

COLLATERAL CONSEQUENCES: The Crossroads of Punishment, Redemption, and the Effects on Communities

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING
REPORT



JUNE 2019

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- Study and collect information relating to discrimination or a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
- Appraise federal laws and policies with respect to discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, or national origin, or in the administration of justice.
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- Submit reports, findings, and recommendations to the President and Congress.
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Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities

**Briefing Before
The United States Commission on Civil Rights
Held in Washington, DC**

Briefing Report

June 2019

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UNITED STATES COMMISSION ON CIVIL RIGHTS

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Letter of Transmittal

June 13, 2019

President Donald J. Trump
Vice President Mike Pence
Speaker of the House Nancy Pelosi

On behalf of the United States Commission on Civil Rights (“the Commission”), I am pleased to transmit our briefing report, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*. The report is also available in full on the Commission’s website at www.usccr.gov.

This report provides an overview of the relevant data and arguments for and against the imposition of collateral consequences on people with criminal records. Each year, federal and state prisons release more than 620,000 people to return to their communities. While these individuals have often completely exited criminal supervision (for example, through a prison sentence or probation), individuals with criminal records still face potentially thousands of collateral consequences upon reentering society. These collateral consequences are sanctions, restrictions, or disqualifications that attach to a person because of the person’s criminal history. For example, individuals with criminal histories can face barriers to voting, jury service, holding public office, securing employment, obtaining housing, receiving public assistance, owning a firearm, getting a driver’s license, qualifying for financial aid and college admission, qualifying for military service, and maintaining legal status as an immigrant. The reach of each collateral consequence extends past people with criminal records to affect families and communities.

The Commission majority (six Commissioners in favor, one Commissioner in opposition) approved key findings including the following: Collateral consequences exacerbate punishment beyond the criminal conviction after an individual completes the court-imposed sentence. Valid public safety bases support some collateral consequences, such as limitations on working with children for people convicted of particular dangerous crimes. Many collateral consequences, however, are unrelated either to the underlying crime for which a person has been convicted or to a public safety purpose. When the collateral consequences are unrelated in this way, their imposition generally negatively affects public safety and the public good.

Evidence shows harsh collateral consequences unrelated to public safety increase recidivism by limiting or by completely barring formerly incarcerated persons’ access to personal and family support. In addition, the general public, attorneys, and the courts often lack knowledge of what the totality of the collateral consequences are in their jurisdiction, how long they last, and

whether they are discretionary or mandatory, or even if they are relevant to public safety or merely an extended punishment beyond a criminal sentence. This absence of public and judicial awareness of collateral consequences of conviction undermines any deterrent effect that might flow from attaching such consequences, separate and apart from the punishment itself, to criminal convictions. The processes people must undertake to restore rights, for example through applications for pardon or for judicial record sealing, are often complicated, opaque, and difficult to access.

The Commission majority voted for key recommendations, including the following: Collateral consequences should be tailored to serve public safety. Policymakers should avoid punitive mandatory consequences that do not serve public safety, bear no rational relationship to the offense committed, and impede people convicted of crimes from safely reentering and becoming contributing members of society. Jurisdictions that impose collateral consequences should periodically review the consequences imposed by law or regulation to evaluate whether they are necessary to protect public safety and if they are related to the underlying offenses.

The Commission majority specifically calls on Congress to limit discretion of public housing providers to prevent them from categorically barring people with criminal convictions from access to public housing; lift restrictions on access to student loans based on criminal convictions, except for convictions related to financial fraud; eliminate restrictions on TANF and SNAP benefits based on criminal convictions; and require federal courts to give comprehensive notice of federal restrictions on individuals' rights before guilty plea entry, upon conviction, and upon release from incarceration.

We at the Commission are pleased to share our views, informed by careful research and investigation as well as civil rights expertise, to help ensure that all Americans enjoy civil rights protections to which we are entitled.

For the Commission,



Catherine E. Lhamon
Chair

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The Commission's Office of Civil Rights Evaluation (OCRE) produced this report under the direction of Katherine Culliton-González, Esq, OCRE Director.

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With the assistance of Contractor Julie Bush, Esq. and Law Clerk Lamayli Hugué (J.D. Candidate 2020, American University), the Commission's General Counsel Maureen Rudolph, Esq., reviewed and approved the report for legal sufficiency.

Commission State Advisory Committees in Alabama, Arizona, Florida, Illinois, Kentucky, Louisiana, Maine, Ohio, Tennessee, and West Virginia collected and provided testimony, findings, and recommendations to the Commission on collateral consequences and related civil rights issues within their jurisdictions.

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Executive Summary

More than 620,000 people are released from federal and state prisons each year and return to their communities.¹ This substantial number is nearly equivalent to the population of Boston annually.² While these and other individuals have already served their prison or jail sentences, are currently serving probation or parole, or have completely exited criminal supervision, they still face numerous collateral consequences of their conviction or criminal history upon reentering society.³ According to the National Institute of Justice, more than 44,000 collateral consequences exist nationwide.⁴ These include civil law sanctions, restrictions, or disqualifications that attach to a person because of the person's criminal history and can affect the person's ability to function and participate in society.⁵ For example, individuals with criminal histories can face barriers to voting,⁶ serving on a jury,⁷ holding public office,⁸ securing employment,⁹ obtaining housing,¹⁰ receiving public assistance,¹¹ owning a firearm,¹² getting a driver's license,¹³ qualifying for financial aid and

¹ E. Ann Carson, *Prisoners in 2016*, U.S. Dep't of Justice, Bureau of Justice Statistics, 2018, at 10, <https://www.bjs.gov/content/pub/pdf/p16.pdf>; Kate Walz and Marie Claire Tran-Leung, The Sargent Shriver National Center on Poverty Law, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 2-3 [*hereinafter* Walz and Tran-Leung Statement].

² U.S. Census Bureau, "Quick Facts: Boston city, Massachusetts," July 1, 2017, <https://www.census.gov/quickfacts/bostoncitymassachusetts> (estimating the mid-2017 population of Boston as 685,094 people).

³ Margaret Love, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 4 [*hereinafter* Love Statement].

⁴ Council of State Governments, "The National Inventory of the Collateral Consequences of Conviction," <https://niccc.csgjusticecenter.org/about/> (last accessed Nov. 24, 2018) [*hereinafter* CSG, "The National Inventory of the Collateral Consequences of Conviction"].

⁵ Sarah B. Berson, National Institute of Justice, "Beyond the Sentence—Understanding Collateral Consequences," *National Institute of Justice Journal*, no. 272, at 25, <https://www.ncjrs.gov/pdffiles1/nij/241924.pdf>.

⁶ See Chapter 3, "Voting," *infra* notes 625-889.

⁷ See Chapter 3, "Jury Service," *infra* notes 890-955.

⁸ Michael Campagna, Cheyenne Foster, Stephanie Karas, Mary K. Stohr, Craig Hemmens, "Restrictions on the Citizenship Rights of Felons: Barriers to Successful Reintegration," *Journal of Law and Criminal Justice*, vol. 4, no. 1 (2016), 24, 25, http://jlcjnet.com/journals/jlcj/Vol_4_No_1_June_2016/2.pdf.

⁹ See Chapter 2, "How a Criminal Record Can Affect Employment Opportunities," *infra* notes 222-409. See also U.S. Commission on Civil Rights, *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy*, 2013 [*hereinafter* USCCR, 2013 Briefing Report], http://www.eusccr.com/EEOC_final_2013.pdf.

¹⁰ See Chapter 2, "How a Criminal Record Can Affect Housing Opportunities," *infra* notes 410-525.

¹¹ See Chapter 2, "How a Criminal Record Can Affect Access to Public Benefits," *infra* notes 526-624.

¹² 18 U.S.C. § 922(d)(1); see also U.S. Dep't of Justice, *Federal Statutes Imposing Collateral Consequences Upon Conviction*, 2000, at 15-20, https://www.justice.gov/sites/default/files/pardon/legacy/2006/11/13/collateral_consequences.pdf.

¹³ See, e.g., 23 U.S.C. § 159 (withholding federal funding from any state that does not revoke or suspend the driver's licenses of individuals convicted of drug offenses); see also Grace Sankey-Berman, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, April 24, 2017, at 1 (indicating that the "most critical of these barriers is access to ID credentials, vital documents that are essential for the successful transition of individuals from prison

college admission,¹⁴ qualifying for military service,¹⁵ and deportation (for noncitizens).¹⁶ As one scholar noted, “the United States has a uniquely extensive and debilitating web of collateral consequences that continue to punish and stigmatize individuals with criminal records long after the completion of their sentences.”¹⁷

The United States has the largest incarcerated population in the world, with about 2.2 million people confined to prisons and jails.¹⁸ The country with the second-largest prison population is China, which incarcerates about 1.7 million individuals.¹⁹ The United States also has the highest per capita rate of incarceration worldwide (670 per 100,000 people), followed by Rwanda (434 per 100,000), Russia (413 per 100,000), and Brazil (325 per 100,000).²⁰ These calculations do not account for the number of adults under correctional supervision, which includes not only those imprisoned but also on probation or parole; as of December 2016, about 6.6 million people in the U.S. were under correctional supervision.²¹ Collectively, at least 70 to 100 million people nationwide are currently or will be affected by the collateral consequences of incarceration, arrest,

to the community”) [*hereinafter* Sankey-Berman Statement]; Vikrant Reddy, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 3-4 [*hereinafter* Reddy Statement]; Marc Levin, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 1-6 [*hereinafter* Levin Statement].

¹⁴ See Chapter 2, “Barriers to Financial Aid for Higher Education,” *infra* notes 587-624.

¹⁵ 10 U.S.C. § 504(a) (prohibiting any person “who has been convicted of a felony” from enlisting in “any armed force.”).

¹⁶ 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, 636 (2006).

¹⁷ Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 524 (2010).

¹⁸ The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections*, 2018, at 1, <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> (citing Roy Walmsley, “Highest to Lowest—Prison Population Total,” Institute for Criminal Policy Research, World Prison Brief, <http://www.prisonstudies.org/world-prison-brief> (last accessed Sept. 30, 2018)).

¹⁹ Roy Walmsley, “Highest to Lowest—Prison Population Total,” Institute for Criminal Policy Research, World Prison Brief, <http://www.prisonstudies.org/world-prison-brief> (last accessed Sept. 30, 2018).

²⁰ The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections*, *supra* note 18 at 1; see also J.F. Atlanta, “Why does America have such a big prison population?” *The Economist* (Aug. 15, 2013), <https://www.economist.com/blogs/economist-explains/2013/08/economist-explains-8> (noting that the U.S. has an incarceration rate “nearly five times that of Britain, seven times that of France and 24 times that of India.”).

²¹ Danielle Kaebler & Mary Cowhig, *Correctional Populations in the United States, 2016*, U.S. Dep’t of Justice, Bureau of Justice Statistics, 2018, at 1, <https://www.bjs.gov/content/pub/pdf/cpus16.pdf>. See also “Demographics of the Corrections Population,” *infra* notes 96-130.

or conviction.²² Due to overrepresentation in the criminal justice system, people of color,²³ people with disabilities,²⁴ and LGBT individuals²⁵ are disproportionately impacted by collateral consequences. Because the female incarceration rate has accelerated, collateral consequences increasingly impact women, many of whom are single mothers whose children will be affected.²⁶ Immigrants who are not U.S. citizens (and those misidentified as noncitizens) often face the unique collateral consequence of deportation, which can disrupt familial relationships.²⁷ The reach of each collateral consequence extends past people with criminal records to affect families and communities.²⁸

²² The Sentencing Project, Half in Ten, Community Legal Services, *Americans with Criminal Records*, 2015, at 1, <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> (estimating that “100 million Americans have a criminal record”); U.S. Dep’t of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2012, 2014*, at 3, <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf> (finding more than “100.5 individuals offenders” in state criminal history repositories); Gary Fields and John R. Emshwiller, “As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime,” *Wall Street Journal*, Aug. 18, 2014, <https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> (reporting that “the FBI currently has 77.7 million individuals on file in its master criminal database—or nearly one out of every three American adults.”).

²³ See generally, Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2012); see also Chapter 1, “Demographics of the Corrections Population,” *infra* notes 96-130.

²⁴ See Chapter 1, “Demographics of the Corrections Population,” *infra* notes 96-130.

²⁵ See Chapter 1, “Demographics of the Corrections Population,” *infra* notes 96-130. “LGBT” is an acronym for lesbian, gay, bisexual, and transgender.

²⁶ E. Ann Carson, *Prisoners in 2016*, *supra* note 1 at 5 (finding that the number of women sentenced to more than a year increased by 700 prisoners in 2016); see also The Sentencing Project, *Fact Sheet: Trends in U.C. Corrections*, *supra* note 18 at 4 (stating that “[t]he number of women in prison has been increasing at twice the rate of growth for men since 1980”); Annie E. Casey Foundation, *A Shared Sentence: The Devastating Toll of Incarceration on Kids, Families, and Communities*, KIDS COUNT Policy Report, 2016, at 2, <https://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf> (stating that roughly half of women ages 24 and younger in prisons are mothers); Elizabeth Swavola, Kristine Riley, Ram Subramanian, *Overlooked: Women and Jails in an Era of Reform*, Vera Institute of Justice, 2016, at 7, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2016/08/overlooked-women-in-jails-report-web.pdf> (reporting that nearly 80 percent of women in jails are mothers and, most likely, single mothers). See also Chapter 2, “The Disproportionate Impact of Lifetime Drug Bans for Public Benefits,” *infra* notes 563-94 (discussing the economic effects of criminal convictions on women and children).

²⁷ Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 *How. L.J.* 639, 666-71 (2011); 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 (2005); National Immigration Law Center, *How ICE Uses Local Criminal Justice Systems to Funnel People Into the Detention and Deportation System*, 2014, at 1, <https://www.nilc.org/wp-content/uploads/2015/11/state-local-enforcement-and-ice-2014-03-25.pdf> (reporting that “it is becoming more common for citizens, too, to be swept into the detention-deportation system”). See also Rose Cahn, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, June 19, 2017, at 1-9 [*hereinafter* ILRC Statement]; Victoria Moreno, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, July 19, 2017, at 1-3 [*hereinafter* Moreno Statement].

²⁸ See, e.g., Annie E. Casey Foundation, *A Shared Sentence: The Devastating Toll of Incarceration on Kids, Families, and Communities*, *supra* note 26 at 2-3, <https://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf>. The authors report that at least 5 million children have had a parent incarcerated at some point during their childhood, and children of incarcerated parents are at higher risk of dropping out of school. Moreover, research has shown that living in a neighborhood with a high incarceration rate “increases residents’ chances of suffering from

Collateral consequences, and their disproportionate impact on people of color and other distinct populations, implicate key civil rights issues.²⁹ Many advocates believe that an arrest or conviction should not unduly hinder an individual's ability to reintegrate into society and attain self-autonomy.³⁰ Ideas for reforming the scope of collateral consequences—with the goals of

depression and anxiety.” *Ibid.* at 4. *See also* Chapter 3’s discussion of how felony disenfranchisement may adversely affect communities at notes 635-762, *infra*.

²⁹ *See* this report’s discussion of how people impacted by collateral consequences face unequal access to employment, housing, and public benefits, *infra* at notes 222-624, and face restrictions on the right to vote and serve on a jury, *infra* at notes 625-955.

³⁰ Katherine Katcher, Founder and Executive Director, Root and Rebound, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 1-2 [*hereinafter* Katcher Statement]; Faiz Shakir and Vanita Gupta, Joint Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 1-17 [*hereinafter* ACLU and LCCHR Joint Statement]; CLASP, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, June 13, 2017, at 1-6 [*hereinafter* CLASP Statement]; Cynthia W. Roseberry, Executive Director, Council for Court Excellence, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, July 19, 2017, at 1-8 [*hereinafter* Council for Court Excellence Statement]; Craig DeRoche, Senior Vice President of Advocacy and Public Policy, Prison Fellowship, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, July 19, 2017, at 1-6 [*hereinafter* Prison Fellowship Statement]; Gerald Unger, Freeborn Institute of Public Policy, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 15, 2017, at 1-6 [*hereinafter* Unger Statement]; Ryan Haygood, President and CEO, New Jersey Institute for Social Justice, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, July 17, 2017, at 1 [*hereinafter* Haygood Statement]; Shon Hopwood, Associate Professor, Georgetown University Law Center, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, July 17, 2017, at 1-5 [*hereinafter* Hopwood Statement]; Human Rights Campaign (HRC), Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, June 19, 2017, at 1-8 [*hereinafter* HRC Statement]; Roberta Meyers, Director of National H.I.R.E. Network, on behalf of the Legal Action Center (LAC), Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, July 17, 2017, at 1-14 [*hereinafter* LAC Statement]; Brian Cladoosby, on behalf of the National Congress of American Indians (NCAI), Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 18, 2017, at 1-2 [*hereinafter* NCAI Statement]; ILRC Statement at 1-9; Robin Chand, on behalf of U.S. Congressman Hank Johnson, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, July 16, 2017, at 1-3 [*hereinafter* Congressman Hank Johnson Statement]; The Reentry Working Group, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, July 19, 2017, at 1-9 [*hereinafter* Reentry Working Group Statement]; Marina Duane and Emily Reimal, on behalf of the Urban Institute, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, July 19, 2017, at 1-4 [*hereinafter* Urban Institute Statement]; Pamela F. Rodriguez, on behalf of Treatment Alternatives for Safe Communities (TASC), Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 17, 2017, at 1-4 [*hereinafter* TASC statement]; Richard T. Cassidy, on behalf of Uniform Law Commission, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the

promoting public safety, allowing formerly incarcerated individuals to become self-sufficient, keeping families together, and reducing stigma—have received bipartisan support.³¹ In recent years, advocates, academics, researchers, and government officials have proposed reforms to improve transparency and mitigate or remove some of the consequences that formerly incarcerated individuals face.³² In 2012, the Equal Employment Opportunity Commission (EEOC) issued a guidance about hiring some applicants with criminal backgrounds.³³ Corporations like Koch Industries, Walmart, Target, and Bed Bath & Beyond have taken affirmative steps to expand employment opportunities for individuals with criminal records.³⁴ States have also acted to lift restrictions on the right to vote and restore the franchise to people with criminal convictions.³⁵

Alleviating the collateral consequences of conviction can help formerly incarcerated individuals lead more productive lives, secure gainful employment, find housing, and obtain the resources they need to become self-sufficient.³⁶ Ultimately, these positive effects may benefit the economy overall. According to the Center for Economic and Policy Research, the vastly diminished employment opportunities for men with criminal records “cost the U.S. economy between \$57 and \$65 billion in lost output” in 2008.³⁷ These data illustrate the potential economic value of lowering hurdles to employment for people with criminal records.³⁸ Furthermore, allowing formerly

U.S. Commission on Civil Rights, May 19, 2017, at 1-50 [*hereinafter* Uniform Law Commission Statement]; U.S. Senator Benjamin L. Cardin, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, June 19, 2017, at 1-11 [*hereinafter* Senator Cardin Statement]; Moreno Statement at 1-3; Southern Poverty Law Center, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, June 19, 2017, at 1-11 [*hereinafter* SPLC Statement].

³¹ See *Ibid.* See also John Malcolm, Vice President of the Institute for Constitutional Government and Director of the Meese Center for Legal & Judicial Studies, The Heritage Foundation, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 1-15 [*hereinafter* Malcolm Statement]; Levin Statement at 1-6; Sankey-Berman Statement at 1.

³² See, e.g., *supra* notes 30-31.

³³ U.S. Equal Employment Opportunity Commission, “Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1965,” Enforcement Guidance 915.002, Apr. 25, 2012, https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [*hereinafter* EEOC, 2012 Guidance]; see also *infra* notes 264-307 (discussing debate of the legality of this guidance).

³⁴ Christine Owens & Wade Henderson, “Koch Brothers are right on fair chance hiring,” *CNN*, April 28, 2017, <http://www.cnn.com/2015/04/28/opinions/owens-henderson-koch-brothers-fair-chance-hiring/index.html>.

³⁵ See Chapter 3, “The Restoration of Voting Rights,” *infra* at notes 805-889.

³⁶ The Leadership Conference, *Fact Sheet: Fair Chance Hiring*, 2017, http://civilrightsdocs.info/pdf/criminal-justice/Fair_Chance_Hiring.pdf; Marie Claire Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, Sargent Shriver National Center on Poverty Law, 2015, <http://www.povertylaw.org/files/docs/WDMD-final.pdf>; Amy E. Hirsch et al., *Every Door Closed: Barriers Facing Parents with Criminal Records*, Center for Law and Social Policy and Community Legal Services, 2002, https://clsphila.org/sites/default/files/issues/every_door_closed.pdf.

³⁷ John Schmitt & Kris Warner, *Ex-offenders and the Labor Market*, Center for Economic and Policy Research, November 2010, at 2, <http://cepr.net/documents/publications/ex-offenders-2010-11.pdf> (also accounting for recidivism to determine lifetime probability of impacts, at 14, Table 6).

³⁸ *Ibid.* at 1.

incarcerated individuals to participate in civic society strengthens their connections with their communities and can thereby foster meaningful rehabilitation.³⁹ Research strongly suggests that relieving some formerly incarcerated individuals from the burdens of certain collateral consequences cultivates successful reintegration into society, helps reduce recidivism, and promotes public safety.⁴⁰

The main arguments against such reforms reflect concerns about the continuing risks that people with criminal records may pose to society. The prospect of recidivism, and its attendant threat to public safety, becomes an issue if individuals convicted of violent crimes⁴¹ are permitted to interact closely with the public, particularly with more vulnerable populations such as children.⁴² Although some opponents of reform insist that states should remain free to impose any collateral consequences they deem reasonable,⁴³ others advocate for a more balanced approach, where the exact consequences flow from the nature of the crime (i.e., prohibiting a person convicted of fraud or theft from working in a bank).⁴⁴

³⁹ Marc Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, 54 HOW. L.J. 549, 562 (2011).

⁴⁰ See Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 10-11 (2014) (“Providing individuals the opportunity for stable employment actually lowers crime recidivism rates and thus increases public safety.”) (quoting American Correctional Assoc., 135th Cong. of Correction, Presentation by Art Lurigio (Loyola University), Safer Foundation Recidivism Study (Aug. 8, 2005)); see also Tanya N. Whittle, “Felony Collateral Sanctions Effects on Recidivism: A Literature Review,” *Criminal Justice Policy Review*, vol. 29, issue 5 (2016): 505-24, <http://journals.sagepub.com/doi/pdf/10.1177/0887403415623328> (citing research suggesting that collateral consequences restricting access to housing and public assistance may increase recidivism).

⁴¹ The Commission notes that the national violent crime rate has been declining for nearly 30 years, and the rate of nonviolent property crimes is at least 6 times the rate of violent crime. See FBI, Uniform Crime Reports, “Estimated crime in United States-Total,” <https://www.ucrdatatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (last accessed Nov. 18, 2018). Moreover, most felony convictions stem from nonviolent crimes, and the relatively small percentage of people convicted of violent crimes tend to serve longer sentences in prison, where they cannot interact with the general public. See U.S. Sentencing Commission, *Overview of Federal Criminal Cases: Fiscal Year 2016, 2017*, at 1-2, 4, https://www.uscc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16_Overview_Federal_Criminal_Cases.pdf (finding that nonviolent drug, immigration, and fraud offenses accounted for about 70 percent of federal cases and that length of imprisonment depended upon seriousness of the crime, with people convicted of murder serving the longest sentences); U.S. Dep’t of Justice, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006—Statistical Tables*, revised 2010, at 2-3, <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf> (reporting that about 72 percent of felony convictions in state courts were for nonviolent drug or property offenses, and people convicted of violent felonies received the longest prison sentences).

⁴² See, e.g., Malcolm Statement at 3 (noting that “it is perfectly reasonable to prohibit convicted sex offenders from running a day care center” and “violent felons from purchasing or possessing firearms”).

⁴³ See, e.g., U.S. Commission on Civil Rights, *Briefing on Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, May 19, 2017 [hereinafter *Briefing Transcript*] at 82 (statement by Hans von Spakovsky, Senior Legal Fellow with the Meese Center for Legal and Judicial Studies, The Heritage Foundation) (arguing, for example, that “Congress does not have the constitutional authority to force states to restore voting rights of convicted felons . . .”). Note, however, von Spakovsky’s acknowledgement that certain collateral consequences “don’t make any sense, particularly for example, the loss of driver’s licenses for crimes that have nothing to do with driving.” *Ibid.* at 85.

⁴⁴ Malcolm Statement at 7 (contending that collateral consequences should be “reasonably related to the offense committed”).

This report provides an overview of the relevant data and arguments for and against the imposition of collateral consequences on people with criminal records. Chapter 1 summarizes the diverse range of collateral consequences, the demographics of the populations affected, and the numerous federal and state laws imposing collateral consequences in various localities. This chapter also analyzes under what circumstances collateral consequences can be removed through government restoration of a person’s civil rights, and the reported lack of transparency about how a person is notified of the potential collateral consequences of a criminal record. Chapter 2 summarizes the collateral consequences that can impede a person’s access to basic needs like housing, employment, and public benefits. Chapter 3 examines the collateral consequences that hinder an individual’s access to civic participation through voting and jury service and explores the racial origins and racial disparities of collateral consequences. Finally, the Commission sets forth findings and recommendations.⁴⁵

⁴⁵ See Chapter 4, “Findings and Recommendations.”

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Chapter 1: Introduction and Overview

Overview of Collateral Consequences

The U.S. Department of Justice estimates that between 70 and 100 million adults in the U.S. have a criminal record, which could include a felony conviction, a misdemeanor, or an arrest without a conviction.⁴⁶ The collateral consequences of criminal records can create an array of lifelong barriers that hamper successful reentry into society—including barriers to voting and other civic participation, education, employment, professional licensing, housing, and receipt of public benefits.⁴⁷ These collateral consequences can profoundly affect individuals and families and their economic security.⁴⁸

Collateral consequences are sanctions, restrictions, or disqualifications that stem from a person's criminal history.⁴⁹ When a person is convicted of a crime, the court may deliver a sentence like imprisonment, probation,⁵⁰ or payment of a fine.⁵¹ In some cases, a parole board may grant parole

⁴⁶ U.S. Dep't of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2014*, 2015, at 2-3, <https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf>. The Dep't of Justice reports that 49 states, the District of Columbia, and Puerto Rico have 105,569,200 persons in their criminal history files, of whom 100,024,400 are automated records. The DOJ notes that a person may have records in more than one state. See National Employment Law Project (NELP), *Research Supports Fair-Chance Policies*, 2016, at 1 n.1, <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>. By reducing by 30 percent the DOJ's reported number of persons to 70,417,410 persons, NELP conservatively estimated that approximately 70 million individuals have criminal histories; this calculation accounts for the duplication of records. See also Jo Craven McGinty, "How Many Americans Have a Police Record? Probably More Than You Think," *Wall Street Journal*, Aug. 7, 2015, <https://www.wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802>. The author indicates that there is no easy way to arrive at the number of people with criminal histories, as a complete data set of arrests and prosecutions does not exist. *Ibid.*

⁴⁷ Berson, "Beyond the Sentence—Understanding Collateral Consequences," *supra* note 5 at 25-27; see also The Sentencing Project, et al., *Americans with Criminal Records*, *supra* note 22 at 1.

⁴⁸ See Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to "Collateral" Punishment Policy*, 10 HARV. L. & POL'Y REV. 123, 132-33 (2016) (documenting thousands of laws and regulations relating to collateral consequences that impact economic security, including ones involving employment (23,715), occupational licensing and certification (15,623), government benefits (1,180), and government loans and grants (293)). See also Chapter 2, "Access to Self-Sufficiency and Meeting Basic Needs," *infra* notes 222-624.

⁴⁹ See, e.g., Berson, "Beyond the Sentence—Understanding Collateral Consequences," *supra* note 5 at 25. According to Berson, collateral consequences are "a host of sanctions and disqualifications that can place an unanticipated burden on [criminally convicted] individuals trying to re-enter society and lead lives as productive citizens."

⁵⁰ See Black's Law Dictionary, *Probation* (10th ed. 2014) (defining "probation" as "[a] court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison"). See also U.S. Dep't of Justice, Bureau of Justice Statistics, "FAQ Detail: What is the Difference Between Probation and Parole?," <https://www.bjs.gov/index.cfm?ty=qa&iid=324> (last accessed Oct. 8, 2018).

⁵¹ See Black's Law Dictionary, *Fine* (10th ed. 2014) (defining "fine" as "[a] pecuniary criminal punishment or civil penalty payable to the public treasury").

to an incarcerated individual, allowing the person's release before full completion of the sentence.⁵² But unlike the direct sentence imposed by the court, a collateral consequence is imposed by federal, state, or local laws and policies.⁵³ Some collateral consequences are discretionary, but most are automatic upon conviction under federal, state, or local laws.⁵⁴ Collateral consequences can attach to felony and misdemeanor convictions, and can last a lifetime or a finite period.⁵⁵

Collateral consequences are traditionally deemed civil sanctions, in that they curtail constitutional civil rights (particularly under the 13th, 14th, 15th, and 19th Amendments); civil statutory protections (such as under the Voting Rights Act); and eligibility for public benefits like food stamps and subsidized housing.⁵⁶ Collateral consequences may serve public safety or regulatory

⁵² See Black's Law Dictionary, *Parole* (10th ed. 2014) (defining "parole" as "[t]he conditional release of a prisoner from imprisonment before the full sentence has been served"); see also Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, *supra* note 16 at 634 (noting that direct consequences of a criminal conviction "include the duration of the jail or prison sentence imposed upon the defendant as well as, in some jurisdictions, the defendant's parole eligibility or imposition of fines."); Bureau of Justice Statistics, "FAQ Detail: What is the Difference Between Probation and Parole?," <https://www.bjs.gov/index.cfm?ty=qa&iid=324>.

⁵³ Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, *supra* note 16 at 634.

⁵⁴ *Id.* at 635 (describing discretionary collateral consequences as those "imposed at the discretion of agencies acting independently of the criminal justice system," and mandatory collateral consequences as those triggered "upon the conviction by operation of law"); *Sanchez v. United States*, 572 F.2d 210, 211 (9th Cir. 1977) (deeming revocation of parole a collateral consequence, but not one that occurs automatically by law because a parole board "may in its discretion determine whether the remainder of [a convicted person's] preexisting sentence will be consecutive to or concurrent with the new sentence imposed by the trial judge."). See also American Bar Association, *ABA Standards for Criminal Justice, Third Edition: Collateral Sanctions and Discretionary Disqualifications of Convicted Persons*, 2004, at 1,

https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_collateralsanctionwithcommentary_authcheckdam.pdf (defining a "discretionary" collateral consequence as "a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction.").

⁵⁵ Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, *supra* note 16 at 648.

⁵⁶ See, e.g., Black's Law Dictionary, *Civil Right* (10th ed. 2014) (defining civil right as "[a]ny of the individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act. Civil rights include [especially] the right to vote, the right of due process, and the right of equal protection under the law."). See also Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 155 (1999) (noting that a criminal conviction can restrict "the ability to work for the government," and "lead to the loss of public benefits...to adopt, be a foster parent, or maintain custody of [one's] own children [and]...can lead to the loss of civil rights...forfeiture of a pension, a requirement for registration or monitoring, or a prohibition on living in a particular area."); Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, *supra* note 16 at 643-44 (asserting that "[Collateral] consequences are considered to be the 'indirect' ramifications of criminal convictions, as they impose 'civil' rather than 'criminal' penalties. . . . Moreover, these distinctions shield trial judges from having to inform defendants of collateral consequences when accepting guilty pleas or pronouncing sentences."). Note that because of the "sustained social stigmatization" of collateral consequences, some scholars have questioned whether collateral consequences should be characterized as criminal rather than civil penalties. See *id.* at 559-60 (stating that "some scholars have challenged the legal distinctions between criminal and civil penalties. Specifically, scholars have

purposes; examples include prohibiting convicted sex offenders from managing day care centers or forcing public officials convicted of bribery to resign from office.⁵⁷ Some collateral consequences directly relate to the specific crime, such as driver's license suspensions for people convicted of a serious traffic offense.⁵⁸ Other collateral consequences apply regardless of any connection between the consequence and the nature or severity of the crime, how long ago the crime was committed, or the individual's post-conviction record.⁵⁹

Collateral consequences can be characterized as “invisible” punishments, because they restrict freedom and opportunity for people with criminal convictions but operate outside of the formal sentencing framework and beyond the public view.⁶⁰ In the absence of clear tabulation of the range of collateral consequences that may attach to particular convictions, judges, prosecutors, and even defense counsel may lack an understanding or knowledge about which crimes trigger certain (or how many) collateral consequences.⁶¹ Moreover, because defense counsel, prosecutors, and judges are not legally required to inform defendants of these collateral consequences (except for the consequence of deportation for noncitizens),⁶² many individuals accused of committing crimes are not fully aware of the ramifications of a guilty plea or conviction.⁶³

Collateral consequences have been a feature of the American justice system since colonial times.⁶⁴ “Civil death” was historically the fate of many criminals dating back to Greek and Roman times, but also existed in English colonial society,⁶⁵ as individuals were essentially stripped of their civil

critiqued appellate court classifications of certain consequences as indirect ‘civil’ penalties that do not constitute ‘criminal’ punishment.”).

⁵⁷ See Love Statement at 3; Malcolm Statement at 4.

⁵⁸ Love Statement at 3.

⁵⁹ Ibid. For example, driver's licenses are often restricted for “underlying crimes that have nothing to do with the operation of motor vehicles. In the State of Virginia, for example, in the Year 2015, 39,000 people . . . had their driver's licenses suspended . . . 99% of the underlying offenses had nothing to do with the operation of motor vehicles.” Statement of Vikrant Reddy, *Briefing Transcript* at 20.

⁶⁰ Berson, “Beyond the Sentence—Understanding Collateral Consequences,” *supra* note 5; Jeremy Travis, “Invisible Punishment: An Instrument of Social Exclusion,” in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, ed. Marc Mauer and Meda Chesney-Lind, (The New Press: New York, 2002), at 16, http://webarchive.urban.org/UploadedPDF/1000557_invisible_punishment.pdf.

⁶¹ Berson, “Beyond the Sentence—Understanding Collateral Consequences,” *supra* note 5; see also Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, *supra* note 16 at 639 (pointing out that “even institutional actors such as judges, prosecutors, and defense attorneys are often unaware of the array of consequences that can attach to a criminal conviction.”).

⁶² *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding that counsel must inform a client whether a guilty plea may result in deportation).

⁶³ Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, *supra* note 16 at 673.

⁶⁴ U.S. General Accountability Office, *Nonviolent Drug Convictions: Stakeholders Views on Potential Actions to Address Collateral Consequences*, GAO-17-691, 2017, at 2, <http://www.gao.gov/assets/690/687003.pdf>.

⁶⁵ Mark Hasse, *Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota*, 99 MINN. L. REV. 1913, 1913-14 (2015), http://www.minnesotalawreview.org/wp-content/uploads/2015/09/Hasse_4fmt_PDF.pdf.

rights and property and could face banishment from society—a status akin to death.⁶⁶ In the United States, the disenfranchisement of criminally convicted people dates back to colonial times, and since then, many states have written restrictive provisions into their constitutions, starting in the late 18th century and continuing into the Jim Crow era.⁶⁷ For example, after the 15th Amendment granted the right to vote to black men, several states enacted laws to disenfranchise individuals with criminal convictions.⁶⁸

Throughout the years, collateral consequences proliferated in number and severity, affected more and more people, and became more difficult to mitigate.⁶⁹ Several such laws impose permanent disqualifications or limitations and provide no opportunities for individuals to avoid or escape their effects.⁷⁰ In her statement to the U.S. Commission on Civil Rights (the Commission), Executive Director of the Collateral Consequences Resource Center Margaret Love wrote:

Many [collateral consequences] consist of nothing more than a direction to an official decision-maker to conduct a criminal background check, frequently understood as an unspoken warning that it is safest to reject anyone with a criminal record. Others are implied by a requirement that eligibility for a benefit or opportunity depends upon a person having “good moral character,” a status considered unattainable after criminal conviction.⁷¹

While most people agree that accountability matters for individuals who are convicted of crimes, many also believe that society must allow formerly incarcerated individuals a chance to

⁶⁶ Gabriel Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1793-94, n.24 (2012), <https://www.pennlawreview.com/print/old/G%20Chin.pdf>.

⁶⁷ Angela Behrens, Christopher Uggen, Jeff Manza, “Ballot Manipulation and the “Menace of Negro Domination”: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002,” *American Journal of Sociology*, vol. 109, no. 3 (2003), at 563, https://users.cla.umn.edu/~uggen/Behrens_Uggen_Manza_ajs.pdf.

⁶⁸ See Chapter 3, “The Racial Origins of Disenfranchisement Laws and Ongoing Disparities,” *infra* notes 730-62.

⁶⁹ Love Statement at 2; Margaret Colgate Love, Jenny Roberts, and Cecelia Klingele, *Collateral Consequences Of Criminal Conviction: Law, Policy And Practice*, at 1-35 (West/NACDL, 2d ed. 2016); Gabriel Chin, “Collateral Consequences of Criminal Conviction,” *Criminology, Criminal Justice, Law & Society*, 2017, vol. 18, no. 3 (2017), at 2, <https://ccjls.scholasticahq.com/article/2721-collateral-consequences-of-criminal-conviction>.

⁷⁰ Love Statement at 3; see also The Collateral Consequences Resource Center (CCRC), *Forgiving and Forgetting in American Justice: A 50-State Guide to Expungement and Restoration of Rights*, 2018, at 2, <http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Aug-2018.pdf> (compiling and analyzing information about relief from collateral consequences to “facilitate a national conversation about how people who have been convicted of a crime may best regain their legal rights and social status.”). The CCRC report reviews the state mechanisms available for obtaining relief from collateral consequences, including record-sealing to expand job opportunities for people with criminal records, certificates of relief to lift occupational licensing requirements, and executive pardons to restore voting rights. *Ibid.* at 2-3, 7-11, 15-17, 22-24. The report’s authors note that many states are enacting reforms to alleviate the effects of collateral consequences, but acknowledge the limits of such reforms and the often lengthy or cumbersome processes involved for people seeking relief from collateral consequences. *Ibid.* at 2-3, 5-17, 22-24.

⁷¹ Love Statement at 3.

successfully reintegrate into society.⁷² Vikrant Reddy, Senior Research Fellow at the Charles Koch Institute, explained in his testimony before the Commission in 2017:

[A]t a certain point the accountability portion ends and you have to help people reenter society. You have to do this for two reasons; the first is the obvious moral reason, but the second reason is really a hard-nosed question of public safety. More than 90% of the people who enter state prisons in this country will come out of those prisons and they will live next door to you and me, and we all have an interest in making sure that they are successfully reintegrated so they are not hurting people again.⁷³

Furthermore, some scholars believe that it is time to reexamine the collateral consequences that hinder the reintegration of individuals with criminal records, whenever doing so does not jeopardize public safety.⁷⁴ As John Malcolm, Vice President of the Institute for Constitutional Government and Director of the Meese Center for Legal and Judicial Studies, wrote in his statement to the Commission:

It is not in anyone's best interests to consign ex-offenders to a permanent second-class status. Doing so will only lead to wasted lives, ruined families, and more crime. . . . Other collateral consequences, though, have a tenuous connection to public safety, appear to be more punitive in nature, and they certainly make it more difficult for an ex-offender to reintegrate into society. State and federal legislators should periodically review existing collateral consequences to ensure that they are truly necessary to protect public safety, not punitive in nature, and are reasonably related to the offense that was committed. Collateral consequences that do not fit these parameters should be amended or repealed so that ex-offenders who are earnestly working to lead lawful, prosperous lives and to provide for their families are not needlessly thrown off-course.⁷⁵

According to the National Inventory of Collateral Consequences of Conviction (NICCC) of the Council of State Governments, over 44,000 separate collateral consequences have been established through federal and state laws and regulations.⁷⁶ Additional collateral consequences may be imposed at the local level among the country's estimated 3,000 county governments and nearly

⁷² *Briefing Transcript* at 16 (statement of Vikrant Reddy, Senior Research Fellow, Charles Koch Institute).

⁷³ *Ibid.*

⁷⁴ See, e.g., John G. Malcolm and John-Michael Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?*, The Heritage Foundation, 2017, at 2, <http://www.heritage.org/sites/default/files/2017-03/LM-200.pdf>.

⁷⁵ Malcolm Statement at 3-4.

⁷⁶ CSG, "The National Inventory of the Collateral Consequences of Conviction."

36,000 municipal, town, and township governments.⁷⁷ Notably, the NICCC database does not track private entities that limit or deny opportunities to individuals with criminal records, including nongovernment employers and private educational and vocational program administrators.⁷⁸ Moreover, evaluations of candidates’ “character and fitness” for certain professions or job positions may encompass review of their criminal records.⁷⁹ For example, state bar associations use these evaluations to assess applicants’ suitability for practicing law, and federal agencies incorporate these evaluations into their hiring decisions for federal contractors.⁸⁰

Figure 1 shows the categories of collateral consequences imposed by U.S. jurisdictions as specified in the NICCC database.⁸¹ Among all the states, the District of Columbia, and American Samoa, Guam, Puerto Rico, and the Northern Mariana and Virgin Islands, employment (19,334) and occupational licensing (13,791) are the most common collateral consequences.⁸²

⁷⁷ U.S. Census Bureau, *2012 Census Of Governments: Organization Component Preliminary Estimates*, July 23, 2012,

http://www2.census.gov/govs/cog/2012/formatted_prelim_counts_23jul2012_2.pdf; Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1, 4-5 (2014), https://kb.osu.edu/bitstream/handle/1811/71617/OSLJ_V75N1_0001.pdf.

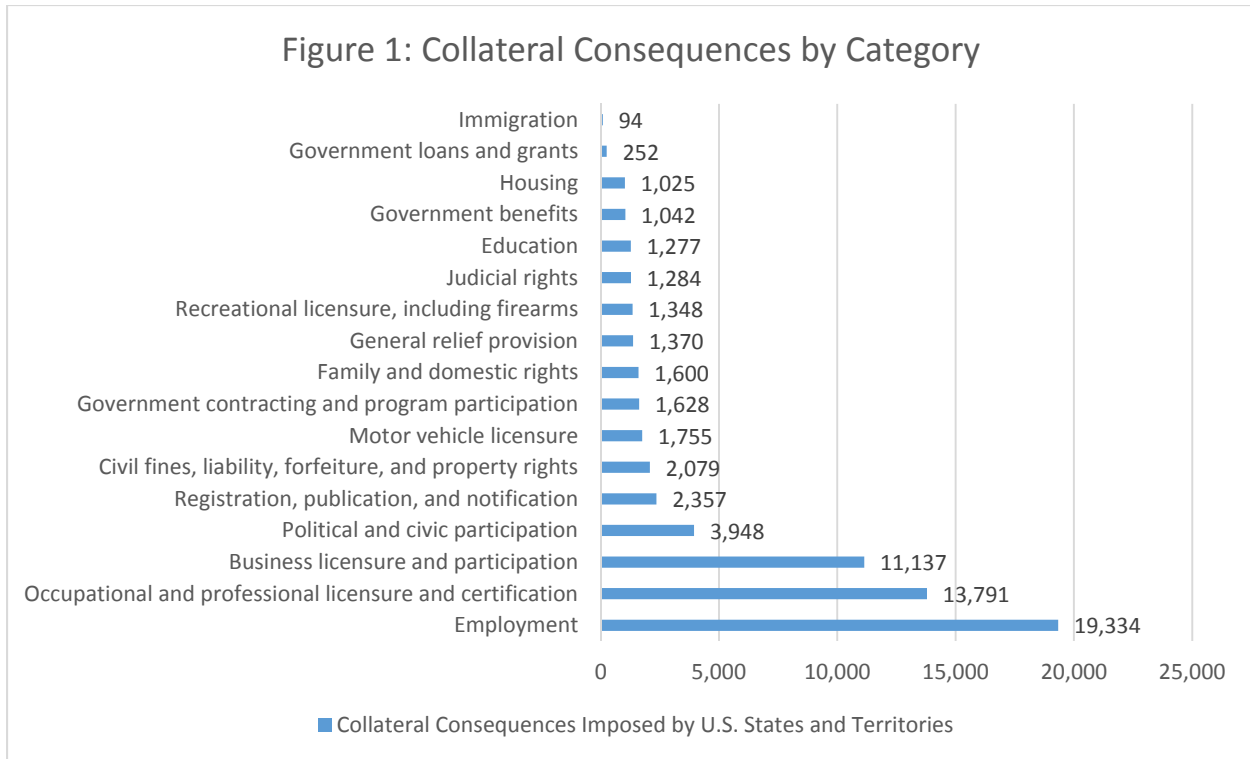
⁷⁸ Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy*, 10 HARV. L. & POL’Y REV. 123, 132-33 (2016). See also Chapter 2, “Occupational Licensing Barriers,” *infra* notes 318-70 (discussing the lawful discretion of private entities to deny occupational licenses to people with criminal records).

⁷⁹ See, e.g., Aaron M. Clemens, *Facing the Klieg Lights: Understanding the “Good Moral Character” Examination for Bar Applicants*, 40 AKRON L. REV. 255, 278-80 (2007) (discussing how findings from character and fitness assessments may prevent people from entering the legal profession); U.S. Office of Personnel Management, “Memo for Chief Human Capital Officers,” May 15, 2013, at 1-4, <https://chcoc.gov/sites/default/files/trans5585.pdf> (discussing authority of federal agencies to include assessments of character and fitness, which may involve review of criminal records, as selection criteria for hiring federal contractors).

⁸⁰ Clemens, *Facing the Klieg Lights: Understanding the “Good Moral Character” Examination for Bar Applicants*, *supra* note 79; U.S. Office of Personnel Management, “Memo for Chief Human Capital Officers,” *supra* note 79. See also National Conference of Bar Examiners, American Bar Association Section of Legal Education and Admissions to the Bar, *Comprehensive Guide to Bar Admission Requirements* (2018), at 5-6, <http://www.ncbex.org/pubs/bar-admissions-guide/2018/mobile/index.html> (revealing that in some jurisdictions, a felony conviction automatically disqualifies a candidate who wishes to practice law). Note that some jurisdictions will admit candidates with felony convictions after a specified waiting period or if they are pardoned, overcome a rebuttable presumption of lack of good moral character, or meet other requirements. *Ibid.*

⁸¹ CSG, “The National Inventory of the Collateral Consequences of Conviction.” For a full explanation of each category, see the CSG National Inventory website, <https://niccc.csjusticecenter.org/>. *Ibid.*

⁸² *Ibid.*



Source: Compiled by U.S. Commission on Civil Rights from CSG, National Inventory of Collateral Consequences of Conviction (NICCC), February 2019

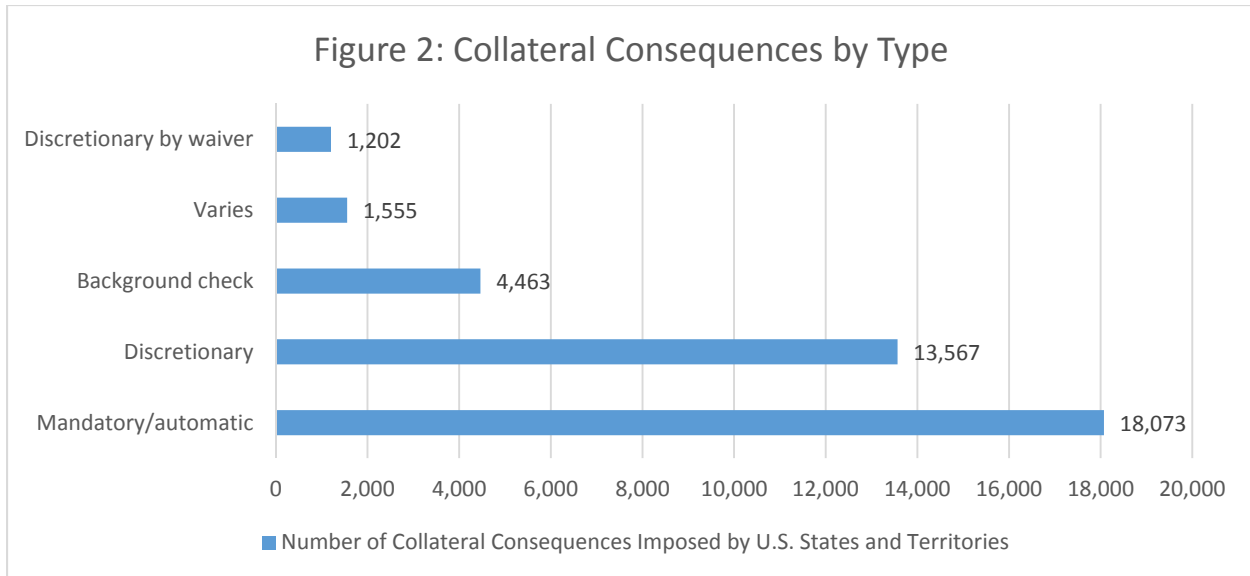
Figure 2 shows the types of state and territorial collateral consequences in terms of whether they are mandatory, discretionary, or invoked by an authorized or required background check.⁸³ Approximately 18,073 collateral consequences are imposed automatically or because of a statutory mandate.⁸⁴ There are 13,567 collateral consequences that are discretionary (authorizing but not requiring a decision-maker to impose the consequence),⁸⁵ and 1,202 that are mandatory but may be waived by the appropriate decision-maker upon the affected individual's request.⁸⁶

⁸³ Ibid. "General Relief" refers to a collateral consequence that cannot be lifted without a pardon, order, or reprieve from a government official. For example, the NICCC databases classifies Alabama's statute authorizing the State Board of Pardons and Paroles to restore voting rights to people convicted of certain felonies as "General Relief." See CSG, "The National Inventory of the Collateral Consequences of Conviction: Consequence Details, Restoration of right to vote upon pardon (relief)," <https://niccc.csgjusticecenter.org/database/entry/restoration-of-right-to-vote-upon-pardon-relief/>; see also Ala. Code § 15-22-36 (granting power to the State Board of Pardons and Paroles "to grant pardons and paroles and to remit fines and forfeitures" after a person's conviction), § 17-3-31 (stating that a person who was disqualified from voting because of a conviction "and who has been pardoned, may be restored to citizenship with the right to vote by the State Board of Pardons and Paroles when specifically expressed in the pardon.").

⁸⁴ Ibid. (CSG).

⁸⁵ American Bar Association, *ABA Standards for Criminal Justice, Third Edition: Collateral Sanctions and Discretionary Disqualifications of Convicted Persons*, *supra* note 54 at 1 (a "discretionary" collateral consequence is defined as "a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction.")

⁸⁶ CSG, "The National Inventory of the Collateral Consequences of Conviction." For a full explanation of collateral consequences that are discretionary by waiver, see Council of State Governments, "Discretion: Discretionary (waiver)," <https://niccc.csgjusticecenter.org/help/> (last accessed Nov. 19, 2018).



Source: Compiled by U.S. Commission on Civil Rights from CSG, National Inventory of Collateral Consequences of Conviction (NICCC), February 2019

The American Bar Association has provided guidance on when discretionary collateral consequences should be imposed and advised:

The legislature should prohibit discretionary disqualification of a convicted person from benefits or opportunities, including housing, employment, insurance, and occupational and professional licenses, permits and certifications, on grounds related to the conviction, unless engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted.⁸⁷

For example:

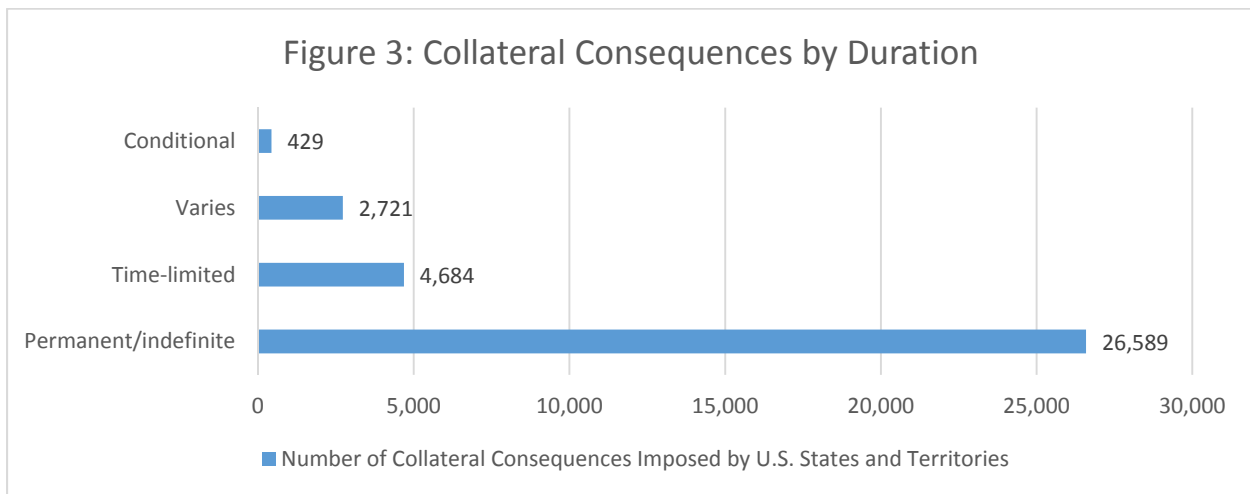
[U]nder this Standard a public housing authority authorized by law to evict tenants who engage in drug trafficking could properly consider an individual's conviction of drug trafficking as sufficient to establish the conduct warranting eviction. In this case, it is the conduct (engaging in drug trafficking) that may trigger eviction; anyone who engages in drug trafficking is subject to the penalty, not just those who have been convicted of drug trafficking. On the other hand, the penalty is not automatic but discretionary: the housing authority is authorized to evict, but is not required to evict. Conviction for drug trafficking will generally establish that the conduct took place, but eviction may or may not be imposed as a result. In other words, a criminal conviction for drug trafficking is neither necessary nor sufficient

⁸⁷ American Bar Association, *ABA Standards for Criminal Justice, Third Edition: Collateral Sanctions and Discretionary Disqualifications of Convicted Persons*, *supra* note 54 at 41.

to warrant eviction, and a convicted person whose conduct is established by the judgment is no better off and no worse off than if the same conduct was shown through civil or administrative proceedings or an admission.⁸⁸

The remainder of collateral consequences are triggered by criminal background checks or by other means such as disclosure requirements.⁸⁹ While criminal background checks are not necessarily considered collateral consequences themselves, they operate as a mechanism by which many collateral consequences are imposed, whether it be through an examination of government records or self-disclosure.⁹⁰ Under certain circumstances, an applicant must demonstrate “good moral character” or meet similar standards for a professional license, or a background check or disclosure may be explicitly required to determine an applicant’s criminal history.⁹¹

Figure 3 shows state and territorial collateral consequences by the duration of the consequence.⁹² About 77 percent (26,589) of all collateral consequences are permanent or last for an indefinite period, 14 percent (4,684) are time-limited or set for a specific term, 8 percent (2,721) vary in terms of duration, and 1 percent (429) are conditional upon circumstances enumerated in the statute.⁹³



Source: Compiled by U.S. Commission on Civil Rights from CSG, National Inventory of Collateral Consequences of Conviction (NICCC), February 2019

⁸⁸ Ibid. at 42.

⁸⁹ CSG, “The National Inventory of the Collateral Consequences of Conviction.”

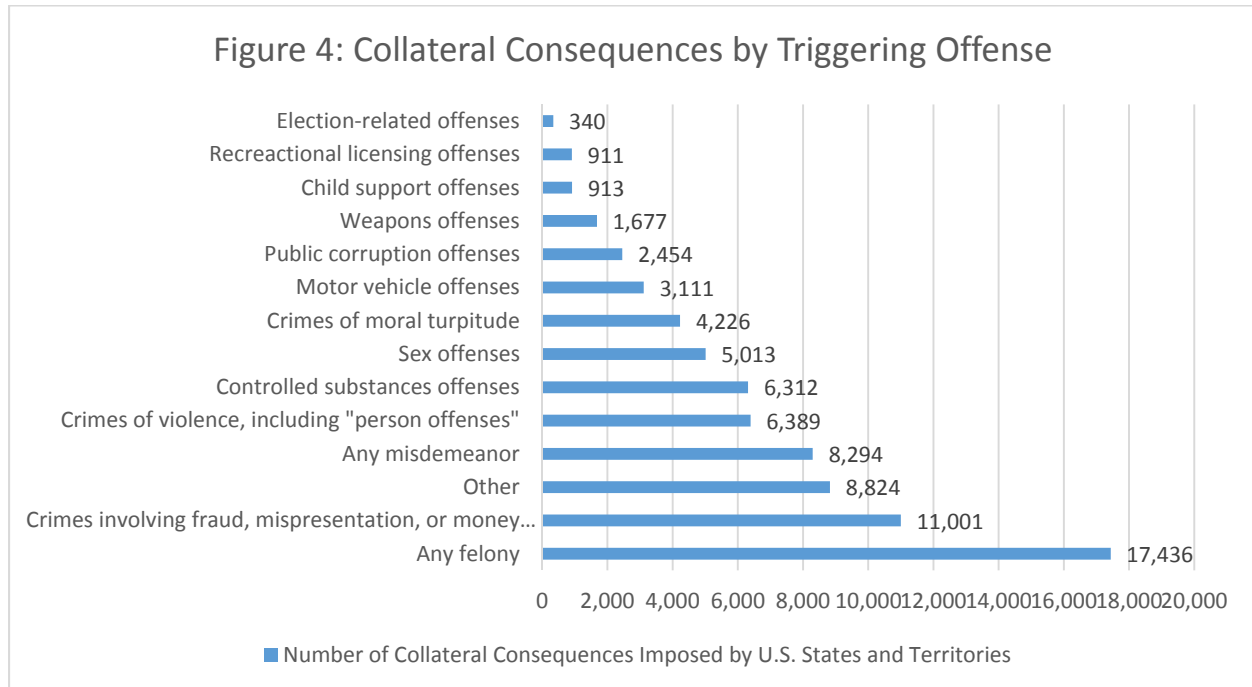
⁹⁰ See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 287-88 (2011) (pointing out that “[i]ncreased access to criminal records coincides with a recent, and exponential, growth in the collateral consequences of criminal convictions” and “employers and landlords can now quickly search criminal records, so that even when there is no legal barrier to housing or employment for the individual, there is an effective bar.”).

⁹¹ See *supra* notes 79-80 (discussing character and fitness assessments).

⁹² CSG, “The National Inventory of the Collateral Consequences of Conviction.”

⁹³ Ibid.

Figure 4 shows state and territorial collateral consequences by the specific type of triggering offense.⁹⁴ Among approximately 44,631 collateral consequences, nearly 40 percent (17,436) are triggered by any felony conviction, and about 19 percent (8,294) are triggered by any misdemeanor.⁹⁵



Source: Compiled by U.S. Commission on Civil Rights from CSG, National Inventory of Collateral Consequences of Conviction (NICCC), February 2019

Demographics of the Corrections Population

As of December 2016, about 6.6 million people were under correctional supervision nationwide.⁹⁶ Approximately 1.5 million of those individuals were housed in prisons, 0.7 million were housed in jails, and about 4.5 million were under community supervision, on parole, or on probation.⁹⁷ Jails are operated and maintained by local jurisdictions (cities, counties, or municipalities) and typically serve as short-term holding facilities for newly arrested individuals, people awaiting sentencing, or people serving a shorter sentence (less than one year).⁹⁸ Prisons are institutional facilities that fall under state or federal jurisdiction and confine individuals serving longer

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Kaebler & Cowhig, *Correctional Populations in the United States, 2016*, *supra* note 21 at 2.

⁹⁷ Ibid.

⁹⁸ Prison Fellowship, "FAQ: Jail vs. Prison," <https://www.prisonfellowship.org/resources/training-resources/in-prison/faq-jail-prison/> (last accessed Oct. 8, 2018).

sentences.⁹⁹ Typically, people convicted of a crime under state law will serve time in a state prison, and people convicted of a federal crime will serve time in a federal prison.¹⁰⁰ In addition, people may be placed under probation and parole, which are alternatives or extensions to incarceration.¹⁰¹ Probation is a sentence where an individual is ultimately placed under supervision in the community in lieu of incarceration, and parole is a conditional release from jail or prison to allow an individual to serve the remainder of their sentence under community supervision.¹⁰²

People of color are more likely to be arrested, convicted, and sentenced more harshly than are white people, which amplifies the impact of collateral consequences on this population.¹⁰³ Statistics illustrating the disproportionate overrepresentation of people of color in the criminal legal system are summarized below:

- In 2017, black people represented 13.4 percent of the U.S. population but 27.2 percent of all arrests by law enforcement, whereas white people represented about 76.6 percent of the population and 68.9 percent of arrests.¹⁰⁴ For certain offenses, the disparities were particularly striking: black people represented 31.8 percent of arrests for disorderly conduct and 40.5 of arrests for curfew and loitering violations, whereas white people represented 62.9 percent and 56.0 percent of arrests for such offenses, respectively.¹⁰⁵
- Despite accounting for 18.1 percent of the population, people identifying as Hispanic or Latino represented 20.8 percent of arrests for curfew and loitering violations and 19.8 percent of drug abuse offenses.¹⁰⁶

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ U.S. Dep't of Justice, Bureau of Justice Statistics, "FAQ Detail: What is the Difference Between Probation and Parole?," *supra* note 50.

¹⁰² Ibid. See also definitions of "Probation" and "Parole" under Black's Legal Dictionary, *supra* notes 50, 52.

¹⁰³ The Sentencing Project, *Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System*, 2013, at 1, <https://nicic.gov/report-sentencing-project-united-nations-human-rights-committee-regarding-racial-disparities-united>; Darren Wheelock, "Collateral Consequences and Racial Inequality: Felon Status Restrictions as a System of Disadvantage," *Journal of Contemporary Criminal Justice*, vol. 21, no. 1 (2005): 83, https://www.researchgate.net/publication/238431800_Collateral_Consequences_and_Racial_Inequality_Felon_Status_Restrictions_as_a_System_of_Disadvantage; American Civil Liberties Union, "Racial Disparities in Sentencing," Written Statement submitted to the Inter-American Commission on Human Rights, Oct. 27, 2014, https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf.

¹⁰⁴ U.S. Census Bureau, "Quick Facts: Population Estimates," July 1, 2017, <https://www.census.gov/quickfacts/fact/table/US/PST045217>; FBI, Uniform Crime Reports, "Arrests by Race and Ethnicity, 2017," <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-43>.

¹⁰⁵ FBI, Uniform Crime Reports, "Arrests by Race and Ethnicity, 2017," <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-43>.

¹⁰⁶ U.S. Census Bureau, "Quick Facts: Population Estimates," July 1, 2017, <https://www.census.gov/quickfacts/fact/table/US/PST045217>; FBI, Uniform Crime Reports, "Arrests by Race and Ethnicity, 2017," <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-43>. Note that this report follows the U.S. Census Bureau rule, which "defines 'Hispanic or Latino' as a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race." See U.S.

- A study focused on California found that although adult arrests overall declined from 2008 to 2017, Latino people were the only racial/ethnic group to experience an increase in share of arrests for both misdemeanors and felonies.¹⁰⁷ And a *Denver Post* analysis found that Latino juveniles represent 41 percent of the city’s 15- to-17-year-old population but account for 67 percent of the curfew violation arrests among that population.¹⁰⁸
- Among male prisoners in 2016, 39.0 percent were white, 41.3 percent were black, 16.6 percent were Latino, 1.4 percent were Native American, 0.6 percent were Asian, and 0.2 percent were Native Hawaiian or Other Pacific Islander.¹⁰⁹
- Among female prisoners in 2016, 61.0 percent were white, 23.9 percent were black, 10.6 were Latina, 2.6 were Native American, 0.6 percent were Asian, and 0.4 percent were Native Hawaiian or Other Pacific Islander.¹¹⁰
- In 2016, black people were nearly six times as likely and Latino people were approximately three times as likely to be incarcerated as white people.¹¹¹ About 60.0 percent of male prisoners were men of color.¹¹² In federal prisons, almost a third of inmates are Latino.¹¹³
- In 2016, black men between the ages of 18 and 19 were 11.8 times as likely to be imprisoned as white men of the same age group.¹¹⁴
- Among adults on probation in 2016, 55 percent were white, 28 percent were black, and 14 percent were Latino.¹¹⁵ The disparities were similar among adults on parole in 2016: 45 percent were white, 38 percent were black, and 15 percent were Latino.¹¹⁶

People with mental health disorders are also disproportionately incarcerated in the United States; the Department of Justice estimates that at least half of incarcerated persons have a mental health diagnosis.¹¹⁷ Statistics detailing the entanglement of people with mental health disorders or other disabilities with the criminal legal system are summarized below:

Census Bureau, “Hispanic Origin,” <https://www.census.gov/topics/population/hispanic-origin/about.html> (last accessed Dec. 12, 2018). This report uses the term “Latino,” unless the source instructs otherwise.

¹⁰⁷ Sonja Diaz and Dora Armenta, *Disrupting the Black-White Paradigm: Latino Arrests in California*, *Latinos Policy & Politics Initiative*, 2018, at 3, <https://latino.ucla.edu/wp-content/uploads/2018/10/CJ-Report-10.8.1812.pdf>.

¹⁰⁸ Andrew Kennedy, “‘It’s a dragnet’: Denver police far more likely to cite Latino kids for violating curfew,” *Denver Post*, Nov. 18, 2018, <https://www.denverpost.com/2018/11/18/denver-police-latinos-curfew-violations/>.

¹⁰⁹ E. Ann Carson, *Prisoners in 2016*, *supra* note 1 at 7.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* at 5, 8.

¹¹² *Ibid.* at 7.

¹¹³ U.S. Federal Bureau of Prisons, “Inmate Ethnicity,” Nov. 24, 2018,

https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp (last accessed Feb. 11, 2019).

¹¹⁴ E. Ann Carson, *Prisoners in 2016*, *supra* note 1 at 13.

¹¹⁵ Danielle Kaebler, *Probation and Parole in the United States, 2016*, U.S. Dep’t of Justice, Bureau of Justice Statistics, 2018, at 17, <https://www.bjs.gov/content/pub/pdf/ppus16.pdf>.

¹¹⁶ *Ibid.* at 23.

¹¹⁷ Doris J. James and Lauren E. Glaze, *Special Report: Mental Health Problems of Prison and Jail Inmates*, Bureau of Justice Statistics, 2006, at 1, <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

- Approximately 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates suffer from a mental health disorder.¹¹⁸
- Incarcerated individuals are three to five times more likely to meet criteria for serious psychological distress than adults in the general population.¹¹⁹ People who have been arrested and those on probation or parole are also more likely to meet such criteria than adults with no criminal justice involvement.¹²⁰
- Incarcerated women experience mental health disorders at higher rates than incarcerated men; 65.8 percent of female prisoners and 67.9 percent of female jail inmates report a history of mental health problems, compared to 34.8 percent of male prisoners and 40.8 percent of male jail inmates.¹²¹
- Incarcerated people are twice as likely to have an intellectual disability, four to six times more likely to have a cognitive disability, twice as likely to have a mobility disorder, three to four times more likely to be blind or have a vision impairment, and two to three times more likely to have a hearing impairment than the general population.¹²²
- 53 percent of state prisoners and 45 percent of federal prisoners report having a substance use disorder, and 70 percent of prisoners have a history of drug use.¹²³

The Department of Justice has also found that many incarcerated individuals who report at least one disability are people of color.¹²⁴ Because people with disabilities have a more limited range of

¹¹⁸ Ibid.

¹¹⁹ Jennifer Bronson & Marcus Berzofsky, *Indicators of Mental Health Problems Reported by Prisoners and Jail Inmates, 2011-12*, U.S. Dep't of Justice, Bureau of Justice Statistics, 2017, at 3, <https://www.bjs.gov/content/pub/pdf/imhprpji1112.pdf>.

¹²⁰ Ibid.

¹²¹ Ibid. at 4. See also Joint Statement of Disability Advocates (including the American Civil Liberties Union, Amplifying Voices of Inmates with Disabilities (AVID) Prison Project of Disability Rights Washington, Center for Public Representation, DC Jail & Prison Advocacy Project, University Legal Services, Disability Rights Education & Defense Fund, Inc., Equal Rights Center, Helping Educate to Advance the Rights of Deaf communities, Judge David L. Bazelon Center for Mental Health Law, National Alliance on Mental Illness, National Association of the Deaf, National Disability Rights Network, National Federation of the Blind, Prison Law Office, Rooted in Rights, Rosen Bien Galvan & Grunfeld LLP, The Arc, Who Speaks for Me?) to the U.S. Commission on Civil Rights, Washington, D.C., May 19, 2017, at 1-2 [*hereinafter* Joint Statement, Disability Advocates].

¹²² Joint Statement, Disability Advocates, at 3-4; Jennifer Bronson & Marcus Berzofsky, *Disabilities Among Prison and Jail Inmates, 2011-2012*, U.S. Dep't of Justice, Bureau of Justice Statistics, 2015, at 3, <https://www.bjs.gov/content/pub/pdf/dpji1112.pdf>; Leigh Ann Davis, *People with Intellectual Disability in the Criminal Justice System: Victims & Suspects*, The Arc, 2009, <http://www.thearc.org/page.aspx?pid=2458>.

¹²³ Joint Statement, Disability Advocates, at 3; Christopher J. Mumola & Jennifer C. Karberg, *Drug Use and Dependence, State and Federal Prisoners, 2004*, Bureau of Justice Statistics, 2006, at 7, <https://www.bjs.gov/content/pub/pdf/dudsfp04.pdf>.

¹²⁴ Bronson & Berzofsky, *Disabilities Among Prison and Jail Inmates, 2011-2012*, *supra* note 122 at 5 (finding that 37 percent of white prisoners, 26 percent of black prisoners, and 42 percent of prisoners of two or more races reported at least one disability; and that 40 percent of white jail inmates, 35 percent of black jail inmates, and 55 percent of jail inmates of two or more races reported at least one disability). Note that the Commission is also investigating the issue of students of color with disabilities who are subjected to school discipline policies that may lead to imprisonment. See U.S. Commission on Civil Rights, "U.S. Commission on Civil Rights to Hold Public Briefing: The School-to-Prison Pipeline: The Intersections of Students of Color with Disabilities," Dec. 6, 2017, <https://www.usccr.gov/press/2017/12-06-PR.pdf> (announcing briefing for report forthcoming in 2019).

employment opportunities available to them, these disabilities may exacerbate the difficulties faced by people reentering society after criminal convictions.¹²⁵

Researchers at the University of California Los Angeles School of Law have also reported that the incarceration rate of lesbian, gay, and bisexual men and women is more than three times that of the U.S. adult population.¹²⁶ Statistics reflecting the disproportionate involvement of LGBT individuals with the criminal legal system are summarized below:

- Although 4.1 percent of American adults identify as LGBT,¹²⁷ 9.3 percent of male prisoners and 42.1 percent of female prisoners identified as LGBT or reported having same-sex encounters before incarceration.¹²⁸
- 6.2 percent of men in jails and 35.7 percent of women in jails identified as LGBT or reported having same-sex encounters before incarceration.¹²⁹
- Twenty-one percent of transgender women and 10 percent of transgender men report that they have spent time in jail or prison.¹³⁰

The demographic characteristics of the corrections population confirm that people of color, individuals with disabilities, and LGBT individuals are disproportionately represented in the criminal justice system and hindered by the impact of collateral consequences.

Federal Statutes that Impose Collateral Consequences

Numerous federal statutes impose collateral consequences upon conviction for federal or state crimes, including felonies and other types of convictions. These laws can impact an individual's civic engagement and economic opportunity, including:¹³¹

- *The right to vote.* While the 14th, 15th, 19th, and 26th Amendments of the U.S. Constitution prohibit disenfranchisement on the basis of race, gender, and age,¹³² and the Voting Rights Act prohibits discrimination in voting on the bases of race, national origin,

¹²⁵ See Chapter 2, "How a Criminal Record Can Affect Employment Opportunities," *infra* notes 222-409.

¹²⁶ Ilan H. Meyer, Andrew R. Flores, Lara Stemple, Adam P. Romero, Bianca D. M. Wilson, Jody L. Herman, "Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012," *Am. Journal of Public Health*, vol. 107, no. 2 (2017): 234-40.

¹²⁷ Gary J. Gates, "In US, More Adults Identifying as LGBT," *Gallup*, Jan. 11, 2017,

<http://www.gallup.com/poll/201731/lgbt-identification-rises.aspx>; Naomi Goldberg, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 2 [*hereinafter* Goldberg Statement].

¹²⁸ Meyer et al., "Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012," *supra* note 126 at 236.

¹²⁹ *Ibid.*

¹³⁰ Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, at 163,

http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf; Goldberg Statement at 2.

¹³¹ U.S. Dep't of Justice, *Federal Statutes Imposing Collateral Consequences Upon Conviction*, *supra* note 12.

¹³² U.S. CONST. amend. XIV; U.S. CONST. amend. XV; U.S. CONST. amend. XIX; U.S. CONST. amend. XXVI.

and disability status (among other characteristics),¹³³ the U.S. Constitution dictates that states determine the qualifications for voting in federal elections.¹³⁴ Section 2 of the Fourteenth Amendment grants power to the states to deny the right to vote “for participation in rebellion, or other crime.”¹³⁵ According to the Supreme Court, this clause permits states to curtail the voting rights of people with felony convictions.¹³⁶ Therefore, the effect of a criminal conviction on an individual’s right to vote will vary from state to state. For further discussion of state laws governing disenfranchisement of persons with felony convictions, as well as related federal court decisions, see *infra* Chapter 3, “The Current Landscape of State Felony Disenfranchisement Laws.”¹³⁷

- *The right to serve on a federal jury.* Federal law prohibits individuals from serving on a federal jury if they have been charged with or convicted of a crime punishable by incarceration for more than one year in state or federal court and have not had their civil rights restored.¹³⁸ Although some states automatically restore a person’s civil rights after completion of the person’s sentence, this automatic restoration does not apply to federal jury service.¹³⁹ The right to serve on a federal jury may be restored only through a pardon or through some affirmative government action.¹⁴⁰

¹³³ Voting Rights Act, 52 U.S.C. § 10301 (Section 2, prohibiting discriminatory denial or abridgement of the right to vote).

¹³⁴ U.S. CONST. art. I § 2, c. 1; U.S. CONST. art. I § 4; U.S. CONST. art. II § 1, c. 2; U.S. CONST. amend. XVII; U.S. CONST. amend. XXIII (for District of Columbia).

¹³⁵ U.S. CONST. amend. XIV, § 2.

¹³⁶ *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974).

¹³⁷ See Discussion and Sources at *infra* notes 634-44, Table 1 (discussing state laws) and 757-804 (discussing related federal cases). Note also that federal lawmakers have proposed federal legislation that would require more uniformity among state laws governing felony disenfranchisement. See Chapter 3, “The Restoration of Voting Rights,” *infra* notes 805-889.

¹³⁸ 28 U.S.C. § 1865(b)(5). See also Black’s Law Dictionary, *Civil Right*, *supra* note 56 (defining a civil right as “[a]ny of the individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act,” especially “the right to vote, the right of due process, and the right of equal protection under the law.”). The exercise of certain civil rights such as voting, serving on a jury, and “participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof” constitutes federally protected activity, the interference with which is prohibited under federal law. See 18 U.S.C. § 245(b). However, the latter statute “does not in terms confer substantive rights; it is solely a criminal statute permitting federal prosecution for interference” with these rights, and it does not proscribe “the ordered functioning of state legal processes, whatever the motivation.” *People v. State of N. Y.*, 424 F.2d 697, 703-03 (2d Cir. 1970), *cert. denied* 90 S. Ct. 1839 (1970).

¹³⁹ See generally U.S. Dep’t of Justice, *Federal Statutes Imposing Collateral Consequences Upon Conviction*, *supra* note 12 at 1-2, 13. See also Chapter 3, “Restoration of Civil Rights,” *infra* notes 798-882.

¹⁴⁰ *United States v. Hefner*, 842 F.2d 731, 732-33 (4th Cir. 1988) (concluding that “some affirmative act recognized in law must first take place to restore one’s civil rights”). See also U.S. Dep’t of Justice, *Federal Statutes Imposing Collateral Consequences upon Conviction*, *supra* note 12 at 13-14 (citing *Hefner* to assert that “the automatic restoration of civil rights that occurs in many states upon completion of sentence will not operate to restore the right to serve on a federal jury.”).

- *The right to hold federal office or employment.* While the U.S. Constitution does not prohibit individuals with criminal convictions from holding federal office, many statutes render individuals with certain types of convictions ineligible for federal office.¹⁴¹
- *Service in the armed forces.* Federal law prohibits individuals with felony convictions from enlisting in any service of the armed forces unless they receive exceptions.¹⁴² Furthermore, individuals convicted of certain offenses can be required to forfeit “accrued or future gratuitous benefits” from military service.¹⁴³
- *Occupational restrictions.* At sentencing, a federal court may impose certain occupational restrictions as a condition of probation or supervised release when there is a “reasonably direct relationship” between the occupation and the offense, in the interest of upholding public safety.¹⁴⁴ Certain convictions, particularly for drug offenses, can result in ineligibility for numerous federal occupational licenses.¹⁴⁵ While not all convictions will result in the automatic loss of a federal license, federal agencies may consider a conviction when reviewing a license application.¹⁴⁶
 - *Banking, commodities, and securities.* Certain criminal convictions involving dishonesty can disqualify individuals from working for or with a federally insured depository institution.¹⁴⁷ In certain cases, this disqualification can be waived after a period of 10 years.¹⁴⁸ The Commodities Futures Trading Commission and the

¹⁴¹ See, e.g., 18 U.S.C. § 2381 (ineligibility due to a conviction of treason); 18 U.S.C. § 201(b) (a federal court may order a disqualification from federal office as a result of a conviction of bribing a public official or accepting a bribe); 5 U.S.C. § 7313 (removal from federal or District of Columbia office and ineligibility for employment by U.S. or District of Columbia for five years upon conviction from being involved in riots or civil disorder, or any offense related to a riot or civil disorder); 18 U.S.C. § 1901 (based on a conviction of a collecting or disbursing officer engaged in trading in public funds or property); 18 U.S.C. § 2071 (concealing, removing, falsifying, or mutilating public documents); 18 U.S.C. §§ 2385, 2387 (ineligibility for federal employment for five years from a conviction of overthrowing or conspiring to overthrow the federal government by force or violence, or interfering with the U.S. armed forces); 25 U.S.C. § 2704 (b)(5)(A) (ineligibility from National Indian Gaming Commission because of a felony conviction or gaming offense).

¹⁴² 10 U.S.C. § 504.

¹⁴³ These offenses include mutiny, treason, sabotage, or rendering assistance to an enemy of the U.S. or its allies. See 38 U.S.C. § 6104(a).

¹⁴⁴ 18 U.S.C. § 3563(b)(5).

¹⁴⁵ 7 U.S.C. § 85 (grain inspector license); 18 U.S.C. § 843(d) (license to import, manufacture, or deal in explosives or permit the use of explosives); 19 U.S.C. § 1641(d)(1)(B) (customs broker license or permit); 22 U.S.C. § 2778(g)(4) (license to export defense articles and services); 46 U.S.C. § 7503 (merchant mariner’s document, license or certificate of registry); 49 U.S.C. § 20135(b)(4) and 49 C.F.R. §§ 240.111, 240.115 (locomotive engineer/operator license); 49 U.S.C. §§ 44709(b)(2) and 44710(b) (airman certificates); 14 C.F.R. § 61.15 (pilot, flight instructor, or ground instructor certifications); see also U.S.S.G. §5F1.6 (describing statutes that deny federal benefits, which in this context are defined as “any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States,” to people convicted of certain drug offenses under certain circumstances).

¹⁴⁶ See, e.g., U.S. Dep’t of Justice, *Federal Statutes Imposing Collateral Consequences Upon Conviction*, *supra* note 12 at 5.

¹⁴⁷ 12 U.S.C. §§ 1818(e), 1818(g); 12 U.S.C. § 1829(a).

¹⁴⁸ See, e.g., 12 U.S.C. § 1829(a).

- Securities and Exchange Commission may also impose licensing restrictions on individuals with certain criminal offenses dating back within a 10-year period.¹⁴⁹
- *Labor organizations.* Certain criminal convictions will disqualify individuals from serving (in many capacities) in labor organizations or employee benefit plans for a period of time, determined by the sentencing court.¹⁵⁰
 - *Participation in federal contracts or programs.* Individuals with certain criminal convictions are prohibited from working in certain capacities for a defense contractor or subcontractor that is receiving federal contracts for a minimum of five years (with an exception for interests of “national security”), and from participating in a federal contract or program (both procurement and non-procurement programs).¹⁵¹ Exclusions from participation in federal or state health care programs or in the drug industry on a temporary or permanent basis also exist for certain types of convictions.¹⁵²
 - *Federal benefits.* Individuals with certain criminal convictions may become ineligible to receive certain federal benefits, particularly for drug-related offenses.¹⁵³
 - *Temporary Assistance for Needy Families (TANF) and Supplemental Nutrition Assistance Program (SNAP) benefits.* Under TANF, the federal government provides grants to states to provide financial assistance to qualifying low-income families.¹⁵⁴ Under SNAP, the federal government appropriates funding to states for qualifying low-income households to purchase food.¹⁵⁵ Both TANF financial assistance and SNAP family nutrition benefits are permanently restricted if an individual has a conviction that involves the possession, use, or distribution of drugs, unless a state elects to limit or revoke the restriction.¹⁵⁶ These restrictions particularly impact people of color, not only because people of color are disproportionately convicted and incarcerated,¹⁵⁷ but also because they are more likely to meet the poverty threshold qualifying them for such public benefits.¹⁵⁸ Most TANF recipients are black or Latino: in 2016, 29.1 percent of TANF recipients were black and 36.9 percent were Latino,

¹⁴⁹ 7 U.S.C. § 12a(2)-(3) (commodities dealer registration); 15 U.S.C. §§ 80b-3(e)-(f) (investment adviser registration); 15 U.S.C. §§ 78o(b)(4)(B), (b)(6)(A) (registration of brokers and dealers).

¹⁵⁰ 29 U.S.C. § 504 (labor organizations); 29 U.S.C. § 1111 (employee benefit plans).

¹⁵¹ 10 U.S.C. § 2408(a) (defense contractor roles).

¹⁵² 42 U.S.C. § 1320a-7 (Medicare and state health care programs); 21 U.S.C. § 335a (debarment from submitting an FDA “drug product” application).

¹⁵³ 21 U.S.C. §§ 862, 862a.

¹⁵⁴ 42 U.S.C. §§ 603, 604.

¹⁵⁵ 7 U.S.C. §§ 2012, 2013.

¹⁵⁶ 21 U.S.C. § 862a. See also Chapter 2, “How a Criminal Record Can Affect Access to Public Benefits,” *infra* notes 526-624 for information about states that have limited or revoked the restriction on TANF and SNAP benefits.

¹⁵⁷ See “Demographics of the Corrections Population,” *supra* notes 96-130.

¹⁵⁸ See U.S. Dep’t of Health and Human Services, Office of Family Assistance, *Characteristics and Financial Circumstances of TANF Recipients: Fiscal Year 2016, 2017*, at Table 10, https://www.acf.hhs.gov/sites/default/files/ofa/fy16_characteristics.pdf; see also Chapter 2, “The Disproportionate Impact of Lifetime Drug Bans for Public Benefits,” *infra* notes 563-94.

whereas 27.6 percent of recipients were white.¹⁵⁹ Similarly, in 2015, 25.8 percent of SNAP households were black and 11.4 percent were Latino, whereas 39.3 percent of households were white.¹⁶⁰ Moreover, because people with criminal convictions face barriers to employment, they are more likely to need financial assistance to survive and avoid recidivism; in this way, the bans on TANF and SNAP may further impair returning citizens' successful reintegration into society.¹⁶¹

- *Financial aid.* A person convicted of any federal or state law involving the possession or sale of drugs “for conduct that occurred during a period of enrollment for which” the person was receiving federal aid is ineligible to receive federal student grants, loans, or work assistance for higher education.¹⁶² The period of ineligibility varies according to whether the person has committed a first, second, or third offense.¹⁶³ An individual can regain eligibility by completing a drug rehabilitation program with certain criteria and passing “two unannounced drug tests,” or if the conviction is set aside or reversed.¹⁶⁴ The Department of Education advises every applicant to submit the Free Application for Federal Student Aid (FAFSA) regardless of eligibility “because most schools and states use FAFSA information to award nonfederal aid.”¹⁶⁵ Research from the National Poverty Center revealed that students of color were more likely to need federal grants, but also more likely to be convicted of the disqualifying drug offenses.¹⁶⁶ Moreover, according to a survey by the Center for Community Alternatives, 66 percent of public and private colleges collect criminal justice information on applicants, and most use this information in the admissions—rather than financial aid—process.¹⁶⁷ Citing the disproportionate involvement of people of color with the criminal justice system, the Department of Education released a report advising postsecondary institutions to limit their consideration of applicants' criminal

¹⁵⁹ U.S. Dep't of Health and Human Services, Office of Family Assistance, *Characteristics and Financial Circumstances of TANF Recipients: Fiscal Year 2016*, *supra* note 158.

¹⁶⁰ U.S. Dep't of Agriculture, *Characteristics of Supplemental Nutrition Assistance Households: Fiscal Year 2015, 2016*, at Table A.21, <https://fns-prod.azureedge.net/sites/default/files/ops/Characteristics2015.pdf>. Note that 12.5 percent of SNAP households were described as “race unknown.” *Ibid.* See also Chapter 2, “The Disproportionate Impact of Lifetime Drug Bans for Public Benefits,” *infra* notes 563-94.

¹⁶¹ See Chapter 2, “How a Criminal Record Can Affect Employment Opportunities,” *infra* notes 222-409.

¹⁶² 20 U.S.C. § 1091(r)(1).

¹⁶³ *Id.*

¹⁶⁴ 20 U.S.C. § 1091(r)(2).

¹⁶⁵ U.S. Dep't of Education, Office of Federal Student Aid, “Students with criminal convictions have limited eligibility for federal student aid,” <https://studentaid.ed.gov/sa/eligibility/criminal-convictions> (last accessed Nov. 20, 2018). See also Free Application for Federal Student Aid, “Question 23,” <https://fafsa.ed.gov/fotw1819/help/fotw12b.htm> (indicating that the FAFSA form, which postsecondary schools use to determine federal and nonfederal aid, asks all applicants about prior drug convictions) (last accessed Nov. 20, 2018).

¹⁶⁶ Darren Wheelock and Christopher Uggen, *Race, Poverty and Punishment: The Impact Of Criminal Sanctions On Racial, Ethnic, and Socioeconomic Inequality*, National Poverty Center, 2006, at 21, http://www.npc.umich.edu/publications/workingpaper06/paper15/working_paper06-15.pdf.

¹⁶⁷ Center for Community Alternatives, *The Use of Criminal History Records in College Admissions Reconsidered*, 2010, at 8, 9, <http://communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>.

backgrounds during the admissions process, in order to expand educational opportunities for people of color and people with criminal records.¹⁶⁸ For more discussion of how criminal records affect access to financial aid, see *infra* Chapter 2, “Barriers to Financial Aid for Higher Education.” For discussion of financial aid restrictions applicable to in-prison educational programs, see *infra* Chapter 2, “How a Criminal Record Can Affect Employment Opportunities.”

- *Low-income housing assistance.* Individuals with convictions related to the manufacturing or producing of methamphetamine on the premises of federally subsidized housing are permanently restricted from occupying such housing and receiving low-income housing assistance, as are individuals subject to a lifetime registration requirement under a state sex offender registration program.¹⁶⁹ For more discussion of housing-related barriers, see *infra* Chapter 2, “How a Criminal Record Can Affect Housing Opportunities.”
- *Social Security and/or Disability Insurance.* Individuals with certain criminal convictions are restricted from receiving federal benefits such as Social Security or disability while incarcerated; certain individuals or their beneficiaries also may be barred from receiving federal benefits if convicted of certain offenses related to national security or from receiving workers compensation benefits if convicted of fraud-related crimes.¹⁷⁰
- *Access to a passport.* Additionally, the passport of an individual with certain criminal convictions may be revoked or denied during or after imprisonment, parole, or supervised release, except if emergency circumstances or humanitarian reasons exist.¹⁷¹
- *Immigration.* There are immigration consequences for noncitizens of the U.S. with certain criminal convictions,¹⁷² including deportation.¹⁷³ The Supreme Court describes deportation as “a particularly severe ‘penalty,’” that is “uniquely difficult to classify as either a direct or a collateral consequence.”¹⁷⁴ Deportation severely restricts reentry by relocating the individual to an often unfamiliar country and severing ties with family and community.¹⁷⁵ Immigrants may be deported upon conviction of various offenses,

¹⁶⁸ U.S. Dep’t of Education, *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*, 2016, at 1, 4-5, 18, <https://www2.ed.gov/documents/beyond-the-box/guidance.pdf>.

¹⁶⁹ 42 U.S.C. § 1437n(f); 42 U.S.C. § 13663.

¹⁷⁰ 42 U.S.C. § 402(x) (limiting payments to prisoners, certain other inmates of publicly funded institutions, fugitives, probationers, and parolees); 5 U.S.C. § 8312 (prohibiting payment of annuities or retired pay for certain convictions); 42 U.S.C. § 402(u)(1) (limiting or eliminating old-age and survivors insurance benefit payments for conviction of “subversive activities”); 5 U.S.C. § 8148 (disallowing workers’ compensation benefit payments for incarcerated individuals convicted of certain fraud-related crimes).

¹⁷¹ 22 U.S.C. § 2714 (denying passports to certain convicted drug traffickers).

¹⁷² 8 U.S.C. §§ 1182(a)(2)(A), (B); 8 U.S.C. § 1227(a); 8 U.S.C. §§ 1101(f)(3), (5), (7), (8); 8 U.S.C. 1427(a).

¹⁷³ Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017); 8 U.S.C. § 1227.

¹⁷⁴ *Padilla*, 559 U.S. at 365.

¹⁷⁵ Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, *supra* note 27 at 666-71.

including crimes “involving moral turpitude,” which are defined broadly.¹⁷⁶ Immigrants may also be deported for drug possession and certain firearms offenses, and for the status of being a “drug abuser or addict,” or becoming “a public charge from causes not affirmatively shown to have arisen since entry.”¹⁷⁷

- *Registration and notification.* Federal law sets minimum national standards for state sex offender registration programs and dictates the types of offenses that trigger registration requirements, the duration of the registration requirement, and the frequency by which an individual would need to verify his or her place of residence with state law enforcement.¹⁷⁸
- *Possessing a firearm.* Individuals with criminal convictions that resulted in imprisonment for over a year are prohibited from possessing a firearm.¹⁷⁹ However, the right to possess a firearm can be restored through a formal pardon, or if the individual “has had civil rights restored.”¹⁸⁰

¹⁷⁶ 8 U.S.C. § 1227(a); Sara Salem, *Should They Stay or Should They Go: Rethinking the Use of Crimes Involving Moral Turpitude in Immigration Law*, 70 FLA. L. REV. 225, 227-28 (2018). See also U.S. Dep’t of Justice, Office of the Att’y Gen., *Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 552 (2015) (vacating a 2008 Attorney General opinion on how immigration judges should identify convictions for crimes of moral turpitude because circuit courts disagreed about the three-step process for determining such convictions). The Immigrant Legal Resource Center has interpreted “crimes involving moral turpitude” as offenses committed with “bad intent,” citing as examples fraud, theft (with intent to permanently deprive the owner of possession), assault or battery (if the statute requires intent to cause “great physical injury”), and some offenses involving “lewd or reckless intent.” See Rose Cahn, *Clean Slate for Immigrants: Reducing Felonies to Misdemeanors: Penal Code § 18.5, Prop 47, Penal Code § 17(b)(3), and Prop 64*, Immigrant Legal Resource Center, 2018, at 4, https://www.ilrc.org/sites/default/files/resources/clean_slate_for_immigrants-rc-20180201.pdf. See also *Flores-Molina v. Sessions*, 850 F.3d 1150, 1163 (10th Cir. 2017) (identifying “a broader pattern visible” in cases addressing fraud or deception as crimes involving moral turpitude, defining such crimes as “explicitly” encompassing “‘fraudulent intent’ (or some variation thereof)”).

¹⁷⁷ 8 U.S.C. § 1227(a).

¹⁷⁸ See, e.g., 18 U.S.C. § 4042(c) (notification requirements for sex offenders); 18 U.S.C. §§ 3563(a)(8) (probation registration requirements for sex offenders).

¹⁷⁹ 18 U.S.C. § 922(d)(1).

¹⁸⁰ 18 U.S.C. § 921(a)(20) (stating that any “conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.”). See also U.S. Dep’t of Justice, *Federal Statutes Imposing Collateral Consequences upon Conviction*, *supra* note 12 at 15-20. This document explains that:

The phrase ‘has had civil rights restored’ is not monolithic but varies in practical effect from state to state depending on the laws regarding loss and restoration of rights . . . because of the considerable variation among the states concerning the loss and restoration of civil rights and firearms privileges, the determination whether a person convicted of a state offense is subject to the federal law prohibiting possession of firearms is complex and requires a painstaking consideration of both state and federal law. While the Supreme Court has answered some of the significant questions of interpretation concerning the federal statute, the variation among the lower courts in addressing issues that have not been definitively settled further underscores the intricacy of the interplay between federal and state law in this area.

State and Local Statutes that Impose Collateral Consequences

State and local laws may also impose added restrictions for individuals with criminal records.¹⁸¹ Laws can differ drastically across different states, counties, and other local jurisdictions in terms of the type of collateral consequence (i.e., voting, jury service, occupational licensing), how the law is applied (i.e., mandatory versus discretionary), the length of time enforced (i.e., permanent, temporary, conditional), and which types of crimes, criminal activity, or sentences trigger the collateral consequence (i.e., arrests versus convictions; felonies versus misdemeanors; incarceration, probation, or parole).¹⁸² Currently, states and local jurisdictions impose thousands of collateral consequences, which are “scattered throughout state and federal statutory and regulatory codes and can be unknown even to those responsible for their administration and enforcement,” making it difficult to identify all of the penalties.¹⁸³

The NICCC, a project initially developed by the American Bar Association and funded by the U.S. Department of Justice, has created a publicly searchable database of all collateral consequences in every U.S. jurisdiction, to make it easier to identify these collateral consequences.¹⁸⁴ While this website was created solely for educational and informational purposes,¹⁸⁵ it can potentially inform judges, prosecutors, defense attorneys, and ultimately those who are facing conviction about the collateral consequences attached to certain types of convictions.

Regarding voting rights, federal courts have held that under the U.S. constitution, state law governs voter eligibility, enabling states to restrict access to the ballot.¹⁸⁶ Twenty-two states prohibit people convicted of a felony from voting until they complete their sentence, which includes parole or probation.¹⁸⁷ Twelve states disenfranchise people with felony convictions indefinitely or until the governor pardons them, or they enforce an extra waiting period (which may include parole or probation) before restoring their voting rights.¹⁸⁸ For further discussion of state laws governing

¹⁸¹ See, e.g., Chapter 2, “How a Criminal Record Can Affect Access to Public Benefits,” *infra* notes 524-624 (discussing state laws prohibiting or allowing people with felony drug convictions to receive certain public benefits and financial aid); Chapter 3, “The Current Landscape of State Felony Disenfranchisement Laws,” *infra* notes 635-74 (discussing state laws prohibiting or allowing people with felony convictions to vote). See also CSG, “The National Inventory of the Collateral Consequences of Conviction” (containing searchable database of state laws imposing collateral consequences).

¹⁸² Love Statement at 3. See also CSG, “The National Inventory of the Collateral Consequences of Conviction” (containing searchable database of state laws imposing collateral consequences and categorizing by type of offense, duration, and application (i.e., mandatory versus discretionary)).

¹⁸³ CSG, “The National Inventory of the Collateral Consequences of Conviction.”

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ See Chapter 3, “Voting,” *infra* notes 625-889.

¹⁸⁷ National Conference of State Legislatures, “Felon Voting Rights,” 2018, <http://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> (last accessed Dec. 5, 2018).

¹⁸⁸ *Ibid.*

felony disenfranchisement, see *infra* Chapter 3, “The Current Landscape of Felony Disenfranchisement Laws.”¹⁸⁹

The collateral consequences attached to a conviction, such as denial of voting rights, may be removed or nullified under certain circumstances. Removal of the collateral consequence will restore the right that the individual had lost by virtue of their conviction. Federal, state and local rights may be restored. The mechanisms vary, but generally involve a pardon, amnesty, expunction of the conviction, or another affirmative act specifying restoration.¹⁹⁰ The next section discusses the restoration of rights in greater detail.

Restoration of Certain Rights

Federal law allows for the undoing of some, but not all, collateral consequences under certain conditions through statutory provisions that permit an individual’s rights to be restored.¹⁹¹ There is no federal statutory procedure for complete rights restoration or expungement of a criminal record.¹⁹² A rare presidential pardon or a judicial expungement is needed to fully restore an individual’s rights following a federal criminal conviction.¹⁹³ However, eligibility for some federal benefits or licenses, such as a firearms license, may be restored automatically after a period of time or may be restored by administrative or judicial action.¹⁹⁴

¹⁸⁹ See *infra* notes 635-74.

¹⁹⁰ U.S. Dep’t of Justice, *Federal Statutes Imposing Collateral Consequences upon Conviction*, *supra* note 12 at 1-2, 13; see also *Hefner*, 842 F.2d at 732-33 (concluding that “some affirmative act recognized in law must first take place to restore one’s civil rights”).

¹⁹¹ U.S. Dep’t of Justice, *Federal Statutes Imposing Collateral Consequences upon Conviction*, *supra* note 12 at 13.

¹⁹² *Ibid.*

¹⁹³ See, e.g., 8 U.S.C. § 1227(a)(2)(A)(vi) (authorizing waivers of deportation for noncitizens with certain criminal convictions who have received “full and unconditional” presidential or gubernatorial pardons); 42 U.S.C. § 402(u)(3) (waiving certain penalties imposed on recipients of old-age and survivors insurance benefits for conviction of “subversive activities” where a presidential pardon has been issued); 38 U.S.C. § 6105(a) (restoring, upon presidential pardon, rights to certain veterans’ benefits that would otherwise be forfeited upon conviction for certain offenses). Some federal courts have held that, under their inherent equitable powers, they may expunge criminal records, but such power is of “exceedingly narrow scope” and only appropriate when “unwarranted adverse consequences” which are “extraordinary or extreme” outweigh the “public interest in maintaining criminal records.” *U.S. v. Buggs*, No. 2:89-CR-180, 2010 WL 1956581 (S.D. Ohio May 13, 2010). See also 6 AM. L. REP. 6th 1 (2011), *Judicial Expunction of Criminal Record of Convicted Adult in Absence of Authorizing Statute*.

¹⁹⁴ 6 AM. L. REP. 6th 1 (2011), at 14; see, e.g., 29 U.S.C. §§ 504 (removing prohibitions on holding office in labor organization upon reversal of conviction), 1111 (removing prohibitions on holding office in employee benefit plan upon reversal of conviction); 8 U.S.C. 1227(a)(7) (authorizing Attorney General to waive deportation of noncitizens convicted of domestic violence under certain circumstances, such as when convicted individual acted in self-defense); 10 U.S.C. § 504 (authorizing exceptions to the ban on military service for certain criminally convicted individuals); 12 U.S.C. § 1829(a)(1)-(2) (authorizing a court to grant exceptions to the ban on service in federally insured depository institutions for certain criminally convicted individuals); 20 U.S.C. § 1091(r)(2) (permitting resumption of eligibility for federal financial aid for students convicted of certain drug-related offenses to access upon reversal of conviction or completion of certain rehabilitation programs); 21 U.S.C. § 335a(d) (authorizing the termination of debarment for certain criminally convicted persons from submitting FDA drug approval applications upon reversal of conviction or approval from the Secretary of Health and Human Services).

A state government may restore a person's rights and remove state-imposed collateral consequences like disenfranchisement,¹⁹⁵ for instance by statute¹⁹⁶ or via a gubernatorial pardon.¹⁹⁷ And if federal law allows the removal of a federally imposed collateral consequence (such as a firearms ban), then state law permitting removal of collateral consequences may not necessarily lead to the release from that federally imposed collateral consequence.¹⁹⁸

Notification of Collateral Consequences

Due to the substantial number of people with criminal records, collateral consequences affect a sizable portion of the U.S. population.¹⁹⁹ Collateral consequences multiply as federal, state, and local governments increase them—yet they remain often invisible and difficult to discover.²⁰⁰ This opacity results in part because they are “vast and wide-ranging,” as they can vary by type, nature, severity, effect, and duration.²⁰¹ The lack of public awareness about collateral consequences calls into question their effectiveness in deterring people from committing crimes.²⁰²

¹⁹⁵ See *infra* Chapter 3, notes 635-74, for discussion of states that permit or do not permit people with felony convictions to vote if their civil rights have been restored.

¹⁹⁶ See, e.g., WIS. STAT. ANN. § 304.078 (restoring a person's civil rights, including the right to vote, upon completion of his or her sentence).

¹⁹⁷ See, e.g., VA. CONST. art. V, § 12 (empowering the governor to “remove political disabilities consequent upon conviction for offenses committed”). Note that the Virginia Supreme Court has interpreted this clause as authority for the governor to pardon people with felony convictions “on a case-by-case basis” and not to pardon all people with felony convictions categorically. See *Howell v. McAuliffe*, 292 Va. 320, 349-50 (2016) (finding that where the Virginia governor restored the voting rights of Virginia residents with felony convictions, “the Governor can use his clemency powers to mitigate a general rule of law on a case-by-case basis. But that truism does not mean he can effectively rewrite the general rule of law and replace it with a categorical exception.”). See Chapter 3, *infra* notes 798-882, for more discussion of voting rights restoration and the *McAuliffe* case.

¹⁹⁸ See *Beecham v. United States*, 511 U.S. 368, 373 (1994) (recognizing that “[m]any jurisdictions have no procedure for restoring civil rights” and so one state's restoration of a convicted person's civil rights does not automatically remove a federally imposed ban on firearm possession for a person with a federal conviction. Because only some states offer the procedures authorized by a federal statute—such as pardon, expungement set-aside, and civil rights restoration—to lift a consequence, “people in some jurisdictions would have options open to them that people in other jurisdictions may lack.”). See also *Fisher v. Kealoha*, 855 F.3d 1067, 1070 (9th Cir. 2017) (recognizing that federal law “create[d] exceptions” to the federal ban on firearm possession for persons convicted of misdemeanor domestic violence where the person's civil rights had been restored); see also *Fisher*, 855 F.3d at 1070 (concluding that even if federal law allows the removal of a federally imposed collateral consequence when a person's civil rights have been restored, “the unavailability of a [state] procedure for... civil rights restoration” does not remove that federally imposed collateral consequence.”).

¹⁹⁹ Gabriel Jackson Chin, “Collateral Consequences,” *Academy for Justice, A Report on Scholarship and Criminal Justice Reform* (Eric Luna ed., 2017, forthcoming), at 2, http://academyforjustice.org/wp-content/uploads/2017/10/17_Criminal_Justice_Reform_Vol_4_Collateral-Consequences.pdf.

²⁰⁰ *Ibid.*

²⁰¹ Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, *supra* note 16 at 634-35.

²⁰² See Tracy Sohoni, *The Effect of Collateral Consequence Laws on State Rates of Returns to Prison*, 2014 (Ph.D. dissertation), at 47, <https://www.ncjrs.gov/pdffiles1/nij/grants/247569.pdf> (reasoning that “considering that many people are unaware of these consequences prior to conviction, and in fact, many are unaware until after their release from custody, it is unlikely to serve as a general deterrent from crime since even if potential offenders were to consider the effect of their criminal actions on their future chances for housing, employment or voting, many are unaware that these consequences exist”) (internal citation omitted)).

Increasingly, issues involving collateral consequences and reentry have been recognized by elected officials, legal scholars, policymakers, and advocates as central to the criminal process and criminal justice policy; still, they are not considered to be legally central or sometimes even relevant to the criminal process because they fall under the separate realm of civil law.²⁰³ In most cases, there are no requirements for judges or defense counsel to notify individuals upon conviction about the collateral consequences that will result from the conviction.²⁰⁴ Because it is often so difficult to identify when and how they will be triggered, individuals involved in the criminal justice system are rarely properly informed about the collateral consequences of entering guilty pleas.²⁰⁵ Until recently, federal and state courts had ruled that a guilty plea was constitutionally valid even if the individual was unaware of the collateral consequences of conviction, as long as that individual was advised of the direct consequences (such as incarceration, probation, or fines).²⁰⁶

In 2010, the Supreme Court ruled in *Padilla v. Kentucky* that counsel must inform a client whether a guilty plea may result in deportation.²⁰⁷ This ruling was significant because the Court acknowledged that, at least in the immigration context, an individual considering a guilty plea must be advised by counsel about the plea's collateral consequences to make an informed decision.²⁰⁸ While the scope of this particular case was limited to advice regarding the risk of deportation, some legal scholars argue that *Padilla's* logic could be extended to argue cases involving other types of collateral consequences.²⁰⁹

The National Conference of Commissioners on Uniform State Laws produced the Uniform Collateral Consequences of Conviction Act in 2009, and amended it in response to the *Padilla* decision in 2010.²¹⁰ The six provisions of this model legislation include:

²⁰³ Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, *supra* note 16 at 629-31.

²⁰⁴ Testimony of Mathias H. Heck, Jr. on behalf of the American Bar Association, *Hearing on Collateral Consequences of Criminal Conviction and the Problem of Over-Criminalization of Federal Law Before the H. Comm. on the Judiciary Task Force on Over-Criminalization*, June 26, 2014, at 3-4, https://www.americanbar.org/content/dam/aba/unacategorized/GAO/2014jun26_collateralconsequences_t_final.authcheckdam.pdf.

²⁰⁵ Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences of Criminal Convictions, Silence and Misinformation in the Guilty Plea Process*, 95 IOWA L. REV. 119, 124 (2009).

²⁰⁶ *Id.*

²⁰⁷ 559 U.S. 356, 374 (2010). The Supreme Court found that a defendant's Sixth Amendment right to "effective assistance of competent counsel" encompasses the right to be informed by counsel about whether a guilty plea "carries a risk of deportation." *Id.* at 364, 374. In this case, because *Padilla's* counsel failed to inform him of that risk, counsel was "constitutionally deficient." *Id.* at 374.

²⁰⁸ *Id.* at 373-75.

²⁰⁹ Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 126-27 (2011).

²¹⁰ National Conference of Commissioners on Uniform State Laws, Uniform Collateral Consequences of Conviction Act (2010), <https://www.uniformlaws.org/viewdocument/committee-archive-3?CommunityKey=74d9914f-f15e-49aa-a5b0-f15f6e5f258a&tab=librarydocuments>; *see also* 13 V.S.A. § 8001 *et seq.* (enacted in Vermont); S.F. 965,

- *Simplified, published collection of collateral consequences.* A designated government agency or official would have to collect information about constitutional provisions, laws, and rules that impose collateral consequences or disqualifications and publish it online in a single document; this collection would also include federally imposed sanctions.²¹¹
- *Required notification of collateral consequences.* A government agency or official would have to notify defendants of any potentially applicable collateral consequences at or before the formal notification of charges, so that the defendant could make an informed decision about how to proceed; notice of these sanctions (including any effects on voting eligibility) would also be required at sentencing to account for the time elapsed between the charging and sentencing stages.²¹² The model legislation recommends that the state legislature designate the agency or official responsible for notification and adds that “appropriate actors” would include “the court or court clerk, pretrial services, jail authorities, or the prosecution.”²¹³
- *Procedural limitations on authorization of collateral consequences.* Blanket or automatic collateral consequences could be imposed only by statute, ordinance, or formal rulemaking; furthermore, if any ambiguity existed as to whether the collateral consequence was mandatory or discretionary, the consequence would be construed as discretionary.²¹⁴
- *Disqualifications based on criminal conviction would be discretionary.* The model legislation provides guidance and offers standards for decision-makers to impose disqualifications on a discretionary basis, after conducting an individualized assessment based on all the facts and circumstances of the offense, rather than the fact of the conviction alone.²¹⁵ The decision-maker could consider the underlying conduct of the person convicted, and the time elapsed since the misconduct occurred, when deciding if the collateral consequence should apply.²¹⁶
- *Overtaken and pardoned convictions, and relief granted by other jurisdictions.* Collateral consequences could not be imposed for convictions that were pardoned or overturned, or for charges that were dismissed pursuant to deferred prosecution or diversion programs.²¹⁷

90th Leg. (Minn. 2017) (proposed in Minnesota); S.B. 328, 79th Leg. (Nev. 2017) (proposed in Nevada); S.B. 292, 2017 Reg. Sess. (N.M. 2017) (passed but not enacted in New Mexico due to pocket veto); S. 4911, New York Assemb. (N.Y. 2017) (proposed in New York).

²¹¹ National Conference of Commissioners on Uniform State Laws, *Uniform Collateral Consequences of Conviction Act*, 2010, at 10-12, <https://www.uniformlaws.org/viewdocument/committee-archive-3?CommunityKey=74d9914f-f15e-49aa-a5b0-f15f6e5f258a&tab=librarydocuments>.

²¹² *Id.* at 13-19. Section 5 of the Act would require courts to ensure that defendants have received notification of any applicable collateral consequences, have understood them, and have had the opportunity to discuss them with defense counsel. *Id.*

²¹³ *Id.* at 14.

²¹⁴ *Id.* at 20.

²¹⁵ *Id.* at 20-23.

²¹⁶ *Id.* at 21-22.

²¹⁷ *Id.* at 23-27.

The model legislation also would confer flexibility on jurisdictions to allow relief granted by other jurisdictions for rehabilitation or good behavior.²¹⁸

- *Procedures for granting relief from collateral consequences.* Individuals with criminal records could obtain relief from collateral consequences by Orders of Limited Relief (available as early as sentencing) and Certificates of Restoration of Rights (available after a period of law-abiding conduct).²¹⁹ Both measures could transform a mandatory collateral consequence into a discretionary one, enabling decision-makers to perform individualized assessments.²²⁰

The Uniform Act has been enacted in Vermont, and has been introduced previously, but at this writing not enacted, in Minnesota, Nevada, New Mexico, New York, and Massachusetts.²²¹

²¹⁸ *Id.*

²¹⁹ *Id.* at 27-37

²²⁰ *Id.*

²²¹ Uniform Law Commission Statement at 3; *see also* National Conference of Commissioners on Uniform State Laws, “Collateral Consequences of Conviction Act: Enactment Status Map,” <https://www.uniformlaws.org/committees/community-home?CommunityKey=74d9914f-f15e-49aa-a5b0-f15f6e5f258a> (last accessed Feb. 26, 2019).

Chapter 2: Access to Self-Sufficiency and Meeting Basic Needs

A criminal conviction jeopardizes the ability of convicted individuals to meet basic needs, as collateral consequences often impose barriers to employment, affordable housing, and public assistance. These barriers can affect the well-being of not only convicted individuals but also their families and communities, and they may have public safety implications. This chapter discusses some of these specific collateral consequences related to access to self-sufficiency, namely barriers to employment and housing and, to a lesser degree, public assistance.

How a Criminal Record Can Affect Employment Opportunities

Employment discrimination can be one of the most “serious and pervasive” collateral consequences faced by people with criminal convictions.²²² A criminal record adversely impacts employment prospects for millions of working-age people in the United States.²²³ Of the over 44,000 state and federal collateral consequences, most (roughly 70%) relate to employment, and thousands of additional local ordinances also restrict employment opportunities for people with criminal convictions.²²⁴ Many public and private employers also have barriers in place to block the hiring of people with criminal convictions.²²⁵ These barriers may stem from policies or practices of private employers that do not favor applicants with criminal records, occupational licensing laws that disqualify workers with criminal records, and statutory hiring restrictions imposed by federal or state agencies.²²⁶ This section explores each of those barriers in detail.

Due to the collateral consequences of criminal convictions, 1 in 4 Americans are locked out of the labor market, leading to between \$57 and \$65 billion in lost output and a significant loss in human capital.²²⁷ An audit study that measured the negative impact of criminal records on employment found that applicants with a criminal record are 50 percent less likely to receive a callback or job offer than applicants without criminal records.²²⁸ The study’s findings were more pronounced for

²²² Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, *supra* note 40 at 10.

²²³ Schmitt & Warner, *Ex-offenders and the Labor Market*, *supra* note 37 at 1, <http://cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

²²⁴ Malcolm & Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?*, *supra* note 74 at 1-3; CSG, “The National Inventory of the Collateral Consequences of Conviction.”

²²⁵ Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 196 (2004).

²²⁶ *Id.* at 195-95.

²²⁷ Schmitt & Warner, *Ex-offenders and the Labor Market*, *supra* note 37 at 1.

²²⁸ Devah Pager, Bruce Western, Naomi Sugie, “Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records,” *Ann Am Acad Pol Soc Sci.*, vol. 623 (2009): 199.

black applicants; about 60 percent of all black applicants with criminal records did not receive callbacks or job offers, compared to 30 percent of all white applicants with criminal records.²²⁹ The ability to work is important to successful reintegration because it allows an individual to earn a living and supports attaining self-sufficiency.²³⁰ Working can also bolster a person's sense of purpose.²³¹ According to many researchers, employment contributes to strong, stable communities, helps to build a strong economy, and helps to drastically reduce recidivism.²³²

On the other hand, important public safety concerns may justify placing reasonable restrictions on employment for people with certain types of convictions, and some argue that this can “outweigh any burden it places on the ex-offender.”²³³ For example, prohibiting a convicted sex offender from running a day care center is a legitimate restriction that serves to protect the public safety of children.²³⁴ However, others argue that placing “irrational” restrictions on employment, when no discernible link between the conviction and the job position exists, “undermines efforts to promote public safety and a cost-effective criminal justice system.”²³⁵

Because of the significant stigma attached to a criminal conviction, an employer could view an applicant with a criminal record as untrustworthy or lacking in “job readiness,” which is generally perceived as a requisite qualification for both skilled and unskilled positions.²³⁶ In addition to their criminal records, some people with criminal convictions may suffer from disadvantages that can

²²⁹ Ibid.

²³⁰ Maurice Emsellem, *Talk Poverty: We Need Fair Chance Hiring of People with Criminal Records*, National Employment Law Project, 2014, <http://www.nelp.org/commentary/talk-poverty-we-need-fair-chance-hiring-of-people-with-criminal-records/>.

²³¹ Ibid.

²³² Ibid; Jeremy Travis, Amy L. Solomon, Michelle Waul, *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, Urban Institute, 2001, at 31, <https://www.urban.org/sites/default/files/publication/61571/410098-From-Prison-to-Home-The-Dimensions-and-Consequences-of-Prisoner-Reentry.PDF>; *Briefing Transcript*, at 146-47 (statement of Marc Levin); Reddy Statement at 2-3; Maria Duane, Nancy La Vigne, Mathew Lynch, Emily Reimal, *Criminal Background Checks: Impact on Employment and Recidivism*, Urban Institute, 2017, at 12-13, <https://www.urban.org/sites/default/files/publication/88621/criminal-background-checks-impact-on-employment-and-recidivism.pdf>; Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, *supra* note 40 at 10.

²³³ John G. Malcolm, “The Problem with the Proliferation of Collateral Consequences,” *19 Federalist Society Review*, Jan. 29, 2018, at 37, <https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/HKcg8n9ZK2vcHFfRpWuncIyrB9yIC30iZb6dKubC.pdf>.

²³⁴ Ibid.

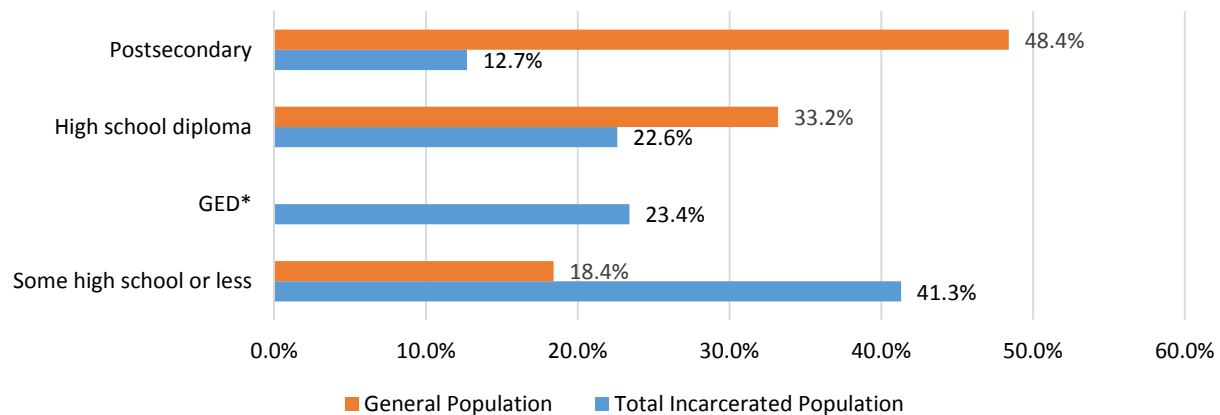
²³⁵ Ibid. at 41. *See also* Levin Statement at 1-5; Malcolm Statement at 2-8.

²³⁶ Travis et al., *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, *supra* note 232 at 31; Harry J. Holzer, Steven Raphael, Michael A. Stoll, *Employment Barriers Facing Ex-Offenders*, Urban Institute, 2003, at 7, <https://www.urban.org/sites/default/files/publication/59416/410855-Employment-Barriers-Facing-Ex-Offenders.PDF>; Harry J. Holzer and Michael A. Stoll, “Employers and Welfare Recipients: The Effects of Welfare Reform in the Workplace,” *Public Policy Institute of California*, (San Francisco: 2001), at 41, https://www.researchgate.net/publication/228628422_The_effect_of_an_applicant's_criminal_history_on_employer_hiring_decisions_and_screening_practices_Evidence_from_Los_Angeles.

challenge their employability.²³⁷ These disadvantages may include inadequate education, limited work experience, substance abuse, or other physical or mental health conditions, all of which can further deteriorate with time spent behind bars.²³⁸ Incarceration can also cause formerly incarcerated individuals to lose their social networks, rendering it more difficult to find gainful employment.²³⁹ Some research indicates that incarceration may also connect inmates with harmful social networks that make them more likely to engage in criminal activity than to obtain gainful employment post-release.²⁴⁰

Figure 5 shows stark aggregate differences in educational attainment between individuals who are incarcerated and individuals who are not. According to the most recent data available from the Department of Justice, 18.4 percent of the general (nonincarcerated) population have not received a high school diploma; among the incarcerated population, the rate is more than double that at 41.3 percent.²⁴¹ Nearly half of the general population has obtained postsecondary education, but only about 13 percent of the incarcerated population have done so.²⁴²

Figure 5: Educational Attainment for Correctional Populations and General Population, 2003



Source: U.S. Department of Justice, Bureau of Justice Statistics, *Education and Correctional Populations*, January 2003

*Information about GED attainment for the general population was not available in this data report.

More recent state-level studies reflect similar patterns. According to 2016 data from Georgia, more than half of incoming state prisoners had not obtained a high school diploma or GED, and fewer

²³⁷ Holzer et al., *Employment Barriers Facing Ex-Offenders*, *supra* note 236 at 4-5.

²³⁸ *Ibid.* at 7; Schmitt & Warner, *Ex-offenders and the Labor Market*, *supra* note 37 at 8.

²³⁹ Schmitt & Warner, *Ex-offenders and the Labor Market*, *supra* note 37 at 8.

²⁴⁰ *Ibid.*

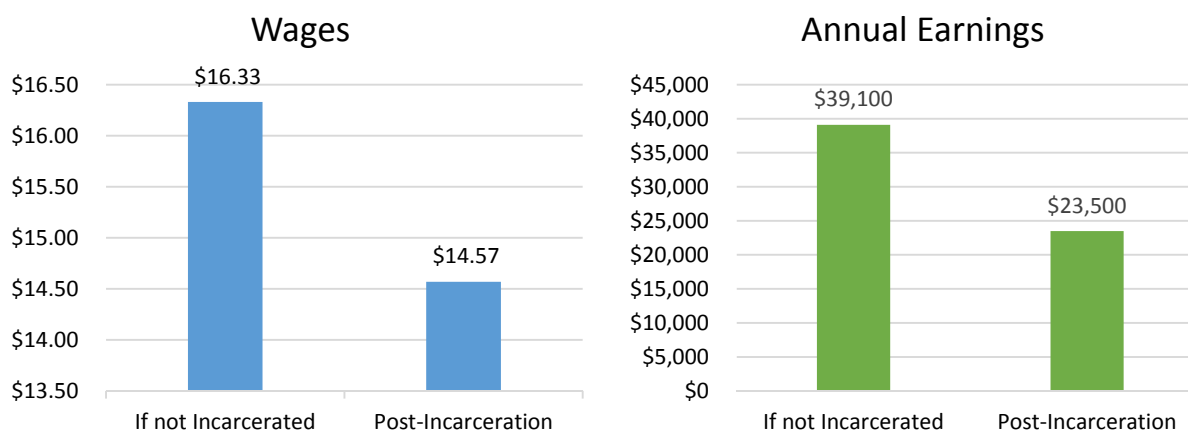
²⁴¹ Caroline Wolf Harlow, *Education and Correctional Populations*, U.S. Dep't of Justice, Bureau of Justice Statistics, 2003, at 2, <https://files.eric.ed.gov/fulltext/ED477377.pdf>.

²⁴² *Ibid.*

than 10 percent had attended college.²⁴³ A 2018 study revealed that nearly three-quarters of Minnesota’s prisoners had not graduated from high school, and only 18.5 percent had received any postsecondary education.²⁴⁴

Figure 6 shows the estimated effect that incarceration has on wages and annual earnings for men. According to a 2010 report, by the age of 45, a man who has been incarcerated can expect to earn on average \$1.76 less per hour than a man who has not been incarcerated.²⁴⁵ On an annual basis, by the same age, a man who has been incarcerated will earn an estimated \$15,600 less than a man who has not been incarcerated.²⁴⁶

Figure 6: Estimated Effect of Incarceration on Male Wages and Annual Earnings, Predicted at Age 45



Source: The Pew Charitable Trusts, *Collateral Costs: Incarceration’s Effect on Economic Mobility*, 2010

According to a Brookings Institution study in 2018, during their first full year after release, only 55 percent of formerly incarcerated people reported earnings.²⁴⁷ Among the formerly incarcerated who were employed, their median annual income was only \$10,090, and only 20 percent of these

²⁴³ Georgia Dep’t of Corrections, *Inmate Statistical Profile*, 2016, at 36,

http://www.dcor.state.ga.us/sites/all/themes/gdc/pdf/profile_inmate_admissions_fy2016.pdf.

²⁴⁴ Minnesota Dep’t of Corrections, *Adult Prison Population Summary*, 2018, at 2,

https://mn.gov/doc/assets/Minnesota%20Department%20of%20Corrections%20Adult%20Prison%20Population%20Summary%207-1-2018_tcm1089-347924.pdf.

²⁴⁵ The Pew Charitable Trusts, *Collateral Costs: Incarceration’s Effect on Economic Mobility*, 2010, at 11,

<https://csgjusticecenter.org/wp-content/uploads/2010/09/2010-Pew.pdf>. The Pew Charitable Trusts authored and published this report based on research conducted by Bruce Western and Becky Pettit. Ibid. at cover page. Note that although incarcerated men do not earn reportable income while incarcerated, the authors state that the expected lost earnings “do not include earnings forfeited during incarceration; they reflect instead a sizable lifelong earnings gap between former inmates and those never incarcerated.” Ibid. at 12.

²⁴⁶ Ibid.

²⁴⁷ Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration*, Brookings Institution, 2018, at 1, https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf.

individuals earned more than \$15,000 that year.²⁴⁸ The Commission notes that most studies are limited to men because 93 percent of the national prison population is male;²⁴⁹ however, the rate of incarceration of women is increasing.²⁵⁰ Given that the average annual income of women is about \$10,169 less than that of men, incarceration may impede women’s access to a sustainable income even more drastically than it does for men.²⁵¹

Research has shown that unemployment is a major cause of recidivism, and if formerly incarcerated individuals can obtain a job with a living wage that meets their basic needs, the risk of reoffending decreases.²⁵² Employment serves as a “linchpin to the successful rehabilitation of ex-offenders and their full and productive participation in society.”²⁵³

Reentry programs exist in each state, and may be privately operated (i.e., by a nonprofit organization) or publicly operated (i.e., by a state government or division).²⁵⁴ The Federal Interagency Reentry Council also represents more than 20 federal agencies, including the Department of Labor and the Department of Education, to coordinate and recommend best

²⁴⁸ Ibid.

²⁴⁹ E. Ann Carson, *Prisoners in 2016*, *supra* note 1 at 3, 6.

²⁵⁰ Ibid. at 1, 3 (reporting that at year-end 2016, 7 percent of the national prison population was female, “an increase of more than 100 prisoners since 2015,” and that the number of women sentenced to a year or more in state or federal prison increased by 700 from 2015 to 2016). In September 2018, the Commission voted in favor of studying female incarceration and producing a report. See U.S. Commission on Civil Rights, Business Meeting, Sept. 14, 2018, transcript, at 65-66 (on file); see also U.S. Commission on Civil Rights, “The U.S. Commission on Civil Rights Will Examine the Confinement Conditions of Incarcerated Women Who Are under the Care of the Bureau of Prisons,” Aug. 23, 2016, <https://www.usccr.gov/press/2016/PR-08-23-16.pdf>; U.S. Commission on Civil Rights, “Women in Prison: Seeking Justice Behind Bars,” Feb. 22, 2019, <https://www.usccr.gov/calendar/2019/02-08-Meeting-Notice2.pdf> (announcing details and agenda of public briefing focused on the civil rights of incarcerated women).

²⁵¹ National Partnership for Women and Families, *America’s Women and the Wage Gap*, September 2018, at 1, <http://www.nationalpartnership.org/research-library/workplace-fairness/fair-pay/americas-women-and-the-wage-gap.pdf> (citing U.S. Census Bureau, *Current Population Survey, Annual Social and Economic (ASEC) Supplement: Table PINC-05: Work Experience in 2017—People 15 Years Old and Over by Total Money Earnings in 2017, Age, Race, Hispanic Origin, Sex, and Disability Status*, <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html>). The National Partnership based this calculation on “the median annual pay for all women and men who worked full time, year-round in 2018.” Ibid. at 5. See also U.S. Dep’t of Labor, Bureau of Labor Statistics, *The Economics Daily: Women’s and Men’s Earnings by Age in 2016*, August 2017, <https://www.bls.gov/opub/ted/2017/womens-and-mens-earnings-by-age-in-2016.htm> (finding that among full-time wage and salary workers ages 16 and older, median weekly earnings were \$749 for women and \$915 for men).

²⁵² Travis et al., *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, *supra* note 232 at 31; Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, *supra* note 40 at 10; Briefing Transcript at 145-47 (statement of Marc Levin); Duane et al., *Criminal Background Checks: Impact on Employment and Recidivism*, *supra* note 232 at 12-13.

²⁵³ Hirsch et al., *Every Door Closed: Barriers Facing Parents With Criminal Records*, *supra* note 36 at 14.

²⁵⁴ National Reentry Resource Center, “Reentry Services Directory,” <https://csgjusticecenter.org/nrrc/reentry-services-directory/> (last accessed Sept. 27, 2018). The National Reentry Resource Center lists organizations and programs in each state that provide various reentry services that focus on employment, health, housing, and reunification of families. Ibid.

practices for reentry services.²⁵⁵ Reentry programs may focus on preparing inmates to reenter the community during their incarceration or may offer short- or longer-term services to individuals post-incarceration.²⁵⁶ The Second Chance Act, which was enacted in part to “break the cycle of criminal recidivism” and “assist offenders reentering the community from incarceration to establish a self-sustaining and law-abiding life,” provides federal grants to states for reentry projects and programs.²⁵⁷ The effectiveness of reentry programs varies, depending in part on the resources and funding available to them.²⁵⁸ Reentry programs that address job training and job readiness can include pre-release vocational training, work release programs, or halfway houses, and some may include substance abuse and mental health treatment.²⁵⁹ Research has suggested that the most successful programs begin while the individual is incarcerated and continue on an intensive basis during his or her reintegration into the community (i.e., the non-correctional setting).²⁶⁰ Some scholars have pointed out that implementing in-prison programs can pose challenges, as the prison system may prioritize certain goals (such as population management) over others (such as reentry-focused work programs).²⁶¹ But research supports the post-release value of in-prison programs for former inmates seeking employment; for example, a meta-analysis of 18 studies found that inmates who participated in education programs (either academic or vocational) had a 13 percent higher chance of finding employment after incarceration than those

²⁵⁵ U.S. Dep’t of Justice, Federal Interagency Reentry Council, *A Record of Progress and a Roadmap for the Future*, 2016, at v-x, xiii, <https://csgjusticecenter.org/wp-content/uploads/2016/08/FIRC-Reentry-Report.pdf>.

²⁵⁶ Nathan James, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*, Congressional Research Service, 2015, at 1, <https://fas.org/sgp/crs/misc/RL34287.pdf>.

²⁵⁷ Pub. Law 110-199, 122 Stat. 657 (April 9, 2008); 34 U.S.C. § 60501; 34 U.S.C. § 10631. Under the Innovations in Reentry Initiative, the Dep’t of Justice’s Bureau of Justice Assistance provides grants for states to assess the “jurisdiction’s approach to contracting reentry services” and support “cognitive-behavioral programming; educational, vocational, and job placement services; transitional employment; substance use treatment; supportive housing; mental health and medical care; programs that promote family reunification; mentoring and peer support; and civil legal aid.” See Council of State Governments Justice Center, “Second Chance Act Innovations in Reentry Initiative,” <https://csgjusticecenter.org/nrrc/second-chance-act-innovations-in-reentry-initiative/> (last accessed Nov. 24, 2018).

²⁵⁸ James, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*, *supra* note 256 at 11 (noting that “[t]he policies affecting prisoners and the kinds of programs available to them both in and out of prison depend on a variety of factors, including the availability of funding for social programs within states and communities”).

²⁵⁹ Richard P. Seiter & Karen R. Kadela, *Prisoner Reentry: What Works, What Does Not, and What is Promising*, CRIME & DELINQUENCY, vol. 49, no. 3, at 368 (2003), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.917.9453&rep=rep1&type=pdf>; see also *Briefing Transcript* at 57-58 (statement of John Malcolm) (discussing the value of pre-release programs for incarcerated individuals).

²⁶⁰ See Shawn Bushway, *Reentry and Prison Work Programs*, Urban Institute Reentry Roundtable Paper, 2003, at 3-4, <https://www.urban.org/sites/default/files/publication/59406/410853-Reentry-and-Prison-Work-Programs.PDF> (describing a vocational program as “one of the best conceived programs” because “it tried to organize the incarceration experience from intake to release, including a community component, around the goal of obtaining work upon release.”); see also James, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*, *supra* note 256 at 21 (stating that the “reportedly most successful programs focus on high-risk offenders, are intensive in nature, begin during institutional placement, and take place mostly in the community.”).

²⁶¹ Bushway, *Reentry and Prison Work Programs*, *supra* note 260 at 3.

who did not participate.²⁶² Moreover, researchers argue that because financial aid can be crucial to obtaining an education, lifting the federal ban on Pell Grants to fund in-prison college programs would enable inmates to gain valuable job skills and significantly boost their employment rates post-incarceration.²⁶³

Criminal Background Checks for Employment

To help ensure safety in the workplace, criminal background checks can be a mechanism for employers to screen out applicants with criminal records who may pose safety risks, particularly in industries where employees interact with vulnerable populations, carry weapons, have access to money, or drive vehicles.²⁶⁴ Employers may also conduct criminal background checks to protect their vulnerability to negligent hiring claims, under which employers could be liable for employees' wrongful actions if they knew, should have known, or could have discovered the risk posed by an employee.²⁶⁵

²⁶² Lois M. Davis, et al., *How Effective Is Correctional Education, and Where Do We Go From Here?*, RAND Corporation, 2014, at 15, 18, https://www.rand.org/pubs/research_reports/RR564.readonline.html. The authors acknowledge that their findings were statistically significant with the caveat that among the 18 studies included in the meta-analysis, only one study had a high-quality, robust research design. *Ibid.*

²⁶³ See Vera Institute of Justice, *Investing in Futures: Economic and Fiscal Benefits of Postsecondary Education in Prison*, 2019, at 21, 23, https://storage.googleapis.com/vera-web-assets/downloads/Publications/investing-in-futures-education-in-prison/legacy_downloads/investing-in-futures.pdf. The Vera Institute's study estimated that restoring Pell Grant funding for incarcerated individuals "would increase state employment rates of formerly incarcerated workers who participated in a postsecondary program by 4.7 percentage points, or nearly 10 percent." *Ibid.* at 23. Although the federal ban on Pell Grants for people in prison remains, a limited number of prisoners are able to access Pell Grants through the Second Chance Pell Experimental Sites Initiative, which provides need-based Pell Grants to certain incarcerated people through partnerships with 65 colleges in 27 states. See Vera Institute of Justice, *Statement from Vera on U.S. Department of Education's Decision to Renew Second Chance Pell*, February 14, 2019, <https://www.vera.org/newsroom/press-releases/statement-from-vera-on-u-s-department-of-educations-decision-to-renew-second-chance-pell>. For more discussion of the obstacles facing criminally convicted people who wish to obtain financial aid for education, see *infra* notes 595-624.

²⁶⁴ See, e.g., *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 49, 51 (Tex. App. 2002) (stating that "[a]n employer owes a duty to its other employees and to the general public to ascertain the qualifications and competence of the employees it hires, especially when the employees are engaged in occupations that require skill or experience and that could be hazardous to the safety of others" and concluding that an employer's failure to conduct a criminal background check was relevant to determining whether the employer had fulfilled that duty) (emphasis added) (internal citations omitted); Duane et al., *Criminal Background Checks: Impact on Employment and Recidivism*, *supra* note 236 at 13; Holzer et al., *Employment Barriers Facing Ex-Offenders*, *supra* note 232 at 8; Eric J. Ellman, on behalf of the Consumer Data Industry Association, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, June 15, 2017, at 2-3 [*hereinafter* Ellman Statement]. Ellman's testimony pointed out that criminal background checks are legally protected under the Fair Credit Reporting Act, and that "employers should be able to hire the best people for the jobs available, and job applicants should not fear unlawful discrimination." *Ibid.*

²⁶⁵ See, e.g., *Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 864 n.4, 865 (2004) (noting that "while there may be no statutory requirement that employers in other businesses conduct background or criminal checks on potential employees, we reject the position that employers who fail to conduct such searches can never be found liable for negligent hiring because of this failure" and concluding that the employer's performance of a criminal background check protected the employer from liability); see also *Morris*, 78 S.W.3d at 49, 51 (asserting that "an employer is liable for negligent hiring, retention, or supervision if it hires an incompetent or unfit employee whom it

But when employers use criminal background checks to indiscriminately disqualify all applicants with criminal records, these employers severely curtail employment opportunities for formerly incarcerated people.²⁶⁶ Because black and Latino individuals are likelier to have criminal records than white and Asian people, and men are likelier to have criminal records than women, black and Latino males are disproportionately affected by criminal background checks.²⁶⁷ Some critics of criminal background checks also allege that they yield incomplete or inaccurate results.²⁶⁸ For example, a background check may reveal an applicant's arrest record without the case disposition to show that no conviction ensued, or an applicant's expunged records may be wrongfully revealed to the employer.²⁶⁹ The extent of these inaccuracies has been disputed.²⁷⁰ In 2006, the Attorney

knows, or by the exercise of reasonable care should have known, was incompetent or unfit" and concluding that the employer could have discovered the risk posed by the employee had it performed a criminal background check). Negligent hiring claims are state causes of action and must satisfy the elements of the state's laws to be successful. See Eniola O. Akinrinade, *Caught Between A Rock, Negligence, Racism, and A Hard Place: Exploring the Balance Between the EEOC's Arrest and Conviction Investigation Guidelines and Society's Best Interest*, 2 TEX. A&M L. REV. 135, 137-38 (2014) (discussing case law related to the role of criminal background checks in negligent hiring claims); see also Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, *supra* note 225 at 196 (discussing the "strong incentive for private employers to avoid hiring persons with a criminal record is the fast-growing tort of negligent hiring"). Because an employer can be liable for the harm that an employee inflicts on a third party, employers may choose to perform criminal background checks when the employee's job requires public interaction (e.g., when a salesperson or technician visits a personal residence and interacts privately with the resident). See, e.g., *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 734-37 (Tex. 1998) (finding that the employer's failure to conduct a criminal background check on an in-home salesman was a substantial factor in holding the employer liable for negligent hiring after the salesman raped a customer whose home he visited).

²⁶⁶ Duane et al., *Criminal Background Checks: Impact on Employment and Recidivism*, *supra* note 232 at 2; National Employment Law Project, *Faulty FBI Background Checks for Employment: Correcting FBI Records Is Key to Criminal Justice Reform*, 2015, <http://www.nelp.org/content/uploads/NELP-Policy-Brief-Faulty-FBI-Background-Checks-for-Employment.pdf>.

²⁶⁷ Duane et al., *Criminal Background Checks: Impact on Employment and Recidivism*, *supra* note 232 at 2, 10.

²⁶⁸ *Ibid.* at 2-9. Employers conduct background checks using information drawn from FBI data that uses fingerprints for identity verification, or from commercial sources that typically use a person's name, date of birth, and Social Security number for identity verification, as well as government records regarding criminal sentences. *Ibid.* See also National Employment Law Project, *Faulty FBI Background Checks for Employment: Correcting FBI Records Is Key to Criminal Justice Reform*, *supra* note 269 at 1; Ellman Statement at 6-7. In his statement, Ellman disputed the levels of inaccuracy of background checks, citing a 2014 audit of the four largest criminal background check companies, which found a dispute rate of 0.3% and a 99.2% rate of accuracy of background checks performed by LeasingDesk, a member of the Consumer Data Industry Association. The statement also asserted that these "high rates of reliability are consistent with the findings of several federal courts." *Ibid.* But in one case cited by the statement, the federal court did not indicate whether these accuracy levels were acceptable; instead, the court described an inaccuracy rate of 0.38 percent as "quite frankly, unflattering." See *Williams v. First Advantage LNS Screening Sols., Inc.*, 238 F. Supp. 3d 1333, 1356 (N.D. Fla. 2017). Ellman's statement noted that courts often redact identifying information such as dates of birth, social security numbers, and addresses from public records, making the conclusive matching of a criminal record to an individual "an increasingly complex undertaking that has required criminal background check providers to innovate." Ellman Statement at 6-7.

²⁶⁹ *Ibid.*

²⁷⁰ At the Commission's 2013 briefing about the use of criminal background checks in hiring, Nick Fishman of EmployeeScreenIQ testified that his company's dispute rate was "just 0.15 percent." See U.S. Commission on Civil Rights, *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy*, 2013, at 79, http://www.eusccr.com/EEOC_final_2013.pdf (including the statement of Nick Fishman, Co-Founder, Chief Marketing Officer, and Executive Vice President, EmployeeScreenIQ, that "when disputes do occur we handle them quickly so in the unlikely event information

General estimated that approximately 50 percent of the FBI records are incomplete or inaccurate.²⁷¹ A 2015 Government Accountability Office (GAO) report confirmed that while improvements in data quality were cognizable, data inaccuracies are still prevalent in most states' data, and the GAO recommended that actions be taken to further improve data quality.²⁷²

In 2013, the Commission held a briefing on the use of criminal background checks in employment. The briefing specifically focused on guidance²⁷³ issued by the Equal Employment Opportunity Commission (EEOC) in 2012 on criminal records and hiring practices (“2012 Guidance”).²⁷⁴ The Commission evaluated how the 2012 Guidance, which recommended that employers individually assess applicants rather than implement blanket policies disqualifying applicants due to criminal records,²⁷⁵ had affected employers and workers.²⁷⁶

The federal government may offer guidance to states and private employers on hiring practices that implicate Title VII of the Civil Rights Act of 1964, as the 2012 Guidance did.²⁷⁷ The legality of such EEOC guidance has been generally upheld but also sometimes challenged. Federal courts have held that “the EEOC gets deference in accordance with the thoroughness of its research and the persuasiveness of its reasoning.”²⁷⁸ The 2012 Guidance sought to address the effects of racial disparities, by cautioning employers that hiring practices that check criminal records could run afoul of Title VII if they create disparate impact based on race and are “not job related and consistent with business necessity.”²⁷⁹ The EEOC followed case law holding that while protecting

needs to be modified it can be done without penalizing the candidate or unnecessarily delaying the hire.”). However, this only reflects the rate of disputes undertaken by impacted individuals and may not reflect all errors. Moreover, even an accuracy rate of 99.9 percent will still negatively impact the lives of millions of people who are seeking employment. See U.S. Census Bureau, *Annual Estimates of the Resident Population for Selected Age Groups by Sex for the United States, States, Counties and Puerto Rico Commonwealth and Municipios: April 1, 2010 to July 1, 2017*, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last accessed Dec. 10, 2018) (claiming that the current U.S. adult population is approximately 201 million). If this estimate is correct, then an accuracy rate of 99.9 percent could yield errors for at least 1 million adults.

²⁷¹ U.S. Dep’t of Justice, Office of the Attorney General, *The Attorney General’s Report on Criminal Background Checks*, 2006, at 3, https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf.

²⁷² U.S. Government Accountability Office, *Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used For Employment-Related Background Checks*, Report 15-162, 2015, <https://www.gao.gov/assets/670/668505.pdf>.

²⁷³ EEOC, *2012 Guidance*.

²⁷⁴ See U.S. Commission on Civil Rights, *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission’s Conviction Records Policy*, 2013 [*hereinafter* USCCR, 2013 Briefing Report], http://www.eusccr.com/EEOC_final_2013.pdf.

²⁷⁵ EEOC, *2012 Guidance* at 25.

²⁷⁶ USCCR, *2013 Briefing Report* at 1.

²⁷⁷ See generally EEOC, *2012 Guidance*.

²⁷⁸ *El v. Se. Pennsylvania Transp. Auth. (SEPTA)*, 479 F.3d 232, 244 (3d Cir. 2007). See also Discussion and Sources, *infra* notes 285-94 (discussing Texas’ litigation attempting to enjoin enforcement of the EEOC 2012 Guidance).

²⁷⁹ EEOC, *2012 Guidance* at 24.

safety is compelling, discriminatory practices are prohibited.²⁸⁰ Citing the disproportionate overrepresentation of black and Latino people in the criminal justice system, the 2012 Guidance recommended that employers perform an individualized assessment of candidates with criminal records and consider factors such as the nature and circumstances of the offense, the duration of time since the offense, any evidence of rehabilitation, relevant job experience, and character references (among other factors).²⁸¹

Some critics of the 2012 Guidance on hiring people with criminal records later characterized it as overreach by the federal government. For instance, Texas sued the EEOC over the guidance, alleging that Texas had “the sovereign right to impose categorical bans on the hiring of criminals,” and that neither EEOC nor the Attorney General “has authority to say otherwise.”²⁸² Texas went to court to prevent the federal government from enforcing the guidance in the state.²⁸³ In February 2018, a federal district court in Texas ruled that the 2012 Guidance qualified as a “substantive rule” requiring public notice and the opportunity to comment under the Administrative Procedures Act (APA).²⁸⁴ The court found that because the EEOC had not complied with the APA’s notice-and-comment requirements, the federal government could not enforce the guidance against the state of Texas as an employer.²⁸⁵ Under this ruling, the EEOC could remedy the error the court identified by submitting its proposal for new substantive rules as new federal regulations subject to the APA’s public notice-and-comment procedures, rather than a mere guidance.²⁸⁶ Still, the court rejected Texas’s request for a declaratory judgment—which would have authorized the state to broadly prohibit anyone with any felony conviction from working for the Texas government—specifically stating:

²⁸⁰ *Id.* at 10, 18. The EEOC cited cases where courts found that statistical evidence showing the disproportionate overrepresentation of African Americans in the criminal justice system could establish a prima facie case of racial discrimination. See *Green v. Missouri Pac. R. Co.*, 523 F.2d 1290, 1295, 1298-99 (8th Cir. 1975) (finding, based on statistical data, that the employer’s criminal record policy “disqualifies black applicants or potential black applicants for employment at a substantially higher rate than whites” and thus the plaintiff “established a prima facie case of discrimination,” and holding that a complete bar of all applicants with felony convictions for office job positions presented potential civil rights violations); *El v. Se. PA Transp. Auth.*, 418 F. Supp. 2d 659, 668-69 (E.D. Pa. 2005), *aff’d sub nom. El v. Se. Pennsylvania Transp. Auth. (SEPTA)*, 479 F.3d 232 (3d Cir. 2007) (concluding that the employer’s criminal record policy “had a disparate impact on African Americans” after reviewing statistical data and expert testimony).

²⁸¹ EEOC, 2012 Guidance at 18; see also *El*, 479 F.3d 232 at 244-45 (explaining that Title VII “does not ask the impossible” but “require[s] that the policy under review accurately distinguish between applicants that pose an unacceptable level of risk and those that do not” and holding that person with a 40-year old murder conviction could be denied a job in public transportation of persons with disabilities).

²⁸² First Amended Complaint for Declaratory and Injunctive Relief at 1, *Texas v. E.E.O.C.*, WL 1372008 (N.D. Tex. 2014) (No. 513-CV-255-C).

²⁸³ *Id.*

²⁸⁴ Order, *Texas v. E.E.O.C.*, No. 513-CV-255-C, at *3 (N.D. Tex. Feb. 1, 2018), <http://www.naacpldf.org/files/about-us/Doc.%201117.pdf>.

²⁸⁵ *Id.* at *4.

²⁸⁶ *Id.*

The Court declines to declare that Texas has a right to maintain and enforce its laws and policies that absolutely bar convicted felons (or certain categories of felons) from serving in any job the State and its Legislature deems appropriate. There are certainly many categories of employment for which specific prior criminal history profiles of applicants would be a poor fit and pose far too great a risk to the interests of the State of Texas and its citizens. However, there may well be instances in which otherwise qualified job applicants with certain felony convictions in their criminal histories pose no objectively reasonable risk to the interests of the State of Texas and its citizens. To find otherwise would be illogical. Thus, a categorical denial of employment opportunities for all job applicants convicted of a prior felony paints with too broad a brush and denies meaningful opportunities of employment to many who could benefit greatly from such employment in certain positions.²⁸⁷

Texas has appealed this decision, and as of this writing, the federal court of appeals has not yet ruled on it. In its appeal, Texas has argued that the district court “did not go far enough.” instead, Texas contends, the district court should have prohibited the 2012 Guidance under all circumstances “because EEOC has no power to promulgate a substantive rule.”²⁸⁸ In response, the EEOC pointed out that the 2012 Guidance “imposes no legal obligations or consequences” on employers²⁸⁹ and only explained EEOC’s “views on how employers’ use of criminal history records in employment decisions *may* implicate Title VII’s prohibitions against discrimination.”²⁹⁰ But Texas disagrees and argues that the 2012 Guidance puts “pressure on [the] state” to hire people with felony convictions, even if the guidance does not mandate this.²⁹¹

At the Commission’s 2013 briefing, some employers expressed another concern: that despite the 2012 Guidance’s recommendation that employers perform individualized assessments, it could dilute discretion to assess a candidate’s suitability according to the employers’ own needs and expertise in the field.²⁹² In 2013, Todd McCracken of the National Small Business Association testified that safety is a significant issue when hiring for certain jobs, especially those that involve caring for children and visiting people’s homes.²⁹³ Both McCracken and Richard Mellor of the

²⁸⁷ *Id.* at *3.

²⁸⁸ Brief for Appellee/Cross-Appellant at 44-46, *Texas v. E.E.O.C.*, 2018 WL 6380924, No. 18-10638 (5th Cir. Nov. 2, 2018).

²⁸⁹ Cross-Appellee Response/Reply Brief for Appellants Cross-Appellees at 1-5, *Texas v. E.E.O.C.*, 2018 WL 6828468, No. 18-10638 (5th Cir. Dec. 20, 2018).

²⁹⁰ *Id.* at 2-3 (emphasis in original).

²⁹¹ Cross-Appellant’s Reply Brief at 3, 19, *Texas v. E.E.O.C.*, 2019 WL 359642, No. 18-10638 (5th Cir. Jan. 24, 2019).

²⁹² USCCR, *2013 Briefing Report* at 8.

²⁹³ *Ibid.* at 205 (statement of Todd McCracken, president of the National Small Business Association, who testified: “It is...a fact of life that not everyone should be employed in certain types of jobs. We do not want rapists entering people’s homes. We do not want child molesters working in day care centers. And we do not want embezzlers handling large sums of cash.”).

National Retail Federation were worried about exposing employers to lawsuits alleging negligent hiring or inventory theft and embezzlement.²⁹⁴ At the Commission's 2017 Commission briefing on collateral consequences, employers discussed their fear of facing excessive insurance rates or restrictions.²⁹⁵ Expert witness Vikrant Reddy testified that even if employers wanted to hire employees with criminal records, they may encounter barriers from the insurance industry.²⁹⁶ But as noted at the 2013 briefing by Harry Holzer, Georgetown University Professor of Public Policy and Senior Fellow at the American Institute Research: "The very high costs of criminal histories on employment are borne not only by the offenders themselves, but also by their families and their children, their communities, and the U.S. economy broadly."²⁹⁷

Other experts, including Carol Miaskoff, then-Acting Associate Legal Counsel of the EEOC, argued that because the 2012 Guidance did not mandate individualized assessments or prohibit criminal background checks, employers maintained the authority to exercise discretion in their hiring decisions.²⁹⁸ According to Miaskoff, the EEOC intended to emphasize that an employer should not automatically disqualify a candidate with a criminal record, but should instead inform the candidate that his or her criminal record could disqualify the candidate and allow the candidate the opportunity to explain or contextualize past conduct.²⁹⁹ Holzer reasoned that this more nuanced approach could better prevent the racial imbalances in the criminal justice system from infecting the hiring process.³⁰⁰

At the 2017 briefing, Marc Levin, Policy Director at the Right on Crime Initiative of the Texas Public Policy Foundation, stated: "Given the public interest in reducing recidivism, it does not make sense to hold employers...liable simply for giving ex-offenders a second chance that will contribute to greater prosperity and public safety."³⁰¹ Levin recommended that states pass laws to seal criminal records automatically after a set time period, such as five to seven years.³⁰² He also suggested that states consider legislation to immunize employers from negligible hiring lawsuits when the employee's alleged offense is unrelated to the job.³⁰³

²⁹⁴ Ibid. at 8, 205 (statement of Todd McCracken), 211 (statement of Richard Mellor, Vice President, Loss Prevention, National Retail Federation).

²⁹⁵ *Briefing Transcript* at 41 (statement of John Malcolm), 42 (statement of Margaret Love).

²⁹⁶ Ibid. at 44 (statement of Vikrant Reddy).

²⁹⁷ USCCR, *2013 Briefing Report* at 21 (statement of Harry Holzer, Professor of Public Policy at Georgetown University and Senior Fellow at the American Institute Research).

²⁹⁸ USCCR, *2013 Briefing Report* at 15-17 (statement of Carol Miaskoff, Acting Associate Legal Counsel, Equal Employment Opportunity Commission).

²⁹⁹ Ibid.

³⁰⁰ Ibid. at 19-22 (statement of Harry Holzer).

³⁰¹ Levin Statement at 3.

³⁰² Ibid. at 2-3. *See also* notes 396-409, *infra*, for more discussion of record-sealing and expungement policy proposals.

³⁰³ Levin Statement at 3.

Some states have experimented with the legislative mechanisms to which Levin alluded. For instance, Texas enacted a statute immunizing employers from negligent hiring lawsuits if the employee's conviction was for an offense substantially unrelated to his job.³⁰⁴ The immunity does not apply if the employer "knew or should have known" of the conviction and the conviction was for a certain violent, sexual, or theft offense.³⁰⁵ Colorado also enacted a statute to address employers' apprehension about negligent hiring lawsuits. Under the statute, a plaintiff alleging negligent hiring against an employer may not introduce the employee's criminal history if "the nature of the criminal history does not bear a direct relationship to the facts underlying the cause of action;" if the criminal record had been sealed; if the employee received a pardon or deferred judgment; or if the arrest record or charge did not lead to a conviction.³⁰⁶

The Texas and Colorado legislation illustrate how states can protect employers while boosting employment rates among people with felony convictions, strengthening their local economies, and improving public safety.³⁰⁷

Removing Barriers to Employment for People with Criminal Records

Some states permit correctional departments or courts to issue certificates of rehabilitation (or qualification for employment) to eligible individuals with criminal records.³⁰⁸ A court may decide to issue such a certificate based on certain factors, including the nature of the offense, the individual's economic and social circumstances, the individual's actions and conduct since the conviction, and any evaluations of the individual's character.³⁰⁹ In 2012, Ohio enacted a law allowing courts to issue Certificates of Qualification for Employment, if the petitioner can prove "all of the following by a preponderance of the evidence:

³⁰⁴ TEX. CIV. PRAC. & REM. CODE ANN. § 142.002.

³⁰⁵ TEX. CIV. PRAC. & REM. CODE ANN. § 142.002(b)(1)-(2). Immunity also does not apply if the employer "knew or should have known" of the employee's conviction for an offense committed while performing duties "substantially similar" to those performed in the course of employment. *Id.*

³⁰⁶ COLO. REV. STAT. ANN. § 8-2-201.

³⁰⁷ Shristi Devu, *Trapped in the Shackles of America's Criminal Justice System*, 20 SCHOLAR: ST. MARY'S L. REV. & SOC. JUST. 217 (2018), <https://commons.stmarytx.edu/thescholar/vol20/iss2/3/> (reviewing policies designed to mitigate the collateral consequences of felony convictions).

³⁰⁸ Peter Leasure and Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL'Y REV. INTER ALIA 11, 14-15 (2016), http://ylpr.yale.edu/inter_alia/effectiveness-certificates-relief-collateral-consequence-relief-mechanisms-experimental. See also OHIO REV. CODE ANN. § 2953.25(B) (allowing some individuals with criminal convictions to petition the state Dep't of Rehabilitation and Correction's parole division or the county court of common pleas for a certificate of qualification for employment under certain circumstances).

³⁰⁹ See *Doe v. United States*, 168 F. Supp. 3d 427, 446 (E.D.N.Y. 2016) (issuing a federal certificate of rehabilitation to the plaintiff based on, inter alia, the nonviolent nature of her crime, her "current economic and social circumstances," her lack of criminal activity post-release from prison, and her "tenacity in overcoming the obstacles imposed on her by law due to her conviction."). Upon finding that the plaintiff's incarceration and supervision "had its intended [deterrent] effect, the court concluded: "There is no longer a need to deprive Doe of her liberty interests in the way collateral consequences imposed by the law have been doing. As her sentencing judge, I owe it not only to Doe, but to her family and community, to do my part to lift any remaining hardship on her." *Id.* at 441.

- Granting the petition will materially assist the individual in obtaining employment or occupational licensing;
- The individual has a substantial need for the relief requested in order to live a law-abiding life;
- Granting the petition would not pose an unreasonable risk to the safety of the public or any individual; and
- The submission of an incomplete petition by an individual shall not be grounds for the designee or court to deny the petition.”³¹⁰

An empirical study of Ohio’s program found that the state’s certificates of rehabilitation nearly tripled the odds of formerly incarcerated individuals obtaining an interview or job offer, and that they nearly equalized the rate at which certificate holders and individuals without criminal records received interviews or job offers.³¹¹

Other states offer tax credits to employers who hire people with criminal records.³¹² In California, the credit extends to 50 percent of the qualified wages for the first year of employment, and gradually diminishes with each subsequent year of employment.³¹³ Illinois, Iowa, Louisiana, Maryland, and Texas also have—or have experimented with—tax-credit programs for employers who hire people with criminal records.³¹⁴ The criteria and conditions attached to the tax credits vary. In Illinois, tax credits are available for employers who hire an employee within three years after the employee has been released from an Illinois “adult correctional center.”³¹⁵ In Louisiana, the tax credit applies only to “employment [of] an individual who has been convicted of a first-time nonviolent offense.”³¹⁶ These policies may begin to proliferate as more states understand that employing people with criminal records provides tax revenue, whereas incarceration represents a significant tax expenditure.³¹⁷

³¹⁰ OHIO REV. CODE ANN. § 2953.25(C)(3). Note that the law exempts certain collateral sanctions from relief via the certificate of rehabilitation, including (under certain circumstances) sanctions applying to sex offenses, vehicular homicide, felony drug offenses committed by medical professionals, among several others. *See* OHIO REV. CODE ANN. § 2953.25(C)(5).

³¹¹ Leasure & Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, *supra* note 308 at 17-20.

³¹² Devu, *Trapped in the Shackles of America’s Criminal Justice System*, *supra* note 307 at 253-55.

³¹³ CAL. REV. & TAX. CODE § 17053.34.

³¹⁴ National Hire Network, “State Tax Credits,” 2017, <http://www.hirenetwork.org/content/state-tax-credits> (last accessed Nov. 25, 2018).

³¹⁵ 35 ILL. COMP. STAT. ANN. 5/216

³¹⁶ LA. STAT. ANN. § 47:287.752.

³¹⁷ Devu, *Trapped in the Shackles of America’s Criminal Justice System*, *supra* note 307 at 253-54.

Occupational Licensing Barriers

In the United States, many professions require individuals to obtain licenses to practice in their chosen field.³¹⁸ The criteria for obtaining an occupational license vary under federal and state laws and may exclude people who have criminal convictions.³¹⁹ The EEOC has found that some occupational licensing requirements for persons with felony convictions are permissible under Title VII of the Civil Rights Act,³²⁰ which prohibits race and national origin discrimination in employment.³²¹ In 2012, “building on longstanding court decisions,” the EEOC found that due to causing disparate impact³²² “use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII.”³²³ The EEOC’s 2012 Guidance, which is still in force, recommends that employers “develop[] a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job,” followed by an individualized assessment of the applicant with a criminal record.³²⁴

About 30 percent of U.S. workers now need licenses, which is a five-fold increase since the 1950s.³²⁵ Occupational licenses can be important to ensure the delivery of quality goods and services to protect consumer health and safety.³²⁶ Examples of when a license may be necessary to serve the public interest can be found in the medical profession.³²⁷

³¹⁸ National Employment Law Project, *The Consideration of Criminal Records in Occupational Licensing*, National Reentry Resource Center, Council of State Governments Justice Center, 2015, at 1, <https://csgjusticecenter.org/wp-content/uploads/2015/12/TheConsiderationofCriminalRecordsinOccupationalLicensing.pdf>.

³¹⁹ *Ibid.* See also EEOC, *2012 Guidance* at 21-23.

³²⁰ EEOC, *2012 Guidance* at 21-23. See also Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 2000e *et seq.*).

³²¹ Title VII of the Civil Rights Act of 1964 (codified as amended at 42 U.S.C. § 2000e *et seq.*).

³²² 42 U.S.C. § 2000e-2(k)(1)(A)(i); see also *Lewis v. City of Chicago*, 560 U.S. 205, 208, 211 (2010) (asserting that “Title VII of the Civil Rights Act of 1964 prohibits employers from using employment practices that cause a disparate impact on the basis of race (among other bases)” and reaffirming disparate impact analysis from *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), interpreting Title VII to “proscrib[e] not only overt discrimination but also practices that are fair in form, but discriminatory in operation.”).

³²³ EEOC, *2012 Guidance* at 1.

³²⁴ *Id.* at 2; see also National Employment Law Project, *The Consideration of Criminal Records in Occupational Licensing*, *supra* note 318 at 1.

³²⁵ Brad Hershbein, David Boddy, Melissa S. Kearney, *Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices*, Brookings Institution, 2015, <https://www.brookings.edu/blog/up-front/2015/01/27/nearly-30-percent-of-workers-in-the-u-s-need-a-license-to-perform-their-job-it-is-time-to-examine-occupational-licensing-practices/> (last accessed Aug. 31, 2018). See also The White House, *Occupational Licensing: A Framework for Policymakers*, 2015, at 3, https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [hereinafter White House, *Occupational Licensing*].

³²⁶ White House, *Occupational Licensing* at 3-5.

³²⁷ Reddy Statement at 1.

But licensing policies can also restrict access to jobs where no discernible nexus between the job and the license exists.³²⁸ Many scholars and advocates believe that occupational licensing bans should be limited to circumstances where the nature of the conviction bears on the ability of the individual to perform the job duties.³²⁹ Others have raised another salient point: licensing policies can limit workers' ability to practice across state lines.³³⁰

Licensing requirements vary drastically from state to state. More than 1,100 different occupations are licensed in at least one state, but fewer than 60 occupations are regulated in all states.³³¹ This variability can restrict workers' ability to move from state to state and can frustrate business's needs to transfer workers when necessary.³³² When these policies adversely affect employees and businesses, they hurt the overall economy as well; one study estimated that occupational licensing laws cost the U.S. economy "between \$34.8 and \$41.7 billion per year."³³³ The brunt of these costs is eventually borne by American consumers, without necessarily enhancing the quality of any products or services.³³⁴

As licensing policies can limit job choices for unlicensed workers, they can also diminish their earning potential. For instance, unlicensed workers earn an estimated 10 to 15 percent less than licensed workers with the same training, education, and experience.³³⁵ Even the path toward obtaining a license can be cumbersome and costly; one speaker informed the Commission that "2,000 hours [are] required to become a cosmetologist in Utah."³³⁶

States commonly require individuals to pass a criminal background check before obtaining a license. Currently, there are more than 13,000 documented state licensing restrictions for individuals with a criminal record.³³⁷ Among these, about 8,000 restrictions apply to people

³²⁸ White House, *Occupational Licensing* at 3 (pointing out that "often the requirements for obtaining a license are not in sync with the skills needed for the job").

³²⁹ Michelle Natividad Rodriguez and Beth Avery, *Unlicensed and Untapped: Removing Barriers to State Occupational Licenses for People with Criminal Records*, National Employment Law Project, 2017, at 4, <http://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses/>. See also Stephen Slivinski, *Turning Shackles Into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform*, Center for the Study of Economic Liberty at Arizona State University, 2016, at 1-2, <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf>; Malcolm & Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?*, *supra* note 74 at 4.

³³⁰ White House, *Occupational Licensing* at 3.

³³¹ *Ibid.*

³³² *Ibid.*

³³³ Levin Statement at 3 (citing Daniel S. Hamermesh, *Labor Demand* (Princeton: Princeton University Press, 1996), Chapter 2).

³³⁴ Reddy Statement at 2.

³³⁵ White House, *Occupational Licensing* at 4.

³³⁶ Reddy Statement at 2.

³³⁷ CSG, "The National Inventory of the Collateral Consequences of Conviction." Visitors to CSG's National Collateral Consequence Inventory site may search by offense type, consequence type, duration, jurisdiction, and application (mandatory versus discretionary). The numbers cited in this section were produced by searching for state

convicted of any felony conviction and over 4,000 apply to people convicted of any misdemeanor.³³⁸ Moreover, at least 9,000 state licensing disqualifications apply for an indefinite period and could last a lifetime, and more than 4,000 are mandatory disqualifications, for which licensing agencies have no choice but to deny a license.³³⁹

Additional hurdles can compound the obstructive impact of licensing laws. For instance, formerly incarcerated individuals often lack the education and training to qualify for many skilled labor jobs; this disadvantage likely disqualifies them from licensed jobs that may require a greater degree of education or training.³⁴⁰ Further, many states use “good moral character” as a standard for granting occupational licenses.³⁴¹ A uniform definition of “good moral character” appears nonexistent as of yet.³⁴² States’ criteria for lack of good moral character can range from convictions for “deadly weapons or firearms offenses” to convictions for “petty offenses indicating an irresponsible attitude toward the law.”³⁴³ Given the subjectivity and vagueness of phrases such as “irresponsibility toward the law,” critics have argued that moral character should not serve as a standard for granting occupational licenses, at least unless it is more precisely defined.³⁴⁴ Since there is often no uniform set of standards for licensing boards when making determinations under a “good moral character” standard, individual prejudices of licensing officials may contribute to the decision-making process.³⁴⁵ One idea is that licensing boards could consider consulting the legal and medical professions for guidance on defining the contours of “good moral character,” given that these professions have historically included this standard when licensing physicians and attorneys.³⁴⁶

Moreover, a recent study found that states with heavy occupational licensing burdens suffered increased rates of recidivism,³⁴⁷ while states with no “character” provisions and lower licensing burdens saw their recidivism rates drop.³⁴⁸ Given that the recidivism rate for people who are

“occupational & professional licensure & certification” consequences, and then narrowing by offense type (felony or misdemeanor), duration (indefinite or temporary), and application (mandatory or discretionary). *Ibid.*

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ Slivinski, *Turning Shackles Into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform*, *supra* note 329 at 1.

³⁴¹ Larry Craddock, “‘Good Moral Character’ as a Licensing Standard,” *Journal of the Nat’l Ass’n of Admin. Law Judiciary*, vol. 28, no. 2 (2008): 450-51,

<http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1117&context=naalj>; Reddy Statement at 2.

³⁴² Craddock, “‘Good Moral Character’ as a Licensing Standard,” *supra* note 341 at 451.

³⁴³ *Id.*

³⁴⁴ *Id.* at 451-52.

³⁴⁵ *Id.* at 451, 456.

³⁴⁶ *Id.*

³⁴⁷ Slivinski, *Turning Shackles Into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform*, *supra* note 329 at 5-6; Reddy Statement at 2.

³⁴⁸ Slivinski, *Turning Shackles Into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform*, *supra* note 329 at 2.

unemployed post-incarceration is nearly twice that of those who find employment,³⁴⁹ correctional facilities could be wise to offer job training programs that can equip inmates to earn occupational licenses. But even when facilities do offer training, the statutory bans on granting licenses to people with criminal convictions impede the formerly incarcerated from using their skills to earn a living.³⁵⁰ For instance, some individuals receive training to become barbers while incarcerated, but then are blocked from obtaining a license to practice “in the one field in which they now have a marketable skill” once they are released.³⁵¹

Inmates who fight fires in California offer another compelling example of how licensing restrictions can impact formerly incarcerated people and public safety overall. The California Department of Corrections and Rehabilitation partners with the Los Angeles Fire Department to train incarcerated people to fight deadly wildfires.³⁵² The *New York Times* reported that, for their labor in 2017, the inmates only earned about \$1 per hour.³⁵³ They may have also learned valuable work skills, but could be stymied in their efforts to apply them post-release due to licensing restrictions for individuals with criminal records.³⁵⁴ *Axios* reported that in August 2018, an estimated 2,000 incarcerated people fought fires in California,³⁵⁵ earning approximately \$3 per day for their work.³⁵⁶ But most fire departments require prospective firefighters to obtain an EMT license, and EMT certifying boards routinely deny licenses to applicants who have criminal records.³⁵⁷ Thus, while the state may accrue value from the service of these individuals during their incarceration, and incarcerated people may learn marketable skills that could ease their reentry and protect public safety, post-release licensing restrictions can then nullify the potentially positive effects of this arrangement.³⁵⁸ Speaking to this point, one advocate questioned why the state should bother releasing prisoners, “[if] there’s still an invisible prison around them.”³⁵⁹

³⁴⁹ *Ibid.*

³⁵⁰ Malcolm & Seibler, *Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?*, *supra* note 74 at 4.

³⁵¹ *Ibid.*

³⁵² Jaime Lowe, “The Incarcerated Women Who Fight California’s Wildfires,” *New York Times*, Aug. 31, 2017, <https://www.nytimes.com/2017/08/31/magazine/the-incarcerated-women-who-fight-californias-wildfires.html>.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*

³⁵⁵ Clark Mindock, “California wildfire: Should inmates be fighting the state’s worst ever blaze?,” *The Independent*, Aug. 8, 2018, <https://www.independent.co.uk/news/world/americas/california-wildfires-latest-inmate-firefighters-prisoners-mendocino-complex-carr-fire-a8483571.html>.

³⁵⁶ *Ibid.*

³⁵⁷ Stef W. Kight, “How inmates who fight wildfires are later denied firefighting jobs,” *Axios*, Aug. 9, 2018, <https://www.axios.com/how-inmates-who-fight-wildfires-are-later-denied-firefighting-jobs-1513306736-c63805dd-c2fb-4c04-a81e-1f9a7058ef34.html>.

³⁵⁸ *See, e.g.*, CAL. CODE REGS. tit. 22, § 100079(a)-(b) (requiring individuals to complete “the criminal background check requirement” and to disclose pending or current criminal investigations, pending criminal charges, and prior convictions to qualify for initial certification as an EMT).

³⁵⁹ Kight, “How inmates who fight wildfires are later denied firefighting jobs,” *supra* note 357.

Several advocates testified to the Commission’s West Virginia State Advisory Committee about formerly incarcerated individuals who had paid for training and education in a particular field, only to find out that they were barred from practicing due to their criminal records. For instance, one young woman went to college with the intention of working as a drug counselor, after she had served time for a drug offense and a related burglary offense (after stealing family jewelry to serve her drug addiction). It was only after paying for and completing 2.5 years of her academic program that she found out she would not be able to be certified as a counselor with her record.³⁶⁰

Moreover, in his testimony before the Commission in 2017, Vikrant Reddy pointed out that licensing barriers “come down much harder on minority communities, disadvantaged communities because those communities are disproportionately represented in the criminal justice system,” and while these policies are well-intentioned, they can “have a counterproductive effect, and have a counterproductive effect on the most vulnerable communities also.”³⁶¹

Some advocates believe that the process of obtaining a license is often confusing to the applicant, and denial of licensure lacks transparency.³⁶² Therefore, many advocates believe that taking the following steps would reduce barriers to certain professions that individuals with criminal records face: making the licensing application review process more transparent; clarifying the application questions regarding criminal history; standardizing the application process across all professions; restricting licensing boards from considering arrests and certain older convictions; considering rehabilitation; and creating a pre-licensing petition process for people with criminal records.³⁶³

Other advocates believe that certain licensing restrictions for certain jobs are necessary to maintain public safety, and can boost both practitioner wages and respect for the profession.³⁶⁴ Yet others disagree with a standard approach to licensing across all professions, as a more nuanced approach may be more sensible to determine commonsense restrictions.³⁶⁵ At the Commission’s 2017 briefing, John Malcolm theorized that broad occupational licensing restrictions can be used to diminish market competition.³⁶⁶ He noted that:

[P]eople who are ex-offenders, they’re the low-hanging fruit in terms of keeping out competition. Just come up with a blanket rule and you’re eliminating a whole slew of competitors. So one thing I think that has to happen is that state legislators

³⁶⁰ West Virginia State Advisory Committee to the United States Commission on Civil Rights, Public Meeting, *Felony Records: Collateral Consequences for West Virginians*, July 19, 2018, Meeting Transcript at 237-39.

³⁶¹ Reddy Statement at 21-22.

³⁶² Council for Court Excellence Statement at 2; Rodriguez & Avery, *Unlicensed and Untapped: Removing Barriers to State Occupational Licenses for People with Criminal Records*, *supra* note 329.

³⁶³ *Ibid.*

³⁶⁴ Rodriguez & Avery, *Unlicensed and Untapped: Removing Barriers to State Occupational Licenses for People with Criminal Records*, *supra* note 329.

³⁶⁵ *Briefing Transcript* at 47 (statement of John Malcolm).

³⁶⁶ *Ibid.* at 47-48.

ought to be paying more attention to avoiding rent-seeking with professional licensing boards . . . it would plumb the depths of my imagination to come up with a legitimate public safety reason why an ex-offender could not be an interior decorator, particularly in the days of Yelp in which people can post bad reviews if an ex-offender is a bad interior decorator. And so I think that they need to be far more scrutinizing in terms of looking at categories and coming up with scalpel-like approaches to eliminating people from professional licenses and jobs than the meat cleaver that is usually employed by people who have a vested interest in keeping out competition.³⁶⁷

In his testimony before the Commission, Reddy further noted that:

I think that some of these licensing boards probably just need to be eliminated altogether, they don't really make a lot of sense, and the criminal justice benefits would be incidental, but you'd have these really broad economic benefits, more competition, lower prices, more innovation.³⁶⁸

Finally, during his testimony before the Commission, Marc Levin from Right on Crime discussed model legislation in Texas that would allow individuals with criminal records to obtain provisional or probationary occupational licenses if they meet certain criteria.³⁶⁹ If these individuals comply with all of the rules of the occupation and do not commit new criminal offenses, the probationary license would become permanent after a period of time, such as six months.³⁷⁰

Fair Chance Hiring Policies

As of September 2018, the District of Columbia, more than 30 states, and over 150 cities and counties have adopted what advocates characterize as fair chance hiring practices.³⁷¹ According to advocates, these practices enable formerly incarcerated individuals to obtain gainful employment despite the stigma attached to their criminal history.³⁷² As mentioned, several private corporations have adopted policies along these lines, and some higher education institutions have released

³⁶⁷ Ibid.

³⁶⁸ *Briefing Transcript* at 48 (statement of Vikrant Reddy).

³⁶⁹ *Briefing Transcript* at 151 (statement of Marc Levin).

³⁷⁰ Ibid.

³⁷¹ Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Chance Policies*, National Employment Law Project, 2018, <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> (last accessed Nov. 26, 2018). See also The Leadership Conference, *Fact Sheet: Fair Chance Hiring*, 2017, http://civilrightsdocs.info/pdf/criminal-justice/Fair_Chance_Hiring.pdf. See generally Michelle Natividad Rodriguez and Anastasia Christman, *The Fair Chance/Ban the Box Toolkit*, National Employment Law Project, 2015, <http://www.nelp.org/publication/the-fair-chance-ban-the-box-toolkit/> (last accessed Nov. 26, 2018).

³⁷² The Leadership Conference, *Fact Sheet: Fair Chance Hiring*, 2017, http://civilrightsdocs.info/pdf/criminal-justice/Fair_Chance_Hiring.pdf.

guidance on fair chance hiring as well.³⁷³ The following sections discuss the Ban the Box and Clean Slate initiatives addressing hiring practices as applicable to people with criminal convictions.³⁷⁴

“Ban the Box” laws and policies prohibit employers from inquiring about criminal history on a job application, deferring the consideration of criminal history to a later point in the hiring process.³⁷⁵ In addition to the numerous states and localities that have already adopted Ban the Box or other fair chance hiring policies, many private employers have voluntarily chosen to implement such policies, and President Obama called on Congress to implement Ban the Box policies in hiring for federal employment.³⁷⁶ The Obama administration then issued a final rule to prohibit federal

³⁷³ See, e.g., Owens & Henderson, “Koch Brothers are right on fair chance hiring,” *supra* note 34; Calif. Community Colleges, Office of the Chancellor, (*Revised*) *California Community Colleges Fair Chance Hiring Best Practices*, 2019, at 3, http://extranet.cccco.edu/Portals/1/AA/PrisonEd/2019/Revised_Policy_Guidance_California_Community_Colleges_Fair_Chance_Hiring_Best_Practices.pdf (outlining best practices for California’s community colleges to hire individuals with criminal records as “advanced by federal and state Equal Employment Opportunity (EEO) law and policies, and in the criminal history background check process in California’s new Fair Chance Act.”).

³⁷⁴ For further discussion of policy proposals to expand employment opportunities for people with criminal records, see *supra* notes 266-72 (discussion of improving the reliability of criminal background checks), notes 273-291 (discussion of implementing EEOC guidelines for hiring people with arrest and conviction records), notes 292-307 (discussion of legal liability protections for employers who hire people with criminal convictions), notes 308-11 (discussion of certificates of rehabilitation or qualification for employment), and notes 312-17 (discussion of tax credits and incentives for employers who hire people with criminal records). See also Legal Action Center, “Beyond ‘Ban the Box’: Four Steps to Build on Fair Chance Hiring,” <https://lac.org/beyond-ban-the-box-four-steps-to-build-on-fair-chance-hiring/> (last accessed Nov. 27, 2018); Rebecca Beitsch, “‘Ban the Box’ Laws May Be Harming Young Black Men Seeking Jobs,” Pew Charitable Trusts, Aug. 22, 2017, <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/08/22/ban-the-box-laws-may-be-harming-young-black-men-seeking-jobs> (last accessed Nov. 27, 2018) (discussing alternatives to Ban the Box policies).

³⁷⁵ National Employment Law Project, *‘Ban the Box’ is a Fair Chance for Workers with Records*, 2017, <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-Fact-Sheet.pdf>. In 2004, a national civil rights movement of formerly incarcerated individuals launched the Ban the Box campaign to challenge “the stereotypes of people with conviction histories by asking employers to choose their best candidates based on job skills and qualifications, *not* past convictions.” See Ban the Box Campaign, “About: The Ban the Box Campaign,” <http://bantheboxcampaign.org/about> (emphasis in original) (last accessed Nov. 26, 2018); Lori Walker, testimony on behalf of Women Against Registry for the U.S. Commission on Civil Rights, May 19, 2017, at 1. Walker noted that Ban the Box is essential to ensure equal treatment of people with felony convictions and stated that “if the government would encourage companies to hire felons they would benefit at the federal and state levels by receiving tax dollars in return from these convicted felons.” *Ibid.*

³⁷⁶ Avery & Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Chance Policies to Advance Employment Opportunities for People with Past Convictions*, *supra* note 371; Marianne Levine, “Koch Industries to Stop Asking About Job Candidates’ Criminal History,” *Politico*, April 27, 2015, <http://www.politico.com/story/2015/04/koch-industries-brothers-criminal-history-job-applicants-ban-the-box-117382>; The White House, Office of the Press Secretary, *Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly Incarcerated*, 2015, <https://obamawhitehouse.archives.gov/the-press-office/2015/11/02/fact-sheet-president-obama-announces-new-actions-promote-rehabilitation>.

agencies from asking about an applicant's criminal background until the agency makes a conditional job offer.³⁷⁷

While there has been momentum from the Ban the Box movement, some believe that Ban the Box is not necessarily the best way to help individuals with criminal records secure employment.³⁷⁸ First, some critics view Ban the Box policies as expanded government regulation that forces employers to spend money on “administrative red tape” and detracts from their freedom to design their own hiring procedures.³⁷⁹ Others have pointed out that Ban the Box policies delay the hiring process, which can be expensive and inefficient for employers.³⁸⁰ These delays may also hurt applicants, who could still face discrimination but must wait longer for the employer's final decision.³⁸¹ Employers may still perform criminal background checks, albeit later in the process, and some employers may never intend to hire an applicant with a criminal record.³⁸²

Another major criticism of Ban the Box policies stems from research suggesting that they may exacerbate racial disparities in the hiring process instead of eliminating them.³⁸³ The findings of a few recent studies support the claim that Ban the Box policies encourage what researchers have termed “statistical discrimination,” where employers assume that black people have a criminal record and that white people do not.³⁸⁴

³⁷⁷ 5 C.F.R. § 731.103(d)(1) (“A hiring agency may not make specific inquiries concerning an applicant's criminal or credit background of the sort asked on the OF-306 or other forms used to conduct suitability investigations for Federal employment (i.e., inquiries into an applicant's criminal or adverse credit history) unless the hiring agency has made a conditional offer of employment to the applicant.”); *see also* Eric Katz, “Obama Makes More Changes to Federal Hiring Through Regulatory Process,” *Government Executive*, Dec. 1, 2016, <https://www.govexec.com/management/2016/12/obama-makes-more-changes-federal-hiring-through-regulatory-process/133561/>.

³⁷⁸ Gail Heriot, “The Unintended Consequences of ‘Ban the Box’: Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden,” *Reason*, Oct. 10, 2018, <https://reason.com/volokh/2018/10/10/the-unintended-consequences-of-ban-the-b/>; Derek M. Cohen, “You Don't Love ‘Fair Chance Hiring’, You Love the Idea of ‘Fair Chance Hiring’,” Texas Public Policy Foundation, April 4, 2016, <https://www.texaspolicy.com/blog/detail/you-dont-love-fair-chance-hiring-you-love-the-idea-of-fair-chance-hiring>.

³⁷⁹ Greg Glod, “An Alternative to ‘Ban the Box’,” *Real Clear Policy*, Aug. 5, 2015, http://www.realclearpolicy.com/blog/2015/08/05/ban_the_box_alternative_1387.html; Reddy Statement at 5.

³⁸⁰ Nina Kucharzyk, *Thinking Outside the Box: Reforming Employment Discrimination Doctrine to Combat the Negative Consequences of Ban-the-Box Legislation*, 85 *FORDHAM L. REV.* 2803, 2812 (2017).

³⁸¹ *Id.*

³⁸² Cohen, “You Don't Love ‘Fair Chance Hiring’, You Love the Idea of ‘Fair Chance Hiring,’” *supra* note 378; *see also* Glod, “An Alternative to ‘Ban the Box,’” *supra* note 379.

³⁸³ *See, e.g.*, Heriot, “The Unintended Consequences of ‘Ban the Box’: Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden,” *supra* note 378; Cohen, “You Don't Love ‘Fair Chance Hiring’, You Love the Idea of ‘Fair Chance Hiring’,” *supra* note 378.

³⁸⁴ Lucy Gubernick, *Erasing the Mark of Cain: An Empirical Analysis of the Effect of Ban-the-Box Legislation on the Employment Outcomes of People of Color with Criminal Records*, 44 *FORDHAM URB. L.J.* 1153, 1190-91 (2017); *see also* Amanda Agan and Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, Univ. of Michigan Law and Economics Research Paper No. 16-012 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795; Jennifer L. Doleac and Benjamin Hansen, *Does “Ban the Box” Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden*, Working Paper No. 22469, National Bureau of Economic Research (2016),

One study compared the experiences of white and black male applicants before and after Ban the Box legislation was enacted in New York and New Jersey.³⁸⁵ It revealed that before the Ban the Box policy took effect and employers could ask about criminal records, the callback rate for applicants with criminal records was nearly the same for both races: 11.1 percent for white applicants and 10.9 percent for black applicants.³⁸⁶ The study also found that overall, white applicants were 7 percent more likely than black applicants to receive a callback;³⁸⁷ but after the Ban the Box policy was implemented, white applicants were 45 percent more likely than black applicants to receive a callback.³⁸⁸ The researchers attributed the results to two possible explanations: statistical discrimination leading employers to believe that all black men likely have criminal backgrounds, and the employers' belief that white men are much less likely to have criminal backgrounds.³⁸⁹ Additional research has yielded similar findings.³⁹⁰ Researchers have hypothesized that when criminal records are unavailable, "employers use race as a proxy for criminal records."³⁹¹ The findings suggest that Ban the Box policies expose the pervasiveness of racial discrimination in hiring, while also possibly excluding more black people from the job market.

Some advocacy groups and institutions have responded to this research by pointing out that Ban the Box policies were never intended as "the silver bullet to a racially biased criminal justice system."³⁹² They argue that "entrenched racism in the hiring process," not Ban the Box policies,

http://jenniferdoleac.com/wp-content/uploads/2015/03/Doleac_Hansen_BanTheBox.pdf; Osbourne Jackson and Bo Zhao, *The Effect of Changing Employers' Access to Criminal Histories on Ex-Offenders' Labor Market Outcomes: Evidence from the 2010-2012 Massachusetts CORI Reform*, Federal Reserve Bank of Boston, Working Paper 16-30 (2016), <https://www.bostonfed.org/publications/research-department-working-paper/2016/the-effect-of-changing-employers-access-to-criminal-histories-on-ex-offenders-labor-market-outcomes.aspx>.

³⁸⁵ Agan & Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, *supra* note 384; see also Nina Kucharczyk, *Thinking Outside the Box: Reforming Employment Discrimination Doctrine to Combat the Negative Consequences of Ban-the-Box Legislation*, *supra* note 380 at 2812-13 (discussing the Agan & Starr study).

³⁸⁶ Agan & Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, *supra* note 384 at 17.

³⁸⁷ *Id.* at 33.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 34-35.

³⁹⁰ Gubernick, *Erasing the Mark of Cain: An Empirical Analysis of the Effect of Ban-the-Box Legislation on the Employment Outcomes of People of Color with Criminal Records*, *supra* note 384 at 1190-91 (citing Harry J. Holzer et. al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451 (2006)); Kucharczyk, *Thinking Outside the Box: Reforming Employment Discrimination Doctrine to Combat the Negative Consequences of Ban-the-Box Legislation*, *supra* note 380 at 2813-14 (citing Doleac & Hansen, *Does "Ban the Box" Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden*, *supra* note 384).

³⁹¹ Kucharczyk, *Thinking Outside the Box: Reforming Employment Discrimination Doctrine to Combat the Negative Consequences of Ban-the-Box Legislation*, *supra* note 380 at 2813.

³⁹² Maurice Emsellem & Beth Avery, *Racial Profiling in Hiring: A Critique of New "Ban the Box" Studies*, National Employment Law Project, 2016, at 1, <http://www.nelp.org/content/uploads/Policy-Brief-Racial-Profiling-in-Hiring-Critique-New-Ban-the-Box-Studies.pdf>. See also Christina Stacy and Mychal Cohen, *Ban the Box and Racial Discrimination: A Review of the Evidence and Policy Recommendations*, Urban Institute, 2017, at 14, https://www.urban.org/research/publication/ban-box-and-racial-discrimination/view/full_report (suggesting that

ultimately facilitates racial profiling.³⁹³ Scholars have also maintained that Ban the Box has been more valuable than harmful and have urged closer examination of the research, which shows that people of color with criminal records received callbacks and obtained employment at higher rates after Ban the Box policies took effect.³⁹⁴ Many proponents of reform endorse a stronger and more comprehensive approach to expand employment opportunities for individuals with criminal records, and to tackle the deep-seated racism within the hiring process.³⁹⁵

Policies other than Ban the Box have been proposed to increase employment opportunities for individuals with criminal records.³⁹⁶ One viable alternative to Ban the Box is expungement or record sealing, through which people with criminal records for certain offenses can petition a court to seal or “shield” their records from public inquiry, enabling them to refrain from disclosing a criminal record to an employer without violating the law.³⁹⁷ Various state laws allow for the expungement of certain criminal records, although jurisdictions generally take a conservative approach when determining which offenses are eligible for expungement.³⁹⁸ In his testimony

other policy interventions, in addition to Ban the Box, are needed “to achieve the desired outcome for people with criminal records and reduce (or at least not increase) discrimination based on race”) (emphasis in original).

³⁹³ Emsellem & Avery, *Racial Profiling in Hiring: A Critique of New “Ban the Box” Studies*, *supra* note 392 at 1. See also Terry-Ann Craigie, “Employment After Incarceration: Ban the Box and Racial Discrimination,” Brennan Center for Justice, Oct. 13, 2017, <https://www.brennancenter.org/blog/employment-after-incarceration-ban-box-and-racial-discrimination> (contending that “Ban the Box is being used a scapegoat for discriminatory hiring practices that have been going on for decades”).

³⁹⁴ *Ibid.* at 5; see also Office of the D.C. Auditor, *The Impact of “Ban the Box” in the District of Columbia*, 2016, <http://dcauditor.org/report/the-impact-of-ban-the-box-in-the-district-of-columbia/>; Southern Coalition for Social Justice, *The Benefits of Ban the Box: A Case Study of Durham, NC*, 2014, http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf; Ellie Anzilotti, “How “Ban the Box” has helped (and hurt) the job prospects of people with criminal records,” *Fast Company*, Nov. 15, 2018, <https://www.fastcompany.com/90267016/how-the-ban-the-box-movement-has-helped-and-hurt-the-job-prospects-of-people-with-criminal-records> (arguing that Ban the Box policies “create an overall positive affect on employment for people with criminal records,” and, as a whole, “increase the odds of public employment for people with criminal records by 30%.”).

³⁹⁵ See, e.g., Emsellem & Avery, *Racial Profiling in Hiring: A Critique of New “Ban the Box” Studies*, *supra* note 392 at 1; Stacy & Cohen, *Ban the Box and Racial Discrimination: A Review of the Evidence and Policy Recommendations*, *supra* note 392 at 15 (supporting stronger and better enforced antidiscrimination laws and regulations in combination with Ban the Box); Craigie, “Employment After Incarceration: Ban the Box and Racial Discrimination,” *supra* note 393 (stating that Ban the Box is “only a starting point” and recommending “hold[ing] employers accountable for their discriminatory practices.”).

³⁹⁶ Legal Action Center, “Beyond ‘Ban the Box’: Four Steps to Build on Fair Chance Hiring,” <https://lac.org/beyond-ban-the-box-four-steps-to-build-on-fair-chance-hiring/> (last accessed Nov. 27, 2018); Glod, “An Alternative to ‘Ban the Box,’” *supra* note 379.

³⁹⁷ See, e.g., MD. CODE ANN., CRIM. PROC. §§ 10-303, 10-306 (statutory provisions in Maryland allowing record-sealing petitions and explaining the legal effects of nondisclosure of sealed records); Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL’Y REV. 361, 369-70 (2016); Michael Haugen, “The Truth About ‘Ban the Box,’” *Right on Crime*, April 13, 2016, <http://rightoncrime.com/2016/04/the-truth-about-ban-the-box/>; Glod, “An Alternative to ‘Ban the Box,’” *supra* note 379; see also Council of State Governments, Justice Center, “About the Clean State Clearinghouse,” <https://cleanslateclearinghouse.org/about/> (last accessed Oct. 11, 2017); Levin Statement at 2.

³⁹⁸ Stacy & Cohen, *Ban the Box and Racial Discrimination: A Review of the Evidence and Policy Recommendations*, *supra* note 392 at 18; Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and*

before the Commission in 2017, Marc Levin discussed record sealing, expungement, and nondisclosure.³⁹⁹ Levin described record sealing as distinct from record expungement, indicating:

[I]f your record is sealed or nondisclosed, the prosecutor or law enforcement, judges, they can still see it, it can still be used to enhance under repeat offender statutes, so it's not a physical destruction of the record.

Now, of course, for people that are exonerated, we absolutely should physically destroy the record and there may be some role for that, I think even for people, especially after 20 years, if somebody had a low-level drug possession, maybe we should expunge it.⁴⁰⁰

He further explained that laws in Texas, Indiana, and a few other states follow this model, and described how these laws benefit both the individual and law enforcement by giving individuals the chance to successfully reintegrate while maintaining commonsense exceptions for public safety purposes.⁴⁰¹

The “Clean Slate” campaign endorses automatic record-sealing policies that do not require an individual to petition a decision-maker.⁴⁰² In 2017, the Pennsylvania State Senate passed a Clean Slate bill, which allows certain criminal records to be automatically sealed by the state, without petition.⁴⁰³ Clean Slate would rely on the computerized criminal record databases to automatically identify cases eligible for sealing, which could reduce caseloads for courts.⁴⁰⁴ Supporters of the legislation point out that automatic record sealing would save individuals from hiring an attorney and incurring court costs, which often limits people who are not “savvy and wealthy enough to navigate the legal process.”⁴⁰⁵ This model legislation could be tailored for other states that have electronic records to match with the data in other states’ electronic criminal records databases.⁴⁰⁶

Federal Levels, *supra* note 397 at 367; *see also*, e.g., TEX. GOV'T CODE ANN. §§411.081(d), 411.071-077; ARK. CODE ANN. § 16-93-1207(b)(1); ARK. CODE ANN. § 16-90-901-05; 18 PA. STAT. AND CONS. STAT. ANN. § 9122.

³⁹⁹ *Briefing Transcript* at 147-49 (statement of Marc Levin).

⁴⁰⁰ *Ibid.* at 147.

⁴⁰¹ *Ibid.* at 147-48. Levin specifically discussed statutory exceptions “for certain licensing boards that could still see some sealed records from some occupations that are, you know, involve potential danger to public safety and so forth.” *Ibid.*

⁴⁰² Community Legal Services and Center for American Progress, *Clean Slate Advocacy Toolkit*, 2017, at 1, <https://clsphila.org/sites/default/files/issues/Clean%20Slate%20Toolkit%20-%202010-2017.pdf>.

⁴⁰³ S.B. 529, 2017-2018 Gen. Assemb., Reg. Sess. (Pa. 2017), <https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2017&sessInd=0&billBody=S&billTyp=B&billNbr=0529&pn=0854>. Note that the bill would generally limit automatic record-sealing to certain misdemeanor convictions and charges not leading to a conviction. *Id.*

⁴⁰⁴ Community Legal Services and Center for American Progress, *Clean Slate Advocacy Toolkit*, *supra* note 402 at 1.

⁴⁰⁵ Levin Statement at 3.

⁴⁰⁶ Community Legal Services and Center for American Progress, *Clean Slate Advocacy Toolkit*, *supra* note 402 at 1.

A Clean Slate bill was also recently introduced on the federal level. In August 2018, Congresswoman Lisa Blunt Rochester (D-Del.) and Congressman Rod Blum (R-Iowa) introduced a federal Clean Slate bill (H.R. 6677) in the House of Representatives.⁴⁰⁷ This proposed legislation, which has garnered bipartisan support, follows the Pennsylvania model to allow automatic record sealing for certain criminal records—for individuals who are not violent offenders or sex offenders—and a streamlined petition process for other types of federal criminal records to allow for successful reentry.⁴⁰⁸ Backers of the measure have described it as a commonsense approach to reinforce the efforts of people with criminal convictions to successfully reintegrate into society.⁴⁰⁹

How a Criminal Record Can Affect Housing Opportunities

Individuals with criminal convictions face barriers to both public and private housing. Federal laws prohibit individuals with certain types of criminal records from living in public or subsidized housing and/or living in certain geographical areas, and private housing providers may implement policies that restrict individuals with arrests or criminal convictions.⁴¹⁰ Many formerly incarcerated people return to low-income communities, and the National Low Income Housing Coalition estimates that only 35 affordable rental units exist for every 100 “extremely low-income” households.⁴¹¹ Coupled with the collateral consequences that formerly incarcerated individuals face when trying to earn a living, formerly incarcerated individuals face a high risk of housing

⁴⁰⁷ Clean Slate Act of 2018, H.R. 6677, 115th Cong. (2nd Sess. 2018), <https://www.congress.gov/bill/115th-congress/house-bill/6677/text>; see also Adam Brandon, “Support the Clean Slate Act, H.R. 6677,” FreedomWorks, Aug. 30, 2018, <https://www.freedomworks.org/content/support-clean-slate-act-hr-6677>.

⁴⁰⁸ Adam Brandon, “Support the Clean Slate Act, H.R. 6677,” FreedomWorks, Aug. 30, 2018, <https://www.freedomworks.org/content/support-clean-slate-act-hr-6677>; Office of Congresswoman Lisa Blunt Rochester, “Blunt Rochester, Blum Introduce Bipartisan, First-in-the-Nation Federal Second Chance Legislation,” Aug. 30, 2018, <https://bluntrochester.house.gov/news/documentsingle.aspx?DocumentID=162>.

⁴⁰⁹ Ibid.

⁴¹⁰ 42 U.S.C. § 1437n(f) (permanently prohibiting from public housing people convicted of manufacturing methamphetamine on the premises); 42 U.S.C. § 13663 (prohibiting from public housing certain individuals registered as state sex offenders); 42 U.S.C. § 13661(a) (prohibiting from public housing a tenant evicted for “drug-related criminal activity” for three years post-eviction unless the evicted tenant completes a rehabilitation program or obtains a waiver); 42 U.S.C. § 13661(b) (requiring public housing agencies and owners to set standards prohibiting from admission any household with a member determined to be “illegally using a controlled substance”); 42 U.S.C. § 13661(c) (allowing public housing agencies and owners to deny admission to an individual or any member of the individual’s household suspected of engaging “in any drug-related or violent criminal activity or other criminal activity” under certain circumstances). See generally Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, *supra* note 36 at 7-8; Walz and Tran-Leung Statement at 7 (discussing barriers in the private rental market).

⁴¹¹ Elayne Weiss, *Housing Access for People with Criminal Records*, National Low Income Housing Coalition, 2017, at 1, http://nlihc.org/sites/default/files/AG-2017/2017AG_Ch06-S06_Housing-Access-Criminal-Records.pdf; National Low Income Housing Coalition, *The Gap: A Shortage of Affordable Homes*, 2017, at 2, https://nlihc.org/sites/default/files/Gap-Report_2017.pdf (The National Low Income Housing Coalition defines “extremely low-income” as having an income at or below the federal poverty guideline or 30 percent of the area median income, whichever is higher.).

insecurity and homelessness.⁴¹² While landlords have an understandable interest in safety,⁴¹³ barring formerly incarcerated persons—regardless of the basis for conviction—from tenancy does not categorically serve that interest. In addition, high barriers to housing have severe implications. This section reviews overarching civil rights issues related to housing barriers for persons with felony convictions, and the subsequent sections discuss particular barriers for public and private housing.

Without a stable residence, it is difficult for formerly incarcerated individuals to reconnect with society.⁴¹⁴ In turn, this difficulty can lead to increased rates of recidivism.⁴¹⁵ Kate Walz, Director of Housing Justice and Director of Litigation at the Sargent Shriver National Center on Poverty Law, offered a snapshot of the challenges confronting formerly incarcerated individuals who seek adequate housing:

For many, a common question emerges on the first night: “Where will I sleep?” But often, securing safe, decent and affordable housing will present a significant challenge for people long after they have left the criminal justice system... Housing barriers for justice-involved individuals can also severely restrain their ability to reintegrate back into their communities by exacerbating other collateral consequences.⁴¹⁶

These housing challenges persist beyond the immediate reentry period because initial housing arrangements are often temporary, and securing permanent housing is a more difficult feat.⁴¹⁷

⁴¹² Stephen Metraux, Caterina G. Roman, Richard S. Cho, *Incarceration and Homelessness*, National Symposium on Homelessness Research, 2007, <https://www.huduser.gov/publications/pdf/p9.pdf>; Claire W. Herbert, Jeffrey D. Morenoff, David J. Harding, *Homelessness and Housing Insecurity among Former Prisoners*, U.S. Dep’t of Health and Human Services, 2015, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4762459/pdf/nihms-729845.pdf>.

⁴¹³ See, e.g., *Kline v. 1500 Massachusetts Avenue Apt. Corp.*, 439 F.2d 477, 479-81 (D.D.C. 1970) (recognizing that “[t]he landlord is no insurer of his tenants safety, but he certainly is no bystander” and imposing “upon the landlord a duty to take those steps which are within his power to minimize the predictable risk to his tenants” when the landlord has notice of foreseeable acts of harm by third parties “in the portion of the premises exclusively within his control.”).

⁴¹⁴ Katherine Cortes & Shawn Rogers, *Reentry Housing Options: The Policymakers’ Guide*, Council of State Governments Justice Center, 2010, at vii, http://csgjusticecenter.org/wp-content/uploads/2012/12/Reentry_Housing_Options-1.pdf.

⁴¹⁵ Faith E. Lutze, Jeffrey W. Rosky, Zachary K. Hamilton, “Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State’s Reentry Housing Program for High Risk Offenders,” *Criminal Justice and Behavior*, vol. 41, no. 4 (2014) at 481, <https://s3.wp.wsu.edu/uploads/sites/436/2014/11/Criminal-Justice-and-Behavior-2014-Lutze-471-91.pdf>; Saneta deVuono-powell, Chris Schweidler, Alicia Walters, Azadeh Zohrabi, *Who Pays? The True Cost Of Incarceration On Families*, Ella Baker Center for Human Rights, Forward Together, and Research Action Design, 2015, at 26, <http://whopaysreport.org/who-pays-full-report/>.

⁴¹⁶ Walz and Tran-Leung Statement at 2-3.

⁴¹⁷ Jocelyn Fontaine, Jennifer Biess, *Housing as a Platform for Formerly Incarcerated Persons*, Urban Institute, 2012, at 3, <https://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF>.

Some individuals are able to stay with family members or friends temporarily or for a lengthy period.⁴¹⁸ Some individuals may qualify for supportive housing programs (transitional or permanent, and depending on various eligibility requirements based on sex or any federal restrictions on eligibility), often serving individuals with mental health needs (and as noted before, over half of the incarcerated population in the U.S. reportedly has a mental health condition⁴¹⁹) or physical disabilities (also as noted previously, the incarcerated population is twice as likely to have a mobility disorder, three to four times likelier to be blind or have a vision impairment, and two to three times likelier to be deaf or hard of hearing than the general U.S. population⁴²⁰), substance abuse disorders, chronic homelessness, or residential instability.⁴²¹ Other individuals must rely on other subsidized housing programs (for low-income individuals) or private housing.⁴²² One study found that nearly 8 in 10 formerly incarcerated individuals reported ineligibility or denial of housing because of their or a loved one's conviction history.⁴²³ According to another study, men who had been incarcerated were twice as likely to become homeless as men without a history of incarceration.⁴²⁴

Research confirms a clear connection between incarceration and homelessness: prior incarceration has been identified as a risk factor for homelessness, and individuals experiencing homelessness are vulnerable to incarceration.⁴²⁵ Many scholars argue that securing housing upon reentry is the most “pressing and immediate short-term need” for formerly incarcerated individuals.⁴²⁶ Formerly incarcerated individuals are especially likely to experience homelessness within the first 30 days

⁴¹⁸ Ibid. at 3.

⁴¹⁹ Joint Statement, Disability Advocates at 2; James & Glaze, *Special Report: Mental Health Problems of Prison and Jail Inmates*, *supra* note 117 at 1.

⁴²⁰ Joint Statement, Disability Advocates at 3-4; Davis, *People with Intellectual Disability in the Criminal Justice System: Victims & Suspects*, *supra* note 122; Bronson & Berzofsky, *Disabilities Among Prison and Jail Inmates, 2011-2012*, *supra* note 122 at 3.

⁴²¹ Fontaine & Biess, *Housing as a Platform for Formerly Incarcerated Persons*, *supra* note 417 at 5.

⁴²² Ibid. at 5.

⁴²³ deVuono-powell et al., *Who Pays? The True Cost Of Incarceration On Families*, *supra* note 415 at 26, <http://whopaysreport.org/who-pays-full-report/>; Walz and Tran-Leung, Written Statement, at 2-3.

⁴²⁴ Amanda Geller and Mariah A Curtis, A Sort of Homecoming: Incarceration and the Housing Security of Urban Men, *Soc Sci Res.* vol. 40, no. 4 (2011): 1196-1213.

⁴²⁵ Herbert et al., *Homelessness and Housing Insecurity Among Former Prisoners*, *supra* note 412 at 2; Metraux et al., *Incarceration and Homelessness*, *supra* note 412 at 9-11, 9-23 to 9-24. Metraux et al. suggested multiple reasons why individuals experiencing homelessness are vulnerable to incarceration, including “the public nature of a homeless existence” and the criminalization of their attempts to survive (manifested by bans on begging and sleeping in public). Ibid. at 9-11. *See also* National Law Center on Homelessness and Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, 2014, at 7-8, https://www.nlchp.org/documents/No_Safe_Place.

⁴²⁶ Herbert et al., *Homelessness and Housing Insecurity Among Former Prisoners*, *supra* note 412 at 2; Faith E. Lutze, Jeffrey W. Rosky, Zachary K. Hamilton, “Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State’s Reentry Housing Program for High Risk Offenders,” *Criminal Justice and Behavior*, vol. 41, no. 4 (2014) at 472, <https://s3.wp.wsu.edu/uploads/sites/436/2014/11/Criminal-Justice-and-Behavior-2014-Lutze-471-91.pdf>; Stephen Metraux & Dennis P. Culhane, “Homeless Shelter Use and Reincarceration Following Prison Release,” *Criminology and Public Policy*, vol. 3, issue 2 (2004) at 139, 141, https://repository.upenn.edu/cgi/viewcontent.cgi?article=1118&context=spp_papers.

after leaving prison.⁴²⁷ Furthermore, more than half of homeless individuals have reported being incarcerated at some point in their lives,⁴²⁸ and individuals who lack housing are more frequently arrested and rearrested than individuals with stable housing.⁴²⁹ Some research has shown that homeless people of color are more likely to have an incarceration history than white homeless individuals,⁴³⁰ which can be explained in part by the disproportionately high rates of incarceration among people of color, particularly black men.⁴³¹ Incarcerated persons with mental health diagnoses are also at a higher than average risk of becoming homeless upon reentry into society.⁴³²

Throughout the U.S., many municipal laws prohibit certain public behaviors, such as sleeping or camping in public, begging, loitering, sleeping in vehicles, or sharing food with the homeless.⁴³³ These laws criminalize the actions of homeless people who are trying to survive, and increase the chances that a homeless person will be arrested and then burdened with a criminal record.⁴³⁴ In turn, people exiting prison or jail are at risk of homelessness because of barriers that deny housing to people with criminal records.⁴³⁵ In certain localities, municipal officials, law enforcement, and policymakers have justified the laws governing public behavior as necessary to promote public safety, maintain the sanitation of public spaces, and reduce the visibility of homelessness so as not to deter customers from businesses.⁴³⁶ However, advocates argue that such policies are “unduly

⁴²⁷ Metraux & Culhane, “Recent Incarceration History Among a Sheltered Homeless Population,” *supra* note 426 at 10.

⁴²⁸ Urban Institute, *Homelessness: Programs and the People They Serve: Findings of the National Survey of Homeless Assistance Providers and Clients*, 1999, at 50, <https://www.urban.org/sites/default/files/publication/66286/310291-Homelessness-Programs-and-the-People-They-Serve-Findings-of-the-National-Survey-of-Homeless-Assistance-Providers-and-Clients.PDF>.

⁴²⁹ HCH Clinicians’ Network, “Keeping Homeless People Out of the Justice System,” *Healing Hands*, vol. 8, no. 6 (2004) at 1-2, https://www.nhchc.org/wp-content/uploads/2012/02/HealingHands12_17_04.pdf.

⁴³⁰ Marian Moser Jones, “Does Race Matter in Addressing Homelessness? A Review of the Literature,” *World Med Health Policy*, vol. 8, no. 2 (2016): 139-56, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5863922/pdf/nihms924492.pdf>.

⁴³¹ See Chapter 1, “Demographics of the Corrections Populations,” *supra* notes 96-130.

⁴³² Patricia McKernan, “Homelessness and Prisoner Reentry: Examining Barriers to Housing Stability and Evidence-Based Strategies That Promote Improved Outcomes,” *Journal of Community Corrections*, 2017, at 7, https://www.voa.org/pdf_files/homelessness-and-prisoner-reentry-examining-barriers-to-housing-stability-and-evidence-based-strategies-that-promote-improved-outcomes.

⁴³³ National Law Center on Homelessness and Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, *supra* note 425 at 7-8. See also Metraux et al., *Incarceration and Homelessness*, *supra* note 412 at 9-11.

⁴³⁴ Metraux et al., *Incarceration and Homelessness*, *supra* note 412 at 9-11.

⁴³⁵ See *supra* note 410 (citing 42 U.S.C. § 1437n(f); 42 U.S.C. § 13663; 42 U.S.C. § 13661(a); 42 U.S.C. § 13661(b); 42 U.S.C. § 13661(c)); Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, *supra* note 36 at 7-8; Walz and Tran-Leung Statement at 7. See also the next two sections of this chapter for more discussion of legal barriers to housing and HUD guidance for people with criminal records.

⁴³⁶ Allard K. Lowenstein International Human Rights Clinic, ‘Forced into Breaking the Law’ *The Criminalization of Homelessness in Connecticut*, Yale Law School, 2016, at 35, https://law.yale.edu/system/files/area/center/schell/criminalization_of_homelessness_report_for_web_full_report.pdf.

punitive,” and they can set up or perpetuate a vicious cycle.⁴³⁷ People who violate these laws typically receive citations that are generally punishable by a fine, unless the individual is unable to pay or plead to a citation, in which case an arrest warrant could be issued that could also lead to jail time.⁴³⁸ Individuals who cannot secure adequate housing post-incarceration are twice as likely to recidivate.⁴³⁹

Relatedly, because younger LGBT people often encounter rejection from their families or discriminatory school discipline policies that push them out of home or school, they may struggle to meet basic housing needs.⁴⁴⁰ Many LGBT people are at high risk of becoming homeless and/or relying on underground “survival” economies (which may include selling or trading sex, selling drugs, or theft), thus leading to more encounters with law enforcement.⁴⁴¹ Discriminatory enforcement of laws and harmful policing tactics can also cause LGBT individuals to experience more encounters with law enforcement.⁴⁴²

After leaving jail or prison, LGBT individuals frequently face steeper challenges post-reentry.⁴⁴³ Because they often lack access to culturally competent reentry, parole, and probation programs, LGBT people may not receive relevant advice on how to handle discrimination (based on their sexual orientation or gender identity) while searching for employment or housing, or how to get adequate physical or mental health care (especially for HIV).⁴⁴⁴ Transgender people also face unique challenges, such as not being able to obtain official documents that accurately reflect their gender identity, which can be problematic when searching for jobs or housing.⁴⁴⁵

⁴³⁷ Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, Center for American Progress, 2014, at 7, <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

⁴³⁸ Allard K. Lowenstein International Human Rights Clinic, ‘*Forced into Breaking the Law*’ *The Criminalization of Homelessness in Connecticut*, *supra* note 436 at 12. *See also* U.S. Commission on Civil Rights, *Targeted Fines and Fees Against Low-Income Communities of Color: Civil Rights and Constitutional Implications*, 2017, https://www.usccr.gov/pubs/2017/Statutory_Enforcement_Report2017.pdf.

⁴³⁹ Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, *supra* note 36 at 2.

⁴⁴⁰ Center for American Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People*, 2016, at 21-25, <http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf>; Goldberg Statement at 4. *See also* LGBTQ Task Force Statement at 5.

⁴⁴¹ Center for American Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People*, *supra* note 440 at 33; LGBTQ Task Force Statement at 5.

⁴⁴² Center for American Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People*, *supra* note 440 at 45-64, <http://www.lgbtmap.org/file/lgbt-criminal-justice.pdf>; Goldberg Statement at 4-5.

⁴⁴³ Meyer et al., “Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011-2012,” *supra* note 126; Center for American Progress and Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People*, *supra* note 440; LGBTQ Task Force Statement at 2; HRC Statement at 2.

⁴⁴⁴ Center for American Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People*, *supra* note 440 at 45-64; Goldberg Statement at 5-6.

⁴⁴⁵ Center for American Progress & Movement Advancement Project, *Unjust: How the Broken Criminal Justice System Fails LGBT People*, *supra* note 440 at 31-33; Goldberg Statement at 5.

Barriers to Subsidized Housing for Individuals with Criminal Records

Federal law places several mandatory and discretionary restrictions on individuals with certain types of criminal records who wish to live in subsidized housing.⁴⁴⁶ For example, applicants who have been convicted of manufacturing methamphetamine on federally assisted property face a mandatory lifetime ban on obtaining subsidized housing, as do applicants who are registered sex offenders.⁴⁴⁷ Under federal law, public housing is also unavailable to anyone determined to be “illegally using a controlled substance” and to anyone evicted from federally subsidized housing for drug-related criminal activity for three years post-eviction.⁴⁴⁸ Public Housing Authorities (PHAs) have the discretion to admit an applicant if the applicant completes an approved rehabilitation program.⁴⁴⁹ Additionally, if applicants have engaged in any drug-related criminal activity, violent criminal activity, or other criminal activity that would affect the health, safety, or peaceful enjoyment of the property, PHAs may deny the applicant if a “reasonable time” (as defined by the PHA) has not passed since the offense or conviction.⁴⁵⁰

In 1996, the U.S. Department of Housing and Urban Development (HUD) issued guidance entitled “*One Strike and You’re Out*”: *Screening and Eviction Guidelines for Public Housing Authorities*.⁴⁵¹ The guidance was designed to help PHAs “develop and enforce stricter screening and eviction as a part of their anti-drug, anti-crime initiatives.”⁴⁵² The guidance urged PHAs to integrate “one-strike” rules into their screening procedures, emphasizing that any “criminal activity” by the applicant or a household member of the applicant may justify denial of housing.⁴⁵³ HUD also encouraged PHAs to spell out these rules in each tenant’s lease, specifying that the ban on criminal activity applies to any guest of the tenant and clarifying that an arrest alone may trigger eviction.⁴⁵⁴

While the HUD guidance called for individualized reviews of applicants that assess a person’s criminal history and evidence of rehabilitation on a case-by-case basis, research has shown that these individualized reviews do not always occur.⁴⁵⁵ Critics believe PHAs vary in their

⁴⁴⁶ See *supra* note 410 (citing 42 U.S.C. § 1437n(f); 42 U.S.C. § 13663; 42 U.S.C. § 13661(a); 42 U.S.C. § 13661(b); 42 U.S.C. § 13661(c)); Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, *supra* note 36 at 7-8.

⁴⁴⁷ 42 U.S.C. § 1437n(f); 42 U.S.C. § 13663.

⁴⁴⁸ 42 U.S.C. § 13661(a)-(b); 24 C.F.R. 960.204(a).

⁴⁴⁹ 42 U.S.C. § 13661(a); 24 C.F.R. 960.204(a).

⁴⁵⁰ 42 U.S.C. § 13661(c); 24 C.F.R. 982.553(a); 24 C.F.R. § 5.100.

⁴⁵¹ U.S. Dep’t of Housing and Urban Development, “*One Strike and You’re Out*”: *Screening & Eviction Guidelines for Public Housing Authorities (HAs)*, HUD Notice PIH 96-16 (1996), <https://www.hud.gov/sites/documents/96-16pihn.doc>.

⁴⁵² *Id.* at i.

⁴⁵³ *Id.* at 5-6.

⁴⁵⁴ *Id.* at 7-8.

⁴⁵⁵ Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, *supra* note 36 at 10; U.S. Dep’t of Housing and Urban Development, “*One Strike and You’re Out*”: *Screening & Eviction Guidelines for Public Housing Authorities (HAs)*, *supra* note 455 at 6. See also *Simmons v. T.M. Assocs. Mgmt., Inc.*, 287 F. Supp. 3d 600, 602, 604-05 (W.D. Va. 2018) (citing HUD’s guidance

interpretations of HUD guidance regarding the consideration of an applicant’s criminal history, and many PHAs may be overly restrictive when screening applicants who have any sort of drug-related or violent offense, no matter how far in the past the offense occurred.⁴⁵⁶

According to a report presented to the U.S. Department of Health and Human Services and HUD, the restrictions on federally subsidized housing may limit family supports and other potential supportive housing options available to formerly incarcerated individuals:

These restrictions also limit the family support available to these persons if their families are living in subsidized housing, as their presence would put all household members at risk for eviction. Current policies pertaining to federal funding for specialized housing have provided little opportunity for housing to be developed to compensate for such restrictions. Ironically, even persons who were homeless prior to incarceration will have increased difficulty in accessing homeless services upon release. This is because persons released from incarceration, even if homeless prior to their incarceration, will not meet the standard criteria for being “homeless” and will have greater difficulty being eligible for programs targeting the homeless population.⁴⁵⁷

In February 2015, the Sargent Shriver National Center on Poverty and Law issued a report on criminal records screening in federally subsidized housing that brings light to four issues that create undue burdens on individuals with criminal records seeking housing, including:⁴⁵⁸

- *Unreasonable lookback periods.* With the exception of two outlined categories of criminal conduct, federal guidance suggests that any inquiries about criminal activity should focus on activity that occurred within a “reasonable time.”⁴⁵⁹ While HUD has suggested that a five-year lookback period is reasonable, some housing providers have implemented screening policies with long lookback periods (exceeding 5 years) or open-ended screening policies that look back indefinitely at a criminal history.⁴⁶⁰

requiring housing providers to perform “an individualized assessment” of an applicant with a criminal record, finding that the housing provider had not conducted an individualized inquiry, and rejecting the housing provider’s argument that the plaintiff’s “conviction insulates it from any housing discrimination claim as a matter of law.”)

⁴⁵⁶ Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, *supra* note 36 at 10; Gwen Rubinstein and Debbie Mukamal, “Welfare and Housing: Denial of Benefits to Drug Offenders,” in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, ed. Marc Mauer and Meda Chesney-Lind (New York: New Press, 2002), at 37-49.

⁴⁵⁷ Metraux et al., *Incarceration and Homelessness*, *supra* note 412 at 9.

⁴⁵⁸ Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, *supra* note 36 at 11-34.

⁴⁵⁹ *Ibid.* at 11-15.

⁴⁶⁰ *Ibid.* at 12-15; *Screening and Eviction for Drug Abuse and Other Criminal Activity*, 66 Fed. Reg. 28,776, at 28,779 (May 24, 2001), <http://www.gpo.gov/fdsys/pkg/FR-2001-05-24/pdf/01-12840.pdf>.

- *Unfair Use of Arrests to Prove Criminal Activity.* Some housing providers consider arrest records when screening applicants, which essentially equates arrests with criminal activity or construes arrests as evidence of criminal activity.⁴⁶¹ The use of arrest records in screening may disproportionately exclude applicants of color, due to their high rate of arrests compared to white applicants.⁴⁶²
- *Overbroad Categories of Criminal Activity.* Many housing providers implement blanket bans on felony convictions, or create policies that have vague, broad categories of prohibited criminal activity.⁴⁶³ These broad categories leave narrow leeway for a successful applicant, can confuse and possibly deter applicants from pursuing subsidized housing options, and can have disparate impact implications.⁴⁶⁴
- *Underuse of Mitigating Circumstances.* Many applicants are not aware that they are able to present evidence of “mitigating circumstances” or appeal a denial of their application.⁴⁶⁵ Additionally, some PHAs refuse to consider this evidence in making their determinations, contrary to HUD guidance.⁴⁶⁶

In June 2015, the Supreme Court affirmed that disparate-impact claims are cognizable under the Fair Housing Act, meaning that a plaintiff does not have to show discriminatory intent when challenging a policy that disproportionately harms people of color.⁴⁶⁷ However, among other limitations, the Court clarified that plaintiffs must show that public housing authorities could have

⁴⁶¹ Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, *supra* note 36 at 18-19.

⁴⁶² Merf Ehman, *Fair Housing Disparate Impact Claims Based on the Use of Criminal and Eviction Records in Tenant Screening Policies*, 2011, at 12, <http://nhlp.org/files/PRRAC%20Disparate%20Impact%201-2011.pdf> (defining criminal records as arrest records, criminal court records, and corrections and state criminal repository records, and citing multiple sources to conclude that “blanket policies denying housing to individuals with criminal records have a disparate impact on” people of color). The author asserted that “[t]he disparate impact of criminal records based [sic] tenant screening on certain protected classes is almost incontrovertible.” *Ibid.* Additionally, as the Ninth Circuit confirmed, “[federal] circuits have held that it is unlawful for housing intermediaries to ‘screen’ prospective housing applicants on the basis of race, even if the preferences arise with landlords.” *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1167 n. 21 (9th Cir. 2008). Applicants and tenants have successfully challenged the use of arrest records by subsidized housing providers. *See Landers v. Chicago Hous. Auth.*, 404 Ill. App. 3d 568, 577 (2010) (finding that an applicant’s record of multiple arrests did not evince a history of criminal activity that would justify the public housing provider’s rejection of the application); *Nashua Hous. Auth. v. Wilson*, 162 N.H. 358, 362 (2011) (holding that a tenant’s arrest for drug-related offenses did not prove that she engaged in drug-related criminal activity that would justify her eviction from public housing).

⁴⁶³ Tran-Leung, *When Discretion Means Denial: A National Perspective on Criminal Records Barriers to Federally Subsidized Housing*, *supra* note 36 at 24.

⁴⁶⁴ *Ibid.* at 22-27.

⁴⁶⁵ *Ibid.* at 29.

⁴⁶⁶ *Ibid.* at 29; 24 C.F.R. § 982.553(a)(2)(ii)(C)(1); Screening and Eviction for Drug Abuse and Other Activity, HUD Notice H.

⁴⁶⁷ *Texas Dep’t of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2513, 2525 (2015). *See also* 42 U.S.C. §§ 3601-3619, 3631.

undertaken a less restrictive alternative policy to accomplish any valid government interests at play.⁴⁶⁸

Some advocates argue that the implications of this ruling could be significant for criminal records screening practices that disproportionately affect people of color.⁴⁶⁹ The Court pointed out that plaintiffs who allege disparate impact may uncover “unconscious prejudices and disguised animus that escape easy classification as disparate treatment.”⁴⁷⁰ Imposing disparate-impact liability on housing providers could, the Court asserted, “prevent segregated housing patterns that might otherwise result from covert and illicit stereotyping.”⁴⁷¹

After the Supreme Court decision, HUD issued updated guidance that appeared to depart from the 1996 “one-strike” guidance.⁴⁷² In the new guidance, HUD stressed that it did not require PHAs to “adopt or enforce so-called ‘one-strike’ rules that deny admission to anyone with a criminal record or that require automatic eviction anytime a household member engages in criminal activity in violation of their lease.”⁴⁷³ Moreover, HUD cautioned that a mere arrest does not constitute “criminal activity” and that PHAs may not deny admission, terminate assistance, or evict a tenant based on an arrest record.⁴⁷⁴ HUD recommended that PHAs read the Shriver Center’s report for examples of best practices in screening and eviction policies.⁴⁷⁵

Across the country, some PHAs have taken steps to allow individuals with criminal records to more easily access public housing programs.⁴⁷⁶ For example, the Housing Authority of New

⁴⁶⁸ *Inclusive Communities Project, Inc.*, 135 S. Ct. at 2511 (least restrictive alternative requirement); *id.* at 2523 (“governmental entities... must not be prevented from achieving legitimate objectives, such as ensuring compliance with health and safety codes”); *id.* at 2533 (“[D]isparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity. Disparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers, not the displacement of valid governmental policies. *Griggs, supra* note 322, at 431, 91 S.Ct. 849. (FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects or perpetuating segregation.”).

⁴⁶⁹ See Rebecca J. Walter, Jill Viglione, Marie Skubak Tillyer, “One Strike to Second Chances: Using Criminal Backgrounds in Admission Decisions for Assisted Housing,” *Housing Policy Debate*, vol. 27, no. 5 (2017) at 5, <https://nlihc.org/sites/default/files/One-Strike-to-Second-Chances.pdf> (arguing that the Supreme Court decision “changed the landscape for housing providers” because “[a]lthough returning citizens are not a protected class, blanket bans on individuals with criminal records are discriminatory since African Americans and Hispanics are disproportionately arrested, convicted, and imprisoned[.]”).

⁴⁷⁰ *Inclusive Communities Project, Inc.*, 135 S. Ct. at 2522.

⁴⁷¹ *Id.*

⁴⁷² U.S. Dep’t of Housing and Urban Development, Office of Public and Indian Housing, *Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions*, HUD Notice PIH 2015-19 (2015), <https://www.hud.gov/sites/documents/PIH2015-19.PDF>.

⁴⁷³ *Id.* at 2.

⁴⁷⁴ *Id.* at 3-4.

⁴⁷⁵ *Id.* at 5.

⁴⁷⁶ Walz and Tran-Leung Statement at 15.

Orleans revised its screening protocol so that criminal history is no longer an automatic disqualifier for prospective applicants.⁴⁷⁷ In 2013, the Vera Institute of Justice partnered with the New York City Housing Authority (NYCHA), the Corporation of Supportive Housing, the New York City Department of Homeless Services, the New York State Department of Corrections and Community Supervision, the New York City Department of Correction, and 13 reentry service providers to launch the Family Reentry Pilot Program (FRPP).⁴⁷⁸ The FRPP aimed to reunite 150 formerly incarcerated individuals with their families in NYCHA housing, with the goals of providing stable and safe housing to improve the individuals' quality of life, decrease their risk of recidivism, and improve public safety.⁴⁷⁹ The program's participants received tailored case management and supportive services from reentry service providers to address their critical needs (employment, education, public benefits, substance-abuse counseling).⁴⁸⁰ As of May 2017, 108 remained in the program, and all but a few had avoided additional criminal convictions; nearly half had found or maintained employment, and the remainder had attended employment workshops or were receiving training for certifications, attending school, or enrolling in substance-use treatment programs.⁴⁸¹ The success of the FRPP inspired other PHAs in New York (including the Schenectady Housing Authority, the Syracuse Housing Authority, and the White Plains Housing Authority) and across the country (including the Chicago Housing Authority and the Housing Authority of the City of Los Angeles) to launch similar pilot programs to help reunite families in public housing.⁴⁸² PHAs adopting these types of programs have touted their benefits, which include decreased administrative duties and costs that accompany a shifted focus on providing housing for individuals rather than excluding people with criminal records and spending time at administrative hearings for applicants who were denied housing.⁴⁸³ PHAs have also reported that the programs did not increase crime at their properties, and some PHAs report that the programs helped to reduce recidivism in their communities.⁴⁸⁴ A description of a participant's participation in the Justice Bridge Housing Program, a similar reentry program in Union County, Pennsylvania, summarizes the benefits of such programs:

⁴⁷⁷ Lionel Smith, John Bae, Margaret diZerega, Ryan Shanahan, Jacob Kang-Brown, Ram Subramanian, *An Evaluation of the New York City Housing Authority's Family Reentry Pilot Program: Final Report to the U.S. Department of Housing and Urban Development*, Vera Institute of Justice, 2017, at 11, <https://www.huduser.gov/portal/sites/default/files/pdf/NYCHAEvaluation-Sept-2017-updated.pdf>.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ *Ibid.* at 11-12.

⁴⁸⁰ *Ibid.* at 12.

⁴⁸¹ *Ibid.* at 12, 30.

⁴⁸² Walz and Tran-Leung Statement at 16-17.

⁴⁸³ *Ibid.*

⁴⁸⁴ *Ibid.*; see also Diana T. Myers & Assocs., Inc., *Justice Bridge Housing Program: A Successful Reentry Program of the Housing Authority of Union County, Pennsylvania: Replication Toolkit*, 2016, at 9, <http://www.unioncountyhousingauthority.org/Documents/JBHP%20Toolkit%20FINAL-PRINT.pdf> (reporting that four years after implementing changes, the housing program's recidivism rate "was 22%, far below both the county recidivism rate of 53% and the state recidivism rate of 60%") [*hereinafter* Diana T. Myers & Assocs., Inc., *Justice Bridge Housing Program*].

AMY: “GRATEFUL FOR [THIS] OPPORTUNITY”

Amy’s children were aged 2½ and 1½ when she was accepted into the Justice Bridge Housing Program (JBHP) in Union County, Pennsylvania, her home county. Amy had been discharged from prison to a relative’s home, where she and her son and daughter lived with six other adults and three other children—a situation she described as “chaos.” The JBHP enabled Amy to move to her own suitable and affordable rental housing, which brought many benefits to Amy, chiefly a measure of financial security along with “routine, calmness, and peace.”

Amy obtained employment and saved money for college tuition. She continues her employment while attending school, majoring in Human Services, where she is gaining the knowledge and skills to work with abused or addicted women.⁴⁸⁵

HUD’s current regulations recognize disparate-impact claims consistent with *Inclusive Communities*, wherein a housing policy that does not intentionally discriminate but still disproportionately harms people of color may be permissible if the policy has a “legally sufficient justification.”⁴⁸⁶ HUD’s standards specify that a plaintiff challenging the policy must show that the legally sufficient justification could be advanced by another policy with “less discriminatory effect.”⁴⁸⁷ In June 2018, HUD announced its decision to reconsider these standards “to determine what changes, if any, may be necessary in light of the *Inclusive Communities* decision.”⁴⁸⁸ In its notice, HUD claimed that it had received “numerous comments” contending that its “burden-shifting framework for analyzing claims of disparate impact under the Fair Housing Act” conflicted with *Inclusive Communities* and “created uncertainty for commercial decision-making, as well as public policymaking.”⁴⁸⁹ HUD acknowledged that it had also received comments supportive of the disparate-impact standards, but said it acted pursuant to a Treasury Department report recommending reconsideration of the standards, and to executive orders to reform “outdated, ineffective, or excessively burdensome” regulations.⁴⁹⁰ HUD invited public comment on several questions, including: whether the burdens of proof were clear, appropriate, and sufficient to ensure that only “artificial, arbitrary, and unnecessary barriers result in disparate impact liability;” whether the standards “strike the proper balance in encouraging legal action for legitimate disparate impact cases” with avoiding meritless actions; if the standards should “clarify

⁴⁸⁵ Diana T. Myers & Assocs., Inc., Justice Bridge Housing Program at 3.

⁴⁸⁶ 24 C.F.R. § 100.500.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard*, 83 Fed. Reg. 28,560-01 (proposed June 20, 2018) (to be codified at 24 C.F.R. pt. 100).

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* (citing U.S. Dep’t of Treasury, *A Financial System That Creates Economic Opportunities, Asset Management and Insurance*, 2017, https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf).

the causality standard for stating a prima facie” disparate-impact claim; if the standards should include “defenses or safe harbors” to disparate-impact claims; and if HUD should revise the standards to “add to the clarity, reduce uncertainty, decrease regulatory burden, or otherwise assist the regulated entities” and public in determining the legality of policies.⁴⁹¹

In response, HUD received more than 500 comments,⁴⁹² including from the Attorneys General of California, the District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington—who submitted a joint letter strongly opposing revision of the standards, arguing that any revision “would reduce clarity and add uncertainty, especially because any revision would likely fail to rely on the half century of disparate impact case law.”⁴⁹³ The Attorneys General asserted that HUD’s standards already comply with *Inclusive Communities*, and pointed out that enforcement actions “based on disparate impact theories are a critical component of states’ efforts to combat discrimination and ensure greater equality of opportunity.”⁴⁹⁴ The National Fair Housing Alliance submitted a letter on behalf of over 100 advocacy groups and local agencies urging HUD not to revise the standards, maintaining that the standards promote “significant administrative efficiency by creating national uniformity and regulatory certainty for the rental, real estate, lending, and insurance industries.”⁴⁹⁵ By contrast, supporters of revising the standards included Roger Clegg of the Center for Equal Opportunity, who argued that the current standards are “misguided as a matter of policy and inherently inconsistent with the constitutional presumption against race-based decision-making.”⁴⁹⁶ As of this writing, HUD has submitted an Advance Notice of Proposed Rulemaking to the Office of Information and Regulatory Affairs

⁴⁹¹ *Id.* (As examples of defenses or safe harbors, HUD suggested “when another federal statute substantially limits a defendant’s discretion or another federal statute requires adherence to state statutes.”).

⁴⁹² See Regulations.gov, “FR-6111-A-01 Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard,”

<https://www.regulations.gov/docketBrowser?rpp=50&so=ASC&sb=postedDate&po=0&dct=PS&D=HUD-2018-0047> (last accessed Nov. 29, 2018).

⁴⁹³ The Attorneys General of North Carolina, California, District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, “Comment Regarding the Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard (Docket No. FR-6111-A-01),” Aug. 20, 2018, at 10, https://cdn.theatlantic.com/assets/media/files/fha_ag_comment_final.pdf.

⁴⁹⁴ *Ibid.* at 1.

⁴⁹⁵ The National Fair Housing Alliance et al., “Re: Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard, Docket No. FR-6111-A-01,” Aug. 20, 2018, at 10, [https://cdn.theatlantic.com/assets/media/files/2018-08-20_nfha_sign-on_letter_re_hud_disparate_impact_anpr_comment_\(final\).pdf](https://cdn.theatlantic.com/assets/media/files/2018-08-20_nfha_sign-on_letter_re_hud_disparate_impact_anpr_comment_(final).pdf).

⁴⁹⁶ Roger Clegg, Center for Equal Opportunity, “Comment on the Department of Housing and Urban Development (HUD) Proposed Rule: FR-6111-A-01 Reconsideration of HUD’s Implementation of the Fair Housing Act’s Disparate Impact Standard,” June 20, 2018, <https://www.regulations.gov/document?D=HUD-2018-0047-0003>.

regarding HUD's implementation of the Fair Housing Act's disparate impact standard, and the content of the proposed rulemaking was issued on February 1, 2019.⁴⁹⁷

Barriers to Private Housing for Individuals with Criminal Records

Formerly incarcerated individuals face financial challenges due to employment-related or public assistance barriers, or other financial burdens (supervision fees, child support, restitution), and thus need to find housing that is affordable.⁴⁹⁸ Living with family members can provide stability for formerly incarcerated people with few resources.⁴⁹⁹ Approximately two-thirds of formerly incarcerated individuals rely on family members for housing, but sharing their homes with formerly incarcerated family can threaten that family's housing due to restrictions on residents who have criminal records.⁵⁰⁰ For individuals who are legally blocked from living with family or who lack family support, the private market is often the only alternative.

The private housing market poses its own set of barriers and challenges for formerly incarcerated individuals. First, private housing can be more expensive than public housing, especially for people who reenter society without jobs or appreciable income.⁵⁰¹ There is a widespread lack of affordable housing all across the U.S., and many housing markets—particularly in urban areas—are increasingly tight, which spurs additional competition.⁵⁰² Formerly incarcerated individuals often lack sufficient funds to cover move-in costs, and face landlords who are unwilling to rent to individuals with criminal records.⁵⁰³ Applicants with criminal records compete against applicants

⁴⁹⁷ On February 1, 2019, HUD released an Advance Notice of Proposed Rulemaking; given the timing of that announcement, the contents of the proposed rulemaking are not discussed in this report. *See* Proposed Rule, HUD's Implementation of the Fair Housing Act's Disparate Impact Standard (FR-6111-P-01), Feb. 1, 2019, <https://www.reginfo.gov/public/do/eoDetails?rriid=128817> (last accessed May 6, 2019).

⁴⁹⁸ Metraux et al., *Incarceration and Homelessness*, *supra* note 412 at 9; Christy Visher, Nancy LaVigne, Jeremy Travis, *Returning Home: Understanding the Challenges of Prisoner Reentry, Maryland Pilot Study: Findings from Baltimore*, Urban Institute, 2004, at 54-55, <https://www.urban.org/sites/default/files/publication/42841/410974-Returning-Home-Understanding-the-Challenges-of-Prisoner-Reentry.PDF>. For more discussion of barriers to public assistance for people with criminal convictions, *see* "How a Criminal Record Can Affect Access to Public Benefits" *supra* notes 222-409.

⁴⁹⁹ Walz and Tran-Leung Statement at 4; Claire Herbert, Jeffrey Morenoff, David Harding, Liam Purvis, *Residential Instability among The Formerly Incarcerated*, National Poverty Center, 2016, at 2-3, http://www.npc.umich.edu/publications/policy_briefs/brief42/policybrief42.pdf.

⁵⁰⁰ Walz and Tran-Leung Statement at 3-4; deVuono-powell et al., *Who Pays? The True Cost of Incarceration on Families*, *supra* note 417.

⁵⁰¹ Metraux et al., *Incarceration and Homelessness*, *supra* note 412 at 9-9; National Low Income Housing Coalition, *The Gap: A Shortage of Affordable Homes*, *supra* note 411 at 2-4.

⁵⁰² *Ibid.*

⁵⁰³ Katherine Cortes & Shawn Rogers, *Reentry Housing Options: The Policymakers' Guide*, Council of State Governments Justice Center, 2010, at vii, http://csgjusticecenter.org/wp-content/uploads/2012/12/Reentry_Housing_Options-1.pdf.

without criminal records, often to their disadvantage.⁵⁰⁴ An estimated 4 out of 5 private landlords utilize background checks to screen out applicants with criminal records.⁵⁰⁵

Private landlords frequently ask for both background and credit checks. Beverly Sharp, Reentry Initiatives Coordinator for the West Virginia Council of Churches, testified to the Commission's West Virginia State Advisory Committee that these checks almost certainly create barriers for formerly incarcerated individuals, who may not have "been able to establish a credit history while incarcerated or their credit history was poor prior to their felony conviction and they have not had time to rebuild it."⁵⁰⁶

The stigma of a criminal record also impairs applicants' ability to obtain housing on the private market.⁵⁰⁷ Studies in various cities including Austin, Baltimore, Dallas, Cleveland, and New York show that few providers would approve applicants with felony convictions (although landlords may be more willing to overlook a misdemeanor conviction).⁵⁰⁸ Many housing providers implement blanket policies that restrict access to individuals with criminal records or even arrest records, which can disproportionately limit options for people of color because they are overrepresented in the criminal justice system.⁵⁰⁹ Additionally, many housing providers are inconsistent in the enforcement of their policies, and may use a criminal record as a proxy for race.⁵¹⁰ A recent study conducted by the Equal Rights Center examined the practices of private District of Columbia-area housing providers when considering both white and black applicants with similar criminal backgrounds, and found that the potential white tenants experienced preferential treatment 47 percent of the time; white applicants more often received sympathetic reactions when disclosing their criminal record and were more often encouraged to apply, despite their criminal record, than black applicants.⁵¹¹ Moreover, property agents imposed tougher

⁵⁰⁴ Metraux et al., *Incarceration and Homelessness*, *supra* note 412 at 9-9.

⁵⁰⁵ Vallas & Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, *supra* note 437 at 19.

⁵⁰⁶ West Virginia State Advisory Committee to the United States Commission on Civil Rights, Public Meeting, *Felony Records: Collateral Consequences for West Virginians*, July 19, 2018, Meeting Transcript at 15-16.

⁵⁰⁷ Walz and Tran-Leung Statement at 7.

⁵⁰⁸ *Ibid*; Austin/Travis County Reentry Roundtable, *Locked Out: Criminal History Barriers to Affordable Rental Housing in Austin & Travis County, Texas*, 2016, at 4, http://www.reentryroundtable.net/wp-content/uploads/2013/10/Criminal-Background-White-Paper.final_.pdf; Phillip Garboden & Eva Rosen, "When Landlords Discriminate," *Talk Poverty*, May 17, 2016, <https://talkpoverty.org/2016/05/17/when-landlords-discriminate/>.

⁵⁰⁹ Walz and Tran-Leung Statement at 7; Austin/Travis County Reentry Roundtable, *Locked Out: Criminal History Barriers to Affordable Rental Housing in Austin & Travis County, Texas*, *supra* note 508 at 4; Garboden & Rosen, "When Landlords Discriminate," *supra* note 508. *See also* Chapter 1, "Demographics of the Corrections Population," *supra* notes 96-130.

⁵¹⁰ Walz and Tran-Leung Statement at 7; Austin/Travis County Reentry Roundtable, *Locked Out: Criminal History Barriers to Affordable Rental Housing in Austin & Travis County, Texas*, *supra* note 508 at 4; Garboden & Rosen, "When Landlords Discriminate," *supra* note 508.

⁵¹¹ Equal Rights Center, *Unlocking Discrimination: A DC Area Testing Investigation about Racial Discrimination and Criminal Records Screening Policies in Housing*, 2016, at 20-26, <https://equalrightscenter.org/wp-content/uploads/unlocking-discrimination-web.pdf>.

criminal records screening criteria and sometimes higher fees on black applicants than white applicants.⁵¹² Furthermore, this study documented that policies like blanket bans on felony convictions rendered over 4,600 housing units in the Washington, D.C. area essentially unavailable to individuals with criminal histories, disproportionately limiting housing opportunities for black applicants.⁵¹³

In April 2016, HUD issued guidance for all housing providers when considering applicants with criminal records.⁵¹⁴ As noted previously, the Fair Housing Act prohibits housing discrimination, and if a facially neutral business policy has a disparate impact upon a protected class, it may violate the Act if there is not a “legally sufficient justification” for the policy.⁵¹⁵ This guidance explains:

... where a policy or practice that restricts access to housing on the basis of criminal history has a disparate impact on individuals of a particular race, national origin, or other protected class, such policy or practice is unlawful under the Fair Housing Act if it is not necessary to serve a substantial, legitimate, nondiscriminatory interest of the housing provider, or if such interest could be served by another practice that has a less discriminatory effect.⁵¹⁶

HUD recognized that the substantial, nondiscriminatory interests of the housing provider include safety interests:

Although the specific interest(s) that underlie a criminal history policy or practice will no doubt vary from case to case, some landlords and property managers have asserted the protection of other residents and their property as the reason for such policies or practices. Ensuring resident safety and protecting property are often considered to be among the fundamental responsibilities of a housing provider, and courts may consider such interests to be both substantial and legitimate, assuming they are the actual reasons for the policy or practice. A housing provider must, however, be able to prove through reliable evidence that its policy or practice of making housing decisions based on criminal history actually assists in protecting resident safety and/or property. Bald assertions based on generalizations or

⁵¹² Ibid. at 21-23.

⁵¹³ Ibid.

⁵¹⁴ U.S. Dep’t of Housing and Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, 2016, https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.

⁵¹⁵ Ibid. at 2 (citing *Inclusive Communities Project, Inc.*, 135 S. Ct. at 2523, 2525 (holding that “disparate-impact claims are cognizable under the Fair Housing Act” but “housing authorities and private developers [must] be allowed to maintain a policy if they can prove it is necessary to achieve a valid interest.”)); *see also* 42 U.S. § 3601.

⁵¹⁶ U.S. Dep’t of Housing and Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, *supra* note 514 at 2; 24 C.F.R. § 100.500.

stereotypes that any individual with an arrest or conviction record poses a greater risk than any individual without such a record are not sufficient to satisfy this burden.⁵¹⁷

Therefore, the HUD guidance clarified that among other policy choices, denying applicants housing based on arrest records that did not result in conviction is not a sufficient justification, as there is insufficient proof that the denial will help protect the safety of other residents or the property.⁵¹⁸ Furthermore, HUD warned that a housing provider who imposes a blanket ban on individuals with criminal records has not met the burden of showing that the policy is “necessary to achieve a substantial, legitimate, nondiscriminatory interest.”⁵¹⁹ Research suggests that because this guidance is relatively new, housing providers are still in the process of updating their policies and procedures, and the effects (if any) of the updated guidance on providers’ practices are not yet known.⁵²⁰

In 2017, Seattle’s City Council formally recognized that “racial inequities in the criminal justice system are compounded by racial bias in the rental application process” and that “there is no sociological research establishing a relationship between a criminal record and an unsuccessful tenancy.”⁵²¹ Accordingly, the City Council enacted the Fair Chance Housing Ordinance, which prohibits landlords from: advertising or implementing policies that categorically reject applicants with an arrest or conviction record; asking about applicants’ criminal history; and denying tenancy based on a criminal record or background check, unless a “legitimate business reason” exists.⁵²² A legitimate business reason exists when the policy is necessary to advance a “substantial, legitimate, nondiscriminatory interest,” and a nexus between the policy and the safety of residents

⁵¹⁷ U.S. Dep’t of Housing and Urban Development, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, *supra* note 514 at 4-5 (citing *Charleston Hous. Auth. v. U.S. Dep’t of Agric.*, 419 F.3d 729, 742 (8th Cir. 2005) (noting that “in the abstract, a reduction in the concentration of low income housing is a legitimate goal that has been recognized by Congress” but finding that “the Housing Authority had not shown a need for deconcentration in this instance, and in fact, had falsely represented the density [of low-income housing] at the location in question in an attempt to do so.”)).

⁵¹⁸ *Ibid.* at 5 (citing *United States v. Berry*, 553 F.3d 273, 284 (3d Cir. 2009) (holding that “a bare arrest record—without more—does not justify an assumption that a defendant has committed other crimes and it therefore can not support increasing his/her sentence in the absence of adequate proof of criminal activity.”); *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006) (concluding that “a mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct.”)).

⁵¹⁹ *Ibid.* at 6; *see also Green v. Missouri Pacific R.R.*, 523 F.2d 1290, 1298 (8th Cir. 1975) (upholding the finding that a blanket ban was a violation of Title VII and stating that the court “cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.”).

⁵²⁰ Walter et al., *One Strike to Second Chances: Using Criminal Backgrounds in Admission Decisions for Assisted Housing*, *supra* note 469 at 6.

⁵²¹ Seattle, Wash., Ordinance 119015 (Aug. 23, 2017), at 2, <http://seattle.legistar.com/View.ashx?M=F&ID=5387389&GUID=6AA5DDAE-8BAE-4444-8C17-62C2B3533CA3>; *see also* SEATTLE, WASH., MUN. CODE §§ 14.09.005-14.09.120.

⁵²² *Id.* at § 14.09.025.

is evident based on several factors, including the nature, severity, and number of convictions, the time elapsed since the conviction, and other relevant circumstances.⁵²³

In order to mitigate the barriers presented in both public and private housing for formerly incarcerated individuals, several advocates testified to the Commission’s West Virginia State Advisory Committee about the specific value of transitional housing, sometimes referred to as “work release centers,” “community release centers” or “halfway houses.”⁵²⁴ One advocate testified that such residences “allow individuals to transition slowly into the community, not immediately walk out of an institution and have to find housing immediately,” giving them an opportunity to work with community organizations who can assist with placement.⁵²⁵

How a Criminal Record Can Affect Access to Public Benefits

Individuals reentering society from incarceration often lack the support needed to attain self-sufficiency.⁵²⁶ With barriers to finding gainful employment and housing, formerly incarcerated individuals often need temporary assistance until they can secure jobs to meet their basic needs of paying for rent, food, clothing, and other necessities.⁵²⁷

People of color with criminal records are disproportionately denied public assistance due to the racially biased enforcement of drug policies, which disproportionately penalizes people of color compared to white people.⁵²⁸ As a group, Native Americans are particularly deprived of resources necessary for rehabilitation, such as substance abuse and mental health counseling, job training, and other services needed to reintegrate into their tribal communities.⁵²⁹ Lack of economic resources and infrastructure on Native American lands often makes many of these services difficult to access.⁵³⁰ Additionally, people of color—particularly black people—are at higher risk of having their families separated, as about 1 in 9 black children has a parent in prison or jail, compared to 1 in 28 children overall with an incarcerated parent.⁵³¹

⁵²³ *Id.* at § 14.09.010.

⁵²⁴ West Virginia State Advisory Committee to the United States Commission on Civil Rights, Public Meeting, *Felony Records: Collateral Consequences for West Virginians*, July 19, 2018, Meeting Transcript at 17-34, 170, 182.

⁵²⁵ *Ibid.* at 33

⁵²⁶ Hirsch et al., *Every Door Closed: Barriers Facing Parents With Criminal Records*, *supra* note 36 at 27.

⁵²⁷ *Ibid.*

⁵²⁸ Burch Statement at 4-5; Pager et al., “Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records,” *supra* note 231; Hirsch et al., *Every Door Closed: Barriers Facing Parents With Criminal Records*, *supra* note 36 at 1-91. *See also* Chapter 1, “Demographics of the Corrections Population,” *supra* notes 96-130.

⁵²⁹ NCAI Statement at 2. *See generally* U.S. Commission on Civil Rights, *Broken Promises: Continuing Federal Funding Shortfall for Native Americans*, 2018, <https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf>.

⁵³⁰ NCAI Statement at 2.

⁵³¹ Bruce Western & Becky Pettit, *Collateral Costs: Incarceration’s Effect on Economic Mobility*, Pew Charitable Trusts, 2010, at 18, http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2010/collateralcosts1pdf.pdf.

Many formerly incarcerated individuals have disabilities that prevent them from working, and thus require supplementary income to survive.⁵³² Prisons often exclude or fail to accommodate people with physical and mental disabilities from reentry programming, which then blocks people with disabilities from locating information and services for disability-related benefits, educational/vocational programs, employment resources, supportive and/or accessible housing, health care, mental health services, drug treatment programs, or other supportive services.⁵³³ Furthermore, the intersectionality among disability and race/ethnicity, sex, sexual orientation, gender identity, and class affect “many incarcerated and formerly incarcerated individuals [who] experience overlapping or intersecting social identities—and related systems of oppression and discrimination.”⁵³⁴ Taking into account the disability of a formerly incarcerated individual and barriers to public benefits and other fundamental needs that accompany a criminal conviction can create seemingly “insurmountable obstacles” to rebuilding a person’s life.⁵³⁵

At present, certain laws prohibit states from providing public assistance to individuals with certain types of felony convictions.⁵³⁶ The federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) prohibits states from providing TANF financial assistance and SNAP nutrition benefits to “fleeing” felons avoiding retribution from committing a felony or violating the terms of their probation or parole, and to individuals who have committed welfare fraud by applying for benefits in multiple states.⁵³⁷ The law also bans individuals convicted of felonies for possession, use, or distribution of illegal drugs before August 22, 1996 (for which some states impose drug testing to determine eligibility) from receiving TANF or SNAP benefits, although states may opt out of the ban or modify the time period for which the ban remains in place.⁵³⁸ States must affirmatively enact legislation to opt out of the bans on TANF and SNAP benefits, and some states have chosen to keep TANF bans intact despite lifting restrictions on SNAP bans.⁵³⁹

⁵³² Hirsch et al., *Every Door Closed: Barriers Facing Parents With Criminal Records*, *supra* note 36 at 2, 27.

⁵³³ Joint Statement, Disability Advocates at 7-14.

⁵³⁴ *Ibid.* at 5.

⁵³⁵ Elliot Oberholtzer, “Police, Courts, Jails, and Prisons All Fail Disabled People,” *Prison Policy Initiative*, August 23, 2017, <https://www.prisonpolicy.org/blog/2017/08/23/disability/>.

⁵³⁶ Maggie McCarty, Gene Falk, Randy Alison Aussenberg, David H. Carpenter, *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, Congressional Research Service, 2016, at 8, <https://fas.org/sgp/crs/misc/R42394.pdf>.

⁵³⁷ *Ibid.* at 10; *see also* 42 U.S.C. § 608 (detailing prohibitions in the TANF program); 7 U.S.C. § 2015 (detailing prohibitions in SNAP); Hirsch et al., *Every Door Closed: Barriers Facing Parents With Criminal Records*, *supra* note 36 at 29.

⁵³⁸ 21 U.S.C. § 862a; *see also* McCarty et al., *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, *supra* note 536 at 8.

⁵³⁹ 21 U.S.C. § 862a.

As of 2016, 13 states and the District of Columbia had eliminated all disqualifications to TANF financial assistance benefits based on drug felony convictions, 27 states modified their disqualification standards, and 10 states maintained a lifetime ban.⁵⁴⁰

As of 2017, 23 states and the District of Columbia eliminated all disqualifications to SNAP food assistance based on drug felony convictions, 23 states enforced modified disqualification bans, and 4 states maintained a lifetime ban.⁵⁴¹ In 2018, Indiana amended its statute to elect out of the lifetime ban on SNAP benefits for people with felony drug convictions; effective 2020, the state will allow SNAP benefits for individuals with drug felony convictions if they have complied with probation, parole, or another court-ordered “postconviction monitoring program.”⁵⁴² In February 2019, the West Virginia legislature passed and sent to the Governor a bill amending its statute to exempt West Virginians from the lifetime ban on SNAP benefits for felony drug convictions “unless the offense of conviction has as an element thereof misuse of supplemental nutrition assistance program benefits, loss of life, or the causing of physical injury.”⁵⁴³ Lida Shepherd of the American Friends Service Committee’s West Virginia Economic Justice Project testified to the Commission’s West Virginia State Advisory Committee that the percentage of people who rely on SNAP benefits in West Virginia is higher than the general population; one in five West Virginians rely on SNAP.⁵⁴⁴ As of this writing, the remaining states with lifetime SNAP bans for people with felony drug convictions are Mississippi and South Carolina.⁵⁴⁵

The rationale for disqualifying people with felony drug convictions stems from judgments and concerns by policymakers about whether such recipients are “worthy” of public assistance.⁵⁴⁶ This rationale judges individuals’ worthiness based not only on their economic need, but also on their moral character.⁵⁴⁷ At the height of the “War on Drugs” in the 1980s, policymakers struggled with

⁵⁴⁰ McCarty et al., *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, *supra* note 536 at 9. As of this writing, the states that enforced lifetime TANF bans were: Arizona, Delaware, Georgia, Mississippi, Missouri, Nebraska, South Carolina, South Dakota, Texas, Virginia.

⁵⁴¹ U.S. Dep’t of Agriculture, *State Options Report: Supplemental Nutrition Assistance Program*, 2018, at 21, <https://fns-prod.azureedge.net/sites/default/files/snap/14-State-Options.pdf>.

⁵⁴² Indiana Pub. L. 209 (2018); H.B. 1317, 120th Gen. Assemb. (Ind. 2018), <https://legiscan.com/IN/text/HB1317/id/1760045/Indiana-2018-HB1317-Enrolled.pdf>.

⁵⁴³ West Virginia H.B. 2459, http://www.wvlegislature.gov/Bill_Status/bills_history.cfm?year=2019&sessiontype=RS&input=2459.

⁵⁴⁴ WV SAC briefing transcript 203

⁵⁴⁵ U.S. Dep’t of Agriculture, *State Options Report: Supplemental Nutrition Assistance Program*, *supra* note 539 at 21; *see also* Center on Budget and Policy Priorities, *How SNAP Can Better Serve the Formerly Incarcerated*, 2018, at 12, <https://www.cbpp.org/sites/default/files/atoms/files/3-6-18fa.pdf>; Molly Born, “In Some States, Drug Felons Still Face Lifetime Ban On SNAP Benefits,” *NPR*, June 20, 2018, <https://www.npr.org/sections/thesalt/2018/06/20/621391895/in-some-states-drug-felons-still-face-lifetime-ban-on-snap-benefits>.

⁵⁴⁶ McCarty et al., *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, *supra* note 536 at 1.

⁵⁴⁷ *Ibid.* at 1-2. In the 1930s, many states historically adopted “suitable home” rules that gave administrators discretion to deny benefits to individuals or households that did not exhibit what they considered proof of good “moral character.” *Ibid.* In *King v. Smith*, the Supreme Court recounted how opponents of “suitable home” rules

how to deal with crime and drug use, and focused on punishing drug use as a crime rather than treating it as a public health problem.⁵⁴⁸ In the late 1980s, specific drug-related sanctions were added to certain federal assistance programs, and supporters of these policies believed that the provisions would deter drug use.⁵⁴⁹ The PRWORA's lifetime bans on SNAP and TANF benefits for individuals with drug convictions were intended to send a "tough on crime" message to the public.⁵⁵⁰ Senator Phil Gramm (R-TX), the sponsor of the amendment implementing the bans, argued, "if we are serious about our drug laws, we ought not to give people welfare benefits who are violating the Nation's drug laws."⁵⁵¹

There are additional collateral consequences attached to Social Security, Supplemental Security Income (SSI) benefits, Social Security Disability Insurance (SSDI), and Medicaid.⁵⁵² During incarceration, inmates are ineligible for SSI or SSDI benefits, so their benefits are suspended during that period.⁵⁵³ For individuals who received SSDI and were confined for less than one year, benefits are reinstated the month after their release.⁵⁵⁴ If an individual has been incarcerated for more than 12 consecutive months, SSI benefits are terminated, and the individual must reapply for those benefits.⁵⁵⁵ To reapply, individuals must provide official documents proving their release from prison or jail.⁵⁵⁶ As advocates have testified, the reapplication process can be cumbersome, requiring detailed documentation from prison administrators whose willingness to assist with the bureaucratic process varies.⁵⁵⁷ Some prisons and jails offer pre-release programs that help incarcerated individuals navigate the reapplication process; many advocacy groups consider such

alleged that such policies were racially discriminatory. *See* 392 U.S. 309, 321-22 (1968) ("Critics argued, for example, that such disqualification provisions undermined a mother's confidence and authority, thereby promoting continued dependency; that they forced destitute mothers into increased immorality as a means of earning money; that they were habitually used to disguise systematic racial discrimination; and that they senselessly punished impoverished children on the basis of their mothers' behavior, while inconsistently permitting them to remain in the allegedly unsuitable homes.").

⁵⁴⁸ McCarty et al., *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, *supra* note 536 at 2.

⁵⁴⁹ *Ibid.* at 2-3; 134 Cong. Rec. H7259-02, 1988 WL 175612 (Sept. 8, 1988) (statement of Representative McCollum urging support of federal policies denying public benefits to people convicted of drug offenses).

⁵⁵⁰ Marc Mauer & Virginia McCalmont, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, The Sentencing Project, 2015, at 1, <https://sentencingproject.org/wp-content/uploads/2015/12/A-Lifetime-of-Punishment.pdf>.

⁵⁵¹ 142 Cong. Rec. S8493, S8498 (July 23, 1996).

⁵⁵² Social Security Administration, "What Prisoners Need to Know," at 1-4, <https://www.ssa.gov/pubs/EN-05-10133.pdf>; Joint Statement, Disability Advocates at 9-10.

⁵⁵³ 20 C.F.R. § 404.468; *Ibid.* at 1-3.

⁵⁵⁴ *Ibid.*

⁵⁵⁵ *Ibid.*

⁵⁵⁶ *Ibid.* at 3.

⁵⁵⁷ Joint Statement, Disability Advocates at 10-11; Hirsch et al., *Every Door Closed: Barriers Facing Parents With Criminal Records*, *supra* note 36 at 36 n.43 (stating that the "process [of reapplying for Social Security benefits] is made more difficult by the refusal of some prison medical care providers to complete disability evaluation forms.").

reentry assistance a best practice for ensuring that formerly incarcerated individuals receive benefits immediately post-release.⁵⁵⁸

As noted above, federal law prohibits incarcerated individuals from receiving Medicaid benefits during confinement.⁵⁵⁹ But Medicaid-eligible inmates admitted to a hospital for more than 24 hours may receive Medicaid coverage during that hospital stay.⁵⁶⁰ Some states have opted to suspend, rather than terminate, Medicaid enrollment during the incarceration period, so that coverage reactivates automatically post-release.⁵⁶¹ By suspending instead of ending coverage, states save the time and costs of reenrolling people who are reentering society and ensure that formerly incarcerated individuals continue to receive the care they need.⁵⁶²

The Disproportionate Impact of Lifetime Drug Bans for Public Benefits

A study of women with drug convictions in Pennsylvania noted that many women developed substance abuse issues early in their lives because of their difficult life circumstances—such as surviving and fleeing sexual or physical abuse, lacking access to education and job-market skills, resorting to homelessness and prostitution, and suffering physical and mental health problems related to drug use.⁵⁶³ In federal prisons, 56 percent of women are incarcerated for drug offenses, compared to 47 percent of men; in state prisons, 25 percent of women are incarcerated for drug offenses, compared to only 14 percent of men.⁵⁶⁴ With a criminal record, these women will face denial of welfare benefits and difficulties attaining self-sufficiency to provide for themselves and their families.⁵⁶⁵ On average, women also earn less money than men for the same amount of work.⁵⁶⁶

⁵⁵⁸ Hirsch et al., *Every Door Closed: Barriers Facing Parents With Criminal Records*, *supra* note 36 at 36-37. Joint Statement, Disability Advocates at 10-11.

⁵⁵⁹ 42 U.S.C. § 1396d(a)(30)(A); 42 C.F.R. § 435.1009.

⁵⁶⁰ 42 C.F.R. § 435.1010; *see also* U.S. Government Accountability Office, *Medicaid: Information on Inmate Eligibility and Federal Costs for Allowable Services*, 2014, at 1, <https://www.gao.gov/assets/670/665552.pdf> (explaining that inmates admitted to a medical institution for at least 24 hours for inpatient services become eligible for Medicaid during the stay).

⁵⁶¹ U.S. Government Accountability Office, *Medicaid: Information on Inmate Eligibility and Federal Costs for Allowable Services*, *supra* note 560 at 6-7.

⁵⁶² *Ibid.* *See also* Families USA, “Why States Should Suspend Medicaid for People During Incarceration,” 2016, <https://familiesusa.org/blog/2016/03/why-states-should-suspend-medicaid-people-during-incarceration> (last accessed Dec. 3, 2018).

⁵⁶³ Amy E. Hirsch, “Some Days Are Harder than Hard”: *Welfare Reform and Women with Drug Convictions in Pennsylvania*, Center for Law and Social Policy, 1999, at 5-35, <http://www.clasp.org/sites/default/files/public/resources-and-publications/files/0167.pdf>.

⁵⁶⁴ Carson, *Prisoners in 2016*, *supra* note 1 at 13.

⁵⁶⁵ Hirsch, “Some Days Are Harder than Hard”: *Welfare Reform and Women with Drug Convictions in Pennsylvania*, *supra* note 563 at 35-41.

⁵⁶⁶ U.S. Dep’t of Labor, Bureau of Labor Statistics, *The Economics Daily: Women’s and Men’s Earnings by Age in 2016*, *supra* note 254 (finding that among full-time wage and salary workers ages 16 and older, median weekly earnings were \$749 for women and \$915 for men).

The lifetime bans on TANF and SNAP benefits often disproportionately impact women, children, and people of color.⁵⁶⁷ The number of women in prison from 1980 to 2010 rose by 646 percent, compared to a 419 percent increase for men,⁵⁶⁸ and the number of female prisoners has continued to climb since then.⁵⁶⁹ Moreover, in 2016, the incarceration rate for black women was almost double that for white women,⁵⁷⁰ and the incarceration rate for Latina women was 1.2 times the rate for white women in 2014.⁵⁷¹ The American Civil Liberties Union reports that women of color are arrested and imprisoned for drug crimes at far higher rates than white women.⁵⁷² An estimated 180,000 women were affected by the TANF ban from 1996-2011 due to felony drug convictions or other convictions that would trigger the ban.⁵⁷³ Approximately 85 percent of adult TANF recipients are women, and most TANF recipients are people of color (27.6 percent white, 29.1 percent black, and 36.9 percent Latino).⁵⁷⁴ Twice as many women (23 percent) as men (12 percent) have received SNAP benefits at any time in their life, and women of color are much likelier to have received SNAP benefits (for example, 39 percent of black women and 31 percent of Latina women versus 19 percent of white women).⁵⁷⁵ In 2015, over half of SNAP's non-elderly adult recipients were women (62 percent), and just under half of SNAP participants were children (44 percent).⁵⁷⁶ By extension, the bans on public benefits impact children being cared for by a parent who is subject to the ban.⁵⁷⁷ Under the law, parents with felony drug convictions can collect SNAP

⁵⁶⁷ Mauer & McCalmont, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, *supra* note 550 at 4; Amy E. Hirsch, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 5 [*hereinafter* Hirsch Statement].

⁵⁶⁸ Mauer & McCalmont, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, *supra* note 550 at 4.

⁵⁶⁹ Carson, *Prisoners in 2016*, *supra* note 1 at 1, 3.

⁵⁷⁰ *Ibid.* at 13.

⁵⁷¹ E. Ann Carson, *Prisoners in 2014*, U.S. Dep't of Justice, Bureau of Justice Statistics, 2015, at 15, <https://www.bjs.gov/content/pub/pdf/p14.pdf>; The Sentencing Project, *Fact Sheet: Incarcerated Women and Girls*, 2015, at 2, <http://www.sentencingproject.org/wp-content/uploads/2016/02/Incarcerated-Women-and-Girls.pdf>.

⁵⁷² American Civil Liberties Union, "Words From Prison: Drug Policy, Race and Women's Incarceration," <https://www.aclu.org/other/words-prison-drug-policy-race-and-womens-incarceration> (last accessed Dec. 3, 2018).

⁵⁷³ Mauer & McCalmont, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, *supra* note 550 at 3.

⁵⁷⁴ U.S. Dep't of Health and Human Services, Office of Family Assistance, *Characteristics and Financial Circumstances of TANF Recipients: Fiscal Year 2016*, *supra* note 159 at Tables 17, 18 (showing that among 2016 adults TANF recipients, 94,967 were men and 542,506 were women) and Table 10 (showing TANF recipients by race and ethnicity).

⁵⁷⁵ Rich Morin, "The Politics and Demographics of Food Stamp Recipients," Pew Research Center, July 12, 2013, <http://www.pewresearch.org/fact-tank/2013/07/12/the-politics-and-demographics-of-food-stamp-recipients/>; Hirsch Statement at 5.

⁵⁷⁶ U.S. Dep't of Agriculture, *Characteristics of Supplemental Nutrition Assistance Households: Fiscal Year 2015*, *supra* note 160 at 21.

⁵⁷⁷ Mauer & McCalmont, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, *supra* note 550 at 4-5.

benefits only on behalf of their child, and thus receive far less assistance than parents who were never convicted.⁵⁷⁸

In her testimony before the Commission in 2017, Amy Hirsch explained how policymakers may not have considered how the lifetime ban for drug convictions could so severely impact women and families, and how much of a difference these benefits could make in a person's life:

When you look at TANF, over 90 percent of the adults who get TANF are women. In order to get TANF, you have to either be pregnant or the custodial parent or other close relative of minor kids . . . And, what you get with those benefits is minuscule . . . [t]he maximum grant [in Pennsylvania] for a mother and child is \$316 a month, and there are 21 states that are less generous than Pennsylvania. But, the difference between having that \$316 and having nothing, is a world. I mean, it means that you may be able to double up with family or friends because you have a little something you can bring to the table. It means that, if you're eligible for transitional housing, you can get it because you have to have some income to get in the door. It's just incredibly huge, the impact of that miserable pittance. The response I would make and the conversation I've had with lots of very conservative folks is that [the ban] had unintended counterproductive consequences.⁵⁷⁹

Hirsch testified that the exclusion of women with drug convictions from eligibility for TANF benefits "absolutely" communicates government animus about which women are eligible and which women are not.⁵⁸⁰

Critics of these lifetime bans argue that they are counterproductive to safe reentry.⁵⁸¹ Welfare benefits allow a person to meet basic survival needs while searching for employment or housing; without public benefits, individuals with criminal records may be more likely to turn to criminal activity to provide for themselves and their families.⁵⁸² One study examined the effects of denying SNAP benefits to individuals with drug convictions and found the denial increased recidivism among those individuals.⁵⁸³ For individuals banned from receiving benefits, another study reported

⁵⁷⁸ 21 U.S.C. § 862a(a)-(b); *see also* Marina Golan-Vilella, "Why SNAP Matters for Formerly Incarcerated People," Friends Committee on National Legislation, June 26, 2018, <https://www.fcnl.org/updates/why-snap-matters-for-formerly-incarcerated-people-1526>.

⁵⁷⁹ *Briefing Transcript* at 164 (statement of Amy Hirsch).

⁵⁸⁰ *Ibid.* at 166.

⁵⁸¹ Jeremy Haile, "How the Felony Drug Ban Keeps Thousands of Americans Hungry," *Talk Poverty*, March 21, 2017, <https://talkpoverty.org/2016/03/21/felony-drug-ban-keeps-thousands-hungry/>.

⁵⁸² *Ibid.*; CLASP Statement at 3.

⁵⁸³ Cody Tuttle, "Snapping Back: Food Stamps Bans and Criminal Recidivism," *SSRN*, 2018, at 26, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2845435.

an elevated risk of food insecurity and other troubling public health implications.⁵⁸⁴ In fact, the level of food insecurity reported in this study among individuals upon reentry “mirror[ed] the magnitude of food insecurity in developing countries.”⁵⁸⁵ In addition, the bans can prevent individuals from obtaining mental health or substance abuse treatment, including residential treatment programs that rely on funds from public assistance to cover room and board costs.⁵⁸⁶

A 2018 University of Maryland researcher’s study examined the effects of the SNAP ban on people with felony drug convictions, and found that these individuals were likelier to recidivate for offenses based on “a monetary motive,” like theft or drug distribution, instead of violent crimes.⁵⁸⁷ The study illustrated that the desperation driving individuals who are denied public assistance based on their criminal records may explain recidivism; without resources, many individuals resort to criminal activity as a stopgap.⁵⁸⁸ Similarly, other studies have found that the first offense resulting in conviction for many women is often a low-level drug crime, which women frequently commit because they are forced to rely on men financially to survive.⁵⁸⁹ In a report collecting the stories of incarcerated women, one woman quit her job because of sexual harassment and threats and could not find a job to care for her grandmother and asthmatic son, so eventually resorted to working as a courier for a drug dealer.⁵⁹⁰ After her arrest and conviction, she was sentenced to 20 years in prison.⁵⁹¹ Another woman reported that she resumed criminal activity after her release from prison for a drug offense because she was blocked from receiving public assistance and denied numerous jobs; she was subsequently charged with parole revocation and returned to prison, where she attempted suicide.⁵⁹²

⁵⁸⁴ Emily A. Wang, Gefei A. Zhu, Linda Evans, Amy Carroll-Scott, Rani Desai, Lynn E. Fiellin, “A Pilot Study Examining Food Insecurity and HIV Risk Behaviors Among Individuals Recently Released from Prison,” *AIDS Educ Prev*, vol. 25, no. 2 (2013), at 4,

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3733343/pdf/nihms469405.pdf>; see also Haile, “How the Felony Drug Ban Keeps Thousands of Americans Hungry,” *supra* note 581; Jeremy Haile, “Thousands of Americans Are Hungry Because of This One Law,” *The Nation*, March 23, 2016, <https://www.thenation.com/article/thousands-of-americans-are-hungry-because-of-this-one-law/>.

⁵⁸⁵ Wang et al., “A Pilot Study Examining Food Insecurity and HIV Risk Behaviors Among Individuals Recently Released from Prison,” *supra* note 584 at 5.

⁵⁸⁶ Mauer & McCalmont, *A Lifetime of Punishment: The Impact of the Felony Drug Ban on Welfare Benefits*, *supra* note 550 at 8.

⁵⁸⁷ Tuttle, “Snapping Back: Food Stamps Bans and Criminal Recidivism,” *supra* note 578 at 3, 20, 26. The author studied “the effect of the SNAP ban on probability of financially motivated recidivism and probability of non-financially motivated recidivism” and found that “the effect is completely driven by recidivism for financially motivated crimes.” *Ibid.* at 20. The author defined “financially motivated recidivism” as “a return to prison” for property crimes and drug distribution offenses among formerly incarcerated people. *Ibid.* at 2-3.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ Shimica Gaskins, “Women of Circumstance”—the Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes, 41 *AM. CRIM. L. REV.* 1533, 1533-34 (2004).

⁵⁹⁰ American Civil Liberties Union, “Words From Prison: Drug Policy, Race and Women’s Incarceration,” *supra* note 567.

⁵⁹¹ *Ibid.*

⁵⁹² American Civil Liberties Union, “Words from Prison: The Collateral Consequences of Incarceration,” <https://www.aclu.org/node/23317> (last accessed Feb. 11, 2019).

In states that have opted out of the bans on public benefits, pre-enrollment in benefits before release from prison or jail reduces gaps in coverage and helps secure access to the resources women need to survive upon release.⁵⁹³ The availability of immediate coverage post-release also enables women to participate in employment and training programs and lowers their likelihood of recidivism.⁵⁹⁴

Barriers to Financial Aid for Higher Education

Federal law prohibits a person who was convicted of certain drug offenses “during a period of enrollment for which” the person was receiving federal aid from obtaining federal student grants, loans, or work assistance for higher education.⁵⁹⁵ The duration of ineligibility for financial aid varies depending on whether the person has committed a first, second, or third offense.⁵⁹⁶ For people with drug-related criminal convictions, the obstacles to obtaining a share of the already-scarce supply of financial aid for postsecondary education are significant.

Moreover, the federal restrictions on financial aid for people with drug-related convictions disproportionately impact people of color.⁵⁹⁷ Students of color are not only more likely to be arrested, convicted, and/or incarcerated than white students, they are also more likely to need federal financial aid to attend college.⁵⁹⁸ Combined with income inequality, legal barriers to financial aid can frustrate the ability of people of color to attend college—even as research has repeatedly proven that postsecondary education boosts employment and earnings.⁵⁹⁹

A postsecondary education can be critical to finding a job with a sustainable wage.⁶⁰⁰ Research confirms that people with a college degree are more likely to be employed and earn higher incomes, and are less likely to rely on public assistance programs.⁶⁰¹ Both the Obama and Trump

⁵⁹³ CLASP Statement at 3.

⁵⁹⁴ Ibid.

⁵⁹⁵ 20 U.S.C. § 1091(r)(1).

⁵⁹⁶ 20 U.S.C. § 1091(r)(2).

⁵⁹⁷ See Chapter 1, “Demographics of the Corrections Population,” *supra* notes 96-130.

⁵⁹⁸ Wheelock & Uggen, *Race, Poverty and Punishment: The Impact Of Criminal Sanctions On Racial, Ethnic, and Socioeconomic Inequality*, *supra* note 166 at 21.

⁵⁹⁹ See Chapter 1, “Demographics of the Corrections Population,” *supra* notes 96-130; The College Board, *Trends in College Pricing 2018*, 2018, at 3, <https://trends.collegeboard.org/sites/default/files/2018-trends-in-college-pricing.pdf> (finding that, after adjusting for inflation, in “the public two-year and private nonprofit four-year sectors, published [college tuition] prices are more than twice as high in 2018-19 as they were in 1988-89,” and the “average in-state tuition and fee price in the public four-year sector is about three times as high in inflation-adjusted dollars as it was in 1988-89.”); U.S. Dep’t of Education, *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*, *supra* note 168 at 1.

⁶⁰⁰ U.S. Dep’t of Education, *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*, *supra* note 168 at 1.

⁶⁰¹ Jennifer Ma, Matea Pender, Meredith Welch, *Education Pays 2016: The Benefits of Higher Education for Individuals and Society*, The College Board, 2016, at 3-4, <https://trends.collegeboard.org/sites/default/files/education-pays-2016-full-report.pdf>. Research has also confirmed that the ability to earn a college degree in prison would expand post-release job opportunities for people once they

Administrations have sought to broaden opportunities for incarcerated students while the federal ban on Pell Grants for people in prison remains in place. In 2015, the Obama Administration launched the Second Chance Pell program, which partners colleges and universities with penal institutions to allow eligible incarcerated students to receive Pell Grants and pursue a postsecondary education. The Trump Administration has extended this program and is now determining how to evaluate the results of the program, which reaches 10,000 students across 65 schools.⁶⁰²

Because of the steep cost of higher education in the United States,⁶⁰³ financial aid is often pivotal to a student's ability to attend and complete college.⁶⁰⁴ But as the price of postsecondary tuition has increased,⁶⁰⁵ federal financial aid has generally decreased—thus making a college education even more cost-prohibitive for many prospective students.⁶⁰⁶ For the seventh consecutive year, federal loans per full-time undergraduate student declined in 2017-18.⁶⁰⁷ Persistent income inequality in the United States exacerbates the struggle of lower-income individuals to attain a

are released from prison. See Vera Institute of Justice, *Investing in Futures: Economic and Fiscal Benefits of Postsecondary Education in Prison*, *supra* note 263 at 21, 23, https://storage.googleapis.com/vera-web-assets/downloads/Publications/investing-in-futures-education-in-prison/legacy_downloads/investing-in-futures.pdf. But the federal ban on Pell Grants as financial aid for incarcerated people has restricted this opportunity. See 20 U.S.C. § 1070a(b)(6) (prohibiting “any individual who is incarcerated in any Federal or State penal institution” from receiving a Pell grant). According to the Vera Institute, restoring Pell grant funding for incarcerated individuals “would increase state employment rates of formerly incarcerated workers who participated in a postsecondary program by 4.7 percentage points, or nearly 10 percent.” Vera Institute of Justice, *Investing in Futures: Economic and Fiscal Benefits of Postsecondary Education in Prison* *supra* note 263 at 23. For more discussion of how education programs in the correctional setting could benefit formerly incarcerated individuals, see *supra* notes 257-63.

⁶⁰² See Andrew Kreighbaum, “Building Momentum Behind Prison Education,” *Inside HigherEd*, Aug. 29, 2018 <https://www.insidehighered.com/news/2018/08/29/trump-administrations-renewed-interest-prison-education>; Vera Institute of Justice, *Statement from Vera on U.S. Department of Education's Decision to Renew Second Chance Pell*, February 14, 2019, <https://www.vera.org/newsroom/press-releases/statement-from-vera-on-u-s-department-of-educations-decision-to-renew-second-chance-pell>.

⁶⁰³ See Organization for Economic Cooperation and Development (OECD), *Education at a Glance 2018*, 2018, at 246, 254 (revealing that the United States spends more money on postsecondary education than any other OECD country except Luxembourg, which provides mostly government-subsidized education); see also Amanda Ripley, “Why Is College in America So Expensive? The outrageous price of a U.S. degree is unique in the world,” *Atlantic*, Sept. 11, 2018, <https://www.theatlantic.com/education/archive/2018/09/why-is-college-so-expensive-in-america/569884/>.

⁶⁰⁴ The College Board, *Trends in Student Aid 2018*, 2018, at 7, <https://trends.collegeboard.org/sites/default/files/2018-trends-in-student-aid.pdf> (noting that federal grants “and tax benefits lower the overall price of education for students and families, making the net price of college less than the published price” and “loans do not lower the price, but they do make it possible to spread payments out over time.”); see also Rick Seltzer, “Net Price Keeps Creeping Up,” *Inside HigherEd*, Oct. 25, 2017, <https://www.insidehighered.com/news/2017/10/25/tuition-and-fees-still-rising-faster-aid-college-board-report-shows> (reporting that high tuition costs “drive questions about the affordability of higher education for many families”).

⁶⁰⁵ The College Board, *Trends in College Pricing 2018*, *supra* note 599 at 29.

⁶⁰⁶ The College Board, *Trends in Student Aid 2018*, *supra* note 604 at 10. See also Seltzer, “Net Price Keeps Creeping Up,” *supra* note 604 (pointing out that the “federal share of grant aid topped out at 44 percent in 2010-11 and has since dropped to 32 percent in 2016-17.”).

⁶⁰⁷ The College Board, *Trends in Student Aid 2018*, *supra* note 604 at 10.

college degree; from 1987 to 2017, family income inequality mushroomed as the incomes of higher-earning families grew fastest.⁶⁰⁸ In 2017, the average income for the highest-earning 20 percent of families was more than triple that of the middle 20 percent (\$245,040 versus \$75,840).⁶⁰⁹ By contrast, in 1987, the average income of the top 20 percent of earners was just 2.6 times higher than the middle 20 percent (\$167,390 versus \$64,000).⁶¹⁰ The income gap is particularly pronounced for people of color; in 2017, the median incomes for black and Latino families were 59 percent and 62 percent, respectively, of the median income for white families.⁶¹¹

According to a 2010 study, 66 percent of surveyed postsecondary institutions collected criminal history information from applicants.⁶¹² On its website, the U.S. Department of Education advises college applicants to submit the federal financial aid form regardless of their ineligibility for federal aid due to drug-related convictions, because “most schools and states use [the] information to award nonfederal aid.”⁶¹³

In 2016, the Department of Education issued guidance that advised colleges against using criminal history information for admissions decisions.⁶¹⁴ The department addressed this issue because data indicated that postsecondary institutions solicited information about applicants’ criminal backgrounds to influence their decisions about admissions (not just financial aid).⁶¹⁵ In the guidance, the department recommended best practices for college and university leaders to remove barriers to higher education for people with criminal convictions.⁶¹⁶ These best practices included encouraging colleges and universities to “assess and consider whether use of [criminal history information] furthers institutional goals of creating safe, inclusive, and diverse campus communities.”⁶¹⁷ The department reasoned that because school disciplinary policies disproportionately impact students of color, leading to entanglement with the criminal justice system and saddling such students with criminal records, college admissions policies that consider criminal records may disproportionately impede students’ access to postsecondary education.⁶¹⁸

Moreover, the department cautioned that under Title VI of the Civil Rights Act of 1964, postsecondary institutions must neither intentionally discriminate on the basis of race nor

⁶⁰⁸ The College Board, *Trends in College Pricing 2018*, *supra* note 599 at 29.

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*

⁶¹¹ *Ibid.*

⁶¹² Center for Community Alternatives, *The Use of Criminal History Records in College Admissions Reconsidered*, 2010, *supra* note 167 at 8-9.

⁶¹³ U.S. Dep’t of Education, Office of Federal Student Aid, “Students with criminal convictions have limited eligibility for federal student aid,” <https://studentaid.ed.gov/sa/eligibility/criminal-convictions> (last accessed Dec. 6, 2018).

⁶¹⁴ U.S. Dep’t of Education, *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*, *supra* note 168 at 1-2, 18.

⁶¹⁵ *Ibid.* at 2, 10.

⁶¹⁶ *Ibid.* at 1-2.

⁶¹⁷ *Ibid.* at 18.

⁶¹⁸ *Ibid.* at 1-2, 4-6.

implement facially neutral policies that have a disparate adverse impact on a racial group.⁶¹⁹ The department outlined its three-step process for determining unlawful disparate impact, which includes analyzing whether the policy produces an adverse impact on a racial group, whether the institution can show that the policy is “necessary to meet an important educational goal,” and whether “comparably effective alternative” policies could meet the goal “with less of a discriminatory effect.”⁶²⁰ According to the department, a school’s policy of asking about an applicant’s criminal history could have a disparate impact on applicants of color because of their disproportionate contact with the criminal justice system.⁶²¹ To comply with Title VI and expand opportunities for student of color to attend postsecondary schools, it recommended that school admissions personnel “consider a multistep approach to mitigate barriers to higher education associated with inquiring about [criminal history information] on college applications and conducting background checks.”⁶²² Under such an approach, the department asserted, admissions personnel should base decisions about applicants on various factors, including their academic record and credentials, test scores, references, essays, and personal interviews.⁶²³ The approach mirrors the “individualized assessment” process recommended by the EEOC in hiring people with criminal convictions.⁶²⁴

⁶¹⁹ Ibid. at 14-17. *See also* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

⁶²⁰ U.S. Dep’t of Education, *Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals*, *supra* note 168 at 17.

⁶²¹ Ibid. at 18.

⁶²² Ibid.

⁶²³ Ibid.

⁶²⁴ Ibid. at 21. *See also* EEOC, *2012 Guidance*.

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Chapter 3: Access to Civic Participation

Civic participation is a term describing engagement with the community, governing institutions, and issues of public concern.⁶²⁵ A criminal conviction can lead to collateral consequences that limit an individual's ability to engage in civic participation.⁶²⁶ For instance, a felony conviction can lead to restrictions on an individual's right to vote and serve on a jury, both of which embody the principles of civic participation. This chapter discusses the barriers that a criminal conviction can impose on voting and jury service. Many states restrict the voting rights of people with criminal records, through a practice known as felony disenfranchisement.⁶²⁷ The history of felony disenfranchisement in the United States, and the arguments supporting and opposing it, are explored herein. This chapter also examines the exclusion of persons with criminal convictions from juries and analyzes the perceived benefits and drawbacks of this policy. Finally, this chapter investigates how collateral consequences related to civic participation disproportionately and adversely affect people of color.

Voting

The United States has a long history of denying individuals with criminal records the right to vote.⁶²⁸ Supporters of felony disenfranchisement justify it as a way to gauge the rehabilitation of individuals who have been convicted of crimes, believing such barriers are warranted until a state decides that a formerly incarcerated individual “ha[s] changed [his] behavior and ha[s] shown that

⁶²⁵ See American Psychological Association, “Civic Engagement,” <http://www.apa.org/education/undergrad/civic-engagement.aspx> (last accessed Sept. 29, 2018) (defining civic engagement as “individual and collective actions designed to identify and address issues of public concern. Civic engagement can take many forms, from individual voluntarism to organizational involvement to electoral participation. It can include efforts to directly address an issue, work with others in a community to solve a problem or interact with the institutions of representative democracy.”). See also the National Civic League, “Why Civic Engagement Matters,” <https://www.nationalcivicleague.org/why-civic-engagement-matters/> (last accessed Sept. 29, 2018) (stating that “[w]here there is inclusive civic engagement, in which everyone has a place at the table to define, direct and implement public services and amenities, there is greater civic pride and responsibility, which then lead to sustained community wellbeing.”).

⁶²⁶ A person can engage in civic participation by exercising certain civil rights, such as voting. See Black's Law Dictionary, *Civil Right*, *supra* note 56 (defining a civil right as “[a]ny of the individual rights of personal liberty guaranteed by the Bill of Rights and by the 13th, 14th, 15th, and 19th Amendments, as well as by legislation such as the Voting Rights Act,” especially “the right to vote, the right of due process, and the right of equal protection under the law.”).

⁶²⁷ Jean Chung, *Felony Disenfranchisement: A Primer*, The Sentencing Project, 2018, at 1, <https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/> (describing felony disenfranchisement laws as “laws that disenfranchise citizens convicted of felony offenses,” which “vary by state.”). It is worth noting, however, that some jurisdictions restrict the right to vote based on convictions for certain misdemeanors in addition to felonies. See, e.g., MO. ANN. STAT. § 115.133(2) (prohibiting people convicted of “a felony or misdemeanor connected with the right of suffrage” from voting). Therefore, this report may generally describe felony disenfranchisement as a restriction applicable to people with criminal records (interchangeably with the term “felony disenfranchisement”).

⁶²⁸ Brian Pinaire, Milton Heumann, Laura Bilotta, *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 FORDHAM URB. L.J. 1519, 1524 (2002).

[he] can be trusted to once again exercise all of the rights of full citizenship.”⁶²⁹ In medieval Europe, governments condemned people who committed certain crimes to a “civil death,” which entailed banishment from the community and “the deprivation of all rights, confiscation of property, exposure to injury and even to death.”⁶³⁰ Individuals deemed offenders were stripped of the right to participate in the political process.⁶³¹ During the U.S. colonial period, some states added restrictive disenfranchisement provisions to their constitutions; but most state constitutions expressly empowered their legislatures to enact laws that disenfranchised people who had committed specific offenses.⁶³²

During the Jim Crow era, states broadened these laws to apply to individuals convicted of all felonies, often citing a desire to “preserve the [racial] purity of the ballot box.”⁶³³ This section discusses the current landscape of relevant state laws, and arguments for and against felony disenfranchisement, including those that arose from the Commission’s 2018 independent investigation: *An Assessment of Minority Voting Rights Access in the United States*.⁶³⁴ It also evaluates the racial history and ongoing racial disparities of these policies, as well as legal challenges and campaigns to restore voting rights.

The Current Landscape of State Felony Disenfranchisement Laws

At least 6 million Americans cannot vote because of a felony conviction.⁶³⁵ Forty-eight states and the District of Columbia prohibit people who are currently incarcerated with felony convictions

⁶²⁹ Hans von Spakovsky, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 3 [hereinafter von Spakovsky Statement].

⁶³⁰ Jamie Fellner & Marc Mauer, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, Human Rights Watch and The Sentencing Project, 1998, at 2 (quoting Howard Itzkowitz and Lauren Oldak, Note, *Restoring the Ex-Offender’s Right to Vote: Background and Developments*, 11 AM. CRIM. L.R. 721, 722 (1973)), <http://www.sentencingproject.org/wp-content/uploads/2016/01/Losing-the-Vote-The-Impact-of-Felony-Disenfranchisement-Laws-in-the-United-States.pdf>. See also Harry David Saunders, *Civil Death—A New Look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988, 990 (1970).

⁶³¹ George P. Fletcher, *Disenfranchisement As Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1899 (1999).

⁶³² Behrens et al., “Ballot Manipulation and the ‘Menace of Negro Domination’: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002,” *supra* note 67 at 563.

⁶³³ *Ibid.* (quoting *Washington v. State*, 75 Ala. 582, 585 (1884)). See “Arguments for and Against Felony Disenfranchisement,” *infra* notes 675-729 for further discussion of arguments for and against felony disenfranchisement.

⁶³⁴ U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States*, 2018, at 106, https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf [hereinafter USCCR, Minority Voting Rights Access].

⁶³⁵ Christopher Uggen, Ryan Larson, and Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016*, The Sentencing Project, Oct. 6, 2016, <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/> at 3.

from voting.⁶³⁶ The only two states that allow currently incarcerated people to vote are Maine and Vermont.⁶³⁷

Disenfranchisement laws generally fall into four categories applicable to people with felony convictions: (1) currently incarcerated individuals convicted of felonies; (2) formerly incarcerated individuals with felony convictions released on parole; (3) individuals with felony convictions who are serving probation instead of incarceration; and (4) formerly incarcerated individuals who have served their sentence and no longer have contact with the criminal justice system.⁶³⁸

As of 2018, in 14 states and the District of Columbia, people with felony convictions regain their voting rights immediately after release.⁶³⁹ In 22 states, people with felony convictions lose their voting rights until the full completion of their sentence, which includes parole and/or probation.⁶⁴⁰ In 12 states, people with felony convictions lose their voting rights indefinitely or until pardoned by the governor, or until an extra waiting period has passed or additional action has occurred⁶⁴¹ (which may include parole or probation) before regaining their voting rights.⁶⁴² Those states are Alabama, Arizona, Delaware, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, Wisconsin,⁶⁴³ and Wyoming.⁶⁴⁴

⁶³⁶ National Conference of State Legislatures, “Felon Voting Rights,” *supra* note 187; *see also* Marc Mauer, Written Statement for the *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities* Briefing before the U.S. Commission on Civil Rights, May 19, 2017, at 1 [*hereinafter* Mauer Statement].

⁶³⁷ *Id.* *See also* Maine Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Maine*, 2018, at 16, <https://www.usccr.gov/pubs/2018/06-29-ME-Voting-Rights.pdf> (concluding that by allowing incarcerated individuals to vote, “Maine recognizes that there is no government interest served by felon disenfranchisement—much less a compelling one.”).

⁶³⁸ Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, SYMPOSIUM, U.S. ELECTIONS, vol. 2, no. 3 (2004), at 494, http://users.soc.umn.edu/~uggen/Manza_Uggen_POP_04.pdf.

⁶³⁹ National Conference of State Legislatures, “Felon Voting Rights,” *supra* note 187.

⁶⁴⁰ *Ibid.*

⁶⁴¹ Additional action could include formal action undertaken by other state actors, such as the Dep’t of Corrections. *See infra* note 643.

⁶⁴² National Conference of State Legislatures, “Felon Voting Rights,” *supra* note 187.

⁶⁴³ Under Wisconsin law, a person with a felony conviction regains the right to vote after incarceration or probation, but the state’s Dep’t of Corrections or “jailer” (for county jails) must “inform the person in writing at the time his or her right to vote is restored.” *See* WIS. STAT. ANN. § 304.078(3). Because this notification is required, it constitutes additional action for the purposes of regaining the right to vote. *Id.*

⁶⁴⁴ National Conference of State Legislatures, “Felon Voting Rights,” *supra* note 187.

Table 1: Restoration of Voting Rights After Felony Convictions

Right to Vote Upheld During Incarceration	Lost Only While Incarcerated Automatic Registration After Release	Lost Until Completion of Sentence Parole and/or Probation Automatic Restoration After	Lost Until Completion of Sentence In Some States a Post-Sentencing Waiting Period Additional Action Required for Restoration
Maine	District of Columbia	Alaska	Alabama
Vermont	Hawaii	Arkansas	Arizona
	Illinois	California (note: individuals may vote while incarcerated in county jails, but not in state or federal prisons)	Delaware
	Indiana	Colorado	Iowa
	Maryland	Connecticut	Kentucky
	Massachusetts	Florida (for most felony convictions)	Mississippi
	Michigan	Georgia	Nebraska
	Montana	Idaho	Nevada
	New Hampshire	Kansas	Tennessee
	North Dakota	Louisiana	Virginia
	Ohio	Minnesota	Wisconsin
	Oregon	Missouri	Wyoming
	Pennsylvania	New Jersey	
	Rhode Island	New Mexico	
	Utah	New York	
		North Carolina	
		Oklahoma	
		South Carolina	
		South Dakota	
		Texas	
		Washington	
		West Virginia	

Sources: National Conference of State Legislatures, *Felon Voting Rights*, November 2018.

The Sentencing Project issued a report that estimated the scope and distribution of felony disenfranchisement in the U.S.⁶⁴⁵ This report highlighted that, as of 2016:

- More than 50 percent of the total disenfranchised population (about 3.1 million people) were people who had already completed their sentences (including parole and/or probation).⁶⁴⁶
- Florida accounted for about 27 percent of the total U.S. disenfranchised population; the state also accounted for 48 percent of the individuals disenfranchised post-sentence (nearly half of the national total).⁶⁴⁷
- One in 13 (7.4%) African Americans of voting age was disenfranchised, which is 4 times greater than the rate of disenfranchisement of non-African Americans (1.8%).⁶⁴⁸
- In 1980, only nine states disenfranchised more than 5 percent of their African-American adult population; today, 23 states do so.⁶⁴⁹

Data on felony disenfranchisement of Latino people are scarce due to insufficient data collection,⁶⁵⁰ but research confirms that the incarceration rate of Latino people is growing.⁶⁵¹ From 2015 to 2016, the number of Latino prisoners sentenced to more than one year in prison increased by about 2 percent.⁶⁵² Moreover, despite representing about 18 percent of the total U.S. population, close to one third (32.2%) of people confined in federal prisons are Latino.⁶⁵³ A 2003 report found that felony disenfranchisement laws in 10 states blocked approximately half a million Latino

⁶⁴⁵ Uggen, *6 Million Lost Voters*, *supra* note 635 at 3.

⁶⁴⁶ *Ibid.* at 3.

⁶⁴⁷ *Ibid.* In November 2018, Florida voters approved a state constitutional amendment restoring voting rights to people with certain felony convictions upon full completion of their sentence (including probation and parole). *See* Fla. Division of Elections, “Constitutional Amendments,” <https://dos.myflorida.com/elections/laws-rules/constitutional-amendments/> (last accessed Dec. 7, 2018); Fla. Division of Elections, “Voting Restoration Amendment 14-01,” <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/64388-1.pdf> (last accessed Feb. 20, 2019); Fla. Division of Elections, Constitutional Amendment Petition Form, “Voting Restoration Amendment,” <https://dos.elections.myflorida.com/initiatives/fulltext/pdf/64388-1.pdf> (containing full text of the amendment). *See also* “The Restoration of Voting Rights,” *infra* notes 805-889, for a full discussion of the Florida initiative and related reform efforts.

⁶⁴⁸ Uggen, *6 Million Lost Voters*, *supra* note 635 at 3.

⁶⁴⁹ *Ibid.* at 11.

⁶⁵⁰ *See* Urban Institute, *The Alarming Lack of Data on Latinos in the Criminal Justice System*, 2016, <http://apps.urban.org/features/latino-criminal-justice-data/?language=english> (finding that Alaska was the only state that “consistently included data on Latinos in regularly and recently released reports on arrests and prison, probation, and parole population.”).

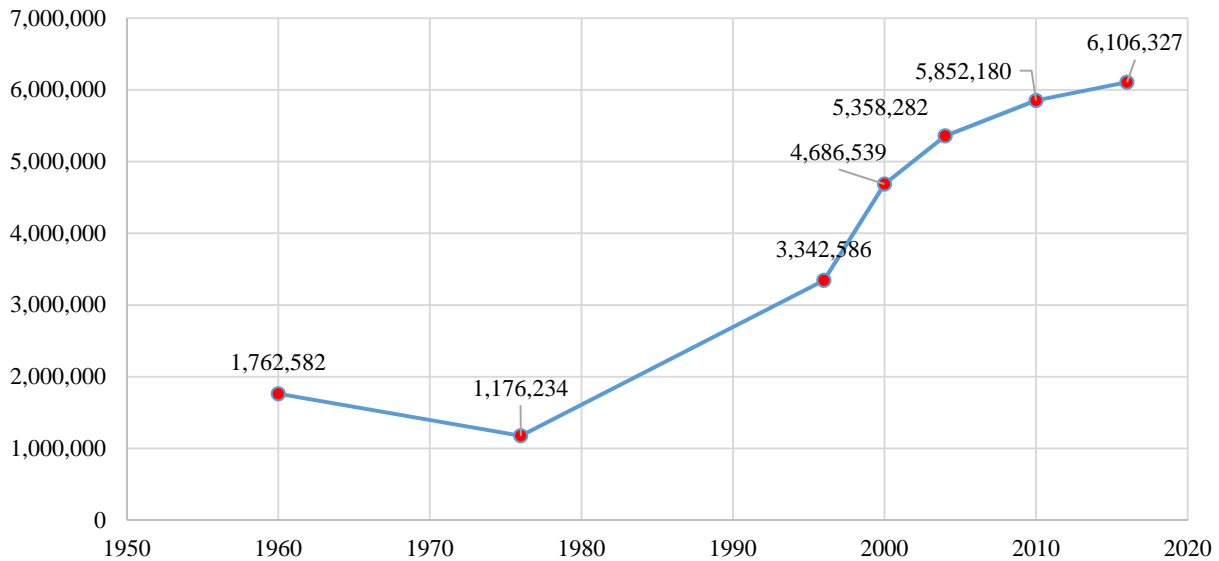
⁶⁵¹ E. Ann Carson, *Prisoners in 2016*, *supra* note 1 at 5.

⁶⁵² *Ibid.*

⁶⁵³ U.S. Census Bureau, “Quick Facts: Population Estimates,” July 1, 2017, <https://www.census.gov/quickfacts/fact/table/US/PST045217> (listing 18.1 percent of the U.S. population as “Hispanic or Latino” as of July 1, 2018); U.S. Federal Bureau of Prisons, “Inmate Ethnicity,” *supra* note 113 (displaying graph showing that 32.2 percent of federal inmates are “Hispanic.”).

people from voting.⁶⁵⁴ These data suggest that felony disenfranchisement impacts Latino people at an increasingly disproportionate rate.⁶⁵⁵

Figure 7: Number Disenfranchised for Selected Years, 1960-2016



Source: Reproduced from “6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement,” The Sentencing Project, 2016, at 9.

Figure 7 shows the number of disenfranchised individuals from 1960 through 2016.⁶⁵⁶ While the number of disenfranchised individuals declined from 1960 to 1976, the number rose steadily from 1976 through 2016, increasing sharply from 1996-2000.⁶⁵⁷ As the number of people under correctional supervision has ballooned, so too has the number of people who cannot vote. The disenfranchised population nearly doubled from 1996-2016, with the population increasing from 3.3 million to 6.1 million disenfranchised individuals.⁶⁵⁸

⁶⁵⁴ Mexican American Legal Defense and Educational Fund (MALDEF), *Diminished Voting Power in the Latino Community: The Impact of Felony Disenfranchisement Laws in Ten Targeted States*, 2003, at iii, <https://maldef.org/assets/pdf/feb18-latinovotingrightsreport.pdf>. In the report, MALDEF cited the difficulties of studying the impact of felony disenfranchisement on Latinos because of inadequate data collection concerning the Latino population. *Ibid.* at 2. In choosing the 10 states to study, MALDEF considered the following factors: “The total number of Latinos in a state; The percentage of Latinos in each state’s total population; The total number and percentage of Latino population growth in a state between the 1990 and 2000 Decennial Census; The level of restriction of a state’s felony disenfranchisement laws and its voting rights laws; The total prison population; and A regional diversity of states.” *Ibid.* at 3.

⁶⁵⁵ *Ibid.*; see also Wayne Taliaferro, Duy Pham, Anna Cielinski, *From Incarceration to Reentry, A Look at Trends, Gaps, and Opportunities in Correctional Education and Training*, Center for Law and Social Policy, 2016, at 4, https://www.clasp.org/sites/default/files/public/resources-and-publications/publication-1/2016.10.27_fromincarcerationtoreentry.pdf (citing the “disproportionately high rate of incarceration among Black and Latino men”).

⁶⁵⁶ Uggen, *6 Million Lost Voters*, *supra* note 635 at 9.

⁶⁵⁷ *Ibid.*

⁶⁵⁸ *Ibid.* Note that the growth rate of the total U.S. population is substantially lower than the growth rate of the disenfranchised population, and has even decreased, during relatively the same period. See Worldometers,

As previously mentioned, state laws vary significantly in terms of when (if ever) voting rights may be restored.⁶⁵⁹ Automatic restoration after release from prison occurs in the District of Columbia and 14 states: Hawaii, Illinois, Indiana, Maryland, Massachusetts, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, and Utah.⁶⁶⁰ Restoration after release from prison, parole, and/or probation occurs in 22 states: Alaska, Arkansas, California, Colorado, Connecticut, Florida (for most felony convictions), Georgia, Idaho, Kansas, Louisiana, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Oklahoma, South Carolina, South Dakota, Texas, Washington, and West Virginia.⁶⁶¹

Alabama, Arizona, Delaware, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, Wisconsin, and Wyoming impose restrictions post-sentence, and the restrictions sometimes depend on the nature of the conviction, the number of convictions, the time elapsed since the conviction, or an individualized assessment of the conviction and subsequent rehabilitation.⁶⁶² For example, Arizona permanently disenfranchises people with two or more felony convictions unless a judge restores their civil rights.⁶⁶³ Nevada permanently disenfranchises people convicted of a category A felony, a category B felony “involving the use of force or violence that resulted in substantial bodily harm,” or two or more separate felonies, unless a court restores their civil rights.⁶⁶⁴ Nebraska requires people with felony convictions to wait two years after probation to regain their voting rights.⁶⁶⁵ Delaware permanently disenfranchises people convicted of certain felonies (murder, bribery, and sexual offenses), but restores the voting rights of people convicted of other felonies upon completion of their sentence or a pardon from the governor.⁶⁶⁶ Similarly, Mississippi permanently disenfranchises people convicted of “murder,

“Population of the United States (2018 and historical),” Dep’t of Economic and Social Affairs, Population Division, <http://www.worldometers.info/world-population/us-population/> (showing that the U.S. population growth rate was 1.02% in 1995 and 0.70% in 2016) (last accessed Dec. 12, 2018).

⁶⁵⁹ See *supra* notes 635-69. See also *infra* notes 670-74, 724-29, and 838-50 for discussion of reports published by the Commission’s state advisory committees (SACs) that address felony disenfranchisement.

⁶⁶⁰ National Conference of State Legislatures, “Felon Voting Rights,” *supra* note 187.

⁶⁶¹ *Ibid.* California is one of these 22 states, but the state does allow people convicted of a felony and incarcerated in jail (but not prison) to vote. See CAL. ELEC. CODE §§ 2101, 2212. In Florida, voters approved a constitutional amendment to restore voting rights to people convicted of felonies, other than murder or sexual offenses, upon completion of their sentence. See Fla. Division of Elections, “Voting Restoration Amendment 14-01,” Constitutional Amendment Petition Form, *supra* note 647. See also “The Restoration of Voting Rights,” *infra* notes 805-889, for a full discussion of the Florida initiative and related reform efforts.

⁶⁶² National Conference of State Legislatures, “Felon Voting Rights,” *supra* note 187.

⁶⁶³ ARIZ. REV. STAT. ANN. § 13-905.

⁶⁶⁴ NEV. REV. STAT. ANN. § 213.157. On Jan. 1, 2019, Nevada implemented a new law that allows the automatic restoration of voting rights for individuals who were convicted of a felony and served their entire sentence, except under the circumstances specified in the above text and in the statute. *Id.* See also Michelle Price, “New Nevada laws lift tampon tax, restore some voting rights,” *Reno Gazette Journal*, Jan. 1, 2019, <https://www.rgj.com/story/news/2019/01/01/new-nevada-laws-lift-tampon-tax-restore-some-voting-rights/2458952002/>.

⁶⁶⁵ NEB. REV. STAT. ANN. § 29-2264. See also Uggem, *6 Million Lost Voters*, *supra* note 635 at 14; National Conference of State Legislatures, “Felon Voting Rights,” *supra* note 187.

⁶⁶⁶ DEL. CONST. art. 5, § 2.

rape, bribery, theft, arson, obtaining money or goods under false pretense, perjury, forgery, embezzlement or bigamy” unless they are pardoned by the governor or obtain approval from two-thirds of the state legislature.⁶⁶⁷ In Alabama, people convicted of a crime of “moral turpitude” are permanently disenfranchised but may petition for restoration of their rights.⁶⁶⁸ Until 2017, Alabama had not defined crimes of moral turpitude, but its statute now specifies that murder, rape, kidnapping, forgery, and certain other offenses belong in that category.⁶⁶⁹

Several of the Commission’s state advisory committees (SACs) have reported on felony disenfranchisement laws in their respective states.⁶⁷⁰ During the Alabama SAC’s hearing on the topic, panelists commended Alabama for its relative transparency about moral turpitude offenses, but questioned its rationale for including some nonviolent offenses as moral turpitude crimes—such as forgery, theft of property, and theft of lost property—while excluding many “white-collar” offenses.⁶⁷¹ The Alabama SAC also heard testimony about the state’s complicated process for voting rights restoration, which first requires a pardon from the State Board of Pardons and Parole and then the submission of a Certificate of Eligibility to Register to Vote to the county board of registers.⁶⁷² According to panelists, the state does not notify people awaiting release from prison about how to petition for a pardon or register to vote, leaving the task to “nonprofit entities without the same resources.”⁶⁷³ The cumbersome process of registering to vote and lack of assistance from states to individuals upon reentry were also flagged as critical issues during the Arizona, Illinois,

⁶⁶⁷ MISS. CONST. art. 12, § 241; MISS. CONST. art. 12, § 253; MISS. CODE ANN. § 47-7-41.

⁶⁶⁸ ALA. CONST. art. VIII, § 177.

⁶⁶⁹ ALA. CODE § 17-3-30.1. See also Samantha Michaels, “Alabama’s Republican Governor Just Helped Thousands of Felons Get Their Voting Rights Back,” *Mother Jones*, May 25, 2017, <https://www.motherjones.com/politics/2017/05/alabama-governor-signs-law-could-restore-voting-rights-thousands-people/>.

⁶⁷⁰ See Ala. Advisory Committee to the U.S. Commission on Civil Rights, *Access to Voting in Alabama*, 2018, at 16-21, <https://www.usccr.gov/pubs/2018/08-08-AL-Voting-Access.pdf>; Ariz. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Arizona*, 2018, at 8-11, <https://www.usccr.gov/pubs/2018/07-25-AZ-Voting-Rights.pdf>; Fla. Advisory Committee to the U.S. Commission on Civil Rights, *Rules of Executive Clemency Should Allow Level 1 Offenders to Have Their Civil Rights Automatically Restored Upon Completion of Their Sentences*, 2014, https://www.usccr.gov/pubs/docs/FL_SAC_Ex-Felon-Report.pdf; Ill. Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and Voting in Illinois*, 2018, at 11-12, 20-30, 56, <https://www.usccr.gov/pubs/2018/IL-Voting-Rights.pdf>; Ky. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Kentucky*, 2009, <https://www.usccr.gov/pubs/docs/KYVotingRightsReport.pdf>; La. Advisory Committee to the U.S. Commission on Civil Rights, *Barriers to Voting in Louisiana*, 2018, at 22-24, <https://www.usccr.gov/pubs/2018/08-20-LA-Voting-Barriers.pdf>; Me. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Maine*, *supra* note 630, at 12-13, 16; Ohio Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Ohio*, 2018, at 4, 16, <https://www.usccr.gov/pubs/2018/06-27-OH-Voting-Rights.pdf>; Tenn. Advisory Committee to the U.S. Commission on Civil Rights, *The Right to Vote and Ex-Felon Disenfranchisement in Tennessee*, 2014, https://www.usccr.gov/pubs/docs/TN_SAC_Ex-Felon-Report.pdf.

⁶⁷¹ Ala. Advisory Committee to the U.S. Commission on Civil Rights, *Access to Voting in Alabama*, *supra* note 670 at 18 (testimony of Johnathan Barry-Blocker, Southern Poverty Law Center); ALA. CODE § 17-3-30.1(c).

⁶⁷² See ALA. CODE § 17-3-31; Ala. Advisory Committee to the U.S. Commission on Civil Rights, *Access to Voting in Alabama*, *supra* note 670 at 17-18 (testimony of Brock Boone, American Civil Liberties Union, and Kareem Crayton, Southern Coalition for Social Justice).

⁶⁷³ Ala. Advisory Committee to the U.S. Commission on Civil Rights, *Access to Voting in Alabama*, *supra* note 670 at 17 (testimony of Brock Boone, American Civil Liberties Union).

Ohio, and Tennessee SAC hearings.⁶⁷⁴ For more discussion about the SAC reports and voting rights restoration in various states, see “The Restoration of Voting Rights,” below.

Arguments For and Against Felony Disenfranchisement

A common argument favoring felony disenfranchisement is grounded in the belief that committing a felony violates a social contract, and this violation threatens the order and well-being of the political community.⁶⁷⁵ According to this reasoning, the logical response is to deny the violator the right to participate in politics and governance.⁶⁷⁶ Another theory embraces the importance of moral character and virtue to the political community, and postulates that any person who commits a felony demonstrates poor moral judgment and an inability to adhere to the moral code of a “civic republic.”⁶⁷⁷ Some policymakers believe that if an individual has disregarded the law, that individual should not be entitled to provide input on public policy.⁶⁷⁸ Moreover, they believe that an individual’s “impurity” will lead him to “cast [his] votes in a corrupt manner.”⁶⁷⁹ This argument dovetails with the justification for why individuals with criminal records cannot hold public office, in that such individuals are perceived to be more susceptible to corruption.⁶⁸⁰ Similarly, some contend that people convicted of felonies are more prone to committing voter fraud and should therefore be barred from the electoral system.⁶⁸¹ It is worth noting that scholars studying this issue have identified no data to support this argument.⁶⁸² In reviewing voter fraud committed by persons

⁶⁷⁴ See Ariz. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Arizona*, *supra* note 670 at 9; Ill. Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and Voting in Illinois*, *supra* note 670 at 27-30; Ohio Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Ohio*, *supra* note 670 at 4, 16.

⁶⁷⁵ Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, *supra* note 628 at 1525; see also John Locke, *Two Treatises of Government*, 269-78 (Peter Laslett ed., Cambridge Univ. Press 1998) (1690).

⁶⁷⁶ Pinaire et al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, *supra* note 628 at 1526.

⁶⁷⁷ *Id.* at 1525-26.

⁶⁷⁸ Campagna et al., “Restrictions on the Citizenship Rights of Felons: Barriers to Successful Reintegration,” *supra* note 8 at 24.

⁶⁷⁹ *Id.* (citing Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259, 312 (2004)).

⁶⁸⁰ *Id.* at 24.

⁶⁸¹ *Id.*

⁶⁸² *Id.* (citing Tanya Dugree-Pearson, *Disenfranchisement-A Race Neutral Punishment for Felony Offenders or A Way to Diminish the Minority Vote?*, 23 HAMLINE J. PUB. L. & POL’Y 359, 371-72 (2002)) (reporting a lack of evidence “showing that a convicted felon is more likely to commit voter fraud or vote for unpopular political changes than the average American citizen.”); see also Justin Levitt, *The Truth about Voter Fraud*, Brennan Center for Justice, 2007, at 16-17,

<https://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf> (stating that “only a handful” of cases existed where individuals with felony convictions voted despite knowing that they were ineligible and therefore not permitted to do so); Human Rights Watch and The Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, Part V, 1998, http://pantheon.hrw.org/legacy/reports98/vote/usvot98o-03.htm#P108_2608 (stating that “there is no evidence that ex-felons are more likely to commit voter fraud than anyone else.”). Thus far, researchers have found relatively few instances of voting fraud even among the general population (not just people with felony convictions). See, e.g.,

with felony convictions, the Commission recently found that, “when voter fraud occurs, it is often aggressively prosecuted, even if the person was mistaken that the person had the right to vote and did not intend to vote illegally.”⁶⁸³ The Commission found this type of voter fraud (and voter fraud overall) to be exceedingly rare.⁶⁸⁴ Federal courts have supported the rights of states to impose some restrictions on the right to vote based upon felony convictions.⁶⁸⁵

By contrast, many scholars point out the unique importance of the right to vote and argue that denying this right to even a “subset of the population” jeopardizes democracy for the entire population.⁶⁸⁶ Dating back to the nineteenth century, the Supreme Court has recognized the right to vote as “a fundamental political right, because preservative of all rights.”⁶⁸⁷ The Court has reaffirmed this principle by declaring that the right to vote is “the essence of a democratic society,

John S. Ahlquist, Kenneth R. Mayer, Simon Jackman, “Alien Abduction and Voter Impersonation in the 2012 U.S. General Election: Evidence from a Survey List Experiment,” *Election Law Journal: Rules, Politics, and Policy*, vol. 13, no. 4 (2014), <https://www.liebertpub.com/doi/10.1089/elj.2013.0231> (reporting the results of “a survey list experiment fielded immediately after the 2012 U.S. general election” and finding “no evidence of widespread voter impersonation, even in the states most contested in the presidential or statewide campaigns.”); Ray Christensen and Thomas J. Schultz, “Identifying Election Fraud Using Orphan and Low Propensity Voters,” *American Politics Research*, vol. 42, issue. 2 (2014), <http://journals.sagepub.com/doi/10.1177/1532673X13498411> (testing a method “in multiple jurisdictions” measuring “actual instances of fraud rather than waiting for conclusive proof of fraud produced in a criminal prosecution” and finding only two election fraud violations).

⁶⁸³ U.S. Commission on Civil Rights, *Minority Voting Rights Access*, *supra* note 634 at 106 (citing Michael Wines, “Illegal Voting Gets Woman 8 Years in Prison, and Almost Certain Deportation,” *New York Times*, Feb. 10, 2017, <https://www.nytimes.com/2017/02/10/us/illegal-voting-gets-texas-woman-8-years-in-prison-and-certain-deportation.html>); see also BBC News, “Texas woman jailed for five years for accidental voter fraud,” March 30, 2018, <http://www.bbc.com/news/world-us-canada-43597908?SThisFB> (discussing the conviction and sentencing of a woman with a felony conviction who voted while on probation in Texas).

⁶⁸⁴ U.S. Commission on Civil Rights, *Minority Voting Rights Access*, *supra* note 634 at 103 (“In a 10-year independent study by News21 commissioned by the Knight Foundation (“News21 Study”), researchers examined public news and court records of all allegations of voter fraud in all 50 states. Researchers found that there were 2,068 cases of alleged fraud from 2000-2010, but only 10 cases of allegations of in-person voter fraud (approximately one case per every 15 million eligible voters).”)

⁶⁸⁵ See *Johnson v. Governor of State of Fla.*, F.3d 1214, 1228 (11th Cir. 2005); *Farrakhan v. Gregoire*, 623 F.3d 990, 993-94 (9th Cir. 2010); *Simmons v. Galvin*, 575 F.3d 24, 42 (1st Cir. 2009). For a full discussion of legal challenges and case law pertaining to felony disenfranchisement, see “Legal Challenges,” *infra* notes 754-97.

⁶⁸⁶ Campagna et al., “Restrictions on the Citizenship Rights of Felons: Barriers to Successful Reintegration,” *supra* note 8 at 22.

⁶⁸⁷ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see also *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (including the right to vote as one of the “fundamental rights and liberties...asserted under the Equal Protection Clause”). But see *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (rejecting the standard of review applied to fundamental rights by stating “[e]lection laws will invariably impose some burden upon individual voters” and “to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest...would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 210 (2008) (arguing that the Court has “avoided preset levels of scrutiny [applied to a voting restriction] in favor of a sliding-scale balancing analysis: the scrutiny varies with the effect of the regulation at issue.”); Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL’Y 143, 152 (2008) (pointing out that “the Court has not always used a fundamental rights approach when considering a state election regulation that distinguishes eligible voters from non-eligible voters”), <https://www.lawschool.cornell.edu/research/JLPP/upload/Douglas.pdf>.

and any restrictions on that right strike at the heart of representative government.”⁶⁸⁸ According to the Court:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.⁶⁸⁹

Critics of felony disenfranchisement believe that it is an unnecessary abridgment. They cite the Court’s proclamations to assert that classifying people with felony convictions as undeserving of the right to vote does not enable democracy to thrive—on the contrary, it subverts the democratic process and flies in the face of democratic ideals.⁶⁹⁰

Another argument against felony disenfranchisement contends that stripping the right to vote from a person with a criminal record can hinder that person’s successful reintegration into society.⁶⁹¹ According to this reasoning, even if incarceration achieved its goal of rehabilitating the alleged criminal (a topic beyond the scope of this report), the continuing disenfranchisement of people post-sentence solidifies their status as ostracized individuals incapable of fully assimilating into society.⁶⁹² The authors of one study make the powerful claim that “the act of voting manifests the desire to participate as a law-abiding stakeholder in a larger society.”⁶⁹³ According to Linda Steele,

⁶⁸⁸ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

⁶⁸⁹ *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

⁶⁹⁰ Campagna et al. “Restrictions on the Citizenship Rights of Felons: Barriers to Successful Reintegration,” *supra* note 8 at 24 (citing *Reynolds*, 377 U.S. at 555 (the right to vote is “the essence of a democratic society”) and *Wesberry*, 376 U.S. at 17-18 (other rights “are illusory if undermined”) to argue that when the right to vote “is denied to a subset of the population, the definition of democracy becomes inconsistent with the practice of democracy.”); see also Anthony Gray, *Securing Felons’ Voting Rights in America*, 16 BERKELEY J. AFR.-AM. L. & POL’Y 3, 31 (2014) (arguing that the United States should “strike down prisoner disenfranchisement laws as being contrary to representative democracy”); Courtney Artzner, *Check Marks the Spot: Evaluating the Fundamental Right to Vote and Felon Disenfranchisement in the United States and Canada*, 13 SW. J. L. & TRADE AM. 423, 428 (2007) (“The principle underlying the extension of the right to vote in the United States is that every citizen is to remain politically equal. Prisoner disenfranchisement laws operate very differently from this general trend by revoking recognition of a prisoner’s political equality, resulting in their exclusion from the political community.”). Critics of felony disenfranchisement frequently cite *Reynolds* and *Wesberry* to support their argument that the voting right is fundamental and cannot be denied to a portion of otherwise eligible voters. See also *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (contending that “[r]estrictions on access to the ballot burden” the “distinct and fundamental” right to vote) (internal citations omitted) (emphasis added); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (asserting that “[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”).

⁶⁹¹ Campagna et al., “Restrictions on the Citizenship Rights of Felons: Barriers to Successful Reintegration,” *supra* note 8 at 22.

⁶⁹² Note, *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and “The Purity of the Ballot Box,”* 102 HARV. L. REV. 1300, 1314-17 (1989).

⁶⁹³ *Id.*

who lost her right to vote due to a felony conviction and later regained it and voted for the first time in November 2008:

There were tears in my eyes as I waited to vote. I felt like I was finally a productive member of society . . . I walked out of the polling place felling like I mattered, that I had made a difference. I realized how far I've come.⁶⁹⁴

Some advocates of criminal justice reform have pointed to high recidivism rates as evidence that the government must support initiatives that destigmatize and ease the reentry of formerly incarcerated people into the community.⁶⁹⁵ This proposal has garnered bipartisan support.⁶⁹⁶ Within the context of voting rights, opponents of felony disenfranchisement assert that protecting the franchise for the formerly incarcerated will foster their reintegration, thereby lowering recidivism rates and improving public safety in the general community.⁶⁹⁷

One study explored the relationship between felony disenfranchisement and recidivism using data from the Department of Justice's Bureau of Justice Statistics.⁶⁹⁸ The authors found that individuals in states with permanent felony disenfranchisement laws were about 10 percent more likely to recidivate than those in states that restore voting rights post-release.⁶⁹⁹ The authors acknowledged that they did not identify a direct causal link, but recommended further investigation of this relationship.⁷⁰⁰ In another study, researchers pointed out this lack of causal connection, finding that although political participation through voting correlated with reduced criminality, such participation did not necessarily decrease criminal behavior.⁷⁰¹

⁶⁹⁴ Erika Wood & Liz Budnitz, *Jim Crow in New York*, Brennan Center for Justice, 2010, at 14.

https://www.brennancenter.org/sites/default/files/legacy/publications/JIMCROWNY_2010.pdf.

⁶⁹⁵ See, e.g., Mark Holden & Ryan Norris, "What Opponents Get Wrong About Criminal Justice Reform," *The Hill*, Aug. 22, 2018, <http://thehill.com/blogs/congress-blog/judicial/403105-what-opponents-get-wrong-about-criminal-justice-reform>.

⁶⁹⁶ See *ibid.* (the authors represent Koch Industries and Americans for Prosperity, respectively, two traditionally conservative organizations); see also American Civil Liberties Union, Lawyers Committee for Civil Rights Under Law, Leadership Conference, NAACP Legal Defense Fund, Sentencing Project, *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, 2013, at 3, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15128_E.pdf (where the authors state that "[f]elony disenfranchisement operates contrary to the goals of ensuring public safety and reducing reoffending by alienating from society those individuals that the criminal justice system is simultaneously attempting to reintegrate.").

⁶⁹⁷ Guy Padraic Hamilton-Smith & Matt Vogel, *The Violence of Voicelessness: The Impact of Felony Disenfranchisement on Recidivism*, 22 BERKELEY LA RAZA L.J. 407, 413-14 (2012).

⁶⁹⁸ *Id.* at 408.

⁶⁹⁹ *Id.* at 427. The authors controlled for individual characteristics and state unemployment, noting that "the crime rate varies with the unemployment rate, and so recidivism can be expected to be higher in states with higher unemployment."

⁷⁰⁰ *Id.* at 429.

⁷⁰¹ Alan S. Gerber, Gregory A. Huber, Daniel R. Biggers, David J. Hendry, "Can Political Participation Prevent Crime? Results from a Field Experiment About Citizenship, Participation, and Criminality," *Political Behavior*, vol. 39, no. 4, 909-34 (2017), <https://link.springer.com/article/10.1007/s11109-016-9385-1>.

Finally, a common argument against felony disenfranchisement stems from the starkly disproportionate effects of these laws on people of color, particularly black men, whose voting rights have historically been imperiled if not denied.⁷⁰² The Commission explores this argument further in the next subsection, “The Racial Origins of Disenfranchisement Laws and Ongoing Disparities.”⁷⁰³

This argument relates to another criticism of felony disenfranchisement, which focuses on how these laws affect civic participation overall, especially in communities of color.⁷⁰⁴ Since voting can be a communal activity, one that individuals often discuss or practice with friends and family, scholars argue that any limits imposed on that activity may cause a ripple effect.⁷⁰⁵ In other words, by disenfranchising a significant portion of the community, these laws discourage civic engagement and create a “culture of political nonparticipation” within that community.⁷⁰⁶

As advocates of reform have observed, felony disenfranchisement may compound the inequities and socioeconomic disadvantages already facing communities of color on a daily basis:

Felony disenfranchisement affects more than individual voters themselves—it diminishes the voting strength of entire communities of color, which are too often already plagued with concentrated poverty, substandard housing, limited access to healthcare services, failing public schools, and environmental hazards. As a result, people in these communities have even less of an opportunity to effect much-needed positive change through the political process.⁷⁰⁷

One study found that states with harsher disenfranchisement laws have lower voter turnout among legally eligible voters.⁷⁰⁸ The study also revealed that in states with harsher disenfranchisement laws, the probability of voting dropped at a higher rate among black voters than white voters, even for individuals who lacked criminal convictions.⁷⁰⁹ Although the study’s authors acknowledged that a direct causal link could not be confirmed, their research suggests that disenfranchisement

⁷⁰² Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, *supra* note 679 at 261-62, 264.

⁷⁰³ See *infra* notes 730-62.

⁷⁰⁴ Aman McLeod, Ismail K. White, Amelia R. Gavin, *The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, 11 VA. J. SOC. POL’Y & L. 66, 80 (2003).

⁷⁰⁵ Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, *supra* note 39 at 561-62.

⁷⁰⁶ NAACP Legal Defense Fund & The Sentencing Project, *Free the Vote: Unlocking Democracy in the Cells and on the Streets*, 2016, at 3, <http://www.sentencingproject.org/wp-content/uploads/2016/12/Free-the-Vote.pdf>.

⁷⁰⁷ *Ibid.*

⁷⁰⁸ McLeod et al., *The Locked Ballot Box: The Impact of State Criminal Disenfranchisement Laws on African American Voting Behavior and Implications for Reform*, *supra* note 704 at 80.

⁷⁰⁹ *Ibid.*

laws may depress overall non-disenfranchised voter turnout, particularly in the black community.⁷¹⁰

In response, supporters of disenfranchisement laws point to the higher rates of black voter turnout in recent elections to contend that felony disenfranchisement does not affect overall black voter turnout.⁷¹¹ For example, they cite data showing that in 2012, black voter turnout surpassed white voter turnout by about 2 percentage points.⁷¹² Other scholars maintain that black voters would have voted in even higher numbers but for felony disenfranchisement laws.⁷¹³ Moreover, data from the 2016 election show that black voter turnout decreased for the first time in 20 years in a presidential election, falling by about 7 percentage points.⁷¹⁴

During the Commission's 2018 voting rights briefing in North Carolina, various experts and community advocates testified about the disproportionate impact of felony disenfranchisement laws on people of color and the need to restore voting rights to persons with felony convictions.⁷¹⁵ In a written statement, former Deputy Assistant Attorney General at the U.S. Department of Justice and current Executive Director of Southern Coalition for Social Justice Anita Earls noted that while over 7 percent of the adult black population are disenfranchised nationwide, over 20 percent

⁷¹⁰ Ibid. at 81.

⁷¹¹ See, e.g., *Briefing Transcript* at 103 (statement of Hans A. von Spakovsky).

⁷¹² *Id.*; see also Jens Manuel Krogstad & Mark Hugo Lopez, "Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots," Pew Research Center, May 12, 2017, <http://www.pewresearch.org/fact-tank/2017/05/12/black-voter-turnout-fell-in-2016-even-as-a-record-number-of-americans-cast-ballots/>.

⁷¹³ *Briefing Transcript* at 103 (statement of Marc Mauer).

⁷¹⁴ Krogstad & Lopez, "Black Voter Turnout Fell in 2016, Even as a Record Number of Americans Cast Ballots," *supra* note 712. Courts have also pointed out that higher voter turnout does not necessarily equate to fair access to the ballot. See, e.g., *N. Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204, 232 (4th Cir. 2016), *cert. denied sub nom. North Carolina v. N. Carolina State Conference of NAACP*, 137 S. Ct. 1399 (2017) (stating that in North Carolina, "although aggregate African American turnout increased by 1.8% in 2014, many African American votes went uncounted" because of North Carolina's restrictive voting law).

⁷¹⁵ See generally U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States*, Briefing Meeting, transcript, Feb. 2, 2018 [*hereinafter Voting Rights Briefing Transcript*]. In their written statements, both Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, and Vanita Gupta, the former head of the Dep't of Justice's Civil Rights Division and current President and CEO of the Leadership Conference on Civil and Human Rights, discussed the disproportionate racial impact of felony disenfranchisement laws and their support for the Democracy Restoration Act of 2017, which would restore voting rights in federal elections to formerly incarcerated citizens. See Sherrilyn Ifill, Written Statement for the *Assessment of Minority Voting Rights Access in the United States* Briefing before the U.S. Commission on Civil Rights, Feb. 2, 2018, at 12; Vanita Gupta, President and CEO, Leadership Conference on Civil and Human Rights, Written Statement for the *Assessment of Minority Voting Rights Access in the United States* Briefing before the U.S. Commission on Civil Rights, Feb. 2, 2018, at 5; *Voting Rights Briefing Transcript* at 128 (statement by Sherrilyn Ifill) (noting that many of the current felon disenfranchisement laws in southern states originated from state officials amending their respective constitutions at the turn of the 20th century to dilute the black vote). See also S. 1588, 115th Cong. (2017), <https://www.congress.gov/115/bills/s/1588/BILLS-115s1588is.pdf>. For more discussion about this legislation, see "The Restoration of Voting Rights," *infra* at notes 805-889.

of the adult black population are disenfranchised in Florida, Kentucky, Tennessee, and Virginia.⁷¹⁶ In addition, Earls stated that the real impact of felony disenfranchisement laws are difficult to measure.⁷¹⁷ According to Earls,

[e]ven as an attorney, I've said to voters 'I've looked up [your record] online, [and] you've completed your sentence. As a lawyer I'm telling you [that] you're eligible to register and vote,' but they don't believe. They're scared, they're intimidated, they won't try to vote. Also there are people who don't know exactly when they're able to re-register.⁷¹⁸

The Commission's 2018 report on voting rights also discussed felony disenfranchisement in the context of voter roll purges.⁷¹⁹ For many years, Florida conducted massive voter purges that allegedly disproportionately impacted voters of color.⁷²⁰ In an earlier report, the Commission studied voter purges in Florida and found that these purges were often based on inaccurate data, denying voting rights to numerous citizens, particularly black voters.⁷²¹ Moreover, in 2004, Florida conducted a purge specifically targeting persons with felony convictions, which also disproportionately affected black voters.⁷²²

Additionally, the Commission's SACs in Alabama, Arizona, Illinois, Kentucky, Louisiana, Ohio, and Tennessee expressed concerns about the disproportionate impact of felony disenfranchisement laws on communities of color.⁷²³ In its report, the Alabama SAC cited testimony about how financial barriers to voting rights restoration (i.e., the state's mandatory payment of significant court fees) especially affected black voters with felony convictions because of Alabama's

⁷¹⁶ Anita Earls, Executive Director, Southern Coalition for Social Justice, Written Statement for the *Assessment of Minority Voting Rights Access in the United States* Briefing before the U.S. Commission on Civil Rights, Feb. 2, 2018, at 2.

⁷¹⁷ *Voting Rights Briefing Transcript* at 163-64 (statement by Anita Earls).

⁷¹⁸ *Ibid.*

⁷¹⁹ USCCR, *Minority Voting Rights Access*, *supra* note 634 at 145.

⁷²⁰ *Ibid.*

⁷²¹ U.S. Commission on Civil Rights, *Voting Irregularities in Florida During the 2000 Presidential Election: Ch. 5 The Reality of List Maintenance*, 2001, <http://www.usccr.gov/pubs/vote2000/report/ch5.htm> (last accessed Sept. 26, 2018).

⁷²² USCCR, *Minority Voting Rights Access*, *supra* note 634 at 145-46; *see also* Ford Fessedon, "Florida List for Purge of Voters Proves Flawed," *New York Times*, July 10, 2004, <http://www.nytimes.com/2004/07/10/us/florida-list-for-purge-of-voters-proves-flawed.html>.

⁷²³ Ala. Advisory Committee to the U.S. Commission on Civil Rights, *Access to Voting in Alabama*, *supra* note 670 at 19; Ariz. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Arizona*, *supra* note 670 at 9; Ill. Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and Voting in Illinois*, *supra* note 670 at 23; Ky. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Kentucky*, *supra* note 670 at 16; La. Advisory Committee to the U.S. Commission on Civil Rights, *Barriers to Voting in Louisiana*, *supra* note 670 at 24; Ohio Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Ohio*, *supra* note 670 at 4; Tenn. Advisory Committee to the U.S. Commission on Civil Rights, *The Right to Vote and Ex-Felon Disenfranchisement in Tennessee*, *supra* note 670 at 1, 18.

“systemic [racial] wealth gap.”⁷²⁴ Arizona’s SAC pointed out that although Native Americans with felony convictions maintained the right to vote in tribal elections, it was unclear whether election officials permitted them to exercise this right, and uncertain whether Native Americans knew the extent of their rights.⁷²⁵

Most of the SACs studying felony disenfranchisement reported that because people of color in their states experienced disproportionate contact with the criminal justice system, these residents experienced disproportionate disenfranchisement.⁷²⁶ According to the Tennessee SAC, black people represented only 17 percent of the state population in 2014, but comprised nearly one-half of the state’s incarcerated population.⁷²⁷ And in 2009, black people constituted only 7 percent of Kentucky’s population but more than 30 percent of the state’s prison population.⁷²⁸ As the authors of the Louisiana SAC report wrote in 2018:

This disproportionate racial impact [of felony disenfranchisement] can affect communities and the very concept of proportional representation. If many members of a community are unable to vote, they are denied the opportunity to be governed by people who might best serve their interests.⁷²⁹

The Racial Origins of Disenfranchisement Laws and Ongoing Disparities

Research suggests that racially motivated felony disenfranchisement laws pre-date the Civil War.⁷³⁰ For example, New York amended its state constitution in 1821 to allow counties to pass laws that denied the right to vote among “persons who have been, or may be, convicted of infamous

⁷²⁴ Ala. Advisory Committee to the U.S. Commission on Civil Rights, *Access to Voting in Alabama*, *supra* note 670 at 19 (testimony of Johnathan Barry-Blocker). For more discussion of state requirements regarding payment of court fees and voting rights restoration, *see* “The Restoration of Voting Rights,” *infra* notes 805-889.

⁷²⁵ Ariz. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Arizona*, *supra* note 670 at 9.

⁷²⁶ *See* Ill. Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and Voting in Illinois*, *supra* note 670 at 23 (“In the state of Illinois, black people are over-represented within the incarcerated population while white people are under-represented.”); Ky. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Kentucky*, *supra* note 670 at 16; La. Advisory Committee to the U.S. Commission on Civil Rights, *Barriers to Voting in Louisiana*, *supra* note 670 at 24; Ohio Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Ohio*, *supra* note 670 at 4; Tenn. Advisory Committee to the U.S. Commission on Civil Rights, *The Right to Vote and Ex-Felon Disenfranchisement in Tennessee*, *supra* note 670 at 1, 18.

⁷²⁷ Tenn. Advisory Committee to the U.S. Commission on Civil Rights, *The Right to Vote and Ex-Felon Disenfranchisement in Tennessee*, *supra* note 670 at 18.

⁷²⁸ Ky. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Kentucky*, *supra* note 670 at 16.

⁷²⁹ La. Advisory Committee to the U.S. Commission on Civil Rights, *Barriers to Voting in Louisiana*, *supra* note 670 at 24.

⁷³⁰ Erika Wood & Liz Budnitz, *Jim Crow in New York*, *supra* note 694 at 6-8, 13.

crimes.”⁷³¹ During the state’s 1821 constitutional convention, the delegates debated whether or not to expand black voting rights.⁷³² To rationalize restricting the franchise, several delegates argued that black men tended to be criminals who filled “your jails and penitentiaries,” implying that black men could not be trusted with the power to vote.⁷³³ Many delegates repeated these allegations at the 1846 constitutional convention, and one delegate claimed that “the relative proportion of infamous crime is nearly thirteen and a half times as great in the colored population as in the white.”⁷³⁴ The New York Constitution was then amended to add bribery and larceny specifically to the disenfranchisement clause, thereby permitting counties to prohibit anyone convicted of “bribery, larceny, or of any infamous crime” from voting.⁷³⁵ Finally, in 1874, the state amended the constitution to explicitly require the disenfranchisement of anyone “convicted of bribery or of any infamous crime.”⁷³⁶

Some scholars argue that rampant racial bias during the Reconstruction spurred the widespread enactment of felony disenfranchisement laws.⁷³⁷ They point to the former Confederate states’ reliance on Section 2 of the 14th Amendment to implement felony disenfranchisement laws; this section reduces electoral representation in any state that disenfranchises male citizens aged 21 and older for reasons other than “participation in rebellion, or other crime.”⁷³⁸ Section 2 expanded the franchise to “any” male citizen, thus allowing black men to vote unless they were convicted of a crime.⁷³⁹ After the passage of the 15th Amendment, which explicitly prohibited states from restricting the franchise “on account of race,”⁷⁴⁰ researchers claim that some states fashioned their felony disenfranchisement laws to encompass crimes that they thought black men were likelier to commit, like burglary, theft, and arson.⁷⁴¹ Because the former Confederate states knew that black people constituted the majority or a sizable minority of their populations,⁷⁴² they purportedly

⁷³¹ N.Y. CONST. art. II § 2 (1821); *see also id.* at 8.

⁷³² Wood & Budnitz, *supra* note 694 at 7-8.

⁷³³ *Ibid.*

⁷³⁴ *Ibid.* at 9.

⁷³⁵ *Ibid.* at 10.

⁷³⁶ *Ibid.* at 13.

⁷³⁷ Reuven (Ruvi) Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, 29 B.U. INT’L L.J. 197, 217-18 (2011).

⁷³⁸ U.S. CONST. amend. XIV, § 2; Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, *supra* note 679 at 267 (citing the recognition of segregationist states that “enfranchisement of African Americans would have given them too much power, [but] Section 2 [of the 14th Amendment] left open the option of de jure disenfranchisement.”).

⁷³⁹ Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, *supra* note 679 at 266-67; U.S. CONST. amend. XIV, § 2.

⁷⁴⁰ U.S. CONST. amend. XV, § 1.

⁷⁴¹ Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, *supra* note 737 at 217-18; *see also* NAACP Legal Defense Fund and The Sentencing Project, *Free the Vote: Unlocking Democracy in the Cells and on the Streets*, *supra* note 706 at 2 (pointing out that “[t]hrough the convoluted reasoning of [one felony disenfranchisement] law, one would be disenfranchised for stealing a chicken, but not for killing the chicken’s owner.”).

⁷⁴² Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, *supra* note 679 at 261-62, 266-67; *see also* Aderson Bellegarde Francois,

recognized that the only way to maintain electoral representation and simultaneously prevent black people from gaining political power was to convict more black men of crimes.⁷⁴³ Mississippi offers an example: in 1890 the state amended its constitution to disenfranchise people who committed those crimes, but not people who committed murder.⁷⁴⁴ In upholding that amendment's constitutionality, the Mississippi Supreme Court reasoned that “[r]estrained by the [U.S.] Constitution from discriminating against the Negro race, the [Mississippi] convention discriminated against its characteristics and the offenses to which its weaker members were prone.”⁷⁴⁵ Here, the Mississippi Supreme Court appeared to acknowledge that the amendment represented a negative reaction to the 15th Amendment, and sanctioned it as such.⁷⁴⁶

As the popularity of felony disenfranchisement laws grew, researchers documented an increase in black imprisonment rates and a decrease in voter registration rates.⁷⁴⁷ For instance, in Alabama in 1850, 2 percent of black people were incarcerated; in 1870, the number had climbed to 74 percent.⁷⁴⁸ In Louisiana after the Civil War, black people represented 44 percent of registered voters, but in 1920 the number had dropped to 2 percent.⁷⁴⁹ These examples strongly suggest that felony disenfranchisement legislation formed part of a “white backlash” against black voting

To Make Freedom Happen: Shelby County v. Holder, the Supreme Court, and the Creation Myth of American Voting Rights, 34 N. ILL. U. L. REV. 529, 542-43 (2014) (reporting that by 1880, black people constituted the majority of the population in Louisiana, Mississippi, and South Carolina, and more than 40 percent of the population in Alabama, Florida, Georgia, and Virginia) (citing Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 88-90 (2008)).

⁷⁴³ See Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, *supra* note 679 at 261-62 (summarizing how “[c]riminal disenfranchisement was widely used in the South after Reconstruction to suppress the vote of African-Americans”); Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 543 (1993) (describing criminal disenfranchisement as “an outright barrier to voting that, like the poll tax and literacy test, was adopted in some states with racially discriminatory intent and has operated throughout our nation with racially discriminatory results”); Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, *supra* note 737 at (stating that after the 15th Amendment’s enactment, “states ‘tailored’ their criminal disenfranchisement legislation to cover crimes they considered African-Americans more likely to commit and excluded crimes they thought both races were equally likely to commit”); Wood & Budnitz, *supra* note 694 at 4 (concluding that “criminal disenfranchisement laws were part of the effort to maintain white control over access to the polls.”).

⁷⁴⁴ Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, *supra* note 737 at 217-18.

⁷⁴⁵ *Ratliff v. Beale*, 74 Miss. 247, 20 So. 865, 868 (1896).

⁷⁴⁶ For more information on Mississippi’s post-Reconstruction efforts to restrict African-American voting rights, see USCCR, *Minority Voting Rights Access*, *supra* note 634 at 17 (reporting, inter alia: “In Mississippi, during Jim Crow, voter suppression was based on a new state constitution enacted in 1890, which specifically intended to exclude African Americans from political participation.”).

⁷⁴⁷ Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, *supra* note 737 at 217-18. The Commission acknowledges that the decrease in black voter registration rates during the post-Reconstruction period corresponded with the proliferation of not only felony disenfranchisement laws, but also various tactics designed to block African Americans from voting, such as poll taxes and literacy tests. See USCCR, *Minority Voting Rights Access*, *supra* note 634 at 17-18.

⁷⁴⁸ Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, *supra* note 737 at 217-18.

⁷⁴⁹ *Id.*

rights, and some advocates contend that the continually disproportionate negative impact of these laws on black people evince the laws' ongoing racially discriminatory purpose.⁷⁵⁰

Supporters of felony disenfranchisement have tended to downplay the racial origins of these laws. In his testimony at the Commission's briefing on collateral consequences, attorney Hans von Spakovsky of the Heritage Foundation stated, "[t]he claim that state laws that take away the right of felons to vote are all rooted in racial discrimination is simply historically inaccurate . . . it is true that five Southern states passed race-targeted felon disenfranchisement laws from 1890 to 1910, but those laws have all been changed and amended."⁷⁵¹ Other supporters argue that because several states had already enacted felony disenfranchisement laws before the Civil War, the more recent laws could not have been racially motivated.⁷⁵² However, this argument neglects to address the research showing that former Confederate states shaped their laws to address crimes they deemed more likely to be committed by black people.⁷⁵³

Regardless of the origins of felony disenfranchisement laws, the data showing their disproportionate effect on black people today are irrefutable.⁷⁵⁴ While felony disenfranchisement laws are facially race neutral to comply with the 15th Amendment, they disproportionately affect people of color because these groups are convicted and incarcerated at disproportionate rates.⁷⁵⁵ As previously noted in this report, black voters are disenfranchised at four times the rate of non-black voters.⁷⁵⁶ Moreover, black people represent nearly 40 percent of the population in federal prisons, about 28 percent of adults on probation, and approximately 38 percent of adults on

⁷⁵⁰ *Id.*; see also Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, *supra* note 679 at 261-62.

⁷⁵¹ von Spakovsky Statement at 4.

⁷⁵² Roger Clegg, George T. Conway III, & Kenneth K. Lee, *The Case Against Felon Voting*, 2 U. ST. THOMAS J.L. & PUB. POL'Y 1, 3 (2008).

⁷⁵³ *Id.*; see also Ziegler, *Legal Outlier, Again? U.S. Felon Suffrage: Comparative and International Human Rights Perspectives*, *supra* note 737 at (stating that after the 15th Amendment's enactment, "states 'tailored' their criminal disenfranchisement legislation to cover crimes they considered African-Americans more likely to commit and excluded crimes they thought both races were equally likely to commit"); Wood & Budnitz, *supra* note 694 at 4 (concluding that "criminal disenfranchisement laws were part of the effort to maintain white control over access to the polls.").

⁷⁵⁴ See "Chapter 1: Demographics of the Corrections Population," *supra* notes 96-130.

⁷⁵⁵ Manza & Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, *supra* note 638 at 492; Human Rights Watch and the Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, 1998, <https://www.sentencingproject.org/wp-content/uploads/2016/01/Losing-the-Vote-The-Impact-of-Felony-Disenfranchisement-Laws-in-the-United-States.pdf>; Wheelock, "Collateral Consequences and Racial Inequality: Felon Status Restrictions as a System of Disadvantage," *supra* note 103 at 84; Mauer, *Voting Behind Bars: An Argument for Voting by Prisoners*, *supra* note 39 at 553-54; American Civil Liberties Union et al., *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, *supra* note 696 at 2. See also Chapter 1, "The Demographics of the Corrections Population," *supra* notes 96-130.

⁷⁵⁶ Uggen, *6 Million Lost Voters*, *supra* note 635 at 3.

parole,⁷⁵⁷ despite accounting for roughly 13 percent of the U.S. population.⁷⁵⁸ An estimated 2.2 million black people are disenfranchised because of their contact with the criminal justice system.⁷⁵⁹ In addition, felony disenfranchisement laws increasingly affect Latino people: Although approximately 16.3 percent of the U.S. population is Latino, about 32.4 percent of federal prisoners are Latino.⁷⁶⁰

But supporters of the laws have contended that “[t]he racial impact of these laws is irrelevant” as a constitutional or policy matter.⁷⁶¹ What matters, according to their reasoning, is that the Constitution authorizes state legislators to determine voting qualifications that are facially neutral in their states; legislators should do so and “let the chips fall where they may.”⁷⁶²

Legal Challenges

The Supreme Court did not weigh in on the issue of felony disenfranchisement until the 20th century. First, in the 1974 case *Richardson v. Ramirez*, the Supreme Court interpreted Section 2 of the 14th Amendment as constitutional support for the power of states to disenfranchise those who participate in “rebellion, or other crime” and, by extension, people convicted of felonies.⁷⁶³ But in 1985, the Court added a caveat. In *Hunter v. Underwood*, the Court held that a disenfranchisement law directed at crimes of “moral turpitude” violated the Equal Protection Clause of the 14th Amendment because, although facially neutral, the law was enacted with a racially discriminatory purpose.⁷⁶⁴ The Court examined a section of the Alabama Constitution of 1901, which disenfranchised people convicted not only of certain felonies but also undefined “crime[s] involving moral turpitude” and many misdemeanors.⁷⁶⁵ Upon review of the legislative

⁷⁵⁷ Federal Bureau of Prisons, “Inmate Race,” 2018, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last accessed Dec. 13, 2018); Kaeble, *Probation and Parole in the United States*, 2016, *supra* note 115 at 17, 23.

⁷⁵⁸ U.S. Census Bureau, “Quick Facts: Population Estimates,” July 1, 2017, <https://www.census.gov/quickfacts/fact/table/US/PST045217>.

⁷⁵⁹ Christopher Uggen, Sarah Shannon, Jeff Manza, *State-Level Estimates of Felon Disenfranchisement in the United States*, The Sentencing Project, 2012, at 17, http://www.sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

⁷⁶⁰ Sharon R. Ennis, Merarys Rios-Vargas, Nora G. Albert. *The Hispanic Population: 2010*, 2011, at 2-3, <https://www.census.gov/content/dam/Census/library/publications/2011/dec/c2010br-04.pdf>; Carson, *Prisoners in 2016*, *supra* note 1 at 5; U.S. Federal Bureau of Prisons, “Inmate Ethnicity,” *supra* note 113.

⁷⁶¹ Hans von Spakovsky & Roger Clegg, *Felon Voting and Unconstitutional Congressional Overreach*, The Heritage Foundation, 2015, at 9, http://thf_media.s3.amazonaws.com/2015/pdf/LM145.pdf.

⁷⁶² *Ibid.*

⁷⁶³ 418 U.S. 24 at 54. Justice Marshall dissented, noting that “there is little independent legislative history as to the crucial words ‘other crime’,” and pointing out that Section 2 “does not differentiate between felonies and misdemeanors;” he further asserted that “absurd results” would occur if “other crime” was interpreted to mean “any crime.” *Id.* at 75 n.24, 72-73 (Marshall, J., dissenting). Marshall also argued that “the disenfranchisement of ex-felons must be measured against the requirements of the Equal Protection Clause of [section] 1 of the Fourteenth Amendment.” *Id.* at 77 (Marshall, J., dissenting).

⁷⁶⁴ 471 U.S. 222, 233 (1985). For an in-depth discussion of racial discrimination and disenfranchisement, see “The Racial Origins of Disenfranchisement Laws and Ongoing Disparities,” in this chapter, *supra* notes 730-62.

⁷⁶⁵ *Hunter*, 471 U.S. at 226.

history, the Court noted that the constitutional convention’s all-white delegates publicly stated their intent “to establish white supremacy” and pointedly chose to disenfranchise individuals convicted of offenses they believed were “more frequently committed by blacks” when enacting the section.⁷⁶⁶ The Court concluded that Alabama added the constitutional provision “motivated by a desire to discriminate against blacks,” and that Alabama would not have enacted it “but for” this unconstitutional motive, regardless of whether the state also intended to discriminate against “poor whites.”⁷⁶⁷ Moreover, the Court asserted that “events occurring in the succeeding 80 years” could neither validate the provision nor erase the ongoing racial impact of the provision “to this day.”⁷⁶⁸

In cases where intentional discrimination cannot be proven, Section 2 of the Voting Rights Act of 1965 (VRA) bans voting qualifications that “result in the denial or abridgement of voting rights of any citizen of the United States on account of race or color.”⁷⁶⁹ A 1982 amendment made clear that proof of discriminatory purpose or intent was not required.⁷⁷⁰ Given the inequitable impact of disenfranchisement laws on black people,⁷⁷¹ advocates of reform began to question their legality based on Section 2 of the VRA.⁷⁷² Some scholars have referred to felony disenfranchisement as a “modern literacy test.”⁷⁷³

Thus far, arguments about disenfranchisement laws as Section 2 violations have not succeeded in the courts. For instance, in *Johnson v. Governor of State of Fla.*, the Eleventh Circuit acknowledged that Section 2 allows a plaintiff to prove a VRA violation exists without showing discriminatory intent, but viewed felony disenfranchisement laws as “unlike other voting qualifications” partly because they “are deeply rooted in this Nation’s history and are a punitive device stemming from criminal law.”⁷⁷⁴ After reviewing the legislative history of the VRA and finding no “clear statement from Congress” that it intended the VRA to “encompass felon disenfranchisement provisions,” the court concluded that Section 2 should not apply to felon

⁷⁶⁶ *Id.* at 227-29.

⁷⁶⁷ *Id.* at 232. In its defense, Alabama contended that the constitutional provision’s “real purpose” was to disenfranchise both “poor whites” and black people. *Id.* at 230. The Court responded that even if this additional intent existed and was deemed permissible, it would not negate the unconstitutionality of the state’s racial motivation in enacting the provision. *Id.* at 232.

⁷⁶⁸ *Id.* at 232-33.

⁷⁶⁹ 52 U.S.C. § 10301(a) (formerly cited as 42 U.S.C. § 1973(a)).

⁷⁷⁰ Kevin J. Coleman, *The Voting Rights Act of 1965: Background and Overview*, Congressional Research Service, 2015, at 21, <https://fas.org/sgp/crs/misc/R43626.pdf>.

⁷⁷¹ See Chapter 1, “Demographics of the Corrections Population,” *supra* notes 96-130; see also “Racial Origins of Disenfranchisement Laws and Ongoing Disparities,” *supra* notes 730-62.

⁷⁷² 52 U.S.C. § 10301(a) (stating that “[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...”).

⁷⁷³ Campagna et al., “Restrictions on the Citizenship Rights of Felons: Barriers to Successful Reintegration,” *supra* note 8 at 23.

⁷⁷⁴ 405 F.3d at 1228 (internal citations omitted).

disenfranchisement laws.⁷⁷⁵ Similarly, in rejecting a Section 2 challenge to a disenfranchisement law, the First Circuit cited “the historic legitimacy of felon disenfranchisement, the constitutional recognition of the authority of states to disenfranchise imprisoned felons, the congressional recognition of that authority and the express congressional statements that the VRA was not meant to proscribe that authority.”⁷⁷⁶

By contrast, the Ninth Circuit ruled that disenfranchisement laws were not entirely exempt from Section 2 challenges.⁷⁷⁷ However, the court held that a challenger bringing such a claim “based on the operation of a state’s criminal justice system must at least show that the criminal justice system is infected by intentional discrimination or that the felon disenfranchisement law was enacted with such intent.”⁷⁷⁸ Moreover, the court was noncommittal about whether a litigant meeting this burden of proof “would necessarily” prove a Section 2 violation.⁷⁷⁹ This case law illustrates the extreme difficulties faced by plaintiffs seeking to repeal disenfranchisement laws based on the VRA.

In Louisiana, plaintiffs representing and including disenfranchised individuals challenged the state’s felony disenfranchisement law on the ground that it conflicts with the state constitution.⁷⁸⁰ The plaintiffs argued that the state law, which prohibits people with felony convictions from voting while on probation or parole, conflicts with the Louisiana Constitution, which forbids people with felony convictions from voting only during “imprisonment.”⁷⁸¹ After the trial court granted the Louisiana Secretary of State’s motion for summary judgment in June 2017,⁷⁸² the plaintiffs filed an appeal the following September.⁷⁸³ But the state court of appeals rejected the plaintiffs’ argument,⁷⁸⁴ and the Louisiana Supreme Court denied the plaintiffs’ appeal.⁷⁸⁵ In the meantime, Louisiana enacted a law to restore voting rights to people who were convicted of felonies and have

⁷⁷⁵ *Id.* at 1227-34.

⁷⁷⁶ *Simmons*, 575 F.3d at 42.

⁷⁷⁷ *Farrakhan*, 623 F.3d at 993-94 (emphasis in original).

⁷⁷⁸ *Id.*

⁷⁷⁹ *Id.* (emphasis in original).

⁷⁸⁰ Class Action Petition for Declaratory and Injunctive Relief, *Voice of the Ex-Offender, et al. v. Louisiana*, Docket No. 649587, at 7-10 (La. 6/30/16); see also Joe Gyan, Jr., “Appeal challenging Louisiana Constitution felon voting rights law taken to state’s high court,” *The Advocate*, June 8, 2018, https://www.theadvocate.com/baton_rouge/news/courts/article_c1f80324-6b5a-11e8-b016-57c105c0e29d.html.

⁷⁸¹ Class Action Petition for Declaratory and Injunctive Relief, *Voice of the Ex-Offender, et al. v. Louisiana*, Docket No. 649587, at 8-10 (La. 6/30/16); see also LA. STAT. ANN. § 18:102(A)(1) (disenfranchising people convicted of felonies while incarcerated, on probation, or on parole); LA. CONST. art. I, § 10 (granting state citizens ages 18 and older “the right to register and vote, except that this right may be suspended while a person is interdicted and judicially declared mentally incompetent or is under an order of imprisonment for conviction of a felony.”).

⁷⁸² Hearing and Oral Reasons for Judgment, *Johnson v. Louisiana*, Docket No. 649587, at 16 (La. 3/13/17).

⁷⁸³ *Voice of the Ex-Offender, et al. v. Louisiana*, No. 2017-CA-1141 (La. App. 1 Cir. 9/27/17).

⁷⁸⁴ *Voice of Ex-Offender v. State*, 249 So. 3d 857, 863-64, *reh’g denied* (Apr. 27, 2018), *reh’g denied* (May 9, 2018), *writ denied*, 2018-0945 (La. 10/29/18), 255 So. 3d 575.

⁷⁸⁵ *Voice of Ex-Offender v. State*, 2018-0945 (La. 10/29/18), 255 So. 3d 575.

been released from incarceration for five years.⁷⁸⁶ The law was scheduled to take effect in March 2019.⁷⁸⁷

As discussed in the next section, Florida voters approved a constitutional amendment restoring the franchise to people who had served their sentences after felony convictions,⁷⁸⁸ but excluding people convicted of murder or a felony sexual offense.⁷⁸⁹ In Florida, people convicted of these felonies are permanently banned from voting unless the governor and two cabinet members (collectively, the Clemency Board) restore their civil rights.⁷⁹⁰ Florida's Rules of Executive Clemency specify that qualifying individuals must wait at least seven years after completing their sentences to apply for rights restoration to the board, which may consider selected applications during one of its four scheduled hearings each year.⁷⁹¹ Under the rules, the governor maintains “unfettered discretion to deny clemency at any time, for any reason,” and the governor and two board members have “unfettered discretion to grant” clemency “at any time, for any reason.”⁷⁹²

In *Hand v. Scott*, a federal court found that Florida's clemency-based voting rights restoration process violated the 1st Amendment of the Constitution and the 14th Amendment's Equal Protection Clause.⁷⁹³ The court pointed out that these protections include the freedom to associate with a political party and the freedom to express political speech by voting.⁷⁹⁴ It then found that despite Florida's legitimate interest “in limiting the franchise to responsible individuals,” the state had not chosen the least restrictive means possible to advance that interest.⁷⁹⁵ The court asserted

⁷⁸⁶ H.B. 265, 2018 Leg., Reg. Sess., Act 636 (La. 2018) (effective 3/1/19). See also Louisiana Advisory Committee to the U.S. Commission on Civil Rights, *Barriers to Voting in Louisiana*, *supra* note 670 at 22-23. In this report, the Commission's Louisiana SAC discussed the legal structure of felony disenfranchisement in the state, including the new law and the ongoing litigation challenging felony disenfranchisement.

⁷⁸⁷ H.B. 265, *supra* note 786.

⁷⁸⁸ See “The Restoration of Voting Rights,” *infra* notes 805-889.

⁷⁸⁹ The amendment, which took effect on Jan. 8, 2019, specifies that “[n]o person convicted of murder or a felony sexual offense shall be qualified to vote until restoration of civil rights.” See Fla. Division of Elections, Constitutional Amendment Petition Form, “Voting Restoration Amendment,” *supra* note 640 at Art. IV, § 4(b). An individual convicted of murder or a felony sexual offense will “continue to be permanently barred from voting unless the Governor and Cabinet vote to restore their voting rights on a case by case basis.” See Floridians for a Fair Democracy, “Voting Restoration Amendment,” <https://secondchancesfl.org/about/voting-restoration-amendment/> (last accessed Dec. 18, 2018). See also FLA. STAT. ANN. § 944.292 (suspending the civil rights of a person convicted of a felony until grant of “a full pardon, conditional pardon, or restoration of civil rights” pursuant to the state constitution); FLA. STAT. ANN. § 97.041(2)(b) (prohibiting individuals convicted of felonies from voting until civil rights restoration); FLA. CONST. art. IV, § 8(a) (authorizing the governor, with approval of two cabinet members, to restore a person's civil rights).

⁷⁹⁰ FLA. STAT. ANN. §§ 944.292, 97.041(2)(b); FLA. CONST. art. IV, § 8(a). See also Fla. Commission on Offender Review, *Rules on Executive Clemency*, Rule 1, at 3, https://www.fcor.state.fl.us/docs/clemency/clemency_rules.pdf (declaring that “[t]he Governor and members of the Cabinet collectively are the Clemency Board.”).

⁷⁹¹ Fla. Commission on Offender Review, *Rules on Executive Clemency*, Rules 10(a), 11(A), 12(A), *supra* note 790 at 14-16.

⁷⁹² *Id.* at 4.

⁷⁹³ 285 F. Supp. 3d 1289, 1292, 1309 (N.D. Fla. 2018).

⁷⁹⁴ *Id.* at 1295-99.

⁷⁹⁵ *Id.* at 1300-01.

that Florida’s process risked “arbitrary and discriminatory vote-restoration” because the process granted the governor and board “unfettered discretion” to restore the franchise to political supporters and deny the franchise to political opponents.⁷⁹⁶ It noted ample evidence in the record showing that viewpoint discrimination (i.e., discriminating against petitioners based on their political views) and lack of clear time limits resulting in years of delays in processing applications had infected the rights restoration process in violation of the 1st Amendment.⁷⁹⁷ Moreover, the rights restoration process violated the 14th Amendment’s Equal Protection Clause because it allowed the governor and board to “make ‘completely arbitrary distinction[s] between groups of felons.’”⁷⁹⁸

The federal court ordered Florida to develop “specific and neutral criteria to direct vote-restoration decisions” and prohibited officials from enforcing “the current unconstitutional” voting restoration process.⁷⁹⁹ Florida immediately appealed, and in 2018, the Eleventh Circuit Court of Appeals lifted the federal district court’s injunction, thereby allowing the clemency-based rights restoration process (as amended by the Voter Restoration Amendment) to continue pending the appeal.⁸⁰⁰

Iowa⁸⁰¹ and Kentucky⁸⁰² permanently disenfranchise individuals with any felony conviction unless they receive an executive pardon, clemency, or rights restoration. In January 2019,

⁷⁹⁶ *Id.* at 1301-03.

⁷⁹⁷ *Id.* The court described the risk of viewpoint discrimination in Florida as “distressingly real. Plaintiffs identify several instances of former felons who professed political views amenable to the [executive clemency] Board’s members who then received voting rights, while those who expressed contrary political views to the Board were denied those same rights. Applicants—as well as their character witnesses—have routinely invoked their conservative beliefs and values to their benefit.” *Id.* at 1302.

⁷⁹⁸ *Id.* at 1308 (internal citations omitted).

⁷⁹⁹ *Hand v. Scott*, 315 F. Supp. 3d 1244, 1255-56 (N.D. Fla. 2018).

⁸⁰⁰ *Hand v. Scott*, 888 F.3d 1206, 1215 (11th Cir. 2018).

⁸⁰¹ IOWA CONST. art. II, § 5 (disqualifying “a person convicted of any infamous crime” from voting). The Supreme Court of Iowa held that an “infamous crime under the constitution means felony crime.” *Griffin v. Pate*, 884 N.W.2d 182, 205 (Iowa 2016). The same court also recognized the power of the governor to restore voting rights via pardon. *State v. Richardson*, 890 N.W.2d 609, 624 n.11 (Iowa 2017). See also IOWA CODE ANN. § 914.2 (permitting persons convicted of a crime to apply “to the board of parole for recommendation or to the governor for a reprieve, pardon, commutation of sentence, remission of fines or forfeitures, or restoration of rights of citizenship at any time following the conviction.”). ; Office of the Governor, “Executive Clemency,” <https://governor.iowa.gov/constituent-services/restoration-of-citizenship-rights> (specifying that the “Application for Restoration of Citizenship” must be filed for most individuals to regain the right to vote) (last accessed Feb. 20, 2019). Individuals who had discharged their sentence before July 4, 2005 had their rights restored automatically under Executive Order 42. *Ibid.* Note that Iowa’s governor has expressed interest in implementing further automatic voting restoration for people with felony convictions in the state. See Tim Lau, “Progress on Voting Rights Restoration in Iowa?” *Brennan Center for Justice Blog*, Nov. 21, 2018, <https://www.brennancenter.org/blog/progress-on-voting-rights-restoration-in-iowa>.

⁸⁰² KY. CONST. § 145 (disqualifying “[p]ersons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare” from voting, but allowing civil rights restoration upon executive pardon); KY. REV. STAT. ANN. § 196.045 (directing the Dep’t of Corrections to develop regulations for applications of “eligible felony offenders” who have served their full sentence for civil rights restoration, including the right to vote, and to “[f]ollow information on a monthly basis of eligible felony offenders who have requested restoration of rights to the Office of the Governor for consideration of a partial pardon.”).

disenfranchised plaintiffs with felony convictions filed a complaint alleging that Kentucky's voting rights restoration process violates the 1st Amendment.⁸⁰³ The plaintiffs argue that the governor's "unfettered discretion" and the lack of "reasonable, definite time limits" within the restoration process risked "arbitrary, biased, and/or discriminatory treatment of restoration of voting rights applications."⁸⁰⁴ At the time of this writing, the case was still pending.

The Restoration of Voting Rights

Some states, including Florida, have taken steps through ballot initiatives, legislative processes, or gubernatorial action toward voting rights restoration for persons with felony convictions.⁸⁰⁵

Florida's state constitution previously disenfranchised people with any felony conviction indefinitely,⁸⁰⁶ who comprised approximately 10.6 percent of the state's voting-age population.⁸⁰⁷ In 2018, Florida voters approved a ballot measure known as the Voting Restoration Amendment, which restores voting rights to people convicted of felonies other than murder or sexual offenses who have completed their sentence (including probation and parole); those individuals convicted of murder or sexual offenses still fall under the clemency regime discussed above.⁸⁰⁸ An estimated 1.4 to 1.5 million Floridians regained the right to vote as a result of the new amendment.⁸⁰⁹ In Tampa alone, during the first week that the amendment took effect, the average number of voter registrations surged to about 2.5 times the weekly average in the preceding months.⁸¹⁰ Moreover, at the start of 2019, black people represented 22 percent of Tampa's registered voters; but on the

⁸⁰³ Third Amended Complaint for Declaratory and Injunctive Relief, *Harbin v. Bevin*, No. 6:18-CV-277-KKC, ¶¶ 7, 35-36, 46 (E.D. Ky. Jan. 4, 2019),

https://docs.wixstatic.com/ugd/85cfb4_843027b8b9554a63aac28a2c24606ed8.pdf.

⁸⁰⁴ *Id.* at ¶¶ 39-40, 49-50.

⁸⁰⁵ See generally Ballotpedia, "2018 Ballot Measures: Voting Requirements and Ballot Access,"

https://ballotpedia.org/2018_ballot_measures (last accessed Oct. 2, 2018). According to research, states generally are not enacting more restrictive felony disenfranchisement laws. See Sarah Jackel & Stuart A. Thompson, "The Myth of the Lazy Nonvoter," *New York Times*, Oct. 5, 2018,

<https://www.nytimes.com/interactive/2018/10/05/opinion/midterm-election-voter-turnout-photo-id.html?smid=tw-nytopinion&smtyp=cur> (citing research from the Campaign Legal Center on state felony disenfranchisement laws, at <https://campaignlegal.org/restoreyourvote/>). See also *supra* notes 780-86 (discussing the law enacted in Louisiana to restore voting rights to people convicted of felonies when five years have elapsed since their release from incarceration).

⁸⁰⁶ Advancement Project, *Democracy Disappeared: How Florida Silences the Black Vote through Felony Disenfranchisement*, 2018, at 29, https://advancementproject.org/wp-content/uploads/2018/10/Democracy-disappeared-FOR-ONLINE-without-blank-pp_26Sep2018.pdf.

⁸⁰⁷ *Ibid.* at 21.

⁸⁰⁸ Fla. Division of Elections, "Voting Restoration Amendment 14-01," Constitutional Amendment Petition Form, *supra* note 647.

⁸⁰⁹ The Brennan Center, "Voting Rights Restoration Efforts in Florida,"

<https://www.brennancenter.org/analysis/voting-rights-restoration-efforts-florida> (last accessed Dec. 8, 2018); Uggen, *6 Million Lost Voters*, *supra* note 635 at 3.

⁸¹⁰ Langston Taylor, "Amendment 4 is already changing Tampa's electorate," *Tampa Bay Times*, Feb. 7, 2019, <https://www.tampabay.com/florida-politics/buzz/2019/02/07/amendment-4-is-already-changing-tampas-electorate-heres-how/>.

first day the amendment took effect (January 8), black people accounted for 47 percent of new voter registrations.⁸¹¹ Black voters constituted 35 percent of new voter registrations in Tampa during the first week of the amendment’s implementation alone.⁸¹² These numbers illustrate the disproportionate effect of felony disenfranchisement on black voters in just one city in Florida.⁸¹³

Virginia’s state constitution still permanently disenfranchises people convicted of any felony unless the governor restores their rights, but unlike in Iowa and Kentucky, many returning Virginians’ rights have been restored.⁸¹⁴ Individuals whose civil rights are restored by the governor “or other appropriate authority” may vote⁸¹⁵ if the Commonwealth “remove[s] political disabilities consequent upon conviction for offenses committed.”⁸¹⁶ In 2016, then-Governor Terry McAuliffe signed an executive order to restore the civil rights of 206,000 Virginians who had been convicted of felonies and served their sentences.⁸¹⁷ The governor also indicated his intent to issue similar orders at the end of each month going forward.⁸¹⁸ In response, Virginia’s state legislature sued the governor, contending that he had exceeded his authority under the state constitution.⁸¹⁹ The Virginia Supreme Court agreed with the state legislature, finding that the governor could pardon individuals only on a “case-by-case” basis and not categorically.⁸²⁰

Governor McAuliffe responded by embarking on an effort to restore voting rights on an individualized basis to Virginians with felony convictions who had served their sentences.⁸²¹ The

⁸¹¹ *Ibid.*

⁸¹² *Ibid.*

⁸¹³ *Ibid.*

⁸¹⁴ VA. CONST. art. II, § 1. *See also infra* notes 815-23.

⁸¹⁵ VA. CONST. art. II, § 1.

⁸¹⁶ VA. CONST. art. V, § 12.

⁸¹⁷ *Howell v. McAuliffe*, 292 Va. 320, 326-28 (2016) (summarizing the governor’s April 22, 2016 executive order); *id.* at 320:

Article II, Section 1 of the Constitution of Virginia sets out a general rule of law and then provides for an exception: “No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.” Va. Const. art. II, § 1 (emphasis added). On April 22, 2016, Governor Terence R. McAuliffe issued an Executive Order that inverts this rule-exception sequence. The practical effect of this Executive Order effectively reframes Article II, Section 1 to say: “No person who has been convicted of a felony shall be disqualified to vote unless the convicted felon is incarcerated or serving a sentence of supervised release.”

⁸¹⁸ *Id.* at 328.

⁸¹⁹ *Id.*

⁸²⁰ *Id.* at 349.

⁸²¹ Lindsey Turok, *Howell v. McAuliffe: Felon Disenfranchisement in Virginia and the “Cautious and Incremental Approach” to Voting Equality*, 28 GEO. MASON U. CIV. RTS. L.J. 341, 342-43 (2018).

state legislature's attempt to hold the government in contempt of court failed,⁸²² and the governor restored the voting rights of more than 170,000 individuals by the end of his term.⁸²³

In April 2018, New York Governor Andrew Cuomo signed an executive order removing voting restrictions for people with felony convictions who are on parole.⁸²⁴ The order mandates that individuals on parole “be given consideration for a conditional pardon that will restore voting rights without undue delay.”⁸²⁵ Prior to the order, New York already allowed individuals on probation or released from prison without post-release community supervision to vote.⁸²⁶

Although public opinion is not the arbiter of civil rights, the Commission notes that public opinion reflects a preference for voting rights restoration. In a 2003 study, academic researchers sought to measure public opinion about whether voting rights should be restored to individuals with felony convictions (including currently and formerly incarcerated individuals, and individuals on parole or probation), and found an overwhelming 81.7 percent of individuals surveyed believed that the right to vote should be restored to these individuals at some point.⁸²⁷ And according to a 2016 report, if state policies reflected current public opinion, 77 percent of the 6.1 million people currently disenfranchised would regain their voting rights.⁸²⁸ Moreover, Florida's November 2018 voting rights restoration amendment was supported by 65.5 percent of the state's total electorate, including voters from both major political parties.⁸²⁹

⁸²² Motion for an Order Requiring Respondents to Show Cause Why They Should Not Be Held in Contempt for Violating the Writ of Mandamus, *Howell v. McAuliffe*, 788 S.E.2d 706 (Aug. 31, 2016, Va.) (No. 160784) (motion on behalf of the state legislature to hold the governor in contempt of court); Upon a Petition for Writs of Mandamus and Prohibition, *Howell v. McAuliffe*, 778 S.E.2d 706 (Sept. 15, 2016, Va.) (No. 160784) (containing the Virginia Supreme Court's unanimous denial of the motion to hold the governor in contempt of court). See also Graham Moomaw, “Virginia Supreme Court denies Republican effort to hold McAuliffe in contempt over felon voting rights,” *Richmond Times-Dispatch*, Sept. 15, 2016, https://www.richmond.com/news/virginia/virginia-supreme-court-denies-republican-effort-to-hold-mcauliffe-in/article_397c5a9f-5695-521c-a791-fabae3e17812.html.

⁸²³ Vann R. Newkirk III, “How Letting Felons Vote Is Changing Virginia,” *The Atlantic*, Jan. 8, 2018, <https://www.theatlantic.com/politics/archive/2018/01/virginia-clemency-restoration-of-rights-campaigns/549830/>.

⁸²⁴ 2018 Sess. Law News of N.Y. Exec. Order 181, *Restoring the Right to Vote for New Yorkers on Parole* (April 18, 2018), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_181.pdf.

⁸²⁵ *Id.*

⁸²⁶ N.Y. ELEC. LAW § 5-106; see also Office of Governor Andrew M. Cuomo, “Governor Cuomo Signs Executive Order to Restore Voting Rights to New Yorkers on Parole,” April 18, 2018, <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-restore-voting-rights-new-yorkers-parole>.

⁸²⁷ Pinaire et. al., *Barred from the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, *supra* note 628 at 1540.

⁸²⁸ Uggen, *6 Million Lost Voters*, *supra* note 635 at 14.

⁸²⁹ See Ballotpedia, “Florida Amendment 4, Voting Rights Restoration for Felons Initiative (2018),” [https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_\(2018\)](https://ballotpedia.org/Florida_Amendment_4_Voting_Rights_Restoration_for_Felons_Initiative_(2018)) (reporting that 64.5 percent of Florida's voters supported the amendment) (last accessed Feb. 14, 2019); German Lopez, “Florida votes to restore ex-felon voting rights with Amendment 4,” *Vox*, Nov. 7, 2018, <https://www.vox.com/policy-and-politics/2018/11/6/18052374/florida-amendment-4-felon-voting-rights-results> (reporting bipartisan endorsements of the measure).

The majority of the American public may disfavor permanent disenfranchisement of people with felony convictions, but opinions differ as to when voting rights should be restored.⁸³⁰ Research shows that although most people do not support voting rights for the currently incarcerated, about 80 percent support restoration for people who have completed their sentence, 68 percent support restoration for people on probation, and 60 percent support restoration for parolees.⁸³¹ Some people advocate for waiting periods or individualized assessments in lieu of automatic restoration, given a perceived likelihood that formerly incarcerated individuals will commit a new crime.⁸³² Backers of this approach sometimes cite a U.S. Department of Justice report revealing that two-thirds of formerly incarcerated individuals in 30 states were arrested for a new crime within three years of release, and three-quarters were arrested within five years of release.⁸³³ The recidivism rate within the three- to five-year period post-release may strengthen the case for waiting periods because, according to this perspective, only formerly incarcerated people who have not been rearrested within those time periods have proven themselves worthy of regaining the franchise.

By contrast, other scholars cite the high recidivism rates during the initial post-release period as evidence that current policies are ineffective in helping to reintegrate the formerly incarcerated.⁸³⁴ They argue that if this is the case, policymakers should intensify their efforts to reintegrate formerly incarcerated people sooner.⁸³⁵ Some research has identified a positive link between voting and reduced criminality, suggesting that restoring the right to vote may facilitate

⁸³⁰ Manza & Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*, *supra* note 638 at 500.

⁸³¹ *Ibid.*

⁸³² *See, e.g.*, von Spakovsky Statement at 5; Roger Clegg, “If You Can’t Follow Laws, You Shouldn’t Help Make Them,” *New York Times*, April 22, 2016, <https://www.nytimes.com/roomfordebate/2016/04/22/should-felons-ever-be-allowed-to-vote-if-you-cant-follow-laws-you-shouldnt-help-make-them> (arguing that voting rights should be restored “on a case-by-case basis after a person has shown that he or she has really turned over a new leaf”).

⁸³³ Matthew R. Durose, Alexia D. Cooper, Howard N. Snyder, *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, U.S. Dep’t of Justice, Bureau of Justice Statistics, 2014, at 1, <https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf>. The report indicated that “states were selected for the study based on their ability to provide prisoner records and the FBI or state identification numbers on persons released from correctional facilities in 2005.” *Ibid.* at 16. The states included Alaska, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Iowa, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, and West Virginia.

⁸³⁴ *See, e.g.*, Holden & Norris, “What Opponents Get Wrong About Criminal Justice Reform,” *supra* note 695 (asserting that “what tough-on-crime supporters fail to acknowledge is that a high recidivism rate is proof our current approach isn’t working, not an argument against reform”); *see also* American Civil Liberties Union et al., *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, *supra* note 696 (where the authors argue that “[f]elony disenfranchisement operates contrary to the goals of ensuring public safety and reducing reoffending by alienating from society those individuals that the criminal justice system is simultaneously attempting to reintegrate.”). For further discussion about the relationship between felony disenfranchisement and recidivism, *see* “Arguments For and Against Felony Disenfranchisement,” *supra* notes 668-720.

⁸³⁵ Holden & Norris, “What Opponents Get Wrong About Criminal Justice Reform,” *supra* note 695; American Civil Liberties Union et al., *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, *supra* note 696.

reintegration.⁸³⁶ Therefore, policies that automatically restore voting rights post-release may benefit public safety more than those that impose waiting periods.⁸³⁷

As previously noted, some Commission SACs have reported a general lack of awareness about post-release voting rights among individuals with criminal convictions, even in states like Illinois and Ohio that automatically restore the franchise.⁸³⁸ These findings suggest that the impact of automatic restoration on reintegration may be limited if corrections personnel do not inform people with criminal convictions about their rights.⁸³⁹ The SAC reports also highlight the vast differences among states in terms of the processes implemented to restore voting rights.

For instance, the Tennessee SAC reported that local election officials “had difficulty understanding and accurately applying” the voting rights restoration and registration process.⁸⁴⁰ In Tennessee, individuals convicted of a serious felony (aggravated rape, first-degree murder, treason, or voter fraud⁸⁴¹) permanently lose their right to vote; however, individuals convicted of other felonies lose their right to vote but may petition for rights restoration after “expiration of the maximum sentence imposed.”⁸⁴² If the pardon is granted, the individual must submit proof of both the pardon and the voting rights restoration to the county elections administrator in order to register to vote.⁸⁴³ But before authorizing the individual to register, the county elections administrator must first confirm

⁸³⁶ Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from A Community Sample*, 36 COLUM. HUM. RTS. L. REV. 193, 213 (2004).

⁸³⁷ Holden & Norris, “What Opponents Get Wrong About Criminal Justice Reform,” *supra* note 695; American Civil Liberties Union et al., *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, *supra* note 696.

⁸³⁸ See, e.g., Ariz. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Arizona*, *supra* note 670 at 9; Ill. Advisory Committee to the U.S. Commission on Civil Rights, *Civil Rights and Voting in Illinois*, *supra* note 670 at 27-30 (reporting that despite Illinois’s automatic restoration of voting rights post-release, some formerly incarcerated people testified about their mistaken belief that they remained disenfranchised); Ohio Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Ohio*, *supra* note 670 at 4, 16 (reporting that despite Ohio’s automatic restoration of voting rights post-release, the differences among state election laws “create confusion and misinformation” and recommending the “universal and systemic notification of the right to vote to people with felony convictions upon their release from prison”). See also “The Current Landscape of State Felony Disenfranchisement Laws,” *supra* notes 635-74.

⁸³⁹ See, e.g., Ohio Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Ohio*, *supra* note 670 at 4, 16 (urging the “universal and systemic notification” of voting rights to people upon release from incarceration). For more discussion about the absence of mechanisms that clarify and notify the public about collateral consequences, see Chapter 1, “Notification of Collateral Consequence,” *supra* notes 199-221.

⁸⁴⁰ Tenn. Advisory Committee to the U.S. Commission on Civil Rights, *The Right to Vote and Ex-Felon Disenfranchisement in Tennessee*, *supra* note 670 at 9.

⁸⁴¹ TENN. CODE ANN. § 40-29-105 (outlining the felonies that result in permanent disenfranchisement, based on the year of the conviction); TENN. CODE ANN. § 40-20-112 (prohibiting people with criminal convictions from exercising the right to vote).

⁸⁴² TENN. CODE ANN. § 40-29-101 (allowing “the circuit court” to restore the rights of citizenship to individuals “rendered infamous or deprived of the rights of citizenship by the judgment of any state or federal court” and permitting individuals who have been pardoned to petition for restoration of their rights); TENN. CODE ANN. § 2-19-143 (disenfranchising any individual “convicted of an infamous crime...unless such person has been pardoned by the governor, or the person’s full rights of citizenship have otherwise been restored as prescribed by law.”).

⁸⁴³ TENN. CODE ANN. § 2-2-139(a)-(b).

with the state coordinator of elections that the individual is indeed eligible.⁸⁴⁴ Moreover, “[t]he state election coordinator is empowered to formulate a uniform procedure for verifying the registration eligibility of any” individual with a felony conviction, and the county elections administrator can allow the individual to register only upon receipt of “sufficient verification of such person’s eligibility to register.”⁸⁴⁵ Unsurprisingly, given the complicated nature of this process, the Tennessee SAC reported not only confusion among local elections officials but also widespread “concerns about procedural barriers to restoration,” including limited access to court records needed to comply with the process and “financial hardship” about outstanding child support payments.⁸⁴⁶

During SAC hearings in Alabama and Arizona, experts also testified about state regulations that further prohibit people with felony convictions from regaining the franchise until they pay certain fines or fees, even when they are otherwise eligible.⁸⁴⁷ One Alabama panelist cited research finding that one-third of applications filed between 2000 and 2014 for regaining voter registration eligibility “were denied due to court debt” even when the applicants met all other conditions for eligibility.⁸⁴⁸ About 70 percent of this court debt constituted docket fees (which vary by judicial district), public defender fees, and district attorney collection fees (“equal to 30 percent of outstanding debt after 90 days”).⁸⁴⁹ The Arizona SAC also recommended that the state “eliminate the requirement” that people with felony convictions pay outstanding court fees to restore their voting rights.⁸⁵⁰ In Arizona, the superior court judge who delivered the sentence (or the judge’s

⁸⁴⁴ TENN. CODE ANN. § 2-2-139(b).

⁸⁴⁵ TENN. CODE ANN. § 2-2-139(c)

⁸⁴⁶ Tenn. Advisory Committee to the U.S. Commission on Civil Rights, *The Right to Vote and Ex-Felon Disenfranchisement in Tennessee*, *supra* note 670 at 9.

⁸⁴⁷ See Ala. Advisory Committee to the U.S. Commission on Civil Rights, *Access to Voting in Alabama*, *supra* note 670 at 19-20; Ariz. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Arizona*, *supra* note 670 at 9-10. See also Ala. Board of Pardons and Paroles, “About Us: Rules, Regulations, and Procedures, art. 9,” <http://www.pardons.state.al.us/DisplayPDF.aspx?sh=Voting> (requiring people who were convicted of crimes of moral turpitude, seeking to regain the right to vote, and unable to pay fines to apply for remission of fines, which must be approved by the Board) (last accessed May 6, 2019); Ariz. Board of Executive Clemency, “Frequently Asked Questions,” <http://www.pardons.state.al.us/DisplayPDF.aspx?sh=Rules> (stating that Arizona’s Board of Executive Clemency will consider “[w]hether the applicant is delinquent on any outstanding fees, restitution and/or other obligations” in deciding whether to forward voting restoration applications to the governor, who ultimately decides if the applicant with a felony conviction will receive a pardon restoring the franchise) (last accessed May 6, 2019).

⁸⁴⁸ Ala. Advisory Committee to the U.S. Commission on Civil Rights, *Access to Voting in Alabama*, *supra* note 670 at 19 (testimony of Johnathan Barry-Blocker) (citing Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 329 (2017)).

⁸⁴⁹ Marc Meredith & Michael Morse, *Discretionary Disenfranchisement: The Case of Legal Financial Obligations*, 46 J. LEGAL STUD. 309, 324 (2017).

⁸⁵⁰ Ariz. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Arizona*, *supra* note 670 at 10. See also Maricopa Cty. Recorder’s Office, “Restoration of Right to Vote,” <https://recorder.maricopa.gov/elections/restorationofvotingrights.aspx> (stating that for a person with one felony conviction to qualify for voting rights restoration, “[i]f a fine or restitution was imposed, that fine and/or restitution must be paid in full”) (last accessed Feb. 13, 2019).

successor) exercises discretion about whether to restore the convicted person’s voting rights;⁸⁵¹ although voting rights restoration generally occurs when applicants pay mandatory fines and satisfy other criteria, this wide judicial latitude sometimes prevents restoration even when applicants are otherwise eligible.⁸⁵² Tennessee’s application for voting rights restoration also mandates the payment of “[a]ll of the restitution ordered by the court as a part of the sentence” for a person with a felony conviction to become eligible for exercising the right to vote once again.⁸⁵³

Due in part to the variability of state laws, some policymakers have proposed federal action on the issue of voting rights restoration. In his written testimony to the Commission, Senator Benjamin Cardin (D-MD) discussed the Democracy Restoration Act that he submitted to the 114th Congress (S. 772).⁸⁵⁴ The bill sought to create a national standard to restore voting rights to formerly incarcerated individuals.⁸⁵⁵ Senator Cardin cited three discrepancies in state laws that the bill would seek to rectify, including:⁸⁵⁶

- The lack of uniformity in voting in federal elections, which creates an “unfair disparity and unequal participation” based on a person’s residence.⁸⁵⁷
- The lack of uniformity in state laws that allow or disallow the restoration of rights.⁸⁵⁸
- The disproportionate impact that disenfranchisement has on racial and ethnic minorities.⁸⁵⁹

⁸⁵¹ ARIZ. REV. STAT. ANN. § 13-908.

⁸⁵² See Ariz. Advisory Committee to the U.S. Commission on Civil Rights, *Voting Rights in Arizona*, *supra* note 670 at 9 (reporting that “25 percent of formerly incarcerated individuals who served time in Maricopa County, who did not owe fees, were denied restoration of voting rights due to [a] judge’s decision.”).

⁸⁵³ Tenn. Division of Elections, *Certificate of Restoration of Voting Rights*, 2017, <https://sos-tn-gov-files.tnsosfiles.com/forms/ss-3041.pdf>.

⁸⁵⁴ Cardin Statement at 1; S. 772, 114th Cong. (2015).

⁸⁵⁵ Cardin Statement at 1; S. 772, 114th Cong. (2015).

⁸⁵⁶ Cardin Statement at 2-3.

⁸⁵⁷ *Ibid.* at 2.

⁸⁵⁸ *Ibid.* at 3.

⁸⁵⁹ *Ibid.*

The previously introduced version of the bill drew widespread support from civil rights and reform organizations, religious and faith-based organizations, and law enforcement and criminal justice organizations.⁸⁶⁰ In 2017, Senator Cardin reintroduced the bill as S. 1588 in the 115th Congress.⁸⁶¹ In the 116th (current) Congress, Congressman Jerrold Nadler (D-NY) introduced the Democracy Restoration Act of 2019 as H.R. 196, which mirrors Senator Cardin's bill.⁸⁶² In addition, the For the People Act of 2019, introduced by Congressman John Sarbanes (D-MD) as H.R. 1, incorporates the Democracy Restoration Act and would prohibit the denial or abridgement of a citizen's right to vote based on his or her conviction "of a criminal offense unless such individual is serving a felony sentence in a correctional institution or facility at the time of the election."⁸⁶³

Critics of this type of legislation have argued that Congress lacks the constitutional authority to impose a national standard on states relating to the qualifications of voters.⁸⁶⁴ For support, they point to Article I, Section 2's provision that voters for members of the House of Representatives in each state "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."⁸⁶⁵ According to the bill's critics, this clause implies that if states must determine the qualifications of voters for state elections, then states must determine voting

⁸⁶⁰ Ibid. at 6-11. Senator Cardin's testimony attached three separate letters of support from multiple organizations. See "Letter In Support Of The Democracy Restoration Act (S. 772/ H.R. 1459) From Civil Rights And Reform Organizations," March 25, 2015, including AFL-CIO, African American Ministers In Action, American Civil Liberties Union, American-Arab Anti-Discrimination Committee (ADC), Asian Americans Advancing Justice | AAJC, Bend the Arc Jewish Action, Brennan Center for Justice, Commission on Social Action of Reform Judaism, Common Cause, Communication Workers of America, CURE, DC Vote, Demos, Drug Policy Alliance, Fair Elections Legal Network, FairVote, FedCURE, Global Alliance, Interfaith Networks, International CURE, Jewish Council for Public Affairs, Lawyers' Committee for Civil Rights Under Law, The Leadership Conference on Civil and Human Rights, League of United Latin American Citizens, MALDEF, NAACP, NAACP Legal Defense & Educational Fund, Inc., National Association of Criminal Defense Lawyers, National Association of Social Workers, National Council of Jewish Women, National Urban League, NETWORK, A National Catholic Social Justice Lobby, OurTime.org, People Demanding Action, People For the American Way, Prison Policy Initiative, Project Vote, The Sentencing Project, Voting Rights Forward; "Letter In Support Of The Democracy Restoration Act (S. 772/ H.R. 1459) From Religious And Faith-Based Organizations," March 27, 2018, including African American Ministers In Action, Bend the Arc Jewish Action, Church of the Brethren, Office of Public Witness, Commission on Social Action of Reform Judaism, CURE, Disciples Justice Action Network, FedCURE, Global Alliance Interfaith Networks, Institute for Prison Ministries, International CURE, Jewish Council for Public Affairs, Mennonite Central Committee U.S. Washington Office, National Council of Churches, National Council of Jewish Women, NETWORK, A National Catholic Social Justice Lobby, People Demanding Action, Presbyterian Church (U.S.A.), United Church of Christ, Justice and Witness Ministries, United Methodist Church, General Board of Church and Society; "Letter In Support Of The Democracy Restoration Act (S. 772/ H.R. 1459) From Law Enforcement And Criminal Justice Organizations," March 27, 2018, including American Probation and Parole Association, Blacks in Law Enforcement of America, Jorge Montes, Principal at Montes & Associates, Former Chairman, Illinois Prisoner Review Board, International Community Corrections Association. Ibid. at 6-11.

⁸⁶¹ S. 1588, 115th Cong. (2017). The 115th Congress runs from Jan. 3, 2017 through the end of Dec. 2018.

⁸⁶² H.R. 196, 116th Cong. (2019), <https://www.congress.gov/116/bills/hr196/BILLS-116hr196ih.pdf>. The 116th Congress runs from Jan. 3, 2019 through the end of Dec. 2020.

⁸⁶³ H.R. 1, 116th Cong. §§ 1401-08 (2019), <https://www.congress.gov/116/bills/hr1/BILLS-116hr1ih.pdf>.

⁸⁶⁴ See, e.g., von Spakovsky Statement at 4.

⁸⁶⁵ U.S. CONST. art. I, § 2, cl. 1.

qualifications for federal elections.⁸⁶⁶ Moreover, they argue, Article I, Section 4 empowers Congress to regulate the “Time, Places, and Manner” of federal elections in the states, but does not explicitly authorize Congress to regulate voting qualifications in the states.⁸⁶⁷

In response, proponents of the legislation maintain that because felony disenfranchisement disproportionately adversely affects people of color, Congress has more leeway.⁸⁶⁸ They note that although federalism devolves ample election authority to the states, the U.S. Constitution preserves the right of Congress to regulate federal elections regarding their time, place and manner, and to protect against racially discriminatory voting procedures in the states.⁸⁶⁹ The U.S. Supreme Court, they argue, has repeatedly upheld the ultimate authority of Congress to supervise federal elections.⁸⁷⁰ Moreover, in upholding the Voting Rights Act of 1965, the Court has upheld the power conferred upon Congress to guarantee equal protection and access to the ballot regardless of race under the 14th and 15th amendments.⁸⁷¹ Given the disproportionate impact of felony disenfranchisement on people of color, supporters of the bill assert, Congress would be well within its power to enact federal legislation to address the issue.⁸⁷²

⁸⁶⁶ von Spakovsky & Clegg, *Felon Voting and Unconstitutional Congressional Overreach*, *supra* note 761 at 9.

⁸⁶⁷ *Ibid.*; U.S. CONST. art. I, § 4, cl. 1.

⁸⁶⁸ Cardin Statement at 2, 4.

⁸⁶⁹ *Ibid.* at 2 (citing U.S. CONST. art. I, § 4, cl. 1. (“Congress may at any time by Law make or alter such [state] Regulations [of elections]”) and U.S. CONST. amend. XIII, XIV, XV, XIX, XXIV, XXVI (authorizing Congress to enforce, respectively, the abolition of slavery, the duty of states to guarantee due process and equal protection of the laws, the requirement that states not deny or abridge the right to vote “on account of race, color, or previous condition of servitude,” the requirement that states not deny or abridge the right to vote “on account of sex,” the requirement that states not deny or abridge the right to vote “by reason of failure to pay any poll tax or other tax,” and the requirement that states not deny or abridge the right to vote of citizens aged 18 and older “on account of age.”)).

⁸⁷⁰ *See, e.g., Ex parte Siebold*, 100 U.S. 371, 383-84 (1879) (interpreting the Elections Clause to find that “the power of Congress over [election regulations] is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them.”); *Ex parte Commonwealth of Virginia*, 100 U.S. 339, 345-46 (1879) (“Whatever legislation is appropriate, that is, adapted to carry out the objects the [Reconstruction] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.”).

⁸⁷¹ *See, e.g., Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 557 (2013) (declining to invalidate Congressional power under Section 2 of the Voting Rights Act to enforce “the permanent, nationwide ban on racial discrimination in voting “); *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (upholding Congressional authority codified in the Voting Rights Act, stating that “Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting. Congress has repeatedly exercised these powers in the past, and its enactments have repeatedly been upheld.”).

⁸⁷² Cardin Statement at 2, 4 (pointing out that “Article I, Section 4, of the Constitution grants Congress ultimate supervisory power over Federal elections, an authority which has repeatedly been upheld by the United States Supreme Court” and that “Congress has a responsibility to remedy [racial disparities] and enact a nationwide standard for the restoration of voting rights.”); *see also* Brennan Center, *Legal Analysis of Congress’ Constitutional Authority to Restore Voting Rights*, 2009, at 2, 3 n.2, <https://www.brennancenter.org/sites/default/files/legacy/Democracy/Brennan%20Center%20analysis%20of%20DR%20federal%20authority%208-10-09.pdf> (noting the Supreme Court’s recognition “that Congress’ enforcement powers are a grant of broad authority to eradicate any racial discrimination in voting” and that “[c]riminal

Prison Gerrymandering and Vote Dilution

Prison gerrymandering refers to the practice of counting incarcerated individuals as residents of correctional facilities, rather than their home communities, when redrawing electoral maps (i.e., during redistricting).⁸⁷³ Like felony disenfranchisement, prison gerrymandering is a collateral consequence of a felony conviction, affecting not just incarcerated people but also their home communities, to which they frequently return.⁸⁷⁴ Voters have challenged prison gerrymandering as a violation of the “one-person, one-vote” principle of the Equal Protection Clause, contending that the practice dilutes the voting strength of incarcerated people’s home communities and inflates the voting strength of communities where prisons are built.⁸⁷⁵ Because prisoners are disproportionately people of color from more urban areas, and prisons are located in primarily white, rural areas, prison gerrymandering can unequally redistribute and reapportion political power and representation.⁸⁷⁶

Among the cases litigated thus far, courts have differed in assessing whether prison gerrymandering violates the Equal Protection Clause. In Florida, a federal district court evaluated the districting scheme of Jefferson County’s five single-member districts, which elect representatives to the County’s Board of Commissioners and School Board; the entire county had an estimated population of 14,761 people.⁸⁷⁷ In District 3, the county was home to a state prison that confined 1,157 people, only nine of whom were convicted in Jefferson County.⁸⁷⁸ The

disenfranchisement provisions today continue to have a substantially greater impact on minorities, especially African American men.”).

⁸⁷³ Harvard Law Review Association, *Constitutional Law-Equal Protection-First Circuit Holds That Prison Gerrymandering Does Not Violate the Equal Protection Clause*, 130 HARV. L. REV. 2235 (2017).

⁸⁷⁴ See Weiss, *Housing Access for People with Criminal Records*, *supra* note 413 at 1 (noting that “as more former prisoners return to their communities, there is a growing concern about how they will fare upon reentry.”). Note that where “an apportionment scheme” confers “greater ‘representational strength’” upon the district where incarcerated people are confined than upon their home district, the equal protection rights of people residing in incarcerated persons’ home districts may be violated. See, e.g., *Calvin v. Jefferson Cty. Bd. of Comm’rs*, 172 F. Supp. 3d 1292, 1303-04 (N.D. Fla. 2016).

⁸⁷⁵ See *Davidson v. City of Cranston, R.I.*, 837 F.3d 135, 139 (1st Cir. 2016) (holding that the city’s redistricting plan, which included nonvoting inmates of a city ward’s correctional facility in the ward’s population count, did not inflate that ward’s voting strength or dilute the other five wards’ voting strength in violation of the Equal Protection Clause); *Calvin*, 172 F. Supp. 3d at 1298, 1325-26 (finding that the county’s redistricting scheme, which counted nonvoting inmates of a state prison as part of that district’s population, enlarged the district’s representational strength and diluted the other five districts’ representational strength in violation of the Equal Protection Clause).

⁸⁷⁶ Julie A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners’ Political Representation*, 45 FORDHAM URB. L.J. 323, 325 (2018).

⁸⁷⁷ *Calvin*, 172 F. Supp. 3d at 1295.

⁸⁷⁸ *Id.* at 1296. A single-member district is a district in which one elected official represents the entire district, whereas a multimember district is one in which multiple elected officials represent voters in one district. See *Thornburg v. Gingles*, 478 U.S. 30, 46-48 (1986). The Supreme Court has held that multimember district plans may “impede the ability of minority voters to elect representatives of their choice” when a minority group can show “that it is sufficiently large and geographically compact to constitute a majority in a single-member district,” that it is “politically cohesive,” and that the majority group “votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.” *Id.* at 48-51.

county's districting scheme, which included the correctional institution's population in District 3, resulted in a 42 percent deviation of the non-incarcerated population as compared to the other four districts in the county.⁸⁷⁹ The court found that the scheme denied residents of other districts equal protection of the laws by diluting their "representational and voting strength" while enlarging that of District 3 residents.⁸⁸⁰ Moreover, the court noted, the county's incarcerated individuals lacked a "meaningful representational nexus" with the county government, "in every way that matters for representative democracy."⁸⁸¹

By contrast, the First Circuit held only a few months later that the redistricting scheme of a city ward in Cranston, Rhode Island was not unconstitutional.⁸⁸² The city ward's population was 13,642, of whom 3,433 were non-voting inmates.⁸⁸³ The court found no equal protection violation because the plaintiffs had not shown "invidious discrimination" on the part of the ward, and absent a showing of intentional discrimination the court must defer to "local election authorities related to apportionment."⁸⁸⁴

On February 19, 2019, another federal court held that a case alleging Equal Protection violations could proceed against the state of Connecticut.⁸⁸⁵ This is the first known statewide prison gerrymandering case.⁸⁸⁶ At the time of this writing, it is still unresolved.

Notably, certain legislative initiatives designed to prevent or rectify prison gerrymandering have been upheld in the courts.⁸⁸⁷ In 2010, Maryland enacted the No Representation Without Population Act, which requires districting authorities to count incarcerated individuals as residents of their home districts and survived a constitutional challenge.⁸⁸⁸ And a New York law that also requires districting maps to include incarcerated persons as residents of their home districts, rather than the districts where they are confined, was upheld by a New York state trial court.⁸⁸⁹

⁸⁷⁹ *Calvin*, 172 F. Supp. 3d at 1298, 1323-24.

⁸⁸⁰ *Id.* at 1323.

⁸⁸¹ *Id.*

⁸⁸² *Davidson*, 837 F.3d at 146.

⁸⁸³ *Id.* at 138.

⁸⁸⁴ *Id.* at 141.

⁸⁸⁵ NAACP, "NAACP Challenge to Prison Gerrymandering Moves Forward, First Statewide Challenge in the Nation," Feb. 19, 2019, <https://www.naacp.org/latest/naacp-challenge-prison-gerrymandering-moves-forward-first-statewide-challenge-nation/?fbclid=IwAR3z9RzHn6XBUQmPR6ynCh4TuXF3LufyLxfEK1hjsoganmckzuNDLeybsDM>.

⁸⁸⁶ *Ibid.*

⁸⁸⁷ *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 904 (D. Md. 2011), *aff'd*, 567 U.S. 930 (2012); Decision and Order, *Little v. LAFTOR*, No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011), at 8-9 https://www.prisonersofthecensus.org/little/Decision_and_Order.pdf.

⁸⁸⁸ *Fletcher*, 831 F. Supp. at 893, 904.

⁸⁸⁹ Decision and Order, *Little v. LAFTOR*, No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011), at 8-9, https://www.prisonersofthecensus.org/little/Decision_and_Order.pdf.

Jury Service

Jury service represents one of the pillars of the U.S. criminal justice system. The right to be tried by a jury of one's peers was established in the U.S. Constitution in 1787.⁸⁹⁰ The Supreme Court has held that exclusion of people of color from jury service violates the defendant's equal protection rights because it denies the defendant's right to a trial "composed of [his] peers or equals...that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."⁸⁹¹ In addition, the Supreme Court has recognized that denying a person the right to serve on a jury based on her race "unconstitutionally discriminate[s] against the excluded juror," not just the defendant.⁸⁹²

Federal courts in the United States prohibit people who have been convicted of a felony from serving on a federal jury.⁸⁹³ In most U.S. states, individuals with felony convictions are automatically disqualified from serving on juries for at least some period of time.⁸⁹⁴ About 30 states ban people with felony convictions from jury service for life.⁸⁹⁵ The restrictions in other states vary; some impose the ban until the completion of the sentence, parole, and probation⁸⁹⁶ and some for a period of time after incarceration,⁸⁹⁷ while others make a juror with a conviction challengeable for cause.⁸⁹⁸ Colorado and Maine are the only two states without restrictions on jury service based on criminal records (except that Colorado bans people with felony convictions from

⁸⁹⁰ U.S. CONST. art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes have been committed[.]").

⁸⁹¹ *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (quoting *Strauder v. State of W. Virginia*, 100 U.S. 303, 308 (1879)). See also *Hernandez v. State of Tex.*, 347 U.S. 475, 477-79 (1954) (noting that "the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection" and adding that exclusion of a juror "solely because of their ancestry or national origin" also runs afoul of the 14th Amendment).

⁸⁹² *Batson*, 476 U.S. at 87.

⁸⁹³ 28 U.S.C. § 1865(b)(5). Federal law specifically excludes from jury service an individual who "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored." *Id.* See also United States Courts, "Juror Qualifications," <http://www.uscourts.gov/services-forms/jury-service/juror-qualifications> (last accessed Aug. 25, 2018).

⁸⁹⁴ Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U. L. REV. 65, 150-58 (2003); see also Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 595-96 (2013).

⁸⁹⁵ Kalt, *The Exclusion of Felons from Jury Service*, *supra* note 894 at 150-58.

⁸⁹⁶ See, e.g., 9 R.I. GEN. LAWS ANN. § 9-9-1.1(c) (stating "[n]o person convicted of a felony shall be allowed to serve as a juror, until completion of such felon's sentence, served or suspended, and of parole or probation regardless of a nolo contendere plea."); WIS. STAT. ANN. § 756.02 (disqualifying a person who "has been convicted of a felony and has not had his or her civil rights restored") and § 304.078 (restoring civil rights after incarceration, parole, or probation).

⁸⁹⁷ See, e.g., MASS. GEN. LAWS ANN. ch. 234A, § 4 (banning a person who "has been convicted of a felony within the past seven years or is a defendant in pending felony case or is in the custody of a correctional institution"); OR. CONST. art. I, § 45 (banning a person who has been convicted of "a felony or served a felony sentence within the 15 years immediately preceding the date" of jury service).

⁸⁹⁸ See, e.g., IOWA RULE 1.915(6)(a) (allowing a juror to be challenged by a party for "[c]onviction of a felony").

serving on grand juries).⁸⁹⁹ The length of disqualification often varies, as some states implement a lifetime disqualification, whereas other states allow for temporary or contingent disqualifications, depending on the particular circumstances of an individual's criminal record:

The disqualification may end at the same time as one's imprisonment, or sentence, or if one is able to obtain an amnesty, annulment, expunction, pardon, reversal, or restoration of civil rights. The disqualification may be triggered only by a particular type of felony, by incarceration, or only by incarceration for a certain period of time. The disqualification may last for only a certain period of years after conviction, or after completion of one's sentence. Each jurisdiction makes the cut differently.⁹⁰⁰

In addition to direct disqualifications to jury service based on an individual's criminal history, some states limit jury service to "qualified electors," which indirectly disqualify people with criminal records from jury service based on a primary exclusion from voting.⁹⁰¹ Forty-eight states place restrictions on voting rights for individuals with felony convictions, and voter registration rolls largely contribute to the compilation of lists of potential jurors.⁹⁰² Furthermore, about a dozen states have statutory provisions that may make misdemeanor convictions susceptible to disqualification from jury service, depending on the type of conviction or otherwise.⁹⁰³

According to scholarship on the topic, there are two primary rationales for the exclusion of formerly incarcerated persons from jury service. The first rationale posits that formerly incarcerated people threaten the probity of the jury ("probity" as in "[m]oral excellence, integrity, rectitude, uprightness; conscientiousness, honesty, sincerity"); the second contends that (within the context of criminal trials only) formerly incarcerated people are inherently biased in favor of criminal defendants.⁹⁰⁴ The inherent bias rationale assumes that individuals with criminal convictions harbor resentment against "the system" that punished them, and will favor the defendant—seen as "a fellow underdog"—due to this bias.⁹⁰⁵

⁸⁹⁹ COLO. REV. STAT. ANN. § 13-71-105; ME. REV. STAT. TIT. 14, § 1211. A grand jury is a body of 16 to 23 people "chosen to sit permanently for at least a month—and sometimes a year" in private proceedings to decide whether to indict an individual accused of a crime. See Black's Law Dictionary, *Grand Jury* (10th ed. 2014); see also Wex's Legal Dictionary, *Grand Jury*, Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/grand_jury (last accessed Oct. 3, 2018). During the grand jury proceedings, the prosecutor presents the case, with or without the accused present, to convince grand jurors that probable cause exists to charge the accused with a crime (i.e., issue an indictment). *Id.*

⁹⁰⁰ Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, *supra* note 894 at 596.

⁹⁰¹ *Id.* at 598.

⁹⁰² *Id.* at 595.

⁹⁰³ *Id.* at 597.

⁹⁰⁴ Kalt, *The Exclusion of Felons from Jury Service*, *supra* note 894 at 73-74.

⁹⁰⁵ *Id.* at 74 (quoting *Rubio v. Superior Court*, 24 Cal. 3d 93, 101 (1979)).

A recent study examined the validity of the inherent bias rationale.⁹⁰⁶ Researchers compared the pretrial biases of three groups of participants: individuals with felony convictions, eligible jurors not convicted of felonies, and law school students not convicted of felonies.⁹⁰⁷ The study found that a felony conviction alone is not the sole predictor of pretrial bias that favors the defense (as opposed to bias favoring the prosecution). Among the factors that predicted pro-defense/anti-prosecution bias, the study revealed that enrollment in law school had a greater effect on pretrial bias than a felony conviction.⁹⁰⁸ Furthermore, this study found that a felony conviction does not uniformly lead to negative views of the law that might create a pro-defense/anti-prosecution bias, and found that formerly incarcerated persons did not possess a disproportionately negative view of the law.⁹⁰⁹ In fact, there was no significant difference between the formerly incarcerated persons' view of the law and that of eligible jurors.⁹¹⁰ No similar studies have focused directly on this issue. However, researchers continue to repeat the assertion that a juror with a criminal record is more likely to sympathize with a criminal defendant, without citing supportive data.⁹¹¹

At the Commission's 2017 briefing, James Binnall, Assistant Professor at California State University Long Beach, argued that the inclusion of jurors with criminal records aids their successful reentry into society:

... former offenders spoke of their inclusion in the jury selection process and in the jury process generally as a corroboration of their reformation, as a certification of their change. And they also noted how removing barriers to reentry helps a former offender build a personal narrative that acknowledges a criminal past while allowing for a law abiding present. As many scholars have noted, this process of reconciling past events with present and future aspirations is a key component to [a] criminal's successful reentry.⁹¹²

He noted from personal experience that even after admission to the California bar:

I was informed by the Jury Commissioner that I was permanently ineligible for jury service in California because of my prior felony conviction and I would never be summonsed again. I protested mildly, explaining that I was an attorney, had used

⁹⁰⁶ James M. Binnall, "A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?" *Law and Policy*, vol. 36, no. 1 (2014): 29.

⁹⁰⁷ *Id.* at 23.

⁹⁰⁸ *Id.*

⁹⁰⁹ *Id.* at 29.

⁹¹⁰ *Id.* at 29.

⁹¹¹ Paula Z. Segal, *A More Inclusive Democracy: Challenging Felon Jury Exclusion in New York*, 13 N.Y. CITY L. REV. 313, 358 (2010) (referencing the contention of some researchers that people "who have been charged with or convicted of committing felonies are likely to bear a grudge against the criminal justice system" despite a lack of supportive evidence).

⁹¹² *Briefing Transcript* at 91-92.

the special entrance, and was told that I should write my congressman if I was unhappy about California's juror eligibility requirements.⁹¹³

Federal courts have found that the Constitution requires neither the exclusion⁹¹⁴ nor the inclusion⁹¹⁵ of people with felony convictions on juries. Three federal circuit courts have asserted that the Sixth Amendment right to an impartial jury does not guarantee a right to “a jury of non-felons” even if a state law mandates the exclusion of people with felony convictions.⁹¹⁶ In *Coleman v. Calderon*, the court reasoned that although the California constitution prohibited people with felony convictions from jury service, the right to a jury of non-felons is not a constitutionally guaranteed “fundamental right” that would affect the defendant’s “substantial rights.”⁹¹⁷ Accordingly, the court found, the service of an individual with a felony conviction on a jury did not deny the defendant due process under the law.⁹¹⁸ Other courts have contended that the Sixth Amendment right to an impartial jury is intended to protect the defendant from juror bias, which is not necessarily present when a person with a felony conviction serves on a jury.⁹¹⁹ According to the courts’ reasoning, a mandatory exclusion of people convicted of felonies from juries “would be appropriate only if one could reasonably conclude that felons are always biased against one party or another.”⁹²⁰

The Supreme Court has not ruled directly on jury exclusion statutes, but has noted that “the Constitution does not forbid the States to prescribe relevant qualifications for their jurors.”⁹²¹ In 1970, in *Carter v. Jury Commission of Greene County*, the Court upheld an Alabama statute that allowed only jurors who were “generally reputed to be honest and intelligent” and “esteemed in the community for their integrity, good character and sound judgment.”⁹²² Black plaintiffs had alleged that the statute was racially discriminatory and violated their right to serve as jurors,

⁹¹³ *Id.* at 88.

⁹¹⁴ See *Coleman v. Calderon*, 150 F.3d 1105, 1117 (9th Cir.), *judgment rev'd on other grounds*, 525 U.S. 141 (1998) (finding that “[t]he Sixth Amendment does not bar ex-felons from jury service.”); *United States v. Humphreys*, 982 F.2d 254, 261 (8th Cir. 1992) (noting that the “Sixth Amendment right to an impartial jury does not require an absolute bar on felon-jurors” (quoting *United States v. Boney*, 977 F.2d 624, 633 (D.C. Cir. 1992)). See also Kalt, *The Exclusion of Felons from Jury Service*, *supra* note 894 at 71.

⁹¹⁵ See *Perez v. State*, 11 S.W.3d 218, 224 (Tex. Crim. App. 2000) (Keller, J., concurring) (asserting that “the Constitution does not affirmatively prohibit jury service by felons” and “the Constitution does not confer upon the defendant a right to exclude criminals from the jury”) (emphasis in original); *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (noting that “in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition.”). See also Kalt, *The Exclusion of Felons from Jury Service*, *supra* note 894 at 71-73.

⁹¹⁶ *Coleman*, 150 F.3d at 1117; see also *Humphreys*, 982 F.2d at 261 (citing *Boney*, 977 F.2d at 633).

⁹¹⁷ 150 F.3d at 1117.

⁹¹⁸ *Id.*

⁹¹⁹ *Humphreys*, 982 F.2d at 261 (citing *Boney*, 977 F.2d at 633).

⁹²⁰ *Id.*

⁹²¹ *Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320, 332-33 (1970).

⁹²² *Id.* at 323, 336-37.

producing evidence that the county clerk charged with recommending jurors to the jury commission consulted primarily white residents and was only “familiar” with black residents who were “convicted of crimes” or “in trouble.”⁹²³ Although they represented 65 percent of the county population, black people thus composed only 32 percent of potential jurors in 1967.⁹²⁴ But finding the Alabama statute “devoid of any mention of race,” the Court upheld its constitutionality and the discretion of states to base jurors’ eligibility on “good intelligence, sound judgment, and fair character.”⁹²⁵

The *Carter* case focused on the equal protection rights of potential jurors, and other cases on jury composition have focused on the equal protection rights of defendants.⁹²⁶ But as mentioned above, courts have often reviewed whether the litigant’s Sixth Amendment right to an impartial jury encompasses the right to a jury that excludes people convicted of felonies.⁹²⁷ Litigants, rather than excluded jurors, have generally launched these challenges to protect against unfair bias in their opponents’ favor, rather than to attain “equal and fair juries.”⁹²⁸ Excluded jurors rarely challenge their exclusion, as it is frequently difficult to ascertain when exclusion is improper.⁹²⁹ An excluded juror may never receive a summons, or may not fully understand why he or she was removed from the jury pool, so “it is hard for an improperly excluded juror even to know that a violation has occurred.”⁹³⁰

The most common argument against exclusion of jurors with felony convictions is the “cross-section” argument, which posits that without the representation of individuals with criminal records, the jury will not draw from a broadly representative pool of people from a community.⁹³¹ Proponents of allowing people convicted of felonies to serve on juries often cite the Federal Jury Selection and Service Act of 1968, in which Congress declared that all federal court litigants “entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.”⁹³² The Supreme Court has recognized the cross-section requirement as “fundamental to the jury trial guaranteed by the Sixth Amendment,” in that it furthers the purpose of the jury as the community’s check on “arbitrary power” wielded by prosecutors and judges.⁹³³ This goal cannot be fulfilled,

⁹²³ *Id.* at 324-25.

⁹²⁴ *Id.* at 327-28.

⁹²⁵ *Id.* at 332-33, 336-37.

⁹²⁶ Mitchell S. Zuklie, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 107-08 (1996) (citing *Smith v. Texas*, 311 U.S. 128 (1940) (where the Court reversed the conviction of a black defendant upon finding that black people were systematically excluded as jurors)).

⁹²⁷ *See, e.g., Humphreys*, 982 F.2d at 261; *Boney*, 977 F.2d at 633. *See also* Kalt, *The Exclusion of Felons from Jury Service*, *supra* note 894 at 71.

⁹²⁸ Kalt, *The Exclusion of Felons from Jury Service*, *supra* note 894 at 72.

⁹²⁹ *Id.*

⁹³⁰ *Id.*

⁹³¹ *Id.*, at 75.

⁹³² 28 U.S.C. § 1861.

⁹³³ *Taylor*, 419 U.S. at 530.

the Court has asserted, if the jury includes “only special segments of the populace” or excludes “large, distinctive groups.”⁹³⁴ However, courts have generally rejected the argument that excluding people with criminal convictions violates the cross-section requirement.⁹³⁵ Numerous federal circuit and district courts have contended that people with criminal convictions do not constitute a “distinctive group,” given the varying nature of the crimes they may have committed, and that their exclusion promotes the necessary “probity” of the jury.⁹³⁶ Some scholars argue that the probity argument unfairly presumes that people with criminal convictions would not adhere to the highest principles or act as upright individuals when serving on a jury.⁹³⁷

The Impact of Jury Exclusion on People of Color

Because people of color are disproportionately arrested, prosecuted, and incarcerated, some contend that jury exclusion based on an individual’s criminal record disproportionately excludes people of color.⁹³⁸ Researchers have alleged that jury exclusion of people with felony convictions allows attorneys to circumvent the ban against racial discrimination in jury selection that the Supreme Court set forth in *Batson v. Kentucky*.⁹³⁹ According to this argument, prosecutors have managed to use contact with the criminal justice system as a proxy for race, given that people of color are more likely to be personally or tangentially involved with the criminal justice system.⁹⁴⁰ For example, one study documented multiple prosecutorial objections to prospective jurors based on “having relatives who were in the criminal justice system, were convicted, or were incarcerated; having a criminal history, including having been charged with a crime; having a negative attitude toward, or negative experiences with, the police; having been a victim of a crime; and opposing the death penalty.”⁹⁴¹

⁹³⁴ *Id.*

⁹³⁵ Kalt, *The Exclusion of Felons from Jury Service*, *supra* note 894 at 75-76 (citing “*United States v. Barry*, 71 F.3d 1269, 1273-74 (7th Cir. 1995) (rejecting a cross-section challenge to felon exclusion); *United States v. Foxworth*, 599 F.2d 1, 4 (1st Cir. 1979) (rejecting a cross-section challenge to felon exclusion); *United States v. Best*, 214 F. Supp. 2d 897, 904-05 (N.D. Ind. 2002) (finding the cross-section argument regarding felon exclusion “unavailing”); *State v. Compton*, 39 P.3d 833, 842 (Or. 2002) (en banc) (rejecting a cross-section challenge to felon exclusion); *Carle v. United States*, 705 A.2d 682, 686 (D.C. 1998) (rejecting the ineffective assistance claim relating to the cross-section argument); *Rubio*, 24 Cal. 3d at 99 (rejecting a cross-section challenge to felon exclusion); *State v. Brown*, 364 A.2d 186, 190-91 (Conn. 1975) (rejecting a cross-section challenge to felon exclusion).”).

⁹³⁶ *See, e.g., Barry*, 71 F.3d at 1273-74 (reasoning that “alleged felons” do not “comprise a distinctive group”); *Foxworth*, 599 F.2d at 4 (finding that exclusion of jurors with criminal convictions is a rationally based measure meant to “assure the ‘probity’ of the jury.”).

⁹³⁷ Kalt, *The Exclusion of Felons from Jury Service*, *supra* note 894 at 74-75.

⁹³⁸ Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, *supra* note 894 at 602. *See also* Kevin R. Johnson, “Hernandez v. Texas: Legacies of Justice and Injustice,” *UC Davis Law, Legal Studies Research Paper No. 19*, at 8 (2004), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=625403 (observing that “[c]itizenship and English language requirements for jury service, as well as the disqualification of felons, bar disproportionate numbers of Latina/os from serving on juries.”).

⁹³⁹ *See* Anna Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, 45 U.C. DAVIS L. REV. 1359, 1374-76, 1403-04 (2012); *see also Batson*, 476 U.S. at 79.

⁹⁴⁰ Roberts, *Disparately Seeking Jurors: Disparate Impact and the (Mis)use of Batson*, *supra* note 939 at 1379.

⁹⁴¹ *Id.*

The first known empirical study on jury exclusion examined Georgia's statute permanently excluding people with felony convictions from jury service, and concluded that the statute racially homogenized juries.⁹⁴² Noting that up to one-fourth of black men in Georgia had been incarcerated with felony convictions, the author found that 27.7 percent of black men were excluded from juries across all Georgia counties.⁹⁴³ Moreover, in nine counties, more than half of black men were banned from jury service due to felony convictions.⁹⁴⁴ Because the group "most likely to have their lives altered by contact with the criminal justice system" was disproportionately excluded from jury service, the results raised the question of whether the right to be tried by a jury of one's peers has been denied to black defendants.⁹⁴⁵ As the author elaborated:

Many minority groups continue to be underrepresented across domains of civic engagement, leading to disparities in juries, the electorate, and possibly even elected office. Furthermore, there is little to no resistance to felon-jury-exclusion policies (and collateral consequences more generally) despite strong preliminary evidence that they have an important and significant impact on racial minorities. The ripple effects of felon jury exclusion could act as a feedback loop back into the criminal justice system, whereby inequalities in the jury selection system ultimately lead to greater levels of racial inequality throughout the criminal justice system itself.⁹⁴⁶

Another study estimated that the exclusion of people with felony convictions from jury service can reduce the number of black men on juries by about 30 percent.⁹⁴⁷

Other scholars contend that states may justifiably bar people with felony convictions from jury service, just as they do with gun ownership or voting.⁹⁴⁸ Pointing out that a statute banning people with felony convictions from juries was "facially race-neutral" and the alleged racial disparities

⁹⁴² See generally Darren Wheelock, "A Jury of One's 'Peers': The Racial Impact of Felon Jury Exclusion in Georgia," *Justice System Journal*, vol. 32, no. 3 (2011): 335-59.

⁹⁴³ *Id.* at 348.

⁹⁴⁴ *Id.*

⁹⁴⁵ *Id.* at 352.

⁹⁴⁶ *Id.* at 353-54.

⁹⁴⁷ Kalt, *The Exclusion of Felons from Jury Service*, *supra* note 894 at 170-71 (citing Christopher Uggen et al., *Crime, Class, and Reintegration: The Scope and Social Distribution of America's Criminal Class* (unpublished manuscript, on file with the American University Law Review, delivered to American Society of Criminology, Nov. 18, 2000), which concluded that "the lower end of the 29 to 37% range is consistent with other estimates in other contexts").

⁹⁴⁸ See, e.g., Hans A. von Spakovsky, "Should Felons Be Allowed to Vote? Yes, But . . .," The Heritage Foundation, May 20, 2016, <https://www.heritage.org/election-integrity/commentary/should-felons-be-allowed-vote-yes> (defending waiting periods for restoration of voting rights in part because "felons lose many other civil rights as well, such as the right to sit on a jury, own a gun, obtain various professional licenses, or work as a public school teacher or law enforcement official in many states.").

“not ‘pronounced’,” the Seventh Circuit rejected an equal protection claim that the statute disproportionately excluded black potential jurors.⁹⁴⁹ Many of the arguments supporting felony disenfranchisement might apply to arguments supporting jury exclusion of people with felony convictions.⁹⁵⁰ For example, like proponents of felony disenfranchisement, proponents of jury exclusion have asserted that individuals who violate “the social contract” through lawlessness forfeit their right to serve on a jury, and/or display their lack of “moral competence and civic responsibility necessary for their participation in self-government.”⁹⁵¹

The counterargument points out that removing people who have experience with the criminal justice system can “creat[e] bias even while being sought in the name of bias-removal” and hence create juries with a less diverse array of viewpoints and perspectives.⁹⁵² Data indicate that two characteristics of wrongful convictions are false confessions and law enforcement (or other government) misconduct.⁹⁵³ Juries composed of individuals who have experienced only positive contact with the criminal justice system (if any) may be less likely to question the validity of a confession or the legality of actions taken by law enforcement.⁹⁵⁴ Excluding the significant swath of the U.S. population represented by people with criminal convictions may frustrate the jury’s ability to bring “a collective wisdom and body of experience” to their service.⁹⁵⁵

⁹⁴⁹ *Barry*, 71 F.3d at 1272.

⁹⁵⁰ *See, e.g.*, von Spakovsky Statement at 5 (arguing that “the loss of certain civil rights,” including the right to vote and serve on a jury, are “sanction[s] that our society has determined should be applied to criminals.”);

⁹⁵¹ Kalt, *The Exclusion of Felons from Jury Service*, *supra* note 894 at 121-23. *See also* “Arguments For and Against Felony Disenfranchisement,” *supra* notes 668-720.

⁹⁵² Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, *supra* note 894 at 605.

⁹⁵³ *Id.* at 607-10.

⁹⁵⁴ *Id.*

⁹⁵⁵ *Grigsby v. Mabry*, 483 F. Supp. 1372, 1378 n.6 (E.D. Ark. 1980), *modified*, 637 F.2d 525 (8th Cir. 1980); *see also* Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, *supra* note 894 at 605.

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Chapter 4: Findings and Recommendations

Findings

1. Collateral consequences are pervasive, broad ranging restrictions on the rights and privileges of people with criminal convictions to participate in society and access certain benefits. These consequences exacerbate punishment beyond the criminal conviction after an individual completes the court-imposed sentence. In addition, collateral consequences affect people living on parole or probation in the community while they complete a criminal sentence.
2. Some collateral consequences, such as limitations on working with children for people convicted of particular dangerous crimes, are enacted for valid public safety reasons. Many collateral consequences are unrelated either to the underlying crime for which a person has been convicted or to a public safety purpose. When the collateral consequences are unrelated in this way, their imposition generally negatively affects public safety and the public good.
3. The convicted person generally lacks notice as to what the collateral consequences are in the jurisdiction in which she/he is charged. Except for immigration consequences, collateral consequences are not required to be included in court proceedings, plea bargaining, or counseling by attorneys. The general public, attorneys, and the courts often lack knowledge of what the totality of the collateral consequences are in their jurisdiction, how long they last, and whether they are discretionary or mandatory, or even if they are relevant to public safety or merely an extended punishment beyond a criminal sentence. This absence of public and judicial awareness of collateral consequences of conviction undermines any deterrent effect that might flow from attaching such consequences, separate and apart from the punishment itself, to criminal convictions.
4. There is scant evidence that collateral consequences act as a deterrent; however, the evidence shows harsh collateral consequences unrelated to public safety increase recidivism. This increase in recidivism is caused by limiting or by completely barring formerly incarcerated persons' access to personal and family support.
5. Many collateral consequence restrictions on professional licensing serve an anti-competitive function and work against the public interest. They hinder the chances for and likelihood of rehabilitation for the formerly incarcerated person.
6. Voting restrictions because of a criminal conviction vary sharply by state. Some states allow individuals to vote while in prison and some require individuals to submit

applications for restoration of the right to vote years after they have served their criminal sentence. Other states require a full pardon for the restoration of rights. In November 2018, Florida voters overwhelmingly required the state to restore voting rights to people with criminal convictions who have completed their sentence. The constitutional amendment was approved by a margin of 64% in favor and 35% against with more than 8 million votes cast.

7. The federal courts and some states permanently bar any person with a felony criminal conviction from sitting on a criminal jury because of a belief that such persons will be biased toward criminal defendants. Studies do not show pro-defendant biases among people with criminal convictions. Rather studies show that formerly incarcerated individuals are no more biased than other potential jurors. Some states also bar persons with felony convictions from sitting on civil juries after they have served their sentences.
8. Restrictions on public housing and public benefits, including TANF and SNAP, make people acutely vulnerable upon leaving prison. Many people who leave prison do so without money and resources for basic living expenses, which are not easily obtained in part due to the restrictions on public benefits and housing. These consequences fail to protect the public safety and can lead the formerly incarcerated person toward unlawful means to earn subsistence money. Data show that persons subject to these bans are overwhelmingly women.
9. Many jurisdictions suspend driver's licenses based on criminal convictions, unrelated to whether the restricted person's conviction involved a criminal driving violation or an offense linked to driving. These restrictions severely limit employment opportunities, leaving people unable to support themselves, which can lead to recidivism putting the public's safety at risk.
10. Access to federal financial aid for higher education is suspended for people with drug convictions, but not for other criminal convictions. This restriction is not related to drug offenses, and is not connected to a purpose that has been shown to promote the public good.
11. Employment is difficult to access for those individuals with a criminal conviction as many employers choose to use a blanket ban on hiring any person with a prior criminal conviction regardless of the offense committed by the person. In some jurisdictions employers are not permitted to inquire about criminal history on an employment application but must delay questioning and background checks about criminal history until a group of finalists are chosen by the employer. These jurisdictions do not bar employers from hiring their candidates of choice or performing background checks later in the hiring process. The EEOC has issued guidance to employers on conducting criminal background checks in ways that reduce unnecessary consequences and racial disparities.

12. The processes people must undertake to restore rights, for example through applications for pardon or for judicial record sealing, are often complicated, opaque, and difficult to access. They often require hiring a lawyer, court filing fees, collecting evidence and several appearances in court before the state will grant such restoration.
13. States, such as Pennsylvania, have instituted automatic restoration of rights and sealing of criminal records for certain offenses after a period of time with no further criminal convictions without the need for individuals to petition for record sealing.

Recommendations

1. Collateral consequences should be tailored to serve public safety. Policymakers should avoid punitive mandatory consequences that do not serve public safety, bear no rational relationship to the offense committed, and impede people convicted of crimes from safely reentering and becoming contributing members of society.
2. Jurisdictions that impose collateral consequences should periodically review the consequences imposed by law or regulation to evaluate whether they are necessary to protect public safety and if they are related to the underlying offenses.
3. Congress should pass legislation creating a process to petition for sealing federal conviction records for certain offenses, such as nonviolent crimes, after a reasonable period of time. It should create a reasonable process where a person's rights are automatically restored when no public safety concerns are present upon completion of the person's sentence. Those collateral consequences that specifically relate to the crime and implicate public safety should be lifted only after the applicant has demonstrated a reasonable period of law-abiding conduct.
4. Congress should eliminate restrictions on TANF and SNAP benefits based on criminal convictions as they do not serve the public safety or interest but do impose harsh burdens, particularly on formerly incarcerated women.
5. Congress should limit discretion of public housing providers to prevent them from categorically barring people with criminal convictions from access to public housing. The United States Department of Housing and Urban Development should provide guidance on what are reasonable periods of time that public housing agencies could permissibly consider requiring to have passed after conviction or completion of sentence before regaining access to public housing, in addition to what underlying conduct could lead to restrictions on access to public housing. In such guidance HUD should consider and list which crimes against people and property merit restrictions on entry to public housing.

This guidance should follow the best practices of state and local housing authorities that have successfully provided access to public housing to people with criminal convictions. Many people convicted of non-violent crimes should be allowed to live in public housing.

6. Congress should lift restrictions on access to student loans based on criminal convictions, except for convictions related to financial fraud. When unrelated to financial fraud, financial aid access restriction does not serve the public safety or interest. Lifting the federal ban on Pell Grants to fund in-prison college programs would enable inmates to gain valuable job skills and significantly boost their employment rates post-incarceration.
7. Congress should require federal courts to give comprehensive notice of federal restrictions on individuals' rights before guilty plea entry, upon conviction, and on release from incarceration. Notice should include how long those restrictions last, and the procedures that set out a step by step process persons must take to restore rights after release. The individual should also be given notice that there will be state and local consequences.
8. The United States Department of Justice should issue guidance sharing best practices related to collateral consequences of criminal convictions, clarifying at minimum the following points:
 - a. State and local jurisdictions should undertake a comprehensive analysis of collateral consequences authorized or required by their laws, collect them in a publicly available format, and analyze the connection of each restriction to public safety and the broader public interest. Consequences not serving the public interest should be repealed. Arrest alone should never be sufficient justification to limit rights and privileges, except as set forth by the court in which the charges are pending.
 - b. Jurisdictions should compile and clearly identify collateral consequences in a format accessible to the public. Court systems should require these consequences to be incorporated into counseling, plea bargaining, and sentencing considerations.
 - c. States should consider restoration of the right to vote to all people who have been released from incarceration or are on probation/parole and are currently disenfranchised because of criminal convictions. Denying the right to vote does not serve the public safety or interest.
 - d. States should notify people disenfranchised because of a criminal conviction when their right to vote is or can be restored, if restored automatically when that occurs, or what steps they must undertake to restore their right to vote. In states where the right to vote is restored upon release from incarceration or completion of supervision, an opportunity to register to vote and assistance to complete the process should be included as part of the completion of the exit process from prison, parole, or probation.

- e. States should eliminate blanket restrictions on jury service because of a criminal conviction as these restrictions do not safeguard the jury process. Rather, challenges to potential jurors for cause in cases where bias is presented are effective safeguards.
- f. The only federally mandated public housing restrictions on access to public housing for convicted persons are bars to Public Housing Authority residents convicted of an offense requiring lifetime sex offender registration or of producing methamphetamines on public housing grounds. For all other offenses, effective local practices to exercise discretion in determining formerly incarcerated persons' eligibility for public housing should be implemented.
- g. States should enact policies that enhance employment opportunities for people with criminal convictions while also vigorously enforcing prohibitions on racial discrimination in hiring. Such policies include training and outreach on how to consider criminal history of applicants and robust equal employment opportunity protections. Employers should not automatically disqualify a candidate with a criminal record, except in circumstances when the criminal record directly conflicts with the scope of employment.
- h. States should clarify and expand opportunities to seal or expunge criminal records. Expungement processes should be transparent and easy to navigate for people seeking record sealing.
- i. States should set standards for licensing boards and other professional licensing entities for considering granting professional licenses for those with criminal convictions. These standards should require a rational connection between the underlying conduct the conviction reveals and ability to serve in the profession. The standards should ban mandatory denials of professional licenses for any criminal conviction. States with existing standards should monitor licensing boards to ensure the standards are being followed.
- j. States should repeal restrictions on driver's licenses not related to an individual's capacity to safely operate a motor vehicle.

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Commissioners' Statements

Statement of Chair Catherine E. Lhamon

As this report documents, many of the more than 44,000 collateral consequences that impact people who have experienced incarceration or have criminal records bear no specific relationship to public safety or to the underlying convictions for which the people were incarcerated.¹ These additional penalties separate and apart from conviction impose heavy burdens on formerly incarcerated persons' ability successfully to reintegrate into free society and in so doing render all of us less equal and less safe. Some of these collateral consequences especially denigrate particular groups of formerly incarcerated people; all of them communicate government disdain for their worth as people. Where these consequences do not follow logically from the crimes for which people were convicted and do not operate to protect public safety, the federal government as well as states and local jurisdictions would do well to discontinue imposing them.

Our criminal justice system is designed to punish persons for their infractions, and deter them and others from future offenses. It is meant to rehabilitate persons who are incarcerated, the vast majority of whom will leave prison and therefore need to be able to sustain themselves and often their families. We all benefit if they are able to participate effectively and responsibly in their communities. Placing impediments in their path to housing, employment, civic engagement, and economic self-sufficiency unrelated to their convictions does not advance these criminal justice goals but does further criminal behavior born of necessity or desperation.

I was struck, and encouraged, by the unusually strong bipartisan support we heard during the Commission briefing for reform in this area, designed to strengthen all American communities. I hope very much that Congress, and local communities, heed the call documented in these pages to lift unnecessary restrictions. It is also imperative to shore up public and legal community knowledge about the collateral consequences that attach to convictions so the consequences serve their deterrent effect and so they attach only where related to the convictions imposed. I look forward to the strengthened and safer communities that would result from securing long overdue reform of these proliferating consequences to speed effective reentry for formerly incarcerated persons.

¹ U.S. Commission on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, June 2019, at ii.

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Statement of Commissioner David Kladney

I proposed this project because I thought it was important to bring attention to the overly harsh consequences we impose on people convicted of crimes. These consequences, which are in addition to official criminal sentences, follow people throughout their lives and set them up to fail. Many of these so-called consequences, with few exceptions, bear no relationship to the offense committed and expose the public to a much higher recidivism rate than is necessary. They are additional punitive punishments, plain and simple, with no redeeming value for the individual or the public.

A fundamental principle of punishment is the punishment must be proportional to the crime. In other words, the punishment must fit the crime. The cumulative effect of “consequences” not related to the offense create punishments that are lifelong and extremely burdensome, beyond what the legal code has determined is a proper criminal sentence. I believe criminal sentences are themselves generally too harsh, and these irrelevant consequences only exacerbate that injustice, but, more importantly, many of these “consequences” set up individuals attempting to right their lives after interaction with the criminal justice system to fail.

One reason there are so many collateral consequences is that they are enacted by many different policy makers and up to the discretion of many different decision makers.

We heard from people on the right and the left who came to the same conclusions, even with very different worldviews and different approaches to the law. They echoed two main sentiments: we should reduce collateral consequences because they are overly harsh and unfair to people convicted of crimes, and we should also reduce them for the safety of the public. It makes logical sense that restrictions on people’s ability to survive in legal ways push them to crime. The data bears out this common-sense idea. States with harsher collateral consequences see higher rates of recidivism.

Our report catalogues the social science research around recidivism, describing studies that show:

- Employment opportunities for formerly incarcerated people reduced recidivism
- Lower barriers to occupational licensing reduced recidivism
- Lack of stable housing increased recidivism
- Allowing some people with criminal convictions to live in public housing reduced recidivism
- Denying SNAP benefits to people with drug convictions increased recidivism
- States with permanent felony disenfranchisement have increased recidivism rates

Those of us who believe in rolling back some of these barriers to good citizenship which make no sense get accused of being cavalier about public safety. This argument offers a false choice. It is entirely possible to keep restrictions related to public safety and remove restrictions unconnected from public safety. This is what I favor, as do the advocates who testified before us. The point is that policy makers should undertake a review of collateral consequences and determine which have a valid safety purpose. Child molesters should be prohibited from being

and working around children; a person convicted of felony drunk driving should be prohibited an unlimited driver's license; a person convicted of fraud should be denied any position of financial trust. Current policy does not make these kinds of connections. Instead it is characterized by blanket restrictions that follow people forever, regardless of whether there is a connection to the crime they committed.

It was once seen as political necessity to impose ever harsher penalties on people who committed crimes. Additional restrictions on top of the criminal sentence therefore faced little opposition, much like the steep increases in criminal sentences. We now understand harsher punishment is not the only way to deal with crime. The U.S. is an international outlier in how much we use incarceration. These consequences also demonstrate a strong zeal for punishment not following evidence-based solutions which lead to rehabilitation for many more people trying to leave the criminal justice system behind.

SNAP and TANF restrictions provide a useful window into the insidious and spiteful nature of some collateral consequences of criminal convictions. During the height of the "war on drugs," lawmakers such as Senator Phil Graham came forward with lines such as, "if we are serious about our drug laws, we ought not to give people welfare benefits who are violating the Nation's drug laws." TANF and SNAP are designed to provide people with the very bare minimum they need to survive. Prior to these drug law regulations, survival-level assistance programs had never contained restrictions based on the conduct of the person needing assistance, for the simple reason that every person needs food to survive. But now, as the twisted logic of the "war on drugs" continues to filter throughout our code, according to federal law, these benefits may be denied based on a drug conviction but not any other crime, including crimes of violence, fraud, or abuse. This is nonsensical. Even when passed it was illogical and as our understanding of drug addictions and effective treatments has grown, it makes less and less sense by the day.

The federal restrictions on these programs can be modified by the states, as our report explains in detail, and we can be thankful that almost all states have limited or removed the restrictions. But this progress is not guaranteed. For example, in Pennsylvania they re-instated the restrictions on receiving benefits just this year. Although the ultimate decisions about these restrictions are left to the states, the federal government should not be putting its thumb on the scale in favor of punishing certain crimes to an extremely harsh degree, and not even the most serious crimes.

In addition to affronting the humanity of people with criminal convictions, these restrictions increase recidivism. This increase, as the report describes, has been empirically shown to be true. And it makes logical sense. If you cannot feed your family through employment (a steep climb coming out of prison) or through an assistance program, what will you do? It is unconscionable to increase people's desperation to this level, and it makes all of us less safe.

Restrictions on benefits are not the only place we find counterproductive blanket restrictions. In addition to all the other challenges people face coming out of prison, it's difficult or impossible for them to get professional licenses in skilled occupations. It's easier for professional organizations to simply deny a license to anyone with a criminal conviction than undertake a thorough review of their application. It serves an anti-competitive interest to have a blanket ban on a segment of the population. It may also be an overreaction to the fear that someone may

reoffend. In reality, they are far more likely to reoffend if they are shut out of employment in a field they are otherwise qualified for. In the most egregious cases, people who took advantage of a professional training program in prison cannot work in that profession when they get out. Licensing boards should understand people are capable of change.

As it stands, professional licenses are either denied outright to people with criminal convictions or they have to navigate a complex hearing process regardless of the seriousness or relevance of their criminal history to the profession. Licensing boards should implement rules so that they can grant some licenses to people with convictions based on their applications alone. For more serious or recent convictions, a hearing should be required, but procedures should be transparent and simple to navigate. The board is responsible for the safety of the public, but their decisions should be rational and not arbitrary. This serves all of our interests in licensing qualified professionals to work in the community and in allowing people with criminal convictions to pursue a career.

On top of denying people the ability to support themselves, we as a society also ostracize people by taking away their right to vote and sit on a jury, categorically, in some places forever, because they committed a crime. As for jury service, the stated rationale is that people with criminal convictions will be biased toward criminal defendants, but when you actually investigate, that isn't the case. People with criminal convictions have a range of thoughts and attitudes about criminal defendants and don't demonstrate a consistent pro-defendant bias. In voting, we don't impose any other qualifications based on conduct or character. We say if you are citizen and are old enough you can vote. That is democracy. People who have committed crimes also have an interest in their communities, who represents them, and who leads this country. Denying them a voice in the political process forever denies a basic right of citizenship. We should be encouraging people to feel like part of society, not pushing them to the margins.

I am struck also by the utter lack of requirements that criminal defendants have any notice of these consequences. It cannot be said that a person is making an informed guilty plea if they have no idea of the true extent of the punishment they are agreeing to. Fair administration of justice demands some kind of mechanism to make pleading guilty a meaningful choice with full knowledge of all the consequences. The Supreme Court has recognized this in the immigration context, and the logic of its decision extends to a range of consequences. It also behooves attorneys to counsel their clients on collateral consequences, even beyond the bare minimum currently required.

Some states are innovating in dealing with the breadth of collateral consequences by enhancing opportunities for record sealing. In one fell swoop, such a remedy removes collateral consequences for people who the state reasonably believes no longer pose any threat. Record sealing is only granted after a period of time when a person has no new criminal charges. It strikes a balance between appropriate punishment and allowing people to move on with their lives. The problem with record sealing is that people have to know about the possibility of record sealing and navigate the complicated processes on their own to achieve it. This of course favors people with resources to hire a lawyer or connections that bring them in contact with people who understand the system. Jurisdictions should instead create a transparent process. They should take the initiative of identifying cases eligible for sealing and proactively notify people. This

notification would occur only after the period of time has passed and the person has no further legal trouble. Advancements in technology and digital records can make this an automated process. All that is lacking is the political will to institute a program.

The way we treat people with criminal convictions after they return to their communities is in need of serious reevaluation. Our report aims to encourage policy makers to undertake these efforts and support, rather than continue to harm, people with convictions. All of us will benefit if they do.

Statement of Commissioner Peter N. Kirsanow

This report's findings and recommendations urge the Department of Justice (DOJ) to issue guidance regarding collateral consequences of incarceration. However, the findings and recommendations do not identify the statute or regulation the guidance would be interpreting.¹ And interpreting existing statutes and regulations is all that guidances can do. Neither DOJ nor any other department has a roving commission to issue pronouncements on any and every topic that may be tenuously related to its purpose.

In this statement, I will elaborate upon the narrow issue of felon voting. Recommendation 8(c) states:

States should consider restoration of the right to vote to all people who have been released from incarceration or are on probation/parole and are currently disenfranchised because of criminal convictions. Denying the right to vote does not serve the public safety or interest.²

I disagree with this blanket recommendation and assertion. Although referred to dismissively in the body of the report, the public does have an interest in having the laws made by people who have managed to clear the very low bar of avoiding incarceration.³ As I noted in my statement in the Commission's report on the use of criminal background checks in employment, "The EEOC's Guidance states that the percentage of Americans who have been incarcerated may reach 6.6%. That means that 93.4% of Americans never serve time in prison."⁴ It is not that hard

¹ Roger Clegg, George T. Conway III, and Kenneth K. Lee, *The Case Against Felon Voting*, The Federalist Society for Law and Public Policy Studies, 2006, <http://fedsoc.server326.com/ElectionLaw/FelonVoting.pdf>.

As a legal matter, felon disenfranchisement laws have long been accepted in the American legal system and easily pass constitutional muster. Indeed, the Fourteenth Amendment explicitly permits states to adopt disenfranchisement statutes, and many such laws were enacted long before African-Americans enjoyed suffrage. These laws are also beyond the reach of the Voting Rights Act of 1965 ("VRA"). The legislative history of the VRA and its 1982, as well as common sense, makes it perfectly clear that the statute was not intended to cover felon disenfranchisement laws because it would then exceed the enforcement powers of the Fourteenth and Fifteenth Amendments.

² Recommendation 8(c).

³ Report at n. 675-679.

A common argument favoring felony disenfranchisement is grounded in the belief that committing a felony violates a social contract, and this violation threatens the order and well-being of the political community. According to this reasoning, the logical response is to deny the violator the right to participate in politics and governance. Another theory embraces the importance of moral character and virtue of the political community, and postulates that any person who commits a felony demonstrates poor moral judgment and an inability to adhere to the moral code of a "civic republic." Some policymakers believe that if an individual has disregarded the law, that individual should not be entitled to provide input on public policy. Moreover, they believe that an individual's "impurity" will lead him to "cast [his] votes in a corrupt manner."

⁴ Statement of Commissioner Peter Kirsanow in U.S. COMMISSION ON CIVIL RIGHTS, ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S CONVICTION RECORDS POLICY, 2013, at 291, http://www.eusccr.com/EEOC_final_2013.pdf.

to avoid going to prison if 93% of Americans manage to do it. There aren't many things that 93% of Americans can all do, other than breathe.⁵

I disagree with the argument that an ex-felon has “paid his debt to society” and therefore should automatically have all his rights restored, including the right to vote. There are multiple purposes of justice: restoration, deterrence—and punishment. It is often impossible to undo the consequences of a crime, or even to know all the consequences. A man is sent to prison for twenty years for selling opioids or cocaine. All the law sees in imposing the sentence is the sale itself. You don't see the mom who lived in a drugged stupor, only half-feeding her kids and only getting them to school half the time.⁶ No one can know all the consequences of any action, but people who engage in wrongful actions know that the consequences exist. Even though a state only incarcerates a person for a set period of time, society is within its rights to determine that the punishment for a crime is not limited to prison time. As Hans von Spakovsky wrote in his testimony:

In short, the initial time in prison is not, and has never been, the only way a felon is punished for breaking the law, endangering his fellow citizens and the public and intentionally and knowingly violating the rules of the civil compact that we have collectively implemented to govern our civil society.⁷

Any society must be able to set boundaries. This is particularly the case in a country based on social compact theory, as von Spakovsky indicates. The right to *include* necessarily encompasses the right to *exclude*. And excluding someone on the basis of felon status is as objective a standard as we can hope to achieve.

⁵ “Our Nation’s Highways: 2011,” Federal Highway Administration, U.S. Dep’t of Transportation, 2011 (87 percent of U.S. population age 16 and over has a license), <https://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/chapter4.cfm>; Mark Dynarski, “Is the High School Graduation Rate Really Going Up?,” Brookings, May 3, 2018 (the reported high school graduation rate is 83 percent, although this is probably artificially high), <https://www.brookings.edu/research/is-the-high-school-graduation-rate-really-going-up/>.

⁶ Matt DeLisi, Gloria Jones-Johnson, W. Roy Johnson, and Andy Hochstetler, *The Aftermath of Criminal Victimization: Race, Self-Esteem, and Self-Efficacy*, 60 CRIME & DELINQUENCY 85, 87 (2014).

McGloin and Widom (2001), for example, conducted a 22-year follow-up study of persons who were abused and neglected between 1967 and 1971 and a control group of 520 persons. Psychiatric assessments were done to evaluate adult success in eight domains of functioning: employment, residency, education, social activity, psychiatric disorder, substance abuse, official arrests, and self-reported acts of violence. Among the formerly abused or neglected treatment group, resilience was defined as persons who were successful in at least six of the eight domain areas. Just 22% of individuals met the criteria for resilience. This means that more than two decades after their victimization and exposure to adverse environments, nearly 80% of formerly maltreated persons continued to suffer across multiple domains of life compared with those who had not been maltreated. In sum, across analytical techniques and data sources, victimization has been linked with an array of maladaptive and negative outcomes including delinquency, psychiatric problems, fear of crime, reduced socioeconomic status, social isolation, residential mobility/relocation, and others. [citations omitted]

⁷ Hans A. von Spakovsky Statement at 2.

The report asserts that even if disfranchisement on the basis of felon status may be generally permissible, it is problematic because it has a disparate effect on blacks and Latinos.⁸ Disfranchisement has a disparate impact on blacks and Latinos *because blacks and Latinos are disproportionately likely to be involved in crime*. And contrary to fashionable political rhetoric, it is highly unlikely that racial discrimination is responsible for the incarceration of a significant number of blacks and Hispanics.⁹

The report notes that despite the disproportionate effect felon disfranchisement has on black voters, black turnout exceeded white turnout in 2012.¹⁰ The report then notes triumphantly, “Moreover, data from the 2016 election show that African-American voter turnout decreased for the first time in 20 years in a presidential election, falling by about 7 percentage points.”¹¹ Here is something else that was different in 2016 versus 2012: the first black president wasn’t on the ballot.

Generally, I do not think it is necessary or even advisable for states to permanently bar ex-felons from voting, though it is certainly within their power to do so. States can plausibly permanently deny the franchise to murderers. After all, a murderer permanently disfranchised his victim.

⁸ Report at n. 702-729.

⁹ Statement of Commissioner Peter Kirsanow in U.S. COMMISSION ON CIVIL RIGHTS, ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S CONVICTION RECORDS POLICY, 2013, at 302, http://www.eusccr.com/EEOC_final_2013.pdf.

African-Americans and Hispanics are more likely to commit crimes than are members of other ethnic groups, and therefore there is no great unfairness in their greater representation in the ranks of ex-offenders. As Jeffrey Sedgwick testified at the Commission’s hearing, several decades of scholarly research indicate that African-Americans and Hispanics are disproportionately likely to come in contact with the criminal justice system because they are disproportionately likely to be involved in criminal activity.

Earlier in his career, Dr. Blumstein specifically addressed the possibility that differing incarceration rates were attributable to racial discrimination, noting that the disproportionate incarceration of African-American men “generate[s] a deep concern that the disproportionality may be a consequence of profound racial discrimination within the criminal justice system.” After analyzing arrests and convictions, Dr. Blumstein concluded that differential rates of involvement in crime, not racial discrimination, were the primary reason for the disproportionate incarceration of African-Americans. His findings are supported by over twenty years’ worth of research.

See also Heather MacDonald, “Is the Criminal Justice System Racist?,” *City Journal*, Spring 2008, <https://www.city-journal.org/html/criminal-justice-system-racist-13078.html>.

A 1987 analysis of Georgia felony convictions, for example, found that blacks frequently received disproportionately lenient punishment. A 1990 study of 11,000 California cases found that slight racial disparities in sentence length resulted from blacks’ prior records and other legally relevant variables. A 1994 Justice Dep’t survey of felony cases from the country’s 75 largest urban areas discovered that blacks actually had a lower chance of prosecution following a felony than whites did and that they were less likely to be found guilty at trial. Following conviction, blacks were more likely to receive prison sentences, however—an outcome that reflected the gravity of their offenses as well as their criminal records.

See also Matt DeLisi and Robert Regoli, *Race, Conventional Crime, and Criminal Justice: The Declining Importance of Skin Color*, 27 *J. CRIM. JUSTICE* 549 (1999).

¹⁰ Report at n. 712.

¹¹ Report at n. 714.

In cases other than murder, I support restoration of a felon's voting rights after some years have passed in order to determine if the individual has desisted from crime. I would suggest restoration of voting rights perhaps seven years after release. The Bureau of Justice Statistics issued a report in May 2018 that analyzed the recidivism of 401,288 state prisoners in 30 states who were released in 2005.¹² 83 percent of the prisoners were re-arrested within 9 years of release.¹³ However, the majority of ex-offenders are re-arrested in years 1-6. The percent re-arrested increases from 79.4 percent in year 6 to 83.4 percent in year 9.¹⁴ Therefore, if a person has avoided arrest for seven years after his release from prison, we can have a fair degree of confidence that he will continue to desist from crime. The report, of course, promotes the view that this is a reflection on society's failure to reintegrate ex-offenders (because when is it not society's fault).¹⁵ The failure here is not on the part of "society," but on the part of ex-offenders.

¹² Mariel Alper, Matthew R. Durose, and Joshua Markman, *2018 Update on Prisoner Recidivism: A 9-Year Follow-up Period* (2005-2014), at 1, <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>.

¹³ I am aware that arrests are not the same as convictions, but this report only analyzed arrests in order to obtain adequate data from these 30 states. Additionally, "The 401,288 state prisoners released in 2005 had an estimated 1,994,000 arrests during the 9-year period, an average of 5 arrests per released prisoner." *Id.* at 1. If released prisoners are arrested an average of five times, it's likely they will eventually be convicted for something.

¹⁴ *Id.* at 4.

¹⁵ Report at n. 833-837.

Joint Statement of Commissioners Gail Heriot and Peter N. Kirsanow

This report contains some useful information about the collateral consequences of a criminal conviction—defined as the “sanctions, restrictions, or disqualifications that stem from a person’s criminal history.” But it also suffers from some significant flaws, which is why we are unable to support its publication in its present form.¹ We agree with parts of it, but not with others.²

We would classify most of these collateral consequences as falling into four broad categories: (1) those intended to punish; (2) those aimed at the fair distribution of a scarce resource; (3) those intended to protect third parties; and (4) those aimed at stifling competition. Many types of collateral consequences fall into more than one category. Each of these categories deserves a comment here. (We will confine our discussion of ex-offenders’ voting rights to a brief word at the end of this Joint Statement, even though the longest portion of the report is devoted to that issue.)

But first, one overarching problem is that at times the report seems to treat a criminal conviction as something that happens almost randomly. For example, the report states, “Because of the significant stigma attached to a criminal conviction, an employer could view an applicant with a criminal record as untrustworthy or lacking in ‘job readiness,’ which is generally perceived as a requisite qualification for both skilled and unskilled positions.”³ The problem is that employers view applicants with criminal records this way not merely because of some artificial stigma attached to criminal conviction, but because people with criminal records really are, on average, more likely than people without such records to engage in misconduct. Obviously, this generalization is untrue in individual cases, and we would all do well to remember to treat individuals as individuals. But ignoring this group difference will lead to stunningly bad policy.

¹ One of us (Heriot) voted no at the telephone meeting at which the report was considered. The other (Kirsanow) arranged for it to be announced at the telephone meeting that he would have voted no if he had been able to attend. In a separate statement, one of us (Kirsanow) discusses the report’s recommendation urging the Dep’t of Justice to issue a guidance on collateral consequences. He points out that the recommendation failed to identify the necessary legal authority for such a guidance. The Dep’t of Justice is not a roving Commission to advise states on legal or policy matters; it acts when Congress, through legislation, gives it the authority to act. Commissioner Heriot agrees with this point and with all or most of the rest of the statement. Only time constraints prevented her from joining in those positions at the time the Commissioners exchanged their statements in the first round.

² Has the scope of the substantive criminal law—particularly federal criminal law—grown too big? Certainly many scholars and authors have made the case that it has. See, e.g., Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (2011); Paul Larkin, *The Extent of America’s Overcriminalization Problem*, May 9, 2014, available at <https://www.heritage.org/report/the-extent-americas-overcriminalization-problem>. See also George Will, “When Everything is a Crime,” *The Washington Post*, April 8, 2015, available at https://www.washingtonpost.com/opinions/when-everything-is-a-crime/2015/04/08/1929ab88-dd43-11e4-be40-566e2653afe5_story.html?utm_term=.2d9dac1344ef. This is an important question that is closely related to the central question of this report. Excessive imposition of collateral consequences is more serious if the scope of the criminal law itself is too big. But because it is distinct from this report’s main question, we will not discuss it further. It also goes well beyond the charge of this Commission.

³ Report at 29.

We won't solve the problem of re-integrating ex-offenders into the economy by being (or pretending to be) naïve. While it is certainly true that formerly incarcerated individuals sometimes struggle as a result of an unfair collateral consequence, sometimes the struggle is the result of the characteristics that drove them to commit crimes in the first place. Any serious effort to assess the benefits and costs of collateral consequences cannot ignore that.⁴

This report focuses mainly on problems with punitive collateral consequences—those done with the purpose of imposing punishment on ex-offenders beyond the term of their prison sentence. We agree that some particular punitive collateral consequences can be too harsh and hence counterproductive.

On the other hand, the zeitgeist seems to be that Americans have over-incarcerated offenders and that some de-incarceration should take place.⁵ Similarly, it is frequently argued that monetary fines imposed on individuals who cannot afford to pay them are counterproductive and only result in anxiety and desperation. Indeed, the Commission's majority has elsewhere made those arguments.⁶ We agree that each of these methods of punishment has its drawbacks. Incarceration is expensive and breaks up families. Some people are too poor to pay fees and fines, while others are too rich for paying a fine to feel like much of a punishment. Yet there have to be *some* negative consequences for law breaking; otherwise many people will eventually conclude that there is no point in following the law.

Punitive collateral consequences are admittedly an imperfect strategy for doing that. Dangling carrots in front of individuals for post-release good behavior—such as restoration of voting rights after a specified period—may also give some ex-offenders incentives to get their lives back on track. Something is necessary.

⁴ Another way in which the Commission seems unwilling to confront the arguments on both sides of these issues is the use of hyperbolic statements in the Commissioner Statements. They call certain collateral consequences “non-sensical,” or based on “twisted logic,” and argue that these consequences “make no sense,” that they “communicate government disdain for [ex-offender’s] worth as people,” and that they “affront[] the humanity of people with criminal convictions.” See Statement of Commissioner David Kladney at 142; Statement of Chair Catherine E. Lhamon at 139. This is not useful.

⁵ Commissioner Kladney points that the United States incarcerates at much higher rates than most other countries. This is in part because at the same time prison populations were expanding, the number of psychiatric inpatients was declining—from a high of over 550,000 in 1950 to around 30,000 by the 1990s. Megan Testa and Sara G. West, *Civil Commitment in the United States*, 7 *Psychiatry* (Edgmont) 30, 33 (Oct. 2010). As a result, many of those who in an earlier day would have been institutionalized in psychiatric hospitals wound up in prisons instead or on the street. Estimates of exactly how many vary widely. Seth J. Prins, *The Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 *Psychiatr. Serv.* 862 (2014). But today's incarceration rates are surely influenced by the near absence of psychiatric inpatients in the American systems. This makes incarceration rate comparisons with other countries where psychiatric inpatients are more common unreliable and flawed. I wish we all had a better sense of international comparisons.

⁶ U.S. Commission on Civil Rights, *Targeted Fees and Fines Against Communities of Color*, 2017; “U.S. Commission on Civil Rights Urges Congress to Prioritize Civil Rights Oversight and Legislation,” 2018, available at <https://www.usccr.gov/press/2018/12-07-Priorities-for-116th-Congress.pdf> (criticizing the use of mandatory minimum prison sentences.)

It is sometimes said that an ex-offender “has paid his debt to society” upon release from prison and that any further punishment is thus wrong. In one sense, this is simply circular logic. If the law imposes a particular prison sentence for a particular crime *and* in addition requires him to perform certain acts (such as community service or the payment of restitution) or deprives him of the possibility of particular benefits, then that is the debt that democratic processes have determined that he must pay to society and not some other.⁷ It isn’t over till it’s over. We are mindful of the desirability of closure at some point. But given the strong desire among many Americans to de-emphasize long-term incarceration, we are disappointed that more effort hasn’t gone into coming up with workable incentives and sanctions that apply *after* an offender leaves prison, thus making it possible to shorten actual prison sentences.

The report also fails to grapple with what we term distributive fairness collateral consequences. These are efforts to allocate a limited resource. Take, for example, financial aid for education. The Department of Education presumably has a limited supply of money to distribute for this purpose. It has to come up with rules for determining who gets it and who doesn’t. It isn’t obvious to all how that “pot” should be divided. Is it fair that ex-offenders should get a share, if that means that there will be fewer funds available for other prospective applicants who have been more law-abiding? Isn’t it at least arguably true that the law-abiding applicants—including the many who are poor or have overcome other forms of disadvantage—are more deserving? On the other hand, is it fair if ex-offenders are shut out of educational opportunities that could help their rehabilitation? Add this to the considerations: Would the program be as popular if the average taxpayer thought that benefits were going to ex-offenders? Might there be efforts to scale it back generally or cancel it altogether?⁸ Alas, there are no simple answers to those questions and no easy way to balance those competing considerations. They are inherently political decisions.

⁷ One possible objection to this argument: some offenders may agree to a plea bargain thinking that their “debt” will have been paid once their sentence is served, without realizing that they will face collateral consequences afterwards. Had they known more about collateral consequences, they might have held out for a lower sentence or agreed to go to trial. Commissioner Kladney points out this problem in his Statement when he states, “I am struck by the *utter lack* of requirements that criminal defendants have any notice of these consequences.” [Italics supplied.] Oddly, he seems to contradict himself in the final sentence of the same paragraph when he writes, “It also behooves attorneys to counsel their clients on collateral consequences, even beyond *the bare minimum currently required*.” [Italics supplied.] If there is a “bare minimum [of notice] currently required, then there can’t be “an utter lack of requirements.”

We are nevertheless sympathetic to the need to warn criminal defendants in some way about collateral consequences up front. Commissioner Kladney is right that attorneys should expend more effort to ensure that their clients are adequately informed. Still, a fundamental problem here is that it is impossible for defendants to understand completely the ramifications of entering into a plea deal. Criminal defendants aren’t ordinarily warned, for example, about the harshness of life in prison. They don’t know how a conviction will affect their relationships with family and friends. We fear some of the outrage about lack of transparency regarding collateral consequences is selective.

⁸ See, e.g., Emily Badger and Margot Sanger-Katz, “Who’s Able-Bodied Anyway? The 400 Year History of How We Talk About the Deserving vs. the Undeserving Poor,” The New York Times, February 3, 2018, available at <https://www.nytimes.com/2018/02/03/upshot/medicaid-able-bodied-poor-politics.html> (“Free riders threaten society—they undermine the basis of altruism,” said Robert Rector, a senior research fellow at the conservative Heritage Foundation, who helped write a work requirement into welfare reform in the 1990s. That’s not a liberal or

The same dilemma exists with regard to dividing up other limited resources discussed in this report, like public housing, which frequently has waiting lists.⁹ Prospective applicants who have obeyed the laws have a sympathetic argument here that they deserve a greater share of these resources. Yet this dilemma is barely acknowledged in the report.¹⁰ We wish that it had engaged these trade-offs more thoughtfully.

One thought that we can contribute to the discussion is that we prefer that decisions about how to distribute limited resources be decentralized. If a single decisionmaker like HUD or the Department of Education dominates the market for public housing or for educational financial aid, then ex-offenders will be either in a very happy or very unhappy position. But if there are multiple entities—such as state governments, local governments, and private charities—sponsoring such benefits, then it is less likely that ex-offenders will be unfairly treated.

The report does a better job addressing what we call third-party-protection collateral consequences—those that are intended to ensure the safety and security of some third party from ex-offenders' misconduct. The Findings, for example, explicitly acknowledge "Some collateral consequences, such as limitations on working with children for people convicted of particular dangerous crimes, are enacted for valid public safety reasons." Rules that restrict firearm ownership and rules that prohibit individuals convicted of financial crimes from working with

conservative belief, he argues, but a human one. "People want to be compassionate, but they don't want to be taken advantage of.")

⁹ Some of the discussion on lifetime bans on public benefits for individuals with drug convictions tries to argue that these bans disproportionately harm women. Report at 72-73. The problem is that prisoners are overwhelmingly male (the number 93% is quoted elsewhere in the report), so the report's efforts to cast these bans as having an unfair bias against women don't quite work. The various statistics cited in the report—e.g., that female offenders are somewhat more likely to have been incarcerated for drugs than male offenders and that women are more likely to qualify for certain public benefits in the absence of a drug conviction—aren't mathematically enough to overcome the fact that prisoners are overwhelmingly male.

We are a bit troubled—and perhaps a bit amused—that our staff took a topic (the collateral consequences of a criminal conviction) that overwhelmingly affects men, downplayed the significance of this disproportionality, and somehow managed to instead argue (incorrectly) that certain collateral consequences have a disparate impact on women. It's a sign of the times: *World ends tonight, women and minorities to suffer most.*

The report also states, "On average, women also earn less money than men for the same amount of work." Report at 72. But the Dep't of Labor statistic cited compares all female full-time wage and salary workers (full time defined as "those who usually work 35 hours or more per week at their sole or principal job") to all male full time wage and salary workers. It does not control for the number of hours worked above 35. Much of that gap simply reflects that female full-time workers tend to work fewer hours than male full-time workers. Women who work between 35-39 hours per week actually earn somewhat more than men who work 35-39 hours per week. See Diana Furchtgott-Roth, Testimony on the Gender Pay Gap, Testimony Before the Joint Economic Committee, September 28, 2010, available at <https://www.jec.senate.gov/public/cache/files/2a1f8ad4-f649-4ad3-a742-268d946962db/furchtgott-roth-testimony.pdf>. Moreover, even if it were true that "[o]n average, women also earn less money for the same amount of work," there is no evidence that applies to female ex-offenders vs. male ex-offenders. On the contrary, since male offenders are more likely than female offenders to have committed a violent crime, they may find it harder to secure well-paying jobs or, indeed, any jobs at all.

¹⁰ It is not discussed, for example, in "Barriers to Subsidized Housing for Individuals with Criminal Records" at pp. 56-63, in "The Disproportionate Impact of Lifetime Drug Bans for Public Benefits at 70-72, or "Barriers to Financial Aid for Higher Education" at 74-77.

money are generally intended to fall into that category, as are those that prevent persons convicted of child abuse or endangerment from working with children.¹¹

On the other hand, the report sometimes fails to address serious third-party-protection collateral consequences arguments. The section on public housing, for example, fails to note that public housing is often home to families with young children, the elderly, people with disabilities, and that many cities have a reputation for failing to protect these and other particularly vulnerable persons living there. In Chicago, in 1981, matters had deteriorated to the point that the city's mayor, Jane Byrne, moved into the Cabrini-Green housing project on the near North Side for 20 days—a move that finally forced the city police to start taking crime there seriously.¹² Again, we are sympathetic to the argument that ex-offenders have to live somewhere. But is it fair to families who are law-abiding but poor to have to share public housing with individuals who, as a group, are more likely to threaten their safety? Alternatively, might it be good policy, at least in many cases, to create a system in which ex-offenders are encouraged to live in halfway houses or with family members who live in non-public housing rather than to attempt to qualify for public housing on their own? These questions at least deserved an airing in this report.

We are in stronger agreement with the report's discussion of anti-competition collateral consequences, such as occupational licensing laws.¹³ The National Council of State Legislatures

¹¹ See, e.g., Statement of Margaret Love, Executive Director of the Collateral Consequences Resource Center, at 3: "Some serve an important and legitimate public safety or regulatory function, such as keeping firearms out of the hands of violent offenders, protecting children or the elderly from persons with a history of abuse, or barring people convicted of fraud from positions of public trust. Others are directly related to a specific type of crime, such as registration requirements for sex offenders, driver's license restrictions for those convicted of serious traffic offenses, or debarment of those convicted of procurement fraud."

¹² "When a Mayor Moved to the Cabrini-Green Projects," National Public Radio, August 30, 2014, available at <https://www.npr.org/2014/08/30/344477127/when-the-mayor-moved-to-the-cabrini-green-projects>.

¹³ The fact that we have concerns about the number of licensing laws that exclude ex-offenders does not mean we approve of forcing employers to hire ex-offenders who would prefer not to by threatening them with disparate impact liability under Title VII. For an extended treatment of our views on that subject, see U.S. Commission on Civil Rights, *Assessing the Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's Conviction Records Policy at 308* (Statement of Commissioner Gail Heriot), available at http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/03/EEOC_final_2013-2.pdf; Id. at 289 (Statement of Commissioner Peter Kirsanow), available at http://www.newamericancivilrightsproject.org/wp-content/uploads/2014/04/EEOC_final_2013.pdf. We prefer the use of modest tax incentives in order to encourage the hiring of ex-offenders, which allows employers to opt in rather than being forced in.

We note that there is considerable empirical evidence that so-called ban-the-box laws and policies operate to the disadvantage of African American males who have clean records. Once employers are prohibited or strongly discouraged from checking into the criminal records of job applicants, they often end up hiring fewer African American men rather than more. See, e.g., Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q. J. Econ. 191 (2018); Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden* (August 2018), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812811. In discussing studies like these, this Report states "Researchers have hypothesized that when criminal records are unavailable, 'employers use race as a proxy for criminal records.' The findings suggest that Ban the Box policies expose the pervasiveness of racial discrimination in hiring, while also possibly excluding more African-Americans from the job market." Report at 49. The truth is closer to the opposite. Ban the Box policies don't "expose the

has estimated that over the last 60 years, the percentage of jobs requiring an occupational license has risen from 1 in 20 to 1 in 4.¹⁴ Some of these licensing requirements undoubtedly serve genuine health and safety purposes. Other licensing regulations ensure that senior professionals have an incentive to give appropriate training to apprentices in their field and that apprentices have an incentive to agree to that training.¹⁵ But established insiders can also use licensing requirements as a way of keeping out newcomers who might become their competitors.¹⁶ As one U.S. Court of

pervasiveness of racial discrimination in hiring.” Instead, they show that employers prefer to use indicators—like a clean criminal record—to predict which job applicants will make the most reliable employees and which will not. Only when they are prevented from using such indicators do they resort to ham-fisted statistical indicators. Ban the Box policies thus create an incentive for employers to engage in racial discrimination that wouldn’t otherwise exist. Two things may be of note here: First, (and this bears repeating over and over), Title VII was not intended to prohibit employers from adopting job qualifications simply because they have a disparate impact on some protected group. As Senators Clifford Case (R-N.J.) and Joseph Clark (D-Pa.), the bill’s co-managers on the Senate floor, emphasized in their highly influential, bipartisan, interpretative memorandum: Title VII “expressly protects the employer’s right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications.” “Indeed,” they wrote, “the very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.”

Second, it is not true that the only explanation for the harm to African-American men that appears to result from Ban-the-Box laws and policies is that employers use race as a proxy for criminal records. Suppose for example, an employer had been happy to hire applicants who did not have a high school diploma as full-time prior to the passage of a Ban-the-Box law. After that law’s passage she decides to revamp her hiring practices entirely and advertise for part-time college students at a local university (in addition to the full-time workers she had been hiring), because she believes (rightly or wrongly) that college students are less likely to have serious criminal records. Such a practice could well have a racial disparate impact, but it would not be a case of using race as a proxy for a clean record.

Rather it would be a case of using college status as a proxy.

¹⁴ Suzanne Hultin, The National Occupational Licensing Database, available at <http://www.ncsl.org/research/labor-and-employment/occupational-licensing-statute-database.aspx>.

¹⁵ See Gail Heriot, “Apprenticeships: Useful Alternatives, Tough to Implement,” Cato Institute Policy Analysis No. 805, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2877970.

¹⁶ In *Sensational Smiles L.L.C. v. Mullen*, 793 F.3d 281 (2d Cir. 2015) cert. denied, 136 S. Ct. 1160 (2016), fifteen public choice economics scholars, including Nobel prize winner Vernon L. Smith, filed an amicus curiae brief urging the Supreme Court to grant the petition for certiorari. Although the petition was ultimately denied, the brief contained a useful and succinct description of the problem to which we refer:

People typically assume that governmental regulations are ‘unbiased and conscientious’ efforts to advance the ‘public interest.’ See John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 *Antitrust L.J.* 1075, 1075 (2005); 1 William F. Shughart II, *Regulation and Antitrust*, in *The Encyclopedia of Public Choice* 263, 263-64 (Charles K. Rowley & Friedrich Schneider eds., 2004); William F. Shughart II & Diana W. Thomas, *Regulatory Rent Seeking*, in *Companion to the Political Economy of Rent Seeking* 169 (Roger G. Congleton & Arye L. Hillman eds., 2015). But among many economists, that assumption is largely regarded as false, as experience has demonstrated that governmental regulations often favor special interest groups to the detriment of the public. The evidence for this conclusion is supplied by ‘public choice economics,’ a branch of economics that applies economic theory to study the causes and effects of government actions. Public choice economics has been widely and successfully used to explain and predict the forces that lead to the enactment of anticompetitive regulations.... Public choice economics has been ‘almost universally accepted’ since the mid-1980s as explaining much economic regulation. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 *COLUM. L. REV.* 223, 224 n.6 (1986) (citing Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 *AM. ECON. REV.* 279 (1984)).

Research from public choice economics has concluded that special interest groups have significant incentives to use the political and regulatory process to further their own financial interests, and

Appeals judge memorably put it, “while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments.”¹⁷

West Virginia requires that would-be “waxing specialists” and “shampoo assistants” be able to demonstrate their “good moral character” to a government board in order to practice these trades.¹⁸ Until recently, in Texas a drug conviction (no matter how old) automatically prevented one from becoming a licensed well driller or water well pump installer.¹⁹ Are rules like these really best understood as primarily intended to keep the public safe from former criminals? We have our doubts.²⁰

that legislators and regulators often have incentives to respond to reward the special interest groups. Thus, special interest groups are expected to mobilize to convince politicians and regulators to implement regulations that benefit the interest groups’ members or to block the repeal of these regulations. These problems are particularly acute when self-interested economic actors—such as the licensed dentists in this case—are given the power to influence the rules by which they are governed. In these situations, public choice theory predicts that they will behave as self-interested private actors and act to benefit their own members, rather than as stewards of the public interest. Cf. *North Carolina State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 11112 (2015).

A particularly insidious form of regulation favored by special interest groups is one that, in effect, operates to insulate a special interest group from competition. . . . Abundant evidence demonstrates that, over the past several decades, interest groups have mobilized to protect themselves from competition by expanding the scope of existing occupational licensing regimes or implementing such regimes in industries where it was previously thought unnecessary. The evidence demonstrates that these exclusionary efforts have been driven overwhelmingly by the special interest groups themselves, rather than by consumer complaints or evidence of consumer harm caused by non-licensed competitors.

Brief of Public Choice Economic Scholars as Amici Curiae in Support of Petitioner at 5-6, in *Sensational Smiles L.L.C. v. Mullen*, No. 15-507 (filed Nov. 18, 2015), available at <https://ij.org/wp-content/uploads/2011/11/ct-teeth-whitening-brief-of-public-choice-economics-scholars-as-amici-curiae-in-support-of-petitioner-11-18-2015.pdf>. See also *Craigmiles v. Giles*, 312 F. 3d 220, 225 (“The weakness of Tennessee’s proffered explanations indicates that the 1972 amendment adding the retail sale of funeral merchandise to the definition of funeral directing was nothing more than an attempt to prevent economic competition. Indeed, Tennessee’s justifications for the 1972 amendment come close to striking us with ‘the force of a five-week-old, unrefrigerated dead fish’”); *St. Joseph Abbey v. Castille*, 712 F. 3d 215 (5th Cir. 2013) (“The FTC determined that it could not rely on state funeral licensing boards to curb such [anti-competitive] practices because the state boards were ‘dominated by funeral directors.’ The funeral directors had organized themselves into industry groups, which lobbied state legislatures and made practices such as a refusal to disclose prices part of their professional ‘ethics’ code”).

¹⁷ *Powers v. Harris*, 379 F.2d 1208, 1221 (10th Cir. 2004)(Tacha, J. for the panel).

¹⁸ West Virginia Code 30-27 et seq.

¹⁹ Texas Public Policy Foundation Policy Perspective, Working with Conviction: Criminal Offenses as Barriers to Entering Licensed Occupations in Texas, “<https://files.texaspolicy.com/uploads/2018/08/16092520/2007-11-PP28-licensing-ml.pdf>. Because of broader efforts at licensing reform—see Jonathan Zalewski, “On Occupational Licensing, Texas is Once Again the Lodestar State for Legal Reforms,” February 11, 2019, available at <https://www.heritage.org/crime-and-justice/commentary/occupational-licensing-texas-again-the-lodestar-state-legal-reforms>—now the licensing board merely considers past criminal convictions as part of its process.

²⁰ We do disagree with the report’s complaints about lack of uniformity in licensing regulations. We agree that if a state has a particularly unusual rule that seems badly crafted to achieve any public safety purpose, it is likely that public safety is not the rule’s actual purpose. The Louisiana rules requiring occupational licensing for florists, challenged by the Institute for Justice, are a typical example. See, e.g., *Peters v. Odom*, Appellants’ Brief, available

Lastly, we take up the issue of ex-offender's voting rights—which has become an extremely hot issue in the last few years.

Curiously enough, it is the issue to which the report devotes the largest number of pages.²¹ Yet limitations on the ability to vote are hardly the greatest challenge faced by ex-offenders. A job and a place to live are far more important. One might even say that the inability to vote is their least important challenge. Unemployed ex-offenders frequently wind up back in prison; those who cannot find a place to live can wind up on the streets.

In discussing the issue, the report sometimes goes off track. For example, it complains that prison gerrymandering is a further collateral consequence of incarceration,²² despite the lack of direct effect on individual prisoners.

The report argues that “denying this right to even a ‘subset of the population’ jeopardizes democracy for the entire population,” and that “the right to vote is the ‘essence of a democratic society, and *any* [italics added] restrictions on that right strike at the heart of representative government.” While the right to vote is, of course, precious, the report's language glosses over the fact that minors and the mentally ill generally cannot vote and that democracy nonetheless appears basically unaffected. Moreover, the Constitution's 14th Amendment specifically acknowledges the ability of states to limit felons from voting.²³

What explains this overemphasis? Disfranchised ex-offenders are widely thought to be a Democratic-leaning group.²⁴ The Commission has six members who were appointed by Democrats. We note that at least two other report topics approved by the current majority have recommended broadening access to the ballot, not coincidentally in ways that looked likely to

at <https://ij.org/wp-content/uploads/2003/12/Appellants-Brief-la-florists.pdf>. On the other hand, we see no reason why licensing requirements must be uniform across all 50 states. In some cases, there may be good reasons for some states to be stricter than others. In other cases, we think that states can be “laboratories of democracy” and can teach each other by example what types of licensing rules work best.

²¹ It devotes 35 pages to voting, but just 25 to employment issues and 16 to housing.

²² Report at 114-115.

²³ Earlier in history, convicted felons were usually executed, so there was no need for a policy that dealt with the question of whether they should vote. But in the 19th century a number of states had to deal with the question of whether the increasing number of convicted felons who had been released from prison should be able to vote. On the eve of the Civil War, some two dozen states had either constitutional provisions or statutes that prohibited ex-felons from voting. Because most states also prohibited blacks from voting (Maine, New Hampshire, Vermont, and Wisconsin being exceptions) at that time, it is extremely unlikely that felon disfranchisement was motivated by race. See Christopher Uggen and Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 *American Sociological Rev.* 777, 781 (2002).

²⁴ See, e.g., Christopher Uggen and Jeff Manza, *Denying Felons and Ex-Felons the Vote: The Political Consequences, Past and Future*, Institute for Policy Research, Northwestern University (February 2002), available at <https://www.ipr.northwestern.edu/publications/docs/policybriefs/manzabrief.pdf> (finding that had disenfranchised felons been allowed to vote in a few key states, the Senate might have stayed Democratic from 1986 through 2002 and that Al Gore might have won the Electoral College in 2000.)

benefit the Democratic Party.²⁵ It is hard to avoid the possibility that the majority is again driven by partisanship here.

²⁵ See, e.g., U.S. Commission on Civil Rights, *An Assessment of Minority Voting Rights Access in the United States* (2018), available at https://www.usccr.gov/pubs/2018/Minority_Voting_Access_2018.pdf; U.S. Commission on Civil Rights, *Increasing Compliance with Section 7 of the National Voting Rights Act* (2016), available at <https://www.usccr.gov/pubs/docs/NVRA-09-07-16.pdf>.

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Commissioners' Rebuttals

Statement of Commissioner David Kladney

My colleagues Commissioners Kirsanow and Heriot strike out in their statements on this report. They fail to acknowledge the overwhelming evidence that reducing collateral consequences reduces recidivism and keeps the public safe. They misrepresent the positions of our findings and recommendations by saying the Commission's majority does not believe in punishment. They are wrong. We do believe in appropriate punishment, but not a lifetime of nonsensical punishment. The Commission has not taken a position otherwise, in this or any other report.

Commissioners Kirsanow and Heriot believe we should continue to deny voting rights to people with criminal convictions even after they have successfully completed their court ordered sentences. They go so far as to say the only reason I or other Commissioners would support expanding voting rights is that people with criminal convictions are more likely to vote for Democrats. This is not only cynical and profoundly anti-democratic, but it is, sadly, untrue. We do not deny people the right to vote based on who we think they will vote for. If we did, perhaps Commissioners Kirsanow and Heriot could find other categories of the electorate they would bar from voting. We cannot exclude those who have paid their debt based on their potential voting patterns if we want to hold ourselves out to the rest of the world as a free and fair electoral system. To do otherwise is to travel down the road of disenfranchising our political opponents.

Short-term partisan considerations have no place in America.

Partisan impediments to expansion of voting rights go beyond my colleagues on this Commission. In Florida, where a large majority of millions of voters (65%) chose to enfranchise people with felony convictions, the Republican legislature is working to block the will of the people. A proposal was approved in the Florida legislature that would require payment of all fines, fees and restitution before restoring voting rights, contrary to the intent of Florida citizens. A poll tax if you will, so only those with money will be able to buy back their right to vote. This Commission has documented in detail the pervasiveness of unconstitutional practices in this country around the imposition of fines and fees. Even setting aside that some of these fees may not be properly imposed, conditioning voting rights on their payment means voting is for people with money and no one else. People who cannot scrape together a few hundred dollars to pay their court costs are no less worthy of having the right to vote than people who can. Maybe the next target on their anti-democratic agenda will be those who fail to pay their speeding tickets.

My colleagues also fail to mention or attempt to justify draconian restrictions on survival-level assistance in the form of TANF and SNAP benefits, except for an oblique mention that including people with criminal convictions in public programs may lessen public support for the programs

overall. This does not engage with the stark testimony we received about the serious personal consequences to people who are denied these benefits. Further, they offer no response to the illogical focus of these restrictions on drug crimes to the exclusion of all other crimes. I believe there is no justification for denying public benefits to people with drug convictions while at the same time granting them to people with convictions for other crimes. Commissioners Kirsanow and Heriot will have to admit their position exhibits a lack of logic and common sense. This lack of common sense extends to the argument proffered by these two conservative Commissioners that the public does not wish to make school loans to those with drug convictions. Yet, that prohibition is for one year only and only for certain crimes. It does not make sense that public support for financial aid would be conditioned on this provision alone.

All in all, my colleagues do not appreciate that those of us who seek to reduce collateral consequences do not do so out of naiveté but, as a conservative panelist at our briefing said, for “hard-nosed” public safety reasons.¹ People returning from incarceration need to be part of the community. This is not only for their benefit, but also for all of us who live in the community. It’s true that we must also abandon illogical and harsh consequences that do not relate to the offense committed. Even if my colleagues disagree that people deserve second chances (which one could take from their writing), they should acknowledge that kneecapping the opportunities of people leaving prison leaves everyone less safe. More than 95% of currently incarcerated people will leave prison, many, many without family support, only a bus ticket, and, maybe, 50 bucks in their pocket.

We deserve laws and rules not driven by the rationale that people who committed crimes deserve to be continually punished. Punishment for punishment’s sake is a useless and cruel exercise. We can do better and we must. My colleagues fail to engage the arguments on these terms, and therefore they fail to provide a logical response.

¹ U.S. Commission on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, June 2019, at 13 (quoting testimony of Vikrant Reddy, Senior Research Fellow at the Charles Koch Institute).

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