

Collateral Consequences of Criminal Records

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As part of any criminal conviction, individuals are sentenced to punishments that are prescribed by the criminal legal system, such as imprisonment, probation, or the payment of fines. In addition to these court-imposed penalties, individuals also face a variety of consequences for their crimes that are not dictated directly by the courts as part of the official sentence.¹

These external repercussions that an individual may face as a result of having a criminal record are called “collateral consequences.” As roughly 8% of all American adults have felony convictions on their records, and many more have misdemeanors and arrests,² it is estimated that millions of Americans have been negatively impacted by collateral consequences.

Collateral consequences of criminal records create social and economic barriers for individuals who are reentering society by denying or restricting rights and privileges that would otherwise be available to them. More than 40,000 collateral consequences exist across the United States in the form of laws, ordinances, and organizational rules, policies, and procedures.³ They include barriers to employment, housing, college admission, student loans, professional licenses, government benefits and services, voting rights, and more. This Special Issue of Caseload Highlights provides an overview of the various forms of collateral consequences, how they differ across states, and what state courts can do to address them.

Why Should the Courts Care about Collateral Consequences?

Although collateral consequences for criminal records formally operate outside of the criminal legal system, they are increasingly being recognized as an intrinsic part of the package of punishments that people receive for their crimes. Many collateral consequences are unrelated to the underlying offense that the individual committed, and they can undermine the fundamental goals and principles of the legal system.⁴ The existence of these extra-judicial penalties has serious implications for the courts.

Proportionality

First, although the American criminal legal system is grounded in the principle that punishments should be proportional to crimes, the existence of collateral consequences means that people are often punished far out of proportion to their offenses.⁵ The problem of punishment disproportionality is further complicated by an array of especially severe collateral consequences that are applied when the label “violent crime” is applied to the individual’s offense; because definitions of violent crime vary widely from state to state, collateral consequences for these crimes can be particularly inconsistent across individuals and disproportional to the severity of the offense.⁶

Rehabilitation and Recidivism

One major goal of the criminal legal system, along with punishment and deterrence, is the rehabilitation of those who have committed crimes.⁷ Some collateral consequences limit people’s ability to successfully reintegrate into society to such a large extent that they *increase* the likelihood of recidivism. Research shows that when people are unable to secure employment and housing as a result of their criminal records, they become more likely to recidivate, because many crimes stem from a lack of access to societal resources.⁸ Collateral consequences that have the effect of increasing crime strain the courts’ resources through heavier caseloads, and they cause programming such as parole and probation resources to be less cost-effective.

Racial Equity

Finally, because the criminal legal system disproportionately involves people of color—particularly African Americans, Indigenous peoples, and Latinx/Latine individuals—these groups also disproportionately bear the burden of collateral consequences.⁹ The unequal weight of collateral consequences for different racial and ethnic groups raises important civil rights issues, threatens the courts’ renewed efforts to address racial inequities in the legal system, and undermines public trust and confidence in the courts.¹⁰

Collateral Consequences Data Highlights

There is a wide variety of collateral consequences that range from formal statutes to informal interpersonal behaviors. In this section, we highlight some of the most common collateral consequences that have demonstrated the strongest connections to re-entry into the community and recidivism.

Employment

One of the most significant collateral consequences that people face after serving their sentences is the inability to find employment. Research studies on employers' attitudes toward people with criminal records show that employer attitudes vary widely and often do not match their actual hiring behavior; employers who claim to be willing to hire people with criminal records frequently decline to do so when given the opportunity.¹¹ Criminal history is not a protected category under Title VII of the Civil Rights Act of 1964, but employment policies that adversely affect people with criminal records do violate Title VII if they have disparate impacts on certain racial groups.¹² Decades of social science research has established that policies that restrict employment opportunities on the basis of criminal records have dramatically worse impacts on people of color.¹³

Several policy solutions have been proposed to address the problem of employment discrimination against people with criminal records. First, expungement is available as a remedy in most states, but often requires the individual to petition the court and offer strong evidence of the harms caused by the criminal record (meaning that the individual must be denied housing and employment opportunities), in addition to strong evidence of rehabilitation.¹⁴ The high bar for expungement in most jurisdictions means that this remedy is effectively not available to most people with criminal records during the period of reentry when it would be beneficial.

Second, at least 36 states and over 150 municipalities, have adopted “Ban-the-Box” laws (BTB), which require employers to wait until the call-back or interview stage of the hiring process before conducting a criminal background check.¹⁵ The idea behind BTB laws is to give job applicants the chance to present their strengths and put their criminal record in context before employers learn about the criminal record, thus increasing their chances of being hired. **Figure 1** shows the current distribution of states that have adopted BTB policies at the statewide level (cities and counties that have adopted local BTB policies are not shown here). While BTB laws have been shown to be effective in increasing employment and decreasing recidivism,¹⁶ they have also been shown to exacerbate racial disparities in hiring. Research suggests that when employers are not allowed to ask applicants about criminal history, many make assumptions about the likelihood of an applicant’s criminal history based on race.¹⁷ Because this approach is still relatively new, more research is needed.

Ban-the-Box Policies

- BTB Protections: All Employers
- BTB Protections: Private Employers Only
- BTB Protections: Public Employers Only
- No BTB Protections

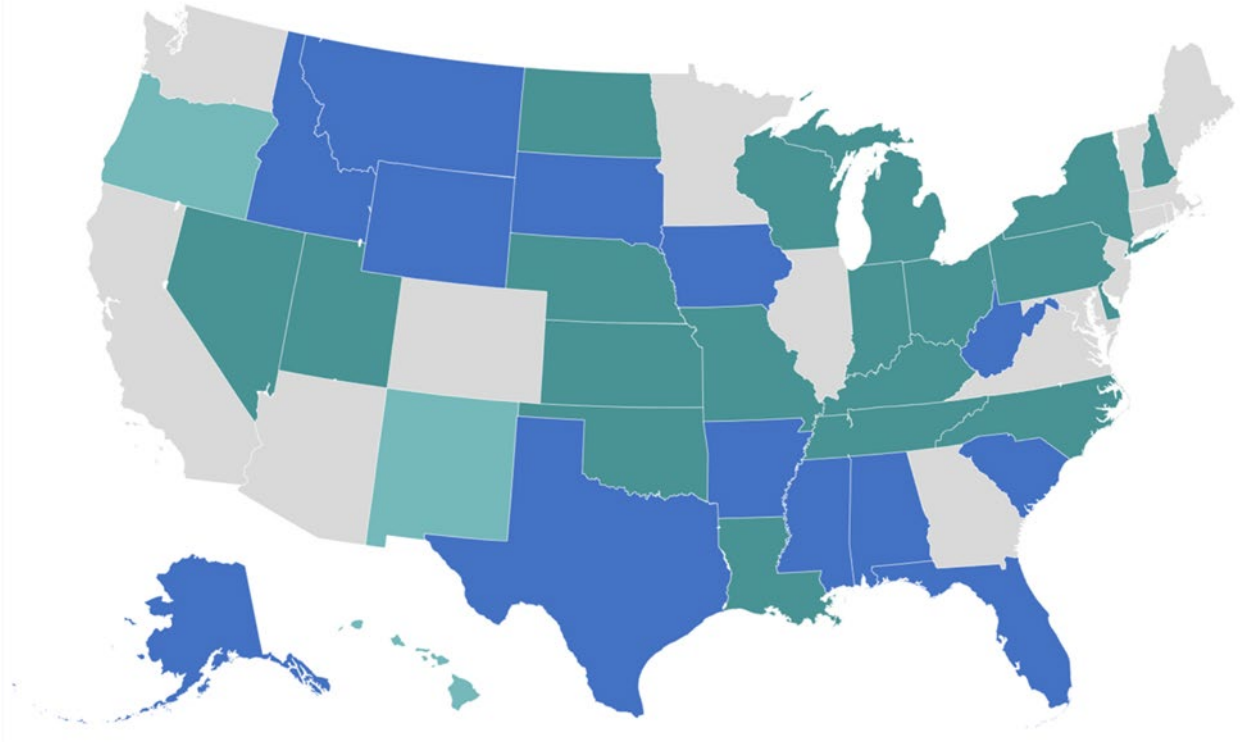


Figure 1

Housing

Under federal law, public housing authorities (PHAs) can restrict or outright ban people who have criminal records (but not arrest records alone) from living in subsidized housing.¹⁸ Private landlords also frequently screen prospective tenants for criminal records and use this information as a basis for denying rental applications, even if the underlying criminal offenses are minor and unrelated to the applicant's fitness as a tenant.¹⁹ As a result, people who have been incarcerated, and the family members with whom they live, are at high risk for housing insecurity and homelessness. Furthermore, being declined housing on the basis of criminal history disproportionately impacts people of color.²⁰

Along with employment, finding housing upon release is one of the most important factors that reduces the likelihood of recidivism.²¹ Because there are many laws that criminalize homelessness across the U.S., housing insecurity puts people at direct risk of coming back into contact with the criminal justice system through homelessness. Housing insecurity also exacerbates other collateral consequences, as it makes it more difficult for people to secure jobs, pursue educational opportunities, and generally reintegrate back into society.²²

Public Benefits

The primary sources of welfare support in the U.S. are the Temporary Assistance for Needy Families (TANF) program,²³ which provides monetary payments to families in need, and the Supplemental Nutrition Assistance Program (SNAP), which is often referred to as “food stamps.”²⁴ These programs are limited in the amount, scope, and duration of support that they provide, but they serve as a critical lifeline to many families living at or near the poverty line, including those whose family members have criminal records.

Federal law imposes a lifetime ban on the receipt of TANF and SNAP benefits by people who have criminal records; however, states are at liberty to lift or modify this restriction. In some states, for example, people with criminal records can become re-eligible to receive benefits after a certain amount of time has passed. In some states, the ban operates differently for people who have committed different types of crimes. **Figures 2 and 3** show the distribution of TANF and SNAP eligibility restrictions, respectively, by state.

The restriction of public benefits to people who have criminal records increases recidivism, particularly in financially motivated crimes, as people who are ineligible for benefits are more likely to resort to criminal activity to survive.²⁵ For individuals who are trying to re-enter society after serving a criminal sentence, difficulties obtaining employment and housing make access to temporary financial and food benefits especially important. Research also suggests that these bans disproportionately harm people of color, making it particularly difficult for African Americans and Latinx/Latine individuals to successfully re-enter society and more likely that they will recidivate.²⁶

TANF Policies

- No Ban on Access to TANF
- Modified Ban on Access to TANF
- Lifetime Ban on Receiving TANF

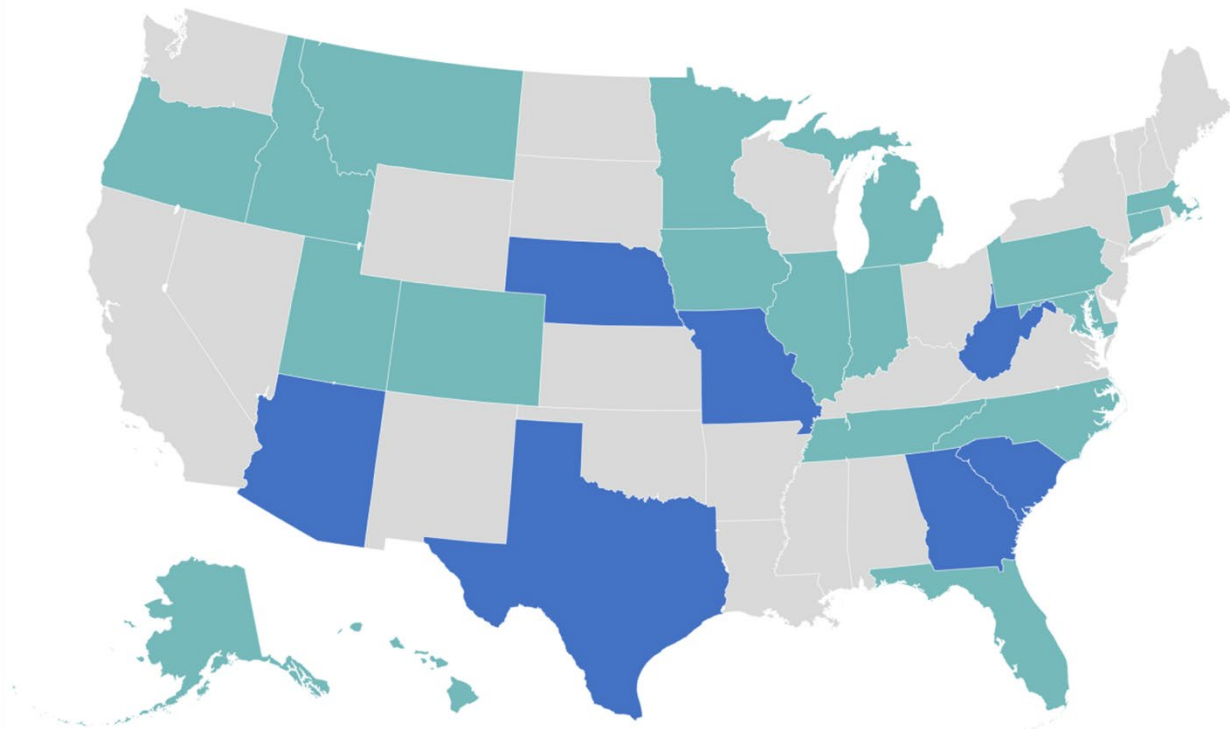


Figure 3

Voting Rights

States vary widely in the extent to which they restrict voting on the basis of criminal history. The majority of U.S. states have felony disenfranchisement policies, in which people with felony convictions lose the right to vote while serving their prison terms; many states also restrict voting beyond the incarceration period.²⁷ **Figure 4** shows the distribution of disenfranchisement policies by state. In total, about 5.2 million Americans (2.3% of the U.S. population) are currently disenfranchised due to felony convictions, and 2.2 million of these people have finished serving their criminal sentences.²⁸

Felony Disenfranchisement Policies

- Everyone can vote
- Disenfranchised while incarcerated
- Disenfranchised while incarcerated or under community supervision
- Disenfranchised if convicted of certain felonies

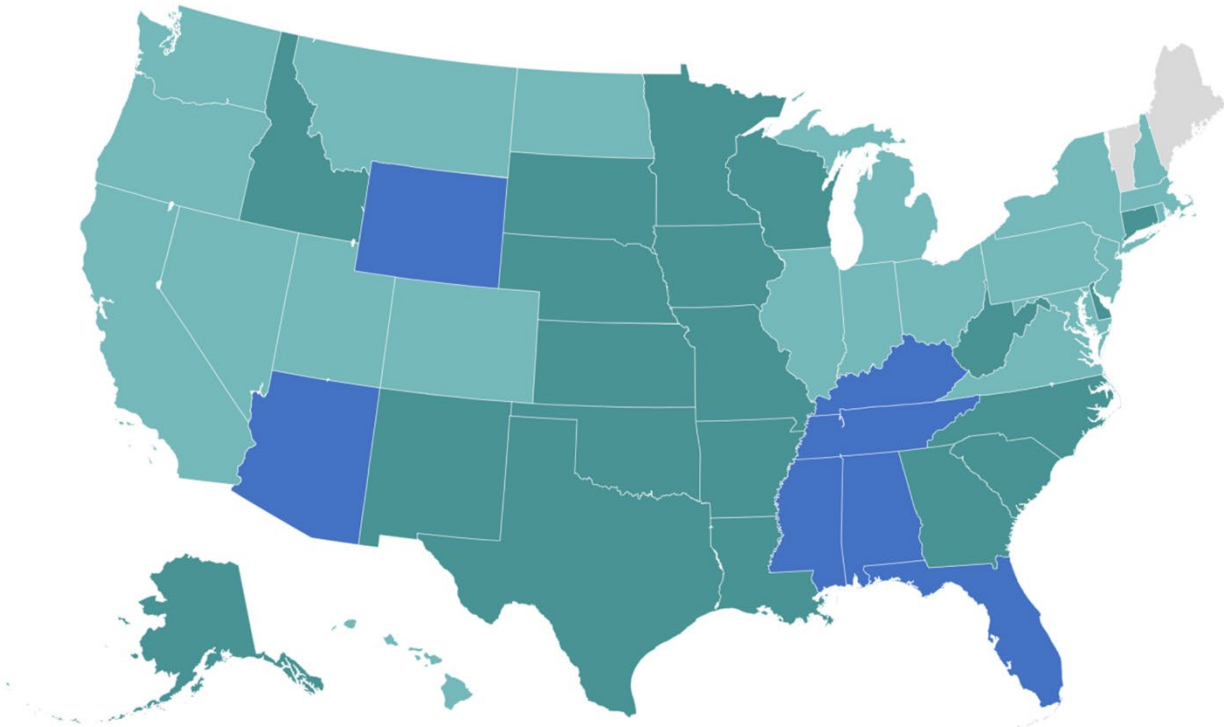


Figure 4

Educational Discrimination and Student Loans

Nearly two-thirds of higher education institutions, both public and private, collect criminal history information as part of the college admissions process.²⁹ Education serves an important role for many in creating employment opportunities and raising standards of living; people with college degrees are more likely to be employed, earn higher incomes, and are less likely to rely on public assistance programs.³⁰ Accordingly, limiting the ability of people with criminal records to pursue an education after serving their sentences undermines their ability to successfully re-enter society.

Federal law also forbids people who have been convicted of certain drug offenses from receiving federal student grants, loans, or work assistance for higher education.³¹ People of color, particularly African Americans, are disproportionately targeted for surveillance and arrest for drug crimes. Because of racialized economic inequality, these groups are also more likely to need financial aid to attend college.³² Taken together, this means that both the use of criminal records in college admissions and the student loan ban disproportionately burden people of color.³³

What Can the Courts Do?

Although many of the collateral consequences discussed here are not under the direct control of the judicial system, courts can take steps to limit the extent to which collateral consequences increase recidivism and threats to public safety and exacerbate racial inequities. Taking these steps is likely to support the courts' strategy to promote public trust and confidence in the legal system.

Ensure data quality in case management systems

Missing and inaccurate case management data are widespread problems in the courts. Common errors include missing disposition data, incorrect case status (i.e., active v. closed), incorrect offenses, duplication of records, and incorrect names and identifiers.³⁴

Accurate case data are critical for people who are working to overcome the barriers that result from having a criminal record, and background checks that contain more accurate information limit the risk of wrongful or unfounded collateral consequences.³⁵ Bans on public housing, public benefits, and student loans are often prescribed for a certain amount of time after the criminal case has been closed. Additionally, expungement eligibility is usually contingent on a certain number of years passing after the criminal case was closed. Therefore, if a case is not closed or has an inaccurate closure date in the record, the ban periods and the waiting period for expungement are erroneously extended.

Eliminate fines and fees

For a large number of criminal defendants, the court fines and fees that are attached to their criminal offenses are the biggest barrier to closing cases and fully reentering society.³⁶ Particularly for defendants with low income, or those who are struggling to find employment upon release from jail or prison, it can become nearly impossible to pay the fines and fees that the court requires in order to consider the sentence fully served.³⁷ In some cases, the inability to pay fines and fees can result in license suspension, arrest, or jail time.

The existence and prevalence of fines and fees has a disproportionate impact on poor people and people of color, both exacerbating the collateral consequences of the original criminal record and adding new offenses to the criminal record stemming solely from poverty. Furthermore, because fines and fees are not particularly effective for raising revenue for the courts, many experts recommend eliminating them altogether.³⁸

Educate judges who are involved in sentencing

Judges who make sentencing decisions think carefully about the proportionality of sentences to the crimes that defendants have committed.³⁹ In order to make sentencing decisions that are fully informed about the realities of the penalties that defendants will face, judges should receive education and training about collateral consequences. To the extent allowed by state law, judges might also consider the range of collateral consequences that a defendant is likely to face when making sentencing decisions.

Make expungement and sealing more accessible

One of the few remedies available to a person with a criminal record who is facing collateral consequences is to have the criminal record expunged or sealed. Although all fifty states make provisions for expunging criminal records, the processes for obtaining an expungement are often arduous. Research suggests that a small fraction of people (about 10%) who are eligible for expungement under their states' laws actually receive one.⁴⁰ This would suggest that tens of millions of Americans are being unnecessarily burdened by the collateral consequences of criminal records. In light of this “second chance gap,” courts should closely evaluate expungement case processes and procedures. To the extent that procedures can be simplified and communicated more clearly to court users, courts can make this theoretical remedy a reality for more people who are eligible. Courts might consider establishing expungement navigator programs, allied legal professional programs for expungement cases, or other initiatives that have been shown to increase access to justice in other areas of law.

Adopt problem-solving courts and prosecutorial diversion programs

Many jurisdictions have established problem-solving courts, in which a primary goal is to divert people away from criminal prosecution when a more treatment-oriented solution would be in the public interest.⁴¹ Problem-solving courts that incorporate diversion programs give defendants an opportunity to receive services that stabilize their living conditions and address the underlying problems (such as mental illness) that contribute to certain types of criminal offenses. In many cases, a defendant's receipt of services and compliance with the case plan leads to criminal charges being dropped. Problem-solving courts and prosecutorial diversion help to address the problem of collateral consequences by preventing people, particularly those who are most vulnerable and most likely to be excessively burdened by collateral consequences, from acquiring a criminal record.

Endnotes

- ¹ U.S. Commission on Civil Rights (June 2019), Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities, <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>.
- ² Shannon, S., Uggen, C., Schnittker, J., Thompson, M., Wakefield, S., & Massoglia, M. (2017), The growth, scope, and spatial distribution of people with felony records in the United States, 1948-2010, *Demography*, 54, 1795-1818.
- ³ Council of State Governments (2018), The National Inventory of the Collateral Consequences of Conviction, <https://csgjusticecenter.org/publications/the-national-inventory-of-collateral-consequences-of-conviction/>.
- ⁴ American Bar Association (Dec. 11, 2020), Reducing the Impact of Collateral Consequences of Convictions, [https://www.americanbar.org/advocacy/governmental legislative work/priorities_policy/criminal_justice_system_improvements/educating-the-impact-of-collateral-consequences-of-convictions/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/criminal_justice_system_improvements/educating-the-impact-of-collateral-consequences-of-convictions/).
- ⁵ Murray, B. M. (2020), Are collateral consequences deserved? *Notre Dame Law Review*, 95(3), 1031-1076.
- ⁶ O'Hear, M. (2019), Third-class citizenship: The escalating legal consequences of committing a "violent" crime, *Journal of Criminal Law and Criminology*, 109(2), 165-235.
- ⁷ Love, M. (2011), Paying their debt to society: Forgiveness, redemption, and the Uniform Collateral Consequences of Conviction Act, *Howard Law Journal*, 54, 753-794.
- ⁸ Whittle, T. (2018), Felony Collateral Sanctions Effects on Recidivism: A Literature Review, *Criminal Justice Policy Review*, 29(5), 505-524.
- ⁹ Alexander, M. (2020), *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (10th Anniversary ed.), New York: The New Press.
- ¹⁰ See National Center for State Courts, State Court Statements on Racial Justice, <https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice>; National Consortium on Racial and Ethnic Fairness in the Courts, <https://www.national-consortium.org/>.
- ¹¹ Pager, D. & Quillian, L. (2005), Walking the talk? What employers say versus what they do, *American Sociological Review*, 70, 355-380.
- ¹² Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k).
- ¹³ Leasure, P. & Kaminski, R. (2021), The impact of a multiple conviction record on hiring outcomes, *Crime & Delinquency*, 67, 1022-1045; Pager, D. (2003), The mark of a criminal record, *American Journal of Sociology*, 108(5), 937-975.
- ¹⁴ Collateral Consequences Resource Center (July, 2021), 50-State Comparison: Expungement, Sealing & Other Record Relief, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/>.
- ¹⁵ National Employment Law Project (Sept. 30, 2020), Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies, <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.
- ¹⁶ D'Alessio, S., Stolzenberg, L., & Flexon, J. (2014), The effect of Hawaii's Ban the Box law on repeat offending, *American Journal of Criminal Justice*, 40, 336-352.
- ¹⁷ Agan, A. & Starr, S. (2018), Ban the Box, criminal records, and racial discrimination: A field experiment, *The Quarterly Journal of Economic*, 2018, 191-235; Doleac, J. & Hansen, B. (2020), The unintended consequences of "Ban the Box": statistical discrimination and employment outcomes when criminal histories are hidden, *Journal of Labor Economics*, 38(2), 321-374.
- ¹⁸ U.S. Department of Housing and Urban Development, Office of Public and Indian Housing, Notice PIH 2015-19, Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions, <https://www.hud.gov/sites/documents/PIH2015-19.PDF>.
- ¹⁹ U.S. Commission on Civil Rights (June 2019), Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities, <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>.
- ²⁰ Schneider, V. (2018), The prison to homelessness pipeline: Criminal record checks, race, and disparate impact, *Indiana Law Journal*, 93(2), 421-455.
- ²¹ Cortes, K. & Rogers, S. (2010), Re-entry housing options: The policymakers' guide, Bureau of Justice Assistance, Council of State Governments, https://bja.ojp.gov/sites/g/files/xvckuh186/files/Publications/CSG_Reentry_Housing.pdf.
- ²² Fontaine, J. & Biess, J. (2012), Housing as a Platform for Formerly Incarcerated Persons, Urban Institute, <https://www.urban.org/sites/default/files/publication/25321/412552-Housing-as-a-Platform-for-Formerly-Incarcerated-Persons.PDF>.
- ²³ 42 U.S.C. § 401; 45 C.F.R. § 260 (2021).
- ²⁴ 45 C.F.R. § 273 (2021).
- ²⁵ Tuttle, C. (2018), Snapping back: Food stamp bans and criminal recidivism, *American Economic Journal: Economic Policy*, 11(2), 301-327.

- ²⁶ Thompson, D. & Burnside, A. (2021), No More Double Punishments: Lifting the Ban on SNAP and TANF for People with Prior Felony Drug Convictions, The Center for Law and Social Policy, https://www.clasp.org/sites/default/files/publications/2021/02/2021_No%20More%20Double%20Punishments.pdf.
- ²⁷ American Civil Liberties Union, Felony Disenfranchisement Laws (Map), <https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map>; National Conference of State Legislatures, Felon Voting Rights, <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx>.
- ²⁸ The Sentencing Project, Estimates of People Denied Voting Rights Due to a Felony Conviction, <https://www.sentencingproject.org/wp-content/uploads/2020/10/Locked-Out-2020.pdf>.
- ²⁹ Center for Community Alternatives (2010), The Use of Criminal History Records in College Admissions Reconsidered, <http://communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>.
- ³⁰ Ma, J., Pender, M., & Welch, M. (2016), Education Pays 2016: The Benefits of Higher Education for Individuals and Society, College Board, <https://research.collegeboard.org/pdf/education-pays-2016-full-report.pdf>.
- ³¹ 34 C.F.R. § 668.40 (2021).
- ³² Wheelock, D. & Uggen, C. (2006), Race, Poverty and Punishment: The Impact of Criminal Sanctions on Racial, Ethnic, and Socioeconomic Inequality, National Poverty Center, http://www.npc.umich.edu/publications/workingpaper06/paper15/working_paper06-15.pdf.
- ³³ U.S. Commission on Civil Rights (June 2019), Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities, <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>.
- ³⁴ Horn, A. (2019), Wrongful collateral consequences, *George Washington Law Review*, 87(2), 315-372.
- ³⁵ Jacobs, J. & Crepet, T. (2008), The expanding scope, use, and availability of criminal records, *N.Y.U. Journal of Legislation and Public Policy*, 11, 177-213.
- ³⁶ Pleggenkuhle, B. (2018), The financial cost of a criminal conviction: Context and consequences, *Criminal Justice and Behavior*, 45, 121-145.
- ³⁷ Fines and Fees Justice Center, <https://finesandfeesjusticecenter.org/>.
- ³⁸ Menendez, M., Crowley, M., Eisen, L., & Atchison, N. (2019), The steep costs of criminal justice fees and fines: A fiscal analysis of three states and ten counties, Brennan Center for Justice, https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf.
- ³⁹ See Murray, B. M. (2020), Are collateral consequences deserved? *Notre Dame Law Review*, 95(3), 1031-1076.
- ⁴⁰ Chien, C. (2020), America's paper prisons: The second change gap, *Michigan Law Review*, 119, 519-612.
- ⁴¹ For more information, see National Center for State Courts, Problem-Solving Courts, <https://www.ncsc.org/services-and-experts/areas-of-expertise/problem-solving-courts>; National Center for State Courts, Tracking problem-solving issues across the country, <https://www.ncsc.org/topics/alternative-dockets/problem-solving-courts/home>.