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Christopher Uggen

Robert Stewart

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### Recommended Citation

Uggen, Christopher and Stewart, Robert, "Piling On: Collateral Consequences and Community Supervision" (2015). *Minnesota Law Review*. 271.

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## Article

# Piling On: Collateral Consequences and Community Supervision

Christopher Uggen & Robert Stewart<sup>†</sup>

### INTRODUCTION

As levels of criminal punishment have risen in the United States, more and more citizens now face the collateral consequences of arrest and conviction. Such consequences are wide-ranging, placing limits on everything from occupational licensure to eligibility for public assistance to voting rights. This article brings a specific focus to how these restrictions affect non-incarcerated felons—those living in their home communities as they complete a term of probation or parole. Although the legal and informal restrictions are separable for analytic purposes, we will demonstrate that people experience them in combination—as a pile of hopelessly tangled problems. While there has been great recent interest in the collateral effects of imprisonment, far less attention has been devoted to collateral consequences during and after these periods of community supervision.<sup>1</sup>

Many such restrictions are surely merited. Few would argue against limiting the gun rights of those convicted of drive-

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<sup>†</sup> Christopher Uggen is Distinguished McKnight Professor of Sociology, University of Minnesota; Robert Stewart is a sociology Ph.D. student and National Science Foundation Graduate Fellow at the University of Minnesota. This Article represents their views and not National Science Foundation positions or policy. The authors thank Lindsay Blahnik for assistance in preparing this article and Emily Baxter and Levi Lachappelle for thoughtful comments on an earlier draft. Copyright © 2015 by Christopher Uggen & Robert Stewart.

1. See generally MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY, AND PRACTICE* (2013); *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind, eds., 2002); Alec Ewald & Christopher Uggen, *The Collateral Effects of Imprisonment on Prisoners, Their Families, and Communities*, in *THE OXFORD HANDBOOK OF SENTENCING & CORRECTIONS* 83 (Joan Petersilia & Kevin R. Reitz eds., 2012); Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87 (2011).

by shootings or restricting access to children among those who have assaulted preschoolers. Yet collateral consequences are typically applied more universally (e.g., to all people convicted of felony-level offenses) rather than being tailored to particular offenses or individuals. While surveying the combined effects of collateral sanctions on probationers and parolees, the term “piling on” came immediately to mind. In American football, “piling on” occurs when one or more players jumps on top of a downed player after a tackle has been made.<sup>2</sup> It is illegal because it is unnecessary, slows the progress of the game, and often results in serious injury.

To that end, the evidence is mounting that at least some collateral sanctions are, in effect, experienced as a form of piling on and, hence, impeding successful completion of community supervision and compromising rather than enhancing public safety. Articles in the national media, reports from the American Bar Association and the Uniform Law Commission, federal legislation such as the Second Chance Act of 2007, and public hearings across the states are now squarely addressing the challenge of community reintegration—and the barriers posed by formal and informal collateral consequences.<sup>3</sup> For example, Democrat Cory Booker of New Jersey and Republican Rand Paul of Kentucky recently introduced the REDEEM Act in the U.S. Senate, a broad-based reform effort that would ease expungement procedures and reduce collateral sanctions such as bans on food stamps and public assistance for people convicted of drug crimes.<sup>4</sup>

With the rapid growth of all correctional populations over the past four decades, such efforts have taken on greater meaning for attorneys, researchers, policy makers, and, most importantly, people convicted of criminal offenses. As shown in Figure 1, nearly seven in ten of those under correctional supervision in 2011 were not incarcerated but were instead supervised in their communities on probation or parole.<sup>5</sup> Moreover, even as correctional populations have risen, there has been a tremendous revolution in scientific knowledge about crime over the life course. We now have clear evidence that the over-

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2. Roger Goodell, NFL, Official Rules of the NFL r. 12.2.6(d) (2013), <http://static.nfl.com/static/content/public/image/rulebook/pdfs/2013%20-%20Rule%20Book.pdf>.

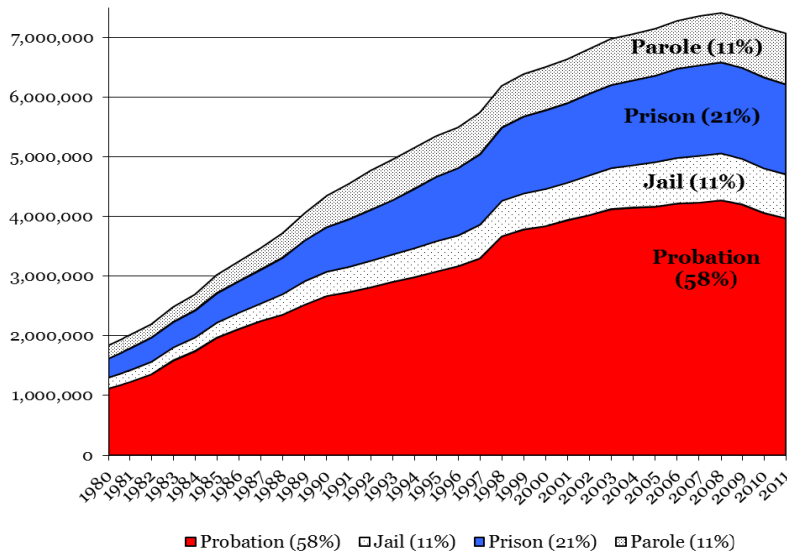
3. See *infra* notes 10–11 and accompanying text.

4. See S. 2567, 113th Cong. § 3 (2014), available at <https://www.congress.gov/bill/113th-congress/senate-bill/2567/text>.

5. See *infra* Figure 1.

whelming majority of people convicted of crimes will eventually desist from criminal behavior.<sup>6</sup> Yet our law, policy, and public discourse have lagged far behind this revolution in scientific knowledge. We continue to proceed as though criminality crystallizes or inheres in individuals, such that many collateral consequences are imposed indefinitely, if not permanently.<sup>7</sup> In this article we consider the balance of interests involved in tallying the costs and benefits of imposing various collateral sanctions.

Figure 1. Rising U.S. correctional populations, 1980–2011.<sup>8</sup>



6. See JOHN H. LAUB & ROBERT J. SAMPSON, *SHARED BEGINNINGS, DIVERGENT LIVES: DELINQUENT BOYS TO AGE 70*, at 275–93 (2013).

7. See Christopher Uggen & Lindsay Blahnik, *The Increasing Stickiness of Public Labels 2* (Nov. 30, 2014) (unpublished manuscript) (on file with author).

8. The source statistics for this figure are taken from the following U.S. Department of Justice Bureau of Justice Statistics annual publications from 1980 to 2011. See generally LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATIONS IN THE UNITED STATES 2011* (2012), available at <http://www.bjs.gov/content/pub/pdf/cpus11.pdf>; LAURA M. MARUSCHAK & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, *PROBATION AND PAROLE IN THE UNITED STATES, 2011* (2014), available at <http://www.bjs.gov/content/pub/pdf/ppus11.pdf>; TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, *JAIL INMATES AT MIDYEAR 2011—STATISTICAL TABLES* (2012), available at <http://www.bjs.gov/content/pub/pdf/jim11st.pdf>.

We will also discuss how a *second* revolution has magnified the effect of collateral sanctions. New and disruptive information technologies now make criminal records more accessible and consequential, blurring the boundaries between public and private information. We now know more about one another than ever before, such that criminal labels are increasingly sticky and consequential—and virtually impossible to “peel off,” dissolve, or remove.”<sup>9</sup> A criminal record check once required a visit to the courthouse and the better part of an afternoon. Today, it only takes a few seconds to order up a comprehensive criminal history from our phones or computers. And landlords, employers, and curious friends and acquaintances are increasingly availing themselves of this information.

This Article assembles a diverse range of evidence to survey this landscape of “invisible punishments” and community supervision. Part I describes the consequences of involvement with the criminal justice system and their effect on probationers and parolees in the United States. We here enumerate these consequences and review their impact on those being supervised—including prospects for employment, education, and social integration. We then conclude in Part II by sketching some reform proposals to assist policy makers in distinguishing necessary and useful collateral consequences from those that appear to do more harm than good.

## I. CONSEQUENCES OF CONVICTION

People convicted of crime are subject to a growing list of federal, state, and local restrictions affecting their economic, political, and social activities.<sup>10</sup> These are often termed “collateral consequences” because they are typically located outside the penal code, implemented by non-criminal justice institutions, and interpreted by the courts as civil regulations rather than criminal penalties.<sup>11</sup> Both the American Bar Association

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9. See Uggen & Blahnik, *supra* note 7, at 2.

10. See generally Ewald & Uggen, *supra* note 1.

11. See generally INVISIBLE PUNISHMENT, *supra* note 1, at 26 (“The agencies that administer these sanctions are far-flung[] [and] have little or no connection with the criminal justice system.”); Velmer S. Burton et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 FED. PROBATION 52, 52 (1987) (“[C]ollateral consequences . . . refer[s] to the rights or privileges that are lost upon convicting as mandated by state and Federal statutes.” (internal quotation marks omitted)); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 634–35 & nn.60–61 (2006).

(ABA) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) have called attention to the expansion of federal and state collateral sanctions in the past two decades.<sup>12</sup> Following the ABA, the Court Security Improvement Act of 2007 further distinguishes between collateral “sanctions” (restrictions imposed *automatically* upon conviction) and “disqualifications” (other penalties a court, agency, or official is authorized but *not* required to impose).<sup>13</sup> This distinction is not yet in wide use, though it is important for both policy and analytic purposes.

Although they are often associated with felony convictions, collateral sanctions affect individuals at earlier and later stages of criminal justice processing and pertain to non-felony offenses (e.g., misdemeanors) as well. At the pre-conviction stage, parents can lose custody of their children immediately when police find drugs in a home; similarly, many employers suspend workers without pay when they are arrested or charged with crimes, regardless of whether they are later convicted.<sup>14</sup> Under New York City’s Narcotics Eviction Program, even the issuance of a search warrant may be sufficient to trigger eviction from private or public housing.<sup>15</sup> The imposition of such sanctions varies dramatically across municipalities, but it is no exaggeration to suggest that each of the 12.2 million U.S. arrests each year could trigger *some* form of collateral sanction.<sup>16</sup> Of those who are charged and convicted, misdemeanants as well as felons are often subject to such consequences. For example, noncitizen residents convicted of misdemeanors may face deportation.<sup>17</sup>

In light of the enormous scope and reach of collateral sanc-

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12. Norman K. Maleng et al., *ABA Standards for Criminal Justice, Collateral Sanctions, and Discretionary Disqualification of Convicted Persons*, 2004 A.B.A. CRIM. JUST. SEC. [hereinafter Maleng]; NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS, AMENDMENTS TO UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (July 9–16, 2010), available at [http://www.uniformlaws.org/shared/docs/collateral\\_consequences/uccca\\_final\\_10.pdf](http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf).

13. See Court Security Improvement Act of 2007, Pub. L. No. 110–77, § 510(d)(1)–(3), 121 Stat. 2534, 2544 (2008).

14. See Ewald & Uggen, *supra* note 1, at 85.

15. See Scott Duffield Levy, *The Collateral Consequences of Seeking Order Through Disorder: New York’s Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 544–54 (2008).

16. *Crime in the United States 2012*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> (last visited Mar. 31, 2015).

17. See Nina Bernstein, *How One Marijuana Cigarette May Lead to Deportation*, N.Y. TIMES, Mar. 31, 2010, at A17.

tions, it is difficult to provide a comprehensive overview of their impact. We will therefore focus directly on sanctions that are most salient for those under community supervision. As of December 31, 2012, nearly 4.8 million people, or one in fifty U.S. adults, were serving a community supervision sentence.<sup>18</sup> This includes over 850,000 parolees and over 3.94 million probationers.<sup>19</sup> Because the full weight of collateral sanctions falls most heavily on those convicted of felonies, we will focus primarily on this group in our review. Approximately 3 million people are currently serving time in their communities for felonies (this includes almost all of the parolees, and 2.1 million felony probationers).<sup>20</sup> We next catalog the individually separable economic, social, physical, and civic consequences of felony conviction. Throughout, however, we will return to the metaphor of “piling on,” as we cite research literature, personal stories, and interview data. Taken together, this evidence will demonstrate how the total weight of collateral sanctions far exceeds their individual impact.

#### A. ECONOMIC CONSEQUENCES

Any interaction with the criminal justice system, including a single arrest,<sup>21</sup> can have long-term repercussions on one’s economic future. A criminal record creates both formal and informal barriers that restrict or limit career and educational opportunities, prohibit certain forms of economic assistance, and significantly reduce lifetime earnings.<sup>22</sup>

##### 1. Employment

Criminologists have long recognized that employment plays a key role in promoting desistance from crime,<sup>23</sup> or the

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18. LAURA M. MARUSCHAK & THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2012, at 1 (Jan. 1, 2015), available at <http://www.bjs.gov/content/pub/pdf/ppus12.pdf>.

19. *See id.*

20. *See id.* at 6.

21. *See* Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland & Hilary K. Whitham, *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 628 (2014).

22. *See* Sara Wakefield & Christopher Uggen, *Incarceration and Stratification*, 36 ANN. REV. SOC. 387, 393–96 (2010); NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 233–60 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

23. *See, e.g.*, John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 17 (2001) (“[O]ffenders are charac-

continued cessation of criminal behavior. Indeed, politicians and criminal justice officials have pointed to the benefits of steady employment as essential, both for putting distance between current and past behavior and as a potential avenue out of poverty.<sup>24</sup>

Paradoxically, though, a criminal past erects informal barriers that prevent individuals from finding jobs in the short-term and, by extension, careers in the long-term. Hiring experiments conclusively demonstrate that a felony prison record significantly decreases the rate of positive employer responses or “callbacks.”<sup>25</sup> For example, one study found that a felony conviction reduced the callback rate by half for white male applicants and nearly two-thirds for African American male applicants.<sup>26</sup> Our own later study probed the limits of such stigma by testing the effect of a single three-year-old misdemeanor arrest.<sup>27</sup> We sent matched pairs of young men to apply for 300 entry-level jobs in Minnesota, assigning one member of the pair a three-year-old disorderly conduct arrest. Figure 2 shows the results for our White and African American pairs in the no-arrest (control) and arrest (treatment) conditions.

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terized by . . . unstable employment.”).

24. *Text of President Bush’s 2004 State of the Union Address*, WASH. POST (Jan. 20, 2004), [http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext\\_012004.html](http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_012004.html) [hereinafter *Bush State of the Union*] (noting that released prisoners unable to “find work or a home or help, they are much more likely to commit crime and return to prison”); *1996 State of the Union Address*, WASH. POST (Jan. 23, 1996), <http://www.washingtonpost.com/wp-srv/politics/special/states/docs/sou96.htm> [hereinafter *Clinton State of the Union*] (outlining programs that “encourage people to move from welfare to work”); Christopher Uggen & Jeremy Staff, *Work As a Turning Point for Criminal Offenders*, 5 CORRECTIONS MGMT. Q. 1, 3 (2001).

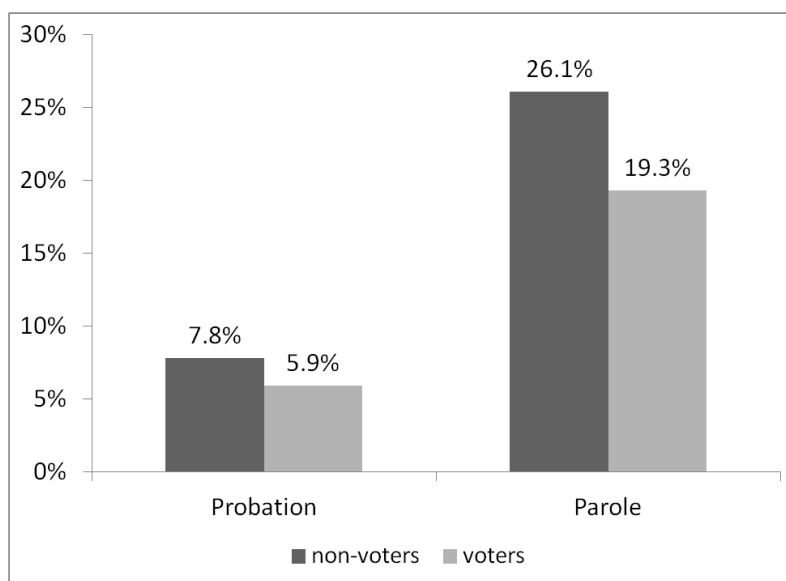
25. See Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 947 (2003) [hereinafter Pager, *The Mark*]; DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 58 (2007) [hereinafter PAGER, MARKED].

26. See Pager, *The Mark*, *supra* note 25, at 958.

27. See generally Uggen et al., *supra* note 21.



Figure 2. Effect of a single misdemeanor arrest on employer callbacks, by race



We found a four-percentage point difference between the arrest and no-arrest groups in the rate of positive “callbacks” by employers. Even a minor arrest record thus causes about a 15% reduction in the likelihood of callback for African Americans and a 10% reduction for Whites.<sup>28</sup> For those under supervision for felonies, of course, the effect is much greater.

These findings are echoed by the stories applicants tell about their job search experiences. When we interviewed people released from prison as part of the Minnesota Exits and Entries Project, some told us that they did not disclose the record. One said, “I won’t even put it down . . . You know, first impression is everything.” When asked why not, he responded bluntly, “If you check that box, they’re not going to hire you! They’re going to be like, [h]e’s a felon! He might steal; he might

28. *Id.* The effect of the treatment is calculated by dividing the percentage difference between callback rates of the control and treatment conditions for each race by the callback rate of control condition. *See id.* at 637–39. For example, the difference in callback rates for the African American male testers was 4% (27.5% – 23.5% = 4%). This amounts to an effective reduction in callbacks for African American males of 14.5% (4 / 27.5 = 14.5%). For our White testers, the treatment condition resulted in an approximately 10% reduction in callbacks (4 / 38.8 = 10.3%).

rob us, you know, all the bad things!”<sup>29</sup>

On the other hand, many told us that being truthful about their criminal justice experience was the best approach, particularly since so much information is now so easily available. As one person explained, “they can just check up [sic] online, too . . . . You can find anything on the web. You type in somebody’s name, their whole entire profile comes up . . . . [T]here’s no use in lying.”<sup>30</sup> In other words, not only do people with records encounter criminal history questions on job applications, but they also confront the ubiquitous availability of online criminal records.<sup>31</sup>

In recent years, the “ban the box” reform movement has gained traction in reducing discrimination on the basis of such records. Ban the box policies prohibit employers from asking about criminal records on the initial application.<sup>32</sup> As of this writing, thirteen states, more than sixty municipalities, and major firms such as Target Corporation had enacted ban-the-box—many within the past five years.<sup>33</sup> While researchers have just begun to assess the effectiveness of these new policies, their impact may be modest within the current context of online criminal record availability. Here, as elsewhere, a single legal change is unlikely to exert a large impact unless it is supported by a much broader transformation in privacy rights and expectations.<sup>34</sup>

Apart from this informal discrimination in hiring, people with records also face formal jurisdiction-specific barriers in the many fields that require occupational licensing and other

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29. Interview by Shelly Schaefer with Participant in the Minn. Exits & Entries Project (May 15, 2008) (on file with author). The Minnesota Exits and Entries Project is a comparative study of reentry from different types of institutions. See Tim Brady, *Exits*, 3 FACETS 2, 3–4 (2008), available at <http://www.soc.umn.edu/assets/pdf/FacetsMay2008.pdf>.

30. Interview by Arturo Baiocchi with Participant in the Minn. Exits & Entries Project (2008) (on file with author).

31. See Sarah Esther Lageson et al., *Legal Ambiguity in Managerial Assessments of Criminal Records*, 40 L. & SOC. INQUIRY 175, 176 (2015).

32. See NAT’L EMPLOYMENT LAW PROJECT, SEIZING THE “BAN THE BOX” MOMENTUM TO ADVANCE A NEW GENERATION OF FAIR CHANCE HIRING REFORMS 2 (2014), available at <http://www.nelp.org/page/-/SCLP/2014/Seizing-Ban-the-Box-Momentum-Advance-New-Generation-Fair-Chance-Hiring-Reforms.pdf>.

33. *Id.* at 3–4. As of this writing, these states include California, Colorado, Connecticut, Delaware, Illinois, Hawaii, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, and Rhode Island. See *id.*

34. See, e.g., PAGER, MARKED, *supra* note 25, at 157 (explaining that sealing and expungement will be ineffective without careful oversight of credit reporting agencies and criminal background services).

heavily regulated sectors. Several blanket policies on the state and federal levels prohibit some or all people with felonies from being licensed or permitted to work in certain occupations and sectors.<sup>35</sup> These include occupations in industries ranging from the public sector,<sup>36</sup> law, real estate,<sup>37</sup> air transportation,<sup>38</sup> race-tracks,<sup>39</sup> and any position in which an individual has “responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.”<sup>40</sup>

Occupations with licensing criteria that do not explicitly prohibit current or former felons often require a “good character” test. As Bruce May points out, character is ambiguous and difficult to define legislatively; lacking a clear definition, licensing agencies and courts have come to accept a prior criminal conviction as evidence of “bad character.”<sup>41</sup>

The American Bar Association’s helpful national inventory, supported in part by the National Institute of Justice, provides much-needed basic information on federal—and state-specific employment consequences.<sup>42</sup> This site distinguishes between discretionary restrictions and those that are mandatory or automatic, as well as the duration over which particular restrictions are imposed. State-specific websites, such as Ohio’s CIVICC (Civil Impact of Criminal Convictions) and the list maintained by the Texas State Law Library, are increasingly aggregating and publishing such details online.<sup>43</sup> For example,

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35. See Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC’Y 18, 23 (2005).

36. See Karol Lucken & Lucille M. Ponte, *A Just Measure of Forgiveness: Reforming Occupational Licensing Regulations for Ex-Offenders Using BFOQ Analysis*, 30 L. & POL’Y 46, 47 (2008).

37. See Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon’s Employment Opportunities*, 71 N.D. L. REV. 187, 191 (1995).

38. 49 U.S.C. § 44936(B) (2012).

39. MINN. STAT. § 240.08 (2014).

40. 42 U.S.C. § 5119a(a)(1) (2012).

41. See May, *supra* note 37, at 195. May also discusses what he considers to be less restrictive character tests, such as “honest and trustworthy” and “reputable character.” *Id.* at 200–02. He argues that these statutes “present a less demanding standard to the ex-felon because they allow somewhat for the amelioration of the past felonious wrong through subsequent good conduct and/or the rehabilitation of the ex-felon.” *Id.* at 200.

42. See generally Am. Bar Ass’n, *National Inventory of the Collateral Consequences of Conviction*, NICCC, <http://www.abacollateralconsequences.org> (last visited Mar. 31, 2015) (interactive database).

43. See generally *Civil Impact of Criminal Convictions Under Ohio Law*, CIVICC, [hereinafter CIVICC], <http://civicohio.org> (last visited Mar. 31, 2015) (interactive database); *Felony Restrictions by Profession/Business License*,

Texas requires a test of good moral character for professionals such as marriage and family counselors, while excluding all convicted felons from positions as labor organizers.<sup>44</sup> Similarly, massage therapists are ineligible for a license if they have been convicted of a “misdemeanor involving moral turpitude” or a felony within the preceding five years.<sup>45</sup> Some occupational licenses in Texas may be revoked following a felony conviction, including those of licensed accountants, architects, and nurses.<sup>46</sup> Applicants confronting these “good character” statutes may argue their case and they may have the opportunity to appeal adverse decisions.<sup>47</sup> At best, however, such appeal procedures can only offer a precarious, daunting, and time-consuming path to licensure.

Of course, an occupational license cannot guarantee a job, nor can it insulate jobseekers from informal discrimination. Because conviction status is not recognized as a protected status, most non-contract workers face an indefinite threat of being fired solely on the basis of their criminal records. In 2012, the U.S. Equal Employment Opportunity Commission issued a lengthy enforcement guidance document designed to clarify standards and provide “best practices” on how employers may address criminal backgrounds without violating prohibitions against employment discrimination under Title VII of the 1964 Civil Rights Act.<sup>48</sup>

The guidance instructs employers to assess criminal records on an individualized basis, considering such factors as the nature of the crime, the time since it was committed, and the nature of the job. As of this writing, the extent to which these policies have been adopted or enforced remains unclear.

In the abstract and in isolation, these barriers may appear surmountable. But people subject to employment restrictions rarely experience them only once and in isolation. It is much more common that collateral consequences pile one atop the

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TEX. ST. L. LIBR., <http://www.sll.texas.gov/library-resources/collections/statutory-restrictions-on-convicted-felons/profession> (last updated Feb. 20, 2014) [hereinafter TSSL].

44. See TSSL, *supra* note 43 (“Marriage and Family Therapist” and “Labor Union Officer or Organizer”).

45. *Id.* (“Massage Therapist”).

46. *Id.* (“Accountant,” “Architect,” “Nurse Aide,” and “Nursing Facility Administrator”).

47. See *id.* (“Dyslexia Practitioner and Therapist”).

48. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at VIII (2012), available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

other. We spoke with Michael, a married ex-felon with a two-year-old son, who explained this “piling on” phenomenon.<sup>49</sup> After serving over a year in prison for a felony driving while intoxicated conviction, Michael enrolled at a private college in Minnesota.<sup>50</sup> In less than four years, he earned a degree in social work, graduating with honors.<sup>51</sup> Following graduation, he faced licensing restrictions because of his felony record.<sup>52</sup> He passed the required examination and then petitioned the Board to consider his case.<sup>53</sup> He provided several letters of recommendation and support, as well as a lengthy account of his past mistakes and his present state. After several months and multiple appearances before the Board, he was eventually granted a license to practice social work in Minnesota.<sup>54</sup>

His difficulties, though, did not end there. He applied for several open positions throughout the state but was consistently rejected.<sup>55</sup> After several months, he finally found a job in a small town.<sup>56</sup> He and his young family packed up and moved across the state using most of their savings, and things were going well at first.<sup>57</sup> He was excited, he said, because “[y]ou know I spent our savings to get up here because it was a chance at a real career.”<sup>58</sup> But then, as he recalled the experience:

After two months of working, I get pulled into the office by the director and my supervisor. [They said,] “Well you are great at what you do and a fantastic social worker, but we don’t think it’s a good fit here because of your past.” So they gave me the option of being terminated or to resign.<sup>59</sup>

When asked why now and not earlier, he told us, “[t]he county commissioners forced them to do that.”<sup>60</sup> In other words, not only did his criminal record present an obstacle in the *licensing* process and the job search, it also came back to haunt him in spite of his good performance. As he summed it up: “[t]he worst part is getting looked [at] and told you are great at

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49. Telephone Interview with Michael (Sept. 25, 2014). Michael is a pseudonym to protect his identity.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

what you do, but we don't want you because of your record."<sup>61</sup>

## 2. Education

Knowing the barriers that await them in the labor market, many people with records seek to improve their employability through education. For most people, investing in human capital makes good economic sense, as academic credentials are strongly associated with both employment and earnings. As the Bureau of Labor Statistics reported recently, those with a four year bachelor's degree are almost half as likely to be unemployed as those with only a high school diploma and, on average, they earn a salary that is roughly 1.7 times that of a high school graduate (and 2.3 times that of a high school dropout).<sup>62</sup> Since the 1970s, increasing demand for skilled workers in the United States has outpaced education levels among young males, further advantaging college educated jobseekers.<sup>63</sup>

Our analysis of changes in college application forms, however, suggests that a growing number of admissions offices are now requiring applicants to disclose criminal history information.<sup>64</sup> Based on our preliminary interviews and extant research, officials cite campus safety as the principal reason for requesting criminal history information, especially in the aftermath of major on-campus incidents such as the 2007 Virginia Tech shooting and the murder of two students at the University of North Carolina.<sup>65</sup> To date, there has been scant research

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61. *Id.*

62. *Employment Projections*, BUREAU LAB. STAT. (Mar. 24, 2014), [http://www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm). In 2013, the Bureau of Labor Statistics estimated that 7.5% of individuals with only a high school diploma were unemployed, and the median weekly earnings for high school graduates who were employed were approximately \$651. *Id.* For bachelor's degree holders, the unemployment rate was 4% and weekly earnings for the employed were approximately \$1,108. *Id.* Median weekly earnings for individuals who did not graduate from high school were estimated at \$472. *Id.* Nevertheless, these data are for individuals age 25 and over and are full-time wage or salary workers. *Id.*

63. David Autor, *The Polarization of Job Opportunities in the U.S. Labor Market: Implications for Employment and Earnings*, 23 CMTY. INVS. 11, 16 (2011).

64. Robert Stewart, *Requiring Criminal History Disclosures in the College Application Process*, Address at the Law and Soc'y Meetings (May 31, 2014); see also CTR. FOR CMTY. ALTERNATIVES, *THE USE OF CRIMINAL HISTORY IN COLLEGE ADMISSIONS: RECONSIDERED 7-22* (2010) [hereinafter CCA], available at <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf> (analyzing survey data on how colleges and universities use these questions in practice).

65. See Darby Dickerson, *Background Checks in the University Admissions Process: An Overview of Legal and Policy Considerations*, 34 J.C. & U.L.

connecting campus crime to admission of students with criminal records, but the little research that exists suggests that such fears are likely overblown.<sup>66</sup>

As in the employment context, disclosing a criminal record at the application stage could disqualify an applicant outright or tip the scale on an application that could go either way. There has been too little research to estimate the magnitude of this effect. But a survey of admissions officials found that more than 90% viewed any felony conviction as particularly negative, and more than 75% felt the same way about any drug or alcohol offense.<sup>67</sup> Our own interviews with admissions officials confirmed these findings. From their perspectives, no offenses were automatic disqualifiers; however, felonies, and especially violent crimes, were particularly concerning.<sup>68</sup> In regard to supervision status, some admissions officials we interviewed preferred applicants to have completed their probation or parole term before applying because it showed evidence of successful reintegration; others told us they preferred that applicants were still under supervision because it provided for another layer of accountability.<sup>69</sup>

In most cases, applicants who disclose a criminal record are required to submit additional material for further scrutiny,

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419, 431–33 (2008); UNIV. OF N.C. OFFICE OF THE PRESIDENT, TASK FORCE ON THE SAFETY OF THE CAMPUS COMMUNITY FINAL REPORT 3–5 (Dec. 14, 2004) [hereinafter UNC REPORT], *available at* <http://counsel.cua.edu/res/docs/final-safety-task-force-report.pdf>; Matthew W. Pierce & Carol W. Runyan, *Criminal Records and College Admissions*, 16 INJURY PREVENTION 58, 58 (2010).

66. *See, e.g.*, UNC REPORT, *supra* note 65, at 7. Screening out applicants with records is unlikely to have large effects on campus crime rates. A campus shooting on a University of North Carolina campus compelled the president of the university to create the Task Force on the Safety of the Campus Community. *Id.* at i. This task force was commissioned to provide a thorough report on safety on the University of North Carolina campuses. *Id.* The seventeen-member panel focused specifically on the pre-enrollment practices of the University of North Carolina's system and campus security between 2001 and 2004. *Id.* at 12. Over this period, the total number of students enrolled at University of North Carolina campuses was approximately 250,000, and 1086 crimes were reported throughout the campus system. *Id.* at 4. Of the reported crimes within this timeframe, only twenty-one were suspected to have been committed by students with a prior criminal history and, of these, only eight had self-disclosed their criminal history on their applications. *Id.* at i–ii. In other words, less than 2% of all reported crimes within the campus system were committed by students with prior criminal histories. *See also* Carol W. Runyan et al., *Can Student-Perpetuated College Crime Be Predicted Based on Precollege Misconduct?*, 19 INJURY PREVENTION 405, 405–06 (2013) (investigating lesser misconduct).

67. CCA, *supra* note 64, at 18.

68. *Id.*

69. Stewart, *supra* note 64.

often by an ad-hoc admissions committee. For example, at least one some New York public colleges require applicants with criminal records to request a copy of the personal and confidential version of their records to be sent directly to the college<sup>70</sup> from the State Division of Criminal Justice Services, even though state law prohibits sending these confidential reports to a third-party.<sup>71</sup> Such requirements are thus literally impossible to legally satisfy, yet they continue in New York and elsewhere. More often, applicants are required to submit letters from themselves and/or criminal justice officials, sign releases for various types of private records, and provide evidence of rehabilitation or good conduct.<sup>72</sup> Recent research focusing on the SUNY colleges has found that these additional requirements, which can be quite onerous, lead to many applicants with criminal records leaving the application process through attrition.<sup>73</sup> While colleges may count these applicants as “incomplete” rather than rejected, they are, for all intents and purposes, tacit rejections.<sup>74</sup> And, at an average cost of \$41 per application, few people with criminal records can afford to apply to a large number of institutions.<sup>75</sup>

Even if a current or former probationer or parolee successfully overcomes these barriers in the admissions process, they may be ineligible for federal financial aid. Everyone applying for federal financial aid must complete the *Free Application for Federal Student Aid* (FAFSA).<sup>76</sup> Question 23 of the FAFSA form

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70. CTR. FOR CMTY. ALTS, INC., BOXED OUT: CRIMINAL HISTORY SCREENING AND COLLEGE APPLICATION ATTRITUION 25 n.11 (2015), available at [http://www.communityalternatives.org/pdf/publications/Boxed Out\\_Full Report.pdf](http://www.communityalternatives.org/pdf/publications/Boxed Out_Full Report.pdf) [hereinafter CTR. FOR CMTY. ALTS, INC., BOXED OUT]; Stewart, *supra* note 64. Supplemental Requirement Letter, Purchase College-State University of New York (on file with authors) (showing that applicants who acknowledge a felony record when applying to Purchase College, a member of the State University of New York system, are sent a standardized letter from the college that requires them to send a request to the Division of Criminal Justice Services “ask that records be sent to me [the Director of Admissions]”). This issue is referenced in CTR. FOR CMTY. ALTS, INC., UNNECESSARY AND COUNTERPRODUCTIVE: SUNY’S CRIMINAL HISTORY SCREENING POLICY 2 (2014) [hereinafter CTR. FOR CMTY. ALTS, INC., UNNECESSARY AND COUNTERPRODUCTIVE].

71. N.Y. COMP. CODES R. & REGS. tit. 9, § 6050.1 (2015).

72. CTR. FOR CMTY. ALTS., INC., BOXED OUT, *supra* note 70, at 23–33.

73. *Id.* at 49.

74. Stewart, *supra* note 64.

75. Delece Smith-Barrow, *Colleges That Charge the Most for Applying*, U.S. NEWS (Sept. 16, 2014), <http://www.usnews.com/education/best-colleges/the-short-list-college/articles/2014/09/16/colleges-that-charge-the-most-for-applying>.

76. *Federal Student Aid*, U.S. DEP’T OF EDUC. (2014), <https://studentaid>



asks applicants, “Have you been convicted for the possession or sale of illegal drugs for an offense that occurred while you were receiving federal student aid (such as grants, loans or work-study)?”<sup>77</sup> Applicants who answer “yes” must then complete an additional form to determine whether they are currently eligible to apply for federal financial aid or whether they are subject to an ineligibility period before they can apply.<sup>78</sup> Those with a single conviction for drug possession while receiving aid who have not completed a federally approved chemical dependency treatment program are ineligible to apply for financial aid for one year from the date of the conviction.<sup>79</sup> Applicants with two drug possession convictions or one drug sales conviction are ineligible for two years from the date of the most recent conviction. And individuals with three drug possession convictions or two drug sales convictions are ineligible until they successfully complete a chemical dependency treatment program.<sup>80</sup> Note that the ineligibility periods begin at date of conviction and not date of offense, thereby leaving those sentenced to community supervision most exposed to these prohibitions.

### 3. Assistance

Apart from informal and formal barriers to work and schooling, people with criminal records also face limited access to public assistance. For example, when congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, welfare reform imposed new formal restrictions on assistance for those with felony drug convictions.<sup>81</sup>

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.ed.gov/fafsa.

77. U.S. DEP’T OF EDUC., FREE APPLICATION FOR FEDERAL STUDENT AID, 3 (2014), available at <https://studentaid.ed.gov/sites/default/files/2014-15-fafsa.pdf>. This question had been broader in scope, applying to any prior drug conviction: “A student who has been convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance shall not be eligible to receive . . . .” It was amended as part of the Deficit Reduction Act of 2005 to read,

A student who is convicted of any offense under any Federal or State law involving the possession or sale of a controlled substance for conduct that occurred during a period of enrollment for which the student was receiving any grant, loan, or work assistance under this title shall not be eligible to receive . . . .

Pub. L. No. 109–171, § 8021(c), 120 Stat. 178, 8021 (2005).

78. *Student Aid Eligibility Worksheet*, U.S. DEP’T EDUC. (2014), <https://studentaid.ed.gov/sites/default/files/2014-15-student-aid-eligibility-drug-worksheet.pdf>.

79. 20 U.S.C. § 1091 (r)(1) (2012).

80. *Id.*

81. Personal Responsibility and Work Opportunity Reconciliation Act of

With Melissa Thompson, we investigated whether this change, banning individuals with felony convictions from receiving aid, affected female arrest rates.<sup>82</sup> Thompson and Uggen compared arrest rates of the states that chose to opt-out of the ban altogether (i.e., not banning drug felons from receiving assistance) with states that only partially opted out and those that did not opt-out (i.e., banning drug felons from receiving assistance). We found a significantly greater increase in female arrest rates in states that imposed the ban relative to those with a partial ban or no ban at all.<sup>83</sup> Although it is difficult to make causal claims on the basis of these state-level data, a supplemental individual-level analysis of the National Longitudinal Survey of Youth (NLSY97) also showed less drug crime and property crime among female public assistance recipients during periods in which they received assistance.<sup>84</sup> Taken together, such work suggests that the denial of benefits may have had the unintended consequence of increasing crime rates.

Informally, the stigma of criminal records has also been invoked in punishing those who fail to disclose criminal convictions. Take, for example, the case of Anita McLemore, a single mother of two teenagers, who was convicted of submitting a false claim for food assistance.<sup>85</sup> McLemore had failed to disclose her felony drug convictions on assistance applications. She pled guilty to the charges and repaid the \$4,367 in benefits she received. The federal sentencing guidelines suggested a sentence ranging from two to eight months, and the prosecution recommended the lower end of the guideline sentence. Nevertheless, U.S. District Court Judge Henry Wingate instead sentenced her to three years in prison. As he put it, “The defendant’s criminal record is simply abominable.”<sup>86</sup> Legal scholar Kaaryn Gustafson suggests that Ms. McLemore “was deemed criminal because she failed to declare herself a criminal on welfare documents.”<sup>87</sup> As Gustafson points out, even though

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1996, Pub. L. No. 104–193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

82. Melissa Thompson & Christopher Uggen, *How Welfare Reform Drove Up Female Arrest Rates* 3–5, (June 19, 2013) (unpublished manuscript) (on file with authors).

83. *Id.* at 11.

84. *Id.* at 16.

85. Matt Taibbi, *Woman Gets Jail for Food-Stamp Fraud: Wall Street Fraudsters Get Bailouts*, ROLLING STONE (Nov. 17, 2011), <http://www.rollingstone.com/politics/news/woman-gets-jail-for-food-stamp-fraud-wall-street-fraudsters-get-bailouts-20111117>.

86. *Id.*

87. Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization*

McLemore and her family were living in poverty during these years and would surely have qualified for state assistance had it not been for her drug convictions, this was never considered as a factor in the case.<sup>88</sup> Instead, her criminal record appears to have superseded all other factors in her sentencing.<sup>89</sup>

## B. SOCIAL CONSEQUENCES

Apart from their economic impact, a history of criminal convictions has far-reaching social effects. These are felt most keenly in intimate relationships, parenting experiences, and social interactions. In recent years, the social impact of criminal convictions has been heightened dramatically by the increasing accessibility of online criminal records to the general public.

### 1. Online Criminal Records

Although criminal records have long been considered public information in the United States, they did not become easily accessible to the general public until very recently.<sup>90</sup> A criminal background check often required either travel to the local courthouse or submission of a mail request that could take days or weeks to process. But this changed as both public agencies (courts, law enforcement, and corrections) and private firms began aggregating and disseminating information about arrests and cases online. Thus, access to criminal record information has expanded exponentially over the last two decades. Today, typing a probationer's name into a simple Google search will often yield everything from original "mugshot" photographs to detailed case information, including charges, convictions, and dispositions—as well as solicitations to conduct more extensive searches for a fee.

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*of Low-Income Women*, 3 U.C. IRVINE L. REV. 297, 308 (2013).

88. *Id.* at 307–08.

89. *Id.* at 308.

90. See Steven Raphael, *Improving Employment Prospects for Former Prison Inmates: Challenges and Policy*, in *CONTROLLING CRIME: STRATEGIES AND TRADEOFFS* 521, 521 (Philip J. Cook et al. eds., 2012); Christopher Uggen, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 *CRIMINOLOGY & PUB. POL.* 367, 368 (2008); Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 *CRIMINOLOGY & PUB. POL.* 371, 372–74 (2008); Richard Freeman, *Incarceration, Criminal Background Checks, and Employment in a Low(er) Crime Society*, 7 *CRIMINOLOGY & PUB. POL.* 405, 406–07 (2008); Bruce Western, *Criminal Background Checks and Employment Among Workers with Criminal Records*, 7 *CRIMINOLOGY & PUB. POL.* 413, 413–16 (2008); Uggen et al., *supra* note 21, at 628.

The expansion of access to criminal record information has given birth to an entire online industry dedicated to its dissemination. These sites typically publicize *all* information, regardless of whether a case was dismissed or the defendant was found not guilty. Mugshots.com provides the following disclaimer in its FAQ:

In Criminal Law, a mugshot is a booking photograph taken during investigation. It isn't an accusation nor an admission. Regardless of case resolution, the arrest (or other incident with the law) has happened, and a booking photograph was taken. This by itself is true and factual and this is what a mugshot represents. It does not represent a case resolution, guilty plea, or not guilty plea.<sup>91</sup>

Even the simplest interaction with the justice system can therefore result in an indefinite, if not permanent, online posting of one's photograph and charges.

The expressed purpose of many such websites is to protect public safety.<sup>92</sup> In the case of a few of these websites, this may be their only purpose.<sup>93</sup> However, most such sites also attempt to wring cash from their subjects, charging fees to people desperate to remove their records.<sup>94</sup> For example, Mugshots.com currently charges \$399 to have a mugshot removed. That fee, though, only pertains to removal of a single arrest record from

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91. *What Is a Mugshot?*, MUGSHOTS, <http://mugshots.com/faq.html> (last visited Oct. 20, 2014).

92. *Mugshots.com Is a "Google for Mugshots,"* MUGSHOTS, <http://www.mugshots.com/faq> (last visited Mar. 31, 2015). Mugshots.com characterizes itself as

a search engine for Official Law Enforcement records, specifically booking photographs, mugshots. Originally collected and distributed by Law Enforcement agencies, Booking [sic] records are considered and legally recognized as public records, in the public domain. Mugshots.com reproduces and republishes these Official Records in their original form ("as is") under the First Amendment to the United States Constitution, the freedom to publish true and factual information.

*Id.*

93. *See, e.g., Have a Question?*, BUSTED MUGSHOTS, <http://www.bustedmugshots.com/contact> (last visited Mar. 31, 2015) (offering to consider removal in cases of "expunged, restricted, sealed or deceased cases"). But see *Free Opt-Out*, JAILBASE, <http://www.jailbase.com/en/about/#freeoptout> (last visited Mar. 31, 2015), for an online database of criminal record information that is an outlier among these types of websites. It offers free removal of criminal record information, stating, "JailBase provides a free opt-out for individuals who do not want their arrest information posted on our site. The opt-out goes into affect [sic] 30 days from the request. We feel this balances the need for timely public arrest information and the needs of those arrested." *Id.*

94. *See* Sarah Lageson, *The Enduring Effects of Online Mug Shots*, SOCIETY PAGES (May 19, 2014), <http://thesocietypages.org/roundtables/mugshots>; *see also* *Lashaway v. D'Antonio III*, No. 3:13-cv-01733 (N.D. Ohio 2013) (naming JustMugShots.com as defendant).

that particular website; in order to remove one's complete criminal record from *multiple* websites, one would either have to pay hundreds of dollars to each site or pay thousands of dollars to an online reputation management firm. Even then, it is quite likely that the information would resurface again on a different site. Moreover, some mugshot sites go well beyond the ostensible 'public safety' purpose—identifying individuals as “hotties,” “hunks,” or “bad babes,” or ridiculing them with “Darwin awards.”<sup>95</sup> Such characterizations are clearly designed to objectify, dehumanize, and humiliate people for commercial purposes. Importantly, these websites are not held to any standards of accuracy; therefore, they will charge even to remove mistaken or erroneous information.<sup>96</sup>

## 2. Relationships

The widespread availability of online records also brings informal social consequences. Online arrest or conviction records brand people as criminals throughout their supervision and into perpetuity. The disruptive effects of these online records are difficult to quantify because they are so diverse and pervasive. For example, searching online for information about current or potential romantic partners is now a common dating practice. One recent survey reported that 47% of single daters research their dates online.<sup>97</sup> In this context, a criminal record can have the same initial disqualifying effect as it does in the employment or education context by limiting the pool of potential partners. This practice similarly pertains to potential friends, colleagues, and acquaintances. The parents of a child's play-date, for example, may become apprehensive about allowing their child to be supervised by a parent with a criminal record. In short, individuals with criminal records are increasingly

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95. Avi Steinberg, *Hotties, Hunks, Beat up, Celebrities: The Allure of the Mug Shot*, THE NEW YORKER (June 13, 2012), <http://www.newyorker.com/culture/culture-desk/hotties-hunks-beat-up-celebrities-the-allure-of-the-mug-shot>.

96. Each site has different policies, but this “disclaimer of warranties” provided by Mugshots.com (and its affiliate, UnpublishArrest.com) is typical: “UnpublishArrest.com does not warrant or make any representations concerning the accuracy, likely results, or reliability of the use of services or Content on its Website or on any sites linked to this site.” *Terms of Service and Use*, UNPUBLISHED ARREST, <http://unpublishedarrest.com/terms-of-service> (last visited Mar. 31, 2015). These terms of service go on to note that Mugshots.com may provide a “courtesy removal” for sealed or expunged records—but only after applicants pay a “document verification” fee of \$199 per arrest. *Id.*

97. *Singles in America: First Dates*, MATCH (2014), <http://blog.match.com/singlesinamerica/first-dates> (last visited Mar. 31, 2015).

socially isolated by virtue of their records.

While we all have a keen interest in learning the past behavior or our potential intimate partners, such knowledge may come at a steep societal cost. A convincing line of criminological research shows that lack stable and supportive family relationships is closely tied to future criminality.<sup>98</sup> To the extent that online searches stoke or exaggerate fear of people with records, they may thus contribute to probation and parole failure, as well as greater crime and recidivism.

### 3. Parenting

A criminal record can similarly become an obstacle to good parenting. For example, many U.S. school districts restrict parents with criminal records from volunteering at a child's school for various types of events, such as chaperoning field trips.<sup>99</sup> In some cases, parents are denied regardless of the length of time since the offense or whether the parent was a juvenile at the time of the offense.<sup>100</sup> Recently a parent in Tuscola County, Michigan applied to volunteer as a chaperone for his seven-year-old son's field trip, but was denied because of the felony breaking and entering conviction he received when he was seventeen—almost twenty years prior.<sup>101</sup> Although this parent found support from some of the other parents, several felt the

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98. See, e.g., Ryan King et al., *The Context of Marriage and Crime: Gender, the Propensity To Marry, and Offending in Early Adulthood*, 45 CRIMINOLOGY 33, 55–59 (2007); LAUB & SAMPSON, *supra* note 6; Bill McCarthy & Teresa Casey, *Love, Sex and Crime: Adolescent Romantic Relationships and Offending*, 73 AM. SOC. REV. 944, 944–46 (2008).

99. News reports of parents being denied volunteering opportunities indicate that even these bans are rarely spelled out in policy, they become de facto bans in practice. Some districts ban some or all felons outright. See Devin Katayama, *JCPS Background Checks Block Parents from Volunteering, Even for Years-Old Offenses*, WFPL NEWS (Aug. 25, 2013), <http://wfpl.org/jcps-background-checks-block-parents-volunteering-even-years-old-offenses>; Gabrielle Russon, *Criminal Past Could Keep Parents from Volunteering at Sarasota Schools*, HERALD-TRIBUNE (Sep. 2, 2014), <http://www.heraldtribune.com/article/20140902/ARTICLE/140909932>; Samantha Allen, *Despite Pleading with Board, Mom with Felony Can't Volunteer at Son's School in Farmington*, FOSTER'S DAILY DEMOCRAT (May 18, 2012), [http://www.fosters.com/apps/pbcs.dll/article?AID=/20120518/GJNEWS\\_01/705189909](http://www.fosters.com/apps/pbcs.dll/article?AID=/20120518/GJNEWS_01/705189909); Monica Scott, *Parents with Criminal Records, ACLU Lobby Grand Rapids School Board Again To Change Its Volunteer Policy*, MLIVE (Sept. 19, 2011), [http://www.mlive.com/news/grand-rapids/index.ssf/2011/09/parents\\_with\\_criminal\\_records.html](http://www.mlive.com/news/grand-rapids/index.ssf/2011/09/parents_with_criminal_records.html).

100. See Katayama, *supra* note 99; James Felton, *School to Ex-Con Dad: No, You Can't Be a Chaperone*, WNEM (May 10, 2012), <http://www.wnem.com/story/18274487/school-to-ex-con-dad-no-you-cant-be-a-chaperone>.

101. Felton, *supra* note 100.

ban was justified. One of those parents was quoted saying, “I wouldn’t want my child around him. It would depend on what they’re convicted of, but if they’re a felon, they don’t need to be around kids like that.”<sup>102</sup> Parents are often similarly barred from extracurricular activities outside of school, including youth coaching.<sup>103</sup>

The more direct consequences of a criminal record, and especially incarceration, are decidedly more severe and damaging. More than half of all incarcerated men and women are parents.<sup>104</sup> The mere fact of parental incarceration, which necessarily separates the parent from the child for some period of time, has detrimental effects on children. The American Bar Foundation and National Science Foundation convened a 2013 White House workshop to review research on the collateral costs of parental incarceration on children.<sup>105</sup> On average, problems in school, the home, and involvement in criminal behavior all increase when a parent is or has been incarcerated.<sup>106</sup>

The consequences of parental incarceration are lasting and intergenerational, reaching well beyond incarcerated individuals to affect their children and communities.

In many cases, loss of parental involvement does not end with incarceration. Parolees and others with criminal records face the possibility of losing custody of their children and/or having their parental rights terminated by the state. In many states, incarceration alone is grounds for termination of parental rights, while other states consider incarceration as a salient factor in assessing parental rights.<sup>107</sup> Even in the absence of in-

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102. *Id.*

103. Jeff DiVeronica, *Youth Sports Making Background Checks Priority for Coaches*, DEMOCRAT & CHRONICLE (May 7, 2012), <http://roc.democratandchronicle.com/article/20120507/SPORTS/305070017/Youth-sports-making-background-checks-priority-coaches>.

104. LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PARENTS IN PRISON AND THEIR MINOR CHILDREN 1 (2010), available at <http://www.bjs.gov/content/pub/pdf/pptmc.pdf>. The Bureau of Justice Statistics found that 52% of state inmates and 63% of federal inmates had minor children, accounting for approximately 2.3% of children in the United States. *Id.*

105. For a review of conference presentations, see Christopher Uggen & Suzy McElrath, *Parental Incarceration: What We Know and Where We Need To Go*, 104 J. CRIM. L. & CRIMINOLOGY 597 (2014). For an excellent empirical treatment of the issue, see Sara Wakefield & Chris Wildeman, *Mass Imprisonment and Racial Disparities in Childhood Behavioral Problems*, 10 CRIM. & PUB. POLICY 793, 806 (2011).

106. *Id.*

107. See generally CHILD WELFARE INFORMATION GATEWAY, U.S. CHILDREN’S BUREAU, GROUNDS FOR INVOLUNTARY TERMINATION OF

carceration, a criminal conviction can be grounds for terminating parental rights in some state jurisdictions.<sup>108</sup> For example, a parent's rights in Georgia can be terminated following a conviction if the parent's conviction "has a demonstrable effect on the quality of the parent-child relationship."<sup>109</sup>

Criminal convictions are also admissible in custody hearings, which often pivot on determinations of the best interests of the child.<sup>110</sup> To be sure, a history of convictions affecting the parent's ability to care for the child, such as convictions for physical abuse, must be considered seriously in a custody hearing. Nevertheless, many family courts also consider convictions unrelated to the care of the child. As one legal scholar argues, "The parent is denied custody, not because he or she mistreated the child, but because the parent is the 'sort of person' who might."<sup>111</sup> Here too, criminal stigma may supersede all other criteria to become the overriding determinant of such decisions.

This is also the case for people with criminal records who wish to adopt or foster a child. Every U.S. state requires a criminal background check for potential adoptive or foster parents.<sup>112</sup> Though not all criminal convictions automatically disqualify prospective parents, by federal law the parent(s) will be denied if any adult living in the household has ever been convicted of crimes against a child, child abuse, neglect, or a crime involving violence.<sup>113</sup> Further, households with an adult member who has been convicted of a felony crime of physical assault, battery, or a drug offense in the past five years will also be rejected.<sup>114</sup> Such restrictions can also separate siblings. For

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PARENTAL RIGHTS (Jan. 2013), available at <https://www.childwelfare.gov/pubPDFs/groundtermin.pdf> (detailing grounds for the termination of a parental rights).

108. Peter D. Schneider, *Criminal Convictions, Incarceration, and Child Welfare: Ex-Offenders Lose Their Children*, in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 53, 56 (Ctr. for Law and Soc. Policy and Cmty. Legal Servs., Inc. eds., 2002).

109. GA. CODE ANN. § 15-11-94(b)(4)(B)(iii)(2010).

110. Tamar Lerer, *Sentencing the Family: Recognizing the Needs of Dependent Children in the Administration of the Criminal Justice System*, 9 NW. J. OF L. & SOC. POL'Y 24, 37 (2013).

111. Deborah Ahrens, *Not in Front of the Children: Prohibition on Child Custody As Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737, 774 (2000).

112. CHILD WELFARE INFORMATION GATEWAY, U.S. CHILDREN'S BUREAU, CRIMINAL BACKGROUND CHECKS FOR PROSPECTIVE FOSTER AND ADOPTIVE PARENTS 3 (2011), available at <https://www.childwelfare.gov/pubPDFs/background.pdf>.

113. See 42 U.S.C. § 671(a)(20)(B)(i) (2012).

114. See *id.* § 671(a)(20)(A)(ii).



example, if a child in foster care is involved in a fight and arrested for assault, his brother or sister may be barred from residing in the same foster care home.<sup>115</sup> In such cases, one sibling could be considered dangerous and the other a vulnerable person.

Finally, courts in at least two states have upheld draconian restrictions on *procreation* as a condition of probation. Bans on procreation as a condition of probation had long been struck down by the courts, but that changed with a pair of recent cases in Oregon and Wisconsin.<sup>116</sup> In Oregon, a man convicted of criminal mistreatment was required, as a condition of his probation, to complete drug treatment and anger management before he had any more children.<sup>117</sup> He appealed, arguing that banning him from having children was a violation of his constitutional rights.<sup>118</sup> The Oregon Court of Appeals rejected his appeal, ruling that because the court could later modify the condition, it was not a “total ban.”<sup>119</sup> A few years later, the Wisconsin Supreme Court upheld a similar ban in the case of a father of nine children in Wisconsin who was convicted of not paying child support.<sup>120</sup>

### C. PHYSICAL CONSEQUENCES

Criminal convictions also influence one’s physical location and well-being. Formal and informal restrictions often limit housing options, freedom of movement, and immigration status, while compromising physical and mental health.

#### 1. Housing

In his famous 1996 State of the Union speech, President Bill Clinton challenged housing authorities and tenant associations throughout the nation to rid themselves of “criminal gang

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115. CHILD WELFARE INFORMATION GATEWAY, U.S. CHILDREN’S BUREAU, SIBLING ISSUES IN FOSTER CARE AND ADOPTION 11 (2013), available at <https://www.childwelfare.gov/pubPDFs/siblingissues.pdf>.

116. Joanna Nairn, *Is There a Right To Have Children? Substantive Due Process and Probation Conditions That Restrict Reproductive Rights*, 6 STAN. J. C.R. & C.L. 1, 7–8 (2010).

117. *State v. Kline*, 963 P.2d 697, 698 (Or. Ct. App. 1998).

118. *Id.* at 699.

119. *Id.*

120. *State v. Oakley*, 629 N.W.2d 200, 202 (Wis. 2001). The defendant was sentenced to three years in prison followed by five years of probation, wherein he was prohibited from having more children until he could show that he was able to provide financial support for the children he already had and any future children. *Id.*

members and drug dealers.”<sup>121</sup> He urged that “the rule for residents who commit crime and peddle drugs should be one strike and you’re out.” While providing safe living arrangements for public housing tenants is certainly a worthy goal, such statements and resulting policies exacerbated housing problems for people with criminal records. A combination of formal and informal consequences sharply curtails the availability of safe and adequate housing options for those under community supervision.

U.S. federal housing policy has prohibited people convicted of felonies and certain other crimes from receiving subsidized housing since 1987.<sup>122</sup> The “one strike and you’re out” policy, signed into law in March 1996, reiterated the prohibition of convicted persons and provided a legal basis to evict not only the person committing the crime, but every member of the household as well—regardless of their level or lack of involvement in the crime.<sup>123</sup> When this policy was challenged constitutionally, the U.S. Supreme Court affirmed its legality, and it remains in force today.<sup>124</sup>

Public housing assistance only makes up a small share of the overall rental housing market.<sup>125</sup> But as is the case in many

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121. *Clinton State of the Union*, *supra* note 24.

122. Anti-Drug Abuse Act of 1988, 42 U.S.C. § 1437(d)(1)(4)(A)(ii) (2012).

123. Housing Opportunity Program Extension Act of 1996, 42 U.S.C. § 1437(d)(1)(6) (2012).

124. *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 130 (2002). The Secretary of the U.S. Department of Housing and Urban Development and Acting Assistant Secretary for Housing did provide guidance in a letter to HUD owners and agents. “The Department is asking owners of HUD-assisted properties to seek a balance between allowing ex-offenders to reunite with families that live in HUD subsidized housing, and ensuring the safety of all residents of its programs. Accordingly, the Department encourages owners of HUD-assisted properties to develop policies and procedures that allow ex-offenders to rejoin the community to the extent that this balance can be maintained.” Letter from Shaun Donovan, Sec’y of U.S. Dep’t of Hous. & Urban Dev’t, & Carol J. Galante, Acting Assistant Sec’y for Hous. for U.S. Dep’t of Hous. & Urban Dev’t, to Owners and Agents of HUD-Assisted Prop. (Mar. 14, 2012), *available at* [http://www.ahscoho.org/UserFiles/Documents/All%20States/MFamily%20properties\\_Re%20entry%20of%20Ex-offenders%20memo.pdf](http://www.ahscoho.org/UserFiles/Documents/All%20States/MFamily%20properties_Re%20entry%20of%20Ex-offenders%20memo.pdf); *see also* Letter from Shaun Donovan, Sec’y of U.S. Dep’t of Hous. & Urban Dev., & Carol J. Galante, Acting Assistant Sec’y for Hous. for U.S. Dep’t of Hous. & Urban Dev., to Publ. Hous. Auth. (PHAs) Exec. Dirs. (June 17, 2011), *available at* <http://www.fhcmichigan.org/wp-content/uploads/2011/06/Rentry-letter-from-Donovan-to-PHAs-6-17-11.pdf>.

125. JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., *AMERICA’S RENTAL HOUSING: EVOLVING MARKETS AND NEEDS* 3 (2013), *available at* [http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs\\_americas\\_rental\\_housing\\_2013\\_1\\_0.pdf](http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs_americas_rental_housing_2013_1_0.pdf). The Joint Center for Housing Studies at Harvard University estimates that renters receiving some type of government housing as-

industries, the private sector tends to follow the government's lead. A 2005 survey conducted by one of the three main professional associations for rental housing found that eighty percent of its members screened applicants for criminal records.<sup>126</sup> Although the respondents in the aforementioned survey were mainly large property owners, David Thacher points out that the three best-selling landlord "how-to" books for small property owners all discussed criminal background checks and included criminal history questions in their sample rental applications.<sup>127</sup> In fact, in his sample of twenty such "how-to" books (ten published before 1990 and ten published after), Thacher found that all of the post-1990 books discussed criminal records while none of the pre-1990 books did so.<sup>128</sup> Recall that federal policy began barring felons from federal housing assistance in 1987.

There is little firm evidence regarding how these policies affect housing opportunities for probationers, parolees, and former felons. In our experience, however, they impose significant barriers to finding safe and suitable housing. For example, Valerie<sup>129</sup> recently moved to Minneapolis to enter a Ph.D. program. Prior to this, she lived on the east coast, where she had completed a master's degree while working two jobs and volunteering at a nonprofit organization. She was also an ex-felon, having been convicted of two low-level felony drug charges almost ten years prior, for which she served less than a year in prison. She told us, "I didn't realize my record was going to be a problem when I started looking for housing, so I didn't think much of it." She quickly realized, though, that it would be a *major* problem in Minnesota; every rental application she came

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sistance made up just over 11% of the rental housing market. Of those receiving assistance, 2.2 million utilized housing vouchers, 1.3 million used subsidies tied to privately owned units (e.g., Section 8 housing), 1.1 million lived in housing owned and operated by public housing authorities, and approximately 270,000 were beneficiaries of a housing program run by the U.S. Department of Agriculture, Office of Rural Development.

126. As quoted in David Thacher, *The Rise of Criminal Background Screening in Rental Housing*, 33 L. & SOC. INQUIRY 1, 12 (2008).

127. *Id.*

128. *Id.* at 18. Thacher also provides a rich legal history that traces the changes in premises liability law, state statutes, and the law enforcement-led "landlord training programs" over time to the current state of affairs. *Id.* at 16. In sum, "law and government have moved on several fronts over the past three decades to make tenants' criminal behavior part of the risk calculation that landlords must consider." *Id.* at 18.

129. E-mail from Valerie to Robert Austin Stewart, Ph.D. Student, Dep't of Sociology, Univ. of Minn. (Oct. 1, 2014) (on file with author). Valerie is a pseudonym to protect the student's identity.

across required a criminal background check. For this reason, she called more than two-dozen lease offices and apartment managers. Each of the nine managers with whom she spoke told her that their criteria were either “no felonies” or “at least ten years incarceration-free.” She left messages with her inquiry and her contact information at the offices that did not answer, but they never returned her call. Eventually she was able to find a manager who was willing to rent to her, but not without a significant amount of searching and stress.

As Thacher put it, “from the perspective of ex-convicts themselves, landlord screening is an especially significant form of institutional exclusion because housing (along with employment) ranks as one of the most important needs it impinges upon.”<sup>130</sup> Coupled with the other barriers to employment and social interaction, these blanket prohibitions serve to make reintegration and reentry more challenging for probationers and parolees.<sup>131</sup>

## 2. Movement

In addition to influencing housing options, a criminal record also imposes other geographic restrictions, generally by prohibiting one from entering or leaving certain spaces. These can take several forms, but we here address a few of the most prevalent.

First, certain types of offenses or designations can trigger spatial exclusion from areas near schools or other specifically designated areas. Scholars have noted the rapid growth of spatial exclusion, or “banishment,” as a tool of social control and another layer of punishment.<sup>132</sup> For example, as a condition of probation or release, individuals convicted of a variety of offenses can be restricted from designated geographic areas, such as “drug-free zones” or “prostitution-free zones.”<sup>133</sup> Entering these zones for any reason can result in a violation of supervision, incarceration, or other sanctions.<sup>134</sup>

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130. Thacher, *supra* note 126.

131. Rue Landau, *Criminal Records and Subsidized Housing: Families Losing the Opportunity for Decent Shelter*, in *EVERY DOOR CLOSED*, *supra* note 108, at 51.

132. KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 6–9 (2009); Katherine Beckett & Steve Herbert, *Penal Boundaries: Banishment and the Expansion of Punishment*, 35 L. & SOC. INQUIRY 1, 2–3 (2010) [hereinafter Beckett & Herbert, *Penal Boundaries*].

133. Beckett & Herbert, *Penal Boundaries*, *supra* note 132, at 9.

134. *Id.*

Individuals subject to predatory or sex offender designations face similar geographic restrictions. In most jurisdictions, they are barred from living in or near “child gathering places,” such as schools, parks, playgrounds, bus stops, or childcare providers.<sup>135</sup> In some locales, these zones can range up to 2,000 feet, or more than one-third of a mile.<sup>136</sup> These restrictions drastically limit where such offenders can find housing. For example, Orange County, Florida has restriction zones within 1,000 feet of places where children gather (attractions, bus stops, daycares, parks, and schools).<sup>137</sup> As a result, sex offenders are restricted from living in 95.2% of residential areas in Orange County.<sup>138</sup> Elsewhere in Florida, Pastor Dick Witherow established “Miracle Village” as a religious community that is home to over one-hundred registered sex offenders who could not otherwise find housing.<sup>139</sup> Despite such extreme social isolation, a study by the Minnesota Department of Corrections found no relation between residency location and sex offense recidivism.<sup>140</sup>

Spatial exclusion also occurs on an even grander scale in regard to international travel. Several nations prohibit individuals with criminal records and those on community supervision from entering.<sup>141</sup> For example, Canada deems travelers who were convicted of offenses in other countries that would be criminal offenses in Canada inadmissible.<sup>142</sup> Similar restrictions are placed on travel to the United Kingdom and Australia.<sup>143</sup>

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135. Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. C.R.-C.L. L. REV. 531, 537 (2007).

136. *Id.*

137. Paul A. Zandbergen & Timothy C. Hart, *Residential Housing Options for Convicted Sex Offenders: Investigating the Impact of Residency Restriction Laws Using GIS*, 8 JUST. RES. & POL'Y 1, 1 (2006); Jill S. Levenson & Andrea L. Hern, *Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry*, 59 JUST. RES. & POL'Y 59, 63 (2007).

138. Zandbergen & Hart, *supra* note 137.

139. Lisa F. Jackson & David Feige, *Sex Offender Village*, N.Y. TIMES (May 21, 2013), <http://www.nytimes.com/2013/05/22/opinion/sex-offender-village.html>.

140. Grant Duwe et al., *Does Residential Proximity Matter? A Geographic Analysis of Sex Offense Recidivism*, 35 CRIM. JUST. & BEHAV. 484, 500–01 (2008).

141. See *infra* notes 142–44 and accompanying text.

142. Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 36 (Can.); see also *Reasons for Inadmissibility*, GOV'T CAN. (Oct. 9, 2012), <http://www.cic.gc.ca/english/information/inadmissibility/who.asp>.

143. Immigration Rules, Part 9 § 322(5) (U.K.); *Migration Act 1958* (Cth) s 501(6) (Austl.). Conversely, nearly every member of the European Union par-

In addition to spatial exclusion, a second form of movement restriction affects noncitizens. Immigrants with criminal records are subject to detention and deportation following any interaction with the criminal justice system. As an illustration of how precarious life can be for noncitizens with criminal records, consider the case of Alex,<sup>144</sup> a Mexican immigrant, as described to us by his pro bono immigration attorney in Minneapolis.

Alex came to the United States illegally in the 1980s with his parents, who were later granted amnesty. Alex eventually obtained a green card by virtue of his mother's status. As a result of a relationship with a 13-year-old when he was 16, Alex was convicted of statutory rape and required to register as a sex offender. When he was 23, he met his partner, Rosa,<sup>145</sup> and they have three children together and own their own home. Their children are U.S. citizens.

Since his juvenile felony, Alex has had three convictions on his record: (1) a gross misdemeanor for giving false information; (2) a gross misdemeanor for solicitation; and, (3) a failure to register in 2007. The failure to register charge was a result of forgetting to update his address with probation authorities, which occurred more than fifteen years after his sex offense conviction. He had not had any further arrests, charges, convictions or even minor driving infractions since 2007. In 2014, an officer with Immigration and Customs Enforcement (ICE) ran an old warrant search for Minnesota and came across a 2007 warrant that was briefly active for Alex's failure to register charge.<sup>146</sup> The ICE official then ran a thorough background check and found his other convictions. As a result, ICE officers came to his home as he was leaving for work, arrested him, and brought him to a detention facility where he was processed and charged with having two crimes

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ticipates in the Schengen Borders Code agreement which opens internal borders between member countries and sets immigration practices for external borders, and there is no criminal record restriction for these countries. See Regulation 562/2006, 2006 O.J. (EC) (establishing a Community Code on the rules governing the movement of persons across borders called the Schengen Borders Code).

144. E-mail from Alex's Immigration Attorney to Robert Austin Stewart, Ph.D. Student, Dep't of Sociology, Univ. of Minn. (Oct. 2, 2014) (on file with author). To protect the identity and confidentiality of the client, "Alex" was chosen as a pseudonym, and the identity of his attorney shall remain confidential. Minor details of his case were slightly altered to protect his identity.

145. This is also a pseudonym to protect the identity of the client's partner.

146. See Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1096–1121 (2008) (explaining an in-depth study of ICE's practice of searching old warrants).

involving moral turpitude. He was in danger of indefinite detention and deportation, but his attorney was able to convince ICE to agree to cancel his removal. Others who lacked experienced representation have not been so lucky. Nevertheless, Alex was detained for two months, which caused significant financial strain for his family, as he was the sole provider but could not work while in detention.

### 3. Health

Collateral consequences of a conviction are also manifest in tangible physical health effects. The first and most obvious consequence extends from the difficulty of finding stable and worthwhile employment as discussed above. Healthcare access in the United States is strongly interwoven with employment and associated benefits, so a lack of stable employment dramatically constrains healthcare choices.<sup>147</sup> Moreover, individuals who are not employed or who lack the means to purchase healthcare on the private market turn to public assistance for healthcare.<sup>148</sup> As noted above, however, restrictions on public benefits for individuals with records can stand in the way of quality or regular care.

Beyond a lack of available health care, mere contact with the criminal justice system can have detrimental long-term health effects. Short-term health actually tends to improve during spells of incarceration, as many inmates lacked adequate care before incarceration.<sup>149</sup> Nonetheless, these improvements are not long-lasting and largely dissipate following release.<sup>150</sup> In fact, compared to the general public, people who have spent any time in the prison system are more likely to have major health issues later in life—a finding that holds even in the most rigorously designed investigations.<sup>151</sup> Specifically, midlife health functioning is significantly worsened by prior exposure to in-

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147. Congress passed healthcare reform in 2010 that mandated employers with more than fifty employees to offer health insurance to offer their full-time employees. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 42 U.S.C.).

148. See David Dooley, Jonathan Fielding, & Lennart Levi, *Health and Unemployment*, 17 ANN. REV. PUB. HEALTH 449, 459 (1996).

149. See Jason Schnittker et al., *Incarceration and the Health of the African American Community*, 8 DU BOIS REV.: SOC. SCI. RES. ON RACE 133, 135 (2011).

150. Jason Schnittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. HEALTH & SOC. BEHAV. 115, 123 (2007).

151. *Id.*

carceration.<sup>152</sup> Furthermore, formerly incarcerated individuals appear to suffer disproportionately from depression, infectious diseases, and stress-related ailments.<sup>153</sup>

#### D. CIVIL CONSEQUENCES

People convicted of crime, particularly felony-level offenses, also incur collateral consequences that restrict or prohibit myriad forms of civic participation. These sanctions vary from state to state, but they include restrictions on participating in elections, serving on juries, owning firearms, and joining the military.<sup>154</sup> Some of these consequences, such as voting, are temporary in some states and permanent in others.<sup>155</sup> But in the case of the other restrictions, such as some types of military service, the restriction is generally permanent.<sup>156</sup>

##### 1. Voting

The right to vote is perhaps the most visible and most direct symbol of civic inclusion in a democratic society.<sup>157</sup> Standing shoulder to shoulder with fellow citizens and participating in the electoral process also encourages identification with the

152. Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 LAW & SOC'Y. REV. 275, 277 (2008).

153. Michael Massoglia, *Incarceration As Exposure: The Prison, Infectious Disease, and Other Stress-Related Illnesses*, 49 J. HEALTH & SOC. BEHAV. 56, 65 (2008); see also Schnittker & John, *supra* note 150, at 126; Jason Schnittker et al., *Out and Down: Incarceration and Psychiatric Disorders*, 53 J. HEALTH & SOC. BEHAV. 448, 458 (2012).

154. Ewald & Uggen, *supra* note 1, at 3–4.

155. See JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY 84–89 (2006) (finding that even states with procedures for restoring voting rights actually restore very few). As discussed below, Maine and Vermont currently have no felon voting restriction; Illinois and 12 other states restrict voting for current prison inmates; California and 4 other states additionally disenfranchise parolees; Minnesota and 18 other states additionally disenfranchise probationers; and, Florida and 10 other states additionally disenfranchise many former felons who have completed their sentences and are no longer under correctional supervision. See CHRISTOPHER UGGEN ET AL., STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 3, tbl.1 (The Sentencing Project ed., 2012), available at [http://sentencingproject.org/doc/publications/fd\\_state\\_level\\_estimates\\_of\\_felon\\_disen\\_2010.pdf](http://sentencingproject.org/doc/publications/fd_state_level_estimates_of_felon_disen_2010.pdf).

156. See Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 586–87 (2006); see also Ewald & Uggen, *supra* note 1, at 3 (stating that the restriction has been lifted in times of war with special permission).

157. See generally Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 HARV. L. REV. 1300, 1309 (1989) (discussing how "political participation is the path to moral growth").



norms and values of a community.<sup>158</sup> As Adam Winkler put it, voting is a “meaningful participatory act through which individuals create and affirm their membership in the community and thereby transform their identities both as individuals and as part of a greater collectivity.”<sup>159</sup> Moreover, there is a robust negative correlation between voting and subsequent recidivism, suggesting that the prosocial nature of voting may contribute to the civic reintegration of current and former felons.<sup>160</sup>

Oregon is one state that permits probationers and parolees to vote.<sup>161</sup> Uggen and Inderbitzin “matched Oregon voting and crime records and found that probationers and parolees who exercise their right to vote have significantly lower recidivism rates than those who do not.”<sup>162</sup> As shown in Figure 3, the parole failure rate was 26.1% for non-voters and 19.3% for voters.<sup>163</sup> “Oregon is an unusual case in that all voting is done by mail; as such, the effect of civic participation may be even stronger in states where voting is a more visible community event and neighbors come together at the polls on election day.”<sup>164</sup>

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158. Christopher Uggen et al., ‘*Less than the Average Citizen*’: *Stigma, Role Transition and the Civic Reintegration of Convicted Felons*, in *AFTER CRIME AND PUNISHMENT: PATHWAYS TO OFFENDER REINTEGRATION* 261, 277–79 (Shadd Maruna & Russ Immarigeon eds., 2004).

159. Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 331 (1993).

160. See Uggen et al., *supra* note 158, at 277–79 for interviews with current and former felons about perspectives on voting and see Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 196–200, 213 (2004), for empirical support for a relationship between voting and desistance from crime.

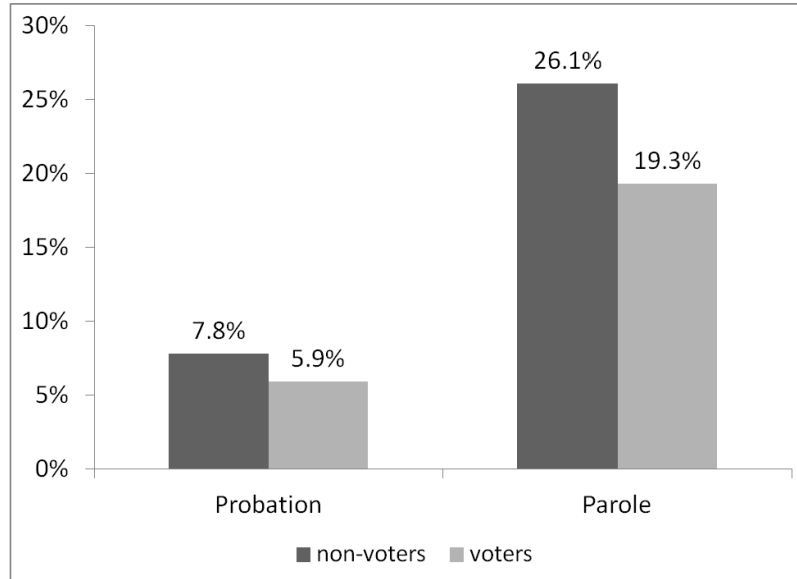
161. Christopher Uggen & Michelle Inderbitzen, *The Price and the Promise of Citizenship: Extending the Vote to Non-incarcerated Felons*, in *CONTEMPORARY ISSUES IN CRIMINAL JUSTICE POLICY* 63 (Natasha A. Frost et al. eds., 2010).

162. *Id.*

163. *Id.* at 64 fig.3.

164. *Id.* at 63.

Figure 3: Probationers and Parolees Who Vote In Oregon Have Significantly Lower Recidivism Rates than Those Who Do Not Vote



The U.S. Supreme Court clearly identifies disenfranchisement as a “nonpenal exercise of the power to regulate the franchise” rather than punishment.<sup>165</sup> Regardless of whether disenfranchisement is directly punitive or a collateral consequence, its effects are widespread and well-established. Our most recent estimates put the number of persons disenfranchised for criminal convictions at approximately 5.85 million, or one in forty American adults.<sup>166</sup> Disenfranchisement laws vary from state to state, though all but two states (Maine and Vermont) disenfranchise felons for at least some period of time following a conviction.<sup>167</sup> Of the remaining states, thirteen restrict currently incarcerated individuals from voting, an additional five restrict parolees, and an additional nineteen also restrict probationers.<sup>168</sup> Eleven states continue to restrict the right to vote

165. *Green v. Bd. of Elections of New York*, 380 F.2d 445, 450 (2d Cir. 1967) (quoting *Trop v. Dulles*, 356 U.S. 86, 97 (1958) (plurality opinion)), quoted in Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1058 (2002).

166. UGGEN ET AL., *supra* note 155.

167. *See id.* at 3, tbl.1.

168. *See id.*

even after individuals complete their sentences<sup>169</sup>—in some cases for life.<sup>170</sup>

Our interviews with disenfranchised probationers and parolees confirmed how the practice conveys a message of exclusion and reaffirms one's outsider status. Several respondents characterized voting as a "part of being a citizen and being an adult."<sup>171</sup> In particular, one stated,

People don't want to recognize that we can still be citizens and still be patriotic even though we made a mistake . . . I can't say anything because I don't have a voice. Or 'cause I can't vote about it . . . How can you feel that you're giving back to a community that you're a part of when you're exiled from it by not being able to vote and have a voice in it?<sup>172</sup>

In other words, not being able to vote seemed to diminish or hinder reintegration efforts. Some of our interview participants characterized disenfranchisement as just one more way for the community to remind them of their outsider status:

[I] would like to someday feel like a, quote, "normal citizen," a contributing member of society, and you know that's hard when every election you're constantly being reminded, "Oh yeah, that's right, I'm ashamed." . . . It's just like a little salt in the wound . . . It's just loss after loss after loss. And this is just another one. Another to add to the pile. . . .<sup>173</sup>

As with other collateral sanctions, many of those directly affected by disenfranchisement experience the practice as draconian and purely punitive.<sup>174</sup> These feelings have been echoed by judges and other officials. In an opinion involving a voting ban for certain misdemeanants, one federal judge called disenfranchisement "the harshest civil sanction imposed by a democratic society, . . . [T]he disenfranchised is severed from the body politic and condemned to the lowest form of citizenship."<sup>175</sup> He also condemned policies that broadly applied voting restrictions: "Such a shadowy form of citizenship must not be imposed lightly; rather, only when the circumstances and the law

169. *See id.* at 3.

170. MANZA & UGGEN, *supra* note 155, at 84–89 (describing the low rate of restored voting rights).

171. *See* Uggen et al., *supra* note 158, at 278 (interview with a 38-year-old incarcerated woman).

172. *See id.* at 278 (emphasis removed) (interview with a 37-year-old incarcerated man).

173. *See id.* at 277–78 (emphasis removed) (interview with a 49-year-old incarcerated woman).

174. *Id.* at 278 (quoting a 37-year-old inmate who described disenfranchisement as a lifelong punishment).

175. *McLaughlin v. City of Canton*, 947 F. Supp. 954, 971 (S.D. Miss. 1995).

clearly direct.”<sup>176</sup> However, voting restrictions, in most jurisdictions, are blanket prohibitions that are applied automatically rather than imposed in a targeted or deliberate manner.<sup>177</sup>

## 2. Juries

Voting is perhaps the most visible barrier to civic participation, but felon jury exclusion is even more widespread than disenfranchisement.<sup>178</sup> All but two states, Colorado and Maine, bar felons on probation and parole from serving on juries, and thirty-one states impose lifetime bans.<sup>179</sup> The remaining states bar some or all felons for life or for some period of time, such as during periods of supervision.<sup>180</sup> As a result, researchers estimate that “13 million citizens can never participate in a jury and an unknown number of others are excluded for some period of time.”<sup>181</sup>

The racial impact of civil consequences is more salient in some jurisdictions than others. Using census and criminal justice data, Darren Wheelock examined the racial impact of felon jury exclusion in Georgia.<sup>182</sup> Across the state, Wheelock estimated that 14% of African-American adults were prohibited from jury service.<sup>183</sup> But when the level of analysis shifted to the county level, Wheelock found that more than *half* of the African-American men in some counties were excluded from the jury selection process.<sup>184</sup> In other words, the likelihood of an accused African-American male in these counties facing a jury that was demographically representative of the community was very small—with felon jury exclusions directly affecting the constitutionally guaranteed right to a jury of one’s peers.<sup>185</sup>

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176. *Id.* Coincidentally, this is the same U.S. District Court Judge who sentenced Anita McLemore to three years in prison for welfare fraud. *See* Taibbi, *supra* note 85.

177. MANZA & UGGEN, *supra* note 155, at 37.

178. AMY E. LERMAN & VESLA M. WEAVER, *ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL* 85 (2014).

179. Darren Wheelock, *A Jury of One’s “Peers”: The Racial Impact of Felon Jury Exclusion in Georgia*, 32 JUST. SYS. J. 335, 336 (2011).

180. *Id.*

181. LERMAN & WEAVER, *supra* note 178, at 85.

182. *See generally* Wheelock, *supra* note 179.

183. *Id.* at 347.

184. *Id.* at 348.

185. *See* *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (discussing the fundamental importance of the right to a fair and impartial jury to guard against arbitrary action or prosecution in the American system of justice: “The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused

### 3. Other Consequences

Space limitations preclude a comprehensive discussion of the many other collateral consequences of criminal convictions. Nevertheless, it is important to note important restrictions on military service, holding elective office, serving in certain positions, and registration requirements.<sup>186</sup>

## II. BROADER EFFECTS AND REFORM PROPOSALS

A decent job, secure housing, stable family relationships, and a stake in one's community surely rank among the strongest predictors of probation and parole success.<sup>187</sup> Many of the collateral sanctions discussed in this article thus fly in the face of theory and research on desistance from crime. As President George W. Bush put it in his 2004 State of the Union Address, if people "can't find work or a home or help, they are much more likely to commit crime and return to prison."<sup>188</sup> As early as 1957, the National Conference on Parole called civil and political restrictions "an archaic holdover from early times," and urged their abolition.<sup>189</sup> The time has surely come for a reasoned reassessment of the costs of broad-scope collateral sanctions.

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with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complacent, biased, or eccentric judge.").

186. See, e.g., AM. BAR ASS'N COMM'N ON EFFECTIVE CRIMINAL SANCTIONS & THE PUB. DEFENDER SERV. FOR D.C., INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS 19–20 (2009), available at <http://www.pdsdc.org/resources/publication/collateral%20consequences%20of%20conviction%20in%20federal%20laws%20and%20regulations.pdf>; LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY 10 (2004), available at [http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC\\_PrintReport.pdf](http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012); Ewald & Uggen, *supra* note 1, at 3–4; Pinard, *supra* note 11, at 639; Love, *supra* note 1, at 97–98.

187. See LAUB & SAMPSON, *supra* note 6, at 6, 129, 146; Michael Massoglia & Christopher Uggen, *Settling Down and Aging Out: Toward an Interactionist Theory of Desistance and the Transition to Adulthood*, 116 AM. J. SOC. 543, 572–74 (2010) (finding certain markers of adulthood are correlated with lower delinquency rates); Christopher Uggen, *Work As a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 542 (2000).

188. *Bush State of the Union*, *supra* note 24.

189. Margaret Colgate Love, *Starting over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1708 (2003) (quoting NAT'L PROB. & PAROLE ASS'N, PAROLE IN PRINCIPAL AND PRACTICE 136 (1957)).

## A. CATALOGING

The first order of business is to continue efforts to catalog and classify the myriad restrictions imposed on individuals. With the support of the National Institute of Justice, the American Bar Association has dramatically advanced knowledge by creating and maintaining an accessible website with a list of all federal and state collateral consequences.<sup>190</sup> To our knowledge, this effort has been quite effective in reaching those directly affected by the sanctions, as well as practitioners and academic researchers with no conviction history themselves.<sup>191</sup> Similarly, the Uniform Law Commission has offered model legislation by which each state could do the same.<sup>192</sup>

## B. NOTIFYING

In the absence of clear and accessible jurisdiction-specific lists of collateral sanctions, it is unsurprising that probationers, parolees, and former felons remain confused about their rights and restrictions. A second area for reform thus concerns the need to apprise defendants and those leaving criminal supervision of the sanctions to which they are—or will be—subject. Defense attorneys are increasingly alerting clients, prosecutors, and judges to the costs of collateral consequences.<sup>193</sup> Those providing such “holistic defense” have won favorable pleas and dismissals “when they [were] able to educate prosecutors and judges on the draconian hidden consequences for the clients and their families.”<sup>194</sup> Regardless of the wishes of clients and defendants, however, such negotiations still depend critically on the responsiveness of prosecutors and judges.<sup>195</sup>

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190. Am. Bar Ass’n, *supra* note 42.

191. See generally *ABA Launches Online Database of Collateral Consequences of Conviction for Each Jurisdiction*, LEGAL NEWS (Dec. 17, 2014) <http://www.legalnews.com/detroit/1398611> (describing the benefits of the database).

192. *Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H.R. Comm. on the Judiciary*, 111th Cong. 12 (2010) (written testimony of Richard T. Cassidy, Chair, Drafting Committee on Uniform Collateral Consequences of Conviction Act of the Uniform Law Commission), available at [http://www.judiciary.house.gov/\\_files/hearings/pdf/Cassidy100609.pdf](http://www.judiciary.house.gov/_files/hearings/pdf/Cassidy100609.pdf).

193. McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide To Using Invisible Punishments As an Advocacy Strategy*, 36 UNIV. TOL. L. REV. 479, 494 (2005).

194. See Smyth, *supra* note 193, at 490, 494.

195. *Id.* at 494–95 (stating that judges and prosecutors are more responsive to consequences that “offend that basic sense of fairness”).

### C. SUNSETTING

A third reform proposal would routinely remove or “sunset” restrictions after a pre-specified period. Criminologists using diverse methodologies have shown that after approximately seven years with no new offenses, the risk of subsequent crime among former felons approximates that of the general population, providing a scientific basis for time-limited collateral sanctions.<sup>196</sup> In many jurisdictions, however, there is currently no mechanism to remove certain designations, let alone “sunset” them, relegating those convicted of sex crimes to permanent and caste-like hyperstigmatization.<sup>197</sup> Such work calls for renewed scrutiny of indefinite or permanent restrictions on persons with criminal records.

### D. TAILORING

Removing a blanket ban on *all* felons does not preclude the imposition of sanctions as a condition of supervision. On the basis of a pre-sentence investigation, judges are well-positioned to identify a checklist of specific sanctions that may be imposed or removed at sentencing.<sup>198</sup> Such considerations could be folded into the individual assessments of risk and dangerousness—the same considerations that govern decisions about whether to incarcerate individuals or place them on community supervision. Such work is a front-end sentencing analogue to the idea of back-end “re-entry courts,” tribunals with the authority to lift some or all sanctions.<sup>199</sup>

### E. ABOLISHING

Reformers are also calling for the complete abolition of particular restrictions, such as felon voting bans and restrictions on public assistance, as well as rigorous cost-benefit analyses of

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196. See Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 338–39 (2009); Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POLICY 483, 498–500 (2006).

197. See Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969, 1002–03 (2011); Christopher Uggen & Heather R. Hlavka, *Does Stigmatizing Sex Offenders Drive Down Reporting Rates? Perverse Effects and Unintended Consequences*, 35 N. KY. L. REV. 347, 355 (2008).

198. See Maleng, *supra* note 12, at 3 (recommending that collateral sanctions should be a factor in the sentencing determination).

199. *Id.* at 3–4 (giving examples of both the front-end and the back-end solution).

others.<sup>200</sup> On the basis of this review, we would offer another proposal for consideration: shifting the default from sanction to no-sanction. Under such a system, the collateral sanction would be imposed for particular enumerated offenses or when otherwise merited (e.g., imposing disenfranchisement for those with a history of voter fraud), but would not be routinely applied.

#### F. RESTRICTING

Most reform efforts target the formal legal consequences of conviction.<sup>201</sup> Insofar as criminal records remain widely disseminated, however, such reforms would leave the *informal* consequences intact.<sup>202</sup> Defenders of the current open-records system argue that “the flow of cheap information about past criminal behavior is not a genie that can be readily put back into Aladdin’s lamp.”<sup>203</sup> Despite potential legal and policy barriers to “sealing” such records, there are many good models to impose sensible restrictions on access to criminal history information. Outside the United States, access to criminal records is far more limited and closely guarded.<sup>204</sup> Within the United States, other potentially stigmatizing records (such as those related to mental and physical health) are similarly and responsibly restricted.<sup>205</sup>

Many of these reform proposals are explicated in the American Bar Association’s Collateral Sanctions Standards.<sup>206</sup> Most importantly, adoption of such Standards would help ensure:

that defendants are fully aware, at the time of a guilty plea and sentencing, of all relevant collateral sanctions that will automatically come into play as a result of a conviction; that the sentencing court has authority to consider applicable collateral sanctions in shaping its own sentence; and, that people who are subject to collateral sanctions have an opportunity to obtain relief from a court or an administrative agency.<sup>207</sup>

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200. See LEGAL ACTION CTR., *supra* note 186, at 22; ERIKA WOOD ET AL., JIM CROW IN NEW YORK 16 (2009), available at [http://www.brennancenter.org/sites/default/files/legacy/publications/JIMCROWNY\\_2010.pdf](http://www.brennancenter.org/sites/default/files/legacy/publications/JIMCROWNY_2010.pdf).

201. See *supra* Part II.C–F.

202. See *supra* Part I.B (detailing the social consequences of widely available criminal records).

203. Freeman, *supra* note 90, at 408.

204. Elena Larrauri Pijoan, *Legal Protections Against Criminal Background Checks in Europe*, 16 PUNISHMENT & SOC’Y 50, 53–54 (2014).

205. Nicolas P. Terry & Leslie P. Francis, *Ensuring the Privacy and Confidentiality of Electronic Health Records*, 2007 U. ILL. L. REV. 681, 682–84 (2007).

206. See generally Maleng, *supra* note 12.

207. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54



## CONCLUSION

While we have isolated each collateral sanction for analytic purposes, we use the concept of “piling on” to emphasize that people experience them collectively—as a totalizing system that touches upon almost every aspect of social life. When they are applied deliberately and appropriately, collateral sanctions serve an important and necessary function in protecting public safety. When applied indiscriminately and unnecessarily, however, they can slow or prevent reintegration and impose great costs on individuals, their families, and their communities. Our brief survey of the collateral consequences of criminal conviction suggests that we may have underestimated the costs and exaggerated the benefits of the broad-scope application of collateral sanctions. In law as in football, “piling on” is unnecessary, retards our progress, and can result in serious injury.