twice as likely to attempt suicide as adolescent males.<sup>160</sup>

Girls are also at greater risk of abuse while in detention than other detainees. Girls are more likely to be subject to “demeaning and sexually abusive language,” strip searches, body cavity exams, physical restraints, and sexually abuse by staff.<sup>161</sup> Substantiated reports of physical and sexual abuse of detained female juveniles have spurred lawsuits and protective state legislation.<sup>162</sup>

To summarize, girls in detention are “high need[,] low risk, inappropriately detained, and inadequately served.”<sup>163</sup>

### B. Putting the Pieces Together

The picture emerging is grim. Police are called to respond to a domestic disturbance. The fight appears to be between a parent and an adolescent female. Due to warrantless and mandatory arrest policies, the officer is required to arrest someone, and will often face increased administrative burdens if no or multiple arrests are made, thus one person must be singled out for arrest. Taking the girl seems to be the easiest and wisest route: avoiding arresting a parent alleviates the need to involve Child Protective Services for the other children in the home, removing the adolescent will provide time to allow everyone to cool off, and detention will keep the girl safe until everything is sorted out. Whereas previous rules allowed the officer to charge the girl with incorrigibility or ungovernability, the officer is now forced to charge her with some form of assault. Juveniles generally cannot be detained in the first instance for status offenses. While the former offense may or may not have landed the girl in detention, the latter offense almost certainly will.

Likely a victim of abuse, this girl probably was not the sole culprit and may not have even been the main offender in the situation. The arrest itself will be traumatic, and the detention facility she faces will not be equipped to handle or respond to her mental health issues, and in fact, will likely exacerbate them. She will likely either stay in detention awaiting placement elsewhere, or will be returned to her home situation, without having the violence properly addressed. Now that she is in the system, it is likely that she will become further involved in a cycle of detention.

<sup>157</sup> Simkins & Katz, *supra* note 2, at 1493.

<sup>158</sup> Sherman, *supra* note 132, at 12.

<sup>159</sup> *Id.* at 6.

<sup>160</sup> *Id.* at 23, 25-26.

<sup>161</sup> Physicians for Human Rights, *Unique Needs of Girls in the Juvenile Justice System 2*, <http://physiciansforhumanrights.org/juvenile-justice/factsheets/girls.pdf>, Simkins & Katz, *supra* note 2, at 1493; Sherman, *supra* note 132, at 25.

<sup>162</sup> Sherman, *supra* note 132, at 25.

<sup>163</sup> *Id.* at 43.

For example, if violence occurs again in her home, she faces the equally unattractive options of staying in the home and risking arrest for domestic violence, or running away and facing arrest for a probation violation. Though she is unlikely to commit a new offense, it is highly likely she will become re-involved in the court through bootstrapping because now the court has the authority to pick her up for a status offense or highly technical violation. Given her violent and traumatic background, interrupted education, and any other number of risk factors, what does the future hold for this girl?

#### IV. REFORM

*“In an ideal world, appropriate interventions would stop the violence in girls’ lives early and they would receive needed services long before they entered the system as delinquents. But once they enter the system, the girls should not be further harmed by their experiences within a system that is supposed to help them.”*<sup>164</sup>

In order to best help these girls, we need to reduce all forms of family violence, develop better responses to family violence, minimize adolescent arrests for domestic violence charges, and reform the juvenile justice system so it is best able to address the needs of adolescents, especially girls. Interestingly, recent reauthorizations of the Juvenile Justice and Delinquency Prevention Act and the Violence Against Women Act hold some promise for improving the plight of girls in violent families. In addition to addressing these federal legal reforms, this section of the article will explain the need to apply a public health approach to better understand and address family violence, and the promise of family-based services integration.

##### *A. JJDPA, OJJDP, and Juvenile Justice System Reforms*

The 1992 reauthorization of the JJDPA added a new requirement that states receiving federal funding must submit an annual plan that “shall contain an analysis of gender-specific services for the prevention and treatment of juvenile delinquency, including the types of such services available and the need for such services for females; and a plan for providing needed gender-specific services for the prevention and treatment of juvenile delinquency.”<sup>165</sup> The majority of states (95%) who received grants provided under this provision used the funding for studying and determining the needs of the girls in their systems, which represents a good start, but only 38% of the states applied any funding to actually implementing programs.<sup>166</sup> The 2002 reauthorization requires states to submit plans that assure, “that youth in the juvenile justice system are treated equitably on the basis of gender.”<sup>167</sup>

In 2004, the OJJDP created a Girls Study Group, “an interdisciplinary group of scholars and practitioners convened . . . to develop a comprehensive research foundation for understanding

<sup>164</sup> Simkins & Katz, *supra* note 2, at 1476.

<sup>165</sup> 42 U.S.C.A. § 5633(a)(7)(B) (1992).

<sup>166</sup> Sherman, *supra* note 132, at 13.

<sup>167</sup> 42 U.S.C.A. § 5633(a)(15) (2002).

and responding to girls' involvement in delinquency."<sup>168</sup> It was tasked with answering the following questions: "Who is the delinquent girl? What are the risk and protective factors associated with girls' delinquency? What are the pathways to girls' delinquency? What programs can prevent girls from becoming delinquent? What are the system responses to girls' delinquency? What are the life consequences of girls' delinquency?"<sup>169</sup> The Girls Study Group has examined existing programs designed for girls in the juvenile justice program, but so far the results are wanting: of the sixty-one programs the Group was able to find, only seventeen have been evaluated, and none of those met the Groups' set standards to be considered effective.<sup>170</sup>

A number of states, however, are experimenting with innovative solutions to address female delinquency, including establishing girls-only dockets in the juvenile courts,<sup>171</sup> implementing gender-responsive programs and services, training judges and juvenile justice staff about girls' needs and unique issues, and linking girls to strengths-based community services.<sup>172</sup> Another promising approach includes collaborations between community programs and probation departments to reduce recidivism among girls. The effort is comprised of staff members who are trained in working with girls and dedicated to finding community services and alternatives to detention.<sup>173</sup> Community-based shelters are an attractive stop-gap solution for girls in violent family situations, especially for those whose only current options appear to be running away or facing potential arrest.<sup>174</sup> Yet another approach includes "Evening Reporting," where juveniles attend school during the day and supervised programming in court or community facilities from after school until evening hours.<sup>175</sup> However, these approaches can only become effective with greater cross-collaboration between various agencies, better preventative measures, and increasing availability of community-based services and detention alternatives.<sup>176</sup> Reducing family violence must become a high priority.

#### i. VAWA Reauthorization

As then-Senator Biden recognized, "[b]y reducing violence against girls, we will significantly narrow a major pathway to delinquency."<sup>177</sup> The 2005 renewal of the Violence Against Women Act established grants to enable states to address the effects of family, intimate,

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<sup>168</sup> Girls Study Group Home Page, [http://girlsstudygroup.rti.org/index.cfm?fuseaction=dsp\\_group](http://girlsstudygroup.rti.org/index.cfm?fuseaction=dsp_group). See also Margaret A. Zahn, Stephanie R. Hawkins, Janet Chiancone & Ariel Whitworth, OJJDP, *The Girls Study Group—Charting the Way to Delinquency Prevention for Girls 3* (Oct. 2008), available at [www.ncjrs.gov/pdffiles1/ojjdp/223434.pdf](http://www.ncjrs.gov/pdffiles1/ojjdp/223434.pdf) (describing the foundation of the Girls Study Group, and the problems it was convened to study).

<sup>169</sup> Girls Study Group Home Page, [http://girlsstudygroup.rti.org/index.cfm?fuseaction=dsp\\_study](http://girlsstudygroup.rti.org/index.cfm?fuseaction=dsp_study).

<sup>170</sup> Stephanie R. Hawkins, OJJDP, *Girls Study Group: Program Review 33* (2008), available at [http://girlsstudygroup.rti.org/index.cfm?fuseaction=dsp\\_presentations](http://girlsstudygroup.rti.org/index.cfm?fuseaction=dsp_presentations).

<sup>171</sup> See, e.g., Hawai'i Girls Court, <http://www.girlscourt.org/aboutus.html>.

<sup>172</sup> Sherman, *supra* note 132, at 40-41.

<sup>173</sup> *Id.* at 43.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 55-56.

<sup>176</sup> *Id.* at 50.

<sup>177</sup> Biden, *supra* note 2, at 44.

and sexual violence among young people, applicable from 2007 until 2011.<sup>178</sup> One set of grants, “Services, Education, Protection and Justice for Young Victims of Violence,” are directed to programs designed to provide “direct counseling and advocacy for youth and young adults, who have experienced domestic violence, sexual assault or stalking,” including violence prevention programs and services for runaway youth.<sup>179</sup> Another set of grants, “Access to Justice for Youth,” were devised to,

encourage cross training and collaboration between the courts, domestic violence and sexual assault service providers, youth organizations and service providers, violence prevention programs, and law enforcement agencies so that communities can establish and implement policies, procedures, and practices to protect and more comprehensively and effectively serve young victims of dating violence, domestic violence, sexual assault, and stalking who are between the ages of 12 and 24.<sup>180</sup>

These grants require a government agency (court or law enforcement) and a victim-service provider to collaborate to further a number of purposes, including intervention programs for young offenders, and prevention or intervention services.<sup>181</sup> Yet another set of grants, “Grants for the Training and Collaboration on the Intersection between Domestic Violence and Child Maltreatment,” is designed to “enhance community responses to families where there is both child maltreatment and domestic violence.”<sup>182</sup>

The 2005 VAWA also provides grants to help children exposed to domestic violence, including counseling and advocacy,<sup>183</sup> and family home visitation services in order to “reduce the impact of violence on children, maintain safety, improve parenting skills, and break intergenerational cycles of violence.”<sup>184</sup> Finally, VAWA provides funding to facilitate research and improve responses to “sexual and domestic violence by and against adults, youth, and children,” by providing funding to the Centers for Disease Control and Prevention (“CDC”) and to state and local public health agencies.<sup>185</sup>

A major shortcoming of VAWA is that it continues to place undue emphasis on mandatory and pro-arrest law enforcement policies. However, the grants encouraging collaboration amongst agencies and a public health approach have the potential to alter our current practices and truly assist girls in violent families.

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<sup>178</sup> Violence Against Women and Department of Justice Reauthorization Act of 2005, 42 U.S.C. § 13701 (2006).

<sup>179</sup> *Id.* § 303.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* § 402(a), § 504.

## ii. A Public Health Approach

The reforms occurring in the juvenile justice system are undoubtedly helpful, but the ideal solution is to keep girls out of the system in the first place by tackling family violence in the community.

As described above, the societal response to family violence has evolved from essentially ignoring the problem to responding reactively, relying heavily on law enforcement and the criminal justice system. The current approach to family violence is also very fragmented in theory, research, and practice. Experts have different understandings of each aspect of the problem (*e.g.*, intimate partner violence, child abuse, etc.) and different and sometimes conflicting goals and services to address it.<sup>186</sup> The goals animating the current approach include: punishment of offenders, protection of communities and victims, reduction of unnecessary costs, and concern for the rights and needs of children and vulnerable adults.<sup>187</sup>

The field of public health is uniquely positioned to address family violence. Originally developed to address infectious disease at the population level, the field of public health has evolved to address a number of societal problems, including obesity, violence, drug abuse and addiction, and pollution, among others.<sup>188</sup> The basic paradigmatic approach of public health is a four step process: defining the problem, identifying risk and protective factors, developing and testing prevention strategies, and ensuring widespread adoption of those strategies.<sup>189</sup> The first step, defining the problem, includes the use of epidemiological methods to determine prevalence and incidence of the problem, in order to understand how widespread the problem is and whom it affects.<sup>190</sup> The second step involves research to determine underlying causes and risk factors associated with the problem, as well as protective factors that may prevent or stop the problem.<sup>191</sup> As discussed above, researchers do not have a clear picture of how widespread the phenomenon of family violence is, especially in its more taboo and less understood forms, such as parental and adolescent abuse.<sup>192</sup> Though researchers have uncovered some risk factors for various forms of family violence, there does not seem to be a comprehensive theory that unites all types of violence that may occur within one family. Thus the public health paradigm provides a method and a lens for gathering the crucial information about family violence that is lacking.

The public health paradigm also lays the framework for designing, implementing, and evaluating interventions to address, and most significantly, to prevent family violence. The public health lens, and in particular its prevention oriented approach, is critical to address family violence, because our current reactionary model including “crisis lines, victim advocates, shelters,

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<sup>186</sup> ROSEMARY CHALK & PATRICIA A. KING, *VIOLENCE IN FAMILIES: ASSESSING PREVENTION AND TREATMENT PROGRAMS* 13 (1998).

<sup>187</sup> *Id.* at 13-14.

<sup>188</sup> *See generally*, MARY-JANE SCHNEIDER, *INTRODUCTION TO PUBLIC HEALTH* (2d ed. 2006) (describing the discipline of public health, including its history, objectives, and theories).

<sup>189</sup> Linda Chamberlain, *A Prevention Primer for Domestic Violence: Terminology, Tools, and The Public Health Approach*, VAWNET, Mar. 2008, at 2, available at [http://www.vawnet.org/category/Documents.php?docid=1313&category\\_id=695](http://www.vawnet.org/category/Documents.php?docid=1313&category_id=695).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *See infra* Part II(b) & (c).

batterer-intervention programs, [and] legal sanctions . . . will never be enough.”<sup>193</sup> In the field of public health, prevention is conceptually divided into three tiers: (1) primary or universal; (2) secondary or selected; and (3) tertiary or indicated.<sup>194</sup> These levels are not mutually exclusive, and generally, a comprehensive approach will incorporate multiple levels of prevention.<sup>195</sup>

As applied to family violence, a primary or universal approach applies to the general population and is designed to prevent family violence before it occurs. Examples of such interventions include education programs for children and adolescents on non-violent conflict resolution and healthy intimate relationships.<sup>196</sup> A secondary or selected approach is slightly more targeted to at-risk populations, and should aim to prevent family violence from occurring or progressing. Examples of these interventions include conducting screening and referrals for potential victims of family violence and instituting nurse visitation programs for children and women at risk of abuse. Finally, a tertiary or indicated approach responds to victims after family violence has occurred. Its goals include reducing the impact of violence, assisting victims to return to “health, wellness, and/or safety” as quickly as possible, and preventing re-victimization and escalating violence.<sup>197</sup> A spectrum of preventative health measures provides the framework for instituting such interventions in a community. Interventions on the spectrum include: strengthening individual knowledge and skills, promoting community education, educating providers, fostering coalitions and networks, changing organizational processes, and influencing policy and legislation.<sup>198</sup>

Addressing and preventing all forms of family violence will take a comprehensive and collaborative approach. Some scholars have suggested using a family perspective to integrate the complicated web of public and private services that respond to family violence, including public health organizations, the criminal and juvenile justice systems, child welfare services, and family courts and services.<sup>199</sup> Such an approach would view individuals in the context of their family relationships and utilize the family as a unit of concern and analysis in policy and program implementation and evaluation.<sup>200</sup> A family-based approach makes sense because in family violence and other family issues, problems tend to occur in clusters; individual problems affect family members and family members affect individuals.<sup>201</sup>

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<sup>193</sup> Mark L. Rosenberg, Mary Ann Fenley, Denise Johnson & Lynn Short, *Bridging Prevention and Practice: Public Health and Family Violence*, 72 ACAD. MED. (1 Supplement) S13, S14 (1997).

<sup>194</sup> Chamberlain, *supra* note 189, at 2.

<sup>195</sup> *Id.* at 4. The “primary, secondary, and tertiary” approach terminology does not overlap perfectly with the “universal, selected, and indicated,” approach terminology. Some public health researchers claim that the two represent very different concepts; and the latter set of terminology was actually designed as a critique to the former. While there are important conceptual differences, the theories do converge quite a bit. For the sake of simplicity and clarity, they will be combined in this discussion. *See, e.g.*, Emory L. Cowen, *Social and Community Interventions*, 24 ANN. REV. PSYCHOL. 423, 432-34 (1973) (discussing the three-tiered prevention model).

<sup>196</sup> Chamberlain, *supra* note 189, at 5.

<sup>197</sup> *Id.* at 3.

<sup>198</sup> *Id.* at 6.

<sup>199</sup> *See, e.g.*, Patricia Voydanoff, *A Family Perspective on Services Integration*, 44 FAM. REL. 63, 63 (1995).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 64.

Services integration has been described as “the quest for the development of systems that are responsive to the multiple needs of the person at risk” and “a systemic effort to solve problems of service fragmentation and the lack of an exact match between individual or a family with problems and needs.”<sup>202</sup> Service integration is an “evolutionary and hierarchal process” that begins with informal cooperation between different agencies; expands to more formal inter-agency coordination and sharing of resources; and ultimately becomes a collaboration in which agencies share common goals, commitments, resources, decision-making, and evaluation responsibilities.<sup>203</sup> Thus, services are coordinated in order to “deal with the whole victim or the whole family.”<sup>204</sup> As explained above, such service coordination is essential in addressing the cycles of family violence and juvenile court involvement that particularly impacts girls who are “dumped” from mental health and child protective services into detention.<sup>205</sup>

#### IV. CONCLUSION

To conclude, more girls are being arrested and detained than ever before. Although these increases are due to a number of factors, one of the most disturbing reasons is the convergence of juvenile justice and domestic violence reforms. Though these two reform movements were seemingly pro-feminist and progressive, each was the result of progressive and feminist reformers joining forces with fiscal and social conservatives. As discussed above, the founding of the juvenile court was the result of an alliance between progressives and more conservative social reformers focused on controlling female sexuality. The passage of the Juvenile Justice and Delinquency Prevention Act relied upon the joint efforts of feminist scholars and human rights activists on one hand and fiscal conservatives on the other. The sweeping reforms in domestic violence law and policy came about after the unlikely union between the grassroots and feminist battered women’s movement and the conservative, punitive, and “tough-on-crime” philosophy manifested as the victims’ rights movement. The goals espoused by these reform movements, including a more restorative and fair juvenile justice system, and the recognition of and response to family violence as a serious problem, are being thwarted, at least in the case of girls in violent families.

The unique needs of girls in the system and increasing arrest rates justify focusing on this population. Girls are more likely than boys are to be abused both inside and outside of detention, and abuse and trauma are greater predictors of delinquency for girls than for boys. Furthermore, girls are being punished for the violence occurring in their families and for their survival tactics, including running away. A lack of collaboration among social, judicial, and law enforcement systems and a lack of community resources leads to girls with abuse histories and mental health issues being inappropriately dumped in detention rather than having their needs adequately addressed. Reforming the juvenile justice system and ensuring equality and greater responsiveness to mental health and violence will undoubtedly help both males and females entering the system. In many, if not most cases, girls entering the system for domestic violence charges should not be arrested at all, and they should certainly not be placed in detention. The practice is unfair, exacerbates existing problems including trauma and mental health issues, and

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<sup>202</sup> *Id.*

<sup>203</sup> CHALK & KING, *supra* note 186, at 262.

<sup>204</sup> *Id.*

<sup>205</sup> Sherman, *supra* note 132, at 19.