

CHALLENGING MULTIGENERATIONAL PUNISHMENT

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This Article presents novel empirical research showing that one in seven U.S. children have had a household member prosecuted by the state in the last five years. Using unique data derived from millions of administrative and Census survey records from multiple states and decades, I show that for an estimated eleven million U.S. children each year, a parent, sibling, or other household member is dealing with an active criminal case or sentence. For children living in high poverty neighborhoods, and Black and American Indian/Alaskan Native children at all economic levels, rates are double or triple that of other groups.

In addition to the profound social and economic implications that such extensive criminal system exposure has for children, there are important legal consequences. Numerous civil laws impose legal disabilities on households containing people with criminal cases, disabilities that can directly subject children to eviction, homelessness, food insecurity, and other kinds of severe, life-altering hardships. These laws provide a mechanism to make “punitive containment” of large numbers of families socially permissible and are a key mechanism through which mass incarceration operates to create a new “caste” system.

This Article argues that the burdens these laws impose on millions of children are not just inhumane and unjust but unconstitutional. Drawing on the Supreme Court’s illegitimacy

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jurisprudence, the Article argues that multigenerational punishment—the imposition of legal disabilities on children for the purpose of punishing their parents—is prohibited by the Equal Protection Clause of the Fourteenth Amendment. Moreover, laws that distinguish between groups of children based on their household members’ conduct must have an important government purpose that is substantially related to their application to children. Specifically, the government must show that legal disabilities or burdens imposed on children have been “carefully tuned to alternative considerations,” a standard that requires a searching inquiry into the short and long-term harms to children’s well-being imposed by the classification. The Article reviews three types of laws that impose legal disabilities on children based on household member criminal matters—federal “one-strike” laws, local “crime-free” ordinances, and TANF and SNAP bans related to felony convictions. I argue that, given the severe deprivation these laws impose on children, their punitive goals, the lack of any justification for their imposition on children, and the lack of any indication that they were narrowed or curtailed to reduce their harm or caste-creating qualities, these laws cannot survive the heightened scrutiny that the Constitution requires.

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INTRODUCTION

Imagine a regime where multiple generations of a family are punished for the crimes of a single member. Children are banned from housing because of their parents' alleged activities, sometimes even when their parent has not been found guilty of any crime. If they need food, they receive a fraction of what other children receive, or none, based on their relationships to people who have come to the attention of the regime.

While North Korea infamously engages in "three generations of punishment,"¹ the United States engages in a similar practice, barring children from public housing, excluding them from entire towns or neighborhoods, and limiting their food and cash support, all because of their adult household members' contacts with the criminal legal system. These punishments² are not simply "collateral" effects of their household members' alleged or actual conduct but are required by federal, state, and local laws that explicitly target households of people with criminal records—sometimes on the basis of something as minor as a police stop.

Far from being rare, the scope of these laws' reach is massive. This Article presents new empirical scholarship showing that an estimated eleven million U.S. children have a parent, sibling, or other household member who is dealing with a recent³

¹ U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., Prisons of North Korea 1 (2019), <https://www.state.gov/wp-content/uploads/2019/03/Prisons-of-North-Korea-English.pdf> [<https://perma.cc/UQ43-8GNK>].

² I use the term "punishment" in its colloquial sense, as it is the term invoked by the Supreme Court in describing laws imposed on children based on parental conduct. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972) ("[N]o child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent."); Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, CRIM. JUST., Fall 2010, at 21, 22 ("[C]onsequences certainly feel like punishment to the individuals affected, whether or not they are subject to the same constitutional limitations.").

³ Within the last five years.

criminal case or sentence, including 3.7 million children whose household members have a recent felony conviction.⁴ Nearly one in seven children have experienced a household member's recent contact with the criminal legal system,⁵ and close to one in two U.S. children, during their childhood, will experience such an event.⁶ Millions of children face eviction, homelessness, hunger, and severe hardship because of laws burdening their households, experiences that can inexorably shape their long-term life opportunities and physical and mental well-being. Because these laws are inequitably experienced by children of color and children living in lower income families or neighborhoods, they also perpetuate social stratification, creating a caste of children who—based on the status of the adults in their lives—cannot access the same opportunities as their peers.

This Article argues that these policies are not just ineffective, inhumane, and unjust, they are unconstitutional. The U.S. Supreme Court has repeatedly recognized that laws that distinguish between groups of children solely because of the conduct of their parents are subject to a higher level of constitutional scrutiny, and that laws that create such classifications for the purposes of deterring adult behavior are never permissible. Given the gravity of the harms imposed by these laws' application to children, the lack of justification for these harms, and the absence of any mechanism through which children might escape their life-altering consequences, these laws cannot survive the heightened constitutional scrutiny that is required.

This Article calls attention to the ways criminal justice sanctions imposed on parents or other household members are incorporated into laws and policies governing access to social welfare programs in ways that exclude entire families, effectively punishing multiple generations for the acts of a single member. Through these laws, putatively non-penal institutions become extensions of the penal state,⁷ and children—particularly the

⁴ See *infra* Part I.

⁵ See *infra* Part I.

⁶ See Keith Finlay, Michael Mueller-Smith & Brittany Street, *Children's Indirect Exposure to the U.S. Justice System: Evidence from Longitudinal Links Between Survey and Administrative Data*, 138 Q.J. ECON. 2181, 2185 (2023).

⁷ The "carceral" or "penal state" includes everything from incarceration to community surveillance, arrest, court charges, electronic monitoring, probation, parole, and criminal records. See David Garland, *Penality and the Penal State*, 51 CRIMINOLOGY 475, 500–01 (2013); LOÏC WACQUANT, *PUNISHING THE POOR* 41–75 (2009).

BIPOC and low-income children whose households are most likely to be targeted by the criminal legal system—become “prisoners once removed”⁸—subjected to the same collateral consequences that we impose on adults, even though they have committed no crimes. This process provides a mechanism to make collective punishment—or “punitive containment”⁹ of whole families or groups—socially permissible, while simultaneously obscuring its operation and insulating it from critique or legal challenge.

To date, much of the research on childhood exposure to household member criminal system involvement has focused on the individual consequences for children, as opposed to systemic drivers of exposure, a perspective that tends to aid the obfuscation process noted above. Child development literature, for example, tends to frame children’s exposure to criminal legal systems through their parents, siblings, or other household members as an unfortunate but unavoidable consequence of family member behavior. In the exposure-rooted-in-individual-failure narrative, children’s experiences of criminal systems are framed as an unusual, if harmful, disruption to children’s lives, and remedies tend to focus on interventions designed to support children through a difficult but implicitly unpreventable experience.¹⁰ The economic and social consequences of legal system involvement for families may be touched upon but are often given a backseat to solutions that benefit the “innocent” party—the child.

By situating the primary locus of control for the problem of criminal legal system exposure at the individual or family level, this lens ignores extensive criminological, historical, and sociological research that shows that the current nature and size of the U.S. criminal legal system is unique among nations and in historical time, and is driven by a complex intersection of legal and political processes and cultural norms.¹¹ It also obscures

⁸ See Jeremy Travis & Michelle Waul, *Prisoners Once Removed: The Children and Families of Prisoners*, in PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES 1, 13–17 (Jeremy Travis & Michelle Waul eds., 2003).

⁹ See WACQUANT, *supra* note 7, at 60.

¹⁰ See, e.g., Joyce A. Arditti, *A Family Stress-Proximal Process Model for Understanding the Effects of Parental Incarceration on Children and Their Families*, 5 COUPLE & FAM. PSYCH.: RSCH. & PRAC. 65, 78–79 (2016).

¹¹ See generally Garland, *supra* note 7; THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

the fact that, even within the contemporary U.S., the *risk* of children's criminal legal system exposure and the severity of that exposure is significantly shaped by social position (particularly race and class) and *where* and *when* a child lives,¹² not to mention who is currently in power in their locale. Things like intensity or geographic focus of policing, charging practices, sentence lengths, likelihood of pretrial jail time or bail, imposition of fees and fines, probation surveillance levels or punitiveness, and criminal record availability to employers and others—all can alter both the risk of exposure and the consequences of exposure for children, and vary substantially across neighborhoods, cities, states, and time. To put it another way, two children with otherwise identical family situations, each of whom has a family member engage in identical chargeable conduct, may have starkly different criminal system exposure risks and experiences with the criminal system by virtue of their family member's race, living in different states or neighborhoods, or even living in the same neighborhood during different decades.

An alternative conceptualization of children's exposure to criminal legal systems frames it as an unfortunate but unintended "spillover effect" of criminal justice policies.¹³ This view recognizes that criminal legal policies, not just individuals, play an enormous role in shaping both levels and experiences of exposure for children.¹⁴ However, the consequences of criminal system exposure for children are primarily framed as indirect, operating through a child's relationship with their parents or others involved in the system. The harm of incarceration, for example, might operate through relationship disruption, stress, and absence caused by criminal system

¹² See generally JESSICA T. SIMES, PUNISHING PLACES: THE GEOGRAPHY OF MASS IMPRISONMENT (2021); Bruce Western & Christopher Muller, *Mass Incarceration, Macrosociology, and the Poor*, 647 ANNALS AM. ACAD. POL. & SOC. SCI. 166 (2013); Christopher Muller & Christopher Wildeman, *Geographic Variation in the Cumulative Risk of Imprisonment and Parental Imprisonment in the United States*, 53 DEMOGRAPHY 1499 (2016); Kristin Turney & Sara Wakefield, *Criminal Justice Contact and Inequality*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS. 1 (2019).

¹³ See, e.g., Finlay, Mueller-Smith & Street, *supra* note 6, at 2186–87; Holly Foster & John Hagan, *Maternal Imprisonment, Economic Marginality, and Unmet Health Needs in Early Adulthood*, 99 PREVENTIVE MED. 43, 47 (2017); John Hagan & Holly Foster, *Mass Incarceration, Parental Imprisonment, and the Great Recession: Intergenerational Sources of Severe Deprivation in America*, 1 RUSSELL SAGE FOUND. J. SOC. SCIS. 80, 82–83, 99 (2015).

¹⁴ See Finlay, Mueller-Smith & Street, *supra* note 6, at 2187; Turney & Wakefield, *supra* note 12, at 10.

engagement, or through the loss of a caregiver's income, employment, or health care.¹⁵

While this view captures important aspects of how the criminal system impacts children, it tends to understate the ways that the criminal legal system is entwined with numerous other systems that shape children's lives directly, including housing, public benefits, immigration, education, child welfare and others. By framing the consequences to children as inadvertent "spillover" from the penal system, it also obscures the fact that some laws and policies *explicitly* and directly place children at a disadvantage because of their relationship to or co-residence with people with criminal system involvement. Children face eviction or food insecurity not just because their parent loses income but because their *status* as a child of someone with a criminal record renders them ineligible for or banned from housing or deprived of the level of food assistance that would provide the household with adequate food. Legally, these laws serve to make children who are related to adults with criminal records second-class citizens, unable to access the same opportunities or benefits as their peers because society has elected to underscore the non-deservingness and social exclusion of their parents.¹⁶ Children are also powerless to change

¹⁵ See, e.g., Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 960 (2003); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOCIO. REV. 526, 528 (2002); Juan Del Toro et al., *The Longitudinal Associations Between Paternal Incarceration and Family Well-Being: Implications for Ethnic/Racial Disparities in Health*, 61 J. AM. ACAD. CHILD & ADOLESC. PSYCHIATRY 423, 424, 430 (2022); Ashley Provencher & James M. Conway, *Health Effects of Family Member Incarceration in the United States: A Meta-Analysis and Cost Study*, 103 CHILD. & YOUTH SERVS. REV. 87, 94 (2019); see also Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC, Oct. 2015, at 60, 66; Travis & Waul, *supra* note 8, at 13–14; BRUCE WESTERN, *HOMEWARD: LIFE IN THE YEAR AFTER PRISON* 108–09 (2018).

¹⁶ The social welfare system's punishment and legal devaluing of groups of children because of their relationships to individuals with criminal legal system contact is also consistent with a long pattern of deeming certain groups—particularly Black families—as both unworthy of social welfare intervention or support, and in need of constant control and surveillance. Societal investments in poverty alleviation or "equal opportunity" have historically been linked to narratives of who is deserving, who deserves punishment, and who must be surveilled or controlled in order to "deserve" economic or social supports. See generally ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016) (tracing the rise in mass incarceration to the structuring of social welfare programs as part of Lyndon Johnson's "Great Society" initiative in the 1960s and its evolution in the 1970s); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); WACQUANT, *supra* note 7; Deborah N. Archer, *Exile from Main Street*, 55 HARV. C.R.-C.L. L. REV. 788, 812–19 (2020); Claudia Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, 76 CHILD WELFARE 9, 20–21 (1997).

their status, making their second-class status analogous to the position that “illegitimate” children once held in society, children who are punished not because of any conduct of their own but because society has determined that it must punish their parents.¹⁷

Reframing children’s experiences of the criminal legal system as directly related to having an unchangeable, unchosen, or immutable status¹⁸ presents new opportunities for understanding and confronting these inequities, while underscoring the ways that mass incarceration and surveillance function as “the new caste system”¹⁹ in the United States. As this Article argues, imposing legal disabilities on children solely on the basis of the conduct of adults in their lives raises serious constitutional concerns, as laws that “disfavor[] [individuals] by virtue of circumstances beyond their control suggest[] the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”²⁰ The Supreme Court has unreservedly prohibited multigenerational punishment, laws that impose legal disabilities or impediments on children in order to punish parents, finding them “an ineffectual—as well as unjust—way of deterring the parent.”²¹ Even laws that impose burdens on children for non-punitive reasons are subject to heightened scrutiny when they are based on parental actions alone.²²

¹⁷ See generally Max Stier, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727 (1992) (setting forth history of constitutional prohibition on treason prosecutions that “work Corruption of Blood” and its connection to equal protection theory, as well as its potential in support of claims to public benefits by undocumented immigrant children).

¹⁸ While scholars have critiqued immutability as a grounds for protection from discrimination, see Jessica A. Clarke, *Against Immutability*, 125 YALE L.J. 2, 12, 16 (2015) (arguing that “immutability is a harsh and intrusive moral theory” that “cannot justify transformative interventions into discriminatory social practices”), concern with discrimination on the basis of immutable characteristics or “accidents of birth” remains a component of contemporary equal protection analysis. See Melissa Murray, *Legitimizing Illegitimacy in Constitutional Law*, 99 WASH. U. L. REV. 2063, 2083, 2096 (2022). Being the child of a person with a criminal record could certainly be recognized as a status warranting protection under more expansive conceptualizations of what constitutes a “suspect” class, including status that arises from structural and pervasive “systemic bias.” Clarke, *supra*, at 91, 95. However, even under the more miserly traditional conceptualization, classifications that treat children differently solely on the basis of their relatives’ criminal legal system contacts are suspect.

¹⁹ ALEXANDER, *supra* note 16, at 324.

²⁰ Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

²¹ Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175–76 (1972).

²² See Mathews v. Lucas, 427 U.S. 495, 505–06 (1976).

Focusing on the ways social welfare systems incorporate mass criminalization processes to punish children also helps expose the specific processes through which the racial and structural inequities of the criminal legal system are amplified.²³ Other scholarship has drawn attention to the ways that porous boundaries between what is traditionally conceptualized as the penal state (prisons, criminal courts, and probation) and other institutions serve to exacerbate mass incarceration's effects. Eisha Jain, for example, draws attention to the way that immigration, housing, licensing, and numerous other state systems use arrest records to determine people's suitability for or access to the programs they offer. These actors use arrest as a regulatory tool of convenience, but in ways that "magnify the effects of policing and arrest decisions."²⁴ Work by Sunita Patel has also explored the ways that schools, hospitals, and employment settings become extensions of the carceral state by making police presence and involvement a standard part of their practice, engaging in "transinstitutional policing."²⁵ Expanding the lens to family members, Mariam Hinds has elucidated how criminal systems impose unique economic, time, and psychological burdens on the women who support people in the criminal legal system, so that women become "shadow defendants"²⁶ who "the criminal legal system relies on" and from whom labor and resources are "forcibly extract[ed]."²⁷ Hinds coins the term "secondary criminalization" to describe "the process by which women are subjected to the economic, social, emotional, and collateral consequences that the criminal legal system imposes."²⁸

²³ See generally Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173 (2019).

²⁴ Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 825 (2015). As Jain discusses, part of this process is informal, as "partnerships" and agreements between penal actors (law enforcement, court officials) and social welfare entities bring penal surveillance into a broader array of settings, from schools to hospitals. See *id.* at 811–15. But it is also formal, as systems shift to more penal approaches (e.g., home removal instead of household economic support in the child welfare context) and directly adopt, by reference, criminal processes and findings into their laws and internal policies.

²⁵ See generally Sunita Patel, *Transinstitutional Policing*, 137 HARV. L. REV. 808 (2024).

²⁶ Mariam A. Hinds, *The Shadow Defendants*, 113 GEO. L.J. 823, 827 (2025); see also MEGAN COMFORT, *DOING TIME TOGETHER: LOVE AND FAMILY IN THE SHADOW OF THE PRISON* 182–84 (2008) (describing family member's experiences of visiting and engaging with their loved ones as "secondary prisonization").

²⁷ Hinds, *supra* note 26, at 828–29.

²⁸ *Id.* at 827.

Grounded in this body of scholarship, this Article asserts that the use of criminal justice sanctions imposed on parents or other caregivers to determine children's access to basic necessities like housing, food or cash assistance, or other social welfare benefits, is an important pathway through which children experience "secondary criminalization," and through which putatively non-penal institutions integrate with and become coextensive with the penal state. The Article seeks to extend the conceptual framing of the mechanisms of mass incarceration to include superficially non-penal institutions that directly shape family life, and which have increasingly become extensions of the penal system, incorporating penal findings and processes directly into their laws and policies. These purportedly civil, "non-penal" laws and the processes through which they are experienced are also a key mechanism through which the caste-making qualities of the criminal legal system are reified across multiple generations. They act as a force of structural racism—superficially race-neutral mechanisms that can "constitute race and maintain hierarchy" and "marginalize and obscure social, political, and economic inequality."²⁹ They reproduce and compound structural disadvantages that arise from and drive criminal legal system involvement, and, as applied to children in particular, violate the "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."³⁰

Part I of this Article presents novel empirical research on the extent of U.S. children's exposure to household member criminal justice events, demonstrating how many children are impacted by these provisions. This research shows that criminal system exposure among children through their households has become common, if inequitably distributed, a reality that has profound consequences for millions of children's well-being and for society. Importantly, rates of exposure among children living in the highest poverty communities—precisely the children who social welfare programs are intended to benefit—are nearly twice as high as those of children living in lower poverty communities, with nearly one in four children living in the highest poverty communities experiencing a *recent* household

²⁹ Bennett Capers, *Critical Race Theory and Criminal Justice*, 12 OHIO ST. J. CRIM. L. 1, 2 (2014).

³⁰ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

criminal charge.³¹ Rates of exposure among Black and American Indian/Alaskan Native (AIAN) children are generally twice as high as that of White children, so that for many of the same groups of children who “have historically been ‘relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,’”³² having a family member prosecuted by the state during childhood is now a more likely experience than completing college.³³

Part II reviews the Supreme Court’s jurisprudence addressing the permissibility of multigenerational legal disabilities, starting with the Court’s holdings striking down laws imposing legal disadvantages on children whose parents did not marry. These cases recognize that laws that distinguish between groups of children solely because of the conduct of their parents are subject to a higher level of constitutional scrutiny than what is provided for in traditional equal protection analysis. Laws that seek to impose legal disabilities on children to punish their parents are per se impermissible, and to the extent such laws are found to have non-punitive goals, the state must show that the imposition of the disability on the child is “substantially related” to an important government purpose,³⁴ and “carefully tuned to alternative considerations,”³⁵ a standard that requires searching inquiry into the level of harm imposed on the child, including their opportunity to succeed on their own merits and the possibility of lifetime disadvantage.

Part III explores how purportedly non-penal laws incorporate criminal system sanctions in ways that impose legal disabilities on children directly. Three illustrations of these laws are presented: “one-strike” laws banning or evicting households containing individuals with criminal records from federally assisted housing, “crime-free” housing ordinances that effectively exclude families from private rental housing, and bans on TANF and SNAP receipt related to felony convictions

³¹ See *infra* section I.B.2.

³² *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

³³ See, e.g., *Black Students in Higher Education*, POSTSECONDARY NAT’L POL’Y INST. (Apr. 2025), https://pnpi.org/wp-content/uploads/2025/05/BlackStudent_FactSheet_Apr25.pdf [<https://perma.cc/42A9-L6YD>] (“Among Black residents aged 25 or over, 26.2% had earned a bachelor’s degree or higher.”).

³⁴ *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

³⁵ *Mathews v. Lucas*, 427 U.S. 495, 513 (1976).

which reduce an entire household's level of access to these programs.³⁶ Each law's requirements and reach are outlined, along with the harms to children's well-being associated with the laws.

In Part IV, I evaluate whether these laws can survive constitutional scrutiny in light of the constitutional limitations on multi-generational punishments discussed in Part II. I argue that, given the harms these laws impose on children, their punitive goals, the lack of any empirical justification for their imposition on children, and their lack of mechanisms to narrow or curtail their harm or their caste-creating qualities, these laws cannot be justified under the intermediate scrutiny standard that equal protection requires.

In conclusion, I briefly explore the feasibility of presenting a novel constitutional argument protecting children to the current federal judiciary, as well as potential alternatives and strategic considerations. I also argue that expanding our understanding of mass incarceration to more directly encompass the ways it shapes children's lives is necessary if we are to fully grapple with the ways that the criminal legal system acts as a force of social stratification, imposing caste-like second-class status on large groups of American children.

I

CRIMINAL LEGAL SYSTEM EXPOSURE AMONG U.S. CHILDREN IS COMMON

Extensive exposure to criminal legal systems was not always a commonplace part of U.S. children's lives. The fifty-year expansion of the penal system has quintupled the U.S. prison population and just as dramatically expanded the number of individuals on probation or parole.³⁷ This expansion has had dramatic effects on labor force participation, economic mobility, family life, and health for adults, as well as substantial impacts for children.³⁸

³⁶ While not an exhaustive list, these laws illustrate the ways that penal systems have become embedded in social welfare programs and the ways that punishment can formally extend to children absent any alleged or actual criminal conduct on their part.

³⁷ See generally Western & Muller, *supra* note 12; THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES, *supra* note 11; VINCENT SCHIRALDI, MASS SUPERVISION: PROBATION, PAROLE, AND THE ILLUSION OF SAFETY AND FREEDOM (2023).

³⁸ See Pager, *supra* note 15, at 960; Western, *supra* note 15, at 541–42; Arditti, *supra* note 10, at 65–66; Del Toro et al., *supra* note 15, at 424, 430; Provencher & Conway, *supra* note 15, at 94.

A. Prior Research on the Prevalence of Parental Incarceration

Exposure to a particularly intensive type of criminal legal system exposure, parental incarceration, has become increasingly common during childhood, with estimates ranging from 3.4% of children reporting a household member's imprisonment in the original, late 1990s study documenting the impact of "Adverse Childhood Experiences" (ACEs) on health³⁹ to about one in fifteen (6.2%) children reporting parental incarceration in the 2022 National Survey on Children's Health (NSCH).⁴⁰ Rates in the NSCH are nearly twice as high among children living at the highest levels of poverty and for Black children at all income levels,⁴¹ and there are stark differences in exposure to parental incarceration across states, ranging from one in thirty-seven (2.7%) children in Minnesota to one in eight children (12.2%) in Arkansas and Montana.⁴² By adulthood, 45% of Americans report having had an immediate family member who has been incarcerated, but this experience differs starkly by race and ethnicity, with 63% of Black and AIAN adults reporting an immediate family member's incarceration, compared to 48% and 42% of Hispanic and White adults, respectively.⁴³

Parental incarceration has been linked to reductions in children's educational attainment, social networks, and health,

³⁹ Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREV. MED. 245, 248 (1998).

⁴⁰ Child & Adolescent Health Measurement Initiative, *NSCH 2021-22: Adverse Childhood Experience: Parent or Guardian Served Time in Jail, Nationwide, Percent of Poverty Level*, DATA RES. CTR. FOR CHILD & ADOLESCENT HEALTH, <https://www.childhealthdata.org/browse/survey/results?q=10688&r=1&g=1122> [<https://perma.cc/N3BA-U72N>] (last visited Aug. 30, 2025) (showing nationwide data, disaggregated by family poverty level, in response to the question "To the best of your knowledge, has this child ever experienced the following: parent or guardian served time in jail?").

⁴¹ See *id.*

⁴² Child & Adolescent Health Measurement Initiative, *NSCH 2021-22: Adverse Childhood Experience: Parent or Guardian Served Time in Jail, All States*, DATA RES. CTR. FOR CHILD & ADOLESCENT HEALTH, <https://www.childhealthdata.org/browse/survey/allstates?q=10688> [<https://perma.cc/5KGG-TRRT>] (last visited Oct. 31, 2025) (showing same data disaggregated by state). However, note that a recent Minnesota-specific survey found much higher rates. See *Survey: Nearly 1 in 5 Greater Minnesota Teens Affected by Parental Incarceration*, MINN. DEP'T OF HEALTH (Mar. 28, 2023), <https://www.health.state.mn.us/news/pressrel/2023/incarceration032823.html> [<https://perma.cc/B8YA-VNNA>].

⁴³ Peter K. Enns et al., *What Percentage of Americans Have Ever Had a Family Member Incarcerated?: Evidence from the Family History of Incarceration Survey (FamHIS)*, SOCIOUS 5-6 (Mar. 4, 2019), <https://journals.sagepub.com/doi/epdf/10.1177/2378023119829332> [<https://perma.cc/9WL2-Z9YE>].

impacts that start as early as birth or even prenatally.⁴⁴ As they enter adulthood, children who have experienced parental incarceration also have lower earnings and educational attainment, and higher rates of depression, anxiety, and substance use,⁴⁵ factors that, in turn, tend to make them more likely to be caught up in the criminal legal system themselves.

B. New Empirical Evidence on Children's Exposure to Household Member Criminal System Contacts

To date, almost no research has documented the extent of children's exposure, through their parents or other household members, to aspects of the criminal legal system beyond incarceration. Yet once the lens expands beyond parental incarceration, childhood exposure to the criminal legal system balloons.⁴⁶ Recent research by Keith Finlay and colleagues has found that, during their childhood, just under 40% of U.S. children will experience a household member's adult system criminal justice contact, with nearly one in ten (9.2%) children experiencing a biological parent's felony conviction and nearly one in five (18.3%) experiencing a felony conviction of a household member.⁴⁷ These rates are even more extreme for

⁴⁴ See Foster & Hagan, *supra* note 13, at 45; Hagan & Foster, *supra* note 13, at 82, 99; Brielle Bryan, *Paternal Incarceration and Adolescent Social Network Disadvantage*, 54 *DEMOGRAPHY* 1477, 1478 (2017); Youngmin Yi et al., *Paternal Jail Incarceration and Birth Outcomes: Evidence from New York City, 2010–2016*, 25 *MATERNAL & CHILD HEALTH J.* 1221, 1229 (2021). There is a large body of research finding associations between parent or household member incarceration, family economic and psychological hardship, and children's well-being. Kristin Turney, for example, has documented that paternal incarceration is associated with changes in parental relationships, health, and economic wellbeing, each of which partially explain higher levels of behavioral problems among adolescents with incarcerated parents. Turney & Wakefield, *supra* note 12, at 10. Juan Del Toro and colleagues have documented associations between paternal incarceration and accelerated reductions in telomere length in children, which are associated with greater mortality risks. Del Toro et al., *supra* note 15, at 424. Qualitative research has also documented the financial and emotional costs for families dealing with an incarcerated family member, including Ta-Nehisi Coates' seminal article, *see* Coates, *supra* note 15, at 75–76, and more recent work by Sylvia A. Harvey, *see generally* SYLVIA A. HARVEY, *THE SHADOW SYSTEM: MASS INCARCERATION AND THE AMERICAN FAMILY* (2020).

⁴⁵ See Daniel P. Mears & Sonja E. Siennick, *Young Adult Outcomes and the Life-Course Penalties of Parental Incarceration*, 53 *J. RSCH. CRIME & DELINQ.* 3, 21–22 (2016); Elizabeth J. Gifford et al., *Association of Parental Incarceration with Psychiatric and Functional Outcomes of Young Adults*, *JAMA NETWORK OPEN* 2, 8 (Aug. 23, 2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2748665> [<https://perma.cc/GPJ8-P3JN>]; *see also* Foster & Hagan, *supra* note 13, at 45.

⁴⁶ See Finlay, Mueller-Smith & Street, *supra* note 6, at 2182.

⁴⁷ *Id.* at 2197–98.

Black and AIAN children, with nearly one in five of these children experiencing a household member's incarceration, one in three experiencing a felony conviction, and nearly two out of three experiencing a household member being prosecuted in court at some point during their childhood.⁴⁸

Importantly, exposure may occur at any time throughout childhood, so that a substantial number of children are experiencing immediate and direct consequences from an active criminal matter on any given day. To estimate *recent* levels of exposure, the instant study drew on a wide array of secure, federal administrative and survey data, data that includes tens of millions of children, from twenty-three states, and spans a twenty-one year period, from 2000 to 2021. Additional details on the sample and analytic methods follow.

1. Sample Creation and Analytic Methods

This study⁴⁹ took advantage of newly available criminal justice data that can be linked to current and nationally representative administrative and survey datasets that span over two decades. Criminal justice data for the study—including records of charges, types of charges (misdemeanor or felony), convictions, and incarcerations—were sourced from the Criminal Justice Administrative Record System (CJARS),⁵⁰ which includes millions of criminal justice records from states around the country and is compiled by staff at the University of Michigan.⁵¹ CJARS data was linked at the person-level to a Census-generated “personal identification key” (PIK) that is shared across multiple Census survey and administrative records. CJARS data are drawn from a variety of states and years, and only some states and years have “full” coverage (as confirmed by CJARS staff), meaning there are complete records

⁴⁸ *Id.* at 2218. These estimates likely *underestimate* the actual levels of childhood exposure to the criminal legal system, as researchers could not include pretrial jail stints, federal system cases, or juvenile justice system related contacts.

⁴⁹ Additional information on the study is available from the author. For additional details on methods, see Naoka Carey & Rebekah Levine Coley, *Children's Exposure to Recent Family Member Criminal Legal System Involvement*, 9 JAMA NETWORK OPEN 5 (2026).

⁵⁰ CRIM. JUST. ADMIN. RECS. SYS., <https://cjars.org> [<https://perma.cc/LLD4-C9N8>] (last visited Sep. 4, 2025).

⁵¹ See Keith Finlay & Michael Mueller-Smith, *Criminal Justice Administrative Records System* (CJARS), CRIM. JUST. ADMIN. RECS. SYS. (Jan. 27, 2025), https://cjars.org/wp-content/uploads/CJARS_data_docs_2024q4.pdf [<https://perma.cc/5YLF-HPM3>].

for all individuals who were subject to a criminal charge, adjudication or incarceration in the state for that year (some states have “full” coverage for *either* court events or incarceration events, some have both).⁵² Importantly, the CJARS data used for this study (2023Q3 vintage) did not include juvenile justice data, federal criminal case data, or full coverage for periods of pretrial incarceration.

To estimate how many children have a household or family member with a recent criminal matter, I followed similar methods to Finlay and colleagues,⁵³ starting with a sample of all children alive and under 18 living or born in states that have CJARS “full coverage” for that year, using data from the Census Numident (generated from Social Security birth records). These children were then linked to all individuals who (1) shared a household with the child in that year or the prior Decennial Census (drawing on the 2000 and 2010 Decennial Censuses, American Community Surveys (2005–2021), and Current Population Surveys (2001–2021) for this determination) or (2) were identified as a parent or sibling of the child in the Census Household Key (which draws on Social Security birth records as well as other Census records). Each of these relatives was then defined by type of relationship (e.g., parent, sibling, other) and then linked to CJARS records for that state and year, or, if they could not be linked, given an indicator that they have no CJARS record in that year. When available, the child’s Census tract was also linked to annual tract poverty data from the Opportunity Atlas⁵⁴ and public Census-created estimates. Child race and ethnicity was drawn from the Census “Best Race” file, which is created by the Census using all available Census data on race or ethnicity for that child.

This process resulted in the creation of four analytic samples, each of which include criminal system events from 2000 to 2021, and each of which include many millions of children from at least a dozen states.⁵⁵ Within each sample, each child

⁵² States that did not include complete misdemeanor records (e.g., because data was not available from municipal or other lower courts) were also excluded from my data to ensure that comparisons of charge and conviction estimates between states would be accurate.

⁵³ See generally Finlay, Mueller-Smith & Street, *supra* note 6.

⁵⁴ THE OPPORTUNITY ATLAS, <https://www.opportunityatlas.org/> [<https://perma.cc/86JV-KHXD>] (last visited Sep. 9, 2025).

⁵⁵ The first sample includes all data from the thirteen states with “full coverage” for court events, including misdemeanors (containing 43,490,000 unique children). The second sample includes all data from the twenty states with “full coverage” for incarceration events in the year exposure was estimated (containing

was given a binary (0 or 1) indicator for each year that they had a criminal system event exposure (charge, conviction, felony conviction, or period of incarceration) across the range of individuals to whom they were linked, and additional indicators indicating whether they had any exposure to a particular event within the prior five years or whether exposure was linked to a parent or a sibling. Logistic regressions assessing the likelihood of exposure were then estimated for the entire sample, as well as across child race and ethnicity, and predicted prevalence estimates (i.e., the estimated percentage of children experiencing each type of event) were then estimated based on these regressions.

Importantly, these estimates likely undercount exposure, both because the available criminal justice data are limited to adult state criminal matters and do not include full coverage for pretrial incarceration, and because children under five, those who are unstably housed, and other groups of vulnerable children are underrepresented in many of the Census and related administrative records I draw on for my estimates.⁵⁶

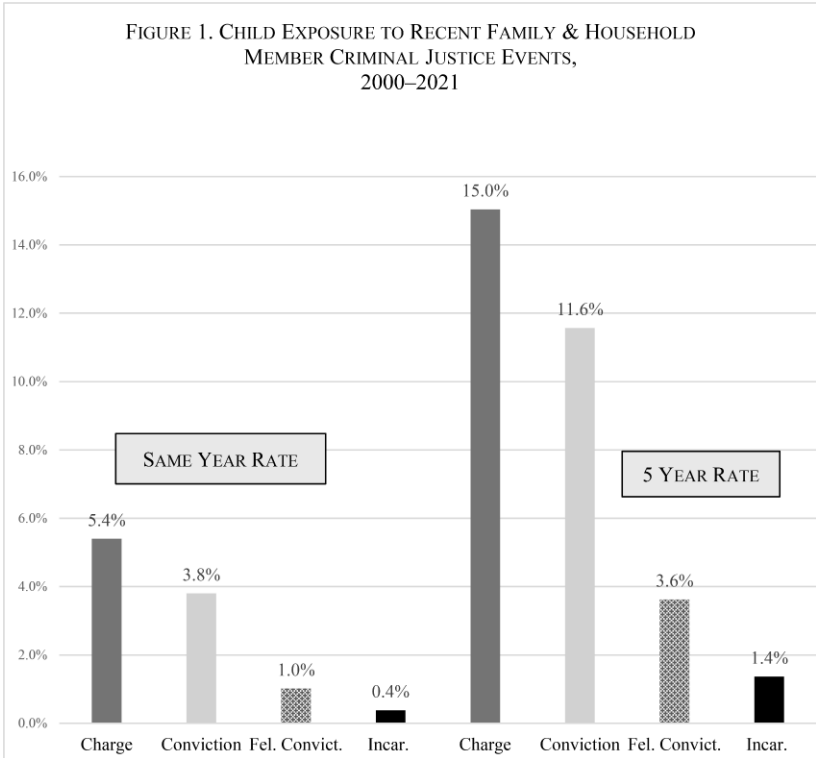
2. Findings

As shown in Figure 1, roughly one in seven (15%) U.S. children have been exposed to a family or household member facing a criminal prosecution within the preceding five years. In any individual year, roughly one in nineteen (5.4%) children will experience a household member's criminal charge and one in twenty-six (3.8%) will experience a household member's conviction. Rates of recent household felony convictions or incarceration are lower, but still substantial, with approximately one in twenty-eight (3.6%) children exposed to a felony conviction within the last five years and slightly less than one in seventy-three (1.4%) exposed to incarceration. With regard to parent-related exposure, specifically, about one in eight (11.8%) have experienced a parent's criminal charge, and one in eleven (9.0%) have experienced a parent's criminal conviction.⁵⁷

76,610,000 unique children). The third and fourth samples are sub-samples of the above that include only children who could be linked to tract level data: a "neighborhood" courts sample (7,313,000 unique children) and a "neighborhood" incarceration events sample (13,130,000 unique children). Note that all numbers have been rounded prior to disclosure to reduce disclosure risks.

⁵⁶ See, e.g., Jennifer Bernard, Kelsey Drotning & Katie R. Genadek, *Where Are Your Parents? Exploring Potential Bias in Administrative Records on Children* 5 (Ctr. for Econ. Stud., Working Paper No. CES-24-18, 2024).

⁵⁷ See Carey & Coley, *supra* note 49, at 5.

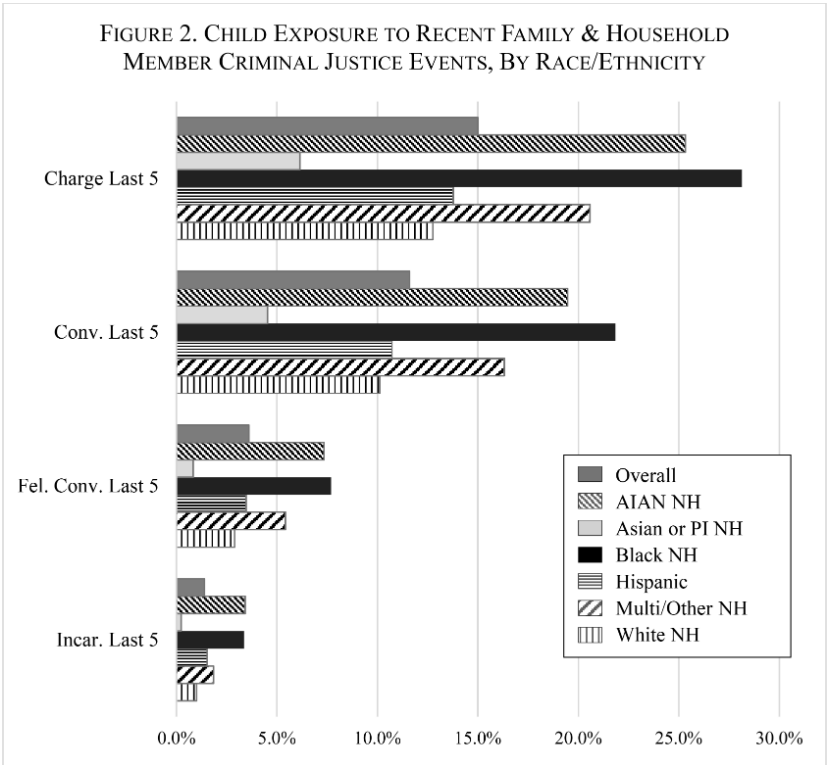


Estimates are derived from data from the Census Numident (children born in each year and state), CJARS data (criminal legal events), and a relationship crosswalk (to identify relationships) derived from the 2000 and 2010 Decennial Censuses, 2001–2021 Community Population Survey, 2005–2021 American Community Survey, and Census Household Composition Key (CHCK). Graphs represent mean levels of each type of criminal legal contact in the courts and incarceration samples. All estimates were rounded to preserve confidentiality. Data for graphs were approved for release by the U.S. Census Bureau, approval number CBDRB-FY25-P2931-R11936.

For Black, AIAN, and multiracial children, these rates were significantly higher (Figure 2): one in four Black and AIAN children, and one in five multiracial children, had a household member experience a recent criminal charge, compared to one in eight White children. Approximately one in five BIPOC children had experienced a household member’s recent conviction, and one in thirteen and one in fourteen AIAN children had a household member with a recent felony conviction. Parental exposure was also quite high, with one in five BIPOC children experiencing a recent (within the last five years) parental charge, one in six experiencing a recent conviction, and one in twenty Black children experiencing a parent’s recent felony conviction.⁵⁸ In general, estimated rates of exposure for Black

⁵⁸ See Carey & Coley, *supra* note 49, at 5.

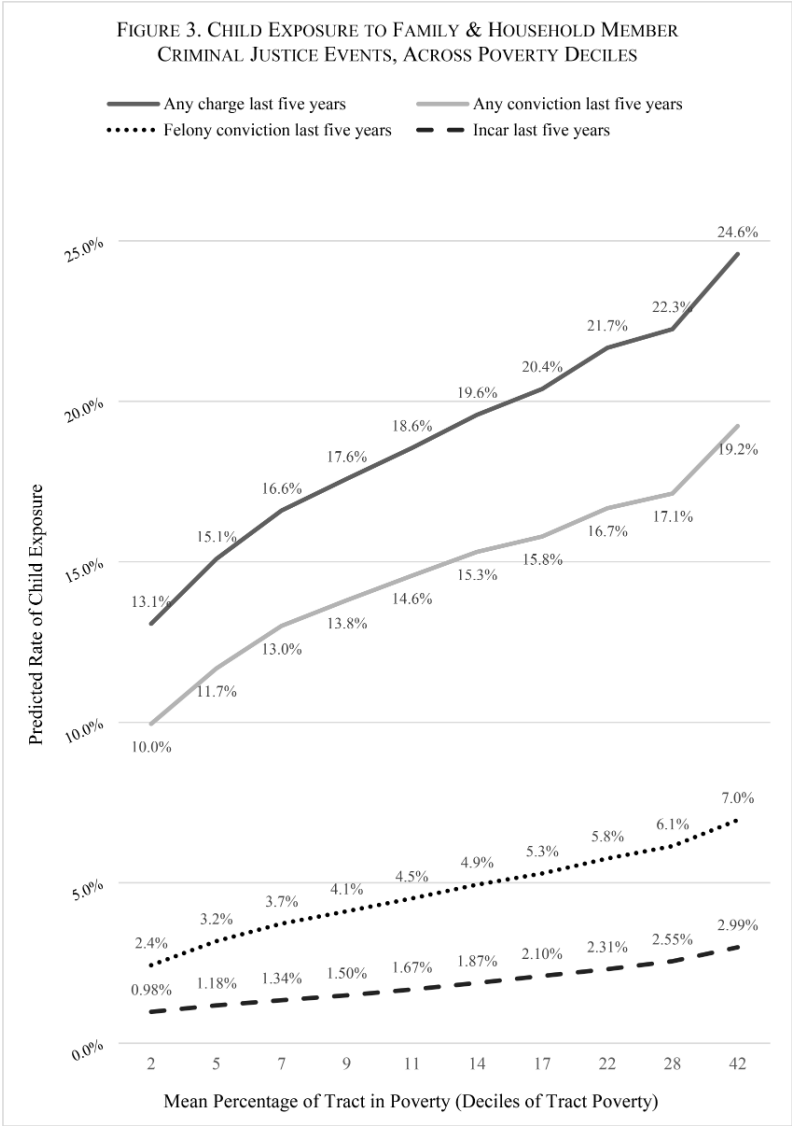
and AIAN children were two to three times as high as estimates for White children across all types of contacts, and rates for Asian or Pacific Islander (API) children were significantly lower. Notably, however, even with lower rates, about one in sixteen API children had experienced a household member’s criminal system contact within the last five years, and one in twenty-five had experienced a parent’s recent criminal system event.



Graphs use predicted levels of each type of criminal legal contact estimated based on logistic regressions on child race/ethnicity. All estimates and sample sizes were rounded to preserve confidentiality. Data were approved for release by the U.S. Census Bureau, approval number CBDRB-FY25-P2931-R11936.

The estimates above are averages across all levels of poverty and states. However, children living in higher poverty Census tracts have considerably higher rates of exposure (Figure 3). For children living in the highest two poverty deciles (where from 28% to over 40% of individuals live at or below the poverty level), one in four children (25%) had experienced a recent household criminal legal system event, and one in fourteen (7%) had experienced a household member’s felony conviction. Rates of recent household member incarceration were about three times as high as in lower poverty tracts, and rates of conviction two to three times as high. In short, among

the children for whom social welfare supports—such as public housing or cash or food assistance—are most critical, rates of recent household member criminal legal system involvement are strikingly high. However, even in low poverty tracts, rates of recent exposure to mass incarceration are still notable, with one in eight children experiencing a recent household member charge and one in ten experiencing a recent conviction.



Graphs are based on predicted levels of each type of criminal legal contact based on logistic regressions on poverty deciles. All estimates and sample sizes were rounded to preserve confidentiality. Data were approved for release by the U.S. Census Bureau, approval number CBDRB-FY25-P2931-R11936.

Together, these findings reveal that children's experiences of criminal justice system contact through their families and households have become the norm for many children. Indeed, around sixty percent of Black and AIAN children will experience a parent or household member's criminal prosecution during childhood⁵⁹ and a very large percentage of children—particularly those living in higher poverty neighborhoods⁶⁰—have parents or household members whose criminal records are too recent to be expunged or excluded from record reporting under the majority of existing legal frameworks.⁶¹

II

CONSTITUTIONAL LIMITS ON MULTIGENERATIONAL PUNISHMENT

While children's rights have not been a focus of Supreme Court jurisprudence over the last fifty years, there was a time when the Supreme Court envisioned a robust set of rights and protections for children, one that focused on children's right to access social benefits that opened up opportunity, and frowned upon "governmental barriers [that present] unreasonable obstacles to advancement on the basis of individual merit."⁶² These cases recognized that laws that distinguish between groups of children solely because of the conduct of their parents are subject to a higher level of constitutional scrutiny than what is provided for in traditional equal protection analysis.⁶³

⁵⁹ See Finlay, Mueller-Smith & Street, *supra* note 6, at 2218.

⁶⁰ See *supra* Figure 3.

⁶¹ See *50-State Comparison: Expungement, Sealing & Other Record Relief*, COLLATERAL CONSEQUENCES RES. CTR. (July 2024), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside-2-2/> [<https://perma.cc/2HJM-8LT2>]; *Waiting for Relief: A National Survey of Waiting Periods for Record Clearing*, COLLATERAL CONSEQUENCES RES. CTR. (Feb. 23, 2022), <https://ccresourcecenter.org/2022/02/23/waiting-for-relief-a-national-survey-of-waiting-periods-for-record-clearing/> [<https://perma.cc/2WWJ-FEAT>].

⁶² *Plyler v. Doe*, 457 U.S. 202, 222 (1982). As Martin Guggenheim has written:

[I]n the 1960s, the Supreme Court appeared to offer hope for reorganizing American law around the Rawlsian idea that government should not treat children differently based on the behavior of their parents when they decided a series of cases challenging laws that treated children born out of wedlock differently from children born to a marriage.

Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J.F. 942, 957–58 (2018).

⁶³ In general, social or economic legislation will survive an equal protection challenge under the Fourteenth or Fifth Amendments if it has a rational basis and serves a legitimate government purpose. The government is also presumed to

While this scrutiny may not always reach the level of “strict,” it requires the government to show that (1) the purpose of a classification burdening children based on parental conduct serves a purpose other than punishing parental misbehavior; (2) the non-punitive justification is important and supported by evidence demonstrating that the child-related classification is substantially related to that purpose; and (3) the government has given adequate attention to “alternative considerations” including the level of harm imposed on the child, the nature of the right or benefit that is being limited, and the ability of the child to potentially avoid or limit the harm of the specific legal burden that is imposed. While the first requirement effectively prohibits the imposition of multigenerational punishments, the latter two allow for the imposition of legal disabilities on children arising from parental behavior where the government has an important and empirically demonstrated interest that is substantially related to the burden on the child, and where the law has been carefully tuned to minimize or alleviate the risk of long-term harm to the child. These last requirements support the underlying, egalitarian purposes of equal protection, ensuring laws do not expressly require children’s legal position or status to be inexorably determined by their parents, regardless of their own individual qualities or behavior.

A. The Illegitimacy Cases

Starting in 1968, the Supreme Court issued a series of decisions striking down laws distinguishing between so-called “illegitimate” children, whose parents had never married, and other children. First, in *Levy v. Louisiana*, the Court struck down a Louisiana statute barring illegitimate children from recovering damages in an action for the wrongful death of their mother.⁶⁴ In a briefly worded opinion, the Court invalidated the statute on equal protection grounds, finding that it was impermissible for Louisiana to discriminate against children born outside of marriage “when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.”⁶⁵

have a legitimate purpose, and the burden in showing a discriminatory purpose falls upon the plaintiff. *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 457–58, 463 (1988).

⁶⁴ *Levy v. Louisiana*, 391 U.S. 68, 71–72 (1968).

⁶⁵ *Id.* at 72. Melissa Murray has argued that *Levy* and its companion case, *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968), are

In *Weber v. Aetna Casualty & Surety Co.*, the Court expanded on its reasoning, this time striking down a Louisiana law that prohibited unacknowledged illegitimate children from recovering worker's compensation benefits. First, the Court held that the applicable standard of review required "stricter scrutiny" than traditional "rational basis" review because the classifications at issue "approach sensitive and fundamental personal rights."⁶⁶ The Court therefore required review of both the importance and legitimacy of the state interest in the classification, and the "fundamental personal rights . . . the classification [might] endanger."⁶⁷

While the Court did not explicitly articulate which "fundamental personal rights" it believed were endangered, the subsequent discussion provided clarification. Reviewing the law, the Court determined that the state had a valid interest in promoting "legitimate family relationships" and in minimizing issues of proof related to dependency, but had failed to demonstrate that the classification was significantly related to either purpose, noting that it was implausible "that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation."⁶⁸ The Court went on: "[V]isiting [societal] condemnation [for parental behavior] on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to *the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.*"⁶⁹

In other words, children, like other individuals, have a basic, fundamental right to be free from legal burdens and disabilities not attributable to their own "individual responsibility or wrongdoing," particularly when the child has no ability to alter their circumstances. The Court went on:

more correctly interpreted not as ensuring that "those of illegitimate birth were no longer legally disfavored" but as instead "reflecting a preference for marriage and the marital family." Melissa Murray, *What's So New About the New Illegitimacy?*, 20 J. GENDER SOC. POL'Y & L. 387, 389 (2012). Murray argues that the facts of both cases—in which the mothers had, "despite their earlier missteps, rehabilitated themselves and comported with many of the norms of respectability and discipline associated with the marital family"—may have informed the favorable outcomes. *Id.* at 398.

⁶⁶ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972).

⁶⁷ *Id.* at 173.

⁶⁸ *Id.* at 173–75.

⁶⁹ *Id.* at 175 (emphasis added) (footnote omitted).

Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent. . . . [T]he Equal Protection Clause does enable us to strike down discriminatory laws relating to the status of birth where—as in this case—the *classification is justified by no legitimate state interest, compelling or otherwise*.⁷⁰

In short, the Court held that deterring parental behavior cannot, as a legal matter, provide a rational basis for imposing legal disabilities on their children.

Following *Weber*, the Court issued a series of decisions striking down illegitimacy laws, even in cases in which the state's interests were arguably stronger. In *New Jersey Welfare Rights Organization v. Cahill*, for example, the Court extended its reasoning in *Weber* to strike down a New Jersey public benefits statute limiting welfare benefits to “ceremonially” married households with children.⁷¹ Even though the law did not explicitly target illegitimate children, the Court noted that the law “in practical effect . . . operate[d] almost invariably to deny benefits to illegitimate children while granting benefits to those children who are legitimate.”⁷² Relying on *Weber*, the Court struck the provision on equal protection grounds, noting that “there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate.”⁷³ In short, even in the context of public benefits, which the Court had given states wide latitude to limit just a few years earlier in *Dandridge v. Williams*,⁷⁴ the Court held firm to the notion that, once benefits are granted, the state cannot restrict children's access to those that are “indispensable to their health and well-being” as a means of encouraging or discouraging specific kinds of parental behavior. Indeed, during the same term, in *Gomez v. Perez*, the Court also struck down a Texas law banning child support for illegitimate children, noting that “a State may not invidiously discriminate against illegitimate children

⁷⁰ *Id.* at 175–76 (emphasis added) (footnote omitted).

⁷¹ *N.J. Welfare Rts. Org. v. Cahill*, 411 U.S. 619, 619, 621 (1973).

⁷² *Id.* at 619–20.

⁷³ *Id.* at 621.

⁷⁴ *See Dandridge v. Williams*, 397 U.S. 471, 481, 486 (1970) (finding no equal protection violation where statute granting state welfare benefits provided benefits based on size of family but with a set maximum, noting that “all children, even in very large families, do receive some aid”).

by denying them substantial benefits accorded children generally.”⁷⁵ The following term, in *Jimenez v. Weinberger*, the Court again struck down a provision related to Social Security disability benefits based on illegitimacy, again distinguishing *Dandridge* and placing the burden on the federal government to justify the provision.⁷⁶

Neither *Weber* nor subsequent decisions gave lower courts extensive guidance on the applicable standard of review for classifications based on illegitimacy, a gap that was subsequently addressed in a pair of decisions. First, in *Mathews v. Lucas*, the Court upheld a provision in the Social Security Act requiring unacknowledged illegitimate children, but not legitimate or acknowledged (or “legitimated”) illegitimate children, to prove dependency in order to receive surviving child benefits.⁷⁷ Importantly, unlike in *Weber*, where state law made it impossible to posthumously establish dependency, the children could potentially prove dependency but were unable to benefit from a statutory presumption of it.⁷⁸

Relying on *Weber*, the lower court applied a strict scrutiny standard and struck the provision, finding that the government did not have a legitimate interest in providing a different level of support to the two classes of children.⁷⁹ The Supreme Court reversed. The Court reiterated the standard set forth in *Weber* but explained that review of statutory classifications distinguishing based on illegitimacy status did not *necessarily* require the same level of justification that “our most exacting scrutiny would entail.”⁸⁰ Consistent with its reasoning in *Weber*, the Court reiterated that where the classification was done “to express society’s disapproval” or as a “way of deterring the parent” such a law was “arbitrary” and “we have had no difficulty in finding [such] discrimination impermissible on less demanding standards than [strict scrutiny].”⁸¹ However, the Court pointed out, “such irrationality in some classifications

⁷⁵ *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

⁷⁶ *Jimenez v. Weinberger*, 417 U.S. 628, 633–35 (1974).

⁷⁷ *Mathews v. Lucas*, 427 U.S. 495, 513, 516 (1976).

⁷⁸ *Id.* at 507, 511–13.

⁷⁹ *See id.* at 502–03.

⁸⁰ *Id.* at 506.

⁸¹ *Id.* at 505 (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)). The Court noted that “discrimination against [illegitimate children] has never approached the severity or pervasiveness of the historic legal and political discrimination against women and [Blacks].” *Id.* at 506.

does not in itself demonstrate that other, possibly rational, distinctions" might be made.⁸²

The Court found that the statute was primarily directed to providing benefits to children who were dependent on the insured, and that the provision at issue was designed to assist in the establishment of dependency, rather than to deter parental behavior.⁸³ The Court noted that even if the dependency presumption for legitimate children was over-inclusive (assuming dependency even if none existed), Congress' enactment of the presumption was "justified as reasonable empirical judgment[]," the classification had a "substantial relation to the likelihood of actual dependency," and, given the ability of a non-presumptively eligible child to establish dependency, thereby avoiding the harm entirely, the statute was "carefully tuned to alternative considerations."⁸⁴

Following *Mathews*, the Court in *Trimble v. Gordon* again reiterated that the standard to be applied was less than strict scrutiny, but struck down an Illinois law, finding that the lower court's reliance on "the promotion of legitimate family relationships" was not a sufficient justification for a provision allowing illegitimate children to inherit from their mothers in intestacy, but not their fathers.⁸⁵ The Court noted that it had repeatedly "expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on [their] children."⁸⁶ While acknowledging the state's concerns with the "orderly disposition of property at death" and around establishing paternity posthumously, the Court found that the intestacy statute was not "carefully tuned to alternative considerations" because it instituted a blanket ban on illegitimate children inheriting, rather than providing a mechanism to establish paternity.⁸⁷ The Court rejected Illinois' contention that the ability of a father to provide for a child via a will (thereby avoiding intestacy entirely) was sufficient to cure the constitutional defect, as the lack of an "insurmountable barrier" did not change the fact that the provision was not substantially related to a permissible, non-punitive state objective.⁸⁸

⁸² *Id.* at 505.

⁸³ *See id.* at 510-13.

⁸⁴ *Id.* at 510, 513.

⁸⁵ *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

⁸⁶ *Id.*

⁸⁷ *Id.* at 771-72.

⁸⁸ *Id.* at 773-74.

Finally, in the Court's last decision involving illegitimacy statutes, *Clark v. Jeter*, the Court again applied a heightened scrutiny standard, striking down a Pennsylvania statute creating a six-year statute of limitations on actions to establish paternity for an illegitimate child.⁸⁹ The Court first found that the Pennsylvania statute did not necessarily "provide a reasonable opportunity to assert a claim," noting that individuals seeking to assert such claims might face both practical and emotional barriers to filing, or only develop a financial need years after the child was born.⁹⁰ The Court also noted that Pennsylvania permitted paternity determinations in numerous other contexts with far less regard to timeliness, undermining its claim that the law was necessary or "substantially related" to the state's asserted "interest in avoiding the litigation of stale or fraudulent claims."⁹¹

While the Supreme Court's equal protection jurisprudence has evolved in the nearly forty years since *Clark v. Jeter*, the illegitimacy cases continue to stand for the proposition that classifications that impose a burden on children solely because of their parent's conduct require a higher level of scrutiny than the deference normally accorded to economic or social regulations. Crucially, the Court has repeatedly rejected the notion that deterrence of parental misbehavior can *ever* justify such a classification. Instead, these classifications are upheld only where important administrative or other non-punitive concerns justify the classification, the classification is supported by evidence showing that the provision applied to children is substantially related to the non-punitive justification, and the statutory scheme is "carefully tuned to alternative considerations," such as providing for a mechanism that can cure the burden imposed by the classification.⁹²

B. Bans on Multigenerational Disabilities Beyond Illegitimacy

The illegitimacy cases established that statutes classifying children based on their parents' sexual behavior outside of marriage require heightened scrutiny by courts. But illegitimacy is not the only context in which the Court has prohibited the use of parental behavior or status as a basis for the state

⁸⁹ See *Clark v. Jeter*, 486 U.S. 456, 464–65 (1988).

⁹⁰ *Id.* at 463–64.

⁹¹ *Id.* at 464.

⁹² *Trimble*, 430 U.S. at 772.

to exclude or limit children from accessing benefits otherwise available to them.

First, in *Plyler v. Doe*, the Supreme Court explicitly extended the reasoning of the illegitimacy cases to classifications based on parental immigration status, ruling that discrimination between children based on their parents' unlawful immigration status required the state to show that such classification furthered a "substantial state interest."⁹³ The case concerned a Texas statute that required children of undocumented immigrant residents to pay tuition in order to access the state's public education system. Reflecting on the purposes of the Equal Protection Clause, the Court noted that it "was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation."⁹⁴ Referencing *Weber* and *Trimble*, the Court focused on the fact that undesired parental conduct was being imputed to their children, noting that "the children [of illegal entrants] 'can affect neither their parents' conduct nor their own status.'"⁹⁵ As it had in *Weber* and *Trimble*, the Court found no "rational justification for penalizing the[] children."⁹⁶ The Court further required that the State's other justifications for the classification be weighed against the "costs to the Nation and to the innocent children who are its victims."⁹⁷ Noting that the Texas law "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status," the Court went on to reject each of Texas's proffered justifications for the law.⁹⁸ While the Court acknowledged that the right at issue

⁹³ *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

⁹⁴ *Id.* at 213.

⁹⁵ *Id.* at 220 (quoting *Trimble*, 430 U.S. at 770).

⁹⁶ *Id.*

⁹⁷ *Id.* at 224. The Court noted that education is also a critical ingredient of healthy child development, writing that:

The inestimable toll of that deprivation [of education] on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.

Id. at 222.

⁹⁸ *Id.* at 223. The Court rejected Texas' assertion that the disfavored status of undocumented immigrants under federal law, including the fact that the children are subject to deportation, justifies Texas' withholding of educational access to these children. *Id.* at 226. The Court also rejected the argument that the discrimination is necessary to preserve limited resources for other state residents, finding that "preservation of resources standing alone can hardly justify the classification." *Id.* at 227. Finally, the Court found the factual record insufficient to support Texas' assertion that excluding undocumented children will disincentive illegal immigration, or that undocumented children are more expensive or less likely to

(to public education) was not fundamental or granted to individuals by the Constitution, it ruled that access to education is more than a simple “benefit,” and was instead distinguished by its importance in “maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child.”⁹⁹

Like the illegitimacy cases before it, the *Plyler* decision stressed the significance of children’s lack of agency over their own status. Lurking throughout the decision was the Court’s concern with the ways that prejudice or systemic discrimination against particular groups can drive such classifications, threatening both the health of the country and the individuals subjected to classifications rooted in those prejudices. In a lengthy footnote, the Court wrote:

Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated on such prejudice is easily recognized as *incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law*. . . . Legislation imposing special disabilities on groups disfavored by virtue of circumstances beyond their control suggests the kind of “class or caste” treatment that the Fourteenth Amendment was designed to abolish.¹⁰⁰

“put their education to productive social or political use within the State” than other children in Texas. *Id.* at 230.

⁹⁹ *Id.* at 221. While the Court in *Plyler* conceded that education was not a fundamental right, it noted that classifications that “impinge upon the exercise of a ‘fundamental right’ . . . requir[e] the State to demonstrate that its classification has been precisely tailored to serve a compelling government interest.” *Id.* at 216–17. In other words, these classifications are subject to strict scrutiny. These fundamental rights include the right of children to remain in the care and custody of their parent, and “the right of the family to remain together without the coercive interference of the awesome power of the state.” *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977). As Peggy Cooper Davis has written, the right to family integrity and for the family to be free from state intrusion has particular salience in the context of the purposes of the Fourteenth Amendment, which was drafted in response to the harms enacted on families during slavery. PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 216–17, 234 (1997); see also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (recognizing parents’ fundamental right to the “companionship, care, custody and management” of their children); *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality opinion) (recognizing that parents have the right to direct the upbringing of their children absent a finding that they are unfit); *Lehr v. Robertson*, 463 U.S. 248, 256–58 (1983) (indicating that parents’ rights to raise children are deeply rooted in the nation’s history and tradition). Children also have a fundamental right to remain in the care and custody of their parents, and to avoid “dislocat[ion] from the ‘emotional attachments that derive from the intimacy of daily association’ with [a] parent.” *Duchesne*, 566 F.2d at 825 (citation omitted) (quoting *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 844 (1977)); see also *Crumpton v. Gates*, 947 F.2d 1418, 1422 (9th Cir. 1991).

¹⁰⁰ *Plyler*, 457 U.S. at 216 n.14 (emphasis added).

In short, the more a classification perpetuates caste-like separation of groups of children, relegating groups of children to second-class status in ways that they cannot escape based on the behavior of their parents over which they have no control, the higher the level of scrutiny equal protection demands.¹⁰¹

In addition to echoing *Mathews* and *Trimble*'s requirement that the government demonstrate a substantial justification for invidious classifications based on parental conduct, the *Plyler* Court explicitly found that the justification must outweigh any harm imposed on children by the classification. Legal disabilities that impose "lifetime hardship" or which result in more lasting "deprivation," the Court suggested, are particularly suspect, even if access to the program is not constitutionally required. As it had in *Cahill* and *Gomez*, the Court ruled that, once a state program is offered or a benefit (such as child support) required, the state cannot pick and choose which children may benefit based on the actions of their parents.

The reasoning in *Cahill*, *Gomez*, and *Plyler* has been extended and reaffirmed by lower courts considering challenges to laws that attempted to exclude U.S. citizen children from receiving benefits on the basis of their parents' immigration status, benefits ranging from Medicaid¹⁰² to in-state tuition.¹⁰³ In *Lewis v. Thompson*, the Second Circuit reviewed a provision in the Medicaid law that denied "automatic eligibility" to infants who were born in the United States to undocumented mothers.¹⁰⁴ The court rejected the federal government's claim that because children could still apply after birth, they were not unduly burdened by the provision.¹⁰⁵ The court noted that while *Plyler* did not extend to all circumstances, it did apply in cases in which a policy was "penalizing children for the illegal conduct of their parents and . . . risk[ed] significant and

¹⁰¹ See *id.*; see also *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 459 (1988) (declining to extend *Plyler* to a case challenging a school district's bus service charge, and noting that *Plyler* was limited to cases in which the child is "be[ing] penalized by the government for illegal conduct by her parents" and where the government policy risks "the creation and perpetuation of a subclass" of disadvantaged children (quoting *Plyler*, 457 U.S. at 230)).

¹⁰² See *Lewis v. Thompson*, 252 F.3d 567, 591–92 (2d Cir. 2001).

¹⁰³ See *Ruiz v. Robinson*, 892 F. Supp. 2d 1321, 1323–26 (S.D. Fla. 2012).

¹⁰⁴ *Lewis*, 252 F.3d at 588.

¹⁰⁵ The Court noted that the provision still resulted in disadvantage to otherwise eligible citizen children, given the need for immediate medical care for the infant upon birth, the fact that needing to apply could delay care, and the fact that non-U.S. citizen mothers may be unaware of the possibility of securing public health insurance. *Id.* at 588–89.

enduring adverse consequences to the children.”¹⁰⁶ Finding that the “social welfare benefit” being withheld was “unrelated to immigration,” the court ruled in favor of the plaintiffs and enjoined the Secretary of Health and Human Services to provide Medicaid services to the plaintiff children “on terms as favorable as those available to the children of citizen mothers.”¹⁰⁷ In *Ruiz v. Robinson*, a Florida federal district court considered a Florida policy that denied in-state tuition or available scholarships to U.S. citizen students who resided in Florida and were otherwise eligible but who were unable to provide evidence of their parents’ immigration status.¹⁰⁸ Applying the intermediate scrutiny standard set forth in *Trimble* and *Plyler*, the court ruled that the state’s policy violated the Equal Protection Clause. The court noted that, like denial of access to elementary education, denying access to higher education presented “obstacles to advancement on the basis of individual merit.”¹⁰⁹ The court went on to find that the state’s denial of in-state benefits to the plaintiffs “solely by virtue of their parents’ undocumented status . . . in a very real way . . . punish[es] the citizen children for the acts of their parents.”¹¹⁰ In weighing potentially non-punitive justifications for the classification, the court reiterated that they must be “substantially related” to important government objectives, then rejected Florida’s argument that because federal law (the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA))¹¹¹ required undocumented parents to be excluded from benefit programs, the state could also exclude the citizen children of those parents.¹¹² The court went on to rule that the law violated the Equal Protection Clause, finding that there was no proffered justification for the law that was sufficient to justify denying the plaintiffs “the same benefits and important opportunities as similarly situated individuals” because of their parents’ undocumented immigration status.¹¹³

¹⁰⁶ *Id.* at 591 (citing *Kadrmas*, 487 U.S. at 459).

¹⁰⁷ *Id.* at 591–92.

¹⁰⁸ *Ruiz*, 892 F. Supp. 2d at 1326.

¹⁰⁹ *Id.* at 1329–30 (quoting *Plyler v. Doe*, 457 U.S. 202, 222 (1982)).

¹¹⁰ *Id.* at 1330.

¹¹¹ See generally Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 and 42 U.S.C.).

¹¹² *Ruiz*, 892 F. Supp. 2d at 1330–31.

¹¹³ *Id.* at 1333. At least one court has extended the reasoning in *Plyler* to children of homeless parents. The Eastern District of New York ruled that by failing to

III

IMPOSING LEGAL DISABILITIES ON CHILDREN BASED ON HOUSEHOLD MEMBERS' CRIMINAL SYSTEM CONTACTS

Laws that place children at a legal disadvantage solely by virtue of being related to individuals with criminal records raise both equal protection and due process concerns under the Fourteenth and Fifth Amendments.¹¹⁴ Imputing a parent or other household member's criminal legal status to a child runs counter to fundamental principles of fairness and responsibility, including "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing" and the recognition that "children can affect neither their parents' conduct nor their own status [related to that conduct]."¹¹⁵ Moreover, when classifications burdening children result in denial of access to programs that are "indispensable to [their] health and well-being"¹¹⁶ or deprivation may "impose[] a lifetime hardship,"¹¹⁷ the state has a particularly high burden to meet to show that the law or policy is permissible.

Despite the constitutional limitations on multigenerational legal disabilities—and the prohibition on laws that impose disabilities on children for the purpose of punishing parents—numerous laws impose legal disabilities on children solely based on their relationship to or co-residence with individuals—including their parents—who have criminal legal system contacts.¹¹⁸ In some cases, these laws expressly apply to all household members, including children. In other cases, like

provide adequate transportation access to public education to children who were homeless, the state and county plaintiffs' transportation policies "appear[ed] to be penalizing these homeless children because of the misfortunes or misdeeds of their parents. Further, in exacting the penalty, the [defendants] are risking significant and enduring adverse consequences to the children by denying them access to a public education." *Nat'l L. Ctr. on Homelessness & Poverty v. New York*, 224 F.R.D. 314, 322 (E.D.N.Y. 2004) (rejecting request for dismissal where state had not proffered "even one rational basis" for distinguishing between homeless children and non-homeless children).

¹¹⁴ The due process and equal protection provisions in the Fourteenth Amendment have been held to be incorporated into the Fifth Amendment, and therefore applicable to federal laws. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217–25 (1995).

¹¹⁵ *Trimble v. Gordon*, 430 U.S. 762, 769–70 (1977) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972)).

¹¹⁶ *N.J. Welfare Rts. Org. v. Cahill*, 411 U.S. 619, 621 (1973).

¹¹⁷ *Plyler v. Doe*, 457 U.S. 202, 223 (1982).

¹¹⁸ *See, e.g., infra* subparts III.A, III.B.

the provisions in *Cahill*,¹¹⁹ they have the “practical effect” of imposing unique, constitutionally suspect burdens on classes of children because of their parent or other household member’s criminal legal system contacts.¹²⁰ Among many others, these laws include: (1) federal laws that exclude children from federally assisted housing,¹²¹ (2) state and local “crime-free” laws that ban or force the eviction of entire families based on criminal cases or sometimes simply contact with a police officer,¹²² and (3) laws that reduce or effectively terminate children’s access to food assistance or public benefits.¹²³ In the subsections below, I provide a brief history of each type of law, including the justification offered for them, explain how they are applied to children, and summarize some of the ways the legal disabilities they impose directly threaten the “health and well-being” of children and present the potential for “lifetime hardship.”

While this Part focuses on direct mechanisms through which statutes or other laws directly impose legal burdens on children related to people ensnared by the criminal legal system, it is worth noting that the harms—and legal disabilities—associated with being imprisoned, surveilled, or “marked” by a criminal record are substantial and have numerous *indirect* effects on children. Individuals with criminal records face barriers to employment in both the public and private sector, including prohibitions on being licensed or holding certain positions in numerous fields (often regardless of the connection between the offense and the field) and sometimes lifetime bans, even

¹¹⁹ See *Cahill*, 411 U.S. at 620–21 (striking down a statute that denied welfare benefits to children of unmarried parents, reasoning that such a law had the practical effect of penalizing children for their parents’ conduct and violated the Equal Protection Clause).

¹²⁰ See Claire K. Child & Stephanie A. Clark, *SNAP Judgments: Collateral Consequences of Felony Drug Convictions for Federal Food Assistance*, BERKELEY J. CRIM. L., Fall 2021, at 1, 5–8.

¹²¹ See Archer, *supra* note 16, at 791.

¹²² See *id.* at 807, 832.

¹²³ It is beyond the scope of this Article to document every statute or regulation through which children may be legally disadvantaged because of their family or household members’ criminal legal system involvement. In the child welfare context, for example, children may be excluded from statutorily preferred placements in relative care when their relatives have criminal records. See 42 U.S.C. § 671(a)(20); CHILD WELFARE INFO. GATEWAY, BACKGROUND CHECKS FOR PROSPECTIVE FOSTER, ADOPTIVE, AND KINSHIP CAREGIVERS (2019), <https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/background-checks-prospective-foster-adoptive-kinship-caregivers-fy25.pdf> [<https://perma.cc/258W-PCKY>]. This Article provides an overview of three specific types of laws with the goal of highlighting variations on the general theme.

for misdemeanor convictions;¹²⁴ the economic disadvantages resulting from less access to employment can shape children's lives in multiple ways. Beyond loss of employment, civil asset forfeiture,¹²⁵ as well as court fines and fees,¹²⁶ impose additional economic burdens on families. Temporary or permanent felon disenfranchisement laws also bar people with active sentences from voting in most states,¹²⁷ including ten that suspend voting rights indefinitely,¹²⁸ so children are doubly excluded from civic participation—directly because of their age and because their parents are unable to vote for policies that may benefit them.¹²⁹ The National Inventory of Collateral Consequences of Conviction documents over 40,000 statutory provisions across the United States that incorporate collateral consequences for individuals convicted—and sometimes simply charged—with a felony or misdemeanor offense in criminal court,¹³⁰ including limitations on access to education or getting a driver's license. In many places, a parental criminal record may also prevent a parent from volunteering at a child's school or out of school activities, even if the record is old or inaccurate.¹³¹

¹²⁴ See generally MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE §§ 2.8–2.11 (2021–2022 ed.); Christopher Uggen & Robert Stewart, *Piling on: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1877–84 (2015); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 299–300 (2011).

¹²⁵ See LOVE, ROBERTS & LOGAN, *supra* note 124, § 2.64.

¹²⁶ Based on recent estimates, as many as ten million people may owe such fees, collectively adding up to tens of billions of dollars. See Aravind Boddupalli & Elaine Maag, *How Fines and Fees Impact Families: Can Policies Like the Child Tax Credit Help?*, HUM. RTS., Apr. 2023, at 15, 15.

¹²⁷ See *Restoration of Voting Rights for Felons*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 19, 2025), <https://www.ncsl.org/elections-and-campaigns/felon-voting-rights> [<https://perma.cc/T7PN-YFTY>]; *Felony Disenfranchisement, State by State*, COLLATERAL CONSEQUENCES RES. CTR. (Oct. 26, 2016), <https://ccresource-center.org/2016/10/26/felony-voting-rights-state-by-state/> [<https://perma.cc/2ALM-P738>].

¹²⁸ *Restoration of Voting Rights for Felons*, *supra* note 127.

¹²⁹ As noted in the Conclusion, the fact that children's relationship to people with criminal records also puts them in a particularly "politically powerless" position gives further weight to the argument that they are part of a suspect class.

¹³⁰ *Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.nationalreentryresourcecenter.org/consequences> [<https://perma.cc/2JB8-DA8S>] (last visited Sep. 4, 2025).

¹³¹ Crystal Elescano, *Hartford Schools' New Volunteer Policy Leaves Some Parents, Advocates Feeling Unwelcomed*, CT INSIDER (Oct. 26, 2025), <https://www.ctinsider.com/news/education/article/hartford-school-volunteer-policy-approved-concerns-21118035.php> [<https://perma.cc/22UL-LWN7>]; *Updated Background Check Rules Now in Effect for School Volunteers*, SPECTRUM BAY NEWS 9 (Mar. 3, 2025), <https://baynews9.com/fl/tampa/news/2025/03/03/>

While each of these kinds of disabilities may result in concrete hardships for children,¹³² these kinds of laws do not explicitly alter children's legal status or rights, although they may still have a "lasting impact . . . on the life of the child."¹³³ In contrast, the laws discussed below explicitly reduce, limit, or preclude children's participation in programs to which they would otherwise have access based on their status as a child who is related to, or co-resides with, adults who, in some cases, are merely suspected of criminal activity. In other words, they impose "special disabilities upon groups disfavored by virtue of circumstances beyond their control," and accordingly "suggest[] the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish."¹³⁴

A. Excluding Children from Housing

There are multiple mechanisms through which children's access to housing is limited because of their co-residence with a parent or other person with a criminal record or even just a person who is suspected of criminal activity. Below I highlight two mechanisms that together apply to, potentially, hundreds of thousands of children: federal "one-strike" policies and local "crime-free" ordinances.¹³⁵

updated-background-check-rules-now-in-effect-for-school-volunteers [https://perma.cc/DJ4J-3BKX]; Suzette Lowe, *BOE Policy Requires Background Checks for All Volunteers*, WV NEWS (Aug. 6, 2023), https://www.wvnews.com/jacksonnews/boe-policy-requires-background-checks-for-all-volunteers/article_acd8c536-34b4-11ee-923f-2f16c8d92d79.html [https://perma.cc/3XBK-XCFR]; 603 MASS. CODE REGS. 51.03 (2025); *Volunteer*, PRINCE GEORGE'S CNTY. PUB. SCHS., <https://www.pgcps.org/offices/ograc/volunteer> [https://perma.cc/3G4H-FRLT] (last visited Mar. 2, 2026).

¹³² While these more indirect collateral consequences may not be subject to the kind of constitutional challenge proposed in this Part, they may still be subject to challenge under existing anti-discrimination schemes.

¹³³ *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

¹³⁴ *Id.* at 216 n.14.

¹³⁵ Private market discrimination, which is facilitated by the regular use of criminal background checks during the housing application process, even in the absence of a "crime-free" ordinance or law, also plays a role. *See generally* Archer, *supra* note 23; Wendy Sawyer, *Estimating the Impact: How Many People Are Excluded from Fair Housing Protections Because of a Past Drug Conviction?*, PRISON POL'Y INITIATIVE (Feb. 5, 2025), <https://www.prisonpolicy.org/blog/2025/02/05/drug-conviction-housing/> [https://perma.cc/X8ZB-X6M6] (noting passage of the "Thurmond Amendment" to the Fair Housing Act in 1988, a provision championed by segregationist lawmaker Strom Thurmond, to permit "landlords to deny housing to people based solely on a past conviction for selling drugs—no matter how qualified they are as tenants, no matter what drugs or quantities were involved, and no matter how long ago they were convicted").

1. *The Federal "One-Strike" Policy*

Under the federal "One-Strike" policy, households applying to or living in federally funded housing developments or using publicly funded housing vouchers (hereinafter "federally assisted housing") can be denied access to or evicted from housing for a variety of criminal system related contacts. Under a provision entitled "Prohibiting admission of drug criminals," denial of admission to an entire household is required if the public housing authority (PHA) determines that a household member is currently engaged in illegal drug use,¹³⁶ if the PHA has "reasonable cause" to believe that a member's drug use or pattern of illegal drug use may "threaten the health, safety, or right to peaceful enjoyment of the premises by other residents," or if any member has, within the prior three years, been evicted from federally assisted housing for "drug-related criminal activity."¹³⁷ The PHA also has discretion, but is not required, to deny admission to a household in any case in which it determines that, within an undefined "reasonable time before the admission,"¹³⁸ any household member has engaged in drug-related or violent criminal activity, or any "other criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents" or the health and safety of the landlord or any PHA staff.¹³⁹ Drug activity does not need to have occurred on the premises and an eviction can result from drug activity that occurred with or without the household member's knowledge,¹⁴⁰ including activity engaged in by guests of the household.¹⁴¹ Thus, a child can be denied access to federally assisted housing based on any household member's prior "drug-related" eviction, even if the prior eviction

¹³⁶ "Currently engaged in" includes any time period "recent[] enough to justify a reasonable belief that the behavior is current." 24 C.F.R. § 982.553(a)(2)(ii)(C)(2) (2025).

¹³⁷ *Id.* § 982.553(a)(1). In the case of the prior eviction requirement, a PHA has discretion to admit the household only if the member has "successfully completed a supervised drug rehabilitation program approved by the PHA" or if "the circumstances leading to eviction no longer exist (for example, the criminal household member has died or is imprisoned)." *Id.*

¹³⁸ PHAs may—but are not required to—define what a "reasonable time" is, see *id.* § 982.553(a)(2)(ii)(B), and "there is tremendous variation in local PHAs' interpretation of reasonable time." REBECCA VALLAS & SHARON DIETRICH, ONE STRIKE AND YOU'RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS 17 (2014).

¹³⁹ 24 C.F.R. § 982.553(a)(2)(ii)(A); see also *id.* § 966.4.

¹⁴⁰ See *Dep't of Hous. & Urb. Dev. v. Rucker*, 535 U.S. 125, 130 (2002).

¹⁴¹ See 24 C.F.R. § 966.4(l)(5)(i)(B).

was based on unknown-to-the-household-member, off-premises drug activity of that household member's guest.

In addition to denying admission, PHAs may also evict entire households on similar grounds.¹⁴² PHAs are required to include lease provisions that allow them to immediately terminate assistance for an entire family if one family member is found to have engaged in any drug-related or violent criminal activity.¹⁴³ Again, PHAs are given incredibly broad discretion in making this determination, and can do so even if there is no arrest or conviction related to the alleged activity.¹⁴⁴ PHAs are also authorized to terminate a lease if any household member is "violating a condition of probation or parole,"¹⁴⁵ regardless of the severity or nature of such a violation.

"One-strike" policies are not limited to adult records, and entire families can also be placed in jeopardy of losing or being denied entry into housing based on a child's involvement in the juvenile justice system.¹⁴⁶ While some PHAs will allow a tenant to remain if they agree to remove the child who is involved in the juvenile justice system, this leaves parent or caretakers to decide between maintaining housing or maintaining their family: "[e]ither the family agrees to dispossess one of its children, or stays together and finds itself on the street."¹⁴⁷ While this is an impossible dilemma, some PHAs do not even provide the option, forcing out some families entirely, even before a case has been resolved.¹⁴⁸

Federal policymakers framed "One-Strike" as being narrowly targeted at predatory and ruthless "criminals."¹⁴⁹ Echoing

¹⁴² See 42 U.S.C. § 1437d(l)(6).

¹⁴³ See 24 C.F.R. § 966.4(l)(5); see also *id.* § 982.553(b) (containing provisions applying to the Housing Choice Voucher Program).

¹⁴⁴ See *id.* § 966.4(l)(5)(iii)(A) (allowing termination after a PHA determination "regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction"); cf. *id.* § 982.553(c) (requiring a "preponderance of the evidence" but no arrest or conviction).

¹⁴⁵ See *id.* § 966.4(l)(5)(ii)(B).

¹⁴⁶ On its face, the law allows for eviction of the entire family for juvenile offenses as minor as marijuana possession or getting into a fight at school.

¹⁴⁷ Wendy J. Kaplan & David Rossman, *Called "Out" at Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE F.L. & SOC. CHANGE 109, 120 (2011).

¹⁴⁸ *Id.*

¹⁴⁹ A quote from then-Secretary of Housing and Urban Development Andrew Cuomo that was included on the cover of a 1997 HUD report on one-strike "progress" is illustrative:

We must have zero tolerance for people who deal drugs. They are the most vicious, who prey on the most vulnerable. They are the jailers,

language used by sociologist Elijah Anderson,¹⁵⁰ then President Clinton stated “it’s morally wrong for criminals to use up homes that could make a big difference in the lives of decent families.”¹⁵¹ Notably, Clinton directly framed the law as being done in the interests of children, asserting that the law would “give the kids the future they deserve.”¹⁵²

While President Clinton’s speech emphasized the needs of families and children, it carefully elided a critical aspect of the one-strike policy—that the ban was not limited to the people who engaged in criminal conduct, or even to households with individuals *currently* engaged in criminal conduct. By its terms, it applied to entire families, including children, even those whose guests engaged in criminal conduct without their knowledge, and even those in which the criminal activity occurred years earlier. Implicitly, the law created two classes of families—those who were “decent” (and therefore unrelated to anyone who had ever been accused of criminal conduct), and those who, President Clinton implied, were not. In this respect, President Clinton echoed the racialized rhetoric of the era, helping to set the stage for the reinstitution of formal, caste-like differentiation between groups of families that the Civil Rights era had sought to reset just a couple of decades earlier.¹⁵³

who imprison the elderly. They are the seducers, who tempt the impressionable young. They must be stopped. “One Strike and You’re Out” is doing just that.

U.S. DEPT OF HOUS. & URB. DEV., MEETING THE CHALLENGE: PUBLIC HOUSING AUTHORITIES RESPOND TO THE ‘ONE STRIKE AND YOU’RE OUT’ INITIATIVE, at iii (1997). The report goes on to openly celebrate enormous increases in denial and eviction rates among PHAs based on the new policy. *See id.* at vi.

¹⁵⁰ *See* Elijah Anderson, *The Code of the Streets*, ATLANTIC MONTHLY, May 1994, at 80.

¹⁵¹ In announcing the policy, Clinton stated:

[I]t’s morally wrong for criminals to use up homes that could make a big difference in the lives of decent families. . . . There is no reason in the world to put the rights of a criminal before those of a child who wants to grow up safe or a parent who wants to raise that child in an environment where the child is safe. . . . [W]e are going to give the good, decent, law-abiding citizens in public housing the life they deserve, and we’re going to give the kids the future they deserve by doing what we should have been doing all along, and doing it together. . . . I want every parent to believe that if he or she works hard, they can do a better job raising their kids in a country that’s supporting them, not undermining them.

Remarks Announcing the “One Strike and You’re Out” Initiative in Public Housing, 1 PUB. PAPERS 519, 520–21 (Mar. 28, 1996). Clinton apparently did not have the over 50% of people in prison who are parents in mind.

¹⁵² *Id.* at 521.

¹⁵³ *See* ALEXANDER, *supra* note 16, at 55–57.

HUD initially advocated for the “One-Strike” policy with enthusiasm. PHAs that embraced the one-strike policy were given an advantage in grant competitions, while those who failed to or had difficulty implementing the policy were subject to strict and intrusive oversight by HUD.¹⁵⁴ In a report released a year after the policy was implemented that included survey results from PHAs around the country, HUD noted that many PHAs were concerned by the requirement that they evict tenants who had not violated any rules based on the conduct of their children, grandchildren, or even guests. However, the report urged PHAs to take heart: as more and more of these families were denied housing entirely, PHAs would no longer have to endure the discomfort that came with evicting innocent children and grandmothers.¹⁵⁵ In 2002, the Supreme Court further strengthened HUD’s hand by affirming that HUD did not violate innocent tenants’ First Amendment freedom of association interests by evicting them despite them having no knowledge of their guests’ drug-related activity.¹⁵⁶

While the “One-Strike” policy does not require PHAs to exclude all people with criminal records, many PHAs implement policies that effectively ban all households that contain members with criminal records.¹⁵⁷ Similarly, while PHAs have

¹⁵⁴ Kaplan & Rossman, *supra* note 147, at 115.

¹⁵⁵ HUD noted that “some PHAs complain that under the new initiatives they have been obligated to evict law-abiding residents whose children, grandchildren, or guests have violated the new rules. However, HUD expects the number of One Strike evictions to decrease as housing authorities strengthen their applicant screening procedure.” U.S. DEP’T OF HOUS. & URB. DEV., *supra* note 149, at vi.

¹⁵⁶ Dep’t of Hous. & Urb. Dev. v. Rucker, 535 U.S. 125, 136 n.6 (2002). As discussed in greater detail in Part IV, *infra*, I assert that *Rucker*’s holding does not compel the same result in the case of children of tenants with criminal records, in part because children cannot reasonably be expected to restrict or control the activities of their co-tenants, and in part because children cannot elect to restructure their households to avoid the imposition of these rules, particularly when the “offending” co-tenant is their parent. *Rucker* also did not raise or address the multigenerational punishment and equal protection issues raised by the imposition of “One-Strike” on children.

¹⁵⁷ See Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. 25332, 25336 (proposed Apr. 10, 2024) (“[S]ome PHAs and HUD-assisted housing owners are unnecessarily restrictive in their use of criminal records . . . us[ing] ‘blanket bans’ to turn away prospective tenants with any criminal records, no matter how far in the past that criminal justice system involvement was and its relation, if any, to the applicant’s current fitness as a tenant . . .”). The proposed rule goes on to note that this “may be” a problem of HUD’s own making. *Id.* (“This may be partly due to mistaken beliefs that HUD still advocates use of ‘One Strike’ admissions policies, as it did in the 1990s.”); see also MARIE CLAIRE TRAN-LEUNG, WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 49 (2015) (noting PHA policies with both “lifetime” bans

discretion in whether or not to evict entire families, there are no standards of proof, and many PHAs have no process in place to consider mitigating circumstances.¹⁵⁸ Some PHAs also construe the phrases “currently engaging in” and “reasonable time” to permit them to screen out applicants who are charged or convicted decades prior.¹⁵⁹ While the law requires PHAs to develop standards for their application and termination processes, some PHAs fail to define their own look-back period, giving applicants no sense of how far into their past a PHA might look.¹⁶⁰

For children, the implications of these bans are enormous. Over half a million children live in public housing, representing over a third of residents.¹⁶¹ An additional “1.7 million children live in voucher funded assisted households, representing 40% of residents receiving voucher funded assistance.”¹⁶² As noted above, roughly one in seven children have experienced a recent household member’s criminal charge; this rate grows to as many as one in four children living in higher poverty communities.¹⁶³ Many more have a parent or household member who may be subject to probation or parole conditions that could be violated. This means that tens or even hundreds of thousands of children may be subject to exclusion or eviction under these policies each year. In jurisdictions in which “blanket bans” are in place, as many as forty percent of otherwise eligible children, and two-thirds of eligible Black children, may be ineligible for federally supported housing based on a household member’s criminal history.¹⁶⁴

for multiple offenses and lookback periods of as long as twenty-five years); VALLAS & DIETRICH, *supra* note 138, at 16–17.

¹⁵⁸ See Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. at 25337.

¹⁵⁹ See *id.* at 25333–34, 25345.

¹⁶⁰ See *id.* at 25345.

¹⁶¹ NAT’L CTR. FOR HEALTH IN PUB. HOUS., DEMOGRAPHIC FACTS: RESIDENTS LIVING IN PUBLIC HOUSING 2 (2022), <https://nchph.org/wp-content/uploads/2022/08/Demographic-Facts-Residents-Living-in-Public-Housing-v2.pdf> [<https://perma.cc/PWT4-Y336>].

¹⁶² *Id.*

¹⁶³ See *supra* section I.B.2.

¹⁶⁴ Precise estimates are challenging. Not all charges or convictions that I use to generate estimates may fall within the scope of a particular PHA’s policy, even if the PHA applies lengthy look-back periods or allows a broad range of offenses to qualify. On the other hand, the exposure estimates above are based on national averages across all children, and it is reasonable to assume that children in need of access to federally assisted housing are *more* likely to have a family member who has had contact with the criminal system at some point in their lives, given associations between economic stress and criminal system involvement.

The health and developmental costs to children of being evicted or denied stable housing are massive and long-lasting. Experiencing eviction or housing instability during childhood is associated with significant harms to child development, including reductions or delays in cognitive development,¹⁶⁵ long-term harms to psychosocial functioning,¹⁶⁶ depression and teenage pregnancy,¹⁶⁷ and other harms to health.¹⁶⁸ Families who experience eviction often end up in poor housing conditions, increasing children's "exposure to allergens, air pollution, toxicants, and unsafe homes."¹⁶⁹ Increasing evictions at the neighborhood level are also associated with neighborhood increases in communicable diseases and crime,¹⁷⁰ including violent crime,¹⁷¹ as well as increased reports of child maltreatment.¹⁷²

In the decades since "One-Strike" was introduced, the policy has been subject to extensive criticism,¹⁷³ particularly considering a growing body of research showing that individuals with criminal records are generally just as successful in housing programs or tenancies as people without records.¹⁷⁴ HUD has also sought to curtail or soften some of the most egregious applications of discretion that the law permits. HUD has cautioned PHAs that an arrest, by itself, is not sufficient

¹⁶⁵ Gabriel L. Schwartz et al., *Childhood Eviction and Cognitive Development: Developmental Timing-Specific Associations in an Urban Birth Cohort*, Soc. Sci. & Med. (Jan. 2022), <https://www.sciencedirect.com/science/article/pii/S0277953621008765> [<https://perma.cc/S7YE-F42F>].

¹⁶⁶ See Rebekah Levine Coley & Melissa Kull, *Cumulative, Timing-Specific, and Interactive Models of Residential Mobility and Children's Cognitive and Psychosocial Skills*, 87 CHILD DEV. 1204, 1217 (2016); Annie Gjelsvik et al., *Residential Mobility and Flourishing Among United States School-Age Children, 2011/2012 National Survey of Children's Health*, 23 MATERNAL & CHILD HEALTH J. 522, 524–27 (2019).

¹⁶⁷ T. Jelleyman & N. Spencer, *Residential Mobility in Childhood and Health Outcomes: A Systematic Review*, 62 J. EPIDEMIOL. & CMTY. HEALTH 584, 590–91 (2008).

¹⁶⁸ See Bruce Ramphal et al., *Evictions and Infant and Child Health Outcomes: A Systematic Review*, JAMA NETWORK OPEN (Apr. 11, 2023), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2803667> [<https://perma.cc/UA2Q-YS29>].

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Eileen M. Kirk, *Untangling Eviction, Disadvantage, Race, and Social Processes: Neighborhood Factors Influencing Crime*, 68 CRIME & DELINQ. 594, 605–09 (2022).

¹⁷² Lindsey Rose Bullinger & Kelley Fong, *Evictions and Neighborhood Child Maltreatment Reports*, 31 HOUS. POL'Y DEBATE 490, 505–06 (2021).

¹⁷³ See Rebecca J. Walter, Jill Viglione & Marie Skubak Tillyer, *One Strike to Second Chances: Using Criminal Backgrounds in Admission Decisions for Assisted Housing*, 27 HOUS. POL'Y DEBATE 734, 737 (2017); TRAN-LEUNG, *supra* note 157, at 3–4; VALLAS & DIETRICH, *supra* note 138, at 56.

¹⁷⁴ Walter, Viglione & Tillyer, *supra* note 173, at 739–40.

to justify either a denial of admission or an eviction, noting that arrest records are often inaccurate.¹⁷⁵ They have repeatedly issued guidance warning PHAs of the potentially discriminatory impacts of overreliance on criminal records to make admissions or termination decisions,¹⁷⁶ explicitly stating that “[u]sing criminal history to screen, deny lease renewal, evict, or otherwise exclude individuals from housing may be illegal under the Fair Housing Act under three different theories of liability—discriminatory intent . . . , discriminatory effects, and refusal to make reasonable accommodations.”¹⁷⁷

Yet despite these efforts, HUD notes, “people are still being excluded from HUD-assisted housing for convictions that do not reflect at all on current fitness for tenancy, such as stale convictions that date back more than a quarter century, or those for low-level nonviolent offenses.”¹⁷⁸ Driven by this concern, HUD recently issued a proposed rule change that would help contain a few of the most problematic aspects of discretion, including: prohibiting PHAs from automatically denying an applicant housing assistance simply based on the presence of *any* criminal conviction (as opposed to those explicitly identified by federal law); instructing PHAs to disregard criminal records that are unlikely to bear on fitness for tenancy, such as arrest records, sealed or expunged records, older convictions, and convictions not involving violence or harm to persons or property; requiring PHAs to use individualized assessments to

¹⁷⁵ See U.S. DEP’T OF HOUS. & URB. DEV., NOTICE PIH 2015-19, GUIDANCE FOR PUBLIC HOUSING AGENCIES (PHAs) AND OWNERS OF FEDERALLY-ASSISTED HOUSING ON EXCLUDING THE USE OF ARREST RECORDS IN HOUSING DECISIONS (2015), <https://www.hud.gov/sites/documents/PIH2015-19.PDF> [<https://perma.cc/HCH7-JYSL>].

¹⁷⁶ See U.S. DEP’T OF HOUS. & URB. DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS (2016), <https://www.fairhousingnc.org/wp-content/uploads/2016/04/HUD-Guidance-on-Criminal-Records-2016.pdf> [<https://perma.cc/G5VB-8JKR>]; Walter, Viglione & Tillyer, *supra* note 173, at 736–39.

¹⁷⁷ Memorandum from Demetria L. McCain, Principal Deputy Assistant Sec’y for Fair Hous. & Equal Opportunity, to Off. of Fair Hous. & Equal Opportunity 3 (June 10, 2022), <https://archives.hud.gov/offices/fheo/Implementation-of-OGC-Guidance-on-Application-of-FHA-Standards-to-the-Use-of-Criminal-Records-June-10-2022.docx> [<https://perma.cc/25UE-QQXB>]. Recent court actions challenging the use of criminal convictions under the Fair Housing Act have been successful in addressing blanket bans, but these cases represent a drop in the bucket. Of the 33,000 fair housing complaints brought in 2022, only 352 related to criminal backgrounds. NAT’L FAIR HOUS. ALL., 2023 FAIR HOUSING TRENDS REPORT 13–14 (2023), <https://nationalfairhousing.org/wp-content/uploads/2023/08/2023-Trends-Report-Final.pdf> [<https://perma.cc/CZW9-MPT5>].

¹⁷⁸ Reducing Barriers to HUD-Assisted Housing, 89 Fed. Reg. 25332, 25332 (proposed Apr. 10, 2024).

determine whether applicants truly pose a future risk to persons or property; and requiring PHAs to provide applicants with criminal history records an opportunity to present mitigating factors before an admission decision is made.¹⁷⁹ Proposed changes would also define “currently engaging in” to be limited to criminal activity within the preceding twelve months, and would explicitly prohibit the use of arrest records, standing alone, to determine the existence of criminal activity.¹⁸⁰ Even if the proposed rule changes survive the recent change in administration, however, none would change the statutorily-required mandatory denials for households related to prior evictions, and PHAs would still be permitted to deny admission to or evict families for a fairly broad array of offenses, as well as wide range of potentially irrelevant, technical, or low-level probation or parole violations.¹⁸¹

2. “Crime-Free” Housing Laws

In addition to the “one-strike” provisions for federally assisted housing, some states and thousands of municipalities across nearly every state in the country have laws or ordinances encouraging private landlords to discriminate against people with criminal legal system involvement.¹⁸² Known as “crime-free” laws, these policies often have the effect of keeping formerly court-involved individuals out of large swaths of available housing entirely, and ultimately out of an entire city or town.¹⁸³ As Deborah Archer has written:

[T]he widespread adoption of tenant-screening and eviction practices based on contacts with the criminal legal system raises a host of public policy and civil rights concerns [including] . . . segregative impact, . . . evidence of intentional racial discrimination, promotion of destructive narratives around people with criminal legal system contacts, and importation of harmful and discredited policing practices into the private housing market.¹⁸⁴

¹⁷⁹ See *id.* at 25333.

¹⁸⁰ See *id.* at 25334, 25361.

¹⁸¹ See *id.* at 25334. Whether or not HUD can successfully limit the excesses of PHA policies through rule changes is also in question in the wake of the Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), which dramatically shifted federal “agencies’ ability or proclivity to respond proactively and effectively in the face of future public problems and needs.” Cary Coglianese & Daniel E. Walters, *The Great Unsettling: Administrative Governance After Loper Bright*, 77 ADMIN. L. REV. 1, 4 (2025).

¹⁸² See Archer, *supra* note 23, at 175.

¹⁸³ See generally Archer, *supra* note 16.

¹⁸⁴ Archer, *supra* note 23, at 198–99.

“Crime-free” provisions generally include licensing and training programs for landlords, use of criminal background databases for screening, “crime-free” lease addendums that allow for eviction for varying levels of actual or suspected criminal activity, and an “enforcement scheme that encourages eviction and exclusion.”¹⁸⁵ These provisions may be encouraged or, in some cases, mandated. Arrests or even police stops that result in no further action may be grounds for denial or eviction under some laws,¹⁸⁶ and, as with federal law, there is often no requirement that the activity took place on the premises.¹⁸⁷ In contrast to federal provisions, there is no requirement that landlords establish processes or standards for eviction, and some laws encourage landlords to evict if there is a single violation.¹⁸⁸ In the case of mandatory crime-free ordinances, landlords are required to be certified or receive a “crime-free” license in order to continue being a landlord.¹⁸⁹ Crime-free ordinances also encourage cooperation between landlords and law enforcement, with some giving landlords the ability to access law enforcement databases directly or to inquire about arrests.¹⁹⁰ Arrest records in public and private databases, as noted above, are often inaccurate, and, of course, many arrests do not result in a charge, let alone a conviction. In some jurisdictions, crime-free ordinances are enforced by special local police forces, some of whom directly initiate adverse landlord action.

Begun by police officers in the 1990s in Mesa, Arizona, and promoted by these officers and others, “crime-free” ordinances spread to as many as 2,000 municipalities, as well as states across the country, before recent advocacy efforts began to limit their spread.¹⁹¹ The discriminatory impact of these policies, as

¹⁸⁵ *Id.* at 189.

¹⁸⁶ See, e.g., Archer, *supra* note 16, at 810, 821–22 (describing and providing an example of police “visits” or “sweeps” that resulted in eviction or exclusion despite an absence of charges); Press Release, U.S. Dep’t of Just., Justice Department Finds Minnesota City’s “Crime-Free” Housing Program Discriminates Against Tenants with Mental Health Disabilities (Nov. 7, 2023), <https://www.justice.gov/archives/opa/pr/justice-department-finds-minnesota-citys-crime-free-housing-program-discriminates-against> [<https://perma.cc/MD5B-CBK8>]; Leora Smith, *When the Police Call Your Landlord*, ATLANTIC (Mar. 13, 2020), <https://www.theatlantic.com/politics/archive/2020/03/crime-free-housing-lets-police-influence-landlords/605728/> [<https://perma.cc/CR7U-4NVG>].

¹⁸⁷ Archer, *supra* note 23, at 194.

¹⁸⁸ See *id.* at 194–95.

¹⁸⁹ See *id.* at 188.

¹⁹⁰ *Id.* at 192–93.

¹⁹¹ Kristen Clarke, U.S. Dep’t of Just., Dear Colleague Letter 1 (Aug. 15, 2024), https://www.justice.gov/d9/2024-08/doj_crime-free_and_nuisance_letter.pdf [<https://perma.cc/YJC7-FL97>].

well as research showing that they are ineffectual to either prevent or reduce crime, and promote increases in evictions,¹⁹² has led to recent federal efforts to clarify and highlight their discriminatory impact.¹⁹³ The U.S. Department of Justice, for example, recently entered into a settlement agreement with a Minnesota town arising from their crime-free ordinance, finding that the law has a particularly discriminatory impact on persons with disabilities.¹⁹⁴

Given the disproportionate targeting of people of color within the criminal system, one effect of crime-free ordinances is to make “White communities Whiter . . . [and] nearby communities of color more segregated and marginalized.”¹⁹⁵ For the children of people with criminal records who are also excluded from housing across whole towns and neighborhoods, these exclusions also have significant implications in terms of access to neighborhood and educational opportunity. Nationally, Black and Latinx children have less access to high quality elementary or high schools than White and Asian children, a trend that is attributable, in part, to historical and ongoing exclusionary practices in the housing market.¹⁹⁶ For children, neighborhood-based disparities in access to educational opportunity are associated with disparities in academic skills and educational attainment, as well as income during adulthood.¹⁹⁷

B. Limiting Children’s Access to Cash Assistance and Food Support

The same mid-1990s “tough-on-crime” policy environment that granted PHAs the authority to ban individuals related to people with criminal records from public housing also gave rise to the Personal Responsibility and Work Opportunity

¹⁹² See MAX GRISWOLD ET AL., AN EVALUATION OF CRIME-FREE HOUSING POLICIES 2 (2023), https://www.rand.org/pubs/research_reports/RR2689-1.html [<https://perma.cc/V74X-E94W>] (evaluating success of California crime-free policies in preventing or reducing crime using rigorous, quasi-experimental analyses of data from 104 California municipalities).

¹⁹³ See, e.g., Clarke, *supra* note 191. The Civil Rights Division of the DOJ also recently found that a Minnesota town’s crime-free ordinance violated the Americans with Disabilities Act. Press Release, U.S. Dep’t of Just., *supra* note 186.

¹⁹⁴ See *supra* note 193.

¹⁹⁵ Archer, *supra* note 23, at 213.

¹⁹⁶ See Rebekah Levine Coley et al., *Racial Inequities in Educational Opportunity: Variation Across Socioeconomic Status*, 16 RACE & SOC. PROBS. 414, 416–17 (2024).

¹⁹⁷ See *id.*

Reconciliation Act (PRWORA).¹⁹⁸ In addition to barring certain undocumented or other immigrants from accessing public benefits, as discussed above, PRWORA reduced overall funding for social support benefits, imposed work requirements and strict time limits on receipt of benefits, and created lifetime bans on participation in the Supplemental Nutrition Assistance Program (SNAP) and Temporary Aid to Needy Families (TANF) programs for anyone convicted of state or federal felony crimes involving controlled substances.¹⁹⁹ PRWORA also banned receipt of SNAP, Social Security Income, and other benefits for individuals found to be in violation of any condition of probation or parole, even if the underlying offense was not a felony.²⁰⁰ The felony exclusion provisions in PRWORA were subject to almost no legislative debate, nor was any justification offered for their inclusion other than to demonstrate “the U.S.’ resolve to fight the ‘war on drugs’” and a desire to penalize individuals who violated drug laws by ensuring that they did not receive welfare benefits.²⁰¹

While PRWORA imposed mandatory bans on SNAP and TANF participation, states were permitted to waive these bans via legislation. As of December 2023, seven states²⁰² still maintained full, lifetime bans on TANF, one state maintained the ban for SNAP, and eighteen states maintained partial bans for one or both programs, while twenty-five states and the District of Columbia had fully lifted them.²⁰³ For states with modified bans, conditions may still be quite burdensome, including requirements for participation in drug treatment or routine drug testing regardless of whether there is any finding that the

¹⁹⁸ See generally Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 and 42 U.S.C.).

¹⁹⁹ See Child & Clark, *supra* note 120, at 5–8.

²⁰⁰ See 7 C.F.R. § 273.11(n)(2) (2025); see also Child & Clark, *supra* note 120, at 15–16.

²⁰¹ PATRICIA ALLARD, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 1 (2002) (citing 142 CONG. REC. S8498 (daily ed. July 23, 1996)), https://www.opensocietyfoundations.org/publications/life-sentences-denying-welfare-benefits-women-convicted-drug-offenses#publications_download [<https://perma.cc/HUC7-3AT2>].

²⁰² Arizona, Georgia, Missouri, Nebraska, South Carolina, Texas, and West Virginia. See Margaret Love & Nick Sibilla, *Accessing SNAP and TANF Benefits After a Drug Conviction: A Survey of State Laws*, COLLATERAL CONSEQUENCES RES. CTR. (Dec. 2023), <https://ccresourcecenter.org/national-snap-tanf-drug-felony-study/> [<https://perma.cc/4QBL-DMT9>].

²⁰³ *Id.*

individual has ever engaged in substance use.²⁰⁴ As an example, up until 2023, a single positive drug test resulted in a 30% reduction in benefits in Minnesota, while a second positive test resulted in a lifetime ban.²⁰⁵

In contrast to housing bans, children whose parents are banned from receiving TANF or SNAP are not completely banned from receiving benefits. Generally speaking, children must be included in the same “household” as their parent for determinations of eligibility, but households can apply for benefits even if one or more household members are ineligible. These household members’ income is, however, counted in determining eligibility, resulting in reduced or no benefits for the rest of the household. Thus, a child living in a household that includes an individual with a relevant criminal record will, as a legal matter, receive fewer benefits than a child living in a household of identical size and resources that does not have such a member.

Children whose parents are ineligible for TANF can potentially be found eligible for “child-only” TANF—a category of cases that has grown in recent years, increasing from about 15% of TANF cases in 1992²⁰⁶ to over half by 2016.²⁰⁷ Child-only cases provide benefits to children in households with parents who are ineligible due to immigration status or for other reasons. No data is currently available on how many child-only TANF cases are related to parent or other caregiver disqualification due to a felony conviction, and it is unclear that families with children who might be eligible for this option are aware of it. Notably, in at least twenty states, *none* of the child-only TANF caseload falls into the category in which these cases would logically be included.²⁰⁸ Given the sizeable number of children with parents with a felony record, it is plausible that families with criminal

²⁰⁴ See *id.*

²⁰⁵ See Act effective Aug. 1, 2023, ch. 70, 2023 Minn. Laws 365. Of note, “failing” a drug test in some jurisdictions does not actually require a detectable presence of a controlled substance but instead can result from missing an appointment.

²⁰⁶ Elizabeth K. Anthony, Catherine M. Vu & Michael J. Austin, *TANF Child-Only Cases: Identifying the Characteristics and Needs of Children Living in Low-Income Families*, 14 J. CHILD. & POVERTY 1, 1 (2008).

²⁰⁷ Kristen Joyce, *TANF Child-Only Cases: Characteristics, Needs, Services, and Service Delivery Challenges*, ADMIN. FOR CHILD. & FAMS. 3 (Apr. 1, 2020), https://perata.acf.hhs.gov/sites/default/files/uploaded_files/TANF_Child-Only-Brief-091919-508.pdf [<https://perma.cc/47CV-4VFX>].

²⁰⁸ See *id.* at 15–16.

records in these states who may be eligible for “child-only” benefits are not receiving benefits at all.

The potential impact of TANF and SNAP bans on children is large. About 1.4 million children currently live in households receiving TANF²⁰⁹ and 14.6 million participate in SNAP,²¹⁰ roughly one in five children in the United States. However, neither TANF nor SNAP reach every person who may be eligible. Nationally, the USDA estimates that about 77% of families living at or near the federal poverty level are receiving SNAP, but this rate varies widely, and some states reach fewer than 50% of potentially eligible families.²¹¹ For TANF at least, the number of children receiving benefits is eclipsed by the number of children who are potentially denied access to it. Roughly 80% of the 250,000 TANF applications filed across the United States each month are denied; in some states—Michigan, for example—over 90% of applications are denied.²¹² Unfortunately, scant research exists on the basis for initial TANF denials,²¹³ and there is little data that would allow us to determine how many children who might otherwise be eligible receive no or reduced benefits because of the bans. Most research in this area focuses not on initial denials, but on sanctions for those already enrolled.²¹⁴ Sanctions cases potentially include cases where a family member has a new criminal case, but no research has considered how many families are denied or sanctioned based

²⁰⁹ *OFA Releases FY 2021 Characteristics and Financial Circumstances of TANF Recipients Data*, ADMIN. FOR CHILD. & FAMS. (Jan. 18, 2023), <https://www.acf.hhs.gov/ofa/news/ofa-releases-fy-2021-characteristics-and-financial-circumstances-tanf-recipients-data/> [<https://perma.cc/3899-G2XK>].

²¹⁰ Michael D. King & Katherine G. Giefer, *Nearly a Third of Children Who Receive SNAP Participate in Two or More Additional Programs*, U.S. CENSUS BUREAU (June 30, 2021), <https://www.census.gov/library/stories/2021/06/most-children-receiving-snap-get-at-least-one-other-social-safety-net-benefit.html> [<https://perma.cc/NK9F-W9DJ>].

²¹¹ Ellen Vollinger, *New SNAP Program Access Index Data Help in Identifying Factors for Better SNAP Performance*, FOOD RSCH. & ACTION CTR. (May 17, 2023), <https://frac.org/blog/new-snap-program-access-index-data> [<https://perma.cc/N5FM-43RG>].

²¹² *See TANF: Average Number of Applications*, ADMIN. FOR CHILD. & FAMS. (Dec. 27, 2023), https://acf.gov/sites/default/files/documents/ofa/fy2023_application_tanf.pdf [<https://perma.cc/5CPF-LTE8>]. Calculations by the author based on total average applications received and total average applications denied in 2023.

²¹³ *See* Andrea Hetling et al., *An Equity Analysis of Applying for Welfare: TANF Application and Denial Reasons by Household and County Characteristics*, 95 SOC. SERV. REV. 616, 618 (2021).

²¹⁴ *See, e.g.*, Stephanie Walsh et al., *A Systematic Literature Review of U.S. Welfare Sanctions & Racial Equity*, J. SOC. EQUITY & PUB. ADMIN., July 2023, at 26.

on federal or state policies related to criminal sanctions or system involvement.

To partially address this research gap, researchers for the Congressional Black Caucus Foundation used state level population and criminal justice data and estimated that over half a million individuals—along with their households—were directly impacted in just the seven states with “full” TANF bans.²¹⁵ This, of course, leaves out hundreds of thousands of people who may be denied under partial bans or subject to conditions that may make eligibility infeasible.

The loss of TANF or SNAP can have multiple, life-altering consequences for children. Both TANF and SNAP are associated with reductions in immediate hardship, as well as longer term poverty prevention.²¹⁶ In 2023, for example, SNAP lifted 3.4 million people above the poverty line, 1.3 million of whom were children.²¹⁷ Children who experience food insecurity, by contrast, are at higher risk for mental health issues,²¹⁸ poor academic outcomes,²¹⁹ delays in school readiness,²²⁰ obesity,²²¹ and behavior problems.²²²

In addition to increasing the likelihood that children will face considerable material hardships at home, ineligibility for TANF or SNAP as a household may limit children’s access to multiple other benefits available through “categorical eligibility,”

²¹⁵ MALIK NEAL & TATYANA HOPKINS, PERPETUAL PUNISHMENT: A STATE-BY-STATE ANALYSIS OF WELFARE BENEFIT BANS FOR PEOPLE WITH PRIOR FELONY DRUG CONVICTIONS 10 (2023), https://issuu.com/congressionalblackcaucusfoundation/docs/2022_cbcf_cpar_a_state-by-state_analysis_of_welfar [<https://perma.cc/L26W-4HSU>].

²¹⁶ See, e.g., Vincent Fusaro, Leila Dal Santo & Margaret M.C. Thomas, *SNAP, Hardship, and Mental Health in U.S. Households with Children: Evidence from the COVID-19 Pandemic*, 17 J. SOC’Y SOC. WORK & RSCH. (forthcoming 2026).

²¹⁷ *Data & Statistics on Hunger*, FOOD RSCH. & ACTION CTR., <https://frac.org/hunger-poverty-america> [<https://perma.cc/K4NN-7DNJ>] (last visited Aug. 29, 2025).

²¹⁸ Kathryn S. Cain et al., *Association of Food Insecurity with Mental Health Outcomes in Parents and Children*, 22 ACAD. PEDIATRICS 1105, 1109 (2022).

²¹⁹ Catheryn A. Orihuela et al., *Associations of Household Food Insecurity with Academic Outcomes in Early Adolescents*, 93 J. SCH. HEALTH 883, 889 (2023).

²²⁰ Dylan B. Jackson, Alexander Testa & Daniel C. Semenza, *Household Food Insecurity and School Readiness Among Preschool-Aged Children in the USA*, 24 PUB. HEALTH NUTRITION 1469, 1472–76 (2021).

²²¹ See generally Jayna M. Dave et al., *Urban-Rural Disparities in Food Insecurity and Weight Status Among Children in the United States*, NUTRIENTS (July 4, 2024), <https://www.mdpi.com/2072-6643/16/13/2132> [<https://perma.cc/ER5E-BZRL>].

²²² See Qiujie Gong & Sehyun Ju, *Food Insecurity and Children’s Problem Behaviors: The Mediating Role of Parental Relationship Quality and Parenting Stress*, 45 J. DEV. & BEHAV. PEDIATRICS e349, e353 (2024).

including free and reduced cost lunch at school. Children are “categorically” eligible for free and reduced lunch if they are in Head Start, in foster care, or homeless, or if their families receive SNAP, TANF, FDPIR,²²³ or (in some states) Medicaid.²²⁴ Eligibility is determined by directly linking district child data to state data documenting participation in these programs, a process called “direct certification.”²²⁵ Direct certification is the foundation on which “community eligibility”—which allows high-poverty school districts to offer school meals at no-cost to all students—is built.²²⁶ States that use categorical eligibility may find children eligible before they even start school, ensuring that there is no gap in food in the first weeks or months of school.²²⁷ Without direct certification, children must fill out an application to be found income eligible for free and reduced lunch, a process that may result in a child being delayed in receiving, or never receiving, the program.

IV

CHALLENGING MULTIGENERATIONAL PUNISHMENT STATUTES

As the Supreme Court has recognized, one of the hallmarks of a caste system is the imposition of life-altering legal disabilities based on a status that one cannot change or control. This Article asserts that children who are subjected to exclusion or eviction from housing, or whose government benefits are reduced, solely by virtue of being related to individuals with criminal records, are placed in precisely such a position, and therefore constitute a constitutionally cognizable class.

Under the Court’s reasoning in *Weber*, *Trimble*, and *Plyler*, a statute that imposes a legal disability on a child based on

²²³ See generally *Food Distribution Program on Indian Reservations*, FOOD & NUTRITION SERV. (May 5, 2025), <https://www.fns.usda.gov/fdpir/food-distribution-program-indian-reservations> [<https://perma.cc/TY5K-PLEJ>].

²²⁴ Beth Sinclair & Chen-Su Chen, *Understanding School Lunch Eligibility in the Common Core of Data*, NAT’L CTR. FOR EDUC. STAT.: BLOG (Aug. 5, 2020), <https://nces.ed.gov/learn/blog/understanding-school-lunch-eligibility-common-core-data> [<https://perma.cc/JGG7-2WCL>].

²²⁵ FOOD RSCH & ACTION CTR., DIRECT CERTIFICATION IMPROVES LOW-INCOME STUDENT ACCESS TO SCHOOL MEALS: AN UPDATED GUIDE TO DIRECT CERTIFICATION 1 (2018), <https://frac.org/wp-content/uploads/direct-cert-improves-low-income-school-meal-access.pdf> [<https://perma.cc/62TZ-94AH>].

²²⁶ *Id.*

²²⁷ See ANDREW GOTHRO ET AL., THE NATIONAL SCHOOL LUNCH PROGRAM DIRECT CERTIFICATION IMPROVEMENT STUDY: PRACTICES AND PERFORMANCE REPORT 16 (2015), <https://fns-prod.azureedge.us/sites/default/files/ops/NSLPDirectCertification-StatePractices.pdf> [<https://perma.cc/88XT-39JD>].

their parent's conduct is subject to heightened scrutiny, a scrutiny that is informed by the nature of the legal impediment or disability²²⁸ and the extent to which the law risks creating a "subclass"²²⁹ of children who are excluded from the same opportunities as their peers. Punishment or deterrence of the parent is not a permissible justification for such a classification. Instead, the government must establish, with evidence, that the particular adversity on a group of children is "substantially related to an important governmental objective,"²³⁰ evidence that outweighs the risk that the policy will result in either short or long-term harm to those children or risks "the creation and perpetuation of a subclass."²³¹ This standard is quite high, and can apply even when there is an alternative mechanism for the child to access a benefit,²³² or when the benefit at issue is not constitutionally required.²³³

As discussed below, the harms and deprivations imposed on children by these laws are immediate, severe, long-lasting, and strike at the heart of their opportunities to succeed as individuals. Additionally, no substantial justifications for these laws' application to children have been offered, nor has evidence been offered that justifies harming an entire class of children as necessary to accomplish some other state purpose. Indeed, the stated justification for these laws is often the *protection* of children, or some other goal that is alleged to benefit them.

A. Punitive Purpose Not Permissible

The Court has repeatedly rejected deterrence or punishment of adult misbehavior as a grounds for imposing legal

²²⁸ The Court's constitutional jurisprudence recognizes a wide array of harms and legal disabilities as constitutionally cognizable, including harms as inchoate as damage to "a person's good name, reputation, honor, or integrity." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971). The laws discussed here are explicitly or effectively directed at all members in the household (including children) and can result in legal action (including eviction proceedings, which may include children as named parties) or a direct reduction or elimination of a benefit that the child would otherwise receive.

²²⁹ *Kadrmass v. Dickinson Pub. Schs.*, 487 U.S. 450, 459 (1988) (quoting *Plyler v. Doe*, 457 U.S. 202, 230 (1982)).

²³⁰ *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

²³¹ *Kadrmass*, 487 U.S. at 459 (quoting *Plyler*, 457 U.S. at 230).

²³² See *Lewis v. Thompson*, 252 F.3d 567, 591–92 (2d Cir. 2001).

²³³ See *Plyler*, 457 U.S. at 229–30; see also *Ruiz v. Robinson*, 892 F. Supp. 2d 1321, 1323–25, 1330 (S.D. Fla. 2012); Nat'l L. Ctr. on Homelessness & Poverty v. New York, 224 F.R.D. 314, 322 (E.D.N.Y. 2004).

disabilities on children, finding it both “illogical and unjust.”²³⁴ In the case of the housing and benefits laws discussed herein, however, there has never been a justification offered for the laws’ application to children beyond (potentially) deterrence, and, indeed, the stated purpose for some of these laws is the protection of children, a justification that is directly at odds with the harm being imposed on them, both immediately and through the long-term harms to their opportunities.

As noted above, in the context of SNAP and TANF, there appears to be no relationship whatsoever between the purely punitive goals of the provisions and the laws’ impacts on children. These legal provisions were not extensively debated, nor was any evidence offered that they served any purpose other than penalizing people with drug convictions by taking away their benefits. The fact that these provisions result in fewer or no benefits for children in households with people with predicate records was not acknowledged, let alone justified.²³⁵

In the context of federally supported housing “one-strike” provisions, the Supreme Court has ruled that “deterrence” is, in fact, the justification for the law. In *Department of Housing and Urban Development v. Rucker*, the Court upheld the eviction clauses required by the federal government as applied to adult tenants who had no knowledge of their co-tenants’ or guests’ drug activities.²³⁶ The Court first overruled the lower court, finding that Congress had intended for strict liability to attach to the provisions, noting that in the real estate context, no-fault eviction provisions “maximize[] deterrence and ease[] enforcement difficulties.”²³⁷ The Court then found it rational for Congress to have determined that “a tenant who ‘cannot

²³⁴ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

²³⁵ Even if the bans could be justified as a crime deterrent, empirical research shows that the opposite is the case. *See, e.g.*, Crystal S. Yang, *Does Public Assistance Reduce Recidivism?*, 107 AM. ECON. REV.: PAPERS & PROC. 551, 554 (2017) (finding that eligibility for welfare and food stamps at the time of prison release significantly reduces the risk of return to prison); *see also* Cody Tuttle, *Snapping Back: Food Stamp Bans and Criminal Recidivism*, 11 AM. ECON. J.: ECON. POL’Y 301, 302–03 (2019) (finding that drug traffickers subject to a ban are more likely to return to prison after release than those who have access to SNAP).

²³⁶ *See* Dep’t of Hous. & Urb. Dev. v. *Rucker*, 535 U.S. 125, 133 n.5, 134 (2002).

²³⁷ *Id.* at 133–36 (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14 (1991)) (holding that the clauses did not violate due process because (1) tenants still had procedural rights to contest the findings of the landlord in another forum and (2) the government was “acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required”).

control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.”²³⁸

Nothing in *Rucker* addresses the equal protection issues raised by subjecting a class of children to denial of housing or eviction based on conduct over which they have no control, nor, given *Weber* and its progeny, is the argument of deterrence permissible in the context of excluding or evicting children. Children are not capable of either preventing or altering the conduct of their parents, nor do they have the option of restructuring their households to avoid the imposition of a ban, particularly when they live with a parent. Indeed, forcing children to choose between living with a parent and accessing shelter potentially creates a distinct, substantive due process violation by infringing on a child’s longstanding and fundamental right to care and custody by their parent. Similarly, in the context of crime-free housing ordinances, one of the frequent justifications offered for these laws is deterrence of criminal behavior,²³⁹ a justification that is explicitly not a sufficient justification for these laws’ application to children.

B. Laws’ Application to Children Not Substantially Related to an Important Purpose

Under *Weber* and its progeny, when a law distinguishes between classes of children based on the conduct of their parents or relatives, such a classification may be justified by an important, non-punitive government purpose. However, the state has the burden to show that its non-punitive goals are important and that the application of the law to children is substantially justified in light of those goals or purpose.

To the extent that SNAP or TANF bans might be justified on the basis of preserving state resources for “worthy” applicants, this justification has been explicitly foreclosed for programs where the burdened children are otherwise similarly situated to other children, except for the conduct of their parents. The Court’s decisions in *Cahill* and *Plyler* specifically considered this kind of argument and found it unpersuasive in the context

²³⁸ *Id.* at 134 (quoting Public Housing Lease and Grievance Procedures, 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991)).

²³⁹ In addition to being impermissible under *Weber*, the “deterrence” argument is illogical as applied to old cases and convictions, many of which pre-date a child’s existence. The idea that individuals will be deterred from drug or other criminal activity by the potential burdens it may place on future children is so unsupportable as to be irrational.

of equal protection challenges based on parental behavior.²⁴⁰ Where, as is the case for felony SNAP and TANF bans, the state has made the program available to otherwise similarly situated children, the state cannot elect to exclude or uniquely burden or lessen the benefits of a class of children based on the conduct of their parent. Moreover, to the extent the programs themselves are established for the purposes of preventing hardship and severe deprivation during childhood, mandatory, non-discretionary bans lessening children's household access to food resources or cash assistance do not serve the underlying purposes of the programs.

In the housing context, where safety and order are the primary non-punitive or deterrence justifications offered for policies, the state would be hard pressed to show that many of the incredibly broad policies and ordinances can be "substantially" justified or related to the goals. Many bans allow for exclusion based on offenses that are decades old or have nothing to do with the purported safety or well-being of other residents, including things like marijuana possession, shoplifting, or even turnstile jumping. These kinds of overly broad blanket bans, laws which apply to "significant categories of . . . children . . . unnecessarily," were specifically called out as problematic in *Trimble*.²⁴¹ Even for more narrowly crafted policies, it is not clear that the government would be able to show evidence that excluding entire households from housing, particularly households containing children, actually serves an important government interest. There is little research to suggest that excluding all people with criminal records from housing, let alone their children and relatives, is necessary to promote housing or community safety, and indeed, the research that exists suggests the opposite.²⁴² If the government seeks to impose a broad, non-individualized standard that burdens children, the government must show a "tailored statutory classification in accord with its calculations of the likelihood of actual [risk] suggested by a narrow set of objective and apparently reasonable indicators."²⁴³ Where, as

²⁴⁰ See *N.J. Welfare Rts. Org. v. Cahill*, 411 U.S. 619, 620–21 (1973); see also *Plyler v. Doe*, 457 U.S. 202, 226 (1982).

²⁴¹ *Trimble v. Gordon*, 430 U.S. 762, 771 (1977); see also *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975) (striking a gender-based distinction that rested upon an "overbroad" assumption that presumed married women, but not married men, to be dependent on a spouse (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 507 (1975))).

²⁴² See *GRISWOLD ET AL.*, *supra* note 192, at 1, 16; see also *Archer*, *supra* note 16, at 807.

²⁴³ *Mathews v. Lucas*, 427 U.S. 495, 516 (1976).

here, many laws appear to rely on hyperbolic and exaggerated assertions around crime, with empirical evidence of no positive crime effect, evidence of increased community harm, and no evidence that crime prevention goals are actually served by imposing bans on entire households, this standard is not met.

C. Laws Are Not “Carefully Tuned to Alternative Considerations”

In addition to having a substantial, empirically supported justification, a statutory scheme that burdens children on the basis of parental or household member conduct must be “carefully tuned to alternative considerations.”²⁴⁴ This requirement reflects both a command to limit laws in ways that minimize their impact on children whenever possible, and a requirement that courts consider the nature of the impact on the child in assessing whether a law is adequately tailored. When the legal disabilities laws impose result in severe deprivation or lifetime disadvantage for a group of children, perpetuating “the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish,”²⁴⁵ these provisions have repeatedly been struck down.

In the case of both housing and welfare benefits bans, it is unlikely that the government can show that any permissible and important goals that may underlie these policies could not be achieved through narrower, more “carefully tuned” policies. Prior examples of permissible narrowing have included providing for a mechanism to allow children to individually challenge the application of a presumptively applicable provision,²⁴⁶ or more “carefully tuning” the policy to avoid the imposition of a burden on children whenever possible.²⁴⁷ The kinds of policies discussed in Part III, however, are often constructed in such a way that children have no opportunity to challenge their imposition on them, or any way to alleviate the harm that is imposed on them. Indeed, many incarnations of these statutes are intentionally drafted to provide no discretion to housing or public benefits staff.

Numerous possibilities for narrowing these policies exist. In the housing context, provisions could be added that require

²⁴⁴ *Id.* at 510–13.

²⁴⁵ *Plyler*, 457 U.S. at 216 n.14.

²⁴⁶ See *Mathews*, 427 U.S. at 512 (noting that the challenged statute allowed burdened children to rebut the presumption of non-dependency).

²⁴⁷ See *Trimble v. Gordon*, 430 U.S. 762, 770–72 (1977).

PHAs to waive requirements when doing so is in the interests of children, allow state housing or non-discrimination laws to preempt federal one-strike provisions,²⁴⁸ require innocent tenant exceptions to eviction proceedings, exclude “technical” violations of probation from the list of potential reasons to evict, or mandate housing authorities or landlords to disregard expunged, sealed, or older criminal records, particularly when doing so will allow a household to access housing and maintain an intact family. In the TANF or SNAP context, states could choose to opt-out of bans entirely, without adding their own, onerous conditions or limitations on receipt.²⁴⁹ Income that is imputed to the household from non-eligible residents with criminal records could be disregarded, or states could be required to disregard older records, or technical violations of conditions. States could also be incentivized or required to offer child-only TANF enrollment to families with children for whom complete household benefits are not a possibility because of an adult member’s criminal record.²⁵⁰

While multiple possibilities exist for potentially curtailing these policies, curtailment also requires a consideration of the specific harms that remain for children still burdened by these provisions, and whether the harms are outweighed by the substantial nature of the government purpose. Given both the immediate and long-lasting harms that these laws impose on children, and the fact that the particular harms they experience directly implicate their ability to succeed as adults, even more carefully crafted laws would require substantial justifications to be proffered by the state, including—at minimum—substantial evidence that the underlying crime-reduction or other purposes the federal government, states, or municipalities have proffered as justifications are actually served by imposing these burdens on children.

²⁴⁸ See Jenna Prochaska, *Breaking Free from “Crime-Free”: State-Level Responses to Harmful Housing Ordinances*, 27 LEWIS & CLARK L. REV. 259, 264 (2023).

²⁴⁹ Cf. Child & Clark, *supra* note 120, at 22. Legislation sponsored by Senator Cory Booker in 2023, referred to as the RESTORE (Re-Entry Support Through Opportunities for Resources and Essentials) Act, would have repealed the bans entirely. S. 1753, 118th Cong. (2023).

²⁵⁰ Separately, states could take steps to ensure that individuals can more easily expunge records, including providing for expungement in cases where expungement will benefit the petitioner’s children or other household members.

CONCLUSION

For children across the United States, having a family or household member arrested, charged, or convicted in criminal court is now a commonplace experience. For many of the same groups of children who “have historically been ‘relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,’”²⁵¹ having a family member prosecuted by the state is now a more likely experience than attending college. The consequences of this broad-based exposure to criminal system sanctions go far beyond the immediate psychological harms that are associated with a parent or relative’s prosecution or incarceration, or even economic harm. For a large group of children, these harms also include being subject to legal disabilities that may directly limit their ability to experience healthy development, experiences that can linger long after a parent is released or their case ends. These harms are imposed on children not in response to any wrongdoing or bad act that they have committed, but simply because they are related to people who have come to the attention of the criminal legal system, a status that is entirely beyond their control.

When government policies impose specific legal burdens on children based on the behavior of their parents, they risk perpetuating multi-generational disadvantage, creating a subclass or caste of children who, for reasons beyond their choice or control, cannot access the same opportunities as their peers. For this reason, these kinds of provisions are subject to a higher level of scrutiny under the equal protection clause. To survive constitutional scrutiny, the government must show that the application of these burdens to children is substantially related to an important government interest, an interest which may not include punishment or deterrence of parental behavior. Because using adult household members’ criminal cases—and sometimes merely suspected criminal activity—to limit children’s access to housing, food, and cash support has severe short and long-term negative consequences for children’s development and well-being, the government must also show that, in crafting the law, the government gave due attention to these harms, providing a mechanism by which children can avoid or at least reduce the burden imposed. Yet many of the laws punishing children for their household member’s criminal

²⁵¹ Plyler v. Doe, 457 U.S. 202, 216 n.14 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

system contacts are broad and mandatory, give no regard to their harmful impacts on children, and provide no mechanism for a child to avoid or lessen their imposition. Given the severity of the harms that these laws impose, and the strong possibility that they will condemn children to join an invidious subclass based on parental or household member behavior, a characteristic over which they have no control, this tailoring process must be exceptionally careful, weighing the government's demonstrated and substantial need to meet an important non-punitive goal against the possibility of permanent, lifetime harm to children, and legally enshrined inequality.

A reasonable question is whether the current Supreme Court or the federal judiciary is open to a novel equal protection challenge. While there is no easy response, it is worth noting that even the conservative Rehnquist Court recognized that a constitutional claim was warranted when a child is "penalized by the government for illegal conduct by [their] parents."²⁵² Even within the current Court's formalistic interpretation of equal protection, they have reaffirmed that equal protection requires programs and laws to treat individuals based on who they are "as an individual—not on the basis of [an immutable characteristic]."²⁵³ This language echoes precisely the same concern reflected in *Weber*, reflecting a deeply rooted skepticism of laws that seek to classify individuals based on factors unrelated to their personal attributes. As the Court explained in *Weber*, it is a "basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."²⁵⁴ In the case of children related to people with criminal records, they experience legal disabilities based on behavior that they have nothing to do with, and based on "prejudice and antipathy" toward their adult household members.²⁵⁵

²⁵² *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 459 (1988).

²⁵³ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023).

²⁵⁴ *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

²⁵⁵ Indeed, in a very real sense, they are being discriminated against based on their parentage—or "ancestry"—a well-recognized category that is subject to strict scrutiny. See *Students for Fair Admissions*, 143 S. Ct. at 2162 ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000))).

Other scholars have argued that the prejudice and antipathy that adults with criminal records face weigh in favor of a "structural approach" to antidiscrimination law, which would permit individuals to bring equal protection claims based on the pervasiveness of the stigma and systemic implementation of that stigma, at least in the context of employment discrimination. See Clarke, *supra* note 18,

As children, they are also politically powerless to effectuate any change in their status, and, in many jurisdictions, their household members are also disenfranchised, rendering them even more politically marginalized, all characteristics that have a long history of recognition in the Court's equal protection jurisprudence.²⁵⁶

To the extent strategic considerations caution against raising these claims in federal courts, state courts and state constitutions also offer a potential avenue for relief. State constitutions often offer broader civil rights protections and are richer in depth and breadth.²⁵⁷ Particularly where, as in this case, there is no clear precedent from the Supreme Court regarding the appropriate protections to be afforded to children of people with criminal records, state courts could potentially chart a path forward that builds upon the Court's clear jurisprudence against multigenerational punishment, preserving children's basic right to grow up free of the legal burdens of their parents while giving due attention to any empirical evidence that exists that burdening children in these ways substantially furthers an important government purpose, one significant enough to outweigh the harms imposed on the child.

To date, much of the scholarship and advocacy addressing the collateral use of criminal records has focused, understandably, on the direct impact on individuals with criminal records. This Article urges scholars, policymakers and advocates to expand their lens to talk explicitly about the ways that these laws impact children, a perspective shift that serves several goals.

First, most policymakers are loathe to admit that these policies are intended to harm children in the ways that they do; indeed, much of the legislative and other history that surrounds these policies—to the extent it exists at all—explicitly frames them as being in the *interests* of children. Highlighting

at 91–92 (“Structural approaches . . . are concerned with whether institutional practices contribute to unequal opportunity, rather than the guilt or innocence of particular types of victims or perpetrators. Structural accounts of discrimination locate the causes and consequences of inequality in social and institutional practices, arrangements, and systems. They change the focus from individuals and their choices to how . . . structures ‘contribut[e] to the production or expression of bias.’” (alteration in original) (quoting Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 488 (2001))). For the policies discussed herein, which thwart equal opportunity on a multigenerational level, this argument is even more compelling.

²⁵⁶ Murray, *supra* note 18, at 2079–80.

²⁵⁷ See Daniel Polonsky, *Equal Protection Through State Constitutional Amendment*, 56 HARV. C.R.-C.L. L. REV. 413, 421–22 (2021).

the ways that mass incarceration—and secondary criminalization in particular—harms children may force a broader discussion and reckoning around the underlying goals of these policies, including what evidence there exists that the policies support legitimate goals, rather than a goal of “overwhelming[] repressi[on].”²⁵⁸

Second, highlighting the ways that children are harmed by policies aimed at people with criminal records also draws attention to the fact that most of the people who are touched by the criminal legal system are parents, and that close to the majority of children in the United States now live in families that include people with criminal records. Exposing and deconstructing the false dichotomy between “criminals” and “families” helps to weaken a particularly harmful, racist, and intentionally misleading narrative that has helped drive both punitive criminal justice and punitive social welfare policies, policies which exacerbate multi-generational, racialized inequality for large swaths of American children.

Finally, bringing explicit attention to the ways that the criminal legal system impacts children can help to underscore the ways that mass incarceration and surveillance function as “the new caste system”²⁵⁹ in the United States. If we are to fully grapple with the ways that mass criminalization functions as a tool of social stratification, we must incorporate a more thorough understanding of the specific mechanisms by which it perpetuates intergenerational disadvantage through its impact on children.

²⁵⁸ Sara Wakefield, Hedwig Lee & Christopher Wildeman, *Tough on Crime, Tough on Families? Criminal Justice and Family Life in America*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 11–12 (2016).

²⁵⁹ ALEXANDER, *supra* note 16, at 18; *see also* Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1494 (2020) (“Mechanisms of criminal legal enforcement that disproportionately punish and control the poorest Americans work to solidify hierarchies based on class, race, and gender.”).