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## Trapped in the Shackles of America's Criminal Justice System

Shristi Devu

*St. Mary's University School of Law*

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## COMMENTS

### TRAPPED IN THE SHACKLES OF AMERICA’S CRIMINAL JUSTICE SYSTEM

SHRISTI DEVU\*

*“Communities can be destroyed by both crime and punishment.”<sup>1</sup>*

—Paul Butler

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\* Candidate for Doctor of Jurisprudence, St. Mary’s University School of Law; B.A., University of Texas at Austin. The author would like to thank Betsy Cavendish, General Counsel to Mayor Muriel Bowser of Washington, D.C., for providing the inspiration for this Comment; Mary Larakers for providing mentorship; friends and family for supporting the author’s academic endeavors; and *The Scholar* for providing a platform to be a voice for the voiceless.

1. PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 133 (2009).

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The United States has the highest rate of incarceration in the world.<sup>2</sup> However, mass incarceration does not affect all communities equally.<sup>3</sup> Socioeconomic inequity fueled by the history of racial bias in the United States combined with policy changes from the “tough on crime” era further fragmented and destroyed black communities.<sup>4</sup> Fifty years after

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2. *The Prison Crisis*, ACLU, <https://www.aclu.org/prison-crisis> [https://perma.cc/C92F-M9B2] (last visited Oct. 7, 2017) (“With only 5% of the world’s population, the U.S. has more than 20% of the world’s prison population – that makes us the world’s largest jailer.”).

3. See George Gao, *Chart of the Week: The Black-White Gap in Incarceration Rates*, PEW RESEARCH CTR. (July 18, 2014), <http://www.pewresearch.org/fact-tank/2014/07/18/chart-of-the-week-the-black-white-gap-in-incarceration-rates> [https://perma.cc/DTX3-R26Q] (reporting black males of color with or without higher education are disproportionately more likely to be incarcerated than white males with or without education).

4. See *A Brief History of the Drug War*, DRUG POL’Y ALLIANCE, <http://www.drugpolicy.org/facts/new-solutions-drug-policy/brief-history-drug-war-0> [https://perma.cc/VV3L-J82E] [hereinafter *A Brief History*] (last visited Oct. 4, 2017) (indicating that Nixon’s War on Drugs continued fragmenting black communities with biased law enforcement); Rich Morin, *Exploring Racial Bias Among Biracial and Single-Race Adults: The IAT*, PEW RESEARCH CTR. (Aug. 19, 2015), <http://www.pewsocialtrends.org/2015/08/19/exploring-racial-bias-among->

passing the Civil Rights Act of 1964, black men are more likely to be institutionalized than they are to be employed.<sup>5</sup> According to a 2013 Pew Research Center study, black men are six times more likely than white men to be incarcerated in federal, state, and local jails.<sup>6</sup>

This Comment focuses on structural barriers resulting from incarceration for minor offenses in the State of Texas, and the disparate effects of those barriers on the African-American community.

## I. HISTORICAL BACKGROUND

The Thirteenth Amendment of the United States Constitution was ratified in 1865 and provides: “[n]either slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction.”<sup>7</sup> The “prisoner-labor exception clause” and the 2.2 million prisoners in the current American justice system have an interrelationship that is traceable to codified policies intended to serve the needs and objectives of political elites.<sup>8</sup>

Who is a criminal? Perhaps the answer is an unoriginal idea that has been manufactured over time to be interpreted in a negative way as

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biracial-and-single-race-adults-the-iat [https://perma.cc/HZ6Z-ZNYJ] (finding that almost “half of single-race whites . . . automatically preferred whites over blacks . . .”); Caroline Newman, *35 Years of Data Reveal Economic Inequality in the United States*, PHYS ORG (Feb. 20, 2017), <https://phys.org/news/2017-02-years-reveal-economic-inequality-states.html> [https://perma.cc/SW7K-KR2M] (discussing socioeconomic inequality in the United States).

5. Gao, *supra* note 3.

6. PAUL TAYLOR ET AL., PEW RESEARCH CTR., KING’S DREAM REMAINS AN ELUSIVE GOAL; MANY AMERICANS SEE RACIAL DISPARITIES 5 (2013), [http://assets.pewresearch.org/wp-content/uploads/sites/3/2013/08/final\\_full\\_report\\_racial\\_disparities.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/3/2013/08/final_full_report_racial_disparities.pdf) [https://perma.cc/744T-EQS5].

7. U.S. CONST. amend. XIII, § 1 (emphasis added).

8. See Aristotle Jones, *The Evolution: Slavery to Mass Incarceration*, HUFF POST (Oct. 6, 2016, 11:07 AM), [https://www.huffingtonpost.com/entry/the-evolution-slavery-to-mass-incarceration\\_us\\_57f66820e4b087a29a54880f](https://www.huffingtonpost.com/entry/the-evolution-slavery-to-mass-incarceration_us_57f66820e4b087a29a54880f) [https://perma.cc/5RF8-9ZCG] (explaining how mass incarceration “evolved from America’s greatest sin: slavery.”); see also 13TH (Kandoo Films 2016) (asserting the U.S. criminal justice system has been driven by racism from the days of slavery to today’s mass incarceration); Pamela Kruger, *Netflix’s 13th’ Explores Modern Slavery’ in Incendiary New Documentary*, FORTUNE (Oct. 6, 2016), <http://fortune.com/2016/10/06/13th-netflix-documentary-ava-duvernay> [https://perma.cc/P86B-UZ7G] (providing an overview of the film 13th, which argues that a “variety of measures—from Jim Crow laws to President Richard Nixon’s ‘war on drugs’ and President Bill Clinton’s ‘three-strikes-you’re-out’ legislation—have served to send increasingly large numbers of black men in prison . . .”).

applied to a particular group of people. This Comment explores the collateral consequences resulting from racially motivated legislation and policy-making aimed at criminalizing African-Americans and other minority members of our society.

After the passage of the Thirteenth Amendment, four million enslaved people were freed, representing the end of an integral component of the Southern economic system.<sup>9</sup> To perpetuate the exploitation of freed slaves, white male businessmen created many myths of the black males. Films, such as *The Birth of a Nation*, glorified the Ku Klux Klan and portrayed black men as animalistic cannibals who were a violent threat to white women, furthering the dangerous Negro male stereotype.<sup>10</sup> Historians identify this “Southern strategy” as an effort, devised by the Republican Party, to win votes from poor Southern whites to transform blatant racism into legally enforceable segregation.<sup>11</sup> As a result, many African-Americans migrated to northern cities as refugees of racial terrorism in the South.<sup>12</sup> Since the migration was forced by terrorism rather than economic opportunities, their community needs were never addressed by local authorities, ultimately leading to generational poverty.<sup>13</sup> African-Americans became second-class citizens, bearing a

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9. See *Reconstruction*, HISTORY, <http://www.history.com/topics/american-civil-war/reconstruction> [<https://perma.cc/66JP-WK8T>] (last visited Oct. 26, 2017) (stating four million slaves were free after 1865); see also *How Slavery Helped Build a World Economy*, NAT'L GEOGRAPHIC NEWS, [https://news.nationalgeographic.com/news/2003/01/0131\\_030203\\_jubilee2\\_2.html](https://news.nationalgeographic.com/news/2003/01/0131_030203_jubilee2_2.html) [<https://perma.cc/THF9-Y6QD>] (last visited Oct. 26, 2017) (analyzing how the slavery system in the United States was the core of its economic and political life).

10. *100 Years Later, What's The Legacy of 'Birth Of A Nation'?*, NPR (Feb. 8, 2015, 5:56 PM), <http://www.npr.org/sections/codeswitch/2015/02/08/383279630/100-years-later-whats-the-legacy-of-birth-of-a-nation>.

11. See KATHERINE BECKETT & THEODORE SASSON, *THE POLITICS OF INJUSTICE CRIME AND PUNISHMENT IN AMERICA* 52-55 (2d ed. 2004) (discussing the “Southern strategy”); see also Stephen Wolfe, *How We Got to US vs. THEM—The Southern Strategy*, MEDIUM (Dec. 2, 2016), [https://medium.com/@stephenwolfe\\_71721/how-we-got-to-us-vs-them-the-southern-strategy-5e96fa63bbbe](https://medium.com/@stephenwolfe_71721/how-we-got-to-us-vs-them-the-southern-strategy-5e96fa63bbbe) [<https://perma.cc/A7AX-2M8S>] (“In American politics the Southern strategy refers to a Republican Party strategy of gaining political support for certain candidates in the Southern United States by appealing to racism against African Americans.”).

12. Brentin Mock, *The 'Great Migration' Was About Racial Terror, Not Jobs* (June 24, 2015), <https://www.citylab.com/equity/2015/06/the-great-migration-was-about-racial-terror-not-jobs/396722/> [<https://perma.cc/9C68-HWFR>] (contending that African-Americans migrated to major cities in the north as refugees and exiles fleeing from racial terror in the south).

13. *Id.*

burden that was so injurious to economic development within their race.<sup>14</sup>

## II. THE LAW AS A WEAPON

The War on Drugs was the beginning of America's draconian approach to illegal drugs, resulting in mass incarceration of American citizens.<sup>15</sup> The "war" was started by President Nixon from a compelling urge to fight back against black activist groups in the 1970s.<sup>16</sup> Continuing the "tough on crime" platform, President Ronald Reagan and First Lady Nancy Reagan launched the "Just Say No" anti-drug campaign.<sup>17</sup> The campaign promise was implemented through a national drug education program called Drug Abuse Resistance Education (DARE) founded by Los Angeles Police Chief Daryl Gates, who believed "casual drug users should be taken out and shot[.]"<sup>18</sup> Because federal policies target illegal drugs, federal and local law enforcement focus on non-violent drug possession offenses.<sup>19</sup>

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14. 13TH, *supra* note 8.

15. *See A Brief History*, *supra* note 4 (discussing the underlying effects of Nixon's drug policy).

16. President Nixon declared a drug abuse "public enemy number one in the United States" in June, 1971. Remarks About an Intensified Program for Drug Abuse Prevention and Control, PUB. PAPERS 738 (June 17, 1971). Despite the intention of eradicating drug addiction, criminalizing drug use and resulting mass incarceration was a tool utilized by President Nixon to strike back at protesters and activists. *See A Brief History*, *supra* note 4 (President Nixon declared a "war on drugs" in June 1971); *Top Adviser to Richard Nixon Admitted that 'War on Drugs' Was Policy Tool to Go After Anti-War Protesters and 'Black People'*, DRUG POL'Y ALLIANCE, <http://www.drugpolicy.org/press-release/2016/03/top-adviser-richard-nixon-admitted-war-drugs-was-policy-tool-go-after-anti> [<https://perma.cc/Z3YM-6ZSJ>] (quoting John Ehrlichman, President Nixon's domestic policy chief).

The Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. You understand what I'm saying. We knew we couldn't make it illegal to be either against the war or black, but by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities.

17. *A Brief History*, *supra* note 4.

18. *Id.* Gates was Police Chief in Los Angeles at the time when four white LAPD officers were video-taped beating Rodney King, a black motorist. The four officers' criminal trial concluded in acquittal which sparked four days of intense rioting across Los Angeles, highlighting the tension between the black community and the LAPD. Joe Domanick, *Daryl Gates' Downfall*, L.A. TIMES (Apr. 18, 2010), <http://articles.latimes.com/2010/apr/18/opinion/la-oe-domanick18-2010apr18> [<https://perma.cc/XR6B-YDGK>].

19. Graham Boyd, *The Drug War Is the New Jim Crow*, ACLU, <https://www.aclu.org/other/drug-war-new-jim-crow> [<https://perma.cc/5F7U-H83V>] (last visited Oct. 26, 2017).

### A. *The Criminal Justice System and the War on Drugs*

Punishment for criminal behavior serves four purposes: retribution, deterrence, incapacitation, and rehabilitation.<sup>20</sup> The American criminal justice system's approach to punishment relies heavily on retribution and incapacitation in the fight against illegal drug use.<sup>21</sup> Indeed, drugs obtaining illegal status in the United States was not based on a scientific assessment of risk, but rather, on the individuals associated with particular drugs.<sup>22</sup>

The first anti-opium laws in the 1870s were directed at Chinese immigrants. The first anti-cocaine laws in the early 1900s, were directed at black men in the South. The first anti-marijuana laws, in the Midwest and the Southwest in the 1910s and 20s, were directed at Mexican migrants and Mexican Americans. Today, Latino and especially black communities are still subject to wildly disproportionate drug enforcement and sentencing practices.<sup>23</sup>

Crack cocaine sentencing, when compared to powder cocaine, illustrates a modern-day example of the War on Drugs' racist enforcement.<sup>24</sup> The Anti-Drug Abuse Act of 1986<sup>25</sup> called for a five-year mandatory minimum sentence for possession of five grams of crack, whereas the same sentence for powder cocaine required possession of 500 grams.<sup>26</sup> Under the Act, African-Americans were predominantly convicted for crack cocaine possession, while Caucasians were generally convicted for

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(reporting that mass incarceration is a consequence of harsh penalties for drug crimes and low-level non-violent offenses).

20. David J. Shestokas, *The Purpose of Criminal Punishment*, SHESTOKAS.COM (Oct. 25, 2012), <http://www.shestokas.com/general-law/criminal-law/the-purpose-of-criminal-punishment> [<https://perma.cc/G5AE-3TP3>].

21. See *A Brief History*, *supra* note 4 (identifying the stringent measures taken to combat drug use in the 1970's).

22. See *id.* (indicating that the Nixon administration's reason for criminalizing marijuana and heroin was not for public safety, but rather, for the purposes of getting the public to associate drugs with hippies and blacks).

23. *Id.*

24. See Deborah C. England, *Crack vs. Powder Cocaine: One Drug, Two Penalties*, CRIM. DEF. LAW, <http://www.criminaldefenselawyer.com/reources/crack-vrs-powder-cocaine-one-drug-two-penalties.htm#> [<https://perma.cc/YM6M-KTAB>] (last visited Oct. 7, 2017) (categorizing the disproportionate impact of crack cocaine sentences of African-Americans).

25. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

26. *Id.* § 1002 (amending 21 U.S.C. § 841(b)(1)).

powder cocaine possession.<sup>27</sup> African-Americans received harsher punishments for lesser amounts than white offenders who received lighter sentences for possession of greater amounts of illegal drugs.

### 1. The “3 Strikes” Laws

An 18-year old high school senior pushes a classmate down to steal his Michael Jordan \$150 sneakers – Strike One; he gets out of jail and shoplifts a jacket from the Bon Marche, pushing aside the clerk as he runs out of the store – Strike Two; he gets out of jail, straightens out, and nine years later gets in a fight in a bar and intentionally hits someone, breaking his nose – criminal behavior, to be sure, but hardly the crime of the century, yet it is Strike Three. He is sent to prison for the rest of his life.<sup>28</sup>

The infamous “3 Strikes, You’re Out” law imposes a mandatory life sentence without parole for certain offenders.<sup>29</sup> Harsh sentencing laws such as the “3 Strikes” law are premised on general deterrence.<sup>30</sup> Instead, enhanced sentencing laws perpetuate the imbalance between whites and blacks.<sup>31</sup> For example, major drug busts in the suburbs require more demanding investigations, because drug-dealing typically occurs behind closed doors in those localities, but drug-dealing on the inner city streets is easier to police, consequently resulting in a heightened police presence in the inner cities.<sup>32</sup> Generally, African-Americans are concentrated in urban settings, thereby magnifying the racial disparity already inherent in the criminal justice system.<sup>33</sup>

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27. England, *supra* note 24.

28. *10 Reasons To Oppose “3 Strikes, You’re Out”*, ACLU, <https://www.aclu.org/other/10-reasons-oppose-3-strikes-youre-out> [<https://perma.cc/AZ6A-65F7>] [hereinafter *10 Reasons*] (last visited Oct. 7, 2017).

29. 18 U.S.C. § 3559(c) (2006); *10 Reasons*, *supra* note 28.

30. *10 Reasons*, *supra* note 28; *see also Deterrence in Criminology: Definition & Theory*, STUDY, <http://study.com/academy/lesson/deterrence-in-criminology-definition-theory.html> [<https://perma.cc/G3TP-Q3KF>] (last visited Oct. 7, 2017) (defining general deterrence as providing an example for society as a whole, more specifically, the effect that the punishment of one offender will have on the entire population).

31. *See 10 Reasons*, *supra* note 28 (emphasizing the effect of racial bias on “3 strikes” as African-American men are overrepresented in all criminal justice statistics).

32. *Id.*

33. *See Race—The Power of an Illusion: Where Race Lives—Go Deeper*, PBS, [http://www.pbs.org/race/000\\_About/002\\_04-background-03-08.htm](http://www.pbs.org/race/000_About/002_04-background-03-08.htm) [<https://perma.cc/7AV9-U2JR>] (last visited Oct. 4, 2017) (recognizing that seventy percent of Blacks and Latinos live in



## 2. Mandatory Minimum Sentencing

The traditional sentencing approach of the American criminal justice system weighs the facts of a case before determining a sentence.<sup>34</sup> However, mandatory minimum sentencing laws limit judicial discretion.<sup>35</sup> During the sentencing phase of a criminal trial, “3 Strikes” laws automatically enhance a penalty without taking into account the defendant’s minimal role in the offense or a lack of criminal history.<sup>36</sup> The ideological utility of sentencing is to keep criminals off the streets, based on the idea that incarcerating one criminal keeps them off the streets. Removing one non-violent drug dealer from society merely provides opportunity for another dealer to take his or her place.<sup>37</sup>

Mandatory minimums did not deter society from buying or selling drugs. Illegal drugs remain as available today as when mandatory minimum-sentencing laws were first enacted,<sup>38</sup> yet the number of incarcerated drug offenders rose from 50,000 to 500,000.<sup>39</sup> In 2010, the Fair Sentencing Act replaced the Anti-Drug Abuse Act of 1986 and increased possession amounts that trigger a mandatory sentence.<sup>40</sup> However, states retain discretion over sentencing laws, and some states

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inner cities); *see also 10 Reasons, supra* note 28 (stating police focus their forces on the inner cities).

34. FAMILIES AGAINST MANDATORY MINIMUMS, MANDATORY SENTENCING WAS ONCE AMERICA’S LAW-AND-ORDER PANACEA. HERE’S WHY IT’S NOT WORKING, FAMM PRIMER ON MANDATORY SENTENCES 1, <http://www.prisonpolicy.org/scans/famm/Primer.pdf> [<https://perma.cc/KE6Z-SBGW>] [hereinafter FAMILIES AGAINST MINIMUMS].

35. *Id.* at 2.

36. *Id.*

37. *See* John Tierney, *For Lesser Crimes, Rethinking Life Behind Bars*, N.Y. TIMES (Dec. 11, 2012), <http://www.nytimes.com/2012/12/12/science/mandatory-prison-sentences-face-growing-skepticism.html> [<https://nyti.ms/2jGhnri>] (suggesting that the imposition of a long sentence for a rape crime is justified for its benefit of keeping the accused off the streets, but a similar sentence is not justified for offenses such as drug dealing, where taking one low-level drug dealer off the streets merely creates a job opening for another).

38. *Id.*

39. *Id.*

40. Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 2-3, 124 Stat. 2372 (2010) (codified as amended in scattered sections of 21 U.S.C); Memorandum from Gary G. Grindler, Acting Deputy Att’y Gen, U.S. Dep’t of Justice, to All Federal Prosecutors (Aug. 5, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fair-sentencing-act-memo.pdf> [<https://perma.cc/95Y4-7TRJ>] (highlighting the increase in minimum quantity of crack cocaine possession, from five grams to twenty-eight grams, that would trigger a mandatory minimum sentence).

continue the harsh practices of federal sentencing laws.<sup>41</sup> For instance, Texas requires a mandatory minimum-sentence for possession of one-quarter pound or more of marijuana.<sup>42</sup>

### B. Prosecutorial Discretion

Inconsistencies in sentencing across races is also attributable to prosecutorial discretion.<sup>43</sup> For example, prosecutors in Georgia have discretion in bringing charges that would subject an accused individual to the state's "2 Strikes" law,<sup>44</sup> which imposes life imprisonment without parole.<sup>45</sup> In 1995, Georgia prosecutors invoked the "2 Strikes" law against 1% of white defendants compared to 16% of black defendants, resulting in 98.4% of those black offenders serving life sentences.<sup>46</sup>

## III. COLLATERAL CONSEQUENCES

Texas is one of the leading states in the number of executions performed per year<sup>47</sup> and rate of incarceration.<sup>48</sup> Imprisonment is not

41. FAMILIES AGAINST MINIMUMS, *supra* note 34, at 2.

42. TEX. HEALTH & SAFETY CODE § 481.121; *Texas State Law and Penalties for Controlled Substances*, SMU, <https://www.smu.edu/StudentAffairs/HealthCenter/Counseling/DrugFreeCampus/TXStateLawPenalties#details> [<https://perma.cc/W7JE-L9TY>] (last visited Sept. 18, 2017); *see also* Angela Leicht, *Three Ridiculous Pot Laws in Texas*, HOUSTONPRESS (Dec. 17, 2014, 9:00 AM), <http://www.houstonpress.com/news/three-ridiculous-pot-laws-in-texas-6740990> [<https://perma.cc/CLK3-RA8M>] (discussing the "incredibly unfair charges" within the power of the State of Texas).

43. RACIAL DISPARITIES IN SENTENCING: HEARING ON REPORTS OF RACISM IN THE JUSTICE SYSTEM OF THE UNITED STATES AT 2 (2014) (written submission of American Civil Liberties Union to the Inter-American Commission on Human Rights), <https://www.aclu.org/other/aclu-submission-inter-american-commission-human-rights-racial-disparities-sentencing> [<https://perma.cc/K228-JV95>] [hereinafter ACLU Report].

44. GA. CODE ANN. § 17-10-7(b)(2) (West 2015).

45. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 114 (2010).

46. *ACLU Report*, *supra* note 43 at 2–3.

47. Alex Silady, *Which States Put the Most People in Prison?*, SMARTASSET (Feb. 3, 2017), <https://smartasset.com/insights/which-states-put-the-most-people-in-prison> [<https://perma.cc/JS95-6CRV>]. In 2016, the State of Texas executed seven inmates, a twenty-year low, but still the second most executions in the United States for that year. *Georgia Leads Nation in Number of Executions as Texas Slows*, CHI. TRIB. (Dec. 20, 2016, 11:59 AM), <http://www.chicagotribune.com/news/nationworld/ct-state-executions-20161220-story.html> [<https://perma.cc/97QT-9PH6>]. Georgia led the U.S. in executions in 2016, killing nine inmates. *Id.*

48. *See* Silady, *supra* note 47 ("Out of a population of 25,145,561, Texas has imprisoned 172,224 people or 0.68 percent of the state population.").

the only consequence of a criminal conviction.<sup>49</sup> The long-lasting harm stemming from a criminal record is severe and crosses generations.<sup>50</sup> Over 300 restrictions in the form of statutes, administrative rules, and state court rules serve as barriers to ex-offenders attempting to reintegrate into society.<sup>51</sup> Diminished access to employment, housing, education, and government benefits creates a vicious cycle by leading many former inmates to recidivate.<sup>52</sup> Almost half of incarcerated individuals have family members who were also incarcerated.<sup>53</sup> Statistics show “[c]hildren with parents involved in the criminal justice system have higher rates of delinquency” and behavioral problems, thereby increasing the risk of the child’s incarceration.<sup>54</sup>

#### A. *Employment*

In the wake of 9/11, the criminal background check industry skyrocketed, making commercial background checks convenient and inexpensive.<sup>55</sup> As a policy matter, both public and private sector employers excluded applicants with misdemeanor or felony convictions

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49. See HELEN GAEBLER, WILLIAM WAYNE JUST. CTR. FOR PUB. INTEREST LAW, CRIMINAL RECORDS IN THE DIGITAL AGE: A REVIEW OF CURRENT PRACTICES AND RECOMMENDATIONS FOR REFORM IN TEXAS 5 (2013), [http://www.reentryroundtable.net/wp-content/uploads/2013/10/criminalrecords\\_report1.pdf](http://www.reentryroundtable.net/wp-content/uploads/2013/10/criminalrecords_report1.pdf) [<https://perma.cc/T7GE-BLJJ>] (discussing the “collateral consequences” that flow from criminal records, such as “lifelong barriers to housing, employment, and other critical resources.”).

50. *Id.*

51. See, e.g., tit. 1 TEX. ADMIN CODE § 372.501 (2017) (disqualifying a person convicted of a felony drug offense from receiving Temporary Assistance for Needy Families and Supplemental Nutrition Assistance (TANF)); TEX. ELECTION CODE ANN. § 11.002 (West 2010) (disqualifying anyone convicted of a felony from being a “qualified voter”); see also TEX. STATE LAW LIBRARY, RESTRICTIONS ON CONVICTED FELONS IN TEXAS (2015), <https://www.sll.texas.gov/assets/pdf/publications/restrictions-on-convicted-felons-in-texas-2015.pdf> [<https://perma.cc/FH2K-NWDR>] (providing all restrictions on convicted felons with the applicable statute).

52. See *Neighborhoods, Recidivism and Employment Among Returning Prisoners*, NAT’L INST. JUST., <http://www.nij.gov/topics/corrections/reentry/pages/employment.aspx> [<https://perma.cc/Z86N-LAF4>] (last modified Apr. 3, 2014) (recognizing several factors that perpetuate the endless cycle of recidivism for individuals convicted of petty crimes).

53. GAEBLER, *supra* note 49, at 11.

54. *Id.*

55. MICHELLE N. RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf) [<https://perma.cc/2A86-LP3S>].

without evaluating the nature of the offense or the applicant's potential fitness for the job.<sup>56</sup> These exclusions affect approximately sixty-five million American adults.<sup>57</sup> African-Americans and Latinos are disproportionately impacted by these policies as a result of their overrepresentation in the criminal justice system.<sup>58</sup> Background checks may contain a troubling number of inaccurate reflections of the applicant's criminal history.<sup>59</sup> The most detrimental error to an applicant's employment is the reporting of an arrest that never led to a conviction.<sup>60</sup>

Many entry-level jobs, from delivery drivers to sales clerks, post advertisements stating "DO NOT APPLY WITH ANY MISDEMEANORS/FELONIES," thereby blatantly discouraging ex-offenders from applying.<sup>61</sup> Other occupations codified restrictions on applicants with criminal offenses.<sup>62</sup> For example, certain state agencies regulating professions may deny an applicant with a criminal misdemeanor or felony conviction from taking the license examination.<sup>63</sup> Other occupations such as those governed by the Private Security Board

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56. *See id.* at 1 (identifying no-exception rules regarding criminal backgrounds in employment applications).

57. Adam Klein, *Computer-Database Background Investigations, Criminal Records, and Hiring Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (July 26, 2011), <https://www.eeoc.gov/eeoc/meetings/7-26-11/klein.cfm> [<https://perma.cc/7XSD-N69S>].

58. *Id.*

59. *Id.*; GAEBLER, *supra* note 49, at 19 (asserting that criminal background checks may contain misleading information, such as arrests being dismissed)

60. *See id.* ("While less than 20% of the arrests of African-Americans for these offenses result in convictions, they will show up on a "routine" criminal background check."). In 2008, The U.S. Department of Justice's Bureau of Justice Statistics reported that roughly one quarter of felony arrests never led to a conviction. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE STATISTICS, STATE COURT PROCESSING STATISTICS: FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009-STATISTICAL TABLES 24, tbl.21 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf> [<https://perma.cc/B68V-LQPA>].

61. RODRIGUEZ & EMSELLEM, *supra* note 55, at 1.

62. *Id.* at 1.

63. *See* TEX. OCC. CODE ANN. § 53.021 (West 2012) (authorizing a licensing authority to deny a person from taking a license examination on the grounds of a criminal conviction); *Regarding Interim Charge Concerning Occupational Licensing Hearing Before the Senate Business & Commerce Committee*, 82d Sess. at 2 (Tex. 2012) (written testimony of Marc Levin, Director Center for Effective Justice, Texas Public Policy Foundation), <http://www.texaspolicy.com/library/doclib/2012-04-10-testimony-occupationallicensing-CEJ.pdf> [<https://perma.cc/2LCQ-M8HG>] [hereinafter Levin Testimony].

(Board) also codified restrictions.<sup>64</sup> In 2006, the Board denied nearly 10,000 applicants the opportunity to work in one of the sixteen professions it regulates.<sup>65</sup> “Unlike most other occupations an arrest without a conviction can lead to license revocation and there is no appeal to the Board or the State office of Administrative Hearings.”<sup>66</sup>

Fitness and character reviews evaluating the moral turpitude of a conviction negates an applicant’s applicable job skills and may justify the denial of a job opportunity, but many agencies apply blanket denials by defining most crimes as “directly related” to the prospective job.<sup>67</sup> Additionally, the offender’s age at the time of the offense is not taken into consideration, and as a result, an applicant is punished for a misdemeanor conviction that may be decades old.<sup>68</sup> Although society’s concern for safety in the workplace appears racially neutral, the disparate impact of recent employment practices substantially disadvantages the African-American community.<sup>69</sup>

#### B. *Public Safety*

It’s crazy . . . My parole conditions allow me to go to a restaurant, buy food and sit there and fraternize with the customers all day long. But I can’t go

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64. See TEX. OCC. CODE ANN. § 1702.113 (West 2012) (disqualification of an applicant “charged under an information or indictment with the commission of a Class A or Class B misdemeanor or felony offense determined to be disqualifying by board.”); Levin Testimony, *supra* note 63, at 2.

65. Levin Testimony, *supra* note 63, at 2.

66. *Id.*

67. See TEX. OCC. CODE ANN. § 53.021 (West 2012) (authorizing licensing authorities to “suspend or revoke a license, disqualify a person from receiving a license, or deny to a person the opportunity to take a licensing examination on the grounds that the person has been convicted of: an offense that directly relates to the duties and responsibilities of the license occupation . . .”); see also Levin Testimony, *supra* note 63, at 2 (acknowledging that though a sex offender should not be allowed to work as a day care worker, someone who was convicted of a minor drug offense should not be denied an opportunity to be considered for a position as a water well driller or an embalmer).

68. See Levin Testimony, *supra* note 63, at 2 (proposing to amend the statutes to allow discretion in considering applicants with minor offenses that occurred many years ago).

69. See RODRIGUEZ & EMSELLEM, *supra* note 55, at 5 (reporting that the procedure of screening out applicants with criminal records “excludes a much larger share of African American candidates.”).

up on their roof and fix their air conditioning. – Stephen White, ex-offender.<sup>70</sup>

Denying a job to an individual because of a conviction for which time was served arguably punishes the individual beyond the intended scope of the law.<sup>71</sup> In forty-two states, Title VII of the Civil Rights Act provides standards that employers may use to account for criminal records in hiring decisions and specifically forbids employment practices that disparately impact individuals of a specific race, religion, sex, or national origin.<sup>72</sup> Practices that disparately impact a particular protected class of individuals must be “job related for the position in question” and “consistent with business necessity.”<sup>73</sup>

A popular claim supporting open criminal records in the hiring process is that knowledge of prior criminal history (or lack thereof) keeps those in the work environment safe.<sup>74</sup> However, advocates of this claim present no evidence correlating the presence of ex-offenders in the workplace to workplace violence or criminal activity.<sup>75</sup> The theory that “past performance predicts future behavior” is another public safety argument supporting the consideration of past convictions for present employment.<sup>76</sup> Despite the lack of scientific research to support it, this theory remains a widely-used argument supporting enforcement of criminal history checks on job applications.<sup>77</sup> Moreover, criminal

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70. GAEBLER, *supra* note 49, at 17 (quoting Stephen White). Stephen White, convicted for molesting his daughter decades ago but classified as a low risk for reoffending, is prohibited from doing work as an air conditioning technician that places him in contact with the public. Eric Dexheimer, *Texas Ex-Offenders are Denied Job Licenses*, STATESMAN (Apr. 11, 2011, 5:22 AM) <https://www.statesman.com/news/special-reports/texas-offenders-are-denied-job-licenses/1Btb33sU6ZrP18uFWqOtbP> [<https://perma.cc/SUA6-NRAC>]. This restraint severely punishes Stephen by restricting his ability to meet his employer's needs.

71. See Gabriel Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. OF GENDER, RACE & JUST. 253, 253 (2002) (“The real sentence comes like a ton of bricks in the form of a series of statutes denying convicted felons a variety of rights.”).

72. Equal Employment Opportunities, 42 U.S.C. § 2000e(a) (2005).

73. *Id.* § 2000e(k).

74. See GAEBLER, *supra* note 49, at 16 (discussing the public safety argument regarding screening individuals with criminal records).

75. *Id.*

76. *Id.* at 19.

77. See *id.* at 17 (recognizing that exclusively relying on criminal records as a predictor for future behavior has flaws because a variety of factors are not reported on criminal background checks, such as dismissals, plea agreements, or the circumstances surrounding the arrest).

history checks may be misleading.<sup>78</sup> Background checks may contain alleged information in lieu of proven facts, further diminishing the correlative relationship between an applicant's suitability for a particular job and the applicant's alleged criminal history.<sup>79</sup>

Charges are dismissed for many reasons including racial profiling.<sup>80</sup> However, employers do not contemplate the distinction between arrest and conviction.<sup>81</sup> Instead, employers exclude individuals from the hiring process, even if their criminal record bears no rational relationship to their ability to perform as an employee.<sup>82</sup> Furthermore, most employers use background check software that does not distinguish between a conviction and an arrest.<sup>83</sup> As a result, background checks often lead employers to improperly correlate an employee's voluntary notification of an arrest with untrustworthiness.<sup>84</sup>

More concerning is the significant number of individuals pressured into pleading guilty when they are otherwise innocent.<sup>85</sup> Many innocent individuals plead guilty to a crime they have not committed for a variety of reasons: pleading guilty in exchange for deferred adjudication or immediate release; avoiding the time and expense of a trial; a lack of monetary resources to post bail; or an incomplete understanding of the

78. *Id.*

79. *See id.* at 19–20 (advancing that information contained on criminal records can either be under- or over-inclusive).

80. *See id.* 19 (addressing the fact that roughly one-third of all arrests conclude in a dismissal); *see also Reasons Why Criminal Charges Would Be Dropped or Dismissed Before Your Court Date*, BAMIEHERICKSON.COM (June 1, 2016), <https://www.bamieherickson.com/blog/reasons-criminal-charges-dropped-dismissed-court-date/> [<https://perma.cc/3GPD-6KEU>] (listing five reasons criminal cases may be dismissed, including expired statute of limitations; lack of witnesses; missing, inadequate, or illegal evidence; prosecutorial misconduct, including racial profiling; and violations of the Double Jeopardy clause).

81. GAEBLER, *supra* note 49, at 19.

82. *See id.* (“Searching for ways to assess an applicant’s employability, employers have looked to criminal background checks as a cheap and easy proxy to evaluate ‘fit’ and trustworthiness.”).

83. *See id.* at 19, 22 (showing that record holders rarely differentiate between convictions and arrests and criminal record reports).

84. *See id.* at 19 (discrediting the use of background checks as a method to evaluate trustworthiness in employment due to the factual errors and the lack of pertinent information from the arrest in a background check).

85. *Id.*

collateral consequences of the conviction.<sup>86</sup> These individuals live with the consequences of their plea for the rest of their lives.<sup>87</sup>

Texas is especially notorious for facilitating a guilty plea under duress that results in a conviction and subsequent life-long consequences.<sup>88</sup> In 2011, 46% of misdemeanor defendants in Harris County, Texas, lacked the resources to post bail, leaving them no choice but to remain in jail or plead guilty.<sup>89</sup> “Pleading guilty to any crime means a conviction record that is not expungable.”<sup>90</sup> Reliance on sometimes-faulty and inaccurate background checks unfairly and disproportionately impacts individuals from minority groups in their attempts to obtain employment, especially when that minority group is over-represented in the criminal justice system.

### C. *Housing*

The United States Department of Housing and Urban Development mandates exclusion for two categories of criminal conduct:

- (1) tenants (or any member of the household) who have ever been convicted of drug-related criminal activity involving the production or manufacture of methamphetamine on the premises of federally subsidized public housing, and (2) tenants (or any member of the household) who are subject to lifetime sex-offender registration.<sup>91</sup>

Beyond the two express mandates from HUD, Public Housing Authorities (PHAs) have discretion to consider a tenant’s criminal record when approving tenant applications.<sup>92</sup> Generally, PHAs routinely exceed HUD’s guidelines and exclude applicants with criminal records<sup>93</sup> despite frequent and stern admonishment from HUD to refrain from such activities.<sup>94</sup>

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86. *Id.*

87. *See id.* (opining that pleading to a reduced charge effectively creates a false criminal record).

88. *Id.*

89. *Id.*

90. *Id.*

91. 24 C.F.R. § 960.204; 24 C.F.R. § 982.553

92. GAEBLER, *supra* note 49, at 7.

93. *Id.*

94. *See e.g.* Letter from Shaun Donovan, HUD Secretary, to Owners and Agents of HUD-assisted Properties (June 17, 2011), <http://nhlp.org/files/Rentry%20letter%20from%20>



Juvenile family members are also severely affected by PHA discretion, when the juvenile is adjudicated for particular crimes.<sup>95</sup> Jean Karlo Ponzanelli is a 17-year-old adjudicated as a sexual offender.<sup>96</sup> Jean and a minor female initially met at a New Year's Eve Party, and during the course of their developing friendship had consensual sex three times.<sup>97</sup> In Texas, sexual intercourse with a minor younger than seventeen is a first-degree felony.<sup>98</sup> On the first two occasions, the minor was thirteen, and Jean was sixteen.<sup>99</sup> After confessing to a continuing sexual relationship with the minor despite knowledge of her age, Jean was arrested and sentenced to six months in county jail; ten years of probation; and required to register as a sex offender.<sup>100</sup> After completing his sentence in county jail "with nowhere to . . . go and no money of his own," Jean moved in with his mother who lived near a daycare.<sup>101</sup> Soon thereafter, Jean was arrested again for violating the conditions of his

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Donovan%20to%20PHAs%206-17-11.pdf [https://perma.cc/FZR7-FDB4] (encouraging PHAs to "balance" competing interests between released offenders reuniting with family members and public safety concerns); Letter from Shaun Donovan, HUD Secretary, to Owners and Agents of HUD-assisted Properties (Mar 14, 2012), <http://nhlp.org/files/HUD%20Letter%203.14.12.pdf> [https://perma.cc/G5AA-Q6HW] [hereinafter 2012 Donovan Letter] (suggesting again that PHAs balance competing objectives of re-integrating released offenders and ensuring safety for all of the tenants under their care and supervision); Office of General Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions, 2 (Apr. 4, 2016) [https://www.hud.gov/sites/documents/HUD\\_OGCGUIDAPPFHASTANDCR.PDF](https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF) [https://perma.cc/L5M2-XJQ5] (warning housing providers that policies restricting access to housing on the basis of criminal history resulting in a disparate impact on a protected class constitutes a violation of the Fair Housing Act). The consistent theme through all of these communications is HUD's emphasis on the importance of second chances and that people who have paid their debt to society deserve the opportunity to become productive citizens and caring parents. 2012 Donovan Letter, *supra*.

95. Dylan Walsh, *The Crimes of Children*, ATLANTIC (Aug. 10, 2015), <http://www.theatlantic.com/politics/archive/2015/08/the-crimes-of-children/398543> [https://perma.cc/2NRC-U8T4] (explaining how entire families of juvenile registered sex offenders may be evicted from public housing if they all live together).

96. *See id.* (describing an incident that occurred in January 2007 at a high school north of Austin).

97. *Id.*

98. TEX. PENAL CODE ANN § 21.11 (West 2011).

99. *Id.* § 22.021(a)(2)(B), (e).

100. Walsh, *supra* note 95.

101. *Id.* (noting that the court never approved Jean living with his mother, which was required per his parole conditions).

probation as a registered sex offender that statutorily limits the places a registered sex offender may live.<sup>102</sup>

There is a recurring pattern of evictions based on juvenile interactions with police.<sup>103</sup> It is unclear whether property management is able to access juvenile records, but parents of juveniles are often surprised when they find eviction notices on their door.<sup>104</sup> Despite an originating event as innocuous as an argument between a parent and child, consequences of eviction are severe: the loss of a public housing voucher, dependency on other family members for housing, forced family separation, or becoming homeless.<sup>105</sup>

In *Dep't of Hous. and Urban Dev. v. Rucker*,<sup>106</sup> the Supreme Court analyzed the statute giving PHAs authority to evict for drug-related crimes even when the tenant “did not know, could not foresee, or could not control behavior by other occupants of the unit.”<sup>107</sup> The Court held that the plain language of the statute provided the agency with the requisite discretion, therefore PHAs may terminate tenancy when a member of the household or a guest engages in drug-related activity without the tenant’s knowledge.<sup>108</sup> The Court concluded that such stringent eviction policies maximize deterrence for engaging in criminal activity among public housing tenants.<sup>109</sup> The outcome of this case is troublesome, not only because it may force families to separate, but also because of the lack of objective evidence to support the finding that “strict

102. Walsh, *supra* note 95; see TEX. CODE CRIM. P. art. 42A.453 (2017) (limiting the location and types of activities a convicted sex offender is able to participate in under court-ordered community supervision).

103. Walsh, *supra* note 95.

104. *Id.*

105. See Wendy Kaplan & David Rossman, *Called “Out” at Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE F. FOR L & SOC. CHANGE 109, 110 (2011) (noting the One Strike policy makes criminal behavior grounds for eviction ultimately threatening the juveniles and their family with homelessness); Walsh, *supra* note 95 (adding eviction to a list of other collateral consequences).

106. 535 U.S. 125 (2002).

107. *Id.* at 129.

108. *Id.* at 136.

109. See *id.* at 134 (finding public housing authorities to be in the best position to understand and combat violent and drug-related crime and subsequently supporting a PHA’s enforcement of a strict liability standard to evict a tenant for any relationship to such crimes despite that tenant having no knowledge of such activity);

liability maximizes deterrence.”<sup>110</sup> In fact, according to Shante Goodloe, a public affairs specialist at HUD, “HUD does not keep track of the annual number of public-housing evictions based on lease violations,”<sup>111</sup> thus the argument that “[s]trict liability maximizes deterrence” is unfounded since eviction outcomes are neither tracked nor measured.<sup>112</sup>

When surveyed, 66% of landlords and property managers in Texas confirmed that they would deny housing to individuals with a criminal record.<sup>113</sup> Private landlords are hesitant to rent to these individuals under a fear of an ex-offender committing a crime on their property.<sup>114</sup> The cycle of consistently being denied housing increases homelessness, and, ultimately, America’s poverty rate.<sup>115</sup> According to a recent study, America’s poverty rate would have dropped by 20% within two and a half decades if the mass incarceration of African-Americans and Latinos in the 1980s never transpired.<sup>116</sup>

#### D. *Public Benefits*

Withholding public benefits as a result of a criminal record is a major threat to indigent ex-offenders.<sup>117</sup> Since 1996, the Federal Government

110. *Id.*; see Walsh, *supra* note 95 (asserting that the “soundness” of the Court’s argument in *Rucker* has never been tested).

111. Walsh, *supra* note 95.

112. *Id.*

113. Douglas Smith, *Legally Protect Landlords Who Provide Housing to People with Criminal Records*, TEX. CRIM. JUST. COAL. (2015), <https://www.texasjc.org/system/files/publications/TCJC%20Fact%20Sheet%20SB%201473%20%28Landlord%20Protection%29.pdf> [<https://perma.cc/UTM6-9FDW>] [hereinafter *Protect Landlords*].

114. Mitch Mitchell, *Ex-Offenders Says Housing, Jobs, are Tough to Find*, FT. WORTH STAR-TELEGRAM (updated May 29, 2012, 6:23 AM) <http://www.mcclatchydc.com/news/nation-world/national/economy/article24730114.html> [<https://perma.cc/786H-5M7J>] (describing a landlord’s desire to avoid premise liability for a crime committed by an ex-offender tenant on another tenant). However the likelihood of ex-offenders committing recidivist crimes, especially offenders that have been vetted for placement in housing, are grossly overstated. *Protect Landlords*, *supra* note 113.

115. Rebecca Vallas & Sharon Dietrich, *One Strike and You’re Out: How we can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, CTR. FOR AM. PROGRESS (Dec. 2, 2014, 7:35 AM), <https://www.americanprogress.org/issues/poverty/reports/2014/12/02/102308/one-strike-and-youre-out> [<https://perma.cc/58QL-TWYL>].

116. *Id.*

117. See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL’Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/L4TW-MTAR>] (finding that

consistently denied welfare benefits, such as monetary assistance and food stamps, to individuals convicted of a drug-related offense.<sup>118</sup> However, states can opt out of this law and many have.<sup>119</sup> As of 2010, fourteen states were compliant with the federal prohibition and consequently “completely exclude[d] individuals convicted of felony drug offenses from these benefits; twenty-two states enforce the ban in part; and fourteen states and the District of Columbia have opted out of the ban entirely.”<sup>120</sup> Texas’s food stamp program is available to individuals convicted of using or selling drugs, but those violating their probation or parole are ineligible to receive benefits for two years.<sup>121</sup> Any subsequent felony drug conviction will bar recipients from benefits for life.<sup>122</sup>

### E. Higher Education

#### 1. Admissions

Many colleges and universities consider criminal history during the admissions process. “Absent clear standards that circumscribe the use of

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incarcerated people in 2014 had “median of \$ 19,185 prior to their incarceration . . .”). *See also For Many Ex-Offenders, Poverty Follows Prison*, NPR: TELL ME MORE (Oct. 18, 2010, 12:00 PM) <https://www.npr.org/templates/transcript/transcript.php?storyId=130647626> (describing the prison-to-poverty-to-prison cycle perpetuated by increased difficulty in finding a job or depressed wages for those ex-offenders that are able to secure employment) Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, in *ON MASS INCARCERATION*, DÆDALUS: J. AM. ACAD. OF ARTS AND SCI. (Summer 2010) 8, 13–15, [https://www.amacad.org/multimedia/pdfs/publications/daedalus/10\\_summer\\_western.pdf](https://www.amacad.org/multimedia/pdfs/publications/daedalus/10_summer_western.pdf) [<https://perma.cc/HL2V-5V3D>] (highlighting a range of factors that may contribute to reduced economic opportunities for individuals who were previously incarcerated, resulting in a severely diminished likelihood of vertical earnings mobility).

118. *See* Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 494 (2010) (citing 21 U.S.C. § 862 which designates individuals convicted of drug trafficking or possession as ineligible for public benefits).

119. *Id.*

120. *Id.*

121. Tex. Admin. Code § 372.501(b)(2) (2017) (Tex. Health and Hum. Serv. Commission, Supplemental Nutrition Assistance Programs). *See* Rebecca Beitsch, *States Rethink Restrictions on Food Stamps, Welfare for Drug Felons*, PEW CHARITABLE TRUSTS (July 30, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/07/30/states-rethink-restrictions-on-food-stamps-welfare-for-drug-felons> [<https://perma.cc/HPJ2-YMW7>] (outlining the effects of barred access to food stamps due to criminal drug convictions in various states).

122. Tex. Admin. Code § 372.501(b)(3) (2017) (Tex. Health and Hum. Serv. Commission, Supplemental Nutrition Assistance Programs); Beitsch, *supra* note 121 (“If they are convicted of another felony, drug-related or otherwise, they are barred for life.”).

criminal history information, screening practices will become the catalyst for a new age of segregation in higher education and society in general.”<sup>123</sup> The overrepresentation of African-Americans in the criminal justice system coupled with institutional prohibitions based on an applicant’s criminal history ultimately results in excluding African-Americans from higher education on account of their race.<sup>124</sup> Such structural barriers to full participation in society have lasting effects best communicated by the Supreme Court. “To separate [African-Americans] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>125</sup>

Despite studies showing that a college education dramatically reduces the rate of recidivism, 64% of higher education institutions require disclosure of criminal records, and 81% of those schools report they consider criminal history in the admissions process.<sup>126</sup> The admission process results in *de facto* racial discrimination in higher education, because the majority of people trapped by the collateral consequences of the criminal justice system are people of color.<sup>127</sup>

Institutions of higher education have different screening processes to determine whether a criminal conviction should result in a denial of admission.<sup>128</sup> Some institutions use committees consisting of the dean, campus security, legal counsel, mental health service providers, and risk assessment personnel to make admission decisions.<sup>129</sup> An admissions

123. MARSHA WEISSMAN ET AL., CTR. FOR CMTY ALTS, CLOSING THE DOORS TO HIGHER EDUCATION: ANOTHER COLLATERAL CONSEQUENCE OF A CRIMINAL CONVICTION 8 (2008), <http://www.communityalternatives.org/pdf/HigherEd.pdf> [<https://perma.cc/W84W-799W>] [hereinafter CLOSING THE DOORS].

124. *Id.* at 7.

125. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

126. MARSHA WEISSMAN ET AL., CTR. FOR CMTY ALTS, THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS: RECONSIDERED 10 (2012), <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admission-s.pdf> [<https://perma.cc/9DY3-AV2B>] [hereinafter COLLEGE ADMISSIONS]; CLOSING THE DOORS, *supra* note 123, at 2.

127. COLLEGE ADMISSIONS, *supra* note 126, at 26.

128. *See id.* at 8 (disclaiming that not all responding colleges in the study utilize screening data in their admission process).

129. *See id.* at 13 (stating approximately 43% of schools have special procedures in evaluating potential students).

committee's consideration of criminal history appears as a prudent safety measure on its face, however involving university officials untrained in admissions decisions is simply unfair; the additional scrutiny is arguably focused only on applicants with criminal records.<sup>130</sup>

In some cases, a student who is admitted despite their criminal record may face additional barriers for the remainder of their college career.<sup>131</sup> One student, Juan, was admitted on the condition that he would be placed on disciplinary probation.<sup>132</sup> Each semester a hold was placed on Juan's account, requiring him to complete a review process before he was cleared to return.<sup>133</sup> Despite quality academic work resulting in graduating with honors, Juan was prohibited from participating in organizations and campus activities, diminishing his university experience as a result of his probationary status.<sup>134</sup> Although Juan overcame these obstacles and eventually sought a Master's degree in Business Administration, someone with lesser conviction could be deterred from pursuing their goals.<sup>135</sup>

## 2. Financial Aid

The Higher Education Amendments of 1998 make students convicted of drug-related offenses ineligible for a grant, loan, or work assistance.<sup>136</sup> States have no choice but to adopt this restriction.<sup>137</sup> Students face automatic disqualification from receiving federal student aid, if convicted while they were already receiving aid.<sup>138</sup>

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130. *See id.* (highlighting that the vast majority of higher education institutions treat applicants with criminal records differently compared to applicants without a criminal record). Weissman references one statistic from the CCA/AACRAO survey that showed a negative recommendation by campus *security personnel* results in an automatic rejection. *Id.* (emphasis added).

131. *Id.* at 2.

132. *Id.*

133. *Id.*

134. *Id.* Juan was selected for the Beta Alpha Psi Honor Society but was subsequently prohibited from serving as an officer in this organization because of his probation status. *Id.*

135. *See id.* at 2 (2012) (illustrating the irrepressible characteristics and resilience required to attend school with implemented barriers due to a criminal record).

136. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 483, 112 Stat. 1735 (1998) (codified at 20 U.S.C. § 1091(a) (2012)).

137. 20 U.S.C. § 1091(r) (2012).

138. *Id.*; *see* Betsy Mayotte, *Drug Convictions Can Send Financial Aid up in Smoke*, U.S. NEWS (Apr. 15, 2015, 10:00 AM), <http://www.usnews.com/education/blogs/student-loan->

Ineligibility for financial aid depends on the nature and number of offenses committed by a student: the first conviction for drug possession results in one year of ineligibility; the second conviction results in two years of ineligibility; and the third conviction results in indefinite ineligibility.<sup>139</sup> Regarding the sale of a controlled substance, a student will be ineligible for financial aid for two years following the first offense and indefinitely following a second conviction.<sup>140</sup> In addition to facing costs related to their interaction with the criminal justice system,<sup>141</sup> students who lose financial aid because of a drug-related conviction face the difficult decision of personally funding their education or taking one or two years off from school.<sup>142</sup> Carrying the costs of attending an institution of higher education while simultaneously paying to defend against drug-related criminal charges is arguably untenable for any but the most affluent.<sup>143</sup> Once again, the financial consequences of a criminal record disproportionately affect a class of young adults most likely without the capacity to absorb such consequences—African-Americans.<sup>144</sup>

### 3. School Safety

The reasoning used to justify criminal history screening in higher education is similar to justifying screening for employment—screening

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ranger/2015/04/15/drug-convictions-can-send-financial-aid-up-in-smoke (explaining the effects of a state or federal drug conviction on receiving federal financial aid). Federal financial aid suffers a fate similar to housing and other supplemental security income. See Alice King, *Collateral Consequences of Criminal Conviction: Five-State Resource Guide*, JUSTICE ACTION CTR. at 19–20 (2007), [http://www.nyls.edu/documents/justice-action-center/student\\_capstone\\_journal/capstone060704.pdf](http://www.nyls.edu/documents/justice-action-center/student_capstone_journal/capstone060704.pdf) [<https://perma.cc/4SFA-4C3Z>] (discussing the wide-ranging financial consequences attached to a criminal record).

139. 20 U.S.C. § 1091(r) (2012). Mayotte, *supra* note 138.

140. 20 U.S.C. § 1091(r) (2012). Mayotte, *supra* note 138.

141. See King, *supra* note 138, at 1, 20 (“Sentences can include court costs, restitution, and contributions to various funds.”).

142. See 20 U.S.C. § 1091(r)(1) (2012) (providing the suspension period for drug-related offenses).

143. See Mayotte, *supra* note 138 (describing some softening measures in the law that would allow a student to regain aid eligibility following completion of a rehabilitation program).

144. See *Poverty Rate by Race/Ethnicity*, KAISER FAMILY FOUND., <http://kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0> [<https://perma.cc/4DC5-QSCT>] (last visited Oct. 21, 2017) (reporting African-American’s with the highest poverty rate within the United States).

for ex-offenders creates a safe environment.<sup>145</sup> This argument is consistently unsuccessful; a 2007 study found no connection between criminal history screening and campus safety.<sup>146</sup> The Olszewska study failed to find any significant difference in campus crime rates between schools using an admission process that included criminal background checks and schools that do not.<sup>147</sup>

Further conflicting the relationship between campus safety and criminal background checks during admissions, a state's classification of a crime may "imply a level of dangerousness" that does not necessarily comport "with the [seriousness of] the actual deed."<sup>148</sup> For instance, in Delaware, a charge for "offensive touching" may imply sexual assault, but is typically used when any one of a variety of contacts is "likely to cause offense or alarm to such other person."<sup>149</sup> An admissions staff member may only see "offensive touching" as a threat to public safety without regard for the underlying context (such as the female security guard being charged with "offensive touching" stemming from the removal of a trespasser).<sup>150</sup> Screening for criminal history in the application process can be misleading or alternatively identify

145. COLLEGE ADMISSIONS, *supra* note 126, at 6.

146. *Id.* (citing MALGORZATA OLSZEWSKA, UNDERGRADUATE ADMISSION APPLICATION AS A CAMPUS CRIME MITIGATION MEASURE: DISCLOSURE OF APPLICANTS' DISCIPLINARY BACKGROUND INFORMATION AND ITS RELATION TO CAMPUS CRIME (2007) (Dissertation, East Carolina Univ.) (on file with Joyner Library, East Carolina Univ.).

147. *Id.*

148. *Id.* at 24.

149. DEL. CODE ANN. Tit. 11 § 601 (2013). *See e.g.* Weber v. State, 971 A.2d 135 (Del. 2009) (describing the defendant's appeal to apply Offensive Touching as a lesser included offense to First Degree Robbery stemming from defendant's contact with a victim during an attempted carjacking); State v. Bennett, No. 052008615/MN05-06-4052, 2006 WL 2615156 (Del. Com. Pl. Aug. 31, 2006) (charging a hotel security guard with offensive touching resulting from her forced removal of a tow-truck driver from the premises when he was attempting to tow a vehicle). *See also* COLLEGE ADMISSIONS, *supra* note 126, at 24 (indicating Offensive Touching can apply to "adolescent behavior such as bra snapping or patting someone's behind."). While such behaviors are socially unacceptable, they are common adolescent behavior. *See* Jessica Firger, *Why Teenage Boys Do Stupid Things*, CBSN (June 12, 2014, 1:00 PM), <https://www.cbsnews.com/news/whats-wrong-with-the-teen-brain/> [<https://perma.cc/QN79-68GT>] ("Adolescents are very much conditioned to peer pressure").

150. *See* The Editorial Board, *College Applications and Criminal Records*, N.Y. TIMES (Mar. 14, 2015), <https://www.nytimes.com/2015/03/15/opinion/sunday/college-applications-and-criminal-records.html> [<https://nyti.ms/1G46Wjd>] ("The process, which often brings greater scrutiny to people who answer "yes," is driving away large numbers of people who present no danger to campus safety and are capable of succeeding academically.").



convictions for behaviors already occurring on campus with some normalcy, creating an illusory safety practice that doesn't increase campus safety<sup>151</sup> and likely excludes African-American applicants disproportionately because of their overrepresentation in the criminal justice system.

It is generally accepted that higher education is a pathway to a productive and comfortable life.<sup>152</sup> There is a distinct relationship between the level of education and the employment rate within the African-American community.<sup>153</sup> 86% of college-educated African-Americans are employed compared to 57% of high school graduates and 33% of high school dropouts.<sup>154</sup>

In addition to a comfortable economic lifestyle, there are other sizeable societal benefits associated with higher education, such as increased participation in the democratic process and the pursuit of knowledge, which may ultimately lead to a better quality of life.<sup>155</sup> Therefore, it is important to *encourage* college enrollment within the African-American community, rather than impeding enrollment with education policies that perpetuate the discriminatory effect of the criminal justice system.

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151. See COLLEGE ADMISSIONS, *supra* note 126, at 24–25 (Acknowledging the behavior one most likely received a criminal conviction for, such as abuse of prescription drugs or marijuana use, is commonplace on college campuses anyway, a condition which severely undermines the campus safety argument for excluding individuals with criminal records).

152. See *e.g.* STUART M. BUTLER ET AL., ECON. MOBILITY PROJECT, PATHWAYS TO ECONOMIC MOBILITY: KEY INDICATORS 11–12 (2008) [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/economic\\_mobility/pewempchartbook12pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/economic_mobility/pewempchartbook12pdf.pdf) [<https://perma.cc/RPB9-3DAJ>] (indicating a parent's education has an important influence on their child's academic future as well as their up-bringing); COLLEGE ADMISSIONS, *supra* note 126, at 29 (highlighting the association between employment opportunities and higher education); Richard A. Matasar, *Higher Education Evolved: Becoming the University of Value*, 66 SYRACUSE L. REV. 689, 696 (2016) (justifying education (and subsequently education debt) as a good investment that would put a student on the pathway to professional job opportunity and income growth).

153. COLLEGE ADMISSIONS, *supra* note 126, at 29.

154. *Id.*

155. MARSHA WEISSMAN ET AL., CTR. FOR CMTY ALTS, THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS: RECONSIDERED 30 (2012), <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf> [<https://perma.cc/HM62-PHUG>] (describing some extrinsic benefits of receiving a higher education).

F. *Recidivism*

Preventing recidivism is an integral part of the criminal justice system.<sup>156</sup> Recidivism is characterized as “a relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime.”<sup>157</sup> Recidivism rates are measured by re-arrests and convictions, or more generally a return to jail following release.<sup>158</sup> The post-conviction collateral consequences ex-offenders are subject to dramatically limit these individuals from becoming productive members of society and seem to cause the high recidivism rate.<sup>159</sup> Ex-offenders may find themselves precluded from public housing,<sup>160</sup> food stamps,<sup>161</sup> and employment.<sup>162</sup> Even access to federal loans in pursuit of higher education is blocked as a result of certain convictions.<sup>163</sup> Because recidivism is engrained in the criminal justice system in the United States, the shackles are never really loosened, diminishing the concept that the punishment should fit the crime.<sup>164</sup>

“Being employed substantially reduce[s] the risk of all recidivism outcomes.”<sup>165</sup> However, obtaining employment is one of the most difficult tasks an ex-offender faces.<sup>166</sup> Additionally, returning to a disadvantaged neighborhood substantially increases the risk of recidivism; the lack of opportunities in some neighborhoods adds to the

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156. *Recidivism*, NAT'L INST. JUST. (June 17, 2014), <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx> [<https://perma.cc/U9FP-YCWB>].

157. *Id.*

158. *See id.* (reviewing a three-year period following an initial offense).

159. *See generally Criminal Justice Reform and Efforts to reduce Recidivism: Hearing Before the H. Comm. on Oversight and Government Reform*, 115th Cong. 1–4 (2017) (statement of Sen. Tim Scott) (describing a range of interventions aimed at addressing factors that contribute to recidivism).

160. *See supra* notes 91–116 and accompanying text.

161. *See supra* notes 117–122 and accompanying text.

162. *See supra* notes 55–69 and accompanying text.

163. *See supra* notes 136–144 and accompanying text.

164. *See* David Chura, *The Real Roots of Prison Recidivism*, BEACON BROADSIDE (May 27, 2014, 11:00 AM), <http://www.beaconbroadside.com/broadside/2014/05/the-real-roots-of-prison-recidivism.html> [<https://perma.cc/7N4W-WF36>] (indicating that once someone is convicted of certain crimes, American society never truly allows them to be forgiven and move forward with their life).

165. *Research on Reentry and Employment*, NAT'L INST. JUST., <https://www.nij.gov/topics/corrections/reentry/pages/employment.aspx> [<https://perma.cc/V4LL-RTP9>] [hereinafter *Research on Reentry*] (last modified Apr. 3, 2013).

166. *See id.* (explaining how joblessness can lead to recidivism).

challenge of integrating successfully into society.<sup>167</sup> When the neighborhood that an ex-offender returns to is also subject to elevated rates of crime,<sup>168</sup> the odds of recidivating are disproportionately high, adversely affecting minority communities.<sup>169</sup> In addition to these structural barriers, living in poverty produces feelings of frustration, hopelessness, anxiety, and ultimately may contribute to recidivism.<sup>170</sup> The amalgamation of social constraints, e.g. poverty and unemployment, with detrimental emotional outcomes, e.g. feelings of hopelessness and despair, and resulting increase in likelihood to recidivate, ultimately keep African-American and minority youth shackled to a vitiated criminal justice system.<sup>171</sup> Although the socioeconomic issues that contribute to criminal activity are beyond the scope of this Comment, they are fundamental to understanding the psychology of individuals trapped in the system in order to develop policies that solve the problem rather than perpetuate it. High recidivism rates prove that enhanced punishments do not effectively deter crime.

#### IV. SOLUTIONS

The cost of maintaining structural impediments that serve to further degrade the lives of the indigent are no longer justified. Policies claiming to encourage deterrence failed.<sup>172</sup> Instead, deterrence policies created a new tier of collateral consequences for an entire class of citizens rejected by society despite having paid their institutional debt to society.<sup>173</sup> The criminal justice system should not focus on prosecution alone, but fairness, justice, and equality for all. Retribution and deterrence are not

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167. See *Research on Reentry*, *supra* note 165 (associating ex-prisoners returning to disadvantaged neighborhoods with recidivism).

168. See Long, *supra* note 159 (explaining release from prison without proper preparation to a high poverty and criminal neighborhood will often lead to recidivism).

169. See *id.* (showing an African-American Forum study, which indicates blacks are affected more than others when released from prison to return to disenfranchised neighborhoods).

170. *Id.*

171. *Id.* Long describes this mix of social and emotional conditions as the “criminality of hopelessness.” *Id.*

172. See *id.* (explaining that strict punitive measures have actually increased the rate of recidivism).

173. See, e.g., *id.* (arguing that individuals leaving prison face societal stigma due to a perceived lack of education); Thomas G. Blomberg et al., *Is Educational Achievement a Turning Point for Incarcerated Delinquents Across Race and Sex?*, 41 J. YOUTH & ADOLESCENCE 202, 214 (2012) (explaining that society views incarcerated delinquents as educationally disposable).

the only objectives of the criminal justice system; it also encompasses rehabilitation as a desired outcome.<sup>174</sup> Rehabilitation begins with community-focused crime prevention policies.<sup>175</sup>

#### A. *Indigent Access to Quality Public Defense*

The average defendant in a criminal proceeding is often an indigent who cannot afford private representation.<sup>176</sup> Evidence shows that black offenders are more likely than white offenders to be represented by a public defender.<sup>177</sup> Underfunded public defenders with large caseloads and limited support services<sup>178</sup> may potentially create serious constitutional repercussions.<sup>179</sup> A federal judge in the Western District of Washington recently concluded the public defender system “deprived indigent criminal defendants . . . of private attorney/client consultation, reasonable investigation and advocacy, and the adversarial testing of the prosecutor’s case” and contributes to “systemic Sixth Amendment violation[s].”<sup>180</sup>

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174. Aaron Rappaport, *Sentencing Reform in California*, 7 HASTINGS RACE & POVERTY L.J. 285, 296 (2010).

175. *See id.* (“The principal benefit of punishment is straightforward - public safety - achieved largely through incapacitation, deterrence, and rehabilitation.”).

176. ALIDA V. MERLO & PETER J. BENEKOS, *WHAT’S WRONG WITH THE CRIMINAL JUSTICE SYSTEM: IDEOLOGY, POLITICS, AND THE MEDIA* 57 (Ellen S. Boyne et al. eds., 2000).

177. *Id.* Nearly half of all cases received by public defenders are misdemeanor crimes. U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS: BUREAU OF JUSTICE STATISTICS, PUBLIC DEFENDER OFFICES, 2007 – STATISTICAL TABLES, at 1 (2010), <https://www.bjs.gov/content/pub/pdf/pdo07st.pdf> [<https://perma.cc/R5PD-4EHB>] (reporting that forty percent of cases received by public defender offices are misdemeanor cases).

178. MERLO & BENEKOS, *supra* note 176, at 57.

179. *See, e.g.*, Sam Wright, *Underfunding Public Defenders Can Lead to Sixth Amendment Violations*, ABOVE LAW (June 23, 2015, 11:33 AM), <http://abovethelaw.com/2015/06/underfunding-public-defenders-can-lead-to-sixth-amendment-violations/?rf=1> [<https://perma.cc/AAX2-744P>] (explaining that Missouri’s underfunded public defender system creates violations of the Sixth Amendment because public defenders spend less time on these criminal cases which, in turn, hurts their ability to provide reasonably effective assistance of counsel).

180. *Wilbur v. Mount Vernon*, 989 F. Supp. 2d 1122, 1133 (D. Wash. 2013). The ACLU brought a class action suit alleging Sixth Amendment violations against the public defender system in Mount Vernon and Burlington, Washington. Wright, *supra* note 179. Class actions alleging ineffective assistance of counsel and subsequent Sixth Amendment violations stemming from poorly-functioning public defenders’ offices are becoming more commonplace. *See e.g.* *Church v. Missouri*, 268 F.Supp.3d 992 (W. D. Mo. July 24, 2017); *Tucker v. Idaho*, CV-OC-2015-10240 (Idaho Dist. Ct., June 17, 2015); *see generally Michigan and Other States Fail to Ensure All Defendants Receive Quality Representation*, ACLU (Mar. 26, 2009),

The United States Supreme Court guaranteed a constitutional right to counsel for indigent criminal defendants in any initial criminal proceeding in their 1963 decision, *Gideon v. Wainwright*.<sup>181</sup> Although the lack of parity between the prosecutor and indigent defense offices is a serious problem, failure to properly fund the public defense system is the underlying issue.<sup>182</sup> By requiring the Bureau of Justice Statistics to “collect, publish, and analyze data on the funding and operation of such programs nationwide,” there could be an increase in federal oversight in the funding for indigent defense programs.<sup>183</sup> Recently, Texas introduced the idea of vouchers, which would allow defendants to seek an attorney of their choice instead of relying upon a court appointed attorney.<sup>184</sup> Vouchers could address the shortage of attorneys, while encouraging accountability between public defenders and their clients.<sup>185</sup>

#### B. *Abolish the Plea Bargain*

The concept of plea bargaining has been contentious for both liberals and conservatives alike.<sup>186</sup> Conservatives purport that plea bargaining is a loophole through which criminals avoid punishment, whereas liberals believe plea bargaining results in major injustices.<sup>187</sup> Despite such varying opinions regarding the legitimacy of their existence, plea bargains can make a mockery of the justice system by focusing on negotiations between the prosecution and defense instead of adjudicating

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<https://www.aclu.org/news/inadequately-funded-public-defender-services-threaten-criminal-justice-system-aclu-testifies> [<https://perma.cc/LV74-98AH>] [hereinafter *States Fail*] (“The United States Supreme Court has ruled that as part of this constitutional right, states must provide counsel to anyone accused of criminal wrongdoing and unable to afford private counsel”).

181. 372 U.S. 335, 339–40 (1963).

182. See *States Fail*, *supra* note 180 (stating that the failures of the system in funding and administration compromise justice).

183. *Id.*

184. Radley Balko, *In Texas, a Novel Idea to Address the Public Defender Crisis*, WASH. POST (Jan. 28, 2014), [https://www.washingtonpost.com/news/opinions/wp/2014/01/28/in-texas-a-novel-idea-to-address-the-public-defender-crisis/?utm\\_term=.b4265842e9e0](https://www.washingtonpost.com/news/opinions/wp/2014/01/28/in-texas-a-novel-idea-to-address-the-public-defender-crisis/?utm_term=.b4265842e9e0) [<https://perma.cc/3VN4-TBX6>].

185. *Id.*

186. SAMUEL WALKER, *SENSE AND NONSENSE ABOUT CRIME AND DRUGS* 167 (Carolyn Henderson Meier et al. eds., 6th ed. 2006).

187. *Id.* at 167–68.

the merits of the case.<sup>188</sup> The “deals” offered by prosecutors vary on a case-by-case basis without any explanation of the merits or reasons for the plea offer.<sup>189</sup> In many instances, privately negotiated pleas involve a coercive defense counsel encouraging their clients to plead guilty and forego their constitutionally protected right to a fair trial.<sup>190</sup> Because public defenders are often overworked and underpaid, the plea bargain system incentivizes the expedient administrative solution to merely “close the case.”<sup>191</sup>

In 1975, Alaska refuted the traditional notion that criminal courts would collapse if plea bargaining was abolished.<sup>192</sup> Not only did Alaska ban plea bargaining by forbidding “sentence bargaining” and “charge bargaining,” but also established procedures for supervising plea negotiations.<sup>193</sup> Alaska’s policy proved that increased oversight in plea negotiations could bring about substantive change.<sup>194</sup> Cases moved faster through the courts because prosecutors did not have the option to negotiate cases without creating a cognizable impact on sentences in cases involving defendants charged with serious crimes or in possession of a substantial criminal record.<sup>195</sup>

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188. *Id.* at 168.

189. See Dylan Walsh, *Why U.S. Criminal Courts Are So Dependent on Plea Bargaining*, ATLANTIC (May 2, 2017), <https://www.theatlantic.com/politics/archive/2017/05/plea-bargaining-courts-prosecutors/524112/> [<https://perma.cc/B8HA-KXU7>] (“Though jury trials demand proof of guilt beyond a reasonable doubt, pleas follow no standards of evidence or proof; the prosecutor offers a break in exchange for a guilty plea, the defendant decides whether to take it without knowing the merits of his case.”).

190. WALKER, *supra* note 186, at 168.

191. See MERLO & BENEKOS, *supra* note 176, at 57 (stating that courts rely on the plea bargaining process to make them run more efficiently).

192. See *State v. Carlson*, 555 P.2d 269 (Alaska 1976) (“We are also concerned that a judge’s involvement as plea negotiator would detract from the judge’s neutrality, and would present a danger of unintentional coercion of defendants who could only view with concern the judge’s participation as a state agent in the negotiating process.”); *State v. Abraham*, 566 P.2d 267 (Alaska 1977) (reviewing a five-year sentence (four of which were suspended) imposed at trial in exchange for a guilty plea by Abraham for the charge of manslaughter regarding Abraham’s felonious killing of his wife, Sophie); WALKER, *supra* note 186, at 168.

193. WALKER, *supra* note 186, at 168.

194. *Id.* at 168–70 (suggesting Alaska’s ban on plea bargaining had no real impact on the crime rate, but that disposition and case processing time dropped).

195. *Id.* at 169.

### C. *Drug Courts*

The purpose of drug courts is to offer individuals charged with low-level drug offenses and other related criminal activity a chance for treatment.<sup>196</sup> Instead of traditional mandatory sentencing, successful treatment may offer a dismissal of the original charge, a reduced sentence, or some lesser penalty.<sup>197</sup> Indigent defendants typically face harsher penalties, because they are often unaware of their rights or lack a full understanding of the criminal justice system.<sup>198</sup> On the other hand, drug courts present clear choices to participants and help ensure compliance with court orders.<sup>199</sup> Compliance with drug court orders rewards the participant and helps them avoid sanctions.<sup>200</sup>

With a reward system based on a participant's progress, comprehensive and inclusive planning is critical to a participant's improvement.<sup>201</sup> Participants work, either individually or in groups, with counselors who supervise and measure the participant's progress toward a stated goal.<sup>202</sup> Progress is based on rigorous supervision, frequent drug tests, court appearances, and tightly structured programs

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196. U.S. DEP'T OF JUSTICE, NAT'L ASS'N OF DRUG COURT PROF'LS, *DEFINING DRUG COURT: THE KEY COMPONENTS* 9 (1997), [http://www.nadcp.org/sites/default/files/nadcp/KeyComponents\\_0.pdf](http://www.nadcp.org/sites/default/files/nadcp/KeyComponents_0.pdf) [<https://perma.cc/K3RY-PBCA>] [hereinafter *KEY COMPONENTS*].

197. *Id.* at 7.

198. Telephone Interview with Jennifer Carroll, Board Member of Virginia Military Institute and Public Defender (Feb. 12, 2017) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*).

199. *KEY COMPONENTS*, *supra* note 196, at 7.

200. *Id.* at 23 (recognizing that some behaviors attract favorable attention from the drug court: appearing at all required court appearances; arriving on time and actively participating in treatment sessions; and maintaining a clean drug test record). Some examples of rewards for compliance and general good behavior range from verbal praise in court for accomplishments to travel privileges that would permit a participant to leave the county on a weekend pass. *Id.* at 23–25. On the other hand, sanctions may be imposed for failure to comply with a treatment plan. *See List of Incentives and Sanctions*, NAT'L DRUG CT. RESOURCES CTR., <http://ndcrc.org/resource/lists-of-incentives-and-sanctions/> [<https://perma.cc/S83B-72FB>] (last visited Oct. 7, 2017) (download “Lists of Incentives and Actions”) (listing a wide range of rewards and sanctions a court may offer to participants in a drug court program). Such sanctions may include verbal admonishment, increased supervision or ultimately expulsion from the treatment program. *Id.*

201. *See KEY COMPONENTS*, *supra* note 196, at 23–24 (explaining that the drug court's strategy is coordinated, continuing, complementary, and measured).

202. *See id.* at 7–8 (providing flexibility in planning an approach for drug offenders so long as outcomes are tangible).

focused on rehabilitation.<sup>203</sup> The drug court program in Miami, with 4,500 offenders enrolled, serves as an example of how a successful program works.<sup>204</sup> After one year of release from the drug court program, only 11% of participants recidivated.<sup>205</sup> Drug court programs offer a stark comparison to the typical recidivism rate of 60% in the criminal justice system.<sup>206</sup>

#### D. Decriminalizing Marijuana

A person was arrested for possession of marijuana every 51 seconds in 2014 despite the national conversation recently shifting toward the decriminalization and legalization of marijuana.<sup>207</sup> Voting polls on this issue have consistently moved toward acceptance of decriminalization;<sup>208</sup> now might be the time to ask whether possession of marijuana is truly a detriment to society.<sup>209</sup> Colorado legalized the use and production of marijuana in 2014.<sup>210</sup> The impact legalization has had on prosecutions is telling. In 2010 (pre-legalization), Colorado

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203. *See id.* at 23–25 (determining that a combination of different techniques should be used in monitoring the participant's progress in the treatment program).

204. Sally Satel, *Do Drug Courts Really Work?*, CITY JOURNAL, <https://www.city-journal.org/html/do-drug-courts-really-work-11756.html> [<https://perma.cc/W7BC-WZQC>] (last visited July 14, 2017).

205. *Id.*

206. *Id.*

207. Nick Wing, *Police Arrested Someone for Weed Possession Every 51 Seconds in 2014*, HUFF POST (Sept. 28, 2015, 6:34 PM), [http://www.huffingtonpost.com/entry/marijuana-arrests-2014\\_us\\_560978a7e4b0768126fe6506](http://www.huffingtonpost.com/entry/marijuana-arrests-2014_us_560978a7e4b0768126fe6506) [<https://perma.cc/KPT8-SGFK>].

208. Jeff Sparrow, *Prohibition Didn't Work for Alcohol and It's Failing for Marijuana*, GUARDIAN (June 22, 2017, 2:00 PM), <https://www.theguardian.com/commentisfree/2017/jun/23/prohibition-didnt-work-for-alcohol-and-its-failing-for-marijunana> [<https://perma.cc/Q4YJ-KDYA>].

209. *See id.* (arguing prohibition didn't work for alcohol nor will it work for marijuana and abolition of anti-pot laws would spare teenagers from contact with the prison system, while freeing up resources).

210. COLO. CONST. art. XVIII, § 16. Residents of Colorado voted to amend the Colorado Constitution with Amendment 64 in November of 2012. Amendment 64 legalized multiple aspects of marijuana consumption and production while simultaneously mandating regulation and oversight by the state. The amendment went into effect in January of 2014. Eli Wald, et al., *Representing Clients in the Marijuana Industry: Navigating State and Federal Rules*, 44 COLO. LAW 61 (2015); *Two Years Later: Has the Legalization of Marijuana Affected Crime in Colorado?*, R&M ATT'YS AT LAW (Feb. 12, 2016), <http://www.rogersandmoss.com/blog/14-criminal-law-articles/56-two-years-later-has-the-legalization-of-marijuana-affected-crime-in-colorado> [<https://perma.cc/UM6N-Z3FT>] [hereinafter *Two Years Later*].



prosecutors filed over 11,000 marijuana-related charges.<sup>211</sup> The number of charges dropped to 2,100 by October 2015.<sup>212</sup> The state experienced a 1% decrease in crime overall in 2014.<sup>213</sup> These statistics illustrate the potential decrease in crime that can occur following legalization of marijuana. Additionally, legalization can divert financial benefit created by the production and sale of marijuana from the black market to legal businesses, thereby generating taxable revenue for the state.<sup>214</sup> In addition to these benefits, legalization of marijuana would reduce the collateral consequences stemming from a simple drug possession charge, especially for those individuals without a criminal record or history of violence.<sup>215</sup>

#### E. *Rehabilitative Justice Programs*

In 1997, San Francisco established the Resolve to Stop Violence Project (RSVP).<sup>216</sup> The main focus of the RSVP program was to lower recidivism rates.<sup>217</sup> Instead of punitive incarceration, the RSVP program emphasizes accountability and focuses on returning an offender to their community.<sup>218</sup> The program presumes that incarceration and punishment stimulate violence instead of deterring it.<sup>219</sup> Gilligan and Lee's study of the effectiveness of the RSVP program revealed program participants were much less likely to be arrested for violent offenses; remained in the community for longer periods; and were in custody for shorter durations

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211. *Two Years Later*, *supra* note 210.

212. *Id.*

213. *Id.*

214. Angela Dills et. al., *Dose of Reality: The Effect of State Marijuana Legalizations*, CATO INST. 1, 9, 18, 21 (Sep. 16, 2016), <https://www.cato.org/publications/policy-analysis/dose-reality-effect-state-marijuana-legalizations> [<https://perma.cc/5MRZ-65AP>].

215. See Telephone Interview with Jennifer Carroll, Board Member, Virginia Military Institute and Public Defender (Feb. 12, 2017) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (recognizing the disparity between approval rates of simple marijuana at voting polls and the large caseload of individuals with simple possession and no criminal or violent history).

216. James Gilligan & Bandy Lee, *The Resolve to Stop the Violence Project: Reducing Violence in the Community Through a Jail-based Initiative*, 27 J. PUB. HEALTH 143, 144 (2005).

217. *Id.*

218. See *id.* (discussing the accountability and restoration components of the RSVP program).

219. See *id.* (“[S]ome of the approaches intended for deterrence may actually stimulate violence, rather than assist in controlling it.”)

compared to non-participants.<sup>220</sup> The RSVP program showed prison-based prevention programs are successful and effective alternatives to punitive incarceration.<sup>221</sup>

Dan Pacholke<sup>222</sup> describes restorative and rehabilitative justice: “when we changed the environment, the behavior changed . . . [t]hese were small changes, and these changes created new possibilities.”<sup>223</sup> While Dan was working on his degree at Evergreen State College, he met a rainforest ecologist who proposed that prisons were potentially similar to a laboratory.<sup>224</sup> Dan and his classmate discussed how inmates could collaborate on projects to advance scientific objectives as though the inmates themselves were in a laboratory setting.<sup>225</sup> Contributing to scientific projects gave inmates an opportunity to feel important while also obtaining marketable skills for post-prison life.<sup>226</sup> By providing meaningful work in prison and giving inmates a legitimate opportunity to work in a humane environment, the program fostered rehabilitation within the prison walls.<sup>227</sup> The state has a significant interest in pursuing rehabilitative programs that treat prisoners as human beings with the same degree of respect and kindness that is expected of them upon returning to their communities.<sup>228</sup>

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220. *See id.* at 144–45 (analyzing the descriptive data of inmates who participated in RSVP).

221. *See id.* at 147–48 (“RSVP was intended to be a comprehensive, major and multidimensional intervention to decrease violence, and the changes that remained for 1 year post-release following only a short stay in jail attest to the program’s effectiveness.”).

222. Pacholke is former secretary of the Washington State Department of Corrections and is currently co-director of Segregation Solutions, a working group focused on promoting alternative corrections management. *About Us*, SEGREGATION SOLUTIONS, <http://www.segregationsolutions.org/about-us.html> [https://perma.cc/VBG2-35G6] (last visited Oct. 7, 2017).

223. Dan Pacholke, *How Prisons Can Help Inmates Live Meaningful Lives*, TED 4 (Aug. 2014), [https://www.ted.com/talks/dan\\_pacholke\\_how\\_prisons\\_can\\_help\\_inmates\\_live\\_meaningful\\_lives/transcript?language=en](https://www.ted.com/talks/dan_pacholke_how_prisons_can_help_inmates_live_meaningful_lives/transcript?language=en) [https://perma.cc/D75Z-G8XS].

224. *Id.*

225. *Id.* Some projects inmates contributed to include the repopulating of endangered frog and butterfly species as well as improving prison facility efficiency by adding solar powered array and other sustainable features. *Id.*

226. *See id.* (arguing that inmates can have decent and meaningful lives, even in prison).

227. *See id.* (discussing the effects that quality and meaningful environments have on inmates while in prison).

228. *See* James Gilligan, *Punishment Fails. Rehabilitation Works.*, N.Y. TIMES, <https://www.nytimes.com/roomfordebate/2012/12/18/prison-could-be-productive/punishment-fails-rehabilitation-works> (last updated Dec. 19, 2012 11:43 AM) (opining that home-like residential communities devoted to providing inmates therapy and education with respect and kindness would be beneficial to the public community).

#### F. *Nominal Expungement Fees*

Those able to afford an expungement are the least likely to need the advantages that come with it.<sup>229</sup> Expungement is a legal outcome that allows an offender to deny the existence of a criminal record or arrest.<sup>230</sup> The expensive filing and attorney fees needed to navigate the complex expungement process disadvantages the indigent.<sup>231</sup> The disconnection between policy rationale and policy implementation must be addressed in order to free people from economic instability.<sup>232</sup>

In Texas, expungement is more difficult to attain than in many other jurisdictions.<sup>233</sup> To be eligible for expungement, an applicant must be acquitted, pardoned, or released without a final conviction.<sup>234</sup> Applicants unable to qualify for expungement may qualify for a non-disclosure order, which is a “court order prohibiting public entities such as courts and police departments from disclosing certain criminal records.”<sup>235</sup> To be eligible for non-disclosure, the applicant must successfully complete the required programs under a deferred adjudication.<sup>236</sup> Furthermore, the applicant must wait a certain period of time after the court’s order of dismissal to seek a non-disclosure order.<sup>237</sup> The total cost for seeking an expungement or non-disclosure order varies

229. See Joshua Gaines, *Excessive Filing Fees Frustrate New Expungement Schemes*, COLLATERAL CONSEQUENCES RES. CTR. (June 3, 2016), <http://ccresourcecenter.org/2016/06/03/excessive-fees-frustrate-purpose-of-expungement-laws> [<https://perma.cc/P4TX-XL6Y>] (recognizing that people most in need of expungement are least likely to be able to afford it).

230. *Id.*

231. *Id.*

232. See *id.* (“There is a major disconnect between these exorbitant fees and the policy rationale that has led many states to create or expand expungement opportunities in recent years.”).

233. See TEX. CODE CRIM. PROC. ANN. art. 55.01 (West 2006) (establishing the procedure for expungement of criminal records); see also James Hirby, *Do I Need a Lawyer to Expunge My Records or Can I Do It Myself in The State of Texas?*, THE LAW DICTIONARY, <http://thelawdictionary.org/article/do-i-need-a-lawyer-to-expunge-my-records-or-can-i-do-it-myself-in-the-state-of-texas> [<https://perma.cc/VV9V-2SDX>] (last visited July 14, 2017) (indicating that Texas’ expungement laws are more harsh than other jurisdictions).

234. TEX. CODE CRIM. PROC. ANN. art. 55.01 (West 2006).

235. *Orders of Nondisclosure Overview*, TXCOURTS.GOV, <http://www.txcourts.gov/media/821650/order-of-nondisclosure-overview.pdf> [<https://perma.cc/2RPP-T5MB>] (last visited Oct. 29, 2017).

236. *Id.*

237. *Id.*

depending on whether the applicant is represented by counsel.<sup>238</sup> With challenging pre-requisites and high expenses, expunction or non-disclosure, as currently implemented seems to be an unworkable reality for indigent offenders. The state has an interest in encouraging employment and drafting laws that balance the interest of public safety and privacy.<sup>239</sup> A revised expunction or non-disclosure scheme should include a tiered payment system. The scheme would offer expungement for a nominal fee for arrests that did not lead to a conviction. First time low-level offenses could be expunged by using a simple court form. Such measures will assist offenders, eager to move past a minor offense, with avoiding the collateral consequences associated with repeat revelations of such an offense to potential employers or landlords.

### G. *Ban the Box & Fair Chance Hiring Policies*

A senior staff attorney at the National Employment Law Project (NELP) stated the “ban the box” movement “is incredibly relevant to the conversations we are having nationally about race and the criminalization of black and brown bodies today.”<sup>240</sup> Currently, there are a total of twenty-nine states, excluding Texas, that delay the conviction history question for job applicants seeking employment from private employers until later in the hiring process.<sup>241</sup> Only nine states have removed the question entirely.<sup>242</sup> The practice known as “banning the box” ensures a fairer evaluation by focusing on the applicant’s credentials and

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238. See, e.g., *Frequently Asked Questions*, LAW OFFICE DAVID THOMAS, <http://www.rosshurdlaw.com/expungement/faqs> [<https://perma.cc/DZT2-JFFA>] (last visited Oct. 7, 2017) (charging up to \$1500 for “uncontested expunction and non-disclosures”).

239. See *Public Records on the Internet: The Privacy Dilemma*, PRIVACY RIGHTS CLEARINGHOUSE (Apr. 19, 2002), <https://www.privacyrights.org/blog/public-records-internet-privacy-dilemma> [<https://perma.cc/N786-BABR>] (identifying the difficulty of accommodating both personal privacy interests and access to public records as one of the most challenging public policy issues).

240. Joel Gillin, *Don't Ask, Don't Tell, Get Hired*, NEW REPUBLIC (May 13, 2015), <https://newrepublic.com/article/121775/ban-box-people-criminal-records-it-works> [<https://perma.cc/44AQ-7YUS>].

241. Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*, NAT'L EMP'T L. PROJECT (Aug. 1, 2017), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide> [<https://perma.cc/M9FL-A8G2>].

242. *Id.*

experience in the initial stages of the hiring process.<sup>243</sup> After the employer decides to hire the applicant, she may then request a criminal record.<sup>244</sup> However, the employer must consider factors such as the applicant's fitness; the amount of time since the applicant's conviction; the correlation between the cause for conviction and the skills needed for the job position; and any other mitigating factor.<sup>245</sup> Although the practice is new and the available data sparse, "the numbers suggest that [banning the box] has significantly helped" ex-offenders gain employment.<sup>246</sup> National implementation of the "ban the box" policy would have the greatest effect on formerly incarcerated African-Americans.<sup>247</sup> The delay in an employer's inquiry into an applicant's previous criminal history removes the chilling effect a criminal record may have on post-conviction employment, and ultimately encourages ex-offenders to seek employment.<sup>248</sup> More importantly, it humanizes the "ex-con" population who are often stigmatized as "unwanted" or "second-class citizen."<sup>249</sup>

Austin was the first municipality in Texas to adopt a Fair Chance Hiring policy<sup>250</sup> prohibiting employers from asking about criminal

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243. *Id.*

244. *Id.*

245. *Id.*; see Johnathan J. Smith, *Banning the Box But Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. CIV. RTS.-CIV. LIBERTIES. L. REV. 197, 215 (2014) [hereinafter *Banning the Box*] (describing a variety of factors and methods an employer may contemplate when reviewing a potential employee's criminal history). One example of factors a municipal employer may consider comes from the City of Baltimore's policy regarding evaluation of criminal history information. The City of Baltimore considers the following elements: the number and type of convictions; the seriousness of the crime(s) and sentence(s) imposed; how recently the conviction(s) occurred; any evidence of rehabilitation; and the specific conditions within the workplace. BUREAU OF THE BUDGET AND MGMT. RESEARCH, AM 237-1, POSITION OF TRUST 4 (2012), <https://bbmr.baltimorecity.gov/administrative-manual> [<https://perma.cc/7MWX-FM53>].

246. Gillin, *supra* note 240; see *Banning the Box*, *supra* note 245, at 216 n.109 (calling for further research into the effectiveness of ban the box measures relative to the hiring of individuals with criminal records).

247. See Gillin, *supra* note 240 (implying that because African-Americans are disproportionately represented with criminal backgrounds, they will be the most benefited group from banning the box).

248. See *id.* (arguing that the "ban the box" movement has helped the outcomes of people with records get employed).

249. *Id.*

250. AUSTIN, TEX., CITY CODE ch. 4-15 (2016).

convictions, until after the employer offers employment.<sup>251</sup> Austin allows a victim of an employer's breach of the Fair Chance Hiring policy an opportunity to file a complaint with the Equal Employment and Fair Housing Office within ninety days of the individual's knowledge of such breach.<sup>252</sup> Employers violating the ordinance are charged with a civil penalty of \$500, if they fail to cease the violation by the end of the tenth business day.<sup>253</sup> Such provisions help ensure fair opportunity for ex-offenders to obtain quality employment without immediately being hindered by a criminal record.

#### H. Create Incentives for Hiring Ex-Offenders

The federal program, Work Opportunity Tax Credit (WOTC), currently incentivizes the hiring of ex-offenders.<sup>254</sup> However, the IRS's definition of a qualified ex-felon limits the eligibility of those who may receive the benefits of the program.<sup>255</sup> The IRS's definition of ex-felon is too narrow, limiting the credit to only those hired individuals who were convicted of a felony or released in the past year.<sup>256</sup> Texas offers a limited state tax credit to corporations hiring ex-offenders.<sup>257</sup> Texas's tax credit program should be expanded to all employers hiring ex-

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251. Philip Gordon & Jennifer Mora, *Austin Becomes First City in Texas to 'Ban the Box'*, SOC'Y FOR HUMAN RES. MGMT. (Mar. 29, 2016), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/austin-becomes-first-city-in-texas-to-ban-the-box.aspx> [<https://perma.cc/TK7Q-SEMZ>]. As promising as this policy is, it is still fairly limited: the code only applies to an individual or entity employing at least fifteen individuals and excludes non-profit organizations. AUSTIN, TEX., CITY CODE ch. 4-15, §4-15-2(F) (2016).

252. AUSTIN, TEX., CITY CODE ch. 4-15, § 4-15-6(B) (2016).

253. *Id.* § 4-15-8(A). First time violations may instead receive a warning. *Id.*

254. LOUIS SARMIENTO, NORTHWESTERN LAW BLUHM LEGAL CLINIC, GOVERNMENT INCENTIVES FOR HIRING RETURNING PRISONERS 2 (2011), [https://www.law.northwestern.edu/legalclinic/prison/documents/Government\\_Sarmiento.pdf](https://www.law.northwestern.edu/legalclinic/prison/documents/Government_Sarmiento.pdf) [<https://perma.cc/26PP-UGCT>]. Ex-felons are one of the target groups whose employment can trigger a tax credit under the WOTC. 26 U.S.C. § 51(d)(1)(C) (2012).

255. 26 U.S.C. § 51(d)(1)(C) (2012) (defining a "qualified ex-felon" as an individual that is "certified by the designated local agency (A) as having been convicted of a felony under any statute of the United State or any State, and (B) as having a hiring date which is not more than 1 year after the last date on which such individual was so convicted or was released from prison").

256. *Id.* § 51(d)(4).

257. *State Tax Credits*, NAT'L HIRE NETWORK (2007), <http://www.hirenetwork.org/content/state-tax-credits> [<https://perma.cc/2VF4-APFQ>].

offenders and resemble the generous credits provided for in the California work opportunity tax credit statute.<sup>258</sup>

To incentivize the state to expand tax credit rewards for hiring ex-felons, consider an employed ex-offender can contribute upwards to \$9,000 a year in tax revenue<sup>259</sup> whereas the cost to house an inmate is close to \$30,000 a year.<sup>260</sup> Employment also helps reduce recidivism, which requires implementing policies that transform liabilities into assets—it requires a recognition that many ex-felons resort to recidivism simply because of the structural impediments to finding a job that pays a livable wage.<sup>261</sup> A policy incentivizing the hiring of ex-offenders transforms a liability into an asset and also turns the collateral consequences in a more productive direction when such an individual turns into a \$9,000 tax contributor opposed to a \$30,000 tax expenditure.

### I. *Protection Against Negligent Hiring Claims*

Some states impose tort liability on an employer for the wrongful acts committed by his or her employee where the plaintiff claims the employer knew the employee had a criminal record.<sup>262</sup> A court may impose liability on said employer for negligently hiring or supervising an employee with such a record.<sup>263</sup> However, some states have mitigated such liability by enacting negligent hiring statutes, restricting the use of

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258. See CAL. REV. & TAX CODE § 17053.34(a) (2015) (allowing for a tax credit equal to 50% of an ex-felon's qualified wages earned in the first year of employment).

259. BYRON JOHNSON, ET AL., BAYLOR INST. FOR STUDIES OF RELIGION SPECIAL REPORT, RECIDIVISM REDUCTION AND RETURN ON INVESTMENT: AN EMPIRICAL ASSESSMENT OF THE PRISON ENTREPRENEURSHIP PROGRAM 28 (2013)

260. Mike Green, *Five Bottom Line Reasons Why Employers Should Hire Ex-Felons*, HUFF POST (Aug. 21, 2015, 4:30 PM), [http://www.huffingtonpost.com/mike-green/five-bottom-line-reasons-\\_b\\_8021476.html](http://www.huffingtonpost.com/mike-green/five-bottom-line-reasons-_b_8021476.html) [<https://perma.cc/JJ28-XRWP>].

261. See Gilligan & Lee, *supra* note 216, at 147 (suggesting that “possible reasons for [recidivating] being the inability to find a job and looking for a quick way to ‘earn a few nickels’”); Green, *supra* note 260 (implying that along with employers, states should have an interest in ensuring ex-offenders have access to jobs garnering a livable wage).

262. Ferdinand S. Tinio, *Employer's Knowledge of Employee's Past Criminal Record as Affecting Liability for Employee's Tortious Conduct*, 48 A.L.R. § 2[a] (1979). See Stacy A. Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L. J. 1001, 1001 (2011) (“An employer may be liable if the injury was foreseeable because that employee had a conviction.”).

263. Tinio, *supra* note 262.

an employee's criminal history in a civil action.<sup>264</sup> Colorado's negligent hiring statute states:

(I) The nature of the criminal history does not bear a direct relationship to the facts underlying the cause of action; or (II) Before the occurrence of the act giving rise to the civil action, a court order sealed any record of the criminal case or the employee or former employee received a pardon; or (III) The record is of an arrest or charge that did not result in a criminal conviction; or (IV) The employee or former employee received a deferred judgment at sentence and the deferred judgment was not revoked.<sup>265</sup>

Legislation with these restrictions may mitigate an employer's fear of being held liable for the wrongful acts committed by an employee with a criminal record by creating a higher burden for establishing causation between an individual's criminal history and current alleged criminal act.<sup>266</sup> Such alleviation couples nicely with financial incentives that culminate in hiring ex-offenders in greater numbers.

#### J. *Provide Post-Conviction Housing*

In 1999, the United States Department of Justice launched a Reentry Partnership Initiative following the steady flow of entry to prison, then to streets, and back to prison.<sup>267</sup> The Urban Institute studied prisoners, 83% of whom were African-American, returning to Chicago.<sup>268</sup> The study found parolees returning to their families and homes were less likely to re-offend and return to prison.<sup>269</sup> Although most of the parolees in the study struggled with other major problems, familial reunification

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264. *See, e.g.* Tex. Civ. Prac. Rem. Code § 142.002(a) (2017) (preventing an employer from being subjected to liability for negligently hiring an employee merely because said employee had been convicted of a previous crime). However, Texas does hold an employer liable for negligent hiring when that employer knew or should have known of a conviction for a crime committed in a similar employment setting. *Id.* § 142.002(b).

265. COL. REV. STAT. ANN. § 8-2-201(2)(a) (2017); *see also* Thomas Ahearn, *New CO Law Gives Ex-Convicts More of a Chance to Find Jobs and Employers Less of a Chance of Liability from Negligent Hiring*, EMP. SCREENING RES. (March 31, 2010), <http://www.esrcheck.com/wordpress/2010/03/31/new-co-law-gives-ex-convicts-more-of-a-chance-to-find-jobs-and-employers-less-of-a-chance-of-liability-from-negligent-hiring> [<https://perma.cc/N69R-J6LX>] (noting that not many are familiar with this bill).

266. COL. REV. STAT. ANN. § 8-2-201(2)(a) (2017).

267. WALKER, *supra* note 186, at 305.

268. *Id.*

269. *Id.*



was the most important factor, when an ex-offender readjusts to their community.<sup>270</sup> The reentry program is “a common sense strategy,” however implementation of the federal program following release is ineffective.<sup>271</sup> The search for post-conviction employment and housing should begin while offenders are still behind bars.

Currently, Massachusetts, Hawaii, and Illinois do not release inmates that may become homeless.<sup>272</sup> The correctional departments’ specialized reentry units address each inmate’s needs as their release date nears.<sup>273</sup> Successfully coordinating ex-offender transition into a community requires planning and organization, as well as local partners: public housing authorities, non-profit organizations, and faith-based shelters.<sup>274</sup> Addressing the post-release housing challenge ex-offenders face is a difficult proposition; one proposal aims to address the low-need ex-offender population through justice-assisted supportive housing programs<sup>275</sup> and for the high-need population, to ensure access to rapid reentry housing in conjunction with rehabilitation programs.<sup>276</sup> Such reentry efforts focused on housing and tailored to an individual’s needs can reduce recidivism.<sup>277</sup> One study tracking a group of released

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270. *Id.*

271. Christopher Moraff, “Housing First” Helps Keep Ex-Inmates Off the Streets (and Out of Prison), NEXT CITY (July 23, 2014), <https://nextcity.org/daily/entry/housing-first-former-prisoners-homelessness> [<https://perma.cc/3G3X-NCHU>].

272. NINO RODRIGUEZ & BRENNER BROWN, VERA INST. OF JUSTICE, STATE SENTENCING & CORRECTIONS PROGRAM, PREVENTING HOMELESSNESS AMONG PEOPLE LEAVING PRISON 5 (2003), [https://www.prisonpolicy.org/scans/vera/209\\_407.pdf](https://www.prisonpolicy.org/scans/vera/209_407.pdf) [<https://perma.cc/F57M-BV9B>].

273. *Id.*

274. *Id.* at 5–6.

275. JOCELYN FONTAINE, WHAT WORKS COLLABORATIVE, EXAMINING HOUSING AS A PATHWAY TO SUCCESSFUL REENTRY: A DEMONSTRATION DESIGN PROCESS 10–11 (2013) <https://www.urban.org/sites/default/files/publication/24206/412957-Examining-Housing-as-a-Pathway-to-Successful-Reentry-A-Demonstration-Design-Process.PDF> [<https://perma.cc/2DQP-DCVE>] (discussing possibility of jurisdictions utilizing Section 8 Housing Choice Vouchers, in partnership with a variety of community stakeholders, to stabilize housing for released offenders)

276. *Id.* (recognizing high-need ex-offenders may suffer from increased risks of homelessness or drug abuse, requiring more comprehensive reentry treatment)

277. NATHAN JAMES, CONG. RES. SERV. OFFENDER REENTRY: CORRECTIONAL STATISTICS, REINTEGRATION INTO THE COMMUNITY, AND RECIDIVISM 15 (2015) <https://fas.org/sgp/crs/misc/RL34287.pdf> [<https://perma.cc/J9QT-DAT2>] (highlighting a number of individual needs a reentry program should address in order to reduce the likelihood of a released offender recidivating).

inmates in Ohio<sup>278</sup> showed a reduced rate of recidivism after inmates transitioned from incarceration to Ohio's Halfway House program.<sup>279</sup> Addressing post-release housing needs, in particular for African-American men, is an effective method of reducing rates of recidivism.

#### K. *Lifting Bans on Other Equality Limitations*

Ex-offenders may be barred from public benefits, student loans, and voting.<sup>280</sup> Nearly twenty years after passing the Anti-Drug Abuse Act that disqualified drug offenders from receiving public benefits, most states are opting out of this exclusion.<sup>281</sup> In 2015, Texas voted to make those offenders with felony drug convictions eligible to receive food stamps.<sup>282</sup> While this is a step in the right direction to provide basic human needs, the benefits are limited to first-time offenders and those in compliance with their terms of parole.<sup>283</sup>

The decision to enroll in college represents a profound opportunity for many Americans, yet the door remains closed for ex-offenders.<sup>284</sup> The Souder Amendment requires the Department of Education to inquire into an applicant's drug conviction on their Application for Federal Student

278. The treatment group was 61% African-American and 89% male. Lowenkamp and Latessa 2002-2007, *WHAT WORKS*, <https://whatworks.csgjusticecenter.org/evaluation/lowenkamp-and-latessa-2002-2007> [<https://perma.cc/UC7U-SNSP>] (last visited Apr. 3, 2018).

279. *Id.* (showing a 6% to 9% decrease in recidivism for moderate- and high-risk offenders treated through the Ohio halfway house program). *See generally* DEP'T OF REHABILITATION & CORRECTION, BUREAU OF COMMUNITY SANCTIONS, *HWH PROGRAM DIRECTORY* (2015) (detailing the various regional halfway house programs across the state of Ohio).

280. *Some States Lift Ban on Benefits for People Convicted of Drug Crimes*, PARTNERSHIP FOR DRUG-FREE KIDS (Sep. 30, 2015), <http://www.drugfree.org/news-service/states-lift-ban-benefits-people-convicted-drug-crimes/> [<https://perma.cc/H7LM-FEZ8>].

281. *Id.*

282. Texas Senate Bill 200, § 2.29, 84th Legislature, R.S.; TEX. HUM. RESOURCES § 33.018(a) (West Supp. 2017) (exempting individuals from complete ineligibility as described in 21 U.S.C. § 862a(a)(2));

283. TEX. HUM. RESOURCES § 33.018(b) (West Supp. 2017); *see* Liz Crampton, *Some Convicted Felons Eligible for Food Stamps*, TEX. TRIB. (June 25, 2016, 6:00 AM), <https://www.texastribune.org/2015/06/25/some-convicted-felons-now-eligible-food-stamps/> [<https://perma.cc/6NR7-HCGN>] (referencing the state of Texas which allows offenders who complete their sentence eligible for food stamps, but a violation leads to a two year disqualification).

284. *See* AMY E. HIRSCH ET AL., *CTR. FOR LAW AND SOC. POLICY, EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS* 5 (2002), [http://www.clasp.org/resources-and-publications/files/every\\_door\\_closed.pdf](http://www.clasp.org/resources-and-publications/files/every_door_closed.pdf) [<https://perma.cc/H7SC-SBP2>] (emphasizing the necessity of education for low-income ex-offenders and the barriers limiting access to education).

Aid (FAFSA).<sup>285</sup> For third-time offenders, there is an indefinite ineligibility on receiving financial aid.<sup>286</sup> Because most offenders are poor or indigent, the lack of federal funding essentially precludes any chance at higher education.<sup>287</sup> Access to education is essential to increasing one's self worth and provides a legal and productive option for an ex-offender attempting to avoid re-entering the cycle of criminal activity.<sup>288</sup> The belief that non-violent drug offenders should continue to be punished after re-entering society is counter-productive.<sup>289</sup> Because there is no rational relationship between denying ex-offenders access to student loans and deterring crime, any restrictions to receiving federal student loans should be removed, thereby encouraging ex-offenders to pursue an education and become productive members of society.<sup>290</sup>

## V. CONCLUSION

For over a century, the dissemination of violent atrocities allegedly committed by African-Americans permeates and conditions society to perceive African-Americans as a threat.<sup>291</sup> Subsequently, instead of addressing this unfounded fear, the destructive misperception fueled legislative action for decades. Although the Civil Rights Act was a major

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285. 20 U.S.C. § 1091(r) (2012).

286. *Id.*

287. See HIRSCH ET AL., *supra* note 284, at 87 (implying that because financial aid is unavailable for third-time offenders, it becomes almost impossible for ex-offenders to obtain the means to afford higher education).

288. *Id.* at 86 (emphasizing the importance of education for ex-offenders in today's society).

289. See *id.* (opining that the removal of post-conviction restrictions because it disproportionately "double punishes" a class of people).

290. *Id.* at 5.

291. See Tanya Basu, *Why Americans See Black Men as a Threat: We Don't Just See Skin*, INVERSE CULTURE (July 12, 2016), <https://www.inverse.com/article/18159-science-of-racism-against-black-americans-police-shootings-research> [<https://perma.cc/ND8M-R8E7>] (explaining that Americans' fear of black men dates back since the "Great Migration saw southern African-American relocate to northern cities, triggering 'white flight.'"); see also Rev. Dr. Susan K. Smith, *Whites and the Fear Caused by White Supremacy*, HUFF POST: BLOG (Dec. 2, 2015, 1:53 PM), [https://www.huffingtonpost.com/rev-dr-susan-k-smith/whites-and-the-fear-cause\\_b\\_8885126.html](https://www.huffingtonpost.com/rev-dr-susan-k-smith/whites-and-the-fear-cause_b_8885126.html) [<https://perma.cc/NA27-KCBB>] (explaining that black people have been traumatized and perhaps white people fear black people because they may feel like black people will "heap upon them what they have heaped upon black people.").

step toward equality for the African-American community,<sup>292</sup> systematic barriers to progress sparked protests in Ferguson, Missouri,<sup>293</sup> and were later substantiated by Department of Justice findings.<sup>294</sup>

Although the Thirteenth Amendment abolished slavery<sup>295</sup> and the Civil Rights Act encouraged equality,<sup>296</sup> the gains are offset by misperceptions of African-Americans.<sup>297</sup> When so many opportunities, benefits, and punishments are disparately affected based on one's immutable racial trait, the collateral consequences of conviction are recurring examples of injustice.<sup>298</sup> Not only does this become a social problem, but a constitutional problem as the American legal system weighs heavily on precedent,<sup>299</sup> further supporting what was once said by Martin Luther King Jr., "injustice anywhere is a threat to justice everywhere."<sup>300</sup>

Criminal punishment is generally based on four theories: deterrence,

292. See Abigail Thernstrom & Stephan Thernstrom, *Black Progress: How Far We've Come and How Far We Have To Go*, BROOKINGS (Mar. 1, 1998), <https://www.brookings.edu/articles/black-progress-how-far-weve-come-and-how-far-we-have-to-go/> [https://perma.cc/2EJJ-8YFC] (reporting that in 1964 when the Civil Rights Act was passed, only 18% of whites claimed to have black friends; after its passage, that number increased to 86%).

293. Sandhya Somashekhar et al., *Black and Unarmed*, WASH. POST (Aug. 8, 2015), [http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/?utm\\_term=.73845b194aff](http://www.washingtonpost.com/sf/national/2015/08/08/black-and-unarmed/?utm_term=.73845b194aff) [https://perma.cc/9EXA-BVVR].

294. CIV. RIGHTS DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), <https://www.justice.gov/crt/file/883296/download> [https://perma.cc/KE9B-RHDM].

295. U.S. CONST. amend. XIII.

296. 42 U.S.C. § 2000e (2012).

297. See Jamilah King, *7 Ways Black People Still Aren't Free in America*, MIC (July 1, 2016), <https://mic.com/articles/147658/7-ways-black-people-still-aren-t-free-in-america#.j4Q8nrRQ5> [https://perma.cc/928R-FCAV] (providing several reasons why African-Americans are still not entirely "free" today).

298. See *End the War on Black People*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/end-war-on-black-people/> [https://perma.cc/W3WG-M4HA] (last visited Oct. 16, 2017) (outlining the ways African-Americans face injustice in America).

299. Toni M. Fine, *Excerpt Reproduced from American Legal Systems: A Resource and Reference Guide*, LEXIS NEXIS, <https://www.lexisnexis.com/en-us/lawschool/pre-law/intro-to-american-legal-system.page> [https://perma.cc/7JGT-5B58] (last visited Oct. 1, 2017).

300. Nicole Hammons, *"Injustice Anywhere Is a Threat to Justice Everywhere,"* U.S. HISTORY SCENE, <http://ushistoryscene.com/article/birmingham-manifesto/> [https://perma.cc/89SV-2QXE] (last visited Oct. 1, 2017).

retribution, rehabilitation and incapacitation.<sup>301</sup> Most of America's criminal justice policies are rooted in deterrence, incapacitation, and retribution, which contribute to establishing the U.S. as the nation with the highest rate of incarceration.<sup>302</sup> Shifting the criminal justice theory to rehabilitation, with emphasis on integrating ex-offenders into society, can limit collateral consequences of incarceration and reduce recidivism rates.<sup>303</sup> It is pertinent to remember that ex-offenders are human; equipping them with transferrable employable skills enables them to escape the trends of recidivism and subsequently benefit society as a whole.

Ex-offenders, by definition, served their time. Therefore, ex-offenders should not be punished with collateral consequences following the successful completion of their sentence. Without skills and opportunities that provide an alternative to recidivism, the cyclical criminalization of African-American men will perpetuate. Until public officials recognize the effect of short-sighted enhancements of particular (and unnecessary) criminal laws that have a disparate impact, African-Americans will continue to suffer social, economic, and political losses.

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301. David J. Shestokas, *The Purpose of Criminal Punishment*, SHESTOKAS.COM (Oct. 25, 2012), <http://www.shestokas.com/general-law/criminal-law/the-purpose-of-criminal-punishment> [<https://perma.cc/5YQD-UBFV>].

302. *Id.*

303. Norway's prison system exemplifies the rehabilitation model, relying on a restorative justice model that addresses the harm caused by a crime. The focus on healing, rather than punishment, contributes to a recidivism rate that is only one-third of the U.S. rate. See Christina Sterbenz, *Why Norway's Prison System Is So Successful*, BUSINESS INSIDER (Dec. 11, 2014, 1:31 PM), <http://www.businessinsider.com/why-norways-prison-system-is-so-successful-2014-12> [<https://perma.cc/9AV7-D582>] (indicating Norway's recidivism rate is 20% compared to the U.S. at 76%).