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## **Criminal Records, Race and Redemption**

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# CRIMINAL RECORDS, RACE AND REDEMPTION

Michael Pinard\*

*Poor individuals of color disproportionately carry the weight of a criminal record. They confront an array of legal and non-legal barriers, the most prominent of which are housing and employment. Federal, state and local governments are implementing measures aimed at easing the everlasting impact of a criminal record. However, these measures, while laudable, fail to address the disconnection between individuals who believe they have moved past their interactions with the criminal justice system and the ways in which decision makers continue to judge them in the years and decades following those interactions. These issues are particularly pronounced for poor individuals of color, who are uniquely stigmatized by their criminal records. To address these issues, this article proposes a redemption-focused approach to criminal records. This approach recognizes that individuals ultimately move past their interactions with the criminal justice system and, therefore, they should no longer be saddled by their criminal records. Thus, the article calls for greatly expanding laws that allow individuals to remove their criminal records from public access and, in the end, allow them to reach redemption.*

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“[T]he time never ends for a lot of men.”<sup>1</sup>

Criminal records are omnipresent in the United States. One in three individuals in the U.S. can expect to be arrested by twenty-three years of age.<sup>2</sup> According to one respected study, an estimated sixty-five million adults in the U.S. have a criminal record.<sup>3</sup> At the end of 2011, one in thirty-four adults was under some form of correctional supervision.<sup>4</sup> These numbers illustrate, in startling ways, the grip of the criminal justice system on individuals, families and communities throughout the United States. The impact is particularly severe on poor individuals of color, who disproportionately interface with the criminal justice system and are subjected to all of its effects, including the unrelenting legal and non-legal burdens that attend a criminal

1. Michael Corbin, *On the Outside*, URBANITE, Nov. 2011, at 34, 38 (quoting Andre Fisher, Case Manager, Druid Heights Community Development Corporation), available at <http://issuu.com/urbanitemagazine/docs/novmber2011>.

2. Robert Brame et al., *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21, 25 (2012).

3. MICHELLE NATIVIDAD RODRIGUEZ & MAURICE ENSELLEM, THE NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3 (2011), available at [http://www.nelp.org/page/-/SCLP/2011/65\\_Million\\_Need\\_Not\\_Apply.pdf?nocdn=1](http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1).

4. LAUREN E. GLAZE & ERIKA PARKS, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2011, at 1 (2012).

record.<sup>5</sup> These burdens, in turn, disproportionately disrupt families and communities of color.<sup>6</sup>

The effects of criminal records are regularly and graphically apparent to my students in the Reentry Clinic I teach at the University of Maryland Francis King Carey School of Law. My students explore the myriad legal and non-legal issues that confront individuals with criminal records. Specifically, they identify the various obstacles that burden individuals with criminal records; provide legal representation to individuals attempting to overcome these obstacles; and work on legislative, policy and research projects that aim to minimize barriers to moving past criminal records.

In their work, my students hear firsthand accounts of the inordinate difficulties of moving past a criminal record. Each week, they conduct an expungement workshop at a One-Stop Reentry Center in Baltimore City. The overwhelming majority of individuals who attend the workshops are African-American men and women from Baltimore City. Attendees typically range in age from their early twenties to their late forties and early fifties.

In Maryland, the ability to expunge charges that result in conviction is essentially limited to nine “nuisance” offenses<sup>7</sup> and to individuals who obtain a gubernatorial pardon for a single non-violent offense.<sup>8</sup> Outside of these limited circumstances, only charges that result in a variety of non-conviction dispositions are eligible for expungement. At nearly every workshop, when my students explain that the overwhelming majority of charges that result in conviction cannot be expunged, at least one (and usually more than one) person asks variations of the following questions:

*What if my conviction was five years ago, ten years ago, twenty years ago?*

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5. See generally Gabriel J. Chin, *Race, the War on Drugs and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253, 262–64 (2002) (providing historical and contemporary overviews of the racial impact of collateral consequences, particularly consequences related to drug convictions); see also Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 512–17 (2010) (discussing race and collateral consequences).

6. E.g., ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* 10 (2008) (collateral consequences “have had at once a disparate and devastating impact on communities of color”).

7. MD. CODE ANN., CRIM. PROC. § 10-105(a)(9)(i)–(ix) (West 2013) (listing the nuisance offense convictions eligible for expungement).

8. *Id.* at § 10-105(a)(8)(i)–(ii). Expungement is also available to a person found not criminally responsible for the misdemeanor offenses of trespass, disturbing the peace or telephone misuse. *Id.* at § 10-105(a)(10)(i).

*What if I was young and immature at the time of my conviction?*

*What if I was convicted of a misdemeanor?*

*What if I was living a totally different life back then and I have moved past the conduct that led me into the criminal justice system?*

My students have to explain that there is nothing these individuals can do, short of obtaining a gubernatorial pardon—a largely impossible feat<sup>9</sup>—to remove the conviction from public inspection. Irrespective of an individual's best efforts, the years or decades that may have passed since his or her conviction, and a genuine commitment to remain crime-free, the individual will be shackled to the conviction forever.

This article explores the long-term and often permanent impact of criminal records on individuals of color and, by extension, families and communities of color. Regardless of offense type, the barriers to moving past an interaction with the criminal justice system are often insurmountable. This article focuses on two of the most intractable barriers: the ability to secure housing and employment. Because these two staples of day-to-day life are essential for stability, security and self-worth, the barriers caused by criminal records can prevent individuals from ever moving past their interaction(s) with the criminal justice system.<sup>10</sup>

A range of legal and non-legal obstacles to securing housing and employment can flow from a criminal record. The legal barriers are found in the various laws and regulations that exclude individuals with criminal records from residing in government-assisted housing or

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9. E.g., Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption and the Uniform Collateral Consequences of Conviction Act*, 54 HOWARD L.J. 753, 775–77 (2011) (the pardon “has become a phantom remedy in most states and the federal system”).

10. E.g., COUNCIL OF STATE GOV'TS, PUBLIC HOUSING (PHAS) AND PRISONER RE-ENTRY 1 (2006), available at [http://www.reentry.net/library/item.110320-Public\\_Housing\\_Authorities\\_and\\_Prisoner\\_Reentry](http://www.reentry.net/library/item.110320-Public_Housing_Authorities_and_Prisoner_Reentry) (“People who do not find stable housing in the community are more likely to recidivate than those who do.”); Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 2012 NAT. INST. JUST. J. 42, 43 (“[W]e know from research that stable employment is an important predictor of re-entry and desistance from crime.”); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment & Recidivism*, 67 AM. SOC. REV. 529, 542 (2000) (“Work appears to be a turning point in the life course of criminal offenders over 26 years old”).

from working in a wide array of jobs.<sup>11</sup> The non-legal barriers are policies of landlords and employers that exclude individuals with criminal records from living in their apartments or working for their businesses.<sup>12</sup> These barriers burden individuals who are attempting to move past—or who truly believe they have moved past—their interactions with the criminal justice system. They constitute constant, graphic illustrations that even the most valiant efforts at rehabilitation will never suffice, and that adequate housing and employment will always be out of reach despite the passage of years or even decades since a conviction and despite numerous changes in their lives.

Part I provides a brief overview of race and criminal records. Part II examines the housing and employment barriers confronting individuals with criminal records. Part III details some federal, state and local efforts to ameliorate housing and employment barriers. Part IV argues that a redemptive-focused approach to criminal records is necessary to truly address the disproportionate burdens these records impose on individuals of color and to afford them meaningful opportunities to support their families and strengthen their communities.

## I.

### RACE AND CRIMINAL RECORDS

The criminal justice system is made up largely and disproportionately of poor African-American and Latino men and women.<sup>13</sup> From encounters with law enforcement officers on our nation's streets,<sup>14</sup>

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11. See *infra* Part II; see also john a. powell, *Constitutionalism and the Extreme Poor: Neo-Dred Scott and the Contemporary "Discrete and Insular Minorities"*, 60 *DRAKE L. REV.* 1069, 1081–82 (2012) (criminal records “impose[ ] many limitations” on “benefits and opportunities,” including employment and public housing).

12. See *infra* Part II.

13. E. ANN. CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, at 8 (2012), available at <http://www.bjs.gov/content/pub/pdf/p11.pdf> (“about 0.5% of all white males, more than 3.0% of all black males and 1.2% of all Hispanic males were imprisoned in 2011” and “[b]lack females were imprisoned at between 2 and 3 times the rate of white females, while Hispanic females were imprisoned at between 1 and 3 times the rate of white females”). While the racial disparity for incarcerated women remains substantial, between 2000 and 2009, the disparity between African-American and white women decreased 53.1%, while the disparity between Latina women and white women decreased 16.7%. MARC MAUER, THE SENTENCING PROJECT, THE CHANGING RACIAL DYNAMICS OF WOMEN'S INCARCERATION 2 (2013), available at [http://sentencingproject.org/doc/publications/rd\\_Changing%20Racial%20Dynamics%202013.pdf](http://sentencingproject.org/doc/publications/rd_Changing%20Racial%20Dynamics%202013.pdf).

14. CTR. FOR CONSTITUTIONAL RIGHTS, STOP AND FRISK: THE HUMAN IMPACT 3 (2012), available at <http://stopandfrisk.org/the-human-impact-report.pdf>.

roads and highways,<sup>15</sup> to arrest,<sup>16</sup> to charging decisions (including youth charged as adults<sup>17</sup>) to sentencing<sup>18</sup> and to incarceration,<sup>19</sup> poor African-Americans and Latinos are disproportionately injected into the criminal justice system and remain stuck in it.<sup>20</sup> Despite a variety of efforts aimed at reducing these disparities—ranging from litigation, proposed policy reforms, law enforcement reforms and legislation such as alternative punishment schemes—race remains stitched into each and every stage of the criminal justice system, so much so that one in three African-American males and one in six Latino males,<sup>21</sup> compared to one in seventeen white males, are expected to spend time in prison at some point in their lives.<sup>22</sup>

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15. See David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 267 (1999) (noting the data showing that “African-Americans are stopped and ticketed more often than whites”).

16. E.g., AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 4, 17, 21 (2013), available at <http://www.aclu.org/files/assets/aclu-the-war-on-marijuana-rel2.pdf> (African-Americans are 3.73 times more likely to be arrested for marijuana possession than whites even though marijuana is used at similar rates).

17. JOLANTA JUSZKIEWICZ, *BUILDING BLOCKS FOR YOUTH, YOUTH CRIME/ADULT TIME: IS JUSTICE SERVED?* 5 (2000), available at [http://www.cclp.org/documents/BBY/Youth\\_Crime\\_Adult\\_Time.pdf](http://www.cclp.org/documents/BBY/Youth_Crime_Adult_Time.pdf) (African-American youth were “over-represented in felony charges filed in adult court compared to their percentage in the felony arrest population”).

18. TUSHAR GANSAL, *THE SENTENCING PROJECT, RACIAL DISPARITIES IN SENTENCING: A REVIEW OF THE LITERATURE* 2 (Marc Mauer ed., 2005), available at [http://www.sentencingproject.org/doc/publications/rd\\_sentencing\\_review.pdf](http://www.sentencingproject.org/doc/publications/rd_sentencing_review.pdf) (young African-American and Latino males are “subject to particularly harsh sentencing compared to other offender populations”).

19. CARSON & SABOL, *supra* note 13. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 6 (2010) (“No other country in the world imprisons so many of its racial or ethnic minorities.”). These disparate incarceration rates directly impact African-American families in many ways, including that African-American children are most likely to have a parent in prison. LAUREN E. GLAZE & LAURA M. MARUSCHAK, *BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN* 2 (2008), available at <http://www.bjs.gov/content/pub/pdf/pptmc.pdf> (African-American and Latino/a children under eighteen years old were seven and a half times more and two and a half times more likely, respectively, to have a parent in prison than white children).

20. E.g., Anthony C. Thompson, *Unlocking Democracy: Examining the Collateral Consequences of Mass Incarceration on Black Political Power*, 54 HOWARD L.J. 587, 588 (2011) (“[C]riminal justice policy—both in substance and in application—has singled out individuals and communities of color and has left significant devastation in its path.”).

21. The Bureau of Justice Statistics, which captures statistical data on these points, refers to individuals as Hispanic. I use Latino/a throughout the article to indicate Latin communities, like Brazil, that are not Hispanic. But when quoting the Bureau of Justice Statistics data I do not alter the designation.

22. THOMAS P. BONCZAR, *BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001*, at 1, available at <http://www.bjs.gov/content/pub/pdf/piusp01.pdf>. See MARC MAUER & RYAN S. KING, *THE SENTENCING*

As a result, poor individuals of color disproportionately bear the mark of a criminal record. This is perhaps the heaviest possible burden to carry, as the *effects* of a criminal record are long-lasting and often permanent. For those who are convicted, these effects include the essentially countless legal disabilities—termed collateral consequences—that attach automatically, in varying degrees, to *all* criminal convictions.<sup>23</sup> Indeed, misdemeanor convictions trigger an array of legal disabilities.<sup>24</sup> Moreover, for individuals merely *charged* with criminal offenses that did not result in conviction, the charge itself often leads to legal and non-legal consequences that shadow them long past their encounters with the criminal justice system.<sup>25</sup> Thus, regardless of the type of crime that resulted in conviction or even the ultimate sentence imposed, the net result is often the same: long-lasting legal barriers that attach to each conviction make it difficult or even impossible for individuals to move past their criminal records.<sup>26</sup>

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PROJECT, UNNEVEN JUSTICE: STATE RATES OF INCARCERATION BY RACE AND ETHNICITY 1–2 (2007), available at [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofinbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofinbyraceandethnicity.pdf) (“While the disproportionate rate of incarceration for African-Americans has been well documented for some time, a significant development in the past decade has been the growing proportion of the Hispanic population entering prisons and jails.”).

23. *E.g.*, Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1791 (2012) (“[H]undreds and sometimes thousands of [collateral] consequences apply under federal and state constitutional provisions, statutes, administrative regulations and ordinances.”). For the details of these consequences, including their historical background and ongoing constitutional challenges, see generally MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013).

24. *E.g.*, John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 33 (2013) (setting forth several collateral consequences of misdemeanor convictions); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1325–26 (2012) (same); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297–303 (2011) (detailing various collateral consequences of misdemeanor convictions).

25. *E.g.*, Jeffrey Toobin, *Rights and Wrongs: A Judge Takes on Stop and Frisk*, NEW YORKER, May 27, 2013, at 36, 41 (reporting that a trespass arrest in New York City would be disclosed to New York’s security guard licensing agency, with the potential result of job loss based on the arrest); McGregor Smyth, “*Collateral*” No More: The Practical Imperative for Holistic Defense in a Post-Padilla World . . . Or, How to Achieve Consistently Better Results for Clients, 31 ST. LOUIS U. PUB. L. REV. 139, 149 (2011) (giving examples of consequences that can attach “from an arrest alone,” which includes initiation of public housing termination proceedings even when a charge is dismissed).

26. *E.g.*, ALEXANDER, *supra* note 19, at 139 (the range of legal barriers is a “parallel universe . . . that promises a form of punishment that is often more difficult to bear than prison time: a lifetime of shame, contempt, scorn and exclusion”); Joshua Dubois, *The Fight for Black Men*, NEWSWEEK, June 19, 2013, <http://mag.newsweek.com/2013/06/19/obama-s-former-spiritual-advisor-joshua-dubois-on-the-fight-for-black->

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Much of the scholarly literature has focused on the formal, legal consequences that attach to criminal convictions. However, the informal, non-legal consequences of these convictions are equally entrenched and, in effect, as severe, particularly as criminal records have become widely accessible to the general public and private actors through databases available on the internet.<sup>27</sup> As a result, employers, landlords, government agencies and anyone else can access criminal records with rapidly increasing ease.

The burdens imposed by the long-lasting effect of criminal records also disproportionately impact families and communities of color.<sup>28</sup> Individuals who have criminal records—particularly those exiting correctional facilities—are clustered in economically disadvantaged, urban communities across the United States.<sup>29</sup> Within these communities, families of color suffer the stigma that attaches to criminal records and struggle to survive in the face of housing, employment and other obstacles that burden parents, spouses and children.<sup>30</sup> With-

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men.html (the disproportionate arrests and confinement of people of color for drug offenses has resulted in an “‘under-caste,’ an apt if cringe-worthy term describing the massive numbers of black men who cannot access housing, who are screened out of employment, and who in many states are denied the right to vote”).

27. See Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOWARD L.J. 675, 676 (2010) (explaining that the importance of counseling clients about collateral consequences has heightened in part because public access to criminal records has increased); Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Policies in Washington State*, 9 SEATTLE J. SOC. JUST. 319, 325 (2010) (criminal records are available online in Washington State). See generally James Jacobs & Tamara Crepet, *The Expanding, Scope Use and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177 (2008) (detailing the expansion of various criminal record databases, the increasing scope of crimes included in criminal records and the greater accessibility to the records).

28. E.g., *Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated: Hearing Before the Subcomm. On Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 18 (2010) (statement of Marc Mauer, Executive Director, The Sentencing Project), available at [http://judiciary.house.gov/hearings/printers/111th/111-139\\_56830.pdf](http://judiciary.house.gov/hearings/printers/111th/111-139_56830.pdf) (“[G]iven the racial dynamics of the criminal justice system, communities of color are experiencing the [ ] impacts [of criminal records] at substantially higher levels than the national average.”).

29. E.g., DAVID M. KENNEDY, *DON’T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA* 17 (2011) (“Most of those arrested, prosecuted, jailed, imprisoned, on probation, and on parole come from and return to the poor, hot-spot neighborhoods where the drugs, crime and violence are also worst.”).

30. E.g., Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 433–34 (2013) (noting the strain and stigma suffered by children of formerly incarcerated individuals as the latter return with “diminished earning power and social status” and asserting that “black families disproportionately bear the brunt of these impacts”).

out stable housing or employment, they cannot support themselves, help sustain their families, or contribute economically to their communities. As a result, communities of color are destabilized by entangled relationships with the criminal justice system. As Professor Paul Butler observes, mass incarceration has undermined the social organization of communities, in part because “too much incarceration creates too many unemployable young men.”<sup>31</sup> He further observes that “mass incarceration changes the way that people think about crime and punishment,” and that “[i]n some low-income communities going to jail has become a rite of passage.”<sup>32</sup> Equally disturbing, Professor Dorothy Roberts explains that social norms in African-American communities become distorted as incarceration is normalized.<sup>33</sup> However, Professor Gabriel Chin notes that “we [also] live in an era of mass conviction,”<sup>34</sup> particularly as “most convicted persons are not sentenced to prison.”<sup>35</sup> These various interrelationships with the criminal justice system have stigmatized entire communities of color, and have contributed to greater and harsher regulation of individuals within these communities.<sup>36</sup> They also marginalize these communities economically and politically.<sup>37</sup>

31. PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 32–33 (2009). For a definition of “mass incarceration,” see Traum, *supra* note 30, at 426 (“In its most generic form, ‘mass incarceration’ is typically used to describe both the trend toward historically high incarceration rates in the United States and the causes and effects of that trend.”).

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32. BUTLER, *supra* note 31, at 33.

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33. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1288–90 (2004).

34. Gabriel J. Chin, *What are Defense Lawyers For? Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH L. REV. 151, 152 (2012) (emphasis added).

35. Chin, *supra* note 23, at 1804.

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36. E.g., Dorothy Roberts, *Collateral Consequences, Genetic Surveillance, and the New Biopolitics of Race*, 54 HOWARD L.J. 567, 568 (2011) (“Mass incarceration and its collateral consequences are the chief examples of the punitive regulation of African American Communities.”).

37. E.g., Jeffrey Fagan et al., *Reciprocal Effects of Crime and Incarceration in New York City Neighborhoods*, 30 FORDHAM URB. L.J. 1551, 1591 (2003) (concentrations of formerly incarcerated individuals deter businesses from “hiring locally or locating in such areas”); Roberts, *supra* note 33, at 1298–300 (discussing negative impact of mass incarceration on political vitality of African-American communities).

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## II.

## CRIMINAL RECORDS, HOUSING AND EMPLOYMENT

The two most persistent and critical obstacles confronting individuals with criminal records are housing and employment.<sup>38</sup> These are markers of family and financial stability and, as such, are two predictors for recidivism. Quite simply, those with stable housing and steady employment are less likely to recidivate.<sup>39</sup> These two obstacles are interconnected. As Professor James Forman, Jr. explains:

By barring the [individual] from public housing, we make it more likely that he will become homeless and lose custody of his children. Once he is homeless, he is less likely to find a job. Without a job he is, in turn, less likely to find housing on the private market—his only remaining option.<sup>40</sup>

A. *Employment*

The injurious impact of a criminal record on employment opportunities cannot be overstated.<sup>41</sup> This is particularly true for those who have served a term of incarceration. Individuals of color constitute the majority of the incarcerated population in the United States.<sup>42</sup> Professor William Stuntz has pointed to several “human consequences” of disproportionate African-American incarceration, one of which is that the African-American unemployment rate doubles that of whites.<sup>43</sup> For those able to find employment, incarceration reduces yearly earnings by an estimated forty percent.<sup>44</sup>

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38. See Chin, *supra* note 23, at 1801 (“Having a criminal record generates a range of social effects, most prominently including employment discrimination and other forms of market discrimination.”).

39. See *supra* note 11. Also, one scholar, writing about drug courts, notes that the long-term prospects of individuals who have experienced treatment can potentially “depend substantially on their ability to hold a job and maintain stable family relationships.” Richard C. Boldt, *The “Tomahawk” and the “Healing Balm”*: *Drug Treatment Courts in Theory and Practice*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 45, 60 (2010).

40. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 31 (2012).

41. E.g., James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 389–90 (2006) (“[A] criminal record has always been a disadvantage in obtaining employment.”).

42. See CARSON & SOBOL, *supra* note 13, at 7 tbl.7.

43. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 48 (2011).

44. PEW CHARITABLE TRUSTS, *COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY* 4 (2010), available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic\\_Mobility/Collateral%20Costs%20FINAL.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf).

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Regardless of the sentence served, individuals of color, particularly African-American men, have become essentially unemployable, largely because of their criminal records. Even African-American men *without* a criminal record experience extraordinary difficulty in securing gainful employment.<sup>45</sup> The difficulty, in substantial part, is due to negative employer attitudes about African-American men.<sup>46</sup> These difficulties are compounded for African-American men with criminal records, who are effectively shut out of significant employment opportunities.<sup>47</sup>

This labor market exclusion is tied to the manifold legal barriers to employment for individuals with criminal records. These legal barriers are grounded in tens of thousands of federal and state statutes, regulations, ordinances and policies that bar those with criminal records from an essentially unquantifiable array of opportunities and benefits.<sup>48</sup> Employment-related barriers include outright bans on particular types of employment and employment-related licensing, as well as broad discretion bestowed upon licensing authorities to deny employment-required licenses based on criminal records.<sup>49</sup> The American Bar Association (ABA) is currently compiling the federal and state collateral consequences across the United States.<sup>50</sup> At one recent

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45. See Patrick McGeehan, *Blacks Miss Out as Job Market Rebounds in City*, N.Y. TIMES, June 21, 2012, at A1 (more than half of African-Americans and non-Hispanic blacks in New York City were unemployed); Michael Luo, *In Job Hunt, Even a College Degree Can't Close the Racial Gap*, N.Y. TIMES, Dec. 1, 2009, at A1 (the economic downturn more deeply impacted college-educated African-American men than white men).

46. See Devah Pager & Diana Karafin, *Bayesian Bigot? Statistical Discrimination, Stereotypes, and Employer Decision Making*, 621 AM. ACAD. OF POL. & SOC. SCI. 70, 70 (2009) (noting studies that reveal employers' "persistence of strong negative associations with minority workers, with particularly negative characteristics attributed with African American men" and their strong preference of "white workers to otherwise similar African Americans" when hiring).

47. See ALEXANDER, *supra* note 19, at 148 ("Black [individuals with criminal records] are the most severely disadvantaged applicants in the modern job market.").

48. See Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 717 (2012) ("Thousands of civil punishments stand in the way of giving people who served their criminal sentences a true second chance.").

49. See, e.g., MD. CODE REGS. 12.10.01.20(A) (2012) (listing convictions that disqualify applicants from certification as correctional officers); MD. CODE ANN. BUS. REG., 9A-310(a)(1)(v) (West 2012) (the Board of Heating, Ventilation, Air Conditioning and Refrigeration Contractors has the discretion to deny license if applicant has been convicted of any felony, or a misdemeanor that is "directly related to the fitness and qualification of the applicant . . . to provide heating, ventilation, air-conditioning or refrigeration services").

50. The American Bar Association is compiling these consequences pursuant to a grant awarded by the National Institute of Justice (NIJ). The NIJ is statutorily required to gather these consequences. See Court Security Improvement Act of 2007, Pub. L.

point, the ABA identified over 38,000 statutes that attached collateral consequences to individuals convicted of offenses, approximately eighty percent of which related to employment.<sup>51</sup>

While these legal barriers are quite formidable, the non-legal barriers to employment—rooted in hiring policies that bar or largely exclude individuals with criminal records—are particularly acute. This holds particularly true for individuals of color. As criminal records have become more widely and easily accessible, employers have increasingly relied upon background checks as part of the application and hiring process. In fiscal year 2012, the Federal Bureau of Investigation released approximately seventeen million criminal record histories for employment background checks, a more than six-fold increase from 2002.<sup>52</sup> These background checks disproportionately exclude applicants of color from employment opportunities, both because they are over-represented in the criminal justice system and because employers are generally reluctant to hire applicants with records.<sup>53</sup>

Empirical studies document employers' resistance to hiring individuals of color with criminal records.<sup>54</sup> The best known of these studies was conducted by sociologist Devah Pager in 2001. Pager assembled two teams of "testers"—one African-American and the

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No. 110-177, § 510, 121 Stat. 2534, 2543 (2008) (requiring the Director of the NIJ to, *inter alia*, "compile the collateral consequences of convictions for criminal offenses in the United States, each of the 50 States, each territory of the United States, and the District of Columbia").

51. Solomon, *supra* note 10, at 44; *see also National Inventory of the Collateral Consequences of Conviction*, ABA COLLATERAL CONSEQUENCES, <http://www.abacollateralconsequences.org/> (last visited Sept. 14, 2013).

52. MADELINE NEIGHLY & MAURICE Emsellem, THE NAT'L EMP'T LAW PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 8 (2013), *available at* <http://www.nelp.org/page/-/SCLP/2013/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf?nocdn=1>.

53. *See* Mary Swanton, *Background Bias: EEOC Steps up Pressure on Employers that Reject Applicants Based on Criminal Records and Credit Scores*, INSIDE COUNSEL, Apr. 2010, at 26, 26 (advocates assert that the "widespread use of criminal background checks is creating a permanent underclass of unemployable people who are disproportionately minorities").

54. *E.g.*, Harry J. Holzer et al., *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants* 6–7 (Inst. for Research on Poverty, Discussion Paper No. 1243-02, 2002), *available at* <http://www.irp.wisc.edu/publications/dps/pdfs/dp124302.pdf> (finding that a majority of 3,000 employers surveyed in four cities would "probably" or "definitely" not employ an individual with a criminal record). Employment hurdles are more substantial for formerly incarcerated individuals. *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 119 (2007) ("[M]en who have been incarcerated have significantly lower wages, employment rates, and annual earnings than those who have never been incarcerated.").

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other white—to apply for entry-level jobs in Milwaukee.<sup>55</sup> The testers had similar educational backgrounds and presented identical employment applications.<sup>56</sup> The one difference on the employment applications was that each week, one of the testers within each team presented a criminal record involving one felony drug conviction and eighteen months incarceration.<sup>57</sup> Pager found that for the white testers, “[a] criminal record . . . reduce[d] the likelihood of a callback by 50 percent,”<sup>58</sup> while for the African-American testers, the same record reduced callbacks “by more than 60 percent.”<sup>59</sup> Most strikingly, Pager found that African-Americans *without* a criminal record were less likely to receive a callback than whites *with* a criminal record.<sup>60</sup> Thus, Pager’s study illustrates starkly the separate and collective stigmas that cling to African-Americans with criminal records who seek employment, three of which are: 1) being African-American;<sup>61</sup> 2) having a criminal record; and 3) being African-American with a criminal record. Thus, the study shows that employers strongly link criminal records with race, and that “being black in America today is just about the same as having a felony conviction in terms of one’s chances of finding a job.”<sup>62</sup>

*B. Housing*

Stable housing is a critical determinant of whether an individual will continue his or her involvement with the criminal justice system.

55. DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 59 (2007).

56. *Id.* at 59–60.

57. *Id.* at 59, 61.

58. *Id.* at 67.

59. *Id.* at 69. Pager, with Bruce Western and Naomi Sugie conducted a subsequent study of African-American and white male applicants for low-wage jobs in New York City. They found that while criminal records reduced employment prospects overall, the negative impact was “substantially larger” for African-Americans. Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 AM. ACAD. POL. & SOC. SCI. 195, 199 (2009) (finding that a criminal record reduces the likelihood of a callback or a job offer for whites by thirty percent, as compared to sixty percent for African-American applicants).

60. PAGER, *supra* note 55, at 90–91 (emphasis added). Specifically, Pager found that fourteen percent of African-American applicants without a criminal record received a callback while seventeen percent of the white applicants with a record received a callback. *Id.* at 91. Pager explained the difference as “not statistically significant.” *Id.*

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61. *E.g.*, Forman, *supra* note 40, at 32 (“[E]ven young, low income black men who are never arrested or imprisoned endure the consequences of a stigma associated with race.”).

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62. PAGER, *supra* note 55, at 91.

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As a result of their criminal records, poor individuals of color disproportionately have no viably stable housing options. They disproportionately reside in low-income, highly segregated urban communities, with concentrations of public housing.<sup>63</sup> Their records exclude them from such housing pursuant to local housing policies and regulations that have expanded dramatically the federal laws and regulations that disqualify individuals convicted of certain offenses from federally assisted housing.<sup>64</sup>

Specifically, under federal law, individuals convicted of manufacturing or producing methamphetamine on federal housing premises and offenses that mandate lifetime sex offender registration under a state registration requirement are banned from government-assisted housing for life.<sup>65</sup> In addition, a household's tenancy may be terminated "when the [public housing authority] determines that a household member is illegally using a drug or when the PHA determines that a pattern of illegal [drug] use . . . interferes with the health, safety or right to peaceful enjoyment of the premises by other residents."<sup>66</sup>

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63. See, e.g., NANCY G. LA VIGNE ET AL., *THE URBAN INST., A PORTRAIT OF PRISONER REENTRY IN MARYLAND* 51 (2003), available at [http://www.urban.org/UploadedPDF/410655\\_MDPortraitReentry.pdf](http://www.urban.org/UploadedPDF/410655_MDPortraitReentry.pdf) (the majority of the reentering population returns to Baltimore City, where the median household income is well below the statewide level and residents "face many economic and social disadvantages compared with other areas in Maryland"); NANCY G. LA VIGNE ET AL., *THE URBAN INST., A PORTRAIT OF PRISONER REENTRY IN ILLINOIS* 51 (2003), available at [http://www.urban.org/UploadedPDF/410662\\_ILPortraitReentry.pdf](http://www.urban.org/UploadedPDF/410662_ILPortraitReentry.pdf) (the reentering population in Illinois returns disproportionately to a handful of communities in Chicago); U.S. DEP'T OF HOUS. & URBAN DEV., *CHARACTERISTICS OF HUD-ASSISTED RENTERS AND THEIR UNITS IN 2003*, at 20 (2008), available at [http://www.huduser.org/Publications/pdf/Hud\\_asst\\_renters\\_report\\_p1.pdf](http://www.huduser.org/Publications/pdf/Hud_asst_renters_report_p1.pdf) (in 2003 two-thirds of public housing tenants lived in "central cities").

64. See, e.g., Christopher Mele, *The Civil Threat of Eviction and the Regulation and Control of U.S. Public Housing Communities*, in *CIVIL PENALTIES, SOCIAL CONSEQUENCES* 123–26 (Christopher Mele & Teresa A. Miller eds., 2005) (detailing federal statutes, regulations and policies that increased local public housing authorities' discretion to evict tenants or exclude applicants based on their criminal records); Corinne A. Carey, *No Second Chance: People with Criminal Records Denied Access to Public Housing*, 36 U. TOL. L. REV. 545, 561–62 (2005) (same).

65. 24 C.F.R. § 966.4(l)(5)(i)(A) (2012) (tenancy must be terminated if "any member of the household has ever been convicted of drug-related activity for manufacture or production of methamphetamine on the premises of federally assisted housing"); 42 U.S.C. § 13663(a) (2006) (prohibiting admission "for any household that includes any individual who is subject to a lifetime registration requirement under a State sex offender registration program").

66. 24 C.F.R. § 966.4(l)(5)(i)(B) (2012). However, the PHA, in determining whether to terminate the tenancy, may consider whether the "household member" who engaged in the drug-related activity "is participating in or has successfully completed a supervised drug or alcohol rehabilitation program, or has otherwise been successfully rehabilitated." *Id.* § 966.4(l)(5)(vii)(D) (citation omitted).

However, aside from these specific exclusions, local public housing authorities and owners of federally assisted housing have vast discretion under federal law to determine the range of other criminal activity that will disqualify individuals and families from such housing.<sup>67</sup> Housing authorities across the U.S. have stripped discretion of its very meaning by enacting zero tolerance policies that prohibit individuals convicted of *any* offense—no matter how petty or substantial—from public and government assisted housing.<sup>68</sup> Some authorities ban individuals charged with offenses that *did not* result in conviction.<sup>69</sup> The prohibitions last for different time periods depending on the type of offense.<sup>70</sup> As a result, a public housing resident convicted of *any* offense in many jurisdictions is faced with a “cruel trilemma”: violate the lease by returning to his or her residence and risk eviction of his entire family,<sup>71</sup> attempt to secure private housing or accept a life of homelessness and/or transience.<sup>72</sup>

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67. See 42 U.S.C. § 13663(c)(1) (2006) (“public housing agency” or “owner of [federally assisted] housing” can deny tenancy if an “applicant or any member of the applicant household is or was . . . engaged in any drug-related or violent criminal activity or other criminal activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents”); see also John J. Ammann, *Housing out the Poor*, 19 ST. LOUIS U. PUB. L. REV. 309, 316–19 (2000) (explaining the broad power of housing authorities to exclude and evict individuals from government-assisted housing because of criminal conduct).

68. See ALEXANDER, *supra* note 19, at 142–43 (“Throughout the United States, public housing agencies have adopted exclusionary policies that deny eligibility to applicants even with the most minor criminal backgrounds.”). R

69. Pinard, *supra* note 5, at 491 & n.186. R

70. E.g., HOUS. AUTH. OF BALT. CITY, ANNUAL PLAN FISCAL YEAR 2013: VOLUME 2: THE HOUSING CHOICE VOUCHER ADMINISTRATIVE PLAN, at AS-3 (2012), available at [http://static.baltimorehousing.org/doc/plansreports/fy2013\\_ap\\_2.pdf](http://static.baltimorehousing.org/doc/plansreports/fy2013_ap_2.pdf) (“During the initial eligibility review, offenses that result in convictions will be subject to a period of ineligibility of 18 months for a misdemeanor offense and 3 years for a felony offense.”); LEGAL ACTION CTR., HOW TO GET SECTION 8 OR PUBLIC HOUSING EVEN WITH A CRIMINAL RECORD: A GUIDE FOR NEW YORK CITY HOUSING AUTHORITY APPLICANTS AND THEIR ADVOCATES 4–5 (2006), available at [http://lac.org/doc\\_library/lac/publications/How\\_to\\_Get\\_Section\\_8\\_or\\_Public\\_Housing.pdf](http://lac.org/doc_library/lac/publications/How_to_Get_Section_8_or_Public_Housing.pdf) (stating that New York City public housing ineligibility periods include six years for Class A, B or C felony convictions, three years for Class A misdemeanor convictions and two years for violations).

71. See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 302 (2009) (because of a conviction an individual’s “entire famil[y] may be evicted, become ineligible for a period of years or be forced to bar [him or her] from the household”).

72. See Carey, *supra* note 64, at 545 (federal and local housing restrictions “exclude countless needy people with criminal records, condemning them to homelessness or transient living”). R



Securing private housing is obviously the ideal solution. In the best case scenario, the individual can live with family members who own a private home. Short of that circumstance, private housing in many instances is the least feasible option<sup>73</sup> because it requires steady employment. Landlords generally require proof of income, a security deposit and first and last month's rent *before* leasing an apartment or house to a tenant. To maintain the home, the tenant needs to pay rent and other home-related bills. As detailed above, securing stable employment is extraordinarily difficult for individuals with criminal records.<sup>74</sup> The degree of difficulty is at its peak when the conviction or release from incarceration is most recent. Thus, the time when the housing needs are often most urgent is also when the individual will be least able to secure housing. Moreover, having steady employment is no guarantee that the individual will find a landlord willing to rent an apartment to him or her. The criminal record will often still stand in the way.<sup>75</sup> As a result, private housing is not an option for many individuals with criminal records.

### III.

#### FEDERAL, STATE AND LOCAL EFFORTS TO AMELIORATE THE IMPACT OF CRIMINAL RECORDS

The criminal justice system is the sum of its component parts, which include criminalization, policing strategies, law enforcement/citizen encounters, arrests, prosecutorial discretion (including charging decisions and plea offers), sentencing and reentry. The articles in this symposium issue detail the disproportionate impact of these components on individuals and communities of color. True and meaningful holistic reform requires solutions that are interconnected in ways that address these various component parts. A criminal record is the end product of a person's introduction into the criminal justice system as well as the mark that extends the impact of the system indefinitely. It is what stays with the person long after all of the other stages of the criminal justice system have ended and the formal punishment has concluded. Thus, truly ameliorating the disproportionate impact of

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73. Susan J. Gauvey & Katerina M. Georgiev, *Reform in Offender Reentry: Building Bridges and Shattering Silos*, MD. B. J., Nov. 2011, at 15, 20 ("Housing options for [individuals with criminal records] who cannot stay with family or friends in a privately owned residence are extremely limited.").

74. See *supra* notes 64–72 and accompanying text.

75. E.g., George Lipsitz, "In an Avalanche Every Snowflake Pleads Not Guilty": *The Collateral Consequences of Mass Incarceration and Impediments to Women's Fair Housing Rights*, 59 UCLA L. REV. 1746, 1774 (2012) ("[M]any landlords . . . refuse to rent dwellings to [individuals with criminal records].").

criminal records on individuals of color mandates reforming all other aspects of the criminal justice system.

Fortunately, there are several ongoing federal, state and local efforts that strive to diminish the obstacles confronting individuals with criminal records, including those pertaining to housing and employment.<sup>76</sup> These efforts have included legal and policy changes that have been implemented recently or are in the process of being implemented. The following are examples of such efforts.

#### A. *Federal Efforts*

##### 1. *The Federal Interagency Reentry Council*

In January 2011, Attorney General Eric Holder established the Federal Interagency Reentry Council.<sup>77</sup> The Council is comprised of twenty federal agencies<sup>78</sup> and has working groups that are charged with focusing on specific areas. Its aims, in part, are to reduce recidivism, help individuals transition to their communities from incarceration and “save taxpayer dollars by lowering the direct and collateral costs of incarceration.”<sup>79</sup> The Council has articulated the need to be smarter about collateral consequences of criminal convictions and has called for reducing these consequences. Specifically, it has stated that:

A chief focus of the . . . Council is to remove federal barriers to successful reentry, so that motivated individuals - who have served their time and paid their debts are able to compete for a job, attain stable housing, support their children and families, and contribute to their communities.<sup>80</sup>

Consistent with this core aim, Attorney General Holder sent a letter in April 2011, to all state Attorney Generals to “encourage [them] to evaluate the collateral consequences in [the respective] state[s] and to determine whether those that impose burdens on individuals convicted of crimes without increasing public safety should be

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76. Some have observed that there is also a public interest in curtailing the housing and employment restrictions. *See, e.g.,* Love, *supra* note 9, at 774 (“The proliferation of exclusionary laws and hardening of social attitudes toward people with a criminal record has begun to generate push-back as the public safety implications of exclusionary employment and housing policies is becoming apparent.”); Alfred Blumstein & Kiminori Nakamura, Op-Ed., *Paying a Price, Long After the Crime*, N.Y. TIMES, Jan. 9, 2012, at A23 (“There is a growing public interest in facilitating job opportunities for those who have stayed crime free for a reasonable period of time.”).

77. *Federal Interagency Reentry Council*, COUNCIL OF STATE GOV'TS JUSTICE CTR., <http://csgjusticecenter.org/nrrc/projects/firc/> (last visited Sept. 14, 2013).

78. *Id.*

79. *Id.*

80. *Id.*

eliminated.”<sup>81</sup> While noting that some collateral consequences—such as those prohibiting gun possession—“serve meaningful public safety goals,”<sup>82</sup> Attorney General Holder explained that others, “including denial of employment and housing opportunities,” “impose additional burdens on people who have served their sentences . . . without increasing public safety in essential ways.”<sup>83</sup>

2. *The Department of Housing and Urban Development*

The ability of individuals with criminal records to access government-assisted housing is a central feature of the reentry council’s work. Shaun Donovan, the Secretary of Housing and Urban Development (HUD), is a member of the council.<sup>84</sup> As part of his work on the council, Secretary Donovan sent letters to the Executive Directors of 3200 public housing authorities, as well as to the owners and agents of HUD properties across the United States.<sup>85</sup> In these letters, he expressed that “[p]art of the support” that needs to be offered to individuals with criminal records is to help them “gain access to one of the most fundamental building blocks of a stable life—a place to live.”<sup>86</sup>

The letters referenced studies that have concluded that individuals without stable housing “are more likely to recidivate than those who do,” that “the majority of people released from prison intend to return to their families, many of whom live in public or other assisted housing,”<sup>87</sup> and “some of whom may live in assisted housing.”<sup>88</sup> Understanding that individuals with criminal records are excluded from federally-assisted housing for a broad range of conduct, Secretary

81. The letters were personally addressed to each state Attorney General. *See, e.g.*, Letter from Eric H. Holder, Jr., Att’y Gen., U.S. Dep’t of Justice, to William H. Sorrell, Att’y Gen. of State of Vt. (Apr. 18, 2011), available at <http://onlawyering.com/wp-content/uploads/2011/05/VT-Attorney-General-Sorrell.0001-1.pdf>.

82. *Id.*

83. *Id.*

84. *See Attorney General Holder Convenes Federal Reentry Council*, U.S. DEP’T OF JUSTICE (Sep. 27, 2011), <http://www.justice.gov/opa/pr/2011/September/11-ag-1263.html>.

85. Letter from Shaun Donovan, U.S. Sec’y of Hous. & Urban Dev., and Sandra B. Henriquez, Assistant Sec’y for Pub. & Indian Hous., to PHA Executive Directors (June 17, 2011), available at <http://nhlp.org/files/Rentry%20letter%20from%20Donovan%20to%20PHAs%206-17-11.pdf> [hereinafter Letter to PHA Executive Directors]; Letter from Shaun Donovan, U.S. Sec’y of Hous. & Urban Dev., and Carol J. Galente, Acting Assistant Sec’y for Hous. & Fed. Hous. Comm’r, to Owners and Agents of HUD-Assisted Properties (March 14, 2012), available at <http://nhlp.org/files/HUD%20Letter%203.14.12.pdf> [hereinafter Letter to Owners and Agents].

86. Letter to PHA Executive Directors, *supra* note 85; Letter to Owners and Agents, *supra* note 85.

87. Letter to PHA Executive Directors, *supra* note 85.

88. Letter to Owners and Agents, *supra* note 85.

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Donovan reminded the PHA Executive Directors of the *two* federal lifetime prohibitions based on criminal convictions as well as the exclusions based on “drug-related activity.”<sup>89</sup> He spelled out similar exclusions to the owners and agents of HUD properties, but asked them “to seek a balance between allowing [individuals with criminal records] to reunite with families that live in HUD subsidized housing, and ensuring the safety of all residents of its programs.”<sup>90</sup> He “encourage[d] owners of HUD-assisted properties to develop policies and procedures that allow [individuals with criminal records] to rejoin the community to the extent this balance can be maintained.”<sup>91</sup> Similarly, he “remind[ed] [the executive directors] of the discretion given to public housing agencies . . . when considering people leaving the criminal justice system,” and “encourage[d] [them] to allow [the individuals] to rejoin their families in the Public Housing or Housing Choice Voucher programs, when appropriate.”<sup>92</sup> He also explained to the PHA Executive Directors that HUD “is engaged in several initiatives that seek a balance between allowing [individuals with criminal records] to reunite with families that live in HUD subsidized housing, and ensuring the safety of all residents . . . .”<sup>93</sup>

HUD is currently undertaking some of the efforts set forth in Secretary Donovan’s letters to reintegrate individuals with criminal records into federally-assisted housing. These efforts include “dispel[ling] the myths regarding HUD occupancy standards via enhanced

89. Letter to PHA Executive Directors, *supra* note 85. Similarly, the Federal Interagency Reentry Council, in a “reentry myth buster” aimed at correcting the misimpression that individuals who have been convicted of a crime are “banned from public housing,” explained that “[t]here are only two convictions for which a PHA *must* prohibit admission.” FED. INTERAGENCY REENTRY COUNCIL, REENTRY MYTH BUSTER!, *available at* [http://csgjusticecenter.org/documents/0000/1089/Reentry\\_Council\\_Mythbuster\\_Housing.pdf](http://csgjusticecenter.org/documents/0000/1089/Reentry_Council_Mythbuster_Housing.pdf) (emphasis added).

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90. Letter to Owners and Agents, *supra* note 85.

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91. *Id.* Here, Secretary Donovan suggested factors to consider when screening a family’s “suitability for tenancy.” These factors include those that “indicate a reasonable probability of favorable future conduct,” such as “evidence of rehabilitation and evidence of the applicant family’s participation in or willingness to participate in social services such as counseling programs.” *Id.* Similarly, when reiterating the three-year prohibition of applicants with a household member who was evicted from federally-assisted housing for “drug-related criminal activity,” Secretary Donovan reiterated the following:

[O]wners retain discretion to consider the circumstances and may admit households if the owner determines that the evicted housing members . . . has successfully completed a supervised drug rehabilitation program, including those supervised by drug courts, or that the circumstances leading to eviction no longer exist.

*Id.* (citing 24 C.F.R. § 5.854).

92. Letter to PHA Executive Directors, *supra* note 85.

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93. *Id.*

promotion of current HUD policy and program efforts to support reentering persons,”<sup>94</sup> implementing pilot projects to “evaluate the impact of housing provision and reduced recidivism”<sup>95</sup> and convening annual Father’s Day programs throughout the U.S. to “sensitize[ ] [public housing authorities] to serving the men in public housing and their unique needs which may include criminal histories.”<sup>96</sup> Representatives from the various HUD housing programs are exploring short and long-term strategies for removing housing barriers confronting individuals with criminal records, including those rooted in regulations and statutes.<sup>97</sup> Also, there are presently two dozen housing authorities across the U.S. that have reentry programs.<sup>98</sup> While most of the programs are connected to Section 8 vouchers, others are connected to public housing units and some work with non-profit organizations.<sup>99</sup> HUD is surveying these programs to determine their effectiveness, with the goal of encouraging additional housing authorities to adopt similar programs.<sup>100</sup>

In addition, each of the eighty-two HUD field offices has a reentry “point of contact.”<sup>101</sup> HUD envisions these contacts to serve as liaisons to reentry workgroups, to share with the groups the housing-related obstacles to reentry and to help housing authorities be more responsive to those obstacles.<sup>102</sup>

### 3. *The Equal Employment Opportunity Commission*

The Equal Employment Opportunity Commission (EEOC) has long implemented guidelines to both protect job applicants with criminal records against discrimination in the hiring process and to offer

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94. U.S. DEP’T OF HOUS. & URBAN DEV., HUD REENTRY PROGRESS REPORT 1 (2011) (on file with author).

95. *Id.*

96. *Id.* at 2. The first Father’s Day Program was held on June 18, 2011.

97. Telephone Interview with Ronald T. Ashford, Director, Public Hous. Supportive Servs., U.S. Dep’t of Hous. & Urban Dev., and Pamela Lawrence, Public Housing Revitalization Specialist/Grant Manager, U.S. Dep’t of Hous. & Urban Dev. (March 21, 2013) [hereinafter “Telephone Interview”].

98. *Id.* For example, the Housing Authority of Baltimore City is working with the Mayor’s Office of Baltimore City on a ten-year plan to end homelessness, which includes a reentry program aimed, in part, at “link[ing] permanent housing with support services” to families with individuals who have criminal records. HOUS. AUTH. OF BALT. CITY, MOVING TO WORK PROGRAM: ANNUAL PLAN FOR FISCAL YEAR 2014 DRAFT, at 7 (2013), available at [http://static.baltimorehousing.org/pdf/FY2014\\_draft\\_annualplan.pdf](http://static.baltimorehousing.org/pdf/FY2014_draft_annualplan.pdf).

99. Telephone Interview, *supra* note 97.

100. *Id.*

101. *Id.*

102. *Id.*

guidance to employers who rely upon criminal records when considering job applicants. In 2012, the EEOC issued a revised Enforcement Guidance,<sup>103</sup> the purpose of which was to “consolidate and update” its “guidance documents regarding the use of arrest or conviction records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*”<sup>104</sup>

The EEOC’s guidance enforces Title VII of the Civil Rights Act of 1964, specifically focusing on the interaction between race, national origin and criminal records in the context of employment discrimination.<sup>105</sup> It recognizes that employers have used criminal records to exclude individuals with criminal records from employment, and that the exclusions have disproportionately impacted African Americans and Latinos because of their overrepresentation in the criminal justice system.<sup>106</sup> It then sets forth, in great detail, the general legal principles applicable to relying on criminal records in employment decisions, disparate treatment and impact analyses in the context of assessing Title VII claims and several hypothetical scenarios that apply the legal principles and provide examples of lawful and unlawful reliance on criminal records to deny employment.<sup>107</sup>

The revised guidance has garnered significant attention. It has been reviewed by employers,<sup>108</sup> and relied upon by job seekers, attorneys, advocates and policy groups in the year and a half since its issuance. It has been used in attempts to educate employers about the illegality of imposing blanket bans on hiring individuals with arrest or conviction records.<sup>109</sup> It has also been used by other federal agencies

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103. OFFICE OF LEGAL COUNSEL, EEOC ENFORCEMENT GUIDANCE NO. 915.002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), available at [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) [hereinafter EEOC ENFORCEMENT GUIDANCE].

104. *Id.*

105. *Id.* at 1 (“The Guidance focuses on employment discrimination based on race and national origin.”).

106. *Id.* at 9–10 (concluding that “[n]ational data . . . supports a finding that criminal record exclusions have a disparate impact” on African Americans and Latinos).

107. *Id.* at 4–20.

108. For instance, a recent survey of nearly 1000 individuals representing U.S. employers that conduct background checks as part of their respective hiring processes revealed that sixty-eight percent of the respondents stated that their organizations have reviewed the revised guidance. EMPLOYEE SCREEN IQ, SURVEY REPORT 2013: EMPLOYMENT SCREENING PRACTICES & TRENDS: THE ERA OF HEIGHTENED CARE AND DILIGENCE 5, available at [www.employeeescreen.com/Survey\\_Report\\_2013.pdf](http://www.employeeescreen.com/Survey_Report_2013.pdf).

109. See *Questions and Answers About the EEOC’s Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII*, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, [http://www.eeoc.gov/laws/guidance/qa\\_arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm) (last visited Sep. 16, 2013) (the Guidance “provides

to educate various constituencies, including one-stop career centers.<sup>110</sup> Perhaps more broadly, it has helped to spotlight the dire employment prospects for individuals with criminal records—particularly individuals of color—and to demonstrate that mechanisms are necessary to enhance employment opportunities.

*B. State and Local Effort to Reduce Impact of Criminal Records—  
The “Ban the Box Movement”*

There have also been efforts at state and local levels to ease the weight of criminal records. Several of these efforts have focused on reducing obstacles to employment, with the recognition that criminal records stand in the way of employment opportunities and therefore impact individuals, families and communities. Some of these efforts have been longstanding while others are more recent and ongoing. For example, several states have statutes designed to protect individuals with criminal records who need to secure or maintain employment.<sup>111</sup> A few states have other mechanisms, such as certificates of relief, that seek to ease the consequences that attach to criminal convictions, including employment obstacles.<sup>112</sup>

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best practices for employers to consider when making employment decisions based on criminal records”). Rather, assessments of criminal records must be individualized or tailored to the particular applicant, considering factors such as “the nature and gravity of the offense,” the time that has elapsed since the offense or completion of sentence, and the relationship between the offense and the specific job-related responsibilities. EEOC ENFORCEMENT GUIDANCE, *supra* note 103, at 11 (citing *Green v. Mo. Pac. R.R.*, 549 F. 2d 1158, 1160 (8th Cir. 1977)).

110. Press Release, U.S. Dep’t of Justice Office of Public Affairs, Attorney General Eric Holder Convenes 3rd Federal Reentry Council Meeting (May 10, 2012), *available at* <http://www.justice.gov/opa/pr/2012/May/12-ag-606.html> (the Department of Labor is educating one-stop career centers “on the new guidance and other nondiscrimination obligations under federal law” and the Federal Trade Commission created an “employer education flyer” that, in part, explains “employer obligations when they use . . . criminal histories for . . . hiring, promotion, reassignment and retention”).

111. *E.g.*, MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: A STATE BY STATE GUIDE 62 (2006) (the majority of states have “general laws that prohibit firing or refusal to hire . . . a person based ‘solely’ on a criminal record”).

112. *E.g.*, 730 ILL. COMP. STAT. ANN. 5 / 5-5.5-15(a) (West 2013) (the circuit court that imposed sentence may issue “a certificate of relief from disabilities to an eligible offender”); N.Y. CORRECT. LAW § 701(1) (McKinney 2013) (“A certificate of relief from disabilities may be granted . . . to relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by reason of his conviction . . . .”); N.C. GEN. STAT. ANN. § 15A-173.2(a) (West 2012) (individual convicted of particular felonies or misdemeanors may petition the court “where the individual convicted for a certificate of relieve relieving collateral consequences . . .”).

Perhaps the most well-known—and certainly the most widespread—are recent state and local efforts to reduce employment-related obstacles that have focused on “banning the box.” The “box” is the part of an employment application that requires an applicant to disclose the existence of a criminal record. State and local “ban the box” advocacy efforts have focused on removing this question from employment applications. These efforts have gained substantial momentum and attention over the past several years, attributable to both their breadth and considerable success, particularly of late.<sup>113</sup> These successful advocacy efforts are due in large measure to mobilization efforts by individuals with criminal records, organizations formed by and working with those individuals<sup>114</sup> as well as networks of policy and legal organizations.

At present, ten states and over fifty cities and counties have removed the “box” from their respective initial employment applications, with the majority having done so within the past several years.<sup>115</sup> As a result, all applicants for state or local jobs in these jurisdictions are evaluated equally at the outset solely on their respective qualifications.<sup>116</sup> The inquiry into the existence of the applicant’s criminal record comes later in the application process, such as after the applicant has secured an interview or has been deemed qualified

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113. Target Corporation has recently announced that it will ban the box from employment applications nationwide. *Target Initiates Ban the Box Nationwide*, Nov. 1, 2013, available at <http://www.insightnews.com/news/11478-target-initiates-ban-the-box-nationwide>.

114. One such organization is All of Us or None, a “grassroots civil rights organization” based in California with affiliate offices in Michigan, Oklahoma and Texas. See *All of Us or None*, LEGAL SERVS. FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/all-of-us-or-none/> (last visited Sep. 16, 2013). This organization started the ban the box efforts that have spread throughout the U.S. See *Ban the Box Campaign*, LEGAL SERVS. FOR PRISONERS WITH CHILDREN, <http://www.prisonerswithchildren.org/our-projects/all-of-us-or-none/ban-the-box-campaign/> (last visited Sep. 16, 2013); see also Eumi K. Lee, *The Centerpiece to Real Reform? Political, Legal, and Social Barriers to Reentry in California*, 7 HASTINGS RACE & POVERTY L.J. 243, 256 (2010) (crediting All of Us or None with starting the ban-the-box effort).

115. The states are California, Connecticut, Colorado, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Mexico and Rhode Island. *Rhode Island Becomes Latest State to Ban the Box*, NAT’L EMP’T LAW PROJECT (July 16, 2013), <http://www.nelp.org/page/-/Press%20Releases/2013/Rhode-Island-Becomes-Latest-State-to-Ban-the-Box.pdf?nocdn=1>. For a list of the cities and counties that have removed the box, see NAT’L EMP’T LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS (2013), available at <http://www.nelp.org/page/-/SCLP/2011/CityandCountyHiringInitiatives.pdf?nocdn=1>.

116. Pinard, *supra* note 5, at 528.



for the position.<sup>117</sup> If a criminal record exists, the employer will then determine the relevance of the record to the position as well as, depending on the jurisdiction, other pertinent factors, such as the amount of time that has lapsed since the conviction(s) and evidence of rehabilitation.<sup>118</sup>

The scope of these laws differs by jurisdiction. For instance, some ban the box laws only apply to public employers while others reach the private sector.<sup>119</sup> Regardless of such differences, these jurisdictions recognize that job applicants should not be judged at the outset solely by their criminal records, but that they often are.<sup>120</sup> Thus, removing the box enhances employment opportunities by giving individuals with criminal records the opportunity to secure interviews,<sup>121</sup> compete for jobs and, if deemed qualified, gain employment.

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117. *E.g.*, MINN. STAT. ANN. § 364.021(a) (West 2012) (“A public employer may not consider the criminal record or criminal history of an applicant . . . until the applicant has been selected for an interview. . . .”); N.M. STAT. ANN. § 28-2-3(A) (West 2012) (“A board, department or agency of the state or any of its political subdivisions . . . shall only take into consideration a conviction after the applicant has been selected as a finalist for the position.”).

118. For instance, in Minnesota an applicant’s prior conviction can disqualify him or her from public employment only if it “directly relate[s] to the . . . employment sought . . .” MINN. STAT. ANN. § 364.03 subdiv. 1 (West 2012). However, this same conviction cannot disqualify the applicant if he or she presents “competent evidence of sufficient rehabilitation and present fitness to perform the duties of the . . . employment.” *Id.* at § 364.03 subdiv. 3(a); *see also* CONN. GEN. STAT. § 46a-80(b) (West 2010) (conviction can bar employment or issuance of an employment-related license “if after considering (1) the nature of the crime and its relationship to the [employment sought]; (2) information pertaining to the degree of rehabilitation . . . ; and (3) the time elapsed since the conviction or release . . .”). For a summary of these and other state-level ban the box laws, see *Hearing on Senate Bill 671 Before the S. Comm. on Finance*, 2012 Reg. Sess. (Md. 2012) at 2–3 (written testimony of the Reentry Clinic at the University of Maryland Francis King Carey School of Law) (on file with author) [hereinafter Reentry Clinic Ban the Box Testimony].

119. *See, e.g.*, HAW. REV. STAT. ANN. § 378-1 (Supp. 2011) (defining employer as “any person, including the state or any of its political subdivisions . . . having one or more employees . . .”); *see also* Rich Lord, *Pittsburgh’s U.S. Attorney Urges Employers to Hire Ex-offenders*, PITTSBURGH POST-GAZETTE, May 20, 2013, <http://www.post-gazette.com/stories/local/region/us-attorney-urges-employers-to-hire-ex-offenders-688378/> (noting that the city council in Philadelphia passed ban the box legislation that would apply to city vendors).

120. *See* Editorial, *An Unfair Barrier to Employment*, N.Y. TIMES, May 6, 2013, at A26 (using criminal records to disqualify job applicants “has become so acute that a growing number of states and municipalities have explicitly prohibited public agencies—and in some case, private business—from asking about an applicant’s criminal history until the applicant reaches the interview stage or receives a conditional job offer”); Reentry Clinic Ban the Box Testimony, *supra* note 118, at 1 (“[B]y checking ‘yes’ on [the] box, many employers will reject [job] applications immediately, even when they are otherwise qualified for the positions.”).

121. Devah Pager conducted a study in 2004 that illustrated the positive effect that meeting an employer can have on the ultimate hiring decision. Again using testers,

## IV.

THE NEED FOR A REDEMPTIVE-FOCUSED APPROACH  
TO CRIMINAL RECORDSA. *The Inadequacy of Existing Efforts to Ameliorate the Impact  
of Criminal Record*

The federal, state and local efforts detailed in Part III seek to improve the housing and employment outcomes for individuals with criminal records. The EEOC's Guidance is specifically tailored to enhance the employment opportunities for individuals of color with criminal records, as it aims to address the disparate impact of employment exclusions by connecting the disparate impact analysis to the disproportionate entanglement of African-Americans and Latinos with each and every stage of the criminal justice system. The other efforts, by reducing these barriers, will also hopefully improve outcomes for individuals, families and communities of color.

Despite the laudable aims of these efforts however, collectively they suffer the same shortcomings. First, they are rooted in law and impose obligations only on those individuals and entities covered by those respective laws. For individuals with criminal records—particularly the poor African-American and Latino individuals who disproportionately bear the mark of a criminal record and desperately need employment and housing, the informal consequences of criminal convictions—those that “are not rooted in law”<sup>122</sup>—are more pervasive and are often as devastating as the legal consequences. They include actions of employers *not* covered by the ban the box laws or the EEOC's guidance who refuse to hire individuals with criminal records, and private landlords who do not accept Section 8 vouchers and often refuse to rent apartments to these same individuals.<sup>123</sup> The legal efforts detailed above do not adequately ameliorate these informal consequences.

Also, these legal efforts fail to address the disconnection between individuals with criminal records who believe they have moved past

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Pager found that those “who interact[ed] with employers [were] between four and six times more likely to receive a callback or job offer than those who did not; and personal contact reduce[d] the effect of a criminal record by roughly 15 percent.” Pager et al., *supra* note 59, at 200.

122. Pinard, *supra* note 5, at 474; see Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 347, 347 (1968) (the “social consequences” of convictions are “those that do not attach by virtue of a legal norm, but rather on account of societal disapprobation (ostracism, refusal to employ, etc.).”).

123. These consequences also include the ways in which neighbors and family members treat the individual upon his or her return. Pinard, *supra* note 5, at 474.

their interactions with the criminal justice system and the ways in which others perceive and judge them. Many wish to atone for the harm they have caused to others (victims, families and communities) and to prove that they are ready, willing and able to contribute to their families and communities. Some believe that once the formal punishment for their acts has concluded, the societal debt has been paid and they should be allowed to move forward. Others believe that after some time has elapsed since their last interaction(s) with the criminal justice system, they should be able to do so. However, despite their best efforts to leave their criminal records in the past and to prove their value and worth to others, they discover repeatedly that those records and the resulting stigma will prevent them from doing so because others, such as potential employers, will always perceive them as suspect. As a result, they often spend months, years or the rest of their lives seeking redemption.<sup>124</sup>

Professor Shadd Maruna has explained that researchers have struggled with how to distinguish “real desistance”—the notion that a particular individual will no longer engage in criminal activity—from “lulls between offenses.”<sup>125</sup> This concept captures perfectly the disconnection between individuals who truly believe they have moved past their criminal activity and the expectation by others that they will, at some point, offend again. The disconnection leads to immense frustration for those individuals because they are typically treated as “risky until proven innocent,”<sup>126</sup> regardless of the number of years that pass.

This frustration is particularly acute for poor individuals of color, as they must deal with an array of stigmas (i.e., poverty, race, criminal record, unemployment) that individually, but especially collectively, marginalize and isolate. As a result, the weight of criminal records is particularly heavy for them, as they struggle to obtain desperately needed employment and housing, and to take the other steps necessary to move forward.

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124. See Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 *CRIMINOLOGY* 327, 328 (2009) (defining redemption in this context as “the process of ‘going straight’ and being released from bearing the mark of crime”).

125. Shadd Maruna et al., *Pygmalion in the Reintegration Process: Desistance from Crime through the Looking Glass*, 10(3) *PSYCHOL., CRIME & L.* 271, 271–72 (2004).

126. *Id.* at 272.

B. The Redemptive-Focused Approach

The federal, state and local efforts detailed in Part III, while laudable and necessary, do not fully address the particularly acute stigmas and, therefore, the unique burdens that attach to individuals of color with criminal records. As a result, additional measures are needed to better position individuals to move past their records. One potential measure—particularly necessary for individuals of color—is to adopt a redemptive-focused approach to criminal records. Specifically, there should come a point at which a person’s criminal record no longer becomes relevant, certainly when it comes to misdemeanors and minor felonies but also with regard to most of the serious felonies.

Laws in many states permit individuals to move past their records by allowing particular (usually minor) criminal convictions to be expunged or sealed.<sup>127</sup> While these laws vary widely among the states,<sup>128</sup> many remove the convictions from public access, including access by employers and landlords.<sup>129</sup> Also, the laws typically mandate waiting periods of some years and impose various conditions and qualifications, such as limiting expungement or sealing to particular types<sup>130</sup> and numbers of convictions,<sup>131</sup> and requiring that the individ-

127. See LOVE ET AL., *supra* note 23, at 428 (“[A] number of jurisdictions have enacted new expungement laws to enable [individuals convicted of] minor offen[s]es to clear their record.”).

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128. For an overview of expungement distinctions among the states, see Amy Sholberg et al., *The Expungement Myth*, 75 ALB. L. REV. 1229, 1231–35 (2011–12).

129. LOVE ET AL., *supra* note 23, at 429 (“In many states, only courts and law enforcement agencies have accessed to expunged or sealed records though in a few states, some employers and licensing authorities also have access.”).

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130. Some states allow various misdemeanor and felony offenses to be expunged, while other states limit expungement or sealing to misdemeanor offenses. See *Hearing on Senate Bill 667 Before the S. Comm. on Judiciary*, 2012 Reg. Sess. (Md. 2012), at 2 & nn.3–4 (written testimony of the Reentry Clinic, University of Maryland Francis King Carey School of Law) (overview of state expungement and sealing statutes) (on file with author) [hereafter Reentry Clinic Shielding Testimony]. For example, Colorado’s newly amended sealing laws allow a range of convictions, including misdemeanor drug offense convictions and some felony drug offense convictions, to be sealed after varying waiting periods. COLO. REV. STAT. § 24-72-308.6 (2)(a)(II)(C) (2013) (petition to seal class five or class six felony drug possession conviction may be filed seven years after disposition date or release from supervision); *id.* at § 24-72-308.6(2)(a)(II.5)(B) (petition to seal level two or level three misdemeanor drug possession conviction may be filed three years after disposition date or release from supervision). Convictions for violent and sexual offenses are generally excluded from expungement or shielding. Reentry Clinic Shielding Testimony, at 2–3 & nn.6–10. However, Massachusetts, which has among the broadest sealing laws in the U.S., allows certain sexual crimes to become eligible for sealing fifteen years after disposition. MASS. GEN. LAWS ch. 276, § 100A(6) (2012) (providing that sex offenses, other than those classified as level 2 or level 3, are eligible for sealing fifteen years after disposition).

ual have no conviction subsequent to the charge that he or she wishes to expunge or seal.<sup>132</sup> At their core, these laws recognize that a person should not be forever judged and burdened by his or her criminal record. Thus, the laws benefit those who have demonstrated a commitment to living a law-abiding life. More broadly, they provide opportunities for these individuals to obtain employment and pursue other opportunities.

Expungement is controversial because in the main it makes the criminal record inaccessible to the general public.<sup>133</sup> Many believe that criminal records should always be accessible to allow for a complete picture, which is especially necessary when, for instance, an employer is considering whether to hire an applicant.<sup>134</sup> Thus, the employer should have all of the facts necessary to make an informed decision, which includes a full understanding of the potential risks.<sup>135</sup> Moreover, some have expressed moral questions about expungement, arguing that it erases a crime that occurred and, by doing so, alters history.<sup>136</sup>

Despite substantial criticism, expungement and sealing are perhaps the most viable measures—short of a gubernatorial pardon, which is essentially impossible to obtain—to ensure that a person will not be judged forever by his or her record. As discussed in Part II, the easy accessibility and widespread availability of criminal records,<sup>137</sup>

131. Some states limit expungement and shielding to first offenses. Reentry Clinic Shielding Testimony, *supra* note 130, at 2 n.5.

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132. *See, e.g.*, N.J. STAT. ANN. § 2C:52-2(a) (2012) (providing that individual cannot expunge conviction if he or she has been convicted of a “subsequent crime”).

133. *See Love, supra* note 9, at 766 n.49 (expungement “may mean anything from a limited withdrawal of records from public access to actual physical destruction of the record”).

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134. *E.g.*, Daniel Fisher, *The Government Checks Criminal Records. Why Can’t Private Employers?*, FORBES (June 21, 2013), <http://www.forbes.com/sites/danielfisher/2013/06/21/the-government-checks-criminal-records-why-cant-private-employers/> (arguing that private employers should have access to criminal records and be “entitled to have law-abiding workers”).

135. Lahny R. Silva, Note, *Clean Slate: Expanding Expungements and Pardons for Non-violent Federal Offenders*, 79 U. CIN. L. REV. 155, 204 (2010) (noting the argument asserting that expungement prevents employers from having all pertinent information about applicants).

136. *See, e.g.*, Jacobs, *supra* note 41, at 411 (arguing that expungement is a “highly problematic policy” as “it seeks to rewrite history, establishing that something did not happen although it really did”); Love, *supra* note 9, at 777 (many view expungement “as a remedy premised on a lie”).

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137. The digital age also creates weaknesses in expungement enforcement. *See Love, supra* note 9, at 759 (“[M]odern technology makes it hard to have confidence in expungement and sealing schemes.”). For example, private companies that conduct criminal records checks in bulk for employers often do not update the searches to account for charges that have been expunged. *E.g.*, Radice, *supra* note 49 at 750 (“A

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compounded by the generalized distrust of anyone who has interacted with the criminal justice system, often saddle poor individuals of color for the rest of their lives, regardless of their individualized circumstances or the subsequent paths they travel. Expungement and sealing

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growing industry of private companies that conduct background checks purchase and store criminal records in their databases without any mechanism for removing expunged records.”).

As a result, employers often review outdated criminal records that include charges that were ordered expunged or sealed. Legal measures are available to attempt to enforce the integrity of background checks, such as state statutes that require companies to disseminate updated (or relatively updated) records. For example, in North Carolina “[a] private entity . . . in the business of compiling and disseminating criminal history information for compensation shall destroy and shall not disseminate any information in [its] possession . . . with respect to which [it] has received a notice to delete the record” N.C.G.S.A. § 15A-152(a). It must do so “pursuant to the terms of the licensing agreement with the State agency,” *id.*, and if there is no such agreement the record must be deleted “within 10 business days of receiving notice to delete.” *Id.*

In addition, the entity can disseminate the information “only if, within the 90-day period preceding the date of dissemination, [it] originally obtained the information or received the information as an updated record to its database.” *Id.* at § 15A-152(b). An entity that violates these provisions is liable civilly “for any damages that are sustained . . . by the person who is subject to that information.” *Id.* at § 15A-152(c). Similarly, in Texas a private background check entity “shall destroy and may not disseminate any information in [its] possession” for which it has received notice that “an order of expunction has been issued.” TX. GOV’T CODE § 411.0851(a)(1). As in North Carolina, an entity that violates these provisions “is liable for any damages.” *Id.* at § 411.0851(c).

Also, the federal Fair Credit Reporting Act (FCRA) requires that a “consumer reporting agency,” when preparing a consumer report, “follow reasonable procedures to assure maximum possible accuracy about whom the report relates.” 15 U.S.C.A. § 1681e(b). A “consumer report” is defined as “communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness . . . character, general reputation [or] personal characteristics . . . which is used . . . or collected . . . [to] serv[e] as a factor in establishing the consumer’s eligibility for . . . employment purposes.” *Id.* at § 1681o(1)(B). The FCRA has been used by individuals asserting claims against criminal background check companies alleging that inaccurate criminal records harmed employment opportunities. *See generally Smith v. HireRight Solutions, Inc.* 711 F. Supp. 2d 426 (2010) (class action against consumer reporting agency pursuant to the FCRA alleging, *inter alia*, that defendant listed single criminal incidents multiple times on the reports, thus creating inaccurate criminal records that jeopardized employment opportunities). *See also Employment Background Screening Company to Pay \$2.6 Million Penalty for Multiple Violations of the Fair Credit Reporting Act*, Aug. 8, 2012 (HireRight Solutions, a criminal background check company, settles multiple charges brought by Federal Trade Commission, including that it incorrectly listed criminal convictions on individuals’ reports), *available* at <http://ftc.gov/opa/2012/08/hireright.shtm>.

For a detailed overview of the FCRA and criminal records see LOVE ET AL., *supra* note 24 at 291-310. These statutes, as well as others, certainly do not thwart the risk and the reality that previously expunged or sealed records can be reported to employers. However, proposed solutions short of vigorous enforcement of expungement or sealing orders will not adequately protect individuals of color from the acute stigma and bias that attach to their criminal records.

target the root of these problems by allowing individuals who have exhibited an inclination or commitment to being productive members of the citizenry to move past their records.

A more robust redemptive-focused approach to criminal records would recognize both that many individuals at some point move past their interactions with the criminal justice system and that those who access criminal records—such as employers—fail to recognize the changes and continue to judge them based on those records regardless of the time that has passed.<sup>138</sup> As a result, it compensates for the shortcomings of existing efforts to ameliorate the disproportionate impact of criminal records on poor individuals of color.

Unlike other important measures—such as the EEOC’s Revised Guidance and the various ban the box laws, which rightfully aim to protect job applicants from the sting of their criminal records—expungement and sealing actually take the criminal record off the table. For all of the reasons set forth above, this is critically important for individuals of color. Although the EEOC’s Revised Guidance aims to protect job seekers by forbidding employers from imposing blanket

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138. This redemptive-focused approach pertains to criminal convictions. However, in many instances legal consequences also attach to charges that *did not* result in conviction. See *supra* note 25 and accompanying text. Online criminal history databases have expanded rapidly in recent years. See LOVE ET AL., *supra* note 23, at 282 (“In many states, the courts have created websites through which criminal record checks can be performed, often instantaneous and for free.”). These databases, and the proliferation of private vendors who gather and prepare criminal background check reports, have resulted in entire criminal records being available to the public. *Id.* at 279–80 (internal quotation marks omitted) (noting that criminal histories are made available through several sources, including state “central repositories . . . , the courts, private vendors which prepare reports from public sources, and even correctional institutions and police blotters”). In many states these histories are not confined to charges that resulted in conviction, but rather detail all interactions with the criminal justice system. *Id.* at 283–84 (noting that the distinction between the dissemination of conviction and non-conviction record information to the public “is eroding as court records, which have been more likely to provide non-conviction information than central repository records, become more available through . . . technology and . . . commercial vendors searching court records”).

As a result, the non-legal consequences of these non-convictions are particularly severe, as employers and landlords often use the underlying charges to reject applicants either because they refuse to employ or rent to individuals with any criminal record, or they simply misread or misunderstand criminal records and thus may not know the difference between conviction and non-conviction dispositions. While there is a range of non-conviction dispositions, criminal records certainly should be purged of charges that prosecutors have declined to pursue, charges that were dismissed by a prosecutor or judge and cases that ended in acquittal. As with all aspects of the criminal justice system, the consequences particularly impact poor individuals of color since they are disproportionately brought into the criminal justice system, including for charges that ultimately do not stick or are otherwise dismissed. Such charges have no place on a criminal record and should have no place in their lives.

hiring bans on individuals with criminal records and has led to successful settlements of Title VII claims,<sup>139</sup> in general it is very difficult to prevail on disparate impact claims, including claims that the use of criminal records has disparately impacted individuals of color.<sup>140</sup> Also, an applicant who believes that a potential employer improperly denied him or her a job based on a ban the box law would have to seek redress.<sup>141</sup> Many of those with criminal records would not perceive enforcing their rights as a viable option. They would be deterred from doing so for a variety of reasons, including the expected rejection that comes with having the record and the resignation that attempting to enforce the law would be futile. Thus, they would simply give up and try to move on.

To help move firmly toward a redemptive-focused approach, de-stigmance or “redemptive studies” can be particularly useful. Alfred Blumstein and Kiminori Nakamura studied a sample of individuals arrested in New York State for the first time as adults (sixteen, eighteen, and twenty years old) in 1980 for robbery, burglary and aggravated assault, and examined their subsequent interactions with the criminal justice system during the following twenty-seven years.<sup>142</sup> They compared their sample with the general population of the same age,<sup>143</sup> and then with individuals who had never been arrested.<sup>144</sup> Be-

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139. *E.g.*, Press Release, U.S. Equal Emp’t Opportunity Comm’n, J.B. Hunt Agrees to Settle EEOC Race Discrimination Case Regarding Criminal Conviction Records (June 28, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/6-28-13c.cfm>.

140. *E.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 999 (1988) (noting “the high standards of proof in disparate impact cases”); see also Deborah Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 *NEW ENG. L. REV.* 229, 257–58 (2012) (detailing the difficulties of prevailing on Title VII claims of pay discrimination). See generally Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 *UCLA L. REV.* 701 (2006) (conducting empirical analysis of 301 disparate impact cases from federal district courts and courts of appeals which illustrates the difficulties of prevailing on disparate impact claims). One advocate has lauded the EEOC’s Revised Guidance, but has explained that several employers have ignored it altogether in the year following its issuance. See SHARON M. DIETRICH, *CMTY. LEGAL SERVS. OF PHILA., EEOC’S CRIMINAL RECORD GUIDANCE ONE YEAR LATER: LESSONS FROM THE COMMUNITY 4* (2013), available at <http://clsphila.org/sites/default/files/issues/EEOC%20CHR%20guidance%20one%20year%20later%20-%20policy%20paper.pdf> (“[w]e continue to see blatant violations, by both small business and national companies employing tens of thousands, of the clear principles of the [EEOC’s] Guidance . . .”).

141. See, e.g., *HAW. REV. STAT.* § 378-4 (Supp. 2011) (an individual claiming improper use of criminal record to deny employment may file complaint with the Civil Rights Commission); *MINN. STAT. ANN.* § 364.06 (West 2012) (providing that a denied applicant may file complaint or grievance).

142. Blumstein & Nakamura, *supra* note 124, at 334–35.

143. *Id.* at 337–40.



cause “[c]omputerized criminal records can have long memories,” their study “intended to provide guidance for imposing some limits to that memory.”<sup>145</sup> Thus, their study aimed to approximate the amount of time clean since the last offense that it took for individuals with criminal records to reach “a point of redemption,” at which point the individuals present no greater risk of re-arrest than (or, to put it another way, to be as safe as) individuals who had never before been arrested.<sup>146</sup>

They found that those arrested for robbery took the longest time to redeem, ranging from approximately nine years for the sixteen-year-olds to approximately four years for the twenty-year-olds “to be similar to their age cohorts from the general population in terms of the probability of an arrest.”<sup>147</sup> Their findings for those arrested for burglary and aggravated assault were essentially the same, ranging from approximately five years for the sixteen-year-olds to approximately three years for the twenty-year-olds.<sup>148</sup>

Blumstein and Nakamura then compared their sample with individuals of the same age who had never been arrested. Here, they measured “violent” and “property” crime.<sup>149</sup> They found that the “redemption time” depended to some degree on the tolerance level of employers: “[t]he more tolerant an employer is . . . the shorter the redemption time . . . .”<sup>150</sup> They concluded that “[f]or the employer who is more accepting of risk,” the redemption time would be slightly over four years for property offenses and seven years for violent offenses, compared to approximately five years and eight years, respectively, for those less tolerant.<sup>151</sup> Regardless of the employer risk tolerance, at some point an individual with a criminal record presents essentially the same risk of offending—or, conversely, the likelihood of not offending—as an individual who has never before been arrested.<sup>152</sup> Thus, the individual has phased out of criminal activity.

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144. *Id.* at 340–44.

145. *Id.* at 328.

146. *Id.* at 331–33, 340.

147. *Id.* at 338–39.

148. *Id.* at 339.

149. *Id.* at 343.

150. *Id.* at 343.

151. *Id.* at 343–44.

152. See Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 *CRIMINOLOGY & PUB. POL'Y*, 483, 490, 499 (2006) (concluding based on arrest data from Philadelphia in 1958 that “after some period of time has passed, the risk of a new criminal event among a population of nonoffenders and a population of prior offenders becomes similar”).

Blumstein and Nakamura tested the “robustness” of these findings in a subsequent study that examined additional data from New York State for 1980, 1985 and 1990, and from Illinois and Florida for 1980.<sup>153</sup> They found that “the patterns of recidivism risk across the three sampling years [were] . . . very similar.”<sup>154</sup> They also found that the “risk patterns and the associated estimates of redemption times vary more across the states than across sampling years, but they appear to converge after 10 years.”<sup>155</sup> As a result, they concluded that the “redemption process [is] reasonably robust across time and place.”<sup>156</sup>

They also tested the risk of recidivism for *specific* crimes that are of particular concern to employers, such as property and violent offenses.<sup>157</sup> Here, they looked at a cohort of nearly 70,000 adults arrested for the first time in New York State in 1980.<sup>158</sup> They concluded that the “propensity to commit the same crime types is relatively weak,” with the exception of individuals arrested for drug offenses.<sup>159</sup> They found that older individuals were more likely than younger individuals to be rearrested for violent or property crimes, while younger individuals were more likely to be arrested for drug offenses.<sup>160</sup> Overall, they concluded that “a prior record of violence is associated with the highest risk of recidivism and the longest redemption times.”<sup>161</sup> However, the risk of rearrest for a *specific* crime “is very low after [ten years], much lower than the risk of rearrest for any crime type.”<sup>162</sup>

Last, Blumstein and Nakamura explored “the relevance of race in the problem of redemption,”<sup>163</sup> as “[t]he issue of redemption is particularly important for African-Americans compared to whites.”<sup>164</sup> Again using the New York State cohort—and looking at violent, prop-

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153. ALFRED BLUMSTEIN & KIMINORI NAKAMURA, EXTENSION OF CURRENT ESTIMATES OF REDEMPTION TIMES: ROBUSTNESS TESTING, OUT-OF-STATE ARRESTS, AND RACIAL DIFFERENCES 39 (2012), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf>.

154. *Id.*

155. *Id.* at 40.

156. *Id.*

157. *Id.* at 3.

158. *Id.* at 44.

159. *Id.* at 48. Because the cohort was gathered from 1980, Blumstein and Nakamura noted that the greater propensity for drug offense rearrests could have been attributable to the proliferation of crack-cocaine in the mid to late 1980s. *Id.* at 47.

160. *Id.* at 48.

161. *Id.* at 60.

162. *Id.* at 61.

163. *Id.* at 4.

164. *Id.* at 61.

erty and drug offenses—they compared the risk of re-arrest for African-Americans and whites “who have stayed clean for a time . . . since the arrest.”<sup>165</sup> They found that within the first ten years African-Americans “experience re-arrests” in “much larger proportions” than whites, but that after ten years “there is virtually no difference . . . in the[ ] probabilities of being rearrested.”<sup>166</sup> As the cohort was gathered from 1980, Blumstein and Nakamura observed that a possible reason for the “large black-to-white difference” within the first ten years was the “‘crack epidemic’” of the middle to late 1980s and the ensuing “drug war” that has had a drastically disparate impact on African-Americans and African-American communities in U.S. cities, including New York City.<sup>167</sup> Overall, they suggest that “employers should be aware that the racial difference in *arrest* prevalence does not accurately reflect the risk difference of white and black applicants whose crime occurred long ago.”<sup>168</sup>

Additional “redemptive studies” are needed.<sup>169</sup> As a result, it is difficult at this point to draw clear and principled lines between those convictions that should be removed from those that should not, particularly as years pass with “time clean.” At minimum, however, the bulk of offenses that have stretched criminal court dockets throughout the U.S. beyond capacity and to the point of dysfunction, particularly the non-violent drug offenses that have overwhelmingly fallen on poor individuals of color, must be eligible for removal. A redemptive-based approach to criminal records requires further study of the various factors to be considered when designing and ultimately legislating a redemptive framework. The factors should include type of offenses and age of individuals. Moreover, factors should be studied to possibly shorten redemption times, such as the impact of rehabilitative-based sentences and completion of various programs (including job training and treatment programs). Thus, considerable work needs to be done, but the true benefit of these studies—at least at this point—is that they show that individuals move past their criminal records. Accordingly, redemptive studies should be used—and further studies commissioned—by legislators to both expand the types of convictions eligible for removal and to bring removal provisions to those states that do not allow any or the vast majority of convictions to be removed.

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165. *Id.* at 69.

166. *Id.* at 76.

167. *Id.* at 78–79.

168. *Id.* at 87 (emphasis added).

169. See Blumstein & Nakamura, *supra* note 124, at 344–46.

## CONCLUSION

As with all aspects of the criminal justice system, poor individuals of color disproportionately shoulder the weight of a criminal record. Federal, state and local government officials have increasingly recognized the actual and everlasting costs of having a criminal record and are implementing measures that hopefully will ease the housing and employment exclusions that disproportionately burden individuals of color and disrupt their families and communities. However, a redemptive-focused approach to criminal records is necessary to truly compensate for the stigma that plagues individuals of color uniquely. Such an approach recognizes that the only true way to remove the stigma of a criminal record is to remove the criminal record.

