

# Parental Criminal Convictions And The Best Interest Of The Child

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## ABSTRACT

*Although the impact of mass incarceration on families is universally recognized, less analyzed is what, if any, the family law response should be. In particular, once the parent is no longer incarcerated, what weight should a parent's criminal conviction be given in making determinations about the children of that parent? In Pennsylvania, where the author directs a family law clinic, the custody statute is hyper-criminalized. Since 1990, the Pennsylvania custody statute has had a rebuttable presumption of threat of harm attached to certain criminal convictions which were listed in the custody statute, but there were only 11 crimes enumerated in the statute. In 2010, Pennsylvania amended its custody statute to expand the list of crimes which create a rebuttable presumption of threat of harm to a child. If a party or household member of a party has been convicted of one of the crimes enumerated in the custody statute, that party may not be granted custody until a court has made an explicit finding that the party does not present a threat of harm to the child(ren). The central question this article seeks to address is as follows: are there good family law reasons for a presumption regarding criminal convictions in custody matters? By considering social science literature and legal sources, the article will evaluate the value of giving weighted consideration to certain crimes in determining the best interest of children. This article will also make recommendations regarding the weight that should be given to criminal convictions in making best interest custody decisions.*

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## INTRODUCTION

For decades, any critical analysis of the rise of mass incarceration in the United States has touched on the impact on families.<sup>2</sup> It is widely acknowledged that the war on drugs and “tough on crime” measures have led to the hyper-criminalization of poor communities and communities of color, and the resulting separation of families, loss of parental rights, and loss of custody.<sup>3</sup> The vast majority of incarcerated adults are parents.<sup>4</sup> One in every twenty-eight children in the United States has an incarcerated parent.

### **The emphasis on criminal convictions in making custody decisions has potentially vast collateral consequences.**

Although the impact of mass incarceration on families is universally recognized, less analyzed is what, if any, the family law response should be. In particular, once a parent is no longer incarcerated, what weight should the parent’s criminal conviction be given in making determinations about the children of that parent? While there is a more extensive literature surrounding the impact of incarceration on decisions to terminate parental rights,<sup>5</sup> there is far less nuanced consideration of the impact of a conviction in making custody decisions. While perpetuating the myth of the absent black father,<sup>6</sup> are we simultaneously promulgating policies within family law which disproportionately

create obstacles to engagement of fathers of color? What should the family law response be to the exponential increase of women, in particular women of color, entering the criminal justice system?

In Pennsylvania where the author directs a family law clinic, the custody statute is hyper-criminalized. Since 1990, the Pennsylvania custody statute has had a rebuttable presumption of threat of harm attached to certain criminal convictions which were listed in the custody statute, but there were only 11 crimes enumerated in the statute.<sup>7</sup> In 2010, Pennsylvania amended its custody statute to expand the list of crimes which create a rebuttable presumption of threat of harm to a child.<sup>8</sup> If a party or household member of a party has been convicted of one of the crimes enumerated in the custody statute, that party may not be granted any form of custody until a court has made an explicit finding that the party does not present a threat of harm to the child(ren). Although many other states’ custody statutes reference considera-

2. See e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (The New Press 2012); Marc Mauer & Meda Chesney Lind, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (The New Press 2002).

3. Lauren Glaze & Lauren Maruschak, *Parents in Prison and Their Minor Children* (Bureau of Justice Statistics 2010), <http://www.bjs.gov/content/pub/pdf/pptmc.pdf>.

4. *Id.*

5. See, e.g. Philip M. Genty, *Damage to Family Relationships as a Collateral Consequence of Parental Incarceration*, 30 *Fordham Urb. L.J.* 1671 (2003); Martha L. Raimon et al., *Sometimes Good Intentions Yield Bad Results: ASFA’s Effect on Incarcerated Parents and Their Children*, in *Intentions and Results: A Look Back at the Adoption and Safe Families Act 125* (2009), <https://www.cssp.org/publications/child-welfare/top-five/intentions-and-results-a-look-back-at-the-adoptions-and-safe-families-act.pdf>; Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 *UCLA L. REV.* 1474 (2012).

6. Jo Jones, Ph.D., and William D. Mosher, Ph.D., *Fathers’ Involvement With Their Children: United States, 2006–2010* (U.S. Department of Health and Human Services 2013), <http://www.cdc.gov/nchs/data/nhsr/nhsr071.pdf>.

7. See, 23 Pa.C.S.A. §5303(B) (repealed 2010).

8. 23 Pa.C.S.A. §5329.

tion of certain criminal convictions,<sup>9</sup> Pennsylvania appears to have the most extensive list of crimes, including non-violent crimes such as prostitution or low-level drug offenses, which create the presumption of threat of harm. In practice, at least as an initial matter, the Pennsylvania statute operates as a “trump card,” preventing the award of custodial rights to a parent or other party with such convictions.

The emphasis on criminal convictions in making custody decisions has potentially vast collateral consequences. The sheer number of individuals who have criminal convictions in the United States means that a significant portion of the adult population is affected by a presumption attached to convictions. When one considers the racial and gendered specter of involvement in the criminal justice system in the U.S., there is a significant potential that such laws will create considerable obstacles to parenting by certain portions of the population, in particular for parents who are African-American or Latino. Given the degree of attention given to decrying (and furthering the myth<sup>10</sup> of) the absent black father, it is counterintuitive to create such roadblocks to parental access for those with criminal convictions. Further, the exponential increase nationally in the numbers of incarcerated women,<sup>11</sup> most of whom are mothers,<sup>12</sup> should create concern about the impact on children.

The central question this article seeks to raise is as follows: are there good family law reasons for a presumption regarding criminal convictions in custody matters? By considering social science literature and legal sources, the article will evaluate the value of giving weighted consideration to certain crimes in determining the best interest of children. This article will also make recommendations regarding the weight that should be given to criminal convictions in making best interest custody decisions.

## THE PENNSYLVANIA CUSTODY STATUTE

The Pennsylvania custody statute, 23 Pa.C.S.A. §5329, states in relevant part:

**(a) Offenses.**—Where a party seeks any form of custody, the court shall consider whether that party or member of that party’s household has been convicted of or has pleaded guilty or no contest to any of the offenses in this section or an offense in another jurisdiction substantially equivalent to any of the offenses in this section. The court shall consider such conduct and determine that the party does not pose a threat of harm to the child before making any order of custody to that party when considering the following offenses:

18 Pa.C.S. Ch. 25 (relating to criminal homicide).

18 Pa.C.S. §2702 (relating to aggravated assault).

18 Pa.C.S. §2706 (relating to terroristic threats).

18 Pa.C.S. §2709.1 (relating to stalking).

9. See, e.g. Cal. Fam. Code §3030 (limiting awards of custody to convicted sex offenders); C.G.S.A. §46b-59b (limiting awards of custody to convicted murders); 13 Del.C. §722 (requiring the court consider any criminal convictions); Ga. Code Ann. §19-9-3 (requiring the court consider any criminal convictions); 19-A M.R.S.A. §1653 (limiting any award of custody to individuals convicted of sex crimes); MD. Code, Family Law §9-101.2 (limiting awards of custody to individuals convicted of murder); Mass. Gen. Laws Ann. 208 §28 (limiting awards of custody to individuals convicted of murder); MC.L.A. §722.25 (limiting awards of custody to individuals convicted of sex crimes); V.A.M.S. §452.375 (limiting awards of custody to individuals convicted of crimes against children); 43 Okl. St. Ann. §112.5 (limiting awards of custody to individuals convicted of sex crimes); R.I. Gen. Laws Ann. §15-5-16 (preventing award of custody to individuals convicted of sex crimes which resulted in conception of child); 15 V.S.A. §665 (limiting awards of custody to individuals convicted of sex crimes).

10. Jones and Mosher, *supra* note 6.

11. E. Ann Carson, Prisoners in 2013, U.S. Department of Justice, Bureau of Justice Statistics 2 (Sept. 30, 2014), <http://www.bjs.gov/content/pub/pdf/p13.pdf>.

12. *Id.*

18 Pa.C.S. §2901 (relating to kidnapping).

18 Pa.C.S. §2902 (relating to unlawful restraint).

18 Pa.C.S. §2903 (relating to false imprisonment).

18 Pa.C.S. §2910 (relating to luring a child into a motor vehicle or structure).

18 Pa.C.S. §3121 (relating to rape).

18 Pa.C.S. §3122.1 (relating to statutory sexual assault).

18 Pa.C.S. §3123 (relating to involuntary deviate sexual intercourse).

18 Pa.C.S. §3124.1 (relating to sexual assault).

18 Pa.C.S. §3125 (relating to aggravated indecent assault).

18 Pa.C.S. §3126 (relating to indecent assault).

18 Pa.C.S. §3127 (relating to indecent exposure).

18 Pa.C.S. §3129 (relating to sexual intercourse with animal).

18 Pa.C.S. §3130 (relating to conduct relating to sex offenders).

18 Pa.C.S. §3301 (relating to arson and related offenses).

18 Pa.C.S. §4302 (relating to incest).

18 Pa.C.S. §4303 (relating to concealing death of child).

18 Pa.C.S. §4304 (relating to endangering welfare of children).

18 Pa.C.S. §4305 (relating to dealing in infant children).

18 Pa.C.S. §5902(b) (relating to prostitution and related offenses).

18 Pa.C.S. §5903(c) or (d) (relating to obscene and other sexual materials and performances).

18 Pa.C.S. §6301 (relating to corruption of minors).

18 Pa.C.S. §6312 (relating to sexual abuse of children).

18 Pa.C.S. §6318 (relating to unlawful contact with minor).

18 Pa.C.S. §6320 (relating to sexual exploitation of children).

Section 6114 (relating to contempt for violation of order or agreement).

The former 75 Pa.C.S. §3731 (relating to driving under influence of alcohol or controlled substance).

75 Pa.C.S. Ch. 38 (relating to driving after imbibing alcohol or utilizing drugs).

Section 13(a)(1) of the act of April 14, 1972 (P.L. 233, No. 64),<sup>1</sup> known as The Controlled Substance, Drug, Device and Cosmetic Act, to the extent that it prohibits the manufacture, sale or delivery, holding, offering for sale or possession of any controlled substance or other drug or device.

A parent convicted of murder of the child's other parent cannot obtain custody rights without the consent of the child who must be of suitable age to give that consent.<sup>13</sup> There are also special provisions regarding custody rights of a parent convicted of a sex crime that resulted in the conception of the subject child.<sup>14</sup> 23 Pa.C.S.A. §5330 provides that a party may move for temporary custody if s/he learns the opposing party is charged with a crime enumerated in 23 Pa.C.S.A. §5329.<sup>15</sup>

Where a parent who has been convicted of any of the listed crimes seeks custodial rights, the statute requires the court to perform an "initial evaluation" to determine whether that parent poses a threat to the child and whether counseling is necessary. The initial evaluation is not to be performed by a mental health professional.<sup>16</sup> The court can order counseling, if deemed necessary,<sup>17</sup> further evaluations,<sup>18</sup> and payment of costs for the counseling and evaluations.<sup>19</sup>

13. 23 Pa.C.S.A. §5329(b).

14. 23 Pa.C.S.A. §5329(b.1).

15. 23 Pa.C.S.A. §5330(a) ("A party who has obtained information under 42 Pa.C.S. §1904 (relating to availability of criminal charge information in child custody proceedings) or otherwise about a charge filed against the other party for an offense listed under section 5329(a) (relating to consideration of criminal conviction) may move for a temporary custody order or modification of an existing custody order. The court shall hold the hearing under this subsection in an expeditious manner.")

16. 23 Pa.C.S.A. §5329(c).

17. 23 Pa.C.S.A. §5329(d).

18. 23 Pa.C.S.A. §5329(e).

19. 23 Pa.C.S.A. §5329(f).

Pennsylvania Rule of Civil Procedure 1915.3-2 further elucidates how the statute is to be applied. It creates a requirement that each party complete a Criminal Record or Abuse History Verification to accompany the filing of any petition for custody, and again five days in advance of trial.<sup>20</sup> The rule also clarifies, “After the initial evaluation, the court may order further evaluation or counseling by a mental health professional if the court determines it is necessary.”<sup>21</sup> The rule states that the court may enter a temporary custody order on behalf of a party with a criminal conviction pending a mental health evaluation.<sup>22</sup>

Pennsylvania first incorporated into the custody statute a requirement that the court consider criminal convictions in rendering custody decisions in 1990.<sup>23</sup> Representative Peter J. Daley, in urging his colleagues to vote for the legislation on the floor of the Legislature stated that the legislation was needed because “the power, rights, and control of parents over their children sometimes conflict with the protection and safety of the children.”<sup>24</sup> Representative Daley indicated that the primary concerns which fueled the need for the legislation were that “parental rights” would enable convicted domestic violence abusers, murderers and rapists to gain custody of their children.<sup>25</sup> This motivation is reflected in the list of criminal convictions for which the 1990 statute required that “the court shall . . . determine that the parent does not pose a threat of harm,” namely criminal homicide, kidnapping, unlawful restraint, rape, statutory rape, involuntary deviate sexual intercourse, indecent assault, incest, endangering welfare of children, promoting prostitution, and sexual assault of children.<sup>26</sup> It is unclear from the legislative history why the non-violent crime of promoting prostitution was included on this list, particularly given the stated legislative purpose. It is clear from the legislative history that the intent was to ensure safeguards against granting custody to parents who abuse their spouse/partner or child(ren), or who commit serious violent crimes against other adults or children.<sup>27</sup> This sort of provision is mirrored in custody statutes in most states.<sup>28</sup>

In 2010, the Pennsylvania Legislature undertook to overhaul the custody statute, with the goal of “modernizing” the law.<sup>29</sup> The resulting changes included adding sixteen factors that the court must weigh in determining a child’s best interest,<sup>30</sup> provisions allowing for the appointment of a *guardian ad litem* or attorney for children,<sup>31</sup> codifying law that previously had been developed through case law regarding *in loco parentis* and grandparent standing,<sup>32</sup> as well as relocation procedure,<sup>33</sup> among numerous other changes. As part of this sweeping reform effort, the Legisla-

20. Pa.R.C.P. 1915.3-2(a).

21. Pa.R.C.P. 1915.3-2(b).

22. *Id.*

23. 23 Pa.C.S.A. 5303(b) (repealed 2010).

24. Pa. Legislative Journal at 1982 (Dec. 5, 1989), <http://www.legis.state.pa.us/WU01/LI/HJ/1989/0/19891205.pdf#page=16>

25. *Id.*

26. 23 Pa.C.S.A. §5303(b)

27. *Supra* note 20, at 1982 “The legislation that we are considering today would give the courts discretion in making custody decisions but would require the courts to consider each parent and adult household member’s present and past violent or abusive conduct in making an order for custody or visitation.”

28. *Supra* note 15.

29. Pa. Legislative Journal at 788 (June 9, 2010), <http://www.legis.state.pa.us/WU01/LI/HJ/2010/0/20100609.pdf>.

30. 23 Pa.C.S.A. §5328.

31. 23 Pa.C.S.A. §§5334 and 5335.

32. 23 Pa.C.S.A. §§5324 and 5325.

33. 23 Pa.C.S.A. §5337.

ture expanded the list of criminal convictions enumerated in the custody statute, which require the court to determine that a parent does not pose a threat of harm to the child(ren).<sup>34</sup> Some of the crimes added to the list are violent crimes commonly associated with abuse of a spouse or partner (criminal homicide, aggravated assault, terroristic threats, stalking, kidnapping, unlawful restraint, false imprisonment, rape, arson and related offenses, and contempt for violation of a protective order or agreement), child abuse (luring a child into a motor vehicle or structure, concealing death of child, endangering welfare of children, dealing in infant children, corruption of minors), and sexual abuse of adults or children (rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault, indecent exposure, sexual intercourse with animal, conduct relating to sex offenders, incest, sexual abuse of children, unlawful contact with minor, sexual exploitation of children).<sup>35</sup> Other enumerated crimes include prostitution and pornography (“prostitution and related offenses,” and “obscene and other sexual materials and performances”) and crimes related to drugs and alcohol (“driving under influence of alcohol or controlled substance/driving after imbibing alcohol or utilizing drugs,” and “manufacture, sale or delivery, holding, offering for sale or possession of any controlled substance or other drug or device”).<sup>36</sup>

Also notable are the crimes which are *not* enumerated in 23 Pa.C.S.A. §5329. For example, while aggravated assault<sup>37</sup> and terroristic threats<sup>38</sup> are enumerated, simple assault<sup>39</sup> and a number of other crimes associated with intimate partner violence such as harassment and reckless endangerment, are not. No crimes involving guns are listed, nor are other violent crimes like armed robbery or burglary.

It is unclear from the legislative history what motivated the expansion of the list of crimes enumerated in the statute, or whether any evidence guided the choice of which crimes to enumerate. Most of the legislative discussion focused on the need for the other provisions which were incorporated. However, the impact of the changes to this provision has drastically changed custody practice throughout the Commonwealth.

## WHY SHOULD WE CARE?

The sheer number of individuals who have a criminal conviction in the United States should give pause. In 2014 in the U.S., over 2.24 million individuals were incarcerated and over 4.5 million were on probation or parole.<sup>40</sup> About 65 million people in the U.S. have a criminal record, and, of these, 20 million have felony convictions.<sup>41</sup> Regardless of race or gender, by age 23, one in three people in the U.S. has

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34. 23 Pa.C.S.A. §5329.

35. *Id.*

36. *Id.*

37. 18 Pa.C.S.A. §2702.

38. 18 Pa.C.S.A. §2706.

39. 18 Pa.C.S.A. §2701 provides “a person is guilty of assault if he: (1) attempts to cause or intentionally, knowingly or recklessly causes bodily injury to another; (2) negligently causes bodily injury to another with a deadly weapon; (3) attempts by physical menace to put another in fear of imminent serious bodily injury; or (4) conceals or attempts to conceal a hypodermic needle on his person and intentionally or knowingly penetrates a law enforcement officer or an officer or an employee of a correctional institution, county jail or prison, detention facility or mental hospital during the course of an arrest or any search of the person.”

40. Danielle Kaeble, Lauren Glaze, Anastasios Tsoutis, & Todd Minton, *Correctional Populations in the United States, 2014* (Bureau of Justice Statistics 2015), <http://www.bjs.gov/content/pub/pdf/cpus14.pdf>.

41. *Id.*

been arrested.<sup>42</sup> The U.S. leads the world in both the rate of incarceration per capita and absolute number of people incarcerated, with imprisonment as the default response to a wide variety of social, economic and racial problems. In Philadelphia alone, it is estimated that at least one-fifth of the population has a criminal record.<sup>43</sup> One in twenty-two adults in Philadelphia is on probation or parole.<sup>44</sup>

It is undisputed that people of color are disparately involved with the criminal justice system in the U.S. African American males are 13% of U.S. population, but 28% of all arrests.<sup>45</sup> 40% of all inmates are African Americans.<sup>46</sup> 50% of African Americans have been arrested by age 23, but for white males, nearly 40% have been arrested.<sup>47</sup> About 25% of the total U.S. adult black population have a felony conviction.<sup>48</sup> Pennsylvania is the seventh most racially disparate state in terms of incarceration, and the third highest for ethnic disparity between Latino and white people incarcerated.<sup>49</sup> In Pennsylvania, the black imprisonment rate is 1,810 out of 100,000 population, and the Latino imprisonment rate is 668 per 100,000, whereas the white imprisonment rate is 204 per 100,000.<sup>50</sup>

There are also gender implications to the rapid rate of criminal conviction and incarceration. Nationally, women are the fastest growing part of the prison population, with African American women incarcerated at twice the rate of white women.<sup>51</sup> Women are incarcerated for drug offenses at a higher rate than men, but less likely to be incarcerated for violent offenses.<sup>52</sup> As Jamie Gullen and Jesse Krohn have argued, women may be *more* likely to suffer employment consequences and loss of custody as compared to their male counterparts as a result of their criminal convictions.<sup>53</sup>

A critical number of those incarcerated or living with criminal convictions are parents. As of 2007, more than half of all those incarcerated in the U.S. were parents of minor children.<sup>54</sup> This translates into an estimated 120,000 incarcerated mothers and 1.1 million incarcerated fathers with children under the age of 18.<sup>55</sup> Over 2.7 million children in the U.S. have a parent who is behind bars.<sup>56</sup> When broken down

42. Robert Brame, Michael G. Turner, Raymond Paternoster, & Shawn D. Bushway, *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, <http://pediatrics.aappublications.org/content/pediatrics/129/1/21.full.pdf>

43. Philadelphia Human Relations Commission, *Ban the Box Ordinance*, <https://www.phila.gov/HumanRelations/PDF/BanTheBoxOrdinance.pdf>

44. Vincent Schiraldi, *The Pennsylvania Community Corrections Story* (Columbia University Justice Lab Apr. 25, 2018), found at <http://justicelab.iserp.columbia.edu/img/PACCommunityCorrections4.19.18finalv3.pdf>.

45. *Supra* note 40.

46. *Id.*

47. Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 3 *CRIME & DELINQUENCY* 471–486 (2014), <http://cad.sagepub.com/content/early/2013/12/18/001128713514801.abstract>.

48. *Supra* note 40.

49. The Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* (The Sentencing Project 2016).

50. The Sentencing Project, *State by State Data*, <https://www.sentencingproject.org/the-facts/#detail?state1Option=Pennsylvania&state2Option=0>.

51. Christopher Harney & Linh Vuong, *Created Equal: Racial & Ethnic Disparities in the U.S. Criminal Justice System* (National Council on Crime and Delinquency 2009).

52. Carson, *supra* note 11 ((showing that 24.6% of incarcerated women are incarcerated for drug offenses (compared to 15.4% of incarcerated men), and 28.2% of incarcerated women are incarcerated for property offenses (compared to 18.1% of incarcerated men), and, overall, only 37.1% of incarcerated women are incarcerated for violent offenses (compared to 55% of incarcerated men)).

53. Jamie Gullen & Jesse Krohn, *Mothers in the Margins: Addressing the Consequences of Criminal Records for Young Mothers of Color*, 46 *U. Balt. L. Rev.* 237, 239–240 (2017).

54. Lauren Glaze & Lauren Maruschak, *Parents in Prison and Their Minor Children* (Bureau of Justice Statistics 2010), <http://www.bjs.gov/content/pub/pdf/pptmc.pdf>.

55. *Id.*

56. Genty, *supra* note 5.

by race and ethnicity, 1 in 57 white children (1.85%), 1 in 28 Latino children (3.5%) and 1 in 9 African American children (11.4%) have an incarcerated parent.<sup>57</sup> Further, 10 million children in the U.S. have had an incarcerated parent at some point in their lives,<sup>58</sup> while half of children currently living with a parent in prison are under the age of 10.<sup>59</sup> Moreover, between 64 and 84% of incarcerated mothers and between 44% and 55% of incarcerated fathers had at least one minor child living with them before their term of imprisonment.<sup>60</sup> Thus, the weight given to criminal convictions in deciding custody matters affects a significant portion of children and their parents.

## ANGELA'S STORY

Pennsylvania's criminal conviction presumption can have a very direct impact on custody case outcomes. The author directs the Family Law Litigation Clinic at Temple University Beasley School of Law, where she and her students see the effects of the criminal conviction presumption in daily practice. Consider this actual example of a case handled by the clinic:

*Angela<sup>61</sup> had been in a relationship with her boyfriend Jamal for over a year, when she became pregnant. Jamal was frequently physically abusive, and the violence escalated once Angela had become pregnant. Although Angela considered the relationship over by the time she gave birth, after the baby Zion was born she and Jamal worked out an arrangement whereby he would stay with the baby in her apartment when she went to work as a security guard and then leave once she came home. Although this arrangement worked relatively well for a short period of time, one night when the baby was 3 months old, Angela and Jamal got into an argument, and Jamal punched Angela and then attempted to strangle her. Angela grabbed the first thing she could, a Sony PlayStation, and hit Jamal in the head. Police arrived due to a neighbor's call, and arrested Angela because Jamal was the one bleeding. Although the Department of Human Services was called, they consented to Jamal keeping custody of the baby. Meanwhile, Angela was incarcerated, and originally charged with attempted murder and a variety of lesser charges. While most of the charges were later dismissed, Angela pled guilty two months later to simple assault and terroristic threats, with the sole goal of being released from jail so she could see her baby. However, when she went to Jamal's home in an attempt to see Zion, Jamal physically threatened her and refused to allow her to see Zion.*

*Angela filed for and was granted a protection order against Jamal, and a domestic violence advocate referred her case to our clinic. A student and I filed a motion alleging lack of access to Zion, and spelling out the safety concerns for the child, including the history of violence, as well as Jamal's habitual use of marijuana. But when we got to court, the judge would not consider granting Angela anything but supervised visits with Zion, because her criminal conviction for "terroristic threats" created a presumption of threat of harm to a child under the Pennsylvania custody statute. Despite Jamal's failure to submit to a court-ordered drug test, and then later testing positive for marijuana, despite testimony about the long history of intimate partner violence Angela had endured, and the particular events which led to her conviction for terroristic threats, we had multiple hearings over the course of the following*

57. *Id.*

58. Marc Mauer, Ashley Nellis, and Sarah Schirmer, *Incarcerated Parents and Their Children - Trends 1991-2007* (The Sentencing Project Feb. 2009), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Incarcerated-Parents-and-Their-Children-Trends-1991-2007.pdf>.

59. *Id.*

60. Glaze and Maruschak, *supra* note 54.

61. Names and identifying information have been changed to protect the identity of this client, who kindly gave the author written permission to share her story.

year and no success in gaining any additional custody time for Angela. It was only after many months of Jamal's failing to comply with the order to bring Zion for the supervised visits and the completion of an extensive forensic evaluation (which fortunately was completed *pro bono*) on Angela, that a judge finally transferred primary custody to Angela, and ordered Jamal to have only supervised visits due to continued evidence of drug use. The victory was bittersweet; Angela had missed out on more than a year of Zion's life, as he was by then 18 months old.

Angela's case crystalizes some of the problems with the way evidence of criminal convictions, and of intimate partner violence, are considered under Pennsylvania custody law. Angela, a long time domestic violence survivor, was denied custody of her child for a year because she fought back against her abuser, was criminally charged, and ultimately pled guilty to "terroristic threats." Despite extensive evidence of the abuse the client suffered, the existence of the criminal conviction served as a trump card to deny her all but weekly supervised custodial time (with which the opposing party did not comply). Only a year later did she regain primary custody of her child.

However, Angela's story is not a rare or uncommon example. Consider these other matters which were handled by the Family Law Litigation Clinic at Temple Law:

- ∞ A father who had an aggravated assault conviction from 2000, before he ever met mother or had a child with her, was granted supervised visits only, despite no further arrests or convictions since that time.
- ∞ A father who had actively raised the child, was ordered to complete a forensic evaluation due to drug convictions that preceded the child's birth, before being granted unsupervised custodial time with his child.
- ∞ A mother who raised the child until she was 12 with minimal involvement from the father, was arrested, unable to pay bail, and ultimately pled guilty for a small amount of marijuana in her possession. As a result, the father was granted primary custody and mother supervised partial custody. The child was so traumatized by the change she had to be psychiatrically hospitalized.

While it is possible that in each of these cases there may have been other evidence before the court that warranted these results, these examples also reflect a disturbing pattern: each of these parents was African American or Latino. Further in each case it was unclear how the parent's criminal conviction was predictive of a threat of harm to the child. It is the author's experience that the existence of a criminal conviction frequently becomes a clear predictor of case outcomes in the clinic's custody litigation.

## ANALYSIS

It is unclear whether the stated legislative goal of protecting children from harm is met by the presumption of threat of harm as articulated in section 5329 of the Pennsylvania Domestic Relations statute. Much has been written about the causal connection between exposure to intimate partner violence and risk of harm to children, and the prevailing view in this scholarship is that judges should give far more weight to evidence of intimate partner violence than currently is given.<sup>62</sup> In contrast, very little critical analysis has been given to the question of whether and how

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62. See, e.g., Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Custody Decisions*, 44 VAND. L. REV. 1041 (1991); Joan S. Meier, *Domestic Violence, Child Custody, and Child Protection, Understanding Judicial Resistance and Imagining the Solutions*, 11 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY AND LAW 657 (2003).

criminal convictions should be considered in making custodial decisions for children.<sup>63</sup> Although there are high rates of recidivism for those who have committed sexual offenses against children (hence the rationale for the Sex Offender Reporting and Notification Act 42 Pa.C.S.A. §9799.14), there is limited empirical evidence about any other particular causal connection between a parent who has a criminal conviction and a risk of harm to children. By relying on an enumerated list of criminal convictions as the weightiest prognostic evidence of threat of harm for children, courts run the risk of not giving sufficient weight to other significant evidence that has direct bearing on the safety and best interest of children.

This is not to say that criminal convictions are irrelevant to custody considerations. The Pennsylvania custody statute requires courts to consider sixteen factors in order to determine a child's best interest.<sup>64</sup> Evidence of criminal convictions certainly can and should be weighed by the court when considering these factors. For example, factor fourteen requires the court to consider "The history of drug or alcohol abuse of a party or member of a party's household." If a party or household member has a conviction for a drug-related offense, certainly the court should weigh the relevance of this evidence here. But the court should also be considering the totality of the circumstances, for example the length of time since that conviction, what steps the parent has taken to ameliorate their situation since the conviction, and most importantly, what other evidence is being presented to the court regarding the child's safety, as well as the physical, emotional, developmental, educational and special needs of the child.

Similarly there may be other criminal convictions which are extremely relevant to best interest decisions which are *not* included on the list enumerated in the statute. There are many violent crimes which are left off the enumerated list, for example simple assault (18 Pa.C.S.A. §2701), recklessly endangerment of another person (18 Pa.C.S.A. §2705), strangulation (18 Pa.C.S.A. §2718), as well as countless other violent crimes. Not a single crime related to possession or illegal possession of a gun is on the list, despite the fact that firearm injuries are the second leading cause of death among American children, and nearly 7,000 children are hospitalized or die from guns in the United States every year.<sup>65</sup>

Most concerning is that evidence of intimate partner violence, absent a criminal conviction, does not carry any presumption of threat of harm to children. Past or present history of abuse is one of the sixteen factors that a court must consider in determining a child's best interest.<sup>66</sup> Although the statute states that factors affecting safety of the child are to be given "weighted consideration," this does not have the same implication that the existence of a criminal conviction might in determining best interest because no presumption of threat of harm attaches. Research shows that there are numerous reasons why intimate partner violence is not reported to the police, or if reported to the police, is not prosecuted or does not result in a conviction. Social science research has repeatedly found that adults who physically abuse their intimate partners are far more likely to abuse or maltreat children.<sup>67</sup> Further, children who live in households where intimate partner violence takes place

63. See, Deborah Ahrens, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737 (2000).

64. 23 Pa.C.S.A. §5328.

65. John M. Leventhal et al., *Hospitalizations Due to Firearm Injuries in Children and Adolescents*, 133 PEDIATRICS 219 (Feb. 2014).

66. 23 Pa.C.S.A. §5328.

67. Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. Ill. U. L. Rev. 403, 404 (2005)

can suffer severe emotional and developmental difficulties that are similar to those of children who are direct victims of abuse.<sup>68</sup> While a number of states have incorporated presumptions related to evidence of intimate partner violence into their custody statutes, Pennsylvania has no such presumption. As a result, we continue to run the risk of children being placed in terribly unsafe situations.

Attaching a presumption of threat of harm only to the crimes enumerated in the Pennsylvania custody statute may result in fairly random outcomes that bear little relationship to the specific physical, emotional, developmental or other needs of the child in question. Attachment theory tells us that children thrive as a result of consistent secure attachments to their caregivers.<sup>69</sup> In Angela's custody case, it is unclear how extremely limited contact and ultimately no contact with baby Zion in any way served Zion's best interest, given that Angela had previously been his primary caregiver. Similarly, in the other case examples provided, each of these children were deprived of ongoing contact with a parent who had previously played a substantial, if not primary, role in their daily sense of stability and security.

The racial and gender implications of how section 5329 applies should also be concerning. With the ever-growing increase in women's involvement in the criminal justice system, it is possible that section 5329 could operate to deprive an entire population of children of color from consistent care and custody from mothers. Similarly, as men of color continue to be disproportionately involved in the criminal justice system, section 5329 may have the impact of disproportionately depriving minority children of connection to willing and able fathers.

Ultimately, the primary concern with section 5329 as written is that it may result in an imbalanced weighing of the best interest factors as articulated in the custody statute. Section 5329 operates such that the court must consider whether a threat of harm exists prior to any award of custody.<sup>70</sup> But because this predicate only attaches to criminal convictions enumerated in the statute, a finding of threat of harm can operate to preempt the consideration of the sixteen other custody factors which the court must otherwise weigh to determine the best interest of the child. Under the current statute, other weighty evidence of threat of harm to the child, whether that evidence is a non-enumerated criminal conviction or other types evidence, in particular evidence of child abuse and maltreatment, or intimate partner violence, will be balanced against all of the other factors. This can and will result in abusive parents gaining custodial time if they are lucky enough to have never been convicted of abuse, or have managed to be convicted of violent crimes not enumerated in the statute. If we are serious about protecting children from dangerous parents, we need a presumption of threat of harm which is evidence-based, specifically a presumption tied to evidence of child abuse or maltreatment, or of intimate partner violence, and not limited to the somewhat random list of crimes enumerated in the statute. Otherwise, evidence of a criminal conviction should be weighed in relation to all of the sixteen factors to determine the best interest of the child.

## CONCLUSION

Section 5329 as written is a case of the tail wagging the dog, in that best interest decisions are being driven by criminal convictions, instead of best interest decisions

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68. THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES FAMILY VIOLENCE DEPARTMENT, *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice*, 9 (1999) <https://www.childwelfare.gov/pubs/otherpubs/ncjfcj.pdf>.

69. Joseph Goldstein, Anna Freud, and Albert Solnit, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

70. 23 Pa.C.S.A. §5329 ("The court shall consider such conduct and determine that the party does not pose a threat of harm to the child before making any order of custody to that party").

being informed by criminal convictions. The Pennsylvania Legislature rightly identified sixteen factors which a court must consider to determine a child's best interest. But the court may never reach these factors in making an initial custody determination if a parent has an enumerated conviction. Certainly some of the crimes enumerated, such as homicide and rape, make sense to create a presumption. But to equate someone convicted of homicide as potentially an equivalent threat of harm as someone convicted of a misdemeanor drug crime or for prostitution, makes little sense. The legislature should consider attaching a presumption of threat of harm to evidence of intimate partner violence, and child abuse and maltreatment.