

Abolishing the Criminal Record: Poverty Following Arrest and Conviction

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ABSTRACT

The collateral consequences of maintaining public access to criminal records are far reaching and prevent individuals from rebuilding their lives after a conviction. These collateral consequences are discussed in the context of their effect on individual poverty and how such poverty could be reduced by the abolition of the use of criminal records generally and in key areas of societal life. This note argues that criminal records, while they are currently omnipresent in American society, are not necessary to the functioning of our society, and in fact, damage its functioning by forcefully othering certain groups of people and contributing to the cycle of poverty through that variety of collateral consequences.

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INTRODUCTION

A criminal record impedes the ability of the impoverished to rebuild after an arrest or conviction. The collateral consequences of having a criminal record are vast and can interfere with rehabilitation and a return to regular life. A record also invites future interaction with the legal system and surveillance. A criminal record is essentially a list of arrests and convictions maintained by various courts and government agencies that is made available to the public at large. These records contribute to the continuation and expansion of individual poverty following arrest and prisoner reentry into society by maintaining a list of all arrests and convictions.

Most people are unaware of how many Americans struggle with such collateral consequences. Those in the general American population have a one in fifteen chance of serving time in prison.¹ This increases to one in nine when just looking at men, and one in three for African American men specifically.² About a third of people in the United States have their very own criminal record—about the same number of people in the U.S. with a college diploma.³ The offenses on these records also tend to be minor.⁴ Given the widespread collateral damage of criminal records, it is imperative that their use be reexamined with a goal of effectively reintegrating and rehabilitating individuals marked by the criminal legal system. Interaction with the criminal legal system, which can include experiences like being stopped by police, arrested, jailed, convicted, and forced to spend days in court under threat of a bench warrant, is an interruption in a person’s life, which often happens at a young age, and a criminal record further complicates the long road to getting back on track.

Those with criminal records are further punished after their sentence is served with difficulties in finding employment, housing, and education opportunities. Thus, abolishing the criminal record is a necessary step in reducing economic hardship following time in prison or jail and in facilitating proper rehabilitation instead of continued retribution. A frequent question asked when it comes to the abolition of almost any institution is “what is the alternative?” In the case of the criminal record an alternative is not necessary, nor should one be instituted. This is what makes the abolition of criminal records a good starting point for accomplishing abolitionist goals—larger institutions such as prisons and police tend to need more time before abolition is possible as we ponder alternatives.

1. Roger Lancaster, *How to End Mass Incarceration*, JACOBIN (Aug. 18, 2017), <https://jacobin.com/2017/08/mass-incarceration-prison-abolition-policing>.

2. *Id.*

3. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas>.

4. Helen Lam & Mark Harcourt, *The Use of Criminal Record in Employment Decisions: The Rights of Ex-offenders, Employers and the Public*, 43 J. BUS. ETHICS 237, 238 (2003).

The American criminal record is unique; other countries effectively maintain a very different system.⁵ State-organized criminal records gained popularity during the tail end of the Progressive Era, but they did not become widely available to the public until the 1970s.⁶ Originally, criminal records were a matter of organization—records were used for things like data analytics and police investigations—but the 1970s came with a turn toward punishment.⁷ Now, criminal records are a public brand and mark those with a record as a future risk to all.⁸

This Note investigates the harm caused by the permanent branding of individuals with a criminal record and advocates for the abolition of this practice. Part I provides background on the intersection of poverty and the criminal legal system and the cycle of poverty that is perpetuated by that system. Part II then addresses the areas of life that having a criminal record most impacts, and how being barred from them contributes to poverty and recidivism. Finally, Part III examines reforms in the United States, analyzes the systems in other countries, and invokes the abolitionist framework as the most effective solution to the criminal record problem.

I. POVERTY AND MASS INCARCERATION

Mass incarceration is, and remains, the core issue of the American criminal legal system. One-third of Americans would not have criminal records if not for mass incarceration,⁹ and the poverty exacerbated by the collateral consequences of conviction or arrest would be more limited if all the resources put into maintaining our system of mass incarceration were placed elsewhere.¹⁰

Modern day mass incarceration has a long history but was, in part, born of an increase in crime in the 1960s and 1970s¹¹ which was dealt with through fear instead of attempting to handle the root cause of increased crime throughout the 1970s and onwards.¹² Tough on crime policies were all the rage even though, as activist and abolitionism scholar Angela Davis put it, “[b]y the time the prison construction boom began, official crime statistics were already falling.”¹³ More and more prisons were built, and more and more people were designated as prisoners.¹⁴ Prisons were an easy alternative to fixing the actual problem and allowed for the sectioning off of undesirable groups.¹⁵ Poor, marginalized people of color

5. Kevin Lapp, *American Criminal Record Exceptionalism*, 14 OHIO ST. J. CRIM. L. 303, 304 (2016).

6. See Sarah Esther Lageson, *Criminal Record Stigma and Surveillance in the Digital Age*, 5 ANNU. REV. CRIM. 67, 69-70 (2022).

7. See *id.*

8. *Id.* at 70.

9. Friedman, *supra* note 3.

10. Lancaster, *supra* note 1.

11. *Id.*; Dallan F. Flake, *When Any Sentence Is a Life Sentence: Employment Discrimination against Ex-Offenders*, 93 WASH. U. L. REV. 45, 54 (2015).

12. ANGELA DAVIS, ARE PRISONS OBSOLETE? 12, 17 (2003).

13. *Id.* at 17.

14. See *id.* at 13.

15. See Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1194 (2015).

especially were placed in prisons so society could move forward unburdened by the prospect of addressing race and class inequality.¹⁶ Politicians' tough on crime rhetoric and society's increased otherization of those imprisoned have allowed for criminal records to become increasingly public (with help, of course, from the rise of the internet and the ease with which information can now be accessed).¹⁷ A concern for privacy tends to go out the window when it comes to individuals who have been dehumanized by the mark of being labeled criminals.

Mass incarceration, interactions with the police, and poverty generally disproportionately affect people of color.¹⁸ As a result, the collateral consequences inherent in criminal records have the same disproportionate effect.¹⁹ Most people have committed a crime, even a minor one—over-criminalization guarantees this—but only those who have been arrested, those disproportionately Black and disproportionately poor (who are more commonly surveilled) are caught.²⁰ This is a consequence of over-policing. While employers cannot overtly discriminate on the basis of race in hiring, they certainly can on the basis of a criminal record in most states.²¹ Criminal records and background checks only serve as a convenient excuse and an additional avenue for employers to covertly discriminate on the basis of race.

Individuals are forced into economic stagnation while imprisoned.²² Many prisoners or jail inhabitants have no ability to save money in anticipation of getting out, and once they do get out, they must start paying off court debt and fees.²³ Reentering society after time in prison is a hard enough adjustment economically, physically, and psychologically without the additional economic burden of a criminal record. Additionally, since incarcerated individuals have no real earning ability, the economic situations of their families often worsen while they are in prison.²⁴ Even after they get out, it is their families who bear the burden of meeting their material needs before they are able to surpass the barriers in place and secure employment and public benefits.²⁵ This further embeds these individuals into a cycle of poverty.

The criminalization of poverty, where poor people face higher consequences and are targeted more often, has fed mass incarceration and has left a third of

16. Davis, *supra* note 12 at 19-21.

17. Lapp, *supra* note 5, at 306.

18. Geneva Brown, *The Intersectionality of Race, Gender, and Reentry: Challenges for African-American Women*, American Constitution Society 2, 5, 14 (Nov. 2010), <https://www.prisonpolicy.org/scans/acs/intersectionality.pdf>.

19. McLeod, *supra* note 15, at 1195.

20. HUMAN RIGHTS WATCH, REVOKED (2020), <https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states>.

21. Lapp, *supra* note 5, at 322.

22. See Harding et al., *Making Ends Meet After Prison*, 33 J. POL'Y ANALYSIS AND MGMT. 440, 443 (2014).

23. See *id.*; Tiana Herring, *For the poorest people in prison, it's a struggle to access even basic necessities*, PRISON POLICY INITIATIVE (Nov. 18, 2021), <https://www.prisonpolicy.org/blog/2021/11/18/indigence/>.

24. *Id.* at 465.

25. *Id.*

Americans with a criminal record.²⁶ Poverty is further exacerbated by contact with the criminal legal system, contributing to a vicious downward cycle. Those interacting with the criminal legal system in the first place are already disproportionately poor.²⁷

Thus, court fees and collateral consequences of arrest or conviction only serve to keep defendants poor.²⁸ For example, not paying court fees can result in incarceration despite the Supreme Court ruling otherwise.²⁹ Additionally, not paying court costs and fees is a probation violation, and only a judge's goodwill stands between an individual with a probation violation and further imprisonment.³⁰ Probation itself also comes with fees that many people are unable to afford including additional costs for drug testing, court-mandated classes, and background checks.³¹ It may be harder to save enough for these additional fees, when individuals, with an already limited income, have to allocate that income to paying probation supervision and court costs first.³² Further, not paying court debt (or child support) can lead to suspension of a driver's license which further complicates the ability to maintain and get to work.³³

Furthermore, the cash bail system also punishes poverty, by allowing those with money on hand to pay their full bail amount or the ability to pay a bond company (that will keep the defendant's money no matter the outcome of the case) a percentage of their set bail amount to have their freedom while awaiting trial while those who cannot afford to pay stay in jail, potentially for the same crime.³⁴ Moreover, laws that target the homeless, such as laws that criminalize panhandling, living in a vehicle, or loitering further contribute to their poverty through the loss of property following arrest and time in jail,³⁵ not to mention the addition to their criminal record that will cause future problems when seeking employment or housing.³⁶

While mass incarceration is the root cause of many of the problems caused by the use of criminal records, it is an issue which will take longer to tackle.

26. Friedman, *supra* note 3.

27. Human Rights Watch, *Criminalization of Poverty as a Driver of Poverty in the United States* (Oct. 4, 2017, 12:00 AM), <https://www.hrw.org/news/2017/10/04/criminalization-poverty-driver-poverty-united-states>.

28. *Id.*

29. *Id.*; Bearden v. Georgia, 461 U.S. 660, 661-62 (1983).

30. Human Rights Watch, *Set up to Fail* (Feb. 20, 2018), <https://www.hrw.org/report/2018/02/20/set-fail/impact-offender-funded-private-probation-poor>.

31. *See id.*

32. *Id.*

33. Nazish Dholakia, *How the United States Punishes People for Being Poor*, VERA INST. (Sep. 21, 2023), <https://www.vera.org/news/how-the-united-states-punishes-people-for-being-poor>.

34. CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, *TRANSFORMING CRIMINAL JUSTICE: ABOLISHING BAIL*, 98-99 (2022); *see also Set up to Fail*, *supra* note 30.

35. Dholakia, *supra* note 33.

36. RACHEL M. KLEINMAN & SANDHYA KAJEEPETA, THURGOOD MARSHALL INSTITUTE, *BARRED FROM WORK: THE DISCRIMINATORY IMPACTS OF CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT 3* (2023), <https://tminstituteldf.org/wp-content/uploads/2023/07/Barred-from-Work.pdf>.

Abolishing criminal records is a treatment, not a cure, but it will allow those with criminal records to live easier lives now. This harm reduction is integral to making the elimination of public criminal record use what abolitionists call a “non-reformist” reform. This kind of reform highlights the system’s flaws while reducing its power.³⁷

Criminal records in the United States are also quite unique.³⁸ They are incredibly public and easy to access.³⁹ How easy it is to find and look at a criminal record depends on the state, but across the board this information remains widely available to the public.⁴⁰ Anyone can Google someone’s name and “criminal record” together and they will receive an endless supply of websites offering to show it to them, and only sometimes for a price.⁴¹ An additional problem is that these records can be inaccurate with some frequency, including plain errors and out of date information.⁴² Both private and government actors regard background checks as standard, and conduct them routinely without interrogation into whether they are actually necessary or just.⁴³ Even volunteers who work for free are often subject to a criminal background check before being able to volunteer with some organizations.⁴⁴

Reducing poverty would doubtlessly, in turn, reduce crime rates just as arrest rates reliably increase when poverty is on the rise.⁴⁵ Tackling the problem of poverty in the United States requires many different facets of political organization that will take a lot of work and perseverance to put together, but fighting to reduce poverty on the back end by eliminating the use of criminal records is a worthwhile form of harm reduction. Additionally, research shows that participation and access to benefits like public life, housing, and employment reduce the likelihood of re-offense.⁴⁶ It is in everyone’s best interest to grant access to opportunities to those with criminal records because it promotes rehabilitation and reduces recidivism.

II. HOW CRIMINAL RECORDS IMPOSE POVERTY

Having a criminal record is like having a scarlet letter pinned to your chest. This section addresses some of the potential collateral consequences that result from having a criminal record: employment, housing, education, voting, increased

37. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019), https://harvardlawreview.org/wp-content/uploads/2019/11/1-122_Online.pdf.

38. See Lapp, *supra* note 5.

39. *Id.* at 307.

40. *Id.* at 309-10.

41. Lageson, *supra* note 6, at 70-71.

42. Lapp, *supra* note 5, at 309.

43. *Id.* at 311.

44. David McElhatten, *The Proliferation of Criminal Background Check Laws in the United States*, 127 AM. J. SOCIO. 1037, 1055-56 (January 2022), <https://doi.org/10.1086/718262>.

45. Flake, *supra* note 11, at 45, 53-54; Benoît De Courson & Daniel Nettle, *Why do inequality and deprivation produce high crime and low trust?*, Scientific Reports (2021), <https://doi.org/10.1038/s41598-020-80897-8>.

46. Lapp, *supra* note 5, at 311.

surveillance, court fees and fines, disparate police outcomes, harsher sentences, and access to civil justice.

Society judges individuals with criminal records, often in materially harmful ways. Criminal records also increase one's likelihood of interaction with the criminal legal system by putting individuals on the police's radar and making it more difficult to secure employment or housing, which perpetuates the cycle of poverty and increases the risk of recidivism.⁴⁷ The use of criminal records acts as a punishment before a court-ordered punishment is actually administered, and far after the court-ordered punishment is over, imposing a label on individuals, limiting their opportunities.⁴⁸ This is a type of legalized and even lauded discrimination.

We must also acknowledge and distinguish arrest or conviction that does not result in prison incarceration. What about those with arrest records but no conviction? Individuals who are arrested and await trial while out on bail face difficulty maintaining or obtaining the employment necessary to convince a judge that they are taking their case seriously.⁴⁹ Those unable to make bail may lose their jobs or housing while they wait in jail for months or even years for their case to be settled or to go to trial.⁵⁰ Moreover, the conditions of pre-trial detention centers and jails lead people to plead guilty, relinquishing their right to a trial, in a rush to get out.⁵¹ Defendants are supposed to be assumed innocent until proven guilty, but the consequences of arrest and indictment start immediately without any kind of conviction. An arrest record that never resulted in a conviction still shows up on most background checks if not expunged.⁵² There are also different struggles born out of being convicted but not serving prison time, either through a time served sentence (where the time an individual spent in jail was already long enough to meet their sentence), or through some type of supervised release like probation or deferment and only being released after serving a prison term.⁵³

A. Criminal Records as a Barrier to Employment

Employers, for instance, can, and do, consider past criminal convictions and arrests.⁵⁴ Even after getting hired, having a criminal record often limits earning ability.⁵⁵ Jobs that will hire those with records are limited to certain fields because individuals with criminal records are often affirmatively barred from working certain areas like healthcare or the government.⁵⁶ Someone with skills in a particular

47. *Id.* at 320; Kleinman & Kajeepeta, *supra* note 36, at 10.

48. Lapp, *supra* note 5, at 315; Lageson, *supra* note 6, at 83.

49. Scott-Hayward & Fradella, *supra* note 34, at 114, 116.

50. *Id.*

51. *Id.* at 102.

52. Lapp, *supra* note 5, at 314.

53. REVOKED, *supra* note 20, at 1-2, 101, 114-15.

54. Kleinman & Kajeepeta, *supra* note 36, at 4.

55. MEGAN MOORE & ANGIE WEIS GAMMELL, FINDING HOME REMOVING BARRIERS TO HOUSING FOR FORMERLY INCARCERATED INDIVIDUALS 7 (Wilson Center for Science and Justice, 2023), <https://wcsj.law.duke.edu/wp-content/uploads/2023/09/Finding-Home.pdf>.

56. Kleinman & Kajeepeta, *supra* note 36, at 4.

area may have a hard time finding employment in that area and must settle for other types of work.⁵⁷ As a result, punishment is extended by limited access to higher paying jobs and stable employment. This harms both the employer, in losing a skilled potential employee, and the potential employee who loses out on a good job. Everyone is harmed by the increased risk of recidivism associated with unemployment.⁵⁸ Some employers are sympathetic, and some participate in programs to specifically hire ex-convicts, but relying on these select employers is far too restrictive.⁵⁹ Employer liability in particular is a prevalent concern.⁶⁰ Employers are reluctant to hire employees with criminal records because they believe that if they knew or should have known about the criminal history they would be held liable for hiring a “dangerous” person.⁶¹ This discrimination against employees or candidates with records also disproportionately affects people of color.⁶²

B. The Affect of Criminal Records on Access to Housing

Employment and housing go hand in hand. Private property owners and public housing agencies alike may legally reject an applicant based on their criminal record alone.⁶³ In addition, access to housing directly impacts one’s ability to find employment.⁶⁴ Public housing programs provide housing to those in need, but often those most in need have interacted with the criminal legal system in the past. The federal Department of Housing and Urban Development (HUD) requires Public Housing Authorities to conduct background checks.⁶⁵ Individuals with certain types of crime on their records are fully prohibited from living in public housing.⁶⁶ Some steps have been taken to allow more flexibility in providing housing to those with criminal histories, but many still go unhoused because of their records.⁶⁷ Private landlords are also wary of renting to individuals with criminal records.⁶⁸ Having a criminal record does not place a person into a protected class; therefore, private landlords can discriminate without limit on the basis of what shows up in a background check.⁶⁹ Not

57. Moore & Gammell, *supra* note 55, at 7; Friedman, *supra* note 3.

58. Kleinman & Kajeepeta, *supra* note 36, at 5.

59. DAVEH PAGER & BRUCE WESTERN, DEPARTMENT OF JUSTICE, INVESTIGATING PRISONER REENTRY: THE IMPACT OF CONVICTION STATUS ON THE EMPLOYMENT PROSPECTS OF YOUNG MEN 9 (2009), <https://www.ojp.gov/pdffiles1/nij/grants/228584.pdf>.

60. *Id.* at 8.

61. *Id.*

62. Kleinman & Kajeepeta, *supra* note 36, at 6-8.

63. Elizabeth L. Beck et al., *Addressing Barriers to Housing in Reentry Programs Working to Address a Variety of Needs*, 25 CITYSCAPE 2, 16 (2023).

64. AFOMEIA TESFAI & KIM GILHULY, HUMAN IMPACT PARTNERS, THE LONG ROAD HOME: DECREASING BARRIERS TO PUBLIC HOUSING FOR PEOPLE WITH CRIMINAL RECORDS 23 (2016), <https://humanimpact.org/wp-content/uploads/2018/10/OHA-HIA-Final-Report.pdf>.

65. Moore & Gammel, *supra* note 55, at 9.

66. *Id.*

67. Beck et al., *supra* note 63.

68. Moore & Gammell, *supra* note 55, at 11.

69. *Id.*; see also Dave Roos & Gabriella Sanchez, *Landmark Supreme Court Cases*, BRENNAN CTR. (Oct. 7, 2024), <https://www.brennancenter.org/our-work/research-reports/landmark-supreme-court-cases>.

having stable housing can also increase the likelihood of recidivism.⁷⁰ When an individual has to move from housing, their chances of recidivism increase by around 70% each time.⁷¹ Not being able to find housing is a large barrier to reintegration since shelter is a basic need.

C. Criminal Records Limit Access to Education

A prior criminal history can also limit access to education which often determines overall earning potential and one's ability to break out of poverty. The quality of prison education programs—if they are available—are far below what could be accessed in the outside world, leaving many behind bars with little to no access to education.⁷² This burden constrains future educational opportunities as it is difficult to return to school once learning is interrupted by incarceration. Once out of prison, accessing higher education remains difficult for those with records.⁷³ A criminal conviction comes with a stigma.⁷⁴ Each college or university makes its own decisions about soliciting information about criminal history and using that information in its admissions process.⁷⁵

D. The Ostracizing Effect of Criminal Records

Participation in civil society is an indicator of future success in reintegration.⁷⁶ Even if governmental access to criminal records remains, there should be a bar on discriminatory use of such records, especially in voting. Moreover, access to civil society is understood to be part of a fundamentally normal life; to be barred from it can be isolating. Voting, for instance, is a civic responsibility and participation in voting correlates with law-abiding behavior.⁷⁷ A history of criminal activity should not bar an individual from voting, because the disenfranchisement of any segment of the population is unhealthy for a functioning democracy, and taking away the responsibility of voting may increase recidivism.⁷⁸ A reduction in recidivism presents an opportunity for those who have been convicted to break away from the criminal legal system and work towards recovery and upward mobility. People are more likely to follow rules that they themselves believe in, and being able to vote on those rules either directly or through a representative can go a long way.

70. Tesfai & Gilhuly, *supra* note 64, at 22.

71. *Id.*

72. Douglas N. Evans et al., *Going Back to College? Criminal Stigma in Higher Education Admissions in Northeastern U.S.*, 27 CRITICAL CRIMINOLOGY 291, 293 (2019), <https://heinonline.org/HOL/P?h=hein.journals/ctclrm27&i=291>.

73. *Id.*

74. *Id.*

75. *Id.* at 294.

76. Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1509 (2003).

77. Danielle R. Jones, *When the Fallout of a Criminal Conviction Goes Too Far: Challenging Collateral Consequences*, 11 STAN. J. C.R. & C.L. 237, 251 (2015).

78. *Id.* at 244.

E. Criminal Records and a Reduction in Privacy

Surveillance of those impacted by the criminal legal system has been normalized.⁷⁹ Being attached to a criminal record creates many barriers, yet increased surveillance is a separate issue in itself. As a result of criminal records being widely available online, ex-offenders are subjected to an astounding lack of privacy.⁸⁰ In the fight between the desires for privacy and security, it is the privacy rights of ex-offenders which have been sacrificed. Professor Sarah E. Lageson, scholar of the use of technology in criminal punishment, explains that “because police, courts, jails, and prisons are in the public record, the criminal records they produce are the easiest and cheapest for the public to obtain. Yet these are the least reliable sources of criminal record data because they are not linked, harmonized, or updated to show the final case disposition.”⁸¹

The omission of a final disposition complicates and distorts an individual’s criminal record because an initial felony charge may be reduced to a misdemeanor or result in no conviction at all, as is true in about one-third of all felony arrests.⁸² Criminal record data is also profitable, and a part of how private actors can participate in punishment within the prison industrial complex.⁸³ There is a real social cost to this stigma. As Lageson puts it, “the process of attaching the criminal label is no longer reserved for state actors only. Rather, a multitude of private actors can now magnify and publicize the criminal label or introduce it into a host of new spaces, such as social media and Internet search results.”⁸⁴ The internet is a new avenue for punishment and shaming that is limitless and everlasting—nothing on the internet can truly go away forever. Mugshots, for instance, are posted to the internet before anyone is ever convicted of a crime and they remain on the internet indefinitely for anyone to find.⁸⁵

F. Criminal Records Prevent Reintegration

Continued interaction with the criminal legal system and the court post-conviction or arrest is another barrier to reintegration.⁸⁶ Fines and court fees for instance are a constant reminder of punishment. Having to pay court fees makes it harder to recover economically, and it forces a connection to the court system that makes it difficult to recuperate and get back to everyday life.⁸⁷ Not being able to pay can also mean another jail sentence, ruining any progress made

79. Lageson, *supra* note 6, at 69.

80. *Id.*

81. *Id.* at 76.

82. Kleinman & Kajeepeta, *supra* note 36, at 7-8; Lageson, *supra* note 6, at 75-76.

83. Lageson, *supra* note 6, at 78.

84. *Id.* at 72.

85. *Id.* at 84.

86. Dholakia, *supra* note 33; REVOKED, *supra* note 20.

87. Dholakia, *supra* note 33; REVOKED, *supra* note 20.

in the meantime.⁸⁸ Even if someone qualifies for clearing of their criminal record, the cost of doing so can be a harsh barrier.⁸⁹

G. Criminal Records Increase Individuals' Interactions with the Criminal Legal System

Having a criminal record also impacts how, and with what frequency, a person experiences interactions with the police. As Professor James B. Jacobs, a specialist in criminal justice, writes, “criminal justice system decision-makers treat a record of past criminality as predictive of future criminality, and may regard individuals with serious criminal records as not deserving leniency or the benefit of the doubt.”⁹⁰ Those with a criminal history get even less benefit from the idea of innocent until proven guilty. Having a criminal record alone can make someone a suspect since they are the first people that the police look to when they begin investigating a new crime.⁹¹ Moreover, a crime that may otherwise have been let off with a warning is more likely to end in arrest if an individual already has a criminal record.⁹² Having a prior criminal record also means harsher sentences in the future.⁹³ Even a low-level offense like stealing a water bottle from a gas station can mean months in prison if it’s someone’s tenth offense. Prosecutors consider prior criminality in plea negotiations, resulting in unequal treatment for the same offenses, and sentencing guidelines require a look at prior criminal history in determining how long someone should be imprisoned.⁹⁴

H. Criminal Records Decrease Access to Justice

Having a criminal record also limits one’s access to justice in the civil context. For example, a plaintiff suing a city for police misconduct is less likely to find a lawyer willing to take their case and to convince a jury that they are sympathetic if they have any kind of criminal record.⁹⁵ A parent in a custody proceeding may find it difficult to get or maintain custody because of their criminal record.⁹⁶ Evidence of a witness having a criminal record can be used at trial to impeach any witness’s credibility.

88. Dholakia, *supra* note 33.

89. Akua Amaning et al., *Fines and Fees Are a Barrier to Criminal Record-Clearing*, CTR FOR AM. PROGRESS (Nov. 30, 2021), <https://www.americanprogress.org/article/fines-and-fees-are-a-barrier-to-criminal-record-clearing/>.

90. James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L. J. 387, 388 (2006).

91. *Id.*

92. *Id.*

93. *Id.* at 389.

94. *Id.*

95. JOANNA SCHWARTZ, SHIELDED: HOW THE POLICE BECAME UNTOUCHABLE 147-49 (2023).

96. Mark Hardin, *Child Protection Laws and Criminal Convictions*, 20 ABA 20 (2003), <https://www.jstor.org/stable/23672314>.

I. The Effect of Collateral Consequences

There are countless other collateral consequences such as prejudicing possibilities for immigration, adoption, asserting Second Amendment rights, and more.⁹⁷ All of these consequences chip away at the ability of people with criminal records to move forward with their lives. Treating people like dangerous pariahs does not inspire them to work against those strongly held beliefs. Rejection from society guarantees poorer economic outcomes for those individuals and perpetuates the cycle of poverty.

III. ABOLISHING THE CRIMINAL RECORD

Punishment should not be indefinite and should not come from all directions. Further, no fact finder has carefully considered the many collateral consequences or imposed them as an adjudicated punishment. They are collateral and thus should be limited. The criminal legal system should not bleed into every aspect of one's post-incarceration life, especially if it does so without any specific intention or an end date.

This section examines the argument for abolition by distinguishing prior attempts at reform from the elimination of public criminal records and reviewing possible counterarguments to abolition. Then, this section argues for abolition based on the international success of alternative systems. This is followed by an argument rooted in the Thirteenth Amendment's prohibition on the "badges and incidents of slavery" which compares criminal records to such badges and incidents of slavery. Finally, this section concludes by contemplating how to move towards the abolition of criminal records most effectively.

A. The Abolitionist Framework and Previously Undertaken Reforms

First, it is best to acknowledge that the category of "criminals" is far outweighed by the category of "lawbreakers" because most people have broken some law at some point.⁹⁸ The difference being whether someone was caught, and then, once caught whether they were actually arrested.⁹⁹ This difference is a fine line colored by race and class. Abolition ultimately seeks the elimination of prisons as the default form of punishment and acknowledges that prisons cannot be the solution to all social ills.¹⁰⁰ As leading abolitionist legal scholar Allegra McLeod writes, "[a]n abolitionist ethic identifies more completely the dehumanization, violence, and racial degradation of incarceration and punitive policing in the basic structure and dynamics of penal practices in the United States."¹⁰¹ Thus, abolishing the use of criminal records aligns with this ethic as it halts punishment at the doors of the prison and insists that a criminal history is not a valid basis for dehumanization.

97. Jones, *supra* note 77.

98. Davis, *supra* note 12, at 112.

99. *Id.* at 113.

100. McLeod, *supra* note 15, at 1208.

101. *Id.* at 1207.

Prison abolitionism is necessary because the carceral system works to subordinate Black individuals through imprisonment and policing.¹⁰² Abolitionism looks at the historical record to connect the racial consequences of slavery to the carceral state as it exists today, and calls for the end to carceral punishment.¹⁰³ Reforms are viewed warily by abolitionists because they risk legitimizing prisons by working within their bounds and blurring the vision of a prison-free future.¹⁰⁴ The danger is that any attempt at reform would not go far enough and instead would perpetuate the place of prisons in society. As abolitionist scholar Professor Dorothy E. Roberts writes, “Efforts to fix the criminal punishment system to make it fairer or more inclusive are inadequate or even harmful because the system’s repressive outcomes don’t result from any systemic malfunction.”¹⁰⁵ The structural design of this system is intended to enact control over Black communities by its very nature—this is a feature, not a bug.¹⁰⁶ Eliminating prisons must coincide with the building of a society that no longer requires them, or even considers locking people in cages.¹⁰⁷ Abolitionists hope to achieve this by creating community-based alternatives for dealing with crime and violence and rectifying the inequalities present in our society as a result of capitalism’s constant drive for profit.¹⁰⁸ As Roberts argues: reform is not enough.

However, as previously mentioned, abolitionist theory also acknowledges the difference between a regular “reformist” reform and a “non-reformist” reform. These non-reformist reforms aim to bring about change with the goal of eventually abolishing the system all together instead of trying to fix it.¹⁰⁹ Abolishing the use of criminal records can be considered a non-reformist reform—it must work within the bounds of the current carceral system, but removes part of that system to help those already impacted by past arrest, conviction, or incarceration. A reformist reform, on the other hand, works to make prisons simply more palatable or to assure the public that the conditions inside prisons and the treatment of prisoners are improving and thus they have nothing to worry about.¹¹⁰

A reformist reform can be seen in the recently popular “ban the box” initiatives. This is a reformist reform because it solely limits self-selection bias, while other criminal background checks remain available.¹¹¹ Prohibiting employers, schools, and housing providers from requiring disclosure about criminal history status still leaves open avenues for accessing criminal records, including publicly

102. Roberts, *supra* note 37, at 42.

103. *Id.* at 19.

104. McLeod, *supra* note 15, at 1207.

105. Roberts, *supra* note 33, at 42.

106. *Id.* at 19.

107. *Id.*

108. *Id.* at 47.

109. *Id.*

110. McLeod, *supra* note 15, at 1207.

111. Mike Vuolo et al., *Employment Application Criminal Record Questions and Willingness to Apply: A Mixed Method Study of Self-Selection*, 128 AM. J. SOCIO. 552, 553 (2022).

available information online and commercial background checking companies.¹¹² Many of these “ban the box” initiatives invoke a delay on background checks but fail to remove them completely.¹¹³ This is a reform that necessarily works within the set framework of continued punishment because it can only delay the inevitable and provides no alternative to discovery.

Various government bodies have previously undertaken many of these reformist reforms. In recent years, states recognizing that there is a problem have taken some steps to relieve the burden of the criminal record.¹¹⁴ For example, a number of states have addressed felon disenfranchisement.¹¹⁵ A Florida ballot initiative passed which restored the right to vote for felons, but Florida’s government limited that right by making felon enfranchisement a grueling and oftentimes expensive process.¹¹⁶ Moreover, expungement reform, which includes attempts at extending eligibility and reducing waiting periods for expungement or record sealing, has been a popular method for states to attempt to address the collateral consequences that come with criminal records.¹¹⁷ However, each state has approached expungement differently which has resulted in disparate outcomes.¹¹⁸

These reformist reforms do not go far enough, and worse yet, place the burden on those with criminal records to be aware of these programs and to request reinstatement of rights or expungement of their records. Attempts at reform have been unsuccessful at attacking the main problem: the cycle of poverty powered by the collateral consequences of interaction with the criminal legal system. A stronger stance is necessary to achieve meaningful change. An abolitionist ethic can provide the guideposts for this attempt at change and a framework for how to best pursue that change.

The abolitionist ethic also works to decenter criminal law as the main tool with which social problems can be fixed, as it calls for transformative change and includes individuals, groups, and communities in these calls.¹¹⁹ Criminal record use inherently centers criminal law by decentering the person tied to that record and ignoring the harm caused by these various collateral consequences. As McLeod summarizes, “An abolitionist framework requires positive forms of social integration and collective security that are not organized around criminal law enforcement, confinement, criminal surveillance, punitive policing, or

112. Lucy Gubernick, *Erasing the Mark of Cain: An Empirical Analysis of the Effect of Ban-The-Box Legislation on the Employment Outcomes of People of Color with Criminal Records*, 44 FORD. URB. L. J. 1153, 1179 (2017).

113. *Id.* at 1183.

114. Ram Subramanian et al., *Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009-2014*, CTR ON SENTENCING AND CORRECTION (Dec. 2014), <https://www.prisonpolicy.org/scans/vera/states-rethink-collateral-consequences-report-v4.pdf>.

115. *Id.* at 7.

116. BRENNAN CENTER FOR JUSTICE, *Voting Rights Restoration Efforts in Florida* (Aug. 7, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-florida>.

117. Subramanian, *supra* note 114, at 13.

118. *Id.*

119. McLeod, *supra* note 15, at 1217.

punishment.”¹²⁰ Abolishing the criminal record would provide space and resources for non-punishment-based alternatives by reducing the stigma and collateral consequences associated with criminal records.

Criminal records have, much like prisons themselves, turned into a private business.¹²¹ Background checks must be completed by someone, and companies fill such demand. Criminal record checking websites are plentiful and run advertisements or ask for payment for more specific information about a person.¹²² Criminal law policy decisions should not be made with profit in mind. That is what leads to social ills like mass incarceration because solving systemic issues related to crime requires investment and resources which a for-profit mindset will never be able to deliver because such a mindset created those problems in the first place.

Some may argue that criminal records are worthwhile because they provide valuable information. The problem, however, is that this information is provided to anyone and without nuance.¹²³ Perhaps criminal record information is worthwhile in some circumstances, like an investigation that seeks to exonerate an individual by pointing to someone else (a classic criminal defense strategy to impose reasonable doubt). This was certainly the case for Curtis Flowers.¹²⁴ An investigative report by *The New Yorker* reviewed Flowers’ case after discovering he was to be tried for the seventh time.¹²⁵ In the course of this investigation, the reporter, Madeleine Baran, and her team interviewed witnesses who had testified in Flowers’s previous trials.¹²⁶ They also uncovered the criminal history of one of the prosecutor’s key witnesses, and cast doubt on him as a witness.¹²⁷ Similarly, they looked into the criminal history of an alternative suspect and attempted to show why he would make a better suspect.¹²⁸ However, this still does not show why this information should not at least be limited to defense counsel. Criminal record information does not need to be available to the general public for it to be useful to such investigations.¹²⁹ The widespread availability of these records also means that they are less accurate. The focus has been on disseminating information profitably, not necessarily accurately.

Another argument for the use of criminal records is rooted in a concern for safety. However, prior to the 1970s (and mass incarceration) criminal records

120. *Id.* at 1164.

121. Sarah Esther Lageson, *Found Out and Opting Out: The Consequences of Online Criminal Records for Families*, 665 ANNALS AM. ACAD. POL. & SOC. SCI. 127, 129 (2016).

122. *Id.*

123. *Id.*

124. APM REPORTS, *In the Dark: July 16, 1996*, at 5:43-6:20 (May 1, 2018), <http://www.apmreports.org/story/2018/05/01/in-the-dark-s2e1>.

125. *Id.*

126. APM REPORTS, *In the Dark: The Route* (May 1, 2018), <http://www.apmreports.org/story/2018/05/01/in-the-dark-s2e2>.

127. APM REPORTS, *In the Dark: Privilege* at 3:27-4:09, 17:52-21:16 (May 22, 2018), <https://www.apmreports.org/story/2018/05/22/in-the-dark-s2e5>.

128. APM REPORTS, *In the Dark: Discovery* at 18:10-20:58, 24:20-26:04 (June 26, 2018), <https://www.apmreports.org/story/2018/06/26/in-the-dark-s2e10>.

129. Lageson, *supra* note 121, at 137.

were not accessible to the general public, and certainly were not so widespread.¹³⁰ Further, each state has slightly different policies concerning access to criminal records.¹³¹ Each state maintains its own distinct database of criminal record and history information, and each state has vastly different rules regarding who can access that information and how.¹³² Some states, for instance, allow any individual to gain access to someone's criminal records so long as they pay a fee.¹³³ Moreover, today's digitized and publicly accessible criminal records have surpassed their originally intended purpose.¹³⁴ As criminal law professor Alessandro Corda argues, "The primary goals were to facilitate the identification of suspects and defendants, and to enhance the legitimacy and strengthen the professionalism of police forces."¹³⁵ Public access to criminal records is not necessary to achieve any of these goals.

The possibility of expungement or record clearing may also be touted as a solution. So, why is expungement not enough? With expungement comes hefty fees, a complicated legal process, and more direct interaction with the court system.¹³⁶ Expungement is also exceedingly rare. Only around seven percent of people eligible for expungement manage to clear their records within five years of becoming eligible.¹³⁷ The criminal legal system has many barriers for individuals trying to navigate it, including inaccessible filing systems, high fees to make those filings, as well as barriers associated with a person's ability to come to in-person court appearances including transportation and childcare.¹³⁸ Not only are there many expungement requirements which are difficult to navigate without some knowledge of the criminal legal system, but in addition to paying for the expungement itself, many individuals are barred from expungement until all court fees and costs are paid in full.¹³⁹ This creates a disparity between those who can pay and those who cannot. The ability to move forward after interacting with the criminal legal system should not be locked behind a paywall.

B. A Society Without Criminal Records

The success of different criminal record-keeping policies abroad further supports eliminating the broad use of criminal records in the United States. In Europe, criminal records are not available to the public and instead stay internal to the police.¹⁴⁰ Spain, for instance, provides the utmost privacy to criminal

130. Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOWARD L.J. 1, 3 (2016).

131. *Id.* at 14.

132. *Id.*

133. *Id.*

134. *Id.* at 41.

135. *Id.*

136. *Id.*

137. Amaning et al., *supra* note 89.

138. *Id.*

139. Jones, *supra* note 77, at 262.

140. Lapp, *supra* note 5, at 306.

defendants by presenting verdicts to the defendant alone, instead of in court, anonymizing the names of defendants when cases are published, and making criminal cases unavailable to the public.¹⁴¹ Spain puts more of an emphasis on rehabilitation as a goal of criminal sentencing and as a result, balks at the use of criminal records as a form of public shaming. Spain recognizes that advertising an individual's criminal record is not an effective criminal deterrence strategy.¹⁴²

This is not unique to Spain. In Europe, most countries, with the United Kingdom as an exception, recognize the "rights of privacy, dignity, and honor that protect the individual from governmental and non-governmental disclosure of criminal record information."¹⁴³ Most of these countries, even when records can only be accessed by government agents, only maintain records of actual convictions.¹⁴⁴ This alone could help reduce the number of errors that are often found on criminal records in the United States. Additionally, in the majority of European countries, unlike in the United States, there are no private sellers of criminal record information.¹⁴⁵ In Finland, for example, criminal records are not available to any private individuals other than to those to whom the record pertains.¹⁴⁶

Europe generally places a greater importance on data protection and privacy than the United States, but many of these policies can still be applied domestically. Other societies remain able to function without public criminal records. The United States is not so different that it would be unable to function without the widespread use of criminal records, as it was able to in the past. These systems of keeping criminal records are not perfect, but at least when it comes to private access to criminal history information, it is clear that the United States' system is not the only option.

C. Criminal Records as a Badge and Incident of Slavery

Unfortunately, despite many efforts to guarantee a right to privacy for the American public, the courts have been reluctant to read this right into the United States Constitution, especially in more recent years with the *Dobbs* anti-abortion decision.¹⁴⁷ The Supreme Court has been even more clear when it comes to criminal records. The Court's ruling in *Paul v. Davis* held that "official criminal justice records do not fall within the constitutional zone of privacy."¹⁴⁸ Nevertheless,

141. *Id.*

142. James B. Jacobs & Elena Larrauri, *Are Criminal Convictions a Public Matter? The USA and Spain*, 14 PUNISHMENT & SOC'Y 3, 6 (2012).

143. James B. Jacobs & Elena Larrauri, *European Criminal Records & Ex-Offender Employment* (Oct. 7, 2015) (Working Paper No. 15-41, N.Y. UNIV. SCH. OF L.).

144. *Id.* at 4.

145. *Id.* at 26.

146. *See id.* at 10; Criminal Records Act, 770/1993, § 3 (Fin.).

147. *See* Len Niehoff, *Unprecedented Precedent and Original Originalism: How the Supreme Court's Decision in Dobbs Threatens Privacy and Free Speech Rights*, A.B.A. (Jun. 9, 2023), https://www.americanbar.org/groups/communications_law/publications/communications_lawyer/2023-summer/unprecedented-precedent-and-original-originalism/.

148. Corda, *supra* note 129, at 36 (describing the holding of *Paul v. Davis*, 424 U.S. 693, 713 (1976)).

some constitutional basis for limiting, or eliminating, the use of criminal records does exist, and the Thirteenth Amendment of the United States Constitution may provide this basis.

Abolitionist legal scholar Brandon Hasbrouck argues that the criminal record, and the collateral consequences that come with conviction, can be categorized as a form of the badges and incidents of slavery found in the Thirteenth Amendment.¹⁴⁹ He finds that such collateral consequences would be beyond the reach of the Punishment Clause and its allowance for forced labor as a punishment for a crime because of how vast and numerous those consequences now are.¹⁵⁰ He likens this network of collateral consequences to the “civil death” the Thirteenth Amendment aimed to prevent.¹⁵¹ The criminal record is a perpetual mark following punishment, thus there is an apparent connection between it and a badge of slavery. As Hasbrouck puts it, “These persistent restrictions strip the convicted person of fundamental privileges and immunities of citizenship, including restrictions on speech, family relations and legal status—all of which are textbook examples of badges and incidents of slavery.”¹⁵²

The restrictions inherent in having a criminal record are a continued punishment disfavored by the intention animating the Thirteenth Amendment. The Thirteenth Amendment sought the end of racial oppression through the elimination of slavery.¹⁵³ Thus, freedom is a major tenet of the Thirteenth Amendment, and it can be argued that a badge or incident of slavery can be any system interfering with that freedom and ability to participate in civil society once a punishment is complete.¹⁵⁴

In 1968, the Supreme Court held in *Jones v. Alfred H. Mayer Co.*, that Congress, under the Thirteenth Amendment, has the power to create the necessary legislation to “eliminate the badges and incidents of slavery.”¹⁵⁵ Since this decision, lower courts have decided that the Thirteenth Amendment applies to physical and literal slavery only.¹⁵⁶ Law Professor William M. Carter, Jr. argues for another interpretation which calls for “an examination of whether a modern condition or form of discrimination is a lingering effect of the system of African slavery.”¹⁵⁷ The central issue in *Jones*, for instance, concerned whether discrimination in the form of a private homeowner refusing to sell his home to a Black individual was adequately connected to the country’s past slavery.¹⁵⁸ The Court held that this fell under the “badges and incidents of slavery” that the

149. Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 145 (2022).

150. *Id.*

151. *Id.*

152. *Id.* at 145–46.

153. *Id.* at 93.

154. *Id.* at 145–46.

155. See William M. Carter Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C DAVIS L. REV. 1311, 1314 (2007).

156. *Id.* at 1316.

157. *Id.* at 1322.

158. *Id.*

Thirteenth Amendment prohibits.¹⁵⁹ Carter argues that the Court came to this conclusion, not because housing discrimination was tantamount to enslavement, but because this form of discrimination was a result of the “vestiges and stigmas arising out of slavery that African Americans still suffered.”¹⁶⁰

This is analogous to mass incarceration, and thus criminal records, today. The way our criminal legal system has developed can be traced back to the time of slavery when police originated as slavecatchers and later participated in overt discrimination against Black Americans, from lynchings to the excessively violent and disproportionate targeting of Black Americans by police today.¹⁶¹ Criminal records are a direct result of policing and incarceration and all three continue to have a disproportionate effect on Black Americans—making the Thirteenth Amendment connection even clearer.¹⁶² Criminal records in particular perpetuate certain stigmas and label the criminal record holder as an undesirable employee, renter, parent or student. A criminal record is a permanent mark against a person that they must wear, like a badge, to signify their status.

D. Accomplishing Abolition

Whether or not courts recognize a constitutional imperative to stop using criminal records, policymakers should abolish their public use. Too many people are ensnared by the criminal legal system, and punishing people further is counterproductive and unethical. Having a record scrutinized many years after an offense often does not present an accurate picture of the person; it just provides an illusion of safety by othering certain groups of people and labeling them as the type to stay away from.¹⁶³ This logic in support of criminal records is unsupported by data. As the authors of *Paying a Price, Long After the Crime* estimate, people who have committed a crime can be considered “redeemed” after a certain point and are no more likely than the average citizen to commit another crime after a period of 10-13 years.¹⁶⁴ Also, people tend to be younger when they commit crimes.¹⁶⁵ Eighteen-year-olds who have committed an offense are only as likely to commit a crime as someone without a criminal record within 3-8 years of that first offense. This number varies depending on the initial crime, but recidivism risk falls steadily with time.¹⁶⁶ Doing something as an eighteen-year-old should

159. *Id.*

160. *Id.*

161. Roberts, *supra* note 37, at 24-25.

162. *See id.*

163. Alfred Blumstein & Kiminori Nakamura, *Paying a Price, Long After the Crime*, N.Y. TIMES (Jan. 9, 2012), <https://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html?smid=url-share>.

164. *Id.*

165. Sweeten et al., *Age and the Explanation of Crime, Revisited*, J YOUTH ADOLESCENCE 921, 936 (2013), DOI 10.1007/s10964-013-9926-4.

166. *See* Blumstein & Kiminori, *supra* note 162; *see also* Alfred Blumstein & Kiminori Nakamura, ‘Redemption’ in an Era of Widespread Criminal Background Checks, 263 NAT’L INST. JUST. J. 10, 12 (2009).

not derail someone's life or follow them around forever. People can grow and change, but the current criminal record system in the United States stifles this growth by imposing a label that acts as a barrier to many of the opportunities that would otherwise play a large role in contributing to that growth.¹⁶⁷ In addition to this direct barrier to opportunities, simply having a criminal record creates a stigma that may make growth seem impossible, which makes it only that much harder to achieve.¹⁶⁸ Instead of imposing punishment through the everlasting presence of criminal records, we should strive to set people up to be successful post-conviction and allow them to rebuild their lives.

Achieving the abolition of criminal record use will require support from several sectors. Grassroots organizers, lawmakers, and legal professionals must all work together to realize the vision of the abolition of criminal records. Public dissent tends to be most effective, but it works best in conjunction with other methods. Criminal record abolition is a small, but necessary step in reducing poverty for people impacted by the criminal legal system. Once criminal record use is abolished there is still more work to be done, particularly in the area of poverty reduction.

Vitality, there should be a federal solution. Disparities among states in how they keep, expunge, or seal criminal records are a source of many of the issues presented in this Note.¹⁶⁹ Some states do not allow for any expungement of convictions—only arrests.¹⁷⁰ Often, only certain crimes or dispositions can be expunged regardless of how many years it has been since the conviction.¹⁷¹ In some states, only record “sealing” is available, which means the record is still accessible to certain groups even if it does not show up in a third-party background check.¹⁷² Federal action would allow for a more uniform resolution so that criminal records are not available to private actors in any state.

CONCLUSION

We should abolish the use of criminal records, at the very least, in housing, employment, and education. The impact of collateral consequences is too severe, especially when it comes to the exacerbation of poverty. The continued use of someone's criminal history against them sets them up for failure both by imposing systemic barriers to such success and by discouraging proper reintegration by othering those with criminal records.¹⁷³

If abolition of criminal record use is achieved, one key question remains: if private actors are prohibited from using criminal records in their decision

167. See Jones, *supra* note 77.

168. See *id.*

169. Margaret Colgate Love, THE MANY ROADS FROM REENTRY TO REINTEGRATION 33 (2022), <https://ccresourcecenter.org/the-many-roads-to-reintegration/>; Corda, *supra* note 129, at 22.

170. Corda, *supra* note 129, at 23.

171. *Id.*

172. *Id.* at 21-22.

173. Makamal & Samuels, *supra* note 76; Jacobs, *supra* note 90.

processes, should the government still keep a record that they are allowed to use? And, if so, when should they be allowed to use it? These are questions that may still require further research and contemplation. Perhaps the consideration of past criminal history should not be used by a police officer making a routine traffic stop or by prosecutors when making charging and plea decisions, but there is something to be said of the benefit of keeping data to hold the government accountable. Not keeping track of the number and causes of police stops for instance would make it more difficult to assess how many stops are made without probable cause or even reasonable suspicion as required by *Terry v. Ohio*.¹⁷⁴ Data can be a powerful tool for the public—knowing at what rates different groups of people are being convicted for instance provides insight into the incentives built into the criminal legal system, so arrest and conviction records are still necessary to an extent.¹⁷⁵ However, such data could be largely anonymized.

Regardless, the current state of criminal record keeping and use is unsustainable and contributes to the prevalence of poverty in formerly incarcerated or convicted individuals. The collateral consequences of conviction can be limited by doing away with the widespread and casual use of criminal records in the United States. Punishment for a crime should certainly not be indefinitely imposed by a criminal record hanging overhead, threatening to upset reintegration and rehabilitation by perpetuating the cycle of incarceration and poverty.

Criminal records do not tell the whole story of a person. Often, they do not even show the disposition of a case. Criminal records should not be used to determine the next part of a person's story, either.

174. *Terry v. Ohio*, 392 U.S. 1 (1968) (a police officer may stop and frisk a person without probable cause if the officer has reasonable suspicion of criminality or a reasonable belief that the person is armed and dangerous).

175. Lageson, *supra* note 6, at 69.