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# IRON SHACKLES TO INVISIBLE CHAINS: BREAKING THE BINDS OF COLLATERAL CONSEQUENCES

Artika Tyner\* and Darlene Fry\*\*

## ABSTRACT

*Mass incarceration has a far-reaching impact when an estimated 70 million, 1 in 3, adults have a criminal record. The impact of mass incarceration is exacerbated due to collateral consequences. Collateral consequences can be defined as hidden sanctions which emerge automatically at the onset of a criminal conviction. They are referred to as “hidden” because they are not formally quantifiable in a sentence or imposed penalty. Due to the disproportionate rate in which African-Americans are incarcerated, collateral consequences have a profound impact by limiting access to jobs, professional licensure, and restricting access to the ladder of economic mobility.*

**Keywords:** collateral consequences; criminal justice; slavery; mass incarceration; employment; equity

## I. INTRODUCTION

The 400 Year Commemoration<sup>1</sup> marks a clarion call to action, which begins with a time to pause and reflect to effectively address

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the criminal justice challenges of the 21st Century in the United States.<sup>2</sup> Pausing starts with reflecting on the legacy of slavery, and its unrelenting presence still felt today.<sup>3</sup> Reflecting requires a critical examination of the Transatlantic Slave Trade's history,<sup>4</sup> which was rooted in the ideology of white supremacy<sup>5</sup> and became operationalized through the force of law and the essence of policy.<sup>6</sup>

The racial hierarchy and related injustices associated with slavery should have ended with the abolishment of slavery in 1865 (codified in the Thirteenth Amendment);<sup>7</sup> however, the Exception Clause only further exacerbated the denial of equal citizenship and impeded access of unalienable human rights to African-Americans.<sup>8</sup> The Exception Clause created a new form of slavery through convict leasing.<sup>9</sup> This laid the foundation for expanding the legacy of

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1. The first kidnapped and enslaved Africans arrived on the shores of Jamestown, Virginia in August of 1619. *See generally The 1619 Project*, N.Y. TIMES MAG., <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> [<https://perma.cc/X6FA-TXXK>] (last updated Sept. 4, 2019) (providing an overview of the Transatlantic Slave Trade's history).
2. *See infra* Part V.
3. *See infra* Part II.
4. *See* V. P. Franklin, *Introduction: Ending the Transatlantic Slave Trade: Bicentennial Research, Reflections, and Commemorations*, 93 J. AFR. AM. HIST. 471, 471–73 (2008).
5. *See Slavery by Another Name: White Supremacy and Terrorism*, PBS, <http://www.pbs.org/tpt/slavery-by-another-name/themes/white-supremacy/> [<https://perma.cc/2UNP-HH5R>] (last visited Apr. 1, 2020) (“White supremacy is the belief that white people are superior to others because of their race.”). According to Rev. Dr. Martin Luther King, Jr., “the doctrine of white supremacy was imbedded in every textbook and preached in practically every pulpit. It became a structural part of the culture.” MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 75 (1967).
6. *Cf.* Rodney Peterson, *The Policy Process Life Cycle*, 44 EDUCAUSE REV. 74, 74–75 (2009) (discussing the life cycle of implementing policies and political actors using positions of influence to force action).
7. U.S. CONST. amend. XIII (“Neither 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.”).
8. *See United States Constitution: Exceptions Clause*, CONST. L. REP., <http://constitutionallawreporter.com/article-03-section-02/exceptions-clause/> [<https://perma.cc/65PX-DLVV>] (last visited Apr. 1, 2020).
9. *See* Flores A. Forbes, *How a 13th Amendment Loophole Created America's Carceral State*, CRIME REP. (June 3, 2019), <https://thecrimereport.org/2019/06/03/539754/> [<https://perma.cc/UY63-FJ2F>].

America's racial apartheid<sup>10</sup> and allowing for a continuation of economic exploitation of the labor of African-Americans.<sup>11</sup>

This period in the late 1860s can be characterized as “slavery by another name” due to the chains of oppression and marginalization being made readily accessible in a new form of labor.<sup>12</sup> African-Americans freed from the bondage of slavery were drawn back into its firm grip.<sup>13</sup> They were convicted of crimes outlined in Black Codes, like vagrancy for not having employment.<sup>14</sup> Hence, slavery suddenly morphed into a new system—convict leasing.<sup>15</sup> The remnants of the past are still present with the emergence of mass incarceration and its disparate impact on the African-American

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10. Cf. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 1, 8, 13 (1993) (explaining how institutional segregation has led to an American racial apartheid).
  11. Cf. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880*, at 156–58 (Henry Louis Gates, Jr., ed., 2007) (explaining the beginning of economic disparities between black people and white people during Reconstruction).
  12. See *infra* notes 13–15 and accompanying text.
  13. See Forbes, *supra* note 9.
  14. See, e.g., *Jim Crow Laws*, NAT'L MUSEUM AM. HIST., <https://americanhistory.si.edu/brown/history/1-segregated/jim-crow.html> [<https://perma.cc/XUG8-8U4K>] (last visited Apr. 1, 2020).

It shall be unlawful for a negro and white person to play together or in company with each other in any game of cards or dice, dominoes or checkers. Birmingham, Alabama, 1930. Marriages are void when one party is a white person and the other is possessed of one-eighth or more negro, Japanese, or Chinese blood. Nebraska, 1911. Separate free schools shall be established for the education of children of African descent; and it shall be unlawful for any colored child to attend any white school, or any white child to attend a colored school. Missouri, 1929. All railroads carrying passengers in the state (other than street railroads) shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the cars by a partition, so as to secure separate accommodations. Tennessee, 1891.

- Id.* (outlining examples of Black Codes).
15. See Forbes, *supra* note 9.

community.<sup>16</sup> Studies show that race matters, as there are more African-American males under the custody of our penal system today than who were enslaved during the 1800s.<sup>17</sup>

The impact of mass incarceration is intensified by collateral consequences.<sup>18</sup> Collateral consequences are defined as hidden sanctions that emerge automatically at the onset of a criminal conviction.<sup>19</sup> They are referred to as “hidden” because they are not formally quantifiable in a sentence or imposed penalty.<sup>20</sup> Due to the disproportionate rate in which African-Americans are incarcerated,<sup>21</sup> collateral consequences have a profound impact by limiting access to jobs and professional licensure,<sup>22</sup> thereby restricting access to the ladder of economic mobility.<sup>23</sup>

Part II of this Article explores the evolution from forced slave labor to convict leasing to the tangled web of mass incarceration.<sup>24</sup> Part III examines how collateral consequences impact the African-American community’s economic mobility and restrict its access to financial liberation.<sup>25</sup> Part IV outlines recommendations for policy changes.<sup>26</sup> Part V concludes by summarizing the findings of this Article.<sup>27</sup>

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16. See Drew Kann, *5 Facts Behind America’s High Incarceration Rate*, CNN (Apr. 21, 2019, 3:50 PM), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html> [<https://perma.cc/46SZ-K5FQ>].
  17. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 175 (2010).
  18. See Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 *GEO. J. ON POVERTY L. & POL’Y* 299, 320–22 (2005).
  19. See U.S. COMM’N ON HUMAN RIGHTS, *COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES* 9 (2019).
  20. See *id.* at 11.
  21. “At year-end 2017, the imprisonment rate for sentenced black males (2,336 per 100,000 black male U.S. residents) was almost six times that of sentenced white males (397 per 100,000 white male U.S. residents).” BUREAU OF JUSTICE STATISTICS, *NCJ 252156, PRISONERS IN 2017* (Apr. 2019).
  22. Natalie Goulette & James Frank, *Examining Criminal Justice Practitioners’ Views on Collateral Consequences Policy*, 43 *AM. J. CRIM. JUST.* 724, 726 (2017).
  23. See *infra* Part III.
  24. See *infra* Part II.
  25. See *infra* Part III.
  26. See *infra* Part IV.
  27. See *infra* Part V.

## II. EVOLUTION FROM SLAVERY TO MASS INCARCERATION

In 1619, the first enslaved Africans were brought to Jamestown, Virginia, where they became a means of exploited production, indispensable builders of the future of our nation, and a source of unpaid labor.<sup>28</sup> The year 2019 marked the 400 Year Commemoration of their arrival and the embodiment of the horrors of the Transatlantic slave trade.<sup>29</sup> “The trans-Atlantic slave trade, which began as early as the 15th century, introduced a system of slavery that was commercialized, racialized and inherited. Enslaved people were seen not as people at all but as commodities to be bought, sold and exploited.”<sup>30</sup> In capturing this historic moment, “Ghana’s President Nana Akufo-Addo declared and formally launched the ‘Year of Return, Ghana 2019’ for Africans in the Diaspora” to pay homage to enslaved ancestors, foster a connection to the continent, and unite Africans of the Diaspora.<sup>31</sup>

The 400 Year Commemoration reflects the long history of human rights violations experienced by enslaved Africans and their descendants.<sup>32</sup> The end appeared to be within reach with the issuance of the Emancipation Proclamation (the Proclamation) in 1863 by President Abraham Lincoln.<sup>33</sup> The Proclamation declared “that all persons held as slaves” within the Southern States (which seceded

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28. See Zoë Jackson, *With ‘Week of Resilience,’ Minneapolis Events to Mark 400 Years Since Start of Slave Trade*, STAR TRIB. (Aug. 15, 2019, 9:42 PM), <http://www.startribune.com/minneapolis-to-commemorate-400-years-of-slave-trade/545715012/> [https://perma.cc/L97D-RVWB].
  29. See Kelley Fanto Deetz, *400 Years Ago, Enslaved Africans First Arrived in Virginia*, NAT’L GEOGRAPHIC (Aug. 13, 2019), <https://www.nationalgeographic.com/history/magazine/2019/07-08/virginia-first-africans-transatlantic-slave-trade/> [https://perma.cc/7NHR-YF2P].
  30. Mary Elliott & Jazmine Hughes, *400 Years After Enslaved Africans Were First Brought to Virginia, Most Americans Still Don’t Know the Full Story of Slavery*, N.Y. TIMES MAG. (Aug. 19, 2019), <https://www.nytimes.com/interactive/2019/08/19/magazine/history-slavery-smithsonian.html> [https://perma.cc/U738-9CS8].
  31. Benjamin Tetteh, *2019: Year of Return for African Diaspora*, AFR. RENEWAL, Dec. 2018–Mar. 2019, at 20, [https://www.un.org/africarenewal/sites/www.un.org.africarenewal/files/AR%2032.3\\_English.pdf](https://www.un.org/africarenewal/sites/www.un.org.africarenewal/files/AR%2032.3_English.pdf) [https://perma.cc/MW5T-UVGZ].
  32. See *400 Years of Perseverance 1619–2019*, ASS’N FOR STUDY AFR. AM. LIFE & HIST., <https://asalh.org/400-years/> [https://perma.cc/M37D-W5UB] (last visited Apr. 1, 2020).
  33. See *The Emancipation Proclamation*, NAT’L ARCHIVES, <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation> [https://perma.cc/W9FG-BC9W] (last updated Apr. 17, 2019).

from the Union) “are, and henceforward shall be free.”<sup>34</sup> However, there was still a long walk to freedom with many more hills to climb, even today.<sup>35</sup> The Thirteenth Amendment served as an initial step towards the abolishment of the institution of slavery, but the new challenges of incarceration and convict leasing emerged.<sup>36</sup>

#### A. *Thirteenth Amendment and the Exception Clause*

In teaching U.S. History, our educational system falsely instructs that the Proclamation freed the slaves.<sup>37</sup> This Executive Order applied to enslaved Africans in the seceded Southern States.<sup>38</sup> “The [P]roclamation declared ‘that all persons held as slaves’ within the rebellious states ‘are, and henceforward shall be free.’”<sup>39</sup> The Proclamation came almost three years into the Civil War.<sup>40</sup> In actuality, the Thirteenth Amendment was what later freed those bound in slavery and involuntary servitude.<sup>41</sup> However, the language in the Exception Clause—“except as a punishment for crime whereof the party shall have been duly convicted”<sup>42</sup>—all but reenslaved those thought to be freed.<sup>43</sup> This fourteen-word exclusion provided leeway for the breaching of the Amendment by the Southern States who never fully agreed to end their subjugation of blacks as mere chattel and instruments of production.<sup>44</sup>

The United States Constitution divided the duty to protect between the federal government and the states, placing most of the burden on the individual states.<sup>45</sup> The states were given the powers to be

34. *Id.*

35. *See infra* Sections II.A–B.

36. *See infra* Sections II.A–B.

37. *See* Melinda D. Anderson, *What Kids Are Really Learning About Slavery*, ATLANTIC (Feb. 1, 2019), <https://www.theatlantic.com/education/archive/2018/02/what-kids-are-really-learning-about-slavery/552098/> [<https://perma.cc/J7V5-HEGN>].

38. *See The Emancipation Proclamation*, *supra* note 33.

39. *Id.*

40. *Id.*

41. *See The 13th Amendment to the U.S. Constitution: Abolition of Slavery*, NAT’L ARCHIVES, <https://www.archives.gov/historical-docs/13th-amendment> [<https://perma.cc/2969-PA8F>] (last updated Sept. 8, 2016).

42. U.S. CONST. amend. XIII, § 1.

43. *See* Becky Little, *Does an Exception Clause in the 13th Amendment Still Permit Slavery?*, HIST. (Oct. 2, 2018), <https://www.history.com/news/13th-amendment-slavery-loop-hole-jim-crow-prisons> [<https://perma.cc/GWS4-ECX7>].

44. *See id.*

45. *See* U.S. CONST. art. IV, § 4; *see* James Madison, *The Federalist No. 10*, in THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 167, 168–69 (David Wootton ed., 2003).

“immediate and visible guardian[s] of life and property.”<sup>46</sup> The process of guardianship was done through the administration of civil and criminal courts, as well as other methods of law enforcement.<sup>47</sup> Only in extreme circumstances would the duty of the federal government supersede that of the states.<sup>48</sup> States had the guardianship of slaves as their duty and were bound to keep this status.<sup>49</sup>

Amending the Constitution by the Thirteenth Amendment to abolish slavery could have been a state-level extreme circumstance.<sup>50</sup> “Radical Congressman Isaac Arnold equated the Thirteenth Amendment with the creation of ‘a new nation’ where ‘equality before the law is to be the great cornerstone.’”<sup>51</sup> The Thirteenth Amendment made the end of slavery permanent and irrevocable.<sup>52</sup>

History demonstrates what is signed into law and what occurs in the populace are two starkly different situations.<sup>53</sup> “With the Thirteenth Amendment’s ratification in December 1865, African Americans were guaranteed the right of habeas corpus, which had previously been denied to them under fugitive Slave Law.”<sup>54</sup> Enslaved Africans were technically freed, “[h]owever, this change seemed to have little effect on the treatment Southern blacks received from whites, many of whom seemed determined to resurrect the violent customs of the mastery over Black bodies despite its legal demise.”<sup>55</sup> In hindsight, the Exclusion Clause of the Thirteenth Amendment could be viewed as an attempt to live between the margins of freeing people while letting their former owners maintain an alternative economic linkage to them.<sup>56</sup>

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46. THE FEDERALIST No. 17 (Alexander Hamilton).

47. See, e.g., Children’s Bureau, *Understanding Child Welfare and the Courts*, CHILD WELFARE INFO. GATEWAY 1 (Oct. 2016), <https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf> [<https://perma.cc/MB36-KYA8>].

48. See *Problems Raised by Concurrency*, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-2/problems-raised-by-concurrency> [<https://perma.cc/YLA9-EQQE>] (last visited Apr. 1, 2020).

49. See *supra* notes 45–46 and accompanying text.

50. See *infra* notes 51–52 and accompanying text.

51. CAROLE EMBERTON, *BEYOND REDEMPTION: RACE, VIOLENCE, AND THE AMERICAN SOUTH AFTER THE CIVIL WAR* 21 (2013).

52. See U.S. CONST. amend. XIII, § 1.

53. See *infra* notes 54–63 and accompanying text.

54. EMBERTON, *supra* note 51, at 23.

55. *Id.*

56. See Shaun King, *How the 13th Amendment Really Didn’t Abolish Slavery, but Let It Live on in U.S. Prisons*, N.Y. DAILY NEWS (Sept. 21, 2016, 5:51 PM),



A critical presidential leadership change may have irrevocably shifted the implementation and enforcement of the Thirteenth Amendment.<sup>57</sup> Upon the assassination of President Lincoln, the reconstruction of the United States was in the hands of new President Andrew Johnson, the former Governor of Tennessee who very briefly served as Vice President before ascending to the nation's highest office.<sup>58</sup> "Once in office, Johnson focused on quickly restoring the Southern states to the Union. He granted amnesty to most former Confederates and allowed the rebel states to elect new governments."<sup>59</sup>

As Southern legislatures reconstructed their state laws, they focused on the Exclusion Clause of the Thirteenth Amendment.<sup>60</sup> "These governments, which often included ex-Confederate officials, soon enacted black codes, measures designed to control and repress the recently freed slave population."<sup>61</sup> "Although the law had replaced the lash as both symbol and substance of the region's political and social institutions, compulsion in its various forms remained at the heart of things."<sup>62</sup> "But although the freedman is no longer considered the property of the individual master, he is considered the slave of society, and all independent state legislation will share the tendency to make him such."<sup>63</sup>

Many historical accounts demonstrate that the beliefs of those in the South remained unchanged about how they viewed the role of blacks in the community.<sup>64</sup> Those in the South constructed the framework for continued control over blacks as a safety concern.<sup>65</sup> "With their labor no longer organized by the intelligence and capital of [their] master, whites believed freedpeople had fallen victim to their own propensity for vice and crime."<sup>66</sup> "Citizen reported crimes of the time included, 'all kinds of misdemeanors' such as being

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<https://www.nydailynews.com/news/national/king-13th-amendment-didn-abolish-slavery-article-1.2801218> [<https://perma.cc/N25G-EVT8>].

57. See *infra* notes 58–59 and accompanying text.

58. See *Andrew Johnson*, HIST. (Oct. 29, 2009), <https://www.history.com/topics/us-presidents/andrew-johnson> [<https://perma.cc/P489-8WAK>].

59. *Id.*

60. See *infra* notes 61–70 and accompanying text.

61. *Andrew Johnson*, *supra* note 58.

62. EMBERTON, *supra* note 51, at 64.

63. W.E.B. DU BOIS, *supra* note 11, at 110.

64. See *infra* notes 65–70 and accompanying text.

65. See EMBERTON, *supra* note 51, at 31–34.

66. *Id.* at 31.

drunk, not working, and being disrespectful of whites.”<sup>67</sup> Disrespectful acts attributed to blacks were:

[E]xhibited in a variety of ways, including asking for higher wages or time off, refusing to sign a work contract, leaving the plantation altogether, . . . ‘talking back’ to their employers[, and r]efus[ing] to move off the sidewalk or tip a hat to a white person, as was the custom before emancipation[.]<sup>68</sup>

Any of these acts could result in criminal sanctions and serve as an entry point into the penal system.<sup>69</sup> Black Codes, while not in effect today, manifested a persistent intention to see African-Americans as criminals.<sup>70</sup>

### B. Mass Incarceration

The United States has been described as the incarceration capital of the world.<sup>71</sup> With only about 5% of the world’s population, the United States incarcerates over 20% of the world’s prison population.<sup>72</sup> There are nearly 2.3 million people incarcerated in the United States.<sup>73</sup> The War on Drugs and punitive criminal justice policies gave rise to this rate of incarceration over the past forty years.<sup>74</sup>

In 1972, 161 U.S. residents were incarcerated in prisons and jails per 100,000 population; by 2007, that rate had more than quintupled to a peak of 767 per 100,000. From its high

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67. *Id.*

68. *Id.*

69. *See id.* at 45.

70. *See supra* notes 60–69 and accompanying text.

71. Drew Kahn, *5 Facts Behind America’s High Incarceration Rate*, CNN (Apr. 21, 2019, 3:50 PM), <https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html> [<https://perma.cc/CF2-WP3N>].

72. Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate than Any Other Country*, WASH. POST (July 7, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/> [<https://perma.cc/2BYU-AYD3>].

73. AM. CIVIL LIBERTIES UNION, *BACK TO BUSINESS: HOW HIRING FORMERLY INCARCERATED JOB SEEKERS BENEFITS YOUR COMPANY 4* (2017) [hereinafter *BACK TO BUSINESS*].

74. *See* NAT’L RESEARCH COUNCIL OF THE NAT’L ACAD., *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 70* (Jeremy Travis et al. eds., 2014).

point in 2009 and 2010, the population of state and federal prisoners declined slightly in 2011 and 2012. Still, the incarceration rate, including those in jail, was 707 per 100,000 in 2012, more than four times the rate in 1972.<sup>75</sup>

In addition, race matters when there are more African-American males under the custody of our penal system than who were enslaved during the 1800s.<sup>76</sup> “African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, and [sic] they are more likely to experience lengthy prison sentences.”<sup>77</sup> “In 2016, black Americans comprised 27% of all individuals arrested in the United States—double their share of the total population.”<sup>78</sup>

More than one in four people arrested for drug law violations in 2015 was black, although drug use rates do not differ substantially by race and ethnicity and drug users generally purchase drugs from people of the same race or ethnicity. For example, the ACLU found that blacks were 3.7 times more likely to be arrested for marijuana possession than whites in 2010, even though their rate of marijuana usage was comparable.<sup>79</sup>

Racial disparities are also present in the arrest rates of African-American youth.<sup>80</sup> “Black youth accounted for 15% of all U.S. children yet made up 35% of juvenile arrests in [2016].”<sup>81</sup>

Additionally, “African-American adults are 5.9 times as likely to be incarcerated than whites and Hispanics are 3.1 times as likely.”<sup>82</sup> “[M]ore than half of the prison population in about 12 states is black, and African Americans can be between 5 and 10 times as likely to be

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75. *Id.* at 33.

76. Sarah Childress, *Michelle Alexander: “A System of Racial and Social Control”*, PBS (Apr. 29, 2014), <https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/> [<https://perma.cc/WJ8W-8G9Y>].

77. THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (Mar. 2018) [hereinafter SENTENCING PROJECT REPORT ON RACIAL DISPARITIES].

78. *Id.*; see also U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2016, at 2 (2017).

79. SENTENCING PROJECT REPORT ON RACIAL DISPARITIES, *supra* note 77, at 3–4.

80. *See id.* at 2.

81. *Id.*

82. *Id.* at 1.

incarcerated as whites because they are stopped, ticketed, and arrested by the police at higher rates.”<sup>83</sup> “African Americans were incarcerated in local jails at a rate 3.5 times that of non-Hispanic whites in 2016”.<sup>84</sup> In addition to racial disparities in incarceration rates, African-Americans are more likely than whites to be charged “with crimes that carry heavier sentences.”<sup>85</sup> For example, in the federal system, black males receive sentences that “are nearly 20 percent longer than those imposed on white males convicted of similar crimes.”<sup>86</sup> Additionally, African-American offenders are sentenced to life without parole for nonviolent offenses at a rate that is more than four times greater than that of white offenders.<sup>87</sup>

Furthermore, recent trends show a sharp increase in the number of women incarcerated.<sup>88</sup> “Between 1980 and 2017, the number of incarcerated women increased by more than 750%, rising from a total of 26,378 in 1980 to 225,060 in 2017.”<sup>89</sup> Moreover, incarceration directly impacts family dynamics because over 5 million children have had an incarcerated parent.<sup>90</sup> Children of incarcerated parents are five times more likely to go to prison during their lifetime than children who have not had an incarcerated parent.<sup>91</sup> If parental incarceration could increase the likelihood of future incarceration for children, “then it creates second generation costs that are manifested in a higher rate of future crime.”<sup>92</sup> “[1] in 9 African American children (11.4%), 1 in 28 Hispanic children (3.5%) and 1 in 57 white children (1.8%) have an incarcerated parent.”<sup>93</sup> The culmination of

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83. MARLYSA D. GAMBLIN, MASS INCARCERATION: A MAJOR CAUSE OF HUNGER 1, 4 (2018), <https://www.bread.org/sites/default/files/downloads/briefing-paper-mass-incarceration-february-2018.pdf> [<https://perma.cc/7VYH-S93J>].

84. See SENTENCING PROJECT REPORT ON RACIAL DISPARITIES, *supra* note 77, at 6.

85. See *id.* at 7, 13.

86. AM. CIVIL LIBERTIES UNION, RACIAL DISPARITIES IN SENTENCING 1 (Oct. 27, 2014).

87. See AM. CIVIL LIBERTIES UNION, A LIVING DEATH: LIFE WITHOUT PAROLE FOR NONVIOLENT OFFENSES 6 (Nov. 2013).

88. See THE SENTENCING PROJECT, INCARCERATED WOMEN AND GIRLS 1 (June 6, 2019).

89. *Id.*

90. See THE ANNIE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES, AND COMMUNITIES 1 (Apr. 2016).

91. See CHARLENE WEAR SIMMONS, CHILDREN OF INCARCERATED PARENTS 1, 6 (Mar. 2000), <https://files.eric.ed.gov/fulltext/ED444750.pdf> [<https://perma.cc/W2N7-5ADH>].

92. Michael McLaughlin et al., *The Economic Burden of Incarceration in the U.S.* 13 (Concordance Inst. for Advancing Soc. Justice, Working Paper No. CI072016, 2016).

93. See *Children and Families of the Incarcerated Fact Sheet*, NAT’L RESOURCE CTR. ON CHILD. & FAMILIES INCARCERATED, <https://nrccfi.camden.rutgers.edu/files/nrccfi-fact-sheet-2014.pdf> [<https://perma.cc/2FJ8-FFY9>] (last visited Apr. 1, 2020).

this data illustrates the societal impact of incarceration on those who have contact with the criminal justice system, their families, their community, and society at large.<sup>94</sup>

Incarceration also has a long-term economic impact.<sup>95</sup> It is a burden on the national budget when imprisonment costs an average of \$31,000 per offender, and in some states costs over \$60,000.<sup>96</sup> In many instances, this allocation exceeds the average cost of higher education, vocational training, and job development programming.<sup>97</sup> Most of the \$75 billion that was spent on corrections in 2008 was spent on incarceration.<sup>98</sup> At the national level, economists estimate that the gross domestic product (GDP) is reduced \$78–\$87 billion as a result of excluding formerly incarcerated job seekers from the workforce.<sup>99</sup> These resources could also be re-allocated to support other national budget priorities like healthcare and education.<sup>100</sup> Considering the fact that 95% of state prisoners will eventually return home, there is an imminent need for re-entry support (i.e. education, skills development).<sup>101</sup>

### III. THE IMPACT OF COLLATERAL CONSEQUENCES ON THE AFRICAN AMERICAN COMMUNITY'S ECONOMIC MOBILITY

The future sustainability and vibrancy of the United States economy is contingent upon full workforce participation.<sup>102</sup> This

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94. See *supra* notes 71–93 and accompanying text.

95. See *infra* notes 96–101 and accompanying text.

96. See *Prison Spending in 2015*, VERA INST. JUST., <https://www.vera.org/publications/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends-prison-spending> [<https://perma.cc/B3QQ-FWTT>] (last visited Apr. 1, 2020).

97. See Emma Kerr, *The Cost of Private vs. Public Colleges*, U.S. NEWS & WORLD REP. (June 25, 2015), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/2019-06-25/the-cost-of-private-vs-public-colleges> [<https://perma.cc/LQ85-Z4LX>].

98. See JOHN SCHMITT ET AL., *THE HIGH BUDGETARY COST OF INCARCERATION 2* (June 2010).

99. See CHERRIE BUKNOR & ALAN BARBER, *THE PRICE WE PAY: ECONOMIC COSTS OF BARRIERS TO EMPLOYMENT FOR FORMER PRISONERS AND PEOPLE CONVICTED OF FELONIES 1–3* (2016).

100. See, e.g., Christopher Ingraham, *US Spending Is Rising Much Faster on Prisons than on Schools*, WORLD ECON. F. (July 18, 2016), <https://www.weforum.org/agenda/2016/07/us-spending-is-rising-much-faster-on-prisons-than-on-schools/> [<https://perma.cc/WXP3-J2PL>].

101. See BACK TO BUSINESS, *supra* note 73, at 4.

102. See *id.*

begins with cultivating the gifts and talents of each individual.<sup>103</sup> It is further manifested through unveiling the limitless potential of innovation.<sup>104</sup> The culmination of these elements is the very essence of the American Dream—the power to work, build, and create a brighter future.<sup>105</sup> Unfortunately, the realization of this dream is unobtainable for many who have a criminal record.<sup>106</sup> A criminal record can be a relentless and persistent impediment to employability, which negatively impacts an individual’s ability to contribute to the future of economic development.<sup>107</sup> A criminal record can restrict one’s access to employment, higher education, and even professional licensure.<sup>108</sup> An estimated “70 million Americans—one in three adults—have a criminal record,”<sup>109</sup> which poses an active barrier to economic and social mobility.<sup>110</sup> Acclaimed attorney and author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, Michelle Alexander, describes this experience as entering a *parallel universe*—“one that promises a form of punishment that is often more difficult to bear than prison time: a lifetime of shame, contempt, scorn, and exclusion.”<sup>111</sup> This parallel universe creates a “tangled mass web of incarceration with far too many entry points into the criminal justice system and far fewer exit points.”<sup>112</sup>

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103. See SUSAN LUND ET AL., *THE FUTURE OF WORK IN AMERICA: PEOPLE AND PLACES, TODAY AND TOMORROW* vi (2019).

104. See *id.* at 15.

105. See Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/592Y-XCQK>].

106. See *id.*

107. See *id.*; see also *The Challenges of Prisoner Re-Entry into Society*, SIMON U. (July 12, 2016), <https://socialwork.simmons.edu/blog/Prisoner-Reentry/> [<https://perma.cc/58RC-C3RS>].

108. See *Barriers to Work: People with Criminal Records*, NAT’L CONF. ST. LEGISLATURES (July 17, 2018), <https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx> [<https://perma.cc/LRY5-KBET>].

109. BACK TO BUSINESS, *supra* note 73, at 4.

110. See *The Challenges of Prisoner Re-Entry into Society*, *supra* note 107.

111. ALEXANDER, *supra* note 17, at 139.

112. Melenie Soucheray, *Advocates Explore Link Between Mass Incarceration, Intergenerational Poverty*, CATH. SPIRIT (Feb. 3, 2017), <https://thecatholicspirit.com/news/local-news/advocates-explore-link-mass-incarceration-intergenerational-poverty/> [<https://perma.cc/GN36-5K5M>].

A. *The Financial Impact of Mass Incarceration on the African-American Community*

This tangled web of incarceration has a disparate impact on the quality of life experienced within the African-American community due to the over-representation of African-Americans in the criminal justice system.<sup>113</sup> The conjoined forces of imprisonment and blackness produce waves of lifelong hardships for those who are imprisoned, their families, and the community at large.<sup>114</sup> Mass incarceration has essentially evolved into a large cohort of a relatively permanent group of young male offenders and ex-offenders, who for the most part are unlikely to be contributing members of the work force in the foreseeable future.<sup>115</sup> The career outlook for this group of men can be relegated to situations of under the table economics or other unscrupulous behavior; a felony record can temporarily disqualify employment in licensed or professional occupations, skilled trades, or in the public sector.<sup>116</sup> Individual men that are qualified for professional positions are derailed.<sup>117</sup> “Incarceration diverts offenders from career jobs through its effects on skills, social connections, and criminal stigma.”<sup>118</sup> “Men in trusted or high-income occupations before conviction experience especially large earnings losses after release.”<sup>119</sup> Obtaining and retaining long-term living wage positions are just some of the difficulties those with criminal records face.<sup>120</sup>

The impact of low paying, dead-end work has severe economic repercussions for the support of African-American families.<sup>121</sup> “For example, a black 30-year-old high school dropout with no prison record will average nearly \$9,000 a year . . . .”<sup>122</sup> When the factor of

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113. See Angela J. Davis, *Introduction*, in *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT* xvi (Angela J. Davis ed., 2017).

114. See Robert D. Crutchfield & Gregory A. Weeks, *The Effects of Mass Incarceration on Communities of Color*, *ISSUES SCI. & TECH.* (2015), <https://issues.org/the-effects-of-mass-incarceration-on-communities-of-color/> [<https://perma.cc/84UJ-J93R>].

115. See THE PEW CHARITABLE TR., *COLLATERAL COSTS: INCARCERATION’S EFFECT ON ECONOMIC MOBILITY* 9–11 (2010).

116. See Bruce Western, *Mass Imprisonment and Economic Inequality*, 74 *SOC. RES.: INT’L Q.* 509, 510 (2007).

117. See *id.* at 525.

118. *Id.*

119. *Id.*

120. See *supra* notes 113–19 and accompanying text.

121. See *infra* notes 122–29 and accompanying text.

122. Bruce Western, *Retrenching Civil Rights, Mass Imprisonment in America*, in *THE NEXT TWENTY-FIVE YEARS: MASS INCARCERATION IN THE UNITED STATES AND SOUTH AFRICA* 144, 149 (David L. Featherman et al. eds., 2010).

jail time is added to the equation, “[m]en with prison records are estimated to earn about 30 to 40 percent less each year than similar men who have never been incarcerated.”<sup>123</sup> The difference in earnings can be seen in hourly wages and racial comparisons; white former prisoners “experience virtually no wage growth from their starting wage of \$10.61 an hour at age 25.”<sup>124</sup> Layering in race, one sees that “[a] black man without a criminal record, at age 25, earns about the same wage as a white man with a criminal record—around \$10.60 an hour.”<sup>125</sup> This one cent difference may seem insignificant, yet over time the cumulative effect is demonstrated: “[h]ourly wages for white men, who are involved in crime but never go to prison, grow from \$11.18 to \$13.81 from age 25 to 35.”<sup>126</sup> African-American men have different growth numbers: “Among black former prisoners, wages grow only a third as fast—just 5 percent from about \$9.85 to \$10.40.”<sup>127</sup> Analyzing these hourly wages reveals that a one cent per hour difference at age twenty-five grows to a \$3.41 per hour difference by age 35.<sup>128</sup> This small hourly pay differential in wages over a ten-year period amounts to \$65,472 that black families are short-changed.<sup>129</sup>

With the combination of difficulties in acquiring longer-term, living wage positions and maintaining salary growth over time, the earning potential for African-Americans who have been incarcerated is astronomically dismal.<sup>130</sup>

### B. Collateral Consequences

The impact of incarceration is exacerbated by collateral consequences.<sup>131</sup> Collateral consequences are hidden sanctions or civil disabilities that emerge automatically at the onset of a criminal conviction.<sup>132</sup> They are referred to as “hidden” since they are not

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123. *Id.*

124. *Id.*

125. *Mass Imprisonment and Economic Inequality*, *supra* note 116, at 527.

126. *Id.*

127. *Id.*

128. *See supra* notes 124–27 and accompanying text.

129. *See supra* notes 124–27 and accompanying text.

130. *See supra* notes 113–29 and accompanying text.

131. *See* Chidi Umez & Rebecca Pirius, *Barriers to Work: Improving Employment in Licensed Occupations for Individuals with Criminal Records* 1–4 (2018), [https://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords\\_v06\\_web.pdf](https://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords_v06_web.pdf) [<https://perma.cc/JS4D-JTTQ>].

132. *See* Sarah B. Benson, *Beyond the Sentence – Understanding Collateral Consequences*, NAT’L INST. JUST. J., Sept. 2013, at 24–25.



formally quantifiable in a sentence or imposed penalty.<sup>133</sup> The reference to “civil disability” reflects the social impact of stigmatization associated with a felony conviction.<sup>134</sup> Chief Justice Earl Warren noted: “Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”<sup>135</sup> According to the National Inventory of Collateral Consequences of Conviction:

Unlike the direct consequences of conviction, such as imprisonment and fines, the indirect — or collateral — consequences of convictions rarely play a prominent role in sentencing or plea negotiations and are often not discussed with the accused. These sanctions and disqualifications are automatically triggered by a conviction but are not part of the punishment set out by sentencing or a plea deal.<sup>136</sup>

The most commonly known collateral consequences are restrictions on voting<sup>137</sup> and firearm ownership.<sup>138</sup> Collateral consequences also impact immigration status; thus, attorneys must inform clients during certain criminal proceedings about potential ramifications. Based on the Supreme Court’s ruling in *Padilla v. Kentucky*,<sup>139</sup> “criminal defense lawyers must advise their noncitizen clients considering a guilty plea that they are likely to be deported as a result.”<sup>140</sup>

Despite the lack of awareness of collateral consequences for the general public and attorneys alike, the ramifications of collateral consequences are broad and expansive.<sup>141</sup> These consequences lead

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133. *See id.* at 25–26.

134. *See Parker v. Ellis*, 362 U.S. 574, 593–94 (1960).

135. *Id.*

136. *National Inventory of the Collateral Consequences of Conviction*, NAT’L INST. JUST. (Nov. 13, 2018), <https://www.nij.gov/topics/courts/pages/collateral-consequences-inventory.aspx> [<https://perma.cc/DB3S-8LAG>].

137. *See* Tilman Klumpp et al., *The Voting of Ex-Felons and Election Outcomes in the United States*, 59 INT’L REV. L. & ECON. 40, 40 (2019).

138. *See* Andrew Chung, *U.S. Top Court Deals Setback to Gun Control Advocates on Felon Ban*, REUTERS (June 26, 2017, 9:53 AM), <https://reuters.com/article/us-usa-court-guns-felons/u-s-top-court-deals-setback-to-gun-control-advocates-on-felon-ban-idUSKBN19H1KZ> [<https://perma.cc/R2SE-2DKE>].

139. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

140. Gabriel J. Chin & Margaret Love, *Status as Punishment – A Critical Guide to Padilla v. Kentucky*, 25 A.B.A. SEC. CRIM. JUST. 21, 21 (2010).

141. *See infra* notes 142–45 and accompanying text.

to difficulty in gaining employment,<sup>142</sup> restrict access to professional licenses,<sup>143</sup> limit financial aid opportunities,<sup>144</sup> and restrict access to public benefits.<sup>145</sup>

The National Inventory of Collateral Consequences of Conviction created by the American Bar Association serves as a key learning tool for gaining a deeper understanding about collateral consequences and their lingering impact.<sup>146</sup> It is a national database with over 44,000 collateral consequences identified and analyzed.<sup>147</sup>

### C. Hiring and Employment

Becoming gainfully employed is one of the key exit points of the criminal justice system.<sup>148</sup> Studies demonstrate that employment can reduce recidivism and promote community-building.<sup>149</sup> Employment creates an opportunity for a formerly incarcerated individual to have a second chance at life by providing for themselves and their families.<sup>150</sup> This in turn impacts upward mobility, wealth-building, and one's overall quality of life.<sup>151</sup> Joblessness has been identified as the single most important predictor of recidivism.<sup>152</sup> Recidivism evaluates the rate at which an individual returns to the criminal

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142. See Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 *How. L. J.* 753, 770 (2011).

143. See *id.*

144. See *id.* at 771.

145. See *id.* at 770.

146. See *About*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <https://niccc.csgjusticecenter.org/about/> [<https://perma.cc/W2SH-USC7>] (last visited Apr. 1, 2020).

147. See *Collateral Consequences Inventory*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, [https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&consequence\\_category=&narrow\\_category=&triggering\\_offense\\_category=&consequence\\_type=&duration\\_category=&page\\_number=1](https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&consequence_category=&narrow_category=&triggering_offense_category=&consequence_type=&duration_category=&page_number=1) [<https://perma.cc/7BP9-T2A6>] (last visited Apr. 1, 2020).

148. See *infra* notes 151–56 and accompanying text.

149. THE COUNCIL OF STATE GOV'TS. JUSTICE CTR., *INTEGRATED REENTRY AND EMPLOYMENT STRATEGIES: REDUCING RECIDIVISM AND PROMOTING JOB READINESS 2* (2013), [https://csgjusticecenter.org/wp-content/uploads/2020/02/Final.Reentry-and-Employment.pp\\_.pdf](https://csgjusticecenter.org/wp-content/uploads/2020/02/Final.Reentry-and-Employment.pp_.pdf) [<https://perma.cc/BTB2-QAKZ>].

150. See *id.* at v.

151. See *id.* at 6.

152. See Peter Cove & Lee Bowes, *Immediate Access to Employment Reduces Recidivism*, REAL CLEAR POL. (June 11, 2015), [https://www.realclearpolitics.com/articles/2015/06/11/immediate\\_access\\_to\\_employment\\_reduces\\_recidivism\\_126939.html](https://www.realclearpolitics.com/articles/2015/06/11/immediate_access_to_employment_reduces_recidivism_126939.html) [<https://perma.cc/W3MM-5N7X>].

justice system after being released from prison.<sup>153</sup> An unemployed former offender is more than twice as likely as an employed one to reoffend.<sup>154</sup>

The potential for a brighter future for those who have been incarcerated is often ignored.<sup>155</sup> People are stigmatized by their past.<sup>156</sup> A felony conviction then becomes a looming, permanent “Scarlet Letter” that reads “F” for felon. However, this analysis overlooks the transformative power of a second chance. Fr. Gregory Boyle, founder of a comprehensive reintegration social enterprise called Homeboy Industries, best characterized the power of employment when he stated: “Nothing stops a bullet like a job.”<sup>157</sup> His words serve as a reminder that job opportunities can disrupt the cycle of incarceration and promote safe communities.<sup>158</sup>

According to a 2017 ACLU report, “nearly 75 percent of formerly incarcerated individuals are still unemployed a year after release.”<sup>159</sup> Managers and Human Resource (HR) personnel recognize that workers with a criminal record bring value and skills to the workplace.<sup>160</sup> A nationwide study showed that more than 80% “of managers and 67% of HR professionals feel that the ‘quality of hire’ for workers with criminal records is as high as or higher than that of workers without records.”<sup>161</sup> Additionally, a majority of workers in all roles are willing to work with employees who have criminal records.<sup>162</sup>

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153. *See Recidivism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/recidivism> [<https://perma.cc/5LZP-KGLB>] (last visited Apr. 1, 2020).

154. Lisa Nagele-Piazza, *Trump Signs Sweeping Criminal Justice Reform Bill*, SHRM (Dec. 19, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/senators-approve-sweeping-criminal-justice-reform-bill.aspx> [<https://perma.cc/G3QR-XQ4D>].

155. *See supra* notes 105–10 and accompanying text.

156. *See* Goulette & Frank, *supra* note 22, at 726.

157. Nico Pitney, “*Nothing Stops A Bullet Like A Job*”, HUFFPOST (Sept. 24, 2015, 7:49 PM), [https://www.huffpost.com/entry/greg-boyle-homeboy-industries-life-lessons\\_n\\_56030036e4b00310edf9c7a4](https://www.huffpost.com/entry/greg-boyle-homeboy-industries-life-lessons_n_56030036e4b00310edf9c7a4) [<https://perma.cc/EYB8-7U5N>].

158. *See id.*

159. BACK TO BUSINESS, *supra* note 73, at 4.

160. *Id.* at 8.

161. SOC’Y FOR HUMAN RES. MGMT. & CHARLES KOCH INST., WORKERS WITH CRIMINAL RECORDS 2 (May 2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/second-chances.aspx> [<https://perma.cc/2YDY-NAE4>].

162. *Id.*

## IV. RECOMMENDATIONS FOR POLICY CHANGES

Despite the best of intentions and recognition of the magnitude of the challenges associated with incarceration in the United States, some employers still use blanket exclusion practices that bar hiring a person with a criminal record.<sup>163</sup> Others are simply bound by their biases and stereotypes associated with incarceration and the label of an offender.<sup>164</sup> Grassroots advocacy has led to the adoption of “ban-the-box” initiatives (which remove criminal history questions from job applications) and support of reintegration programs.<sup>165</sup> However, a widespread challenge exists because more than 640,000 community members are released from prison each year and nearly 75% of formerly incarcerated individuals do not have a job a year after release.<sup>166</sup>

A. *Policy Reform at the Organizational Level*

***The EEOC Enforces Title VII of the Civil Rights Act of 1964 (Title VII), Which Prohibits Employment Discrimination Based on Race, Color, Religion, Sex, or National Origin.***<sup>167</sup>

The Equal Employment Opportunity Commission (EEOC) offers guidance for employers to create fair, reasonable, and just hiring practices.<sup>168</sup> The Enforcement Guidance on the Consideration of Arrest and Conviction Records serves as a valuable tool for employers.<sup>169</sup> It “suggests that excluding job applicants who have

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163. John D. Bible, *To Check or Not to Check: New EEOC Enforcement Guidance on the Use of Criminal History Information in Making Hiring Decisions*, A.B.A. (Mar. 2013), [https://www.americanbar.org/groups/business\\_law/publications/blt/2013/03/05\\_bible/](https://www.americanbar.org/groups/business_law/publications/blt/2013/03/05_bible/) [<https://perma.cc/3ZEJ-VAJG>].

164. KELLY E. MOORE ET AL., *THE EFFECT OF STIGMA ON CRIMINAL OFFENDERS' FUNCTIONING: A LONGITUDINAL MEDIATIONAL MODEL 1* (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4788463/pdf/nihms665217.pdf> [<https://perma.cc/LX7L-LWG2>].

165. SOC'Y FOR HUMAN RES. MGMT. & CHARLES KOCH INST., *supra* note 161, at 6.

166. *See* BACK TO BUSINESS, *supra* note 73, at 4.

167. *See Title VII of the Civil Rights Act of 1964*, EEOC, <https://www.eeoc.gov/laws/statutes/titlevii.cfm> [<https://perma.cc/S6HU-6S7N>] (last visited Apr. 1, 2020).

168. *See Employers*, EEOC, <https://www.eeoc.gov/employers/> [<https://perma.cc/5KQX-8LB3>] (last visited Apr. 1, 2020).

169. *See EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, EEOC (Apr. 25, 2012), [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm#I](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#I) [<https://perma.cc/9XMY-XUSR>].

criminal records may constitute employment discrimination under Title VII of the Civil Rights Act.”<sup>170</sup>

The EEOC provides the following guidelines for employers to create and sustain inclusive hiring policies:

1. Employers should not ask about convictions on job applications. Inquiries should be limited to convictions for which exclusion would be job-related for the position.
2. Employers should avoid policies that automatically exclude people from employment based on only certain criteria (such as criminal status) - particularly “blanket exclusion” policies.
3. Employers should avoid hiring practices that result in adverse impact for a protected group (such as on race, national origin, etc.). Employers should regularly investigate whether their background screening practices are resulting in adverse impact for protected group.
4. Employers should be cautious about excluding employees from the hiring process based on their criminal record, especially if the criminal offense is unrelated to the job.
5. Employers should consider other factors relative to the conviction including the facts or circumstances of the offense/conduct, the number of offenses the individual has been convicted of, the age of the convictions, the length and consistency of employment history before and after offense, rehabilitation efforts, and references.
6. Employees should give all applicants a chance to explain their criminal records.<sup>171</sup>

Employers often discount prospective employees who have any sort of criminal record, which can include misdemeanor offenses,

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170. *Hiring Felons: 6 Rules Employers Need to Know*, ERC: HR INSIGHTS BLOG (July 10, 2013), <https://www.yourerc.com/blog/post/hiring-felons-6-rules-employers-need-to-know> [<https://perma.cc/QDS9-QXQD>].

171. *Id.*

arrests that did not lead to conviction, and convictions for offenses unrelated to the job.<sup>172</sup> Furthermore, employers should be wary that using criminal records to exclude applicants may inadvertently impact specific racial groups adversely.<sup>173</sup> Specifically, refusing to hire candidates with a criminal record disproportionately impacts African-American men seeking employment.<sup>174</sup>

*B. Policy Reform at the State Level*

Some states have taken a proactive approach to ensure equal access to employment.<sup>175</sup> One common policy effort has been the adoption of “ban the box” policies.<sup>176</sup> Currently, “35 states and over 150 cities and counties have adopted” this policy.<sup>177</sup> It requires employers to consider the applicant’s qualifications prior to checking the applicant’s criminal record to prevent their view from being tainted by the stigma associated with a conviction or arrest record.<sup>178</sup> This policy emerged from the work of All of Us or None;<sup>179</sup> “these policies provide applicants a fair chance at employment by removing the conviction history question from job applications and delaying background checks until later in the hiring process.”<sup>180</sup> Thirteen states have taken a step further:

California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington—have also mandated the removal of conviction history questions from job applications for *private* employers, a crucial step toward ensuring that people with records have a fair chance at employment in the majority of jobs.<sup>181</sup>

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172. *Id.*

173. *Id.*

174. *Id.*

175. *See infra* Section IV.B.

176. BETH AVERY, NAT’L EMP’T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (2019).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

In addition to these states with private-sector laws, government agencies have also transformed their policies.<sup>182</sup> The District of Columbia and thirty-three cities and counties are combatting the remnants of felon disenfranchisement through the adoption of fair hiring practices.<sup>183</sup> Some areas including “Austin, Baltimore, Buffalo, Chicago, Columbia (MO), the District of Columbia, Kansas City (MO), Los Angeles, Montgomery County (MD), New York City, Philadelphia, Portland (OR), Prince George’s County (MD), Rochester, San Francisco, Seattle, and Spokane (WA), and Westchester County (NY)” included private sector employers in their policy reform efforts.<sup>184</sup>

As referenced above, the 2012 EEOC advice for using arrest and conviction records in employment decisions has served as a blueprint for best practices in fair hiring.<sup>185</sup> Employers who have adopted a comprehensive fair chance hiring protocol delay review of criminal records until after the interview process is completed and the applicant receives a conditional offer of employment.<sup>186</sup> This provides employers with the opportunity to take a more comprehensive look at the nexus between one’s criminal record and the current employment opportunity.<sup>187</sup> Employers also evaluate the length of time since the initial conviction, mitigating circumstances, and evidence of rehabilitation.<sup>188</sup> At the national level, former President Barack Obama “endorsed ban-the-box by directing federal agencies to delay inquiries into job applicants’ records until later in the hiring process,” which promotes procedural fairness and equal access to employment opportunities.<sup>189</sup>

To impact policy changes at the state level, innovative approaches and active involvement of all stakeholders from prosecutors to judges is of necessity.<sup>190</sup> Some jurisdictions have implemented procedural changes in prosecutorial practices.<sup>191</sup> One such example is Ramsey County (MN) Attorney’s issuance of a prosecution policy regarding

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182. *Id.*

183. *Id.*

184. *Id.*

185. *See id.*

186. *Id.*

187. *See id.* at 1–2.

188. *Id.*

189. *Id.* at 1.

190. *See infra* notes 191–95 and accompanying text.

191. *See* Memorandum from John J. Choi, Ramsey Cty. Attorney, to All Assistant Ramsey County Attorneys and Law Clerks in the Criminal Division; Victim, Witness and Community Services Division; and Juvenile Division 3–5 (Jan. 31, 2019).

the consideration of collateral consequences.<sup>192</sup> The County Attorney instructed his team of prosecutors “to consider collateral consequences to inform your discretion as you administer justice.”<sup>193</sup> In addition, the American Bar Association compiled and published the *Collateral Consequences of Criminal Convictions Judicial Bench Book* to serve as a useful guide for judges.<sup>194</sup> It defines collateral consequences, explores judicial considerations of collateral consequences, offers a step-by-step guide for using the National Inventory of Collateral Consequences of Conviction (NICCC), and outlines uniform law (the Uniform Collateral Consequences of Conviction Act).<sup>195</sup>

### C. National Policy Reform

Creating equal access to employment will require intentional action and coordinated efforts of the U.S. Oval Office and C-suite leadership roles.<sup>196</sup> One such action is the recent passage of the First Step Act (the Act).<sup>197</sup> This bipartisan effort has drawn national attention to the need for widescale criminal justice reform.<sup>198</sup> The Act will reduce prison sentences for nonviolent offenders and combat recidivism.<sup>199</sup> It will retroactively apply the Fair Sentencing Act of 2010, pioneered by President Barack Obama, which reduces the

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192. *Id.* at 4–5.

193. *Id.* at 3. Annoka County Attorney Robert M.A. Johnson applauded Attorney Choi’s efforts when he stated: “There is a duty to seek justice and justice implies a reasonable sentence.” Barbara L. Jones, *Considering Collateral Consequences of Conviction*, MINN. LAW. (Feb. 21, 2019), <https://minnlawyer.com/2019/02/21/considering-collateral-consequences-of-conviction/> [<https://perma.cc/2322-UD7B>].

194. See AM. BAR ASS’N, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 2* (2018).

195. *Id.* at 6–7, 11, 18.

196. See *infra* notes 197–207 and accompanying text.

197. See President Donald J. Trump *Is Committed to Building on the Successes of the First Step Act*, WHITE HOUSE (Apr. 1, 2019), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-committed-building-successes-first-step-act/> [<https://perma.cc/336U-TV5C>].

198. See Dartunorro Clark & Janell Ross, *The First Step Act Promised Widespread Reform. What Has the Criminal Justice Overhaul Achieved So Far?*, NBC NEWS (Nov. 24, 2019, 8:00 AM), <https://www.nbcnews.com/politics/politics-news/first-step-act-promised-widespread-reform-what-has-criminal-justice-n1079771> [<https://perma.cc/L85A-J3Y8>].

199. Dale Chappell & Douglas Ankney, *First Step Act Update: Over 1,600 Sentences Reduced, 3,000 Prisoners Released*, PRISON LEGAL NEWS (Sept. 9, 2019), <https://www.prisonlegalnews.org/news/2019/sep/9/first-step-act-update-over-1600-sentences-reduced-3000-prisoners-released/> [<https://perma.cc/H2D5-WQD4>].



disparity in sentencing for crack cocaine versus powder cocaine.<sup>200</sup> Nearly 3,000 federal prisoners can seek relief as a result of the Act.<sup>201</sup> The Act will help to create a pathway for future opportunities related to obtaining employment, fostering community-building, and promoting re-entry upon release from prison.<sup>202</sup>

Several national employers have taken a proactive approach by working in partnership to advance an initiative led by the Society for Human Resources Management (SHRM).<sup>203</sup> Employers like IBM and Walmart pledged to support hiring individuals with a previous criminal history.<sup>204</sup> Johnny C. Taylor, Jr., SHRM-SCP president and chief executive officer of the SHRM, has issued a clarion call to HR professionals.<sup>205</sup> He challenged them to leverage their influence and model the path of inclusive hiring: “I encourage HR professionals to lead conversations about inclusive hiring at their organizations so other executives can make informed, sensible and beneficial hiring decisions.”<sup>206</sup> Through these conversations and strategic action, second chances will be obtainable for individuals with a criminal background.<sup>207</sup> Prospective applicants will be able to compete in the hiring process based upon merit and will be evaluated based on one’s qualifications, education, training, and preparation for the job.<sup>208</sup> Further, myths and stereotypes about having a criminal record will be dispelled, therefore creating new inroads to employment.<sup>209</sup>

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200. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

201. *Id.*

202. *See* #CUT 50 & ROOT & REBOUND, FIRST STEP TO SECOND CHANCES: A GUIDE FOR PEOPLE LEAVING FEDERAL PRISON UNDER THE FIRST STEP ACT 4 (July 2019), <https://www.thedreamcorps.org/wp-content/uploads/2019/11/First-Step-to-Second-Chances-Guide.pdf> [<https://perma.cc/RW5V-8H62>].

203. *Top Organizations Join SHRM Initiative and Pledge to Change Hiring Practices for Those with Criminal Backgrounds*, SHRM (Jan. 27, 2019), <https://www.shrm.org/about-shrm/press-room/press-releases/pages/pledge-to-consider-those-with-criminal-backgrounds-in-hiring.aspx> [<https://perma.cc/CM3V-QBB3>].

204. Eric Galatas, *Companies Pledge to Hire More Applicants with Criminal Backgrounds*, ORANGE LEADER (Mar. 17, 2019, 4:28 PM), <https://www.orangeleader.com/2019/03/17/companies-pledge-to-hire-more-applicants-with-criminal-backgrounds/> [<https://perma.cc/V6XE-6ASA>].

205. *See id.*

206. Lisa Nagele-Piazza, *3 Ways HR Can Help Close the Skills Gap*, SHRM (June 23, 2019), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/3-ways-hr-can-help-close-the-skills-gap.aspx> [<https://perma.cc/VL3K-KFE5>].

207. *See id.*

208. *See id.*

209. *See supra* notes 206–08 and accompanying text.

The American Bar Association has heralded the effort of adopting the Criminal Justice Standards Committee's recommendations related to standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons.<sup>210</sup> Recommendations include codification of collateral sanctions, notice requirement procedures, and abolition of most collateral sanctions laws.<sup>211</sup> This framework provides states with the guidance needed for widescale policy reform that takes into account the social, political, and economic components of collateral consequences, which is often hidden from plain view—hence, easily overlooked.<sup>212</sup>

## V. CONCLUSION

There is a simple but profound adage: “when you know better, do better.”<sup>213</sup> The 400-year anniversary of the Transatlantic Slave Trade reaching the shores of the United States is a reflective beacon for policymakers to “do better” to break the binds of collateral consequences.<sup>214</sup> Understanding the depth of the historical trauma placed on African-Americans due to chattel slavery is the beginning of the “knowing better” process.<sup>215</sup> The sins of our nation in maintaining laws, policies, and practices that reaffirm the beliefs that African-Americans are “convicts” until proven otherwise must be dismantled.<sup>216</sup> Data demonstrates that African-Americans are disproportionately represented in the penal system,<sup>217</sup> which perpetuates the new form of convict leasing and community strangulation through the effects of collateral consequences.<sup>218</sup>

All too often, through legislation and policies on the local, state, and federal levels, the legacy of racial and economic “otherness” is

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210. AM. BAR ASS'N, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 1–2 (3d ed. 2004) (ebook).

211. *Id.* at 1–3.

212. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 19, at 135–36.

213. See Adam Dachis, “When You Know, Do Better”, LIFEHACKER (June 28, 2013, 5:30 PM), <https://lifehacker.com/when-you-know-better-do-better-565500764> [<https://perma.cc/W8RP-XVDD>].

214. See Finzen, *supra* note 18, at 322.

215. See *supra* Section II.A.

216. See KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 74–75 (2010).

217. Jeremy Travis & Bruce Western, *Poverty, Violence, and Black Incarceration*, in POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT, *supra* note 113, at 294, 294–95.

218. See *supra* notes 7–36 and accompanying text.

given to African-Americans.<sup>219</sup> America cannot afford to continue to bankrupt future generations of African-American children through the impact of collateral consequences<sup>220</sup> and believe that we can maintain our position as a world economic leader.<sup>221</sup> Our country needs the intellectual, emotional, and physical engagement of African-Americans as our success is collective and connected.<sup>222</sup>

This clarion call to reverse, dismantle, or amend policies and practices related to collateral consequences,<sup>223</sup> offers America the opportunity to “do better” in recognizing African-Americans as full citizens, which was purposefully neglected in the Constitution.<sup>224</sup> In the pursuit of justice and hope for future generations, we are reminded of the words of the late Senator Paul Wellstone who admonished us to build equal access to prosperity: “we all do better when we all do better.”<sup>225</sup>

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219. See discussion *supra* Sections IV.B–C.

220. See discussion *supra* Part III.

221. See Joshua Holland, *The Average Black Family Would Need 228 Years to Build the Wealth of a White Family Today*, NATION (Aug. 8, 2016), <https://www.thenation.com/article/archive/the-average-black-family-would-need-228-years-to-build-the-wealth-of-a-white-family-today/> [https://perma.cc/9JXM-HW4M].

222. See generally *Why Working for Racial Equity Benefits Everyone*, LOC. & REGIONAL GOV'T ALLIANCE ON RACE & EQUITY, <https://www.racialequityalliance.org/about/our-approach/benefits/> [https://perma.cc/4XRS-NYTY] (last visited Apr. 1, 2020) (discussing strategies to eliminate the gap between races).

223. See discussion *supra* Part I.

224. James Oliver Horton, *Race and the American Constitution: A Struggle Toward National Ideals*, GILDER LEHRMAN INST. AM. HIST., <https://www.gilderlehrman.org/history-now/essays/race-and-american-constitution-struggle-toward-national-ideals> [https://perma.cc/2RQV-P3NY] (last visited Apr. 1, 2020).

225. Gary Cunningham, *We All Do Better When We All Do Better*, STAR TRIB.: BLOGS (Sept. 22, 2010, 9:51 PM), <http://www.startribune.com/we-all-do-better-when-we-all-do-better/103588254/> [https://perma.cc/AXS2-6ZS].